

**United States Bankruptcy Court  
District of New Mexico**

**Document Verification**

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**Case Number:** 00-01247  
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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW MEXICO

In re:

KATHERINE P. LE BLANC,  
Debtor.

No. 7-00-14675 SA

KATHERINE P. LE BLANC,  
Plaintiff,

v.

Adv. No. 00-1247 S

KEY CORP TRUST, et al.,  
Defendants.

**MEMORANDUM OPINION and ORDER GRANTING  
MICHIGAN HIGHER EDUCATION ASSISTANCE  
AUTHORITY'S MOTION TO DISMISS  
-AND-  
DENYING MOTION FOR SUMMARY JUDGMENT AS MOOT**

This matter came before the Court to consider the Defendant Michigan Higher Education Assistance Authority's Motion to Dismiss and Motion for Summary Judgment. For the reasons set forth below, the Motion to Dismiss will be granted, and the Motion for Summary Judgment will be denied as moot.

In Innes v. Kansas State University (In re Innes), 184 F.3d 1275 (10<sup>th</sup> Cir. 1999) the Court of Appeals for the Tenth Circuit addressed an 11<sup>th</sup> Amendment challenge to a student loan dischargeability case. It found an "overwhelming implication" in the record, including the Kansas state statute, the contract with the federal government, and the federal regulation, that the state had waived its 11<sup>th</sup> Amendment immunity by electing to participate in the federally funded

student loan program. Id. at 1282-83. Basically, the Court relied on the responsibilities and duties set forth in 34 C.F.R. § 674.49 to find that the state consented to perform certain actions in bankruptcy court. Id. at 1283.

After the Innes decision, 34 C.F.R. § 674.49(c) was amended to give institutions the option of "asserting any defense consistent with its status under applicable law to avoid discharge of the loan."

Recently, some State institutions have responded to undue hardship claims by asserting that sovereign immunity barred relief on these claims in bankruptcy proceedings. We intend the proposed amendment to make clear that every institution must use due diligence to oppose discharge, but that State institutions may do so - if they wish - by asserting sovereign immunity as a defense to an undue hardship complaint. Unfortunately, some courts misconstrue Department regulations to bar State institutions from asserting sovereign immunity in these circumstances. We intend this amendment as an authoritative explanation of the meaning of the Federal Perkins Loan regulations and Program Participation Agreement on this due diligence obligation.

64 Fed. Reg. 58298, 58307 (Oct. 28, 1999). It therefore seems that Innes may not have continuing vitality.

Bankruptcy Code section 106 deals with waiver of sovereign immunity. To the extent section 106 is based on Article I of the Constitution, it is probably ineffective to waive a state's sovereign immunity. Board of Trustees of the University of Alabama v. Garrett, \_\_ U.S. \_\_, 121 S.Ct. 955,

962 (2001) ("Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."); Thompson v. Colorado, \_\_\_ F.3d \_\_\_, 2001 WL 883305 at 3 (10<sup>th</sup> Cir. 2001) ("After Seminole Tribe, [517 U.S. 44 (1996)], only Section Five of the Fourteenth Amendment stands as a recognized source of power by which Congress can abrogate Eleventh Amendment immunity.") Furthermore, Section 106(a) has been declared unconstitutional by the Bankruptcy Appellate Panel for the Tenth Circuit. Straight v. Wyoming Department of Transportation (In re Straight), 248 B.R. 403, 421 (10<sup>th</sup> Cir. B.A.P. 2000).

Neither Michigan or the Michigan Higher Education Authority has filed a proof of claim in the Plaintiff's bankruptcy case. The Court therefore cannot find waiver under § 106(b).

In summary, the Court does not find that Michigan has waived its sovereign immunity in this case. The Court therefore lacks jurisdiction and the adversary proceeding should be dismissed as to defendant Michigan Higher Education Authority.

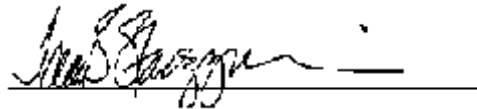
This ruling does not preclude the Debtor from obtaining a discharge of the obligation owed to the Michigan Higher

Education Authority pursuant to 11 U.S.C. §523(a)(8), assuming the Debtor can meet the requirements of the statute. Congress has given the bankruptcy courts exclusive jurisdiction to determine the dischargeability of claims contested under subsections (2), (4), (6) and, in chapter 7 cases, (15) of 11 U.S.C. §523(a). 11 U.S.C. §523(c); compare Brown v. Felsen, 442 U.S. 127, 129-30 (1979) (under the Bankruptcy Act, the dischargeability of specific debts was often determined in state courts). Thus the Debtor can presumably raise a dischargeability defense in any state (or federal) court collection action that the Michigan Higher Education Authority may bring against her, and it may be in addition that she is entitled under Michigan law to bring an action in that state's courts to obtain such a determination. She is thus left with a means to obtain the ruling she seeks in this Court. See State of Texas by and through Board of Regents of the University of Texas System v. Walker, 142 F.3d 813, 822-23 (5<sup>th</sup> Cir. 1998) ("[T]he grant of a bankruptcy discharge does not offend the Eleventh Amendment[, ] although commencement of certain adversary proceedings directly against a state that has not filed a proof of claim in a bankruptcy case would do so-....")

For the reasons set forth above, IT IS ORDERED that the

defendant Michigan Higher Education Authority's Motion to Dismiss is granted.

IT IS FURTHER ORDERED that defendant Michigan Higher Education Authority's Motion for Summary Judgment is denied as moot.



Honorable James S. Starzynski  
United States Bankruptcy Judge

I hereby certify that on October 9, 2001, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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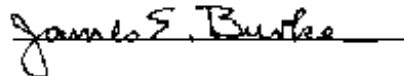
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