**UNITED STATES BANKRUPTCY COURT**
**WESTERN DISTRICT OF NEW YORK**

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**In Re:**

**Douglas E. Brown,** **CASE NO. 95-22567**

**Debtor(s).**

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**Douglas E. Brown,**

**Plaintiff(s),** **A.P. NO. 96-2007**

**vs.**

**Vermont Student Assistance Corp.,** **DECISION & ORDER**

**Defendant(s).**

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## BACKGROUND

On October 27, 1995, Douglas E. Brown (the "Debtor") filed a petition initiating a Chapter 7 case. On his Schedule F, the Debtor listed the Vermont Student Assistance Corporation ("VSAC") as an unsecured creditor the consideration for which was an October 1, 1988 student loan (the "VSAC Loan"), and he indicated that the Loan had an outstanding balance of approximately $17,552.96.

On January 9, 1996, the Debtor commenced an adversary proceeding (the "Dischargeability Proceeding"). In his Complaint he requested that the Court determine that the VSAC Loan was dischargeable under Section 523(a)(8)(A), because he alleged that it became due more than seven years before the date of the filing of his petition, and under Section 523(a)(8)(B), because he alleged that excepting the VSAC Loan from discharge under Section 727 would impose an undue hardship

on him.

VSAC interposed an Answer to the Complaint in the Dischargeability Proceeding which alleged that: (1) the VSAC Loan first became due fewer than seven years before the filing of the Debtor's petition; and (2) the facts alleged in the Complaint did not warrant a finding by the Court of undue hardship.

On March 19, 1996, the Court conducted a telephonic pretrial conference in the Dischargeability Proceeding, adjourned the Proceeding for an additional pretrial conference to be conducted on June 25, 1996 and entered an Order which provided that if either party wished to make a motion for summary judgment it should be made by June 1, 1996 and be made returnable by no later than June 19, 1996.

By motion (the "Summary Judgment Motion"), dated May 30, 1996 and made returnable on June 19, 1996, VSAC requested partial summary judgment in the Dischargeability Proceeding with respect to the Debtor's first cause of action which alleged that the VSAC Loan first became due more than seven years before the filing of the Debtor's petition. The Summary Judgment Motion indicated that on May 8, 1989, the Debtor executed a consolidation promissory note (the "Consolidated Note") under which the first payment was due on July 14, 1989, a date less than seven years prior to October 27, 1995, the date on which the Debtor filed his bankruptcy petition. The Motion further alleged that the Consolidated Note was a consolidated loan under 20 U.S.C.S Section 1078-3, the Higher Education Act of 1965, Section 428C as amended.

The Debtor interposed a response to the Summary Judgment Motion and filed a cross-motion for summary judgment (the "Cross-Motion") which alleged that: (1) the seven-year period under

Section 523(a)(8)(A) should be determined by the Court to run from October 1, 1988, the date the original loans which were later consolidated first became due; (2) the Congressional history of Section 523(a)(8), which indicates that the subsection was intended to stop students from filing bankruptcy shortly after their studies terminated and before they obtained gainful employment and acquired significant assets, does not indicate that Congress intended a consolidated loan to restart the seven-year period, since this could extend the seven-year period for an unlimited time period and be a disincentive for borrowers to enter into consolidation loan agreements; and (3) notwithstanding that 20 U.S.C.S. Section 1078-3(e) indicates that "[l]oans made under this section which are insured by the Secretary shall be considered to be new loans made to students for the purpose of section 424(a) [20 U.S.C.S. Section 1074(a)]", the Court should hold that a new loan for purposes of that statute is, nevertheless, not a "new loan" for purposes of Section 523(a)(8)(A) of the Bankruptcy Code.

## DISCUSSION

It appears from the Memoranda of Law submitted on behalf of the parties that there is some disagreement among the courts as to whether consolidation loans under the Higher Education Act restart the seven-year period under Section 523(a)(8)(A). I find the decision of Circuit Judge Thomas J. Meskill, sitting by designation on the Seventh Circuit Court of Appeals, in *Hiatt v. Indiana State Student Assistance Commission*, 36 F.3d 21 (7th Cir. 1994), *cert. denied*, ― U.S. ― , 115 S.Ct. 1109 (1995), which addresses all of the relevant arguments and holds that such consolidation loans do restart the seven-year period, to be the more persuasive authority.

## CONCLUSION

The Motion for Partial Summary Judgment on behalf of the Vermont Student Assistance Corporation with respect to the Debtor's first cause of action under Section 523(a)(8)(A) is in all respects granted, and the obligation owed to the Vermont Student Assistance Corporation is determined to be nondischargeable under Section 523(a)(8)(A); the Cross-Motion for Summary Judgment on behalf of the Debtor is in all respects denied; and the dischargeability proceeding is adjourned to the Court's Trial Calendar on July 17, 1996 to set a trial date with respect to the Debtor's second cause of action under Section 523(a)(8)(B).

**IT IS SO ORDERED.**

**_____/s/_____**
**HON. JOHN C. NINFO, II**
**U.S. BANKRUPTCY JUDGE**

**Dated: June 20, 1996**