EASY ACCESS TO LOANS, BUT WHAT ABOUT ACCESS TO JUSTICE?

Brooke D. Coleman[*]

Rafael Pardo's article, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*,[1] thoughtfully details how, in bankruptcy litigation involving student-loan debt, repeat-player creditors have an undoubted advantage. This advantage, however, goes beyond the standard narrative of how the resource disparities between creditor and debtor result in debtor gain. As Pardo explains, the debtor faces a stacked deck in a number of respects. Indeed, a difficult burden of proof, a complex test for carrying that burden, procedural infirmities, and an arguably vexatious litigant-creditor all combine to make just—let alone successful—litigation a near impossibility for debtors. *The Undue Hardship Thicket* carefully demonstrates how, like civil litigation at large, bankruptcy litigation risks disadvantaging those who are most marginalized, and thus, has negative implications for access to justice.

Student-loan debt is unique, as Pardo explains, because it can be conditionally discharged in bankruptcy.[2] In short, the debtor need only show that repaying the student loan would result in an "undue hardship."[3] There are two steps in making this showing. First, the creditor has to show that the debt exists and that it is covered under the dischargeability statute.[4] Second, the burden shifts to the debtor—she has to establish she would suffer "undue hardship" if she were required to pay back the loan.[5] The process sounds straightforward, but Pardo argues that bankruptcy courts have been inconsistent in how they apply the undue hardship standard.[6] This inconsistency, when combined with the nature of the adversarial process, leads repeat-players to engage in litigation tactics meant to force debtors to simply give up.[7]

Pardo's article lays out the primary ways in which the undue hardship process is problematic for student-loan debtors. First, Pardo demonstrates that the undue hardship test is more onerous for debtors than for creditors. The creditor's burden is relatively simple and is usually accepted on its face.[8] In contrast, the debtor's burden varies depending on the

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* Associate Professor of Law, Seattle University School of Law.

1. 66 FLA. L. REV. 2101 (2014).
2. *Id.* at 2107.
3. *Id.*
4. *Id.* at 2110 (referencing 11 U.S.C. § 523(a)(8)).
5. *Id.*
6. *Id.* at 2009.
7. *See id.* at 2109–10. Pardo supports his argument that this inconsistency exists with a previous study he conducted with Professor Michelle Lacey. *Id.*
8. *See id.* at 2114–15.

jurisdiction.[9] There are two tests—the Second Circuit's *Brunner* test and the "totality test."[10] Pardo discusses their advantages and disadvantages, but ultimately concludes that both tests are problematic because they require the debtor to prove multiple elements and facts.[11] The complexity of what a debtor must demonstrate exists in stark contrast to the simplicity of the creditor's burden.

Second, Pardo criticizes prior studies of the undue hardship test. Specifically, he discusses Jason Iuliano's study (the "Iuliano Study"), which generally concluded that any access-to-justice concerns arising out of the undue hardship test were exaggerated.[12] The Iuliano Study argued that more debtors should in fact litigate the dischargeability of their student loans because, according to the study, the cost of doing so is fairly low when compared to how much it costs to file bankruptcy.[13] Pardo argues that the study and its conclusion are problematic because of the way the study constructed its sample, because the study inaccurately coded its protocols for relief, and finally, because of its "misconceptions" of the legal landscape, including misstating the *Brunner* test.[14] Pardo then discusses his own study[15] as well as others and determines that, contrary to the Iuliano Study, it is not always best for a debtor to engage in an adversary proceeding.[16] Indeed, it might be better for the debtor to pursue an administrative remedy because the inequities of litigating undue hardship are so high.[17]

In order to explore these inequities, Pardo focuses on how one repeat-creditor-player, the Educational Credit Management Corporation ("ECMC"), has engaged in adversarial proceedings involving student loans. ECMC is the guaranty agency for the Department of Education in a number of states.[18] The Department of Education has also designated ECMC as its assignee in bankruptcy proceedings involving federal student loans.[19] What this means is that ECMC is involved in a lot of bankruptcy proceedings where student debt is involved. Pardo examined ECMC's conduct in a sample of 100 adversary proceedings during a two-year

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9. *Id.* at 2116.
10. *Id.* at 2116–17.
11. *Id.* at 2118.
12. *Id.* at 2125.
13. *Id.*
14. *Id.* at 2126–35. *See also* Lonny Hoffman, *Rulemaking in the Age of* Twombly *&* Iqbal, 46 U.C. DAVIS L. REV. 1483, 1548–50 (2013) (discussing the difficulty in conducting empirical studies of Civil Rules and the additional difficulty of properly using that information in formulating policy).
15. Pardo, *supra* note 2, at 2122–24.
16. *Id.* at 2135–42.
17. *See id.* at 2137.
18. *Id.* at 2143.
19. *Id.* at 2143–44.

period.[20] From that data set, he found that ECMC regularly failed to comply with certain procedural requirements and systematically engaged legal arguments that were arguably frivolous.[21] For procedural non-compliance, for example, Pardo discovered that in about 80% of the cases, ECMC failed to file its corporate disclosure statement—a statement that is required to be made by "[a]ny corporation . . . that directly or indirectly owns 10% or more of any class of the [corporate party's] equity interests."[22] Without this statement, the judge is unable to determine whether she has a financial interest in ECMC and should thus disqualify her adjudication of the claim.[23] Pardo also determined that ECMC regularly skirted the technical requirements of how it joins in bankruptcy litigation, how it responds to the complaint, and how it engages in discovery.[24] In short, ECMC, according to Pardo's study, regularly missed technical procedural requirements. As for ECMC's legal stance, Pardo chronicles how ECMC has repeatedly made an ill-conceived, if not frivolous, argument that once a judge has granted a discharge in the debtor's underlying bankruptcy case, the debtor is precluded from initiating an undue hardship adversary proceeding.[25] Court after court has rejected this argument; yet, ECMC continues to pursue it, leading to what Pardo calls "pollutive litigation."[26] This example of pollutive litigation, along with the procedural deficiencies Pardo unearths, lead him to the inevitable conclusion that the debtor's access to justice is often blocked.[27]

After making the case that debtors seeking to discharge their student debt are at a distinct disadvantage, Pardo then proposes a solution. He admits that Congress had the chance to help student-loan debtors in the past, but has not, so the likelihood of finding remedy within Congress is unlikely.[28] Bankruptcy lawyers do not have the power to engage in meaningful reform.[29] As for courts, Pardo is skeptical that appellate courts can do much good because they do not see enough of these "small cuts" that Pardo argues combine to do more severe damage.[30] Instead, Pardo argues that the bankruptcy judges themselves are the place to look for relief. These judges, Pardo argues, will be able to make small differences by monitoring how creditors like ECMC conduct themselves and will,

20. *Id.* at 2148.
21. *See id.* at 2146, 2163.
22. *Id.* at 2148–49 (citing FED. R. BANKR. P. 7007.1(a)).
23. *Id.* at 2149.
24. *Id.* at 2150, 2154, 2159.
25. *Id.* at 2163.
26. *Id.*
27. *Id.* at 2173.
28. *Id.* at 2174.
29. *See id.* at 2175.
30. *Id.* at 2176.

ultimately, be able to push the system closer to a just one.[31]

Pardo paints a convincing picture of how bankruptcy litigation and more specifically the undue hardship test in the context of student loans is rather bleak for debtors, and his access-to-justice argument is compelling. I have only small quarrels with the piece. For example, his criticism of ECMC's procedural noncompliance is well-taken, but one could argue it is overstated. His findings about how ECMC regularly missed certain requirements upon joinder and also chronically missed responsive pleading deadlines is concerning. Yet, it is hard to imagine how his solution of greater engagement from bankruptcy judges will remedy these lapses in compliance. As Pardo points out, the bankruptcy rules adopt in whole the Federal Rules of Civil Procedure. When it comes to joinder and responsive pleading, the Civil Rules are immensely flexible and forgiving. It is true that when seeking to amend an answer, for example, the defendant must seek consent from the court or the opposing party (assuming the time for amending as a matter of right has passed).[32] But, that consent is freely given when justice requires it,[33] and in many cases, the opposing party will simply consent, preventing the court from engaging at all. This is not to say that Pardo is not right to argue that ECMC's noncompliance is problematic. It is, and his larger point is certainly valid: This kind of noncompliance—in combination with the other problems he discusses in the article—is concerning because of its cumulative effect on debtors. However, managerial judging—greater engagement by judges in the litigation process—does not seem to answer some of the specific types of procedural noncompliance that Pardo exposes. The Civil Rules are simply so flexible. It is difficult to imagine a judge rejecting these types of requests, meaning that the end result will often be the same.

Finally, my skepticism of managerial judging has another layer. Judith Resnik originated the term "managerial judge," and her critique of that term and the judge's role was—and this is an oversimplification—that the role of the judge used to be to adjudicate the claim, not to manage the case.[34] Resnik argued that this new model of judging "br[oke] sharply from American norms of adjudication" because it was "judge initiated, invisible, and unreviewable."[35] Pardo anticipates this critique by explaining that undue hardship litigation does not generally lead to trial, but instead is often settled or resolved through other modes of pretrial disposition.[36] Pardo's point is well-taken—perhaps the enforcement of procedural rules

31. *Id.* at 2177.

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

33. *Id.*

34. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77.

35. *Id.* at 414.

36. Pardo, *supra* note 2, at 2178. Resnik's critique, however, largely focused on the discretion judges had to force parties into settlement at the pre-trial stage. *See* Resnick, *supra* note 34, at 379.

and a stronger response to pollutive litigation might indeed force actors like ECMC to behave better. However, it is not clear why bankruptcy judges would enforce the rules in this way. In the federal district court context, some scholars critique the judiciary as pro-business and otherwise hostile to less-resourced litigants.[37] Undoubtedly, this is an oversimplification of the arguments (and, of course, the Judiciary), but the gist is that federal district court judges are not sympathetic to marginalized individuals and their claims. It is thus difficult to imagine that they would be likely to otherwise enforce the procedural rules being violated. It may be that bankruptcy judges are differently composed. But, to the extent they share commonalities with federal district court judges, I am cautious of a claim that managerial judging is the answer to an access-to-justice critique. That caution does not mean that Pardo is wrong. It is simply that as we make our way through the thicket that he so eloquently outlines, we must take care that the solution does not serve to compound the problem.

37. *See, e.g.*, Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 520 (2010) (examining "the disparate impact that the changing nature of pretrial practice has on civil rights and employment discrimination cases"); Brooke D. Coleman*, The Vanishing Plaintiff*, 42 SETON HALL. L. REV. 501, 522 (2012) (arguing that judicial enforcement of procedural rules is used to marginalize lower-resourced plaintiffs). This is reflected in the Supreme Court as well. *See, e.g.*, Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013) ("We find that five of the ten Justices who, over the span of our study (the 1946 through 2011 Terms), have been the most favorable to business are currently serving, with two of them ranking at the very top among the thirty-six Justices in our study."); Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 962 (2008) ("[T]he Roberts Court is the most pro-business Court of any since the mid-1930s.").