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Written Testimony of

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"An Undue Hardship? Discharging
Educational Debt in Bankruptcy"

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Witness Background

I am currently a tenured member of the faculty at Seattle University School of Law, which I joined in July 2006. Prior to that, I was an associate professor at Tulane Law School from July 2003 through June 2006. Since entering academia, I have routinely taught courses in bankruptcy and commercial law. Most of my empirical research has focused on the discharge of student loans in bankruptcy and has been published in the *American Bankruptcy Law Journal*, the *Florida State University Law Review*, and the *University of Cincinnati Law Review*.[1]

Prior to entering academia, I worked as an associate in the Business Reorganization and Restructuring Group of Willkie Farr & Gallagher LLP in New York. I also served as a law clerk to the Honorable Prudence Carter Beatty of the United States Bankruptcy Court for the Southern District of New York. I received my J.D. degree from the New York University School of Law, where I served as an executive editor of the *New York University Law Review* and was a recipient of the Judge John J. Galgay Fellowship in Bankruptcy and Reorganization Law. I received my B.A. degree from Yale College.

I currently sit on the board of trustees of the Consumer Education and Training Services (CENTS), a nonprofit organization dedicated to providing a variety of resources to the Seattle community on matters of money management, consumer credit personal finances, and financial literacy. I also serve as a volunteer attorney for the King County Bar Association Debt Clinic. On January 1, 2010, I will begin a three-year term as an academic member of the Editorial Advisory Board of the *American Bankruptcy Law Journal*, a peer-reviewed journal that is published by the National Conference of Bankruptcy Judges. In 2005, I was selected as an American Bankruptcy Law Journal Fellow by the National Conference of Bankruptcy Judges; and in 2008, I was selected as an Institute for Higher Education Law and Governance Fellow in connection with the Houston Higher Education Finance Roundtable at the University of Houston Law Center.

I have not received any federal grants or any compensation in connection with this testimony. I also do not represent any party in connection with student loan issues (both inside and outside of bankruptcy). The views expressed in this written testimony are mine and do not necessarily reflect the views of Seattle University School of Law.

Introduction

Chairman Cohen, Ranking Member Franks, and Members of the Subcommittee:

I am pleased to testify in support of any legislation that would restore the unconditionally dischargeable status of private student loans in bankruptcy that existed prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[2] As student-loan defaults and bankruptcy filings continue to rise in the current economic downturn,[3] more student-loan borrowers will inevitably find themselves within the bankruptcy system seeking forgiveness of their debt. Unfortunately, many of them, including some who are among the most desperate for relief, are unlikely to get the fresh start that the bankruptcy system promises other types of individual debtors.

The general rule in bankruptcy is that all prebankruptcy debts are discharged—that is, a debtor will no longer be personally liable for such debts after emerging from bankruptcy. This represents bankruptcy's fresh start for debtors. The Bankruptcy Code, however, singles out certain types of debts as nondischargeable (e.g., debts for certain income taxes; debts for alimony, maintenance, and child support). Debts for student loans are exceptional insofar as they are the only type of debt that is *conditionally* dischargeable in bankruptcy—that is, the debt is not automatically discharged but can be upon the satisfaction of a certain condition. If a debtor establishes that repayment of the student-loan debt would impose an undue hardship, the debt will be discharged.[4] Accordingly, the Bankruptcy Code requires a court to determine whether a debtor's circumstances warrant forgiveness of such debt.

There are two issues that are of particular concern with the process for discharging student loans in bankruptcy. First, the discharge standard for student loans, undue hardship, is undefined by the Bankruptcy Code. Because it is a vague and indeterminate standard, concerns arise that similarly situated debtors will obtain differential treatment given the inherent subjectivity of the standard. Second, for a debtor to obtain a discharge of student loans, the debtor must initiate an adversary proceeding against the creditor—essentially, a full-blown law suit. Because bringing such a proceeding requires substantial monetary resources, debtors in bankruptcy, already in financial distress, face additional hurdles in obtaining a discharge of their student loans.

My most recent co-authored study on this topic documents and analyzes trial-level outcomes of adversary proceedings in bankruptcy pursuant to which debtors have sought to discharge their student loans.[5] The

goal of the study was to ascertain whether evidence exists suggesting that it is problematic that the current bankruptcy system necessitates litigation as the path to relief from educational debt. My co-author (Professor Michelle R. Lacey from Tulane University) and I conclude that such evidence does exist and that there are important access-to-justice concerns for student-loan debtors. Ultimately, our findings challenge long-standing assumptions regarding the propriety of discharge litigation for relief from student loans in a bankruptcy system that is designed to provide debtors a fresh start.

My written testimony makes the following major points:

1) Empirical evidence suggests that student-loan debtors who seek a discharge of educational debt in bankruptcy suffer from severe financial distress.

2) The legal standard for discharging educational debt in bankruptcy, undue hardship, is currently undefined by the Bankruptcy Code. As such, the standard provides minimal guidance to litigants and judges. This produces differential treatment of similarly situated debtors, with some granted a discharge and others denied a discharge.

3) Legally irrelevant factors that should not bear on the merits of a debtor's claim for relief, such as the level of experience of the debtor's attorney and the identity of the judge assigned to the debtor's case, appear to affect whether a debtor obtains a discharge of his or her student loans. Accordingly, the procedural hurdles that student-loan debtors confront in litigating their claims of undue hardship further exacerbate the problem of inconsistent outcomes.

4) Private student loans are largely unregulated. Without limits on the amount that students can borrow, with limited options for repayment relief, and with variable interest rates, borrowers of such loans often find themselves deeply mired in debt.[6] In 2005, when Congress removed the unconditionally dischargeable status of such loans in bankruptcy, it stripped away the social safety net available to the borrowers of such loans. In the absence of robust nonbankruptcy relief from private student loans, it stands to reason that the negative effects of litigating claims of undue hardship will fall disproportionately on debtors with such loans.

The remainder of my testimony will elaborate on these four points. It will conclude by suggesting that Congress should amend the Bankruptcy

Code (1) to make private student loans automatically dischargeable and (2) to clarify the undue hardship standard.

Debtors Who Seek an Undue Hardship Discharge of Their Student-Loans Likely Suffer from Severe Financial Distress

The following financial portrait of student-loan debtors who seek an undue hardship discharge is derived from my co-authored study that was published in 2009 (the "Discharge Litigation Study").[7] That study focused on the litigation of undue hardship adversary proceedings that were commenced in the U.S. Bankruptcy Court for the Western District of Washington during the five-year period spanning 2002 through 2006.[8] Because the data are confined to the experience of litigants in a single federal judicial district during a half-decade period, it cannot be said that the data are representative of undue hardship discharge litigation nationally, including the profile of debtors who seek such a discharge. That said, the Western District of Washington appears to be comparable to the nation in terms of (1) the consumer bankruptcy filing rate, (2) the level of educational attainment of the adult population, and (3) levels of student-loan debt.[9] Furthermore, regardless of whether the data are nationally representative, they shed light on the profile of certain student-loan debtors who have looked to the bankruptcy system for relief from their educational debt.

The median student-loan debtor in the Discharge Litigation Study suffered from severe financial distress. Consider the following statistics, keeping in mind that all dollar amounts from the study have been converted to 2009 dollars for purposes of this written testimony. The annual income generated by the median debtor's household was $19,188. Once taking into account the annual expenses of the median debtor's household, *exclusive* of any expenses relating to the debtor's student loans, the annual disposable income of the median debtor's household was an annual deficit of $2,064 (i.e., -$2,064). In other words, the median debtor household lacked excess income to repay the debtor's student loans, which for the median debtor amounted to $56,711.

One can get a better sense of the crushing student-loan burden faced by the median debtor in the Discharge Litigation Study by focusing on the ratio of student-loan debt to annual household income—a measure that indicates the number of years of household income the debtor would have to dedicate to fully repay his or her student loans, assuming that the debtor's household during this period of time would live expense free and that the educational debt would not increase by virtue of accrued interest, fees, and the like. When calculating this educational debt-to-income ratio on a debtor-by-debtor basis, the median debtor in the Discharge Litigation Study would have had to devote two years and nine months of household income to fully

repay his or her student loans. In comparison, consider that the median debtor in the general bankruptcy population in 2007 would have had to devote approximately one year and three months of income to fully repay his or her total unsecured debt.[10]

Clearly, many of the debtors in the Discharge Litigation Study faced severe financial distress as a result of their educational debt.[11] Before addressing how the debtors in the study fared in litigating their claims of undue hardship, this testimony will summarize how bankruptcy court doctrine (i.e., published and unpublished opinions issued by bankruptcy courts in connection with student-loan discharge determinations) has interpreted and applied the undue hardship standard.

The Inconsistency of the Undue Hardship Doctrine

The Bankruptcy Code provides that educational debt may not be discharged "unless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents."[12] Because the Code does not define undue hardship, courts have had to establish a framework for analyzing a debtor's claim of undue hardship. The dominant framework, established by the U.S. Court of Appeals for the Second Circuit in *Brunner v. New York State Higher Education Services Corp.*,[13] requires a debtor to show:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[14]

This test has been endorsed and adopted by eight other federal courts of appeals.[15]

In 2005, Professor Lacey and I empirically investigated the manner in which bankruptcy courts have applied the undue hardship doctrine.[16] We examined ten years' worth of opinions issued by bankruptcy courts in undue hardship discharge determinations.[17] In that study, we expected to find statistically significant differences in the demographic and financial characteristics of debtors who were granted a discharge and debtors who were denied a discharge—after all, it is the factual circumstances of a debtor's claim of undue hardship that ought to give content to the law. Contrary to our expectation, however, we found few statistically significant differences between the two groups of debtors.[18] We concluded that legal

outcome was best explained by differing judicial perceptions of how the same standard applied to similarly situated debtors.[19] In other words, bankruptcy court doctrine had generally been inconsistent in its treatment of student-loan debtors.

In a follow-up study,[20] I found that, where the doctrine had been applied consistently, the measure of consistency turned on whether the debtor suffered from a medical condition.[21] After showing how a debtor's health can be an underinclusive metric for gauging a debtor's inability to repay his or her student loans, I concluded that bankruptcy court doctrine had failed to give the undue hardship standard its proper reach—that is, providing relief to student-loan debtors with an inability to repay their educational debt.[22]

The findings from both of these studies raise several concerns. If one conceives of the bankruptcy court doctrine as serving a signaling function to litigants regarding the likelihood of relief for the debtor, and if that doctrine is generally unclear, it seems more likely that litigants will not have overlapping expectations regarding the outcome of undue hardship discharge proceedings. This, in turn, will discourage settlement,[23] thus requiring litigants to incur more litigation costs—which would, on balance, have a disproportionate impact on debtors who file for bankruptcy as a result of financial distress and a lack of monetary resources.[24] Moreover, if the doctrine signals to litigants that suffering from a medical condition is a necessary element for establishing a claim of undue hardship, then the doctrine will likely discourage some healthy debtors with meritorious claims of undue hardship from pursuing a discharge of their educational debt. It is against this doctrinal backdrop that the debtors in the Discharge Litigation Study litigated their claims of undue hardship.

The Negative Effects of Undue Hardship Discharge Litigation

In terms of substantive outcome, the discharge of student loans appears to be the rule rather than the exception in the Western District of Washington: Approximately 57% of the adversary proceedings in the Discharge Litigation Study resulted in some amount of debt discharged (whether through settlement or through trial), with the median debtor obtaining a discharge of approximately 71% of his or her educational debt.[25] At first blush, it appears that the debtors in the study experienced a moderate rate of success. Further considerations, however, suggest that Congress ought to be concerned about the manner in which litigating a claim of undue hardship may encroach upon a student-loan debtor's fresh start.

First, it should be noted that the U.S. Court of Appeals for the Ninth Circuit has held that a court may grant a debtor a partial undue hardship

discharge, provided that the debtor satisfies the burden of proof with respect to the portion of the educational debt that imposes an undue hardship.[26] Accordingly, courts within the Ninth Circuit, including the U.S. Bankruptcy Court for the Western District of Washington, have flexibility in fashioning relief for student-loan debtors, whereas courts in other regions of the nation have worked within the confines of the undue hardship discharge as an all-or-nothing proposition.[27] If applicable legal standards require a showing of undue hardship with respect to all of a debtor's educational debt, it seems reasonable to conclude that such a requirement imposes a higher evidentiary hurdle that reduces the likelihood of prevailing on a claim of undue hardship. The possibility therefore exists that student-loan debtors in other parts of the country do not fare as well as their counterparts in the Western District of Washington.

Second, the Discharge Litigation Study sought to identify the factual characteristics surrounding a debtor's undue hardship claim that were statistically significantly associated with the extent to which the debtor's student loans were discharged. The study considered factual characteristics that the legal doctrine would deem relevant (e.g., the debtor's age, health status, and employment status) and irrelevant (e.g., the experience level of the debtor's attorney, the identity of the judge assigned to the debtor's adversary proceeding) to the merits of the debtor's claim. The disquieting revelations of the study were (1) that legally irrelevant characteristics were associated with legal outcome and (2) that those characteristics were more strongly associated with legal outcome than the handful of legally relevant characteristics associated with legal outcome.[28] Professor Lacey and I concluded that, "[i]f extralegal factors predominantly influence the extent of discharge obtained by student-loan debtors, then policymakers need to reconsider the assumptions they have made regarding the propriety of discharge litigation in a system oriented toward granting substantive relief to debtors."[29]

The Disproportionate Impact of Undue Hardship Discharge Litigation on Debtors with Private Student Loans

In recent years, private student loans have increasingly grown as a source of funding for students' higher education costs.[30] The increased reliance on private student loans can be attributed to the effort of borrowers and their families to close the gap between education costs and other available sources of funding—a gap that has widened as a result of (1) rising tuition rates that have outpaced the rate of inflation, (2) limited amounts of federal aid and scholarship aid, (3) stagnant incomes, and (4) reduced savings (including the disappearance of home equity against which families can borrow).[31] Due to the absence of other options for pursuing the promise of

higher education, borrowers of private student loans unfortunately end up facing higher risks than do borrowers of federal student loans:

> With private loans, options for handling overwhelming debt burden are more limited in comparison to federal loans, and lenders are not mandated to offer any particular relief. . . . Understanding the impact of the availability of economic hardship relief is particularly important for students with the lowest incomes or independent students paying for their own college expenses, a group to which the private loan industry is increasingly reaching out.[32]

In more blunt terms, New York State Attorney General Andrew M. Cuomo has referred to private student loans as the "Wild West of the student loan industry."[33]

Because the costs of private student loans can quickly spiral out of control, and because there exist limited nonbankruptcy options for mitigating the financial distress imposed by such costs, borrowers of private student loans are particularly vulnerable to the negative effects of undue hardship discharge litigation. If they end up seeking relief through the bankruptcy system and subsequently fail to prevail in their claim of undue hardship, they will find themselves struggling interminably under an oppressive amount of educational debt with little to no other options for relief. By stripping away the one social safety net that existed for borrowers of private student loans—that is, the automatic discharge of such loans in bankruptcy—Congress has likely condemned certain student-loan debtors to the Sisyphean task of repaying obligations that will never be extinguished.

Proposed Solutions

In light of my foregoing testimony, I respectfully urge Congress to restrike the balance between student-loan debtors and lenders of private student loans by restoring the automatically dischargeable status of private student loans in bankruptcy. Doing so would provide borrowers of such loans with a much needed social safety net.

Critics of such a proposal are likely to respond that making private student loans automatically dischargeable in bankruptcy will have the negative effects of (1) decreasing the availability of private student loans due to the increased availability of the discharge of such loans and (2) encouraging abuse of the bankruptcy system by borrowers of such loans. In response to the former point, existing empirical research indicates that, subsequent to BAPCPA's enactment and the reduced availability of the discharge of private student loans, the availability of such loans increased

only slightly and only for borrowers with the lowest credit scores.[34] In other words, economic theory aside, the market for private student loans appears to be predominantly insensitive to the risk of bankruptcy discharge.

In response to the latter point, first and foremost, the pecuniary and nonpecuniary costs associated with a bankruptcy filing likely prompt debtors to view bankruptcy relief as an option to be exercised only in the most dire of circumstances rather than an easy fix to their financial distress.[35] Moreover, the Bankruptcy Code provides independent mechanisms for a court to police abuse of the bankruptcy system by student-loan debtors. If a student-loan debtor files for Chapter 7 relief in bad faith, this provides a basis for the court to dismiss the debtor's case;[36] and if a student-loan debtor files for Chapter 13 relief in bad faith, this too provides a basis for the court to dismiss the debtor's case.[37] Accordingly, criticisms of making private student loans automatically dischargeable in bankruptcy are likely to be unfounded and should therefore fall on deaf ears.

I would also urge Congress to clarify the undue hardship standard. Here, there is a simple solution that would bring certainty to the standard while simultaneously harmonizing the Bankruptcy Code. The Code currently provides that, if a debtor seeks to enter into an agreement with a creditor that would make the debtor legally bound to repay a debt that otherwise would have been discharged, such a reaffirmation agreement will be enforceable only if, among other requirements, the "agreement does not impose an undue hardship on the debtor or a dependent of the debtor."[38] With the 2005 amendments to the Bankruptcy Code, Congress provided that a presumption of undue hardship arises in the context of reaffirmation agreements if the debtor's disposable income (i.e., income less expenses) is insufficient to make the payments specified in the reaffirmation agreement.[39] The debtor may rebut the presumption, thereby clearing the way for approval of the agreement, only by identifying an additional source of funds that will enable the debtor to make the scheduled payments.[40]

One witnesses in the reaffirmation context the formulation of undue hardship as a function of presuming that a debtor will have a future inability to repay a debt based on the debtor's current inability to repay. Were Congress to write a similar presumption into the Bankruptcy Code's undue hardship discharge provision, it would relieve debtors from the unreasonable burden that current doctrine has imposed upon them—namely, the requirement to forecast with certainty a future inability to repay that will persist over a significant period of time, a period that can potentially span decades given the long repayment periods for certain student loans.[41] Instead, student-loan creditors would bear the burden of rebutting the presumption of the debtor's inability to repay. This legislative change would

strike a more appropriate balance in a litigation process that unjustifiably favors of creditors:

> Debtors who have filed for bankruptcy in the first instance as a result of financial distress must somehow find the resources to litigate a full-blown lawsuit in order to prove that their predicament qualifies them for relief from their student loans. It does not take much imagination to recognize that a power imbalance exists in this context tilting in favor of student-loan creditors who undoubtedly have more resources and, as repeat players, more familiarity with the system. Thus, the structure of the system threatens access to justice by debtors with the concomitant effect of undermining the fresh start policy in bankruptcy.[42]

Finally, incorporating such a presumption would bring a consistent meaning to the phrase "undue hardship" throughout the Bankruptcy Code.

Conclusion

The House of Representatives recently signaled its commitment to the plight of student-loan borrowers by passing the Student Aid and Fiscal Responsibility Act of 2009,[43] which would expand federal aid to college students. For that commitment to be fully realized, however, this chamber must be equally responsive to the plight of student-loan debtors who seek bankruptcy relief from their educational debt. To do otherwise is to allow our higher education finance system to be plagued by inconsistent policies—that is, "a public-oriented approach to student-loan origination but a business-oriented approach to student-loan collection."[44] It is my hope that Congress will enact legislation similar to that which I have proposed in my testimony, and I stand ready to assist the Subcommittee in any way that I can to make that hope become reality.

Thank you for considering my views.

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Associate Professor of Law

[1] Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179 (2009) [hereinafter Pardo & Lacey, *Undue Hardship Discharge Litigation*]; Rafael I. Pardo, *Illness and Inability to Repay: The Role of Debtor Health in the Discharge of Educational Debt*, 35 FLA. ST. U. L. REV. 505 (2008); Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405 (2005) [hereinafter Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*]. These articles are available at http://ssrn.com/author=355713.

[2] In using the phrase "private student loan," I am specifically referring to an "educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual." 11 U.S.C. § 523(a)(8)(B) (2006). Congress amended the Bankruptcy Code in 2005 to include such loans among the types of educational debt that can discharged only upon a showing of undue hardship. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (codified at 11 U.S.C. § 523(a)(8)(B)). Prior to 2005, such debts were automatically dischargeable in bankruptcy. *See* 11 U.S.C. § 523(a)(8) (2000) (amended 2005).

[3] *See*, *e.g.,* Tara Siegel Bernard & Jenny Anderson, *Downturn Drags More Consumers into Bankruptcy*, N.Y. TIMES, Nov. 16, 2008, at A1; Anne Marie Chaker, *Student Loans: Default Rates Are Soaring*, WALL. ST. J., Apr. 21, 2009, at D1; Tamar Lewin, *Student Loan Default Rate Rises*, N.Y. TIMES, Sept. 15, 2009, at A14.

[4] 11 U.S.C. § 523(a)(8) (2006).

[5] *See* Pardo & Lacey, *Undue Hardship Discharge Litigation*, *supra* note 1.

[6] *See* Sandra Block, *Private Student Loans Pose Greater Risk*, USA TODAY, Oct. 25, 2006, at 1B; Diana Jean Schemo, *With Few Limits and High Rates, Private Loans Deepen Student-Debt Crisis*, N.Y. TIMES, June 10, 2007, at A28.

[7] *See* Pardo & Lacey, *Undue Hardship Discharge Litigation*, *supra* note 1. For additional data documenting the financial characteristics of student-loan debtors who have sought an undue hardship discharge of their educational debt, see Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*, *supra* note 1, at 452-76.

[8] For a description of how the data for the study were obtained, see Pardo & Lacey, *Undue Hardship Discharge Litigation*, *supra* note 1, at 202-03.

[9] *See id.* at 200-02.

[10] *See* Robert M. Lawless et al., *Did Consumer Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 373 (2008) (reporting median unsecured debt-to-income ratio of 1.22 for debtors who filed for bankruptcy in 2007).

[11] For further details regarding the financial profile of the debtors in the Discharge Litigation Study, see Pardo & Lacey, *Undue Hardship Discharge Litigation*, *supra* note 1, at 206-08.

[12] 11 U.S.C. § 523(a)(8) (2006).

[13] 831 F.2d 395 (2d Cir. 1987) (per curiam).

[14] *Id.* at 396.

[15] *See* Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 400 (4th Cir. 2005); Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385 (6th Cir. 2005); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004); U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003); Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1241 (11th Cir. 2003); United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1112 (9th Cir. 1998); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 306 (3d Cir. 1995); *In re* Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993). Other courts have adopted a "totality of the circumstances" test, including the U.S. Court of Appeals for the Eight Circuit. *See* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 553 (8th Cir. 2003).

[16] Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*, *supra* note 1.

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

[18] *See id.* at 481-86.

[19] *See id.* at 495-509.

[20] *See* Pardo, *supra* note 1.

[21] *See id.* at 509-13.

[22] *See id.* at 516-24.

[23] In the Discharge Litigation Study, 18% of the undue hardship adversary proceedings went to trial. Pardo & Lacey, *Undue Hardship Discharge Litigation*, *supra* note 1, at 210. This trial rate starkly contrasts with the trial rate that has been documented for all adversary proceedings in bankruptcy, which Elizabeth Warren has found to be in steady decline: While 16% of all adversary proceedings in the nation went to trial in 1985, the percentage dropped to 5% by 2002. *See* Elizabeth Warren, *Vanishing Trials: The New Age of American Law*, 79 AM. BANKR. L.J. 915, 930 (2005). In discussing the difference in these trial rates, Professor Lacey and I have observed the following:

> The high trial rate [for undue hardship adversary proceedings] has the potential to be problematic. It has been suggested that the diminishing trial rate in bankruptcy adversary proceedings can be attributed to the evolving certainty in decisional standards, which has better enabled parties to agree on expected outcomes and thus reach settlement with greater frequency. We have already noted that the undue hardship standard appears to be far from certain. Perhaps this accounts for the high trial rate for undue hardship discharge adversary proceedings relative to adversary proceedings generally. If so, then it becomes imperative that the standard be clarified, particularly because of the adverse impact that such uncertainty is likely to have upon a debtor's fresh start.

Pardo & Lacey, *Undue Hardship Discharge Litigation*, *supra* note 1, at 210-11 (footnotes omitted).

[24] For further discussion of this litigation dynamic, see Pardo & Lacey, *Undue Hardship Discharge Litigation*, *supra* note 1, at 190-92.

[25] *Id.* at 213.

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

[27] *See, e.g.,* Pincus v. Graduate Loan Ctr. (*In re* Pincus), 280 B.R. 303, 311-12 (Bankr. S.D.N.Y. 2002).

[28] *See* Pardo & Lacey, *Undue Hardship Discharge Litigation*, *supra* note 1, at 223-29.

[29] *Id.* at 235.

[30] INST. FOR HIGHER EDUC. POLICY, THE FUTURE OF PRIVATE LOANS: WHO IS BORROWING, AND WHY? 1 (2006); Block, *supra* note 6; Schemo, *supra* note 6.

[31] *See* INST. FOR HIGHER EDUC. POLICY, *supra* note 30, at 13; Jonathan D. Glater, *College Costs Outpace Inflation Rate*, N.Y. TIMES, Oct. 23, 2007, at A23; Jonathan D. Glater, *Fewer Options for Paying Costs of College*, N.Y. TIMES, Apr. 12, 2008, at A1; Jonathan D. Glater, *In a Downturn, College Strains Family Budgets*, N.Y. TIMES, Oct. 17, 2008, at A1; Jonathan D. Glater, *Scholarships for College Dwindle as Providers Pull Back Their Support*, N.Y. TIMES, June 27, 2009, at A8; Tamar Lewin, *Higher Education May Soon Be Unaffordable for Most Americans, Report Says*, N.Y. TIMES, Dec. 3, 2008, at A19.

[32] INST. FOR HIGHER EDUC. POLICY, *supra* note 30, at 11.

[33] *Paying for College: The Role of Private Student Lending*, Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs, 110th Cong. (June 6, 2007) (written testimony of Andrew M. Cuomo, State of N.Y. Att'y Gen., at 3), *available at* http://banking.senate.gov/public/_files/cuomo.pdf.

[34] *See* MARK KANTROWITZ, FINAID.ORG, IMPACT OF THE BANKRUPTCY EXCEPTION FOR PRIVATE STUDENT LOANS ON PRIVATE STUDENT LOAN AVAILABILITY (2007), *available at* http://www.finaid.org/educators/20070814pslFICOdistribution.pdf

[35] In terms of pecuniary costs, future extensions of credit may be more difficult for a debtor to obtain postbankruptcy. *See* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 122 (2006). In terms of nonpecuniary costs, debtors must struggle with the stigma associated with filing for bankruptcy. *See* Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213 (2006) (concluding that, over a twenty-year period, the stigma of bankruptcy has increased).

[36] *See* 11 U.S.C. § 707(b)(1) (2006) (providing for dismissal of a Chapter 7 case on the basis of abuse); *id.* § 707(b)(3)(A) (providing that a bad-faith filing of a Chapter 7 petition can constitute an abuse).

[37] *See id.* § 1325(a)(7) (providing that a court may not confirm a Chapter 13 plan unless "the action of the debtor in the filing the petition was in good faith"); *id.* § 1307(c)(5) (providing that denial of confirmation of a Chapter 13 plan constitutes cause for dismissing a debtor's

Chapter 13 case). For the argument that, as a statutory matter, a debtor's good faith is an improper consideration in analyzing a claim of undue hardship, see Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*, *supra* note 1, at 514-19.

[38] If the debtor is represented by counsel, the debtor's attorney must file a declaration or affidavit to this effect. *See* 11 U.S.C. § 524(c)(3)(B). If the debtor is unrepresented by counsel, the court must make that determination. *See id.* § 524(c)(6)(A)(i).

[39] *See id.* § 524(m)(1).

[40] *See id.*

[41] Professor Lacey and I have previously described this burden as imposing upon student-loan debtors "the unenviable and nearly impossible task of proving a negative about their future—that is, convincing the court that nothing could improve their financial circumstances." Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*, *supra* note 1, at 512.

[42] Pardo & Lacey, *Undue Hardship Discharge Litigation*, *supra* note 1, at 183.

[43] H.R. 3221, 111th Cong. (as passed by the House of Representatives, Sept. 17, 2009).

[44] Pardo & Lacey, *Undue Hardship Discharge Litigation*, *supra* note 1, at 235.