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An American Crisis: Proprietary Schools and National Student Debt

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COMMENTS

AN AMERICAN CRISIS: PROPRIETARY SCHOOLS AND NATIONAL STUDENT DEBT

CHARLES POLLACK†

ABSTRACT

Proprietary schools encounter increased scrutiny as they become more influential within the United States. Many students claim that these for-profit businesses fraudulently request student loans from the government. These allegations have created a debate over review standards in the circuit courts. A recent Supreme Court decision has further complicated this issue by allowing mandatory arbitration clauses in enrollment agreements.

This comment argues that the Ninth Circuit's review standard should be adopted by all courts. This would best allow students to raise claims while still protecting courts from frivolous lawsuits. In addition, if proprietary schools choose to include an arbitration clause in their enrollment agreements, they should explicitly share this information with all prospective students. These proposals are important to ensure that all students understand the consequences of enrolling in a proprietary school and to prevent an even greater American debt crisis.

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I. PROPRIETARY SCHOOLS AND NATIONAL STUDENT DEBT

Nation-wide tuition increases, together with a weakened economy and competitive admissions, leave many American students unable to obtain a traditional university education.¹ This reality forces many students to consider alternative higher education options so they can find better job

¹ See U.S. BUREAU OF LABOR STATISTICS, BLS SPOTLIGHT ON STATISTICS, BACK TO COLLEGE 8 (2010), available at <http://www.bls.gov/spotlight/2010/college/pdf/college.pdf> (showing that the price of college tuition has consistently outpaced the rate of United States inflation for the last three decades); cf. Anthony Carnevale & Jeff Strohl, *How Increasing College Access Is Increasing Inequality, and What to Do About It*, in REWARDING STRIVERS: HELPING LOW-INCOME STUDENTS SUCCEED IN COLLEGE 74-75 (Richard D. Kahlenberg ed., 2010) (explaining that while American children have the most average schooling of any world population—at twelve and a half years—postsecondary performance and graduation rates are falling behind other industrialized countries).

opportunities.² The most popular alternative is a proprietary school, but there is growing concern that their recruitment schemes violate federal law.³ Several former proprietary school students claim recruiters fraudulently induced them to request student loans for better job opportunities that never materialized.⁴

The federal circuit courts have heard several fraud complaints against proprietary schools, however, they have not applied a uniform review standard to determine whether a student had a valid tort or contract action.⁵ A debate exists over how students enrolled at schools that are certified with the Department of Education ("ED") should structure their claims.⁶ The

² See Amanda Harmon Cooley & Aaron Cooley, *From Diploma Mills to For-Profit Colleges and Universities: Business Opportunities, Regulatory Challenges, and Consumer Responsibility in Higher Education*, 18 S. CAL. INTERDISC. L.J. 505, 505-06 (2009) (detailing that a changing labor market has prompted people to seek non-traditional educational opportunities); cf. PEW RESEARCH CTR., SOC. & DEMOGRAPHIC TRENDS, IS COLLEGE WORTH IT?: COLLEGE PRESIDENTS, PUBLIC ASSESS VALUE, QUALITY AND MISSION OF HIGHER EDUCATION I (2011) (reporting results from a public poll that found fifty-seven percent of Americans believe that the traditional higher education system in the United States does not provide good value to students and seventy-five percent believe attendance is too expensive, but ninety-four percent still expect their child to attend college).

³ See LAURA G. KNAPP ET AL., U.S. DEP'T OF EDUC., INST. OF EDUC. SCIS., NAT'L CTR. FOR EDUC. STATISTICS, NCES 2011-230, ENROLLMENT IN POSTSECONDARY INSTITUTIONS, FALL 2009; GRADUATION RATES, 2003 & 2006 COHORTS; AND FINANCIAL STATISTICS, FISCAL YEAR 2009, at 7 (2011) (detailing that in Fall 2009 approximately ten percent of all higher education students attended a for-profit institution); see also Higher Education Act, 20 U.S.C. § 1002(b)(1) (2006 & Supp. III 2010) (providing federal requirements for proprietary schools such as recognition by a regional accrediting agency since October 2007 and stipulating that the national accrediting agency must have certified an institution within the last two years). See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-4, FOR PROFIT SCHOOLS: LARGE SCHOOLS AND SCHOOLS THAT SPECIALIZE IN HEALTHCARE ARE MORE LIKELY TO RELY HEAVILY ON FEDERAL STUDENT AID 7 (2010) (characterizing proprietary schools' reliance upon federal student loan funding and its relation to fraudulent recruitment practices).

⁴ See *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1169 (9th Cir. 2006) (filing by former for-profit counselors that the institution used fraudulent promises to comply with the False Claims Act ("FCA") and continued to use commissioned admissions recruiters in its business practices); *Olsen v. Univ. of Phoenix*, 244 P.3d 388, 389 (Utah Ct. App. 2010) (filing by student that university fraudulently included e-resource fee on tuition bill to which student was unaware).

⁵ Compare *Hendow*, 461 F.3d at 1177-78 (finding that a student claim was sufficient irrespective whether it related to any initial certification with the government to comply with regulations), with *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791, 797-98 (8th Cir. 2011) (concluding that a complaint cannot solely rely upon a plaintiff's experience and must specifically reference a violated federal provision for fund disbursement).

⁶ See generally, 20 U.S.C. § 1094(a) (2006 & Supp. III 2010) (detailing several factors a school must comply with in order to obtain student loan funds, including a requirement that schools notify the Secretary of Education ("Secretary") whether the institution is no longer meeting a stipulated provision).

Ninth Circuit will hear most fraud claims by reasoning that every new federal aid request includes an implicit recertification to comply with federal guidelines, irrespective of whether the student cited specific provisions within the complaint.⁷ Conversely, the Eighth Circuit only supports a claim if it relates to the school's initial certification to comply with all federal regulations.⁸ This circuit disagreement ultimately creates an inequity for students by requiring a higher burden of proof in some jurisdictions.⁹

Divergent review standards for proprietary school fraud litigation are further complicated by an industry preference for arbitration.¹⁰ The Supreme Court recently reinforced this practice in *AT&T Mobility LLC v. Concepcion* by prohibiting class action lawsuits in situations where the plaintiffs sign mandatory arbitration clauses.¹¹ While the Supreme Court did not expressly target proprietary schools in its *Concepcion* decision, the ruling nonetheless has broad implications for students signing enrollment agreements at for-profit institutions.¹²

This comment argues that the Ninth Circuit's review standard for proprietary school fraud should be applied across the entire federal system, and that the ED should require proprietary schools to explicitly share all relevant arbitration terms with prospective students. Part II describes American proprietary school development and the federal statutes implicated by questionable recruitment practices. Part III details the different circuit approaches to review proprietary school fraud litigation and the debate over implied certification. Part IV discusses the recent

⁷ See *Hendow*, 461 F.3d at 1169 (allowing a student to file a fraud complaint under the Higher Education Act ("HEA") and FCA if he or she can show that a recruiter used fraudulent tactics to encourage a student loan request under the theory that once an institution has certified its compliance with the ED, it remains in compliance during all subsequent business).

⁸ See *Vigil*, 639 F.3d at 797-98 (requiring complaints filed using the FCA to specifically state the HEA provision that an institution violated before receiving federal funds).

⁹ Compare *Hendow*, 461 F.3d at 1177 (allowing a complaint to proceed without relying upon the HEA), with *Vigil*, 639 F.3d at 799-800 (dismissing a complaint for failure to state a claim because the HEA was not referenced).

¹⁰ See *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 129 (2nd Cir. 2010), *vacated sub nom. Affiliated Computer Servs., Inc. v. Fensterstock*, 131 S. Ct. 2989 (2011) (arguing that an arbitration clause should not be enforced if hidden within the terms to an enrollment agreement); *Bernal v. Burnett*, No. 10-cv-01917-WJM-KMT, 2011 WL 2182903, at *1, *2-3 (D. Col. June 6, 2011) (claiming that a separate signed arbitration agreement did not make litigation forfeiture clear).

¹¹ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752-53 (2011) (finding that mandatory arbitration clauses in an adhesion contract are not inherently unconscionable).

¹² See *id.* (focusing on cellular phone enrollment agreements with a mandatory arbitration clause).

Concepcion decision and its future impact on student litigation. Part V explains why the Ninth Circuit has established the preferable review standard and the benefit to requiring proprietary schools to unambiguously communicate arbitration clauses with potential students. Finally, Part VI asserts that a new review process is needed to protect students and ensure the United States' long-term economic success.

II. PROPRIETARY SCHOOL DEVELOPMENT, FEDERAL LAW, AND ENSUING CONTROVERSY

Proprietary schools' recent rise in popularity may seem like a modern American phenomenon, but they actually originated during the early eighteenth-century.¹³ These institutions have expanded over several centuries into today's large for-profit corporations. While proprietary schools developed with noble intentions, students in the twenty-first century are claiming that these schools violate federal law by encouraging fraudulent loan requests. The student lawsuits have prompted increased government scrutiny.

A. *Four Centuries of Proprietary Schools in American Higher Education*

In the colonial period, proprietary education existed to provide students with an alternative to classical studies that some considered unnecessary luxuries for the wealthiest class.¹⁴ An alternative colonial education focused on basic literacy, handwriting, arithmetic, and career training.¹⁵ By the early nineteenth century, proprietary education expanded as many business leaders felt that traditional colleges did not sufficiently train students in the practical skills needed for most professions.¹⁶ Proprietary schools subsequently garnered early support from students seeking the education that businesses most preferred.¹⁷ These schools also expanded to

¹³ See KEVIN KINSER, FROM MAIN STREET TO WALL STREET: THE TRANSFORMATION OF FOR-PROFIT HIGHER EDUCATION (ASHE HIGHER EDUCATION REPORT) 13-15 (2006) (detailing how proprietary schools originated from apprenticeships that emphasized the practical skills that a person needed to be successful within the workforce).

¹⁴ See *id.* at 14-15 (expressing the importance of training people in the skills that they would need to earn a living).

¹⁵ See *id.* (emphasizing that these base skills are needed for most all professions, particularly those in trade or commerce); see also Aaron Taylor, "Your Results May Vary": Protecting Students and Taxpayers Through Tighter Regulation of Proprietary School Representations, 62 ADMIN. L. REV. 729, 752 (2010) (noting that these schools relied upon a very basic curriculum, coupled with specialized training in a particular field).

¹⁶ See KINSER, *supra* note 13, at 15 (detailing how early proprietary institutions built basic writing and arithmetic instruction around business classes).

¹⁷ See RICHARD S. RUCH, HIGHER ED, INC.: THE RISE OF THE FOR-PROFIT UNIVERSITY 52 (2001) (explaining that proprietary education became popular among students who

build a strong reputation with minority groups that did not have the same educational opportunities as the white majority.¹⁸ The early American goals to provide practical and equitable higher education has not wavered for over three centuries and has ultimately established an industry foundation that still exists today.¹⁹

Higher education is no longer reserved for the most affluent classes in a globalized twenty-first century.²⁰ College attendance in the United States has consequently risen over the past several decades as the economy increasingly demands workers with specialized skills.²¹ These workers are needed to keep the United States atop world markets while other nations produce goods at a rate that threatens to end American dominance.²² One factor that has helped several industrialized countries close the economic gap is a higher college completion rate.²³

did not have the money to spare on traditional colleges because it was believed that specialized training would be rewarded with employment).

¹⁸ See Bobby Wright, *For the Children of the Infidels?: American Indian Education in the Colonial Colleges*, 12 AM. INDIAN CULTURE & RESEARCH J. 1988, at 10 (exemplifying Native American access to proprietary institutions since their American founding).

¹⁹ See *Mission Statement*, UNIVERSITY OF PHOENIX, http://www.phoenix.edu/about_us/about_university_of_phoenix/mission_and_purpose.html (last visited Oct. 25, 2011) ("University of Phoenix provides access to higher education opportunities that enable students to develop knowledge and skills necessary to achieve their professional goals, improve the productivity of their organizations and provide leadership and service to their communities.").

²⁰ See NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NCES 2009-020, DIGEST OF EDUCATION STATISTICS 2008 278 (2009) (table showing that student enrollment at American universities has exponentially increased over the last several decades from a little over two million students in 1950 to over eighteen million in 2007).

²¹ See, e.g., ANTHONY CARNEVALE ET AL., HELP WANTED: PROJECTIONS OF JOBS AND EDUCATION REQUIREMENTS THROUGH 2018 109 (2010) (explaining that employers will continue to seek workers in the future with some form of higher education or specialized training).

²² See ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., REAL HISTORICAL GROSS DOMESTIC PRODUCT (GDP) SHARES AND GROWTH RATES OF GDP FOR BASELINE COUNTRIES/REGIONS (IN BILLIONS OF 2005 DOLLARS) 1969-2010 (2010), available at <http://www.ers.usda.gov/Data/Macroeconomics/> (displaying the total United States GDP in comparison with the European Union and Asia, with an emphasis on China); see also *United States Share of World GDP Remarkably Constant*, NAT'L CTR. FOR POL'Y ANALYSIS (Dec. 2, 2009), http://www.ncpa.org/sub/dpd/index.php?Article_ID=18745 (explaining that while the United States GDP has remained constant over the last several decades, Asia (China) has experienced significant economic growth over the same time period).

²³ See Patrick Callan, *Introduction: International Comparisons Highlight Educational Gaps Between Young and Older Americans*, in MEASURING UP 2006: THE NATIONAL REPORT CARD ON HIGHER EDUCATION 7 (Nat'l Ctr. for Pub. Pol'y and Higher Educ., ed. 2006) (analyzing a downward trend in American college education that shows the United States ranks second worldwide in population percentage aged 35-64 with a college degree, but only seventh aged 25-34).

The American government has responded to the need for specialized workers by encouraging all students to obtain some form of higher education.²⁴ President Obama rhetorically asked Americans at the 2011 State of the Union Address if they were “willing to do what’s necessary to give every child a chance to succeed.”²⁵ He sought to prioritize education in his administration after a recent Georgetown University study showed that by 2018 over sixty percent of American jobs will require at least a bachelor’s degree.²⁶ This projection has rejuvenated national interest in higher education and college attendance.²⁷ The federal government is committed to expanding educational access, however, dramatic tuition increases at traditional universities present a major obstacle to higher enrollments.²⁸

Modern proprietary schools have adapted to national higher education interests by expanding in size and scope.²⁹ They are no longer local businesses with a single owner but are instead highly profitable national organizations that garner government regulation.³⁰ Proprietary schools that offer online classrooms and more flexible class schedules are increasingly able to accommodate more students while traditional universities restrict enrollments with higher tuition.³¹ Proprietary education typically focuses on certificate and associate-level curriculums, but some offer bachelor’s,

²⁴ See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §§ 801-805, 123 Stat. 115, 181-190 (codified in scattered sections in 29 U.S.C., 33 U.S.C., and 42 U.S.C.) (2009) (allocating federal funds to education, among other areas, to help facilitate better training for the American workforce).

²⁵ Barack Obama, President, Address Before a Joint Session of Congress on the State of the Union (Jan. 25, 2011) (referencing the Obama administration’s Race to the Top education program that rewards states for implementing ambitious plans to improve teacher quality and student achievement).

²⁶ See, e.g., CARNEVALE, *supra* note 21, at 109; cf. Carnevale, *supra* note 1, at 73 (graphing trends in social mobility with those Americans earning only a high school diploma in 2007 on a downward escalator that leads toward the lowest income class).

²⁷ See, e.g., American Recovery and Reinvestment Act, 123 Stat. at 181 (targeting funds toward disadvantaged students as a means to diversify and improve American higher education).

²⁸ See generally David Leonhardt, *As Wealthy Fill Top Colleges, Concerns Grow Over Fairness*, N.Y. TIMES, Apr. 22, 2004, at A1 (citing trends at elite schools that suggest wealthy students are more likely to enroll in elite colleges).

²⁹ See CARNEVALE, *supra* note 21, at 109 (projecting that the future American workforce will require a more highly educated worker).

³⁰ See Higher Education Act, 20 U.S.C. § 1002(b)(1) (2006 & Supp. III 2010) (presenting the criteria for modern proprietary schools seeking federal student aid).

³¹ See Sherry Linkon, *Education or Exploitation? For-Profit Schools and Working-Class Students*, CTR. FOR WORKING CLASS STUDIES (Sept. 20, 2010), <http://workingclassstudies.wordpress.com/2010/09/20/education-or-exploitation-for-profit-schools-and-working-class-students/> (referencing how the changing market has given a tactical advantage to proprietary schools seeking to make a profit, while also encouraging many traditional universities to consider online programs).

master's, and doctoral-level coursework.³² Both proprietary and traditional universities can therefore provide similar degree-granting programs.

B. Title IV and the Higher Education Act ("HEA")

Proprietary schools rely more heavily on federal student aid than traditional universities and colleges.³³ The ED manages the federal financial aid program under Title IV of the HEA to determine student and institutional eligibility.³⁴ Overall, approximately nineteen percent of all federal student aid currently goes to students attending proprietary schools and this percentage is projected to rise.³⁵

Universities and colleges can receive Title IV funds if they offer specific student programs under the HEA.³⁶ They must also certify compliance with several ED disbursement requirements before requesting funds.³⁷ Certification is completed through a formal agreement with the Secretary of Education ("Secretary") stating that a school will comply with all rules while participating in the program.³⁸ This acknowledgment creates a two-step process for all higher education institutions to obtain federal student

³² See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-600, PROPRIETARY SCHOOLS: STRONGER DEPARTMENT OF EDUCATION OVERSIGHT NEEDED TO HELP ENSURE ONLY ELIGIBLE STUDENTS RECEIVE FEDERAL STUDENT AID 4-6 (2009) (distinguishing the various proprietary school programs by the time it takes for completion).

³³ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-4, *supra* note 3, at 7 (highlighting that during the 2008/2009 school year, for-profit schools received over \$24 billion in grants and loans from the federal government).

³⁴ See Higher Education Act, 20 U.S.C. § 1001 (2006) (detailing the types of institutions that qualify for federal student aid under the ED's program).

³⁵ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-600, *supra* note 32, at 5 (comparing the proprietary sector to the public and private non-profit sector, which are respectively given forty-eight percent and thirty-three percent of the annual student loan disbursements); see also NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 2009 Table 338 (2010) available at http://nces.ed.gov/programs/digest/d09/tables/dt09_338.asp?referrer=report (showing that over sixty-five percent of all American undergraduate students receive some form of financial aid from the federal government).

³⁶ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-4, *supra* note 3, at 13 (listing eligible Title IV institutions as those that include certificate, associate, bachelor's, graduate, or professional degree programs). See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-600, *supra* note 32, at 6 (2009) (stating the proprietary sector disproportionately awards more certificates than it does bachelor or graduate degrees).

³⁷ See Higher Education Act, 20 U.S.C. § 1094(a) (2006 & Supp. III 2010) (providing several very specific requirements that include how a school reports its continued compliance with the federal program, qualifies as an eligible institution, and performs certain business operations so federal student safeguards are not ignored); see also *id.* at § 1094(a)(20) (prohibiting commissioned recruiters at all schools).

³⁸ See *id.* at § 1094(a)(3) (stating that the agreement with the Secretary includes the establishment of an administrative system that will maintain compliance with HEA guidelines).

loans: a school initially certifies with the ED that it is compliant with federal guidelines and then the school receives funds through individual student loan requests.³⁹ This process includes additional qualifications for proprietary schools.⁴⁰ It requires that for-profit institutions provide training for an industry-recognized credential or certification and is accredited by a nationally recognized agency.⁴¹ If a proprietary school fails to comply with any HEA provision, the Secretary may place it on probation and revoke its student loan eligibility.⁴²

C. The False Claims Act ("FCA") and Private Causes of Action

Students who feel that a proprietary school fraudulently caused them to obtain student loans may file a claim through the FCA.⁴³ This statute prohibits any entity from knowingly submitting a fraudulent request for government funding.⁴⁴ FCA claims are permitted for both the government and private citizens to recover damages for funds that were induced fraudulently.⁴⁵ The FCA also allows multiple parties to file claims as a class action.⁴⁶ Students that bring a *qui tam* action against proprietary

³⁹ See *id.* at § 1094(c)(1) (implementing procedures for the Secretary to verify school's continued compliance without explicit recertification).

⁴⁰ See *id.* at § 1094(a)(24) (attempting to make it even more difficult for a proprietary school to fraudulently request funds by requiring that it generate at least ten percent revenue outside federal student loans).

⁴¹ See Higher Education Opportunity Act, 20 U.S.C. § 1002(b) (2006 & Supp. III 2010) (requiring proprietary institutions to exist for at least two years with regional accreditation and admit students beyond the age of compulsory school attendance, or who are concurrently enrolled in another secondary institution, before gaining loan eligibility). See generally ABOUT ACCSCT, ACCREDITING COMMISSION OF CAREER SCHOOLS AND COLLEGES OF TECHNOLOGY (ACCSCT) 8 (2011) available at <http://www.accsc.org/Content/Accreditation/index.asp> (explaining accreditation standards with a heavy reliance upon self-reporting that includes analyzing application materials, self-evaluations, annual reports, financial reports, student complaints, information from government agencies, on-site evaluations, and other related sources); ACCREDITATION HANDBOOK, DISTANCE EDUCATION AND TRAINING COUNCIL 16 (2011) (defining that a "bona fide" distance learning institution must enroll students, hire quality faculty, transfer materials in an organized manner to students, provide constant communication, and offer at least fifty-one percent of classes online).

⁴² See Higher Education Act, 20 U.S.C. § 1094(d)(2)(B) (2006 & Supp. III 2010) (stating that the Secretary may put a proprietary institution on probation for a two year period if it fails to comply with any requirements under § (a)(24)).

⁴³ See False Claims Act, 31 U.S.C. § 3729 (2006) (regulating how the government may legally respond against any person or business that fraudulently obtains federal funds).

⁴⁴ See *id.* at § 3729(a)(1)(A) (including fraudulent acts against the government that a business deliberately creates and those where a business knowingly causes another person or entity to commit an act that the business knows to be fraudulent).

⁴⁵ See *id.* at § 3730(b)(1) (expressing that *qui tam* provisions exist under the FCA, which allow private citizens to bring suit on behalf of the government).

schools for violating the HEA, however, create a difficult question for courts: can an institution fraudulently receive student loans if the Secretary has not revoked certification?⁴⁷ The circuits have split over this issue.

D. Growing Concern with For-Profit Higher Education

Proprietary schools allocate significant resources to counter negative publicity in the twenty-first century.⁴⁸ This proactive approach emerged from frequent student lawsuits, governmental investigations, and national media attention.⁴⁹ Proprietary schools particularly rely upon television and internet advertisements to refocus public attention toward their historically positive educational goals.⁵⁰ Most advertising campaigns appear harmless, but a subtle issue exists.⁵¹ Potential students often view these commercials and believe that the proprietary school will easily lead to the career or lifestyle shown in the advertisement.⁵² Some proprietary school recruiters reinforce a false understanding about graduation outcomes by deliberately deceiving students to request federal loans through such tactics as false statements, assurances, and hyperbole.⁵³

⁴⁶ See Higher Education Opportunity Act, 20 U.S.C. § 1094(a) (2006 & Supp. III 2010) (explaining that once an institution is deemed eligible for federal student loans, only the Secretary can revoke its eligibility).

⁴⁷ See *id.* at § 1094(c)(1) (stating that the Secretary has the sole ability to revoke loan eligibility). Compare *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166 (9th Cir. 2006) (ignoring the issue whether the Secretary has acted), with *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791, 800-01 (8th Cir. 2011) (requiring reference back to initial certifying document, which applied to the HEA, necessitates a non-definitive consideration about the Secretary's actions).

⁴⁸ See Chris Kirkham, *For-Profit Colleges Mount Unprecedented Battle for Influence in Washington*, HUFFINGTON POST (April 25, 2011, 3:16PM) http://www.huffingtonpost.com/2011/04/25/for-profit-colleges_n_853363.html? (explaining how proprietary school lobbying expenditures more than doubled between 2008 and 2010 as their industry incurred greater scrutiny from Washington politicians).

⁴⁹ See, e.g., *Price of Admission: America's College Debt Crisis*, CNBC, <http://www.cnbc.com/id/39911910> (last visited Nov. 12, 2011) (reporting on American student debt issues with a special emphasis on the role for-profit schools play in this crisis).

⁵⁰ See *Mission Statement*, UNIVERSITY OF PHOENIX, *supra* note 19 (noting that equal and affordable access to an education are two fundamental goals for the University of Phoenix).

⁵¹ See University of Phoenix, *Thinking Ahead Commercial - University of Phoenix*, YOUTUBE (Jul. 20, 2011) <http://www.youtube.com/watch?v=5mFMiTcFdNQ> (showing happy and engaged students either in class or in the work force behind flashing messages that describe the benefits to a college education).

⁵² *Cf. id.* (failing to reference any school-specific job placement data that supports greater student marketability after graduation).

⁵³ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-600, *supra* note 32, at 22-25 (presenting reports from undercover government agents who witnessed some school recruiters deliberately changing admissions test scoring scales to admit unqualified students).

Student skepticism toward proprietary schools has subsequently increased, even among such minority groups as Native Americans who have long benefited from proprietary schools.⁵⁴ The state legislative response to this concern is a possible reduction in tax support.⁵⁵ Several state attorney generals have also initiated inquiries into proprietary school business practices.⁵⁶ These investigations started after a federal government report identified several proprietary schools that encouraged admissions staff to use deceptive recruitment tactics.⁵⁷ State judicial departments are now trying to discern whether these practices are legal.⁵⁸ The Department of Justice ("DOJ") has also joined the states in these investigations to prepare for future litigation.⁵⁹ Frequent student lawsuits have prompted the

⁵⁴ See Armando Montaña, *States Move to Limit Spending on For-Profit Colleges While Tightening Oversight*, CHRONICLE OF HIGHER EDUC., July 16, 2011 (highlighting the Cherokee Nation which has prohibited its students from accepting scholarships from any proprietary school).

⁵⁵ See *id.* (detailing efforts made by several Democratic and Republican lawmakers to curb spending on for-profit schools).

⁵⁶ See Chris Kirkham, *Attorneys General in 10 States Launch Joint Investigation Into For-Profit Colleges*, HUFFINGTON POST (May 3, 2011, 7:10 PM) http://www.huffingtonpost.com/2011/05/03/for-profit-colleges-10-state-investigation_n_857199.html (citing that rising enrollments and increased reliance on federal student aid by for-profits as the reasons for increased industry scrutiny); see also Todd Wallack, *University of Phoenix Target of Mass. Probe*, BOSTON.COM (May 16, 2011, 6:07 PM) http://www.boston.com/business/ticker/2011/05/university_of_p.html (focusing on the University of Phoenix, the largest for-profit university, for its alleged deceptive recruitment practices); *Apollo Group, Inc. Reports Fiscal 2011 Third Quarter Results*, APOLLO GROUP, INC. (June 30, 2011) <http://phx.corporate-ir.net/phoenix.zhtml?c=79624&p=irol-newsArticle&ID=1581481&highlight=> (announcing that while enrollments were down at the University of Phoenix to just under 400,000 in the third quarter, revenues still topped \$1,235.8 million).

⁵⁷ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-600, *supra* note 32, at 22-25 (documenting several situations where a government employee pretended to be a prospective student and was told false information or was helped with a minimum skills entrance examination to ensure they would qualify for admission).

⁵⁸ Cf. Kelly Field, *Faculty at For-Profits Allege Constant Pressure to Keep Students Enrolled*, CHRONICLE OF HIGHER EDUC., May 8, 2011, at A1, A10-A12 (investigating how faculty at for-profit schools are asked to change student grades and encouraged to recommend future student attendance to maintain revenue).

⁵⁹ See Press Release, Office of Pub. Affairs, Dep't of Justice, U.S. Files Complaint Against Education Management Corp. Alleging False Claims Act Violation (Aug. 8, 2011) available at <http://www.justice.gov/opa/pr/2011/August/11-civ-1026.html> (detailing the DOJ's rationale for filing a complaint against one of the largest proprietary school agencies for fraudulent recruitment practices that violate the FCA through *United States ex rel. Washington v. Educ. Mgmt. Corp.*, Civil No. 07-461 (W.D. Pa. 2011)); see also Tamar Lewin, *For-Profit College Group Sued as U.S. Lays Out Wide Fraud*, N.Y. TIMES, (Aug. 8, 2011) http://www.nytimes.com/2011/08/09/education/09forprofit.html?_r=1&ref=tamarlewin (emphasizing the significance of the federal government's involvement in a suit against a proprietary school as evidence that the DOJ is also taking student financial safety seriously).

DOJ to file a complaint against the United States' second largest proprietary school owner, Education Management Corporation.⁶⁰

In June 2011, the ED responded to growing public concern with proprietary schools by implementing new regulations that focus on gainful employment as a means to curb fraudulent practices.⁶¹ For instance, proprietary schools are now required to prove that its students are gainfully employed upon graduation or else federal funding could be revoked.⁶² Proprietary schools responded to the revised regulations by arguing that they are too harsh.⁶³ Student plaintiffs have conversely argued that gainful employment may ultimately become an effective regulatory measure, but it does not sufficiently address student fraud concerns.⁶⁴

Proprietary school recruitment is an important issue for both federal and state governments because students who attend for-profit schools have a higher likelihood of defaulting on their student loans.⁶⁵ Default occurs when a student is delinquent for over 270 days.⁶⁶ Several factors account

⁶⁰ See Press Release, Office of Pub. Affairs, Dep't of Justice, *supra* note 59 (believing that the DOJ's litigation will force schools to reconsider their recruitment practices).

⁶¹ See Program Integrity: Gainful-Employment Debt Measures, 76 Fed. Reg. 34,386 (June 13, 2011) (to be codified at 34 C.F.R. § 668) (updating the HEA to reflect the government's strong interest in releasing student loans only to promote academic and career opportunities).

⁶² See Press Release, Justin Hamilton, Obama Administration Announces New Steps to Protect Students from Ineffective Career College Programs, U.S. Dep't of Educ. (June 2, 2011) available at <http://www.ed.gov/news/press-releases/gainful-employment-regulations> (announcing that if proprietary schools cannot show that at least one third of its students are employed and able to start repaying their loans upon graduation, then federal funding can be withheld); see also Larry Abramson, *Softened Regulations Issued for For-Profit Schools*, NAT'L PUB. RADIO, June 2, 2011, <http://www.npr.org/2011/06/02/136876216/softened-regulations-issued-for-for-profit-schools> (acknowledging that some for-profit schools may close in response to the new federal regulations).

⁶³ See, e.g., Michael Horn, *New Higher Ed Regulations Leave Everyone Empty*, FORBES.COM (June 16, 2011, 10:51 AM), <http://www.forbes.com/sites/michaelhorn/2011/06/16/new-higher-ed-regulations-leave-everyone-empty/> (acknowledging that there is a delicate balance between both sides on this issue, but a better solution still probably exists to prevent fraud).

⁶⁴ See *id.* (emphasizing that the ED only focused on one possible deceptive tactic—inflated employment statistics—that proprietary schools could use against students).

⁶⁵ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-600, *supra* note 32, at 15-18 (showing charts which detail student loan default rates at proprietary schools are more than double those found at traditional universities and colleges); see also ALISA F. CUNNINGHAM & GREGORY S. KIENZL, *DELINQUENCY: THE UNTOLD STORY OF STUDENT LOAN BORROWING* 40 (2011) (contrasting student borrowers from various higher education sectors to show that seventy-four percent of students attending two-year and forty-three percent of students attending four-year proprietary schools must start repaying their loans after one year of study for either failing to re-enroll or dropping below half-time status).

⁶⁶ See CUNNINGHAM & KIENZL, *supra* note 65, at 35 (defining that a default occurs

for high default rates at proprietary schools, including family education and income, which improper student recruitment only exacerbates.⁶⁷ Despite this problem, student claims for fraudulent proprietary school recruitment and loan inducement have found inconsistent treatment within the federal courts.⁶⁸ Judicial attention toward this issue is therefore needed to ensure that loans are not improperly released while the government seeks to bolster college attendance and proprietary schools rise in popularity.⁶⁹

III. THE NINTH AND EIGHTH CIRCUITS' DIVERGING APPROACHES TO PROPRIETARY SCHOOL FRAUD

The federal circuits do not agree on the litigation process for student fraud claims against proprietary schools. The Ninth Circuit follows promissory fraud theory and does not distinguish between a school's false loan certification with the ED and false statements made to a student that induced a loan request.⁷⁰ Conversely, the Eighth Circuit applies initial falsification theory and finds that if an institution remains certified with the government, then it cannot be held liable for fraud unless a claim directly relates back to the certification.⁷¹ The circuits differ on whether to use an implied certification standard and if a student's complaint must cite school

when a student is delinquent in making a payment; when the student is late between 60 and 120 days, this information is reported to a consumer credit agency).

⁶⁷ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-600, *supra* note 32, at 19-20 (suggesting that in addition to family education and income, older students with other family commitments tend to enroll at proprietary schools and do not have the resources to repay loans, leading to default).

⁶⁸ Compare *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005) (reversing a district court decision to dismiss a complaint for failure to state a claim because a student can use the FCA to recover damages for fraudulent student loan requests) and *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166 (9th Cir. 2006) (allowing students to recover damages for fraudulent recruitment by using implied certification to create an implicit school certification with each submitted loan request), with *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791 (8th Cir. 2011) (failing to explicitly state a violated federal regulation under the FCA will result in a 12(b)(6) dismissal).

⁶⁹ See generally CARNEVALE, *supra* note 21 (failing to address this issue would cause the United States to face an even greater education and debt crisis by 2018); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-600, *supra* note 32, at 12 (emphasizing that students who default on their student loans leave taxpayers with the burden to repay the remaining balance while also forcing the student into a poor financial situation).

⁷⁰ See *Hendow*, 461 F.3d at 1172 (explaining that a false statement made at certification or through a student's subsequent request for funds are both actionable under the FCA, the material issue is whether a false representation fraudulently induced funds).

⁷¹ See *Vigil*, 639 F.3d at 797-98 (concluding that a certified institution cannot fraudulently request funds when it is still pre-approved to make requests with the federal government, a decision that implicates proprietary schools certifying ED compliance under the HEA).

certification with the ED.⁷²

A. Promissory Fraud Theory

The Ninth Circuit's promissory fraud theory adopts a four-part test from the Seventh Circuit to determine fraud.⁷³ The four requirements are: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, and (4) causes the government to pay out money or forfeit monies due.⁷⁴ The Ninth Circuit places particular weight on the scienter component that requires an institution to actually know that their statements are false.⁷⁵ It must be shown that a school knowingly made false representations that are material to an alleged injury.⁷⁶

The Ninth Circuit's four-part test also inherently requires implied certification to resolve cases.⁷⁷ This requirement assumes that when a business agrees to receive federal funding—through a contract, voucher, agreement, or form—its subsequent requests include an implicit agreement to remain compliant with federal regulations.⁷⁸ In *United States ex rel. Hendow v. University of Phoenix*, the Ninth Circuit considered a complaint where former employees alleged that the university deliberately made false statements to the government so it could receive federal loans.⁷⁹ The court found for Hendow and specifically cited implied certification in the decision, but it did not include a detailed justification for applying the

⁷² See *id.* at 796 (detailing that once an institution certifies with the government, it remains in compliance unless subsequent fund requests ask for recertification prior to each new disbursement).

⁷³ See *Main*, 426 F.2d at 916-17 (describing a review standard later adopted by the Ninth Circuit).

⁷⁴ See, e.g., *Hendow*, 461 F.3d at 1177-78 (stating that this standard is applied to all fraud cases within the circuit, irrespective of federal certification policies, while individual courts may reword the elements for their jurisdiction).

⁷⁵ See *id.* at 1174 (mentioning that the Ninth Circuit does not find a difference between its theory and the Seventh Circuit's False Certification Theory as they both rely upon the same elements and rationale).

⁷⁶ See *Main*, 426 F.3d at 916-17 (7th Cir. 2005) (explaining that if a false representation is material and causes the government to disburse funds, then it is irrelevant when a school signed a compliance agreement because a violation still exists).

⁷⁷ See *Hendow*, 461 F.3d at 1172 n.1 (stating that implied certification has been considered by other courts, such as the Court of Federal Claims).

⁷⁸ See *Ab-Tech Const., Inc. v. United States*, 31 Fed. Cl. 429 (1994) (payment vouchers); *Shaw v. AAA Eng'g & Drafting Co.*, 213 F.3d 519 (10th Cir. 2000) (work order contracts); *United States ex rel. Joslin v. Cmty. Home Health of Md., Inc.*, 984 F. Supp. 374 (D. Md. 1997) (Medicare claim forms); *United States ex rel. Bennett v. Medtronic, Inc.*, 747 F. Supp. 2d 745 (S.D. Tex. 2010) (Medicare device coverage).

⁷⁹ *Hendow*, 461 F.3d at 1168.

standard.⁸⁰ The Ninth Circuit has found that liability can be assessed through the FCA using an implied certification standard.⁸¹

B. Initial Falsification Theory

The Eighth Circuit will apply a four-part test similar to the Ninth Circuit to resolve student fraud claims, but it conversely requires that a complaint focus on a school's initial certification with the government.⁸² The court reasoned in *United States ex rel. Vigil v. Nelnet, Inc.* that a preliminary motion to dismiss could be granted when a person fails to claim fraud with reference to a specific government regulation in the cause for action.⁸³ The complaint should include enough factual information to show that a claim is plausible.⁸⁴ Any alleged false statement must further be material in causing the government to disperse funds.⁸⁵ Implied certification is consequently not applied by the Eighth Circuit; it requires specific evidence that a defendant expressly certified compliance and then intentionally violated its agreement.⁸⁶

C. Divergent Student Fraud Standards

The Eighth Circuit's initial falsification theory exemplifies why it is significant that a school does not need to recertify its compliance with HEA guidelines with each student loan request.⁸⁷ After a school has been

⁸⁰ *Id.* at 1172 n.1 (stating that implied certification was not necessary to reach a decision in this case, but that it was still relevant enough to include in a note).

⁸¹ *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) ("[A] complaint alleging implied false certification must plead with particularity allegations that provide a reasonable basis to infer that (1) the defendant explicitly undertook to comply with a law, rule or regulation that is implicated in submitting a claim for payment and that (2) claims were submitted (3) even though the defendant was not in compliance with that law, rule or regulation. We do not embrace [a] categorical approach that would, as a matter of course, require a relator to identify representative examples of false claims to support every allegation, although we recognize that this requirement has been adopted by some of our sister circuits.").

⁸² See *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791, 799-800 (8th Cir. 2011) (explaining that it is insufficient to merely present evidence of potential misconduct without any additional context to show why it proves that a federal provision was violated).

⁸³ *Vigil*, 639 F.3d at 791, 801-02 (describing how the FCA was intended for narrowly defined circumstances unless sufficient supporting authority could be produced).

⁸⁴ *Id.* at 796 (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948-49 (2009)) (stressing that enough factual material is required to show that a defendant adopted and implemented policies that violated federal regulations).

⁸⁵ *Id.* (citing *Mikes v. Straus*, 274 F.3d 687, 697 (2nd Cir. 2001)) (admitting that not all instances of regulatory noncompliance will violate the FCA if they are not material to the government's disbursement decision).

⁸⁶ *Id.* at 795-96 (explaining that the FCA is not violated through simple regulatory non-compliance, rather a defendant must knowingly defraud the government).

⁸⁷ See Higher Education Opportunity Act, 20 U.S.C. § 1094(a) (2006 & Supp. III

certified, the ED will review a student's loan request and dispense funds, unless the Secretary states that the school is not compliant.⁸⁸ This approach makes it more difficult to establish liability for fraudulent recruitment when the Secretary has not revoked a school's certification.⁸⁹ A student must file a fraud claim not for the loan that he or she withdrew, but against the school for its initial false certification with the government to comply with disbursement guidelines.⁹⁰ This is a tougher fraud standard to satisfy because a scienter requirement remains, meaning that a student must prove that a proprietary school knowingly made a false claim in relation to its initial certification with the ED.⁹¹

Initial falsification theory is beneficial, however, in retaining a review standard that is closest to the language used in the FCA.⁹² The FCA only requires that a defendant knowingly make a false representation and does not ask the court to imply intent from another action.⁹³ The promissory fraud theory creates an additional burden on the court to determine whether one or more incidents violate a certification agreement.⁹⁴ It further does not provide a clear procedure to determine when a certification inference is justified.⁹⁵ Initial falsification theory avoids this issue by simply requiring that a plaintiff draft a complaint that specifically details any fraudulent behavior by the defendant to determine whether it violated any provision within the FCA.⁹⁶

2010) (detailing the certification requirements that each school must satisfy receiving federal student loans).

⁸⁸ See *id.* at § 1094(c)(1) (empowering only the Secretary to make decisions).

⁸⁹ See generally *id.* at § 1094(d)(2) (describing the sanctions available to the Secretary for non-compliance).

⁹⁰ See *id.* (meaning a plaintiff cannot recover damages when the ED still certifies a proprietary school to receive federal funds).

⁹¹ See *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791, 801 (8th Cir. 2011) (reiterating that the FCA has a knowledge component and that any claim for relief must prove that a defendant has knowingly violated a stipulated regulation).

⁹² See, e.g., False Claims Act, 31 U.S.C. § 3729 (2006).

⁹³ See *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 381 (1st Cir. 2011) (deciding that FCA cases should not be resolved by using any judicially-created framework for implied certification).

⁹⁴ See *United States ex rel. Marcy v. Rowan Companies, Inc.*, 520 F.3d 384, 388-89 (5th Cir. 2008) (refusing to apply implied certification in Fifth Circuit decisions under the theory that a claim must be materially related to a violated government benefit).

⁹⁵ See S. REP. NO. 99-345, at 9 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5274 (reporting Congress' intent for the FCA to hold a defendant liable for "[E]ach and every claim submitted under a contract, loan guarantee, or other agreement *which was originally obtained* by means of false statements or other corrupt or fraudulent conduct.") (emphasis added).

⁹⁶ See *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791, 795-96 (8th Cir. 2011) (explaining that because the FCA is an anti-fraud statute a claim must be stated with particularity to satisfy federal rules of civil procedure).

Promissory fraud theory may require more effort from the courts, but it is ultimately less restrictive by allowing a plaintiff to avoid adherence to initial certification in the cause of action.⁹⁷ In *Hendow*, the Ninth Circuit attempted to limit any additional burden by providing a succinct four-part test to determine fraud.⁹⁸ This test does not discriminate between whether a claim is based upon fraudulent loan inducement or initial certification.⁹⁹ It is therefore more flexible than the Eighth Circuit requirements.¹⁰⁰

The other notable difference between the circuits is their opinion toward implied certification. The Ninth Circuit favors this standard, but the Eighth Circuit instead relies upon an initial certification to resolve FCA cases.¹⁰¹ Every new student loan application in the Eighth Circuit consequently is not an acknowledgement that a proprietary school remains in compliance with the HEA, but rather only signifies that a student requests funds and intends to use them at a particular school.¹⁰² The circuits' competing review standards are created from a national judicial debate over how and if implied certification should be applied.¹⁰³

Some federal jurisdictions, such as the Federal District Court for Maryland, do not use the implied certification standard to resolve FCA cases.¹⁰⁴ This court refused to apply implied certification and found that merely submitting forms did not recertify compliance, even if the party was aware of non-compliance.¹⁰⁵ The Federal Claims Court has conversely

⁹⁷ See *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1172 n.1 (9th Cir. 2006) (allowing implied certification to replace initial certification if not referenced in a complaint).

⁹⁸ See *id.* at 1177-78 (displaying that this standard is flexible within the circuit's district courts).

⁹⁹ See *id.* (assuming that all four elements are satisfied, a cause of action exists).

¹⁰⁰ See *Vigil*, 639 F.3d at 799 (requiring relation back to initial certification and a specific government regulation, without exception).

¹⁰¹ See *id.* at 801-02 (creating a higher burden of proof to show fraud).

¹⁰² See *id.* (claiming that if any fraud has occurred, it can only be in relation to the initial certification).

¹⁰³ See *United States ex rel. Willis v. United Health Grp., Inc.*, No. 10-2747, 2011 WL 2573380, at *8 (3rd Cir. 2011) ("[O]ther courts of appeals have considered [implied certification] and a majority of those courts, including those in the Second, Sixth, Ninth, Tenth, Eleventh, and District of Columbia Circuits have recognized that there can be implied false certification liability under the FCA. . . . We now join with these many courts. . . .").

¹⁰⁴ See *United States ex rel. Joslin v. Cmty. Home Health of Md., Inc.*, 984 F. Supp. 374, 384 (D. Md. 1997) (finding that a plaintiff that uses the FCA based only on their submission of payment claims to the government is insufficient to show liability under the act without directly citing a violated section within a federal statute).

¹⁰⁵ See *id.* at 384-85 ("While ignorance of the law is usually no excuse to justify one's actions, the FCA requires that a false statement be made with actual knowledge, deliberate ignorance, or reckless disregard of the statement's falsity.").

relied upon implied certification in its FCA cases.¹⁰⁶ It found that each request for additional funds under the FCA implied compliance recertification.¹⁰⁷ The federal circuit split over implied certification exists, even though most jurisdictions follow the latter standard when deciding private FCA claims.¹⁰⁸ The majority reasons that if a regulation imposes a conditional duty for federal funding, then an institution will be liable for fraud when it requests funds while non-compliant because every submitted claim implicitly includes compliance recertification.¹⁰⁹

The circuit division over how to properly review student fraud claims against proprietary schools is subtle, but generates great consequence. As the Eighth Circuit noted in *Vigil*, the facts in its case were different from what the Ninth Circuit considered in *Hendow*.¹¹⁰ The Eighth Circuit therefore distinguished its decision by stating that *Vigil* did not file a complaint challenging any specific certification provisions and the court did not want to assume his argument.¹¹¹ Both circuits accept that a four-step test similar to the promissory fraud theory is ultimately needed, but differ on whether to allow inferences over certification questions, often

¹⁰⁶ See *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429, 430-31, 434 (1994) (contracting to build an automated data processing facility for the United States Army Corps of Engineers); see also Small Business Act, 15 U.S.C. § 631 (2010) (encouraging a free and competitive market by requiring that minority business contractors have an equal opportunity to obtain government contracts).

¹⁰⁷ See *Ab-Tech*, 31 Fed. Cl. at 434 (articulating that a continual presentation of payment vouchers constituted an implied certification that Ab-Tech was continuing to adhere to the program; failure to notify the government about subcontracts thus violated federal statute even though Ab-Tech did not explicitly recertify with every payment).

¹⁰⁸ See *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 415 (6th Cir. 2002) (explaining that implied certification exists and liability can attach to a defendant if he violates a continuing duty to comply with regulations that are a condition for payment); *Mikes v. Straus*, 274 F.3d 687, 700 (2nd Cir. 2001) (concluding that implied certification is appropriate when a statute or regulation expressly states that a provider must stay in compliance for payment) (emphasis in the original); *Shaw v. AAA Eng'g & Drafting Co.*, 213 F.3d 519, 531, 533 (10th Cir. 2000) (finding that the *Joslin* court misinterpreted the application of implied certification because the scienter requirement from the promissory fraud theory must still be satisfied even if a business' recertification is implied).

¹⁰⁹ But see *United States ex rel. Graves v. ITT Educ. Servs., Inc.*, 284 F. Supp. 2d 487, 497 (S.D. Tex. 2003) (stipulating that liability under the FCA only exists if a defendant has made a false claim; the mere violation of a regulation does not create liability under the FCA unless a false certification is actually submitted to the government).

¹¹⁰ See *United States ex rel. Vigil v. Nelnnet, Inc.*, 639 F.3d 791, 796-97 (8th Cir. 2011) (explaining why a factual distinction between the Eighth and Ninth Circuits created different outcomes).

¹¹¹ See *id.* (reiterating that *Vigil* only attached several documents to the complaint without any context to show when and how Nelnnet certified its federal compliance).

resulting in different outcomes for similar claims.¹¹²

A final distinction between the Ninth and Eighth Circuits is that they respectively represent the highest percentage of Democratic and Republican court appointments.¹¹³ From a political perspective, one potential explanation for why the Eighth Circuit has a slightly stricter standard is that its more conservative justices tend to favor less government regulation over business.¹¹⁴ Nevertheless, the circuits' different philosophies have ultimately established an unsettled national standard for proprietary school fraud cases.

IV. MANDATORY ARBITRATION AND THE FUTURE OF STUDENT FRAUD LITIGATION

While the circuit courts remain divided over review standards for proprietary school fraud litigation, a recent United States Supreme Court decision may nullify this debate by allowing mandatory arbitration agreements in adhesion contracts.¹¹⁵ The Court in *AT&T Mobility LLC v. Concepcion* considered a class action lawsuit against AT&T for fraudulently promoting a free phone in exchange for a service agreement, but then charging the customer sales tax on the phone's value.¹¹⁶ The service agreement mandated arbitration for any legal disputes and forbade class actions.¹¹⁷ The plaintiffs relied upon a California Supreme Court

¹¹² Compare *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1170 (9th Cir. 2006) (citing *United States v. Neifert-White Co.*, 390 U.S. 228 (1968)) ("The False Claims Act, however, is not limited to such facially false or fraudulent claims for payment," but "is 'intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.'"), with *Vigil*, 639 F.3d at 799 (8th Cir. 2011) (citing *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 553 U.S. 662 (2008)) ("If a false statement 'is not made with the purpose of inducing payment of a false claim. . . . [T]he direct link between the false statement and the Government's decision to pay or approve a false claim is too attenuated to establish liability.'").

¹¹³ Compare THE JUDGES OF [THE NINTH CIRCUIT] IN ORDER OF SENIORITY, http://www.ca9.uscourts.gov/content/view_seniority_list.php?pk_id=0000000035 (showing that approximately sixty percent of Ninth Circuit justices were appointed by Democratic presidents), with EIGHTH CIRCUIT COURT OF APPEALS JUDGES, <http://www.ca8.uscourts.gov/newcoa/judge.htm> (displaying that approximately eighty percent of Eighth Circuit justices were appointed by Republican presidents).

¹¹⁴ Cf. ANDREW HEYWOOD, *POLITICAL IDEOLOGIES: AN INTRODUCTION* 69-70 (2003) (sharing how modern conservatism developed and disfavors governmental regulations over public affairs).

¹¹⁵ See Molly Redden, *Supreme Court Decision on Arbitration May Have Eroded For-Profit Students' Right to Sue*, CHRONICLE OF HIGHER EDUC., June 21, 2011 (explaining how a case involving class actions and arbitration clauses in relation to cell phones will hinder a student's ability to sue the proprietary school industry).

¹¹⁶ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (emphasizing how the plaintiffs were also not aware of any mandatory arbitration clause associated with the promotion for a free phone).

¹¹⁷ *Id.* at 1744 (restating the agreement included a provision that allowed AT&T to

ruling that found arbitration clauses prohibiting class actions in consumer contracts unconscionable.¹¹⁸ The Supreme Court reversed the California court's decision on the grounds that state law is preempted by the Federal Arbitration Act ("FAA").¹¹⁹ This decision may not have explicitly applied to proprietary schools, but *Concepcion* has nonetheless become an important case for students attempting to recover damages for fraudulent recruitment practices.¹²⁰

A. *The Concepcion Standard and Proprietary Schools*

Concepcion was applied to a proprietary school case within a couple months after the decision was announced. In *Bernal v. Burnett*, several students brought a class action against Alta Colleges Inc. for using deceptive and high-pressure recruitment practices to induce enrollment.¹²¹ Alta was specifically accused of misrepresenting attendance costs, the chances for job placement, and salary expectations upon graduation.¹²² Before the named plaintiffs agreed to take classes, however, they signed an arbitration agreement and a jury trial waiver.¹²³

The *Bernal* court rejected the plaintiff's primary argument that collateral estoppel applied in this case.¹²⁴ It stated that the agreement could only be

unilaterally change the terms to the agreement, which the plaintiffs claimed was frequently employed in conjunction with the arbitration clause).

¹¹⁸ See *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005) (finding that the waiver of class actions in consumer adhesion contracts was unconscionable in certain situations and their prohibition is not prohibited by the Federal Arbitration Act ("FAA")).

¹¹⁹ See Federal Arbitration Act, 9 U.S.C. § 2 (1947) (enforcing agreements to arbitrate as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"); *Concepcion*, 131 S. Ct. at 1756.

¹²⁰ See *Affiliated Computer Servs., Inc. v. Fensterstock*, 131 S. Ct. 2989 (2011) (detailing how a student claim was dismissed by the Supreme Court after *Concepcion*).

¹²¹ *Bernal v. Burnett*, No. 10-cv-01917-WJM-KMT, 2011 WL 2182903, *1 (D. Col. June 6, 2011) (alleging that key facts about the school's operation were made before students enrolled in online programs).

¹²² See *id.* (arguing that these tactics violated the Colorado Consumer Protection Act and the plaintiffs requested class certification, an injunction against the school for continued fraudulent behavior, and monetary compensation to the affected students); see also Colorado Consumer Protection Act, COLO. REV. STAT. § 6-1-105 (2010) (codifying various deceptive methods a business may employ that will make it liable for damages).

¹²³ See *Bernal*, 2011 WL 2182903 at *2 (including the following clause, "Both the Student and College irrevocably agree that any dispute between them shall be submitted to arbitration").

¹²⁴ See BLACK'S LAW DICTIONARY 298 (9th ed. 2009) (defining collateral estoppel as: "The binding effect of a judgment as to matters actually litigated and determined in one action on later controversies between the parties involving a different claim from that on which the original judgment was based"); see also *Bernal*, 2011 WL 2182903 at *2-*3 (presenting arbitration decision prior to litigation where an arbitrator ruled that there

invalidated if the students claimed the arbitration clause was unconscionable.¹²⁵ The court ultimately used the *Concepcion* standard to resolve the case against the plaintiffs.¹²⁶ The judge in *Bernal* sympathized with the students, however, and acknowledged in the opinion that *Concepcion* was a “serious blow to consumer class actions and likely foreclosed the possibility of any recovery for many wronged individuals.”¹²⁷ The court was nonetheless bound by the *Concepcion* decision to enforce the FAA over state law.¹²⁸

After *Bernal*, the Supreme Court considered *Fensterstock v. Education Financial Partners* where several plaintiffs claimed that their loan repayment schedule was altered by Education Finance Partners without notice or permission.¹²⁹ The loan agreement signed by the parties included a mandatory arbitration clause and prohibited class actions.¹³⁰ The Supreme Court granted certiorari on this case and immediately overruled the Second Circuit’s decision that the FAA did not preempt state law.¹³¹ The case was subsequently remanded back to the lower court so a decision consistent with *Concepcion* could be reached.¹³²

was no specific provision in agreement to compel arbitration, but under Colorado law, the agreement was not unconscionable).

¹²⁵ Cf. *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010) (finding that when a mandatory arbitration clause is at issue, a claim that the clause is unconscionable must be made against the clause itself and not against the entire contract); *Central Bank Denver, NA v. Mehaffy, Rider, Windholtz & Wilson*, 940 P.2d 1097, 1103 (Colo. App. 1997) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 28(2)(b) (1982)) (articulating that collateral estoppel does not apply when the issue is one of law and a new determination is needed to account for a change in the law “or otherwise avoid inequitable administration of the laws”).

¹²⁶ See, e.g., *Bernal*, 2011 WL 2182903 at *5 (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747) (“When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”).

¹²⁷ See *id.* at *7 (detailing an overall displeasure with applying the *Concepcion* decision to the facts in this case).

¹²⁸ See Federal Arbitration Act, 9 U.S.C. § 2 (1947) (providing a federal government preference for arbitration if included in a contract).

¹²⁹ *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 128-30 (2nd Cir. 2010), *vacated sub nom. Affiliated Computer Servs., Inc. v. Fensterstock*, 131 S. Ct. 2989 (2011) (describing how Fensterstock was a lawyer but even he claimed to not fully understand or could not immediately find any mandatory arbitration clause in the loan repayment agreement).

¹³⁰ See *id.* at 129 (noting that the arbitration clause was hidden within enrollment terms).

¹³¹ See *Affiliated Computer Servs., Inc. v. Fensterstock*, 131 S. Ct. 2989 (2011) (explaining its decision in only two sentences).

¹³² See, e.g., *Fensterstock v. Educ. Fin. Partners*, 426 F. App’x. 14 (2nd Cir. 2011) (remanding case back to district court because its initial review was no longer viable after *Concepcion*).

B. Concepcion's Future Effects on Fraud Claims Against Proprietary Schools

Concepcion was not decided to directly limit litigation by student plaintiffs, but subsequent judicial opinions appear to have had that effect.¹³³ Bill Ojile, lead counsel for Alta in the *Bernal* case, has stated that the *Concepcion* decision will ultimately deny class action status to student plaintiffs.¹³⁴ Students would consequently be forced to choose between taking classes with a mandatory arbitration clause in their enrollment agreement and not attending a proprietary school.¹³⁵ *Concepcion's* impact on proprietary school fraud litigation is therefore quite important.

Mandatory arbitration is beneficial in allowing the courts to unload cases from its docket.¹³⁶ It also removes technical procedure from a proceeding and allows both parties to have their issue resolved without delay.¹³⁷ Students may feel that a mandatory arbitration clause limits their ability to recover, but it could also allow them to have their case heard in a circuit that does not follow implied certification.¹³⁸ Students who cannot satisfy initial falsification requirements in the Eighth Circuit would still be able to file their complaint with an arbiter. Arbitration will at least allow all students an opportunity to recover damages while the circuit courts apply different FCA litigation standards.

The Supreme Court's decision to enforce arbitration changed how proprietary schools can protect themselves against fraud lawsuits.¹³⁹ *Bernal* and *Fensterstock* are the two immediate examples. The cases are distinguished in that the former separated its arbitration clause from the enrollment agreement while the latter left the clause among other terms.¹⁴⁰

¹³³ See *id.* (tracing complaint progress through judicial system before and after *Concepcion*).

¹³⁴ See Dana Olsen, *School Battles in Wake of Supreme Court Arbitration Decision*, LAW.COM (last visited Oct. 30, 2011), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202499577280> (explaining why counsel for proprietary schools still believe that arbitration is an appropriate remedy because it still allows students an opportunity to have their grievances heard by a neutral decision-maker without overloading an already crowded court docket).

¹³⁵ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748-54 (2011) (establishing that a business, including schools, can now simply avoid litigation by inserting a mandatory arbitration clause in its business agreements).

¹³⁶ See GEORGE GRAHAM, *TO VALIDATE CERTAIN AGREEMENTS FOR ARBITRATION*, H.R. DOC. NO. 96-646, at 1-2 (1924) (citing that arbitration will keep expenses to a minimum as a justification for passing the FAA).

¹³⁷ *Id.*

¹³⁸ See *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791, 798 (8th Cir. 2011).

¹³⁹ See *Concepcion*, 131 S. Ct. at 1748-54 (2011) (permitting proprietary schools to use adhesion contracts to prevent class actions and compel arbitration rather than rely upon the litigation process).

¹⁴⁰ Compare *Bernal v. Burnett*, No. 10-cv-01917-WJM-KMT, 2011 WL 2182903, *2

The courts enforced arbitration in each case, but the outcome was more predictable for the students in *Bernal* than in *Fensterstock*. How proprietary schools decide to present mandatory arbitration to prospective students may therefore become an issue in the future. It will ultimately depend upon resolution to complaints challenging *Concepcion*'s collateral consequences and whether the Supreme Court will limit its decision to certain agreements.¹⁴¹

V. THE NEED TO SIMPLIFY FRAUD CLAIMS UNDER THE HEA AND FCA AFTER *CONCEPCION*

Proprietary schools will continue to earn large profits as they expand across the country, but their recruitment practices must be monitored.¹⁴² The government response to this expansion must also be increased, however, as many students feel that it has not sufficiently responded to the problem.¹⁴³ The government will therefore need to implement changes that balance the for-profit nature of proprietary schools, the financial interests of students, and the current economic times. There are two solutions that do not require significant changes to current programs, or court review standards, that could be implemented to remedy this situation: implementing implied certification across all circuits and requiring all proprietary schools to include arbitration clauses in separate agreements.

A. *Reconciling Promissory Fraud and Initial Falsification Theories*

The implied certification standard promoted in *Hendow* should be employed across all circuits and would sufficiently remedy problematic litigation issues with the Eighth Circuit's initial falsification theory.¹⁴⁴ This

(June 6, 2011), with *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 129 (2nd Cir. 2010), *vacated sub nom. Affiliated Computer Servs., Inc. v. Fensterstock*, 131 S. Ct. 2989 (2011).

¹⁴¹ See Martha Neil, *After Supreme Court Win Forcing Customers to Arbitrate, AT&T Now Sues to Stop the Arbitration*, A.B.A.J. (Aug. 17, 2011), available at http://www.abajournal.com/news/article/after_supreme_court_win_requiring_customer_s_to_arbitrate_att_now_tries/ (announcing new litigation from AT&T to restrict its victory in *Concepcion* by arguing that customers cannot initiate unlimited arbitrations in order to prevent a company merger).

¹⁴² See LAURA G. KNAPP ET AL., U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTIC, NCES 2011-230 ENROLLMENT IN POSTSECONDARY INSTITUTIONS, FALL 2009; GRADUATION RATES, 2003 & 2006 COHORTS; AND FINANCIAL STATISTICS, FISCAL YEAR 2009 (2011) available at <http://nces.ed.gov/pubsearch> (projecting that proprietary school enrollments will increase as more students seek higher education).

¹⁴³ See Horn, *supra* note 63 (arguing that the government's attempt to balance public protection with business freedom has created a new standard that leaves everyone frustrated with federal funding being now dependent upon schools passing an arbitrary minimum employment standard).

¹⁴⁴ See *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1172 n.1

standard has faced criticism at the district court level over its application, though most courts acknowledge that the standard exists.¹⁴⁵ Implied certification would allow the Eighth Circuit to assume that any request for funds implicitly includes an agreement that an institution still meets all HEA standards, making a pretrial dismissal motion for failure to state a claim less likely to succeed.¹⁴⁶ The Eighth Circuit's restrictive standard prevents such loan cases from proceeding past the pleading stage because the potential victim did not properly cite fraud to a particular HEA provision, something a student presumably has never seen nor even knew existed.¹⁴⁷

Implied certification should especially be used in all circuits following the *Concepcion* decision.¹⁴⁸ If the Eighth Circuit standard remained, the *Concepcion* decision would require a student to prove that a school defrauded the government on its initial compliance certification by relying upon only one experience.¹⁴⁹ The Ninth Circuit's scienter requirement resolves this issue by establishing a high standard for the plaintiff to satisfy that will protect a court against frivolous legal claims.¹⁵⁰ Promissory fraud theory is therefore preferable to allow more students an opportunity to raise potential violations; the alternative is a prohibition on actions that simply fail to meet a technical requirement. The Ninth Circuit approach helps offset the greater financial resources available to proprietary schools and recognizes that its students tend to come from the lowest financial class.¹⁵¹

(9th Cir. 2006) (mentioning that other courts have used an implied certification standard, but this court will not discuss its merits because it is beyond the purview of the case).

¹⁴⁵ Compare *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005) (relying on implied certification), with *United States ex rel. Marcy v. Rowan Companies, Inc.*, 520 F.3d 384, 388-89 (5th Cir. 2009) (ignoring implied certification's application).

¹⁴⁶ See *Hendow*, 461 F.3d at 1177-78 (9th Cir. 2006) (allowing a student to at least bring his case in front of a judge or jury).

¹⁴⁷ Cf. GAO-09-600, *supra* note 32, at 19-21 (identifying common characteristics for persons most likely to attend proprietary schools—older age, minority status, and limited parental education—that make them particularly susceptible to default and coercion).

¹⁴⁸ See generally *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (limiting plaintiff ability to recover damages after signing an arbitration agreement by prohibiting class actions).

¹⁴⁹ See generally *United States ex rel. Vigil v. Nelnex, Inc.*, 639 F.3d 791 (8th Cir. 2011) (exemplifying that if plaintiffs cannot jointly submit their claims before the court, it becomes more difficult to prove that a school violated the HEA).

¹⁵⁰ See generally *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976) (defining scienter as “a mental state embracing intent to deceive, manipulate, or defraud”).

¹⁵¹ Cf. GAO-09-600, *supra* note 32, at 7 (showing that adherence to the Ninth Circuit standard would give students with lesser means a better opportunity to bring their claim

If a student can show that a school knowingly made false statements, a fraud claim should exist.¹⁵² In the Eighth Circuit, a student needs to argue beyond his or her personal experience to prove that initial certification was fraudulent.¹⁵³ This standard creates an additional burden to frame an argument with HEA language or accept case dismissal. The Ninth Circuit's promissory fraud theory is therefore more practical than the Eighth Circuit's standard in proprietary school fraud cases by allowing students to more easily construct a case.¹⁵⁴

B. Requiring Proprietary School Notification Over Arbitration Clauses

The ED should require proprietary schools to notify potential students about any arbitration clauses during the recruitment process to counter the use mandatory arbitration. These mandatory provisions place students at a great disadvantage, especially when the right to litigate is forfeited without their knowledge.¹⁵⁵ Schools should need to present arbitration clauses to prospective students similar to Alta Colleges, Inc. in *Bernal*.¹⁵⁶ This would at least allow students to know at the outset that they cannot litigate against the school for any reason. If students do not agree to these terms, then they can seek an alternative option such as another proprietary school or traditional college.

The notification requirement only works, however, if some proprietary schools do not mandate arbitration. The *Concepcion* ruling may ultimately cause most schools to include arbitration clauses because it forbids class actions and upholds the FAA over contrary state law.¹⁵⁷ If all proprietary

before a court).

¹⁵² See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543 (1943), *superseded by statute*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, *as recognized in* *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885 (2011) (expressing that after an initial fraudulent certification, every subsequent request for funds makes a defendant liable under the FCA).

¹⁵³ See *Vigil*, 639 F.3d at 799 (applying initial certification theory to all FCA claims).

¹⁵⁴ *Id.* (explaining that unless a claim explicitly includes details about making, using, or submitting fraudulent certifications, a claim is insufficient within the Eighth Circuit; merely alleging why certifications are false is not enough).

¹⁵⁵ See *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 128 (2nd Cir. 2010), *vacated sub nom. Affiliated Computer Servs., Inc. v. Fensterstock*, 131 S. Ct. 2989 (2011) (describing how plaintiff signed a "Private Consolidated Loan Application and Promissory Note" that included an arbitration clause hidden among its terms); *Bernal v. Burnett*, No. 10-cv-01917-WJM-KMT, 2011 WL 2182903, *2 (D. Colo. June 6, 2011) (detailing how plaintiffs were required to fill out an "Agreement to Binding Arbitration and Waiver of Jury Trial" form before they could enroll).

¹⁵⁶ See *Fensterstock*, 611 F.3d at 128 (hiding an arbitration clause within the enrollment agreement's terms).

¹⁵⁷ See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (allowing businesses to include a mandatory arbitration clause without it being unconscionable).

schools choose to include arbitration clauses in their enrollment agreements, the industry will not offer any alternatives. Student plaintiffs seeking to litigate would then be required to go through a two-step process by first arguing that the enrollment agreement was unconscionable and then that student loans were induced fraudulently and in violation of the FCA.¹⁵⁸ Action should be taken to protect disadvantaged consumers, who do not understand complex legal contracts, from more resourceful business executives.

VI. AN AMERICAN CRISIS

Proprietary school fraud is not a simple issue to solve. AT&T's recent decision to essentially restrict its *Concepcion* victory emphasizes this point.¹⁵⁹ This development also exemplifies why it is important for the court system to install uniform litigation and arbitration standards for proprietary school fraud cases. Court decisions can have unexpected consequences that create unpredictability.¹⁶⁰ Reform is therefore needed so that both students and schools can understand their legal options. It is also needed to protect the United States' future educational growth and economic health.

The American dream is most easily obtained with a college education, so it is imperative that corporations do not exploit students for their own economic gain. It should not be ignored that student loan debt has surpassed credit card debt in the United States.¹⁶¹ American students consequently must be diligent before obtaining student loans. Those who leave college with significant debt will not only complicate their own lives, but also hurt the American economy. This problem is exacerbated if proprietary schools are permitted to encourage students to request loans they cannot afford to repay.

Higher education will remain an American priority while the economy rebounds from its current economic instability. As college and graduate

¹⁵⁸ Cf. *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010) (distinguishing the differences between claiming a clause is unconscionable and an entire contract is unconscionable).

¹⁵⁹ See Neil, *supra* note 141.

¹⁶⁰ See *id.* (explaining how two firms have created a "Stop the Merger" campaign to prohibit AT&T from merging with T-Mobile by relying upon the *Concepcion* decision to encourage several plaintiffs to bring arbitration cases against AT&T that will prevent the merger to proceed; AT&T did not anticipate that its victory would create such a problem and it consequently is attempting to curb the decision so it can merge).

¹⁶¹ See Mary Pilon, *Student-Loan Debt Surpasses Credit Cards*, WALL STREET JOURNAL, Aug. 9, 2010, <http://blogs.wsj.com/economics/2010/08/09/student-loan-debt-surpasses-credit-cards/> (detailing how more students now owe money on their student loans than Americans currently owe on their credit cards for the first time in American history).

school applications increase with students attempting to shield themselves from the economic downturn, the country has an urgent need to protect its students. The legal system must be able to address student plaintiff concerns and to discipline proprietary schools who fraudulently recruit students. This is needed to prepare students for the workforce and to prevent another American debt crisis.