



3-1-2018

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Recommended Citation

Sean R. Whelehan, *Tying Fiduciary Duties to Student Loans: One Small Step Out of the Massive Debt*, 22 N.C. BANKING INST. 209 (2018).

Available at: <http://scholarship.law.unc.edu/ncki/vol22/iss1/13>

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Tying Fiduciary Duties to Student Loans: One Small Step Out of the Massive Debt

I. INTRODUCTION

Student loans have become such an overpowering form of debt for Americans that some have referred to the current generation of students as the “Indentured Generation.”¹ In fact, it may be difficult to walk down a city street without passing someone who has not had to deal with such trials and tribulations, as over 44 million Americans collectively owe upwards of \$1.3 trillion in student loan debt.² This makes for an average of nearly \$30,000 per individual borrower.³ This staggering number accounts for the second highest consumer debt category in the country, second only to mortgages.⁴ Moreover, it is estimated that about one in four of the 44 million borrowers are either in default or struggling to stay current on their loans.⁵ Student loan debt can be especially shackling, as it may prevent borrowers from buying homes or even starting families.⁶ Indeed, many Americans will be indebted for

1. Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 330–31 (2013).

2. *2017 Student Loan Debt Statistics*, STUDENT LOAN HERO (Aug. 7, 2017), <https://studentloanhero.com/student-loan-debt-statistics/>.

3. CONSUMER FIN. PROT. BUREAU, *STUDENT LOAN SERVICING: ANALYSIS OF PUBLIC INPUT AND RECOMMENDATIONS FOR REFORM 8* (Sept. 2015), http://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf [hereinafter *STUDENT LOAN SERVICING*].

4. Zack Friedman, *Student Loan Debt in 2017: A \$1.3 Trillion Crisis*, FORBES (Feb. 21, 2017, 7:45 AM), <https://www.forbes.com/sites/zackfriedman/2017/02/21/student-loan-debt-statistics-2017/#5802b3075dab>.

5. Shahien Nasiripour, *Student Debt Giant Navient to Borrowers: You're on Your Own*, BLOOMBERG (Apr. 3, 2017, 4:00 AM), <https://www.bloomberg.com/news/articles/2017-04-03/student-debt-giant-navient-to-borrowers-you-re-on-your-own>.

6. See Chris Ciciora, *Student Loan Debt for the Millennial Generation and Ineffectiveness of the Federal Student Loan Program*, 50 J. MARSHALL L. REV. 139, 139–40 (2016) (“Student loans cause borrowers to put off financial or personal milestones. Some of these milestones include marriage and having kids.”); see also Eric Pianin, *5 Alarming Facts About America's \$1.3 Trillion in Student Debt*, BUSINESS INSIDER (Apr. 4, 2017, 8:41 PM), <http://www.businessinsider.com/americas-student-loan-debt-facts-2017-4> (“Those with significant student debt are much less likely to own a home at any given age than those who completed their education with little or no student debt.”).

life due to the near inability to discharge student loans through bankruptcy.⁷

Of course, dealing with student loan debt can be taxing, but it has become apparent that borrowers may be battling more than just their debt.⁸ A recent lawsuit filed January 18, 2017 by the Consumer Financial Protection Bureau (“CFPB” or “the Bureau”) alleged that Navient Corporation (“Navient”), the nation’s largest servicer of student loans, engaged in “unlawful acts and practices in connection with [its] servicing and collection of student loans.”⁹ This lawsuit raises the question of whether, and to what extent, student loan borrowers are entitled to protection from servicers.¹⁰ Currently, the CFPB “enforce[s] Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that [those markets] are fair, transparent, and competitive.”¹¹ However, with 44 million Americans dealing with student loan debt,¹² there is only so much the CFPB can do.¹³ Instead, consistent standards and regulations should be imposed on student loan servicers to protect borrowers from being exploited and forced to make excessive payments on their loans.¹⁴

This Note proceeds in five parts. Part II provides background information on the CFPB and its current lawsuit against Navient.¹⁵ Part III presents legal arguments for and against servicers owing a fiduciary obligation to student loan borrowers.¹⁶ Part IV discusses the need for consistent standards in the student loan market, as well as potential

7. Austin, *supra* note 1, at 331.

8. See Complaint for Permanent Injunction and Other Relief, Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-cv-00101 (M.D. Pa. Jan. 18, 2017) (accusing a major student loan servicer of deceptive and unfair practices in their servicing of student loans).

9. *Id.*

10. See *id.*; see also Motion to Dismiss, Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-cv-00101 (M.D. Pa. Mar. 24, 2017) (comparing the opposing arguments as to what duties and how much protection servicers owe to borrowers).

11. 12 U.S.C. § 5511(a) (2016).

12. 2017 Student Loan Debt Statistics, *supra* note 2.

13. See *infra* Part IV.A.

14. See STUDENT LOAN SERVICING, *supra* note 3, at 5 (“Industry commenters, including the two largest participants in the student loan servicing market, identify certain student loan servicing practices where there is significant diversity in the marketplace and suggest that policymakers require consistent approaches to common servicing functions . . .”).

15. See *infra* Part II.

16. See *infra* Part III.

alternative standards and regulations to a fiduciary obligation.¹⁷ Part V concludes by advocating for a fiduciary duty, or some alternative regulation, to be consistently implemented across all types of student loans for the benefit of both borrowers and servicers.¹⁸

II. THE CONSUMER FINANCIAL PROTECTION BUREAU AND NAVIENT

The CFPB was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”), and is granted supervisory authority over non-depository institutions, including mortgage and private education lenders, as well as other institutions offering consumer financial products or services.¹⁹ The Bureau also has supervisory authority over any covered person²⁰ who, based on complaints or other information from sources, it has reason to believe is “engaging, or has engaged, in conduct that poses risks to consumers with respect to the offering or provision of consumer financial products or services.”²¹ Finally, the Bureau may take action “to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice,” as it relates to consumer financial products or services.²²

In January 2017, the CFPB exercised its enforcement authority by bringing suit against Navient Corporation, formerly part of Sallie Mae—currently the largest student loan servicer²³ in the United States²⁴—and its subsidiaries, Navient Solutions, Inc. and Pioneer Credit

17. *See infra* Part IV.

18. *See infra* Part V.

19. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) §6, 12 U.S.C. §§ 5491, 5514(a)(1) (2016).

20. A covered person is defined as “any person that engages in offering or providing a consumer financial product or service; and any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person.” 12 U.S.C. § 5481(6) (2016).

21. 12 U.S.C. § 5514(a)(1)(c) (2016).

22. 12 U.S.C. § 5531(a) (2016).

23. A “loan lender” is the institution that originates the loan, or the one that allows one to borrow money, while a “loan servicer” is a third-party company the lender contracts with to oversee the repayment plan of the loan. Kali Hawlk, *Student Loan Servicing Explained: The Difference Between Your Servicer and Lender*, STUDENT LOAN HERO (June 21, 2016), <https://studentloanhero.com/featured/student-loan-servicing-explained-difference/>.

24. CONSUMER FIN. PROT. BUREAU, CFPB SUES NATION’S LARGEST STUDENT LOAN COMPANY NAVIENT FOR FAILING BORROWERS AT EVERY STAGE OF REPAYMENT (Jan. 18, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment/> [hereinafter FAILING BORROWERS].

Recovery, Inc., for what the Bureau claims are “unlawful acts and practices in connection with [Navient’s] servicing and collection of student loans.”²⁵ The lawsuit claims that Navient failed to correctly apply or allocate borrower payments to borrowers’ accounts, steered struggling borrowers into paying more than required on loans, obscured information necessary for borrowers to maintain lower payments, deceived private student loan borrowers about requirements to release any co-signer from the loan, and severely harmed the credit of disabled borrowers, including severely injured veterans, by misreporting that borrowers were in default when they were not.²⁶ If true, these allegations should, at the very least, raise some questions and concerns about loan servicing behavior.

More specifically, Navient is being accused of practices such as repeatedly misapplying or misallocating payments when borrowers began paying back their loans, often making the same error multiple times.²⁷ When struggling borrowers sought to gain access to income-driven payment plans that would allow for extended payment relief and other significant benefits,²⁸ Navient allegedly steered many borrowers into forbearance instead,²⁹ which can dramatically increase the total amount due per period of the loan.³⁰ Borrowers in an income-driven repayment plan need to recertify annually, but Navient allegedly failed to adequately inform those borrowers of deadlines or obscured necessary

25. Complaint for Permanent Injunction and Other Relief at 2, Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-cv-00101 (M.D. Pa. Jan. 18, 2017).

26. FAILING BORROWERS, *supra* note 24.

27. Complaint for Permanent Injunction and Other Relief at 39–43, *Navient*, No. 3:17-cv-00101 (M.D. Pa. Jan. 18, 2017); FAILING BORROWERS, *supra* note 24.

28. Under income-driven repayment plans, a borrower’s monthly payments are capped at a certain percentage of the borrower’s discretionary income. This allows for smaller monthly payments over *longer periods of time* than a borrower would pay under a standard plan. Kat Tretina, *Is an Income-Driven Repayment Plan the Best Choice for You?*, STUDENT LOAN HERO (Sept. 13, 2016), <https://studentloanhero.com/featured/income-driven-repayment-plan-think-twice/>.

29. Forbearance may allow a borrower to reduce or postpone monthly payments for up to twelve months. This system is designed to benefit borrowers dealing with *short-term* emergency situations by allowing the borrower relief while they work on getting back on track. The issue with forbearance, however, is that interest continues to accrue on the loan while the borrower is in forbearance, which can add to the cost of the loan. Since the system is designed for short-term relief, it can be problematic for a borrower who has more long-term problems. *Id.*

30. Complaint for Permanent Injunction and Other Relief at 12–23, *Navient*, No. 3:17-cv-00101 (M.D. Pa. Jan. 18, 2017); FAILING BORROWERS, *supra* note 24.

information.³¹ Borrowers were told they could apply for co-signer release if they made a certain number of consecutive payments, however, Navient allegedly reset the counter on the number of consecutive payments made so borrowers applying for co-signer release were denied and had to start over.³² Finally, permanently disabled borrowers with federal student loans, including veterans, have the right to seek forgiveness, but Navient allegedly misreported that borrowers who had their loans discharged under this program had defaulted, potentially damaging their credit.³³

This was not simply an isolated incident, as the CFPB reported that between March 1, 2016 and February 28, 2017, consumer complaints were submitted against more than 320 companies, including “student loan servicers, debt collectors, private student lenders, and companies marketing student loan ‘debt relief.’”³⁴ In fact, the CFPB saw a 325% increase in complaints against servicers during the same twelve-month period.³⁵ In addition to Navient, servicing companies such as Pennsylvania Higher Education Assistance Agency, Nelnet, Great Lakes Higher Education Corporation, and others also received a significant number of complaints.³⁶ The five issues about which there were the most complaints during this period were: (1) borrower communication, (2) income-driven repayment plan enrollment, (3) payment allocation, (4) public service loan forgiveness, and (5) payment processing.³⁷

Following the complaint filed by the CFPB, Navient subsequently filed a motion to dismiss³⁸ which was denied by the United States District Court for the Middle District of Pennsylvania.³⁹ The motion to dismiss did, however, raise a significant question: should a fiduciary duty exist on behalf of servicers upon which borrowers can

31. Complaint for Permanent Injunction and Other Relief at 23–31, *Navient*, No. 3:17-cv-00101 (M.D. Pa. Jan. 18, 2017); *FAILING BORROWERS*, *supra* note 24.

32. Complaint for Permanent Injunction and Other Relief at 34–39, *Navient*, No. 3:17-cv-00101 (M.D. Pa. Jan. 18, 2017); *FAILING BORROWERS*, *supra* note 24.

33. Complaint for Permanent Injunction and Other Relief at 31–34, *Navient*, No. 3:17-cv-00101 (M.D. Pa. Jan. 18, 2017); *FAILING BORROWERS*, *supra* note 24.

34. CONSUMER FIN. PROT. BUREAU, MID-YEAR REPORT 6 (June 2017), http://files.consumerfinance.gov/f/documents/201706_cfpb_PSLF-midyear-report.pdf.

35. *Id.*

36. *Id.* at 13.

37. *Id.* at 12.

38. Motion to Dismiss, *Navient*, No. 3:17-cv-00101 (M.D. Pa. Mar. 24, 2017).

39. Memorandum Opinion at 60, *Navient*, No. 3:17-cv-00101 (M.D. Pa. Aug. 4, 2017) (denying Navient’s motion to dismiss).

“reasonably rely on [a student loan servicer] to counsel them about their many options?”⁴⁰

III. FIDUCIARY OBLIGATIONS

A fiduciary is “someone who is required to act for the benefit of another person on all matters within the scope of their relationship.”⁴¹ In common law, the term has generally come to be defined as “an agent who is required to treat his principal with utmost loyalty and care—treat him, indeed, as if the principal were himself.”⁴² It follows, then, that student loan borrowers would want servicers to owe a fiduciary obligation because this would relieve some of the work and pressure of keeping up with the loans. Servicers, however, would want student loans to work like any other loan, where both sides are assumed competent and work at arms-length.⁴³

A. *Arguments for Servicers Owing a Fiduciary Obligation to Student Loan Borrowers*

The first argument for servicers owing a fiduciary duty to student loan borrowers is a combination of statutory interpretation and contractual estoppel.⁴⁴ The Consumer Financial Protection Act makes it “unlawful for . . . any covered person or service provider . . . to engage in any unfair, deceptive, or abusive act or practice.”⁴⁵ The terms “unfair” and “deceptive” have been interpreted either in this statute,⁴⁶ or in other similar statutes where courts have adopted and applied the interpretation

40. Nasiripour, *supra* note 5 (quoting Navient CEO Jack Remondi’s response to the CFPB’s lawsuit).

41. *Fiduciary*, BLACK’S LAW DICTIONARY (10th ed. 2014).

42. Pohl v. Nat’l Benefits Consultants, Inc., 956 F.2d 126, 128–29 (7th Cir. 1992) (citing Mkt. St. Associates Ltd P’ship v. Frey, 941 F.2d 588, 593 (7th Cir. 1991)).

43. *See, e.g.*, Spencer v. DHI Mortg. Co., 642 F.Supp.2d 1153, 1160–61 (E.D. Cal. 2009) (“DHI Mortgage correctly notes the absence of an actionable duty between a lender and borrower in that loan transactions are arms-length and do not invoke fiduciary duties.”).

44. The notion of this combination was first put forth in the Middle District of Pennsylvania’s Memorandum Opinion denying Navient’s Motion to Dismiss. Memorandum Opinion at 44–47, *Navient*, No. 3:17-cv-00101 (M.D. Pa. Aug. 4, 2017).

45. 12 U.S.C. § 5536(a)(1)(B) (2016).

46. 12 U.S.C. § 5531(c)(1) (2016) (defining “unfairness” as “[an] act or practice [that] causes or is likely to cause substantial injury to consumers which is not reasonable avoidable by consumers; and such substantial injury is not outweighed by countervailing benefits to consumers or to competition”).

to the language in this statute.⁴⁷ The term “abusive,” however, is arguably the most important in this situation, and is defined under the statute as any act or practice that, *inter alia*, “takes unreasonable advantage of . . . the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.”⁴⁸ This is in essence the contractual concept of promissory estoppel.⁴⁹ It is important to note that the requisite “promise” here does not need to be explicit, but rather can be implied by language or other conduct.⁵⁰ Thus, if a servicer, either through statements or conduct, creates a “reasonable reliance by the consumer” that it will act “in the interest of the consumer,” it cannot then take unreasonable advantage of that reliance.⁵¹

Since Navient is the nation’s largest servicer of student loans,⁵² and currently involved in litigation concerning this particular practice,⁵³ it is the ideal candidate to use as illustrative evidence here. Navient’s website is littered with statements urging borrowers to reach out if they are experiencing problems, asserting that the corporation has the resources and expertise to help borrowers “achieve financial success” and

47. *See id.* (discussing the meaning of deceptive and unfair practices); *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1193 n.7 (adopting the definition given to “deceptive act or practice” under the Federal Trade Commission Act (15 U.S.C. § 45(a)) as applicable to the language in 12 U.S.C. § 5536(a)(1)(B)); *see also* 15 U.S.C. § 45(a) (2016) (defining “unfair or deceptive acts or practices” as acts or practices involving foreign commerce that “cause or are likely to cause reasonably foreseeable injury within the United States; or involve material conduct occurring within the United States”).

48. 12 U.S.C. § 5531(d)(2)(C).

49. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (“A promise which the promisor should reasonable expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”).

50. *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 534 (5th Cir. 2000) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. a) (“[J]ust as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances . . .”).

51. *See* Memorandum Opinion at 19, *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 3:17-cv-00101 (M.D. Pa. Aug. 4, 2017) (“Navient’s alleged practice is abusive under the CFP Act if Navient took unreasonable advantage of a borrower’s reasonable reliance that Navient would act in the borrower’s interest.”).

52. *See* David Scheer, *JPMorgan to Sell \$6.9 Billion of Student Loans to Navient*, BLOOMBERG (Apr. 18, 2017, 4:33 PM), <https://www.bloomberg.com/news/articles/2017-04-18/navient-agrees-to-buy-6-9-billion-of-student-debt-from-jpmorgan> (discussing how the Navient, “the largest servicer of student loans in the U.S.,” has just agreed to buy a \$6.9 billion portfolio of student loans from JPMorgan Chase & Co.).

53. *See* Complaint for Permanent Injunction and Other Relief, *Navient*, No. 3:17-cv-00101 (M.D. Pa. Jan. 18, 2017) (alleging Navient has been or continues to be involved in practices in violation of 12 U.S.C. § 5531(d)).

“make the right decision for [their] situation.”⁵⁴ Furthermore, Navient’s Chief Executive Officer Jack Remondi has repeatedly made statements urging borrowers to reach out for assistance, quite possibly implying a level of fiduciary care that Navient would assume with borrowers.⁵⁵ Since Navient is not the only servicer to make these types of statements,⁵⁶ it is conceivable that a court may find these servicers to be holding themselves out as fiduciaries to borrowers.⁵⁷

Even if a servicer has not made such statements, it could still be subject to a fiduciary obligation due to statements made by the

54. See *Who We Are*, NAVIENT, <https://www.navient.com/about/who-we-are/> (last visited Sept. 9, 2017) (“We help our clients and millions of Americans achieve financial success through our services and support.”); *Avoiding Delinquency and Default*, NAVIENT, <https://www.navient.com/loan-customers/postponing-payments/avoiding-default/> (last visited Sept. 9, 2017) (“Our representatives can help you by identifying options and solutions, so you can make the right decision for your situation.”); *5 Habits of Successful Borrowers*, NAVIENT, <https://www.navient.com/loan-customers/getting-started/successful-student-loan-borrowers/> (last visited Sept. 9, 2017) (“Navient is here to help. We’ve found that, 9 times out of 10, when we can talk to a struggling federal loan customer we can help him or her get on an affordable payment plan and avoid default.”).

55. See Jack Remondi, *Four Recommendations to Improve Student Loan Success*, MEDIUM (Apr. 12, 2016), <https://medium.com/@JackRemondi/four-recommendations-to-improve-student-loan-success-94488bf0bb7f> (“If borrowers are led to believe that calling their servicer is useless, who benefits? There needs to be a concerted effort to encourage borrowers to contact their loan servicer as a resource.”); Jack Remondi, *It’s Time to Put Students First*, MEDIUM (May 23, 2016), <https://medium.com/@JackRemondi/its-time-to-put-students-first-7cd578ca266e> (“At Navient, we make it a priority to educate our federal borrowers about income-driven options” . . . “Help is a phone call away.”); Jack Remondi, *4 Ideas for a Better Student Loan Program: A Common Sense Recipe for Reform*, MEDIUM (Feb. 12, 2017), <https://medium.com/@JackRemondi/4-ideas-for-a-better-student-loan-program-a-common-sense-recipe-for-reform-521e651d612> (“For some borrowers, student loan debt can be especially daunting. The good news is that borrowers can turn to their student loan servicers for help to navigate the complex repayment options.”); Nasiripour, *supra* note 5 (noting that in September 2014, Remondi told investors at a Wall Street conference, “[o]ur job as a servicer is to really work with those customers and make sure that they understand the differences and which program best fits their needs”).

56. See *Welcome to FedLoan Servicing!*, FEDLOAN SERVICING, <https://myfedloan.org/> (last visited Sept. 9, 2017) (“We are your student loan servicer and we have one goal: to help you successfully repay your loans.”); *Get to Know Mohela*, MOHELA, <https://www.mohela.com/DL/common/about.aspx> (last visited Sept. 9, 2017) (“As your knowledgeable and approachable go-to resource for account information and repayment options, we provide the tools to help you successfully repay your student loan.”).

57. There has already been some inclination that this is a possibility, or at least not an unreasonable argument. In response to Navient’s Motion to Dismiss, Judge Robert D. Mariani declined to dismiss the argument that Navient created a reasonable expectation to act in the interest of its customers. See Memorandum Opinion at 46, *Navient*, No. 3:17-cv-00101 (M.D. Pa. Aug. 4, 2017) (“It is therefore enough that a borrower’s reliance that a loan servicer will act in their interest is reasonable, irrespective of whether a legal duty actually exists on the part of the loan servicer to act in the borrower’s interest.”).

Department of Education (“Department”).⁵⁸ Not only does the Department’s website make claims and urge borrowers to reach out to servicers similar to the claims and statements on other servicers’ websites,⁵⁹ but current and former agents of the Department have also made statements that would imply a fiduciary duty.⁶⁰ This includes former Director of the Office of Postsecondary Education David Bergeron who said, “[t]he Education Department ultimately is asking loan servicers to act on its behalf to fulfill its fiduciary responsibility to borrowers.”⁶¹ The Department contracts out the servicing of these federal loans to servicers and, as such, the servicer is beholden to the lender in certain aspects of the loan terms.⁶² Professor William J. Cox has argued that only lenders can hold servicers accountable, though they “lack the necessary incentives to pursue an action because any action taken would likely adversely affect their bottom line.”⁶³ However, a lender’s reasoning and refusal to pursue action is irrelevant in this case; all that matters is that lenders have the ability to hold servicers accountable.⁶⁴ The fact that a lender controls some terms of a loan, and a servicer is accountable to the lender, means that a borrower can reasonably rely on statements and promises a lender makes about how a servicer will handle the loan.⁶⁵ As such, if a lender makes statements or promises that imply or expressly state that a servicer will act in the borrower’s interest, a fiduciary obligation could be found.⁶⁶

58. The U.S. Department of Education is a lender for Federal student loans. *See* FED. STUDENT AID, LOANS, <https://studentaid.ed.gov/sa/types/loans> (last visited Sept. 9, 2017) (“The William D. Ford Direct Loan (Direct Loan) Program is the largest federal student loan program. Under this program, the U.S. Department of Education is your lender.”).

59. *See* FED. STUDENT AID, LOAN SERVICERS, <https://studentaid.ed.gov/sa/repay-loans/understand/servicers> (last visited Sept. 9, 2017) (“The loan servicer will work with you on repayment plans and loan consolidation and will assist you with other tasks related to your federal student loan.”).

60. Nasiripour, *supra* note 5.

61. Nasiripour, *supra* note 5.

62. William J. Cox, *The Student Borrower: Slave to the Servicer*, 27 LOY. CONSUMER L. REV. 189, 192 (2015).

63. *Id.* at 203.

64. *Id.*

65. *See* Memorandum Opinion at 46, *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 3:17-cv-00101 (M.D. Pa. Aug. 4, 2017) (“It is therefore enough that a borrower’s reliance that a loan servicer will act in their interest is reasonable, irrespective of whether a legal duty actually exists on the part of the loan servicer to act in the borrower’s interest.”).

66. *Id.*

The second argument in favor of servicers owing a fiduciary duty to student loan borrowers is that current case law illustrates certain factors that may create a fiduciary or confidential relationship, and those factors are often present in the student loan context.⁶⁷ To determine whether a fiduciary relationship exists, one must analyze the relationship in its entirety, taking into account the particular circumstances or facts surrounding it.⁶⁸ Courts have relied on certain factors for assistance, including (1) a solicitation or an imposition of trust and confidence for a period of time,⁶⁹ and (2) situations where there is a great disparity of position⁷⁰ and the disparity is considered “very important or absolutely essential.”⁷¹

67. It must be noted that the information being cited here comes from G.G. BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 482 (Rev. 2d ed. 1978), which is titled “Abuse of confidential relationship.” This is significant as § 481 is titled “Breach of fiduciary obligation.” While this may seem misleading, Bogert begins § 482 with the sentences, “[t]here is no uniform practice among courts in their use of the phrases ‘fiduciary relation’ and ‘confidential relation,’ and often the terms are used as synonyms. The term confidential relation, however, often is used when the relationship is similar to those noted in a fiduciary relation but does not fit into one of the well-defined categories of fiduciary law.” The categories mentioned in § 481 include, *inter alia*, “[a] trustee of an express trust,” “personal representatives of estates,” and “[a] guardian or conservator.” The section goes on to list some categories where a fiduciary relationship has or has not been found. Under that category, “mortgagor or mortgagee” is mentioned as one where a fiduciary agreement has been found not to exist. As will be discussed later, this note looks to distinguish between mortgage lending and student loan lending. As such, student loan lending does not fall into one of the mentioned categories of fiduciary relationships under § 481, and so it will be examined under § 482. It is also worth noting that some of the cases cited under § 482 do, in fact, refer to the relationship as “fiduciary” rather than “confidential,” further illustrating the synonymous relationship.

68. BOGERT ET AL., *supra* note 67, §§ 481, 482.

69. BOGERT ET AL., *supra* note 67, § 482; *see also* *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992) (“If a person solicits another to trust him in matters in which he represents himself to be expert as well as trustworthy and the other is not expert and accepts the offer and reposes complete trust in him, a fiduciary relation is established.”); *Grenier v. Harley*, 250 F.2d 539, 542 (9th Cir. 1957) (finding a confidential relationship existed where the defendant, prior to the death of the decedent, acted as his business agent and attorney, and decedent reposed trust and confidence in defendant); *Lee v. Choi*, 754 S.E.2d 371, 375–76 (Ga. Ct. App. 2013) (finding that a fiduciary duty existed because defendant had a relationship with plaintiffs in which he “was in a position of trust and confidence, was entrusted with financial responsibility and authority, and was privy to personal information”).

70. The “disparity of position” here is a general term to be determined on a case by case basis. The disparity can be in regards to bargaining power, management power, level of sophistication, dependence, influence, etc. *See* BOGERT ET AL., *supra* note 67, § 482 n.7.

71. BOGERT ET AL., *supra* note 67, § 482; *see also* *Miller*, 957 F.2d 1375; *Francois v. Francois*, 599 F.2d 1286, 1292 (3rd Cir. 1979) (noting that a confidential relationship arises when one party places confidence in another, which results in superiority and influence on one side); *Murphy v. Country House, Inc.*, 307 Minn. 344, 352, 240 N.W.2d 507, 512 (1976) (“Disparity of business experience and invited confidence could be a legally sufficient basis for finding a fiduciary relationship”).

As mentioned previously, student loan servicers and the Department of Education do their part in soliciting borrowers to place their trust and confidence in servicers.⁷² More important, however, is the disparity of position between servicers and student loan borrowers. Student borrowers are in an especially weak position because of their youth or inherent lack of education at the outset of the loan.⁷³ Loan servicers are undoubtedly experts in the field, as a significant portion of their services involve managing borrowers' accounts, processing payments, and assisting borrowers as they navigate through the various and "overly complex array" of repayment options.⁷⁴ The repayment options can be so complex that "[e]ven student loan experts are baffled by the unnecessary hurdles and steps created by the federal repayment system."⁷⁵ This complex system is inherently designed to have young borrowers.⁷⁶ Indeed, close to 60% of the total U.S. student loan debt was used to finance undergraduate degrees,⁷⁷ which are almost exclusively sought by students who were high school graduates the prior year.⁷⁸ It is also axiomatic that a discrepancy in knowledge or education would exist here, as students who obtain student loans are generally not experts in finance, but rather seeking to learn and educate themselves further.⁷⁹ This disparity in the relationship between a servicer and student loan borrower could lead to the creation of a fiduciary duty.⁸⁰

72. See Remondi, *4 Ideas for a Better Student Loan Program*, *supra* note 55 ("For some borrowers, student loan debt can be especially daunting. The good news is that borrowers can turn to their student loan servicers for help to navigate the complex repayment options."); LOAN SERVICERS, *supra* note 59 ("The loan servicer will work with you on repayment plans and loan consolidation and will assist you with other tasks related to your federal student loan."); Remondi, *It's Time to Put Students First*, *supra* note 55 ("Our data show that more than 9 times out of 10, when we reach a struggling federal borrower, we successfully help him or her avoid default.").

73. BOGERT ET AL., *supra* note 67, § 482.

74. Remondi, *It's Time to Put Students First*, *supra* note 55; FAILING BORROWERS, *supra* note 24.

75. Remondi, *4 Ideas for a Better Student Loan Program*, *supra* note 55.

76. See Mala Gusman Bridwell, *Student Loan Bankruptcies*, 1978 WASH. U. L. Q. 593, 595–96 (1978) ("The purpose of the student loan programs are . . . to allow every person the fullest possible educational opportunity by making loans available to those who could not otherwise obtain a loan because of their age and lack of collateral borrowing history.").

77. *2017 Student Loan Debt Statistics*, *supra* note 2 ("About 40 percent of the \$1 trillion student loan debt was used to finance graduate and professional degrees.").

78. KEVIN EAGAN ET AL., *THE AMERICAN FRESHMAN: NATIONAL NORMS FALL 2016* 27 (2017) (illustrating statistics of college freshman, one of which being 97.9% of first-time, full-time freshmen graduated high school in 2016).

79. See Cox, *supra* note 62, at 191 ("First, students are generally not economists.").

80. BOGERT ET AL., *supra* note 67, § 482.

The final argument to be made for servicers owing a fiduciary duty to student loan borrowers is that the servicers are simply an extension of the federal student loan lender,⁸¹ the federal government,⁸² which should be considered in a fiduciary relationship with the people it serves.⁸³ Since the federal government is the lender of federal student loans,⁸⁴ while servicers merely oversee the repayment of the loans,⁸⁵ the duties and obligations should be viewed through the relationship between the government and the student, or the lender and the borrower.

The question now becomes whether the federal government owes a fiduciary duty to the borrowers and, if so, whether that fiduciary duty should transfer to the servicer as a part of the loan.⁸⁶ There are numerous historical and theoretical reasons, both in general and specifically pertaining to the United States, to believe a government is in a fiduciary relationship with its people.⁸⁷ In his *Second Treatise of Civil Government*, John Locke argued that the government has a fiduciary obligation to the people.⁸⁸ Locke's idea was that in the original social contract the citizens conveyed power to the government on the condition that the power would be used for the public good and, as such, the government was obliged to act on behalf of the people rather than in its

81. See Hawlk, *supra* note 23 (“In other words, student loan servicing companies act as middlemen between you and the original lender.”).

82. It should be noted that this argument pertains solely to federal student loans, not private student loans.

83. See D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 706–13 (2013) (discussing the “Constitutional History and Political Theory” for considering politicians and the government as being in a fiduciary relationship with the people).

84. The U.S. Department of Education is a lender for Federal student loans. See LOANS, *supra* note 58 (“The William D. Ford Direct Loan (Direct Loan) Program is the largest federal student loan program. Under this program, the U.S. Department of Education is your lender.”).

85. Hawlk, *supra* note 23.

86. See Ryan Lane, *A Guide to Understanding Student Loan Servicer Changes*, U.S. NEWS (Nov. 18, 2015, 10:00 AM), <https://www.usnews.com/education/blogs/student-loan-ranger/2015/11/18/a-guide-to-understanding-student-loan-servicer-changes> (stating that when a lender contracts a loan out to a servicer, the general terms of the loan will stay the same, and the borrowers must be notified of any changes).

87. See Rave, *supra* note 83, at 706–13 (discussing both the views of John Locke, as well as those of the Founding Fathers, on government's owing a fiduciary duty to their people).

88. Rave, *supra* note 83, at 708; Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239, 245 (2007).

own interests.⁸⁹ Locke was not alone, as this became a widely accepted view in England by the eighteenth century.⁹⁰

This popular theory was not contained to England, as it had a heavy influence on the Founding Fathers as well.⁹¹ After the revolution, newly independent Americans frequently referred to legislative representatives and political officials as being in an agency or trusteeship capacity.⁹² The vast majority of delegates to the Constitutional Convention were experienced lawyers or businessmen and were well aware of what these concepts meant.⁹³ The Framers were not referring to these concepts through mere hollow rhetoric, but rather implanted them in the Constitution to “impose on public officials fiduciary obligations comparable to those duties borne by private law fiduciaries.”⁹⁴ Indeed, these concepts were central to the Framers in the drafting, debating, and ratifying the Constitution, and helped shape their understanding of political representation.⁹⁵

The theory is not simply based on the views of historical figures such as Locke, but is also supported by private law justifications for fiduciary duties.⁹⁶ The political theories of contract and delegation of power reinforce the ideals the Framers leaned upon.⁹⁷ It may help to view the American constitutional democracy as a contract, the terms of which delegate power from the people to the government.⁹⁸ The U.S. Constitution is the contract, defining the relationship between the

89. Rave, *supra* note 83, at 708–09; Natelson, *Judicial Review*, *supra* note 88, at 245.

90. Rave, *supra* note 83, at 709.

91. Rave, *supra* note 83, at 710; Natelson, *Judicial Review*, *supra* note 88, at 245–46.

92. Rave, *supra* note 83, at 710; Natelson, *Judicial Review*, *supra* note 88, at 246; U.S. CONST. art. VI, cl. 3; U.S. CONST. art. I § 3, cl. 7; US CONST. art. II § 1, cl. 2 (“Office of Trust”).

93. Natelson, *Judicial Review*, *supra* note 88, at 247–48.

94. Rave, *supra* note 83, at 711; Natelson, *Judicial Review*, *supra* note 88, at 245–47; Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1087, 1178 (2004).

95. Robert G. Natelson, *Public Trust*, *supra* note 94, at 1083–86; *see also* U.S. CONST. art. I § 10 cl. 1 (prohibiting the states from passing bills of attainder or ex post facto laws); U.S. CONST. amend. XIV (forbidding states from depriving any person of equal protection of the law).

96. Rave, *supra* note 83, at 711.

97. Rave, *supra* note 83, at 711.

98. Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WAS. L. REV. 1119, 1121–22 (1998); *see also* Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, 79 GEO. WASH. L. REV. 1, 3 (2010) (analogizing the Constitution to a corporate charter, claiming that it establishes a “body politic and corporate”).

representatives and the people.⁹⁹ In this contract, the people agreed to be bound by the rules and policies of a government, only if it in turn agreed to act in the sole interests of the people.¹⁰⁰ This is the basis for the fiduciary obligation imposed on government officials, and it should translate into the relationship the federal government has with its people, such as through student loan lending.¹⁰¹ If a fiduciary duty was extended to the people—the borrowers—the federal government and servicers could not contractually waive the duty without the mutual assent of the borrower.¹⁰²

B. Arguments Against Servicers Owing a Fiduciary Obligation to Student Loan Borrowers

The first argument against servicers owing a fiduciary duty is simply that the Consumer Financial Protection Act does not place any affirmative duty on the part of the servicer to act in the interest of the consumer; rather it simply prohibits certain acts or practices.¹⁰³ As previously mentioned, the Act makes it “unlawful for . . . any covered person or service provider . . . to engage in any unfair, deceptive, or abusive act or practice.”¹⁰⁴ Again, one definition for the term “abusive” is when a servicer “takes unreasonable advantage of . . . the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.”¹⁰⁵ This does not mean a servicer has an affirmative duty to counsel borrowers and act in their best interests;¹⁰⁶ instead the servicer’s

99. Rave, *supra* note 83, at 712.

100. See Rave, *supra* note 83, at 712 (“We can discern those duties by asking what the parties would have agreed to if bargaining were costless, and the natural answer is that the people would have agreed to be bound by the rules of the legislature only if the legislature had agreed to act solely in the interests of the people.”).

101. Rave, *supra* note 83, at 711–13.

102. See RESTATEMENT (SECOND) OF CONTRACTS § 18 (AM. LAW INST. 1981) (“Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.”).

103. The title given to 12 U.S.C. § 5536 (2016) is “Prohibited acts.” As a general matter, this inherently means there would be no affirmative duties under this section, only a duty to abstain from certain practices. What’s more, there is nothing in this section of the act stating that a covered person or service provider must do something, or that it must act in the interest of the borrower. The section simply outlines types of practices that are prohibited.

104. 12 U.S.C. § 5536(a)(1)(B).

105. 12 U.S.C. § 5531(d)(2)(C) (2016).

106. See *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 611 (3rd Cir. 1995) (“[T]o be liable for material nondisclosures, a party must have a duty to speak”).

only duty is to refrain from taking “unreasonable advantage” of a consumer’s “reasonable reliance;” as well as to refrain from any prohibited acts listed or any other illegal acts such as fraud.¹⁰⁷ Indeed, these sections do not even assert that a consumer’s reasonable reliance will create a duty to act in the consumer’s interests; they only state that if a consumer does in fact reasonably rely on the servicer to act in his or her interest, the servicer cannot take “unreasonable advantage” of that reliance.¹⁰⁸ This, again, is not a duty to act in a certain way, but rather a duty to refrain from acting in a certain way.¹⁰⁹

The next argument against fiduciary duties comes from current case law, where courts have consistently held that in mortgage lending practices a loan servicer generally does not owe a fiduciary duty to a borrower.¹¹⁰ While there may be some differences in the terms, mortgages and student loans are both loans nonetheless.¹¹¹ Like student loans, mortgages have servicers who handle the loans.¹¹² So why should servicers of student loans be assigned a higher duty of care than mortgage loan servicers if there is no material difference between the two? The

107. 12 U.S.C. § 5536.

108. 12 U.S.C. § 5536; 12 U.S.C. § 5531.

109. Judge Mariani seemingly rejected this argument as it pertained to Navient’s Motion to Dismiss in Memorandum Opinion at 46–47, *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 3:17-cv-00101 (M.D. Pa. Aug. 4, 2017). However, the decision was not entirely based on the merits of the argument, but rather Judge Mariani found that Navient “placed reliance inducing statements on their webpage,” and there was sufficient evidence to the claim that Navient had taken unreasonable advantage of that reliance. It is also worth noting that this was an opinion rejecting a motion to dismiss, not deciding the case on its merits. The argument being made here is not based specifically on Navient, but rather on a hypothetical servicer who has not made reliance inducing statements and has not taken unreasonable advantage of its consumers.

110. *See, e.g.*, *Bret Binder v. Weststar Mortg., Inc.*, No. CV 14-7073, 2016 WL 3762710, at *20 (E.D. Pa. July 13, 2016) (“Much like mortgage lenders, loan servicers do not owe borrowers any specific fiduciary duties based upon their servicer/borrower relationship.”); *Edwards v. Ocwen Loan Servicing, LLP*, 24 F.Supp. 3d 21, 30 (D.D.C. 2014) (“[D]efendants are correct that loan servicers . . . owe no fiduciary duties to borrowers”); *Monreal v. GMAC Mortg., LLC*, 948 F.Supp. 2d 1069, 1078 (S.D. Cal. 2013) (“Similarly, loan servicers, like lenders do not owe borrowers any fiduciary obligations”).

111. *See* Tobie Stranger, *Student Debt vs. Mortgage Debt: What Makes Them So Different?*, CONSUMER REPORTS (June 27, 2016), <https://www.consumerreports.org/student-loan-debt-crisis/student-loans-vs-mortgages-what-makes-student-debt-different/> (describing some differences between mortgage debt and student debt, including the differences in interest, repayment and refinancing differences, and the ability (or lack thereof) to discharge debt in bankruptcy).

112. *See* *What’s the Difference Between a Mortgage Lender and a Servicer?*, CFPB (Sept. 13, 2017), <https://www.consumerfinance.gov/ask-cfpb/whats-the-difference-between-a-mortgage-lender-and-a-servicer-en-198/> (explaining the servicer’s role in collecting mortgage payments).

language courts have used is unambiguous, recognizing that “[a] debt is not a trust and there is not a fiduciary relation between [a] debtor and creditor as such;”¹¹³ and further holding that “loan servicers do not owe a fiduciary duty to borrowers.”¹¹⁴ It makes little sense to hold a student loan servicer to a higher standard simply because of the youth or ignorance of its borrowers.¹¹⁵

A third argument to be made against a servicer owing a fiduciary duty to a student loan borrower comes from a doctrine known as the “business judgment rule.”¹¹⁶ This is “a presumption that in making a business decision the directors or officers of a corporation acted on an informed basis, in good faith, and in an honest belief that the action taken was in the best interest of the company.”¹¹⁷ At first glance, it would appear that this rule should not fit in the student loan market since federal student loans are issued by the government, not a corporation.¹¹⁸ However, student loan servicers are indeed corporations, and as such should be afforded the same benefits and protections as any other corporation.¹¹⁹ If the business judgment rule is applied to student loan servicers, as it has previously been applied to loan servicers, then no fiduciary duty would exist.¹²⁰

113. *Downey v. Humphreys*, 102 Cal. App. 2d 323, 332, 227 P.2d 484, 490 (1951).

114. *Moreno v. Citibank, N.A.*, No. C 09-5339 CW, 2010 WL 1038222, at *3 (N.D. Cal. Mar. 19, 2010); see also *Conquest v. WMC Mortg. Corp.*, No. CV 16-03604, 2017 WL 1177106, at *9 (E.D. Pa. Mar. 30, 2017) (“Under Pennsylvania law, it is well established that a lender does not owe a fiduciary duty to a borrower.”); *Henok v. Chase Home Fin., LLC*, 915 F. Supp. 2d 162, 168 (D.D.C. 2013) (“Nor is a debtor-creditor relationship ordinarily a fiduciary relationship.”); *Iannuzzi v. Am. Mortg. Network, Inc.*, 727 F. Supp. 2d 125, 138 (E.D.N.Y. 2010) (“New York courts have held that a fiduciary duty generally does not exist between mortgage brokers and borrowers.”).

115. See *supra* Part III.A.

116. See generally, Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 81-83, (2004) (“The business judgment rule is corporate law’s central doctrine, pervasively affecting the roles of directors, officers, and controlling shareholders.”).

117. *Resolution Tr. Corp. v. Eason*, 17 F.3d 1126, 1133 n.5 (8th Cir. 1994).

118. The U.S. Department of Education is a lender for Federal student loans. See LOANS, *supra* note 58 (“The William D. Ford Direct Loan (Direct Loan) Program is the largest federal student loan program. Under this program, the U.S. Department of Education is your lender.”).

119. See LOAN SERVICERS, *supra* note 59 (“A loan servicer is a company . . .”). It is also worth noting that some student loan servicers are publicly traded companies, including Navient Corporation (NASDAQ: NAVI), and Nelnet (NYSE: NNI).

120. See *First Citizens Fed. Sav. & Loan Ass’n v. Worthen Bank & Trust Co.*, 919 F.2d 510, 514 (9th Cir.1990) (holding that no fiduciary relationship should be inferred in the context of loan participation agreements absent “unequivocal contractual language” since the parties are obligated to make decisions regarding the loan “in good faith and in a reasonable

C. *Compliance Issues*

A fiduciary duty seems regal in theory, but implementation of such a duty may prove difficult. The Department of Labor recently issued a new fiduciary regulation that will require financial advisors to act in their clients' best interest when giving retirement investment advice.¹²¹ This regulation was met with much resistance, prompting President Trump to delay implementation of some portions of the rule in order to further study the consequences.¹²² Critics worry about the complexity of implementing such a regulation, as well as the increased compliance costs that could lead to brokers abandoning clients with small account balances.¹²³ In addition, this rule could increase liability costs and subject advisors to a higher risk of litigation.¹²⁴

While these are significant issues to consider, they may not translate entirely to student loans if a fiduciary duty was imposed on servicers. First, a loan account is fundamentally different than an investment account in that the "consumer" in an investment gives money to the financial advisor in hopes that it will generate future income, while the "consumer" of a loan is given money now that she must repay later.¹²⁵ This difference, in essence, removes the possibility of a servicer abandoning a borrower's account because it would eliminate the possibility of receiving the rest of the money owed on that loan.¹²⁶

manner," which is "more indicative of a typical business relationship among equally sophisticated entities dealing at arm's length than of a fiduciary relationship").

121. Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20945 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, 2550).

122. Kristen Ricaurte Knebel, *DOL to Propose Pushing Back Fiduciary Rule another 18 Months*, 44 Pension & Benefits Rep. (BNA) No. 32 (Aug. 15, 2017).

123. See Bruce Kelly, *Financial Trade Groups to DOL: Advisers Dumping Small Accounts*, INVESTMENTNEWS (Aug. 8, 2017, 1:34 PM), <http://www.investmentnews.com/article/20170808/FREE/170809936/financial-trade-groups-to-dol-advisers-dumping-small-accounts> ("Critics say the DOL measure is too complex and costly and would force brokers to abandon clients with small account balances.").

124. *Id.*; Jamie Hopkins, *New Fiduciary Rule For Financial Advisors Moves The Needle, But In Which Direction?*, FORBES (June 14, 2017), <https://www.forbes.com/sites/jamiehopkins/2017/06/14/new-fiduciary-rule-for-financial-advisors-moves-the-needle-but-in-which-direction/#36e9a2774caa>.

125. Aditya Shankar, *What is the Difference Between a Loan and an Investment?*, QUORA (Sept. 21, 2016), <https://www.quora.com/What-is-the-difference-between-a-loan-and-an-investment>.

126. See Investopedia Staff, *Loan Servicing*, INVESTOPEDIA, https://www.investopedia.com/terms/l/loan_servicing.asp ("Loan servicing is the administration aspect of a loan from the time the proceeds are dispersed *until the loan is paid off.*") (emphasis added) (last visited Nov. 15, 2017).

Similar to financial advising, however, it is likely that a fiduciary obligation would increase compliance and liability costs, which in turn would likely be passed on to borrowers.¹²⁷ Although this would indeed increase the costs associated with a borrower's student loan, it could be seen by borrowers as an equitable trade off in comparison to the potential costs associated with predatory lending practices that could raise the costs and interest associated with a loan, as well as significantly damaging a borrower's credit.¹²⁸

D. Should Servicers Owe a Fiduciary Obligation to Student Loan Borrowers?

Persuasive arguments exist on both sides of this debate, and it can be quite easy for one to simply side with those who are in the same or similar circumstances.¹²⁹ Many students will want to enforce a fiduciary obligation on loan servicers because they are the ones dealing with the debt, and understandably want the process to be as painless and inexpensive as possible.¹³⁰ On the other hand, many creditors and those interested in financial deregulation will want loan servicers to be free of any fiduciary obligations because after all, these are businesses, not charitable organizations, and this could make doing business more difficult.¹³¹ Regardless of the side one falls on, the question of whether a loan servicer *should* owe a fiduciary obligation to student borrowers still remains.

127. See Hopkins, *supra* note 124 (discussing the increase in compliance and liability costs on financial advisors, and the likelihood that the increase in costs would likely be passed on to consumers).

128. See Complaint for Permanent Injunction and Other Relief, Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-cv-00101 (M.D. Pa. Jan. 18, 2017) (accusing Navient, a student loan servicer, of illegal lending practices that resulted in borrowers having to pay more on their accounts and/or damaged the credit of borrowers).

129. See *supra* Part III.

130. See Austin, *supra* note 1, at 333 ("As a result of financial stress, student loan debtors experience high levels of personal depression, family dysfunction, adverse health effects, and delay major purchases.").

131. See Nasiripour, *supra* note 5 (citing to Navient's motion to dismiss where it claims borrowers cannot reasonably rely on the servicer to counsel them about their many options because the primary role of the servicer is to collect their payments); see also Bruce Kelly, *DOL Fiduciary Rule to Cost The Securities Industry \$11B by 2020: Study*, INVESTMENTNEWS (Sept. 21, 2016, 3:35 PM), <http://www.investmentnews.com/article/20160921/FREE/160929978/dol-fiduciary-rule-to-cost-the-securities-industry-11b-by-2020-study> (discussing how compliance costs for implementing the Department of Labor's fiduciary rule for retirement accounts will cost the brokerage industry \$11 billion in revenue over four years).

The arguments that have been presented here lay the legal foundation for whether one *could* enforce such an obligation, but they do not answer the public policy question of whether society *should* hold student loan servicers to a higher standard, or whether it would be better to afford them the same protections and liberties that are awarded to loan servicers in other financial markets. The answer to this question *should* be a resounding yes—student loan servicers should be held to a higher standard than loan servicers in other financial markets.

First, the case law holding that a fiduciary duty does not exist for mortgage loan servicers should not influence the student loan market because student loans and mortgages are sufficiently distinguishable.¹³² For example, interest rates for mortgages are constantly fluctuating based on secondary markets,¹³³ while interest rates for federal student loans are set by Congress and are typically higher than those for mortgages.¹³⁴ Additionally, mortgage loans can be discharged in bankruptcy,¹³⁵ yet student loans are typically not discharged unless the borrower can prove an “undue hardship,” which is quite difficult.¹³⁶ Mortgage servicers can be sued for improper practices, while there is currently little recourse for individual student borrowers due to lack of consistent standards.¹³⁷

132. See Stranger, *supra* note 111 (describing some of the key differences between mortgages and student loans).

133. *Id.*

134. *Id.*; see also FREDDIE MAC, 15-YEAR FIXED-RATE MORTGAGES SINCE 1991, <http://www.freddiemac.com/pmms/pmms15.html> (lasted visited Sept. 14, 2017) (illustrating average interest rates for 15-year fixed-rate mortgages in 2016 to be 2.93%, and 3.29% in 2017 through August); FREDDIE MAC, 30-YEAR FIXED-RATE MORTGAGES SINCE 1971, <http://www.freddiemac.com/pmms/pmms30.html> (last visited Sept. 14, 2017) (illustrating average interest rates for 30-year fixed-rate mortgages in 2016 to be 3.65%, and 4.04% in 2017 through August); FED. STUDENT AID, INTEREST RATES AND FEES, <https://studentaid.ed.gov/sa/types/loans/interest-rates#older-rates> (last visited Sept. 14, 2017) (illustrating current student loan rates for direct subsidized loans as 4.45%, direct unsubsidized loans for undergraduates as 4.45%, direct unsubsidized loans for graduate and professional students as 6%, and direct PLUS loans as 7%).

135. 11 U.S.C. §§ 727, 1328 (2016).

136. 11 U.S.C. § 523(a)(8)(B) (2016); see also Ciciora, *supra* note 6, at 147–48 (outlining the Brunner three-prong test to show that not forgiving the student loan would be an undue hardship, which includes (1) the debtor must not be able to pay the loan by “engaging in some short-term, belt tightening,” or living by the bare essentials; (2) “showing that the current financial situation will continue during the repayment period;” and (3) the debtor must make good faith efforts to obtain employment and maximize income, while minimizing expenses).

137. Stranger, *supra* note 111; see also Ted Wegner, *Student Loan Servicing Standards: Should the Government Look to Other Markets to Better Protect Student Borrowers*, 42 J. CORP. L. 749, 763 (2017) (examining the lack of consistent standards in the student loan market, and potential solutions garnered from other markets).

Refinancing is much simpler with mortgages, as it does not lead to the forfeiting of consumer protections like refinancing student loans would, if they can even be refinanced at all.¹³⁸ Finally, mortgages generally do not grow over time,¹³⁹ while even Navient's CEO Jack Remondi has acknowledged the complexities of the different repayment plans for student loans,¹⁴⁰ which can cause the principal balance to grow substantially over time.¹⁴¹ Significant differences such as these warrant placing student loans in a separate category from mortgages, and therefore considering them independently.

Generally inherent in student loans is the lack of knowledge and expertise by the borrower due to the fact that he or she is acquiring the loan in order to obtain an education.¹⁴² In such a complex field,¹⁴³ this leads to a "great disparity of position"¹⁴⁴ between borrowers and servicers that is undoubtedly "very important or absolutely essential."¹⁴⁵ Such a disparity allows servicers to make a profit by severely taking advantage of borrowers,¹⁴⁶ while the borrower becomes so increasingly hampered by the overwhelming debt that he or she must put off or refrain from important financial or personal milestones like buying a home or having children.¹⁴⁷ Additionally, it is likely that many borrowers will be

138. Stranger, *supra* note 111; Ryan Lane, *4 Things to Think About When Refinancing Student Loans*, U.S. NEWS (Apr. 29, 2015, 10:00 AM), <https://www.usnews.com/education/blogs/student-loan-ranger/2015/04/29/4-things-to-think-about-when-refinancing-student-loans> (warning that while federal student loans may be able to be refinanced into private loans, it may cause interest rates to increase and even remove the option of having the loan forgiven).

139. Stranger, *supra* note 111.

140. See Remondi, *4 Ideas for a Better Student Loan Program*, *supra* note 55 ("Even student loan experts are baffled by the unnecessary hurdles and steps created by the federal repayment system.").

141. Stranger, *supra* note 111; see also Ciciora, *supra* note 6, at 143 (explaining the difficulties with student loan repayment, including the concept of capitalized interest which result when interest is added to the principal amount of the loan, leading to the borrower "paying interest on interest").

142. See Cox, *supra* note 62, at 191 ("First, students are generally not economists.") (discussing the potential naivety of young students involved in the student loan process).

143. See Remondi, *4 Ideas for a Better Student Loan Program*, *supra* note 55 ("Even student loan experts are baffled by the unnecessary hurdles and steps created by the federal repayment system.").

144. BOGERT ET AL., *supra* note 67, § 482.

145. BOGERT ET AL., *supra* note 67, § 482.

146. The complaint in *Consumer Fin. Prot. Bureau v. Navient Corp.* illustrates the types of practices servicers can do to take advantage of borrowers due to their lack of expertise or knowledge. See Complaint for Permanent Injunction and Other Relief, *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 3:17-cv-00101 (M.D. Pa. Jan. 18, 2017).

147. Ciciora, *supra* note 6, at 139–40.

burdened by their student loans for much of their lifetimes since the loans cannot be easily discharged through bankruptcy.¹⁴⁸

While most student loan borrowers are not experts in the field, it is essential that student loan servicers are.¹⁴⁹ Servicers solicit the trust¹⁵⁰ of student loan borrowers to do their job not only correctly, but also in good faith,¹⁵¹ and should not be able to take advantage of that trust simply because a borrower is young or ignorant at the outset of the loan. Some have begun referring to this generation of Americans as the “Indentured Generation”¹⁵² because they are a “class of indentured servants who must work to free themselves of the bondage of educational debts”¹⁵³ for most or all of their lives. As much as one may wish student loan borrowers were more informed or knowledgeable, the reality of the situation is most are not, and so fiduciary obligations on student loan servicers should be in place to protect borrowers who already must deal with the crushing burden of student debt.

IV. CONSISTENT STANDARDS

Although imposing a fiduciary duty may be one possible solution to student loan borrower protection, consistent standards and regulations

148. 11 U.S.C. § 523(a)(8)(B) (2016) (making it impossible to discharge student loan debt through bankruptcy unless the debtor can prove an undue hardship).

149. See LOAN SERVICERS, *supra* note 59 (“The loan servicer will work with you on repayment plans and loan consolidation and will assist you with other tasks related to your federal student loan.”).

150. This is a very important part of the language mentioned in *Bret Binder* to create a fiduciary duty. See *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992) (“If a person solicits another to trust him in matters in which he represents himself to be expert as well as trustworthy and the other is not expert and accepts the offer and reposes complete trust in him, a fiduciary relation is established.”).

151. See Remondi, *Four Recommendations to Improve Student Loan Success*, *supra* note 55; Remondi, *4 Ideas for a Better Student Loan Program*, *supra* note 55 (“For some borrowers, student loan debt can be especially daunting. The good news is that borrowers can turn to their student loan servicers for help to navigate the complex repayment options.”).

152. Austin, *supra* note 1.

153. Austin, *supra* note 1, at 330–31 n.2 (quoting Janet Lorin, *Indentured Students Rise as Loans Corrode College Ticket*, BLOOMBERG (July 9, 2012, 12:01 AM), <https://www.bloomberg.com/news/articles/2012-07-09/indentured-students-rise-as-loans-corrode-college-ticket>).

across all student loans¹⁵⁴ may be similarly effective.¹⁵⁵ Unlike the credit card market¹⁵⁶ or mortgage lending,¹⁵⁷ there is no existing federal statutory or regulatory framework providing consistent standards for the servicing of student loans.¹⁵⁸ While student loans differ significantly from mortgages,¹⁵⁹ the standards and regulations that govern mortgage lending and servicing, as well as credit card servicing, could shed light on possible solutions to student loan borrower protection issues.¹⁶⁰ The key is to make sure any standards or regulations implemented are consistent across all types of student loans, even if that regulation is imposing a fiduciary duty.¹⁶¹

A. *Continuous, Clear Contact and Early Intervention*

While there are various reasons why a student loan borrower may struggle with payments, one issue that seems easily preventable is the lack of information.¹⁶² Since the student loan system can be quite complex,¹⁶³ borrowers frequently have issues with basic information,

154. There are four main types of postsecondary education loans: (1) Direct Loans (federal loans made directly to borrowers by the Department of Education through the William D. Ford Federal Direct Loan Program), (2) Federal Family Education Loan Program loans (originated by private lenders and guaranteed by the federal government), (3) Federal Perkins Loans (administered by participating institutions and co-funded by the federal government and institutions of higher education), and (4) Private student loans (made by depository and non-depository financial institutions, states, institutions of higher education, and other entities). The first three types are made pursuant to the Higher Education Act of 1965, while private loans are governed by federal and state laws rather than the HEA. Joint Statement of Principles on Student Loan Servicing, 80 Fed. Reg. 67,389, 67,390 (Nov. 2, 2015).

155. This is only a cursory analysis in order to illustrate possibilities other than a fiduciary duty, as well as the central need for consistency in any standards or regulations imposed on the student loan market. For a more in-depth examination of potentially beneficial standards and regulations, see Wegner, *supra* note 137, at 766.

156. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified as amended in scattered sections of 15 U.S.C.).

157. Regulation X, 12 C.F.R. § 1024.30–41 (2017).

158. STUDENT LOAN SERVICING, *supra* note 3, at 11.

159. See *supra* Part III.C.

160. STUDENT LOAN SERVICING, *supra* note 3, at 12.

161. STUDENT LOAN SERVICING, *supra* note 3, at 5.

162. See Cox, *supra* note 62, at 198 (discussing the frequent inability of student loan borrowers to obtain all accurate information on payment application and other important aspects of their loans).

163. See Remondi, *4 Ideas for a Better Student Loan Program*, *supra* note 55 (describing selecting a student loan as a labyrinth); STUDENT LOAN SERVICING, *supra* note 3, at 4 (“Loan servicers also comment that the complexity of the student loan programs may contribute to these problems.”).

such as how their payments are being applied¹⁶⁴ or whether they are eligible to enroll in alternative repayments plans.¹⁶⁵ As the Navient case illustrates, even when servicers communicate with borrowers there is no guarantee that the information will be clear or helpful.¹⁶⁶ Further, there is little incentive for servicers to work with delinquent borrowers in an attempt to mitigate damages and get borrowers back on track.¹⁶⁷

Like with mortgage lending, student loan servicers could be forced to make contact with delinquent borrowers early in the process¹⁶⁸ and stay in contact¹⁶⁹ to attempt to discover what issues the borrower may be having and what loss mitigation solutions may be available.¹⁷⁰ Further, servicers could assign personnel, much like a case worker, to delinquent borrower accounts to provide more personalized attention.¹⁷¹ In addition, servicers could be required to publish eligibility criteria on their websites for the various alternative repayment options.¹⁷² Servicers could also be required to apply payments to accounts on the same or next day as they are received, and provide monthly billing statements to borrowers similar to that required of credit card servicers.¹⁷³ Implementation of standards and regulations such as these would lead to increased transparency and communication between borrowers and servicers,¹⁷⁴ which would be a significant step in the right direction.

164. See Cox, *supra* note 62, at 198 (“Students are frequently unable to find out from their servicers how payments are applied when paying more than the minimum amount due.”).

165. STUDENT LOAN SERVICING, *supra* note 3, at 108.

166. See Complaint for Permanent Injunction and Other Relief at 4, Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-cv-00101 (M.D. Pa. Jan. 18, 2017) (alleging Navient failed to disclose deadlines and obscured key information).

167. Wegner, *supra* note 137, at 763.

168. 12 C.F.R. § 1024.39 (2017) (“[A] servicer shall establish or make good faith efforts to establish live contact with a delinquent borrower no later than the 36th day of the borrower’s delinquency.”).

169. 12 C.F.R. § 1024.40 (2017) (requiring a mortgage servicer to maintain policies that help the borrower stay in contact during delinquencies).

170. STUDENT LOAN SERVICING, *supra* note 3, at 109.

171. See 12 C.F.R. § 1024.40 (requiring a mortgage servicer to assign personnel to delinquent borrowers).

172. STUDENT LOAN SERVICING, *supra* note 3, at 112.

173. 15 U.S.C. §§ 1666b-1666c (2016).

174. Wegner, *supra* note 137, at 763.

B. *Notice and Appeal Process*

Similar to the administrative law process, student loan servicers could be subject to a notice and appeal system.¹⁷⁵ After a servicer conducts a review to determine whether a borrower is eligible for any loan modification or alternative repayment plan, that decision could be subject to an appeal and subsequent hearing.¹⁷⁶ Similarly, if a borrower feels there has been an error on her account or relating to payment allocation, she could request an investigation to respond to and correct the issue.¹⁷⁷ The borrower would then have the right to appeal any adverse decisions or findings, and be allowed some sort of informal review, mediation, or formal administrative hearing before a neutral third party.¹⁷⁸

V. CONCLUSION

A fiduciary obligation would undoubtedly add to the workload and compliance costs of a student loan servicer,¹⁷⁹ but the benefits outweigh the costs. The disparity in position between servicers and student loan borrowers¹⁸⁰ leaves the borrowers far too exposed at the mercy of the servicer, as has become apparent with the allegations against Navient.¹⁸¹ As much as one might wish that student loan borrowers were fully informed and knowledgeable enough to protect themselves in this situation, the empirical evidence shows that this does not happen.¹⁸² Although the costs of compliance would likely be passed on to the consumer, it is realistic to believe this cost could be spread amongst all borrowers at a price that would make the increased cost an equitable trade

175. See 5 U.S.C. §§ 553–54, 556–57 (2016) (requiring notice and appeal system for administrative, military, and foreign affairs agencies of the U.S. government).

176. STUDENT LOAN SERVICING, *supra* note, at 113.

177. STUDENT LOAN SERVICING, *supra* note 3, at 113.

178. STUDENT LOAN SERVICING, *supra* note 3, at 113.

179. See *supra* Part III.C.

180. See BOGERT ET AL., *supra* note 67, § 482 (asserting that “a great disparity of position and this disparity [being] treated as very important or absolutely essential” may create a fiduciary duty).

181. Complaint for Permanent Injunction and Other Relief, Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-cv-00101 (M.D. Pa. Jan. 18, 2017); see also FAILING BORROWERS, *supra* note 24 (discussing the allegations against Navient in their handling and servicing of student loans).

182. See *supra* Part III.A.

off to the amplified protection.¹⁸³ Although a fiduciary duty could be beneficial for student loan borrower protection, other standards and regulations could be implemented as well.¹⁸⁴ Regardless of what standard or regulation is implemented, it is vital that it be consistently applied across all types of student loans, as consistency will help both borrowers and servicers alike in handling the massive student loan debt in the United States.¹⁸⁵

SEAN R. WHELEHAN

183. *See supra* Part III.C.

184. *See supra* Part IV.

185. *See supra* Part IV; *also see* STUDENT LOAN SERVICING, *supra* note 3, at 5 (“Industry commenters, including the two largest participants in the student loan servicing market, identify certain student loan servicing practices where there is significant diversity in the marketplace and suggest that policymakers require consistent approaches to common servicing functions . . .”).