

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)
)
) In Proceedings
) Under Chapter 13
GLENNARD M. BELK and)
MICHELLE F. BELK,)
) No. BK 95-30504
)
)
Debtor(s).)

OPINION

On April 10, 1995, debtors Glennard and Michelle Belk filed a joint Chapter 13 bankruptcy petition. In their schedules, the debtors listed Lincoln College as a general unsecured creditor with a claim in the amount of \$2,600. The schedules indicated that this claim was based on a "judgment . . . in [the] Circuit Court of Logan County, Illinois" rendered on February 24, 1995. The debtors proposed a plan which provided that unsecured creditors with allowed claims would be paid on a pro-rata basis from all funds remaining after payment of priority and secured claims.

Lincoln College filed no proof of claim in the debtors' bankruptcy case but, instead, filed the present "objection to plan," which asserts that debtor Glennard Belk's obligation to the College totalling \$2,982.97 is nondischargeable under § 523(a)(8) because it was for "funds received as an educational benefit."¹ In support of its

¹ Section 523(a)(8) prevents the discharge of any debt

(8) for an educational benefit . . . or loan . . .
, unless--

objection, Lincoln College presented a document entitled "Tuition Payment Agreement," which provided for the payment of tuition and fees for Glennard Belk for the fall semester of the 1985-86 school year.² Lincoln College alleges that following the debtor's discharge in a Chapter 7 bankruptcy proceeding filed in May 1992, it brought suit in state court to enforce the debtor's obligation under the Tuition Payment Agreement. The state court rendered judgment against the debtor despite his defense that this debt had been discharged in the Chapter 7 proceeding. Lincoln College maintains that, as a result of this state court judgment, the debtors are collaterally estopped from relitigating the dischargeability of this debt in the present Chapter 13 proceeding. Lincoln College acknowledges that it has "no concern with the details of payment, or the allocation of income proposed in the [debtors'] plan." Rather, Lincoln College states that it filed its objection "solely to preserve [debtor Glennard Belk's] obligation to

(A) such loan [or] benefit . . . first became due more than 7 years . . . before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents[.]

11 U.S.C. § 523(a)(8).

² It is unclear from the Tuition Payment Agreement when payment first became due, and the parties have not stipulated concerning this fact.

Lincoln College." See Memo. Supp. Obj. to Plan, filed Aug. 14, 1995, at 1.

In response, the debtors assert that a determination that this debt is nondischargeable would not affect their plan because if the debt is, in fact, nondischargeable, "the balance of the debt would be due and owing at the conclusion of the plan." See Resp. Obj. of Lincoln College, filed Aug. 31, 1995, at 1. The debtors do not concede that the debt in question is nondischargeable or even that it is a student loan debt. Rather, they question whether this debt, arising from a "default on a promissory note," constitutes a debt for purposes of § 523(a)(8). In addition, they maintain that "there is a wealth of facts in the budget and list of debts to establish that it would work a severe hardship on the debtor[s] to not have a part of the debt discharged." Id.

DISCUSSION

Despite its characterization as an objection to confirmation of the debtors' plan, it is apparent that Lincoln College's "objection" is, in fact, an attempt to obtain a determination of nondischargeability as to the alleged student loan obligation of debtor Glennard Belk. Lincoln College candidly admits that it has no concern with the debtors' proposed payments under the plan but merely wishes to

preserve its right to payment following the debtors' discharge.³ However, Lincoln College's arguments concerning dischargeability of this debt are misplaced in the context of confirmation of the debtors' plan, as confirmation and dischargeability are entirely separate steps in Chapter 13. See In re Owens, 82 B.R. 960, 964 (Bankr. N.D. Ill. 1988). Unlike in Chapter 11, confirmation of a plan under § 1325 does not discharge the debtor. Rather, in order to be entitled to discharge under § 1328(a), a debtor must first complete the payments called for in the plan. See 11 U.S.C. § 1328(a); cf. 11 U.S.C. § 1141(d) (confirmation of Chapter 11 plan discharges the debtor of preconfirmation debts). Therefore, confirmation of the debtors' plan in this case would not discharge the student loan debt owed to Lincoln College, and the present confirmation proceedings have no bearing on the dischargeability of this debt. See In re Key, 128 B.R. 742, 743 (Bankr. S.D. Ohio 1991) ("there is no provision [in § 1328] that would grant a discharge upon confirmation of a Chapter 13 plan even for those debts not specifically excepted [from discharge]").⁴

³ Because Lincoln College has filed no proof of claim in this case, it would not be entitled to payment under the debtors' plan, which provides that "payments to creditors will be made only if a claim is filed and allowed." See 11 U.S.C. § 502(a) (providing for the allowance of claims filed pursuant to 11 U.S.C. § 501).

⁴ In Key, the debtor's plan contained a provision that "confirmation of the plan shall constitute a finding that payment of more than the percentage provided for in the plan would constitute a hardship under 11 U.S.C. § 523(a)(8)(B) and that any balance owing on the student loan after payment under the plan is discharged." 128

Conversely, the dischargeability of a particular debt does not affect the confirmation of a Chapter 13 plan. The grounds for objecting to confirmation of a plan are set forth in 11 U.S.C. § 1325(a) and (b).⁵ Section 1325 in no way indicates that the dischargeability or nondischargeability of a debt constitutes a ground for objecting to a plan. In this case, a finding that Lincoln

B.R. at 742. The Key court ruled that the Chapter 13 discharge provisions could not be so altered and sustained the objection of the student loan creditor to confirmation of the debtor's plan. By contrast, the debtors' plan in the present case contains no such provision pertaining to discharge of student loan debt of Glennard Belk.

⁵ Generally, the court must confirm plan if: (1) it complies with the provisions of Chapter 13 and other applicable provisions of the Bankruptcy Code; (2) any filing fees or other charges required to be paid before confirmation have been paid; (3) the plan has been proposed in good faith and not by any means forbidden by law; (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid if the debtor were proceeding under Chapter 7; (5) with respect to secured claims provided for by the plan, the holder of the claim has accepted the plan or the plan provides that the holder of the claim retain the lien securing such claim and the property to be distributed under the plan is not less than the allowed amount of the claim, or the debtor surrenders the property securing the claim to such holder; and (6) the debtor will be able to make all payments under the plan and to comply with the plan. See 11 U.S.C. § 1325(a)(1)-(6).

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, the court may not approve the plan unless the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim or the plan provides that all of the debtor's projected disposable income over the period of the plan will be applied to make payments under the plan. See 11 U.S.C. § 1325(b)(1).

College's claim is nondischargeable would not prevent the debtors' plan from being confirmed but would only result in the debtors owing Lincoln College any balance remaining on the claim after they emerged from Chapter 13. Thus, Lincoln College's "objection" that its claim is nondischargeable must be rejected as a basis for denying confirmation of the debtors' plan.

Lincoln College's "objection," rather than raising an issue of confirmation under § 1325, is concerned with the effect of a Chapter 13 discharge under 11 U.S.C. § 1328(a). Section 1328(a)(2) provides that after completion by the debtor of all payments under a Chapter 13 plan, the court shall grant a discharge of debts provided for by the plan, except certain debts specified in § 523(a), including § 523(a)(8). Under § 523(a)(8), student loan debts are nondischargeable unless (1) the loan first became due more than seven years before filing or (2) excepting the loan from discharge would cause undue hardship to the debtor. In re Gustafson, 111 B.R. 282, 285 (Bankr. 9th Cir. 1990), rev'd on other grounds, 934 F.2d 216 (9th Cir. 1991). This provision is self-executing, and a creditor is not required to file an action to determine the nondischargeability of a student loan before commencing collection efforts.⁶ See S. Rep. No. 989, 95th Cong., 2d

⁶ As a result of legislative compromise, student loan debts were excluded from the requirement of 11 U.S.C. § 523(c) that a lender bring a timely action in bankruptcy court to establish the nondischargeability of a debt or have it discharged. See Buford, 85 B.R. at 581.

Sess. 79 (1978); Buford v. Higher Educ. Assistance Found., 85 B.R. 579, 581 (D. Kan. 1988). Rather, a student loan debt that is less than seven years old at the time of bankruptcy is presumptively nondischargeable, and a debtor seeking discharge of such a loan must bring an action to establish that repayment would constitute an undue hardship.⁷ See United States v. McGrath, 143 B.R. 820, 825 (D. Md. 1992), aff'd 8 F.3d 821 (4th Cir. 1993); Buford, 85 B.R. at 582.

In this case, neither the debtors nor Lincoln College have filed a complaint to determine the dischargeability of the alleged student loan debt, although both parties have raised issues concerning dischargeability of this debt in argument on Lincoln College's objection to confirmation. These issues concerning the application of § 523(a)(8) should properly be determined in an adversary proceeding filed by either the debtors or Lincoln College. See In re Griffin, 108 B.R. 717, 720 (Bankr. W.D. Mo. 1989). The dischargeability of the alleged student loan debt of Glennard Belk, however, has no bearing on confirmation of the debtors' plan under § 1325. Accordingly, for the reasons stated, Lincoln College's objection to confirmation of the debtors' plan will be overruled.

⁷ A proceeding to determine the dischargeability of a debt must be filed as an adversary proceeding. See Bankr. R. 7001(6); see In re Smith, 103 B.R. 392, 396 (Bankr. N.D. N.Y. 1988) (finding that the debtor's affidavits of undue hardship were insufficient to establish the dischargeability of a student loan debt under § 523(a)(8)(B)).

SEE WRITTEN ORDER.

ENTERED: NOVEMBER 1, 1995

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE