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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

5	In re:)	BAP No.	CC-16-1298-FLKu
)		
6	MELISSA HODA KASHIKAR,)	Bk. No.	2:14-bk-23848-ER
)		
7	Debtor.)	Adv. No.	2:15-ap-01184-ER
)		
8	_____)		
)		
9	MELISSA HODA KASHIKAR,)		
)		
10	Appellant,)		
)		
11	v.)	O P I N I O N	
)		
12	TURNSTILE CAPITAL MANAGEMENT,)		
	LLC, assignee from)		
13	DB Structured Products, Inc.,)		
)		
14	Appellee.)		
)		

Submitted without oral argument
on March 23, 2017

Filed - April 28, 2017

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Ernest M. Robles, Bankruptcy Judge, Presiding

Appearances: M. Jonathan Hayes on the brief for appellant
Melissa Hoda Kashikar; Scott S. Weltman on the
brief for appellee Turnstile Capital Management,
LLC.

Before: FARIS, LAFFERTY, and KURTZ, Bankruptcy Judges.

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1 FARIS, Bankruptcy Judge:
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3 **INTRODUCTION**

4 Section 523(a) (8) of the Bankruptcy Code¹ provides that
5 several categories of educational indebtedness are not
6 dischargeable in bankruptcy unless the debtor proves that paying
7 the debt would impose undue hardship on the debtor or her
8 dependents. Chapter 7 debtor Melissa Hoda Kashikar argues that
9 her educational debt owed to Appellee Turnstile Capital
10 Management LLC ("Turnstile") is not covered by § 523(a) (8). The
11 bankruptcy court declined to consider her argument concerning one
12 of the categories of debt and held that her debt was included in
13 the category of an "educational benefit" under
14 § 523(a) (8) (A) (ii). The court erred on both counts.
15 Accordingly, we REVERSE IN PART the court's ruling as to
16 § 523(A) (8) (A) (ii), VACATE the court's ruling as to
17 § 523(a) (8) (A) (i), and REMAND this case to the bankruptcy court.

18 **FACTUAL BACKGROUND**

19 Ms. Kashikar attended St. Matthew's University School of
20 Medicine ("SMU") in Grand Cayman, Cayman Islands. In order to
21 fund her education and pay for the costs of attending SMU,
22 Ms. Kashikar signed an application and promissory note with
23
24

25 _____
26 ¹ Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure, and all "Civil Rule" references are to the Federal
Rules of Civil Procedure.

1 StudentLoan Xpress. Turnstile's predecessor in interest²
2 directly disbursed the funds to SMU.

3 There is no dispute that Ms. Kashikar attended classes at
4 SMU for the purposes of obtaining a degree and learning about
5 medicine. However, Ms. Kashikar did not complete her education
6 at SMU. She returned to the United States, but could not
7 transfer any of her SMU credits.

8 On July 21, 2014, Ms. Kashikar filed her chapter 7 petition.
9 She scheduled her student loan on Schedule F in the amount of
10 \$73,804. She received a standard discharge on or around
11 November 10, 2014.

12 On April 14, 2015, Ms. Kashikar filed an adversary complaint
13 seeking a determination that the loan (the balance of which had
14 grown to \$74,968.74) was discharged under § 523(a)(8). The
15 complaint is very brief. After identifying the parties and
16 describing the loan, it alleges that:

17 Since the purpose of the loan(s) in question were
18 not for an, "eligible education institution" as defined
19 by 26 U.S.C. 221(d)(1) and (2), the subject loan(s) are
20 not, "qualified education loan(s)" under 11 U.S.C.
21 523(a)(8)(B), and therefore not subject to the student
22 loan general exception to discharge found at 11 U.S.C.
23 523(a)(8). Accordingly, the loan(s) alleged in
24 Paragraph 4 were discharged on November 12, 2014, when
25 Plaintiff/debtor obtained her discharge in the
26 underlying bankruptcy case.

27 In response to this paragraph of the complaint, Turnstile denied

28 ² StudentLoan Xpress was the original lender. Deutsche Bank
Americas Holding Corp. acquired the promissory note from
StudentLoan Xpress. Subsequently, DB Structured Products, Inc.
purchased the promissory note. Turnstile purchased the
promissory note from DB Structured Products, Inc. For ease of
reference, we will collectively refer to these creditors as
"Turnstile."

1 that the loan was discharged.

2 The parties entered into a Pretrial Stipulation for Claims
3 for Relief ("Pretrial Stipulation"). The parties agreed that
4 certain facts were admitted and required no proof, including:

5 SMU has never been, and is not now, an "eligible
6 educational institution" as that term is defined under
7 section 481 of the Higher Education Act of 1965 (20
8 U.S.C. 1088), and has never been, and is not now,
9 eligible to participate in a program under title IV of
10 the Higher Education Act.

11 The parties further stipulated that no issues of fact remained to
12 be litigated and that:

13 The following issues of law, and no others, remain to
14 be litigated:

15 Whether or not Plaintiff's student loans were
16 excepted from discharge under 11 U.S.C.
17 § 523(a)(8)?

18 **Defendant's Defenses:**

19 Can Plaintiff discharge her Student Loans solely
20 under 11 U.S.C. § 523(a)(8)(B), as plead [sic] in
21 the complaint?

22 The Pretrial Stipulation provided that "this stipulation shall
23 supersede the pleadings and govern the course of trial in this
24 adversary proceeding, unless modified to prevent manifest
25 injustice."

26 After reviewing the Pretrial Stipulation, the bankruptcy
27 court determined that there were no disputed facts to be
28 litigated and directed the parties to submit briefs explaining
why each party was entitled to judgment as a matter of law. The
court noted that it treated the Pretrial Stipulation as a
pretrial order and said that "the Pretrial Stipulation supersedes
the pleadings and governs this action."

1 On July 22, 2016, Ms. Kashikar filed her motion for judgment
2 as a matter of law ("Motion").³ She contended that her loan did
3 not fall within §§ 523(a)(8)(A)(i), (A)(ii), or (B). Regarding
4 subsection (A)(i), she argued that SMU was not an eligible
5 "governmental unit" as contemplated by the Bankruptcy Code.
6 Regarding subsection (A)(ii), she said that the statute covers
7 only "funds received" directly by the debtor. Because she did
8 not "actually" or "directly" receive any of the loan proceeds
9 (which were paid directly to SMU), she argued that subsection
10 (A)(ii) was not applicable. Regarding subsection (B), she argued
11 that Turnstile conceded that her loan was not a "qualified
12 educational loan" as defined by the Internal Revenue Code.

13 In response, Turnstile contended that Ms. Kashikar's
14 complaint was deficient under Civil Rule 8 and the pleading
15 standards of Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007),
16 and Ashcroft v. Iqbal, 556 U.S. 662 (2009), and only offered an
17 unsupported legal conclusion concerning § 523(a)(8)(B). It also
18 argued that she did not plead any theory relating to
19 § 523(a)(8)(A) in her complaint and that it was prejudicial for
20 her to raise that argument for the first time in her Motion. In
21 the alternative, it argued that she received an "educational
22 benefit" under § 523(a)(8)(A)(ii) and that the Ninth Circuit has
23 commanded that the statute is to be interpreted broadly.

24 The bankruptcy court issued its memorandum decision on
25 September 2, 2016. It considered whether Ms. Kashikar's loan

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27 ³ The bankruptcy court noted that the Motion should have
28 been styled as a motion for judgment on partial findings under
Civil Rule 52.

1 fell into any of the categories enumerated in § 523(a) (8).

2 The court said that it would not decide whether
3 § 523(a) (8) (A) (i) covered the loan because the complaint only
4 mentioned § 523(a) (8) (B) and Turnstile had no opportunity to
5 address or produce evidence regarding subsection (A) (i).

6 However, the court decided to consider § 523(a) (8) (A) (ii)
7 because the facts concerning that subsection were undisputed and
8 Turnstile had an opportunity to fully brief the issues (in
9 connection with subsection (B)). The court extensively examined
10 the conflicting case law and sided with the cases adopting an
11 "expansive reading" of the phrase "educational benefit" in
12 § 523(a) (8) (A) (ii). It held that "a tuition payment made by a
13 third-party lender to a school on behalf of a debtor creates 'an
14 obligation to repay funds received as an educational benefit.'"'
15 Accordingly, the court concluded that Ms. Kashikar's loan was
16 excepted from discharge.⁴

17 The bankruptcy court entered its judgment in favor of
18 Turnstile, and Ms. Kashikar timely appealed.

19 JURISDICTION

20 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
21 §§ 1334 and 157(b) (2) (I). We have jurisdiction under 28 U.S.C.
22 § 158.

23 ISSUES

24 (1) Whether the bankruptcy court erred in holding that
25 Ms. Kashikar's student loan was covered by § 523(a) (8) (A) (ii).

26 _____
27 ⁴ Regarding § 523(a) (8) (B), the court stated that the
28 parties agreed that the loan was not a "qualified educational
loan" under that subsection.

1 (2) Whether the bankruptcy court erred in declining to
2 decide whether Ms. Kashikar's loan was covered by
3 § 523(a)(8)(A)(i).

4 STANDARD OF REVIEW

5 "We review de novo the bankruptcy court's application of the
6 legal standard in determining whether a student loan debt is
7 dischargeable." Educ. Credit Mgmt. Corp. v. Jorgensen (In re
8 Jorgensen), 479 B.R. 79, 85 (9th Cir. BAP 2012) (citing Rifino v.
9 United States (In re Rifino), 245 F.3d 1083, 1087 (9th Cir.
10 2001)). "To the extent the bankruptcy court interpreted
11 statutory law, we review the issues of law de novo." Thorson v.
12 Cal. Student Aid Comm'n (In re Thorson), 195 B.R. 101, 104 (9th
13 Cir. BAP 1996).

14 De novo review requires that we consider a matter anew, as
15 if no decision had been rendered previously. United States v.
16 Silverman, 861 F.2d 571, 576 (9th Cir. 1988).

17 DISCUSSION

18 Section 523(a)(8) provides that certain kinds of educational
19 debts are not discharged in bankruptcy unless repayment of the
20 debt would result in undue hardship. This section applies to:

21 (A)(i) an educational benefit overpayment or loan made,
22 insured, or guaranteed by a governmental unit, or made
23 under any program funded in whole or in part by a
24 governmental unit or nonprofit institution; or

24 (ii) an obligation to repay funds received as an
25 educational benefit, scholarship, or stipend; or

25 (B) any other educational loan that is a qualified
26 education loan, as defined in section 221(d)(1) of the
27 Internal Revenue Code of 1986, incurred by a debtor who
28 is an individual.

§ 523(a)(8).

1 We have previously said that § 523(a)(8) excepts four types
2 of educational claims from discharge:

3 (1) loans made, insured, or guaranteed by a
4 governmental unit; (2) loans made under any program
5 partially or fully funded by a governmental unit or
6 nonprofit institution; (3) claims for funds received as
an educational benefit, scholarship, or stipend; and
7 (4) any "qualified educational loan" as that term is
defined in the Internal Revenue Code.

8 Institute of Imaginal Studies v. Christoff (In re Christoff), 527
9 B.R. 624, 632 (9th Cir. BAP 2015) (quoting Benson v. Corbin (In
re Corbin), 506 B.R. 287, 291 (Bankr. W.D. Wash. 2014)).

10 Ms. Kashikar did not plead or prove that repayment of the
11 debt would subject her or a dependent to undue hardship. The
12 only issue is whether § 523(a)(8) covers her debt to Turnstile.

13 **A. The bankruptcy court erred in holding that Ms. Kashikar's**
14 **loan is excepted from discharge under § 523(a)(8)(A)(ii).**

15 The bankruptcy court held that Ms. Kashikar's student loan
16 debt was nondischargeable under § 523(a)(8)(A) because the "funds
17 received" constituted an "educational benefit." While we agree
18 that the "funds received" requirement was met, we hold that her
19 student loan was not an "educational benefit" within the meaning
20 of the statute.

21 **1. Ms. Kashikar's loan constitutes "funds received."**

22 Ms. Kashikar contends that, because the loan proceeds were
23 disbursed directly to SMU and not to her, her student loan is not
24 included in § 523(a)(8)(A)(ii). We disagree.

25 Section 523(a)(8)(A)(ii) excepts from discharge "an
26 obligation to repay **funds received** as an educational benefit
27" (Emphasis added.) The statute does not specify who
28 must receive the funds.

1 We recently construed this phrase in Christoff. In that
2 case, the debtor applied for admission to a for-profit private
3 university. 527 B.R. at 626. The university offered her \$6,000
4 of financial aid in the form of a tuition credit; she did not
5 receive any money from the university. She signed (1) an
6 agreement that the university was "financing" \$6,000 of her
7 tuition and (2) a promissory note in favor of the university in
8 which she promised to repay the financial aid in installments
9 beginning when she either graduated or withdrew from the
10 university. Id. The following year, she executed a similar
11 agreement and promissory note for \$5,000. Id.

12 The debtor withdrew from the university without receiving a
13 degree and defaulted on her payments. Id. She filed a chapter 7
14 bankruptcy petition, and the university commenced an adversary
15 proceeding seeking a determination that the debt was excepted
16 from discharge under § 523(a)(8). Id. at 626-27. The university
17 argued that the debt was excepted under § 523(a)(8)(A)(ii); the
18 bankruptcy court disagreed, holding that the debt "did not flow
19 from 'funds received' either by her as the student or by [the
20 university] from any other source" and was thus outside the scope
21 of § 523(a)(8)(A)(ii). Id. at 627. It said that the university
22 "simply agreed to be paid the tuition later It did not
23 receive any funds, such as from a third party financing source."
24 Id.

25 The university appealed, and we affirmed. Relying on the
26 plain language of the statute, we said that "[t]he phrase 'funds
27 received' has been interpreted by the BAP, in an opinion which
28 was as [sic] adopted by the Ninth Circuit as its own, to require

1 'that a debtor **receive actual funds** in order to obtain a
2 nondischargeable benefit.'" Id. at 633-34 (quoting President of
3 Ohio Univ. v. Hawkins (In re Hawkins), 317 B.R. 104, 112 (9th
4 Cir. BAP 2004), aff'd, 469 F.3d 1316 (9th Cir. 2006)) (emphasis
5 in original). We thus held that the debtor did not receive any
6 funds, and her debt was not excepted from discharge under
7 § 523(a)(8)(A)(ii).

8 Ms. Kashikar argues that her case is similar to Christoff.
9 She contends that, because the loan proceeds were disbursed
10 directly to SMU, she did not "receive" any "funds." However,
11 Christoff is distinguishable in this respect. In Christoff, the
12 university extended the debtor educational credits. Neither she
13 nor the university received any funds to pay for her education;
14 rather, the university just agreed to be paid at a later date.
15 See id. at 627. In the present case, however, Turnstile, a third
16 party, did disburse funds to SMU. In such a situation, the
17 disbursed funds were "funds received."

18 We drew this very distinction in Christoff. Citing our
19 previous ruling in Hawkins, we said that § 523(a)(8)(A)(ii)
20 "includes a condition, distinct from those in the other
21 subsections of 523(a)(8), that must be fulfilled. . . . [T]his
22 unique requirement, that 'funds [be] received' by the debtor,
23 mandates that cash be advanced to **or on behalf of the debtor.**"
24 Id. at 634 n.9 (emphasis added). Indeed, in Hawkins, we noted
25 that "an educational loan need not include an actual transfer of
26 money or some form of cash equivalent to Debtor" 317
27 B.R. at 110. In other words, the statute does not require that
28 the lender pay funds directly to the borrower; the funds may be

1 paid to the educational institution on behalf of the borrower.
2 See also Rizer v. Acapita Educ. Fin. Corp. (In re Rizer), 553
3 B.R. 144, 150 (Bankr. D. Alaska 2016) (“[T]he restriction to only
4 money paid directly to the debtor does not appear in
5 § 523(a)(8)(A)(ii). Money paid to the education institution for
6 a debtor’s educational benefit which the debtor is required to
7 repay to the lender also qualifies.”).

8 Accordingly, the bankruptcy court did not err in holding
9 that “funds received” includes funds received by SMU on behalf of
10 Ms. Kashikar.

11 **2. Ms. Kashikar’s loan is not an “educational benefit.”**

12 The bankruptcy court ruled that Ms. Kashikar’s student loan
13 is an “educational benefit” contemplated by § 523(a)(8)(A)(ii).
14 The court’s expansive reading of the statute is not supported by
15 relevant case law or the statute itself. Accordingly, we hold
16 that Ms. Kashikar’s loan from Turnstile was not an “educational
17 benefit” under § 523(a)(8)(A)(ii).

18 Christoff is instructive. In that case, we held that an
19 “obligation to repay funds received as an educational benefit” is
20 different from an “educational overpayment or loan” or a
21 “qualified educational loan.” We stated:

22 This result [that the student loan debt was
23 dischargeable because it did not constitute “funds
24 received”] is bolstered by the changes made to
25 § 523(a)(8) by Congress in BAPCPA. As noted above, the
26 exact wording used in amended § 523(a)(8)(A)(ii) was
27 formerly a part of § 523(a)(8). However, BAPCPA set
28 off the “obligation to repay funds received” language
from the other provisions of § 523(a)(8) in a new
subsection. We agree with the bankruptcy court, that
in restructuring the discharge exception in this
fashion, Congress created “a separate category delinked
from the phrases ‘educational benefit or loan’ in
§ 523(a)(8)(A)(i) and ‘any other educational loan’ in

1 § 523(a)(8)(B).” Put another way, “new”
2 § 523(a)(8)(A)(ii), now standing alone, excepts from
3 discharge only those debts that arise from “an
4 obligation to repay funds received as an educational
5 benefit,” and must therefore be read as a separate
6 exception to discharge as compared to that provided in
7 § 523(a)(8)(A)(i) for a debt for an “educational
8 overpayment or loan” made by a governmental unit or
9 nonprofit institution or, in § 523(a)(8)(B), for a
10 “qualified education loan.”

11 In re Christoff, 527 B.R. at 634 (emphasis added) (citation
12 omitted).

13 We further rejected the lender’s argument that “loan” can be
14 read into § 523(a)(8)(A)(ii):

15 [The university’s] arguments conflating “loan” as
16 used in § 523(a)(8)(A)(i) and (a)(8)(B) . . . with “an
17 obligation to repay funds received” as provided in
18 § 523(a)(8)(A)(ii) are unconvincing. According to [the
19 university], “[t]here is no reason why the word ‘funds’
20 should not be interpreted in the same light that
21 ‘loans’ has been interpreted in prior cases in the
22 Ninth Circuit” In effect, [the university]
23 argues that we should read § 523(a)(8)(A)(ii) to say
24 “loans received” as opposed to “funds received.” But
25 this we must not do. . . . **Instead, we must presume
26 that, in organizing the provisions of § 523(a)(8) as it
27 did in BAPCPA, Congress intended each subsection to
28 have a distinct function and to target different kinds
of debts.**

19 Id. (citations omitted) (emphases added). “[Section]
20 523(a)(8)(A)(ii) is not a ‘catch-all’ provision designed to
21 include every type of credit transaction that bestows an
22 educational benefit on a debtor.” Id. at 634 n.9.

23 Therefore, we hold that a “loan” is not an “educational
24 benefit” within § 523(a)(8)(A)(ii).

25 **B. The bankruptcy court erroneously declined to rule on
26 § 523(a)(8)(A)(i).**

27 The bankruptcy court held that it would not rule on
28 dischargeability under § 523(a)(8)(A)(i) because Ms. Kashikar did

1 not properly raise it in her complaint. We reluctantly conclude
2 that the bankruptcy court should revisit the issue, although the
3 problem stemmed from an ill-conceived complaint and a poorly
4 drafted Pretrial Stipulation.

5 As the bankruptcy court accurately noted, the complaint
6 alleged that the loan was discharged under § 523(a)(8) because it
7 is not of the kind described in § 523(a)(8)(B). The inexplicable
8 defect of this allegation is that the three subsections of
9 § 523(a)(8) are stated in the disjunctive; therefore, if the loan
10 is covered by any of the three subsections, it is not discharged
11 (absent undue hardship). A determination that only one of the
12 three subsections does not apply to a particular loan is useless,
13 because if either of the other two subsections applies, the loan
14 is not dischargeable (again, unless the debtor proves undue
15 hardship).

16 Ms. Kashikar attempted to clarify matters in the Pretrial
17 Stipulation, where she said that the issue for decision was
18 whether the loan was dischargeable under § 523(a)(8), without
19 identifying any particular subsection. At this point, Turnstile
20 muddied the waters by (1) inserting a defense contending that
21 only § 523(a)(8)(B) was at issue because the complaint only
22 mentioned that subsection; and (2) arguing that the complaint did
23 not adequately allege claims under the other subsections. This
24 argument ignored the point that the Pretrial Stipulation, by its
25 terms, superseded the complaint (and therefore cured the alleged
26 deficiency in the complaint).

27 The bankruptcy court attempted to straighten out this
28 confusion by considering Ms. Kashikar's arguments under

1 § 523(a)(8)(A)(ii), but not under § 523(a)(8)(A)(i). This was
2 error. The Pretrial Stipulation did not limit the issues to any
3 of the subsections of § 523(a)(8). Turnstile's attempt to
4 preserve its argument about the adequacy of the complaint, and
5 its contention of prejudice, are unavailing because the Pretrial
6 Stipulation superseded the complaint. Therefore, we must remand.

7 We remind the parties of two points.

8 First, once the question is put at issue by an appropriate
9 party, "[u]nder § 523(a)(8), the lender has the initial burden to
10 establish the existence of the debt and that the debt is an
11 educational loan within the statute's parameters. . . . The
12 burden then shifts to the debtor to prove [undue hardship] by a
13 preponderance of the evidence." Roth v. Educ. Credit Mgmt. Corp.
14 (In re Roth), 490 B.R. 908, 916-17 (9th Cir. BAP 2013) (citations
15 omitted); see Shells v. U.S. Dep't of Educ. (In re Shells), 530
16 B.R. 758, 763 (Bankr. E.D. Cal. 2015); Scott v. U.S. Dep't of
17 Educ. (In re Scott), 417 B.R. 623, 629 (Bankr. W.D. Wash. 2009).
18 Therefore, Turnstile will bear the burden of proving that
19 § 523(a)(8) applied to the loan.

20 Second, documents included in the excerpt of record state
21 that the program which provided Ms. Kashikar's loan was funded in
22 whole or in part by a nonprofit corporation. If this is true, it
23 means that § 523(a)(8)(A)(i) covers the loan and that
24 Ms. Kashikar's loan is not dischargeable. But Ms. Kashikar filed
25 a motion in limine to exclude those documents from evidence at
26 trial; the court did not rule on that question because it held
27 that the complaint did not adequately invoke § 523(a)(8)(A)(i).
28 We express no opinion concerning the admissibility of those

1 documents or any other issues bearing on § 523(a)(8)(A)(i).

2 Accordingly, we vacate the court's ruling regarding
3 § 523(a)(8)(A)(i) and remand this matter to the bankruptcy court
4 to consider whether Ms. Kashikar's loan is covered by that
5 subsection.

6 **CONCLUSION**

7 For the reasons set forth above, the bankruptcy court erred
8 in holding that Ms. Kashikar's debt was an "educational benefit"
9 excepted from discharge under § 523(a)(8)(A)(ii) and declining to
10 rule on the § 523(a)(8)(A)(i) issue. Accordingly, we REVERSE IN
11 PART the court's judgment as to § 523(a)(8)(A)(ii), VACATE the
12 court's judgment as to § 523(a)(8)(A)(i), and REMAND this case to
13 the bankruptcy court so that it can determine whether
14 § 523(a)(8)(A)(i) applies.