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11 U.S.C. § 523(a) (8)
20 U.S.C. § 1078-3
Attorney fees

Halbert v. NW Educational Loan Assoc., Adv. No. 96-3106
In re Halbert, Case No. 393-36606-elp7

8/19/96 ELP Unpublished

Debtor sought a determination that her consolidated student loan was dischargeable. The issue is whether the consolidated loan, made under the provisions of the Higher Education Act of 1965, 20 U.S.C. § 1001 et seq., is nondischargeable under Bankruptcy Code § 523(a) (8). The court determined that the consolidation loan given under 20 U.S.C. § 1078-3 was an educational loan that was not dischargeable.

The court denied the creditor's request for attorney fees under the attorney fee provision in the promissory note, because it appeared that any attorney fees incurred by the creditor related solely to the determination of dischargeability, an issue peculiar to bankruptcy law, and not to enforcement of the promissory note.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 393-36606-elp7
JANET HALBERT,)
) Debtor.)
_____)
JANET HALBERT,) Adversary No. 96-3106
) Plaintiff,)
) v.) MEMORANDUM OPINION
NW EDUCATIONAL LOAN ASSOCIATION,)
a corporation,)
) Defendant.)

Debtor filed this adversary proceeding to obtain a determination that her debt to defendant Northwest Educational Loan Association (NELA) for a loan that consolidated her educational loans is dischargeable under 11 U.S.C. § 523. NELA counterclaims for a determination that the debt is not dischargeable under section

1 523(a)(8)¹ and for a judgment for the amount of the outstanding debt
2 plus interest and attorney fees. This is a core proceeding. 28
3 U.S.C. § 157(b)(2)(I).

4 FACTS

5 The parties have stipulated to the facts. Over the past
6 several years, debtor executed several promissory notes for loans
7 for an educational purpose. On August 31, 1992, debtor consolidated
8 her student loans pursuant to 20 U.S.C. §§ 1087-2(o) and 1078-3, by
9 executing a promissory note for what was referred to as a "SMART
10 loan." The payee of the note was the Student Loan Marketing
11 Association, commonly referred to as "Sallie Mae." Debtor certified
12 in her application for the SMART loan that "[a]ll of the loans
13 selected for consolidation have been made to me to finance my
14 education." The note provided that the consolidation loan funds
15 would be advanced on debtor's behalf "to creditors who currently
16 hold eligible loans named above which I herein select for
17 consolidation in my SMART LOAN Account." The loan consolidated
18 debtor's earlier educational loans into one note. All of the
19 proceeds of the consolidation loan were paid to lenders who had
20 provided funds for debtor's educational benefit.

21 NELA is a guaranty agency that guaranteed Sallie Mae against
22 student loan losses pursuant to 20 U.S.C. § 1078, and is the holder
23 of debtor's consolidation note by virtue of its guaranty of that
24 note. The August 31 note was for \$34,894.89; on April 22, 1993

25
26 ¹ All statutory references are to the Bankruptcy Code, 11
U.S.C. § 101 et seq., unless otherwise provided.

1 debtor requested that \$6,169.52 be added to the note, bringing the
2 total balance to \$43,522.65.

3 ISSUE

4 Is a consolidation loan given pursuant to 20 U.S.C. §§ 1087-
5 2(o) and 1078-3 an educational loan that is excepted from discharge
6 under 11 U.S.C. § 523(a)(8)?

7 DISCUSSION

8 11 U.S.C. § 523(a)(8) provides that a bankruptcy discharge
9 under 11 U.S.C. § 727 does not discharge a debtor from any debt:

10 "for an educational benefit overpayment or loan made,
11 insured or guaranteed by a governmental unit, or made under
12 any program funded in whole or in part by a governmental unit
13 or nonprofit institution, or for any obligation to repay
14 funds received as an educational benefit, scholarship or
15 stipend, unless

16 "(A) such loan, benefit, scholarship, or stipend
17 overpayment first became due more than 7 years * * * before
18 the date of the filing of the petition; or

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

22 The evidence establishes that debtor has a debt that was guaranteed
23 by NELA, which is a guaranty agency that guaranteed the loan
24 pursuant to 20 U.S.C. § 1078. Debtor does not assert that either
25 paragraph (A) or (B) applies. The sole issue is whether the SMART
26 loan is an educational loan within the meaning of section 523(a)(8).

The consolidated loan at issue in this case was made under
the provisions of the Higher Education Act of 1965, 20 U.S.C. § 1001
et seq. As part of the legislative scheme to make available funds
for higher education, Congress created various student loan programs

1 that are either funded by or guaranteed by the federal government.
2 NELA is a guaranty agency within the meaning of the Higher Education
3 Act of 1965, which defines a guaranty agency as a private nonprofit
4 organization that has an agreement with the Secretary of Education
5 to administer a loan guaranty under the student loan program. 20
6 U.S.C. § 1085(j).

7 Included in Congress's student loan program is its
8 authorization to Sallie Mae to make consolidation loans under that
9 program. 20 U.S.C. § 1087-2(o). Consolidation loans by definition
10 are given after a student completes school. To be eligible for a
11 consolidation loan, a borrower must be in repayment status, in the
12 grace period preceding repayment, or, if in default, the borrower
13 must have made arrangements to repay the obligation. 20 U.S.C. §
14 1078-3(a)(3). Only loans that were "made, insured, or guaranteed"
15 under 20 U.S.C. § 1071 et seq. may be consolidated. 20 U.S.C. §
16 1078-3(a)(4). A lender who wishes to participate in the
17 consolidation loan must make an agreement with the guaranty agency
18 or the Secretary of Education that the proceeds of each
19 consolidation loan will be paid by the lender to the holder or
20 holder of the loans that are consolidated. 20 U.S.C. § 1078-
21 3(b)(1)(D).

22 There is no dispute that the consolidation loan in this case
23 complied with the statutory requirements. The loan was made by
24 Sallie Mae and guaranteed by NELA. Debtor was in the grace period
25 of the original loans when she entered into the consolidation loan.
26 The loan application/promissory note provided that the proceeds of

1 the loan would be advanced to the lenders on the eligible loans that
2 debtor had chosen for consolidation. There is also no dispute that
3 the proceeds of the loan were actually used to pay off the earlier
4 student loans.

5 There are no cases discussing whether a consolidation loan
6 given under 20 U.S.C. § 1087-2(o) meets the definition of an
7 educational loan for purposes of discharge under section 523(a)(8).
8 Cases that have discussed consolidation loans under the Higher
9 Education Act have focused on when consolidation loans first become
10 due, for purposes of determining whether the loan is within the 7
11 year nondischargeability period of section 523(a)(8).² Those cases
12 have routinely viewed loan consolidations as "educational loans"
13 within the meaning of § 523(a)(8).

14 For example, in In re Hesselgrave, 177 BR 681 (Bankr D Or
15 1995), the court held that consolidation loans "first become due"
16 when the first payment is due on the consolidation loan, not when
17 the first payment was due on the underlying loans that were
18 consolidated. The court followed the reasoning of In re Saburah,
19 136 BR 246 (Bankr CD Cal 1992), in which the court noted that the
20 consolidation loan was a new loan containing terms that differed
21 from those of the original loans. It considered that the statutory
22 period was seven years from the date "such loan" first became due,
23 and that "such loan" referred to the existing consolidation loan,
24 not to the loans that had been paid off prepetition with the

25 ² Some of the cases were decided before the 1990 amendments,
26 when the period was five years.

1 proceeds of the consolidation loan. The courts in both cases
2 recognized the strong public policy to secure repayment of student
3 loans to insure that funds continue to be available to help future
4 students, and determined that that policy would be furthered by
5 excepting from discharge consolidation loans that had first come due
6 no more than seven years before the petition was filed.

7 Similarly, in In re Martin, 137 BR 770 (Bankr WD Mo 1992),
8 the court considered whether the consolidation of two student loans
9 into a new loan altered the date when the loan "first becomes due."
10 In concluding that it does, the court found that the loan was an
11 educational loan covered by 11 U.S.C. § 523(a)(8), 137 BR at 772,
12 because it was authorized by the Higher Education Act. Id. at 773.

13 None of those cases contained any discussion about whether a
14 consolidation loan was an educational loan within the meaning of
15 section 523(a)(8), nor does it appear that there was any dispute
16 about that issue. In fact, in Hesselgrave, the court specifically
17 said that the parties did not dispute that the loan was an
18 educational loan. Therefore, I do not find any of the cases helpful
19 in resolving the dispute in this case over whether the consolidation
20 loan is an educational loan.

21 Debtor relies on two cases for her argument that the
22 consolidation loan is not an educational loan. First, in In re
23 Segal, 57 F3d 342 (3d Cir 1995), the debtor entered into a
24 scholarship contract, which allowed her to receive educational
25 benefits from the National Health Service Corps (NHSC). The
26 contract provided that, upon debtor's graduation from medical

1 school, she was required to provide medical services for four years
2 at a location chosen by NHSC. If she did not provide those
3 services, then she was obligated to repay the amount that had been
4 provided to her under the scholarship.

5 The debtor completed some but not all of the service
6 requirement, and therefore became obligated to repay a portion of
7 the scholarship. The debtor's new employer, in order to induce the
8 debtor to accept employment with it, entered into an agreement under
9 which it loaned the debtor the funds to pay off the obligation to
10 NHSC. The debtor did not repay the employer, and then she filed
11 bankruptcy. The employer sought a determination that the debt was
12 nondischargeable under section 523(a)(8). The Third Circuit agreed
13 with the Bankruptcy Court and the District Court that the debt was
14 dischargeable. The court said that, even if it were to assume that
15 the loan was an educational loan, the loan was not made pursuant to
16 some program, as required by section 523(a)(8). 57 F3d at 347. The
17 employer had no educational program, but instead had made a single
18 loan to the debtor for the purpose of inducing her to work for the
19 employer.

20 The employer also argued that the loan was an "obligation to
21 repay funds received as an educational benefit, scholarship, or
22 stipend." 57 F3d at 348. In rejecting that argument, the court
23 noted that the loan itself did not provide educational benefits:
24 "the only educational benefits or stipends received by [the debtor]
25 were provided by NHSC and not by [the employer]." 57 F3d at 348.
26 Finally, in response to the employer's argument that the court

1 should consider the purpose of the funds received rather than the
2 purpose of the parties, the court asked how far the term
3 "educational purposes" could be stretched, and concluded that the
4 purpose of the loan from the employer was not to facilitate the
5 debtor's education, which had been completed, but was to induce the
6 debtor to accept employment. Therefore, the court concluded that
7 the debt did not fall within the nondischargeability provision of
8 section 523(a)(8).

9 Debtor also relies on In re Ziglar, 19 BR 298 (Bankr ED Va
10 1982). In that case, the debtors had obtained numerous federally
11 insured student loans. After they defaulted on the loans, two
12 judgments were entered against them for the outstanding balance.
13 Later, the debtors executed a new note in favor of the State
14 Educational Assistance Authority (the Authority), the consideration
15 for which was the release of the two judgments. When the debtors
16 filed bankruptcy, the Authority sought a determination that the debt
17 was nondischargeable under section 523(a)(8). The court concluded
18 that the debt on the note did not come within the
19 nondischargeability provision of section 523(a)(8), because the
20 original loans had first become due more than five years before the
21 debtors filed bankruptcy. The court went on to say that the debt
22 owed to the Authority was not an educational loan, because the
23 debtors received no money in exchange for the note and they did not
24 return to school after the note was executed. Instead, the note was
25 given in exchange for the Authority's agreement to release the two
26 judgments against the debtors. 19 BR at 300.

1 Neither of those cases is helpful in resolving this case.
2 Segal involved a loan from a private employer to a potential
3 employee for the purpose of inducing the debtor to provide her
4 services to the employer. The purpose of the loan was not in any
5 sense educational; it was, as the court said, a "buyout." 57 F3d at
6 349. The court made clear, however, that its holding was specific
7 to the particular facts of the case:

8 "This case does not involve loan consolidations, which
9 courts routinely have viewed as 'educational loans,' within
10 the meaning of 11 U.S.C. § 523(a)(8). There is even a
11 federal statute permitting such educational loan
12 consolidations. See 20 U.S.C. § 1078-3. Several courts have
13 determined that consolidation loans meet the § 523(a)(8)
14 definition and that the date of the consolidation loan starts
15 the running of the seven-year limit of § 523(a)(8)(A). See
16 Hiatt v. Indiana State Student Assistance Comm'n, 36 F.3d 21,
17 25 (7th Cir. 1994) ('We conclude that, in cases in which a
18 debtor has consolidated her educational loans pursuant to 20
19 U.S.C. § 1078-3, the plain language of section 523(a)(8)(A)
20 requires that the nondischargeability period commences on the
21 date on which the consolidation loan first became due. '),
22 cert. denied, ___ U.S. ___, 115 S. Ct. 1109, 130 L.Ed.2d 1074
23 (1995); Martin v. Great Lakes Higher Educ. Corp., 137 B.R.
24 770, 772 (Bankr. W.D. Mo. 1992) ('[T]he court finds the
25 consolidation loan is an educational loan covered by 11
26 U.S.C. § 523(a)(8)(A) The consolidation loan is
nondischargeable because it first became due less than five
years before the bankruptcy filing. '); see also In re
Roberts, No. 91-7241, 1993 WL 192816, at *3 (D. Kan. May 19,
1993) ('The court . . . agrees with the majority of courts
deciding the issue and concludes that the date the debtor's
consolidated loan first became due is the date for
determining dischargeability under § 523(a)(8)(A).') ."³

57 F3d at 349 n 8.

In re Ziglar is similarly unhelpful. The loan in that case

³ As the parentheticals indicate, the issue in those cases was the time from which the five or seven year period began to run, not whether the consolidation loan fit the definition of "educational loan."

1 was not a consolidation loan under 20 U.S.C. § 1078-3, nor was it in
2 any sense of the word a consolidation of educational loans. The
3 original loans had been reduced to judgment, and the new loan was
4 given in return for a release of those judgments. Further, there is
5 no indication in the opinion whether the second loan was made
6 pursuant to some program or whether it was insured or guaranteed by
7 a governmental unit.

8 We return to the language of the statute. Section 523(a)(8)
9 makes nondischargeable any debt for an "educational loan." That
10 could mean that only loans that are given for prospective
11 educational benefit are nondischargeable, or that loans given for an
12 educational purpose, including loans given to consolidate earlier
13 educational loans after the debtor has completed school, are
14 nondischargeable.⁴ Because the language of the statute itself does
15 not give the answer, I will look to the legislative purpose of
16 section 523(a)(8) and 20 U.S.C. § 1078-3 to determine whether
17 Congress intended to include consolidation loans given under 20
18 U.S.C. §§ 1078-3 and 1087-2(o) in the term "educational loan."

19 Section 523(a)(8) was enacted to meet two concerns: to remedy
20 abuse of the educational loan system by students who immediately
21 upon graduation file bankruptcy and obtain a discharge, In re
22 Merchant, 958 F2d 738, 740 (6th Cir 1992), and to safeguard the
23 financial integrity of educational loan programs by reducing

24
25 ⁴ Of course, the loan would also have to meet the other
26 criteria set out in the statute, e.g., be guaranteed or insured by a
governmental agency.

1 defaults and thereby assuring that future generations of students
2 will have loan funds available to them. In re Rosen, 179 BR 935,
3 938 (Bankr D Or 1995).

4 "Congress sought principally to protect government entities
5 and nonprofit institutions of higher education--places which
6 lend money or guarantee loans to individuals for educational
7 purposes--from bankruptcy discharge. Because such loans are
8 not based upon a borrower's proven credit-worthiness, and
9 because they serve a purpose which Congress sought to
encourage, section 523(a)(8) protects the lender when a
borrower, who often would not qualify under traditional
underwriting standards, files a chapter 7 bankruptcy. See In
re Merchant, 958 F.2d [738,] 740 [(6th Cir. 1992)]."

10 In re Segal, 57 F3d at 348.

11 The purpose of the various loan provisions of the Higher
12 Education Act is "to assist in making available the benefits of
13 postsecondary education to eligible students * * * in institutions
14 of higher education * * *." 20 U.S.C. § 1070(a). As a part of the
15 legislative scheme to make higher education available to eligible
16 students, Congress provided for various loan programs, including,
17 for example, the Guaranteed Student Loan program and National Direct
18 Student Loans. See Dunham and Buch, "Educational Debts under the
19 Bankruptcy Code," 22 Mem. St. U.L. Rev. 679, 682-83 (1992). Also
20 part of this scheme is the consolidation loan program. 20 U.S.C. §§
21 1078-3; 1087-2(o). Congress adopted the consolidation provisions in
22 an effort to reduce defaults by making repayment terms sensitive to
23 borrowers' financial conditions. In re Martin, 137 BR at 774.

24 In the light of the purpose of § 523(a)(8) to safeguard the
25 financial integrity of the educational loan programs, of which the
26 consolidation loan program is one, and the purpose of the

1 consolidation loan program to reduce defaults by making the payments
2 easier for borrowers to meet, I conclude that it is consistent with
3 the legislative purpose to hold that consolidation loans given under
4 20 U.S.C. § 1078-3 are educational loans within the meaning of
5 section 523(a) (8). Accord Hiatt v. Indiana State Student Assistance
6 Com'n, 36 F3d 21, 24 (7th Cir 1994) (consolidation loan "is in fact
7 a second government guaranteed student loan debt"). Preventing
8 their discharge for seven years after they first come due will meet
9 Congress's concern for the financial integrity of the system as well
10 as for the potential abuse by debtors of the loan system.⁵

11 Debtor argues that Congress knows how to except from
12 discharge debts incurred for the purpose of paying off other
13 nondischargeable debts, because it did that with debts incurred to
14 pay nondischargeable tax debt. See 11 U.S.C. § 523(a) (14). She
15 asserts that if Congress did not intend to allow for discharge of
16 consolidation loans, it is within Congress's power to amend section
17 523 to so provide. See In re Nunn, 788 F2d 617, 619 (9th Cir 1986)
18 (Wright, J., concurring).

19 I am not convinced that Congress's adoption of a provision
20

21 ⁵ Debtor argues that this interpretation will have the
22 absurd result of excepting from discharge consolidation loans made
23 by credit unions, which she asserts have been held to be nonprofit
24 organizations. My holding today is limited to consolidation loans
25 made under the Higher Education Act. If, however, a credit union
26 fits within the parameters of section 523(a) (8) and the logical
extension of this holding is that a credit union's consolidation of
student loans under a student loan program is also an educational
loan that is nondischargeable under section 523(a) (8), that result
would be consistent with Congress's purpose of preserving the
integrity of student loan programs.

1 excepting from discharge any debt incurred to pay a nondischargeable
2 federal tax reveals anything about its intended meaning of
3 "educational loan" under section 523(a)(8). Where Congress has
4 expressed its meaning in the language it adopted, it has no reason
5 to enact another provision that might make its intent more explicit.

6 Debtor also argues that the nondischargeability provisions
7 are to be construed narrowly and that holding that this
8 consolidation loan is nondischargeable runs counter to the fresh
9 start policy of the Bankruptcy Code. In the case of § 523(a)(8),
10 however, "Congress has revealed an intent to limit the
11 dischargeability of educational debt, and [I] can construe the
12 provision no more narrowly than the language and legislative history
13 allow." In re Pelkowski, 990 F2d 737, 745 (3d Cir 1993). I
14 conclude that debtor's debt to NELA is not dischargeable.

15 NELA is entitled to a determination that its debt is
16 nondischargeable. It also seeks a judgment for the unpaid balance.
17 It is also entitled to that judgment. NELA also seeks attorney fees
18 based on the attorney fee provision in the promissory note. Because
19 it appears that any attorney fees incurred by NELA in this case
20 relate solely to a determination of dischargeability under section
21 523(a)(8), which is an issue peculiar to bankruptcy law, it is not
22 entitled to an award of attorney fees. In re Fobian, 951 F2d 1149
23 (9th Cir 1991); In re Itule, 114 BR 206 (BAP 9th Cir 1990).

24 This Memorandum Opinion shall constitute Findings of Fact and
25 Conclusions of Law as required by Fed. R. Bankr. P. 7052 and 9014
26 and they shall not be separately stated. Counsel for NELA should

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3 prepare a judgment that is consistent with this Memorandum Opinion.

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ELIZABETH L. PERRIS

Bankruptcy Judge

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7 cc: T. Michael Ryan
Richard T. Anderson, Jr.

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