NOTE

HEIGHTENED NOTICE MEANS HEIGHTENED PROBLEMS: DUE PROCESS NOTICE CONCERNS WHEN DISCHARGING STUDENT LOAN DEBTS UNDER CHAPTER 13

I. INTRODUCTION

Most college and graduate school graduates cringe when they hear the words "student loans." Student loans are seemingly just as difficult to avoid as they are to eliminate. For some unfortunate individuals, overwhelming student loan debts are so great that they cannot be repaid. These student loan debtors may have no choice but to resort to the bankruptcy process for financial relief.

Chapter 13 bankruptcy cases allow most individuals with regular income[1] to devise a plan by which to repay creditors out of the debtor's future income.[2] If the bankruptcy court approves the debtor's plan, the payment of the debts pursuant to the plan will discharge most debts provided for by the plan.[3] Student loans, however, are non-dischargeable without the debtor coming forward with evidence showing that failure to discharge the student loans would create an extreme financial burden on the debtor.[4] The issue then becomes whether the bankruptcy procedure rules require the debtor to commence an "adversary proceeding"[5] and provide the creditor with personal notice to determine whether a student loan debt may be discharged, or whether the debtor may discharge the student loan debt in some other manner.

The United States Courts of Appeals that have considered this issue have either held in favor of claim preclusion where a student loan debt is discharged without litigating its dischargeability or in favor of allowing

1. *See* 11 U.S.C. § 109(e) (2006).

2. BARRY E. ADLER ET AL., CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 26 (4th ed. 2007).

3. *See* 11 U.S.C. § 1327(a); *see also id.* § 523(a).

4. *See id.* § 523(a)(8).

5. *See* FED. R. BANKR. P. 7001.

a creditor to attack a bankruptcy order which is violative of the creditor's due process rights.[6] A debtor's Chapter 13 plan which clearly apprises the creditor: (1) of the debts which the debtor wishes to discharge; (2) that subsequent confirmation by the court will satisfy the "undue hardship" requirement of the bankruptcy code; and (3) of the potential res judicata effect of its confirmation, satisfies minimal constitutional due process requirements of notice and procedure.[7] However, the plan does not comport with the heightened due process privilege afforded to creditors by the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"),[8] and such failure to comply with the clear language of the rules renders the order confirming the plan void.

This Note posits that the bankruptcy laws should not afford the creditor heightened due process notice because the Chapter 13 bankruptcy process affords creditors ample opportunities to protect their interests.[9] Part II provides a brief overview of the history of student loans and how the government has promoted higher learning while curbing potential abuses of using the bankruptcy courts as a vehicle to avoid repaying hefty student loans. Part III provides a look at the bankruptcy process with a focus on Chapter 13 cases. Part IV offers a detailed description of the existing controversy between due process rights and finality of judgments among the circuit courts. Part IV then provides an alternative viewpoint of the controversy in light of the two separate due process standards. Finally, Part V argues for resolution of the dispute in favor of adopting minimal standards of due process notice in Chapter 13 cases, over affording creditors greater procedural protections.

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6. *See infra* Part IV.A-D.

7. Under due process, notice and procedure requirements stem from different sources. The due process notice required in a particular case is governed by the test set forth by *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), requiring "notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Meanwhile, the procedural requirement of due process emanates from the balancing test set forth by *Mathews v. Eldridge*, 424 U.S. 319 (1976), which applied the following three-factor test: (1) the "private interest that will be affected by the official action;" (2) the risk of erroneous decision making and likely value of additional procedural safeguards; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would" impose. *Id.* at 335.

8. The only means of discharge of student loans explicitly permitted by the rules is by way of an adversary proceeding which requires service of process. FED. R. BANKR. P. 7001(6), 7003, 7004.

9. *See* discussion *infra* Part IV.D.

II. A HISTORY OF STUDENT LOANS AND FINANCING EDUCATION

A. A Brief Introduction

Higher education provides today's youth with countless professional opportunities. However, as with everything else in life, there is a price to pay. When it comes to postsecondary education, that price is a rather hefty one. According to the most recent survey performed by the National Postsecondary Student Aid Study ("NPSAS"), approximately two-thirds (65.7%) of four-year undergraduate students graduate with some debt,[10] and the average student loan debt amassed by those graduating students is $19,237.[11] Meanwhile, as more and more students seek graduate degrees, their outstanding student loan obligations worsen. According to the study, the average graduate student accrues $37,067 by graduation date, with an average cumulative debt[12] of $42,406.[13] In fact, the average student loan debt incurred by those graduating from a private law school is $83,181; meanwhile, median gross starting salaries at public service organizations are less than $40,000 per year.[14] Considering these troubling statistics, a student loan debtor who cannot secure a high-income employment position may not be able to avoid relying on the bankruptcy courts for individual financial relief.

B. Government Financing of Education: National Defense Education Act of 1958 and Higher Education Act of 1965

The sources of student loans vary. While private student loans existed as far back as the pre-Civil War era,[15] government secured student loans are relatively new to our nation's history. The origin of

10. These figures exclude PLUS Loans, but include all Federal Stafford and Perkins Loans, other federal and state government loans, as well as private lender loans. FinAid.org, *Student Loans*, http://www.finaid.org/loans (last visited Jan. 20, 2009) (referring to the National Postsecondary Student Aid Study of 2003-04).

11. *Id.*

12. Cumulative debt is described as total undergraduate debt plus total graduate school debt accumulated. *Id.*

13. *Id.*

14. Letter from Carl C. Monk, Executive Dir., Ass'n of Am. Law Sch., to Hon. Mike George Miller, Chair, House Comm. on Educ. & Labor, and Hon. Edward M. Kennedy, Chair, Senate Comm. on Health, Educ., Labor and Pensions, (Sept. 4, 2007), *available at* http://www.aals.org/documents/millerkennedy2007.pdf.

15. *See* Kevin C. Driscoll Jr., Note, *Eradicating the "Discharge by Declaration" for Student Loan Debt in Chapter 13*, 2000 U. ILL. L. REV. 1311, 1313 (citing Waters v. Cleland, 32 Ga. 633 (1861)).

government secured student loans dates back to the passage of the National Defense Education Act of 1958,[16] which was created to "encourage and assist in the expansion and improvement of educational programs to meet critical national needs."[17]

However, the main event in government student loan history was the passage of the Higher Education Act of 1965 ("HEA").[18] The HEA started the trend toward students utilizing federal funds to finance their education as opposed to using high interest private loans.[19] Among other benefits of the act, the HEA is credited with the consistent rise in higher education enrollment.[20] This is partly due to the fact that government secured education loans are made available to those students who may not qualify for credit under traditional credit standards.[21]

C. Congress Responds to Student Loan Discharge

In 1973, the Commission on the Bankruptcy Laws of the United States,[22] a creation of Congress, concluded that filing under Chapter 13 of the Bankruptcy Code (the "Code") should be encouraged for consumer debtors as an alternative to filing under Chapter 7.[23] While Chapter 7 cases can trace their roots back to the 1898 Bankruptcy Act ("Bankruptcy Act"), Chapter 13 became available to individuals as a result of the 1938 Amendments to the Bankruptcy Act ("Chandler Act").[24] The purposes and objectives of the Bankruptcy Act, and Chapter 7 cases, contrast with the motivations behind the creation of Chapter 13 cases.[25] In Chapter 7, individual debtors receive a "clean slate" from previous financial burdens at the cost of surrendering nonexempt

16. 20 U.S.C. §§ 421-29 (1970) (repealed 1972).

17. *Id.*

18. *Id.* §§ 1071-87 (2000).

19. Driscoll, *supra* note 15, at 1313-14.

20. *Id.* at 1314.

21. COLLIER ON BANKRUPTCY 523.14[1] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008) (citing Santa Fe Med. Servs., Inc. v. Segal (*In re* Segal), 57 F.3d 342 (3d Cir. 1995)).

22. "[T]he Commission on the Bankruptcy Laws of the United States [is] an independent group of judges and private citizens" called "to evaluate the bankruptcy system and make suggestions for reform." Seth J. Gerson, Note, *Separate Classification of Student Loans in Chapter 13*, 73 WASH. U. L.Q. 269, 274 n.40 (1995).

23. *Id.* at 274.

24. Gerald F. Munitz, *The Bankruptcy Power and Structure of the Bankruptcy Code*, *in* UNDERSTANDING THE BASICS OF BANKRUPTCY & REORGANIZATION 2007 35, 45 (Practising Law Inst. ed., 2007).

25. *See* ADLER ET AL., *supra* note 2, at 25-26.

assets.[26] Congress later gave individual debtors the ability to restructure their debt obligations and maintain even their nonexempt assets by offering Chapter 13 relief.[27] Under Chapter 13, creditors receive a percentage of their receivables from the debtor's future income.[28] Creditors benefit since they will receive at least as much as they would under Chapter 7 liquidation, and debtors benefit since they do not have to surrender their assets, of which they likely place a greater value on than any one of their creditors.[29]

In addition to encouraging Chapter 13 cases as an appropriate alternative to Chapter 7 cases, the Commission on the Bankruptcy Laws noted some early concerns regarding the prospect of discharging student loans pursuant to the liberal Bankruptcy Act then in place.[30] To address some of these concerns, the Education Amendments of 1976 made student loans secured by the government non-dischargeable for a period of five years.[31] Implicitly, in providing a five-year provision, Congress feared granting discharge to those individuals who recently graduated and have not had an ample opportunity to secure a comfortable financial position would encourage students to immediately seek relief from the bankruptcy courts before paying off a significant amount of their student loan debts.[32] Moreover, Congress seemed to believe that the non-discharge provision safeguarded "the financial integrity of governmental entities and nonprofit institutions that participate in educational loan programs."[33]

However, the 1977 House report[34] seemed to suggest otherwise. The report included a study performed by the Government Accountability Office ("GAO") that documents findings that demonstrate that between one-half to three-fourths of one percent of all matured educational loans were discharged in bankruptcy.[35] Congress supported the provision which made secured government student loans

26. *Id.* at 25. The Bankruptcy Code provides a laundry list of assets that cannot become part of the bankruptcy estate in Chapter 7 liquidation cases. *See* 11 U.S.C. § 522(d) (2006).

27. ADLER ET AL., *supra* note 2, at 25-26.

28. *Id.* at 26.

29. *Id.*

30. Gerson, *supra* note 22, at 280-81.

31. 20 U.S.C. § 1087-3(a) (1976) (repealed 1978).

32. *See* H.R. DOC. NO. 93-137, pt. 1, at 176-77 (1973) (displaying Congress's concern that any discharges would discredit the system of advancing government secured loans).

33. COLLIER ON BANKRUPTCY, *supra* note 21, at 523.14[1] (citing *In re* Renshaw, 222 F.3d 82 (2d Cir. 2000)).

34. H.R. REP. NO. 95-595, pt. 1 (1977), *as reprinted in* 1978 U.S.S.C.C.A.N. 5963.

35. DEANNE LOONIN, NAT'L CONSUMER LAW CTR., NO WAY OUT: STUDENT LOANS, FINANCIAL DISTRESS, AND THE NEED FOR POLICY REFORM 29 (2006).

non-dischargeable by advancing the argument that student loans differ from other debt since the debtor obtains an asset, a degree, which cannot be taken away in the event of default.[36]

Congress passed the Bankruptcy Reform Act of 1978[37] which, irrespective of the extremely meager discharge rates discovered by the GAO study, severely limited the possibility of discharging an education loan under Chapter 7[38] by incorporating the five-year provision into section 523(a) of the Code.[39] This provision made student loans non-dischargeable for five years unless the debtor could demonstrate that excepting the debt from discharge would impose "undue hardship" upon the debtor.[40] However, the non-discharge provision did not extend to bankruptcy cases commenced under Chapter 13.[41] Eventually, in 1990, Congress amended § 1328(a) to incorporate student loans as non-dischargeable in Chapter 13 cases absent a showing of "undue hardship."[42] Additionally, Congress extended the five-year non-discharge period for student loan debts to seven years.[43]

In 1998, Congress amended the Code again when it deleted the seven-year provision, "leaving 'undue hardship' as the sole basis for discharging an educational loan or benefit."[44] Congress's fear of the potential harmful effects of creating a provision that would make a government secured student loan virtually non-dischargeable was softened by the fact that they were able to provide students with record-low interest rates on their loans.[45] In fact, during the 105th Congress's

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36. *Id.*

37. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 259 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (2006)).

38. Chapter 7 bankruptcy cases discharge debts through liquidation. *See* 11 U.S.C. § 727; Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007). The provision did not apply to Chapter 13 cases (discharge by completion of plan payments, discussed *infra*) in 1978. Gerson, *supra* note 22, at 282.

39. Gerson, *supra* note 22, at 281-82.

40. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 259 (codified as amended at 11 U.S.C. §§ 101-1330). Although there is no agreement among the courts of the United States as to what the true definition of "undue hardship" is, the leading test is found in the Second Circuit's decision in *Brunner v. N.Y. State Higher Education Services Corp.*, 831 F.2d 395, 396 (2d Cir. 1987). *See infra* notes 211-12 and accompanying text.

41. Gerson, *supra* note 22, at 282.

42. *See* 11 U.S.C. § 1328(a)(2) (incorporating § 523(a)(8) and various other non-dischargeable debts); Gerson, *supra* note 22, at 283.

43. *See* 11 U.S.C. § 523(a)(8) (1994) (current version at 11 U.S.C. § 523(a)(8) (2006) (deleting the seven year requirement)).

44. COLLIER ON BANKRUPTCY, *supra* note 21, at 523.14[6].

45. *See* 144 CONG. REC. S11069-71, 22,679-80 (daily ed. Sept. 29, 1998) (statement of Rep. Jeffords) (acknowledging that eliminating the seven-year provision may be problematic, but

floor debates, Senator Edward M. Kennedy of Massachusetts mentioned that the cost of college had risen 304% in the previous twenty years in contrast to only a 165% inflation increase.[46]

Finally, in 2005, Congress broadened the discharge exception of § 523(a)(8) of the Code to include "any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986,"[47] incurred by a debtor who is an individual.[48] This amendment to the Code extended the non-dischargeable provision to some loans that are not insured or guaranteed by a governmental unit or under a program funded by a governmental unit[49] or non-profit institution.[50] The issue then turns to how an education loan debtor may seek to discharge his student loan debt. The next Part will demonstrate how the Code and Bankruptcy Rules have sought to resolve that issue and how such attempts at resolution appear to be ineffectual.

III. THE BANKRUPTCY PROCESS

A. The Chapter 13 Confirmation Process

An individual debtor seeking relief from collection of student loans may commence a bankruptcy case to obtain such relief.[51] Although a student loan debtor may seek relief under Chapter 7 or Chapter 13,[52] Chapter 13 bankruptcy cases are more attractive to individuals seeking discharge of debts since they provide that the debtor's assets are not seized and liquidated.[53] Furthermore, Chapter 13 provides the debtor

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suggesting that the provision was a means by which Congress could achieve other objectives in facilitating repayment of student loans).

46. *Id.* at 22,681 (statement of Sen. Kennedy).

47. 11 U.S.C. § 523(a)(8) (2006).

48. *Id.* Section 221(d)(1) defines a qualified education loan and indebtedness incurred solely to pay for "qualified higher education expenses," which includes all costs of attendance: tuition, fees, books, room and board, supplies, and other related expenses. 26 U.S.C. § 221(d)(1) (2006); 20 U.S.C. § 1087*ll* (2006).

49. The term "governmental unit" is defined by 11 U.S.C. § 101(27).

50. COLLIER ON BANKRUPTCY, *supra* note 21, at 523.14[1].

51. *See* 2 DANIEL R. COWANS, BANKRUPTCY LAW AND PRACTICE 273-74, 276, 278 (7th ed. 1998). Also note that federal statute mandates that bankruptcy judges hear all core bankruptcy proceedings, including (of most relevance to this Note) confirmation of plans and determinations as to the dischargeability of particular debts. 28 U.S.C. § 157(b)(2)(I), (L) (2000).

52. For purposes of this Note, the commentary and analysis will focus on Chapter 13 cases since they are the cases that sparked the controversy in the law regarding the appropriate notice required to creditors before a student loan debtor is excused of his loan obligations.

53. Farris E. Ain, Comment, *Never Judge a Bankruptcy Plan by its Cover: The Discharge of Student Loans Through Provisions in a Chapter 13 Plan*, 32 SW. U. L. REV. 703, 709 (2003).

with broader discharge abilities than are offered under Chapter 7.[54] Ultimately, the goal of Chapter 13 is to reorganize an individual's debts by setting up a repayment plan of three years for low-income debtors,[55] and up to five years for higher-income debtors.[56]

The debtor in a Chapter 13 case is responsible for moving the bankruptcy process along.[57] To commence a case under Chapter 13, the debtor must file a petition with the bankruptcy court.[58] The filing of the petition under Chapter 13 automatically stays most actions against the debtor or the debtor's property.[59]

In addition to the petition, the debtor is obligated to file a Chapter 13 plan,[60] which may be done with the petition or up to fifteen days after the petition is filed.[61] Among other requirements, the plan must provide for the submission of the necessary future earnings and income of the debtor to the control of the trustee for the purposes of executing the plan, as well as provide for full payment of "all claims entitled to priority" pursuant to the Code.[62]

The United States trustee will convene a meeting of the creditors no fewer than twenty days and no more than fifty days after the Chapter 13 order for relief.[63] At least twenty days after the meeting of the creditors, but in any event no more than forty-five days after the meeting, the court must hold a confirmation hearing for the Chapter 13 plan.[64] Any party in interest may object to confirmation of the plan.[65] However, whether or not there are objections, the court shall consider the plan for confirmation.[66]

The bankruptcy court will then review the Chapter 13 plan to ensure that it complies with the provisions of the Code, that it was

54. COLLIER ON BANKRUPTCY, *supra* note 21, at 523.02.

55. Whether a debtor is considered one of low-income is determined by a specialized formula added to the Bankruptcy Code in 2005, which takes into account the debtor's monthly income. *See* 11 U.S.C. § 1322(d) (2006).

56. *Id.* § 1322(a)(4). A plan may not provide for payments over a period longer than five years. *Id.* § 1322(d)(1); ADLER ET AL., *supra* note 2, at 621.

57. ADLER ET AL., *supra* note 2, at 621.

58. 11 U.S.C. § 301(a). Petition is defined by the Bankruptcy Code to represent any petition which commences a case under the Code itself. *Id.* § 101(42).

59. *Id.* § 362(a).

60. *Id.* § 1321.

61. FED. R. BANKR. P. 3015(b).

62. 11 U.S.C. § 1322(a)(1)-(2); *see id.* § 507(a) (detailing priority order of expenses and claims).

63. FED R. BANKR. P. 2003(a) (individual debt adjustment cases).

64. 11 U.S.C. § 1324(b).

65. *Id.* § 1324(a).

66. *See id.*

proposed in good faith and not by any unlawful means, and that "the debtor will be able to make" all the scheduled "payments under the plan."[67] If the proposed plan comports with these statutory requirements, and there are no other statutory hurdles[68] to be met, the Code mandates that the Chapter 13 plan be confirmed.[69] The confirmed plan binds the debtor and each creditor to the terms set forth in the plan.[70]

The Bankruptcy Rules require that a creditor who wishes to object to a Chapter 13 plan serve the objection on the debtor and the trustee before the plan is confirmed.[71] However, should a creditor fail to raise a timely objection, the bankruptcy court may determine that the plan was proposed in good faith and not by any unlawful means, even if the absence of any evidence supporting such findings.[72] The Bankruptcy Rules require a creditor who wishes to contest confirmation of a plan to file an objection, and such objection is governed by the rules applicable to contested matters initiated by motion.[73]

An unsecured creditor may also seek to modify the plan after confirmation to increase monthly payments and reduce the time to make such payment.[74] Absent any objection by the debtor, the modifications by the creditor shall take effect and become the new plan.[75] This provides the creditor with another means of protecting its interest and avoid being bound by the payment plan designed by the debtor.[76]

Unless the debtor executes a written waiver of discharge, the bankruptcy court will grant the debtor a discharge of most debts provided for by the plan after the debtor completes all of the payments pursuant to the plan.[77] Education loans are one type of debt excluded from discharge upon completion of plan payments.[78] Furthermore,

67. *Id.* § 1325(a).

68. The statutory hurdles are the exceptions set forth by 11 U.S.C. § 1325(b) (including if the trustee or an unsecured creditor objects to the plan, given that the amount of the claim exceeds the value of the property distributed under the Chapter 13 plan). If the value of the property distributed under the plan matches the amount of the claim, the court will proceed with plan confirmation even if the trustee or any unsecured creditor objects to confirmation. *Id.* § 1325(b)(1)(A).

69. *Id.* § 1325(a). Note that the Bankruptcy Code provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. *Id.* § 105(a).

70. *Id.* § 1327(a).

71. FED. R. BANKR. P. 3015(f).

72. *Id.*

73. *See id.* at 9014(a).

74. 11 U.S.C. § 1329(a).

75. *Id.* § 1329(b)(2).

76. *See supra* note 70 and accompanying text.

77. 11 U.S.C. § 1328(a).

78. *Id.* §§ 523(a)(8), 1328(a).

§ 1328 of the Code provides that the court may revoke discharge within one year after it is granted if such discharge was procured through fraud not known (by the party seeking relief) at the time the discharge was granted.[79] If the aggrieved party knew of the fraud, relief still may be sought from a confirmation order that was procured by fraud if the party seeks such relief within 180 days after the date of entry of the order of confirmation.[80]

The confirmation order becomes final ten days after entry of the confirmation order should none of the creditors file an appeal.[81] Although the Code permits extensions of time for appeals to be filed, no such extension is available to appeal from a confirmation order of a Chapter 13 plan.[82] Moreover, whereas the Bankruptcy Rules adopt the time limits set forth by Rule 60 of the Federal Rules of Civil Procedure governing relief from judgments and orders,[83] such provision is inapplicable to orders confirming Chapter 13 plans.[84]

B. Discharge By Way of the Adversary Hearing

Section 523(a)(8) of the Code provides the debtor with the ability to discharge an otherwise non-dischargeable debt by demonstrating that excluding student loan debt from discharge would impose "undue hardship on the debtor and the debtor's dependents."[85] An issue arises because § 523(a)(8) does not provide any guidance on what procedural vehicle a debtor must use to demonstrate undue hardship. The only procedural rule that provides any guidance is Rule 7001 of the Bankruptcy Rules, which provides that "a proceeding to determine the dischargeability of a debt" is an adversary hearing.[86]

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79. *Id.* § 1328(e).

80. *Id.* § 1330(a).

81. *See* FED. R. BANKR. P. 8002(a).

82. *Id.* at 8002(c)(1)(F).

83. This Rule provides that the court may relieve a party from an order that was the product of "mistake, inadvertence, surprise, . . . excusable neglect," or fraud if the party seeking relief moves the court within a reasonable time, but in no event more than one year after the date of entry of the order. FED. R. CIV. P. 60(b), (c)(1). Furthermore, the Rule also permits a party to seek relief from an order that is void if the party seeking relief moves the court within a reasonable time. *Id.* at 60(b)(4), (c)(1).

84. FED. R. BANKR. P. 9024. Furthermore, the Advisory Committee Notes state that time periods established by § 1330 of the Bankruptcy Code, 11 U.S.C. § 1330, which governs appeal from Chapter 13 plan confirmation orders, may not be circumvented by the time periods set forth by Rule 60 of the Federal Rules of Civil Procedure. FED. R. BANKR. P. 9024 advisory committee's note.

85. 11 U.S.C. § 523(a)(8).

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

Rule 4007 of the Bankruptcy Rules governs the procedure required to determine the dischargeability of a debt.[87] Rule 4007, drafted in permissive terms, provides that a "debtor or any creditor may file a complaint to obtain a determination of the dischargeability of any debt."[88] The Bankruptcy Rules require that a party seeking to determine whether a debt is dischargeable must file a complaint with the bankruptcy court.[89] Furthermore, the requirements of service of process under the Bankruptcy Rules attempt to mirror those of Rule 4 of the Federal Rules of Civil Procedure; however, the Rules provide that service by first class mail is an adequate means of serving a summons and complaint.[90] This stark difference demonstrates the Bankruptcy Rules' attempt to facilitate the commencement of adversary hearings.

Thus, the Bankruptcy Rules provide a means by which a debtor can demonstrate "undue hardship" to satisfy the exception to non-dischargeability under § 523(a)(8), but they fail to mention whether the debtor is precluded from utilizing other procedural tools to accomplish the same showing. It is this failure that provoked a great deal of litigation[91] on the issue of whether a Chapter 13 debtor may discharge a student loan debt, by inserting language in the plan that places the creditor on notice that confirmation of the plan shall constitute a determination of "undue hardship," or whether a Chapter 13 debtor must commence an adversary hearing to discharge a student loan debt. The next Part will outline the controversy among the United States Courts of Appeals and provide an alternative to how this matter may be viewed, in light of the two separate due process standards, and resolved in favor of adopting minimal standards of due process notice instead of affording creditors greater procedural protections.

87. *Id.* at 4007.

88. *Id.* at 4007(a).

89. *Id.* at 7003 (applying Rule 3 of the Federal Rules of Civil Procedure to all adversary proceedings). Rule 3 provides that a complaint must be filed for a civil action to commence. FED. R. CIV. P. 3.

90. FED. R. BANKR. P. 7004(a), (b). In addition, the Federal Rules of Bankruptcy Procedure permit a clerk to sign, seal, and issue a summons electronically. *Id.* at 7004(a)(2).

91. *See infra* Part IV.A-C.

IV. LEGAL ANALYSIS

A. The Early Cases: The Ninth and Tenth Circuits' Commitment to Finality of Judgment

1. *In re Andersen*

In the first of a barrage of cases regarding the discharge of student loans, the Tenth Circuit of the United States Court of Appeals, in *In re Andersen* ("*Andersen*"), held that a creditor who fails to object to a proposed Chapter 13 plan and does not timely appeal the confirmation of such plan may not collaterally attack the order of the bankruptcy court.[92] In *Andersen*, the debtor filed a Chapter 13 plan, which provided language that confirmation of the plan shall constitute a finding of "undue hardship" and render the debt dischargeable.[93] While the creditor argued that such language is in contravention to § 523(a)(8) of the Code, the Tenth Circuit held that the "'policy favoring the finality of confirmation is stronger than'" the court's duties to "'verify a plan's compliance with the Code.'"[94] The *Andersen* court reasoned that there must be finality of judgment to ensure that parties relying upon a confirmation order, by taking actions subsequent to its issuance, are not upset by later revocation of it.[95] In applying the doctrine of claim preclusion, or to the determination of "undue hardship," the court argued that a creditor may not "sit on its rights and expect that the bankruptcy court . . . will assume the duty of protecting its interests."[96]

2. *In re Pardee*

Just four months after *In re Andersen*, the Ninth Circuit followed its sister circuit by refusing to allow a creditor to collaterally attack a confirmed plan on the grounds that the interest discharge provision violated the Code.[97] In *In re Pardee* ("*Pardee*"), the student loan debtors sought merely to eliminate the interest which accumulated on their outstanding debt from the date the petition was filed, or "post-petition

92. 179 F.3d 1253, 1258 (10th Cir. 1999), *overruled by In re* Mersmann, 505 F.3d 1033, 1051-52 (10th Cir. 2007). Although subsequently overruled, *In re Andersen* set off a wide ranging debate within the circuits about discharge of student debt under Chapter 13 and is being cited for that reason. *See infra* notes 119, 123, 125 and accompanying text.

93. *Andersen*, 179 F.3d at 1254.

94. *Id.* at 1258 (quoting *In re* Szostek, 886 F.2d 1405, 1406 (3d Cir. 1989)).

95. *Id.* at 1259.

96. *Id.* at 1257.

97. *In re* Pardee, 193 F.3d 1083, 1086 (9th Cir. 1999).

interest."[98] They sought to achieve discharge of post-petition interest by drafting a plan that provided for such interest to be discharged upon confirmation of the plan.[99] Unlike the plan in *Andersen*, the plan in *Pardee* failed to include "undue hardship" language, since the debtors agreed to pay the entire balance of the student loan accrued prior to the filing of the petition.[100]

The *Pardee* court agreed with the rationale supporting the decision in *Andersen* and held that the creditor "'must take an active role in protecting its interests.'"[101] The Ninth Circuit held that it had previously recognized, in various other bankruptcy cases, the importance of finality in confirmation orders even when they confirm bankruptcy plans containing illegal provisions.[102] The court concluded that a confirmed plan constitutes "'res judicata as to all issues that could have or should have been litigated at the confirmation hearing.'"[103]

B. Creating a Circuit Split: In re Banks *and Its Progeny*

1. *In re Banks*

The Fourth Circuit, through its holding in *In re Banks* ("*Banks*"), refused to follow the lead of the Ninth and Tenth Circuits.[104] Like the debtors in *Pardee*, the debtor in *Banks* sought to discharge post-petition interest by inserting language in the plan which stated that upon discharge he would only be liable for the unpaid balance of his pre-petition debt.[105] The *Banks* court refused to grant preclusive effect to the confirmed Chapter 13 plan since the court ruled that the debtor failed to give specific notice to the creditor of the debtor's intent to discharge the underlying student loan debt, thereby violating the creditor's due process rights.[106] The court held that while a confirmed order is generally entitled to preclusive effect, it is not entitled to such effect when a creditor's Fifth Amendment Due Process rights are violated.[107] In dismissing the Chapter 13 plan as a means to discharge a student loan

98. *Id.* at 1084-85.
99. *Id.* at 1085 & n.5.
100. *See id.* at 1085 n.5.
101. *Id.* at 1086 (quoting *In re Andersen*, 179 F.3d at 1257).
102. *Id.*
103. *Id.* at 1087 (quoting *In re* Pardee, 218 B.R. 916, 925 (B.A.P. 9th Cir. 1998)).
104. 299 F.3d 296, 302 (4th Cir. 2002).
105. *Id.* at 298-99.
106. *Id.* at 302.
107. *Id.* (citing *Piedmont Trust Bank v. Linkous*, 990 F.2d 160, 162 (4th Cir. 1993), in which a creditor successfully moved to revoke a Chapter 13 plan when the debtor sought to convert it to a Chapter 7 plan, thus implicating the creditor's due process rights).

debt, the Fourth Circuit expressed concern about the holdings of the Ninth and Tenth Circuits, since the number of debtors seeking to discharge otherwise non-dischargeable debt had increased in the years subsequent to the decisions of *Andersen* and *Pardee*.[108] Such a policy concern appeared to weigh heavily on the Fourth Circuit's ultimate decision. Summarizing its position on due process notice in Chapter 13 cases, the *Banks* court held that discharging a student loan debt requires the commencement of an adversary hearing.[109]

2. The Seventh, Sixth, and Second Circuits Follow *Banks*

In 2005, the once minority view present in *Banks* became the popular approach as some of the other circuit courts adopted and furthered the due process arguments advanced by the Fourth Circuit.[110] The tide was quickly turning against finality principles in favor of constitutional due process rights.

The Seventh Circuit, in *In re Hanson* ("*Hanson*"), extended the ruling in *Banks* to principal pre-petition student loan debt discharged by a confirmed Chapter 13 plan.[111] In *Hanson*, the student loan debtor's plan provided for repayment of nineteen percent of the balance on his loan over a period of sixty months, or five years.[112] Like the Fourth Circuit, the *Hanson* court acknowledged the strong policy argument favoring finality of orders, but ultimately felt that the "dictates of due process trump policy arguments about finality."[113] The court commented that it was Congress's "unmistakable intent" to make education loan debt non-dischargeable in the absence of a showing of "undue hardship" by the debtor seeking discharge.[114]

Similarly, the Sixth Circuit, in *In re Ruehle* ("*Ruehle*"),[115] held that "discharge by declaration," or the inserting of language into a plan that confirmation shall constitute a finding of "undue hardship," is void and subject to being set aside by motion under Federal Rule of Civil Procedure 60(b)(4) by a creditor seeking relief from the confirmation order.[116] In *Ruehle*, the student loan debtor proposed a plan whereby she

108. *In re Banks*, 299 F.3d at 301.
109. *Id.* at 303.
110. *In re* Mersmann, 505 F.3d 1033, 1046 (10th Cir. 2007).
111. 397 F.3d 482, 486 (7th Cir. 2005).
112. *Id.* at 483.
113. *Id.* at 486.
114. *Id.*
115. 412 F.3d 679 (6th Cir. 2005).
116. *Id.* at 684. FED. R. CIV. P. 60(b)(4) provides that upon motion by a party, the court may relieve such moving party from any final judgment, order, or proceeding that is void. Note that Rule

would pay five percent of her loans over a period of forty months, and that completion of the payments would constitute a finding that said debt is dischargeable.[117] The *Ruehle* court was convinced that the *Banks* and *Hanson* decisions represented an "evolving majority view" that discharging student loan debt via a bankruptcy plan is invalid and void.[118] The fact that the *Andersen* and *Pardee* courts did not consider due process concerns also weighed heavily into the Sixth Circuit's ruling.[119] Finally, the *Ruehle* court held that there was no balancing of interests in the case, but rather there was a clear "denial of fundamental rights."[120]

Roughly six months later, the Second Circuit became the fourth circuit to require a debtor to affirmatively secure an "undue hardship" determination by adversary hearing before any student loans could be discharged.[121] In *Whelton v. Education Credit Management Corp.*, the student loan debtor's plan provided that confirmation of the plan would constitute a finding of undue hardship.[122] The *Whelton* court firmly disagreed with the Ninth and Tenth Circuits' holdings that a creditor's failure to object to a plan or to appeal its confirmation operates as a waiver of its right to collaterally attack the order confirming the plan.[123] The Second Circuit opined that a discharge of a student loan without filing an adversary proceeding to establish "undue hardship" is in contravention to the clear language of the Code.[124] The court concluded that the debtor's failure to comply with § 523(a)(8) of the Code and initiate adversary proceedings via service of a summons and complaint rendered the confirmation of the plan void.[125]

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60 is made applicable in bankruptcy cases by FED. R. BANKR. P. 9024. Rule 9024 also provides certain limitations to Rule 60. *See* FED. R. BANKR. P. 9024.

117. *In re Ruehle*, 412 F.3d at 681.
118. *Id.* at 684.
119. *See id.* at 682.
120. *Id.* at 685.
121. Whelton v. Educ. Credit Mgmt. Corp., 432 F.3d 150, 154 (2d Cir. 2005).
122. *Id.* at 151-52.
123. *Id.* at 153-54.
124. *See id.* at 154-55.
125. *Id.* at 156.

C. *Drawing the Battle Lines: The Ninth and Tenth Circuits Go Their Separate Ways*

1. *Andersen* Overruled

In 2004, in *In re Poland* ("*Poland*"), the Tenth Circuit showed signs of retreating from its previous position in favor of discharging student loans via confirmation of Chapter 13 plans as opposed to via commencement of adversary proceedings.[126] In *Poland*, the Tenth Circuit examined a Chapter 13 plan which provided that student loans would be discharged upon completion of the plan payments, but lacked language advising the creditor that confirmation of the plan would constitute a finding of "undue hardship."[127] The court held that the lack of such language was fatal to the debtor's defense of res judicata on the issue of "undue hardship."[128] The *Poland* court acknowledged that the doctrine of res judicata would preclude a collateral attack of the confirmation order if there was a finding of undue hardship, whether judicial or otherwise.[129] Despite the court's acceptance of detailed Chapter 13 plans as a means to discharge student loan debt, the court issued an advisory that the "proper way" to discharge such debt is by way of an adversary proceeding in which the debtor establishes "undue hardship."[130]

Finally, in 2007, the Tenth Circuit officially overruled *Andersen* with its decision in *In re Mersmann (*"*Mersmann*"), ending *Andersen*'s reign as the circuit's position on Chapter 13 plans and their preclusive effect.[131] In *Mersmann*, the Tenth Circuit held the practice of establishing "undue hardship" by inserting language into a Chapter 13 plan to be violative of the Bankruptcy Code and not entitled to res judicata effect.[132] The *Mersmann* court reasoned that: (1) Congress evinced the unmistakable intent to make student loans "'presumptively nondischargeable;'" (2) discharging student loan debt without any adversary hearing is contrary to § 1328(a)(2) of the Bankruptcy Code; and (3) confirmation of a Chapter 13 plan requires that the plan be consistent with the rest of the Code.[133] The court placed the burden of

126. 382 F.3d 1185, 1189 (10th Cir. 2004).
127. *Id.* at 1187-89.
128. *Id.* at 1188.
129. *See id.* at 1188-89.
130. *Id.* at 1189.
131. 505 F.3d 1033, 1051 (10th Cir. 2007).
132. *Id.* at 1047.
133. *Id.* at 1047-48 (quoting Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 450 (2004)).

establishing claim preclusion on the party asserting it (the debtor) and concluded that the debtor could not satisfy all the elements of res judicata[134] in order to support its application in the case.[135] This decision ultimately left the Ninth Circuit hanging by a thread as the only circuit court to currently allow the discharge of a student loan debt via confirmation of a Chapter 13 plan. The next Part will demonstrate how the confirmation of a Chapter 13 plan discharging student loan debt does not violate a creditor's constitutional due process rights and why the bankruptcy procedural rules should permit such notice to commence a proceeding to determine the dischargeability of a debt.[136]

2. The Ninth Circuit's Retreat from *Pardee*

Five years after *Pardee*, the Ninth Circuit began to give credence to the due process argument first advanced by the Fourth Circuit in *Banks*.[137] The Bankruptcy Appellate Panel of the Ninth Circuit held in *In re Repp (*"*Repp*"*)* that a debtor seeking to discharge student loan debt would have to render notice to the creditor of the Chapter 13 case which was substantially similar to the notice required for commencement of an adversary hearing.[138] In *Repp*, the confirmed plan in question provided language that confirmation would constitute a finding of "undue hardship" and that completion of payments pursuant to the plan would discharge the entire loan.[139] In rendering its decision, the Bankruptcy Appellate Panel adopted the due process notice test, as stated in *Mullane v. Central Hanover Bank & Trust Co.*,[140] that "[n]otice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to

134. The Tenth Circuit applied the elements of res judicata as established by *Nwosun v. General Mills Restaurants, Inc.*, which requires the proponent of claim preclusion to demonstrate:

> (1) the prior suit must have ended with a judgment on the merits; (2) the parties must be identical or in privity; (3) the suit must be based on the same cause of action; and (4) the plaintiff must have had a full and fair opportunity to litigate the claim in the prior suit.

124 F.3d 1255, 1257 (10th Cir. 1997).

135. *In re Mersmann*, 505 F.3d at 1049-50.

136. The analysis of whether the confirmation of a Chapter 13 plan discharging student loan debt violates a creditor's basic constitutional due process rights differs dramatically from the analysis of whether the Federal Rules of Bankruptcy Procedure and the Bankruptcy Code permit such a discharge. *See infra* Part IV.D.2. This Note focuses on the dichotomy of these two standards.

137. *In re* Repp, 307 B.R. 144, 153-54 (B.A.P. 9th Cir. 2004). The Ninth Circuit Bankruptcy Appellate Panel is an inferior court to the Ninth Circuit Court of Appeals and therefore may not overrule any Ninth Circuit decisions and its decisions are not binding on the Ninth Circuit.

138. *See id.*

139. *Id.* at 147.

140. 339 U.S. 306 (1950).

object."[141] The court concluded that "the method chosen for notice was calculated to minimize the chance that it would come to the attention of persons in the position to make litigation decisions for the creditor."[142] Therefore, the Bankruptcy Appellate Panel reversed the order confirming the Chapter 13 plan on due process grounds.[143]

One year after its decision in *Repp*, the Bankruptcy Appellate Panel of the Ninth Circuit faced another Chapter 13 student loan case whereby the debtor sought discharge of post-petition interest on a student loan via plan confirmation.[144] The debtor in *In re Ransom* ("*Ransom*") devised a Chapter 13 plan whose language was vague and ambiguous and failed to reasonably place the creditor on notice that it would constitute a discharge of the debtor's post-petition interest on the underlying student loan debt.[145] The rationale of the *Ransom* court echoed that of *Repp* as the court concluded that the terms of the Chapter 13 plan were too ambiguous to place a creditor on notice that confirmation of the plan would effectively discharge the debt.[146] Once again, the Bankruptcy Appellate Panel held that the plan must be served in a manner similar to that which commences an adversary proceeding.[147] The *Ransom* court failed to expound on its ruling and refused to offer examples of notice that would comport with the due process standard.

In 2007, the Bankruptcy Appellate Panel of the Ninth Circuit faced this same issue in light of a debtor who commenced a Chapter 13 case to discharge liability for pre-petition property taxes.[148] In *In re Brawders* ("*Brawders*"), the Bankruptcy Appellate Panel acknowledged that while § 1327 of the Bankruptcy Code allows even illegal provisions of a Chapter 13 plan to have binding effect on the creditor, claim preclusion does not apply to a claim "that was not within the parties' expectations of what was being litigated."[149] The *Brawders* court further held that "considerations of due process mandate great caution and require that the creditor receive specific notice" and an "opportunity to litigate one-

141. *In re Repp*, 307 B.R. at 149 (citing *Mullane*, 339 U.S. at 314).

142. *Id.*

143. *Id.* at 154. Note that Judge Ryan of the Ninth Circuit Bankruptcy Appellate Panel issued a well-reasoned dissenting opinion that expressed concern that the majority holding does not comport with the ruling in *Pardee*, which is binding authority. *Id.* at 154, 156 (Ryan, J., dissenting).

144. *In re* Ransom, 336 B.R. 790, 792-93 (B.A.P. 9th Cir. 2005).

145. *See id.* The plan provided that no post-petition interest on the outstanding student loan would accumulate, but did not mention "undue hardship" at all. *Id.*

146. *Id.* at 798.

147. *See id.*

148. *In re* Brawders, 503 F.3d 856, 859 (9th Cir. 2007).

149. *In re* Brawders, 325 B.R. 405, 410-11 (B.A.P. 9th Cir. 2005), *aff'd*, *In re Brawders*, 503 F.3d at 859.

on-one."[150] The court concluded that the plan was void since the creditor did not receive clear notice and the procedural protections required by due process.[151] At this time, the overwhelming trend in the Ninth Circuit dictated that it was only a matter of time before the Ninth Circuit overruled *Pardee* outright and followed the coattails of the other circuit courts that place the due process rights of parties before the interests supporting finality of judgments.

3. *Pardee* Affirmed on Both Statutory and Due Process Grounds

However, in December, 2008, the Ninth Circuit finally set its position on the issue by affirming its decision in *Pardee*. The Ninth Circuit, in *Espinosa v. United Student Aid Funds, Inc.*,[152] held that a student loan creditor, which received actual notice of debtor's Chapter 13 case and was notified of the consequences of failing to object to a proposed plan through which debtor sought to discharge his student loan obligations, was not denied due process, despite the fact that the creditor was never served with a summons and complaint.[153] In *Espinosa*, the debtor created a plan of repayment for his student loan debts and, within the plan, warned the creditor of the fact that the discharge amount was less than the outstanding balance on the loan and that if the creditor did not object to the plan, it would be confirmed and the debts would be discharged.[154] However, the creditor failed to raise an objection to the debtor's plan, and therefore the bankruptcy court granted the debtor a discharge upon successful completion of the plan payments.[155]

The Ninth Circuit found the holding in *Pardee* to be more persuasive than the position taken by the other circuits.[156] The court criticized the creditor's apparent willingness to benefit from the debtor's Chapter 13 plan, but unwillingness to face the consequences of sitting on its rights.[157] Unlike the preceding cases, the Ninth Circuit in *Espinosa* dismissed the relevance of the heightened notice requirement for an adversary proceeding since there was no adversary proceeding in the case.[158] Finally, the court held that the Due Process Clause does not

150. *In re Brawders*, 325 B.R. at 414 (quoting Varela v. Dynamic Brokers, Inc. (*In re* Dynamic Brokers, Inc.) 293 B.R. 489, 497 (B.A.P. 9th Cir. 2003)).

151. *Id.* at 417.

152. No. 06-16421, 2008 WL 5158728 (9th Cir. Dec. 10, 2008).

153. *Id.* at *7.

154. *Id.* at *2.

155. *Id.*

156. *Id.* at *6-7.

157. *Id.* at *8.

158. *Id.* at *9.

generally require heightened notice and therefore actual notice was sufficient to adequately protect the creditor's rights.[159] In supporting *Pardee* on due process grounds, the court gave more strength to the *Pardee* decision and answered the critique of the Sixth Circuit in *Ruehle* that the Ninth Circuit did not consider the due process consequences of granting the debtor a discharge without an adversary hearing.[160] Having justified its holding on statutory and constitutional grounds, the court enforced the underlying discharge order of the bankruptcy court.[161]

After the *Espinosa* decision, the split among the United States Courts of Appeals remains intact, eventually leaving the issue up to the Supreme Court, if fate permits such a destination. However, until such time, the following Parts discuss how the split among the courts may be resolved.

D. Due Process Problem of Sufficient Notice and Opportunity to Be Heard Are Resolved

1. A Chapter 13 Plan Drafted With Specificity Provides Proper Notice to Creditors

A Chapter 13 plan which clearly outlines the outstanding obligations the debtor is seeking to discharge, places the creditors on notice that confirmation of the plan will constitute a finding of "undue hardship" and advises the creditors that an order by the bankruptcy court confirming the plan constitutes res judicata as to all issues that could have been litigated by an adversary hearing, satisfies the minimal notice requirement of the Due Process Clause of the Fifth Amendment to the United States Constitution. The procedures mandated by the Bankruptcy Rules ensure that each creditor is clearly apprised of the pendency of the action and given an opportunity to present any objections which the creditor may have.[162]

The Fifth Amendment safeguards against deprivation of "life, liberty, or property without due process of law."[163] During the process of distilling just what the Framers of the Constitution meant by the due process clause, the United States Supreme Court determined that the

159. *See id.*

160. *See supra* note 119-20 and accompanying text.

161. *Espinosa*, 2008 WL 4426634 at *10.

162. The United States Supreme Court decision in *Mullane v. Central Hanover Bank & Trust Co.* set forth the governing due process notice test. 339 U.S. 306, 314 (1950). The elements of the test are set forth in note 7, *supra*.

163. U.S. CONST. amend. V.

Due Process Clause affords individuals with two distinct privileges.[164] The first privilege of due process hinges on the level of notice that must be given to an individual before any of his liberty or property rights may be adjudicated.[165] This privilege determines whether a court has jurisdiction over the person whose rights are being adjudicated in the underlying action.[166] The second protection afforded by the Due Process Clause prohibits adjudication of an individual's rights unless the proper procedures are in place to enable the individual to adequately protect his rights.[167] This privilege scrutinizes the entire procedure collectively from initiation of the legal proceeding to the entry of final judgment and through appeal.[168]

The issue now arises as to which privilege should be examined for purposes of determining whether a summons and complaint and an adversary hearing is necessary before a debtor may discharge an otherwise non-dischargeable debt. Since most of the Courts of Appeals that hold that discharging student loan debt via confirmation of a debtor's proposed Chapter 13 plan is violative of due process concerns of notice rather than procedure, this Note will focus its attention on the due process notice requirement as set forth by the Supreme Court in *Mullane*.[169] Furthermore, the Supreme Court has shown its bias toward applying the notice requirement standard set forth in *Mullane*[170] rather

164. Note that although the privileges are distinct in application, they are not mutually exclusive. *See supra* note 7. Both the notice and procedural privileges afford a party a fair opportunity to be heard and a method by which to state their objections. It is their similarities that often cause confusion among courts as to which standard to apply when the due process rights of a party are implicated by a particular proceeding. *See supra* Part IV.A-C.

165. *Mullane*, 339 U.S. at 314.

166. *Id.* at 311-12 (referring to in personam jurisdiction implications of notice under the doctrine set forth by *Pennoyer v. Neff*, 95 U.S. 714, 726-27 (1877), overruled by *Shaffer v. Heitner*, 433 U.S. 186, 212 n.39 (1977)). *Pennoyer* held that power, consent, and notice are the three requirements for a court to properly exercise jurisdiction over a person. STEPHEN C. YEAZELL, CIVIL PROCEDURE 145 (6th ed. 2004).

167. The test for this privilege is set forth by the Supreme Court decision in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The three-factor test is set forth in note 7, *supra*.

168. *See Mathews*, 424 U.S. at 333-34, 342-43, 345-49.

169. The two standards both scrutinize the procedural safeguards afforded parties so that they may have their objections heard. *See supra* note 164. Therefore, if a particular procedure satisfies the due process procedural requirement, it will likely also satisfy the due process notice requirement.

170. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (requiring "notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

than the very complex balancing test[171] for procedural due process as set forth in *Mathews v. Eldridge*.[172]

Before this Note attempts to apply the *Mullane* test to a Chapter 13 bankruptcy case, we must analyze the objective and goals furthered by the standard. In *Mullane*, the Supreme Court considered the due process notice rights of beneficiaries of a common trust fund when the trustee sought judicial settlement of its accounts as trustee.[173] The Supreme Court reasoned that notice by publication to those beneficiaries of whose residence was known by the trustee failed to comport with the Fourteenth Amendment's[174] minimal requirement of due process notice.[175] The Supreme Court determined that the right to be heard demands that one be informed of the existing action against him and have the opportunity to decide whether to appear or default.[176] Further, the *Mullane* Court held that the "notice must be of such nature as reasonably to convey the required information" and simultaneously must grant "a reasonable time for those interested to make their appearance."[177] Finally, the Supreme Court set forth the due process notice standard ("*Mullane* Test") by holding that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[178]

The *Mullane* Test's reasonableness standard leaves its application subject to a case-by-case analysis. One clear maxim of *Mullane* is that publication notice is frowned upon where a party's address is known. However, it is not clear whether receipt of notice is always necessary to

171. *Mathews*, 424 U.S. at 335 (holding that to determine what process is due in a specific action, the court must balance the following three factors: (1) "the private interest that will be affected by the official action;" (2) the risk of erroneous decisionmaking and likely value of additional procedural safeguards; and (3) "the Government's interest, including the purpose of the action along with the fiscal and administrative burdens that the additional or substitute procedural requirement would" impose).

172. *See* Dusenbery v. United States, 534 U.S. 161, 167-68 (2002) (citing numerous examples of Supreme Court decisions employing the *Mullane* test to resolve issues dealing with due process notice requirements).

173. *Mullane*, 339 U.S. at 309-11.

174. Note that *Mullane* examined the notice given under the Fourteenth Amendment since the publication notice was enacted pursuant to a state statute as opposed to a federal law, which would implicate the Fifth Amendment Due Process Clause. *See id.* at 309-10.

175. *Id.* at 320.

176. *Id.* at 314.

177. *Id.*

178. *Id.*

satisfy due process.[179] Therefore, there are cases where personal service is not necessary to notify a party that an action is pending.[180]

In the world of bankruptcy, application of the *Mullane* Test provides no serious obstacle. Three years after *Mullane*, in *City of New York v. New York, New Haven & Hartford Rail Road*, the Supreme Court faced a bankruptcy case involving known and unknown creditors.[181] Adopting the same principles set forth in *Mullane*, the *City of New York* Court held that known creditors should be provided with actual written notice of a debtor's bankruptcy filing, while notice by publication provides an adequate means of notifying unknown creditors.[182]

However, when dealing with Chapter 13 plans discharging otherwise non-dischargeable debt, the due process notice analysis is far more intricate. First, as mentioned in Part II of this Note, debtors generally move the Chapter 13 bankruptcy case along, as opposed to other creditor-driven cases.[183] This places creditors in an unfavorable position insofar as their ability to ensure their rights are safeguarded. Second, the Bankruptcy Rules suggest that a debtor seeking to discharge a debt file a complaint.[184] Finally, student loan debts can be quite hefty, as seen in Part I of this Note, and therefore the creditors have much at stake when a plan is confirmed. Therefore, it is essential that a creditor's due process notice rights are sufficiently protected.

By inserting clear language in the Chapter 13 plan which places each creditor on notice of the way each debt will be paid off and of the rights of the creditor that are at stake, and by mailing a copy of said plan to the creditor, the debtor ensures that a creditor's minimal due process notice rights are adequately protected. In the simplest terms, the mailing of the plan to the creditor apprises the creditor of the pending action and allows the creditor to present objections.

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179. *See* Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 489-91 (1988).

180. See *Dusenbery v. United States*, 534 U.S. 161, 171 (2002), in which the Supreme Court stated that previous due process cases "have never required actual notice." *Id.* The Supreme Court defined actual notice as "'notice given directly to, or received personally by, a party.'" *Id.* at 169 n.5 (quoting BLACK'S LAW DICTIONARY 1087 (7th ed. 1999)).

181. 344 U.S. 293, 294 (1953).

182. *Id.* at 296; *see* PacifiCorp v. W.R. Grace & Co., No. 05-764, 2006 WL 2375371, at *3 (D. Del. Aug. 16, 2006).

183. *See supra* note 57 and accompanying text.

184. *See supra* note 88 and accompanying text. Note that for purposes of this sub-Part, the focus is on whether serving a plan upon a debtor satisfies due process notice requirements, not whether such practice satisfies the procedural requirements set forth by the Bankruptcy Rules. The latter serves as the focal point of the following sub-Part.

A Chapter 13 creditor, upon receipt of the debtor's proposed plan, has a plethora of procedural vehicles to ensure that its rights are protected. First and foremost, the creditor may file a complaint to determine the dischargeability of the debt in question.[185] Second, the bankruptcy trustee is required to hold a meeting of the creditors after the filing of the plan.[186] Thus, the creditor is apprised of the action and given ample opportunity to take action. Assuming no action by the creditor is taken, the creditor is still given notice of a hearing by which the bankruptcy court will consider the debtor's plan for possible confirmation.[187]

Furthermore, the creditor may object to the proposed plan before confirmation of the plan.[188] The creditor takes on an obligation to object to confirmation of a plan if such creditor believes the plan inadequately provides for its claim.[189] Moreover, the creditor may attend the confirmation hearing and proffer evidence demonstrating any defects in the debtor's proposed plan.[190]

Finally, even after the payments are completed and the order confirming the plan is entered, the creditor has ten days from the entry of the order to file a timely notice of appeal.[191] Although the argument exists that ten days is not ample time to decide whether to appeal confirmation of the order and the bankruptcy courts generally do not grant extensions of time to perfect notice of appeal in Chapter 13 cases,[192] the creditor is not left without any recourse beyond the ten-day period. If the creditor believes the plan was procured by fraud, the creditor may attempt to revoke the confirmation order within 180 days of its entry.[193]

These protections made available by the bankruptcy laws and their procedural rules clearly safeguard a creditor's due process rights. If there is any concern by any creditor that a debtor seeking discharge, as clearly outlined in the Chapter 13 plan, is doing so in a fraudulent or unlawful manner, or any other manner not prescribed by the bankruptcy laws for that matter, the creditor has numerous opportunities to halt the debtor

185. FED. R. BANKR. P. 4007(a).
186. 11 U.S.C. § 341(a) (2006).
187. *Id.* § 1324(a).
188. FED. R. BANKR. P. 3015(f).
189. *In re* Holmes, 225 B.R. 789, 793 (Bankr. D. Colo. 1998).
190. *Id.*
191. FED. R. BANKR. P. 8002(a).
192. *See supra* note 82 and accompanying text.
193. *See supra* note 80 and accompanying text.

from obtaining a discharge by having its objections heard.[194] Furthermore, the mailing of the Chapter 13 plan to each creditor clearly is actual notice of the pendency of the action and is reasonable considering the circumstances. Even if one argues that this notice is unreasonable since a summons may better alert the creditor of the pending action, the subsequent notice to the creditor of the confirmation hearing and entry of the confirmation order certainly place the creditor on notice that its rights are at stake and it should take action to protect those rights.

Although the Tenth Circuit in *Andersen* advances a cogent argument that a creditor shall not sit on his rights and expect a bankruptcy court to assume the duty of protecting those rights,[195] the Bankruptcy Rules actually place duties on the bankruptcy courts to ensure a creditor's rights are protected nonetheless. First of all, the debtor's proposed Chapter 13 plan undergoes scrutiny by the bankruptcy court prior to confirmation.[196] More specifically, the bankruptcy court will ensure that the plan complies with the provisions of the Code, that it was proposed in good faith and by no unlawful means, that the debtor will be able to make all payments in accord with the plan, and that the action of the debtor in filing the petition was in good faith, among other requirements.[197] Although some may argue that some bankruptcy courts do not strictly adhere to this principle and simply "rubber-stamp" a debtor's proposed plan, when analyzing the due process provided to creditors, the mere existence of such a procedural protection alone furthers the argument that the creditor's rights are adequately protected. Furthermore, the Code gives the court broad discretion to issue orders that may further the interests of the Code itself, thereby providing the bankruptcy court with an additional vehicle by which the court can ensure that the rights of any interested party, including a creditor's due process rights, are effectively safeguarded.[198]

Furthermore, the Code has a built-in safeguard against proposed plans that procure confirmation by fraudulent means.[199] The Code permits the court to revoke the discharge of any debt within one year of such discharge if it was obtained by a debtor's fraudulent acts which were not known to the creditor when the discharge of the debt

194. *See supra* Part III.A.
195. *See supra* note 96 and accompanying text.
196. *See* 11 U.S.C. § 1325(a) (2006).
197. *Id.* §§ 1325(a)(1), (3), (6)-(7).
198. *Id.* § 105(a); *see supra* note 69 and accompanying text.
199. *See* 11 U.S.C. § 1328(e).

occurred.[200] Although the court will not act on its own to revoke the discharge of the debtor's obligations,[201] it provides the creditor with sufficient time to uncover any tortious behavior of the debtor and seek relief from the court.

In conclusion, it is clear that the confirmation process as outlined and defined by the Code and the Bankruptcy Rules provides a creditor in a Chapter 13 case with sufficient due process notice and satisfies the minimal requirements of the Fifth Amendment. The benefits of requiring a debtor to serve a summons and complaint and to discharge a student loan debt via an adversary hearing over merely requiring a debtor to serve a Chapter 13 plan and to seek confirmation are minimal when all the opportunities the creditors have to protect their rights are considered in totality. After all, the *Mullane* Test demands an analysis of the notice "reasonably calculated" to reach the parties involved, taking into account "all the circumstances."[202] Mailing a copy of the proposed plan which outlines the debt in question, the payments the debtor wishes to make to satisfy the debt, and the legal implications of confirmation of the plan to the creditor is certainly reasonable and allows the creditor the ability to protect his or her rights by interposing timely objections. It follows that the Chapter 13 plan process affords creditors numerous notices of the pending action and ample opportunities to be heard at various stages of the case. These procedures certainly satisfy the constitutional minimal requirement of notice and an opportunity to be heard and should be sufficient to satisfy the bankruptcy procedural requirements as well. However, the promulgated Bankruptcy Rules provide the creditor with heightened due process notice protections.

2. A Chapter 13 Plan Drafted with Specificity Does Not Comport with the Bankruptcy Rules' Heightened Notice Requirement

Although a clearly drafted Chapter 13 plan may satisfy minimal constitutional due process requirements,[203] it does not comport with the heightened notice afforded creditors by the Bankruptcy Rules.[204] The

200. *Id.*

201. Section 1328(e) of the Code requires that a "party in interest" request relief from the court in order for the court to effectively revoke a prior discharge of a debt. *Id.*

202. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

203. *See supra* Part IV.D.1.

204. *See* FED R. BANKR. P. 4007(a), 7001(6), 7004(a) (allowing the dischargeability of a debt to be determined by way of an adversary hearing, which requires service of a summons and complaint).

debtor must serve a summons and complaint and commence an adversary hearing before a student loan debt may be discharged.[205]

Congress granted the United States Supreme Court the "power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under Title 11."[206] Pursuant to the power granted by Congress, the Supreme Court promulgated Federal Rule of Bankruptcy Procedure 4007, which provides that "[a] debtor or any creditor may file a complaint to obtain a determination of the dischargeability of any debt."[207] The rules further explain that a proceeding which determines the dischargeability of a debt is known as an "adversary proceeding."[208] Adversary proceedings, however, are not the only means by which a debtor may discharge certain forms of debt.[209]

Nevertheless, student loans are non-dischargeable in bankruptcy unless failure to discharge the debts would result in "undue hardship" on the debtor and the debtor's dependents.[210] Although there is no uniform standard for determining whether failure to discharge the debt would result in "undue hardship," most circuit courts apply the three-step approach set forth by the Second Circuit in *Brunner v. New York State Higher Education Services Corp.*,[211] which requires the debtor seeking discharge to demonstrate that: (1) the debtor cannot maintain a "minimal standard of living" for the debtor and the debtor's dependents, if forced to repay the loans; (2) "that additional circumstances exist" which demonstrate that the debtor's situation will continue for a "significant portion of the repayment period" for the loans; and (3) the debtor exercised good faith in attempting to repay the loans.[212] The Eighth Circuit adopted a case-by-case analysis standard which, while not as restrictive as the more burdensome Second Circuit test, proves very

205. Whelton v. Educ. Credit Mgmt. Corp., 432 F.3d 150, 153 (2d Cir. 2005); *In re* Ruehle, 412 F.3d 679, 681 (6th Cir. 2005); *In re* Hanson, 397 F.3d 482, 484 (7th Cir. 2005); *In re* Banks, 299 F.3d 296, 300-01 (4th Cir. 2002).

206. 28 U.S.C. § 2075 (2000). Title 11 of the United States Code encompasses the entire Bankruptcy Code.

207. FED. R. BANKR. P. 4007(a).

208. *Id.* at 7001(6). Adversary proceedings, in general, are governed by Part VII of the Bankruptcy Rules. *Id.* at 7001.

209. *See* 11 U.S.C. § 523(a) (2006) (referring to the relevant sections of the Code that provide how a debtor may obtain discharge of a debt under Chapters 7, 11, 12, and 13). Under Chapter 13, a debtor may discharge some debts by completing payments pursuant to a Chapter 13 plan. *See id.* § 1328(a).

210. *Id.* § 523(a)(8).

211. 831 F.2d 395 (2d Cir. 1987).

212. *Id.* at 396.

restrictive on debtors seeking a discharge.[213] Under the Eighth Circuit's test, the bankruptcy court must conclude whether there would be any remaining funds from the debtor's estimated future income so the debtor may make payments on the loan and still maintain a minimal standard of living for the debtor and the debtor's dependents.[214] Regardless of the appropriate test, the "undue hardship" requirement of the Code creates a giant hurdle for debtors seeking to discharge student loan debts. Therefore, a debtor cannot discharge student loan debts by completing payments pursuant to the Chapter 13 plan.[215]

The problem of discharging a debt by inserting language in the Chapter 13 plan stems from the fact that bankruptcy courts confirm plans discharging debts that are otherwise non-dischargeable.[216] The Bankruptcy Rules offer little guidance on the issue of whether discharging a student loan debt by confirming a Chapter 13 plan is permissible. Proponents of the position that a student loan debtor may discharge a debt by inserting language in the Chapter 13 plan that confirmation of the plan constitutes a finding of "undue hardship" may turn to Rule 4007(a) of the Bankruptcy Rules for support. Rule 4007(a) permits, but does not require, a debtor to determine the dischargeability of a debt by commencing an adversary hearing.[217] Although this reasoning seems to support the proposition that there may be other procedural vehicles for a debtor seeking discharge of student loans, the United States Supreme Court has dismissed such rationale as meritless.[218]

The Supreme Court, interpreting the rules that it promulgated, held that because student loans are not automatically dischargeable, the Bankruptcy Rules require such a debtor to commence an adversary proceeding to make a showing of "undue hardship."[219] Since § 2075 of Title 28 of the United States Code clearly states that the Bankruptcy Rules may not "abridge, enlarge, or modify any substantive right,"[220] but does not speak to a party's procedural rights, the Supreme Court, in extending a student loan creditor's minimal due process rights, did not exceed its power as conferred by Congress. Therefore, in deferring to the

213. *See In re* Andrews, 661 F.2d 702, 704 (8th Cir. 1981).

214. *In re* Reynolds, 425 F.3d 526, 531 (8th Cir. 2005) (citing *In re Andrews*, 661 F.2d at 704).

215. *See* 11 U.S.C. § 1328(a)(2).

216. *See supra* Parts IV.A-C (citing examples of circuit court decisions which resulted from bankruptcy courts discharging student loan debts via confirmation).

217. FED. R. BANKR. P. 4007(a).

218. Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 451 (2004).

219. *Id.*

220. 28 U.S.C. § 2075 (2000).

interpretation of the Supreme Court, it is clear that a student loan debtor must serve a summons and complaint[221] and commence an adversary hearing,[222] by which the debtor must demonstrate "undue hardship,"[223] to discharge a student loan obligation.[224]

Given that a Chapter 13 plan, drafted with the requisite specificity to satisfy a creditor's constitutional due process rights of notice,[225] does not comport with the heightened notice afforded student loan creditors under the Bankruptcy Rules, the next issue becomes whether a final order discharging a student loan debt by confirming the Chapter 13 plan is entitled to res judicata effect and incapable of being collaterally attacked by a creditor claiming denial of due process notice pursuant to the Bankruptcy Rules. The next sub-Part demonstrates how a confirmed Chapter 13 plan should be awarded preclusive effect, but should be set aside by a creditor claiming denial of due process rights, since an order discharging an otherwise non-dischargeable debt is void as a matter of law.[226]

3. Although the Elements of Res Judicata Are Capable of Being Met Where a Bankruptcy Court Confirms a Chapter 13 Plan, Such Confirmation Is Void and Capable of Being Set Aside

Claim preclusion may attach to a final order confirming a Chapter 13 plan that purports to discharge an otherwise non-dischargeable debt. Claim preclusion, or res judicata, requires that: (1) the prior action ended with a judgment on the merits; (2) the parties are identical or in privity; (3) the suit is based on the same cause of action; and (4) the party being precluded had a "full and fair opportunity" to litigate in the prior action.[227] As an affirmative defense, the defendant, or party seeking to benefit from preclusion, bears the burden of setting forth facts sufficient to satisfy the above four elements.[228] A final order confirming a Chapter 13 plan constitutes a judgment on the merits since the Code provides that such confirmation binds the debtor and each creditor on any and all

221. *See* FED. R. BANKR. P. 7003.

222. *See id.* at 7001(6).

223. Remember that there are two tests for "undue hardship" adopted by the circuit courts which both place a tremendous burden on the debtor. *See supra* notes 203-06 and accompanying text.

224. *See supra* note 205 and accompanying text.

225. *See supra* Part IV.D.1.

226. *See infra* note 240 and accompanying text.

227. Nwosun v. Gen. Mills Rests., Inc., 124 F.3d 1255, 1257 (10th Cir. 1997).

228. *Id.*

claims, whether stated in the plan or not.[229] Furthermore, the parties affected by the court's confirmation are the same parties involved in an action by the creditor to set aside confirmation of the debtor's plan. In addition, the action would involve the same claims of the creditor that were discharged by the final order. Therefore, the first, second, and third elements are met with ease.

In contrast, satisfaction of the fourth element of res judicata, that the creditor had a "full and fair opportunity"[230] to challenge the discharge of the claim, seems to pose a greater obstacle. To satisfy this element, the debtor must show that the creditor had an opportunity to challenge the discharge of the claim, not that the dischargeability of the debt was actually litigated.[231]

In determining whether the creditor had a proper opportunity to challenge the discharge, the court must look to any existing procedural limitations and the creditor's overall incentive to challenge the discharge.[232] In the case of Chapter 13 confirmation, the bankruptcy rules provide the creditor with a myriad of procedural opportunities to challenge the discharge of a student loan debt.[233] For the same reasons that a debtor seeking discharge via Chapter 13 plan confirmation renders the affected creditor with sufficient notice for the creditor to come forth with its objections,[234] the lack of procedural limitations of the confirmation process warrant the awarding of preclusive effect to a final order confirming the plan.

Moreover, the student loan creditor likely has great incentive to fully litigate the dischargeability of the debt. Although one may argue that creditors are less likely to pursue their interests at the confirmation hearing since the Code provides that student loans are non-dischargeable by confirmation,[235] it would behoove a creditor to refuse to object to a debtor's proposed plan and risk confirmation of the plan which fails to comport with the Bankruptcy Rules. Furthermore, once the Chapter 13 plan is confirmed, the need for the creditor to reject the plan is far more urgent since there is nothing left for the court to do but grant the discharge upon completion of the plan payments.[236] Therefore, the fourth prong of the res judicata test is satisfied.

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229. *See* 11 U.S.C. § 1327(a) (2006).
230. *Nwosun*, 124 F.3d at 1257; *see also supra* text accompanying note 227.
231. *See* Jones v. U.S. Dep't of Justice, 137 F. App'x 165, 167-68 (10th Cir. 2005).
232. *Nwosun*, 124 F.3d at 1257-58.
233. *See supra* notes 185-93 and accompanying text.
234. *See supra* Part IV.D.1.
235. 11 U.S.C. § 523(a)(8) (2006); *see also id.* § 1328(a)(2).
236. *See id.* § 1328(a).

The analysis does not end there, however. The issue yet to be determined is whether the denial of a creditor's due process rights under the Bankruptcy Rules may afford the creditor relief from the bankruptcy court's final order, now entitled to preclusive effect, which discharged the debtor's student loan obligations. The Bankruptcy Rules require that a party seeking relief from a final order of the bankruptcy court serve a motion pursuant to Rule 60 of the Federal Rules of Civil Procedure.[237] A creditor claiming denial of due process notice is essentially attacking the bankruptcy court's jurisdiction over the person whose rights are being adjudicated in the underlying action.[238] Further, it is arguable that bankruptcy courts lack the subject matter jurisdiction to enter a discharge order that violates due process principles.[239] The bankruptcy court's lack of jurisdiction would render any final order granted by the court as void as a matter of law.[240] Under Rule 60 of the Federal Rules of Civil Procedure, the court, upon motion, may relieve a party from a final order that is void.[241] Therefore, the void nature of the final order permits the order to be set aside upon motion by the creditor if the creditor was denied due process notice.[242]

Allowing a creditor to set aside a final order of the bankruptcy court at any time the creditor pleases creates problems within the bankruptcy system. A creditor who makes a motion under Rule 60(b)(4) of the Federal Rules of Civil Procedure to set aside a final order that is void must do so within a "reasonable time" after the order becomes final.[243] The "reasonable time" restriction set by the Bankruptcy Rules, in incorporating Rule 60 of the Federal Rules of Civil Procedure,[244] is ambiguous and appears to be lenient on creditors in light of the one-year restriction placed on creditors setting aside a final order for other

237. *See* FED. R. BANKR. P. 9014, 9024.

238. *See supra* note 166 and accompanying text (examining the connection between due process notice and in personam jurisdiction).

239. *See* 11 U.S.C. § 105(a) (permitting the court to issue an order necessary or appropriate to carry out the provisions of the Bankruptcy Code); 28 U.S.C. § 157(b)(1) (2000) (providing the bankruptcy court with limited jurisdictional power).

240. *See In re* Ruehle, 412 F.3d 679, 684 (6th Cir. 2005); *In re* Hanson, 397 F.3d 482, 485-86 (7th Cir. 2005).

241. FED. R. CIV. P. 60(b)(4).

242. *See In re* Banks, 299 F.3d 296, 302 (4th Cir. 2002) (citing numerous cases whereby a final order of the bankruptcy court was set aside and the court refused to accord finality to it since the debtor failed to provide appropriate notice and thereby violated a party's due process rights).

243. FED. R. CIV. P. 60(c).

244. Although Rule 9024 of the Federal Rules of Bankruptcy Procedure lists exceptions to the incorporation of Rule 60 of the Federal Rules of Civil Procedure, the exception only deals with Chapter 13 plans procured by fraud. *See* FED. R. BANKR. P. 9024(3) (referencing the Bankruptcy Code's provision controlling the revocation of a confirmation order in a Chapter 13 case).

reasons, such as mistake, neglect or newly discovered evidence.[245] The next sub-Part tackles this concern over disturbing a bankruptcy court's final order discharging a debt, and proposes a solution to the policy concerns which stem from the conclusion that the mailing of a clearly drafted Chapter 13 plan comports with minimal notions of due process notice.[246]

E. Public Policy Concerns over the Denial of a "Fresh Start" to Debtors Do Not Outweigh the Benefit Derived from Discouraging Overzealous Advocacy by Failing to Grant Confirmed Chapter 13 Plans Preclusive Effect

1. The Need to Ensure a Debtor's "Fresh Start" Applies with Less Force in Chapter 13 Cases

It is well-settled that the main goal of bankruptcy is to provide debtors with a "fresh start" free from prior obligations.[247] The idea is to give the debtor a new opportunity in life with a clean slate, unburdened by "oppressive indebtedness" which caused the debtor to file for bankruptcy in the first place.[248] However, the principle that a debtor is entitled to come out of the bankruptcy process with the slate wiped clean derives from the fact that a debtor, under the Bankruptcy Act,[249] was required to surrender his non-exempt assets in bankruptcy.[250] This problem does not apply to the same degree in Chapter 13 cases since debtors do not surrender their assets, as they do in Chapter 7 liquidation cases, but rather pay a percentage of their outstanding debts from their future income.[251] This does not suggest that a Chapter 13 debtor, who

245. *See* FED. R. CIV. P. 60(b)-(c). Various circuit courts have interpreted the "reasonable time" limitation to extend far beyond one year after the final order is entered. *See, e.g.*, *In re Ruehle*, 412 F.3d at 681-82; *In re Hanson*, 397 F.3d at 484; *In re* Poland, 382 F.3d 1185, 1187-88 (10th Cir. 2004).

246. *See supra* Part IV.D.1.

247. Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) ("[t]he principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor'") (quoting Grogan v. Garner, 498 U.S. 279, 286-87 (1991)); *Grogan*, 498 U.S. at 286-87 (noting that "a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt'" (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934))).

248. *Local Loan Co.*, 292 U.S. at 244.

249. *See supra* text accompanying note 26.

250. *See Local Loan Co*., 292 U.S. at 244.

251. *See supra* notes 28-29 and accompanying text.

receives a discharge of his student loan debts, is not entitled to the peace of mind in knowing that the unpaid balances on his loans, that were supposedly discharged, will not come back to haunt him years after discharge. In fact, there should be a strict, definite time limitation whereby a creditor waives his right to collaterally attack a final order of the bankruptcy court, regardless of the purpose for seeking relief from the order. The analysis does, however, suggest that a Chapter 13 debtor who completes plan payments derives an economic advantage over his counterpart Chapter 7 debtor who had his non-exempt assets liquidated in bankruptcy, and therefore is less deserving of a fresh start than a debtor without assets.

2. Allowing a Chapter 13 Debtor to Obtain a Discharge of an Otherwise Non-dischargeable Debt Promotes Unethical Legal Practices by Bankruptcy Attorneys

Attorneys owe their clients a duty to zealously advocate in their client's interests.[252] By the same token, however, attorneys may not abuse legal procedure.[253] If confirmation of a Chapter 13 plan containing a provision which is in contravention to the Bankruptcy Rules is given preclusive effect, a bankruptcy attorney, knowing the possibility of such a procedural windfall, may find it extremely difficult to juggle these two ethical obligations. Although bankruptcy attorneys are not required to "press for every advantage that might be realized for a client,"[254] bankruptcy attorneys will likely risk discipline for overzealous advocacy than fail to utilize any potential advantage for the benefit of their clients.[255] Furthermore, the Fourth Circuit acknowledged the tremendous rise in the number of debtors seeking to improperly discharge non-dischargeable debt after the decisions of the Ninth and Tenth Circuits granted preclusive effect to the respective orders of the court confirming discharge of non-dischargeable debt.[256] This overzealous advocacy of the debtor's interests effectively eradicates the Code's provision which makes student loans non-dischargeable absent a showing of "undue

252. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2007).

253. *Id.* at 3.1 cmt. 1.

254. *Id.* at 1.3 cmt. 1.

255. *See* Driscoll, *supra* note 15, at 1334 (stating that there was only one published attempt to sanction an attorney for seeking a discharge not permitted by the Bankruptcy Rules in contrast with the great number of bankruptcy filings on an annual basis).

256. *In re* Banks, 299 F.3d 296, 301 (4th Cir. 2002).

hardship" and encourages bankruptcy attorneys to circumvent the bankruptcy laws.

Although securing finality in a bankruptcy order granting discharge of a student loan debt certainly furthers the goal of bankruptcy in wiping the debtor's slate clean upon completion of the bankruptcy case, the interests in protecting the integrity of the bankruptcy system by deterring unethical advocacy practice outweigh the interests in providing the debtor a fresh start where the bankruptcy case did not liquidate the debtor's non-exempt assets.

The Supreme Court can avoid having to compromise interests of the debtor, the creditor and the bankruptcy court, however, by eliminating the heightened notice requirement altogether, and adopting the notice requirements of Bankruptcy Rule 2002[257] for proceedings to determine the dischargeability of any debt. Such a rule would clarify the proper procedure for discharging a student loan debt and simultaneously comport with the requirements of due process.

V. CONCLUSION

As the preceding argument demonstrated, if the debtor mails a copy of a Chapter 13 plan, which clearly apprises the creditor: (1) of the debts which the debtor wishes to discharge; (2) that subsequent confirmation by the court will satisfy the "undue hardship" requirement of the Code; and (3) of the potential res judicata effect of its confirmation, to the creditor, the due process rights of the creditor are not compromised. Any additional procedural safeguards are excessive and unnecessary since the creditor is afforded ample opportunity to appear and raise objections to a Chapter 13 plan which the creditor believes is inconsistent with the bankruptcy laws. Just as general notice is sufficient to satisfy the requirements of the mailing of an order of relief and notice of a confirmation hearing, which already has the potential of discharging most debts, such notice should be sufficient where the debtor requests that the bankruptcy court determine the dischargeability of a debt. The Bankruptcy Rules should not distinguish between the notice required to commence an adversary hearing and the notice necessary to confirm a Chapter 13 plan. As a result, a final order confirming such a plan will be afforded preclusive effect since the due process issues are resolved.

257. This Rule requires that a clerk of the court provide notice of the confirmation hearing and the time fixed for filing an objection by mail, as opposed to personal service. *See* FED. R. BANKR. P. 2002(b).

Finally, the debtor will be given his fresh start and the integrity of the bankruptcy system will be protected.

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