

DEC 27 2005

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	WW-05-1004-KSD
)		
7	KIMBERLY RANSOM,)	Bk. No.	97-06636
)		
8	Debtor.)		
)		
9	_____)		
)		
10	SALLIE MAE SERVICING)		
	CORPORATION,)		
11)		
)		
12	Appellant,)		
)		
13	v.)	OPINION	
)		
14	KIMBERLY RANSOM,)		
)		
15	Appellee.)		
)		
16	_____)		

Argued and Submitted on October 21, 2005
at Seattle, Washington

Filed - December 27, 2005

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding.

Before: KLEIN, SMITH, and DUNN,¹ Bankruptcy Judges.

¹ Hon. Randall L. Dunn, United States Bankruptcy Judge for
the District of Oregon, sitting by designation.

1 KLEIN, Bankruptcy Judge:

2
3 This is another attempt to use a chapter 13 plan to effect a
4 "discharge-by-declaration" of student loan debt by ambush.

5 In Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee),
6 193 F.3d 1083 (9th Cir. 1999), the Ninth Circuit, leaving open a
7 due process question, held that interest accrues on student loans
8 postpetition and that confirmed chapter 13 plans bind creditors
9 in a manner that may operate to discharge student loans.

10 Later, the Ninth Circuit resolved the open due process
11 issue, ruling that a "confirmed plan has no preclusive effect on
12 issues that must be brought by adversary proceeding, or were not
13 sufficiently evidenced in a plan to provide adequate notice to
14 the creditor." Enewally v. Wash. Mut. Bank (In re Enewally), 368
15 F.3d 1165, 1173 (9th Cir. 2004), cert. denied, 125 S.Ct. 669
16 (2004).

17 We accurately anticipated Enewally when we held that any
18 discharge of student loans through a chapter 13 plan requires
19 notice of the quality expected of the adversary proceeding that
20 Federal Rule of Bankruptcy Procedure 7001 prescribes for making
21 "undue hardship" dischargeability determinations under 11 U.S.C.
22 § 523(a)(8). Educ. Credit Mgmt. Corp. v. Repp (In re Repp), 307
23 B.R. 144 (9th Cir. BAP 2003).

24 This appeal illustrates how Pardee, Enewally, and Repp co-
25 exist. Under Pardee, student loan interest continued to accrue
26 but the terms of the confirmed chapter 13 plan barring the
27 payment of interest bound the student loan creditor to apply all
28 plan payments to principal. Under the analysis in Enewally and

1 Repp, the accrued, unpaid interest was not discharged upon
2 completion of the chapter 13 plan because there was no
3 determination of "undue hardship" following notice of the quality
4 attendant to an adversary proceeding.

5 We AFFIRM the fixing of the principal balance owed at the
6 end of the plan but REVERSE the bar on later collecting interest.

7 FACTS

8 Appellee, Kimberly Ransom, filed a chapter 13 case in May
9 1997 that included \$36,993.40 in student loan debt owed to
10 appellant Sallie Mae Servicing Corporation ("Sallie Mae").

11 Her chapter 13 plan directed the trustee to pay secured debt
12 arrearages and priority claims, and then to pay the "student loan
13 debt which is non-dischargeable under 11 U.S.C. [§§] 523(a)(8)
14 and 1328(a)(2)" in full before paying other unsecured creditors.

15 The order of confirmation recited that notice of the
16 confirmation hearing was given pursuant to Federal Rule of
17 Bankruptcy Procedure 2002(b), which requires 25-day notice of the
18 hearing but which does not require that a copy of the plan be
19 provided and does not require that such notice be directed to an
20 agent for service of process. Although appellant later asserted
21 that the plan was "provided" to Sallie Mae, it is conceded that
22 the plan was neither served nor directed to a person at Sallie
23 Mae upon whom a summons and complaint could be correctly served.

24 The 60-month plan was confirmed without objection in July
25 1997. The order confirming the plan was not appealed.

26 During the ensuing 60 months, Sallie Mae received plan
27 payments totaling \$11,417.78 on its \$36,993.40 claim and did
28 nothing else to collect the student loan debt.

1 Following completion of the plan, a discharge was entered
2 that provided, in pertinent part: "the debtor is discharged from
3 all debts provided for by the plan or disallowed under 11 U.S.C.
4 [§] 502 except debt: ... of the kind specified in paragraph (5),
5 (8) [student loans] or (9) of 11 U.S.C. [§] 523(a)."

6 After Ransom received the discharge that expressly excluded
7 student loan debt from its scope, Sallie Mae began sending
8 billing statements showing a current balance of \$42,222.39.

9 Ransom disputed the balance, contending that the following
10 plan provision prohibited interest accrual during the life of the
11 plan and forever barred collection of such interest:

12 Other Provisions Not Inconsistent With Title 11.

13 (a). Any allowed unsecured claims which are non-
14 dischargeable under 11 U.S.C. [§] 523(a)(8) and/or 11 U.S.C.
15 [§] 1328(a)(2) shall be paid in full prior to any payments
16 to other allowed unsecured claims discharg[e]able under [§]
17 523 or [§] 1328.

18 The Debtor believes that the princip[al] loan amounts
19 [creditors and acct. nos. omitted] and identified as
20 "Student Loan" debts on Debtor's Schedule F comprise those
21 debts which are nondischargeable under [§§] 523(a)(8) and/or
22 1328(a)(2). No post-petition interest on these claims shall
23 accrue against either the debtor personally or her
24 bankruptcy estate, and no post-petition interest shall be
25 paid on the allowed claims of these creditors through the
26 plan or otherwise.

27 Unable to resolve the matter informally, she had the case
28 reopened and filed a motion to compel Sallie Mae to revise the
outstanding balance by excluding all post-petition interest
accrued during the 60-month life of the plan.

Ransom's specific request for relief was that Sallie Mae be
ordered to adjust her balance to \$25,500.24 to reflect the
"stopping of interest during the five years of Ms. Ransom's plan
and the \$11,417.78 in principal payments."

Ransom's theory was that the plan provision permanently

1 barring accrual and collection of interest on a nondischargeable
2 student loan debt is not the same as a discharge. Relying only
3 on incantation of "Pardee," "binding," and "res judicata," she
4 articulated no distinction between permanent bar and discharge.

5 Sallie Mae countered that giving permanent effect to plan
6 language providing for no accrual of post-petition interest would
7 constitute a discharge that could not, as held in Repp, be done
8 without a determination of "undue hardship" following notice of a
9 nature and quality attendant to the adversary proceeding that
10 Rule 7001 prescribes for making such determinations.

11 Granting the motion, the court permanently barred collection
12 of interest attributable to the 60 months of the plan:

13 (1) Sallie Mae shall comply with the terms of Debtor's
14 confirmed Chapter 13 Plan; (2) Sallie Mae shall reverse
15 all interest accrued during the 60 month period of the
16 plan; (3) Sallie Mae shall apply all payments made
17 under the plan to debtor's principal balance; (4)
18 Sallie Mae shall correct its statements and records
19 regarding Debtor Kimberly Ransom's outstanding student
20 loan balance; and (5) Such statements and records of
21 Sallie Mae shall reflect a principal balance as of the
22 date of discharge of \$25,500.24.²

23 Without mentioning Enewally, the court merely rejected Repp as
24 "skirting" Pardee.

25 JURISDICTION

26 Subject-matter jurisdiction was based on 28 U.S.C. §§ 1334
27 and 157(b)(2). We have jurisdiction under 28 U.S.C. § 158(a)(1).

28 ISSUES

1. Whether a permanent ban on accrual and collection of

² The record does not support the \$25,500.24 balance.
Using the proof of claim, the balance would be \$25,575.62 (= \$36,993.40 - \$11,417.78); the schedules suggest \$24,326.01 (= \$35,743.79 - \$11,417.78). Any issue, however, is waived by silence.

1 postpetition interest on student loan debt is equivalent to
2 discharge of the interest obligation.

3 2. Whether accrual and collection of postpetition interest
4 on student loan debt can be forever barred by a chapter 13 plan
5 provision without an "undue hardship" determination under 11
6 U.S.C. § 523(a)(8) that is made following notice consonant with
7 the adversary proceeding that Rule 7001 requires.

8 STANDARD OF REVIEW

9 Whether an order or plan provision operates as a discharge is
10 a question of law to be reviewed de novo, and whether adequate due
11 process notice was given in any particular instance is a mixed
12 question of law and fact that we likewise review de novo. Repp,
13 307 B.R. at 148; GMAC Mortgage Corp. v. Salisbury (In re Loloee),
14 241 B.R. 655, 659 (9th Cir. BAP 1999).

15 DISCUSSION

16 We begin by focusing on the crucial issue of whether
17 enforcement of the no-accrual-of-interest provision in the chapter
18 13 plan operates as a discharge of interest attributable to the
19 60-month life of the plan or not. Finding a de facto discharge,
20 we turn to the question whether the plan was confirmed in
21 circumstances that pass muster under the due process analysis
22 prescribed by the Ninth Circuit in Enewally whenever the rules of
23 procedure require an adversary proceeding. We conclude that the
24 plan confirmation does not pass muster and that Sallie Mae cannot
25 be permanently barred from collecting interest.

26 I

27 The key landmarks on the legal landscape regarding discharge
28 of student loans are well-known and not in controversy.

1 Student loan obligations cannot be discharged in bankruptcy
2 without a showing that repayment would cause "undue hardship" to
3 the debtor and the debtor's dependents, as prescribed by 11 U.S.C.
4 § 523(a)(8). Rifino v. United States (In re Rifino), 245 F.3d
5 1083, 1087 (9th Cir. 2001).

6 Post-petition interest on nondischargeable student loans is
7 also nondischargeable. Bruning v. United States, 376 U.S. 358,
8 363 (1964); County of Sacramento v. Foross (In re Foross), 242
9 B.R. 692, 693 (9th Cir. BAP 1999); Pardee, 193 F.3d at 1085 n.4
10 (9th Cir. 1999), aff'g 218 B.R. 916, 919-21 (9th Cir. BAP 1998).

11 As a feature of what the Supreme Court has described as
12 "greater procedural protection," Rule 7001(6) requires that an
13 adversary proceeding be used to determine a student loan
14 discharged as an "undue hardship." Fed. R. Bankr. P. 7001(6);
15 Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 451 (2004)
16 ("Because student loan debts are not automatically dischargeable,
17 however, the Federal Rules of Bankruptcy Procedure provide
18 creditors greater procedural protection.").

19 A

20 Ransom first contends that the plan provision purporting to
21 bar the accrual and collection of post-petition interest on her
22 student loan debt is not a discharge, but rather is merely a
23 permanently enforceable plan provision barring collection. This
24 is a distinction without a difference.

25 1

26 The essential features of a bankruptcy discharge are two:
27 first, a determination that the debtor is no longer personally
28 liable for the obligation; and, second, an injunction to enforce

1 that result. 11 U.S.C. § 524(a).

2 The essential features of Ransom's "permanently binding plan
3 provision," as presented in this appeal, are two: first, a
4 determination that Ransom is no longer personally liable for the
5 interest obligation under the student loan debt during the 60-
6 month life of the chapter 13 plan; and, second, a court order
7 compelling the student loan creditor to eliminate from the unpaid
8 balance the interest charged during those 60 months.

9 As the essential features of a bankruptcy discharge and the
10 consequence of the "permanently binding plan provision" are the
11 same, it follows that the latter constitutes a de facto discharge.

12 2

13 Ransom's plan provided that no post-petition interest on the
14 student loan would accrue against the debtor and the estate and
15 said nothing about "undue hardship." Ransom would distinguish
16 this from Repp where the plan expressly provided that confirmation
17 would constitute a determination that excepting student loan debt
18 from discharge would impose an "undue hardship" on the debtor and
19 the debtor's dependents. Repp, 307 B.R. at 147. Here, Ransom
20 argues that her plan is different because it expressly concedes
21 that Ransom's student loan debt is nondischargeable and makes no
22 "undue hardship" finding. Instead, she contends the plan merely
23 modified the terms of her obligation to Sallie Mae by preventing
24 the accrual of post-petition interest. We are not persuaded.

25 In the first place, interest on a debt is part of the debt.
26 Cohen v. De La Cruz, 523 U.S. 213, 223 (1998); Bruning, 376 U.S.
27 at 363. In Pardee, we squarely held that interest on a
28 nondischargeable student loan debt is part of the nondischargeable

1 debt. Pardee v. Great Lakes Higher Educ. Corp. v. Pardee (In re
2 Pardee), 218 B.R. 916, 921-22 (9th Cir. BAP 1998), aff'd, 193 F.3d
3 1083 (9th Cir. 1999).

4 Second, the plan provision that purports to stop accrual of
5 postpetition interest against the estate is a diversion that has
6 no legal consequence because it is merely declarative of the
7 statute. As a matter of law, claims for unmatured interest on
8 unsecured claims cannot be "allowed"; hence, the estate cannot be
9 liable for postpetition interest on a nondischargeable unsecured
10 debt. 11 U.S.C. § 502(b)(2). However, as we explained in Pardee,
11 the debtor remains liable for postpetition interest on
12 nondischargeable student loans notwithstanding the statutory
13 disallowance under § 502(b). Id. Ransom has at all times
14 conceded that her student loans are nondischargeable.

15 This attempt to distinguish a permanently enforceable plan
16 provision from a discharge is untenable.³ If the no-accrual-of-
17 interest plan provision is forever enforceable, then it operates
18 to discharge student loan debt. As a de facto discharge without
19 an adversary proceeding, it is subject to the Enewally analysis.

20 B

21 Moreover, the substantive plan provisions regarding accrual
22 of interest (apart from the question of notice with which we deal
23 in the next section) are so ambiguous that it is not apparent that
24 the plan actually accomplishes what Ransom contends.

25 The pertinent portion of the plan is in a section titled,
26 "Other Provisions Not Inconsistent With Title 11," which begins

27
28 ³ The Fourth Circuit rejected an identical argument. Banks
v. Sallie Mae Serv'g Corp. (In re Banks), 299 F.3d 296, 300 (4th
Cir. 2002).

1 with an express concession that the student loan debt is
2 nondischargeable under § 523(a) (8).

3 The key language in that section follows a sentence that
4 recites that Ransom's student loans are nondischargeable: "No
5 post-petition interest on these claims shall accrue against either
6 the debtor personally or her bankruptcy estate, and no post-
7 petition interest shall be paid on the allowed claims of these
8 creditors through the plan or otherwise."

9 As noted above, insofar as the accrual of postpetition
10 interest against the bankruptcy estate and payment of such
11 interest by the trustee through the plan from property of the
12 estate is involved, the sentence is merely declarative of existing
13 law for the reasons we explained in Pardee. To that extent, the
14 language is innocuous and accomplishes nothing.⁴

15 Specifically, the plan language that "no post-petition
16 interest shall be paid on the allowed claims ... through the plan
17 or otherwise." The precise reference is to postpetition interest
18 on allowed claims, which, per § 502(b) (2), is never payable with
19 respect to unmatured contractual interest. 11 U.S.C.
20 § 502(b) (2);⁵ Pardee, 218 B.R. at 921-22. Under strict linguistic
21 construction, this language does not refer to postpetition
22

23 ⁴ As against the debtor, no interest accruing postpetition
24 could be collected without relief from the automatic stay. The
25 automatic stay with respect to a chapter 13 debtor remains in
26 effect until the discharge is granted following completion of the
27 plan. 11 U.S.C. § 362(c) (2) (C). In other words, there is
28 nothing unusual about not collecting postpetition interest from a
debtor during the life of a chapter 13.

⁵ To be precise, the chapter 7 distribution scheme provides
for payment of postpetition interest at the legal rate on all
allowed claims after all such claims have been paid in full. 11
U.S.C. § 726(a) (5). Such interest, however, is statutory and
does not qualify as "unmatured" for purposes of § 502(b) (2).

1 interest on nondischargeable debt and, thus, says nothing about
2 the debtor's liability on the nondischargeable debt. The reading
3 that is consistent with the Bankruptcy Code is contrary to that
4 which Ransom now asserts.

5 Finally, the chapter 13 plan is only effective during its
6 life. During that period, everyone must comply with it.
7 Thereafter, the debts that are discharged are discharged. The
8 debts that are not discharged may be collected. We are aware of
9 no chapter 13 appellate decision holding that a chapter 13 plan
10 can forever eliminate interest on an nondischargeable debt.

11 In short, the language in the chapter 13 plan regarding
12 postpetition interest can be understood as being consistent with
13 the law under the Bankruptcy Code that the estate is not liable to
14 pay unmatured interest on nondischargeable debt and that the
15 automatic stay protects the debtor from collection of such
16 interest until the automatic stay expires, which occurs after the
17 plan is completed and the discharge issued.

18 II

19 Having concluded that the plan as enforced by the bankruptcy
20 court would effectuate a de facto discharge of student loan debt
21 for which Congress has specified that a finding of "undue
22 hardship" is prerequisite and for which Rule 7001(6) prescribes an
23 adversary proceeding, this appeal boils down to whether the plan
24 provision that offends the statute and rules is nevertheless
25 enforceable on the theory that it is "binding" by virtue of 11
26
27
28

1 U.S.C. § 1327(a).⁶

2 A

3 The argument that a chapter 13 plan provision not authorized
4 by the Bankruptcy Code without an adversary proceeding prescribed
5 by the Federal Rules of Bankruptcy Procedure is nevertheless
6 "binding" under § 1327(a) is precisely the argument that the Ninth
7 Circuit confronted in Enewally.

8 In Enewally, the Ninth Circuit explained and drew together
9 its pertinent precedents. First, in Trulis v. Barton, 107 F.3d
10 685, 691 (9th Cir. 1995), it established that § 1327(a) is linked
11 with the principles of res judicata such that the "binding"
12 consequence of a confirmed plan equates with "res judicata," or
13 claim preclusive effect. Enewally, 368 F.3d at 1172.

14 Second, the ruling in Pardee that a creditor who does not
15 timely object to a plan or appeal a confirmation order cannot
16 later complain about a plan provision that is inconsistent with
17 the Bankruptcy Code is merely an application of the basic res
18 judicata rule of claim preclusion that precludes the parties or
19 their privies from relitigating issues that were or could have
20 been raised in that action. Enewally, 368 F.3d at 1172, citing
21 and quoting Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394,
22 398 (1981), and Pardee, 193 F.3d at 1086.

23
24 ⁶ That section provides:

25 (a) The provisions of a confirmed plan bind the debtor and
26 each creditor, whether or not the claim of such creditor is
27 provided for by the plan, and whether or not such creditor
has objected to, has accepted, or has rejected the plan.

28 11 U.S.C. § 1327(a).

1 Applying that analysis to unauthorized chapter 13 plan
2 provisions, it explained that: "Although confirmed plans are res
3 judicata [i.e. claim preclusive] to issues therein, the confirmed
4 plan has no preclusive effect on issues that must be brought by an
5 adversary proceeding, or were not sufficiently evidenced in a plan
6 to provide adequate notice to a creditor." Enewally, 368 F.3d at
7 1173. In that connection, the Ninth Circuit Enewally panel cited
8 with approval a Fourth Circuit decision to the same effect. Cen-
9 Pen Corp. v. Hanson, 58 F.3d 89, 93 (4th Cir. 1995) ("[I]f an
10 issue must be raised through an adversary proceeding it is not
11 part of the confirmation process and, unless it is actually
12 litigated, confirmation will not have a preclusive effect."),
13 cited with approval, Enewally, 368 F.3d at 1173.

14 It cautioned that one needs to take into account the Ninth
15 Circuit's bankruptcy-specific rule of decision for applying claim
16 and issue preclusion, which is premised on bankruptcy presenting a
17 "unique" context: "the principle of res judicata should be
18 invoked only after careful inquiry because it blocks unexplored
19 paths that may lead to truth." Enewally, 368 F.3d at 1172-73,
20 quoting Latman v. Burdette, 366 F.3d 774, 784 (9th Cir. 2004).

21 Reaching the due process question that had been left open in
22 Pardee, the Ninth Circuit in Enewally reasoned that if chapter 13
23 plan provisions regarding matters that require an adversary
24 proceeding do not "adequately identify" the modification of a
25 creditor's claim, then there would be an "ambush" that would raise
26 due process concerns. Enewally, 368 F.3d at 1173, citing with
27 approval, In re Henline, 242 B.R. 459, 465-66 (Bankr. D. Minn.

28

1 1999); accord, Repp, 307 B.R. at 146-54.⁷ Such ambushes involving
2 the bankruptcy discharge are disfavored. New York v. N.Y., N.H. &
3 Hartford R.R., 344 U.S. 293, 297 (1953) ("But even creditors who
4 have knowledge of a reorganization have a right to assume that the
5 statutory 'reasonable notice' will be given them before their
6 claims are forever barred.").

7 Accordingly, the Ninth Circuit concluded in Enewally that the
8 offending chapter 13 plan provision was not "binding" for purposes
9 of § 1327(a) because the provision, under the procedural
10 circumstances of that case, would not be entitled to preclusive
11 effect in subsequent litigation. Enewally, 368 F.3d at 1173.⁸

13 ⁷ In Repp, we set forth at length the procedural
14 differences between adversary proceeding procedure and chapter 13
15 plan confirmation procedure that affect the due process analysis
and need not repeat them here. Repp, 307 B.R. at 149-56.

16 ⁸ Another consequence of Enewally was that it tended to
17 narrow an apparent split in the circuits regarding the
18 "discharge-by-declaration" problem. The Second, Fourth, Sixth,
19 and Seventh Circuits hold that chapter 13 plans cannot be used to
20 discharge student loan debt by declaration. Whelton v. Educ.
21 Credit Mgmt. Corp., ___ F.3d ___, 2005 WL 3436663 (2d Cir. 2005);
22 Banks v. Sallie Mae Serv'g Corp. (In re Banks), 299 F.3d 296 (4th
23 Cir. 2002); Ruehle v. Educ. Credit Mgmt. Corp. (In re Ruehle),
412 F.3d 679 (6th Cir. 2005); In re Hanson, 397 F.3d 482 (7th
24 Cir. 2005). In contrast, before these circuits addressed the
25 issue, the Ninth and Tenth Circuits had permitted such discharges
26 to be effective. Pardee, 193 F.3d at 1087; Andersen v. UNIPAC-
27 NEBHELP (In re Andersen), 179 F.3d 1253 (10th Cir. 1999).

28 The circuit split, however, may be more apparent than real.
The panel in Pardee relied on Andersen, which had not yet been
decided when Pardee was argued (Pardee argued 5/13/99; Andersen
decided 6/7/99; Pardee decided 7/7/99). Another Tenth Circuit
panel has recently cabined Andersen to the limited situation
where there is an express finding of "undue hardship" in the
chapter 13 plan and has expressed the view that "Andersen was
wrongly decided and should be reconsidered." Poland v. Educ.
Credit Mgmt. Corp. (In re Poland), 382 F.3d 1185, 1189 n.2 (10th
Cir. 2004). Likewise, Enewally dealt with the Ninth Circuit's

(continued...)

1
2 We are persuaded that Enewally controls the result and that
3 the bankruptcy court was not free to ignore binding Ninth Circuit
4 precedent.

5 The facts of this appeal do not pass Enewally muster on two
6 counts. First, it is conceded that the plan was not served with
7 notice of a nature and quality associated with the adversary
8 proceeding that Rule 7001(6) requires for determining the
9 dischargeability of debts.

10 Second, the terms of the supposedly "binding" plan provision
11 are too ambiguous to place anyone on notice that student loan debt
12 is being discharged. To the contrary, the plan provisions are
13 misleading and have the structure of multi-step ambush.

14 The initial part of the ambush lies in the payment
15 instruction in paragraph 2 of the plan that requires "payment in
16 full on Debtor's student loan debt which is non-dischargeable
17 under 11 U.S.C. [§§] 523(a)(8) and 1328(a)(2)."

18 Next, there are two statements in paragraph 4 of the plan
19 that suggest that student loan debt is not being discharged. The
20 first statement mirrors paragraph 2: "Any allowed unsecured
21 claims which are non-dischargeable under 11 U.S.C. [§] 523(a)(8)
22 and/or 11 U.S.C. [§] 1328(a)(2) shall be paid in full prior to any
23 payments to other allowed unsecured claims discharg[e]able under
24 [§] 523 or [§] 1328." The second is: "The Debtor believes that
25 the princip[al] loan amounts [creditors and acct. nos. omitted]

26
27 _____
28 ⁸(...continued)

unresolved due process problem in a manner that commonly will
lead to results consistent with the rest of the circuits. Hence,
any split may be in the process of healing itself.

1 and identified as "Student Loan" debts on Debtor's Schedule F
2 comprise those debts which are nondischargeable under [§§]
3 523(a) (8) and/or 1328(a) (2)."

4 Then, subparagraph 4(b) provides that if, after 54 months,
5 Ransom's "best efforts have not resulted in full repayment of
6 those allowed claims otherwise non-discharg[e]able under [§§]
7 523(a) (8) and/or 1328(a) (2), then the Debtor shall apply for a
8 discharge pursuant to [§] 523(a) (8) (B) with regards to such
9 debts."⁹ (Emphasis supplied.)

10 Taken together, the plan says three times that Ransom's
11 student loan debt is nondischargeable and then promises that she
12 will seek relief under § 523(a) (8) if she later wants it
13 discharged. Since the way to "apply" for a discharge of student
14 loan debt as an "undue hardship" under § 523(a) (8) is by way of
15 adversary proceeding, this amounts to notice that the plan is not
16 intended to operate to discharge student loan debt.

17 For these reasons, the language of the provision regarding
18 non-accrual of interest and no payment of interest can be read to
19 be merely declarative of law, rather than as a permanent ban on
20 collecting the interest attributable to the debt. The estate is
21 not liable for unmatured interest on unsecured nondischargeable
22 debt. 11 U.S.C. § 502(b) (2). The automatic stay protects the
23 debtor until the discharge is issued after the completion of the
24 plan. 11 U.S.C. § 362(c) (2) (C).

26 ⁹ There has been no subsection § 523(a) (8) (B) since the
27 elimination of subsection § 523(a) (8) (A) by the Act of Nov. 29,
28 1990, Pub. L. 101-647, § 3621, 104 Stat. 4964-65. The inaccurate
citation in Ransom's plan, however, has no substantive
consequence as the current text of § 523(a) (8) preserves the
"undue hardship" provision of former § 523(a) (8) (B).

1 The plan did not say that Sallie Mae would never be able to
2 collect the interest that accrued against the debtor during the
3 life of the plan. In context, the language of the plan created
4 the impression that the discharge status of interest was not being
5 altered and that Sallie Mae could safely rely on settled law that
6 interest on a debt is part of the debt. Cohen, 523 U.S. at 223;
7 Bruning, 376 U.S. at 363; Pardee, 218 B.R. at 921-22.

8 It follows that there was not adequate notice to Sallie Mae
9 that the discharge status of an interest component of its student
10 loan debt would be affected by the plan provision in question,
11 which Enewally requires in order to afford preclusive effect to
12 such a provision. Enewally, 368 F.3d at 1173.

13 Finally, our conclusion is confirmed by considering another
14 procedural alternative that is more than hypothetical. It would
15 still be possible for Sallie Mae to file an adversary proceeding
16 under § 523(a)(8) to establish the discharge status of the
17 interest component of its student loan debt that is attributable
18 to the 60 months of the chapter 13 plan. While the debtor is
19 usually the plaintiff in such matters, the creditor would have
20 standing to seek the same determination, and there is no specific
21 limitations period for such an action. If such an action were to
22 be filed, Enewally would lead to the conclusion that claim
23 preclusion would not apply to bar Sallie Mae from taking such
24 action. Enewally, 368 F.3d at 1173.

25 Nor do we perceive injustice here. To the contrary, Ransom
26 probably should never have been permitted to have nondischargeable
27 unsecured debt paid before dischargeable unsecured debt. A
28 provision favoring nondischargeable debt over dischargeable debt

1 normally, without any substantial showing to the contrary, is an
2 unfair discrimination that violates 11 U.S.C. § 1322(b)(1) and
3 that flunks the confirmation standard of 11 U.S.C. § 1325(a)(1).
4 Labib-Kiyarash v. McDonald (In re Labib-Kiyarash), 271 B.R. 189,
5 192-96 (9th Cir. BAP 2001); McDonald v. Sperna (In re Sperna), 173
6 B.R. 654, 658-60 (9th Cir. BAP 1994); Amfac Distrib. Corp. v.
7 Wolff (In re Wolff), 22 B.R. 510, 512 (9th Cir. BAP 1982). Since,
8 however, the order confirming the plan was not appealed on a
9 theory of unfair discrimination, the confirmation remains
10 effective. Pardee, 193 F.3d at 1087.

11 Nevertheless, Ransom appears to have reaped an undeserved
12 benefit at the expense of her other unsecured creditors by being
13 able to have more of the principal of her student loan debt paid
14 as a result of an apparent unfair discrimination.

15 * * *

16 As noted at the outset, the Ninth Circuit decisions in Pardee
17 and Enewally, as well as our decision in Repp, co-exist. Under
18 Pardee, interest continued to accrue as part of the student loan
19 debt but the terms of the confirmed chapter 13 plan bound the
20 student loan creditor to apply all plan payments to principal.
21 Under the analysis in Enewally, the accrued, unpaid interest was
22 not discharged upon completion of the chapter 13 plan because
23 there was no determination of "undue hardship" following notice of
24 the quality attendant to an adversary proceeding. The bankruptcy
25 court was not free to ignore Enewally.

26 Accordingly, we AFFIRM as to the \$25,500.24 principal balance
27 owed at the end of the plan and REVERSE as to the liability of the
28 debtor to pay interest accrued during the life of the plan.