TIGHTENING THE LOOPHOLE: THE ROLE OF FEE-SHIFTING STATUTES IN RESOLVING THE GROWING PROBLEM OF SERVICING AMERICA'S STUDENT LOAN DEBT

I. INTRODUCTION

No one can accuse Denise Bronsdon of not working hard or not risking it all to achieve her dreams.[1] At age 50, she confronted her goals, and she received a bachelor's degree in English from Wellesley College.[2] After graduating, she set her sights on law school and, in December 2005, Denise graduated in the top half of her class at Southern New England School of Law.[3] To finance her education, Denise, like many other law students, took out student loans, totaling more than $82,000.[4]

After graduation, Denise prepared and sat for the bar exam.[5] Unfortunately, she failed her first exam by a significant margin.[6] Unwilling to give up, Denise studied again and sat for the bar exam a second time.[7] Again, she failed.[8] Looking for the elusive "third time is a charm," Denise prepared and sat a third time for the bar exam.[9] Disappointingly, Denise failed again.[10]

In what can be described as a law student's worst nightmare, Denise Bronsdon found herself at age 64 with a law degree, no law license, no job, and $82,000 in debt.[11] Single and without children, Denise owned no property and lived in her father's home.[12] With no hope to repay her debts, Denise filed a

1 The following fact pattern comes from *Bronsdon v. Educ. Credit Mgmt. Corp.*, 435 B.R. 791 (B.A.P. 1st Cir. 2010).

2 *Id.* at 794.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

bankruptcy petition in 2007.[13] Denise also sought to discharge her student loan obligations, arguing that her circumstances met the government's high bar for bankruptcy discharge and qualified her loans as an "undue hardship" that, like her other consumer debts, should be discharged and dissolved in the bankruptcy proceedings.[14]

The court, after analyzing Denise's "work history, narrow work experience, failure to pass the bar exam, age, [and] unsuccessful attempts to find employment in a variety of fields, [agreed that Denise] had no reasonably reliable future financial resources other than [her] Social Security payments" and agreed that Denise would suffer an undue hardship unless her debt was discharged.[15] The United States Bankruptcy Appellate Panel of the First Circuit agreed.[16] Denise was released from her debt and the reminder of her failure.

Today, there are more than 40 million people in the United States who owe federal or private student loan debt, and the total debt is close to $1.2 trillion.[17] America's "second largest consumer debt market" is the student loan market, a market that has grown rapidly over the last decade.[18] Since the 1970s, the discharge of student loan debt in bankruptcy has been strictly limited to those borrowers in extreme circumstances.[19] Today's consumer market—one that is increasingly skeptical of educational debts[20]—presents unique challenges to the current student loan system. These challenges are even more acute given

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13 *Id.*

14 *Id.*

15 *Id.* at 795 (quoting *In re* Bronsdon, Bankr. No. 07-14215-JR, 2009 WL 95038, at *2–3 (Bankr. D. Mass. Jan. 13, 2009), *vacated and remanded sub nom.*, Educ. Credit Mgmt. Corp. v. Bronsdon, 421 B.R. 27 (D. Mass 2009)).

16 *Id.* at 804.

17 Press Release, Consumer Fin. Prot. Bureau, CFPB Launches Public Inquiry Into Student Loan Servicing Practices (May 14, 2015), [hereinafter CFPB Launches Public Inquiry], http://www.consumerfinance.gov/newsroom/cfpb-launches-public-inquiry-into-student-loan-servicing-practices/.

18 *Id.*

19 Brendan Baker, Comment, *Deeper Debt, Denial of Discharge: The Harsh Treatment of Student Loan Debt in Bankruptcy: Recent Developments and Proposed Reforms*, 14 U. PA. J. BUS. L. 1213, 1214 (2012).

20 *See, e.g.*, JOEL BEST & ERIC BEST, THE STUDENT LOAN MESS: HOW GOOD INTENTIONS CREATED A TRILLION-DOLLAR PROBLEM (2014); ALAN MICHAEL COLLINGE, THE STUDENT LOAN SCAM: THE MOST OPPRESSIVE DEBT IN U.S. HISTORY—AND HOW WE CAN FIGHT BACK (2010).

increasing reports of the improper servicing[21] of student loans.[22] Verified reports of illegal servicing activity include improperly allocating payments in order to maximize late fees, misrepresenting minimum payments, charging late fees that violate the terms of the loan, providing inaccurate tax information, providing misleading information about bankruptcy protections, and making illegal debt collection calls that violate consumer protection standards.[23] Given the high bar imposed on student loan borrowers' discharge of student loans,[24] reports of such unconscionable servicing practices are increasingly worrisome for students and regulators.

As a response to the 2008 mortgage crisis, state and federal consumer advocates strengthened consumer laws, including adding and strengthening fee-shifting statutes that encouraged and enabled student loan borrowers to challenge the servicers of their mortgage loans.[25] The concept of fee shifting originated in the civil rights context to encourage litigation in the public interest.[26] Fee-shifting statutes function by allowing successful plaintiffs to recover their attorney's fees from the defendants in their suits.[27] Fee-shifting provisions have expanded beyond civil rights to other areas of the law as a way to provide attorneys with the economic interest to litigate cases that would not otherwise provide sufficient or reliable recovery.[28]

Ultimately, this Note will argue that the high bar that accompanies student loan discharge in bankruptcy creates a vulnerable population of student

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21 "Servicing" is the term used to describe the receipt of loan payments, the application of payments to borrowers' accounts, maintenance of records, communication with borrowers, and facilitation of default-prevention programs. *See generally* CONSUMER FIN. PROT. BUREAU, STUDENT LOAN SERVICING: ANALYSIS OF PUBLIC INPUT AND RECOMMENDATIONS FOR REFORM (2015) [hereinafter 2015 REPORT], http://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf.

22 In 2015, the Consumer Financial Protection Bureau ("CFPB") released a report on what it termed "illegal servicing practices," or the "sloppy, patchwork practices that can create obstacles to repayment, raise costs, cause distress, and contribute to driving struggling borrowers to default." *See* 2015 REPORT, *supra* note 21, at 12. Servicers are the businesses that connect student borrowers to the entities that hold their loans or originate them. *Id.* at 11. Servicers are different from lenders or holders, which originate the loan capital or hold the note. *Id.* See *infra* Part II.C.3 for a more detailed discussion of the *2015 Report*.

23 Press Release, Consumer Fin. Prot. Bureau, CFPB Supervision Report Highlights Risky Practices in Student Loan Servicing (Oct. 28, 2014), http://www.consumerfinance.gov/newsroom/cfpb-supervision-report-highlights-risky-practices-in-student-loan-servicing/.

24 See *infra* Part II.B for a discussion of the elevated standard.

25 See *infra* Part II.D for a discussion of mortgage servicing reforms.

26 Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 L. & CONTEMP. PROBS. 233, 233 (1984), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3755&context=lcp.

27 *Id.* at 233.

28 *Id.*

loan borrowers that are susceptible to frustrating and unconscionable loan servicing practices, but through strong consumer protection measures, including broadly-awarded fee-shifting provisions, this concern may be minimized. Although regulators are investigating ways to increase borrower protections through increased oversight, such provisions will not have adequate individual impacts. Using the success of the mortgage servicing reforms as a guide, student loan borrowers must have a method of individually challenging their student loan servicers in the courts to achieve immediate and individual relief. In order to completely protect borrowers, state consumer protection statutes must include strong fee-shifting provisions that apply to student loan borrowers.

Part II of this Note outlines the history of student loans in the United States, the undue burden standard on bankruptcy discharge, the current student loan complaint process, and the key elements of mortgage crisis reform, which provided independent relief. Next, Part III of this Note addresses the shortcomings of the current student loan system and argues that increased regulation must be accompanied by increased statutory protections and vehicles for bringing independent claims for egregious servicing, including the importance of fee-shifting statutes to encourage such claims. Lastly, this Note concludes by examining the possibilities that could threaten the consumer market if proper action is not taken.

II. BACKGROUND

The growth of America's student loan market has increased interest and awareness of the issues and policies surrounding student loan debt. This part offers a brief examination of some key issues related to student loans. Section A explains the political environments and policies that gave way to the popularity of student loans in America. Section B examines the prohibition on the discharge of student loan debt in bankruptcy and the government's interests in securing repayment. This section also examines the prohibition's evolution to its current standard, requiring a showing of "undue burden," as well as judicial interpretations of this term. Section C examines recent inquiries into the servicing of student loans, growing reports of servicing abuses in this market, and the current regulatory complaint process. Finally, Section D offers a brief overview of mortgage reforms, including the particular effectiveness of fee-shifting provisions.

A. Origins of the Student Loan System

Loans for post-secondary education became popular in the 1950s, an effect of the Cold War and a response to fears that, without encouragement and assistance, America would not be capable of challenging Russia's rocket scientists. [29] These concerns led President Eisenhower to establish the nation's first "low-interest college loan program through the National Defense Education Act of 1958" ("Defense Act").[30] In the mid-1960s, student loans grew again under President Johnson's "Great Society" initiatives, part of the "war on poverty."[31] Under that regime, the focus shifted from encouraging Russian competition to improving the lives of the American poor through education and social advancement.[32] This shift was accompanied by new funding as well: rather than being funded by the government, as under the Defense Act, President Johnson's plan enabled banks to make loans to students, which were in turn guaranteed by the government.[33]

In the 1970s, bankruptcy reforms established a high standard for the discharge of student loan debt, which has remained substantively the same since its enactment.[34] At the same time, college tuition has increased dramatically, jumping 439% from 1982 to 2006, and exceeding the average increase in family income during that same period by 147%.[35] President Obama has recently proposed revising the 40-year-old standards under which such loans can be discharged,[36] but some experts question whether the policy behind the treatment of student loan debt merits enough deference to be revised.[37] Some policymakers believe that the entire education system merits a complete overhaul,[38] but that topic is beyond the scope of this Note.

Discussions about the history of student loans should include the fact that, with few exceptions, student loans are rarely dischargeable in bankruptcy, a policy which grew from a "public[ly] perceived . . . loophole in the student loan

29 Connie Cass, *Student Loans 101: Why Uncle Sam Is Your Banker*, HUFFINGTON POST (July 19, 2013, 9:46 AM), http://www.huffingtonpost.com/huff-wires/20130719/ap-us-student-loans-banker-sam/.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 Baker, *supra* note 19, at 1213.

35 *Id.*

36 Presidential Memorandum, The White House Office of the Press Sec'y, Student Aid Bill of Rights (Mar. 10, 2015) [hereinafter Presidential Memorandum], https://www.whitehouse.gov/the-press-office/2015/03/10/presidential-memorandum-student-aid-bill-rights.

37 *See, e.g.*, B.J. Huey, Comment, *Undue Hardship or Undue Burden: Has the Time Finally Arrived for Congress to Discharge Section 523(a)(8) of the Bankruptcy Code?*, 34 TEX. TECH. L. REV. 89 (2002).

38 *See* Barry Malone, *Lawmakers Begin Taking on Student Loan Debt*, STUDENT LAW. Nov.–Dec. 2015, at 20–24; Betsy Mayotte, *The Student Loan Ranger: Explore How Presidential Candidates Stand on Student Loan Debt*, U.S. NEWS & WORLD REP. (Oct. 28, 2015, 10:00 AM), http://www.usnews.com/education/blogs/student-loan-ranger/2015/10/28/explore-how-presidential-candidates-stand-on-student-loan-debt.

programs that was subject to abuse."[39] This "public perce[ption]" was influenced by the media and stories about a few students who did abuse the system, discharging their debts to escape repayment and increase their earnings.[40] Despite conflicting evidence regarding actual abuses of the student loan system using bankruptcy, the 1970 Commission on Bankruptcy Laws ("Commission") recommended restrictions on the discharge of student loans.[41]

Yet, when the General Accounting Office ("GAO") studied the levels of student loan discharge abuse for Congress's consideration in Bankruptcy Code provisions,[42] the GAO determined that the abuse through bankruptcy discharge was very rare and not problematic.[43] The GAO determined that the high rate of default for students who were actually paying back their education obligations was a greater and more pressing concern.[44] Despite these findings, the Commission still "recommended a restriction on the discharge of student loans."[45] The Commission proposed that discharge of student loans should be prohibited unless (1) loan repayment started at least five years before bankruptcy filing, or (2) "repayment . . . would impose an 'undue hardship' on the [borrower]."[46]

Ultimately, Congress adopted the Commission's recommendations,[47] including the five year and hardship exceptions recommended by the Commission.[48] In 1990, Congress further restricted the instances under which students could discharge their loans by extending the prohibition to both Chapter

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39 Huey, *supra* note 37, at 97.

40 *Id.* at 97–98 (citing for example Jean Seligman et al., *Study Now, Pay Never*, NEWSWEEK, May 7, 1977, at 95).

41 *Id.* at 99 (citing REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, at 209 (1973); Thad Collins, Note, *Forging Middle Ground: Revision of Student Loan Debts in Bankruptcy as an Impetus to Amend 11 U.S.C. § 523(a)(8)*, 75 IOWA L. REV. 733, 740 (1990)).

42 *Id.* (citing H.R. REP. NO. 95-595, at 132–33 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093–94).

43 *Id.* at 98. Huey notes that the GAO concluded that only one-half to three-quarters of a single percent of educational loans were improperly discharged. *See id.* (quoting H.R. REP. No. 95-595, 132–33 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093–94).

44 *Id.*

45 *Id.* at 98–99.

46 H.R. DOC. NO. 93-137, at 140.

47 Huey, *supra* note 37, at 99. Huey notes that these provisions were included first in the Education Amendments of 1976 and were later added to the Bankruptcy Reform Act of 1978. *See also* Education Amendments of 1976, PUB. L. NO. 94-482, 90 Stat. 2081; Act of Nov. 6, 1978, PUB. L. NO. 95-598, 92 Stat. 2549, 2591, *reprinted in* 1978 U.S.C.C.A.N. 5787 (codified as amended at 11 U.S.C. § 523(a)(8) (2000)).

48 Huey, *supra* note 37, at 100 (citing S. REP. NO. 95-989, at 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865).

7 and Chapter 13 bankruptcy proceedings.[49] That same year, the Bankruptcy Code was amended to lengthen the time exception from five to seven years.[50] In 1998, Congress eliminated any time-related exceptions to the prohibition on discharge,[51] tightening the law to its current form and firmly establishing Congress's commitment to eliminate any loopholes through which students could seek to avoid loan repayment.[52] Congress's treatment of student loan discharge is a high bar, but it is not an impossible one.[53] The standard required to successfully discharge student loan debt in bankruptcy is that of "undue burden," a standard that courts have attempted to define and test for 40 years.

B. Limited Discharge of Student Loans in Bankruptcy

The statute that provides the limitations for discharging student loan debt in bankruptcy is 11 U.S.C. § 523(a)(8), which states that the grant of discharge in bankruptcy proceedings "does not discharge an individual debtor from any [student loan] debt" *unless* failing to grant the discharge would "impose an undue hardship."[54] The statute provides that this limitation on discharge applies to three types of student loan debts: (1) any overpayment or loan made, guaranteed, or insured by the government, or funded by any government unit or nonprofit; (2) "an obligation to repay funds received as an educational benefit, scholarship, or stipend;" and (3) any other education loan, incurred by an individual, and defined in section by statute.[55]

The statute's prohibition, that student loan debt may not be discharged unless the borrower would experience "undue hardship," has traditionally been interpreted narrowly by courts, in accordance with Congress's desire to limit discharge. The standard, which is not self-defining, has led to the development of multiple tests to assist courts in evaluating which circumstances meet this standard.[56] Two tests in particular have become popular for courts deciding this issue: (1) the *Brunner* test and (2) the totality-of-the-circumstances test.

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49 *Id.*

50 *Id.* (citing Higher Education Amendments of 1998, PUB. L. NO. 105-244, 112 Stat. 1837 (codified as amended at 11 U.S.C. § 523(a)(8) (2012))).

51 *Id.* at 101.

52 *Id.* at 101 (discussing loopholes present in 11 U.S.C. § 523(a)(8) (2012)).

53 See *supra* notes 2–16 and Denise Bronsdon's story in Part I.

54 11 U.S.C. §§ 523(a), 523(a)(8)(A)–(B) (2012).

55 *Id.* § 523(a)(8)(A)(ii). A qualified education loan is defined as a loan taken "solely to pay qualified higher education expenses" incurred (A) by the debtor, the debtor's spouse, or any dependent during the relevant time period that is (B) incurred or paid "within a reasonable period of time" and which is (C) "attributable to education." *Id.* § 221(d)(1).

56 There are multiple tests that have been developed by courts to test undue hardship. However, the *Brunner* test and the totality-of-the-circumstances test are the most commonly used and

1. Student Loans in Bankruptcy: A Look at the Case Law

Scholars have articulated that the American bankruptcy system hinges on the notion of providing a "fresh start" to the debtor, and this is a goal that has been recognized by both Congress and the Supreme Court.[57] In the case of student loans, this fresh start is limited by statute to those borrowers who would experience undue hardship without it,[58] but the drafters of the Bankruptcy Code did not define that term.[59] Instead, the question of what constitutes undue hardship was left to the bankruptcy courts, to be decided on a case-by-case basis.[60] Over the years, many different tests have been adopted by courts,[61] but today, two tests have remained popular: the Second Circuit's *Brunner* test, and the Eighth Circuit's totality-of-the-circumstances test.

i. *The Second Circuit:* Brunner v. New York State Higher Education Services Corporation

In *Brunner v. New York State Higher Education Services Corp.*,[62] the Second Circuit set forth an interpretation of the statutory term "undue hardship" that served as a primary standard for courts determining bankruptcy discharge. In *Brunner*, the bankruptcy court discharged the borrower's educational loans based on a finding that repayment would cause undue hardship given the borrower's circumstances.[63] The creditor appealed to the United States District Court for the Southern District of New York, which found that it was clear error for the bankruptcy court to discharge the borrower's student loans.[64]

therefore are the only ones discussed in this Note. For a detailed analysis of tests, see Huey, *supra* note 37.

57 Jeffrey L. Zackerman, *Discharging Student Loans in Bankruptcy: The Need for a Uniform "Undue Hardship" Test*, 65 U. CIN. L. REV. 691, 691 (1997).

58 *See* § 523(a)(8).

59 Kurt Wiese, *Discharging Student Loans in Bankruptcy: The Bankruptcy Court Tests of 'Undue Hardship'*, 26 ARIZ. L. REV. 445, 447 (1984) (citing H.R. DOC. 93-137, at 140 (1973)).

60 *Id.* at 447.

61 *See, e.g.*, *id.* at 448–51 (describing the bankruptcy commission test, the *In re Johnson* test, the *Wegfert* analysis); Zackerman, *supra* note 57, at 701–13, 720–21 (discussing the *Johnson* test, the *Bryant* test, and the *Brunner* test, and hypothesizing that *Brunner* would become the test of choice for many courts).

62 831 F.2d 395 (2d Cir. 1987).

63 *Id.* at 396; *see also In re* Brunner, 46 B.R. 752, 756–57 (S.D.N.Y. 1985). Marie Brunner had received her bachelor's degree in 1979 and her master's degree in social work in 1982. Seven months after receiving her master's degree, she filed for bankruptcy. Her student loans accounted for 80% of her total indebtedness and, at the time that she filed for discharge, she had no employment prospects. See *id.* for this factual background.

64 *Brunner*, 831 F.2d at 396.

The Second Circuit, reviewing the lower courts' findings for clear error, held that it was not required to accept the bankruptcy court's conclusions of law.[65] The circuit found that the determination of whether failing to discharge the student loans would impose "'undue hardship' under 11 U.S.C. § 523(a)(8)(B) require[d] a conclusion regarding the legal effect of the bankruptcy court's findings as to her circumstances" and was therefore appropriately reviewed by the district court.[66] The district court had determined that discharge of student loans would only be appropriate if the debtor showed: (1) if she were required to repay the loans, she could not "maintain . . . a 'minimal' standard of living for herself and her dependents" given her current expenses and income; (2) the presence of "additional circumstances" to indicate that her current situation was "likely to persist for a significant portion of the repayment period;" and finally (3) that the borrower had made "good faith efforts to repay the loans."[67]

The Second Circuit noted that other courts had frequently applied the first part of the test in order to establish the undue hardship standard[68] and that the additional elements were "reasonable," given the "clear congressional intent" of the statute by "mak[ing] the discharge of student loans more difficult than that of other nonexcepted debt."[69] Utilizing the three-part test set forth by the district court, the Second Circuit agreed that Ms. Brunner had failed to establish sufficient undue hardship to discharge her student loans.[70] The court found that "the record demonstrate[d] no 'additional circumstances,'" such as: (1) a demonstrated likelihood that Ms. Brunner would not find work for a "significant portion of the loan repayment period;" (2) that she was "not disabled, nor elderly;" (3) that Ms. Brunner had disclosed no dependents on the record; (4) a lack of "evidence . . . present[ing] a total foreclosure of job prospects in her area of training;" (5) the fact that only ten months had passed since Ms. Brunner had graduated from her program and searched for employment; and (6) that Ms. Brunner filed for discharge without first seeking a "less drastic remedy," such as a deferment of payment, and had therefore not shown a "good faith attempt" at repayment.[71]

65 *Id.*

66 *Id.*

67 *Id.*

68 *See id.* (collecting cases).

69 *Id.*

70 *Id.*

71 *Id.* at 396–97.

ii. The Eighth Circuit: Long v. Educational Credit Management Corporation

The Eighth Circuit has consistently held that the three-part test from *Brunner* is too restrictive, in part because under the *Brunner* analysis, a debtor must meet every part of the test or the debt is not dischargeable.[72] In *Long v. Educational Credit Management Corp.*, the Eighth Circuit expressly rejected the *Brunner* test, choosing instead to reaffirm the pre-*Brunner* "totality-of-the-circumstances" test adopted by the Eighth Circuit in 1981.[73] The totality-of-the-circumstances test urges courts to consider (1) "reasonably reliable future financial resources" as well as past and present resources, (2) the debtor's "reasonable necessary living expenses," and (3) "any other relevant facts and circumstances" surrounding each particular bankruptcy case.[74]

In the Eighth Circuit's view, the totality-of-the-circumstances test is more flexible and honors the "inherent (judicial) discretion" implied in the statute and intended by Congress.[75] The court articulated in *Long* that the purpose of limiting student loan debt dischargeability was to "prevent recent graduates who were beginning lucrative careers" from "escap[ing] their student loan obligation[s]."[76] The court believed that the "legislative purpose and policy" accompanying the exception "is decidedly absent in the meaning Congress ascribed to the term 'undue hardship,'" because the Bankruptcy Code does not define the term.[77] As a result, a "divergent body of appellate authority" has struggled to define the term,[78] and, while a majority of Circuits has adopted the

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72 Long v. Educ. Credit Mgmt. Corp., 322 F.3d 549, 554 (8th Cir. 2003). Nanci Long was a 39-year-old single mother with a chiropractic degree, which she had financed through substantial loans. In 1993, Long developed extreme depression, which affected her work and personal life, resulting in the loss of her practice and culminating in attempted suicide. In 1997, after extensive professional support, Long had recovered somewhat and was employed and back in school, but was making significantly less than before; she was also still suffering from daily, disabling depressive episodes. Long had paid on her student loans consistently for ten years before her breakdown, and the Eighth Circuit reversed the lower court's refusal to grant Long's discharge, finding that her circumstances met the undue burden standard. See *id.* at 549–53 for this factual background.

73 *See, e.g.*, *id.* at 553; *see also* Andrews v. S.D. Student Loan Assistance Corp., 661 F.2d 702, 704 (8th Cir. 1981).

74 *Long*, 322 F.3d at 554.

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.* (collecting cases).

Brunner test,[79] the Eighth Circuit has continued to utilize the totality-of-the-circumstances test, honoring its deference to judicial discretion.[80]

2. Discharge of Student Loans Is Not Impossible, or Limited to Bankruptcy

The standard for discharging student loans is a high bar, subject to a fact-intensive inquiry.[81] However, Denise Bronsdon's story proves that discharge is not an impossible standard to meet.[82] Further, because the determination of "undue burden" is a question of law to be reviewed *de novo*,[83] it is not unusual for appellate courts, reviewing the exact same facts, to come to opposite conclusions regarding a borrower's qualifications.[84] Despite these facts, some scholars believe that few debtors attempt discharge for three reasons: (1) private educational lenders are likely to negotiate with distressed borrowers outside of the court system; (2) there are administrative programs that assist federal borrowers in distress; and (3) the media has convinced borrowers that they have no chance of discharging their student loan debts in bankruptcy.[85]

Additionally, bankruptcy discharge is not the only way that borrowers can seek to rid themselves of debt.[86] Student borrowers may also seek discharge for disability or for certain institutional misconduct under the Higher Education Act ("HEA").[87] Under the HEA provision, codified at 20 U.S.C. § 1087, borrowers who receive loans after January 1, 1986, can pursue discharge in three circumstances because of institutional misconduct.[88] Students may discharge their loan obligations if the higher education institution closes, has advertised a

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79 *Id.*

80 "We apply a totality-of-the-circumstances test in determining undue hardship under § 523(a)(8)." Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 779 (8th Cir. 2009).

81 Huey, *supra* note 37, at 90–91.

82 *See supra* notes 2–16 and accompanying text.

83 *See Long*, 322 F.3d at 553 (collecting cases where the Third Circuit, Ninth Circuit, Sixth Circuit, Tenth Circuit, Seventh Circuit, and Second Circuit concluded that the undue hardship determination is a question of law requiring *de novo* review).

84 *See, e.g.*, Pa. Higher Educ. Assistance Agency v. Faish, 72 F.3d 298 (3d Cir. 1995) (bankruptcy court discharged the debt, district court reversed, circuit court upheld the reversal); Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987) (bankruptcy court discharged loans, district court reversed, circuit court upheld the reversal).

85 Richard B. Keeton, *Guaranteed to Work or It's Free!: The Evolution of Student Loan Discharge in Bankruptcy and the Ninth Circuit's Ruling in* Hedlund v. Educational Resources Institute, Inc., 89 AM. BANKR. L.J. 65, 66–70 (2015).

86 Doug Rendleman & Scott Weingart, *Collection of Student Loans: A Critical Examination*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 215, 262 (2014).

87 *Id.* (citing 20 U.S.C. § 1087(c) (2012)).

88 *Id.* at 262–63.

false certification, or fails to pay the student a required refund.[89] If a student shows that the statutory requirements relating to one of these provisions have been met, the loan is discharged, and, in exchange, the borrower transfers all claims to any refund of the discharged loan to the Department of Education and agrees to cooperate with attempts to enforce collection.[90]

This method of discharge, like the undue burden prohibition, is not easy to obtain.[91] Students may only qualify under the school closure provision if the program for which the loans were obtained closes and the student chooses not to complete a different program.[92] Borrowers' discharge abilities are also foreclosed if the school offers a "teach out" program at another school that the student participates in or if the borrower chooses to continue his or her education by transferring credits earned to another school.[93]

Finally, borrowers may seek discharge for death and disability.[94] Disability, however, is another high standard that triggers a high degree of proof.[95] To receive discharge based on disability, borrowers must submit applications, including a certification by a physician of permanent and total disability, to the lender or to the Department of Education.[96] If approved for a disability discharge, the borrower is required to update the Department of all changes in address and annual earnings, and such earnings have the potential to reinstate a previously-discharged loan.[97]

C. *Recent Investigations of the Student Loan Servicing System*

In 2013, the Consumer Financial Protection Bureau ("CFPB") acknowledged that there was a discrepancy between the standards student loan borrowers were held to and the standards applicable to student loan servicers by announcing that it would begin to more closely regulate the student loan market in response to increased reports of alleged abuses of borrowers by student loan servicers.[98] The CFPB addressed the issue by subjecting student loan servicing

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89 *Id.* at 262.

90 *Id.* at 263.

91 *Id.* at 262.

92 *Id.* at 263 (citing 20 U.S.C. § 1087(c) (2012); 34 C.F.R. §§ 674.33(g)(2), 682.402(d)(2), 685.214(b) (2016)).

93 *Id.*

94 *Id.* at 268 (citing 20 U.S.C. §§ 1087(a)(1), 1087dd(c)(1)(F)(i) (2012); 34 C.F.R. §§ 685.212(a), 682.402(b), 674.61(a) (2016)).

95 *Id.* at 269.

96 *Id.* (citing 34 C.F.R. §§ 674.61(b)(2)(iv), 682.402(c)(2), 685.213(b)(1) (2016)).

97 *Id.* at 270.

98 Eleazar David Melendez, *CFPB Will Regulate Student Loan Debt Servicers*, HUFFINGTON POST BUS. (Mar. 14, 2013, 3:46 PM), http://www.huffingtonpost.com/2013/03/14/cfpb-student-loan-debt_n_2877345.html.

companies to audits by the CFPB and by establishing fines for servicers who violate federal statutes governing lending.[99] This new area of regulation was a response investigation that revealed that student loan borrowers "are often victimized by costly and frustrating errors" perpetuated by the third-party companies that service their student loans.[100]

The Huffington Post, in a separate investigation, found that some student loan servicers "engage in practices meant to defraud borrowers, especially when dealing with those at risk of defaulting."[101] The Director of the CFPB told reporters that the CFPB had "heard complaints from private loan borrowers that no one makes servicers accountable," and that the agency intended to change that by making sure that servicers "play[ed] by the rules and treat[ed] borrowers appropriately."[102] The CFPB explained that it was concerned with "cracking down" on companies that served more than one million clients, extending oversight to seven new companies and, by extension, 80% of the student loan market.[103]

1. The Current CFPB Student Loan Servicing Complaint Process

Under the CFPB regulations revised after the 2013 announcement, loan servicers are obligated to investigate and correct errors alleged by borrowers, provide information to borrowers, and protect borrowers with industry-specific relief programs.[104] Servicers must also provide information about loss mitigation to borrowers and establish programs that facilitate communications with delinquent and distressed borrowers at risk of default.[105]

When servicers fail to perform these tasks, the CFPB investigates after borrowers submit a "complaint" to the CFPB, which is forwarded to the company against the allegedly at-fault company.[106] The CFPB then "work[s] to get a response" about the issue and, if necessary, forwards the complaint to any other government agency under whose jurisdiction the issue may fall.[107] Then, the servicing company is given the opportunity to "review[] [the] complaint,

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99 *Id.*

100 *Id.*

101 *Id.*; *see also* Chris Kirkham, *For-Profit Colleges Manage Student Loan Default Rates, Senators Call for Investigation*, HUFFINGTON POST BUS. (Dec. 27, 2012, 5:33 PM), http://www.huffingtonpost.com/2012/12/27/for-profit-colleges-student-loan-default_n_2371688.html.

102 *See generally* Melendez, *supra* note 98.

103 *Id.*

104 *Id.*

105 *Id.*

106 *The Complaint Process*, CONSUMER FIN. PROT. BUREAU, www.consumerfinance.gov/complaint/process (last visited Nov. 4, 2016).

107 *Id.*

communicate[] with [the consumer] as needed, and report[] back [to the CFPB] about the steps taken or that will be taken on the issue [that was the subject of the complaint]."[108] When excessive complaints are lodged against a company, the CFPB may take large-scale action; in 2015, the CFPB instituted a $2.5 million penalty against Discover Bank for servicing errors and required Discover to refund $16 million to student loan borrowers.[109]

After the company's response, the complainant is notified and given the opportunity to "review [the] response" and provide feedback to the CFPB on the process; when the complaint is resolved, it is published on the CFPB's Consumer Complaint Database, where the public can review all problems reported to the CFPB.[110]

2. Renewed Focus on Servicers

Despite these changes, the CFPB admitted in 2015 that the regulatory extensions had not reached the total impact desired and that student loan servicing regulations are still not as complete and effective as students, regulators, and advocates would like.[111] This admission was a result of President Obama's direct comments on the student loan market in March 2015.[112] In a memorandum titled "A Student Aid Bill of Rights to Help Ensure Affordable Loan Repayment," President Obama directly challenged the CFPB's regulations and alleged that the current system remains inadequate to meet borrowers' needs.[113] Specifically, the President called for "stronger protections" for student loan borrowers and offered specific areas in which his Administration believes that the student loan servicing market could be improved.[114] As a result of that memorandum, the CFPB launched a public inquiry regarding student loan servicing experiences and, uniquely, asked consumers to consider the effectiveness of the elevated servicing regulations that have been implemented in other consumer industries, such as the mortgage and credit card industries.[115]

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108 *Id.*

109 *CFPB Orders Discover Bank to Pay $18.5 Million for Illegal Student Loan Servicing Practices*, CFPB NEWSROOM (July 22, 2015), http://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-discover-bank-to-pay-18-5-million-for-illegal-student-loan-servicing-practices/.

110 *Id.*

111 *See e.g.*, CFPB Launches Public Inquiry, *supra* note 17; CONSUMER FIN. PROT. BUREAU, REQUEST FOR INFORMATION REGARDING STUDENT LOAN SERVICING [hereinafter REQUEST FOR INFORMATION], http://files.consumerfinance.gov/f/201505_cfpb-rfi-student-loan-servicing.pdf.

112 *See* Presidential Memorandum, *supra* note 36.

113 *See id.*

114 *Id.*

115 REQUEST FOR INFORMATION, *supra* note 111, at 3.

The CFPB requested that the public and servicing industry provide information "[r]egarding [s]tudent [l]oan [s]ervicing."[116] The request was broad and directed at individuals and organizations across the spectrum of the borrowing, collecting, and servicing of private and government-funded student loans to "assist market participants and policymakers on potential options to improve borrower service, reduce defaults, develop best practices, assess consumer protections, and spur innovation."[117] The request for comments was extended to borrowers, student organizations, technology providers, education institutions, financing services providers, credit reporting agencies, debt collectors, and civil rights groups, among others.[118] As part of the request, the CFPB also released a detailed report on the current status of student loan servicing to provide context for comments.[119] The CFPB explained that the student loan market is unique in that market data is limited and often incomplete compared to other consumer industries.[120]

i. Types of Student Loans

The CFPB has identified "three main types of post-secondary education loans under which borrowers have outstanding balances" that would be affected by regulatory changes.[121] These include (1) loans made under the Federal Family Education Program ("Family Education"); (2) loans made through the William D. Ford Federal Direct Loan program ("Direct Loans"), and (3) private loans.[122] The first type, Family Education loans, are no longer an option for borrowers,[123] but were a program to fund education wherein private capital was guaranteed by a government entity or non-profit and then reinsured by the government.[124] Under the Student Aid and Fiscal Responsibility Act ("SAFRA"),[125] the origination of new loans guaranteed under the Family Education program has been indefinitely halted.[126] Still, the Department of Education estimates that

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116 *Id.* at 1.

117 *Id.*

118 *Id.* at 3.

119 *See generally id.* at 1–36.

120 *Id.* at 4; *see* CONSUMER FIN. PROT. BUREAU & U.S. DEP'T OF EDUC., PRIVATE STUDENT LOANS REPORT (2012), http://www.consumerfinance.gov/reports/private-student-loans-report/.

121 REQUEST FOR INFORMATION, *supra* note 111, at 5.

122 *Id.*; *see* 20 U.S.C. § 1078(b)–(c) (2012).

123 REQUEST FOR INFORMATION, *supra* note 111, at 5.

124 *Id.* at 5–6.

125 SAFRA was included in the Health Care and Education Reconciliation Act of 2010; Pub. L. No. 111-152, 124 Stat. 1029 (2010).

126 REQUEST FOR INFORMATION, *supra* note 111, at 6.

more than $380 billion remain outstanding under this program.[127] The CFPB asserts that a "noteworthy portion of these loans" also currently serve as "collateral for asset-backed securities."[128] The servicing model that these loans operate under is simple: they are either served by the holders themselves or by any third party with which the holder has contracted.[129]

In 2010, the Department of Education shifted from the Family Education program to a system of direct lending.[130] Although the Direct Loan program has existed since 1992,[131] Direct Loans were only a small portion of the student loan picture until SAFRA.[132] Direct Loans are serviced by third-party companies under contract with the Department of Education under Title IV of the HEA.[133] At the end of the 2014 calendar year, approximately 28.5 million borrowers owed more than $744 billion dollars in Direct Loans.[134]

The final large category of student loans is private student loans, which are loans not originated or secured by the government.[135] Instead, these loans are originated by large depositories or special loan companies, and a large portion of these loans also serve as collateral for asset-backed securities.[136] This sector of the student loan market on which the least data is available, as participants generally are not required to provide origination and performance information to the public or for regulatory purposes.[137]

ii. Servicing of Student Loans

Most student loans are serviced by a third-party servicer who acts as the primary point of contact regarding repayment and account management.[138] The CFPB has defined student loan servicing to include three primary duties: (1) student loan servicers typically receive loan payments and apply those payments

[127] *Id.* at 5; U.S. DEPT. OF EDUC., FEDERAL STUDENT AID PORTFOLIO SUMMARY, https://studentaid.ed.gov/about/data-center/student/portfolio.

[128] REQUEST FOR INFORMATION, *supra* note 111, at 6; *see also* SALLIE MAE, SLM CORPORATION: OVERVIEW OF FFELP AND FFELP ABS TRANSACTIONS (2012), https://www.navient.com/assets/about/investors/webcasts/2012FFELPOverviewvFinal.pdf.

[129] REQUEST FOR INFORMATION, *supra* note 111, at 6.

[130] *Id.* (citing Pub. L. No. 111-152, §§ 2101–213, 124 Stat. 1071-81).

[131] Higher Education Act of 1965, Pub. L. No. 102-325, 106 Stat. 569 (1992).

[132] REQUEST FOR INFORMATION, *supra* note 111, at 6 n.10.

[133] *Id.*; 20 U.S.C. § 1087f(b) (2012).

[134] REQUEST FOR INFORMATION, *supra* note 111, at 6; *see* FEDERAL STUDENT AID PORTFOLIO SUMMARY, *supra* note 127.

[135] REQUEST FOR INFORMATION, *supra* note 111, at 6.

[136] *Id.*

[137] *Id.* at 7.

[138] *Id.*

to borrowers' accounts; (2) servicers maintain records and communicate with borrowers during periods when payments may not be required; and (3) servicers communicate with borrowers to "help prevent default" and to "facilitate the [foregoing] activities."[139] Both a major focus of the CFPB and the President's Memorandum is the fate of the 8 million students in default on their student loan obligations—and the fate of the $110 billion in outstanding and unpaid balances.[140] In addition, 3 million more direct loan borrowers are more than 30 days past due, tying up another $58 billion.[141]

3. Report and Recommendations

After the Call for Comments and related investigations, the CFPB released a report ("2015 Report") stating that problems in servicing were directly related to the fact that "there is no existing, comprehensive federal statutory or regulatory framework providing consistent standards for the servicing of all student loans."[142] In the 2015 Report, the CFPB confirmed that "the respective loan types come with varying levels of consumer protections and special benefits"[143] but, generally, that all student loans need stronger servicing protections. The CFPB concluded that there are four areas where servicing guidelines could be substantially improved and that these goals should be the focus of the CFPB, Department of Education, and other agencies to strengthen protections for all student loan borrowers.[144]

In the 2015 Report, the CFPB included four areas of student loan servicing that needed specific improvements. First, the CFPB concluded that guidelines that describe appropriate servicing must be more consistent and must articulate a "clear set of expectations for what constitutes minimum requirements for services."[145] Second, information must be "accurate and actionable," or "presented in a manner that best informs borrowers, helps them achieve possible outcomes, and mitigates the risk and cost of default."[146] Third, the entire student loan servicing system must become more transparent, so that "[t]he public, including student loan borrowers, may benefit from information about the performance of private and federal loans and the practices of individual student

[139] 12 C.F.R. § 1090.106 (2016).

[140] REQUEST FOR INFORMATION, *supra* note 111, at 9; *see* FEDERAL STUDENT AID PORTFOLIO SUMMARY, *supra* note 127 (reporting that, at the end of the first quarter in 2015, 7.3 million federal loan borrowers were in default, and their outstanding balance totaled more than $106 billion).

[141] REQUEST FOR INFORMATION, *supra* note 111, at 9; *see also* FEDERAL STUDENT AID PORTFOLIO SUMMARY, *supra* note 127.

[142] 2015 REPORT, *supra* note 21, at 11.

[143] *Id.* at 150.

[144] *Id.*

[145] *Id.*

[146] *Id.*

loan lenders and servicers."[147] Finally, the report recommends that "borrowers, federal and state agencies and regulators, and law enforcement officials should have access to appropriate channels for recourse."[148]

D. An Example of Successful Reform: The Mortgage Sector

As consumer advocates have expressed growing concern regarding the standards that apply to the loan holders and servicers who manage student debt in the United States,[149] the CFPB has indicated that the mortgage sector is a place to look to for a solution to the problem in student loan servicing.[150] In 2013, the CFPB Director acknowledged that "[p]roblems in mortgage servicing ha[d] plagued consumers for years" and that these problems contributed to the 2008 mortgage crisis.[151] Yet, in its Call for Comments,[152] the CFPB asked student loan borrowers to examine the regulatory response to the mortgage crisis and to provide comments about experiences in that market.[153]

1. Mortgage Servicers

The CFPB characterizes mortgage servicers, like student loan servicers, as companies that collect payments, handle customer service, collections, loan modifications, and foreclosures.[154] The CFPB admitted that "[e]ven before the [2008] financial crisis," when problems of mortgage servicing became national news, "the mortgage servicing industry . . . experienced problems with bad practices and sloppy recordkeeping."[155] Further, "[a]s millions of borrowers fell behind on their loans[,] . . . servicers were unable to provide the level of service necessary to meet homeowners' needs."[156] Increasing regulation was the CFPB's

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147 *Id.* at 151.

148 *Id.*

149 *See, e.g.*, *New York Looking at Student Debt Relief Companies for Signs of Abuse*, 19 No. 20 WESTLAW J. BANK & LENDER LIABILITY 4 (Feb. 24, 2014).

150 *See* Presidential Memorandum, *supra* note 36.

151 *CFPB Supervision Report Highlights Mortgage Servicing Problems in 2013*, CFPB NEWSROOM (Jan. 30, 2014) [hereinafter *Supervision Report*], http://www.consumerfinance.gov/newsroom/cfpb-supervision-report-highlights-mortgage-servicing-problems-in-2013/. For a detailed examination of the mortgage crisis, causes, and effects, see KEITH HENNESSEY, DOUGLAS HOLTZ-EAKIN & BILL THOMAS, CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS, http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_hennessey_holtz-eakin_thomas_dissent.pdf.

152 *See* REQUEST FOR INFORMATION, *supra* note 111.

153 *Id.*

154 *Supervision Report*, *supra* note 151.

155 *Id.*

156 *Id.*

response to these problems, and the recent inquiry exhibits a trend toward modeling the student loan market after the regulatory reforms implemented in the mortgage sector.[157]

2. Expanded Servicing Regulation in Response to the Mortgage Crisis

In 2013, the CFPB expanded and tightened regulations around mortgage servicers through the implementation of the 2013 Real Estate Settlement Procedures Act ("RESPA") and amendments to the Truth in Lending Act ("TILA").[158] Under the 2010 Dodd-Frank Act, disclosures, force-placed insurance, and periodic statements for mortgage loans became required for adjustable-rate mortgages.[159] The Dodd-Frank Act also required "prompt crediting or mortgage payments and providing payoff statements to consumers" in addition to "requir[ing] servicers to take action to correct certain errors asserted by [borrowers] regarding their mortgages and to respond to requests for certain information from [borrowers] regarding their mortgages."[160] The Dodd-Frank Act was supplemented by TILA and RESPA, which expanded servicing rules to enforce these requirements.[161] Finally, the "Mortgage Servicing Rules" issued by the CFPB to supplement these statutes focus on "policies, procedures, and requirements" that require servicers to contact borrowers and "work with them to be considered for applicable loss mitigation options."[162]

These servicing rules do not apply to "small [mortgage loan] servicers," companies that service 5,000 or fewer loans.[163] For all other servicing companies, however, the servicing rules specified the activities of mortgage servicers and the way that servicers were required to deal with borrowers in default or at risk of default. RESPA established general servicing policies, procedures, and requirements for all mortgage servicers that are not exempt under the small

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157 See, for example, the CFPB's major revisions of the Real Estate Settlement Procedures Act of 1974 through the 2013 Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z). A brief summary of these statutory provisions can be found at *Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X)*, CONSUMER FIN. PROT. Bureau http://www.consumerfinance.gov/regulations/2013-real-estate-settlement-procedures-act-regulation-x-and-truth-in-lending-act-regulation-z-mortgage-servicing-final-rules/ (last updated Feb. 14, 2013).

158 *See generally* CONSUMER FIN. PROT. BUREAU, 2013 REAL ESTATE SETTLEMENT PROCEDURES ACT (REGULATION X) AND TRUTH IN LENDING ACT (REGULATION Z) MORTGAGE SERVICING FINAL RULES: SMALL ENTITY COMPLIANCE GUIDE (2013) [hereinafter SMALL ENTITY COMPLIANCE GUIDE], http://files.consumerfinance.gov/f/201306_cfpb_compliance-guide_2013-mortgage-servicing-rules.pdf.

159 *Id.* at 11.

160 *Id.*

161 *Id.* at 11–12

162 *Id.*

163 *Id.* at 17; *see also* 12 C.F.R. § 1026.41(e)(4) (2015).

servicers exception.[164] RESPA set forth "[r]easonable policies" that "*shall* [be] maintain[ed]" and "that are reasonably designed to achieve the objectives set forth in [the regulations.]"[165] The objectives include "providing timely and accurate information," including providing "accurate and timely disclosures to [the] borrower;" "[i]nvestigat[ing], respond[ing] to, and, as appropriate, mak[ing] corrections in response to complaints asserted by a borrower;" and "[p]roperly evaluating loss mitigation applications."[166]

The entire scheme that underlies the general procedures for servicers under RESPA is based on "[f]acilitat[ing] the sharing of accurate and current information"[167] regarding all aspects of the servicing relationship. This includes the status and evaluation of loss mitigation and foreclosure proceedings, including information about "personnel assigned to a borrower's mortgage loan account,"[168] information about servicing transfers,[169] information about "error resolution and information requests procedures,"[170] and compliance by service providers of all applicable regulations. The scheme also includes "periodic reviews of service providers, including by providing appropriate servicer personnel with documents and information necessary to audit compliance by service providers[.]"[171]

TILA's overall purpose and provisions are similar to RESPA's in that the act focuses on proper and prompt notification of interest rate adjustments for adjustable-rate mortgages, proper crediting of payments, prompt responses to requests for payoff information, and periodic statements about the status of mortgage loans.[172] TILA has been in place since 1968, but subsequent to the mortgage crisis, was amended to protect mortgage consumers "from unfair, abusive, or deceptive lending and servicing practices."[173] Specifically, this 2008 amendment increased regulations on "a newly defined category of 'higher-priced mortgage loans' that includes virtually all closed-end subprime loans secured by a consumer's principal dwelling."[174] TILA was also broadened by the Mortgage Disclosure Improvement Act of 2009, which requires early disclosures for more

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164 *See* SMALL ENTITY COMPLIANCE GUIDE, *supra* note 158.

165 12 C.F.R. § 1024.38(a) (emphasis added).

166 *Id.* § 1024.38(b).

167 *Id.* § 1024.38(b)(3)(iii).

168 *Id.*

169 *Id*. § 1024.38(b)(4)(i)–(iii).

170 *Id.* § 1024.38(b)(5).

171 *Id.* § 1024.38(b)(3)(i)–(iii).

172 SMALL ENTITY COMPLIANCE GUIDE, *supra* note 158, at 12; *see* 12 C.F.R. §§ 1026.20, 1026.36(c), 1026.41.

173 FDIC, FDIC COMPLIANCE EXAMINATION MANUAL V-1.1 (2015), https://www.fdic.gov/regulations/compliance/manual/ComplianceExaminationManual.pdf.

174 *Id.*

types of transactions and adds a waiting period between the time that disclosures are given and the time the transaction is completed.[175] TILA now requires disclosures of payments, interest rates, and other financial statements.[176]

3. Regulatory Changes Were Supplemented by Fee-Shifting Statutes

Federal statutes and increased regulations were supplemented in the mortgage context by state-level fee-shifting provisions that provided a way for borrowers without the means to hire an attorney to challenge companies that allegedly improperly serviced their mortgage loans under consumer protection statutes, known as Unfair and Deceptive Practices ("UDAP") laws.[177] Legal scholars have described fee-shifting statutes as "[t]he most significant exception to the 'American Rule' that civil litigants bear their own attorney fees[.]"[178] These statutes function by "permit[ting] fee awards to successful plaintiffs in order to encourage litigation deemed to be in the public interest."[179] Fee-shifting statutes, created to increase civil rights litigation, [180] have expanded to other areas of the law that have inadequate economic incentives for attorneys to litigate.[181] The American Bar Association describes two types of fee-shifting schemes: the first "requiring the loser in a legal matter to pay the legal fees and costs of the prevailing party"; the second "unilaterally shift[ing fees] so that losing defendants must pay the plaintiff's reasonable attorney fees and costs."[182]

Despite CFPB regulations and complaint process, many consumers found that the best way to experience immediate relief in consumer issues after the mortgage crisis was to take on their servicers and lenders directly, in

175 *Id.*

176 *Id.*

177 For example, see Mountain State Justice ("MSJ"), a legal services and civil litigation law firm that "provides aggressive legal advocacy on behalf of low-income West Virginians," particularly those who have been the victims of predatory lending and illegal loan servicing. MSJ often brings suits against banks, lenders, and servicers and then seeks reimbursement for fees under the West Virginia Consumer Protection Act and section 104, article 5, chapter 46A of the West Virginia Code. For more information and stories about MSJ clients, see MOUNTAIN ST. JUST. http://www.mountainstatejustice.org (last visited Nov. 1, 2016); see also CAROLYN L. CARTER, NAT'L CONSUMER L. CTR., INC., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 3 (Feb. 2009), https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf.

178 Percival & Miller, *supra* note 26, at 233.

179 *Id.*

180 *See id.* at 233–34.

181 *Id.* at 237–38.

182 *Id.*

adversarial proceedings.[183] Using state fee-shifting statutory provisions, individuals challenged servicers in courts rather than through the CFPB complaint process, providing immediate results for the poorest victims of the mortgage crisis.[184] Successful individual challenges, brought under state consumer protection codes, offered immediate relief to individual borrowers who could prove that their servicing was inadequate while simultaneously policing servicing standards and ensuring conformity to national goals set forth by the CFPB.

III. ANALYSIS

This Note argues that the current bankruptcy standards for student loan discharge create a vulnerable population of student borrowers that are susceptible to unconscionable loan servicing practices. Although regulators have investigated ways to increase borrower protections through increased oversight, such provisions are inadequate. Using the success of the mortgage servicing reforms as a guide, student loan borrowers must have a method of individually challenging student loan servicers in the courts to achieve immediate and individual relief. Overall, this Note proposes that strong fee-shifting provisions—applicable to student loan borrowers—should be added to consumer protection statutes to fully and adequately protect student loan borrowers.

Part II of this Note outlined the history of student loans in the United States, the undue burden standard on bankruptcy discharge, and key elements of mortgage crisis reform, which provided independent relief for individual consumers in the courts. Here, in Part III, this Note addresses the shortcomings of the current student loan servicing complaint system and argues that increasing regulation must be accompanied by increased state-level statutory protections. For these statutory protections to be efficient, these consumer protection laws must include vehicles for bringing independent claims for unconscionable and illegal loan servicing, including fee-shifting statutes, which provide for and encourage adversarial challenge. Section A will explore the 2015 Report's most pertinent recommendation, increasing legal accountability for servicers. Section B discusses the failures in the current CFPB complaint process. Section C puts forth the argument that increasing accountability must be a primary goal of any servicing reform, and introduces the idea that fee-shifting provisions in consumer protection statutes can be an effective way of achieving this goal. This section offers the West Virginia Consumer Credit and Protection Act's fee-shifting provisions as an adequate basis for new legal reforms. Section D argues that fee-

183 *See, e.g.*, Quicken Loans, Inc. v. Brown, 737 S.E.2d 640 (W. Va. 2012) (plaintiff borrower in interest brought a successful claim against lender for fraud and unconscionable contracts under the West Virginia Consumer and Credit Protection Act).

184 See, for example, Mountain State Justice's shared success stories at MOUNTAIN ST. JUST., *supra* note 177.

shifting provisions can supplement regulatory reforms and unite the interests of the government, students, and loan servicers. Lastly, this Note concludes by examining the disadvantageous possibilities that could threaten the consumer market if proper legal action is not taken.

A. The CFPB's 2015 Report Rightfully Recommends Increasing Legal Accountability for Servicers

As illustrated in Part II of this Note, a significant critique of the current student loan servicing market is that "there is no existing, comprehensive federal statutory or regulatory framework providing consistent standards for the servicing of all student loans."[185] Instead, federal student loans are regulated separately from private loans, under regulations provided by the Department of Education, as authorized by the HEA.[186] Under these regulations, student loan borrowers who used federal loans have access to mitigation plans such as Income-Based Repayment and Pay As You Earn options, which are not provided to private loan borrowers.[187] Despite these plans, recent research indicates that major issues remain within federal student loans because, even though required to do so, "[b]orrowers may not be informed" from servicers about "basic information about [these] alternative repayment plans."[188] Most importantly, however, research confirms that federal student loan borrowers are not immune to the servicing failures that also plague private student loan borrowers, are often not enrolled in correct repayment plans because of processing errors,[189] and can encounter costly delays when attempting to provide necessary information to update their plans.[190]

In the 2015 Report released after the CFPB's Call for Comments and investigation,[191] the CFPB confirmed that "the respective loan types come with varying levels of consumer protections and special benefits," but that all student loans need stronger servicing protections.[192] The report's conclusion was that there are four areas where servicing guidelines could be substantially improved, and these "goals" should be the focus of the CFPB, Department of Education, and other agencies to strengthen protections for all student loan borrowers.[193]

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185 2015 REPORT, *supra* note 21, at 103.

186 *Id.* at 21.

187 *Id.* at 22.

188 *Id.* at 25.

189 *Id.* at 28.

190 *Id.* at 30–31.

191 *See supra* Part II.C.2.

192 2015 REPORT, *supra* note 21, at 150.

193 *Id.* at 150–51.

First, the CFPB recommends that new guidelines are needed, guidelines that describe appropriate servicing consistently and that articulate a "clear set of expectations for what constitutes minimum requirements for services."[194] Second, information provided to borrowers must be "accurate and actionable"—the information must be correct and "presented in a manner that best informs borrowers, helps them achieve possible outcomes, and mitigates the risk and cost of default."[195] Third, the entire system of student loan servicing must become more transparent, so that "[t]he public, including student loan borrowers, may benefit from information about the performance of private and federal loans and the practices of individual student loan lenders and servicer[s.]"[196]

Most importantly, the report suggests that servicing guidelines must provide more accountability.[197] The report acknowledges that, in order for other changes to be effective and to adequately address the identified problems in student loan servicing, "borrowers, federal and state agencies and regulators, and law enforcement officials should have access to appropriate channels for recourse[.]"[198] Presumably, this would begin with identifying and structuring a regulatory scheme that would set forth specifically the requirements of servicers and that would provide guidelines for agencies, law enforcement, and borrowers to identify sub-standard activities and seek correction. Given the findings of the CFPB's investigations, this is an apt recommendation.

In light of the regulatory successes that accompanied servicing reform in the mortgage sector, which the CFPB has indicated would be an ideal model to utilize for student loan servicing reform, increasing accountability through more specific statutory and regulatory control may not be sufficient. Such statutes would be meaningless if companies were not strictly required to conform, and the current CFPB regulatory enforcement and complaint process is not sufficient to address each individual challenges and provide individual relief to borrowers in the most serious situations.

B. Current CFPB Regulatory Enforcement and Complaint Process Is Inadequate to Provide Individual Relief for All Complainants

The CFPB markets itself as "a 21st century agency that helps consumer finance markets work by making rules more effective, by consistently and fairly enforcing those rules, and by empowering consumers."[199] Under CFPB regulations, loan servicers are obligated to investigate and correct errors alleged

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194 *Id.* at 150.

195 *Id.*

196 *Id.* at 151.

197 *Id.*

198 *Id.*

199 *About Us*, CONSUMER FIN. PROT. BUREAU, www.consumerfinance.gov/the-bureau/ (last visited Nov. 4, 2016).

by borrowers,[200] to provide information to borrowers,[201] and to protect borrowers with industry-specific relief programs.[202] Servicers must provide information about loss mitigation to borrowers and establish programs that facilitate communications with delinquent and distressed borrowers at risk of default.[203]

When servicers fail to perform these tasks, the CFPB's approach to resolving problems[204] is lengthy and bureaucratic; it begins when borrowers submit a complaint to the CFPB, which is logged and then forwarded to the offending company. The CFPB allows the company to respond to the allegation with any defenses or explanations and, if it receives a response that is in some way concerning, the CFPB forwards the response to any other agency that may be implicated.[205] The servicing company is given time to review the complaint, investigate its cause, and communicate with the borrower to resolve the issue.[206] In an ideal world, the servicer will correct its mistake or sufficiently communicate with the borrower to determine and resolve the issue, and then will inform the CFPB of the steps that have been taken and the resolution that has been reached.[207] After this idealistic resolution, the complaint is published on the CFPB's Consumer Complaint Database, where the public can review all problems reported to the CFPB related to that company. After the company's response, the complainant is notified and given the opportunity to "review the response" and provide feedback to the CFPB.[208]

The problem with this system of complaint resolution is that it assumes compliance and adequate responses from all parties involved—and, given the recent investigations and identification of widespread servicing errors, this is not a realistic solution for all borrowers. Research shows that servicing companies are committing errors on a wide scale, and, currently, CFPB regulators have not been able to sufficiently curtail these abuses. The system is one that is better suited to larger, collective actions, but these require a significant number of complaints before large-scale action is taken. This interpretation is evidenced by a 2015 CFPB decision that instituted a $2.5 million penalty against Discover Bank for servicing errors and required Discover to refund $16 million to student

200 12 C.F.R. § 1024.35 (2016).

201 *Id.* § 1024.36.

202 *See generally* HELP FOR STRUGGLING BORROWERS, CONSUMER FIN. PROT. BUREAU (2013) http://files.consumerfinance.gov/f/201312_cfpb_mortgages_help-for-struggling-borrowers.pdf.

203 *About Us*, *supra* note 199; *see generally* 12 C.F.R. § 1024.41 (2016).

204 *See supra* Part II.C.1 for discussion of the CFPB complaint system.

205 *About Us*, *supra* note 199. *See generally Submit a Complaint*, CONSUMER FIN. PROT. BUREAU, www.consumerfinancial.gov/complaint (last visited Nov. 3, 2016).

206 *Id.*

207 *Id.*

208 *Id.*

loan borrowers.[209] While that result is a significant step in that it shows that the CFPB is holding student loan servicers to a high bar of service, such a decision has less impact on each individual borrower, who may have suffered under poor servicing for a lengthy period of time. While the CFPB has shown a willingness to punish servicers whose errors negatively impact large communities of borrowers, the individual effects for a borrower in distress would not be immediate. Instead, only after an incredible number of errors illustrated a widespread problem with servicing by Discover Bank did the CFPB issue a large punitive verdict.

While the CFPB believes that its current system of "[c]omplaints help . . . to supervise companies, enforce federal consumer financial laws, and write better rules and regulations," as well as provide information to Congress about issues that consumers experience, the system offers no adequate methods under the current structure of enforcing individual relief for borrowers that experience unconscionable servicing.[210] Instead, the system assumes adequate responses to individual issues or, in the alternative, passes along the issue to any other applicable agency. The system, therefore, is best attuned to provide relief on a large scale, which, while an important step, does not provide borrowers with specific, immediate, individual relief.

C. Accountability and Individual Challenges Through State Fee-Shifting Structures Is an Important Next Step in Student Loan Servicing Reform

Student loan servicers have always been required to comply with state and federal laws, including federal consumer financial laws.[211] Despite this, problems have grown in student loan servicing even though many other consumer markets have rebounded following the economic recession.[212] The CFPB's Call for Comments[213] and subsequent report confirms the growing fear that "current servicing practices may not meet the needs of borrowers or loan holders . . . [or] taxpayers."[214] In order for success in student loan servicing reform to be effective, regulators must realize that in the CFPB's model market, mortgage loan servicing, change was not effectuated entirely by regulatory changes. It was a combination of factors that led to the success of that model, and the contributing effects of individual challenges under state laws should not be overlooked.

209 *The Complaint Process*, *supra* note 106.

210 *Id.*

211 2015 REPORT, *supra* note 21, at 11–12.

212 *Id.* at 8.

213 *See generally* REQUEST FOR INFORMATION, *supra* note 111.

214 2015 REPORT, *supra* note 21, at 12.

While increased regulation in response to mortgage crisis focused on "certain mortgage servicing practices [that created] a significant source of distress" for homeowners,[215] CFPB and agency action were not the only ways that homeowners asserted their rights, challenged practices, and regained control of their homes. In many instances, homeowners, empowered by qualified advocates, challenged the servicers, holders, and originators of their loans independently in court, and those challenges were an extra-regulatory part of the effectiveness of the mortgage regulation revisions as well as a way that borrowers were able to receive relief. The CFPB's suggestion of increasing accountability[216] is one that should be a primary focus of impending reforms, and one that, given the past success of the mortgage loan servicing market, must be supplemented with strong state consumer protection statutes, accompanied by strong fee-shifting provisions, which are broadly interpreted and enforced.

1. Fee-Shifting Provisions Support Meaningful Challenges

Each state has its own form of Unfair and Deceptive Acts and Practices ("UDAP") statutes, commonly known as consumer provisions, which are the "main lines of defense protecting consumers from predatory, deceptive, and unscrupulous business practices."[217] These state statutes complement and overlap federal laws.[218] Consumer advocates believe that these protections are the "bedrock protections for consumers."[219] Unfair, unconscionable, or deceptive practices—practices that are illegal under regulatory structures—can extend to "billions of transactions" affecting consumers and should "provide the main protection . . . against predators and unscrupulous businesses."[220] Given the government's prohibition against discharge of student loan debt, it is of extra-importance for student loan holders and servicers to be held to the highest standards; any deception, costly error, or unscrupulous practice is an extreme disadvantage to student loan borrowers. Student loan borrowers, who are unable to obtain the "fresh start" that is provided in bankruptcy discharge, are a

215 *Id.*

216 *Id.* at 151.

217 CARTER, *supra* note 177, at 3.

218 See, for example, Truth in Lending Act section 1640, which provides that creditors who violate any requirement imposed by the Truth in Lending Act are liable to the consumer for the total of all damages, including actual damages, statutory damages for violations of certain provisions, court costs and attorney's fees, and the sum of all fees and finance charges paid for the high-cost loan. *See* Robin P. Myers, *Consumer Damages and Remedies for Truth in Lending Act and Regulation Z Violations*, FED. RES. BANK PHILA., https://www.philadelphiafed.org/bank-resources/publications/compliance-corner/2006/fourth-quarter/q4cc1_06 (last visited Nov. 6, 2016).

219 CARTER, *supra* note 177, at 5.

220 *Id.*

vulnerable population who are "stuck" with their student loan debt, regardless of the effectiveness of servicing activity, and therefore require the strictest standards and highest levels of protection throughout the entire life of their loans.

Although the CFPB considers itself a "cop on the beat," the agency's first enumerated goal is to "make sure consumers have the information they need to choose the consumer financial products and services that are best for them."[221] The success stories listed on the CFPB website illustrate how complaints have raised awareness of issues to increase regulation, and do not describe how the CFPB has achieved "justice" or has otherwise "fixed" the problems that the profiled consumers have experienced, nor how those consumers may have been otherwise compensated.[222] Added protections in the form of strong state consumer laws, applicable to student loan borrowers and accompanied by broadly interpreted fee-shifting provisions are needed in order to effectuate individual relief and lasting change.

2. Not All Consumer Statutes Are the Same

While a majority of states has consumer protection statutes, the National Consumer Law center has commented that "in almost all states significant gaps or weaknesses undermine the promise of UDAP protections for consumers."[223] The effectiveness of UDAP and other consumer law statutes has a wide variance from state to state,[224] a problem that would be increasingly frustrating in student loan situations, where federal diversity jurisdiction[225] and a gateway to federal court may not be available when debts are less than $75,000.

Most problematically, perhaps, the National Consumer Law Center has identified a substantial problem in states where "the financial deck [is stacked] against consumers who go to court to enforce the law themselves[]" due to the absence or limited application of fee-shifting statutes.[226] In every state except Iowa, which does not allow consumers to proceed in court to enforce UDAP provisions, consumers have the ability to pursue adversary proceedings to enforce statutes and regulations that determine appropriate business practices.[227] In Arizona, Delaware, Mississippi, South Dakota, and Wyoming, consumers are not able to recover their attorneys' fees at all.[228] Unbelievably, Alaska's UDAP

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221 *The Bureau*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/about-us/the-bureau/ (last visited Nov. 8, 2016).

222 *Id.*

223 CARTER, *supra* note 177, at 3.

224 *Id.*

225 28 U.S.C. § 1332 (2012).

226 CARTER, *supra* note 177, at 3.

227 *Id.*

228 *Id.*

statute institutes a *requirement* that unsuccessful consumers pay partial attorneys' fees to businesses, and in several other states, UDAP statutes have not been "authoritatively interpreted to rule out this result."[229] Indeed, "special procedural obstacles on consumers" under these statutory provisions "can hinder or even prevent them from enforcing [the consumer statute]."[230]

i. Effective Statutes Must Include Broad Definitions

In order to provide adequate protection to student loan borrowers and other consumers, UDAP statutes must include broad definitions of unfairness, deception, and unconscionable practices, and the National Consumer Law Center has specified that effective statutes must specifically include provisions that extend not only to deceptive acts, but also to unfair acts.[231] These statutes must also have a broad scope of application and must not be worded in such a way "that the statute appears to prohibit unfairness and deception but actually applies to few businesses[.]"[232] In order to provide effective and long-lasting reforms in the student loan market, accountability must be a priority. These UDAP statutes must be broad enough to cover student loan servicers and must include references to the regulatory provisions that define appropriate servicing activity. While these statutes are a matter of individual state legislation, government and agencies must encourage the passage of such provisions in order to provide widespread and meaningful protection to student loan borrowers and to provide reasonable structure and enforcement for student loan servicers.

ii. Attorneys' Fees Must be Broadly Awarded

A major critique of fee-shifting statutes is that there is a great deal of judicial discretion in the decision of whether or not to award fees.[233] Scholars have remarked that this system of discretion undermines the principles behind fee shifting and that such "discretionary denial[s] . . . [are] unwarranted once the decision has been made to grant . . . relief."[234] If the rationale behind fee-shifting is to deter behavior, the system, on its face, supports mandatory awards, "or at least gives reason to make the standard for the exercise of discretion lean strongly in the direction of not denying a shift."[235] Indeed, the Supreme Court has noted

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.*

233 Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 669.

234 *Id.* at 670.

235 *Id.*

that shifting is always appropriate in favor of plaintiffs who prevail in civil rights cases where statutes provide for that relief "unless special circumstances would render such an award unjust."[236] Therefore, in addition to the need for individual state consumer protections, which extend to student loan borrowers and student loan servicers, the judiciary must be encouraged to award attorneys' fees in such a way that makes these provisions meaningful and makes them a sufficient deterrent for unconscionable and illegal servicing activity.

3. West Virginia's Consumer Credit Protection Act: An Example

Because of the varying UDAP and consumer statutes and the different degrees of protection offered to consumers based on their geographic location, a strong universal provision that is part of student loan reforms is necessary to protect consumers and to enact lasting change in the student loan market. West Virginia's provision under the Consumer Credit and Protection Act[237] contains language that would be a beneficial starting point, and the success of this provision in the mortgage servicing industry has already been vetted.[238] The statute provides that if a claim is brought under applicable law, the court may award "all or a portion of the costs of litigation, including reasonable attorney fees, court costs and fees, to the consumer."[239] The statue also provides that, should the court find that "a claim brought under this chapter . . . was brought in bad faith and for the purposes of harassment[,]" then the court "may award to the defendant reasonable attorney fees."[240]

The bare bones of this statue are strong enough to serve the interests of the government, servicers, and borrowers. Borrowers, who are held to a very high bar when seeking to discharge their student loan debt in bankruptcy, have an interest in making sure that their loans are serviced properly. It also provides protections for servicing companies, which have the opportunity to collect their own attorneys' fees from borrowers who would seek to utilize the adversarial system for the purpose of harassment or otherwise to bring claims without merit. However, such a provision should only be used in the most egregious circumstances—certainly the mere fact that a borrower would not prevail on his or her action should not be enough to require attorneys' fees—as such, a provision would undermine the purpose of fee-shifting structures to encourage lawful behavior by providing a way for wronged borrowers to challenge meaningful claims in court.

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236 Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416–17 (1978) (quoting Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968)).

237 *See* W. VA. CODE ANN. § 46A-1-101 et seq. (West 2016).

238 *See, e.g.*, *Mortgage Abuses*, MOUNTAIN ST. JUST., http://www.mountainstatejustice.org/our-work/mortgage-abuses/ (last visited Nov. 3, 2016).

239 W. VA. CODE ANN. § 46A-5-104 (West 2016).

240 *Id.*

Given the recent reports of servicing errors and their effect on borrowers, particularly those in distress,[241] accountability in the form of adversarial regulations that proscribe servicing behavior and that apply across the board to all student loans should be a part of any reform system. Further, in order to provide a way that these borrowers can challenge under these accountability provisions, fee-shifting provisions should be included in borrowing contracts and regulatory schemes, so that all borrowers can have the opportunity to bring meaningful challenges, which provide for individual relief.

D. Fee-Shifting Structures to Supplement Regulatory Reforms Serve the Interests of the Government, Students, and Servicers

Challenges brought in state courts against companies that service student loans also serve the government's interest to see the repayment of student loans and to make sure that borrowers are not victimized by costly errors. Fee-shifting provisions serve the government's interest by supporting the high bar of discharge for student loans while making sure that borrowers remain adequately protected from poor servicing practices.

Servicing companies are also served through the implementation of this provision. While the provision is discretionary, it should be noted that the award of attorneys' fees is the way that challenges will be funded and, therefore, as the Supreme Court has said, fees should generally be offered to prevailing parties.[242] However, the West Virginia example statute includes an exception and opportunity for reversal for those borrowers who attempt to abuse the system and bring bad-faith claims.[243] The deterrent effect would apply across the entire servicing market as well, and so servicers who do comply with the law would have the added benefit of seeing an increase in the overall effectiveness and public opinion of their profession.

E. Consequences of Failing to Act

Failing to supplement borrower protections with adequate consumer protection statutes and broadly-applied fee-shifting provisions is not one that will make or break proposed regulatory reform. Indeed, improvement in this area of state law would not have any reciprocal impact on the federal regulations. It would, however, have a marked impact on individual borrowers, who would be

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241 *See generally* 2015 REPORT, *supra* note 21.

242 *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416–17 (1978) (quoting Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968)); *see also supra* note 236 and accompanying text.

243 W. VA. CODE ANN. § 46A-5-104 (West 2016) ("On a finding by the court that a claim brought under this chapter applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice was brought in bad faith and for the purposes of harassment, the court may award to the defendant reasonable attorney fees.").

a faceless body in thousands of potential complaints logged with the CFPB.[244] While the CFPB's current complaint resolution process is adequate, it does not provide the same immediate, adversarial relief as strong consumer statutes.

Also, unfortunately, there appear to be no numbers, which indicate the impact that consumer protection statutes with fee-shifting provisions had on the mortgage industry. But the presence of consumer activist law firms dedicated to this very issue and funded through this very way is sufficient to indicate that the effect is not negligible. While some may argue that the effort needed to create, maintain, and amend consumer protection statutes to cover student loan borrowers and servicing complaints is greatly outweighed by the potential benefits, such critics should be reminded of two facts: there are 40 million student loan borrowers in the United States,[245] and those borrowers have undertaken a burden, in hopes of individual success, that Congress has exempted from the "fresh start" relief of bankruptcy discharge.[246]

III. CONCLUSION

As this Note has shown, the high bar that accompanies student loan discharge in bankruptcy creates a vulnerable population of student loan borrowers that are susceptible to frustrating and costly loan servicing errors. While regulators are investigating ways to increase protections through increased oversight, these provisions will not provide adequate individual relief. By identifying the successes of the mortgage servicing reforms, including fee-shifting provisions in consumer protection statutes, it is clear that to completely protect borrowers, consumer protection statutes must be expanded to include student loan borrowers, must include strong fee-shifting provisions, and must be broadly interpreted by courts.

Denise Bronson[247] was part of the lucky (or most unlucky) few; her circumstances were so unfortunate that to prevent her from having a "fresh start" would be to impose an undue burden which would unconscionably reduce her standard of living. Denise's student loan debt was discharged. For a majority of student borrowers, however, student loan debt is real and, regardless of how individual careers play out, lasting. Because of this, student loan servicers must be held to the strictest of standards in servicing, and must be quickly and efficiently policed when their activities fall below that standard. To protect the

244 The CFPB reports that in 2015 approximately 7,500 student loan complaints were received, and 60% of those complaints were about servicers, including getting information about accounts and making payments. CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 34 (2015), http://files.consumerfinance.gov/f/201511_cfpb_semi-annual-report-fall-2015.pdf.

245 CFPB Launches Public Inquiry, *supra* note 17.

246 *See* Zackerman, *supra* note 57, at 691.

247 *See supra* notes 1–16 and accompanying text for Denise Bronsdon's story.

40 million student loan borrowers,[248] any loopholes must be tightened. To protect borrowers, state consumer protection statutes must include fee-shifting provisions whereby borrowers can enforce high servicing standards and engage immediate and adequate relief.

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248 CFPB Launches Public Inquiry, *supra* note 17.

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