UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 97-16081
THOMAS A. BANUS,	)	
Debtor.	)	Chapter 7
	)	
THOMAS A. BANUS,	)	Adversary Proceeding No. 05-1032
Plaintiff,	)	
v.	)	Judge Arthur I. Harris
	)	
U.S. DEPARTMENT OF EDUCATION, *et al.*,	)	
Defendants.	)	

PROPOSED CONCLUSIONS OF LAW RECOMMENDING THAT THE DISTRICT COURT DISMISS BANUS'S AMENDED ADVERSARY COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

Before the Court is creditor Educational Credit Management Corporation's (ECMC) unopposed second motion for summary judgment. ECMC asserts that no subject matter jurisdiction exists over the claims contained in the amended adversary complaint filed by the debtor-plaintiff involving the dischargeability of student loan debt under 20 U.S.C. § 1087(c)(1). For the reasons that follow, the undersigned bankruptcy judge agrees with ECMC that subject matter jurisdiction is lacking but believes that, under the procedures set forth in Title 28 establishing the authority of bankruptcy judges to hear proceedings related to cases under Title 11, only the district court may enter a final order dismissing this amended adversary complaint. Therefore, pursuant to 28 U.S.C. § 157(c)(1) and Bankruptcy Rule

9033, the Court submits these proposed conclusions of law recommending that the district court dismiss plaintiff's amended adversary complaint for lack of subject matter jurisdiction.

Factual and Procedural Background

From August 1984 through June 1988, plaintiff Thomas A. Banus attended Cleveland-Marshall College of Law. He received his J.D. degree but never passed the bar exam and therefore never received his license to practice law. To pay for law school, Banus acquired a series of student loans totaling approximately $43,000. As of May 26, 2005, the total balance due on the student loans, including principal, interest, and other charges, exceeded $128,000. *See* Aff. of Angela Houff (Docket #20 at ¶ 11).

On September 9, 1997, Banus filed a voluntary Chapter 7 petition. He received his discharge, and the case was closed on January 23, 1998. In March 2004 the case was reopened, and Banus filed this adversary complaint seeking to discharge his student loan debt. The original complaint sought discharge of the student loan debt under two alternative theories: (1) the student loan debt is dischargeable under former 11 U.S.C. § 523(a)(8)(A) because it first became due more than seven years before the bankruptcy petition was filed, and (2) the student loan debt is dischargeable under 20 U.S.C. § 1087(c)(1) because the

law school allegedly certified falsely that he would benefit from his law school education ("false certification claim"). Banus did not seek an undue hardship discharge under current 11 U.S.C. § 523(a)(8).

In July 2005, ECMC, holder of some of the student loan debt, filed a motion for summary judgment. On November 28, 2005, this Court issued a memorandum of opinion and order (Docket #25 & #26) granting ECMC's motion in part. The order stated:

> Because Banus consolidated his student loans less than three years before filing for bankruptcy, his student loan debt is ineligible for discharge under the seven year rule of former section 523(a)(8)(A). Banus's alternative claim to a discharge under the false certification provisions of 20 U.S.C. § 1087(c)(1) will be the subject of further proceedings once Banus files an amended complaint . . . .

Docket #25 at 13. The Court requested an amended complaint because:

> Banus's false certification claim possesses a number of procedural deficiencies. First, as already discussed, it is unclear whether subject matter jurisdiction exists and whether this Court may render a final judgment under 28 U.S.C. § 157(b). Second, the Court cannot discern whether Banus is asserting a private right of action under the Higher Education Act or perhaps judicial review of a final agency action under the Administrative Procedures Act, 5 U.S.C. § 704. Finally, it is unclear who is the proper defendant or defendants for Banus's false certification claim.

Id. at 11-12.

On January 30, 2006, Banus filed his amended adversary complaint. In the amended complaint, Banus stated that the proceeding was non-core, and he did not

consent to this Court entering final judgment. He further stated that he was seeking judicial review of the denial of his false certification claim and was also asserting a private right of action. On February 21, 2006, ECMC filed a second motion for summary judgment (Docket #37). Banus did not respond to the motion. At a status conference on March 21, 2006, the Court indicated to Banus and counsel for ECMC that its tentative analysis of the pending motion would likely result in a recommendation that the district court dismiss the amended adversary complaint for lack of subject matter jurisdiction.

Limitations on a Bankruptcy Judge's Authority to Hear Proceedings and Issue Final Orders Related to Cases Arising under Title 11

Banus's amended adversary complaint and ECMC's second motion for summary judgment raise a complicated series of jurisdictional and procedural questions. These questions involve the outer limits of subject matter jurisdiction under 28 U.S.C. § 1334 as well as the outer limits of a bankruptcy judge's authority to hear proceedings and issue final orders related to cases arising under Title 11. While it is often said that a court always has jurisdiction to determine whether it has subject matter jurisdiction, *see United States v. United Mine Workers of Am.*, 330 U.S. 258, 291 (1947), under the relevant procedures set forth in Title 28, the undersigned bankruptcy judge concludes that he may not enter a

final order dismissing Banus's amended adversary complaint for lack of subject matter jurisdiction. As discussed below, because plaintiff's claim is "non-core," the Court will only enter proposed conclusions of law, with the district court to enter any final order.

Core Versus Non-Core

Under 28 U.S.C. § 157, proceedings before a bankruptcy judge are either core or non-core. The relevance of the core/non-core distinction is the extent of the bankruptcy judge's authority. A bankruptcy judge may enter a final order or judgment in a core proceeding. 28 U.S.C. § 157(b)(1). In a non-core proceeding, absent consent of the parties, the bankruptcy judge may not enter a final order or judgment but may only submit proposed findings of fact and conclusions of law to the district judge who will enter the final order or judgment. 28 U.S.C. § 157(c)(1). The bankruptcy judge determines whether a proceeding is core or non-core. 28 U.S.C. § 157(b)(3). The term "core proceeding" is not defined, but subsection 157(b)(2) contains a non-exclusive listing of examples of core proceedings. The Sixth Circuit has further explained that "if the proceeding does not invoke a substantive right created by federal bankruptcy law and is one that could exist outside of the bankruptcy, then it is not a core proceeding." *In re Wolverine Radio Co.*, 930 F.2d 1132, 1143-44 (6th Cir. 1991); *see also In re Hughes-Bechtol, Inc.*,

132 B.R. 339, 343-44 (Bankr. S.D. Ohio 1991) (defining a non-core proceeding as a proceeding alleging a cause of action which "(1) is not *specifically* identified as a core proceeding under § 157(b)(2)(B) through (N), (2) existed prior to the filing of the bankruptcy case, (3) would continue to exist independent of the provisions of title 11, and (4) the parties' rights, obligations, or both are not significantly affected as a result of the filing of the bankruptcy case").

Banus's false certification claim arises from a non-bankruptcy federal statute, can be raised outside of his bankruptcy case, and is not affected by his bankruptcy case. These factors support a finding of non-core. On the other hand, subsection 157(b)(2)(I) expressly identifies "determinations as to the dischargeability of particular debts" as core proceedings. The Court, however, interprets this provision to refer to determinations of dischargeability *under the Bankruptcy Code, e.g.*, 11 U.S.C. § 523, *or under other statutes which specifically establish the discharge of debts in bankruptcy*, *e.g.*, 42 U.S.C. § 292f(g). *See In re Pinkham*, 224 B.R. 728, 729 (Bankr. E.D. Mo. 1998) (dischargeability of HEAL loans is core proceeding); *see also In re Rice*, 78 F.3d 1144 (6th Cir. 1996) (applying unconscionability standard of § 292f(g) to debtor in bankruptcy). Unlike 42 U.S.C. § 292f(g), the application of 20 U.S.C. § 1087(c)(1) is not dependent upon a bankruptcy case being filed under Title 11. Indeed, student loan debtors

may pursue an administrative discharge under 20 U.S.C. § 1087(c)(1) outside of bankruptcy, and the filing of a bankruptcy case under Title 11 will not affect the ultimate resolution of that false certification claim. Thus, the Court finds that Banus's false certification claim does not fit within the meaning of 28 U.S.C. § 157(b)(2)(I) and is a non-core proceeding.

In his amended adversary complaint, Banus expressly declined to consent to this Court's entry of a final order or judgment as to this non-core proceeding. S*ee* Bankr. R. Civ. P. 7008. Under 28 U.S.C. § 157(c)(1), therefore, a bankruptcy judge

> shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

In this case, the Court is not making factual findings but is resolving a dispositive motion through at-law findings. Therefore, the Court is submitting only proposed conclusions of law. *See In re Blackwell ex rel. Estate of I.G. Services, Ltd.*, 279 B.R. 818, 824 (Bankr. W.D. Tex. 2002) (finding that dispositive motions in non-core matters, where only legal conclusions are implicated, are to be referred to district court for a final order); *In re Molten Metal Tech., Inc.*, 271 B.R. 711, 714-15 n.5 (Bankr. D. Mass. 2002) (submitting proposed conclusions of law,

without findings of fact, to resolve motion for summary judgment).

Analogous to Magistrate Judge Decisions on Dispositive Motions

This situation is analogous to that of a magistrate judge addressing a dispositive motion on a matter referred under 28 U.S.C. § 636(b)(1)(B), where all parties have not consented to the magistrate judge entering a final judgment. Section 636 of Title 28 provides a mechanism whereby a magistrate judge may "submit to a [district court judge] proposed findings of fact and recommendations for the disposition . . . of any [motion for injunctive relief, for judgment on the pleadings, for summary judgment, . . . to dismiss for failure to state a claim upon which relief can be granted . . .]." 28 U.S.C. § 636(b)(1)(A) & (B). Rule 72 of the Federal Rules of Civil Procedure further explains that magistrate judges can hear pretrial matters that are dispositive of a claim or defense of a party and that the magistrate judge then will enter a "recommendation for disposition of the matter, including proposed findings of fact when appropriate." These procedures are analogous to what the Court is doing in this instance. In fact, the similarities are by design as Bankruptcy Rule 9033 is specifically modeled on Rule 72 of the Federal Rules of Civil Procedure. *See* Fed. R. Bankr. P. 9033 advisory committee note.

For the reasons stated above, the undersigned bankruptcy judge concludes that the proper procedure here is to submit proposed conclusions of law to the

district court regarding ECMC's motion to dismiss. Plaintiff's claim is a non-core matter, and only the district court can enter "final judgments or orders" on dispositive motions as to non-core matters, absent consent of the parties.

Dismissal for Lack of Subject Matter Jurisdiction

Banus urges the Court to hold that Cleveland-Marshall College of Law "falsely certified" his student loan eligibility. Discharge due to false certification is governed by the Higher Education Act, codified at 20 U.S.C. § 1087(c)(1), which states in pertinent part:

> If [a] student's eligibility to borrow under this part was falsely certified by the eligible institution, then the Secretary [of Education] shall discharge the borrower's liability on the loan (including interest and collection of fees).

See also 34 C.F.R. §§ 685.215 & 682.402 (describing criteria for a false certification discharge). ECMC's motion for summary judgment argues that Banus's false certification claim is outside this Court's jurisdiction and thus should be dismissed.

The jurisdiction of federal district courts in bankruptcy matters is set out at 28 U.S.C. § 1334, which provides in relevant part:

> (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) . . . [T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

If a district court has bankruptcy jurisdiction over a case, 28 U.S.C. § 157(a) allows the court to refer the case to the bankruptcy court. Pursuant to 28 U.S.C. § 157(a) and Local General Order No. 84, entered on July 16 1984, by the United States District Court for the Northern District of Ohio, the district court has referred to the bankruptcy judges of the district "any and all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11."

> For the purpose of determining whether a particular matter falls within bankruptcy jurisdiction, it is not necessary to distinguish between . . . proceedings "arising under," "arising in," and "related to" a case under title 11. These references operate conjunctively to define the scope of jurisdiction. Therefore, for purposes of determining section 1334(b) jurisdiction, it is necessary only to determine whether a matter is at least "related to" the bankruptcy.

In re Wolverine Radio, 930 F.2d at 1141.

"A matter is related to a bankruptcy case if 'the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.' " *Sanders Confectionery Products, Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 482-83 (6th Cir. 1992) (quoting *In re Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984) (emphasis omitted)). "The matter need not directly involve the debtor, as long as it 'could alter the debtor's rights [or] liabilities,' but an 'extremely tenuous connection' will not suffice." *Id.* (quoting *In re Wolverine*

Radio, 930 F.2d at 1142); *see also In re Stewart*, 62 Fed. App. 610 (6th Cir. 2003) (applying the *Pacor* test and, alternatively, asking "whether the action would benefit the debtor and not the estate; if so, then the action would not be related to the bankruptcy case") (unpublished decision).

In the present case, the outcome of the false certification claim is not dependent upon application of the Bankruptcy Code, nor will the outcome affect Banus's bankruptcy estate. Banus received his discharge in 1998, and the case was closed as a "no asset" case. The false certification claim, if successful, will benefit Banus personally, removing his liability for the student loan debt, but it will not bring any monies into his bankruptcy estate nor will it affect how any estate monies are distributed. *Cf. In re Goldberg*, 297 B.R. 465 (Bankr. W.D.N.C. 2003) (sustaining debtor's objection to school's student loan claim, pursuant to 20 U.S.C. § 1087(c)(1), because school committed fraud when it closed one week after student enrolled). Therefore, the Court concludes that the false certification claim is not "related to" the bankruptcy case and is not within the bankruptcy jurisdiction of this Court or the district court.

In addition, the Court concludes that the district court should reject the possible alternative bases for jurisdiction over Banus's amended adversary complaint under 28 U.S.C. § 1331 (federal question jurisdiction) or 28 U.S.C.

§ 1367 (supplemental jurisdiction). Had Banus *commenced a civil action by filing a complaint* in the district court, the district court might well have had subject matter jurisdiction over Banus's claim for an administrative discharge under 20 U.S.C. § 1087 (or judicial review of such a determination) pursuant to 28 U.S.C. §§ 1331 or 1367. Here, however, the current claims are before the bankruptcy court and the district court only because Banus reopened his bankruptcy case and *commenced an adversary proceeding within that pending bankruptcy case filed under Title 11*. While sections 1331 and 1367 are valid jurisdictional bases for *civil actions* filed in district court, the only jurisdictional basis for a district court or a bankruptcy court to hear an *adversary proceeding commenced within a pending bankruptcy case filed under Title 11* is under the broad, but not unlimited, jurisdiction conferred under 28 U.S.C. § 1334.[1] As explained above, Banus's false certification claim is not within the "related to" jurisdiction of 28 U.S.C. § 1334. Accordingly, this Court recommends that the district court reject other possible bases for subject matter jurisdiction over Banus's

[1] Even if supplemental jurisdiction were to exist under 28 U.S.C. § 1367, it is doubtful whether such jurisdiction would extend to the bankruptcy court. *See, e.g.*, *In re Premium Escrow Services, Inc.*, 342 B.R. 390, 402-03 (Bankr. D.D.C. 2006) (noting that 28 U.S.C. § 157(a) appears to restrict the district courts' ability to transfer matters to bankruptcy courts to those proceedings over which the district courts have jurisdiction under 28 U.S.C. § 1334).

amended adversary complaint. Nevertheless, even if Banus's amended *adversary complaint* is dismissed for lack of subject matter jurisdiction, Banus will presumably be free to commence a *civil action* in the district court asserting a claim for an administrative discharge under 20 U.S.C. § 1087 (or judicial review of such a determination) pursuant to 28 U.S.C. § 1331.

Because the Court recommends that the amended adversary complaint be dismissed for lack of subject matter jurisdiction, the Court does not reach ECMC's other arguments regarding the need for Banus to exhaust his administrative remedies or the alleged lack of a private right of action under 20 U.S.C. § 1087(c). *See In re Barton*, 226 B.R. 922 (Bankr. S.D. Ga. 2001) (dismissing dischargeability claim under 20 U.S.C. § 1087(c) because "no private cause of action is created under 20 U.S.C. § 1087(c) whereby a bankruptcy court can determine whether a debt is discharged under that provision"); *In re Scholl*, 259 B.R. 345 (Bankr. N.D. Iowa 2001) (dismissing claim without prejudice to refiling after exhausting administrative remedies); *In re Bega*, 180 B.R. 642 (Bankr. D. Kan. 1995) (finding no private right of action).

Conclusion

For the foregoing reasons, the Court recommends that ECMC's second motion for summary judgment be granted and that Banus's amended adversary

complaint be dismissed for lack of subject matter jurisdiction. Pursuant to 28 U.S.C. § 157(c)(1) and Fed. R. Bankr. P. 9033(a), the Court enters and submits these proposed conclusions of law to the United States District Court. Within the time period prescribed by rule, Banus or ECMC may file with the bankruptcy clerk any written objections to these proposed conclusions of law. *See* Fed. R. Bankr. P. 9033(b) & (c). Pursuant to 28 U.S.C. § 157(c)(1) and Fed. R. Bankr. P. 9033(d), the district court will enter a final order or judgment after de novo of those matters to which either party has lodged a timely objection.

IT IS SO ORDERED.

/s/ Arthur I. Harris 6/30/2006
Arthur I. Harris
United States Bankruptcy Judge

OBJECTIONS

Pursuant to Rule 9033 of the Federal Rules of Bankruptcy Procedure, any objections to these conclusions of law must be filed with the Clerk of Courts **within 10 days of receipt of this notice**. Failure to file objections within the specified time may constitute a waiver of the right to appeal the District Court's order. *See United States v. Walters,* 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn,* 474 U.S. 140 (1985), *reh'g denied,* 474 U.S. 1111 (1986). The written objections should identify the specific proposed conclusions objected to and state the grounds for such objection. A party may respond to another party's objections within 10 days after being served with a copy thereof.