STUDENT BORROWER PROTECTION CENTER

MORALLY BANKRUPT

How the Student Loan Industry Stole a Generation's Right to Debt Relief

January 2022

Acknowledgments

This paper was prepared with foundational guidance and technical assistance from Austin Smith of Smith Law Group, LLP. Mr. Smith's article, *The Misinterpretation of 11 USC 523(a)(8)*, was foundational in articulating the proper scope and application of the student loan non-dischargeability provision of the Bankruptcy Code, and its arguments and reasoning have been adopted by bankruptcy courts all across the country. Mr. Smith's work on behalf of student loan borrowers has been profiled by the Wall Street Journal, NPR, ABC News, Fox News, People Magazine, GOOD Magazine, the National Law Journal, Law 360, the American Bankruptcy Institute, and more. Business Insider has described Mr. Smith as the 'Don Quixote' of canceling student debt.

This paper also benefited from gracious review and input by John Rao of the National Consumer Law Center and Leigh Ferrin of the Public Law Center.

Protect Borrowers

Table of Contents

Executive Summary

It is a commonly held belief that private student loans in the U.S. are simply not dischargeable in bankruptcy, or that they are dischargeable only after a showing of exceptional financial hardship. Both conceptions are false. Instead, there are likely tens of billions of dollars of private student loans owed by countless borrowers that can be discharged as a matter of course through the normal personal bankruptcy process—or that have already been discharged through that path, but for which borrowers continue to unlawfully face bills and collections notices.

This report exposes the truth about the dischargeability of private student loans in bankruptcy, reveals the nefarious industry schemes that have served to defraud financially strapped borrowers to boost the student loan industry's bottom line, and illustrates a path forward for law enforcement to hold accountable the companies that have perpetuated this harmful fraud.

In particular, this report finds the following:

- **Only a narrow subset of "private student loans" actually face limits to dischargeability in bankruptcy.** The Bankruptcy Code does generally limit the dischargeability of certain "qualified education loans," but that statutory term references a very specific and limited subset of what one might colloquially refer to as a "private student loan." In particular, a "qualified education loan" is a loan that is incurred solely to pay for certain higher education expenses at an accredited institution by an "eligible" student. Loans that do not meet these specifics are not "qualified education loans," and they do not fall under the associated limits to dischargeability in bankruptcy.

- **Many loans that a consumer might consider "private student loans" are presumptively dischargeable in bankruptcy.** In the 2000s and early 2010s, students took on tens of billions of dollars of loans that were branded as education credit but that do not meet the definition of a "qualified education loan," and are therefore presumptively dischargeable in bankruptcy. These products include loans that law students take on while studying for the bar exam, "direct to consumer" student loans that exceed schools' cost of attendance, loans to students at non-accredited schools, and more. **We identify as much as $50 billion of "private student loans" owed by more than 2.6 million people that could fall under this category of presumptively dischargeable debt.**

- **Industry schemes have robbed borrowers of their right to discharge, even when those borrowers have already gone through bankruptcy.** Big banks and other private creditors have systematically lied to borrowers for years about the availability of bankruptcy as it relates to loans that are not qualified education loans. In many cases, private creditors have even continued to collect on the discharged debts of borrowers who have already gone through the bankruptcy process—that is, borrowers whose debts have legally already been discharged. Many times, firms even told borrowers that their loans were not dischargeable in bankruptcy at the same time that they admitted to Wall Street that those same loans were, in fact, presumptively dischargeable. Firms engaged in this double-speak so that they might avoid liability under securities fraud statutes while still padding their profits. Through their misrepresentations, student loan companies have collected potentially hundreds of millions of dollars of payment on debt that borrowers did not—or did not have to—owe.

- **It is time for consumer protection and law enforcement officials at all levels to fight back.** There is both an opportunity and a dire need for public and private actors to use the tools of consumer financial protection to safeguard borrowers and to hold industry accountable for nearly two decades of malfeasance. Courts have increasingly sided with borrowers in private litigation related to the dischargeability of the debts discussed here. It is long past due for state and federal law enforcement to build on this momentum, wielding their powers under the law to end this charade and deliver borrowers their rights.

Introduction: Student Loans in Name Only

It is a commonly held and widely repeated conception that all private student loans are not dischargeable in bankruptcy, or that they are dischargeable only after a showing of extreme financial hardship.[1] Both beliefs are false. Instead, there are likely tens of billions of dollars of private student loans owed by countless borrowers that can be discharged as a matter of course through the normal personal bankruptcy process. Borrowers across the country are currently struggling under the weight of these loans wholly unaware of their ability to discharge them in a typical consumer bankruptcy, having either adopted the same widely held beliefs cited above regarding private student debt's non-dischargeability or having been affirmatively lied to by a student loan company.

Moreover, borrowers across the country are being ripped off by student loan companies that continue to collect on debt that has already legally been discharged by borrowers who have completed bankruptcy proceedings. Although there is no itemization of each debt discharged in bankruptcy, and consequently borrowers who have undergone bankruptcy proceedings may have never affirmatively been told that their private student loans were in fact discharged, these debts *were* nonetheless discharged. Unfortunately, in the vast majority of cases, these borrowers either assumed that their loans could not be and therefore had not been discharged, or they were directly—and falsely—told by a student loan company that they continued to owe on these debts. In many cases, these affirmative representations have come in the form of debt collection notices.

The crux of the issue is that many products that one may refer to in common parlance as "private student loans" do not actually meet the specific definition of a student loan relevant to the Bankruptcy Code, which does generally limit the dischargeability of a specifically defined subset of private credit.[2] The particular definition of a private education credit relevant for the purposes of bankruptcy is that of a "qualified education loan"—a loan that is taken on by legally defined "eligible students," used to finance attendance at recognized colleges and universities that are eligible to offer students federal financial aid, and originated in amounts that do not exceed the cost of attendance at the student's school, among other requirements.[3] Regardless of how industry may brand them for marketing purposes, loan products that do not meet this specific definition of a qualified education loan are not subject to the Bankruptcy Code's generally restrictive treatment of qualified education loans in bankruptcy. Instead, many products that are branded as "private student loans" but that do not meet this definition are likely eligible for discharge through the same process that provides relief from credit card debt, medical debt, and other common categories of consumer debt.

As this report outlines, the set of products branded or otherwise thought of as private student loans that do not meet the specific legal definition of a qualified education loan is vast. These products include loans that law students take on while studying for the bar exam,[4] "direct to consumer" student loans that exceed schools' cost of attendance,[5] loans to students at non-accredited schools,[6] and many others.

Courts have increasingly acknowledged that borrowers have discharged these types of loans as part of a typical consumer bankruptcy, regardless of whether borrowers or their creditors acknowledged this fact at the time.[7] Further, although the battle to allow borrowers to discharge already presumptively dischargeable private student loans has so far mostly been fought in bankruptcy courtrooms, there is both a need and an opportunity for public and private actors to use the tools of consumer financial protection to hold industry accountable for nearly two decades of malfeasance—and to aid some of the most vulnerable borrowers in the student loan system along the way.

A wide range of the most prominent student loan companies in America have engaged in a startling array of illegal practices related to the marketing, servicing, and collection of these private student loans.

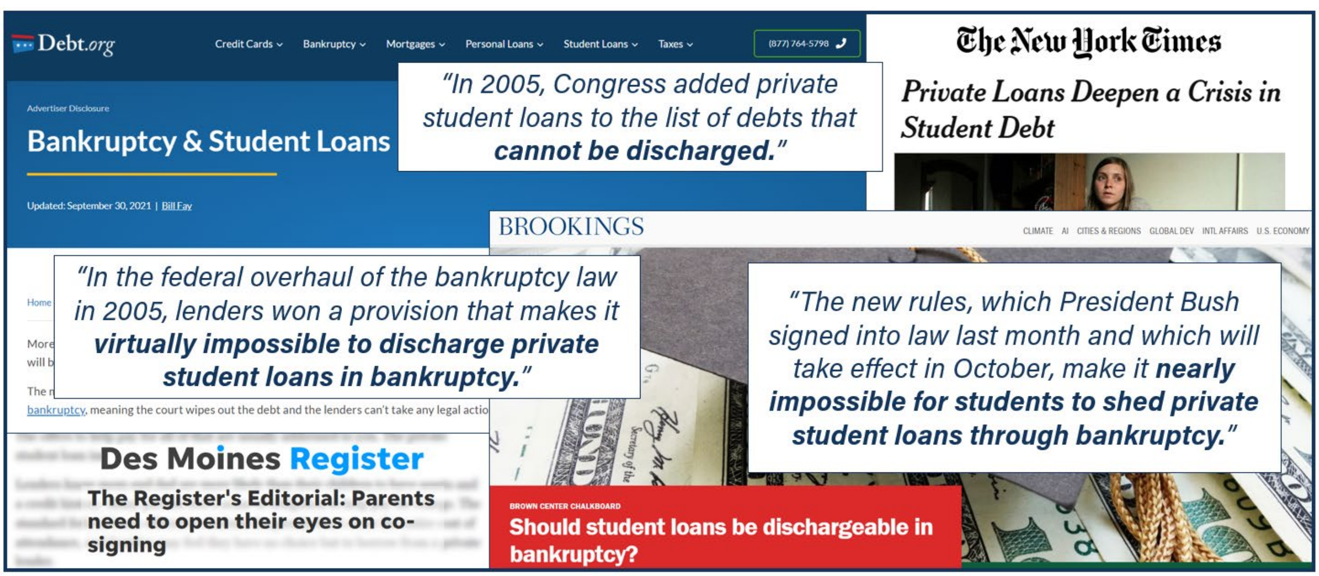
A wide range of the most prominent student loan companies in America have engaged in a startling array of illegal practices related to the marketing, servicing, and collection of presumptively dischargeable private student loans. Big banks and other private creditors have lied to borrowers about the availability of bankruptcy and have even continued to collect on the discharged debt from borrowers who have gone through the bankruptcy process. In doing so, these companies have collected potentially hundreds of millions of dollars of payments on debt that borrowers did not owe.

The following report briefly identifies the specific legal questions at play with regard to private student loans' dischargeability, answers those questions through well-settled case law, and illustrates their application to a decade of predatory practices by student loan companies. First, the report examines the Bankruptcy Code and other relevant statutes to identify the types of debts that are and are not presumptively dischargeable in bankruptcy. Then, the report discusses the broad set of products that are presumptively dischargeable in the ordinary course of bankruptcy, even though student loan companies market them as private student loans and sometimes affirmatively represent that these loans are not presumptively dischargeable. In doing so, the report discusses the various harmful and illegal tactics student loan companies have used to mislead borrowers away from understanding, utilizing, or enjoying their right to discharge these debts in bankruptcy. Finally, the report examines the legal landscape related to efforts to hold these companies accountable, noting an estimate of the scope of the problem and outlining the broad set of tools that law enforcement agencies at the state and federal level can and must utilize to deliver borrowers justice.

The Law Clearly Defines Only a Specific Subset of Private Student Loans as Being Exempt from Presumptive Bankruptcy Discharge

When a borrower decides to pursue bankruptcy, as part of her application she must list all of her outstanding debts in her bankruptcy petition. At the end of a successful bankruptcy under Chapter 7 of the Bankruptcy Code, generally all debts owed by the debtor and included in her petition are discharged by operation of law. This is the case unless a debt is specifically exempt from discharge under Section 523(a) of the Bankruptcy Code,[8] which provides that certain student loans are not presumptively discharged even if listed on the borrower's bankruptcy petition. For these covered student loans to be discharged, the borrower must meet a higher burden of financial hardship.

Figure 1: Industry, the media, and even scholars perpetuate the myth that all private student loans simply cannot be discharged in bankruptcy.



However, not all of what might be referred to colloquially as a private student loan meets the statutory definition of a student loan that is relevant to any exemption from presumptive discharge in bankruptcy. In particular, Section 523(a)(8) of the Bankruptcy Code exempts only certain educational debts from presumptive discharge, stating:[9]

> "(a) A discharge [of personal debt in bankruptcy] . . . does not discharge an individual debtor from any debt — . . .
>
> (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for —
>
> (A) (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
>
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
>
> (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual[.]"

If an "educational loan" or "student loan" does not fit within the ambit of Section 523(a)(8),[10] that debt is treated just like any other presumptively dischargeable debt, and, if listed on the bankruptcy petition, is discharged automatically upon entry of a discharge order at the conclusion of the bankruptcy process.[11] Thus, for a student loan to be excluded from discharge in a typical consumer bankruptcy, it must fall into one of the following three categories:[12]

- **Student loans made under government or nonprofit loan programs (Section 523(a)(8)(A)(i)).** The first group of debts exempt from presumptive discharge under the law are loans funded by the government and/or nonprofit institutions. The statute reads, "an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution[.]"[13] The first part of this statute—loans "made, insured, or guaranteed by a governmental unit"—is relatively straightforward, and includes loans made under both the federal Direct Student Loan Program and the defunct Federal Family Education Loan Program, as well as loans extended by state or local governments. The second part of the statute's clause—referencing loans "made under any program funded in whole or in part by a . . . nonprofit institution"—was intended to apply to debts for loans made under the National Direct Student Loan Program, protecting from discharge loans made directly to students by nonprofit colleges and universities, funded either partially or wholly by the government.[14]

- **Conditional educational grants (Section 523(a)(8)(A)(ii)).** The second group of exempt debts covers any "obligation to repay funds received as an educational benefit, scholarship, or stipend."[15] This exemption clearly refers to the extension of an educational grant or support that is required to be repaid, creating a debt. Here, Congress used the term "obligation to repay funds," not "loan." "Congress was certainly aware of the term 'loan' and is presumed to have made a conscious decision of when to use it and when to choose something different."[16] Section 523(a)(8)(A)(ii) refers to a specific type of defaulted conditional educational grant, not student loans, and applies to funds received in the character of an educational benefit—like veteran's benefits or employment benefits—not funds received in exchange for an educational benefit, which would illogically cover "a loan for a car used by a commuter student to travel to and from school every day."[17] A narrow interpretation dominates the trend of the most recent slate of decisions, which have looked at this issue using all of the tools of statutory interpretation.[18]

- **Qualified educational loans (Section 523(a)(8)(B)).** The third group of exempt debts applies to "qualified educational loans," as defined in section 221(d)(1) of the Internal Revenue Code. A qualified education loan is any indebtedness incurred solely to pay qualified higher expenses, which are limited to the cost of attendance (as published and concrete) at an eligible educational institution.[19] At a minimum, a qualified education loan is any indebtedness (i) incurred by a (ii) taxpayer (iii) solely (iv) to pay qualified higher education expenses (v) which are incurred on behalf of the taxpayer as of the time the indebtedness was incurred, (vi) which are paid or incurred within a reasonable period of time before or after the indebtedness is incurred, and (vii) which are attributable to education furnished during a period during which the recipient was an eligible student.[20]

Examining the Definition of a Qualified Educational Loan

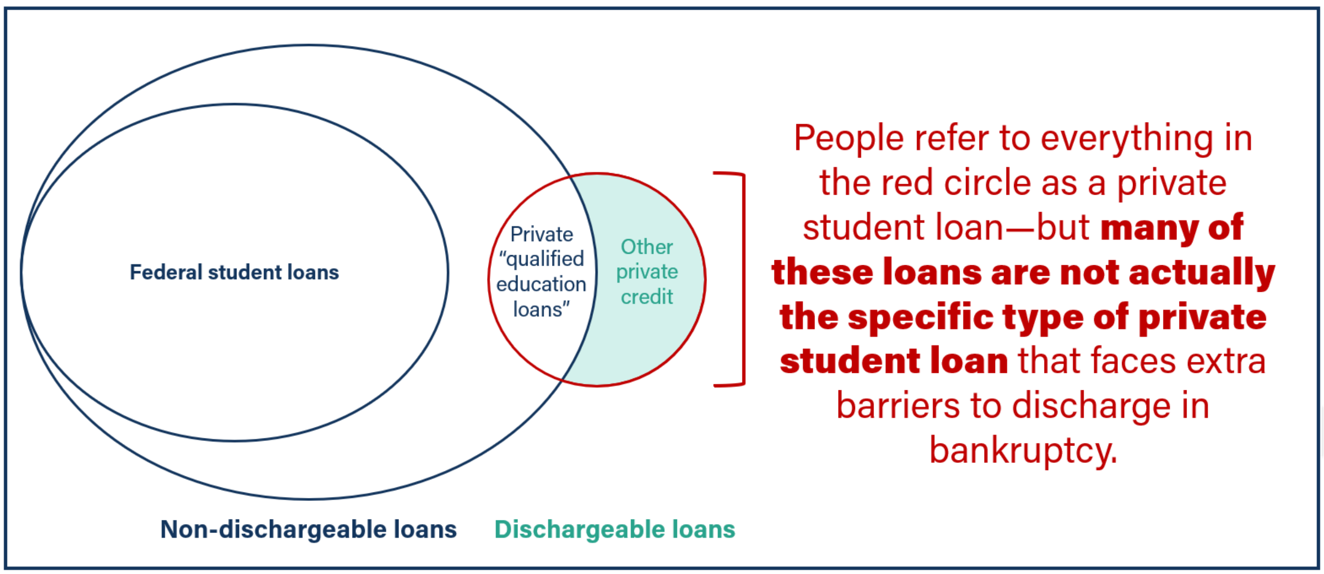
To better understand the definition of a qualified education loan, and thus the circumstances under which a borrower would be denied access to discharge in a typical bankruptcy, it is necessary to examine the elements outlined above.

First, the term "qualified higher education expenses" is defined in the statute as "the cost of attendance . . . at an eligible educational institution, reduced by the sum of," among other things, the amount of any scholarship, allowance, or such kind of payment.[21] In essence, a qualified educational loan is a loan taken out to pay for approved educational expenses only at a specific type of approved institution, a so-called Institution of Higher Education as defined under the Higher Education Act of 1965.

There is also an additional relevant aspect to this definition: the borrower's intention. A qualified education loan requires an element of intentionality that the debt be used solely for qualified higher education expenses.[22] For that reason, lenders cannot create "non-dischargeable" debts by simply labeling them as "undergraduate loans" in advertising or on the relevant credit agreements.[23]

College students have credit cards and car loans, and they borrow money from friends and family; indeed, when pursuing a higher education, there is often a great need for borrowing and lending.[24] But every dollar a person borrows while pursuing a higher education is not automatically deemed non-dischargeable because its purpose was to help the student or because it is for an amount below the published "cost of attendance" at the institution they attend. As the courts have ruled, the law "must be applied in a way that provides discernable boundaries between a dischargeable and a nondischargeable debt."[25] In fact, the Second, the Fifth, and the Tenth Circuit Courts of Appeals have all rejected arguments made by creditors that courts need only confirm that the promissory note expresses an educational purpose for the loan to be non-dischargeable.[26]

Figure 2: Many "private student loans" are not "qualified education loans" for the purposes of the bankruptcy code.



Finally, the definition of a qualified educational loan must be interpreted narrowly, lest it become an exception that swallows the rule. Were it read to include any loan used to obtain an education of any kind, then its coverage would extend to include those loans already excepted by Section 523(a)(8)(A) in violation of the rule against surplusage. Since Congress did not act so broadly as to except all loans used for an education, as evidenced by its particular attention to the first two identified groups, this final group must be understood to be equally as precise.

The various components of the definition of a qualified education loan may seem complex and arbitrary, but they are natural outgrowths of the term's origin. Starting in 1978 and culminating in 1998, Congress narrowed and eventually completely limited the dischargeability of federal student loans.[27] In 2005, private education lenders and debt collectors successfully lobbied Congress to extend provisions limiting dischargeability to certain private student loans.[28] However, in doing so Congress limited protection for private education loan borrowers in bankruptcy *only to the extent that their private student loans supplemented and mirrored federal student lending*. Loans that do not fall into the narrow subset of being directed to eligible students at accredited schools for expenses such as tuition, room, board, and books do not mirror federal student loans, and therefore were not meant to face similar limitations to federal student loans in bankruptcy.[29]

Congress limited protection for private education loan borrowers in bankruptcy *only to the extent that their private student loans supplemented and mirrored federal student lending.*

Creditors Have Developed Various Products That are Advertised as Private Student Loans but are Not "Qualified Education Loans" for the Purpose of Bankruptcy Law

Although commercial lenders could originate the newly non-dischargeable qualified education loans that Congress created in 2005, they were not satisfied with the origination volume that this business line produced.[30] The paperwork these loans involved was burdensome, schools would not agree to certify loan sums that exceeded students' cost of attendance, and the Title IV accreditation requirement prevented lending to students at thousands of for-profit colleges and institutions that had not obtained Title IV accreditation.[31] Looking to sidestep these hurdles, private commercial lenders initiated new programs that lent money directly to students, bypassing schools' financial aid offices and creating a channel to reach students attending non-accredited schools.[32]

Regardless of corporate branding, public misconceptions, or industry's underhanded insistence, these forms of credit were always and remain presumptively dischargeable in bankruptcy.

Of course, while these products are and were generally advertised as being or strongly resembling something commonly thought of as a private student loan, key aspects of their design place them outside of the statutory definition of non-dischargeable qualified education loans discussed above. Indeed, regardless of corporate branding, public misconceptions, or industry's underhanded insistence, these forms of credit were always and remain presumptively dischargeable in bankruptcy.

The following are only a few examples of the various types of credit products available in the market that are presumptively dischargeable under the law, even though they are branded as private student loans and often improperly exempted from discharge by the courts.

Direct to Consumer Loans

In the early 2000s, commercial lenders began experimenting with a new student loan product called the "direct to consumer" ("DTC") loan.[33] DTC loans were marketed and disbursed outside of financial aid offices to avoid regulatory restrictions under the Higher Education Act that prohibited lenders from originating loans for more than a school's published cost of attendance.[34] Accordingly, DTC loans are not typically qualified education loans because they often a) exceeded the cost of attendance (or exceeded the cost of attendance less other federal aid and/or qualified education loans already received),[35] b) were made to ineligible students, and/or c) were made to students at non-accredited schools. These DTC loans are presumptively dischargeable in bankruptcy.

A prominent example of these DTC products is the Tuition Answer Loan that Sallie Mae introduced in 2004.[36] Sallie Mae described the loan by saying, "[u]nder the Tuition Answer loan program, creditworthy parents, sponsors and students may borrow between $1,500 and $30,000 per year . . . to cover any college-related expense. No school certification is required, although a borrower must provide enrollment documentation."[37] Clarifying the definition of a "college-related" expense, Sallie Mae touted in advertising materials that these loans could be used for anything "from tuition and books to living expenses and even laptops."[38] This set of uses notably departs from the limited set of "qualified higher education expenses" that a loan must be used exclusively for if it is to be a non-dischargeable qualified education loan, which are strictly based on a college's listed cost of attendance.[39]

In order to make its DTC loans look like non-dischargeable qualified education loans, Sallie Mae inserted representations and warranties into the promissory notes that read, "I certify that this is a qualified education loan as that term is defined in 26 U.S.C. § 221(d)," and, "Not Dischargeable: This loan may not be dischargeable in bankruptcy."[40] These legal conclusions purport to affect a pre-petition waiver of discharge, and are therefore unenforceable.[41] As discussed below, they are also deceptive because they intentionally foster and perpetuate the false net impression that the loans are not dischargeable in bankruptcy. Years after this deceptive marketing, courts are beginning to confirm that loans like Tuition Answer Loans are not "qualified education loans" and may therefore be discharged through bankruptcy as a matter of course. As a judge in one case ruled:[42]

> "Tuition Answer Loans were made through the Defendants' direct-to-consumer lending program, and not through the financial aid office of an eligible school. And for this reason, the loans were not limited in amount, and could be for sums that were 'above and beyond the published cost of attendance.'"

In contrast to their consumer-facing representations, when Sallie Mae and its successor, Navient, later sold these loans to sophisticated investors, they explicitly disclosed that DTC Loans bore a risk of discharge.[43] As one court noted, "Navient disclosed to its potential (sophisticated) investors in student loan asset-backed securities prospectuses that 'pursuant to Section 523(a)(8), only private loans made for qualified expenses were excepted from discharge.'"[44] Many additional prominent examples exist of firms such as Navient engaging in this duplicitous double-speak.[45]

Figure 3: Sallie Mae and Navient actively lied to borrowers, all while telling investors on Wall Street the truth to avoid liability.

What Sallie Mae/Navient told borrowers:

3. Communications and Notices from You - Any communication between you and any borrower or cosigner will be binding on all borrowers and cosigners. Any notice required to be given to me by you will be effective when mailed to the latest address you have for me.
4. Reports to Credit Bureaus - **You may report the status of this loan to the School and to any credit bureaus. Late payments, missed payments, or other defaults on my account may be reflected in my credit bureau report.**
5. Not Negotiable - This is a non-negotiable consumer note.
6. Not Dischargeable - This loan may not be dischargeable in bankruptcy.
7. Federal Notices - I understand that the following notice is required by law when a new account is opened.

"This loan **may not be dischargeable** in bankruptcy."

What Sallie Mae/Navient told investors:

Private credit student loans made for qualified education expenses are generally not dischargeable by a borrower in bankruptcy. Private credit student loans can become dischargeable if the borrower proves that keeping the loans non-dischargeable would impose an undue hardship on the debtor and the debtor's dependents. In addition, direct-to-consumer loans are disbursed directly to the borrowers based upon certifications and warranties contained in their promissory notes, including their certification of the cost of attendance for their education. This process does not involve school certification as an additional control and, therefore, may be subject to some additional risk that the loans are not used for qualified education expenses. If you own any notes, you will bear any risk of loss resulting from the discharge of any borrower of a private credit student loan to the extent the amount of the default is not covered by the trust's credit enhancement.

"[DTC loans] may be subject to some additional risk that the loans are **not used for qualified education expenses**. If you own any notes, you will bear any risk of loss resulting from **the discharge of any borrower** . . . ."

What courts said about this deception:

"Navient **disclosed to its potential (sophisticated) investors** in student loan asset-backed securities prospectuses that 'pursuant to Section 523(a)(8), only private loans made for qualified expenses were excepted from discharge.'"

- *In re* McDaniel, 590 B.R. 537, 542 (Bankr. D. Colo. 2018)

The latter disclosures underscore the reality of the situation. DTC loans may, as above, be private credit advertised as helping students address college-related expenses. However, these products nevertheless fall far outside of the definition of qualified education loan relevant to the Bankruptcy Code. As Sallie Mae and Navient's actions illustrate, many of the companies originating, securitizing, holding, and/or servicing these loans are and have always been well aware of this fact.

Loans to Students at Non-Accredited Schools and Institutions

To be eligible for Title IV funding, including federal student loans and grants, an institution of higher education must "satisfy the program integrity triad, under which it must be:

- licensed or otherwise legally authorized [by a state agency] to operate in the state in which it is physically located;
- accredited or pre-accredited by an agency recognized for that purpose by the Department of Education (ED); and
- certified by ED as eligible to participate in Title IV programs."[46]

As mentioned above, a private student loan can meet the definition of a qualified education loan only if (among other requirements) the institution a student uses the loan to attend is eligible for Title IV funding. In turn, this means that a private student loan can be a qualified education loan only if it is used to finance attendance at a school that has been both licensed or authorized by the relevant state regulator in the state where the school is physically located and accredited by an accrediting agency recognized by the Department of Education.

Many of the DTC loan products created in the early 2000s were marketed toward students attending non-accredited schools.[47] Because these schools were not Title IV-eligible, loans made to students attending them necessarily fail to meet the statutory limitation that qualified education loans include only those loans made to students at Title IV-eligible institutions.[48] Loans made to students at non-accredited schools are therefore not qualified education loans for the purposes of the Bankruptcy Code. Like student credit card debt, these loans are simply unsecured consumer debts, and they are discharged automatically upon entry of a discharge injunction.

The intersection of predatory lending, non-accredited schools, and misrepresentations surrounding dischargeability in bankruptcy has created a great risk for a uniquely vulnerable population of consumers.

The intersection of predatory lending, non-accredited schools, and misrepresentations surrounding dischargeability in bankruptcy has created a great risk for a uniquely vulnerable population of consumers.

Predatory schools' recruiting often targets communities of color, and the lack of even an accreditor's loose oversight for non-accredited schools means that their educational product is likely to be sub-par, therefore increasing the likelihood that the borrower will need to seek bankruptcy protection.[49] These schools are also likely to drive students toward various forms of risky and expensive private credit, exacerbating the consequences of poor educational outcomes.[50] This is the backdrop against which borrowers are seeking to discharge their unaffordable credit, and why the affirmation of their right to do so is so important.

As above, the actions of the private student loan company Navient are notable with regard to efforts to block borrowers from discharging loans from non-accredited schools. One party to the case *Crocker v. Navient*, Michael Shahbazi, took on a $11,658.99 Sallie Mae Career Training loan in 2002 to finance attendance at STMC, a non-accredited technical school in Virginia.[51] Shahbazi was told that his loan was "an education loan that must be repaid," playing into the false perception that his loans would not be presumptively dischargeable in bankruptcy.[52] But this was false. Because the school that Shahbazi attended lacked accreditation and was therefore not eligible for Title IV aid, any private credit extended to finance attendance at that institution necessarily fell outside of the definition of a qualified education loan for the purposes of discharge in bankruptcy.[53]

Nevertheless, even after Shahbazi declared bankruptcy in 2011 and had all "properly scheduled pre-petition debt" discharged, Navient—which by that time had taken ownership of the loan from Sallie Mae—continued to collect on his loan.[54] Navient hired collectors who regularly and harassingly demanded Shahbazi pay on the discharged debt, contacting him multiple times per day and even calling his mother-in-law, his brother, and his wife's employer.[55] This happened, as described above, just as Navient warned investors in securities backed by loans like Shahbazi's that these debts were "generally dischargeable by a borrower in bankruptcy."[56] Courts across the country have gone on to affirm that Shahbazi's loans and ones like them are presumptively dischargeable due to their having financed attendance at a non-Title IV school.[57]

Creditors Have Developed Various Predatory Tactics to Keep Borrowers from Discharging their Debts and to Continue Collecting on Debt that Has Already Been Discharged

Prior to 2005, Section 523(a)(8) of the Bankruptcy Code was easy to apply because it denied special bankruptcy treatment to all private student loans made by commercial lenders. If a student loan was issued or guaranteed by the federal government, it was non-dischargeable absent a showing of "undue hardship." All other student loans received the same bankruptcy treatment as other types of consumer debt. When Congress amended the Bankruptcy Code to give special treatment to certain private student loans in 2005, it fueled the belief that all student loans are non-dischargeable—a belief that was echoed and cemented by industry and the media.[58] But private lenders were only given qualified protection in 2005 such that, as discussed above, Section 523(a)(8)(B) exempts a limited set of private education loans from discharge.[59] This situation created an opportunity for unscrupulous creditors to exploit the application of Section 523(a)(8) and to deceive debtors into thinking that all private student loans, like their federal counterparts, were non-dischargeable.

This problem was made worse because Section 523(a)(8) is "self-executing," meaning that its correct application relies on the good faith and honesty of creditors. In particular, when a debtor files a bankruptcy petition, the debtor includes all unsecured debts on a "Schedule F" form, listing only the amount of the debt, the name of the creditor, and the consideration received. After demonstrating compliance with the Bankruptcy Code, a court then issues an order discharging all pre-petition debts listed on the bankruptcy petition except for those covered by Section 523(a).[60] But the discharge order does not specifically enumerate which loans, if any, have been discharged and which ones have not. Rather, it simply states generally that the order does not discharge some debts, including "debts for most student loans." Against the backdrop of the widely accepted narrative that all forms of private credit used to help students attend college are non-dischargeable, this ambiguity is likely to leave borrowers under the impression that their loans were exempted and are still owed.

If a creditor believes that a debt they hold is excepted from discharge, they have the legal burden to prove that the debt is encompassed by Section 523(a)(8).[61] To meet this burden, the creditor must prove that it is more likely than not that the debt falls entirely within the meaning of one of Section 523(a)(8)'s exceptions.[62] Once the creditor proves the debt is presumptively non-dischargeable, the debtor must prove that repaying the debt would constitute an "undue hardship" in order to receive a discharge of that debt.[63] Thus, any educational debt not encompassed by Section 523(a)(8) is automatically and as a matter of law discharged upon entry of the discharge order.[64]

Borrowers who have already been through the bankruptcy process but who labor under the widespread belief that private student loans cannot be discharged in bankruptcy may therefore not even know that they have already been freed from their debts.

Unfortunately, this burden-shifting framework rarely plays out so simply for the borrower in practice. Often, unscrupulous creditors continue collections activity even in the face of a discharge order and it is left to the debtor to initiate either an adversary proceeding to specifically determine the dischargeability of the debt or an action asking the court to enforce the discharge injunction.[65]

The creditor's good faith and the threat of sanctions are the only checks on compliance with discharge injunctions. Accordingly, the upshot for borrowers is deceptively simple. If a borrower has gone through bankruptcy while owing a so-called "private student loan" that is not entitled to special treatment in bankruptcy and a creditor did not take specific steps in court to prevent that debt from being discharged, then the debt has already automatically been discharged. However, even borrowers well-versed in this niche area of bankruptcy law will likely need further court intervention to force creditors to comply with the law. Worse still, borrowers who have been through the bankruptcy process but who labor under the widespread belief that private student loans cannot be discharged in bankruptcy may therefore not even know that they have already been freed from their debts.

Of course, borrowers' misunderstanding may involve not just passive ignorance but rather may be the result of active steps by student loan companies to keep borrowers in the dark. The following are a few of the ways that student loan companies have attempted to prevent borrowers from accessing or enjoying their right to discharge.

Creditors Manipulate the Application of Section 523(a)(8) and Deceive Debtors into Believing their Non-Qualified Student Loans Were Not Discharged

Not content with the protections won from Congress in 2005, creditors soon devised a scheme to leverage the widespread presumption of non-dischargeability and deceive debtors and the bankruptcy courts into thinking that all private student loans—both qualified and non-qualified, made to students at both accredited and non-accredited schools—were excepted from discharge. To effectuate this fraud, creditors represented to student debtors that the Bankruptcy Code prohibited discharge of any loan made to any person for any educational purpose.[66]

Low-income students who lack the resources and knowledge to seek relief in an adversary proceeding, which is an expensive and time-consuming undertaking, are disproportionately likely to struggle to repay on private student loans.[67] And only one tenth of one percent (0.1 percent) of debtors in bankruptcy actively seek to discharge their student debts, an affirmative right they have at their disposal even given creditors' existing obligation to establish that a given debt was not discharged in bankruptcy.[68] In the rare event a debtor has filed an adversary proceeding seeking a determination related to dischargeability of their student loans, creditors often settle or forgive student debts that were already legally discharged.

Further, when lenders put language into a contract expressly invoking 523(a)(8), some courts have declared the loans non-dischargeable.[69] Even if the lenders do not use the same statutory language in their promissory notes, some courts will conclude that any education-related statement related to use of the proceeds of the loans is close enough for the loan to fall under 523(a)(8).[70]

With these traps in place, a law that was originally designed to prevent students from taking advantage of the bankruptcy system has enabled unscrupulous creditors to take advantage of the bankruptcy system. [71]

Creditors Collect or Attempt to Collect on Discharged Debt

Though many of the loans considered here are presumptively dischargeable in bankruptcy, lenders nevertheless continue to collect on them post-bankruptcy.[72] For example, in one case the plaintiffs obtained bankruptcy discharges for their non-qualified education loans (DTC loans owned by Navient), but alleged that even after discharge "Navient had both of these plaintiffs contacted frequently by telephone and email to demand repayment" of their loans.[73] In another case, even after the bankruptcy discharge of non-qualified education loans, the plaintiff alleged that the lender "sought to collect on his debts by use of 'dunning letters, phone calls, negative reports made to credit bureaus, failure to update credit reports, and commencing or continuing legal action to recover' on the discharged debt."[74]

When private citizens have responded to predatory action along these lines by bringing suit to enjoin creditors from continuing to collect on discharged private student debts, the courts have agreed that their loans are presumptively dischargeable and were, in fact, discharged during preceding bankruptcy.[75] In *Homaidan v. Sallie Mae, Inc.*, the U.S. Second Circuit Court of Appeals held that two DTC Tuition Answer Loans issued by Sallie Mae Inc. were not presumptively excepted from discharge by Section 523(a)(8)(A)(ii), finding that it stretched the limits of the English language and rules of statutory interpretation to read private student loans into the scope of "funds received as an educational benefit."[76] Unfortunately, some courts have also concluded that, while these loans are presumptively dischargeable, debtors cannot bring claims for injunctive relief to stop unlawful post-discharge collection activity outside of the bankruptcy court where their original bankruptcy proceeding occurred.[77] Consumers' ability to prevent unlawful post-discharge collection against themselves is therefore somewhat limited, but worse their ability to act as private attorneys general and protect their fellow consumers is all but non-existent.

Illustratively, in 2017, while the *In re Cocker* case was pending, the bankruptcy court was able to convince Navient to temporarily stop collecting on DTC loans on a nationwide basis as a "responsible corporate citizen."[78] Unfortunately, faced with a ruling that DTC loans are presumptively dischargeable but that consumers' ability to stop post-discharge collection was limited, Navient did not proactively change its collection policies. Instead, the company's CEO acknowledged the presumptive dischargeability of the company's DTC loans but implied that enforcement of the ruling would be nearly impossible, saying "[W]hile these loans may in fact be dischargeable, the [bankruptcy judge] was wrong when he found that the plaintiffs had jurisdiction to bring these claims outside of the bankruptcy court that originally heard their bankruptcy case."[79] This attitude appears to be representative of the industry's approach, and the need for federal and state law enforcement to act on this issue is therefore clear.

Navient's CEO acknowledged the presumptive dischargeability of the company's DTC loans but implied that enforcement of the ruling would be nearly impossible.

Law Enforcement Must Step in to Protect Borrowers

The Scope of the Problem is Massive

The fact pattern laid out above makes clear that borrowers are already being taken advantage of nationwide. But even that does not capture the full scope of the problem. For numerical scale, **we estimate that almost $50 billion private student loans owed by more than 2.6 million people may be presumptively dischargeable in bankruptcy.**

Those figures stem from a combination of three underlying estimates: the proportion of private student loan debt that has been used for expenses that make them ineligible to qualify as "qualified education loans," the proportion of private student debt that has been used to finance attendance at non-Title IV schools, and the proportion of private student loan debt to owed by students who were not "eligible students" for the purposes of the definition of a qualified education loan when they took on the relevant credit.[80] In turn, those underlying estimates consist of the following:

- **The proportion of private student loan debt used for ineligible expenses:** Between 2005 and 2011, lenders originated $98 billion in private student loans.[81] Based on Consumer Financial Protection Bureau ("CFPB") data, we estimate that 10 percent of private student loans originated overall between 2005 and 2011 overall were DTC loans.[82] DTC lending was severely restricted after 2010, and we therefore cannot suppose that these numbers can be extrapolated across all private student loan originations over time.[83] But the total amount of private student debt originated between 2005 and 2011 constitutes roughly 59 percent of all private student debt originations between 2000 and 2014 (roughly the time period bounding the rise and fall of most DTC lending).[84] Thus, if we multiply 10 percent (the total share of private student loans originated between 2005 and 2011 that we estimate were DTC loans) by 59 percent (private student loan debt originated from 2005 to 2011 as a proportion of all private student loan debt originated from 2000 to 2014), we can conservatively estimate that **6 percent** of private student loans originated between 2000 and 2014 were presumptively dischargeable DTC loans.

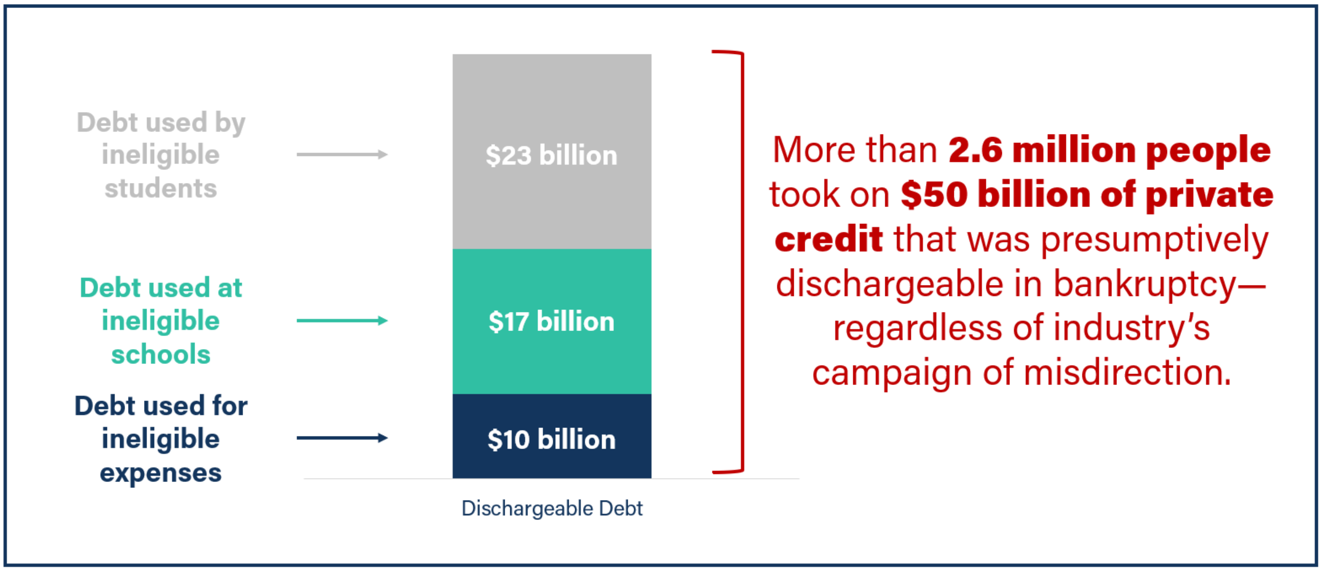
- **The proportion of private student loan debt used to finance attendance at ineligible schools:** An estimate of the overall share of private student loans that are presumptively dischargeable because they financed attendance at non-Title IV eligible programs can be extrapolated based on Sallie Mae's portfolio. Sallie Mae offers various credit products aimed at specific student populations.[85] Sallie Mae describes one product, the Career Training Smart Option Student Loan ("Career Training loans"), as being designed for students attending "professional training and trade certificate courses (culinary, technical, etc.) at a non-degree-granting school."[86] Sallie Mae's then-CEO Tim Fitzpatrick clarified in 2007 that these loans are "not made to the Title IV-sponsored schools, they're made to the non-Title IV certificates and 2-year award granting programs."[87] Accordingly, Career Training loans are generally not qualified education loans for the purposes of the Bankruptcy Code.

  Sallie Mae has disclosed that it originated $3.97 billion in Career Training loans between 2003 and 2010 in a rise-and-fall trajectory typical of the industry for that period.[88] The company has also disclosed that it originated $40.96 billion in "private education loans" as a whole during that same timeframe.[89] Accordingly, Sallie Mae's Career Training originations constitute 9.7 percent of its self-described private student loan originations from 2003 to 2010. Assuming that this rate of Career Training loan origination as a proportion of overall private student lending is representative of the company's lending from the 2000 to 2014 period discussed above, and that—given Sallie Mae's position as one of the largest players in the private student loan market during that time[90]—the company's actions are representative of most other firms in the market, we can estimate that roughly **10 percent** of all private student loans made from 2000 to 2014 were made to students attending non-Title IV eligible programs. As mentioned, these loans are not qualified education loans for the purposes of the bankruptcy code.

- **The proportion of private student loan debt used to finance ineligible students:** Estimates of ineligible students admittedly do not involve the same reliability as figures drawn directly from SEC disclosures and government data. However, reasonable assessments can nonetheless be made. Eligible students are required to be: (1) US citizens and (2) attending school half-time or more.[91] There are no reliable estimates of the number of non-US citizen student loan borrowers. However, available estimates reveal that roughly 14 percent of all college students in 2012 were attending school less than half-time.[92] Admittedly, this says nothing of the actual proportion of students attending school less than half-time who also took on student loan debt. But it should be noted that since these students are not eligible for federal funding, they effectively have no other generalizable source of financial aid beyond private lenders, and the cost of college remains high even for these part-time students. Accordingly, it is reasonable for the present purposes to assume that **14 percent** of students from 2000 to 2014 were enrolled less than half-time and therefore that any debts these students took on, assuming those debts were in roughly equal proportion to enrollment, were not qualified education loans.

We may conclude that as much as **30 percent** of all private student loans originated between 2000 and 2014 were not qualified education loans (6 percent + 10 percent + 14 percent). If that is the case, almost $50 billion in private student loan debt may be presumptively dischargeable.[93] Moreover, given available data on average private student loan balances, it is possible to conclude that more than 2.6 million borrowers took on these presumptively dischargeable debts.[94]

Figure 4: More than 2.6 million borrowers took on $50 billion in presumptively dischargeable education debt.



Law enforcement agencies at all levels must wield the full set of tools at their disposal to hold private companies accountable for violating borrowers' right to discharge in bankruptcy in this massive market.

This estimate obviously relies on several assumptions and intermediate estimations. As enumerated in the accompanying footnotes, these assumptions are generally conservative. Nevertheless, the scope of uncertainty present only underscores the need for those with more rigorous investigative tools—such as state and federal law enforcement—to study the issue.

Private Enforcement and Bankruptcy Pose Key Challenges

Debtors have struggled to prevent creditors from or punish creditors for collecting or attempting to collect on discharged debts. Courts have denied debtors the ability to use the class action litigation process to sue creditors who repeatedly collect or attempt to collect on discharged debt.[95] Several courts of appeals have also limited debtors ability to use the contempt proceeding to recover damages for violations of bankruptcy discharge orders through collecting or attempting to collect on a discharged debt.[96] Thus, according to case law, the only remedy would be for each debtor to sue for damages or sanctions for violations of the discharge order through a contempt proceeding in the bankruptcy court that filed the discharge order. Such a piecemeal and expensive process of individual contempt proceedings is not feasible for or attractive to debtors and bankruptcy lawyers and without a change in the law, leaves the offending creditors free to continue this abusive practice nationwide.

As it stands, the litigants appear unable to permanently correct the problem outside of their respective jurisdictions that have allowed enforcement of discharge orders—the Southern District of Texas and the Eastern District of New York. Though the Fifth Circuit did not reach the issue of class certification, it seems that because of the identified limitation on enforcement (combined with the lack of precedent for certification of a class that includes debtors whose discharges were entered by bankruptcy courts in other districts), certifying such a class would be highly dubious.[97] Consequently, success in the Crocker[98] and Homaidan[99] cases is unlikely to lead to relief for debtors who filed bankruptcy in Illinois, for example.

Debtors have also tried to tackle this issue through claims under the Fair Credit Reporting Act (“FCRA”),[100] the Fair Debt Collection Practices Act (“FDCPA”),[101] and even the antitrust laws which, while valuable tools, do not build into bankruptcy court case law determining what specific classes of debts are discharged under Section 523(a)(8).[102]

The Consumer Financial Protection Bureau, Federal Trade Commission, State Attorneys General, and State Financial Regulators Should Protect Borrowers by Exercising their Ability to Enjoin and Remedy Unfair, Deceptive, and Abusive Acts and Practices

The Consumer Financial Protection Act (“CFPA”) prohibits “unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service,”[103] which is defined to include "extending credit and servicing loans."[104] Similarly, the Federal Trade Commission Act prohibits "unfair or deceptive acts or practices" in trade or commerce.[105]

In addition to federal prohibitions on unfair and deceptive conduct, all states have adopted generally applicable consumer protection statutes that prohibit unfair or deceptive acts and practices in trade or commerce. Some state consumer protection statutes broadly prohibit "unfair or deceptive acts or practices in the conduct of any trade or commerce,"[106] while others prohibit more targeted categories of harmful practices, such as misrepresentations concerning the nature of or obligations incurred in a credit transaction.[107] This federal and state authority applies to unfair and deceptive practices throughout the loans' lifecycles, from origination to servicing and collection.

Origination and Pre-Discharge Servicing and Collection

The practices that lenders have historically employed to deceive borrowers into believing that private student loans that do not fall within the definition of a "qualified education loan" were and are not dischargeable in bankruptcy are particularly troublesome because they occur in the context, discussed above, of widespread consumer misunderstanding of student loan dischargeability. While lenders were (and are) not entirely responsible for the general environment of consumer confusion, they have both contributed to and benefited from it. Moreover, because whether an act or practice is "deceptive" is determined based on the "least sophisticated consumer" standard,[108] a loan origination marketplace that encourages misrepresentations requires strict honesty and extra care from lenders to avoid creating a deceptive "net impression" amongst the least sophisticated consumers. This is particularly true where the less sophisticated consumers in the market—those taking out loans to attend non-accredited schools that are not eligible for Title IV funds, and those who most likely need to borrow more than a school's own calculated cost of attendance—are the most likely to engage with the loan products where the popular wisdom is incorrect.

It is against this backdrop that lenders engaged in practices that created the false impression that borrowers' presumptively dischargeable private student loans were or are either (a) non-dischargeable, or (b) subject to the "undue hardship" requirement. As noted above, certain Sallie Mae DTC loans included the following statement: "Not Dischargeable: This loan may not be dischargeable in bankruptcy." This statement is false, because as explained above these DTC loans do not meet the statutory requirements for qualified education loans and are therefore presumptively dischargeable through the ordinary bankruptcy process. Sallie Mae's DTC loans also include a "certification" purportedly made by the borrower, stating that "I certify that this is a qualified education loan as that term is defined in 26 U.S.C. § 221(d)." While this statement is couched as a representation by the borrower, it was drafted by the lender, and presented to the borrower as part of a contract of adhesion.[109] Generally, disclosures and certifications are required where the information asymmetry runs in the opposite direction—i.e., the party with more information is required to certify or disclose it for the protection and benefit of the party with less information. That paradigm is inverted by the certification, which is drafted by the lender (who knows it to be false) but signed or made by the borrower, who has significantly less knowledge and sophistication concerning student loans and bankruptcy. As a result, this "certification" is problematic in at least three respects.

First, for sophisticated borrowers who look up and read the statute—either during or after origination—it creates a deceptive net impression that the loan is only dischargeable in bankruptcy upon a showing of "undue hardship." Borrowers are likely to be deceived by the false representation implicit in the lender-drafted certification due to a background belief that a lender would not ask them to certify a fact that the lender knew to be false.

Second, even if the borrower subsequently discovers that the certification is false, the certification unfairly deters borrowers from seeking discharge of the loan in bankruptcy by raising the specter of the bankruptcy court finding wrongdoing on the part of the borrower arising from the false certification, with unknown consequences. Thus, even though the lender drafted the certification knowing it to be false, it is the borrower who signs it and stands to suffer as a result.

Third, the false certification provides the lender—which knows or should know it to be false—with an opportunity to deceive the bankruptcy court and prevent an order of discharge. In this manner, the certification acts as a pre-petition waiver of dischargeability, which is disallowed as discussed above.[110] Lenders should not be permitted to accomplish through deception what they cannot through operation of a non-deceptive agreement.

Fourth, the false certification provides the lender with an opportunity to deceive the court by claiming a good faith mistake or bona fide error in an attempt to avoid liability for post-discharge collection attempts, discussed below.

In addition to misrepresentations during the origination of non-qualified education loans, lenders, servicers, and collectors may also engage in unfair or deceptive acts or practices by misrepresenting the dischargeability—and circumstances under which a discharge may be had—of student loans. For example, in *Easterling v. Collecto, Inc.*,[111] the Second Circuit held that collection letters falsely stating that a federally guaranteed student loan was not dischargeable in bankruptcy—rather than dischargeable, but only upon a showing of "undue hardship" discussed above—were deceptive.

Post-Discharge Servicing and Collection

The CFPB has unequivocally stated that "[d]ebt collectors cannot try to collect on debts that were discharged in bankruptcy."[112] The Bureau and its state enforcement partners should use the legal tools at their disposal to curb and remedy the unlawful servicing and collection of discharged private student loans.

First, the Bureau, state attorneys general, and other financial regulators can and should address ongoing servicing and collection of discharged private student loans as violations of the general prohibition on unfair, deceptive, and abusive acts or practices. The Bureau has applied this power to the servicing and collecting of unenforceable loans in other contexts. For example, in *Consumer Financial Protection Bureau v. CashCall, Inc.*,[113] the Bureau alleged that a group of defendants had "engaged in unfair, deceptive, and abusive acts and practices . . . by servicing and collecting full payment on loans that state-licensing and usury laws had rendered wholly or partially void or uncollectible." CashCall was a California-based consumer lender that made loans to consumers in other states through a network of state-based shell companies designed to evade those states' lender licensing and usury laws. However, the court rejected the company's attempt to evade state regulation and held that CashCall was the "true" or "de facto" lender, and instead applied the law of the borrowers' home states to the loan agreements.[114] Because CashCall lacked the requisite state consumer loan licenses and most of the loans violated state usury laws, the loans were void or uncollectible.[115]

The *CashCall* court then held that CashCall and its servicer, Delbert Services, violated the CFPA's prohibition on deceptive conduct by creating "the 'net impression' that the loans were enforceable and that borrowers were obligated to repay the loans in accordance with the terms of their loan agreements," when in fact "that impression was patently false—the loan agreements were void and/or the borrowers were not obligated to pay" as a result of CashCall's licensing and usury violations.[116] Indeed, it would be virtually impossible to service or collect on a loan without creating the net impression that payments are due and the obligation enforceable—otherwise, borrowers would never make payments. Critically, the *CashCall* court also rejected the servicer's argument that its belief that the loans were valid and enforceable served as a defense to liability, dismissing this "general mistake-of-law defense" to the CFPA as unsupported by any relevant authority.[117]

It is therefore well-established that "[i]nforming Consumers that they have an obligation to repay under a transaction in which the assignment is void or unenforceable clearly meets the materially misleading threshold under the CFPA," and that "[c]ollecting on loans that are void is materially misleading because it gives Consumers the impression that 'borrowers were obligated to repay' the [lender] when in reality the loan agreements were void and the borrowers were not legally obligated to pay."[118] Accordingly, companies that service so-called "private student loans" that have been discharged in bankruptcy, or which request and/or receive fees to which they or their lender principals are not entitled, are operating in violation of the CFPA.

Second, the Bureau is authorized to enforce "enumerated consumer laws," which include the FDCPA.[119] The FDCPA applies to debt collectors and was enacted in part because "[a]busive debt collection practices contribute to the number of personal bankruptcies,"[120] which makes it particularly troubling when abusive, deceptive, and unfair collection practices follow consumers even after bankruptcy. There can be no dispute that "[w]hen a debtor's debts are discharged in bankruptcy, efforts to collect them are unlawful."[121] Following a bankruptcy discharge,[122] a debt collector may violate the FDCPA in several ways—particularly if it takes the erroneous position that the debt has not been discharged. For example, the FDCPA prohibits "any false, deceptive, or misleading representation or means in connection with the collection of any debt,"[123] including without limitation a false representation of "the character, amount, or legal status of any debt."[124] As the Seventh Circuit has explained:[125]

> "Dunning people for their discharged debts would undermine the 'fresh start' rationale of bankruptcy (bankruptcy as a system of debtors' rights as well as creditors' remedies), and is prohibited by the Fair Debt Collection Practices Act, which so far as relates to this case prohibits a debt collector (a defined term) from making a 'false representation of the character, amount, or legal status of any debt.' Although not aimed specifically at efforts to collect debts that have been discharged in bankruptcy, this provision fits that practice to a T."

The FDCPA also prohibits debt collectors from making any "threat to take any action that cannot legally be taken or that is not intended to be taken."[126] Thus, collection letters or telephone calls that threaten legal action on, or other consequences for, discharged private student loan debt also violate the FDCPA. Particularly in light of consumers' general background understanding (or misunderstanding) of private student loan dischargeability and the deceptive acts described above, attempts to collect on discharged private student loan debt easily meets the FDCPA's standard as likely to deceive the "least sophisticated consumer."[127]

Importantly, beginning in November 2021 debt collectors will be prohibited from selling, transferring for consideration or placing for collection a debt if the collector "knows or should know that the debt has been . . . discharged in bankruptcy."[128]

State Attorneys General and Regulators Should Protect Borrowers from Bankruptcy-Related Violations of Student Borrower Bills of Rights

A growing number of states have also enacted laws governing student loan servicers, often referred to as a "Student Borrower Bill of Rights."[129] These statutes are specifically aimed at student loan servicers, and they contain several provisions that prohibit acts associated with the servicing of discharged loans.

Many loans that do not meet the Bankruptcy Code's definition of "qualified education loan" nevertheless fall within the ambit of state Student Borrower Bills of Rights. For example, California's Student Borrower Bill of Rights defines a "student loan" in relevant part as "any loan made solely for use to finance a postsecondary education and costs of attendance at a postsecondary institution, including, but not limited to, tuition, fees, books and supplies, room and board, transportation, and miscellaneous personal expenses."[130] Similarly, Washington's student loan servicing law defines "student education loan" in relevant part as "any loan solely for personal use to finance postsecondary education and costs of attendance at an educational institution."[131] These definitions—and similar definitions in other states' laws—do not contain the same requirements as the Bankruptcy Code's definition of a "qualified education loan" and are easily broad enough to encompass many of the loans discussed above. The state agencies charged with administering these statutes should therefore closely examine their licensees' practices for compliance with servicing requirements.[132]

Similarly, private litigants should aggressively enforce their rights. The legal exposure facing companies that violate these laws can be significant—for example, Colorado permits the borrower to recover their actual damages, a "monetary award equal to three times the total amount the student loan servicer collected from the student loan borrower in violation of" the law, punitive damages, and attorney's fees.[133]

Attempts to service or collect student loan debt discharged in bankruptcy may also run afoul of state debt collection law. For example, California's Rosenthal Fair Debt Collection Practices Act requires debt collectors to comply with the FDCPA,[134] and prohibits them from "[o]btaining an affirmation from a debtor of a consumer debt which has been discharged in bankruptcy, without clearly and conspicuously disclosing to the debtor, in writing, at the time such affirmation is sought, the fact that the debtor is not legally obligated to make such affirmation."[135]

Endnotes

[1] *See, e.g.*, Bill Fay, *Bankruptcy & Student Loans*, DEBT.ORG (Sept. 30, 2021), https://www.debt.org/students/bankruptcy/ ("In 2005, Congress added private student loans to the list of debts that cannot be discharged."); The Register's Editorial, *The Register's Editorial: Parents Need to Open Their Eyes on Co-Signing*, DES MOINES REG. (Aug. 10, 2014), https://www.desmoinesregister.com/story/opinion/editorials/2014/08/11/register-editorial-student-loans/13883081/ ("Private student loans cannot be discharged in bankruptcy."); Rajeev Darolia, *Should Student Loans be Dischargeable in Bankruptcy?*, THE BROOKINGS INST.: BROWN CTR. CHALKBOARD (Sept. 29, 2015), https://www.brookings.edu/blog/brown-center-chalkboard/2015/09/29/should-student-loans-be-dischargeable-in-bankruptcy/ ("As a result, federal student loans have been considered nondischargeable since the 1970s, and bankruptcy reform in 2005 extended nondischargeability to private student loans.").

[2] Readers should note that the definition of a student loan under the Bankruptcy Code differs from the definition of a Private Education Loan under the Truth in Lending Act. *See* 15 U.S.C. § 1650.

[3] *Id.*

[4] *Infra* note 68.

[5] *In re* McDaniel, 590 B.R. 537, 545 (Bankr. D. Colo. 2018).

[6] *Infra* note 50.

[7] *Infra* note 26.

[8] 11 U.S.C § 523.

[9] *Id.* § 523(a)(8).

[10] "'Educational' loans, or 'student' loans, are not non-dischargeable simply because they are labeled as such; they must meet one or more of the criteria set forth in Section 523(a)(8)." *McDaniel*, 590 B.R. at 545. *See also In re* Campbell, 547 B.R. 49, 61 (Bankr. E.D.N.Y. 2016) ("Simply calling the Bar Loan a student loan is not a declaration that the Bar Loan comes within the ambit of these provisions, and says nothing about the dischargeability of the Bar Loan in bankruptcy.").

[11] *See, e.g.*, *In re Meyer*, No. 15-13193, 2016 WL 3251622, at *2 (Bankr. N.D. Ohio June 6, 2016) ("[T]he debtor's student loans were discharged on September 16, 2015, because they do not fall within 11 U.S.C. § 523(a)(8). The Court further finds that the student loan servicers violated the discharge injunction of § 524(a)(2) by attempting to collect on the student loan accounts after the date of the debtor's discharge.").

[12] *See* 11 U.S.C. § 523(a)(8).

[13] *Id.* § 523(a)(8)(A)(i).

[14] *See* LYNN MAHAFFIE, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: UNDUE HARDSHIP DISCHARGE OF TITLE IV LOANS IN BANKRUPTCY ADVERSARY PROCEEDINGS 12–15 (2015), https://fsapartners.ed.gov/sites/default/files/attachments/dpcletters/GEN1513.pdf.

[15] 11 U.S.C. § 523(a)(8)(A)(ii).

[16] *In re* Crocker, 585 B.R. 830, 835 (Bankr. S.D. Tex. 2018), *aff'd in relevant part*, *In re* Crocker, 941 F.3d 206 (5th Cir. 2019).

[17] *In re* Dufrane, 566 B.R. 28, 40 (Bankr. C.D. Cal. 2017) ("Section 523(a)(8)(A)(ii) excepts from discharge educational debts, other than loans, such as conditional grants and stipends that generally are not required to be repaid.").

[18] *See, e.g.*, *In re* Kashikar, 567 B.R. 160 (B.A.P. 9th Cir. 2017); *Crocker*, 585 B.R. 830; *In re* Nypaver, 581 B.R. 431 (Bankr. W.D. Pa. 2018); *In re* Essangui, 573 B.R. 614 (Bankr. D. Md. 2017); *Dufrane*, 566 B.R. at 40 ("In a series of cases following the 1990 amendment, bankruptcy courts uniformly rejected the notion that the new term 'educational benefit' could be read broadly and independent of other portions of § 523(a)(8) to except from discharge loans made by for-profit lenders to fund truck driving training courses."); *In re* Decena, 549 B.R. 11 (Bankr. E.D.N.Y. 2016), *rev'd in part, vacated in part on other grounds sub nom.*, *Citizens Bank v. Decena*, 562 B.R. 202 (E.D.N.Y. 2016); *In re* Campbell, 547 B.R. 49 (Bankr. E.D.N.Y. 2016); *In re* Schultz, No. 2016-03042, 2016 WL 8808073 (Bankr. D. Minn. Dec. 13, 2016); *In re* Swenson, No. 16-10016, 2016 WL 4480719 (Bankr. W.D. Wis. Aug. 23, 2016); *In re* Meyer, No. 15-13193, 2016 WL 3251622 (Bankr. N.D. Ohio June 6, 2016). *In re* Navient Sols., LLC, No. 21-10249 (MG), 2021 WL 857114 (Bankr. S.D.N.Y. Mar. 8, 2021) ("This involuntary case rests on allegations of discharge violations committed by Navient Solutions, LLC. The Court takes these allegations very seriously. The Court also notes that the Fifth Circuit and the Tenth Circuit, in well-reasoned opinions, have recently ruled that section 523(a)(8)(A)(ii) of the Bankruptcy Code does not apply to exempt from discharge certain private student loans.").

[19] 26 U.S.C. § 221(d).

[20] *In re* Brown, 539 B.R. 853, 859 (Bankr. S.D. Cal. 2015).

[21] 26 U.S.C. § 221(d)(2). Cost of attendance is then defined as:

> " (1) tuition and fees normally assessed a student carrying the same academic workload as determined by the institution . . .
>
> (2) an allowance for books, supplies, transportation, and miscellaneous personal expenses . . . as determined by the institution;
>
> (3) an allowance (as determined by the institution) for room and board costs incurred by the student which—
>
> > (A) shall be an allowance determined by the institution for a student without dependents residing at home with parents;
> >
> > (B) for students without dependents residing in institutionally owned or operated housing, shall be a standard allowance determined by the institution based on the amount normally assessed most of its residents for room and board . . . ."

20 U.S.C. 1087ll(1)-(3).

[22] Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 884 ("That standard combines a state of mind (a fact) with a legal characterization (a mixed question of law and fact).").

[23] *In re* Macias Coto*,* No. 6:10-bk-10520-KSJ, 2020 WL 5758999, at *2 (Bankr. M.D. Fla. Jan. 9, 2020).

[24] *See, e.g.*, Andrew Haughwout et al., *Charging into Adulthood: Credit Cards and Young Consumers*, FED. RSRV. BANK OF N.Y. (Feb. 11, 2020), https://libertystreeteconomics.newyorkfed.org/2020/02/charging-into-adulthood-credit-cards-and-young-consumers.html; Stefan Lembo Stolba, *U.S. Auto Debt Grows to Record High Despite Pandemic*, EXPERIAN (Apr. 12, 2021), https://www.experian.com/blogs/ask-experian/research/auto-loan-debt-study/; Janna Herron, *Young Adults Turn to Personal Loans for Debt, Wedding and Moving Expenses*, USA TODAY (Oct. 8, 2018, 3:05 PM), https://www.usatoday.com/story/money/2018/10/08/personal-loans-millennials-use-debt-weddings-moving-costs/1567959002/.

[25] *In re* Golden*,* 596 B.R. 239, 269 (Bankr. E.D.N.Y. 2019).

[26] *In re* Crocker, 941 F.3d 206, 221 (5th Cir. 2019) (characterizing a creditor's argument that all the court need do it determine whether promissory note express the debt was for education as a "bold" and "errant" view of the law); *In re* McDaniel, No. 18-1445, 2020 WL 5104560, at *14 (10th Cir. Aug. 31, 2020); *Homaidan v. Sallie Mae, Inc.*, No. 20-1981, 2021 U.S. App. LEXIS 20934, at *10 (2d Cir. July 15, 2021).

[27] Bankruptcy Reform Act of 1978, Pub.L. No. 95-598, 92 Stat. 2549 (1978).

[28] Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (2005) [hereinafter "BAPCPA"].

[29] CONSUMER FIN. PROT. BUREAU, PRIVATE STUDENT LOANS 9-11 (2012), https://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf ("Federal student aid provides a critical context for understanding psls, which were originally designed to supplement federal loans and grants.").

[30] *Id.* at 19 ("During the lending boom, PSL lenders sought to increase volume through a new marketing channel and processing protocol: Direct-to-Consumer ("DTC").").

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 19-22 ("The school did not certify the borrower's financial need, and the lender instead imposed a cap of the lesser of total cost of attendance or a fixed amount, such as $30,000.This new technique could simultaneously increase the number of borrowers and the amount each one borrowed. It also created an opportunity for the student to borrow more than the EFC. . . . There is reason to infer that the increase in DTC loan amounts relative to tuition and fees reflects additive borrowing; students were borrowing more directly from lenders while maintaining other financial aid sources, that is, over-borrowing (borrowing more than the Expected Family Contribution). This comports with the fact that, absent school certification, lenders may not know what other debt aid the student has already incurred for the academic year. Notably, the difference in the level of borrowing between the school-certified and DTC channels narrows over the sample period, suggesting that as underwriting standards tightened the risk of over-borrowing was partially reduced.") (citations omitted).

[35] Note that the "cost of attendance" is a concrete value determined by the eligible institution based on the average costs for individual students. Institutions must report the "cost of attendance" as a concrete value to the Department of Education to participate in federal student aid programs. The reported cost of attendance is published on the Integrated Postsecondary Education Data System ("IPEDS") website. *See Integrated Postsecondary Education Data System*, NAT'L CTR. FOR EDUC. STAT.,

https://nces.ed.gov/ipeds/ (last visited Nov. 23, 2021). Qualified education loans are typically made through financial aid offices to confirm that the loans do in fact meet the criteria. As described above, if an educational loan exceeds the published "cost of attendance" or, alternatively, is within the "cost of attendance" but exceeds the "qualified higher education expenses"—for example, because the amount is greater than the cost of attendance reduced by a scholarship received—the loan is not "solely for qualified higher education expenses" and hence it is not a "qualified education loan." Such a loan (exceeding either the "cost of attendance" or the "qualified higher education expenses") is not exempted from discharge under Section 523(a)(8)(B). Loans that exceed both the "qualified higher education expenses" and the "cost of attendance" or solely the "qualified higher education expenses" are therefore discharged by operation of law when discharge orders were entered.

[36] SLM Corporation, Annual Report (Form 10-K) (Mar. 16, 2005), https://www.sec.gov/Archives/edgar/data/1032033/000095013305001066/w05293e10vk.htm ("In the third quarter of 2004 we began to offer Tuition AnswerSM loans direct to the consumer through targeted direct mail campaigns and web-based initiatives.").

[37] *Id.*

[38] Screenshot of an advertisement for Sallie Mae Tuition Answer Loan, https://web.archive.org/web/20041212133811/http://www.tuitionanswerloan.com/ (Dec. 12, 2004).

[39] *See supra* note 21.

[40] Tuition Answer Loan Application, McDaniel v. Navient Solutions, 590 B.R. 537 (2018) (17-01274), https://protectborrowers.org/wp-content/uploads/2022/01/McDaniel-Notes.pdf at 22.

[41] *See In re* Huang, 275 F.3d 1173, 1177 (9th Cir. 2002) ("It is against public policy for a debtor to waive the pre-petition protection of the Bankruptcy Code. This prohibition of prepetition waiver has to be the law; otherwise, astute creditors would routinely require their debtors to waive.").

[42] *In re* Homaidan, 596 B.R. 86, 99-100 (Bankr. E.D.N.Y. 2019).

[43] SLM Loan Trust 2008-1 Prospectus Supplement at 32-33 (Jan. 10, 2008) *available at* https://www.sec.gov/Archives/edgar/data/949114/000119312508006271/d424b5.htm ("Private credit student loans made for qualified education expenses are generally not dischargeable by a borrower in bankruptcy . . . direct-to-consumer loans are disbursed directly to the borrowers based upon certifications and warranties contained in their promissory notes . . .[t]his process does not involve school certification as an additional control and, therefore, may be subject to some additional risk that the loans are not used for qualified education expenses. If you own any notes, you will bear any risk of loss resulting from the discharge of any borrower of a private credit student loan.")

[44] *In re* McDaniel, 590 B.R. 537, 542 (Bankr. D. Colo. 2018).

[45] *See generally* Austin Smith, Not All Student Loans Are Non-Dischargeable in Bankruptcy and Creditors Know This, STUDENT BORROWER PROT. CTR.: DOMINO (Mar. 18, 2019), https://protectborrowers.org/not-all-student-loans-are-non-dischargeable-in-bankruptcy-and-creditors-know-this/. Note that despite the conduct discussed here, both Sallie Mae and Navient have included in student loan asset-backed securities' ("SLABS") prospectuses language warning investors that, pursuant to Section 523(a)(8), only private loans made for qualified expenses were excepted from discharge. *See, e.g.*, SLM Loan Trust 2008-1 Prospectus Supplement at 33 (Jan. 10, 2008) ("Risk of Bankruptcy Discharge of Private Credit Student Loans: Private credit student loans made for qualified education expenses are generally not dischargeable by a borrower in bankruptcy . . . direct-to-consumer loans

are disbursed directly to the borrowers based upon certifications and warranties contained in their promissory notes, including their certification of the cost of attendance for their education. This process does not involve school certification as an additional control and, therefore, may be subject to some additional risk that the loans are not used for qualified education expenses. If you own any notes, you will bear any risk of loss resulting from the discharge of any borrower of a private credit student loan to the extent the amount of the default is not covered by the trust's credit enhancement."); NAVIENT, OFFERING MEMORANDUM at S-29 (July 15, 2014), https://images.navient.com/investors/debtasset/Navient-Loan-Trusts/11-15/2014-CT/NAVSL%202014-CT%20-%20Offering%20Memorandum%20-%20As%20Printed.pdf ("Career training loans are generally dischargeable by a borrower in bankruptcy. If you own any notes, you will bear any risk of loss resulting from the discharge of any borrower of a career training loan to the extent the amount of the default is not covered by the trust's credit enhancement."). The inclusion of this language was likely intended to insulate the companies from the risk of securities violations related to possible misrepresentations surrounding their loans to investors. *See, e.g.*, 15 U.S.C. § 78(j).

[46] ALEXANDRA HEGJI, CONG. RSCH. SERV, INSTITUTIONAL ELIGIBILITY FOR PARTICIPATION IN TITLE IV STUDENT FINANCIAL AID PROGRAMS (updated Feb. 14, 2019), https://www.everycrsreport.com/files/20190214_R43159_c3b6e4794352b00014783b91d4508e366e0900c1.pdf.

[47] *See* SLM Corporation, Proxy Statement (Schedule 14A) (Apr. 22, 2021), https://www.salliemae.com/assets/investors/shareholder/annual-reports/SLM-Proxy_2021.pdf.

[48] 26 U.S.C. § 221(d) (defining a qualified education loan as being one used toward "qualified higher education expenses" and defining "qualified higher education expenses" as being calculated based on "the cost of attendance . . . at an eligible educational institution" and defining that "the term 'eligible educational institution' has the same meaning given such term by section 25A(f)(2). . ."); *see also* 26 U.S.C. § 25A(f)(2) (defining an eligible educational institution as one "(A) which is described in section 481 of the Higher Education Act of 1965 (20 U.S.C. 1088), as in effect on the date of the enactment of this section, and (B) which is eligible to participate in a program under title IV of such Act.")

[49] CTR. FOR RESPONSIBLE LENDING ET AL., QUICKSAND: BORROWERS OF COLOR AND THE STUDENT DEBT CRISIS (Sept. 2019), https://www.responsiblelending.org/research-publication/quicksand-borrowers-color-student-debt-crisis.

[50] Kat Welbeck, *How Private Student Loans are Furthering Racial Disparities in the Student Loan Market*, STUDENT BORROWER PROT. CTR.: DOMINO (Aug. 7, 2020), https://protectborrowers.org/how-private-student-loans-are-furthering-racial-disparities-in-the-student-loan-market/; STUDENT BORROWER PROT. CTR., SHADOW STUDENT DEBT (July 2020), https://protectborrowers.org/shadow-student-debt-report/.

[51] *See In re* Crocker, 941 F.3d 206 (5th Cir. 2019), Second Amended Complaint, *In re* Haas, No. 15-35886 (DRJ), 2017 WL 11562532 (Bankr. S.D. Tex. Apr. 11, 2017), https://jonesswanson.com/wp-content/uploads/other/Haas-Shahbazi-Second-Amended-Complaint-1-26-17.pdf.

[52] Second Amended Complaint, *Haas*, 2017 WL 11562532, https://jonesswanson.com/wp-content/uploads/other/Haas-Shahbazi-Second-Amended-Complaint-1-26-17.pdf.

[53] *See* discussion *supra* pp. 13-17; *Crocker*, 941 F.3d 206.

[54] Second Amended Complaint, *Haas*, 2017 WL 11562532, https://jonesswanson.com/wp-content/uploads/other/Haas-Shahbazi-Second-Amended-Complaint-1-26-17.pdf.

[55] Lynn E. Swanson, *Student Loan Class Actions Take Aim at "A Massive Effort to Defraud Student Debtors"*, AM. BAR ASS'N (Mar. 5, 2018), https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/articles/2018/winter2018-student-loan-class-actions-take-aim-at-massive-effort-to-defraud-student-debtors/.

[56] NAVIENT, OFFERING MEMORANDUM at S-29 (July 15, 2014), https://images.navient.com/investors/debtasset/Navient-Loan-Trusts/11-15/2014-CT/NAVSL%202014-CT%20-%20Offering%20Memorandum%20-%20As%20Printed.pdf.

[57] Keith Anderson et al., *Tenth Circuit Agrees with the Fifth Circuit—Private Student Loans May be Dischargeable in Bankruptcy*, JD SUPRA (Sept. 8, 2020), https://www.jdsupra.com/legalnews/tenth-circuit-agrees-with-the-fifth-33512/.

[58] Diana Jean Schemo, *Private Loans Deepen a Crisis in Student Debt*, N.Y. TIMES (June 10, 2017), https://www.nytimes.com/2007/06/10/us/10loans.html ("In the federal overhaul of the bankruptcy law in 2005, lenders won a provision that makes it virtually impossible to discharge private student loans in bankruptcy. Previously such provisions had only applied to federal loans, as a way to protect the taxpayer against defaulting by students."); Sam Kennedy, *School Steers Students to Backbreaking Loans*, THE MORNING CALL (May 22, 2005), https://www.mcall.com/news/all-a1_5loansmay22-story.html ("The new rules, which President Bush signed into law last month and which will take effect in October, make it nearly impossible for students to shed private student loans through bankruptcy.").

[59] 11 U.S.C. § 523(a)(8)(B).

[60] 11 U.S.C. § 727(b) ("Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter.").

[61] Owens v. Owens, 155 F. App'x 42, 43 (2d Cir. 2005) ("It is the creditor seeking an exception to discharge who bears the burden of proving facts coming within one of the § 523 exceptions."); *In re* Renshaw, 222 F.3d 82, 86 (2d Cir. 2000) ("Because bankruptcy is both a right of the debtor, and a remedy for the creditor . . . a proper balancing of those competing interests requires the creditor to prove by a preponderance of the evidence that its claim is one that is not dischargeable."); *In re* Mehta, 310 F.3d 308, 311 (3d. Cir 2002) (stating that creditor opposing discharge has burden of establishing that the obligation is an educational loan under section 523(a)(8)).

[62] Grogan v. Garner, 498 U.S. 279, 287-88 (1991).

[63] *See In re* Bronsdon, 435 B.R. 791, 796 (B.A.P. 1st Cir. 2010) ("The creditor bears the initial burden of establishing that the debt is of the type excepted from discharge under § 523(a)(8). Once the showing is made, the burden shifts to the debtor to prove that excepting the student loan debt from discharge will cause the debtor and her dependents 'undue hardship.'").

[64] *In re* Meyer, No. 15-13193, 2016 WL 3251622, at *2 (Bankr. N.D. Ohio June 6, 2016) ("For the reasons stated in the debtor's motions and the Decena decision, the Court finds that the debtor's student loans were discharged on September 16, 2015, because they do not fall within 11 U.S.C. § 523(a)(8). The Court further finds that the student loan servicers violated the discharge injunction of § 524(a)(2) by attempting to collect on the student loan accounts after the date of the debtor's discharge.").

[65] National Consumer Law Center, Student Loan Law § 11.3.1.1 (6th ed. 2019), updated at https://library.nclc.org/sl/11030101.

[66] *See supra* note 18.

[67] STUDENT BORROWER PROT. CTR., PRIVATE STUDENT LENDING 10 (Apr. 2020), https://protectborrowers.org/wp-content/uploads/2020/04/PSL-Report_042020.pdf.

[68] Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 505 (2012) (stating that in 2007, at least, only .01 percent of all debtors in bankruptcy with student loans filed an adversary proceeding seeking discharge).

[69] *See, e.g.,* Conti v. Arrowood Indemnity Co., 612 B.R. 877, 882 (E.D. Mich. 2020) (finding that the loan was for an educational purpose because each loan included text stating, "You may borrow up to the full cost of ***education*** less any financial aid you are receiving.") (emphasis added).

[70] *Id.*

[71] Note also that attempted collection of non-owed debt in general has consistently been the most common collection-related complaint since the CFPB began accepting consumer complaints. *See* CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT (2021) at 19, https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2021.pdf. It appears that practice along the lines presented here are endemic to the broader debt servicing and collection industry.

[72] Letter from Sens. Elizabeth Warren and Richard Blumenthal to Betsy DeVos, Secretary, U.S. Dept. of Educ, and General Mark A. Brown, Chief Operating Officer, Office of Fed. Student Aid at 7 (Oct. 10, 2019), https://www.warren.senate.gov/imo/media/doc/2019.10.11%20Letter%20to%20ED%20re%20Navient%20contract.pdf ("Navient disguised certain loans that may have been dischargeable in bankruptcy as non-dischargeable student loans and continued to collect on them.").

[73] *In re* Crocker, 941 F.3d 206, 209 (5th Cir. 2019).

[74] *In re* Homaidan, 596 B.R. 86, 93 (Bankr. E.D.N.Y. 2019), *aff'd sub nom.*, Homaidan v. Sallie Mae, Inc., 3 F.4th 595 (2d Cir. 2021).

[75] Crocker, 941 F.3d at 217, as revised Oct. 22, 2019; Homaidan, 596 B.R. 86.

[76] *Homaidan*, 3 F.4th 595.

[77] *Crocker*, 941 F.3d 206.

[78] Jillian Berman, *This Class-Action Lawsuit May Offer Hope for Student Loan Borrowers in Bankruptcy*, MARKETWATCH (Apr. 8, 2017), https://www.marketwatch.com/story/this-class-action-lawsuit-may-offer-hope-for-student-loan-borrowers-in-bankruptcy-2017-04-07.

[79] *See* Letter from Jack Remondi, President and Chief Executive Officer, Navient, to Betsy DeVos, Secretary, U.S. Dept. of Educ, and General Mark A. Brown, Chief Operating Officer, Office of Fed. Student Aid at 8 (Nov. 9, 2019), https://news.navient.com/static-files/a80053ef-de4d-4a26-952d-173394dbde4e.

[80] Assumes no overlap across these three areas.

[81] *See Trends in Student Aid*, COLLEGE BOARD, https://research.collegeboard.org/trends/student-aid (Student Borrower Protection Center ["SBPC"]) calculation based on Table 2, calendarizing the "04-05" academic year through the "11-12" academic year).

[82] *See* CONSUMER FIN. PROT. BUREAU, *supra* note 30, at 19 and 69. Takes private student loans to undergraduates as representative of all private student loans. Note that between five and 32 percent of private student loans originated each year from 2005 to 2011 were DTC loans.

[83] Note that this analysis ignores issues related to state law statutes of limitation to which private student loans and consumer credit in general may be subject. It is possible that many of the loans discussed here are no longer collectible under state law. However, these loans would still be presumptively dischargeable in bankruptcy, and it is likely that many borrowers continue to pay on these loans for fear of collection activity. In any case, issues of state statutes of limitations add only further unknowns to the question of how much presumptively dischargeable debt borrowers took on and owe on during the period considered in this report, underscoring the need for law enforcement agencies to exhaustively investigate and study the issue.

[84] SBPC calculation based on College Board, *supra* note 81. Regarding the timing of most DTC lending, we take as representative the rise and fall of DTC lending reported by Navient, (mostly taking place between 2004 and 2013) and extend the relevant window from 2000 to 2014 so that our estimate may be conservative. *See* Navient 2017 4th Quarter Investor Deck at 63 (February 27, 2018), available at https://www.sec.gov/Archives/edgar/data/1593538/000119312518059429/d516420dex991.htm.

[85] *See supra* note 47. Note that the present discussion leaves out many other presumptively dischargeable student loans that Sallie Mae offers, such as bar study loans and dental residency and relocation loans. This omission makes our estimates only more conservative.

[86] Career Training Smart Option Student Loan, Sallie Mae, https://www.salliemae.com/student-loans/career-training-smart-option-student-loan/ [https://perma.cc/42JY-TSCY].

[87] Transcript, SLM Corporation at Credit Suisse Group Financial Services Forum, Feb 8, 2007 [available at https://www.bamsec.com/transcripts/1458780].

[88] *See* Navient 2016 2nd Quarter Investor Deck at 67 (July 25, 2016), available at: https://www.sec.gov/Archives/edgar/data/1593538/000119312516656582/d226448dex991.htm. Note that $3.97B is calculated as the sum of "Disbursed Principal Entering Repayment" from 2003 through 2010. It is reasonable to take the value of capital entering repayment as the value of Career Training Loans disbursed that year, as Sallie Mae has previously indicated that, with regard to the programs that Career Training loans finance, "[o]n average, these career training programs typically last fewer than 12 months." *See* SLM Corporation, Annual Report (Form 10-K) (Feb. 9, 2008), https://web.archive.org/web/20170510120003/https:/www.salliemae.com/assets/about/investors/shareholder/annual-reports/200710KBOW49222BOW014_BITS_NFeb292009.pdf at 16.

[89] *See* SLM Corporation, Annual Report (Form 10-K) (Mar. 9, 2006), https://www.sec.gov/Archives/edgar/data/1032033/000110465906015405/a06-6041_110k.htm at 76; SLM Corporation, Annual Report (Form 10-K) (Feb. 29, 2008), https://www.sec.gov/Archives/edgar/data/1032033/000095013308000892/w49222e10vk.htm at 82; SLM Corporation Annual Report (Form 10-K) (Feb. 28, 2011), https://www.sec.gov/Archives/edgar/data/1032033/000095012311019779/w80795e10vk.htm at 62.

[90] *See, e.g.* Transcript, SLM Corporation Appoints Jack Remondi CEO, Announces Strategic Plan to Create Separate Education Loan Management and Consumer Banking Companies - Conference Call https://www.bamsec.com/transcripts/5105926 (citing "Leading market share of 47% in private loan originations" in 2013).

[91] *See* 26 U.S.C. 221(d), and 20 U.S.C. 1091(a).

[92] *See* Complete College America, How Full-Time are "Full-Time" Students? 2 (Oct. 2013), https://completecollege.org/wp-content/uploads/2017/11/2013-10-14-how-full-time.pdf (adding 1.8 percent of students enrolled in "0-2" semester hours or equivalent and 11.8 percent of students enrolled in "3-5" semester hours or equivalent," noting that the source indicates 12 semester hours as "Technically 'Full-Time' for Enrollment Reporting).

[93] SBPC calculation based on *supra* note 81.

[94] *See* EDUCATION LOAN FINANCE, *The State of Student Loan Debt (2021)*, https://www.elfi.com/student-loan-debt-statistics-us/ (SBPC calculations based on indications that private student loan balances per borrower average $18,550).

[95] Courts have held that the Bankruptcy Code does not provide for a private right of action for a discharge injunction violation, much less a class action. Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 421 (6th Cir. 2000) (analyzing the legislative history of § 524, contrasting § 524 with Congress's choice in § 362(h) to create private causes of action for violations of bankruptcy stays, and concluding § 524 does not impliedly create a private right of action); Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 509 (9th Cir. 2002) (tracking and adopting *Pertuso*'s analysis); Cox v. Zale Del., Inc., 239 F.3d 910, 917 (7th Cir. 2001) (agreeing with the result in *Pertuso* and concluding that a contempt action in the bankruptcy court that issued the discharge is the only relief available to remedy alleged § 524 violations); *In re* Joubert, 411 F.3d 452, 456 (3d Cir. 2005) (adopting the reasoning of *Pertuso*, *Walls*, and *Cox* in the context of § 506(b) post-petition assessment of fees); *see also* Bessette v. Avco Fin. Servs., Inc., 230 F.3d 439, 444–45 (1st Cir. 2000) (refusing to address whether § 524 implies a right of action, because, in the First Circuit's view, a bankruptcy court's contempt power under § 105(a) offers sufficient remedies).

[96] *In re* Belton v. GE Capital Retail Bank, 961 F.3d 612, 616–17 (2d Cir. 2020) (concluding that the only court that may offer a contempt remedy is the court that issued the discharge order – the bankruptcy court). *See In re* Anderson, 884 F.3d 382, 391 (2d. Cir. 2018) (recognizing that "the bankruptcy court alone has the power to enforce the discharge injunction in Section 524" through a contempt citation); *accord In re* Crocker, 941 F.3d 206, 216–17 (5th Cir. 2019); Alderwoods Grp., Inc. v. Garcia, 682 F.3d 958, 970 (11th Cir. 2012); *Walls*, 276 F.3d at 509–10; *Cox*, 239 F.3d at 916–17 (7th Cir. 2001).

[97] Also, the Fifth Circuit's holding was based on the removal of two words from the statutory framework allowing for the enforcement of discharge orders. Specifically, the Fifth Circuit noted that the 1970 registration statute was by far the most direct support for allowing one bankruptcy court to enforce another's discharge injunction, but because that statute is no more, the court concluded that Congress intended to abolish such enforcement. Because current Rule 4004(f) guides registration but does not authorize "like manner" enforcement as did its predecessor, the court held that even registering a discharge order under Rule 4004(f) will not allow a bankruptcy court to enforce that discharge order if it was not the issuing court. Accordingly, Congress's failure to use the words "like manner" in Rule 4004(f) apparently demonstrated to the Fifth Circuit that debtors could never certify a class exceeding their own district (and possibly even their own court).

[98] *In re* Crocker, 585 B.R. 830, 835 (Bankr. S.D. Tex. 2018), *aff'd in relevant part*, *Crocker*, 941 F.3d 206.

[99] *In re* Homaidan, 596 B.R. 85 (Bankr. E.D.N.Y 2019).

[100] Mader v. Experian Info. Sols., LLC, No. 19 Civ. 3787 (LGS), 2020 WL 264396 (S.D.N.Y. Jan. 17, 2020).

[101] DiDonato v. GC Servs. Ltd. P'ship, No. 20 Civ. 2154 (LGS), 2021 WL 210503, at *2 (S.D.N.Y. Jan. 20, 2021) ("[T]he question of whether the Sallie Mae Loans were discharged by the Discharge Order is a question of law arising in this matter that this Court can resolve.").

[102] Somosky v. Consumer Data Indus. Ass'n, No. 1:20-cv-04387-MKV, 2020 WL 5416622 (S.D.N.Y. Sept. 3, 2020).

[103] 12 U.S.C. §§ 5531(a), 5536(a).

[104] 12 U.S.C. § 5481(15)(A)(i).

[105] 15 U.S.C. § 45(a)(1).

[106] *See, e.g.*, WASH. REV. CODE § 19.86.020 (1961).

[107] *See, e.g.*, OR. REV. STAT. § 646.608(e) (2020).

[108] Elwin Griffith, *The Fair Debt Collection Practices Act—Reconciling the Interests of Consumers and Debt Collectors*, 28 HOFSTRA L. REV. 1, 14 (1999).

[109] *See* Fensterstock v. Educ. Fin. Partners, 611 F.3d 124, 140 (2d Cir. 2010) (noting that private student loan promissory note was "a standardized consumer contract of adhesion drafted by a party that had superior bargaining power"), *cert. granted, judgment vacated sub nom.*, Affiliated Computer Servs., Inc. v. Fensterstock, 564 U.S. 1001 (2011). While *Fennerstock* was vacated and remanded, that action related to the relevance of the contract's undisputedly adhesive nature on the question whether its arbitration clause was binding.

[110] *See In re* Huang, 275 F.3d 1173 (9th Cir. 2002).

[111] Easterling v. Collecto, Inc., 692 F.3d 229 (2d Cir. 2012).

[112] *See Can a Debt Collector Try to Collect on a Debt that was Discharged in Bankruptcy?*, CONSUMER FIN. PROT. BUREAU (last reviewed Oct. 25, 2017), https://www.consumerfinance.gov/ask-cfpb/can-a-debt-collector-try-to-collect-on-a-debt-that-was-discharged-in-bankruptcy-en-1425/.

[113] Consumer Fin. Prot. Bureau v. CashCall, Inc., No. CV 15-7522-JFW (RAOx), 2016 WL 4820635, at *4 (C.D. Cal. Aug. 31, 2016).

[114] *Id.* at *5–*9.

[115] *Id.* at *9.

[116] *Id.* at *10. Because the court found the servicer's conduct to be deceptive, it did not proceed to address whether it was also unfair and abusive; such inquiries were unnecessary to impose liability. *Id.* at *11.

[117] The court also rejected the servicers' argument that it could not be liable because it was "merely enforcing the express terms of their agreements with the borrowers" because those agreements were void. *Id.*

[118] Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 777 (S.D.N.Y. 2018), *amended*, Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, No. 17-CV-890 (LAP), 2018 WL 11219167 (S.D.N.Y. Sept. 12, 2018), *vacated on other grounds, aff'd in part, and remanded*, Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, 828 F. App'x 68 (2d Cir. 2020).

[119] 12 U.S.C. § 5481(12)(H).

[120] 15 U.S.C. §1692(a).

[121] Ross v. RJM Acquisitions Funding LLC, 480 F.3d 493, 495 (7th Cir. 2007).

[122] FDCPA claims will generally not conflict with, or be impliedly repealed by, the Bankruptcy Code or the discharge order in any given case. *See* Garfield v. Ocwen Loan Servicing, LLC, 811 F.3d 86, 92 (2d Cir. 2016) (rejecting creditor's argument that FDCPA was implicitly repealed by Bankruptcy Code). There is a circuit split on the issue of whether the FDCPA applies to collection attempts in violation of the automatic stay while the bankruptcy is pending. *See* Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 511 (9th Cir. 2002) (refusing to allow FDCPA claim); Randolph v. IMBS, Inc., 368 F.3d 726, 728 (7th Cir. 2004) (permitting FDCPA claim); Simon v. FIA Card Services, N.A., 732 F.3d 259, 274 (3d Cir. 2013) (permitting FDCPA claim). This paper is focused on unlawful servicing and collection after discharge and will not address violations of the automatic stay.

[123] 15 U.S.C. § 1692e.

[124] 15 U.S.C. § 1692e(2)(A).

[125] *Ross*, 480 F.3d at 495 (internal citation omitted).

[126] 15 U.S.C. § 1692e(5).

[127] Courts evaluate the circumstances giving rise to an alleged FDCPA violation from the perspective of the "least sophisticated consumer." The least sophisticated consumer "possess[es] a rudimentary amount of information about the world and a willingness to read a collection notice with some care." LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1193–94 (11th Cir. 2010); Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1175 n.6 (11th Cir. 1985) (the least sophisticated consumer is "on the low side of reasonable capacity"). The standard protects "naïve consumers." *LeBlanc*, 601 F.3d at 1194.

[128] 12 C.F.R. § 1006.30(b)(1).

[129] *See, e.g.*, Amy Loftsgordon, *What Is a Student Loan Bill of Rights?*, NOLO, https://www.nolo.com/legal- encyclopedia/what-is-a-student-loan-bill-of-rights.html ("A student loan 'bill of rights' is a set of laws that protects borrowers from abusive student loan servicing companies.").

[130] CAL. CIV. CODE § 1788.100(q)(1) (West 2021).

[131] WASH. REV. CODE § 31.04.015(32) (2018).

[132] For example, the Colorado Student Loan Servicers Act provides that a student loan servicer shall not "engage in an unfair or deceptive practice toward any person or misrepresent or omit any material information in connection with the servicing of a student education loan, including misrepresenting the amount, nature, or terms of any fee or payment due or claimed to be due on a student education loan, the terms and conditions of the loan agreement, or the student loan borrower's obligations under the loan." COLO. REV. STAT. ANN. § 5-20-109(1)(b) (2019); Readers should also note that other states' student loan servicing statutes contain substantially the same provision. *See, e.g.*, 110 ILL. COMP. STAT. ANN. 992/5-5(a) (2018); N.Y. BANKING LAW § 719(2) (McKinney 2019); WASH. REV. CODE § 31.04.027(2)(b) (2021).

[133] *See* COLO. REV. STAT. ANN. § 5-20-112 (2021).

[134] CAL. CIV. CODE § 1788.17 (West 2001).

[135] CAL. CIV. CODE § 1788.14(a) (West 2019).