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A More Realistic Solution to the Unintended Consequences of Private Student Loan Discharge Protection

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A More Realistic Solution to the Unintended Consequences of Private Student Loan Discharge Protection

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"The economic pathology that leads to bankruptcy is indeed depressing, but bankruptcy itself is the process of healing and restoration...The bankruptcy scholar searches for a better treatment of economic wounds that is less painful and more permanent."[1]

I. Introduction

Just after 2007, the United States economy suffered a recession.[2] As of October 2011, fourteen million people were without jobs in the United States.[3] Consequently, the unemployment rate remained between 9.0 and 9.2 percent from April to October of that year.[4] August 2011 marked a particularly difficult month as net zero jobs were created.[5] It is in this

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[1] ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS, xxvi (6th ed. 2009).

[2] *See* Christian E. Weller, Bernard J. Morzuch, & Amanda Logan, *Estimating the Effect of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 On the Bankruptcy Rate*, 84 AM. BANKR. L.J. 327, 328 (2010) (noting that 2007 was "the last year before the Great Recession").

[3] Economic News Release, Bureau of Labor and Statistics (Oct. 7, 2011), http://www.bls.gov/news.release/pdf/empsit.pdf.

[4] *Id.*

[5] *Net Total Jobs Added in August: Zero*, CBSNews.com, (September 2, 2011, 8:50 AM),

climate that student loan default rates and bankruptcy filings have reportedly risen.[6]

320,000 of the 3.6 million federal student loan borrowers who were scheduled to begin repayment between October 1, 2008,

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http://www.cbsnews.com/stories/2011/09/02/national/main20100884.shtml (last visited Oct. 11, 2011). This dismal situation, in which one job is lost for every job that is created, has not been reported by the United States government since 1945. *Id.*

[6] Admin. Office of the U.S. Courts, *Bankruptcy Statistics on Filings*, U.S. COURTS.GOV, http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx. The Administrative Office of the U.S. Courts maintains statistics on bankruptcy petition filings for twelve-month and three-month periods at various points in the year including periods marking the end of the fiscal year and calendar year. ADMIN. OFFICE OF THE U.S. COURTS, BANKRUPTCY STATISTICS ON FILINGS – 2009-2010 SEPTEMBER YEAR COMPARISON, *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2010/0910_f.pdf. These statistics suggest that bankruptcy filings have risen in response to the burdensome economic climate.

and September 30, 2009, defaulted by September 30, 2009.[7] This number marks a significant rise from 7.0 percent in fiscal year 2008 to 8.8 percent in fiscal year 2009.[8] The private student loan default rate has similarly risen to 5.4 percent.[9] Furthermore, the Administrative Office of the United States Courts reports that bankruptcy filings nationwide increased by 13.8 percent from September 30, 2009 to September 30, 2010.[10]

In 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)[11] in an attempt to limit

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[7] Tamar Lewin, *Student Loan Default Rates Rise Sharply in Past Year*, N.Y. TIMES, Sept. 12, 2011.

[8] *Id.*

[9] Drew FitzGerald, *Moody's: Private Student-Loan Defaults Tick Up*, WALL ST. J., Aug. 17, 2011.

[10] ADMIN. OFFICE OF THE U.S. COURTS, 2009-2010 SEPTEMBER YEAR COMPARISON, *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2010/0910_f.pdf.

[11] Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C.). Congressman John Conyers has correctly noted that this statute is inappropriately named. *An Undue Hardship? Discharging Educational Debt in Bankruptcy: Hearing Before the Subcomm. on Commercial and Admin.*

Chapter 7 bankruptcy filings through imposition of the means test.[12] BAPCPA also made private student loans non-dischargeable unless the student debtor could prove that repayment would create an undue hardship.[13] Government-issued student loans should not be discharged because they are funded by taxpayer

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Law, 111th Cong. 1, 5 (2009) [hereinafter *Undue Hardship Hearing*] (prepared statement of Congressman John Conyers).

[12] *See* 151 CONG. REC. S1813-06, S1814 (2005) (statement of Sen. Bill Frist) (explaining that the Legislature feared that debtors were liquidating under Chapter 7 to "evade personalresponsibility").

[13] *See* DEANNE LOONIN, NATIONAL CONSUMER LAW CENTER, NO WAY OUT: STUDENT LOANS, FINANCIAL DISTRESS, AND THE NEED FOR POLICY REFORM 29 (2006), *available at* http://www.studentloanborrowerassistance.org/uploads/File/nowayout.pdf (noting that this was part of the bankruptcy amendments). The Bankruptcy Code uses the phrase "any other educational loan that is a qualified education loan, as defined in Section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual" to include private student loans in the undue hardship provision. 11 U.S.C. § 523(a)(8)(B) (2011).

dollars and do not disadvantage borrowers.[14] Conversely, profit-driven, unsecured student loan creditors should not be given the same protection because there are significant differences between government and private student loans.[15]

This Comment argues that economy-focused regulation of private student loans is necessary to curtail risky and predatory lending practices and to reduce the potential for bankruptcy misuse. Part II illustrates the consequences of BAPCPA discharge protection and shows how protection sanctions

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[14] 153 CONG. REC. S7335 (2007) (statement of Sen. Durbin), *available at* http://thomas.loc.gov/cgi-cbin/query/F?r110:3:./temp/~r1102Zjw97:e0:. (reasoning that government student loans contain "protections in cases of economic hardship, unemployment, death and disability"); *see also* DUKE CHEN, CONGRESSIONAL RESEARCH SERVICE, THE LIBRARY OF CONGRESS, STUDENT LOANS IN BANKRUPTCY 6 (2007), *available at* http://www.policyarchive.org/handle/10207/bitstreams/19283.pdf. (explaining that when a debtor takes out a government loan, the money is owed to taxpayers).

[15] 153 CONG. REC. S7335, *supra* note 14.

predatory lending practices.[16] Part III explains how judicial interpretation undermines BAPCPA's means test and attempt at curtailing bankruptcy misuse.[17] Part IV chronicles the Legislature's unsuccessful attempts to eliminate private student loan protection, which is evidence of the fact that a more realistic solution to private student loan problems should be economy-focused rather than consumer-focused.[18] Part V argues that economy-focused regulation of private lending is the best solution to both predatory and risky lending as well as bankruptcy misuse.[19]

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[16] *See infra* Part II (analyzing the undue hardship obstacle and analogizing private student loans to credit cards to show that protection sanctions aggressive lending practices).

[17] *See infra* Part III (discussing the purpose behind the means test and providing examples of how judicial interpretation of the Bankruptcy Code undermines Congress's attempt to curtail bankruptcy misuse).

[18] *See infra* Part IV (arguing that Congress's attempts to address problems with private student loan protection are improperly focused).

[19] *See infra* Part V (advocating solutions to the private student loan problem as a way of reducing the need for bankruptcy

II. The First Problem – Private Student Loan Protection from Discharge Incentivizes Predatory Lending

Prior to BAPCPA, private student loans were dischargeable in bankruptcy just like any other unsecured debt.[20] BAPCPA made private student loans non-dischargeable unless a debtor can prove that paying this debt will "impose an undue hardship on the debtor and the debtor's dependents."[21] The fact that this

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relief—at least for debtors whose greatest financial burden is student loan debt).

[20] *See Private Student Loan Bankruptcy Fairness Act of 2010: Hearing Before the Subcomm. on Commercial and Admin. Law on H.R. 5043*, 111th Cong. 1 (2010) [hereinafter *Bankruptcy Fairness Act Hearing*] (chronicling how federal student loans were protected from discharge since 1978 to "protect the viability" of the Federal loan program).

[21] 11 U.S.C. § 523(a)(8) (2010). Section (8)(A)(i) specifies an educational loan made by the government, while (8)(B) contains a catchall for all qualified educational loans regardless of the lender's status. 11 U.S.C. § 523(a)(8)(2010). BAPCPA amended the undue hardship provision of the Bankruptcy Code, to include "any other educational loan that is a qualified education loan." Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,

change was made under the undue hardship provision is especially problematic because Congress has not issued guidance to clarify this standard.[22]

Private education loans should not be protected as strongly as those issued by the government because their terms resemble credit card agreements and their discharge in bankruptcy does not create a negative externality for tax payers.[23] By providing protection from discharge, BAPCPA also endorses predatory lending practices, which mimic those that resulted in the subprime mortgage crisis.[24] Judicial discretion regarding treatment of student debt under Chapter 13 plans incentivizes lenders to impose strict default provisions.[25]

Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (2005) (codified as amended in scattered sections of 11 U.S.C.).

[22] *See infra* Part II.B (discussing how courts have interpreted this standard in a way that makes this obstacle almost impossible to overcome).

[23] *See infra* Part II.C (noting that although credit card debt is debilitating, it is dischargeable in bankruptcy).

[24] *See infra* Part II.D (juxtaposing reckless education lending with predatory mortgage lending).

[25] *See infra* Part II.E (explaining how some debtors are allowed to continue making payments on private student loan debt if they

A. The Rationale Behind the Legislature's Step in the Wrong Direction

The applicable 2005 amendment was never the subject of any formal Congressional debate.[26] Nevertheless, proponents of BAPCPA assert that private student loans are necessary to fill gaps that the federal government cannot afford.[27] Proponents also believe that withdrawing discharge protection will drive away capital that some students need in order to finance their education.[28] This comment does not take issue with this rationale, but argues that something must be done in order to deter lenders from making risky and predatory loans now that the possibility of discharge will not serve as a deterrent.

B. Undue Hardship Creates Undue Obstacles

Despite these well-intentioned concerns, BAPCPA bankruptcy protection introduces obstacles for debtors because undue

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can show that their lender will impose harsh default provisions once the stay has been lifted).

[26] *Undue Hardship Hearing*, *supra* note 11, at 5 (statement of Congressman John Conyers).

[27] *Id.* at 3 (statement of Congressman Trent Franks). Congressman Franks argues that the "real culprit" is the rising cost of college. *Id.* at 4.

[28] *Id.*

hardship is a vague and high standard.[29] While there is no clear federal test, most courts use the three-part *Brunner v. N.Y. State Higher Education Services Corp.* standard to determine if student loan repayment creates an undue hardship for the debtor.[30] Under this test, a court determines whether: (1) paying student loans will prevent the debtor from maintaining a minimal standard of living; (2) the situation will continue for a significant portion of the repayment period; and (3) the debtor has made a good faith effort to pay these loans.[31]

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[29] *See* Kerry Brian Melear, *The Devil's Undue: Student Loan Discharge in Bankruptcy, The Undue Hardship Standard, and the Supreme Court's Decision in United Student Aid Funds v. Espinosa*, 264 ED. LAW REP. 1, 6 (2011) (explaining that Congress created the undue hardship standard to discourage student loan discharge); *see also infra* text accompanying note 38 (illustrating that sometimes the outcome of this hearing has little to do with the evidence presented by the debtor).

[30] Melear, *supra* note 29, at 6; *see also id.* at 6 n.38 (listing tests used by other jurisdictions).

[31] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

The first element directs the court to examine the debtor's monthly student loan payments.[32] Here, the court may exercise discretion to discharge only a portion of the student loan debt until the monthly payment is more manageable.[33] The second element is particularly difficult to satisfy because the debtor will have to show extraordinary conditions such as a physical disability.[34] Finally, the court may consider whether the debtor attempted to exhaust deferment and forbearance options.[35] Thus,

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[32] MARK KANTROWITZ, FINAID.ORG, LIMITATIONS ON EXCEPTION TO DISCHARGE ON PRIVATE STUDENT LOANS 8 (2009), *available at* http://www.finaid.org/questions/bankruptcylimitations.pdf. The judge may take income based repayment plans into consideration. *Id.*

[33] *Id.*

[34] *Id.* at 9; *see also Undue Hardship Hearing*, *supra* note 11, at 7 (prepared statement of Rafael I. Pardo) (finding that undue hardship findings "consistently turned on whether the debtor suffered from a medical condition").

[35] KANTROWITZ, *supra* note 32, at 9. During a deferment period, payment of the principle amount due is temporarily postponed if a debtor meets certain requirements. STUDENT EXPERIENCE GROUP, U.S. DEPARTMENT OF EDUCATION FEDERAL STUDENT AID, YOUR FEDERAL STUDENT LOANS: LEARN THE BASICS AND MANAGE YOUR DEBT 30 (2010) [hereinafter LEARN THE BASICS],

under the last element, the court will want to see that the debtor tried to work with its student loan creditors.[36] This element may weigh in favor of finding undue hardship when the loans are private rather than federal because private lenders are not required to accommodate debtors in repayment.[37] In any case, the outcome of the undue hardship analysis may depend more on the debtor's attorney or the judge than the circumstances prompting the debtor's need for bankruptcy relief.[38] Thus,

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available *at* http://studentaid.ed.gov/students/attachments/siteresources/11-12YFSL.pdf. Forbearance allows qualifying debtors to reduce or postpone payments for a specified period of time. *Id.* at 32. Although these options exist for federal loans, private student lenders are under no obligation to provide deferment or forbearance options to debtors.

[36] KANTROWITZ, *supra* note 32, at 9.

[37] *See Bankruptcy Fairness Act* Hearing, *supra* note 20, at 7 (opening statement of Rep. Henry Johnson) (emphasizing that "private student loan borrowers are often unable to work out terms that ensure a reasonable and fair repayment schedule").

[38] *Undue Hardship Hearing*, *supra* note 11, at 2 (statement of Rep. Steve Cohen, Presiding Chairman of the Subcommittee). *But see* KANTROWITZ, *supra* note 32, at 5–7 (summarizing how one judge

without clear legislative guidance for this standard, undue hardship can create undue obstacles to a new financial start.

C. Private Student Lending Mimics Credit Card Lending

Requiring that private student loans be discharged only after a finding of undue hardship is onerous for debtors because there are significant differences between government and private student loans.[39] The overall cost is among the many problems with private student loans; such loans may carry a variable interest rate as high as nineteen percent.[40] The government, however, does not require a cap on the amount of interest a private student

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attempted to limit dischargeability protection by distinguishing between loans that are funded by a nonprofit and those that are only guaranteed by a nonprofit only to be overturned on appeal).

[39] *See* LEARN THE BASICS, *supra* note 35, at 8–9, tbl.5 (educating potential borrowers on the differences between private and government loans).

[40] DEANNE LOONIN & ALYS COHEN, NATIONAL CONSUMER LAW CENTER, THE HIGH COST OF PRIVATE STUDENT LOANS AND THE DANGERS FOR STUDENT BORROWERS 22 (2008) [hereinafter THE HIGH COST OF PRIVATE STUDENT LOANS], *available at* http://www.studentloanborrowerassistance.org/blogs/wp-content/www.studentloanborrowerassistance.org/uploads/File/Report_PrivateLoans.pdf. The average initial interest rate for private loans in this survey was 11.5 percent. *Id.*

loan creditor may charge.[41] Furthermore, the creditor can require that the interest rate not fall below a certain percentage.[42] Other distinguishing features of private loans include unforgiving repayment rules.[43]

Particularly relevant to bankruptcy is the fact that private loans may have aggressive default provisions similar to those seen in credit card agreements.[44] For example, federal loan default may not occur until nine months' worth of payments are missed, while private loan default may occur when debtors fail

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[41] *See id.* (reporting that none of the private loans in the survey had a cap on the amount of accruable interest).

[42] *See id.* (noting that floors do not let borrowers take advantage of low market rates).

[43] *See id.* at 26 (observing that none of the private loans surveyed specified income-based repayment as an option). Unlike government loans, private loans may require that payments be made while the borrower is still in school. LEARN THE BASICS, *supra* note 35, at 9 tbl.5. Private lenders may also impose prepayment penalty fees. *See id.* (advising student loan borrowers to make sure their private loan does not impose these fees).

[44] *See infra* Part II.E (explaining that bankruptcy protections incentivize these creditors to enforce aggressive default provisions to the detriment of other creditors).

to make one payment on that or any other loan.[45] Furthermore, some private student loan agreements allow the lender to declare the borrower in default if the lender feels uncertain about the debtor's ability to pay.[46] This means that the private student loan lender can declare a default simply because a debtor tries to work out a more reasonable repayment plan during periods of temporary financial trouble.[47] Given that bankruptcy law encourages debtors to communicate with their student loan creditors, this default provision undermines BAPCPA's intent to reduce bankruptcy filings.[48] Finally, some private student loan agreements state that the note will not be cancelled upon death or disability of the debtor or co-signor.[49] Other agreements,

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[45] THE HIGH COST OF PRIVATE STUDENT LOANS, *supra* note 40, at 29. This type of default provision is known as a "universal default clause" and is even criticized in ordinary consumer credit transactions. *Id.*

[46] *Id.*

[47] *Id.*

[48] *See supra* notes 35–36 and accompanying text (showing that courts may condition a finding of undue hardship on the debtor's efforts to work with student loan creditors).

[49] THE HIGH COST OF PRIVATE STUDENT LOANS, *supra* note 40, at 28.

however, may allow cancellation due to disability but require more proof than the federal government does.[50]

Private student loans are considered consumer debt, and debtors can typically obtain relief through discharge of this debt in bankruptcy.[51] Only a few consumer debts, including child support, taxes, and criminal fines, are not dischargeable.[52] Opponents of private loan discharge, therefore, argue that private student loans should be treated like other consumer debt because they do not have the same consumer protections as federal loans.[53] Furthermore, discharge protection allows

[50] *Id.* In 2006, one private loan co-signor was unable to get the loan cancelled despite proof of her son's disability and her husband's serious illness. *Id.*

[51] *Undue Hardship Hearing*, *supra* note 11, at 10 (prepared statement of Rep. Danny Davis).

[52] *Id.*

[53] *Id.* Congressman Davis also observed that a consumer with debt resulting from luxury goods can obtain relief in bankruptcy, though a teacher with student loans cannot. *Id.*

creditors to pursue unaffordable repayment indefinitely, even after the debtor has died.[54]

Although private student loans are sometimes necessary to help finance education, student borrowers may fail to consider that the fine print adds up to a debilitating debt.[55] Thus, it may actually be wiser for a consumer to charge their education costs to a credit card because this debt is dischargeable in bankruptcy.[56]

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[54] *Id.* at 15 (testimony of Lauren Asher, Inst. for College Access and Success); *see also supra* text accompanying note 49 (reporting that some agreements outlive the life of the debtor).

[55] *See supra* note 40 and accompanying text (discussing the dangers of variable interest rates); *see also* THE HIGH COST OF PRIVATE STUDENT LOANS, *supra* note 40, at 20 (illustrating that private student loan debt reached over $100,000 for a social worker who earned less than $40,000 per year).

[56] *See Undue Hardship Hearing*, *supra* note 11, at 20 (prepared statement of Lauren Asher, Institute for College Access and Success) (explaining that credit cards may be safer than a private student loan). One study, however, shows that students do the exact opposite of this because they use student loans to pay outstanding credit card balances. Robert Manning, *Credit Cards on Campus: Academic Inquiry, Objective Empiricism, or*

D. Protection Sanctions Predatory Lending Practices

Private student lenders respond strongly to investor demands, resulting in predatory lending practices akin to those that triggered the mortgage crisis.[57] Investor demands are grounded in the reality that the consumer finance business is profitable only if there are many low-risk loans on which investors may collect.[58] Critics of private student loans warn

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Advocacy Research?, 35 NASFAA J. OF STUDENT FIN. AID 39, 42–43 (2005), *available at* https://ritdml.rit.edu/bitstream/handle/1850/7968/RManningArticle2005.pdf?sequence=1.

[57] *See* THE HIGH COST OF PRIVATE STUDENT LOANS, *supra* note 40, at 19 (illustrating that private loans "are offered not only in response to consumer need, but also due to investor demand"). Loonin refers to this as a "push market." *Id.*

[58] *Id.* The fact that private student loans are not dischargeable in bankruptcy makes these products less risky and more appealing to investors. *See id.* (disclosing how lenders "prominently advertise" this aspect to investors). However, there is substantial risk with regard to whether a debtor will realistically be able to repay these loans. *See supra* note 55 (recounting one debtor's inability to earn enough to pay this debt after graduating).

that this "push market" is analogous to the one that led to the mortgage crisis because it is similarly sustained through aggressive selling.[59] Thus, BAPCPA's treatment of private student loans in bankruptcy may be doing more harm than good for an economy that is already in trouble.

One type of private student loan is known as a "direct-to-consumer" student loan because it does not reach borrowers through their colleges.[60] These loans bear few safeguards because lenders do not have to verify that the borrower is actually a student.[61] Proponents of withdrawing bankruptcy protection for private student loans are concerned that lender practices in this market are similar to those that led to the subprime mortgage crisis.[62]

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[59] *Id.* at 19–20. Private student loans are being marketed as aggressively as credit cards and mortgage refinancings. *Id.* at 20; *see also* LEARN THE BASICS, *supra* note 35, at 8 (warning that despite aggressive marketing private student loans are much more costly than federal loans).

[60] *Undue Hardship Hearing*, *supra* note 11, at 5 (prepared statement of Rep. Danny Davis).

[61] *Id.*

[62] *Undue Hardship Hearing*, *supra* note 11, at 5 (prepared statement of Rep. John Conyers).

As mentioned above, interest rates on private student loans are variable and can increase without warning.[63] For example, one researcher found that seventy-five percent of students receive the worst interest rates on private student loans.[64] This is likely because a borrower's credit-worthiness determines the interest rate on these loans, and most students have yet to establish their credit.[65] While creditors do this in order to account for the risk of making the loan, subprime mortgage market research suggests that "higher interest rates and fees may create the risk, rather than compensate for it."[66] Because debtors will continue to incur debt to get an education, just as they have incurred debt to achieve homeownership, the private

[63] *Id.* at 6; *see also supra* note 40 and accompanying text (revealing that while the average initial interest was 11.5 percent, the highest reported interest was nineteen percent).

[64] *Undue Hardship Hearing*, *supra* note 11, at 6 (prepared statement of Rep. John Conyers).

[65] *See id.* (opining that there are similarities between private student loan borrowers and subprime mortgagees because both tend to have poor credit histories).

[66] THE HIGH COST OF PRIVATE STUDENT LOANS, *supra* note 40, at 37.

student loan market has potential to trigger an economic crisis similar to the subprime mortgage lending crisis.[67]

Additionally, student loan lenders appear to be as difficult to contact and work with as mortgage lenders.[68] Critics note that private loan consumers complain of improper billing

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[67] *See* THE HIGH COST OF PRIVATE STUDENT LOANS, *supra* note 40, at 33–34 (analogizing the impact that mortgage debt had on the credit market to the potential impact that education debt may have if predatory lending continues because of the importance society attaches to home ownership and education); *see also* Jean Braucher, *Mortgaging Human Capital: Federally-Funded Subprime Higher Education*, 69 WASH. & LEE L. REV. at 32 (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971735 (opining that student loan debt is worse than a mortgage because it is "effectively secured by human capital and nondischargeability" thereby allowing lenders to hound debtors unless they can satisfy the undue hardship test).

[68] *Undue Hardship Hearing*, *supra* note 11, at 6 (prepared statement of Rep. John Conyers); *see also Bankruptcy Fairness Act Hearing*, *supra* note 20, at 31 (testimony of Valisha Cooks) (discussing how her private student loan creditor was hard to research and repeatedly lost her paperwork).

and fees similar to those reported by mortgage borrowers.[69] Furthermore, once contact is established, student loan creditors can be just as inflexible as mortgage lenders, declining to modify the terms of the loan.[70] One of the most egregious alleged practices by private student loan creditors is to steer low-income, minority borrowers into loan agreements with higher interest rates.[71] This practice, known as "reverse red-lining," was believed to have been used prior to the mortgage foreclosure crisis as well.[72] Thus, by not regulating the private student loan industry, BAPCPA's bankruptcy protection is effectively sanctioning predatory lending practices.[73]

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[69] *Undue Hardship Hearing*, *supra* note 11, at 6 (prepared statement of Rep John Conyers).

[70] *Id.*

[71] *Id.* The Congressman testified that two borrowers brought allegations of this against Sallie Mae, the largest private student loan lender. *Id.*

[72] *Id.* Lenders who are guilty of this direct minorities to loans with high interest rates regardless of whether or not they would qualify for a better rate. *Id.*

[73] *See supra* text accompanying notes 69–72 (revealing various predatory terms in private student loans).

From 2006 to 2008, just after Congress enacted BAPCPA, there was a forty-two percent increase in "non-traditional" subprime student loan lending by the nation's largest lender.[74] After 2008, however, when default rates hit new highs and the economy collapsed, lenders like Sallie Mae decreased risky lending.[75] Thus, proponents of maintaining bankruptcy protection argue that the market will regulate itself because lenders will realize the advantages in reducing their risk.[76] They further argue that creditors are learning from their mistakes and are creating ways to make these loans more accessible.[77] Some members of Congress, however, justifiably believe that waiting is not a remedy for BAPCPA's unintended consequences.[78]

Another predatory practice is strategic borrower recruitment, which results in students taking out private loans

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[74] *Undue Hardship Hearing*, *supra* note 11, at 15 (testimony of Lauren Asher).

[75] *Id.*

[76] *Bankruptcy Fairness Act Hearing*, *supra* note 20, at 46 (response of John Hupalo).

[77] *See id.* (giving longer repayment periods as an example of creditor innovation).

[78] *See infra* Part IV (chronicling various failed legislative attempts to repeal discharge protection).

before exhausting their federal aid options. This effectively undermines federal student loan policy because private loans are replacing rather than supplementing public aid.[79] Surely BAPCPA proponents did not intend such a result.[80] Nevertheless, that is precisely what happened in 2007-2008: two-thirds of students who used private loans had not yet exhausted federal loan eligibility for that year.[81] As all of these private student

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[79] *See* Federal Student Aid, *Federal Aid First*, DEPARTMENT OF EDUCATION, http://federalstudentaid.ed.gov/federalaidfirst/ (last visited December 19, 2011) (advising students and parents to "always exhaust federal student loan options before considering a private loan").

[80] *See supra* text accompanying note 27 (explaining that advocates of private student lending focus on the fact that these loans are critical to supplementing the costs of education when federal loans are not enough).

[81] *Undue Hardship Hearing*, *supra* note 11, at 17 (prepared statement of Lauren Asher, Inst. for College Access and Success). This may also be attributable to the student loan scandal in which colleges were steering students to specific lenders. *See* Jim Hawkins, *Doctors as Bankers: Evidence From Fertility Markets*, 84 TULANE L. REV. 841, 881 (2010) (revealing that some schools did not tell students that they had discretion

loans enter repayment, federal regulation of the private student loan market will become imperative to avoid further filings and misuse of the bankruptcy system.[82]

E. How Special Circumstances Considerations Under Chapter 13 May Incentivize Abusive Private Lending Practices

Some courts think BAPCPA allows judicial discretion only once a Chapter 13 debtor is determining how to pay unsecured creditors.[83] For instance, the bankruptcy court in *In re Carrillo* explained that if student loan debt was incurred in the ordinary course of obtaining an education, it should not be counted as a special circumstance under the means test.[84] Thus, a debtor with ordinary student loans will file under Chapter 13.[85]

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in which lender to use, while others told students they must use a particular lender).

[82] *See supra* Part I (suggesting a connection between bankruptcy filings and student loan default).

[83] *In re* Carrillo, 421 B.R. 540, 543 (Bankr. D. Ariz. 2009). Although it is not clear that the examples of special circumstances "must be of an involuntary nature or otherwise beyond the debtor's control," Congress's intent was to force debtors into Chapter 13 bankruptcy. *Id.*

[84] *Id.* at 543–44. The fact that student loan debt is non-dischargeable does not create a special circumstance unless the

Once a debtor has filed for Chapter 13 bankruptcy, § 1322(b)(1) applies and states that a plan "may not discriminate unfairly" between unsecured debt, but may treat certain unsecured debt differently.[86] Section 1322(b)(5) of the Code allows a debtor to continue making payments on an unsecured claim whose payments will not mature until after the last payment of the Chapter 13 plan.[87] A majority of bankruptcy courts take both of these provisions together and require that a debtor use § 1322(b)(5) to continue making payments on long term debt as long as doing so would not be unfair under § 1322(b)(1).[88]

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circumstances that led the debtor to incur the student loan debt were themselves something more than the usual costs of education. *Id.* The means test is discussed further in *infra* Part III.B.

[85] *In re* Carrillo, 421 B.R. 543, 543–44 (Bankr. D. Ariz. 2009).

[86] 11 U.S.C. § 1322(b)(1) (2011).

[87] *Id.* at § 1322(b)(5). Secured and unsecured claims whose last payments continue after the plan are called "long term debt." *In re* Labib-Kiyarash, 271 B.R. 189, 193 (9th Cir. BAP 2001).

[88] *Id.* at 195. The minority view is that if long-term debt payments are permitted under § 1322(b)(5), the different treatment presumably satisfies the fairness requirement of

Debtors usually do not continue making student loan payments while in Chapter 13 because doing so would discriminate against other unsecured creditors in favor of the unsecured student loan creditor.[89] Nevertheless, courts have reasoned that aggressive collection methods used by a student loan creditor can be considered for purposes of allowing the debtor to continue making payments on that debt.[90] The debtor has the burden of proving that continuing to pay an unsecured student loan creditor's claim would not be unfair.[91] Some debtors have

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§ 1322(b)(1). *Id.* at 194 (citing *In re* Cox, 186 B.R. 744, 746–47 (Bankr. N.D. Fla. 1995)).

[89] *In re Carrillo*, 421 B.R. 543, 546 (Bankr. D. Ariz. 2009). Other unsecured debtors would be paid nothing, and their claims would be discharged if student loans were treated as *per se* special circumstances under Chapter 13 because the debtor's money would be paid to the unsecured student loan creditor rather than being distributed among all unsecured creditors. *Id.*

[90] *Id.*

[91] *In re Labib-Kiyarash*, 271 B.R. 189, 195 (9th Cir. BAP 2001). Fairness of the discrimination is determined by looking at factors such as reasonableness, necessity, good faith, and proportionality. *See id.* at 192 (citing Amfac Distrib. Corp. v. Wolff (*In re Wolff*), 22 B.R. 510, 512 (9th Cir. BAP 1982))

satisfied this by showing that their student loan payments are current and that non-payment would trigger strict default provisions or would ruin their chances of a "fresh start" by hurting their credit history.[92] If courts take this approach to the fairness issue in a Chapter 13 plan, unsecured private student loan lenders have an additional incentive to impose strict default provisions and enforce them.[93] Thus, BAPCPA's means test and private student loan discharge protection can collide in Chapter 13 cases to produce increasingly inequitable results. Although unprotected unsecured creditors suffer most in bankruptcy,[94] this serves as further evidence that abusive repayment terms need to be addressed by federal regulation.

(expounding a fairness test to use when § 1322(b)(1) is at issue)).

[92] *See In re* Knecht, 410 B.R. 650, 656 (Bankr. D. Mont. 2009) (providing examples of these debtors passing the fairness test) (citations omitted).

[93] *See supra* notes 45–47 and accompanying text (providing examples of common student loan default provisions).

[94] *See* WARREN & WESTBROOK, *supra* note 1, at 142 (explaining that general unsecured creditors are paid pro rata from funds remaining after payment is made to secured creditors).

III. The Second Problem – BAPCPA Means Testing Creates Obstacles to Chapter 7 Liquidation Bankruptcy

Chapter 7 bankruptcy is "the central idea behind the bankruptcy system—liquidate property, distribute the proceeds, discharge the debt, and leave the debtor with a reason to keep working."[95] When Congress enacted the 1978 Bankruptcy Code (the "Code"), however, it created incentives for filing under the Chapter 13 repayment alternative.[96] Despite this, the credit industry believed that too many debtors were pushing the limits of bankruptcy relief.[97] After nine years of lobbying, creditors achieved codification of a presumption of abuse when a debtor fails the means test in § 707 of the Code.[98] The Supreme Court's decision in *Espinosa*, however, shows that debtors can misuse Chapter 13 to avoid paying at least part of their student loan debt.[99]

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[95] WARREN & WESTBROOK, *supra* note 1, at 142.

[96] *Id.* at 143.

[97] *Id.* at 149–50.

[98] *Id.* at 150–51.

[99] *See infra* Part III.C (analyzing the circumstances under which this decision can be used to discharge student loan debt without a finding of undue hardship).

A. Justifying Reform — Legislative Concern About Bankruptcy Abuse

Before BAPCPA was enacted, debtors could choose to liquidate their assets in order to pay off as much debt as possible and embark on a "fresh start" by filing for Chapter 7 bankruptcy.[100] Chapter 7 bankruptcy allows debtors to discharge most of their debts after liquidating their non-exempt assets.[101] Although debtors cannot discharge child support, unpaid taxes, and student loan debt, filing under Chapter 7 is good for those who have equity in exempt property such as a vehicle or a home.[102] Alternatively, Chapter 13 bankruptcy requires that debtors establish and complete a repayment plan that lasts up to five years.[103] Upon completion of repayment under the plan, the

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[100] *See* Lauren E. Tribble, *Judicial Discretion and the Bankruptcy Abuse Prevention Act*, 57 DUKE L.J. 789, 793–94 (2007) (explaining the history of Chapter 7).

[101] Weller, Morzuch, & Logan, *supra* note 2, at 330.

[102] *Id.* State laws determine which assets are exempt. *Id.*

[103] *Id.* 11 U.S.C. § 1322 provides guidance on how debt can be treated under the plan and allows the debtor to provide for less than full payment of debt subject to certain requirements. 11 U.S.C. § 1322(a)(4) (2010).

court enters a discharge order to cancel the remaining debt.[104] Chapter 13 bankruptcy is appropriately used by debtors who have at least some disposable income to pay down their debt, which may be more beneficial to creditors.[105]

Congress passed BAPCPA out of fear that debtors were abusing the discharge privileges of Chapter 7 bankruptcy in order to avoid making good faith efforts to pay off their debt.[106] The legislature noted that filings had almost doubled from 1994 to 2004 and speculated that this was partly because consumers lacked personal financial accountability, and the system lacked oversight for eliminating abuse.[107] Notably, the increase in filings happened at a time "of unprecedented

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[104] Weller, Morzuch, & Logan, *supra* note 2, at 330. This excludes the same non-dischargeable debt as mentioned above. *Id.*

[105] *See id.* (stating that BAPCPA's emphasis on Chapter 13 filings "shift[s] the rules to benefit creditors").

[106] *See* H.R. Rep. No. 109-31, pt. 1, 1 at 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 92 (chronicling that another motivating factor for bankruptcy reform "is that the present bankruptcy system has loopholes and incentives that allow and-sometimes-even encourage opportunistic personal filings and abuse").

[107] *Id.* at 4.

prosperity, with low unemployment and high wages."[108] In 1997, however, the Bankruptcy Commission found that the bankruptcy system was not "systematically abused" when debtors were allowed to discharge student loans.[109] Nevertheless, Congress passed BAPCPA in 2005.[110]

A 2010 study reveals that BAPCPA has certainly had an effect on bankruptcy filings, although not the one that Congress intended.[111] First, state-level bankruptcy rates show that the number of bankruptcy filings is determined by economic factors, not legal hurdles such as higher costs.[112] Second, the study shows that BAPCPA's shift toward more Chapter 13 filings was only temporary, and the rate is what it would have been if the

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[108] S. REP. 106-49, at 2 (1999).

[109] CHEN, *supra* note 14, at 6.

[110] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C.).

[111] Weller, Morzuch, & Logan, *supra* note 2, at 347–48. Congress intended for the Act to result in fewer overall bankruptcy filings with more being filed under Chapter 13. *Id.* at 330.

[112] *Id.* at 347. After BAPCPA, attorney fees for both types of filings increased significantly. *Id.* at 330–31.

Act had not been passed.[113] Finally, the study concludes that the best way to lower the bankruptcy rate is not by making it harder to file, but by addressing the economic causes of bankruptcies.[114]

B. Means Testing Under BAPCPA – How the Law Changed But Failed to Reduce Bankruptcy Misuse

BAPCPA was designed to substantially limit the use of Chapter 7 bankruptcy procedures by requiring that the court use Congress's new means test.[115] This test calculates whether a debtor will qualify to file under Chapter 7 by subtracting the debtor's statutorily defined expenses from their monthly

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[113] *Id.* at 347. The study also notes that the total bankruptcy rate possibly grew despite the Act. *Id.*

[114] *Id.* at 348. Another study showed that the post-BAPCPA decline in bankruptcy filings may be more attributable to a 2006 rise in credit card borrowing, rather than being due to the effectiveness of the Act. *Id.* at 332; *see also supra* Part II.C.iv (arguing that bankruptcies may be less necessary despite hard economic times if private student lenders are required to provide IBR options).

[115] Anthony P. Cali, *The "Special Circumstance" of Student Loan Debt Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 52 ARIZ. L. REV. 473, 481–82 (2010).

income.[116] The test, which only applies to debtors with above-median incomes,[117] is meant to reveal if debt repayment is possible.[118] When a debtor fails the means test, abuse is presumed, and the court will either dismiss the case or convert it to a Chapter 13 bankruptcy.[119] Thus, BAPCPA forces certain debtors to file for Chapter 13 bankruptcy unless they can rebut the presumption of abuse by showing that there are "special circumstances" that prevent the debtor from paying their debt.[120] Section 707(b)(2)(B)(i) gives examples of events that would create special circumstances:

> In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by

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[116] 11 U.S.C. § 707(2)(A)(i) (2010). The debtor's monthly expenses are defined by § 707(2)(A)(ii) and specifically exclude "any payments for debts." *Id.* at § 707(2)(A)(ii)(I).

[117] *See* Cali, *supra* note 115, at 482 n.66 (citing 11 U.S.C. § 707(b)(7) (2006) and 11 U.S.C. § 109(39A) (2006), which defines median incomes by state income figures that are "both calculated and reported by the Bureau of the Census in the then most recent year").

[118] S. REP. 106-49, at 3 (1999).

[119] 11 U.S.C. § 707(b)(1) (2010).

[120] *See* S. REP. 106-49, at 3 (1999) (explaining how § 707(b) works).

> demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.[121]

Exorbitant student loans are not considered a special circumstance for rebutting the means test presumption, nor are they included as an expense in the means test calculation.[122] By not allowing student loan payments to count as an expense or a special circumstance, Congress has indirectly broadened the meaning of "misuse" as it applies to Chapter 7 filings because abuse will be presumed.[123] Furthermore, a bankruptcy judge, who feels that the debtor has a legitimate need to file under

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[121] 11 U.S.C. § 707(b)(2)(B)(i) (2010).

[122] Cali, *supra* note 115, at 483.

[123] *See supra* text accompanying note 119 (showing how abuse is presumed if the debtor fails the means test); *see also supra* text accompanying note 120 (explaining that special circumstances may rebut this presumption). This means that the debtor's only option is to prove undue hardship. *See supra* note 21 (observing that student loans fall under the undue hardship provision).

Chapter 7 of the Code, has little discretion to change the result of the means test.[124]

Means testing, therefore, may be encouraging more bankruptcy misuse than it prevents. For instance, if debtors show that they make less than the median income, they instantly qualify for Chapter 7 liquidation bankruptcy.[125] It is not difficult to "misuse" bankruptcy because courts only look at the income a debtor makes in the six months prior to the filing of the bankruptcy petition.[126] Therefore, debtors who are not

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[124] Tribble, *supra* note 100, at 805. Before BAPCPA, a judge could consider the reasons a debtor was filing for bankruptcy, such as recent unemployment or expected medical bills, and allow the Chapter 7 petition, but the means test changes this. *Id.*

[125] Robert M. Lawless & Elizabeth Warren, *Shrinking the Safety Net: The 2005 Changes in U.S. Bankruptcy Law*, Revista de Derecho Concursal y Paraconcursal, Nov. 6, 2006; U. Illinois Law & Economics Research Paper No. LE06-031 8 (2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=949629.

[126] *See In re* Carrillo, 421 B.R. 540, 541 n.3 (Bankr. D. Ariz. 2009) (citing 11 U.S.C. § 101(10A)(A)[(i)] for the definition of the current monthly income).

continuously employed are encouraged to wait for a less profitable time to file.[127]

Debtors with above median incomes and steady jobs may also manipulate the system.[128] Such debtors can avoid a presumption of abuse by increasing their expenses calculation.[129] This increase can be achieved by asking relatives to move in with them or claiming as dependent a child of which the debtor has only shared custody.[130] The means test, thus, does not prevent

[127] Lawless & Warren, *supra* note 125, at 8. This means that above-median income filers are still "abusing" the system despite what supporters of BAPCPA believe. *Id.*

[128] *See id.* (explaining that the allowed income also changes based on the size of the household); *see also* 11 U.S.C. § 707(b)(2)(A)(ii)(II) (allowing the debtor to include expenses for various additional members of the household).

[129] Lawless & Warren, *supra* note 125, at 8.

[130] *Id.*; *see also* 11 U.S.C. § 707(b)(2)(A)(ii)(II) (providing explicitly that care of grandparents, children, and other immediate family dependents can be included as an expense).

bankruptcy misuse as effectively as proponents may have imagined.[131]

C. Why Chapter 13 May Fall Short of Being a Fail-Safe Solution to Bankruptcy Misuse – Lessons from Espinosa[132]

Prior to the Supreme Court's decision in *Espinosa*, bankruptcy courts had identified a new majority trend that voided "discharge by declaration of student loan debt."[133] Under this view, courts reasoned that simply proposing discharge of student loan debt through the Chapter 13 plan not only violates

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[131] *See supra* note 106 and accompanying text (discussing the legislature's belief that means testing would reduce Chapter 7 abuse).

[132] United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367 (2010).

[133] *In re* Ruehle, 412 F.3d 679, 684 (6th Cir. 2005) (citing *In re* Banks, 299 F.3d 296, 302 (4th Cir. 2002), *abrogated by* United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367 (2010) and *In re* Hanson, 397 F.3d 482, 487 (7th Cir. 2005), *abrogated by* United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367 (2010)), *abrogated by* United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367 (2010)).

§ 523(a)(8) of the Bankruptcy Code,[134] but also violates the creditor's due process right to notice and hearing.[135] Thus, these courts felt that such creditors could properly bring a motion under Federal Rule of Civil Procedure 60(b)(4) despite the finality of a bankruptcy court's confirmation order.[136] Courts that take the majority approach would then set aside such illegal plans because Rule 60(b)(4) acts as an exception to final judgments such as confirmation orders.[137]

The Supreme Court's holding in *United Student Aid Funds, Inc. v. Espinosa* explicitly opposed this view and favored the finality of a confirmation order that was not timely appealed.[138] To fully understand why this may undermine BAPCPA's student loan policy, it is important to understand the mistakes that led up

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[134] *See* 11 U.S.C. § 523(a)(8)(2011) (requiring debtors to prove undue hardship before discharging student loans).

[135] *See In re Ruehle*, 412 F.3d at 681 (instructing that undue hardship requires the debtor to file a complaint and gives the creditor the right to be served with a summons).

[136] *See id.* at 684 (contemning that finality threatens due process, "which is the cornerstone of justice").

[137] United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1376 (2010).

[138] *Id.* at 1372.

to the *Espinosa* decision. The debtor, Francisco Espinosa, obtained federal student loans in the principal amount of $13,250 and subsequently filed for Chapter 13 bankruptcy in 1992.[139] In his repayment plan, Espinosa proposed to discharge the interest on his federal student loans upon repayment of the principal amount.[140] Thus, he did not initiate an adversary proceeding to prove that repayment would pose an undue burden.[141]

This comment observes that three notable mistakes triggered each of the three rules that the Supreme Court created in this case. First, although the bankruptcy court sent the creditor actual notice of the plan, the debtor failed to serve the creditor with a summons and complaint because he did not go through the undue hardship hearing process.[142] The Supreme Court

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[139] *Id.* at 1376–77.

[140] *Espinosa*, 130 S. Ct. at 1374. A Chapter 13 debtor submits a plan of repayment to the bankruptcy court and can propose different treatment for debt under § 1322(a)(4) of the Code. *See* 11 U.S.C. § 1322(a)(4) (2011) (allowing the debtor to "provide for less than full payment of all amounts owed").

[141] *Espinosa*, at 1374.

[142] *See id.* at 1378 (expounding that failure to send the creditor summons and a complaint deprives the creditor of a procedural rule, not of a constitutional right to due process).

nevertheless held that that the creditor's due process rights were not violated because it received actual notice of the plan and the confirmation order.[143] The Supreme Court further disparaged the creditor for failing to timely object to the unlawful discharge and lack of undue hardship hearing.[144] In this mistake, the Court equitably placed responsibility on the creditor because the trustee had followed the correct procedure.[145] Thus, blame was placed on the creditor, and the creditor appropriately suffered the consequences.

A second mistake was that the bankruptcy court committed legal error when it confirmed the debtor's plan without a finding of undue hardship.[146] In response, the Court held the

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[143] United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1374 (2010); *see also id.* at 1380 (emphasizing that "Rule 60(b)(4) does not provide a license for litigants to sleep on their rights").

[144] *Id.* at 1374.

[145] *See id.* (recounting how the creditor filed a proof of claim that included the interest, but did not respond when the trustee sent notice of the discrepancy and explained that the creditor would be paid the amount in the plan unless the creditor disputed the amount within thirty days).

[146] *Id.* at 1375.

final judgment was not void despite the bankruptcy court's legal (but not jurisdictional) error.[147] Thus, the Supreme Court allowed a court error to benefit the debtor and declined to follow what was once the majority view.[148] Although the Court's reasoning shifts the blame and places it on the bankruptcy court and the debtor, the creditor once again pays the consequences.

The most significant mistake for purposes of enabling bankruptcy misuse is that the lower court confirmed planned discharge of student loan debt without an undue hardship hearing.[149] Here, the Supreme Court assigned fault to the creditor who only asserted its rights after the plan had been confirmed, debts paid, and interest discharged.[150] The debtor was, nonetheless, chastised for proposing a plan that violated

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[147] *See id.* at 1377 (determining that an erroneous judgment is not void unless the error is jurisdictional or deprives one of notice and hearing).

[148] *See* United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1381–82 (2010) (acknowledging the potential for Chapter 13 misuse when the bankruptcy court overlooks the discharge).

[149] *See id.* at 1380 (accepting that confirmation of the plan was legal error, but deciding that this plan is still enforceable).

[150] *Id.* at 1374.

bankruptcy rules and procedures.[151] Justice Thomas, however, ultimately placed responsibility for these kinds of mistakes on bankruptcy courts.[152] He held that bankruptcy courts are obligated to direct Chapter 13 debtors to conform their plan to the Code even if the creditor fails to object.[153]

Notably, the last rule suggests that courts should not let debtors use *Espinosa*'s other rules to bypass the undue hardship requirement and simply declare that student loans be discharged.[154] However, this rule is only invoked if the bankruptcy court does its job correctly before entering a final

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[151] *See id.* at 1382 (endorsing the use of sanctions against debtors and attorneys who misuse bankruptcy proceedings).

[152] *See id.* at 1380 (disagreeing with the Ninth Circuit "that bankruptcy courts *must* confirm a plan proposing the discharge of a student loan debt without a determination of undue hardship in an adversary proceeding unless the creditor timely raises a specific objection").

[153] *Id.* at 1381.

[154] United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1381–82 (2010) (cautioning that while Rule 60(b)(4) is not the "appropriate prophylaxis," 11 U.S.C. § 1325(a) obligates bankruptcy courts to only confirm plans that comply with the Code).

judgment.[155] This rule can also be invoked if the trustee catches the problem before the plan is confirmed.[156] Nonetheless, this rule is undermined by the fact that if a bankruptcy court fails to meet its gatekeeper duties or the creditor neglects to assert its rights, the other two rules are triggered and the stealthy debtor is allowed to discharge part of his student loan debt.[157]

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[155] *See* Karen Cordry, *Setoff, Plan Provisions and Espinosa,* 29 AM. BANKR. INST. J. 12, 12 (2011) (reporting that although the Supreme Court put an end to policing declaration by discharge through Rule 60(b)(4) voidness, courts are now policing plans prior to confirmation in accordance with *Espinosa*); *see also In re* Kinney, 456 B.R. 748, 752–53 (Bankr. E.D.N.C. 2010) (denying the debtor's confirmation motion based on *Espinosa* because the plan proposed discharge of student loans without a finding of undue hardship).

[156] *See* Cordry, *supra* note 155, at n.5 (citing *In re* Wright, 444 B.R. 883, 886 (Bankr. S.D. Ind. 2010)) (discussing how that case denied the trustee's motion to set aside the confirmation order because the trustee did not timely object to the plan).

[157] *See In re Wright*, 444 B.R. at 887 (rejecting the trustee's untimely motion, but cautioning debtor's counsel that discharge by declaration will be met with sanctions).

In an attempt to ensure equitable results, the Supreme Court warned debtors and their attorneys that bankruptcy misuse should result in sanctions.[158] While some attorneys have been sanctioned for attempting to discharge their client's student loan debt without a finding of undue hardship even before *Espinosa*,[159] others, including Espinosa's attorney, have not.[160] In a particularly ironic twist, the bankruptcy court recently imposed sanctions on the student loan creditor in *Espinosa* for violating the discharge order.[161]

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[158] United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1382 (2010).

[159] *See, e.g.*, *In re* Lemons, 285 B.R. 327, 333 (Bankr. W.D. Okla. 2002) (sanctioning a Chapter 13 debtor's attorney under Federal Rule of Bankruptcy Procedure 9011 for attempting to improperly discharge student loan debt).

[160] *See In re Espinosa*, No. 4:92-bk-03819-EWH, 2011 WL 2358562, at *5 (Bankr. D. Ariz. June 8, 2011) (seeing "no bad faith by Espinosa or his counsel for pursuing a result which was not definitively found to be improper until the Supreme Court issued its decision").

[161] *See id.* at *6 (holding that Espinosa is entitled to actual damages including monetary harm for emotional distress and attorneys fees).

While the Supreme Court's holding in *Espinosa* may succeed at curtailing bankruptcy misuse by placing more responsibility on courts and trustees, the reality is that student loan debtors' incentives to misuse both Chapter 7 and Chapter 13 bankruptcy proceedings may outweigh empty threats of penalty imposition.[162] It also stands to reason that perhaps judges are allowing discharge by declaration in an attempt to strike a necessary balance between student loan debtors and their creditors.[163]

Rather than trust that *Espinosa* may result in less bankruptcy misuse, Congress should view this holding as proof that Chapter 13 is not the fail-safe solution to bankruptcy misuse presumed by BAPCPA. Furthermore, the Legislature should take note of the fact that some Chapter 13 plans, which allow debtors to continue paying private student loan debt, may

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[162] *See* Cordry, *supra* note 155, at 12 (noting the "discharge by declaration outbreak").

[163] *See, e.g.*, *Espinosa*, 130 S. Ct. at 1380 (revealing that the Ninth Circuit felt it must confirm such plans when the creditor failed to object).

exacerbate problems with aggressive collection terms in private loans.[164]

IV. Congress's Failed Attempts to Solve the Problem – Evidence that the Focus Should be on Economic Effects

Congressional attempts to address the unintended consequences of private student loan discharge protection can be categorized as having either an economy-based or consumer-based focus.[165] As early as 2006, just one year after the passage of BAPCPA, the Legislature began attempts to address problems with private student loan discharge protection.[166] Although the

[164] *See supra* text accompanying notes 89–93 (analyzing how one interpretation of special circumstances under Chapter 13 encourages student loan creditors to have and enforce aggressive default provisions).

[165] This comment argues that an economy-based focus will provide a more realistic solution to risky and predatory lending. *See infra* Part V (presenting solutions that will help consumers and provide more permanent stability for the economy).

[166] On May 26, 2006, Senator Hillary Clinton introduced the Student Borrower Bill of Rights Act. Bill Summary & Status: 109th Congress (2005-2006) S. 3255, THOMAS THE LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s3255: (last visited December 15, 2011)

Student Borrower Bill of Rights Act never became law,[167] this legislation focused on both consumer-based solutions and economy-based solutions.[168] The goal of this bill was to curtail predatory practices by private student loan lenders.[169] Aside from imposing disclosure requirements on these lenders,[170] the bill would have allowed debtors in bankruptcy to discharge public and private student loans if the petition was filed after seven years of repayment.[171] When Congress proposes to inform

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[167] KANTROWITZ, *supra* note 32, at 9. This bill was reintroduced in February 2007, but similarly never made it out of committee. Legislation S. 3255 Related Legislation S. 511, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=s110-511 (last visited December 15, 2011).

[168] This comment categorizes interest rate limits and better repayment provisions as economy-based solutions and dischargeability as a consumer-based solution.

[169] The National Association of Graduate-Professional Students, *Student Borrower Bill of Rights Act (S. 3255)*, http://www.nagps.org/node/771 (last visited December 15, 2011).

[170] *See id.* (explaining that private lenders would be required to disclose student loans as such, and to report borrowers' timely payments).

[171] CHEN, *supra* note 14, at 6.

debtors and give them more access to bankruptcy relief, the focus rests on concerns about consumers' rights.[172]

This bill also attempted to place limits on repayment amounts and interest rates.[173] While these types of remedies have benefits for consumers, there are also benefits to the economy because such solutions facilitate repayment. Admittedly, some dispute whether repayment is better or worse for the economy. On the one hand, lenders fear that flexible repayment options will make these loans less appealing to investors.[174] There is also evidence, however, that investors have learned from the failures of the mortgage market and are uncomfortable with securities comprised solely of student loans with rising defaults.[175] This view is further supported by the fact that "the private student loan market rose only 6 percent in the 2006-07 academic year, after growing at an annual rate of 27 percent for the preceding

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[172] *See* Student Borrower Bill of Rights Act of 2006, S. 3255, 109th Cong. 1 (2006) (stating that the purpose of the bill is "[t]o provide student borrowers with basic rights").

[173] *Id.*

[174] THE HIGH COST OF PRIVATE STUDENT LOANS, *supra* note 40, at 26.

[175] *Id.* at 34.

five years."[176] Stability in repayment appears to be a better solution for the economy in the long term.

In 2007[177] and 2008,[178] Congress simply attempted to undo BAPCPA's protection from discharge. This consumer-based solution failed in both years,[179] but the 2008 attempt, known as the College Opportunity and Affordability Act, was successful in

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[176] *Id.*

[177] Bill Summary & Status: 110th Congress (2007-2008) S. 1561, THOMAS THE LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s1561: (last visited December 15, 2011).

[178] The College Opportunity and Affordability Act contained an amendment that would achieve this. Doug Lederman, *House, Focusing on Cost, Approves Higher Education Act 2009 Hearing Regarding Undue Hardship*, INSIDE HIGHER ED (February 8, 2008, 4:00 AM), http://www.insidehighered.com/news/2008/02/08/hea; *see also* H.R. REP. NO. 110-523, at 5 (2008); *see also* H.R. REP. NO. 110-523, at 5 (2008).

[179] Congress declined to pass S. 1561. KANTROWITZ, *supra* note 32, at 9. The relevant amendment to the College Opportunity and Affordability Act failed by a vote of 236 to 179. Lederman, *supra* note 178.

securing more disclosure requirements.[180] The problem with the consumer-based disclosure remedy is that most consumers are not able to effectively determine whether the loan is actually a viable option.[181] Private loan protection advocates prevailed in the discharge debate once again by arguing that dischargeability would make these loans more costly.[182] Thus, economy-focused arguments prevailed over the consumer-focused reasoning that Congress continues to rely upon when attempting to make private student loans dischargeable.

The Health Care and Education Reconciliation Act of 2010 is another example of how Congress's consumer-focused reasoning is successful only in securing greater disclosure rights. Prior to July 1, 2010, it may have been difficult for borrowers to recognize the difference between a private loan and federal loan

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[180] Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008). This law seeks to reduce predatory private student loan lending by increasing lender and institution disclosure requirements. *See id.* § 152, 122 Stat. at 3119 (requiring that the institution inform the borrower that they may qualify for government loans and that both the institution and lender comply with the Truth in Lending Act).

[181] THE HIGH COST OF PRIVATE STUDENT LOANS, *supra* note 40, at 40.

[182] Lederman, *supra* note 178.

on their financial aid award letter because government loans through the Federal Family Education Loan Program (FFELP) could be serviced by the same lenders who provide private loans.[183] Thus, even a sophisticated borrower would have trouble recognizing that there was a significant difference between the two loans offered.[184] As a result of this legislation, however, FFELP loans are no longer granted through private lenders.[185] These loans now reach borrowers through the Direct Loan Program from the Department of Education.[186] In October of 2011, President Obama's Administration brought this consumer-focused

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[183] *See Undue Hardship Hearing*, *supra* note 11, at 18 (prepared statement of Lauren Asher, Inst. for College Access and Success) (illustrating how Sallie Mae could offer both a federal and private "Smart Option" loan on the same award letter, which creates the impression that both are a "safe form of financing").

[184] *Id.*

[185] STUDENT EXPERIENCE GROUP, U.S. DEPARTMENT OF EDUCATION FEDERAL STUDENT AID, FUNDING EDUCATION BEYOND HIGH SCHOOL: THE GUIDE TO FEDERAL STUDENT AID 2011-12, 16 (2010), *available at* http://studentaid.ed.gov/students/attachments/siteresources/Funding_Education_Beyond_HS_2011-12.pdf.

[186] *Id.*

remedy into the economy-focused realm by allowing debtors with at least one Direct Loan and one FFELP loan to consolidate into the Direct Loan program as early as January 2012.[187] This consolidation will reduce the interest paid on such loans, thereby making repayment more likely.[188]

In 2010, the Subcommittee on Commercial and Administrative Law held a hearing[189] to highlight consumer-focused policy considerations in support and opposition of the Private Student Loan Bankruptcy Fairness Act of 2010, a bill to remove bankruptcy protection for private student loans.[190] The

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[187] *FACT SHEET: "Help Americans Manage Student Loan Debt"*, THE WHITE HOUSE (Oct. 25, 2011) [hereinafter *FACT SHEET*], http://www.whitehouse.gov/the-press-office/2011/10/25/fact-sheet-help-americans-manage-student-loan-debt.

[188] *See id.* (explaining that consolidation decreases the likelihood of default by simplifying the repayment process and reducing the interest rate on some the loans by up to .5 percent).

[189] *Bankruptcy Fairness Act Hearing*, *supra* note 20, at 1.

[190] Private Student Loan Bankruptcy Fairness Act of 2010, H.R. 5043, 111th Cong. (2010). The bill was introduced to the 111th Congress on April 15, 2010, and reintroduced to the 112th Congress on May 26, 2011. *See* H.R. 2028-112th Congress: Private

Subcommittee heard from a constituent who testified about her personal experience with a for-profit university that directed her to fund her education through a private loan from one specific lender.[191] This abusive practice occurred before the Higher Education Opportunity Act took effect.[192] Thus, there should now be fewer examples of colleges steering students toward specific lenders. Nevertheless, the Subcommittee's consumer-focused approach once again prevented Congress from entertaining any solution short of complete discharge. This consumer-focused hearing also failed to discuss the negative

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Student Loan Bankruptcy Fairness Act of 2011, GovTrack.us, http://www.govtrack.us/congress/bill.xpd?bill=h112-2028 (last visited December 20, 2011) (chronicling the life of this legislation).

[191] *See generally id.* at 30–35 (testimony of Valisha Cooks) (exposing how the University of Phoenix misguided her into believing that a loan through Wachovia was "just like a federal loan").

[192] *See id.* at 31 (explaining that she graduated in 2007); *see also supra* text accompanying note 180 (showing that this Act was passed in 2008).

economic effects of subprime higher education caused by for-profit colleges.[193]

Private student loan advocates are correct in acknowledging that these risky loans are nevertheless necessary to cover the increasing costs of education. [194] However, it is unlikely that regulation will affect the availability of these loans because the private student loan market was growing rapidly prior to BAPCPA's extended protection.[195] Thus, bankruptcy protection did not make these loans more available or affordable for

[193] The impact that for-profit colleges have on the economy is beyond the scope of this paper. For a discussion about the similarities between subprime mortgage lending and subprime for-profit education see Jean Braucher, *Mortgaging Human Capital: Federally-Funded Subprime Higher Education*, 69 WASH. & LEE L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971735.

[194] *See Bankruptcy Fairness Act Hearing*, *supra* note 20, at 23 (testimony of John Hupalo) (contending that student borrowers are not an easy customer to serve absent some protection).

[195] *See supra* text accompanying note 176 (indicating that the growth of the private loan market substantially decreased after the passage of BAPCPA's discharge protection in 2005).

consumers.[196] The consumer-focused solution of making these loans dischargeable is also an unrealistic strategy.[197] A better solution to bankruptcy misuse and the problems arising from private student lending begins with economy-focused regulation.

V. More Realistic Solutions to the Private Student Loan Problem

It is difficult to ignore the fact that debtors can use private student loans to supplement federal loans, which cannot keep up with the rising costs of higher education.[198] Some say dischargeability creates a "social safety net" for debtors

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[196] *See Bankruptcy Fairness Act Hearing*, *supra* note 20, at 37 (testimony of John Hupalo) (declaring that discharge will not affect the availability of private student loans).

[197] *See* Rafael I. Pardo & Michelle R. Lacy, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 180 (2009) (commenting that Sallie Mae's leaked lobbying strategy revealed how "Congress ha[d] been capitulating to the lender lobby").

[198] *See* Philip G. Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations*, 36 HOFSTRA L. REV. 27, 33 (2007) (commenting that "[b]etween 1992 and 2005, Congress did not adjust the ceiling on the amount that graduate and professional students could borrow").

dealing with poorly regulated private loan products.[199] It is better, however, to accept that the Legislature will not soon repeal protection. Therefore, Congress should curtail bankruptcy misuse by clarifying the undue hardship standard and enacting legislation aimed at reducing defaults.

A. Statutorily Define the Undue Hardship Standard

If protection for private student loan creditors is here to stay, Congress must clarify the undue hardship standard.[200] One scholar argues that this is especially necessary because student loan debtors do not have adequate relief outside of bankruptcy.[201] Furthermore, student loan debtors suffer greater financial distress than people who file with other types of debt.[202] One solution would be realized if Congress mandated

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[199] *Undue Hardship Hearing*, *supra* note 11, at 28 (testimony of Rafael I. Pardo).

[200] *See id.* at 28 (testimony of Rafael I. Pardo) (disapproving of the fact that the Bankruptcy Code does not define this standard).

[201] *See id.* at 38 (rationalizing that the lack of options to reduce financial distress leaves student loan debtors especially vulnerable to the negative effects of discharge litigation).

[202] *See id.* at 34 (reporting that according to one study, two years and nine months of median household income before expenses

bankruptcy courts to presume undue hardship when a debtor's disposable income is insufficient to cover the cost of student loan payments.[203] This solution would also reduce litigation costs associated with the adversarial hardship hearing, which can restrict fair access to a fresh start.[204]

Regardless of how clearly undue hardship is defined, this Comment notes that BAPCPA broadened the meaning of "misuse" by extending discharge protection to private student loans. Now, debtors who have a legitimate need for a financial fresh start due to exorbitant student loans will be deemed to have misused the bankruptcy system unless they can prove undue hardship.[205]

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would have to be devoted to paying median student loan debt notwithstanding interest).

[203] *Id.* at 29. 11 U.S.C. § 524(m)(1) stipulates a similar presumption of undue hardship when a debtor's disposable income is insufficient to make payments on reaffirmed debt. *Id.* at 39.

[204] *Id.* at 40; *see also* Pardo & Lacy, *supra* note 197, at 235 (finding that "extralegal factors predominantly influence the extent of discharge obtained by student-loan debtors").

[205] *See infra* note 123 (demonstrating that abuse is presumed when a debtor fails the means test because student loan debt is not counted as an expense or special circumstance, leaving undue hardship as the only option).

Because this standard depends less on the debtor's financial hardships than on other factors,[206] Congress has inadvertently created a larger number of so-called bankruptcy "abusers." The best way to reconcile this problem is by taking the time to provide courts with clear guidance on undue hardship standards for student loan debt.[207]

B. Mandate Income-Based Repayment Options for Private Student Loans

Default statistics from the Department of Education signal that the economy is taking a toll on borrowers' abilities to repay their student loans.[208] The Obama Administration recently addressed repayment for federal loans by building on a program

[206] Pardo & Lacy, *supra* note 197, at 119, 221 (finding that the identity and years of experience of the debtor's attorney played a statistically significant role in the success of an undue hardship trial).

[207] *See* supra text accompanying note 203 (suggesting an undue hardship presumption); *but see generally*, *Undue Hardship Hearing*, *supra* note 11 (discussing only discharge protection removal and failing to address the need for a better undue hardship standard despite this hearing's misleading name).

[208] *See supra* Part I (referencing statistics from the Bureau of Labor and Statistics as well as the Department of Education).

that began in 1993.[209] The program and its predecessors allow qualifying debtors to consolidate their loans and calculate a reduced payment over a longer payment period.[210] This is now known as Income-Based Repayment (IBR).[211] The IBR amount is based on how much discretionary income the debtor has.[212]

Although the program has costs and benefits,[213] some feel that if private lenders were to offer similar income-based

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[209] *See* Philip G. Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations*, 36 HOFSTRA L. REV. 27, 30–32 (2007) (disparaging the first income-contingent repayment plan); *see also FACT SHEET*, *supra* note 186 (announcing that the administration expedited implementation of new IBR measures, making the option available in January 2012 rather than July 2014).

[210] *See* Schrag, *supra* note 209, at 31, 35–38 (contrasting 1993 Income-Contingent Repayment (ICR) with the later-refined Income--Based Repayment program). Consolidation is not a requirement for the program. *Id.* at 38.

[211] *Id.* at 34–35.

[212] *See id.* at 35–38 (detailing how IBR works).

[213] *See id.* at 43 (providing an example of how IBR is good option for debtors with low-paying jobs and federal loans). Extended

repayment options, these loans would be much more affordable.[214] These debtors would arguably be less likely to file for bankruptcy if they could afford private loan repayment.[215]

C. Maintain a Reasonably High Ceiling on Federal Aid to Reflect Higher Costs of Education

If congressional caps on federal student aid do not reflect the rising costs of education, more students will turn to

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repayment plans do, however, allow greater interest to accrue and the total amount due to increase. *Id.* at 31. Depending on the debtor's occupation, their federal loans may be forgiven through the Public Service Loan Forgiveness Program after ten10 years of payment. *FACT SHEET*, *supra* note 186.

[214] *See, e.g.*, *Bankruptcy Fairness Act Hearing*, *supra* note 20, at 52 (testimony of Valisha Cooks) (explaining that repayment options would at least keep her out of default). This solution would be especially beneficial if the debt was forgiven after a finite number of years in repayment.

[215] For example, if the interest rate is capped, monthly payments will be more manageable. Although unemployed borrowers will have difficulty repaying any amount, IBR options will give underemployed borrowers a better chance of preventing default.

private loans.[216] For example, because the legislature did not adjust the Stafford Loan limit between 1992 and 2005, graduate students in the late 1990s had to use commercial sources to cover a greater percentage of their costs.[217] The Grad PLUS loan program, implemented in 2006, helped address this problem for graduate students.[218]

In the past decade, tuition and fees for public four-year colleges have increased by an annual average of 5.6 percent beyond inflation.[219] During this period, grant aid and federal loans have increased at an annual average of five percent per

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[216] *See* Schrag, *supra* note 209, at 33 (observing the effects of a stagnant federal Stafford loan program); *see also supra* text accompanying note 27 (recognizing that private loans are useful when government loans are not enough).

[217] *Id.*

[218] *Id.*

[219] THE COLLEGE BOARD, TRENDS IN COLLEGE PRICING 2011, 3 (2011), *available at* http://trends.collegeboard.org/downloads/College_Pricing_2011.pdf.

student, per year, after adjusting for inflation.[220] Not coincidentally, the percent of nonfederal loans used in education borrowing has decreased from about twenty-five percent to seven percent from lending years 2005-2006 and 2007-2008 to lending year 2010-2011.[221] Because federal loans are better for debtors, this is a step in the right direction.[222] However, private loans should not be completely eliminated because they provide an additional option.[223] Thus, now that the need for such

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[220] THE COLLEGE BOARD, TRENDS IN STUDENT AID 2011, 3 (2011) [hereinafter TRENDS IN STUDENT AID], *available at* http://trends.collegeboard.org/downloads/Student_Aid_2011.pdf.

[221] *Id.* at 13. This is due to both increases in federal aid as well as economic issues facing lending markets. *Id.* at 9; *see also supra* text accompanying note 76 (positing that the lending market will regulate itself).

[222] *See* TRENDS IN STUDENT AID, *supra* note 220, at 9 (recognizing that private loans are good supplements, but commonly have higher long-term interest rates and stricter repayment terms).

[223] *Id.* Another productive change is that by October 29, 2011, colleges and universities will have to post net-price calculators on their websites to help borrowers determine how much money they will need to cover the cost of their education after grants and tax-credits. *Id.* at 8.

loans has been reduced, new debtors are best served by the regulation of private lending practices, while debtors who have already borrowed from private lenders will benefit from interest and repayment regulation.

D. Regulate the Private Student Loan Industry

Most recently, the new Consumer Financial Protection Bureau is attempting to regulate private loan lending by helping borrowers report abusive practices.[224] Soon, the agency's website will provide a streamlined way for consumers to disclose predatory private student lending.[225] This indirect solution does not address repayment issues.

Federal loans have limits, capped interest rates, and other borrower protections.[226] Therefore, if private student loans are

[224] *See* How Do I Get Help With Other Products: Consumer Questions and Complaints, CONSUMER FINANCIAL PROTECTION BUREAU, http://www.consumerfinance.gov/get-help-now/consumer-questions-and-complaints/ (last visited December 28, 2011) (taking debtors through a series of questions to determine the lender and direct users to the federal regulator that oversees that institution).

[225] *See id.* (announcing that CFPB will have a private student loan reporting function similar to that of the Department of Education).

[226] THE HIGH COST OF PRIVATE STUDENT LOANS, *supra* note 40, at 44.

to be given the same discharge protection as public loans, they too should be regulated to protect borrowers from predatory practices and abusive terms.[227] While some argue that interest rate regulation will result in fewer borrowers qualifying for private loans,[228] the reality is that the lending market is already making fewer loans.[229] Thus, in addition to capping private loan interest rates, the government should mandate more flexible repayment provisions.

The federal government has already recognized that difficult economic times make income-based repayment options imperative for some debtors.[230] Given that so many debtors will begin to repay sizable private student loans in the near

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[227] *See id.* (acknowledging the difficulties of developing responsible underwriting, but declaring that these issues underscore the need for regulation).

[228] *Id.*

[229] TRENDS IN STUDENT AID, *supra* note 220, at 9; *see also supra* note 221 and accompanying text (reporting that private education borrowing has declined because of market concerns and increased federal aid).

[230] *See supra* Part V.B (propounding arguments for income--based repayment of private student loans).

future,[231] IBR could prevent such debtors from defaulting on private loans.[232] Furthermore, such options could help these debtors avoid bankruptcy in the future by freeing up money for other monthly debt payments.[233]

It is not clear that withdrawing bankruptcy discharge protection for private loans would indirectly reduce predatory lending.[234] Thus, direct regulation of these loans is needed to protect BAPCPA's general goals and reduce the need for

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[231] *See supra* text accompanying note 221 (showing that between 2005 to 2008 about twenty-five percent of education borrowing came from nonfederal loans).

[232] *See supra* text accompanying note 214 (recounting that one bankrupt debtor claims that IBR would have kept her from defaulting on her private loan).

[233] *See Bankruptcy Fairness Act Hearing*, *supra* note 20, at 31 (testimony of Valisha Cooks) (explaining that she filed for bankruptcy because temporary medical problems and her large student loan payments kept her from being able to pay the $10,000 she owed in other unsecured debt).

[234] *See supra* text accompanying note 199 (summarizing testimony regarding a policy reason for removing private loan discharge protection).

bankruptcy relief.[235] Although private loans may be necessary to cover rising education costs, protecting these loans from discharge has not made them more affordable.[236] Furthermore, private loan default rates have risen along with unemployment rates.[237] Debtors in this economic climate, who are facing aggressive private student loan creditors have greater incentives to misuse bankruptcy law. Thus, BAPCPA's protection of private student loans may undermine BAPCPA's means test goal of reducing bankruptcy misuse.[238]

VI. Conclusion

The time is ripe for Congress to assuage the negative effects of BAPCPA—if not for the sake of debtors, then at least

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[235] *See* Weller, Morzuch, & Logan, *supra* note 2, at 329–30 (disclosing that one BAPCPA goal was to reduce bankruptcy filings overall); *see also infra* Part III.A (discussing the goals of the BAPCPA means test).

[236] *See supra* text accompanying note 196 (drawing upon testimony to show that protection has not made private loans less costly).

[237] *See* FitzGerald, *supra* note 9 (reporting that the private student loan default rate rose as unemployment among recent college graduates continues).

[238] *See supra* Part III (examining the purpose of the means test and how debtors can overcome this barrier).

in an effort to reduce temptation to misuse bankruptcy relief.[239] The Bankruptcy Code's vague undue hardship standard leaves student loan debtors with few options[240] and Chapter 13 is not a fail-safe solution to bankruptcy misuse.[241] Furthermore, predatory lending practices increase the potential for misuse of the bankruptcy system.[242] Therefore, it is not enough to hope that the student lending market will continue to regulate itself.[243] Providing student loan debtors with nothing more than

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[239] *See supra* Part I (juxtaposing the economic recession with decreases in employment with increases in student loan default rates and unemployment).

[240] *See supra* Part II.B (illustrating the obstacles created by the vague undue hardship standard).

[241] *See supra* Part III.C (discussing how the Supreme Court's interpretation of the Bankruptcy Code enables bankruptcy misuse).

[242] *See supra* text accompanying note 82 (arguing that as private student loans enter repayment and default rates remain prevalent due to the current economic downturn the only relief may come from misuse of the bankruptcy system).

[243] *See supra* text accompanying note 76 (indicating that lenders are reducing their risk).

legislative lip service is also inadequate.[244] The Executive has attempted to address federal student loan default.[245] Yet, private student loan borrowers, whose loans are entering repayment, need affirmative regulation–not just post-hoc bureaucratic reporting mechanisms.[246] Thus, members of Congress must extricate themselves from private student lenders' pockets, if only to make these loans have more reasonable repayment provisions.[247] Given the general preoccupation with national debt and bankruptcy misuse,[248] surely this is not too much to ask.

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[244] *See supra* Part IV (disputing the earnestness of congressional attempts to address private loan problems and arguing that a debtor-focused remedy is ineffective and disingenuous).

[245] *See supra* Part V.B (approving of new IBR options); *see also supra* Part V.D (endorsing the new consumer protection agency).

[246] *See supra* Part V.D (disapproving of how this is only an indirect solution).

[247] *See supra* note 197 (contending that the private lending lobby flaunts its power over Congress).

[248] *See supra* Part II.A (manifesting Congress's concern with student loan debtors attempting to escape responsibility); *see also supra* Part III.A (evidencing that the Legislature suspected bankruptcy misuse).