South Carolina Law Review

Volume 52
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*
Article 2

Summer 2001

In Re Renshaw: "Extensions of Credit" by an Educational Institution -- Are They Exempt From Discharge under Section 523(a)(8) of the Bankruptcy Code?

F. S. McQueen

IN RE RENSHAW: "EXTENSIONS OF CREDIT" BY AN EDUCATIONAL INSTITUTION—ARE THEY EXEMPT FROM DISCHARGE UNDER SECTION 523(A)(8) OF THE BANKRUPTCY CODE?

I. INTRODUCTION

An important reality of modern education is that many students rely on some form of financial assistance, other than family, to pay for their education.[1] This assistance comes from a variety of sources and usually takes the form of scholarships, grants, employment, or loans.[2] Most of these forms of assistance, especially loans, have important consequences if a student later decides to file for bankruptcy.[3]

Typically, a debtor in bankruptcy is allowed to discharge all debts that existed prior to the date of filing for bankruptcy.[4] Section 523 of the Bankruptcy Code, however, exempts certain debts from discharge; student loans are among the exemptions enumerated.[5] Section 523(a)(8) of the Bankruptcy Code, in its current form, provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
>
> . . . .
>
> (8) for an *educational benefit overpayment or loan* made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless— . . . excepting such debt from discharge

1. *See* DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS, 1999 ch. 3 (2000), *available at* http://nces.ed.gov/pubs2000/digest99/chapter3.html (last visited Feb. 2, 2001) ("For the 1998-1999 academic year, annual prices for undergraduate tuition, room, and board were estimated to be $7,093 at public colleges and $19,410 at private colleges.").

2. *See* EDGAR W. MILLER, FINANCIAL AID: A KEY PART OF COLLEGE, *at* http://www.edunetwork.com/reference/html/fa.keypart.html (last visited Feb. 2, 2001) ("Financial aid comes from four different sources: [t]he federal government, state governments, numerous private sector entities, *and the schools themselves*." (emphasis added)).

3. *See* 11 U.S.C. § 523(a)(8) (1993 & Supp. 2000).

4. *See* Cazenovia Coll. v. Renshaw (*In re* Renshaw), 222 F.3d 82, 86 (2d Cir. 2000).

5. 11 U.S.C. § 523 (1993 & Supp. 2000) (providing a list of all debts that are exempt from discharge).

> under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.[6]

The question then becomes what constitutes a loan for purposes of section 523(a)(8) of the Bankruptcy Code. Specifically, could an *extension of credit* by an educational institution constitute a loan for purposes of this provision? For example, suppose a student enrolls in college for the upcoming semester but is unable to pay his tuition when it is due. Nonetheless, the college agrees to let the student enroll and attend classes in exchange for a promise to pay the tuition at a later date. At the end of the semester, the student fails to pay the tuition and subsequently files for bankruptcy. Is this a loan for purposes of section 523(a)(8) of the Bankruptcy Code?

Federal courts in South Carolina have yet to address the issue of whether debts owed directly to a school for unpaid tuition and other expenses are within the scope of section 523(a)(8) of the Bankruptcy Code. Federal courts in other jurisdictions that have addressed the issue struggle with what the phrase "*educational benefit overpayment or loan*" includes.[7] Some jurisdictions interpret this phrase narrowly to include only those transactions where money actually changes hands, thus excluding extensions of credit.[8] Other jurisdictions, however, interpret this phrase broadly to include any transaction that confers on the debtor an educational benefit, thus including extensions of credit.[9]

The Second Circuit Court of Appeals, in *Cazenovia College v. Renshaw (In re Renshaw)*,[10] rejected both the "actual money must change hands approach" and the "educational benefit approach."[11] The Second Circuit held that in order to constitute a loan for purposes of section 523(a)(8), there must be a prior or contemporaneous contract, whereby one party transfers a defined quantity of money, goods, or services to another, and the other agrees to pay for that sum or items transferred at a later date.[12] The Second Circuit also found that the phrase *"educational benefit overpayment or loan"* refers to a loan or an educational benefit overpayment, as opposed to an educational benefit, an educational overpayment, or an educational loan.[13]

---

6. 11 U.S.C. § 523(a)(8) (1993 & Supp. 2000) (emphasis added).

7. *See* cases cited *infra* notes 8-9.

8. *See* Johnson v. Va. Commonwealth Univ. (*In re* Johnson), 222 B.R. 783, 787 (Bankr. E.D. Va. 1998); N.M. Inst. of Mining and Tech. v. Coole (*In re* Coole), 202 B.R. 518, 519 (Bankr. D.N.M. 1996); Dakota Wesleyan Univ. v. Nelson (*In re* Nelson), 188 B.R. 32, 34 (D.S.D. 1995). *See generally* United Res. Sys., Inc. v. Meinhart (*In re* Meinhart), 211 B.R. 750, 754-55 (Bankr. D. Colo. 1997) (citing *In re Coole* with approval).

9. Stone v. Vanderbilt Univ. (*In re* Stone), 180 B.R. 499, 502 (Bankr. M.D. Tenn. 1995); Stevens Inst. of Tech. v. Joyner (*In re* Joyner), 171 B.R. 762, 763 (Bankr. E.D. Pa. 1994); Najafi v. Cabrini Coll. (*In re* Najafi), 154 B.R. 185, 190 (Bankr. E.D. Pa. 1993).

10. 222 F.3d 82 (2d Cir. 2000).

11. *Id.* at 88.

12. *Id.*

13. *Id.* at 92 (emphasis added).

The purpose of this Comment is to advocate the approach adopted by the Second Circuit in *Renshaw* by illustrating the weaknesses in the other jurisdictions' approaches to this issue. Part II of this Comment reviews both the legislative history and purpose of section 523, as well as the *Renshaw* opinion. Part III discusses other jurisdictions' approaches to this issue and highlights their differences and weaknesses. Part IV discusses the impact other jurisdictions' approaches may have on a bankruptcy court in South Carolina if this issue ever arises.

II. BACKGROUND

A. Legislative History and Purpose of Section 523(a)(8) of the Bankruptcy Code

The fundamental purpose of our bankruptcy laws is to provide a debtor with a fresh start in life.[14] Although our bankruptcy laws seek to provide a debtor with a clean slate by discharging debts, Congress created exceptions to the general rule of dischargeability because sometimes a creditor's interest in recovering full payment of debts outweighs the debtor's interest in a fresh start.[15] Since bankruptcy laws favor dischargeability, it is well-established that exceptions to discharge should be narrowly construed against the creditor and in favor of the debtor.[16] However, courts "can construe the [exceptions] no more narrowly than the language [of the statute] and legislative history allow."[17]

Congress created the Guaranteed Student Loan Program through the adoption of the Higher Education Act of 1965.[18] The program was designed to combat the increased cost of post-high school education by insuring that students lacking financial resources would be able to continue their education.[19] Over the years, the program proved to be successful.[20] However, the program also proved to be subject to abuse by students.[21] Reports emerged about increasing numbers of students discharging their educational obligations on the

14. *See id.* at 86; Andrews Univ. v. Merchant (*In re* Merchant), 958 F.2d 738, 740 (6th Cir. 1992); Johnson v. Va. Commonwealth Univ. (*In re* Johnson), 222 B.R. 783, 785-86 (Bankr. E.D. Va. 1998); Alibatya v. N.Y. Univ. (*In re* Alibatya), 178 B.R. 335, 337 (Bankr. E.D.N.Y. 1995).

15. *See Renshaw*, 222 F.3d at 86; *Merchant*, 958 F.2d at 740; *Alibatya*, 178 B.R. at 337. The Bankruptcy Code provides a list of the different categories of debts that are excepted from discharge. *See* 11 U.S.C. § 523(a)(1)-(a)(12) (1993 & Supp. 2000).

16. *See Renshaw*, 222 F.3d at 86; *In re* Pelkowski, 990 F.2d 737, 744 (3d Cir. 1993); Roosevelt Univ. v. Oldham (*In re* Oldham), 220 B.R. 607, 610 (Bankr. E.D. Ill. 1998); *Alibatya*, 178 B.R. at 337; Seton Hall Univ. v. Van Ess (*In re* Van Ess), 186 B.R. 375, 377-78 (Bankr. D.N.J. 1994).

17. *In re Pelkowski*, 990 F.2d at 745; *Alibatya*, 178 B.R. at 338.

18. Pub. L. No. 89-329, 79 Stat. 1219 (1965).

19. S. REP. NO. 89-673 (1965), *reprinted in* 1965 U.S.C.C.A.N. 4027, 4053.

20. S. REP. NO. 94-882 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4713, 4730-31.

21. *Id.*

eve of lucrative careers.[22] Congress, recognizing this abuse as a threat to the continuance of the educational loan program,[23] adopted section 439A of the Educational Amendments of 1976,[24] which limited the dischargeability of student loans.[25]

Under the Bankruptcy Reform Act of 1978,[26] Congress repealed section 429A of the Educational Code and adopted section 523(a)(8) of the Bankruptcy Code.[27] Section 523(a)(8), in its original form, provided:

> (a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt–
>
> . . . .
>
> (8) to a governmental unit, or a nonprofit institution of higher education, for an educational loan, unless–
>
> (A) such loan first became due before five years before the date of the filing of the petition; or

---

22. H.R. DOC. No. 93-137 pt. 1, at 187 (1973).

23. *Id.* Courts have frequently discussed the "twin policy considerations"—preventing abuse and safeguarding the financial integrity of the system—behind the adoption of this exception. *See In re* Pelkowski, 990 F.2d 737, 743 (3d Cir. 1993) (stating that "Congress enacted 11 U.S.C. § 523(a)(8) in an effort to prevent abuses in and protect the solvency of the educational loan programs"); Andrews Univ. v. Merchant (*In re* Merchant), 958 F.2d 738, 742 (6th Cir. 1992) (stating that "Congress enacted 11 U.S.C. § 523(a)(8) in an effort to prevent abuses in and protect the solvency of the educational loan programs"); Johnson v. Va. Commonwealth Univ. (*In re* Johnson), 222 B.R. 783, 786 n.1 (Bankr. E.D. Va. 1998) (providing that "[c]ourts have focused on the twin policy considerations fundamental to this exclusion: preventing abuse of the educational loan system and bankruptcy process . . .; and safeguarding the financial integrity of the loan system as well as those participating government entities and nonprofit institutions"); United Res. Sys. v. Meinhart (*In re* Meinhart), 211 B.R. 750, 754 (Bankr. D. Colo. 1997) (stating that "the exclusion of educational loans from the discharge provisions was designed to remedy abuses of the educational loan system . . . and to safeguard the financial integrity of educational loan programs"); Seton Hall Univ. v. Van Ess (*In re* Van Ess), 186 B.R. 375, 378 (Bankr. D.N.J. 1994) (providing that "[the] expansion of [§ 523(a)(8)] is completely consistent with the Congressional intent discerned by the Court in Pelkowski 'to prevent abuses in and protect the solvency of the educational loan programs'" (citations omitted)).

24. Pub. L. No. 94-482, § 439A, 90 Stat. 2081, 2141 (1976) (repealed 1978).

25. *Id.* Section 439A(a) provided:

> A debt which is a loan insured or guaranteed under the authority of this part may be released by a discharge in bankruptcy under the Bankruptcy Act only if such discharge is granted after the five-year period (exclusive of any applicable suspension of the repayment period) beginning on the date of commencement of the repayment period of such loan, except that prior to the expiration of that five-year period, such loan may be released only if the court in which the proceeding is pending determines that payment from future income or other wealth will impose an undue hardship on the debtor or his dependents.

Id.

26. Pub. L. No. 95-598, 92 Stat. 2549 (1978).

27. *Id.* at 2590-91.

> (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents. . . .[28]

This section, as adopted under the Bankruptcy Reform Act of 1978, basically paralleled section 429A of the Educational Code.[29]

Section 523(a)(8) has been amended several times since its adoption under the Bankruptcy Reform Act of 1978.[30] Congress first amended section 523(a)(8) in 1979 in order to provide for equal treatment of student loans administered by nonprofit and profit-making institutions of higher education.[31] The amendment struck out the phrase "*to a governmental unit, or a nonprofit institution of higher education, for an educational loan*" and replaced it with the phrase "*for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution of higher education.*"[32] The amendment also changed subparagraph (A) by adding the phrase "*exclusive of any applicable suspension of the repayment period*" after the phrase "*before five years.*"[33] In 1984, Congress expanded section 523(a)(8) to apply to loans made under a program funded by any nonprofit institution, as opposed to just nonprofit institutions of higher learning.[34] The 1990 amendment expanded section 523(a)(8) to cover "*educational benefit overpayment[s]*" as well as "*obligation[s] to repay funds received as educational benefit[s], scholarship[s], or stipend[s].*"[35] The amendment also increased the coverage period in subparagraph (A) from five years to seven years.[36] In 1998, however, Congress deleted section 523(a)(8)(A), leaving undue hardship as the only

---

28. *Id.*

29. Pub. L. No. 94-482, § 439A, 90 Stat. 2081, 2141 (1976) (repealed 1978).

30. *See* Pub. L. No. 96-56, 93 Stat. 387 (1979); Pub. L. No. 98-353, 98 Stat. 376 (1984); Pub. L. No. 101-647, 104 Stat. 4933, 4964-65 (1990); Pub. L. No. 105-244, 112 Stat. 1581, 1837 (1998).

31. Pub. L. No. 96-56, 93 Stat. 387 (1979); S. REP. NO. 96-230 (1979), *reprinted in* 1979 U.S.C.C.A.N. 936. The report recognized that section 523(a)(8), as adopted by the Bankruptcy Reform Act of 1978, had a very uneven effect upon the student loan programs administered by the Department of Health, Education, and Welfare. *Id.* at 936.

> For example, National Direct Student Loan (NDSL) funds are administered by both nonprofit and profit-making institutions of higher education. Under [the current version], a student who obtained an NDSL loan from a profit-making institution of higher education would be free to have that loan discharged in bankruptcy. In contrast, a student who obtained an NDSL loan from a nonprofit institution of higher education would be subject to the prohibitions contained in the [current version].

Id. at 936-37.

32. Pub. L. No. 96-56, 93 Stat. 387 (1979) (emphasis added).

33. *Id.* (emphasis added).

34. Pub. L. No. 98-353, 98 Stat. 376 (1984).

35. Pub. L. No. 101-647, 104 Stat. 4933, 4964-65 (1990) (emphasis added).

36. *Id.* at 4965.

basis for discharging an educational loan or benefit covered under section 523(a)(8).[37]

B. Cazenovia College v. Renshaw

In *Cazenovia College v. Renshaw* (*In re Renshaw*),[38] the Second Circuit Court of Appeals consolidated an appeal from the United States Bankruptcy Appellate Panel for the Second Circuit[39] and an appeal from the United States District Court for the Northern District of New York.[40] Kevin Renshaw ("Renshaw") and David W. Regner ("Regner"), the debtors, failed to pay college tuition when due, yet both Cazenovia College ("Cazenovia") and the College of Saint Rose ("St. Rose") respectively, permitted them to attend classes anyway.[41] Cazenovia and St. Rose contended that by permitting the debtors to attend classes, they extended to the debtors educational loans exempt from discharge in bankruptcy.[42] Alternatively, Cazenovia contended that Renshaw's class attendance constituted an educational benefit subject to exemption from discharge in bankruptcy.[43] Both of the lower courts found in favor of the debtors and held that the colleges' extension of credit did not fall within the scope of section 523(a)(8) of the Bankruptcy Code.[44]

In the *Cazenovia* case, Renshaw signed a "Reservation Agreement" before attending classes.[45] In return for signing the "Reservation Agreement," Cazenovia agreed to hold open a place for Renshaw, provided that he would pay the amounts due when billed.[46] The "Reservation Agreement" required Renshaw to pay a $285 reservation fee, tuition, room, and board and to be bound by various payment-related provisions in the agreement.[47] Renshaw failed to pay Cazenovia's charges when due, yet Cazenovia allowed him to register, live in college housing, eat his meals, and attend classes for the 1992 Summer and Fall terms.[48] For both terms, Renshaw owed Cazenovia $5,027.16, which included applicable service charges.[49]

---

37. Pub. L. No. 105-244, 112 Stat. 1581, 1837 (1998).
38. 222 F.3d 82 (2d Cir. 2000).
39. Cazenovia Coll. v. Renshaw (*In re* Renshaw), 229 B.R. 552 (B.A.P. 2d Cir. 1999).
40. Coll. of Saint Rose v. Regner (*In re* Regner), 229 B.R. 270 (Bankr. N.D.N.Y. 1999).
41. *Renshaw*, 222 F.3d at 86.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 84-85. Cazenovia required all incoming students to sign identical agreements. *Id.*
46. *Id.* at 85.
47. *Renshaw*, 222 F.3d at 85. These provisions included an obligation to pay a service charge with an effective annual interest rate of 19.2% if payments were not made by their due date. *Id.*
48. *Id.*
49. *Id.* Before Renshaw filed for bankruptcy under Chapter 7, Cazenovia sued and obtained a default judgment against him in the amount of $9,999.87. *Id.* This amount included $3,169.99 in accrued service charges, plus an award of attorney's fees of $1,339.18. *Id.*

In the *St. Rose* case, Regner paid his tuition through financial aid until he enrolled for the 1993 Fall term.[50] St. Rose permitted Regner to attend classes that semester without fully paying his tuition.[51] On April 20, 1994, after realizing that Regner failed to pay his tuition for the 1993 Fall semester, St. Rose mailed Regner a letter asking him to contact the College's business office about his past due balance.[52] Regner acknowledged his obligation to St. Rose and made some payments, but failed to pay his tuition bill in full.[53]

As to the first issue of whether or not the colleges' extensions of credit qualified as loans under section 523(a)(8) of the Bankruptcy Code, the Second Circuit recognized that Congress did not define the term "loan" in section 523(a)(8).[54] Therefore, the court relied on the common law definition of a loan articulated in the classic case of *In re Grand Union Co.*[55] Based on this definition, the court held that for the credit extension "[t]o constitute a loan, there must be (i) a contract, whereby (ii) one party transfers a defined quantity of money, goods, or services, to another, and (iii) the other agrees to pay for the sum or items transferred at a later date."[56] The court reasoned that this definition implies that the contract to transfer items in return for later payment must be reached prior to or contemporaneous with the transfer.[57] According to the court, when determining whether a transaction is a loan, the focus should be on the intent of the parties, not the form of the transaction.[58] Absent a prior or contemporaneous agreement, failure to pay a bill when due does not create a loan.[59]

The court held that the transactions (extensions of credit) in both cases failed to meet the definition of a loan as articulated by *In re Grand Union Co.*[60]

---

50. *Id.* at 85.

51. *Id.*

52. *Id.*

53. *Renshaw*, 222 F.3d at 85. St. Rose obtained a default judgment against Regner, after he stipulated that he owed St. Rose $4,445.32 in tuition cost, not including interest. *Id.* Regner thereafter filed for bankruptcy under Chapter 7. *Id.*

54. *Id.* at 88.

55. *Id.* (citing *In re* Grand Union Co., 219 F. 353, 356 (2d Cir. 1914)). The Second Circuit Court of Appeals in *In re Grand Union Co.* defined a loan as follows:

> A loan of money is a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows.
>
> "In order to constitute a loan there must be a contract whereby, *in substance* one party transfers to the other a sum of money which that other agrees to repay absolutely, together with such additional sums as may be agreed upon for its use. If such be the intent of the parties, the transaction will be considered a loan without regard to its form."

In re Grand Union Co., 219 F. at 356 (citations omitted) (emphasis added).

56. *Renshaw*, 222 F.3d at 88.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

Specifically, the court found that neither college entered into a prior or contemporaneous agreement to extend credit to the debtors or to permit the debtors to attend classes in return for a payment of tuition at a future date.[61]

Cazenovia tried to argue that the Reservation Agreement signed by Renshaw evidenced a prior or contemporaneous agreement.[62] The court rejected this argument and concluded that the only purpose of that agreement was to notify Renshaw of the college's fees and to obligate him to pay those fees even if he stopped attending classes.[63] According to the court, the agreement was not an obligation to permit Renshaw to attend classes or to obtain other services from the college without paying his bills, nor was it a promise to extend such credit to him.[64]

Similarly, St. Rose tried to argue that Regner agreed, in response to the college's demands, that he owed them money.[65] The court rejected this argument because the parties did not agree, prior to or contemporaneous with Regner's attendance, that the college would provide him with educational services that he would pay for later.[66] The agreement was entered into in 1994, well after Regner's attendance during the 1993 Fall semester.[67]

As to the second issue, the court rejected Cazenovia's contention that Renshaw's class attendance constituted an "educational benefit" exempt from discharge.[68] Cazenovia urged the court to follow other jurisdictions and interpret the phrase *"educational benefit overpayment or loan"* as including an educational benefit, an educational overpayment, or an educational loan.[69] The court, based on rules of common English, found that the phrase refers to a loan or an educational benefit overpayment.[70]

III. ANALYSIS

Courts recognize that neither section 523(a)(8) nor any other section of the Bankruptcy Code defines the term loan.[71] Therefore, courts must infer what Congress intended the term to encompass by looking at its established

---

61. *Id.*

62. *Renshaw*, 222 F.3d at 88.

63. *Id.* at 88-89.

64. *Id.* at 89. The court also found relevant to their conclusion evidence such as the fact that such agreements were entered into without making any inquiry into students' financial needs, creditworthiness, or intent to pay the college's fees on time, as well as fact that the 19.2% annual interest rate violated New York state usury law that sets a cap on loans at 16%. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 90.

68. *Renshaw*, 222 F.3d at 92.

69. *Id.* (emphasis added).

70. *Id.*

71. *Id.* at 88; Roosevelt Univ. v. Oldham (*In re* Oldham), 220 B.R. 607, 612 (Bankr. E.D. Ill. 1998); Andrews Univ. v. Merchant (*In re* Merchant), 958 F.2d 738, 740 (6th Cir. 1992).

meaning.[72] Most courts rely on the common law definition of a loan articulated in *In re Grand Union Co.*[73] to determine if a particular transaction constitutes a loan for purposes of section 523(a)(8) of the Bankruptcy Code.[74] Based on this definition, some jurisdictions apply approaches similar to the Second Circuit's approach in *Renshaw* and look for some form of agreement between the parties acknowledging the debt owed, whether or not money actually changed hands.[75] By contrast, other jurisdictions require money to actually change hands before a transaction can constitute a loan.[76] There are a few jurisdictions, however, that hold that any educational benefit conferred on a debtor is subject to section 523(a)(8) of the Bankruptcy Code.[77]

A. Similar Approaches

Those courts that have adopted approaches similar to the Second Circuit's approach in *Renshaw* hold that in order for an extension of credit to constitute a loan, the following requirements must be met: (1) the student was aware of the credit extension and acknowledged the money owed; (2) the amount owed was liquidated; and (3) the extended credit was defined as a sum of money due to a person.[78] Courts utilizing this approach adhere to the view that the substance of the debt and the reason for which it is being incurred should control over the form in which the debt was created and structured.[79] Therefore, if an educational institution extends credit to a student for educational purposes, and the extension of credit meets the three requirements set out above, then the

---

72. *Merchant*, 958 F.2d at 740.

73. 219 F. 353, 356 (2d Cir. 1914); *see supra* note 55 (quoting the *In re Grand Union Co.* definition of a loan).

74. *See Renshaw*, 222 F.3d at 88; *Merchant*, 958 F.2d at 741; Johnson v. Mo. Baptist Coll. (*In re* Johnson), 218 B.R. 449, 455 (B.A.P. 8th Cir. 1998); Johnson v. Va. Commonwealth Univ. (*In re* Johnson), 222 B.R. 783, 787 (Bankr. E.D. Va. 1998); N.M. Inst. of Mining and Tech. v. Coole (*In re* Coole), 202 B.R. 518, 519 (Bankr. D.N.M. 1996); Alibatya v. N.Y. Univ. (*In re* Alibatya), 178 B.R. 335, 338-39 (Bankr. E.D.N.Y. 1995); U.S. Dep't of Health and Human Servs. v. Avila (*In re* Avila), 53 B.R. 933, 936 (Bankr. W.D.N.Y. 1985).

75. *Merchant*, 958 F.2d at 741; *Oldham*, 220 B.R. at 612-13; Stone v. Vanderbilt Univ. (*In re* Stone), 180 B.R. 499, 501-02 (Bankr. M.D. Tenn. 1995); Univ. of N.H. v. Hill (*In re* Hill), 44 B.R. 645, 647 (Bankr. D. Mass. 1984).

76. *Johnson*, 222 B.R. at 787; *Coole*, 202 B.R. at 519; Dakota Wesleyan Univ. v. Nelson (*In re* Nelson), 188 B.R. 32, 34 (D.S.D. 1995). *See generally* United Res. Sys., Inc. v. Meinhart (*In re* Meinhart), 211 B.R. 750, 754-55 (Bankr. D. Colo. 1997) (citing *In re Coole* with approval).

77. *Stone*, 180 B.R. at 502; Stevens Inst. of Tech. v. Joyner (*In re* Joyner), 171 B.R. 762, 763 (Bankr. E.D. Pa. 1994); Najafi v. Cabrini Coll. (*In re* Najafi), 154 B.R. 185, 190 (Bankr. E.D. Pa. 1993).

78. *Merchant*, 958 F.2d at 741; *Stone*, 180 B.R. at 501; *see also Hill*, 44 B.R. at 647 (holding that the college's extension of credit constituted a loan because the debtor was aware of and acknowledged that he was extended credit to be paid as soon as he received the proceeds of his student loan); *Oldham*, 220 B.R. at 612-13 (applying the same factors as *Hill* and *Merchant*).

79. *Oldham*, 220 B.R. at 613.

extension of credit will constitute a loan for purposes of section 523(a)(8) of the Bankruptcy Code.[80]

Like *Renshaw*, these courts hold that absent some form of agreement or acknowledgment, an extension of credit does not ripen into a loan for purposes of section 523(a)(8) of the Bankruptcy Code. In *Andrews University v. Merchant (In re Merchant)*, the Court of Appeals for the Sixth Circuit relied on the debtor's signed promissory note acknowledging her debt to find that the University's extension of credit for educational expenses fell within the scope of section 523(a)(8) of the Bankruptcy Code.[81] Although a promissory note is a good indicator of an agreement, it is not the only way to show that the parties entered into a contract.[82] In *University of New Hampshire v. Hill (In re Hill)*, the Bankruptcy Court for the District of Massachusetts found that an oral agreement was sufficient to satisfy this requirement.[83]

The only major difference between the approach used by these courts and the approach adopted by the Second Circuit in *Renshaw* is that these courts do not require that there be an agreement or acknowledgment prior to or contemporaneous with the extension of credit.[84] Although these courts do not appear to specifically require a prior to or contemporaneous agreement or acknowledgment, most of the cases indicate that the agreement or acknowledgment occurred prior to or contemporaneous with the extension of credit.[85]

---

80. *Merchant*, 958 F.2d at 741; *Oldham*, 220 B.R. at 612-13; *Stone*, 180 B.R. at 501-02; *Hill*, 44 B.R. at 647.

81. *Merchant*, 958 F.2d at 741; *see also Oldham*, 220 B.R. at 613 (holding that the debt was for a liquidated total and for a definite sum of money representing the unpaid tuition as provided in the promissory notes); *Stone*, 180 B.R. at 502 (holding that there was a loan because the amount claimed is liquidated and the note proves an amount due Vanderbilt).

82. *See Hill*, 44 B.R. at 647 (allowing an oral agreement to satisfy requirements of a contract).

83. *Id.* While attempting to register, Mr. Hill was told that he could not complete registration because his tuition was unpaid. *Id.* at 646. After conferring with his hockey coach and the school business manager, Mr. Hill was permitted to register and had thirty days to satisfy his tuition. *Id.* Although Mr. Hill did not sign any form of an agreement, the court found that the University, in effect, provided Mr. Hill with short term credit pending receipt of his loan proceeds. *Id.*

84. *Merchant*, 958 F.2d at 741; *Stone*, 180 B.R. at 501; *see also Hill*, 44 B.R. at 647 (holding that the college's extension of credit constituted a loan because the debtor was aware of and acknowledged that he was extended credit to be paid as soon as he received the proceeds of his student loan); *Oldham*, 220 B.R. at 612-13 (applying the same factors as *Hill* and *Merchant*).

85. *See Oldham*, 220 B.R. at 609 (noting that debtor signed promissory note promising to pay total cost of tuition at time of registration); *Hill*, 44 B.R. at 646 (finding that an oral agreement was entered into before the debtor was permitted to register for classes). *But see Stone*, 180 B.R. at 500 (holding that there was a loan, even though debtor signed promissory note after she withdrew from school). In *Renshaw* the Second Circuit found that it was not entirely clear from the *Merchant* opinion if the promissory notes were entered into prior to or contemporaneous with the extension of credit. Cazenovia Coll. v. Renshaw (*In re* Renshaw), 222 F.3d 82, 91 (2d Cir. 2000). However, in *Merchant* the Sixth Circuit specifically stated in its

The distinction between the approach adopted by *Renshaw* and the similar approach adopted by these other jurisdictions may prove detrimental to the debtor. If these jurisdictions do not require a prior or contemporaneous agreement or acknowledgment, the debtor conceivably could turn an otherwise dischargeable debt into a nondischargeable debt by acknowledging the debt at a later time. For example, the debtor could turn a dischargeable debt into a nondischargeable debt by either stipulating to the debt in a judicial proceeding or acknowledging the debt orally or in writing after the debtor finished school. If this is true, then debtors in these jurisdictions have an incentive to deny ever being aware of the credit extension and the debt.[86] However, in this situation both approaches would render the same result. The debt would be dischargeable by either a lack of a prior or contemporaneous contract or a lack of awareness and acknowledgment of the debt.

To the extent that these jurisdictions do not require a prior or contemporaneous agreement or acknowledgment, their approach provides no protection to the debtor as it construes section 523(a)(8) of the Bankruptcy Code in favor of the creditor. These jurisdictions seem to ignore the well-established principle that exceptions to discharge should be narrowly construed against the creditor and in favor of the debtor.[87] It is also well-settled that courts can construe the exception no more narrowly than the statute's language and legislative history will allow.[88] Congress limited this exception to cover loans.[89] However, in the situation where an educational institution allows a student to attend class without paying tuition, absent any form of agreement or acknowledgment, a loan was not created, and there is no creditor/debtor relationship between the educational institution and the student. To allow an educational instituion to approach the student well after the period in which the credit was extended and create a loan where one did not exist before would be contrary to the principles of construction mentioned above. The educational institution had ample time to secure a creditor/debtor relationship with the student during the period in which the institution extended credit to the student.

---

holding that the debtor signed forms evidencing the amount of indebtedness before she registered for classes. *Merchant*, 958 F.2d at 741. Nevertheless, the Second Circuit indicated its agreement with *Merchant* to the extent that the debtor signed the promissory note prior to or contemporaneous with the extension of credit. *Renshaw*, 222 F.3d at 91-92.

86. This incentive will really only exist after the debtor finishes school. If at the time the debtor receives the credit extension, the debtor were to either deny that it was a credit extension or fail to acknowledge the debt, then more likely than not, the educational institution would not permit the debtor to enroll or attend classes. However, if the educational institution were to allow the debtor to enroll and attend classes anyway, then the educational institution deserves to be subject to the debtor's incentive to lie.

87. *See Renshaw*, 222 F.3d at 86; *In re* Pelkowski, 990 F.2d 737, 744 (3d Cir. 1993); *Oldham*, 220 B.R. at 610; Alibatya v. N.Y. Univ. (*In re* Alibatya), 178 B.R. 335, 337 (Bankr. E.D.N.Y. 1995); Seton Hall Univ. v. Van Ess (*In re* Van Ess), 186 B.R. 375, 377-78 (Bankr. D.N.J. 1994).

88. *In re Pelkowski*, 990 F.2d 737, 745 (3d Cir. 1993); *Alibatya*, 178 B.R. at 338.

89. 11 U.S.C. § 523(a)(8) (1993 & Supp. 2000).

An educational institution that allows a student to attend classes without paying tuition, and without an agreement or acknowledgment to pay the tuition at a later time, should not be able to subsequently create a loan where one did not exist before in order to invoke the protection of section 523(a)(8) of the Bankruptcy Code.

B. Sum of Money Approach

While some courts follow *Renshaw* and allow the institution to create a loan ex post facto if certain factors are met, other courts use a different approach. Courts following the "sum of money" approach hold that there must be an actual exchange of money before a transaction can constitute a loan under section 523(a)(8) of the Bankruptcy Code.[90] These courts rely on the "plain" or "common sense" meaning of the word loan.[91] In *New Mexico Institute of Mining and Technology v. Coole* (*In re Coole*), the Bankruptcy Court for the District of New Mexico relied on both the dictionary definition of a loan found in *Black's Law Dictionary*[92] and the definition of a loan articulated in *In re Grand Union Co.*[93] Both of these definitions contain the phrase "sum of money."[94] Based on these definitions, the court in *Coole* held that the plain meaning of the term "loan" is that a sum of money must change hands.[95] The court reasoned that although Congress expressed a strong policy of excepting student obligations from discharge, "Congress did not intend to make every student obligation nondischargeable."[96] The court said, "A line has to be drawn. The line was drawn at the word 'loan.'"[97] Therefore, an extension of credit

---

90. Johnson v. Va. Commonwealth Univ. (*In re* Johnson), 222 B.R. 783, 787 (Bankr. E.D. Va. 1998); N.M. Inst. of Mining and Tech. v. Coole (*In re* Coole), 202 B.R. 518, 519 (Bankr. D.N.M. 1996); Dakota Wesleyan Univ. v. Nelson (*In re* Nelson), 188 B.R. 32, 34 (D.S.D. 1995). *See generally* United Res. Sys., Inc. v. Meinhart (*In re* Meinhart), 211 B.R. 750, 754 (Bankr. D. Colo. 1997) (citing *In re Coole* with approval).

91. *Johnson*, 222 B.R. at 787; *Coole*, 202 B.R. at 519.

92. *Coole*, 202 B.R. at 519 (citing BLACK'S LAW DICTIONARY 936 (6th ed. 1990)). The Court in *Coole* cited the following definition from Black's Law Dictionary: "'A Lending. Delivery by one party to and receipt by another party of *sum of money* upon agreement, express or implied, to repay it with or without interest.'" *Coole*, 202 B.R. at 519 (emphasis added). The Second Circuit in *In re Grand Union Co.* defined a loan of money as "a contract by which one delivers a *sum of money* to another and the latter agrees to return at a future time a sum equivalent to that which he borrows." *In re Grand Union Co.*, 219 F. 353, 356 (2d Cir. 1914) (emphasis added).

93. *Id.* at 356.

94. *Coole*, 202 B.R. at 519.

95. *Id.* The court also specifically rejected the reasoning in *Merchant* because it ignored the fact that no money had changed hands. *Id.*; *see also Johnson*, 222 B.R. at 787 (finding the narrow approach to defining a loan more persuasive because the definitions cited indicate a sum of money must change hands).

96. *Coole*, 202 B.R. at 519 ("[T]he policy expressed by Congress cannot be used as a catchall which overlooks the specific wording of the statute, thereby sweeping all student obligations into the category of nondischargeable debts.").

97. *Id.*

under this approach can never amount to a loan for purposes of section 523 of the Bankruptcy Code.[98]

The sum of money approach that the *Coole* court and other courts adopted is flawed for several reasons. First, the courts' reliance on the definition of a loan articulated by the Second Circuit in *In re Grand Union Co.* is misdirected. These courts seem only to rely on the Second Circuit's definition of a "loan of money." The Second Circuit defined a "loan of money" as "'a contract by which one delivers a *sum of money* to another and the latter agrees to return at a future time a sum equivalent to that which he borrows.'"[99] However, the Second Circuit defined a "loan" as a "'contract whereby, *in substance* one party transfers to the other a sum of money which that other agrees to repay absolutely, together with such additional sums as may be agreed upon for its use.'"[100] The Second Circuit further stated that "'[i]f such be the intent of the parties, the transaction will be considered a loan without regard to its form.'"[101] This broad definition of a loan focuses on the substance and the intent of the transaction, as opposed to its form.[102] By reading this definition as a whole, it is clear that a contract to extend credit fits within the scope of the Second Circuit's definition of a loan.

The courts that interpret the definition of a loan narrowly ignore the fact that an extension of credit is *in substance* a transfer of a sum of money. There is little difference between a transaction where an educational institution agrees to extend credit to a student for the cost of tuition and a transaction where an educational institution agrees to actually give the student money to pay the tuition. The latter only adds one more step to the substance of the transaction. The former just bypasses the step where the educational institution writes a check to the student and the student turns around and writes a check back to the educational institution. Both transactions, in substance, create a debt to the educational institution.[103]

---

98. *See id.*

99. *In re Grand Union Co.*, 219 F. at 356 (emphasis added).

100. *Id.* (citations omitted) (emphasis added).

101. *Id.*

102. *Id.*; *see also* Roosevelt Univ. v. Oldham (*In re* Oldham), 220 B.R. 607, 613 (Bankr. E.D. Ill. 1998) (holding that the substance of the debt and what it was incurred for should control rather than the form in which the debt is created or structured); U.S. Dep't of Health and Human Servs. v. Avila (*In re* Avila), 53 B.R. 933, 936 (Bankr. W.D.N.Y. 1985) (stating that a loan may exist regardless of its form).

103. An example of the two options illustrates this point. Suppose the cost of tuition for the upcoming semester is $3,000. At the beginning of the semester the student has an open tuition account with a balance due of $3,000. Under the first option, the educational institution agrees to give the student $3,000 to pay his tuition in return for the student's promise to pay it back at a later date. The educational institution writes the student a check for $3,000 out of its cash account, thus creating a debt obligation of $3,000. The student then writes a check back to the educational institution for $3,000 to pay off the balance in the student's open tuition account. Under the second approach, the educational institution agrees to extend credit to the student for the cost of tuition in return for the student's promise to pay it back at a later time. The educational institution then transfers money out of its cash account to the student's open tuition

Another flaw in the approach adopted by these courts is that the *Black's Law Dictionary* definition the courts rely on is not the only definition of a loan. As the courts in *Roosevelt University v. Oldham (In re Oldham)*,[104] *DePasquale v. Boston University School of Dentistry (In re DePasquale)*,[105] and *Johnson v. Missouri Baptist College (In re Johnson)*[106] recognized, *Black's Law Dictionary* and other dictionaries contain many different definitions of a loan.[107] The definition of a loan in *Black's Law Dictionary* following the definition these courts used provides that a loan is "[a]nything furnished for temporary use to a person at his request, on condition that it shall be returned, or its equivalent in kind, with or without compensation for its use."[108] *Black's Law Dictionary* also defines a loan as "[a] borrowing of money or other personal property by a person who promises to return it."[109] Relying on these definitions, the Bankruptcy Court for the Northern District of Illinois, in *Oldham,* found that it defied common sense, as well as the frequent use of the term, to merely confine a loan to cash or money transactions.[110] "If one can 'loan' a tangible piece of property to someone, such as a tool, car or the like, one can 'loan' intangible things such as credit for unpaid tuition."[111]

Another definition found in *Black's Law Dictionary* further defines a loan as "the creation of debt by a credit to an account with the lender upon which the debtor is entitled to draw immediately."[112] The Bankruptcy Appellate Panel for the Eighth Circuit, in *Johnson*, found that an educational institution's extension of credit to a student is, in effect, a credit to the student's account upon which the student is entitled to draw immediately.[113] The student draws on these accounts through immediate class attendance.[114]

---

account to satisfy the balance due, thus creating a debt obligation of $3,000. Under both options, the educational institution had to reduce its cash account in order to satisfy the student's open tuition account.

104. *Oldham*, 220 B.R. at 612.

105. 225 B.R. 830, 832 (B.A.P. 1st Cir. 1998).

106. 218 B.R. 449, 456 (B.A.P. 8th Cir. 1998).

107. *Oldham*, 220 B.R. at 612; *DePasquale*, 225 B.R. at 832; *Johnson*, 218 B.R. at 256.

108. BLACK'S LAW DICTIONARY 936 (6th ed. 1990); *see also* BLACK'S LAW DICTIONARY 947 (7th ed. 1999) (defining a loan as a thing lent for the borrower's temporary use); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 683 (10th ed. 1993) (defining a loan as a thing lent for the borrower's temporary use); WEST'S LEGAL THESAURUS/DICTIONARY 464 (1985) (defining a loan as anything furnished for temporary use with or without compensation on the condition that it or its equivalent in kind be returned).

109. BLACK'S LAW DICTIONARY 936 (6th ed. 1990).

110. *Oldham*, 220 B.R. at 612; *see also DePasquale*, 225 B.R. at 832 (quoting *Oldham*).

111. *Oldham*, 220 B.R. at 612; *see also DePasquale*, 225 B.R. at 832 (quoting *Oldham*).

112. BLACK'S LAW DICTIONARY 936 (6th ed. 1990); *see also* WEST'S LEGAL THESAURUS/DICTIONARY 464 (1985) (including a "credit" among its definitions of a loan); BURTON'S LEGAL THESAURUS 340, 341 (3d ed. 1998) (including a credit among its definitions of a loan).

113. *Johnson*, 218 B.R. at 457.

114. *Id.*

By applying section 523(a)(8) to only those transactions where money actually changes hands, these courts ignore the well-established principles in construing exceptions to dischargeability.[115] Although courts are to construe exceptions to discharge narrowly against the creditor and in favor of the debtor,[116] they can construe the exceptions no more narrowly than the language of the statute and the legislative history allow.[117] Based on all the definitions mentioned above, a loan can easily encompass an extension of credit by an educational institution.[118] As the court in *Johnson* recognized, the "common sense" or "plain" meaning approach adopted by these courts "overlooks the realities of most commercial transactions in which money, in its most concrete manifestation, never actually changes hands."[119] Under this approach, "only the most mechanical transactions will constitute a loan."[120] The reality of this so called "common sense" or "plain" meaning approach adopted by these courts is that the courts fail to recognize the common sense or plain meaning of the word "loan." By doing so, they have construed section 523(a)(8) of the Bankruptcy Code completely in favor of the debtor, ignoring both the purpose of the exception, as articulated in the legislative history, and the actual meaning of the term "loan."

C. Educational Benefit Approach

In addition to the factor test used in *Renshaw* and the sum of money approach, courts have used a third method to determine whether an extension of educational credit is a loan. Courts following the "educational benefit approach," although few in number, broaden the scope of section 523(a)(8) of the Bankruptcy Code to cover any transaction that confers on the debtor an educational benefit.[121] The approach centers around the statutory construction of the phrase "educational benefit overpayment or loan" contained within section 523(a)(8) of the Bankruptcy Code.[122] The Bankruptcy Court for the Eastern District of Pennsylvania, undoubtedly the strongest advocate of this approach, found that the absence of commas makes this phrase difficult to

115. *See* Cazenovia Coll. v. Renshaw (*In re* Renshaw), 222 F.3d 82, 86 (2d Cir. 2000); *In re* Pelkowski, 990 F.2d 737, 744-45 (3d Cir. 1993); *Oldham*, 220 B.R. at 610; Alibatya v. N.Y. Univ. (*In re* Alibatya), 178 B.R. 335, 337-38 (Bankr. E.D.N.Y. 1995); Seton Hall Univ. v. Van Ess (*In re* Van Ess), 186 B.R. 375, 377-78 (Bankr. D.N.J. 1994).

116. *See Renshaw*, 222 F.3d at 86; *In re Pelkowski*, 990 F.2d at 744; *Oldham*, 220 B.R. at 610; *Alibatya*, 178 B.R. at 337; *Van Ess*, 186 B.R. at 377-78.

117. *In re Pelkowski*, 990 F.2d at 745; *Alibatya*, 178 B.R. at 338.

118. *See Johnson*, 218 B.R. at 457.

119. *Id.*

120. *Id.*

121. Stone v. Vanderbilt Univ. (*In re* Stone), 180 B.R. 499, 501-02 (Bankr. M.D. Tenn. 1995); Stevens Inst. of Tech. v. Joyner (*In re* Joyner), 171 B.R. 762, 763 (Bankr. E.D. Pa. 1994); Najafi v. Cabrini Coll. (*In re* Najafi), 154 B.R. 185, 190 (Bankr. E.D. Pa. 1993).

122. 11 U.S.C. § 523(a)(8) (1993 & Supp. 2000).

interpret.[123] In adopting an overly-broad interpretation of this phrase, the court believed that the terms "benefit," "overpayment," and "loan" should be construed as a series of nouns, all modified by the term "educational."[124] Therefore, under this approach, any educational benefit, educational overpayment, or educational loan would be exempt from discharge in a bankruptcy proceeding.[125] The court felt that there was no logical reason for linking the terms "benefit" and "overpayment" together so that the phrase only includes loans or educational benefit overpayments.[126] However, the court noted that even if the phrase only referred to loans or educational benefit overpayments, extensions of credit by an educational institution would still fall under the purview of an educational benefit overpayment.[127] The court reasoned that "[i]f anything could logically be termed as an 'educational benefit overpayment,' it would be an instance where a student received an educational benefit which was in excess of that for which the student paid."[128]

A number of courts disagree with the Eastern District of Pennsylvania's approach to the interpretation of the phrase "educational benefit overpayment or loan."[129] In *Renshaw*, the Second Circuit best highlighted the flawed reasoning of this approach.[130] Relying on rules of common English usage, the Second Circuit found that when Congress wishes to indicate that a series of items is a set of alternatives, they consistently separate the items by commas and use the word "or" before the last item.[131] The Second Circuit illustrated this point by highlighting specific phrases within section 523(a)(8) where Congress had employed this method:

> (8) for an educational benefit overpayment or *loan made, insured or guaranteed* by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as *an educational benefit, scholarship or*

123. *Joyner*, 171 B.R. at 763; *Najafi*, 154 B.R. at 190.

124. *Joyner*, 171 B.R. at 763; *Najafi*, 154 B.R. at 190; *see also Stone*, 180 B.R. at 501-02 n.5 (citing *Najafi* with approval).

125. *See Joyner*, 171 B.R. at 763; *Najafi*, 154 B.R. at 190; *see also Stone*, 180 B.R. at 501-02 n.5 (citing *Najafi* with approval).

126. *Najafi*, 154 B.R. at 190.

127. *Id.*

128. *Id.*

129. *See* Cazenovia Coll. v. Renshaw (*In re* Renshaw), 222 F.3d 82, 92 (2d Cir. 2000) (holding that although this approach is ingenious, it is unpersuasive); Dakota Wesleyan Univ. v. Nelson (*In re* Nelson), 188 B.R. 32, 34 (finding that the court in *Stone* adopted the flawed and unsupportable construction of section 523(a)(8) set out in *Najafi*); Seton Hall Univ. v. Van Ess (*In re* Van Ess), 186 B.R. 375, 380 (Bankr. D.N.J. 1994) (holding that the reading of the clause proposed by the court in *Najafi* is strained and contrary to not only its plain language, but also the legislative history).

130. *Renshaw*, 222 F.3d at 92.

131. *Id.*

> *stipend*, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.[132]

The Second Circuit stated that if Congress meant for the phrase to include "educational benefits or educational overpayments or educational loans," then the statute would read "educational benefits, overpayments or loans."[133] The Second Circuit also found compelling the fact that the language "educational benefit overpayment" was not added to the statute until the 1990 amendment.[134] The proper or sensible reading of the phrase is that it includes a loan or an educational benefit overpayment.[135]

A second flaw in the reasoning of the Bankruptcy Court for the Eastern District of Pennsylvania is that an educational benefit overpayment would include an extension of credit by an educational institution. An "educational benefit overpayment" is an overpayment from a program such as the GI Bill, where a student receives periodic payments while the student is enrolled in school.[136] When a student receives these periodic payments but is not enrolled in school as the program requires, an educational benefit overpayment occurs.[137] An extension of credit fails to meet this definition because the student never receives periodic payments.

The courts utilizing this approach interpret section 523(a)(8) too broadly and construe it to completely favor creditors, thus ignoring the well-established principles of construction mentioned above.[138] Not only is this approach contrary to the abundance of authority, but it is fundamentally unsound.

IV. IMPACT IN SOUTH CAROLINA

As mentioned earlier, federal courts in South Carolina have yet to address the issue of whether debts owed directly to a school for unpaid tuition and other

---

132. 11 U.S.C. § 523(a)(8) (1993 & Supp. 2000) (emphasis added).

133. *See Renshaw*, 222 F.3d at 92.

134. *Id.*; *see* Pub. L. No. 101-647, 104 Stat. 4933, 4964 (1990).

135. *Renshaw*, 222 F.3d at 92; *Nelson*, 188 B.R. at 33; *Van Ess*, 186 B.R. at 380.

136. Cazenovia Coll. v. Renshaw (*In re* Renshaw), 229 B.R. 552, 556 n.8 (B.A.P. 2d Cir. 1999); Coll. of Saint Rose v. Regner (*In re* Regner), 229 B.R. 270, 271 (Bankr. N.D.N.Y. 1999); Johnson v. Va. Commonwealth Univ. (*In re* Johnson), 222 B.R. 783, 786 (Bankr. E.D. Va. 1998); N.M. Inst. of Mining and Tech v. Coole (*In re* Coole), 202 B.R. 518, 519 (Bankr. D.N.M. 1996); Alibatya v. N.Y. Univ. (*In re* Alibatya), 178 B.R. 335, 338 (Bankr. E.D.N.Y. 1995).

137. *Renshaw*, 229 B.R. at 556 n.8; *Regner*, 229 B.R. at 271; *Johnson*, 222 B.R. at 786; *Coole*, 202 B.R. at 519; *Alibatya*, 178 B.R. at 338.

138. Exceptions to discharge should be narrowly construed against the creditor and in favor of the debtor. *See Renshaw*, 222 F.3d at 86; *In re Pelkowski*, 990 F.2d 737, 744 (3d Cir. 1993); Roosevelt Univ. v. Oldham (*In re* Oldham), 220 B.R. 607, 610 (Bankr. E.D. Ill. 1998); *Alibatya*, 178 B.R. at 337; *Van Ess*, 186 B.R. at 377-78. However, courts can construe the exceptions no more narrowly than the language of the statute and legislative history will allow. *In re Pelkowski*, 990 F.2d at 745; *Alibatya*, 178 B.R. at 338.

expenses (extensions of credit) are within the scope of section 523(a)(8) of the Bankruptcy Code. One federal court within the Fourth Circuit, however, has addressed the issue.[139] The Bankruptcy Court for the Eastern District of Virginia, in *Johnson*, appeared to follow the "sum of money approach."[140] If a federal court in South Carolina were inclined to follow the reasoning of *Johnson*, then a strong argument could be made that this case should be limited to its facts.

In *Johnson* the debtor attended Virginia Commonwealth University from the Spring 1992 term until the Fall 1995 term.[141] The debtor paid all applicable tuition and fees through the Spring 1995 term, but failed to make tuition and fee payments for the Summer and Fall 1995 terms.[142] Nonetheless, the University allowed her to attend classes anyway.[143] Relying on the maxim that courts should construe exceptions to discharge in favor of the debtor, the court found that the reasoning of the courts following the narrow "sum of money" approach was more persuasive in this case.[144] Of particular interest to the court was the fact that nothing in the record indicated that the debtor made any arrangements to borrow money from the University or through a student loan program and that the University did not require the debtor to sign a promissory note.[145] Based on these facts, the court held that nonpayment in this situation could not amount to an educational loan for purposes of section 523(a)(8) of the Bankruptcy Code.[146]

The court recognized that many courts adopt a broader interpretation of section 523(a)(8) of the Bankruptcy Code that looks to the intent of the parties.[147] The court cited many cases that relied on a promissory note or some other form of agreement to find extensions of credit nondischargeable.[148] However, the court never specifically rejected the broader approach.[149] Instead, it held that the narrow "sum of money" approach was more persuasive in this instance.[150] The court limited its analysis to a situation where the University remained silent while the debtor attended classes without paying for tuition.[151] Therefore, it is unclear from the opinion if the result would be different if the debtor had signed a promissory note acknowledging her debt to the University.

---

139. Johnson v. Va. Commonwealth Univ. (*In re* Johnson), 222 B.R. 783 (Bankr. E.D. Va. 1998).

140. *Id.* at 787.

141. *Id.* at 785.

142. *Id.*

143. *Id.*

144. *Id.* at 787.

145. *Johnson*, 222 B.R. at 787.

146. *Id.*

147. *Id.* at 786-87.

148. *Id.* The cases the court cited follow an approach similar to the approach the *Renshaw* court adopted. *Id.*

149. *See id.* at 787.

150. *Id.*

151. *See Johnson*, 222 B.R. at 787.

V. CONCLUSION

Until Congress defines what constitutes a loan for purposes of section 523(a)(8) of the Bankruptcy Code, courts will continue to struggle with whether extensions of credit by an educational institution fall within the scope of this provision. Unfortunately, the lack of uniformity in the federal courts on this issue leaves educational institutions guessing as to how to keep the doors open for students with financial need without losing the protection afforded under section 523(a)(8) of the Bankruptcy Code. The answer to this question will often depend on which jurisdiction is handling the bankruptcy proceeding, thus resulting in unequal treatment of creditors and debtors throughout the country.

The Second Circuit Court of Appeals in *Renshaw* appears to offer the best resolution to this issue. In order for an extension of credit by an educational institution to constitute a loan for purposes of section 523(a)(8) of the Bankruptcy Code, there must be a prior or contemporaneous contract, "whereby one party transfers a defined quantity of money, goods, or services to another, and the other party agrees to pay for the sum or items transferred at a later date."[152] This approach conforms to the well-established principles that courts must construe exceptions to discharge narrowly against the creditor and in favor of the debtor[153] and that courts must construe exceptions no more narrowly than the statute's language and legislative history will allow.[154] Under most definitions of a loan, a loan can easily encompass an extension of credit by an educational institution. However, under the *Renshaw* approach, an educational institution must secure some form of an agreement during the period in which the credit is extended before it can seek protection under section 523(a)(8) of the Bankruptcy Code.[155] The emphasis of this approach is on the substance of the transaction and the parties' intent. Absent some form of agreement during the period in which the credit is extended, a student's failure to pay tuition will never ripen into a loan for purposes of section 523(a)(8) of the Bankruptcy Code. By limiting the applicability of section 523(a)(8) of the Bankruptcy Code to extensions of credit by an educational institution, this approach offers the maximum amount of protection to debtors that the legislative history and the statute's language allow.

F. Stewart McQueen

---

152. Cazenovia Coll. v. Renshaw (*In re* Renshaw), 222 F.3d 82, 88 (2d Cir. 2000).

153. *See id.* at 86; *In re* Pelkowski, 990 F.2d 737, 744 (3d Cir. 1993); Roosevelt Univ. v. Oldham (*In re* Oldham), 220 B.R. 607, 610 (Bankr. E.D. Ill. 1998); Alibatya v. N.Y. Univ. (*In re* Alibatya), 178 B.R. 335, 337 (Bankr. E.D.N.Y. 1995); Seton Hall Univ. v. Van Ess (*In re* Van Ess), 186 B.R. 375, 377-78.

154. *In re Pelkowski*, 990 F.2d at 745; *Alibatya*, 178 B.R. at 338.

155. *Renshaw*, 222 F.3d at 88.

*