The Real Student-Loan Scandal: Undue Hardship Discharge Litigation

by

Rafael I. Pardo and Michelle R. Lacey***

INTRODUCTION

The nation's student-loan system, which originated $85 billion in loans in 2007,[1] was struck by scandal during that year. Major institutional actors involved in the system—universities, the U.S. Department of Education (the "Education Department"), and the loan companies—all played a role. Not surprisingly, heads rolled off the proverbial chopping block. The fallout included the departure of financial aid directors from storied institutions such as Columbia University, Johns Hopkins University, and the University of Texas at Austin.[2] The chief operating officer of the Office of Federal Student Aid at the Education Department resigned her post amidst public criticism over the Department's failure to police the student-loan system effectively.[3] Top executives at Student Loan Xpress, a company whose payoffs to college officials made it a posterchild for the scandal,[4] were suspended.[5]

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*Associate Professor of Law, Seattle University.

**Assistant Professor, Department of Mathematics, Tulane University.

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[1]Jonathan D. Glater, *U.S. Puts Limits on Lenders' Ties to Universities*, N.Y. TIMES, June 2, 2007, at A1.

[2]Karen W. Arenson, *Columbia Fires Its Director of Student Aid*, N.Y. TIMES, May 22, 2007, at B1; Jonathan D. Glater, *U. of Texas Fires Officer over Tie to Loan Company*, N.Y. TIMES, May 15, 2007, at A13.

[3]Jonathan D. Glater, *Federal Student Loan Official Is Resigning*, N.Y. TIMES, May 9, 2007, at A21.

[4]Karen W. Arenson & Diana Jean Schemo, *Senate Report Details Deals in Student Loan Industry*, N.Y. TIMES, June 15, 2007, at A21.

[5]Jonathan D. Glater & Sam Dillon, *Student Lender Had Early Plans to Woo Officials*, N.Y. TIMES, Apr. 10, 2007, at A1.

As the scandal continued to unfold, public officials at the state and federal levels took steps to fix the situation. New York's attorney general, Andrew M. Cuomo, and various universities whose financial aid practices had been under investigation by Mr. Cuomo's office reached settlements that created a multimillion dollar fund to educate students and parents about student loans. Moreover, the universities agreed to adhere to a code of conduct governing relations between student-loan lenders and academic institutions.[6] Congress also got involved in the crackdown in various ways, from questioning Education Secretary Margaret Spellings about the Education Department's lax oversight of the student-loan system to the near-unanimous passing of a bill by the House of Representatives to require the disclosure of relationships between academic institutions and student-loan lenders.[7]

While these actions represented an effort to protect student-loan borrowers and to restrike a balance in the student-loan debtor-creditor relationship, politicians did not go far enough in their efforts. To draw this conclusion, one need only look to congressional inaction on a little-heralded, yet extremely significant, bill that Senator Richard Durbin introduced on June 7, 2007 (the "Durbin bill"): an amendment to the Bankruptcy Code that would allow debtors in bankruptcy to discharge privately issued student loans.[8] Enactment of the legislation would have constituted a unique push-back against the lender lobby, the kind that would have robustly championed the plight of student-loan borrowers. The leak of a document outlining the lobbying strategy of Sallie Mae, the nation's leading provider of student loans, suggests that Congress may have failed to act on this front due to interest-group capture: Among other things, Sallie Mae's tactics call for "substantial penetration of 'first tier' congressional offices for initial contacts," hiring a Democratic lobbyist, and "arm[ing] Congressional Republicans and [the] Administration to combat irresponsible proposals."[9] The history of the Bankruptcy Code's student-loan discharge provision further bolsters the conclusion that Congress has been capitulating to the lender lobby.

Federal bankruptcy law generally enables debtors to discharge their prebankruptcy debts and, at one time, this discharge extended to student loans. Congress changed the legal landscape in 1976 by making student loans dischargeable only under a narrow set of circumstances. Congress took this action on the basis of perceived abuses of the bankruptcy system by student-

[6]*See* Andrew M. Cuomo, State of N.Y. Attorney Gen., Testimony Before United States Senate Committee on Banking, Housing, and Urban Affairs 6-7 (June 6, 2007) (transcript available at http://banking.senate.gov/public/_files/cuomo.pdf).

[7]Student Loan Sunshine Act, H.R. 890, 110th Cong. (2007).

[8]S. 1561, 110th Cong. (2007).

[9]Sallie Mae, Federal Government Relations Strategy Discussion 4, 6 (Dec. 5, 2006) (unpublished document, on file with authors).

loan debtors, relying on a few stories of recent graduates who had obtained discharges of their student loans without any attempted repayment and in the absence of extenuating circumstances. Tragically, Congress disregarded empirical evidence from a General Accounting Office study which found that less than one percent of all federally insured and guaranteed student loans were discharged in bankruptcy. Simply put, the discharge of student loans in bankruptcy was too minor to threaten the economic viability of the student-loan program.[10]

Over the past three decades, Congress has continued to curtail the bankruptcy relief available to student-loan debtors.[11] The most recent change came in the 2005 amendments to the Bankruptcy Code. By virtue of that legislation, *for-profit* lenders have been extended the special treatment that had been traditionally reserved for educational and nonprofit institutions.[12] This change did not meet with any objections from lawmakers, even from the House members who expressed dissenting views to accompany the House Judiciary Committee's report on the 2005 amendments. In the fifty-four pages documenting these dissenting views, there does not exist a single mention of the preferential treatment that was ultimately extended to for-profit lenders.[13]

The significance of the 2005 amendment should not be overlooked. First, the private student-loan market constitutes a considerable segment of the industry. During the 2005-2006 academic year, the private student-loan market originated $17.3 billion in loans.[14] Second, unlike federal student loans, private student loans are largely unregulated. Without limits on the amount students can borrow, without programs to reduce or defer payments, and without caps on interest rates, students can quickly find themselves deeply mired in debt.[15] In the words of New York State Attorney General Cuomo, these loans are the "Wild West of the student loan industry."[16] Thus, with the 2005 overhaul of the Bankruptcy Code, Congress stripped away the social safety net available to the borrowers of such loans.

Ultimately, one might conceive of legislation like the Durbin bill as a litmus test for gauging whether those who would purport to reform the stu-

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[10]For a full account of these events and the evolution of the Bankruptcy Code's student-loan discharge provision, 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, 419-28 (2005).

[11]*See id.* at 427 & n.116.

[12]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) (2006)).

[13]*See* H.R. REP. NO. 109-31, at 537-90 (2005).

[14]Diana Jean Schemo, *With Few Limits and High Rates, Private Loans Deepen Student-Debt Crisis*, N.Y. TIMES, June 10, 2007, at A28.

[15]*See id.*

[16]Cuomo, *supra* note 6, at 3.

dent-loan system stand ready to go the distance. If the student-loan scandal has truly brought Congress to a tipping point, then it seems reasonable to conclude that, at a minimum, Congress would undo the special treatment given in bankruptcy to for-profit student-loan lenders. But, for now, it appears that this will not be the case. In February 2008, as the House of Representatives considered a bill to amend the Higher Education Act of 1965,[17] it struck down a proposed amendment to the bill that would have made private student loans once again dischargeable in bankruptcy.[18] Shortly thereafter, President Bush signed legislation in May 2008 that, in its current form, authorizes the Education Department through July 1, 2010 to buy certain federally guaranteed student loans that lenders cannot sell as securitized debt.[19] These recent episodes reveal that, when trouble looms for student-loan lenders, Congress willingly lends a helping hand and gives them an exit strategy. Student-loan borrowers, on the other hand, get the short end of the stick.

But even if Congress had rolled back the Bankruptcy Code's protection for the claims of private student-loan lenders, this reform would not have been enough. If Congress is actually serious about restoring the social safety net for student-loan debtors, all fingers point to the need for wholesale repeal of the Bankruptcy Code's student-loan discharge provision.[20] And herein lies the truth of the matter. The real student loan scandal is the existence of the Bankruptcy Code's student-loan discharge provision. Debtors who legitimately seek relief from their student loans through the bankruptcy system must grapple with the burdens of the provision—not only its substance, but also its collateral effects.

Whether or not the substance of the provision is normatively defensible,[21] the fact remains that, because the legal system has been structured so that student-loan debtors must litigate their claims for relief under an uncertain standard, the law has introduced a complexity to the discharge process

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[17]*See* H.R. 4137, 110th Cong. (2008).

[18]*See* H. AMEND. 939 to H.R. 4137 (offered Feb. 7, 2008). The amendment failed by a recorded vote of 179 to 236.

[19]*See* Ensuring Continued Access to Student Loans Act of 2008, Pub. L. No. 110-227, § 7(b), 122 Stat. 740, 746 (codified as amended at 20 U.S.C.A. § 1087i-1 (West 2008)).

[20]The National Bankruptcy Review Commission, authorized by Congress in 1994 to evaluate and recommend revisions to the Bankruptcy Code, *see* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 603, 108 Stat. 4106, 4147, argued for repeal of the Bankruptcy Code's student-loan discharge provision. *See* 1 NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 207-17 (1997). Needless to say, Congress did not heed the Commission's recommendations.

[21]For a discussion exploring the theoretical justifications for carving out an exception to the discharge of student loans in bankruptcy, see John A. E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CANADIAN BUS. L.J. 245 (2006). For a critique of the policy justifications underlying the Bankruptcy Code's student-loan discharge provision, see Pardo & Lacey, *supra* note 10, at 405.

that has resulted in improper and excessive encroachment on a debtor's fresh start. In our prior study of bankruptcy court doctrine regarding the discharge of student loans, we observed the following:

> While bankruptcy courts have perceived the Bankruptcy Code's [student-loan] discharge provision to have been enacted by Congress as a necessary measure to curb abuse of the bankruptcy system, the data have shown that the statute has proved to be much less selective, primarily because of its inherently overbroad scope. The inevitable result has been a law applied, counter to its purported objective, to a class of individual whose behavior could not have been deemed by Congress to be a legitimate target for legislative reform. . . .
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> . . .[W]hat has proved to be most troublesome regarding application of the law has not been the infrequency with which relief has been granted, but rather the haphazard fashion in which courts have determined whether a debtor's circumstances support a claim of undue hardship that warrants forgiveness of educational debt.[22]

Simply put, the legal doctrine suggests that the law targets debtors who do not deserve to be targeted, and, to make matters worse, those debtors face inconsistent application of the law.

But there is perhaps a bigger and deeper problem with the student-loan discharge provision that our prior study could not uncover. Because the study derived its data from bankruptcy court opinions that arose in proceedings that went to trial,[23] thus telling us nothing about the proceedings that did not go to trial, it was impossible for us to investigate the broader litigation process by which debtors seek to discharge their student loans. The litigation process itself may have a collateral effect with greater consequence than the effects we documented in our prior study. Debtors who have filed for bankruptcy in the first instance as a result of financial distress must somehow find the resources to litigate a full-blown lawsuit in order to prove that their predicament qualifies them for relief from their student loans. It does not take much imagination to recognize that a power imbalance exists in this context tilting in favor of student-loan creditors who undoubtedly have more resources and, as repeat players, more familiarity with the system. Thus, the structure of the system threatens access to justice by debtors with the concomitant effect of undermining the fresh start policy in bankruptcy.

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[22]Pardo & Lacey, *supra* note 10, at 479-80.

[23]*See id.* at 433-38.

This Article seeks to provide an empirical account of the litigation process for bankruptcy debtors who have had to litigate their claims for relief from their student loans, with the goal of ascertaining whether valid concerns exist regarding access to justice. We have compiled an original dataset of 115 terminated student-loan discharge proceedings in the U.S. Bankruptcy Court for the Western District of Washington that were commenced during the five-year period beginning on January 1, 2002 and ending on December 31, 2006. Our findings from these data serve to test and reconsider assumptions that have been made in the debate over whether student-loan debt should be automatically dischargeable in bankruptcy. In our view, any assessment of whether formulation of the law has been a success or failure must take into account the manner in which litigants within the bankruptcy system have had to cope with it.

Two basic questions have motivated our empirical inquiry: Can bankruptcy debtors obtain a discharge from their student loans, and, if so, how much debt gets discharged?[24] Our curiosity has stemmed from the fact that critiques of the Bankruptcy Code's student-loan discharge provision have been based on abstract generalizations and intuitive hunches, perhaps none as illustrative as the one issued by the National Bankruptcy Review Commission in its evaluation of the Bankruptcy Code during the 1990s:[25] "Although the drafters of the nondischargeability provision may have intended that those who truly cannot pay should be relieved of the debt under the undue hardship provision, *in practice, nondischargeability has become the broad rule with only a narrowly construed undue hardship discharge.*"[26] In support of this sweeping statement, the Commission cited to only four decisions by federal courts of appeals.[27] While we were surprised in our prior study to find that nearly half (45%) of the determinations resulted in a discharge of student loans,[28] the findings from our present study surprised us even more: Approximately 57% of the 115 proceedings resulted in discharge of some portion (and in some cases all) of the debtor's student loans. For those debtors who did obtain a discharge, the average debtor succeeded in getting approximately 72% of the debt discharged.[29] These findings further contravene prior assumptions and understandings of the frequency with which student-loan

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[24]Our prior study focused on the first question. *See* Pardo & Lacey, *supra* note 10, at 479 ("[T]he question remains whether it has been overly difficult for debtors to prevail in undue hardship litigation, at least as documented in the issued opinions. In other words, has it been the case that courts predominantly find a lack of undue hardship?").

[25]*See supra* note 20.

[26]1 NAT'L BANKR. REV. COMM'N, *supra* note 20, at 211 (emphasis added).

[27]*See id.* at 211 n.530.

[28]Pardo & Lacey, *supra* note 10, at 479.

[29]Of the 66 proceedings in which a debtor obtained relief, only 62 proceedings provided sufficiently detailed information to track the percentage of debt discharged.

debtors obtain relief in bankruptcy, suggesting that the discharge of student loans is prevalent and that the amount discharged may be substantial.

Although we consider doubtful the previously untested assumption that obtaining a discharge of student loans in bankruptcy is a rare event, the fact remains that a fair amount of debtors still did not obtain a discharge. In light of our prior finding that bankruptcy court doctrine has been applied inconsistently to similarly situated student-loan debtors,[30] as well as our concerns over barriers to justice in this context, we evaluated the data to ascertain the factors that explain the extent of discharge. Our findings reveal that factors unrelated to the command of the law (e.g., the identity of the judge assigned to the debtor's adversary proceeding), rather than factors deemed relevant by the legal doctrine (e.g., the debtor's income and expenses), account for the substantive outcomes we have studied. These findings offer important insights into the burdens that have been imposed upon student-loan debtors as a result of a legal framework that requires debtors to litigate their eligibility for forgiveness of debt. Our hope is that this perspective will relocate the debate over the propriety of the discharge of student loans in bankruptcy and ultimately lead to meaningful reform.

The Article proceeds in the following manner. Part I establishes the background for our empirical study. Part I.A discusses the nature of discharge litigation in bankruptcy. Part I.B situates our study within the universe of student-loan debtors generally. Part I.C introduces Ninth Circuit legal doctrine interpreting the standard for discharging student loans in bankruptcy. It is within the shadow of these formal legal rules that the debtors and creditors in our study have litigated. Part I.D sets forth the design of our study as well as descriptive statistics regarding the student-loan debtors. Part II presents our findings from bivariate and regression analyses of the data and evaluates the implications of these results. The Article concludes that our findings raise serious concerns regarding access to justice for student-loan debtors who suffer financial distress and that this should prompt policymakers to give serious consideration to reformulating the law.

I. BACKGROUND

A. On the Nature of Discharge Litigation in Bankruptcy

The litigation of claim-based disputes within the bankruptcy system undermines two of its central purposes: (1) a fresh start for the debtor and (2) the expeditious and efficient resolution of creditor claims against the debtor. Bankruptcy law provides a fresh start by releasing the debtor from personal liability on prebankruptcy debts in exchange for the debtor's nonexempt as-

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[30] *See* Pardo & Lacey, *supra* note 10, at 481-86.

sets or a portion of the debtor's future income.[31] A debtor who has filed for bankruptcy as a result of financial distress generally will not be well positioned to expend resources to litigate a dispute relating to his or her prebankruptcy debts. Allowing such litigation to proceed would encroach upon the debtor's fresh start. In recognition of this, bankruptcy law immediately affords respite to the debtor upon filing for bankruptcy by enjoining the commencement or continuation of a judicial, administrative, or other proceeding to recover a claim against the debtor that arose prior to the commencement of the bankruptcy case.[32] Thus, from the debtor's perspective, the Bankruptcy Code is hostile toward the litigation of disputes over prebankruptcy debts.[33]

Bankruptcy law equally displays hostility toward such litigation from the creditor's perspective. When one considers the effect of discharge and the common pool problem that inheres in the repayment of creditor claims in bankruptcy, the reason for the bankruptcy system's emphasis on expediency and efficiency in processing creditor claims becomes quite clear. Since the law generally absolves a debtor from personal liability on prebankruptcy debts, it necessarily limits creditor recovery to repayment within the bankruptcy process. That process generally ties the amount of repayment to the amount of the debtor's nonexempt prebankruptcy assets, whether or not the source of repayment will be those assets or a portion of the debtor's future income. As the majority of consumer debtors have insufficient assets to re-

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[31]*See* 11 U.S.C. § 524(a)(2) (2006) (providing that bankruptcy discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act to collect, recover or offset any [discharged] debt as a personal liability of the debtor"); *id.* § 541(a)(1) (providing that commencement of a case creates an estate consisting of "all legal or equitable interests of the debtor in property as of the commencement of the case"); *id.* § 522(b) (allowing debtor to exempt certain property from property of the estate); *id.* § 704(a)(1) requiring Chapter 7 trustee to "collect and reduce to money the property of the estate"); *id.* § 726(a) (providing for distribution of property of the estate to unsecured creditors); *id.* § 1306(b) (stating that Chapter 13 debtor remains in possession of all property of the estate "[e]xcept as provided in a confirmed plan or order confirming a plan"); *id.* § 1327(b) (providing that confirmation of Chapter 13 debtor's repayment plan "vests all property of the estate in the debtor"); *id.* § 1322(a)(1) (requiring debtor's repayment plan to "provide for the submission of all or such portion of future earnings as future income of the debtor . . . as is necessary for the execution of the plan").

[32]*Id.* § 362(a)(1); *see also* S. Rep. No. 95-989, at 50 (1978) ("All proceedings are stayed, including arbitration, license revocation, administrative, and judicial proceedings. Proceeding in this sense encompasses civil actions as well, and all proceedings even if they are not before governmental tribunals."), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5836; H.R. Rep. No. 95-595, at 340 (1977) (same), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6297. Bankruptcy Code § 362(a)(1) constitutes part of the Code's automatic stay, which the legislative history describes as "one of the fundamental debtor protections provided by the bankruptcy laws . . . [that] gives the debtor a breathing spell from his creditors." S. Rep. No. 95-989, at 54, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5841; H.R. Rep. No. 95-595, at 340, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97.

[33]This Article uses the term "Bankruptcy Code" to refer to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended primarily at 11 U.S.C. §§ 101-1532).

pay their creditors' claims in full,[34] creditors have little incentive to litigate disputes related to claim repayment. Such litigation entails costs that will effectively reduce the creditor's limited recovery.[35] Accordingly, to facilitate an expeditious and efficient resolution of creditor claims,[36] the Bankruptcy Code (1) expansively defines a claim as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured,"[37] and (2) presumptively deems such a claim to be valid in the absence of an objection.[38] From the creditor's perspective, then, the bankruptcy system's compulsory and collective forum for the repayment of creditor claims has been designed to minimize litigation over such matters.[39]

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[34]The number of annual bankruptcy filings are overwhelmingly consumer bankruptcy cases (i.e., upwards of 90%), and the overwhelming majority of consumer bankruptcy cases are Chapter 7 Cases. *See* U.S. Courts, Bankruptcy Statistics, http://www.uscourts.gov/bnkrpctystats/bankruptcystats.htm (last visited Mar. 25, 2008) (providing statistics for bankruptcy filings by calendar year and fiscal year, among others). Consumer bankruptcy cases filed under Chapter 7 of the Bankruptcy Code tend to be no-asset cases—that is, cases where the debtor does not have any nonexempt assets to be distributed to creditors. *See* U.S. TR. PROGRAM, U.S. DEP'T OF JUSTICE, PRELIMINARY REPORT ON CHAPTER 7 ASSET CASES 1994 TO 2000, at 7 (2001) (noting that, "[h]istorically, the vast majority (about 95 to 97 percent) of chapter 7 cases yield no assets"), *available at* http://www.usdoj.gov/ust/eo/private_trustee/library/chapter07/docs/assetcases/Publicat.pdf.

[35]Moreover, to the extent a dispute would involve a creditor challenging the claim of another, the Bankruptcy Code's *pro rata* distribution scheme would create a further disincentive to litigate such a dispute: While the litigation costs would solely be borne by the challenging creditor, the benefit of the litigation would inure to the benefit of all similarly situated creditors. The possibility exists, of course, that a creditor may be situated to externalize such costs, in which case the disincentive to litigate disputes would not be as strong.

[36]*See* Elizabeth Warren, *Vanishing Trials: The New Age of American Law*, 79 AM. BANKR. L.J. 915, 942 (2005) ("Bankruptcy law is premised on the wholesale resolution of claims without extended trials; surely no part of the legal system is more cognizant of costs and more determined to keep them under control.").

[37]11 U.S.C. § 101(5)(A) (2006).

[38]*Id.* § 502(a); *see also* FED. R. BANKR. P. 3001(f) (providing that properly filed proof of claim is *prima facie* evidence of the validity and amount of the claim). Interestingly, the bankruptcy system's collective, streamlined approach to creditor repayment may create an incentive for consumer debtors to avail themselves of bankruptcy relief instead of seeking alternative avenues of nonbankruptcy relief on a creditor-by-creditor basis. *See* Warren, *supra* note 36, at 935.

[39]It is, of course, impossible to eradicate all claim-based litigation in the bankruptcy system. For example, notwithstanding the Bankruptcy Code's expansive definition of a claim, the Code does impose certain limits regarding the extent to which a claim will be allowed. *See* 11 U.S.C. § 502(b) (2006). But even here, it can be said that the bankruptcy system seeks to minimize litigation costs over such matters. The Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") divide disputes into one of two categories: (1) an adversary proceeding or (2) a contested matter. Adversary proceedings resemble other federal lawsuits insofar as Part VII of the Bankruptcy Rules governing such proceedings virtually incorporates (with occasional modification) the Federal Rules of Civil Procedure. *See, e.g.,* FED. R. BANKR. P. 7003 (FED. R. CIV. P. 3); *id.* 7004(a) (portions of FED. R. CIV. P. 4); *id.* 7012(b) (FED. R. CIV. P. 12(b)-(h)); *id.* 7056 (FED. R. CIV. P. 56). The Bankruptcy Rules classify only a limited number of disputes as adversary proceedings. *See id.* 7001. If a dispute cannot be classified as an adversary proceeding, it is deemed to be a "contested matter" and proceeds according to less complex procedures than an adversary proceeding—including request for relief by motion, *see id.* 9014(a), rather than the filing of a complaint, *see id.*

Against this backdrop of hostility toward claim litigation in bankruptcy there stands an exception in stark contrast—namely, nondischargeability litigation. When Congress designed the fresh start, it determined that the substantive relief provided to debtors should not be so broad as to forgive all prebankruptcy debt. Instead, Congress curtailed the scope of relief to exclude certain types of debts from discharge.[40] The Federal Rules of Bankruptcy Procedure classify a debt dischargeability determination as an adversary proceeding,[41] which is, in essence, a separate lawsuit within the debtor's underlying bankruptcy case.[42] A party who seeks such a determination must initiate a proceeding by complaint.[43] The procedural implementation of Congress's directive that repayment of debt ought to trump forgiveness of debt has thus had the effect of encouraging claim litigation in certain circumstances.

One might be inclined to deem this state of affairs as appropriate for several reasons, despite the fact that claim litigation generally subverts the Bankruptcy Code's efforts to promote a debtor's fresh start and to process creditor claims expeditiously and efficiently. First, because nondischargeability litigation involves establishing the right of certain creditors to be paid notwithstanding the debtor's financial distress, we should not be concerned if such litigation makes inroads into the debtor's fresh start. Such inroads are part and parcel of the balance Congress has struck in favor of creditors with respect to nondischargeable debts. Second, while nondischargeabilty litigation is a type of claim litigation, it is not the sort of claim litigation that the Bankruptcy Code seeks to avoid—namely, litigation regarding the right of claim holders to participate in the distribution of property from the debtor's estate. Nondischargeabilty litigation focuses on the right of a claim holder to seek postbankruptcy payment from the debtor on the basis of his or her personal liability. Such litigation has no bearing on the distributional treatment afforded to the claimant within bankruptcy and thus does not impinge upon the Bankruptcy Code's goals of expediency and efficiency in the claim process.[44]

7003. *See* 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."). Only in limited circumstances do the Bankruptcy Rules treat a claim objection as an adversary proceeding. *See* FED. R. BANKR. P. 3007. Thus, the bankruptcy system seeks to avoid the costs of a full-blown lawsuit when a claim objection has been raised.

[40] *See* 11 U.S.C. § 523(a)(8) (2006).

[41] FED. R. BANKR. P. 7001(6).

[42] *See supra* note 39.

[43] FED. R. BANKR. P. 4007(a). The Bankruptcy Rules provide that only a debtor or a creditor has standing to file such a complaint. *See id.*

[44] *Cf.* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 225 (1986) ("Another key policy in bankruptcy law applies only to debtors that are individuals. That policy, commonly seen as

Concerns over the effect of nondischargeability litigation on a debtor's fresh start, however, cannot be so readily dismissed. Although one might accept the idea that society's interest in the repayment of certain types of debts should outweigh the need for a debtor's fresh start, the costs imposed by such litigation on a debtor can have a pernicious effect under certain conditions. One might imagine that a debtor and a creditor will each have an independent assessment of the nondischargeable status of the debt owed to the creditor. Accordingly, four categories of cases would exist for any conceivable debt: (1) where both parties believe the debt to be nondischargeable, (2) where both parties believe the debt to be dischargeable, (3) where the creditor believes the debt to be dischargeable and the debtor believes the debt to be nondischargeable, and (4) where the creditor believes the debt to be nondischargeable and the debtor believes the debt to be dischargeable. One presumably would not expect to see nondischargeability litigation in any case that falls within one of the first three categories.[45] As such, the concern over litigation encroaching upon a debtor's fresh start would not arise in the first instance.

On the other hand, for a case that falls within the fourth category, one would expect this to be a prime situation for nondischargeability litigation. For those cases where the debtor's assessment is correct (i.e., the debt is dischargeable), the litigation will have a negative impact on the debtor's fresh start that is unintended and unwarranted. The debtor will expend resources in vindicating his or her fresh start at a time when resources are likely to be scarce,[46] thereby undermining the debtor's short-term prospects (and perhaps even long-term prospects) of returning to economic productivity. Even if this scenario will play itself out only in a limited number of cases, it cannot and should not be ignored. Any erosion of the fundamental substantive relief afforded to debtors by the Bankruptcy Code demands close examination so that reformative measures can be prescribed.

Nondischargeability litigation over educational debt in particular merits

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one of discharge, has nothing to do with the rights of claimants inter se or with the notion that bankruptcy exists to solve a common pool problem."). The distributional treatment that will be afforded to a particular claimant within bankruptcy, however, may influence the claimant's cost-benefit analysis in determining whether to pursue nondischargeability litigation.

[45]For example, where the creditor believes the debt to be dischargeable, one would expect the creditor not to pursue nondischargeability litigation, regardless of the debtor's expectations of prevailing on his or her claim of undue hardship. *See* Espinosa v. United Student Aid Funds, Inc., 2008 WL 5158728, at *4 (9th Cir. Dec. 10, 2008) ("The creditor might, for example, believe that the debtor would be able to make a convincing showing of undue hardship, and thus see no point in wasting the debtor's money, and its own, litigating the issue.").

[46]*See* 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").

special attention. While the nondischargeable status of a debt generally depends on the debt having been incurred under a specific set of circumstances,[47] the determination of whether educational debt will be deemed nondischargeable has an added dimension. Beyond the classification issue of whether the debt in question qualifies as the type of educational debt singled out by the Bankruptcy Code for purposes of nondischargeability,[48] such debt will be nondischargeable only if the continued obligation to repay will not impose an undue hardship on the debtor.[49] The discharge of educational debt thus represents a form of conditional discharge pursuant to which the debtor can obtain relief by establishing the condition of undue hardship.[50]

Of particular significance, Congress has not provided a definition of undue hardship,[51] with the result that courts have had to fashion tests that identify when a debtor's circumstances warrant forgiveness of educational debt. We have previously documented in an empirical study of bankruptcy court doctrine applying the undue hardship standard that such doctrine has generally been inconsistent in its treatment of student-loan debtors.[52] If we conceive of the doctrine as serving a signaling function to future litigants regarding the likelihood of relief in undue hardship discharge determinations,[53] the doctrine has the potential to exacerbate the negative effect of nondischargeability litigation on the fresh start of a debtor who seeks relief from educational debt. By signaling that undue hardship discharge litigation is a crapshoot,[54] the doctrine produces noise rather than clarity. The percep-

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[47]*See, e.g.,* 11 U.S.C. § 523(a)(1)(A) (2006) (debt for certain income taxes); *id.* § 523(a)(5) (debt for domestic support obligation); *id.* § 523(a)(9) (debt for death or personal injury caused by debtor's unlawful operation of a motor vehicle, vessel, or aircraft while intoxicated).

[48]The Bankruptcy Code identifies three types of debts that can qualify as educational debt that ultimately could be deemed nondischargeable: (1) a 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," *id.* § 523(a)(8)(A)(i); (2) a debt for "an obligation to repay funds received as an educational benefit, scholarship, or stipend," *id.* § 523(a)(8)(A)(ii); or (3) a debt for "any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual," *id.* § 523(a)(8)(B).

[49]*See id.* § 523(a)(8).

[50]*See* Pardo & Lacey, *supra* note 10, at 418.

[51]*See* 11 U.S.C. § 101 (setting forth definitions applicable throughout the Bankruptcy Code, but failing to provide definition for undue hardship).

[52]*See* Pardo & Lacey, *supra* note 10, at 478-509. A follow-up study concluded that, where the doctrine had been applied consistently, the measure of consistency was less than ideal. *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 (2008).

[53]*See* Bernard Trujillo, *Regulating Bankruptcy Abuse: An Empirical Study of Consumer Exemptions Cases*, 3 J. EMPIRICAL LEGAL STUD. 561, 574 (2006) (noting in an empirical study of bankruptcy court doctrine in consumer exemptions proceedings over a twenty-year period that "patterns [across a large number of cases] tell us not only what particular judges accomplished in specific cases, but also what courts have signaled to future litigants about . . . debtors' chances of success" (footnote omitted)).

[54]*See supra* text accompanying note 22.

tion that outcomes are highly uncertain under the fact-intensive decision standard of undue hardship may produce, in turn, a climate that encourages parties to engage in an adversary proceeding. With tens of thousands of dollars of student loans routinely at stake, and with the odds of a finding of undue hardship close to even (at least according to the data derived from our prior study of bankruptcy court doctrine),[55] both debtors and creditors have much to gain and little to lose. If the debtor does not litigate, he or she will be haunted by the specter of a crushing debt load and creditor collection efforts for years and years; and if the creditor does not litigate, it will likely face an uncooperative debtor who refuses to pay based on the belief that the debt ought to be considered discharged. Both parties will want a resolution to what otherwise could be a postbankruptcy impasse, and they will attain it through litigation.

On this account, consider the problems inherent in a bankruptcy system that necessitates litigation as the path for relief from educational debt. Those debtors who are in the most dire need of relief—that is, those for whom repayment will certainly impose an undue hardship—will likely lack the resources to pursue such relief in the first instance.[56] One would hope that, in such instances, the parties would consensually agree, without the initiation of an adversary proceeding, that the debtor need not repay his or her student loans. We are not sanguine, though, that hope mirrors reality here. As debtors with student loans are likely to owe debts to large institutional creditors that are well funded, legally sophisticated, and repeat players (e.g., the federal government), the power imbalance between such adversaries creates a disincentive for the powerful to acquiesce.[57] Furthermore, the inconsistency of the doctrine gives such creditors room to maneuver and argue that a debtor should not prevail in his or her claim of undue hardship. Perhaps, then, some of the most sympathetic cases of undue hardship fail to wend their way through the court system. 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

[55]*See* Pardo & Lacey, *supra* note 10, at 479 (observing that "[n]early half (45%) of the discharge determinations analyzed concluded that failing to discharge a debtor's student loans would impose an undue hardship on the debtor").

[56]*See* 1 NAT'L BANKR. REV. COMM'N, *supra* note 20, at 212 ("It hardly is surprising that some courts see few requests for hardship discharges of educational loans given the pitfalls of the undue hardship standard. The borrowers most likely to prevail in many courts are those with the least possibility of being able to litigate the question. The risk of losing is also high. Failure to meet the burden of proof leaves the debtor with student loan debts and substantial litigation expenses." (footnote omitted)).

[57]*Cf.* Espinosa v. United Student Aid Funds, Inc., 2008 WL 5158728, at *10 (9th Cir. Dec. 10, 2008) ("We find it highly unlikely that a creditor whose business it is to administer student loans will be misled by the customary bankruptcy procedures or somehow be bamboozled into giving up its rights by crafty student debtors.").

a potential source of repayment. In such cases, creditors may be further encouraged to litigate. Worse yet, some creditors may view undue hardship discharge litigation as a war that can be won by attrition. With a greater advantage in resources and the ability to externalize the costs of such litigation, creditors can inflict upon their debtor adversaries death by a thousand cuts. They can push the litigation process to its limits and hope that, at some point along the way, the debtor will capitulate.[58] If the debtor does not, then the creditor will willingly take its chances at trial where, over time, the deck is not likely to be stacked in either side's favor.

We have painted a bleak portrait of what undue hardship discharge litigation may look like and have done so simply based on the knowledge that significant distributional inequalities exist between debtors and creditors in bankruptcy. We are not, however, content to work at this level of generality and abstraction. Instead, we prefer a more informed evaluation based on a substantive set of data. To that end, we have conducted this empirical study.

B. The Universe of Student-Loan Debtors

In order to place our empirical study in its proper context, it is first necessary to hypothesize what the universe of student-loan debtors may look like. We can begin by classifying student-loan debtors into two broad categories: (1) student-loan debtors who have not filed for bankruptcy (nonbankruptcy student-loan debtors) and (2) student-loan debtors who have filed for bankruptcy (bankruptcy student-loan debtors). The default rate of student-loan debtors as well as data regarding the number of bankruptcy student-loan debtors within the general bankruptcy population suggest that nonbankruptcy student-loan debtors likely constitute the bulk of the universe of student-loan debtors. We consider each of these in turn.

First, notwithstanding the immense volume of student loans generated annually,[59] the incidence of default on student loans generally is quite low.[60] We might infer that the overwhelming majority of student-loan debtors do not default because they do not suffer from financial distress that prevents them from making timely payment on their loans. In the absence of financial distress, one is not likely to file for bankruptcy. Accordingly, only a small percentage of student-loan debtors are prime candidates to file for bank-

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[58] *See* 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.").

[59] *See* text accompanying *supra* note 1.

[60] Over the past several years, the national student loan cohort default rate has been at historic lows: By way of example, the default rate for the 2004 fiscal year was 5.1 percent and dropped to 4.6 percent for the 2005 fiscal year. Press Release, U.S. Dep't of Educ., Student Loan Defaults Remain Low (Sept. 10, 2007), *available at* http://www.ed.gov/news/pressreleases/2007/09/09102007.html.

ruptcy—that is, those student-loan debtors who have defaulted as a result of financial distress.

Second, it could very well be that some nondefaulting student-loan debtors suffer financial distress but do not default because they prioritize repayment of their student loans over other debts. While such individuals could be likely candidates for bankruptcy, we believe that they do not constitute a significant percentage of the universe of student-loan debtors. If they did, and if one further assumes that the majority of defaulting student-loan debtors seek bankruptcy relief, one would expect bankruptcy student-loan debtors to constitute a greater percentage of the general bankruptcy population than that which has previously been documented. The Consumer Bankruptcy Project I, led by Professors Teresa Sullivan, Elizabeth Warren, and Jay Westbrook, studied 1,529 consumer bankruptcy cases filed in 1981 in ten judicial districts across three different states.[61] After excluding cases with extreme values on assets, total debt, or income, the Project documented that approximately 6.5% of the cases involved debtors with student loans.[62] Unfortunately, there is a dearth of recent data documenting the number of bankruptcy student-loan debtors within the general bankruptcy population. Nonetheless, if we assume that the Project's figures have held relatively constant over time, especially in light of the historically low default rate by student-loan debtors in recent years,[63] it seems reasonable to conclude that nonbankruptcy student-loan debtors predominate the general population of student-loan debtors.

It becomes evident, then, that a study of bankruptcy student-loan debtors, such as ours, initially begins with a narrow focus on a subpopulation. That focus becomes even narrower if one assumes that not all bankruptcy student-loan debtors seek relief in bankruptcy from their educational debt. Put another way, not every bankruptcy student-loan debtor makes a claim of undue hardship in the context of an adversary proceeding, which is the only way to obtain a discharge of educational debt in bankruptcy. Thus, our study concerns itself with a very specific subpopulation: bankruptcy student-loan debtors who litigate over the dischargeability of their educational debt. We illustrate the various groups we have just described in Figure 1.

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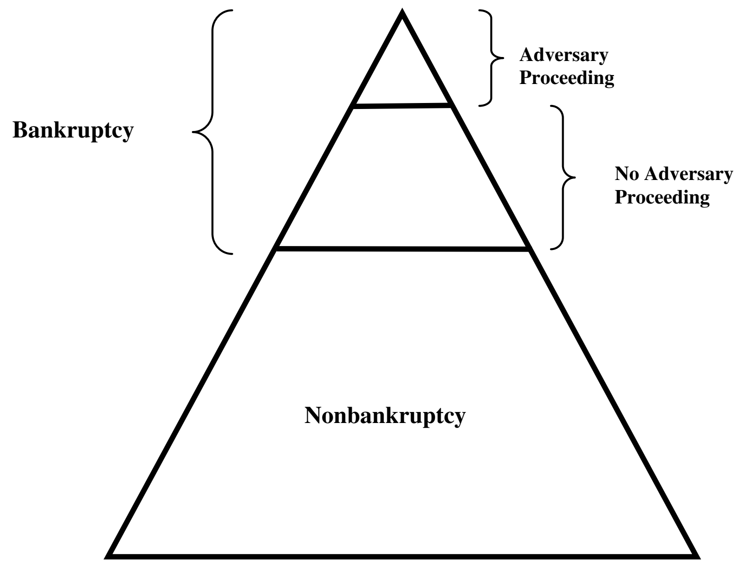
[61]*See* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS 17-20 (reprint ed. 1999).

[62]Of the 1202 cases analyzed for purposes of identifying debts owed to "reluctant creditors," which Professors Sullivan, Warren, and Westbrook define as "completely involuntary creditors . . . as well as creditors who are sometimes forced by circumstance or government regulation to extend credit," 78 cases involved debtors with student loans. *See id.* at 293, 295 tbl.16.1

[63]*See supra* note 60.

Figure 1
The Universe of Student-Loan Debtors



In addition to focusing on a very specific subgroup, it must be kept in mind that our study further confines itself to examining the experience of litigants in a single federal judicial district during a half-decade period. In light of this, we readily acknowledge that our findings cannot be generalized to the experience of litigants in the same district during a different time period or to the experience of litigants in other districts regardless of the time period. Having made that disclaimer, we would like to emphasize the value of our findings. By using empirical analysis to reveal past patterns that have been associated with substantive outcome, we hope to generate a better understanding of the effect that the litigation process has had upon a particular set of its participants. The account that emerges will hopefully encourage others to test and reconsider certain assumptions that have been made regarding the undue hardship discharge and, perhaps most importantly, to reevaluate the desirability of changing the law to make educational debt automatically dischargeable.

C. Analyzing Undue Hardship in the Ninth Circuit

In order to set the stage for this study's findings, we discuss the doctrinal framework that federal courts in the Ninth Circuit have adopted to implement the undue hardship standard. It is within the shadow of this set of formal legal rules that the adversary proceedings in our study have been litigated.

Without a definition of undue hardship in the Bankruptcy Code, courts have filled this statutory interstice with a variety of judicially created rules. The dominant framework that has emerged for analyzing a claim of undue hardship has been the test articulated by the U.S. Court of Appeals for the Second Circuit in *Brunner v. New York State Higher Education Services Corp.*,[64] which eight other federal regional circuits have formally adopted.[65] In order to prevail in a claim of undue hardship, a debtor must 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 repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[66]

The U.S. Court of Appeals for the Ninth Circuit (the Ninth Circuit) formally adopted the *Brunner* test in 1998.[67]

A debtor bears the burden of proof to establish each element of the *Brunner* test by a preponderance of the evidence.[68] Failure to do so with respect to any element results in a finding of nondischargeability.[69] Notably, the Ninth Circuit has held that a court may grant a debtor a partial discharge provided that the debtor satisfies the burden of proof with respect to a portion of the debt.[70] The significance of this should not be overlooked. Because partial discharge creates the potential for asymmetric returns, undue hardship discharge litigation in the Ninth Circuit may look quite different than in circuits that do not allow partial discharge and thus cast the issue of relief as an all-or-nothing proposition.

Under which factual circumstances will a debtor be deemed to have satisfied each prong of the *Brunner* test and therefore have proved that nondischarge of his or her student loans will impose an undue hardship? As courts

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[64]831 F.2d 395 (2d Cir. 1987) (per curiam).

[65]Pardo, *supra* note 52, at 514 & n.34.

[66]831 F.2d at 396.

[67]United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1112 (9th Cir. 1998).

[68]Rifino v. United States (*In re* Rifino), 245 F.3d 1083, 1087-88 (9th Cir. 2001); Hinkle v. Wheaton College (*In re* Hinkle), 200 B.R. 690, 692 (Bankr. W.D. Wash. 1996); Raymond v. Nw. Educ. Loan Ass'n (*In re* Raymond), 169 B.R. 67, 70 (Bankr. W.D. Wash. 1994). It should be noted that the burden of proof initially rests upon the creditor to establish that the debt owed to it qualifies as the type of educational debt that the Bankruptcy Code identifies as conditionally dischargeable. *Raymond*, 169 B.R. at 69. Once this showing has been made, the burden of proof shifts to the debtor to establish his or her claim of undue hardship. *Id.*

[69]*Rifino*, 245 F.3d at 1088; United States Aid Funds, Inc. v. Nascimento (*In re* Nascimento), 241 B.R. 440, 445 (B.A.P. 9th Cir. 1999).

[70]Saxman v. Educ. Credit Mgmt. Corp. (*In re* Saxman), 325 F.3d 1168, 1175 (9th Cir. 2003).

in the Ninth Circuit have addressed this question over time, the constituent elements of the *Brunner* test have become encrusted with many doctrinal pronouncements. We outline here some of the most important ones.

1. *Current Inability to Repay*

We begin by considering the first prong of the *Brunner* test, which requires the debtor to establish that, on the basis of current income and expenses, repayment of the educational debt will preclude the debtor from maintaining a minimal standard of living.[71] Put another way, the debtor must establish a current inability to repay his or her student loans by reference to a certain threshold quality of life—namely, a minimal standard of living. The U.S. Bankruptcy Appellate Panel of the Ninth Circuit (the Ninth Circuit BAP) has framed this inquiry as a function of whether requiring of the debtor an income increase or expense reduction would be unconscionable.[72] It has indicated that the level of impermissible sacrifice by a debtor that would equate to unconscionability falls somewhere in between "temporary financial adversity" and "utter hopelessness."[73] While the Ninth Circuit BAP and the U.S. Bankruptcy Court for the Western District of Washington (the Western District of Washington) have refused to interpret the concept of a minimal standard of living as requiring a debtor to live at or below poverty,[74] the Ninth Circuit BAP has made it clear that discharge will not be granted solely because the debtor may have to undertake "major personal and financial sacrifices," including abandoning a middle-class standard of living.[75]

All of this begs the question of the proper methodology by which a court should determine whether a debtor has satisfied the first prong of the *Brunner* test. The basic approach tacitly approved by the Ninth Circuit envisions calculating a debtor's monthly disposable income by (1) identifying the debtor's monthly reasonable and necessary expenses and (2) deducting those expenses from the debtor's monthly income.[76] If the calculation shows a defi-

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[71]*See supra* text accompanying note 66.

[72]Pa. Higher Educ. Assistance Agency v. Birrane (*In re* Birrane), 287 B.R. 490, 495 (B.A.P. 9th Cir. 2002); *Nascimento*, 241 B.R. at 445.

[73]*Birrane*, 287 B.R. at 495; *Nascimento*, 241 B.R. at 445. In this regard, the Ninth Circuit BAP has been more charitable than courts that have framed a debtor's evidentiary burden as one requiring the debtor to demonstrate a "certainty of hopelessness." *See* Pardo & Lacey, *supra* note 10, at 492 n.363.

[74]*See* Educ. Credit Mgmt. Corp. v. Howe (*In re* Howe), 319 B.R. 886, 889 (B.A.P. 9th Cir. 2005); *Nascimento*, 241 B.R. at 445 n.4; Hinkle v. Wheaton College (*In re* Hinkle), 200 B.R. 690, 693 (Bankr. W.D. Wash. 1996). The Ninth Circuit BAP has impliedly suggested, however, that the Federal Poverty Guidelines may serve as a useful reference point. *See Nascimento*, 241 B.R. at 445 n.4 ("Although we do not hold that a person must fall below the Poverty Guidelines to discharge a student loan, we note that the Debtor's income is four times the amount required to obtain assistance from various federal programs.").

[75]*See Howe*, 319 B.R. at 889-90.

[76]*See* Educ. Credit Mgmt. Corp. v. Mason (*In re* Mason), 464 F.3d 878, 882 (9th Cir. 2006); United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1112-13 (9th Cir. 1998).

cit, the debtor will have established an inability to maintain a minimal standard of living in the absence of an undue hardship discharge.[77]

At first blush, the disposable income calculus appears to be quite formulaic and rigid. A closer look, however, suggests that it is actually quite fluid. In ascertaining a debtor's current ability to repay his or her student loans, the Ninth Circuit has stressed that courts retain discretion over the methodological approach that is implemented.[78] For example, courts need not be confined to a snapshot in time when computing a debtor's current disposable income, but rather can refer to an historical average of the debtor's income and expenses when fluctuations have occurred in the past.[79] Furthermore, it may be the case that courts not only have discretion in analyzing whether a debtor can maintain a minimal standard of living if required to repay his or her student loans, but in fact must exercise that discretion. The Ninth Circuit BAP seems to have espoused this view in holding that a bankruptcy court cannot solely rely on the IRS Collection Financial Standards as a measure of the expenses required by the debtor to maintain a minimal standard of living, but instead must conduct an individualized analysis.[80]

It seems fair to say that the Ninth Circuit doctrine interpreting the first prong of the *Brunner* test provides little guidance to litigants. To be fair, the doctrine does explicate that a debtor need not be mired in poverty to satisfy the burden of proof and that a lack of disposable income will enable a debtor to plead that he or she cannot maintain a minimal standard if required to repay his or her student loans. Beyond this, however, the doctrine fails to set forth even the rough contours of how to engage in a substantive evaluation of income and expenses, which are the sole and dispositive components of the disposable income formula. Instead, the doctrine merely confirms that courts have free rein to infuse subjectivity into what should be a straightforward financial calculation.[81] The result may be an inconsistent application of the doctrine.[82]

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[77]*See Pena*, 155 F.3d at 1113.

[78]*Id.* The Western District of Washington has echoed this view in discussing a court's discretion to scrutinize the debtor's expenses. *See Hinkle*, 200 B.R. at 693 ("This Court concludes that it is left to its discretion in assessing the debtor's budget, to determine whether it contains unnecessary or unreasonably high expenses.").

[79]*See Pena*, 115 F.3d at 1113 ("[A]lthough the *Brunner* test looks to the debtor's 'current' income and expenses, where the evidence suggests that the debtor's income or expenses tend to fluctuate, it is not inappropriate to average figures over a reasonable period of time.").

[80]*See Howe*, 319 B.R. at 892-93, 894.

[81]*See In re* Packham, 126 B.R. 603, 609 (Bankr. D. Utah 1991) ("'[A]n inquiry into a debtor's "reasonably necessary" expenses is unavoidably a judgment of values and lifestyles and close questions emerge.' While the court attempts to avoid superimposing its values for those of the debtors', certain sections of the Code require it to make decisions that unavoidably are made based on its sense of equity of what is right and wrong." (citation omitted) (quoting *In re* Sutliff, 79 B.R. 151, 156 (Bankr. N.D.N.Y. 1987))).

[82]In our prior empirical study of bankruptcy court doctrine interpreting the undue hardship standard,

2. *Future Inability to Repay*

Upon satisfying the first element of the *Brunner* test, a debtor must then show that, by virtue of additional circumstances, the inability to maintain a minimal standard of living will likely persist for a significant portion of the repayment period of the student loans.[83] In other words, the debtor must establish a future inability to repay the student loans. The Ninth Circuit has described this requirement as instrumental in effectuating the congressional intent underlying the Bankruptcy Code's undue hardship discharge provision—namely, that of restricting the scope of relief available to student-loan debtors.[84] In so doing, the Ninth Circuit has signaled to undue hardship discharge litigants that debtors will face an uphill battle in establishing their claims of undue hardship.[85] We think this to be quite unfortunate given that the historical record suggests the *absence* of unequivocal congressional intent.[86] Nonetheless, the reality appears to be that the Ninth Circuit has given a directive that debtors be held to an exacting standard when establishing a future inability to repay their student loans.

Assessing a student-loan debtor's claim of future inability to repay is, at bottom, a predictive exercise. A court must be willing to make the inference that the additional circumstances plead by the debtor will preclude his or her state of affairs from ameliorating—that is, that nothing in the future will reverse the current inability to repay.[87] Well aware that crystal-ball gazing may inherently be undisciplined, the Ninth Circuit has attempted to impart some measure of consistency in the future inability inquiry by setting forth a list of nonexhaustive "objective factors" that it assumes will be good predictors of such inability.[88] Such factors include: (1) serious mental or physical disability of the debtor or the debtor's dependents; (2) the debtor's obligation to care for dependents; (3) lack of or severely limited education; (4)

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we reported that, "[w]hile higher levels of both household income and disposable household income certainly seemed to predispose a court to determine that a debtor did *not* have a current inability to repay, the odds [were] essentially even for the most financially comfortable debtors." Pardo & Lacey, *supra* note 10, at 502. We concluded that the doctrine failed to determine a debtor's current inability to repay solely on the basis of financial considerations. *Id.*

[83]*See supra* text accompanying note 66.

[84]*See* Rifino v. United States (*In re* Rifino), 245 F.3d 1083, 1089 (9th Cir. 2001) (stating that second prong of *Brunner* test is "intended to effect the clear congressional intent exhibited in § 523(a)(8) to make the discharge of student loans more difficult than that of other non-excepted debt").

[85]The Ninth Circuit has created a formal rule to this effect by establishing a presumption against a debtor who has established a current inability to repay—specifically, that the debtor's income will increase over time to a level permitting repayment while maintaining a minimal standard of living. *See* Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 946 (9th Cir. 2006).

[86]*See* Pardo & Lacey, *supra* note 10, at 419-28.

[87]*Nys*, 446 F.3d at 946 (noting that additional circumstances plead by debtor "need be exceptional only in the sense that they demonstrate insurmountable barriers to the debtor's financial recovery and ability to pay").

[88]*Id.*

poor quality of education; (5) lack of usable or marketable job skills; (6) underemployment; (7) maximized income potential in the debtor's chosen educational field and no other lucrative job skills; (8) a limited number of years remaining in the debtor's work life to allow repayment; (9) age or other factors that prevent retraining or relocation that would facilitate repayment; (10) lack of assets to repay the loans (whether exempt or not); (11) potentially increasing expenses that outweigh potential appreciation in the value of the debtor's assets and/or likely increases in the debtor's income; and (12) the lack of better financial options elsewhere.[89]

While the Ninth Circuit should be applauded for attempting to bring some semblance of order to analysis of the second prong of the *Brunner* test, we must admit that we are not optimistic that the doctrine will achieve its intended result. A multifactor test within a multifactor test does not strike us as a realistic way to accomplish consistent results. If anything, it will likely create more disorder.[90]

3. *Good Faith Effort to Repay*

If the debtor has established both a current and future inability to repay, then the debtor will prevail upon a final showing that he or she made a good faith effort to repay the student loans.[91] Yet again, the Ninth Circuit has filtered its analysis through the lens of congressional intent. Perceiving the undue hardship discharge provision as having been designed to prevent abuse of the bankruptcy system by student-loan debtors,[92] the Ninth Circuit has identified the following class of debtors as being worthy of relief: debtors who (1) have acted responsibly toward their creditors and (2) are not responsible for having created the hardship that is the basis of the debtor's claim for relief. As indicia of the former attribute, courts will consider the debtor's payment history and efforts to negotiate a repayment plan.[93] As indicia of the latter attribute, courts will look to the debtor's efforts to obtain employment, maximize income, and minimize expenses.[94] In this regard, the good faith prong incorporates the concept of unclean hands.[95] At bottom, the good faith inquiry scrutinizes a student-loan debtor's prebankruptcy conduct and asks whether that conduct should make him or her ineligible for relief.

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[89] *Id.*

[90] In our prior empirical study of undue hardship discharge doctrine, we found few statistically significant differences between debtors deemed to have a future ability to repay and those deemed to have a future inability to repay. *See* Pardo & Lacey, *supra* note 10, at 503-07.

[91] *See supra* text accompanying note 66.

[92] *See* United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1111 (9th Cir. 1998).

[93] Pa. Higher Educ. Assistance Agency v. Birrane (*In re* Birrane), 287 B.R. 490, 499 (B.A.P. 9th Cir. 2002)

[94] Educ. Credit Mgmt. Corp. v. Mason (*In re* Mason), 464 F.3d 878, 884 (9th Cir. 2006).

[95] *Cf. Birrane*, 287 B.R. at 500 ("The debtor may not willfully and negligently cause his own default, but rather his condition must result from factors beyond his reasonable control.").

As we previously stated, the legislative history does not provide any clear-cut evidence regarding Congress's intent behind the undue hardship discharge provision.[96] Unfortunately, this means that, without proper justification, courts are likely predisposed to apply the undue hardship standard from a less forgiving stance.[97] Given the inherent subjectivity in an amorphous standard such as good faith, any efforts to clarify its meaning will probably create mischief rather than produce clarity.[98]

D. Study Design and Descriptive Statistics

1. *Study Design*

Before we present statistics describing the adversary proceedings in our dataset, a description is warranted of the more salient characteristics of the study's location, the Western District of Washington, and the manner in which we selected adversary proceedings for analysis. In many respects relevant to this type of study, the Western District of Washington (the Western District), one of ninety-four federal judicial districts in the United States, appears to be a microcosm of the rest of the nation. To illustrate this point, we have constructed a profile for the Western District using data from (1) the Census 2000 Demographic Profile,[99] (2) estimates from the 2006 American Community Survey,[100] and (3) bankruptcy filing statistics from the Administrative Office of the U.S. Courts.[101]

The Western District consists of 19 counties, both rural and metropolitan.[102] As of 2006, it is estimated that its population of persons age 18 and over was 3,822,780. Nearly three-quarters (73.4%) of that population resided in four counties—King, Pierce, Snohomish, and Clark Counties—with the remainder scattered over fifteen counties. As previously mentioned, our study consists of adversary proceedings that were commenced during the

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[96] *See supra* note 86 and accompanying text.

[97] For a critique of policy arguments in favor of using the undue hardship discharge provision to police abuse of the bankruptcy system by student-loan debtors, see Pardo & Lacey, *supra* note 10, at 429-31. For the argument that the Bankruptcy Code does not provide a statutory basis for defining the undue hardship standard partly as a function of a debtor's prebankruptcy conduct, see *id.* at 514-19.

[98] In our prior empirical study of undue hardship discharge doctrine, we found few statistically significant predictors of a debtor's good faith efforts to repay. *See id.* at 508-09. In other words, the doctrine inconsistently treated debtors who were, for the most part, similarly situated.

[99] *See* Census 2000: Demographic Profiles, http://www.census.gov/Press-Release/www/2002/demoprofiles.html (last visited July 29, 2008).

[100] *See* American Community Survey (ACS), http://www.census.gov/acs/www/ (last visited July 29, 2008).

[101] *See* Bankruptcy Statistics, http://www.uscourts.gov/bnkrpctystats/bankruptcystats.htm (last visited July 29, 2008).

[102] Those counties are Clallam, Clark, Cowlitz, Grays Harbor, Island, Jefferson, King, Kitsap, Lewis, Mason, Pacific, Pierce, San Juan, Skagit, Skamania, Snohomish, Thurston, Wahkiakum, and Whatcom Counties. 28 U.S.C. § 128(b) (2000).

five-year period beginning on January 1, 2002 and ending on December 31, 2006. For this reason, we refer to figures from both calendar years 2000 and 2006 in describing the rest of the Western District's profile.

First, we consider the level of higher education attained by the population of persons age 25 and over. Of that population nationwide, 24.4% in 2000 and 27.7% in 2006 attained a bachelor's degree or higher (i.e., a master's, professional, or doctorate degree). By comparison, for the cohort within the Western District, 22.5% in 2000 and 24.9% in 2006 had that level of educational attainment.

Second, we consider levels of undergraduate student debt. In its study of undergraduate student-debt loads of graduates in 2006 from four-year colleges and universities, the Project on Student Debt found that the national average was $19,646.[103] For graduates who attended four-year colleges and universities in Washington State, the proportion graduating with debt in 2006 was 59%, which ranked 22nd out of the 46 states reporting sufficient data to cover at least 30% of undergraduate students in the state.[104] The average debt load for such a graduate was $18,040.[105]

Finally, we consider the bankruptcy filing rate for consumer debtors in the adult population (18 and over). Nationally, 6 out of every 1,000 adults filed for bankruptcy relief in 2000, in comparison to 7 out of every 1,000 adults in the Western District during the same year.[106] Six years later, 3 out of every 1,000 adults filed for bankruptcy nationwide, in comparison to 2 out of every 1,000 adults in the Western District.[107] On the basis of this profile,

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[103]Project on Student Debt, Student Debt and the Class of 2006, at 3 (2007), *available at* http://projectonstudentdebt.org/files/pub/State_by_State_report_FINAL.pdf.

[104]Project on Student Debt: Washington, http://projectonstudentdebt.org/state_by_state-view.php?area=WA (last visited Apr. 14, 2007).

[105]*Id.*

[106]In 2000, there were 1,217,972 nonbusiness bankruptcy filings in the nation, and the adult population nationally was 209,128,094. By comparison, there were 22,420 nonbusiness bankruptcy filings in the Western District of Washington, and the adult population in the District was 3,438,668.

[107]In 2006, there were 597,965 nonbusiness bankruptcy filings in the nation, and the adult population nationally was 225,633,342. By comparison, there were 8,171 bankruptcy filings in the Western District of Washington, and the adult population in the District was 3,822,780. The dramatic downturn in bankruptcy filing rates that occurred in 2006 has been attributed to the surge of filings that occurred prior to October 17, 2005, the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23, which has had the effect of making it more difficult, at least administratively and perhaps substantively, for individuals to file for bankruptcy. *See* Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 487-88 & 488 n.77 (2007); *see also* Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A. E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Did Consumer Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 350 (2008) ("[T]he number of families seeking bankruptcy protection dropped abruptly after adoption of [BAPCPA]. Some of this shift can be explained by a sharp increase in the number of people filing shortly before the amendments went into effect—a sudden rush to the courthouse of 'transition filings' that might have drained the pool of troubled families that otherwise would have filed over a longer time horizon." (footnote omitted)).

we witness that Washingtonians from the Western District have attained a level of higher education comparable to the national average, are likely to have a level of undergraduate student debt comparable to the national average, and have filed for bankruptcy at a rate comparable to the national average.

The Western District of Washington has two U.S. Bankruptcy Courthouses, one in Seattle and the other in Tacoma. The District has five bankruptcy judges,[108] three of whom preside over cases in Seattle, one of whom presides over cases in Tacoma, and one of whom presides over cases in both Seattle and Tacoma. Individual debtors who reside in Clallam, Island, Jefferson, King, Kitsap, San Juan, Skagit, Snohomish, and Whatcom Counties must file their cases in Seattle, while debtors from the other counties in the Western District must file their cases in Tacoma.[109] Once a case has been filed, the clerk of the court randomly assigns it to one of the respective judges of the court, and adversary proceedings are assigned to the judge to whom the underlying case has already been assigned.[110]

Using the Public Access to Court Electronic Records (PACER) system for the U.S. Bankruptcy Court for the Western District of Washington,[111] which makes individual, case-level data for that court electronically available, we conducted a search for all adversary proceedings (whether relating to undue hardship discharge or not) that were commenced during the five-year period beginning on January 1, 2002 and ending on December 31, 2006. During that time period, there were 4,664 proceedings filed. From this list of proceedings, we individually identified those that involved a complaint seeking a dischargeability determination regarding educational debt, of which there were only 135. Accordingly, over a half-decade period, only 2.9% of

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[108]*See* 28 U.S.C. § 152(a)(2) (2000).

[109]*See* Amended Local Bankruptcy Rule for the Western District of Washington 1072-1(a), *available at* http://www.wawb.uscourts.gov/read_file.php?file=1525&id=510. The local rule for case filing did not change throughout the time period covered in this study: January 1, 2002 through December 31, 2006. *See* http://www.wawb.uscourts.gov/read_file.php?file=1529&id=511 (last visited Jan. 13, 2009) (redlined document comparing Local Rules of Bankruptcy Procedure for the Western District of Washington (effective April 1, 1999) with the Amended Local Bankruptcy Rules for the Western District of Washington (effective July 1, 2008)).

[110]Amended Local Bankruptcy Rule for the Western District of Washington 1073-1, *available at* http://www.wawb.uscourts.gov/read_file.php?file=1525&id=510. The local rule for assignment of cases did not change throughout the time period covered in this study: January 1, 2002 through December 31, 2006. *See* http://www.wawb.uscourts.gov/read_file.php?file=1529&id=511 (last visited Jan. 13, 2009) (redlined document comparing Local Rules of Bankruptcy Procedure for the Western District of Washington (effective April 1, 1999) with the Amended Local Bankruptcy Rules for the Western District of Washington (effective July 1, 2008)).

[111]The PACER system for the U.S. Bankruptcy Court for the Western District of Washington can be accessed at https://ecf.wawb.uscourts.gov/cgi-bin/login.pl.

the adversary proceedings initiated in the Western District of Washington involved the undue hardship discharge.

Once we identified the relevant population of undue hardship adversary proceedings, we then began coding the data from those proceedings that had been terminated.[112] As of August 2007, when we finished coding, 124 of 135 proceedings (approximately 92%) had terminated. For those debtors who sought to discharge student loans owed to multiple creditors, the overwhelming majority filed a single adversary proceeding. For the few debtors who filed individual adversary proceedings against each creditor, we consolidated those multiple proceedings into a single observation, provided that the proceedings were commenced within a month of each other. We also excluded a couple of "skeleton proceedings" that contained very little information that could be coded.[113] By virtue of the foregoing, we reduced the 124 proceedings to 115 proceedings. These 115 proceedings constitute the study's sample from which we derive our findings.

2. *Descriptive Statistics*

a. The Debtors

We begin by presenting some of the demographic and financial characteristics of the student-loan debtors in our study. While it is our view that the financial characteristics best indicate the magnitude of hardship faced by the debtors in our study, we also believe that some of the demographic characteristics serve as disquieting indicia of an inability repay and thus are relevant to considering the average claim of undue hardship. As we set forth the demographic characteristics of the student-loan debtors in our study, it should be noted that the Bankruptcy Code permits married couples to file for bankruptcy relief jointly.[114] For such joint cases, the possibility exists that both debtors will have student loans that they seek to discharge. This occasion arose nine times in our study. As a result, the 115 adversary proceedings that are the focus of our analysis involve 124 student-loan debtors who sought an undue hardship discharge. The figures we report below, whether percentages or averages, are based on the 115 adversary proceeding observa-

[112]For each adversary proceeding, we primarily derive our data from the docket sheet for the proceeding, the complaint filed to initiate the proceeding, any answer filed in the proceeding, any motions filed by the parties to the proceeding, any orders entered by the court in the proceeding, and the petition and schedules filed by the debtor in his or her underlying bankruptcy case. Research assistants Bryan Case, Amanda Spencer, and Meredith Wyman independently coded each adversary proceeding pursuant to written coding protocols and entered the data into specially designed Microsoft Excel spreadsheets. In order to ensure reasonable accuracy of the coded data, Professor Pardo and the research assistants met as a group on a weekly basis to review the results from the initial coding. Whenever a discrepancy occurred in those results, the group reviewed the case file documents to resolve the inconsistency.

[113]We derive the term "skeleton proceedings" from SULLIVAN ET AL., *supra* note 61, at 42 n.11.

[114]11 U.S.C. § 302(a) (2006).

tions. For the nine proceedings involving joint debtors who both sought to discharge student loans, we combine the financial data (e.g., income, expenses, educational debt) for both debtors and report a single figure; we average the age data for both debtors and report a single figure; and we report a positive response for dichotomous categorical data (e.g., employment status) whenever one of the two debtors exhibited the trait being coded. The one exception to the last rule is that we report the gender profile for the debtors based on the 124 debtor observations rather than the 115 adversary proceeding observations.

Table 1 sets forth the demographic characteristics for the "typical" student-loan debtor measured as of or after the date that the debtor filed the adversary proceeding. We define the "typical" debtor to be one who exhibited (1) the most frequently occurring values for categorical data characteristics and (2) the average value for interval data characteristics.

Table 1
The "Typical" Student-Loan Debtor: Demographic Characteristics

Demographic Characteristic	Mode	Missing Values
Gender	Female (58%)	0 of 124
Marital Status	Unmarried[115] (80%)	0 of 115
Dependents	None (62%)	0 of 115
Medical Condition Suffered by Debtor or Debtor's Dependent	Yes (55%)	0 of 115
Employment Status	Employed (58%)	12 of 115
Educational Attainment	Advanced Degree (58%)	70 of 115
Demographic Characteristic	**Mean**	**Missing Values**
Age	45 years old	45 of 115

Some of these characteristics may ultimately translate into an inability to

[115]The "unmarried" classification includes debtors who were either divorced ($n = 32$), separated ($n = 8$), or widowed ($n = 1$). Three of the adversary proceedings did not have sufficiently detailed information to code for the debtor's marital status. All three of those proceedings involved singly-filed cases under Chapter 13 of the Bankruptcy Code. For the 10 adversary proceedings that arose in singly-filed Chapter 13 cases and for which the debtor's marital status could be ascertained, only one of those proceedings involved a married debtor. On this basis, it seems reasonable to conclude that the debtors in the three proceedings for which we were unable to ascertain marital status were very likely unmarried. Accordingly, for purposes of Table 1, we coded these three debtors as unmarried.

repay a student loan. First, consider that the majority of debtors in our study (58%) were women. It has been documented that women may face financial pressures either unexperienced by or experienced less than men, such as wage discrimination.[116] For this reason, educational debt may have a disproportionate impact on women. Second, the majority of debtors in our study (55%) either suffered from a medical condition or had a dependent who suffered from a medical condition. For a debtor who suffers from a medical condition, that condition may interfere with a debtor's ability to work and thus generate income. In fact, of the adversary proceedings with a debtor who suffered from a medical condition, approximately 81% of those proceedings involved a work-limiting medical condition (i.e., the medical condition interfered with the debtor's ability to obtain employment and/or perform at the place of employment).[117] Moreover, debtors may face the financial burden of uninsured medical costs if they suffer from a medical condition themselves or if they have good health but are responsible for a household member who suffers from a medical condition. Given that uninsured medical costs have been documented to be one of the leading causes of bankruptcy filings,[118] it very well could be the case that some of the student-loan debtors in our study may have filed for bankruptcy partly in response to a medical calamity that ultimately manifested itself in financial misfortune.[119] Such debtors would face the dual debt burden of medical debt and educational debt. Third, the average age of a student-loan debtor in our study was 45 years old. When one considers that individual earning capacity plateaus with age,[120] and that repayment terms for student loans can last twenty to thirty years, the typical student-loan debtor in our study cannot be said to have been facing a lifetime of opportunity and achievement at the time she sought an

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[116]*See* DANIEL H. WEINBERG, U.S. DEP'T OF COMMERCE, EVIDENCE FROM CENSUS 2000 ABOUT EARNINGS BY DETAILED OCCUPATION FOR MEN AND WOMEN 21 (U.S. Census Bureau, Census 2000 Special Reports No. CENSR-15, 2004) (reporting that, even when controlling for work experience, education, and occupation, there exists "a substantial gap in median earnings between men and women that is unexplained"), *available at* http://www.census.gov/prod/2004pubs/censr-15.pdf.

[117]There were fifty-nine adversary proceedings with a debtor who suffered from a medical condition. All but one of those proceedings provided sufficiently detailed information for us to classify whether the debtor's medical condition was work-limiting.

[118]*See* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 141-71 (2000); Melissa B. Jacoby & Elizabeth Warren, *Beyond Hospital Misbehavior: An Alternative Account of Medical-Related Financial Distress*, 100 NW. U. L. REV. 535 (2006); Melissa B. Jacoby, Teresa A. Sullivan & Elizabeth Warren, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375 (2001).

[119]In our prior study of bankruptcy court doctrine regarding the undue hardship discharge, we found that many of the opinions contained references to debtors who could not afford health insurance. *See* Pardo & Lacey, *supra* note 10, at 448 & n.192.

[120]*See* WEINBERG, *supra* note 116, at 3 tbl.1 (documenting how, according to Census 2000 data, average earnings of year-round, full-time workers aged 55 and older exceeded those of workers aged 35 to 54 by only $1,000).

undue hardship discharge. Instead, she faced serious impediments to repaying her student loans.

While the demographic characteristics have somewhat suggested that the typical debtor may not have had the ability to repay her student loans, the financial characteristics confirm that the typical debtor suffered extreme financial distress that would preclude meaningful repayment. We present the following data measured as of or after the date that the debtor filed the adversary proceeding:[121] (1) the debtor's monthly household income; (2) the debtor's monthly household expenses (exclusive of student-loan payments); (3) the debtor's monthly disposable household income, measured as the difference between the debtor's monthly household income and expenses; (4) the ratio of the debtor's annual household income to the amounts set forth in the poverty guidelines established by the U.S. Department of Health and Human Services (HHS) (the "poverty ratio");[122] (5) the amount of student loans sought to be discharged by the debtor; and (6) the number of years worth of household income that the debtor would have had to devote to fully repay his or her student debt, measured by the ratio of the student debt sought to be discharged to the debtor's annual household income (the "debt-to-income ratio"). Table 2 sets forth the financial characteristics for the "typical" student-loan debtor with all figures adjusted to 2006 dollars using Consumer Price Index conversion factors.

When one considers the monthly income generated by the typical debtor household, it becomes immediately clear that the typical debtor in our study had been living on the financial margins of society at the time she sought

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[121]Financial data were obtained from the various documents filed by the parties to the adversary proceeding (e.g., complaint, answer, trial briefs). Our preference for obtaining the data was from the following sources, listed from highest preference to lowest preference: (1) the court's opinion, (2) the joint statement of facts, (3) the trial briefs, and (4) the complaint or answer. When no opinion or joint statement of facts was filed in the case and multiple sources presented conflicting data, we coded the income and expense data provided by the debtor and the student-loan data provided by the creditor. This approach reflects our belief that a debtor is in the best position to know, and thus report, his or her own income and expense data and that a student-loan creditor would be more likely to document accurately the amounts owed by a debtor. Finally, when none of the documents filed in the adversary proceeding provided the financial data that we sought to code, but those data appeared in the schedules filed by the debtor with his or her bankruptcy petition, the data were obtained from those sources if the adversary proceeding was commenced within 120 days of the petition date. This approach reflects our belief that, within this period of time, it was more likely than not that the debtor's financial situation as reported on the petition date would not have changed significantly by the time the adversary proceeding was commenced.

[122]The poverty guidelines constitute a simplified version of the federal poverty thresholds and are administratively used to determine financial eligibility for certain federal assistance programs. *See* Annual Update of the HHS Poverty Guidelines, 72 Fed. Reg. 3147, 3147 (Jan. 24, 2007). Because HHS poverty guidelines for any given calendar year approximate the Census Bureau poverty thresholds from the previous calendar year, *see id.*, and because we have adjusted our financial data to 2006 dollars, we use the 2007 HHS poverty guidelines to calculate the poverty ratio.

relief from her student loans. With an annual household income of approximately $20,800, the typical debtor would be hard-pressed to make daily ends meet, let alone attempt repayment on student loans. Our disposable income data further reinforces this point. The typical debtor household operated at a monthly deficit of $377, unable to meet its monthly expenses, let alone the debtor's student-loan payments. Given the low monthly expense figure of $2,398, the typical debtor was not likely to be a spendthrift, but instead devoted her monthly income to meet basic needs such as housing, food, and transportation. The proximity of the typical debtor household to the poverty line further suggests that, more likely than not, the typical debtor had little flexibility, if any at all, to reduce her monthly expenses. The 2007 HHS poverty guidelines define the poverty line for the contiguous United States as a household with income of $10,210 for the first member and $3,480 for each additional member.[123] The typical debtor household did not generate sufficient income to place it twice over the poverty line, thus conjuring the image of a household that ekes out an existence precariously close to the outer margins.[124] Under these conditions, the typical debtor was expected to cope with the crushing educational debt load of $76,139. The typical debtor would have had to devote 4.7 years worth of her household's income to fully repay her student loans (assuming, of course, that the amount of debt would not augment by virtue of interest or other charges and that the debtor's household would live expense free). This astronomical debt-to-income ratio far exceeds the ratio of unsecured debt to income of approximately 1.22 that was documented for debtors in the general bankruptcy population in 2007.[125] Simply put, the typical debtor in our study was in horrible financial shape.

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[123] *Id.*

[124] On this score, consider that federal law provides for a waiver of the mandatory filing fee required to commence a bankruptcy case for a debtor whose household income is less than 150% of the poverty line and who has an inability to pay the mandatory filing fee in installments. *See* 28 U.S.C. § 1930(f)(1) (Supp. V 2005). While the typical student-loan debtor had household income equal to 160% of the poverty line, it does not seem to be too much of a stretch to say that the typical debtor may have been uncomfortably close to qualifying for *in forma pauperis* relief—particularly in light of the ease with which individuals slip in and out of poverty due to the volatile nature of income. *See* SULLIVAN ET AL., *supra* note 118, at 63.

[125] Lawless et al., *supra* note 107, at 373. For further details on the 2007 Consumer Bankruptcy Project, see *id.* at 391-97.

Table 2
The "Typical" Student-Loan Debtor:
Financial Characteristics (in 2006 Dollars)

Financial Characteristic	Mean	Missing Values
Monthly Household Income	$1,736	28 of 115
Monthly Household Expenses	$2,398	47 of 115
Monthly Disposable Household Income	–$377	53 of 115
Poverty Ratio	1.6	32 of 115
Educational Debt	$76,139	14 of 115
Debt-to-Income Ratio	4.7	47 of 115

Based on the demographic and financial characteristics presented, we conclude that the typical debtor in our study did not have a reasonable prospect of repaying her student loans. That the typical debtor found herself in dire financial straits and forced to expend resources to litigate a claim of undue hardship strikes us as an injustice visited upon an individual in legitimate need of relief.

b. Debtor Representation

The overwhelming majority of the debtors in our study (86%) were represented by counsel in their adversary proceedings. In nearly half (46%) of the adversary proceedings, the debtor was represented by an attorney who appeared as debtor's counsel in at least five percent of the undue hardship adversary proceedings in our dataset involving represented debtors. There were five attorneys who satisfied this profile. Two attorneys, however, dominated the sample. Lawyer 1 appeared as debtor's counsel in approximately 22% of the adversary proceedings, and Lawyer 2 appeared as debtor's counsel in approximately 10% of the adversary proceedings. In terms of experience, debtor's counsel had been in practice an average of 20 years as of the date of the filing of the adversary proceeding.[126] For 94 of the 99 adversary proceedings involving represented debtors, we were able to ascertain whether the

[126]We calculated the number of years that the debtor's attorney had been in practice as the difference between the calendar year in which the adversary proceeding was commenced and the calendar year in which the attorney was first admitted to practice before the bar of any state, regardless of whether that jurisdiction was Washington State. We obtained the data from Westlaw's PROFILER-WLD database, which contains more than 1,000,000 profiles of law firms, offices, and lawyers from all 50 states, Puerto Rico, the Virgin Islands, the District of Columbia, Canada, England, and Europe. In those instances in which the PROFILER-WLD database did not contain information on the debtor's attorney, we searched the Washington State Bar Association's lawyer directory, *see* Washington State Bar Association, Lawyer Directory, http://pro.wsba.org (last visited Jan. 12, 2009), which includes the date on which an attorney was admitted to practice in Washington State. We were able to calculate the number of years that the debtor's attorney had been in practice for all adversary proceedings involving represented debtors.

debtor's attorney or the firm with which the debtor's attorney was associated had bankruptcy expertise as suggested either by (1) the attorney's affiliation with a bankruptcy section of the bar or professional bankruptcy association (e.g., the American Bankruptcy Institute), (2) the attorney's certification or specialization in bankruptcy, or (3) the attorney's firm having a bankruptcy practice group. All 94 attorneys were classified as having bankruptcy expertise.

c. The Creditors

The overwhelming majority of the adversary proceedings involved one of two well-funded, legally sophisticated, repeat creditors: (1) the Education Department; and (2) Educational Credit Management Corporation (ECMC), a nonprofit, national guaranty agency that insures loans under the Federal Family Education Loan (FFEL) Program in addition to servicing loans transferred from guarantee agencies when a student-loan borrower has filed for bankruptcy.[127] Approximately 33% involved the Department, and 58% involved ECMC.[128]

d. Procedural Outcomes

In order to describe the procedural outcomes in our dataset, we provide several definitions. First, borrowing from the definition of dispute that Professors George Priest and Benjamin Klein implemented in their study of the selection of disputes for litigation,[129] we define a "potential proceeding" as any occasion in which a debtor or creditor in bankruptcy would have *the possibility* of initiating an undue hardship discharge adversary proceeding (regardless of the merit of the complaint).[130] Thus, pursuant to this definition, all debtors who owe and all creditors who are owed educational debts of the kind specified in the Bankruptcy Code's undue hardship discharge provision would have potential proceedings. Second, we define a "proceeding" as any occasion in which a debtor or creditor initiates an adversary proceeding to determine the dischargeability of educational debt. Third, we define an "adjudicated proceeding" as any proceeding that is resolved by court judgment after trial.[131] Fourth, we classify all proceedings other than adjudicated pro-

[127] *See* ECMC – About Us, http://www.ecmc.org/main/about_us.html (last visited May 5, 2008).

[128] Six of the 115 adversary proceedings involved both the Education Department and ECMC. Accordingly, there is overlap in the percentages that have been reported. As a matter of clarification, approximately 86% of the proceedings involved either the Department, ECMC, or both.

[129] *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 6 (1984) ("We define a 'dispute' as any occasion in which a plaintiff asserts a claim for some injury against a defendant.").

[130] The Bankruptcy Rules permit either a debtor or a creditor to initiate a dischargeability complaint. FED. R. BANKR. P. 4007(a).

[131] Because some adversary proceedings involved multiple creditors, the possibility exists that trial could have occurred with respect to some creditors rather than all creditors. Accordingly, so long as the adversary proceeding went to trial with respect to at least one creditor, the proceeding would be defined

ceedings as "nonadjudicated proceedings."

Nonadjudicated proceedings can be further classified according to the manner in which they were terminated: (1) "dismissed proceedings," (2) "settled proceedings," and (3) "creditor default proceedings." We define dismissed proceedings as those that were dismissed in their entirety with respect to all creditors involved and that did not reach the merits of the debtor's undue hardship claim (i.e., the parties did not resolve whether the debtor should be granted an undue hardship discharge). We define settled proceedings as those proceedings in which a merit-based settlement occurred with respect to at least one creditor (i.e., the parties resolved whether the debtor should be granted an undue hardship discharge) and in which no trial was held. Accordingly, such proceedings could involve a wholesale settlement between the debtor and all of the creditors involved; or they could involve a settlement between the debtor and some of his creditors as well as a dismissal of the proceeding with respect to nonsettling creditors. Finally, we define creditor default proceedings as those proceedings where the court entered a default judgment in favor of the debtor against all creditors involved in the proceeding.

Our dataset predominantly consists of nonadjudicated proceedings—to wit, approximately 82% (94 of 115). Accordingly, over a half-decade period in the Western District of Washington, one witnesses an 18% trial rate for undue hardship discharge adversary proceedings. This finding is quite anomalous when contrasted to Professor Elizabeth Warren's finding that, just as trials have been disappearing as a means of resolving federal civil law suits generally, so too have trials disappeared as a means of resolving adversary proceedings in bankruptcy: Specifically, Warren found that, while 16% of all adversary proceedings in the nation went to trial in 1985, the trial rate had dropped to 5% by 2002.[132] Thus, the trial rate witnessed in our study exceeds both figures reported by Warren, especially the most current one.

The high trial rate has the potential to be problematic. It has been suggested that the diminishing trial rate in bankruptcy adversary proceedings can be attributed to the evolving certainty in decisional standards, which has better enabled parties to agree on expected outcomes and thus reach settlement with greater frequency.[133] We have already noted that the undue hard-

as an adjudicated proceeding. In theory, an adversary proceeding could be settled after trial before the court entered its judgment. In this study, however, none of the 21 proceedings that went to trial terminated in this manner. Put another way, all proceedings that went to trial resulted in the court entering a judgment.

[132]Warren, *supra* note 36, at 930.

[133]*See* Robert M. Lawless, *Are Bankruptcy's Trials Vanishing? If So, Who Cares?*, 79 AM. BANKR. L.J. 995, 1001 (2005) ("Turning from what the vanishing trials data do not say to what they do say, one point on which everyone agrees is that the data demonstrate bankruptcy law's maturation. . . . There are fewer trials because outcomes are more predictable, making settlement more likely."). Another possibility for the

ship discharge standard appears to be far from certain.[134] Perhaps this accounts for the high trial rate for undue hardship discharge adversary proceedings relative to adversary proceedings generally. If so, then it becomes imperative that the standard be clarified, particularly because of the adverse impact that such uncertainty is likely to have upon a debtor's fresh start.[135]

Other factors may also account for the unusually high trial rate in undue hardship discharge adversary proceedings. Student-loan debtors may be less informed than their creditor adversaries and may thus erroneously assess the strength of their undue hardship claim, ultimately leading them to proceed to trial. Moreover, given the pressures of financial distress, student-loan debtors may suffer from a self-serving bias which leads them to believe that fairness demands relief from their debt burden and consequently to overestimate their probability of success. Finally, consider the possibility that a debtor's attorney's economic incentives may discourage settlement. It seems reasonable to conclude that contingent-fee arrangements do not exist between attorneys and debtors in undue hardship discharge proceedings since a discharge does not generate a monetary award but rather a release from personal liability.[136] Moreover, one would expect that flat-fee arrangements are also rare insofar as postbankruptcy student-loan debtors are unlikely to be able to make the large, lump-sum payment that would be required under such an arrangement.[137] Accordingly, it seems likely that most debtors and attorneys would

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reduced trial rate may be a 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. *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) (reporting findings from an empirical study based on survey data from approximately 71% of active bankruptcy judges that, in business bankruptcy cases, "the judges' self-reported general style . . . indicated clear and significant support for managerial judging" and that "almost two-thirds of responding judges preferred control in adversary proceedings"); *see also* Richard B. Levin, *Towards a Model of Bankruptcy Administration*, 44 S.C. L. REV. 963, 968 (1993) (noting that "many bankruptcy judges continue to view themselves as responsible for the overall management and supervision of the cases on their dockets" and that they "often move to fill any vacuums in the administration or management of the cases, because they continue to feel responsible for the expeditious resolution of their cases"). Such "managerial judging" may have the effect of encouraging settlement. *See* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 322-26 (1986). For a normative appraisal of managerial judging, see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

[134]*See supra* note 52 and accompanying text.

[135]*See supra* Part I.A.

[136]*See* 11 U.S.C. § 524(a)(2) (2006).

[137]We assume that attorneys' fees for representation in an adversary proceeding will equal, if not exceed, attorneys' fees in no-asset Chapter 7 cases, which range anywhere from several hundred dollars to thousands of dollars and cover only routine services. *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). In light of this assumption, we assert that postbankruptcy student-loan debtors will not be well situated to make a large lump-sum payment based on the amount of money the student-loan debtors had on hand, whether in cash or in a bank account, at the time that they filed for bankruptcy. For the 106 proceedings in the dataset providing sufficiently

enter into an hourly-fee arrangement.[138] Under such an arrangement, an attorney may be encouraged to try a debtor's undue hardship claim, rather than settle it, with the aim of generating more legal fees.[139] If information barriers in conjunction with a principal-agent problem explain the high trial rate, then it strikes us that serious justice concerns arise that cannot be effectively addressed through judicial reform efforts.

e. Substantive Outcomes

Unlike other areas of law where settlement generally occurs in private and the terms agreed to by the parties are not disclosed to the public, every

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detailed information on these amounts, we find that the average student-loan debtor had $78 in cash and $583 in a bank account (in 2006 dollars) on the bankruptcy filing date. It may be argued that these figures are poor indicators of a student-loan debtor's ability to pay attorneys' fees in connection with an adversary proceeding insofar as a general discharge in the underlying bankruptcy case would free up postbankruptcy income. A general discharge in bankruptcy, however, does not necessarily translate into an economic fresh start for debtors. *See supra* note 46. We would also point out that, for the above-referenced 106 adversary proceedings, the average student-loan debtor filed the complaint initiating the proceeding less than six months (165 days) after filing for bankruptcy—in other words, a relatively short period of time for the effects of the fresh start to inure to the benefit of the debtor.

It may also be argued that, at least for Chapter 7 debtors, the bankruptcy filing would immediately free up postbankruptcy income since such income does not become property of the estate available for distribution to creditors. *See* 11 U.S.C. § 541(a)(6) (2006) (defining property of the estate to exclude "earnings from services performed by an individual debtor after the commencement of the case"); *id.* § 726(a) (establishing order of distribution of property of the estate in Chapter 7 cases). *But see id.* § 1115(a)(2) (providing that property of the estate in a Chapter 11 case involving an individual debtor includes "earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted"); *id.* § 1306(a)(2) (providing that property of the estate in a Chapter 13 case includes "earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted"). In response, we would point out that the student-loan debtors in our study who filed for Chapter 7 relief would not likely have had enough time to save sufficient income to pay a flat fee for representation in their adversary proceedings. Ninety-three of the above-referenced 106 adversary proceedings involved Chapter 7 debtors, and the average student-loan debtor from this group filed the complaint initiating his or her adversary proceeding less than five months (145 days) after filing for bankruptcy. Within this group, we were able to calculate monthly household income for 78 debtors and monthly disposable household income for 54 debtors. The average debtor's household generated only $1,688 per month and operated at a monthly *deficit* of $434 (in 2006 dollars). On the basis of these figures, we would expect that student-loan debtors who obtained representation by an attorney in their adversary proceedings generally did so on some basis other than a flat-fee arrangement.

[138]*Cf.* Landry & Yarbrough, *supra* note 137, at 334 ("Fees in typical no-asset chapter 7 cases are usually a flat charge, typically paid in advance of filing. The fee covers most basic services associated with the routine consumer case. Services beyond routine services are subject to further agreement, likely at an hourly rate, between the debtor and the attorney." (footnotes omitted)).

[139]*Cf.* Jeffrey Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 172 (1996) ("The attorney, of course, may use the ability to influence the client's settlement decision to encourage the client to reject a settlement offer as well. As easily as an attorney can remind a client of the positive progress made in the litigation, an attorney can encourage the client to recall the losses that gave rise to the litigation in the first place. Thus, the framing model of litigation poses a powerful role for the attorney. 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. An avaricious defense attorney who works on an hourly rate may portray all settlements as losses so as to encourage the risk-seeking proclivities of the client.").

settled proceeding in our dataset included a written stipulation by the litigants setting forth the terms of their settlement. The bankruptcy court would enter an order in accordance with the stipulation, and that order constituted the judgment of the court. Accordingly, we have been able to document the substantive outcome for every adversary proceeding in our dataset that reached the merits of a debtor's undue hardship claim.

As previously mentioned, granting a debtor relief from his or her student loans is the rule rather than the exception in the Western District. Approximately 57% of the adversary proceedings resulted in an undue hardship discharge. When considering the extent of discharge for all adversary proceedings in our study (i.e., proceedings with and without discharge), the average debtor obtained a discharge of approximately 62% of the educational debt that the debtor sought to discharge. Half of the debtors obtained a discharge of approximately 71%, and nearly a quarter of the debtors (24%) received full discharges. We caution the reader not to interpret these figures to mean that the undue hardship discharge provision does not encroach upon a student-loan debtor's fresh start. For reasons we will now discuss in Part II, the determinants of the extent of discharge raise serious concerns regarding access to justice.

II. LITIGATING UNDUE HARDSHIP

In this Part, we present the findings from our study. Our primary interest lies in the statistical relationship between the factual characteristics of a debtor's undue hardship claim and the percentage of debt that was discharged. Our analysis explores the factual circumstances that the doctrine has identified as relevant in an undue hardship discharge determination ("doctrinal characteristics") and whether they prove to be associated with the substantive outcome of the adversary proceedings in the study. We also consider whether extralegal factors, such as the identity of the debtor's counsel or the identity of debtor's creditor ("nondoctrinal characteristics"), influence the extent to which debtors obtain a discharge. We first conduct bivariate analyses of the data with the goal of identifying statistically significant relationships warranting further inquiry and then proceed to conduct regression analyses in order to confirm the persistence of those relationship when controlling for other factors.

In order to ascertain both the doctrinal and nondoctrinal determinants of substantive outcome, we first reduced the dataset to exclude all adversary proceedings in which the debtor litigated his or her undue hardship claim against multiple student-loan creditors. Many of these proceedings involved distinct procedural dispositions, thereby making it significantly more complex and difficult to identify the factors that may have accounted for the substantive outcomes we have singled out for study. Moreover, by focusing on adversary proceedings involving a single student-loan creditor, a preliminary baseline explaining substantive outcome can be established, and that baseline can be elaborated upon in the future to further our understanding of substantive outcome in proceedings involving multiple creditors. We then further reduced the dataset to exclude all creditor default proceedings and dismissed proceedings. We consider these proceedings to have a sufficiently distinct litigation dynamic that warrants their exclusion for purposes of our current analysis.[140] These reductions left 46 adversary proceedings for analysis.

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[140]With respect to a creditor default proceeding, it appears as if the creditor generally decided not to defend against the debtor's claim of undue hardship because the gains from litigating the dispute would exceed the costs. We were able to ascertain the amount of educational debt sought to be discharged for five of the seven creditor default proceedings. For those five proceedings, the amounts sought to be discharged (in 2006 dollars) were approximately (1) $1,976, (2) $3,640, (3) $5,029, (4) $33,945, and (5) $63,121. Only in the latter two instances do the stakes appear to have reached a sufficiently high threshold where it would be potentially worthwhile for the creditor to litigate the dispute. One might infer that the creditor did not do so based on its low estimate of the probability of success in litigating the dispute. For example, if the creditor anticipated a 10% probability of success, the expected values of the nondischargeability determinations in the latter two proceedings would have been, respectively, $3,395 and $6,312. This calculation assumes one of two possible outcomes: full discharge or no discharge. As mentioned before, however, the Ninth Circuit allows for the partial discharge of educational debt. *See supra* note 70 and accompanying text. Were the creditor to have anticipated that the debtor would obtain some relief at trial, the expected value of the nondischargeability determination would have been less. Thus, for the two proceedings where the stakes were high enough to make it potentially worthwhile for the creditor to litigate, it seems reasonable to conclude that its failure to do so stems from the strength of the debtor's claim of undue hardship—in other words, its merits.

With respect to dismissed proceedings, several reasons occur to us why wholesale dismissal of the adversary proceeding, without reaching the merits of the debtor's undue hardship claim, would have occurred. First, although the debtor needed relief, he or she did not have the financial resources to litigate the undue hardship claim. Of the 38 dismissed proceedings in the original dataset of 115 adversary proceedings, 6 of the dismissed proceedings were dismissed for want of prosecution by the debtor. These 6 proceedings appear to have been complex insofar as there appears to have been a fair amount of litigation activity over a substantial period of time. The average number of docket entries (e.g., notices, motions, orders) for this group was 25; and the average duration of such a proceeding, measured as the difference in days between the time the proceeding was filed and closed, was approximately 9 months (279 days). Moreover, a trial date had been set in 4 of the 6 proceedings. One might infer from these statistics that the claims of undue hardship in these proceedings had some merit but that the debtor's lack of resources ultimately resulted in dismissal.

A second possibility is that the debtor would have realized that a more economical path to relief existed outside of bankruptcy (e.g., forbearance, deferment, consolidation, or administrative discharge). For 31 of the 32 dismissed proceedings that were not dismissed for want of prosecution, we were able to ascertain whether dismissal of the proceeding was prompted by the debtor's pursuit of a nonbankruptcy administrative remedy. Approximately 21 of the 31 proceedings (68%) were dismissed on this basis. Accordingly, 27 of the 38 dismissed proceedings appear to have been dismissed on a basis other than the merits of the debtor's claim of undue hardship—that is, either for lack of resources or for pursuit of nonbankruptcy relief. Given that all dismissed proceedings (other than those dismissed for want of prosecution) were dismissed with the consent of both parties, we might infer that, for the remaining 11 dismissed proceedings, the debtor agreed to dismissal based on an assessment that prevailing on a claim of undue hardship would be unlikely. That said, it certainly appears that the stakes were high enough for the debtor to litigate the claim. We were able to ascertain the amount of educational debt sought to be

Thus, the reduced dataset consists of 40% of the adversary proceedings from the original dataset.

A. Bivariate Analyses of Doctrinal Characteristics

As set forth above, the doctrinal framework used by courts to evaluate a debtor's claim of undue hardship requires a debtor to establish three elements in order to prevail: (1) a current inability to repay, (2) a future inability to repay, and (3) a good faith effort to repay.[141] For the 46 observations in the reduced dataset, we consider various factual circumstances which either Ninth Circuit courts have expressly identified as relevant in an undue hardship discharge determination or which may be fairly considered to serve as proxies for such doctrinally relevant circumstances.

First, we would expect that the following financial characteristics—measured as of or after the date that the adversary proceeding was filed—would be statistically significant predictors of a debtor's current inability to repay his or her student loans: (1) the debtor's monthly household income;[142] (2) the debtor's monthly household expenses;[143] (3) the debtor's monthly disposable household income;[144] (4) the poverty ratio;[145] and (5) the debt-to-income ratio.[146] We find that none of these characteristics is statistically significantly associated with the extent of discharge obtained by the debtor. Table 3 sets forth the results from our analysis using a nonparametric Spearman rank correlation.

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discharged for 10 of these 11 proceedings and found that the median and mean amounts (in 2006 dollars) were, respectively, $66,525 and $80,645.

[141] *See supra* Part I.C.

[142] *See supra* text accompanying notes 71-72.

[143] *See id.*

[144] *See supra* text accompanying notes 76-77.

[145] *See supra* note 74 and accompanying text.

[146] Although we are unaware of any court in the Ninth Circuit using a debt-to-income ratio as a measure of current inability to repay, we have observed elsewhere that, "[g]iven that reasonable minds will differ as to what might constitute a reasonable household budget for maintenance of a debtor and his or her dependents, reference to an educational debt-to-household income ratio as a metric of ability to repay might be more palatable for some since it does not take into account expense data." Pardo & Lacey, *supra* note 10, at 471. For this reason, we think a debt-to-income ratio serves as a reasonable proxy for current inability to repay. Moreover, it may very well be the case that, even though litigants do not overtly marshal facts in this regard (as evidenced by the silence of court documents on this score), they nonetheless take into account such considerations and allow those considerations to influence their decisionmaking.

Table 3
Percentage of Debt Discharged by Current Inability Characteristics

	Percentage of Debt Discharged			
	Spearman's rho	*p*-value	N	Missing Values
Monthly Household Income	−0.1518	0.4069	32	14
Monthly Household Expenses	−0.0733	0.7163	27	19
Monthly Disposable Household Income	−0.1238	0.5645	24	22
Poverty Ratio	−0.2388	0.2037	30	16
Debt-to-Income Ratio	0.2963	0.1334	27	19

Second, we would expect that the following demographic characteristics would be statistically significant predictors of a debtor's future inability to repay his or her student loans: (1) whether the debtor or a dependent of the debtor suffered from a medical condition; (2) whether the debtor was married; (3) whether the debtor had dependents; (4) whether the debtor had obtained an advanced degree (i.e., master's, professional, or doctorate degree); (5) whether the debtor failed to attain the education pursued with borrowed funds; and (6) the debtor's age.[147] We find that the only characteristics that are statistically significantly associated with the extent of debt discharged are (1) the debtor or a debtor's dependent suffering from a medical condition and (2) the debtor's failure to attain the education pursued with borrowed funds.

The median and mean percentages of debt discharged for the group of debtors who suffered or whose dependents suffered from a medical condition were, respectively, 100% and 79.6%; in contrast, the median and mean percentages for the group of debtors whose entire household did not suffer from a medical condition were, respectively, 30.9% and 42.1%. Our analysis confirms that there is less than a 0.01 probability that random chance alone would have yielded these differences. The median and mean percentages of debt discharged for the group of debtors who failed to attain the education pursued with borrowed funds were, respectively, 100% and 72.2%; in contrast, the median and mean percentages for the group of debtors who attained the education they pursued with borrowed funds were, respectively, 0% and 24.3%. Our analysis confirms that there is less than a 0.01 probability that random chance alone would have yielded as large a difference across the median as that witnessed and that there is less than a 0.05 probability that random chance alone would have yielded as large a difference across the mean as that witnessed. Table 4 sets forth the results from our analysis using (1) a

[147] *See supra* text accompanying notes 88-89.

Table 4
Percentage of Debt Discharged by Future Inability Characteristics

	Percentage of Debt Discharged			
Medical Condition	Median	Mean	N	Missing Values
Yes	1.000	0.796	25	0
No	0.309	0.421	21	0
t-test of difference in means: $t = -3.5517$ ($p = 0.0009$) Wilcoxon rank-sum test: $z = -3.067$ ($p = 0.0022$)				
	Percentage of Debt Discharged			
Married	Median	Mean	N	Missing Values
Yes	0.869	0.631	8	0
No	0.6625	0.624	38	0
t-test of difference in means: $t = -0.0486$ ($p = 0.9615$) Wilcoxon rank-sum test: $z = -0.375$ ($p = 0.7079$)				
	Percentage of Debt Discharged			
Dependents	Median	Mean	N	Missing Values
Yes	0.568	0.525	18	0
No	0.841	0.689	28	0
t-test of difference in means: t = 1.3661 ($p = 0.1789$) Wilcoxon rank-sum test: $z = 1.199$ ($p = 0.2306$)				
	Percentage of Debt Discharged			
Advanced Degree	Median	Mean	N	Missing Values
Yes	0.245	0.326	8	30
No	0.328	0.411	8	
t-test of difference in means: $t = 0.4333$ ($p =$ 0. 6714) Wilcoxon rank-sum test: $z = 0.439$ ($p = 0.6607$)				

	Percentage of Debt Discharged			
Unattained Education	Median	Mean	N	Missing Values
Yes	1.000	0.722	10	26
No	0.000	0.243	10	
t-test of difference in means: $t = -2.7922$ ($p = 0.0120$) Wilcoxon rank-sum test: $z = -2.741$ ($p = 0.0061$)				
	Percentage of Debt Discharged			
	Spearman's rho	p-value	N	Missing Values
Debtor Age	0.2223	0.2465	29	17

two-sided, nonparametric Wilcoxon rank-sum test and an independent samples t-test for ascertaining the association between categorical characteristics and the median and mean percentage of debt discharged and (2) a nonparametric Spearman rank correlation for ascertaining the association between debtor age and the percentage of debt discharged.

Third, we would expect the following characteristics to be statistically significant predictors of a debtor's good faith efforts to repay his or her student loans: (1) whether the debtor was employed as of or after the date that the adversary proceeding was filed and (2) whether the debtor had attempted to manage his or her repayment obligation by seeking appropriate nonbankruptcy administrative relief (e.g., forbearance, deferment, consolidation, or negotiation with the creditor).[148] We find the debtor's employment status to be statistically significantly associated with the extent of debt discharged. The median and mean percentages of debt discharged for the group of unemployed debtors were, respectively, 100% and 80.5%; in contrast, the median and mean percentages for the group of employed debtors were, respectively, 51.3% and 47.9%. Our analysis confirms that there is less than a 0.05 probability that random chance alone would have yielded as large a difference across the median and mean as that witnessed. Table 5 sets forth the results from our analysis using a two-sided, nonparametric Wilcoxon rank-sum test and an independent samples t-test for ascertaining the association between these characteristics and the median and mean percentage of debt discharged.

B. Bivariate Analyses of Nondoctrinal Characteristics

We consider whether extralegal factors are associated with the extent of discharge. Specifically, we focus on (1) the identity of the creditor, (2) whether the debtor was represented by an attorney; (3) the identity of the debtor's attorney,[149] (4) the level of experience of the debtor's attorney as of the commencement of the adversary proceeding,[150] and (5) the identity of the

[148] *See supra* text accompanying notes 93-94. We would also expect attempts by the debtor to manage his or her repayment obligation by seeking appropriate nonbankruptcy administrative relief to be a statistically significant predictor of a debtor's good faith efforts to repay. Twenty-four of the 46 adversary proceedings provided sufficiently detailed information to code this variable. In all 24 of those proceedings, the debtor sought nonbakruptcy administrative relief. Accordingly, for those 24 proceedings, this factor had no explanatory value. If, however, we assume that the debtors in the other 22 proceedings did not obtain nonbankruptcy administrative relief and code their cases as such, the factor is statistically insignificant.

[149] For the 46 observations in the reduced dataset, Lawyer 1 appeared as debtor's counsel in approximately 17% of the adversary proceedings. We operationalize the identity of the debtor's attorney on the basis of whether Lawyer 1 represented the debtor.

[150] For the 46 observations in the reduced dataset, 41 involved debtors who were represented by counsel. For those 41 proceedings, we were able to calculate the years of experience of debtor's counsel as of the date that the adversary proceeding was filed. The years of experience ranged from a minimum of 9 years to a maximum of 48 years, with the median and mean respectively 21 years and 22 years of experience. We divided these attorneys into two groups according to whether the attorney had been in practice for at least 20 years. For the 5 proceedings involving *pro se* debtors, we classified these debtors as not being represented by an experienced attorney.

Table 5
Percentage of Debt Discharged by Good Faith Characteristics

	Percentage of Debt Discharged			
Debtor Employed	Median	Mean	N	Missing Values
Yes	0.513	0.479	27	5
No	1.000	0.805	14	
t-test of difference in means: $t = 2.6128$ ($p = 0.0127$) Wilcoxon rank-sum test: $z = 2.492$ ($p = 0.0127$)				
	Percentage of Debt Discharged			
Payment on Student Loans	Median	Mean	N	Missing Values
Yes	0.440	0.469	22	22
No	0.845	0.845	2	
t-test of difference in means: $t = 1.2179$ ($p = 0.2361$) Wilcoxon rank-sum test: $z = 1.226$ ($p = 0.2203$)				

judge assigned to the adversary proceeding. We also consider whether resolution of the debtor's adversary proceeding through trial, rather than settlement, is associated with the extent of discharge. We find that four nondoctrinal factors are statistically significantly associated with resolution by trial: (1) the identity of the creditor, (2) resolution of the debtor's adversary proceeding by trial, (3) the level of experience of the debtor's attorney measured as of the commencement of the adversary proceeding, and (4) the identity of the debtor's attorney.

First, considering creditor identity, the median and mean percentages of debt discharged for the group of debtors who litigated against the Education Department were, respectively 34.0% and 39.4%; in contrast, the median and mean percentages of debt discharged for the group of debtors who did not litigate against the Education Department were, respectively, 97.3% and 74.8%.[151] Our analysis confirms that there is less than a 0.01 probability that

[151]This example possibly highlights a distributional inequality that inheres between debtors and creditors in undue hardship discharge litigation. The Education Department, as a repeat creditor with a wealth of experience and resources, has an informational advantage over a debtor who is a one-shot litigant seeking relief from financial distress. It also seems likely that the U.S. Attorney's Office (USAO), which represents the Department of Education, will have a reputational advantage in defending undue hardship adversary proceedings. Given the USAO's efforts to protect the public fisc so as to ensure access to higher education for future students, it seems reasonable to conclude that a bankruptcy court would view the USAO in a revered light in this context. *Cf.* FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 130 (2007) (outlining reasons why the federal government has particular influence as a litigant, among them the federal government's "repeat player and party capability advantages" as well as the possibility that, "as officers of the federal government themselves, judges may feel some solidarity with and sometimes socialize with other federal officers," thus giving rise to "a sort of 'regime deference' by judges, in which they act as agents of the government, at least on a broad functional level"). Ultimately,

random chance alone would have yielded differences this large. Further considering creditor identity, the median and mean percentages of debt discharged for the group of debtors who litigated against ECMC were, respectively, 94.6% and 75.0%; in contrast, the median and mean percentages of debt discharged for the group of debtors who did not litigate against ECMC were, respectively, 49.0% and 37.6%.[152] Our analysis confirms that there is less than a 0.05 probability that random chance alone would have yielded differences this large.

Second, considering the manner in which the debtor's adversary proceeding was resolved, the median and mean percentages of debt discharged for the group of debtors who went to trial were, respectively 0% and 35.2%; in contrast, the median and mean percentages of debt discharged for the group of debtors who settled were, respectively, 93.9% and 72.1%. Our analysis confirms that there is less than a 0.05 probability that random chance alone would have yielded as large a difference across the median as that witnessed and that there is less than a 0.01 probability that random chance alone would have yielded as large a difference across the mean as that witnessed.

Third, the median and mean percentages of debt discharged for the group of debtors represented by a highly experienced attorney were, respectively, 100% and 75.9%; in contrast, the median and mean percentages for the group of debtors not represented by a highly experienced attorney were, respectively, 51.3% and 46.6%. Our analysis confirms that there is less than a 0.01 probability that random chance alone would have yielded as large a difference across the median as that witnessed and that there is less than a 0.05 probability that random chance alone would have yielded as large a difference across the mean as that witnessed.

Fourth, the median and mean percentages of debt discharged for the

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one would expect that the Department would exploit these advantages. Perhaps that is why we witnessed debtors who litigated against the Department to fare worse than debtors who did not.

[152] One reason occurs to us why debtors who litigate their claims of undue hardship against ECMC may fare better than other debtors. As previously mentioned, in addition to acting as a guarantor of student loans, ECMC sometimes functions as a servicer of student loans when a student-loan borrower has filed for bankruptcy. *See supra* text accompanying note 127. When ECMC acts in its capacity as guarantor, its economic incentive to oppose a debtor's claim of undue hardship is much greater than when it acts in its capacity as a servicer. As a guarantor, ECMC bears the loss of the entire amount of discharged student loans. As a servicer, however, ECMC bears the loss of only a portion of the amount of the discharged student loans—that is, the servicer fee that ECMC would have collected had the student loans not been discharged. *See* Archibald v. United Student Aid Funds, Inc. (*In re* Archibald), 280 B.R. 222, 226-27 (Bankr. S.D. Ind. 2002) ("ECMC is a non-profit corporation that defends student loans in bankruptcy cases for the federal government and other guaranty agencies. Of every dollar collected on Archibald's student loans, 76 cents goes into a reserve fund (owned by the Department of Education) and 24 cents is deposited into ECMC's operating account."). If the stakes for ECMC are lower when it defends as a servicer, and if ECMC defends as a servicer more often than as a guarantor in undue hardship adversary proceedings, then the combination of these factors may account for the success experienced by debtors who litigate against ECMC.

group of debtors represented by Lawyer 1 were, respectively, 15.2% and 31.9%; in contrast, the median and mean percentages for the group of debtors not represented by Lawyer 1 were, respectively, 93.9% and 68.9%. Our analysis confirms that there is less than a 0.05 probability that random chance alone would have yielded differences this large. Table 6 sets forth the results from our analysis using a two-sided, nonparametric Wilcoxon rank-sum test and an independent samples t-test for ascertaining the association between these characteristics and the median and mean percentage of debt discharged.[153]

Given that, of all the statistically significant associations we unearthed in evaluating the extent of discharge obtained by the debtor, resolution by trial was the only characteristic to entail a choice by either one or both of the litigants during the litigation process, we sought to ascertain whether any of the doctrinal or nondoctrinal characteristics we evaluated in considering substantive outcome were statistically significantly associated with resolution by trial. In the absence of such an association, we would have expected to see approximately 26% of the adversary proceedings resolved by trial for the 46 observations in the reduced dataset. We find that none of the doctrinal factors is statistically significantly associated with resolution by trial.

On the other hand, we find that two nondoctrinal factors are statistically significantly associated with resolution by trial: (1) the identity of the debtor's counsel and (2) the level of experience of the debtor's attorney measured as of the commencement of the adversary proceeding. When analyzing the association between attorney identity and substantive outcome on the basis of whether the debtor was represented by Lawyer 1,[154] we find that 62.5% of the adversary proceedings involving Lawyer 1 were resolved by trial in contrast to 18% for the proceedings not involving Lawyer 1. Our analysis confirms that there is less than a 0.05 probability that random chance alone would have produced these differences. When analyzing the association between attorney experience and substantive outcome on the basis of whether the debtor was represented by an attorney with at least twenty years of experience, we find that 12% of the adversary proceedings involving an experienced attorney were resolved by trial in contrast to 43% for those proceedings where the debtor was not represented by a highly experienced attorney. Our analysis confirms that there is less than a 0.05 probability that random chance alone would have produced these differences. Table 7 sets

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[153]The differences in the mean and median percentages of debt discharged were not statistically significant when grouping debtors according to the judge assigned to the adversary proceeding. In order to economize space, these results have been omitted from Table 9.

[154]*See supra* Part I.D.2.b.

Table 6
Percentage of Debt Discharged Nondoctrinal Case Characteristics

	Percentage of Debt Discharged			
Creditor: Education Department	Median	Mean	N	Missing Values
Yes	0.340	0.394	16	0
No	0.973	0.748	30	0
t-test of difference in means: $t = 3.1191$ ($p = 0.0032$) Wilcoxon rank-sum test: $z = 2.826$ ($p = 0.0047$)				
	Percentage of Debt Discharged			
Creditor: ECMC	Median	Mean	N	Missing Values
Yes	0.946	0.750	25	0
No	0.490	0.376	21	0
t-test of difference in means: $t = -2.4353$ ($p = 0.0190$) Wilcoxon rank-sum test: $z = -2.189$ ($p = 0.0286$)				
	Percentage of Debt Discharged			
Resolution by Trial	Median	Mean	N	Missing Values
Yes	0.000	0.352	12	0
No	0.939	0.721	34	0
t-test of difference in means: $t = 2.9766$ ($p = 0.0047$) Wilcoxon rank-sum test: $z = 2.561$ ($p = 0.0104$)				
	Percentage of Debt Discharged			
Represented by Counsel	Median	Mean	N	Missing Values
Yes	0.737	0.636	41	0
No	0.689	0.531	5	0
t-test of difference in means: $t = -0.5518$ ($p = 0.5839$) Wilcoxon rank-sum test: $z = -0.566$ ($p = 0.5716$)				
	Percentage of Debt Discharged			
Represented by Highly Experienced Attorney	Median	Mean	N	Missing Values
Yes	1.000	0.759	25	0
No	0.513	0.466	21	0
t-test of difference in means: $t = -2.6327$ ($p = 0.0116$) Wilcoxon rank-sum test: $z = -2.600$ ($p = 0.0093$)				
	Percentage of Debt Discharged			
Represented by Lawyer 1	Median	Mean	N	Missing Values
Yes	0.152	0.319	8	0
No	0.939	0.689	38	0
t-test of difference in means: $t = 2.5157$ ($p = 0.0156$) Wilcoxon rank-sum test: $z = 2.278$ ($p = 0.0227$)				

forth the differences between the two groups of debtors for these statistically significant characteristics as assessed by a two-sided Fisher's exact test.

Table 7
Procedural Outcome by Nondoctrinal Case Characteristics

	Trial		Settlement	
Represented by Lawyer 1	N	Row Percentage	N	Row Percentage
Yes	5	62.50	3	37.50
No	7	18.42	31	81.58
	$p = 0.020$			
	Trial		**Settlement**	
Represented by Highly Experienced Attorney	N	Row Percentage	N	Row Percentage
Yes	3	12.00	22	88.00
No	9	42.86	12	57.14
	$p = 0.023$			

C. Modeling Extent of Discharge

Here, we seek to provide a more comprehensive analysis of the extent of discharge by presenting a series of regression models that test whether the statistically significant relationships we identified through bivariate analyses in Parts II.A and II.B persist when controlling for other factors. While our bivariate analyses demonstrated that several doctrinal characteristics had statistically significant associations with substantive outcome, attempts to combine these factors in a highly predictive regression model proved to be unsuccessful due to missing values, multicollinearity, and small sample size. We solved this problem, however, by aggregating certain statistically significant and insignificant doctrinal factors. Specifically, we first created seven indicator variables that tracked the following characteristics that, if present, would doctrinally weigh in favor of discharge: (1) whether the debtor's annual household income fell below the poverty line; (2) whether the debtor failed to attain the education pursued with borrowed funds; (3) whether the debtor or a dependent of the debtor suffered from a medical condition; (4) whether the debtor suffered from a work-limiting medical condition; (5) whether the debtor was more than 55 years old; (6) whether the debtor obtained the student loans on behalf of a third party (e.g., a co-signing parent); and (7) whether the debtor was unemployed. We consider the first variable to relate to a debtor's current inability to repay; the second through sixth variables to relate to a debtor's future inability to repay; and the seventh variable to relate to a debtor's good faith efforts to repay.[155] For each of these indicator variables, positive responses were coded as 1 and negative responses were coded as 0. Additionally, missing values were coded as 0 (thus weighing against discharge).

After creating these seven indicator variables, we created a variable that tracked the sum total of the indicator variables that were present in each adversary proceeding (the "aggregate factor count"). Table 8 summarizes the number of adversary proceedings by aggregate factor count, with no adversary proceeding having more than 5 factors present.

Table 8
Aggregate Factor Count in Adversary Proceedings

Aggregate Factor Count	Number of Proceedings	Column Percentage
0	9	19.57
1	11	23.91
2	8	17.39
3	10	21.74
4	6	13.04
5	2	4.35
Total	46	100.00

As Figure 2 illustrates, the aggregate factor count appears to be a good predictor of the percentage of debt discharged, with the mean percentage steadily increasing with the count: Zero-factor proceedings averaged a 37.6% discharge; one-factor proceedings averaged a 45.2% discharge; two-factor proceedings averaged a 53.8% discharge; three-factor proceedings averaged an 83.3% discharge; four-factor proceedings averaged a 96.8% discharge; and five-factor proceedings averaged a 97.2% discharge.

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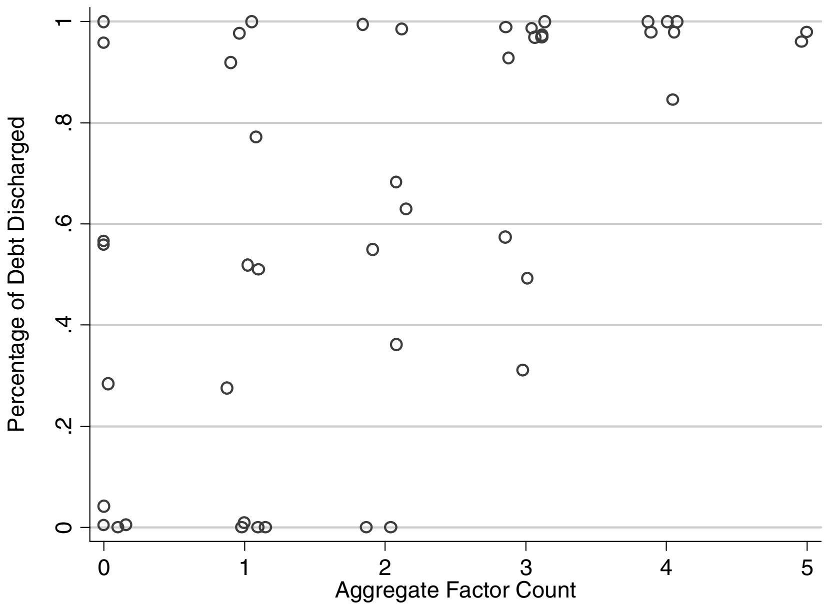
[155]Courts have generally held that the Bankruptcy Code's undue hardship discharge provision applies both to the recipient of a student loan as well as nonrecipient who co-signs for the loan. *See, e.g., In re* Pelkowski, 990 F.2d 737 (3rd Cir. 1993); Keilig v. Mass. Higher Educ. Assistance Corp. (*In re* LaFlamme), 188 B.R. 867 (Bankr. D.N.H. 1995). Nonetheless, it seems reasonable to conclude that a debtor's status as a co-signer may indirectly affect the strength of an undue hardship claim. Since a co-signing debtor will not have received the education derived from the student loan and its concomitant pecuniary benefit, considerations regarding future inability to repay would be more likely to tilt in favor of such a debtor, *see supra* text accompanying note 89, thus making for a more sympathetic claim of undue hardship.

Figure 2
Percentage of Debt Discharged by Aggregate Factor Count[156]



In order to confirm the significance of the aggregate factor count as a predictor of the percentage of debt discharged, we conducted a series of regression analyses. As our analyses focus on a fractional dependent variable, a linear regression model was not ideal given that the dependent variable's observed values are bounded between 0 and 1 and given that a large proportion of the observations for our dependent variable have values of 0 and 1 (i.e., 56.5%). With a linear model, there would be no guarantee that the predicted values would fall between 0 and 1. Accordingly, we used the quasi-maximum likelihood estimator (QMLE) approach that has been suggested for estimating fractional response variables,[157] fitting generalized linear models with a logit link function and a binomial distributional family while using robust standard errors for our estimates.

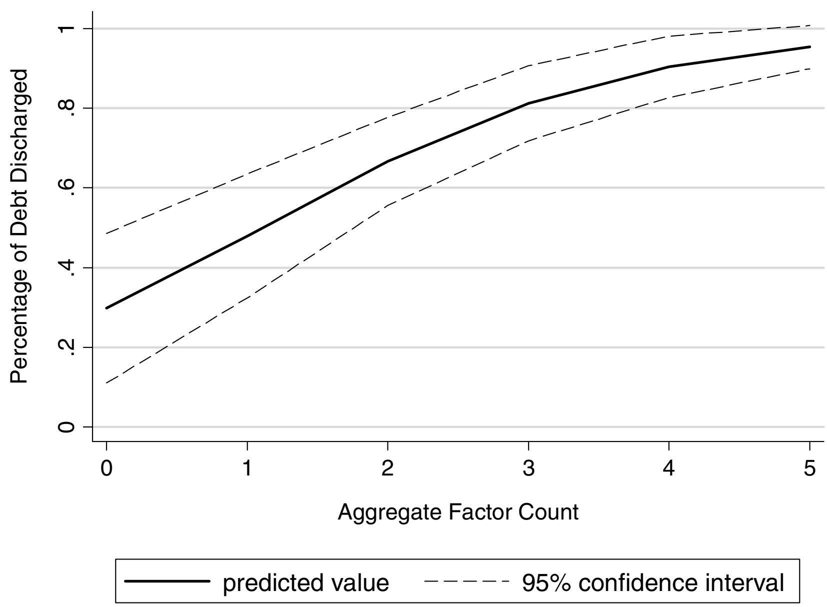
The first model (Model 1) consisted solely of one independent variable, the aggregate factor count, and confirmed that the variable was highly statis-

[156]In plotting the data in Figure 2, we have added spherical random noise to the data in order to avoid having observations with the same values of aggregate factor count and percentage of debt discharged from being plotted as a single point. For this reason, it may appear as if there are some adversary proceedings with aggregate factor counts that are not whole numbers (e.g., 2.1), but this is not the case. The aggregate factor count value for each adversary proceeding in the dataset is a whole number. *See supra* tbl.8.

[157]*See* Leslie E. Papke & Jeffrey M. Woolridge, *Econometric Methods for Fractional Response Variables with an Application to 401(k) Plan Participation Rates*, 11 J. APPLIED ECONOMETRICS 619 (1996).

tically significant ($p = 0.0005$). Figure 3 illustrates how the model predicts that the percentage of debt discharged increases as the aggregate factor count increases, with the magnitude of the effect greater at the lower end of the scale. Specifically, the model predicts that a zero-factor proceeding will average a 29.8% discharge; a one-factor proceedings will average a 48.0% discharge; a two-factor proceeding will average a 66.6% discharge; a three-factor proceeding will average an 81.2% discharge; a four-factor proceeding will average a 90.4% discharge; and a five-factor proceedings will average a 95.3% discharge.

Figure 3
Model 1 Prediction for Percentage of Debt Discharged by Aggregate Factor Count



Model 1 greatly improved upon our attempt to fit a model using each of the seven indicator variables that comprise the aggregate count factor. In such a model, only two individual factors emerged as statistically significant predictors of the percentage of debt discharged: (1) whether the debtor was more than 55 years old and (2) whether the debtor or a dependent of the debtor suffered from a medical condition. Notwithstanding this improvement, the fact remained that Model 1 insufficiently explained the variability in the data—as evidenced, for example, by the fact that some zero-factor and one-factor proceedings resulted in full or nearly full discharges while some three-factor proceedings did not. Furthermore, when considering the difference between the predicted values and observed values of the percentage of debt discharged, the degree of underprediction and overprediction suggested that some other factors accounted for the substantive outcomes we witnessed: For 25 of the 46 adversary proceedings, Model 1 underpredicted or overpredicted the percentage of debt discharged by at least 21 percentage points.

In order to provide a better account, we fitted a model that, in addition to the aggregate factor count, included various nondoctrinal case characteristics. After extensive analysis, we found that the best-fitting model included the following variables: (1) whether the debtor was represented by an attorney with more than 25 years of experience, (2) whether the judge assigned to the debtor's adversary proceeding was one of two judges (Judge A or Judge B), (3) whether the parties failed to settle the adversary proceeding prior to the court setting a trial date,[158] and (4) whether the debtor sought a discharge of more than $100,000 of student loans. Once again, the aggregate factor count proved to be a statistically significant predictor of the percentage of debt discharged. The nondoctrinal case characteristics also proved to be statistically significant predictors.[159] This model (Model 2) greatly improved upon Model 1, reducing the residual deviance by 52%.[160] When comparing the degree of prediction error of Model 1 to Model 2, it became clear that Model 2 fit the data much better—to wit, for only 12 of the 46 adversary proceedings, Model 2 underpredicted or overpredicted the percentage of debt discharged by at least 21 percentage points. Table 9 sets forth the regression results from Models 1 and 2, and Table 10 compares the degree of prediction error by both models.

Model 2 indicates that two variables were predicted to increase the percentage of debt discharged: (1) the aggregate factor count and (2) whether the debtor was represented by a highly experienced attorney. On the other hand, the remaining variables were predicted to reduce the percentage of debt discharged. Interpreting the magnitude of the effect of these variables on the percentage of debt discharged presents some difficulty given the nonlinear nature of the 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 the independent variables upon the percentage of debt discharged, we have set forth in

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[158]For the 46 adversary proceedings considered, only 9 settled prior to the court setting a trial date. For the remaining 37 proceedings in which the court set a trial date, 25 proceedings settled and 12 proceedings went to trial.

[159]The addition of other nondoctrinal case characteristics to the model—such as the identity of the creditor or the procedural resolution of the adversary proceeding (i.e., settlement or trial)-did not significantly improve the model's quality.

[160]Diagnostic plots indicated approximately normally distributed deviance residuals.

Table 9
QMLE Models for Percentage of Debt Discharged

	Model 1	Model 2
Variable	Percentage of Debt Discharged	
Intercept	−0.8551* (−1.6954, −0.0761)	1.6440* (0.1026, 3.4060)
Aggregate Factor Count	0.7737*** (0.3997, 1.0297)	0.8106** (0.3903, 1.3135)
Highly Experienced Attorney		2.5289** (0.8853, 4.6059)
Judge A		−3.6435*** (−5.7418, −1.9786)
Judge B		−2.6318*** (−4.2079, −1.2908)
Trial Date Set		−1.7722* (−3.5198, −0.2556)
High Educational Debt		−1.4163* (−2.9042, −0.0427)
N	46	46
Log pseudolikelihood	−21.8253	−14.6721
AIC	1.0359	0.9423
BIC	−138.7995	−133.9628

Note: *** $p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$. Model coefficients presented with 95% confidence intervals in parentheses.

Table 10
Comparing Model Fit

	Number of Proceedings	
Degree of Prediction Error	Model 1	Model 2
0.0 - 10.4 percentage points	14	21
10.5 - 20.4 percentage points	7	13
20.5 - 30.4 percentage points	11	3
30.5 - 40.4 percentage points	2	4
40.5 percentage points or more	12	5

Tables 11 and 12 the predicted percentage of debt discharged for all combinations of the independent variables in Model 2. Focusing on some of the combination patterns in our dataset nicely illustrates how the magnitude of the effect of the independent variables changes according to the different values of those variables.

For example, the most prevalent debtor profile in the reduced dataset was a debtor with an aggregate factor count of zero, who sought to discharge less than $100,000 of student loans and was not represented by a highly experienced attorney, and whose adversary proceeding was assigned neither to Judge A nor Judge B and for which a trial date had been set (Profile 1). According to Model 2, the percentage of debt discharged for a debtor with this profile is predicted to be 46.8%. Another profile pattern in our dataset mirrored that of Profile 1 with the exception that the debtor had an aggregate factor count of one (Profile 2). The predicted percentage of debt discharged for such a debtor was 66.4%. We see, then, that the magnitude of an aggregate factor increase from zero to one was quite substantial for debtors fitting the described profile—approximately a twenty percentage point increase in the amount of debt discharged. However, the size of the effect of an aggregate factor increase from zero to one is predicted to virtually disappear for a debtor who has the same case characteristics as those described for Profiles 1 and 2, but whose proceeding has been assigned to Judge B. For such a debtor, an aggregate factor increase from zero to one is predicted to result in merely a 6.5 percentage point increase in the amount of debt discharged (from 6.0% to 12.5%). These are but just a few examples of the manner in which the reader, by referring to Tables 8 and 9, can explore how the interrelationship of case characteristics affects the percentage of debt discharged.

D. Assessing the Impact of Undue Hardship Discharge Litigation on Access to Justice

Here, we critically evaluate the determinants of substantive outcome in undue hardship discharge litigation. In our analyses of the data, we have identified five determinants for the extent of discharge a debtor will receive when litigating a claim of undue hardship. Two of these fall within the category of doctrinal case characteristics: the aggregate factor count and the amount of student-loan debt sought to be discharged (i.e., more than $100,000). The remaining three determinants—the experience level of the debtor's attorney (i.e., more than 25 years), the identity of the judge assigned to the debtor's adversary proceeding (i.e., Judge A or Judge B), and the procedural resolution of the debtor's adversary proceeding (i.e., settlement before a trial date was set)—are nondoctrinal case characteristics.

We find these results quite disquieting for a couple of reasons. First, close examination of the doctrinal determinants reveals that the undue hardship doctrine has undermined the fresh start principle by establishing a frame for litigants that places emphasis on factors that fail to properly establish the threshold that constitutes impermissible sacrifice by a student-loan debtor. Second, nondoctrinal case characteristics, which have no legal relevance and

Table 11
Predicted Percentage of Debt Discharged for Debtors with Less than $100,000 of Educational Debt

	Neither Judge A nor Judge B				Judge A				Judge B			
	No highly experienced attorney		Highly experienced attorney		No highly experienced attorney		Highly experienced attorney		No highly experienced attorney		Highly experienced attorney	
Aggregate Factor Count	No trial set	Trial set	No trial set	Trial set	No trial set	Trial set	No trial set	Trial set	No trial set	Trial set	No trial set	Trial set
0	83.8	46.8	98.5	91.7	11.9	2.2	62.9	22.4	27.1	6.0	82.4	44.3
1	92.1	66.4	99.3	96.1	23.3	4.9	79.2	39.4	45.6	12.5	91.3	64.1
2	96.3	81.7	99.7	98.2	40.6	10.4	89.6	59.4	65.3	24.3	95.9	80.1
3	98.3	90.9	99.9	99.2	60.6	20.8	95.1	76.7	80.9	41.9	98.2	90.0
4	99.3	95.7	99.9	99.6	77.6	37.1	97.8	88.1	90.5	61.8	99.2	95.3
5	99.7	98.1	100.0	99.8	88.6	57.0	99.0	94.3	95.5	78.5	99.6	97.9

Table 12
Predicted Percentage of Debt Discharged for Debtors with More than $100,000 of Educational Debt

	Neither Judge A nor Judge B				Judge A				Judge B			
	No highly experienced attorney		Highly experienced attorney		No highly experienced attorney		Highly experienced attorney		No highly experienced attorney		Highly experienced attorney	
Aggregate Factor Count	No trial set	Trial set	No trial set	Trial set	No trial set	Trial set	No trial set	Trial set	No trial set	Trial set	No trial set	Trial set
0	55.7	17.6	94.0	72.8	3.2	0.6	29.2	6.5	8.3	1.5	53.1	16.1
1	73.9	32.4	97.3	85.8	6.9	1.2	48.1	13.6	16.9	3.3	71.8	30.2
2	86.4	51.9	98.8	93.1	14.3	2.7	67.6	26.2	31.4	7.2	85.1	49.3
3	93.5	70.8	99.4	96.8	27.2	6.0	82.4	44.3	50.7	14.9	92.8	68.7
4	97.0	84.5	99.8	98.6	45.7	12.5	91.3	64.2	69.8	28.2	96.7	83.1
5	98.6	92.5	99.9	99.4	65.4	24.3	96.0	80.1	83.9	46.9	98.5	91.7

thus ought not to have any bearing on the amount of debt discharged, do influence the substantive outcome of undue hardship discharge litigation. The fact that such characteristics predominate the group of determinants and generally have a greater effect on outcome than the doctrinal determinants suggests that undue hardship discharge litigation improperly curtails access to justice for student-loan debtors who legitimately need relief from their financial distress. Our discussion will now elaborate further upon both of these conclusions.

We begin by evaluating the doctrinal determinants of the extent of discharge received by a student-loan debtor. Consider the positive effect documented for the aggregate factor count, an amalgam of seven doctrinal factors each of which would weigh in favor of discharge if present. At first blush, one might deem this effect to be appropriate. If, however, one reconsiders the nature of the factors incorporated into the aggregate factor count, one might be disinclined to reach such a conclusion. As previously mentioned, only one of the seven factors relates to a debtor's current inability to repay—namely, whether the debtor's annual household income fell below the poverty line.[161] Perhaps financial characteristics have not had a predictive role in substantive outcome because most student-loan debtors who seek an undue hardship discharge find themselves in relatively similar positions with regard to the financial distress they suffer as a result of their educational debt.[162] But there may be a different account.

As has been previously documented, financial indicators have not had a statistically significant association with the outcome of bankruptcy court doctrine regarding the undue hardship discharge.[163] If the doctrine has failed

[161]While it is not surprising that this consideration would play a role in determining the extent of relief obtained by some debtors, it is surprising that no other financial indicia of ability to repay partially account for substantive outcome. Reference to the poverty line alone will be underinclusive in ascertaining current ability to repay. While this consideration clearly identifies the worst-off debtors whom the doctrine would categorize as prime candidates for relief, *see supra* note 74 and accompanying text, it fails to give a nuanced account for the current repayment ability of above-poverty debtors that, for example, reference to a debt-to-income ratio would provide.

One might also consider the amount of student-loan debt sought to be discharged (i.e., more than $100,000) as yet another case characteristic related to a debtor's current inability to repay. *See supra* note 146. Given that this characteristic is negatively associated with the extent of discharge, *see supra* tbl.9, we interpret this case characteristic otherwise. For five of the eight adversary proceedings in the reduced data set involving debtors who sought to discharge more than $100,000, we were able to ascertain the educational attainment of the debtor. In all five proceedings, the debtor had obtained an advanced degree. With this information in mind, one possible inference to be drawn from the negative association of high student-loan debt with the extent of discharge is that a debtor with an extremely high debt load would be deemed to have an unsympathetic claim of undue hardship to the extent that such a debt load was the product of obtaining an advanced degree, which would better situate the debtor to repay the loans than a debtor without an advanced degree. *See supra* text accompanying note 89.

[162]*See supra* tbl.3.

[163]*See* Pardo, *supra* note 52, at 510-13.

to emphasize financial indicators, thereby signaling to litigants that there are more significant considerations for a debtor to prevail in a claim of undue hardship, we might expect the parties to approach the litigation with an eye to focusing on nonfinancial indicators emphasized by the doctrine. As further evidence of this, five of the seven factors in the aggregate factor count relate to proxies for future inability to repay, with two of those factors involving health-related considerations. The dominance of future-inability factors mirrors the prominence bankruptcy court doctrine has given to the second prong of the *Brunner* test,[164] which requires the debtor to establish a future inability to repay the student loans.[165] Using nonfinancial characteristics as a proxy for repayment ability, however, can result in an improper sorting of debtors that, in all likelihood, will be underinclusive in identifying debtors with an inability to repay their student loans.[166] Accordingly, although consonant with current doctrine, the aggregate factor count and its association with the extent of relief may nonetheless be interpreted as a negative unintended consequence of a system that requires debtors to establish their eligibility for debt relief under an unclear standard.

This problem will be further compounded by the nondoctrinal determinants of substantive outcome. Consider our finding that representation by a highly experienced attorney is positively associated with the extent of discharge. One might characterize this situation as a lack of access to justice that results from excessive search costs that prevent student-loan debtors from finding the highly experienced attorneys who will provide better chances of obtaining extensive relief. Or perhaps the situation can be characterized as the product of a principal-agent problem where, for some reason, less-experienced attorneys fail to act in their clients' best interests.[167] A principal-agent problem may also be linked to our finding that early settlement (i.e., before the court set a trial date) yielded more extensive relief for debtors. The decision to settle and the point in time at which to do so are considerations for which a debtor will rely upon his or her attorney for gui-

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[164]*See* Pardo & Lacey, *supra* note 10, at 496.

[165]*See supra* Part I.C.2.

[166]*See* Pardo, *supra* note 52, at 519-23 (demonstrating how reliance on a debtor's health status as a proxy for repayment ability can result in an unjust denial of an undue hardship discharge).

[167]*See* 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 (1994) ("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."); *see also* Fiss, *supra* note 58, 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, and to which their clients would not agree if the choice were still theirs."); *supra* notes 138-39 and accompanying text (discussing how hourly-fee arrangements may discourage attorneys from settling a debtor's adversary proceeding).

dance. If the fee arrangement between the debtor and the debtor's attorney discourages the attorney from recommending settlement, the debtor may end up being steered to a procedural posture that works to the disadvantage of the debtor but to the financial advantage of the attorney.[168] While our data do not and cannot shed light on these inferences, the possibility that these issues may underlie the nondoctrinal determinants of the extent of discharge warrants serious re-evaluation of structuring a system that requires debtor to litigate their claims for forgiveness of student-loan debt.

Finally, consider our finding that the identity of the judge assigned to the adversary proceeding is associated with the extent of discharge. To properly interpret this finding, one must keep in mind that assignment of an adversary proceeding to a judge is not the equivalent of a judge making an undue hardship discharge determination. The latter only occurred only in proceedings resolved by trial, which constituted 26% of the proceedings in the reduced dataset. Accordingly, in nearly three-quarters of the proceedings upon which our statistical model is based, the judge did not decide whether the debtor's circumstances warranted an undue hardship discharge. Nonetheless, through managerial judging, judges may attempt to facilitate pretrial settlement.[169] If managerial judging signals to litigants what the outcome would be were the proceeding to be resolved by trial, then it seems reasonable to conclude that a judge may be well poised to influence the outcome of settled proceedings.

As for proceedings resolved by trial, we have previously documented in our study of bankruptcy court doctrine regarding the undue hardship discharge that substantive outcome was best explained by differing judicial perceptions of how the same standard applied to similarly situated debtors.[170] We have no reason to believe that the dynamic would be different in this context. As one bankruptcy judge has observed, because of the lack of a statutory definition for undue hardship, "so much is therefore left to the individual view of each judge who, after all, brings the sum of who and what he was, what he has become, and what he sees through his own eyes."[171] When disparate treatment results from the judge to whom a case has been assigned, rather than from differences in the factual characteristics underlying a debtor's claim of undue hardship, we have a uniform law only in form and not in substance. In the context of undue hardship discharge litigation, this has the consequence of denying access to justice and thus undermining the fresh start principle enshrined in the Bankruptcy Code.

Ultimately, the associations unearthed by our regression analyses give

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[168]*See supra* notes 138-39 and accompanying text.

[169]*See supra* note 133.

[170]*See* Pardo & Lacey, *supra* note 10, at 486-509.

[171]N.Y. State Higher Educ. Serv. Corp. v. White (*In re* White), 6 B.R. 26, 29 (Bankr. S.D.N.Y. 1980) (citation omitted).

considerable traction to our concerns regarding access to justice. If extralegal factors predominantly influence the extent of discharge obtained by student-loan debtors, then policymakers need to reconsider the assumptions they have made regarding the propriety of discharge litigation in a system oriented toward granting substantive relief to debtors.

CONCLUSION

The goal of the consumer bankruptcy system ought to be the optimization of the financial health of debtors who seek relief from financial distress. Sadly, attaining this goal has proved to be elusive with respect to the student-loan debtors in our study. With its inherently overbroad scope, the Bankruptcy Code's undue hardship discharge provision has swept into its fold debtors who find themselves in dire financial straits. All undoubtedly expended considerable economic resources in their efforts to escape crushing educational debt loads. While the majority of the debtors in our study obtained relief, others did not. To make matters worse, the extent of relief obtained by debtors turned more on extralegal factors than legal factors. These are the hallmarks of a system that has run amok. The time has come for Congress to recognize that our higher education finance system suffers from schizophrenia—namely, a public-oriented approach to student-loan origination but a business-oriented approach to student-loan collection. Undue hardship discharge litigation is merely a symptom of this pernicious discord.[172] If we are to restore the higher education finance system to a harmonious state, congressional reform efforts need to begin by giving student-loan debtors in bankruptcy unfettered access to a fresh start.

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[172]*See* H.R. REP. NO. 95-595, at 134 (1977) ("[I]f [student] loans are granted too freely and that is what is causing the increase in bankruptcies, then the problem is a general problem, not a bankruptcy problem. The loan program should be tightened, or collection efforts should be increased. If neither of those alternatives is acceptable, then the loan programs should be viewed as general social legislation that has an associated cost. It is inappropriate to view the program as social legislation when granting the loans, but strictly as business when attempting to collect. Such inconsistency does not square with general bankruptcy policy."), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6095.