Student Loans: 40 Million Borrowers — Average Debt $29,000 — Total Debt $1.2 Trillion

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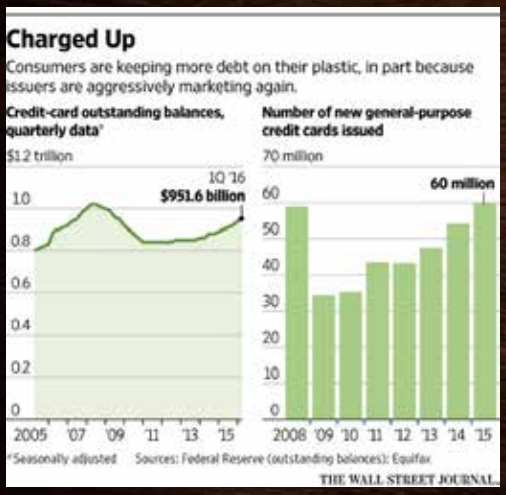
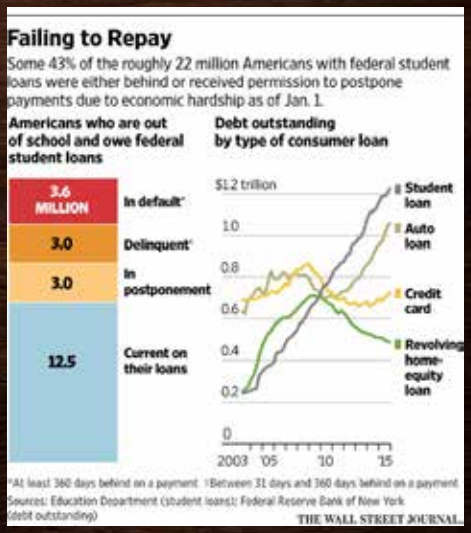
Scope of the Problem

40,000,000 debtors @ $29,000 each

$1,200,000,000 total debt

Compare to Credit Card Debt





Donald Trump- has no real position except thinks that the government shouldn't make money on it

Hillary Clinton- Allow refinancing, reduce future rates and income driven repayment programs

When did Student Loans begin?

Higher education Act of 1965 (Part of Great Society)

(MasterCard was started in 1966, Visa in 1958)

Types of Loan Programs

Federal vs. Private

Federal-

Subsidized vs. unsubsidized

Only students can borrow

Stafford Loan (any student can borrow)(subsidized and unsubsidized)

Perkins Loan (needs based)

PLUS (parent loan for undergraduate student)

Private

Private loans from Banks to Students and Parents

Bankruptcy History of Student Loans

Before 1976 were dischargeable

Perceived abuses- made non dischargeable in 1976

Non-dischargeable protection extended to private lenders in BAPCA

How much is the private market?
$91 Billion

Non-Bankruptcy Relief

Disability

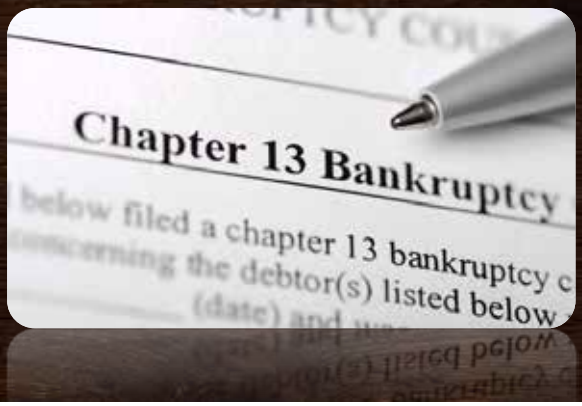
Work off loan

Special relief

Still from *Ferris Bueller's Day Off*, Copyright 1986 Paramount Pictures.

Ch. 13

Different Treatment, Separate Classification



Brunner Test (majority view)

a) Debtor cannot maintain, based on current income and expenses, a Minimal standard of living if forced to pay
b) Additional circumstances exist indicating this is likely to persist for portion of the repayment period
c) Debtor made good faith efforts to repay the loans
d) Burden is on debtor to prove a, b, and c

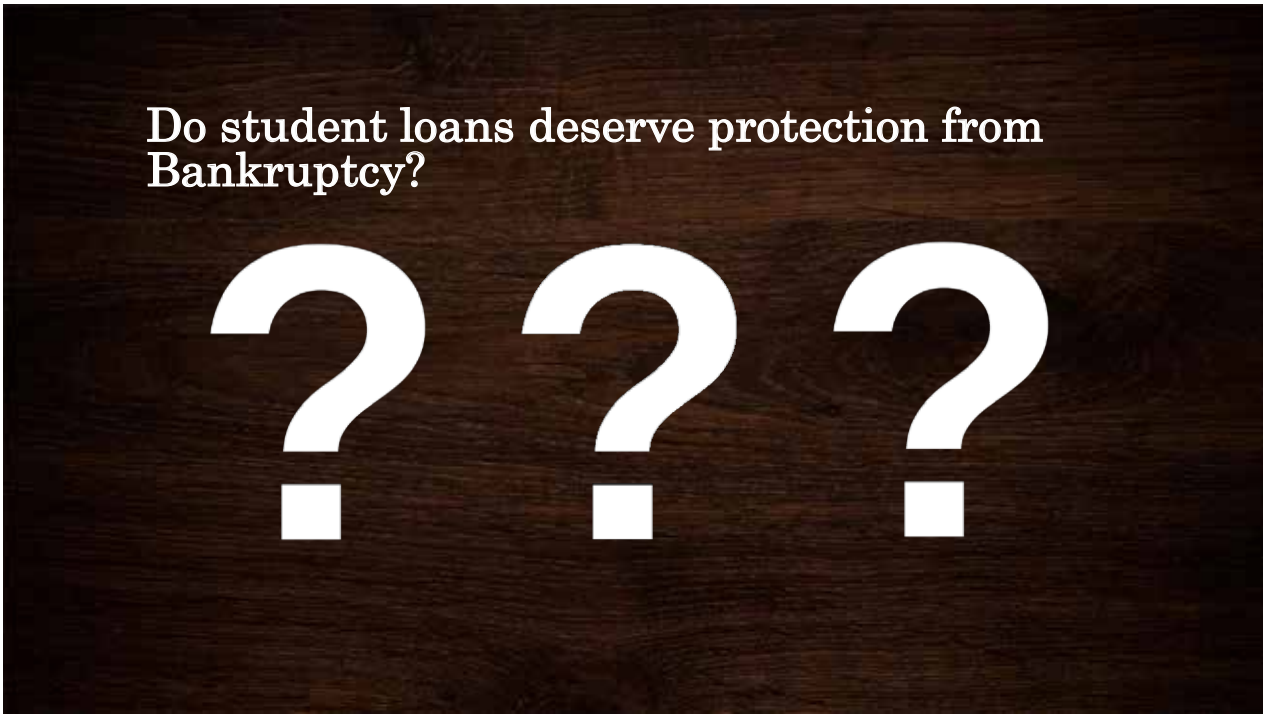
Totality of Circumstances Test

(8th and 1st Circuit except N.H.)

Court must consider 1) the debtor's past, present, and reasonably reliable future financial resources 2) the debtor's reasonable and necessary living expenses, and 3) other relevant facts and circumstances. Under this test, the debtor has the burden of proving undue hardship by a preponderance of the evidence. "The burden is rigorous. Simply put, if the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt- while still allowing for a minimal standard of living- then the debt should not be discharged." *Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 779 (8th Cir. 2009)*

Potential for fraudsters preying on Student debtors

Still from *The Wolf of Wall Street*, Copyright 2013 Paramount Pictures.


Do student loans deserve protection from Bankruptcy?
? ? ?

Student Loan Litigation In and Out of Bankruptcy

Thomas W. Joyce
Jones, Cork and Miller, LLP

STUDENT LOAN LITIGATION IN AND OUT OF BANKRUPTCY

15th Bankruptcy Law Seminar
Macon Centreplex

Thomas W. Joyce, Esq.
Jones, Cork & Miller, LLP
Macon, GA

I. GENERAL OVERVIEW OF STUDENT LOANS

A. Higher Education Act of 1965: In 1965, Congress, in response to a perceived need for financial assistance to students in higher education, passed the Higher Education Act of 1965 (HEA). The purpose of the HEA is to "keep the college door open to all students of ability," regardless of socioeconomic background. One of the Acts many goals is to allow students educational opportunities while preserving funding sources for others with similar needs.

B. (There Were) Two Federal Student Loan Programs: The HEA governs two federally-backed student loan programs: the Federal Family Education Loan Program (FFELP) and the William D. Ford Direct Loan Program (the Ford Program). Under the Health Care and Education Reconciliation Act of 2010, Congress eliminated the FFELP, effective July 1, 2010. Currently, the total debt at stake in the two federal student loan programs approaches one trillion dollars.

1. FFELP: Under the FFELP, eligible lenders make guaranteed loans on favorable terms to students or parents to help finance student education. The loans are guaranteed by guaranty agencies (state agencies or private non-profit corporations), which are ultimately reinsured by the United States Department of Education (ED).

2. The Ford Program: Under the Ford Program, ED makes loans directly to student and parent borrowers from the federal treasury.

C. Types of Federal Loans:

1. HEA: Loans under the HEA include Perkins Loans, Stafford (subsidized and unsubsidized) Loans, PLUS Loans and Consolidation Loans. Grants include Pell Grants and Supplemental Education Opportunity Grants. The terms of Stafford, PLUS and Consolidation loans in both the FFELP and the Ford Program are similar except that the Ford Program offers two income-related payment options (IBR and ICR) as well as a Public Service Loan Forgiveness program (discussed *infra* at .

2. Health and Human Services Loans: The United States Department of Health and Human Services (DHHS) also administered a student loan program, Health Education Access Loan program, (HEAL), for borrowers engaged in

health related studies. This program is no longer active. Like FFELP loans, HEAL loans are also presumptively nondischargeable. Courts have construed the dischargeability standard of "unconscionability" for HEAL loans as being a "higher standard" than that of FFELP/Ford loans, which require a showing of "undue hardship." Even though HEAL loans are administered by DHHS, HEAL loans are eligible for consolidation along with FFELP loans in ED's Ford program.

D. Non-HEA Loans: Private Loans: Private label loan programs have also emerged on the scene to provide educational funds to students who have exhausted their federal loan limits or are otherwise ineligible to borrow under the federal loan programs. Private label loans are not eligible for administrative relief discussed below and may not be consolidated under federally-sponsored consolidation programs. The bankruptcy reform legislation of 2006, however, expressly included private loans in the presumption of nondischargeability under 11 U.S.C. § 523(a)(8).

II. NONBANKRUPTCY RELIEF

There are numerous administrative remedies for student loan borrowers to consider in lieu of seeking discharge under § 523(a)(8). Unlike relief under 11 U.S.C § 523(a)(8), borrowers may be entitled to administrative relief irrespective of whether they've filed bankruptcy. But these administrative options require administrative determinations and, thus, should not be the basis for claim objections or adversary proceedings in a bankruptcy context.[1]

A. Total and Permanent Disability Discharge (TPD): Borrowers may be eligible to have their federal student loan debt discharged because of a total and permanent disability. A medical doctor or doctor of osteopathy must certify that the borrower (1) is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that (i) can be expected to result in death; (ii) has lasted for a continuous period of not less than 60 months; or (iii) can be expected to last for a continuous period of not less than 60 months; or (2) as been determined by the Secretary of Veterans Affairs to be unemployable due to a service-connected disability.

If the TPD request is approved, there is a three-year conditional waiting period, running from the date the doctor signs the TPD application. During this three-year period, borrowers cannot earn more than 100% of the federal poverty guidelines for a family of two (in 2011 = $14,710) and cannot have obtained any new federal student loans. Typically, ED's Conditional Discharge Unit will contact the borrower when the three-year mark is approaching to update the disability status and financial status before reviewing for final discharge.

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[1] The discharge provisions described here are illustrative only of the administrative relief available under the HEA. For full detail of requirements necessary for relief, see 34 C.F.R. §§ 682.100 *et seq.*, 685.100 *et seq.* These administrative options are available for both FFELP and Ford Program loans unless otherwise noted.

Veterans who have a 100% service-connected disability are immediately eligible for discharge of their federal student loan debt without further certification under the TPD regulation. They need only provide their Veteran's Administration disability rating paperwork to the loan holder who will process the discharge.

B. Closed School Discharge: Borrowers whose school closed before they could complete the program of study may be eligible for discharge. The borrower must show they were enrolled at the time of closure or that they withdrew from the school not more than 90 days prior to the date the school closed and that they were unable to complete the program of study through a teach-out at another school or by transferring academic credits or hours earned at the closed school to another school.

C. False Certification Discharge: A borrower's student loans can be discharged if a school falsely certified the student's eligibility for a federal student loan on the basis of ability to benefit from the education, signed the borrower's name without authorization by the borrower on the loan application or promissory note, or someone else obtained a federal student loan because of identity theft.

D. Death Discharge: If an individual borrower dies, or the student for whom a parent received a PLUS loan dies, the obligation of the borrower and any endorser to make any further payments on the loan is discharged.

E. Teacher Loan Forgiveness Program: Teachers who meets the requirements in 34 C.F.R. §685.217 are eligible for forgiveness of up to $17,500. Typically, this provision is for teachers in low-income areas and those who teach math or science at schools designated eligible by the U.S. Department of Education. (Ford Program loans only).

F. Public Service Loan Forgiveness: Borrowers who make 120 qualifying payments under the IBR, ICR, or 10-year fixed payment schedule while employed in the public sector are eligible to have any balance remaining on their student loan debt forgiven. Public service includes employment with most local, state, federal, tribunal nation, or § 501(c)(3) corporations. (Ford Program loans only).

G. September 11 Survivors Discharge: Survivors of or eligible victims of the September 11 attacks may request discharge of their student loan debt. (Ford Program loans only).

H. Administrative Discharges Specific to Perkins Loans: In addition to the above-mentioned non-bankruptcy discharge options, borrowers may also request discharge or forgiveness of their Perkins Loans for the following reasons:

- full-time teacher in elementary school serving student from low-income families (up to 100%);
- full-time special education teacher (up to 100%);

- full-time qualified professional provider of early intervention services for the disabled (up to 100%);
- full-time math, science, foreign language, bilingual education, etc. in designated teacher shortage area (up to 100%);
- full-time employee of public or nonprofit child or family-services agency for high-risk children and families from low-income areas (up to 100%);
- full-time nurse or medical technician (up to 100%);
- full-time law enforcement or corrections officer (up to 100%);
- full-time staff member in education component of Head Start Program (up to 100%);
- VISTA or Peace Corps volunteer (up to 70%);
- Service in the U.S. Armed Forces (up to 50% in areas of hostilities or imminent danger);
- full-time teacher in designated educational service agency serving students from low-income families (up to 100%);
- full-time staff in prekindergarten or child care program licensed or regulated by State (up to 100%);
- full-time firefighter (up to 100%);
- full-time faculty member at Tribal College or University (up to 100%);
- full-time speech pathologist with master's degree working in Title I-eligibility elementary or secondary school (up to 100%);
- Master's degreed-librarian working in Title I-eligibility elementary or secondary school or public library serving title-eligible schools (up to 100%);
- full-time attorney working in public or community defender organization (up to 100%)

III. FLEXIBLE, AFFORDABLE PAYMENT OPTIONS: INSIDE OR OUTSIDE OF BANKRUPTCY

Both the FFELP and the Ford Program have flexible, affordable payment options for borrowers who have financial hardship. These payment options are available whether or not the borrower has filed bankruptcy. ECMC will always rely on the most affordable payment amount available to the borrower when arguing undue hardship discharge cases.

A. Consolidation: Consolidation benefits a borrower by spreading the payments over a term of up to 30 years, depending on the total loan balance. New consolidations are available only in the Ford Program. Borrowers who have previously consolidated their loans in the FFELP may reconsolidate their loans (even if defaulted) in the Ford Program but not vice-versa.

B. Income-Related Payments: In addition to fixed, amortized extended payment terms, there are two payments options that are based on a borrower's income and family size: the Income Based Repayment plan (IBR) and the Income Contingent Repayment plan (ICR) (available only in the Ford Program).

1. **Income Based Repayment:** To qualify for the IBR, borrowers must first demonstrate partial financial hardship (PFH). Borrowers can demonstrate PFH if the annual amount due on all eligible student loans under a 10-year repayment schedule is more than 15% of their adjusted gross income (AGI) minus 150% of the federal poverty guideline for the applicable family size. Most borrowers whose total loan balance exceeds their annual earnings will satisfy the PFH requirement.

The IBR payment is calculated using the borrower's AGI and family size. If the borrower earns less than 150% of the poverty level for their family size, the IBR payment will be $0. The required annual loan payment under the IBR is capped at 15% of earnings above 150% of the applicable poverty level. Because the monthly IBR payment is calculated as a percentage of the borrower's income, if the borrower's income drops, the monthly payment is reduced accordingly.

The IBR payment is recalculated annually based on household income. Married borrowers who file separate tax returns have their IBR payments based on their respective incomes but may still count each other and any dependents in the family size. Borrowers who elect the IBR must sign a consent form authorizing the disclosure of their tax information and must recertify their family size on an annual basis. A borrower may contact their lender at any time if they experience a change in financial circumstances that could impact their required IBR payment. The IBR repayment period is 25 years. At the conclusion of the 25-year repayment period, any remaining balance is forgiven.[2]

2. **Income Contingent Repayment:** Like the IBR, the ICR is recalculated annually and the payment amount is based on 20% of the difference between a borrower's AGI and 100% of the federal poverty level for the family size. If the AGI is below 100% of the poverty level for the borrower's family size, then the ICR payment is $0. The ICR is available to PLUS loan borrowers and also to borrowers who have defaulted loans in the Ford Program. The ICR is based on household income. After 25 years, any balance that is remaining is forgiven by the Secretary of Education.

3. **Public Service Loan Forgiveness:** Borrowers who make 120 qualifying payments under the IBR, ICR, or 10-year fixed payment schedule while employed in the public sector are eligible to have any balance remaining on their student loan debt forgiven. Public service includes employment with most local, state, federal, tribunal nation, or § 501(c)(3) corporations. There is specific language in this regulation that exempts any forgiven debt from constituting a taxable event. (Ford Program loans only).

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[2] Under the Internal Revenue Code, student loan debt forgiven at the end of the ICR or IBR term may constitute a taxable event. This is a nonissue in most cases because any forgiven debt is taxable only to the extent the borrower is solvent. Thus, it is unlikely that borrowers with large student loan debts will have assets that exceed the debt forgiven 25 years into the future.

C. Alternative Payment Arrangements: Borrowers who believe that none of the payment options are suitable may request an alternative repayment plan from the Secretary of Education. *See* 34 C.F.R. § 685.208(g).

D. Suspension of Payments: In addition to the different types of repayment plans, borrowers may seek deferment of repayment or forbearance.

1. Deferment: A deferment (postponement of payments) may be granted where a debtor is conscientiously seeking, but unable to find, full-time employment (for up to three years) or while a borrower is experiencing an economic hardship as defined by federal law (for up to three years). *See*, 34 C.F.R. § 685.204.

2. Forbearance: Forbearance allows a debtor to stop or reduce monthly payments for a limited, specific period, during which interest on the loans accrues. If the interest is not paid, it is added to the principal balance. Forbearance nay be granted based upon a borrower's poor health, temporary financial hardship, or if the borrower is obligated to make payments on federal student loans that are equal to or greater than 20% of monthly gross income or other reasons acceptable to the Department of Education. *See*, 34 C.F.R. § 584.205.

IV. ADMINISTRATIVE WAGE GARNISHMENT

In November, 1991, Congress amended the Higher Education Act of 1965 (HEA to authorize administrative non-judicial wage garnishment as a cost effective means of collecting on defaulted loans. Section 488A of the HEA, 20 U.S.C. § 1095a. The HEA authorizes the garnishment up to fifteen percent of a defaulted borrower's disposable pay.

The HEA requires the holder of the defaulted, reinsured loan to act with "due diligence" and to take a number of procedural steps before garnishing a borrower's wages including a sequence of dunning letters and telephone contacts. *See* 20 U.S.C. § 1095a(a), 34 C.F.R. § 682.100 *et seq*. Required collection actions also include reporting the defaulted loan to credit bureaus, Federal and State income tax refund offsets, and, where appropriate, collection litigation.

A borrower does have an administrative remedy where the borrower can request an administrative hearing if borrower believes that he or she does not owe the debt or questions the amount of the debt. There is no private cause of action against the holder of a student loan debt for violations of the HEA.

Significantly, a non-compliant employer is liable for all amounts it failed to withhold, as well as all attorneys' fees and costs. The attorneys' fees need not be reasonable. *Educ. Credit Mgmt. Corp. v. Central Equip. Co.*, 477 F.Supp.2d 788 (E.D.Ky. 2007).

V. TREATMENT OF STUDENT LOANS IN BANKRUPTCY

A. Plan Provisions:

1. Classification of student loan debt: Recent cases have addressed the issue of whether a Chapter 13 Plan can be confirmed over objection where the Plan separately classifies a non-dischargeable student loan debt and proposes to pay that debt more than the other general unsecured creditors. It is generally recognized that discrimination based **solely** on non-dischargeability is improper. *In re: Pracht*, 464 B.R. 486, 489 (Bankr. M.D.Ga. 2012); *In re Kalfayan*, 415 B.R. 907, 909 (Bankr. S.D.Fla. 2009).

Recent decisions, however, in the Middle District of Georgia and the Northern District of Georgia hold that a debtor may treat student loan debt more favorably than other unsecured debt subject to an "unfair discrimination" analysis. *In re Pracht, supra*; *In re Webb*, 370 B.R. 418 (Bankr. M.D.Ga. 2007).

When considering this issue, courts first refer to 11 U.S.C. § 1322(b)(1) which provides that the plan may:

> (1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but **may not discriminate unfairly** against any class so designated . . . .[3]

Judge Smith, citing Judge Margaret Murphy's decision in *In re Webb*, 370 B.R. 418 (Bankr.N.D.Ga. 2007) said:

> Whether curing a default and continuing to make direct contract payments on a long term debt should be subject to unfair discrimination analysis is unsettled. *See In re Brown*, 162 B.R. 506, Appendix A (N.D.Ill. 1993). The minority view excepts long-term obligations (*i.e.* for which the payment period extends beyond the life of the plan) from the unfair discrimination analysis under 1322(b)(1). *See In re Jackson*, Case No. 05-85212, P.4 (Bankr. N.D.Ga. 2006) (J. Mullins), *citing In re Williams*, 253 B.R. 220 (Bankr.W.D.Tenn. 2000); *In re Benner*, 156 B.R. 631

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[3] As Judge Smith pointed out in *In re Pracht, supra*, some courts have held that section 1322(b)(1) is "trumped" by section 1322(b)(5), which provides that a plan may:

> . . . provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

Accordingly, these Courts exclude "long-term debt" from an "unfair discrimination analysis." Judge Smith, however, rejected this notion. *Pracht* at 490.

> (Bankr.D.Minn. 1993). Courts that have accepted the minority position permit the debtor's plan to cure defaults and to maintain contract payments on long-term unsecured debt even when other unsecured debt will receive less than full payment.
>
> The majority position requires plans that provide full payment of student loan obligations under § 1322(b)(5) to undergo unfair discrimination analysis. *In re Simmons*, 288 B.R. 737, 744 (Bankr.N.D.Tex. 2003).

Id. at 422-23.

Judge Smith, like Judge Murphy in *Webb*, concluded that payments on long-term debt will not be permissible if the payments discriminate unfairly against other unsecured claims in violation of 11 U.S.C. § 1322(b)(1).

The Eleventh Circuit has not addressed the standards to be applied to determine whether a plan "discriminates unfairly." Id. at 492. After examining tests in a number of circuits, Judge Smith adopted the reasoning of the Bankruptcy Court for the Southern District of Florida in *In Re Harding*, 423 B.R. 568 (Bankr.S.D.Fla. 2010) and ruled:

> The principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor. *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367, 127 S.Ct. 1105, 15 [166] L.Ed.2d 956 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)). Congress and the judiciary are constantly striving to achieve a wise balance between this fresh start policy, which *is* paramount, and the obvious primary competing aim of the Bankruptcy Code. As stated by Bankruptcy Judge Black, 'Any exercise of judicial discretion under the Bankruptcy Code should be informed by the two fundamental concepts of a fresh start for debtors and fairness to creditors.' *In re Forte*, 341 B.R. 859, 869 (Bankr.N.D.Ill. 2005). While Congress has chosen to treat certain creditors differently than others for a variety of reasons, §§ 507, 523(a)(8), and 1322(b) combine with the rest of the Bankruptcy Code to require a fair balancing of:
>
> (1) the Debtor's fresh start;
> (2) the clear legislative objective of student loan repayment; and
> (3) fair treatment of creditors as a whole.

423 B.R. at 575.

Because the separate classification of the student loan debt by debtor in *Pracht* allowed her to write off approximately $50,000 under the Public Service Loan Forgiveness Program and that the cost of discrimination to other creditors, Judge Smith ruled that debtor's plan did not "unfairly" discriminate against other unsecured creditors. Id. at 492-493.

Judge Murphy, while using a slightly different "unfair discrimination" analysis, reached a similar decision in *In re Webb, supra.* In *Webb*, Judge Murphy noting that disallowing "direct payments on the student loan debt would only result in a 2% additional dividend to the other unsecured creditors, held that a plan provision paying student loan creditors more than other unsecured creditors did not "unfairly discriminate" against the other unsecured creditors. Judge Murphy ruled:

> The choice Congress made to endow student loan debt with nondischargeable status sends a strong signal of intent that should not be easily ignored. Balancing the major policies of Chapter 13, including the fresh start, and the strong intent of Congress to elevate the payment status of student loans leads to the conclusion that the only logical way in this case to implement both policies is to allow Debtors' plan to be confirmed. This conclusion is, however, limited to the specific facts in this case and other cases may present other facts that would require further inquiry or lead to a different conclusion.

Webb at 426.

2. **Discharge by Declaration:** The Supreme Court recently held in *United Student Aid Funds v. Espinosa*, 130 S.Ct. 1367 (2010) that under certain circumstances a student loan debt can be discharged by plan provision. In *Espinosa*, the Chapter 13 debtor utilized a discharge-by-declaration provision. Though the creditor received actual notice of the debtor's plan, it did not object or appeal the confirmation order. Several years later, the creditor attempted to collect the debt and the debtor asked the court to enforce the discharge order and the creditor sought to correct the confirmation order pursuant to a Rule 60(b)(4) motion. The bankruptcy court and, ultimately, the Ninth Circuit ruled the orders were not void.

The Supreme Court unanimously affirmed the Ninth Circuit's decision to let the unlawful order stand. The Court held that although a bankruptcy court is required to make an undue hardship determination prior to discharging student loan debt, the court's failure to do so is not sufficient to void a final judgment under FRCP 60(b)(4).

The Court held that the statutorily-required undue hardship finding is not a limitation on the bankruptcy court's jurisdiction. Rather, § 523(a)(8)'s requirement is merely a precondition to obtaining a discharge order. Likewise, the Court held that the requirement that bankruptcy courts make this undue hardship finding within an adversary proceeding is derived from the Bankruptcy Rules, which are "procedural rules adopted by the Court for the orderly transaction of its business" and not jurisdictional.

The Court also held that a creditor's *actual* notice of the filing and contents of the debtor's plan more than satisfied its due process rights even though the debtor failed to employ the required service of a summons and complaint pursuant to Federal Rules of Bankruptcy Procedure.

Although the Court seemed to understand the possible practical consequences that would follow from allowing "discharge-by-declaration," it apparently believed other mechanisms, such as Rule 11 sanctions, would prevent debtors and their attorneys from attempting to abuse the system.

The Court also explicitly rejected the Ninth Circuit's view that, absent a timely objection from a creditor, a bankruptcy court must confirm a discharge-by-declaration provision and held that bankruptcy courts have an independent obligation to review the plan and to direct a debtor to conform his plan to the requirements of §§ 1328(a)(2) and 523(a)(8).

B. Discharge by Adversary Proceeding:

1. Standard for Discharge: Section 523(a)(8) of the Federal Bankruptcy Code ("Code") provides that an educational loan is not dischargeable in bankruptcy 'unless excepting such debt from discharge . . . would impose an *undue hardship* on the debtor and the debtor's dependents.' The term 'undue hardship,' is not defined in the Code. The term, therefore, has been considered by many courts across the nation with two primary standards emerging: the totality of the circumstances test and the *Brunner* test. *Douglas v. Educ. Credit Mgmt. Corp. (In re Douglas)*, 366 B.R. 241 (Bankr. M.D.Ga. 2007). The *Brunner* test was adopted by the Eleventh Circuit in the 2003 case of *Hemar Insurance Corp. of America v. Cox (In re Cox)* [338 F.3d 1238 (11th Cir. 2003].

The *Brunner* test, which was originally articulated by the Second Circuit Court of Appeals in 1987, provides that proving undue hardship requires a three-part showing: (1) the debtor cannot maintain, based on current income and expenses, a *minimal* standard of living for herself and her dependents if forced to repay the loans; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) the debtor has made good faith efforts to repay the loans. [*Brunner v. New York State Higher Educ. Serv's. Corp. (In re Brunner)*, 831 F.2d 395, 396 (2nd Cir. 1987)]. Under the *Brunner* test, the debtor bears the burden of proving all three prongs by a preponderance of the evidence.

The *Brunner* test attempts to strike a proper balance by "safeguard[ing] the financial integrity of . . . student loan program[s] by not permitting debtors who have obtained the substantial benefits of an education funded by taxpayer dollars to dismiss their obligation merely because repayment of the borrowed funds would require some major personal and financial sacrifices.

2. Borrower Cannot Make Monthly Student Loan Payments and Maintain a Minimal Standard of Living for Himself and His Dependents: Under the first prong of the *Brunner* test, the debtor must show that if he is "required to make the monthly student loan payment, his standard of living will fall below the minimum level." *In re Brunner*, 46 B.R. 752, 754 (S.D.N.Y. 1985) (district court opinion establishing

Brunner test); *In re Boykin*, 313 B.R. 516, 521 (M.D.Ga. 2004); *In re Bell*, 5 B.R. 461, 463 (Bankr. N.D.Ga. 1980).

It is not sufficient for the debtor simply to show that being required to repay the debt would diminish his or her existing lifestyle. Under *Brunner*, the debtor is entitled to a "minimal standard of living" for himself and his dependents, but the debtor is not entitled to maintain whatever standard of living he has previously attained, nor the level he would maintain if not required to repay the debt. "Minimal" does not mean pre-existing, and it does not mean comfortable. *Educ. Credit Mgmt. Corp. v. Stanley*, (*In re Stanley*), 300 B.R. 813, 817-18 (N.D.Fla. 2003). A debtor, however, is not required to live in "abject poverty" in order to service a student loan debt. *Douglas* at 252.

Numerous courts have considered the use of the IRS Standards to determine a "minimal standard of living." Although some courts have looked to the standards as one piece of evidence to be considered, nearly all courts have concluded that blindly applying the IRS Standards may lead to an erroneous calculation of the debtor's "minimal standard of living":

> [T]he living expense allowance under the IRS Standards increases not only with a debtor's family size, but also with his or her income. What is necessary for a minimal standard of living may differ depending on certain factors commonly associated with income. For example, a debtor employed in a professional occupation may require a higher clothing budget than a non-professional debtor. However, all other factors being equal, the amount necessary to maintain a minimal standard of living under § 523(a)(8) should not be adjusted upward just because one debtor has a higher income that another. Secondly, a bankruptcy court should not allow a debtor more than the debtor's actual expenses. Sometimes the amount that a debtor actually spends will be less than the amount permitted under the IRS Standards. Allowing a debtor more than he or she actually spends is inconsistent with the requirements of the economy and sacrifice necessary to obtain discharge of student loan debt under § 523(a)(8).

Educ. Credit Mgmt. Corp. v. Howe (*In re Howe*), 319 B.R. 886 (9th Cir.B.A.P. 2005)

3. Additional Circumstances Exist Indicating that Debtor Cannot Maintain A Minimal Standard of Living for a Significant Portion of the Repayment Period if He Honors His Student Loan Obligations: Under the second prong of *Brunner*, a debtor must prove that **additional circumstances** exist indicating that the debtor cannot maintain a minimal standard of living for a significant portion of the repayment period if forced to repay the loans. *Brunner*, 831 F.2d at 396. *See also*, *Cox*, 338 F.3d 1241-42. A finding of undue hardship is reserved for the exceptional case, and requires the presence of **unique** or **extraordinary circumstances** that would render it unlikely that the debtor would ever be able to honor his obligations. This is a demanding

requirement. *Brightful v. Pennsylvania Higher Educ. Assistance Agency*, 267 F.3d 324, 328 (3d Cir. 2001); *see also*, *In re Ballard*, 60 BR 673, 675 (Bankr. W.D.Va. 1986).

It is not enough for a debtor to demonstrate that he is currently in financial straits; rather, he must prove a total incapacity in the future to pay his debts. Dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitments. *Id. See also, In re Mosley*, 494 F.3d 1320, 1326 (11th Cir. 2007); *In re Spence*, 541 F.3d 538 (4th Cir. 2008); *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993); *In re Frushour*, 433 F.3d 393, 401 (4th Cir. 2005); *In re Brightful*, 267 F.3d 324, 328 (3d Cir. 2001); *In re Tirch*, 409 F.3d 677, 681 (6th Cir. 2005).

4. Debtor Has Made a Good Faith Effort to Repay His Student Loan Debt: *Brunner's* good faith prong is meant to effect Congressional intent by requiring the repayment of student loans in all but the most extreme cases. *See Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 399-400 (4th Cir. 2005). Under *Brunner*, good faith is "measured by the [the debtor's] efforts to obtain employment, maximize income and minimize expenses" and to undertake all other reasonable efforts to ensure repayment." *Brunner*, 831 F.2d at 397. A debtor may not "willfully or negligently cause his own default, but rather his condition must result from factors beyond his reasonable control." *Id.*

Satisfaction of this third prong of the *Brunner* test requires a showing that the debtor made efforts to satisfy the debt by all means – or at least by some means – within the debtor's reasonable control. A lack of bad faith is not the applicable test for deciding the third prong of *Brunner*. Actual payments are not required to prove good faith. Since a debtor's good faith is interpreted in light of his ability to pay, a complete failure to make even minimal payments on a student loan does not prevent a finding of good faith where the debtor never had the resources to make payments.

Finally, requesting forbearances and deferments does not establish a good faith effort to repay student loan debt. *Educational Credit Mgmt. Corp. v. Mosko*, 515 F.3d 319 (4th Cir. 2008). Further, expenditures on items not necessary to maintain a minimal standard of living and the failure to minimize and even eliminate certain expenses does not demonstrate a good faith effort to minimize expenses. *See, Educational Credit Mgmt. Corp. v. Buchanan*, 276 B.R. 744, 751-52 (N.D.W.Va. 2002).

VII. ADDITIONAL RESOURCES

National Consumer Law Center, *Student Loan Law: Collections, Intercepts, Deferments, Discharges, Repayment Plans, and Trade School Abuses* (2d ed. 2002).

David J. Light, Esq., *Discharging Student Loans in Bankruptcy* (2d ed. 1999).

VIII. WEB SITES

Federal Student Aid (government website): (http://studentaid.ed.gov)

Finaid (consumer financial aid website): (www.finaid.org)
Department of Education (www.ed.gov)
Department of Education Ombudsman Office (www.ombudsman.ed.gov)
William D. Ford Direct Loan Program (www.loanconsolidation.ed.gov)
National Student Loan Data System (www.nslds.ed.gov)
ED PIN website: (www.pin.ed.gov)
National Counsel of Higher Education Loan Programs (www.nchelp.org)
Educational Credit Management Corporation (www.ecmc.org)
FFEL Forms: (http://www.ecmc.org/topic/mainForms.html)
Direct Loan (Ford program) Forms: (https://www.dl.ed.gov/borrower)

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Taking Bankruptcy Rights Seriously

Rafael I. Pardo

91 WASH. L. REV. (forthcoming 2016)

Taking Bankruptcy Rights Seriously

Rafael I. Pardo[*]

Perhaps more so than any other area of law affecting individuals of low-to-moderate means, bankruptcy poignantly presents an affordability paradox: The system's purpose is to relieve individuals from financial distress, yet it simultaneously demands a significant commitment of resources to obtain such relief. To date, no one has undertaken a comprehensive study of the complexities and costs of the litigation burden that Congress has imposed on self-represented debtors who seek a fresh start in bankruptcy. In order to explore the problems inherent in a system that sometimes necessitates litigation as the path for vindicating a debtor's statutory right to a discharge, this Article focuses on the particular example of debtors who seek to discharge their educational debt (e.g., student loans) through bankruptcy. Such debt may be discharged only if the debtor can establish through a full-blown lawsuit, essentially governed by the Federal Rules of Civil Procedure, that repaying the debt would impose an undue hardship on the debtor.

Using an original dataset of educational-debt dischargeability determinations, this Article reveals that, even when controlling for a variety of factors, including a debtor's financial characteristics and applicable legal standards, the typical self-represented debtor in such proceedings has only a 28.5% chance of litigation success, which pales in comparison to the 56.2% success rate of a similarly situated debtor who is represented. This finding casts serious doubt on the litigation framework that has been implemented to resolve disputes over a debtor's discharge rights. After exploring various approaches to reforming the framework, this Article concludes that our reform efforts will signify how committed we are as a society to deliver bankruptcy law's promise of a fresh start to financially distressed individuals—to wit, whether we are willing to take bankruptcy rights seriously.

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Introduction

More than forty years ago, the U.S. Supreme Court proclaimed the simple, yet harsh, truth that "[t]here is no constitutional right to obtain a discharge of one's debts in bankruptcy."[1] Nonetheless, it is abundantly clear that the bankruptcy discharge constitutes a statutory right.[2] Unfortunately, vindicating the right to a discharge has proved to be elusive for certain individual debtors, not so much as a result of substantive eligibility rules,[3] but rather because of procedural barriers that increase the complexity of accessing the right. With increased procedural complexity, the costs of legal representation for right vindication also increase, thus making representation unaffordable for some debtors.[4] Those debtors face the choice of either foregoing an attempt to vindicate the right or seeking to vindicate it without the assistance of counsel. For debtors who represent themselves, the question arises whether the lack of legal representation has made them worse off than if they had been represented.

This question has previously been explored with respect to individual debtors who represent themselves in their bankruptcy cases, and the research has found that self-represented debtors have fared worse than their represented counterparts.[5] The question, however, has not been

1. United States v. Kras, 409 U.S. 434, 446 (1973); *see also* Grogan v. Garner, 498 U.S. 279, 286 (1991) ("We have previously held that a debtor has no constitutional or 'fundamental' right to a discharge in bankruptcy. We also do not believe that, in the context of provisions designed to exempt certain claims from discharge, a debtor has an interest in discharge sufficient to require a heightened standard of proof." (citing *Kras*, 409 U.S. at 445-46)).

2. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1967 (2015) (Thomas, J., concurring) ("No doubt certain aspects of bankruptcy involve rights lying outside the core of the judicial power. The most obvious of these is the right to discharge, which a party may obtain if he satisfies certain statutory criteria."); *cf. Kras*, 409 U.S. at 447 (referring to bankruptcy discharge as "a legislatively created benefit" and "a statutory benefit").

3. *See* Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 416 (2005) [hereinafter Pardo & Lacey, *Bankruptcy Courts*] (discussing bankruptcy eligibility rules and discharge eligibility rules).

4. *See, e.g.*, Rafael I. Pardo, *Self-Representation and the Dismissal of Chapter 7 Cases*, *in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA (Samuel Estreicher & Joy Radice eds., forthcoming 2016) (manuscript at 9-11) [hereinafter Pardo, *Self-Representation*]; *see also* Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 67 VAND. L. REV. 151, 166 (2014) ("Access to legal representation becomes even more difficult as litigation costs increase.").

5. *See infra* note 46 and accompanying text.

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thoroughly explored with respect to individual debtors who represent themselves in litigation related to their statutory right to discharge. As discussed below in greater detail, bankruptcy cases usually do not involve litigation for most individual debtors. When litigation does arise, some of it, including discharge litigation, will entail a full-blown federal lawsuit, subject to the Federal Rules of Civil Procedure and some variations thereon.

In a recent appeal involving a self-represented inmate asserting a § 1983 claim[6] against prison administrators and staff, Judge Richard Posner astutely noted that "[p]ure adversary procedure works best when there is at least approximate parity between the adversaries."[7] In the setting of bankruptcy, this observation resonates loudly. Individual debtors routinely file for bankruptcy relief as a result of financial distress. It does not take a lot of imagination to realize that financially distressed debtors will have limited means to retain any counsel, let alone counsel that is highly skilled, competent, and efficient.[8] On the other hand, repeat institutional creditors who litigate against debtors have considerable resources at their disposal that enable them to secure robust representation.

When bankruptcy litigation occurs, we can expect lack of parity between represented debtors and represented creditors, with the resource asymmetry favoring the latter. Taking it a step further, when the dispute involves a self-represented debtor and a represented creditor, we can expect the resource gap to become a gaping chasm. This reality demands a close examination of and critical inquiry into the decision to use complex procedure to channel bankruptcy litigation involving individual debtors, a challenge to which this Article responds.

This Article seeks to empirically evaluate the effect of self-representation on success in discharge litigation by focusing on determinations regarding the dischargeability of educational debt in bankruptcy (e.g., student loans). Such debt is not automatically discharged in bankruptcy; rather, the debt will be deemed dischargeable if a debtor

6. See 42 U.S.C. § 1983 (2012) (providing a cause of action against any person who, acting under color of state law, abridges the federal constitutional or statutory rights of the plaintiff).

7. Rowe v. Gibson, 798 F.3d 622, 632 (7th Cir. 2015).

8. *See* Berliner v. Pappalardo (*In re* Puffer), 674 F.3d 78, 86 (1st Cir. 2012) (Lipez, J., concurring) ("[A] struggling debtor who lacks the resources to pay a Chapter 7 attorney's fee up front has limited options. . . . I have no reason to think . . . that competent bankruptcy legal advice is readily available for free.").

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establishes that repayment of the debt would impose an undue hardship.[9] That showing must be made within the framework of a full-blown federal lawsuit—that is, pure adversary procedure.[10] Analyses of the data gathered for this study—a total of 1,430 proceedings filed nationwide during the 2011 and 2012 calendar years—provides support for the proposition that complex procedure creates access-to-justice barriers for self-represented debtors who seek to vindicate their discharge rights. Even when controlling for a variety of factors, including a debtor's financial characteristics and applicable legal standards, the typical self-represented debtor in such proceedings has only a 28.5% chance of litigation success, which pales in comparison to the 56.2% success rate of a similarly situated debtor who is represented.[11] This finding casts serious doubt on the litigation framework that has been implemented to resolve disputes over a debtor's discharge rights.

This Article proceeds as follows. Part I provides a backdrop for assessing individual debtors' need for legal representation in Chapter 7 bankruptcy cases and litigation in connection with those cases. Part II presents an empirical study whose findings should prompt a reconceptualization of the role of procedure in bankruptcy litigation involving individual debtors. Part III explores various approaches to reforming the extant litigation framework. This Article concludes that our approaches to procedural reform will signify how committed we are as a society to deliver bankruptcy law's promise of a fresh start to financially distressed individuals—to wit, whether we are willing to take bankruptcy rights seriously.

I. Assessing the Need for Legal Representation in Bankruptcy

Bankruptcy is supposed to be, at least in its modern incarnation, a haven for debtors suffering from financial distress.[12] Filing for bankruptcy automatically gives rise to an injunction that prohibits, among other things,

9. *See* 11 U.S.C. § 523(a)(8) (2012).

10. *See infra* notes 284-286 (discussing how disputes in bankruptcy are resolved either as adversary proceedings or as contested matters and how the former are more procedurally complex than the latter).

11. *See infra* Part II.D.

12. *See, e.g.*, Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 475-76 (2007) [hereinafter Pardo, *Judicial Function*]. *See generally* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325 (1991).

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collection activities by creditors,[13] thereby marking the beginning of what will potentially be a new financial life for the debtor. Merely filing for bankruptcy, however, does not guarantee that the debtor will be afforded the major substantive relief that bankruptcy law offers—a discharge.[14] If a debtor is to have "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt,"[15] a release from personal liability for such debt becomes imperative. After all, such liability is the cornerstone for the enforcement of debts in our society.[16] The bankruptcy discharge effectuates such a release by prohibiting creditors from recovering their prebankruptcy debts as a personal liability of the debtor.[17]

The path to discharge, however, is not always straightforward. Bankruptcy law is highly specialized and technical, including the provisions of the law that relate to consumer bankruptcies.[18] Accordingly, if a debtor is to successfully navigate the complex path that ultimately culminates in a discharge, it stands to reason that the assistance of an expert will be indispensable in doing so.[19] Nonindividual entities,[20] such as corporations and partnerships, cannot act without the assistance of their agents, including the lawyers who represent them in connection with legal action. As such,

13. *See* 11 U.S.C. § 362(a).

14. *See, e.g.*, *id.* § 727.

15. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

16. *See* Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 3-4 (1996).

17. 11 U.S.C. § 524(a)(2).

18. *See, e.g.*, Dignity Health v. Seare (*In re* Seare), 493 B.R. 158, 221 (Bankr. D. Nev. 2013) ("Being able to trust lawyers to protect one's property is especially important for consumer bankruptcy debtors, who typically seek representation in dire circumstances and face a complex legal process."); *In re* Malewicki, 142 B.R. 353, 357 (Bankr. D. Neb. 1992) ("Bankruptcy is a specialized area of practice. Even consumer bankruptcy cases involve complex federal bankruptcy laws and related state laws."); 1 NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 79 (1997) ("No area of bankruptcy law is more complex than consumer bankruptcy.").

19. *See* Berliner v. Pappalardo (*In re* Puffer), 674 F.3d 78, 86 (1st Cir. 2012) (Lipez, J., concurring) ("Although [a debtor] theoretically could proceed pro se, I doubt that bankrupt individuals will ordinarily be able to navigate the complexities of the bankruptcy process on their own.").

20. This Article uses the term "nonindividual entity" to describe an entity that is not a natural person (i.e., a human being). Under the Bankruptcy Code, "[t]he term 'entity' includes person, estate, trust, governmental unit, and United States trustee," 11 U.S.C. § 101(15) (2012), and "[t]he term 'person' includes individual, partnership, and corporation," *id.* § 101(41).

nonindividual entities *cannot* forego the assistance of lawyers when legal representation is required. One might therefore expect that, if a legal entity sought bankruptcy relief, it would seek out the assistance of counsel with expertise in the area.[21] On the other hand, when individuals seek bankruptcy relief, they have a choice. They can either go it alone or seek the assistance of an attorney.[22]

In order to properly contextualize a debtor's need for legal representation when seeking a bankruptcy discharge, one must understand that the nature of representation will differ depending on whether the facts and circumstances of the debtor's case will provide a basis for seeking to deny the debtor a discharge altogether or seeking a determination that, notwithstanding the debtor's entitlement to a discharge, a particular debt should be deemed nondischargeable. If the facts and circumstances do not provide such a basis, a debtor who has sought a Chapter 7 discharge is highly unlikely to encounter litigation whose outcome would preclude the debtor from obtaining a discharge. But if such a basis does exist, the debtor will have to contend with complex and protracted discharge litigation whose outcome could result in denial of discharge or a discharge of reduced scope. The remainder of this Part discusses how these dynamics affect the need for legal representation.

A. Case Representation

To obtain a discharge, a debtor must first commence a bankruptcy case by filing a petition under the operative chapter of the Bankruptcy Code pursuant to which the debtor wishes the case to proceed.[23] Relief under the Code's operative chapters proceeds according to a basic principle—the discharge of debt in exchange for the debtor's assets or future income. For

21. *See generally* Matthew Cormak, Note, *The Cost of Representation: An Argument for Permitting Pro Se Representation of Small Corporations in Bankruptcy*, 2011 COLUM. BUS. L. REV. 222, 224-30 (discussing the general requirement of attorney representation for corporations in bankruptcy).

22. Of course, self-representation does not necessarily mean that the debtor will lack assistance. For example, some debtors may enlist the aid of non-attorneys, which falls short of formal legal representation. One example of such assistance is that of a bankruptcy petition preparer ("BPP"), which the Bankruptcy Code defines as "a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attorney, who prepares for compensation a document for filing." 11 U.S.C. § 110(a)(1). The Code sets forth standards governing the activities of BPPs and provides for civil remedies in the event of noncompliance. *See id.* § 110.

23. *See* 11 U.S.C. § 301.

example, an individual debtor who seeks a Chapter 7 discharge must give up all nonexempt assets, which will be liquidated by a trustee.[24] The trustee will use the liquidation proceeds to satisfy creditor claims.[25] If granted a Chapter 7 discharge, the debtor will be absolved of personal liability for all prebankruptcy debts that are dischargeable.[26] Accordingly, one can conceive of a Chapter 7 debtor's fresh start as "the net financial benefit" that results when deducting (1) the sum of the debtor's direct costs of filing for bankruptcy (e.g., attorneys' fees and filing fees) and the value of the debtor's nonexempt assets from (2) the total amount of discharged debt.[27]

Nationwide, Chapter 7 cases routinely account for the majority of bankruptcy filings by individuals whose debts primarily consist of consumer debts ("consumer debtors").[28] For example, Chapter 7 cases constituted approximately 66% (i.e., 600,885 of 909,812) of all cases filed by consumer debtors in 2014.[29] Because the Chapter 7 discharge has greater applicability, the discussion below focuses on substantive and procedural considerations relating to that discharge.

The bankruptcy case itself is an administrative proceeding within which disputes involving the debtor may, but need not, arise.[30] Although bankruptcy is formally a judicial process, much of that process historically

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24. *See id.* §§ 522(b)(1), 541(a)(1), 704(a)(1).

25. *See id.* § 726(a).

26. *See id.* §§ 523(a), 524(a)(2), 727(b).

27. Michelle J. White, *Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 U. CHI. L. REV. 685, 700 (1998); *cf.* Harris v. Viegelahn, 135 S. Ct. 1829, 1835 (2015) ("Chapter 7 allows a debtor to make a clean break from his financial past, but at a steep price: prompt liquidation of the debtor's assets.").

28. *See* Admin. Office of the U.S. Courts, *Caseload Statistics Data Tables*, U.S. CTS., http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables. The Bankruptcy Code defines a consumer debt as a "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8).

29. Admin. Office of the U.S. Courts, *Table F-2—U.S. Bankruptcy Courts Statistical Tables for the Federal Judiciary (December 31, 2014)*, U.S. CTS., http://www.uscourts.gov/statistics/table/f-2/statistical-tables-federal-judiciary/2014/12/31.

30. *See* Menk v. Lapaglia (*In re* Menk), 241 B.R. 896, 910 (B.A.P. 9th Cir. 1999) (stating that a bankruptcy case "serves as the *administrative mechanism* by which the debtor receives a discharge and a fresh start"); *In re* Attorneys at Law & Debt Relief Agencies, 353 B.R. 318, 322-23 (S.D. Ga. 2006) ("A 'case' refers to a matter initiated by the filing of a petition seeking relief under the Bankruptcy Code. A 'proceeding' refers to everything which happens within the context of a bankruptcy case.").

has been and continues to be managerial and ministerial in nature.[31] Because garden-variety Chapter 7 consumer cases are devoid of litigation ("uncontested cases"), they essentially constitute transactional work focused on front-end client interviews that generate the requisite information documented in the disclosure forms that facilitate entry into the bankruptcy system.[32] Failure to comply with the Bankruptcy Code's disclosure requirements can result in dismissal of the debtor's case.[33] As such, from a debtor's perspective, the key task in a Chapter 7 consumer case is properly filling out forms so as to ensure that the court seamlessly processes the filing and ultimately grants the debtor a discharge.[34] This dynamic has been one of the dominant factors that has shaped the market for legal representation at the point of entry into the bankruptcy system via Chapter 7.

As a preliminary matter, the stakes of Chapter 7 relief are high from the debtor perspective. For example, we can roughly estimate that the average Chapter 7 consumer case filed in 2014 involved approximately $153,607 of dischargeable debt.[35] That is a sizable debt burden when one

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31. *See* Richard B. Levin, *Towards a Model of Bankruptcy Administration*, 44 S.C. L. REV. 963, 965-68 (1993).

32. *See, e.g.*, Va. State Bar, Legal Ethics Opinion No. 1883, at 6 (July 23, 2015), https://www.vsb.org/docs/LEO/1883.pdf. The disclosure requirements are an integral component of bankruptcy as a collective proceeding that aims to distribute the debtor's assets for the benefit of creditors. The marshalling and distribution functions of such a proceeding can be properly executed only if adequate information exists regarding the debtor's financial circumstances (e.g., assets, liabilities, income, and expenses). *See* Siegel v. Weldon (*In re* Weldon), 184 B.R. 710, 715 (Bankr. D.S.C. 1995); 1 HENRY J. SOMMER ET AL., CONSUMER BANKRUPTCY LAW AND PRACTICE § 7.1.1, at 85 (John Rao ed., 9th ed. 2009). Accordingly, the Bankruptcy Code has structured a self-reporting system pursuant to which a debtor must make such disclosures. *See* 11 U.S.C. § 521 (2012).

33. *See, e.g.*, 11 U.S.C. §§ 521(e)(2)(B), 521(i)(1), 707(a)(3).

34. *See* 1 SOMMER, *supra* note 32, § 7.1.1, at 85; Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 68, 101 (2012). This is not to say, however, that a debtor will no longer need the advice of counsel after having filed for bankruptcy relief. *See In re* Castorena, 270 B.R. 504, 529 (Bankr. D. Idaho 2001) ("To send a debtor into a bankruptcy *pro se*, on the theory that he has had 'enough' advice and counseling in the document preparation stage to safely represent himself, is except in the extraordinary case so fundamentally unfair as to amount to misrepresentation.").

35. In compiling bankruptcy statistics, the Director of the Administrative Office of the United States Courts (the "AOUSC") is required to report "the aggregate amount of debt discharged in cases filed during the reporting period, determined as the difference between the total amount of debt and obligations of a debtor reported on the schedules and the amount of such debt reported in categories which are predominantly nondischargeable." 28

considers that $2,413 was the amount of average monthly income reported in the median Chapter 7 consumer case filed in 2014.[36] It should go without saying that a debtor with annual income of less than $30,000 does not have a meaningful prospect of retiring a six-digit debt load. Wiping out personal liability of this magnitude would make a world of difference for a low-income debtor. Given that more than ninety percent of Chapter 7 cases filed by individual debtors have been no-asset cases (i.e., cases in which the debtor does not have any nonexempt assets for liquidation and distribution to creditors),[37] for most Chapter 7 consumer debtors, only the direct costs of filing for bankruptcy are likely to offset the financial benefit of discharge.[38]

The question arises as to how individuals who are in dire need of financial relief can afford representation. Several practical considerations limit the options available to debtors. First of all, given that debtors file for bankruptcy to have their debts discharged, the nature of the relief sought (i.e., injunctive relief)[39] does not generate a monetary award from which an attorney can carve out a contingent fee. As such, Chapter 7 debtors

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U.S.C. § 159(c)(3)(C) (2012). The AOUSC refers to this amount as "net scheduled debt" in the table that reports this statistic. *See* ADMIN. OFFICE OF THE U.S. COURTS, BAPCPA TABLE 1A n.2 (2014), http://www.uscourts.gov/statistics/table/bapcpa-1a/bankruptcy-abuse-prevention-and-consumer-protection-act-bapcpa/2014/12/31. In 2014, debtors reported a total amount of $83,745,558,000 of net scheduled debt in 545,191 Chapter 7 consumer cases with complete schedules, *see id.* & n.1, for an average amount of $153,607 of net scheduled debt. Again this is a rough estimate. Due to incomplete schedules, the AOUSC's statistic for net scheduled debt does not include data from all filed cases. *See id.* n.1. Furthermore, the AOUSC's reliance on categories of debt to determine the amount of nondischargeable debts scheduled by debtors can result in both overinclusion and underinclusion of scheduled debts in the category of nondischargeable debts.

36. ADMIN. OFFICE OF THE U.S. COURTS, BAPCPA TABLE 2A (2014), http://www.uscourts.gov/statistics/table/bapcpa-2a/bankruptcy-abuse-prevention-and-consumer-protection-act-bapcpa/2014/12/31.

37. *See, e.g.*, LOIS R. LUPICA, AM. BANKR. INST. & NAT'L CONFERENCE OF BANKR. JUDGES, THE CONSUMER BANKRUPTCY CREDITOR DISTRIBUTION STUDY 6 (2013).

38. Recall that the net financial benefit that an individual debtor derives from Chapter 7 discharge requires deducting (1) the sum of the debtor's direct costs of filing for bankruptcy (e.g., attorneys' fees and filing fees) and the value of the debtor's nonexempt assets from (2) the total amount of discharged debt. *See supra* note 27 and accompanying text.

39. *See* 11 U.S.C. § 524(a)(2) (2012).

generally must pay up-front for legal services,[40] many of them likely experiencing difficulty in scraping together the funds needed to do so.[41]

Given these economic realities, attorneys are severely constrained in the amount that they can charge clients to represent them in a Chapter 7 consumer case. For example, from 2003 through 2009, the nationwide average for attorneys' fees in no-asset Chapter 7 consumer cases in which the debtor obtained a discharge did not exceed $1,000 (in 2005 inflation-adjusted dollars).[42] Despite these constraints, attorneys have made a profit in representing Chapter 7 consumer debtors through the combination of high volume and low cost.[43] A large swath of Chapter 7 consumer practice has structured itself by implementing routinized procedures that screen for large numbers of uncontested cases and that efficiently generate the documentation required for a debtor to overcome the procedural hurdles faced at the time of filing.[44]

We see, then, that uncontested Chapter 7 practice lends itself to economy of scale. This, in turn, facilitates a market for legal representation that ultimately appears to be accessible to many debtors. For example, from 2007 through 2012, the median and mean self-representation rates in Chapter 7 consumer cases nationwide were, respectively, 7.4% and 7.5%.[45]

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40. *See* Robert J. Landry, III & Amy K. Yarbrough, *An Empirical Examination of the Direct Access Costs to Chapter 7 Consumer Bankruptcy: A Pilot Study in the Northern District of Alabama*, 82 AM. BANKR. L.J. 331, 334 (2008); Lupica, *supra* note 34, at 105.

41. *See, e.g.*, Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 318, 322 & n.130 (2010).

42. *See* Lupica, *supra* note 34, at 46, 69.

43. *See, e.g.*, *In re* Bruzzese, 214 B.R. 444, 450 (Bankr. E.D.N.Y. 1997).

44. *See* Bruce M. Price & Terry Dalton, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (and Some Unintended Consequences)*, 26 YALE L. & POL'Y REV. 135, 154 (2007); William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 406, 409-10 (1994). For such practices, a reduction in filings can have a drastic effect on their operations. *See, e.g.*, Marilyn Odendahl, *Attorneys, Courts Feel Drop in Bankruptcy Filings*, THE INDIANA LAWYER (Jan. 27, 2016), http://www.theindianalawyer.com/attorneys-courts-feel-drop-in-bankruptcy-filings/PARAMS/article/39309 ("At the peak, Zuckerberg, who has offices around the state, was handling 200 to 300 cases a month. With the decline, he has laid off attorneys and staff members in 2014 and 2015."); *cf.* Lupica, *supra* note 34, at 123-24 ("[S]ignificant gross receivables are required to support a law office. . . . [B]ecause consumer debtors are not likely to be repeat clients, . . . lawyers must take affirmative steps to ensure a steady stream of new clients." (footnote omitted)).

45. *See* Pardo, *Self-Representation*, *supra* note 4 (manuscript at 24-25).

In other words, the overwhelming majority of Chapter 7 consumer debtors find a way to enlist the assistance of counsel when filing for bankruptcy relief. Importantly, prior research has suggested that such representation nearly assures that the debtor's case will not be dismissed,[46] which is a crucial procedural hurdle to overcome given that case dismissal will dispositively result in the debtor's failure to obtain a discharge.

B. Representation in Discharge Litigation

For nondismissed Chapter 7 cases, the court must grant the debtor a discharge unless the debtor falls within a particular class of individual, usually defined by reference to a limited set of circumstances relating to the debtor's fraud or misconduct in connection with the bankruptcy case.[47] An objection to a Chapter 7 debtor's discharge must generally be filed no later than sixty days after the first date set for the meeting of creditors,[48] which must be set no earlier than twenty days and no later than forty days after the date that the Chapter 7 debtor filed for bankruptcy.[49] Accordingly, approximately three months after filing for bankruptcy, a Chapter 7 debtor will likely know whether a discharge will be forthcoming.[50] Practically speaking, only a small percentage of Chapter 7 consumer cases result in denial of discharge.[51]

The scope of a Chapter 7 discharge does not include all pre-bankruptcy debts.[52] Presently, the Bankruptcy Code classifies nineteen

46. *See id.* (reporting dismissal rates for Chapter 7 consumer cases filed in the Western District of Washington from 2008 through 2012 and finding that the dismissal rate for self-represented cases (i.e., 12.96%) was statistically significantly greater than the dismissal rate for represented cases (i.e., 0.89%)).

47. *See* 11 U.S.C. § 727(a).

48. FED. R. BANKR. P. 4004(a). A court, however, may extend for cause the time for filing an objection to discharge. *Id.* 4004(b).

49. *Id.* 2003(a).

50. Upon expiration of the time fixed for objecting to a discharge, the court must grant the debtor a discharge, unless procedural considerations—such as an extension of the time for filing a complaint objecting to discharge or a pending motion to dismiss the debtor's case—warrant otherwise. *See id.* 4004(c)(1). The procedural deadline for filing a discharge objection, however, is a claim-processing rule that the debtor will forfeit if he fails to timely assert it as an affirmative defense. *See* Kontrick v. Ryan, 540 U.S. 443, 456-60 (2004).

51. *See, e.g.*, Lupica, *supra* note 34, at 68, 138 tbl.A-6 (reporting discharge rates exceeding 90%); Pardo, *Self-Representation*, *supra* note 4 (manuscript at 18).

52. *See* 11 U.S.C. § 727(b).

types of debts to be excepted from such a discharge,[53] generally on the basis of either the creditor's identity (e.g., a domestic support creditor) or the circumstances that gave rise to the debt (e.g., an intentional tort).[54] With the exception of three types of nondischargeable debt, the Federal Rules of Bankruptcy Procedure (the Bankruptcy Rules) do not impose any time limit on seeking a determination regarding the dischargeability of a debt.[55] In fact, the Bankruptcy Rules contemplate the possibility that such a determination may be sought after the debtor has been granted a discharge and the case has been closed.[56] Accordingly, the potential for litigation over the scope of discharge may persist well beyond the debtor's exit from bankruptcy.

As previously mentioned, if the facts and circumstances of the debtor's case provide a basis for seeking to deny the debtor a discharge or seeking a determination that a particular debt should be deemed nondischargeable, the debtor will have to contend with complex and protracted discharge litigation. The Bankruptcy Rules classify nearly all proceedings objecting to the debtor's discharge and all proceedings to determine the dischargeability of a debt as adversary proceedings.[57] Adversary proceedings in bankruptcy are the analogue to nonbankruptcy federal civil litigation insofar as the Bankruptcy Rules governing such proceedings virtually incorporate, with occasional modification, the Federal Rules of Civil Procedure (the Federal Rules).[58] As such, discharge litigation will entail the panoply of procedure that permeates nonbankruptcy federal civil litigation.[59]

The increased procedural complexity and varying substantive requirements of discharge litigation make debtor representation in this vein

53. *See id.* § 523(a).

54. *See, e.g.*, Douglas G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, 89 n.99 (1982).

55. *See* 11 U.S.C. § 523(c); FED. R. BANKR. P. 4007(b), (c).

56. FED. R. BANKR. P. 4007(b).

57. *Id.* 7001(4), (6).

58. *See id.* pt. VII; Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 457 (2004) (Thomas, J., dissenting) ("The similarities between adversary proceedings in bankruptcy and federal civil litigation are striking. Indeed, the Federal Rules of Civil Procedure govern adversary proceedings in substantial part.").

59. *See* Christopher M. Klein, *Bankruptcy Rules Made Easy (2001): A Guide to the Federal Rules of Civil Procedure That Apply in Bankruptcy*, 75 AM. BANKR. L.J. 35, 38 (2001).

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more costly than uncontested case representation. Attorneys are likely to exclude discharge litigation from the range of services included in the fee paid by the debtor for case representation.[60] As a consequence, many debtors will have to procure additional funds if they want to enlist the services of an attorney in discharge litigation,[61] which could be a struggle even for debtors who have been granted a discharge, but who subsequently end up litigating over the dischargeability of a debt.[62] Any amassed funds are likely to be insufficient to pay for more than a minimal amount of services.[63] Furthermore, if the economics of debt dischargeability litigation discourage many attorneys from representing debtors in such proceedings,[64] it could be "that the choice of counsel for debtors will be quite limited and perhaps confined mostly to low-quality attorneys."[65] Finally, we can expect that many debtors will simply be priced out of the market for legal representation and will have to represent themselves.[66]

The perception held by federal court judges of the experience of self-represented litigants provides a useful benchmark for thinking about the

60. *See* Landry & Yarbrough, *supra* note 40, at 347; Gary Neustadter, *Randomly Distributed Trial Court Justice: A Case Study and Siren from the Consumer Bankruptcy World*, 24 AM. BANKR. INST. L. REV. (forthcoming 2016) (manuscript at 62 n.304), http://digitalcommons.law.scu.edu/facpubs/915/.

61. *See* Neustadter, *supra* note 60 (manuscript at 62 n.304).

62. *Cf.* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 88 (2006) (reporting finding from empirical study of Chapter 7 debtors one year postbankruptcy that "35% of families indicated that they continued to experience financial problems equivalent to or more severe than those that drove them to seek bankruptcy relief in the first place").

63. *See, e.g.*, Neustadter, *supra* note 60 (manuscript at 59); Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLA. L. REV. 2101, 2137 (2014) [hereinafter Pardo, *Thicket*].

64. *Cf.* Lupica, *supra* note 34, at 123 ("Many respondents described a disconnect between the skill, time, and commitment it takes for attorneys to provide debtors with first-rate representation, and compensation that does not always reflect such excellence."); Shepherd, *supra* note 4, at 194 ("High litigation costs make accepting many legitimate cases economically infeasible for contingent fee attorneys. Unless expected damages are large, the attorneys simply cannot justify accepting many cases because the expected fees will not offset the high costs of medical malpractice litigation.").

65. Pardo, *Thicket*, *supra* note 63, at 2139; *see also* Neustadter, *supra* note 60 (manuscript at 58) (discussing the possibility that, in the context of debt-dischargeability litigation, "some attorneys may lack the degree of knowledge or skill necessary to discover, formulate, or effectively communicate relatively obscure and complex legal arguments").

66. *See* Emery G. Lee III, *Law Without Layers: Access to Civil Justice and the Cost of Legal Services*, 69 U. MIAMI L. REV. 499, 514-15 (2015).

difficulties that individual debtors may face in bankruptcy litigation. Several years ago, the Federal Judicial Center (the "FJC") conducted a study that sought feedback from chief judges of the federal district courts about the challenges presented by self-represented parties in their courts.[67] In July 2010, the FJC sent questionnaires to the nation's ninety-four chief district judges, of whom sixty-one responded (i.e., a response-rate of approximately sixty-five percent).[68] One-half to two-thirds of the respondents "reported that five major issues or conditions are present in most or all pro se cases,"[69] which the FJC identified as follows:

1. pleadings or submissions that are unnecessary, illegible, or cannot be understood;

2. problems with pro se litigants' responses to motions to dismiss or for summary judgment;

3. pro se litigants' lack of knowledge about legal decisions or other information that would help their cases;

4. pro se litigants' failure to know when to object to testimony or evidence; and

5. pro se litigants' failure to understand the legal consequences of their actions or inactions (e.g., failure to plead statute of limitation, failure to respond to requests for admissions).[70]

On the basis of these survey results, the FJC concluded that, "[o]verall, pro se litigants appear to have a difficult time presenting the substance of their cases to the court."[71]

Given the procedural similarities between bankruptcy litigation and federal nonbankruptcy civil litigation,[72] we should expect self-represented

67. DONNA STIENSTRA ET AL., FED. JUDICIAL CTR., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES (2011), http://www.fjc.gov/public/pdf.nsf/lookup/proseusdc.pdf/$file/proseusdc.pdf.

68. *Id.* at 39 n.2.

69. *Id.* at vii.

70. *Id.*

71. *Id.*

72. *See supra* notes 57-59 and accompanying text.

debtors in discharge litigation to experience difficulties similar to those experienced by their nonbankruptcy self-represented counterparts. For example, consider the following warning that one bankruptcy judge in a debt-dischargeability determination provided to the self-represented creditor who had initiated the litigation and had failed to submit a form of summons for issuance by the court: "The filing and prosecution of a . . . complaint to determine dischargeability and the procedures and practice associated with prosecuting such a complaint are **extremely complex**. *It is difficult to proceed successfully with such litigation without the help of competent legal counsel*."[73] Self-represented debtors have made similar comments in debt-dischargeability determinations, indicating that procedural complexity has forced them to give up on vindicating their discharge right.[74]

* * *

In sum, we should expect self-represented debtors to experience difficulty in vindicating their discharge right as a result of procedural complexity. The remainder of this Article addresses whether empirical evidence supports this hypothesis.

II. Empirically Examining the Effect of Self-Representation in Discharge Litigation

To test the hypothesis regarding the relationship between the represented status of a debtor and success in discharge litigation, this study focuses its investigation on a subset of such litigation—specifically, adversary proceedings to determine whether an educational debt was excepted from an individual debtor's discharge (an "educational-debt

73. Order at 1 n.1, Proctor v. Hegwood (*In re* Hegwood), Ch. 7 Case No. 14-12682, Adv. No. 14-1271 (Bankr. D. Colo. June 12, 2014), ECF No. 3. That the warning targeted a self-represented creditor, rather than a self-represented debtor, should not matter. Both parties must work within the same procedural framework. Additionally, given that either a debtor or a creditor may initiate a debt-dischargeability determination, *see* FED. R. BANKR. P. 4007(a), debtors can be plaintiffs in such proceedings and often are, *see infra* note 107 and accompanying text.

74. *See, e.g.*, Letter/Motion to Withdraw Complaint Filed by Plaintiff/Debtor, Henry v. Wells Fargo Bank NA (*In re* Henry), Ch. 7 Case No. 12-71257, Adv. No. 12-07044 (Bankr. W.D. Va. Oct. 3, 2012), ECF No. 32 ("It is clear to me that I did not understand the complexity of filing an Adversary Complaint to discharge my student loans when doing so. . . . I did not foresee that the process would be infinitely more complicated than the filing of bankruptcy itself. The documents that have been addressed to me concerning this matter are overwhelming.").

dischargeability determination"). There are several reasons that motivate this specific approach.

First, confining the empirical investigation to a particular subset of litigation minimizes concerns over controlling for (1) differences in the procedural nature, litigant identity, and subject matter of the various types of discharge litigation; [75] (2) differences in burdens of proof; [76] and (3) potential selection effects in the decision to initiate such litigation.[77] With this approach, the study's dataset becomes more homogenous, which in turn ought to make the results more reliable.

Second, focusing on the dynamics of a debt dischargeability determination, as opposed to a particular type of discharge objection, will hopefully provide insights that are farther reaching and thus have greater relevance to the topic of discharge litigation. Prior research suggests that, when a Chapter 7 consumer case involves an adversary proceeding, the proceeding will most likely involve a debt-dischargeability determination.[78]

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75. For an example of differences in the procedural nature of debt-dischargeability proceedings, consider that, for certain types of debts, the debt will be discharged unless the creditor initiates the proceeding no later than sixty days after the first date set for the meeting of creditors that Bankruptcy Code § 341(a) requires. *See* 11 U.S.C. § 523(c)(1) (2012); FED. R. BANKR. P. 4007(c). With the exception of these debts, the Bankruptcy Rules do not impose a deadline for filing a complaint to determine the dischargeability of a debt. *See* FED. R. BANKR. P. 4007(b).

76. Some debt-dischargeability proceedings involve conditionally dischargeable debts—that is, debts that are initially excepted from discharge but that nonetheless may be discharged if the debtor establishes the relevant exception to the exception. *See* 11 U.S.C. § 523(a)(3), (a)(8); *see also* Boshkoff, *supra* note 54, at 73-74, 89 (discussing conditional discharge rules). These proceedings entail a bifurcated burden of proof pursuant to which the creditor bears the burden to establish the exception (i.e., nondischargeability) and the debtor bears the burden to establish the exception to the exception (i.e., dischargeability). *See, e.g.*, Hill v. Smith, 260 U.S. 592, 594-95 (1923).

77. For example, because certain debts will be deemed discharged if a creditor fails to initiate a debt-dischargeability determination during the pendency of the case, *see supra* note 75, some of those proceedings may be improvidently commenced merely to preserve the opportunity to argue that the debt should be deemed nondischargeable, *see* Jonathan Remy Nash & Rafael I. Pardo, *Does Ideology Matter in Bankruptcy? Voting Behavior on the Courts of Appeals*, 53 WM. & MARY L. REV. 919, 980-81 (2012) [hereinafter Nash & Pardo, *Ideology*]. If, after the fact, the creditor decides that its argument is weak or has no merit, the creditor could voluntarily dismiss its complaint. *See* FED. R. CIV. P. 41(a)(1); FED. R. BANKR. P. 7041 (incorporating, with some exceptions, Federal Rule of Civil Procedure 41).

78. *See* Douglas G. Baird & Edward R. Morrison, *Adversary Proceedings in Bankruptcy: A Sideshow*, 79 AM. BANKR. L.J. 951, 957, 959 (2005).

Third, educational-debt dischargeability determinations "involve a nontechnical area of bankruptcy law with a minimal role (if any) for specialized expertise."[79] As discussed below, such determinations involve a bifurcated burden of proof.[80] With respect to the creditor's burden to establish the nature and amount of the debt, "it would . . . be fair to characterize the three alternatives for establishing the existence of an educational debt excepted from discharge as 'crystalline, highly specific statutory provisions, that while difficult to penetrate, leave little to the imagination.'"[81] With respect to the debtor's burden to establish that repayment of the debt would impose an undue hardship and thus should be deemed dischargeable, the vague nature of the standard "invites a court to make a general, nontechnical inquiry into the level of sacrifice that is expected of debtors and the threshold at which the sacrifice becomes impermissible."[82] By focusing on a type of bankruptcy litigation in which the law will be less complex and technical, a preliminary baseline explaining litigation success can be established, and that baseline can be elaborated upon in the future to further our understanding of litigation success in matters that are more substantively complex.

Fourth, given that prior research has found a statistically significant increase in the likelihood of self-representation in Chapter 7 and Chapter 13 consumer cases as a debtor's educational attainment increases,[83] one might be concerned that individual debtors who have attained a higher level of education would also be more likely to attempt self-representation in discharge litigation. If this were so, questions would arise about the true nature of the observed effect of self-representation on litigation success.[84]

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79. Jonathan Remy Nash & Rafael I. Pardo, *Rethinking the Principal-Agent Theory of Judging*, 99 IOWA L. REV. 331, 346 (2013) [hereinafter Nash & Pardo, *Principal-Agent*].

80. *See infra* Part II.C.3.

81. *See* Pardo, *Thicket*, *supra* note 63, at 2115 (quoting Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559, 560 (2001)).

82. *See* Nash & Pardo, *Principal-Agent*, *supra* note 79, at 346.

83. *See* Angela Littwin, *The Do-It-Yourself Mirage: Complexity in the Bankruptcy System*, *in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 160 tbl.9.1, 161-62 (Katherine Porter ed., 2012) (finding a statistically significant increase in the likelihood of self-representation in Chapter 7 and Chapter 13 consumer cases as a debtor's level of educational attainment increases).

84. Notably, prior research has found that, when controlling for the represented status of a debtor, no statistically significant association exists between the educational attainment of a consumer debtor and the outcome of Chapter 7 and Chapter 13 cases. *See* Littwin, *supra* note 83, at 167.

Importantly, prior research suggests that individuals who have attained at least an undergraduate degree constitute a greater percentage of bankruptcy debtors who seek to discharge their educational debt than of debtors in the general bankruptcy population.[85] Accordingly, a focus on educational-debt dischargeability determinations should minimize educational-attainment differences between the groups of represented and self-represented debtors, thereby bolstering the reliability of the study's results.

Part II.A provides background information on the litigation dynamics of educational-debt dischargeability determinations. Part II.B sets forth the design of this empirical study, and Part II.C sets forth summary statistics and bivariate analyses of the data from the study. Part II.D reports the findings from a multivariate logistic regression model for predicting litigation success. Finally, Part II.E interprets these results.

A. The Dynamics of Educational-Debt Dischargeability Determinations

Outstanding educational debt currently exceeds $1 trillion and constitutes the largest category of non-mortgage debt (e.g., credit card accounts and auto loans) owed by consumers.[86] One of the enduring fault lines of the policy on student-loan repayment has been whether such debt should be discharged in bankruptcy. Since 1977, rather than being automatically discharged, educational debt has been conditionally dischargeable in bankruptcy, [87] requiring the debtor to establish the applicable condition for the debt to be deemed dischargeable.[88] Over time, Congress has repeatedly made it more difficult for debtors to obtain a

85. *Compare* Pardo & Lacey, *Bankruptcy Courts*, *supra* note 3, at 451 ("Of the 259 discharge determinations reporting sufficiently detailed information on the debtor's level of educational attainment . . ., approximately 39% involved debtors who had obtained an advance degree [and] . . . 35% involved debtors who had obtained an undergraduate degree . . . ." (footnotes omitted)), *and* Pardo & Lacey, *Discharge Litigation*, *supra* note 104, at 204 tbl.1 (reporting that, of the 45 discharge determinations providing sufficiently detailed information on the debtor's level of educational attainment, approximately 58% involved debtors who had obtained an advanced degree), *with* Katherine Porter, *College Lessons: The Financial Risks of Dropping Out*, *in* BROKE, supra note 83, at 85, 86 ("In 2007, 58.9 percent of bankrupt debtors had attended college. However, three-quarters of those college efforts did not result in a bachelor's degree.").

86. *See* Federal Reserve Statistical Release No. G.19 (Consumer Credit), Bd. of Governors of the Fed. Reserve Sys. (Mar. 6, 2015), *available at* http://www.federalreserve.gov/releases/g19/current/.

87. Pardo & Lacey, *Bankruptcy Courts*, *supra* note 3, at, 420-22 (discussing section 439A of the Higher Education Amendment of 1976 and its delayed effective date).

88. *See supra* note 76.

discharge of educational debt in bankruptcy, by either expanding the category of debts that qualify as educational debts or limiting the conditions under which such debts may be discharged.[89]

The two most recent amendments to the Bankruptcy Code in this vein occurred in 1998 and 2005. In 1998, Congress limited a debtor's basis for bankruptcy relief from educational debt to a single condition:[91] establishing that excepting the debt from discharge "would impose an undue hardship on the debtor and the debtor's dependents."[92] In 2005, Congress expanded the category of excepted educational debt—which already encompassed federal student loans—to include private student loans.[93]

Debtors must litigate their eligibility for forgiveness of educational debt—specifically, by demonstrating that undue hardship will result from the continued obligation to repay the debt.[94] The legal framework's attendant procedures and burdens of proof create access-to-justice barriers for debtors that tilt the scales in favor of their student-loan creditors.[95]

Because of the inherent complexity of the procedural framework for obtaining a discharge of student loans through bankruptcy, the litigation costs for debtors are likely to be quite substantial,[96] with "fees [that] can

89. Pardo & Lacey, *Bankruptcy Courts*, *supra* note 3, at 427 & n.116.

91. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837.

92. 11 U.S.C. § 523(a)(8) (2012). Before 1998, debtors could also seek to have their student loans discharged in bankruptcy on the basis that the loans had been due and owing for a certain period of time prior to the bankruptcy filing—initially a five-year period that Congress subsequently extended to a seven-year period. *See* Pardo & Lacey, *Bankruptcy Courts*, *supra* note 3, at 420-21, 434 n.140.

93. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (codified at 11 U.S.C. § 523(a)(8)(B)). In using the phrase "private student loan," this Article specifically refers to "a qualified educational loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual." 11 U.S.C. § 523(a)(8)(B).

94. *See* 11 U.S.C. § 523(a)(8); FED. R. BANKR. P. 4007(a); *see also* United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 268-69 (2010) ("[T]he Bankruptcy Rules require a party seeking to determine the dischargeability of a student loan debt to commence an adversary proceeding by serving a summons and complaint on affected creditors.").

95. Pardo, *Thicket*, *supra* note 63, at 2106-21.

96. *Id.* at 2137-39; *cf.*, *e.g.*, Consent to Discharge Loan Owed to Educational Credit Management Corporation ¶¶ 7-8, Coffee v. Nat'l Student Loans (*In re* Coffee), Ch. 7 Case No. 07-12822, Adv. No. 11-01037 (Bankr. N.D. Ga. May 2, 2012), ECF No. 11 ("[T]he

easily mount in the thousands and tens of thousands of dollars."[97] These costs adversely affect the ability of debtors, who have filed for bankruptcy because of financial distress, to vindicate their undue hardship claims. In essence, debtors without the means to hire an attorney are confronted with one of two stark choices: self-representation or giving up any attempt to seek an undue hardship determination.[98]

In light of these considerations, it is expected that represented debtors will be more likely to experience litigation success in this context than self-represented debtors. If such evidence exists, then a key focus of the debate over the dischargeability of educational debt in bankruptcy should be about how debtors may attain unfettered access to their "statutory right to an undue hardship determination."[99] As a descriptive matter, no one can dispute that debtors who would suffer undue hardship if required to repay their student loans are entitled to relief.[100] That is the state of the law. But if undue hardship debtors cannot successfully navigate a highly technical and complex legal process because of lack of representation, and thus fail to vindicate their statutory entitlement to relief, then policymakers need to refocus their efforts to reformulating the process so that it eliminates the extant access-to-justice barriers that inhere in the current legal framework. Without doing so, the law will inexorably continue to create false hope.

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unpaid balance on the Note is $7,616.61 . . . . ECMC states that Plaintiff's Note is dischargeable under 11 U.S.C. § 523(a)(8) as the cost of defense of this litigation will likely exceed the loan balance.").

97. NAT'L CONSUMER LAW CTR. THE TRUTH ABOUT STUDENT LOANS AND THE UNDUE HARDSHIP DISCHARGE 1 (2013), *available at* http://www.studentloanborrowerassistance.org/the-truth-about-student-loans-and-the-bankruptcy-undue-hardship-discharge-2/.

98. *See, e.g.*, Transcript of Hearing at 65 ll. 19-23, Murphy v. Sallie Mae, Inc. (*In re* Murphy), Ch. 7 Case No. 11-19098, Adv. No. 12-01003 (Bankr. D. Mass. May 23, 2013), ECF No.123 ("People that are a lot worse than I am wouldn't have even contemplated doing this, I don't think. They couldn't—certainly couldn't afford an attorney. I couldn't afford an attorney. That's the reason I did it myself.").

99. Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 454 (2004).

100. Such a proposition is, of course, subject to normative debate. It should be noted, however, that ever since student loans lost their automatically dischargeable status in bankruptcy and became conditionally dischargeable, no major reform effort has been undertaken to make student loans unconditionally nondischargeable in bankruptcy. *See* Pardo, *Thicket*, *supra* note 63, at 2174-75.

B. Study Design

This project utilizes an original dataset of adversary proceedings to determine the dischargeability of educational debt commenced in any U.S. Bankruptcy Court during the 2011 and 2012 calendar years.[101] The dataset consists of 1,430 such proceedings (the "Study Population").[102] Additionally, to explore in greater detail the nature and role of legal representation in such proceedings, a random sample of 395 adversary proceedings (the "Representative Sample") was drawn from the Study Population. Notably, the Study Population consists of some adversary proceedings that were filed in the same underlying bankruptcy case.[103] In order to avoid including multiple adversary proceedings from the same underlying bankruptcy case in the Representative Sample, the sample was drawn so that every bankruptcy case number appearing in the sample would appear only once for a given federal judicial district. Put another way, the Representative Sample does not consist of multiple adversary proceedings that were filed in the same underlying bankruptcy case, thus ensuring that each debtor in the Representative Sample is unique. Table A2 of the Appendix sets forth a comparison of the Study Population to the Representative Sample.

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101. For details on the process used to identify adversary proceedings for inclusion in the dataset, see Pardo, *Thicket*, *supra* note 63, 2146-48. Every federal judicial district in the fifty states, the District of Columbia, and Puerto Rico, of which there are ninety-one, *see* 28 U.S.C. §§ 81-131 (2012), has a bankruptcy court. *See id.* § 152. Bankruptcy judges have the authority to "hear and determine" all core proceedings that arise under the Bankruptcy Code, *id.* § 157(b)(1), which include "determinations as to the dischargeability of particular debts," *id.* § 157(b)(2)(I).

102. A prior project utilizing a subset of these data reported that the entire dataset consisted of 1,439 such proceedings. *See* Pardo, *Thicket*, *supra* note 63, 2148. Continuing work with the dataset for this current project revealed that some of the 1,439 proceedings involved erroneously filed complaints. The clerk's office for the court in which such a complaint was filed would designate the corresponding adversary proceeding as having been opened in error and would close the proceeding, with no other docket activity (e.g., the issuance of a summons) having occurred. *See, e.g.*, Haueter v. Sallie Mae (*In re* Haueter), Ch. 7 Case No. 11-25837, Adv. No. 11-01516 (Bankr. C.D. Cal. opened Dec. 27, 2011 and closed Jan. 9, 2012). These erroneously opened proceedings have been omitted from the dataset, thus resulting in an updated dataset consisting of 1,430 proceedings. The subset of the data used in the prior project did not include any of the erroneously opened proceedings.

103. *See infra* Appendix Table A1.

C. Descriptive Statistics and Bivariate Analyses

This Section provides descriptive statistics of the current study's data and discusses bivariate analyses that explore correlations between the outcome of an adversary proceeding and various explanatory variables of interest.

1. Debtor Litigation Success

By commencing an educational-debt dischargeability determination, a debtor signals a desire to obtain relief from such debt through the bankruptcy process.[104] As a preliminary matter, such an adversary proceeding essentially entails a request for a declaratory judgment specifying whether the discharge order entered in the debtor's bankruptcy case included the educational debt at issue.[105] Although debtors and creditors have equal opportunity to commence such proceedings,[106] debtors are nearly always the party who appears as the plaintiff in this context. For example, based on the observations in the Representative Sample, it is estimated that debtors commenced 99.0% [97.3, 99.7] of the adversary proceedings in the Study Population.[107] Accordingly, for ease of

104. In a creditor-initiated proceedings, one would expect debtors to defend on the basis that either (1) the debt does not qualify as a type of educational debt excepted from discharge, or (2) the educational debt would impose an undue hardship on the debtor if deemed nondischargeable. *See* Pardo, *Thicket*, *supra* note 63, at 2110-21 (discussing burdens of proof in educational debt dischargeability determinations). Prevailing on either defense would mean that the debt was dischargeable, thus resulting in relief from the debt through the bankruptcy process. Accordingly, the incentives of debtors in creditor-initiated proceedings should be similar in most instances to the incentives of debtors in debtor-initiated proceedings. For further discussion regarding the assessments that drive the decision to pursue debt-dischargeability litigation, see Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 189 (2009) [hereinafter Pardo & Lacey, *Discharge Litigation*].

105. *See* O'Brien v. First Marblehead Educ. Res., Inc. (*In re* O'Brien), 419 F.3d 104, 105 (2d Cir. 2005) (per curiam); Keenom v. All Am. Mktg. (*In re* Keenom), 231 B.R. 116, 125 (Bankr. M.D. Ga. 1999); *In re* Anderson, 72 B.R. 495, 497 (Bankr. D. Minn. 1987).

106. *See* FED. R. BANKR. P. 4007(a) ("A debtor or any creditor may file a complaint to obtain a determination of the dischargeability of any debt.").

107. This Article uses the notation [#, #] to indicate the lower and upper bounds of the ninety-five-percent confidence interval for estimates. When making estimates of proportions in the Study Population based on observations from the Representative Sample, this Article follows the recommendation to use (1) the Wilson interval for estimates based on forty observations or less and (2) the Agresti-Coull interval for estimates based on more than forty observations. *See* Lawrence D. Brown et al., *Interval Estimation for a Binomial Proportion*, 16 STAT. SCI. 101, 115 (2001).

exposition, this Article orients discussion of the litigation process from the vantage of debtor-initiated proceedings.

Given the core inquiry of this study to determine whether legal representation has an effect on a debtor's ability to obtain relief from his educational debt through the bankruptcy litigation process, an important task is defining when a debtor ought to be deemed to have obtained such relief. As the following considerations suggest, this is a nuanced task requiring careful discernment informed by the research question.

There are, of course, a variety of procedural mechanisms for a debtor to obtain relief in an adversary proceeding—for example, default judgment, summary judgment, or trial judgment. But some of these victories may prove hollow—for example, if the debtor obtains a default judgment against the wrong party[108]—or short-lived—for example, if an appellate court reverses a trial judgment in favor of the debtor. On the other hand, while the dismissal of a debtor-initiated adversary proceeding will not confer any bankruptcy relief on the debtor,[109] the possibility exists that the debtor may nonetheless obtain nonbankruptcy relief from his educational debt (e.g., enrollment in an income-contingent repayment program or an administrative discharge) and in fact may have sought a voluntary dismissal of his proceeding toward this end.[110]

Adding yet another wrinkle, the debtor and creditor could settle the matter, agreeing that the debtor is entitled to relief (or not). Importantly, unlike other areas of law where settlement usually occurs in private and the terms agreed to by the parties remain undisclosed to the public, all but two of the settled proceedings in the Study Population included a written stipulation by the litigants setting forth the terms of their settlement.[111] In such instances, the bankruptcy court entered an order in accordance with the stipulation, and that order constituted the judgment of the court.

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108. *See* Pardo, *Thicket*, *supra* note 63, at 2131-32 & 2132 n.199.

109. In a creditor-initiated proceeding, an involuntary dismissal would result in relief for the debtor given that such a dismissal usually "operates as an adjudication on the merits." FED. R. CIV. P. 41(b); *see also* FED. R. BANKR. P. 7041 (incorporating, with some exceptions, Federal Rule of Civil Procedure 41).

110. *See* Pardo, *Thicket*, *supra* note 63, at 2131 & n.193.

111. For further discussion on bankruptcy settlements, see generally Reynaldo Anaya Valencia, *The Sanctity of Settlements and the Significance of Court Approval: Discerning Clarity from Bankruptcy Rule 9019*, 78 OR. L. REV. 425 (1999).

Accordingly, this study has been able to document the substantive outcome for nearly every settled adversary proceeding in the Study Population.

In light of these considerations, how should a coding protocol define litigation success for purposes of the research question at hand? To explore the effect of self-representation in educational-debt dischargeability determinations, this study's dependent variable focuses on whether the debtor obtained *within* the adversary proceeding any relief from educational debt, regardless of the procedural avenue pursuant to which the court granted such relief. Provided that the court entered any order granting some relief to the debtor, no matter how generous (e.g., full discharge) or meager (e.g., forbearance or reduction of interest), and regardless of whether it was hollow or short-lived, the study classified the adversary proceeding as one involving bankruptcy litigation success for the debtor. For the couple of settled proceedings in which the parties did not disclose their settlement terms, the study classified the proceeding as not involving bankruptcy litigation success given that the court order did not adopt the settlement terms.[112]

On the other hand, the study classified any dismissed proceeding as not involving bankruptcy litigation success, including dismissals that the debtor requested in order to pursue nonbankruptcy relief or as a result of having obtained nonbankruptcy relief. In such instances, the bankruptcy court itself did not grant any debt relief, and so it cannot be said that the debtor experienced success in using the mandatory litigation process for obtaining bankruptcy relief from such debt.[113]

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112. *See* Agreed Order of Settlement, Rust v. Student Loan Xpress, Inc. (*In re* Rust), Ch. 7 Case No. 11-40833, Adv. No. 11-04030 (Bankr. W.D. Ky. Dec. 12, 2012), ECF No. 34 ("Upon agreement of the parties, . . . this Judgment is entered which settles and compromises all claims with prejudice pursuant to the terms of a confidential settlement reached by the parties."); Order re Stipulation to Dismiss Complaint Without Prejudice, Dang v. Educ. Credit Mgmt. Corp. (*In re* Dang), Ch. 7 Case No. 10-28221, Adv. No. 11-01124 (Bankr. D. Nev. Nov. 2, 2011), ECF No. 13.

113. *See* United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 263 (2010) (stating that "[b]ankruptcy courts must make th[e] undue hardship determination in an adversary proceeding"). It might be argued that initiating the bankruptcy litigation process may have given the debtor some leverage in obtaining nonbankruptcy relief, and thus that one should consider such a voluntary dismissal as a success in using the bankruptcy litigation process to obtain debt relief. Nonbankruptcy remedies, however, are available to borrowers of federal student loans without the need to resort to bankruptcy litigation. Moreover, such litigation can impede the debtor from obtaining nonbankruptcy relief. For example, stipulations in support of voluntary dismissals to pursue nonbankruptcy administrative remedies often aver that the U.S. Department of Education will not consider granting

This study has intentionally implemented a broad coding protocol that sets the bar quite low for what constitutes litigation success. Prior research has documented that self-represented debtors in bankruptcy experience less success than their represented counterparts when attempting to navigate the procedural barriers present at the outset of a bankruptcy case.[114] If we expect that self-represented debtors are more likely to commit the procedural errors that lead to hollow or short-lived victories, and if those victories are not counted as litigation successes, the concern arises that such a coding protocol could skew results toward a finding that self-represented status has a negative effect on experiencing litigation success. Thus, this study looks to err on the side of caution by using a coding protocol that will likely *understate* any correlation between the represented status of the debtor and litigation success.

Pursuant to these coding protocols, approximately 39.0% (555 of 1,424) of the adversary proceedings in the Study Population involved litigation success for the debtor.[116]

2. Debtor Representation

Approximately 65.2% (932 of 1,430) of the adversary proceedings in the Study Population involved a debtor who was represented by counsel during the entirety of the proceeding, and approximately 2.3% (33 of 1,430) of the proceedings involved a debtor who had representation for part, but not all, of the proceeding. The remaining 32.5% (465 of 1,430) of the

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administrative relief while the adversary proceeding is pending. *See, e.g.*, Stipulation to Dismiss Adversary Proceeding Without Prejudice ¶ 2, Marek v. Educ. Credit Mgmt. Corp. (*In re* Marek), Ch. 7 Case No. 11-32555, Adv. No. 11-03177 (Bankr. N.D. Ohio Jan. 4, 2012), ECF No. 40 ("ECMC has informed Plaintiff that, for administrative reasons, this adversary proceeding must be dismissed to allow for the original lender of Plaintiff's student loans to repurchase same and to facilitate consideration of the repayment plan application by the lender/the U.S. Department of Education."). Accordingly, it is not readily apparent that a debtor can obtain leverage through the bankruptcy process that would facilitate the granting of nonbankruptcy relief.

114. *See* Pardo, *Self-Representation*, *supra* note 4 (manuscript at 35-37); Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by* Pro Se *Debtors*, 26 EMORY BANKR. DEV. J. 5, 27-31 (2009) [hereinafter Pardo, *Access*].

116. For an explanation of those observations for which there were missing values, see *infra* notes 311-312.

proceedings involved debtors who did not have any formal representation whatsoever during the proceeding.[117]

In the absence of a relationship between the represented status of the debtor and litigation success for the debtor, one would expect debtors in the Study Population to experience litigation success approximately 39.0% of the time—that is, the proportion of adversary proceedings in the Study Population involving litigation success.[118] For adversary proceedings involving debtors who were fully self-represented, however, debtors experienced litigation success only 26.8% of the time. In stark contrast, for adversary proceedings involving debtors with representation (i.e., debtors who had either partial or complete representation), such debtors experienced litigation success 44.8% of the time. A chi-square test with one degree of freedom indicates that the difference between the observed and expected values is statistically significant ($p < 0.0001$).[119]

3. Legal Doctrine

In an adversary proceeding to determine the dischargeability of educational debt, the creditor "has the initial burden to establish the existence of the debt and that the debt is an educational loan within the [Bankruptcy Code's] parameters."[120] If the creditor satisfies its burden of

117. The possibility exists, however, that some of these debtors may have had undisclosed assistance of counsel. For example, in an appeal of an educational-debt dischargeability determination, the federal district court noted that the appellant, a self-represented debtor, "was utilizing the services of a ghost writer for many of her filings." Greene v. U.S. Dep't of Educ., Civ. No. 4:13cv79, 2013 WL 5503086, at *10 (E.D. Va. Oct. 2, 2013), *aff'd*, 573 Fed. App'x 300 (4th Cir. 2014) (per curiam). While it is unclear whether the debtor had such assistance while litigating her adversary proceeding, the bankruptcy court in *Greene* observed "that Ms. Greene's pleadings, including her twenty-four (24) page Brief and thirty-two (32) page Reply Brief, are *extremely well-drafted, particularly for an unrepresented litigant*." Greene v. U.S. Dep't of Educ. (*In re* Greene), 484 B.R. 98, 107 (Bankr. E.D. Va. 2012) (emphasis added), *aff'd*, *Greene*, 2013 WL 5503086. The *Greene* adversary proceeding appears in the Study Population, but not in the Representative Sample.

118. *See supra* text accompanying note 116.

119. This Article uses the level of $p \leq 0.05$ to assess statistical significance.

120. Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 916 (B.A.P. 9th Cir. 2013); *see also* Educ. Credit Mgmt. Corp. v. Savage (*In re* Savage), 311 B.R. 835, 839 (B.A.P. 1st Cir. 2004) ("The creditor bears the initial burden of proving the debt exists and that the debt is of the type excepted from discharge under § 523(a)(8)."); Rumer v. Am. Educ. Servs. (*In re* Rumer), 469 B.R. 553, 561-63 (Bankr. M.D. Pa. 2012) ("The cases interpreting § 523(a)(8) have held that the initial burden is on the lender to establish the

proof, then the burden shifts to the debtor to establish that the debt is dischargeable on the basis of undue hardship.[121] Specifically, the debtor must prove that the debt "would impose an undue hardship on the debtor and the debtor's dependents" if excepted from discharge.[122] In theory, the debtor could prevail in such an adversary proceeding by challenging the creditor's prima facie case—that is, arguing that the debt at issue does not fall within one of the categories of educational debt that are excepted from discharge in the absence of a finding of undue hardship.[123] The reality, however, is that debtors rarely make such challenges,[124] with the result that the litigation usually focuses on the issue of undue hardship. Accordingly, in exploring the determinants of litigation success in such proceedings, the study controls for the doctrinal framework applied to decide that issue.

The Bankruptcy Code does not define the phrase "undue hardship."[125] Courts have filled this statutory gap by adopting one of two judicial tests: (1) the test established by the U.S. Court of Appeals for the Second Circuit in *Brunner v. New York State Higher Education Services Corp.*[126] (the "*Brunner* test"), and (2) the totality-of-the-circumstances test established by the U.S. Court of Appeals for the Eighth Circuit (the "totality test").[127]

The *Brunner* test is a three-prong test that requires a debtor to establish:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the

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existence of the debt and to demonstrate that the debt is included in one of the four categories enumerated in § 523(a)(8).").

121. *E.g.*, *In re Savage*, 311 B.R. at 839.

122. 11 U.S.C. § 523(a)(8) (2012).

123. *See* Pardo, *Thicket*, *supra* note 63, at 2114-15 & n.79.

124. *See id.* at 2115 & n.82.

125. *See* 11 U.S.C. § 101.

126. 831 F.2d 395 (2d Cir. 1987) (per curiam).

127. For a discussion on the origins of the totality test, see Pardo & Lacey, *Bankruptcy Courts*, *supra* note 3, at 488 n. 348.

> repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[128]

On the other hand, the totality test requires consideration of "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case."[129]

Outside of the First and Eighth Circuits, courts apply the *Brunner* test to analyze a debtor's claim of undue hardship.[130] Within the First Circuit, courts apply the totality test, with the exception of the U.S. Bankruptcy Court for the District of New Hampshire, which applies the *Brunner* test.[131] And, as previously mentioned, courts in the Eighth Circuit apply the totality test.[132]

Approximately 88.4% (1,264 of 1,430) of the adversary proceedings in the Study Population were commenced in jurisdictions that apply the *Brunner* test.[133] As before, in the absence of a relationship between the law of the jurisdiction and litigation success for the debtor, one would expect debtors in the Study Population to experience litigation success approximately 39.0% of the time. The data reveal that debtors experienced litigation success 38.8% of the time in *Brunner* jurisdictions and 40.6% of the time in totality jurisdictions. A chi-square test with one degree of freedom indicates that the difference between the observed and expected values is not statistically significant ($p = 0.648$).

4. Financial Characteristics

At its essence, deciding the merits of a debtor's claim of undue hardship requires a court to evaluate the economic effect on the debtor if the

128. *Brunner*, 831 F.2d at 396.

129. Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003).

130. *See* Pardo, *Thicket*, *supra* note 63, at 2121.

131. *Id.*

132. *See supra* note 127 and accompanying text. When recently presented with the opportunity to clarify the meaning of undue hardship, *see* Petition for Writ of Certiorari, Tetzlaff v. Educ. Credit Mgmt. Corp., 136 S. Ct. 803 (2016) (No. 15-485), 2015 WL 6083507, the U.S. Supreme Court declined to do so, *see Tetzlaff*, 136 S. Ct. at 803.

133. For further detail regarding the geographic distribution of the adversary proceedings in the Study Population, see *infra* Appendix Table A1.

court determines the educational debt to be nondischargeable.[134] A debtor who files for bankruptcy must file a variety of financial disclosures, including schedules of assets, liabilities, current income, and current expenditures.[135] Such information has been deemed relevant in evaluating a debtor's claim of undue hardship.[136] Importantly, however, the Bankruptcy Rules provide that a complaint to obtain a dischargeability determination "may be filed at any time," including after the debtor has been granted a discharge and the case has been closed.[137] Given the potential time lag between the commencement of a bankruptcy case and the commencement of an adversary proceeding, courts have also taken the view that events and circumstances subsequent to the commencement of the case are relevant in evaluating a debtor's undue hardship claim.[138] Relatedly, prior research has demonstrated how the financial situation for certain debtors can worsen over the period of time between the commencement of the case and the commencement of the adversary proceeding.[139]

To control for the merits of a debtor's claim of undue hardship, the study tracked the amounts that debtors in the Representative Sample reported in the schedules of assets, liabilities, debts, current income, and

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134. *See, e.g.*, Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010) ("Irrespective of the test, the decision of a bankruptcy court, whether the failure to discharge a student loan will cause undue hardship to the debtor . . ., rests on both the economic ability to repay and the existence of any disqualifying action(s)."); Weir v. Paige (*In re* Weir), 296 B.R. 710, 716 (Bankr. E.D. Va. 2002) ("Regardless of the test used in determining whether repayment of student loans constitutes undue hardship . . . , at a minimum the court must focus on two issues: (1) the economic prospects of the debtor and (2) whether the conduct of the debtor disqualifies the debtor from taking advantage of the exception.").

135. 11 U.S.C. § 521(a)(1)(B)(i), (ii) (2012); FED. R. BANKR. P. 1007(b)(1)(A), (B). The above-referenced schedules must be filed no later than fourteen days after the debtor has commenced the bankruptcy case, unless the court provides the debtor with an extension of time for cause shown. *See id.* 1007(c).

136. *See, e.g.*, United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1112-13 (9th Cir. 1998); Greene v. U.S. Dep't of Educ. (*In re* Greene), 484 B.R. 98, 107 n.7 (Bankr. E.D. Va. 2012); Roundtree-Crawley v. Educ. Credit Mgmt. Corp. (*In re* Crawley), 460 B.R. 421, 436 n.15 (Bankr. E.D. Pa. 2011); Anelli v. Sallie Mae Servicing Corp. (*In re* Anelli), 262 B.R. 1, 9-10 (Bankr. D. Mass. 2000); Brown v. USA Group Loan Servs. (*In re* Brown), 234 B.R. 104, 106 (Bankr. W.D. Mo. 1999).

137. FED. R. BANKR. P. 4007(b).

138. *See, e.g.*, Walker v. Sallie Mae Servicing Corp. (*In re* Walker), 650 F.3d 1227, 1231 (8th Cir. 2011); *In re Pena*, 155 F.3d at 1112-13; *Bronsdon*, 435 B.R. at 800.

139. *See* Pardo, *Thicket*, *supra* note 63, at 2127.

current expenses that they filed in their bankruptcy cases.[140] Recognizing that the financial situation of such debtors could fluctuate between the commencement of the case and the commencement of the adversary proceeding, this study controls for the number of days between the two dates.[141] Finally, in addition to the financial data obtained from the self-reported information provided by the debtors in their schedules, the following financial characteristics have been calculated using those data: (1) the debtor's monthly disposable household income, measured as the difference between the debtor's monthly household income and expenses on a debtor-by-debtor basis; (2) the ratio of the debtor's educational debt to his total debt; and (3) the number of years' worth of household income that the debtor would have had to devote to fully repay his educational debt, measured by the ratio of total debt to the debtor's annual household income. Table A1 in the Appendix sets forth these characteristics with all figures adjusted to 2014 dollars.[142]

The financial characteristics indicate the magnitude of hardship faced by debtors in the Study Population at the time that they filed for bankruptcy, which, as a general matter, was before they subsequently sought relief from their educational debt pursuant to a dischargeability determination commenced either in 2011 or in 2012.[143] Consider, for

140. Because these amounts are self-reported, valid concerns exist regarding the accuracy and completeness of the data. *See* Steven W. Rhodes, *An Empirical Study of Consumer Bankruptcy Papers*, 73 AM. BANKR. L.J. 653 (1999) (analyzing a random sample of two hundred consumer bankruptcy cases commenced during the first half of 1998 in the U.S. Bankruptcy Court for the Eastern District of Michigan and documenting errors in and omissions of some of the information provided by debtors in their financial disclosures). That said, debtors have a strong incentive to ensure the accuracy of their schedules given that they are likely to be questioned under oath at the meeting of creditors, *see* 11 U.S.C. § 343, about the information they have provided. *See, e.g.,* United States v. Naegele, 341 B.R. 349, 352 (D.D.C. 2006). Depending on the circumstances, debtors who provide inaccurate information in their schedules may be denied a discharge, *see* 11 U.S.C. § 727(a)(4)(A), or may face criminal penalties, *see* 18 U.S.C. § 152(2), (3) (2012). For these (and other) reasons, researchers have deemed such data to be a valuable source of information for studying the consumer bankruptcy system. *See, e.g.*, Melissa B. Jacoby et al., *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 383 (2001) ("Despite these difficulties of interpretation, however, petition data have the advantage of being filed under penalty of perjury and of being public data that are relatively easy to locate and to sample in a valid way." (footnote omitted)).

141. *See infra* Part II.B.6.

142. *See The Cost of Living Calculator*, Am. Inst. for Econ. Res., https://www.aier.org/cost-living-calculator (last visited Feb. 20, 2016).

143. *See infra* Part II.B.6.

example, some of the following characteristics (in 2014 dollars) that have been estimated for the median debtor in the Study Population based on the financial profile of the median debtor in the Representative Sample. With monthly household income of approximately $1,924 [1,797, 2,040],[144] the median debtor would be hard-pressed to make daily ends meet. The disposable income data further reinforce this point. After accounting for monthly household expenses, the household of the median debtor operated at a monthly *deficit* of $61 [5, 108].[145] In other words, the median debtor household did not likely have excess income to make meaningful payments toward the debtor's educational debt, which for the median debtor amounted to $59,315 [48,722, 64,977] and constituted approximately 41% [37, 47] of the debtor's total household debt.[146] Furthermore, the median debtor would have had to devote approximately 2.3 [2.0, 2.7] years' worth of annual household income to repay his educational debt in full—assuming, of course, that the amount of debt would not increase by virtue of interest or other charges and that the debtor's household could live expense free during this period of time.[147] Simply put, the median debtor was in horrible financial shape at the time he filed for bankruptcy.

As set forth in Table A5 of the Appendix, according to a series of two-sided nonparametric Wilcoxon rank-sum tests, no statistically significant association exists between the financial characteristics of debtors in this study and litigation success.

5. Creditor Identity

Federal student debt constitutes the overwhelming majority of the total amount of outstanding student debt. For example, as of the end of 2011 (i.e., one of the calendar years included within this study), outstanding student debt totaled approximately $1 trillion, of which $843 billion was

144. *See infra* Appendix Table A4.

145. *See id.* Some debtors in the Representative Sample included their monthly student-loan payments in their schedule of current expenses. *See, e.g.*, Schedule J l. 13.c, *In re* Cummins, Ch. 7 Case No. 11-26242 (Bankr. C.D. Cal. Dec. 29, 2011), ECF No. 6 (reporting monthly payment of $98.00 for student loans). Because most debtors did not include such payments in their expense schedule, the reported deficit of monthly disposable household income understates the extent to which the debtor's household operated at a deficit. In other words, if all debtors had included their monthly student-loan payments in their expense schedule, the reported amount of monthly household income would have been much lower.

146. *See infra* Appendix Table A4.

147. *See id.*

federal student debt and an estimated $150 billion was private student debt.[148] In an adversary proceeding to determine the dischargeability of federal student debt, one of two litigants will usually appear to contest the dischargeability of the debt: (1) the U.S. Department of Education (the "DOE"); and (2) Educational Credit Management Corporation ("ECMC"),[149] whom the DOE has tasked to represent the federal interest in bankruptcy litigation involving federally guaranteed student loans.[150] According to prior research, the involvement of these creditors in such adversary proceedings has been statistically significantly associated with the outcome of the proceedings.[151]

For the Study Population, approximately 65.1% of the adversary proceedings involved an appearance either by the DOE, ECMC, or both parties.[152] Once again, in the absence of a relationship between the appearance of either of these litigants, one would expect debtors in the Study Population to experience litigation success approximately 39.0% of the time. The data reveal that debtors experienced litigation success 38.2% of the time in proceedings in which the DOE appeared and 39.4% of the time in proceedings in which the DOE did not appear. A chi-square test with one degree of freedom indicates that the difference between the observed and expected values is not statistically significant ($p = 0.651$).

On the other hand, debtors experienced litigation success 35.2% of the time in proceedings involving ECMC's appearance, as opposed to a

148. Rhoit Chopra, CFPB, *Student Debt Swells, Federal Loans Now Top a Trillion* (Jul. 17, 2013), http://www.consumerfinance.gov/newsroom/student-debt-swells-federal-loans-now-top-a-trillion/; *see also* CFPB, PRIVATE STUDENT LOANS 9 (2012), http://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf (stating that private student loans "make up less than 15% of total student debt outstanding as of January 1, 2012").

149. *See, e.g.*, Pardo & Lacey, *Discharge Litigation*, *supra* note 104, at 209.

150. For a more comprehensive description of the relationship between the DOE and ECMC, see Pardo, *Thicket*, *supra* note 63, at 2143-46. The U.S. government ceased originating federally guaranteed student loans in July 2010. *Id.* at 2130 n.182. As of September 30, 2015, the outstanding balance of federally guaranteed student loans was $134.7 billion. *See* Fed. Student Aid, U.S. Dep't of Educ., Annual Report 2015, at 31 (2015), https://www2.ed.gov/about/reports/annual/2015report/fsa-report.pdf.

151. *See, e.g.*, Pardo & Lacey, *Discharge Litigation*, *supra* note 104, at 219-20.

152. More specifically, for the proceedings in the Study Population, approximately (1) 23.9% (341 of 1,426) involved an appearance by the DOE, but not ECMC; (2) 29.5% (421 of 1,426) involved an appearance by ECMC, but not the DOE; and (3) 11.7% (167 of 1,426) involved an appearance by the DOE and ECMC.

success rate of 41.2% for debtors whose proceedings did not involve ECMC's appearance. According to a chi-square test with one degree of freedom, the difference between the observed and expected values is statistically significant ($p = 0.014$).

6. Adversary Proceeding Characteristics

In order to control for the complexity of the adversary proceeding, the study coded (1) the duration of the proceeding, measured as the number of days from the date that the debtor commenced the adversary proceeding to the date that the bankruptcy court entered its last order in the proceeding; (2) the number of documents filed in the proceeding (whether by a litigant or the court); and (3) whether a trial was held in the proceeding. In order to account for the fact that the financial situation of such debtors could fluctuate between the commencement of the case and the commencement of the adversary proceeding,[153] this study also controls for the number of days between the two dates. Finally, the study controls for the calendar year in which the adversary proceeding was commenced.

For the adversary proceedings of the Study Population, the median and mean proceeding durations were, respectively, 244 days and 290 days; [154] the median and mean number of filed documents were, respectively, twenty-three documents and thirty documents; [155] and the median and mean delays between the commencement of the bankruptcy case and the adversary proceeding were estimated to be, respectively, 92 [90, 96] days and 257 [189, 345] days.[156] Approximately 6.8% of the adversary proceedings in the Study Population resulted in a trial,[157] and approximately 53.5% of the proceedings were commenced during the 2012 calendar year.

153. *See supra* notes 137-139 and accompanying text.

154. The study was able to code the duration of the adversary proceeding for 1,415 of the 1,430 observations in the Study Population.

155. The study was able to code the number of filed documents for 1,426 of the 1,430 observations in the Study Population.

156. The study coded the time lag between the commencement of the case and the adversary proceeding only for the Representative Sample. Accordingly, the delay figures that have been reported are estimates for the Study Population based on the observations in the Representative Sample. Confidence intervals have therefore been reported for those figures. The study was able to code the time lag for all 395 observations in the Representative Sample.

157. The study was able to code whether a trial occurred for 1,426 of the 1,430 observations in the Study Population.

Of these variables, only the number of documents filed in the adversary proceeding is statistically significantly associated with litigation success.[158] For the group of debtors in the Study Population who did not experience litigation success, the median and mean number of documents filed were, respectively, twenty-two documents and twenty-seven documents. On the other hand, for the group of debtors in the Study Population who experienced litigation success, the median and mean number of documents filed were, respectively, twenty-seven documents and thirty-four documents. According to a two-sided, nonparametric Wilcoxon rank-sum test, there is less than a 0.0001 probability that random chance alone would have yielded differences this large across the two groups.[159]

D. Modeling Debtor Litigation Success

This Section provides an analysis of the determinants of bankruptcy litigation success in educational-debt dischargeability determinations by fitting a logistic regression model. For all dichotomous variables in the model, negative responses are coded as 0, and positive responses are coded as 1. The dependent variable is whether the debtor experienced litigation success (Debtor Litigation Success).[160] The model controls for the following factors:

- whether the debtor was fully self-represented (Fully Self-Represented);
- whether the litigation occurred in a jurisdiction in which the *Brunner* test is the governing legal standard for undue hardship (Brunner);
- whether ECMC made an appearance in the adversary proceeding (ECMC Appearance);
- whether the DOE made an appearance in the adversary proceeding (DOE Appearance);
- the duration of the adversary proceeding in days (Duration);

158. *See infra* Appendix Tables A6, A7.

159. *See infra* Appendix Table A6.

160. *See supra* Part II.B.1.

- the number of documents filed in the adversary proceeding (Filed Documents);

- the ratio of (1) the debtor's amount of educational debt at the time that the debtor filed his bankruptcy case to (2) the debtor's annual household income (Educational-Debt-to-Income Ratio);

- the number of days between the bankruptcy filing and the commencement of the adversary proceeding (Commencement Delay);

- whether a trial was held (Trial); and

- whether the adversary proceeding was commenced in 2012 (2012 Proceeding).

Overall, the model is statistically significant as compared to a model without independent variables. To assess model fit, the observed and predicted values for litigation success were compared. Using the model equation, the predicted probability of Litigation Success was calculated for each observation in the model given the actual value of the independent variables for that observation. The predicted litigation outcome of the adversary proceeding was classified (1) as unsuccessful for any predicted probability that was less than or equal to 0.5 and (2) as successful for any predicted probability that was greater than 0.5. The model correctly predicted litigation success in 68.7% of the observations.[161]

Of course, without referring to any of the independent variables in the model, one could correctly classify the outcome in some of the observations by assigning the most frequent category of outcome—that is, the marginal distribution of the dependent variable—to all of the observations. In this instance, one could correctly classify the outcome in approximately 61.2% of the observations by guessing that the debtor did not experience litigation success in the adversary proceeding.[162] Thus, when predicting with the model that includes the independent variables, the error

161. The proportion of correct predictions is referred to as the *count* R^2. J. SCOTT LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES 107 (1997).

162. For the 374 observations included in the model, 229 observations involved a debtor who did not experience litigation success.

rate drops by approximately 19.3% compared to a prediction based solely on the marginal distribution of the dependent variable.[163]

The model results support the hypothesis that self-represented debtors will experience less litigation success than represented debtors.[164] The represented status of the debtor is a statistically significant predictor of litigation success in the adversary proceeding. The model indicates that, holding all other variables constant, the odds of litigation success decrease by 68.0% [44.9, 81.4] if the debtor is self-represented.[165] To illustrate the relationship between the debtor's represented status and litigation success, Figure 1 plots two kernel densities of the predicted probability of litigation success—one for adversary proceedings involving represented debtors and the other for adversary proceedings involving self-represented debtors. The predicted probabilities are those that have been calculated for each observation in the model given the actual values of the independent variables for that observation.

Examination of the overlaying density curves in Figure 1 reveals that the curve for self-represented debtors has a higher peak than the one for represented debtors. Moreover, the former peak appears at the lower end of the probability scale (i.e., where the predicted probability of litigation success is less than 0.5), thus indicating the greater tendency for litigation failure by self-represented debtors. On the other hand, the highest peak of the curve for represented debtors appears at the upper end of the probability scale (i.e., where the predicted probability of litigation success is greater than 0.5), thus indicating the greater tendency for litigation success by represented debtors.

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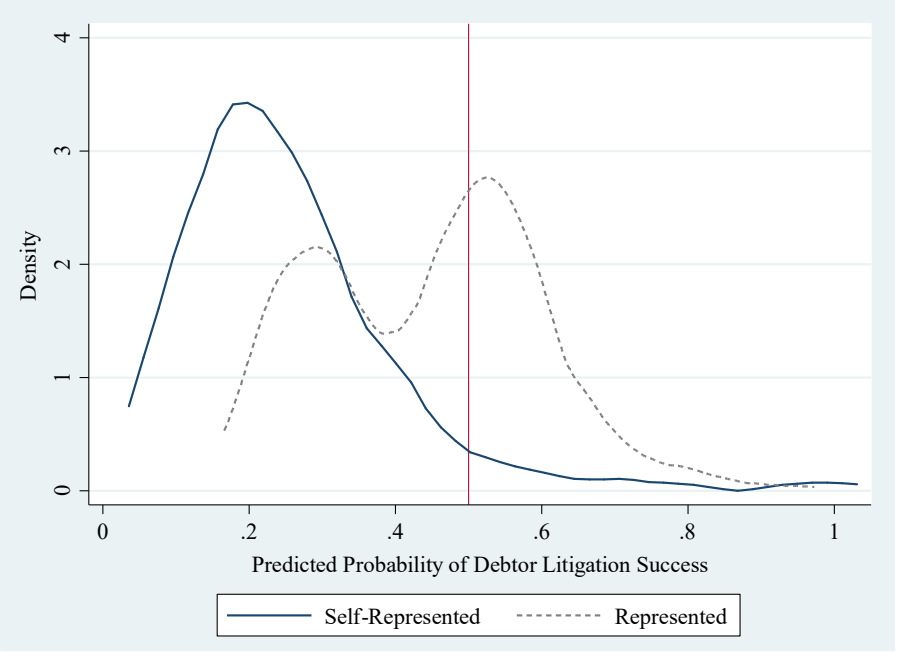
163. The proportion of correct predictions beyond the number that would be correctly predicted with the marginal distribution of the dependent variable is referred to as the *adjusted count* R^2. LONG, *supra* note 161, at 108.

164. *See infra* Appendix Table A8.

165. The findings reported in this Section remain qualitatively unchanged with alternative specifications of the logistic regression model. These specifications include additional independent variables, such as the monthly income, monthly expenses, and educational debt of the debtor as of the commencement of the case. For each of the specifications, the model coefficients remain correlated in the same direction as those reported here. Likewise, the statistically significant coefficients from the alternative specifications are the same as the statistically significant coefficients for the logistic regression model reported here.

Figure 1
Kernel Density Plot of Debtor Litigation Success by Represented Status



Interpreting the magnitude of the effect of the represented status of the debtor on litigation success presents some difficulty given the non-linear nature of the logistic regression model. Because of the nonlinearity, the effect of a change in one independent variable depends on the values of all other variables in the model. Accordingly, to facilitate interpretation of the effect of represented status on litigation success, the Article focuses on the example of the "typical" debtor that appeared in the 357 observations from the Representative Sample that were included in the model. The "typical" debtor is one who exhibited (1) the modal values for categorical data characteristics (e.g., represented status, *Brunner* jurisdiction) and (2) the median value for interval data characteristics (e.g., the ratio of educational debt to annual household income, duration of the adversary proceeding).[166] The values for the typical debtor are set forth below in Table 1. Because the typical debtor was represented, the remainder of this Article will refer to such a debtor as the "typical represented debtor."

166. For a discussion of the two alternative tests applied by courts to evaluate a debtor's undue hardship claim (i.e., the *Brunner* test and the totality test), see *supra* Part II.C.3.

Table 1
The "Typical" Debtor

Categorical Data Characteristic	**Mode**
Represented Status	Represented (71.2%)
Brunner Jurisdiction	Yes (88.2%)
ECMC Appearance	No (57.7%)
USDOE Appearance	No (61.9%)
2012 Adversary Proceeding	Yes (52.4%)
Trial Held	No (92.4%)
Interval Data Characteristic	**Median**
Duration of Adversary Proceeding (Days)	245
Number of Filed Documents	23
Time to Filing Adversary Proceeding (Days)	92
Ratio of Educational Debt to Annual Household Income	2.35

According to the model, the predicted probability of litigation success for the typical represented debtor is 56.2% [44.6, 67.7]. On the other hand, when changing the represented status of the typical debtor from represented to self-represented (the "typical self-represented debtor"), the predicted probability of litigation success dramatically drops to 28.5% [15.9, 41.1]. Along similar lines, when estimating the discrete change in the predicted probability of litigation success for a change in the represented status of the debtor, the predicted probability of litigation success for the typical self-represented debtor is 27.7 [15.5, 39.9] percentage points lower than the typical represented debtor.

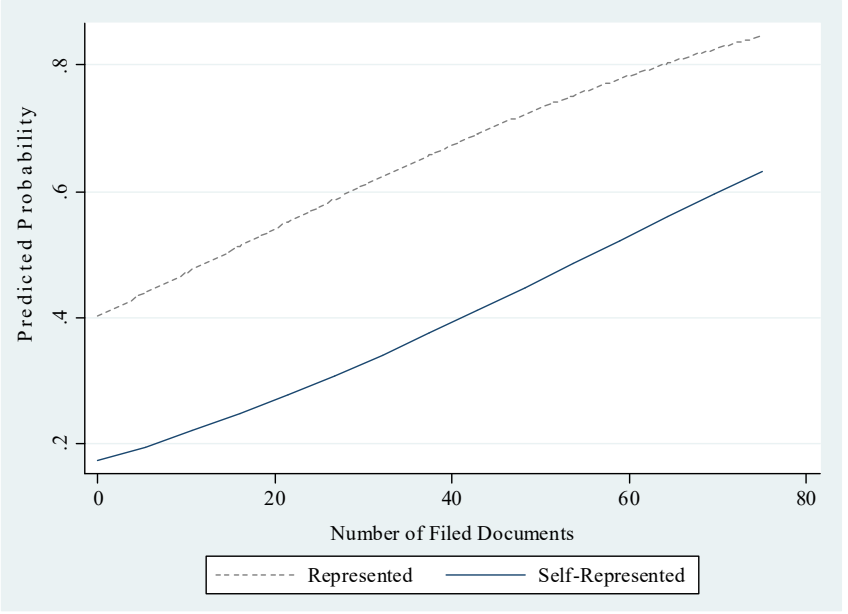
The model further reveals that the number of filed documents and the appearance of ECMC are statistically significant predictors of litigation success in the adversary proceeding. The number of filed documents is positively correlated with litigation success, while the appearance of ECMC

is negatively correlated with litigation. Each of these findings will now be discussed in greater detail.

The model indicates that, holding all other variables constant, the odds of litigation success increase by 2.9% [1.4, 4.3] for each additional document filed in the adversary proceeding. To further interpret this finding, consider the profile of (1) the typical represented debtor and (2) the typical self-represented debtor.

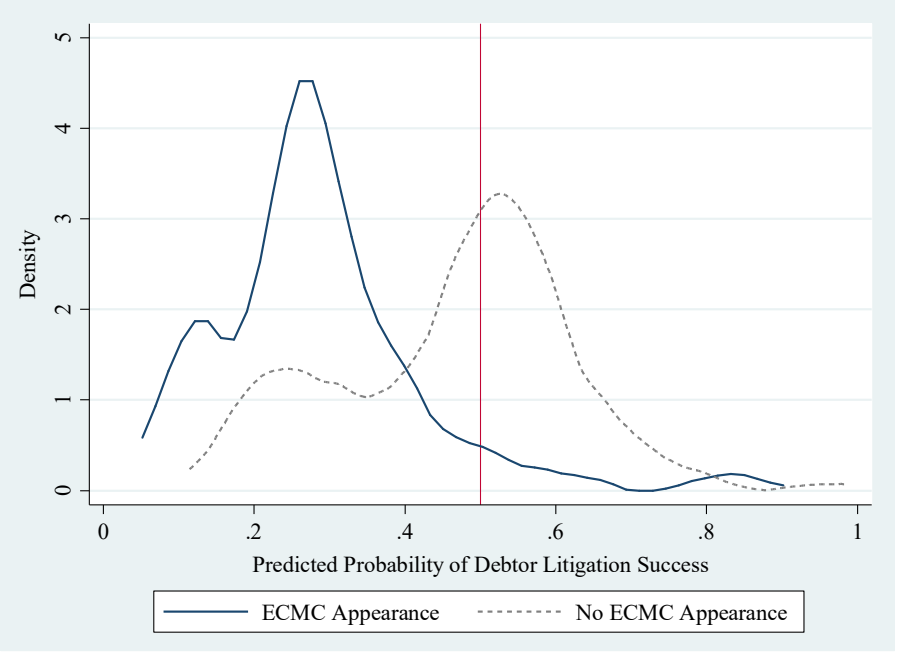
As illustrated in Figure 2 below and as set forth in Table A9 of the Appendix, the predicted probability of litigation success increases for the typical represented debtor as the number of filed documents increase. Likewise, the predicted probability of litigation success for the typical self-represented debtor increases as the number of filed documents increase. The size of the effect of increased filings, however, is not substantial. For example, increasing the number of filed documents from twenty to thirty for the typical represented debtor is estimated to increase the predicted probability of litigation success by only 6.9 [3.5, 10.2] percentage points. For the typical self-represented debtor, increasing the number of filed documents from twenty to thirty has an effect of similar magnitude—that is, increasing the predicted probability of litigation success by only 5.9 [2.7, 9.1] percentage points. Nonetheless, the latter debtor (i.e., the typical self-represented debtor whose adversary proceeding has thirty filed documents) has a dramatically lower predicted probability of litigation success, 32.7% [19.1, 46.3], than a similarly situated represented debtor, whose predicted probability of litigation success is 61.0% [49.3, 72.7]. This difference emphasizes the substantial magnitude of the effect that a debtor's represented status has on litigation success.

Figure 2
Predicted Probability of Debtor Litigation Success by
Number of Filed Documents and Represented Status



The model further indicates that, holding all other variables constant, the odds of litigation success decrease by 70.1% [50.0, 82.1] if ECMC appears as a litigant in the adversary proceeding. To illustrate the relationship between the appearance of ECMC in the adversary proceeding and litigation success, Figure 3 plots two kernel densities of the predicted probability of litigation success—one for adversary proceedings in which ECMC appeared and the other for adversary proceedings in which ECMC did not appear. Once again, the predicted probabilities are those that have been calculated for each observation in the model given the actual values of the independent variables for that observation.

Figure 3
Kernel Density Plot of Debtor Litigation Success by ECMC Appearance



Examination of the overlaying density curves reveals that the curve for adversary proceedings that involved an appearance by ECMC has a higher peak than the one for adversary proceedings in which ECMC did not appear. Moreover, the highest peak of the former curve appears at the lower end of the probability scale (i.e., where the predicted probability of litigation success is less than 0.5), thus indicating the greater tendency for litigation failure for debtors whose adversary proceedings involve ECMC. On the other hand, the highest peak of the curve for adversary proceedings not involving ECMC appears at the upper end of the probability scale (i.e., where the predicted probability of litigation success is greater than 0.5), thus indicating the greater tendency for litigation success by debtors whose adversary proceedings do not involve ECMC.

To further interpret this finding, consider the following predicted probabilities set forth below in Table 2. First, recall that the predicted probability of litigation success for the typical represented debtor (whose adversary proceeding does not involve an appearance by ECMC) is 56.2% [44.6, 67.7] and that the predicted probability of litigation success for the typical self-represented debtor dramatically drops to 28.5% [15.9, 41.1]. Second, consider the manner in which the predicted probabilities are further

reduced when the adversary proceedings for both of these debtors involve an appearance by ECMC. For the typical represented debtor, the predicted probability of litigation success plummets to 27.7% [17.5, 37.9]. For the typical self-represented debtor, the predicted probability of litigation success drops to 10.7% [3.9, 17.4].

Table 2
Predicted Probability of Debtor Litigation Success by
ECMC Appearance and Represented Status

ECMC Appearance	**Represented Status**	
	Represented Debtor	Self-Represented Debtor
No	56.2% [44.6, 67.7]	28.5% [15.9, 41.1]
Yes	27.7% [17.5, 37.9]	10.7% [3.9, 17.4]

The appearance of ECMC in the adversary proceeding has an effect of far greater magnitude on the litigation outcome for the typical represented debtor—that is, altering the predicted outcome from litigation success to litigation failure—than on the litigation outcome for the typical self-represented debtor—that is, further increasing the likelihood of what was already predicted to be litigation failure. Put another way, the discrete change in the predicted probability of litigation success for the typical represented debtor is estimated to drop by 28.5 [17.0, 40.0] percentage points when ECMC makes an appearance; on the other hand, the discrete change in the predicted probability litigation success for the typical self-represented debtor is estimated to drop by only 17.9 [8.7, 27.0] percentage points when ECMC makes an appearance.

E. Interpretation and Implications of Results

This Section evaluates the findings and non-findings from this study. Analyses of the data revealed three determinants of litigation success in educational-debt dischargeability determinations: (1) the represented status of the debtor, (2) the appearance of ECMC in the proceeding, and (3) the number of documents filed in the proceeding. The first two determinants were associated with a statistically significant *decrease* in the likelihood of litigation success, whereas the third determinant was associated with a statistically significant *increase* in the likelihood of litigation success. Additionally, the study did not find any statistically significant relationship between the debtor's financial circumstances and

litigation outcome. The discussion that follows presents an account of how these findings buttress the claim that procedural complexity presents a significant access-to-justice barrier that interferes with the ability of self-represented debtors to vindicate their discharge right.

1. The Represented Status of the Debtor

To begin, consider the study's principal finding that self-represented debtors have a statistically significantly lower likelihood of experiencing litigation success than represented debtors. Given all of the other control variables in the study, the fact that self-represented debtors fared worse than their represented counterparts suggests that procedural complexity has adversely affected the ability of self-represented debtors to present the substance of their claims regarding the scope of discharge.[167] Moreover, a comparison to the experience of the ability of debtors to obtain a discharge further illustrates how increased procedural complexity further exacerbates the barriers confronted by debtors in vindicating their discharge right.

As discussed above, procedural complexity significantly increases with the shift from filing for bankruptcy relief to litigating over the scope of discharge.[168] Recall that, in the Study Population, the rate of litigation success for self-represented debtors was observed to be 18.0 percentage points lower than that of represented debtors.[169] In contrast, for Chapter 7 consumer cases filed nationwide during roughly the three-year period

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167. One might ask whether the statistically significant difference in the success rates of represented and self-represented debtors can be attributed to a potential selection effect—specifically, that attorneys might be discouraged from representing debtors who have weaker claims of undue hardship. If the weaker claims are less likely to result in litigation success, then the lower success rates for self-represented debtors might not be attributable to lack of representation, but rather to the merits of the debtor's undue hardship claim. Such a concern is partly tempered by the nature of the undue hardship inquiry, which largely focuses on the debtor's current and future ability to repay his educational debt. *See supra* text accompanying notes 128-129. Thus, one might expect debtors who can afford representation to have undue hardship claims that are weaker than those of debtors who cannot afford representation. *See* Pardo & Lacey, *Discharge Litigation*, *supra* note 104, at 191-92 ("For those debtors who have the resources required to litigate a claim of undue hardship, their claim ironically becomes less sympathetic insofar as the creditor may be able to point to such resources as a potential source of repayment."). It should further be noted that, in the Representative Sample, self-represented debtors had statistically significantly lower amounts of monthly income and monthly disposable income than represented debtors. *See infra* Appendix Table A10.

168. *See supra* Part I.

169. *See supra* Part II.B.

following the effective date of the 2005 amendments to the Bankruptcy Code,[170] which increased the procedural complexity of filing for bankruptcy relief,[171] the discharge rate for self-represented debtors was observed to be 10.2 percentage points lower than that of represented debtors.[172] That the success-rate gap between represented and self-represented debtors is larger in the setting of educational-debt dischargeability determinations further highlights the burdens that have been imposed on debtors as a result of a legal framework that establishes full-blown adversary procedure as the means to relief.

Although the study did not have any formal hypotheses regarding the two other determinants of litigation success, they are discussed here as a vehicle for informing future studies of bankruptcy litigation. The goal is to hypothesize why such statistically significant relationships were observed and whether they have substantive significance, with the hope that these hypotheses will serve as a basis for new lines of inquiry that confirm or reject the observed patterns.

2. The Appearance of ECMC

The finding that the appearance by ECMC is statistically significantly associated with a decreased likelihood of litigation success for debtors raises interesting questions about the role of repeat players within the bankruptcy system. Prior research has theorized that access-to-justice barriers inherent in educational-debt dischargeability determinations create opportunities for creditors to overreach by ignoring procedural requirements and by espousing frivolous legal arguments.[173] Furthermore, that research documented how procedural noncompliance and pollutive litigation by ECMC had prejudicially distorted the form in which courts have considered debtors' claims for relief.[174] A possible implication of that evidence was that "ECMC's procedural noncompliance and pollutive litigation decrease a debtor's odds of prevailing in those proceedings where such litigation

170. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. The effective date of the 2005 amendments was October 17, 2005. *See id.* § 1501(a), 119 Stat. at 216.

171. *See* Pardo, *Access*, *supra* note 114, at 15-18.

172. Pardo, *Self-Representation*, *supra* note 4 (manuscript at 17) (discussing discharge rates from Lupica, *Fee Study*, *supra* note 34).

173. *See* Pardo, *Thicket*, *supra* note 63, at 2106-21.

174. *See id.* at 2142-73.

conduct occurs."[175] Recall that, in this study, the statistically significant negative correlation between ECMC's appearance and litigation success for the debtor persisted when controlling for other factors, including the represented status of the debtor.[176] This finding invites further empirical examination into what accounts for the litigation success of certain repeat players—that is, whether such success can be attributed to resource and informational asymmetries, reputational effects, litigation misbehavior, or some combination thereof.[177]

3. The Number of Filed Documents

The finding that the number of filed documents is statistically significantly associated with an increased likelihood of litigation success for debtors, regardless of their represented status, suggests that vigorously contesting the creditor works to the advantage of debtors—that is, the idea of living to fight another day.[178] Unfortunately, there are serious obstacles for both self-represented and represented debtors that will hinder them from robustly challenging creditors.

As previously mentioned, faced with the daunting task of navigating a highly technical and complex legal process, some self-represented debtors give up in despair, failing to live to fight another day.[179] For those self-

175. *Id.* at 2173.

176. *See supra* Part II.D. For an example of how procedural noncompliance has at times contributed to ECMC's litigation success, see Pardo, *Thicket*, *supra* note 63, at 2160-63 (describing improper discovery practice by ECMC in a particular educational-debt dischargeability determination).

177. *See* Nash & Pardo, *Ideology*, *supra* note 77, at 942-44 (discussing the dynamic of resource and informational asymmetries in debt-dischargeability determinations); Neustadter, *supra* note 60 (manuscript 16-57) (documenting procedural noncompliance and pollutive litigation by Heritage Pacific Financial, L.L.C. in 218 debt-dischargeability determinations regarding debts alleged to have been fraudulently incurred and discussing resource and informational asymmetries favoring Heritage); Pardo, *Thicket*, *supra* note 63, at 2145-46 (discussing how resource asymmetries have favored ECMC in educational-debt dischargeability determinations); Pardo & Lacey, *Discharge Litigation*, *supra* note 104, at 219 n.151 (discussing informational, resource, and reputational advantages that favor the DOE in educational-debt dischargeability determinations).

178. Janger, *supra* note 81, at 606 ("Increased expenditure by litigating parties will increase the likelihood of success in bankruptcy court.").

179. *See supra* note 74 and accompanying text; *cf.* Mann & Porter, *supra* note 41, at 316 ("[D]ebtors must 'save up' certain emotional resources, such as humility, before they will consider bankruptcy."); D. James Greiner et al., Self-Help, Reimagined 9 (Feb. 15, 2016) (unpublished manuscript), http://ssrn.com/abstract=2633032 ("Solving justiciable problems typically requires action. . . .We hypothesize that failures to take action are in part a

represented debtors who do not initially give up, vigorously litigating over their discharge right will take time, an investment that can severely disrupt everyday life,[180] and that ultimately may prove to be prohibitive for some debtors.[181]

For represented debtors, a highly contested proceeding will also require time, but it will be the debtor's attorney's time that is implicated. We might expect that vigorous contestation will drag out a proceeding,[182] which inevitably would have a bearing on the costs of litigation. It has been empirically documented that, even when controlling for other factors, an increase in case duration is associated with a statistically significant increase in the litigation costs for both plaintiffs and defendants in federal civil cases.[183] But, as previously discussed, debtors are not likely to be able to fund protracted litigation.[184] If represented debtors can only afford to pay a limited lump sum for representation throughout the proceeding, debtor attorneys will have little economic incentive to engage in vigorous

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function of the psychological and mental state a lay individual finds herself in when faced with a justiciable problem: overtaxed, anxious, unfamiliar with legal mundanity.")

180. *See, e.g.*, Sperazza v. Educ. Credit Mgmt. Corp. (*In re* Sperazza), 366 B.R. 397, 405 (Bankr. E.D. Pa. 2007) ("[B]ecause of the fact that I had no choice but to prepare and litigate my own adversary proceeding, . . . I also had no choice but to temporarily suspend my job seeking activities—mainly the applying for specific jobs." (internal quotation marks omitted)).

181. *Cf.* Greiner et al., *supra* note 179, at 10 (discussing how self-represented, low-to-moderate-income individuals must contend with the challenges of "overtaxed bandwidth and little excess prospective memory").

182. For the debtors in the Study Population, the number of filed documents was associated with a statistically significant increase in the duration of the proceeding according to a nonparametric Spearman rank correlation ($n = 1{,}415$; $\rho = 0.6616$; $p < 0.0001$).

183. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS 5, 7 (2010), http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf.

184. *See supra* text accompanying note 63; *see also, e.g.*, Motion for Withdrawal of Counsel at 2, Hester v. White (*In re* White), Ch. 7 Case No. 14-25727, Adv. No. 14-02263 (Bankr. D. Utah Oct. 1, 2015), ECF No. 16 ("The reason for withdrawal is that Client has incurred legal fees in a sum exceeding $30,000 in connection with the main case and two (2) pending adversary proceedings. Furthermore, Drake has joined the firm of Miller Toone, P.C., and Client is unable to pay the requested retainer for continued representation by that firm."); *cf.* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984) ("[T]he poorer party might be forced to settle because he does not have the resources to finance the litigation, to cover either his own projected expenses, such as his lawyer's time, or the expenses his opponent can impose through manipulation of procedural mechanisms such as discovery.").

contestation, thus potentially undermining the ability of their clients to vindicate their discharge right.[185] Further empirical inquiry is warranted to explore whether the filing activity in bankruptcy litigation is a telltale sign of a principal-agent problem—specifically, attorneys for debtors failing to act in their clients' best interests.[186]

Finally, consider that no statistically significant relationship was found between the debtor's financial circumstances and the likelihood of litigation success. Undeniably, the debtor's financial circumstances should give content to the law and thus be predictive of outcome.[187] But here they were not,[188] a finding that is consistent with prior empirical studies of educational-debt dischargeability determinations that have failed to unearth such a statistically significant association.[189]

The disparate litigation outcomes experienced by debtors with similarly dire financial circumstances points to the pernicious effects of requiring debtors to prove their eligibility for relief pursuant to vague and indeterminate standards (in this case, undue hardship):

> If one conceives of bankruptcy court doctrine as serving a signaling function to litigants regarding the likelihood of relief for the debtor, and if that doctrine is generally unclear, it seems more likely that litigants will not have overlapping

185. *Cf.* Fiss, *supra* note 184, at 1078 ("In many situations, however, individuals are ensnared in contractual relationships that impair their autonomy: Lawyers . . . might, for example, agree to settlements that are in their interests but are not in the best interests of their clients . . . ."); Jeffrey Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 172 (1996) ("The attorney can control the client's frame, thereby influencing settlement decisions in either direction. The attorney may or may not use this ability to serve his clients' best interests.").

186. *See, e.g.*, *In re Mills*, 170 B.R. 404 (Bankr. D. Ariz. 1994) ("Vulnerable would-be debtors, who are often in desperate straits, may need protection against their attorneys, who themselves may be tempted to put their own financial interests ahead of those of debtors."); Whitford, *supra* note 44, at 406 ("Rather than making informed decisions reflecting their particular circumstances and personal goals, debtors are steered to particular choices by their attorneys. Too often, I believe, those choices reflect the best interests of the attorneys rather than the interests of debtors themselves.").

187. *See* Rafael I. Pardo, *Illness and Inability to Repay: The Role of Debtor Health in the Discharge of Educational Debt*, 35 FLA. ST. U. L. REV. 505, 518 (2008) [hereinafter Pardo, *Debtor Health*].

188. *See infra* Appendix Table A5.

189. *See* Pardo, *Debtor Health*, *supra* note 187, at 510-11; Pardo & Lacey, *Discharge Litigation*, *supra* note 104, at 215 & 216 tbl.3.

> expectations regarding the outcome of undue hardship discharge proceedings. This state of affairs will discourage settlement, requiring litigants to incur more litigation costs. On balance, such costs will have a disproportionate impact on debtors who file for bankruptcy as a result of financial distress and a lack of monetary resources. When coupled with the complex and protracted procedure of an adversary proceeding, the indeterminacy of the undue hardship standard creates an environment hospitable to attrition litigation by creditors.[190]

At the end of the day, if litigation is deemed to be a desirable channel for vindicating the discharge right, then serious consideration must be given to amending the substantive law for relief so that it is more crystalline,[191] "[i]n the hopes of ensuring fair debtor treatment, promoting certainty, and reducing costs."[192]

III. Reforming Discharge Litigation

The discussion regarding the implications of this empirical study suggests that there are various reforms that could improve the plight of debtors who seek to vindicate their discharge right: (1) simplifying the substance of the law, (2) increasing the assistance available to debtors, and (3) reducing the procedural complexity of discharge litigation. As has been discussed elsewhere, Congress and the Supreme Court are the two primary actors who could simplify the substance of the law,[193] but neither has shown an inclination to do so.[194] Accordingly, that leaves the latter two options as the more likely avenues for reform.

This Part will first discuss how one possibility for increasing the assistance available to debtors—fee-shifting legislation—has proved to be

190. Pardo, *Thicket*, *supra* note 63, at 2109-10 (footnotes omitted).

191. *See* Janger, *supra* note 81, at 619-20.

192. Pardo & Lacey, *Bankruptcy Courts*, *supra* note 3, at 521.

193. *See* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 391, 401-02, 438-39 (2012).

194. *See* Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L.J. 221, 221-30 (2004) (discussing Congress's inability to engage in effective reform efforts to improve deficiencies in the bankruptcy system); Pardo & Watts, *supra* note 193, at 438 (discussing the dearth of bankruptcy decisions by the Supreme Court).

largely ineffective at doing so.[195] The discussion will then shift to how procedural complexity can be reduced, first cautioning against ad hoc judicial reform efforts and then arguing for procedural reform through the rulemaking process.

A. Fee-Shifting Legislation

If representation improves the likelihood of a debtor's ability to vindicate his discharge right, one avenue of reform would be to find the means to increase the availability of representation for debtors. The problem, as discussed above,[196] is that many debtors are likely to be priced out of the market for legal services relating to discharge litigation, as suggested by various statistics from this study. First, recall the 32.5% self-representation rate for debtors in the Study Population,[197] which far exceeds the self-representation rate for debtors in Chapter 7 consumer cases (i.e., less than 8%),[198] as well as the self-representation rate for litigants in federal civil cases (i.e., approximately 10%).[199] It has been observed that "statistics on self-representation . . . make a compelling case for overpricing,"[200] and the high self-representation rate for debtors in this study certainly points to a serious accessibility problem in the context of discharge litigation.

Lending further support to the "priced-out" theory, self-represented debtors in the Representative Sample had statistically significantly lower amounts of monthly income and monthly disposable income than represented debtors,[201] and an estimated 18.7% [12.7, 26.6] of self-

195. Another possibility for increasing the assistance available to debtors would be the creation of effective self-help materials. *See* Greiner et al., *supra* note 179, at 51 ("[T]he volume of litigants who interact with the formal legal system without any form of professional assistance means that effective self-help materials must be part of any reasonable access to justice strategy."). For a comprehensive discussion on reconceptualizing self-help materials, *see id.* at 17-44.

196. *See supra* notes 60-66 and accompanying text.

197. *See supra* Part II.C.2.

198. *See supra* note 45 and accompanying text.

199. *See* Lee, *supra* note 66, at 506.

200. Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 DRAKE L. REV. 845, 848 (2013).

201. *See infra* Appendix Table A10. Self-represented debtors in Chapter 7 consumer cases have likewise been found to have statistically significant lower amounts of monthly income and monthly disposable income than represented debtors. *See, e.g.*, Pardo, *Self-Representation*, *supra* note 4 (manuscript at 29).

represented debtors in the Study Population had been represented by counsel when they initially filed for bankruptcy relief.[202] The inability of debtors to pay for representation presents one of the serious challenges to reform in this area.[203] Compounding the affordability paradox,[204] debtors generally cannot enlist the aid of counsel through a contingent-fee arrangement because the discharge of debt does not generate a monetary award.[205]

There is, however, one type of discharge litigation for which an attorney could theoretically represent a debtor on a contingency basis: adversary proceedings to determine whether a debt should be deemed nondischargeable as a result of the debtor's fraud in incurring the debt ("fraudulent-debt dischargeability determinations").[206] For such proceedings, if the debtor prevails and the debt is deemed dischargeable, the Bankruptcy Code provides that "the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified."[207] The Code further provides, however, "that the court shall not award such costs and fees if special circumstances would make the award unjust."[208]

Given the possibility of a debtor being awarded fees and costs in such litigation an attorney might be incentivized to take on such representation, for the right client, entirely on the contingency of procuring such an award. If sufficiently robust, such a fee-shifting provision could create a larger market for legal services that would increase the accessibility

202. This estimate is based on the Representative Sample. Of the 123 self-represented debtors in the sample, twenty-three had been represented by counsel when they initially filed for bankruptcy relief.

203. *Cf.* Lee, *supra* note 66, at 500 (describing "access to justice as a function of the cost of civil litigation").

204. *Cf.* Pardo, *Illness*, *supra* note 187, at 517 n.52 ("Given that debtors who seek an undue hardship discharge are likely to lack the resources necessary to litigate the matter generally, courts have recognized the paradox that arises from a rule requiring debtors to present expert testimony, which entails more financial resources, to support an undue hardship claim based on a medical condition." (citations omitted)).

205. *See supra* Part I.A.

206. *See* 11 U.S.C. § 523(a)(2) (2012).

207. *Id.* § 523(d).

208. *Id.*

of representation for some debtors in discharge litigation.[209] Furthermore, the provision's applicability could be extended. For example, one congressional bill has proposed that the Code be amended to expand the reach of this fee-shifting provision so that it also applies to educational-debt dischargeability determinations.[210]

To assess whether the Code's current fee-shifting provision might be a model for viable reform, this Article once again relies on empirical data, this time looking at the experience of debtors in fraudulent-debt dischargeability determinations. A search query was formulated in Bloomberg Law's "Dockets" database,[211] with the query retrieval based on the following parameters: (1) limiting the search to all U.S. bankruptcy court dockets, (2) limiting query retrieval to dockets that were opened in 2014; and (3) searching by the nature-of-suit code assigned to fraudulent-debt dischargeability determinations.[212] The search query yielded 4,362 results, and a random sample of 527 proceedings was drawn. This random sample is used to provide a preliminary account for testing and reconsidering assumptions that have been made regarding the efficacy of the Code's fee-shifting provision.

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209. *Cf.* 2 NAT'L BANKR. REVIEW COMM'N, *supra* note 18, app. G-1.c at 27 (1997) ("To encourage adequate representation of consumer debtors, we strongly recommend that, as to debtors with primarily consumer debts, the award of costs and attorneys' fees be mandatory."); Lee, *supra* note 66, at 503 ("A potential plaintiff with a large enough and strong enough claim may be able to find an attorney to handle the case on a contingency fee.").

210. Stopping Abusive Student Loan Collection Practices in Bankruptcy Act of 2015, H.R. 100, 114th Cong. § 2 (as referred to the H. Comm. on the Judiciary, Jan. 6, 2015). Interestingly, the fact that the Code's fee-shifting provision does not currently and has never extend to educational-debt dischargeability determinations has not stopped debtors from erroneously requesting that they be awarded fees and costs under that provision. *See, e.g.*, Defendant's Answer and Counterclaim ¶ 47, Cal. Coast Univ. v. Aleckna (*In re* Aleckna), Ch. 13 Case No. 12-03367, Adv. No. 12-00247 (Bankr. M.D. Pa. Sep. 7, 2012), ECF No. 3 ("Defendant is entitled to a reasonable attorney's fee under 11 U.S.C. § 523(d)."); Motion by Debtor John Carl DelBonis for Assessment of Fees and Costs Pursuant to 11 U.S.C. § 523(d), TI Fed. Credit Union v. DelBonis (*In re* DelBonis), Ch. 7 Case No. 93-18441, Adv. No. 93-02003 (Bankr. D. Mass. June 3, 1994), ECF No. 13.

211. BLOOMBERG LAW, http://www.bloomberglaw.com/dockets (last visited Feb. 20, 2016) (subscription required).

212. The nature-of-suit (NOS) code for such determinations is "62-Dischargeability - § 523(a)(2), false pretenses, false representation, actual fraud." Official Form B1040 ("Adversary Proceeding Cover Sheet"), http://www.uscourts.gov/forms/bankruptcy-forms/adversary-proceeding-cover-sheet-0. For a discussion on the limitations of using an NOS code to construct a sample, see Pardo, *Thicket*, *supra* note 63, at 2130 n.184.

The data suggest that the Code's fee-shifting provision may not be a promising avenue for increasing debtor representation in discharge litigation. It is estimated that, of the fraudulent-debt dischargeability determinations that were commenced in U.S. bankruptcy courts during 2014,[213] approximately 37.4% [33.4, 41.6] involved fully self-represented debtors. Given that this self-representation rate exceeds the self-representation rate of debtors in educational-debt dischargeability determinations,[214] it casts doubt on whether the fee-shifting provision has facilitated the creation of a more accessible market for representation in discharge litigation.

Relatedly, the data reveal that debtors rarely seek to avail themselves of the fee-shifting provision. In the above-referenced determinations, it is estimated that only 19.7% [16.0, 23.8] of the debtors prevailed,[215] with represented debtors prevailing at a statistically significant greater rate.[216] It is further estimated that merely 3.7% [1.0, 10.3] of the prevailing debtors sought to recover fees and costs pursuant to the Code's fee-shifting provision.[217] Finally, of the three debtors in the random sample who sought a fee award, only one succeeded.[218]

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213. Because federal jurisdiction over debt-dischargeability determinations is original, but not exclusive, *see* 28 U.S.C. § 1334(b) (2012), such determinations can be made by the appropriate state court, *see, e.g.*, *In re* Mendiola, 99 B.R. 864, 866, 870 (Bankr. N.D. Ill. 1989).

214. *See supra* Part II.C.2.

215. As of this writing, a disposition had been made in approximately 91.0% (i.e., 478 of 527) of the fraudulent-debt dischargeability determinations in the random sample—that is, the court had entered an order disposing of the claim that the debtor had fraudulently incurred the debt at issue. Of those dispositions, approximately 87.2% (i.e., 417 of 478) constituted a merits-based disposition. The debtor prevailed in approximately 19.7% (i.e., 82 of the 417) merits-based dispositions.

216. In the absence of a relationship between the represented status of the debtor and the outcome of the fraudulent-debt dischargeability determination, one would expect to see debtors from the random sample prevail 19.7% of the time. *See supra* note 215. The data reveal, however, that represented debtors prevailed 24.4% of the time, whereas self-represented debtors prevailed only 12.3% of the time. A chi-square test with one degree of freedom indicates that the difference between the observed and expected values is statistically significant ($p = 0.002$). These calculations are based on the 417 merits-based dispositions in the random sample. *See id.*

217. This estimate is based on the dispositions in the random sample in which the debtor prevailed, of which there were eighty-two. *See id.* All of the debtors who sought to recover fees and costs were represented debtors. It should be noted that self-represented debtors are not precluded from recovering fees and costs under the Code's fee-shifting

What might account for the fee-shifting provision's failure to live up to its promise, as envisioned by Congress,[219] to level the playing field between creditors and debtors in fraudulent-debt dischargeability determinations? The answer simply may be that the current version of the provision has been suboptimally designed and thus destined to fail. Recall that the prevailing debtor may recover fees and costs only "if the court finds that the position of the creditor was not substantially justified."[220] As Professor Jonathan Nash and I have observed elsewhere:

> [I]t seems reasonable to conclude that debtors may not seek to vindicate their entitlement to such fees. It would be quite daunting and risky to engage in a second round of litigation with the creditor, only to fail to establish that "the position of the creditor was not substantially justified." And, even if the debtor made such a showing, the creditor could still avoid liability "if special circumstances would make the award unjust."[221]

Put another way, as currently drafted, the fee-shifting provision poses too much risk and uncertainty to make the game worth the candle.[222]

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provision. *See* Trs. of the Will Cty. Carpenters, Local 174, Health & Welfare Fund v. Cooney, 532 B.R. 296, 299 (N.D. Ill. 2015).

218. These findings comport with the findings of a case study analyzing 218 fraudulent-debt dischargeability determinations involving the same plaintiff-creditor. *See* Neustadter, *supra* note 60 (manuscript at 62-64).

219. *See* S. REP. NO. 95-989, at 80 (1978) ("The purpose of the provision is to discourage creditors from initiating proceedings . . . in the hope of obtaining a settlement from an honest debtor anxious to save attorney's fees. Such practices impair the debtor's fresh start and are contrary to the spirit of the bankruptcy laws."), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5866; H.R. REP. NO. 95-595, at 131 (1977) ("The threat of litigation over this exception to discharge and its attendant costs are often enough to induce the debtor to settle for a reduced sum, in order to avoid the costs of litigation. Thus, creditors with marginal cases are usually able to have at least part of their claim excepted from discharge . . ., even though the merits of the case are weak."), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6092.

220. 11 U.S.C. § 523(d) (2012).

221. Nash & Pardo, *Ideology*, *supra* note 77, at 980-81 (footnote omitted) (quoting 11 U.S.C. § 523(d)).

222. *See* 2 NAT'L BANKR. REV. COMM'N, *supra* note 18, app. G-1.c at 27 ("These conditions [i.e., "substantially justified" and "special circumstances"] have resulted in a reluctance by many courts to award fees and costs to prevailing debtors, with the result that debtors cannot be assured of recovering their costs of litigation when they prevail.").

If fee-shifting provisions are to play a productive role in helping debtors vindicate their discharge right, such provisions will have to be optimally drafted.[223] It should further be kept in mind that even a robust fee-shifting provision will not be a cure-all. Having access to representation does not necessarily mean that a debtor will be able to enlist the assistance of a high-quality attorney who obtains successful outcomes for his clients.[224] Accordingly, it becomes imperative to consider in tandem other means for reforming discharge litigation—specifically, means by which its complexity might be reduced.

B. Ad Hoc Judicial Reform Efforts

Given the tendency of bankruptcy judges to be actively involved in case management, both with respect to a debtor's underlying bankruptcy case as well as adversary proceedings within the case,[225] another opportunity for reform potentially lies in the ability of bankruptcy judges to achieve just results[226] through managerial judging.[227] As described by Professor E. Donald Elliott, "[m]anagerial judges believe that the system

223. As originally drafted, the Code's fee-shifting provision mandated that the court award a prevailing debtor in a fraudulent-debt dischargeability determination fees and costs "unless such granting of judgment would be clearly inequitable." 11 U.S.C. § 523(d) (Supp. III 1979) (amended 1984). For the argument that the current provision should be restored to its former version, see Neustadter, *supra* note 60 (manuscript at 76).

224. Pardo, *Thicket*, *supra* note 63, at 2139-40 (providing examples of low-quality attorneys who have represented debtors in educational-debt dischargeability determinations); Pardo & Lacey, *Discharge Litigation*, *supra* note 104, at 220-21, 222 tbl.6 (finding that debtors represented by a particular attorney had a statistically significantly lower percentage of student-loan debt discharged than debtors who were not represented by that attorney); *see also In re* Bruzzese, 214 B.R. 444, 450 (Bankr. E.D.N.Y. 1997) ("The most frustrating aspect of this judicial position is opening case files on a daily basis and discovering clients who are not effectively represented by their lawyers.").

225. *See* Stacy Kleiner Humphries & Robert L. R. Munden, *Painting a Self-Portrait: A Look at the Composition and Style of the Bankruptcy Bench*, 14 BANKR. DEV. J. 73, 76, 82, 105 (1997); Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, 2015 U. ILL. L. REV. 571, 576; *see also, e.g.,* Melissa B. Jacoby, *Superdelegation and Gatekeeping in Bankruptcy Courts*, 87 TEMP. L. REV. 875, 892 (2015) (noting how a bankruptcy judge in California "has developed his own set of rules and requirements for Chapter 13 that expressly depart from, at the very least, the local rules of procedure in the district").

226. *See* FED. R. BANKR. P. 1001 ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding.").

227. For the argument that bankruptcy judges may not be inclined to engage in this type of managerial judging, see Brooke D. Coleman, *Easy Access to Loans, But What About Access to Justice?*, 66 FLA. L. REV. F. 56, 59-60 (2015).

does not work; that *something* must be done to make it work; and that the only plausible solution to the problem is *ad hoc* procedural activism by *judges*."[228] In support of managerial judging, he has argued that it "can be justified not only in terms of reducing the procedural costs of civil litigation generally, but also by showing that managerial judging improves the quality of substantive justice received by litigants in particular cases."[229] But he has also cautioned that managerial judging has the potential to "reduce procedural fairness [because of] its ad hoc character."[230]

It is beyond the scope of this Article to suggest specific management procedures that could reduce the procedural complexity faced by debtors when vindicating their discharge right. While recognizing that we can "increase[] [the] quality of substantive justice . . . when managerial judging techniques are applied appropriately,"[231] this Article seeks to raise a cautionary flag that warns courts to think carefully about how they deploy management procedures in their courtrooms. The decision of the U.S Bankruptcy Appellate Panel of the Ninth Circuit (the Ninth Circuit BAP) in *Nichols v. Align Western States Learning Corp. (In re Nichols)*[232] demonstrates how "there may indeed be some costs associated with managerial judging in terms of a loss of real or perceived procedural fairness."[233]

At the trial level, Eric and Bonita Nichols commenced an adversary proceeding in the U.S. Bankruptcy Court for the District of Arizona to determine the dischargeability of the student loans that Mr. Nichols owed to Align Western States Learning Corporation ("Align").[234] Align failed to timely answer the Nichols' complaint, which prompted the court clerk to enter a default against Align.[235] Align sought to set aside the default, but

228. E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 309 (1986).

229. *Id.* at 326.

230. *Id.* at 328.

231. *Id.* at 327; *see also* Zorza, *supra* note 200, at 854-55 ("At its best, caseflow management can be used to identify roadblocks and as an opportunity to provide services or to change procedures to help remove those roadblocks.").

232. No. AZ-12-1305-JuTaAh, 2013 WL 3497666 (B.A.P. 9th Cir. July 9, 2013), *aff'd*, 605 Fed. App'x 660 (9th Cir. 2015) (per curiam).

233. Elliot, *supra* note 228, at 327.

234. *Id.* at *1.

235. *Nichols*, 2013 WL 3497666, at *1. The Bankruptcy Rules provide that, "[i]f a complaint is duly served, the defendant shall serve an answer within 30 days after the

rather than rule on the motion, the bankruptcy court "decid[ed] instead to conduct a prove-up hearing to determine if [the] debtors could establish a *prima facie* case for undue hardship."[236] Pursuant to this procedure, the court would permit the Nichols to testify and to present evidence in support of their undue hardship claim.[237] Align agreed only to cross-examine the debtors at the hearing without further defending against their claim.[238] Thus, if the Nichols established a prima facie case for undue hardship, the court would discharge their debt.[239]

After the prove-up hearing, the bankruptcy court determined that the Nichols had failed to establish a prima facie case for undue hardship and entered an order determining the debt to be nondischargeable and dismissing the adversary proceeding.[240] On appeal, the Ninth Circuit BAP rejected the Nichols' argument that the prove-up procedure had denied them due process of law, noting that "[a]lthough not labeled as a 'trial,' [the prove-up] procedure accorded the Nichols full opportunity to present an evidentiary showing to prove their claims and was more favorable to them than a full trial because Align was not allowed to present a defense, such as testimony from expert witnesses."[241] In light of this, the Ninth Circuit BAP opined that "[t]he Nichols' complaint of not having a trial rings hollow."[242] A closer look at the relevant procedure in the *Nichols* case, however, reveals that the bankruptcy court improperly absolved Align from *multiple* evidentiary burdens, thereby calling into question the quality of justice that the Nichols received.

In fairness, it should be noted that the prove-up procedure implemented by the bankruptcy court in *Nichols* was, in fact, a well-

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issuance of the summons." FED. R. BANKR. P. 7012(a). Rule 55(a) of the Federal Rules—which applies in adversary proceedings by virtue of Bankruptcy Rule 7055, *see* FED. R. BANKR. P. 7055—provides that, "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk *must* enter the party's default." FED. R. CIV. P. 55(a) (emphasis added).

236. *Nichols*, 2013 WL 3497666, at *1.

237. *See id.* at *1, *3.

238. *See id.*

239. *Id.*

240. *See id.* at *2.

241. *Id.* at *3.

242. *Id.*

intentioned shortcut. The animating concern for the court appears to have been to spare the Nichols, who were self-represented,[243] the time, difficulty, and expense of litigating their adversary proceeding through a traditional trial process involving discovery and the like.[244] Notwithstanding these best intentions, the court's procedure placed the proverbial cart before the horse, essentially giving Align a free pass through, not one, but two evidentiary hurdles that would have doomed the case for Align had it failed to carry either burden.[245]

First and foremost, in the Ninth Circuit, relief from entry of default is governed by a three-factor test pursuant to which a court must determine (1) whether the defendant's culpable conduct led to the default, (2) whether the defendant has a meritorious defense, and (3) whether the plaintiff will be prejudiced by such relief.[246] Importantly, the three-factor test is "disjunctive, such that a finding that any one of these factors is true is sufficient reason for the district court to *refuse* to set aside the default."[247] Thus, a court may refuse to set aside a default or default judgment if it finds either culpability by the defaulting defendant, the lack of a meritorious

243. *See* Docket, Nichols v. Align W. States Learning Corp. (*In re* Nichols), Case No. 11-12027, Adv. No. 11-00784 (Bankr. D. Ariz. dismissed Apr. 19, 2012).

244. *See* Hearing Transcript at 13, Nichols v. Align W. States Learning Corp. (*In re* Nichols), Ch. 7 Case No. 11-12027, Adv. No. 11-00784 (Bankr. D. Ariz. Sept. 27, 2011), ECF No. 22 ("I don't want to go down the road where we have a full-blown trial on the matter, where you need to bring in your doctors and they need to testify, and Mr. Cox will have his doctors come in and testify. I'm trying to avoid that."); *id.* at 15 ("Again, I was trying to short-circuit this. I was trying to get a prove-up hearing from the debtors. I was trying to get some evidence from them in support of their position. I was trying to avoid a full-blown trial.").

245. In its threadbare opinion affirming the Ninth Circuit BAP, it is readily apparent that the Ninth Circuit was oblivious to the evidentiary free pass that the bankruptcy court gave to Align. *See* Nichols v. Align W. States Learning Corp. (*In re* Nichols), 605 Fed. App'x 660, 660-61 (9th Cir. 2015) (per curiam) ("The bankruptcy court properly dismissed the Nichols' adversary proceeding because they failed to make a prima facie showing that excepting the debt from discharge would constitute an undue hardship.").

246. *See* Brandt v. Am. Bankers Ins. Co. of Fla., 653 F.3d 1108, 1111 (9th Cir. 2011); United States v. Signed Personal Check No. 730 of Yubran S. Mesle, 615 F.3d 1085, 1091 (9th Cir. 2010); TCI Grp. Life Ins. Plan v. Knoebber, 244 F.3d 691, 696 (9th Cir. 2001). The Federal Rules provide that a "court may set aside an entry of default for good cause." FED. R. CIV. P. 55(c); *see also* FED. R. BANKR. P. 7055 (incorporating Federal Rule 55 in adversary proceedings).

247. *Mesle*, 615 F.3d at 1091 (emphasis added).

defense, or prejudice to the plaintiff.[248] Crucially, as the moving party, the defendant bears the burden of proof to establish that vacating a default is warranted.[249]

By virtue of the bankruptcy court's prove-up procedure, the creditor in *Nichols* did not have to contend with its evidentiary burden for setting aside the default that had been entered against it. This seems particularly troublesome given that Align did not have a slam-dunk argument for setting aside the default. Specifically, rather than filing an answer to the Nichols' complaint in their adversary proceeding, Align filed a proof of claim[250] in the Nichols' underlying bankruptcy case,[251] an action which the bankruptcy court viewed unfavorably.[252] Although the court did not articulate how this conduct would be analyzed under the legal standard for setting aside a default,[253] Align's decision to file only a proof of claim relates to its culpability in failing to answer. Under Ninth Circuit case law, "a defendant's conduct is culpable if he has received actual or constructive notice of the filing of the action and intentionally failed to answer."[254]

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248. Hammer v. Drago (*In re* Hammer), 940 F.2d 524, 525-26 (9th Cir. 1991); *see, e.g.*, *Brandt*, 653 F.3d at 1112; Emp. Painters' Trust v. Ethan Enters., Inc., 480 F.3d 993, 1000 (9th Cir. 2007) ("Because appellants were culpable with respect to the default and have no meritorious defense, the district court acted well within its discretion when it refused to set aside the judgment."); Direct Mail Specialists, Inc. v. Eclat Computerized Techs., 840 F.2d 685, 690 (9th Cir. 1988) ("We need not consider the first two factors because . . . the defendant's culpable conduct was responsible for the entry of the default judgment in this case.").

249. *TCI Grp.*, 244 F.3d at 696.

250. *See* 11 U.S.C. § 501(a) (2012) (providing that a creditor may file a proof of claim); FED. R. BANKR. P. 3001 (detailing various aspects regarding a proof of claim).

251. *See* Motion to Set Aside Entry of Default ¶¶ 2-4, Nichols v. Align W. States Learning Corp. (*In re* Nichols), Ch. 7 Case No. 11-12027, Adv. No. 11-00784 (Bankr. D. Ariz. July 26, 2011), ECF No. 13.

252. *See* Hearing Transcript at 5, Nichols v. Align W. States Learning Corp. (*In re* Nichols), Ch. 7 Case No. 11-12027, Adv. No. 11-00784 (Bankr. D. Ariz. July 26, 2011), ECF No. 57 ("Well, I don't think filing a proof of claim, whether it's in an adversary or an administrative case helps you with an appropriate answer."); *id.* at 6 ("But I think the problem I'm having is the one that I've just stated on the record, and that is filing a proof of claim in the administrative case, even if it's filed in the adversary, doesn't help the Defendant. That's my sticking point.").

253. *See* Hearing Transcript, *supra* note 252, at 6 ("But filing the proof of claim, I just don't know what to do with that, Mr. Cox. I think it's just whether there's the ability to set aside the default and whether your particular client has the ability to proceed.").

254. Alan Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1392 (9th Cir. 1988); *see also, e.g.*, United States v. Signed Personal Check No. 730 of Yubran S. Mesle, 615 F.3d 1085,

Furthermore, when the moving party is a "legally sophisticated entity" that is represented by counsel, for purposes of determining such party's culpability in a default, "an understanding of the consequences of its actions may be assumed, *and with it, intentionality*."[255]

It is unclear how these issues would have been resolved if addressed by the bankruptcy court in *Nichols*,[256] let alone how a finding of culpability would have influenced the court to balance the three factors considered in determining whether good cause exists to set aside a default. But that is the point. Align essentially received a "Get Out of Jail Free" card without being put to its proof on its motion to vacate the default. The consequences of this decision are quite significant. It might be that Align would not have carried its burden.[257] If so, then the default would not have been vacated. While true that the default by itself would not necessarily require entry of a default judgment against Align,[258] a point emphasized by the bankruptcy

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1092 (9th Cir. 2010) (same); *TCI Grp.*, 244 F.3d 691 at 697 (same); Hammer v. Drago (*In re* Hammer), 940 F.2d 524, 526 (9th Cir. 1991) (same).

255. *Mesle*, 615 F.3d at 1093 (emphasis added); *cf.* Latshaw v. Trainer Wortham & Co., 452 F.3d 1097, 1101 (9th Cir. 2006) ("We agree that Rule 60(b)(1) is not intended to remedy the effects of a litigation decision that a party later comes to regret through subsequently-gained knowledge that corrects the erroneous legal advice of counsel. For purposes of subsection (b)(1), parties should be bound by and accountable for the deliberate actions of themselves and their chosen counsel.")

256. For example, Align's counsel at the initial hearing on the motion to vacate the default represented to the court that he did not represent Align at the time that it filed the proof of claim. *See* Hearing Transcript, *supra* note 252, at 3. The record does not indicate whether Align was represented by in-house counsel or other outside counsel when it made the decision to file the proof of claim. This fact would be relevant to an analysis of whether Align's default was intentional. *See supra* note 255 and accompanying text.

257. For an example of a student-loan creditor's failure to carry its burden of proof on a motion to set aside a default *judgment* under the "excusable neglect" standard of Federal Rule 60(b)(1), see Gourlay v. Sallie Mae, Inc. (*In re* Gourlay), 465 B.R. 124, 128-31 (B.A.P. 6th Cir. 2012).

258. This would be true whether entry of a default judgment was sought pursuant to Federal Rule 55(b)(1) or Federal Rule 55(b)(2). *See, e.g.*, Fisher v. Taylor, 1 F.R.D. 448, 448 (E.D. Tenn. 1940) (stating that "the court has power to enter an order of default and Rule 55 is not a limitation thereof"); RICHARD D. FREER, CIVIL PROCEDURE § 7.5.3, at 362 (2012) ("[T]he plaintiff has no *right* to a default judgment under Rule 55(b)(2), even though the defendant is clearly in default. . . . Our system of justice prefers to resolve disputes on the merits rather than on technicalities. The matter is in the district judge's discretion, and she may ask for evidence on any relevant matter, including the strength of the plaintiff's claim on the merits and the viability of any defense the defendant might have.").

court to the Nichols,[259] the effect of the unvacated default would have been to ease the Nichols' evidentiary burden at trial.[260] Or, in the alternative, if the bankruptcy court had determined that Align met its burden in showing that good cause existed to set aside the default, the opportunity would have existed for the Nichols to argue on appeal that the court had abused its discretion in doing so or that it had committed clear error in its fact finding.[261] Either way, a set of litigation options that would otherwise have been available to the Nichols evaporated once the bankruptcy court implemented the prove-up procedure.[262]

To make matters worse, this procedure failed to take into account that Align would have the initial burden at trial of establishing that the debt owed by the Nichols qualified as the type of educational debt excepted from discharge.[263] If Align had failed to make such a showing, that failure would have constituted a basis for determining the debt to be dischargeable, without the Nichols ever having to present any evidence related to their claim of undue hardship.[264] The bankruptcy court appears to have been

259. The bankruptcy court in *Nichols* indicated as much to the Nichols. *See* Hearing Transcript, *supra* note 252, at 16 ("So even if Mr. Cox hadn't filed anything, if it were simply a situation that the default remained on the docket, I would still have you come in . . . because I don't have enough information to say that there's a prima facie case [for undue hardship].").

260. *See, e.g.*, Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc. 561 F.3d 1298, 1307 (11th Cir. 2009) (stating that "[a] 'defendant, by his default, admits the plaintiff's well-pleaded allegations of fact'" (quoting Nishimatsu Const. Co. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975))); FREER, *supra* note 258, § 7.5.2, at 360 (stating that entry of default "cuts off the defendant's right to file a response to the complaint").

261. *See, e.g.*, Chavez v. Lockheed Missiles & Space Co., No. 94-16006, 1995 WL 242284, at *2 (9th Cir. Apr. 26, 1995).

262. The bankruptcy court in *Nichols* appears to have been aware, at least momentarily, that fairness would dictate following proper procedure. *See* Hearing Transcript, *supra* note 244, at 15 ("You started the process with your motion to set aside the default. I think you walked through the issues and you indicated why it should be set aside. So if in fact you want to have a full-blown trial, in fairness to the debtors, I believe I have to go back and address again the motion to set aside the default.").

263. *See supra* note 120 and accompanying text.

264. *See* EBC, Inc. v. Clark Bldg. Sys., Inc., 618 F.3d 253, 272 (3d Cir. 2010) ("A court may grant a Rule 52(c) motion made by either party or may grant judgment *sua sponte* at any time during a bench trial, so long as the party against whom judgment is to be rendered has been "fully heard" with respect to an issue essential to that party's case. As a result, the court need not wait until that party rests its case-in-chief to enter judgment pursuant to Rule 52(c)."); *cf.* Sepulveda v. Pacific Maritime Ass'n, 878 F.2d 1137, 1139 (9th Cir. 1989) ("In a bench trial, the court may involuntarily dismiss an action under Rule 41(b) when the court finds, after considering the evidence, that the plaintiff has not established a prima

blinded by slavish adherence to the principle that a debtor bears the burden of proof to establish undue hardship.[265] As a result, it failed to situate that burden properly within the Code's bifurcated burden-of-proof structure.[266]

The blindness in this instance may have stemmed from the channeling effect of the legal framework for vacating a default (the vacatur framework), which does not fit neatly within the context of an educational-debt dischargeability determination in bankruptcy. In a garden-variety law suit, the plaintiff will sue a defendant for coercive relief on account of the defendant's harmful conduct (e.g., damages for breach of contract). Within this context, the vacatur framework naturally demands whether a meritorious defense to the plaintiff's claim exists: "It makes no sense to set aside a default, and thus to put the case back in the litigation stream, if the defendant has no colorable defense on the merits."[267]

But once the scene changes to a declaratory judgment action that seeks a determination of the rights of the parties, the possibility exists that the plaintiff is the party who would have been named as the defendant in a suit between the parties that sought coercive relief. For example, an insurer might sue for a declaratory judgment of nonliability under an insurance policy, even though it is the insured or the beneficiary that has a claim for coercive relief against the insurer to recover benefits under the policy.[268] Absent the insurer's declaratory judgment action, one could imagine the

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facie case."). Federal Rule 52(c) provides that, "[i]f a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue." FED. R. CIV. P. 52(c); *see also* FED. R. BANKR. P. 7052 (incorporating Federal Rule 52 in adversary proceedings). As noted by the U.S. Bankruptcy Appellate Panel of the Eighth Circuit, "[s]ince the 1991 amendments to the Federal Rules of Civil Procedure, Rule 52(c) has subsumed the role formerly played by Rule 41." L'Heureux v. Homecomings Fin. Network, Inc. (*In re* L'Heureux), 322 B.R. 407, 409 (B.A.P. 8th Cir. 2005).

265. *See* Hearing Transcript, *supra* note 252, at 11 ("What I would normally do—and I do this in almost all of my cases—is I have a prove-up hearing. And basically from my standpoint, because on the student loan issues it's the Plaintiff that has to show that there's an undue hardship, normally at the prove-up hearing I would get the kind of information that you're walking through now.").

266. *See supra* text accompanying notes 120-122 (discussing the bifurcated burden-of-proof structure for educational-debt dischargeability determinations).

267. FREER, *supra* note 258, § 7.5.4, at 366.

268. *See* Aetna Life Ins. Co. v. Little Rock Basket Co., 14 F.R.D. 381, 381-82 (E.D. Ark. 1953).

insured or the beneficiary as plaintiff suing the insurer as defendant for the amount owed under the policy (i.e., coercive relief in the form of damages).

Importantly, if the insured did have such a claim, but was sued by the insurer for a declaratory judgment of nonliability before the insured had commenced its suit for coercive relief, the insured's claim would constitute a compulsory counterclaim that would have to be asserted in the declaratory judgment action.[269] More specifically, the defendant would have to plead the counterclaim in the answer to the insurer's complaint.[270] Failure to do so would result in waiver of the counterclaim,[271] unless the defendant amended its answer.[272]

Focusing on these principles reveals why the meritorious-defense prong of the vacatur framework is potentially inapt when a default has been entered against a defendant in a declaratory judgment action in which the defendant has a compulsory counterclaim. The default will have been entered because of the defendant's failure to file an answer, and it is in the answer that the defendant must assert the compulsory counterclaim. If the counterclaim is the point of origin for evaluating the declaratory relief requested by the plaintiff, then initially asking whether the defendant has a meritorious defense does not make sense. Returning to the example of the insurer's suit for a declaratory judgment of nonliability, the vacatur framework should initially ask whether the defendant has a meritorious *claim* against the insurer for amounts or benefits owed under the policy. If so, then it is appropriate to ask whether the defendant has a meritorious *defense* to the plaintiff's allegation of nonliability. If so, then the equities may weigh in favor of vacating the default for two purposes: (1) to permit the defendant to answer and assert its compulsory counterclaim against the plaintiff and (2) to resolve the plaintiff's assertion of nonliability on the merits, whatever the grounds for that assertion may be (e.g., the defendant's failure to establish a prima facie case for its counterclaim against the plaintiff, an affirmative defense to the defendant's counterclaim).

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269. *See id.* Federal Rule 13(a)(1) provides that "[a] pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction." FED. R. CIV. P. 13(a)(1).

270. FREER, *supra* note 258, § 12.5.1, at 678.

271. *See id.* at 679.

272. *See id.* at 678; *cf.* FED. R. CIV. P. 15(a) (governing whether a pleading may be amended before trial).

As an action for declaratory relief,[273] which can be commenced either by the creditor or the debtor,[274] an educational-debt dischargeability determination presents the opportunity for this unusual procedural posture to arise when the debtor commences the proceeding and the creditor subsequently defaults. Like the insurer, the debtor has sought a determination of nonliability—to wit, that the debt allegedly owed, even if of the type excepted from discharge on the basis of its educational nature,[275] is nonetheless dischargeable because its repayment would impose an undue hardship on the debtor. And like the insured, the creditor has a compulsory counterclaim—to wit, that the debtor is liable to pay a sum on an obligation that qualifies as an educational debt excepted from discharge.[276] Thus, the relevant inquiry under the vacatur framework should initially be whether the creditor (i.e., the defendant) has a meritorious *claim* on this basis against the debtor. If not, the scales would tip in favor of a finding of nonliability based on the deficiency in the creditor's prima facie case for liability,

273. *See* Pardo, *Thicket*, *supra* note 63, at 2170 (discussing declaratory nature of an educational-debt dischargeability determination).

274. *See* FED. R. BANKR. P. 4007(a).

275. In the allegations set forth in their complaint, the Nichols pled that they "became indebted for a student loan" and that, as of the date that the complaint was filed, the balance owed was $65,661.55. Adversary Complaint, Nichols v. Align W. States Learning Corp. (*In re* Nichols), Case No. 11-12027, Adv. No. 11-00784 (Bankr. D. Ariz. Apr. 27, 2011), ECF No. 1. While true that "[f]actual assertions in pleadings . . . , unless amended, are considered judicial admission conclusively binding on the party who made them," Am. Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988), it would be improper to construe such allegations as a judicial admission by the Nichols that Align had a meritorious claim against them. The allegation referring to the obligation as a "student loan" lacks sufficient specificity to support a claim that the obligation falls within the parameters of the Code's educational debt provision. *See* Pardo, *Thicket*, *supra* note 63, at 2113–16 (providing a detailed description of a creditor's burden of proof in an undue hardship adversary proceeding). Of course, if the default had been vacated, thereby allowing Align to answer, the Nichols would have had the right to amend their complaint. *See* FED. R. CIV. P. 15(a)(1)(B); FED. R. BANKR. P. 7015. And they could have done so in such a way that their allegation of indebtedness would not absolve Align of its evidentiary burden to establish its prima facie case. This suggests that the defaulting creditor should be required to set forth its meritorious claim within the vacatur framework, regardless of whether the factual allegations in the complaint could be construed as a judicial admission of the merits of the creditor's claim.

276. A claim arising from a default on a promissory note that evidences a student loan obligation constitutes a claim for monetary damages. *See* United States v. Ragan, No. CV 10-7654 RSWL, 2011 WL 2940354, at *3 (C.D. Cal. July 21, 2011).

thereby rendering the undue hardship inquiry—essentially, a defense to liability—irrelevant.[277]

If, on the other hand, the creditor were to have a meritorious *claim* against the debtor, then the inquiry should shift to whether the creditor has a meritorious defense to the debtor's allegation of undue hardship. If not, such a finding would tilt in favor of letting the default stand. But if the creditor did establish a meritorious defense, then the interest in reaching a merits-based determination of the debtor's undue hardship allegation would be more compelling. Vacating the default would allow the creditor to answer and assert its compulsory counterclaim against the debtor, thereby paving the way for the court to resolve the debtor's assertion of nonliability based on undue hardship. This analytical framework further reinforces the idea that the bankruptcy court in *Nichols* absolved Align of one of its key evidentiary burdens—that is, the burden relating to its claim against the Nichols.[278]

At the end of the day, the Ninth Circuit BAP in *Nichols* appears to have lost sight of one of its prior opinions, in which the court emphasized the importance of following proper procedure, specifically noting that "[w]ell-intentioned shortcuts that give short shrift to orderly procedure create unfortunate misimpressions about the quality of justice dispensed in bankruptcy courts, look sloppy, and lead one into disorienting thickets that present more trouble than they avoid."[279] Ad hoc reform efforts through managerial judging may prove to be a viable avenue for reducing the

277. This would not mean, however, that there did not initially exist a live issue to adjudicate. *See* Educ. Credit Mgmt. Corp. v. Coleman (*In re* Coleman), 560 F.3d 1000, 1005 (9th Cir. 2009).

278. At least one bankruptcy court has expressly recognized that the declaratory nature of an educational-debt dischargeability determination is not a basis for abandoning the bifurcated burden of proof for such a proceeding, even if it is the debtor who commences the proceeding. *See* Dudley v. S. Va. Univ. (*In re* Dudley), 502 B.R. 259, 271 & 271 nn.11-12 (Bankr. W.D. Va. 2013). A recent decision by the Supreme Court in the patent context bolsters this proposition. In *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843 (2014), the Court held that, when a patent licensee initiates a declaratory judgment against the patentee to establish that the licensee has not infringed the patent, the burden of proof remains the same as it would in a coercive action for patent infringement brought by the patentee against the licensee: Specifically, just as a plaintiff-patentee would bear the burden of proof to establish patent infringement in a coercive action against a defendant-licensee, so too does a defendant-patentee bear the burden of proof in a declaratory judgment action brought by a plaintiff-licensee seeking a determination of noninfringement. *See id.* at 846, 849.

279. Menk v. Lapaglia (*In re* Menk), 241 B.R. 896, 908, 916 (B.A.P. 9th Cir. 1999).

procedural complexity associated with vindicating the discharge right, but courts must tread carefully down this path lest they subvert procedural fairness.

C. Rule Reform

Procedural reform through the rulemaking process[280] offers the promise of reducing procedural complexity without the dangers of ad hoc judicial reform efforts. Through the notice-and-comment framework for amending the Bankruptcy Rules, one might expect that the input from a wide array of stakeholders will yield a more considerate and informed approach to simplifying the process for vindicating discharge rights.[282] The

280. *See* 28 U.S.C. § 2075 (2012) ("The Supreme Court shall have the power to prescribe by general rules . . . the practice and procedure in cases under title 11.").

282. *See generally* Alan N. Resnick, *The Bankruptcy Rulemaking Process*, 70 AM. BANKR. L.J. 245, 255 (1996) (noting how the process for promulgating the Bankruptcy Rules "gives judges, lawyers, court clerks, law professors, bar associations, national organizations, and others an opportunity to analyze and submit written comments regarding . . . proposed [rule] changes"). *But see* Suja A. Thomas & Dawson Price, *How Atypical Cases Make Bad Rules: A Commentary on the Rulemaking Process*, 15 NEV. L.J. 1141, 1142 (2015) (describing the various ways in which "[c]ommentators have criticized the rulemaking process for decades").

It should be noted that the rulemaking process can encompass reform efforts targeting the official forms used in bankruptcy litigation. *See* 28 U.S.C. § 2075 ("The Supreme Court shall have the power to prescribe by general rules . . . the forms of process, writs, pleadings, and motions . . . in cases under title 11."); FED. R. BANKR. P. 9009 ("[T]he Official Forms prescribed by the Judicial Conference of the United States shall be observed . . . ."). By way of analogy, a seven-year reform process undertaken by the Advisory Committee on Bankruptcy Rules to modernize the official forms used in bankruptcy cases culminated in a set of revised forms that went into effect on December 1, 2015. *See* Diane Davis, *New Bankruptcy Forms Roll out Effective Dec. 1*, 27 Bankr. L. Rep. (BNA) 1548 (Nov. 16, 2015). With self-represented debtors in mind, the modernization project sought to make the official forms more comprehensible by simplifying them. *See* Press Release, Admin. Office of the U.S. Courts, First Revamped Bankruptcy Forms out for Public Comment (Jan. 8, 2013), http://www.uscourts.gov/news/2013/01/08/first-revamped-bankruptcy-forms-out-public-comment.

Importantly, simplification can help reduce or eliminate "barriers to understanding," which in turn ought to facilitate "lay deployment of professional legal knowledge." Greiner et al., *supra* note 179, at 6, 8; *see also id.* at 7 ("[W]e further posit that the way information is currently presented to self-represented individuals—without visual imagery, with unnecessary details, and without attention to layout and organization—can thwart its effective deployment."); *cf.* Rhodes, *supra* note 140, at 703 (calling for "a complete overhaul of the Official Forms, for several purposes," among them "maximiz[ing] the chances that unsophisticated debtors will understand what is required."). Paternalistic concerns over improvident bankruptcy filings, however, might lead some to disapprove of the reduction of such barriers. *See* Katy Stech, *Critics: New Bankruptcy Paperwork Will*

goal of this Section is to remind practitioners, courts, and policymakers that (1) they have the capacity to reduce such procedural complexity through the rulemaking process and (2) that they have done so in the past.

First, as to the possibility of shifting away from full-blown adversary procedure to vindicate discharge rights, the Supreme Court has obliquely, yet unmistakably, set forth the blueprint for doing so in the context of educational-debt dischargeability determinations, noting that the current litigation framework merely represents a choice by the drafters of the Bankruptcy Rules and that a less complex procedure could suffice.[283] More specifically, the Bankruptcy Rules classify only a limited number of disputes as adversary proceedings.[284] If a dispute does not qualify as an adversary proceeding, the Bankruptcy Rules deem the dispute to be a "contested matter," which proceeds according to less complex procedures than an adversary proceeding,[285] including request for relief by motion.[286] Accordingly, a retreat to less complex procedure is possible in discharge litigation.

Importantly, precedent exists for making this retreat. Recall that a proceeding to object to a debtor's discharge typically qualifies as an adversary proceeding.[287] The Bankruptcy Code has several provisions that

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Cause Inaccurate Filings, WALL ST. J.: BANKRUPTCY BEAT (Nov. 23, 2015, 3:11 PM), http://blogs.wsj.com/bankruptcy/2015/11/23/critics-new-bankruptcy-paperwork-will-cause-inaccurate-filings/ ("Bankruptcy experts who have been working to freshen up and simplify the new forms since 2008 got an earful from critics who worried that the clearer instructions—free of legalese and a confusing format—will encourage more people to file without help from a bankruptcy lawyer. That could lead people to make big mistakes . . . , critics said during the public-comment phase of the process.").

283. Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 453 (2004) ("The text of § 523(a)(8) does not require a summons, and absent [Bankruptcy] Rule 7001(6) a debtor could proceed by motion . . . .").

284. *See* FED. R. BANKR. P. 7001.

285. *See* Fisher Island Ltd. v. Solby+Westbrae Partners (*In re* Fisher Island Invs., Inc.), 778 F.3d 1172, 1194 (11th Cir. 2015) (noting that "contested matters are subject to less elaborate procedures" than adversary proceedings); Khachikyan v. Hahn (*In re* Khachikyan), 335 B.R. 121, 125 (B.A.P. 9th Cir. 2005) ("In a contested matter, there is no summons and complaint, pleading rules are relaxed, counterclaims and third-party practice do not apply, and much pre-trial procedure is either foreshortened or dispensed with in the interest of time . . . .").

286. *See* FED. R. BANKR. P. 9014(a). Some of the procedural rules governing adversary proceedings, however, equally apply in contested matters. *See id.* 9014(c).

287. *See supra* note 57 and accompanying text.

preclude a court from granting the debtor a discharge if the debtor has previously received a discharge in a prior case, depending on when the prior case was commenced and the chapter under which the prior discharge was granted (the "time-bar provisions").[288] Prior to 2010, the Bankruptcy Rules classified all discharge objections as adversary proceedings.[289] However, with the 2010 amendments to the Bankruptcy Rules, which took effect on December 1st of that year, discharge objections based on the Code's time-bar provisions no longer qualified as adversary proceedings,[290] thereby relegating such objections to the less complex procedures governing contested matters.[291] The Advisory Committee on Bankruptcy Rules provided the following rationale for the rule change: "Because objection to discharge on these grounds [i.e., the time-bar provisions] typically present issues more easily resolved than other objections to discharge, the more formal procedures applicable to adversary proceedings, such as commencement by a complaint are not required."[292]

Implicit in the Committee's rationale is the idea that the degree of procedural complexity should be a function of the substantive complexity of the issues in dispute. Given the limited scope of the 2010 amendment, we might infer that the Committee viewed the other grounds for discharge objection to be more substantively complex, thus warranting more complex procedure. Likewise, we might infer that the Committee would deem the substantive issues that arise in debt-dischargeability determinations to be sufficiently complex so as to justify full-blown adversary procedure.

Using substantive complexity as a metric to guide the optimal level of procedural complexity, however, presents a classification problem. How do we determine what qualifies as an issue of sufficient substantive complexity warranting full-blown adversary procedure? To illustrate the difficulty here, consider the divergent procedural approaches to (1) hearings to determine whether the court should approve an agreement between a debtor and creditor pursuant to which the debtor will be legally bound to repay a prebankruptcy debt that would have otherwise been discharged (a

288. *See* 11 U.S.C. §§ 727(a)(9), (10), 1328(f) (2012).

289. *See* FED. R. BANKR. P. 7001(6) (2009) (amended 2010).

290. *See* FED. R. BANKR. P. 7001(6) (providing that adversary proceedings include "a proceeding to object to or revoke a discharge, other than an objection to discharge under §§ 727(a)(8), (a)(9), or 1328(f)").

291. *See id.* 4004(d).

292. *See id.* 7001 advisory committee's note to 2010 amendment.

"reaffirmation agreement"),[293] and (2) educational-debt dischargeability determinations.

Among the statutory requirements that must be satisfied for a reaffirmation agreement to be enforceable, the agreement must "not impose an undue hardship on the debtor."[294] The Bankruptcy Code further provides for a presumption of undue hardship over the sixty-day period (or longer by court extension) following the filing of the reaffirmation agreement if the scheduled payments on the reaffirmed debt exceed the debtor's monthly disposable income.[295] The debtor may rebut the presumption upon identifying additional sources of funds that will enable the debtor to make the scheduled payments.[296] If the debtor fails to rebut the presumption, the court may deny approval of the agreement.[297] Of course, the court will have to hold a hearing on these matters.[298] Because a reaffirmation hearing does not qualify as an adversary proceeding,[299] it is a contested matter and thus is governed by less than full-blown adversary procedure. On the other hand, educational-debt dischargeability determinations, which also entail the substantive issue of the debtor's undue hardship,[300] are resolved pursuant to the more elaborate procedures governing adversary proceedings.[301]

What accounts for this differential procedural treatment? One might argue that the substantive complexity of undue hardship differs depending on the context, thus justifying differing levels of procedural complexity. But the text, structure, and legislative history of the Bankruptcy Code all strongly suggest that the undue hardship standard calls for the same analytical framework to be applied across the different settings.[302] If that is so, then the substantive-complexity metric would mean that we either have

293. *See* 11 U.S.C. § 524(c).

294. *Id.* § 524(c)(3)(B), (c)(6)(A)(i).

295. *See id.* § 524(m)(1).

296. *See id.*

297. *See id.*

298. *See* FED. R. BANKR. P. 4004(c)(1)(K).

299. *See id.* 7001.

300. *See supra* Part II.C.3.

301. *See* FED. R. BANKR. P. 7001(6).

302. *See* Brief for Rafael I. Pardo as Amicus Curiae in Support of Appellant and Urging Reversal 7-27, Murphy v. United States, No. 14-1691 (1st Cir. July 29, 2015), 2015 WL 4985562.

insufficient procedure in reaffirmation hearings or excessive procedure in educational-debt dischargeability determinations. If classification problems regarding substantive complexity arise when the same statutory language is at issue, it would seem that using substantive complexity to inform procedural complexity is not a particularly workable metric.

On the other hand, if we think of "access to justice as a function of the cost of civil litigation,"[303] and if increasing procedural complexity increases litigation costs, then procedural complexity is anathema to the cause of access to justice.[304] Relatedly, "[i]f we conceptualize the value of a debtor's substantive rights . . . to be inversely related to the extent to which procedure acts as a barrier to vindicating the substantive right, then the value of the substantive right will be increasingly diminished" as the procedure becomes increasingly complex.[305] As such, using cost reduction as a metric, the Bankruptcy Rules Committee should consider whether a retreat to less complex procedure in certain types of discharge litigation would improve access to justice for debtors.[306]

Conclusion

To place the consequences of the failure to make a robust commitment to the discharge right, consider a scene from *Disturbing the Universe*,[307] a documentary about William Kunstler, the famous civil rights

303. Lee, *supra* note 66, at 500.

304. *Cf.* Zorza, *supra* note 200, at 860-61 ("Thus, a major component of cost reduction comes from reducing the need for full advocacy services. Moreover, reducing the need for these resources increases equity by ensuring that access is available for all, regardless of one's ability to obtain those advocacy or support resources.").

305. *See* Pardo, *Thicket*, *supra* note 63, at 2178.

306. *Cf.* Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 263 (2009) (arguing "that the structure of the rulemaking process should be modified to better facilitate an interpretation of the rulemaking mandate that includes access"). Importantly, the decision to opt for reduced complexity does not necessarily mean that increased complexity will be unavailable if needed. For example, while some of the procedural rules governing adversary proceedings equally apply in contested matters, the Bankruptcy Rules provide courts with the flexibility to apply the other adversary proceeding rules that do not apply by default, *see* FED. R. BANKR. P. 9014(c), a point noted by the Bankruptcy Rules Committee in connection with the 2010 amendment, *see id.* 7001 advisory committee's note to 2010 amendment ("In an appropriate case, however, Rule 9014(c) allows the court to order that additional provisions of Part VII of the rules apply to these matters [i.e., discharge objections based on the Code's time-bar provisions.").

307. Disturbing the Universe (Off Center Media 2009).

lawyer.[308] The scene features Kunstler speaking in 1970 about the "aura of legitimacy" and the "aura of legality." During the speech, Kunstler observes the following:

> And that is the terrible myth of organized society, that everything that's done through the established system is legal—and that word has a powerful psychological impact. It makes people believe that there is an order to life, and an order to a system, and that a person that goes through this order and is convicted has gotten all that is due him. And therefore society can turn its conscience off, and look to other things and other times.[309]

Kunstler's observations about the criminal justice system should equally inform our thinking about the civil justice system, including the bankruptcy system. The bankruptcy discharge is a powerful statutory right, but that right will have no value to intended beneficiaries who cannot vindicate it as a result of procedural barriers. Without continuous critical reflection on the process for vindicating the discharge right, we risk becoming a society that turns its conscience off. At the end of the day, our approaches to procedural reform will signify how committed we are as a society to deliver bankruptcy law's promise of a fresh start to financially distressed individuals—to wit, whether we are willing to take bankruptcy rights seriously.[310]

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308. Among his accomplishments, Kunstler successfully argued before the Supreme Court on behalf of Gregory Lee Johnson in *Texas v. Johnson*, 491 U.S. 397, 398 (1989), the case in which the Court invalidated on First Amendment grounds Johnson's conviction for having expressed political protest by publicly burning an American flag, *see id.* at 399.

309. A video clip and transcript of the scene are available at *William Kunstler: Disturbing the Universe—The Terrible Myth*, PBS.org, http://www.pbs.org/pov/disturbingtheuniverse/terrible_myth.php (last visited Mar. 21, 2015).

310. *See* Bruce H. Mann, *Failure in the Land of the Free*, 77 AM. BANKR. L.J. 1, 1 (2003) ("Whether a society forgives its debtors and *how it bestows or withholds forgiveness* are more than matters of economic or legal consequence. They go to the heart of what a society values." (emphasis added)).

Appendix

Table A1
Distribution of Adversary Proceedings in the Study Population

Number of Adversary Proceedings Filed Per Case	Number of Cases	Total Proceedings
1	1,170	1,170
2	63	126
3	23	69
4	5	20
6	3	18
7	1	7
8	1	8
12	1	12

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Table A2
Comparison of Study Population and Representative Sample

Proceeding Characteristic	**Study Population**[311]	**Representative Sample**[312]
Debtor Litigation Success	39.0% (555 of 1,424)	38.5% (152 of 395)
2012 Adversary Proceeding	53.5% (765 of 1,430)	52.7% (208 of 395)
Fully Self-Represented	32.5% (465 of 1,430)	31.1% (123 of 395)
Brunner Jurisdiction	88.4% (1,264 of 1,430)	88.1% (348 of 395)
ECMC Appearance	41.2% (588 of 1,426)	42.5% (168 of 395)
DOE Appearance	35.6% (508 of 1,426)	38.5% (152 of 395)
Median/Mean Duration (Days)	244/291 (n = 1,415)	247/289 (n = 391)
Median/Mean Number of Filed Documents	23/30 (n = 1,426)	23/31 (n = 395)
Trial Held	6.8% (97 of 1,426)	7.6% (30 of 395)

311. The documents in four of the 1,430 adversary proceedings in the Study Population could not be electronically accessed. Accordingly, some of the figures reported in Table A2 are limited to the 1,426 proceedings for which there was electronic access to the proceedings' documents. Also, as of the time of this writing, 1.5% (21 of 1,426) of these electronically accessible proceedings remained open. Ten of the twenty-one open proceedings, however, appeared to have concluded for all intents and purposes. Thus, the duration of the proceeding is calculated for 1,415 of the 1,426 electronically accessible proceedings in the Study Population.

312. At the time of this writing, 1.8% (7 of 395) of the adversary proceedings in the Representative Sample remained open. Three of the seven open proceedings, however, appeared to have concluded for all intents and purposes. Thus, duration of the proceeding is calculated for 391 of the 395 proceedings in the Representative Sample.

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Table A3
Distribution of Adversary Proceedings by
Federal Regional Circuit (from Most to Least)

Federal Regional Circuit	**Number of Proceedings**	**Observed Judicial Districts**[313]
Ninth Circuit	366	13 of 13
Sixth Circuit	210	9 of 9
Eleventh Circuit	167	9 of 9
Third Circuit	112	4 of 5
Seventh Circuit	110	7 of 7
Eighth Circuit	105	10 of 10
Tenth Circuit	92	8 of 8
Fourth Circuit	72	9 of 9
Second Circuit	69	6 of 6
First Circuit	66	5 of 5
Fifth Circuit	59	8 of 9
D.C. Circuit	2	1 of 1
Total	**1,430**	**89 of 91**

313. The third column of Table A3 reports (1) the number of federal judicial districts per circuit in which adversary proceedings from the Study Population were commenced out of (2) the number of total federal judicial districts per circuit (exclusive of the districts located outside of the fifty states, the District of Columbia, and Puerto Rico). There are a total of ninety-one federal judicial districts in the fifty states, the District of Columbia, and Puerto Rico. *See supra* note 101. As Table A3 indicates, eighty-nine of ninety-one judicial districts were observed. The two districts that were not observed in the Study Population were the District of Delaware and the Middle District of Louisiana.

Table A4
Bankruptcy Case Financial Characteristics (in 2014 Dollars) of Debtors
Who Filed Educational-Debt Adversary Proceedings in 2011 and 2012

Financial Characteristic	Median	Mean	Missing Values
Real Property	$0 [0, 0]	$70,721 [54,149, 87,293]	6 of 395
Personal Property	$9,943 [7,830, 11,762]	$19,537 [16,186, 22,888]	6 of 395
Monthly Household Income	$1,924 [1,797, 2,040]	$2,433 [2,209, 2,656]	6 of 395
Monthly Household Expenses	$2,194 [2,097, 2507]	$3,490 [2,144, 4,835]	6 of 395
Monthly Disposable Household Income	-$61 [-108, -5]	-$1,057 [-2,390, 276]	6 of 395
Educational Debt	$59,315 [48,722, 64,977]	$88,948 [79,045, 98,851]	17 of 395
Total Debt	$165,272 [152,435, 180,043]	$276,903 [224,362, 329, 444]	17 of 395
Ratio of Educational Debt to Total Debt	0.41 [0.37, 0.47]	0.44 [0.41, 0.48]	18 of 395
Ratio of Educational Debt to Annual Household Income[314]	2.3 [2.0, 2.7]	5.1 [4.2, 6.0]	34 of 395

314. Eighteen of the thirty-four missing observations for this financial characteristic are undefined values—that is, the debtors in the cases corresponding to those eighteen observations listed their monthly household income as $0.

Table A5
Debtor Litigation Success by Financial Characteristics (in 2014 Dollars)

	Real Property			
Debtor Litigation Success	Median	Mean	N	Missing Values
No	$0	$72,205	239	4
Yes	$0	$68,356	150	2
Wilcoxon rank-sum test: $z = 0.176$; $p = 0.8599$				
	Personal Property			
Debtor Litigation Success	Median	Mean	N	Missing Values
No	$9,378	$17,914	239	4
Yes	$11,705	$22,125	150	2
Wilcoxon rank-sum test: $z = -1.287$; $p = 0.1982$				
	Monthly Household Income			
Debtor Litigation Success	Median	Mean	N	Missing Values
No	$1,883	$2,412	239	4
Yes	$1,936	$2,466	150	2
Wilcoxon rank-sum test: z = -0.414; $p = 0.6788$				
	Monthly Household Expenses			
Debtor Litigation Success	Median	Mean	N	Missing Values
No	$2,219	$3,900	239	4
Yes	$2,158	$2,835	150	2
Wilcoxon rank-sum test: $z = 0.207$; $p = 0.8360$				
	Monthly Disposable Household Income			
Debtor Litigation Success	Median	Mean	N	Missing Values
No	-$61	-$1,488	239	4
Yes	-$60	-$370	150	2
Wilcoxon rank-sum test: $z = -0.219$; $p = 0.8266$				

Table A5 (cont.)
Financial Characteristics (in 2014 Dollars) by Debtor Litigation Success

	Educational Debt			
Debtor Litigation Success	Median	Mean	N	Missing Values
No	$59,433	$84,709	231	12
Yes	$58,618	$95,610	147	5
Wilcoxon rank-sum test: z = -0.467; p = 0.6406				
	Total Debt			
Debtor Litigation Success	Median	Mean	N	Missing Values
No	$163,916	$281,528	239	4
Yes	$167,028	$269,534	150	2
Wilcoxon rank-sum test: z = -0.594; p = 0.5526				
	Ratio of Educational Debt to Total Debt			
Debtor Litigation Success	Median	Mean	N	Missing Values
No	0.40	0.44	230	13
Yes	0.45	0.45	147	5
Wilcoxon rank-sum test: z = -0.440; p = 0.6596				
	Ratio of Educational Debt to Annual Household Income			
Debtor Litigation Success	Median	Mean	N	Missing Values
No	2.19	5.27	220	23
Yes	2.53	4.89	141	11
Wilcoxon rank-sum test: z = -0.632; p = 0.5276				

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Table A6
Debtor Litigation Success by Proceeding Duration,
Filed Documents, and Commencement Delay

	Proceeding Duration (in Days)			
Debtor Litigation Success	Median	Mean	N	Missing Values
No	237	279	864	16
Yes	256	308	550	
Wilcoxon rank-sum test: z = -1.748; p = 0.0805				
	Filed Documents			
Debtor Litigation Success	Median	Mean	N	Missing Values
No	22	27	869	6
Yes	27	35	555	
Wilcoxon rank-sum test: z = -5.384; p < 0.0001				
	Commencement Delay (in Days)			
Debtor Litigation Success	Median	Mean	N	Missing Values
No	94	248	243	0
Yes	90	298	152	0
Wilcoxon rank-sum test: z = 0.487; p = 0.6263				

Table A7
Debtor Litigation Success by Trial Held and Calendar Year

	Debtor Litigation Success		
Trial Held	No	Yes	Total
No	814 (61.34)	513 (38.66)	1,327 (100.00)
Yes	55 (56.70)	42 (43.30)	97 (100.00)
Total	869 (61.03)	555 (38.97)	1,424 (100.00)
Row percentages are reported in parentheses. The *p*-value from a chi-square test with one degree of freedom is 0.366.			
	Debtor Litigation Success		
Calendar Year	No	Yes	Total
2011	401 (60.48)	262 (39.52)	663 (100.00)
2012	468 (61.50)	293 (38.50)	761 (100.00)
Total	869 (61.03)	555 (38.97)	1,424 (100.00)
Row percentages are reported in parentheses. The *p*-value from a chi-square test with one degree of freedom is 0.695.			

Table A8
Logistic Regression Model for Debtor Litigation Success

Variable	Debtor Litigation Success
Fully Self-Represented	0.311*** (0.177, 0.545)
Brunner	0.831 (0.410, 1.684)
ECMC Appearance	0.299*** (0.179, 0.500)
DOE Appearance	0.791 (0.481, 1.301)
Duration	0.999 (0.997, 1.000)
Filed Documents	1.029*** (1.014, 1.042)
Educational-Debt-to-Income Ratio	0.996 (0.968, 1.023)
Commencement Delay	1.000 (0.999, 1.001)
Trial	0.832 (0.309, 2.241)
2012 Proceeding	1.011 (0.636, 1.608)
Observations	357
Adjusted Count R^2	0.201
Note: *** $p \leq 0.001$. Odds ratios presented with 95% confidence intervals in parentheses.	

Table A9
Predicted Probability of Debtor Litigation Success by
Number of Filed Documents and Represented Status

Number of Filed Documents	Represented Status	
	Represented Debtor	Self-Represented Debtor
1	40.1% [28.2, 53.5]	17.7% [7.4, 28.0]
10	47.1% [35.1, 59.0]	21.7% [10.5, 32.8]
20	54.1% [42.5, 65.6]	26.8% [14.6, 39.0]
30	61.0% [49.3, 72.7]	32.7% [19.1, 46.3]
40	67.4% [55.3, 79.5]	39.1% [23.4, 54.5]
50	73.3% [60.7, 85.8]	46.0% [28.6, 63.4]
60	78.4% [65.9, 90.9]	53.0% [33.7, 72.3]
70	82.8% [70.6, 94.9]	59.9% [39.1, 80.7]
80	86.4% [75.0, 97.8]	66.4% [44.8, 88.1]

Table A10
Financial Characteristics (in 2014 Dollars) by Represented Status

	Monthly Household Income			
Represented Status	Median	Mean	N	Missing Values
Represented	$2,055	$2,572	269	3
Self-Represented	$1,609	$2,121	120	3
Wilcoxon rank-sum test: $z = 3.275$; $p = 0.0011$				
	Monthly Disposable Household Income			
Represented Status	Median	Mean	N	Missing Values
Represented	-$7	-$291	269	3
Self-Represented	-$212	-$2,775	120	3
Wilcoxon rank-sum test: $z = 2.757$; $p = 0.0058$				

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No. 14-1691

United States Court of Appeals for the First Circuit

IN RE ROBERT E. MURPHY, *Debtor*

ROBERT E. MURPHY, *Appellant*

v.

US DEPARTMENT OF EDUCATION; EDUCATIONAL CREDIT MANAGEMENT CORPORATION, *Appellees*

SALLIE MAE, INC.; COLLEGE BOARD, *Interested Parties*

On Appeal from the United States District Court for the District of Massachusetts (Zobel, J.), Civil Action No. 13-11408-RWZ

BRIEF FOR PROFESSOR RAFAEL I. PARDO AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND URGING REVERSAL

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July 29, 2015

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Rafael I. Pardo is the Robert T. Thompson Professor of Law at Emory University School of Law, where he teaches bankruptcy, contracts, and secured transactions. Much of his scholarship and many of his professional activities reflect his expertise on the discharge of educational debt in bankruptcy. *Amicus* has authored and co-authored several articles on the topic. *See* Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 Fla. L. Rev. 2101 (2014); Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 Am. Bankr. L.J. 179 (2009); Rafael I. Pardo, *Illness and Inability to Repay: The Role of Debtor Health in the Discharge of Educational Debt*, 35 Fla. St. Univ. L. Rev. 505 (2008); Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. Cin. L. Rev. 405 (2005). *Amicus* has presented this research at academic conferences, continuing-legal-education seminars for attorneys, and educational programs organized by the Federal Judicial Center. *E.g.*, Rafael I. Pardo, *Issues Arising in Undue Hardship Discharge Litigation*, National Workshop for Bankruptcy Judges I, Federal Judicial Center (Apr. 17, 2013). He has also testified before Congress about some of this research. *See An Undue Hardship? Discharging Educational Debt in*

Bankruptcy: *Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 27-44, 85-89 (2010).

The interest of *amicus* in this appeal stems from his desire to promote an accurate and thorough consideration of the legal principles governing the discharge of educational debt in bankruptcy on the basis of undue hardship. He has written the accompanying brief to fully address some arguments concerning the interpretation and application of the Bankruptcy Code as it applies to the undue hardship standard. These arguments have not been addressed by the parties to the appeal. The analysis set forth in this brief will assist the Court in assessing the meaning, context, and history of the undue hardship standard and in issuing a decision that will facilitate uniform treatment of debtors in this Circuit.

Amicus seeks leave of the Court to file this brief.

STATEMENT REGARDING AUTHORSHIP OF *AMICUS CURIAE*

Amicus states that this brief was not authored in whole or in part by counsel for any party. *Amicus* did not receive any monetary contribution for the preparation or submission of this brief other than the financial support of Emory University School of Law to defray the costs of printing the brief. The views expressed in this brief are those of *amicus* and do not necessarily reflect the views of his academic institution.

SUMMARY OF ARGUMENT

The district court erroneously affirmed the bankruptcy court's determination that Murphy's educational debt is nondischargeable. In order to establish that an educational debt is dischargeable, a debtor must prove that "excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8) (2012). In reaching their decisions, however, the lower courts relied on dictum from a prior decision by this Court that framed a debtor's evidentiary burden to require a showing of both the degree of hardship and its cause. *See T I Fed. Credit Union v. DelBonis*, 72 F.3d 921, 927 (1995) ("The hardship alleged . . . must be undue *and attributable to truly exceptional circumstances, such as illness* or the existence of an unusually large number of dependents." (emphasis added)).

At the conclusion of the trial below, the bankruptcy court suggested that, in determining whether a debtor's educational debt is dischargeable, the *cause* of the debtor's hardship is a relevant consideration. *See* App. 278 [Tr. 64:9–11] ("[T]he Circuit Courts of [A]ppeal have said that essentially *we're looking at mostly health issues* in order to find non-dischargeability." (emphasis added)). Furthermore, in setting forth the framework pursuant to which it made its dischargeability determination, the bankruptcy court stated that "[u]ndue hardship is generally found only in 'truly exceptional circumstances.'" Addendum 11 [Bankr. Ct.

Proceeding Mem./Order 2 (quoting *Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon)*, 435 B.R. 791, 797 n.7 (B.A.P. 1st Cir. 2010) (quoting *DelBonis*, 72 F.3d at 927))]. The district court also incorporated in its opinion the concept of "truly exceptional circumstances." *See* Addendum 4, 8 [District Ct. Mem. Decision 4, 8 (quoting *DelBonis*, 72 F.3d at 927)].

The text, structure, and legislative history of the Bankruptcy Code indicate that the bankruptcy court and district court improperly framed Murphy's evidentiary burden to require a showing of "truly exceptional circumstances." Accordingly, this Court should reverse the district court's affirmance of the bankruptcy court's dischargeability determination and remand the proceeding to the bankruptcy court so that it may conduct a determination that is consistent with the plain meaning of the Bankruptcy Code.

ARGUMENT

I. THE BANKRUPTCY COURT AND THE DISTRICT COURT FRAMED MURPHY'S EVIDENTIARY BURDEN TO REQUIRE A SHOWING OF "TRULY EXCEPTIONAL CIRCUMSTANCES" BASED ON DICTUM BY THIS COURT

In an adversary proceeding to determine whether an educational debt is dischargeable, a creditor must first prove the existence of the debt and that the debt satisfies the statutory criteria for qualifying as one of the types of educational debt excepted from discharge. *See Educ. Credit Mgmt. Corp. v. Savage (In re Savage)*, 311 B.R. 835, 839 (B.A.P. 1st Cir. 2004); *see also* 11 U.S.C. § 523(a)(8)(A)(i),

(A)(ii), (B) (2012) (setting forth the types of debt that qualify as educational debts excepted from discharge). Once the creditor satisfies its burden, the burden shifts to the debtor to establish that the debt is dischargeable. *See Savage*, 311 B.R. at 839. To do so, the debtor must establish the statutory condition that "excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8).

The Bankruptcy Code does not define the term "undue hardship." *See* 11 U.S.C. § 101 (setting forth definitions applicable throughout the Bankruptcy Code, but failing to provide a definition for "undue hardship"). As a result of this definitional gap, "courts have struggled with [the term's] meaning," as evidenced by "[a] divergent body of appellate authority [that] has attempted to unwrap the 'undue hardship' enigma." *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554 (8th Cir. 2003).

This Court has not yet adopted a formal test for analyzing a debtor's claim of undue hardship. *See Nash v. Conn. Student Loan Found. (In re Nash)*, 446 F.3d 188, 190 (1st Cir. 2006). In 1995, however, this Court observed that "[t]he hardship alleged . . . must be undue *and attributable to truly exceptional circumstances*, such as illness or the existence of an unusually large number of dependents." *DelBonis*, 72 F.3d at 927 (emphasis added). In this statement, the Court identified two conditions that a debtor would have to satisfy: (1) the type of

hardship that would result if the debt were deemed nondischargeable (i.e., "undue" hardship) and (2) the *cause* of such hardship (i.e., hardship "attributable to truly exceptional circumstances").

Importantly, the statement in *DelBonis* was dictum: The issue before the Court was whether the debt in question qualified as a type of educational debt excepted from discharge, *see id*. at 924,[1] which the Court held it was, *see id*. at 938. With its holding, the Court remanded the proceeding to the bankruptcy court for a determination of whether the debt might nonetheless be deemed dischargeable under either of the two exceptions to the nondischargeability of educational debt that existed at the time, including the undue hardship standard.[2] *See id*.

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[1] DelBonis did not raise or argue the issue of undue hardship in his brief to this Court. *See* Appellant's Brief and Addendum, *T I Federal Credit Union v. DelBonis*, 72 F.3d 921 (1995) (No. 95-1702), 1995 WL 17828916.

[2] At the time of this Court's decision in *DelBonis*, the Bankruptcy Code's provision for the discharge of educational debt provided, in relevant part, as follows:

> A discharge . . . does not discharge an individual debtor from any debt . . . 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—(A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or (B) excepting

As set forth in the Summary of Argument, *see supra*, the bankruptcy court and the district court relied on the *DelBonis* dictum to frame Murphy's evidentiary burden. For the reasons that follow, a requirement that a debtor's hardship be "attributable to truly exceptional circumstances" cannot be squared with the text, structure, and legislative history of the Bankruptcy Code.

II. THE TEXT AND STRUCTURE OF THE BANKRUPTCY CODE INDICATE THAT PROPER APPLICATION OF THE UNDUE HARDSHIP STANDARD SOLELY ENTAILS DETERMINING THE EFFECT THAT REPAYMENT OF A PREBANKRUPTCY DEBT WOULD HAVE ON THE DEBTOR

As the U.S. Supreme Court has repeatedly stated in its interpretations of the Bankruptcy Code, "[i]t is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)); *accord, e.g., Rake v. Wade*, 508 U.S. 464, 471 (1993). When the Bankruptcy Code does not define a term or phrase, its "ordinary meaning" governs. *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011). Of course, the possibility exists that the undefined term or phrase may

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> such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

11 U.S.C. §523(a)(8) (1994) (amended 1998 and 2005).

have multiple meanings, thus ostensibly rendering the term ambiguous. *See, e.g.*, *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1758 (2013); *Morse v. Rudler (In re Rudler)*, 576 F.3d 37, 52 (1st Cir. 2009) (Lynch, J., concurring). But even in the case of multiple meanings, statutory context may reveal that the term as used in the Bankruptcy Code has one particular meaning. *See, e.g.*, *Bullock*, 133 S. Ct. at 1761; *Rudler*, 576 F.3d at 54 (Lynch, J., concurring); *cf. Carcieri v. Salazar*, 555 U.S. 379, 391 (2009) ("But the susceptibility of the word 'now' to alternative meanings 'does not render the word . . . whenever it is used, ambiguous,' particularly where 'all but one of the meanings is ordinarily eliminated by context.'" (omission in original) (quoting *Deal v. United States*, 508 U.S. 129, 131-32 (1993)).

Accordingly, "the plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 340, 341 (1997). The Supreme Court has specifically embraced this approach when interpreting the Bankruptcy Code, stating as follows:

> Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—*because the same terminology is used elsewhere in a context that makes its meaning clear*, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (emphasis added) (citations omitted). Similarly, this Court has indicated that "the Bankruptcy Code should be read as a whole, with a view toward effectuating Congress's discerned intent." *Jamo v. Katahdin Fed. Credit Union (In re Jamo)*, 283 F.3d 392, 399 (1st Cir. 2002).

Part and parcel of this "holistic" approach is the "'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'" *Bank of America, N.A. v. Caulkett*, 135 S. Ct. 1995, 1999 (2015) (quoting *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003)); *accord Soto-Hernandez v. Holder*, 729 F.3d 1, 4 (1st Cir. 2013); *Lovgren v. Locke*, 701 F.3d 5, 26 (1st Cir. 2012). Time and time again, the Supreme Court has deployed this presumption of consistent usage to clarify the meaning of terms and phrases in the Bankruptcy Code. *See, e.g., Law v. Siegel*, 134 S. Ct. 1188, 1195 (2014); *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 450-51 (1999); *Cohen v. de la Cruz*, 523 U.S. 213, 220-21 (1998); *Rake*, 508 U.S. at 474-75; *Timbers*, 484 U.S. at 365-66 (1988).

At first blush, it might appear that the term "undue hardship" gives rise to ambiguity because the word "undue" is susceptible to multiple ordinary meanings. For example, *The American Heritage Dictionary of the English Language*, which the Supreme Court has repeatedly referred to in interpreting the Bankruptcy Code,

see, e.g., *Clark v. Rameker*, 134 S. Ct. 2242, 2246 (2014); *Bullock*, 133 S. Ct. at 1758-59; *Cohen*, 523 U.S. at 220, *Rake*, 508 U.S. at 473, lists three senses for the adjective "undue": (1) "[e]xceeding what is appropriate or normal; excessive," (2) "[n]ot just, proper, or legal," and (3) "[n]ot yet payable or due." The American Heritage Dictionary of the English Language 1949 (3d ed. 1996). Clearly, the third sense, which refers to an unmatured obligation, is inapt in this context. To speak of hardship as "not yet payable or due" would be illogical. On the other hand, one could logically characterize hardship as either being "excessive" (i.e., the first sense) or as being "not just" (i.e., the second sense).

In the first sense, the issue would be one of degree—that is, "the threshold that constitutes impermissible sacrifice by a debtor." Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. Cin. L. Rev. 405, 491 (2005). In the second sense, the issue would be one of clean hands—that is, the debtor should be granted relief provided that he is not to blame for his hardship. *See, e.g.*, *Educ. Credit Mgmt. Corp. v. Mosley*, 494 F.3d 1320, 1327 (11th Cir. 2007). The question for the Court is whether, in using the word "undue," Congress intended to refer either (1) to excessive hardship—in which case a court should focus on ascertaining the *effect* that declaring the debt nondischargeable would have on the debtor—or (2) to unjust hardship—in which case a court should focus on

ascertaining whether, given the *cause* of the hardship (e.g., misfortune), it would be unjust to declare the debt nondischargeable.

Two contextual features of the Bankruptcy Code support the conclusion that Congress intended to use the word "undue" to mean "excessive" and not "unjust." They are the provision on reaffirmation agreements, *see* 11 U.S.C. § 524(c), and the provision on discharge for Chapter 13 debtors who fail to complete their repayment plans, *see id*. § 1328(b). Each will be considered in turn.

A. The Phrase "Undue Hardship" in the Context of Reaffirmation Agreements Clearly Refers to "Excessive" Hardship

First and foremost, the one other instance in the Bankruptcy Code where the term "undue hardship" (and, for that matter, the phrase "impose an undue hardship") appears is the Code's provision on reaffirmation agreements, which permits a debtor and a creditor to enter into an agreement pursuant to which the debtor will be legally bound to repay a prebankruptcy debt that otherwise would have been discharged. *See id*. § 524(c). An agreement to reaffirm such a debt will be enforceable only if several statutory requirements are satisfied. *See id*. § 524(c)(1)-(6). Among the requirements, the agreement must "not impose an undue hardship on the debtor or a dependent of the debtor." 11 U.S.C. § 524(c)(3)(B) (requiring in the case of a represented debtor that the debtor's attorney file a declaration or affidavit stating that the reaffirmation agreement "does not impose an undue hardship on the debtor or a dependent of the debtor");

id. § 524(c)(6)(A)(i) (requiring in the case of a self-represented debtor that the court "approve [the reaffirmation] agreement as . . . not imposing an undue hardship on the debtor or a dependent of the debtor"). As this Court has recognized, the purpose of these requirements is to safeguard a debtor's fresh start. *See Jamo*, 283 F.3d at 398. Thus, it is clear that the undue hardship inquiry under the reaffirmation provision concerns itself with the *effect* that repayment of a pre-bankruptcy debt would have on the debtor—specifically, whether the debtor's agreement to remain personally liable for an otherwise dischargeable debt will impose excessive hardship on the debtor or a dependent of the debtor.

Congress's amendment of the reaffirmation provision in 2005 bolsters this proposition. Among the amendments to the provision, Congress created a presumption of undue hardship over the sixty-day period (or longer by court extension) following the filing of the reaffirmation agreement with the court for those instances in which the scheduled payments on the reaffirmed debt exceed the debtor's monthly disposable income (i.e., monthly income less monthly expenses). *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 203(2), 119 Stat. 23, 48 (codified at 11 U.S.C. § 524(m)(1) (2012)). The debtor may rebut the presumption upon identifying additional sources of funds that will enable the debtor to make the scheduled payments. 11 U.S.C.

§ 524(m)(1). If the debtor fails to rebut the presumption, the court may deny approval of the agreement. *Id*.

The structure of the presumption reinforces the conclusion that, in the reaffirmation context, the term "undue hardship" focuses on the economic effect that an inability to repay a prebankruptcy debt from future income will have on the debtor. *See In re Visnicky*, 401 B.R. 61, 63-64 (Bankr. D.R.I. 2009); *cf*. *In re Melendez*, 235 B.R. 173, 196-97, 200-01 (Bankr. D. Mass. 1999) (applying a disposable-income framework to determine whether reaffirmation agreements imposed undue hardship on debtors in cases filed prior to the 2005 amendments to the Bankruptcy Code). Accordingly, even though "undue hardship" may be susceptible to multiple meanings, the reaffirmation provision presents a scenario in which "all but one of the meanings is ordinarily eliminated by context." *Deal*, 508 U.S. at 131-32. The question then becomes whether this Court should apply the presumption of consistent usage in interpreting the meaning of "undue hardship" for purposes of determining the dischargeability of educational debt. It should.

B. The Presumption of Consistent Usage Indicates That Congress Intended the Phrase "Undue Hardship" to Have the Same Meaning Throughout the Bankruptcy Code

Various factors indicate the propriety of applying the presumption of consistent usage to conclude that, in determining the dischargeability of an educational debt, the term "undue hardship" likewise focuses on the economic

effect that the inability to repay a prebankruptcy debt from future income will have on the debtor.

First, the similarity in structure of the phrases in the Bankruptcy Code using "undue hardship," *compare* 11 U.S.C. § 524(c)(3)(B) (incorporating the phrase "impose an undue hardship on the debtor or a dependent of the debtor"), *and id*. § 524(c)(6)(A)(i) (incorporating the phrase "imposing an undue hardship on the debtor or a dependent of the debtor"), *with id*. § 523(a)(8) (incorporating the phrase "impose an undue hardship on the debtor and the debtor's dependents"), warrants application of the presumption. *Cf*. *Desert Palace*, 539 U.S. at 101 (stating that, "[d]ue to the similarity in structure between [two provisions of Title VII] . . . , it would be logical to assume that the term 'demonstrates' would carry the same meaning with respect to both provisions").

Second, when the same phrase "serves [an] identical function . . . , the presumption that equivalent words have equivalent meaning when repeated in the same statute has particular resonance." *Cohen*, 523 U.S. at 220 (citation omitted). Congress incorporated the phrases using the term "undue hardship" as the standard by which it would be determined whether a debtor would remain liable on account of certain prebankruptcy debts—specifically, educational debts and debts that would be discharged but for the debtor's agreement to repay them. The fact that a debtor seeks to be absolved from liability with respect to an educational debt, in

contrast to a debtor who affirmatively seeks to remain liable on account of an otherwise dischargeable debt, should have no bearing on giving the term "undue hardship" equivalent meaning in both sections of the Bankruptcy Code. *Cf*. *Desert Palace*, 539 U.S. at 101 ("Absent some congressional indication to the contrary, we decline to give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue.").

Third, applying the presumption is "doubly appropriate" when identical words and phrases have been inserted into the same statute at the same time. *Powerex Corp*. *v*. *Reliant Energy Servs*., *Inc*., 551 U.S. 224, 232 (2007). The Bankruptcy Code, as originally enacted, included both provisions incorporating the "undue hardship" term. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 523(a)(8)(B), 523(c)(4)(A)(i), 92 Stat. 2549, 2590, 2593 (codified as amended at 11 U.S.C. §§ 523(a)(8), 524(c) (2012)).

Finally, "[t]he interrelationship and close proximity of . . . provisions of the statute 'presents a classic case for application of the "normal rule" of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'" *Comm'r v*. *Lundy*, 516 U.S. 235, 250 (1996) (quoting *Sullivan v*. *Stroop*, 496 U.S. 478, 484 (1990)). Here, the phrases incorporating the term "undue hardship" appear in sequential sections of the Bankruptcy Code. *See* 11 U.S.C. § 523(a)(8); *id*. § 524(c)(3)(B), (c)(6)(A)(i).

Moreover, the subject matters of the two sections are clearly interrelated, as evidenced by the sections' headings, *compare* 11 U.S.C. § 523 ("Exceptions to discharge"), *with id*. § 524 ("Effect of discharge"), a consideration that the Supreme Court has deemed relevant in interpreting the Bankruptcy Code, *see Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) ("[S]tatutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute.'" (quoting *Porter v. Nussle*, 534 U.S. 516, 528 (2002))).

While exceptions to the presumption of consistent usage exist, none applies here. First, Congress may have expressly indicated that a particular term or phrase is not meant to have the same meaning throughout the entire enactment, thus making it inappropriate to apply the presumption. *See Finnegan v. Leu*, 456 U.S. 431, 437 n.9 (1982); *Saysana v. Gillen*, 590 F.3d 7, 15 (1st Cir. 2009). But, for the reasons set forth above, nothing in the Bankruptcy Code suggests that Congress intended the phrase "impose an undue hardship" to have different meanings across the two sections that contain the phrase.

Second, "the presumption . . . readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932); *accord,*

e.g., *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986). But here, given "the clarity of the statutory text"—as evidenced by the fact that the phrases have similar structures, the fact that the phrases were enacted simultaneously in the Bankruptcy Code, the fact that the two sections containing the phrases are interrelated and in close proximity, and the fact that they share an identical function—any proponent of the argument that Congress intended the phrases to have different meanings in the different sections should "bear[] an 'exceptionally heavy' burden of persua[sion]." *Patterson v. Shumate*, 504 U.S. 753, 760 (1992).

C. The Chapter 13 Hardship Discharge Further Indicates That Congress Intended the Phrase "Undue Hardship" to Mean "Excessive" Hardship Rather Than "Unjust" Hardship

The other contextual feature of the Bankruptcy Code that supports the conclusion that Congress intended to use the word "undue" to mean "excessive" and not "unjust" is the provision on discharge for Chapter 13 debtors who fail to complete their repayment plans. A debtor who files for relief under Chapter 13 of the Bankruptcy Code proposes to repay his prebankruptcy debts from future income pursuant to a repayment plan confirmed by the court. *See* 11 U.S.C. §§ 1321, 1322(a)(1), 1325 (2012). To confirm a repayment plan, a court must find, among other things, that "the debtor will be able to make all payments under the plan." *Id.* § 1325(a)(6). If a Chapter 13 debtor completes all payments proposed under the plan, the court must grant the debtor a discharge, *see id.* § 1328(a),

subject to certain exceptions that are not relevant to the issues at hand, *see id*. § 1328(a), (f), (g)(1), (h).

Alternatively, if the debtor fails to complete all payments under the plan, the court may nonetheless grant the debtor a discharge provided that the debtor establishes three conditions. *See id*. § 1328(b)(1)–(3). The first condition requires the debtor to prove that the "failure to complete such payments is due to circumstances for which the debtor should not *justly* be held accountable." *Id*. § 1328(b)(1) (emphasis added). Both this Court and the legislative history to the Bankruptcy Code have referred to this discharge as the "hardship discharge." *See Roberts v*. *Boyajian (In re Roberts)*, 279 F.3d 91, 93 (1st Cir. 2001); H.R. Rep. No. 95-595, at 430 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6386. In sum, a Chapter 13 hardship discharge involves a debtor whom a court erroneously predicted to have an ability to repay his debts, *cf*. *Till v*. *SCS Credit Corp*., 541 U.S. 465, 493 (2004) (Scalia, J., dissenting) ("That so many [Chapter 13 plans] failed proves that bankruptcy judges are not oracles and that trustees cannot draw blood from a stone."), but whose request for relief from those debts will be granted only if, among other things, the debtor proves that he is not responsible for having created his inability to repay and thus that "the request is justified." *See Bandilli v*. *Boyajian (In re Bandilli)*, 231 B.R. 836, 840 (B.A.P. 1st Cir. 1999).

Importantly, the Bankruptcy Code, as originally enacted, included the provision on the Chapter 13 hardship discharge. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 1328(b), 92 Stat. 2549, 2650 (codified as amended at 11 U.S.C. § 1328(b) (2012)). If Congress had intended the term "undue hardship" to mean "unjust" hardship, and not "excessive" hardship, then one would expect Congress to have used the term in setting forth the conditions for a Chapter 13 hardship discharge. Instead of the language that Congress used for the first condition (i.e., "the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable," 11 U.S.C. § 1328(b)(1)), Congress could have provided, for example, that the debtor would have to prove that "denying a discharge under this subsection would impose an undue hardship on the debtor and the debtor's dependents." But it did not. Rather, Congress used distinct statutory language to differentiate between (1) a condition for relief based on the *cause* for a debtor's inability to repay a prebankruptcy debt (i.e., the first condition for a Chapter 13 hardship discharge) and (2) a condition for relief based on the *effect* that repaying a prebankruptcy debt would have on the debtor (i.e., undue hardship). As this Court has stated, "when Congress includes language in one section of a statute but omits it in another, 'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *United States ex rel. Heineman-Guta v. Guidant Corp.*,

718 F.3d 28, 35 (1st Cir. 2013) (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)).[3]

[3] In this vein, it is worth noting that, when Congress has desired to use language similar to "truly exceptional circumstances" in the Bankruptcy Code as a condition for debtor relief, it has expressly done so. *See* 11 U.S.C. § 109(h)(3)(A)(i) (2012) (requiring a showing of "*exigent* circumstances" (emphasis added)); *id.* § 707(b)(2)(B)(i) (requiring a showing of "*special* circumstances" (emphasis added)).

Negative implication further suggests that courts that have engrafted a debtor's good faith (or bad faith) into the undue hardship standard as a condition for granting (or denying) relief from educational debt have done so in contravention of the text and structure of the Bankruptcy Code. *See, e.g., Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (per curiam) (requiring that, to establish undue hardship, the debtor must prove three factors, including "that the debtor has made *good faith efforts* to repay the loans" (emphasis added)); *Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon)*, 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010) ("The party opposing the discharge of a student loan has the burden of presenting evidence of any disqualifying factor, such as *bad faith*." (emphasis added)). Congress has expressly indicated when it has desired to make a debtor's good faith (or bad faith) as a condition for granting (or denying) a debtor relief under the Bankruptcy Code. *See* 11 U.S.C. §§ 348(f)(2) (bad faith), 707(b)(3)(A) (bad faith), 727(a)(9)(B)(ii) (good faith), 921(c) (good faith), 1129(a)(3) (good faith), 1325(a)(3) (good faith), 1325(a)(7) (good faith). As the Supreme Court recently noted, its decision in *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007), "most certainly did not endorse, even in dictum, the view that equitable considerations permit a bankruptcy court to contravene express provisions of the Code," *Law v. Siegel*, 134 S. Ct. 1188, 1197 (2014).

Finally, Congress has clearly indicated elsewhere that it knows how to expressly incorporate good faith as a condition that is separate and distinct from the condition of undue hardship for purposes of granting a debtor relief. *See* 42 U.S.C. § 3796(m) (2012) ("The Bureau [of Justice Assistance] may suspend or end collection action on an amount disbursed pursuant to a statute enacted retroactively or otherwise disbursed in error under subsection (a) or (c) of this section, where such collection would be impractical, or would cause *undue hardship* to a debtor who acted in *good faith*." (emphasis added)).

III. LEGISLATIVE HISTORY BOLSTERS THE CONCLUSION THAT CONGRESS INTENDED THE TERM "UNDUE HARDSHIP" TO ENCOMPASS AN INQUIRY INTO THE EFFECT OF REQUIRING A DEBTOR TO REPAY A PREBANKRUPTCY DEBT

As the foregoing arguments demonstrate, the text of the Bankruptcy Code's provision for the discharge of educational debt, inferences drawn from other Code provisions, and substantive canons of statutory interpretation all point to the conclusion that Congress used the term "undue hardship" to refer to excessive hardship. Although the Court's inquiry on the meaning of undue hardship could end at this point, the Court may nonetheless refer to legislative history to bolster this conclusion. *See United States v. Gelin*, 712 F.3d 612, 617 (1st Cir. 2013).

As an initial matter, the House and Senate Reports discussing the legislation that would ultimately be enacted as the Bankruptcy Code, *see* S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787; H.R. Rep. No. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963; *see also United States v. Yellin (In re Weinstein)*, 272 F.3d 39, 45-46 (1st Cir. 2001) (discussing legislative history of the Bankruptcy Code), and that the Supreme Court and this Court have relied upon to interpret the Bankruptcy Code, *see, e.g.*, *Johnson v. Home State Bank*, 501 U.S. 78, 86-87 (1991); *CFTC v. Weintraub*, 471 U.S. 343, 351 (1986); *Sauer Inc. v. Lawson (In re Lawson)*, No. 14-2058, ___ F.3d ___, 2015 WL 3982395, at *4 (1st Cir. July 1, 2015), do not yield insight into the meaning of "undue hardship." The report by

the House Judiciary Committee recommended that educational debt be automatically dischargeable in bankruptcy, *see* H.R. Rep. No. 95-595, at 132 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093, a proposal that the House ultimately rejected, *see* 124 Cong. Rec. 1798 (1978). The report by the Senate Judiciary Committee merely described the operative effect of the provision governing the dischargeability of educational debt, but without making any mention of "undue hardship." *See* S. Rep. No. 95-989, at 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865. Accordingly, this is one of those instances in which the House and Senate reports will be "unedifying."[4] *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 963 n.4 (1997).

There is, however, another source of legislative history that sheds light on the meaning of "undue hardship" as used in the Bankruptcy Code. In 1970, Congress established the Commission on the Bankruptcy Laws of the United States (the "Commission") to analyze the then-existing system of bankruptcy laws and to

[4] Representative Edwards and Senator DeConcini, "the relevant subcommittee leaders" of the legislation that became the Bankruptcy Code, *United States v. Yellin (In re Weinstein)*, 272 F.3d 39, 45 (1st Cir. 2001), made cursory floor statements regarding the Code's provision on the dischargeability of educational debt that likewise do not provide any insight into the meaning of "undue hardship." *See* 124 Cong. Rec. 33,998 (1978) (statement of Sen. DeConcini) ("Section 523(a)(8) represents a compromise between the House bill and the Senate amendment regarding educational loans. This provision is broader than current law which is limited to federally insured loans. Only educational loans owing to a governmental unit or nonprofit institution of higher education are made nondischargeable under this paragraph."); *id*. 32,399 (statement of Rep. Edwards) (same).

suggest recommendations for its reform. *See* Pub. L. No. 91-354, 84 Stat. 468 (1970). In 1973, the Commission issued its report to Congress (the "Commission Report"), Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, pts. 1 & 2 (1973), which laid the foundation for "what would become the 1978 [Bankruptcy] Code," *Collins v. Greater Atl. Mortg. Corp. (In re Lazarus)*, 478 F.3d 12, 18 n.7 (1st Cir. 2007). More specifically, Congress relied on the Commission Report when drafting the Code. *See* S. Rep. No. 95-989, at 1-2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5787-88; Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DePaul L. Rev. 941, 943 n.20 (1979) (stating that "portions of Pub. L. No. 95-598 [i.e., the Bankruptcy Code] . . . are derived from the Commission's draft statute" (citation omitted)).[5] It is also worth noting that this Court has consulted the Commission Report in examining the Bankruptcy Code's legislative history. *See Lomas Mortg., Inc. v. Louis*, 82 F.3d 1, 4 & n.4 (1st Cir. 1996); *Shine v. Shine*, 802 F.2d 583, 586-87 (1st Cir. 1986); *In re Bos. & Me. Corp.*, 634 F.2d 1359, 1379 n.35 (1st Cir. 1980).

The Commission Report's proposed statutory changes to reform the bankruptcy system were set forth in a model statute titled "Bankruptcy Act of 1973." H.R. Doc. No. 93-137, pt. 2. Two of the proposals further corroborate that

[5] Professor Kenneth Klee was one of the principal draftsmen of the Bankruptcy Code. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 328 (S.D.N.Y. 2008).

the phrase "undue hardship" refers to the concept of excessive hardship, but that it does not encompass an inquiry into the causes of such hardship. They are the proposals included in (1) section 4-506(a)(8), *see* H.R. Doc. No. 93-137, pt. 2, at 136, the analogue to the Bankruptcy Code's provision on the dischargeability of educational debt (i.e., 11 U.S.C. § 523(a)(8)), and (2) section 4-505(a)(7), *see* H.R. Doc. No. 93-137, pt. 2, at 132-33, the analogue to the Bankruptcy Code's provision imposing a time bar on the granting of a Chapter 7 discharge to a debtor who previously received such a discharge (the "Chapter 7 time-bar provision") (i.e., 11 U.S.C. § 727(a)(8)).

The provision on the dischargeability of educational debt that Congress enacted in the Bankruptcy Code was quite similar to the Commission Report's analogous provision, as revealed by a comparison of the two provisions set forth below in Table 1.

Table 1
Comparison of Educational-Debt Dischargeability Provisions

"A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt . . . 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 (B) excepting such debt from discharge will impose an undue hardship on the debtor and the debtor's dependents[.]"	"A discharge extinguishes all debts of an individual debtor . . . except the following: . . . any educational debt if the first payment of any installment thereof was on a date less than five years prior to the date of the petition and if its payment from future income or other wealth will not impose an undue hardship on the debtor and his dependents[.]"
Source: Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523(a)(8), 92 Stat. 2549, 2590-91 (codified as amended at 11 U.S.C. § 523(a)(8) (2012)).	**Source:** H.R. Doc. No. 93-137, pt. 2, at 136.

On the other hand, the Chapter 7 time-bar provision that Congress enacted in the Bankruptcy Code differed substantially from the Commission Report's analogous provision. Specifically, contrary to the Commission's recommendation, Congress did not incorporate into the provision the concept of conditional discharge to mitigate the potential harshness of the time bar. A comparison of the two provisions set forth below in Table 2 reveals this difference.

Table 2
Comparison of Chapter 7 Time-Bar Provisions

"The court shall grant the debtor a discharge, unless . . . the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371 or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition."	"An individual debtor shall be granted a discharge unless . . . he was granted a discharge or had a plan confirmed under Chapter VII in a case commenced within five years before the date of the petition. A discharge otherwise deniable under this clause (7) may nevertheless be granted *if the inability of the debtor to pay his debts is the result of causes not reasonably within his control* and *if payment of them from future income or other wealth will impose an undue hardship on the debtor and his dependents*."
Source: Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 727(a)(8), 92 Stat. 2549, 2609-10 (codified as amended at 11 U.S.C. § 727(a)(8) (2012)).	**Source:** H.R. Doc. No. 93-137, pt. 2, at 132-33 (emphasis added).

Notably, the Commission Report's Chapter 7 time-bar provision proposed the satisfaction of two conditions for a debtor to be granted relief from the time bar to discharge: (1) that the *effect* of requiring a debtor to repay his prebankruptcy debts would be to impose an "undue hardship" on him, and (2) that the *causes* of the debtor's repayment inability were not attributable to him.

Although Congress did not follow the Commission's recommendation with respect to the Chapter 7 time-bar, it did rely on the Commission Report to draft the

Bankruptcy Code. In doing so, Congress would have recognized that the Commission differentiated between two types of conditions as a basis for relief from prebankruptcy debt: the *effect* that repaying such a debt would have on the debtor (i.e., "undue hardship") and the *cause* of the debtor's repayment inability (e.g., illness or loss of employment). Moreover, Congress maintained the distinction, as evidenced by (1) the manner in which it implemented the phrase "impose an undue hardship" throughout the Bankruptcy Code and (2) the manner in which it expressly incorporated the *cause* of a debtor's repayment inability as a condition for the Chapter 13 hardship discharge. Thus, the Bankruptcy Code's legislative history lends further support to the proposition that courts should confine the undue hardship inquiry solely to determining the *effect* that repayment of a prebankruptcy debt would have on the debtor.

CONCLUSION

The U.S. Court of Appeals for the Seventh Circuit recently observed that, when a court seeks to determine whether repayment of an educational debt would impose an undue hardship on a debtor, "[i]t is important not to allow judicial glosses . . . to supersede the statute itself." *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013). For the reasons set forth above, this Court's dictum in *DelBonis* that undue hardship must be "attributable to truly exceptional circumstances" is a judicial gloss that cannot be squared with the plain language of

the Bankruptcy Code. By incorporating this evidentiary requirement into their respective undue hardship analyses, the bankruptcy court and the district court engrafted into the statute an improper condition for relief. This Court should reverse the district court's affirmance of the bankruptcy court's judgment that Murphy's educational debt is nondischargeable and should remand the proceeding to the bankruptcy court so that it may conduct a determination that is consistent with the plain meaning of the Bankruptcy Code.

Respectfully submitted,

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I hereby certify that, on July 29, 2015, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the Court's CM/ECF system.

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