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Forgotten But Not Forgiven: Remedies for Student Loan Debtors in Public Service

Andrew Goring

FORGOTTEN BUT NOT FORGIVEN: REMEDIES FOR STUDENT LOAN DEBTORS IN PUBLIC SERVICE

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Abstract

This Note identifies a timely issue with student loans and discusses potential remedies. Under the Public Service Loan Forgiveness program, borrowers of federal student loans who make 120 qualifying monthly payments while working in public service may have their loans forgiven. When a loan is forgiven, the borrower no longer has to pay the remaining balance of the debt. Since both the prevalence of student loans and the average student debt are increasing, loan forgiveness is an important opportunity for borrowers under the crushing debt of student loans. However, a Consumer Financial Protection Bureau report found a rising problem: Loan servicers are leading borrowers to believe that borrowers' monthly payments qualify for loan forgiveness, when they in fact do not. Right now, the only solution for those borrowers is to restart the clock on their ten years of public service. This Note determines that there are several causes of action that could be brought against student loan servicers in order to offer relief to borrowers who believed their loans would be forgiven.

* J.D., University of Florida Levin College of Law; B.A. Rollins College. I would like to thank Lauren Northup for her loving support and Christie Arkovich for being the ultimate resource on student loans.

INTRODUCTION

The Public Service Loan Forgiveness (PSLF) program was introduced as part of the College Cost Reduction and Access Act[1] in 2007.[2] The concept behind PSLF is simple: A student loan borrower who works in public service for ten years[3] can get his student loans discharged.[4] October 1, 2017, marked ten years from the first qualifying payments for PSLF,[5] so borrowers working in public service have only recently been able to have their loans forgiven under the PSLF program. The results have been shocking: The PSLF program has rejected ninety-nine percent of applicants who completed ten years of payments, with the most common reason for rejection being that the payments did not count as "qualifying payments."[6]

According to a recent Consumer Financial Protection Bureau (CFPB) report, deceptive practices by federal loan servicers have caused some borrowers to believe that their loan payments were contributing toward forgiveness, when in fact they were not.[7] In some situations, servicers were aware that borrowers had qualifying public service jobs and did not inform those borrowers of their eligibility for PSLF.[8] The CFPB report tells the story of one borrower who informed his servicer of his intention to enroll in PSLF.[9] His servicer consolidated his loans for that purpose, and when the borrower asked whether he was qualified, the servicer told him he was "all set."[10] It was not until four years later that the borrower learned that his payments were not counting toward the 120 monthly

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1. Pub. L. No. 110-84, 121 Stat. 784 (2007) (codified as amended in scattered sections of 20 U.S.C.).

2. Robert Proudfoot, *Securitization of Student Loans: A Proposal to Reform Federal Accounting, Reduce Government Risk, and Introduce Market Mechanisms as Indicators of Quality Education*, 9 U. MASS. L. REV. 6, 21–23 (2014).

3. To be more specific, 120 monthly payments, which need not be made on consecutive months. 34 C.F.R. § 685.219 (2018).

4. *Id.*

5. *Id.*

6. *Public Service Loan Forgiveness Data*, FED. STUDENT AID, https://studentaid.ed.gov/sa/about/data-center/student/loan-forgiveness/pslf-data [https://perma.cc/7QNV-2XVQ] (containing a March 2019 PSLF report); Zach Friedman, *Student Loan Forgiveness Program Rejects 99% of Applicants*, FORBES (Sept. 24, 2018, 8:32 AM), https://www.forbes.com/sites/zackfriedman/2018/09/24/public-service-loan-forgiveness-rejected/#342c71b91824 [https://perma.cc/3RYB-G6K7].

7. CONSUMER FIN. PROT. BUREAU, STAYING ON TRACK WHILE GIVING BACK: THE COST OF STUDENT LOAN SERVICING BREAKDOWNS FOR PEOPLE SERVING THEIR COMMUNITIES 29–31 (2017), http://files.consumerfinance.gov/f/documents/201706_cfpb_PSLF-midyear-report.pdf [https://perma.cc/LH86-J8WG].

8. *Id.*

9. *Id.* at 30.

10. *Id.*

payments required for PSLF.[11] In a recent class action lawsuit against a student loan servicer,[12] former professor and meteorologist Bill Cottrill describes how he "asked the right questions" about his student loan payments.[13] Nevertheless, after ten years of payments totaling $130,000, Cottrill's servicer told him that he had the wrong type of loan—it could not be forgiven—and now Cottrill must "delay[] retirement another decade."[14] Stories like these show that there are clear gaps in the system. This Note aims to address how those gaps can be filled.

One of the greatest sources of confusion for borrowers is whether their student loans qualify for PSLF.[15] In order for a loan payment to count toward PSLF, that payment must be for a Direct loan.[16] Congress implemented Direct loans in 1994 as a replacement for federally guaranteed private loans under the Federal Family Education Loans (FFEL) program.[17] While FFEL loans were discontinued in 2010, 21.6 million borrowers still owe $437 billion on the program.[18] No payments toward a FFEL loan count toward PSLF.[19] Although a FFEL loan can be consolidated into a Direct loan, only subsequent payments under the Direct loan will count toward PSLF.[20] To complicate matters, the only way for a borrower to find out whether his loans are Direct or FFEL is to go to the National Student Loan Data System and create a profile; the servicers' websites and billing statements do not contain this information.[21] So even if a borrower working in public service discovers that his loans are under the FFEL program, his only option for loan

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11. *Id.*

12. Class Action Complaint, Daniel v. Navient Solutions, LLC, No. 8:17-cv-02503 (M.D. Fla. Oct. 25, 2017).

13. Jackie Callaway, *Navient Accused of Misleading Students About Loan Forgiveness*, ABC ACTION NEWS (Feb. 2, 2018, 12:06 PM), https://www.abcactionnews.com/money/consumer/taking-action-for-you/navient-accused-of-misleading-students-about-loan-forgiveness- [https://perma.cc/L529-2N52].

14. *Id.*

15. CONSUMER FIN. PROT. BUREAU, *supra* note 7, at 30.

16. 34 C.F.R. § 685.219(c)(1)(iii) (2018); CONSUMER FIN. PROT. BUREAU, *supra* note 7, at 29.

17. Terrence L. Michael & Janie M. Phelps, *"Judges?! – We Don't Need No Stinking Judges!!!": The Discharge of Student Loans in Bankruptcy Cases and the Income Contingent Repayment Plan*, 38 TEX. TECH. L. REV. 73, 81 (2005).

18. Doug Rendleman & Scott Weingart, *Collection of Student Loans: A Critical Examination*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 215, 221 (2014).

19. *Id.* at 232.

20. *Id.*

21. *What Type of Loan Do I Have?*, STUDENT LOAN BORROWER ASSISTANCE, http://www.studentloanborrowerassistance.org/start-here/what-type-of-loan-do-i-have/ [https://perma.cc/8ZF3-8CP5].

forgiveness is to consolidate the FFEL loans into a Direct loan and restart the clock for another ten years of public service.

Although one might argue that it is borrowers' responsibility to ensure that they have the correct type of loan, there are several reasons why the law should protect student loan borrowers from their servicers. First of all, the increasing requirement of college degrees for entry-level jobs, combined with the increasing cost of tuition, means that student loans are becoming increasingly necessary for young Americans.[22] In 2014, graduates had an average debt of $29,400[23] and studies show that most students overestimate their ability to repay their student loans.[24] Another issue is that during bankruptcy, there is a higher bar[25] to discharge student loans than other types of loans.[26] This is largely due to several highly publicized but misrepresentative bankruptcy cases during the early 1970s, in which recent graduates went on to lucrative careers shortly after discharging their student loans in bankruptcy.[27] Finally, graduates who seek public interest work are at greater financial risk because public interest jobs typically have much lower salaries than private sector jobs.[28] In fact, the Department of Education has estimated that a college graduate working in public service may end up repaying over 170% of their initial principal balance.[29] This results in a class of borrowers who are under

22. William J. Cox, *The Student Borrower: Slave to the Servicer?*, 27 LOY. CONSUMER L. REV. 189, 195 (2015); Mitch et al., *Financial Help Puts Public Interest Careers in Reach*, 81 WIS. LAW. 25, 25 (2008).

23. For law school graduates, the average debt ranges from one and a half to over two times as much. L. Kinvin Wroth, *Access to Justice: The Problem of Law Student Debt*, 30 VT. B.J. 28, 28 (2004).

24. Cox, *supra* note 22, at 195–96. In fact, for many Americans, student loan repayment is becoming a lifelong endeavor—a CFPB study shows that over the past several years, the number of borrowers over the age of sixty with student loan debt has increased in every state and that the median debt of those elderly borrowers has increased in nearly every state. CONSUMER FIN. PROT. BUREAU, OLDER CONSUMERS AND STUDENT LOAN DEBT BY STATE 4–9 (2017), https://www.consumerfinance.gov/documents/5184/201708_cfpb_older-consumers-and-student-loan-debt-by-state.pdf [https://perma.cc/VU6H-NDAZ].

25. The Brunner Test, requiring a showing of undue hardship in order to discharge student loans, has been "judicially defined too harshly by most of the bankruptcy courts." Kevin J. Smith, *Defining the Brunner Test's Three Parts: Time to Set a National Standard for All Three Parts to Determine When to Allow the Discharge of Federal Student Loans*, 58 S.D. L. REV. 250, 251 (2013). However, some studies show that the discharge of student loans through bankruptcy is still quite feasible. Jason Iuliano, *Student Loans and Surmountable Access-to-Justice Barriers*, 68 FLA. L. REV. 377, 388 (2016).

26. Kurtis Wiard, *Hope for the Hopeless: Discharging Student Loans in Bankruptcy*, 84 J. KAN. B. ASS'N 24, 25 (2015).

27. *Id.*

28. Wroth, *supra* note 23, at 28 (noting that the average salary for government lawyers is less than half that of private practice attorneys).

29. CONSUMER FIN. PROT. BUREAU, *supra* note 7, at 26–27.

pressure to take on high amounts of debt with few options to pay it back, and who are ripe for exploitation. Student loan servicers are too happy to oblige.

In 2013, the CFPB acknowledged student loan borrowers' increased reports of abuse by servicers by announcing that it would investigate the issue.[30] According to the director of the CFPB, the agency intended to change servicer practices "meant to defraud borrowers" by extending oversight to the largest servicers.[31] The investigation highlighted several concerning issues.[32] While servicers have greatly increased the number of repayment options for borrowers, the change has also resulted in a much more complicated and difficult-to-navigate system.[33] There is over a twenty percent variance in delinquency rates across the repayment plans available for federal Direct loans, which shows that getting into the right repayment plan is crucial for borrowers.[34] However, borrowers report not being adequately informed about their options, even when experiencing financial hardship.[35] For example, some servicers advised borrowers to postpone payments through forbearance—which is an attractive short-term solution, but can make a difficult financial situation worse by significantly increasing the amount of unpaid interest—instead of informing borrowers about lower repayment options.[36] Borrowers further report that even when they identify the repayment plan that best fits their financial needs to their loan servicers, the servicers sometimes enroll them in a different repayment plan.[37] Also, over half of borrowers who enroll in an income-based repayment plan fail to properly submit the annual income documentation requirements,[38] which results in severe consequences.[39] Finally, borrowers are penalized for missing payments when they are transferred to a different servicer without notice, or when

30. Katheryn E. Marcum, *Tightening the Loophole: The Role of Fee-Shifting Statutes in Resolving the Growing Problem of Servicing America's Student Loan Debt*, 119 W. VA. L. REV. 829, 841–42 (2016).

31. *Id.* at 842.

32. CONSUMER FIN. PROT. BUREAU, STUDENT LOAN SERVICING: ANALYSIS OF PUBLIC INPUT AND RECOMMENDATIONS FOR REFORM 20–38 (2015), http://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf [https://perma.cc/47Y8-SW8K].

33. *Id.* at 20.

34. *Id.* at 22–23.

35. *Id.* at 25.

36. *Id.* at 25–27.

37. *Id.* at 27–28.

38. Although this failure is not entirely the fault of the borrower, as will become evident in Part III.

39. CONSUMER FIN. PROT. BUREAU, *supra* note 32, at 31–36. For example, when the recertification for an income-driven repayment plan is not processed in time, the borrower is billed at the much higher standard repayment rate, which can result in interest capitalization, forced forbearance, and the loss of government subsidies. *Id.* at 33–35.

they are told that their loan is in forbearance, but their forbearance application is later denied.[40]

Part of the problem is that student loan servicers often benefit from the financial hardship their practices bring upon borrowers. Servicers are compensated with a flat monthly fee per account serviced.[41] Because servicers' fees do not depend on the level of service given to borrowers, "this fee structure may create an economic disincentive to address borrower default."[42] So whenever a servicer advises that a borrower go into forbearance instead of using an income-adjusted repayment plan, the servicer gets easy money for the years that the borrower is in forbearance in addition to the money from the increased time it will take the borrower to eventually repay the loan, since the borrower will have to pay a greater amount after coming out of forbearance.[43] Furthermore, servicers "may be reluctant to inform borrowers of PSLF" because whenever a borrower successfully enrolls in the PSLF program, that borrower is transferred to a different, dedicated PSLF servicer.[44] The longstanding federal regulatory scheme similarly discouraged protective action for borrowers for two main reasons.[45] First, the same agencies charged with overseeing banks also had "a primary mission to protect the safety and soundness of the banking system."[46] Second, the regulating agencies made more money if they regulated more banks, but the banks were able to choose which agency regulated them.[47] Thus, regulators who actually enforced consumer protection law risked their profitability.[48]

In response to the recent economic recession and the realization that the bank regulatory system did not work, the legislature implemented the Dodd-Frank Wall Street Reform and Consumer Protection Act[49] (Dodd-Frank Act).[50] Most notably, the Act created the CFPB and established a presumption against preemption.[51] The significance of the CFPB is evident by the extent of its investigations into student loan servicer practices, but it also serves an important function in its authorization to

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40. *Id.* at 39, 51–52.

41. *Id.* at 134.

42. *Id.*

43. *Id.* at 26.

44. *Id.* at 44–45.

45. Cox, *supra* note 22, at 208.

46. *Id.* at 208 & n.158 (quoting Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 90 (2008)).

47. *Id.* at 208–09.

48. *Id.* at 209.

49. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C.).

50. Cox, *supra* note 22, at 214.

51. *Id.* at 214–15.

prescribe rules.[52] While the CFPB does not have explicit authority over student loan servicers, it passed a larger-participant rule in 2014, which allows the CFPB to exercise supervisory authority over certain larger participants in a market.[53] This supervisory authority allows the CFPB to regulate large[54] student loan servicers engaging in unfair, deceptive, or abusive acts or practices.[55]

When placed into the greater context of servicers' abusive treatment of student loan borrowers, the problem of misinformed borrowers eligible for PSLF but not enrolled in the program is clearly an injustice. As one servicer commented in reply to allegations of misleading borrowers, "[W]e are on the front lines of repayment every day, so we know how complex the federal loan program can be."[56] And yet, servicers blame borrowers—most of whom likely have little to no experience with the federal loan system—for not servicing errors.[57] This is not merely a matter of borrowers sleeping on their rights; it is the result of a systematic exploitation of vulnerable debtors. Several recent changes have set the stage for judicial action against student loan servicers, and with the recent ten-year anniversary of the PSLF program, the time is ripe for action.

This Note examines the possible remedies for borrowers who were not adequately informed about their eligibility for PSLF. Part I concludes that state law claims should not be preempted by the Higher Education Act of 1965,[58] despite a Ninth Circuit decision holding otherwise. Part II evaluates three viable state law remedies. Part III considers unfair, deceptive, and abusive acts and practices under Title X of the Dodd-Frank Act. Based on the Middle District of Pennsylvania's reasoning in denying a Motion to Dismiss for claims brought against a student loan servicer, it is likely that those claims would also be effective at securing PSLF remedies.

I. PREEMPTION OF STATE LAW CLAIMS

The Dodd-Frank Act's presumption against preemption is believed to be "one of the most important fixes to federal consumer protection regulation since the subprime mortgage crisis."[59] Prior to the Act,

52. 12 U.S.C. § 5531 (2012).

53. Cox, *supra* note 22, at 218–20.

54. The larger-participant rule gives the CFPB authority over all the government's servicers and two private loan servicers, but not smaller private loan servicers, comprising 29% of the student loan market. *Id.* at 220–21.

55. *Id.* at 219–20.

56. Callaway, *supra* note 13.

57. *Id.*

58. Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in scattered sections of 20 U.S.C.).

59. Cox, *supra* note 22, at 215.

banking regulators used preemption to halt state efforts at consumer protection.[60] Now, the Dodd-Frank Act allows state laws that offer greater protection than, or are not inconsistent with, the Act.[61] Otherwise, the Dodd-Frank Act can only preempt state consumer protection laws if:

> (A) application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State;
>
> (B) . . . the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers . . . ; or
>
> (C) the State consumer financial law is preempted by a provision of Federal law other than title 62 of the Revised Statutes.[62]

However, federal circuit courts have disagreed in the application of (C).[63] The Ninth Circuit has held that the Higher Education Act of 1965 preempts state law claims, while the Fourth Circuit has held that it does not.[64]

A. *Circuit Split over Preemption*

Borrowers who try to bring any state law claims against their servicers will have to overcome the argument that state law claims are preempted by the Higher Education Act, particularly after the Ninth Circuit decision in *Chae v. SLM Corp.*[65] In *Chae*, student loan borrowers brought California business, contract, and consumer protection claims against their loan servicer.[66] The Ninth Circuit first determined whether any of the plaintiffs' claims were barred by express preemption.[67] Where Congress enacts an express preemption, the court's task is to "interpret the provision and 'identify the domain expressly pre-empted by that language.'"[68] In total, the Ninth Circuit identified that the Higher Education Act preempted the operation of state usury laws, statutes of limitations, limitations on recovering the costs of debt collection, infancy defenses to contract liability, wage garnishment limitations, and

60. *Id.* at 209.
61. 12 U.S.C. § 5551(a) (2012); Cox, *supra* note 22, at 215.
62. 12 U.S.C. § 25b(b).
63. Cox, *supra* note 22, at 215–16.
64. *Id.* at 216 n.222.
65. 593 F.3d 936 (9th Cir. 2010).
66. *Id.* at 941.
67. *Id.* at 942.
68. *Id.* (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 484 (1996)).

disclosure requirements.[69] Of these, the court concluded that the preemption of state disclosure requirements barred the plaintiffs' misrepresentation claims.[70] In doing so, the court reasoned that "[a]t bottom, the plaintiffs' misrepresentation claims are improper-disclosure claims."[71]

Of course, the servicers' failure to "proactively inform" borrowers about PSLF does sound like an improper disclosure claim under the Ninth Circuit's reasoning.[72] However, the express preemption for disclosure requirements is limited to "loans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act of 1965."[73] In contrast, the PSLF program is neither a loan nor authorized by the Higher Education Act.[74] Indeed, as the Southern District of New York observed, "there is nothing in the HEA that standardizes or coordinates how a customer service representative of a third-party loan servicer like Sallie Mae shall interact with a customer . . . in the day-to-day servicing of his loan."[75] The remaining challenge for student loan borrowers to overcome, and the issue upon which the circuits are split, is whether state claims are barred by conflict preemption.

Conflict preemption is derived from the principle that a state law is preempted if it creates an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[76] The court determines Congress's objectives by "examining the federal statute as a whole and identifying its purpose and intended effects."[77] In *Chae*, the Ninth Circuit evaluated the FFEL program's explicitly stated purposes and determined that the underlying objective was to "make lending to college students a less-risky proposition."[78] It further determined that the intended effect of the program was uniformity.[79] The court primarily attributed the intention of uniformity to the "comprehensive framework" of the Act and its "precisely-detailed provisions."[80] In connecting the program's objective and purpose, the court observed that "exposure to lawsuits under fifty separate sets of laws and court systems could make lenders reluctant to

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69. *Id.*
70. *Id.* at 942–43 (citing 20 U.S.C. § 1098g).
71. *Id.* at 942.
72. CONSUMER FIN. PROT. BUREAU, *supra* note 7, at 30–32.
73. 20 U.S.C. § 1098g (Supp. V 2018).
74. *See* 34 C.F.R. § 685.219 (2018).
75. Genna v. Sallie Mae, Inc., No. 11-CV-7371(LBS), 2012 WL 1339482, at *8 (S.D.N.Y. Apr. 17, 2012).
76. *Chae*, 593 F.3d at 943.
77. *Id.*
78. *Id.*
79. *Id.* at 947.
80. *Id.* at 944.

make new federally-guaranteed student loans."[81] Concluding that the application of California consumer protection law would upset the FFEL program's uniformity, the Ninth Circuit held that the plaintiffs' remaining claims were conflict-preempted by the Higher Education Act.[82]

In contrast, the Fourth Circuit in *College Loan Corp. v. SLM Corp.*[83] was not convinced that uniformity was "actually an important goal of the HEA."[84] Instead, the Fourth Circuit focused on the explicitly stated purposes of the FFEL program under § 1071(a)(1) of the Higher Education Act[85]:

> (A) to encourage States and nonprofit private institutions and organizations to establish adequate loan insurance programs for students in eligible institutions (as defined in section 1085 of this title),
>
> (B) to provide a Federal program of student loan insurance for students or lenders who do not have reasonable access to a State or private nonprofit program of student loan insurance covered by an agreement under section 1078(b) of this title,
>
> (C) to pay a portion of the interest on loans to qualified students which are insured under this part, and
>
> (D) to guarantee a portion of each loan insured under a program of a State or of a nonprofit private institution or organization which meets the requirements of section 1078(a)(1)(B) of this title.[86]

The Fourth Circuit further did not believe that the mere existence of an extensive system of regulations was sufficient to preempt nonconflicting state law.[87] It cited to the Supreme Court for two important propositions. First, "[t]o infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive."[88] Second, "pre-emption is ordinarily not to be implied

81. *Id.* at 945 (quoting Brannan v. United Student Aid Funds, Inc., 94 F.3d 1260, 1264 (9th Cir. 1996)).

82. *Id.* at 950.

83. 396 F.3d 588 (4th Cir. 2005).

84. *Id.* at 597.

85. *Id.*

86. 20 U.S.C. § 1071(a)(1) (2012).

87. *College Loan Corp.*, 396 F.3d at 598.

88. *Id.* (alteration in original) (quoting Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 717 (1985).

absent an 'actual conflict.'"[89] The court concluded that it should not "seek[ ] out conflicts between state and federal regulation where none clearly exists."[90] Thus, the Fourth and Ninth Circuits disagree about whether uniformity was such an important intention of Congress in drafting the Higher Education Act that it should preempt state law.

B. *Problems with Preemption*

No other circuits have weighed in on the issue yet, and thus the conflict is largely unresolved. Even though the Fourth Circuit opinion was written first and was rebutted by the Ninth Circuit in a much lengthier discussion, the Fourth Circuit better adhered to precedent. In fact, the Ninth Circuit seems to have blended conflict preemption with field preemption. There are three types of preemption: "(1) Congress enacts a statute that explicitly pre-empts state law [express preemption]; (2) state law actually conflicts with federal law [conflict preemption]; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field [field preemption]."[91] The Ninth Circuit has held that field preemption does not apply to the Higher Education Act, and that field preemption is "off the table to resolve this case."[92] Nevertheless, its application of conflict preemption seems very similar to field preemption. Compare the definition of field preemption above with the Ninth Circuit's reasoning, in *Chae*, that Congress intended the Higher Education Act to be uniform:

> After reviewing the FFELP as a whole, we agree with the DOE that Congress intended it to operate uniformly. That intent is shown by the comprehensive framework that Congress set up to govern the $2 billion per year program. The statutes describe the nuts and bolts of the FFELP, defining the required terms of each type of loan. The statutes go so far as to mandate specified repayment terms and specified insurance and guaranty requirements. As one example, the FFELP sets the maximum interest rate that a lender may charge, depending on the type of loan and the date when it was taken out. Such precisely-detailed

89. *Id.* (quoting English v. Gen. Elec. Co., 496 U.S. 72, 90 (1990)).

90. *Id.* (quoting *English*, 496 U.S. at 90).

91. Chae v. SLM Corp., 593 F.3d 936, 941 (9th Cir. 2010) (quoting Tocher v. City of Santa Ana, 219 F.3d 1040, 1045 (9th Cir. 2000)).

92. *Id.* at 941–42. Other courts have also concluded that the Higher Education Act does not occupy the field so as to preempt state claims. *See, e.g.*, Armstrong v. Accrediting Council, 168 F.3d 1362, 1369 (D.C. Cir. 1999), *amended*, 177 F.3d 1036 (D.C. Cir.); Morgan v. Markerdowne Corp., 976 F. Supp. 301, 318 (D.N.J. 1997).

> provisions show congressional intent that FFELP participants be held to clear, uniform standards.[93]

The Ninth Circuit essentially reasoned that Congress had left no room for state regulation in the field, and therefore Congress intended that the Higher Education Act be uniform. It then reasoned that any state legislation "would threaten [the Department of Education's] ability to carry out the congressional objectives of ensuring uniformity and stability within the [Higher Education Act]," and that state law therefore is preempted by the Act.[94]

Indeed, the reasoning in *Chae* is very similar to the Supreme Court's reasoning in *Hines v. Davidowitz*.[95] In *Hines*, the Court concluded that because the Alien Registration Act of 1940 was "a single integrated and all-embracing system . . . it plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system," and any state law was therefore preempted.[96] However, *Hines* has been consistently characterized as an example of field preemption—not conflict preemption.[97] Therefore, *Chae*'s reasoning should be characterized as field preemption as well. This is problematic for *Chae* because of the Ninth Circuit's previous holding that field preemption does not apply to the Higher Education Act.[98] By reasoning that any state law would conflict with Congress's intention that the Higher Education Act be uniform, the Ninth Circuit essentially circumvented its earlier holding that field preemption does not apply to the Higher Education Act.

Furthermore, courts do not infer an intent of uniformity merely because legislation is comprehensive.[99] In *Hines*, the primary consideration was not necessarily the comprehensiveness of the Alien Registration Act, but rather the issues it addressed.[100] The Court was most swayed by the Act's effects on international relations and human rights, both of which the Court recognized to be uniquely suited for federal legislation.[101] In fact, the field of student loans is less like the field of

93. *Chae*, 593 F.3d at 944 (citations omitted).

94. *Id.* at 949.

95. 312 U.S. 52 (1941).

96. *Id.* at 74.

97. Arizona v. United States, 567 U.S. 387, 401 (2012); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Lozano v. City of Hazleton, 724 F.3d 297, 322 (3rd Cir. 2013).

98. *Chae*, 593 F.3d at 941–42.

99. Hillsborough Cty. v. Automated Med. Labs., Inc. 471 U.S. 707, 707 (1985).

100. *Hines*, 312 U.S. at 67–68.

101. *Id.* ("And in that determination [of preemption], it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. . . . And it is also of importance that this legislation deals with the rights, liberties, and personal freedoms

alien registration and more like that of tax statutes, which the Court considered to be "an entirely different category," presumably unworthy of federal preemption.[102] Student loans further seem to fall into the category of fiduciary responsibilities, for which the Second Circuit recognized that "[t]here does not appear to be a pressing need for national uniformity."[103] The Second Circuit further did not see "any unreasonable burden placed upon union officers required to comply with the fiduciary requirements of the various states in which their unions function,"[104] in contrast to the Ninth Circuit's conclusion that uniformity was necessary to avoid "exposure to lawsuits under fifty separate sets of laws and court systems."[105] Therefore, the Ninth Circuit's insistence that the Higher Education Act's comprehensiveness is proof of Congressional intent of uniformity may very well be ill-founded.

Indeed, the Ninth Circuit does not point to any actual conflict between a state law and the Higher Education Act.[106] While the servicer in *Chae* implemented the Higher Education Act in a way that conflicted with California law,[107] the Higher Education Act is broad enough that the conflict could have been averted. For example, the Higher Education Act permits, but does not require, a late fee, while California law prohibits a late fee.[108] Also, the Higher Education Act allows servicers to set the first repayment date up to sixty days after disbursement, while California law provides a shorter window.[109] Thus, there was no actual conflict because it was entirely possible for the servicer to comply with both California law and the Higher Education Act. It should be noted that courts apply two different definitions for conflict preemption: conflict preemption exists either where "it is impossible for a private party to comply with both state and federal requirements" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[110] *Chae* relies on the latter definition, that state law is preempted when it is an obstacle to federal law,[111] seemingly

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of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans.").

102. *Id.*

103. Fitzgerald v. Catherwood, 388 F.2d 400, 405 (2d Cir. 1968).

104. *Id.*

105. Chae v. SLM Corp., 593 F.3d 936, 945 (2010) (quoting Brannan v. United Student Aid Funds, Inc., 94 F.3d 1260, 1264 (9th Cir. 1996)).

106. *See generally Chae*, 593 F.3d 936.

107. *Id.* at 940–41.

108. *Id.* at 947.

109. *Id.* at 947–48.

110. English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

111. *Chae*, 593 F.3d at 943.

because it was not impossible for the student loan servicer to comply with both state and federal requirements. The issue with this is that the "obstacle" language traces back to *Hines*, in which the Supreme Court was actually discussing field preemption.[112] The position that obstacle preemption is not in fact conflict preemption is consistent with how the Supreme Court has "observed repeatedly that pre-emption is ordinarily not to be implied absent an 'actual conflict.'"[113] An actual conflict should mean one that makes it impossible to comply with both state and federal law, not merely one that creates an obstacle in doing so. Thus, the Ninth Circuit's entire analysis, from establishing a congressional intent of uniformity to finding California state law to be an obstacle to that intent, uses the term *conflict preemption* while actually using the language and analysis of field preemption. Because field preemption does not apply to the HEA, *Chae*, or any case determined on similar grounds, it should not justify the preemption of state law remedies to aggrieved student loan debtors unless it is actually impossible for the loan servicer to comply with both federal and state laws.

II. State Law Claims

With the issue of preemption resolved, this Note now turns to potential remedies for borrowers who were misled by their servicers into making years of payments that did not count toward PSLF.

A. *Negligent or Fraudulent Misrepresentation*

Borrowers who were told that their student loans payments were eligible for PSLF when they in fact were not may have either a negligent or fraudulent misrepresentation claim, or both. The elements for these misrepresentations are "essentially the same," with the only difference being the scienter requirement.[114] Fraudulent misrepresentation requires "the representor's knowledge that the representation is false," while negligent misrepresentation instead requires that the representor "reasonably should have known of the statement's falsity."[115] Including the scienter requirement, there are four elements for each claim: "(1) a

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112. *Hines*, 312 U.S. at 66–68 ("And in that determination [of whether Pennsylvania's law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"], it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.").

113. *English*, 496 U.S. at 90.

114. Rogers v. Cisco Sys., Inc., 268 F. Supp. 2d 1305, 1312 (N.D. Fla. 2003) (applying Florida law).

115. *Id.* (emphasis omitted) (quoting Elders v. United Methodist Church, 793 So. 2d 1038, 1042 (Fla. 3d DCA 2001)).

false statement concerning a material fact; (2) [the scienter requirement]; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation."[116] Florida courts have acknowledged the possibility that the plaintiff's detrimental reliance could be either an action or refraining from action.[117] As a tort claim, negligent misrepresentation would be subject to a defense of contributory fault if the court determined that the borrower was also negligent in causing the harm.[118] However, due to the complexity of modern student loan payment options,[119] it seems difficult to fault the borrower for relying on his servicer. Finally, the statute of limitations for negligent misrepresentation in Florida is subject to the delayed discovery doctrine, meaning that the limitation period does not begin to run until "the facts giving rise to the cause of action were discovered or should have been discovered."[120]

The success of a negligent or fraudulent misrepresentation claim would likely depend on the specific fact pattern of the student loan servicers' PSLF practices. For instance, the situation in which a servicer affirmatively told the borrower that her payments qualified for the loan forgiveness program[121] would make a strong fraudulent misrepresentation claim. First, there is clearly a false statement—whether the borrower's repayments qualified for PSLF—of material fact. Second, it seems likely that the borrower would be able to prove that his servicer knew the status of his loan payment, and almost a certainty that the servicer should have known the status of the borrower's loan payment. And while courts do not tend to focus on the third element, student loan servicers clearly have an incentive to keep borrowers off of PSLF, because doing so greatly increases their own income.[122] Finally, any

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116. *Id.* (quoting *Elders*, 793 So. 2d at 1042).

117. *Id.* ("One who fraudulently makes a misrepresentation . . . for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability . . . ." (emphasis omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977))).

118. Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So. 2d 334, 338 (adopting the Restatement (Second) of Torts' position).

119. CONSUMER FIN. PROT. BUREAU, *supra* note 32, at 20 ("We service loans made under an increasingly complex student loan program. Since 1990, the number of repayment options available to borrowers has increased from two to 15—including multiple income-driven repayment plans with similar sounding names and differing eligibility criteria. There are now eight forgiveness programs and over 35 different deferment and forbearance options.").

120. Mayor's Jewelers, Inc. v. Meyrowitz, No. 12–80055–CIV, 2012 WL 2344609, at *4–5 (S.D. Fla. June 20, 2012) (applying Florida law). In Florida, the delayed discovery rule applies to actions "founded upon fraud," and for this purpose, negligent misrepresentation "sounds in fraud rather than negligence." *Id.*

121. CONSUMER FIN. PROT. BUREAU, *supra* note 7, at 30; *see supra* text accompanying notes 9–11.

122. CONSUMER FIN. PROT. BUREAU, *supra* note 32, at 44–45.

reasonable borrower, upon hearing that she was "all set," would likely rely on that information in deciding that no further action is necessary.[123] While negligent or fraudulent misrepresentation may not be as likely to succeed in a fact pattern where the servicer neglected to inform a borrower about his payments' ineligibility for PSLF, it is a strong option for borrowers who were told that their payments were PSLF eligible. In any case, the statute of limitations should not be an issue because even if the borrower spent years making payments that were not PSLF eligible,[124] the limitation period would only begin once the borrower realized that his servicer had deceived him.[125]

B. *Unjust Enrichment*

Another possible theory of recovery against student loan servicers is that the servicers are being unjustly enriched by payments that do not count toward PSLF. Unjust enrichment is "an equitable claim based on a legal fiction which implies a contract as a matter of law" even though no actual contract exists between the parties.[126] Indeed, a claim for unjust enrichment is precluded where an express contract already exists on the same subject matter, for the proper claim would be one for breach of contract.[127] The FFEL loan Master Promissory Note permissively allowed the borrower to consolidate his loan into a Direct Loan "to take advantage of the public service loan forgiveness program," but it did not guarantee that the servicer would ensure that qualifying borrowers did so.[128] Thus, while a borrower may want to bring a breach of contract claim in the alternative, the better cause of action likely lies with unjust enrichment. The elements for an unjust enrichment claim are: "(1) plaintiff conferred a benefit on the defendant; (2) defendant voluntarily accepted and retained the benefit; and (3) it would be inequitable for

123. CONSUMER FIN. PROT. BUREAU, *supra* note 7, at 30.

124. A fact pattern described in the 2017 CFPB report. *Id.* at 29–30.

125. *See supra* note 120 and accompanying text.

126. 14th & Heinberg, LLC v. Terhaar & Cronley Gen. Contractors, Inc., 43 So. 3d 877, 880 (Fla. 1st DCA 2010).

127. GTP Structures I, LLC v. Wisper II, LLC, 153 F. Supp. 3d 983, 992 (W.D. Tenn. 2015) (quoting Diamond "S" Dev. Corp. v. Mercantile Bank, 989 So. 2d 696, 697 (Fla. 1st DCA 2008)) (applying Florida law).

128. U.S. DEP'T OF EDUC., OMB NO. 1845-0069, FEDERAL FAMILY EDUCATION LOAN PROGRAM (FFELP): FEDERAL PLUS LOAN APPLICATION AND MASTER PROMISSORY NOTE, https://ifap.ed.gov/dpcletters/attachments/FP0904PLUSHEOAExp083110.doc [https://perma.cc/PPQ3-ZMW6].

defendant to retain the benefit without paying the value of the benefit to plaintiff."[129] Each element will be discussed in turn.

In order to satisfy the first element, student loan borrowers have to show that they conferred a benefit upon student loan servicers. While borrowers should have to make only 120 monthly payments before their loans are forgiven under the PSLF program, if borrowers were misled by their servicer, any payments that did not qualify for PSLF do not count toward the required 120 monthly payments. When a student loan borrower—who is otherwise eligible for PSLF—is misled into believing that his payments qualified for PSLF, he confers a benefit upon his servicer when he makes any payment after the 120th monthly payment. Florida courts also emphasize that the plaintiff must directly confer the benefit to the defendant.[130] The benefit is not direct, for example, where the plaintiff confers a benefit to the defendant's subsidiary company or to a corporation in which the defendant has two-thirds ownership, even though the defendant receives a portion of that benefit.[131] In this situation, student loan servicers should be a direct beneficiary of loan repayments, even though some servicers act on behalf of another lender.[132]

As for the second element, it should be easy to show that servicers knowingly accepted the benefit by simply providing the billing information for any payments after the 120th monthly payment. For the third and final element, borrowers have to show that servicers' practices of receiving more than 120 monthly payments from PSLF-eligible borrowers is unjust unless those borrowers are compensated. The unjust enrichment claim will fail on this element if the defendant has "given adequate consideration to someone for the benefit conferred."[133] However, it seems apparent that in the posed situation, borrowers receive no compensation at all for the excess loan payments they have to pay due to servicers' misleading practices. After all, if not for the misleading practices, borrowers would have completely wiped out their student loan debt after the 120th payment; any additional money that borrowers have

129. Johnson v. Catamaran Health Sols., LLC, 687 F. App'x 825, 830 (11th Cir. 2017) (citing Fito v. Attorneys' Title Ins. Fund, Inc., 83 So. 3d 755, 758 (Fla. 3d DCA 2011)) (applying Florida law).

130. Kopel v. Kopel, 229 So. 3d 812, 118 (Fla. 2017).

131. *Catamaran Health Sols.*, 687 F. App'x at 830 (applying Florida law); Kopel v. Kopel, 117 So. 3d 1147, 1152 (Fla. 3d DCA 2013), *rev'd on other grounds*, 229 So. 3d 812.

132. While the holder of a loan and the servicer of a loan can be two different entities, the two largest holders of FFEL loans, Navient and Nelnet, are also both loan servicers. *Top 100 Current Holders of FFELP Loans for 2017 and 2016*, FED. STUDENT AID, https://fp.ed.gov/attachments/publications/FY2017Top100Lenders.pdf [https://perma.cc/YJC8-4G8H].

133. Am. Safety Ins. Serv. v. Griggs, 959 So. 2d 322, 331–32 (Fla. 5th DCA 2007).

to spend toward that debt is purely money lost to borrowers and money gained by servicers.

With all three elements satisfied, borrowers should be able to receive damages for the benefit unjustly conferred upon student loan servicers. These damages are "measured in terms of the benefit to the owner, not the cost to the provider."[134] The benefit to the student loan servicer will depend on whether the servicer is also the lender of the loan. In either situation, the servicer always receives a flat rate from the government.[135] But where the servicer also holds the loan as a lender, the lender receives the additional benefit of the entire principal repayment of the loan plus interest subsidies from the government.[136] Thus, under unjust enrichment, borrowers could potentially receive more in damages than the amount of money they lost in excess payments, but only if their loan servicer is also the holder of the loan. If the loan servicer is a different entity from the holder of the loan, courts may be concerned about the potential for the plaintiff receiving a windfall through double recovery,[137] and thus the proper course of action may be to bring in the lender as a defendant.

Unjust enrichment has a statute of limitations of four years,[138] and because the unjust enrichment in this scenario occurs with each payment after the 120th monthly payment, most borrowers should have no difficulty being within the limitation period. One potential issue with this theory of recovery is that it only recognizes harm as payments after the 120th monthly payment—each earlier payment would not be unjust enrichment because the borrower intended to make 120 monthly payments under the PSLF program. Thus, borrowers who are aware that they have been deceived by their servicers and have since consolidated their loan into a Direct loan may have to wait until they have made 120 monthly payments after consolidation before bringing this cause of action.

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134. Kane v. Stewart Tilghman Fox & Bianchi, P.A., 85 So. 3d 1112, 1115 (Fla. 4th DCA 2012) (quoting Tooltrend, Inc. v. CMT Utensili, SRL, 198 F.3d 802, 806 (11th Cir. 1999)).

135. While the flat rate is quite low for individual borrowers—2.85 dollars per month per borrower—this could still contribute a substantial amount to damages in a class action suit with many borrowers who each enriched their servicer for many years. *Issue Primers Federal Student Loan Financing*, PNPI (July 9, 2018), http://pnpi.org/federal-student-loan-servicing/ [https://perma.cc/WVA9-MJYS].

136. 2010 U.S. DEP'T EDUC. ECASLA ANN. REP. 9, https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/June2010ECASLAReport.pdf [https://perma.cc/WVA9-MJYS] (describing how the government "no longer pays lenders default and interest rate subsidies for these loans" after it purchases the loans from the lender).

137. Engelke v. Athel-Tech Comp. Sys., Inc., 982 So. 2d 3, 9 (Fla. 2d DCA 2008).

138. Beltran v. Vincent P. Miraglia, M.D., P.A., 125 So. 3d 855, 859 (Fla. 4th DCA 2013).

C. *Breach of Fiduciary Duty*

Claims against student loan servicers for breach of fiduciary duty have not been widely successful.[139] The elements of a claim for breach of fiduciary duty are "the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff's damages."[140] The issue for student loan borrowers bringing breach of fiduciary duty claims against their servicers is that generally, a fiduciary relationship does not exist between a lender and a borrower.[141] Despite the general rule, a fiduciary relationship can be "based upon trust or confidence by one person in the integrity and fidelity of another."[142] Under Florida law, "the principle of fiduciary duty 'extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side and the resulting superiority and influence on the other.'"[143] This flexibility of definition is expanded by the court's acknowledgement of implied fiduciary duty.[144]

An implied fiduciary duty "is based on the circumstances surrounding the transaction and the relationship of the parties,"[145] and may be found when "confidence is reposed by one party and a trust accepted by the other."[146] Thus, if a student loan servicer exhibited confidence in its ability to help a borrower and the borrower indicated his trust in the servicer, the servicer may actually have an implied fiduciary duty to the borrower. Unfortunately, the conversations between borrower and servicer that could have created such a duty would have happened years ago in many cases, and it is unlikely that most borrowers would have created and kept a recording. Nevertheless, a borrower is much more likely to succeed on a theory of breach of implied fiduciary duty by

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139. *E.g.*, Ikeri v. Sallie Mae, Inc., No. CV 13-1943 (DSD/JSM), 2014 WL 12599634, at *16 (D. Minn. Feb. 5, 2014); Genna v. Sallie Mae, Inc., No. 11 Civ. 7371 (LBS), 2012 WL 1339482, at *4 (S.D.N.Y. Apr. 17, 2012).

140. Patten v. Winderman, 965 So. 2d 1222, 1224 (Fla. 4th DCA 2007) (quoting Gracey v. Eaker, 837 So. 2d 348, 353 (Fla. 2002)).

141. *Genna*, 2012 WL 1339482, at *4 (citing Bank Leumi Trust Co. v. Block 3102 Corp., 580 N.Y.S.2d 299 (App. Div. 1992)); *Bank Leumi*, 580 N.Y.S.2d at 301 ("The legal relationship between a borrower and a bank is a contractual one of debtor and creditor and does not create a fiduciary relationship between the bank and its borrower or its guarantors.").

142. *Genna*, 2012 WL 1339482, at *4 (quoting Penato v. George, 383 N.Y.S.2d 900, 904 (App. Div. 1976)).

143. Fla. Bar v. Adorno, 60 So. 3d 1016, 1027–28 (Fla. 2010) (quoting Quinn v. Phipps, 113 So. 419, 421 (Fla. 1927)).

144. *Id.*

145. *Id.* (quoting Maxwell v. First United Bank, 782 So. 2d 931, 933–34 (Fla. 4th DCA 2001)).

146. *Maxwell*, 782 So. 2d at 933–34 (quoting Capital Bank v. MVB, Inc., 644 So. 2d 515, 518 (Fla. 3d DCA 1994)).

alleging an exchange of confidence and trust, rather than making a general allegation of breach of fiduciary duty.

The statute of limitations for breach of fiduciary duty is four years, starting when the last element of the cause of action occurs.[147] While some borrowers may be able to bring an action against their servicer within four years, this is only a small portion of the ten years that a borrower may have continued making payments under the impression that their payments counted toward PSLF. There may, however, be an argument that could extend the statute of limitations. Courts differ as to whether the last element of the cause of action for breach of fiduciary duty is the breach itself or damage caused by that breach.[148] Because the statute of limitations is based on when the last element occurs and because there is a large gap between when the breach occurs and when damages occur, this ambiguity is significant. If the last element of the claim, and thus the start of the limitation period, is in fact the damages caused by the breach, borrowers could argue that the damages do not occur until the borrower has completed the 120 monthly payments—the point at which the loan should have been forgiven. Nevertheless, breach of fiduciary duty remains a difficult cause of action to bring.

III. Unfair, Deceptive, or Abusive Acts or Practices

The Dodd-Frank Act prohibits unfair, deceptive, or abusive acts or practices, which offers a potential recourse for victimized borrowers.[149] While the Act does not create a private right of action that borrowers could bring, the CFPB regularly brings actions on consumers' behalf.[150] Notably, in January 2017 the CFPB filed action against Navient, one of the main federal student loan servicers, for violating Title X of the Dodd-Frank Act, also known as the Consumer Financial Protection (CFP) Act.[151] The Middle District of Pennsylvania denied Navient's motion to dismiss, finding, among other things, that the CFPB had the authority to bring the action and that it sufficiently pleaded Navient's violations of

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147. Davis v. Monahan, 832 So. 2d 708, 709 (Fla. 2002); Woodward v. Woodward, 192 So. 3d 528, 531 (Fla. 4th DCA 2016); *see also* Patten v. Winderman, 965 So. 2d 1222, 1224–25 (Fla. 4th DCA 2007) (explaining that breach of fiduciary duty is not subject to the delayed discovery doctrine).

148. *Compare* Minotty v. Baudo, 42 So. 3d 824, 835–36 (Fla. 4th DCA 2010) (citing Gracey v. Eaker, 837 So. 2d 348, 353 (Fla. 2002)) (listing damages as a third element of the claim), *with Gracey*, 837 So. 2d at 353 (listing breach as the second and final element of the claim, though including within this element that the breach must result in damages).

149. 12 U.S.C. § 5531 (2012).

150. Simpson v. Xerox Educ. Serv., LLC, No. 3:17-CV-00076-JHM, 2017 WL 6507654, at *2 (W.D. Ky. Dec. 19, 2017).

151. Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-CV-101, 2017 WL 3380530, at *1 (M.D. Pa. Aug. 4, 2017).

the Dodd-Frank Act.[152] The CFPB's preliminary success in *Consumer Financial Protection Bureau v. Navient Corp.*[153] is therefore an indication that harm to student loan debtors who are working in public service but not enrolled in the PSLF program may have a remedy through the CFPB alleging unfair, deceptive, and abusive acts or practices. While the *Navient* court did not directly contemplate servicers' PSLF practices, its analysis provides a useful framework for discussing unfair, deceptive, and abusive acts or practices in the PSLF context.

A. *Abusive Acts or Practices*

The CFPB's first count against Navient was for abusive acts, and the facts of this count most closely parallel servicers' PSLF practices.[154] The complaint alleged that Navient advertised its ability to help borrowers choose the best repayment plan for their individual needs, but "instead steered borrowers into forbearance without adequately advising them about other repayment options."[155] It is true that forbearance can be a useful option for borrowers; forbearance offers a temporary reprieve from payments[156] and can thus be well-suited for situations such as that of a borrower who is temporarily in between jobs. However, interest continues to accrue during the forbearance period, and if it goes on for long enough the interest will capitalize, increasing the principal.[157] This means that when a borrower in forbearance resumes payments, the monthly payment will likely be larger, and there could be "a significant increase in the total amount he or she must ultimately pay back."[158] Because of the drawbacks to forbearance, a borrower in long-term financial hardship would be better served with an income-driven repayment plan.[159]

Income-driven repayment plans take into account several factors to calculate an affordable monthly payment—even one as low as $0 per month.[160] However, developing an income-based repayment plan for a borrower is a much longer and more complicated process than simply putting the borrower into forbearance, and Navient incentivizes its employees to make phone calls with borrowers as short as possible.[161]

152. *Id.* at *9, *25.
153. No. 3:17-CV-101, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017).
154. *Id.* at *19.
155. *Id.*
156. *Id.* at *2.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*

This practice resulted in an outcome one might expect: Navient "routinely entered financially distressed borrowers into forbearance without adequately discussing—or sometimes discussing at all—the option of income-driven repayment plans."[162] Despite the numerous advantages of income-driven repayment plans over forbearance, the number of Navient's borrowers in forbearance exceeded those in income-driven repayment plans.[163] The disregard for Navient's borrowers' financial well-being stands in stark contrast to the representations on Navient's website—that it could help borrowers make the right decision for their situation.[164] According to the Middle District of Pennsylvania, the CFPB's Complaint alleged sufficient facts for a count of abusive acts or practices to survive Navient's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6).[165]

There are two ways for an act or practice to be determined abusive under the Dodd-Frank Act. First, the act or practice is abusive if it "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service."[166] Second, the act or practice is abusive if it takes unreasonable advantage of:

> (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
>
> (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
>
> (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[167]

The CFPB relied on 2(C), unreasonable advantage of reasonable reliance, in its case against Navient.[168] The court noted the CFPB's allegations that Navient took unreasonable advantage of that reliance by failing to "give complete information on income-driven repayment plans and instead push[ing] borrowers into forbearance," which was "both detrimental to borrowers and beneficial to Navient."[169] The court was satisfied with the CFPB's allegations that borrowers reasonably relied on

162. *Id.*
163. *Id.*
164. *Id.* at *1, *19.
165. *Id.* at *19–20.
166. 12 U.S.C. § 5531(d)(1) (2012).
167. *Id.* § 5531(d)(2).
168. *Navient*, 2017 WL 3380530, at *19.
169. *Id.*

Navient to act in their interests based on the representations on Navient's website and its invitation for borrowers to contact them for help,[170] regardless of whether Navient had any legal duty to provide individualized financial counseling to borrowers.[171] As the court observed, the Dodd-Frank Act does not state that duty is an element of abusive act or practice.[172] After all, reasonable reliance does not necessarily come from a preexisting legal duty.[173] Therefore, as long as a borrower's reliance on a loan servicer is reasonable, any act that takes unreasonable advantage of that reliance could qualify as an abusive act.[174] According to the court, the CFPB's allegations were sufficient at the pleading stage to allege an abusive act or practice.[175]

The similarities between Navient's forbearance practices and servicers' PSLF practices described in the CFPB report are persuasive that the law should apply to them similarly. The CFPB reported that after borrowers communicated to their servicer that they worked in public service, servicers "withh[e]ld essential information about eligibility for PSLF."[176] Further, some borrowers informed their servicer of their intention to pursue PSLF, only for their servicer to place them into a nonqualifying repayment plan.[177] The consequences of servicers' actions were the years that borrowers paid into a nonqualifying repayment plan and the increased costs of doing so.[178] Therefore, in both the PSLF context and in the CFPB's suit against Navient, servicers failed to proactively inform borrowers about an option that would have significantly improved their financial situations.

The CFPB's action against Navient and the Middle District of Pennsylvania's denial of Navient's Motion to Dismiss lays the groundwork for potential abusive practices claims against servicers for PSLF practices. If a servicer made positive representations about its ability to help borrowers choose an appropriate repayment plan, the CFPB should be able to show that the borrowers reasonably relied on their servicer to act in their interests. From there, borrowers must also be able to show that their servicer took unreasonable advantage of their reliance. If failing to inform borrowers about a more suitable income-driven repayment plan constitutes taking unreasonable advantage of

170. *Id.* at *19–20.

171. *Id.*

172. *Id.*; 12 U.S.C. § 5531(d).

173. *Navient*, 2017 WL 3380530, at *19–20 (citing RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 2017)).

174. *Id.*

175. *Id.*

176. CONSUMER FIN. PROT. BUREAU, *supra* note 7, 29–30.

177. *Id.* at 33.

178. *Id.* at 29–33.

borrowers, then failing to inform them about their eligibility for the PSLF program should as well. The CFPB took note that not putting a borrower on a suitable income-driven repayment plan was detrimental to the borrower and beneficial to Navient,[179] and the same is true for not informing a borrower about the PSLF program. After all, a servicer loses money whenever a borrower is placed into PSLF because "doing so currently leads to the loan being reassigned to a specialty server."[180] And it seems clear that the borrower's loss of access to loan forgiveness causes significant financial harm. Therefore, the CFPB should have a strong case, on behalf of borrowers who were not informed about their eligibility for PSLF, against servicers under 12 U.S.C. § 5531(d) for abusive acts or practices.

B. *Unfair Acts or Practices*

The CFPB's second and third counts against Navient were for unfair acts or practices, using both the same facts as the first count as well as additional information about Navient's failure to adequately notify borrowers about necessary paperwork.[181] Under the income-driven repayment plans, borrowers must submit renewal paperwork annually.[182] Although failure to submit this paperwork results in potentially irreversible consequences for borrowers, Navient's notice to borrowers about the deadline, both through email and nonelectronic mail, did not fully inform borrowers as to what was required of them.[183] The emails had a subject line of either "Your Sallie Mae Account Information" or "New Document Ready to View," and the body of the email simply stated that "a new education loan document is available. Please log in to your account to view it," and contained a hyperlink to Navient's website. The nonelectronic mail informed borrowers that their income-driven repayment plan would "expire in approximately 90 days" and that the "renewal process may take at least 30 days."[184] The Middle District of Pennsylvania determined that under both Navient's forbearance practices (from Count I) and its notice practices, the CFPB adequately pleaded a claim for unfair acts or practices.[185]

179. *Id.*

180. CONSUMER FIN. PROT. BUREAU, *supra* note 32, at 46.

181. Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-CV-101, 2017 WL 3380530, at *20, *21 (M.D. Pa. Aug. 4, 2017).

182. *Id.* at *2.

183. *Id.* at *2–3.

184. *Id.* at *3.

185. *Id.* at *20–23.

There is a two-part test to determine whether an act or practice is unfair under the Dodd-Frank Act.[186] First, "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers."[187] Second, "such substantial injury is not outweighed by countervailing benefits to consumers or to competition."[188] An injury is reasonably avoidable if "consumers had a free and informed choice."[189] With both Navient's forbearance practices and its notice practices, the court found that the CFPB's allegations, if true, meant that borrowers would be unlikely to know that they needed to seek information beyond what their servicer told them either by phone, mail, or email.[190] Thus, while consumers may have had a free choice, the choice was not informed, and thus the injury was likely not reasonably avoidable.

Based on this standard and with the Middle District of Pennsylvania's analysis as guidance, the CFPB would also likely succeed on a claim that servicers' PSLF practices are unfair. First, the CFPB should have little difficulty in proving that the practice of not informing borrowers about their PSLF eligibility is likely to cause substantial injury to consumers. Just like Navient's forbearance and notice practices, servicers' PSLF practices can have permanent consequences on borrowers by increasing the total amount they must pay toward their loan. Also, the reasonable avoidability of this harm is analogous to that of both Navient's forbearance and notice practices: because borrowers do not have a free and informed choice where a servicer fails to inform them of their eligibility for PSLF based on their repayment plan, the harm of losing out on PSLF payments was not reasonably avoidable. Second, it seems clear that there are no countervailing benefits to consumers or competition by not informing borrowers about their PSLF eligibility. PSLF encourages college graduates to serve the public good in lower paying jobs. Preventing graduates from accessing the compensation for this service that Congress provided has no public benefit. Therefore, the CFPB should have a good chance at succeeding on an unfair acts or practices claim against servicers on the behalf of public service workers who were not informed about their PSLF eligibility.

186. 12 U.S.C. § 5531(c) (2012).

187. *Id.* § 5531(c)(1)(A).

188. *Id.* § 5531(c)(1)(B).

189. *Navient*, 2017 WL 3380530, at *21 (quoting FTC v. Neovi, Inc., 604 F.3d 1150, 1158 (9th Cir. 2010)).

190. *Id.* at *21, *22.

C. *Deceptive Acts or Practices*

Finally, the CFPB's complaint also alleged several counts of deceptive acts or practices.[191] One count was for the mailed notices about the renewal paperwork for income-driven repayment plans, which stated that incorrect or incomplete information would result in a delay, "and thus implied that delay was the only consequence of submitting incorrect or incomplete information, when in truth it could have several irreversible consequences."[192] The remaining counts alleged that Navient informed defaulting borrowers that the federal loan rehabilitation program would reduce the consequences of default more than the program actually did.[193]

While the Dodd-Frank Act clearly defines the criteria for abusive and unfair acts, it does not define any criteria for a deceptive act.[194] Instead, courts evaluating deceptive practices under the Dodd-Frank Act apply the test used for deceptive acts under the Federal Trade Commission Act.[195] According to this test, an act or practice is deceptive if: "(1) 'there is a representation, omission, or practice that,' (2) 'is likely to mislead consumers acting reasonably under the circumstances,' and (3) 'the representation, omission, or practice is material.'"[196] Courts consider deception based on the "net impression" a representation has on the consumer.[197] Applying this test, the Middle District of Pennsylvania was able to determine that Navient's practice of "creat[ing] a false impression that a processing delay was the only adverse consequence of filing an incomplete or inaccurate application[]" was a sufficient pleading for a deceptive act.[198] And although circuits are split on the issue of whether Federal Rule of Civil Procedure 9(b)'s heightened pleading requirement for allegations of fraud or mistake applies to allegations of a deceptive act,[199] the Eleventh Circuit has not weighed in on the issue.[200]

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191. *Id.* at *23–26.

192. *Id.* at *23.

193. *Id.* at *24.

194. 12 U.S.C. § 5531 (2012); *Navient*, 2017 WL 3380530, at *23.

195. *Navient*, 2017 WL 3380530, at *23 (citing Consumer Fin. Prot. Bureau v. Gordon, 819 F.3d 1179, 1193 n.7 (9th Cir. 2016)).

196. *Id.* (quoting *Gordon*, 819 F.3d at 1192–93).

197. *Id.* (quoting *Gordon*, 819 F.3d at 1193).

198. *Id.* at *23–24.

199. The 9th Circuit has expanded Rule 9(b)'s heightened pleading standard to claims in which fraud is not an element, reasoning that using the word *deceptive* instead of *fraud* did "not detract from the apparently fraudulent nature of the allegations." Consumer Fin. Prot. Bureau v. Prime Mktg. Holdings, LLC, No. CV1607111-BRO (JEMX), 2016 WL 10516097, at *5 (C.D. Cal. Nov. 15, 2016) (quoting FTC v. Lights of Am., Inc., 760 F. Supp. 2d 848, 853 (C.D. Cal. 2010)). On the other hand, the Tenth Circuit and some district courts more strictly limit 9(b) to fraud. *Navient*, 2017 WL 3380530, at *24–25; Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assoc., P.C., 114 F. Supp. 3d 1342, 1371–74 (N.D. Ga. 2015).

200. *Frederick J. Hanna & Assoc.*, 114 F. Supp. 3d at 1371–72.

According to the Middle District of Pennsylvania's analysis, the CFPB should also be able to make a successful claim that student loan servicers engaged in deceptive acts or practices. As the CFPB report indicated, loan servicers led borrowers to believe that their payments were eligible for PSLF, when they in fact were not.[201] The net impression of the servicers' representation was that borrowers working in public service jobs only needed to continue making their loan payments for 120 months in order for their loans to be forgiven. It logically follows that a borrower acting reasonably under the circumstances would continue making loan payments. However, that borrower would be misled, because the borrower would in fact have to consolidate his loan into a Direct loan in order for his payments to be PSLF eligible.[202] Also, the misleading would be material, because it has great impact on the decisions the borrower makes.[203]

Therefore, servicers' PSLF practices should meet all three factors of the test for deceptive acts or practices.[204]

D. *Statute of Limitations*

The CFPB's final hurdle in bringing action against student loan servicers for the violation of the Dodd-Frank Act is that the claims must be within the statute of limitations. The law on this matter is explicit: "Except as otherwise permitted by law or equity, no action may be brought under this title more than 3 years after the date of discovery of the violation to which an action relates."[205] The 3-year limitation period does not start at the "mere receipt of a consumer complaint."[206] Rather, such a consumer complaint would only put the CFPB on inquiry notice that it should investigate the matter for a possible violation.[207] The limitation period begins when the CFPB discovers "the facts constituting the violation."[208] It is unclear from the CFPB's reports exactly when it discovered the facts constituting student loan servicers' unfair, deceptive, and abusive acts or practices; however, it seems likely that the CFPB was

201. CONSUMER FIN. PROT. BUREAU, *supra* note 7.

202. *Id.* at 29.

203. Consumer Fin. Prot. Bureau v. NDG Fin. Corp., No. 15-cv-5211 (CM), 2016 WL 7188792, at *14 (S.D.N.Y. Dec. 2, 2016) (describing a material misrepresentation as one "likely to affect consumer decisionmaking"); *Material Misrepresentation*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A false statement to which a reasonable person would attach importance in deciding how to act . . . .").

204. *Navient*, 2017 WL 3380530, at *23.

205. 12 U.S.C. § 5564(g)(1) (2012).

206. Consumer Fin. Prot. Bureau v. Nationwide Biweekly Admin., Inc., No. 15-CV-02106-RS, 2017 WL 3948396, at *10 (N.D. Cal. Sept. 8, 2017).

207. *Id.*

208. *Id.*

aware of the facts by time it published them in its June 2017 report.[209] While the CFPB has been less aggressive under its recent leadership,[210] time remains to see whether the CFPB will act on the PSLF issues raised in its reports. Furthermore, the CFPB may have an argument that its statute of limitations has only began to run more recently based on the discovery of new facts.

CONCLUSION

The Public Service Loan Forgiveness program offered much-needed relief to a class of borrowers who put public service ahead of their own financial needs. While a complete forgiveness of loans, regardless of their value, is generous, borrowers who decided to pursue PSLF made a huge commitment: ten years of public service. For a borrower who has worked for years with the understanding that his loans would be forgiven after the 120th monthly payment, the realization that his payments were not in fact PSLF eligible would be devastating. And yet, because of the practices of student loan servicers, this exact scenario is unfolding across the country. With only one percent of applications for loan forgiveness being approved, the problem is obvious, and initial litigation is already laying the ground for a continued increase in litigation against student loan servicers.

For borrowers wanting to bring action against their student loan servicer, the first step will be overcoming an argument of federal preemption. Despite a Ninth Circuit holding to the contrary, precedent best supports the conclusion that the Higher Education Act does not preempt state law claims against student loan servicers. While no court has considered whether there is a valid cause of action against student loan servicers for their PSLF practices, there are at least three causes of action that could succeed under Florida law. Harm through misinformation seems to best fall under fraudulent misrepresentation, and, indeed, that might be the strongest cause of action available to borrowers. There is also a compelling argument that servicers are unjustly enriched by their actions, although courts may be skeptical of the idea that a doctrine originating in property law should apply to loan payments spanning several years. Finally, even though courts have consistently found that loan servicers do not owe borrowers a fiduciary duty, courts may be amenable to recovery under breach of implied fiduciary duty.

209. CONSUMER FIN. PROT. BUREAU, *supra* note 7, at 27–43.

210. *Pressure Mounts on CFPB Over Public Service Loan Forgiveness Program*, PYMNTS (Apr. 9, 2019), https://www.pymnts.com/consumer-finance/2019/cfpb-public-service-loan-forgiveness/ [https://perma.cc/8UJ8-BQRP]; Chris Arnold, *Trump Administration Plans to Defang Consumer Protection Watchdog*, NPR (Feb. 12, 2018), https://www.npr.org/2018/02/12/584980698/trump-administration-to-defang-consumer-protection-watchdog [https://perma.cc/U3NB-CX3Q].

Alternatively, while the Consumer Financial Protection Act does not give borrowers a private right of action, it does give the Consumer Financial Protection Bureau a potent cause of action against student loan servicers. Not only do the elements for unfair, deceptive, and abusive acts or practices align very closely to servicers' PSLF practices, but the CFPB has already had preliminary success against a student loan servicer on a very similar fact pattern. States are already starting to bring actions against student loan servicers based on state-law claims that closely resemble the Dodd-Frank Act,[211] thus broadening the avenues for justice. Unless Congress takes action to protect student loan borrowers,[212] only litigation can allow borrowers turn back the clock on their student loan payments and receive the forgiveness that they deserve.

211. *See, e.g.*, Pennsylvania v. Navient Corp., 354 F. Supp. 529, 561–64 (M.D. Pa. 2018) (applying Pennsylvania law to claims that a student loan servicer engaged in unfair, deceptive, and abusive practices); *Attorney General James And Superintendent Vullo Announce $9 Million Settlement Of Federal Student Loan Servicing Claims With Acs Education Services*, NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL: PRESS RELEASES (Jan. 4, 2019) (announcing a settlement with a student loan servicer for "claims that a federal student loan servicer deceived borrowers concerning the availability of Public Service Loan Forgiveness"), https://ag.ny.gov/press-release/attorney-general-james-and-superintendent-vullo-announce-9-million-settlement-federal [https://perma.cc/M59V-ANNU].

212. Congress has taken a welcome first step of approving a one-time 350 million-dollar fund that will allow borrowers who would be eligible for PSLF but for having the wrong loan type to have their loans canceled on a first-come, first-serve basis. Michael Stratford, *Compromise 'Fix' for Public Service Loan Forgiveness*, POLITICO (Mar. 23, 2018, 10:00 AM), https://www.politico.com/newsletters/morning-education/2018/03/23/compromise-fix-for-public-service-loan-forgiveness-149361 [https://perma.cc/JQ6G-5356]. And a recently introduced bill would expand qualifying payments for PSLF to include FFEL loans. Annie Nova, *Bill May Help Millions Qualify for Popular Public Service Loan Forgiveness Program*, CNBC (Apr. 11, 2019, 5:08 PM), https://www.cnbc.com/2019/04/11/bill-may-help-millions-qualify-for-popular-public-service-loan-forgiveness-program.html [https://perma.cc/S7ZX-29ED].

