UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
LULA B. HARRIS, Case No. 02-23827-L
Debtor. Chapter 13

Lula B. Harris,
Movant,
v. (Objection to Claim)
United States Department of Education,
Respondent.

MEMORANDUM AND ORDER

BEFORE THE COURT is the objection of the Debtor Lula B. Harris to the proof of claim filed by the United States Department of Education ("DOE"). The Debtor asserts that the claim of the DOE for student loans was discharged in her prior chapter 13 bankruptcy case. For the reasons set forth below, the court will **sustain** in part and **overrule** in part the objection. This is a core proceeding. 28 U.S.C. § 157(b)(2)(B).

FACTS

Lula B. Harris filed a voluntary petition commencing this chapter 13 case on March 4, 2002. DOE filed a proof of claim in the amount of $17,132.60. The Debtor filed an objection to the proof of claim on August 20, 2002. The parties announced a consensual resolution of the objection but were unable to agree on the terms of a written order. As a result, the Debtor renewed her objection on November 12, 2003. The Debtor asserts that the claim of DOE is "inequitable, contrary to the applicable provisions of the Bankruptcy Code, and inconsistent with the intent of the Bankruptcy Code to provide debtors with a fresh financial start." (Doc. No. 18). Between 1978 and 1986, the Debtor obtained the following student loans:

> 1. An NDSL Perkins Direct student loan dated 1978 in the amount of $1,900 for attending LeMoyne Owen College. DOE admits that there is no outstanding balance owed on this loan.
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> 2. A student loan from Citibank dated October 27, 1983, in the amount of $5,000 to attend Memphis State University. This loan was assigned to Higher Education Assistance Foundation ("HEAF") in 1986, and reassigned to DOE sometime thereafter.
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> 3. A student loan from Citibank dated September 19, 1985, in the amount of $5,000 to attend Memphis State University. This loan was assigned to Tennessee Student Assistance Corporation ("TSAC"), and was reassigned to DOE on September 5, 1992.
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> 4. A student loan from Commerce Union Bank dated June 22, 1986, in the amount of $2,500 to attend Trevecca Nazarene College. This

loan was assigned to TSAC, and reassigned to DOE on April 10, 2003.

The Debtor filed her first chapter 13 case on August 14, 1991, and received her discharge on January 9, 1997. DOE was listed as a creditor in that case. The plan provided for the payment of 100% of unsecured claims, including the claims of DOE. The Debtor listed DOE and HEAF as general unsecured creditors. The deadline for filing governmental proofs of claim was fixed at December 9, 1991. DOE filed a proof of claim in the amount of $2,557.09 and HEAF filed a proof of claim in the amount of $6,783.38. Both of these claims were paid in full, but without post-petition interest. No proofs of claim were filed with respect to the third and fourth student loans incurred by the Debtor.

The Debtor testified that she provided all information in her possession concerning her outstanding student loans to her attorney when her first chapter 13 case was filed. She further testified that she was unaware that any amount remained outstanding on any of her student loans until she applied for graduate school at Cumberland University sometime between the entry of discharge in her prior case on January 9, 1997, and the filing of her present case on March 4, 2002. The Debtor claims that as the result of the inactivity by DOE, interest on the student loans has been allowed to accrue. DOE filed a proof of claim in the present chapter 13 case in the amount of $17,132.60. The proof of claim shows outstanding balances owed on two loans, numbers 2 and 3 in the list above. Number 2 is shown to have a principal balance of $5,277.21 and accrued interest of $2,780.63. Number 3 is listed as having a principal balance of $5,000 and accrued interest of $4,074.76. The proof of claim makes no claim with respect to the fourth loan, which was assigned to DOE after the present bankruptcy case was commenced.

The principal amount shown in the proof of claim filed by HEAF in the prior case was $5,277.21. This matches the principal amount for loan number G199304052360901 on the attachment to the proof of claim filed in the present case. The court believes that this is loan number 2 described above even though DOE assigned a different loan number to this loan in its Memorandum. It is clear that no credit has been given for the payments made in the prior chapter 13 case on the former HEAF loan. If $6,783.38 is applied to the balance shown in the proof of claim of $8,057.84, a small balance of $1,274.46 in interest remained to be paid when the present case was filed. This amount is excessive, however, because the calculation of interest has been based on outstanding principal of $5,277.21. No principal has been owed on this loan since January 9, 1997. The only amount that should be outstanding under any circumstance is the post-petition interest that accrued on the steadily reduced principal amount during the administration of the prior chapter 13 case. DOE will be instructed to provide an accounting of the remaining balance owed on the HEAF loan when proper credit is given for payments made.

This leaves the two TSAC loans (loans 3 and 4). DOE asserts that these loans were not discharged in the prior chapter 13 case because (i) for all cases filed after November 5, 1990, student loans are not dischargeable unless these is a showing of undue hardship; and (ii) TSAC and/or DOE were not given notice of the filing of the prior chapter 13 case in time to file proofs of claim with respect to these loans.

The Debtor asserts that DOE was given notice of the filing of the prior chapter 13 case, and that this notice was sufficient as to all the Debtor's outstanding student loans. The Debtor further asserts that all her student loan obligations, including post-petition interest, were discharged in the prior chapter 13 case either because (i) these loans are dischargeable by operation of law and were

discharged in the prior chapter 13 case; or (ii) DOE is bound by the terms of the confirmed plan which provided for 100% payment to all unsecured creditors; or (iii) DOE is prevented by the equitable doctrine of laches from attempting to collect these student loans after the substantial passage of time with no collection efforts.

ANALYSIS

A. Dischargeability of Student Loans in Chapter 13

Related to the Debtor's argument that her student loans were discharged in her prior chapter 13 case by operation of law is a question of notice. The Debtor asserts that DOE should be bound as to all the Debtor's student loans by the notice given to it concerning loan number 1 and to HEAF concerning loan number 2. DOE asserts that it should not be charged with notice concerning loans 3 and 4 because it was not the holder of those loans on the date of filing.

According to DOE, it did not become the holder of loan number 3 until September 5, 1992, when it was assigned this loan by TSAC. That date falls after the date of the filing of the prior chapter 13 case, August 14, 1991. DOE did not become the holder of loan number 4 until April 10, 2003, when it was assigned the loan by TSAC. This date fell after discharge was entered in the prior chapter 13 case.

TSAC, the holder of loans 3 and 4 when the prior chapter 13 case was filed, was not listed as a creditor in that chapter 13 case. TSAC is an agency of the state of Tennessee. DOE is an agency of the federal government. The Debtor has not demonstrated any reason why the notice given to DOE should have been imputed to TSAC, or why the notice to DOE should have put it on notice of loans held by TSAC. While DOE might be charged with notice given to its predecessor, it does not appear that notice was in fact given to its predecessor. DOE cannot be charged with

notice concerning a loan it had not yet acquired at the time notice was given. Pushed to its extreme, the Debtor's position would charge DOE with knowledge of the filing of a bankruptcy case affecting any loan it is subject to acquiring. Nothing in the record reveals the circumstances under which DOE acquired these loans nor is there any information in the record about what information DOE maintains concerning loans possibly subject to acquisition by it. The court cannot conclude that notice given to DOE would be calculated to inform it of the effect of the Debtor's bankruptcy case upon loans it had not acquired.

The discussion of notice may be a red herring, however. Whether or not notice was given to TSAC becomes material only if the Debtor's student loans were subject to discharge in her prior chapter 13 case. Prior to the 1990 bankruptcy amendments, student loans were dischargeable in chapter 13 cases. At that time, section 1328 provided for the prompt discharge of all debts "provided for by the plan" (with certain exceptions not applicable to this case) at the completion of all payments under the plan. Section 1328(a) was amended in 1990, however, to except from discharge those educational loans described in section 523(a)(8). The amendment applied to all cases filed after November 5, 1990, including the case filed by the Debtor in 1991. Had the Debtor's case been filed prior to November 5, 1990, her student loans would have been dischargeable in her chapter 13 plan and the court would have to determine whether loans 3 and 4 were "provided for" by the Debtor's plan even though (i) notice of the filing of her case was not given to TSAC; (ii) TSAC was not named as a creditor in the chapter 13 plan; (iii) TSAC did not file a timely proof of claim; and (iv) TSAC received no distributions from the plan.

The matter is still more complicated. The 1990 amendments to the Bankruptcy Code were subject to a sunset provision. The provision stated, "The amendments made by this subtitle shall

cease to be effective on October 1, 1996." Section 3003 of Pub. L. No. 101-508, 104 Stat. 1388 (Nov. 5, 1990) (quoted in 4 Keith M. Lundin, *Chapter 13 Bankruptcy* § 346-1, 346-2 (2000)). The sunset provision was repealed effective October 1, 1992. The Debtor's case was filed *after* the 1990 amendments but *before* the repeal of the sunset provision. The Debtor received her discharge after the 1990 amendments would have ceased to be law had the sunset provision not been repealed. Further, the scope of section 523(a)(8) has changed in the intervening years since the filing of the Debtor's first chapter 13 case. These changes are summarized in the Lundin treatise. *See Lundin*, § 346.1, at 346-6 through 346-7. For cases filed between May 28, 1991, and October 7, 1998 (including the Debtor's first case), section 523(a)(8) limited student loans that could be discharged to those that "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." Section 3621 of Pub. L. No. 101-647, 104 Stat. 4789 (Nov. 29, 1990). It does not appear from the record when loans number 3 and 4 first became due, but they were made within seven years preceding the filing of the Debtor's first chapter 13 case, so this limitation need not concern us. If loans 3 and 4 were dischargeable in bankruptcy when the Debtor filed her first chapter 13 case, it is because of the sunset provision enacted in Public Law 101-508.

Judge Lundin suggests that the discharge of student loans in chapter 13 cases filed in the period between November 5, 1990, and October 1, 1992, for which the debtor becomes eligible for discharge after October 1, 1996, is problematic. For these cases, Judge Lundin suggests that the court must determine whether the law in effect on the day a case is filed or the law in effect on the day a debtor becomes eligible for discharge determines eligibility for discharge. Judge Lundin suggests that if the court considers the law on the date of filing, and includes within that law the

sunset provision as law upon which the debtor could reasonably rely, then student loans for cases filed in the questionable period would be dischargeable.

The Court respectfully disagrees with Judge Lundin. Although the Debtor's case falls squarely within the problematic period, the law in effect on both the day of filing and the day of eligibility for discharge specified that student loan debts described in section 523(a)(8) were not dischargeable in chapter 13. The presence of the sunset provision does not change this result unless the court is called upon to determine what the law on the day of eligibility for discharge would have been based upon the law in effect on the date of filing had no amendments intervened, and apply that law on the day of eligibility for discharge. The Court does not believe that it is called upon to perform such mental gymnastics, and further does not believe that any debtor could reasonably have expected that a court would apply a hypothetical law on the day of eligibility for discharge in lieu of the law actually in force on that day. To reiterate, in this case the Court need not determine whether to apply the law at the date of filing or the law at the date of eligibility for discharge. On both these dates, for this Debtor, student loans described in section 523(a)(8) were not dischargeable in chapter 13.

What are the effects of finding that the Debtor's student loans were not dischargeable in her prior chapter 13 case? One effect is that the question of notice or lack of notice is rendered immaterial. Whether or not TSAC or DOE had notice of the filing of Debtor's chapter 13 case, the loans were not discharged. A second effect is that these loans are not subject to discharge in the Debtor's present chapter 13 case absent a showing of undue hardship. Absent undue hardship, student loans cannot be discharged; they can only be satisfied, either by full payment or by agreement.

The Debtor raises two additional arguments: first that DOE is bound by the terms of the prior confirmed plan which provided for 100% payment of unsecured claims; and second, DOE is barred by the equitable doctrine of laches from collecting these debts.

B. The Effect of Confirmation of the Debtor's Plan

The Debtor argues that notwithstanding the fact that her student loans were not dischargeable in her prior chapter 13 case, the loans were discharged by operation of the confirmed chapter 13 plan. The Debtor relies upon two cases from other jurisdictions in support of her argument.

In the first case, *In re Andersen*, 179 F.3d 1253 (10th Cir. 1979), the issue on appeal was the effect on student loan debts of confirmation of a chapter 13 plan which contained the following language:

> All timely filed and allowed unsecured claims, including the claims of Higher Education Assistance Foundation and UNIPAC-NEBHELP, which are government guaranteed student loans, shall be paid ten percent (10%) of each claim, and the balance of each claim shall be discharged. Pursuant to 11 U.S.C. § 523(a)(8), excepting the aforementioned education 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.

Andersen, 179 F.3d at 1254. The plan was confirmed over the untimely objection of HEAF, and HEAF did not appeal. During the pendency of the debtor's chapter 13 case, HEAF transferred all of its loan portfolio to DOE, which in turn transferred the debtor's loan to Educational Credit Management Corporation ("ECMC"). The debtor completed all payments under her plan. Following collection efforts by ECMC, the debtor filed an adversary proceeding seeking a declaration that her student loans had been discharged. The bankruptcy court determined that the debts were not discharged because the debtor did not formally seek a determination of

dischargeability of her student loan in connection with the confirmation of her plan. The Bankruptcy Appellate Panel reversed, holding that confirmation of the debtor's plan constituted a finding of undue hardship, and the court of appeals affirmed based upon its position that "[a]bsent timely appeal, the confirmed plan is res judicata and its terms are not subject to collateral attack." *Id*. at 1258 (quoting *United States v. Richman*, 124 F.3d 1201, 1209 (10th Cir. 1997)).

The second case relied upon by the Debtor, *In re Pardee*, 193 F.3d 1083 (9th Cir. 1999), concerned similar facts. The debtors included a provision in their chapter 13 plan that purported to discharge post-petition interest on a student loan debt owed Great Lakes Higher Education Corporation ("Great Lakes"). Great Lakes did not object to confirmation of the plan and did not appeal the confirmation order. The debtors completed their payments and received their discharge. After discharge, Great Lakes attempted to collect the interest that had accrued on the student loan while the bankruptcy case was pending. The debtors filed a motion seeking to enforce the discharge and enjoin Great Lakes from attempting to collect the debt. The bankruptcy court granted the motion and the bankruptcy appellate panel and court of appeals both affirmed. The court of appeals agreed that "failure to object to the plan or to appeal the confirmation order 'constitutes a waiver of its right to collaterally attack the confirmed plan post-confirmation on the basis that the plan contains a provision contrary to the Code.'" *In re Pardee,* 193 F.3d at 1085 (quoting *In re Pardee,* 218 B.R. 925, 928 (B.A.P. 9th Cir. 1998).

The Debtor candidly admits that the result in *Anderson* and *Pardee*, in effect "discharge by declaration," has been criticized as a failure of due process to the creditor. *See, e.g., In re Banks*, 299 F.3d 296 (4th Cir. 2002); *In re Ruehle*, 307 B.R. 28 (B.A.P. 6th Cir. 2004). Moreover, the facts in this case are substantially different from those in either *Anderson* or *Pardee.* In this case, the

Debtor's plan contained no express provision concerning the discharge of post-petition interest. It cannot be said that a provision for payment of "100% of the following claims," put any creditor on notice concerning the Debtor's intention to either pay or not pay post-petition interest. In addition, it is clear that the holders of loans 3 and 4 received no notice of the pendency of the case that would have enabled them to file timely objections to confirmation or an appeal from the order of confirmation. Finally, the plan did not "provide for" loans 3 and 4 in any sense of the word. The debts were not listed and the holders of the debts were not named. Student loans number 3 and 4 now held by DOE were not discharged by virtue of completion of the Debtor's prior chapter 13 plan.

This leaves for consideration the discharge of post-petition interest on student loan number 2. The Debtor's plan made no provision for the payment or discharge of post-petition interest. The underlying student loan is nondischargeable. The question of the discharge of post-petition interest on a nondischargeable obligation has been addressed by a number of courts, the majority of which agree that a student loan creditor is entitled to accrue post-petition interest on a nondischargeable obligation, even though this can work a hardship on the debtor who may not prefer the nondischargeable obligation over other unsecured obligations in his plan. *See, e.g., Leeper v. Pennsylvania Higher Education Assistance Agency*, 49 F.3d 98 (3d Cir. 1995); *Wagner v. Ohio Student Loan Commission*, 200 B.R. 160 (Bankr. N.D. Ohio 1996); *Branch v. UNIPAC/NEBHELP*, 175 B.R. 732 (Bankr. N.D. Neb 1994); *In re Shelbayah*, 165 B.R. 332 (Bankr. N.D. Ga. 1994); *In re Jordan*, 146 B.R. 31 (Bankr. D. Colo. 1992). The one exception is *In re Wasson*, 152 B.R. 639 (Bankr. D.N.M. 1993), which overruled a creditor's objection to confirmation of a chapter 13 plan that did not provide for payment of post-petition interest on a nondischargeable student loan debt.

The issue in *Wasson,* however, was slightly different from the issue in this case. In *Wasson*, the issue was whether a plan could be confirmed without providing for payment of post-petition interest on a student loan. The issue was not whether post-petition interest continues to accrue on a nondischargeable student loan, but rather whether postpetition interest could be paid through the debtor's plan. This distinction is highlighted by *Collier* which states:

> Since the Supreme Court's decision in *Bruning v. United States* [376 U.S. 358 (1964)], it has been settled that the estate's freedom from liability does not relieve the debtor from personal liability for postpetition interest on a nondischargeable tax debt. This principle applies to nondischargeable student loan debts in chapter 13 cases. Thus, unless the chapter 13 plan provides otherwise, the debtor will remain liable for post petition interest on a student loan claim which is nondischargeable under section 523(a)(8) after the conclusion of the chapter 13 case, even if the chapter 13 plan provides for full payment of the prepetition claim.

4 *Collier on Bankruptcy* ¶ 523.14[5] (15th ed. rev. 2004).

Collier assumes that a chapter 13 plan might provide for the discharge of postpetition interest. As stated previously, it has become increasingly questionable whether this is so. Nevertheless, it is clear that in this case, the Debtor's plan did not address the discharge of post-petition interest so there can be no question of discharge of postpetition interest by virtue of confirmation of the debtor's plan. Although the court believes that calculation of postpetition interest by DOE on loan number 2 is incorrect, there remains some amount of postpetition interest to be paid on that loan.

C. Application of the Doctrine of Laches

Although the Debtor has not specifically briefed the applicability of the doctrine of laches to the DOE's collection efforts, she does complain of the long lapse of time between the issuance of her loans and any communication from DOE concerning her loans. She says that had she only

known that there was an outstanding indebtedness, she could have taken steps to avoid the large accumulation of interest on her loans.

Although the Court invited the Debtor to brief this issue, she chose not to. DOE did address the issue and correctly points out that, in general, the United States is not bound by statutes of limitations or subject to the defense of laches when it seeks to enforce a public right or protect a public interest. *See Alaska Dep't of Conservation v. E.P.A.,* 124 S. Ct. 983, 1016 (2004) (Kennedy, J., dissenting) (citing *United States v. Beebe*, 127 U.S. 338, 344, 8 S. Ct. 1083 (1888); *United States v. Summerlin*, 310 U.S. 414, 416, 60 S. Ct. 1019 (1940); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409, 37 S. Ct. 387 (1917). In the case of student loans, Congress has affirmatively acted to eliminate all statutes of limitation. This process began in 1985 with The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), which standardized all federal and state statutes of limitation concerning collection of defaulted student loans to six years after the date the loan was assigned to the Secretary of Education. In 1991, Congress went further and retroactively eliminated all statutes of limitations for actions to recover defaulted student loans, first on an interim and later on a permanent basis. *See* Higher Education Technical Amendments Act of 1991, § 3(c), Pub. L. No. 102-325, § 1551, 106 Stat. 448, 838 (1992). As codified at 20 U.S.C. § 1091(a), the law now provides:

> Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced or an offset, garnishment or other action initiated or taken by –
> * * *
> (D) the Secretary, the Attorney General, or the administrative head of another Federal agency, as the case may be, for . . . repayment of the amount due from a borrower on a loan made under this subchapter and part C of subchapter I of chapter 34 of Title 42 that

> has been assigned to the Secretary under this subchapter and part C of subchapter I of chapter 34 of Title 42.

20 U.S.C.A. § 1091(a); *see also* Kris Aungst*, Student Loan Dischargeability: Does the Doctrine of Laches Apply?,* 23 AM. BANKR. INST. J. 42, 42 (July-August 2004). The courts that have considered the issue are in agreement that the retroactive abrogation of the statute of limitations eliminates the availability of laches as a defense to collection of amounts due under a student loan. *See, e.g., United States v. Lawrence*, 276 F.3d 193, 196 (5th Cir. 2001); *United States v. McLaughlin*, 7 F. Supp. 2d 90 (D. Mass 1998); *United States v. Smith*, 862 F. Supp. 257 (D. Ha. 1994).

The United States Court of Appeals for the Sixth Circuit in *United States v. Weintraub*, 613 F.2d 612 (6th Cir. 1979), *cert. denied* 447 U.S. 905, 100 S. Ct. 2987 (1980), reaffirmed the rule *nollum tempus occurrit regi* (lit. "time does not run against the king"). In that case, the United States waited thirteen years to enforce personal liability of the defendant for failure to honor a notice of levy issued with respect to a tax debt owed by a third person to whom the defendant was alleged to be indebted. The defendant moved for summary judgment on the basis that the suit was barred by laches and the statute of limitations. The motion was denied. A jury found in favor of the United States. On appeal, the defendant assigned as error the failure of the district court to dismiss the complaint on the basis of laches or the statute of limitations. The court of appeals affirmed, noting the principle of *nollum tempus occurritt regi*. While no longer based upon the prerogative of the crown, nevertheless it is "based upon the important public policy of preserving public rights and revenues from the negligence of public officers." *Id.* at 618 (citing *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132-33, 58 S. Ct. 785 (1938)). Circuit Judge Keith concurred in the result, but expressed his reluctance to do so in light of there being no reasonable excuse for the government's

delay. Circuit Judge Merritt wrote a dissenting opinion. All of this indicates that the operation of the rule may beget harsh results.

This bankruptcy judge is without authority to overlook precedent established by the court of appeals for this judicial circuit. Although it does not appear that the DOE made any effort to collect these student loans from the Debtor for an extended period of time, its right to do so was not extinguished by the passage of time.

CONCLUSION

For the foregoing reasons, the Debtor's objection to the claim of DOE is **SUSTAINED** in part and **OVERRULED** in part. DOE is directed to apply payments made by the Debtor in her prior chapter 13 plan to loan number 2 and to recalculate the remaining balance owed. DOE's claim based on loan number 3 is allowed as filed. As stated previously, no claim was made with respect to loan number 4. DOE may seek to amend its claim with respect to that loan. Even though the amendment would not be timely, the Debtor may wish to have some amount applied to this loan through her current chapter 13 plan.