



Signed: November 23, 2005

Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

No. 04-43327
Chapter 13

CATHY COLEMAN,

Debtor

CATHY COLEMAN,

A.P. No. 05-4297

Plaintiff,

vs.

EDUCATIONAL CREDIT
MANAGEMENT CORPORATION,

Defendant.

**MEMORANDUM OF DECISION RE EDUCATIONAL CREDIT
MANAGEMENT CORPORATION'S MOTION TO DISMISS**

Before the Court is defendant Educational Credit Management Corporation's ("ECMC") motion to dismiss the complaint in the above-captioned adversary proceeding. The motion was opposed by

2 the debtor, Cathy Coleman ("Coleman"). Having considered the
3 applicable law and argument of the parties, both oral and
4 written, for the reasons stated below, the motion is denied.

5 **SUMMARY OF FACTS AND CONTENTIONS**

6 On June 16, 2004, Coleman filed a voluntary petition
7 seeking relief under Chapter 13 of the Bankruptcy Code.¹ The
8 Court confirmed Coleman's first amended plan on August 26, 2004,
9 providing for payments over a five year period. ECMC filed a
10 timely proof of claim in the amount of \$102,393.46, including
11 unpaid interest and collection costs, for the balance due on
12 Coleman's student loans (the "Student Loan Debt"). On June 23,
13 2005, Coleman filed this adversary proceeding, seeking a partial
14 discharge of the Student Loan Debt on the ground that excepting
15 the entire Student Loan Debt from her Chapter 13 discharge would
16 constitute an undue hardship.² As of August 3, 2005, the
17 principal and interest balance on the promissory notes was
18 \$106,139.11. Prior to filing her petition, Coleman had made
19 repayments totaling \$1,000.00.

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23 ¹The Bankruptcy Code is contained in Title 11 of the United
24 States Code. Hereinafter, all statutory references are to
Title 11 unless otherwise specified.

25 ²The Ninth Circuit has held that a bankruptcy court has the
26 authority to grant a partial discharge of a student loan
debt. In re Saxman, 325 F.3d 1168, 1173-74 (9th Cir.
2003).

2 To support her claim of undue hardship, Coleman relied
3 primarily on her history of irregular employment and current
4 unemployed status. Specifically, Coleman alleged that she holds
5 a bachelor's degree in art and attended graduate school, seeking
6 a master's degree in cultural anthropology, but did not complete
7 the degree program. Coleman holds a single subject teaching
8 credential and has worked intermittently as a teacher since
9 1999, having been laid off four times. Her income has ranged
10 from \$1,800 to \$4,000 per month as a teacher, but she was laid
11 off in June 2005 and currently receives \$410 per month on
12 unemployment. Coleman has sought employment in related fields
13 to no avail.

14 On August 19, 2005, ECMC filed the instant motion to
15 dismiss the complaint on two grounds. First, ECMC argued that
16 the Court lacks subject matter jurisdiction because the issue of
17 the dischargeability of Coleman's Student Loan Debt is not ripe
18 for adjudication until Coleman has completed her Chapter 13 plan
19 payments and obtained a discharge. Second, ECMC argued that,
20 even if the Court has subject matter jurisdiction, as a
21 discretionary matter, the Court should wait to rule on the
22 hardship issue until Coleman receives a discharge because a
23 determination at an earlier time is too speculative. Coleman
24 opposed ECMC's motion.

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2 DISCUSSION

3 I. WHETHER COURT LACKS SUBJECT MATTER JURISDICTION TO
4 DETERMINE UNDUE HARDSHIP PRIOR TO COMPLETION OF PLAN
5 PAYMENTS

6 Section 1328 provides that a Chapter 13 debtor is entitled
7 to a discharge of his or her debts "as soon as practicable after
8 completion...of all payments under the plan..." However,
9 certain categories of debts are excepted from the discharge. 11
10 U.S.C. § 1328(a). Among the excepted debts are those debts
11 excepted from an individual chapter 7 debtor's discharge under §
12 523(a)(8). 11 U.S.C. § 1328(a)(2). Section 523(a)(8) provides
13 that student loan debts are nondischargeable unless repayment of
14 the debt would impose an undue hardship on the debtor and the
15 debtor's dependents. 11 U.S.C. § 523(a)(8). ECMC contends that
16 the bankruptcy court lacks subject matter jurisdiction to
17 determine whether excepting the Student Loan Debt from a Chapter
18 13 debtor's discharge would impose an undue hardship because the
19 issue is not "ripe" until the debtor has earned her right to a
20 discharge by completing the plan payments.

21 Ripeness is a concept rooted in the "case and controversy"
22 clause of the Constitution and is a prerequisite to the Court's
23 subject matter jurisdiction. See U.S. Const. art. III, § 2, cl.
24 1. The basic rationale of the ripeness doctrine "is to prevent
25 the courts, through avoidance of premature adjudication, from
26 entangling themselves in abstract disagreements over
administrative policies, and also to protect the agencies from

2 judicial interference until an administrative decision has been
3 formalized and its effects felt in a concrete way by the
4 challenging parties." Abbott Labs. v. Gardner, 387 U.S. 136,
5 148-49 (1967). In analyzing ripeness, a federal court must
6 "evaluate both the fitness of the issues for judicial decision
7 and the hardship to the parties of withholding court
8 consideration." Id. at 149; see also American-Arab Anti-
9 Discrimination Committee v. Thornburgh, 970 F.2d 501, 510 (9th
10 Cir. 1992).

11 In In re Taylor, 223 B.R. 747 (Bankr. 9th Cir. 1998), the
12 Bankruptcy Appellate Panel (the "BAP") held that a court may
13 determine whether a student loan debt should be discharged as an
14 undue hardship prior to the completion of a Chapter 13 debtor's
15 plan payments. In Taylor, the debtors filed their complaint
16 less than six months after filing their Chapter 13 petition and
17 almost three months before the Chapter 13 plan was confirmed.
18 In concluding that the issue could be determined before the
19 debtor's discharge was imminent, the Taylor court relied on
20 Federal Rule of Bankruptcy Procedure (hereinafter "FRBP")
21 4007(b) which provides that "a § 523(a)(8)[] action can be
22 brought *at any time*." Taylor, 223 B.R. at 751 (emphasis added);
23 see FRBP 4007(b).

24 The Taylor court observed that the "filing of a complaint
25 at any time to discharge a student loan based on undue hardship
26 does not conflict with any statutory right or procedure or with

2 public policy." See Taylor, 223 B.R. at 751. Consequently, it
3 concluded that the debtors "had a right to file the Complaint
4 when they did, and the issues were *ripe* for adjudication at that
5 time." Taylor, 223 B.R. at 752 (emphasis added). However, it
6 does not appear from the text of the decision that the term
7 "ripe" was used in its constitutional sense.

8 ECMC contends that Taylor is contrary to two Ninth Circuit
9 Court of Appeals decisions and thus should not be followed by
10 this Court: i.e., In re Heincy, 858 F.2d 548 (9th Cir. 1988) and
11 In re Beaty, 306 F.3d 914 (9th Cir. 2002). In Heincy, prior to
12 confirmation of the Chapter 13 plan, the debtor sought a
13 determination regarding the dischargeability of a criminal
14 restitution debt, and the bankruptcy court held the debt to be
15 dischargeable. Heincy, 858 F.2d at 549. The Ninth Circuit
16 reversed, concluding that the dischargeability issue was "not
17 ripe for resolution until the court knows whether the Heincys
18 have successfully completed payments under the plan." Id. at
19 550. At the time of the Ninth Circuit's decision in Heincy,
20 criminal restitution debts were not dischargeable under
21 § 1328(b), but were arguably dischargeable under § 1328(a). See
22 11 U.S.C. § 1328 (1989); Pub. L. No. 101-581 (1990) (amending
23 § 1328(a) to except criminal restitution debts from discharge).

24 The Heincy court applied the following reasoning:

25 If the Heincys ultimately complete payments under
26 the plan, their discharge would be controlled by 11
U.S.C. § 1328(a). If they do not, their discharge

2 would be controlled by 11 U.S.C. § 1328(b). Under
3 the latter section, the restitution order would not
4 be dischargeable. Under the former section, there
5 is considerable doubt whether the restitution order
6 would be dischargeable in light of the Supreme
7 Court's recent decision in Kelly v. Robinson []
(expressing "serious doubts" as to whether
8 restitution orders are ever dischargeable.) We need
9 not now decide that issue. Because the plan is
10 still in progress, the bankruptcy court could not
11 have known which discharge provision would apply.

12 Id. (citations omitted).

13 The Taylor court found Heincy distinguishable because the
14 rationale recited above did not apply to the issue of the
15 dischargeability of student loan debt. See Taylor, 223 B.R. at
16 751. Unlike a criminal restitution obligation at the time of
17 Heincy, whether a student loan debt is excepted from discharge
18 under either § 1328(a) and § 1328(b) is governed by the same
19 standard: i.e., "undue hardship." See 11 U.S.C. §§ 523(a),
20 1328(a)(2).

21 ECMC argued that it is irrelevant that student loan debts
22 are excepted from discharge under both § 1328(a) and § 1328(b)
23 because the Heincy court concluded that a criminal restitution
24 obligation could probably not be discharged under either
25 provision. See Heincy, 858 F.2d at 550. However, the Heincy
26 court expressly refused to resolve the question of whether
criminal restitution debt was in fact excepted from the
discharge under either provisions. To the contrary, it relied
on the ostensibly disparate treatment of criminal restitution
debt under § 1328(a) and § 1328(b). See id. As a result, the

2 Taylor court correctly distinguished the Heincy decision from
3 the issue before it.

4 In Beaty, the issue was whether laches could be raised as a
5 defense to a complaint to determine that a debt should be
6 excepted from the debtor's discharge under § 523(a)(3)(B).
7 Section 523(a)(3)(B) excepts an unsecured debt from the
8 debtor's discharge if the creditor has a claim that would have
9 been entitled to be excepted from the debtor's discharge under §
10 523(a)(2), (4), or (6) if the creditor had received notice of
11 the bankruptcy in time to file a timely action to have the debt
12 excepted from the debtor's discharge, as required by § 523(c).
13 11 U.S.C. §§ 523(a)(3)(B), 523(c). Rule 4007(b) provides that a
14 complaint seeking a determination that an unsecured debt of
15 this sort is nondischargeable may be filed "at any time."
16 Beaty, 306 F.3d at 917. Notwithstanding this language, the
17 Beaty court held that laches could be asserted as a defense to
18 such an action. It observed that "the bankruptcy court is a
19 court of equity and should invoke equitable principles and
20 doctrines, refusing to do so only where their application would
21 be 'inconsistent' with the Bankruptcy Code." Id. at 922-23.³

22
23 ³The Ninth Circuit rejected the applicability of the Supreme
24 Court's interpretation of the phrase "at any time" in Heflin v.
25 United States, 358 U.S. 415, 420 (1959). In Heflin, the Supreme
26 Court held that a statute providing that a motion to vacate a
sentence "may be made at any time" rendered the doctrine of
laches inapplicable. The Ninth Circuit distinguished Heflin on
the ground that, there, the language was contained in a statute

2 Beaty is clearly distinguishable. ECMC does not contend
3 that Coleman's claim is barred by laches. To the contrary, it
4 contends that the action is premature. Moreover, the question
5 is not whether a procedural rule could create subject matter
6 jurisdiction where it does not exist. Clearly, it cannot.
7 Thus, the question remains whether the issue is ripe as a
8 constitutional matter.

9 ECMC contends that the issue of undue hardship is not ripe
10 as a constitutional matter because it would require the
11 bankruptcy court to speculate as to Coleman's financial
12 situation at a future time: i.e., when she completes her plan
13 payments. Unless she modifies her plan to shorten its term,
14 Coleman will not complete her plan payments until 2009. The
15 Court finds this argument without merit.

16 In the Ninth Circuit, as in most circuits, the test for
17 undue hardship under § 523(a)(8) is governed by In re Brunner,
18 831 F.2d 395 (2d Cir. 1987). See In re Pena, 155 F.3d 1108,
19 1112 (9th Cir. 1998)(adopting Brunner test). To establish that
20 excepting a student loan debt from the discharge would impose an
21 undue hardship, a debtor must prove three things: "(1) that she
22 cannot maintain, based on current income and expenses, a
23 "minimal" standard of living for herself and her dependents if

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25 rather than a procedural rule. It noted that Rule 4007 "cannot
26 create an exception to the Bankruptcy Code, and cannot abridge,
enlarge, or modify any substantive right." Beaty, 306 F.3d at
924 (internal quotations omitted).

2 forced to repay the loans; (2) that additional circumstances
3 exist indicating that this state of affairs is likely to persist
4 for a significant portion of the repayment period of the student
5 loans; and (3) that the debtor has made good faith efforts to
6 repay the loans." Saxman, 325 F.3d at 1172.

7 Unless the repayment period is close to completion at the
8 time a Chapter 13 discharge is due, the second prong of the
9 Brunner test always requires the Court to speculate as to the
10 debtor's future financial prospects. Granted, the Court may be
11 required to speculate to a greater degree if it makes the
12 determination a few years prior to the debtor's discharge.
13 However, the Court does not view this difference of degree as of
14 constitutional significance.

15 The majority of circuit courts that have addressed this
16 issue have disagreed with Taylor. See In re Bender, 368 F.3d
17 846 (8th Cir. 2004); In re Rubarts, 896 F.2d 107 (5th Cir.
18 1990); In re Hochman, 853 F.2d 1547 (11th Cir. 1988).⁴ These
19 courts concluded that the express language of § 1328(a) requires
20 the determination to be made at the time of discharge. One
21 lower court observed that, while FRBP 4007(b) permits the
22 dischargeability action to be *filed* at any time, it does not
23 provide that the issue of dischargeability may be *determined* at

24
25 ⁴See also In re Pair, 269 B.R. 719 (Bankr. N.D. Ala. 2001);
26 In re Soler, 250 B.R. 694 (Bankr. D. Minn. 2000); In re
Raisor, 180 B.R. 163 (Bankr. E.D. Tex. 1995).

2 any time. See, e.g., Raisor, 180 B.R. at 165–67. One circuit
3 court has agreed with Taylor. See In re Ekenasi, 325 F.3d 541
4 (4th Cir. 2003).⁵

5 However, with the exception of Craine and Bender, none of
6 these courts addressed the issue from a constitutional
7 standpoint. The Craine court discussed the Article III “case or
8 controversy” requirement and held that an actual controversy existed.
9 See Craine, 206 B.R. at 600–01. The Bender court decided the issue
10 on prudential grounds. Bender, 368 F.3d at 847–48. The Court
11 agrees with Craine that the issue of the dischargeability of a
12 student loan presents a “case and controversy” from a
13 constitutional standpoint as soon as the Chapter 13 case is
14 filed. Thus, the Court concludes that it has subject matter
15 jurisdiction to determine whether a student loan debt should be
16 discharged as an undue hardship prior to the completion of a
17 chapter 13 debtor’s plan payments. ECMC’s motion to dismiss on
18 the grounds of lack of subject matter jurisdiction will be
19 denied.

20 **II. SHOULD COURT EXERCISE ITS DISCRETION TO DELAY DETERMINATION**
21 **OF UNDUE HARDSHIP UNTIL DISCHARGE IS IMMINENT?**

22 As noted above, in order to establish “undue hardship” a
23 debtor must demonstrate that: (1) given her current income and
24 expenses, she cannot maintain a minimal standard of living if

25 ⁵See also In re Strahm, 327 B.R. 319 (Bankr. S.D. Ohio
26 2005); In re Craine, 206 B.R. 598 (Bankr. M.D. Fla. 1997);
In re Goranson, 183 B.R. 52 (Bankr. W.D.N.Y. 1995).

2 required to repay the loans; (2) her inability to repay is
3 likely to persist for a significant portion of the repayment
4 period; and (3) she has made good faith efforts to repay the
5 loan. See In re Pena, 155 F.3d 1108, 1111-12 (9th Cir. 1998)
6 (adopting Brunner test). The debtor has the burden of proving
7 all three prongs by a preponderance of the evidence. See In re
8 Nys, 308 B.R. 436, 441 (Bankr. 9th Cir. 2004).

9 ECMC argues that the Court should wait until Coleman has
10 completed her Chapter 13 plan to determine the dischargeability
11 issue because "it would be difficult, if not impossible, for the
12 Court to adjudicate her undue hardship claim until she receives
13 her discharge." Specifically, ECMC argues that, while the
14 second prong of the Brunner test always requires some
15 speculation regarding the debtor's future circumstances, a
16 greater degree of speculation would be required here because the
17 future, that is, the time period following discharge, is further
18 off. Further, ECMC argues, a court does not normally have to
19 speculate as to the first prong because it can use the debtor's
20 current income at the time of plan completion. Here, however,
21 the Court would be required to speculate as to Coleman's current
22 income when Coleman completes the plan in 2009.

23 ECMC also suggests that the third prong of the Brunner test
24 cannot be met because Coleman has demonstrated a lack of good
25 faith by attempting to obtain an undue hardship determination
26 while her Chapter 13 case is pending. Finally, ECMC argues that

2 a trial at this time is a waste of judicial resources because
3 Coleman may not complete her Chapter 13 plan. ECMC contends
4 that Coleman will not be prejudiced by waiting for a
5 determination until her discharge is imminent because that
6 determination will not have any effect on her Chapter 13 plan.

7 At least one court has characterized the above arguments as
8 "more prudential, rather than jurisprudential." See Strahm, 327
9 B.R. at 321. The Taylor court did not discuss these
10 "prudential" arguments. However, courts that have followed
11 Taylor have discussed and rejected them. See Ekenasi, 325 F.3d
12 541; Strahm, 327 B.R. 319; Goranson, 183 B.R. 52.

13 In Goranson, the court concluded that a debtor "may select
14 any snapshot date during or after [the case] as the date on
15 which to prove undue hardship." Goranson, 183 B.R. at 56. The
16 court acknowledged that it may be a challenge to apply the
17 Brunner test to the debtor's chosen "snapshot date," but "[t]o
18 do otherwise would be to penalize a debtor for electing Chapter
19 13 over Chapter 7." Id.

20 The Fourth Circuit, in Ekenasi, has also permitted a debtor
21 to choose the "snapshot date" for determining undue hardship on
22 the grounds that the "text of the pertinent statute does not
23 prohibit such an advance determination." Ekenasi, 325 F.3d at
24 547. The court, however, provided the following caution:

25 [I]t will be most difficult for a debtor, to
26 prove with the requisite certainty that the
repayment of his student loan obligations

2 will be an "undue burden" on him during a
3 significant portion of the repayment period
4 of the student loans when the debtor chooses
to make that claim far in advance of the
expected completion date of his plan.

5 Id. The Strahm court adopted the reasoning of the Ekenasi court
6 in rejecting arguments identical to those here. See Strahm, 327
7 B.R. at 325.

8 Moreover, two published decisions from courts within the
9 Ninth Circuit have applied the Brunner test in Chapter 13 cases
10 where the debtors had not yet completed payments under the plan.
11 See In re Cota, 298 B.R. 408 (Bankr. D. Ariz. 2003); In re
12 Ritchie, 254 B.R. 913 (Bankr. D. Idaho 2000). Both courts, when
13 determining the first prong, looked at evidence of the debtor's
14 *current* income and expenses at the time of trial. See Cota, 298
15 B.R. at 414-15; Ritchie, 254 B.R. at 918. This is consistent
16 with the language of the first prong, which requires a court,
17 when applying the test, to consider "current income and
18 expenses," see Pena, 155 F.3d at 1111. It is contrary to ECMC's
19 argument that a court is required to look at a debtor's income
20 at the date of discharge under the first prong. Further, this
21 approach mirrors that of those courts that permit the debtor to
22 choose the "snapshot date" for the dischargeability
23 determination. See Ekenasi, 325 F.3d at 546-47; Goranson, 183
24 B.R. at 56.

25 With respect to the second prong, as noted above,
26 consideration of additional circumstances indicating whether the

2 debtor's state of affairs is likely to persist for a significant
3 portion of the repayment period "always requires the court to
4 consider a future time period where certainty is never
5 available, whether evidence in regard to this factor is
6 presented in the early stages, or the later stages, of a chapter
7 13 case." Strahm, 327 B.R. at 322. In Cota, for example, while
8 the court lamented that it did "not have a crystal ball to
9 assist in determining what will happen in the future," the court
10 nevertheless analyzed the second prong over a twenty-five year
11 repayment period. Cota, 298 B.R. at 417-18. The court looked
12 to evidence presented at trial regarding the debtor's current
13 physical condition, education, and number and ages of his
14 children in determining the debtor's future ability to maintain
15 a minimal standard of living. See id.

16 In accord with ECMC's position, however, are Bender, 368
17 F.3d 846; Pair, 269 B.R. 719; Soler, 250 B.R. 694; and Raisor,
18 180 B.R. 163. The Eighth Circuit points out, for example, that
19 "the factual question is whether there is undue hardship at the
20 time of discharge, not whether there is undue hardship at the
21 time that a § 523(a)(8) proceeding is commenced." Bender, 368
22 F.3d at 848. For this reason, it concludes, the proceeding
23 should take place relatively close to the date of discharge so
24 the court can examine the debtor's actual circumstances at that
25 time. Id.

26

2 ECMC also quotes United States v. Lee, 89 B.R. 250 (N.D.
3 Ga. 1987), aff'd, United States v. Hochman (In re Hochman), 853
4 F.2d 1547 (11th Cir. 1988), as stating, "No debt is
5 dischargeable under § 1328(a) until successful completion of all
6 payments under a Chapter 13 plan." Lee, 89 B.R. at 257. In
7 Lee, the issue was the timeliness of the proceeding to determine
8 dischargeability of a health education assistance loan. Id. at
9 251. Title 42 U.S.C. § 294f(g) imposed requirements beyond
10 § 523(a)(8) for discharge of a health education loan, and the
11 debtors there failed to satisfy the requirements of 42 U.S.C.
12 § 294f(g). In dicta, however, the court acknowledged that "[i]f
13 the debt the dischargeability of which is at issue [] is
14 arguably one of two exceptions provided for in § 1328(a) . . .
15 then it would be appropriate for a court to determine, before
16 completion of the Chapter 13 plan, whether that debt is
17 nondischargeable under § 1328(a)." Id. at 257.

18 The Soler court responded to the Lee court's assertion.
19 Soler, 250 B.R. at 696. The court there pointed out that, at
20 the time of Lee, a debt under § 523(a)(8) was not an exception
21 to Chapter 13 discharge but was added as an exception in 1990.
22 Id. At the time of Lee, the only exceptions to discharge under
23 § 1328(a) were for certain long term debts and alimony and child
24 support. See Lee, 89 B.R. at 257. The Soler court concluded
25 that the "nature of the exception of student loan debt from
26 discharge" distinguished it from the two types of exceptions

2 that existed at the time of Lee. See Soler, 250 B.R. at 696.
3 Specifically, the Soler court, somewhat circularly, relied on
4 "the fact that dischargeability cannot be determined absent a
5 discharge that has been granted or is imminent." Id. The court
6 clarified that whether a debtor suffers from undue hardship
7 "depends on the debtor's situation at the time of discharge."
8 Id.

9 However, the Bender and Soler courts appear to be adding a
10 judicial gloss to § 523(a)(8) by defining the issue as whether
11 undue hardship exists *at the time of discharge*. The issue
12 defined by the statute does not include the italicized words.
13 There is no express statutory prohibition on determining this
14 issue before the discharge is granted.

15 As the Goranson court pointed out, to require the
16 dischargeability determination to be postponed until the
17 debtor's Chapter 13 plan payments are completed would make
18 Chapter 13 less attractive to debtors with student loans than
19 Chapter 7 where the determination could be made promptly. This
20 would be contrary to congressional intent to encourage debtors
21 to choose Chapter 13 over Chapter 7. See Goranson, 183 B.R. at
22 56. Further, a determination at a relatively early stage of the
23 bankruptcy case may be of significant import to a Chapter 13
24 debtor. As the Strahm court noted, "if the Debtor prevails, in
25 whole, or in part, a number of options may be available to the
26 Debtor, which may impact future collective proceedings in the

2 chapter 13 case." Strahm, 327 B.R. at 325. If the debtor does
3 not prevail, early resolution of the issue may enable a debtor
4 to modify its plan to propose payment to the creditors, and
5 thereby prevent the accrual of additional interest and
6 penalties. See Craine, 206 B.R. at 601.

7 Coleman understandably would like to know before she makes
8 plan payments for five years whether her remaining student loan
9 debt will be discharged upon a successful completion of her
10 plan. Given the potential impact of the dischargeability
11 determination at this stage in the proceedings, the Court does
12 not believe that such a determination would be a waste of
13 judicial resources. Therefore, the Court concludes that it
14 should exercise its discretion to consider the issue at this
15 time and will deny ECMC's motion to dismiss on prudential
16 grounds as well.

17 **CONCLUSION**

18 ECMC's motion to dismiss Coleman's complaint will be
19 denied. Counsel for Coleman is directed to submit a proposed
20 form of order in accordance with this decision.

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