

AN EMPIRICAL ASSESSMENT OF STUDENT LOAN DISCHARGES AND THE UNDUE HARDSHIP STANDARD

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For years, academics have argued that the undue hardship standard for discharging student loans in bankruptcy is both unduly burdensome and applied in an inconsistent manner. By reviewing a nationwide sample of student loan bankruptcy disputes, this study shows that neither criticism is warranted. First, judges grant a hardship discharge to nearly forty percent of the debtors who seek one. Second, successful debtors differ from their unsuccessful counterparts in three important respects. They are (1) less likely to be employed, (2) more likely to have a medical hardship, and (3) more likely to have lower annual incomes the year before they filed for bankruptcy. The real failing of the student loan discharge process is lack of participation by those in need. Incredibly, only 0.1 percent of student loan debtors who have filed for bankruptcy attempt to discharge their student loans. That statistic is even more surprising in light of this Article's finding that a debtor does not need to hire an attorney to be successful. In fact, debtors without attorneys were just as likely to receive discharges as debtors with attorneys were. Ultimately, the low rate of filing shows that, although the system is broken, many of its flaws stem from a failing not previously discussed in the literature.

INTRODUCTION

Every week, it seems, newspapers publish profiles of recent graduates who cannot afford to pay back their loans.¹ Given the sheer amount of outstanding federal and private student loan debt (\$1 trillion)² and the high

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¹ See, e.g., Mary Pilon, *The \$555,000 Student-Loan Burden*, WALL ST. J. ONLINE (Feb. 13, 2010), <http://online.wsj.com/article/SB10001424052748703389004575033063806327030.html>; Kathy M. Kristof, *Students Learn Too Late the Costs of Private Loans*, L.A. TIMES (Dec. 27, 2008), <http://articles.latimes.com/2008/dec/27/business/fi-collegedebt27>.

² *Student Loan Debt Clock*, FINAID, <http://www.finaid.org/loans/studentloandebtclock.phtml> (last visited June 1, 2012). To

ten-year default rate (10%),³ these profiles are representative of a substantial number of graduates. The recent recession has only further exacerbated the problem.

Generally, one solution to insurmountable debts is to declare bankruptcy. However, student loans cannot be discharged through normal bankruptcy proceedings.⁴ Instead, Congress requires debtors to file an adversary proceeding.⁵ During the adversary proceeding, debtors have the additional burden of proving that repaying their student loans would constitute an “undue hardship.”⁶ More specifically, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 states that a bankruptcy proceeding “does not discharge an individual debtor from any [educational] debt . . . unless excepting such debt from discharge under this paragraph would impose an *undue hardship* on the debtor and the debtor’s dependents.”⁷ Because Congress failed to define “undue hardship,” courts have been forced to provide their own interpretations.⁸

Although judges devised numerous tests,⁹ in recent years, the *Brunner* standard has come to dominate the field. This test, first set forth in *Brunner v. New York State Higher Education Services Corp.*,¹⁰ requires the debtor to establish the following three elements:

better understand the size of this figure, one need only observe that Americans now have more student loan debt than credit card debt. See Susan Tompor, *Student Loan Debt Exceeds Credit Card Debt in USA*, USA TODAY (Sep. 10, 2010), http://www.usatoday.com/money/perfi/college/2010-09-10-student-loan-debt_N.htm.

³ NATIONAL CENTER FOR EDUCATION STATISTICS, DEALING WITH DEBT vi (2006), available at <http://nces.ed.gov/pubs2006/2006156.pdf>.

⁴ See generally 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) (2006)).

⁵ An adversary proceeding is a lawsuit within a bankruptcy case. In the context of student loans, an adversary proceeding occurs when a debtor sues an educational creditor and attempts to prove that repayment would constitute an undue hardship.

⁶ *Id.*

⁷ 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) (2006) (emphasis added). Although the Code has been amended numerous times since then, this undue hardship standard has been in effect since the 1970s.

⁸ Judges have frequently lamented this responsibility. See, e.g., *Kopf v. U.S. Dep’t of Educ.* (*In re Kopf*), 245 B.R. 731, 736 (Bankr. D. Me. 2000) (“Without express statutory definition, ‘undue hardship’ has proved an eely notion. Courts have long struggled to articulate its content.”); *Speer v. Educational Credit Management Corp.* (*In re Speer*), 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) (“As an additional irritation, the statute Congress casted gives the Courts absolutely no guidance as to what would constitute ‘undue hardship’ other than a Webster’s dictionary.”).

⁹ For a description of the more notable tests, see B.J. Huey, *Undue Hardship or Undue Burden: Has the Time Finally Arrived for Congress to Discharge §523(a)(8) of the Bankruptcy Code?*, 34 TEX. TECH L. REV. 89, 101–12 (2002).

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

- (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.¹¹

Detailed treatment of these provisions can be found elsewhere.¹² For present purposes, the reader need only know that the three prongs require the debtor to show (1) a current inability to repay the loans, (2) a future inability to repay the loans, and (3) a good faith effort to repay the loans.¹³ In interpreting these elements, many courts have held that the debtor must have more than “temporary financial adversity,” but the situation need not be one of “utter hopelessness.”¹⁴

The *Brunner* test has been officially adopted in nine circuits.¹⁵ The two holdouts are the First and Eighth Circuits. Whereas the Eighth Circuit employs a more holistic totality of the circumstances test,¹⁶ the First Circuit has not settled the issue, thus allowing lower courts to use either approach.¹⁷ Although the tests are doctrinally quite distinct, my analyses did not find any statistically significant differences between outcomes in *Brunner* circuits and the Eighth Circuit. Identical debtors filing in a *Brunner* circuit and a totality of the circumstances circuit should expect similar outcomes.¹⁸ For this reason, the Article will focus its discussion on the *Brunner* standard.

¹¹ *Id.* at 396.

¹² See, e.g., Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 196–200 (2009).

¹³ I borrow this terminology from Pardo & Lacey, *supra* note 18, at 496.

¹⁴ Pa. Higher Educ. Assistance Agency v. Birrane (In re Birrane), 287 B.R. 490, 495 (B.A.P. 9th Cir. 2002); United States Aid Funds, Inc. v. Nascimento (In re Nascimento), 241 B.R. 440, 445 (B.A.P. 9th Cir. 1999).

¹⁵ 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, 514, n. 34 (2008).

¹⁶ Huey, *supra* note 9, at 106–08.

¹⁷ See Noah Schaffer, *Bankruptcy – Student loans – Undue hardship*, MASS. LAW. WKLY. (Oct. 20, 2010), <http://masslawyersweekly.com/2010/10/20/bankruptcy-student-loans-undue-hardship-4>.

¹⁸ This finding is supported by previous research. 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. 487 (2005).

In the legal literature, scholars have devoted substantial time to arguing both the merits of the *Brunner* test and Congress' decision to impose the undue hardship standard on student loans.¹⁹ Nearly all authors agree that the undue hardship requirement is both unduly burdensome and inconsistently applied.²⁰ Instead of rehashing these debates via normative arguments, this paper uses quantitative analysis to determine whether the undue hardship standard warrants such harsh criticism. To date, this area has been largely unexplored. In the past few years, Rafael Pardo and Michelle Lacey have conducted the most extensive empirical work on student loan discharges.²¹

In their first empirical study of student loan discharge, Pardo and Lacey

¹⁹ See, e.g., Huey, *supra* note 9, at 112–28; Charles Booker, *The Undue Hardship of Education*, 39 J.L. & EDUC. 273, 278–79 (2010) (suggesting a modification to the second prong of the *Brunner* test); Robert B. Milligan, *Putting an End to Judicial Lawmaking: Abolishing the Undue Hardship Exception for Student Loans in Bankruptcy*, 34 U.C. DAVIS L. REV. 221, 254 (2000) (arguing that Congress should “[r]eplac[e] the undue hardship exception with a bright-line rule of non-dischargeability coupled with the Department of Education’s Income Contingent Repayment Plan [to] bring uniformity and efficiency to this area of bankruptcy law”); Patricia Somers & James M. Hollis, *Student Loan Discharge Through Bankruptcy*, 4 AM. BANKR. INST. L. REV. 457, 469–76 (1996); Jeffrey L. Zackerman, *Discharging Student Loans in Bankruptcy: The Need for a Uniform “Undue Hardship” Test*, 65 U. Cin. L. Rev. 691, 701–25 (1997) (recommending the adoption of the *Brunner* test).

²⁰ See, e.g., Edward Paul Canterbury, *The Discharge of Student Loans in Bankruptcy: A Debtor’s Guide to Obtaining Relief*, 32 OHIO N.U. L. REV. 149, 149 (2006) (The undue hardship standard “has produced unpredictable and unfair results due to Congress’ failure to adequately define the contours of the standard”); Robert C. Cloud, *When Does Repaying a Student Loan Become an Undue Hardship?*, 185 ED. LAW REP. 783 (2004) (claiming that “many bankruptcy courts have interpreted undue hardship harshly and narrowly”); Jennifer L. Frattini, *The Dischargeability of Student Loans: An Undue Burden*, 17 BANKR. DEV. J. 537, 538 (2001) (arguing that “inequitable and detrimental effects . . . can result from judicial interpretations of undue hardship”); Katheryn E. Hancock, *A Certainty of Hopelessness: Debt, Depression, and the Discharge of Student Loans Under the Bankruptcy Code*, 33 LAW & PSYCHOL. REV. 151, 165 (2009) (“The current body of case law may contain standards, but the way in which these standards are applied leads to decisions that are not uniform and many times unfair.”); Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors be Impoversihed to Discharge Student Loans?*, 71 TUL. L. REV. 139, 149 n. 64 (1996) (“The variations [of the undue hardship test] that exist from court to court are staggering. Even courts purporting to use the same test will differ in the subtleties with which the test is applied.”). Even courts have claimed that undue hardship analysis is not uniformly applied. See *Speer v. Educational Credit Management Corp. (In re Speer)*, 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) (“[T]he application of this standard requires each court to apply its own intuitive sense of what ‘undue hardship’ means on a case by case basis. With so many Solomons hearing the cases, it is no wonder the results have varied.”).

²¹ See Pardo & Lacey, *supra* note 12; Pardo, *supra* note 15; Pardo & Lacey, *supra* note 18.

examined published court opinions²² and found three statistically significant differences between debtors who received discharges and those who did not. Successful debtors (1) had lower monthly incomes, (2) had lower monthly expenses, and (3) were more likely to have a medical problem or have a dependent with a medical problem.²³ Given the few dissimilarities between successful and unsuccessful discharge seekers, they concluded that the undue hardship standard is applied inconsistently and is largely based on a judge's personal sentiments.²⁴ Unfortunately, because judges choose not to publish opinions for most adversary proceedings, this study's generalizability is rather limited.²⁵ Indeed, for more than ninety percent of the proceedings in my sample, judges declined to publish a court opinion.

In their most recent piece, Pardo and Lacey examined student loan discharges in the Western District of Washington.²⁶ Seeking to fill some gaps in their original study, they looked beyond published opinions, this time relying on filings in adversary proceedings. Because that method is not limited to judicial opinions, it yields a sample that is more representative of the population of student loan debtors who sought discharges. However, the results are only generalizable to the extent that this single district is representative of the nation as a whole.²⁷ In that study, Pardo and Lacey found that discharge decisions largely depend upon which judge rules on a given case. Additionally, they found that debtors with

²² See Pardo & Lacey, *supra* note 18, at 433–38.

²³ See Pardo & Lacey, *supra* note 18, at 481–86 (“The percentage of unhealthy debtors among the discharge group is substantially higher than among the nondischarge group. Furthermore, within the subset of unhealthy debtors, the discharge group includes a greater proportion of debtors who suffered from a work-limiting medical condition. Finally, among those debtors with dependents, the proportion of those responsible for an unhealthy family member is more than twice as large in the discharge group.”); see also Pardo, *supra* note 15, at 516–23 (In this follow-up article, Pardo reexamined the set of published court opinions. He once again showed that debtors with medical conditions are substantially more likely to receive discharges. Pardo concluded the article by arguing that financial characteristics should play a more prominent role in discharge outcomes.)

²⁴ See Pardo & Lacey, *supra* note 18, at 486 (“Our comparison of the factual circumstances of the discharge group and the nondischarge group has demonstrated that courts have not applied the law in a consistent fashion . . . the outcome of undue hardship determinations has generally been based on differing judicial perceptions of what the law commands.”).

²⁵ Pardo and Lacey acknowledge the limitations inherent in this study. Pardo & Lacey, *supra* note 18, at 433–34.

²⁶ See Pardo & Lacey, *supra* note 12.

²⁷ Pardo and Lacey argue that the Western District of Washington is “a microcosm of the rest of the nation.” They make this claim based on their finding that the district is similar to the nation along three metrics: (1) the level of higher education attained by persons over age 25, (2) the amount of undergraduate student debt, and (3) the bankruptcy rate.

“highly experienced” attorneys were more likely to obtain discharges. The influence of these nondoctrinal case characteristics on discharge outcomes led Pardo and Lacey to conclude that financial hardship is a less important factor than it should be.²⁸

My study expands upon prior research in several respects. First, I draw my data from a nationwide sample of adversary proceedings. This broader geographic scope means that my results are more generalizable. In addition, this method allowed me to determine how frequently people in bankruptcy actually attempt to discharge their student loans. The answer was surprising: barely 0.1 percent of student loan debtors in bankruptcy sought to discharge their educational debts. This figure illustrates the central flaw in the system: 99.9 percent of bankrupt student loan debtors do not even try to discharge their student loans.

Second, I include all adversary proceeding outcomes in my study. Existing research has been limited to cases that were either settled or reached a trial verdict.²⁹ However, because default judgments and dismissals occur nearly as often as settlements and trial verdicts, omitting these alternative outcomes leaves the researcher with an incomplete view of student loan discharge.³⁰ After all, someone whose case was dismissed received just as little relief as a person who lost at trial. Likewise, a default judgment provides the same amount of relief as a trial victory. In fact, it is even better for debtors because they do not have to spend time litigating the dispute.

This Article’s third contribution is that it compares the financial and demographic characteristics of discharge seekers with those of non-discharge seekers. Throughout this paper, I refer to those debtors who filed an adversary proceeding with the hope of discharging their student loan debt as “discharge seekers.” Likewise, I use “non-discharge seekers” to signify the debtors who filed for bankruptcy but did not seek to discharge their student loans.

The comparison between these two groups reveals that tens of thousands of non-discharge seekers are as bad off financially as the typical discharge seeker. This suggests that many more debtors could obtain relief if they filed an adversary proceeding to request a discharge. Instead of

²⁸ See Pardo & Lacey, *supra* note 12, at 229–35.

²⁹ See Pardo & Lacey, *supra* note 12, at 210–14 (After eliminating certain procedural positions and case dispositions, Pardo and Lacey reduced the number of adversary proceedings in their sample from 115 to 46. Their analysis then focused on these 46 proceedings.).

³⁰ My sample contained ninety dismissals and four default judgments for a total of ninety-four. By contrast, there were sixty-seven settlements, four summary judgments, and forty trial verdicts, for a total of 111. By choosing to exclude dismissals and default judgments, Pardo and Lacey disregarded approximately half of the observations.

arguing about the burdensome nature of the undue hardship standard, academics, policymakers, journalists, and consumer advocates alike should encourage more non-discharge seekers to file adversary proceedings to discharge their student loans.

My study's final contribution is its examination of whether differences exist among three broad groups of discharge-seeking debtors: those who received (1) no discharges, (2) partial discharges, or (3) full discharges. Previous research used much finer distinctions and was, therefore, unable to find much consistency in decisions. By examining coarser gradients, I make it easier to determine whether any financial or demographic characteristics are truly predictive of receipt of a discharge. I chose the three aforementioned groupings because they closely align with a judge's decision-making process. When ruling on a student loan case, judges must generally decide whether the debtor should receive any relief, and if so, whether the debtor should get a full or partial discharge.³¹

Given the small sample size available, it is difficult to find meaningful differences between debtors who received similar amounts of relief. After all, even the most eloquent judge would find it hard to articulate precisely why there were minor differences in discharge percentages between two debtors. Admittedly, having a sufficiently large sample size would resolve this problem. Unfortunately, there are simply not enough student loan discharges to iron out that issue. Prior to my research, the most comprehensive study examined just 46 cases.³² Even at 207 cases, my sample size is too small for a regression to detect fine-grade differences in discharge outcomes.

However, by using the three groups identified above, my regressions do identify three variables that are predictive of discharge: (1) whether the debtor has a medical hardship, (2) whether the debtor is employed, and (3) the debtor's income the year before filing bankruptcy. These variables match the first two prongs of the *Brunner* test quite closely³³ and show that there is some degree of consistency in the judicial decisions. Debtors in bad economic positions *are* more likely to get relief. This finding of judicial consistency bolsters my argument that the major flaw in the system is not inconsistent application of the undue hardship standard, but rather the fact that 99.9 percent of student loan debtors in bankruptcy never attempt to get

³¹ Although the vast majority of circuits allow for partial discharges, the third circuit has taken an "all or nothing" approach and refuses to grant them. Some circuit courts have not addressed the issue, and therefore, district court judges in these circuits have been left to decide the issue themselves. *See e.g.*, *In re Kapinos*, 243 B.R. 271 (W.D. Va. 2000) (citing to an extensive list of court opinions allowing for partial discharges).

³² Pardo & Lacey, *supra* note 12, at 214.

³³ The first two prongs require a current inability to repay and a future inability to repay. *See supra* note 11 and accompanying text.

a discharge.

Given that the cost of pursuing a student loan discharge is relatively low compared to the cost of filing bankruptcy, this statistic is even more surprising. Add on the fact that there is no statistically significant difference in outcomes between debtors without attorneys and debtors with attorneys,³⁴ and one cannot help but wonder why more people in bankruptcy do not seek to discharge their student loans. Ultimately, it seems that bankruptcy filers' lack of accurate knowledge of the system is the main problem.

Part I of this paper details the methodology behind my data collection, and Part II presents the study's findings. First, I compare the attributes of discharge seekers and non-discharge seekers. Then I estimate regression models to determine which variables are correlated with receipt of a discharge. Part III discusses the implications of my findings.

I. METHODOLOGY

To locate adversary proceedings for this study, I used Public Access to Court Electronic Records (PACER),³⁵ an online, government-run database that stores case information for U.S. bankruptcy courts. Although each court maintains its own database, the PACER Case Locator permits searches that encompass multiple judicial districts. This multi-district search allowed me to collect a nationwide sample.

My first step was to restrict the search fields to bankruptcy cases filed in the year 2007. I chose 2007 because, at the time of data collection,³⁶ it was the most recent year for which nearly all of the proceedings had been resolved. As of this writing,³⁷ only one student loan adversary proceeding from the 2007 sample is still pending.

Through use of the party name field, I further limited the results to adversary proceedings involving major education lenders. This step was necessary because PACER's search capabilities are quite limited. Notably, no way exists to restrict results to student loan discharges or even to locate adversary proceedings more generally.

Given PACER's deficiencies, the most efficient way to gather a nationwide sample of student loan debtors was to limit the search by specific education loan holders. Because of their dominance of the student loan market, I restricted the search results to cases involving at least one of

³⁴ In my sample, forty-three percent of debtors without attorneys received a discharge versus thirty-eight percent of debtors with attorneys.

³⁵ <https://pcl.uscourts.gov>.

³⁶ October 2010.

³⁷ June 2011.

the ten largest education loan holders: Sallie Mae, Citi Student Loans, National Education Loan Network, Wells Fargo Education Financial Services, Pennsylvania Higher Education Assistance Agency, Wachovia Education Finance, JP Morgan Chase Bank, College Loan Corporation, and Student Loan Xpress.³⁸ I ran a separate search for each of these creditors using the “Party Name” field.

Collectively, in 2007, these ten lenders held 71.2 percent of all student loans.³⁹ In addition to the companies already listed, I also searched for “Educational Credit Management Corporation.” Because this entity is the nation’s largest guarantor of education loans and plays a role in more than half of all student loan cases,⁴⁰ leaving it out would have led me to severely undercount the true number of cases.⁴¹

For every adversary proceeding in the search results, I opened the docket report and looked at the Nature of Suit. The Nature of Suit is a designation that the courts use to classify the matter in dispute.⁴² If the Nature of Suit indicated the debtor was seeking to discharge student loans, I included the proceeding in my sample.

Only 217 adversary proceedings involved a debtor pursuing a student loan discharge. For each of these 217 proceedings, I collected approximately fifty variables related to the debtor’s financial and demographic characteristics and the proceeding’s disposition. To construct this dataset, I compiled information from both the student loan adversary proceeding and its associated bankruptcy case.⁴³ Most of the financial and demographic variables were available on Schedules A–J.⁴⁴ I gathered the

³⁸ *Largest Education Lenders (FY2007)*, FINAID, <http://www.finaid.org/loans/biglendersfy2007.phtml>.

³⁹ *Largest Education Lenders (FY2007)*, FINAID, <http://www.finaid.org/loans/biglendersfy2007.phtml>.

⁴⁰ See Pardo & Lacey, *supra* note 12, at 209 (finding that Educational Credit Management Corporation was involved in 58% of the student loan proceedings in their study).

⁴¹ In many proceedings, only Educational Credit Management Corporation, and not the actual debt holder, appeared on the docket.

⁴² Student loan proceedings have the following Nature of Suit designation: “63 Dischargeability - 523(a)(8), student loan.” Individual district court databases do have a limited “Nature of Suit” search function. Unfortunately, it is impossible to search by the Nature of Suit code for student loan cases. This is likely because the relevant Nature of Suit code only appears on the adversary proceeding docket, not on the docket for the main bankruptcy case.

⁴³ The adversary proceeding contains filings directly related to the student loan dispute. The associated bankruptcy case contains broader and more detailed financial information that is related to the debtor’s general bankruptcy petition.

⁴⁴ These schedules present a detailed picture of debtors’ financial positions at the time they file for bankruptcy. The information contained in each schedule is as follows: (A) real property, (B) personal property, (C) property claimed as exempt, (D) creditors holding

remaining variables by examining the complaint in the adversary proceeding. When available, I also collected data from final settlement agreements and judicial opinions.

Although most debtors filed only one adversary proceeding, four debtors filed separate complaints against each of their student loan creditors. So no person would be counted multiple times and skew the results, I consolidated these multiple filings into single observations. Because the judge and financial information for each debtor remained constant across the multiple filings, this was a simple process. It required aggregating the amount of educational debt sought to be discharged and doing the same for the amount of debt that was actually discharged. Taking these steps brought the four debtors who filed multiple proceedings into conformity with the rest of my sample.

I excluded six cases from the sample because PACER lacked the schedules required to code a usable observation. These empty dockets, which Pardo and Lacey have dubbed “skeleton proceedings”,⁴⁵ are a frequent problem on PACER.⁴⁶ Finally, I eliminated one case because it was still pending as of this writing. Due to these measures, my final dataset declined from 217 to 207 observations.

In my sample, a broad swath of the judiciary is represented. Cases are distributed among the circuits in the following manner: First – 6.8%, Second – 5.8%, Third – 7.7%, Fourth – 3.9%, Fifth – 5.8%, Sixth – 11.6%, Seventh – 5.8%, Eighth – 16%, Ninth – 18.8%, Tenth – 9.7%, Eleventh – 7.7%, and D.C. – 0.5%. One hundred and twenty-nine judges and seventy-three of the ninety-four judicial districts are represented.

Although the bulk of my study relies upon these 207 student loan proceedings, the 2007 Consumer Bankruptcy Project, which is a national sample of consumer bankruptcy cases,⁴⁷ proved invaluable in making the findings detailed in Part II.A.

II. FINDINGS

A. *Who Pursues a Discharge?*

secured claims, (E) creditors holding unsecured priority claims, (F) creditors holding unsecured nonpriority claims, (G) executory contracts and unexpired leases, (H) codebtors, (I) current income of individual debtor(s), and (J) current expenditures of individual debtor(s).

⁴⁵ I borrow the term from Pardo & Lacey, *supra* note 12, at 203 n.113 (2009).

⁴⁶ See Pardo & Lacey, *supra* note 12, at 203 (2009).

⁴⁷ The principal investigators of the project are David Himmelstein, Melissa Jacoby, Robert Lawless, Angela Littwin, Katherine Porter, John Pottow, Teresa Sullivan, Deborah Thorne, Elizabeth Warren, and Steffie Woolhandler.

This section examines which debtors actually pursue student loan discharges. The first subpart shows that the overwhelming majority of bankruptcy filers with student loans do not attempt to discharge them. The second subpart compares debtors who sought relief with those who did not. Similarities between the two groups indicate that tens of thousands more bankruptcy filers would likely be successful if they tried to discharge their student loans in adversary proceedings.

1. The Potential Filers

In 2007, the year of this study's focus, there were 822,590 consumer bankruptcy filings.⁴⁸ Of these debtors, 238,446 (29%) owed student loans. To arrive at this number, I calculated the percentage of debtors in the Consumer Bankruptcy Project⁴⁹ who had student loans. I then multiplied that figure (29%) by the total number of consumer bankruptcy filings (822,590). The result was 238,446.

Next, I needed to approximate how many debtors in bankruptcy owed student loans to the creditors in my study (i.e. the ten largest student loan holders and Educational Credit Management Corporation). To do so, I made the assumption that student loan borrowers file for bankruptcy at similar rates regardless of which entity is currently holding their loans.⁵⁰ I then multiplied the estimated number of student loan borrowers in bankruptcy (238,446) by 71.2 percent, the percentage of student loan debt held by the creditors in my study. The resulting figure estimates that, in 2007, there were 169,774 bankrupt debtors who owed student loans to at least one of the ten lenders in my study. Because I designed my searches to capture anyone from this population who sought to discharge their student loans, this number also estimates the entire population of bankruptcy filers eligible to be in my sample. Of these 169,774 debtors, only 217 (0.1%) filed an adversary proceeding for the purpose of discharging their student loans.

Those debtors who did file adversary proceedings were relatively successful. Half of them received some type of relief. More specifically,

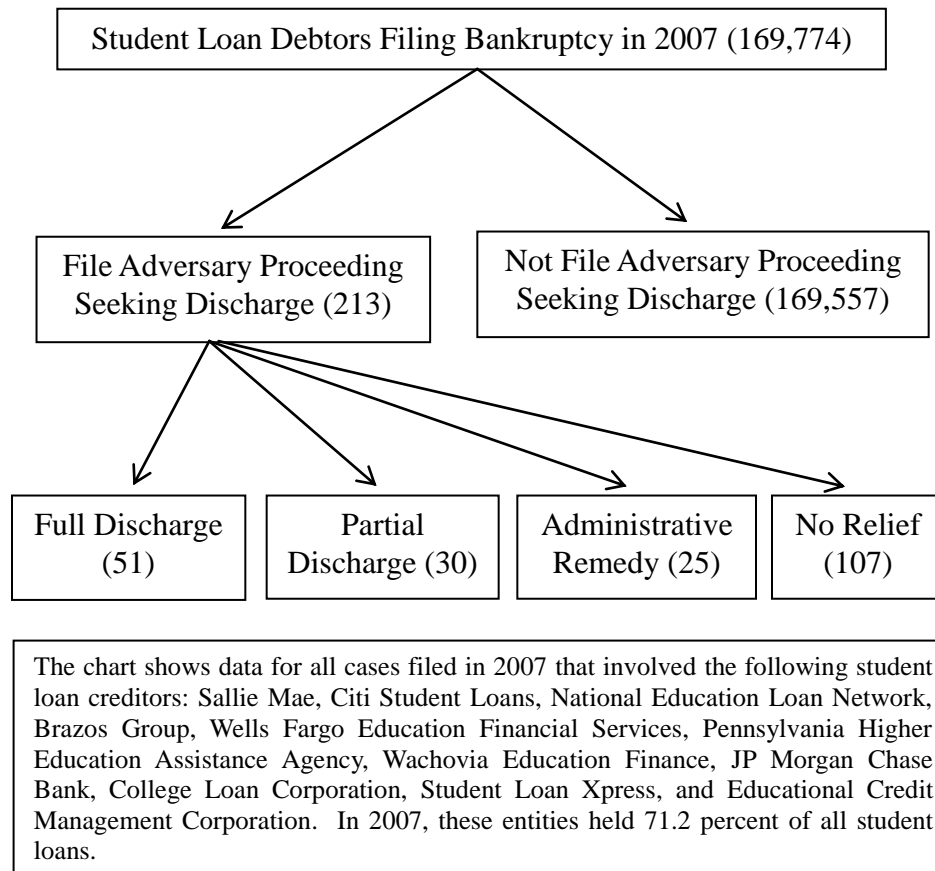
⁴⁸ See American Bankruptcy Institute, *Quarterly Non-business Filings by Chapter (1994-2010)*, available at <http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=54477>.

⁴⁹ For a discussion of the representativeness of the Consumer Bankruptcy Project, see Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 353–56 (2008).

⁵⁰ Some may argue that this assumption is untenable if, for instance, certain student-loan creditors have better repayment plans or are more likely to permit forbearance. However, because student loans are but one part of a person's decision to file for bankruptcy, the leniency of student loan creditors will be determinative in very few cases.

the remedies were as follows: fifty-one (24% of the entire sample) full discharges, thirty (14%) partial discharges, and twenty-five (12%) administrative repayment plans. Despite the availability of these remedies, debtors who received any form of relief constituted less than 0.1 percent of student loan borrowers in bankruptcy. Figure 1 uses a flow chart to depict this information visually.

Figure 1: The Path of Student Loan Debtors in Bankruptcy



At a glance, three theories could explain why such a small percentage of bankrupt debtors seek to discharge their student loans. First, lenders may be granting discharges outside of the bankruptcy process. However, because federally guaranteed loans can only be discharged by bankruptcy courts, this out-of-bankruptcy discharge is restricted to private loans and therefore, unlikely to be a common occurrence. Less than fifteen percent of borrowers have private student loans, and most of those only take out private loans

after they have exhausted the federally guaranteed options.⁵¹ In addition, private lenders have little reason to negotiate with borrowers. After all, they can easily dissuade debtors from filing by just directing them to the widespread media reports that contend student loans are all but impossible to discharge.

A second reason for such a low filing rate is that debtors might frequently turn to administrative remedies for assistance. Indeed, in my sample, twenty-five borrowers ultimately pursued an administrative remedy, with the most popular being the William D. Ford Income Contingent Repayment Plan.⁵² Such remedies, however, are poor substitutes for bankruptcy discharges. Whereas bankruptcy relief is immediate, administrative remedies require debtors to make payments on their loans for twenty-five years before receiving a discharge, and even after that time is up, the discharged debt is treated as taxable income.⁵³ For this reason, I do not categorize administrative remedies as a form of relief in the rest of this Article.

A third reason why debtors might decline to file adversary proceedings is that they simply do not think they will be able to discharge their student loans in bankruptcy. For years, the message in both popular media and academic journals has been that it is extremely difficult to meet the undue hardship threshold.⁵⁴ One article in the *New York Times* went so far as to

⁵¹ *Private Loans: Facts and Trends*, THE PROJECT ON STUDENT DEBT (July 2011), available at http://projectonstudentdebt.org/files/pub/private_loan_facts_trends.pdf.

⁵² Administrative remedies are generally only available for federal loans. For more information on the William D. Ford Income Contingent Repayment Plan, see *Income Contingent Repayment*, FINAID, <http://www.finaid.org/loans/icr.phtml>; see also 34 C.F.R. § 685.209.

⁵³ Letter from Eric Solomon, Assistant Secretary for Tax Policy, Department of the Treasury, to Sander Levin, Member of the House of Representatives (Sep. 19, 2008) (available at <http://www.finaid.org/loans/20080919treasurylevinfoforgiveness.pdf>) (“[L]oan forgiveness under HEA §§ 455(e) [Income-Contingent Repayment] and 493(c)(7) [Income-Based Repayment] does not satisfy requirements for income exclusion under Code § 108(f).”).

⁵⁴ See e.g., Diana Jean Schemo, *Private Loans Deepen a Crisis in Student Debt*, N.Y. TIMES (June 10, 2007), <http://www.nytimes.com/2007/06/10/us/10loans.html> (calling it “virtually impossible to discharge private student loans in bankruptcy”); Michelle Singletary, *Students Trapped in Private Loans, With no Bankruptcy Protection*, WASH. POST (Apr. 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/28/AR2010042804396.html> (calling undue hardship “a high hurdle to jump”); Katie Fraser, *Private Student Loans can Pinch*, CHI. SUN-TIMES (Oct. 4, 2010), <http://beaconnews.suntimes.com/news/1860184-418/loans-student-private-bankruptcy-debt.html> (stating that “by law [private student loans] cannot be discharged in bankruptcy”); Anya Kamenetz, *No Need to Go Begging to Get Out From Underneath Student Loan Debt*, BOS. GLOBE (Jan. 22, 2011), http://articles.boston.com/2011-01-22/business/29347769_1_income-based-repayment-student-lenders-student-loan (“Both

contend that “The cases are so harsh in measuring what an undue hardship is that anybody who is working and maintaining any kind of home life has very little chance of discharging these things in bankruptcy.”⁵⁵ Such bleak reports have produced a chilling effect that deters debtors from pursuing student loan discharges. These harsh warnings hurt two types of debtors. First, they convince people who are already in bankruptcy not to file an adversary proceeding to seek relief from their student loans. Second, they discourage people whose debt is primarily comprised of student loans from filing for bankruptcy in the first place. After all, why would a person who has a lot of student loan debt file if he believes that none of it will be discharged in bankruptcy.

In each case, the rational debtor weighs the lawyer’s fees and court time against the perceived miniscule chance of success. From this simple analysis, most people would likely conclude that the costs far outweigh the expected benefits.

This calculation, however, is based on two incorrect premises. First, the common belief that it is nearly impossible to discharge student loans is wrong. Although the standard is certainly not lenient, it is frequently met. For instance, in my sample, twenty-four percent of debtors received full discharges and an additional fourteen percent received partial discharges.

The second misconception is that lawyers are necessary. Surprisingly, they are not. In fact, in my sample, pro se debtors were actually more likely to receive discharges than their counterparts who were represented by counsel (43% vs. 38%). This is not to say that attorneys add no value in these cases. Instead, it proves that hiring an attorney is not a prerequisite to obtaining relief. Both of these findings will be discussed further in Part III, but first, I present some broader descriptive statistics that illustrate the characteristics of student loan debtors.

2. Descriptive Statistics

This section examines the demographic and financial characteristics of the debtors in my sample. The data in the accompanying tables show that student loan debtors are in dismal financial positions. This section also compares discharge seekers in my study to a random sample of 653 non-discharge seekers.⁵⁶

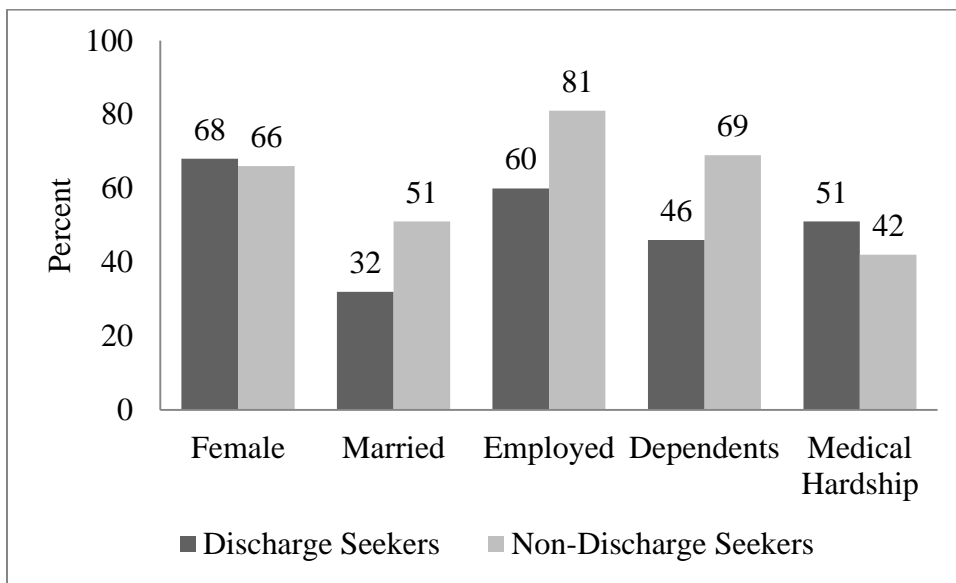
federal and private student loans are all but undischARGEABLE in bankruptcy.”).

⁵⁵ Jonathan D. Glater, *That Student Loan, So Hard to Shake*, N.Y. TIMES, Aug. 24, 2008, at BU1 (Quoting a bankruptcy attorney).

⁵⁶ For my sample of non-discharge seekers, I used all student loan debtors in the Consumer Bankruptcy Project. Admittedly, some of these debtors may actually have been discharge seekers. However, since the Consumer Bankruptcy Project does not contain

From Figure 2, one can see that the modal characteristics among discharge seekers are as follows: female (68%), unmarried (68%), employed (60%), no dependents (54%), and medical hardship (51%). Of particular note is the disproportionate percentage of discharge seekers who are female (68%). This figure is substantially higher than the percentage of people in bankruptcy who are female (56%); however, it is in line with the percentage of student loan debtors in bankruptcy who are female (66%).⁵⁷

Figure 2: Percentage of Student Loan Debtors with Certain Demographic Characteristics



The fact that substantially more women than men seek educational discharges can likely be attributed to the gender disparities in post-secondary enrollment and student loan debt borrowing. Since 1991, women have outnumbered men on college campuses.⁵⁸ At present, women account for fifty-seven percent of college enrollment and earn fifty-seven percent of bachelor’s degrees. This figure has remained constant for the past ten

identifying information, I could not determine which, if any, debtors to exclude. Fortunately, as I have already shown that non-discharge seekers outnumber discharge seekers by a ratio of more than five hundred-to-one, we can estimate that only one debtor was incorrectly classified. Given the size of the Consumer Bankruptcy Project sample, this potential misclassification will not skew the data and therefore, should not concern us.

⁵⁷ Both these figures are according to data from the CBP.

⁵⁸ Mark Mather & Dia Adams, *The Crossover in Female-Male College Enrollment Rates*, POPULATION REF. BUREAU, <http://www.prb.org/Articles/2007/CrossoverinFemaleMaleCollegeEnrollmentRates.aspx>.

years.⁵⁹ Turning to graduate school, the balance is similarly tilted, with women constituting approximately sixty percent of the enrollment.⁶⁰

This discrepancy does not entirely account for the data in my sample. Two additional aspects must be considered. First, among lower socioeconomic status families, female students outnumber male students at even higher rates than average, while the ratio among wealthier families is far less skewed.⁶¹ Second, a greater percentage of female students incur student loan debt. At the master's level, forty-seven percent of women have student loans, compared to thirty-eight percent of men.⁶² For women and men at the doctoral level, the numbers are thirty-seven percent and twenty-seven percent, respectively.⁶³

Substantially more women than men enroll in post-secondary programs. On top of that, proportionally more women than men take out student loans. Given these enrollment and borrowing differences, it is easy to see why more women than men are attempting to discharge their student loans through bankruptcy.

A couple other noteworthy demographic characteristics are the mean age (49) and median age (48.5) of debtors in my sample. These figures show that most filers are well beyond the traditional college age. Because Congress enacted the undue hardship standard to prevent abusive filings by recent college graduates, such a finding is important. At the time Congress passed the undue hardship provision, many politicians feared that young people would borrow substantial sums to pay for college and then discharge their student loans in bankruptcy right after graduation. My data shows that this is not a problem today.

Two more highlights from Figure 2 are the sixty percent employment rate and the fifty-one percent medical hardship rate of discharge seekers. Just by looking at the unemployment and medical statistics, one can see that these debtors are in pretty bad positions, but how do they compare to people who did not attempt to discharge their student loans?

⁵⁹ *College Gender Gap Appears to be Stabilizing with One Notable Exception, American Council on Education Analysis Finds*, AM. COUNCIL EDUC. (Jan. 26, 2010) <http://www.acenet.edu/AM/Template.cfm?Section=Home&CONTENTID=35338&TEMPLATE=/CM/ContentDisplay.cfm>.

⁶⁰ Council of Graduate Schools, *Graduate Enrollment Continues Strong Growth in 2009*, available at http://www.cgsnet.org/portals/0/pdf/N_pr_ED2009.pdf.

⁶¹ Claudia Goldin, Lawrence F. Katz, & Ilyana Kuziemko, *The Homecoming of American College Women: The Reversal of the College Gender Gap*, 20 J. ECON. PERSP. 133, 146–48 (2006) (noting that “the female advantage has become greatest (at least in proportional terms) for the children of families with low socioeconomic status”).

⁶² Council of Graduate Schools, *Data Sources: Graduate Student Loan Debt*, available at http://www.cgsnet.org/portals/0/pdf/DataSources_2009_11.pdf.

⁶³ Council of Graduate Schools, *supra* note 62.

First, discharge seekers are considerably more likely to be unmarried, be unemployed, and have a medical hardship. These three characteristics indicate greater levels of adversity for discharge seekers. Of all the variables in the table, dependents is the only one in which non-discharge seekers are worse off (they are more likely to have dependents). On balance, the demographic characteristics seem to show that discharge seekers have a greater degree of hardship. Nonetheless, there is significant overlap between both groups, and this will become even more apparent after we explore the groups' respective financial characteristics.

Table 1 provides financial information for both discharge seekers and non-discharge seekers. Except for the two variables discussed in the next paragraph, I gathered all of the data for Table 1 from Schedules A–J and the Statement of Financial Affairs in the associated bankruptcy case.⁶⁴ Since most debtors filed an adversary proceeding within six months of their initial voluntary petition, there is little reason to suspect that the debtors' financial status changed appreciably during the intervening time. An additional reason reinforced my decision to gather data from the associated bankruptcy case: for cases that did not go to trial, even the most basic financial data is frequently absent from the adversary proceeding docket.

Table 1: Financial Characteristics

Characteristic	Discharge Seekers			Non-Discharge Seekers		
	Median	Mean	Std. Dev.	Median	Mean	Std. Dev.
Monthly Income	1,704	1,932	1,242	2,423	2,796	2,346
Monthly Expenses	1,997	2,268	1,440	2,451	2,775	2,299
Disposable Income	-49	-329	864	2	29	1,118
Prior Year Income	21,754	23,850	25,705	25,345	30,132	28,092
Total Assets	13,211	79,969	290,534	39,235	103,107	159,410
Total Liabilities	129,966	214,445	460,796	98,965	149,516	187,131
Educational Debt	47,610	80,746	89,327	9,252	20,538	28,380

I collected two variables (Educational Debt and Amount Discharged) from documents filed in the adversary proceeding. For Educational Debt, I examined the following, in order of preference: (1) judicial opinion, (2) joint statement of facts, and (3) complaint.⁶⁵ To find Amount Discharged, I

⁶⁴ The associated bankruptcy case is the Chapter 7 or Chapter 13 case that is associated with the debtor's adversary proceeding.

⁶⁵ I chose this order because it corresponds to the reliability of the respective documents. First, the judicial opinion is the most reliable because it is issued by an unbiased judge after both parties have had an opportunity to present their sides of the dispute. Next, the joint statement of facts is a stipulation of facts to which both parties agree. Finally, since the complaint is authored by one party (the debtor), it is the most likely to be inaccurate.

reviewed either the judicial opinion or stipulation for entry of discharge, depending on whether the case went to trial or was settled.

Table 1 shows that the average discharge seeker has a monthly income of \$1,932 which equates to an average annual income of just over \$23,000. Twenty-seven percent of discharge seekers are living below the poverty line⁶⁶ and the average monthly disposable income⁶⁷ of discharge seekers is negative \$329.

These low incomes are not one-year flukes. For the two years preceding bankruptcy, discharge seekers averaged annual salaries of \$23,850 and \$23,973, respectively. To make matters worse, these debtors are highly leveraged. The average discharge seeker has nearly three times the amount of liabilities as assets, and the median debtor fares even worse, with a liabilities-to-assets ratio approaching ten-to-one. By any reasonable metric, these filers are in extreme financial distress.

Now that we have a sense of discharge seekers, we can compare them with non-discharge seekers.⁶⁸ In nearly every category, both the mean and median values indicate that discharge seekers have higher levels of financial distress than non-discharge seekers. They make less money, own fewer assets, and have more liabilities, including educational debt.

Non-discharge seekers are in relatively better financial positions. However, this certainly does not mean they are in desirable economic shape. Their disposable income averages just twenty-nine dollars a month, and their liabilities exceed their assets.

The groups are not as distinct as they may seem at first glance. The large standard deviations indicate that there is a high degree of variance within each population and that there is more overlap between the two populations than the means and medians convey by themselves.

Using data from the Consumer Bankruptcy Project, I found that twelve percent of non-discharge seekers have at least as much educational debt as the median discharge seeker. At the time of filing, thirty-one percent of non-discharge seekers had monthly incomes below the median discharge seeker's, and in the year before bankruptcy, forty-four percent of non-discharge seekers earned less than the median discharge seeker earned. Finally, a full thirty-seven percent of non-discharge seekers had disposable

⁶⁶ For each debtor, I calculated the poverty line based on household size. For the forty-eight contiguous states and D.C., the 2007 poverty line was \$10,210 plus \$3,480 for each additional member of the household. Alaska and Hawaii have slightly modified poverty lines. See *The 2007 HHS Poverty Guidelines*, U.S. DEP'T HEALTH & HUM. SERVICES, <http://aspe.hhs.gov/poverty/07poverty.shtml>.

⁶⁷ I calculated monthly disposable income for each debtor by subtracting monthly expenses (Schedule J, Line 18) from monthly income (Schedule I, Line 16).

⁶⁸ I used the 2007 Consumer Bankruptcy Project to determine all Table 1 characteristics of non-discharge seekers.

incomes below that of the median discharge seeker. These figures show that there is quite a bit of similarity between both groups of debtors. Later in the paper, I discuss this comparison in greater detail.⁶⁹

Now that we have seen the financial distress that both discharge seekers and non-discharge seekers experience, the next section will set about determining what factors influence whether a debtor receives a discharge.

B. Who Obtains a Discharge?

Of the 207 debtors in my sample, eighty-one (39%) obtained a discharge. Their relief came in several forms, the most common being through settlement with their student loan creditors. That happened in fifty-six cases (27%). In twenty cases (10%), judges delivered a trial verdict that granted a discharge. Finally, four cases (2%) terminated by default judgment, and one (0.5%) ended in summary judgment.

This section explores what characteristics made these debtors successful and whether those characteristics were the same ones that courts, through judicial opinions, have identified as important undue hardship determinants. To answer these questions, I first employ several statistical tests to identify which variables warrant further inspection. Then I use an ordered logistic regression⁷⁰ to determine whether that significance persists after controlling for other relevant variables.

As discussed earlier, in order to satisfy the undue hardship standard, debtors must prove they (1) have a current inability to repay, (2) have a future inability to repay, and (3) made a good faith effort to repay.⁷¹ The tests in this section are designed to determine whether indicators of these elements are correlated with student loan discharges.

To begin, I employ the Spearman rank correlation⁷² to determine the correlation between the percentage of debt discharged and each of the following household financial characteristics: (1) monthly income, (2)

⁶⁹ See *infra* Part III.

⁷⁰ See *infra* pages 22–24.

⁷¹ This is Pardo and Lacey's restatement of the *Brunner* test which I adopt in this article. See *supra* text accompanying notes 9–14.

⁷² Although Pearson's *r* is the most common correlation coefficient, I cannot determine that statistic from my sample. One of the assumptions underlying Pearson's *r* is normality. However, since the percent discharges in my sample are overrepresented at the maximum (100%) and minimum (0%) possible values, my data does not satisfy this assumption. For this reason, I chose to use the Spearman rank correlation. This is a nonparametric test and, as such, does not make the distributional assumption of normality. For a more detailed description of the Spearman rank correlation, see generally DOUGLAS G. ALTMAN, PRACTICAL STATISTICS FOR MEDICAL RESEARCH 285–88 (1991).

monthly expenses, (3) disposable income, (4) poverty ratio,⁷³ (5) prior year income, and (6) assets minus liabilities. Each of these six factors is closely related to a debtor's current inability to repay outstanding student loans.

Contrary to Pardo and Lacey's findings,⁷⁴ my results indicate that several current inability metrics are correlated with higher discharge percentages. More specifically, lower monthly income ($p = .0250$), lower monthly expenses ($p = .0108$), and lower prior year income ($p = .0058$) are all correlated with higher discharge percentages. These findings are displayed in Table 2.

Table 2: Percentage of Debt Discharged by Financial Characteristics

Characteristic	Percentage of Debt Discharged		
	Spearman's rho	p -value	Observations
Monthly Income	-0.1585	0.0250	200
Monthly Expenses	-0.1802	0.0108	199
Disposable Income	0.0470	0.5095	199
Prior Year Income	-0.1968	0.0058	195
Poverty Ratio	-0.0829	0.2458	198
Assets – Liabilities	0.0875	0.2177	200

Regarding monthly expenses, one's expectation may be that the opposite should be true. Debtors with higher expenses are carrying greater financial burdens and therefore, should be better candidates for discharge. A possible explanation is that judges rely more heavily on a debtor's income than on his expenses to determine whether undue hardship exists. If this is true and income is the more important factor, the high degree of correlation between income and expenses (0.802) may indicate why higher expenses are correlated with lower percentage discharges. Although judges have not generally held that student loan discharge requires "utter hopelessness," they have made it clear that debtors will not receive discharges "merely because repayment of the borrowed funds would require some major personal and financial sacrifices."⁷⁵ Likewise, debtors are not entitled to discharges merely because repayment of their student loans would force

⁷³ The poverty ratio is calculated by dividing the debtor's household income by the poverty line established by the U.S. Department of Health and Human Services. The poverty line varies based on the number of dependents a debtor claims. See U.S. Department of Health and Human Services, *supra* note 66.

⁷⁴ See Pardo & Lacey, *supra* note 12, at 215–16 (2009) (finding that no current inability measures are correlated with higher discharge percentages).

⁷⁵ *Educ. Credit Mgmt. Corp. v. Howe (In re Howe)*, 319 B.R. 886, 889–90 (B.A.P. 9th Cir. 2005)

them to live below a middle class standard.⁷⁶ With this in mind, it seems possible that judges believe that debtors with higher expenses are better able to cut their expenses while still remaining well above a situation that would necessitate a discharge.

Although there is substantial overlap between the characteristics that determine one's current inability to repay and those that predict one's future inability to repay, there are some factors that are particularly indicative of future inability. These include whether the debtor (1) claims a medical hardship,⁷⁷ (2) is employed,⁷⁸ (3) is sixty years or older, (4) has dependents, (5) is married, or (6) has graduated from the school for which the loans were borrowed. These six characteristics are good measures of a debtor's future inability to pay because they are forward-looking with regard to a debtor's earning capacity and expenses. For instance, someone who is sixty years or older is unlikely to have as many working years left as a person in his twenties; caring for dependents is a long-term responsibility; a married person is more likely to live in a dual-income household; and additional education generally increases a person's earning potential.

I used a nonparametric Wilcoxon rank-sum test⁷⁹ to determine the association between these six characteristics and the median percentage of debt that was discharged. Table 3 displays the results and shows that the first four of these variables are statistically significant. Debtors with medical hardships received higher percentage discharges (44% vs. 22%, $p = .0002$). Likewise, unemployed debtors (46% vs. 25%, $p = .0005$) and those over age sixty (66% vs. 32%, $p = .0063$) discharged greater percentages of student loan debt.

⁷⁶ See *id.* at 889.

⁷⁷ For cases classifying medical hardship as a "future inability" characteristic, see e.g., *Oyler v. Educ. Credit Mgmt. Corp.* (In re Oyler), 397 F.3d 382, 385-86 (6th Cir. 2005); *Hafner v. Sallie Mae Servicing Corp.* (In re Harrer), 303 B.R. 351, 356 (Bankr. S.D. Ohio 2003); *Thoms v. Educ. Credit Mgmt. Corp.* (In re Thoms), 257 B.R. 144, 149 (Bankr. S.D.N.Y. 2001). When a debtor claims that a medical condition is causing undue hardship, the court should rely heavily on the debtor's word. Corroborating expert testimony is not necessary. See *In re Mosley*, 494 F.3d 1320, 1325 (11th Cir. 2007).

⁷⁸ Employment is arguably categorized as both a current inability and a future inability factor.

⁷⁹ Because the percent discharges in my sample are not normally distributed, my data does not satisfy the assumptions necessary to use a t-test. Therefore, I employ the nonparametric Wilcoxon rank-sum test. For a more detailed explanation of the Wilcoxon rank-sum test, see generally MYLES HOLLANDER & DOUGLAS A. WOLFE, *NONPARAMETRIC STATISTICAL METHODS* (1973).

Table 3: Percentage of Debt Discharged by Case Characteristics (Wilcoxon Rank Sum)

Groups	Observations	Median	Mean	z-statistic
Medical Hardship	104	11	43.69	3.734***
No Medical Hardship	96	0	21.85	(0.0002)
Employed	118	0	24.75	-3.478***
Unemployed	81	14	45.96	(0.0005)
Age \geq 60 years	18	100	65.95	2.730**
Age < 60 years	51	0	32.12	(0.0063)
Dependents	89	0	24.42	-2.524*
No Dependents	109	0	47.17	(0.0116)
Trial	39	61.64	48.32	-2.133*
Settlement	63	87.67	65.92	(0.0329)
Married	64	0	25.81	-1.874
Single	135	0	36.23	(0.0609)
Disposable Income > 0	70	0	29.30	-0.907
Disposable Income \leq 0	129	0	35.43	(0.3644)
Graduate from School	59	0	27.64	-0.750
Not Graduate	32	0	34.03	(0.4533)
Male	52	0	33.98	0.259
Female	132	0	32.64	(0.7956)
Attorney	162	0	32.70	-0.258
Pro Se	41	0	34.63	(0.7964)
Last Loan \geq 7 Years	59	0	36.71	0.186
Last Loan < 7 Years	93	0	34.60	(0.8524)
Loan for Self	170	0	32.61	-0.179
Loan for Other	20	0	34.65	(0.8579)
Chapter 7	190	0	32.80	-0.058
Chapter 13	15	0	36.60	(0.9537)

* p < .05; ** p < .01; *** p < .001

Interestingly, debtors without dependents discharged a higher percentage of student loan debt than debtors with dependents did (47% vs. 24%, p = .0116). To determine whether another factor was driving the dependents' coefficient to point in the "wrong" direction, I examined the

correlation between dependents and other variables. Primarily, I wanted to know if there was a high degree of correlation between being less than sixty and having dependents or between being married and having dependents. Since both of these categories (being less than sixty and being married) were correlated with lower percent discharges of student loans, a high degree of correlation between dependents and either of these two attributes would suggest that they might be causing this unexpected outcome. Neither relationship provided support for that hypothesis. The correlation between being less than sixty and having dependents was 0.27, and the correlation between being married and having dependents was 0.35.

As it stands, I do not have a theoretical reason for why debtors without dependents manage to discharge a greater percentage of student loans. Fortunately, we should not be too worried since, after I control for other factors in later regressions, the dependents variable loses its statistical significance.

The table also contains several factors that, although not directly related to a debtor's future inability to repay, may nonetheless be expected to have some effect on the amount of relief obtained. These are whether (1) the case ended in settlement or at trial, (2) the debtor's disposable income was less than zero, (3) the debtor was represented by an attorney, (4) the debtor was male, (5) the debtor cosigned the student loan for another person, and (6) the lead case was a Chapter 7 or Chapter 13 filing. I included these variables for the following reasons: first, whereas a settlement generally falls in the middle ground, a trial verdict is more likely to be an all-or-nothing outcome; second, a debtor with negative disposable income has insufficient money to pay off his lenders; third, attorneys are generally thought to increase their clients' likelihood of success; fourth, given the large disparity in filing rates between men and women, determining if there is gender bias in outcomes would show whether outcome discrimination is a potential causal factor; fifth, judges may be more lenient when a person cannot pay debts incurred for the benefit of another than when that person cannot pay debts incurred for his own benefit; and finally, since someone who files Chapter 13 intends to confirm a plan and repay a percentage of his debts, judges may be less willing to discharge student loans outright.

Of these six measures, the only significant variable was whether the case ended in settlement or by trial verdict. Those debtors who settled discharged a higher percentage of debt than those who rolled the dice on a judge's decision (88% vs. 62%, $p = .0329$).⁸⁰

The final prong of the Brunner test requires the debtor to have made a

⁸⁰ This does not imply that the trial debtors should have pushed for a settlement. Since the Wilcoxon rank-sum test does not control for other factors, there may be additional differences between the two groups that account for the higher success of settlements.

good faith effort to repay the loan. Pardo and Lacey have recommended two variables to measure this requirement: whether the debtor (1) is employed or (2) has sought administrative relief before turning to the bankruptcy courts for assistance.⁸¹ Pardo and Lacey argue that, if a debtor is employed, it shows that he is making an effort to repay the loans. However, since so many outside factors govern employment, it is not a reliable measure of good faith repayment. For example, the variable does not indicate whether an unemployed debtor is actively looking for work, and such information is generally not found within the bankruptcy filings, although it may come out at trial. Additionally, the good faith effort prong requires courts to look at the debtor's past actions. Current employment status is irrelevant as to whether the debtor made a good faith effort to repay student loans in the past. Finally, given employment's close association with financial well-being, employment is more indicative of a debtor's current and future inability to repay than of a debtor's good faith effort to repay.

The second variable, which deals with administrative relief, is a better measurement of good faith effort to repay. By seeking this type of non-judicial relief, the debtor provides evidence that he has attempted to work with his creditors to create a manageable repayment plan. Unfortunately, very few adversary proceedings contain enough information to code whether the debtor sought administrative relief.

Because of these shortcomings, I did not use either of Pardo and Lacey's suggested variables. Instead, I created a binary variable that takes a value of one if the debtor last borrowed student loans at least seven years before the filing date of the adversary proceeding and a value of zero otherwise. The theory supporting this variable choice comes from the belief that a debtor who shoulders student loans for a number of years has made more of a good faith effort to repay than the debtor who files for bankruptcy shortly after borrowing student loans. I chose seven years as the cutpoint because, until 1998, Congress allowed all people to discharge student loans through the regular bankruptcy process, provided the loans were at least seven years old.⁸²

There was no statistical difference in the percentage of debt discharged between debtors whose loans were at least seven years old and those whose

⁸¹ See Pardo & Lacey, *supra* note 12, at 218 (2009).

⁸² Before the 1998 amendments, the undue hardship standard only applied to debtors whose loans did not meet the seven-year minimum. Compare P.L. 101-647; 104 Stat. 4865 (1990) (Student loans are dischargeable if they "first became due more than 7 years . . . before the date of the filing of the petition.") with Higher Education Amendments of 1998; P.L. 105-244 (1998) (eliminating the seven year option and making undue hardship the only method to discharge student loans).

loans were younger than seven years (37% vs. 35%, $p = .8524$). Using different years as break-points produced similarly high p-values.

After seeing what variables were statistically significant in isolation, I set out to determine what variables remained statistically significant when other factors are controlled for. Because I am analyzing what characteristics are predictive of obtaining a discharge, I opted to run ordered logistic regressions.

An ordered logistic regression is similar to a binary logistic regression. The primary difference is that, instead of requiring a dichotomous dependent variable, the regression employs an ordinal dependent variable. This allows me to divide the debtors into three groups: those who received no discharge (122), a partial discharge (29), and a full discharge (51).

Only three variables remained statistically significant across a wide variety of models (i.e., were robust to alternative specifications). These were (1) whether the debtor has a medical hardship, (2) whether the debtor is employed, and (3) the debtor's income the year before filing bankruptcy. All coefficients pointed in the expected directions. Medical hardship is positively correlated with receipt of a discharge. Being employed and having a higher income in the year preceding bankruptcy are negatively correlated with receipt of a discharge.

Table 5 presents the regression models, but first, Table 4 shows the relative frequency with which debtors who have these characteristics fall into the three discharge categories. I also include whether the debtor is represented by an attorney because the lack of a significant difference is theoretically interesting.

Table 4: Discharge Frequencies, by Regression Variables

Groups	Observations	No Discharge	Partial Discharge	Full Discharge
Medical Hardship	104	48%	17%	35%
No Medical Hardship	98	73%	11%	15%
Employed	120	68%	16%	16%
Unemployed	81	48%	12%	40%
Attorney	163	61%	13%	25%
Pro Se	42	57%	19%	24%
Prior Year Income	197	\$28,272	\$20,072	\$16,394

As can be seen in Table 4, medical hardship and employment status appear to be correlated with discharge outcome. Whereas seventy-three percent of people who did not have a medical hardship failed to receive any type of

discharge, the same can be said about only forty-eight percent of debtors who had a medical hardship. Similarly, forty percent of unemployed debtors received a full discharge, but only sixteen percent of debtors with a job received a full discharge.

Whether one hires an attorney appears to have little correlation with discharge outcome. A comparison between the groups reveals that the relative frequencies with which each outcome is reached are quite similar.

Due to its non-categorical nature, for the variable Prior Year Income, relative frequencies are not listed. Instead, the mean income for debtors who fall in each of the discharge outcomes is displayed. The table shows that there is a clear and substantial dropoff in income as one proceeds from no discharge (\$28,272) to partial discharge (\$20,072) and, finally, to full discharge (\$16,394).

With these descriptive statistics in mind, I now turn to the ordered logistic regressions in Table 5. Model 1 reaffirms that, when taken alone, medical hardship is a strong predictor of whether a debtor will receive a discharge ($p = .0002$). To see whether certain medical conditions are more predictive of higher discharges than other medical problems are, I subdivided medical hardship into three categories⁸³: (1) physical disability,⁸⁴ (2) mental illness,⁸⁵ and (3) chronic disease.⁸⁶ As shown in model 2, all three variables are statistically significant.

To determine whether a medical problem's severity had any influence, I categorized the medical hardships by severe and not severe. I classified as severe those debtors who claimed to have terminal illnesses or who were enrolled in the Social Security Total and Permanent Disability program.⁸⁷ I placed debtors who did not meet either of these requirements into the not severe group.⁸⁸ Surprisingly, there was not a statistically significant difference in outcomes between the two groups. Putting the severity and type of illness findings together, it appears that the mere existence of a medical condition may be the driving factor. Alternatively, judges might be using information not available in court documents to classify severity

⁸³ Only seven debtors fell into more than one category, and none fell into all three.

⁸⁴ Forty debtors had a physical disability. Examples from my dataset include paraplegia, a crushed sciatic nerve, and physical injuries during the war in Iraq.

⁸⁵ Twenty-eight debtors fell into this category. The most common mental illness was bi-polar disorder, which occurred eleven times. Other examples are clinical depression and post-traumatic stress disorder.

⁸⁶ Forty debtors were in this grouping. Some chronic diseases from my sample include AIDS, cancer, and transverse myelitis.

⁸⁷ Some examples from this group include terminal cancer, severe brain damage from an injury, and paraplegia.

⁸⁸ Debtors in this category had osteoarthritis, hypertension, emphysema, and other similar conditions.

differently than I did. For instance, judges might place substantial weight on the debtor’s testimony, on affidavits from medical personnel, or on how ill the debtor looks during the hearings.

Table 5: Ordered Logistic Regression Models of Case Characteristics on Student Loan Discharge

	(1)	(2)	(3)	(4)	(5)
Medical Hardship	1.090*** (0.294)			0.822* (0.324)	0.853** (0.329)
Employed			-0.973*** (0.288)	-0.652* (0.321)	-0.631* (0.322)
Prior Year Income (thousands)				-0.017* (0.007)	-0.017* (0.007)
Attorney					-0.248 (0.385)
Physical Disability		1.083** (0.360)			
Mental Illness		1.025* (0.399)			
Chronic Disease		0.863* (0.361)			
Intercept 1	1.016 (0.227)	0.984 (0.216)	-0.164 (0.220)	0.077 (0.360)	-0.093 (0.447)
Intercept 2	1.722 (0.248)	1.694 (0.239)	0.536 (0.224)	0.798 (0.365)	0.630 (0.449)
Observations	202	202	201	193	193
AIC	367.589	370.467	369.486	343.983	345.571

* p < .05; ** p < .01; *** p < .001

The dependent variable “Student Loan Discharge” takes a value of 0 if the debtor received no discharge, a value of 1 if the debtor received a partial discharge, and a value of 2 if the debtor received a full discharge. The parentheses contain standard errors.

Model 3 shows that unemployed debtors are significantly more likely to receive discharges (p = .0007). Model 4 builds upon previous models by combining medical hardship with employment status and prior year income. Each of these variables is statistically significant. Debtors are more likely to receive student loan discharges if they have a medical hardship (p = .0112), are unemployed (p = .0422), or have a lower prior year income (p =

.0152). As seen by its AIC score, Model 4 is also the best model.

Before drawing any additional conclusions, I must first test whether the regression results suffer from multicollinearity. A basic assumption of logistic regression is that the independent variables are not highly correlated. If this assumption is not met, the coefficients for the individual predictors will be less reliable and the error terms will increase. This makes it hard to accurately assess the importance of each independent variable in predicting the outcome. Because several of the variables in my analysis (especially medical hardship, employed, and prior year income) seem like they could be highly correlated, checking for multicollinearity is especially important. To test for this problem, I calculated the tolerance and variance inflation factor (VIF) for each of the independent variables. Table FF displays the results.

The findings should alleviate any concern that the regression models suffer from multicollinearity. If the variables were completely uncorrelated, tolerance and VIF would equal one. As such, values close to one indicate that multicollinearity is not a problem. The square root of VIF shows the small effect that correlation among the independent variables had on the size of their standard errors. Medical Hardship and Employed's standard errors are ten percent larger than if the independent variables had been completely uncorrelated, and the standard errors for Prior Year Income and Attorney are a mere one percent larger. Both of these values are quite low and indicate that correlation between the independent variables is not adversely affecting the estimation.

Table 6: Tolerance and Variance Inflation Factor of Regression Variables

Variable	Tolerance	VIF	Square Root of VIF
Medical Hardship	0.82	1.22	1.10
Employed	0.82	1.22	1.10
Prior Year Income	0.99	1.01	1.01
Attorney	0.98	1.02	1.01

Now that the issue of multicollinearity has been evaluated, it is possible to draw some firmer conclusions regarding the ordered logistic regressions. Notably, the models suggest that people who meet the first two prongs of the *Brunner* test receive discharges at higher rates. The prior year income variable is indicative of one's current inability to repay, the medical hardship variable is indicative of one's future inability to repay, and the employment variable speaks to both the current and future inability prongs. The variable I used (years since debtors borrowed their student loans) as a proxy for the third part of the *Brunner* test was not statistically significant.

This does not mean that courts do not take into consideration whether a debtor made a good faith effort to repay his student loans. As mentioned before, judges may look at other factors such as whether a debtor has pursued administrative remedies or whether a debtor is actively seeking employment. Unfortunately, the data to code these variables is not available on most bankruptcy dockets.

Model 5 in Table 5 shows that even after I controlled for other variables, there was no statistical difference ($p = .5195$) in outcome between debtors with attorneys and those without attorneys. This is an encouraging finding for the 99.9 percent of debtors who do not attempt to discharge their student loans. If the cost of hiring an attorney is deterring them from pursuing a discharge, they should consider filing *pro se*. Debtors who took that path were just as successful as debtors who had the aid of an attorney. In deciding whether to file *pro se*, the debtor might also consider the judge’s reputation for assisting unrepresented clients. Discussions with several bankruptcy attorneys led me to believe that judges differ widely in how they handle *pro se* debtors during adversary proceedings. Whereas judges at one end of the continuum treat them exactly the same as debtors who are represented by attorneys, judges on the other end help guide *pro se* debtors through the process.

As mentioned above, the regressions show that the variables Medical Hardship, Employed, and Prior Year Income are associated with receipt of a discharge. However, the logistic regression table does not provide a quick way to determine just how predictive these variables are. The predicted probabilities presented in Table 7 serve this role.

Table 7: Predicted Probability of Receiving a Student Loan Discharge, by Debtor Characteristics

	No Discharge		Partial Discharge		Full Discharge	
	Employed					
Medical Hardship	Yes	No	Yes	No	Yes	No
Yes	52	36	17	18	31	46
No	71	56	12	16	17	28

The estimates are for debtors whose income was at the poverty line (\$10,210) the year before they filed bankruptcy.

The table shows that employment and medical status have substantial predictive power. At one extreme, a debtor who is employed and lacks a medical hardship has a seventeen percent chance of receiving a full discharge but a seventy-one percent chance of getting no discharge. Reversing those characteristics so the debtor is unemployed and has a

medical hardship drastically changes the predicted probabilities. Such a debtor is three times as likely to get a full discharge (46%) and would only come away without any type of discharge on thirty-six percent of the occasions.

These variables appear to be less important in determining when a partial discharge will be granted. Given the broad range of possible outcomes grouped in the partial discharge category, this is not particularly surprising. Indeed, debtors in my sample represent this wide spectrum, having had their loans reduced from anywhere between sixteen percent and ninety-seven percent of their total educational debt. Nonetheless, Table 7 shows that two characteristics of a debtor (employment and medical status) have a substantial affect on the predicted outcome of student loan discharge cases.

III. IMPLICATIONS

From academics and judges to consumer advocates and journalists, much of the bankruptcy community has mounted a two-pronged attack against the undue hardship standard, arguing that it is too burdensome and applied inconsistently.⁸⁹ This paper has provided empirical evidence against both of these criticisms. Nonetheless, an important question remains: why do so few people in bankruptcy attempt to discharge their student loans? A couple reasons likely account for this phenomenon. First, the view that student loan discharges are nearly impossible to obtain may be a self-fulfilling prophecy. As mentioned earlier, journalists and academics have long asserted that it is nearly impossible to meet the undue hardship standard. If debtors take these comments to heart and believe that their chances of success are trivial, they will be less likely to attempt to discharge their educational debt. Judges grant so few discharges simply because they hear so few student loan cases. Unfortunately, with judges granting so few discharges, commentators feel even more justified in arguing that the undue hardship requirement is too harsh. Thus, the cycle continues. The data dispels the myth that it is nearly impossible to discharge educational debt. Thirty-nine percent of debtors who filed an adversary proceeding received a full or partial discharge.

A second reason that people may choose not to pursue discharges is that they do not have money to pay an attorney. Because the adversary proceeding is essentially a trial, debtors may believe that they need an attorney in order to win. Quite reasonably, they do not think they will be able to represent themselves against a large company such as Sallie Mae or

⁸⁹ See *supra* notes 19 and 20.

Wells Fargo. My study, however, shows that a debtor can be successful without an attorney. In fact, after controlling for other factors, I found that there was no statistical difference in outcome between *pro se* debtors and debtors represented by an attorney.

Whatever the reason, the largest flaw in the system is not the undue hardship requirement itself. The problem is that debtors are not informed about the actual workings of the discharge process. Although most academics would welcome the end of the undue hardship requirement, they should step back and consider whether the standard's existence is truly burdening many debtors. The answer seems to be "no." A debtor cannot obtain a discharge if he never asks for one, and 99.9 percent of student loan debtors in bankruptcy fail to ask for one. Instead of criticizing the undue hardship requirement, scholars, policymakers, and consumer advocates could help many more people by informing them both that courts grant a large percentage of student loan discharge requests and that many debtors are successful without the help of a lawyer.

To produce a conservative estimate of just how many people such an informational campaign could help, I calculated the number of non-discharge seekers who (1) have a medical hardship, (2) are unemployed, and (3) earned less income in the year before filing for bankruptcy than the median discharge seeker earned. I chose these three measures because, as discussed above, they were the variables that produced the best model.

Relying upon data from the Consumer Bankruptcy Project, I determined that 7.2 percent of non-discharge seekers met all three of these requirements and 21.9 percent met two. In 2007, there were 238,446 student loan debtors who filed for bankruptcy. Knowing this allowed me to calculate that slightly more than 17,000 (7.2%) student loan debtors were worse off than the median discharge seeker in my sample on the three measures most predictive of receiving a discharge and another 52,000 (21.9%) were worse off in two of the three measures. Given that thirty-nine percent of the debtors in my sample received a discharge, these 69,000 debtors would have been good candidates to obtain relief. Nonetheless, less than three hundred actually attempted to discharge their student loans. Consider that again. There were 69,000 student loan debtors in bankruptcy who would have had a good chance to discharge their student loans, but less than three hundred even attempted to do so.

Although this finding is alarming, the dearth of petitioners actually speaks to one successful aspect of the system: student loan creditors get paid. After paying loan collection agencies, the U.S. Department of Education recovers approximately eighty-five percent of student loans in

default based on present value.⁹⁰ Because most student loans are guaranteed by the federal government, Congress's undue hardship requirement saves American taxpayers more than four billion dollars a year.⁹¹ If student loans were placed on the same level as normal debts, non-discharge seekers would have automatically had their educational loans wiped out.

Educational loans that are backed by the federal government should not be as easily dischargeable as regular debts.⁹² At the same time, the process should not appear so daunting that it dissuades all but a handful of debtors from pursuing a discharge. If more debtors want discharges, they should file adversary proceedings and prove undue hardship. This will allow the courts to sort out the debtors who have no ability to repay their loans from those debtors who can repay at least a portion. At present, it is unwise to eliminate a provision that saves billions of dollars. My point, however, is not meant to diminish the burdens carried by many debtors. On the contrary, each year, tens of thousands more non-discharge seekers should be attempting to discharge their student loans.

CONCLUSION

For years, commentators have derided the undue hardship requirement as too burdensome and attacked courts for applying the standard in an inconsistent manner. The real problem, it turns out, is that debtors are simply not pursuing student loan discharges. So few discharges are granted, not because judges set the bar too high, but rather, because so few people request relief. This study showed that only 0.1 percent of student loan debtors in bankruptcy file an adversary proceeding in an attempt to discharge their educational debts. This statistic is surprising for three main reasons.

First, many debtors who do not try to discharge their loans are in dire

⁹⁰ See Melissa Korn, *Government Sees High Returns On Defaulted Student Loans*, WALL ST. J. ONLINE (Jan. 4, 2011), <http://online.wsj.com/article/SB10001424052748704723104576061953842079760.html>.

Interestingly, the federal government may actually profit from debtors who default on their student loans. *Id.* (“[T]he government stands to earn \$2,010.44 more in interest from a \$10,000 loan that defaulted than if it had been paid in full over a 20-year term, and \$6,522.00 more than if it had been paid back in 10 years.”).

⁹¹ I arrived at this number by multiplying the total number of non-discharge seekers (238,141) by the average educational debt of non-discharge seekers (\$20,120)

⁹² It is important to note that although private student loans are not federally guaranteed, they are still subject to the undue hardship discharge requirement. Since taxpayers are not footing the bill for private loan defaults, it makes little sense to grant them special status. Debtors should be able to discharge private student loans via normal bankruptcy procedures.

financial positions. Second, courts grant discharges to nearly forty percent of discharge seekers. Third, many debtors are successful without the aid of an attorney.

This study also showed that courts are not granting relief in an indiscriminate manner. People who received discharges differed from people who were denied discharges in three respects: successful debtors (1) were more likely to have a medical hardship, (2) were less likely to be employed, and (3) had lower annual incomes the year before they filed bankruptcy.

Rather than condemn the undue hardship requirement, members of the bankruptcy community should encourage debtors with legitimate need to file adversary proceedings even if they cannot hire an attorney. Courts are willing to grant discharges. The problem is that few people are asking for them.

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