

In the United States Bankruptcy Court

for the Northern District of Iowa

KENNETH E. FOLZ
ISABELLE H. FOLZ

Bankruptcy No. L91-00946-C

Debtor(s).

Chapter 7

KENNETH E. FOLZ

Adversary No. 99-9020-C

Plaintiff(s)

vs.

EDUCATIONAL CREDIT MANAGEMENT
CORP.

Defendant(s)

ORDER RE MOTION FOR SUMMARY JUDGMENT

This matter came before the undersigned on August 13, 1999 on Motion for Summary Judgment. Attorney Paul Gandy represented Debtor/Plaintiff Kenneth E. Folz. Attorney Christopher Foy represented Defendant Educational Credit Management Corp. ("ECMC"). After oral argument, the Court took the matter under advisement. The time for filing briefs has now passed and this matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I).

STATEMENT OF THE CASE

Debtor reopened his Chapter 13 case and filed an adversary proceeding to determine whether a student loan debt is discharged. He requests an order enjoining further collection efforts by ECMC. ECMC, the present and sole owner of the student loan, asserts the debt is excepted from discharge.

FINDINGS OF FACT

Debtor and his spouse filed their Chapter 13 petition on May 17, 1991. The amended discharge order entered December 2, 1996 states Debtor is discharged from all debts provided for by the plan or disallowed, except any debt "for a student loan or educational benefit overpayment as specified in 11 U.S.C. Section 523(a)(8)." ECMC is the successor in interest to a debt provided for in the plan. The parties stipulate the debt is a student loan under §523(a)(8). The student loan first became due on August 10, 1989. Debtor's payment obligation was suspended for eight months between October 1989 and June 1990.

Debtor argues the relevant law in effect at the petition date provides that the student loan would be discharged upon successful completion of the plan. He asserts that although an amendment to §1328

(a)(2), effective November 5, 1990, rendered educational loans nondischargeable, a sunset provision allowed that such nondischargeability ceased on October 1, 1996.

ECMC notes that the sunset provision was repealed in 1992. It argues that the law in effect on the date Debtor filed his Chapter 13 petition excepts the student loan from discharge. ECMC asserts Debtor had no right to discharge the student loan debt based on the expectation of a future repeal of §523(a)(8). It further argues Debtor's failure to appeal the discharge order, which expressly excepts student loans from discharge, bars this action. Although ECMC has not filed a cross motion for summary judgment, it requests judgment in its favor.

CONCLUSIONS OF LAW

Generally, case precedent and the legislative scheme of the Bankruptcy Code dictate application of the law in effect at the time of filing the petition when considering dischargeability of debts. Franklin v. State, 730 F.2d 86, 87 (8th Cir. 1984); In re Morris, 21 B.R. 816, 821 (Bankr. N.D. Iowa 1982). It is then that the rights of parties are vested. Subsequent repeal does not operate to change the relationships between the parties. In re James, 4 B.R. 115, 118 (Bankr. W.D. Pa. 1980).

There is a presumption against retroactive application of legislative enactments. Morris, 21 B.R. at 218. Debtors file their petitions in reliance on the scope of discharge existing at the petition date. Id. Applying subsequent enactments would frustrate the reasonable expectations of debtors who act in reliance on existing legislation. Id.

Congress amended §1328(a)(2) in 1990 to include student loan debts in the Chapter 13 exceptions to discharge. See In re Johnson, 218 B.R. 449, 454 (B.A.P. 8th Cir. 1998). Congress also enacted a sunset provision to repeal the amendment effective October 1, 1996. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §3008 (effective Nov. 5, 1990). This sunset provision was itself repealed effective October 1, 1992. Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 841, §1558. [\(1\)](#)

According to the 1990 amendment to §1328(a)(2), in order to discharge student loans in Chapter 13 cases filed after November 5, 1990, the conditions precedent specified in §523(a)(8) must be met. In re Smith, 130 B.R. 102, 103 (Bankr. D. Utah 1991). On May 17, 1991 when Debtor filed his Chapter 13 petition, the amendment was in effect and §1328(a)(2) stated:

[A]fter completion by the debtor of all payments under the plan, . . . the court shall grant the debtor a discharge of all debts provided for by the plan . . . , except any debt -

. . .

(2) of the kind specified in section . . . 523(a)(8).

The kind of debt specified in §523(a)(8) is any debt "for an educational . . . loan . . . , unless"

(A) such loan . . . first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition.

11 U.S.C. §523(a)(8)(A).

Pursuant to the foregoing, the Court must conclude ECMC's claim is excepted from discharge. Student loans are excepted from a Chapter 13 discharge pursuant to §1328(a)(2). The debt to ECMC does not meet the conditions precedent in §523(a)(8). The student loan did not first become due more than seven years prior to the date Debtor filed his petition, May 17, 1991.

Debtor argues his student loan debt to ECMC is discharged because the sunset provision, which was viable on the date he filed his petition, granted dischargeability to student loans in cases in which discharges were entered after the anticipated repeal date of October 1, 1996. Debtor's discharge entered December 1, 1996.

As discussed above, it is the date the petition is filed, not the date of discharge, which is determinative. Further, Congress repealed the sunset provision prior to Debtor's discharge. Regardless, had the sunset provision resulted in repeal of the §1328(a)(2) exception of student loans from discharge in Chapter 13, it would have no effect in Debtor's case.

A general savings statute, 1 U.S.C. §109, prevents the expiration of a temporary statute from cutting off its effectiveness in fixing liability under such statute. See Allen v. Grand Cent. Aircraft Co., 347 U.S. 535, 554 (1954). Section 109 saves not merely liability under the statute but saves the statute itself for purposes of enforcing such liability. De La Rama S.S. Co. v. United States, 344 U.S. 386, 389 (1953). Liability accruing while a statute was in effect may be enforced after its repeal, unless the repealing statute expressly provides otherwise. United States v. Jackson, 468 F.2d 1388, 1390 (8th Cir. 1972), cert. denied 410 U.S. 935 (1973). In other words, §109 keeps extinguished statutes alive for the purpose of permitting enforcement actions relating to conduct that occurred prior to the date of repeal or expiration. United States v. Van den Berg, 5 F.3d 439, 443 (9th Cir. 1993).

Under the foregoing, even if the sunset provision remained effective to repeal §1328(a)(2) in 1996, Debtor could not have benefitted from it. The nondischargeability of Debtor's student loan was fixed at the time he filed his Chapter 13 petition. Subsequent repeal of the exception of student loans from discharge would not have affected his liability under §1328(a)(2). Debtor had no reasonable expectation of discharge of his student loan based on the sunset provision of the 1990 amendment to §1328(a)(2).

WHEREFORE, Debtor's Motion for Summary Judgment is DENIED.

FURTHER, the student loan debt to Educational Credit Management Corp. is excepted from discharge under §1328(a)(2) and §523(a)(8).

FURTHER, the Court grants ECMC ten days from the date of this ruling to file a Motion for Summary Judgment in its favor. Debtor shall file a response withing 10 days after ECMC files such Motion.

SO ORDERED this 27 day of August, 1999.

Paul J. Kilburg
Chief Bankruptcy Judge

1. Counsel did not disclose the repeal of the sunset provision in Debtor's Motion for Summary Judgment. The Iowa Code of Professional Responsibility requires lawyers to disclose legal authority known to be directly adverse to the position of a client and to fully inform the court on the applicable

law. Iowa Code of Prof. Responsibility, EC 7-23, DR 7-106(b)(a); Rural Water Sys. #1 v. City of Sioux Center, 967 F. Supp. 1483, 1499 n.2 (N.D. Iowa 1997). Counsel's failure to provide the full legislative history was misleading to the extent that the legal issues presented were incompletely framed.