American College of Bankruptcy Class 27 Induction Ceremony & Related Events

March 18-19, 2016

Education Session Materials

Current Topic Discussion

March 18, 2016
2:00-3:15 p.m.

Martin J. Bienenstock
Michael L. Cook
Prof. Bruce A. Markell

CURRENT TOPICS DISCUSSION, MARCH 18, 2016

Martin J. Bienenstock, Bruce A. Markell and Michael L. Cook

1. Equitable Mootness: Judicial Rumblings. In re Transwest Resort Properties, Inc., 801 F.3d 1161 (9th Cir. 2015) (2-1) (Appellate review would not unfairly affect "third parties or entirely unravel the plan"; appeal from chapter 11 plan confirmation order not equitably moot because, among other things, lender "diligently sought a stay" and court could grant effective relief); In re One 2 One Communications LLC, 805 F.3d 428, 437 (3d Cir. 2015) (reversed district court's dismissal of confirmation order appeal on equitable mootness grounds; "[confirmed] Plan did not involve the issuance of any publicly traded securities, bonds or other circumstances that would make it difficult to retract the Plan"; "limited evidence of potential third-party injury."); In re NICA Holdings, Inc., 2015 WL 9241140, at *4 (11th Cir. Dec. 17, 2015) ("The equitable mootness doctrine seeks to avoid an appellate decision that 'would knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the…court'."); quoting Miami Cir. Ltd. Partnership v. Bank of N.Y., 838 F.2d 1547, 1555 (11th Cir. 1988); and In re Tribune Media Co., 799 F.3d 272 (3d Cir. 2015) (One of two appeals equitably moot because (a) plan had been "consummated"; (b) appellant had "spurned the offer of a stay accompanied by a bond"; and (c) "it would be unfair" to unravel "the most important aspect of the overwhelmingly approved Plan"; appellant had sought to revoke settlement that was "central" to substantially consummated plan but had failed "to post a bond to obtain a stay pending appeal" after being given "the opportunity to" do so; nevertheless, second appeal, when appellant had challenged plan's allocation of funds among two classes of creditors, not equitably moot because court could grant relief to appellant; third parties would not be harmed; and plan would not be fatally scrambled). See generally, Bruce A. Markell, "Equitable Cuteness: Of Mountains and Mice," 35 Bankr L. Letter, issue 11 (November 2015).

2. Preemption: Franklin California Tax-Free Trust v. Puerto Rico, 805 F.3d 322, 345 (1st Cir. 2015), cert. granted, 2015 WL 5005197 (2015) (Puerto Rico may not provide alternative protection by authorizing municipalities to seek composition of debts under Puerto Rico law; Bankruptcy Code expressly preempted Puerto Rico Corporation Debt Enforcement and Recovery Act, legislation purporting to create a municipal bankruptcy process to allow municipalities to deal with fiscal crisis; affirmed bondholders' motion for declaratory injunctive relief to prevent application of Puerto Rican legislation; "In denying Puerto Rico the power to choose Federal Chapter 9 relief, Congress has retained for itself the authority to decide which solution best navigates the gauntlet in Puerto Rico's case."); Nat'l Hockey League v. Moyes, 2015 U.S. Dist. LEXIS 153262, at *14-18 (D. Arizona Nov. 12, 2015) ("Where state law tort claims…question whether a bankruptcy was filed for an improper purpose or in bad faith, these claims are preempted by federal bankruptcy law, 'a field in which the federal

interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'"), quoting MSR Exploration, Ltd. v. Meridian Oil, Inc., 74 F.3d 910, 913 (9th Cir. 1996) and Fidelity Federal Sav. And Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53 (1982).

3. Fee Shifting: Is It Still Possible In Bankruptcy Cases? Baker Botts LLP v. ASARCO LLP, 135 S. Ct. 2158, 2169 (2015) (6-3) (Code "does not permit bankruptcy courts to award compensation for…fee – defense litigation [i.e., the cost of a professional's defending against an objection to its fees]."); In re Lehman Bros. Holdings Inc., 508 BR. 283 (S.D.N.Y. 2014) (legal costs of creditors' committee members cannot be reimbursed from debtor's estate merely because confirmed reorganization plan classifies fees as permissive plan payments; held, plan provisions must comply with Code § 503(b)(3)(D) for committee members to be reimbursed for legal expenses); In re Schwartz – Tallard, 2015 WL 5946342, *5 (9th Cir. Oct. 2015) (en banc) (10-1) (debtor "entitled to recover the attorney's fees reasonably incurred in opposing [lender's] appeal" from sanctions order for lender's automatic stay violation); In re Connolly North America, LLC, 2015 WL 5515229, *6 (6th Cir. Sept. 21, 2015) (2-1) (§ 503(b)(3)(D) of "Code does not divest the bankruptcy court of authority to allow reimbursement under §503(b) of reasonable administrative expenses of creditors whose efforts substantially benefit the bankruptcy estate and its creditors in a Chapter 7 [case]."). See generally, Bruce A. Markell, "Losers Lament: Caulkett and ASARCO," 35 Bankr L. Letter, issue 8, at 8 (Aug. 2015) ("…there are many reasons to include contractual provisions allowing [a] defense of fees clause in bankruptcy retainer agreements…. A professional's fees in hiring another professional to defend compensation has been approved as both 'actual' and 'necessary' [expenses]"); Nat'l Hockey League v. Moyes, 2015 U.S. Dist. LEXIS 153262, at *35 (D. Arizona Nov. 12, 2015) ("Contractual agreements to pay attorneys' fees arising in bankruptcy court are not preempted under the Bankruptcy Code."), citing Travelers (A.S. & Sur. Co. of Am v. Pac. Gas & Elec. Co., 549 U.S. 443, 448-449 (2007) (Code does not disallow "contract-based claims for attorneys' fees [when] fees at issue were incurred litigating issues of bankruptcy law"; despite "American Rule" preventing "prevailing litigant" from collecting "reasonable attorneys' fee from the loser…default rule can be overcome by statute or 'by an enforceable contract allocating attorney's fees (i.e., one that is enforceable under substantive, non-bankruptcy law)….").

The Emerging International Architecture for Restructuring Corporate Groups

March 19, 2016
9:00-10:15 p.m.

Moderator: Edward J. Janger, David M. Barse Professor, Brooklyn Law School

Panelists:
Hon. Allan Gropper (Ret.), Bankruptcy Judge, SDNY
Lord Justice David Richards, Court of Appeal of England and Wales
Christopher Redmond, Husch Blackwell

- Edward J. Janger, Brooklyn Law School (moderator)
- Hon. David Richards, High Court of England and Wales
- Christopher Redmond, Husch Blackwell LLP
- Hon. Allan Gropper, Bankruptcy Judge S.D.N.Y. (ret.)

Fontainebleau
Miami Beach

NCBJ National Conference of Bankruptcy Judges

2015

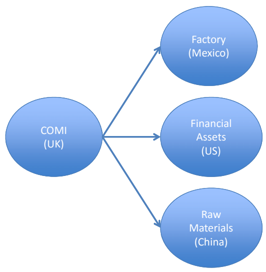
The Emerging Architecture for Coordinated Restructuring of International Corporate Groups

- Edward J. Janger, Brooklyn Law School (moderator)
- Hon. David Richards, High Court of England and Wales
- Christopher Redmond, Husch Blackwell LLP
- Hon. Allan Gropper, Bankruptcy Judge S.D.N.Y. (ret.)

Introduction

Edward J. Janger
David M. Barse Professor
Brooklyn Law School

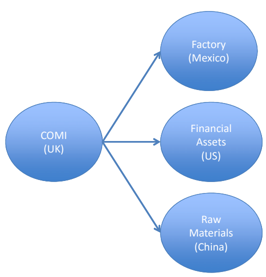
Goals of Cross-Border Practice



- Coordinated global restructuring or
- going-concern sale of a multinational firm

2

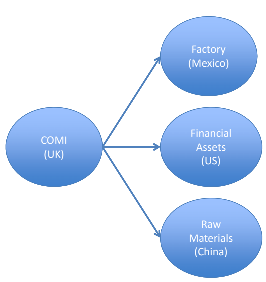
Goals of Cross-Border Practice



- Facilitated through Modified Universalism
  - Court at COMI coordinates (“Main”)
  - Ancillary courts cooperate (“non-main,” or “secondary”)

3

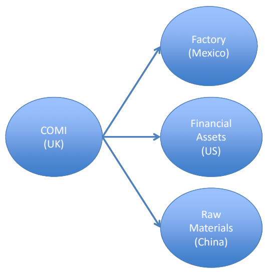
Existing Instruments –ModifiedUniversalism



- Recognition and Cooperation
  - EU Insolvency Regulation
  - UNCITRAL Model Law
- Legal Harmonization
  - UNCITRAL Legislative Guide

4

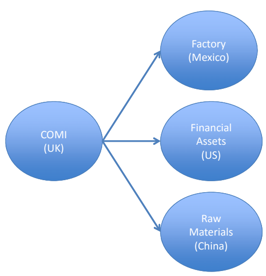
COMI Focused Centralization



- Ancillary courts cooperate with the court at the debtor's COMI

5

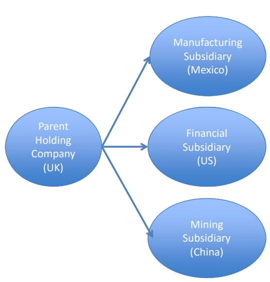
Single Firm Focus



- Model Law and EU Reg assume that the debtor is a single firm.

6

What about Groups?

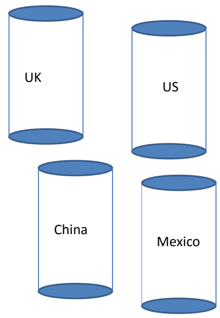


- Groups
  - Clarify entitlements.
  - Complicate governance.
- Each group member has its own COMI:
  - May not be the COMI of the parent or other group members;
  - Reverses the presumptions regarding deference.
- Practice has responded with an *ad hoc* solution.
- Current law reform efforts are seeking to formalize it.

7

Informal Synthetic Treatment

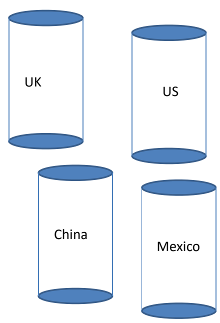
- Choice of Law
  - Virtual Territoriality
- Procedural
  - Synthetic Secondary
- Comity
  - Reciprocal Comity



8

Informal Synthetic Treatment

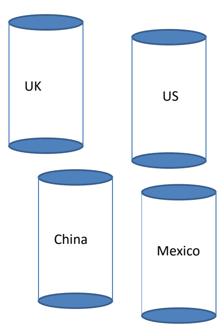
- Administrator of parent offers to honor territorial priorities.
  - Subsidiary does not open a secondary or ancillary proceeding.
  - The local creditors of the subsidiary go along.
- *Collins and Aikman*
- *MG Rover*



9

Catching on

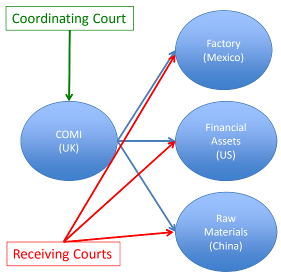
- Amendments to EU Insolvency Regulation
  - The enforceable undertaking
- UNCITRAL
  - Project on Corporate Groups
  - Obligations of Officers and Directors in the Zone of Insolvency
  - Enforcement of Insolvency Related Judgments



10

New Vocabulary – New Tools

- Coordinating Court
  - Group Solution
  - Best Interests
    - Synthetic
    - Virtual Territorial
    - As-if
    - No Worse Than Treatment
- Receiving Court
  - Abstention/Suspension
  - Ratification/Implementation



11

Corporate Groups and Synthetic Measures in the EU

Hon. David Richards,
High Court of England and Wales

EU Regulation, Article 36(1):
Undertaking to Avoid Secondary Proceedings

1. In order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking (the 'undertaking') in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State. The undertaking shall specify the factual assumptions on which it is based, in particular in respect of the value of the assets located in the Member State concerned and the options available to realise such assets.

2

EU Regulation, Article 36(2):
Undertaking to Avoid Secondary Proceedings

2. Where an undertaking has been given in accordance with this Article, the law applicable to the distribution of proceeds from the realisation of assets referred to in paragraph 1, to the ranking of creditors' claims, and to the rights of creditors in relation to the assets referred to in paragraph 1 shall be the law of the Member State in which secondary insolvency proceedings could have been opened. The relevant point in time for determining the assets referred to in paragraph 1 shall be the moment at which the undertaking is given.

3

EU Regulation, Article 38:
Decision to Open Secondary Insolvency Proceedings

1. A court seised of a request to open secondary insolvency proceedings shall immediately give notice to the insolvency practitioner or the debtor in possession in the main insolvency proceedings and give it an opportunity to be heard on the request.
2. Where the insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court referred to in paragraph 1 of this Article shall, at the request of the insolvency practitioner, not open secondary insolvency proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors.

4

EU Regulation, Articles 61-77:
Group Coordinating Proceedings

4

Treatment of Corporate Groups in Cross-Border Insolvencies: UNCITRAL

Christopher Redmond,
Husch Blackwell LLP

The Challenge

20 corporations in 20 different states,
each corporation with its COMI in its individual state

Brazil Corporation 1	**Colombia** Corporation 2	**Mexico** Corporation 3	**Chile** Corporation 4	**Cayman** Corporation 5
British Virgin Islands Corporation 6	**Canada** Corporation 7	**Guernsey, Channel Islands** Corporation 8	**Isle of Man** Corporation 9	**United States** Corporation 10
United Kingdom Corporation 11	**Germany** Corporation 12	**France** Corporation 13	**Italy** Corporation 14	**Thailand** Corporation 15
China Corporation 16	**Russia** Corporation 17	**Switzerland** Corporation 18	**South Africa** Corporation 19	**Japan** Corporation 20

2

The Challenge

- The twenty corporations would like to coordinate a group solution.
  - The group manufactures and sells widgets.
  - Substantial expansions by the corporation were not successful.
  - Bank debt exceeds the value of the twenty group.
  - The bank is agreeable to a restructure of existing debt with a write down of debt if a group solution can be effectuated.

3

The Problems

- Intercorporate Debt
  - Five – **yes.**
  - Fifteen – **no.**
- Jurisdiction
  - **Subsidiaries do not have "establishments" in any jurisdiction other than their COMI.**

4

The Reality

- Integrated Group
  - Consolidated financing.
  - Integrated cash management.
  - Shared rights in intellectual property.
- Unequal Subs
  - Five insolvent and unnecessary (should sell or liquidate).
  - Five solvent and essential.
  - Ten on the verge of insolvency.
- Disinterested Parent
  - No equality in the shares of the twenty corporations and will not provide any further funding.

5

The Problems Under the Present Law

- Insolvency proceedings in 20 countries.
- Rescue v. Liquidation.
- Priority of post petition financing.
- Displacement of current management.
- Jurisdiction and Standing.

6

UNCITRAL's Work and Structure to Develop a Model Law for Group Enterprises

- In December, 2013 UNCITRAL Working Group V (Insolvency Law) determined its top priority was to continue its work on the cross-border insolvency of multinational enterprise groups.
- Working Group V meetings have been held in December of 2014 and May of 2015 to advance this work.
- The next meeting is set for December, 2015 at the United Nations facility in Vienna, Austria.

7

Development of a Foundation for a Model Law on Enterprise Groups

- Two components:
  - Development of a model law for enterprise groups
  - Domestic legislative provisions of group members may have to be enacted to allow implementation of a model law for enterprise groups.

8

Building Blocks on a Model Law for Enterprise Groups

Coordination and Cooperation

- Selection of coordinating court/jurisdiction.
- Participation by group member in coordinating case.
- Local filings by group members where necessary or desired.
- Stay or suspension of local proceeding.
- Confirmation and recognition of "Group Solution."

9

Building Blocks on a Model Law for Enterprise Groups

Coordination and Cooperation

- Group members select representative to appear in the coordinating case.
- Group member selects a representative to appear in the local cases of other group members.

10

Building Blocks on a Model Law for Enterprise Groups

Coordination and Cooperation

- Establish, in coordinating proceeding, creditors committee consisting of representatives from each COMI corporation.
- Establish in COMI reorganization proceeding enterprise group committee consisting of representatives of each COMI corporation.
- Allow creditors of each group member in the COMI jurisdiction of the group member to file an insolvency proceeding to protect their respective interests.

11

Building Blocks on a Model Law for Enterprise Groups

Group Solution

- Coordinating Court coordinates development of Group Solution.
- Right of solvent and insolvent group members to appear and be heard in coordinating case.
- Coordinate liquidation, where necessary, to provide maximum recovery.

12

Building Blocks on a Model Law for Enterprise Groups

Group Solution

- Determine treatment for each group member.
- Coordinate plan for reorganized group members.
- Appoint, where necessary, a group representative by the group reorganization court.
- Determination by each group member whether to participate in the Group Solution.

13

Building Blocks on a Model Law for Enterprise Groups

Relief Available

Issuance and recognition of group-wide order to:

- Stay execution against a group member's assets
- Suspend the group member's right to transfer, encumber or otherwise dispose of any assets
- Stay the commencement of actions or proceedings concerning a group member's rights, obligations or liabilities.
- Centralized administration or realization of all or part of a group member's assets.

14

Building Blocks on a Model Law for Enterprise Groups

Relief Available

- Examination of witnesses, the taking of evidence, or the delivery of information concerning a group member's assets, affairs, rights, obligations or liabilities.
- Granting any additional or provisional relief that may be available under the laws of the group reorganization court.

15

Building Blocks on a Model Law for Enterprise Groups

Relief Available

- Utilizing synthetic measures in the Coordinating Court to avoid filing a separate insolvency proceeding, or facilitate recognition of the Group Solution in the jurisdiction of each group member.

16

Building Blocks on a Model Law for Enterprise Groups

Relief Available

- Confirmation of Group Solution:
  - Disclosure, solicitation and voting on Group Solution
    - Group Solution would describe the individual treatment of each group member and its respective creditors
    - Group Solution would be voted on by the group member's creditors and parties entitled to vote on such a plan.

17

Building Blocks on a Model Law for Enterprise Groups

Relief Available

- Recognition of Group Solution
  - If necessary, the Group Solution will be submitted to the group member's COMI court for review and approval.

18

Building Blocks on a Model Law for Enterprise Groups

Form

Group members would not be required to have an operation or an establishment in the jurisdiction of the group reorganization proceeding to participate in a group solution.

19

Practical Effects and Developments under Chapter 15?

Hon. Allan Gropper,
Bankruptcy Judge S.D.N.Y. (ret.)

Making the Bankruptcy Courts Work Better for Families and Students

March 19, 2016
10:30-11:30 a.m.

Moderator: Robert M. Lawless, Associate Dean for Research and Max L. Rowe Professor of Law, University of Illinois College of Law

Panelists:

Prof. Melissa Jacoby, UNCSchool of Law
Prof. Angela Littwin, University of Texas, Austin
John Rao, National Consumer Law Center, Inc.

SUPERDELEGATION AND GATEKEEPING IN BANKRUPTCY COURTS

Melissa B. Jacoby[*]

INTRODUCTION

America's bankruptcy court system runs on delegation, all the way down. The Judicial Code expressly authorizes federal district judges to make a wholesale hand off of bankruptcy cases and related adversary proceedings to bankruptcy judges.[1] Many observers, including justices on the U.S. Supreme Court, doubt this arrangement with non–Article III judges is fully constitutional.[2] Some district judges even try to offload appeals from bankruptcy court decisions onto their non–Article III magistrates.[3] But delegation of work

* Graham Kenan Professor of Law, University of North Carolina at Chapel Hill. Thanks to Bill Whitford for inspiration, to Jill Family for her administrative law expertise, and to the UNC Law Chancellors' Scholars for their helpful and enthusiastic discussion at a paper workshop in February 2015. Robert El-Jaouhari and Britton Lewis provided substantial research and editorial assistance for which I am grateful. Insofar as this Article is part of a larger project, it also has benefitted from the research assistance of Raymond Echevarria, Dana Messenger, Brett Neve, and Safa Sajadi. I have had the good fortune to discuss the subjects of this article with several bankruptcy judges and lawyers. To quote Professor Whitford, "[n]one of these persons is responsible for any of the errors contained herein, nor should they be presumed to agree with the views set forth. But without their assistance, the errors would have been more numerous and the views more outlandish." William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 397 n* (1994) [hereinafter Whitford, *Individualized Justice*].

1. 28 U.S.C. § 157(a) (2012).

2. Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, 2015 U. ILL. L. REV. 571, 573–74 [hereinafter, Jacoby, *What Should Judges Do*] (discussing the Supreme Court's decisions in *Stern v. Marshall* and *Executive Benefits Insurance Agency v. Arkison*, and its grant of certiorari in *Wellness International Network Limited v. Sharif*). With three justices dissenting, the Supreme Court recently held that bankruptcy judges have the constitutional authority to adjudicate *Stern* claims with party consent. Wellness International Network, Limited v. Sharif, 135 S. Ct. 1932 (2015).

3. *See, e.g.,* Bannistor v. Ullman, 287 F.3d 394 (5th Cir. 2002); Hall v. Vance, 887 F.2d 1041 (10th Cir. 1989); Minerex Erdoel, Inc. v. Sina, Inc., 838 F.2d 781, 786 (5th Cir. 1988); *In re* Elcona Homes Corp., 810 F.2d 136 (7th Cir. 1987); *In re* Continental Airlines, Inc., 218 B.R. 324 (Dist. Del. 1997); Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA. L. REV. 384, 428 n.282 (2012). The more benign reasons for an eagerness to offload bankruptcy might relate to the obligation of district courts to prioritize the processing of criminal cases. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–74 (2012). A darker rationale can be gleaned from the savage language some district judges have employed in their descriptions of bankruptcy work. *E.g.*, Arthur D. Hellman, *Conference on Empirical Research in Judicial Administration,* 21 ARIZ. ST. L.J. 33, 121 (1989) (quoting Judge Bilby as saying, "[m]ost district judges like bankruptcy about as much as AIDS . . . . [t]hey hate [bankruptcy], they don't want anything to do with it"); *id.* at 122 ("Most judges will take two death penalty cases to one bankruptcy case."); *see also* Pardo & Watts, *supra*, at 428

by bankruptcy judges *to* other actors has escaped the attention of Congress, federal courts of appeal, and even the "fastidious carping of scholars."[4]

In a volume of scholarship celebrating Professor Bill Whitford, this Article considers the allocation of government oversight in Chapter 13, a type of bankruptcy about which Professor Whitford has much expertise.[5] Chapter 13 bankruptcy is available to individuals with regular income as long as their debts are not too large.[6] It offers special tools for protecting co-debtors and dealing with property encumbered by security interests or mortgages.[7] Systematic empirical studies illustrate strongly rooted localized practices for Chapter 13.[8] Although filing ratios vary by location, Chapter 13 remains the second most populous type of bankruptcy nationally, behind Chapter 7.[9]

To manage the volume of cases, some bankruptcy judges hand over their courtrooms to Chapter 13 trustees, who then supervise plan confirmation hearings in the courtroom without a judge present. According to a finding in an extensive survey of judges, nearly one-third of judges in the early 1990s reported

("[W]hen Article III judges do have the opportunity to decide bankruptcy appeals, they may not find such matters interesting, which may lead to suboptimal decisionmaking.").

4. Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 365 (1986) (noting that the judicial system relies on safeguards such as "the self-consciousness of judges, the vigilance and assertiveness of advocates, the probing suspicions of journalists, and the fastidious carping of scholars").

5. William C. Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 IND. L.J. 85 (1989) [hereinafter Whitford, *Has the Time Come*]; William C. Whitford, *A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. ILL. L. REV. 143; Whitford, *Individualized Justice*, *supra* note *; William C. Whitford, *Secured Creditors and Consumer Bankruptcy in the United States*, 37 OSGOODE HALL L. J. 339 (1999). Also, Professor Whitford's work on business bankruptcy reveals an interest in delegation within the bankruptcy system. William C. Whitford, *What's Right About Chapter 11*, 72 WASH. U. L. Q. 1379, 1402–05 (1994) [hereinafter Whitford, *What's Right About Chapter 11*] (discussing how bankruptcy judges could deploy their discretion to change business bankruptcy practices, questioning whether "value choices such as these should be made by Congress, not by an unelected judiciary," but ultimately acknowledging the difficulty of placing expectations for reform in the hands of Congress).

6. 11 U.S.C. § 109(e) (2012) (imposing a regular income requirement and debt limits that are adjusted for inflation every three years); *id.* § 101(30) (defining "individual with regular income" for Chapter 13 purposes).

7. *Id.* §§ 1301, 1322, 1325; *see* Gordon Bermant & Jean Braucher, *Making Post-Petition Mortgage Payments Inside Chapter 13 Plans: Facts, Law, Policy*, 80 AM. BANKR. L.J. 261 (2006); Juliet M. Moringiello, *Mortgage Modification, Equitable Subordination, and the Honest but Unfortunate Creditor*, 79 FORDHAM L. REV. 1599, 1603–07 (2011); Juliet M. Moringiello, *(Mis)use of State Law in Bankruptcy: The Hanging Paragraph Story*, 2012 WIS. L. REV. 963.

8. Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993) [hereinafter Braucher, *One Code*]; Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J. L. & PUB. POL'Y 801 (1994).

9. U.S. BANKR. COURTS, BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2013 tbl.F-2 (2013), *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/1213_f2.pdf.

some version of this method.[10] Yet, this particular subset of the practice of deference to the positions of Chapter 13 trustees seems to have escaped sustained attention from, or even detailed description by, legal scholars. Likewise, I cannot find appellate court treatment of the practice. That absence is consistent with the disconnect between what justices on the U.S. Supreme Court think bankruptcy judges do and the reality.[11]

In some districts, therefore, individual debtors have passed through the bankruptcy system possibly believing that the Chapter 13 trustees are, in fact, the federal judges. But the addition of the "super" to the term "delegation" comes from the cross-branch structure of the handover. Congress assigned oversight of the plan confirmation process to the federal judiciary rather than to an executive agency.[12] As already noted, Congress expressly authorized Article III judges to pass along bankruptcy work to bankruptcy judges, not to trustees. Who appoints trustees? In all states but two, they are appointed and overseen by the United States Trustee, part of the U.S. Department of Justice.[13] Thus, this little-studied convention and its variations should be of interest to administrative law and federal courts scholars as well as to the bankruptcy world.

At the other end of the philosophy spectrum, some judges are such active gatekeepers that they impose hurdles on Chapter 13 that are difficult to locate in the Bankruptcy Code. Especially before the Bankruptcy Code's 2005 amendments, it was well known that some judges refused to confirm plans unless they promised particular percentage payments to unsecured creditors.[14] But recent examples are even more intriguing. I have heard a rumor of a judge in Kentucky who conditioned Chapter 13 plan confirmation on a debtor quitting smoking.[15] And a judge in California is systematically seeking to heighten the bar not only to plan confirmation, but also to the receipt of a discharge after plan

10. Hon. Stephen A. Stripp, *An Analysis of the Role of the Bankruptcy Judge and the Use of Judicial Time*, 23 SETON HALL L. REV. 1329, 1391 (1993) (reporting twenty-eight percent of judges who responded to his survey "permit the standing trustee to conduct uncontested chapter 13 confirmation hearings without the judge's presence in the courtroom"); *id.* at 1427 (reporting that over 120 judges responded to this question). A slightly distinct question is whether a Chapter 13 confirmation hearing is required at all if no party in interest objects.

11. See *infra* Section I for an examination of the perceived role of bankruptcy judges. For a parallel point about Chapter 11, see Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69 (2004).

12. For a critique of that choice, see Pardo & Watts, *supra* note 3.

13. 11 U.S.C. § 1302 (2012) (setting forth duties of standing Chapter 13 trustee appointed by the U.S. trustee).

14. NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 234–35 (1997) (discussing how some courts "condition confirmation on payment of high percentages of unsecured debt"); *id.* at 267 ("Some courts throughout the country will not confirm plans that provide less than a certain percentage of repayment to unsecured creditors. . . . Had the debtor's case been assigned to another judge who will confirm plans that promise no payments to unsecured creditors, the outcome would have been different."); Braucher, *One Code*, *supra* note 8, at 532; Whitford, *Has the Time Come*, *supra* note 5, at 97; Whitford, *Individualized Justice*, *supra* note *, at 404, 409, 410–11 (citing Chapter 13 trustee survey).

15. See *infra* Section III for a discussion of "extreme" gatekeeping.

completion.[16] Such practices are difficult to counter through the expensive, and one-case-at-a-time, appellate process, particularly if there is no absolute right to appeal an order denying plan confirmation.[17] As distinct from superdelegation, judges who impose extra requirements to the most fundamental element of bankruptcy—the discharge of debt—arguably overconsume the gatekeeping authority Congress gave them. Of course, many, if not most, courts fall in between these two poles.

This Article proceeds as follows. Section I considers the baseline expectations of judges in the Bankruptcy and Judicial Codes, coupled with the interpretive overlay of the Supreme Court and appellate courts. Section II examines cross-branch delegation of Chapter 13 gatekeeping, featuring an example I observed in a bankruptcy court in 2012. Section III considers gatekeeping that goes beyond Congress's or the Supreme Court's expectations for exercising the judicial role.

I. THE BANKRUPTCY JUDGE'S ROLE ACCORDING TO CONGRESS, THE SUPREME COURT, AND SOME APPELLATE COURTS

A. *The Statutory Baseline*

In the 1970s, Congress made an earnest attempt to divide judicial and administrative duties, allocating the first category to courts and the second to the executive branch.[18] In the idealized world, this production of a distinct administrative apparatus and adjunct trustee program meant bankruptcy judges could preserve their time and authority resolving disputes.[19] A key component of this structure is the U.S. Trustee Program (part of the U.S. Department of Justice). The U.S. Trustee Program was created as a pilot program in 1978 and made permanent in 1986,[20] after Congress restructured the bankruptcy courts in response to the Supreme Court's *Northern Pipeline* ruling.[21]

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16. Standing Order *In re* Procedures for Chapter 13 Cases Assigned to Judge Johnson (Bankr. C.D. Cal.) [hereinafter Standing Order of Judge Johnson] (applicable to cases after Jan. 1, 2013). See *infra* Section III for a review of pleadings in specific cases.

17. Bullard v. Blue Hills Bank, 135 S. Ct. 1686 (2015) (holding that an order denying confirmation of a plan is not a final order that the debtor has the right to immediately appeal). For the more general challenges associated with relying on the appellate process, see Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559, 619 (2001), noting that "[i]n most consumer cases, the burden of litigation will be dispositive." *See also* NAT'L BANKR. REVIEW COMM'N, *supra* note 14, at 264–65 (1997) (discussing the difficulty of parsing fact-intensive court decisions in Chapter 13 and the resource requirements of litigation).

18. Richard B. Levin, *Towards a Model of Bankruptcy Administration*, 44 S.C. L. REV. 963, 966–67 (1993); Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 488–93 (2007); Pardo & Watts, *supra* note 3, at 394–99.

19. Jacoby, *What Should Judges Do*, *supra* note 2.

20. Pardo & Watts, *supra* note 3, at 394–96 (describing the U.S. Trustee Program as well as the fact that Alabama and North Carolina were permitted to opt out of the program).

21. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982), a plurality ruled that bankruptcy court structure violated Article III of the United States Constitution. In 1984, Congress revised the Judicial Code to conform with *Northern Pipeline* in the Bankruptcy

Per its statutory authorization, the United States Trustee for each region appoints and oversees private trustees, including Chapter 13 trustees.[22] The Bankruptcy and Judicial Codes specify the duties of trustees. For example, they convene and oversee meetings of creditors with the debtor; judges are not permitted to attend.[23] In Chapter 13, trustees have rather mixed responsibilities. On the one hand, they assess whether the debtor is promising sufficient payments to creditors to meet the confirmation standards.[24] Trustees also have a facilitative role, however. Congress has charged trustees with assisting the debtor in performance under the plan.[25] In some districts, trustees have experimented over time with credit rehabilitation and methods of increasing the odds that mortgages remain current, thus protecting debtors from post-plan default and foreclosure.[26]

The Bankruptcy Code provides that a judge "shall confirm" a Chapter 13 plan "if" it meets a lengthy list of requirements.[27] A traditional formulation of how that task unfolds appears in the classic bankruptcy study, *As We Forgive Our Debtors*: "After the hearing, the clerk schedules a confirmation hearing at which the trustee makes a recommendation to the court about the debtors' plan."[28] In the subset of cases in which the debtor completes the plan, the court is to enter a discharge order "as soon as practicable after completion by the debtor of all payments under the plan."[29]

What happens if the trustee endorses the debtor's proposed plan and all other parties are silent or acquiescent? The Bankruptcy Code drafters did not make clear how bankruptcy judges are supposed to perform their roles when the

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Amendments and Federal Judgeship Act of 1984. *See* Pub. L. No. 98-353, 98 Stat. 333 (codified as amended at 11 U.S.C. § 101(47)(A)(i) (2012)).

22. 28 U.S.C. § 586(a)(1), (3) (2012); *see id*. § 586(b) (authorizing the appointment of a standing Chapter 13 trustee for a region if the volume of cases so warrants); *id.* § 586(d) (authorizing the Attorney General to prescribe by rule the requirements for serving as a standing Chapter 13 trustee); *id.* § 586(e) (authorizing the Attorney General to fix the compensation, including by a percentage of no greater than ten percent).

23. *Id.* § 586(b); 11 U.S.C. § 341; U.S. DEPT. OF JUSTICE EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES, HANDBOOK FOR CHAPTER 13 STANDING TRUSTEES, 3–9 (2012); *see also* Donald R. Lassman & Carolyn A. Bankowski, *Advice for Bankruptcy Trustees in Consumer Cases*, *in* STRATEGIES FOR CONSUMER BANKRUPTCY TRUSTEES: LEADING LAWYERS ON ANALYZING THE ROLE OF THE TRUSTEE IN THE BANKRUPTCY PROCESS 36 (2012) (private trustees from Massachusetts noting that the trustee "will be the only person in an official capacity the debtor will meet during their bankruptcy case. Therefore, for most people filing for bankruptcy, their entire perception of the bankruptcy process will be based on their interaction with their bankruptcy trustee.").

24. *See* 11 U.S.C. § 1302(b)(2).

25. *Id.* § 1302(b)(4).

26. *See* NAT'L BANKR. REVIEW COMM'N, *supra* note 14, at 294 (discussing Chapter 13 trustee credit rehabilitation programs); Bermant & Braucher, *supra* note 7 (discussing methods of mortgage payment during Chapter 13).

27. 11 U.S.C. § 1325.

28. TERESA SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS 36 (1989).

29. 11 U.S.C. § 1328(a).

case proved nonadversarial.[30] Should the judge presume the statutory requirements are met if the Chapter 13 trustee says so? If a trustee and the parties in interest have no objections, should the judge raise one or two of her own? The Bankruptcy Code does not tell the judge how she should assess the plan's legality other than based on what the parties tell her.[31] At least in dicta, we will see, the U.S. Supreme Court attempted to fill the gap.

B. *The Supreme Court's Vision of Plan Confirmation*

United Student Aid Funds, Inc. v. Espinosa,[32] a unanimous 2010 Supreme Court decision, emphatically instructs bankruptcy judges to independently review the requirements for Chapter 13 plan confirmation in each case, even if no one has objected. Espinosa's Chapter 13 plan provided that completion of the plan would discharge some unpaid student loans. This part of the plan violated bankruptcy law; Espinosa's lawyer should have brought a separate lawsuit to determine whether the circumstances necessary to discharge student loans—a highly fact-intensive inquiry—were present.[33] The creditor should have been served with a complaint and summons on a nondischargeability action. But no one objected to the clause: not the creditor to whom Espinosa owed the student loans, and not the Chapter 13 trustee, who ordinarily would be expected to flag noncompliant plan provisions. The repayment plan was confirmed.

Espinosa finished the plan and earned a discharge order from the court.[34] After the entry of that order, the student loan creditor tried to intercept Espinosa's tax refund to satisfy the modest unpaid debt. Espinosa responded that he no longer owed this debt. The creditor argued the plan should be considered void as to the student loan. On the initial appeal, the district court sided with the creditor. The Court of Appeals for the Ninth Circuit reversed, stating that the bankruptcy court was *obliged* to confirm the plan in the absence of objections.[35] The panel explained:

> If the creditor is notified and fails to object, it is doubtless the result of a careful calculation that this course is the one most likely to yield repayment of at least a portion of the debt. In such circumstances, bankruptcy courts have no business standing in the way.[36]

Espinosa's student loan creditor successfully sought review from the U.S. Supreme Court. Although the Supreme Court upheld the result, the content of the opinion was quite different from that of the Ninth Circuit.

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30. John D. Ayer, *The Forms of Action in Bankruptcy Practice: An Exposition and a Critique*, 1985 NORTON ANN. SURV. BANKR. L. 6, 11; John D. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANKR. L.J. 355, 393 (1986).

31. Such gaps are not unique to bankruptcy. *See* Jacoby, *What Should Judges Do*, *supra* note 2.

32. 559 U.S. 260 (2010).

33. 11 U.S.C. § 523(a)(8).

34. *Espinosa*, 559 U.S. at 265–66.

35. Espinosa v. United Student Aid Funds, Inc., 553 F.3d 1193, 1205 (9th Cir. 2008).

36. *Id.*

Delivering the opinion of a unanimous court, Justice Thomas readily dispensed with the main issue. The conditions for unraveling a judgment, as the creditor requested, were not present in this case and thus discharge of the remaining student loan debt would be upheld. Yet, the Court explained that the bankruptcy court had committed legal error by confirming Espinosa's Chapter 13: "the Code makes plain that bankruptcy courts have the authority—indeed, the obligation—to direct a debtor to conform his plan to the requirements of [the Bankruptcy Code]."[37] Several variations followed on the judge-as-gatekeeper theme. The law "*requires* bankruptcy courts to address and correct a defect in a debtor's proposed plan even if no creditor raises the issue," said the Court.[38] Citing just one bankruptcy court decision, the Court noted that bankruptcy judges "appear to be well aware of this statutory obligation."[39] Then, speaking in particular to the student loan issue, the Court stated, "the bankruptcy court must make an *independent* determination of undue hardship before a plan is confirmed, even if the creditor fails to object or appear in the adversary proceeding."[40]

The takeaway message of *Espinosa* on the gatekeeping responsibility of bankruptcy judges seems to be that they should independently review hundreds of thousands of Chapter 13 plans, annually, for potentially erroneous provisions. They should do so, suggested the Supreme Court, even if neither a standing trustee, nor a creditor with money on the line, alerts the court to a flaw.

Espinosa's message, however striking, was not entirely new. The 1990 Supreme Court decision *United States v. Energy Resources Co.*,[41] which focused on trust fund taxes in Chapter 11, had already revealed the expectation that judges would review Chapter 11 plans to ensure that those plans *will* succeed (contrary to Chapter 11 language that speaks of probability, not certainty).[42] In *Till v. SCS Credit Corp.*,[43] a 2004 decision about the interest rate for restructuring a truck loan in Chapter 13, members of the Supreme Court made empirical statements about how bankruptcy judges assess the viability of repayment plans.[44] Justice Stevens's plurality opinion assumed the bankruptcy judge would set the interest rate through a deliberative bespoke process, assessing the likelihood that each particular debtor would complete his or her

37. *Espinosa*, 559 U.S. at 277.

38. *Id.* at 277 n.14.

39. *Id.* at 277 n.15.

40. *Id.* at 278 (emphasis added). This last iteration may not be literally achievable. *See* David Gray Carlson, *The Federal Rules of Bankruptcy Procedure in Reorganization Cases: Do They Have a Constitutional Dimension?*, 84 AM. BANKR. L.J. 251, 271 (2010).

41. 495 U.S. 545 (1990).

42. *Energy Resources Co.*, 495 U.S. at 549 (misapplying 11 U.S.C. § 1129(a)(11), as did the First Circuit below); *see also In re* Michelson, 141 B.R. 715, 720 (Bankr. E.D. Cal. 1992) (restating the *Energy Resources* holding so that it was more consistent with § 1129 language).

43. 541 U.S. 465 (2004).

44. *Till*, 541 U.S. 465. The dispute that went up to the Supreme Court related to the interest rate Till should pay on the restructured debt secured by a truck, dividing the Supreme Court into more shreds than many of the thorniest constitutional issues.

plan.[45] In dissent, Justice Scalia observed correctly that every confirmed Chapter 13 plan has been accompanied by a finding that the debtor *will* complete the plan, a legal condition of confirmation contained in the Bankruptcy Code. And yet, the majority of confirmed Chapter 13 cases are never completed. "[B]ankruptcy judges are not oracles," Justice Scalia concluded.[46] Although he understands the consumer bankruptcy system better than many other sitting justices, Justice Scalia inaccurately assumed that bankruptcy judges *try* to predict the future in Chapter 13 cases.

C. A Spectrum of Circuit Court Conceptions of Plan Confirmation

In *Espinosa* and similar decisions from courts of appeals, the declaration of a judicial duty did not change the result ex post.[47] A few further-reaching circuit

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45. "[T]his requirement obligates the court to select a rate high enough to compensate the creditor for its risk but not so high as to doom the plan." *Id.* at 480. For an earlier circuit decision with similar expectations, see *United States v. Estus*, 695 F.2d 311, 316 (8th Cir. 1982), which observes that "[t]he bankruptcy court must utilize its fact-finding expertise and judge each case on its own facts after considering all the circumstances of the case."

46. *Till*, 541 U.S. at 493 (Scalia, J., dissenting).

47. *In re Szostek*, a Third Circuit case from the 1980s, is in the spirit of *Espinosa*, asserting the judge's independent duty but with duller teeth. 886 F.2d 1045 (3d Cir. 1989). The Szosteks sought confirmation of their Chapter 13 repayment plan. The trustee endorsed confirmation. Hearing no objection, the plan was confirmed. Four months later, the Kissell Company complained that the Szoskeks' plan violated the law because it did not pay interest on its secured claim. After a hearing, the bankruptcy court said it was "too late" to raise this objection. Kissell appealed to the district court. The district court vacated the confirmation of the Szosteks' plan. *In re Szostek*, 886 F.2d at 1408. According to the district court, the bankruptcy court had failed to perform its independent duty to ensure the plan was fully compliant with all legal requirements. *Id.* The debtors appealed to the Third Circuit, which reversed the district court. True, the bankruptcy judge had an independent duty that it failed to perform, said the Third Circuit decision. But clear rules determine when creditors can object to plans that affect them; those rules would be meaningless if the creditor could stay silent while the bankruptcy judge's duty preserved parties' rights to appeal. The benefits of finality of the confirmation order trumped the bankruptcy judge's mistake in the case. *Id.* at 1414. In an Eleventh Circuit case, a debtor in a confirmed Chapter 13 plan was in a dispute with a mortgage lender. *In re* Bateman, 331 F.3d 821, 828 (11th Cir. 2003). The mortgage lender had not objected to the plan, and sought to complain after the fact. The collateral attack on the plan was unsuccessful in the bankruptcy court, district court, and, ultimately, in the U.S. Court of Appeals for the Eleventh Circuit. Nonetheless, footnote six of the Eleventh Circuit decision previews *Espinosa*:

> We will not lecture on the various roles and responsibilities delegated to and required of each party in interest participating in a Chapter 13 plan confirmation; however, we deem it necessary to urge all parties to carefully execute their responsibilities such that every confirmed plan will result in a synthesis of the interests of all participants in a consistent manner. . . . Moreover, it is the independent duty of the bankruptcy court to ensure that the proposed plan comports with the requirements of the bankruptcy code.

In re Bateman, 331 F.3d at 828 n.6.

One last example: the Fifth Circuit, in *In re Williams*, imposed an "independent duty" on a bankruptcy judge with respect to a contested Chapter 11 plan *rejected* by the bankruptcy court. Williams v. Hibernia National Bank (*In re* Williams), 850 F.2d 250, 251 (5th Cir. 1988). Williams owned thirty-two horses as well as real estate. Earlier in the case, the court had ruled on the value of the horses at $134,300; Williams's creditor Fidelity did not object to that valuation. *Id.* at 251. But Fidelity disputed the value of the horses at the confirmation hearing. It so happens that the bankruptcy court used a lower valuation of the horses as part of its reasoning for rejecting the plan. The Fifth court decisions, however, have charged bankruptcy judges with responsibilities that preserve issues for appeal even for creditors who sat on their rights.

The *In re Lett*[48] appeal arose from a Chapter 11 case filed by an individual. Lett sought bankruptcy protection in the face of a $3 million judgment and a big debt to the U.S. Department of Housing and Urban Affairs. After working through several objections, Lett's plan was confirmed. Appealing the confirmation order to the district court, a creditor argued for the first time that Lett's plan violated the absolute priority rule, a requirement of nonconsensual Chapter 11 plan confirmation.[49] Recognizing that the creditor had not raised the issue below, the district court found that the issue was not preserved for appeal.[50] Undaunted, the creditor appealed to the U.S. Court of Appeals for the Eleventh Circuit, which reversed in favor of the creditor. The majority of the panel said the bankruptcy court had an independent duty to ensure that the absolute priority rule was satisfied, even if no creditor raised an objection.[51] This conclusion, the court noted, "should rededicate bankruptcy courts to the faithful execution of their statutory duties . . . ."[52]

Lett had a precursor in a Ninth Circuit decision, *In re Perez*,[53] which also involved an individual debtor in Chapter 11. After a difficult process, the bankruptcy court confirmed Perez's third proposed plan, and the Bankruptcy Appellate Panel for the Ninth Circuit affirmed.[54] As in *Lett*, the creditor appealed further on the basis of the absolute priority rule, an objection the creditor did not make in the bankruptcy court. The majority of the Ninth Circuit panel decided the appeal could be heard anyway.[55] Bankruptcy is "not precisely analogous to normal adversary litigation," the majority reasoned, and bankruptcy courts "must pass on those issues, whether or not they're specifically

Circuit upheld the bankruptcy court's rejection of the plan. Quoting an Arkansas bankruptcy court, the court stated, "[i]n addition to the consideration of objections raised by creditors, the [c]ourt has a mandatory independent duty to determine whether the plan has met all of the requirements necessary for confirmation." *Id.* at 253 (alteration in original) (quoting *In re* Holthoff, 58 B.R. 216, 218 (Bankr. E.D. Ark. 1985)). Thus, said the Fifth Circuit, the bankruptcy court "properly re-examined" the value of the horses at the time of confirmation, independent of creditors' positions on valuation. *Id.* at 253. In the spirit of the Fifth Circuit's opinion are many others that use independent duty language to reinforce the power of the bankruptcy court rather than to scold a judge for shirking. *E.g.*, *In re* Duval Manor Associates, 203 B.R. 42, 44–45 (E.D. Pa. 1996) (using the term "inquisitor" to normatively characterize bankruptcy judges' review of plan confirmation requirements).

48. 632 F.3d 1216 (11th Cir. 2011).

49. *Lett*, 632 F.3d at 1218–19.

50. *Id.* at 1224.

51. *Id.* at 1229.

52. *Id.* at 1230. In concurrence, the third panel judge wrote separately to stress that the holding was narrow and applied to only the absolute priority rule. *Id.* at 1231 (Carnes, J., concurring). But in light of the *Espinosa* reasoning that the bankruptcy judge runs the lighthouse, on the lookout for any legal violations, it is not obvious why the analysis would be limited to that doctrinal question.

53. 30 F.3d 1209 (9th Cir. 1994).

54. *Perez*, 30 F.3d at 1212.

55. A district court judge sitting by designation did not join the majority decision and was sharply critical of its reasoning as well as its imagery. *Id.* at 1219–20 (Zilly, J., dissenting).

put in dispute."[56] The panel majority held the bankruptcy court committed clear error when it confirmed the plan.[57] It also chastised the bankruptcy court, the Bankruptcy Appellate Panel, and the lawyers, noting "[n]one of the repeat players in the bankruptcy system have covered themselves with glory in this case."[58]

Lett and *Perez* illustrate a world in which several hundred bankruptcy judges are admonished to engage in a sufficiently strong form of gatekeeping to preserve an uncomplaining creditor's right to appeal a bankruptcy court's orders. But even the more modest *Espinosa* tells judges to directly inquire into the details of hundreds of thousands of repayment/restructuring plans each year before approving the plans. *Espinosa* therefore casts doubt on earlier circuit decisions that could be read to endorse a higher level of deference to trustees.

For example, in *In re Hines*,[59] the Commonwealth of Pennsylvania objected that a Chapter 13 plan was not filed in good faith because the plan made only nominal payments to unsecured creditors and the debtor failed to carry the burden of proof to affirmatively establish good faith.[60] At the confirmation hearing, the debtor introduced as evidence the report of the standing trustee stating that the plan met all of the statutory requirements. The standing trustee appeared and recommended confirmation. The U.S. Court of Appeals for the Third Circuit said, "If the statute imposes any affirmative burden of showing good faith upon the debtor, it was satisfied by the report of the standing trustee."[61] At least prior to *Espinosa*, that conclusion could support a significant level of deference on the legality of plans to Chapter 13 trustees.

D. Espinosa's *Legacy?*

The independent duty and gatekeeping language are routinely picked up in bankruptcy and district court decisions,[62] as well as appellate court

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56. *Id.* at 1213 (majority opinion).

57. *Id.* at 1217–18.

58. *Id.* at 1218. Curiously, the author of the *Perez* majority opinion later penned the Ninth Circuit's *Espinosa* opinion that characterized the bankruptcy judge's role in an entirely different light. Why such a different attitude? The Ninth Circuit's *Espinosa* opinion does not even cite *Perez*. Perhaps Chapter 13 and Chapter 11, or student loans and the absolute priority rule, were thought to be sufficiently different from each other? Neither distinction is persuasive.

59. 723 F.2d 333 (3d Cir. 1983).

60. *Hines*, 723 F.2d at 334.

61. *Id.* at 334.

62. For example, in a California case, a plan that would strip a second lien from the debtors' residence proposed to pay the debtor's lawyer through the plan, but claimed no disposable income to pay general unsecured creditors. *In re* Ingram, No. 11–13216, 2012 WL 10812, at *1 (Bankr. N.D. Cal. Jan. 3, 2012). The trustee initially did not object. Worried that this was, in essence, a disguised Chapter 7, the judge raised questions and held a hearing, noting that he had a responsibility to review Chapter 13 plans, and offered his view of how to fix the plan. The debtor's lawyer contended that the court's demands were supported by no legal requirement, and that the court did not have the right to propose terms to a plan. Transcript of Confirmation Hearing 14–15, *In re* Ingram, No. 11–13216, 2012 WL 10812 (Bankr. N.D. Cal. Jan 3, 2012) (4:12-CV-00408). Eventually, the trustee chimed in and joined

decisions.[63] Recounting the "disturbing number of serial filers and high number of defaulting active cases," an Alabama judge declared he "will no longer confirm a plan for a below median-income debtor unless facts, not mere speculation, are shown that support cause for an extended term."[64] Aligning itself with the aspirations of *Espinosa*, the court reported its practice as follows: it "reviews each plan every time the case is up for confirmation, and takes seriously its duty to apply the Code's requirements for confirmation."[65] In another case, the same judge challenged, sua sponte, portions of a debtor's plan that did not comply with the statute and conditioned confirmation on very specific changes.[66] This judge has criticized lawyers for their role in producing infeasible plans.[67] Other courts, though, take an entirely different approach, as Section II explores.

II. THE SUPERDELEGATION MODEL

A. *Help Wanted*

Recall that, in his *Till* dissent, Justice Scalia observed that judges are not oracles in their efforts to predict whether Chapter 13 plans will be completed.[68] What Justice Scalia did not say, probably because he did not know, is that some (perhaps many) judges do not make any attempt to predict the future themselves.[69] The idea that they would read all the Chapter 13 plans and

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the judge's objection, but in any event, the bankruptcy judge denied confirmation. The debtor appealed and the district court affirmed the bankruptcy court's denial of confirmation. Ingram v. Burchard, 482 B.R. 313, 323 (N.D. Cal. 2012). Citing the Supreme Court, the district court noted that "[t]he Bankruptcy Court is not a rubber stamp." *Id.* at 321. Thereafter, the debtor put forth a confirmable plan.

63. For example, the U.S. Court of Appeals for the Eighth Circuit upheld a confirmed repayment plan, but in a footnote chastised the bankruptcy court for not independently reviewing Chapter 13 plans for full legal compliance. Burnett v. Burnett (*In re* Burnett), 646 F.3d 575, 581, 581 n.3 (8th Cir. 2011).

64. *In re* Davis, No. 11–43159–JJR, 2012 WL 3239204, at *7 n.6 (Bankr. N.D. Ala. June 7, 2012).

65. *Id.* at *7 n.8. The court emphasized that the confirmation standard was not lack of bad faith, but an affirmative showing of good faith. *Id.* at *6.

66. *In re* Kirk, 465 B.R. 300, 303 (Bankr. N.D. Ala. 2012). The court was especially concerned with whether the debtor had proposed the plan in good faith. But the court also had a specific statutory concern about the payment schedule for secured and unsecured debts. *Id.* at 302 (citing *Espinosa* and *Lett*); *see also In re* Jackson, Nos. 11–42528–JJR–13, 11–42825–JJR–13, 2012 WL 909782, at *1 (Bankr. N.D. Ala. Mar. 16, 2012) (finding two Chapter 13s, which would essentially only pay lawyers' fees, did not satisfy the good faith requirement for confirmation: "These cases contort the intent of chapter 13 . . . and benefit no one with the exception of debtors' counsel.").

67. *In re* Garrard, Nos. 13–40418–JJR13, 13–40419–JJR13, 2013 WL 4009324, at *7–14 (Bankr. N.D. Ala. Aug. 5, 2013) (denying lawyer's motion to strike footnote in prior opinion criticizing lawyer).

68. Till v. SCS Credit Corp., 541 U.S. 465, 493 (Scalia, J., dissenting). See *supra* notes 44–46 and accompanying text for a discussion of *Till*.

69. For judges' reluctance to assess plan feasibility, see Melissa B. Jacoby, *Bankruptcy Reform and Homeownership Risk*, 2007 U. ILL. L. REV. 323, 336–37, which discusses how judges "delegate[] this review, in one form or another, to chapter 13 trustees"; and Melissa B. Jacoby, *Collecting Debts*

make a judgment on each one would seem, to those judges, as practical as commuting to work on a unicorn. They allocate or outsource the work, to various degrees.

Federal judges of all types have been known to seek help to manage their cases.[70] Strands of case law have addressed how far federal district judges can go in such endeavors. Some involve delegees Congress has expressly authorized, such as magistrates, or endorsed through the Rules Enabling Act, such as special masters.[71] When district judges have relied on their "inherent" authority, for example, to appoint technical advisors, those advisors have been considered to be within the fold of the judiciary, not another branch.[72]

With high volumes of cases, some of which are large and sprawling, bankruptcy judges have likewise sought help in undertaking their responsibilities.[73] The extent of their recruitment may surprise some jurists, academics, and members of Congress. When a U.S. senator asked a district judge at a hearing in the 1970s whether bankruptcy judges would need law clerks to perform their new duties, the district judge's response implied that a bankruptcy judge *was,* essentially, a law clerk.[74] Even after judges shed their prior "referee" title, bankruptcy judges were still "subjudges" according to Professor Owen Fiss, falling "somewhere between law clerks and judges in terms of their power."[75] Justice Breyer's dissent in *Stern v. Marshall*[76] likewise analogized bankruptcy judges to law clerks.[77]

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from the Ill and Injured; The Rhetorical Significance, But Actual Irrelevance, of Culpability and Ability to Pay, 51 AM. U. L. REV. 229, 261 (2001).

70. Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. REG. (forthcoming 2016) [hereinafter Jacoby, *Federalism Form and Function*] (discussing team building tendencies of judges, including the use of fee examiners, mediators, court-appointed experts, and nontestifying consultants).

71. Mathews v. Weber, 423 U.S. 261, 265 (1976) (upholding a district court's use of a standing order to refer all Social Security benefit cases to a magistrate for preliminary review, oral argument, and preparation of a recommended decision as to whether there is substantial evidence to support the administrative determination); La Buy v. Howes Leather Co., 352 U.S. 249, 250–51 (1956) (holding that district judge abused his power by referring antitrust actions to special master, and that the court of appeals properly used mandamus authority in response).

72. *In re* Peterson, 253 U.S. 300, 312 (1920) (holding that courts have "inherent power" to appoint "persons unconnected with the court to aid judges in the performance of specific judicial duties"); Techsearch L.L.C. v. Intel Corp., 286 F.3d 1360, 1377–78 (Fed. Cir. 2002) (quoting *Peterson* for the proposition that "[c]ourts have . . . inherent power to provide themselves with appropriate instruments required for the performance of their duties"); Ass'n Mexican-Am. Educators v. California, 231 F.3d 572, 590–91 (9th Cir. 2000) ("In those rare cases in which outside technical expertise would be helpful to a district court, the court may appoint a technical advisor."); Conservation Law Found. v. Evans, 203 F. Supp. 2d 27, 30, 32 (D.D.C. 2002) (asserting that an advisor "shall *not* give any advice to the Court on the ultimate issue of the remedy that is most appropriate"); Reilly v. United States, 682 F. Supp. 150 (D. R.I. 1988).

73. Jacoby, *Federalism Form and Function*, *supra* note 70.

74. *See* Lloyd D. George, *The Bankruptcy Appellate Panels: An Unfinished Experiment*, 1982 BYU L. REV. 205, 208 n.12 (quoting judicial witness at Senate hearing responding, "I do not think they need a law clerk. *That is why they were appointed in the first place, because of their competence to do this*.").

75. Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1446 (1983).

Today, few would question bankruptcy judges' need to hire law clerks.[78] Delegation of work is inevitable within a judge's chambers, such as conducting routinized reviews of proposed Chapter 13 plans or, in Chapter 11 cases, fee applications.[79] This Part focuses on a strong form of outsourcing across branches of government, to Chapter 13 trustees, who play an essential administrative function in the second most populous type of bankruptcy case.

Everywhere but North Carolina and Alabama, Chapter 13 trustees are executive branch appointees with specific statutory duties.[80] Judicial reliance on or deference to trustees can take many forms. As suggested earlier, the most traditional is that the judge solicits the trustee's opinion during the plan confirmation hearing and gives great weight to that opinion.[81] A middle approach is that judges do not schedule and hold hearings at all unless the trustee indicates a dispute or objection.[82] The focus of the next Part is the practice of permitting standing Chapter 13 trustees to oversee Chapter 13 plan confirmation hearings.[83]

B. Handing Over the Courtroom

To give flavor to the practice of allowing Chapter 13 trustees to supervise plan confirmation hearings, here is an example I observed, somewhat by accident, in June 2012.[84] I had wanted to sit in on bankruptcy court hearings and

76. 131 S. Ct. 2594 (2011).

77. *Marshall*, 131 S. Ct. at 2627 (Breyer, J., dissenting). Justice Breyer wrote this, it seems, in an effort to illustrate pragmatically that portions of title 28 of the United States Code establishing the bankruptcy court's authority pass constitutional muster. Justice Breyer also swept magistrates into this comparison, along with "administrative officials" of the judiciary. *Id.*

78. *See* 28 U.S.C. § 156(a) (2012) (authorizing hiring of law clerks by bankruptcy judges). The Federal Judicial Center's handbook for law clerks includes advice to bankruptcy court law clerks. FED. JUDICIAL CTR., LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES 1, 38–46, 62, 65, 67, 75–76, 103, 105, 107, 112–13 (Sylvan A. Sobel ed., 2d ed. 2007).

79. Even delegation to law clerks has its critics outside of bankruptcy. For allegations of law clerk overuse, see LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 393–96 (2013), which calls the role of staff in federal courts a topic "cry[ing] out for systematic analysis," with law clerks being their primary subject, and lamenting the "growing dominance of a management model of the judicial workplace"; and JOHN BILYEU OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS 29–35 (1980), which expresses concern about impact of routinized work of long-term law clerks in California state courts.

80. See *supra* Part I.A for a discussion of the U.S. Trustee Program, from which Alabama and North Carolina were permitted to opt out.

81. In such courts, the structure resembles judicial solicitation of the opinions of probation officers. But probation officers are part of the judiciary, unlike most Chapter 13 trustees.

82. *In re* Dues, 98 B.R. 434, 440 n.3 (Bankr. N.D. Ind. 1989) (noting, in Chapter 12 family farmer case, awareness of "more than one" jurisdiction in which courts say a hearing is not required unless objections are raised).

83. Again, the primary recognition I can find in the scholarship is Stripp, *supra* note 10, at 1391–92.

84. Although I visited the Eastern District of Pennsylvania, I believe the practices observed there reflect those of many districts, as addressed in Stripp, *supra* note 10. Notes taken

looked up the time and place for hearings on the court's website. That schedule announced the case numbers that would be called. The hearing started in the courtroom at the appointed time, but without a judge. The Chapter 13 trustee did not take the judge's bench, but turned a speaker's podium 180 degrees to face the audience. He called the cases in the order they appeared on the court's official hearing list, with the relevant parties and lawyers approaching the podium in turn. The parties had conversations with the trustee about the status of the case that were audible to others in the courtroom. If a debtor requested an extension of time, and the trustee agreed, the judge's courtroom deputy was present to adjust the court calendar, as if the judge had made or expressly acceded to the request. If the issue could not be resolved through these methods, the courtroom deputy added the matter to a much-shortened list for the judge to handle later that day. The trustee resolved at least two-thirds of the cases himself.[85] It took about an hour to ninety minutes for the trustee to get through the list, including re-calling cases in which no one initially appeared.

C. *Why Superdelegation Matters*

To many bankruptcy judges and trustees who engage in some form of what I have described above, the practice is non-news, common sense, and the only reasonable allocation of work. The practice also prevents judges from adopting what they might perceive as an overly inquisitorial role in uncontested cases. Thus, it might seem unduly formalistic to observe that the practice is unanticipated in the Bankruptcy Code and, as best I can tell, unexplored by appellate judges and scholars. After all, some courts do not hold confirmation hearings at all if the trustee supports a debtor's plan and no other parties object. The trustee or her staff may meet with the debtor's lawyer in a private office or talk on the phone to resolve the matters. Does that non-hearing approach differ meaningfully from what would appear to the outside world as trustees holding court? Yes. The former is a bureaucratized negotiation. The latter depends heavily on a public court paradigm, creating the visible impression that a federal court proceeding is underway with a judge at the helm.[86] The drafters of the Bankruptcy Code specified that a Chapter 13 trustee has a right to be heard at a plan confirmation hearing,[87] not a right or power to run a public hearing while the judge does other work elsewhere, however capable and reliable the trustee might be.

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contemporaneously are on file with the author and have been checked against this description by the author's research assistant.

85. For those plans, the judge's signature will likely be affixed to confirmation orders. Stripp, *supra* note 10, at 1443–44, 1456 (reprinting standing omnibus order permitting a clerk of court to affix stamp on Chapter 13 confirmation orders).

86. For an extensive analysis of courthouses and images of justice, see JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011).

87. 11 U.S.C. § 1302(b)(2)(B) (2012).

Allowing Chapter 13 trustees to preside over confirmation hearings generates a range of practical questions. On the day I visited court,[88] a cellular phone rang, prompting the trustee to request decorum in the courtroom. That same party's phone rang at least once more, generating yet another stern warning by the trustee. The trustee could raise his voice or pound a fist, but what more could he do? Also, is the portion of the hearing overseen by the Chapter 13 trustee on the record or off the record, with transcripts or recordings available? Consistent with the notion that a national bankruptcy system is infused with localized practices, the answer will not be the same from court to court.

This Chapter 13 hearing practice does not violate the "nondelegation doctrine" sometimes discussed by constitutional and administrative law scholars, assuming that such a doctrine even exists.[89] The nondelegation doctrine is occupied with instances in which Congress has overshared its policymaking authority.[90] As already established, having trustees preside over the courtroom was not Congress's plan. Congress allocated oversight of bankruptcy plan confirmation to the federal judiciary, not to an executive agency.[91] The legislative choice to select judge over executive agency for this particular responsibility may be deliberate and well reasoned.[92] As noted at the outset of Section I, the Bankruptcy Code drafters were quite intentional in their allocation of bankruptcy-related responsibilities to judges on the one hand and the executive branch on the other. This allocation happened in response to longstanding concerns about the conflicted position of a bankruptcy referee.[93]

The practice described in Section II.B more closely fits what Professors F. Andrew Hessick and Carissa Byrne Hessick call redelegation: "When Congress delegates power to a particular agent, a court should presume that it cannot redelegate that power to another."[94] Hessick and Hessick focused on the

88. See *supra* Part II.B

89. *Compare* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) (arguing that there is no nondelegation doctrine), *with* F. Andrew Hessick & Carissa Byrne Hessick, *The Non-Redelegation Doctrine*, 55 WM. & MARY L. REV. 163, 170 (2013) (reviewing nondelegation doctrine but noting that court holdings signify that the doctrine "has over time been rendered toothless").

90. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Pardo & Watts, *supra* note 3, at 421–23 (describing the doctrine and its limited use).

91. Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 644, 656 (2008) (observing that "the bankruptcy power is conducted almost entirely in courts"); Pardo & Watts, *supra* note 3, at 415–18 (questioning choice of judiciary over executive agency for significant swaths of bankruptcy law).

92. Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 469–71 (2008); Lipson, *supra* note 91, at 654; Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1040 (2006).

93. Jacoby, *What Should Judges Do*, *supra* note 2, at 578–79; *see* DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 160–64 (1971) (discussing bankruptcy referees).

94. Hessick & Hessick, *supra* note 89, at 214.

Supreme Court's decision, *United States v. Booker*,[95] which essentially transferred the power to make sentencing decisions from the U.S. Sentencing Commission to individual district judges.[96] The Sentencing Commission itself, however, is part of the judicial branch.[97] Thus, even that example is less structurally notable than this Chapter 13 practice.

* * *

Chapter 13 trustees have shaped the consumer bankruptcy system for decades.[98] And Professor Whitford has long taught us that the law in action may bear little resemblance to abstract theory or the law on the books.[99] Yet, he has also reminded us that bankruptcy is a powerful, albeit blunt, form of consumer protection of last resort.[100] The ability to appear before a judge is a component of that protection. To some extent, the Dodd-Frank Wall Street Reform and Consumer Protection Act lightened the bankruptcy system's do-it-all burden: it created a Bureau of Consumer Financial Protection (CFPB) funded by the Federal Reserve, and restored the power of states to enforce consumer protection laws.[101] Although the CFPB's activities are consistent with Professor Whitford's vision,[102] the bankruptcy system's function is, thus far, hardly rendered irrelevant.

Replacing one institutional actor with another surely has consequences for fulfillment of that mission. As noted earlier, Congress imposed a curious mix of

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95. 543 U.S. 220 (2005).

96. Hessick & Hessick, *supra* note 89 (citing and discussing *Booker*).

97. *About*, U.S. SENT'G COMM'N, http://www.ussc.gov/about (last visited Sept. 15, 2015); *see* Mistretta v. United States, 488 U.S. 361, 371–79 (1989) (upholding Sentencing Commission's presence in the judicial branch against nondelegation doctrine challenge).

98. Braucher, *One Code*, *supra* note 8, at 547.

99. *E.g.*, William C. Whitford, *Comment on* A Theory of the Consumer Product Warranty, 91 YALE L.J. 1371, 1380–81 (1982) (critiquing article purporting to establish complete theory of warranty content that was not accompanied by sufficient attention to the real life content of warranties for the poor). Professor Whitford also has raised the perils of isolated anecdotes, even if accurately depicted. Whitford, *What's Right About Chapter 11*, *supra* note 5, at 1386 ("Eastern Airlines happened, and it was a travesty. But it was not a typical large Chapter 11 case.").

100. Whitford, *Individualized Justice*, *supra* note *, at 416 (positing that bankruptcy comes closer to the ideal of individualized justice, even on matters that should have been redressable through other means); *id.* (calling consumer bankruptcy both a serious new problem and an advance, the latter for "the development of a private legal practice that is routinized, relatively low cost, and capable of offering effective solutions to everyday consumer problems of large numbers of people"); *see also* William C. Whitford, *Structuring Consumer Protection to Maximize Effectiveness*, 1981 WIS. L. REV. 1018, 1043 (concluding that public remedies are superior to private remedies to address consumer protection problems).

101. *See* Melissa B. Jacoby, *Dodd-Frank, Regulatory Innovation, and the Safety of Consumer Financial Products*, 15 N.C. BANKING INST. 99 (2011).

102. Whitford, *Individualized Justice*, *supra* note *, at 398 ("From a law enforcement perspective there is no substitute for aggressive public enforcement of consumer protection laws.").

duties on trustees.[103] They not only collect money for creditors and seek to maximize payment, but also advise debtors on performance of their plans. It is an honorable business, but one that differs significantly from the adjudicative obligations of a federal bankruptcy judge. Title 28 also specifies distinct appointment processes and job protections for judges and trustees.

It is either ironic or fitting to close a discussion in a symposium honoring Professor Whitford with a call to for further study. But that would illuminate at a more granular level whether my formal structural concerns have functional effects. In the meantime, courts that engage in superdelegation could take steps to make clearer to parties and the public that the event is not a court hearing, the trustee is not a federal judge (or even an employee of the federal judiciary), and parties have the right to a hearing before the presiding judge.

III. THE OTHER END OF THE SPECTRUM: EXTREME GATEKEEPING

The diversity of gatekeeping approaches includes treating oversight as an opportunity to screen cases on criteria that do not flow readily from the statutory design. The potential for creativity in gatekeeping is, of course, not limited to bankruptcy. In 2012, I watched an hour-long sentencing hearing in the U.S. District Court for the Northern District of Illinois arising from a currency counterfeiting scheme.[104] Apparently, this defendant's role was limited to painting hair gel onto the fake money, and the defendant's lawyer requested lenient treatment due to the limited nature of his client's role relative to the alleged mastermind. The judge attached strings to an otherwise relatively light sentence. In addition to requiring drug testing, the judge prohibited the defendant from riding a motorcycle for several years. There was no connection between motorcycles and the counterfeiting. But the defendant had previously earned a citation for speeding on a highway with which the judge was familiar. The judge presumably was seeking to keep the defendant out of trouble more generally. The defendant planned to move away from Chicago to help with the family business, but the judge planned to retain oversight; if he violated the terms of the sentence, the judge emphasized, the defendant would have to return to Chicago to look the district judge in the eye.[105]

Recounting this story of counterfeiting and motorcycles to a large room of lawyers and judges the following year prompted a lawyer to privately share with me a bankruptcy example. Apparently, a bankruptcy judge in Kentucky had conditioned approval of a Chapter 13 repayment plan on the debtor quitting

103. See *supra* Part I.A for a discussion of the duties imposed on bankruptcy trustees. *See also* Iain Ramsay, *Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy*, 74 AM. BANKR. L.J. 399 (2000) (comparing U.S. trustee system with Canadian trustee system).

104. The defendant had pled guilty, obviating the need for a trial on the underlying offense, as in the great majority of criminal actions. *See* STEPHANO BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012); U.S. SENTENCING COMM'N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C (2014) (indicating 96.9% of federal criminal cases were resolved by a guilty plea in 2013).

105. Notes taken contemporaneously with the hearing are on file with the author, and this account has been checked for accuracy against those notes by the author's research assistant.

smoking. According to this lawyer, the bankruptcy judge asked the debtor, rhetorically, didn't he want to stay alive to watch his kids grow up? If this story is accurate (and I have no reason to doubt it),[106] the judge used his ability to withhold the right to Chapter 13 relief to accomplish what he perceived to be a public health and pro-family objective.

The nonsmoking condition to plan confirmation may or may not have been a one-off, but in California, bankruptcy judge Wayne Johnson is more systematically heightening the bar to Chapter 13.[107] Citing low Chapter 13 plan completion rates, in his location and nationally, Judge Johnson has developed his own set of rules and requirements for Chapter 13 that expressly depart from, at the very least, the local rules of procedure in the district.[108] For example, his standing order claims to override the local rules such that the Chapter 13 trustee does not have the power to excuse debtors' counsel or debtors from appearing at the confirmation hearing or to continue the hearing.[109] The standing order puts lawyers and parties on notice that the judge actively reviews cases with a skeptical eye, regardless of the views of the trustee, debtor, and creditors.

Judge Johnson has prefaced his approach in part on enforcement of the statutory plan confirmation requirement, colloquially known as feasibility, that the debtor will be able to make all of the plan payments.[110] Judicial attention to feasibility is consistent with the Bankruptcy Code and the Supreme Court cases reviewed in Section I. Yet, his interpretation of feasibility has provoked a rare appeal and reversal. In *In re Mycek*,[111] the court held that a plan that promises zero payment to general unsecured claims is subject to a higher feasibility standard and evidentiary burden than the debtor's schedules of income and expenses, filed with the court under penalty of perjury. Reversing, the district court concluded, "The Bankruptcy Court did not cite to any federal law, federal

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106. Diligent efforts failed to locate written documentation of this practice or to identify the case number. The lawyer was quite specific about the details.

107. *In re* Hobbs, No. 6:11–bk–19132–WJ, 2012 WL 1681981, at *3 (Bankr. C.D. Cal. May 7, 2012) (quoting lawyer in separate case who professed to have given up "'a long time ago' trying to figure out 'who is going to make it and who isn't'"); *id.* at *7 (stating that all Chapter 13 debtors must provide evidence of their plans' feasibility lest "courts are tempted to simply ignore [the feasibility requirement] which is a prerogative the law does not permit"); *see also* Standing Order of Judge Johnson, *supra* note 16.

108. Standing Order of Judge Johnson, *supra* note 16, at 5 (citing Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103 (2011) for study statistics and noting a three percent plan completion rate in the Central District of California and an eight percent plan completion rate in the Riverside Division). Chapter 13's track record of noncompletion is long. Whitford, *Individualized Justice*, *supra* note *, at 411 (reporting significant noncompletion rates regardless of percentage of debt promised).

109. Standing Order of Judge Johnson, *supra* note 16, at 14.

110. Transcript of Proceedings at 2, 4, *In re* Judge Johnson's General Comments, Case No. N/A (C.D. Cal. April 13, 2011) ("Section 1325(a)(6) is about as clear as it could be regarding feasibility in a chapter 13 plan. Some courts, I'm well aware, have a no-look policy on feasibility. Essentially, there's not going to ask any questions regarding the payment practices of the debtor. I don't have that policy, and I won't have that policy"); Standing Order of Judge Johnson, *supra* note 16, at 8.

111. No. 5:15–cv–00369–JGB, 2013 WL 9994332 (C.D. Cal. Oct. 22, 2013).

rules, or local rules to support its additional requirement."[112] The district court noted the lack of authority for the counterintuitive notion that the zero payment plans are subject to the highest burden of proof to assess feasibility.[113] The district court found several other bases for reversal, including the concern that the court was basing its assessment of the plan's feasibility on hypotheticals rather than on the facts of the case.

Technically, the *Mycek* appeal was a win for the debtor and the debtor's lawyer. But it was an expensive step to give the debtor another chance to convince a still-skeptical judge to confirm a plan. One-at-a-time successes at the district court level—which have no binding effect on other cases—are unlikely to produce wholesale changes to a judge's practices. As Professor Whitford explained several decades ago, "[I]f a judge disfavors Chapter 13, . . . she can discourage their filing by conducting extensive inquiries into the feasibility of any Chapter 13 plan. The need to prepare for and participate in a lengthy confirmation hearing can effectively discourage lawyers from steering clients to Chapter 13."[114] An occasional win in the district court does not alter that calculus, especially given the Supreme Court's ruling, previously mentioned, that there is no absolute right to appeal an order denying plan confirmation.[115]

The judge also seems to defer the entry of discharge orders when debtors have completed their plans. A major part of the job of a Chapter 13 trustee is to regularly and carefully track and log debtors' payments over the life of the plan. Trustees file reports on the docket to certify that payment is complete. The discharge is supposed to be entered as soon as practicable after plan completion.[116]

In *In re Engler*,[117] the debtor's plan promised to pay general unsecured creditors in full, and the debtor finished the plan early; Engler's plan did not address secured or priority debt because the debtor had none.[118] Around the time Engler completed the plan, his case was assigned to Judge Johnson, who imposed several additional hurdles to be cleared before he would enter the discharge order, including a status conference four months after the debtor completed the plan and nearly three months after the trustee filed a final report.[119]

112. *In re Mycek*, 2013 WL 9994332, at *4.

113. *Id.* at *4–*5. Judge Johnson's rationale appeared to be that if a debtor in a zero percent plan hit a rough patch, there was no room in the plan to reduce the payments.

114. Whitford, *Has the Time Come*, *supra* note 5, at 92 (internal footnote omitted).

115. See *supra* note 17 and accompanying text.

116. See *supra* notes 29–30 and accompanying text.

117. No. 6:10–bk–15174–WJ (Bankr. C.D. Cal. July 2, 2012).

118. Debtor's Objection to Order Setting Status Conference and Motion to Enter Discharge and Vacate Status Conference Hearing at 2, *In re* Engler, No.: 6:10–bk–15174-WJ (Bankr. C.D. Cal. July 2, 2012).

119. *Id.*; *see* In Response to Order Setting Status Conference at 1, *In re* Engler, No. 6:10–bk–15174–WJ (Bankr. C.D. Cal. July 25, 2012) (citing § 105(d)(1) of the Bankruptcy Code as authority to hold status conference because additional information was necessary). The declarations the court

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Extreme forms of gatekeeping bear similarities with superdelegation. They are not among the nonuniform features of Chapter 13 that attracted the most attention over the last several decades. Deferring the discharge after years of payment (and the rarity of plan completion) has consumer protection implications,[120] although presumably the automatic stay remains in place until the details are worked out. Extreme forms of gatekeeping, like superdelegation, also raise structural questions about allocation of authority to the judicial branch.

CONCLUSION

Writing this Article for a symposium honoring Professor Whitford admittedly started with an immodest objective: to report things that Professor Whitford would find interesting. For all he has done for several fields of study, he deserves that and much, much more. Whatever the level of fulfillment of that objective, the Article offers food for thought for participants in the bankruptcy system who engage in the practices identified herein, as well as for academic audiences.

For a rising generation of consumer bankruptcy scholars, the practices explored in this Article show the desirability of using a broader range of methods and theories to study the bankruptcy system. The pathbreaking studies of the past several decades could not, and did not, pick up and analyze all features that may be significantly and systematically affecting the implementation of the bankruptcy system. Additional methods of observation, and theories with which to frame the findings, are in order.

The discussion likewise serves as another reminder that bankruptcy is far more than a subspecies of commercial or corporate law. Administrative law and federal courts scholars should not forget the bankruptcy system when they evaluate the institutional structure and challenges of modern government.

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sought seem to relate to types of claims (secured and priority) that the debtor did not have and were not part of the plan. The hearing does appear to have been held and a discharge entered the following day. Discharge of Debtor After Completion of Chapter 13 Plan, *In re* Engler, No. 6:10–bk–15174–WJ (Bankr. C.D. Cal. July 26, 2012), ECF No. 48.

120. *See* Whitford, *Individualized Justice*, *supra* note *.

Note: These materials are drawn from two articles – Angela Littwin *Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence*, 161 UNIV. OF PENN. L. REV. 363-429 (2013); Angela Littwin, *Coerced Debt: The Role of Domestic Violence in Consumer Credit*, 100 CALIF. L. REV. 951-1026 (2012) – as well as a preliminary analysis of data collected through the National Domestic Violence Hotline. *The results may change as we continue data analysis.*

An Initial Quantitative Look at Coerced Debt

by

Adrienne Adams[*] and Angela Littwin[**]

Debt and domestic violence (DV) are connected in ways not previously imagined. A new type of debt – which we have labeled "coerced debt" – is emerging from abusive relationships.[1] Coerced debt occurs when the abuser in a violent relationship obtains credit in the victim's name via fraud or duress. This is a new problem, one enabled by the tremendous growth of consumer credit markets in recent decades and by the corresponding depersonalization of the credit system.[2] Our previous research revealed that batterers may engage in an extensive array of damaging credit transactions, including fraudulently taking out credit cards in victims' names, coercing victims into signing loan documents, and tricking victims into relinquishing their rights to the family home, among many others. This debt then becomes a major obstacle to escaping abusive relationships. Victims face liabilities that absorb income needed for starting a new household as well as significant damage to their credit scores. Because employers, landlords, and utility companies now make extensive use of credit scores,[3] a credit score that has been damaged by coerced debt can make it prohibitively difficult for victims to obtain employment, housing, or basic utilities, all of which are requirements for establishing an independent household.[4]

Some background about domestic violence is helpful for understanding coerced debt. The latest research suggests that there are two major types of domestic violence. Situational DV, also known as "common couple violence,"[5] occurs when couples use violence as a problem-solving strategy. It tends to involve relatively minor violent incidents[6] that erupt occasionally from both partners in a relationship.[7] In contrast, coercive control originates with one partner, occurs more frequently, and is more likely to result in injury.[8] The violence is accompanied by behaviors

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[1] *See* Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CALIF. L. REV. 951, (2012) (surveying professionals who work with victims and survivors of domestic abuse who had been coerced into debt).

[2] *See*, e.g., *id.* at 986-87 (detailing banks' transition from face-to-face lending to the mass mailing of credit cards).

[3] *See* Angela Littwin, *Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence*, 161 UNIV. OF PENN. L. REV. 363, 417-28 (2013).

[4] Littwin, *supra* note 1, at 1001-02.

[5] Michael P. Johnson, *Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women*, 57 J. MARRIAGE & FAM. 283, 284-85 (1995).

[6] *Id.* at 285.

[7] *Id.* at 283.

[8] Michael P. Johnson, *Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 1003, 1010 (2006).

designed to limit the victim's agency,[9] such as monitoring victims' time, preventing them from accessing medical care, prohibiting socializing, keeping them from seeing family, restricting car use, forbidding them to leave the house, and preventing them from working.[10]

We are currently engaged in two data collection efforts designed to increase our understanding of coerced debt. The first is small preliminary study consisting of in depth interviews with women who have experienced coerced debt. We are obtaining detailed information quantitative and qualitative data on nature, consequences and timing of coerced debt from a very small sample. The second is a National Domestic Violence Hotline (NDVH or Hotline) survey that is the subject of this draft. For eight weeks in July and August, 2014, the Hotline surveyed its callers about coerced debt based on a short questionnaire we developed. Our goals for this survey were to obtain a prevalence estimate for coerced debt and to understand the relationships among the different facets of coerced debt and three potential negative outcomes. We developed the survey based on each of our previous research and the early results of the current preliminary study.

I. Data Collection and Survey Questions

During the eight weeks of data collection, the advocates who staff the Hotline surveyed females calling about their own experiences of domestic violence. There were 10,104 eligible callers during our data collection period. To qualify for the survey, a caller had to be female,[11] eighteen or older and identify as a victim of domestic violence.[12] However, most of them were not solicited for the survey. The Hotline is a crisis intervention program, so callers are surveyed at the end of the call, after crisis-intervention is complete. But if an advocate judges that the survey could send a caller back into crisis, she does not ask about the survey. Of the eligible callers, advocates asked 3,652 callers for their consent to participate. Of those, 52.4 percent consented and 47.6 percent did not. See Table 1.

Table 1. Consent to the Hotline Survey

	Frequency	Percent
Eligible Callers	10,194	100
Consented	1,912	18.8
Did Not Consent	1,740	17.1
Not Asked for Consent	6,542	64.2

Of the 1,912 callers who did consent, 17 did not answer any questions, and another 47 were calling from outside the U.S. or were missing information for the country variable.[13] This left us with a sample of 1,848 callers. See Table 2.

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[9] EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 13 (2007).
[10] *Id.* at 277 tbl.8.1. The studies that documented these behaviors are particularly persuasive because, not only did victims report experiencing them, batterers admitted engaging in them, although the rates they reported were not as high. *Id.* at 275.
[11] We limited our sample to female callers because it was unclear whether we would be able to obtain demographic information and did not want to risk obtaining a mixed-gender sample with no gender identification.
[12] Approximately half of Hotline calls are from friends and family members.
[13] Of those callers, seven were calling from Canada, one was calling from Mexico, and the remaining thirty-nine were missing. With Canada and Mexico numbers that small, we thought the best approach was to use the U.S.-only sample.

Table 2. Callers Excluded from the Survey

	Number	Percent
Eligible, Consenting Callers	1,912	100
No Questions Answered	17	0.9
Outside U.S. or Country Unknown	47	2.5
Final Sample	**1,848**	**96.7**

We asked six questions and a total of four follow-up questions. The quantitative survey questions and response frequencies are in Table 3. Most of the questions were quantitative in nature, but two of the follow-up questions were qualitative. In addition, we instructed advocates to "Record useful comments, anecdotes, and/or quotes in the space below." Question 1 asks about financial control, which is when an abuser prevents the victim from having any information about household finances or funds. Hiding bills or otherwise preventing the victim from accessing them is the most common financial control tactic we have seen in our preliminary research, so we focused on that in the question. We suspected that financial control would be an important preliminary tactic for generating coerced debt. The next three questions represent the three direct tactics abusers use to generate debt in the names of their partners: putting all of the household bills in the victim's name and preventing their payment, fraud, and coercion. The final two questions and fourth follow up question ask three potential negative effects of coerced debt: credit rating damage, staying in a controlling relationship longer than wanted because of financial factors, and staying in the relationship longer specifically because of debt.

Table 3. Quantitative Survey Questions and Positive Response Rates

Item	N	Frequency
1. Has an intimate partner ever kept financial information from you?	1834	1310 (71.4%)
2. Has an intimate partner ever convinced or pressured you to put the bills under only your name?	1816	731 (40.3%)
2.a. Were you ever left owing money on bills that had not been paid on time or in full?	704	588 (83.4%)
3. Have you ever found out about debt or bills you owed that an intimate partner put in your name without you knowing?	1777	389 (21.9%)
4. Has an intimate partner ever convinced or pressured you to borrow money or buy something on credit when you didn't want to?	1770	854 (48.2%)
5. Has your credit report or credit score been hurt by the actions of an intimate partner?	1754	809 (46.1%)*
6. Have you ever stayed longer than you wanted in a relationship with someone who was controlling because of concerns about financially supporting yourself or your children?	1747	1281 (73.3%)
6.a. Were any of your concerns about money you owed because your partner put bills in your name or convinced you to borrow it?	1186	490 (41.3%)

N = 1,848.
*Note: Another 251 (14%) said they were "unsure" about whether their credit had been hurt.

II. Prevalence Estimate of Coerced Debt

Our concept of coerced debt includes debt generated by fraud or coercion because the two can reinforce each other.[14] To estimate known fraudulent debt, we simply used callers' responses to question 3 with no follow up necessary,[15] although of course we cannot capture debt about which the caller was currently unaware.[16] But for debt generated by coercion, there is a second step. We operationalized coercion as consisting of a demand that the abuser makes and a negative consequence that the victim believes the abuser might impose if she refuses the demand.[17] Question 4 covers the demand that the victim incur debt, and Question 4a covers the consequence, asking, "What did you think might happen if you said, 'No?'" The level of

[14] For example, if an abuser generates debt by fraudulently obtaining a credit card in the victim's name, even if the victim discovers it, she still may be too afraid of the abuser to prevent additional charges.
[15] Question 3 has a qualitative follow up question that does not influence the prevalence rate and that we have not yet coded: "3a. How did you find out about the debt or bills?"
[16] In our preliminary study, participants obtain their credit report, and we have found debts that were previously unknown to the participant.
[17] We took these steps from one of the major instruments used to measure coercive control. See Mary Ann Dutton, Lisa Goodman & R. James Schmidt, *Development and Validation of a Coercive Control Measure for Intimate Partner Violence in Boston, Massachusetts and Washington, DC, 2004*, available at http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/4570.

coercion depends on the nature of the consequence. Physical violence is obviously directly coercive, but a threat to leave the relationship, in and of itself, is not.

Our measure is not perfect, because in a relationship in which the abuser is exerting coercive control, consequences are not meted out on a per-demand-refused basis. Coercive control occurs when one partner uses domestic violence to undermine the other's autonomy (Stark, 2007). It includes behaviors designed to limit the victim's independence, such as isolating the victim from friends and family, denying her access to resources such as income or transportation, and establishing strict rules to regulate her behavior (Johnson, 1995, 2006; Stark, 2007). The objective of these tactics is to limit a victim's ability to interact with the outside world, establish her dependence on the abuser, and undermine her attempts to maintain an independent life (Johnson, 1995, 2006; Stark, 2007). In a relationship like this, the consequence might not happen immediately, but the victim knows that any exertion of autonomy is dangerous. Coercive control also makes it extraordinarily difficult for a victim to leave the relationship. Without context, we cannot assess coercive control. Nevertheless, we did our best to look for clues that callers were describing relationships permeated with coercion.

We developed a coding scheme that sorted the qualitative responses into forty-four specific categories and then placed those categories on a coercion spectrum of how likely it is that the caller was coerced into incurring the demanded debt. See Table 4. We created the spectrum in part because coercion does occur on a spectrum. Some tactics, such as verbal abuse to the caller's children, are not outright coercive but would induce many people to acquiesce to a loan they did not want. The other reason to create a spectrum is that it is particularly important in a short survey because we do not have access to the context of callers' relationships. In our preliminary research, we have interviewed participants whose relationships were abusive on some level but that lacked the coerciveness required to determine that a debt was incurred against the participant's will. We tried to balance being conservative in finding coercion with interpreting answers in light of the fact that these women were calling a domestic violence hotline.

Table 4. Caller-Predicted Consequences of Refusing a Partner's Demand to Borrow Money

Threat	Number	Percent	Valid Percent
Coercion	*284*	*15.4*	*38.1*
Physical Abuse / Violence	224	12.1	30.1
Borrowed Money Anyway	16	.9	2.1
Batterer-created Econ Consequence	15	.8	2.0
Caller Scared	15	.8	2.0
Animal Violence	3	.2	.4
Criminal Law or Commitment Threat	3	.2	.4
Take Kids	2	.1	.3
Physical Abuse to Kids	2	.1	.3
Confinement	1	.1	.1
Sleep Deprivation	1	.1	.1
Take Away Medication	1	.1	.1
Immigration Abuse	1	.1	.1
Probable Coercion	*112*	*6.1*	*15.0*

A Tantrum, Rage or Fit	21	1.1	2.8
Partner Would be “Abusive”	18	1.0	2.4
Would Be Bad / Trouble / Hell to Pay	15	.8	2.0
No Choice	14	.8	1.9
Intimidation	11	.6	1.5
Kicked or Locked Out	9	.5	1.2
Property Violence	9	.5	1.2
Partner Would Be “Aggressive”	8	.4	1.1
Other Legal Threats	2	.1	.3
Cut off from Friends & Family	2	.1	.3
Other Control (Cut off from phone or car)	2	.1	.3
Take Property	1	.1	.1
Possible Coercion	*112*	*6.1*	*15.0*
Partner Angry / Upset	59	3.2	7.9
A Fight	42	2.3	5.6
Partner Would Make Things Bad / Miserable	6	.3	.8
Caller Avoiding Confrontation	2	.1	.3
Partner would makes things unpleasant / uncomfortable	2	.1	.3
Verbal Abuse to Kids	1	.1	.1
Pressure	*142*	*7.7*	*19.1*
Emotional / Verbal Abuse (name calling, cursing, screaming at)	51	2.8	6.8
Harassment or Continued Pressure	46	2.5	6.2
Manipulation	44	2.4	5.9
Wouldn't Help Her Later	1	.1	.1
Not Coercion	*88*	*4.8*	*11.8*
Partner Leaving or Turning to Other Women for the Credit	22	1.2	3.0
Caller Not Sure	22	1.2	3.0
Argument	18	1.0	2.4
No Consequence	15	.8	2.0
Non-Batterer Econ Consequences	6	.3	.8
Silent Treatment, Withholding Affection	5	.3	.7
Ambiguous Response	*7*	*.4*	*.9*
Valid Total	**745**	**40.3**	**100.0**
Missing			
Incomplete or Irrelevant Response (666)	26	.6	1.3
Inapplicable (888)	1007	54.5	.2
System Missing (999)	70	3.8	8.4
Total	1103	59.7	
Total	**1848**	**100.0**	

The coercion category is dominated by threats of physical violence and also includes threats that would have direct physical consequences for the victim, such as threats to report the victim to immigration authorities or to prevent the victim from having access to any money.[18] The probable coercion classification includes tactics that are slightly less coercive than physical abuse, code phrases for physical abuse (partner would become "aggressive" or "abusive") as well as phrases that women in our preliminary study have used to describe consequences of refusing batterer demands when they are in coercively controlling relationships. These include statements like they had no choice, there would be "trouble," or "it would be bad." Similarly, many of the statements in the "possible coercion" category are those that women in coercion-dominated relationships use to describe consequences, but they are also statements someone might make regarding a relationship that was, for example, verbally abusive but not physically coercive. The pressure classification is largely self-explanatory, although it is worth noting that many of the callers who described harassment or continued pressure stated that they would be hounded until they gave in, which suggests a lack of choice. Finally, even some of the "not coercion" tactics could be coercive in the right context. For example, if an abuser had established financial control and kept the victim from having access to money, leaving the relationship would leave the victim destitute through operation of the abuse. When callers stated these circumstances explicitly, we coded it as "batterer-created economic consequences," but when a caller simply stated a fear that her partner would leave the relationship, she could also simply mean that she was afraid of him leaving the relationship.

In order to account for these ambiguities, we created three variables for question 4.a. – one that includes actual and probable coercion; a second that includes actual, probable, and possible coercion; and one that includes all three plus pressure. Throughout this draft, we use the variable that includes actual, probable and possible coercion but not pressure. We are particularly interested in feedback about our classification system and which level of coercion to use.[19]

To create our coerced debt variables, we included any participant who answered "yes" to the fraud question or fell within the coercion spectrum. See Table 5. Unfortunately, even though we have found in our preliminary research that putting all the household bills in the victim's name and then preventing their payment is another way to generate coerced debt, we were not able to ask the coercion follow-up question because we needed the follow-up question about whether the bills resulted in debt for the caller.[20]

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[18] In a relationship in which the abuser has financial control, the victim frequently is denied access to bank accounts or cash, so her access to funds would be at the abuser's discretion. This can be true even in relationships in which the victim is working. The abuser would either take her pay check or have it deposited into an account that he controls.

[19] When we vary the level of coercion, the results change only by magnitude, not by direction or significance. The significance is sometimes greater when we go further down the coercion spectrum, but findings that were statistically significant with one coercion variable were never above $p = .05$ with any of the others.

[20] With four follow-up questions, we were already testing the Hotline's definition of the "six" questions we were allotted.

Table 5. Prevalence Estimate for Coerced Debt (Fraud and Coercion)

5.A. Coerced Debt, Including Actual, Probable and Fraud

	Number	Percent	Valid Percent
No	1090	59.0	63.5
Yes	626	33.9	36.5
Total Valid	1716	92.9	100.0
Missing	132	7.1	
Total	**1848**	**100.0**	

Table 5.B. Coerced Debt Including Actual, Probable, Possible and Fraud

	Number	Percent	Valid Percent
No	1009	54.6	58.7
Yes	710	38.4	41.3
Total Valid	1719	93.0	100.0
Missing	129	7.0	
Total	**1848**	**100.0**	

5.C. Coerced Debt Including Actual, Probable, Possible, Pressure and Fraud

	Number	Percent	Valid Percent
No	912	49.4	52.9
Yes	811	43.9	47.1
Total Valid	1723	93.2	100.0
Missing	125[21]	6.8	
Total	**1848**	**100.0**	

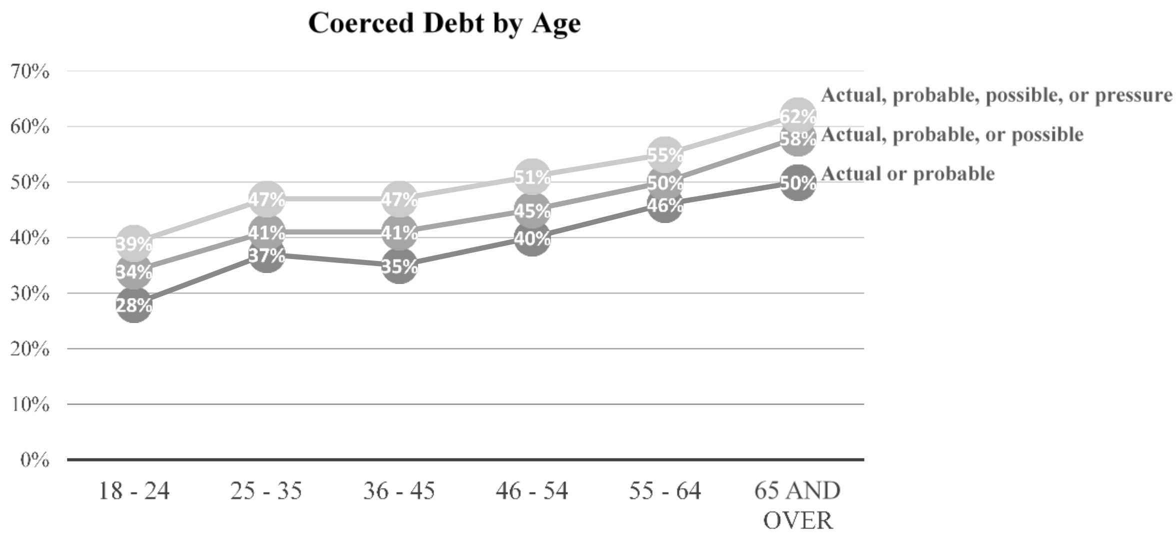
The striking result of the prevalence estimate is that the percentages are high. Even with the most restrictive definition of coercion, more than one-third of callers have experienced coerced debt. Once we include possible and pressure, the estimate is close to half of the callers.

We found one other prevalence result of note. The estimated prevalence increases with age in a stair-step fashion. See Figure 1. For example, 28% of 18-24 year olds had experienced actual or probable coerced debt. The rate continues to rise until it reaches 50% among the 65 and older group. This is logical because our questions asked whether an intimate partner had "ever" engaged in a given tactic, so the older callers had more years to possibly experience coerced debt. However, consumer credit was not easily available on a mass scale until at least the 1980s and possibly the 1990s, which means that callers in the older age groups would not have been as susceptible to coerced debt in their earlier years. Thus, an alternative explanation might be that

[21] The number of missing responses differs in each of the Table 5 tables because the variable at issue combines fraud- and coercion- generated debt. If a caller experienced either coercion or fraud, her entry was coded as a yes. And if a caller experienced neither, her entry was coded as a no. But if a caller had missing data for one question and no for the other, we coded her entry as missing because we did not know if she experienced coerced debt. Because the number of no entries for the coercion question declines as we broaden the definition of coercion, the number of entries coded as missing because callers' fraud responses were missing also declines.

older callers had more assets or better credit than their younger counterparts, making them targets for financial exploitation.

Figure 1.



<u>III. Relationships Among Economic Abuse Tactics and Negative Outcomes</u>[22]

Our first question of interest is whether financial control sets the stage for financial exploitation. As shown in Table 6, the overarching finding is that there is a significant relationship between financial control and exploitation. When their abusers hid financial information from them (control), callers were more likely to experience pressure to put bills in their name, debt through coercion and debt through fraud (exploitation).

[22] The remaining tables are crosstabulations. We have begun our regression analysis, but it is not yet ready for presentation.

Table 6. Financial Control Setting the Stage for Exploitation

6.A. Crosstabulation of "Partner hid financial information" and "Partner convinced or pressured her into putting bills in her name"

Hid Financial Info	Convinced or Pressured into Bills: No	Convinced or Pressured into Bills: Yes	χ^2	Φ
No	404 (78%)	115 (22%)	97.67***	.233
Yes	676 (53%)	608 (47%)		

Note: *** = p < .001

6.B. Crosstabulation of "Partner hid financial information" and "Partner coercively created debt in her name"[23]

Hid Financial Info	Coercively Created Debt: No	Coercively Created Debt: Yes	χ^2	Φ
No	347 (69%)	155 (31%)	84.242***	.219
Yes	565 (45%)	693 (55%)		

Note: *** = p < .001

6.C. Crosstabulation of "Partner hid financial information" and "Partner fraudulently created debt in her name"

Hid Financial Info	Fraudulently Created Debt: No	Fraudulently Created Debt: Yes	χ^2	Φ
No	474 (93%)	35 (7%)	93.432***	.230
Yes	907 (72%)	350 (28%)		

Note: *** = p < .001

6.D. Crosstabulation of "Partner hid financial information" and "Partner convinced or pressured her to put bills in her name, buy things on credit, or borrow money"—with perceived threat of negative consequence

Hid Financial Info	Coercively Created Debt: No	Coercively Created Debt: Yes	χ^2	Φ
No	433 (86%)	68 (14%)	81.01***	.216
Yes	801 (65%)	435 (35%)		

Note: *** = p < .001

[23] In this analysis and those that follow, we use the intermediate specification of coercion that includes actual, probable and possible coercion.

Next, we examined the relationships between economic abuse tactics and the three negative outcomes. The first negative outcome was damage to the caller's credit report. Earlier research with DV professionals suggested that ruined credit ratings were an important consequence of coerced debt, one that prevented DV victims from obtaining employment, housing, and utilities. We, in fact, found statistically significant association between credit damage, and hiding financial information, a caller being left owing money on bills in her name, and coerced debt. Owing money because of bills in the caller's name has the strongest relationship with credit damage, probably because owing money is a better predictor of credit damage than owing money because of a specific abusive tactic. It is worth noting that for both debt-creation analyses, at least 70% of callers reported credit damage, although rates this high may be based more on belief or speculation than knowledge.

We expected that many callers would not know whether their credit rating had been damaged, particularly if they were being denied access to financial information, so we included a "not sure" response option for this question. As reported earlier, 14% of callers selected the "not sure" option. And callers who had experienced financial control did have the highest rate of "not sure" responses.[24]

7. Economic Abuse Related to Damaged Credit

7.A. Crosstabulation of "Partner hid financial information" and "Credit hurt by partner"

Hid Financial Info	Credit Hurt by Abuser: No	Yes	Not Sure	χ^2	Φ
No	333 (67%)	121 (25%)	39 (8%)	225.49***	.304
Yes	356 (28%)	682 (55%)	211 (17%)		

Note: *** = p < .001

7.B. Crosstabulation of "Left owing money on bills partner put in her name" and "Credit hurt by partner"

Left Owing Money	Credit Hurt by Abuser: No	Yes	Not Sure	χ^2	Φ
No	184 (61%)	66 (30%)	51 (17%)	265.88***	.550
Yes	70 (12%)	435 (75%)	74 (13%)		

Note: *** = p < .001

[24] In our preliminary regression analysis, we found that callers whose partners hid financial information from them were two times more likely to be unsure whether their credit had been damaged than callers did not have financial information hidden from them. This finding was statistically significant at $p \leq 0.05$.

7.C. Crosstabulation of "Partner fraudulently or coercively created debt in her name (Coerced debt)" and "Credit hurt by partner"

Coerced Debt	Credit Hurt by Abuser				
	No	Yes	Not Sure	χ^2	Φ
No	558 (58%)	284(29%)	129 (13%)	322.82***	.441
Yes	108 (16%)	485 (70%)	99 (14%)		

Note: *** = p < .001

The other two negative outcomes involved callers remaining in controlling relationships longer than they wanted due to financial concerns. When DV victims are asked why they remain in abusive relationships, they frequently cite economic factors. We wanted to test that finding and apply it specifically to debt. The first version of the question asked generally about caller concerns about supporting themselves. We found a statistically significant relationship between financial self-sufficiency concerns and: financial control, owing money on bills in the caller's name, coerced debt, and credit rating damage. See Table 8.

Table 8. Economic Abuse Related to Self-Sufficiency Concerns

8.A. Crosstabulation of "Partner hid financial information" and "Stayed longer because of concerns about financially supporting self"

Hid Financial Info	Stayed due to Self-Sufficiency Concerns			
	No	Yes	χ^2	Φ
No	245 (50%)	240 (50%)	195.11***	.335
Yes	218 (18%)	1031 (82%)		

Note: *** = p < .001

8.B. Crosstabulation of "Left owing money on bills partner put in her name" and "Stayed longer because of concerns about financially supporting self"

Left Owing Money	Stayed due to Self-Sufficiency Concerns			
	No	Yes	χ^2	Φ
No	130 (44%)	166 (56%)	83.06***	.308
Yes	91 (16%)	490 (84%)		

Note: *** = p < .001

8.C. Crosstabulation of "Partner fraudulently or coercively created debt in her name (Coerced debt)" and "Stayed longer because of concerns about financially supporting self"

Coerced Debt	Stayed due to Self-Sufficiency Concerns			
	No	Yes	χ^2	Φ
No	339 (35%)	626 (65%)	87.416***	.230
Yes	101 (15%)	592 (85%)		

Note: *** = p < .001

8.D. Crosstabulation of "Credit hurt by abuser" and "Stayed longer because of concerns about financially supporting self"

Credit Hurt by Abuser	Stayed due to Self-Sufficiency Concerns			
	No	Yes	χ^2	Φ
No	284 (42%)	391 (58%)	144.11***	.291
Yes	118 (15%)	674 (85%)		
Not Sure	46 (20%)	184 (80%)		

Note: *** = p < .001

Our final negative outcome measure was whether the caller stayed longer than she wanted in a relationship with someone controlling because of concerns about debt. Specifically, we referenced survey questions 2 and 4, money owed because of bills in her name and money she was pressured to borrow.[25] Interestingly, the relationships between the debt-generation questions and staying longer because of debt concerns are slightly stronger than the corresponding relationships with staying longer because of self-sufficiency concerns. That the debt measures are most strongly related to the debt negative consequence provides some initial evidence of validity of the debt-generation measures. The same is true for credit rating damage, suggesting some validity of that measure as well.

[25] When we attempted to write the question to include fraud as well, it became too unwieldy to ask.

Table 9. Economic Abuse Related to Debt Concerns

9.A. Crosstabulation of "Partner hid financial information" and "Stayed longer due to concerns about money owed on bills put in your name or she was convinced to borrow"

Hid Financial Info	Stayed due to Debt Concerns			
	No	Yes	χ^2	Φ
No	411 (89%)	53 (11%)	101.608***	.249
Yes	744 (63%)	430 (37%)		

Note: *** = p < .001

9.B. Crosstabulation of "Left owing money on bills partner put in her name" and "Stayed longer due to concerns about money owed on bills put in your name or she was convinced to borrow"

Left Owing Money	Stayed due to Debt Concerns			
	No	Yes	χ^2	Φ
No	256 (88%)	36 (12%)	170.21***	.449
Yes	227 (41%)	327 (59%)		

Note: *** = p < .001

9.C. Crosstabulation of "Partner fraudulently or coercively created debt in her name (Coerced debt)" and "Stayed longer due to concerns about money owed on bills put in your name or she was convinced to borrow"

Coerced Debt	Stayed due to Debt Concerns			
	No	Yes	χ^2	Φ
No	782 (86%)	131 (14%)	241.854***	.392
Yes	326 (49%)	334 (51%)		

Note: *** = p < .001

9.D. Crosstabulation of "Credit hurt by abuser" and "Stayed longer due to concerns about money owed on bills put in your name or she was convinced to borrow"

Credit Hurt by Abuser	Stayed due to Debt Concerns			
	No	Yes	χ^2	Φ
No	578 (90%)	67 (10%)	269.01***	.409
Yes	375 (50%)	374 (50%)		

Note: *** = p < .001

In conclusion, this is a very preliminary analysis of data with methodological limitations, specifically with respect to data collection. We are very interesting in hearing your feedback.

Appendix: Demographic Information

Characteristic	Frequency
Race	
White	834 (45%)
Black	415 (23%)
Hispanic	330 (18%)
Multiracial	85 (7%)
Asian	69 (4%)
Other or Unknown	69 (4%)
Native American/ Native Alaskan	21 (1%)
Native Hawaiian/Pacific	15 (1%)
Age	
18 - 24	213 (12%)
25 – 35	687 (38%)
36 – 45	505 (28%)
46 – 54	276 (15%)
55 – 64	107 (6%)
65 and over	28 (2%)
Region	
South	692 (38%)
West	541 (30%)
Northeast	310 (17%)
Midwest	293 (16%)

Note: We used the Census regions, which place Delaware, Maryland, and Washington, D.C. in the South.

Note: These slides are drawn from two articles – Angela Littwin, *Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence*, 161 UNIV. OF PENN. L. REV. 363 (2013); Angela Littwin, *Coerced Debt: The Role of Domestic Violence in Consumer Credit*, 100 CALIF. L. REV. 951 (2012) – as well as a preliminary analysis of data collected through the National Domestic Violence Hotline. *The results may change as we continue data analysis.*

An Initial Quantitative Look at Coerced Debt

Angie Littwin, JD
University of Texas – Austin Law School

Adrienne E. Adams, Ph.D.
Michigan State University


DEBT
DOMESTIC VIOLENCE


Coerced debt
DEBT
DOMESTIC VIOLENCE

Coerced debt

Occurs when the abuser in a violent relationship obtains credit in the victim's name via fraud or duress

Coerced debt

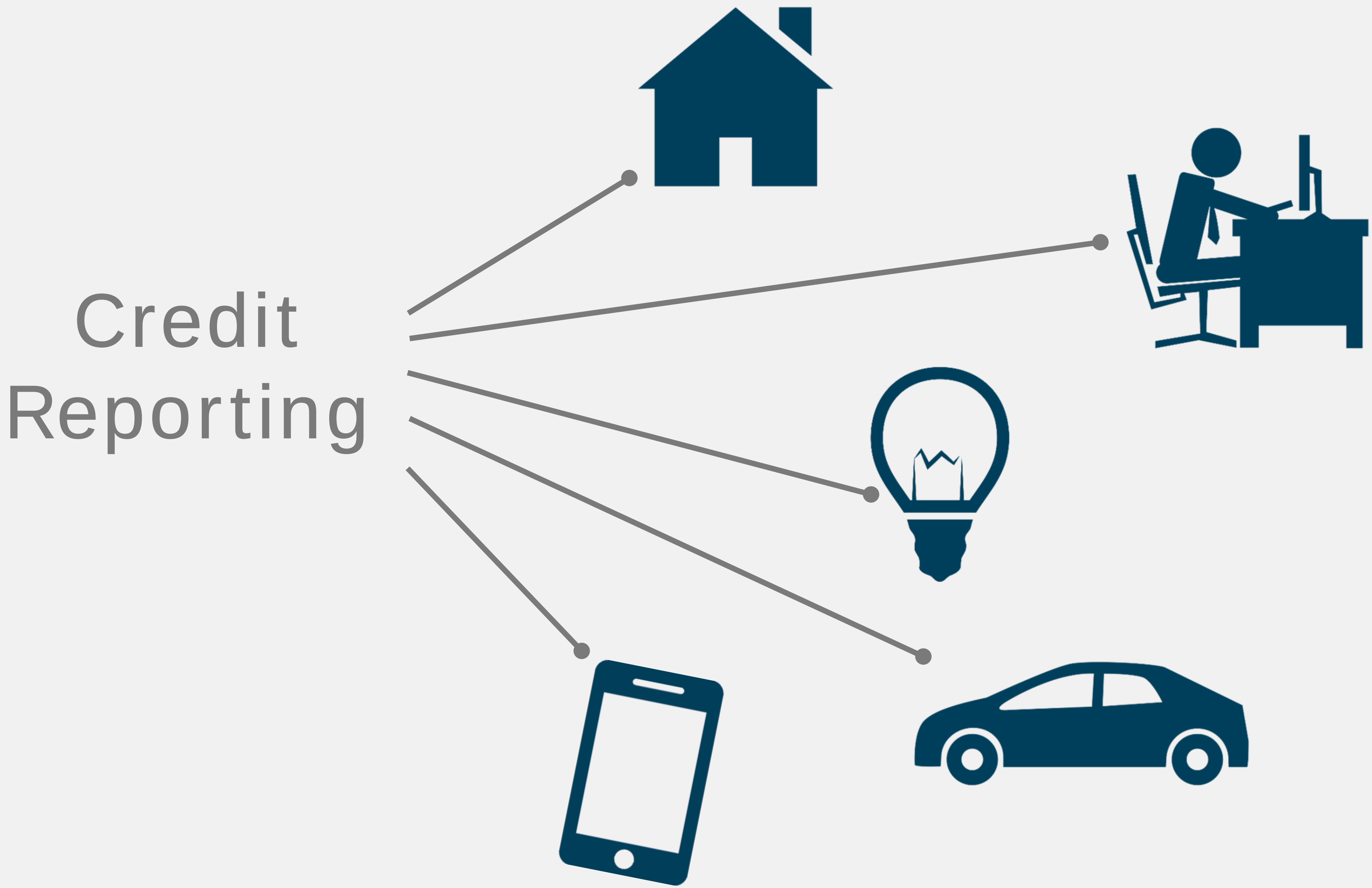
Enabled by the growth of consumer credit and corresponding depersonalization of the credit system

Damaging credit transactions

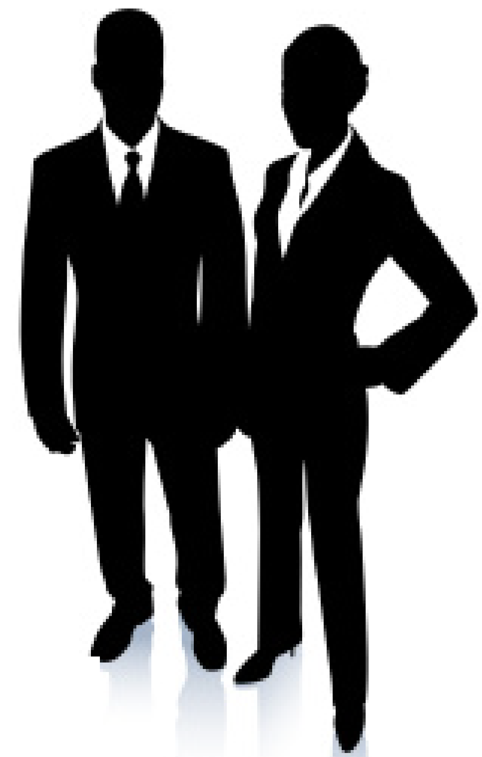
Debt through fraud

Debt through force

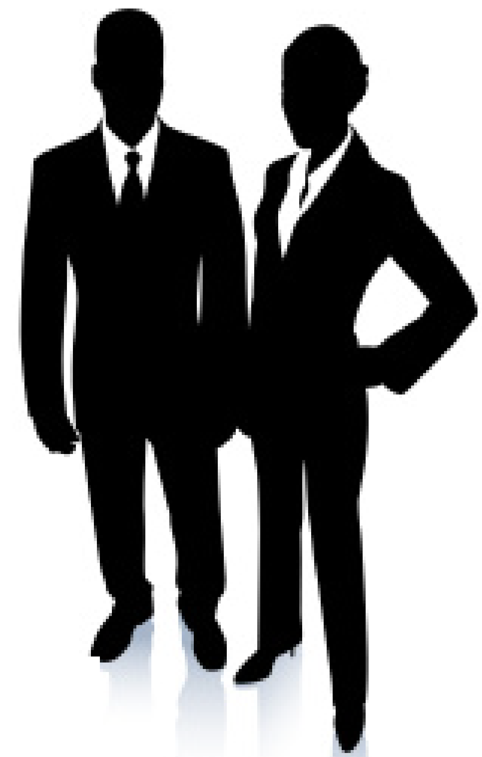
- Debt stays with victim
- Family court ineffective
- Traditional defenses ineffective

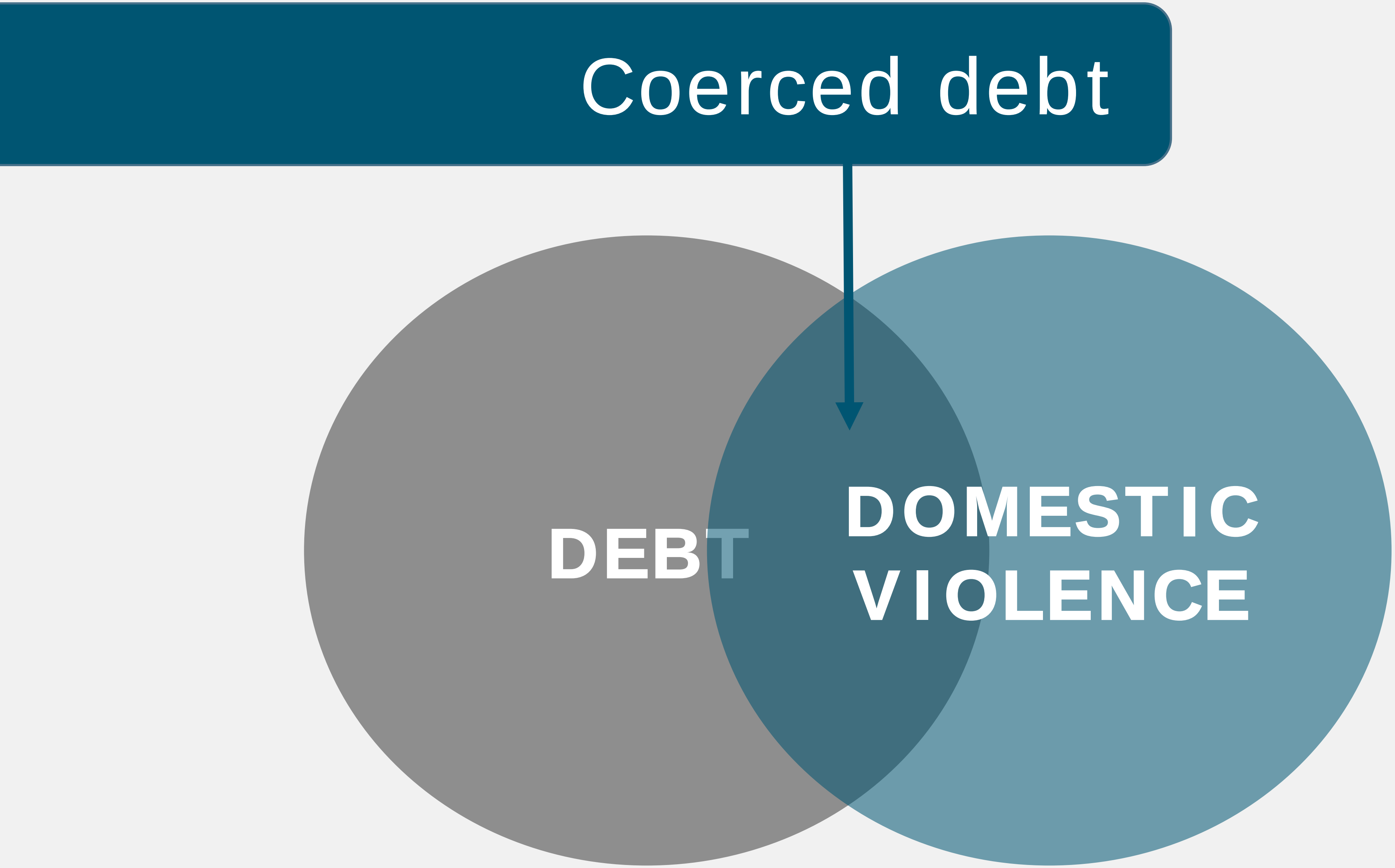

Credit
Reporting

How does somebody end up this much debt without their knowledge or consent?

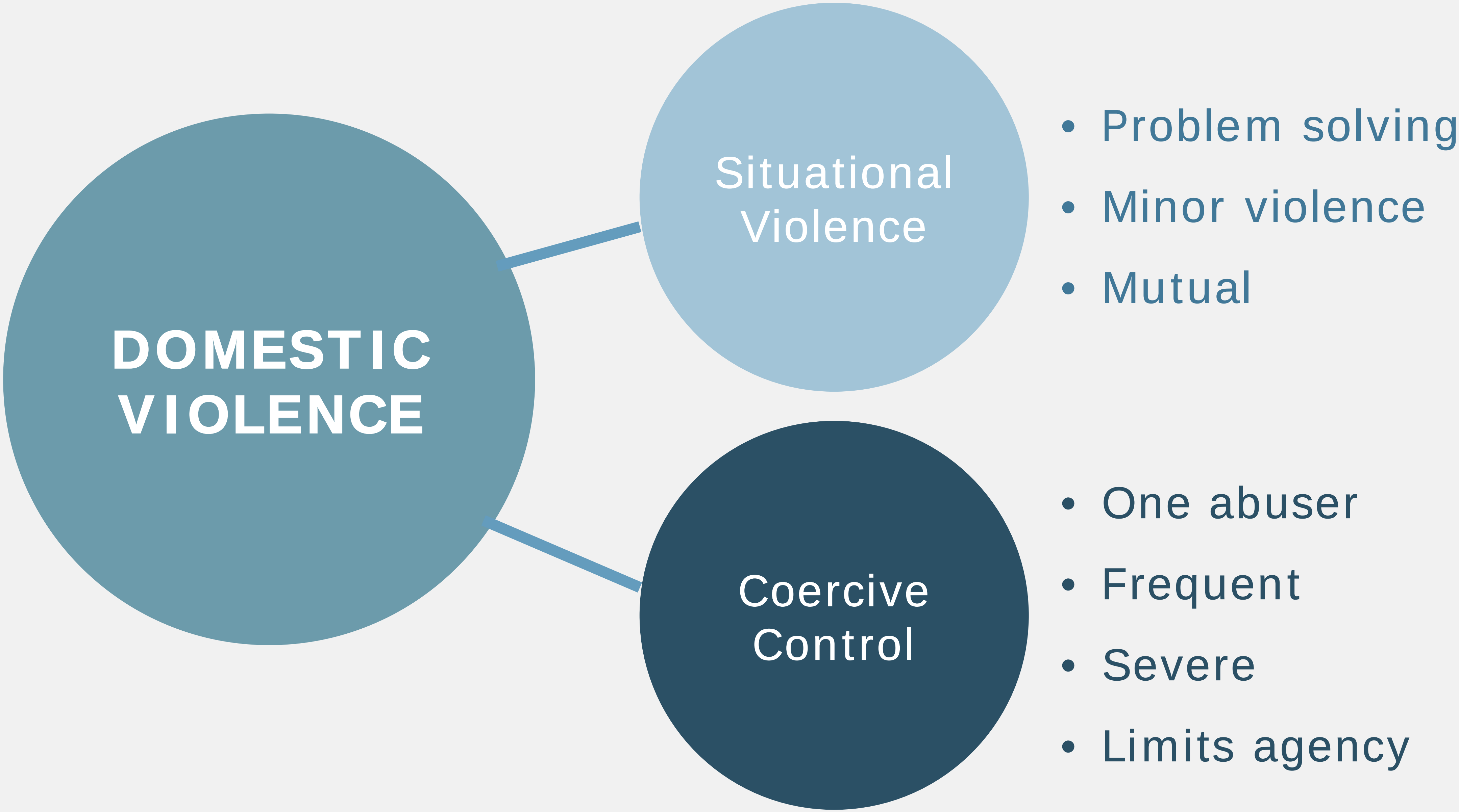


Is it really not possible for DV victims to leave these relationships when faced with financial ruin?

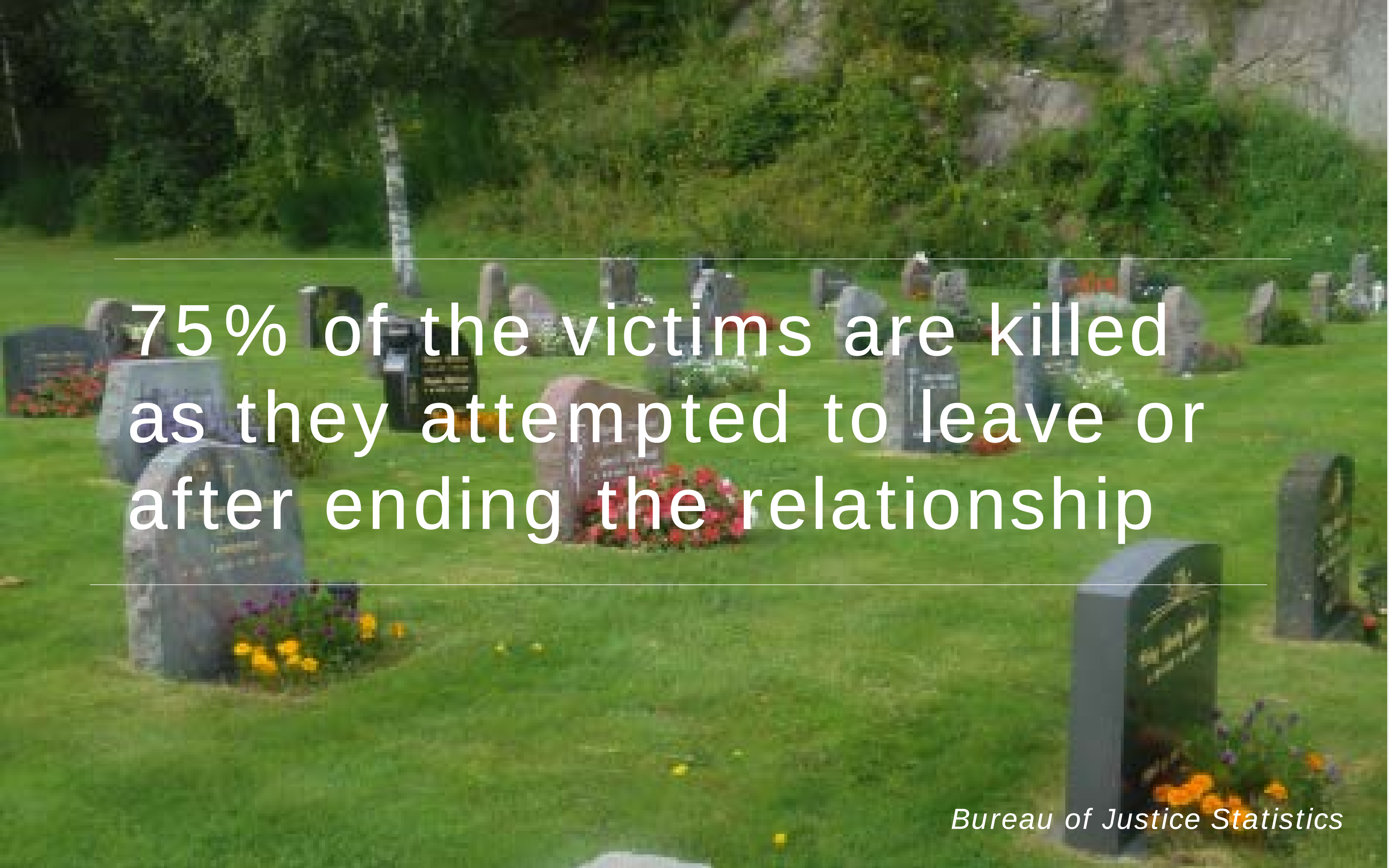



Coerced debt
DEBT
DOMESTIC VIOLENCE

DOMESTIC VIOLENCE


DOMESTIC VIOLENCE
Situational Violence
• Problem solving
• Minor violence
• Mutual
Coercive Control
• One abuser
• Frequent
• Severe
• Limits agency


3 women are killed everyday
in the U.S. by an abusive partner
Bureau of Justice Statistics



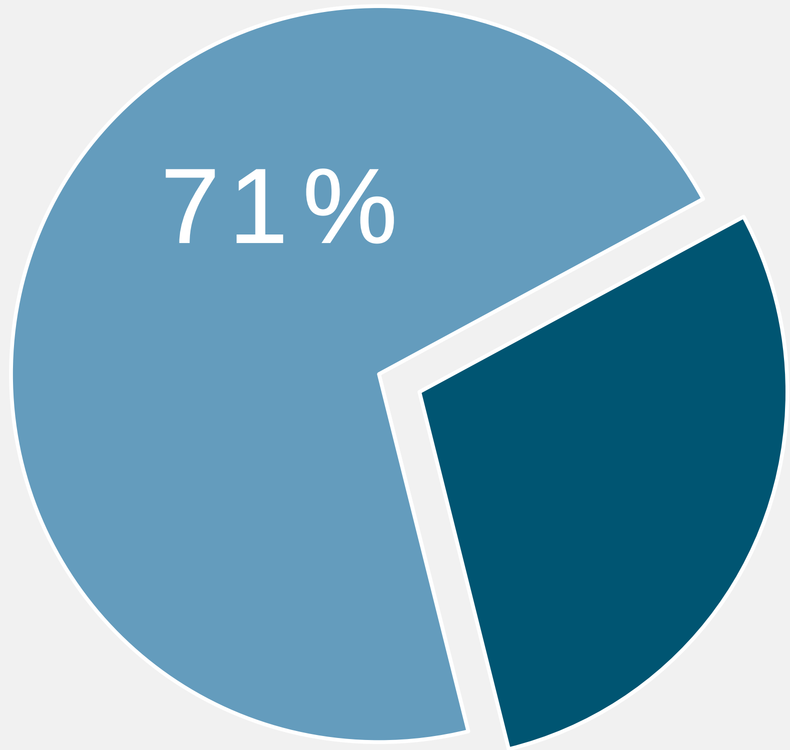
75% of the victims are killed as they attempted to leave or after ending the relationship

Bureau of Justice Statistics

Methodology

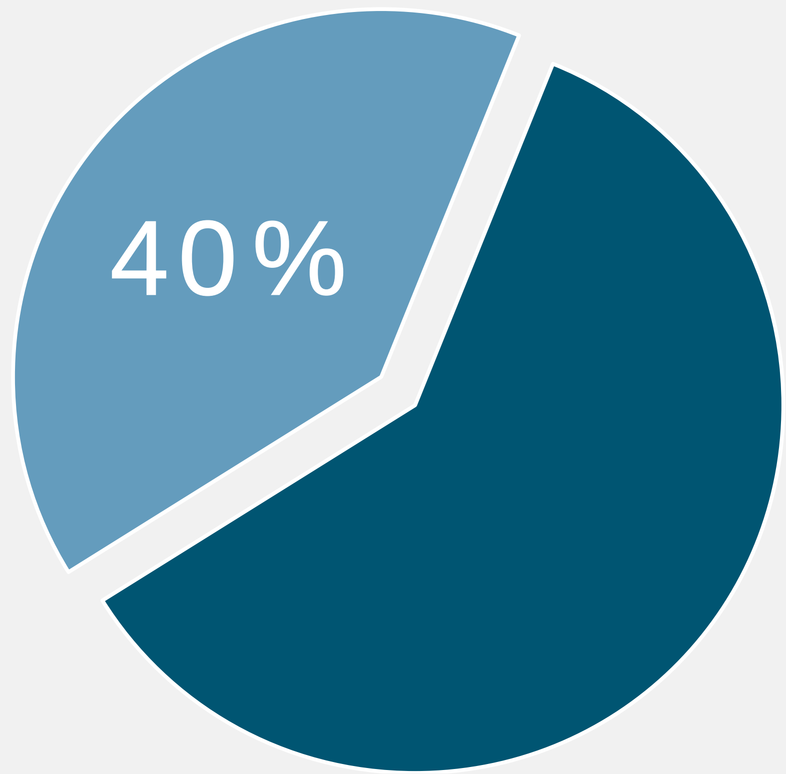
- National Domestic Violence Hotline
- 10-question survey
- Administered by hotline staff
- Eight weeks
- English-speaking female callers over age 18
- N = 1848

Has an intimate partner ever kept financial information from you?



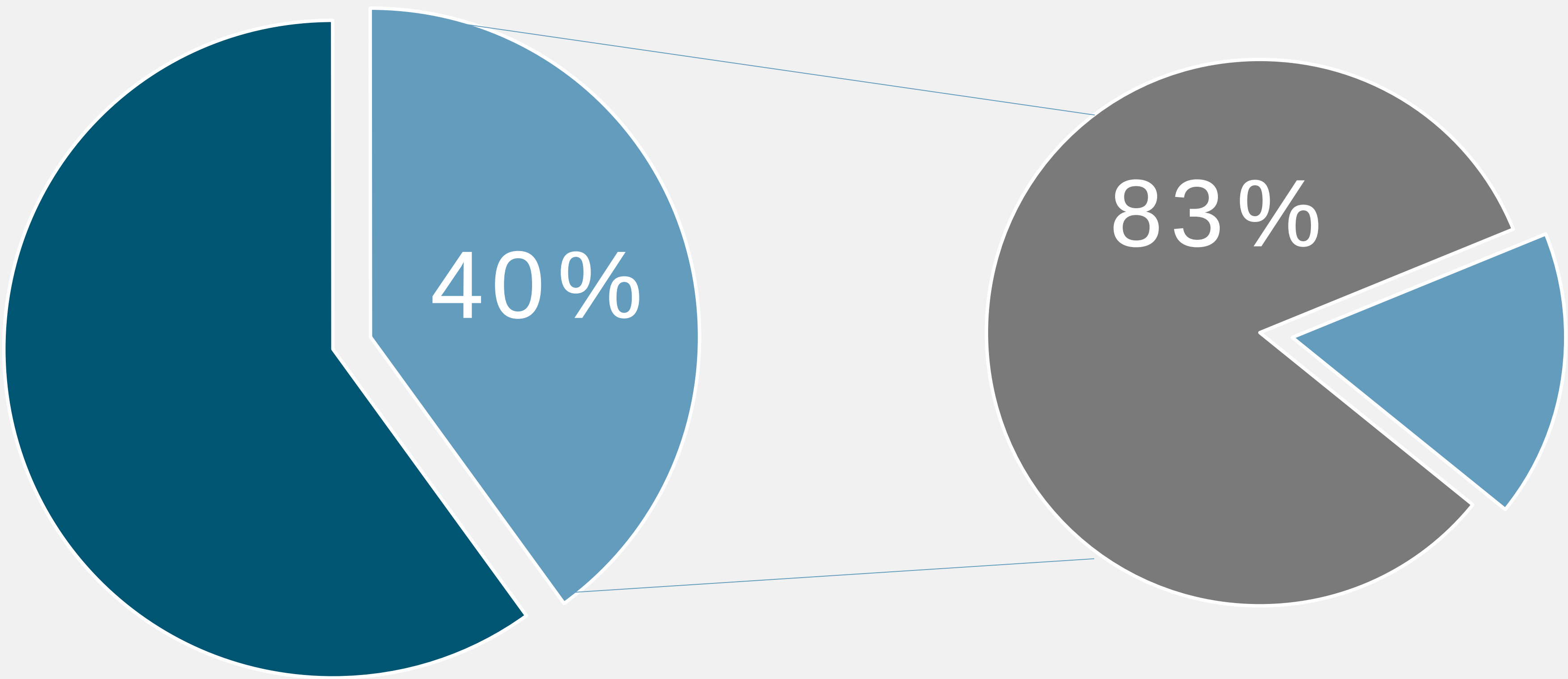
n = 1834

Has an intimate partner ever convinced or pressured you to put the bills under only your name?



n = 1816

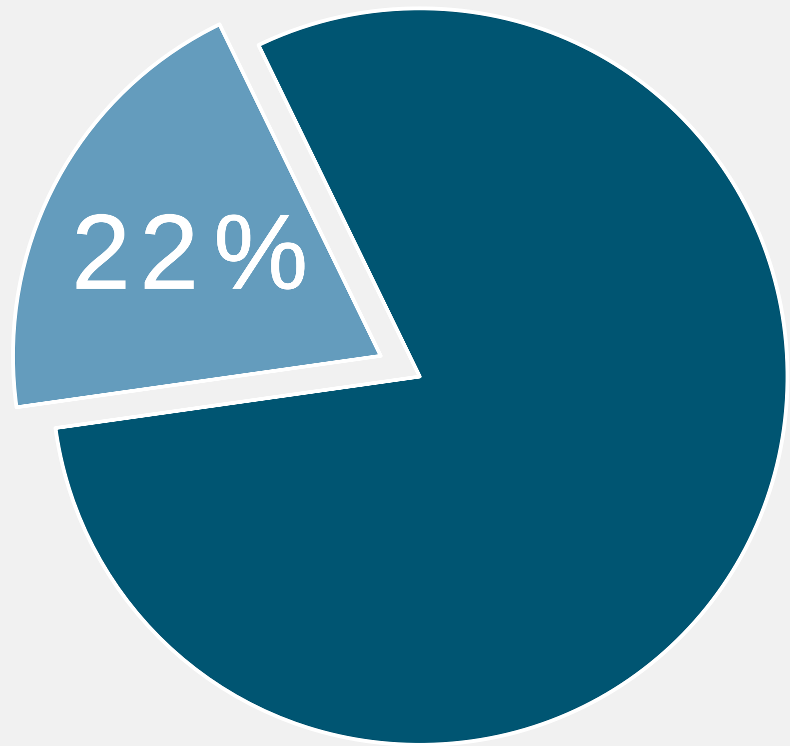
Were you ever left owing money on bills that had not been paid on time or in full?



Convinced or pressured to put bills in name

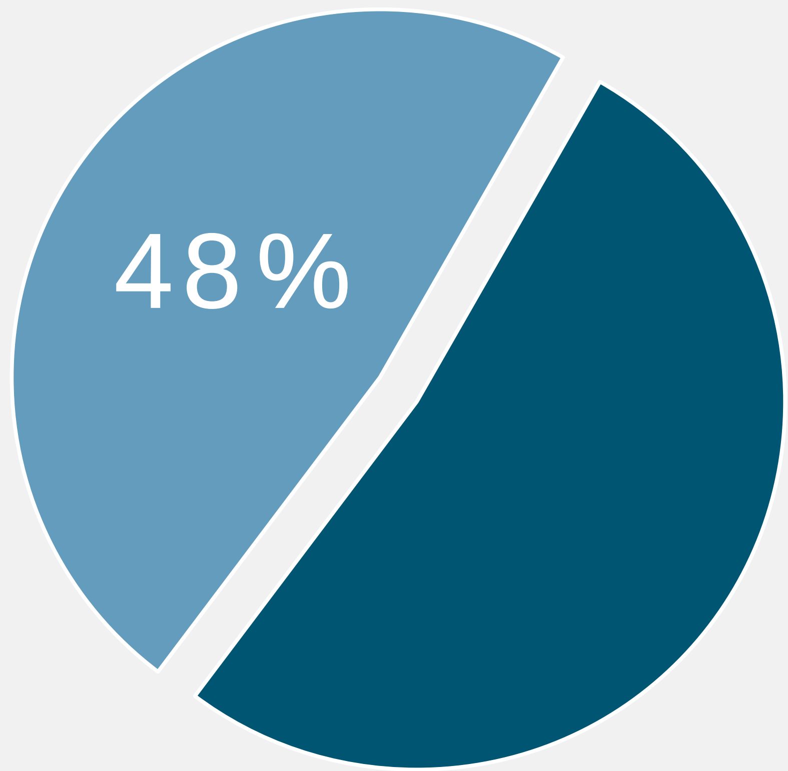
n = 704

Have you ever found out about debt or bills you owed that an intimate partner put in your name without you knowing?



n = 1777

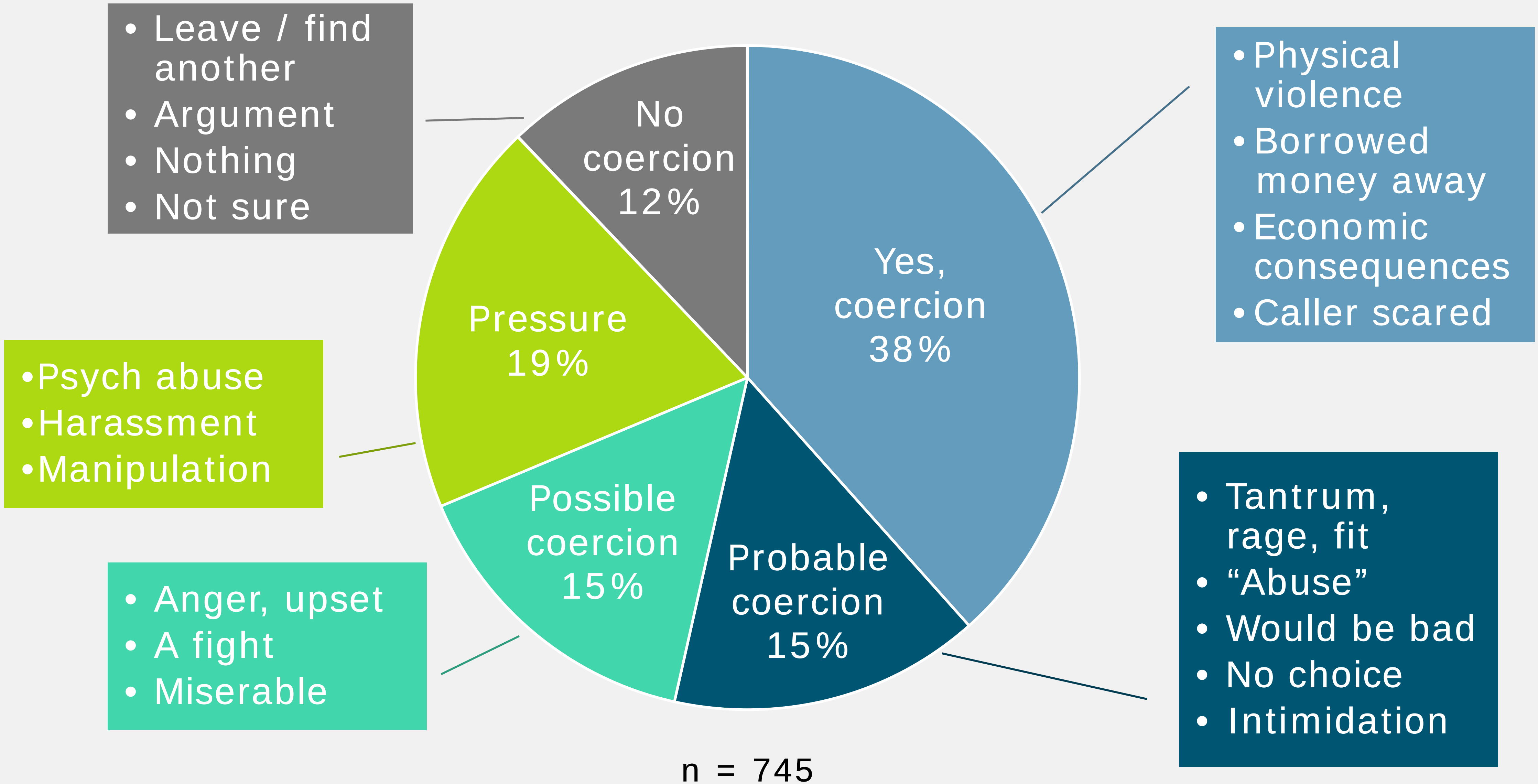
Has an intimate partner ever convinced or pressured you to borrow money or buy something on credit when you didn't want to?



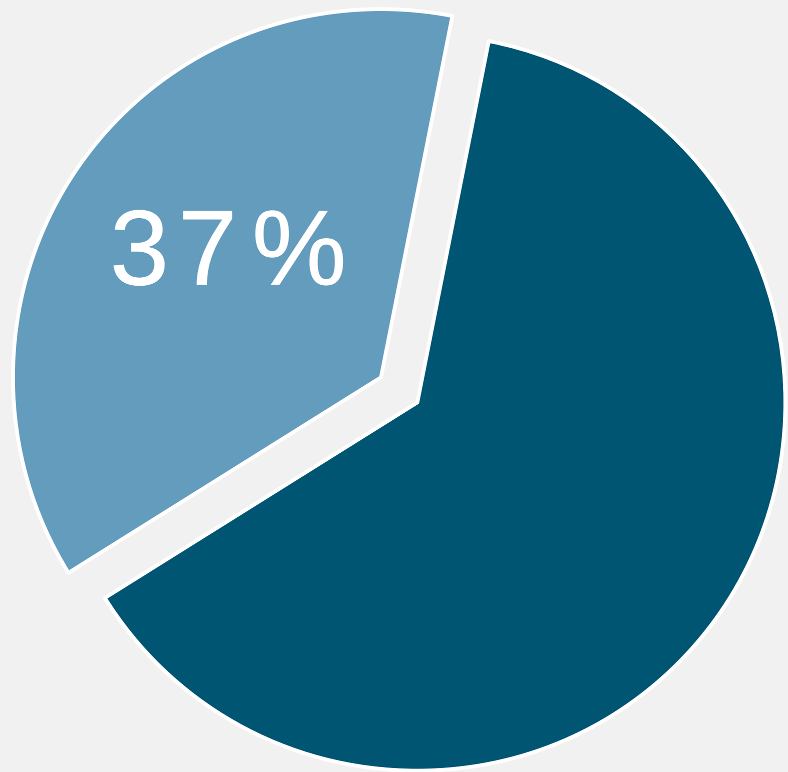
n = 1770

Demand + Consequence = Coercion

What did you think might happen if you said, “No?”

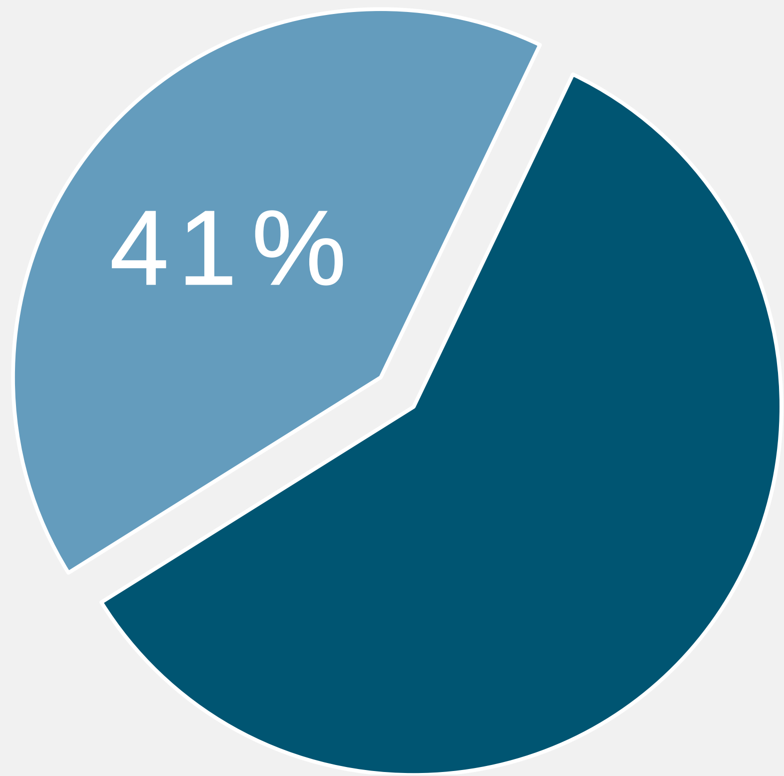


Coerced Debt:
Actual, Probable and Fraud



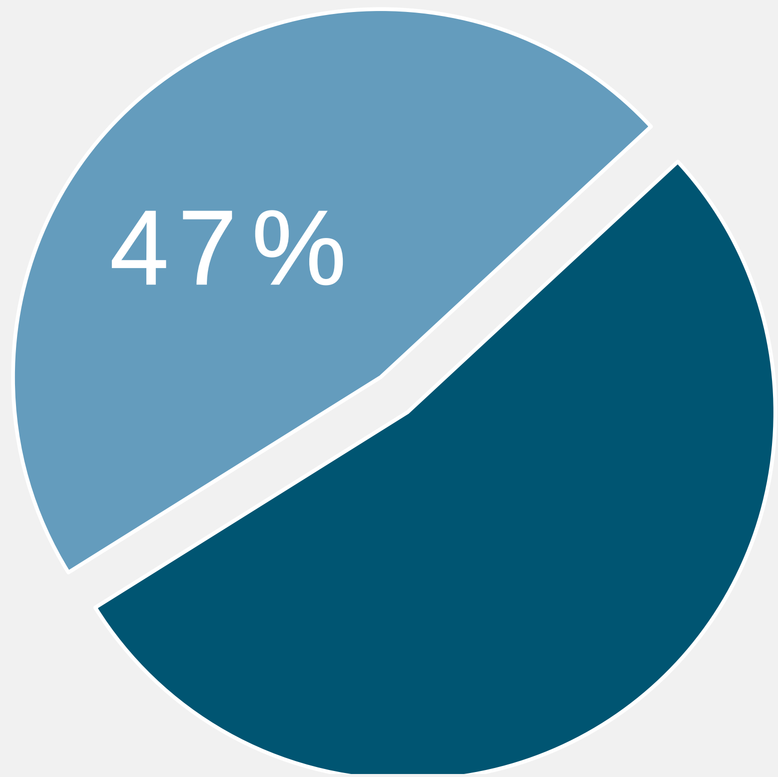
n = 1716

Coerced Debt: Actual, Probable, Possible, and Fraud



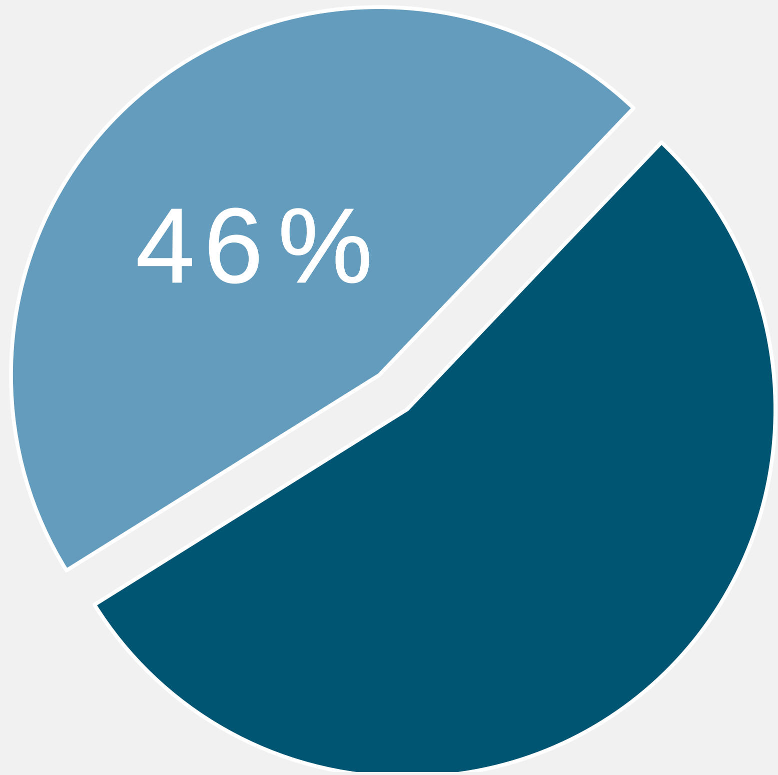
n = 1719

Coerced Debt:
Actual, Probable, Possible, Pressure, and Fraud



n = 1723

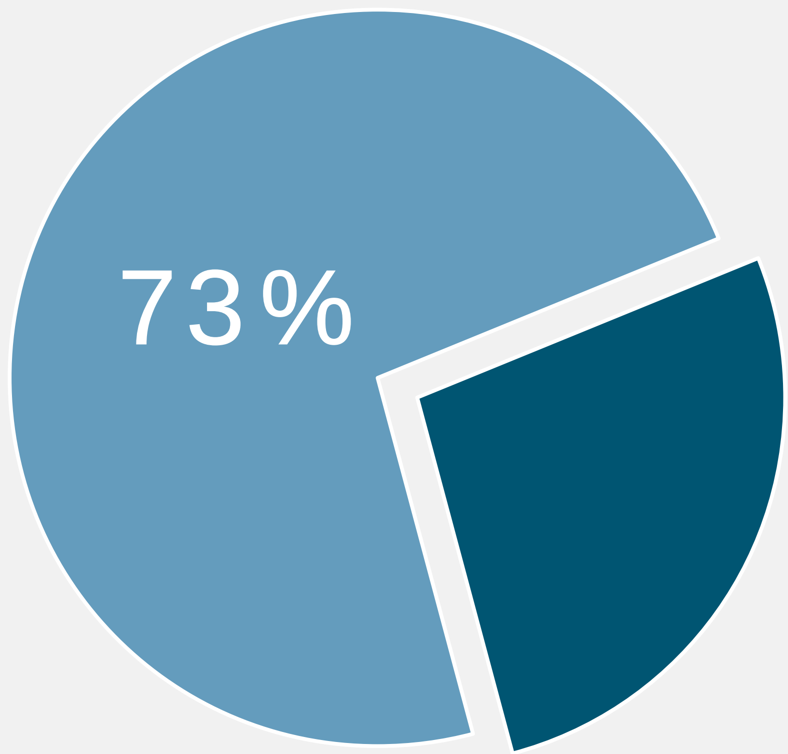
Has your credit report or credit score been hurt by the actions of an intimate partner?



Note: Another 251 (14%) said they were “unsure” about whether their credit had been hurt.

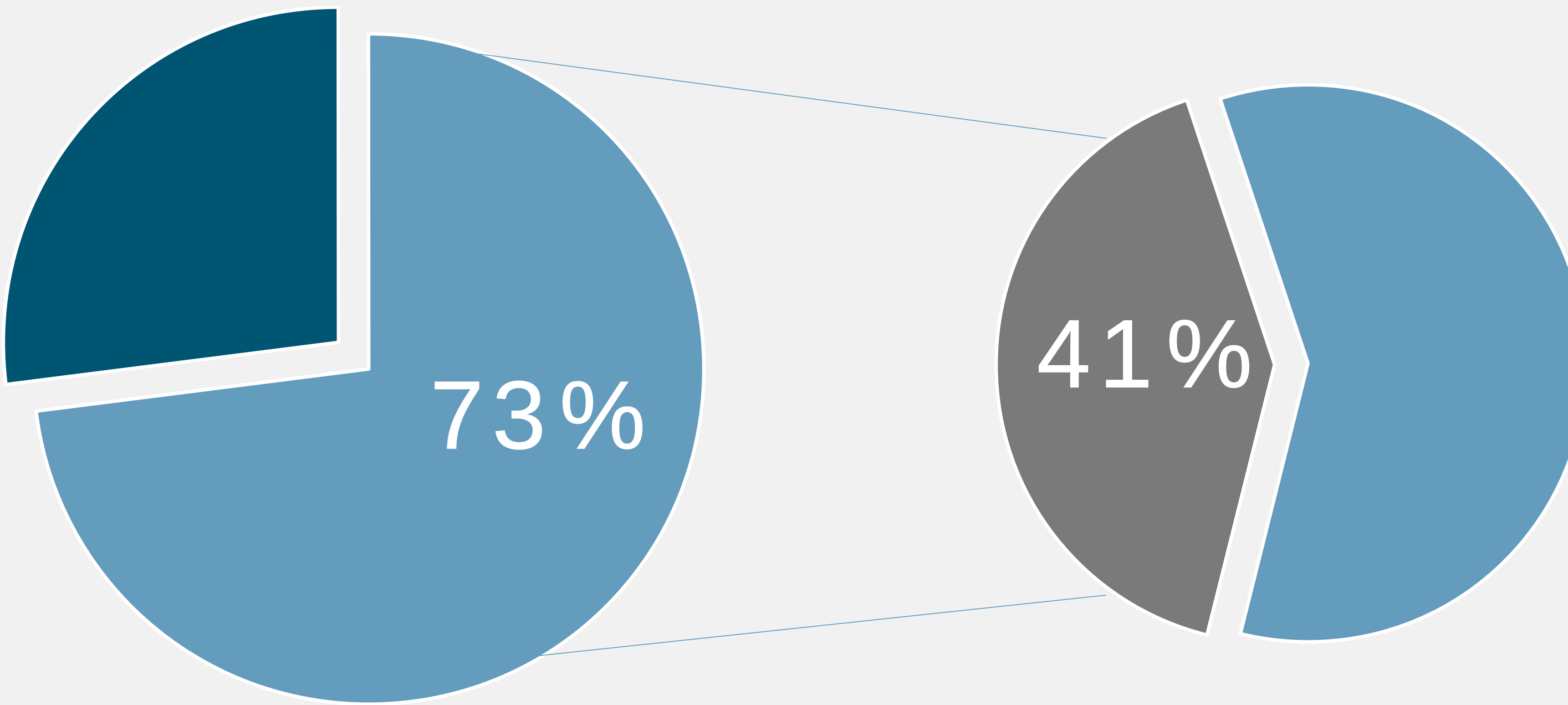
n = 1754

Have you ever stayed longer than you wanted in a relationship with someone who was controlling because of concerns about financially supporting yourself or your children?



n = 1747

Were any of your concerns about money you owed because your partner put bills in your name or convinced you to borrow it?

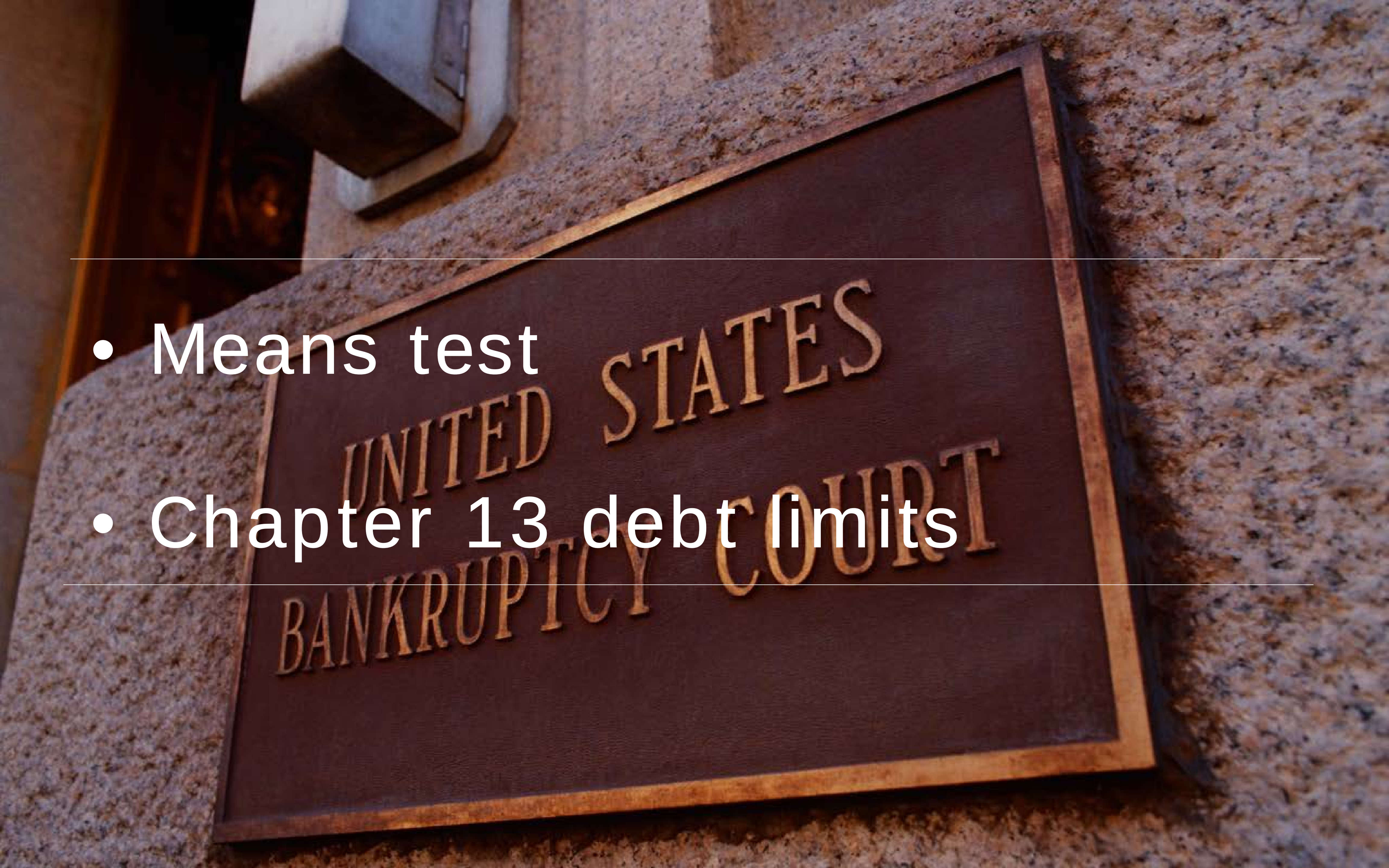


Stayed longer because of financial concerns

n = 1186

Limitations

- Participation limited to callers not in crisis
- Survey questions limited, excluding key follow-up
- Missing data
- Superficial qualitative responses



- Means test
- Chapter 13 debt limits

- Undue hardship in student loans
- Non-dischargeability for fraud

Undermines fundamental premise: Voluntariness of debt

Student Loan Dischargeability: Revisiting the *Brunner* Undue Hardship Test

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The *Brunner* test used by most courts in applying the undue hardship provision in section 523(a)(8) was developed over twenty-five years ago.[1] The nature of individual student loan debt, the structure of the loan programs, and the Bankruptcy Code itself have all changed significantly since 1987. These changes have given some courts cause to question the continued utility of the *Brunner* test.[2]

1. The statutory language

Section 523(a)(8) provides:

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual.

2. The undue hardship tests

a. Most courts have adopted the "*Brunner* test." It requires that the debtor show: (1) the student loans prevent the debtor and the debtor's dependents from maintaining a

[1] Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).
[2] *See e.g.*, *In re* Roth, 490 B.R. 908, 920/-/23 (B.A.P. 9th Cir. 2013) (Pappas, B.J., concurring); Krieger v. Educ. Mgmt. Corp., 713 F.3d 882, 884 (7th Cir. 2013) (noting it is important not to allow "judicial glosses" of the statutory language, such as found in *Brunner*, to supersede the statute itself); *In re* Myhre, 503 B.R. 698, 702-703 (Bankr. W.D. Wis. 2013) (noting that when it was decided *Brunner* "only applied to a small subsection of student loans" and the Code and the nature of student loan borrowing have changed significantly since then); *In re* Wolfe, 501 B.R. 426, 434-35 (Bankr. M.D. Fla. 2013) ("There is merit to the argument that the rigors of the *Brunner* test are no longer appropriate to curb borrower abuse from a premature discharge amidst only temporary financial distress.").

"minimal" standard of living; (2) additional circumstances exist indicating that the hardship is likely to continue for a "significant portion of the repayment period;" and (3) the debtor has made a good-faith effort to repay the loans (and to maximize income and limit expenses. Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752 (S.D.N.Y. 1985), aff'd, 831 F.2d 395 (2d Cir. 1987).

b. The Eighth Circuit in *In re* Long, 322 F.3d 549 (8th Cir. 2003) has adopted a "totality of circumstances" test for determining undue hardship. This test considers (1) the debtor's past, current, and reasonably reliable future financial resources; (2) the debtor's and the debtor's dependents' reasonable necessary living expenses; and (3) any other relevant facts and circumstances applicable to the bankruptcy case.

3. First Circuit Appeal in Murphy v. U.S. Dept. of Education

a. Bankruptcy courts in the First Circuit generally have used a "totality of circumstances" test for determining undue hardship.[3] However, the First Circuit Court of Appeals has not yet decided what the standard should be, and invited amicus parties to address the issue in the pending appeal, Murphy, U.S. Dept. of Education, No. 14-1691. The National Consumer Law Center (NCLC) and the National Association of Consumer Bankruptcy Attorneys (NACBA) were invited by the Court to participate as amicus parties. The following are excerpts from the brief filed by NCLC and NACBA. The full brief, including a section omitted here on the role of nonbankruptcy, administrative repayment plans, is available at: www.nclc.org/images/pdf/bankruptcy/brief-murphy-1st-cir-amicus.pdf.

b. **Summary of Argument**

The undue hardship tests of other circuit courts were developed at a time when debtors sought an immediate discharge of student loans in bankruptcy without waiting five or seven years for an automatic discharge the law then provided. Today, borrowers who are seeking discharge of student loans are not jumping the gun on a future automatic discharge. On the contrary, many have already been burdened by the obligations for decades and, if denied a discharge, face a lifetime of crushing debt. Other changes to bankruptcy law and student loan programs suggest that this Court should not be restrained by decisions from other circuits that gave undue weight to concerns that are not pertinent today.

Rather than adopt one existing test over another, we urge this Court to provide a formulation of the undue hardship standard in simple terms, that restricts consideration of extraneous and inappropriate factors not consistent with the statutory language. A finding about whether a debtor's hardship is likely to persist should be based on hard facts, not conjecture and unsubstantiated optimism. Hardship should be assessed based on the debtor's ability to repay student loans based on the loan terms, not twenty-five years into the future under an administrative income-based repayment plan.

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[3] Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), 435 B.R. 791 (B.A.P. 1st Cir. 2010) (adopting totality test; "good faith" prong of *Brunner* test lacks textual foundation).

Consideration of the debtor's good faith, past conduct and life choices simply has no place in an undue hardship determination and if permitted, results in unnecessary litigation and value-laden, inconsistent judgments.

c. **Changes To Section 523(a)(8) And Student Loan Programs Have Rendered The Brunner Test Obsolete And Compel Consideration Of A New Approach.**

The nature of student loan debt, the structure of student loan programs, and the Bankruptcy Code itself have all changed significantly since the undue hardship test adopted by nine circuit courts of appeal was first developed by the Second Circuit in *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987). At that time, student loans were automatically dischargeable in bankruptcy, without proving undue hardship, if debtors simply waited five years after their loans first became due. Thus, the overarching concern expressed in virtually all of the seminal decisions was about potential abuse, that debtors may prematurely seek a discharge soon after student loans came due, without demonstrating a sustained period of inability to pay.

This concern was also described in a House Report at the time Congress enacted the five-year waiting period. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess., 133, reprinted in 1978 U.S.Code Cong. & Admin.News 5787, 6094 ("Instead, a few serious abuses of the bankruptcy laws by debtors with large amounts of educational loans, few other debts, and well-paying jobs, who have filed bankruptcy shortly after leaving school and before any loans became due, have generated the movement for an exception to discharge.").

The harshness of the *Brunner* test understandably can be seen as a reaction to this concern about impetuous filings, as demonstrated by facts of the Brunner case itself. Ms. Brunner filed bankruptcy approximately seven months after receiving her Master's degree, and sought to discharge her student loans two months later when they came due. Like all other debtors at the time, Ms. Brunner could have simply waited five years before filing bankruptcy and her student loans would have been discharged. This helps explain why the *Brunner* court and those following *Brunner* added a "good faith" prong to the test despite the lack of any textual basis for it in § 523(a)(8). *See In re Brunner*, 46 B.R. 752, 755 (S.D. N.Y. 1985) (hereinafter "*Brunner* I") ("good-faith" requirement carries out the intent of § 523(a)(8) to "forestall students ... from abusing the bankruptcy system").

Amici submit that most debtors today, like Mr. Murphy, are not seeking an undue hardship discharge soon after their student loans come due. A recent empirical study that considered the demographic characteristics of debtors who seek undue hardship discharges found that the mean age of those in the sample was 49 and the median age was 48.5. *See* Iuliano, Jason, "An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard," 86 American Bankruptcy Law Journal 495 (2012). The concern of Congress and courts adopting the Brunner test, that debtors seeking a bankruptcy discharge soon after graduating college or ending their studies, is simply no longer relevant.

The early undue hardship cases also reflected a concern about the financial stability of loan programs, particularly when a bankruptcy discharge was sought before the government had an opportunity to collect on the debt. Not only are debtors now seeking discharges long after loans have been made, but the government has been provided extraordinary collection tools that did not exist during the *Brunner* era. In 1991, the Higher Education Act was amended to permit a borrower's wages to be garnished to collect defaulted student loans in an administrative proceeding, without obtaining a court judgment. 20 U.S.C. § 1095a. A Department of Treasury procedure also can be used to collect student loans through the offset of tax refunds. 31 U.S.C. § 3720A. The Debt Collection Improvement Act of 1996 expanded these collection efforts by permitting the offset of Social Security of other government benefits. Pub. L. No. 104-134, 110 Stat. 1321 (1996); 31 U.S.C. § 3716. In 1991, the then-existing six-year statute of limitations for filing collection actions against borrowers, and all other limitation periods for student loan collection, were eliminated. *See* Pub. L. No. 102-26, 105 Stat. 123 (Apr. 9, 1991), amending 20 U.S.C. § 1091a. Collection lawsuits, tax intercepts, wage garnishments, and government benefit offsets may be done at any time. The only end point is that collection must cease when a borrower dies. 20 U.S.C. § 1091(a)(d). The possibility of debtors avoiding collection during periods when they have an ability to repay their student loans, before seeking a bankruptcy discharge, is another factor not relevant today.

The amount of student loan debt burdening debtors today is significantly greater than in the *Brunner* era. This is caused in part by the substantial increase in the costs of education. It also reflects student loan collection practices, in which interest and collection fees of 25 per cent or more are capitalized during periods of nonpayment, and payments are first applied to accrued interest and fees. A debt of $20,000 can quickly grow to over $50,000. *See, e.g., In re Martish*, 2015 WL 167154 (Bankr. E.D. N.C. Jan 12, 2015) (after making approximately $39,835 in payments on a consolidation student loan in the original amount of $11,202, debtor still owed $27,021 at time her chapter 13 case was filed).

A 2005 Code amendment expanded the scope of § 523(a)(8) to include student loans made by private lenders that are not subsidized or guaranteed by the government, and which may be denied to borrowers based on creditworthiness. The "undue hardship" language is now applicable to purely private student loans regardless of the terms of the loan or the underwriting criteria. The concern of Brunner and its progeny in protecting the "enlightened social policy" of student loan programs that promise loans to borrowers without considering creditworthiness is also of less relevance today. *Brunner I*, 46 B.R. at 756 ("In return for giving aid to individuals who represent poor credit risks, [§ 523(a)(8)] strips these individuals of the refuge of bankruptcy in all but extreme circumstances.").

The *Brunner* test may have served its purpose in a different time, but it is now obsolete and should not be adopted by this Court.

d. **Existing Undue Hardship Tests Stray Too Far From The Plain Language Of Section 523(a)(8) And Test Too Much.**

The *Brunner* undue hardship test, and certain incarnations of the totality of the circumstances test (hereafter "totality test"), consider matters not contemplated by the words of the statute. The Second Circuit's review of the statutory language in *Brunner* was cursory at best. Even the lower court's opinion that was largely adopted by the Second Circuit devoted little attention to statutory construction and focused more on policy considerations it believed had motivated Congress. Writing on a clean slate, this Court has the opportunity to take a fresh look at the undue hardship standard, first by considering the meaning of "undue hardship."

The ordinary meaning of "hardship" is a "condition that is difficult to endure," Random House Webster's College Dictionary (2010); "a thing or circumstance that causes ongoing or persistent suffering or difficulty," American Heritage Dictionary of the English Language (Fifth Ed. 2011). "Undue" is defined as "exceeding what is appropriate or normal." *Id*. It conveys that a matter is significant, as opposed to *de minimis* or insignificant. Together these words refer to a significant, ongoing condition that is difficult for the debtor to endure. Read in the context of the debt dischargeability, the statutory language looks at the present and future financial condition of the debtor and the debtor's dependents and asks the question whether they will endure significant difficulty, such as being unable to maintain a normal standard of living, if the student loan must be repaid rather than discharged. At bottom, if repayment of the student loan would prevent the debtor from satisfying ordinary and necessary living expenses so that a debtor could not effectively "make ends meet," this would be an undue hardship. *See*, *e.g*., *In re Skaggs*, 196 B.R. 865, 868 (Bankr. W.D. Okla. 1996).

This meaning of "undue hardship" is consistent with its application in a similar context. In determining whether recovery of a benefit overpayment should be waived, the Veterans Administration regulations provide that one of the factors that should be considered is "undue hardship." This is defined in the regulation to be: "[w]hether collection would deprive debtor or family of basic necessities." 38 C.F.R. § 1.965(a).

Congress adopted a construct for "undue hardship" in another section of the Code, after *Brunner* was embraced by the circuit courts, that comports with its ordinary meaning. Section 524(c) has long required that reaffirmation agreements entered into by the debtor must be reviewed, either by the court or through a certification of debtor's attorney, to ensure that the repayment obligation will not impose an "undue hardship on the debtor or a dependent of the debtor." In the 2005 Code amendments, Congress included a presumption to guide bankruptcy courts in applying this undue hardship standard:

> … it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt.
>
> 11 U.S.C. § 524(m)(1).

The test created by the presumption looks solely at the debtor's income and expenses in relation to the payment requirements under the reaffirmed debt. *See, e,g, In re Visnicky*, 401 B.R. 61, 63 (Bankr. D. R.I. 2009); *In re Stevens*, 365 B.R. 610, 612 (Bankr. E.D. Va. 2007). Although the context in which "undue hardship" arises under § 524(c) and (m) is different than dischargeability under § 523(a)(8), there is no escaping the fact that Congress used the identical phrase in both sections of the same statute. At a minimum, the presumptive test added in 2005 sheds light on what Congress intends when it uses the phrase "undue hardship" in a statute with respect to the impact of debt repayment on a debtor.

e. **The Limited Legislative History of Section 523(a)(8) Suggests A Less Stringent View Of Undue Hardship Than Courts Have Adopted.**

Numerous courts have commented that Congress said little about "undue hardship" in the Code's legislative history. *E.g., In re Kopf*, 245 B.R. 731, 736, n.10 (Bankr. D. Me. 2000). The Tenth Circuit observed that "[t]he phrase 'undue hardship' was lifted verbatim from the draft bill proposed by the Commission on the Bankruptcy Laws of the United States." *ECMC v. Polleys*, 356 F.3d 1302, 1306 (10th Cir. 2004). The Commission Report provided a description of undue hardship that Congress may have relied upon in enacting § 523(a)(8). *Brunner I*, 46 B.R. at 754 ("The Commission's report provides some inkling of its intent in creating the exception, intent which in the absence of any contrary indication courts have imputed to Congress."). The Commission Report describes "undue hardship" as follows:

> In order to determine whether nondischargeability of the debt will impose an "undue hardship" on the debtor, the rate and amount of his future resources should be estimated reasonably in terms of ability to obtain, retain, and continue employment and the rate of pay that can be expected. Any unearned income or other wealth which the debtor can be expected to receive should also be taken into account. The total amount of income, its reliability, and the periodicity of its receipt should be adequate to maintain the debtor and his dependents, at a minimal standard of living within their management capability, as well as to pay the education debt.
>
> Report of the Comm'n on the Bankr. H.R. Doc. No. 93-137, Pt. II § 4-506 (1973).

Importantly, the Commission Report focuses on the debtor's inability to maintain a minimum standard of living while repaying the loans. It is devoid of stringent terms such as "certainty of hopelessness" or "total incapacity." *In re Randall*, 255 B.R. 570, 577 (Bankr. D. N.D. 2000) (applying totality of circumstances test and noting that standard involves a "total incapacity both at the time of filing and on into the future to pay one's debts"); *Brunner I*, 46 B.R. at 755 ("dischargeability of student loans should be based upon the certainty of hopelessness"). The Report refers to a debtor maintaining a "minimal standard of living" based on "adequate" income, rather than suggesting the debtor must endure extreme poverty and demonstrate extraordinary circumstances. *In re Courtney*, 79 B.R. 1004, 1010 (Bankr. N.D. Ind. 1987) (suggesting that a debtor must show that an effort to repay would "strip[] himself of all that makes life worth living."). The Report also focuses on the debtor's present and future condition. It does not refer to any of the debtor's pre-bankruptcy past, such as the debtor's reasons for obtaining the student loans or attempts to repay them.

Courts that require a "certainty of hopelessness," "total incapacity," or virtual absence of any expectation of loan repayment by the debtor have strayed too far from the statute's plain meaning and its legislative history. *Krieger v. Educ. Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013) (noting "it is important not to allow judicial glosses, such as the language found in *Roberson* and *Brunner*, to supersede the statute itself"); *Kopf*, 245 B.R. at 741 (*Brunner* and other similar approaches "test too much").

f. **This Court Should Provide A Formulation Of The Undue Hardship Standard In Simple Terms Based On The Statutory Language, That Avoids Inconsistent Results And Unnecessary Litigation.**

Although the totality of circumstances test (hereafter "totality test") has been described as a "less restrictive approach" than *Brunner*, *In re Long*, 322 F.3d 549, 554 (8th Cir. 2003), it has not always been applied in a manner that avoids the harshness of *Brunner*. Both tests consider similar financial matters under their first prongs. While the totality test does not expressly incorporate the objectionable aspects of *Brunner's* second and third prongs, they can nevertheless creep back into the totality test under its catch-all third prong that considers "any other relevant facts and circumstances." This provides an opportunity for the parties to argue, and the court to consider, numerous factors that may not be probative of undue hardship as contemplated by the statutory language. *Polleys*, 356 F.3d at 1309 (under totality test, "courts may choose from a multitude of factors and apply any combination of them to a given case, suggesting that just about anything the parties may want to offer may be worthy of consideration"). The *Brunner* test already is unpredictable and non-uniform; a totality test is likely to be no different. *See In re Speer*, 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) ("[T]he application of [*Brunner*] standard requires each court to apply its own intuitive sense of what 'undue hardship' means on a case by case basis. With so many Solomons hearing the cases, it is no wonder the results have varied.").

The existing undue hardship tests are far too complex and encourage parties opposing discharge to engage in costly, contested litigation. Rather than adopt one of the existing **tests**, amici urge this Court to describe the undue hardship **standard** in simple terms based on the statutory language. In light of the numerous decisions applying *Brunner* and totality tests, this Court should describe what the undue hardship standard is, and more importantly, what it is not.

The First Circuit B.A.P. has "distilled [undue hardship] to its essence" by noting that it "rests on one basic question: 'Can the debtor now, and in the foreseeable near future, maintain a reasonable, minimal standard of living for the debtor and the debtor's dependents and still afford to make payments on the debtor's student loans?'" *In re Bronsdon*, 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010).

To the extent the inquiry extends beyond this basic question, we urge the Court to provide guidance on the key considerations as follows.

i. **Consideration of the economic factors should focus on whether the debtor can maintain a minimal standard of living while repaying the student loan.**

Consideration of the debtor's financial circumstances is at the core of the undue hardship standard. The amount of the debtor's income is reviewed in relation to the debtor's ability to meet necessary expenses. The standard should not require "abject poverty" or income below a certain threshold, such as the federal poverty guideline. *In re Hornsby*, 144 F.3d 433 (6th Cir. 1998) (debtors did not need to be at poverty level to show undue hardship). In most cases, though, this is not an issue in dispute as the income of debtors who file bankruptcy is far below other Americans.[4]

It is appropriate for the bankruptcy court to consider whether the debtor's expenses are commensurate with a reasonable, not extraordinary, standard of living. Regardless of whether this is a characterized as a "minimal" standard of living, the focus should be on whether the debtor can pay for basic necessities. Rather than becoming mired in arguments over whether a particular expense is excessive in relation to various shifting standards, a better approach is to focus on certain basic needs of the debtor's family. The bankruptcy court's analysis in *In re Ivory*, 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001), serves as useful example of this approach. The court listed what it considered to be the elements of a minimal standard of living. These include decent shelter and utilities, communication services, food and personal hygiene products, vehicles (maintained, insured, and tagged), health insurance or the ability to pay for medical and dental expenses when they arise, some small amount of life insurance, and some funds for recreation. When a borrower's monthly income falls hundreds of dollars below the level at which the debtor could afford to pay for these necessities, courts need not consider arguments over much smaller expenditures for items such as cable television

[4] Median household income for debtors filing chapter 7 bankruptcy in 2007 was $23,136. This was 52% below the median household income of $48,200 for the general U.S. population. Lawless, Robert, *et al*., Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors, Am. Bankr. Law J. Vol. 82 , 363 (2008).

and Internet access. The basic purpose of this inquiry is to ensure that, after debtors have first provided for their basic needs, they do not allocate discretionary income to the detriment of the student loan creditor.

Bankruptcy courts are accustomed to evaluating debtors' expenses for reasonableness under other Code provisions. This process is done when a chapter 7 filing is challenged for abuse under § 707(b) or there is a dispute over whether all of the debtor's projected disposable income is being contributed to a chapter 13 plan in accordance with § 1325(b). In both instances, the court is guided by standards for certain basic living expenses set under the "Collection Financial Standards" used by the Internal Revenue Service in setting repayment terms for delinquent taxpayers. There is nothing unique about the undue hardship standard that warrants a different approach. If there are legitimate disputes about whether the debtor could repay a student loan by limiting unnecessary expenses, courts should make use of the Code's well-established expense standards.

The analysis of current income and expenses must also consider whether the debtor can satisfy basic living expenses while paying student loans. As discussed below, the full current monthly payment required to amortize the loan should be considered. *In re Fecek*, 2014 WL 1329414 (Bankr. S.D. Ind. Mar. 31, 2014) (using student loan's contractual monthly payment, borrower has nothing left over for expenses typically included in IRS payment standards).

ii. **Additional or extraordinary circumstances may help the debtor prove undue hardship, but should not be required.**

Brunner's second prong, which looks at additional circumstances showing that the hardship is likely to persist, has encouraged courts to create rigid threshold requirements. Often this includes a requirement to show a "certainty of hopelessness" or certain "unique" or "extraordinary" circumstances that look well beyond foreseeable continued financial hardship. Many courts have required that the exceptional circumstances must be something beyond the likely persistence of the debtor's financial problems, and may require proof of serious illness, psychiatric problems, incapacity or disability of a debtor or dependent. This consideration, albeit formulated differently, may appear in the totality test's first and third prongs.

The requirement to show something akin to a "certainty of hopelessness" requires debtors to prove a negative; that a virtually unpredictable course of events will not result in good fortune for the debtor. Life has many twists and turns that are unforeseen, making it impossible to forecast with precision a debtor's condition in ten or twenty years (as some courts have required). The requirement also suggests a burden of proof much stricter than the preponderance of the evidence standard that applies to hardship determination cases. Such a proof requirement eviscerates the "fresh start" potential inherent in § 523(a)(8)'s allowance for discharge in certain circumstances. *Polleys*, 356 F.3d at1310 (courts need not require a "certainty of hopelessness").

Rather than require some degree of certainty that is simply beyond proof in most cases, the debtor should be required to show that it is more likely than not that the financial difficulties causing undue hardship will continue into the immediate, foreseeable future. The likely persistence of hardship may be due to health problems or physical or mental disability of the debtor or a dependent. But it may also stem from more mundane causes, such as financial barriers that the borrower faces in his or her economic environment. The court should evaluate only realistic expectations rather than speculate concerning improved future prospects.

Although the standard is forward-looking, looking back at the debtor's employment history can help forecast the debtor's realistic future prospects. If the debtor has been stuck in low or modest paying jobs for the past ten or fifteen years, achieved only modest pay increases over that time, maximized her income potential in her field based on education, experience and skills, and there are no more lucrative jobs available to the debtor, only some highly unusual circumstance would suggest that the condition is not likely to persist. Debtors who despite being in good health and working hard, do not earn enough to pay for basic necessities for their family, should be not be denied a hardship discharge because they cannot show they are disabled or some additional circumstances. Age of the debtor or other factors that limit employment opportunities, or prevent retraining or relocation, are factors to be weighed.

The "future" should not exceed beyond the loan repayment period. *Bronsdon's* focus on the debtor's circumstances "in the foreseeable near future" is noteworthy. Student loan creditors have aggressively pushed courts to consider long-term repayment plans, up to twenty-five years long, as alternatives to bankruptcy discharge. This is inconsistent with bankruptcy law, as addressed below.

iii. **Consideration of lack of good faith or improvident decision-making from the debtor's past should not be part of the undue hardship analysis.**

Brunner's third prong requires that the debtor show a good faith attempt to repay the loan. Courts have considered under this prong (as well as under the third prong of the totality test) whether the debtor made efforts to obtain employment or maximize income, and whether the debtor willfully or negligently caused the default. This requirement looks to the debtor's past conduct.

While initially somewhat narrow in scope, the debtor's good faith has seemingly extended to all prongs of *Brunner* and the third catch-all prong of the totality test. It has morphed into a morality test in which a myriad of the debtor's life choices and past conduct are called into question. Permitting consideration of "good faith" or "other relevant facts and circumstances" has forced debtors to refute arguments by student loan creditors that they should have avoided having too many children (*In re Walker*, 406 B.R. 840, 863 (Bankr. D. Minn. 2009); *Ivory*, 269 B.R. at 911)); should not take prescription drugs to counteract the side effects of mental health medication (*In re Renville*, 2006 Bankr. LEXIS 3211 (Bankr. D. Mont. Jan. 5, 2006)); should not have taken custody of two grandchildren, one of whom was victim of physical abuse (*In re Mitcham*, 293 B.R. 138 (Bankr. N.D. Ohio 2003)); or should not have ended studies without getting a degree so as to care for elderly parents (*In re Bene*, 474 B.R. 56 (Bankr. W.D. N.Y. 2012)).

As previously noted, a good faith consideration lacks foundation in the words of the statute. It is also significant that other subsections of § 523 do in fact make certain debts nondischargeable based on the debtor's past bad conduct. *See, e.g.*, § 523(a)(2(A)(debts obtained by false pretenses or representations, or actual fraud); § 523(a)(6)(debts based on willful and malicious injury of another or property of another); § 523(a)(9)(debts based on death or injury caused by debtor's operation of a motor vehicle while intoxicated). Except when Congress has expressly provided otherwise in § 523 or in some other Code section, debts are discharged in bankruptcy even when debtors have made mistakes, exercised bad judgment, and engaged in immoral actions. Congress did not make student loan dischargeability turn on questions of good faith or morality, as it did for other debts under § 523.

An open-ended inquiry into decisions the debtor made in the past, based on its subjective nature, inevitably leads to inconsistent results. Good faith should not provide the means for student loan creditors and courts to impose their own values on a debtor's decisions and life choices. To the extent there is some role for a good faith inquiry in the undue hardship standard, it should be limited to questions about the debtor's honesty in relation to the claimed hardship, such as whether the debtor has fabricated or fraudulently portrayed a hardship. Issues related to the debtor's good faith in filing bankruptcy can be addressed by the court under § 707(b) or § 1325(a)(7).

4. Recent Student Loan Undue Hardship Decisions

a. *In re* Abney, 540 B.R. 681 (Bankr. W.D. Mo. 2015).

Debtor (pro se) is forty years old, unmarried, and employed as a delivery driver. He has a gross monthly income of approximately $3,063 per month. After payroll deductions for taxes, a modest retirement contribution, insurance, and child support, his net take-home pay is approximately $1,183. He testified that he has no job skills other than as a driver. He currently makes a voluntary contribution of $62 per month toward a retirement plan through his employer, but has only saved about $540 in a 401k. He has no other retirement savings. Debtor has made payments of approximately $11,000 on the original student loans totaling approximately $25,000.

"In sum, the Debtor has made every humanly-possible effort to pay his child support and student loans, to the point of riding a bicycle to work and living out of his employers' trucks and homeless shelters for periods of time. In addition, the mere availability of the IBRP is of no help to the Debtor's current or future situation but, rather, imposes additional burdens on him. Undue hardship should not be interpreted so harshly as to prevent this debtor—who is acting in good faith to fulfill his obligations—from ever getting the fresh start that the Bankruptcy Code is intended to provide." *Id*. at

691.

b. *In re* Johnson, 2015 WL 795830 (Bankr. D. Kan. Feb. 19, 2015).

The balance due on the debtors' joint spousal consolidation student loan is approximately $83,000. George Johnson is 38 years old and Melanie Johnson is 36 years old. They have three minor children (11, 8 and 5 years old). Neither George nor Melanie has any mental or physical disabilities; their children also have no mental or physical disabilities. At the time of trial, Melanie's adjusted net income was $2,124 and despite his best efforts, George's income was $0. When subtracted from their reasonable expenses of $3,921.84, the debtors' available net monthly is negative $1,797.84.

"Absent refinancing or, in the alternative, a program for repayment, the standard student loan repayment term is ten years. It might be argued that since the ten years has expired with respect to repayment of the Loan, this repayment period factor does not apply and any proposed total repayment plan should not exceed ten years. This observation is sound because at the time *Brunner* was decided, student loans that had been in a repayment period for a more than five years were dischargeable and, by extension, all student loans for which debtors sought discharge under undue hardship had to be in the ten-year repayment period. Of equal or greater force is that *Brunner* was decided at the time that all student loans were eventually dischargeable, subject to the five-year test. The *Brunner* test was developed when there were means other than undue hardship to discharge student loans under the Code."

c. *In re* Acosta-Conniff, 536 B.R. 326 (Bankr. M.D. Ala. 2015)

Conniff is a 44–year old single mother with two sons. She earned a Ph.D. and teaches high school. At the time she filed her petition she had take home pay of $2,950 per month plus an additional $500 per month in child support. The Court calculated that the monthly payment required to amortize her student loans would be $915.00 per month. Based on Schedules I and J and the evidence at trial, the court concluded that "Conniff could not make that payment and support herself and her children with a minimal standard of living if forced to repay the loan."

"Based upon Conniff's testimony, there is nothing in her circumstances which is likely to change in the future. To be sure, her two sons will grow up and eventually become emancipated, reducing her living expenses somewhat. However, her youngest son was 11 at the time she filed her petition in bankruptcy, so the time of emancipation will be some years off. Moreover, when her sons become emancipated, her child support will be terminated, likely offsetting much of the savings from the emancipation of her children. The Court concludes that additional circumstances exist which make Conniff's current state of affairs likely to persist for a significant portion of the student loan."

d. *In re* Lamento, 520 B.R. 667, 679 (Bankr. N.D. Ohio 2014)

Debtor is 35 years old and works at a supermarket where she earns $10.15 an hour. Her children are ages 11 and 12. Her monthly take home pay is $1,328, and after expenses, her monthly balance is $3.00. (She has no rent or utilities expense because she lives with her mother and stepfather). She does not anticipate being able to go back to school to complete her degree. Her student loan debt is about $72,000.

"Given [debtor's] desperate circumstances, and her status as the proverbial honest but unfortunate debtor, she is entitled to sleep at night without these unpayable debts continuing to hang over her head for the next 25 years."

Views from the Bench: Current Developments and Trends in Bankruptcy Law

March 19, 2016
11:30 a.m.-12:30 p.m.

Moderator: Hon. Eugene Wedoff (Ret.), Bankruptcy Judge, ND Ill

Panelists:

Hon. Dennis Dow, Bankruptcy Judge, WD Mo

Hon. Deborah Thorne, Bankruptcy Judge, ND Ill

Four recent decisions bearing on the intersection of the Fair Debt Collection Practices Act and the Bankruptcy Code.

1. *Garfield v. Ocwen Loan Servicing, LLC,* 2016 WL 26631 (2d Cir. 2016)

This decision involves a complaint brought in district court by a Chapter 13 debtor, Donna Garfield, who had received a discharge in her bankruptcy case. According to the complaint, Ocwen Loan Servicing violated several provisions of the Fair Debt Collection Practices Act by attempting to collect a mortgage debt that was covered by Garfield's bankruptcy discharge.

Ocwen moved to dismiss the complaint on the ground that the Bankruptcy Code—and bankruptcy court—provided the exclusive remedy for violation of the discharge injunction, and so Garfield's allegations failed to state a claim.

The district court accepted this argument and granted the motion; the Second Circuit reversed. The circuit court's decision addresses two questions: first, to what extent the Bankruptcy Code implicitly repeals the FDCPA, and second, whether the particular violations of the FDCPA alleged by Garfield remain viable.

As to the general question of implicit repeal, the decision noted that the circuit had previously held that the Bankruptcy Code supplants the FDCPA for all activities within a bankruptcy case itself, citing *Simmons v. Roundup Funding, LLC,* 622 F.3d 93, 96 (2d Cir. 2010). (*Simmons* had refused to apply the FDCPA to an allegedly inflated proof of claim, holding that the protection afforded to debtors by bankruptcy law made FDCPA protection unnecessary.) In reviewing other authorities on this point, the decision noted that the Ninth Circuit reached a similar result in *Walls v. Wells Fargo Bank, N.A.,* 276 F.3d 502, 511 (9th Cir. 2002). But what the Second Circuit found particularly relevant was the Seventh Circuit's decision in *Randolph v. IMBS, Inc.,* 368 F.3d 726, 728 (7th Cir. 2004), which stated that one federal statute cannot "preclude" another, and that implicit repeal was the only basis for not enforcing both federal statutes bearing on the same matter. Implicit repeal, in turn, can only take place if it is not possible to comply with both statutes—and *Randolph* accordingly held that because it was possible to comply with both the automatic stay and with the FDCPA simply by not engaging in collection activity, improper collection activity could be challenged under either or both statutes. A consistent Third Circuit decision, *Simon v. FIA Card Services, N.A.,* 732 F.3d 259, 274 (3d Cir. 2013), was also noted.

While not overruling *Simmons*, the Second Circuit determined to apply the Seventh Circuit's *Randolph* analysis to activities allegedly violating the discharge injunction, reasoning that after the bankruptcy case ends, the debtor is no longer under bankruptcy protection and that if the provisions of the Bankruptcy Code and a the FDCPA are not incompatible, they should both be enforced.

Then, turning to the specific violations of the FDCPA set out in the complaint, the decision found no reason why FDCPA enforcement could not be pursued, notwithstanding the bankruptcy remedies for violation of the discharge injunction. (As an aside, it's hard to see how Garfield's debt could properly have been discharged, since it was apparently treated under § 1322(b)(5), and so was excepted from discharge by § 1328(a)(1).)

* * *

The remaining decisions all apply the *Randolph* rule that an FDCPA violation can take place within a bankruptcy case. They deal with the question whether a complaint stated a cause of action under the FDCPA by alleging that a debt collector filed proof of a claim subject to a statute of limitations defense. Each complaint alleged that the filing proof of a "stale" claim violated15 U.S.C. § 1692e, a section of the FDCPA that prohibits debt collectors from using false, deceptive, or misleading representations or means to collect a debt. All three of the decisions—representing a range of thinking on this question—are from the Northern District of Illinois.

2. *Robinson v. eCast Settlement Corporation,* 2015 WL 494626 (N.D.Ill. Feb. 3, 2015).

In this decision, a district judge found that the complaint failed to state a claim on which relief could be granted. The opinion recognized that the Seventh Circuit had held that a debt collector not only violates the FDCPA by filing a lawsuit on a stale claim, *Phillips v. Asset Acceptance, LLC,* 736 F.3d 1076 (7th Cir.2013), but even by sending a letter that asks a consumer to pay a stale claim, because the implies that the claim is actionable, *McMahon v. LVNV Funding, LLC,* 744 F.3d 1010, 1020–22 (7th Cir. 2014). The district court held, however, that a proof of claim in bankruptcy is "not deceptive, false, or misleading." 2015 WL 494626 at *3. Debt collectors are required to comply with Rule 3001(c)(3), which requires proof of claim for credit card debts to include a statement of the information relevant to a limitations defense, and the decision relies on the rule in concluding that proof of a stale credit card claim does not violate the FDCPA. "[A] proof of claim submitted on a court-approved form, fully compliant with Rule 3001(c)(3), is a neutral statement that a debt existed at a certain time and is now owned by the claimant. There is a risk that the untimeliness of a claim will not be caught (by the debtor, her lawyer, or the trustee), but that risk is not caused by any deception on the part of the claimant." *Id.*

3. *Edwards v. LVNV Funding, LLC* (*In re Edwards*), 539 B.R. 360 (Bankr. N.D.Ill. 2015).

This decision takes the view that proofs of claim are indistinguishable from complaints, and so pursuing a stale claim through either procedure violates the FDCPA. The opinion seeks to refute each of four aspects of the bankruptcy claims process that other decisions had said distinguished bankruptcy from general litigation:

a. *The presence of trustees charged with reviewing the validity of claims.* The opinion states that trustees do not in fact object to proofs of stale claims because this would "require trustees to examine the details of virtually every unsecured proof of claim, which is impracticable." 539 B.R. at 365.

b. *The lack of impact on the debtor*. The opinion recognizes that proofs of claim in Chapter 7 rarely affect the amount the debtor must pay, but states that in Chapter 13, the amount of the claims "often" affects debtor payments. 539 B.R. at 366.

c. *Legal representation.* The opinion acknowledges that the great majority of Chapter 13 debtors have legal representation, but says that for those who do not (perhaps 10% of total filers), the process of filing a claim objection will likely not be understood. *Id.*

d. *Absence of embarrassment.* One of the reasons why the Seventh Circuit found that the filing of stale claims in general litigation violated the FDCPA was that a consumer served with a complaint might default in order to avoid the embarrassment of appearing in court. *Phillips,* 739 F.3d at 1079. In a bankruptcy case, the debtor has already appeared at the time a claim is filed. The *Edwards* decision responds to this asserted difference by stating that "filing a viable objection to a claim could be very daunting" for unrepresented debtors. 539 B.R. at 366.

4. *Glenn v. Cavalry Investments LLC (In re Darryl Glenn)* 542 B.R. 833 (Bankr. N.D.Ill. 2016).

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This decision takes a unique approach to the filing of stale claims. In addition to citing the grounds for distinguishing proofs of claim from non-bankruptcy complaints, the decision notes that even under the FDCPA, a debt collector is allowed to make a non-misleading request for payment of a stale claim, citing the Seventh Circuit in *McMahon*, 744 F.3d at 1020 ("We do not hold that it is automatically improper for a debt collector to seek re-payment of time-barred debts . . . ."). The creditor thus holds a claim, even though subject to a limitations defense, and this claim is a property right. It then points out that a creditor who fails to file a timely proof of claim has the claim discharged in bankruptcy—preventing any further request for payment. If the FDCPA prohibited a creditor from filing proof of a stale claim, the decision holds, it could violate the Taking Clause of the Fifth Amendment, by depriving the creditor of its property right without due process. 542 B.R. at 847.

<u>SECTION 523(a)(2)(A)</u>
<u>Circuit Split and Other Interesting § 523 Issues</u>

When *Husky International Electronics, Inc. v. Ritz* was decided by the Fifth Circuit, it created a circuit split between the Fifth and Seventh Circuits. Subsequently, the First Circuit agreed with the Seventh Circuit in *Lawson*. The Supreme Court granted certiorari in *Husky*, and oral argument is set for March 1, 2016.

***Husky Int'l Elecs. Inc. v. Ritz,* 787 F.3d 312 (5th Cir. 2015)**

In this case, Husky sold goods to Chrysalis Manufacturing Corp., which Debtor was in control of and owned at least 30% of its common stock. Debtor transferred a substantial amount of Chrysalis' funds to other entities controlled by Debtor. Husky sued Debtor in district court to hold him liable for Chrysalis' debt, and Debtor subsequently filed Chapter 7 case. Husky objected to the discharge of the alleged debt under §§ 523(a)(2)(A), 523(a)(4), and 523(a)(6).

The Fifth Circuit held that a representation is needed to show actual fraud in § 523(a)(2)(A). First, the court looked to the *Field v. Mans* case, which it said appeared to assume that a false representation is required to show actual fraud. It also stated that *McClellan* was contrary to, and possibly foreclosed by, its own precedent. The court argued that the addition of "actual fraud" in 1978 was intended to codify the limited scope of the fraud exception, not to create a separate basis.

The court stated that if § 523(a)(2)(A) was read as broadly as *McClellan*, sections 727(a)(2), 523(a)(4), and 523(a)(6) would be redundant. Finally, the court concluded that any ambiguity to the exceptions to discharge should be construed in favor of the debtor.

***McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000)**

In this case, McClellan sold business assets to debtor's brother for $200,000. The brother defaulted, and McClellan filed suit seeking an injunction against debtor's brother transferring the assets. While the suit was pending, the brother sold the assets to Debtor for $10. Debtor then sold the assets for $160,000, and subsequently filed a case under Chapter 7.

The court determined that limiting § 523(a)(2)(A) to actual fraud is to exclude constructive fraud, not related to whether the intent to defraud was through misrepresentation of other improper means. The court stated that by distinguishing "actual fraud" and a "false representation," it is clear that actual fraud is broader. Further, it is difficult to lay down a definite and invariable rule of what defines fraud.

To the issue that § 523(a)(2)(A) may be intended to reach fraud in the inception of a debt—the court found that the debt in question arose when the sister prevented McClellan from collecting the money owed from his brother. The court determined that the debt the sister owes McClellan arose from her fraud against McClellan, not when her brother borrowed the money. However, the dissent noted that § 523(a)(6) was a more direct avenue of dealing with this situation.

***Sauer Inc. v. Lawson*, 791 F.3d 214 (1st Cir. 2015)**

In this case, Sauer obtained a $168,351 judgment against Debtor's father. Debtor's father subsequently transferred $100,151 to a shell entity owned by Debtor. Then Debtor transferred $80,000 to herself over the course of the next year and later filed a Chapter 13 case.

The court held that § 523(a)(2)(A) extends to knowingly accepting a fraudulent transfer that was intended to hinder the transferor's creditor. The court stated that the Supreme Court directed the meaning of "actual fraud" to be its common law meaning at the time that language was added to

§ 523(a)(2)(A)—and the Restatement would include fraudulent conveyances along with fraudulent misrepresentations. The court concluded that a common understanding of "fraud" is in line with this.

The court also denied the argument that § 523(a)(2)(A) should be extended less because this was a Chapter 13 case instead of a less forgiving Chapter 7 case. The court noted that, if it were to say that receiving a fraudulent conveyance was under § 523(a)(6), then the transferee could file for Chapter 13 and have this debt discharged.

RELATED SECTION 523 CASES

The following recent cases analyze other sections of Section 523.

***In re Martin*, 542 B.R. 479 (B.A.P. 9th Cir. 2015)**

In this case, Debtors did not file their tax returns for three years ending in 2006. In 2008, the IRS completed an audit examination and a notice of deficiency for each of the three years. After the IRS threatened to collect unpaid taxes, Debtors filed the three returns and the IRS adjusted their liability. Debtors filed a case in Chapter 7, and the IRS sought to find the tax debt non-dischargeable under § 523(a)(1)(B)(i).

The issue in this case was whether the Debtor's tax returns were qualified returns for the purposes of § 523. Both parties agreed that a literal reading of "return" was too harsh, but the IRS focused on whether the Debtors filed before or after its assessment to determine whether it qualified.

The court rejected the literal reading of the hanging paragraph in § 523, which seemed to show that untimely returns are not returns under § 523. The court, instead, stated that by adding the "return" definition in 2005, Congress effectively codified a test (the *Beard* test) to determine what would qualify as a return.

***In re Bobinski*, No. 2:15-CV-085-JD, 2015 WL 9094054 (N.D. Ind. Dec. 15, 2015)**

In this case, Debtor and his former spouse went through litigation regarding their children and they each agreed to pay half the fees of a guardian *ad litem* who served during the case. Debtor filed a case in Chapter 7, and the guardian *ad litem* sought to determine the fees owed by Debtor were non-dischargeable under § 523(a)(5).

In determining that these fees were non-dischargeable, the court reasoned that the fees were "in the nature of support" for Debtor's child, even though they were not payable to a payee specifically listed in 11 U.S.C. § 101(14A)(A). The court also reasoned that, since Debtor had a legal obligation to hire a guardian *ad litem*, the person hired satisfies the payee requirement.

Equitable Cuteness: Of Mountains and Mice
By Bruce A. Markell

Bankruptcy Law Letter

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Equitable Cuteness: Of Mountains and Mice

By Bruce A. Markell

Introduction

Circuit courts are buzzing this year with a doctrine peculiar to bankruptcy: equitable mootness. This edition of the *Bankruptcy Law Letter* looks at three recent circuit level cases issued in the last six months which could reshape and perhaps redefine the doctrine. Each of these cases, *In re One2One Communications, LLC*,[1] *In re Tribune Media Company*,[2] and *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Properties Inc.*,[3] involves efforts by plan proponents to dismiss potentially meritorious appeals on grounds that too much has occurred since confirmation to make any decision by an appellate court relevant. Before examining each of these cases, however, I take a quick survey of the development of the equitable mootness doctrine.

Evolution

As doctrines go, equitable mootness is relatively new, dating from 1981. Most trace its origins to *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*.[4]

Roberts Farms

In *Roberts Farms*, the debtor had filed a Chapter XI case under the 1898 Bankruptcy Act, and confirmed its plan of arrangement. Trone, a creditor, objected. Before lodging his appeal of the confirmation order, Trone sought a writ of mandamus from the district court seeking to bar the bankruptcy judge from implementing the plan. The request was denied.[5] The appellees then moved to dismiss the appeal as moot, and the district court granted the motion. Trone appealed that order (and also foolishly tried again for a writ of mandamus, which again was denied).

On appeal to the Ninth Circuit, the only issue was the propriety of the mootness dismissal. The appellees again moved to dismiss the appeal on mootness grounds. After examining cases involving sales from bankruptcy estates, and the adoption of Rule 805 (a precursor to Section 363(m)), the court had the following to say:

IN THIS ISSUE:

> Here . . . many intricate and involved transactions . . . were contemplated by the plan of arrangement (even to and including liquidation and reorganization of the debtor corporation) and stand solely upon the order confirming the plan of arrangement for court approval and confirmation of the transactions. Were we to deny the motion to dismiss for mootness and on consideration of the merits reverse the order of the District Court, what would be the result? Are we not quite patently faced with a situation where the plan of arrangement has been so far implemented that it is impossible to fashion effective relief for all concerned? Certainly, reversal of the order confirming the plan of arrangement, which would knock the props out from under the authorization for every transaction that has taken place, would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court.[6]

As authority, the court cited *Mills v. Green*,[7] an 1895 Supreme Court case in which the Court dismissed an appeal that sought to enjoin the selection of a committee to attend a constitutional convention that had already occurred by the time the Court heard the appeal.

Interestingly, the Ninth Circuit dealt with Trone's failure to seek a stay as a separate grounds for dismissing the appeal.[8] On this aspect, the Ninth Circuit had the following to say:

> it is obligatory upon appellant in a situation like the one with which we are faced to pursue with diligence all available remedies to obtain a stay of execution of the objectionable order (even to the extent of applying to the Circuit Justice for relief (Rule 51, Supreme Court Rules)) if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.[9]

Thus, there were two grounds in *Roberts Farms* for dismissal: one of futility of remedy, and the other an equity-based analysis based on a lack of diligence and a change of circumstances.

Continental

Roberts Farms and the doctrine of equitable mootness had slow acceptance after 1981. In 1996, however, the equitable mootness doctrine received a major boost in *In re Continental Airlines*.[10] There, the Third Circuit, sitting on *en banc* with a bare majority of 6-5, explicitly embraced equitable mootness without explicitly defining it. Instead, the majority opinion noted five factors to be considered:

> Factors that have been considered by courts in determining whether it would be equitable or prudential to reach the merits of a bankruptcy appeal include (1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments.[11]

Among other authorities, the majority used *Roberts Farms* to justify this set of factors. But as pointed out by then-Judge Alito in dissent, *Roberts Farms* was a narrow decision, apparently based on the theory that courts should refrain from deciding a case where "no relief was practicable as a result of the many post-confirmation transactions that were irreversible" due to former Bankruptcy Rule

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805.[12] Judge Alito did not see the same statutory basis or the same facts in *Continental*. As he explained, "the holding of *Roberts Farms* was gradually extended well beyond anything that could be supported by the authority on which Roberts Farms rested."[13] And as there was no clear statutory basis precluding the court from hearing case, he dissented.

Charter

The Third Circuit wasn't the only circuit embracing equitable mootness. The Second Circuit was developing its own jurisprudence on the subject, which it expressed in *R2 Investments, LDC v. Charter Communications, Inc.*[14] In *Charter*, the nation's fourth largest cable company sought Chapter 11 relief. Its confirmed plan contained many compromises and, to no surprise, many creditors believed those compromises were improper.

They appealed, and sought a stay. It was denied. The plan proponents then "immediately took actions under the Plan, including cancelling the equity issued by the prepetition Charter, issuing shares in the reorganized Charter, converting notes issued by the prepetition Charter entities into new notes, and issuing warrants to Charter's prepetition noteholders."[15]

At the Second Circuit, the objectors were met with equitable mootness arguments. The Second Circuit characterized its standard used to determine equitable mootness as follows:

> In this circuit, an appeal is presumed equitably moot where the debtor's plan of reorganization has been substantially consummated. . . . "Substantial consummation" is defined in the Bankruptcy Code to require that all or substantially all of the proposed transfers in a plan are consummated, that the successor company has assumed the business or management of the property dealt with by the plan, and that the distributions called for by the plan have commenced. See 11 U.S.C. § 1101(2).
>
> The presumption of equitable mootness can be overcome, however, if . . . five . . . factors are met:
>
> (1) "the court can still order some effective relief";
> (2) "such relief will not affect the re-emergence of the debtor as a revitalized corporate entity";
> (3) "such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court";
> (4) "the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings"; and
> (5) "the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from."[16]

Charter left open some important questions. Just who had the burden of introducing evidence of factors that could "overcome" the presumption of mootness? What did it mean to "knock the props out from under" the plan provisions? What exactly was the role of a stay request?

Semcrude

Cases nonetheless progressed in the Second Circuit and elsewhere. *Continental* was often cited as a key precedent in deciding dismissal motions. In 2013, however, the Third Circuit had another look at *Continental's* five factors in *Samson Energy Resources Company v. Semcrude, L.P. (In re Semcrude, L.P.)*.[17]

It was not satisfied with their content. Here's why:

> These factors . . . are interconnected and overlapping. . . . "The second factor principally duplicates the first in the sense that a plan cannot be substantially consummated if the appellant has successfully sought a stay." In analyzing the first factor, courts have asked "whether allowing an appeal to go forward will undermine the plan, and not merely whether the plan has been substantially consummated under the Bankruptcy Code's definition." This collapses the first and fourth factors. The third factor adds an additional consideration—whether granting relief will undermine "the reliance of third parties, in particular investors, on the finality of [plan confirmation]." "Finally, the fifth factor supports the other four by encouraging investors and others to rely on confirmation orders, thereby facilitating successful reorganizations by fostering confidence in the finality of confirmed plans."
>
> In practice, it is useful to think of equitable mootness as proceeding in two analytical steps: (1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation.[18]

Against this background came the wave of equitable mootness decisions in 2015.

The Recent Cases

Semcrude did not end the debate. Although it called for a careful and nuanced analysis, many lawyers were deaf to its warnings. They pressed equitable mootness in all cases, even ones that were small and simple. Their actions could be characterized as proceeding "[w]ith the thrust and lack of craft of a berserk sword; All lion, none of the fox."[19] And this strategy nearly did them in—but not quite.

One2One

The first significant reaction in the Third Circuit was *In re One2One Communications, LLC.*[20] *One2One* is notable as much for its concurrence as for its main opinion. But both are worth studying.

The Majority Opinion

One2One was a billing services company concentrating on the cable industry. It had gotten into trouble over stealing clients, however, and because of those thefts it and its chief executive officer[21] were on the wrong end of a $9 million judgment.[22] That judgment chased One2One into Chapter 11.

Other than the judgment, however, One2One's case was fairly simple. It had but 17 unsecured creditors, not counting insiders. It had one secured creditor with a blanket lien on all of One2One's assets, and that lender was owed less than $100,000.[23] There were no structural changes in the debtor (only an option for a change of ownership), and no public equity or debt was floated as part of the plan. As noted by the Third Circuit, "the Plan did not provide for new financing, mergers or dissolutions of entities, issuance of stock or bonds, name change, change of business location, change in management or any other significant transactions."[24] The plan did, however, release third parties; in particular, it released the former executive from the $9 million judgment.

Quad/Graphics, Inc., the holder of the $9 million judgment, appealed. Among other things, it believed that the plan violated the absolute priority rule, and improperly released the CEO from its judgment. It sought and was denied a stay by both the bankruptcy and the district courts. The debtor then sought to dismiss the appeal on equitable mootness grounds.

The district court faithfully intoned the learning of *Continental*, and dismissed the appeal. Quad/Graphics appealed to the Third Circuit.

The circuit reversed. It also looked to *Continental*, but threw in citations to *Semcrude* as well.[25] Somewhat surprisingly, the appellate court found that the granting of the motion to dismiss was an abuse of discretion. It was surprising not because of the facts, but because the abuse of discretion standard which the court applied is quite a burden for an appellant to establish, especially in a fact intensive inquiry such as equitable mootness requires.

The Third Circuit found two instances of abuse of discretion. First, the district court "placed the burden on Appellant to demonstrate" that reversal would undermine the plan. Second, "it concluded that because granting Appellant's requested relief would reverse the Plan, this factor necessarily favored the Debtor."[26]

As to the first point, the court found that, as with most civil matters, the person who seeks the requested relief has the burden to demonstrate entitlement to that relief. Appellees who wish to dismiss need to demonstrate that the appeal is equitably moot. Switching burdens is an error of law, and the Third Circuit thought it thus thought it an abuse of discretion.[27]

The second error, however, is not so easily justified. Here, the debtor had argued that the expectations of the plan sponsor, the creditors and the employees would be at risk. The plan sponsor had invested $200,000 in the company and had assumed managerial roles and taken managerial responsibility. The creditors had received two installments of payments. New employees had been hired.

These arguments did not move the Third Circuit. Labeling them "routine transactions," the court indicated that such actions were "likely to transpired in almost every bankruptcy reorganization."[28] Combined with a lack of publicly-issued debt or equity, "that would make it difficult to retract the

Plan," the court found an abuse of discretion in applying the first and fourth *Continental* factors—whether the plan was substantially consummated[29] and whether the relief would affect the success of the plan. It thus reversed.

The Concurrence

That, however, was not the end of the story. Circuit Judge Krause appended a 15-page concurrence, nearly double the length of the majority opinion. And what a concurrence. It was nothing short of a full blown, no page limit, attack on equitable mootness.

She first questioned whether equitable mootness was being implemented in the fashion intended. As she saw it, equitable mootness was a limited doctrine that should be cautiously applied in complex cases.[30] Yet "district courts have continued to invoke the doctrine in modest, non-complex bankruptcies and where appellants have sought limited relief."[31] The fact that the "thoughtful and diligent" district judge in *One2One* "misconstrued" the case law behind equitable mootness "reflects a doctrine adrift and in need of reconsideration."[32]

She then searched for the analytical underpinnings of the doctrine, and found none. In light of this vacuum, she suggested as a theme of her concurrence that the duty of federal judges to hear cases properly before them trumped the "abdication" of jurisdiction she found inherent in equitable mootness.[33] In particular, she found Congress' implementation of Section 363(m) and 364(e), sections which insulate certain sale and financing orders from appeal, created a negative inference that such insulation extends to appeals from confirmation orders.[34]

Judge Krause then questioned the constitutionality of the doctrine in light of *Stern v. Marshall*. Her argument is compact, and compelling: how can a system that requires Article III supervision of bankruptcy judges as a condition of its existence tolerate a doctrine in which Article III judges are required to decline to review a certain, important, class of orders entered by the bankruptcy judges they are supposed to supervise?[35]

Judge Krause's final critique was of the doctrine's efficacy. In essence, she pointed to the fuss caused by whether an appeal is moot, and wondered whether the energy expended on equitable mootness dismissal motions would be better spent reviewing the merits—and posited that cases would end earlier or at the same time were there no fights about mootness.[36]

In light of these criticisms, Judge Krause suggested en banc review to eliminate the doctrine was appropriate. She stated that other doctrines and approaches could fill the role served by equitable mootness. In particular, she suggested laches and sanctions against delay. She also suggested a more expansive view towards many things thought to be scrambled by consummation of a plan.[37] With respect to this last point, Judge Krause particular looked to the Seventh Circuit and its acceptance that even mergers and stock issuances can be unwound.[38]

Even if en banc review were not to be granted, and the doctrine retained, Judge Krause offered a series of modifications to make the rule less objectionable. She first suggest that, with respect to diligence, dismissal should only occur if a stay is not sought, and not inquire into other aspects of diligence.[39]

She then would seek clarification the "significant harm" and "justifiable reliance" factors of *Continental*, and not defer to those "who act opportunistically or advocate unlawful plan provisions."[40]

Judge Krause's third suggestion is that a de novo, instead of an abuse of discretion, review would be appropriate.[41]

Finally, she suggested that courts should take " 'a quick look at the merits of [an] appellant's challenger' to determine if it is 'legally meritorious or equitable compelling.' "[42]

All good arguments. But the parties did not seek a rehearing in One2One, and another panel of the Third Circuit took up Judge Krause's challenge not less than two months later in *In re Tribune Media Company*.[43]

Tribune

Tribune is in part an appellate opinion, and in part an answering brief to Judge Krause's concurrence in *One2One*. And, as we shall see, it is the winning brief. As with *One2One*, there is a majority opinion and a concurrence—with the author of the majority opinion also the author of the concurrence!

The Majority Opinion

Tribune involved a leveraged-buyout (LBO) gone bad. When the sponsor of the LBO, Sam Zell, structured the original buyout, he secured the debt necessary for the LBO financing with the assets of the target—the Tribune Company—and with guaranties from the Tribune Company's subsidiaries. When Tribune filed, the validity of this debt and the guaranties was placed squarely at issue.

Ultimately, the debtor, together with the Unsecured Creditors' Committee and with Tribune's lender, proposed a plan that settled the LBO-based claims for approximately $369 million and a percentage of recoveries from other claims for relief.

Aurelius Capital Management, however, had bought $2 billion of pre-LBO debt, and objected to the plan. It thought the settlement was way too cheap, and proposed its own plan. It lost; the bankruptcy court chose to belief the independent examiner's evaluation of the merits and of the value of the LBO claims, and approved the settlement and the plan on that basis.

Aurelius sought to stay the effectiveness of the plan. The bankruptcy court indicated it would enter a stay—if Aurelius would post a $1.5 *billion* bond. Aurelius balked, and appealed seeking to eliminate the bond and expedite its appeal. It lost on both counts. Tribune then proceeded to implement its plan.

Tribune then filed the inevitable motion to dismiss on equitable mootness grounds. The district court granted the motion, and Aurelius again appealed.

The court, speaking through Judge Ambro, engaged in some consolidation and massaging of the equitable mootness doctrine. After citing *Continental's* five factors, Judge Ambro noted that "[t]his statement reveals that the doctrine was then, as far as our Court was concerned, in its infancy."[44] Matters uttered in infancy are rarely binding, and so Judge Ambro noted that as the doctrine matured, experience brought about a more mature list of factors. As the court put it:

> Over the years, our precedential opinions have refined the doctrine to its current, more determinate state. As we recently put it, equitable mootness . . . proceed[s] in two analytical steps: (1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation.[45]

The formulation focuses on the effect a successful appeal (or the possibility that a successful appeal) would have on third parties. In particular, the court stated, this statement of the rule primarily focuses on investors, especially outside investors who contribute money as equity investments.[46]

Favoring these investors' interests encourages socially valuable interests such as investing in viable reorganizations, and reducing disturbances of the free flow of commerce.[47] The court summarizes the rationale for its reformulation as follows:

> The theme is that the third parties with interests protected by equitable mootness generally rely on the emergence of a reorganized entity from court supervision. When a successful appeal would not fatally scramble a confirmed and consummated plan, this specific reliance interest most often is not implicated, as the plan stays in place (with manageable modifications possible) and the reorganized entity remains a going concern.[48]

Thus, if an appeal simply reallocates consideration from one class of creditors to another, it is less likely to be equitably moot than an appeal which seeks to attack a plan provision relied upon by an investor who has furnished hard money consideration.

Against this background, the court found Aurelius' appeal moot. Aurelius wanted nothing less than to scuttle the settlement with Zell, which formed the basis of the plan. If that were allowed, the result would "recall the entire Plan for a redo."[49]

Judge Ambro then mused that "returning to the drawing board would at a minimum drastically diminish the value of new equity's investment. That investment no doubt was in reliance on the Settlement . . . ."[50] Since Aurelius' competing plan had done just that, and had been significantly out-voted, such a result would "give Aurelius by judicial fiat what it could not achieve by consensus within Chapter 11 proceedings . . . "[51]

That may be a little too far. Appellate courts typically do not find facts, and it is unclear where Judge Ambro is getting facts such as the claim that a return to the drawing board would "drastically diminish" new equity's value (after all, if Aurelius is right, it might actually increase its value). Similarly, it is not quite true that Aurelius sought victory by "judicial fiat"—that would discount the fact that all Aurelius sought was reversal of the order confirming the competing plan, not confirmation of its plan, something that would require additional factual findings at the bankruptcy court level.

And then there is an added insult. The court not only chastised Aurelius for trying to gain by appeal what it could not by negotiation, but also, as the court couldn't "help but add," what it could have obtained "if it had put up a bond."[52] This is sort of the ultimate gotcha. In most appeals, the amount of the appeal bond bears some resemblance to the liability of a party in the underlying action—a defendant who has a judgment entered against it posts a supersedeas bond keyed to the amount of its liability as found by the court. But in an appeal bond from a confirmation, the appellee is not bonding over a determination of its past liability; rather, it is bonding its future, contingent, liability to the debtor for simply taking an appeal. And it doesn't even get a discount for the possibility it might prevail. In short, it gets taxed even if it wins for being cheeky enough to appeal.

This inequity is underscored by the amount of the required bond in *Tribune*—$1.5 billion. A lot of money is required to post such a bond,[53] and curiously absent from the equitable mootness discussion is the fairness in requiring an appellant to be at risk for damage yet to occur to the estate for simply exercising its appeal rights.

Indeed, Judge Ambro re-emphasized the bond point when pointing out why it was fair to not hear a meritorious challenge—the appellant had the opportunity to bond the consummation of the plan, and thus bears some responsibility for allowing it to consummate. Such inaction then gives justification to other parties to treat the confirmation as unassailable.[54]

The court took some comfort that Aurelius never challenged the bond amount; it simply tried to eliminate the bond requirement entirely. That such an argument is not to be taken very seriously is underscored by noting that the court stated that the bankruptcy judge "carefully calculated the likely damage to the estate" and that "the valuation was well-considered and as convincing as the alchemy of valuation in bankruptcy can be."[55]

The court thus concluded that Aurelius' appeal was moot—it would fatally scramble the reorganization while upsetting justifiable expectations of investors.

The Third Circuit did, however, allow another appeal in the same case. In addition to Aurelius, other creditors who had a prepetition subordination agreement had appealed claiming that the plan ignored that agreement. Here, the court had no trouble finding a lack of the destructive scrambling Aurelius sought. These creditors' rights could be vindicated simply by ordering disgorgement against the class improperly receiving the distribution.

But the court tap dances around the reliance of the creditors in the subordinated class, stating that if the senior creditors were correct, the subordinated creditors "by definition cannot *justifiably* have relied on the payments."[56] Moreover, noted the court, disgorgement was only one of many possible remedies; a change in future distributions to address the overpayment was another.[57]

So Aurelius' appeal is moot; the senior creditors' is not. But that was not the end of the story.

The Concurrence

Judge Ambro, joined by another member of the panel, Judge Vanaskie, concurred in his own opinion. The purpose was plain: to respond to Judge Krause's concurrence in *One2One* by laying "out briefly why this judge-made doctrine is abided by every Court of Appeals."[58]

Judge Ambro first addressed the constitutional issue: whether Article III supervision is eroded beyond recognition if Article III judges decline to hear appeals from confirmations entered by bankruptcy judges. He makes quick work of this argument. After noting that the constitutional concern is either a personal waivable right, or a structural right not capable of being waived, he disposes of the personal right argument by stating that "[a]s an equitable doctrine applied by Article III courts, equitable mootness does not implicate this right."[59]

This rings odd. Article III supervision and review presupposes the ability of an Article III court to review of the *merits* of a decision made by a non-Article III tribunal, not just the *consequences* of that decision. Undaunted by this mismatch of merits and consequences, Judge Ambro next addresses the structural concern, and also finds it absent. There is no congressional usurpation for the same reason as there is no personal right—the doctrine is one developed and applied by the judiciary, so that there is no congressional "aggrandizement" that the structural concern fears.[60]

As to the statutory argument—that if Congress had wanted confirmation orders to have the same status as sale and financing orders, it would have so provided—Judge Ambro simply recounts that sometimes stuff happens, and stuff happening is not confined to bankruptcy. In this regard, he points out that bankruptcy courts are courts of equity, and in equity the merits of a position sometimes lose to the equities of the situation.[61] In short, there is no bankruptcy exceptionalism here, just the unexceptional extension of traditional equitable concepts to the confirmation arena.

Judge Ambro concludes by putting forward a public policy argument that by favoring justifiable reliance by investors, costs of bankruptcy can be and often are reduced. The reduction of these costs "significantly mitigates the injustice to a wronged appellant whose cause may otherwise be deemed moot . . . ."[62]

The stage was thus set for a battle on equitable mootness. On September 11, however, Judge Ambro, in accordance with Third Circuit rules, signed an order indicating that there would be no rehearing, and stating that a majority of active judges had not supported a rehearing en banc.

Transwest

The final case in the cavalcade of equitable mootness decisions is *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Properties Inc.*[63] As with *One2One* and *Tribune*, there are two opinions, except the Ninth Circuit followed the tradition of a majority opinion and a dissent.

The Majority Opinion

In *Transwest*, lenders had claims approaching $300 million against hotel properties worth $92 million.[64] The lenders made the Section 1111(b) election, thereby forgoing their deficiency claim in return for a larger secured claim on the property. They made the election so that if the properties were ever sold after confirmation, there secured claim would be equal to their debt, and thus they might stand to collect more than the $92 million.

The debtors, however, jiggered their plan so that if the hotels were sold between five and 15 years after confirmation, there would be no due on sale clause applicable. The lender believed that this gutted their Section 1111(b) clause and appealed.[65]

The lender also requested a stay, and it was denied on the curious ground that the appeal was not likely to be moot if the stay were not granted, and thus there was no irreparable harm.[66]

When the appeal was heard by the district court, however, that court thought the plan had been consummated and that third parties had relied on that consummation. It thus found upsetting the plan would be inequitable, and dismissed the appeal as moot.[67]

When the Ninth Circuit got the appeal, it first set out the differences between equitable and constitutional mootness. "Unlike Article III mootness, which causes federal courts to lack jurisdiction and so to have an *inability* to provide relief, equitable mootness is a judge-created doctrine that reflects an *unwillingness* to provide relief."[68]

The Ninth Circuit then set out its own four elements of relief:

"We will look first at whether a stay was sought, for absent that a party has not fully pursued its rights. If a stay was sought and not gained, we then will look to whether substantial consummation of the plan has occurred. Next, we will look to the effect a remedy may have on third parties not before the court. Finally, we will look at whether the bankruptcy court can fashion effective and equitable relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation for the bankruptcy court."[69]

In undertaking this inquiry, the court indicated that factual findings made by the courts below were reviewed for clear error, but that legal conclusions were reviewed de novo.[70]

In reviewing the appeal, the Ninth Circuit focused on the third consideration, that of whether it is possible to effect a remedy that is equitable. In this examination, however, the court stated that

[t]hird parties' reliance on the consummation of the plan is not enough to find this prong satisfied. Rather, for this factor to weigh in favor of holding a party's appeal to be equitably moot, the specific relief sought must bear unduly on innocent third parties.[71]

Here, the court noted that the outside investor had participated in the plan process and had even negotiated with the lenders over the final confirmation order. With such intimate knowledge of the plan process, the court thus held that such participation meant the outside investor was not an innocent third party, and that this difference in status affected the equities.[72] This was the case even though the investor was not a party to the appeal, and thus could not be part of any court-ordered relief on the appeal.

The court thus found the appeal not equitably moot; the lenders' claim to have their matter heard outweighed the other considerations put forward in favor of dismissal.

The Dissent

Judge Milan Smith dissented. The key point of disagreement was whether the investor's participation in the plan process made a difference. Everyone acknowledged that the investor was not an insider, and was merely looking to protect its interests—as you would expect investors to do in order to ensure that their money was being invested wisely. By categorizing the investor's concerns as no different than insiders, Judge Milan indicated that the court had done much to erode confidence in the bankruptcy process, and to lower the amount that would be paid for future bankruptcy debtors (much to the detriment of creditors generally).

Conclusion

These decisions seem to indicate a trend that mindless extensions of equitable mootness will fail. There is some room left for the doctrine, but whether that room is a large or small space is still up for debate. Until more clarity exists, however, it is worthwhile to outline some of the differences and distinctions drawn.

On the difference side, the circuits disagree on whether the standard of review is de novo or abuse of discretion. The Third Circuit adopts abuse of discretion; the Ninth adopts de novo. Although the Ninth and the Third agree that it is the appellant's burden to show an appeal is equitably moot, this is not consonant with the Second's view in *Charter*; it is also belied somewhat by *Tribune's* focus on Aurelius's failure to challenge or supply evidence on the amount of a fair bond.

But the main point of contention is what constitutes justifiable reliance, and whose reliance counts. The Third Circuit undoubtedly would have ruled the opposite way had it been presented with the facts in *Transwest*. There was no doubt that the investors in Tribune were just as involved in the progress of that case as was the investor in *Transwest*.

At the end of this, however, the Third and the Ninth Circuits embrace the equitable mootness doctrine, with modification designed to rein in abuses. One change seems to be a move to confine the doctrine to large and complex cases that involve public debt or equity. Another is to allow, as in *Tribune*, appeals only if the appeal affects inter-class allocation of value, rather than presenting a challenge to the central core of the confirmation.

One2One, Tribune and *Transwest* spill much ink in trying to define or at least confine equitable mootness. In the end, however, the landscape has been left relatively unchanged, except for the dull rumblings of discontent. To paraphrase an Aesop's Fable, the mountains have labored mightily, but produced a mouse.[73]

ENDNOTES:

[1]In re One2One Communications, LLC, 61 Bankr. Ct. Dec. (CRR) 94, 2015 WL 4430302 (3d Cir. 2015).

[2]In re Tribune Media Co., 799 F.3d 272, 61 Bankr. Ct. Dec. (CRR) 124 (3d Cir. 2015).

[3]In re Transwest Resort Properties, Inc., 801 F.3d 1161 (9th Cir. 2015).

[4]In re Roberts Farms, Inc., 652 F.2d 793, 7 Bankr. Ct. Dec. (CRR) 1248, Bankr. L. Rep. (CCH) P 68325 (9th Cir. 1981).

[5]The Ninth Circuit characterized the decision to seek a writ of mandamus instead of an appeal as "a procedural monstrosity." Roberts Farms, 652 F.2d at 795.

[6]Roberts Farms, 652 F.2d at 797.

[7]Mills v. Green, 159 U.S. 651, 653, 16 S. Ct. 132, 40 L. Ed. 293 (1895).

[8]Roberts Farms, 652 F.2d at 798 ("An entirely separate and independent ground for dismissal has also been established because Appellants have failed and neglected diligently to pursue their available remedies to obtain a stay of the objectionable orders of the Bankruptcy Court and have permitted such a comprehensive change of circumstances to occur as to render it inequitable for this court to consider the merits of the appeal.").

[9]Roberts Farms, 652 F.2d at 798.

[10]In re Continental Airlines, 91 F.3d 553, 29 Bankr. Ct. Dec. (CRR) 629, 36 Collier Bankr. Cas. 2d (MB) 785 (3d Cir. 1996) (en banc).

[11]91 F.3d at 560 (citation omitted).

[12]In re Continental Airlines, 91 F.3d 553, 569, 29 Bankr. Ct. Dec. (CRR) 629, 36 Collier Bankr. Cas. 2d (MB) 785 (3d Cir. 1996) (Alito, J., dissenting). Rule 805 formerly provided that, unless stayed, "an order approving a sale of property . . . to a good faith purchaser . . . shall not be affected by the reversal or modification of such order on appeal."

[13]91 F.3d at 570 (Alito, J., dissenting).

[14]In re Charter Communications, Inc., 691 F.3d 476, 56 Bankr. Ct. Dec. (CRR) 254, 68 Collier Bankr. Cas. 2d (MB) 196, Bankr. L. Rep. (CCH) P 82339 (2d Cir. 2012), cert. denied, 133 S. Ct. 2021, 185 L. Ed. 2d 905 (2013).

[15]691 F.3d at 481.

[16]691 F.3d at 481 (quoting Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.), 10 F.3d 944, 952-53 (2d Cir. 1993)).

[17]In re Semcrude, L.P., 728 F.3d 314, 58 Bankr. Ct. Dec. (CRR) 100, Bankr. L. Rep. (CCH) P 82538, 179 O.G.R. 413 (3d Cir. 2013).

[18]Samson Energy Resources Co. v. Semcrude, L.P. (In re Semcrude, L.P.), 728 F.3d 314, 320-21 (3d Cir. 2013) (quoting In re Phila. Newspapers, LLC, 690 F.3d 161, 168 (3d Cir. 2012) (citing Nordhoff Invs., Inc. v. Zenith Elecs. Corp., 258 F.3d 180, 184 (3d Cir. 2001) (citations omitted).

[19]Stephen Vincent Benét, Army of Northern Virginia (describing Confederate general John Bell Hood).

[20]In re One2One Communications, LLC, 61 Bankr. Ct. Dec. (CRR) 94, 2015 WL 4430302 (3d Cir. 2015).

[21]These matters are never simple. The chief executive officer held no equity in the debtor, but was the husband of the owner of 75% of the equity interests in the holding company that held 100% of the membership interests in the debtor.

[22]That judgment was affirmed during One2One's appeal. Quad/Graphics, Inc. v. One2One Communications, LLC, 529 Fed. Appx. 784 (7th Cir. 2013).

[23]One2One, 2015 WL 4430302 at *5.

[24]One2One, 2015 WL 4430302 at *5.

[25]One2One, 2015 WL 4430302 at *3-4.

[26]One2One, 2015 WL 4430302 at *5.

[27]This itself is odd. Typically, courts of appeals review district courts' decisions to grant or deny equitable relief for abuse of discretion, underlying questions of law de novo, and findings of fact upon which the decision to grant equitable relief was made under the clearly erroneous standard. Preferred Sites, LLC v. Troup County, 296 F.3d 1210 (11th Cir. 2002); Grossbaum v. Indianapolis-Marion County Bldg. Authority, 100 F.3d 1287 (7th Cir. 1996).

[28]One2One, 2015 WL 4430302 at *6.

[29]The court played fast and loose with substantial consummation. While it agreed that the plan had been substantially consummated under the statutory definition contained in 11 U.S.C.A. § 1101(2), One2One, 2015 WL 4430302 at *5, the court found that the first Continental factor only required a determination " 'whether allowing an appeal to go forward will undermine the plan, and not merely whether the plan has been substantially consummated under the Bankruptcy Code's definition.' " One2One, 2015 WL 4430302 at *3 (quoting In re Philadelphia Newspapers, LLC, 690 F.3d 161, 168-69, 56 Bankr. Ct. Dec. (CRR) 222, 67 Collier Bankr. Cas. 2d (MB) 1770, Bankr. L. Rep. (CCH) P 82311 (3d Cir. 2012), as corrected, (Oct. 25, 2012) and cert. dismissed, 133 S. Ct. 1001, 184 L. Ed. 2d 777 (2013)).

[30]One2One, 2015 WL 4430302, at 7 (Krause, J., concurring).

[31]One2One, 2015 WL 4430302, at 7 (Krause, J., concurring).

[32]One2One, 2015 WL 4430302, at 8 (Krause, J., concurring).

[33]One2One, 2015 WL 4430302, at 9 (Krause, J., concurring).

[34]One2One, 2015 WL 4430302, at 11-12 (Krause, J., concurring).

[35]One2One, 2015 WL 4430302, at 13-15 (Krause, J., concurring).

[36]One2One, 2015 WL 4430302, at 15-16 (Krause, J., concurring).

[37]One2One, 2015 WL 4430302, at 16-17. (Krause, J., concurring).

[38]One2One, 2015 WL 4430302, at 18 (Krause, J., concurring).

[39]One2One, 2015 WL 4430302, at 20 (Krause, J., concurring).

[40]One2One, 2015 WL 4430302, at 20 (Krause, J., concurring).

[41]One2One, 2015 WL 4430302, at 21 (Krause, J., concurring).

[42]One2One, 2015 WL 4430302, at 22 (Krause, J., concurring) (quoting In re Paige, 584 F.3d 1327, 1339, 52 Bankr. Ct. Dec. (CRR) 91 (10th Cir. 2009)).

[43]In re Tribune Media Co., 799 F.3d 272, 61 Bankr. Ct. Dec. (CRR) 124 (3d Cir. 2015).

[44]Tribune, 799 F.3d at 278.

[45]Tribune, 799 F3d. at 278 (quoting Semcrude, 728 F.3d at 321). Not surprisingly, Judge Ambro was Semcrude's author.

[46]Tribune, 799 F.3d at 279.

[47]Tribune, 799 F.3d at 279.

[48]Tribune, 799 F.3d at 280.

[49]Tribune, 799 F.3d at 281.

[50]Tribune, 799 F.3d at 281.

[51]Tribune, 799 F.3d at 281.

[52]Tribune, 799 F.3d at 281.

[53]For example, Exxon had to pay $70 million to bond the $5 billion punitive damages judgment in the Exxon Valdez case. See generally Jessica J. Berch, The Costs of Litigation: A Proposal To Amend Federal Rule of Appellate Procedure 39(a)(4), 83 Temple L. Rev. 103 (2010).

[54]Tribune, 799 F.3d at 281.

[55]Tribune, 799 F.3d at 282.

[56]Tribune, 799 F.3d at 283 (emphasis in original).

[57]Tribune, 799 F.3d at 283.

[58]Tribune, 799 F.3d at 285 (Ambro, J., concurring).

[59]Tribune, 799 F.3d at 285 (Ambro, J., concurring).

[60]Tribune, 799 F.3d at 285-86 (Ambro, J., concurring).

[61]Tribune, 799 F.3d at 287-88 (Ambro, J., concurring).

[62]Tribune, 799 F.3d at 289 (Ambro, J., concurring). Judge Ambro also takes a shot at Judge Krause's suggestion that courts take a quick view of the merits before finding equitable mootness, stating that "court have had unpleasant experiences with 'rigid order[s] of battle' like this before, and we do not see the wisdom of an ironclad requirement for all cases." Tribune, 799 F.3d at 289 n.2 (Ambro, J., concurring).

[63]In re Transwest Resort Properties, Inc., 801 F.3d 1161 (9th Cir. 2015).

[64]Transwest, 2015 WL 5332447, at *1.

[65]Transwest, 2015 WL 5332447, at *2. The lenders also objected that the bankruptcy court had applied § 1129(a)(10) on a per plan basis (since there was on consolidated plan) instead of a per debtor basis.

[66]Transwest, 2015 WL 5332447, at *3.

[67]Transwest, 2015 WL 5332447, at *3.

[68]Transwest, 2015 WL 5332447, at *3 (emphasis in original).

[69]Transwest, 2015 WL 5332447, at *4 (quoting Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.), 677 F.3d 869, 881 (9th Cir. 2012)).

[70]Transwest, 2015 WL 5332447, at *4.

[71]Transwest, 2015 WL 5332447, at *5.

[72]Transwest, 2015 WL 5332447, at *6.

[73] http://www.taleswithmorals.com/aesop-fable-the-mountains-in-labour.htm.

legalsolutions.thomsonreuters.com

***Ullrich v. Welt (In re Nica Holdings, Inc.)*, 2015 WL 9241140 (11th Cir. 2015).**

FACTS:

Debtor entered into an assignment for the benefit of creditors (an "ABC") under Florida law with defendant Welt named assignee of its assets to dispose of in accordance with state law. After failure to liquidate the company, Plaintiff Ullrich (co-owner of Debtor) filed suit against Welt and Welt filed a malpractice suit against the law firm representing him as assignee. Welt also filed a Chapter 7 on behalf of Debtor and the state court lawsuits were removed to bankruptcy court. The trustee obtained bankruptcy court approval of the settlement of both actions, over Ullrich's objections and motions to stay. The district court affirmed Ullrich appealed to the 11th Circuit.

Appellees argued that , among other things, the doctrine of equitable mootness applied to the appeal because the settlements had been effectuated in both of the suits which were the only assets of Debtor.

ISSUE:

Did the doctrine of equitable mootness apply to the appeal of the approval of the settlement agreements?

HOLDING:

The doctrine of equitable mootness did not apply to the appeal of the approval of the settlement agreements.

ANALYSIS:

Equitable mootness permits appellate courts to dismiss challenges when effective relief would be impossible.[1] The 11th Circuit determined that whether or not an appeal is equitably moot depends on the specific circumstances and issues of each individual case. The court stated that in order to find an appeal equitably moot, an appellate court must determine that it cannot grant effective relief. No single factor is determinative, but it identified several questions important to the inquiry:

(1) Has a stay pending appeal been obtained?[2] If not, then why not?

(2) Has the plan been substantially consummated?[3] If so, what kind of transactions have been consummated?

(3) What type of relief does the appellant seek?

(4) What effect would granting relief have on the interest of third parties not before the court?

(5) And, would relief affect the re-emergence of the debtor as a revitalized entity?

The Court found that appellant attempted several times to obtain a stay and was not granted a stay through no fault of his own. Also, it was not clear to the court that the settlement agreements had been substantially consummated. No creditors had been paid anything yet as a result of either settlement and the funds remained in the bankrupt estate. Further, the

[1] In a footnote, the court notes that the doctrine normally arises in connection with appeals of confirmation of Chapter 11 plans. Accordingly, some courts have questioned whether the doctrine is applicable in Chapter 7 cases. Because it determines that the appellees have not shown the appeal to be equitably moot, it assumes without deciding that mootness applies in a Chapter 7 context. *Ullrich*, 2015 WL 9241140 at *8, n. 4.

[2] The absence of the stay is a factor to consider and does not compel a finding of mootness. *Ullrich*, 2015 WL 9241140 at *8, n. 5.

[3] The court observed that it had noted before that substantial consummation does not itself resolve the issue of equitable mootness. *Ullrich*, 2015 WL 9241140 at *8, n. 5.

transactions at issue were not complicated or irreversible and the settlements did not contemplate a revitalization of Debtor that would be thwarted by the appellate court's decision. The court concluded that effective relief would not be precluded in this case and equitable mootness did not dictate dismissal.

ADDITIONAL HOLDING:

Reversed and remanded. (Based on the court's decision that Welt, as assignee, did not have authority to file bankruptcy on behalf of Debtor).