UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA

In the Matter of	:	**Case No. 92-2565-DH**
	:	**Chapter 7**
WILLIAM THOMAS MONROE and KATHERINE ANN MONROE,	:	
Debtors.	:	
- -	:	
WILLIAM THOMAS MONROE and KATHERINE ANN MONROE,	:	
	:	**Adv. No. 93-93081**
v.	:	
HIGHER EDUCATION ASSISTANCE FOUNDATION & UNITED STATES DEPARTMENT OF EDUCATION, NEBRASKA STUDENT LOAN PROGRAM, INC.,	:	
Defendants.	:	

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ORDER--COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

This proceeding pends upon the Complaint to Determine Dischargeability of Debt filed by the Plaintiffs, William Thomas Monroe and Katherine Ann Monroe. The parties stipulated that trial briefs would be filed in lieu of oral arguments. Both parties have submitted trial briefs and the Court considers this matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. § 152(b)(2)(I). The Court, upon review of the pleadings, briefs, and written arguments, now enters its findings of fact and conclusions of law pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. Plaintiff, William Thomas Monroe ("Monroe") executed two (2) promissory notes in favor of Hawkeye Bank and Trust of Des Moines ("I-HELP") in 1982 and 1983, respectively, in principal amounts of $2,500, each bearing a rate of interest of 9%. In 1984 Monroe executed a note in favor of First Interstate Bank of Arizona in the principal amount of $2,500 with a rate of 9%. The monies advanced by all three notes were for educational purposes and were guaranteed student loans established under the Higher Education Act of 1965, Public Law No. 89-329, 20 U.S.C. Section 1071 to Section 1087.

2. The above notes became due by the end of 1984.

3. On October 20, 1987, Monroe consolidated the three (3) notes. The consolidating lender was I-HELP. The consolidated note is also reinsured by the United States Department of Education in accordance with the Higher Education Act as amended in 1986.

4. The consolidated note provides for different repayment schedules than the original notes, but bears the same interest rate as the original notes.

5. On August 25, 1992, the Plaintiffs filed their petition for relief under Chapter 7 of the Bankruptcy Code. The consolidated loan was included on Schedule F of the Plaintiffs' petition. The unpaid principal and accrued interest due on the promissory note is $10,354.41 as of August 25, 1992.

6. The consolidated note became due within seven (7) years prior to the filing of the Plaintiffs' bankruptcy petition.

7. The Plaintiffs received their discharge on November 24, 1992.

8. On May 12, 1993, I-HELP assigned its claim to the Higher Education Assistance Foundation. Subsequently, the consolidated note was assigned to the Nebraska Student Loan Program, Inc. ("Nebraska, Inc.").

9. The Plaintiffs filed this adversary proceeding on June 23, 1993, to determine the dischargeability of the consolidated loan debt. The Complaint named Higher Edication Assistance Foundation and United States Department of Education as defendants.

10. On August 17, 1993, Nebraska, Inc. was added as a defendant to this proceeding and on September 24, 1993, Plaintiffs dismissed their complaints against the United States Department of Education and the Higher Education Assistance Foundation.

11. On December 6, 1993, Nebraska, Inc. filed a counterclaim seeking judgment against the Plaintiffs in the amount of $10,354.51 plus interest accruing thereon after August 25, 1992 at the note rate of 9%. Additionally, Nebraska, Inc. sought attorney's fees and costs of this action.

DISCUSSION

Plaintiffs argue the debt sought to be discharged first became due more than seven years prior to the filing of their bankruptcy petition, and is, therefore, dischargeable pursuant to 11 U.S.C. § 523(a)(8). The Plaintiffs rely on the repayment date of the original student loans. The Defendant argues that because the consolidated loan is the debt sought to be discharged, the date of that loan should be used to determine dischargeability. The consolidated loan first became due less than seven years prior to the filing of the bankruptcy petition.

The dischargeability of an educational loan guaranteed or insured by a governmental unit or a nonprofit organization is governed by 11 U.S.C. § 523(a)(8), which provides in relevant part:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt--
>
> > (8) for an educational benefit or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or

> for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless--
>
> > (A) Such loan, benefit, scholarship or stipend overpayment 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 . . .

The Higher Education Act as amended in 1986 and subsequently revised in 1992 includes a provision for the consolidation of student loans. 20 U.S.C. § 1078-3, provides in relevant part:

> Consolidation loans
>
> > (e) The authority to make loans under this section expires at the close of September 30, 1997. Nothing in this section shall be construed to authorize the Secretary to promulgate rules and regulations governing the terms or conditions of the agreements and certificates under subsection (h) of this section. Loans made under this section which are insured by the Secretary shall be considered to be new loans made to students for the purpose of section 1074(a) of this title.

Section 1074(a) provides:

> (a) Limitations on amounts of loan covered by Federal insurance

The total principal amount of new loans made and installments paid pursuant to lines of credit (as defined in section 1085 of this title) to students covered by Federal loan insurance under this part shall not exceed $2,000,000,000 for the period from July 1, 1976, to September 30, 1976, and for each of the succeeding fiscal years ending prior to October 1, 1998. Thereafter, Federal loan insurance pursuant to this part may be granted only for loans made (or for loan installments paid pursuant to lines of credit) to enable students, who have obtained prior loans insured under this part, to continue or complete their educational program; but no insurance may be granted for any loan made or installment paid after September 30, 2002.

Prior to the 1986 amendments to the Higher Education Act, the Bankruptcy Court for the Eastern District of Virginia in In re Brown, 4 B.R. 745 (Bankr. E.D. Va. 1980),

held that in determining when student loans first became due under 11 U.S.C. § 523(a)(8), the court must look to the terms of the original notes, not the subsequent consolidated obligation. The court reasoned that to hold otherwise the student loan "would be potentially NON-DISCHARGEABLE . . . in contradiction to the plain language of the statute and clear intent of Congress." Id. at 746. This view was followed in In re Ziglar, 19 B.R. 298 (Bankr. E.D. Va. 1982), and later applied in In re Washington, 41 B.R. 211 (Bankr. E.D. Va. 1984) based on the court's view that this approach represented the law in the Eastern District of Virginia.

One other bankruptcy court reached the same result as Brown. In re McKinney, 120 B.R. 416 (Bankr. N.D. Ohio 1990). In McKinney, the court rejected the argument that the 1986 Amendments to the Higher Education Act, which allows for the consolidation of some student loans to be consolidated, makes a consolidation loan a new loan for purposes of § 523. Id. The court determined the language "new loan" from sections 1078-3 and 1074(a) of the Higher Education Act was for the administrative purpose of limiting the amount of consolidated loans extended each year. Id. However, this decision was reversed by the district court in an unpublished opinion. In re McKinney, No 1:90CV1946, 1992 WL 265992 (N.D.Ohio May 12, 1992). The appeals court focused on the words "such loan" of § 523(a)(8)(A), stating that it refers to the debt sought to be discharged. Id. at *2. The court found the consolidated loan was the only loan in existence since the original loans were paid off. Id. Moreover, the consolidated note was a new agreement with a new creditor with new terms. Id. Finally, the court held there was not an assignment of an old obligation, but rather a new loan. Id.

In In re Saburah, 136 B.R. 246 (Bankr. C.D. Calif. 1992), the court found the words "such loan" refer to the consolidated loan which the debtor sought to discharge. The court reasoned that the consolidated loan was voluntarily taken, having new terms and new creditors. Id. at 252. Therefore, the consolidated loan constituted a separate loan not a continuation of the original loans. Id. Additionally, the court believed there is a

strong public policy in favor of repaying student loans as evidenced in the legislative history of § 523(a)(8)(A) and further evidenced by Congress recently extending the period under § 523(a)(8)(A) from five to seven years. Id.

In In re Martin, 137 B.R. 770 (Bankr. W.D. Mo. 1992), the court, in considering whether consolidation of student loans alters the date when the loan "first becomes due," determined that the old notes were discharged as expressly stated by 20 U.S.C. § 1078-3(b)(1)(D) and the consolidated note was a new loan to students according to 20 U.S.C. §1078-3(d). The court examined the consolidated note which stated on the reverse side that the debtor "undertakes a new obligation which is not subject to any defenses . . . [the debtor] might have with respect to the loans selected for consolidation." Id. at 774. In finding the loan "first becomes due" according to the terms of the consolidated loan not according to the terms of the original loans, the court believed it would be inequitable to rule otherwise. Id. The court felt a borrower should not be able to extinguish the old notes, eradicate their troublesome parts, and then claim the favorable repayment dates of the old notes. Id. Additionally, the court feared the potential for borrowers to first avoid payment of student loans by obtaining a consolidation loan to reduce payments, and then later file bankruptcy to avoid the balance. Id. The court believed this result to be contrary to the legislative intent of both the Higher Education Act and the Bankruptcy Code.

Similarly, the district court in In re McGrath, 143 B.R. 820, 823 (D. Md. 1992), expressed concern that under the reasoning of Brown a student could obtain forbearances on the original loans, consolidate and drastically reduce the monthly payment, obtain forbearances on the consolidated loan, then file bankruptcy once the period of §523(a)(8)(A) ended. The court concluded the words "first became due" refers to the particular loan a debtor seeks to discharge, not any earlier loan that has been paid off. Id. at 824.

In In re Menendez, 151 B.R. 972 (Bankr. N.D. Fla. 1993), the court followed a plain reading approach to interpreting § 523(a)(8)(A) and found the words "such loan"

must refer to the loan sought to be discharged, which was the consolidated note. Responding to the position taken in Washington and Ziglar, the court found those cases to be irrelevant and unpersuasive since they were decided prior to the 1986 Amendment to the Higher Education Act. Id. at 973.

This Court also finds the reasoning in the Brown line of cases unpersuasive. The only remaining authority for the proposition that a court should look to the terms of the original note is the McKinney decision, which was reversed on appeal. Therefore, the Court finds that under a plain reading of § 523(a)(8)(A), the words "such loan" refer to the loan debt sought to be discharged on a debtor's petition. In this case, Monroe executed a consolidation loan in accordance with the Higher Education Act on October 20, 1987, which was listed on Schedule F of the petition. Any prior student loans executed by Monroe are no longer in existence and therefore not relevant to the determination of the dischargeability of the consolidated note. Accordingly, the Court finds the consolidated loan debt first became due less than seven years before the date of the filing of the petition and, therefore, should be excepted from discharge pursuant to § 523(A)(8)(A).

Regarding Defendant's Counterclaim, the Court finds that judgment should be entered for Defendant in the amount of $10,354.51 plus 9% interest accruing from November 24, 1992, the date of Debtors' Discharge. The Court denies Defendant's request for attorney fees as the record reveals that Defendant has failed to provide adequate proof to ascertain the validity of the request or proper award.

ORDER

IT IS THEREFORE ORDERED, in accordance with the above discussion, that the debt to Nebraska Student Loan Program, Inc. is excepted from discharge pursuant to § 523(a)(8)(A).

IT IS FURTHER ORDERED, in accordance with the above discussion, that judgment is entered for Counterclaimant/Defendant, Nebraska Student Loan Program, for $10,354.51 plus 9% interest accruing from November 24, 1992.

IT IS FURTHER ORDERED that the request for attorney fees by Defendant, Nebraska Student Loan Program, is denied.

Dated this _____ day of June, 1994.

_____
RUSSELL J. HILL, JUDGE
UNITED STATES BANKRUPTCY COURT

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WILLIAM THOMAS MONROE and KATHERINE ANN MONROE,	:	
	:	**Adv. No. 93-93081**
v.	:	
HIGHER EDUCATION ASSISTANCE FOUNDATION & UNITED STATES DEPARTMENT OF EDUCATION, NEBRASKA STUDENT LOAN PROGRAM, iNC.,	:	
Defendants.	:	

JUDGMENT

The issues of this proceeding having been duly considered by the Honorable Russell J. Hill, United States Bankruptcy Judge, and a decision having been reached,

IT IS ORDERED AND ADJUDGED as follows:

(1) that the debt to Nebraska Student Loan Program, Inc., is excepted from discharge pursuant to § 523(a)(8)(A), and

(2) that judgment is entered for Counterclaimant/Defendant, Nebraska Student Loan Program, for $10,354.51 plus 9% interest accruing from November 24, 1992.

IT IS FURTHER ORDERED AND ADJUDGED that this judgment is nondischargeable.

Dated this 20th day of June, 1994.

Mary M. Weibel
Clerk of U.S. Bankruptcy Court
By:_____
Deputy Clerk

SEAL OF U.S. BANKRUPTCY COURT
ENTRY OF JUDGMENT
Dated: June 20, 1994