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**Oh, What a Relief It (Sometimes) Is: An Analysis of Chapter 7
Bankruptcy Petitions to Discharge Student Loans**

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OH, WHAT A RELIEF IT (SOMETIMES) IS: AN ANALYSIS OF CHAPTER 7 BANKRUPTCY PETITIONS TO DISCHARGE STUDENT LOANS

Aaron N. Taylor

Daniel J. Sheffner**

Conventional wisdom dictates that it is all-but-impossible to discharge student loans in bankruptcy. This contention, however, misstates the fact that bankruptcy discharge of student loans is possible—and it happens. This Article presents a statistical analysis of what happened when Chapter 7 bankruptcy petitioners in the First and Third federal judicial circuits filed 523(a)(8) adversary proceedings—or proceedings to discharge their student loan debt due to an “undue hardship.” In our analysis, we found undue hardship discharge rates of 54% in the First Circuit and 24% in the Third Circuit. But more significantly, we found that undue hardship determinations were relatively rare. A plurality of cases was dismissed at the debtors’ behest. The next most common resolution was settlements between debtors and creditors. And when all forms of resolution were considered, 51% of First Circuit debtors and 46% of Third Circuit debtors who sought discharge of their student loans obtained some form of relief—either an undue hardship discharge, a settlement, or a default judgment. These rates, while not representing certainty, surely do not reflect the near-impossibility of relief that is often assumed when student loans are discussed in the context of bankruptcy.

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INTRODUCTION

Conventional wisdom dictates that it is all-but-impossible to discharge student loans in bankruptcy.¹ This contention, however, is an exaggeration, at best—likely more of a misstatement. This Article presents a statistical analysis of what happened when Chapter 7 bankruptcy petitioners in the First² and Third³ federal judicial circuits filed 523(a)(8) adversary proceedings—or proceedings to discharge their student loan debt due to an “undue hardship.”

In our analysis, we found undue hardship discharge rates of 54% in the First Circuit and 24% in the Third. These rates, while not representing certainty, are likely higher than is often assumed when student loan discharge is discussed. Admittedly, we knew beforehand that student loan bankruptcy discharge was possible—both in theory and in fact. But we wanted to move beyond our anecdotal insights and document these occurrences in a more tangible manner. Achieving that goal turned out to be rather straightforward.

In our review, however, we uncovered a more elemental misconception that caught us somewhat by surprise. Discussions about how student loans are treated in bankruptcy tend to focus on the classic judge-rendered undue hardship determinations. But these determinations—captured in the proportions above—represent only a small portion of resolutions of 523(a)(8) adversary proceedings.

Between 2011 and 2014, only 10% of proceedings in the First Circuit and 9% in the Third were resolved by undue hardship determinations. A plurality of proceedings was dismissed upon debtors’ motions or joint motions with creditors—44% and 46% in the First and Third Circuits respectively. Agreements between debtors and creditors to settle debts for lower amounts than what were owed were the next most common resolution, accounting for 30% in the First Circuit and 35% in the Third Circuit. Even default judgments

1. Amy Connolly, *Bankruptcy case could make it easier to shed student loans*, UNITED PRESS INT’L (Oct. 9, 2015, 1:40 PM), http://www.upi.com/Top_News/US/2015/10/09/Bankruptcy-case-could-make-it-easier-to-shed-student-loans/3361444380821 (asserting that bankruptcy attorneys consider the standard for discharging student loans “impossible . . . to meet”); Betsy Mayotte, *Debunking the Student Loan Bankruptcy Myth*, U.S. NEWS & WORLD REPORT (Aug. 13, 2014, 10:00 AM), <http://www.usnews.com/education/blogs/student-loan-ranger/2014/08/13/debunking-the-student-loan-bankruptcy-myth> (characterizing the prospect of discharging student loans in bankruptcy as “incredibly difficult”); Katy Stech, *5 Things Student Loan Lawyers Ask Borrowers Who File for Bankruptcy*, WALL STREET 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> (“It’s nearly impossible to cancel your student loan debt in bankruptcy.”).

2. U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT, <http://www.ca1.uscourts.gov> (“The First Circuit includes the Districts of Maine, Massachusetts, New Hampshire, Puerto Rico[,] and Rhode Island.”).

3. U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, <http://www.ca3.uscourts.gov/about-court> (explaining that the Third Circuit includes Delaware, New Jersey, Pennsylvania, and the Virgin Islands).

outpaced undue hardship determinations in the number of resolutions between the circuits.

These trends suggest that the very framing of discussions concerning student loans in the context of bankruptcy is misguided. Therefore, we broadened our focus from simply challenging the conventional wisdom about undue hardship discharge to gaining a holistic picture of how student loans are treated in bankruptcy.

This shift in focus produced a rather notable statistic: when all forms of resolution were considered, 51% of First Circuit debtors and 46% of Third Circuit debtors who sought discharge of their student loans obtained some form of relief—either an undue hardship discharge, a settlement, or a default judgment.

Of course it is possible that only the most compelling debtors are pursuing discharge, while others with weaker claims are being counseled out of the endeavor. But that argument strikes us as more of a theory than a reality. We believe that the hyper-focus on judge-rendered undue hardship determinations distorts perceptions of both the frequency of student loan bankruptcy relief and how it is most commonly secured. These perceptions likely have a discouraging effect on debtors and lawyers who may be less inclined to pursue discharge of student loans, due to potentially exaggerated feelings of unlikelihood.

This article provides a holistic, data-based view of what happened when Chapter 7 bankruptcy petitioners in the First and Third federal judicial circuits sought to discharge their student loans. The bulk of the analyses focuses on the four-year period, 2011-2014, though in much of our analyses of undue hardship determinations we focus on the 10-year period, 2005-2014.

During the four-year period, only about one-tenth of one percent of debtors who filed personal Chapter 7 petitions sought the discharge of student loan debt; therefore, the numbers of 523(a)(8) adversary proceedings we found and analyzed were relatively small—118 proceedings in the First Circuit, 194 in the Third. This Article is the precursor to a national analysis that we are conducting and will publish soon. The trends in this piece are intended to be mostly illustrative. We do not assert that they are generalizable outside of the First and Third Circuits. Nonetheless, the trends provide a glimpse into an area of bankruptcy and law practice that is largely misunderstood.

Part I of the Article provides an overview of the bankruptcy system, generally. Part II discusses the undue hardship standard, including the different undue hardship tests. Part III explains the different forms of student loan debt relief. Part IV presents the analysis of the 523(a)(8) adversary proceedings.

I. PERSONAL BANKRUPTCY

Of the powers granted to Congress by Article I of the United States Constitution, one is the power “[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”⁴ Since 1898, creditor-debtor relations have consistently operated under the shadow of bankruptcy, first under the Bankruptcy Act of 1898⁵ and, after 1978, the Bankruptcy Code.⁶ This section provides a brief overview of the consumer bankruptcy system, with special emphasis paid to the bankruptcy discharge and the concept of nondischargeability.

The Bankruptcy Code is located in Title 11 of the United States Code.⁷ The relief provided by the Code depends on the chapter under which a bankruptcy case is filed. Individual consumer debtors⁸ generally file under either Chapters 7 or 13.⁹ In Chapter 13 proceedings, debtors with regular income dedicate a portion of their post-petition wages to creditors under restructured payment plans for a period of three to five years.¹⁰ Upon completion of the repayment plan and ancillary obligations, the debtor receives a discharge of her pre-petition debts.

Chapter 7 proceedings, which are the focus of this analysis, are liquidation proceedings. Once a debtor files a Chapter 7 bankruptcy, his assets (excluding

4. U.S. CONST. art. I, § 8, cl. 14.

5. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

6. 11 U.S.C. § 101 (2014). The seeds of the United States bankruptcy system were planted in sixteenth-century England when, in 1542, Parliament passed the first modern bankruptcy statute entitled “An Acte againste suche persones as doo make Bankrupte.” 34 & 35 Hen. 8, ch. 4 (1542-43). Bankruptcy in medieval England was nothing more than a collections device for creditors in which bankrupts, a category of persons limited to merchant debtors, were classified “offenders” and treated as criminals. *See* Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 500, 501, 502 n.76 (1996) (quoting the preamble to 34 & 35 Hen. 8, ch. 4 (1542-43) and noting that bankrupt persons were referred to as “offenders” under that statute and 1 Jam., ch. 15, §§ 10, 17 (1604)). By 1800, the year Congress passed the United States’ first bankruptcy statute, Act of Apr. 4, 1800, ch. 19, 2 Stat. 19, English bankruptcy law was decidedly pro-creditor: only merchants were eligible for bankruptcy; voluntary petitions were prohibited; death or imprisonment awaited the fraudulent bankrupt; and the availability of bankruptcy was based on the commission of a wrongful act by the debtor. *See* Andrew J. Duncan, *From Dismemberment to Discharge: The Origins of Modern American Bankruptcy Law*, 100 COM. L.J. 191, 198-99 (1995); John C. McCoid, II, *The Origins of Voluntary Bankruptcy*, 5 BANKR. DEV. J. 361, 366 (1988) (remarking that “the aim of [the discharge provision in the Statute of Anne, 4 Anne, ch. 17, § 7 (1705)] seems to have been more to help creditors by encouraging debtor cooperation, than to benefit debtors”); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 16 (1995).

7. 11 U.S.C. § 101 (2014).

8. Individual creditors may also file under these chapters by way of an involuntary petition. *See id.* § 303.

9. *See* 2014 Bankruptcy Filings, U.S. COURTS, <http://www.uscourts.gov/report-name/bankruptcy-filings?tn=&pt=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D=2014> (last visited June 20, 2016).

10. 11 U.S.C. §§ 1301-1330 (2014).

those exempt under applicable state or federal laws)¹¹ become property of the so-called “bankruptcy estate.”¹² The trustee of the estate collects and liquidates the debtor’s property and distributes the proceeds to the debtor’s creditors.¹³ After the proceeds are fully distributed, the debtor’s pre-petition debts are discharged and his case is completed.

The American bankruptcy system is fundamentally a remedial scheme for the benefit of all parties involved. By consolidating creditor claims into a single federal proceeding, bankruptcy ensures similar creditors are treated similarly and relieves creditors of the necessity of participating in a “race to the courthouse.”¹⁴ But the Supreme Court has acknowledged that “[t]he principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor.”¹⁵ The “fresh start” policy undergirds the modern American bankruptcy system and is exemplified by those provisions of the Code that afford the debtor the chance to achieve economic independence after bankruptcy. For example, realization of the debtor’s fresh start is aided by section 522(b) of the Code, which allows the debtor to exempt a portion of the equity in his home, automobile, and other assets,¹⁶ and by section 362(a), which stays creditor collection activities upon the filing of the bankruptcy case.¹⁷

No Code provision is more vital to the debtor’s fresh start than the bankruptcy discharge. Section 727(a) of the Code dictates that upon the completion of the debtor’s Chapter 7 case, the bankruptcy court must discharge the debtor’s pre-petition debts.¹⁸ A court’s discharge order enjoins creditors from holding the debtor personally liable on her discharged debts and from instituting or continuing legal proceedings on the debts post-bankruptcy.¹⁹ The

11. *See id.* § 522(b).

12. Section 541(a) of the Bankruptcy Code contains a list of assets included in the bankruptcy estate, including all of the legal and equitable interests held by the debtor at the time of the commencement of the bankruptcy case, any interest in property recovered by the trustee as a result of a fraudulent transfer, the profits or proceeds of any property of the bankruptcy estate, and any interest in property acquired by the estate during the course of the bankruptcy case. *Id.* § 541(a)(1)-(7).

13. *Id.* § 704.

14. *See* KENNETH N. KLEE, *BANKRUPTCY AND THE SUPREME COURT* 242 (2009).

15. *Marrama v. Citizens Bank*, 549 U.S. 365, 367 (2007) (internal citation omitted).

16. 11 U.S.C. § 522(b).

17. *Id.* § 362(a).

18. *Id.* § 727(a).

19. *Id.* § 524(a). Section 524(a) states, in part:

[A] discharge in a case under this title . . .

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover[,] or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified

discharge injunction is thus indicative of the central focus bankruptcy places on the debtor's fresh start, and is the reason individuals file for bankruptcy.

While the bankruptcy discharge's protections are broad, it does not reach all debts.²⁰

Section 523(a) of the Code specifies a number of categories of debts that are prohibited from inclusion in the court's discharge order due to public policy concerns.²¹ These include debts incurred as a result of the debtor's fraud²² or his "willful and malicious" injuring of the creditor,²³ as well as for domestic support obligations and certain tax debts.²⁴

Student loans are included in section 523(a)'s list of nondischargeable debts. Unlike the other types of debts listed in that section, however, student loans are not categorically nondischargeable—they are merely presumed to be as such. The relevant provision, section 523(a)(8), provides that student loan debts are nondischargeable "unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents."²⁵ Thus, in order to rebut the presumption of nondischargeability,

in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

Id. § 524(a)(2)-(3).

20. In addition to the categories of debts excepted from discharge discussed in this section, the Code completely prohibits the entry of a discharge order in certain instances. *See id.* § 727(a) (specifying twelve grounds for denying (or delaying, in one case) the entry of a discharge order). Further, debtors may reaffirm certain debts, thus ensuring that their liability on a debt survives bankruptcy. *See id.* § 524(c).

21. *Id.* § 523(a).

22. *See id.* § 523(a)(1), (2), (4).

23. *Id.* § 523(a)(6).

24. *See id.* § 523(a)(5), (14).

25. *Id.* § 523(a)(8). The section states in full:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . .

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

the debtor must establish that repaying the student loan obligation would impose an undue hardship.²⁶

II. THE UNDUE HARDSHIP EXCEPTION

This peculiar treatment of student loan debts in bankruptcy as conditionally dischargeable raises two questions for the debtor. The first is substantive: what exactly constitutes “undue hardship”? The second is procedural: how does one pursue an undue hardship claim?

A. History

Prior to 1976, student loans were dischargeable in bankruptcy, and so debtors were not obligated to institute a separate “full blown federal lawsuit”²⁷ to discharge them.²⁸ However, alarmed by sensationalized reports of newly minted physicians, lawyers, and other professionals discharging their student loan debts prior to setting off on lucrative careers, in 1973 the Commission on the Bankruptcy Laws of the United States (“Commission”)²⁹ proposed that student loans be exempted from discharge, unless the debtor “has demonstrated that for any reason he is unable to earn sufficient income to maintain himself and his dependents and to repay the educational debt.”³⁰ The Commission characterized the inability “to earn sufficient income” and “repay the educational debt” as “undue hardship.”³¹

Congress took heed of the Commission’s suggestion, and in 1976 passed the Education Amendments Act.³² This Act prohibited debtors from

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual[.]

Id.

26. *Id.*

27. *In re TransAmerican Nat. Gas Corp.*, 978 F.2d 1409, 1416 (5th Cir. 1992).

28. Note, *Ending Student Loan Exceptionalism: The Case for Risk-Based Pricing and Dischargeability*, 126 HARV. L. REV. 587, 595 (2012).

29. The Commission was created by Congress in 1970 to study and propose changes to the bankruptcy laws. Pub. L. No. 91-354, 84 Stat. 468 (Jul. 24, 1970).

30. COMM’N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, TRANSMITTING A REPORT OF THE COMM’N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 93-137, 93d Cong., 1st Sess., at 140 n.15 (1973) [hereinafter “COMM’N REPORT”]; Frank T. Bayuk, Comment, *The Superiority of Partial Discharge for Student Loans Under 11 U.S.C. § 523(a)(8): Ensuring a Meaningful Existence for the Undue Hardship Exception*, 31 FLA. ST. U.L. REV. 1091, 1094 (2004); Anthony Bowers, Note, *Discharging Student Loans via Bankruptcy: Undue Hardship Doctrine in the First Circuit*, 4 S. NEW ENG. ROUNDTABLE SYMP. L.J. 143, 146 (2009).

31. COMM’N REPORT, *supra* note 30, at 140-41 n.17.

32. Educ. Amendments of 1976, Pub. L. No. 94-482, 90 Stat. 2081 (codified at 20 U.S.C. § 1087-3) (1976); Richard B. Keeton, *Guaranteed to Work or It’s Free!: The*

discharging their federally guaranteed student loans if the debtor filed for bankruptcy within five years of the debt becoming due, unless the debtor established that repayment would impose an “undue hardship” on himself or his dependents.³³ Congress retained this formula when it enacted the Bankruptcy Code in 1978.³⁴

Congress continued to impose restrictions on the discharge-status of student loans into the 1990s. The Crime Control Act of 1990 extended the nondischargeability period to seven years,³⁵ and section 3007(b)(1) of the Omnibus Budget Reconciliation Act of 1990 introduced the discharge limitations to Chapter 13 cases.³⁶ Finally, in 1998 Congress eliminated the seven-year waiting period altogether, leaving “undue hardship” as the only mechanism by which debtors could discharge their student loan debts.³⁷

At the same time Congress was limiting the potency of the student loan discharge, it was expanding the types of loans defined as conditionally nondischargeable.³⁸ The original nondischargeability exception only concerned federally guaranteed education loans; however, successive legislation extended its reach to student loans “made . . . [or] insured by a governmental unit, or made under any program funded . . . by a governmental unit or by a nonprofit institution of higher education,”³⁹ and to student loans made under programs funded by nonprofit institutions⁴⁰ and educational benefit overpayments.⁴¹ Most recently, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 brought private educational lenders under the protection of the nondischargeability provision,⁴² such that now the undue hardship exception applies to both federal and private student loans.⁴³

Thus, student loan debts, which were originally dischargeable just as are most unsecured debts, are now nondischargeable absent proof of undue hardship. This gradual strengthening of the protections afforded to student loan

Evolution of Student Loan Discharge in Bankruptcy and the Ninth Circuit’s Ruling in Hedlund v. Educational Resources Institute Inc., 89 AM. BANKR. L.J. 65, 75 (2015).

33. Keeton, *supra* note 32, at 75 (citing H.R. Doc. No. 93-137, pt. 2, at 136).

34. *Id.*; Note, *Ending Student Loan Exceptionalism*, *supra* note 28, at 596.

35. Pub. L. No. 101-647, § 3621(1), 104 Stat. 4789, 4965; Keeton, *supra* note 32, at 76.

36. Pub. L. No. 101-508, 104 Stat. 1388; Keeton, *supra* note 32, at 76.

37. Note, *Ending Student Loan Exceptionalism*, *supra* note 28, at 596 (citing the Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837).

38. Keeton, *supra* note 32, at 75.

39. Note, *Ending Student Loan Exceptionalism*, *supra* note 28, at 596 (quoting Act of Aug. 14, 1979, Pub. L. No. 96-56, § 3(1), 93 Stat. 387, 387) (internal quotation marks omitted).

40. Keeton, *supra* note 32, at 75 (citing Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 454(a)(2), 98 Stat. 333, 376).

41. Keeton, *supra* note 32, at 75 (citing Crime Control Act of 1990, Pub. L. No. 101-647, § 3621(1), 104 Stat. 4789, 4964-65).

42. Pub. L. No. 109-8, § 220, 119 Stat. 23, 59.

43. Keeton, *supra* note 32, at 75.

lenders in bankruptcy occurred even though the Commission's fears that young doctors and lawyers were threatening the continued existence of student loan programs were not supported by actual evidence.⁴⁴ Nonetheless, by the time the National Bankruptcy Review Commission⁴⁵ recommended repeal of the nondischargeability exception in 1997, the status of student loan debts as conditionally dischargeable had been well entrenched in bankruptcy law.⁴⁶

B. *What is an Undue Hardship?*

The Bankruptcy Code does not define "undue hardship"; therefore, the task of ascribing a meaning to this term has fallen to the courts. Bankruptcy courts generally apply one of two tests: (1) the *Brunner* test⁴⁷ and (2) the totality of the circumstances test (or simply, the "totality test").

1. *The Brunner Test*

The majority of courts, including those in the Third Circuit and some in the First Circuit, apply the tripartite *Brunner* test to determine the existence of undue hardship.⁴⁸ The test was first articulated at the appellate level by the Second Circuit in *Brunner v. New York State Higher Education Services Corp.* Under the test, the debtor must establish:

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

44. NAT'L BANKR. REVIEW COMM'N, *BANKRUPTCY: THE NEXT TWENTY YEARS* 213 (1997) (noting that "the available evidence does not support the notion that the bankruptcy system was systematically abused when student loans were more easily dischargeable"); 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, 420 (2005) (writing that in proposing the undue hardship exception the Commission "reacted viscerally to anecdotal evidence of recent graduates who had obtained discharges of their student loans without any attempted repayment and in the absence of extenuating circumstances").

45. The National Bankruptcy Review Commission was an independent commission created by Congress to evaluate the bankruptcy laws. *NBRC Fact Sheet*, NAT'L BANKR. REV. COMM'N (Aug. 12, 1997), <http://govinfo.library.unt.edu/nbr/facts.html>.

46. NAT'L BANKR. REVIEW. COMM'N, *supra* note 44, at 216.

47. The *Brunner* test was named after the Second Circuit decision in which it first appeared at the appellate level. *See Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987) (per curiam).

48. Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 373 (2013).

good faith efforts to repay the loans.⁴⁹

The debtor must satisfy each prong to establish the existence of undue hardship.⁵⁰ If one or more prongs are not established by a preponderance of the evidence, the debtor's student loans will be declared nondischargeable.⁵¹

Under the first prong, the debtor must convince the court that his current income and expenses prevent him from repaying his educational loans while also maintaining a "minimal standard of living" for himself and his dependents.⁵² In this posture, the bankruptcy court must review evidence of the debtor's income and expenses with an eye toward determining whether (1) the debtor has maximized his income to the extent allowed by his "vocational profile" and (2) the debtor's expenses are no more than required for a "minimal standard of living."⁵³ This prong empowers judges to make value judgments, particularly regarding debtor expenses, in seeking to tie undue hardship to some rough conception of poverty.⁵⁴

The second prong obligates the debtor to point to the existence of "additional circumstances" that ensure his dire financial straits will endure.⁵⁵ Inability to pay is not enough; to satisfy this prong debtors must prove "total incapacity" to pay their debts due to realities outside of their control.⁵⁶ Some courts have characterized this requirement as necessitating the existence of a "certainty of hopelessness," a phrase that perfectly encapsulates the heavy burden placed on the debtor under this prong.⁵⁷ In this stage of the analysis, the court will examine factors personal to the debtor, such as the debtor's age, health status, employment status and prospects, and education level.⁵⁸

49. *Brunner*, 831 F.2d at 396. Professors Rafael Pardo and Michelle Lacey have re-conceptualized the test as consisting of the following three considerations: "(1) the debtor's current inability to repay (current inability); (2) the debtor's future inability to repay debt (future inability); and (3) the debtor's good faith effort to repay (good faith)." Pardo & Lacey, *supra* note 44, at 496.

50. *See* Pa. Higher Educ. Assistance Agency v. Faish (*In re Faish*) 72 F.3d 298, 306 (3d Cir. 1995).

51. *See* Educ. Credit Mgmt. Corp. v. Frushour (*In re Frushour*), 433 F.3d 393, 400 (4th Cir. 2005).

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

53. *Armstrong v. Access Group (In re Armstrong)*, 394 B.R. 43, 52-54 (Bankr. M.D. Pa. 2008).

54. Keeton, *supra* note 32, at 81.

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

56. *Faish*, 72 F.3d at 307 (quoting *Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner)*, 46 B.R. 752, 758 (S.D.N.Y. 1985) (internal quotation marks omitted)).

57. This language stems from the district court's opinion in *Brunner*. *See* 46 B.R. at 755 (writing that the "dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment") (quoting *Briscoe v. Bank of N.Y. (In re Briscoe)*, 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981) (internal quotation marks omitted)).

58. *See* Educ. Credit Mgmt. Corp. v. Jorgensen (*In re Jorgensen*), 479 B.R. 79, 88 (B.A.P. 9th Cir. 2012).

A debtor will not receive a discharge of his student loans under *Brunner* if he did not make good faith efforts to repay his loans prior to filing for bankruptcy.⁵⁹ This requirement is an attempt to protect the solvency of the student loan system by demanding that student loan debtors deal with their lenders in a way deemed acceptable by the courts.⁶⁰ Under the “good faith” prong, courts examine many factors, including the amount the debtor has repaid on the subject loans, any pre-bankruptcy attempts to restructure his educational debt,⁶¹ and the ratio of student loan debt to overall debt on which discharge is sought.⁶²

The *Brunner* test’s bright-line, simple approach to undue hardship has garnered its acceptance by a majority of courts, including the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuit Courts of Appeal.⁶³ The Eighth Circuit and a majority of courts in the First Circuit, however, unimpressed with what they see as *Brunner*’s cabined approach to undue hardship, apply the totality of the circumstances test.

2. *The Totality Test*

While it is by far the most popular test, many courts are troubled by *Brunner*’s gloss on the undue hardship standard. These courts believe that *Brunner*’s “good faith” and “additional circumstances” prongs are too far removed from the text of section 523(a)(8)⁶⁴ and that its compartmentalized methodology hampers bankruptcy courts’ discretion under the statute.⁶⁵ Of

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

60. See *Wolph v. U.S. Dep’t of Educ. (In re Wolph)*, 479 B.R. 725, 730 (Bankr. N.D. Ohio) (writing that the good faith prong “serves the goal of helping to ensure that a debtor acts responsibly toward their student-loan creditor given that educational loans are, in most cases, extended without regards to a debtor’s creditworthiness, with the expectation that the debtor will use their education to obtain remunerative employment so as to be able to repay the debt”).

61. See *Kuznicki v. Educ. Credit Mgmt. Corp. (In re Kuznicki)*, 483 B.R. 296, 302 (W.D. Pa. 2012).

62. See *Fabrizio v. U.S. Dep’t of Educ. (In re Fabrizio)*, 369 B.R. 238, 247 (Bankr. W.D. Pa. 2007).

63. See *Austin*, *supra* note 48, at 375 & nn. 285-92 (citing cases).

64. See *Hicks v. Educ. Mgmt. Corp. (In re Hicks)*, 331 B.R. 18, 27 (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 § [5]23(a)(8). The debtor need only demonstrate ‘undue hardship.’”). The First Circuit Bankruptcy Appellate Panel refused to adopt the *Brunner* test because it saw it as divorced from section 523(a)(8)’s basic mandate that the requirements that the debtor affirmatively prove the existence of additional debilitating circumstances and that she did not act in bad faith. *Bronsdon v. Educ. Mgmt. Corp. (In re Bronsdon)*, 435 B.R. 791, 799-800 (B.A.P. 1st Cir. 2010).

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

those courts that believe *Brunner* “test[s] too much,”⁶⁶ most adhere to the totality of the circumstances test.

Under the totality test, courts assess the following three considerations: (1) the debtor’s past, present, and reasonably reliable future financial resources; (2) the debtor’s and his dependents’ reasonable necessary living expenses; and (3) “any other relevant facts and circumstances.”⁶⁷ In adopting the totality test, the Bankruptcy Appellate Panel for the First Circuit⁶⁸ noted that the totality test and *Brunner* assess many of the same considerations: both tests seek to determine whether the debtor’s financial resources allow for the maintenance of a minimal standard of living along with debt repayment.⁶⁹ However, the totality test, in form, eschews reliance on good faith, “certainty of hopelessness,” and other such extra-statutory terms so, in that court’s opinion, more faithfully adheres to the statutory text.⁷⁰

C. *The Adversary Proceeding*

Bankruptcy cases are much different from the adversarial actions litigated in federal district courts. In a Chapter 7 case, the bankruptcy court is concerned with the consolidation of creditors’ claims and the distribution of the proceeds from liquidation to the debtor’s creditors.⁷¹ There are no plaintiffs and defendants, but debtors, creditors, and court-appointed trustees, who ensure the smooth administration of the claims allowance process.⁷² In this manner, the bankruptcy system fosters and encourages cooperation among parties in a way that is uncommon in other areas of litigation.⁷³

66. Kopf v. U.S. Dep’t of Educ. (*In re Kopf*), 245 B.R. 731, 741 (Bankr. D. Me 2000).

67. *Long*, 322 F.3d at 554.

68. The First Circuit has not formally adopted a test for undue hardship.

69. *Bronsdon*, 435 B.R. at 798-99 (quoting *Lorenz v. American Educ. Servs.* (*In re Lorenz*), 337 B.R. 423, 430-31 (B.A.P. 1st Cir. 2006)).

70. *Id.* at 799-800.

71. Adam M. Langley, et al., *The Case for a Constitutional Bankruptcy Court*, 88 AM. BANKR. L.J. 515, 529 (2014).

72. The practice of allowing or disallowing claims and determining creditors’ property rights invokes something of an air of summary proceedings in equity. *See, e.g.*, *SNA Hut Co. v. Haagen-Dazs Co., Inc.*, 302 F.3d 725, 730 (7th Cir. 2002) (“To determine whether a party has submitted itself to the equitable jurisdiction of the bankruptcy court, the relevant inquiry is whether the party has submitted a claim against the bankruptcy estate, thereby subjecting itself to the bankruptcy court’s equitable power to allow or disallow claims.”). Whether the bankruptcy court is a “court of equity,” however, is disputed. *See, e.g.*, Marcia S. Krieger, “*The Bankruptcy Court Is a Court of Equity*”: *What Does that Mean?*, 50 S.C. L. REV. 275 (1999); Adam, J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1 (2006); Daniel J. Sheffner, *Situating Reimposition of the Automatic Stay Within the Federal Common Law of Bankruptcy*, 47 U. TOLEDO L. REV. (forthcoming 2016).

73. The process of discovery also fosters cooperation, albeit within the larger adversarial context. *See* FED. R. CIV. P. 26–37.

The filing of a bankruptcy petition, however, does not eliminate or prevent disagreements between parties. In certain instances, creditors, debtors, and trustees may seek resolution of disputes through the institution of adversarial actions in the bankruptcy court. These actions, aptly designated “adversary proceedings” by the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”), are subject to the Federal Rules of Civil Procedure⁷⁴ and have been characterized as “full blown federal lawsuits within the larger bankruptcy case.”⁷⁵

The Bankruptcy Rules designate “proceeding[s] to determine the dischargeability of a debt” as adversary proceedings.⁷⁶ The debtor who wishes to have her student loan debt discharged by the bankruptcy court, therefore, must initiate the process by filing an adversary proceeding in the bankruptcy court.⁷⁷ To successfully initiate her adversary proceeding, the debtor must file a complaint and serve process on all interested parties.⁷⁸ In this procedural posture, the debtor is now a plaintiff, and the student loan lender a defendant.

Many debtors navigate bankruptcy without the benefit of counsel.⁷⁹ These individuals, already facing or having faced a complex and specialized set of rules and procedures in their main bankruptcy case, must now represent themselves in a trial that contains a new host of obstacles. Those debtors who wish to hire a lawyer to litigate their adversary proceeding must pay their lawyer; for debtors already utilizing the services of a lawyer in their main bankruptcy case, this means an additional expenditure.⁸⁰

74. See FED. R. BANKR. P. 7001 (listing those actions which are considered adversary proceedings).

75. *In re TransAmerican Nat. Gas Corp.*, 978 F.2d 1409, 1416 (5th Cir. 1992).

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

77. This is not the debtor’s only option. States have concurrent jurisdiction with bankruptcy courts to determine dischargeability. See *Standifer v. State*, 3 P.3d 925, 927 (Alaska 2000).

78. See FED. R. BANKR. P. 7004. Luckily for the debtor, she need not pay a fee to initiate an adversary proceeding. The fee for filing a Chapter 7 case is \$335. See *Chapter 7—Bankruptcy Basics*, UNITED STATES COURTS, <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics> (last visited October 10, 2015). The court may waive the filing fee if the debtor’s household income is less than 150% of the federal poverty line. 28 U.S.C. § 1930(f) (1994). If the debtor is not below 150% of the poverty line, the court may assuage difficulties in paying the filing fee by breaking it up into installments. See *id.* The fee for filing an adversary proceeding is an additional \$350. See *id.* However, the fee is waived if the plaintiff is also the debtor. See *id.* If the debtor’s bankruptcy case closed prior to the initiation of her adversary proceeding, however, she must file a motion to reopen. The fee to file a motion to reopen a Chapter 7 case is \$245. See *id.*

79. See Joseph Callanan, *Pro Se Bankruptcy Filings Growing Faster than Other Debtor Relief*, AM. BAR ASS’N (Dec. 29, 2011), https://apps.americanbar.org/litigation/litigationnews/top_stories/010312-pro-se-bankruptcy-growing.html.

80. Attorneys’ fees vary by jurisdiction and depend on the complexity of the debtor’s case. A Government Accountability Office study determined average Chapter 7 attorneys’ fees to be \$1078. U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-697, BANKRUPTCY REFORM:

In proceedings to determine the dischargeability of a debt, the burden of proof is a preponderance of the evidence.⁸¹ This burden is bifurcated in the student loan context: the lender bears the burden of establishing that the loan at issue is a student loan. If the lender establishes this, the burden shifts to the debtor to prove that excepting the subject debt from discharge would impose an undue hardship.⁸² Because courts have imposed on the debtor the burden of satisfying multi-pronged tests that require proving a myriad of factors, burdens born by debtors are much more complex and burdensome than those born by the creditor.⁸³

III. STUDENT LOAN DEBT RELIEF

As is the case with the substantive law of undue hardship, the relief available to a debtor who successfully establishes undue hardship is dependent on the theory embraced by the court. Some courts take an all-or-nothing approach, discharging the entire debt or none at all. Others embrace a more lenient, individual-loan-by-individual-loan approach. Other avenues of bankruptcy relief include settlement agreements and default judgments due to no-show defendants. Outside of bankruptcy, many debtors pursue administrative discharges offered by the Department of Education.

A. *Undue Hardship Discharge*

Courts do not only grapple over the substantive requirements of the undue hardship exception. They also disagree as to the extent of the remedy available to student loan debtors. That is to say, courts are split on whether a discharge order must encompass all of the debtor's student loans or, rather, whether a court may discharge a portion of a debtor's debts even if he did not prove undue hardship as to the entirety of his obligations. This disagreement has resulted in the advancement of three different approaches by the courts: the full discharge, partial discharge, and "hybrid" discharge.⁸⁴

DOLLAR COSTS ASSOCIATED WITH THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 23 (2008).

81. *Grogan v. Garner*, 498 U.S. 279, 287 (1991) ("Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless particularly important individual interests or rights are at stake.") (internal citations and quotation marks omitted).

82. See *Bloch v. Windham Prof'l (In re Bloch)*, 257 B.R. 374, 377 (Bankr. D. Mass. 2001); *Koch v. Pa. Higher Educ. Assistance Agency (In re Koch)*, 144 B.R. 959, 963 (Bankr. W.D. Penn. 1992).

83. Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLA. L. REV. 2101, 2116-22 (2014).

84. See Aaron Taylor, *Undo Undue Hardship, An Objective Approach to Discharging Federal Student Loans In Bankruptcy*, 38 J. Legis. 185, 225-226 (2012).

1. *Full Discharge*

Some courts believe that section 523(a)(8) only authorizes bankruptcy courts to grant debtors a “full” discharge. These courts believe they are constrained by the plain meaning of the statute, which nowhere says bankruptcy courts can discharge a portion of a debtor’s student loan obligation. For example, in *In re Conway*,⁸⁵ the court opined that there was no “authority ‘in the Code or elsewhere’ for the judicial revision of the terms of debtors’ student loans.”⁸⁶ The *Conway* court also decried “the ‘unpredictability,’ ‘lack of uniformity of outcomes,’ and potential inequities inherent in the subjective application of § 523(a)(8),” as reason to adhere to an all-or-nothing approach.⁸⁷

2. *Partial Discharge*

Courts that take a more expansive approach to bankruptcy authority believe that under some circumstances they may absolve a debtor of a portion of her student loan debt, even if she has not satisfied the undue hardship test. These courts believe that partial discharge orders are within bankruptcy courts’ equitable powers.⁸⁸ In *In re Hornsby*,⁸⁹ the Sixth Circuit held that “where facts and circumstances require intervention in the financial burden on the debtor, an all-or-nothing treatment thwarts the purposes of the Bankruptcy [Code].”⁹⁰ Undergirding this point of view is the belief that an all-or-nothing approach incentivizes debtors to amass excessive student loan debt and, at the same time, penalizes debtors who borrowed within their means (and are therefore unable to establish undue hardship).⁹¹

3. *Hybrid Discharge*

The hybrid discharge approach achieves middle ground between the purists in the full discharge camp and the more equitable-minded courts on the partial discharge side. While hybrid discharge courts consider the partial discharge of aggregate student loan debt violative of section 523(a)(8)’s plain meaning, they believe that courts can assess the *individual* loans that make up the aggregate

85. *Conway v. Nat’l Collegiate Tr. (In re Conway)*, 495 B.R. 416 (BAP 8th Cir. 2013).

86. *Id.* at 423 (quoting *Andersen v. Neb. Student Loan Program, Inc. (In re Anderson)*, 232 B.R. 127, 137 (B.A.P. 8th Cir. 1999)).

87. *Id.* (quoting *Anderson*, 232 B.R. at 129-136).

88. *See, e.g., Heckathorn v. United States ex rel. U.S. Dep’t of Educ. (In re Heckathorn)*, 199 B.R. 188, 194 (Bankr. N.D. Okla. 1996) (holding that courts may grant partial discharges because “[t]he Bankruptcy Code is embedded in equity”).

89. *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433 (6th Cir. 1998).

90. *Id.* at 439.

91. Taylor, *supra* note 84, at 226 (citing *Skaggs v. Great Lakes Higher Educ. Corp. (In re Skaggs)*, 196 B.R. 865, 866 (Bankr. W.D. Okla. 1996)).

and order each one discharged or not depending on whether they impose an undue hardship on the debtor.⁹² Proponents believe that this hybrid approach is truer to the plain meaning of the statute and congressional intent.⁹³

B. *Adversary Proceeding Settlement*

Most of the adversary proceedings in our analysis were resolved through settlements between debtors and creditors.⁹⁴ Many civil litigants have long favored settling their disputes in private rather than at the conclusion of a public trial because litigation generally requires both parties to expend significant amounts of time, energy, and money.⁹⁵ Settlement agreements also benefit the courts: out-of-court legal resolutions reduce docket congestion in overworked federal trial courts and thus conserve precious judicial resources.⁹⁶ For these reasons, the Federal Rules of Civil Procedure,⁹⁷ the Civil Justice Reform Act,⁹⁸ and other sources of federal law encourage parties to reach settlement agreements.⁹⁹

Bankruptcy litigation is no different in this regard from litigation in other federal trial courts. Given that bankruptcy law is very complex, bankruptcy caseloads are very large, and bankruptcy estates consist of limited financial resources that once belonged to a debtor who now has even fewer resources, bankruptcy courts frequently encourage settlement.¹⁰⁰ In fact, the Bankruptcy Rules specifically authorize judicial approval of settlement agreements.¹⁰¹ It is therefore unsurprising that most of the cases in our analysis were resolved out-of-court.

Settlements in the context of 523(a)(8) adversary proceedings tend to take the form of full discharges of the debt, partial discharges, or dismissals of the

92. *See id.* (citing *Grigas v. Sallie Mae Servicing Corp. (In re Grigas)*, 252 B.R. 866, 872 (Bankr. D. N.H. 2000)).

93. *See Lamanna v. EFS Services, Inc. (In re Lamanna)*, 285 B.R. 347, 353 (Bankr. D. R.H. 2002) (holding that the hybrid discharge approach “does not offend the plain language of the statute and still reflects the spirit of Congress in enacting Section 523(a)(8)”).

94. *See infra* Part IV.

95. *See* Leandra Lederman, *Precedent Lost: Why Encourage Settlements, and Why Permit Non-party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 225-26 (1999).

96. Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 591 n.8 (1991).

97. FED. R. CIV. P. 66.

98. 28 U.S.C. § 471 *se seq.*

99. Lederman, *supra* note 95, at 257 (“Federal policy seems to favor settlement and disfavor litigation, as reflected in the Civil Justice Reform Act, Federal Rule of Civil Procedure 68, Federal Rule of Evidence 408’s exclusion from evidence of settlements and settlement offers, and statutory support for private contractual agreements to arbitrate rather than litigate.”) (footnotes omitted).

100. *See* Lisa A. Lomax, *Alternative Dispute Resolution in Bankruptcy: Rule 9019 and Bankruptcy Mediation Programs*, 68 AM. BANKR. L.J. 55, 56 (1994).

101. *See* FED. R. BANKR. P. 9019.

proceedings (oftentimes as a precondition to pursuing administrative or other non-bankruptcy relief).¹⁰²

While settlement in student loan discharge litigation is a prevalent theme, the judicial tests discussed above are nonetheless relevant to our study. Settlement agreements are formed under the backdrop of a potential trial, ensuring that parties negotiate with an eye toward the court's potential interpretation of undue hardship.

C. *Adversary Proceeding Default Judgment*

Several debtors in our analysis received discharge orders pursuant to default judgments when defendants failed to respond to their adversary complaints. Of course, it takes more than a no-show defendant to affect such a result. In order for a court to enter a default judgment, debtors must establish their *prima facie* case.¹⁰³ This means a debtor must marshal sufficient evidence to satisfy whichever complex test his bankruptcy judge utilizes, even if he is the only party in the courtroom.

D. *Administrative Relief*

Bankruptcy is not the only avenue of relief for student loan debtors. Most federal student loan debtors may opt to make payments through income-sensitive plans offered by the Department of Education. Through the Income-Based Repayment (IBR) Plan, the broadest of these plans, debtors can have their monthly payments capped at no more than ten to fifteen percent of their discretionary income in a given year.¹⁰⁴ After a mandatory repayment period, ranging from 10 to 25 years (based on the debtor's type of employment and age of the loan), any remaining balances are forgiven.¹⁰⁵

A debtor may also receive an administrative discharge due to total permanent disability (TPD) or death. Under the first option, the debtor must prove to the Department of Education that she is totally and permanently disabled. This can be achieved by, for example, a letter from a debtor's physician indicating that she suffers from a medical condition that prohibits her from engaging in substantial gainful activity and which will result in death, has persisted continuously for at least sixty months, or may persist continuously for

102. See *infra* Part III.D.

103. See, e.g., *Roy v. Roy (In re Roy)*, 09-1406, 2012 WL 1523996, at 8 *1 (Bankr. D. N.J. April 15, 2010) ("The Court has reviewed your Request to Enter Default Judgment but cannot enter the judgment requested because you have not proven a *prima facie* case for the relief requested.").

104. See *If Your Federal Student Loan Payments Is High Compared to Your Income, You May Want to Repay Your Loans Under an Income-Driven Repayment Plan*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven> (last visited June 20, 2016).

105. See *id.*

at least sixty months.¹⁰⁶ Also, a debtor's death discharges his student loan obligations, as well as his parent's obligation to repay loans taken out on his behalf.¹⁰⁷

IV. ANALYSIS OF 523(A)(8) ADVERSARY PROCEEDINGS

Our initial interest in reviewing the 523(a)(8) adversary proceedings was a desire to challenge the oft-uttered assertion that student loans are "impossible" to discharge through the bankruptcy process. We knew the assertion to be false; but in the research literature, we found only limited statistical inquiry into the question.¹⁰⁸ Therefore, we undertook this analysis with the aims of providing

106. *In Certain Situations, You Can Have Your Federal Student Loan Forgiven, Cancelled, or Discharged*, FED. STUDENT AID, U.S. DEP'T OF EDUC., <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation#total-and> (last visited June 20, 2016).

107. The student's obligation is also extinguished upon the parent's death. *Id.*

108. There are few empirical studies of undue hardship litigation. Rafael Pardo, a law professor at Emory University, and Michelle Lacey, an assistant professor in the Department of Mathematics at Tulane University, have produced the most meaningful scholarship in this area to date. Their first such study was published in 2005. *See* Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405 (2005). Using Westlaw's electronic database, the pair conducted a statistical analysis of 286 undue hardship cases decided between October 7, 1993 and October 6, 2003 by bankruptcy courts representing every regional federal circuit. *Id.* at 434, 438. Fifty-seven percent of debtors in the cases studied received some form of relief. *Id.* at 479. They concluded that there were virtually no differences in characteristics between debtors who received relief and those who did not, the pair concluded that bankruptcy courts were inconsistent in their application of the undue hardship standard. *Id.* at 520.

Pardo and Lacey published another undue hardship study in 2009. *See* Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179 (2009). That study was smaller in scope than their previous work, focusing solely on adversary proceedings commenced during the five-year period between 2002 and 2006 in a single judicial district (the U.S. Bankruptcy Court for the Western District of Washington). *Id.* at 202-03. In all, Pardo and Lacey assessed 115 cases, using the Public Access to Court Electronic Records (PACER) system for the Western District of Washington bankruptcy court. *Id.* at 203. Just as they found in their first study, 57 percent of debtors in the 2009 study received some form of relief. *Id.* at 213. The researchers' central finding was that the scope of a debtor's discharge was based on considerations other than whether he or she was able to repay her loans, such as the identity of the bankruptcy judge and the level of experience of the debtor's lawyer. *Id.* at 229.

Jason Iuliano conducted the most recent empirical study. *See* Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495 (2012). The Iuliano study analyzed a nationwide sample of 207 adversary proceedings commenced in 2007, covering cases that went to verdict, as well as those resulting in default judgment, settlement, and dismissal. *Id.* at 499-500, 502-03. Unlike Pardo and Lacey, Iuliano did not conclude that there was a problem with inconsistent judicial application of § 523(a)(8), instead concluding that barriers to discharge exist because most debtors (99.9 percent according to the study) do not seek to discharge their student loan debts. *Id.* at 501. For a detailed critique of the Iuliano study, see Rafael I. Pardo, *The Undue*

insight about (1) the frequency of undue hardship discharge through the bankruptcy process, and (2) the factors that are associated with discharges.

Our review of the proceedings, however, prompted us to alter our focus. We noticed a profound trend towards dismissals of proceedings and settlements. A plurality of proceedings was dismissed upon debtors' motions or on joint motions with creditors. Agreements between debtors and creditors to settle debts for lower amounts than what were owed were the next most common resolution. These trends exposed judge-rendered undue hardship determinations as a surprisingly minor aspect of how 523(a)(8) adversary proceedings are resolved. Therefore, our focus became a desire to track not only the frequency of undue hardship discharge, but also student loan bankruptcy relief through all means, including settlements and default judgments.

A. *Scope and General Findings*

In selecting the First and Third federal judicial circuits for use as comparators, we logged docket data from a sample of 250 undue hardship determinations from all circuits.¹⁰⁹ We then selected the circuit that had the highest percentage of undue hardship determinations in favor of debtors (First Circuit) and the circuit with the highest percentage of determinations in favor of creditors (Third Circuit). We believed that this admittedly blunt means of identifying circuits on which to focus would yield compelling contrasts. But as we logged fuller data, we found surprising statistical similarities between the two circuits, the most notable of which we discuss in this section.

We initially set out to chart and analyze trends over the 10-year period, 2005-2014. However, a noticeable dearth of settlement filings in the PACER and Bloomberg Law databases¹¹⁰ over this period prompted concerns about

Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy, 66 FLA. L. REV. 2101, 2124-42 (2014). For a piece that assesses undue hardship cases in the appellate context, see Ryan Alexander Freeman, Comment, *Student-Loan Discharge—An Empirical Study of the Undue Hardship Provision of § 523(A)(8) Under Appellate Review*, 30 EMORY BANKR. DEV. J. 147 (2014).

Our study hopes to build on this developing area of research. As opposed to the first Pardo & Lacey and Iuliano studies, our research is not national in scope, focusing rather on two federal judicial circuits. Our study is beneficial in that, instead of focusing on simply published decisions, we utilized PACER and Bloomberg to analyze both published and non-published bankruptcy decisions. Further, we analyzed not only decisions on the merits, but also settlements, default judgments, and summary judgments.

109. The sample was obtained by conducting a rather narrow search, using all of the following terms: “523(a)(8),” “adversary proceeding,” and “undue hardship.” We also limited the date range to only yield 523(a)(8) adversary proceedings filed between 2005 and 2014. We then logged the first 250 results, irrespective of circuit.

110. PACER (Public Access to Court Electronic Records) is an “electronic public access service that allows users to obtain [bankruptcy] case and docket information online.” It is hosted by the federal judiciary, and can be accessed via <https://www.pacer.gov>. Bloomberg Law is a legal research platform hosted by The Bureau of National Affairs, Inc.,

whether the databases housed all the records. As a result, the bulk of the analyses below focuses on the four-year period, 2011-2014. Fortunately, the number of dockets pertaining to judge-rendered undue hardship determinations was relatively balanced across the ten-year period; thus, we felt comfortable discussing many of the judge-rendered undue hardship trends using the longer timeframe.

Below are some general findings:

- It is exceedingly rare for Chapter 7 debtors to seek discharge of student loans. Only about one-tenth of one percent of these debtors in the First and Third Circuits sought discharge during the four-year period, 2011-2014.
- Overall, 47% of debtors in our review received full or partial discharge or other relief from their student loan debt. In the First Circuit, 51% of debtors obtained some form of relief. The proportion was 46% among Third Circuit debtors. In both circuits, the most common path to relief was through settlements.
- Dollar amounts of discharged debts and settlement relief tended to be higher in the First Circuit. Settlement relief was proportionally more generous in the Third Circuit, however. In both circuits, larger debts were less likely to be discharged through an undue hardship determination.
- Certain debtor characteristics were associated with higher likelihood of relief. Debtors who obtained undue hardship discharges were more likely to have unfavorable employment prospects, coupled with (and potentially caused or exacerbated by) health issues. Similarly, in the settlement context, unfavorable financial conditions, coupled with health issues, were most closely associated with relief.
- Certain “structural” factors (those unrelated to underlying merits) were associated with higher likelihood of discharge or relief. These factors included the judicial circuit in which the proceeding was filed and, most prominently, whether the debtor was represented by counsel. Debtors who had their student loans discharged or received some other form of relief were more likely to be represented by counsel than those who did not.

and it may be accessed via <https://www.bloomberglaw.com/home>. Both databases mirror each other in terms of available dockets. Nonetheless, we used both databases as a redundant means of searching for relevant dockets.

- In considering the data, it seems the “perfect” debtor—one who is most likely to obtain an undue hardship discharge or settlement relief—has the following characteristics: unfavorable employment prospects, an aggravating factor such as a health issue, representation by counsel, and an overall debt of \$75,000 or less.

B. Filing Trends: Chapter 7 Petitions and 523(a)(8) Proceedings

According to United States Courts data, there were more than 91,000 personal Chapter 7 petitions filed in the First Circuit and more than 175,000 in the Third Circuit between 2011 and 2014.¹¹¹ Debtors in only a miniscule portion—about one-tenth of one percent—of these petitions sought the discharge of student loan debt. Searches of the PACER and Bloomberg Law databases yielded just seventy-eight 523(a)(8) debtor-plaintiffs and ninety-seven related adversary proceedings in the First Circuit for the four-year period, 2011-2014. For the Third Circuit, 147 plaintiffs and 177 adversary proceedings were generated for the same period. Table 1 charts the number of proceedings during both the 10-year and four-year periods.

Table 1: Numbers of 523(a)(8) plaintiffs and adversary proceedings by circuit and timeframe¹¹²

	Plaintiffs		Adversary proceedings	
	2005-2014	2011-2014	2005-2014	2011-2014
First Circuit	97	78	118	97
Third Circuit	163	147	194	177

Table 2 charts the 523(a)(8) adversary proceedings found in the databases by year. There was a noticeable increase in found records starting with the year 2011. This increase prompted concerns about the completeness of the pre-2011 records. Due to these concerns, most of our analysis and discussion relies on the 2011-2014 timeframe.

111. Over the ten-year period, 2005-2014, there were more than 220,000 personal Chapter 7 petitions in the First Circuit and almost 417,000 in the Third Circuit. See *Caseload Statistics Data Tables*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables> (last visited June 20, 2016).

112. Multiple adversary proceeding numbers pertaining to an individual plaintiff were counted separately. However, multiple proceedings contained within one docket number were counted only once, unless a judge rendered separate undue hardship determinations. Similarly, consolidated docket numbers were counted only once.

Table 2: Number of 523(a)(8) adversary proceedings¹¹³

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
First Circuit	4	2	0	10	1	4	22	28	30	17
Third Circuit	2	3	6	2	2	2	41	56	41	39

Almost all of the 523(a)(8) adversary proceedings including in this analysis were resolved either by an undue hardship determination, a dismissal of the proceeding, a settlement, or a default judgment. The most common resolution was a dismissal, accounting for 44% of resolutions in the First Circuit and 46% in the Third Circuit. In addition, seven proceedings were pending in the First Circuit and six in the Third Circuit as of October 15, 2015, when the records were last reviewed.

Table 3 displays the number of adversary proceeding per type of resolution, as well as the numbers of pending proceedings.

Table 3: Numbers of 523(a)(8) adversary proceedings per resolution by circuit and timeframe

	Undue hardship determinations		Settlements	Settlement-Dismissals	Default Judgments	Pending	Other
	2005-2014	2011-2014	2011-2014	2011-2014	2011-2014	2011-2014	2011-2014
First Circuit	26	9	27	40	15	6	0
Third Circuit	29	15	60	78	15	6	3

C. Resolution Trends

Discussions about how student loans are treated in bankruptcy tend to focus on the manner in which judges interpret and apply the undue hardship standards; but this framing provides only a narrow, skewed view of how student loans are treated in bankruptcy and the frequency of relief.

As Table 4 highlights, judicial applications of the undue hardship standard were uncommon, accounting for just 10% and 9% of resolutions in the First and Third Circuits respectively. Dismissals upon debtors' motions or joint motions with creditors were the most common resolution, accounting for 44% and 46% in the First and Third Circuits respectively. Settlements were the next most common resolution and the most common path to actual relief, accounting

113. Just as above, multiple adversary proceeding numbers pertaining to an individual plaintiff were counted separately. However, multiple proceedings contained within one docket number were counted only once, unless a judge rendered separate undue hardship determinations. Similarly, consolidated docket numbers were counted only once.

for 30% of resolutions in the First Circuit and 35% in the Third Circuit. Even default judgments, which were exclusively in favor of debtors, outpaced undue hardship determinations in the First Circuit and tied in frequency with undue hardship determinations in the Third Circuit.

Table 4: Proportion of each type of 523(a)(8) adversary proceedings resolutions by circuit (pending cases excluded)

	2011-2014				
	Number of proceedings	Undue hardship determinations	Settlements	Settlement-Dismissals	Default Judgments
First Circuit	91	10%	30%	44%	17%
Third Circuit	171	9%	35%	46%	9%

1. *Undue Hardship Determinations*

Between 2005 and 2014, there were only twenty-six undue hardship determinations in the First Circuit and twenty-nine in the Third Circuit. Table 5 charts the per-year trends of 523(a)(8) adversary proceedings in which a bankruptcy judge rendered an undue hardship determination between 2005 and 2014.

Table 5: Number of 523(a)(8) adversary proceedings adjudicated by undue hardship determination

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	Total
First Circuit	4	2	0	8	0	3	1	5	2	1	26
Third Circuit	2	3	4	2	1	2	4	4	3	4	29

The infrequency of undue hardship determinations is particularly apparent when trends among the individual districts within each circuit are tracked. In the First Circuit, the Puerto Rico and Rhode Island districts had no undue hardship determinations between 2005 and 2014; the District of Maine had one. In the Third Circuit, the District of Delaware had only one determination; the Middle District of Pennsylvania had two. Just three of the ten districts—Massachusetts, New Jersey, and Pennsylvania-Western—accounted for 73% of the total undue hardship determinations in the First and Third Circuits collectively. Table 6 charts these trends.

Table 6: Number of undue hardship determinations by district

2005-2014			
First Circuit		Third Circuit	
Maine	1	Delaware	1
Massachusetts	19	New Jersey	11
New Hampshire	6	Pennsylvania (Eastern)	5
Puerto Rico	0	Pennsylvania (Middle)	2
Rhode Island	0	Pennsylvania (Western)	10

Undue hardship determinations can result in three general outcomes: (1) full student loan discharge, when a judge determines that the plaintiff has proven undue hardship pertaining to the entire debt; (2) partial student loan discharge, when a judge determines that the plaintiff has proven undue hardship pertaining to some, but not all, of the debt; and (3) no discharge, when a judge determines that the plaintiff has not proven any undue hardship.

In reviewing undue hardship determinations, the most significant trend is the disparate rates of discharge between the two circuits. Judges granted undue hardship discharges at a much higher rate in the First Circuit than in the Third. For the 10-year period, 2005-2014, First Circuit judges granted discharge in more than half of the proceedings they resolved. Judges in the Third Circuit granted discharge in less than a quarter of proceedings. Discharge rates in both circuits were lower over the 4-year period, 2011-2014, compared to the 10-year period; but First Circuit judges still granted discharge in more than twice the proportion of proceedings.

The First Circuit grants both full and partial discharges. Partial discharges are premised on the idea that debtors and creditors are best served when judges are allowed to consider the extent of undue hardship, if any, with nuance. Other circuits, including the Third Circuit, only grant full, all-or-nothing discharges; either every penny of the debt is an undue hardship or none of it is. First Circuit judges granted partial discharges in two of the fourteen proceedings in which discharge was granted between 2005 and 2014. Hybrid discharges were not granted in either circuit. Table 7 illustrates trends relating to 523(a)(8) undue hardship determinations.

Table 7: Outcomes of 523(a)(8) undue hardship determinations by circuit and timeframe

	2005-2014					2011-2014				
	Total	Discharge		No	Discharge %	Total	Discharge		No	Discharge %
		Full	Partial				Full	Partial		
First Circuit	26	12	2	12	54%	9	3	1	5	44%
Third Circuit	29	7	0	22	24%	15	3	0	12	20%

The dollar amounts of debts discharged through undue hardship determinations tended to be higher in the First Circuit.¹¹⁴ In that circuit, the average amount discharged was about \$75,000, with a median of about \$65,000. In the Third Circuit, the average discharge was about \$41,000, with a median of about \$20,000. The vast majority of discharges were for the entire student loan debts claimed in the petitions.

In both circuits, larger debts were less likely to be discharged. In the First Circuit, the average debt in proceedings where no discharge was granted was about \$163,000, with a median of about \$184,000. In the Third Circuit, the average debt in these proceedings was about \$78,000, with a median of about \$51,000.

There are a few possible reasons for the trends relating to larger debts. In the First Circuit, the trend may have been influenced by the educational backgrounds of debtors. Of the eight debtors who were unsuccessful in obtaining an undue hardship discharge (and for whom educational background could be discerned), six (or 75%) had degrees above the bachelor's level.¹¹⁵ These degrees included four Master's degrees, a law degree, and a Ph.D.

For the twelve debtors who obtained discharges (and for whom educational background could be discerned), three (or 25%) had degrees above the bachelor's level—all law degrees.¹¹⁶ Moreover, educational background was considered to the detriment of only one of the fourteen successful debtors, compared to three of the twelve unsuccessful debtors.¹¹⁷

Trends were more difficult to discern in the Third Circuit, due in large part to the relative infrequency of undue hardship discharge in the circuit. In fact, the trend of lower incidence of discharge for larger debts may have truly been

114. Given the interest-induced fluidity of the student loan balances, these figures are presented as approximations.

115. Educational background of four of these debtors could not be discerned.

116. Educational background of two of these debtors could not be discerned.

117. Educational background was only considered in five of the proceedings, to the detriment of debtors in four. The lone beneficial consideration resulted in discharge for a debtor possessing an associate's degree.

random. A trend we discuss later—the fact that five of the seven successful discharges were for student loans debts accrued for the benefit of someone else—may be the more consequential (and mostly unrelated) cause of the discharge amount trends.

2. Settlements

Settlements of 523(a)(8) adversary proceedings tended to result in full relief or partial relief. The term “relief” in the settlement context betokens an agreement between the parties to settle the debt for an amount lower than what was owed.¹¹⁸ In both circuits, full relief tended to be more common, accounting for 59% (16/27) of settlement relief in the First Circuit and 57% (34/60) in the Third Circuit.

The distinction between full and partial relief is important because the granting of partial relief is often premised on a debtor agreeing to make timely month payments on the new balance. If a debtor misses a payment, and some inevitably do, the relief is rescinded, and the original balance with interest becomes due. Debtors in this predicament have little recourse for once again seeking the discharge of the debt, because as part of the agreement for partial relief, the debtor stipulates that the debt does not represent an undue hardship.

In the First Circuit, the average amount of settlement relief was about \$31,000, with a median of about \$19,000.¹¹⁹ In Third Circuit proceedings, the average was about \$29,000, with a median of about \$15,000.¹²⁰ In both circuits, student loan balances tended to be higher in proceedings in which partial settlement relief was obtained than in those in which full relief was obtained.

In the First Circuit, the average balance in full relief settlements was about \$29,000, with a median of about \$13,500. In the Third Circuit, full relief balances were about \$24,000 on average, with a median of about \$14,000. In proceedings in which partial relief was obtained, the average balance was about \$89,000 in the First Circuit and \$66,000 in the Third. Median balances were about \$71,000 and about \$37,000 in the First and Third circuits, respectively.

Partial relief tended to be proportionally more generous in the Third Circuit. Average relief in that circuit was about \$36,000, roughly 55% of the average balance of about 66,000.¹²¹ Median relief balance was about 19,000—

118. In proceedings where the parties agree to settle the debt for an amount lower than the full debt, the agreements typically require debtors to stipulate that no undue hardship exists, and if the debtor breaches the terms of the agreement (usually payment obligations), the full debt would be due. By stipulating that no undue hardship exists, the plaintiff cannot seek to have the debt discharged pursuant to a later bankruptcy petition.

119. Of the 26 proceedings in which relief was obtained in the First Circuit, we were able to glean an amount of relief in 22.

120. Of the 61 proceedings in which relief was obtained in the Third Circuit, we were able to glean an amount of relief in 56.

121. Of the 27 Third Circuit proceedings in which partial relief was obtained, we were able to glean balances and relief amounts for 25.

or roughly 51% of the median balance of \$37,000. In the First Circuit, average relief was about \$33,000—37% of the average balance of about \$89,000.¹²² The median relief was about \$22,000, or 31% of the median balance of about \$71,000.

3. *Dismissals*

Dismissals were the most common resolution in both circuits between 2011 and 2014. Dismissals were most often sought via joint motions, though sometimes on debtor motions. The underlying reasons for the dismissals varied and were not always disclosed in the settlement filings. Oftentimes, proceedings were dismissed in order to give the litigants an opportunity to reach other resolutions, such as allowing the debtor to enroll in an income-based repayment plan¹²³ or seek an administrative discharge due to a total and permanent disability. Sometimes the proceedings were dismissed because the debtor had actually received an administrative discharge, thereby rendering the proceeding moot. Dismissals could also be evidence of some debtors simply giving up on pursuing their claims, due to the expense and time associated with doing so.

4. *Default Judgments*

While default judgments could be entered in favor of either party, each of the 30 default judgments entered in the First and Third Circuits between 2011 and 2014 was in favor of the plaintiff. This trend prompts us to theorize that most of these were strategic defaults by creditors who concluded that the plaintiffs had provable undue hardship claims. It seems doubtful that a creditor would unintentionally fail to respond to the filing of a 523(a)(8) adversary proceedings against it. Also, judges may deny motions for default based on insufficient facts, in spite of an opposing party's unresponsiveness. Therefore, a judge's granting of a motion for default is an acknowledgment that the plaintiff has pleaded facts sufficient to make a plausible undue hardship claim.

5. *Overall Relief*

When all types of resolutions are considered, plaintiffs secured student loan bankruptcy discharge or other relief in 51% of First Circuit proceedings and 46% of Third Circuit proceedings between 2011 and 2014. These proportions paint a very different picture than what we saw after only analyzing the undue hardship determinations. These trends likely reflect the proverbial

122. Of the 10 First Circuit proceedings in which partial relief was obtained, we were able to glean balances and relief amounts for nine.

123. *See, e.g.*, Stipulation to Dismiss Adversary Proceeding Without Prejudice, In Re Mattox, (Bankr. W.D. Pa. July 10, 2012) (No. 12-2055).

“bargaining in the shadow of the law” that is commonly associated with non-litigation outcomes.¹²⁴ Table 9 tracks the discharge and relief rates in each circuit by type.

Table 9: Rates of discharge and relief in 523(a)(8) adversary proceedings

	2011-2014				
	Total number of proceedings	Number of discharges/relief			Overall discharge/relief rate
		Undue Hardship	Settlements	Defaults	
First Circuit	91	4	27	15	50.5%
Third Circuit	171	3	60	15	46%

D. Factors Associated with Relief

In order to understand the nature of student loan bankruptcy discharge and relief, it is important to assess the underlying factors. Factors fall into two broad categories: (1) characteristics of the debtor, and (2) structural factors.

Characteristics of the debtor relate to things that are relevant to determining undue hardship. Judges commonly discussed the following six characteristics: (1) employment prospects; (2) health status; (3) eligibility for an income-based repayment plan; (4) age; (5) educational background; and (6) the ratio of student loan debt to total debt. In the settlement context, commonly cited characteristics included: (1) financial difficulties; (2) health status; and (3) age.

Structural factors pertain to the court in which the proceeding was filed and whether the debtor is represented by counsel. The court in which a proceeding is filed is important because it determines the applicable undue hardship test and judicial receptiveness to the debtor’s prayer for relief.¹²⁵ Whether the debtor is represented by counsel is important because legal representation is associated with higher incidences of discharge and relief.¹²⁶

124. See, e.g., Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982) (providing an empirical analysis of this phenomenon in civil litigation).

125. We suspect that the judge to whom the case is assigned influences the outcome of proceedings, but the relative small number of proceedings analyzed in this study makes it difficult to confidently highlight any noteworthy trends.

126. See Tbls. 18 and 19, *infra*.

1. *Debtor Characteristics: Undue Hardship Determinations*

In making undue hardship determinations, most judges explicated the factors upon which they relied.¹²⁷ Between 2005 and 2014, debtor employment prospects were considered in 77% of First Circuit and 55% of Third Circuit undue hardship opinions. These proportions reflect the central role that determining a debtor's current and future ability to earn income plays in undue hardship determinations. Debtors who, in the judge's estimation had favorable employment prospects, were less likely to obtain a discharge than other debtors. For example, in *In re Davis*, the judge held that the debtor's "educational background and experience" made her marketable to "a wide array of prospective employers."¹²⁸ This finding served as a basis for denying the debtor's petition to have her student loans discharged based on hardship.

Employment prospects interact with other factors—such as debtor age, health, and educational background—because they indicate the ability to gain and maintain employment, as well as the type of employment for which a debtor qualifies. Therefore, the proportions above understate the true prominence of employment prospects as a factor, as they only account for direct references in the judicial opinions.

Health status was considered by judges in 58% of the First Circuit proceedings and 69% of the Third Circuit proceedings. Health status interacts with the employment prospects factor. In addition, health status can often provide context regarding how the debtor came to file bankruptcy in the first place.

Eligibility for an income-based repayment plan was considered by judges in 62% of First Circuit proceedings and in 41% of Third Circuit proceedings. These alternative repayment plans are premised on providing relief for debtors experiencing difficulty repaying their loans through standard plans. A detrimental consideration of this factor could be a finding that a debtor had failed to avail herself of these alternative plans prior to seeking discharge. A beneficial consideration could be a finding that a debtor availed herself of such plans or that the plans would not have fundamentally changed the debtor's financial hardship. It is often creditor-defendants that urge judges to consider this factor under the guise of proving a debtor's bad faith.

Debtor age was considered by judges in 31% of proceedings in the First Circuit and 28% in the Third. Like health status, age may often imply a debtor's employment status and future employment prospects. Age can also determine the number of years in which a debtor could reasonably be expected to continue working, placing the length of the creditor-imposed repayment window into an undue hardship context.

127. Most of these explanations were presented in written opinions; however, some judges read their decisions in open court, in lieu of filing written opinions.

128. *Davis v. Nat'l Collegiate Tr. (In re Davis)*, 526 B.R. 136, 147 (Bankr. W.D. Pa. 2015).

Debtor educational background, including whether the debtor completed the education for which the student loans were obtained, was considered by judges in 19% of First Circuit proceedings and 31% of Third Circuit proceedings. Like other factors, the primary significance of educational background was in the context of employment prospects. In considering this factor, debtors with more education were often assumed to have relatively favorable employment prospects.

The ratio of debtors' student loan debt to overall debt was considered by judges in 4% of First Circuit proceedings and 10% of Third Circuit proceedings. The premise of this consideration is a judicial disfavoring of bankruptcy petitions brought principally for the purpose of discharging student loans. Therefore, some judges view a high ratio of student loan debt as evidence of bad faith on the part of the debtor.¹²⁹

Table 10 charts the frequency in which each factor was explicitly considered by judges rendering undue hardship determinations.

Table 10: Frequency of consideration of specific factors in undue hardship determinations

	2005-2014					
	Employ prospects	Health	IBR Eligibility	Age	Education Background	Ratio
First Circuit	77%	58%	61.5%	31%	19%	4%
	20/26	15/26	16/26	8/26	5/26	1/26
Third Circuit	55%	69%	41%	28%	31%	10%
	16/29	20/29	12/29	8/29	9/29	3/29

2. *Effects of Characteristics*

Factors could be considered either to the benefit or the detriment of a debtor. Some factors were more associated with beneficial consideration; others were associated with detrimental consideration. In the First Circuit, age and eligibility for an income-based repayment plan were considered to the benefit of debtors more than half of the time in which these factors were considered at all. In the Third Circuit, almost every factor was considered to the detriment of debtors. Employment prospects and health were the only factors that were

129. *Fabrizio v. U.S. Dep't of Educ.* (*In re Fabrizio*), 369 B.R. 238, 247 (Bankr. W.D. Pa. 2007) (citing the fact that debtor's student loan debt was 80% of the total debt the debtor was seeking to discharge as evidence of bad faith).

beneficial to debtors in at least 30% of considerations. Table 11 charts these trends.

These trends could be reflections of differences in receptiveness to undue hardship claims between the different circuits. It might be that judges in the First Circuit were more likely to search for reasons to grant discharge, while judges in the Third Circuit were more likely to search for reasons to deny discharge. The disparate discharge rates between the circuits are likely manifestations of these approaches.

Table 11: Proportion of beneficial consideration of specific factors in undue hardship determinations

	2005-2014					
	Employ prospects ¹³⁰	Health	IBR Eligibility ¹³¹	Age ¹³²	Education Background ¹³³	Ratio
First Circuit	45%	40%	53%	62.5%	20%	100%
	10/22	6/15	10/19	5/8	1/5	1/1
Third Circuit	37.5%	30%	17%	12.5%	20%	0%
	6/16	6/20	2/12	1/8	2/10	0/3

Some factors were more strongly associated with discharge than others. In First Circuit proceedings in which judges considered debtor employment prospects and eligibility for an income-based repayment plan, discharge was granted at a higher rate than average. On the other hand, when First Circuit judges considered debtor health status or educational background, discharge was granted at lower than average rates.

In the Third Circuit, disproportionately high discharge rates were associated with the consideration of employment prospects and health status.

130. Employment prospects were considered in both favorable and detrimental ways in two proceedings in each the First and Third Circuits.

131. Eligibility for an income-sensitive repayment plan was considered in both favorable and detrimental ways in three proceedings in each the First and Third Circuits.

132. In the First Circuit, age was considered to the benefit of debtors in five proceedings. The average age of debtors in these proceedings was 57. The average in the other fifteen proceedings in which debtor age could be discerned (including three proceedings in which age was a detrimental factor) was 44. In the Third Circuit, age was a beneficial factor in just one proceeding where the debtor was 47 years old. In the other seventeen proceedings in which debtor age could be discerned (including seven in which age was a detrimental factor), the average age was 44.

133. Education background was considered in both favorable and detrimental ways in one proceeding in the Third Circuit.

The consideration of debtor eligibility for an income-based repayment plan, educational background, or age was associated with below-average discharge rates. Table 12 charts undue hardship discharge rates based on the consideration of specific factors.

Table 12: Rates of discharge by consideration of specific factors in undue hardship determinations

	2005-2014						
	Overall	Age	Education Background	Employ prospects	Health	IBR Eligibility	Ratio
First Circuit	52%	50%	40%	55%	47%	56%	100%
		4/8	2/5	11/20	7/15	9/16	1/1
Third Circuit	24%	12.5%	11%	31%	30%	8%	0%
		1/8	1/9	5/16	6/20	1/12	0/3

Viewing the effects of the factors through the frame of identifying those factors most likely to lead to discharge yields a couple interesting trends. In the First Circuit, ten of the 14 (71%) debtors who received discharges were found to have unfavorable employment prospects. In the Third Circuit, six of the seven (86%) debtors who received discharges were found to have health issues, with explicit ties being made to employment prospects for five of the six.

Another interesting trend emerged in the Third Circuit, whereby five of the seven debtors (71%) who received discharges incurred the student loan debts for the benefit of someone else's education, usually a dependent child.¹³⁴ Put another way, five of the six debtors (83%) who incurred the student loan debt in this way obtained a discharge. No such trends were observed in the First Circuit.¹³⁵

These trends suggest that the debtors most likely to receive discharge had unfavorable employment prospects, coupled with an aggravating factor such as health issues—and in the Third Circuit, they obtained the student loan debt for another person's benefit. The numbers are too small to identify definitive profiles, but these trends seem both stark and intuitive.

134. These debtors either co-signed on a student loan for another person or secured a Parent PLUS loan through the federal student aid program. The beneficiary was typically a dependent child.

135. In the First Circuit, only three of the debtors in undue hardship proceedings incurred the debt for someone else's benefit; one of them obtained a discharge.

3. *Debtor Characteristics: Settlements*

Unlike judicial opinions, settlement agreements and orders do not typically identify reasons underlying a resolution. We addressed this issue, however, by imputing reasons for relief using the claims made in debtor complaints, but only in proceedings where the amount of relief exceeded two-thirds of the student loan debt and no reasons were explicated elsewhere. We reasoned that creditors would be unwilling to agree to large relief, unless the facts as presented in the debtor's complaint were provable.

In the First Circuit, there were eighteen proceedings in which a reason underlying the relief could be identified or imputed; in the Third Circuit, there were 42. Settlement relief appeared to be based on at least one of the following three debtor characteristics: (1) financial condition; (2) health status; and (3) age. Akin to employment prospects in undue hardship determinations, debtor financial difficulty was the fundamental basis underlying almost all relief. The significance of the two other factors—health status and age—was most often rooted in the extent to which they affected debtor finances. Therefore, financial difficulty was accompanied as a factor by at least one other factor in the majority of proceedings in which relief was obtained.

In one First Circuit proceeding and in seventeen Third Circuit proceedings, financial difficulty was the sole identified or imputed factor. We found it noteworthy that in these proceedings, relief seemed to be obtained without any additional or aggravating characteristics beyond debtor present and presumably future inability to pay. It is possible that other factors were influential in settlement negotiations, though these factors were not mentioned in ways that were amenable to identification.

We were able to identify or impute health issues in thirteen of the eighteen (72%) First Circuit proceedings that resulted in relief and in half of the 42 proceedings in the Third Circuit. Drilling down further, five of the thirteen (38%) health-related settlements in the First Circuit were based on findings that the debtor had a total and permanent disability.¹³⁶ This type of disability accounted for only two of the 21 (10%) health-related settlements in the Third Circuit. Debtor age was identified or imputed as a factor in 22% of proceedings that resulted in relief in the First Circuit and 24% in the Third Circuit.

Table 13 lists the frequency in which age or health was identified or imputed as a factor underlying settlement relief. The table also lists the number of proceedings in which financial difficulty was the only identified or imputed factor underlying the relief.

136. In these proceedings, the debtors had not already obtained an administrative discharge.

Table 13: Frequency of specific factors being identified or imputed as underlying settlement discharges

	2011-2014		
	Age	Health	Financial difficulty
First Circuit	22%	72%	1
	4/18	13/18	
Third Circuit	24%	50%	17
	10/42	21/42	

4. *Structural Factors*

As mentioned earlier, the court in which a proceeding is filed is important because it determines the applicable undue hardship test and the judicial receptiveness to the debtor's claim. Additionally, legal representation is associated with higher incidences of discharge and relief.

a. *Court in Which Proceeding is Filed*

Debtors in the First Circuit were more than twice as likely as debtors in the Third Circuit to secure a discharge through an undue hardship determination. Over the ten-year period, 2005-2014, discharge was granted in more than half (52%) of First Circuit undue hardship determinations, but less than a quarter (24%) of such determinations in the Third Circuit.

Disparities play out among the judicial districts as well. As a threshold matter, the number of undue hardship determinations varied widely. In the First Circuit, only two districts—Massachusetts and New Hampshire—had more than one undue hardship determination. Each of the Third Circuit districts had at least one undue hardship determination over the 10-year period. But the number of determinations varied—from one in the Delaware District to eleven in the New Jersey District.

Over the ten-year period, the New Hampshire District (in the First Circuit) had the highest rate of discharge in undue hardship determinations (67%); the Western District of Pennsylvania (in the Third Circuit) had the lowest rate (10%).

Table 14 lists the number of undue hardship determinations and the frequency of discharge in the First and Third Circuits respectively.

Table 14: Frequency of First Circuit undue hardship determinations and discharge

First Circuit: 2005-2014			Third Circuit: 2005-2014		
	Undue hardship determination	Discharge Percentage		Undue hardship determination	Discharge Percentage
Maine	1/1	100%	Delaware	0/1	0%
Massachusetts	9/19	47%	New Jersey	3/11	27%
New Hampshire	4/6	67%	PA (ED)	2/5	40%
Puerto Rico	0	--	PA (MD)	1/2	50%
Rhode Island	0	--	PA (WD)	1/10	10%

Disparities among the districts narrow somewhat when the number of undue hardship discharges is viewed in light of the total number of 523(a)(8) adversary proceedings filed in each district.¹³⁷ Viewing the trends in this way highlights the relative rarity of undue hardship discharges, which reflects the rarity of undue hardship determinations overall.

In six districts—three in each the First and Third Circuits—no debtors received discharges through an undue hardship determination. In the New Hampshire District, 12.5% of all 523(a)(8) adversarial proceedings filed between 2011 and 2014 resulted in a discharge through an undue hardship determination. This is the highest proportion among all districts in both circuits. But this proportion is misleading, since it represents only one such discharge out of eight proceedings. And no other district had a relative discharge rate in double-digits. The Massachusetts District had the next highest rate at 6%, with the Middle District of Pennsylvania and the New Jersey District following at 4% and 3% respectively.

Tables 15 list the relative discharge rates through an undue hardship determination between 2011 and 2014 in the First and Third Circuits respectively.

137. Given the concerns about the completeness of the online records, this inquiry required us to focus the analysis on the four-year period, 2011-15.

Table 15: Relative discharge rates via undue hardship determination

First Circuit: 2011-2014				Third Circuit: 2011-2014			
	U.H. discharge	Total APs	Relative discharge		U.H. discharge	Total APs	Relative discharge
Maine	0	20	0%	DE	0	4	0%
MA	3	53	6%	NJ	2	58	3%
NH	1	8	12.5%	PA (ED)	0	45	0%
Puerto Rico	0	1	0%	PA (MD)	1	27	4%
RI	0	9	0%	PA (WD)	0	37	0%
Total	4	91	4%	Total	3	171	2%

b. *Effects of Different Undue Hardship Tests*

A primary culprit behind the disparate rates of undue hardship discharge between the circuits could very well be the different undue hardship tests applied in the circuits. Judges in the First Circuit may opt to apply either the totality or *Brunner* test, but totality predominates. Of the twenty-three First Circuit determinations in our analysis in which a test could be discerned, judges applied the totality test in eighteen and the *Brunner* test in five.¹³⁸ On the other hand, judges in the Third Circuit only apply the *Brunner* test.

The *Brunner* test is considered substantively more stringent than the totality test.¹³⁹ As such, it seems unsurprising that the rate of undue hardship discharge would be higher in proceedings in which the totality test was applied. In our review, the rate of discharge between 2005 and 2014 was 44% in totality

138. We were unable to discern the test in three of the proceedings.

139. See, e.g., G. Michael Bedinger IV, *Time for a Fresh Look at the "Undue Hardship" Bankruptcy Standard for Student Debtors*, 99 IOWA L. REV. 1817, 1829 (2014) ("[T]he *Brunner* test's conjunctive structure extinguishes the inquiry of a debt's dischargeability, perhaps prematurely, if the debtor fails any one of the test's prongs. The totality test, on the other hand, possesses the flexibility to consider 'any additional facts and circumstances unique to the case' without relying on any one factor as dispositive.") (footnotes omitted) (quoting *Hicks*, 331 B.R. 18, at 26.).

proceedings (all in the First Circuit) and 32% in the *Brunner* proceedings (mostly from the Third Circuit).

But even though the particular test applied influences a plaintiff's chances of an undue hardship discharge, there is more to the story. Both tests—even the rather rigid *Brunner*—allow for judicial subjectivities to influence outcomes. This reality seems highlighted by the fact that First Circuit judges granted discharge in 80% of proceedings in which they applied the *Brunner* test, while the discharge rate in the Third Circuit—which exclusively applies the *Brunner* test—was just 24%. Table 16 charts discharge rates based on specific test used.

Table 16: Relative discharge rates via undue hardship determination

	2005-2014					
	Both Circuits		First Circuit		Third Circuit	
<i>Brunner</i>	32%	11/34	80%	4/5	24%	7/29
Totality	*	*	44%	8/18	*	*

While the numbers of cases are too small for us to comfortably draw definitive conclusions, they nonetheless suggest fundamentally different perceptions of undue hardship. As remarked earlier, it might be that judges in the First Circuit were more likely to search for reasons to grant discharge, while judges in the Third Circuit were more likely to search for reasons to deny discharge. And this may have been true irrespective of the test applied.

Undue hardship determinations are uncommon, but we suspect that they hold broader influence over how proceedings are resolved. For example, litigants might be more or less willing to negotiate a settlement based on their perceived odds of success before a bankruptcy judge—bargaining in the shadow of the law. Similarly, creditors might be more willing to allow a debtor to obtain relief through a default judgement if they feel the debtor has a strong undue hardship claim.

In our review, we found speculative hints of the effects of the different judicial postures between the circuits, most notably pertaining to default judgments. Relief through default judgments was more common in the First Circuit than in the Third. Seventeen percent (17%) of First Circuit proceedings ended in default judgment in favor of the debtor, compared to in 9% of proceedings in the Third Circuit. The default judgment trends are interesting because they represent both a seemingly willful lack of defense on the parts of creditors as well as judicial findings that the debtors' claims were at least plausible. Most significantly, default judgments also represent full discharge of the student loan debt.

An intriguing question is whether the higher proportion of default judgments in the First Circuit were influenced by the manner in which judges

tend to decide undue hardship determinations in each circuit. In the First Circuit, some creditors might be more willing to allow a default judgment based on a feeling that mounting a defense is useless.

c. Counsel Representation

A 523(a)(8) adversary proceeding is essentially a trial within the larger bankruptcy case. The evidentiary and fact-finding burdens render these proceedings daunting for most debtor-plaintiffs. Legal representation in these proceedings can be costly, especially for people already experiencing financial distress. Unfortunately, debtors unable (or unwilling) to retain legal representation were less likely to obtain student loan discharge or settlement relief.

Most debtors who filed 523(a)(8) adversary proceedings in the First and Third Circuits between 2011 and 2014 were represented by counsel. A higher proportion of debtors were represented in the First Circuit (82%) than in the Third (77%). A review of counsel representation based on the type of resolution yielded interesting trends. In both circuits, the proportion of debtors represented by counsel was highest in proceedings that ended in default judgements for debtors and lowest in proceedings for which an undue hardship determination was rendered. The trends, taken together, suggest that lawyers were often effective at securing resolutions at stages that were more favorable to their clients than the undue hardship hearing.

This suggestion is particularly strong in the Third Circuit, where only 47% of debtors were represented by counsel in proceedings that ended with an undue hardship determination—a proportion more than 30% lower than the circuit’s overall rate of representation. First Circuit debtors whose proceedings were resolved by an undue hardship determination were represented at a much higher rate than their counterparts in the Third. But the 78% rate was still tied with dismissals for the lowest among all First Circuit debtors. Table 17 presents the counsel representation trends.

Table 17: Proportion of counsel representation based on type of resolution

	2011-2014									
	Undue Hardship		Settlements		Settlement-Dismissals		Defaults		Overall	Percentage
First Circuit	7/9	78%	22/27	81%	32/41	78%	14/15	93%	75/92	81.5%
Third Circuit	7/15	47%	49/60	82%	62/78	79%	13/15	87%	131/168	78%

Counsel representation was not only associated with different types of resolutions, but also with higher rates of discharge. This trend was particularly profound in proceedings in which an undue hardship determination was made. In both the First and Third Circuits, 100% of plaintiffs who received a discharge from a judge between 2011 and 2014 were represented by counsel. Conversely, only 60% of plaintiffs who received an unfavorable undue hardship determination in the First Circuit and 33% in the Third Circuit were represented by counsel. These trends hold even when undue hardship determinations alone are analyzed along the ten-year timeframe.

Table 18 charts representation trends based on resolution during the four-year period, 2011-2014. Table 19 charts representation trends in undue hardship determinations during the 10-year period, 2005-2014.

Table 18: Proportion of counsel representation of debtors by discharge/relief status

	2011-2014					
	Overall	Undue Hardship		Settlements		Default
		Discharge	No Discharge	Relief	Dismissal	Discharge
First Circuit	81.5%	100%	60%	81%	78%	93%
		4/4	3/5	22/27	32/41	14/15
Third Circuit	77%	100%	33%	82%	79%	87%
		3/3	4/12	49/60	62/78	13/15

Table 19: Proportion of counsel representation of debtors by undue hardship determination discharge status

	2005-2014		
	Overall	Undue Hardship	
		Discharge	No Discharge
First Circuit	73%	86%	58%
		12/14	7/12
Third Circuit	52%	86%	41%
		6/7	9/22

In both circuits, debtors who received settlement relief were slightly more likely to be represented by counsel than those who agreed to dismiss their proceedings. This trend was driven by debtors who received full settlement relief. Ninety-four percent of First Circuit debtors who received full settlement relief were represented by counsel; the proportion was ninety-one percent in the Third Circuit. On the other hand, only about 70% of debtors in both circuits who secured partial relief were represented by counsel. These latter proportions fall below the overall representation rates in both circuits as well as the rate among those who agreed to dismiss their proceedings. Table 20 charts representation trends in settlements based on whether relief was full or partial.

Table 20: Proportion of counsel representation of debtors by type of settlement relief

	2011-2014			
	Overall	Settlement Relief		Settlement/ Dismissals
		Full	Partial	
First Circuit	81%	94%	70%	78%
		15/16	7/10	32/41
Third Circuit	79%	91%	70%	79%
		31/34	19/27	62/78

Dismissals were sometimes motivated by the debtor having received an administrative discharge due to a total and permanent disability, rendering the proceeding moot. There were eleven such dismissals between the circuits—one in the First Circuit and ten in the Third. Relatedly, there were seven full relief settlements—five in the First Circuit and two in the Third—that were based on debtors producing documentation supporting claims of a total and permanent disability (in effect an extreme health issue), though they had not received an administrative discharge.

Given the difficulty of proving total and permanent disability, we thought it would be useful to assess whether debtors who were successful in doing so were more likely to be represented by counsel. Confirming our suspicions, we found that the debtor had legal representation in *each* of the eighteen proceedings.

Lastly, when we compared all forms of discharge and relief to all other outcomes (including dismissals), the associations between counsel representation and favorable outcomes remained stark. Put simply, debtors who

were represented by counsel were more likely to obtain favorable outcomes. Table 21 charts these trends.

Table 21: Proportion of counsel representation of plaintiffs by discharge/relief status

	2011-2014	
	Discharge/Relief	No Discharge/No Relief
First Circuit	89%	74.5%
	42/47	35/47
Third Circuit	83.5%	68.5%
	81/97	50/73

CONCLUSION

As stated earlier, the goal of this Article is to provide insight on what happens when debtors seek to have student loans discharged as part of a Chapter 7 bankruptcy petition. We hope that this information adds some, albeit limited, clarity to an area of legal practice that is broadly misunderstood. We caution against drawing general conclusions from the data above, beyond the two circuits analyzed. This Article is intended to be a precursor to a national study we are undertaking. In that study, we plan to analyze a broader set of factors and trends, including more robust analyses of the effects of judges and lawyers as well as the different undue hardship tests on resolutions.

Limited scope aside, the trends in this article highlight the error of assuming that obtaining bankruptcy relief from student loans is impossible. Obtaining relief is surely not an easy undertaking. The laborious (and expensive) manner in which these proceedings have to be litigated contributes to power asymmetries that benefit creditors. But relief is possible, and we imagine there are many debtors who have been counseled against or otherwise discouraged from pursuing discharge—even though they may have benefited from the attempt. If the information in this Article informs and empowers debtors, lawyers, and others to whom it may be relevant, we will consider this undertaking a success.