UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:	)	
	)	Bankr. No. 95-40211
LORI ANN HAGEMAN	)	Chapter 13
	)	
Social Security No. 504-78-1888	)	ORDER DENYING
	)	CONFIRMATION OF PLAN
Debtor.	)	*FILED APRIL 21, 1995*

In compliance with and recognition of the Memorandum of Decision Re: Confirmation of Plan Dated Filed April 21, 1995,

IT IS HEREBY ORDERED that confirmation of Debtor's plan filed April 21, 1995 is DENIED. Within twenty days of entry of this Order, Debtor shall promptly file, serve, and notice for hearing a modified plan. (The confirmation hearing itself may be outside the twenty-day period.)

So ordered this 25th day of July, 1995.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA A. JOHNSON, ACTING CLERK

By: Deputy Clerk

(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to all parties in interest set forth on the attached service list.

U.S. Bankruptcy Clerk
District of South Dakota

By:
Date: 07-25-95

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

JUL 25 1995

Clerk
U.S. Bankruptcy Court, District of S.D.

Case: 95-40211 Form id: 122 Ntc Date: 07/25/95 Off: 4 Page : 1
Total notices mailed: 6

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Trustee Yarnall, Rick A. PO Box J, Sioux Falls, SD 57101
Creditor Education Assistance Corporation, 115 First Avenue SW, Aberdeen, SD 57401
Aty Sveen, Jeffrey T. PO Box 490, Aberdeen, SD 57401-0490
Intereste U.S. Trustee, Shrivers Square, Suite 502, 230 S. Phillips Avenue, Sioux Falls, SD 57102

UNITED STATES BANKRUPTCY COURT
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Southern Division

In re:	)	
	)	Bankr. No. 95-40211
LORI ANN HAGEMAN	)	Chapter 13
	)	
Social Security No. 504-78-1888	)	MEMORANDUM OF DECISION RE:
	)	CONFIRMATION OF PLAN
Debtor.	)	FILED APRIL 21, 1995

The matter before the Court is the confirmation of Debtor's Chapter 13 plan dated November 17, 1994 and filed April 21, 1995. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below more fully, the Court concludes that Debtor's plan filed April 21, 1995 cannot be confirmed.

I.

Debtor Lori A. Hageman filed a Chapter 7 petition on March 1, 1994. Scheduled unsecured creditors included the Education Assistance Corporation (EAC) and the Pennsylvania Higher Education Assistance Agency (PHEAA). Debtor received a discharge on May 25, 1994.[1]

Debtor filed a Chapter 13 petition and plan on April 21, 1995. The plan provided for one secured creditor and three unsecured creditors. Each unsecured creditor was in a separate class. Debtor proposed to pay unsecured creditors Miner County Bank and St. Joseph's Cathedral in full without interest over the first nine months of a five-year plan. Debtor proposed to pay unsecured creditors EAC and PHEAA $250.00 a month to be distributed between

[1] The Hon. Peder K. Ecker, presiding.

29.

the two *pro rata*. Debtor proposed that the payments to these student loan creditors would begin after the other unsecured creditors were paid in full, approximately nine months into the plan. Debtor further proposed that the payments would apply to the principal of the student loans and that under 11 U.S.C. §§ 502(b)(2) and 506(b) no interest would accrue on these student loan claims during the pendency of the case.

EAC filed an objection on May 25, 1995. It stated the student loans were non dischargeable and objected to the "no interest" provision in the plan. EAC also wanted clarification that Debtor did not intend that the student loan debts would be discharged at the end of the plan term. Finally, EAC accepted the $250.00 monthly payments but wanted them applied to interest first and then principal.

The Chapter 13 Trustee filed several objections on May 26, 1995. A confirmation hearing was held June 27, 1995.[2] Appearances included Jonathan K. Van Patten for Debtor, Trustee Rick A. Yarnall, and Jeffrey T. Sveen for EAC. The Trustee stated his objections had been resolved. Attorney Van Patten clarified that Debtor did not anticipate a discharge of her student loans at the end of the plan term. After receipt of briefs, the Court took under advisement the issue of whether a Chapter 13 plan may suspend the payment of interest on a nondischargeable claim.

II.

Other courts have addressed the issue of whether a plan may

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[2] The Hon. Irvin N. Hoyt, presiding.

suspend the accrual of post-petition interest on a non dischargeable debt. In *Leeper v. Pennsylvania Higher Education Assistance Agency*, 49 F.3d 98 (3rd Cir.), the court stated:

> Under the Bankruptcy Code, creditors are not entitled to include unmatured (or "post-petition") interest as part of their claims in the bankruptcy proceedings. *See* 11 U.S.C. § 502(b)(2)(1988); *see also Sexton v. Dreyfus*, 219 U.S. 339, 344, 31 S.Ct. 256, 257, 55 L.Ed. 244 (1911)(noting that this rule is derived from a fundamental principle of the English bankruptcy system). This long-standing rule is designed to assure that no creditor gains an advantage or suffers a loss due to the delays inherent in liquidation and distribution of the estate. *American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry.*, 233 U.S. 261, 266, 34 S.Ct. 502,504, 58 L.Ed. 949 (1914); *see also In re Hanna*, 872 F.2d 829, 830-31 (8th Cir. 1989). The prohibition against *claims* for post-petition interest generally applies even in instances where the claims are based upon underlying debts that are not dischargeable. *See, e.g., City of New York v. Saper*, 336 U.S. 328, 337-38, 69 S.Ct. 554, 559-60, 93 L.Ed. 710 (1949); *see also In re JAS Enterprises, Inc.*, 143 B.R. 718, 719 (Bankr. D. Neb. 1992).
>
> In *Bruning v. United States*, 376, U.S. 358, 84 S.Ct. 906, 11 L.Ed.2d 772 (1964), the precedent of most significance for the issue before us, the Supreme Court distinguished between denial of post-petition interest against the bankruptcy *estate* on a non dischargeable debt and the accrual of interest on a non dischargeable debt during the pendency of the bankruptcy to be collected *from the debtor* after the bankruptcy proceeding is completed. *Id.* at 362-63, 84 S.Ct. at 908-09.

Leeper, 49 F.2d at 100-01. In *Bruning*, the Court concluded that when a debt was non dischargeable, the post-petition interest on that debt would also be nondischargeable. *Id.* at 101 (citing *Bruning*, 376 U.S. at 362-63, 84 S.Ct. at 908-09.

The court in *Leeper* applied *Bruning* to a non dischargeable student loan claim in a Chapter 13 case. The debtor's plan did not propose to pay the student loans in full, excluding post-petition interest, over the term of the plan. Like every court before it

with one exception, the court in *Leeper* concluded that a debtor remains personally liable for post-petition interest on non dischargeable student loan debts after the bankruptcy proceedings are completed. *Leeper*, 49 F.2d at 103. Similar conclusions were reached in *In re Shelbayah*, 165 B.R. 332, 337 (Bankr. N.D. Ga. 1994); *Branch v. UNIPAC/NEBHELP (In re Branch)*, 175 B.R. 732 (Bankr. D.Neb. 1994), and *Ridder v. Great Lakes Higher Education Corp. (In re Ridder)*, 171 B.R. 345 (Bankr. W.D. Wisc. 1994).

There is one reported decision to the contrary. In *In re Wasson*, 152 B.R. 639 (Bankr. D.N.M. 1993), the court overruled a creditor's objection to confirmation of a plan that failed to provide for post-petition interest on a nondischargeable student loan claim. *Id.* at 642. The court in *Wasson* noted that the student loan, excluding post-petition interest, was paid in full during the plan term. It found that the more specific provision of § 502(b)(2), which disallows post-petition interest on an unsecured claim, took precedence over the more general non dischargeability provision of § 523(a)(8). *Id.* at 641. The *Wasson* court relied on one of its earlier decisions that concluded *Bruning* does not apply in cases where the underlying non dischargeable debt is paid in full from the estate. *Id.* at 641-42. As a matter of policy, the *Wasson* court also concluded that post-petition interest should not accrue until all creditors are paid in full. *Id.* at 642. The courts in *Shelbayah*, *Branch*, and *Ridder* distinguished *Wasson*.

Although *Bruning* is a pre-Code case, its reasoning has been applied to cases under Code. *Hanna*, 872 F.2d at 830-31. Further,

the reasoning in *Bruning* has been applied to several types of nondischargeable debts in addition to nondischargeable student loans. *See, e.g., In re Fullmer*, 962 F.2d 1463, 1468 (10th Cir. 1992)(post-petition interest on non dischargeable tax penalty); *Burns v. United States (In re Burns)*, 887 F.2d 1541, 1543 (11 Cir. 1989)(same); *In re Brace*, 131 B.R. 612, 613-14 (Bankr. W.D. Mich. 1991)(post-petition interest on non dischargeable claim that arose from fraudulent misrepresentation).

III.

Relevancy of objection. Contrary to Debtor's assertions, EAC's objection is not misplaced. Whether Debtor may suspend payment of interest on a nondischargeable claim is an appropriate confirmation issue because a Chapter 13 plan must be proposed in good faith and must meet the best interest of creditors test. 11 U.S.C. §§ 1325(a)(3) and 1325(a)(4). The interest question is relevant to both of these confirmation requirements. It does Debtor little good to win a battle at confirmation only to lose the war later in a dischargeability action.

Accrual of interest. Upon consideration of the Code provisions and case law discussed above, this Court joins the majority and concludes that post-petition interest may accrue on a non dischargeable debt in a Chapter 13 case. While under § 502(b) the student loan creditors may not include post-petition interest in their Chapter 13 claim, the post-petition interest nonetheless is nondischargeable under § 523(a)(8). The precedence in this Circuit provides ample guidance and support and needs no further

discussion here. *See Hanna*, 872 F.2d at 830-31, and *Branch*, 175 B.R. at 733. Therefore, EAC is precluded from collecting interest while Debtor's case is pending. However, the interest continues to accrue on EAC's non dischargeable debt and the interest itself is nondischargeable. Debtor's plan should not confuse this principle.

Discrimination among unsecured claims. Debtor has not provided any justification for paying two other unsecured creditors in full before she begins to repay her student loan creditors. Before a plan will be confirmed that includes such discriminatory treatment, Debtor will need to address for the Court the four-part test discussed in *Mickelson v. Leser (In re Leser)*, 939 F.2d 669, 672 (8th Cir. 1991). *See also Groves v. LaBarge (In re Groves)*, 39 F.3d 212 (8th Cir. 1994).

An order will be entered denying confirmation of Debtor's plan dated November 17, 1994 and filed April 21, 1995.

So ordered this 25th day of July, 1995.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA A. JOHNSON, ACTING CLERK

By: Deputy Clerk

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