

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

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EASTERN DIVISION
FILED

IN RE:

RICHARD H. BOOTH,

Debtor.

CASE NO. 95-10448

CHAPTER 7

JG
FEB 05 1997
JED G. WEINTRAUB
CLERK OF COURT
WESTERN DISTRICT OF TENN.

RICHARD H. BOOTH,

Plaintiff,

v.

ADV. PROC. NO. 95-5049

EDUSERV TECHNOLOGIES and
HEMAR INSURANCE CORPORATION
OF AMERICA,

Defendants.

MEMORANDUM OPINION AND ORDER RE
CROSS MOTIONS FOR SUMMARY JUDGMENT

Richard H. Booth (“Debtor”), the debtor and plaintiff in this adversary proceeding, filed a complaint to determine the dischargeability of student loan debts on August 7, 1995. The Debtor named as the sole defendant Eduserv Technologies. HEMAR Insurance Corporation of America (“HICA”), a South Dakota corporation, filed a motion to be joined as an additional defendant on April 5, 1996. In support of its motion, HICA stated that it insured the student loans at issue and that the holder of the promissory notes made a claim against HICA, which HICA accepted. As further support HICA stated that the promissory notes had been endorsed and assigned to HICA. This Court joined HICA as a proper defendant by a court order entered May 30, 1996. HICA

of interest, which was set at a rate of 8.75% as of October 1, 1996. The Notes also provide that should the Debtor default on payment of the obligation, the Debtor is responsible for all attorneys' fees and costs incurred in enforcing the obligation, as well as for late fees. As the result of a valid assignment, the Debtor owed HICA, a for profit corporation, **\$34,457.47** on the Notes at the time the Debtor filed his bankruptcy petition.

The Debtor obtained the loans at issue under the Law Access Program ("Program"). Nor-west, HICA, Higher Education Assistance Foundation ("HEAF"), and Law School Administrative Services, Inc. ("LSAS") are all part of the Program pursuant to the Law Plan Multiparty Agreement ("Agreement"), which all four entities signed. The Program was designed to provide educational loans to help law students afford the increasing cost of legal education. It allows law students attending eligible institutions to access several types of educational loans through a single program. Under the Law Access Program, a law student fills out a single application form to apply for all types of loans available, and one lender originates all of the loans.

Law School Administrative Services, Inc. ("LSAS") is a non-profit organization. LSAS, the entity responsible for conducting and scoring the Law School Admissions Test to prospective law students, paid for the cost of producing and distributing the application booklet for the program. LSAS was also responsible for all marketing and promotional activities of the Program. Further, at its expense, LSAS received and initially reviewed all loan applications, provided data entry, and initially processed all loan applications. LSAS did not fund, make, insure, or guarantee any of the Debtor's loans. The role of LSAS was limited to producing and distributing application booklets, marketing, and promoting the loans on behalf of Nor-west. LSAS was paid a fee for services provided in the administration and marketing of these loans.

Pursuant to the Program and as a condition to making any loans under the Program, Norwest required that it receive insurance from HEAP or HICA against the default, death, disability, and bankruptcy of its borrowers. Default, death, disability, and bankruptcy claims made under the Program were to be paid and funded either by HEAF or HICA depending on the loan type.¹ HICA charged a premium for the cost of its insurance. In addition, as part of the Program and pursuant to the Agreement, HEAP, at its expense, also provided certain administrative functions. HEAF agreed to purchase up to \$35 million in loans made under the Program, which were insured by HICA. HEAP paid over \$40 million in claims made under the Program and its successor Program. Pursuant to the Higher Education act of 1965, as amended, HEAP received reimbursement for a portion, but not all, of such claims from the United States Department of Education based upon the annual default rate of HEAF's loans. However, all such claims paid under the Program were funded either by HEAP, a nonprofit corporation, or the federal government.

According to the Debtor's memorandum in support of its motion for summary judgment, HEAF had no financial risk in the transactions at issue. HEAF did not fund, make, insure, or guarantee any of the Debtor's loans. All of the Debtor's loans were covered under the HICA surety bond. Any financial risk was assumed by HICA, a for profit insurance corporation. The Debtor paid a premium to HICA from the proceeds of the loan at the time of the disbursement of the loan amounts. HICA paid all losses.

¹ HEAP guaranteed Title IV loans; HICA guaranteed non-Title IV loans. In the current case, HICA is the appropriate creditor because it paid Nor-west for the Debtor's loan when the Debtor defaulted. In cases involving Program loans guaranteed by HEAF rather than HICA, HEAP pays the holder when a borrower defaults.

II. Conclusions of Law

A. Standard for Summary Judgment

Summary judgment under Federal Rule of Civil Procedure 56, made applicable to bankruptcy adversary proceedings by Federal Rule of Bankruptcy Procedure 7056, is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson V. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Any inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). As both parties agree that there is no genuine issue of material fact, this Court must determine which party is entitled to judgment as a matter of law.

B. The loans made to the Debtor part of a program funded in whole or in part by a non-profit organization

Section 523(a)(8) of the Bankruptcy Code provides as follows:

- (a) a discharge under section 727, . . . of this title does not discharge an individual debtor **from** any debt --
 - (8) for an educational 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 a non-profit institution²

11 U.S.C. § 523(a)(8). The issue before the Court is whether the loans made to the Debtor

² Section 523(a)(8) only allows the discharge of student loans if the loans are more than seven years old or repaying the loans would place an undue hardship on the debtor. 11 U.S.C. § 523(a)(8)(A) and (B). The Debtor does not allege either of these exceptions to discharge.

through the Law Access Program were funded in whole or in part by a non-profit organization.

In Andrews University v. Merchant (In re Merchant), 958 F.2d 738 (6th Cir. 1992), the Sixth Circuit Court of Appeals held that the loans made to the debtor were nondischargeable because they were funded in part by the university, a non-profit institution. **Id.** at 740. The debtor received an educational loan from Michigan National Bank, a partner with the university in the student loan program at issue. According to the court, the university provided two crucial functions with respect to the student loan program: (1) the university processed and submitted the debtor's student loan application to the bank; and (2) upon default the university guaranteed the loan. **Id.** at 739-40. Because the court found that the role of the university, a non-profit institution, was crucial to the student loan program, the Sixth Circuit Court of Appeals held that the student loans were nondischargeable under § 523(a)(8). **Id.** at 740.

The Debtor argues that because the funds were given by Nor-west and insured by **HICA**, both for profit institutions, they were not made, funded, insured, or guaranteed by a governmental unit or non-profit institution, and thus no non-profit organization had any risk in connection with the Debtor's loans. Under the Law Access Program, LSAS, a non-profit organization, provides the Program with one of the crucial services cited by the Sixth Circuit Court of Appeals by (1) receiving and reviewing completed loan applications; (2) processing the loans; and (3) producing, printing, and distributing application materials. **HICA**, a for profit organization, and **HEAF**, a non-profit organization, provide the other crucial service of guaranteeing the loans. The participation of **HICA** and **HEAF** is essential to the feasibility of the Program as Nor-west requires some type of indemnification covering the disability, death, default, and bankruptcy of its borrowers as a condition to making any loans under the Program. Thus, under the terms of the

Program, either HICA or **HEAF** insured every loan by paying and funding any death, default, disability, or bankruptcy claim made under the Program.

The Court recognizes that the only non-profit organization to handle the Debtor's loan was LSAS; however, the Court concludes that the Program is one that falls within the parameters of § 523(a)(8). Section 523(a)(8) excepts **from** discharge “any program funded in whole or in part by a . . . non-profit institution.” 11 U.S.C. 523(a)(8) (emphasis added). This Court finds persuasive the reasoning set forth in In re Pilcher, 149 B.R. 595, 598 (9th BAP 1993), wherein the Bankruptcy Appellate Panel held that a loan made under the Law Access Program by Nor-west and guaranteed by HICA was nondischargeable. In so holding, the Pilcher court stated:

[B]y using the broad language “made under any program funded in whole or in part by . . . a nonprofit institution,” Congress intended to include within section 523(a)(8) all loans made under a program in which a nonprofit institution plays any meaningful part in providing funds.

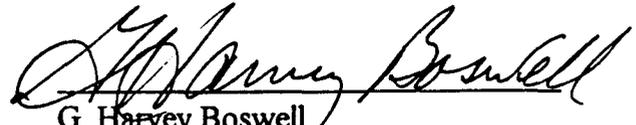
Id. (quoting In re Hammarstron, 95 B.R. 160, 165 (Bankr. N.D. Cal 1989)). As this Court has found that the non-profit parts of the Program provided crucial services to the processing, and ultimately the disbursements, of Debtor's loans, the Court holds that the student loan debts incurred by the Debtor and owing to HICA are nondischargeable.

III Order

It is therefore ORDERED that the Debtor's motion for summary judgment is DENIED and that HICA's motion for summary judgment is GRANTED.

IT IS SO ORDERED.

By the Court,


G. Harvey Boswell
United States Bankruptcy Judge

Date: February 5, 1997

cc:

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Mailed on February 5, 1997
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