

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

In re:

ELIZABETH AMBUHL,

Debtor.

**Chapter 13
Case No. 99-10698**

#64-1

Appearances: *Rebecca Rice, Esq.
Cohen & Rice
Rutland, VT*

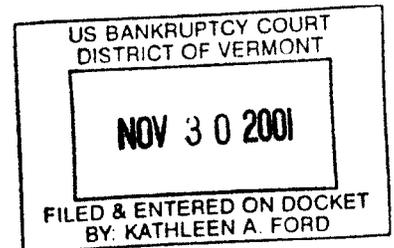
*Gregory A. Weimer, Esq.
Little, Cicchetti & Conard
Burlington, VT*

**MEMORANDUM OF DECISION
OVERRULING CREDITOR'S OBJECTION TO PROPOSED PLAN MODIFICATION
AND DENYING DEBTOR'S MOTION TO MODIFY CHAPTER 13 PLAN**

The matter before the Court is the Debtor's Motion to Modify Chapter 13 Plan dated October 5, 2001 [Dkt. #48-1; 49-1] and the Objection to Motion to Amend Chapter 13 Plan dated October 23, 2001 [Dkt. #55-1] filed by Vermont Student Assistance Corporation ("VSAC"). This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. Based upon the matters filed of record and the argument of counsel, VSAC's objection to plan modification is overruled and the debtor's motion to modify her plan as proposed is denied, for the reasons set forth below.

1. Background

This bankruptcy case was commenced by the filing of debtor's voluntary petition for chapter 13 relief under title 11 U.S.C. ("the Bankruptcy Code") on May 13, 1999. In conjunction with her voluntary petition, the debtor filed a proposed chapter 13 plan which provided in pertinent part:



The confirmation of this plan will constitute a finding that excepting the debtor's education loans from discharge will impose an undue hardship upon the debtors [sic].

This provision was intended to provide the debtor with a discharge of the student loans she owed to VSAC, pursuant to 11 U.S.C. §523(a)(8). No objections to this plan provision were raised by VSAC at the time of confirmation and the proposed chapter 13 plan was ultimately approved by this Court (Littlefield, J.) following a confirmation hearing held on September 29, 1999.

The debtor was unable to maintain her plan payments and on October 5, 2001 she filed a motion to modify her chapter 13 plan. The proposed First Modified Chapter 13 Plan provides for a modified payment schedule and maintains the above cited provision discharging her VSAC student loans. VSAC filed an Objection to Motion to Amend and also filed a Motion to Dismiss Chapter 13 Case Combined with Brief in Support Thereof. VSAC contends that the proposed modified plan is contrary to bankruptcy law, and violates bankruptcy procedural requirements, in that it purports to discharge a student loan debt without compliance with §§523(a)(8), 1325 and 1328 and without satisfying her burden of demonstrating the requisite undue hardship. VSAC also contends that neither the original nor the proposed modified plan were filed in good faith. A hearing was held on October 30, 2001. The Court entered an oral Order overruling the creditor's objection, denying the debtor's motion to modify, and (at the debtor's request, with the creditor's consent) adjourning the motion to dismiss.¹ This Memorandum of Decision is entered to make clear the basis of the Court's ruling.

2. Discussion

VSAC raises various objections to the proposed modified plan that challenge the legality of the student loan discharge provision in the confirmed plan. While the objections may have merit,

¹ The hearing on VSAC's motion to dismiss is set for December 20, 2001 at 3:00 PM; on November 14, 2001, the debtor filed a newly modified plan [dkt #60-1] which will also be considered at that time.

they were not asserted prior to the initial confirmation of the plan. If a creditor fails to timely object to a proposed plan or appeal the confirmation order, it cannot later complain about a certain provision contained in a confirmed plan, even if such provision is inconsistent with the Bankruptcy Code. *See In re Andersen*, 179 F.3d 1253 (10th Cir. 1999)(order confirming chapter 13 plan was *res judicata* as to issue of whether full payment of student loans would constitute undue hardship and the balance of the debtor's student loans were discharged pursuant to the terms of the confirmed plan accordingly); *In re Pardee*, 218 B.R. 916 (9th Cir. BAP 1998)(creditor's failure to object timely to plan's student loan interest discharge provision at confirmation hearing constituted a waiver of its right to collect post-petition interest on its claim); *see also* COLLIER ON BANKRUPTCY (15th ed. rev. 2001) at §1327.02. Moreover, a proposed plan modification that does not alter a creditor's treatment does not permit the creditor to raise objections previously overlooked or waived. *See In re York*, 250 B.R. 842 (Bankr. D. Del. 2000); *In re Eason*, 178 B.R. 908 (Bankr. M.D. Ga. 1994). As well-stated by a leading bankruptcy treatise:

The binding effect of the plan also bars creditors from raising, at the time of a motion for modification of the plan, issues that could have been raised at the time the plan was originally confirmed. If a debtor moves for plan modification, but the modification does not alter the treatment of a creditor's claim, that creditor may not object to the modification.

COLLIER ON BANKRUPTCY (15th ed. rev. 2001) at §1327.02[1][c]. Because VSAC failed to raise any objections to the original chapter 13 plan that contained the identical terms providing for a discharge of its student loans, VSAC has waived its objections and the principles of *res judicata* preclude its objections to the proposed modified plan.

However, a finding that the creditor has waived its objection to confirmation of the proposed modified plan does not end the inquiry. Under §1329(b) any proposed modified plan must comply with certain Bankruptcy Code provisions, including §1325(a) which provides in pertinent part:

[T]he court shall confirm a plan if-

- (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;
- ...
- (3) the plan has been proposed in good faith and not by means forbidden by law.

Furthermore, §1328(a) provides in pertinent part:

As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt -

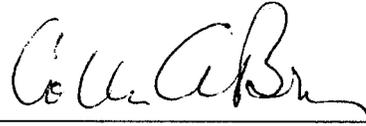
- ...
- (2) of the kind specified in paragraph (5), (8), or (9) of §523(a) of this title

It is well-settled that a bankruptcy court has an independent obligation to consider the merits of a proposed plan's confirmability and compliance with the Bankruptcy Code, including an assessment of a debtor's good faith. See In re Warren, 89 B.R. 87 (9th Cir. BAP 1988); In re Stevens, 236 B.R. 350 (Bankr. E.D. Va. 1999); In re Farmer, 186 B.R. 781 (Bankr. D. RI 1995); In re Fricker, 116 B.R. 431 (Bankr. E.D. Pa. 1990).

In this instance, the proposed modified plan fails to comply with the requirement of §1329(b), which requires any modified plan to be consistent with the above-referenced mandates of §1325(a), because it seeks to by-pass important Code provisions for obtaining an undue hardship discharge of a student loan. The attempt to obtain a student loan discharge summarily through the modified plan and without a showing of undue hardship contravenes §§ 523(a) and 1328(a)(2) and circumvents Bankruptcy Rule 7001(6) which provides for the filing of an adversary proceeding to determine the dischargeability of a debt.

Based upon the foregoing, the debtor's Motion to Modify Chapter 13 Plan dated October 15, 2001 is denied and VSAC's Objection to Motion to Amend Chapter 13 Case is overruled.

November 30, 2001
Rutland, Vermont

A handwritten signature in cursive script, appearing to read 'C. A. Brown', written in black ink on a white background.

Colleen A. Brown
United States Bankruptcy Judge