

Bureau of Health Professions

December 16, 1999

To: Lenders, Holders and Servicers Participating in the Health Education Assistance (HEAL) Program

Subject: Objections to the Discharge of a HEAL Loan in a Chapter 11 and Chapter 13 Bankruptcy Proceeding
Lender Policy Memorandum L-2000-1

This is to rescind Lender Policy Memorandum L-1998-6, issued on January 7, 1998, effective immediately. L-1998-6 stated that "lenders, holders, servicers will no longer be required to file an objection to a statement by a debtor in a bankruptcy plan. . . ." For the reasons set forth below, it is again necessary to impose the requirement of section 60.40(c)(4) of the HEAL regulations (42 CFR § 60.40(c)(4)) that "a lender or holder must file with the bankruptcy court . . . an objection to the discharge or compromise of the HEAL loan . . ." for a Chapter 11 or 13 of the Bankruptcy Act. **The purpose of this requirement is to protect the HEAL loan to enable the lender or holder to receive payment of a bankruptcy claim based on the assignment of the unimpaired note or judgment.**

Courts are now holding that the failure to object to or appeal the *negative treatment* of a nondischargeable student loan in a Bankruptcy Plan is *res judicata*. This means that the plan binds the creditor to the terms of the plan and cannot be challenged. The fact that the terms of the plan may directly conflict with the applicable law does not alter this outcome due to the compelling need for the finality of the confirmed plan. Great Lakes Higher Education Corporation v. Robert McKnight Pardee (In re Pardee), 187 F.3d 648 (9th Cir. 1999).

Courts have found that the creditor "has a duty to ensure that its interests are adequately protected. A creditor cannot simply sit on its rights and expect that the bankruptcy court or trustee will assume the duty of protecting its interests." Anderson v. UNIPAC-NEBHELP and Educational Credit Management Corp. (In re Doreen Ann Andersen), 179 F.3d 1253, 1257 (10th Cir. 1999). Although the debtor has an obligation to prove unconscionability by filing an adversary proceeding, the creditor also has an affirmative duty to protect its interest by reviewing the plan and objecting if it is believed to be improper.

To protect the HEAL loan in a Chapter 11 or 13 plan, the lender or holder must:

- (1) Obtain and review the plan to discern the proposed treatment of the HEAL debt if the debtor has filed a plan at the time of claim submission. If the debtor has filed a plan but not sent it to the lender or holder, the lender or holder must obtain a copy of the plan.; and

(2) If the plan proposes the partial or total discharge of the HEAL loan or the interest (either pre-petition or post-petition) on the HEAL loan, file a timely objection to the confirmation or approval of the plan with the court. If the debtor has not filed a plan within the time required for the lender or holder to file the insurance claim, the lender or holder may file the claim without filing an objection.

We note that if the plan is merely silent concerning the treatment of the HEAL loan or interest, it is our understanding, based on case law to date, that it is unnecessary to file an objection. The statutory bar to discharge would operate to preserve the debt even if the plan makes no statement to this effect. The objection is necessary when the plan contains a statement proposing the discharge of any part of the HEAL debt or interest. In re Klassen, 227 B.R. 187 (Bankr. Ka. 1998).

Please be aware that objections, appeals, and other filings must conform to all applicable court rules.

If you have any questions regarding this memorandum, please contact the HEAL Program at (301) 443-1540.

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