UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 98-61475
	)	
JOEL S. COLLINSWORTH,	)	CHAPTER 7
Debtor.	)	
	)	ADV. NO. 00-6152
JOEL S. COLLINSWORTH,	)	
Plaintiff,	)	JUDGE RUSS KENDIG
	)	
v.	)	
	)	
EDUCATIONAL CREDIT	)	
MANAGEMENT CORPORATION,	)	
Defendant.	)	**MEMORANDUM OF DECISION**

This matter came before the court upon the cross motions for summary judgment filed by Joel S. Collinsworth (hereinafter "debtor") and Educational Credit Management Corporation (hereinafter "ECMC"). This is a core proceeding over which the court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(A) and (I). The following constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

S T A N D A R D O F R E V I E W

The summary judgment standard is found in Fed. R. Civ. P. 56(c), made applicable to this proceeding through Fed. R. Bankr. P. 7056, which provides in part that:

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970). Summary judgment is not

appropriate if there is a material dispute over the facts, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The parties are in agreement as to the material facts in this case.

D I S C U S S I O N

Facts

Debtor filed his voluntary petition for relief under chapter 13 of title 11 of the United States Code on May 12, 1998. Debtor scheduled only two unsecured, non-priority obligations, one of which was an unpaid student loan owing Bank One/AFSA Data Corporation (hereinafter "Bank One") in the amount of $3,872.00.[1] Debtor's plan proposed a 10% dividend to unsecured creditors over a thirty-six month term. The proposed plan also contained an unusual provision, appearing at paragraph 16, which read:

> All timely filed and allowed unsecured claims, including the claim of Bank One AFSA, which are government guaranteed education loans, shall be paid ten (10%) of each claim, and the balance of each claim shall be discharged. Pursuant to 11 U.S.C. Section 523(a)(8), excepting the aforementioned educational loans from discharge will impose an undue hardship on the debtor and the debtor's dependents. Confirmation of debtor's plan shall constitute a finding to that effect and that said debt is dischargeable.

Debtor's counsel served a copy of the proposed plan on all creditors, including Bank One, on May 13, 1998 as evidenced by counsel's certificate of service filed May 15, 1998. The court's notice of debtor's chapter 13 filing was served on May 16, 1998. The notice stated that the court scheduled debtor's confirmation hearing for July 8, 1998 and that objections to the plan must be filed by not later than five days prior to the hearing. No timely objections were received and the court confirmed the plan on July 8, 1998.[2] Only the chapter 13 trustee (hereinafter "trustee") appeared at the confirmation hearing. The order confirming the plan was served upon debtor, debtor's counsel, trustee and the United States Trustee.

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[1] Debtor's other unsecured obligation was a deficiency claim on an automobile loan owing to Fifth Third Bank. Debtor also scheduled, for notice purposes only, the Cleveland, Ohio office of Weltman, Weinberg & Reis as counsel for Fifth Third Bank.

[2] Fifth Third Bank filed its objection to debtor's proposed plan and requested a hearing on July 24, 1998. The court's notes of July 27, 1998 indicate creditor's intent to withdraw its untimely objection.

Bank One filed its proof of claim in the amount of $3,978.99 on June 23, 1998. On June 25, 1998, Bank One filed its notice of assignment of claim to Great Lakes Higher Education Guaranty Corporation. The claim was then assigned to ECMC, as evidenced by the notice of assignment filed by ECMC on October 8, 1999. On or about September 15, 2000 Arizona Educational Loan Marketing Corporation purchased the loans and notified debtor that Southwest Student Services Corporation (hereinafter "Southwest") would be servicing the loans. Southwest filed its untimely proof of claim in the amount of $4,709.91 on November 28, 2000. During the January 31, 2001 pretrial conference, the parties stipulated that ECMC had been assigned all claims previously held by Southwest and that ECMC was the proper party defendant.

Debtor completed his plan payments on or about March 3, 2000. The court's order discharging debtor, dated June 9, 2000, was served upon all creditors and counsel on June 11, 2000. The order stated that "[p]ursuant to 11 U.S.C. § 1328(a), the debtor is discharged from all debts provided for by the plan . . . except any debt . . . for a student loan or educational benefit overpayment as specified in 11 U.S.C. § 523(a)(8) . . . . " The order also stated that "all creditors are prohibited from attempting to collect any debt that has been discharged in this case." The final decree was entered on June 15, 2000 and the case closed.

Debtor reopened his case and commenced this adversary proceeding by filing a complaint naming Southwest as defendant. As relief, debtor requested an order declaring that Southwest's claim was previously discharged and that Southwest had violated 11 U.S.C. § 523 by continuing to collect on the debt.[3] Debtor asserts that the order confirming debtor's plan is res judicata as to the dischargeability of Southwest's claim.

Southwest failed to answer timely and debtor moved for default judgment. ECMC later filed for leave to answer, instanter, and answered, admitting only the preliminary jurisdictional allegations of the complaint, denying all substantive allegations and requesting an order declaring plaintiff's student loan obligations to ECMC nondischargeable under 11 U.S.C. § 523(a)(8). In its pretrial statement, ECMC argues its conduct did not violate the discharge injunction because the student loans are nondischargeable and were not otherwise properly discharged through an adversary proceeding. ECMC asserts that the repayment of the loans would not be an undue hardship for debtor as defined by the Bankruptcy Code and applicable case law.

Debtor moved for summary judgment, asserting these loans were discharged by the plan and that the order confirming his plan is entitled to finality under 11 U.S.C. § 1327(a).

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3 Although debtor references 11 U.S.C. § 523, the court assumes that debtor intended to reference 11 U.S.C. § 524 and the discharge injunction contained therein.

Debtor maintains ECMC failed to object at the confirmation hearing and further failed to properly vacate the court's confirmation order pursuant to Fed. R. Civ. P. 60(b). Debtor relies upon Medley v. Education Credit Mgmt. Corp., 5:99-CV-1463 (N.D. Ohio Dec. 13, 1999) (reversing bankruptcy court's partial revocation of confirmed plan).[4] Debtor filed an affidavit in support of his motion.

ECMC also moved for summary judgment, requesting an order denying plaintiff's complaint for contempt and request for damages. Defendant maintains that debtor failed to properly serve both the United States, the guarantor of the student loans, and the defendant. Defendant also maintains that debtor's discharge order clearly states debtor's student loans were excepted from discharge.

In his response to defendant's motion, debtor asserts proper notice and service in the proceedings. In its response to debtor's motion, defendant argues that the court should distinguish the Medley decision and that in any conflict between debtor's confirmation and discharge order, the discharge order should control. In his supplemental response to defendant's motion, debtor suggests there is no conflict between the confirmation and discharge orders because defendant's claim, as previously discharged by the confirmation order, no longer existed and therefore could not be excepted from discharge by the discharge order.

Analysis

The issues facing the court include whether the court's previously entered confirmation order can be challenged, whether the debtor-plaintiff effected proper service of process in these proceedings, and whether there exists any conflict between the court's order confirming debtor's plan and granting debtor's discharge.

Finality of Confirmation Orders

Plaintiff asserts that the court's previously entered confirmation order is a final judgment as to all issues raised, or which could have been raised, prior to confirmation. Further, plaintiff asserts that if defendant wished to contest debtor's plan, defendant should have filed an objection prior to confirmation, a timely appeal of the confirmation order or a timely motion for relief from judgment. Defendant concedes that it failed to ever make such attempts. Accordingly, plaintiff maintains that defendant is bound by the finality of the confirmation order pursuant to 11 U.S.C. § 1327(a). Although defendant alludes to the tension between 11 U.S.C. § 1327(a), providing for the finality of the confirmed plan, and 11 U.S.C. § 1325 (a),

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The court notes that the facts present in Medley are similar to those here. Further, Donald M. Miller represented Ms. Medley and Weltman, Weinberg & Reis represented ECMC. The facts of the case and the district court's holding are discussed later in this decision.

requiring plans which conform to the Bankruptcy Code, defendant fails to cite authority resolving this tension in favor of section 1325(a).

To determine if the confirmation order can be challenged, the court must first review the Medley decision cited by both parties. Debtor argues that the Medley decision clearly disposes of the instant case, asserting that since ECMC failed to object to the proposed plan prior to confirmation, appeal the confirmation order or otherwise seek relief from the judgment under Fed. R. Civ. P. 60(b), ECMC is bound by the terms of the confirmation order. ECMC distinguishes the Medley decision, arguing that the district court faced procedural issues not present in this case.

The facts of the Medley matter are similar to those here. Ms. Medley's proposed plan contained a provision which sought to discharge ECMC's claim upon the entry of the final discharge order. ECMC failed to object and the plan was confirmed. ECMC later moved for partial revocation of the confirmed plan, arguing the plan discharged the debt in violation of the Bankruptcy Code. The bankruptcy court revoked the offensive plan provision, finding that 11 U.S.C. § 1307(a) did not authorize a plan provision in violation of the Bankruptcy Code. In its unpublished decision, the District Court for the Northern District of Ohio reversed the bankruptcy court's partial revocation, finding the bankruptcy court erred in granting ECMC's motion. Although this court finds that Medley is distinguishable, the distinction does not change the outcome in this matter.

In Medley, the district court faced a challenge to this court's order revoking the student loan provision. Treating ECMC's motion as an appeal under Fed. R. Civ. P. 60(b)(1), the district court focused on two issues: the effect of res judicata on the confirmation order and the timing of appellee's requested relief. The district court determined that appellee's motion was a direct attack on the confirmed plan rather than a collateral attack on the bankruptcy court's judgment, and therefore was not barred by res judicata. The district court found that the challenge was untimely because it was not filed within thirty days following the entry of the confirmation order. The district court reversed the bankruptcy court's order partially revoking the confirmed plan, thereby giving effect to the plan provision.

Here, the court faces a different challenge. Debtor presents an adversary proceeding seeking to enforce the confirmation and discharge orders rather than a motion challenging the confirmation order. The court finds that ECMC's motion for summary judgment in this adversary proceeding represents not a direct attack on the court's prior judgment, but rather a collateral attack on the confirmation order. ECMC attempts to circumvent the binding effect of an order entered during the confirmation process in the main case by arguing that the court committed an error confirming the plan. A challenge of this nature can only be maintained through a direct attack, such as an appeal or a motion for rehearing. *See, e.g.*, In re Puckett, 193 B.R. 842 (N.D. Ill. 1996); Remley v. Kleypas, 645 F.Supp. 690, 692 (E.D. Texas 1986);

Wetherbee v. Willow Lane, Inc. (In re Bestway Prod., Inc.), 151 B.R. 530 (Bankr. E.D. Cal. 1993); Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee), 218 B.R. 916 (B.A.P. 6th 1998) (dissenting opinion).

Since adversary proceedings are not forums to appeal confirmation orders, they constitute collateral proceedings. As a collateral attack, any challenge to the confirmation order is precluded under the doctrine of res judicata. *See* Medley at 6 (citing Jordon v. Gilligan, 500 F.2d 701, 710 (6th Cir. 1974)).

This determination also comports with 11 U.S.C. § 1327(a) which states that "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." Several recent decisions with nearly identical facts addressed issues similar to those raised here.

In Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee), 193 F.3d 1083 (9th Cir. 1999), the Ninth Circuit Court of Appeals held that a student loan creditor's failure to object to a particular plan provision or to appeal the order confirming the plan waived the creditor's right to assert a postconfirmation collateral attack against the plan on the basis that the offensive plan provision violated the Bankruptcy Code. Robert and Darlene Pardee's chapter 13 plan expressly purported to discharge postpetition interest on their student loan debt. Great Lakes failed to object to the plan and failed to appeal the confirmation order. Upon Great Lakes' attempts to collect postpetition interest, the Pardees moved to enforce the discharge and enjoin further collection. The court held the plan had res judicata effect as to all issues that could have been or should have been litigated at the confirmation hearing. The court said "'[a]lthough the provision at issue did not comply with the Code, it is now too late for [the creditor] to make the argument that it failed to timely raise in the bankruptcy proceedings." Id. at 1086 (quoting Andersen v. UNIPAC-NEBHELP (In re Andersen), 179 F.3d 1253, 1259 (10th Cir. 1999)). The court said further that "[i]f a creditor fails to protect its interests by timely objecting to a plan or appealing the confirmation order, 'it cannot later complain about a certain provision in a confirmed plan, even if such provision is inconsistent with the Code.'" Id. at 1086 (quoting Andersen, 179 F.3d at 1258).

In the Andersen case, Doreen Andersen filed a ten percent plan purporting to discharge the balance of her student loans upon confirmation.[5] The court denied the student loan creditor's untimely objection and confirmed the plan. Following discharge, the creditor attempted to collect the unpaid balance. The Tenth Circuit Court of Appeals held that the

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The court notes that the subject provision in debtor's plan is nearly identical to that appearing in Ms. Andersen's.

confirmed plan was a binding determination that the payment of the loans, beyond that provided for in the plan, would constitute an undue hardship and was res judicata on the issue of dischargeability. The court affirmed the Tenth Circuit's Bankruptcy Appellate Panel decision, which decision discussed the flexibility to be afforded the plan process, suggesting the process was essentially consensual. The court compared the plan to debtor's offer to creditors, which is deemed accepted if the creditor

does not object. Andersen, 179 F.3d at 795; In re Szostek, 886 F.2d 1405 (3rd Cir. 1989); Heins v. Ruti-Sweetwater, Inc. (In re Ruti-Sweetwater, Inc.), 836 F.2d 1263 (10th Cir. 1988).

Several courts have recognized the finality of confirmation orders even where the confirmed bankruptcy plan contained illegal provisions. *See* Trulis v. Barton, 107 F.3d 685, 691 (9th Cir. 1995); Lawrence Tractor Co. v. Gregory (In re Gregory), 705 F.2d 1118, 1121 (9th Cir. 1983); In re Brenner, 189 B.R. 121 (Bankr. N.D. Ohio 1995). *See also* Factors Funding Co. v. Fili & Pappalardo (In re Fili), 257 B.R. 370 (B.A.P. 1st Cir. 2001) (plan confirmation process results in final order with res judicata effect and strong policy favoring finality); In re Sanders, 243 B.R. 326 (Bankr N. D. Ohio 2000) (creditor's rejection of plan terms as part of proof of claim ineffective, creditor required to object to plan under appropriate Bankruptcy Rules); In re Patton, 261 B.R. 44 (Bankr. E.D. Wash. 2001) (in five unrelated chapter 13 cases where creditors neither objected to confirmation, appealed confirmation orders, nor attempted to revoke confirmation orders, court held confirmation orders were res judicata and could not be challenged, even though plans attempted to discharge student loans independent of an adversary proceeding, which was inconsistent with the Bankruptcy Code and Rules). *But see* Ridder v. Great Lakes Higher Educ. Corp. (In re Ridder), 171 B.R. 345 (Bankr. W.D. Wis. 1994) (holding student loan creditor did not waive right to collect postpetition interest on student loan debt by failing to object to confirmation of chapter 13 plan denying postpetition interest as its debt survives bankruptcy whatever its treatment under the plan); In re Artisan Woodworkers, 225 B.R. 185 (B.A.P. 9th Cir. 1998) (taxing authority did not waive its right to collect postpetition, as personal liability of debtor, preconfirmation interest that accrued on nondischargeable tax claim, though authority failed to object to plan that did not provide for payment of such interest).

As in Medley, the parties to this action are bound by an illegal plan provision. However, here the court's prior order is binding because of its preclusive effect, not because of the timing of any requested relief. Accordingly, the application of Rule 60(b) and the timeliness of ECMC's requested relief is not central as it was in Medley. But, the same result would occur since this attack is even later than the attack in Medley.

The court finds the debtor has sufficiently demonstrated that no genuine issue of fact remains as to either the dischargeable nature of his student loan obligations to Bank One or the finality of debtor's confirmation order. Given ECMC's failure to participate in the confirmation

process, otherwise contest the confirmation order, or demonstrate any facts remaining at issue, the court finds that its previously entered confirmation order is a final judgment as to these issues and the challenge presented by ECMC in these proceedings is barred by the doctrine of res judicata. The unlawful plan provision will be upheld on that basis.

Sufficiency of Process

Defendant challenges the sufficiency of plaintiff's notice and service of process in these proceedings. Specifically, defendant alleges that the debtor failed to serve defendant with a copy of the proposed plan in violation of Fed. R. Bankr. P. 2002. Defendant alleges further that plaintiff failed to properly serve the United States Attorney and the United States Department of Education with copies of the plan, in violation of Fed. R. Bankr. P. 2002(j)(4), or with copies of the adversary complaint, in violation of Fed. R. Bankr. P. 7004. Plaintiff maintains the plan was properly served upon the then claimant of record, Bank One.

The court finds that upon debtor's filing and service of his proposed plan, Bank One was the proper claimant. Debtor served Bank One with a copy of his proposed plan in accordance with the Bankruptcy Rules. Defendant was not a party at the time and there is no reason defendant would have been served. Bank One was the party in interest and was properly served. The authority cited by defendant is neither relevant nor persuasive.

As to any insufficiency of process with respect to the United States, its offices or agencies, the court finds that defendant fails to allege sufficient standing to raise this issue on behalf of the United States. Defendant provides no rationale for why its claim should not be discharged because a third party (the United States) did not receive notice. This is not to say that the United States has not been prejudiced. The court is *not holding* that debtor has discharged any obligation to the United States.[6] That question is not present. Defendant cites no authority or rationale for the proposition that a lender's rights are not discharged in cases in which the United States is a guarantor of student loans held and serviced by the lender or an assignee other than the United States and in which the United States is not served.

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The court is cognizant of caselaw establishing that the failure to include a guarantor in bankruptcy proceedings precludes discharge of an obligation to the guarantor. *See generally* United States v. Erkard, 200 B.R. 152 (N.D. Ohio 1996); Educational Credit Mgmt. Corp. V. Bernal (In re Bernal), 207 F.3d 595 (9th Cir. 2000); Garmhausen v. Sallie Mae Servicing Corp. (In re Garmhausen), 262 B.R. 217 (Bankr. E.D. N.Y. 2001). This may be the case even when the obligation is discharged as to the primary lender. *See* Erkard, 200 B.R. 152. While this is difficult to reconcile with traditional surety principles, the holdings of the cases are unmistakable.

Conflict Between Order Confirming and Order Discharging

ECMC suggests its claim survives debtor's discharge pursuant to 11 U.S.C. § 1328(a) because claims of the type held by ECMC are excepted from discharge. ECMC further suggests that there exists a conflict between the confirmation order, which purports to discharge ECMC's claim, and the discharge order.

Debtor argues that the terms of the discharge order do not modify the prior effect of the confirmation order, and vice versa. Debtor implies that ECMC improperly reads the discharge order in the disjunctive. Reading the discharge order and section 1328(a) in the conjunctive, Debtor argues that only those student loans not addressed by the plan or otherwise disallowed are excepted from discharge. ECMC's claims, according to debtor, were provided for by the plan, and to the extent not paid through the plan, do not survive to entry of the discharge order.

The decision from the Tenth Circuit Bankruptcy Appellate Panel in Andersen addressed this issue. Discussing creative resolutions to disputes about the dischargeability of student loans, the court said

> [h]ere, the Chapter 13 plan does not purport to make a nondischargeable debt dischargeable. The plan, instead, resolved a potential controversy about whether payment of the student loan would result in an undue hardship to the debtor. Confirmation of the plan constituted a finding to that effect, thereby rendering the loan dischargeable. Thus the ultimate order of discharge properly discharged the balance of the student loan obligation.

Andersen v. UNIPAC-NEBHELP, 215 B.R. 792, 796 (B.A.P. 10th Cir. 1998).

Debtor's plan included specific provisions for the student loans owing to Bank One, and upon confirmation, any balance beyond that to be paid through the plan was discharged as an undue hardship upon debtor. When the discharge order entered, ECMC's claim had been satisfied by debtor's plan payments. ECMC provides no authority supporting its narrow reading of the discharge order or the idea that the discharge order somehow "trumps" the previously entered confirmation order.

CONCLUSION

Bank One and its successors in interest had a full and fair opportunity to participate in the confirmation process, as well as time to seek postconfirmation relief. Neither Bank One, nor any assignee, sought to protect its interests in any timely fashion. Despite defendant's challenge to the propriety of debtor's confirmed plan, and its lack of compliance with the requirements of 11 U.S.C. § 1325(a) and Fed. R. Bankr. P. 7001, the court must afford the debtor's confirmed plan a measure of finality. Accordingly, the student loan debt has been discharged.

An appropriate order shall enter.

_____/s/ Russ Kendig July 27, 2001_____
RUSS KENDIG
UNITED STATES BANKRUPTCY JUDGE

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NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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JOEL S. COLLINSWORTH,	)	CHAPTER 7
Debtor.	)	
	)	ADV. NO. 00-6152
JOEL S. COLLINSWORTH,	)	
Plaintiff,	)	JUDGE RUSS KENDIG
	)	
v.	)	
	)	
EDUCATIONAL CREDIT	)	
MANAGEMENT CORPORATION,	)	
Defendant.	)	**ORDER**

This matter came before the court upon the cross motions for summary judgment filed by Joel S. Collinsworth and Educational Credit Management Corporation. For the reasons set forth in the accompanying Memorandum of Decision, the court finds debtor's motion for summary judgment asserting that plaintiff's student loan was discharged is well taken and the same should be, and hereby is, **GRANTED**. The court finds further that defendant's motion for summary judgment is not well taken and the same should be, and hereby is, **DENIED**.

IT IS THEREFORE ORDERED that the claims of Educational Credit Management Corporation, as successor in interest to Bank One/AFSA Data Corporation, against the debtor, Joel S. Collinsworth, are discharged.

__/s/ Russ Kendig July 27, 2001_____
RUSS KENDIG
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ____ day of July, 2001, the above Memorandum of Decision and Order was sent via regular United States Mail to:

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_____
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