18-6011

UNITED STATES BANKRUPTCY APPELLATE PANEL
for THE EIGHTH CIRCUIT

Richelle Page,
Plaintiff/Appellant

v.

National Collegiate Student Loan Trust,
Defendant/Appellee

Appeal from an order of summary judgment granted by the
Hon. Charles Rendlen of the United States Bankruptcy Court for the
Eastern District of Missouri

Brief of Appellant Richelle Page

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3. JURISDICTIONAL STATEMENT

Richelle Page filed an adversary proceeding under 11 U.S.C. § 523(a)(8) seeking to declare a loan made by a private lender excepted from discharge because it falls outside that statute's ambit. The bankruptcy court had subject matter jurisdiction under 28 U.S.C. §§ 157 and 1334. The adversary was a core proceeding under § 157(b)(2)(I).

The bankruptcy court entered a final judgment on March 22, 2018. Docket Nos. 46 and 47. Richelle filed a timely notice of appeal on March 26. Docket No. 50. This court has jurisdiction under § 158(b)(1).

4. ISSUES PRESENTED

Richelle presents four issues on appeal:

1. **Funded.** The Code doesn't define "funded". Case law suggests a nonprofit funds a loan program where it plays any meaningful part in providing funds to the program. Here, the sole piece of evidence of the nonprofit's role in the program was that Chase, after conditionally approving an application, instructed that some documents, if mailed, were to be sent to the nonprofit. Did the court err in concluding a nonprofit funded the program?
2. **Educational loan.** The Code doesn't define "educational loan". Congress, and in turn the 8th Circuit, has recognized that an educational loan, unlike a commercial loan, is made without business considerations, cosigners, or security interests. Did the court err in concluding the loan Chase made Richelle was an educational loan?
3. **Inference.** National Collegiate moved for summary judgment and produced evidence that showed loan applicants who chose to return proof of income by mail, were instructed to mail it to a nonprofit. The court inferred that by being the designated mail recipient, the nonprofit would have expended its resources and thereby funded the loan program. Did the court err in drawing that inference in National Collegiate's favor?
4. **Narrowly construed.** The Code provides that an educational loan may be excepted from discharge if it was made under a program funded by a nonprofit institution. By holding a nonprofit funded the loan program simply by being the designated recipient of some mail, did the court narrowly construe § 523(a)(8)(A)(i)?

The applicable standard of review for each of these issues is de novo because they come before the Court on an order and judgment on cross motions for summary judgment involving an issue of statutory interpretation. *Cty. of Dakota v. Milan, (In re Milan)*, 556 B.R. 922, 924 (B.A.P. 8th Cir. 2016).

5. FACTUAL AND PROCEDURAL BACKGROUND

The facts, many of which are undisputed, are simple and straightforward.

The Chase loan

Richelle attended her local community college during the spring 2006 semester.[1] The college calculated her cost of attendance at $1602 and awarded her enough federal financial aid to cover those costs.[2]

Later that semester, Chase Bank sent Richelle marketing materials encouraging her to apply for a loan of up to $30 thousand through its Education One Loan Program.[3] Richelle applied for the loan using an application designed by Chase.[4] She submitted that application to Chase and once received, Chase representatives contacted her and told her that Chase had approved her loan contingent upon her providing evidence of her enrollment and signing the promissory note.[5] She did those things and, a few days later, Chase deposited $30 thousand in her bank account.[6]

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[1] Page Decl. at ¶ 1.

[2] *Id*. at ¶ 2.

[3] *Id*. at ¶ 3.

[4] *Id*.

[5] *Id*.

[6] *Id*. at ¶ 5.

That loan documents showed that Chase:

- Made the loan through its Education One Undergraduate Loan program;[7]
- Charged an origination fee of $3100;[8]
- Charged an initial variable APR of 9.846% with any increase tied to the LIBOR index;[9]
- Charged in school interest rate of 4.65% and did not offer any subsidies;[10]
- Required, at times, cosigners;[11]
- Required borrowers to be credit worthy; and
- Took a security interest in all refunds the college owed Richelle.[12]

The proceedings below

Years later, Richelle filed a chapter 7 bankruptcy petition and received a discharge of most of her debts.[13] Last August, she filed an adversary proceeding to declare the loan made by Chase, which is now held by National Collegiate Student Loan Trust, discharged because it doesn't fall within the ambit of 11 U.S.C. § 523(a)(8).[14] The

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[7] Loan Req./Credit Agreement.

[8] Note Disclosure Statement

[9] *Id*.

[10] *Id*.

[11] See *Id*. ("Borrower(s)").

[12] *Id*.

[13] Page Statement of Material Facts, at ¶ 16.

[14] Complaint,

bankruptcy court directed both National Collegiate and Richelle to file motions for summary judgment.

In their briefs, the parties focused mainly on whether the loan was made under a program funded in whole or in part by a nonprofit. Specifically, the parties argued about whether the loan was excepted from discharge because it was purportedly guaranteed by a non-profit.[15]

The court, in granting summary judgment for National Collegiate, declined to address that argument. It focused instead on the materials attached to National Collegiate's motion. One of those documents showed that Chase, after conditionally approving Richelle's loan application, instructed her to sign the loan application and return it along with other documents to Chase either by fax or mail.[16] If mailed, Chase instructed Richelle to send the documents to The Educational Resources Institute, Inc. (TERI), a now defunct nonprofit entity.

Based on that sole fact, the Court concluded the nonprofit held a plenary capacity in the loan program and thereby funded the program with its meaningful participation.[17]

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[15] Page Mot. Summ. J; NCSLT Mot. Summ. J.

[16] Loan Instructions Sheet.

[17] Mem. Op. & Order, at 10, March 22, 2018.

6. SUMMARY OF THE ARGUMENT

The Chase loan should be declared discharged because it is a run of the mill consumer loan masquerading as the type of debt that deserves the special protection offered under § 523(a)(8). The loan was neither made, nor insured, nor guaranteed by the government. Nor was it given to Richelle as a conditional grant of money like a scholarship or stipend. Nor did Richelle borrow the loan solely to pay qualified higher education expenses. (Those expenses had already been provided for by funds from the federal financial aid program.) Likewise, the loan was not made under a program funded by a nonprofit.

A careful reading of the Bankruptcy Code and applicable law shows that a nonprofit must do more than simply receive a for-profit lender's mail before it can be said the nonprofit has funded the lender's loan program. While an advance of funds isn't necessary, the nonprofit's involvement in the program must be so absolute that the lender's role is reduced to that of serving as the nonprofit's agent.

National Collegiate failed to show Chase served merely as its agent. The court should not have granted summary judgment in it's favor. But it did. And in so doing, the court incorrectly interpreted the meaning of funded and educational loan. It also failed to view the evidence in the light most favorable to Richelle. And it failed to narrowly interpret the exception to discharge.

Richelle respectfully requests this Court reverse the order granting summary judgment for the purported holder of the Chase loan, National Collegiate Student Loan Trust.

9. ARGUMENT

9.1 Congress has consistently amended § 523(a)(8) to except from discharge debts owed for federal educational funding programs and loans made by private lenders that mirror those programs

The federal government began loaning students money to attend post-high school educational programs almost six decades ago through two major programs: The National Direct Student Loan program and the Guaranteed Student Loan program.[18] Under the NDSL program, the government placed money in a loan fund and required participating schools of higher education to do the same.[19] After the government and school had funded the NDSL program, the school was free to make loans to its students.[20]

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[18] Jerome Organ, *'Good Faith' and the Discharge of Educational Loans in Chapter 13: Forging a Judicial Consensus*, 38 Vand. L. Rev. 1087, 1090 (1985).

[19] 20 U.S.C. § 1087aa(b) (1982).

[20] § 1087dd(b) (1982).

This was different from the GSL program. Under it, the government didn't fund the program.[21] That was left to private lenders.[22] So too was the making of loans under the program.[23] The government limited its role instead to serving as either the primary or secondary guarantor of loans made under the program.[24]

Both programs also had the added benefit of offering students "reasonable access to low interest rate loans".[25]

Combined, these loan programs were a success. About a decade after the first loans were made under the programs, almost $30 billion had been lent.[26] Naturally, as the number of borrowers increased, so too did the number of bankruptcy debtors with student loans.[27]

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[21] § 1071a (1982).

[22] *Id*.

[23] *Id*.

[24] Organ, *supra* at 1090.

[25] 1965 U.S.C.C.A.N. 4027, 4030; *Matter of Bruce*, 3 B.R. 77, 78 (Bankr. N.D. Ill. 1980) (acknowledging that NDSL (formerly National Defense Education Act loans) loans were made to students at 3% interest).

[26] Organ, *supra* at 1090.

[27] *Id*.

Congress knew it needed to protect its two educational loan programs to ensure funding for future generations.[28] So it responded to this increase by excepting from discharge any debt owed to the government or a nonprofit institution of higher education for an educational loan.[29]

This version of the statute didn't last long.

Over the next year, Congress realized the statute needed tweaking. Its coverage was narrower than intended.[30] In certain instances, the

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[28] 124 Cong. Rec. 1791–92 ("Without this amendment, [Congress would be] discriminating against future students, because there will be no funds available for them to get an education.").

[29] Bankruptcy Reform Act of 1978 § 523(a)(8), 92 Stat. at 2590–91; See H.R.Doc. No. 137, 93d Cong., 1st Sess., Pts. I and II (1973); *In re Pelkowski*, 990 F.2d 737, 742 (3d Cir. 1993) ("It is undisputed that section 523(a)(8) was enacted in response to the belief that students were taking advantage of the loan program. In the early 1970's, there was concern by legislators and the public about the perceived rise in bankruptcy filings by students on the brink of lucrative careers."); see also *Dep't of Mental Health, State of Missouri v. Shipman (In re Shipman)*, 33 B.R. 80, 82 (Bankr. W.D. Mo. 1983) (recognizing that Congress, when it enacted the Higher Educational Act of 1965 and later placed language from that Act in 523(a)(8), intended to except educational loans made by the federal government from discharge); *TI Federal Credit Union v. DelBonis*, 72 F.3d 921 (1st Cir. 1995) ("Section 523(a)(8) would only make educational loans issued by governmental units or nonprofits nondischargeable....")

[30] S.REP. No. 96-230 at 1 (1979), reprinted in 1979 U.S.C.C.A.N. 936; *McClure v. Action Career Training (In re McClure)*, 210 B.R. 985 (Bankr. N.D. Tex. 1997) (recognizing the Bankruptcy Reform Act expanded the

statute failed to protect loans made under either loan program. For instance, under the GSL program, since the government served as a guarantor of educational loans made by private lenders, a debt would only be owed to the government if the debtor defaulted on the loan before she filed bankruptcy.[31]

The problem was similar with the NDSL program. Under it, the educational loans were made by the schools, not the government. Many of the schools who participated in the program were for-profit institutions. Consequently, if the loan was made by a for-profit institution, then the statute wouldn't except it from discharge and the government's educational loan programs would be threatened.[32]

With this in mind, Congress amended the statute in 1979[33] to except from discharge an educational loan:

- made, insured, or guaranteed by the government;[34] or

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types of obligations § 523(a)(8) covered to include loans made, insured, or guaranteed by the government or a nonprofit).

[31] *See* S. Rep. 96-230, 2, 1979 U.S.C.C.A.N. 936, 937 (illustrating how § 523(a)(8) failed to except from discharge loans made under the NDSL GSL programs).

[32] *Id*.

[33] Act of August 14, 1979, Pub. L. No. 96-56, § 3(1), 93 Stat. 387 (1978).

[34] GSL program loans.

- made under any program funded in whole or in part by the government or a nonprofit institution of higher education.[35]

Over the next several years, Congress continued tweaking the statute through amendments by:

- striking "of higher education" so that educational loans made by seminaries and trade schools received the same protection as did educational loans made by traditional schools of higher education;[36]
- adding language to extend protection to funds owed to government programs that provided conditional grants to students (e.g., Montgomery GI bill and the National Health Service Corps Scholarship);[37] and

[35] NDSL program loans.

[36] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, Title III, § 454(a)(2), 98 Stat. 333 (amending 11 U.S.C. § 523(a)(8) (1982)).

[37] Pub.L. No. 101-647, 104 Stat. 4789 (1990); Federal Debt Collection Procedures of 1990: Hearing on P.L. 101-647 Before the H. Subcomm. On Econ. and Commercial Law, H. Judiciary Committee 101st Cong. 74-75 (June 14, 1990) ("This section [amending 11 U.S.C. § 523(a)(8)] adds to the list of nondischargeable debts, obligations to repay educational funds received in the form of benefits (such as VA benefits), scholarships (such as medical service corps scholarships) and stipends. These obligations are often very sizeable and should receive the same treatment as a "student loan" with regard to restrictions on dischargeability in bankruptcy. See *U.S. Department of Health and Human Services v. Smith*, 807 F.2d 122 (8th Cir. 1986).").

- increasing the number of years educational loans were excepted from discharge absent undue hardship from 5 to 7 years[38] and later, eliminating the period altogether.[39]

Finally, in 2005, Congress turned its attention to loans made outside of the government's educational funding programs. Before BAPCPA's passage, educational loans made by private lenders *but not guaranteed or insured by the government* weren't covered by the statute.[40] Congress remedied this by extending discharge protection to those loans but only if they were incurred solely to pay a student's qualified higher education expenses at school eligible to receive federal financial aid. [41]

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[38] Pub.L. No. 101-647, 104 Stat. 4789 (1990).

[39] Higher Education Amendments of 1998, Pub.L. No. 105-244, § 971(b); 112 Stat. 1581, 1837 (1998).

[40] *In re Segal*, 57 F.3d 342, 348 (3d Cir. 1995) ("By enacting section 523(a)(8), Congress **sought principally to protect government entities and nonprofit institutions**...from bankruptcy discharge...[because those loans] are not based upon a borrower's proven credit-worthiness...") (emphasis added).

[41] *See* § 523(a)(8)(B) (referring to section 221(d)(1) of the I.R.C., which requires a loan be incurred to pay qualified higher education costs at an eligible institution.

After the last of the amendments, four types of debts were excepted from discharge under § 523(a)(8):

1. Educational loans made, insured, or guaranteed by the government;[42]
2. Educational loans made under a program funded by the government or a nonprofit;[43]
3. Educational debts owed for conditional grants of money, scholarships, or stipends;[44]
4. Loans made by private lenders solely to pay for qualified higher education costs. [45]

The Chase loan was neither made, nor insured, nor guaranteed by the government. Nor was it made under a loan program funded by

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[42] § 523(a)(8)(A)(i) (first clause).

[43] *Id*. (second clause).

[44] § 523(a)(8)(A)(ii); *see also In re Campbell*, 547 B.R. 49 (Bankr. E.D.N.Y. 2016) (concluding that "educational benefit" refers to conditional grants of money); *Decena v. Citizens Bank (In re Decena)*, 549 B.R. 11 (Bankr. E.D.N.Y. 2016) *rev'd in part on other grounds Citizens Bank v. Decena*, 562 B.R. 202 (E.D.N.Y. 2016) (same); *Schultz v. Navient Solutions, Inc., (In re Schultz),* WL 8808073 (Bankr. D. Minn. Dec. 13, 2016) (same); *Dufrane v. Navient Solutions, Inc. (In re Dufrane)*, 566 B.R. 28 (Bankr. C.D. Cal. 2017) (same); *DeWine v. Dudley (In re Dudley)*, WL 8772047 (Bankr. S.D.Ohio Aug. 17, 2017) (same); *Essangui v. SLF V-2015 Trust (In re Essangui)*, 573 B.R. 614 (Bankr. D. Md 2017) (same); *Wiley v. Wells Fargo Bank (In re Wiley)*, (Bankr. D. Maine 2017) (same); *In re Nypaver*, 581 B.R. 431 (Bankr. W.D. Pa. 2018) (same).

[45] *See* § 523(a)(8)(B) (referring to section 221(d)(1) of the I.R.C., which requires a qualified education loan to be incurred solely to pay qualified higher education expenses).

the government. Likewise, the loan isn't a conditional grant of money like a scholarship or stipend. And, because the loan exceeded Richelle's cost of attendance, the loan isn't a qualified education loan.

All that's at issue here is whether the loan was made under a program funded by a nonprofit.

9.2 The bankruptcy court has reduced the meaning of funded so that any entity that plays any role in a loan program, however marginal, can be said to have funded the program

What does "funded" mean? The meaning of that term and its proper application are the crux of this appeal. Congress didn't define it. But it's plain meaning is clear: the advance of money to an entity for a specific purpose.[46] The legislative history and the evolution of the statute amplify this plain meaning. Still, courts have tried to define "funded" for themselves.

The way they've done that is by asking this simple question:

> **Did a nonprofit play a meaningful part in providing funds to the loan program?**[47]

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[46] *Taratuska v. The Educ. Res. Inst., Inc., (In re Taratuska)*, 374 B.R. 24 (Bankr. D. Mass. 2007) *rev'd The Educ. Res. Inst., Inc. v. Taratuska*, WL 4826279 (D. Mass. Aug. 25, 2008) citing Black's Law Dictionary (8th ed. 2004).

[47] *The Educ. Res. Inst., Inc. v. Hammarstrom (In re Hammarstrom)*, 95 B.R. 160, 165 (Bankr. N.D. Cal. 1989).

If yes, the nonprofit funded the loan program and the debt was nondischargeable. But if no, then the opposite was true.

The bankruptcy court used this test. It reviewed the loan documents Chase sent Richelle after conditionally approving her loan. It saw that Chase instructed her to return certain documents either by fax or mail. It noted that if she chose to mail those documents, Chase required she send them only to TERI, a now defunct nonprofit entity.

Evidence of the nonprofit's role in the loan program ended there. So the court stopped its fact gathering and asked that simple question. It answered by concluding that, yes, the nonprofit, by receiving some mail, had played a meaningful part in providing funds to Chase's loan program.

That conclusion was wrong. It misapplies the meaningful part test by weakening the meaning of funded to the point that any entity that plays any marginal role in a private lender's loan program can be said to have funded that program. A careful reading of the meaningful part test's creation shows that it's use was designed to protect nonprofit institutions who did everything but actually make the loan to the borrower.

9.2.1 *A nonprofit plays a meaningful part in the funding of a loan program only if it's involvement in the loan program was so absolute that it reduced the for-profit lender's function role to that of a mere agent.*

From the start, Congress has crafted § 523(a)(8)'s language narrowly. It had to do so to balance the overarching goal of bankruptcy (grant debtors a fresh start) against the need to ensure that future generations had access to federal funding for higher education.[48]

In crafting that language narrowly, there have been instances when a plain reading of the statute would fail to protect certain educational debts owed to the government or a nonprofit from discharge.[49] The meaningful part test comes from one of those instances.[50]

The court that created that test was faced with these facts:

- A nonprofit entity had a preexisting agreement with a for-profit lender whereby the lender would make educational loans at the nonprofit's behest.[51]
- The nonprofit entered into the agreement with the for-profit lender because it was prohibited by law from making loans.[52]

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[48] *Gorosh v. Posner (Posner)*, 434 B.R. 800, 803 (Bankr. E.D. Mich. 2010).

[49] See S. Rep. 96-230, 2, 1979 U.S.C.C.A.N. 936, 937 (illustrating how § 523(a)(8) failed to except from discharge loans made under the NDSL and GSL programs).

[50] *Hammarstrom*, 95 B.R. at 165.

[51] *Id.* at 161.

[52] *Id.*

- In accordance with that agreement, the nonprofit would buy the loans shortly after they were made.[53]
- The nonprofit marketed the loans to students; it designed the loan application; and it approved the loan applications.[54]

This case is from the '80s. Back then, the Code excepted from discharge both (a) an educational loan made, insured, or guaranteed by a governmental unit and (b) an educational loan made under any program funded in whole or in part by a government unit or a nonprofit.[55]

Read literally, the statute wouldn't have excepted the loan from discharge. It would have been dischargeable because the nonprofit never literally funded the loan program. That is to say, the nonprofit never advanced money to the program. But to hold that the nonprofit hadn't funded the loan program, at least in part, would be wholly to ignore the substance of the transaction.[56]

So what to do?

The court avoided that absurd result by creating a test that accounted *for* those limited instances where a nonprofit's involvement in the loan program was so absolute that it reduced the forprofit lender's function role to that of a mere agent.[57]

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[53] *Id*.

[54] *Id*.

[55] *Id*. at 162.

[56] *Id*. at 166.

[57] *Id*.

That was the meaningful part test's beginning. Over the next three decades, courts have used it to conclude that a nonprofit played a meaningful part in the funding of a loan program when the nonprofit:

- guaranteed the educational loans made;[58]
- insured some of the educational loans made;[59]
- produced evidence that: (a) the making of the loan was conditioned upon the nonprofit guaranteeing the loans; and (b) the nonprofit purchased the loan following the borrower's default;[60]
- extended credit to the borrower via a promissory note but did not advance actual funds;[61]
- approved the loan applications and directed the bank to make approved loans;[62]
- administered the program by providing and processing applications, servicing the loans, and eventually purchasing the loans;[63]

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[58] *E.g., McClain v. American Student Assistance (In re McClain)*, 272 B.R. 42 (Bankr. D. N.H. 2002).

[59] *E.g., Hemar Service Corp. of America, Inc. v. Pilcher (In re Pilcher)*, 149 B.R. 595 (BAP 9th Circuit 1993).

[60] *E.g., In re O'Brien*, 419 F.3d 104 (2d Cir. 2005).

[61] *Gakinya v. Columbia College, (In re Gakinya)*, 364 B.R. 366 (Bankr. W.D. Mo. 2007).

[62] *Sears v. Educap, Inc., (In re Sears)*, 393 B.R. 678 (Bankr. W.D. Mo. 2008).

[63] *Rojas v. Educap Inc., (In re Rojas)*, Case No. 1-15-42037 Adv. Pro. No. 1-150172, (Bankr. E.D.N.Y. March 18, 2018).

The unifying theme of almost all these cases is that but for the nonprofit's actions, the for-profit lender wouldn't have funded the loan program.[64]

That isn't the case here. The evidence of the nonprofit's involvement in Chase's loan program was limited to its receiving some of Chase's mail. There was no showing that Chase conditioned its funding of its loan program upon any action by the nonprofit. There was no showing the nonprofit's involvement in the loan program was so absolute that it reduced Chase's role to that of a mere agent.

The court wrongfully concluded a nonprofit funded the loan program.

9.3 The Chase loan is not an educational loan; it is a personal loan cloaked with features made to deceive others into believing it is one of the small class of debts Congress intended to except from discharge

Even if the nonprofit had meaningfully participated in Chase's loan program and even if whether the nonprofit funded the loan program were material, the Chase loan would still be dischargeable because it wasn't an educational loan.

Sure, it was made through Chase's Education One Loan program. And yes, some loan documents listed Richelle's school. And Chase did instruct borrowers to submit proof that they were either in school or would soon be attending.

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[64] *But see In re Gakinya at* 368-69 (Bankr. W.D. Mo. 2007) (loan made by a nonprofit school; no private lender involved).

All those things are true. But none of them make the loan an educational loan within the meaning of § 523(a)(8)(A)(i). The Chase loan is a generic, run of the mill, routinely dischargeable consumer loan.

In the lead up to adding "educational loans" to the statute, Congress pointed out that "educational loans...are different from most loans." They're "made without business considerations, without security, without cosigners,"[65] at low interest rates, and at no profit.[66] And it's because of those differences, the Eighth Circuit has acknowledged, that those loans ought be protected and consumer loans ought not.[67]

The bankruptcy court ignored these differences. It focused instead on whether the transaction between Chase and Richelle was a loan (it was) and how Chase characterized the loan (as a loan for educational expenses). Had the court reviewed the record for these differences, it would have seen that:

- Chase took a security interest when it made the loan;
- Chase required cosigners;

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[65] 126 H.R.Rep. No. 595, 95th Cong., 2d Sess. 133, reprinted in 1978 U.S.Code Cong. & Ad.News 5963, 6094; *U.S. Dep't of Health & Human Servs. v. Smith*, 807 F.2d 122, 126 (8th Cir. 1986).

[66] *In re Van Ess*, 186 B.R. 375 (Bankr. D. NJ 1994) citing S. Rep. No. 673, 89th Cong., 1st Sess. (1965); *see also* 1965 U.S.C.C.A.N. 4027, 4061 (acknowledging that loans made by private lenders as part of the GSL program are made at no profit).

[67] *In re Meyer*, WL 12626478, at *4 (Bankr. S.D. Iowa Jan. 21, 1992) citing *In re French*, 62 B.R. 235, 243 (Bankr. D. Minn. 1986).

- Richelle's credit score was a factor in Chase's making of the loan;
- The loan's interest rate was neither fixed nor relatively low;
- Chase charged an origination fee that was more than 10% of the loan amount; and, if fully amortized,
- Chase stood to profit almost double what it lent.

The loan Chase made to Richelle was not an education loan. The Panel should see it for what it is: a personal loan cloaked with features to make it look like the noncommercial loans made by the government and schools that Congress actually intended to protect under § 523(a)(8)(A)(i).

9.4 By inferring the nonprofit expended resources in processing some of Chase's mail and thereby funded Chase's loan program, the court drew an inference in the movant's favor

The Eighth Circuit has said that on summary judgment courts must:

- view the material presented by the movant in the light most favorable to the nonmovant;[68]
- grant summary judgment only if the material establishes "with such clarity as to leave no room for controversy, that the [nonmovant] is not entitled to recover under any discernible circumstances."[69]; and

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[68] *Champale, Inc. v. Pickett & Sons, Inc.*, 599 F.2d 857, 859 (8th Cir. 1979) citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

[69] *Williams v. Evangelical Retirement Homes of Greater St. Louis*, 594 F.2d 701, 703 (8th Cir. 1979).

- must draw inferences in the nonmovant's favor.[70]

The bankruptcy court did none of those things. Instead, it skipped past National Collegiate's statement of facts and homed in on the materials attached to that statement. Once there, the court scrutinized those several pages until it ultimately cherry-picked a fact to support its conclusion that a nonprofit partially funded Chase Bank's loan program.

That fact?

After having conditionally approved a loan, Chase instructed the applicant to return certain documents to it either by fax or mail. If the applicant chose mail, Chase instructed her to mail the documents to a nonprofit entity.

There are at least a couple of ways to view that fact in a light most favorable to Richelle. *TERI served as Chase Bank's post office box for select mail.* Or, *Chase hired TERI to confirm that applicants who submitted documents by mail had met the requirements set forth by Chase to disburse the loan.*

The court adopted neither of those views nor any other in Richelle's favor. Rather, the court looked at TERI's role as Chase's designated recipient of certain mail and said that role established that "TERI

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[70] *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990) citing *Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517, 519 (8th Cir. 1988).

served in plenary or near plenary capacity" in Chase's Education One Loan program. And since TERI served in that absolute capacity, the court inferred, TERI "would have expended its resources" in administering the program and thereby funded the program.

The court could have ignored that statement. It did not. It could have drawn an inference in Richelle's favor. It did not. It could have decided that based on the evidence before it, granting summary judgment was inappropriate – especially when the "record permits reasonable minds to draw conflicting inferences about a material fact."[71] But again, it did not.

This is reversible error.

9.5 The court broadly construed § 523(a)(8)(A)(i) to cover a class of debt that Congress sought to protect only under subsection (B)

And so too is the court's failure to narrowly construe § 523(a)(8)(A)(i) against National Collegiate.

Bankruptcy courts are duty bound to construe exceptions to discharge narrowly.[72] In so doing, courts should confine exceptions to discharge to those plainly expressed.[73] A court should depart from a

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[71] *Ozark Interiors, Inc. v. Local 978 Carpenters*, 957 F.2d 566, 569 (8th Cir. 1992) citing *Donovan v. General Motors*, 762 F.2d 701, 703 (8th Cir.1985).

[72] *In re Miller*, 276 F.3d 424, 429 (8th Cir. 2002).

[73] *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998).

statute's plain meaning only in "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters."[74]

The bankruptcy court here in at least three different instances construed § 523(a)(8)(A)(i) broadly against Richelle. First, the court broadly interpreted funded so that a nonprofit can be said to have funded a private lender's loan program simply by receiving some of the lender's mail. Second, the court expanded § 523(a)(8)(A)(i) to cover debts made outside of the federal educational loan programs – debts that Congress sought to protect solely under § 523(a)(8)(B). Finally, the court enlarged the definition of "educational loans" so that almost any loan made to a debtor while she was a student can be said to be an educational loan.

The court could have construed those three things against National Collegiate while giving effect to defined statutory terms and according undefined terms their ordinary meaning. It could have. But it didn't.

This is reversible error.

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[74] *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982); *see also Holliday v. Kline (In re Kline)*, 65 F.3d 749, 751 (8th Cir. 1995) (refusing to narrowly construe an exception to discharge for spousal and child support related debts because the policy underlying excepting those types of debts "favors enforcement of familial support obligations over a 'fresh start' for the debtor.").

10. CONCLUSION

Congress has made it hard to discharge educational loans. And that makes sense. The lending industry that allows borrowers to pay for schooling they wouldn't otherwise be able to attend must be protected. If not, funding for higher education may dry and would be scholars would be cut off from realizing the full promise of the American Dream.

That can't happen.

But this loan? This loan doesn't come from that industry. It wasn't made to pay qualified higher education expenses. It wasn't made by the government. And it wasn't made under a loan program funded by a nonprofit. At least not in a way courts over the past three decades have interpreted "funded".

By concluding a nonprofit funds a loan program simply by serving as a designated mail recipient for some of a bank's mail transmogrifies the plain meaning of funded. It strips away any requirement that funds be advanced from one entity to another. It eliminates any showing that a nonprofit's involvement was critical to the funding of the loan program. And it brings almost any loan made to a student into the ambit of § 523(a)(8) so long as a bank mandates documents be mailed to it using the USPS.

The Panel should reject this perverse definition and the one that equates educational loans with generic consumer loans — especially

when they're being used to broadly interpret § 523(a)(8) in a manner that deprives Richelle of the fresh start she would otherwise deserve.

Respectfully submitted,

Stanley Tate
Attorney for Appellant

11. CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation prescribed in procedural rule 8015. This brief has 6417 words.

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CERTIFICATION OF INTERESTED PARTIES

Certification required by L.R. BAP 8th Cir. 8014(b)(1): The undersigned, counsel of record for Richelle Page, certifies there are no known parties that have an interest in the outcome of this appeal aside from Richelle and National Collegiate.

Stanley Tate

CERTIFICATION OF RELATED CASES

In accordance with L.R. BAP 8th Cir. 8014(b)(2), the undersigned, counsel of record for Richelle Page, certifies there are no known related cases before a United States Court of Appeals, a United States District Court, a United States Bankruptcy Court, or a United States Bankruptcy Panel.

Stanley Tate