student loans over a period of 40 months, and included a provision that purported to discharge the student loan debt without an adversary proceeding, called "discharge by declaration." Because the provisions of the Bankruptcy Code, U.S.C. Section 523(a)(8) and the Federal Rule of Bankruptcy Procedure 7001(6), require the debtor to file a complaint for an adversarial hearing when seeking to discharge a student debt, the Bank failed to file an objection and the debt was discharged in April 2001.

After the student loans had been assigned by the Bank to Educational Credit Management Corporation ("ECMC"), ECMC then filed a motion to vacate the discharge in December 2002, arguing that Ruehle had violated the creditor's due process rights by not filing for an adversarial hearing to give the lender proper notice. The bankruptcy court granted ECMC's Rule 60 motion, finding it failed to receive proper due process. Ruehle appealed the Bankruptcy Appellate Court's affirmation of the bankruptcy court's order.

**HOLDING:** Affirmed.

**REASONING:** The court rejected Ruehle's contention that cases from the Ninth and Tenth Circuits indicated that a confirmed bankruptcy plan may not be overturned on a Rule 60 motion. Other courts have been critical of this approach, because the cases failed to recognize the due process issue underlying the notice and an adversary hearing.

The Fourth Circuit held in *Banks v. Sallie Mae Servicing Corp. (In re Banks),* 299 F.3d 296 (4th Cir. 2002), that notice to the creditor of the plan's confirmation was sufficient to satisfy the notice requirement of Bankruptcy Rule 2002, but not the summons requirements of Rule 7004. Recently, the Seventh Circuit adopted the holding in *Banks* stating that "where the Bankruptcy Code and Bankruptcy Rules require a heightened degree of notice, due process entitles a party to receive such notice before an order binding the party will be afforded preclusive effect." *Hanson v. Educ. Credit Mgmt. Corp. (In re Hanson),* 397 F.3d 482, 487 (7th Cir. 2005). The *Hanson* court also noted that the Ninth and Tenth Circuits appear to be backing away from, or at least narrowing their earlier holdings.

The court concluded that the decisions in *Banks* and *Hanson* represented the evolving majority view that a purported "discharge by declaration" of student loan debt is not only invalid, but void and, therefore, subject to being set aside upon a Rule 60(b)(4) motion. The court adopted the analysis of the bankruptcy court, which noted that the finality analysis proposed in Ruehle's argument embodied many of the dangers inherent in winking at due process; (1) It ignores the clear intent of Congress and the Judicial Conference; (2) It enriches and emboldens those who take what is not theirs and legitimizes it with court sanction; (3) It violates the entitlement to certainty and consistency and the benefits resulting therefrom, not the least of which is the economic efficiency of being able to plan; (4) It strikes at the core of American legal values, procedure. The court affirmed the bankruptcy court's holding that a "discharge by declaration" of a

## CONSUMER CREDIT

### FAILURE TO DISCLOSE CAR REBATE DOES NOT VIOLATE THE TRUTH IN LENDING ACT

Virachack v. University Ford, 410 F.3d 579 (9th Cir. 2005).

**FACTS:** On November 18, 2001, the Virachacks bought a Ford Explorer from Bob Baker Ford partly on credit. The day the Virachacks bought the Explorer, Ford Motor Company offered a $2,000 rebate to certain customers buying that model and year vehicle, but did not offer this rebate to customers buying on credit at the 0.9% rate. The rebate option was not noted in the Federal Truth In Lending Disclosure of the contract.

The automobile buyers brought a class action suit against automobile dealer for alleged violations of the Truth in Lending Act ("TILA"). The plaintiffs sought damages, alleging University Ford violated TILA because the $2,000 cash rebate they might have received had they paid cash, should have been disclosed as part of the finance charge. The district court granted dealer's motion for summary judgment and denied buyers' cross motion for partial summary judgment. Both parties appealed.

**HOLDING:** Affirmed.

**REASONING:** A "finance charge" is defined by the TILA as "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not include charges of a type payable in a comparable cash transaction." 15 U.S.C. Section 1605(a). Thus, the statutory definition does not include a rebate that was withheld; a charge is defined as a request for payment while a rebate was considered a reduction in payment.

The provisions of the TILA are explained by the Federal Reserve Bank's Regulation Z. The regulation notes an example of a finance charge as "discounts for the purpose of inducing payments by a means other than the use of credit." FRB Regulation Z, 12 C.F.R. Section 226.4(b)(9 )(2004). Nathaniel Torres, the finance manager at Bob Baker Ford, stated that the inducement to pay with means other than credit was not the purpose of the offer. According to Torres, the rebate was not an index of a hidden credit charge but simply a subsidy from the manufacturer that was available only to those not getting the subsidized interest rate. Thus, the element of a purpose to induce a cash payment, as indicated by Regulation Z, is absent.

Torres' declaration was confirmed in two facts. First, Bob Baker Ford did not determine eligibility for the rebate. If a rebate had been offered, the price of the vehicle for sales tax purposes would not have been affected; the tax would have been paid on the price before the rebate. The price was therefore the same on credit or cash terms. Second, the Virachacks complained that by never being told of the rebate, they never got to choose; that they were not the informed users of credit the law seeks to assure. The TILA, however, does not require them to be informed to this extent. The court finds that the buyers are entitled to only what is required by the TILA and Regulation Z.