Comments of Bankruptcy Scholars on Evaluating Hardship Claims in Bankruptcy

The following is a letter signed by more than 40 law professors in response to the Department of Education's Request for Information ("RFI") regarding Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings (Docket No. ED–2017–OPE–0085).

The letter was prepared by the following, and signed by an additional 41 professors:
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May 22, 2018
Jean-Didier Gaina
U.S. Department of Education
Office of Postsecondary Education, 400 Maryland Avenue SW
Washington, DC 20202–6110
Via upload to: http://www.regulations.gov

Dear Ms. Gaina:
Please see the submission below in response to the Department of Education's Request for Information ("RFI") regarding Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings (Docket No. ED–2017–OPE–0085).

We are legal academics who research and teach about bankruptcy law and related topics. Many of the below signatories have also written articles specifically about student loans and bankruptcy.

We appreciate the opportunity to submit these comments for your consideration and are at your disposal should you wish to discuss any of these comments further.

Although by law student loan borrowers may receive a discharge of their student loans when repayment would constitute an "undue hardship," in practice many borrowers who would qualify for such a discharge in bankruptcy do not receive it. This proposal recommends changes to the Department of Education's policies and regulations that govern federal loan guarantors and loan servicers. The proposal would facilitate the appropriate discharge of student loans by establishing 10 categories of borrower circumstances under which the Department should agree to the borrower's discharge of federal student loans. The aim of the proposal is to establish clear, easy-to-verify, dire circumstances that merit the Department's acquiescence to a student loan discharge because would promote the efficient use of taxpayer funds, which should not be used to challenge the discharge where there is clear undue hardship, or where the costs to fight a discharge are disproportionate to future repayment of the loan.

I. Proposal and Recommendations

In this RFI, the Department asked for comments on "(1) [f]actors to be considered in evaluating undue hardship claims; (2) weight to be given to any such factors; (3) whether the use of two tests results in inequities among borrowers; (4) circumstances under which loan holders should concede an undue hardship claim by the borrower; and (5) whether and how the 2015 Dear Colleague Letter should be amended."[1]

Our recommendations are guided by two primary goals: (1) increasing access to justice and (2) reducing costs to taxpayers. The linchpin of these goals is simplicity.[2] Our primary recommendation is that the Department define ten categories of easy-to-verify personal circumstances in which the Department will not challenge a borrower who seeks an undue hardship discharge.

A. Increasing Access to Justice

The evidence is overwhelming that the United States' legal system suffers from an access to justice problem.[3] This is true in civil[4] and criminal law,[5] and has also been documented with regards to bankruptcy generally and student loan dischargeability specifically.[6]

Given the significant gap between individuals' need for legal advice and the limited resources available to meet that need, we focus our proposals on the most vulnerable student loan borrowers. The dual aims of our clear-cut procedures are to encourage individuals suffering undue hardship to seek a discharge and to avoid the need for an attorney. These objectives align with the Department's stated goal of "ensuring that borrowers for whom repayment of their student loans would be an undue hardship are not inadvertently discouraged from filing an adversary proceeding in their bankruptcy case."[7]

Our primary recommendation is that the Department define ten categories of easy-to-verify personal circumstances in which the Department will not challenge a borrower who seeks an undue hardship discharge.

B. Reducing Costs to Taxpayers

As noted in the 2015 Dear Colleague Letter, when dealing with undue hardship claims, the Department ought to "avoid inefficient use of taxpayer resources through protracted or unnecessary litigation."[8] A natural consequence of the clear criteria we propose is cost reduction. In this case, the savings inure to the taxpayer.

Our recommendations go further than the Department's 2015 letter[9] and focus on ways in which the Department could ensure that the most deserving borrowers obtain fast relief. By design these proposals only apply to a narrow set of borrowers. The intent is also that borrowers who fit one or more of these definitions will be able to easily verify their eligibility such that servicers and holders of FFEL or Perkins loans can minimize the costs to taxpayers.

Recommendation 1: Clear Criteria for Simple Undue Hardship Determinations

We recommend that the Department adopt a presumption of undue hardship for borrowers who seek to discharge their student loans in bankruptcy and who meet one or more of the ten different criteria listed below.

a. Borrower's household income has been at the federal poverty level[10] or below for the last five years; OR
b. Borrower's current income is less than 150% of the federal poverty level AND at least one of the following criteria is also met:[11]
    1. the borrower is receiving disability benefits under the Social Security Act; OR
    2. the borrower has been determined by the Secretary of Veterans Affairs to be unemployable due to a service-connected disability; OR
    3. the borrower's income is derived solely from retirement benefits under the Social Security Act or from a retirement fund or account; OR
    4. the borrower is a caregiver of an adult or child and qualifies for services pursuant to the Lifetime Respite Care Act, 42 U.S.C. 300ii; OR
    5. the borrower is a family caregiver of an eligible veteran pursuant to 38 U.S.C §1720G; OR
    6. three or more years have passed since the borrower ceased attending an institution of higher education and the borrower has not obtained a credential from the educational program for which the student loans were borrowed; OR
    7. the student attended a school that closed and did not complete a program of study at that school because the school closed while the student was enrolled; OR
    8. the borrower owes less than $5,000 in aggregate federal student loans; OR
    9. The student loan first became due more than 25 years ago.

Recommendation 2: Minimizing Litigation Costs

To avoid the unnecessary costs of opposing an undue hardship discharge, the Department's regulations, guidance, and contracts should direct its servicers/agents to accept from the borrower reasonable proof that the borrower meets the criteria specified above without engaging in formal litigation discovery. This proof can include a written and sworn statement by the borrower made under penalty of perjury; the borrower's bankruptcy Schedule of Current Monthly Income;[12] tax return transcripts for the relevant time period; verification of benefits from the Social Security Administration; or similar evidence.

Recommendation 3: Implementation

Once the Department or its agent(s) determines that one or more of these undue hardship criteria has been met by

the borrower, the Department should direct its servicer/agent to promptly enter into a settlement agreement or consent order with the borrower providing for the discharge of the student loan debt.

The Department should monitor servicers, collectors, guarantee agencies, and institutions. In the event that the Department observes that the costs of opposing discharge expended by guaranty agencies, institutions, or direct loan servicers are consistently above one-third of the loans for which discharge is sought, we recommend the Department consider implementing enforcement mechanisms that will discourage this inefficient use of funds by capping reimbursement of legal fees at one-third the total amount of the loan.

Recommendation 4: Data

To understand how the student loan market functions, and to allow academics and advocates to better advise to Department about how it should consider "undue hardship" discharge requests, it is crucial that the Department collect and release more data about federal student loans. We describe some of the current gaps in data in Part V.

Recommendation 5: Stop Seizure of Federal Benefits and Tax Refunds

The Department should cease garnishing the social security income, disability benefits, and tax refunds of individuals who have defaulted on their student loans. This recommendation falls admittedly outside the Department's RFI. Nonetheless, we include it here because it directly affects the population of student loan borrowers who most frequently will qualify for an undue hardship, causing unnecessary additional hardship prior to the discharge of student loans.

Many students leave school without acquiring sufficient skills or knowledge to increase their marketability for higher-paying employment.

I. Justifications for Recommendations

A. Using Objective and Clear Criteria will Simplify Many Undue Hardship Determinations and Reduce Unnecessary Subjectivity

A student loan may not be discharged in bankruptcy unless continued liability on the loan would "impose an undue hardship on the debtor and the debtor's dependents."[13] Neither Congress nor the ED has defined "undue hardship." Instead, the courts have been left to fashion a workable definition.

Unsurprisingly, different judges have defined undue hardship differently, using various multi-factor tests to evaluate whether an undue hardship exists.[14] Not only are different tests used in different courts, but even judges that use the same test often apply that test dissimilarly. In other words, it appears that factually-similar cases often yield different legal conclusions.[15] Perhaps this is inevitable when multi-factor tests are used because such tests "require consideration of a combination of factors."[16] While this sort of ad-hoc weighing of various factors may be thought to lead to justice in individual cases, it appears to be unfairly subjective when viewed across bankruptcy cases.

The subjective nature of decision-making in the student loan discharge context is well-known and has been a long-standing concern. In a 2005 study, Professors Rafael Pardo and Michelle Lacey found that debtor's "counsel's years of experience; the identity of the judge assigned to the case; and whether the case was settled or went to trial" were three of the most important determinants of whether a student loan would be discharged.[17] Yet none of these factors are at all related to whether or not a borrower meets the "undue hardship" standard.[18] Without objective standards uniformly applied, the decision of whether or not to discharge a particular student loan for imposing an undue hardship often appears arbitrary.[19]

The case for an objective standard has been repeatedly made by academics,[20] elected representatives,[21] and the national media.[22] As noted above, we have proposed a set of objective standards to remedy this problem. We have sought to reduce the appearance of arbitrary decision making by eliminating the use of multi-factor tests in certain circumstances. Under our proposal, if any single standard is satisfied a presumption of dischargeability should arise in the borrower's favor.[23]

B. Focus on Helping the Most Vulnerable

"Every year, 1 million student borrowers default on nearly $20 billion in federal loans."[24] More than half of these defaulters eventually resolve the default by paying off their debt.[25] But the other forty-five percent of defaulters are unable to return their defaulted loans to good standing. It is this group that may seek to discharge their student loans in bankruptcy. Ultimately, our recommendations are targeted at the individuals who are most vulnerable to default and be unable to repay their student loans. [26]

Ben Miller, the senior director for Postsecondary Education at the Center for American Progress, recently analyzed the data to come up with a portrait of the average defaulter.[27] His report found "that the average defaulter looks very different from [the] stereotypical portrait of a college student."[28] The average defaulter is older, poorer, and more likely to come from a background underrepresented on college campuses.[29] In addition, the median defaulter borrows substantially less than the median non-defaulter; less than $10,000 in total.[30] Further, nearly one-half of all defaulters never finish college.[31] In other words, the portrait of borrowers who strategically default on their student loans, the concern drove Congress to limit the bankruptcy discharge in the first instance, does not appear to accurately reflect the contemporary portrait of student loan defaulters.[32] The portrait of a recent graduate immediately defaulting on their student loans is also complicated by the reality that the median defaulter attempted to repay his or her loans for more than two years and nine months before eventually defaulting.[33]

Student loan defaulters are typically not heavily-indebted recent graduates looking to put their new degrees to use while avoiding paying back the educational debt that enabled them to land these entry-level positions in the first place. Many students leave school without acquiring sufficient skills or knowledge to increase their marketability for higher-paying employment. Sometimes this is because the school they attended provided poor training,[34] sometimes it is because students have dropped out.[35] In any case, these students have made an investment in their own human capital but, for various reasons, that investment was not successful.[36]

As a form of "rough justice,"[37] we recommend that the Department agree to an undue hardship determination (or a settlement with a similar effect) where the borrower earns less than 150% of the poverty level and owes less than $5,000 in aggregate federal loans. In our view, the likely cost of litigating the nondischargeability of these loans is highly likely to outweigh the benefits. We foresee a great deal of benefit to struggling and deserving borrowers as well as taxpayers from a blanket rule in this space.

Similarly, we recommend that the Department agree to an undue hardship determination (or a settlement with a similar effect) where the borrower earns less than 150% of the poverty level and the federal loan first became due more than 25 years ago. Our reasoning is that after a certain time, it becomes financially unreasonable for the government to continue collecting from an individual. There are good utilitarian reasons for ceasing to collect after a lengthy period of time has passed, as one of us has argued elsewhere.[38] We know that most bankruptcy debtors struggle financially for many years before filing bankruptcy.[39] We also know about the emotional and sometimes physical costs of coping with debt.[40] The student loan borrowers who would benefit from this recommendation have lived in the shadow of these debts for over two decades. During this 25-year period, servicers and collectors would have been permitted to engage in a variety of severe measures to collect from the borrower. As noted above, we recommend the cessation of measures that tend to target the most vulnerable, and those who are most likely to qualify for a discharge due to undue hardship.

Like many facially neutral policies in the United States,[41] the student loan system has differing effects across racial and economic lines.[42] In fact, the current system has been called "a crisis for African American borrowers."[43] Our recommendations would help alleviate the disproportionate impact of the system on certain traditionally disadvantaged groups. For example, nearly one half of African American borrowers defaulting on their loans as compared to only twenty-nine percent of borrowers overall.[44] Black borrowers borrow more money for college[45] and black borrowers' student loans are far more likely to negatively amortize than white or Hispanic/Latino borrowers.[46] While the reasons for these differences are not known with a high degree of certainty, we think that our recommendations would disproportionately benefit some of the most vulnerable members of American society.[47]

C. Income-Driven-Repayment Is Broken and Not a Suitable Alternative for the Most Vulnerable

Federal student loan borrowers have more options if they cannot repay their loans than private loan borrowers. On paper, the various income-driven repayment (IDR) options might be seen a reason why a student loan bankruptcy discharge should remain difficult to obtain.[48] We disagree. While many federal student loans are theoretically eligible for some form of IDR plan, all the available empirical evidence indicates that the IDR system is failing the most vulnerable borrowers.

The CFPB Student Loan Ombudsman has documented alarming trends in the implementation of current default resolution and income-driven-repayment (IDR) programs available to federal student loan borrowers. The numbers are staggering: there are over 8 million federal student loan borrowers in default and 15% of those borrowers defaulted just in 2016.[49] Eighty percent of those defaulted borrowers would have been eligible for an IDR payment, which begs the question: why are they in default?[50]

As the Ombudsman's Report explained, "a combination of problematic servicing practices and government programs can prevent the most vulnerable student loan borrowers from accessing affordable repayment plans—increasing costs to taxpayers and failing to set up borrowers for success over the long term."[51] The primary problem appears to be the implementation of the loan rehabilitation program and the IDR recertification process. More specifically, rehabilitation is failing many borrowers since "[n] early one in three borrowers who exited default through rehabilitation defaulted for a second time within 24 months, and over 40 percent of borrowers redefaulted within three years."[52]

In "stark contrast," as the CFPB noted, "borrowers who used consolidation to resolve their student loan defaults are more likely to immediately begin to repay their debts successfully."[53] Rehabilitations make up about 70 percent of federal loan collections,[54] which elevates the magnitude of the concern. We urge the Department to investigate these issues and implement reforms that increase the likelihood that all borrowers eligible for IDR are able to enroll and stay enrolled. In the meantime, we do not believe that the theoretical availability of IDR should be used to prevent a borrower who meets the criteria we've suggested in our first recommendation from obtaining a discharge of their loans through bankruptcy.

D. Stop Use of the Treasury Offset Program

When a student loan borrower defaults, the IRS may garnish their tax return or their social security checks.[55] The U.S. Department of Treasury administers the Treasury Offset Program,

pursuant to which the federal government may seize any federal payments owed to a taxpayer to offset any "delinquent debt owed to a federal or state agency."[56] Private lenders may not seize a student's tax refund.[57] The federal government garnishes the social security and social security disability benefits of more than one hundred thousand people age 50 and older each year to offset their student loan debt.[58] In both cases, the government's seizure of these benefits can exacerbate the garnishee's already precarious financial situation.

In discussing the garnishment of social security benefits, Senator Claire McCaskill argued that "[w]e can't be garnishing people's Social Security in a way that puts them into poverty."[59] But this is exactly what we are doing. Each year, the Department of Education garnishes the benefits paid to "tens of thousands of seniors and people with disabilities," often helping to push such folks deeper into poverty.[60] It is counterproductive to provide government benefits with one hand only to take them away with the other.[61] Whether or not our other recommendations are followed, we recommend that the government cease garnishing all the federal public assistance benefits and tax refunds of individuals in order to offset any student loan-related debts.

II. Courts' Current Interpretations of "Undue Hardship" result in the Disparate Application of the Discharge of Student Loans

The majority of courts considering whether a debtor faces an "undue hardship" in paying student loans rely on the three-pronged test in *Brunner*.[62] Courts' current interpretations of the *Brunner* test vary widely such that the "undue hardship" discharge is not applied uniformly across the country.[63] The standard proposed in this response is designed to reduce the subjectivity and disparity in discharge of student loans in bankruptcy across the country.

The majority of courts considering whether a debtor faces an "undue hardship" in paying student loans rely on the three-pronged test in *Brunner*.

Under the *Brunner* test, debtors must demonstrate that they (1) "cannot maintain, based on current income and expenses, a 'minimal' standard of living" for themselves and dependents if required to repay their 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 they have made "good faith efforts to repay the loans."[64] The remainder of courts follow the totality of the circumstances test set forth by the Eighth Circuit.[65] This test relies on similar criteria as *Brunner*.[66]

Courts apply these tests in differing and inconsistent ways, resulting in a wide variation of access to justice across the country. For example, in interpreting the first prong of the *Brunner* test, some courts hold that "minimal standard of living" should be based on the debtor's reasonable monthly expenses as set by the Code's means test.[67] Although this interpretation is consistent with the text of § 523(a)(8), in contrast, other courts require debtors to minimize monthly expenses.[68] Some of these courts rely on poverty guidelines to determine "minimum" monthly expenses.[69] Other courts engage in a case-by-case examination of the debtors' circumstances, specifying which individual expenses are not reasonable.[70]

Similarly, courts apply different standards for determining when additional circumstances indicate that the debtors' state of affairs will persist (prong 2). Some courts require a "certainty of hopelessness."[71] Other courts do not require such desperate circumstances,[72] and have criticized the conversion of the "undue hardship" standard into one requiring a "certainty of hopelessness."[73]

If the debtor has a medical condition, some courts require the debtor to provide additional evidence of the veracity of the medical condition,[74] while others allow the debtor simply to testify to the condition.[75] These differences in interpretation lead some courts to import the *Brunner* test's "good faith" prong into the first two prongs, in turn leading to further variations in the application of "undue hardship." In addition, courts differ on whether debtors should be required to have entered into a repayment plan or have attempted to negotiate different payment terms with lenders.[76] These differences cumulatively result in wide variations in how courts apply to "undue hardship" standard and in which debtors are granted discharges of their student loan debt.[77]

If the Department adopts the standard proposed in this response, the disparity in application of "undue hardship" should decrease, at least among the most vulnerable populations of borrowers.

III. Suggestions for Implementation

A. The Department's Authority to Promulgate Regulations and Guidance

Pursuant to 20 U.S.C. § 1221e-3, the Department of Education has authority to make and amend rules and regulations to govern the applicable programs administered by the Department, including the federal student loan program. Currently, regulations applicable to the subject of student loans in bankruptcy are found at 34 C.F.R. § 682.402(i)(1) and 34 C.F.R. § 674.49(c) ("Regulations"). These Regulations require outside lenders to assert any applicable defense to avoid discharge of a loan in bankruptcy, unless the lender determines (a) that repayment would impose an undue hardship on the borrower, or (b) that the expected costs of opposing discharge exceed one-third the total amount owed on the loan. Pursuant to its authority, the Department has issued further guidance regarding these provisions, including its "Dear Colleague Letter" of July 7, 2015.

In the Letter, the Department directed loan holders through the FFELP and Perkins programs, guaranty agencies and institutions, respectively, to follow a two-step analysis to determine if the holder would not oppose a claim of undue hardship in bankruptcy, consistent with the Regulations.[78] The Letter gave additional guidance regard the first inquiry by describing the *Brunner* and totality of the circumstances legal tests and describing some examples of relevant factors to be consider. The Letter further indicated that the Department follows similar guidance in responding to actions for discharge of debt brought against loans held by the Department, also known as direct loans.

B. Proposed Implementation of the Above Proposals

It is our position that implementation of the proposals suggested above would be most effective if accomplished with the amendment of current regulations, accompanied by more detailed guidelines. These guidelines would apply universally to both loans held by the Department and loans guaranteed by the government. We would further recommend that these guidelines be published on the Department website in plain English, with an explanation of their significance to borrowers, and with the goal of informing borrowers who might be considering attempting a discharge of their student loans in bankruptcy. In addition, we

would propose the Department exercise greater oversight of loan holders and servicers with regards to the above proposals to ensure their consistent implementation across loans and borrowers.

1. Rule Amendment On Costs Evaluation

As currently written, the Regulations establish a presumption that loan holders will oppose a discharge in bankruptcy *even if doing so would not be cost-effective.* A Bloomberg analysis of contracts between the government debt collectors in May 2017 has indicated that the government pays $38 for every $1 collected,[79] yet the Regulation dealing with FFELP loans indicates that, if the guaranty agency has determined that costs of opposing a discharge will exceed one-third the total amount of the loan, it nonetheless "may, but is not required to," engage in activities to oppose the discharge. Insofar as compensation structures for lenders creates the incentives to continue holding uncollectable loans this language permits and even encourages lenders to oppose a discharge despite a determination that the cost would be disproportionate to the benefit. Accordingly, we recommend altering the language of 34 C.F.R. § 682.402(i)(1) as follows:

> (iii) If the guaranty agency determines that repayment would not constitute an undue hardship, the guaranty agency must then determine whether the expected costs of opposing the discharge petition would exceed one-third of the total amount owed on the loan, including principal, interest, late charges, and collection costs. If the guaranty agency has determined that the expected costs of opposing the discharge petition will exceed one-third of the total amount of the loan, it [shall stipulate to the discharge of the borrower's student loans. If the expected costs of opposing the discharge petition will not exceed one-third of the total amount of the loan, the guaranty agency shall -] [~~may , but is not required to, engage in the activities described in paragraph (i)(1)(iv) of this section.~~]
>
> [(A) Oppose the borrower's petition for a determination of dischargeability; and
>
> (B) If the borrower is in default on the loan, seek a judgment for the amount owed on the loan.]

We further recommend amending 34 C.F.R. § 674.49(c) to mirror this language, as follows:

> (5) If the expected costs of opposing discharge of such a loan [exceed one-third of the total amount owed on the loan, the institution shall stipulate to the discharge of the loan. If the expected costs of opposing discharge of the loan are less than or equal to] one-third of the total amount owed on the loan, the institution shall –
>
> (i) Oppose the borrower's request for a determination of dischargeability; and
>
> (ii) If the borrower is in default on the loan, seek a judgment for the amount owed on the loan.

(Alterations underlined and bracketed.)

In the event that the Department observes that the costs of opposing discharge expended by guaranty agencies, institutions, or direct loan servicers are consistently above one-third of the loans for which discharge is sought, we encourage the Department implement enforcement mechanisms that will discourage this inefficient use of funds by capping reimbursement of legal fees at one-third the total amount of the loan.

2. Guidelines as to Undue Hardship

In addition to this amendment, we recommend issuing an instructive document explaining the parameters of the Department of Education's undue hardship standard and making this document freely available to the public and accessible via a hyperlink on the Department of Education's homepage.

We further recommend edits to 34 C.F.R. § 682.402(i)(1)(iv) and 34 C.F.R. § 674.49(c) that would direct guaranty agencies and institutions to follow the instructions set forth on the web page. The instructions would map the proposals as outlined above, and would communicate to both loan holders and loan servicers the Department's position regarding the specific standards to be used in evaluating whether or not to oppose an effort to discharge student loans in bankruptcy. The regulations would then direct guaranty agencies and institutions to quickly settle cases in which there is undue hardship in order to minimize costs associated with the loans and more speedily resolve cases.

The proposed change to 34 C.F.R. § 682.402(i)(1) is as follows:

> (iv) The guaranty agency must [follow the Undue Hardship Instructions, available at [insert hyperlink], when responding to a complaint for a determination of dischargeability under 11 U.S.C. 523(c)(8). If the guaranty agency determines that a finding of undue hardship is warranted, the institution should promptly enter into a settlement agreement with the borrower stipulating to the discharge of the loan.] ~~use diligence and may assert any defense consistent with its status under applicable law to avoid discharge of the loan. Unless discharge would be more effectively opposed by not taking the following actions, the agency must -~~
>
> ~~(A) Oppose the borrower's petition for a determination of dischargeability; and~~
>
> ~~(B) If the borrower is in default on the loan, seek a judgment for the amount owed on the loan.~~

The proposed change to 34 C.F.R. § 674.49(c) is as follows:

> (1) ~~The institution must use due diligence and may assert any defense consistent with its status under applicable law to avoid discharge of the loan.~~ [The institution must follow the ~~procedures in this paragraph~~ Undue Hardship Instructions, available at [insert hyperlink] when responding to a complaint for a determination of dischargeability under 11 U.S.C. 523(c)(8). If the institution determines that a finding of undue hardship is warranted, the institution should promptly enter into a settlement agreement with the borrower stipulating to the discharge of the loan.] ~~on the ground that repayment of the loan would impose an undue hardship on the borrower and his or her dependents, unless discharge would be more effectively opposed by avoiding that action."~~

(Alterations underlined and bracketed.)

Providing the standards laid out in the Undue Hardship Instructions to guaranty agencies and institutions will ensure uniformity and facilitate the quick and cost-effective resolution of bankruptcy cases. These standards will serve the essential purpose of increasing access to justice for individuals suffering from undue hardship. Individuals in bankruptcy do not receive an automatic evaluation of undue hardship for purposes of obtaining a discharge. Rather, they must file a complaint, and evidence suggests that individuals who would otherwise be entitled to an undue hardship discharge are discouraged from doing so by the procedural requirements involved.[80] A clearer understanding of the principles used by the Department in determining whether or not to oppose a claim for undue hardship, as set forth on the Department's website, will increase transparency and permit these individuals to make an informed decision regarding the exercise of their legal rights. This will also reduce costs to the taxpayer and discourage frivolous claims by providing clearer guidance as to the

Department's standard for undue hardship.

We further recommend that the Department establish and publicize standards for the substantiating documents a borrower needs to demonstrate proof of undue hardship, in keeping with the proposals outlined above. Within the Undue Hardship Instructions, guaranty agencies and institutions should be directed to accept the substantiated claims of the borrower without further investigation or use of formal litigation discovery. This will further reduce costs to the taxpayer while establishing a clear standard for the substantiation of undue hardship claims for borrowers.[81]

3. Regulations for Non-guaranty Agencies/ Loan Servicers

Although traditionally loan servicers of direct loans funded by the Department have mirrored their practices after those required in the C.F.R. regulations governing guaranty agencies and FFEL lenders, the Regulations do not explicitly apply to these contractors, and no other regulation is directed specifically at direct loan servicers. Because there is no C.F.R. on point, there is a risk that contractors will not follow these rules, that there will be insufficient transparency, and that there will not be redress in situations where contractors ignore the Undue Hardship Instructions. Accordingly, we recommend that the Department of Education review its regulations and amend its regulations to clarify that these regulations are also binding on contractors, where appropriate.

There is almost no information available about the intersection of bankruptcy and student loans.

IV. Data about Student Loan Borrowers and Outcomes Will Help Craft Better Policy

To understand how the student loan market functions, and to allow academics and advocates to better advise to Department about how it should consider "undue hardship" discharge requests, it is crucial that the Department collect and release more data about federal student loans. At present, data about student loans comes from three primary sources. First, the National Center for Education Statistics (NCES) posts data from the Integrated Postsecondary Data System. These data include who gets student loans in a given year, the dollar value of student loans in a given year, and the proportion of students repaying their debt, disaggregated by institution and by certain student characteristics. Second, the NCES administers a set of national surveys that use representative samples of students. From these surveys, it reports data on borrowing, including cumulative debt and private loan debt, by certain student and institutional characteristics. Third, the Department publishes some information about the performance of student loans on its websites. These data include volume of applications and disbursement of federal student loans, aggregate information about the student loan portfolio, including breakdowns by debt size, location, school type, loan status, repayment plan, and delinquency status, and limited information on loans by servicer.[82]

Even when considered in aggregate, this information is inadequate to assess the market for federal student loans. The data illustrate borrowers' outcome in aggregate, but do not allow for an assessment of "why borrowers ended up the way they did, and what could be done to improve their results."[83] For example, these resources contain little data useful to evaluate how delinquency differs by amount of debt, income and education level achieved, which borrowers face the greatest risk of default, and the handling by servicers of borrowers' complaints.[84] There also is little data about whether the Department's servicers are implementing student loan policies such that borrowers are likely to repay or to seek repayment assistance when needed.[85] For those borrowers who do seek help, there likewise is little data about income-repayment plans, including which borrowers enroll in these plans, factors that may cause a borrower to default on these plans, and whether these plans lessen repayment issues.[86]

A. General Data Gaps

Given these gaps in publicly-available information, there are a few ways in which the Department may expand its data reporting practices to improve the data available so that academics and advocates may better assess the market for federal student loans. To the extent possible to preserve individual borrower anonymity, the Department should release data, at the level of an individual borrower about:

1. borrower characteristics, such as delinquency, income, education level, original loan balance, program attended, current loan balance (at the individual borrower level);
2. utilization of loan forbearance, deferment, and income-based repayment plans, including the borrower outcomes under each of these options;
3. borrower complaints to the Department about servicers and collectors; and
4. borrower complaints to servicers or collectors.

The complaint information described in 3 and 4 should include how servicers and collectors process complaints and complaint outcomes. The Department should also release more information about what it gets from borrowers when they complain through the Federal Student Aid (FSA) Feedback System and to the FSA Ombudsman.

Finally, to ensure that data used by policy-makers and researchers is accurate, the Department should allow for the revision of data.[87]

B. Bankruptcy-Specific Data Desert

There is almost no information available about the intersection of bankruptcy and student loans, such as the number of federal student loan borrowers who file bankruptcy (and which type), whether debtors make payments on student loans while they are in bankruptcy, how many debtors attempt to obtain a discharge, and the Department's actions in adversary proceedings regarding student loan discharge.[88]

We propose that to the extent possible to protect privacy, the Department release data on bankruptcy petitions that involve a borrower who has liability on a federal student loan.

To the extent possible, we'd ask the Department consider providing borrower-level data about all bankruptcy petitions that involve a federal student loan that includes:

1. characteristics about the debtor (bankruptcy chapter filed, bankruptcy district where filed, total amount owed in federal student loans, number of loans);
2. the Department's position on the bankruptcy petition (e.g., consented to settlement, litigated undue hardship determination); and
3. outcome information on bankruptcy petitions where the borrower had at least one federal student loan (e.g., no adversary proceeding file, adversary ended with settlement, adversary ended in favor of the Department after a trial, etc.).

We would also request that this data be linked to the general loan-level data specified above.

If borrower-level data is not available, we recommend the department provide *annual* aggregate data at the level of *the*

bankruptcy district where the bankruptcy petition was filed and with regard to *each type of bankruptcy chapter* applicable (7, 11, 12, and 13). This could include, for example:

1. number of bankruptcy petitions that listed federal student loans as one or more of their debts;
2. mean and median amount owed in federal student loans by those borrowers;
3. number of bankruptcy petitions where a borrower filed adversary proceedings to discharge federal student loans;
4. number of times in which the Department consented to a settlement of a full or partial discharge of federal student loans;
5. number of times in which a debtor obtained a full or partial discharge of their federal student loans without a settlement with the Department;
6. number of appeals the Department filed, per level of court filed (e.g., bankruptcy appellate panel, district court, court of appeals); and
7. mean and median total litigation costs to oppose adversary proceedings for the set of cases in cases in which the Department opposed the debtor's discharge.

Additionally, in connection with recommendation 4 in Part I regarding implementation, particularly to minimize litigation costs, the Department should collect data about undue hardship litigations costs incurred by servicers, collectors, guarantee agencies, and institutions. In addition to using these data to monitor costs, the Department should publicly release these data regarding litigation costs incurred by these entities.

We note that the Department's Federal Student Aid office previously proposed a single platform for all borrower accounts.[89] This platform should ease the burden and cost of collection of data that the Department can then publicly release.

Endnotes

1 Department of Education, Request for Information on Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings 83 Fed. Reg. 7460, 7461 (Feb. 21, 2018) [hereinafter Department of Education Undue Hardship RFI].

2 "The simpler a rule is, the fewer provisions there are and the less it costs to enforce them." Luigi Zingales, *Why I Was Won Over by Glass-Steagall*, Fin. Times (June 10, 2012) https://www.ft.com/content/cb3e52be-b08d-11e1-8b36-00144feabdc0?mhq5j=e5.

3 Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 Conn. L. Rev. 741 (2015); Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 94 Judicature 156 (2010)

4 Deborah L. Rhode, *Whatever Happened to Access to Justice*, 42 Loy. LA L. Rev. 869 (2008).

5 Deborah L. Rhode, Access to Justice 122 (Oxford Univ. Press 2004).

6 Most Americans who file bankruptcy have struggled with financial problems for at least two years before filing, oftentimes "go[ing] without healthcare, food, and utilities, [and losing] homes and other property. . . ." Pamela Foohey et al., *Life in the Sweatbox*, Notre Dame L. Rev. (forthcoming 2018), https://papers.ssrn.com/abstract=3126901 (last visited May 9, 2018).

7 Department of Education Undue Hardship RFI, *supra* note 1.

8 2015 Dear Colleague Letter, GEN-15-13 (July 7, 2015), at 4, *available at* https://ifap.ed.gov/dpcletters/attachments/GEN1513.pdf.

9 Our proposal was inspired by a letter to the Department signed by Congressman Steve Cohen (TN-09) and Senators Dick Durbin (D-IL), Jack Reed (D-RI) and Elizabeth Warren (D-MA) with U.S. Representatives John Conyers (D-MI), Elijah Cummings (D-MD), and Hank Johnson (D-GA). *See* Cohen, 6 Members of Congress Urge Education Secretary to Bring More Fairness to Struggling Students (March 16, 2014), *available at* https://cohen.house.gov/press-release/cohen-6-members-congress-urge-education-secretary-bring-more-fairness-struggling [https://perma.cc/CQK3-6F4J] [hereinafter Cohen *et. al.* Letter].

10 The federal poverty guidelines are the same across most of the United States (except Alaska and Hawaii) but vary based on household size. In 2018, a 1-person household earning less than $12,140 is considered below poverty. For a 2-person household the 2018 poverty level was $16,460; a 3-person $20,780; and a 4-person $25,100. *See* U.S. Department of Health and Human Services, https://aspe.hhs.gov/poverty-guidelines, [https://perma.cc/7YRJ-LN2Z]. By comparison, the median income for a 1-person household in Mississippi was $39,231 in 2018. Department of Justice, Census Bureau Median Family Income By Family Size (Cases Filed Between November 1, 2017 and March 31, 2018, Inclusive), https://www.justice.gov/ust/eo/bapcpa/20171101/bci_data/median_income_table.htm [https://perma.cc/VX4M-3HDA].

11 As noted earlier, some of these recommendations were inspired by and are very similar to ones made by Representative Cohen and others in 2014. *See* Cohen *et. al.* Letter, *supra* note 9.

12 Bankruptcy Form 22A, 22B, or 22C depending on the type of bankruptcy filed.

13 11 U.S.C. § 523(a)(8).

14 *See, e.g.*, Brunner v. New York State Higher Educ. Serv. Corp., 831 F.2d 395 (2d Cir.1987); Long v. Educ. Credit Mgmt. Corp *(*In re *Long*), 322 F.3d 549 (8th Cir. 2003) (using a totality-of-the-circumstances test).

15 *See, e.g.,* Chrystin Ondersma, *Undue Hardship in the Fifth Circuit – What Does the Law Require*?, (2018) (on file with authors).

16 2015 Dear Colleague Letter, *supra* note 8, at 5 ("Evaluation of an undue hardship claim is rarely completed on the basis of a single factor, but rather requires consideration of a combination of factors.")

17 Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 J. of Legis. 185, 228 (2012) (citing Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 Am. Bankr. L.J. 179, 229 (2009)).

18 Taylor, *supra* note 17, at 228 (noting that these factors "should be irrelevant to determining the merits of an undue hardship case").

19 Chrystin Ondersma, *Undue Hardship in the Fifth Circuit – What Does the Law Require?* (2018) (on file with authors) (discussing the current situation as one where "judges may inject their personal preference as to the debtor's spending choices" about whether debtors' have too many children, are taking the appropriate prescription medication for their mental health issues, should shelter their grandchildren from abuse, or care for elderly parents) (case citations omitted).

20 *See, e.g.*, Taylor, *supra* note 17, at 228.; Craig Peyton Gaumer, *Chaos in the Courts The Meaning of Undue Hardship in 11 U.S.C. 523(a)(8) and the Argument for Establishing a Uniform Federal Standard*, Am. Bankr. J. (May 2004), https://www.abi.org/abi-journal/chaos-in-the-courts-the-meaning-of-undue-hardship-in-11-usc-523a8-and-the-argument-for; Rebekah Keller, *The Undue Hardship Test: The Dangers of a Subjective Test in Determining the Dischargeability of Student Loan Debt in Bankruptcy*, 82 Mo. L. Rev. 211 (2017); see also G. Michael Bedinger VI, *Time for a Fresh Look at the "Undue Hardship" Bankruptcy Standard for Stu-*

dent Debtors, 99 Iowa L. Rev. 1817 (2014); Kevin J. Smith, *Defining the Brunner Tests' Three Parts: Time to Set a National Standard for All Three Parts to Determine When to Allow the Discharge of Federal Student Loans*, 58 S.D. L. Rev. 250 (2013).

21 Cohen *et. al.* Letter, *supra* note 9.

22 *Cf.* Tara Siegel Bernard, *Judges Rebuke Limits on Wiping Out Student Loan Debt*, N.Y. Times (July 17, 2015), https://www.nytimes.com/2015/07/18/your-money/student-loans/judges-rebuke-limits-on-wiping-out-student-loan-debt.html.

23 Couched in statutory terms, the presumption would be that if the student loan is not discharged, the loan would presumptively impose an undue hardship on the debtor and the debtor's dependents, if any. *See* 11 U.S.C. § 523(a)(8).

24 Ben Miller, *Who Are Student Loan Defaulters?*, Ctr. For Am. Progress (Dec. 14, 2017, 12:01 AM), https://www.americanprogress.org/issues/education-postsecondary/reports/2017/12/14/444011/student-loan-defaulters/ (citing Office of Federal Student Aid, "Default Rates," available at https://studentaid.ed.gov/sa/about/data-center/student/default).

25 *Id.*

26 According to data from the Consumer Bankruptcy Project, approximately one-third of families who seek relief under the Bankruptcy Code have incomes that are at or below 150% of the federal poverty level at the time of their bankruptcy filing. Although data for the years leading up to their bankruptcy filing are not available, the data we do have offers an upper limit of how many people our proposal would include. *See* Data provided by Bob Lawless and Pamela Foohey (on file with authors).

27 Miller, *supra* note 24.

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *See, e.g.,* Rajeev Darolia & Dubravka Ritter, *Strategic Default Among Private Student Loan Debtors: Evidence from Bankruptcy Reform*, Federal Reserve Bank of Philadelphia Working Paper No. 17-38 (2017), https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2017/wp17-38.pdf?la=en ("Laws that inhibit debtors from discharging their student loan debt were passed because of the concern that student loan debtors have the incentive to strategically declare bankruptcy even if they have, or expect to have, sufficient income to service their debt."); *see also* Constantine Yannelis, *Strategic Default on Student Loans*, (working paper, Oct. 2016), http://faculty.chicagobooth.edu/workshops/financelunch/past/pdf/Strategic%20Default.pdf ("Policy makers have long assumed that strategic behavior on the part of borrowers is a threat to the functioning of student loan programs, despite limited evidence of the magnitude or even presence of such effects.").

33 Miller, *supra* note 24 ("Even after a borrower leaves school, it typically takes some time for them to default. In fact, the median defaulter took two years and nine months to default after entering repayment—significantly longer than the nine months it takes to default without a payment.")

34 Matt Krupnick, *States, Federal Government Cracking Down on For-profit Colleges*, CNNMoney (Mar. 12, 2014: 7:16 AM) (noting that more than sixty percent of state attorneys general were investigating whether various for-profit colleges were "leaving students with heavy loan debt and without marketable job skills.").

35 Katherine M. Porter, *College Lessons: The Financial Risks of Dropping Out*, *in* Broke: How Debt Bankrupts the Middle Class 85-100 (Katherine M. Porter ed., 2012) (explaining that incurring educational debt without earning a degree can lead to bankruptcy); *cf.* Miller, *supra* note 24 (discussing which students default on their student loans and noting that "nearly one-half of all defaulters never finish college").

36 Constantine Yannelis, *Strategic Default on Student Loans*, (working paper, Oct. 2016), http://faculty.chicagobooth.edu/workshops/financelunch/past/pdf/Strategic%20Default.pdf ("Student loans are used to finance investments in human capital.")

37 We borrow from Alexandra Lahav's use of the term in the civil litigation context. Alexandra D Lahav, Rough justice (2010), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1562677 (defining the term as "the attempt to resolve large numbers of cases by using statistical methods to give plaintiffs a justifiable amount of recovery").

38 Dalié Jiménez, *Ending Perpetual Debts*, 55 Houston L. Rev. 609 (2018) (proposing a seven year automatic discharge on private consumer debts).

39 Foohey *et al.*, *Life in the Sweatbox*, *supra* note 6 (reporting that "[t]wo thirds (66.4%) of households struggled to pay their debts for more than two years. And almost a third (30%) of households reported suffering through serious financial problems for five years or longer.").

40 Jiménez, *Ending Perpetual Debts*, *supra* note 38 at 638-39.

41 "On its face, bankruptcy law is race blind . . . The system's operation may not be neutral as to race, however—a possibility that has particular cultural resonance in the United States where African Americans have long suffered financial disadvantages." Katherine Porter, *College Lessons: The Financial Risks of Dropping Out*, Broke: How Debt Bankrupts the Middle Class 85 (Katherine Porter ed., 2012). *See also* Pamela Foohey, *Lender Discrimination, Black Churches, and Bankruptcy*, 54 Hous. L. Rev. 1079–1138 (2016); Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. Empirical Legal Stud. 393–429 (2012); A Mechele Dickerson, *Race Matters in Bankruptcy*, 61 Wash. & Lee L. Rev. 1725 (2004).

42 *See, e.g.,* Judith Scott-Clayton and Jing Li, Black-white disparity in student loan debt more than triples after graduation, Brookings (Oct. 20, 2016), https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-than-triples-after-graduation/ (last visited May 15, 2018); Brandon A. Jackson & John R. Reynolds, *The Price of Opportunity: Race, Student Loan Debt, and College Achievement*, 83 Sociological Inquiry 335–368 (2013) ("On the one hand, student loans reduce educational inequality that otherwise results from disadvantaged students' struggles to pay for college and complete college in a timely fashion. At the same time, the degree to which loans reduce racial inequality is diminished by black students' higher loan amounts, the large number of black students who borrow but do not finish college, and the large racial difference in the odds of defaulting on a loan.").

43 Miller, *supra* note 24.

44 *Id.* (citing Ben Miller, "New Federal Data Show a Student Loan Crisis for African American Borrowers," Center for American Progress, October 16, 2017, available at https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers/.)

45 *See, e.g.,* Emily Deruy, *The Racial Disparity of the Student-Loan Crisis*, Atlantic (Oct. 24, 2016), https://www.theatlantic.com/education/archive/2016/10/why-debt-balloons-after-graduation-for-black-students/505058/ (describing the problem as "well-known" and "widely covered").

46 "Black borrowers who began school during the 2003-2004 academic year owed 113% of what they originally borrowed 12 years later, CAP found. That's compared to 65% for white borrowers and 83% for Hispanic or Latino borrowers." Jillian Ber-

man, How Race Affects Student Debt, MarketWatch (Dec. 27, 2017: 7:59 p.m.), https://www.marketwatch.com/story/how-race-affects-student-debt-2017-10-16; *see also* Deruy, *supra* note 43 (discussing research by Judith Scott-Clayton and Jing Li).

47 Some have suggested that discrimination is the culprit. *See, e.g.* Jillian Berman, *The Black-White Wealth Gap is Fueled by Student Debt*, MarketWatch (May 6, 2018 10:27 AM), https://www.marketwatch.com/story/how-student-debt-is-fueling-the-racial-wealth-gap-2018-05-03 (citing https://www.ssc.wisc.edu/cde/cdewp/2018-02.pdf) [https://perma.cc/635C-M3E3] (noting that one reason for these trends could be discrimination in the job market against people with black-identifying names).

48 For a discussion of some of the problems Susan M. Dynarski, An Economist's Perspective on Student Loans in the United States (2014), https://www.brookings.edu/research/an-economists-perspective-on-student-loans-in-the-united-states/ (last visited May 15, 2018).

49 https://www.consumerfinance.gov/about-us/blog/new-data-documents-disturbing-cycle-defaults-struggling-student-loan-borrowers/ [https://perma.cc/Q8KT-TTYB]

50 https://www.americanprogress.org/issues/education-postsecondary/news/2017/05/19/432751/income-driven-repayment-isnt-enough-prevent-default/

51 https://www.consumerfinance.gov/about-us/blog/new-data-documents-disturbing-cycle-defaults-struggling-student-loan-borrowers/ [https://perma.cc/Q8KT-TTYB]

52 *Id.* at 5.

53 *Id.* at 6.

54 *Id.*

55 *See, e.g.*, Betsy Mayotte, *What to Do When a Tax Refund Is Seized for Student Loans*, U.S. News (Feb. 10, 2016: 10:00 AM), https://www.usnews.com/education/blogs/student-loan-ranger/2016/02/10/what-to-do-when-a-tax-refund-is-seized-for-student-loans (re garnishing tax returns); Danielle Douglas-Gabriel, *The Disturbing Trend of People Losing Social Security Benefits to Student Debt*, Wash. Post (Dec. 20, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/12/20/the-disturbing-trend-of-people-losing-social-security-benefits-to-student-debt/?utm_term=.cddd516ab32c (re garnishing social security).

56 Mayotte, *supra* note 52.

57 Douglas-Gabriel, *supra* note 52.

58 *See id.* ("Unpaid debt has resulted in the government garnishing the benefits of 114,000 people age 50 and older in the past year, more than half of whom were receiving Social Security disability rather than retirement income, the GAO report said.").

59 *See id.*

60 *Id.*

61 *Id.* (quoting Senator Warren as describing this trend as "predatory and counterproductive.")

62 Brunner v. N.Y. Higher Educ. Servs. Corp. (*In re* Brunner), 831 F.2d 395 (2d Cir. 1987).

63 *See, e.g.*, Rafael I Pardo & Michelle R Lacey, *The Real Student-Loan Scandal : Undue Hardship Discharge Litigation*, 83 Am. Bankr. Inst. L. Rev. 179, 183 (2009) [hereinafter Pardo & Lacey, *Real Student-Loan Scandal*] ("Simply put, the legal doctrine [regarding the discharge of student loans] suggests that the law targets debtors who do not deserve to be targeted, and, to make matters worse, those debtors face inconsistent application of the law."); 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, 480 (2005) [hereinafter Pardo & Lacey, *Undue Hardship*] ("[W]hat has proved to be most troublesome regarding application of the law has not been the infrequency with which relief has been granted, but rather the haphazard fashion in which courts have determined whether a debtor's circumstances support a claim of undue hardship that warrants forgiveness of educational debt."); Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 J. Legis. 185, 185 (2012) (discussing how current applications of "undue hardship" results in "rampant inconsistency in the manners in which similarly-situated debtors (and creditors) are treated by the courts").

64 *Id.* at 396.

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

66 Under the totality of the circumstances test, courts consider: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) the debtor's reasonable and necessary living expenses; and (3) any other relevant facts and circumstances. *Id.* at 554.

67 Demmons v. R3 Educ., Inc. (*In re* Demmons), 2016 Bankr. LEXIS 3659, at *18 (E.D. La 2016); *see also* U.S. Dept. of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 92 (5th Cir. 2003) (holding that because the debtor's "monthly expenses exceed his monthly income, he has no ability at the present time to maintain a minimal standard of living if forced to repay his loans").

68 Justice v. Educ. Credit Mgmt. Corp. (*In re* Justice), 2016 Bankr. LEXIS 4100 at *12 (N.D. Miss. Nov. 26, 2016); *In re* Webb, 132 B.R. 199, 202 (Bankr. M.D. Fla. 1991).

69 *In re* Justice, 2016 Bankr. LEXIS 4100 at *12; Knox v. Sallie Mae (*In re* Knox), 2007 Bankr. LEXIS 3873, at *4 (S.D. Miss. Nov. 6, 2007).

70 *See, e.g.*, *In re* Bene, 474 B.R. 56 (Bankr. W.D. N.Y. 2012); *In re* Walker, 406 B.R. 840, 863 (Bankr. D. Minn. 2009); *In re* Mitcham, 293 B.R. 138 (Bankr. N.D. Ohio 2003); Pardo & Lacey, *Real Student-Loan Scandal, supra* note 61, at 196-97 (overviewing courts' interpretation of the first prong of the *Brunner* test).

71 White v. Educ. Credit Mgmt. Corp. (*In re* White), 2008 Bankr. LEXIS 4617, at *14 (E.D. Texas 2008).

72 O' Donohoe v. Panhandle Plains Higher Educ. Auth. (*In re* O' Donohoe), 2013 Bankr. LEXIS 2415, at *11 (Bankr. S.D. Tex. June 13, 2013) ("If a debtor can demonstrate that some condition will, in all likelihood, inhibit the long-term ability to repay the student loan debt, the second prong of the Brunner test is satisfied.").

73 Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 884-85 (7th Cir. 2013); *see also* Pardo & Lacey, *Real Student-Loan Scandal, supra* note 61, at 198-99 (overviewing courts' interpretation of "future inability to repay").

74 *See* Educ. Credit Mgmt. Corp. v. Blake (*In re* Blake), 377 B.R. 502, 509 (E.D. Tex. 2007).

75 *In re* O' Donohoe, 2013 Bankr. LEXIS 2415, at *11 (citing Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 359-60 (6th Cir. 2007)).

76 *See In re* O' Donohoe, 2013 Bankr. LEXIS 2415, at *17; Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 917 (B.A.P. 9th Cir. 2013); Educ. Credit Mgmt. Corp. v. Jorgensen, 479 B.R. 79, 89 and n. 4 (9th Cir. 2012)); Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 Santa Clara L. Rev. 329, 379-80 (2013) (discussing courts' consideration of whether debtors participated in alternate repayment plans).

77 *See* Pardo & Lacey, *Real Student-Loan Scandal, supra* note 61, at 199-200; Pardo & Lacey, *Undue Hardship*, *supra* note 61.

78 2015 Dear Colleague Letter, GEN-15-13 (July 7, 2015), *available at* https://ifap.ed.gov/dpcletters/attachments/GEN1513.pdf.

79 *See* Emily Wilkins, *Student Loans to Cost $10 Billion More than Expected, CBO Projects*, Bloomberg Law, BNA's Bankruptcy Law Reporter, April 10, 2018.

80 *See* Rafael I. Pardo, *The Undue Hardship Thicket: On Access*

to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy, 66 Fl. L. Rev. 2101, 2104 (2014)
81 *Id.* at 2112.
82 *See* Deanne Loonin & Julie Margetta Morgan, *Federal Student Aid: Can We Solve a Problem We Do Not Understand?* 7-9 (Jan. 11, 2018), https://ssrn.com/abstract=3098185.
83 *Id.* at 9. *See also* Ben Miller, *Who Are Student Loan Defaulters?*, Center for American Progress (Dec. 14, 2017), https://www.americanprogress.org/issues/education-postsecondary/reports/2017/12/14/444011/student-loan-defaulters/ (noting the limitations of data released by the Education Department).
84 *See* Seth Frotman & John McNamara, *Increasing Transparency in the Student Loan Market*, Consumer Fin. Protection Bureau (Feb. 16, 2017), https://www.consumerfinance.gov/about-us/blog/increasing-transparency-student-loan-servicing-market/; Letter from Ted Mitchell, Under Secretary, U.S. Department of Education to James Runcie, Chief Operating Officer, Federal Student Aid, *Policy Direction on Federal Student Loan Servicing* (July 20, 2016), https://www2.ed.gov/documents/press-releases/loan-servicing-policy-memo.pdf [hereinafter Mitchell Letter]; Susan Dynaski, *We're Frighteningly in the Dark About Student Debt*, NY Times (March 22, 2015), https://www.nytimes.com/2015/03/22/upshot/were-frighteningly-in-the-dark-about-student-debt.html.
85 *See* Loonin & Morgan, *supra* note 79, at 9-10.
86 *See* Ingrid Schroeder & Erin Currier, *Potential Solutions to the Student Debt Challenge? Yes, but More Data Needed*, Pew Charitable Trusts (March 9, 2018), http://www.pewtrusts.org/en/about/news-room/opinion/2018/03/09/potential-solutions-to-the-student-debt-challenge-yes-but-more-data-needed; Frotman & McNamara, *supra* note 81.
87 *See* Jill Barshay, *The Accuracy of Federal Education Data*, The Hechinger Report (May 9, 2013), http://educationbythenumbers.org/content/the-accuracy-of-federal-education-data_119/ [(discussing data revision and locking).
88 The Consumer Bankruptcy Project collects some data about student loans. *See* Katherine Porter, *College Lessons: The Financial Risks of Dropping Out*, in Broke: How Debt Bankrupts the Middle Class 85, 92-95 (Katherine Porter, ed., 2012) (discussing student loan debt), Katherine Porter, *Methodology of the 2007 Consumer Bankruptcy Project*, in Broke: How Debt Bankrupts the Middle Class 235 (Katherine Porter, ed., 2012) (overviewing methodology). Others likewise have assembled their own limited datasets about attempted student loan discharges in bankruptcy. *See* Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 Am. Bankr. L.J. 495 (2012); Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 Am. Bankr. L.J. 179 (2009); 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).
89 *See* Mitchell Letter, *supra* note 82, at 7 (discussing the single servicing platform).