# ERADICATING THE "DISCHARGE BY DECLARATION" FOR STUDENT LOAN DEBT IN CHAPTER 13

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*The many benefits of higher education come with a cost. Armed with knowledge financed by government-backed loans, today's students enter the workforce burdened by debt. For many, other debts follow, causing some students to file bankruptcy soon after graduation. In this note, Kevin Driscoll examines the viability of the "discharge by declaration"—a tactic used by bankruptcy lawyers to circumvent the adversarial process and obtain a discharge of student loan debt. Despite the apparent problems with this tactic, a majority of courts decline to review the propriety of a discharge obtained through such means. In upholding such discharges, the courts claim that creditors' due process rights are satisfied, and they cite res judicata and collateral estoppel as excuses. Examining the various rationales underlying the majority stance, this note questions whether the discharge by declaration is a legally, and ethically, sound method of obtaining relief for overburdened student debtors.*

## I. INTRODUCTION

"Bankruptcy," as succinctly noted by a leading commentator, "happens."[1] Jobs are lost. Illness arrives unexpectedly. Transmissions break. Shimmery widgets of the latest style tantalize. Education challenges; its promise of prestige, financial gain, and self-actualization offsets the risks and costs associated with financing knowledge. The credit cards are there every step of the way.

The rosy picture of tomorrow, so clearly envisioned and anticipated when the bargain is struck, fades away. Perhaps attempts are made to repay; perhaps not. Perhaps long nights of soul searching are involved, or perhaps the attorney is on speed dial. In any event, the financially challenged debtor, through counsel, files a chapter 13 petition, and initiates the bankruptcy process.[2]

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1. CHARLES J. TABB, THE LAW OF BANKRUPTCY v (1997).

2. *See* 11 U.S.C. § 301 (1994) (stating that a voluntary bankruptcy case is initiated by the filing of a petition). The well-heeled may find chapter 13 foreclosed and be forced into a chapter 11 plan instead. *See id.* § 109(e) (stating that an individual may file under chapter 13 only if aggregate unse-

The process moves rapidly.[3] Immediately, a stay is granted, preventing any creditor from pursuing the debtor's money or property, at least until the court is able to assess the particulars of each debtor's situation.[4] Either contemporaneous with the petition or shortly thereafter, a plan is filed.[5] This plan will set forth a proposed series of monthly payments, in which the debtor purports to announce what will be paid to the creditors.[6] If the plan meets with the court's approval, it is given operative effect by confirmation.[7] Faithful adherence to this schematic ultimately results in a discharge of some or all of the debtor's financial obligations.[8] The slate, as the saying goes, is wiped clean, and the debtor is given the opportunity to create a rosier financial tomorrow.

However, a debtor trying to escape payment of student loans faces additional challenges before this type of debt will be discharged. Discharge of a student loan requires that the debtor undertake an adversarial proceeding[9] to show that payment of the loan is an undue hardship.[10] This adversarial process is much like a minitrial between the debtor and the student loan creditor.[11] The undue hardship standard is tough to meet, and courts are very reluctant to grant a debtor relief from educational loans.[12]

Some debtors avoid an adversarial proceeding, yet the courts still grant them a discharge.[13] Craftily, these debtors insert language into their plan stating that confirmation of the plan constitutes a binding adjudication of hardship entitling the debtor to a discharge of the debtor's student loan.[14] Thus, these debtors trigger discharge of the student loan through plan confirmation, rather than showing undue hardship through an adversarial proceeding.

After confirmation, the student loan creditor may move to strike the plan on the grounds that no adversarial proceeding occurred. But,

cured debt is less than $250,000 and aggregate secured debt is less than $750,000); *see, e.g.*, Lou Carlozo, *The Hammer Falls—Hard in 1990, He Was One of Music's Biggest Stars; Now He's Battling Creditors and a Bankrupt Career*, CHI. TRIB., Apr. 14, 1996, at C1 (noting that a famous entertainer filed for chapter 11 after claiming debts in excess of ten million dollars and assets between one and ten million dollars). Such a debtor is beyond the scope of this note.

3. *See* TABB, *supra* note 1, at 914 (noting the rapid unfolding of the chapter 13 process).

4. *See* 11 U.S.C. § 362 (staying most claims of a creditor against the estate of the debtor pending resolution of the bankruptcy).

5. *See id.* § 1321 (requiring a plan); FED. R. BANKR. P. 3015(b) (requiring the plan to be filed within 15 days).

6. *See id.* § 1322.

7. *See* TABB, *supra* note 1, at 915.

8. *See* 11 U.S.C. § 1328(a). Because chapter 13 grants a much broader possibility of discharge to the debtor than is available in chapter 7, its discharge is commonly called a "superdischarge." *See* TABB, *supra* note 1, at 916.

9. *See* discussion *infra* Part II.B.3.

10. *See* discussion *infra* Part II.B.4.

11. *See* discussion *infra* Part II.B.3.

12. *See* discussion *infra* Part II.B.4.

13. *See* discussion *infra* Parts II.B.5, III.A.1.

14. *See In re* Evans, 242 B.R. 407, 408–09 (Bankr. S.D. Ohio 1999) (quoting a debtor's student loan addendum with language to this effect); *see also* discussion *infra* Parts II.B.5, III.A.1.

the majority of courts addressing this issue hold that mere confirmation of the plan shall constitute a binding adjudication of hardship, entitling debtors to discharge of their student loan obligations.[15] Thus, a creditor's attempts to strike the provision fail. This note asks whether confirmation of a chapter 13 plan, rather than an adversary proceeding, should constitute a binding adjudication of undue hardship entitling the debtor to a discharge of student loan obligations.

A confirmed plan that calls for discharge of student loan debt should be subject to judicial reexamination if the debtor fails to undertake an adversarial proceeding. In part II, the historical aspects of student loans and their discharge are examined.[16] An analysis follows in part III, setting forth the reasons advanced by the majority in its refusal to reexamine confirmed plans and ascertaining why a minority of courts favor reexamination.[17] Part IV outlines four conclusions drawn from this analysis: (1) discharge by declaration violates creditors' due process rights, rendering reexamination appropriate;[18] (2) the majority's reliance on res judicata and collateral estoppel is misplaced;[19] (3) the majority opinion clouds professional responsibilities of zealous advocacy and good-faith representation;[20] and (4) the majority opinion creates inconsistent bankruptcy adjudications.[21] Thus, the question posed in this note is answered in the negative, i.e., confirmation of a chapter 13 plan containing a discharge by declaration of student loan debt should not satisfy the undue hardship requirement.

## II. FINANCING EDUCATION: A BRIEF HISTORY

### *A. The Private Sector Displaced by the Public Sector as the Source of Student Loans*

Student loans have been around nearly as long as the education that they finance.[22] However, a suitable starting point for the modern experience with educational loans is the passage of the Higher Education Act in 1965 (the "Act").[23] Pursuant to the Act, the government entered the student loan arena, both administering the loans and backing them in the case of default.[24] Prior to the Act's passage, loans were generally the

15. *See* discussion *infra* Parts III.A.1–2.
16. *See* discussion *infra* Parts II.A–B.
17. *See* discussion *infra* Parts III.A–G.
18. *See* discussion *infra* Part IV.A.
19. *See* discussion *infra* Part IV.B.
20. *See* discussion *infra* Part IV.C.
21. *See* discussion *infra* Part IV.C.
22. *See generally* Waters v. Cleland, 32 Ga. 633 (1861) (involving a slave as collateral for student loan).
23. 20 U.S.C §§ 1071–1087 (1994).
24. *See id.* § 1071(a)(1)(D) (stating that a purpose of the Act is to foster educational loans by having the government back a portion of each loan).

province of charitable organizations, private trusts, or private agreements.[25]

Originally, critics chided the Act as unnecessary,[26] but history has proven its worth. The Act is credited for more than doubling the number of students in postsecondary education by enabling those with the desire, but not the funds, to go to college.[27] In 1997, the federal government guaranteed nearly thirty billion dollars in loans to millions of students.[28] Proponents of the program proclaim that it advances the social good of an educated society without burdening the government with the entirety of the cost.[29]

Of course, the downside of this social good is that students enter the workforce burdened by debt. With debt comes default. Upon default, the loan can be charged back to the government,[30] who, in essence, pays off the loan. Then, the government will attempt to recoup this payment either by trying to collect the loan itself or turning the loan over to a collection agency.[31] Thus, unpaid loan debt is ultimately paid by all of us.

25. *See, e.g.*, *Waters*, 32 Ga. at 633 (examining a student loan extended between private parties); HARMON FOUNDATION, SEVEN YEARS EXPERIENCE WITH STUDENT LOANS *passim* (1929) (describing charitable foundation's duty to extend loans and experience therein); Michael S. McPherson, *Appearance and Reality in the Guaranteed Student Loan Program*, *in* RADICAL REFORM OF INCREMENTAL CHANGE? STUDENT LOAN POLICY ALTERNATIVES FOR THE FEDERAL GOVERNMENT 11, 12–13 (Lawrence E. Gladieux ed., 1989) [hereinafter RADICAL REFORM] (describing the early educational loan structure as a "major problem" because of banks' reluctance to lend, especially to minority and disadvantaged students, and overall student reluctance to borrow).

26. *See* Joseph M. Cronin, *Improving the Guaranteed Student Loan Program*, *in* RADICAL REFORM, *supra* note 25, at 57, 57 (stating that loans pursuant to the Act were "originally derided as merely a 'loan of convenience for the middle class'").

27. *See* Richard Fossey, *The Dizzying Growth of the Federal Student Loan Program: When Will Vertigo Set In?*, *in* CONDEMNING STUDENTS TO DEBT: COLLEGE LOANS AND PUBLIC POLICY 7, 7 (Richard Fossey & Mark Batemen eds., 1998) [hereinafter CONDEMNING STUDENTS] (noting that "federally guaranteed student loans [are] a major reason that higher education enrollment has grown from less than 6 million students in 1965 to approximately 15 million" in 1998).

28. *See id*. at 8.

29. *See* Robert D. Reischauer, *HELP: A Student Loan Program for the Twenty-First Century*, *in* RADICAL REFORM, *supra* note 25, at 33, 37–38 (noting that the "nation benefits from a more highly educated citizenry," however, the average taxpayer is burdened with "contribut[ing] to the higher education of the nation's future elite"). The Guaranteed Student Loan program is not without its critics, and many alternative sources of funding higher education have been advocated. For example, one commentator touts a national student loan bank as a better system because of equivalent or superior services at less cost. *See* Arthur M. Hauptman, *The National Student Loan Bank: Adapting an Old Idea for Future Needs*, *in* RADICAL REFORM, *supra* note 25, at 75, 80–84.

30. *See, e.g.*, Andersen v. UNIPAC-NEBHELP (*In re* Andersen), 179 F.3d 1253, 1254 (10th Cir. 1999) (noting that title to defaulted student loan transferred to United States Department of Education); *see also* Rene Sanchez, *Economy, Crackdown, Pay Off in College Loan Default Rate*, WASH. POST., Jan. 10, 1997, at A2 (stating that such charge-offs cost the government $1.7 billion in 1992 and $249 billion in 1996).

31. *See* Sanchez, *supra* note 30, at A2 (noting that government uses litigation, wage garnishment, and income tax refund capture to collect defaulted student loans).

### *B. Evolution Toward a Presumption of Nondischargeability for Student Loan Debt*

#### *1. Background*

Rather than face garnishment or other postdefault collection techniques, the debtor may seek the refuge of the bankruptcy court.[32] This note is concerned with the debtor who files a plan under chapter 13. Unlike a chapter 7 liquidation, chapter 13 is "intended . . . [t]o function as the primary rehabilitation chapter for individual consumer debtors."[33] This rehabilitation, at least in theory, was designed to be advantageous to both creditor and debtor. The creditor's primary benefit from chapter 13 is the possibility of greater recovery than under chapter 7.[34] The ability to keep more property and discharge more debt provides the incentive for the debtor to choose chapter 13 over chapter 7.[35] Congress also believed that chapter 7 imposed more stigma on a debtor than chapter 13, but a leading commentator suggests that the deterrent power of stigma may be wishful thinking.[36] In 1998, 1.4 million consumer bankruptcies were filed.[37]

#### *2. Tension Between Student Loans and Discharge*

A great tension has enveloped the folding of student loan debt into a chapter 13 discharge. Student loans are viewed as "enabling loans" allowing debtors to improve their own human capital, presumably with a commensurate increase in income.[38] But, the capital improvement bestowed upon the debtor exists in an amorphous and intangible state when compared to the traditional loan for a capital good. If a debtor borrows money for a capital good, that good can be reclaimed by the creditor if the loan is not repaid. No such tangible construct exists for the student loan creditor. The improvement bestowed upon the student loan debtor—the education—is beyond seizure, garnishment, or repossession. It cannot be auctioned off on the courthouse steps, nor can its benefits be severed from the recipient debtor. Thus, it is felt that the

32. The stay provided by the filing of the bankruptcy petition stops these collection attempts, at least for the short term. *See* 11 U.S.C. § 362 (1994).

33. TABB, *supra* note 1, at 895.

34. *See id*.

35. *See id*.

36. *See id*. at 896. *But see* ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 429–32 (3d ed. 1996) (noting that "attorneys advertise debt relief without mentioning the emotionally laden term 'bankruptcy'").

37. *See, e.g.*, *Bankruptcy Senate Should Hold Off on Rule Changes*, STAR TRIB. (Minneapolis-St. Paul), Nov. 9, 1999, at 12A.

38. TABB, *supra* note 1, at 730; *cf. In re* Roberson, 999 F.2d 1132, 1137 (7th Cir. 1993) (categorizing a student loan as an "investment" with a rate of return rather than an improvement to the student's underlying human capital).

"enabling loan in fairness . . . [s]hould be repaid before permitting the debtor to enjoy the fruits of that enhanced capital."[39]

This tension was not lost on lawmakers and has been the subject of debate since the mid-1970s.[40] Congress was troubled by the thought of a college student who incurs government-backed loans and wantonly discharges the debts moments after graduation, brazenly embarking on a lifetime of enhanced earnings unfettered by loan payments.[41] The piper, as the story goes, must be paid.[42]

As a result, the Code has undergone a long period of reform, beginning in 1978 and continuing to the present day.[43] In short, student loan debt has gone from readily dischargeable to presumptively nondischargeable unless the debtor undertakes an adversary proceeding that proves that repayment is an "undue hardship."[44]

### *3. The Adversary Proceeding*

This adversary proceeding is viewed as a "subaction" that underlies the main bankruptcy action.[45] The Bankruptcy Rules state that "[a]n adversary proceeding is . . . a proceeding . . . to determine the dischargeability of a debt."[46]

The procedure for the adversary proceeding is governed by the Code[47] and is modeled on the traditional civil-litigation format.[48] First, the debtor must initiate the actual bankruptcy proceeding.[49] The adversary proceeding is then launched by the filing of a complaint,[50] requiring service of process[51] and an answer from the defendant creditor within

39. TABB, *supra* note 1, at 730.

40. *See, e.g.*, H.R. Doc. No. 93-137, pts. I & II (1973) (expressing concern that students, on the brink of lucrative careers, will shed their student loan obligations).

41. *See id*.

42. *See generally* ROBERT HOLDEN, THE PIED PIPER OF HAMELIN (1998) (chronicling a fictional municipality's foray into default and debtor self-help).

43. In 1978, the Code was amended to require debtors to wait for a period of five years before discharging a student loan, unless a threshold requirement of "undue hardship" was met. In 1990, the threshold requirement of "undue hardship" was retained, but the waiting period was extended to seven years. *See Are the Bankruptcy Courts Creating the Certainty of Hopelessness for Student Loan Debtors? Examining the Undue Hardship Rule*, *in* CONDEMNING STUDENTS *supra* note 27, at 161, 161. Finally, in 1998, the waiting period was abandoned, and all debtors must now meet the onerous "undue burden" requirement before their student loan will be discharged. *See* 11 U.S.C. § 523(a)(8) (Supp. IV 1998).

44. 11 U.S.C. § 523(a)(8).

45. Blevins Elec., Inc. v. First Am. Nat'l Bank (*In re* Blevins Elec., Inc.), 185 B.R. 250, 253 (Bankr. E.D. Tenn. 1995) ("Adversary proceedings . . . are subactions which are raised within a 'case' and are commenced by the filing of a complaint.").

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

47. *See id.* Rules 7001–7087.

48. *See id.* Rule 7001 advisory committee's note (stating that rules governing adversary proceedings are much like those governing civil litigation).

49. *See* 11 U.S.C. § 301 (1994).

50. *See* FED. R. BANKR. P. 7003 (incorporating FED. R. CIV. P. 3).

51. *See id.* Rule 7004 (incorporating FED. R. CIV. P. 4).

thirty days after the issuance of a summons.[52] If the creditor is the United States, the answer time is extended to thirty-five days.[53]

The parallels to civil litigation continue as the adversary proceeding journeys toward resolution. There are rules for discovery,[54] the court can grant summary judgment,[55] and award costs to the prevailing party.[56] Finally, the unhappy litigant can appeal.[57] In short, the adversarial proceeding is a "minitrial" that determines whether the undue hardship standard has been met.

### *4. The Bankruptcy Code, Student Loan Discharge, and Undue Hardship*

Thus, the adversarial proceeding is a framework in which the debtor attempts to show (and presumably the student loan creditor attempts to rebut) that repayment would be an undue hardship on the debtor. This undue hardship standard is statutory in origin, and currently, the Code provides that a chapter 13 discharge will not be granted:

> [F]or an education 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 for an obligation to repay funds received as an educational benefit, scholarship, or stipend, unless . . . excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.[58]

Despite its statutory origin, the courts, by necessity, have attempted to flesh out the meaning of undue hardship. Rather than reaching specific income to debt ratios to warrant discharge, the courts look at each debtor on a case-by-case situation.[59] This provision "gives considerable discretion to the bankruptcy judge to tailor the fresh start policy of the Code to the vagaries of the specific fact situation, and to find that in the totality of the circumstances, there was no abuse of the system."[60]

As a practical matter, the courts have been reluctant to find undue hardship and many a hopeful debtor has emerged from the adversary proceeding a loser.[61] For instance, *In re D'Ettore*[62] shows the difficulty of

52. *See id.* Rule 7012(a).
53. *See id*.
54. *See id.* Rule 7026 (incorporating FED. R. CIV. P. 26).
55. *See id.* Rule 7056 (incorporating FED. R. CIV. P. 56).
56. *See id.* Rule 7054 (incorporating FED. R. CIV. P. 54(a)–(c)).
57. *See id.* Rule 8001(a) (allowing appeal of a final judgment, order, or decree of the bankruptcy judge); *id.* Rule 8002(a) (requiring notice of this appeal to be filed within 10 days).
58. 11 U.S.C. § 523(a)(8) (1994).
59. *Cf.* TABB, *supra* note 1, at 731 (explaining the use of a totality-of-circumstances approach).
60. *Id.* at 731.
61. *See, e.g.*, Bandilli v. Boyajian (*In re* Bandilli), 231 B.R. 836 (B.A.P. 1st Cir. 1999); United Student Aid Funds, Inc. v. Nascimento (*In re* Nascimento), 241 B.R. 440 (B.A.P. 9th Cir. 1999); White v. United States Dep't of Educ. (*In re* White), 243 B.R. 498 (Bankr. N.D. Ala. 1999); Palanca v. Texas Guaranteed Student Loan Corp. (*In re* Palanca), 219 B.R. 502 (Bankr. N.D. Ill. 1998) (denying an at-

meeting the undue hardship standard. In this case, a debtor who earned an annual salary of $12,500 a year[63] and owed nearly $17,000 on her loans[64] was denied a discharge of her student loans.[65] Although she was unable to find work in her field of study[66] and was forced to live at home with her father,[67] the court felt that her situation was a "garden variety hardship."[68] The court particularly noted the debtor's purchase of a "non-economy car"—a Suzuki—and her recent purchase of jewelry from Zales.[69] The court felt that "the extravagant purchases of the [d]ebtor" precluded her from meeting the undue hardship threshold.[70]

Another example of the courts' reluctance to grant student loan discharges is presented in *In re Douglass*.[71] In this case, the debtor earned a little over a $1000 a month, and owed nearly $60,000 in student loans.[72] In support of the student loan discharge, the debtor argued that her expenses exceeded her income and that she had done her best to minimize her expenses.[73] The court was not impressed. It held that she had not met the undue hardship standard for several reasons. First, she was healthy.[74] Second, she filed for bankruptcy in the December following her June graduation.[75] Third, the court felt the debtor was purposely underemploying herself because she refused to take the certification test for her social-work degree, which would presumably result in higher wages.[76] Finally, student loans comprised ninety-two percent of the debtor's debts.[77] Thus, the court felt that the debtor's primary reason to file bankruptcy was solely to discharge these debts.[78]

torney discharge of his student loan because even though payment would subject him to terrible present hardship, he had failed to show that the burden was likely to continue into future); Lawson v. Hemar Serv. Corp. (*In re* Lawson), 190 B.R. 955 (Bankr. M.D. Fla. 1995) (denying an attorney discharge on student loan, even though the debtor suffered from learning defects and medical conditions, because, inter alia, the debtor failed to negotiate with loan company to reduce payments); *see also* TABB, *supra* note 1, at 731 (noting that "[c]ourts are not . . . lenient to debtors in finding 'undue hardship,' to put it mildly").

62. D'Ettore v. Devry Inst. of Tech. (*In re* D'Ettore), 106 B.R. 715 (Bankr. M.D. Fla. 1989).
63. *See id*. at 717.
64. *See id.* at 719.
65. *See id*.
66. *See id*. at 717.
67. *See D'Ettore*, 106 B.R. at 719.
68. *Id*.
69. *Id*.
70. *Id*.
71. Douglass v. Great Lakes Higher Educ. Servicing Corp. (*In re* Douglass), 237 B.R. 652 (Bankr. N.D. Ohio 1999).
72. *See id*. at 653.
73. *See id*.
74. *See id*. at 656.
75. *See id*. at 657.
76. *See Douglass*, 237 B.R. at 656.
77. *See id*.
78. *See id*. at 657 (noting that the "[d]ebtor had no intention of repaying the loan by filing for bankruptcy relief before the loan came due").

Of course, the courts do allow some student loans to be discharged. For example, in *In re Brightful*,[79] the court allowed a debtor to discharge her student loan debt. In this case, debtor earned approximately $8,500 in 1999.[80] Her student loan debts totaled over $50,000.[81] The student loan creditor argued that discharge should be denied because the debtor filed for bankruptcy soon after graduation,[82] debtor failed to repay any of her loan,[83] and debtor's sole motivation for attending school was enjoyment, and not vocational improvement.[84] Nonetheless, the court granted the discharge.[85] In support of its finding of undue hardship, the court stated that the debtor "has no degree, no home, a fragile job, a dependent child, and we found her emotionally unstable."[86]

Thus, courts will grant the discharge, but they are reluctant to do so. One commentator deemed this hesitancy "harsh," criticizing the courts for lacking compassion.[87] Yet, others applaud the tightening of the discharge reins, stating that the "bankruptcy loophole thus has been virtually closed."[88]

### *5. "Discharge by Declaration": Use of the Chapter 13 Plan to Bypass the Adversary Proceeding*

At its heart, the chapter 13 plan is a laundry list of whom is to be paid, how much they are to be paid, and over what length of time this payment will occur.[89] It is up to the debtor to create the initial plan, which is then proposed to the court.[90] Usually, the plan is filed at the same time as the debtor's initial petition for bankruptcy.[91] After the plan is submitted, the court judges the debtor's proposed terms against statutory standards.[92] Unlike other reorganizations, creditors do not vote for or against the plan.[93] Instead, their only vehicle for protest is to file an objection.[94] If the plan complies with § 1325 of the Code, and the court determines it is feasible, then it is confirmed.[95]

79. No. 99-15518DAS, 1999 WL 1024516, at *1 (Bankr. E.D. Pa. Nov. 8, 1999).
80. *See id*. at *1.
81. *See id* at *2.
82. *See id*. at *3.
83. *See id*. at *2.
84. *See Brightful*, 1999 WL 1024516, at *3.
85. *See id*. at *1.
86. *Id*. at *3.
87. Fossey, *supra* note 27, at 175 (noting that "harsh measures against individuals who default on their educational loans is not good public policy").
88. Cronin, *supra* note 26, at 62.
89. *See* 11 U.S.C. § 1322 (1994).
90. *See id.* § 1321.
91. *See* FED. R. BANKR. P. 3015(b).
92. *See* 11 U.S.C. § 1325.
93. *See* TABB, *supra* note 1, at 914–15.
94. *See* 11 U.S.C § 1324.
95. *See id.* § 1325.

But some debtors attempt to the use the chapter 13 plan to adjudicate undue hardship, rather than undergoing an actual adversarial proceeding. This process has been referred to as "discharge by declaration."[96] Generally speaking, the debtor will state, somewhere in the plan, that plan confirmation triggers an adjudication of undue hardship.[97] Thus, mere confirmation of the plan discharges student loan debt. No adversary proceeding is undertaken, nor are summons for the adversary proceeding served.

To the debtor's credit, notice of the plan is provided to the student loan creditors.[98] The debtor is required to provide a copy of the plan and notice of the confirmation hearing.[99] However, student loan creditors may not respond to these notices for three reasons. First, chapter 13 cases move at a rapid pace, and the confirmation hearing may have already happened by the time the notice moves from the mailroom to the appropriate office.[100] Second, because the law requires an adversarial hearing, the creditor may not feel that the arrival of a mere notice affects its interests in anyway. Third, ostensibly innocent debtors mail the notices to the wrong addresses.[101]

If no objections are made by any creditor,[102] the court,[103] or the trustee,[104] then the plan is confirmed.[105] The confirmed plan is a significant step in the debtor's financial rehabilitation. Once the plan is confirmed, its "provisions . . . bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan."[106] However, confirmation does not make the plan immutable, and in certain instances, the plan can be changed postconfirmation.[107]

96. *In re* Evans, 242 B.R. 407, 413 (Bankr. S.D. Ohio 1999). The term "discharge by declaration" pays homage to the Supreme Court's use of the term "exemption by declaration" for bad faith claims of exemption. *See* Taylor v. Freeland & Kronz, 503 U.S. 638, 644 (1992).

97. *See Evans*, 242 B.R. at 408–09 (setting forth exact wording used by the debtor in her ill-fated attempt at a discharge by declaration).

98. *See* FED. R. BANKR. P. 2002(b).

99. *See id.* Rule 3015(d).

100. *See* TABB, *supra* note 1, at 914 (categorizing as rapid the pace at which chapter 13 progresses).

101. *See In re* Conner, 242 B.R. 794, 799 (Bankr. D.N.H. 1999).

102. *See* 11 U.S.C. § 1324 (1994).

103. *See id.* §§ 105(a), 1325.

104. *See id.* § 1325(b)(1).

105. *See id.* § 1325.

106. *Id.* § 1327(a).

107. *See infra* notes 203–07 and accompanying text.

## III. ANALYSIS

### *A. Majority*

#### *1. In re* Andersen

*In re Andersen*[108] nicely illustrates the majoritarian use of due process,[109] res judicata,[110] and collateral estoppel[111] to prevent any attack on a confirmed plan, even one that discharges student loans without an adversarial proceeding. In this case, the debtor presented a plan that, inter alia, called for a ten percent payout on her student loans, with the remaining ninety percent to be discharged upon successful completion of the plan.[112] However, the debtor failed to initiate the required adversarial proceeding necessary to prove undue hardship. Instead, the debtor's plan simply stated that "excepting the . . . education loans from discharge will impose an undue hardship on the debtor and the debtor's dependents. Confirmation of debtor's plan shall constitute a finding to that effect and that said debt is dischargeable."[113] The creditor failed to timely object to this plan, and it was confirmed.[114]

The debtor followed the provisions outlined in the plan, resulting in a discharge of the remaining ninety percent of her loan debt.[115] However, the creditor remained unabashed and continued to attempt collection.[116] To stifle the creditor's collection effort, the debtor then "reopened her bankruptcy case . . . for the purpose of filing a complaint to determine the dischargeability of the [student loan] debt."[117] The bankruptcy court held for the creditor, stating:

> Language in a plan does not constitute a judicial determination of hardship. HEAF and the other creditors were entitled to a higher level of due process before the confirmation of the plan invokes the concept of res judicata. Congress'[s] clear intent to except student loans from discharge cannot be overcome simply by inserting language into a proposed plan providing that confirmation of the plan constitutes a finding of undue hardship.[118]

108. Andersen v. UNIPAC-NEBHELP (*In re* Andersen), 179 F.3d 1253 (10th Cir. 1999).
109. *See id.* at 1256 n.6 (noting that the creditor's failure to complain that it lacked adequate notice precluded any due process claim).
110. *See id.* at 1258–60.
111. *See id.* at 1258–59 n.9.
112. *See id.* at 1254.
113. *Id.* at 1254.
114. *See id.*
115. *See id*.
116. *See id.* 1254–55.
117. *Id.* at 1255.
118. Andersen v. Higher Educ. Assistance Found. (*In re* Andersen), 215 B.R. 792, 794 (B.A.P. 10th Cir. 1998).

On appeal, the debtor prevailed.[119] The issue presented was "whether confirmation of the plan constitute[d] a binding adjudication of hardship."[120] In holding that such confirmation was a binding adjudication, the court first noted that there was "no allegation that [creditor] did not receive notice of the plan, or . . . lacked the opportunity to object."[121] The court reasoned that proper notice precluded any due process claim by the appealing creditor and stated that "[a] creditor cannot simply sit on its rights" and expect that its interests will be protected.[122]

The creditor claimed that the "Bankruptcy Court exceeded its authority in confirming a plan that contained provisions [that] were contrary to the Code."[123] But, the court stated that "a confirmed plan . . . is not rendered void merely because a certain provision of the plan may be inconsistent with, or even contrary to, the Code" because of the doctrine of res judicata.[124] "Although the provision at issue did not comply with the Code, it is now too late for [the creditor] to make the argument" that the plan should not have been confirmed because the importance of finality outweighs the adverse effects of confirming a plan with provisions offensive to the Code.[125]

Finally, the court felt that the creditor was collaterally estopped from collection of the student loan debt.[126] Because the creditor "failed to appeal the confirmation order within the time limits of Bankruptcy Rules 8001 and 8002," any movement by creditor toward the debt was a collateral attack on the confirmed plan.[127] The court felt that such a collateral attack was prohibited because the Code provides that the "'provisions of a confirmed plan bind the debtor and each creditor'"[128] and that the debtor "possessed a reasonable expectation that her student loans had been discharged."[129]

### *2. In re* Pardee

The Tenth Circuit's reasoning in *Andersen* was adopted by the Ninth Circuit in *In re Pardee*.[130] In this case, the debtor's plan "expressly

119. *See Andersen*, 179 F.3d at 1260 (affirming a prodebtor decision of Bankruptcy Appellate Panel that had reversed procreditor ruling of bankruptcy court).

120. *Id.* at 1255 (internal quotation omitted).

121. *Id*. at 1256 n.6 (citing *Andersen*, 215 B.R. at 795).

122. *Id*. at 1257.

123. *Id*.

124. *Id.* at 1247 n.8.

125. *Id.* at 1259.

126. *See id.* at 1258–59.

127. *Id*. at 1258 n.9.

128. *Id.* at 1259 n.10 (quoting 11 U.S.C. § 1327(a) (1994)).

129. *Id.* at 1259.

130. Great Lakes Higher Educ. Corp. v. Pardee (*In re* Pardee), 193 F.3d 1083 (9th Cir. 1999), *aff'g* 218 B.R. 916 (B.A.P. 9th Cir. 1998) (Klein, J., dissenting).

purported to discharge post-petition interest on a student loan debt."[131] The plan did not attempt to discharge the underlying loan.

On appeal, the creditor argued that discharge of postpetition interest was contrary to the Code and should not be allowed.[132] Much like the *Andersen* court, the Ninth Circuit did not address this substantive issue because the creditor's "failure to object to the plan or to appeal the confirmation order 'constitutes a waiver of its right to collaterally attack the confirmed plan post-confirmation on the basis that the plan contains a provision contrary to the Code.'"[133]

Relying on *Andersen*,[134] the court noted that a creditor must object to a plan before it is confirmed.[135] The court further noted that a confirmed plan should withstand attack "even if the confirmed bankruptcy plan contains illegal provisions."[136] Finally, the court noted that it was "well-settled policy that confirmation orders are final orders that are given preclusive effect."[137]

Thus, the majority view allows mere confirmation of a plan to act as a de facto adjudication of undue hardship. Although the adversary proceeding is never undertaken to consider the merits of the debtor's claim, due process is not offended under this view because the creditor had notice of the plan and an opportunity to object. Also, the majority view treats the confirmed plan as a final judgment on the merits, which allows these courts to use res judicata as a bar to relitigating the propriety of the plan's confirmation and to collaterally estop a creditor from either collecting on the debt or attacking the confirmed plan.

### *B. Minority View*

#### *1. In re* Stevens

A debtor's attempt to use the confirmation of a chapter 13 plan as an adjudication of undue hardship failed in *In re Stevens*.[138] In this case, the debtor presented a plan containing the following language:

> The debtor hereby moves the Court for a Hardship Discharge pursuant to 11 U.S.C. § 523(a)(8)(B). The debtor asserts that excepting such debt from discharge under 11 U.S.C. § 523(a)(8) will impose an undue [hardship] on the Debtor and the debtor's dependents.[139]

131. *Id.* at 1084.
132. *See id*. at 1085.
133. *Id*. (quoting *Pardee*, 218 B.R. at 922).
134. *See id.* at 1086 ("We agree with the Tenth Circuit.").
135. *See id.* at 1086.
136. *Id.*
137. *Id*. at 1087.
138. 236 B.R. 350 (Bankr. E.D. Va. 1999).
139. *Id.* at 351.

A plan containing the above language was confirmed, without objection by the creditor, on October 21, 1998.[140] For reasons unknown, the following day the debtor filed a modified plan, which contained the same loan-discharge language.[141] The student loan creditor did not raise a timely objection to the second plan.[142]

A confirmation hearing was held for the second plan. At this hearing, the debtor argued that the confirmation of the first plan and the creditor's failure to timely object to the second plan precluded the court from denying confirmation.[143] Although this argument worked on the courts in *Andersen*[144] and *Pardee*,[145] it failed to persuade this court.

As to the second plan, the court noted that it could consider the merits of a proposed plan, even though the creditor's objection was untimely.[146] A bankruptcy court has the power to act sua sponte in reviewing a proposed plan.[147] The court noted that the adversary proceeding was necessary as it was a "due process requirement,"[148] and it was not proper "to permit the discharge of an otherwise nondischargeable debt by a provision of a chapter 13 plan."[149]

However, the rejection of the second plan meant that the first plan was the viable, controlling plan. Because this plan was confirmed and contained the same language concerning discharge of the student loan debt, it would appear that the provision was untouchable under *Andersen*[150] and *Pardee*.[151] But despite the confirmation, the court refused to give credence to the provision concerning the student loan discharge. The court simply stated:

> [I]t does not matter that debtor's earlier plan, which sought to discharge the education loan as undue hardship, has been confirmed. The provision cannot have the effect sought for it. When the debtor completes payment of the plan, then an appropriate adversary proceeding may be filed on the undue hardship claim.[152]

140. *See id*.
141. *See id*.
142. *See id*.
143. *See id.* at 351.
144. 179 F.3d 1253 (10th Cir. 1999).
145. 193 F.3d 1083 (9th Cir. 1999).
146. *See Stevens*, 236 B.R. at 351. Presumably, the court is referring to 11 U.S.C. § 105 (1994), which gives the court power to object sua sponte to prevent abuse of process. *See supra* note 103. Interestingly, the bankruptcy court in *Andersen* refused to exercise that power. *See Andersen*, 179 F.3d at 1254 (noting that the court denied the creditor's objection to the plan as untimely and subsequently confirmed the plan). This disparity in the court's decorum increases the ill-desired effect of inconsistent bankruptcy adjudication. *See infra* Part III.F.3.
147. 11 U.S.C. § 105(a).
148. *Stevens*, 236 B.R. at 352.
149. *Id*.
150. 179 F.3d 1253 (10th Cir. 1999).
151. 193 F.3d 1083 (9th Cir. 1999).
152. *Stevens*, 236 B.R. at 352.

### 2. *Judge Klein's Dissent in In re* Pardee

Judge Klein's dissent in *In re Pardee*[153] argues for the same result reached in *Stevens*, albeit in a lengthier and more developed manner. The linchpin of Judge Klein's argument is that a "chapter 13 plan provision purporting to discharge a nondischargeable debt is unenforceable."[154]

First, Judge Klein argued that "res judicata bars a collateral attack on a final judgment but does not bar a direct attack on a final judgment."[155] A direct attack "is an attempt to correct [a judicial proceeding], or to void it, in some manner provided by law to accomplish that object. It is an attack . . . by appropriate proceedings between the parties . . . to have [the confirmation] annulled, reversed, vacated or declared void."[156] Thus, according to Judge Klein, an attack on a confirmed plan is not a collateral attack, but is a direct attack.[157] Therefore, res judicata is an insufficient reason to prevent judicial reexamination of a confirmed plan.

Second, Judge Klein presented a jurisdictional argument and stated that confirmation of the plan was not binding because "there was a total want of jurisdiction due to the strict requirements of [the Bankruptcy Code]."[158] First, "[a]ny disagreement about the discharge status [of the student loan] must be resolved by way of an adversary proceeding."[159] Thus, any "order confirming the chapter 13 plan was void insofar as it purported to require the discharge of a student loan without compliance with the statutory requirements."[160] By way of example, Judge Klein urged that if a court's order "purported to require the imprisonment of a creditor, nobody would think that the order was anything but void regardless of whether there was a timely appeal."[161]

Additionally, Judge Klein argued that the "chapter 13 trustee had a statutory duty to participate in the confirmation, opining on suitability for confirmation."[162] Also, the court has an "independent duty to confirm only those plans that meet confirmation standards."[163] Thus, the creditor was "entitled to expect the chapter 13 trustee and the court to do their jobs."[164]

153. 218 B.R. 916, 927–41 (B.A.P. 9th Cir. 1998) (Klein, J., dissenting).
154. *Id.* at 927.
155. *Id*. at 932 (citations omitted).
156. *Id*. at 933 (citations omitted).
157. *See id*.
158. *Id.* at 934 (Klein, J., dissenting).
159. *Id*.
160. *Id*.
161. *Id*. at 935.
162. *Id*. at 939.
163. *Id.*; *see also supra* notes 102, 146 and accompanying text.
164. *Pardee*, 218 B.R. at 939 (Klein, J., dissenting).

### *C. Due Process Concerns over an* Andersen *Proposal*

In *Andersen*,[165] student loan creditors received notice of the plan and the confirmation hearing, but the debtor never initiated the adversarial portion of the student loan discharge prior to the plan confirmation.[166] This raises the question of whether the failure to initiate the adversarial proceeding denied due process to the student loan creditor. Due process is best addressed by examining whether the debtor has given proper notice and the creditor is given proper opportunity to present their opposition to the plan.

#### *1. Notice*

First, due process requires "notice reasonably calculated, under all the circumstances, to appraise the parties of the pendency of the action."[167] The major argument in favor of the debtor is that the student loan creditor was provided with a copy of the plan containing the loan-discharge language and notice of the hearing at which the plan was to be confirmed. The *Andersen* court stated that a copy of the plan, rather than the summons and adversarial proceeding, was all that was required to meet due process.[168]

The creditors, in turn, acknowledge that some notice may have been provided by a copy of the plan, but argue that the debtor's willful failure to initiate an adversary proceeding failed to satisfy the complete protection afforded by due process. For instance, the court in *Stevens* felt that a debtor's failure to undertake an adversarial proceeding offended due process because the adversary process was a necessity.[169]

Without the adversarial proceeding, the student loan creditor never receives notice that the issue of dischargeability has been raised by the debtor. Certainly, notice of the intent to discharge the loan debt is included somewhere within the plan, but such language can be obtuse. For instance, in *In re Conner*,[170] the debtor failed to specifically name the student loan creditors, failed to highlight the provision, and delivered the plan containing the discharge by declaration to an improper address.[171] The court held that such a plan presented "no assurance that these creditors received sufficient notice to satisfy due process."[172]

But what of a plan delivered promptly to the correct address that highlighted its discharge by declaration in bold print? Would this plan

165. 179 F.3d 1253 (10th Cir. 1999).
166. *See id.* at 1254–55.
167. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).
168. *See supra* notes 121–22 and accompanying text.
169. *See supra* notes 148–49 and accompanying text.
170. 242 B.R. 794 (Bankr. D.N.H. 1999).
171. *See id.* at 799.
172. *Id*.

satisfy due process? Under *Andersen*, it would. The fact that no summons was served does not matter. But creditors argue that because Congress has declared the adversary proceeding a necessity, any discharge by declaration violates due process.[173] The adversary proceeding "provide[s] the appropriate forum . . . within which to provide due process and procedural safeguards to all parties."[174]

The fact that the U.S. government backs some of these loans[175] in case of nonpayment creates an additional due process issue favoring the creditors. The Code provides that proper service on the United States is made by mailing a copy of the summons and complaint to the U.S. attorney in the "district in which the action is brought."[176] If this is not done, then "the United States has not been made a party to an action and a court is without jurisdiction to enter judgment against the United States."[177]

Because of these procedural safeguards, the United States and its agencies, are deemed to have "heightened notice" requirements.[178] Under this heightened notice requirement, mere mailing of notice would not meet due process if the United States is somehow involved in the loan. Considering that the United States is connected to many of these loans, the creditors would be correct in claiming that service of a summons is a necessity.

### *2. Meaningful Opportunity to Object*

A second due process question is whether cases like *Andersen* violate creditors' due process rights by denying them the "opportunity to present their objections."[179] The debtor supporting a discharge by declaration would argue that a mere objection to the plan's confirmation is alone sufficient to prevent the plan's confirmation. The creditors' argument is that any notice of loan discharge via plan confirmation is an indirect and obtuse way of alerting the creditor that discharge is an issue, and that the Code requires an adversary process with summons.

The *Andersen* court agreed with the debtor. According to the court, any arguments by the creditor "should have been raised in a timely objection to the plan prior to confirmation, or argued subsequently in a timely filed appeal attacking the confirmed plan."[180] Thus, *Andersen* stands for the proposition that due process does not require the adver-

173. *See* 11 U.S.C. § 523(a)(8) (1994) (requiring an adjudication of undue hardship to discharge student loan debt); FED. R. BANKR. P. 5005, 7003.

174. *In re* Mammel, 221 B.R. 238, 241 (Bankr. N.D. Iowa 1998).

175. *See supra* note 30.

176. FED. R. BANKR. P. 7004(b)(4).

177. *In re* Evans, 242 B.R. 407, 410 (Bankr. S.D. Ohio 1999).

178. *Id*.

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

180. Andersen v. UNIPAC-NEBHELP (*In re* Andersen), 179 F.3d 1253, 1257 (10th Cir. 1999).

sary proceeding, and that mere objection to the plan's confirmation presents meaningful opportunity for the loan creditor to state its case.

However, it is not so clear that raising an objection to a plan confirmation constitutes a meaningful opportunity to be heard. The adversary proceeding would allow debtors to present their objections to the proposed discharge by way of their answer.[181] Furthermore, the adversary proceeding culminates in a trial—the ultimate opportunity to be heard.[182] Bankruptcy courts have noted the impropriety of requiring the creditor to voice objections to the discharge via the confirmation process because "the filing of a plan does not generally initiate a contested matter with respect to a particular claim because a plan is not a vehicle through which objections are made."[183]

In summary, the due process issues raised by discharge by declaration are whether sufficient notice is provided to the creditor and whether the creditor has a meaningful opportunity to object. The court in *Andersen* felt that notice of the debtor's intent was sufficiently provided through delivery of a copy of the plan and notice of plan confirmation to the creditor. However, the *Stevens* court held that the adversary proceeding was a necessity and that the debtor's failure to undergo the proceeding violated due process. Also, if the United States is involved in the proceeding, service of summons is a necessity, as the government enjoys heightened notice requirements. Therefore, notions of creditor due process present serious obstacles to discharge by declaration in chapter 13.

### *D. Res Judicata*

#### *1. Failure of Due Process Precludes Use of Res Judicata*

In addition to holding that due process was not offended, *Andersen* and its progeny cite res judicata as a further reason for refusing to alter a confirmed plan. Res judicata means that the controversy "has been settled by judicial decision[]" and is no longer an open question.[184] In application, res judicata prevents relitigation of "claims that should have been raised and resolved in earlier litigation between the same parties."[185] Res

181. *See* FED. R. BANKR. P. 7012(a).

182. *See In re* Woodcock, 100 B.R. 520, 523 (Bankr. E.D. Cal. 1989) (noting that adversary proceedings culminate in a formal trial).

183. *In re* Galey, 230 B.R. 898, 899 (Bankr. S.D. Ga. 1999) (citations and internal quotations omitted). In this case, the debtor's "discharge by declaration" was objected to by the Trustee. The Court upheld the objection and denied the plan's confirmation. *See id.* at 900.

184. Tayloe v. Thomson's Lessee, 30 U.S. 358, 361 (1831).

185. Communications Telesystems Int'l v. California Pub. Util. Comm'n, 196 F.3d 1011, 1015–16 (9th Cir. 1999).

judicata simultaneously promotes the finality of judgments and encourages parties to litigation to actively protect their interests.[186]

But, if a proceeding fails to satisfy due process, then res judicata is inappropriate.[187] Thus, creditors may make the argument that the failure of due process prevents res judicata from being applied.

The lack of the summons raises issues of its own. The creditor is never an actual litigant, but only an interested party to the debtor's bankruptcy proceeding. This is analogous to an interested party in civil litigation, who has knowledge of the suit but has not been served or otherwise been joined as a party. Addressing this very issue, the Supreme Court in *Martin v. Wilkes*[188] stated that "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated a party or to which he has not been made a party by service of process."[189]

The *Andersen* court, though, felt that the student loan creditor's mere knowledge of the offending provision in the proposed plan was sufficient to put the creditor on notice and that this notice negated the need for personal service.[190]

However, knowledge of a court proceeding is not always by itself sufficient to bind a party. The Supreme Court has stated that status as a litigant is required before subjecting a party to the jurisdiction and judgment of the court.[191] Mere knowledge of a suit is insufficient.[192] Furthermore, "[i]t makes sense . . . to place . . . a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit."[193]

Thus, res judicata, if properly applied, cements a judgment's effect upon the parties to litigation. However, res judicata is limited in its application. If a party suffered due process violations, then res judicata is not appropriate. Also, if a party was never made an actual litigant to the action, then res judicata should not be raised.

### *2. The Necessary Elements to Trigger Res Judicata Are Not Present*

Even assuming that due process is not offended by a debtor's failure to serve an adversarial party, it is not clear that res judicata is proper be-

186. *See, e.g.*, Andersen v. UNIPAC-NEBHELP (*In re* Andersen), 179 F.3d 1253, 1258, 1260 (10th Cir. 1999) (noting "a strong policy favoring finality" and criticizing the "creditor's complete failure to properly protect its interest").

187. *See* Wright v. Union Central Life Ins. Co., 304 U.S. 502, 518 (1938) (noting that congressional power over bankruptcy law must satisfy the Due Process Clause).

188. 490 U.S. 755 (1989).

189. *Id.* at 761 (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)).

190. *See Andersen*, 179 F.3d 1253, 1256 n.6 (10th Cir. 1999).

191. *See Wilkes*, 490 U.S. at 765.

192. *See id*.

193. *Id*.

cause the doctrine is justified only if four elements are met.[194] First, a final judgment on the merits must exist.[195] Second, said final judgment must have originated from a court of competent jurisdiction.[196] Third, the matter must involve the same parties.[197] Finally, the same cause of action must be present.[198] Only if all of these elements are met does the doctrine of res judicata terminate any attempt to relitigate the matter.[199]

First, is a confirmed plan a final judgment on the merits? A final judgment is one that leaves nothing open to further dispute and sets to rest a cause of action between the parties.[200]

The debtor's argument is that § 1327(a) of the Code provides that the "provisions of a confirmed plan bind the debtor and each creditor . . . whether or not such creditor has objected to, has accepted, or has rejected the plan."[201] Relying on that section of the Code, the *Andersen* court stated that there was a "res judicata effect of the confirmed plan."[202]

However, it is not so clear that mere confirmation of plan is truly a "final judgment." A confirmed plan is not rigid and can be altered for a number of reasons. It can be destroyed by debtor noncompliance.[203] It can be modified if the circumstances warrant.[204] A confirmed plan can be revoked[205] or appealed.[206] It has been stated that "[c]onfirmation is not the final step, but more of an important way station along the road."[207] Thus, the confirmed plan is not worthy of the title "final judgment."

Furthermore, bankruptcy courts are willing to invalidate confirmed plans when it is shown that mandatory requirements of the Code are not met. For instance, in *In re Escobedo*,[208] the Seventh Circuit Court of Appeals refused to apply res judicata to a confirmed plan that "failed to account for the full payment of all priority claims as required" by the Code.[209] Thus, a plan containing offensive provisions can resist res judi-

194. *See* Anaconda-Ericsson, Inc. v. Hessen (*In re* Teltronics Servs., Inc.), 762 F.2d 185, 190 (2d Cir. 1985).

195. *See id*.

196. *See id*.

197. *See id*.

198. *See id*.

199. *See Teltronics Servs., Inc.*, 762 F.2d at 190.

200. *See, e.g.*, Nichols v. Cadle Co., 101 F.3d 1448, 1449 n.1 (1st Cir. 1996).

201. 11 U.S.C. § 1327(a) (1994).

202. Andersen v. UNIPAC-NEBHELP (*In re* Andersen), 179 F.3d 1253, 1259 (10th Cir. 1999).

203. Failure of a debtor to make payments would move the court to grant a discretionary "hardship discharge." *See* 11 U.S.C. § 1328(b)(1)–(3) (requiring three elements: (1) that the circumstances triggering nonpayment were not the fault of the debtor; (2) that the amount already paid not less than what a chapter 7 would have garnered for the creditors; and (3) that modification would not be practicable).

204. *See* 11 U.S.C. § 1329.

205. *See id.* § 1330.

206. *See* FED. R. BANKR. P. 8001–8002.

207. TABB, *supra* note 1, at 945.

208. 28 F.3d 34 (7th Cir. 1994), *aff'g* 169 B.R. 178 (Bankr. N.D. Ind. 1993).

209. *Id.* at 35.

cata. However, it is inconsistent for the courts to use res judicata for some plans, and not others.

Second, it is not clear that the bankruptcy court is a court of competent jurisdiction when it confirms a plan discharging a student loan without an adversarial hearing and a showing of undue hardship. The Seventh Circuit Court of Appeals has stated that "[a] bankruptcy court lacks the authority to confirm any plan unless it 'complies with the provisions of this chapter and with the other applicable provisions of this title.'"[210] Under this approach, a confirmed plan that does not meet with the mandatory requirements of the Code is void.[211] Judge Klein's dissent adopts this reasoning and states that a confirmed plan containing discharge by declaration language is void because of the "total lack of jurisdiction" caused by the absence of the adversary proceeding.[212]

Third, it is not clear that a chapter 13 proceeding involves the same parties. Because student loan creditors are not served, they never achieve the status of "party." There is no final judgment bearing the names of the debtor and creditor. At best, they are interested parties. Thus the interaction between the debtor and the creditor is not between parties, rendering res judicata inappropriate.

The fourth element, same cause of action, may be present, because the debtor's cause "to discharge the student loan" remains. But, given the failure of the first three elements, it is clear that res judicata is improper.

### *E. Collateral Estoppel*

Collateral estoppel, as its name suggests, bars collateral attacks on a final judgment.[213] A collateral attack is an attempt to avoid, defeat, or evade a final judgment.[214] Collateral estoppel is a partner to res judicata, and it is the judicial mechanism that stops a party from attacking a final judgment. The *Andersen* court felt that any attack on a confirmed plan was a collateral attack because it was an attempt by the creditor to avoid the effects of the previously confirmed plan, and as such, was barred by res judicata.[215] It ruled that the creditor's attack was collateral because it failed to appeal the confirmation order within the time limits set forth by the Code.[216]

210. *Id*. (quoting 11 U.S.C. § 1325(a)(1) (1994)).

211. *See Escobedo*, 28 F.3d at 35.

212. *In re Pardee*, 218 B.R. 916, 934 (B.A.P. 9th Cir. 1998) (Klein, J., dissenting) (suggesting that confirmation of the plan with the student loan discharge was a void judgment due to the court's lack of jurisdiction).

213. *See id.* at 932.

214. *See* May v. Casker, 110 P.2d 287, 288 (Okla. 1940).

215. *See* Andersen v. UNIPAC-NEBHELP (*In re* Andersen), 179 F.3d 1253, 1259 n.9 (10th Cir. 1999).

216. *See id*. at 1259 n.9.

However, Judge Klein urged that an attack on a confirmed plan containing a provision like that found in *Andersen* would not be a collateral attack.[217] Under this argument, the court lacked jurisdiction because it entered a plan in violation of the Code.[218] This lack of jurisdiction voids the confirmed plan. Therefore, any attacks made on that judgment are direct attacks, not collateral attacks, because they question the underlying validity of the judgement. Because these attacks on the confirmed plan are direct, they are not prevented by collateral estoppel.

### *F. Public Policy and Discharge by Declaration*

In addition to the above legal analysis, an analysis of discharge by declaration raises public policy issues. First, discharge by declaration has an effect on attorney good faith. Second, *Andersen* and its progeny alter the concept of zealous advocacy. Finally, *Andersen* may prevent the bankruptcy system from consistent adjudication of claims.

#### *1. Good Faith*

Presentation of a discharge by declaration in a proposed chapter 13 plan must be consistent with an attorney's ethical duties. First, confirmation of the plan by a court will occur only if "the plan has been proposed in good faith and not by any means forbidden by law."[219] Second, an attorney filing a plan with the court certifies that "the legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."[220] This rule tracks state law, which generally requires that an attorney "not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law."[221]

The precise definition of "good faith" in a bankruptcy setting defies exact description. Courts note that good faith is an "amorphous notion, largely defined by factual inquiry."[222] A leading scholar suggests that "it is impossible to capture the full meaning of a concept as broad and as vague as good faith in tidy phrase or test."[223] Perhaps the inability to precisely define good faith arises from the tension created by the courts between allowing a debtor to exercise his full statutory rights, but not

217. *See Pardee*, 218 B.R. at 934.
218. *See id*.
219. 11 U.S.C. § 1325(a)(3) (1994).
220. FED. R. BANKR. P. 9011(b)(2).
221. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1; *see also* FED. R. CIV. P. 11 (allowing sanctions for frivolous pleadings and motions).
222. Metro Employees Credit Union v. Okoreeh-Baah (*In re* Okoreeh-Baah), 836 F.2d 1030, 1033 (6th Cir. 1998).
223. TABB, *supra* note 1, at 928.

allowing the use of those rights in such a manner as to subvert the underlying societal goal of equity.[224] Or better said, bankruptcy laws are a shield, not a sword.[225]

In *Andersen*,[226] the issue of good faith was not raised, so there was no examination of the basis for submitting the plan. However, in other like cases, the good faith asserted by the debtor's attorney is generally that the debtor lacked the funds to fully prosecute the adversary proceeding, so the attempted circumvention through declaration was not abusive of the system.[227]

Even if this were true, such actions are not an attempt to extend, modify, or reverse existing law. Rather, those actions are an attempt to avoid existing law. Congress was surely aware that consumer debtors possess limited resources when it nevertheless required that dischargeability be determined by adversary proceeding.[228]

At least one court agreed that discharge by declaration was not proposed in good faith and sanctioned the attorney for trying to emulate *Andersen*. In *In re Evans*,[229] the debtor's attorney presented a plan containing a "student loan addendum."[230] This addendum contained nearly the same language as the debtor's plan in *Andersen*.[231] However, unlike *Andersen*, the court, sua sponte, caught this provision before the plan was confirmed and prevented confirmation.[232] The court additionally ordered the drafting attorney to report for a sanctions hearing.[233] The court felt that *Andersen* and *Pardee*:

> [S]tand for the following proposition: the Code and the Rules don't permit you to include such an addendum in a chapter 13 plan, but if you do and the plan is confirmed due to the absence of a timely objection, the provision is nonetheless binding upon the creditor due to the need for finality.[234]

However, the court in this case caught the provision before confirmation and stated that inclusion of such a provision violated good-faith

224. Sometimes a debtor violates good faith even by acting within the letter of the law. *See* TABB, *supra* note 1, at 654–55 (discussing a liquidation case in which the court felt that the debtor was guilty of abusing the process, even though the debtor's actions were entirely within state law).

225. *See In re* Jones, 231 B.R. 110, 114 (Bankr. N.D. Ga. 1999) (categorizing a debtor's use of the bankruptcy court to stifle child-support contempt action as bad faith).

226. 179 F.3d 1253 (10th Cir. 1999).

227. *See In re* Evans, 242 B.R. 407, 409 (Bankr. S.D. Ohio 1999); *In re* Mammel, 221 B.R. 238, 241 (Bankr. N.D. Iowa 1998).

228. *See Mammel*, 221 B.R. at 241.

229. 242 B.R. 407 (Bankr. S.D. Ohio 1999).

230. *Id.* at 408.

231. In this case, the debtor's "student loan addendum" stated, inter alia, that "[c]onfirmation of debtor's plan shall constitute a finding to that effect and that said debt is dischargeable." *Id*. at 409. For the language used by *Andersen*, see *supra* note 113 and accompanying text.

232. *See Evans*, 242 B.R. at 411.

233. *See id*. at 413.

234. *Id*. at 412.

standards.[235] Otherwise, a debtor would not be subject to sanctions for proposing an exemption unfounded in law.[236]

### *2. Zealous Advocacy*

Legal practitioners owe their clients a duty of zealous representation.[237] By taking a case, the attorney represents that the client will be afforded every right and legal opportunity.[238] Failure to take advantage of all claims or defenses may mean malpractice.[239]

Arguably, it is now incumbent on all debtors' attorneys to try and do what was done in *Andersen*. After all, the *Evans* court held:

> If [the attorneys] include the student loan addendum and the plan is confirmed without objection, they can argue that the student loan obligation is discharged under the doctrine of res judicata and the authority of *Andersen* and *Pardee*. If an objection is raised, they simply strike the addendum and are no worse off than if they hadn't tried.[240]

Even when the provisions are caught before confirmation, there is only one published case "out of the over one million filed bankruptcies filed annually" in which an attempt was even made to sanction an attorney for filing a discharge by declaration.[241] Simply put, the deterrent is not there, and the courts are too busy to scrutinize the plans. Deterrence can be accomplished by breaking from *Andersen* and allowing attacks on confirmed plans with provisions not in accord with the Code.

### *3. Inconsistent Results*

Bankruptcy adjudication should be consistent.[242] Congress is granted the authority to implement "uniform laws on the subject of bankruptcies."[243] Although uniformity does not mean that the courts are to act in lockstep fashion in the decision making process,[244] it is clear that consistency is a fundamental goal of the Bankruptcy Code.

*Andersen* promotes inconsistency for several reasons. As it stands now, some loans are discharged by use of a discharge by declaration.[245]

235. *See id*.
236. *See id*.
237. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 advisory committee's note.
238. *See id*.
239. *See generally* Louisiana State Bar Ass'n v. Williams, 549 So. 2d 275 (La. 1989).
240. *Evans*, 242 B.R. at 412.
241. *Id.* at 413.
242. *See* Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188 (1902) (noting that although state-initiated variation is permitted, the laws passed on bankruptcy should be uniform).
243. U.S. CONST. art. I, § 8, cl. 4.
244. *See* TABB, *supra* note 1, at 685–88.
245. *See generally* Andersen v. UNIPAC-NEBHELP (*In re* Andersen), 179 F.3d 1253 (10th Cir. 1999); Great Lakes Higher Educ. Corp. v. Pardee (*In re* Pardee), 193 F.3d 1083 (9th Cir. 1999).

Some loans are not.[246] Some attempts are caught by the trustee.[247] Others are caught by the court.[248] Every once in a great while, a debtor's attorney faces possible sanctions for trying to skip the adversary process.[249] Most are not sanctioned.[250]

Furthermore, the roles of the court[251] and trustee[252] further exacerbate *Andersen*'s propensity for inconsistent results. Just as some courts catch discharges by declaration before the plans are confirmed,[253] some trustees will notice and object to the provisions, but others will not.[254] For discretionary matters, it is not possible, or even desirable, for all the courts and trustees to react to the varied factual and legal problems presented to them. But, the clear abuse of the Code through discharge by declaration should always be objected to by the court or the trustee if the provision is noticed preconfirmation.

Refusal to follow *Andersen* will deter debtor's counsel from even attempting to discharge debt without having first undergone an adversary proceeding. Then, both the court and trustee would be able to expect plans proposed in conformity with the law, as the benefit of circumvention is removed.

*Andersen*'s promotion of inconsistent rulings offends general, judicial fundamentals as well. After all, it is a fundamental principle of justice that like cases should be accorded like treatment in the interest of achieving consistent results.[255] *Andersen*'s holding does not promote this goal.

## IV. RESOLUTION

### *A. Due Process*

It is clear from *Andersen* that the creditor had knowledge of the debtor's proposed discharge by declaration. Nonetheless, *Andersen* subverts due process in two ways. First, it fails to give proper notice to the creditor that the issue of discharge has been raised.[256] Considering the amount of outstanding loans,[257] the number of debtors,[258] and the number

246. *See In re* Stevens, 236 B.R. 350, 352 (Bankr. E.D. Va. 1999).

247. *See In re* Evans, 235 B.R. 133, 134 (Bankr. S.D. Fla. 1999).

248. *See In re* Mammel, 221 B.R. 238, 239 (Bankr. N.D. Iowa 1998) (noting that the courts have the right to review chapter 13 plans even if the creditor does not object to the plan). *See generally Stevens*, 236 B.R. 350 (Bankr. E.D. Va. 1999).

249. *See In re* Evans, 242 B.R. 407, 413 (Bankr. S.D. Ohio 1999).

250. *See generally Andersen* 179 F.3d 1253; *Stevens*, 236 B.R. 350; *Mammel*, 221 B.R. 238.

251. *See* 11 U.S.C. §§ 105(a), 1325 (1994).

252. *See id.* § 1325(b)(1).

253. *See, e.g.*, *In re* Conner, 242 B.R. 794 (Bankr. D.N.H. 1999).

254. *See, e.g.*, *In re* Mammel, 221 B.R. 238 (Bankr. N.D. Iowa 1998).

255. *See* Vasquez v. Hillary, 474 U.S. 254, 265–66 (1985) (noting that the doctrine of stare decisis plays a key role in the maintenance of our constitutional system).

256. *See* discussion *supra* Part III.C.1.

257. *See supra* note 30 and accompanying text.

of bankruptcies filed each year,[259] the burden should not be placed on the creditor to sift through plan provisions for language inconsistent with the Code. The summons, with its inherent ability to place a party on notice and its power to grant jurisdiction over a party, is the proper vehicle to alert a creditor to the fact that the debtor is attempting to discharge student loans.[260]

Second, the failure to undertake an adversary proceeding precludes creditors from meaningfully voicing their opposition to the plan.[261] Raising an objection to a plan is not the same as an adversarial proceeding because the creditor is stripped of a right to a process that places the burden of showing undue hardship on the debtor. Congress intended for loans to be discharged through the adversarial proceeding,[262] and the courts should respect this directive. Otherwise, the adversary proceeding is superfluous,[263] trivializing[264] the entire bankruptcy process.

### *B. Res Judicata and Collateral Estoppel*

Res judicata is not the proper doctrine to prevent the courts from reexamining confirmed plans. First, the due process violations suffered by the creditor make res judicata inapplicable.[265] To bind a party by a judgment without due process would be incongruent with the aims of our judicial system. It is important to encourage parties to protect their rights. But to require parties to do this when they have not even been served with a summons is extreme.

Even if discharge by declaration does not offend due process, the necessary elements required to invoke res judicata are not present.[266] First, the confirmed plan is not necessarily a final judgment and can be changed postconfirmation for a number of reasons.[267] Second, the court lacks competent jurisdiction to enter such an order.[268] Although the court has great flexibility to tailor a plan,[269] the adversary proceeding is not discretionary[270] and, as noted by the Seventh Circuit, such a judgment is void.[271]

258. *See supra* note 30 and accompanying text.
259. *See supra* note 37 and accompanying text.
260. *See supra* notes 167–71 and accompanying text.
261. *See* discussion *supra* Part III.C.2.
262. *See supra* note 118 and accompanying text.
263. *See In re* Mammel, 221 B.R. 238, 241 (Bankr. N.D. Iowa 1998).
264. *See In re* Evans, 242 B.R. 407, 411 (Bankr. S.D. Ohio 1999) (criticizing the debtor's attorney for attempting to bypass adversary proceeding as done in *Andersen*).
265. *See* discussion *supra* Part III.D.1.
266. *See* discussion *supra* Part III.D.2.
267. *See supra* notes 200–07 and accompanying text.
268. *See supra* notes 158–61, 210–12 and accompanying text.
269. *See supra* note 59 and accompanying text.
270. *See* discussion *supra* Part II.B.3.
271. *See supra* note 211 and accompanying text.

Because the confirmed plan is void,[272] any attack is a direct attack and should not be barred by collateral estoppel.[273] It is important to prevent a party from relitigating the same matter, but when the underlying judgment is void that party should be able to petition the court for redress. It hints at judicial stonewalling when a court confirms a plan that contains a discharge by declaration and then uses collateral estoppel to prevent the aggrieved party from seeking justice.[274]

### *C. Policy*

The discharge by declaration permitted in *Andersen* should not be allowed because it distorts ethical responsibilities for attorneys in two ways. First, it is not an exercise of good faith for an attorney to circumvent proper bankruptcy procedure.[275] Despite the difficulty of defining good faith, it is clear that an *Andersen* proposal is not made in good faith. It exemplifies the debtor's misuse of the Code as a sword. The attempt to avoid the adversary process is an attempt to circumvent a legal obligation through a technicality of the law.[276] It is an example of abuse of process that serves a debtor's own malevolent and selfish aims. It preys on the fact that over a million bankruptcies are filed each year, which makes it possible that such a provision may escape the attention of the court and the trustee to survive confirmation.

Second, *Andersen* twists and subverts the concept of zealous advocacy.[277] Because the debtor's attorney in *Andersen* essentially "got away with it," is it now incumbent on all members of the bar to try and do the same? After all, it is a win-win situation. Even if the provision is caught preconfirmation, the loan can still be discharged through the adversary proceeding.[278] The odds of sanctions to the attorney are literally one in a million.[279] Sadly, *Andersen* allows a debtor to pull a fast one on the court and increases its burden to review plans.

Finally, *Andersen* promotes inconsistency in the bankruptcy system, which ultimately harms the reputation of the court.[280] Attorneys are uncertain about the risks associated with serving their clients. Those playing by the rules may lose clients to attorneys who take risks. Consumer debtors will be treated differently, not because of the variances in their

272. *See supra* note 211 and accompanying text.

273. *See supra* notes 217–18 and accompanying text.

274. *See In re* Pardee, 218 B.R. 916, 934 (B.A.P. 9th Cir. 1998) (Klein, J., dissenting) (suggesting that res judicata and collateral estoppel used to avoid court having to own up to its original error).

275. *See* discussion *supra* Part III.F.1.

276. *See* discussion *supra* Part III.F.1.

277. *See* discussion *supra* Part III.F.2.

278. *See, e.g.*, *In re* Evans, 242 B.R. 407, 411–12 (Bankr. S.D. Ohio 1999).

279. This statistic was created simply by taking the number of bankruptcies filed annually, over a million, in relation to the number of reported cases dealing with attorney sanctions for filing a plan containing a discharge by declaration, one. *See supra* notes 37, 241 and accompanying text.

280. *See* discussion *supra* Part III.F.3.

economic situations, but because of the workloads and personalities of the judges and trustees.[281] Debtor *A* may have student loan debt discharged without showing undue hardship, while Debtor *B* may go through the expense of litigating an adversary proceeding and lose. This is not a proper result.

## V. CONCLUSION

As demonstrated, *Andersen* should not be followed, and discharge by declaration should not be allowed. The current bankruptcy system sets forth strict requirements concerning discharge of student loans. The Code reflects the intent of Congress and sets forth the public policy that, absent extenuating circumstances, these loans are to be repaid. Refusal to reexamine a plan that discharges a student loan debt without requiring the debtor to first undergo the adversary proceeding subverts the Code, the intent of Congress, and harms the public in general. Furthermore, such actions by the courts deny student loan creditors due process. Without satisfying due process, res judicata and collateral estoppel are invalid excuses for courts to allow the confirmed plan to withstand reexamination. Allowing discharge by declaration promotes inconsistency in the bankruptcy courts, contrary to our judicial system's desire for uniformity. Finally, *Andersen* proposals violate an attorney's duty to exercise good faith, distorts the concept of zealous advocacy, and encourages the attorney to act in an unethical manner. Thus, courts should adopt a consistent approach by eradicating the discharge by declaration and imposing consequences on debtors and attorneys who attempt to escape the adversary proceeding.

281. *See supra* notes 251–55 and accompanying text.