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The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy

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THE UNDUE HARDSHIP THICKET: ON ACCESS TO JUSTICE, PROCEDURAL NONCOMPLIANCE, AND POLLUTIVE LITIGATION IN BANKRUPTCY

*Rafael I. Pardo**

Abstract

This Article offers new insights into understanding the complexities and costs of the litigation burden that Congress has imposed on debtors who seek a fresh start in bankruptcy. In order to explore the problems inherent in a system that necessitates litigation as the path for obtaining certain types of bankruptcy relief, this Article focuses on the particular example of debtors who seek to discharge their student loans in bankruptcy. Such debt may be discharged only if the debtor can establish through a full-blown lawsuit that repaying the loans would impose an undue hardship. The procedure and burdens of proof governing undue hardship adversary proceedings have created access-to-justice barriers that ratchet up the difficulty faced by student-loan debtors in establishing the merits of their claims for relief. Moreover, the complexity of the litigation framework has created opportunities for creditors to engage in unchecked, harmful practices that, to the detriment of debtors, prejudicially distort the form in which courts consider undue hardship claims. To demonstrate this phenomenon, this Article examines how litigation conduct by Educational Credit Management Corporation—a legal entity that routinely litigates against debtors in undue hardship adversary proceedings—sometimes entails

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procedural noncompliance and pollutive litigation, both of which exacerbate the access-to-justice barriers confronted by student-loan debtors. Absent congressional intervention, the solution to this problem will require bankruptcy courts to engage in more robust monitoring. Consequently, this Article illustrates the need to pay careful attention to procedural realities when assessing whether debtors in bankruptcy will be able to vindicate their legal entitlements.

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INTRODUCTION

It is axiomatic that many, if not most, individual debtors seek relief in bankruptcy because they suffer from financial distress. Moreover, most individual debtors who file for bankruptcy do not have nonexempt assets for distribution to their creditors.¹ Given debtors' lack of resources to litigate disputes relating to their pre-bankruptcy debts, and given the limited recoveries available to creditors, bankruptcy litigation may simultaneously undermine a debtor's fresh start and the efficient resolution of creditor claims against the debtor.² In the past, bankruptcy reformers have urged Congress to design a bankruptcy system that eschews complex and costly litigation.³ While Congress has partly

1. See LOIS R. LUPICA, AM. BANKR. INST., THE CONSUMER BANKRUPTCY CREDITOR DISTRIBUTION STUDY 6 (2013), available at <http://www.abiworld.org/e-news/Creditor.Distributions.ABI.Final.pdf> (“[W]e are fairly certain that of the 5.8 million chapter 7 consumer cases filed [between 2003 and 2009], less than 6% were asset cases.”).

2. Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 185 (2009) [hereinafter Pardo & Lacey, *The Real Student-Loan Scandal*].

3. See, e.g., COMM'N ON THE BANKR. LAWS OF THE U.S., REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 82 (1973); 1 NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 211–13, 216, 247–49 (1997).

heeded such advice and crafted a Bankruptcy Code that evinces hostility toward the litigation of disputes over pre-bankruptcy debts,⁴ a significant exception has been non-dischargeability litigation, which “focuses on the right of a claim holder to seek post-bankruptcy payment from the debtor on the basis of his personal liability.”⁵

This Article seeks to provide a better understanding of the complexities and costs of the litigation burden that Congress has imposed on debtors who seek a fresh start in bankruptcy. In order to explore the problems inherent in a system that necessitates litigation as the path to obtaining certain types of bankruptcy relief, this Article focuses on the particular example of debtors who seek to discharge their student loans in bankruptcy. If repayment of a student loan would impose an undue hardship on the borrower, then the debt is dischargeable in bankruptcy.⁶ This legal entitlement, however, is difficult to vindicate: “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 to prove that their predicament qualifies them for relief from their student loans.”⁷ Policy makers and scholars have generally failed to provide a thorough account of the manner in which this litigation framework imposes undue burdens on financially distressed debtors.⁸ Why such burdens arise and how they impact debtors are issues warranting closer scrutiny and explication.

In an empirical study from 2009 (the Pardo–Lacey Study),⁹ Professor Michelle Lacey and I documented that legally irrelevant factors unrelated to the merits of a debtor’s claim for relief (e.g., the level of experience of the debtor’s attorney and the identity of the judge assigned to the debtor’s case) influence the extent to which a debtor obtains a discharge of her student loans. Importantly, such factors appear to have a *stronger* effect than the handful of legally relevant factors associated with discharge outcomes.¹⁰ In light of these findings,

4. See Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 185–87. 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 (2012)).

5. Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 188.

6. 11 U.S.C. § 523(a)(8).

7. Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 183.

8. A few journalists, however, have focused the public’s attention on the litigation burdens borne by debtors who seek relief from their student loans through the bankruptcy process. See, e.g., Natalie Kitroeff, *Student Loan Monitor’s Tactics on Bankruptcy Draw Criticism*, N.Y. TIMES, Jan. 2, 2014, at A1; Ron Lieber, *Last Plea on School Loans: Proving a Hopeless Future*, N.Y. TIMES, Sept. 1, 2012, at A1; Katy Stech, *The New Basics: Grads Skirt Student Loans*, WALL ST. J., Dec. 8, 2012, at B8.

9. Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2.

10. See *infra* text accompanying note 136.

the Pardo–Lacey Study concluded that, “[i]f 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.”¹¹

A critical reevaluation of the propriety of discharge litigation inevitably warrants a close examination of the access-to-justice barriers that inhere within a legal framework requiring financially distressed debtors to litigate their eligibility for forgiveness of debt. Moreover, it is important not to lose sight of the fact that such barriers may create an opportunity for creditors to overreach and thereby exacerbate what is already an uphill struggle for debtors. If debtors generally are not in a position to expend a meaningful amount of resources in presenting the merits of their undue hardship claims,¹² then they certainly do not have the financial wherewithal to pay the litigation costs to hold overreaching creditors accountable. Knowing this, creditors may be tempted to ignore procedural requirements—litigation conduct that this Article will refer to as “procedural noncompliance”—or to espouse arguments that can be characterized as frivolous by virtue of the “insistence on litigating a question in the face of controlling precedents which remove[] every colorable basis in law for the litigant’s position”¹³—litigation conduct that this Article will refer to as “pollutive litigation.”

Procedural noncompliance and pollutive litigation potentially undermine the ability of debtors to access justice. After all, procedural rules have an instrumental value in securing just determinations;¹⁴ and frivolous arguments, which entail “legally inaccurate propositions,”¹⁵ threaten to derail meritorious litigation. This Article provides new insights into understanding the access-to-justice barriers faced by student-loan debtors in bankruptcy by taking into account the twin threats of procedural noncompliance and pollutive litigation by creditors, as illustrated by the litigation conduct of Educational Credit Management Corporation (ECMC), a legal entity that routinely litigates against debtors who seek relief from their student loans through the bankruptcy process.¹⁶

Over the past couple of years, the media, consumer advocacy organizations, and courts have criticized ECMC’s litigation conduct. As described in a 2012 *New York Times* article, student-loan debtors who

11. Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 235.

12. *See* Robinson v. Educ. Credit Mgmt. Corp. (*In re* Robinson), 416 B.R. 275, 280 n.3 (Bankr. E.D. Va. 2009); *infra* text accompanying notes 233–46.

13. Reid v. United States, 715 F.2d 1148, 1154 (7th Cir. 1983).

14. *See* FED. R. CIV. P. 1; FED. R. BANKR. P. 1001.

15. Williams v. U.S. Postal Serv., 873 F.2d 1069, 1075 (7th Cir. 1989).

16. *See infra* Section III.A.

press their claims of undue hardship in court “face the daunting task of arguing against opponents who specialize in beating back the bankrupt,” including ECMC.¹⁷ A 2013 report by the National Consumer Law Center referred to “the highly aggressive litigation tactics of ECMC.”¹⁸ Similarly, according to a 2014 *New York Times* article, ECMC “is now facing concerns that its tactics have grown ruthless.”¹⁹ Finally, in a recent decision by the U.S. Court of Appeals for the First Circuit affirming a bankruptcy court’s imposition of sanctions against ECMC, the court observed that “it was *ECMC’s entire course of conduct* that led the [bankruptcy appellate panel] to conclude that ECMC had abused the bankruptcy process.”²⁰ All of these observations suggest that ECMC’s conduct is a fertile area for exploring the question of whether student-loan debtors in bankruptcy have had to contend with procedural noncompliance and pollutive litigation by creditors. This Article takes on that task.

Part I of this Article describes the procedure and burdens of proof governing undue hardship litigation. Part II discusses how prior empirical research of such litigation should inform thinking about the access-to-justice issues that are the focus of this Article. Part III reveals that such barriers enable repeat institutional creditors to engage in unchecked careless practices that, to the detriment of debtors, prejudicially distort the form in which courts consider undue hardship claims. Section III.A begins by briefly describing the role of ECMC in undue hardship adversary proceedings. Section III.B then presents data from original empirical research documenting instances of procedural noncompliance by ECMC in such proceedings. Section III.C discusses an example of ECMC’s pollutive litigation—the frivolous argument that the doctrine of claim preclusion prevents a Chapter 7 debtor from initiating an undue hardship adversary proceeding after the court has granted a discharge in her underlying bankruptcy case. This Article concludes that only robust monitoring by bankruptcy courts will restrain ECMC’s procedural noncompliance and pollutive litigation.

I. ACCESS-TO-JUSTICE BARRIERS IN UNDUE HARDSHIP ADVERSARY PROCEEDINGS

While bankruptcy law offers debtors relief in many forms,²¹ the

17. Lieber, *supra* note 8.

18. NAT’L CONSUMER LAW CTR., THE TRUTH ABOUT STUDENT LOANS AND THE UNDUE HARDSHIP DISCHARGE 3 (2013), available at <http://www.studentloanborrowerassistance.org/wp-content/uploads/2007/03/iulianoresponse.pdf>.

19. Kitroeff, *supra* note 8.

20. *Hann v. Educ. Credit Mgmt. Corp.* (*In re Hann*), 711 F.3d 235, 243 (1st Cir. 2013) (emphasis added).

21. *See, e.g.*, 11 U.S.C. § 362(a) (2012) (providing that the filing of a bankruptcy petition enjoins, among other things, various acts and proceedings against the debtor and his property).

ultimate relief sought by debtors is a discharge, which generally releases the individual from personal liability on pre-bankruptcy debts.²² This represents bankruptcy's fresh start for debtors.²³ The Bankruptcy Code, however, singles out certain types of debts as non-dischargeable (e.g., debts for certain income taxes and debts for alimony, maintenance, and child support).²⁴ A debt for a student loan is exceptional insofar as it is one of the few types of debt that is *conditionally* dischargeable in bankruptcy (i.e., the debt is dischargeable if a certain condition exists).²⁵ If a debtor establishes that repayment of the student loan would impose an undue hardship, the court will deem the debt to be dischargeable.²⁶

This description might create the illusion that the path to bankruptcy relief from educational debt is simple and straightforward. But close examination of the structural features of undue hardship litigation reveals that they create access-to-justice barriers for debtors. The remainder of this Part will consider two prominent litigation features—procedure and burdens of proof—and describe how each feature advantages student-loan creditors.

A. Procedure

The Federal Rules of Bankruptcy Procedure (the Bankruptcy Rules) classify a debt dischargeability determination as an adversary proceeding,²⁷ which must be initiated by the filing of a complaint,²⁸ either by the debtor or the creditor.²⁹ Adversary proceedings resemble other federal lawsuits insofar as the Bankruptcy Rules governing such proceedings incorporate—with occasional modifications—the Federal Rules of Civil Procedure.³⁰ Given the intricacies of pretrial and trial procedures, the complex nature of the process is one that will allow a creditor to leverage its likely advantages in resources and information against the debtor. As the Pardo–Lacey Study reported, “some creditors may view undue hardship discharge litigation as a war that can be won

22. *See id.* § 524(a)(2).

23. *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007).

24. *See* 11 U.S.C. § 523(a).

25. *See* Douglas G. Boshkoff, *Limited, Conditional and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, at 73–74, 89 (1982).

26. 11 U.S.C. § 523(a)(8).

27. FED. R. BANKR. P. 7001(6).

28. FED. R. BANKR. P. 4007(a); *see also* *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1376 (2010). Adversary proceedings in bankruptcy are distinct from the debtor's underlying bankruptcy case; the case itself constitutes an administrative matter. *See* *Menk v. Lapaglia (In re Menk)*, 241 B.R. 896, 910 (B.A.P. 9th Cir. 1999) (stating that “the bankruptcy ‘case’ is an administrative exercise that occurs under the auspices of the court, but with a barrier . . . erected between the administrative and the judicial hemispheres”). Disputes such as adversary proceedings may, but need not, arise within the case. *See id.* at 907–08.

29. FED. R. BANKR. P. 4007(a).

30. *See generally* FED. R. BANKR. P. pt. VII.

by attrition,” which is to say that “creditors can inflict upon their debtor adversaries death by a thousand cuts . . . [by] push[ing] the litigation process to its limits and hop[ing] that, at some point along the way, the debtor will capitulate.”³¹

There are some disquieting signs that creditors may be implementing the attrition model in undue hardship litigation—specifically, the duration of and the trial rate for undue hardship adversary proceedings. Past evidence suggests that, when considering in the aggregate all adversary proceedings nationwide, their average duration has been in decline—to wit, from an average duration of approximately ten months in 1993 to approximately seven and a half months in 2002.³² Professors Douglas Baird and Edward Morrison have rightly observed that “[s]ix months is an eternity in bankruptcy court”³³ and have concluded that the decline in average duration “is merely additional evidence that bankruptcy judges are managing their dockets effectively.”³⁴

In stark contrast to the national trend for adversary proceedings generally, the average duration of an undue hardship adversary proceeding in the Western District of Washington from 2002 through 2006 was approximately ten months.³⁵ Furthermore, while the nationwide trial rate for all adversary proceedings declined from 16% in 1985 to approximately 5% in 2002,³⁶ the Pardo–Lacey Study documented a trial rate of 18% for undue hardship adversary proceedings in the Western District of Washington from 2002 through 2006.³⁷

The anomalously high trial rate for undue hardship adversary proceedings in the Western District of Washington suggests that student-loan creditors may be waging attrition litigation on their debtor

31. Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 192; *cf.* Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559, 606 (2001) (“Increased expenditure by litigating parties will increase the likelihood of success in bankruptcy court.”).

32. Douglas G. Baird & Edward R. Morrison, *Adversary Proceedings in Bankruptcy: A Sideshow*, 79 AM. BANKR. L.J. 951, 966 (2005).

33. *Id.*

34. *Id.*

35. Broken down by the year in which the undue hardship adversary proceedings were commenced, the average duration was as follows: 8.1 months for 2002, 10.1 months for 2003, 11.2 months for 2004, 10.5 months for 2005, and 10.0 months for 2006. These are unreported data derived from the Pardo–Lacey Study and are on file with the Author.

36. Elizabeth Warren, *Vanishing Trials: The New Age of American Law*, 79 AM. BANKR. L.J. 915, 930 (2005).

37. Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 210. More recent research has documented a nationwide trial rate of 19.5% for undue hardship adversary proceedings. *See infra* note 223 and accompanying text. Flaws in that research, however, call into question the accuracy of the figure. *See infra* Section II.B.

adversaries.³⁸ The lack of clarity regarding the vague and indeterminate standard of undue hardship may facilitate such litigation.³⁹ Commentators have hypothesized that the declining trial rate in adversary proceedings generally can be explained by the evolving certainty in decisional standards, which has increased the frequency with which parties will agree on expected outcomes and thus settle.⁴⁰ But the same cannot be said about the undue hardship standard.

In 2005, Professor Lacey and I empirically investigated the manner in which bankruptcy courts had applied the undue hardship doctrine.⁴¹ That study examined ten years' worth of opinions issued by bankruptcy courts in undue hardship discharge determinations.⁴² The study hypothesized that statistically significant differences would exist in the demographic and financial characteristics of debtors who obtained a discharge and those who did not.⁴³ The study, however, identified few such differences between the two groups of debtors.⁴⁴ The study concluded that legal outcome was best explained by differing judicial perceptions of how the same standard applied to similarly situated debtors.⁴⁵ In other words, bankruptcy court doctrine had generally been inconsistent in its treatment of student-loan debtors.

These findings raise several concerns. If one conceives of bankruptcy court doctrine as serving a signaling function to litigants regarding the likelihood of relief for the debtor,⁴⁶ and if that doctrine is generally unclear, it seems more likely that litigants will not have overlapping expectations regarding the outcome of undue hardship discharge proceedings.⁴⁷ This state of affairs will discourage

38. See Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 210–11.

39. See *infra* text accompanying notes 41–45.

40. *E.g.*, Baird & Morrison, *supra* note 32, at 955 (“With greater predictability, fewer adversary proceedings should be brought and those that are brought should be more likely to succeed, implying in turn that the likelihood of settlement should rise”); Robert M. Lawless, *Are Bankruptcy’s Trials Vanishing? If So, Who Cares?*, 79 AM. BANKR. L.J. 995, 1001 (2005).

41. Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405 (2005) [hereinafter Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*].

42. See *id.* at 433–38.

43. See *id.* at 480–81.

44. See *id.* at 481–86.

45. See *id.* at 495–509.

46. 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, 510 (2008).

47. See *Armstrong v. U.S. Dep’t of Educ.* (*In re Armstrong*), No. 10-82092, Adv. No. 10-8118, 2011 WL 6779326, at *9 n.13 (Bankr. C.D. Ill. Dec. 27, 2011) (“The vagueness of section 523(a)(8) fosters litigation and inconsistency of results.”); *Speer v. Educ. Credit Mgmt. Corp.* (*In re Speer*), 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) (“Basically, the 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

settlement,⁴⁸ requiring litigants to incur more litigation costs.⁴⁹ On balance, such costs will have a disproportionate impact on debtors who file for bankruptcy as a result of financial distress and a lack of monetary resources. When coupled with the complex and protracted procedure of an adversary proceeding, the indeterminacy of the undue hardship standard creates an environment hospitable to attrition litigation by creditors.⁵⁰

B. *Burdens of Proof*

This Section explicates how the allocation and implementation of the burdens of proof in undue hardship adversary proceedings favor creditors. Section I.B.1 describes how the Bankruptcy Code's student-loan-dischargeability provision creates a bifurcated burden of proof that creates an access-to-justice barrier for debtors. Section I.B.2 then demonstrates that courts have implemented the provision in a way that requires a creditor, in satisfying its burden, to establish fewer and less complex elements than a debtor.

1. A Bifurcated Structure

An adversary proceeding to determine the dischargeability of a student loan entails a bifurcated burden of proof.⁵¹ The creditor "has the initial burden to establish the existence of the debt and that the debt is an educational loan within the statute's parameters."⁵² Once the creditor makes this showing, the burden of proof shifts to the debtor to establish her claim of undue hardship.⁵³

varied.").

48. See, e.g., Christina L. Boyd & David A. Hoffman, *Disputing Limited Liability*, 104 NW. U. L. REV. 853, 865 (2010); Janger, *supra* note 31, at 581.

49. See Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991).

50. If this descriptive account is accurate, "then it becomes imperative that the [undue hardship] standard be clarified, particularly because of the adverse impact that such uncertainty is likely to have upon a debtor's fresh start." Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 211.

51. See, e.g., *Dudley v. S. Va. Univ. (In re Dudley)*, 502 B.R. 259, 271 & nn.11–12 (Bankr. W.D. Va. 2013); *Raymond v. Nw. Educ. Loan Ass'n (In re Raymond)*, 169 B.R. 67, 69 (Bankr. W.D. Wash. 1994).

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

53. E.g., *In re Savage*, 311 B.R. at 839; *In re Raymond*, 169 B.R. at 69. This bifurcated structure is consistent with the Supreme Court's bankruptcy jurisprudence regarding the

Notably, although presented with an opportunity to create a burden-of-proof structure that would have tilted in favor of debtors in undue hardship adversary proceedings, Congress instead opted for the bifurcated structure that currently exists in the Bankruptcy Code. In the report issued in 1973 by the Commission on the Bankruptcy Laws of the United States,⁵⁴ the Commission proposed statutory changes to effectuate its recommendations for reform of the bankruptcy system, which were set forth in a model statute titled “Bankruptcy Act of 1973.”⁵⁵ The proposals included section 4-506(a)(8), the analogue to the Bankruptcy Code’s student-loan-dischargeability provision, which provided as follows:

A discharge extinguishes all debts of an individual debtor . . . except the following: . . . any educational debt if the first payment of any installment thereof was due on a date less than five years prior to the date of the petition and if its payment from future income or other wealth will not impose an undue hardship on the debtor and his dependents[.]⁵⁶

Unlike the structure of the Code’s student-loan-dischargeability provision, which consists of an exception to discharge (i.e., certain types of educational debt) and an exception within the exception to discharge (i.e., educational debts that impose an undue hardship), the Commission’s model provision consisted merely of an exception to discharge—specifically, an educational debt satisfying two requirements.⁵⁷ As explained by the Commission, not only would the creditor have to establish that the debt had first become due less than five years prior to the bankruptcy filing,⁵⁸ the creditor would also have to establish that the debtor would be able to repay the debt without undue hardship.⁵⁹ Had Congress adopted the Commission’s proposal, the burden of proof in undue hardship adversary proceedings would have rested squarely on student-loan creditors. Such an adoption would have made the path to relief from educational debt less of an uphill battle for debtors. But instead, Congress made a different commitment by splitting the burden of proof between the parties.

allocation of a burden of proof when (1) a creditor seeks to claim an exception to discharge and (2) a debtor seeks to claim an exception within the exception to discharge. *See Hill v. Smith*, 260 U.S. 592, 594–95 (1923).

54. COMM’N ON THE BANKR. LAWS OF THE U.S., REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pts. 1 & 2 (1973).

55. *Id.* pt. 2.

56. *Id.* at 136.

57. *Id.* at 140.

58. *See id.*

59. *See id.*

Importantly, this access-to-justice barrier can be attributed to suboptimal statutory design. Professor Ted Janger has argued that while amorphous standards can be used in consumer bankruptcy cases to regulate abuse, such as when a debtor has the ability to repay creditors, it is crucial that the litigation burden be allocated to the debtor only if empirical evidence suggests that the paradigmatic dispute will involve an abusive debtor.⁶⁰ If the paradigmatic dispute will involve a nonabusive debtor, the combination of the litigation burden and the debtor's resource constraints will, on balance, preclude debtors who merit relief from obtaining it.⁶¹

Unfortunately, this is precisely what has happened in the context of undue hardship litigation. The Code's student-loan-dischargeability provision was the product of the stereotype of an abusive student-loan debtor, notwithstanding empirical evidence to the contrary at the time of the provision's enactment.⁶² Moreover, prior research has repeatedly shown that the paradigmatic undue hardship adversary proceeding involves a nonabusive debtor.⁶³ Finally, the consumer bankruptcy bar has emphasized that many debtors do not have the financial wherewithal to litigate an undue hardship adversary proceeding.⁶⁴ As the Pardo–Lacey Study concluded, “[t]hat 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.”⁶⁵ Having established this backdrop, this Article now turns to the claim that the Code's bifurcated structure skews undue hardship adversary proceedings in favor of creditors.

2. A Differential Allocation That Favors Creditors

The standard of proof in undue hardship adversary proceedings is a preponderance of the evidence.⁶⁶ Given the bifurcated burden of proof in such proceedings, this means that the creditor must first establish by a

60. See Janger, *supra* note 31, at 601, 619–20.

61. See *id.*

62. See Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*, *supra* note 41, at 419–28.

63. See Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 208; Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*, *supra* note 41, at 477.

64. See Stephanie M. Acree, *Lawmakers, Others Urge Bankruptcy Change to Allow Discharge of Private Student Loans*, 25 BANKR. L. REP. (BNA) 868 (June 20, 2013); see also *infra* notes 233–39 and accompanying text (discussing litigation costs in undue hardship adversary proceedings).

65. Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 208.

66. See *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991) (holding that a creditor must prove the nondischargeability of a debt by a preponderance of the evidence); *Easterling v. Collecto, Inc.*, 692 F.3d 229, 232 (2d Cir. 2012) (stating that a debtor must establish undue hardship by a preponderance of the evidence).

preponderance of the evidence that the debt owed qualifies as an educational debt excepted from discharge.⁶⁷ Upon making such a showing, the burden of proof will then shift to the debtor to establish by a preponderance of the evidence that repayment of such debt would impose an undue hardship.⁶⁸

Under the preponderance-of-the-evidence standard, for the burden to shift from the creditor to the debtor, the court need only find that the evidence offered by the creditor establishes that it is more likely than not that the debt qualifies as an educational debt.⁶⁹ Quantitatively, the court can make such a finding if it is convinced that there is at least a 0.501 probability that the debt so qualifies.⁷⁰ If the creditor offers a sufficient quantum of proof, then the debt will be nondischargeable unless the court finds that the evidence offered by the debtor establishes that it is more likely than not (i.e., a 0.501 probability) that repayment of the debt will impose an undue hardship.

In its decision holding that the preponderance-of-the-evidence standard applies in debt-dischargeability determinations, the Supreme Court noted that the standard “results in a roughly equal allocation of the risk of error between litigants.”⁷¹ If that is so, then why would the burden of proof skew in favor of creditors in undue hardship adversary proceedings? Simply put, in satisfying their respective burdens of proof, the creditor has fewer and less complex elements to establish than does the debtor. For the reasons set forth below, this translates into a much easier evidentiary showing for the creditor.

a. The Creditor’s Burden

A student loan will be excepted from discharge if the creditor establishes that the debt is for either (1) “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;”⁷² (2) “an obligation to repay funds received as an educational benefit, scholarship, or stipend;”⁷³ or (3) “any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986.”⁷⁴

67. See *supra* note 52 and accompanying text.

68. See *supra* note 53 and accompanying text.

69. See *United States v. Arnold & Baker Farms (In re Arnold & Baker Farms)*, 177 B.R. 648, 654 (B.A.P. 9th Cir. 1994).

70. See, e.g., Saul Levmore, *Conjunction and Aggregation*, 99 MICH. L. REV. 723, 725–26 (2001).

71. See *Grogan*, 498 U.S. at 286.

72. 11 U.S.C. § 523(a)(8)(A)(i) (2012).

73. *Id.* § 523(a)(8)(A)(ii).

74. *Id.* § 523(a)(8)(B).

Importantly, the Code defines “debt” as “liability on a claim”⁷⁵ and defines “claim” as a “right to payment.”⁷⁶ Thus, the creditor bears the burden of proof at trial to establish, among other things, the amount of the debtor’s liability under the student loan—a showing that necessarily entails a detailed accounting of the rights to payment that arise from the debtor’s loan obligation as determined by non-bankruptcy law.⁷⁷

Admittedly, some complexity inheres in such a showing,⁷⁸ and perhaps debtors should challenge more vigorously whether the creditor has made a prima facie showing. One line of attack could be that the creditor has failed to establish that the debt has all of the characteristics of an educational debt excepted from discharge.⁷⁹ Or yet another line of attack could be that the creditor has erroneously alleged the amount of debt owed or has failed to establish the amount owed.⁸⁰ After all,

75. *Id.* § 101(12).

76. *Id.* § 101(5)(A).

77. For example, federal regulations limit the amount of collection costs that a guaranty agency can charge a borrower who has defaulted on a student loan under the Federal Family Education Loan Program (FFELP). *See* 34 C.F.R. § 682.410(b)(2) (2013). The regulations also limit the amount of unpaid interest that can be capitalized on such a loan, *see id.* § 682.410(b)(4), and the sum on which interest charges can accrue, *see id.* § 682.410(b)(3). These limitations circumscribe a creditor’s right to payment from the student-loan debtor. Thus, the creditor’s burden of proof at trial requires it to show that any amount claimed to be a debt for a FFELP loan does not exceed the rights to payment that may be recovered on account of such a loan.

78. *See, e.g.,* *Bos. Univ. v. Mehta (In re Mehta)*, 310 F.3d 308, 311 (3d Cir. 2002) (“Congress did not define ‘loan’ in § 523, and courts that have been called upon to interpret that provision have not agreed upon its meaning.”).

79. Examples of possible challenges include: (1) whether the debtor’s financial obligation constitutes a debt for an educational loan, *see, e.g., id.* at 312–16; *Cazenovia Coll. v. Renshaw (In re Renshaw)*, 222 F.3d 82, 84 (2d Cir. 2000); (2) whether an educational loan was made under a program funded by a governmental unit or a nonprofit institution, *see, e.g., O’Brien v. First Marblehead Educ. Res., Inc. (In re O’Brien)*, 419 F.3d 104, 106–07 (2d Cir. 2005) (*per curiam*); or (3) whether the debtor’s financial obligation constitutes a qualified education loan, *see, e.g., Rumer v. Am. Educ. Servs. (In re Rumer)*, 469 B.R. 553, 561–63 (Bankr. M.D. Pa. 2012).

80. The possibility exists that the parties to an undue hardship adversary proceeding could “seek liquidation of the [student-loan] debt as a contested issue.” *Roth v. Educ. Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908, 916 n.13 (B.A.P. 9th Cir. 2013). In fact, federal regulations indicate that, if cost-effective, guaranty agencies should do so with respect to federally guaranteed student loans that are in default. *See* 34 C.F.R. § 682.402(i)(1)(iv)(B). Notwithstanding the Supreme Court’s holding that a bankruptcy court is constitutionally prohibited from entering a final judgment on a state law tortious interference counterclaim, *see Stern v. Marshall*, 131 S. Ct. 2594, 2610–11 (2011), a bankruptcy court would arguably have constitutional authority to reduce a student-loan debt to judgment, *see Deitz v. Ford (In re Deitz)*, 469 B.R. 11, 23 (B.A.P. 9th Cir. 2012) (stating that “*Stern* is altogether reconcilable with . . . the bankruptcy court’s authority to enter final judgments in actions to determine dischargeability and for liquidation of a creditor’s claim”). *But see* Douglas G. Baird, *Blue Collar Constitutional Law*, 86 AM. BANKR. L.J. 3, 4 (2012) (stating that “the Supreme Court’s opinion in *Stern v. Marshall* puts the matter [of a bankruptcy judge entering judgment on a non-

institutional student-loan creditors are not paragons of accurate financial recordkeeping.⁸¹ But debtors routinely appear to passively accept the creditor's allegations and evidence,⁸² in all likelihood because they lack the resources to mount challenges undercutting the creditor's prima facie case.⁸³

The possibility of such challenges aside, it would nonetheless be fair to characterize the three alternatives for establishing the existence of an educational debt excepted from discharge as “crystalline, highly specific statutory provisions that, while difficult to penetrate, leave little to the imagination.”⁸⁴ Yet, notwithstanding the precision and clarity of these statutory elements, evidence suggests that some courts fail to rigorously apply the law as written⁸⁵—that is, they apply a lax interpretive approach favoring creditors who already enjoy a substantively relaxed burden relative to debtors. In implementing such an approach, courts contravene the longstanding and widely held principle that exceptions to discharge should be narrowly construed in favor of dischargeability.⁸⁶

dischargeable debt] in doubt”). Likewise, the bankruptcy court would have constitutional authority to determine the dischargeability of the debt owed to the student-loan creditor. *See* *Dudley v. S. Va. Univ. (In re Dudley)*, 502 B.R. 259, 270–71 (Bankr. W.D. Va. 2013).

81. *See, e.g.*, ROHIT CHOPRA, CONSUMER FIN. PROT. BUREAU, ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN 13 (2012), available at http://files.consumerfinance.gov/f/201210_cfpb_Student-Loan-Ombudsman-Annual-Report.pdf (noting that “[s]ome of the deficiencies identified in the mortgage servicing industry might also exist in student loan servicing,” including “inappropriate application of payments”); Tara Siegel Bernard, *Sallie Mae to Pay Fine over Loans to Troops*, N.Y. TIMES, May 14, 2014, at B4 (“Sallie Mae, the giant student lender, and Navient, previously a loan servicing unit of Sallie Mae, have agreed to pay \$97 million to settle allegations by federal regulators that military service members were charged excessive interest and fees on student loans.”).

82. *See, e.g.*, *In re Roth*, 490 B.R. at 916 n.13 (noting debtor's stipulations “that the loans in question were educational loans as contemplated in § 523(a)(8)” and “that the loans had an outstanding aggregate balance of no less than \$95,403.86” (internal quotation marks omitted)); *Sperazza v. Educ. Credit Mgmt. Corp. (In re Sperazza)*, 366 B.R. 397, 406–407 (Bankr. E.D. Pa. 2007) (“Neither party has suggested that plaintiff's debts to ECMC are anything other than educational loans made, insured or guaranteed by a governmental unit, or made under a program funded in whole or in part by a governmental unit or non-profit institution.”). For an example of an undue hardship adversary proceeding involving a debtor who refused to accept the creditor's allegations and evidence and who ultimately prevailed as a result of the creditor's failure to carry its burden of proof, see *Anderson v. Educational Credit Management Corp. (In re Anderson)*, Ch. 7 Case No. 02-51298, Adv. No. 03-4034, slip op. at 2–3 (Bankr. W.D. Wash. Apr. 22, 2004), ECF No. 44.

83. *See infra* notes 239–46 and accompanying text; *see also* Janger, *supra* note 31, at 598 (discussing the practical limits on judicial involvement in consumer bankruptcy cases and noting that “[d]ebtors cannot afford to pay their lawyers to appear at contested hearings”).

84. Janger, *supra* note 31, at 560.

85. *See* *Campbell v. S. Or. Univ. (In re Campbell)*, BAP No. OR-11-1342-JuMkH, slip op. at 26–27 (B.A.P. 9th Cir. Aug. 15, 2012) (Markell, J., dissenting), available at <http://cdn.ca9.uscourts.gov/datastore/bap/2013/07/29/CampbellDecision.pdf>.

86. *See, e.g.*, *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998).

That the undue hardship standard itself may exact a stringent evidentiary burden on debtors seeking relief (as discussed below) is irrelevant. The bifurcated evidentiary framework that Congress has created requires courts to put student-loan creditors to their proofs before shifting the burden to debtors.⁸⁷

b. The Debtor's Burden

In stark contrast to creditors, debtors face a much greater hurdle in carrying their burden of proof in undue hardship litigation. As a formal matter, two primary factors create this hurdle: (1) the inordinately complex nature of the undue hardship calculus; and (2) the manner in which the dominant rule of decision governing such proceedings has fractionated the burden of proof.

i. Undue Hardship's Complexity

First, consider the manner in which the undue hardship standard has evolved to consist of “myriad doctrinal factors,”⁸⁸ which force debtors to contend with a much more exhaustive evidentiary checklist than creditors. Because the Bankruptcy Code does not define undue hardship, a variety of judicially created rules have filled this statutory interstice.⁸⁹ The current legal landscape essentially consists of two tests for undue hardship: (1) the test that the U.S. Court of Appeals for the Second Circuit set forth in *Brunner v. New York State Higher Education Services Corp.*⁹⁰ (the *Brunner* test), and (2) the totality-of-the-circumstances test (the totality test).

To prevail on a claim of undue hardship under the *Brunner* test, 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

87. For examples of courts that properly held a student-loan creditor to its evidentiary burden and in doing so applied the principle that exceptions to discharge should be narrowly construed in favor of dischargeability, see *Boston University v. Mehta (In re Mehta)*, 310 F.3d 308, 311–17 (3d Cir. 2002), and *Ray v. University of Tulsa (In re Ray)*, 262 B.R. 544, 548–52 (Bankr. N.D. Okla. 2001).

88. Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*, *supra* note 41, at 488.

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

90. 831 F.2d 395 (2d Cir. 1987) (per curiam).

debtor has made good faith efforts to repay the loans.⁹¹

Over time, as courts have sought to further flesh out the factors that ought to be considered in determining whether a debtor has satisfied each element of the *Brunner* test, its “constituent elements . . . have become encrusted with many doctrinal pronouncements.”⁹² For example, the U.S. Court of Appeals for the Ninth Circuit has identified a non-exhaustive list of twelve factors that a debtor may rely upon to establish a future inability to repay the student loan (i.e., the second element of the *Brunner* test).⁹³ In somewhat similar fashion, one bankruptcy court has set forth seven relevant factors for consideration in determining whether the debtor has made good faith efforts to repay the student loan (i.e., the third element of the *Brunner* test).⁹⁴ With the evolution of the *Brunner* test, the undue hardship standard has become quite complex—to wit, multifactor considerations proliferating within a multifactor test.

The totality test, on the other hand, requires consideration of “(1) the debtor’s past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor’s and her dependent’s reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case.”⁹⁵ Although the totality test does not expressly reference a debtor’s good faith efforts to repay the student loan, “it certainly leaves the door open to such a consideration, given its reference to ‘other relevant facts and

91. *Id.* at 396. For an in-depth analysis of the origins of the *Brunner* test, see *Bene v. Educational Credit Management Corp. (In re Bene)*, 474 B.R. 56, 62–68 (Bankr. W.D.N.Y. 2012).

92. Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 196.

93. *See Educ. Credit Mgmt. Corp. v. Nys (In re Nys)*, 446 F.3d 938, 946–47 (9th Cir. 2006). Moreover, amendments to the Code’s student-loan dischargeability provision have had the effect of creating, in a formal legal sense, a temporally unbounded framework for ascertaining a debtor’s future inability to repay the student loan. *See Pardo & Lacey, Undue Hardship in the Bankruptcy Courts*, *supra* note 41, at 513 n.415. Thus, a debtor must not only prove a negative—a difficult proposition in and of itself—but must also prove that negative in the context of an unbounded time horizon—an even more difficult proposition. *See Wolfe v. U.S. Dep’t of Educ. (In re Wolfe)*, 501 B.R. 426, 434 (Bankr. M.D. Fla. 2013) (“How does a debtor . . . prove that financial circumstances will not improve in the future, a ‘future’ which was five years long when the *Brunner* test was first adopted, but which may now be 25 years or longer?”); Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 198.

94. *See Stupka v. Great Lakes Ed. (In re Stupka)*, 302 B.R. 236, 243–44 (Bankr. N.D. Ohio 2003).

95. *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554 (8th Cir. 2003); *see also Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon)*, 435 B.R. 791, 797–800 (B.A.P. 1st Cir. 2010) (discussing and adopting the totality test). For a discussion on the origins of the totality test, see Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*, *supra* note 41, at 488 n.348.

circumstances.”⁹⁶ And, in fact, courts applying the totality test have signaled that a debtor’s good faith is a relevant consideration in analyzing a debtor’s claim of undue hardship.⁹⁷ Moreover, just as with the *Brunner* test, multifactor considerations have likewise proliferated under the totality test.⁹⁸

Whether under the *Brunner* test or the totality test, courts have made the debtor’s evidentiary burden increasingly complex, and thus difficult,⁹⁹ by setting forth a panoply of facts and circumstances that are relevant to the undue hardship calculus. Granted, “[i]t may be reasonable to conclude that a court *should* have the discretion to dispense particularized justice on a case-by-case basis where Congress has spoken with broad, general pronouncement rather than highly specific language.”¹⁰⁰ And notably, jurists have echoed this view when commenting on the open-textured nature of the undue hardship standard.¹⁰¹

What has been troubling about the evolution of the standard, however, has been the trend whereby the interpretation by some courts has gone well beyond the broad contours of the statutory language, with the result that an “impermissible judicial gloss” has permeated the legislative enactment.¹⁰² Perhaps the most extreme example of this has been the manner in which courts have “framed [the debtor’s]

96. Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*, *supra* note 41, at 489.

97. *See, e.g.*, *Educ. Credit Mgmt. Corp. v. Jesperson*, 571 F.3d 775, 783–84 (8th Cir. 2009) (Smith, J., concurring); *Bronsdon*, 435 B.R. at 800. The approach of the U.S. Bankruptcy Appellate Panel of the First Circuit to the totality test does not require the debtor to establish good faith in the first instance, but rather places the burden on the creditor to establish the debtor’s bad faith. *See id.*

98. *See Jesperson*, 571 F.3d at 783–84 (Smith, J., concurring) (listing nine factors).

99. *See, e.g., id.* at 779 (describing debtor’s burden of proof as “rigorous”); *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 399 (4th Cir. 2005) (describing debtor’s burden of proof as a “difficult burden”). The difficulty obviously does not stem from the standard of proof—the preponderance-of-the-evidence standard—which applies equally to the creditor in establishing that the debt qualifies as an educational debt excepted from discharge. *See supra* text accompanying notes 66–71. Accordingly, the observation that student-loan debtors face a difficult burden must be attributable to the perception that, when juxtaposed against the substantive law defining the creditor’s evidentiary burden, the substantive law defining the debtor’s evidentiary burden is much more complex.

100. Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*, *supra* note 41, at 520; *cf. Janger*, *supra* note 31, at 601 (“In the Bankruptcy Code, muddy rules are used to allow a judge to determine whether abusive behavior has occurred.”).

101. *See, e.g., Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 885 (7th Cir. 2013); *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554 (8th Cir. 2003); *Roth v. Educ. Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908, 923 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring).

102. Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*, *supra* note 41, at 520. For statutory arguments regarding the proper application of the undue hardship standard, *see id.* at 509–19.

evidentiary burden in terms of the overwhelmingly subjective phrase ‘certainty of hopelessness.’”¹⁰³ Such framing has been criticized,¹⁰⁴ most notably by Judge Frank Easterbrook, who rebuked a prior panel of the U.S. Court of Appeals for the Seventh Circuit for having adopted that evidentiary frame.¹⁰⁵ Judge Easterbrook sounded a clarion call, reminding courts that “[i]t is important not to allow judicial glosses, such as the language in *Roberson* and *Brunner*, to supersede the statute itself.”¹⁰⁶ Nonetheless, the fact remains that debtors face a much greater evidentiary burden than creditors in undue hardship adversary proceedings due to the asymmetrical design of the Code’s student-loan-dischargeability provision—specifically, a relatively bright-line rule for establishing the creditor’s prima facie case and a vague and indeterminate standard for establishing the debtor’s prima facie case.

ii. Fractionating the Debtor’s Burden of Proof

What is even more troubling is that the *Brunner* test has fractionated the debtor’s burden of proof, which forces debtors in *Brunner* jurisdictions to marshal a greater amount of evidence to prevail on a claim of undue hardship. A debtor bears the burden of proof to establish *each element* of the *Brunner* test by a preponderance of the evidence; failure to do so with respect to *any* element results in a finding of nondischargeability.¹⁰⁷ By articulating the evidentiary burden in this fashion, courts have infused the undue hardship calculus with the issue of “conjunctive probability,”¹⁰⁸ which requires an assessment of the “conjoined probability that [multiple requirements] are true at the same time.”¹⁰⁹

To make this assessment, the factfinder ought to apply the “product rule,” which entails “multiplying the probabilities associated with several . . . requirements in order to assess a combined likelihood.”¹¹⁰ Importantly, applying the product rule without modification is

103. *Id.* at 492 n.363 (citing bankruptcy court cases).

104. *See, e.g.,* *Hicks v. Educ. Credit Mgmt. Corp.* (*In re Hicks*), 331 B.R. 18, 28 (Bankr. D. Mass. 2005) (“Requiring the debtor to present additional evidence of ‘unique’ or ‘extraordinary’ circumstances amounting to a ‘certainty of hopelessness’ is not supported by the text of § 623(a)(8) [sic.]”); *Bronsdon v. Educ. Credit Mgmt. Corp.* (*In re Bronsdon*), 435 B.R. 791, 799–800 (B.A.P. 1st Cir. 2010) (quoting approvingly the analysis in *Hicks* which criticized the “certainty of hopelessness” evidentiary frame).

105. *See Krieger*, 713 F.3d at 885.

106. *Id.* at 884.

107. *See, e.g.,* *Brightful v. Pa. Higher Educ. Assistance Agency* (*In re Brightful*), 267 F.3d 324, 327–28 (3d Cir. 2001).

108. Levmore, *supra* note 70, at 723.

109. *Id.* at 726.

110. *Id.* at 723.

appropriate only when the requirements are independent.¹¹¹ If there is some, but not complete, interdependence between the multiple requirements, then the factfinder should apply the product rule with some adjustment to account for the partial interdependence between the requirements.¹¹² Finally, if the “multiple requirements are entirely interrelated, application of the product rule *is unnecessary*,”¹¹³ in which case we ought to question the imposition of multiple requirements in the first instance.¹¹⁴

With this backdrop in mind, consider how the issue of conjoined probability arises within the framework of the *Brunner* test, which essentially requires a debtor to establish: (1) a current inability to repay, (2) a future inability to repay, and (3) a good faith effort to repay.¹¹⁵ First, assume that the three elements are independent, which is not an unreasonable assumption.¹¹⁶ This assumption warrants application of the product rule without modification. If the bankruptcy judge concludes that there is a 0.8 probability of a current inability to repay, a 0.8 probability of a future inability to repay, and a 0.7 probability of a good faith effort to repay, the combined probability that the debtor has established all three *Brunner* elements is 0.448. In other words, the bankruptcy judge would have to conclude that the debtor failed to establish undue hardship by a preponderance of the evidence. Thus, when the product rule applies, debtors must produce a greater amount of evidence to surpass the preponderance-of-the-evidence threshold than they would be required to marshal if the product rule were inapplicable. One can look to the totality test in support of this claim.

The evidentiary framework under the totality test casts the undue hardship calculus as a single question requiring an affirmative answer based on the evidence taken as a whole,¹¹⁷ thereby eschewing the issue of conjoined probability. Courts that apply the totality test have implicitly suggested as much.¹¹⁸ Moreover, at least one bankruptcy

111. *See id.* at 726 n.4.

112. *See id.* at 728.

113. *Id.* at 727.

114. *See id.*

115. *See supra* note 91 and accompanying text.

116. For example, the Ninth Circuit has formally decoupled the first *Brunner* prong (i.e., current inability to repay) from the second *Brunner* prong (i.e., future inability to repay) 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).

117. *Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon)*, 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010).

118. *See Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554 (8th Cir. 2003) (“We are convinced that requiring our bankruptcy courts to adhere to the strict parameters of a particular test would diminish the inherent discretion contained in § 523(a)(8)(B).”).

judge has openly lamented the constraints imposed by the *Brunner* test relative to the totality test.¹¹⁹

The scope of the conjunction problem is significant given the widespread adoption of the Second Circuit's *Brunner* test. The U.S. Courts of Appeals for the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have all formally adopted the *Brunner* test as the framework for analyzing a debtor's claim of undue hardship.¹²⁰ Although the U.S. Court of Appeals for the District of Columbia Circuit has not adopted the *Brunner* test, the U.S. Bankruptcy Court for the District of Columbia applies the *Brunner* test in undue hardship adversary proceedings.¹²¹ Moreover, even though (1) the U.S. Court of Appeals for the First Circuit has not formally adopted a test for undue hardship,¹²² (2) the U.S. Bankruptcy Appellate Panel of the First Circuit has rejected the *Brunner* test in favor of the totality test,¹²³ and (3) the majority of bankruptcy courts within the First Circuit apply the totality test,¹²⁴ the U.S. Bankruptcy Court for the District of New Hampshire nonetheless applies the *Brunner* test.¹²⁵

Thus, the overwhelming majority of student-loan debtors—that is, all debtors in ten of the twelve federal regional circuits and some debtors in the First Circuit—must satisfy their burden of proof within the *Brunner* framework.¹²⁶ Given the conjunction problem that has been judicially infused into that framework, the heightened evidentiary burden represents yet another access-to-justice barrier confronted by student-loan debtors.¹²⁷

119. See *Roth v. Educ. Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908, 920, 923 & n.17 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring) (arguing that the *Brunner* analysis “is too narrow, no longer reflects reality, and should be revised by the Ninth Circuit” and also that “bankruptcy courts should be free to consider the totality of a debtor’s circumstances in deciding whether a discharge of student loan debt for undue hardship is warranted”).

120. Pardo, *supra* note 46, at 514 & n.34.

121. See *Zook v. Edfinancial Corp. (In re Zook)*, Ch. 7 Case No. 05-00083, Adv. No. 05-10019, 2009 WL 512436, at *1 (Bankr. D.D.C. Feb. 27, 2009).

122. See *Nash v. Conn. Student Loan Found. (In re Nash)*, 446 F.3d 188, 190 (1st Cir. 2006).

123. *Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon)*, 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010).

124. See *id.* at 798 & n.10.

125. See *id.* at 798 & n.11.

126. Debtors within the Eighth Circuit must satisfy their burden of proof within the framework of the totality test. See *supra* note 95 and accompanying text.

127. At least one bankruptcy court has recognized as much. See *Wolfe v. U.S. Dep’t of Educ. (In re Wolfe)*, 501 B.R. 426, 434 (Bankr. M.D. Fla. 2013) (“Over time, courts have grafted sub-elements to each of the three parts of the *Brunner* test. Proof of these sub-elements may force debtors into inconsistent positions or difficult burdens of proof.”).

II. PRIOR EMPIRICAL STUDIES OF UNDUE HARDSHIP LITIGATION

Having described the way in which the procedures and burdens of proof in undue hardship adversary proceedings have made it more difficult for student-loan debtors to establish the merits of their claims for relief, this Part discusses how prior empirical research of undue hardship litigation should inform thinking about these access-to-justice issues.

A. *The Pardo–Lacey Study*

The Pardo–Lacey Study analyzed trial-level outcomes of adversary proceedings in bankruptcy where debtors sought to discharge their student loans.¹²⁸ The goal of the study was to ascertain whether it is problematic that the current bankruptcy system necessitates litigation as the path to relief from educational debt. To make this determination, the study focused on the litigation of undue hardship adversary proceedings commenced in the U.S. Bankruptcy Court for the Western District of Washington during the five-year period spanning 2002 through 2006.¹²⁹ Because the data were confined to the experience of litigants in a single federal judicial district during a half-decade period, it cannot be said that the data are representative of undue hardship litigation nationally, including the profile of debtors who seek such a discharge. Nonetheless, the data shed light on the profile of certain student-loan debtors who have looked to the bankruptcy system for relief from their educational debt.

The average student-loan debtor in the Pardo–Lacey Study suffered from severe financial distress. Consider the following statistics, keeping in mind that all dollar amounts from the study have been converted to 2013 dollars for purposes of this Article:¹³⁰ The average debtor's household generated an annual income of \$24,045.¹³¹ After accounting for annual household expenses *exclusive* of those relating to the debtor's student loans, the average debtor's household operated at an annual *deficit* of \$5,222 (i.e., -\$5,222 of annual disposable household income).¹³² In other words, the average debtor's household did not have any excess income to repay the debtor's student loans, which for the average debtor amounted to \$87,882.¹³³

128. See Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2.

129. See *id.* at 202–03.

130. See *The Cost of Living Calculator*, AM. INST. FOR ECON. RES., <https://www.aier.org/cost-living-calculator> (last visited Oct. 30, 2014).

131. See Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 208 tbl.2.

132. See *id.*

133. See *id.* For further details regarding the financial circumstances of student-loan debtors in the Pardo–Lacey Study, see *id.* at 206–08.

In terms of substantive outcome, the discharge of student loans appeared to be the rule rather than the exception in the Western District of Washington during the time period of the Pardo–Lacey Study: Approximately 57% of the adversary proceedings resulted in some amount of debt discharged (whether through settlement or trial), with the average debtor obtaining a discharge of approximately 62% of his educational debt.¹³⁴ At first blush, it appeared that the debtors in that study experienced a moderate rate of success. Further considerations, however, suggested concerns about the manner in which litigating a claim of undue hardship encroached upon a student-loan debtor’s fresh start.

The Pardo–Lacey Study sought to identify the factual characteristics surrounding a debtor’s undue hardship claim that were statistically significantly associated with the extent to which the debtor’s student loans were discharged. The study considered factual characteristics that the legal doctrine would deem relevant (e.g., the debtor’s age, health status, and employment status) and irrelevant (e.g., the experience level of the debtor’s attorney and the identity of the judge assigned to the debtor’s adversary proceeding) to the merits of the debtor’s claim.¹³⁵ The study made the following disquieting revelations: (1) Legally irrelevant characteristics were associated with legal outcome, and (2) those characteristics were more strongly associated with legal outcome than were the handful of legally relevant characteristics.¹³⁶

The Pardo–Lacey Study’s findings suggest that non-doctrinal case characteristics, which have no legal relevance to, and thus should have no bearing on, the amount of debt discharged, do influence the substantive outcome of undue hardship 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 litigation improperly curtails access to justice for student-loan debtors who legitimately need relief from their financial distress. Consider the finding that representation by a highly experienced attorney was positively associated with the extent of discharge.¹³⁷ One might characterize this situation as a lack of access to justice that results from excessive search costs preventing 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

134. *Id.* at 213.

135. *Id.*

136. The discussion below, *infra* notes 137–42 and accompanying text, is excerpted (with some modification) from Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 229–35.

137. Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 227, 228 tbl.9.

some reason, less-experienced attorneys fail to act in their clients' best interests.¹³⁸

A principal-agent problem may also be linked to the finding from the Pardo-Lacey Study that early settlement—before the court set a trial date—yielded more extensive relief for debtors.¹³⁹ The decision to settle and the point in time at which to do so are considerations for which a debtor will rely upon her attorney for guidance.¹⁴⁰ If the fee arrangement between the debtor and her attorney discourages the attorney from recommending settlement,¹⁴¹ 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.¹⁴²

While the data from the Pardo-Lacey Study cannot validate any of these hypotheses, these issues may have been underlying elements of the non-doctrinal determinants of the extent of discharge. If so, this warrants a serious reevaluation of Congress's decision to structure a system that requires debtors to litigate their claims for forgiveness of student-loan debt.

B. *The Iuliano Study*

More recently, Jason Iuliano conducted an empirical study of student-loan-discharge litigation (the Iuliano Study).¹⁴³ This study claimed to offer four primary contributions to the existing research on the subject. First, the study was based on a nationwide sample—207 adversary proceedings that were commenced in 2007;¹⁴⁴ because of this “broader geographic scope,” the study emphasized that its “results [were] more generalizable” than prior research.¹⁴⁵ Second, the Iuliano Study included “all adversary proceeding outcomes” (i.e., dismissals, default judgments, settlements, and trial verdicts) in its analyses to provide a complete view of the landscape of student loan discharges.¹⁴⁶

138. 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).

139. Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 227, 228 tbl.9.

140. See Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 172 (1996).

141. See, e.g., *Berliner v. Pappalardo (In re Puffer)*, 674 F.3d 78, 83 (1st Cir. 2012) (noting that “fee-only arrangements may be vulnerable to abuse by attorneys seeking to advance their own interests without due regard for the interests of debtors”); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1078 (1984).

142. See Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 211–12.

143. Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495 (2012).

144. *Id.* at 502–03.

145. *Id.* at 499.

146. *Id.* at 499–500.

Third, using data from the 2007 Consumer Bankruptcy Project, the Iuliano Study estimated a financial profile of non-discharge seekers.¹⁴⁷ The study's comparisons of discharge seekers and non-discharge seekers revealed similarly situated groups, and thus suggested that more non-discharge seekers should file undue hardship adversary proceedings.¹⁴⁸ Finally, the study's regression analyses identified three statistically significant factors associated with discharge relief: (1) the debtor's health status, (2) the debtor's employment status, and (3) the debtor's income during the year prior to the petition date.¹⁴⁹ The study reported that these factors revealed "some degree of consistency in the judicial decisions."¹⁵⁰

The Iuliano Study ultimately concluded that any arguments pointing to access-to-justice barriers in this setting are overstated:

[T]he 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 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, 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.¹⁵¹

Simply put, according to the Iuliano Study, more non-discharge seekers should seek an undue hardship determination.¹⁵²

A report issued by the National Consumer Law Center (the NCLC Report) critiqued the Iuliano Study because its conclusions "may leave readers with the false impression that it is not so difficult for consumers to discharge student loans in bankruptcy."¹⁵³ The NCLC Report does

147. *See id.* at 500, 504, 507 & n.54, 510–12. Iuliano uses the term "non-discharge seekers" to signify the debtors who filed for bankruptcy but did not seek to discharge their student loans." *Id.* at 500.

148. *Id.* at 500.

149. *Id.* at 501.

150. *Id.*

151. *Id.* (footnote omitted).

152. *Id.* at 525 ("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.")

153. NAT'L CONSUMER LAW CTR., *supra* note 18, at 1.

not challenge the study's central point—namely, that “few consumers who file for bankruptcy try to have a bankruptcy judge decide if their student loans can be discharged.”¹⁵⁴ The report nonetheless argues that “the study's conclusions beyond this [central] point are not supported by the empirical data and ignore the plain realities facing student loan borrowers.”¹⁵⁵ In making this argument, the NCLC Report “highlights the shortcomings of the Iuliano study and sets the record straight on undue hardship in bankruptcy.”¹⁵⁶

The remainder of this Section explains why the NCLC Report's concerns are well founded. A close examination of the Iuliano Study reveals that its conclusions rest on shaky ground as a result of (1) sampling bias, (2) poor coding protocols for relief, and (3) misconceptions of the legal landscape. This Article next discusses these problems in turn.

1. Sampling Bias

The Iuliano Study's sampling methodology provides the first reason to question its conclusions. Sampling bias is systematic error arising due to sample selection that can potentially skew findings. In other words, the sample selected will not accurately represent the target population. The study's selection of time-period constraints, its approach to using PACER, and the manner in which it identified party names to use as search terms for finding adversary proceedings all raise concerns regarding systematic error in constructing the study's sample.

a. Time-Period Constraints

The Iuliano Study first restricted its search to bankruptcy cases that were filed in 2007.¹⁵⁷ It then appears that the Iuliano Study searched for adversary proceedings filed in 2007 in connection with those cases.¹⁵⁸ This approach necessarily omits adversary proceedings filed in 2007 in

154. *Id.*

155. *Id.*

156. *Id.*

157. *See* Iuliano, *supra* note 143, at 502.

158. *See id.* at 502, 504. Iuliano never specifies whether his sample includes adversary proceedings that were filed in years subsequent to the calendar year in which the debtor commenced his bankruptcy case. He states that “most debtors filed an adversary proceeding within six months of their initial voluntary petition.” *Id.* at 510. But he does not indicate whether adversary proceedings filed after 2007 are included in the sample. In a podcast discussing his study, however, Iuliano does state that his study was confined to adversary proceedings filed in 2007. *Study on Student Loan Discharges and the Undue Hardship Standard*, AM. BANKR. INST. 06:16–06:21 (Dec. 4, 2012), <http://news.abi.org/podcasts/125-study-on-student-loan-discharges-and-the-undue-hardship-standard> (“I used PACER . . . to find debtors who filed adversary proceedings in 2007 to discharge their student loans.”).

connection with cases that were commenced *prior* to 2007.¹⁵⁹ The NCLC Report noted this possibility in expressing its concern over the temporal scope of the Iuliano Study.¹⁶⁰

The temporal focus of the Iuliano Study potentially skews its findings. For example, 38% (44 of 115) of the undue hardship adversary proceedings filed in the Pardo–Lacey Study related to bankruptcy cases that were commenced in a calendar year prior to the filing of the adversary proceeding.¹⁶¹ The median and mean number of days between the commencement of the bankruptcy case (the petition date) and the filing date of the adversary proceeding for this group of debtors (the delaying filers) were, respectively, 236 days and 620 days. In stark contrast, for the group of debtors who filed their adversary proceeding in the same calendar year as their bankruptcy case (the non-delaying filers), *both* the median and mean number of days between the petition date and the filing date of the adversary proceeding were 91 days.

With time comes change, so it is not hard to imagine that the circumstances surrounding the claim of undue hardship for the delaying filers could be very different than those of the non-delaying filers.¹⁶² In the Pardo–Lacey Study, 67.7% of the non-delaying filers were employed as of the petition date, and that number dropped to 61.8% by the time they filed their adversary proceeding. In contrast, 60.0% of the delaying filers were employed as of the petition date, and that number dropped to 48.6% by the time they filed their adversary proceeding. In other words, the delaying filers became unemployed at a greater rate than the non-delaying filers. Thus, it is quite possible that the decision to exclude delaying filers biased the Iuliano Study’s sample. Such a bias would be highly relevant given that the study found a statistically significant association between the debtor’s employment status and discharge outcomes.¹⁶³

b. PACER Approach

The Iuliano Study’s use of PACER to construct its sample is also problematic. The study relied on the PACER Case Locator,—“a

159. See *infra* notes 443–45 and accompanying text (discussing timing rules for commencement of an undue hardship adversary proceeding).

160. See NAT’L CONSUMER LAW CTR., *supra* note 18, at 5.

161. These are unreported data derived from the Pardo–Lacey Study, which is described in *supra* Section II.A.

162. Post-discharge events and circumstances are relevant in evaluating a debtor’s undue hardship claim. See, e.g., *Walker v. Sallie Mae Servicing Corp.* (*In re Walker*), 650 F.3d 1227, 1231 (8th Cir. 2011); *United Student Aid Funds, Inc. v. Pena* (*In re Pena*), 155 F.3d 1108, 1112–13 (9th Cir. 1998); *Bronsdon v. Educ. Credit Mgmt. Corp.* (*In re Bronsdon*), 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010).

163. See Iuliano, *supra* note 143, at 501, 520.

national index for U.S. district, bankruptcy, and appellate courts”¹⁶⁴—to locate the adversary proceedings for the study.¹⁶⁵ The Iuliano Study explained that it resorted to using a party name search because of the Case Locator’s limited search capabilities, specifically noting that “*no way exists to restrict results to student loan discharges or even to locate adversary proceedings more generally.*”¹⁶⁶ The Iuliano Study further noted that, although student-loan adversary proceedings are assigned a specific Nature-of-Suit Code (NOS Code),¹⁶⁷ that code could not be used to construct the study’s sample: “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.*”¹⁶⁸

These explanations present an incomplete picture of the way in which researchers can use PACER to construct a proper sample for studying student-loan adversary proceedings. First, the Iuliano Study’s reference to “[i]ndividual district court databases”¹⁶⁹ is perplexing. Because student-loan adversary proceedings are routinely commenced in a bankruptcy court, the individual PACER databases for each bankruptcy court are the relevant databases for finding student-loan adversary proceedings. The “Query” search function for these databases permits searches for adversary proceedings by NOS Code, including the code for student-loan adversary proceedings: “63 (Dischargeability—523(a)(8), student loan).”¹⁷⁰ Accordingly, the study’s assertion regarding the impossibility of searching for student-loan adversary proceedings by NOS Code is incorrect, subject to the caveat below.

Search functionality by NOS Code in PACER’s bankruptcy court databases has not always been possible. For example, this functionality did not exist when the Pardo–Lacey Study was conducted in 2007. Accordingly, it may be that the search functionality by NOS Code was unavailable during the Iuliano Study. But even so, the study could have searched for adversary proceedings generally—which the study claimed was impossible¹⁷¹—by utilizing the individual PACER databases for

164. *PACER Case Locator*, PACER, <https://www.pacer.gov/pcl.html> (last visited Oct. 20, 2014).

165. *See* Iuliano, *supra* note 143, at 501 & n.35.

166. *Id.* at 502 (emphasis added).

167. *Id.* at 502 n.40.

168. *Id.* (emphasis added).

169. *Id.*

170. *See, e.g.*, QUERY, <https://ecf.mab.uscourts.gov/cgi-bin/iquery.pl> (last visited Oct. 30, 2014) (subscription required) (displaying search options for the U.S. Bankruptcy Court for the District of Massachusetts); QUERY, <https://ecf.wawb.uscourts.gov/cgi-bin/iquery.pl> (last visited Oct. 30, 2014) (subscription required) (displaying search options for the U.S. Bankruptcy Court for the Western District of Washington).

171. *See supra* text accompanying note 166.

each bankruptcy court.¹⁷² The “Docket Activity Report” search function for these databases permits searches for adversary proceedings generally, by selecting “ap” as the relevant case type.¹⁷³ Accordingly, the assertion regarding the impossibility of searching for adversary proceedings generally is also incorrect.

Ultimately, the Iuliano Study resorted to a suboptimal search process for constructing its sample—namely, using the PACER Case Locator and its extremely limited search functionality.¹⁷⁴ The Case Locator’s search template for bankruptcy cases limits searches to fields related either to the bankruptcy case (e.g., case number, case title, chapter, date filed) or to a party (i.e., party name, social security number, tax identification number).¹⁷⁵ This search approach likely resulted in a significant undercounting of student-loan adversary proceedings filed in 2007.¹⁷⁶

c. Party Name Identification

Limiting itself to the PACER Case Locator’s search template, the Iuliano Study relied on a party-name search to construct its sample.¹⁷⁷ The study derived the list of names from the website *FinAid: The SmartStudent Guide to Financial Aid*, which includes a webpage entitled “Largest Education Lenders (FY2007).”¹⁷⁸ The first sentence of the webpage states: “The following tables show the top 100 originators, holders and consolidators of *Federal Family Education Loan Program*

172. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-28, JUDICIARY SHOULD TAKE FURTHER STEPS TO MAKE BANKRUPTCY DATA MORE ACCESSIBLE 20–21 (2008), available at <http://www.gao.gov/new.items/d0928.pdf>.

173. See, e.g., DOCKET ACTIVITY REPORT, <https://ecf.mab.uscourts.gov/cgi-bin/DktActivityRpt.pl> (last visited Oct. 30, 2014) (subscription required) (displaying search options for the U.S. Bankruptcy Court for the District of Massachusetts); DOCKET ACTIVITY REPORT, <https://ecf.wawb.uscourts.gov/cgi-bin/DktActivityRpt.pl> (last visited Oct. 30, 2014) (subscription required) (displaying search options for the U.S. Bankruptcy Court for the Western District of Washington). The Pardo–Lacey Study used this approach to construct the sample for its research. See Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 202.

174. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 172, at 3 (“The U.S. Party/Case Index was designed to allow nationwide searches of individual bankruptcy cases, and although it serves that function, its search parameters are limited and the results do not include much of the data held by the system.”).

175. See *id.* at 21.

176. The Iuliano Study’s sample consisted of 217 adversary proceedings filed by 213 debtors. Iuliano, *supra* note 143, at 503. According to research by the Wall Street Journal, an NOS Code search using the “Query” page function for the individual PACER databases for each bankruptcy court indicates that 445 individual debtors filed undue hardship adversary proceedings nationwide in 2007. E-mail from Katherine Stech, Reporter, Wall Street Journal, to author (Mar. 13, 2014, 08:24 p.m. EDT) (on file with author).

177. See Iuliano, *supra* note 143, at 502.

178. See *id.* at 502 & n.36 (citing *Largest Education Lenders (FY2007)*, FINAID (Apr. 14, 2008), <http://www.finaid.org/loans/biglendersfy2007.phtml>).

loans.”¹⁷⁹ Importantly, student loans originated under the Federal Family Education Loan Program (FFELP)¹⁸⁰ are federally guaranteed student loans pursuant to which a private lender has provided the funds, and they are distinct from student loans originated under the William D. Ford Federal Direct Loan Program pursuant to which the federal government has provided the funds.¹⁸¹ Accordingly, the Iuliano Study likely involved only student loans made under FFELP.¹⁸² Nonetheless, the study states that, “[c]ollectively, in 2007, these ten lenders held 71.2 percent of *all* student loans.”¹⁸³

By searching solely for FFELP lenders,¹⁸⁴ the Iuliano Study omitted a search for adversary proceedings involving the U.S. Department of Education (DOE), a concern raised by the NCLC Report criticizing the Iuliano Study.¹⁸⁵ Importantly, 20% (23 of 115) of the adversary proceedings in the Pardo–Lacey Study involved *solely* the DOE and no other creditor. Because it did not include a search for the DOE, the Iuliano Study’s sample likely underrepresents the DOE’s involvement.¹⁸⁶ This is quite significant given the Pardo–Lacey Study’s

179. *Largest Education Lenders (FY2007)*, FINAID, <http://www.finaid.org/loans/biglenders/fy2007.phtml> (last visited Oct. 20, 2014) (emphasis added).

180. The statutory provisions governing FFELP are set forth in Chapter 28, Subchapter IV, Part B of Title 20 of the United States Code. *See* 20 U.S.C. §§ 1071–1087-4 (2012). The regulatory provisions governing FFELP student loans guaranteed by a guaranty agency are set forth in Part 682, Subpart D of Title 34 of the Code of Federal Regulations. *See* 34 C.F.R. §§ 682.400–423 (2012).

181. *See* FED. STUDENT AID, U.S. DEP’T OF EDUC., ANNUAL REPORT 2012, at 9 (2012), available at <http://www2.ed.gov/about/reports/annual/2012report/fsa-report.pdf> (summarizing briefly the differences between FFELP and the Direct Loan Program). *See generally* DAVID P. SMOLE, CONG. RESEARCH SERV., FEDERAL STUDENT LOANS MADE UNDER THE FEDERAL FAMILY EDUCATION LOAN PROGRAM AND THE WILLIAM D. FORD FEDERAL DIRECT LOAN PROGRAM: TERMS AND CONDITIONS FOR BORROWERS (2013), available at <http://www.fas.org/sgp/crs/misc/R40122.pdf> (discussing the differences between FFELP and the Direct Loan Program).

182. That program ceased originating loans in July 2010. *See* FED. STUDENT AID, *supra* note 181, at 9.

183. Iuliano, *supra* note 143, at 502 (emphasis added).

184. It should further be noted that, once the Iuliano Study obtained its search results, it selected the adversary proceedings to include in its sample by relying on the NOS Code appearing in the proceeding’s docket report. *Id.* at 502–03. Importantly, it is the party filing the adversary proceeding who selects the NOS Code to which the proceeding relates. The party may fail to select the NOS Code indicating a student-loan-dischargeability action, even though the proceeding does involve such an action. *See, e.g.*, Adversary Complaint Seeking: Relief on Loan Through Discharge in Bankruptcy, *DeVito v. Am. Educ. Servs.*, Ch. 7 Case No. 11-40414, Adv. No. 12-01851 (Bankr. D.N.J. Aug. 17, 2012), ECF No. 1; Complaint for Declaratory Relief, *Bernstein v. Sallie Mae, Inc.*, Ch. 7 Case No. 10-19772, Adv. No. 11-01545 (Bankr. C.D. Cal. Sept. 12, 2011), ECF No. 1. A better approach is to read the plaintiff’s complaint commencing the adversary proceeding to ascertain whether it involves a student-loan-dischargeability action.

185. *See* NAT’L CONSUMER LAW CTR., *supra* note 18, at 4.

186. There is the possibility that, given the mix of student loans owed by the debtor, some of the adversary proceedings in the Iuliano Study could have involved the DOE. *See, e.g.*, Pardo

finding that the amount of debt discharged was *negatively* correlated with the involvement of the DOE as a party in the adversary proceeding.¹⁸⁷ Once again, this points to the likelihood of sample bias in the Iuliano Study.¹⁸⁸

2. Poor Coding Protocols for Relief

The second reason to question the Iuliano Study's conclusions is that they rest on potentially inaccurate coding protocols for relief. Specifically, the study coded dismissal of an adversary proceeding as not involving relief,¹⁸⁹ including dismissals where the debtor sought non-bankruptcy administrative relief.¹⁹⁰ On the other hand, the study coded a default judgment entered against a creditor as involving relief.¹⁹¹ These coding protocols, however, are not sufficiently fine-grained. Debtors sometimes seek a voluntary dismissal of their adversary proceedings to pursue a non-bankruptcy discharge granted by the DOE,¹⁹² such as a discharge based on the debtor's total and permanent disability due to a medical condition.¹⁹³ The study's assertions that "someone whose case was dismissed received just as little relief as a person who lost at trial"¹⁹⁴ and that administrative remedies "are poor substitutes for bankruptcy discharges"¹⁹⁵ are just not true in every instance.

Furthermore, strong reasons exist to doubt the Iuliano Study's assertions that "a default judgment provides the same amount of relief as a trial victory"¹⁹⁶ and that such a judgment "is even better for debtors because they do not have to spend time litigating the dispute."¹⁹⁷ Debtors will sometimes name as the defendant the servicer of the student loan or a previous holder of the student loan (who subsequently

& Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 209 n.128 ("Six of the 115 adversary proceedings involved both the Education Department and ECMC.").

187. *Id.* at 219–20, 222 tbl.6.

188. See NAT'L CONSUMER LAW CTR., *supra* note 18, at 4 ("Including DOE surely would have provided a more robust and representative dataset.").

189. See Iuliano, *supra* note 143, at 499–500.

190. See *id.* at 506.

191. See *id.* at 499–500, 512.

192. See, e.g., Joint Stipulation for Dismissal of This Proceeding Without Prejudice, Ruiz v. Chase (*In re Ruiz*), Ch. 7 Case No. 12-40600, Adv. No. 12-04031 (Bankr. D. Mass. Aug. 12, 2012), ECF No. 13.

193. See 20 U.S.C. § 1087(a)(1) (2012); 34 C.F.R. § 682.402(c) (2012). For an example of such a voluntary dismissal, see Assented to Motion to Dismiss Complaint, Eafrazi v. Educ. Credit Mgmt. Corp. (*In re Eafrazi*), Ch. 13 Case No. 11-10784, Adv. No. 12-01021 (Bankr. D.N.H. Sept. 23, 2013), ECF No. 27.

194. Iuliano, *supra* note 143, at 500.

195. *Id.* at 506.

196. *Id.* at 500.

197. *Id.*

assigned the loan to a third party *prior* to the commencement of the adversary proceeding), while failing to name the current lender (and, if applicable, the guarantor) of the loan.¹⁹⁸ Under these circumstances, a default judgment granted against the servicer or a prior holder will not provide any substantive relief to the debtor insofar as the debtor does not owe a debt to either party.¹⁹⁹ Accordingly, depending on the circumstances, it may have been inappropriate for the Iuliano Study to code adversary proceedings resolved by default judgments as proceedings involving relief for the debtor.

3. Misconceptions of the Legal Landscape

The third reason to question the Iuliano Study's conclusions is that some of its assertions evince misconceptions of the legal landscape. Here, this Article offers four examples: (1) the inaccurate description of ECMC and its role in the system, (2) the discussion of administrative remedies, (3) the use of the poverty guidelines, and (4) the discussion of the undue hardship doctrine.

First, the Iuliano Study characterized ECMC as "*the nation's largest guarantor* of educational loans" and further noted that, "[i]n many proceedings, only Educational Credit Management Corporation, *and not the actual debt holder*, appeared on the docket."²⁰⁰ Both of these statements are likely inaccurate. First, during the 2008 fiscal year, ECMC was the seventh-largest guarantor of federal student loans, with a market share of 3.9%.²⁰¹ Second, when not acting as a FFELP

198. See, e.g., Motion by Educational Credit Management Corporation to Intervene and/or Be Joined as a Party Defendant at 1–2, 2 n.2, Griggs v. Access Grp. Loan Servicing (*In re Griggs*), Ch. 7 Case No. 11-09227, Adv. No. 12-00285 (Bankr. M.D. Fla. Sept. 20, 2012), ECF No. 25; Sallie Mae, Inc.'s Objection to Motion for Default Judgment and Request to Dismiss Sallie Mae, Inc. as a Party Defendant ¶¶ 17–18, Johnson v. Sallie Mae, Inc. (*In re Johnson*), Ch. 7 Case No. 11-23108, Adv. No. 11-06250 (Bankr. D. Kan. Mar. 6, 2012), ECF No. 15.

199. See, e.g., Lepre v. Dep't of Educ. (*In re Lepre*), 466 B.R. 727, 729–30 (Bankr. W.D. Pa. 2012); Srinivasan v. Sallie Mae, Inc. (*In re Srinivasan*), Ch. 7 Case No. 10-12732(RTL), Adv. No. 10-1545(RTL), 2010 WL 3633062, at *1 (Bankr. D.N.J. Sept. 7, 2010); Lyso v. Student Loan Fin. Corp., Ch. 7 Case No. 07-40653, Adv. No. 08-4014, 2008 WL 2513818, at *1 (Bankr. D.S.D. June 20, 2008). A default judgment against an originally named defendant will provide substantive relief if the defendant held the loan at the time that the debtor commenced the adversary proceeding but thereafter assigned the loan to a third party whom the debtor did not name as a defendant. See, e.g., Educ. Credit Mgmt. Corp. v. Bernal (*In re Bernal*), 207 F.3d 595, 598 (9th Cir. 2000); Wedell v. Sallie Mae, Inc. (*In re Wedell*), 329 B.R. 59, 61 (W.D. Wash. 2005); Garmhausen v. Sallie Mae Servicing Corp. (*In re Garmhausen*), 262 B.R. 217, 222 (Bankr. E.D.N.Y. 2001). If, however, the assignee had an independent claim against the debtor, such as a guarantee claim, the default judgment against the assignor would not affect the guarantee claim. See, e.g., *In re Wedell*, 329 B.R. at 61–62; *In re Garmhausen*, 262 B.R. at 22–23.

200. Iuliano, *supra* note 143, at 502 & n.39 (emphasis added).

201. *Who's Up/Who's Down: Changes in Guarantor Federal Student Loan Commitments for FY08 (Updated)*, STUDENT LENDING ANALYTICS BLOG (Mar. 16, 2009, 11:43 AM), http://studentlendinganalytics.typepad.com/student_lending_analytics/2009/03/whos-upwhos-do

guarantor,²⁰² ECMC “defends student loans in bankruptcy cases for the federal government and other guaranty agencies.”²⁰³ As a result of this process, ECMC purportedly becomes the holder of the debt,²⁰⁴ contrary to the study’s assertion.

Second, in describing administrative remedies available to student-loan debtors, the Iuliano Study stated: “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.”²⁰⁵ While it is true that certain administrative remedies involve income-based repayment plans over a certain period of time, not all involve twenty-five-year repayment periods,²⁰⁶ and not all involve cancellation of indebtedness.²⁰⁷ Moreover, some administrative remedies involve an immediate discharge of the debtor’s student loan.²⁰⁸ Finally, for those repayment plans involving cancellation of indebtedness, the cancelled debt is not always treated as taxable income.²⁰⁹

Third, to calculate the percentage of discharge seekers who lived below the poverty line, the Iuliano Study relied on the poverty guidelines established by the U.S. Department of Health and Human Services (HHS) in 2007.²¹⁰ In doing so, the study did not account for the

wn-guarantor-market-share-changes-for-fy08.html; see also *Who Are the Ten Largest Student Loan Guarantors?*, STUDENT LENDING ANALYTICS BLOG (Sept. 23, 2008, 11:32 PM), http://www.studentlendinganalytics.typepad.com/student_lending_analytics/2008/09/who-are-the-ten-largest-student-loan-guarantors.html (providing statistics indicating that ECMC was not the nation’s largest guarantor of educational loans either during the first three quarters of the 2007 fiscal year or during the first three quarters of the 2008 fiscal year).

202. See *infra* Section III.A.

203. *Archibald v. United Student Aid Funds, Inc.* (*In re Archibald*), 280 B.R. 222, 226 (Bankr. S.D. Ind. 2002).

204. See, e.g., *Alfes v. Educ. Credit Mgmt. Corp.* (*In re Alfes*), 709 F.3d 631, 633 (6th Cir. 2013).

205. Iuliano, *supra* note 143, at 506.

206. Compare 34 C.F.R. § 682.209(a)(6)(viii)(E), (a)(7)(i) (2013) (providing that, for certain FFELP loans paid under an income-sensitive repayment schedule, “a lender shall allow a borrower at least 5 years, but not more than 10 years” to repay the loan), with *id.* § 685.209(b)(3)(iii)(A) (stating that the “maximum repayment period under the [income contingent repayment] plan” for Direct loans “is 25 years”).

207. See *id.* § 682.209(a)(6)(viii)(E), (a)(7)(i) (providing that, for certain FFELP loans paid under an income-sensitive repayment schedule, “a lender shall allow a borrower at least 5 years, but not more than 10 years” to repay the loan).

208. See, e.g., *id.* § 682.402(c)(9)(x), (xii)(A)–(B) (providing for total-and-permanent-disability discharge for FFELP loans owed by veterans); *id.* § 682.402(d)(2)(i) (providing for closed-school discharge for FFELP loans); *id.* § 685.214(b)(1) (providing for closed-school discharge for Direct loans).

209. See 26 U.S.C. § 108(a)(1)(B), (f)(1) (2012).

210. See Iuliano, *supra* note 143, at 511 & n.65.

fact that the “HHS poverty guidelines for any given calendar year approximate the Census Bureau poverty thresholds from the previous calendar year.”²¹¹ Because the Iuliano Study derived its income data from bankruptcy cases filed in 2007,²¹² and because it also presumably used the 2007 monthly income data to calculate the percentage of discharge seekers who lived below the poverty line,²¹³ the study should have relied on the HHS poverty guidelines from 2008.

Finally, the Iuliano Study made unsubstantiated, patently incorrect assertions regarding the undue hardship doctrine. In jurisdictions that have adopted the *Brunner* test for undue hardship, a debtor must establish that he “has made good faith efforts to repay the loans.”²¹⁴ The Iuliano Study correctly identified this requirement,²¹⁵ but then proceeded to make the following assertions:

[T]he 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.²¹⁶

The Iuliano Study did not cite to *any* source, let alone any judicial opinions, in support of these propositions.

Judicial opinions interpreting the undue hardship standard, however, clearly establish that a debtor’s actions *subsequent* to the commencement of the adversary proceeding are relevant in applying the good-faith prong of the *Brunner* test.²¹⁷ Moreover, courts have indicated that a debtor’s employment status is a relevant factor when conducting the good-faith analysis. For example, in its decision adopting the *Brunner* test, the Seventh Circuit stated: “With the receipt of a government-guaranteed education, the student assumes an obligation to

211. Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 206 n.122 (citing Annual Update of the HHS Poverty Guidelines, 72 Fed. Reg. 3147, 3147 (Jan. 24, 2007)).

212. *See* Iuliano, *supra* note 143, at 502, 510.

213. *Id.* at 510–11, 511 nn.65–67.

214. *E.g.*, Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 400 (4th Cir. 2005) (quoting *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (per curiam)). Every federal regional circuit—except for the First, Eighth, and District of Columbia Circuits—has adopted the *Brunner* test. *See supra* notes 120–26 and accompanying text.

215. *See* Iuliano, *supra* note 143, at 516.

216. *Id.* at 517 (emphasis added).

217. *See, e.g.*, Pa. Higher Educ. Assistance Agency v. Birrane (*In re* Birrane), 287 B.R. 490, 500 (B.A.P. 9th Cir. 2002); *Burton v. Educ. Credit Mgmt. Corp.* (*In re* Burton), 339 B.R. 856, 886 (Bankr. E.D. Va. 2006).

make a good faith effort to repay those loans, *as measured by his or her efforts to obtain employment*, maximize income, and minimize expenses.”²¹⁸ Similarly, the Ninth Circuit has stated that “[g]ood faith is measured by the debtor’s efforts to obtain employment, maximize income, and minimize expenses.”²¹⁹ It goes without saying that a debtor who actually is employed has made an effort to gain employment (i.e., the employment is an observable effect of that effort).

These examples highlight how the Iuliano Study’s description of the system that it sought to empirically study was, at times, flawed. The absence of an accurate descriptive account of these core system features calls into question whether the Iuliano Study had the proper lens to carefully and critically analyze the primary materials it reviewed to gather the data upon which its findings are based.²²⁰

4. The Disconnect Between the Iuliano Study’s Conclusion and Reality

On the basis of a shaky sample, the Iuliano Study observed that “courts grant discharges to nearly forty percent of discharge seekers” and further stated that the study’s data “also showed that courts are not granting relief in an indiscriminate manner.”²²¹ These findings prompted the Iuliano Study to criticize the bankruptcy community for “condemn[ing] the undue hardship requirement.”²²² These statements further exemplify sweeping claims that fail to properly grasp the bigger picture. In the Iuliano Study’s sample, approximately 19.5% (40 of 205) of the proceedings resulted in a trial verdict.²²³ In other words, approximately 80.5% of the adversary proceedings did *not* involve a judicial determination regarding undue hardship.²²⁴ Courts are not likely

218. *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993) (emphasis added).

219. *Educ. Credit Mgmt. Corp. v. Mason (In re Mason)*, 464 F.3d 878, 884 (9th Cir. 2006) (emphasis added) (quoting *In re Birrane*, 287 B.R. at 499).

220. Cf. Daniel E. Ho & Larry Kramer, *Introduction: The Empirical Revolution in Law*, 65 STAN. L. REV. 1195, 1201 (2013) (“[E]mpiricism cannot be divorced from substance. *The design of credible empirical work must be informed by substantive, institutional knowledge.*”).

221. Iuliano, *supra* note 143, at 525 (emphasis added).

222. *Id.*

223. *Id.* at 500 n.30. It is unclear why Iuliano sets forth only 205 procedural outcomes, *see id.*, when his dataset consisted of 207 observations, *see id.* at 503.

224. It could be that, for the four adversary proceedings in the Iuliano Study that resulted in summary judgment, *see id.* at 500 n.30, the disposition was one involving an undue hardship determination. The Iuliano Study, however, does not specify the basis for each summary judgment disposition or the party that prevailed. Importantly, a summary judgment motion might dispose of discrete issues rather than the entire matter before the court. *See* RICHARD D. FREER, CIVIL PROCEDURE § 9.4, at 473–74 (3d ed. 2012). But even if the Iuliano Study’s summary judgment dispositions involved an undue hardship determination, only 21.5% (44 of 205) of the proceedings would have resulted in a judicial determination regarding undue hardship. *See supra* note 223 and accompanying text.

to apply the undue hardship standard to the facts of the debtor's claim when there is a default judgment, and they do not apply the standard when there is a settlement or when there is a voluntary dismissal (or even, in some instances, when there is an involuntary dismissal, depending on the basis of the dismissal). In light of these considerations, the Iuliano Study overclaims what its data show.

Moreover, the forty trial verdicts in the Iuliano Study's sample do not reveal much about the consistency of *judicial* application of the undue hardship standard.²²⁵ Prior research indicates "that local legal culture exercises a pervasive, systematic influence on the operation of the federal bankruptcy system in ways unanticipated by lawmakers or academic researchers."²²⁶ The Iuliano Study's sample was far too small to show whether *courts* within individual judicial districts have consistently applied the undue hardship standard. With forty trial verdicts, the Iuliano Study's sample, in essence, has less than one judicial determination of undue hardship per federal judicial district (of which there are ninety-one in the fifty states, the District of Columbia, and Puerto Rico).²²⁷ Thus, the Iuliano Study overclaimed in stating that its data demonstrated consistent application of the undue hardship standard *by courts*. Its data cannot shed light, one way or another, on the validity of this claim.

Nonetheless, the Iuliano Study proceeded to argue that more debtors should initiate adversary proceedings to determine the dischargeability of their student loans.²²⁸ In doing so, the study ruminated that "it seems that bankruptcy filers' lack of accurate knowledge of the system is the main problem."²²⁹ The study based this claim on its observations that "the cost of pursuing a student loan discharge is relatively low compared to the cost of filing bankruptcy"²³⁰ and that "there is no statistically significant difference in outcomes between debtors without attorneys and debtors with attorneys."²³¹ But, as the NCLC Report noted, the study's conclusions "are not supported by the empirical data

225. See *supra* note 223 and accompanying text.

226. Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801, 806 (1994).

227. See 28 U.S.C. §§ 81–131 (2012). Moreover, many of those judicial districts have multi-judge bankruptcy courts. See *id.* § 152(a)(2). Importantly, the Pardo–Lacey Study found that the identity of the judge assigned to the debtor's adversary proceeding was statistically significantly associated with the percentage of debt discharged. See Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 234.

228. Iuliano, *supra* note 143, at 501, 525.

229. *Id.* at 501.

230. *Id.*

231. *Id.*

and ignore the plain realities facing student loan borrowers.”²³²

Consider the faults with the Iuliano Study’s observations. In a recent adversary proceeding from 2012, an attorney charged his client a fixed fee of \$2,500, which “included all legal services necessary to prepare and file the complaint and to represent the Debtor through mediation or settlement of the adversary proceeding, whichever came first.”²³³ The attorney spent a total of nine to thirteen hours working on such matters,²³⁴ which equated to an hourly fee ranging from \$192 to \$277. Moreover, the fixed fee of \$2,500 *exceeded* the \$2,000 fee that the attorney charged the debtor for filing her Chapter 7 case.²³⁵ Finally, the settlement involved voluntary dismissal of the adversary proceeding so the debtor could pursue an administrative remedy—an income-based repayment plan²³⁶—that presumably was available to her prior to filing the adversary proceeding. This anecdote exemplifies the extent to which the Iuliano Study’s cost observation is ungrounded.

The NCLC Report correctly states that a student-loan adversary proceeding “is subject to the civil procedural rules dealing with the filing of a complaint and service of process, pre-trial discovery, motion practice, and evidentiary requirements,”²³⁷ and it accurately observes that “ECMC and other student loan creditors . . . will conduct a deposition of the debtor, require responses to formal discovery requests, and challenge the debtor if expert testimony is not provided.”²³⁸ Given the complexity of such proceedings, the NCLC Report concludes the following regarding the litigation costs involved in student-loan discharge proceedings:

Given the highly aggressive litigation tactics of ECMC and other creditors . . . most hardship discharge cases require substantial time to properly litigate, ranging anywhere from 40 to 100 hours, or more. If attorneys charge for this time even at a discounted hourly rate, fees can easily mount in the thousands and tens of thousands of dollars.²³⁹

232. NAT’L CONSUMER LAW CTR., *supra* note 18, at 1.

233. Disclosure of Compensation of Attorney for Debtor/Plaintiff at 2, *Madson v. U.S. Dep’t of Educ. (In re Madson)*, Ch. 7 Case No. 12-25607, Adv. No. 12-02008 (Bankr. C.D. Cal. Feb. 4, 2012), ECF No. 12.

234. *Id.*

235. *See id.*

236. Order Approving Stipulation for Settlement of Student Loan Debt and Dismissal of Adversary Proceeding Without Prejudice at 1–2, *Madson*, Case No. 12-25607, Adv. No. 12-02008, ECF No. 15.

237. NAT’L CONSUMER LAW CTR., *supra* note 18, at 3.

238. *Id.* For an example of an adversary proceeding in which ECMC scheduled a deposition of the debtor, see Notice of Taking Deposition Duces Tecum at 1–2, *Griggs v. Access Grp. Loan Servicing (In re Griggs)*, Ch. 7 Case No. 11-09227, Adv. No. 12-00285 (Bankr. M.D. Fla. Feb. 28, 2013), ECF No. 31.

239. NAT’L CONSUMER LAW CTR., *supra* note 18, at 3.

If one assumes an hourly rate of \$100, which is much less than the real-life example provided above,²⁴⁰ a debtor would have to pay an attorney \$4,000 to \$10,000 to properly litigate a student-loan adversary proceeding, if not more.²⁴¹ And herein lies one of the access-to-justice barriers: “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.”²⁴² In fact, there is evidence that many attorneys may be disinclined to take on such cases.²⁴³ When one considers “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,”²⁴⁴ and that such debtors are unlikely to have sufficient sums of money to pay for more than a minimal amount of services,²⁴⁵ the lack of economic incentives to take on such representation becomes readily apparent.²⁴⁶

Alternatively, “[f]or those debtors who have the resources required to litigate a claim of undue hardship, their claim ironically becomes less sympathetic insofar as the creditor may be able to point to such resources as a potential source of repayment.”²⁴⁷ Such debtors face the risk of losing at trial and thus incurring “substantial litigation

240. See *supra* text accompanying notes 233–35.

241. See, e.g., Katy Stech, *5 Things Student Loan Lawyers Ask Borrowers Who File for Bankruptcy*, WALL ST. J. (Jan. 6, 2014, 4:38 PM), <http://blogs.wsj.com/briefly/2014/01/06/5-things-student-loan-lawyers-ask-borrowers-who-file-for-bankruptcy/> (reporting that student-loan debtor’s attorney “didn’t charge the [debtor] for the \$25,000 worth of legal work on the case”).

242. Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 191.

243. See NAT’L ASS’N OF CONSUMER BANKR. ATTORNEYS, STUDENT LOAN DEBT CRISIS SURVEY (2012), available at <http://www.nacba.org/Legislative/StudentLoanDebt.aspx> (follow “Read the February 7, 2012 NACBA member survey results here.” hyperlink) (“Most bankruptcy attorneys (95 percent) report that few student loan debtors are seen as having any chance of obtaining a discharge as a result of undue hardship.”); Lieber, *supra* note 8 (“Mr. Stanton did not see it that way. ‘It’s the last one [i.e., undue hardship adversary proceeding] I’ve ever done, because I was just so horrified,’ he said. ‘I didn’t even have the client pay me. In all of the cases in 30 years of bankruptcy work, I came away with about the worst taste in my mouth that I’ve ever had.’” (quoting Steven Stanton, a bankruptcy lawyer in Granite City, Illinois)).

244. Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 211.

245. See *id.* at 211–12, 211 n.137.

246. Cf. Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 67 VAND. L. REV. 151, 194 (2014) (“High litigation costs make accepting many legitimate cases economically infeasible for contingent fee attorneys. Unless expected damages are large, the attorneys simply cannot justify accepting many cases because the expected fees will not offset the high costs of medical malpractice litigation.”).

247. Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 191–92.

expenses”²⁴⁸ without any attendant benefit. Worse yet, depending on the terms of the student-loan promissory note, the debtor’s litigation expenses might even include the attorney’s fees incurred *by the creditor* during the adversary proceeding.²⁴⁹ Finally, this group of debtors might encounter yet another access-to-justice barrier: “excessive search costs that prevent [such] student-loan debtors from finding the highly experienced attorneys who will provide better chances of obtaining extensive relief.”²⁵⁰

Given that the economics of undue hardship litigation are likely to dissuade most attorneys from representing debtors in such proceedings, concerns arise that the choice of counsel for debtors will be quite limited and perhaps confined mostly to low-quality attorneys. Examples here include an attorney who filed a blank shipping order as the complaint initiating the adversary proceeding on his client’s behalf,²⁵¹ as well as an attorney who was “barred from appearing on behalf of any client in the United States Bankruptcy Court for the District of Nebraska, including the filing of further bankruptcy cases or filing any documents or pleadings in existing bankruptcy cases” due to the attorney’s repeated failures to comply with the court’s order demanding his appearance.²⁵² And, for a more extreme example, consider the attorney who pleaded guilty to a federal charge of illegally possessing an unregistered machine gun,²⁵³ and thus could not continue

248. 1 NAT’L BANKR. REVIEW COMM’N, *supra* note 3, at 212.

249. *See, e.g.*, *Busson-Sokolik v. Milwaukee Sch. of Eng’g (In re Busson-Sokolik)*, 635 F.3d 261, 267 (7th Cir. 2011).

250. Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 233.

251. *See* Complaint, *Reslink v. Educ. Credit Mgmt. Corp. (In re Reslink)*, Ch. 7 Case No. 11-12041, Adv. No. 12-01075 (Bankr. W.D. Pa. June 29, 2012), ECF No. 1. The court, *sua sponte*, dismissed the “complaint” without prejudice. *See* Order, *Reslink*, Ch. 7 Case No. 11-12041, Adv. No. 12-01075 (Bankr. W.D. Pa. July 3, 2012), ECF No. 6 [hereinafter Dismissal Order, *Reslink v. ECMC*]. Lest the reader think that this was an isolated instance of ineffective assistance in this adversary proceeding, the docket in *Reslink* is rife with corrective entries by the clerk’s office indicating the failure of debtor’s counsel to comply with various procedural requirements. *See, e.g.*, Docket, *Reslink*, Ch. 7 Case No. 11-12041, Adv. No. 12-01075 (Bankr. W.D. Pa. opened June 28, 2012), ECF Nos. 9, 11, 13, 20, 31, 32. Moreover, the failure of debtor’s counsel to comply with a court order prompted the court to issue an order against him “to show cause as to why the Adversary Proceeding should not be dismissed *with prejudice* and/or other sanctions imposed, including a monetary fine imposed against him, in addition to other possible sanctions.” Order to Show Cause at 1–2, *Reslink*, Ch. 7 Case No. 11-12041, Adv. No. 12-01075 (Bankr. W.D. Pa. Feb. 28, 2013), ECF No. 66.

252. *Grimm v. United States (In re Grimm)*, Ch. 7 Case No. 10-42511, Adv. No. 11-04016, slip op.at 2 (Bankr. D. Neb. Dec. 12, 2012), ECF No. 40.

253. Gary Ridley, *Owosso Attorney Pleads Guilty in Flint Federal Court to Machine Gun Charge*, MLIVE (Dec. 18, 2012, 4:35 PM), http://www.mlive.com/news/flint/index.ssf/2012/12/owosso-area_attorney_pleads_gu.html.

representing his client in her student-loan adversary proceeding.²⁵⁴

The Iuliano Study's response to all of this would apparently be that debtors should represent themselves when seeking a bankruptcy discharge of their student loans: "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."²⁵⁵ The NCLC Report took issue with this recommendation, stating that "[i]t is absurd to suggest that many debtors without representation could properly litigate a hardship case and avoid dismissal"²⁵⁶ and that "[m]ost *pro se* debtors do not know what proof is required [to establish undue hardship] or how to present it in court under the evidence rules."²⁵⁷

The dockets of student-loan adversary proceedings include voluntary dismissals where self-represented debtors have explained to the bankruptcy court their inability to litigate their claims of undue hardship without the assistance of counsel.²⁵⁸ For self-represented debtors, the reality is that their lives become severely disrupted and consumed by the daunting task of navigating a highly technical and complex legal process.²⁵⁹ Despite these realities, the Iuliano Study made the following

254. See Docket, *Schmidt v. Sallie Mae (In re Schmidt)*, Ch. 7 Case No. 12-31821, Adv. No. 12-03280 (Bankr. E.D. Mich. opened Aug. 3, 2012) (indicating that debtor's attorney was suspended).

255. Iuliano, *supra* note 143, at 525.

256. NAT'L CONSUMER LAW CTR., *supra* note 18, at 3.

257. *Id.*

258. For example, one self-represented debtor stated:

Honorable Court I would like to communicate to you ahead of time for my non attendance [sic] on November 6th, hearing I am new to the Bankruptcy procedures and find it quite complicated, I am uneducated on my rights and I feel extremely intimidated by the two defendants, do [sic] to their years of experience in the Bankruptcy laws.

Declaration of Voluntary Dismissal of Chapter 7, Adversary Hearing at 1, *Reveles v. Sallie Mae*, Ch. 7 Case No. 12-34871, Adv. No. 12-02033 (Bankr. C.D. Cal. Nov. 30, 2012), ECF No. 16. Another self-represented debtor stated:

It is clear to me that *I did not understand the complexity of filing an Adversary Complaint to discharge my student loans* when doing so. I understood from my research that discharging these loans is difficult and almost never occurs, but I did not foresee that the process would be infinitely more complicated than the filing of the bankruptcy itself. The documents that have been addressed to me concerning this matter are overwhelming.

Letter/Motion to Withdraw Complaint Filed by Plaintiff/Debtor, *Henry v. Wells Fargo Bank NA (In re Henry)*, Ch. 7 Case No. 12-71257, Adv. No. 12-07044 (Bankr. W.D. Va. Oct. 3, 2012), ECF No. 32 (emphasis added).

259. See *Sperazza v. Educ. Credit Mgmt. Corp. (In re Sperazza)*, 366 B.R. 397, 405 (Bankr. E.D. Pa. 2007) ("[B]ecause of the fact that I had no choice but to prepare and litigate my

definitive claim, based on a statistically *nonsignificant* finding.²⁶⁰

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.*²⁶¹

The NCLC Report expressed strong doubts about this claim,²⁶² a position that is valid for the following reasons: First, the Iuliano Study’s observation fails to recognize that skill and competence vary among attorneys and that differences in lawyer quality might create statistical noise when grouping all lawyers together for purposes of comparing outcomes between represented and self-represented debtors. Second, the observation ignores statistically significant findings to this effect. While the Pardo–Lacey Study did not find a statistically significant association between the percentage of debt discharged and the represented status of debtors (i.e., represented by an attorney or self-represented),²⁶³ it did find that the percentage of debt discharged was statistically significantly greater for the group of debtors represented by a “highly experienced” attorney than for the group of debtors who were not represented by such an attorney (i.e., debtors who were represented by a “lesser-experienced” attorney or who were self-represented).²⁶⁴ The correlation persisted even when controlling for a variety of factors, including doctrinally relevant facts and the identity of the judge assigned to the adversary proceeding.²⁶⁵ Thus, while not all representation will contribute to successful outcomes,²⁶⁶ high-quality representation should make a difference.

own adversary proceeding, which I have stated several times during this proceeding, I also had no choice but to temporarily suspend my job seeking activities—mainly the applying for specific jobs.” (internal quotation marks omitted)).

260. Iuliano, *supra* note 143, at 501 & n.34.

261. *Id.* at 507 (emphasis added).

262. NAT’L CONSUMER LAW CTR., *supra* note 18, at 2 (“The Iuliano study *irresponsibly* suggests that debtors do ‘not need to hire an attorney to be successful’ in hardship discharge cases.” (emphasis added)).

263. *See* Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 222 tbl.6.

264. *See id.* at 220, 222 tbl.6. The Pardo–Lacey Study operationalized an attorney’s level of experience based on the number of years of experience of the debtor’s counsel as of the date of the filing of the adversary proceeding. *See id.* at 218 n.150.

265. *See id.* at 227, 228 tbl.9.

266. Consider, for example, the Pardo–Lacey Study’s finding that representation by a particular attorney was statistically significantly associated with both the discharge of a lower percentage of student-loan debt and the resolution of such proceedings by trial. *See id.* at 220–21, 222 tbl.6, 223 tbl.7.

At the end of the day, readers of the Iuliano Study should reject its assertions—whether express or implied—that access-to-justice barriers are not a concern in undue hardship litigation. Such barriers do exist, and they ratchet up the difficulty faced by debtors in establishing the merits of their claims for relief. To make matters worse, some institutional creditors repeatedly force debtors to contend with procedural noncompliance and pollutive litigation. This sort of litigation behavior prejudicially distorts, to the detriment of debtors, the form in which courts consider undue hardship claims. This Article now turns to an explanation and illustration of this dynamic.

III. A CAUTIONARY TALE OF MISTAKES AND MISBEHAVIOR IN UNDUE HARDSHIP LITIGATION

When *The New York Times* recently asked ECMC to comment on critiques of ECMC's litigation behavior in undue hardship adversary proceedings, the company "issued a statement saying that its practices *strictly follow federal law*."²⁶⁷ Furthermore, while a DOE spokesman indicated "that the department . . . believes that [ECMC] complies with the law and government policies," he also noted that the DOE would be willing to investigate ECMC if evidence of its misbehavior came to light.²⁶⁸ For the reasons that follow, it may be worthwhile for the DOE to reexamine and question the role that ECMC plays in undue hardship litigation.²⁶⁹

This Part challenges these assertions regarding the propriety of ECMC's compliance with the law. Section III.A provides an account of ECMC's operations in undue hardship litigation. Using original empirical research that investigated the dockets of undue hardship adversary proceedings from 2011 and 2012 involving ECMC, Section III.B provides examples of how ECMC has failed to comply with certain procedural requirements in litigating against student-loan debtors. Section III.C then discusses in detail an example of pollutive

267. Kitroeff, *supra* note 8 (emphasis added).

268. *Id.*

269. In a similar vein, some members of Congress have called upon the DOE to establish guidelines for its contractors—including ECMC—that identify when it is appropriate to contest a debtor's request for relief in an undue hardship adversary proceeding. Press Release, Congressman Steve Cohen, Cohen, 6 Members of Congress Urge Education Secretary to Bring More Fairness to Struggling Students (May 16, 2014), *available at* <http://cohen.house.gov/press-release/cohen-6-members-congress-urge-education-secretary-bring-more-fairness-struggling> (stating that "the path to an undue hardship discharge is often blocked by Department contractors, such as the Educational Credit Management Corporation (ECMC), which have a practice of aggressively challenging debtors' efforts to show undue hardship" and also that it is not "sensible or cost-effective for the Department or its contractors to engage in lengthy legal challenges and appeals against bankruptcy student loan borrowers who have demonstrated a clear and legitimate inability to repay their loans" (internal quotation marks omitted)).

litigation by ECMC—the frivolous argument that the doctrine of claim preclusion prevents a Chapter 7 debtor from initiating an undue hardship adversary proceeding after having been granted a discharge in her underlying bankruptcy case.

A. A Thumbnail Sketch of ECMC

Founded in 1994 as Transitional Guaranty Agency, Inc.,²⁷⁰ and renamed Educational Credit Management Corporation in 1996,²⁷¹ ECMC was created to facilitate the takeover of failing guaranty agencies as well as to provide other services to the DOE.²⁷² Since ECMC’s founding in 1994, the DOE has designated ECMC as the guaranty agency in four states: Virginia in 1996,²⁷³ Oregon in 2005,²⁷⁴ and California and Connecticut in 2010.²⁷⁵

In addition to serving as a designated guarantor for FFELP loans, pursuant to its agreement with the DOE, ECMC is “authorized to accept assignment of all FFELP loans on which the borrower has filed a petition for relief under the U.S. Bankruptcy Code.”²⁷⁶ The agreement further states that “ECMC may accept assignment of a loan in any stage

270. Letter from Helen Lew, Acting Assistant Inspector Gen. for Audit Servs., U.S. Dep’t of Educ., to Theresa S. Shaw, Chief Operating Officer, Fed. Student Aid, U.S. Dep’t of Educ., and Sally Stroup, Assistant Sec’y, Office of Postsecondary Educ., U.S. Dep’t of Educ. at 2 & n.2 (Mar. 20, 2003) [hereinafter Lew Letter], available at <http://www2.ed.gov/about/offices/list/oig/auditreports/a05d0001.pdf>.

271. *Id.* But see *McAlpin v. Educ. Credit Mgmt. Corp. (In re McAlpin)*, 254 B.R. 449, 451 (Bankr. D. Minn. 2000) (stating that ECMC’s name change occurred in May 1995), *rev’d*, 263 B.R. 881 (B.A.P. 8th Cir. 2001), *aff’d*, 278 F.3d 866 (8th Cir. 2002).

272. Lew Letter, *supra* note 270, at 2; see also Letter from Gary D. Whitman, Reg’l Inspector Gen. for Audit Servs., U.S. Dep’t of Educ., to Richard Boyle, Chief Exec. Officer, ECMC Grp. Inc., at 21 (Mar. 3, 2011) [hereinafter Whitman Letter], available at <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2011/a05k0001.pdf> (setting forth the 2006 agreement between ECMC and the DOE and providing that “[t]he Department may ask ECMC to assist or assume the responsibilities for an insolvent or otherwise failing guarantor”).

273. Lew Letter, *supra* note 270, at 2.

274. Whitman Letter, *supra* note 272, at 16. But see *Rowe v. Educ. Credit Mgmt. Corp.*, 730 F. Supp. 2d 1285, 1288 (D. Or. 2010) (stating that the DOE designated ECMC as the guaranty agency for Oregon in 2004).

275. See Press Release, Educ. Credit Mgmt. Corp., CSLF Transitions Its Student Loan Guarantee Portfolio to ECMC (Nov. 2, 2009), available at http://www.ecmc.org/idc/native/cslf_announcement.pdf; Press Release, Educ. Credit Mgmt. Corp., ECMC Assumes Responsibility for Loans Guaranteed by California Agency (Nov. 1, 2010), available at <http://www.ecmc.org/idc/native/ecmcnewsrelease110110-ca.pdf>.

276. Whitman Letter, *supra* note 272, at 19; see also, e.g., Brief of *Amicus Curiae* Educational Credit Management Corp. in Support of Petitioner at 3, *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010) (No. 08-1134), 2009 WL 2896305, at *3 (“For example, when a borrower files a chapter 13 bankruptcy, the lender receives general notice of filing from the bankruptcy clerk; the lender then files a claim for the student loan with the guaranty agency, who then, in the majority of cases, assigns the account to ECMC for handling.”).

of the bankruptcy process and from any guaranty agency or the Department.”²⁷⁷ Given this Article’s focus on ECMC’s procedural noncompliance and pollutive litigation, it is especially worth noting that the DOE has emphasized in its agreement with ECMC the reason why it has chosen ECMC to represent the federal interest in bankruptcy litigation involving FFELP loans:

The Department acknowledges that, over the past 10 years in performing its bankruptcy servicing role . . . , ECMC has developed unique legal expertise and capabilities in defending and promoting the interests of the FFEL Program on a national basis. Subject to applicable law and regulations, ECMC is authorized to continue to take all appropriate action to defend and promote the interests of the FFEL Program on a national basis, including without limitation helping develop a more uniform interpretation and enforcement of the student loan provisions within the U.S. Bankruptcy Code and other applicable laws throughout all jurisdictions in the United States.²⁷⁸

As Sections III.B and III.C will discuss, various indicators suggest that one can characterize some of ECMC’s litigation conduct as procedurally noncompliant and pollutive. This should prompt the DOE to reassess whether ECMC is an appropriate representative of the federal interest in undue hardship adversary proceedings—particularly if ECMC’s noncompliance contravenes the DOE’s mandate that ECMC adhere “to applicable law and regulations.”²⁷⁹ But before turning to examples of ECMC’s litigation conduct, this Article will briefly discuss the scope of ECMC’s involvement in the bankruptcy forum and the resources available to it in carrying out its bankruptcy-servicing role.

From 2008 through 2012, the bankruptcy student-loan portfolio serviced by ECMC has grown in size. At the end of each calendar year, its portfolio had loans with an outstanding balance of approximately \$1.45 billion in 2008,²⁸⁰ \$1.8 billion in 2009,²⁸¹ \$2.3 billion in 2010,²⁸²

277. Whitman Letter, *supra* note 272, at 19.

278. *Id.* at 20.

279. *Id.* In a similar vein, the U.S. Government Accountability Office has recently called upon the DOE to improve its monitoring of collection agencies to ensure that they comply with federal law when interacting with student-loan borrowers. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-256, FEDERAL STUDENT LOANS: BETTER OVERSIGHT COULD IMPROVE DEFAULTED LOAN REHABILITATION 22 & n.31, 25 (2014), *available at* <http://www.gao.gov/assets/670/661437.pdf>.

280. Whitman Letter, *supra* note 272, at 2.

281. Educ. Credit Mgmt. Corp., IRS Form 990, Return of Organization Exempt from Tax Income (OMB No. 1545-0047) (2009) (on file with author).

282. Educ. Credit Mgmt. Corp., IRS Form 990, Return of Organization Exempt from Tax Income (OMB No. 1545-0047) (2010) (on file with author).

\$2.8 billion in 2011,²⁸³ and \$2.9 billion in 2012.²⁸⁴ These figures clearly illustrate that a significant number of student-loan debtors in bankruptcy must contend with ECMC.

Evidence suggests that, annually, the federal government makes available to ECMC large amounts of money for ECMC to carry out its bankruptcy-servicing role. That money is located in a Federal Reserve Fund that is maintained by the Federal Services Bureau (the FSB Fund).²⁸⁵ The DOE has authorized ECMC to use the FSB Fund to “handle[] all functions or assignments carried out by ECMC at the request of the Department;”²⁸⁶ and the DOE has identified the servicing and monitoring of FFELP loans subject to bankruptcy proceedings as the FSB’s primary function.²⁸⁷ The following description of the operation of the FSB Fund demonstrates ECMC’s access to significant resources when litigating against student-loan debtors:

All of the FSB’s funds are the property of the Department, and the Agreement requires ECMC to return to the Department 100 percent of the FSB Federal Reserve Fund balance each year. However, the Department, at its sole discretion, may require less than 100 percent transfer of the Federal Reserve Fund balance. The Department did not require ECMC to return any of the \$252 million balance that existed in the FSB Federal Reserve Fund as of September 30, 2008. However, in a memorandum to ECMC dated February 5, 2010, the Department required ECMC to return \$438 million of the \$538 million balance that existed in the FSB Federal Reserve Fund as of September 30, 2009.²⁸⁸

This financing arrangement highlights how the resource asymmetries inherent in undue hardship litigation skew heavily in favor of ECMC. While ECMC has been able to pay some of its local counsel at hourly rates of approximately \$205,²⁸⁹ \$270,²⁹⁰ and \$275,²⁹¹ the overwhelming

283. Educ. Credit Mgmt. Corp., IRS Form 990, Return of Organization Exempt from Tax Income (OMB No. 1545-0047) (2011) (on file with author).

284. Educ. Credit Mgmt. Corp., IRS Form 990, Return of Organization Exempt from Tax Income (OMB No. 1545-0047) sched. O, pt. III, l. 4d (2012) (on file with author).

285. Whitman Letter, *supra* note 272, at 2.

286. *Id.*

287. *Id.*

288. *Id.*

289. See Affidavit of Gwen P. Weisberg, Exhibit 2, August v. Pa. Higher Educ. Assistance Agency (*In re* August), Ch. 7 Case No. 05-34060, Adv. No. 05-03158 (Bankr. D. Conn. Apr. 21, 2006), ECF No. 37-2.

290. See Notice of Motion and Motion to Compel from Plaintiff Further Responses to Interrogatories and Requests for Production of Documents and Request for an Order Directing Plaintiff to Pay ECMC’s Legal Expenses in the Amount of \$3,226.50, ¶ 10, at 10, Graber v.

majority of student-loan debtors do not likely have the financial wherewithal to hire such attorneys.²⁹² Given the significant amount of resources available to it, ECMC is well poised to wage a war of attrition against student-loan debtors.²⁹³

B. *An Empirical Investigation of ECMC's Procedural Noncompliance*

This Section presents the results of original empirical research that attempts to uncover patterns of procedural noncompliance by ECMC in undue hardship litigation. First, this Section summarizes the study design. Next, it provides descriptive statistics relating to four categories of pretrial practice to illustrate ECMC's noncompliant litigation behavior in undue hardship adversary proceedings. Those categories are (1) compulsory-disclosure practice, (2) motion practice, (3) responsive-pleading practice, and (4) discovery practice. For the time period studied, the data show that some of ECMC's litigation conduct has involved high levels of procedural noncompliance. In setting forth the descriptive statistics, this Section comments on why such instances of noncompliant behavior should be deemed harmful.

1. Study Design

To document ECMC's procedural noncompliance in undue hardship litigation, I created an original dataset of adversary proceedings involving such litigation that were commenced during 2011 and 2012. To constitute the dataset, I formulated a search query in Bloomberg Law's "Dockets" database.²⁹⁴ Using the search template for the database, I limited query retrieval based on the following parameters: First, in the "Courts" field, I limited the search source to dockets from U.S. Bankruptcy Courts. Second, to exclude bankruptcy case dockets

ECMC-CA (*In re Graber*), Ch. 7 Case No. 11-19573, Adv. No. 11-01749 (Bankr. C.D. Cal. Dec. 12, 2011), ECF No. 24 [hereinafter Notice of Motion and Motion to Compel, *In re Graber*].

291. Declaration Michaelanne Ehrenberg in Support of Motion to Compel Production of Discovery Responses, Dismiss Proceeding, and for Issuance of Sanctions ¶ 8, at 3, *Moreno v. NW Educ.* (*In re Moreno*), Ch. 7 Case No. 05-15973, Adv. No. 05-01416 (Bankr. W.D. Wash. Mar. 30, 2006), ECF No. 17.

292. See Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 2, at 211 n.137.

293. See *supra* note 31 and accompanying text. To illustrate the potential for attrition litigation, compare the debtor who can only afford to pay his attorney a \$2,500 flat fee for limited-scope representation (i.e., filing the complaint and negotiating a settlement), see *supra* text accompanying notes 233–34, with ECMC, which can afford to pay its attorney \$3,226.50 to file a motion to compel discovery, see Notice of Motion and Motion to Compel, *In re Graber*, *supra* note 290, ¶ 10, at 10–11.

294. BLOOMBERG LAW, <http://www.bloomberglaw.com/dockets> (last visited Oct. 20, 2014) (subscription required).

and thus limit query retrieval to adversary proceeding dockets, I entered “adversary proceeding” in the “Keywords” field. Third, in the “Party Options” field, I searched for fifty-four terms that would likely capture the overwhelming majority of diverse non-debtor parties (e.g., creditors, guarantors, servicers, and debt collectors) who would be named as a litigant and/or appear in an undue hardship adversary proceeding.²⁹⁵ In doing so, I instructed the query retrieval to include such parties regardless of their role in proceeding (e.g., plaintiff or defendant) and to include any proceedings involving any of the non-debtor parties for whom I had searched. Fourth, I formulated the search query to include both dockets and proceedings and to include all dockets regardless of the case status (i.e., open or closed). Finally, I included a date restriction that limited query retrieval to dockets that were opened during the two-year period beginning on January 1, 2011 and ending on December 31, 2012.

Because Bloomberg Law limits query retrieval to 1000 search results, I had to run multiple searches due to the over-inclusive nature of my search for non-debtor parties. The first search produced 989 results;²⁹⁶ the second search produced 668 results;²⁹⁷ the third search produced 729 results;²⁹⁸ the fourth search produced 794 results,²⁹⁹ and the fifth search produced 201 results.³⁰⁰ From this list of 3381 results, I

295. This Article uses the term “litigant,” rather than “defendant,” because of the ability of either the debtor or the creditor to file a complaint initiating a debt dischargeability determination. *See* FED. R. BANKR. P. 4007(a). Although debtors and creditors have equal opportunity to commence a student-loan adversary proceeding, debtors are the ones who overwhelmingly appear as plaintiffs in such proceedings. *See, e.g., infra* notes 333–34 and accompanying text.

296. The first search entered the following terms in the “Party Options” field: “access group”; “account control technology”; ACS; “action financial services”; AES; “affiliated computer services”; “allied interstate”; “apollo group”; “CBE Group”; CHELA; “coast professional”; “collection technology”; college; collegiate; conserve; “delta management”; “direct loan”; “direct loans”; and “directloan.”

297. The second search entered the following terms in the “Party Options” field: “diversified collection”; ecmc; educap; education; educational; “EIS collections”; “EOS-CCA”; ERS; fedloan; “financial asset management systems”; “first mark services”; “FMS Investment”; “GC Services”; “great lakes”; and “guaranty”. Running the search for the two-year period produced more than 1000 results. Accordingly, I ran the search twice: once for the 2011 calendar year—the second search—and once for the 2012 calendar year—the third search.

298. For details regarding the terms entered in the “Party Options” field for the third search, see *supra* note 297.

299. The fourth search entered the following terms in the “Party Options” field: “Immediate Credit Recoveries”; ITT; KHEAA; MHELSA; National Recoveries; NCO Group; Nelnet; NYSHESC; PHEAA; “Pioneer Credit”; “Premiere Credit”; “Progressive Financial”; “Sallie Mae”; *salliemae*; “SLM Corporation”; and student.

300. The fifth search entered the following terms in the “Party Options” field: university; “USA Group Loan”; “Van Ru Credit”; “West Asset Management”; and “Windham Professionals.”

individually identified the adversary proceedings that involved a complaint seeking a dischargeability determination regarding educational debt, of which there were 1439. In approximately 41% (597 of 1439) of those proceedings, ECMC was a named party and/or appeared in the proceeding. To explore ECMC's procedural noncompliance in such adversary proceedings, I drew a random sample of 100 adversary proceedings from the 597 proceedings in which ECMC was a named party and/or appeared. I independently examined each proceeding to ascertain the frequency with which certain types of noncompliance occurred.

2. Evidence of ECMC's Procedural Noncompliance

Here, I present the results of my empirical investigation into ECMC's procedural noncompliance in undue hardship litigation. Keep in mind that I have confined this research to examining a limited subset of litigation conduct by ECMC over a two-year period. In light of this, the findings set forth below cannot be generalized to other areas of ECMC's litigation conduct or to ECMC's litigation in the same areas during a different time period. Despite that disclaimer, these findings nonetheless reveal past patterns of ECMC's litigation conduct. Knowledge about those patterns will hopefully generate a better understanding of how the litigation conduct of repeat institutional creditors like ECMC might exacerbate the access-to-justice barriers that inhere in undue hardship litigation.

I focus on four categories of pretrial practice to illustrate instances of ECMC's noncompliant litigation behavior in undue hardship adversary proceedings: (1) compulsory-disclosure practice, (2) motion practice, (3) responsive-pleading practice, and (4) discovery practice. To be sure, the noncompliance may seem more egregious in some categories than others. My goal, however, is simply to demonstrate a range of noncompliance—that is, litigation behavior demonstrating a consistent disregard for the rules irrespective of the magnitude of the harm that the noncompliance may cause.

a. Compulsory-Disclosure Practice

The first example of pretrial practice by ECMC that demonstrates its procedural noncompliance relates to a mandated disclosure that corporate parties in adversary proceedings must make. Any nongovernmental corporate party to an adversary proceeding (other than the debtor) must file a corporate ownership statement identifying “[a]ny corporation . . . that directly or indirectly owns 10% or more of any class of the [corporate party's] equity interests.”³⁰¹ If no corporation

301. FED. R. BANKR. P. 7007.1(a).

holds such an ownership interest in the corporate party, the party nevertheless must file a statement indicating “that there are no entities to report.”³⁰² The corporate party must file the statement with its first pleading in the adversary proceeding.³⁰³ The purpose of the compulsory disclosure is to provide information that will facilitate a determination by the presiding judge as to whether her own disqualification is appropriate under the Code of Conduct for United States Judges.³⁰⁴

The extent of procedural noncompliance by ECMC in this instance is quite striking. Based on the random sample, ECMC failed to file the corporate ownership statement in approximately 81.3% [72.2, 87.9]³⁰⁵ of the undue hardship adversary proceedings in which it appeared in 2011 and 2012.³⁰⁶ And even when ECMC managed to file the corporate ownership statement, it occasionally failed to comply with the strict letter of the law—for example, by failing to file the statement with its first pleading.³⁰⁷

The significance of such procedural noncompliance is that, in the overwhelming majority of these adversary proceedings, ECMC has failed to provide the presiding judge with the information necessary to determine whether she has a financial interest in ECMC that would warrant self-disqualification. Even assuming that ECMC would not have had to report any entity in the corporate ownership statement if ECMC had been procedurally compliant, the failure to file the statement casts a cloud on the legitimacy of the outcomes of proceedings that ended favorably for ECMC.

302. *Id.*

303. FED. R. BANKR. P. 7007.1(b).

304. FED. R. BANKR. P. 7007.1 advisory committee notes.

305. This Article uses the notation [#,#] to indicate the lower and upper bounds of the 95% confidence interval for estimates. This Article follows the recommendation to use (1) the Wilson interval for estimates based on forty observations or less, and (2) the Agresti–Coull interval for estimates based on more than forty observations. See Lawrence D. Brown et al., *Interval Estimation for a Binomial Proportion*, 16 STAT. SCI. 101, 115 (2001).

306. Recall that the random sample consists of 100 undue hardship adversary proceedings in which ECMC was a named party and/or made an appearance. See *supra* Subsection III.B.1. ECMC made an appearance in 96 of the 100 proceedings. Because the compulsory-disclosure requirement would apply only in this subset of proceedings, the estimate is based on the subset. For the four proceedings in which ECMC did not make an appearance, the debtor had originally named ECMC as a defendant. ECMC may not have appeared due to procedural noncompliance by the debtor, such as insufficient service of process. See, e.g., Order Dismissing Adversary Proceeding as to Defendant ECMC Only, *Watkins v. ECMC (In re Watkins)*, Ch. 7 Case No. 09-77414, Adv. No. 12-04207 (Bankr. E.D. Mich. Mar. 2, 2012), ECF No. 8 [hereinafter Dismissal Order, *In re Watkins*] (dismissing undue hardship adversary proceeding with respect to one defendant based on improper service of summons and complaint).

307. See, e.g., Docket, *Finley v. Conduit BONY ELT SLMA Cavalier Fund (In re Finley)*, Ch. 7 Case No. 11-47177, Adv. No. 12-04039 (Bankr. N.D. Tex. opened Apr. 17, 2012).

b. Motion Practice

The second example of pretrial practice by ECMC illustrating its procedural noncompliance relates to its motion practice—specifically, the manner in which ECMC sets forth the grounds in its motions to join those proceedings in which the debtor has not originally named ECMC as a defendant in the complaint. In such proceedings, ECMC will make its motion pursuant to one of the various joinder mechanisms set forth in the Federal Rules of Civil Procedure (the Federal Rules)—primarily, intervention or substitution.³⁰⁸ The Federal Rules generally provide that a “motion must . . . state with particularity the grounds for seeking the order.”³⁰⁹ The U.S. Court of Appeals for the Federal Circuit has stated that “[t]he purpose of the particularity requirement . . . is to afford notice of the grounds and prayer of the motion to both the court and to the opposing party, providing that party with a meaningful opportunity to respond and the court with enough information to process the motion correctly.”³¹⁰ Accordingly, courts have invoked the particularity requirement when litigants have failed to specify the Federal Rule upon which the movant has based the request for relief.³¹¹ Courts have also invoked the particularity requirement when litigants have made allegations that are too general and not substantiated with factual support or evidence.³¹²

When considering application of the particularity requirement in this context, an understanding of the nature of the evidentiary burden imposed on a movant seeking intervention or substitution is crucial. This burden informs what the particularity threshold ought to be for such motions. First and foremost, the movant bears the burden of proof to establish that the court should grant relief, whether the relief requested is intervention,³¹³ or substitution based on the transfer of an interest.³¹⁴ Intervention of right requires the movant to establish that he

308. See FED. R. CIV. P. 24, 25(c); see also FED. R. BANKR. P. 7024, 7025 (incorporating Rules 24 and 25 in adversary proceedings).

309. See FED. R. CIV. P. 7(b)(1)(B); see also FED. R. BANKR. P. 7007 (incorporating Rule 7 in adversary proceedings).

310. *Registration Control Sys., Inc. v. Compusystems, Inc.*, 922 F.2d 805, 807 (Fed. Cir. 1990).

311. See, e.g., *Comspec Int'l, Inc. v. RentSonic, L.L.C.*, No. 2:10-CV-12601, 2012 WL 368424, at *1 (E.D. Mich. Jan. 17, 2012); *Frees v. Duby*, No. 1:10-cv-609, 2010 WL 4923535, at *2 (W.D. Mich. Nov. 29, 2010); *Rivera v. Berg Elec. Corp.*, No. 2:08-cv-01176, 2010 WL 3002000, at *1 (D. Nev. July 28, 2010).

312. See, e.g., *Comspec Int'l*, 2012 WL 368424, at *1–2.

313. See, e.g., *FREER*, *supra* note 224, § 12.6.3, at 732.

314. The manner in which the Rule 25(c) is structured strongly suggests that the burden of proof ought to rest on the movant seeking to be substituted for or joined with an original party to the action. Subsequent to a transfer of interest, Rule 25(c) contemplates that the litigation will

“claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.”³¹⁵ On the other hand, permissive intervention requires the movant to establish that he “has a claim or defense that shares with the main action a common question of law or fact.”³¹⁶ Finally, substitution based on a transfer of interest requires the movant to establish that, under applicable substantive law, the movant has become the successor-in-interest to the originally named party who transferred the interest.³¹⁷

Given these details, how should the particularity requirement of the Federal Rules apply in this context? In the overwhelming majority of proceedings in which ECMC seeks to join the litigation, it should plead in its motion one particular, dispositive fact—that a creditor or guarantor has assigned to ECMC the debtor’s student loan. The reason for this is that ECMC’s agreement with the DOE generally limits ECMC’s bankruptcy-servicing role to this specific scenario.³¹⁸ Moreover, one would expect ECMC to support its motion with documentation indicating that such a transfer had occurred. The procedural posture of the adversary proceeding, of course, will dictate whether an intervention or substitution motion (or some combination thereof) should be brought by ECMC.³¹⁹ Regardless, one would expect ECMC to indicate the Federal Rule on which ECMC had based its request for relief.

I examined the dockets of the proceedings in the random sample to ascertain whether ECMC failed to comply with the particularity requirement when it sought to join an adversary proceeding in which the

continue with the original parties to the action. *See* 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1958, at 696 (3d ed. 2007). Because substitution and joinder are the exceptions to this rule and must be sought by motion, it is reasonable to conclude that the movant should bear the burden of proof in this context. For a discussion on the absence of guidance in the Federal Rules regarding the application of Rule 25(c), see *Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 72 (3d Cir. 1993).

315. FED. R. CIV. P. 24(a)(2). In this context, no federal statute confers “an unconditional right to intervene.” FED. R. CIV. P. 24(a)(1).

316. FED. R. CIV. P. 24(b)(1)(B). In this context, no federal statute confers “a conditional right to intervene.” FED. R. CIV. P. 24(b)(1)(A).

317. *See* *Standard Fed. Bank v. United States*, 51 Fed. Cl. 695, 708 (Fed. Cl. 2002).

318. *See supra* notes 276–77 and accompanying text. If, however, ECMC was the original guarantor of the student loan, *see supra* notes 273–75 and accompanying text, one would expect ECMC to allege that fact in its motion (and also, possibly, the transfer of the loan from the creditor to ECMC).

319. For an example of when ECMC has failed to utilize the proper joinder mechanism, see *Educational Credit Management Corp. v. Bernal (In re Bernal)*, 207 F.3d 595, 599 (9th Cir. 2000) (holding that ECMC should have sought to join the litigation via substitution rather than intervention).

debtor did not originally name ECMC as a defendant. I tracked particularity deficiencies according to three metrics.³²⁰ First, if ECMC failed to make *any* factual allegation that it was an assignee of a student loan,³²¹ I considered the motion to have a particularity deficiency.³²² Along the same lines, if ECMC alleged in the alternative that the student loan had been or would be assigned to it in the future,³²³ I considered the motion to have a particularity deficiency.³²⁴ Second, if ECMC failed to support its motion with *any* documentation indicating that a transfer had occurred, I considered the motion to have a particularity deficiency.³²⁵ Finally, if ECMC failed to indicate the

320. Recall that the random sample consists of 100 undue hardship adversary proceedings in which ECMC was a named party and/or made an appearance. *See supra* Subsection III.B.1. ECMC was not originally named as a defendant in 76 of the 100 proceedings. ECMC made a motion to join the litigation in 69 of the 76 proceedings. In the 69 proceedings in which ECMC made a motion, 2 of the proceedings involved an oral motion made during a hearing. Accordingly, I was able to track particularity deficiencies in 67 of the 69 proceedings in which ECMC made a motion to join the litigation.

321. Or, in the alternative, that it was the original guarantor of the student loan (and also, possibly, that it had accepted transfer of the loan from the creditor). *See supra* note 318.

322. I considered a motion as nondeficient if it made *any factual allegation whatsoever* indicating assignment of the student loan to ECMC. In some instances, however, this approach may have been overly generous given the threadbare nature of the allegation. *See, e.g.*, Motion to Add ECMC as a Defendant at 1, *Williams v. Sallie Mae Inc. (In re Williams)*, Ch. 7 Case No. 12-07045, Adv. No. 12-07045 (Bankr. D. Kan. Sept. 5, 2012), ECF No. 8 (setting forth only three sentences of allegations, only one of which alleged assignment by stating that “ECMC has been assigned seven (7) Stafford loans from USAF”).

323. *See, e.g.*, Educational Credit Management Corp.’s Motion to Intervene as Defendant, to Amend the Caption, and for Leave to File an Answer ¶ 3, at 2, *Henry v. Wells Fargo Bank N.A. (In re Henry)*, Ch. 7 Case No. 12-71257, Adv. No. 12-07044 (Bankr. W.D. Va. Sept. 28, 2012), ECF No. 30 (“Certain student loans owed by the Debtor have been or will be assigned by NSLP to ECMC.”).

324. After all, if ECMC’s bankruptcy-servicing role requires it to have taken assignment of a student loan for which a debtor seeks a dischargeability determination, an allegation that fails to represent to the court that such an assignment has occurred must be deficient, notwithstanding that the assignment may occur in the future. *See supra* notes 312, 318 and accompanying text. This is particularly so in the context of a substitution motion, pursuant to which the movant must establish that an interest has been transferred. *See supra* note 317 and accompanying text.

325. I considered a motion as nondeficient if it was supported by *any documentation whatsoever* indicating assignment of the student loan to ECMC. In some instances, however, this approach may have been overly generous given the threadbare nature of the documentation. For example, in one adversary proceeding, ECMC attached to its substitution motion a two-page exhibit that consisted of (1) a two-sentence letter stating, in relevant part, that USA Funds “hereby assigns to the Educational Credit Management Corporation . . . its rights, title, and interest in those student loans listed in the enclosure to this letter” and (2) a skeletal spreadsheet virtually devoid of information. Motion to Substitute Educational Credit Management Corp. for Defendant Sallie Mae, Inc., Exhibit B, *Rogers v. Educ. Credit Mgmt. Corp. (In re Rogers)*, Ch. 7 Case No. 11-40437, Adv. No. 11-04112 (Bankr. E.D. Mich. Mar. 2, 2011), ECF No. 12-2.

Federal Rule on which it had based its request for relief, I considered the motion to have a particularity deficiency.³²⁶

Based on the random sample, debtors did *not* originally name ECMC as a defendant in their complaints in approximately 76.0% [66.7, 83.3] of the undue hardship adversary proceedings from 2011 and 2012 in which ECMC was a named party and/or appeared.³²⁷ Remarkably, for the proceedings in which ECMC was not an originally named defendant, ECMC *failed to make any motion* to be made a party to the litigation in approximately 9.2% [4.3, 18.1] of such proceedings—but nonetheless acted as if the court had made it a party, impermissibly serving and filing substantive motions, responsive pleadings, or both.

Furthermore, for the proceedings in which ECMC made a *written* motion to be made a party to the litigation,³²⁸ the data suggest a high rate of particularity deficiencies—that is, failure to allege assignment of the loan, failure to provide documentation of the loan assignment, or failure to indicate the applicable Federal Rule (or a combination thereof). ECMC’s motion contained at least one of these particularity deficiencies in approximately 80.6% [69.4, 88.4] of those proceedings. More specifically, approximately 35.8% [25.4, 47.8] of the motions failed to allege assignment of the loan; 77.6% [66.2, 86.0] of the motions failed to provide documentation of the loan’s assignment; and 19.4% [11.6, 30.6] failed to indicate the Federal Rule pursuant to which the court should grant the requested relief.

In sum, ECMC’s motion practice demonstrates consistent deficiencies in stating with particularity the grounds for joining adversary proceedings in which the debtor did not originally name ECMC as a defendant. Such procedural noncompliance is significant because it calls into question the legitimacy of a court’s decision to allow a movant, who may not have a valid basis to join the litigation,³²⁹

326. I considered a motion as nondeficient if it made *any mention whatsoever* of a Federal Rule. In some instances, however, this approach may have been overly generous given the threadbare legal grounds articulated by ECMC. For example, in one intervention motion, ECMC neither set forth the substantive standard for when intervention is appropriate, nor did it indicate whether it sought intervention of right or permissive intervention. Instead, the motion set forth a conclusory sentence that cited Rule 24. *See* Motion by Educational Credit Management Corp. to Intervene and Be Added as a Defendant ¶ 5, at 2, Ruiz v. Chase (*In re* Ruiz), Ch. 7 Case No. 12-40600, Adv. No. 12-04031 (Bankr. D. Mass. Apr. 7, 2012), ECF No. 7 (“Thus, ECMC will be the sole holder of the Student Loan and, as such, ECMC submits that its request for intervention and to be added as a party herein is warranted under F.R.Civ.P., Rule 24.”).

327. Many of the estimates set forth in this Subsection are based on this subset of adversary proceedings and will accordingly be noted where relevant.

328. *See supra* note 320.

329. For example, courts have noted in both reported and unreported opinions that ECMC has provided either an inconsistent or improper account of its interest in the student loan(s) at issue. *See* Alfes v. Educ. Credit Mgmt. Corp. (*In re* Alfes), 709 F.3d 631, 633 (6th Cir. 2013); Educ. Credit Mgmt. Corp. v. Corbett (*In re* Corbett), Ch. 7 Case No. CV-08-1672, 2009 WL

to upend the plaintiff-debtor's ability to determine the structure of the adversary proceeding.³³⁰ Concomitantly, if courts have not been vigilant in putting ECMC to its proof when determining ECMC's status as assignee of the student loan,³³¹ it suggests that courts may also have given short shrift (or no attention at all) to the question of whether ECMC's presence would facilitate the litigation in the proceeding—a relevant inquiry when considering both intervention and substitution motions.³³²

c. Responsive-Pleading Practice

The third example of pretrial practice by ECMC demonstrating procedural noncompliance relates to its responsive-pleading practice—specifically, the manner in which ECMC has responded to debtors' complaints seeking a determination of the dischargeability of their student loans. Although both debtors and creditors may initiate such determinations,³³³ debtors initiated every adversary proceeding in the random sample. Accordingly, ECMC's litigant role in such proceedings will almost always, if not exclusively, be that of a defendant.³³⁴

As a defendant, ECMC has an affirmative obligation to answer the debtor's complaint or to serve a defensive motion in response to the complaint.³³⁵ Whether the answer was permissibly and timely served depends on the manner in which ECMC was brought into the proceeding. In the random sample, ECMC was generally brought into

684810, at *4 n.9 (D. Ariz. Mar. 16, 2009). Moreover, even if one assumes that ECMC does comply with the particularity requirements when presenting its intervention or substitution motion, it is not a *fait accompli* that ECMC should be allowed to join the litigation. First and foremost, a guarantor's economic interest in litigation, by itself, may not be a sufficient interest for a court to permit intervention of right for the guarantor. *See Ouch v. Sharpless*, 237 F.R.D. 163, 165–66 (E.D. Tex. 2006). Second, permissive intervention and substitution are discretionary types of relief that a court is not required to grant. *See Educ. Credit Mgmt. Corp. v. Bernal (In re Bernal)*, 207 F.3d 595, 598 (9th Cir. 2000) (explaining that substitution is discretionary); *Ouch*, 237 F.R.D. at 166 (explaining that permissive intervention is discretionary).

330. *See* FREER, *supra* note 224, § 12.6.3, at 734, 736; *cf.* 7C WRIGHT ET AL., *supra* note 314, § 1958, at 696 (“The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred. The action may be continued . . . against the original party, and the judgment will be binding on the successor in interest even though the successor is not named.”).

331. For an example of a court that has been vigilant on this front, see *Srinivasan v. Sallie Mae, Inc. (In re Srinivasan)*, 2010 WL 3633062, at *1, *3 (Bankr. D.N.J. Sept. 7, 2010).

332. *See In re Bernal*, 207 F.3d at 598–99; FREER, *supra* note 224, § 12.6.3, at 736.

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

334. This phenomenon can largely be attributed to the manner in which ECMC purportedly receives assignment of FFELP loans and the timing of such assignments (i.e., subsequent to the debtor's initiation of the adversary proceeding). *See supra* Section III.A.

335. *See* FED. R. BANKR. P. 7012(a)–(b); FED. R. CIV. P. 12(b).

the proceeding pursuant to one of three scenarios: (1) the debtor originally named ECMC as a defendant in the complaint initiating the adversary proceeding; (2) the court substituted ECMC as a defendant, or (3) the court allowed ECMC to intervene as a defendant.³³⁶ The remainder of this Subsection will discuss each of these scenarios with respect to ECMC's responsive-pleading practice.

The first scenario entails those proceedings in which the debtor originally named ECMC as a defendant in the complaint. When a defendant is originally named in the complaint, the defendant must serve a response to the complaint within thirty days after the issuance of the summons,³³⁷ and the defendant must file the response with the court "within a reasonable time after service."³³⁸ If the defendant fails to serve a timely response and does not request an extension of time prior to the expiration of the response deadline, then the defendant must move for permission to serve the untimely response on the basis that the defendant's failure was "excusable neglect."³³⁹ Only if the court grants the motion should it allow the defendant to serve what would otherwise have been an untimely response.³⁴⁰ Finally, while a defendant has the right (without court approval) to amend its answer once within twenty-one days after serving it,³⁴¹ the defendant may amend after the expiration of this time period only with the plaintiff's consent or the court's permission.³⁴²

I examined the dockets of the proceedings in the random sample to ascertain whether ECMC served an improper response to the debtor's complaint when ECMC was an originally named defendant. I define an "improper response" in this scenario as either an answer, amended answer, or Rule 12(b) motion that ECMC untimely served without obtaining the court's approval. To determine whether the response was

336. There were seven proceedings in the random sample in which ECMC sought to be brought into the proceeding on multiple grounds (e.g., substitution and intervention).

337. See FED. R. BANKR. P. 7012(a); FED. R. CIV. P. 12(b); see also FED. R. BANKR. P. 7012(b) ("Rule 12(b)-(i) F.R.Civ.P applies in adversary proceedings.").

338. FED. R. CIV. P. 5(d)(1); see also FED. R. BANKR. P. 7005 (incorporating, without change, Rule 5 in adversary proceedings).

339. FED. R. BANKR. P. 9006(b)(1). The Supreme Court has held that, for purposes of Bankruptcy Rule 9006(b), the determination of whether neglect is excusable "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993). The Court indicated that such circumstances include "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.*

340. See FED. R. BANKR. P. 9006(b)(1).

341. See FED. R. CIV. P. 15(a)(1)(A); see also FED. R. BANKR. P. 7015 (incorporating, without change, Rule 15 in adversary proceedings).

342. FED. R. CIV. P. 15(a)(2).

untimely, I consulted the date of the issuance of the summons as well as the service date of ECMC's response as set forth in the certificate of service filed by ECMC. Based on the random sample, debtors originally named ECMC as a defendant in their complaints in approximately 24.0% [16.6, 33.3] of the undue hardship adversary proceedings from 2011 and 2012 in which ECMC was a named party and/or made an appearance. Based on a subset of these proceedings, ECMC served an improper response in approximately 25.0% [11.2, 46.8] of the undue hardship adversary proceedings from 2011 and 2012 in which ECMC appeared as an originally named defendant.³⁴³

The second and third scenarios entail those proceedings in which ECMC was not an originally named defendant, but the court substituted ECMC as a defendant or allowed ECMC to intervene as a defendant. Each of these procedural devices has distinct features that further inform the analysis of procedural compliance by ECMC in responding to a debtor's complaint.

First, consider those scenarios involving substitution. The Federal Rules provide that, "[i]f an interest is transferred, the action may be continued . . . against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party."³⁴⁴ Until substituted for an originally named defendant, the movant will neither be a party to nor a defendant in the litigation.³⁴⁵ Accordingly, in those instances in which the original defendant has not served a response to the complaint and the movant desires to do so, it is proper for the movant to serve such a response *only after* the court has granted the substitution motion.³⁴⁶ Moreover, once the court substitutes the movant for the originally named defendant, the substituted party will be bound to the response deadline of its predecessor (absent a court

343. ECMC was named as an original defendant in twenty-four of the proceedings in the random sample. In four of those proceedings, however, ECMC did not make an appearance. *See supra* note 306. Accordingly, the reported estimate is based on the twenty proceedings in the random sample in which ECMC was originally named as a defendant *and* made an appearance.

344. FED. R. CIV. P. 25(c); *see also* FED. R. BANKR. P. 7025 (incorporating Rule 25 in adversary proceedings).

345. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011) (stating that "[a] 'party' to litigation is '[o]ne by or against whom a lawsuit is brought,' or one who 'become[s] a party by intervention, substitution, or third-party practice'" (alterations in original) (citation omitted) (quoting *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230, 2234 (2009) and *Karcher v. May*, 484 U.S. 72, 77 (1987))).

346. *See* FED. R. BANKR. P. 7012(a) (providing that a "defendant shall serve an answer"); FED. R. CIV. P. 12(b) (providing that "a party may assert . . . [certain] defenses"); *see also* FED. R. BANKR. P. 7012(b) (providing that Rule 12(b) applies in adversary proceedings); *cf.* 7C WRIGHT ET AL., *supra* note 314, § 1958, at 696 ("The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred. The action may be continued . . . against the original party, and the judgment will be binding on the successor in interest even though the successor is not named.").

order directing otherwise).³⁴⁷ As such, if the response deadline has expired at the time the substituted party enters the case, the substituted party will have to seek the court's permission to serve the untimely response on the basis of excusable neglect.³⁴⁸

Next, consider those scenarios involving intervention. The Federal Rules provide that an intervention motion "must . . . be accompanied by a pleading that sets out the claim or defense for which intervention is sought."³⁴⁹ When seeking to intervene as a defendant, the movant must "offer an answer in intervention, which responds to the plaintiff's anticipated claim against her once intervention is granted."³⁵⁰ Importantly, as with substitution,³⁵¹ the movant will neither be a party to nor a defendant in the litigation until the court grants the intervention motion.³⁵² Thus, it is improper for a would-be intervenor to serve a response to the debtor's complaint prior to, or separate and apart from, an intervention motion.³⁵³

I examined the dockets of the proceedings in the random sample to ascertain whether ECMC served an improper response to the debtor's complaint when ECMC was not an originally named defendant but sought to be substituted or to intervene as a defendant. For those proceedings where ECMC sought to substitute, I define an "improper response" as either an answer or Rule 12(b) motion that: (1) ECMC served *before* the court granted the substitution motion or (2) ECMC untimely served *after* the court granted the substitution motion and without first obtaining the court's approval to serve the out-of-time

347. In describing the "nature of substitution in federal litigation," the Seventh Circuit has noted that the litigation status of the transferee who is substituted pursuant to Rule 25(c) must track the position of its transferor: "Any other approach would make a shambles of litigation; a party could sell its interest or change its internal structure . . . and require the court to start the case from scratch." *Brook, Weiner, Sered, Kreger & Weinberg v. Coreq, Inc.*, 53 F.3d 851, 852 (7th Cir. 1995). Thus, a successor-in-interest who is substituted for an original party "takes the case as he finds it." *Id.*; *see also* *Educ. Credit Mgmt. Corp. v. Bernal (In re Bernal)*, 207 F.3d 595, 598 (9th Cir. 2000) ("Only at a later time were the notes, and any possible rights under them, transferred to ECMC. That was, therefore, the very paradigm of an assignment controlled by Rule 25(c), and ECMC was bound by what had gone on before."); *Minn. Mining & Mfg. Co. v. Eco Chem, Inc.*, 757 F.2d 1256, 1263 (Fed. Cir. 1985) (stating that, under Federal Rule 25(c), "[w]hen the successor in interest voluntarily steps into the shoes of its predecessor, it assumes the obligations of the predecessor's pending litigation").

348. *See supra* notes 337–40 and accompanying text.

349. FED. R. CIV. P. 24(c); *see also* FED. R. BANKR. P. 7024 (incorporating Rule 24 in adversary proceedings).

350. FREER, *supra* note 224, § 12.6.3, at 736.

351. *See supra* note 345 and accompanying text.

352. FREER, *supra* note 224, § 12.6.3, at 736.

353. *See* FED. R. BANKR. P. 7012(a) (providing that "the defendant shall serve an answer"); FED. R. CIV. P. 12(b) (providing that "a party may assert . . . [certain] defenses"); FED. R. CIV. P. 24(c); *see also* FED. R. BANKR. P. 7012(b) (providing that Rule 12(b) applies in adversary proceedings); FED. R. BANKR. P. 7024 (incorporating Rule 24 in adversary proceedings).

response. For those proceedings where ECMC sought to intervene, I define an “improper response” as either (1) an answer or Rule 12(b) motion that ECMC served *before* it served its intervention motion or (2) an intervention motion served *without*, or separate and apart from, ECMC’s answer. To determine whether a response was improper, I consulted the date of the issuance of the summons, the service dates of ECMC’s response and motion to substitute or intervene as set forth in the certificates of service filed by ECMC, and the date of the court’s order granting the substitution or intervention motion.

For those proceedings in which debtors did *not* originally name ECMC as a defendant in their complaints and in which ECMC moved in writing to be made a party to the litigation,³⁵⁴ ECMC served an improper response approximately 89.9% [80.2, 95.2] of the time. The significance of such procedural noncompliance is twofold. First, a prematurely served answer has the potential to create mischief where there should be none. As the litigation progresses, a defendant might argue that the debtor waived or is estopped from taking certain action given the defendant’s service of its answer. For example, a plaintiff may amend her complaint without court approval only once and only within twenty-one days after the defendant has served an answer to the complaint (assuming that the defendant did not serve a Rule 12 motion in response to the complaint).³⁵⁵ One might imagine a defendant arguing that the debtor’s opportunity to amend as of right had expired.³⁵⁶ In the end, premature answers allow defendants to impose the costs of their noncompliant behavior on debtors who must uncover the potential ramifications of such behavior. Furthermore, a tardily served answer allows a defendant to escape its obligation to explain its neglect in failing to serve a timely answer.³⁵⁷ Permitting a defendant to shirk this accountability mechanism creates the perception that the court has

354. See *supra* note 320.

355. See FED. R. CIV. P. 15(a)(1)(B); see also FED. R. BANKR. P. 7015 (incorporating Rule 15 in adversary proceedings).

356. Such an argument would likely take the form of a motion to strike the debtor’s amended complaint. See FED. R. CIV. P. 12(f)(2); FED. R. BANKR. P. 7012(b) (incorporating Federal Rule 12(f) in adversary proceedings). Rule 12(f) confers upon a court the authority to strike a pleading in its entirety. See *Culinary & Serv. Emps. Union, AFL-CIO Local 555 v. Haw. Emp. Benefit Admin., Inc.*, 688 F.2d 1228, 1232 (9th Cir. 1982).

357. Cf. *Educ. Credit Mgmt. Corp. v. Bernal (In re Bernal)*, 207 F.3d 595, 599 (9th Cir. 2000) (“ECMC, it seems, does not wish to confront the default by CSAC or attempt to explain that default. . . . Rather, it has intoned a monody about how difficult it was for ECMC to proceed in a timely fashion. That is all well and good, if unimpressive. Nevertheless, it does not even begin to explain why CSAC, its predecessor, allowed its default to be taken, and *that* is what ECMC would have to do were it allowed to substitute into this action now that it has been assigned CSAC’s rights.” (footnote omitted)).

extended preferential treatment to a procedurally noncompliant litigant.³⁵⁸

d. Discovery Practice

The last example of pretrial practice by ECMC demonstrating procedural noncompliance relates to some of its discovery practice. Keep in mind that the picture presented here will necessarily be an incomplete one because the Federal Rules require that parties must not file certain discovery requests and responses with the court “until they are used in the proceeding or the court orders filing.”³⁵⁹ Because of this, there may be ongoing discovery activity in an adversary proceeding that cannot be discerned from the proceeding’s docket. Nonetheless, 38% of the dockets for the adversary proceedings in the random sample had some evidence of discovery activity—whether in the form of prematurely filed discovery requests and responses;³⁶⁰ discovery requests and responses filed pursuant to local bankruptcy rules; certificates of service of discovery requests and responses; or motions to compel discovery or to impose discovery sanctions.³⁶¹ Upon examining these proceedings, one example of procedurally noncompliant discovery practice by ECMC came to light: *prematurely served* discovery requests.

Importantly, in making a suite of discovery devices available to litigants, the Federal Rules limit the use of such devices to *parties* to the litigation.³⁶² The Supreme Court has stated that the Federal Rules are to be interpreted according to their plain meaning,³⁶³ and it has further observed that “[a] ‘party’ to litigation is ‘[o]ne by or against whom a lawsuit is brought,’ or one who ‘become[s] a party by intervention, substitution, or third-party practice.’”³⁶⁴ On this authority, it is readily

358. *Cf.* *United States v. Locke*, 471 U.S. 84, 101 (1985) (“Filing deadlines . . . necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced.”).

359. FED. R. CIV. P. 5(d)(1); *see also* FED. R. BANKR. P. 7005 (incorporating Rule 5 in adversary proceedings). The specific discovery requests and responses to which Rule 5 refers are “depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.” FED. R. CIV. P. 5(d)(1).

360. *See supra* note 359 and accompanying text.

361. *See* FED. R. CIV. P. 37; *see also* FED. R. BANKR. P. 7037 (incorporating Rule 37 in adversary proceedings).

362. *See, e.g.*, FED. R. CIV. P. 33(a)(1) (providing that “a *party* may serve . . . written interrogatories” (emphasis added)); FED. R. CIV. P. 34(a)(1)(A) (providing that “[a] *party* may serve” a request to produce documents (emphasis added)); FED. R. CIV. P. 36(a)(1) (providing that “[a] *party* may serve” requests for admissions (emphasis added)); *see also* FED. R. BANKR. P. 7033, 7034, 7036 (incorporating Rules 33, 34, and 36 in adversary proceedings).

363. *See Pavelic & LeFlore v. Marvel Entm’t Grp.*, 493 U.S. 120, 123 (1989).

364. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011) (alterations in original) (citation omitted) (quoting *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230, 2234 (2009) and *Karcher v. May*, 484 U.S. 72, 77 (1987)).

apparent that a nonparty may not serve discovery requests until it has joined the litigation.

I examined the dockets of the proceedings in the random sample to ascertain whether ECMC served a *premature* discovery request on the debtor when ECMC was not an originally named defendant, but sought to be substituted or to intervene as a defendant. I define a “premature discovery request” as any discovery request that ECMC served on the debtor *before* the court entered an order joining ECMC as a party to the adversary proceeding. To determine whether a discovery request was premature, I consulted (1) the date of the order that joined ECMC as a party to the litigation and (2) evidence in the record that clearly indicated the service date of any discovery request (e.g., a certificate of service of discovery requests or ECMC’s allegations of the service date of discovery requests in a motion to compel discovery).

For the subset of proceedings in which debtors did *not* originally name ECMC as a defendant in their complaints, ECMC served a premature discovery request on the debtor in approximately 10.5% [5.2, 19.6] of those proceedings. For the reasons stated above, this figure may understate the extent to which ECMC has made premature discovery requests.³⁶⁵

The significance of such procedural noncompliance is that, like prematurely served answers,³⁶⁶ prematurely served discovery requests have the potential to create mischief where there should be none. For example, one might imagine a defendant arguing that, because a debtor had failed to respond to its prematurely served requests for admissions within thirty days of their service, the matters therein should be deemed admitted,³⁶⁷ and thus conclusively established.³⁶⁸ Lest the reader think this scenario is far-fetched, this Article now highlights one adversary proceeding in which a variation of this scenario occurred.

In *Sykes v. Devry, Inc. (In re Sykes)*,³⁶⁹ the bankruptcy court entered an order allowing ECMC to intervene in the proceeding on February 18, 2011.³⁷⁰ Two days before the court entered the order, however, ECMC, as a nonparty to the litigation, prematurely served discovery requests on

365. See *supra* notes 359–61 and accompanying text.

366. See *supra* notes 355–58 and accompanying text.

367. See FED. R. CIV. P. 36(a)(3).

368. See FED. R. CIV. P. 36(b).

369. Docket, *Sykes v. Devry, Inc. (In re Sykes)*, Ch. 7 Case No. 09-17091, Adv. No. 11-01015 (Bankr. W.D. Okla. opened Jan. 24, 2011).

370. Unopposed *Ex Parte* Order Granting Educational Credit Management Corporation Leave to Intervene as Additional Party Defendant at 2, *Sykes*, Ch. 7 Case No. 09-17091, Adv. No. 11-01015 (Bankr. W.D. Okla. Feb. 18, 2011), ECF No. 9.

the debtor with a response date of March 18, 2011.³⁷¹ On March 22 and March 29, 2011, ECMC unsuccessfully attempted to contact debtor's counsel by telephone and by e-mail.³⁷² Five days after its last attempt at contacting debtor's counsel (and only eighteen days after the response deadline to the discovery requests), ECMC served a motion seeking both dismissal of the debtor's complaint with prejudice and partial summary judgment determining the debtor's student loans to be nondischargeable.³⁷³ ECMC's summary judgment motion entirely hinged on the debtor's deemed admissions.³⁷⁴ The admissions included (1) an admission that the student loan was an educational loan within the meaning of the Bankruptcy Code's student-loan-dischargeability provision³⁷⁵ and (2) that the student loan would not impose an undue hardship on the debtor and his dependents.³⁷⁶ The debtor did not respond to ECMC's motion, which the court ultimately granted.³⁷⁷

To be sure, debtor's counsel should have sought to engage with ECMC and should have objected to ECMC's summary judgment motion. But none of that excuses the procedural noncompliance by ECMC that resulted in an adverse ruling against the debtor. To understand the scope of procedural noncompliance by ECMC in *Sykes*, one must consider the following principles: First, premature discovery requests violate the Federal Rules, and courts thus may consider them void and unenforceable in appropriate circumstances.³⁷⁸ Second, the Federal Rules do not permit a party to request an admission of a conclusion of law.³⁷⁹ Finally, when the moving party to a summary judgment motion has failed to carry her initial burden of proof to demonstrate the absence of a genuine issue of material fact, the nonmoving party need not respond to the motion to prevail.³⁸⁰

In *Sykes*, ECMC predicated its summary judgment motion solely on what it alleged were deemed admissions. But the admissions requests were premature such that the court should have disregarded them.

371. See Intervenor's Motion to Dismiss and for Partial Summary Judgment and Brief in Support Thereof ¶ 1, at 2, *Sykes*, Ch. 7 Case No. 09-17091, Adv. No. 11-01015 (Bankr. W.D. Okla. Apr. 5, 2011), ECF No. 17.

372. *Id.* ¶ 3, at 2.

373. See *id.* ¶¶ 6–14, at 2–6.

374. See *id.* ¶¶ 10–11, at 4–5.

375. See *id.* ¶ 10, at 5 (Request No. 10).

376. See *id.* (Request No. 17).

377. See Memorandum of Decision and Order Granting Motion to Dismiss and for Partial Summary Judgment at 2, *Sykes*, Ch. 7 Case No. 09-17091, Adv. No. 11-01015 (Bankr. W.D. Okla. May 10, 2011), ECF No. 22.

378. See *Khalil v. Transunion, LLC*, No. 08-10303, 2008 WL 4642857, at *2–3 (E.D. Mich. Oct. 20, 2008).

379. See, e.g., *Playboy Enters., Inc. v. Welles*, 60 F. Supp. 2d 1050, 1057 (S.D. Cal. 1999); see also FED. R. CIV. P. 36(a)(1) (defining scope of requests for admissions).

380. See *FREER*, *supra* note 224, § 9.4, at 477–78.

Moreover, two of the admissions requests made by ECMC in *Sykes*—that the student loan was an educational loan within the meaning of the Bankruptcy Code and that the student loan would not impose an undue hardship—were requests for admissions of conclusions of law.³⁸¹ At the end of the day, because ECMC’s summary judgment motion was tainted with procedural noncompliance, the bankruptcy court should have determined that ECMC had failed to carry its burden of proof even though the debtor had not presented evidence of a genuine issue of material fact.

It has been argued that, “[b]ecause the costs incidental to discovery production are, morally and economically, properly attributable to the requesting party, allocation of discovery costs to the producing party effectively transforms discovery costs into a litigation subsidy, which requires a party to fund a portion of its opponent’s case.”³⁸² When one couples this view with the possibility that some student-loan debtors must contend with procedurally noncompliant discovery requests such as those documented here, it makes one think twice about Congress’s

381. See, e.g., *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1305 (10th Cir. 2004); *Cazenovia College v. Renshaw (In re Renshaw)*, 222 F.3d 82, 86 (2d Cir. 2000).

382. Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 778 (2011). There have also been instances in which ECMC has not complied with its initial disclosure obligations, thereby potentially shifting production costs to debtors to the extent that they are forced to compel ECMC to comply with such obligations. Recall that a creditor bears the burden of proof in an undue hardship adversary proceeding to establish the amount owed by the debtor, which necessarily entails a detailed accounting of the rights to payment arising from the student-loan obligation as determined by non-bankruptcy law. See *supra* notes 75–77 and accompanying text. Rule 26 requires that “a party must, without awaiting a discovery request, provide to the other parties . . . a computation of each category of damages claimed by the disclosing party.” FED. R. CIV. P. 26(a)(1)(A)(iii). This obligation “requires more than providing—without any explanation—undifferentiated financial statements; it requires a ‘computation,’ supported by documents.” *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 295 (2d Cir. 2006). Importantly, the computational disclosure requirement applies in adversary proceedings to determine the dischargeability of a debt. See *Hartford Fire Ins. Co. v. Sambrano (In re Sambrano)*, 440 B.R. 702, 704–05, 709 (Bankr. W.D. Tex. 2010). Furthermore, a claim arising from a default on a promissory note that evidences a student-loan obligation constitutes a claim for monetary damages. See *United States v. Ragan*, No. CV 10-7654 RSWL, 2011 WL 2940354, at *3 (C.D. Cal. July 21, 2011). Accordingly, absent a court order or stipulation to the contrary, student-loan creditors should initially disclose computational evidence of the amounts owed by the debtor in undue hardship adversary proceedings. But there have been instances in which ECMC either has asserted that it has no damages to claim or has set forth the amount of damages without providing a computational explanation. See, e.g., Defendant Educational Credit Management Corp.’s Initial Rule 26(a)(1) and (a)(2) Disclosures at 4, *Gesualdi v. Educ. Credit Mgmt. Corp. (In re Gesualdi)*, Ch. 7 Case No. 07-12637, Adv. No. 12-01816 (Bankr. S.D. Fla. Feb. 4, 2013), ECF No. 50 (failing to claim damages); ECMC’s FRCP (26)(a)(1) and Expert Disclosures ¶ 3, at 2, *Tippens v. Educ. Credit Mgmt. Corp. (In re Tippens)*, Ch. 7 Case No. 11-10768, Adv. No. 11-01354 (Bankr. W.D. Wash. Aug. 1, 2011), ECF No. 12 (listing loan balance, but failing to provide computational explanation).

decision to require debtors to litigate their eligibility for forgiveness of debt within the extant procedural framework for adversary proceedings.

C. *A Case Study of Pollutive Litigation: ECMC's Frivolous Claim Preclusion Argument*

Having set forth various examples of ECMC's procedural noncompliance, this Article now turns to a prime example of ECMC's pollutive litigation—the frivolous argument that the doctrine of claim preclusion prevents a Chapter 7 debtor from initiating an undue hardship adversary proceeding after having been granted a discharge in his underlying bankruptcy case.

ECMC's claim preclusion argument recklessly seeks to deprive student-loan debtors of their legitimate day in court. Its provenance and evolution appears to be as follows: ECMC marshaled the argument in December 2009 in a student-loan adversary proceeding before the U.S. Bankruptcy Court for the Northern District of California in *Ehmke v. Sallie Mae, Inc. (In re Ehmke)*.³⁸³ The following year, in 2010, ECMC raised the argument, for the first time on appeal, before the U.S. Bankruptcy Appellate Panel of the Eighth Circuit (the Eighth Circuit BAP) in *Walker v. Sallie Mae Servicing Corp. (In re Walker)*.³⁸⁴ In January 2011, ECMC raised the argument again in *Watkins v. Educational Credit Management Corp. (In re Watkins)*,³⁸⁵ a student-loan adversary proceeding before the U.S. Bankruptcy Court for the Western District of Missouri. Finally, in September 2011, ECMC raised the argument in *Thurman v. United Student Aid Funds, Inc. (In re Thurman)*,³⁸⁶ a student-loan adversary proceeding before the U.S. Bankruptcy Court for the Western District of Washington.

Each time that ECMC has raised the argument, it has had the same basic thrust: The doctrine of claim preclusion prevents a Chapter 7 debtor from initiating an undue hardship adversary proceeding after the

383. See Memorandum of Points and Authorities in Support of Motion of Educational Credit Management Corp. to Intervene, to Dismiss and for a More Definite Statement-Federal Rules of Civil Procedure 24, 12(b)(1), 12(b)(6), and 12(e) at 6–7, *Ehmke v. Sallie Mae, Inc. (In re Ehmke)*, Ch. 7 Case No. 98-71834, Adv. No. 09-4364 (Bankr. N.D. Cal. Dec. 10, 2009), ECF No.12-1 [hereinafter Memorandum, *In re Ehmke*].

384. 427 B.R. 471, 476–77 (B.A.P. 8th Cir. 2010), *aff'd on other grounds*, 650 F.3d 1227 (8th Cir. 2011).

385. Educational Credit Management Corp.'s Motion to Dismiss at 1–3, *Watkins v. Educ. Credit Mgmt. Corp. (In re Watkins)*, Ch. 7 Case No. 90-41473, Adv. No. 10-4319 (Bankr. W.D. Mo. Jan. 19, 2011), ECF No. 17 [hereinafter ECMC's Motion to Dismiss, *In re Watkins*].

386. Notice and Motion to Set Aside Default Judgment Against United Student Aid Funds at 11, *Thurman v. United Student Aid Funds, Inc. (In re Thurman)*, Ch. 7 Case No. 97-10126, Adv. No. 11-01352 (Bankr. W.D. Wash. Sept. 8, 2011), ECF No. 51 [hereinafter Notice and Motion to Set Aside Default Judgment, *In re Thurman*].

court has granted a discharge in her underlying bankruptcy case.³⁸⁷ Given that the argument solely involves a question of law,³⁸⁸ whether that argument is frivolous will turn on whether it is “based on a conception of the law that is both unsupported and unsupportable under any existing principle.”³⁸⁹ An indicator of an unsupported-and-unsupportable conception might be if the proponent of the argument states it in a conclusory fashion without distinctly pleading the various legal elements of the argument. In this particular context, ECMC has never articulated the distinct elements for establishing a claim preclusion defense³⁹⁰ when asserting it against student-loan debtors. Instead, ECMC has talismanically incanted that a discharge order is a final judgment that has res judicata effect.³⁹¹ On the other hand, when ECMC has been on the receiving end of a preclusion argument, it has been very explicit in calling the court’s attention to the debtor’s burden to plead the elements.³⁹²

ECMC’s success with its claim preclusion argument has been paltry at best. In *In re Ehmke*, although the bankruptcy court entered an order dismissing the debtor’s complaint,³⁹³ the court did not state anything in its order that could be construed to support the claim preclusion argument (a fact pointed out by the Eighth Circuit BAP in *In re Walker*).³⁹⁴ The Eighth Circuit BAP flatly rejected the argument in *In re Walker*.³⁹⁵ In *In re Watkins*, although the bankruptcy court entered an

387. See *In re Walker*, 427 B.R. at 477; Memorandum, *In re Ehmke*, *supra* note 383, at 6; ECMC’s Motion to Dismiss, *In re Watkins*, *supra* note 385, at 7; Notice and Motion to Set Aside Default Judgment, *In re Thurman*, *supra* note 386, at 11.

388. *E.g.*, *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 466 (5th Cir. 2013).

389. Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1198 (2014).

390. See *infra* note 421 and accompanying text (setting forth elements for claim preclusion).

391. See *In re Walker*, 427 B.R. at 477, 479; Memorandum, *In re Ehmke*, *supra* note 383, at 6–7; ECMC’s Motion to Dismiss, *In re Watkins*, *supra* note 385, at 2–3; Notice and Motion to Set Aside Default Judgment, *In re Thurman*, *supra* note 386, at 11.

392. See Memorandum of Law in Support of ECMC’s Cross-Motion for Summary Judgment at 10, *Hann v. Educ. Credit Mgmt. Corp.* (*In re Hann*), Ch. 13 Case No. 04-13901, Adv. No. 11-01046 (Bankr. D.N.H. Oct. 7, 2011), ECF No. 30 (“The Debtor cites to the proper legal standard [for collateral estoppel] but does not engage in any substantive discussion as to how those elements apply to these facts, or provide any legal authority where collateral estoppel applied under similar facts. ECMC should therefore prevail . . .”).

393. Order at 2, *Ehmke v. Sallie Mae, Inc.* (*In re Ehmke*), Ch. 7 Case No. 98-71834, Adv. No. 09-4364 (Bankr. N.D. Cal. Jan. 28, 2010), ECF No. 25

394. See *In re Walker*, 427 B.R. at 479 n.19.

395. See *id.* at 480. It is worth noting that, after losing before the Eighth Circuit BAP, ECMC subsequently appealed to the U.S. Court of Appeals for the Eighth Circuit, raising three issues on appeal—none of which involved the claim preclusion argument. See *Walker v. Sallie Mae Servicing Corp.* (*In re Walker*), 650 F.3d 1227, 1231 (8th Cir. 2011).

order dismissing the debtor's complaint,³⁹⁶ the district court reversed the bankruptcy court, partly relying on the reasoning set forth by the Eighth Circuit BAP in *In re Walker*.³⁹⁷ Finally, the bankruptcy court in *In re Thurman* rejected the argument.³⁹⁸ When ECMC sought leave for interlocutory appeal of the bankruptcy court's decision, the district court denied ECMC's motion, stating that no substantial ground for a difference of opinion existed on the issue of whether the debtor's complaint initiating the adversary proceeding was barred by the doctrine of res judicata.³⁹⁹

It is remarkable that, despite its repeated failures in asserting the claim preclusion argument in *In re Walker* and *In re Watkins*, ECMC continued to push the argument in *In re Thurman*. One might hypothesize that ECMC did so because it is a repeat player that seeks favorable precedent that will give it further ammunition to deny student-loan debtors their day in court. The injury, of course, was that the debtor in *In re Thurman* had to expend a great deal of effort to dispel a frivolous legal argument. The insults added to this injury were: (1) that ECMC had previously argued before the U.S. Bankruptcy Appellate Panel for the Ninth Circuit (the Ninth Circuit BAP) that the discharge order in a reopened Chapter 7 case did *not* have a claim preclusive effect on the issue of whether the debtor's student loan had been discharged by the order; and (2) that ECMC *prevailed* on this argument.⁴⁰⁰ If ever there was a scenario for application of judicial estoppel—which “prevents a party that has taken one position in litigating a particular set of facts from later reversing its position when

396. Order Granting Motion to Dismiss at 2, *Watkins v. Educ. Credit Mgmt. Corp.* (*In re Watkins*), Ch. 7 Case No. 90-41473, Adv. No. 10-4319 (Bankr. W.D. Mo. Feb. 10, 2011), ECF No. 20.

397. See *Queen v. Educ. Credit Mgmt. Corp.* (*In re Watkins*), 461 B.R. 57, 61 (W.D. Mo. 2011).

398. Order Granting Plaintiff's Motion for Partial Summary Judgment at 2, *Thurman v. United Student Aid Funds, Inc.* (*In re Thurman*), Ch. 7 Case No. 97-10126, Adv. No. 11-01352 (Bankr. W.D. Wash. Dec. 12, 2011), ECF No. 81.

399. *Thurman v. United Student Aid Funds, Inc.*, No. C12-80MJP, 2012 WL 993412, at *3 (W.D. Wash. Mar. 21, 2012). Importantly, in articulating the standard for determining whether a substantial ground for difference of opinion exists, the Ninth Circuit has observed that, “when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent.” *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). If, however, fair-minded jurists would not reach contradictory conclusions, the attempt to appeal represents an “insistence on litigating a question in the face of controlling precedents which remove[] every colorable basis in law for the litigant's position,” *Reid v. United States*, 715 F.2d 1148, 1154 (7th Cir. 1983), and is thus pollutive, see *supra* note 13 and accompanying text.

400. See *Drysdale v. Educ. Credit Mgmt. Corp.* (*In re Drysdale*), 248 B.R. 386, 390 (B.A.P. 9th Cir. 2000), *aff'd*, 2 F. App'x 776 (9th Cir. 2001).

it is to its advantage to do so”⁴⁰¹ and which “is intended to protect courts from being manipulated by chameleonic litigants who prevail, twice on opposite theories”⁴⁰²—*In re Thurman* was a prime candidate.⁴⁰³

If the past is prologue, then one might expect ECMC to continue asserting its frivolous argument elsewhere throughout the country.⁴⁰⁴ This Article now demonstrates why ECMC’s claim preclusion argument is a prime example of pollutive litigation (with the added hope that exposing this frivolity will quell further attempts by ECMC to assert the argument).

* * *

As set forth below, when one considers Supreme Court precedent and the black-letter principles set forth in the *Restatement (Second) of Judgments* (the *Restatement*), on which the Supreme Court and the U.S. Courts of Appeals have frequently relied, it is clear that the doctrine of claim preclusion does not prevent a Chapter 7 debtor from initiating an undue hardship adversary proceeding after the court has granted a discharge in his underlying bankruptcy case. The argument proceeds as follows: First, if one properly distinguishes between claim preclusion and issue preclusion and also takes into account that a discharge order is the product of an in rem proceeding, one must conclude that the discharge order has limited preclusive effect that does not prevent the post-discharge initiation of a student-loan adversary proceeding. Second, even if one concludes, contrary to Supreme Court precedent, that a discharge order is the product of an in personam proceeding, a

401. *Levinson v. United States*, 969 F.2d 260, 264 (7th Cir. 1992).

402. *Id.*

403. Perhaps the greatest tragedy stemming from *In re Drysdale* is that the bankruptcy judge who ruled in favor of ECMC at the trial level, *see Drysdale*, 248 B.R. at 386, and the attorney who represented ECMC, *see id.* at 387, were the same bankruptcy judge and ECMC attorney in *In re Ehmke*, *see Memorandum, In re Ehmke, supra* note 383, at 1. Recall that, in *In re Ehmke*, ECMC argued that the discharge order *did* have claim preclusive effect, *see id.* at 6–7, which was contrary to its prior position in *In re Drysdale*, *see supra* note 400 and accompanying text. And further recall that the bankruptcy court ruled in ECMC’s favor in *In re Ehmke*. *See supra* note 393 and accompanying text. Given this set of circumstances, *In re Ehmke* involved an even more compelling scenario for the application of judicial estoppel than did *In re Thurman*. Unfortunately, the self-represented debtor in *In re Ehmke* very likely was not in a position to make that argument—because she probably did not know about either the Ninth Circuit BAP’s opinion in *In re Drysdale* or the doctrine of judicial estoppel.

404. *See, e.g.*, Educational Credit Management Corp.’s Motion to Dismiss at 6 n.2, *Osborne v. U.S. Dep’t of Educ.*, Ch. 7 Case No. 97-52947, Adv. No. 12-05011 (Bankr. E.D. Ky. Apr. 20, 2012), ECF No. 10 (“Indeed, although the Court does not need to reach the issue for purposes of resolving this motion, *res judicata* bars this action as it seeks to relitigate issues that could or should have been litigated in the original proceeding. Because Plaintiff failed to litigate the dischargeability of his student loans before receiving a discharge order holding those loans non-dischargeable, *res judicata* bars him from seeking to relitigate that issue here.” (citations omitted)).

Chapter 7 case and a student-loan adversary proceeding do not involve the same claim, so the discharge order will not have claim preclusive effect. Finally, even if one concludes that the discharge order is the product of an in personam proceeding and that a Chapter 7 case and a student-loan adversary proceeding *do* involve the same claim, the statutory-scheme exception to claim preclusion applies in this context, meaning that the discharge order will still lack claim preclusive effect. At bottom, regardless of the path taken, ECMC's claim preclusion argument is a nonstarter.

1. The Distinction Between Claim Preclusion and Issue Preclusion

The Supreme Court has stated that the doctrine of *res judicata* encompasses “two discrete effects”—claim preclusion and issue preclusion—and has relied on the *Restatement* in support of that proposition.⁴⁰⁵ On one hand, “[c]laim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.”⁴⁰⁶ On the other hand, “[i]ssue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim.”⁴⁰⁷

Importantly, there are two critical distinctions between claim preclusion and issue preclusion. First, claim preclusion prevents litigation of issues that have *never* been litigated whereas issue preclusion does not.⁴⁰⁸ Second, a “valid and final *personal* judgment” triggers claim preclusion,⁴⁰⁹ whereas a “valid and final judgment” triggers issue preclusion.⁴¹⁰ In other words, a final judgment rendered in an in personam proceeding will have claim preclusive effect between parties, whereas a final judgment rendered in an in rem proceeding will not.⁴¹¹

405. Thomas *ex rel. Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 n.5 (1998) (citing RESTATEMENT (SECOND) OF JUDGMENTS §§ 17–19, 27 (1982)).

406. *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 17).

407. *Id.* at 748–49 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27).

408. Compare RESTATEMENT (SECOND) OF JUDGMENTS §§ 17(1), 18(1), 24(1), with *id.* § 27.

409. *Id.* § 17 (emphasis added).

410. *Id.* § 27.

411. *See id.* § 30(3).

2. The Narrow Preclusive Effect of a Chapter 7 Discharge Order

The *Restatement* provides that:

[a] valid and final judgment in an action based only on jurisdiction to determine interests in a thing . . . [i]s conclusive as to those interests with regard to all persons, if the judgment purports to have that effect (traditionally described as “in rem”) . . . and . . . [i]s conclusive between parties, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.⁴¹²

A bankruptcy court’s entry of a discharge order constitutes the court’s exercise of its in rem jurisdiction to issue a judgment declaring the debtor’s status as a discharged debtor,⁴¹³ and such an order is a final judgment.⁴¹⁴

Because an in rem discharge order declares the debtor’s status as a discharged debtor, it is conclusive on this point with regard to all persons.⁴¹⁵ A Chapter 7 discharge order, however, does not specify which debts the court has discharged.⁴¹⁶ When a debtor initiates, post-discharge and for the first time, an adversary proceeding to determine the dischargeability of a student loan, the issue of undue hardship presented by the debtor in her complaint is one that will never have been actually litigated and determined by a valid final judgment—the trigger for issue preclusion. Indeed, the issue of undue hardship is irrelevant for purposes of whether a Chapter 7 debtor will be granted a discharge.⁴¹⁷ Accordingly, because a Chapter 7 discharge order is not conclusive as between the debtor and the student-loan creditor with respect to the undue hardship issue, the order will not bar the debtor from litigating it in a post-discharge adversary proceeding.⁴¹⁸

412. *Id.* § 30(1), (3).

413. *See* *Local Loan Co. v. Hunt*, 292 U.S. 234, 241 (1934); *Hanover Nat’l Bank v. Moyses*, 186 U.S. 181, 191–92 (1902); James Wm. Moore, *Res Judicata and Collateral Estoppel in Bankruptcy*, 68 *YALE L.J.* 1, 23 (1958); *cf.* *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004) (“The discharge of a debt by a bankruptcy court is . . . an *in rem* proceeding.”).

414. *Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193, 1199 (9th Cir. 2008), *aff’d*, 130 S. Ct. 1367 (2010).

415. Moore, *supra* note 413, at 23–24.

416. *See* Official Form 18 (“Discharge of Debtor”), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_018_1207.pdf (last visited Oct. 20, 2014).

417. *See* 11 U.S.C. § 727(a)(1)–(12) (2012) (setting forth the grounds for the denial of a Chapter 7 discharge); *infra* notes 430–32 and accompanying text.

418. *See* Moore, *supra* note 413, at 23 & n.116, 24 & n.120.

3. Counterfactual: A Chapter 7 Discharge Order Is the Product of an In Personam Proceeding

Assuming for the sake of argument that a discharge order is a valid and final *personal* judgment (i.e., the product of an in personam proceeding), the possibility arises that the order could have claim-preclusive effect between the parties—specifically, precluding litigation of a matter that has never been litigated before.⁴¹⁹ But even on this assumption, the discharge order would not have claim preclusive effect on an undue hardship adversary proceeding for one of two reasons: a debtor’s Chapter 7 case and his undue hardship adversary proceeding do not involve the same claim; or, in the alternative, even if they do, a key exception to claim preclusion applies given the relevant facts in this context.

a. A Chapter 7 Case and an Undue Hardship Adversary Proceeding Do Not Involve the Same Claim

One of the essential elements of claim preclusion is that “the same claim or cause of action was involved in both suits.”⁴²⁰ To determine whether the same claim or cause of action was involved in both suits, a court must consider four criteria:

- (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;
- (2) whether substantially the same evidence is presented in the two actions;
- (3) whether the two suits involve infringement of the same right; and
- (4) whether the two suits arise out of the same transaction or nucleus of facts.⁴²¹

Of the four factors, the last is the most important.⁴²² In answering whether two suits arise out of the same transaction of facts, the *Restatement* provides that the answer is “to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.”⁴²³

419. See, e.g., *Rein v. Providian Fin. Corp.*, 270 F.3d 895, 898–99 (9th Cir. 2001); RESTATEMENT (SECOND) OF JUDGMENTS §§ 17(1), 18(1), 24(1) (1982).

420. *Rein*, 270 F.3d at 899.

421. *Id.* at 903.

422. *Id.* at 904 (citing *C.D. Anderson & Co. v. Lemos*, 832 F.2d 1097, 1100 (9th Cir. 1995)).

423. RESTATEMENT (SECOND) OF JUDGMENTS § 24(2).

The first factor—that the rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action—is not implicated in this context. A debtor’s undue hardship complaint is an action for a declaratory judgment by the bankruptcy court that her student loan is of the type that imposes an undue hardship and thus falls within the scope of her Chapter 7 discharge.⁴²⁴ In other words, the debtor’s complaint seeks a declaration of the rights conferred by the discharge order⁴²⁵—the prior judgment—and would not destroy or impair any previously established right.⁴²⁶

Nothing about the “self-executing” nature of the Bankruptcy Code’s undue hardship provision changes this analysis. As the Supreme Court has observed:

[Section] 523(a)(8) requires a court to make a certain finding before *confirming the discharge of a student loan debt*. It is true, as we explained in *Hood*, that this requirement is “self-executing.” But that means only that the bankruptcy court must make an undue hardship finding even if the creditor does not request one[.]⁴²⁷

The Court’s use of the phrase “confirming the discharge of a student loan debt” comports with the view that an undue hardship adversary proceeding merely entails declaratory relief for a pre-existing right—that the scope of the original discharge order included the student loan at issue in the adversary proceeding.⁴²⁸ In light of the declaratory nature of the relief sought by a debtor in a dischargeability determination,⁴²⁹ the adversary proceeding does not destroy or impair the rights or interests established in the original discharge order.

The second factor—that substantially the same evidence is presented in the two actions—is not implicated in this context. A court must grant an individual debtor a Chapter 7 discharge unless one of the grounds for denying a discharge exists.⁴³⁰ If such a ground exists, a party must generally commence an adversary proceeding by filing a complaint

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

425. See *In re Anderson*, 72 B.R. at 497.

426. See *Walker v. Sallie Mae Servicing Corp. (In re Walker)*, 427 B.R. 471, 479 (B.A.P. 8th Cir. 2010).

427. *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1379 (2010) (emphasis added) (footnote omitted) (quoting *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004)).

428. See *In re Anderson*, 72 B.R. at 496; David Gray Carlson, *The Federal Rules of Bankruptcy Procedure in Reorganization Cases: Do They Have a Constitutional Dimension?*, 84 AM. BANKR. L.J. 251, 277 (2010).

429. See *In re Anderson*, 72 B.R. at 497.

430. See 11 U.S.C. § 727(a) (2012).

against the debtor.⁴³¹ In the absence of an objection, the only evidence a debtor may need to submit as a condition to obtaining a discharge is “a statement of completion of a course concerning personal financial management” and certain tax documents.⁴³² Because a debtor must present a great deal more evidence in substantiating a claim of undue hardship, it would strain credulity to say that the underlying bankruptcy case and the adversary proceeding have substantial evidentiary overlap.

The third factor—whether the two suits involve infringement of the same right—is not implicated in this context. As set forth above, the grant of a Chapter 7 discharge depends on an individual debtor’s statutory *eligibility* for such a discharge. Through an undue hardship adversary proceeding, a debtor seeks a declaratory order regarding the *scope* of his Chapter 7 discharge, specifically, whether or not his student loan was already discharged. Accordingly, distinct rights are involved in the underlying bankruptcy case and the adversary proceeding.⁴³³

Finally, the fourth factor—that the two suits arise out of the same transaction or nucleus of facts—is also not implicated in this context. A bankruptcy case is a collective proceeding that “serves as the *administrative mechanism* by which the debtor receives a discharge.”⁴³⁴ The court must grant an individual debtor a Chapter 7 discharge unless she falls within a particular class of individual, usually defined by reference to a limited set of circumstances that relate to debtor fraud or misconduct in connection with the bankruptcy case.⁴³⁵ An undue hardship adversary proceeding, however, involves a much narrower subset of all parties to the bankruptcy case and is often a two-party dispute involving only the debtor and the student-loan creditor. In such a proceeding, the debtor must establish either (1) in jurisdictions following the *Brunner* test, that he has a current and future inability to repay the student loan and that he has made a good faith effort to do so;⁴³⁶ or (2) in jurisdictions following the totality test, “that (1) his past, present, and reasonably reliable future financial resources; (2) his and his dependents’ reasonably necessary living expenses; and (3) other relevant facts or circumstances unique to the case, prevent him from paying the student loans in question while still maintaining a minimal

431. See FED. R. BANKR. P. 4004(a), 7001(4), 7003.

432. FED. R. BANKR. P. 4004(c)(1)(H), (L). These requirements were promulgated in 2008. See FED. R. BANKR. P. 4004 advisory committee notes.

433. See Moore, *supra* note 413, at 23 & n.116.

434. Menk v. Lapaglia (*In re Menk*), 241 B.R. 896, 908, 910 (B.A.P. 9th Cir. 1999) (emphasis added).

435. See 11 U.S.C. § 727(a).

436. See, e.g., United Student Aid Funds, Inc. v. Pena (*In re Pena*), 155 F.3d 1108, 1111–12 (9th Cir. 1998).

standard of living.”⁴³⁷ Given these contrasts, a Chapter 7 case and an undue hardship adversary proceeding simply do not arise from facts that are substantially related in time, space, origin, or motivation. Nor do a Chapter 7 case and an adversary proceeding form a convenient trial unit.⁴³⁸

Because the four essential factors for claim preclusion are either absent or marginally present in this context, an assumption that a Chapter 7 discharge order results from an in personam proceeding would not lead to the conclusion that the discharge order has claim preclusive effect between the parties to the adversary proceeding.

b. The Statutory-Scheme Exception to Claim Preclusion

Assuming for the sake of argument that a Chapter 7 case and an undue hardship adversary proceeding involve part or all of the same claim, a critical exception to claim preclusion applies in this context that courts should not overlook.⁴³⁹ The *Restatement’s* provision on exceptions to claim preclusion, upon which the Supreme Court and the U.S. Courts of Appeals have relied,⁴⁴⁰ states that if one of six circumstances exists, a valid and final judgment from the first action will not extinguish the original claim, “and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant.”⁴⁴¹

This particular context triggers the statutory-scheme exception, which applies when “it is the sense of the [statutory] scheme that the plaintiff should be permitted to split his claim.”⁴⁴² Specifically, it is the

437. *Lorenz v. Am. Educ. Servs./Pa. Higher Educ. Assistance Agency (In re Lorenz)*, 337 B.R. 423, 430 (B.A.P. 1st Cir. 2006).

438. *See In re Menk*, 241 B.R. at 907–08; *cf.* Christopher Klein et al., *Principles of Preclusion and Estoppel in Bankruptcy Cases*, 79 AM. BANKR. L.J. 839, 888 (2005) (“[A] confirmation hearing is a collective proceeding that necessarily involves all parties to the bankruptcy case and is not an occasion for efficiently resolving two-party disputes that may require trial.”).

439. *See Klein et al., supra* note 438, at 874 (“Another puzzle in preclusion cases is a tendency to bypass the recognized exceptions to imposition of preclusion. If the stated exceptions are ignored, preclusion may wind up being imposed in situations that should not lead to the litigant being deprived of a legitimate day in court.”).

440. *See, e.g., Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982)); *Klipsch, Inc. v. WWR Tech., Inc.*, 127 F.3d 729, 734 (8th Cir. 1997) (“The District Court erred in its decision not to follow Restatement (Second) of Judgments section 26(1)(a).”); *Dodd v. Hood River Cnty.*, 59 F.3d 852, 862 (9th Cir. 1995) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(a)–(b)).

441. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1).

442. *Id.* § 26(1)(d); *cf. Maxwell v. Mich. Fidelity Acceptance Corp. (In re Maestas)*, 354 B.R. 844, 846–47 (Bankr. E.D. Wis. 2006) (relying on RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(d) to conclude that, “in view of the separate and distinct statutes of limitations for

“sense of the statutory scheme” that a Chapter 7 debtor may bring an adversary proceeding to determine the dischargeability of a debt subsequent to the grant of discharge. The Bankruptcy Rules provide that “[a] debtor . . . may file a complaint to obtain a determination of the dischargeability of *any debt*”⁴⁴³ and that the complaint “may be filed at *any time*.”⁴⁴⁴ Moreover, the Bankruptcy Rules clearly contemplate the initiation of such an adversary proceeding *subsequent* to the entry of a discharge order by providing that “[a] case may be reopened . . . for the purpose of filing a complaint to obtain a determination under this rule.”⁴⁴⁵ Thus, the Bankruptcy Rules should prompt application of the statutory-scheme exception,⁴⁴⁶ with the result that a Chapter 7 discharge order does not have claim preclusive effect on an undue hardship adversary proceeding.

D. *The Harm Caused by ECMC’s Litigation Conduct*

One might be inclined to readily dismiss the foregoing examples because they are isolated incidents and do not impose much, if any, harm on the debtor. This Article flatly rejects this argument. This Article has made the theoretical case, bolstered by empirical evidence, that the access-to-justice barriers faced by debtors in undue hardship litigation are significant and daunting.⁴⁴⁷ Such barriers alone impede a debtor’s ability to attain the benefits of bankruptcy’s fresh start. ECMC’s conduct further exacerbates those barriers.

It is entirely conceivable that ECMC’s procedural noncompliance and pollutive litigation decrease a debtor’s odds of prevailing in those proceedings where such litigation conduct occurs. But even if ECMC’s conduct does not impose much harm in certain individual cases, aggregating the conduct will reveal something akin to a public-health epidemic, one that undermines the integrity of the bankruptcy system. Put another way, when focusing narrowly on certain individual cases, the harm may not seem substantial, but when viewing the group of cases broadly, it matters very much. The pattern that emerges calls into question the system’s commitment to ensuring that debtors who suffer undue hardship obtain relief from their educational debt.

[Bankruptcy Code] §§ 547 and 550, respectively, and consistent with the sense of the statutory scheme, that this second adversary is an exception to *res judicata*”).

443. FED. R. BANKR. P. 4007(a) (emphasis added).

444. FED. R. BANKR. P. 4007(b) (emphasis added).

445. *Id.*; see also *Menk v. Lapaglia (In re Menk)*, 241 B.R. 896, 908, 911 (B.A.P. 9th Cir. 1999) (“The Bankruptcy Code contemplates that various activities may occur *after* closing [of the case]. . . . The discharge *status* of various debts may, as in the instant appeal, need to be determined.” (emphasis added)).

446. See Klein et al., *supra* note 438, at 875 n.122.

447. See *supra* Part I; *supra* Section II.A.

CONCLUSION

In order to restrain procedural noncompliance and pollutive litigation in undue hardship adversary proceedings, change will have to come from the trial courts in the bankruptcy system. Such change is unlikely to come from Congress, bankruptcy professionals, or appellate courts in the bankruptcy system for several reasons.

First and foremost, Congress has not demonstrated any inclination to take serious action in reforming student-loan relief through the bankruptcy system. Since the Bankruptcy Code's enactment in 1978,⁴⁴⁸ Congress has repeatedly amended the Code's student-loan-dischargeability provision to make it *more restrictive*—less forgiving toward debtors—in one of two ways: (1) broadening the types of debts that qualify as student loans that are conditionally dischargeable or (2) narrowing the conditions under which such debts may be discharged.⁴⁴⁹ Granted, since Congress amended the Bankruptcy Code in 2005 to make private student loans conditionally dischargeable (upon a showing of undue hardship) rather than automatically dischargeable,⁴⁵⁰ some of its members have introduced various bills to restore the pre-2005 automatically dischargeable status of private student loans.⁴⁵¹ Nonetheless, Congress has failed to enact any of those bills. Moreover, the focus on the dischargeable status of private student loans is quite narrow and does nothing to address issues relating to (1) the clarification of the undue hardship standard or (2) the access-to-justice barriers discussed in Part I. Even if Congress restored the pre-2005 automatically dischargeable status of private student loans, given that such loans constitute only a small percentage of total student-loan debt,⁴⁵² this would leave a huge swath of debtors litigating their undue

448. See *supra* note 4.

449. See Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*, *supra* note 41, at 427 & n.116. For a comprehensive discussion about the legislative history of the Bankruptcy Code's student-loan-dischargeability provision, see *id.* at 419–28.

450. In using the phrase “private student loan,” this Article specifically refers to an “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.” 11 U.S.C. § 523(a)(8)(B) (2012). Congress amended the Bankruptcy Code in 2005 to include such loans among the types of educational debt that can discharged only upon a showing of undue hardship. 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)). Prior to 2005, such debts were automatically dischargeable in bankruptcy. See 11 U.S.C. § 523(a)(8) (2000) (amended 2005).

451. See, e.g., Private Student Loan Bankruptcy Fairness Act of 2013, H.R. 532, 113th Cong. (2013); Fairness for Struggling Students Act of 2013, S. 114, 113th Cong. (2013); Private Student Loan Bankruptcy Fairness Act of 2011, H.R. 2028, 112th Cong. (2011); Private Student Loan Bankruptcy Fairness Act of 2010, H.R. 5043, 111th Cong. (2010); S. 1561, 110th Cong. (2007).

452. See, e.g., DEP'T OF EDUC., STUDENT LOANS OVERVIEW: FISCAL YEAR 2014 BUDGET PROPOSAL, at S-19 (2013), available at <http://www2.ed.gov/about/overview/budget/budget14/>

hardship claims for relief under a vague and indeterminate standard. These debtors would still face the extant procedural hurdles that plague the system today. At best, Congress might engage in modest reform efforts. At worst, Congress will do nothing.⁴⁵³

Second, although bankruptcy professionals may be situated to reform the system in some circumstances,⁴⁵⁴ I am not sanguine about their ability to do so within the context of undue hardship litigation. It is unfortunate but true that the access-to-justice barriers confronted by debtors create a non-level playing field that tilts in favor of student-loan creditors. Given the adversarial and recursive nature of the litigation process, the professionals representing such creditors have no incentive to engage in system reform that would level the playing field.

On the other hand, attorneys who represent student-loan debtors might have an incentive to reform the system. Assuming that they do, the membership of this group is likely to be small, diffuse, and unlikely to have a great deal of financial resources at its disposal to advocate for reform. Moreover, given that the quality of lawyering on behalf of student-loan debtors is not likely to be robust,⁴⁵⁵ debtors' attorneys are not prime candidates to engage in courtroom advocacy that seeks modification or reversal of the case law governing the undue hardship standard. Thus, exhortations by the judiciary for such advocacy⁴⁵⁶ are likely to fall on deaf ears.

Organizations dedicated to protecting debtors' rights—the National Consumer Law Center (NCLC) or the National Association of Consumer Bankruptcy Attorneys (NACBA), for instance—may be better situated to effectuate change. And, in fact, NCLC routinely advocates for relief for student-loan borrowers, including bankruptcy relief.⁴⁵⁷ Nonetheless, the student-loan lobby representing creditors undoubtedly has greater economic resources than nonprofit

justifications/s-loansoverview.pdf. The federal government disbursed over \$106 billion in federal student loans during the 2012 fiscal year. See FED. STUDENT AID, *supra* note 181, at 8. As of June 2013, the outstanding balance for Direct loans was \$569.2 billion, and the outstanding balance for FFELP loans was \$429.5 billion. See Rohit Chopra, *A Closer Look at the Trillion*, CONSUMER FIN. PROT. BUREAU BLOG (Aug. 5, 2013), <http://www.consumerfinance.gov/blog/a-closer-look-at-the-trillion/>. On the difference between Direct loans and FFELP loans, see *supra* notes 180–81 and accompanying text.

453. For further discussion casting doubt on Congress's ability to engage in effective reform efforts that would improve deficiencies in the bankruptcy system, see Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L.J. 221, 221–30 (2004).

454. See *id.* at 236–37.

455. See *supra* notes 251–54 and accompanying text.

456. See, e.g., *Bene v. Educ. Credit Mgmt. Corp.* (*In re Bene*), 474 B.R. 56, 68 n.12 (Bankr. W.D.N.Y. 2012).

457. See Nat'l Consumer Law Ctr., *Advocacy*, STUDENT LOAN BORROWER ASSISTANCE, <http://www.studentloanborrowerassistance.org/advocacy/> (last visited Oct. 20, 2014).

organizations that advocate on behalf of student-loan borrowers. For this reason, nonprofits will likely face stiff resistance in their reform efforts, thereby decreasing their likelihood of effectuating change.

If congressionally mandated change is unlikely, and if bankruptcy professionals will not be instrumental in effectuating change, then the judiciary stands as the last bastion for reforming the system. The bankruptcy litigation system, however, consists of various courts: bankruptcy courts at the trial level, district courts and bankruptcy appellate panels (BAPs) at the first tier of intermediate appellate review, courts of appeals at the second tier of intermediate appellate review, and the Supreme Court at the apex with discretionary final appellate review.⁴⁵⁸ If the “ultimate [residual] policymaking power [in bankruptcy] does not rest with the expert bankruptcy judges but rather with those judges exercising appellate review,”⁴⁵⁹ then why have I concluded that change in this context must come from the bankruptcy courts rather than the appellate courts?

As a practical matter, by virtue of the two tiers of intermediate appellate review in the bankruptcy litigation system, appellate-level policy making is quite limited due to the infrequency with which appeals make their way to the Supreme Court or the courts of appeals, which are best situated to issue binding precedent.⁴⁶⁰ The Supreme Court has only heard two cases involving the discharge of student loans in bankruptcy,⁴⁶¹ and the issues tackled by the Court were procedural.⁴⁶² Notably, when presented with the opportunity to clarify the meaning of undue hardship, the Court declined to do so.⁴⁶³ Moreover, during the fifteen-year period spanning 1997 through 2011, the courts of appeals issued only forty-six opinions relating to trial-level dispositions of adversary proceedings that sought a dischargeability determination of student loans in bankruptcy.⁴⁶⁴ Finally, while courts at the first tier of intermediate appellate review hear the bulk of bankruptcy appeals,⁴⁶⁵

458. See Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 424–27 & 426 fig.1 (2012).

459. See *id.* at 425.

460. See *id.* at 438–39.

461. *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004).

462. See *Espinosa*, 130 S. Ct. at 1373; *Hood*, 541 U.S. at 445.

463. See *Petition for Writ of Certiorari i, Educ. Credit Mgmt. Corp. v. Reynolds*, 549 U.S. 811 (2006) (No. 05-1361), 2006 WL 1126177; *Reynolds*, 549 U.S. at 811.

464. See Jonathan Remy Nash & Rafael I. Pardo, *Rethinking the Principal-Agent Theory of Judging*, 99 IOWA L. REV. 331, 348–50 (2013). The forty-six opinions consist of both published and unpublished opinions; they also consist of opinions disposing of the appeal on the merits as well as opinions involving solely procedural dispositions (e.g., dismissal for lack of jurisdiction or for lack of standing). See *id.* at 350.

465. See Pardo & Watts, *supra* note 458, at 438.

the opinions issued by district courts and BAPs have limited precedential value.⁴⁶⁶ This state of affairs illustrates how “the current structure of bankruptcy administration is poorly designed to achieve uniform, clear answers” to open-ended questions under the Code,⁴⁶⁷ including what the meaning of “undue hardship” should be for purposes of determining the dischargeability of student loans.⁴⁶⁸

If this is true, why do I hold out hope that reform will flow from the bankruptcy courts? After all, any decision-making by bankruptcy judges at the trial level will generally lack precedential effect.⁴⁶⁹ This is true enough. But this Article has primarily focused on highlighting the manner in which *procedural* noncompliance and pollutive litigation have amplified the access-to-justice barriers that prevent student-loan debtors from obtaining a fresh start. By shining a spotlight on such mistakes and misbehavior, I hope that, going forward, bankruptcy judges will be better situated to play a more robust monitoring role in undue hardship adversary proceedings and thus to serve as a check against any attempts by creditors to run roughshod over student-loan debtor’s procedural rights.

Should bankruptcy judges be expected to serve such a monitoring role? Absolutely. The suggested monitoring role fits squarely within the mandate set forth in the Federal Rules of Civil Procedure and Bankruptcy Procedure that procedural rules should be administered to secure just determinations.⁴⁷⁰ If courts have had a vigilant eye toward enforcing creditors’ procedural rights,⁴⁷¹ then they should also exercise vigilance in enforcing debtors’ procedural rights.⁴⁷²

466. See Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1761–62, 1761 nn.68–73 (2008) (discussing the precedential effect of district court and BAP opinions).

467. Pardo & Watts, *supra* note 458, at 439.

468. See Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AM. BANKR. L.J. 625, 657–58 (2002).

469. See, e.g., *In re 400 Madison Ave. Ltd. P’ship*, 213 B.R. 888, 890 n.2 (Bankr. S.D.N.Y. 1997); *In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 160 B.R. 882, 898 (Bankr. S.D.N.Y. 1993); *In re Jones*, 112 B.R. 975, 977 (Bankr. W.D. Mo. 1989).

470. FED. R. CIV. P. 1; FED. R. BANKR. P. 1001.

471. See, e.g., *Scott v. United States (In re Scott)*, 437 B.R. 376, 380 (B.A.P. 9th Cir. 2010); Dismissal Order, *In re Watkins*, *supra* note 306 (dismissing undue hardship adversary proceeding with respect to one defendant based on improper service of summons and complaint); Order Regarding Improper Service of Summons and Complaint on Defendant(s), *Hoefler v. ACS College Loan Corp.*, (*In re Hoefler*), Ch. 7 Case No. 10-71401, Adv. No. 11-04084 (Bankr. E.D. Mich. Jan. 28, 2011), ECF No. 3; Dismissal Order, *Reslink v. ECMC*, *supra* note 251, at 1 (dismissing debtor’s complaint without prejudice on the basis that the original complaint “fails to comply with [Bankruptcy Rule 7010] regarding the content of pleadings filed in adversary matters”).

472. Importantly, the monitoring role would comport with the tendency of bankruptcy judges to be actively involved in case management. See Baird & Morrison, *supra* note 32, at 966; Stacy Kleiner Humphries & Robert L. R. Munden, *Painting a Self-Portrait: A Look at the*

The importance of a debtor's procedural rights should not be underestimated. If we conceptualize the value of a debtor's substantive rights—here, the entitlement to a discharge of student loans that impose undue hardship—to be inversely related to the extent to which procedure acts as a barrier to vindicating the substantive right,⁴⁷³ then the value of the substantive right will be increasingly diminished if bankruptcy judges do not engage in more robust procedural monitoring.

Judges should not underestimate the potential of such monitoring to have a positive impact on effectuating change for student-loan debtors. The world of undue hardship litigation is not a world of trials; it is overwhelmingly a world of settlements and other pretrial dispositions (e.g., dismissals).⁴⁷⁴ Accordingly, the real opportunity for reform lies in the ability of bankruptcy judges to achieve just results through managerial judging.⁴⁷⁵ This approach ought to have great appeal for judges who feel frustrated by Congress's failure to revisit its policy regarding the dischargeability of student loans in bankruptcy or who feel that the decisional law governing application of the undue hardship standard has been excessively constraining.⁴⁷⁶

At the end of the day, “[t]he cogs of the wheel of justice move much more smoothly when attorneys . . . follow the rules of practice and procedure.”⁴⁷⁷ The undue hardship thicket can be cleared, but it will require bankruptcy courts to accept more responsibility in policing for procedural noncompliance and pollutive litigation.

Composition and Style of the Bankruptcy Bench, 14 BANKR. DEV. J. 73, 76, 82, 105 (1997); Janger, *supra* note 31, at 587.

473. Cf. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting) (“Suffice it to say that actually in many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible.”); Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 451 (2013) (“[T]here is no hermetic seal; procedural provisions routinely affect the enforcement of substantive rights.”).

474. See *supra* Part II.

475. See E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 325–26, 335 (1986).

476. See, e.g., *Roth v. Educ. Credit Mgmt. Corp.* (*In re Roth*), 490 B.R. 908, 920 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring); *Wolfe v. U.S. Dep’t of Educ.* (*In re Wolfe*), 501 B.R. 426, 434 (Bankr. M.D. Fla. 2013); *Armstrong v. U.S. Dep’t of Educ.* (*In re Armstrong*), Ch. 7 Case No. 10-82092, Adv. No. 10-8118, 2011 WL 6779326, at *9 n.13 (Bankr. C.D. Ill. Dec. 27, 2011).

477. *Dela Rosa v. Scottsdale Mem’l Health Sys., Inc.*, 136 F.3d 1241, 1244 (9th Cir. 1998).