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THE STUDENT BORROWER: SLAVE TO THE SERVICER?

*William J. Cox**

I. INTRODUCTION

“[T]he borrower is slave to the lender.”¹ This old Christian proverb rang true for centuries, but as time has progressed, so has the complexity of our financial transactions.² For most of human history, lenders collected on, or serviced, the loans they originated. Today, third parties known as loan servicers typically perform this function.³ However, these servicers have no accountability to the borrowers they collect from and often little accountability to the lenders with whom they contract.⁴ This system of lending has become particularly troubling in the context of student loans, shackling our nation’s youth

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¹ *Proverbs* 22:7.

² See generally Kathryn Judge, *Fragmentation Nodes: A Study in Financial Innovation, Complexity, and Systemic Risk*, 64 *STAN. L. REV.* 657 (2012) (discussing how growing complexities in financial markets complicates regulation).

³ See *What’s the Difference Between a Mortgage Lender and a Servicer?*, CONSUMER FIN. PROTECTION BUREAU (Nov. 4, 2013), <http://www.consumerfinance.gov/askcfpb/198/whats-the-difference-between-a-mortgage-lender-and-a-servicer.html>.

⁴ See *infra* notes 111-114 and accompanying text (discussing how no party to the student loan transaction holds both the ability and the incentive to hold a student loan servicer accountable).

with the heavy chains of student loan debt.⁵ Today, it seems that the student borrower is slave to the servicer.

Currently, outstanding student loan debt stands at over \$1.2 trillion.⁶ This amount eclipses all other forms of consumer debt in the American economy aside from mortgage debt.⁷ In July 2013, the Consumer Financial Protection Bureau (CFPB) issued a report detailing the troubling story behind this staggering number and the domino effect it has on other financial markets.⁸ For instance, high amounts of student loan debt are forcing students to move back in with their parents instead of buying a house,⁹ forgo start-up business opportunities in favor of safer job opportunities,¹⁰ and dismiss job opportunities in certain underserved sectors and locations.¹¹ In fact, the median net worth of college graduates who are under forty and have student loan debt is only \$8,700.¹²

Student loans are shackling our youth. This Article focuses on the problems of the student loan servicing market, how these problems have contributed to the staggering amount of student loan debt, and how these problems can be solved.

⁵ See *infra* Section II.B (detailing the rampant abuses students faced under this system).

⁶ Rohit Chopra, *Student Debt Swells, Federal Loans Now Top a Trillion*, CONSUMER FIN. PROTECTION BUREAU (July 17, 2013), <http://www.consumerfinance.gov/newsroom/student-debt-swells-federal-loans-now-top-a-trillion/>. However, the CFPB speculates the actual amount of student loan debt might be much larger. *Id.*

⁷ Eamon Javers, *Parents Face the Student Loan Double Whammy*, USA TODAY (Sept. 2, 2013), <http://www.usatoday.com/story/money/business/2013/09/02/parents-student-loan/2749233/>.

⁸ *Student Loan Affordability: Analysis of Public Input on Impact and Solutions*, CONSUMER FIN. PROTECTION BUREAU, 7-11 (2013), http://files.consumerfinance.gov/f/201305_cfpb_rfi-report_student-loans.pdf.

⁹ *Id.* at 7 (explaining how home-ownership rates among the young have vastly decreased as a result of student debt).

¹⁰ *Id.* at 8-9.

¹¹ *Id.* at 9-11. The report specifically mentions the health care and teaching sectors as those that have been the hardest hit by rising student loan debt. *Id.* at 9-10. Rural areas are the hardest hit locations. *Id.* at 10-11.

¹² Walter Hamilton, *Median Net Worth of Grads Under 40 with Student Debt Is Only \$8,700*, LOS ANGELES TIMES (May 14, 2014, 9:00 AM), <http://www.latimes.com/business/la-fi-young-people-with-student-debt-have-median-net-worth-of-only-8700-20140514-story.html>.

A loan servicer is an entity that handles the day-to-day management of loans.¹³ Loan servicers are often not the same entity as the entity that originated or made the loan.¹⁴ In the student lending arena, this is particularly true because the government originates all federal loans while contracting out servicing work to the largest student loan servicers.¹⁵ The abuses reported to the CFPB include allegations that servicers are misapplying payments; applying payments late; applying payments to loans with the lowest principal and interest over those loans with higher amounts and interest rates; giving inaccurate payoff information; placing students in the wrong repayment plan; and transferring loans without adequate notice to students.¹⁶ These abuses lead to excessive fees and extended repayment times, hindering students' ability to pay off their debt.¹⁷

Several issues currently exist in the student loan servicing market. First, students are generally not economists.¹⁸ Using the economic principles of rational choice theory, scholars have pointed out that students are not economically rational, but instead display a heavy optimism bias in their financial investments.¹⁹

Second, the relationship resulting from the complex lender–student–servicer structure poses major obstacles to holding servicers accountable for their actions. Some scholars have diagnosed this problem as a principal–agent issue, where servicers (the agents) have little to no incentive to do the bidding of their principals (lenders) and

¹³ See Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 23 (2011). The main responsibilities of servicers are transactional in nature: sending payment statements to borrowers, collecting payments from borrowers, applying payments from borrowers, and tracking account balances. *Id.*

¹⁴ See *What's the Difference Between a Mortgage Lender and a Servicer?*, *supra* note 3.

¹⁵ Christine DiGangi, *Scoring Sallie Mae: How Student Loan Servicers are Rated*, FOXBUSINESS.COM (Oct. 2, 2013), <http://www.foxbusiness.com/personal-finance/2013/10/02/scoring-sallie-mae-how-student-loan-servicers-are-rated/22>.

¹⁶ See *infra* Section II.B.

¹⁷ *Id.*

¹⁸ While some may aspire to be, the issue of high student loan debt and the obstacles to repayment caused by servicing abuses may well cut off these students' access to such a commendable goal.

¹⁹ Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 8 (2008) (“Markets and contracts can be relied upon to maximize welfare only when consumers are rational and informed.”); *id.* at 9 (discussing how optimism bias and risk underestimation affects consumers' financial transactions).

even less incentive to do what is best for the borrower, who is left out of this relationship.²⁰ Under this type of transaction, students are not technically consumers of “servicing products” and lack a contractual relationship with the servicer.²¹ Instead, it is the lender who has made a contract with the servicer and who has privity with the servicer.²² This can leave consumers outside the safety of both common law remedies²³ and some state consumer protection laws.²⁴

Third, the statutory fixes to the consumer financial market made under the Dodd–Frank Wall Street Reform and Consumer Protection Act and the recent actions of the Executive Branch are not sufficient to fix the problems currently plaguing the student loan servicing market.²⁵ Even the CFPB’s power to supervise certain institutions that engage in “unfair, deceptive, or abusive act[s] or practice[s]” (UDAAPs)²⁶ is inadequate and will be of no use to state attorneys general (SAGs),²⁷ who have traditionally been at the forefront of consumer protection.²⁸ In spite of President Obama’s June 2014 presidential memorandum and the Department of Education’s subsequent renegotiation of its contracts with federal student loan servicers, student borrowers will still face abuses from federal loan servicers because the order does not create the sort of enforcement

²⁰ Levitin & Twomey, *supra* note 13, at 69-70, 79-81.

²¹ *Id.* at 83.

²² *See id.* at 81-83.

²³ *See infra* Part III.

²⁴ *See infra* notes 181-197 (discussing state consumer protection laws and their applicability in the servicing market).

²⁵ *See infra* Section V.A (discussing how the statutory changes made regarding servicer regulation apply only to mortgage servicers and how the statutory presumption against preemption does not apply to potential preemption of state consumer protection laws by the Higher Education Act).

²⁶ 12 U.S.C. § 5531 (2012).

²⁷ Gail Hillebrand, *The Consumer Financial Protection Bureau: Title X of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010*, 8 BERKELEY BUS. L.J. 219, 223 (2011) (discussing the need for many enforcers in consumer protection and how the inability for SAGs to enforce the general UDAAP prohibition is an “odd wrinkle”).

²⁸ Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd–Frank*, 99 IOWA L. REV. 115, 123-24 (2013) (discussing how before federal preemption ramped up, “[s]tates had been at the forefront of consumer protection in the banking field for over a century”).

mechanism that is required and advocated for in this Article.²⁹ In any event, these actions do not affect private student loan servicers and will not protect student borrowers in the private market.³⁰

A solution to the problems plaguing student loan servicing will not be easy, but as the subprime mortgage crisis illustrates, any practical solution will involve the states playing a central role.³¹ Throughout the mortgage crisis, a recurring issue was that the states lacked the power to enforce many of their consumer protection laws against national banks and their subsidiaries.³² While the Dodd–Frank Act provides greater consumer financial protection, the mortgage crisis has proven that the federal government is often too large and too slow to react to rapidly changing financial markets.³³ Further, the servicing fixes in the Dodd–Frank Act were too finely tuned to the issues prevalent in the mortgage market and will not provide much relief in the context of student loan abuses.³⁴ Instead, the CFPB must step up and use its rulemaking power to define specifically the acts or practices that constitute a UDAAP.³⁵ Additionally, the states—who attempted to lead the way during the mortgage crisis³⁶—must be

²⁹ See Helping Struggling Federal Student Loan Borrowers Manage Their Debt, 79 Fed. Reg. 33,843 (June 9, 2014); Michael Stratford, *Feds Overhaul Servicing Contracts*, INSIDE HIGHER ED (Sept. 2, 2014), <https://www.insidehighered.com/news/2014/09/02/education-department-renegotiates-contracts-student-loan-servicers>

³⁰ Helping Struggling Federal Student Loan Borrowers Manage Their Debt, 79 Fed. Reg. 33,843; Stratford *supra* note 29.

³¹ *The Causes and Current State of the Fin. Crisis: Hrg. Before the Fin. Crisis Inquiry Comm'n* 4 (Ill. 2010) (testimony of Ill. Att'y Gen. Lisa Madigan), http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2010-0114-Madigan.pdf [hereinafter Madigan Testimony].

³² See Totten, *supra* note 28, at 123-25 (discussing obstruction by federal regulators, who preempted state regulatory attempts).

³³ See Carliss N. Chatman, *HOLA Preemption and the Original Intent of Congress: Are Federal Thrifts Necessary to Stabilize the Housing Market?*, 18 FORDHAM J. CORP. & FIN. L. 565, 606 (2013) (“The federal government has proven that it is slow to react to changes in the residential mortgage industry, and that the changing tides in Washington can have a major impact on its regulation of mortgage servicing.”). Further, federal regulation of student loan servicers is almost exclusively within the authority of the CFPB, and when power over a market is so highly concentrated, there is always the possibility of agency capture. See *infra* notes 304-305 and accompanying text.

³⁴ See *infra* Section VI.A.

³⁵ See *infra* Section VI.B.

³⁶ See *infra* Section IV.B.

given the power to act as a second line of defense, behind the CFPB, in the protection of consumers in the field of student loan servicing.³⁷

Part II of this Article details the problems inherent in the average consumer of student loans and the abuses perpetrated by student loan servicers. Part III discusses the problems students face when attempting to bring their own suits. Part IV chronicles the dearth of federal regulation that has existed in the servicing arena, including the role the states have played in filling that void. Part V discusses the impact of the new consumer protection regulations on the servicing market, most importantly the creation of the CFPB. Finally, Part VI proposes that these changes are insufficient, and suggests three strategies to bring greater accountability to the student loan servicing market: (1) greater access to consumer choice in choosing servicers; (2) CFPB rulemaking to define what constitutes a UDAAP in the market; and (3) the use of a coordinated SAG lawsuit to create a settlement with substantive protections.

II. HOW SERVICERS ARE SHACKLING STUDENTS WITH HIGH DEBT

While there has been an understandable concentration on mortgage loan servicing given the subprime mortgage crisis,³⁸ student loans are quickly becoming just as pervasive of a problem in financial markets.³⁹ This Article starts with the extra-legal problems in the market, which can be split into two categories: (1) the problems inherent in the average student borrower;⁴⁰ and (2) servicing abuses that are a consequence of the ways in which loan servicers are compensated.⁴¹

³⁷ See Kurt Eggert, *Foreclosing on the Federal Power Grab: Dodd–Frank, Preemption, and the State Role in Mortgage Servicing Regulation*, 15 CHAP. L. REV. 171, 225 (2011) (“Given the lack of federal standards, and the go-ahead from Dodd–Frank, the best strategy by states could well be to plow forward with effective servicer regulation.”); see *infra* Section VI.D.

³⁸ See Gerald Korngold, *Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis*, 60 S.C. L. REV. 727 (2009), for an in-depth review of the subprime mortgage crisis.

³⁹ See *supra* notes 6-12 and accompanying text (discussing how student loan debt now surpasses all other forms of debt aside from mortgage debt and the domino effects that this is causing).

⁴⁰ See *infra* Section II.A.

⁴¹ See *infra* Section II.B.

A. The Young, Uninformed, and Captive Consumer

While the American financial system is premised on laissez-faire economics, free choice only works to the extent that consumers are actually able to make their own “informed and rational” decisions.⁴² Unfortunately, many young Americans are not truly free in their choice of how to pay for college—roughly 60% of students take out loans to attend college each year,⁴³ and higher education is essential to young Americans striving to obtain the American dream.⁴⁴ In fact, by 2018, 63% of new job openings will require at least some form of college education.⁴⁵ Additionally, the cost of attending college keeps rising,⁴⁶ forcing more students not only to take out loans, but also to take out more expensive loans. “From the academic year 2001-2002 to 2011-2012, the average total borrowing per student increased by 55%.”⁴⁷ In 2014, students graduating from four-year institutions had an average debt of \$29,400.⁴⁸ The problems associated with student lending will only increase as this level of borrowing continues to grow.⁴⁹

Further, while many students are left without a choice in how to pay for college, many of those students also greatly overestimate

⁴² See Bar-Gill & Warren, *supra* note 19, at 7 (discussing how “freedom-of-contract principle[s]” require an “informed and rational” consumer).

⁴³ *Student Loan Debt Statistics*, AM. STUDENT ASSISTANCE, <http://www.asa.org/policy/resources/stats/> (last visited Oct. 30, 2013).

⁴⁴ Anthony P. Carnevale, Nicole Smith & Jeff Strohl, *Help Wanted: Projections of Jobs and Education Requirements Through 2018*, at 13 (2010), available at <http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/fullreport.pdf>.

⁴⁵ *Id.*

⁴⁶ Defining Larger Participants of the Student Loan Servicing Market, 78 Fed. Reg. 73,383, 73,385 (Dec. 6, 2013) (citing, *Trends in College Pricing 2012*, COLL. BD. ADVOCACY & POLICY CTR., at 7 (2012), https://trends.collegeboard.org/sites/default/files/college-pricing-2012-full-report_0.pdf) (stating that from 2000 to 2010, the average cost of attending a four-year institution increased at a rate of 5.2% per year above the rate of inflation).

⁴⁷ *Id.* (citing *Trends in College Pricing 2012*, COLL. BD. ADVOCACY & POLICY CTR., at 4 (2012), https://trends.collegeboard.org/sites/default/files/college-pricing-2012-full-report_0.pdf).

⁴⁸ Helping Struggling Federal Student Loan Borrowers Manage Their Debt, 79 Fed. Reg. 33,843 (June 9, 2014).

⁴⁹ See Section II.B, for a discussion of the problems in the market.

their ability to repay their student loans.⁵⁰ In one study, “over 50% of the [college freshman] overestimated their future income upon graduation.”⁵¹ This confidence is not surprising, considering many college students are young consumers⁵² and have not yet had the opportunity to learn from any other large financial transactions.⁵³ Students’ lack of choice in how to pay for college, their overestimation of their ability to repay debt, and their inexperience with large financial transactions leaves them uniquely vulnerable when they first encounter their student loan servicer.⁵⁴

B. Servicing Abuses

The CFPB has done a commendable job in chronicling the issues prevalent in the student loan servicing market, mainly through the use of a specialized consumer complaint system.⁵⁵ This system has

⁵⁰ See Linda Simpson et al., *College Debt: An Exploratory Study of Risk Factors Among College Freshmen*, 42 J. STUDENT FIN. AID 16, 22 (2012), http://www.nasfaa.org/research/Journal/subs/College_Debt_An_Exploratory_Study_of_Risk_Factors_Among_College_Freshmen.aspx.

⁵¹ *Id.*

⁵² Seventy-nine percent of college students in 2012 were between the ages eighteen and twenty-four. *U.S. College Student Demographics in 2012*, MARKETINGCHARTS.COM (Sept. 12, 2013), <http://www.marketingcharts.com/wp/topics/demographics/us-college-student-demographics-in-2012-36555/>.

⁵³ See Bar-Gill & Warren, *supra* note 19, at 38 (discussing how because consumers enter into few mortgage contracts they have fewer opportunities to learn these large transactions than they do with smaller transactions like credit cards). In fact, one of the more troubling problems with high student loan debt is that students are not making large financial purchases, like houses, after graduating due to the high amount of debt they must still pay back on their student loans. *Student Loan Affordability: Analysis of Public Input on Impact and Solutions*, *supra* note 8, at 7-8; Farran Powell, *Gen-Yers Delay First-Time Home Buying*, YAHOO! FIN. (June 7, 2013), <http://finance.yahoo.com/news/gen-yers-delay-first-time-104900279.html>.

⁵⁴ This vulnerability is much higher for students who took out student loans and did not complete college. See Susan Woodward, *Consumer Confusion in the Mortgage Market* 22 (2003), http://www.sandhill.com/pdf/consumer_confusion.pdf (finding that consumers with a college education saved an average of \$1,500 on their mortgage by avoiding excessive mortgage broker fees).

⁵⁵ Lily Altavena, *Consumer Protection Bureau Opens Student Loan Complaint System*, N.Y. TIMES (Mar. 9, 2012, 4:11 PM), <http://thechoice.blogs.nytimes.com/2012/03/09/consumer-protection-bureau-opens-student-loan-complaint-system/>.

been instrumental in the CFPB documenting the widespread abuses prominent in the student loan servicing market.⁵⁶ Overall, the abuses students reported to the CFPB can be broken down into two distinct types: (1) attempts by servicers to extend the length of time the student stays in repayment; and (2) servicers' use of excessive ancillary fees.⁵⁷

1. Extending the Length of Repayment

Servicers are likely intentionally committing abuses as a means to prolong the repayment process of students and thereby obtain additional tranches, or cuts, of each student's repayments.⁵⁸ For many private loans, servicers receive the first tranche in the form of a predetermined percentage of the unpaid principal balance on the loans that they service each month.⁵⁹ Therefore, the longer the student stays in repayment, the longer the servicer can continue to collect this tranche.⁶⁰ Unfortunately, the longer a student stays in repayment, the more interest accrues, increasing the amount that student will have to pay in the end.⁶¹

Federal loan servicer compensation works in a slightly different manner.⁶² Servicers are compensated with a monthly flat rate, which depends upon the status of the loan.⁶³ This rate shrinks for

⁵⁶ *Annual Report of the CFPB Student Loan Ombudsman*, CONSUMER FIN. PROTECTION BUREAU 5 (2013), http://files.consumerfinance.gov/f/201310_cfpb_student-loan-ombudsman-annual-report.pdf.

⁵⁷ *Id.* at 2 ("Opaque or inaccurate payment processing [has] emerged as a significant trend in complaints.")

⁵⁸ *See infra* notes 59-64.

⁵⁹ *See* Levitin & Twomey, *supra* note 13, at 37 (detailing the manner in which mortgage servicers are compensated).

⁶⁰ *See id.* at 38.

⁶¹ *Annual Report of the CFPB Student Loan Ombudsman*, *supra* note 56, at 9-10.

⁶² *Redacted Signed Great Lakes Contract Award*, <https://www.fbo.gov/index?tab=documents&tabmode=form&subtab=core&tabid=f0b9abcbbad6bddd83cc2be1a41e2de>.

⁶³ *See, e.g., id.* The CFPB estimated that the average amount was \$1.68 per month per account. Defining Larger Participants of the Student Loan Servicing Market, 78 Fed. Reg. 73,383, 73,388 (Dec. 6, 2013) (citing *Title IV Redacted Contract Awards* 12-13,

a loan that goes into delinquency, but so long as the loan stays current, the servicer collects the largest amount possible under the contract each month.⁶⁴ Therefore, even under this style of compensation, servicers have an incentive to keep loans in repayment status for a longer period of time, so they can continue to collect these payments. Even if the student's loans slip into the lower-compensated tiers of delinquency and default, servicers can still charge students ancillary fees for falling behind on their payments to cover the difference in compensation tiers.⁶⁵

The abuses under this category are especially troubling because they often affect students who are simply trying to pay what they owe to their servicer.⁶⁶ Students are frequently unable to find out from their servicers how payments are applied when paying more than the minimum amount due.⁶⁷ Even if students explicitly instruct a servicer on how they want the extra payments applied, servicers often disregard the instructions.⁶⁸ These practices can create an abuse because many students have more than one loan, and these loans can have more than one interest rate.⁶⁹ Servicers who apply the overpayment to loans with lower interest rates end up increasing the overall amount that students will have to repay, as those loans with higher interest will have less of their principal paid down.⁷⁰ This, in turn, will extend the overall time that these students will stay in debt.⁷¹ Doing so increases the number of tranches, or payments for federal loans, that services will ultimately collect, thereby increasing their bottom line at the expense of students.

<https://www.fbo.gov/index?tab=documents&tabmode=form&subtab=core&tabid=f0b9abcbbad6bddd83cc2be1a41e2de> (last visited Feb. 17, 2014)).

⁶⁴See, e.g., *Redacted Signed Great Lakes Contract Award*, <https://www.fbo.gov/index?tab=documents&tabmode=form&subtab=core&tabid=f0b9abcbbad6bddd83cc2be1a41e2de> (last visited Feb. 17, 2014).

⁶⁵ Levitin & Twomey, *supra* note 13, at 41.

⁶⁶ *Annual Report of the CFPB Student Loan Ombudsman*, *supra* note 56, at 8-11.

⁶⁷ *Id.* at 8.

⁶⁸ *Id.* at 9-10.

⁶⁹ *Id.* at 9.

⁷⁰ *Id.* at 9-10.

⁷¹ *Id.*

2. Ancillary Fee Add-On

The second major issue student borrowers face is that servicers are engaging in certain practices to rack up the number of ancillary fees that student borrowers pay.⁷² Ancillary fees are “late fees . . . and fees for any costs involved in collection.”⁷³ Often, servicers are allowed to keep all ancillary fees collected from the borrower.⁷⁴ Therefore, servicers frequently have an incentive to play “add-on,” so to speak, and charge students as many ancillary fees as possible.⁷⁵

In situations where students do not have enough money to pay their minimum amount due and instead attempt to pay a smaller amount, rather than paying nothing at all,⁷⁶ students encountered servicers who misapplied their payments.⁷⁷ In these situations, servicers applied this underpayment by splitting it up so that none of the student’s loans had the minimum amount due paid.⁷⁸ By doing so, students faced a late fee on each and every loan, even though the servicer could have applied the payments in such a way that the minimum amount due was paid on at least some of the student’s loans.⁷⁹

Students also reported that they were making payments before the due date but the payments were processed afterwards, leading to late fees.⁸⁰ Check payments would often be inexplicably lost in the mail.⁸¹ Student loan servicers also frequently gave students inaccurate pay-off information.⁸² Therefore, students who attempted to pay off their entire outstanding debt were often told their debt was one amount when the amount was a little more.⁸³ Students did not find out that their loan had not been paid off until the loan went into

⁷² See *Annual Report of the CFPB Student Loan Ombudsman*, *supra* note 56, at 11-14.

⁷³ Levitin & Twomey, *supra* note 13, at 41.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ The CFPB calls these “good faith payments.” *Annual Report of the CFPB Student Loan Ombudsman*, *supra* note 56, at 11-12.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 13.

⁸¹ *Id.* at 14.

⁸² *Id.*

⁸³ *Id.*

delinquency or default.⁸⁴ This practice again resulted in servicers charging late fees for the number of payments missed.⁸⁵

Students encountered numerous problems when their loans were transferred from one servicer to another.⁸⁶ Students usually have no control over servicer transfers, which are decisions made by the holder of the loan.⁸⁷ The most common problem that students whose loans were transferred to a different servicer faced was a lack of notice.⁸⁸ This lack of adequate notice led both to students paying their old servicer and students paying in a payment method that, while accepted by their previous servicer, was not accepted by their new servicer.⁸⁹ Both of these mistakes led to students being charged ancillary fees.⁹⁰ Moreover, when loans were transferred from one servicer to another, student borrowers reported that they were placed into the wrong repayment plan.⁹¹ One especially disconcerting observation is that transfer problems are exceedingly prevalent with loans originating through the William D. Ford Federal Direct Loan Program.⁹²

Another troubling problem is that many of these inappropriate fees are likely never discovered.⁹³ In mortgage servicing, inappropriate ancillary fees charged by servicers have often only been discovered in bankruptcy hearings, at which point they have been challenged.⁹⁴ However, student loans cannot be discharged through

⁸⁴ *Id.* For federal student loans, delinquency starts from the first day that a payment is missed until the borrower defaults, and default occurs once a student has missed payments for either 270 or 330 days, depending upon under what program the student borrowed. *Don't Ignore Your Student Loan Payments or You'll Risk Going into Default*, FED. STUDENT AID, <http://studentaid.ed.gov/repay-loans/default> (last visited Feb. 17, 2014). Additionally, servicers report all delinquencies of over 90 days to the three major credit reporters. *Id.*

⁸⁵ *Annual Report of the CFPB Student Loan Ombudsman*, *supra* note 56, at 14.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Defining Larger Participants of the Student Loan Servicing Market*, 78 Fed. Reg. 73,383, 73,386 (Dec. 6, 2013).

⁹² *Id.* This could be described as the equivalent of government-sanctioned abuse.

⁹³ *See infra* notes 94-98 and accompanying text.

⁹⁴ Levitin & Twomey, *supra* note 13, at 44.

bankruptcy unless the student can show undue hardship,⁹⁵ which is a monumentally high standard that few borrowers can meet.⁹⁶ Often, students must face a debilitating mental or physical impairment or other extreme hardship for the courts to discharge their student loan debt.⁹⁷ This high standard likely deters borrowers from even attempting to discharge their student loans through a bankruptcy hearing, leaving many of these potentially abusive ancillary fees undiscovered. Worse, some servicers are affirmatively lying to student borrowers by telling them that their loans are not dischargeable in bankruptcy at all.⁹⁸ However, even if students do notice such fees, they must still jump through a myriad of hoops to protect themselves.⁹⁹

III. ATTEMPTS AT CONSUMER SELF-PROTECTION

The susceptible characteristics of the student borrower coupled with the abuses perpetrated by student loan services create a wrong that demands a solution.¹⁰⁰ However, in many such scenarios the

⁹⁵ 11 U.S.C. § 523(a)(8) (2012).

⁹⁶ Brendan Baker, *Deeper Debt, Denial of Discharge: The Harsh Treatment of Student Loan Debt in Bankruptcy, Recent Developments, and Proposed Reforms*, 14 U. PA. J. BUS. L. 1213, 1214 (2012) (calling student loans “virtually impossible to discharge in bankruptcy”); Mark Kantrowitz, *Congress Proposes Allowing Private Student Loans to Be Discharged in Bankruptcy*, FASTWEB (Apr. 22, 2010), <http://www.fastweb.com/financial-aid/articles/2259-congress-proposes-allowing-private-student-loans-to-be-discharged-in-bankruptcy> (finding that only twenty-nine borrowers in bankruptcy in 2008 were able to have their student-loan debt discharged).

⁹⁷ *Bronsdon v. Educ. Credit Mgmt. Corp.* (*In re Bronsdon*), 435 B.R. 791, 799 (B.A.P. 1st Cir. 2010) (“Many courts . . . place dispositive weight on the debtor’s ability to demonstrate ‘additional extraordinary circumstances’ that establish a ‘certainty of hopelessness.’ This has led some courts to require that the debtor show the existence of ‘unique’ or ‘extraordinary’ circumstances, such as the debtor’s advanced age, illness or disability, psychiatric problems, lack of usable job skills, large number of dependents or severely limited education.”) (quoting *Hicks v. Educ. Credit Mgmt. Corp.* (*In re Hicks*), 331 B.R. 18, 27-28 (Bankr. D. Mass. 2005)).

⁹⁸ *Supervisory Highlights*, CONSUMER FIN. PROTECTION BUREAU 17 (Fall 2014), http://files.consumerfinance.gov/f/201410_cfpb_supervisory-highlights_fall-2014.pdf (“CFPB examiners found one or more supervised entities that were misrepresenting to consumers that student loans are never dischargeable in bankruptcy.”).

⁹⁹ See *infra* Part III.

¹⁰⁰ See *supra* Part II.

traditional claims in contract common law have proven insufficient.¹⁰¹ Due to the extreme difference in power between loan servicers and student borrowers, this is an ideal field for consumer law to provide students with greater protections than what are normally available.¹⁰² However, private enforcement of consumer protection statutes still presents many of the same obstacles, including a lack of privity between the servicer and the student, the reluctance of courts to find that a servicing contract constitutes an assignment, and the limited knowledge of and lack of incentive for most students to pursue a claim.

Historically, a borrower's only recourse against potentially abusive or deceptive consumer financial practices was the common law.¹⁰³ However, common law claims quickly became inadequate to handle the complex and rapidly changing financial industry.¹⁰⁴ The most applicable common law protections to students who face issues with their student loan servicer are the contract doctrines of breach and unconscionability.¹⁰⁵ The doctrine of unconscionability allows courts to not only strike certain terms in contracts, but also to cancel entire contracts if they "shock the conscience and are the product of a flawed bargaining procedure."¹⁰⁶ However, courts have been very reluctant to use this doctrine in consumer financial transactions.¹⁰⁷

Instead of asserting an unconscionability claim against an originator, borrowers could attempt to assert a breach-of-contract

¹⁰¹ Totten, *supra* note 28, at 119.

¹⁰² See Michael S. Greve, *Consumer Law, Class Actions, and the Common Law*, 7 CHAP. L. REV. 155, 157 (2004) (discussing how consumer law attempts to provide consumers greater protections because of "asymmetric information (or wholesale consumer ignorance), unequal bargaining power, and irrational consumer preferences"). (citing Lary Lawrence, *Toward a More Efficient and Just Economy: An Argument for Limited Enforcement of Consumer Promises*, 48 OHIO ST. L.J. 815, 817, 824-25 (1987)).

¹⁰³ Totten, *supra* note 28, at 119.

¹⁰⁴ *Id.*

¹⁰⁵ See Bar-Gill & Warren, *supra* note 19, at 71.

¹⁰⁶ *Id.* (citing ALLAN FARNSWORTH, CONTRACTS § 4.28 (3d ed.1999)). Students could make the argument that their contract with the originator is unconscionable because the contract contains several terms that could shock the conscience, including free assignability and the ability for any servicer to charge exorbitant ancillary fees. Students could also argue that the process by which the contract was negotiated was deeply flawed in that the loan originator held all of the power over the student, forcing them to sign a contract of adhesion. See *supra* Part II.

¹⁰⁷ Bar-Gill & Warren, *supra* note 19, at 71.

claim against the servicer for failing to apply payments properly and timely, or for failing to give proper notice of a servicing transfer, or for whatever other abuses the servicer might have perpetrated. One issue with this strategy is that the contract might not forbid such practices, even though such practices could be considered abusive, deceptive, or unfair.¹⁰⁸ The bigger issue with this strategy is the lack of privity between the student borrower and the servicer.¹⁰⁹ Because the servicer contracts with the lender, and not the borrower, it is the lender that is in privity with the servicer.¹¹⁰ Therefore, a consumer's claim against a servicer will likely fail, as the contractual relationship between the two "clearly does not support [a] breach of contract claim given the lack of privity between the servicer and the [borrower]."¹¹¹

Instead, only lenders can hold servicers accountable.¹¹² These lenders, however, often lack the necessary incentives to pursue an action because any action taken would likely adversely affect their bottom line.¹¹³ The complexity of an added party in financial transactions has created a problem where "there is no party with the ability and incentive to monitor a servicer's actions," leaving students slaves to the actions of servicers.¹¹⁴

Some scholars argue that the problems inherent in the average student borrower further contribute to this lack of a principal-agent relationship because many borrowers do not know that they should be able to bargain over to whom the loan can be *assigned*.¹¹⁵ While

¹⁰⁸ See *infra* Section VI.C (discussing the desirability of the CFPB defining these acts or practices as such).

¹⁰⁹ See Levitin & Twomey, *supra* note 13, at 81-83.

¹¹⁰ *Id.*

¹¹¹ Griffin v. Am. Home Mortg. Servicing (*In re Griffin*), No. 10-22431-RDD, 2010 WL 3928610, at *7 (Bankr. S.D.N.Y. Aug. 31, 2010) (holding that a mortgage servicer is not in contractual privity with a mortgagor, and that therefore, a claim of a breach of contract could not go forward).

¹¹² Levitin & Twomey, *supra* note 13, at 81.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* If it is, in fact, an assignment that is at issue. See *infra* notes and 120-123 and accompanying text (discussing how the designation of a servicing contract as an assignment is likely missing the mark). According to BLACK'S LAW DICTIONARY (9th ed. 2009), an assignor is "[o]ne who transfers property rights or powers to another." Of course, an assignor can always transfer only part of his or her interests or powers. BLACK'S LAW DICTIONARY (9th ed. 2009), assignment (defining partial assignment as "[t]he immediate transfer of part but not all of the assignor's right").

certainly interesting, bargaining over a servicer is likely only possible in the context of mortgages and private student loans. Newly originated federal student loans are assigned only to certain pre-approved servicers: Title IV Additional Servicers (TIVAS).¹¹⁶ Therefore, if the government has not contracted with a certain servicer, pursuant to Title IV of the Higher Education Act of 1965, then the student cannot bargain to have that servicer service their loan.¹¹⁷ Further, after the government measures a servicer's performance in a variety of areas, federal loans are contracted out to these servicers without any input from the affected student borrower.¹¹⁸ Therefore, bargaining over servicers would likely only help the small percentage of student borrowers who take out private loans.¹¹⁹

More importantly, having students negotiate over their servicers, which has been discussed in terms of assignability,¹²⁰ raises an important issue because the designation of a servicing contract as an assignment might be missing the mark. If the loan was being *assigned* to a servicer, then privity would be created between the borrower and the servicer, allowing them to assert any common law or statutory claims they might have against a servicer.¹²¹ Yet, federal courts have held that the servicing of loans does not constitute an assignment.¹²² The courts deciding so follow a rather straightforward

¹¹⁶ Defining Larger Participants of the Student Loan Servicing Market, 78 Fed. Reg. 73,383, 73,386 (Dec. 6, 2013) (citing 20 U.S.C. §§ 1071-81 (2012)).

¹¹⁷ *Id.* (citing 20 U.S.C. §§ 1071-81).

¹¹⁸ DiGangi, *supra* note 15. These areas include “default rates by number of loans and by dollar value, and the combination of their customer satisfaction and default rankings[.]” *Id.*; see Section VI.B, for a discussion on granting students the ability to pick their own servicer from the pre-approved TIVASs.

¹¹⁹ The CFPB estimates that TIVASs “account for between approximately 67 to 87% of activity in the market.” Defining Larger Participants of the Student Loan Servicing Market, 78 Fed. Reg. 73,383, 73,387 (June 9, 2014). Further, the Bureau estimates that federal student loans account for more than 90% of all new student loans. *Id.* at 73,388.

¹²⁰ See Levitin & Twomey, *supra* note 13, at 83 (“If homeowners were worried about servicing risk, they would bargain over assignability.”).

¹²¹ *Assignments*, USLegal.com, assignments.uslegal.com, (last visited July 28, 2014) (citing *Merchs. Servs. Co. v. Small Claims Court*, 25 Cal. 2d 109, 113 (Cal. 1950)).

¹²² See e.g., *Short v. Wells Fargo Bank Minn.*, 401 F. Supp. 2d 549, 563 (S.D.W. Va. 2005); *Wile v. Green Tree Servicing*, No. Civ.A. 04-2866, 2004 WL 2644390, at *2 (E.D. Pa. Nov. 22, 2004).

Truth in Lending Act provision, which explicitly states that “a servicer . . . shall not be treated as an assignee.”¹²³

In a 2013 Ohio Supreme Court case, *Anderson v. Barclay’s Capital Real Estate, Inc.*,¹²⁴ the Court held that Ohio’s consumer protection statute did not protect consumers from the practices of servicers. The Court made two important holdings on the definition of a consumer transaction under the state consumer protection statute.¹²⁵ First, the Court held that mortgage servicers do not provide a service to the *consumer* but instead provide a service to the mortgage note holder.¹²⁶ This holding echoes the principal–agent issue confronting borrowers, and prevents students from bringing claims under both the common law and Ohio’s consumer protection statute.¹²⁷ Second, the Court held—without any discussion—that a servicing contract between a lender and a servicer does not constitute an assignment.¹²⁸ Since the servicing of a student loan does not constitute an

¹²³ 15 U.S.C. § 1641(f) (2006).

¹²⁴ *Anderson v. Barclay’s Capital Real Estate, Inc.*, 136 Ohio St. 3d 31, 2013-Ohio-1933, 989 N.E.2d 997, at ¶¶ 15-17, 29-32 (holding that mortgage servicing is not a consumer transaction that the Ohio Consumer Sales Protection Act covers and that servicers are not suppliers within the Act’s definition).

¹²⁵ *Id.* ¶¶ 15-17. Ohio’s consumer protection statute defines a consumer transaction to be “a sale, lease, *assignment*, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family or household.” OHIO REV. CODE ANN. § 1345.01(A) (West 2013) (emphasis added).

¹²⁶ *Anderson*, 136 Ohio St. 3d 31, 2013-Ohio-1933, 989 N.E.2d 997, at ¶¶ 15-17.

¹²⁷ Levitin & Twomey, *supra* note 13, at 83. Additionally, this first holding is extremely important to the enforcement of Ohio’s Consumer Sales Protection Act. *See infra* notes 180-181 and accompanying text (discussing how this holding affects the ability of the Ohio Attorney General to bring consumer protection claims against loan servicers). While Section IV.B only discusses SAG enforcement of state consumer protection statutes, the applicability of these statutes is the same regardless of a suit brought by a SAG or by a student borrower.

¹²⁸ The Court simply states that “in the servicing of a real estate mortgage, one essential element of R.C. 1345.01(A) is not met: there is no sale, lease, *assignment*, award by chance or other transfer of a service to a consumer.” *Anderson*, 136 Ohio St. 3d 31, 2013-Ohio-1933, 989 N.E.2d 997, at ¶ 15 (emphasis added) (citing OHIO REV. CODE ANN. § 1345.01(A)). Additionally, the Court made a third holding, which was their second explicit holding, that is important to the application of Ohio’s consumer protection statute, but need not be expounded upon here. *Id.* ¶¶ 29-32 (holding that servicers were not suppliers within the meaning of Ohio’s consumer protection statute).

assignment, the student lacks any sort of legal relationship with the servicer to bring a common law claim or an unfair or deceptive acts or practices (UDAP) claim under state consumer protection laws that require this relationship, such as Ohio.¹²⁹ While state UDAP prohibitions will be expounded upon at greater length in the discussion of SAG enforcement of these laws,¹³⁰ it will suffice for now to say that state UDAP prohibitions are roughly the equivalent of their federal UDAAP analogue.¹³¹

However, even if students had the ability to hold servicers accountable through lawsuits, as they do in some states,¹³² the issue of the uninformed and overly optimistic consumer remains.¹³³ First, students may not notice a servicer's inappropriate acts or practices, or the fees servicers charged.¹³⁴ Should students even notice a charge, they are unlikely to have the motivation to challenge what will, in all probability, only be a small fee.¹³⁵ However, just one improper \$15 late fee assessed to 7,000 loans results in the servicer receiving an additional \$105,000 in revenue,¹³⁶ and a consumer has no way of knowing if these fees are systemic in nature.¹³⁷ Therefore, these obstacles make student-initiated consumer protection under either the framework of the common law or state consumer protection statutes an inadequate remedy for the abuses perpetrated by servicers.¹³⁸

Instead, both the CFPB and SAGs have large consumer complaint databases, which are able to document any systemic illegal practices by student loan servicers.¹³⁹ Therefore, these entities—in

¹²⁹ See *infra* notes 190-193 and accompanying text (discussing the states which interpret their statutes in the same way as Ohio).

¹³⁰ See *infra* notes 168-173 and accompanying text.

¹³¹ For an in-depth discussion on UDAP laws and how they differ from the federal UDAAP law see *infra* notes 252-257.

¹³² See *infra* notes 182-188 and accompanying text.

¹³³ See *supra* Section II.A.

¹³⁴ Levitin & Twomey, *supra* note 13, at 43.

¹³⁵ *Id.* Consumers have little incentive to “haggl[e] over . . . \$15 or even \$1,000.” See *id.* (discussing the unlikelihood of consumers bringing actions for small amounts of money once a mortgage is in default).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ This proposition is applicable both to common law claims, which were discussed in depth in this Section, and state law UDAP claims, which are discussed more in depth in Section IV.B in the context of SAG enforcement of these laws.

¹³⁹ Totten, *supra* note 28, at 160-61.

cooperation with one another—must be the ones to lead the charge in the battle for greater financial consumer protection.¹⁴⁰ Unfortunately, SAGs have historically been frustrated in their attempts to provide greater accountability in the servicing market.¹⁴¹ This has led to a long-existing lack of regulation of loan servicers.¹⁴²

IV. THE HISTORY OF THE LOAN SERVICING MARKET: REGULATION AND THE LACK THEREOF

Legal scholarship on loan servicing has focused largely on the issues in the mortgage servicing market.¹⁴³ Throughout the history of the mortgage servicing market, there has been a great deal of confusion as to which federal agency should regulate this market.¹⁴⁴ In fact, when the 2008 financial crisis occurred, “regulators seemed almost mystified as to who regulated mortgage servicers and how servicers should be regulated.”¹⁴⁵ Prior to and during the crisis, many states attempted to fill the gap left by the uncertainty in federal oversight.¹⁴⁶ However, they were often preempted by federal regulators who were responsible for the financial soundness of many of these servicers as financial institutions and saw servicer regulation as a threat to these institutions’ bottom lines.¹⁴⁷

¹⁴⁰ *Id.* at 161 (“In addition to sharing information, the states and the CFPB can also partner to analyze and respond to consumer-complaint information in a manner that is more efficient and effective than would be possible through individual efforts alone.”).

¹⁴¹ *See infra* notes 164-166 and accompanying text.

¹⁴² *See infra* Part IV.

¹⁴³ Although this Article will briefly discuss some of the issues in the mortgage-servicing market and the steps taken to remedy them, more complete discussions can be found in Aleatra P. Williams, *Foreclosing Foreclosure: Escaping the Yawning Abyss of the Deep Mortgage and Housing Crisis*, 7 *NW. J. L. & SOC. POL’Y* 455 (2012), and Levitin & Twomey, *supra* note 13.

¹⁴⁴ Eggert, *supra* note 37, at 172.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 172-73.

¹⁴⁷ *Id.*

A. The Federal History of Inaction

Prior to the changes of the Dodd–Frank Act,¹⁴⁸ the federal regulatory scheme was fragmented.¹⁴⁹ The Office of the Comptroller of Currency (OCC) regulated national banks.¹⁵⁰ The Federal Deposit Insurance Corporation (FDIC) regulated state banks that are not a part of the Federal Reserve.¹⁵¹ The Office of Thrift Supervision (OTS) regulated federal savings associations and state-chartered banks that are a part of the Federal Reserve.¹⁵² Finally, the National Credit Union Administration (NCUA) regulated both federal- and state-chartered credit unions.¹⁵³ However, in the years leading up to the mortgage crisis, federal regulators rarely pursued enforcement actions against the financial companies they regulated.¹⁵⁴ From 1995 to 2007, the OCC did not issue “a public enforcement order against any of the eight largest national banks.”¹⁵⁵ In the end, all this federal oversight did little more than “create[] a degree of friction with state law, which [has] historically dominated the field of consumer protection.”¹⁵⁶

The lack of oversight can be largely attributed to two causes. First, federal regulators lacked incentives to bring enforcement actions against these institutions¹⁵⁷ because these regulators were not only responsible for the oversight of these institutions, but also for these institutions’ financial soundness.¹⁵⁸ Second, these regulatory agencies were compensated partly based on the number of institutions they

¹⁴⁸ The changes made under this Act are explored in Part V.

¹⁴⁹ Bar-Gill & Warren, *supra* note 19, at 86

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Credit Card Practices: Current Consumer and Regulatory Issues: Hearing before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Servs.*, 110th Cong. 70 (2007) (written testimony of Arthur E. Wilmarth, Jr., Professor of Law, George Washington University Law School) [hereinafter Wilmarth Testimony].

¹⁵⁵ *Id.*

¹⁵⁶ JOHN A. SPANOGLE, JR. ET AL., *CONSUMER LAW: CASES AND MATERIALS* 163 (4th ed. 2013).

¹⁵⁷ Bar-Gill & Warren, *supra* note 19, at 90.

¹⁵⁸ *Id.* (“These agencies are designed with a primary mission to protect the safety and soundness of the banking system. This means protecting banks’ profitability. Consumer protection is, at best, a lesser priority.”).

regulated, and the institutions themselves were often free to choose their own regulators.¹⁵⁹ This compensation scheme resulted in a “race to the bottom, where the banking agencies sought to increase market share by minimizing consumer protections.”¹⁶⁰ Therefore, these regulators had no incentive to enforce any consumer protection law because it might have affected the entity’s profitability and, if the entity’s consequently decided to change regulators, shrink the budgets of those regulatory agencies.¹⁶¹ This left a gaping hole in the regulatory oversight of financial products.¹⁶²

B. State Gap Filling and the Importance of a Dual-Enforcement Regime

Eventually, states attempted to fill this gap.¹⁶³ However, federal regulators’ most destructive practice in the years leading up to the mortgage crisis was the preemption of state attempts to enforce state consumer protection laws.¹⁶⁴ In several instances, regulators preempted states that brought enforcement actions,¹⁶⁵ but, instead of taking up the action themselves, the regulators often simply dropped any and all claims against the financial institutions.¹⁶⁶ This pattern of preemption and non-enforcement led Illinois Attorney General Lisa Madigan to recognize that “a dual state-federal regulatory regime . . . is vital to the health of our economy.”¹⁶⁷

Beginning in the 1960s, recognizing the growing complexity of consumer financial transactions, both federal and state governments began to pass statutory protections for consumers.¹⁶⁸ The most important were those banning UDAPs.¹⁶⁹ While the UDAP prohibition started as a federal regulation enforced by the Federal

¹⁵⁹ *Id.* at 93-95.

¹⁶⁰ Totten *supra* note 28, at 125.

¹⁶¹ Bar-Gill & Warren, *supra* note 19, at 90-95.

¹⁶² At the very least, it created significant “cracks” in the regulatory scheme. Totten, *supra* note 28, at 122-25.

¹⁶³ *Id.* at 123-24.

¹⁶⁴ *Id.*, at 123-25.

¹⁶⁵ See Bar-Gill & Warren, *supra* note 19, at 91-93.

¹⁶⁶ See *id.* at 91-92 (detailing a specific case of preemption in California involving the OCC).

¹⁶⁷ Madigan Testimony, *supra* note 31, at 4.

¹⁶⁸ Totten, *supra* note 28, at 119-20.

¹⁶⁹ *Id.*

Trade Commission (FTC), the states soon adopted their own UDAP prohibitions in their respective consumer protection statutes and gave their citizens a private right of action under the protection—something which the federal statute lacked.¹⁷⁰ Now, all fifty states have at least some prohibition against deceptive acts.¹⁷¹ However, these laws have varying degrees of strength and applicability.¹⁷² Most states attempted to use these UDAP statutes to “regulate” consumer financial products through litigation.¹⁷³ While these laws provide for private causes of action,¹⁷⁴ there are still significant obstacles to private enforcement.¹⁷⁵ Instead, SAGs, with their expansive resources and consumer complaint databases, are in a better position to enforce these laws¹⁷⁶ against the widespread abuses that students have reported.¹⁷⁷

However, SAG enforcement of state UDAP provisions faces its own challenges. As discussed, a recent Ohio Supreme Court decision, *Anderson v. Barclay’s Capital Real Estate, Inc.*, neutered that state’s consumer protection statute as applied to loan servicers.¹⁷⁸ This would apply whether a private litigant or that State’s Attorney General brought the action because in either case there would be no contractual relationship between borrower and servicer, which is a prerequisite to that state’s consumer protection statute.¹⁷⁹ The Ohio Attorney General participated in the litigation as an *amicus curiae*, arguing that Ohio’s consumer protection statute covered loan

¹⁷⁰ *Id.*

¹⁷¹ Carolyn L. Carter, *Consumer Protection in the States: A 50 State Report on Unfair and Deceptive Acts and Practices Statutes*, NAT’L CONSUMER L. CENTER (2009), http://www.nclc.org/images/pdf/udap/report_50_states.pdf.

¹⁷² *See generally id.* (discussing the strength and scope of all fifty states’ UDAP prohibitions).

¹⁷³ Raymond H. Brescia, *Leverage: State Enforcement Actions in the Wake of the Robo-Sign Scandal*, 64 ME. L. REV. 17, 30 (2011) (“Across the nation, state attorneys general have filed a number of high profile actions under state UDAP laws and other consumer protection statutes against lenders active in the subprime mortgage market over the last decade. Several high profile cases have resulted in sweeping settlements that resulted in the payment of penalties and attorneys fees, and *forced lenders to reform their lending practices.*” (emphasis added)).

¹⁷⁴ Totten, *supra* note 28, at 121.

¹⁷⁵ *See supra* Part III.

¹⁷⁶ *See supra* notes 139-140 and accompanying text.

¹⁷⁷ *See supra* Section II.B.

¹⁷⁸ *See supra* notes 124-128 and accompanying text.

¹⁷⁹ *Id.*

servicers, as they provided a service to the borrower.¹⁸⁰ The Court disagreed and held that a servicer was not providing a service to the consumer but to the lender.¹⁸¹

While *Anderson* is the most recent decision regarding state UDAP statutes' applicability to lender-servicer-borrower relationships, and one of the few decided by a state court, various (albeit few) courts have weighed in on the issue, construing other state UDAP provisions. Some courts have indicated that different states' UDAP provisions would apply to loan servicers. These states include California,¹⁸² Connecticut,¹⁸³ Florida,¹⁸⁴ New Jersey,¹⁸⁵ Massachusetts,¹⁸⁶ Pennsylvania,¹⁸⁷ South Dakota,¹⁸⁸ and Washington.¹⁸⁹ However, other jurisdictions have taken a stance

¹⁸⁰ Merit Brief of *Amicus Curiae* State of Ohio in Support of Respondent Sondra Anderson, *Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St. 3d 31, 2013-Ohio-1933, 989 N.E.2d 997 (No. 3:09-cv-02335-JGC).

¹⁸¹ *Anderson*, 989 N.E.2d 997, at 1001.

¹⁸² *Young v. Wells Fargo*, 671 F. Supp. 2d 1006, 1024-25 (S.D. Iowa 2009) (construing CAL. BUS. & PROF. CODE §§ 17200-17210 (West 2008)).

¹⁸³ *Brooks v. Salle Mae, Inc.*, No. FSTCV096002530S, 2011 WL 6989888, at *7 (Conn. Super. Ct. Dec. 20, 2011) (construing CONN. GEN. STAT. §§ 42-110a-110q (2010)). This decision is also the only decision cited here that expressly involves student loan servicers as opposed to mortgage services. The decision is particularly important and is discussed in more detail later. *See infra* notes 222, 228 and accompanying text.

¹⁸⁴ *In re G-Fees Antitrust Litigation*, 584 F. Supp. 2d 26, 42-43 (D.D.C. 2008) (construing FLA. STAT. § 501.204(1) (2007)) (explaining the change in Florida's consumer protection statute that now allows suits by anyone affected by a violation instead of only those in a direct contractual relationship with the violating party).

¹⁸⁵ *Gonzalez v. Wilshire Credit Corp.*, 25 A.3d 1103, 1115-17 (N.J. 2011) (construing N.J. STAT. ANN. § 56:8-19 (West 2010)). In New Jersey the statute is interpreted broadly using three main elements as a guidepost to applicability: "(1) an unlawful practice, (2) an 'ascertainable loss,' and (3) 'a causal relationship between the unlawful conduct and the ascertainable loss.'" *Id.* (quoting *Lee v. Carter-Reed Co.*, 4 A.3d 561, 576 (N.J. 2010)).

¹⁸⁶ *Hart v. GMAC Mortg. Corp. & Fed. Nat'l Mortg. Ass'n (In re Hart)*, 246 B.R. 709, 733-37 (Bankr. D. Mass. 2000) (construing MASS. GEN. LAWS ch. 93A, § 2(a) (1999)).

¹⁸⁷ *Vassalotti v. Wells Fargo Bank*, 732 F. Supp. 2d 503, 510-511 (E.D. Penn. 2010) (construing 73 PA. STAT. ANN. § 201-2(4)(xxi) (2009)).

¹⁸⁸ *Young v. Wells Fargo*, 671 F. Supp. 2d 1006, 1032-33 (S.D. Iowa 2009) (construing S.D. CODIFIED LAWS § 37-24-6 (2008)).

¹⁸⁹ *Birkholm v. Washington Mut. Bank*, 447 F. Supp. 2d 1158, 1165-66 (W.D. Wash. 2006) (construing WASH. REV. CODE § 19.86.020 (2005)) ("To prove a violation of the CPA, a claimant must show: (1) an unfair or deceptive act; (2) the

similar to Ohio and concluded that their consumer protection statutes do not reach loan servicers. These jurisdictions include the District of Columbia,¹⁹⁰ Minnesota,¹⁹¹ Texas,¹⁹² and Virginia.¹⁹³

While this issue has not been explicitly litigated in the remaining states, four additional states have consumer protection statutes that explicitly exempt the credit industry¹⁹⁴—Louisiana, Michigan, New Hampshire, and Rhode Island.¹⁹⁵ Therefore, these states' UDAP provisions are also inapplicable in the lender–servicer–borrower relationship.¹⁹⁶ Further, Oregon's statute does not apply to consumer lending.¹⁹⁷ Therefore, at least nine states (Louisiana, Michigan, Maine, New Hampshire, Ohio, Oregon, Rhode Island,

act occurred in the conduct of trade or commerce; (3) the act has an impact on the public interest; (4) injury to the claimant; and (5) *causation*.” (emphasis added) (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 532-33. (Wash. 1986)). Therefore, under the Washington statute the courts look more at the effect of the potentially unfair or deceptive act or practice than at the relationship between the two parties. *See id.*

¹⁹⁰ *In re G-Fees Antitrust Litig.*, 584 F. Supp. 2d 26, 42-43 (D.D.C. 2008) (construing D.C. CODE §§ 28-3901–3913 (2007) (holding that mortgagors are not consumers of mortgage servicers, and that therefore, the D.C. consumer protection statute does not apply).

¹⁹¹ *Rosbach v. FBS Mortg. Corp.*, Nos. C3-97-1622, C9-97-1852, 1998 WL 156303, at *2-3 (Minn. Ct. App. Apr. 7, 1998) (construing MINN. STAT. §§ 325F.68-70 (1996)) (concluding that a mortgage servicer was not covered by the Minnesota consumer protection statute because the servicer did not provide a service to the consumer and because the servicer did not offer merchandise to the consumer).

¹⁹² *Rico v. JPMorgan Chase Bank*, No. 3:10-CV-1643-L, 2011 WL 1792854 at *4-5 (N.D. Tex. May 10, 2011) (construing TEX. BUS. & COM. CODE ANN. § 17.45 (West 2010)) (holding that mortgagors were not consumers of loan servicing because servicing was only incidental to the reason for the consumer transaction: purchasing a house).

¹⁹³ *In re G-Fees Anti-Trust Litigation*, 584 F. Supp. 2d at 43 (construing VA. CODE ANN. § 59.1-200) (holding that neither Fannie Mae nor Freddie Mac provides mortgagors with any good or service, and therefore, cannot be held liable under the Virginia consumer protection statute); *Salehi v. Wells Fargo*, No. 1:11-cv-1323, 2012 WL 2119333 at *5-6 (E.D. Va. June 11, 2012).

¹⁹⁴ *See Carter*, *supra* note 171, at 14.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* (“Despite the overwhelming problem of predatory and abusive lending, five states—Louisiana, Michigan, New Hampshire, Rhode Island, and Virginia—immunize all or almost all lenders and creditors from the UDAP statute, regardless of the unfair or deceptive nature of their practices.”).

¹⁹⁷ *Id.* at 31 n.15 (citing *Haeger v. Johnson*, 548 P.2d 532 (Or. Ct. App. 1976)). However, the issue has never made it to the Oregon Supreme Court. *Id.*

Texas, and Virginia) and the District of Columbia cannot enforce their UDAP provisions against student loan servicers.¹⁹⁸ This number is likely a low estimate, as many states have exemptions for banks and for entities overseen by a regulator.¹⁹⁹ Moreover, the states that have UDAPs that cover mortgage loan servicers may face a field-preemption problem when attempting to apply these statutes to student loan servicers.²⁰⁰ Therefore, it is possible that *no* state truly has the power to hold servicers accountable for abusing students; the issue of federal preemption as applied to student loan servicing will be discussed shortly.²⁰¹

While in the past states were largely preempted when it came to holding mortgage servicers accountable,²⁰² there were some successes. The most important achievement was a \$25 billion settlement paid by mortgage servicers to all fifty SAGs.²⁰³ This settlement was the culmination of a year-long investigation led by SAGs.²⁰⁴ This one-time settlement, while certainly helpful, is less useful than the powers SAGs had before federal regulators preempted their consumer protection authority.²⁰⁵ However, there are some very interesting aspects to this settlement, including substantive requirements for mortgage servicers and the appointment of a monitor to ensure that these requirements are met—truly a great example of regulation through litigation.²⁰⁶

¹⁹⁸ See *supra* notes 181, 190-197 and accompanying text.

¹⁹⁹ Carter, *supra* note 171, at 13-14.

²⁰⁰ See *infra* notes 222-228 and accompanying text.

²⁰¹ *Id.*

²⁰² Eggert, *supra* note 37, at 207-13.

²⁰³ See *id.* at 216; *State Attorneys General, Feds Reach \$25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs*, NAT'L ASS'N. ATTORNEYS GEN., http://www.naag.org/medianaag/media/naag-news/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php?searched=Feds+Reach+%2425+Billion&advsearch=allwords&highlight=ajaxSearch_highlight+ajaxSearch_highlight1+ajaxSearch_highlight2+ajaxSearch_highlight3+ajaxSearch_highlight4 (last visited Feb. 18, 2014).

²⁰⁴ David McLaughlin & Tom Schoenberg, *Foreclosure Settlement with Banks Filed in Federal Court*, BLOOMBERG NEWS (Mar. 12, 2012, 6:40 PM), <http://www.bloomberg.com/news/2012-03-12/u-s-mortgage-foreclosure-settlement-with-banks-filed-in-federal-court.html>.

²⁰⁵ Wilmarth Testimony, *supra* note 154, at 79.

²⁰⁶ *State Attorneys General, Feds Reach \$25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs*, *supra* note 203.

Therefore, while individual SAG actions against student loan servicers might be successful, many states would likely still have issues enforcing their consumer protection statutes due to the varying applicability of each state's statutes.²⁰⁷ Instead, the answer must come from either greater federal oversight, which enables states to act as a second line of defense,²⁰⁸ or SAG teamwork in a coordinated effort similar to that of the national mortgage settlement.²⁰⁹ Fortunately, the federal government has taken greater notice of the issues in the financial consumer protection market in the past several years.²¹⁰

V. A NEW FEDERAL REGULATORY SCHEME: THE DODD-FRANK ACT AND OTHER OBAMA ADMINISTRATION ACTIONS

After the subprime mortgage bubble burst and we entered an economic recession, the federal government slowly realized that the old regulatory scheme did not work.²¹¹ Therefore, the government made several changes to the scheme, most importantly the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).²¹² Included in these reforms were some very important changes for state financial consumer protection enforcement, specifically a statutory presumption against preemption of state consumer protection laws.²¹³ Further, the Act created the CFPB and gave it rulemaking authority over certain consumer financial markets.²¹⁴ Specific to student loan servicing, on June 9, 2014, the Obama Administration issued a presidential memorandum, regarding abuses in student loan servicing, and the Department of Education announced that it would be renegotiating its contracts with student loan servicers.²¹⁵

²⁰⁷ See *supra* notes 181-197 and accompanying text.

²⁰⁸ See *infra* Section VI.C.

²⁰⁹ See *infra* Section VI.D.

²¹⁰ See *infra* Part V. However, even these changes are not sufficient to defeat the abuses of the student loan servicing market. See *infra* Section VI.A.

²¹¹ Totten, *supra* note 28, at 122-25 (discussing the “cracks in the foundation” of the old consumer finance regulatory regime).

²¹² *Id.* at 125-28.

²¹³ *Id.* at 128 (citing 12 U.S.C. §§ 5551(d), 5587 (2012)). Therefore, “federal law is [now] a floor, not a ceiling.” *Id.*; see also *infra* Section V.A.

²¹⁴ See *infra* Section V.B.

²¹⁵ See *infra* Section V.C.

A. Statutory Changes

Procedurally, many scholars believe that the presumption against preemption in Title X of the Dodd–Frank Act is one of the most important fixes to federal consumer protection regulation since the subprime mortgage crisis.²¹⁶ Under this presumption, the Dodd–Frank Act preempts only those state laws that are inconsistent with it, and those laws are preempted only to the extent that they are inconsistent with the Act.²¹⁷ Further, state laws that provide additional protections to consumers are not inconsistent.²¹⁸ Additionally, the Act mostly eliminates federal banking regulators’ claims that their oversight field preempts any state attempts at regulation.²¹⁹

[I]nstead [it] provides that state consumer financial laws are preempted by national banks, thrift laws, and regulations only in three circumstances: (1) if the state consumer financial law would have a “discriminatory effect on national banks” compared to state chartered banks, (2) if “in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank . . .* the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers,” and if (3) “the State consumer financial law is preempted by a provision of Federal law other than this title.”²²⁰

However, regulation of federal student loan servicers could fall under one of these exceptions because it is possibly preempted by another provision of federal law.²²¹ The courts are split on this issue: different courts have held that the Higher Education Act of 1965 (HEA) both

²¹⁶ Eggert, *supra* note 37, at 217-24 (discussing the effect of the Dodd–Frank Act on preemption of state consumer protection laws); Totten, *supra* note 28, at 128. *Contra* Raymond Natter & Katie Wechsler, *Dodd–Frank Act and National Bank Preemption: Much Ado About Nothing*, 7 VA. L. & BUS. REV. 301, 304 (2012) (finding Dodd–Frank’s preemption language not to be a material change).

²¹⁷ 12 U.S.C. § 5551(a).

²¹⁸ 12 U.S.C. § 5587.

²¹⁹ Eggert, *supra* note 37, at 219-20 (citing 12 U.S.C. § 25b).

²²⁰ *Id.* (quoting 12 U.S.C. § 25b).

²²¹ 12 U.S.C. § 25b.

preempts and does not preempt state law claims.²²² Because the HEA is what may preempt state UDAP laws as applied to federal servicers, and not the Dodd–Frank Act, the Act’s presumption against preemption has not been of help in the field of federal student loan servicing.

The cases so far make it clear that an explicit provision of the HEA, which does not require disclosure, preempts any state law that does contain a disclosure requirement.²²³ This provision states, “[l]oans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act . . . shall not be subject to any disclosure requirements of any State law.”²²⁴ More drastically, the Ninth Circuit in *Chae v. SLM Corp.* held that this provision bars any “state-law prohibition on misrepresenting a business practice [because it] ‘is merely the converse’ of a state-law requirement that alternate disclosures be made.”²²⁵ As the court itself acknowledges, this means that consumers and SAGs will have problems alleging a deceptive misrepresentation under state UDAP laws.²²⁶

However, there is no definitive answer on whether the HEA field preempts state UDAP prohibitions on deceptive practices. While the Ninth Circuit in *Chae* held that it did,²²⁷ several courts, including

²²² *Chae v. SLM Corp.*, 593 F.3d 936, 942-43, 950 (9th Cir. 2010) (holding that the plaintiff’s claims against Sallie Mae were both either expressly preempted or field preempted). *But see* *Coll. Loan Corp. v. SLM Corp.*, 396 F.3d 588, 599 (4th Cir. 2005) (“The HEA and its regulations do not preempt the state law claims which College Loan seeks to pursue in this proceeding.”); *Brooks v. Sallie Mae, Inc.*, No. FSTCV096002530S, 2011 WL 6989888, at *7 (Conn. Super. Ct. Dec. 20, 2011) (distinguishing *Chae* and holding that the HEA did not field preempt Connecticut’s consumer protection statute). However, the *College Loan* case did not implicate a state consumer protection law, only state tort law. 396 F.3d at 598.

²²³ 20 U.S.C. § 1098g.

²²⁴ *Id.*

²²⁵ *Chae*, 593 F.3d at 942-43 (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 527 (1992)).

²²⁶ *Id.*

²²⁷ *Id.* at 947-50. (quoting *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 159, (1982)) (“Congress granted the DOE the power to prescribe regulations, access lender records, audit participants, impose civil penalties, suspend or terminate lenders from the program, and sue regulatory violators. A grant of ‘ample authority’ to regulate a detailed legislative scheme, such as the one administered by the DOE here, is evidence that Congress intended the agency to have the authority to preempt state law.”).

the Fourth Circuit in *College Loan Corp. v. SLM Corp.*, have not interpreted that provision of the HEA so broadly.²²⁸ But, if the *Chae* view ultimately prevails, all fifty states will be powerless to prevent abuses perpetrated by federal servicers (TIVASs), instead of only the nine discussed above.²²⁹ Therefore, this Article advocates for the CFPB to promulgate rules that will ultimately enable states act as a second line of defense behind the CFPB.²³⁰

Other more substantive fixes to regulating mortgage servicers in the Dodd–Frank Act include mandating the use of escrow accounts,²³¹ requiring responses to certain consumer inquiries,²³² and ensuring prompt crediting of loan payments.²³³ Unfortunately, these fixes apply only to mortgage loans because of the inclusion of language that qualifies their applicability to only those loans “secured by a consumer’s principal dwelling.”²³⁴ Therefore, while the Dodd–Frank Act has been, and should be, recognized for its positive effects on the mortgage market,²³⁵ the Act’s presumption against preemption

²²⁸ *Coll. Loan Corp. v. SLM Corp.*, 396 F.3d 588, 598-99 (4th Cir. 2005) (holding the HEA does not preempt state tort law claims in a case between a lender and a servicer); *Kentucky ex rel. Conway v. Daymar Learning, Inc.*, 4:11CV-00103-JHM, 2012 WL 1014989 (W.D. Ky. Mar. 22, 2012) (citing *Adkins v. Excel College of Corbin, Inc.*, Nos. 93-5138, 93-5139, 1994 WL 124268, *2 (6th Cir. April 11, 1994)); *Bland v. Educ. Credit Mgmt. Corp.*, No. ELH-11-02812, 2012 WL 603194, *4 (D. Md. Feb. 22, 2012) (citing *College Loan Corp. v. SLM Corp.*, 396 F.3d 588 (4th Cir.2005)) (“[C]ourts that have addressed this issue have consistently held that the HEA does not completely preempt state law claims.”); *Brooks v. Salle Mae, Inc.*, No. FSTCV096002530S, 2011 WL 6989888 *7 (Conn. Super. Ct. Dec. 20, 2011) The *Brooks* court hung its coat on two different lines of reasoning. First, “the fact that the HEA contains provisions that expressly preempt state law . . . precludes a finding that the HEA occupies the regulatory field and leaves no room for state law[.]” and second that ““consumer protection is a field traditionally regulated by the states . . . and the Supreme Court has . . . reaffirmed that there is a presumption against finding implied preemption of state law in these fields.” *Id.* (quoting *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1126 (11th Cir. 2004)).

²²⁹ See *supra* notes 181, 190-197 and accompanying text.

²³⁰ See *infra* Section VI.C.

²³¹ 15 U.S.C. § 1639d.

²³² 12 U.S.C. § 2605.

²³³ 15 U.S.C. § 1639f.

²³⁴ See, e.g., *id.* (“In connection with a consumer credit transaction secured by a consumer’s principal dwelling, no servicer shall fail to credit a payment to the consumer’s loan account as of the date of receipt.”) (emphasis added)).

²³⁵ See generally Eggert, *supra* note 37 (discussing the effect of the Dodd–Frank Act on mortgages and preemption of state consumer protection laws); Totten,

and more substantive statutory fixes will not be as useful for student loan borrowers.

B. *The Creation of a Federal Watchdog*

In addition to these statutory changes dealing with preemption and mortgage servicing, Congress, in the Dodd–Frank Act, created the CFPB.²³⁶ The CFPB was originally the brainchild of Senator Elizabeth Warren, who advocated for an agency with both the “authority and motivation” to provide consumers with effective protections.²³⁷ The CFPB has the power to “issu[e] rules, orders, and guidance implementing Federal consumer financial law.”²³⁸ The CFPB also has exclusive authority over federal depositories with over \$10 billion in assets, while the OCC, NCUA, and FDIC retain their authority as to depositories with less than \$10 billion in total assets.²³⁹

Additionally, the Dodd–Frank Act gave the CFPB supervisory authority over certain non-bank persons.²⁴⁰ Unfortunately, the Dodd–Frank Act again only recognizes the severity of servicing abuses in the mortgage servicing market, not the student loan servicing market.²⁴¹ The Act grants the CFPB explicit authority over any person who “offers or provides origination, brokerage, *or servicing* of loans secured by real estate,” but only grants the CFPB supervisory authority over any person who “offers or provides to a consumer any private education loan.”²⁴² The CFPB seems to confirm the absence of the “origination, brokerage, *or servicing*” language leaves them without the power to regulate private loan servicers unless that loan servicer is also a large depository institution, barring special circumstances.²⁴³ Although some commentators have read this section

supra note 28 (discussing how the Dodd–Frank Act affected the state consumer protection regulation landscape).

²³⁶ 12 U.S.C. § 5491.

²³⁷ See Bar-Gill & Warren, *supra* note 19, at 85.

²³⁸ 12 U.S.C. § 5511.

²³⁹ 12 U.S.C. §§ 5515-16.

²⁴⁰ 12 U.S.C. § 5514(a)(1).

²⁴¹ *Id.*

²⁴² *Id.* (emphasis added).

²⁴³ *CFPB to Oversee Nonbank Student Loan Servicers*, CONSUMER FIN. PROTECTION BUREAU (Dec. 3, 2013), <http://www.consumerfinance.gov/newsroom/cfpb-to-oversee-nonbank-student-loan-servicers/>.

differently,²⁴⁴ this Article will continue under the CFPB's interpretation that it does not have explicit statutory authority over private loan servicers, which comports better with the plain language of the statute.²⁴⁵

While the grant of authority over those institutions that offer or provide student loans does not cover servicers, it has given the CFPB a special interest in the student loan arena.²⁴⁶ Notably, the CFPB passed a larger-participant rule, which took effect in March 2014.²⁴⁷ Larger-participant rules allow the CFPB to define certain "larger participant[s] of a market for other consumer financial products or services."²⁴⁸ Once these participants of the market are defined, the CFPB can then exercise supervisory authority over them as if they were one of the non-bank persons over which the CFPB has explicit authority.²⁴⁹ The CFPB has interpreted this power as permitting the agency to select different criteria best suited to each market to define what exactly would make a participant "larger."²⁵⁰ Given the lack of explicit authority over student loan servicers, this wide grant of authority is particularly important.²⁵¹

The designation as a larger participant is critical because it allows the CFPB to regulate the market through enforcement actions under its UDAAP authority and helps the CFPB consider potential

²⁴⁴ Michael A. Benoit & Jeffrey P. Taft, *CFPB Developments: Coordinating the Supervision of Depository and Non-Depository Institutions*, 68 BUS. L. 619, 621 (2013).

²⁴⁵ 12 U.S.C. § 5514(a)(1).

²⁴⁶ For instance, the CFPB has a very helpful website on paying for college. *Paying for College*, CONSUMER FIN. PROTECTION BUREAU, <http://www.consumerfinance.gov/paying-for-college/> (last visited Jan. 3, 2014); see also *supra* notes 55-56 and accompanying text (discussing the CFPB's student loan consumer-complaint database); see *infra* notes 258-263 (explaining the CFPB's new student loan servicer larger participant rule).

²⁴⁷ Defining Larger Participants of the Student Loan Servicing Market, 78 Fed. Reg. 73,383 (Dec. 6, 2013) (to be codified at 12 C.F.R. Part 1090).

²⁴⁸ 12 U.S.C. § 5514(a)(1)(D).

²⁴⁹ 12 U.S.C. *Id.* § 5514(b)(1).

²⁵⁰ *CFPB Proposes Rule to Supervise Larger Participants in Consumer Debt Collection and Consumer Reporting Markets*, CONSUMER FIN. PROTECTION BUREAU (Feb. 16, 2012), <http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-proposes-rule-to-supervise-larger-participants-in-consumer-debt-collection-and-consumer-reporting-markets/>.

²⁵¹ 12 U.S.C. § 5514(a)(1).

UDAPP-defining rules.²⁵² In the new student loan servicing rule, the Bureau stated that it “will be examining whether larger participants of the student loan-servicing market engage in unfair, deceptive, or abusive acts or practices (UDAAPs). Conduct that does not violate an express prohibition of another Federal consumer financial law may nonetheless constitute a UDAAP.”²⁵³

The extra “A” in this UDAAP is attributable to Congress’ extension of the old federal UDAP authority to also cover abusive acts.²⁵⁴ Therefore, the CFPB now has authority over any “unfair, deceptive, or *abusive* act or practice.”²⁵⁵ However, there is a critical wrinkle in the power granted under this blanket UDAAP regulation. While the CFPB will have the authority to enforce any UDAAP violation, whether a specific rule defines the conduct as a UDAAP or not, SAGs will not have the ability to enforce any potential UDAAP violations until the CFPB has first issued a rule declaring that a particular act or practice constitutes a UDAAP.²⁵⁶ The CFPB can pass these UDAAP-defining rules, which “may include requirements for the purpose of preventing such acts or practices.”²⁵⁷

As for the newly passed student loan servicer larger-participant rule, the CFPB has determined that one is a larger participant in the market if the entity and its affiliated companies perform student loan servicing duties on over one million accounts.²⁵⁸

²⁵² Defining Larger Participants of the Student Loan Servicing Market, 78 Fed. Reg. at 73,387.

²⁵³ *Id.*

²⁵⁴ 12 U.S.C. § 5531. There is quite a litany of fascinating scholarship on exactly what the new abusive standard means. See Carey Alexander, *Abusive: Dodd-Frank Section 1031 and the Continuing Struggle to Protect Consumers*, 85 ST. JOHN’S L. REV. 1105, 1127 (2011) (urging the CFPB to adopt an expansive interpretation of what abusive means); Rebecca Schonberg, *Introducing “Abusive”: A New and Improved Standard for Consumer Protection*, 100 CAL. L. REV. 1401, 1432-42 (2012) (discussing how abusive might cover some territory beyond the prohibitions against unfair or deceptive acts or practices).

²⁵⁵ 12 U.S.C. § 5531 (emphasis added).

²⁵⁶ 12 U.S.C. § 5552(a)(2)(B); Hillebrand, *supra* note 27, at 223 (“In the area of enforcement, there should be many enforcers. State Attorneys General will be able to enforce both state and federal law with respect to national banks. There’s an odd wrinkle here: state Attorneys General cannot enforce those statutory provisions on unfair, deceptive and abusive practices but they will be able to enforce the rules under those provisions.”).

²⁵⁷ 12 U.S.C. § 5531(b).

²⁵⁸ 12 C.F.R. § 1090.106(b) (2014).

This covers all the government's servicers (TIVASs) and two other private loan servicers²⁵⁹ but may leave as much as 29% of the non-bank market unregulated.²⁶⁰ Like all other larger-participant rules, the rule "does not impose new substantive consumer protection requirements."²⁶¹ However, it is important to note that the oversight allows the CFPB to gather better information on exactly what practices servicers are engaging in that might constitute a violation of the CFPB's UDAAP power.²⁶² Therefore, while this new rule is hugely important for federal oversight of the market, it does nothing to create greater *state* oversight as a second line of defense for students or to protect students with private loans serviced by smaller servicers.²⁶³ Instead, students serviced by the "smaller participants" of the market must wait for the CFPB to pass substantive regulations on what student loan servicers can and cannot do before SAGs will be able to act as a second line of defense.²⁶⁴

C. *An Executive Gesture*

On June 9, 2014, President Obama announced in a presidential memorandum executive-branch changes to the current system of federal education lending.²⁶⁵ A presidential memorandum is widely considered to be simply one form of an executive order in a legal sense,²⁶⁶ although in the technical sense, it is not an executive order, but an executive action.²⁶⁷ The only major announcement dealing with

²⁵⁹ Defining Larger Participants of the Student Loan Servicing Market, 78 Fed. Reg. 73,383, 73,386-87 (Dec. 6, 2013).

²⁶⁰ *Id.*

²⁶¹ *Id.* at 73,384.

²⁶² *Id.* at 73,400.

²⁶³ 12 U.S.C. § 5514(c)(1) ("[W]ith respect to any person described in subsection (a)(1) [which includes larger participants] the Bureau shall have exclusive authority to enforce that Federal consumer financial law.").

²⁶⁴ Hillebrand, *supra* note 27, at 223.

²⁶⁵ Helping Struggling Federal Student Loan Borrowers Manage Their Debt, 79 Fed. Reg. 33,843 (June 9, 2014).

²⁶⁶ John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 352, 352 n.152 (2010).

²⁶⁷ *Id.*; Dan Amira, *President Obama Didn't Sign Any Executive Orders Today*, DAILY INTELLIGENCER (Jan. 16, 2013), <http://nymag.com/daily/intelligencer/2013/01/obama-23-executive-orders-actions-gun-control.html>.

federal student loan servicing in this memorandum was that “[b]y December 31, 2014, the Secretary of Education shall develop, evaluate, and implement new targeted strategies to reach borrowers who may be struggling to repay their Federal student loans to ensure that they have the information they need to select the best repayment option and avoid future default.”²⁶⁸ The memorandum also announced several other potential improvements to help students with their loans.²⁶⁹ The biggest potential improvement deals with the wider availability of alternative repayment plans for loans, and not with loan servicing.²⁷⁰

On that same day the Department of Education also announced that it would be “strengthen[ing] the incentives for loan contractors to serve students well.”²⁷¹ To do so, the Department announced it would renegotiate its contracts with federal student loan servicers. However, certain abuses such as extending student loan repayment and adding excessive ancillary fees are not addressed in this action.²⁷² The incentives addressed will focus solely on helping students avoid delinquency and default by granting bonuses to servicers for reducing the default rates of their borrowers.²⁷³ While these two executive actions will bring greater attention to the issue of student lending, these actions may be nothing more than a gesture when it comes to the issues of excessive ancillary fees and extending the length of time that students remain in repayment.²⁷⁴

²⁶⁸ Helping Struggling Federal Student Loan Borrowers Manage Their Debt, 79 Fed. Reg. 33,843.

²⁶⁹ *Id.*

²⁷⁰ *Id.* But see Anna Bahr, *Obama’s Move to Help Students Is Not as Forgiving as It Seems*, N.Y. TIMES (June 23, 2014), http://www.nytimes.com/2014/06/24/upshot/obamas-move-to-help-students-is-not-as-forgiving-as-it-seems.html?_r=0 (discussing why this change might not be enough.).

²⁷¹ The White House, Office of the President, *FACTSHEET: Making Student Loans More Affordable*, THE WHITE HOUSE (June 9, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/09/factsheet-making-student-loans-more-affordable>.

²⁷² Helping Struggling Federal Student Loan Borrowers Manage Their Debt, 79 Fed. Reg. 33,843.

²⁷³ Stratford *supra* note 29 (“Officials have renegotiated the government’s contracts with the four main loan servicers, which together collect payments for tens of millions of federal student loan borrowers. The servicers will now also receive bonuses for reducing the delinquency rates of their borrowers.”).

²⁷⁴ See *infra* text accompanying notes 313-319.

VI. SERVICING SOLUTIONS TO UNSHACKLE STUDENTS

At this point, one question remains: did the federal consumer financial regulatory overhaul led by the Dodd–Frank Act do enough to free students from servicer abuses, or are student borrowers still slave to the servicer? The new scheme undoubtedly provides greater accountability in the mortgage servicing market²⁷⁵ and, in general, provides SAGs with greater authority in the field of financial consumer protection than they had in the years prior to the passage of the Dodd–Frank Act.²⁷⁶ However, with the growing abuses reported in the field of student loan servicing,²⁷⁷ the inherent vulnerabilities of the average student borrower,²⁷⁸ and the effect that high student loan debt has on other financial markets,²⁷⁹ it is absolutely critical that student loan servicers are held accountable.

While the executive branch as a whole and the CFPB particularly seem headed towards greater market oversight,²⁸⁰ states should be proactive in creating a strong dual-enforcement regime to protect students from unscrupulous student loan servicing practices. After all, preemption and federal inaction played a large role in precipitating the subprime mortgage crisis.²⁸¹ To allow states to act as a second line of defense, the CFPB should take action by adopting UDAAP-defining rules.²⁸² If they do not, greater accountability could

²⁷⁵ Eggert, *supra* note 37, at 217-24.

²⁷⁶ Totten, *supra* note 28, at 174 (“Empowering states to enforce federal law was only one of multiple strategies Congress employed in the wake of the Great Recession to protect consumers in the financial marketplace. Nonetheless, this strategy is critical.”).

²⁷⁷ See *supra* Section II.B.

²⁷⁸ See *supra* Section II.A.

²⁷⁹ See *supra* notes 6-11 and accompanying text (discussing the “domino effect” that high student loan debt is having on other markets such as housing and small-business start-ups).

²⁸⁰ Rohit Chopra, *We Asked About Your Student Loans and You Answered*, CONSUMER FIN. PROTECTION BUREAU (Feb. 3, 2014), <http://www.consumerfinance.gov/blog/we-asked-about-your-student-loans-and-you-answered/> (discussing CFPB action on the issue of student loans, including the larger participant rule and providing a form letter for students to use in their communications with servicers).

²⁸¹ Eggert, *supra* note 37, at 207-13.

²⁸² This Article argues that it should and that doing so is the best of the possible options for student borrowers. See *infra* Section VI.C.

be accomplished in two other ways: (1) through greater consumer choice in federal loan programs;²⁸³ and (2) through a multi-state SAG enforcement action led by SAG in states with the strongest consumer protection statutes.²⁸⁴

A. Why the Current Regulatory Scheme Is Insufficient

The most glaring issue with the new federal scheme is that the 2010 consumer financial protection reforms are too finely tuned to the causes of the 2008 mortgage crisis and apply exclusively to mortgage servicing and Dodd–Frank Act preemption.²⁸⁵ This leaves regulation of student loan servicers to other means, namely rules developed by the CFPB pursuant to its Dodd–Frank Act authority.²⁸⁶ Unfortunately, the only current CFPB rule on the issue is the larger-participant rule, which provides only for CFPB oversight—not any substantive protections.²⁸⁷ The lack of any other significant regulation presents two issues.

First, the lack of substantive, UDAAP-defining rules leaves the states with only their own UDAP bans as the basis for any authority over student loan servicers until the CFPB passes a rule determining what specific acts or practices constitute a UDAAP violation under its rulemaking authority.²⁸⁸ With the Dodd–Frank Act’s focus on dual-enforcement authority for federal and state regulators as well as SAGs traditionally important role as consumer advocates, such a result is puzzling.²⁸⁹ Further, any SAG claiming to bring an action within the scope of their UDAP powers must actually plan on bringing an action, instead of merely using any investigative authority they may have under their state’s UDAP statute as a way to oversee the servicer in question.²⁹⁰ The Supreme Court deemed such a

²⁸³ See *infra* Section VI.B.

²⁸⁴ See *infra* Section VI.D.

²⁸⁵ See *supra* Section V.A.

²⁸⁶ 12 U.S.C. §§ 5511-14 (2012).

²⁸⁷ See *supra* notes 258-261 and accompanying text.

²⁸⁸ 12 U.S.C. § 5514(c)(1) (“[W]ith respect to any person described in subsection (a)(1) . . . the Bureau shall have exclusive authority to enforce that Federal consumer financial law.”).

²⁸⁹ See Totten, *supra* note 28, at 123-25; Hillebrand, *supra* note 27, at 223.

²⁹⁰ See Totten, *supra* note 29, at 145 (citing *Cuomo v. Clearing House Ass’n, L.L.C.*, 557 U.S. 519, 536 (2009)).

use of investigatory powers an illegal exercise of “visitorial powers.”²⁹¹ Therefore, states cannot regulate without the intent to actually litigate. An even bigger problem remains, however, because states that actually attempt to litigate might be preempted by the HEA.²⁹²

Second, by definition, the CFPB can only regulate larger participants of the student loan servicing market under larger-participant rules, leaving smaller participants unregulated by the CFPB.²⁹³ These smaller servicers would then be free from federal oversight, unlike their larger brothers and sisters.²⁹⁴ This could leave as much as 29% of the non-bank market unregulated at the federal level.²⁹⁵ It would then be solely up to state UDAP prohibitions—which vary greatly in their applicability²⁹⁶—to protect student borrowers from smaller servicers.

Therefore, depending upon the scope of each state’s consumer protection provisions²⁹⁷ and how courts interpret the HEA,²⁹⁸ there are likely large holes in the new regulatory scheme. Regardless, nine states and the District of Columbia are unambiguously unable to use their UDAP power to protect students from servicer abuses.²⁹⁹ If the view of the Ninth Circuit prevails over the Fourth Circuit and other courts on HEA preemption,³⁰⁰ then the lack of UDAAP-defining rules and the inability of the CFPB to regulate smaller participants creates two even larger problems: (1) TIVASs would be subject solely to CFPB oversight; and (2) most non-TIVASs would not be subject to any oversight.

²⁹¹ *Cuomo*, 557 U.S. at 536. This decision was later adopted in Dodd–Frank and is now codified at 12 U.S.C. § 25(b).

²⁹² See *supra* notes 227-228 and accompanying text (discussing the uncertain status of HEA preemption of state consumer protection laws).

²⁹³ 12 U.S.C. § 5514(a)(1)(b), (a)(2).

²⁹⁴ While it is not entirely clear how many servicers will end up being covered by the larger participant rule, the final rule states that it is likely that seven entities would be covered by this rule. Defining Larger Participants of the Student Loan Servicing Market, 78 Fed. Reg. 73,383, 73,395-96 (Dec. 6, 2013).

²⁹⁵ See *supra* note 259-260 and accompanying text.

²⁹⁶ See *supra* notes 178-193 and accompanying text.

²⁹⁷ See *supra* notes 178-193 and accompanying text.

²⁹⁸ See *supra* notes 222-228 and accompanying text.

²⁹⁹ See *supra* notes 181, 190-197 and accompanying text.

³⁰⁰ See *supra* notes 227-228 and accompanying text.

Because the HEA would preempt the forty-one state UDAPs,³⁰¹ which may apply to student loan servicers,³⁰² TIVASs and the one or two other larger participants would be regulated solely by the CFPB under the larger-participant rule. This CFPB regulation would consist of oversight only for blanket, undefined UDAAP violations.³⁰³ Therefore, if the CFPB was ever subject to “agency capture”³⁰⁴ by the servicing market, there would be no oversight of the nation’s largest student loan servicers.³⁰⁵

Even more problematic, most non-TIVASs would not be subject to any federal regulation,³⁰⁶ unless the non-TIVAS was also a large depository institution³⁰⁷ or one of the few additional servicers covered by the larger-participant rule.³⁰⁸ Given the fact that these servicers are by definition smaller, it is unlikely that many fit these exceptions. However, SAGs would have the power to regulate these non-TIVAS smaller-participant servicers because SAGs would not be preempted by the HEA, which regulates only TIVASs,³⁰⁹ and the Dodd–Frank Act’s presumption against preemption would ensure that the CFPB’s authority over the few non-TIVAS larger participants did not preempt state UDAP bans.³¹⁰ But, in the nine states whose UDAP statutes would be unambiguously inapplicable to any lender–servicer–

³⁰¹ See *supra* note 227 and accompanying text.

³⁰² See *supra* notes 182-189, 199 and accompanying text.

³⁰³ See *supra* notes 258-264 and accompanying text.

³⁰⁴ Dennis D. Hirsch, *Going Dutch? Collaborative Dutch Privacy Regulation and the Lessons It Holds for U.S. Privacy Law*, 2013 MICH. ST. L. REV. 83, 106 n.142 (“Agency capture is the control or domination of administrative agencies by private parties who are subject to the regulatory authority of the agency. It occurs when a regulated entity, for example a group of corporations, replaces the public-policy agenda of the agency with its own private and self-serving agenda through lobbying or other influential methods.”).

³⁰⁵ See Jared Elost, *Dynamic Federalism and Consumer Financial Protection: How the Dodd–Frank Act Changes the Preemption Debate*, 89 N.C. L. REV. 1273, 1296 (2011) (“In spite of these reasons for optimism that the CFPB will be able to fulfill its mission, capture remains a serious threat: considering the lobbying power of the financial industry, it will likely be aggressive in its attempt to capture the CFPB.”).

³⁰⁶ See *supra* note 293 and accompanying text.

³⁰⁷ See *supra* note 243 and accompanying text.

³⁰⁸ See *supra* note 259 and accompanying text.

³⁰⁹ See *supra* note 117.

³¹⁰ See *supra* notes 219-220 and accompanying text.

borrower relationship,³¹¹ these smaller participants would be left completely unregulated. Even if these servicers constitute only a small fragment of the student loan servicing industry—the CFPB estimates this could leave as much as 29% of the nonbank market uncovered³¹²—a complete lack of regulation of even a small number of servicers is disconcerting.

Further, President Obama’s new presidential memorandum on select issues confronting students with education loans amounted to no more than a gesture with no effect on the issues addressed in this Article. In terms of servicing, the memorandum only directed the Secretary of the Department of Education to develop “targeted strategies” to help students pick the right repayment plan.³¹³ Moreover, the Department of Education’s renegotiation of contracts with servicers to provide servicers incentives to help students avoid delinquency and default addressed neither the issue of excessive and abusive ancillary fees, nor servicers improperly keeping student loans in repayment.³¹⁴ Additionally, these incentives largely consist of paying servicers bonuses for reducing the rate of delinquency or default of the borrowers they service.³¹⁵ However, federal loans are already structured to compensate servicers better when loans are kept out of delinquency or default.³¹⁶ Therefore, it is unclear how an additional bonus would make a difference in this area, especially when servicers could simply make up any difference in payment by charging a greater number of ancillary fees or larger amounts in ancillary fees to those students’ loans.³¹⁷ Moreover, this executive action will do nothing for the students who do not borrow from the federal government, namely the students who borrow from the potentially completely unregulated smaller participants.³¹⁸ Therefore,

³¹¹ See *supra* notes 181, 190-197 and accompanying text.

³¹² See *supra* note 259-260 and accompanying text.

³¹³ Helping Struggling Federal Student Loan Borrowers Manage Their Debt, 79 Fed. Reg. 33,843 (June 9, 2014).

³¹⁴ The White House, Office of the President, *supra* note 271; Stratford *supra* note 29.

³¹⁵ Stratford *supra* note 29 (“The servicers will now also receive bonuses for reducing the delinquency rates of their borrowers”).

³¹⁶ See *supra* notes 63-64 and accompanying text.

³¹⁷ Remember, the federal government as well as private lenders generally allow servicers to keep any ancillary fees assessed. Levitin & Twomey, *supra* note 13, at 41.

³¹⁸ See *supra* notes 258-263 and accompanying text.

these well-intentioned federal actions on the problems in the student loan servicing market are too narrowly tailored to delinquency and default, and they fail to fix the problems that many students continue to report to the CFPB.³¹⁹ Further action must be taken.

B. Consumer Choice

A more free-market approach to fixing the reported student loan servicing abuses would be to allow student loan borrowers greater freedom in choosing their servicer.³²⁰ Currently, students are not given a choice over who services their federal loans.³²¹ The federal government, while still retaining control over which entities qualify for student loan servicing, could allow students to pick which of these servicers they wanted. But, even in the field of private student loans, where students could technically bargain over which entity services their loan,³²² the relative differences in bargaining experience and power between the two parties makes such an exercise beneficial for only a limited number of the most sophisticated student borrowers.³²³ Remember, most students taking out student loans have little to no experience in taking out a loan of that size.³²⁴

The government could help make a student's decision an informed one by giving the information the government uses to measure servicer performance directly to the student when it comes time for him or her to choose a servicer.³²⁵ This information could be made available to all student borrowers through the Department of Education and CFPB websites, so as to enable easy access to servicer-performance information, leveling the bargaining field between

³¹⁹ See generally *Annual Report of the CFPB Student Loan Ombudsman*, *supra* note 56.

³²⁰ See Levitin & Twomey, *supra* note 13, at 83 (discussing the possibility of consumers bargaining over assignability of mortgage servicing).

³²¹ See *supra* notes 116-118 and accompanying text.

³²² See Levitin & Twomey, *supra* note 13, at 83.

³²³ See Lary Lawrence, *Toward a More Efficient and Just Economy: An Argument for Limited Enforcement of Consumer Promises*, 48 OHIO ST. L.J. 815, 825-26 (1987) (discussing inherent weaknesses in consumers that more sophisticated sellers frequently exploit).

³²⁴ See *supra* notes 50-54 and accompanying text.

³²⁵ See DiGangi, *supra* note 15 (discussing the current federal report card used to evaluate student loan servicers).

student and servicer.³²⁶ However, more than just information is necessary to make the correct decision. Students must also possess the ability to decipher such information.³²⁷ The government could ameliorate this concern by presenting the information in the form of an easy-to-use, easy-to-comprehend website that employs comparison tools.³²⁸

This solution would vary in three significant ways from past attempts at consumer self-protection, which have been notoriously unsuccessful.³²⁹ First, it would give students the ability to avoid any potentially unscrupulous practices in the first place, instead of having to first suffer the consequences of such practices to bring a lawsuit. Second, it would likely be more effective than lawsuits, which are largely not worth a student's time and money due to the nature of the seemingly insignificant fees these servicers charge.³³⁰ However, these fees do add up when assessed to a multitude of borrowers.³³¹ Third, students would no longer be at the mercy of the court system in determining whether they have contractual privity to bring a common law claim³³² or whether their state UDAP provision covered loan servicers.³³³

However, even if the government gave students the information necessary for them to make an informed decision, significant obstacles to a consumer-choice solution remain. First, for the proposed information-sharing website this solution is based on to help all students, the government would have to start collecting information for private servicers as well, instead of just TIVASs.³³⁴

³²⁶ This is an important concept in consumer law. *See* Lawrence, *supra* note 323, at 818-19 (discussing the importance of making information available to consumers and the lack of an incentive for sellers to do so).

³²⁷ *Id.* at 825 (discussing the need for consumers to possess the ability to select which information is most relevant for them).

³²⁸ The CFPB, in the context of choosing how to pay for college, has a great website for the template of such a site. *See generally Paying for College, supra* note 246.

³²⁹ *See supra* Part III.

³³⁰ Levitin & Twomey, *supra* note 13, at 43.

³³¹ *See supra* note 136 and accompanying text.

³³² *See supra* pp. 201-02 (detailing the availability of common-law claims against servicers).

³³³ *See supra* pp. 209-12 (discussing the applicability of state-specific UDAP statutes to claims against servicers).

³³⁴ *See* DiGangi, *supra* note 15.

Such an undertaking would likely require a prohibitive influx of staffing and money. Second, because students often overestimate their ability to pay back loans, they will likely not worry over who is servicing their loans.³³⁵ Third, it is extremely doubtful that young consumers would research a product even if the information is freely available. Therefore, while front-end consumer choice is potentially a more appealing option than back-end enforcement, this solution still faces a significant obstacle in the form of the overly optimistic and hard-to-inform student.³³⁶ Due to these concerns, and potentially others,³³⁷ this Article advocates consumer choice only as an alternative to a stronger dual-enforcement regime. This alternative is posed largely due to the recognition that not all policymakers will be receptive to the idea of greater government oversight and that some change in this market is preferable to no change whatsoever. However, a stronger dual-enforcement regime, whether accomplished by CFPB rulemaking or a SAG settlement, would best solve the problems that plague the market.³³⁸

C. Defining UDAAPs in the Student Loan Servicing Market

The best possible fix to the current regulatory regime would be further CFPB involvement. While the student loan servicer larger-participant rule was an important step on the road to greater oversight,³³⁹ it did not provide for any substantive protections.³⁴⁰ The CFPB should pass rules defining exactly what constitutes a UDAAP. This would implicitly give SAGs the authority to prevent and punish these specific UDAPs, thereby creating a state–federal dual-enforcement regime.³⁴¹

³³⁵ See Simpson, *supra* note 50.

³³⁶ See *supra* Section II.A.

³³⁷ Additional concerns would be the cost of this solution and whether such a solution would be feasible.

³³⁸ See *supra* Sections VI.C-D.

³³⁹ See *supra* notes 252-255 and accompanying text.

³⁴⁰ See *supra* note 261 and accompanying text.

³⁴¹ See *supra* note 256 and accompanying text (discussing how once the CFPB has defined what specifically constitutes a UDAAP, pursuant to their rule-making authority, SAGs can enforce that prohibition, but until then, only the CFPB can enforce the blanket UDAAP prohibition).

These rules should focus specifically on the abuses that consumers reported to the CFPB.³⁴² These rules should include requirements that forbid servicers from giving inaccurate pay-off information³⁴³ and from placing students in the wrong repayment plan.³⁴⁴ Further, these rules should require that servicers apply both over- and underpayments in the way specified by the student,³⁴⁵ apply payments in a timely manner,³⁴⁶ and give students adequate notice if their loan servicer changes.³⁴⁷ Finally, if the borrower did not specify a way to apply the payments, the rules should require that the payments will be applied in a way that avoids as many late fees as possible and pays off the loans with the highest interest rates and principal amounts first.³⁴⁸ These changes would eliminate the abuses reported to the CFPB and would prevent servicers from abusing students by charging excessive ancillary fees and extending students' time in debt repayment.³⁴⁹

A major drawback to the CFPB passing UDAAP-defining regulations would be the added costs to both businesses and government. The costs would likely be similar to the costs the CFPB noted when they adopted the larger-participant rule.³⁵⁰ The CFPB noted that, while the rule might result in increased operating costs, the costs of compliance would largely be borne by the larger participants, not students.³⁵¹ "While the price of servicing Federal student loans might change, depending on market conditions, the pricing for and access to Federal student loans would likely not change substantially as a consequence of increases in servicers' compliance with Federal consumer financial law."³⁵² The Bureau, using prior mortgage-servicer investigations as a guide, estimated that a servicer would spend roughly \$24,000 in assuring compliance during a normal larger-

³⁴² See *supra* Section II.B.

³⁴³ See *supra* notes 82-85 and accompanying text.

³⁴⁴ See *supra* note 91 and accompanying text.

³⁴⁵ See *supra* notes 68, 77-79 and accompanying text.

³⁴⁶ See *supra* note 80 and accompanying text.

³⁴⁷ See *supra* notes 86-88 and accompanying text.

³⁴⁸ See *supra* notes 68, 77-79 and accompanying text.

³⁴⁹ See *supra* Section II.B.

³⁵⁰ See *Defining Larger Participants of the Student Loan Servicing Market*, 78 Fed. Reg. 73,383, 73,400-03 (Dec. 6, 2013).

³⁵¹ *Id.* This would be especially true for federal student loans with interest rates and loan limits that are determined statutorily. *Id.* at 73,400.

³⁵² *Id.*

participant examination.³⁵³ However, one could assume that an examination into a more specific UDAAP violation would not be as expensive as this overall UDAAP-compliance figure. While costs could rise if SAGs and the CFPB do not coordinate and each bring separate examinations over similar violations, each SAG is required to provide the CFPB with a copy of the complaint so as to encourage consultation.³⁵⁴ Therefore, the costs of any added regulations would not be felt by students and, at a cost of likely less than \$24,000, should be negligible for these financial services companies.

Defined-UDAAP regulations provide three benefits: (1) easier adjudication of UDAAP violations; (2) upfront notice to servicers as to what constitutes a UDAAP; and (3) a second line of defense for students in the form of SAG enforcement of these rules. First, instead of the CFPB having to prove that a certain set of acts or practices by a servicer was unfair, deceptive, or abusive, a definition of acts and practices that constitute UDAAPs will allow the CFPB to simply prove that the act occurred, and at that point, the action will be deemed either unfair, deceptive, or abusive as a matter of law.³⁵⁵ Second, clear regulations will give servicers upfront notice as to what constitutes a UDAAP and will help prevent students from being subjected to that act or practice in the first place.³⁵⁶ Third, the importance of a dual-enforcement financial consumer protection regime is monumental.³⁵⁷ If the CFPB does not define what constitutes a UDAAP, at least nine states and the District of Columbia will be unable to protect students from servicer abuses.³⁵⁸ Additionally, depending upon how the HEA preemption battle plays out, state UDAP claims against federal student loan servicers could be preempted.³⁵⁹ Further, SAGs would be empowered to monitor smaller participants, who, without UDAAP-defining rules, are left

³⁵³ *Id.* at 73,402.

³⁵⁴ 12 U.S.C. § 5552(b)(1)(A) (2012) (“[T]o enforce any provision of this title, including any regulation prescribed by the Bureau under this title, a State attorney general or State regulator shall timely provide a copy of the complete complaint to be filed and written notice describing such action or proceeding to the Bureau and the prudential regulator.”).

³⁵⁵ 12 U.S.C. § 5531(b).

³⁵⁶ *See id.*

³⁵⁷ *See, e.g., supra* notes 31-37 and accompanying text.

³⁵⁸ *See supra* notes 181, 190-197 and accompanying text.

³⁵⁹ *See supra* notes 227-228 and accompanying text.

unregulated at the federal level and completely unregulated in the nine states without UDAPs that apply in the lender–servicer–borrower context.³⁶⁰ Without states to act as this second line of defense, the specter of agency capture looms large, as it does with any agency that has exclusive authority over a field of law.³⁶¹ While the CFPB is designed to be insulated from agency capture,³⁶² it would be more difficult—if not impossible—for the student loan servicing market to “capture” both the CFPB and all fifty SAGs.

D. SAG Teamwork: Regulation Through Litigation

Alternatively, SAGs should band together in a fifty-state enforcement action against student loan servicers.³⁶³ SAGs have often aided each other in situations where one has a stronger enforcement regime than another.³⁶⁴ One major drawback to this approach is that it is reactionary and not preventative. Instead of monitoring student loan servicers to prevent unsavory practices the CFPB has defined as UDAAPs on the front end, SAGs would be litigating against these practices on the back end—after they have already occurred. However, through such a suit, SAGs may be able to obtain a settlement that provides for substantive protections.

³⁶⁰ See *supra* notes 293-294 and accompanying text. See *supra* notes 377-381 and accompanying text, for a complete discussion on why SAGs are important in the dual-enforcement regime advocated here.

³⁶¹ See *supra* notes 304-305 and accompanying text.

³⁶² See generally Michael C. Nissim-Sabat, *Capturing This Watchdog? The Consumer Financial Protection Bureau Keeping the Special Interests Out of Its House*, 40 W. ST. U. L. REV. 1 (2012) (describing how the CFPB can avoid regulatory capture).

³⁶³ See *supra* notes 181-197 and accompanying text. One other potential solution, which is outside the scope of this Article, would be a movement in the states whose statutes do not apply to loan servicers to adopt a more inclusive UDAP statute. One example of a helpful formulation is that of the State of Washington, which focuses on the effect of the violation and not necessarily the identity of the violator. See *supra* note 189. This solution is not seriously considered in this Article because of the difficulty in getting at least ten sovereigns to pass such statutes.

³⁶⁴ This Article has already discussed one such example. See *supra* note 203 and accompanying text. However, some commentators disapprove of this practice. See, e.g., Jerry W. Markham, *Merging the SEC and CFTC—A Clash of Cultures*, 78 U. CIN. L. REV. 537, 542 (2009) (calling SAGs “wolf packs” who attack financial institutions).

This is exactly what SAGs did when they settled with mortgage servicers in 2012.³⁶⁵ In addition to the \$25 billion payout to SAGs, some of the substantive protections included “requiring a single point of contact for borrowers, establishing case review and paperwork processing requirements and deadlines, and restricting practices such as ‘dual tracking’ (when banks pursue a loan modification while simultaneously pursuing a foreclosure).”³⁶⁶ This settlement not only provided for these substantive requirements, but also provided for a monitor to ensure compliance with these agreed-to protections.³⁶⁷ The monitor, while lacking enforcement power in itself, serves as an alert system for the D.C. court to enforce the requirements.³⁶⁸

From a practical standpoint, the suit must be led by a SAG with ample statutory authority under that state’s UDAP. The Connecticut Attorney General would be an ideal candidate because Connecticut has strong consumer protection laws for student loan servicers³⁶⁹ that are not HEA field preempted under Connecticut state court precedent.³⁷⁰ The suit would ideally result in a settlement that incorporated the substantive protections discussed above in the context of CFPB rulemaking.³⁷¹ Additionally, this settlement should provide for a monitor to alert the court if servicers are not adhering to these provisions.³⁷²

This strategy is not without its risks. First, there is the cost of litigation. In the mortgage settlement, the executive committee that negotiated the final agreement required \$10 million in attorneys’

³⁶⁵ *State Attorneys General, Feds Reach \$25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs*, *supra* note 203.

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Frequently Asked Questions*, OFF. MORTGAGE SETTLEMENT OVERSIGHT, <https://www.jasmithmonitoring.com/omso/faqs/> (last visited Feb. 18, 2014).

³⁶⁹ *Brooks v. Salle Mae, Inc.*, No. FSTCV096002530S, 2011 WL 6989888, at *7 (Conn. Super. Ct. Dec. 20, 2011) (construing CONN. GEN. STAT. § 42-110(a), et seq. (2010)).

³⁷⁰ *Id.* However, this will ultimately be an issue for the federal courts to decide, which are currently split on this issue. *See supra* notes 227-228 and accompanying text.

³⁷¹ *See supra* notes 342-347 and accompanying text.

³⁷² *See supra* note 368 and accompanying text.

fees,³⁷³ and this amount did not cover what each state individually spent.³⁷⁴ A repeat performance of such a well-orchestrated settlement might be hard to come by, and if SAGs lose, they will have to foot the bill on their own. However, SAGs have successfully banded together in other lawsuits, including the national tobacco settlement.³⁷⁵ This uncertainty should not deter SAGs—the abuses documented in the student loan servicing market should give them ample incentive and bargaining power in any potential suit.³⁷⁶

Much like CFPB UDAAP-defining rules, the positives of a settlement with substantive protections would be a dual-enforcement regime and upfront notice to servicers as to what constitutes a UDAAP.³⁷⁷ Using SAGs as a second line of defense presents at least three major benefits. First, with their local consumer complaint systems, SAGs are truly in the best position to hear the issues prevalent in their local market.³⁷⁸ Second, SAGs are also more nimble than a large regulatory agency like the CFPB.³⁷⁹ And third, almost all SAGs are elected,³⁸⁰ whereas the Director of the CFPB is

³⁷³ *National Mortgage Settlement Summary*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/financial-services-and-commerce/national-mortgage-settlement-summary.aspx> (last updated Sept. 4, 2013).

³⁷⁴ *See id.* (discussing how each SAG who signed the final judgment allocated its split of the settlement funds for attorneys' fees).

³⁷⁵ *The ABCs of the Tobacco Master Settlement Agreement*, NAT'L ASS'N ATTORNEYS GEN., http://www.naag.org/publications/naagazette/volume_1_number_2/the_abcs_of_the_tobacco_master_settlement_agreement.php (last visited Jan. 28, 2015) (discussing the 46-state tobacco settlement).

³⁷⁶ *See supra* Section II.B. However, SAGs will lose all bargaining power if the court hearing the case finds that the state consumer protection statute is preempted by the HEA. *See supra* notes 227-228 and accompanying text (discussing the current stance of courts on the issue of HEA preemption of state consumer protection statutes).

³⁷⁷ *See supra* notes 357-362 and accompanying text.

³⁷⁸ *See supra* notes 139-140 and accompanying text.

³⁷⁹ Chatman, *supra* note 33, at 606 (commenting that Washington has been too slow to react to changes in the mortgage servicing industry); Sarah W. Rubenstein, Comment, *CERCLA's Contribution to the Federal Brownfields Problem: A Proposal for Federal Reform*, 4 U. CHI. L. SCH. ROUNDTABLE 149, 163 (1997) (commenting that because states are smaller and "more centralized," they are more nimble than the federal government).

³⁸⁰ *Attorney General Election Updates*, NAT'L ASS'N ATTORNEYS GEN., <http://www.naag.org/publications/naagazette/volume-4-number-9/attorney-general->

appointed.³⁸¹ This direct link to the voters makes SAGs more accountable to students than the bureaucrats at the CFPB.³⁸² Therefore, if the CFPB does not act, SAGs must take matters into their own hands and become the emancipators that students so desperately need.

VII. CONCLUSION

While many problems exist within the field of student lending, one area that has yet to receive enough attention is student loan servicing. Student loan servicers have engaged in a pattern of unsavory, and frankly illegal, practices aimed at increasing their profit margins, including charging students excessive ancillary fees and engaging in conduct that causes students to spend more time in repayment, accruing interest on the underlying debt.³⁸³ While students are unlikely to be able to defend themselves in court,³⁸⁴ a consumer-choice solution coupled with better access to servicer information might result in students stemming the abuse themselves.³⁸⁵ However, this is unlikely.³⁸⁶

Students deserve a stronger regulatory regime to free them from the servicing abuses that are preventing them from pursuing their dreams. One of the major issues in the subprime mortgage crisis was the lack of meaningful mortgage servicer regulation.³⁸⁷ Despite improvements to the federal consumer protection scheme since that time,³⁸⁸ significant gaps in student loan servicer oversight still remain.³⁸⁹ Therefore, either the CFPB or SAGs must act to gain

election-updates.php (last visited Jan. 29, 2015) (“The Attorney General is popularly elected in 43 states . . .”).

³⁸¹ 12 U.S.C. § 5491(b)(1)-(2) (2012).

³⁸² DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 3-21 (1993) (stating that democracy requires lawmaking that is done by elected officials rather than unaccountable bureaucrats).

³⁸³ See *supra* Section II.B.

³⁸⁴ See *supra* Part III.

³⁸⁵ See *supra* Section VI.B.

³⁸⁶ See *supra* Section VI.B.

³⁸⁷ See *supra* Section IV.A.

³⁸⁸ See *supra* Part V.

³⁸⁹ See *supra* Section VI.A.

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substantive protections for student borrowers and to provide for a strong state–federal dual-enforcement regime.³⁹⁰ Until then, the student borrower is most certainly slave to the servicer.

³⁹⁰ *See supra* Section VI.C-D.