RUTGERS LAW RECORD

The Internet Journal of Rutgers School of Law | Newark

www.lawrecord.com

Volume 40 **2012-2013**

PRIVATE ACTIONS AGAINST PROPRIETARY SCHOOLS

Charlie Shelton[1]

I. INTRODUCTION

Post-secondary education and the student loans associated with it have become hot topics recently. There has been increasing political and media attention focusing on the rising cost of education[2] as well as the low employment numbers among graduates.[3] There has also been, and will continue to be, media punditry[4] and political soap boxing[5] about whether we should modify the bankruptcy statute to permit a greater number of people to discharge their student loans.[6]

---

[1] Charlie Shelton is currently a law clerk to the Hon. Raymond T. Lyons, U.S.B.J., and is a graduate of Rutgers School of Law – Newark (May 2011). He may be contacted at charlie.shelton@gmail.com.

[2] Mark Memmott, *Report: College Costs Continue Rising, Aid Cuts Could Add to Pain*, THE TWO-WAY (Oct. 26, 2011, 12:16 PM), *available at* http://www.npr.org/blogs/thetwo-way/2011/10/26/141721559/report-college-costs-continue-rising-aid-cuts-could-add-to-pain.

[3] Elie Mystal, *ABA Employment Stats are Just as Dire as We Expected*, ABOVE THE LAW (June 18, 2012, 12:47 PM), *available at* http://abovethelaw.com/2012/06/aba-employment-stats-are-just-as-dire-as-we-expected; *see also*, Lorraine Mirabella, *Life After College: High Unemployment and Depressed Wages*, THE BALTIMORE SUN, May 12, 2012.

[4] Kayla Webley, *Why Can't You Discharge Student Loans in Bankruptcy?*, TIME, Feb. 9, 2012, http://moneyland.time.com/2012/02/09/why-cant-you-discharge-student-loans-in-bankruptcy.

[5] Todd Ruger, *Private Student Loans Should be Dischargeable in Bankruptcy Courts, Senator Says*, THE BLT (Mar. 20, 2012, 11:48 AM), *available at* http://legaltimes.typepad.com/blt/2012/03/private-student-loans-should-be-dischargeable-in-bankruptcy-courts-senator-says.html.

[6] Most of the discussion seems centered around whether Congress should, in effect, return the student loan discharge provision to its pre-2005 status, which is when the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) became effective. Prior to BAPCPA, a student loan was only presumptively non-dischargeable if it was ". . .

Proprietary schools operate within this mix and it is this author's opinion that they deserve a closer look. This article will focus on the potential harm caused to students by proprietary schools and some of the remedies available to those students.

The Department of Education (DOE) has recently issued new regulations designed to prevent Title IV funds from being consumed by schools that produce poor outcomes and also to help increase the information available to prospective students.[7] Additionally, there are at least two recent publications discussing proprietary schools. The first, *Dreams Protected: A New Approach To Policing Proprietary Schools' Misrepresentations*, posits that due to the deficiencies in the current legal regime, aggrieved students lack remedies and proprietary schools are not sufficiently deterred from engaging in dishonest and predatory practices by those remedies.[8] It also argues that the DOE is in the best position to address these deficiencies.[9] The other, *"Your Results May Vary": Protecting Students And Taxpayers Through Tighter Regulation of Proprietary School Representations*, similarly argues that regulatory bodies should take a stronger position regarding proprietary schools.[10] The author, Aaron N. Taylor, then suggests a multi-faceted approach to dealing with the same problems outlined in *Dreams Protected*. Taylor suggests that the Federal Trade Commission (FTC) should require schools to provide disclosures warning students that most students do not complete the program and that

---

insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution . . . ." 11 U.S.C. § 523(a)(8) (2000) (amended by BAPCPA). After BAPCPA, it is presumptively non-dischargeable if it is an "educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual . . ." "The term 'qualified education loan' means any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses . . . ." 26 U.S.C. § 221(d)(1) (2012). Thus, BAPCPA removes the requirement that for an educational loan to be presumptively non-dischargeable in bankruptcy the loan must be made by a non-profit institution or that it be made, insured, or guaranteed by a governmental unit. Under this new iteration, loans made by for-profit companies are also presumptively non-dischargeable.

[7] Program Integrity Issues, 75 Fed. Reg. 66832 (Oct 29, 2010); Program Integrity: Gainful Employment – New Programs, 75 Fed. Reg. 66665 (Oct 29, 2010); Program Integrity: Gainful Employment – Debt Measures, 76 Fed. Reg. 34386 (Jun 13, 2011).

[8] Patrick F. Linehan, Note, *Dreams Protected: A New Approach To Policing Proprietary Schools' Misrepresentations*, 89 GEO. L.J. 753, 755 (2001).

[9] *Id.*

[10] Aaron N. Taylor, *"Your Results May Vary": Protecting Students And Taxpayers Through Tighter Regulation of Proprietary School Representations*, 62 Admin. L. Rev. 729, 731 (2010).

completion does not guarantee employment.[11] He also suggests that the FTC should expand its advisory Guides for Private Vocational and Distance Education Schools to include some of the more modern style schools, that the industry should be encouraged to self-regulate, that schools should be required to affirmatively make disclosures rather than simply provide pertinent information on request and that disclosure standards should be expanded.[12]

Both of these articles are well-written and well-argued and this author could easily support some of their conclusions. Generally, the proposed solutions and recently passed regulations either focus on preventing harm to students and the Title IV system or they focus on providing remedies to the harmed student. The two main positions of this article are: 1) while prevention efforts are laudable and should be pursued, we should exercise caution when pursuing prevention measures as some of those measures may serve to undercut the remedies available to the individual student; and 2) the current legal regime, despite its flaws, is usually sufficient to provide remedies to individually harmed students. In the areas where the legal regime is insufficient to address harm to the individual student, it is possible that the solution is best left to individual states rather than the DOE or some other federal agency. Before diving directly into the substance, readers will likely benefit from an introduction to the current state of proprietary schools.

A proprietary school could also be termed a "for-profit school."

> Proprietary institutions range from small vocational and technical schools to large accredited colleges and universities offering "traditional classroom experiences" and online degrees. The main difference between proprietary institutions and traditional public and private nonprofit institutions relates to control, operation and mission.[13]

[11] *Id.* at 777.
[12] *Id.* at 778-81.
[13] DEANNE LOONIN & NAT'L CONSUMER LAW CTR., PILING IT ON: THE GROWTH OF PROPRIETARY SCHOOL LOANS AND THE CONSEQUENCES FOR STUDENTS 6 (2011).

The seven largest schools in this category are: Apollo Group (which owns a host of schools including: University of Phoenix, Carnegie Learning, and the College for Financial Planning), Education Management Corp. (The Art Institutes, Argosy University, Brown Mackie College, South University), Career Education Corp. (which owns a host of schools including: Colorado Technical University and Le Cordon Bleu), Corinthian Colleges, DeVry, Kaplan Education, and ITT Educational Services.

The enrollment at proprietary schools has skyrocketed compared to that of not-for-profit private schools and public schools. Between 1998 and 2008, enrollment in higher education generally increased 31% versus 225% at proprietary schools over the same time period.[14] Proprietary schools currently have a total enrollment of 1.8 million students,[15] which is close to 10% of all enrolled post-secondary students.[16]

The profitability of proprietary schools has also increased. The average operating profit of those proprietary schools that are publicly traded grew from $127 million in 2005 to $229 million in 2009.[17] According to the National Consumer Law Center, the CEO of Strayer Education was paid $41.9 million in 2009.[18] Clearly, these schools and their principals have financially benefitted tremendously over the last fifteen years.

The concern about growth of proprietary schools stems from the poor results and questionable business practices at many of the schools. Despite accounting for only about 10% of all post-secondary students, proprietary schools account for 23.6% of all Pell grant monies and 23.5%

---

[14] *Id.* at 8.
[15] *Id.*
[16] *See*, S. COMM. ON HEALTH, EDUCATION, LABOR AND PENSIONS, 111TH CONGRESS, EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION 2 (June 24, 2010) (reporting an overall enrollment at proprietary schools of 1.8 million versus 19.6 million higher education students overall), *available at* http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf. The largest seven proprietary schools had a total enrollment in 2008-09 of 889,913 students. *Id.*
[17] LOONIN, *supra* note 13, at 6.
[18] *Id.* at 8.

of all federal loan monies.[19] This federal funding generates a tremendously high percentage of the proprietary schools' revenues, contributing as much as 90% of any particular school's revenue.[20] This high level of federal funding is coupled with higher incidences of private student loans, which do not offer the same protections as federal loans. For example, in 2007-08, 46% of students at proprietary schools utilized private student loans compared to 25% at private non-profit four-year schools.[21] Further, total indebtedness is generally higher at proprietary schools than public schools (though not necessarily higher than not-for-profit private schools).[22]

Additionally, proprietary schools have higher loan default rates. According to DOE data released in 2010, about 43% of all federal student loan defaulters attended proprietary schools even though these schools only enrolled about 9% of all students during this time period.[23] Further, 46.3% of all Stafford loans to students at two and four-year proprietary schools will eventually go into default compared to a 15.8% lifetime default rate for all higher education sectors.[24] Proprietary schools also make loans directly to the student, called institutional loans. These institutional loans have an estimated default range of 37.5% to 58%.[25]

---

[19] EMERGING RISK?, *supra* note 16, at 3.
[20] This comes from what is known as the 90/10 rule. Under this rule, a school must obtain at least ten percent of its revenues from sources other than federal student aid in order to participate in Title IV of the HEA. 20 U.S.C. § 1094 (2012). The number can go as high as 93.1% when all sources of federal funds are taken into account. LOONIN, *supra* note 13, at 9.
[21] CONSUMER FIN. PROT. BUREAU, REPORT TO THE SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, THE SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS, THE HOUSE OF REPRESENTATIVES COMMITTEE ON FINANCIAL SERVICES, AND THE HOUSE OF REPRESENTATIVES COMMITTEE ON EDUCATION AND THE WORKFORCE, PRIVATE STUDENT LOANS 33 (2012). *See also*, *id.* at 37. Under this report, the term "private student loan" includes institutional loans, which are loans made from the proprietary school directly to the student. *Id.* at 9.
[22] *Id.* at 49.
[23] LOONIN, *supra* note 13, at 10. Cumulative default rates currently exceed $8.1 billion, representing over 850,000 distinct loans. CONSUMER FIN. PROT. BUREAU report, *supra* note 21, at 64.
[24] LOONIN, *supra* note 13, at 10.
[25] *Id.* at 18-19.

Graduation rates at proprietary schools are also lower. In 2009, the overall dropout rate of post-secondary students who borrowed money to finance their education was 29%.[26] At less-than-four-year proprietary schools, the dropout rate was 41%.[27] At four-year proprietary schools, the dropout rate was a staggering 54%.[28] Of course, each student that fails to graduate is a student that has accumulated presumptively non-dischargeable debt but has not yet obtained the advantage of having a degree or certification.

Based on these numbers, we have students (and former students) whose income potential is no higher than, and possibly lower than, their counterparts at not-for-profit private schools and public schools;[29] students whose graduation rates are lower; students who have a greater incidence of private student loans; and students who are more likely to default on their loans. Many students and former students are simply in a worse financial situation than when they started with no measurable improvement in their earning potential.

Having outlined how proprietary schools are performing worse than public schools and private not-for-profit schools, the obvious question is: "how are these schools able to remain successful?" The evidence suggests that their success derives in large part from deceptive marketing and questionable business practices. For example, the U.S. Government Accountability Office (GAO) performed an undercover study at fifteen proprietary schools. As the study summarizes:

> Undercover tests at 15 for-profit colleges found that 4 colleges encouraged fraudulent practices and that all 15 made deceptive or otherwise questionable statements to GAO's undercover applicants. Four undercover applicants were encouraged by college personnel to falsify their financial aid forms to qualify for federal aid—for example, one admissions representative told an applicant to fraudulently remove $250,000 in savings. Other college

[26] MARY NGUYEN, EDUCATION SECTOR, DEGREELESS IN DEBT: WHAT HAPPENS TO BORROWERS WHO DROP OUT 6 (2012), *available at* http://www.educationsector.org/publications/degreeless-debt-what-happens-borrowers-who-drop-out.
[27] *Id.*
[28] *Id.*
[29] CONSUMER FIN. PROT. BUREAU report, *supra* note 21, at 60.

> representatives exaggerated undercover applicants' potential salary after graduation and failed to provide clear information about the college's program duration, costs, or graduation rate despite federal regulations requiring them to do so. For example, staff commonly told GAO's applicants they would attend classes for 12 months a year, but stated the annual cost of attendance for 9 months of classes, misleading applicants about the total cost of tuition. Admissions staff used other deceptive practices, such as pressuring applicants to sign a contract for enrollment before allowing them to speak to a financial advisor about program cost and financing options. However, in some instances, undercover applicants were provided accurate and helpful information by college personnel, such as not to borrow more money than necessary.[30]

As will be discussed, there are also many lawsuits detailing similar conduct. Suffice it to say that these stories are not unique to GAO undercover evaluations.[31] Such practices cause great harm to honest students who are attempting to do what we as a society tout as the path to success and claim to value: get an education. We do a great disservice to ourselves when we permit such abuses and failures to continue. What is worse is that the public fisc is being used to support this system. The remainder of this article will discuss some of the remedies available to individuals against proprietary schools that engage in unethical business practices, focusing on which approaches are more or less successful, followed by an argument for caution when fashioning federal level regulations designed to mitigate the individual level harm,. I will forego an analysis of the remedies against schools in their capacity as a lender, non-institutional lenders, and other necessary parties to the student-school contract as a complete discussion of those topics would require another article.

II. THE REMEDIES

In their effort to protect their rights as consumers, students have brought many different causes of action against schools with varying degrees of success. The most common causes of action are:

---

[30] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-948T, UNDERCOVER TESTING FINDS COLLEGES ENCOURAGED FRAUD AND ENGAGED IN DECEPTIVE AND QUESTIONABLE MARKETING PRACTICES 2 (2010), *available at* www.gao.gov/assets/130/125197.pdf.

[31] *See, e.g.*, Taylor, *supra* note 10, at 733-34.

1) Fraud;
2) Violation of various deceptive trade practices acts or consumer fraud acts; and
3) Breach of contract.

Some of the less frequently alleged wrongdoing includes making false certifications to the DOE,[32] violation of RICO statutes (which are attached to underlying fraud allegations),[33] lack of accreditation,[34] violation of the Higher Education Act (HEA) program provisions,[35] breach of fiduciary duty,[36] violation of various state statutes,[37] negligence,[38] intentional infliction of emotional distress,[39] and poor results generally.[40] I will only be focusing on the three enumerated most common causes of action.

a. Fraud

Allegations of fraud are probably the most successful basis for pursuing schools. Such allegations present a variety of factual scenarios. Some plaintiffs allege that the school misrepresented the level of education and/or facilities.[41] Others allege that the school knew the prospective student was either unqualified or unable to adequately complete the coursework or was

[32] *See, e.g.*, Wilson v. Chism, 665 N.E.2d 446 (Ill. App. Ct. 1996).
[33] *See, e.g.,* Cullen v. Whitman Medical Corp., 197 F.R.D. 136 (E.D. Pa. 1999); Rodriguez v. McKinney, 156 F.R.D. 118 (E.D. Pa. 1994); Beckett v. Computer Career Institute, Inc., 852 P.2d 840 (Or. Ct. App. 1993); Moy v. Adelphi Institute, Inc., 866 F.Supp. 696 (E.D.N.Y. 1994); Moy v. Terranova, 1999 WL 118773 (E.D.N.Y. Mar. 02, 1999); Rosario v. Livaditis, 963 F.2d 1013 (7th Cir. 1992).
[34] *See*, Lidecker v. Kendall College, 550 N.E.2d 1121 (Ill. App. 1990).
[35] *See*, De Jesus Chavez v. LTV Aerospace Corp., 412 F.Supp. 4 (N.D. Tex. 1976) (heavily criticized by multiple cases regarding the private right of action under the Higher Education Resources and Assistance Act).
[36] *See*, Andre v. Pace University, 161 Misc.2d 613 (N.Y.City Ct. 1994), *rev'd*, 170 Misc.2d. 893 (N.Y.App.Div.1996).
[37] *See, e.g.*, CenCor, Inc. v. Tolman, 868 P.2d 396 (Colo 1994); Malone v. Academy of Court Reporting, 582 N.E.2d 54 (Ohio App. 1990).
[38] *See*, *Cencor*, 868 P.2d at 397-98.
[39] *See*, *id.* at 398.
[40] *See, e.g.,* Blane v. Alabama Commercial College, Inc., 585 So.2d 866 (Ala. 1991) (affirming granting of summary judgment in defendant's favor because the school provided precisely what was bargained for – typing proficiency of thirty five words per minute).
[41] *See,* Schwitters v. Des Moines Commercial College, 203 N.W. 265 (Iowa 1925); Moy v. Adelphi Institute, Inc., 866 F.Supp. 696 (E.D.N.Y. 1994); Moy v. Terranova, 1999 WL 118773 (E.D.N.Y. Mar. 02, 1999); Morgan v. Markerdowne Corp., 976 F.Supp. 301 (D. N.J. 1997); Rosario v. Livaditis, 963 F.2d 1013 (7th Cir. 1992); Schultz v. Talley, 1991 WL 538754 (W.D. Mo. Oct. 15, 1991) (Schultz survived the defendants' summary judgment motion because of disputed issues of fact – namely whether allegedly false statements were in fact made and whether they were in fact untrue); Phillips Colleges of Alabama, Inc. v. Lester 622 So.2d 308 (Ala. 1993); Tolman v. CenCor Career Colleges, Inc., Div. of CenCor, Inc., 851 P.2d 203 (Colo. App. 1992); Jamieson v. Vatterott Educational Center, Inc., 473 F.Supp.2d 1153 (D. Kan. 2007).

unqualified or unable to obtain employment after graduation and yet encouraged the prospective student to enroll nonetheless.[42] Some allege that the school misrepresented its placement services.[43] Some allege that the school falsely promised that the prospective student could obtain employment or that the prospective student could expect a particular starting salary.[44] Some also allege fraud occurred through more specific false statements such as, *inter alia*: 1) the school had a certain percentage job placement rate; 2) the school had a recruitment relationship with employers; 3) the school possessed certain licenses or approvals; or 4) the student would receive a particular degree or certification.[45]

As one can clearly see, there are many factual scenarios that might give rise to allegations of fraud. A quick reminder of a common formulation of fraud will help to demonstrate why some of these actions are successful while others are unsuccessful. In order for a plaintiff to demonstrate fraud, the plaintiff will typically need to show:

> (1) a false statement of material fact, (2) knowledge or belief of the falsity by the party making it, (3) intention to induce the other party to act, (4) action by the other party in reliance on the truth of the statements, and (5) damage to the other party resulting from such reliance.[46]

---

[42] *See, e.g.*, Joyner v. Albert Merrill School, 97 Misc.2d 968, 970 (N.Y. Civ. Ct. 1978); Rosario v. Livaditis, 963 F.2d 1013 (7th Cir. 1992).

[43] *See, e.g.*, Moy v. Adelphi Institute, Inc., 866 F.Supp. 696 (E.D.N.Y. 1994); Moy v. Terranova, 1999 WL 118773 (E.D.N.Y. Mar. 02, 1999); Schultz v. Talley, 1991 WL 538754 (W.D. Mo. Oct. 15, 1991); Tolman v. CenCor Career Colleges, Inc., 851 P.2d 203 (Colo. App. 1992).

[44] *See* Schwitters v. Des Moines Commercial College, 203 N.W. 265 (Iowa 1925) (stating that, to the extent plaintiff's complaint alleged that unfulfilled promise that plaintiff could obtain employment in eight weeks, such promise was a non-actionable prophecy); Morgan v. Markerdowne Corp., 976 F.Supp. 301 (D. N.J. 1997); Schultz v. Talley, 1991 WL 538754 (W.D. Mo. Oct. 15, 1991); Blane v. Alabama Commercial College, Inc., 585 So.2d 866 (Ala. 1991) (affirming granting of summary judgment in defendant's favor because the school provided precisely what was bargained for: typing proficiency of thirty five words per minute); *see* Stad v. Downs Model & Air Career School, 65 Misc.2d 1095 (N.Y. Civ. Ct. 1971) (finding that the "heady" overtures made by the school were more than mere puffery and amounted to promises); *see also* Delta School of Commerce, Inc. v. Wood , 769 S.W.2d 738 (Ark. 1989).

[45] *See, e.g.,* Morgan v. Markerdowne Corp., 976 F.Supp. 301 (D. N.J. 1997); Schultz v. Talley, 1991 WL 538754 (W.D. Mo. Oct. 15, 1991); Tolman v. CenCor Career Colleges, Inc., Div. of CenCor, Inc., 851 P.2d 203 (Colo. App. 1992); Malone v. Academy of Court Reporting, 582 N.E.2d 54 (Ohio Ct. App. 1990); Jamieson v. Vatterott Educational Center, Inc., 473 F.Supp.2d 1153 (D. Kan. 2007).

[46] Board of Ed. of Chicago v. A, C and S, Inc., 546 N.E.2d 580, 591 (Ill. 1989).

With this backdrop in mind, we can compare the successful actions to the unsuccessful ones in order to get a good sense of what distinguishes them.

i. Moy v. Adelphi Institute, Inc.

The case of *Moy v. Adelphi Institute, Inc.*, serves as a good place to begin the analysis.[47] In *Adelphi*, students filed a class action against Adelphi Institute, a private vocational school, and also against the school officials and principals.[48] The plaintiffs listed eight causes of action including fraud, misrepresentation, fraudulent inducement, breach of contract, mail and wire fraud, and violations of the Higher Education Resources and Assistance Act (HEA).[49] Adelphi ran business and data processing schools and provided training to prepare students for work in "accounting, business administration, secretarial services, computer programming, and word processing."[50]

The plaintiffs' complaint alleged multiple failures and misrepresentations. Adelphi allegedly failed to provide the vocational training placement services promised.[51] The plaintiffs also alleged that the catalogs and other written materials misrepresented the available curricula, instructional equipment, and the placement services. Further, the plaintiffs alleged that the defendants made fraudulent representations by claiming that: "(1) jobs were available which they would be qualified for upon completion of their studies at Adelphi; (2) state and federal grants would cover the costs; and (3) a G.E.D. would be given as part of Adelphi's program."[52] Adelphi also allegedly promised to provide certified teachers selected for their technical knowledge, practical experience, and teaching ability.[53]

[47] 866 F.Supp. 696 (E.D.N.Y. 1994).
[48] *Id.* at 699
[49] *See id.*
[50] *Id.* at 699.
[51] *Id.* at 700.
[52] *Id.*
[53] *Id.* at 706

The defendant's principals, Albert and Melany Terranova ("Terranovas"), moved for dismissal of the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure arguing in part that the plaintiffs failed to plead a *prima facie* case of fraud or fraud in the inducement.[54] The court then pointed to the specific alleged ways in which Adelphi failed to live up to its representations and promises.[55] Adelphi allegedly:

> Assign[ed] classes to teachers who were often absent and were not replaced by qualified substitutes and [assigned] classes to teachers who were not qualified to instruct in the subject assigned because they were unlicensed, not adequately English speaking, or not trained or educated in the area in which they were purportedly instructing. . . .
>
> Fail[ed] to provide the specific courses and numbers of hours of instruction promised.
>
> Fail[ed] to provide the equipment (typewriters, adding machines, computers, etc.) required to complete the curriculum or denying students sufficient access to such equipment.
>
> Fail[ed] to provide promised placement services.[56]

The court then held that these factual allegations were sufficient to plead fraud and fraud in the inducement, and the two causes survived the motion to dismiss.[57] After the motion was granted in part and denied in part, the plaintiffs made a couple of amendments to the complaint and the third amended complaint was the subject of another motion to dismiss by the Terranovas in a case captioned *Moy v. Terranova.*[58] This second motion to dismiss was once again made pursuant to Rule 12(b)(6). In analyzing this second motion to dismiss, the same court distinguished between fraud claims that are more like breaches of contract and those that are more like fraud in the inducement.[59] The court explained that fraud claims that pertained to promises of future performance were really

[54] *Id.* at 698
[55] *Id.* at 706.
[56] *Id.* at 706.
[57] *Id.*
[58] 1999 WL 118773, *1 (E.D.N.Y. Mar. 2, 1999).
[59] *Id.* at *6

allegations of a breach of contract, which had already been pleaded and, to that extent, those fraud claims were dismissed.[60] However, the fraud in the inducement claims that related to specific representations of fact that were allegedly untrue at the time when made were not the same as breach of contract claims in that they were not promises of future performance.[61] Rather, they were statements of present facts that may have induced the plaintiffs into entering into a contract with the defendants.[62]

Of course, the difference between a successful action for fraud and one for breach of contract may be enormous. If a court reads a complaint as alleging fraud or fraud in the inducement, the remedy may be a complete rescission of the contract, and/or damages in the amount of the tuition paid, and/or punitive damages.[63] However, if a complaint alleges breach of contract, the remedy will likely be contract damages only and that will likely be offset by the value of the services the school provided.[64] Under such a calculation, an aggrieved plaintiff may not receive a full refund of his or her tuition. Thus, *Terranova* demonstrates that a complaint should, if possible, clearly allege that the plaintiff would not have entered into the contract but for the representations and that those representations were false at the time they were made. If a complaint cannot make such an allegation, and fraud in the performance under the contract is alleged, then the plaintiff will have to distinguish fraud and breach of contract.

In analyzing whether a broken promise of future performance is fraud or breach of contract, courts frequently ask whether the promisor intended at the time he or she made the promise to ever

---

[60] *Id.* at *6.
[61] *Id.*
[62] *Id.*
[63] *See, e.g.*, Phillips Coll. of Alabama, Inc. v. Lester, 622 So.2d 308 (Ala. 1993); *see also, e.g.*, Joyner v. Albert Merrill Sch., 97 Misc.2d 568, 570 (Civ. Ct. 1978).
[64] Stad v. Grace Downs Model & Air Career Sch., 65 Misc.2d 1095 (Civ. Ct. 1971); Till v. Delta Sch. of Commerce, Inc., 487 So.2d 180 (La. Ct. App. 1986).

fulfill it.[65] If at the time the promise was made, the promisor never intended to keep the promise, then, even in the context of a contract, the failure may amount to fraud.[66] In order to get at this question, courts frequently have to look to circumstantial evidence as proof of the tortfeasor's intent.[67] Courts frequently look to the performance under the contract for evidence of intent.[68] In the case of a school, one particular problem that a plaintiff may have in arguing that the defendant never intended to keep its promise is that, in most cases, the defendant school actually opens its doors, provides some instruction, and provides some services. In short, even though its performance may be grossly inadequate, the plaintiff may not be able to prove that the defendant engaged in fraud and may be limited to contract law.

Adelphi distinguishes between statements of fact that are untrue at the time when made and promises of future performance that only become broken promises at some future date. It provides a remedy to a student who is able to demonstrate the classic elements of fraudulent inducement. The next two cases demonstrate the more complicated issue of statements of opinion concerning future events beyond the school's control that turn out to be incorrect and statements concerning future events that are definite enough that they are considered to be statements of fact.

ii. Delta School of Commerce, Inc. v. Wood

In *Delta School of Commerce, Inc. v. Wood*, a former nursing student, Earlene Wood ("Wood") brought suit against her nursing school, Delta School of Commerce, Inc. ("Delta").[69] Wood alleged that the school president, Steve McCray ("McCray") induced her to enroll in a nursing course by falsely representing that Licensed Practical Nurses were being phased out in Arkansas and that nursing assistants would be taking their place and also that the course would train her to be a

[65] *See, e.g.*, Phillips Colleges of Alabama, Inc. v. Lester, 622 So.2d 308 (Ala. 1993); *see also In re* Goepp, 455 B.R. 388, 396 (Bankr. D. N.J. 2011).
[66] *Lester*, 622 So.2d at 311.
[67] *Goepp*, 455 B.R. at 396.
[68] *Lester*, 622 So.2d at 311.
[69] 766 S.W.2d 424, 425 (Ark. 1989).

nursing assistant, which would have a pay scale similar to a Licensed Practical Nurse.[70] After completing seven months of the eight or nine month program, Wood discovered that she was studying to be a nurse's aide and dropped out. Delta and McCray denied making any false statements. The matter was tried by jury, which found in Wood's favor and assessed compensatory damages of $3,064.00 (the full cost of tuition) and punitive damages of $50,000.00 against Delta and McCray.[71]

The defendants appealed arguing in part that McCray's statements were non-actionable statements of opinion and predictions of future events. The court agreed with the general proposition that statements of opinion cannot be the basis for a cause of action for fraud.[72] However, the court found that McCray's statements were statements of fact and not statements of opinion because they were "specific and definite."[73] Without much elaboration, the court found that the "specific and definite" statements were sufficient to distinguish the facts of *Wood* from two other Arkansas cases where the defendants' alleged misrepresentations that "an oil investment was a 'good thing' and would 'make money' and that the wells would pump 'fifty barrels a day'"[74] and that a house a vendor was selling was a "good house"[75] were held to be non-actionable statements of opinion.[76]

The *Wood* court further stated that even if McCray's statements were statements of opinion, such statements concerning possible future events may still be actionable if the statements are known to be false when made.[77]

---

[70] *Id.* at 425.
[71] *Id.*
[72] *Id.* at 426-27.
[73] *Id.* at 427.
[74] Grendell v. Kiehl, 723 S.W.2d 830, 832 (Ark. 1987).
[75] Cannaday v. Cossey, 312 S.W.2d 442, 443 (Ark. 1958).
[76] *Wood*, 766 S.W.2d at 427.
[77] *Id.*

Wood distinguishes between statements of opinion concerning future events beyond the school's control and statements of fact. The next case, *Joyner v. Albert Merrill School* reiterates that if a school makes specific enough promises of the future, the school may be found to be making fraudulent statements. [78]

iii. Joyner v. Albert Merrill School

In *Joyner v. Albert Merrill School*, the plaintiff, Michael Joyner ("Joyner"), went to the Albert Merrill School in order to obtain training as a computer programmer.[79] Joyner was fifty-nine or sixty years old at the time he was interviewed by Mr. Paredes, a representative of the defendant. Joyner had a sixth grade education, never attended high school, had never obtained a high school equivalent, and had a difficult time with English (he was born in Mexico). Although Paredes was aware of these facts, he had Joyner take an aptitude test. Joyner, after needing additional time because he was having a difficult time understanding the test, was given a score of "B-." Joyner was then told that the school would place him in a $10,000 per year job (these events took place in 1969) once he completed the course.[80]

In order to register for the course, Joyner also had to complete an application that only required his name, address, date of birth, and signature. The signature line was on the front of the document and Joyner testified that he never read the application and only received a copy of the front portion which he had signed. The court pointed out three clauses written on the back of the contract:

> "1. I understand that this application, if accepted by the school, constitutes a binding contract.

[78] 411 N.Y.S.2d 988 (N.Y. Civ. Ct. 1978).
[79] *Id.*
[80] *Id.*

"2. I understand that this application contains all the terms of the contract . .

.

"9. I understand that upon successful completion of the course, I will be eligible for the services of the school's placement department for free job counseling. I further understand that this is not a guarantee of a job or an offer of employment."[81]

After classes had started, Joyner was then told to sign two other documents without ever being told what the documents were or why he needed to sign them. As it turned out, the documents were loan applications, but Joyner was told he would not have to pay the loans back until he had obtained his promised position in computer programming.[82]

Joyner regularly attended classes and repeatedly told his instructors that he was unable to understand the material. He attempted to quit but was discouraged from doing so because, in the words of the school's director, "everybody here graduates."[83] Despite his concerns, the school instructors and officials told him that all he had to do was to graduate and that they would then place him in a good job with a high salary.[84]

Sure enough, Joyner eventually completed the course. The tests were open book and students were permitted to copy off of other students. The court found that at the completion of the course, Joyner still did not understand computer programming.[85] Joyner visited the defendants' job placement office and they helped him prepare a resume. The defendants intentionally gave an incorrect date of birth, 1931 instead of 1919. The resume also falsely stated that Joyner had completed a bookkeeping course and two years of high school. After this, Joyner went on fifty or sixty interviews, but he could not pass any of the competency tests he was given. The defendants

[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] Joyner, 411 N.Y.S.2d 988, 991 (N.Y. Civ. Ct. 1978).

then informed him that no job could be found for him. Joyner then filed an action for breach of contract and for fraud.[86]

In analyzing the fraud issue, the court stated:

> The doctrine of Caveat emptor has given way, at least in part, to the doctrine of Caveat venditor in recognition of the fact that many consumers, by reason of their lack of education, lack of experience, and limited bargaining power, are not in equal bargaining positions with the vendors with whom they deal.[87]

The court found that the defendants fraudulently induced Joyner to enter into the program by admitting him and falsely promising to place him in a job at $10,000 per year.[88] The court also found that the high score on the aptitude test was designed to deceive Joyner.[89] As to reliance, the court found to be credible Joyner's statement that he would not have joined the program if they had not promised him a job.[90]

As to the clauses on the back of the contract that purported to inform Joyner that there was no guarantee of a job and purported to merge all extraneous agreements into the written contract, the court pointed out that it was uncontroverted that Joyner had not read the contract and was not given a copy. Further, the court explained that the language "fails to constitute a specific disclaimer by plaintiff of reliance upon defendants' fraudulent misrepresentation" and that even if it was specific enough, Joyner's cause of action could not be barred unless he had an opportunity to discover the true facts. [91] As to the merger clause, the parol evidence rule gives way to fraud.[92] In short, the court found that the defendants promised Joyner a job in order to induce him to enter the

[86] *Id.*
[87] *Id.* at 992.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 993.
[91] Joyner v. Albert Merrill School, 411 N.Y.S.2d 988, 993 (Civ.Ct. 1978).
[92] *Id.* at 992.

program and they continued to promise him work in order to dissuade him from exercising his contractual right to withdraw.

The court awarded compensatory damages of $1,486.90 (the entire cost of the course) and punitive damages of $2,500. The court made it clear that if Joyner had asked for more, it would have been willing to grant more as it felt that these facts were particularly egregious.[93]

Joyner is obviously overshadowed by the fact that the plaintiff's educational situation was so poor that it is likely that the defendants knew the promise of a future job was false on the day they made it. Although *Joyner* and *Wood* could both be read as suggesting that if a statement regarding the future is specific and definite enough, then a defendant who turns out to be wrong may be held liable even if the defendant had no way of knowing that his or her prediction would not come to fruition. Such a reading would delete the second element of fraud: knowledge or belief of the falsity of the statement. It is more likely that those two cases stand for the idea that when a person represents that a future state of affairs is probable, contrary to evidence at hand which suggests it is improbable, then that person may be engaging in fraud. Some courts have handled this by explaining that a reckless disregard for the truth may also satisfy the second element of fraud.[94] As will be explained later, some state courts have, in the context of consumer fraud statutes, gone one step further and stated that the person making the incorrect statement may be held liable even if they have no way of knowing that the statement is wrong as long as they are aware that the issue is material to the listener's decision.

---

[93] *Id.* at 994-95.

[94] *See, e.g.*, Mike Finnin Ford, Inc. v. Automatic Data Processing, Inc., 220 F.Supp.2d 970, 974 (N.D. Iowa 2001) (stating "Knowledge of the falsity of a material representation can be proved by showing that the defendant had actual knowledge of its falsity or possessed reckless disregard for its truth.").

Even though these three decisions provide a basis for a student to recover for fraudulent statements regarding the future or for fraudulent statements regarding a present fact, the common law is not without its shortcomings.

iv. Unsuccessful Actions

Despite the success of the three cases outlined earlier, some plaintiffs will have a more difficult time proving their case. In contrast to *Joyner* and *Wood*, where the courts felt that the forecasts of the future were specific enough to support an action for fraud, in *Schwitters v. Des Moines Commercial College*, a case where the plaintiff sued her business school for fraud based on the school's false representation that the plaintiff could complete the course and get a job within eight weeks, the court stated: "the representation that appellee could complete the course and obtain a position in eight weeks was no more than a prophecy."[95] Further, ". . . its fulfillment, in the very nature of things, depended upon the ability, previous education, industry, and application of the student." As such, *Schwitters* stands for the idea that establishing the falsity of an opinion or prediction is not enough. The plaintiff must establish the falsity of a statement of fact and other cases have reiterated this point. One court in Illinois, in response to an action by the plaintiff students against the school based in part on the school's incorrect prediction that its accreditation application would be approved, stated simply: "predictions about the future are opinions and not actionable under a theory of fraud."[96]

Blane v. Alabama Commercial College, Inc. keeps in line with *Schwitters*.[97] In *Blane*, a thirty-four year old housewife with a ninth grade education[98] enrolled in Riley Business College's (Riley) twenty-

[95] Schwitters v. Des Moines Commercial Coll., 203 N.W. 265 (Iowa 1925).
[96] Lidecker v. Kendall Coll., 550 N.E.2d 1121, 1125 (Ill. App. Ct. 1990).
[97] 585 So.2d 866 (Ala. 1991).
[98] *Id.*(stating that she also had her G.E.D.).

six week computer/clerical program at a tuition of $3,695.[99] Although Blane expressed concern about her ability to type, Riley representative Linda Brown assuaged her fears. Brown explained that half of the course was dedicated to typing and that enrollees had to achieve a proficiency of at least thirty-five words per minute in order to receive a diploma. Such proficiency was, according to Brown, designed to qualify students to compete in the job market.[100] Despite Blane achieving this thirty-five words per minute proficiency and attending the majority of classes, she was unable to obtain a clerical position after applying for approximately fifteen spots. She then brought suit alleging breach of contract, fraud, and educational malpractice.

As to a particular fraudulent statement, Blane argued that Riley represented that it would train her to a level necessary to be competitive in the job market and that it had failed to do so. Riley argued that it only promised to help Blane achieve thirty-five words per minute in typing and that Blane had done so. The court granted summary judgment in Riley's favor and the Alabama Supreme Court upheld the judgment stating:

> The essence of Blane's claim is that she was unable to find employment in the computer/clerical field despite the training she received from Riley Business College. However, we find no cause of action for breach of contract or fraud stemming from such a claim, because there is no evidence that anyone from Riley Business College guaranteed Blane a job or gave her the assurance that she would find a job upon completing the 26–week course.[101]

The fraud count in *Blane* failed because the plaintiff was unable to point to a specific statement from the school that was false. The court in *Blane* compared the facts of *Blane* to those of *Joyner v. Albert Merrill School*,[102] where the defendants made guarantees of a future job and plaintiff

[99] *Id.*(stating that a portion of which was covered with student loans).
[100] *Id.*
[101] *Id.* at 868.
[102] 411 N.Y.S.2d 988 (N.Y. Civ. Ct. 1978).

was able to recover because the guarantees were specific enough.[103] Based on this, an attorney should not necessarily be discouraged from bringing an action based solely on guarantees of a future job, despite the implications of *Schwitters* and *Blane*. Rather, an attorney should take counsel from *Joyner v. Albert Merrill School*, *Moy v. Adelphi Institute, Inc.*,[104] and *Delta School of commerce, Inc. v. Wood*,[105] and hone in on the specific statement that was false. If such an action is to be brought, the attorney will have to be able to point to statements that are specific enough to transform them from non-actionable predictions of the future to actionable guarantees of the future. The distinction between actionable and non-actionable is going to be, in most circumstances, based on whether the defendant knew its prediction was false at the time it made such prediction[106] or whether its prediction was specific enough to amount to a guarantee.[107]

Additionally, specificity is not only useful for separating mere incorrect predictions of future events from fraud, but also it is required in federal practice in order to properly plead fraud. Rule 9(b) of the Federal Rules of Civil Procedure provides: "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."[108] *Plastic Packaging Corp. v. Sun Chem. Corp.* has explained that allegations of fraud must set out the "who, what, where, and when of the alleged fraud." [109]

Adelphi distinguishes between statements of fact that are untrue at the time when made and promises of future performance that only become broken promises at some future date. *Wood* and *Joyner* distinguish between statements of opinion concerning future events beyond the school's

[103] *Blane*, 588 So. 2d at 868.
[104] 866 F.Supp. 696 (E.D.N.Y. 1994).
[105] 766 S.W.2d 424 (Ark. 1989).
[106] *Id.* at 426.
[107] *Joyner*, 411 N.Y.S.2d at 993.
[108] FED.R.CIV.P. 9(b).
[109] 136 F.Supp.2d 1201, 1203 (D. Kan. 2001).

control and statements of fact. As has already been demonstrated, each case leads inexorably to the conclusion that an attorney considering filing such an action must focus on identifying the specific misrepresentation and the evidence demonstrating that the person making the statement knew it was false.

Even with these evidentiary burdens, many plaintiffs succeed under a fraud cause of action. For those that do not have an action in fraud, they might have an action in breach of contract.

b. Breach of Contract

A breach of contract claim is a claim that the defendant school promised to perform a task or to provide a service and that the school failed to perform on such promise. As explained earlier, the breach is typically not so egregious as to amount to fraud; otherwise an action in fraud would be better. As will be demonstrated, breach of contract actions can occasionally succeed but they carry the risk of being classified as educational malpractice actions, which is typically not a good litigation position for the plaintiff to be in.

i. CenCor , Inc. v. Tolman

CenCor, Inc. v. Tolman was a case out of Colorado where thirty-eight students brought various claims against CenCor, a Delaware corporation that operated in Colorado as Colorado College of Medical and Dental Careers.[110] The students alleged deficiencies in the education provided. CenCor offered adult education courses designed to train students for jobs as medical and dental assistants. The claims of nineteen of the plaintiffs were dismissed for failure to comply with discovery requests[111] and of the nineteen remaining, thirteen completed the courses and received diplomas, six

[110] 868 P.2d 396, 397 (Colo. 1994).
[111] *Id.*

did not.[112] Of those thirteen that received a diploma, ten found employment in their desired field.[113] Of the six that did not receive a diploma, one found employment in the health care field.[114]

The students alleged various claims against CenCor (negligence, statutory violations, etc…) including four contract claims for breach of contract, breach of express warranties, unjust enrichment, and promissory estoppel.[115] After discovery, CenCor moved for summary judgment on all claims, which the trial court granted. As to the breach of contract claims, the trial court concluded that the plaintiffs failed to submit any factual support for the claim that CenCor breached its contractual obligations. On appeal, the plaintiffs argued that disputed issues of material fact remained respecting the contract claims and the appellate court agreed and reversed the trial court's summary judgment regarding all four contract claims. CenCor then filed a petition for certiorari seeking review of portions of the appellate court's decision. What is most relevant here is that CenCor appealed the appellate court's decision to reverse the granting of summary judgment as to the contract claims. The Colorado Supreme Court granted certiorari only as to the appellate court's judgment reversing the trial court's granting of summary judgment in CenCor's favor as to the plaintiffs' breach of contract claim.[116]

In analyzing the issue, the Court explained:

> The basic relationship between a student and an educational institution is contractual in nature. . . . Materials actually provided to a student, including enrollment agreements and catalogs, may become part of the agreement. . . . Contract claims that in fact attack the general quality of educational experiences provided to students have generally been rejected. . . . Such claims in reality raise questions concerning the reasonableness of conduct by educational institutions in providing particular educational services to students-questions that

[112] Tolman v. CenCor Career Coll., Inc., Div. of CenCor, Inc., 851 P.2d 203, 204 (Colo. App. 1992).
[113] *Id.*
[114] *Id.*
[115] *CenCor*, 868 P.2d at 398.
[116] *Id.*

> must be answered by reference to principles of duty, standards of care, and reasonable conduct associated with the law of torts.
>
> However, when students allege that educational institutions have failed to provide specifically promised educational services, such as a failure to offer any classes or a failure to deliver a promised number of hours of instruction, such claims have been upheld on the basis of the law of contracts. . . . Similarly, if certain requisites necessary to attain certification in a specific program are not even offered, a claim based on contract principles may be viable.[117]

Applying these general principles to the case at bar, the Court analyzed the specific promises alleged to have been made by CenCor to the students. The alleged promises included, but were not limited to: 1) the plaintiffs would be trained on up-to-date equipment and instruments; 2) the plaintiffs would work under the supervision of qualified faculty; and 3) computer, word processing and typing would be a part of the curriculum.[118] The Court found that these allegations were specific enough to distinguish the allegations from the plaintiffs' general allegations of unreasonable conduct.[119] CenCor argued that it had met its contractual obligations and also provided portions of the plaintiffs' depositions. CenCor argued that the evidence demonstrated that there was no genuine dispute as to a material fact such that summary judgment was properly granted. The Court disagreed, citing interrogatories submitted to the plaintiffs wherein the plaintiffs pointed to specific failures such as the failure to provide modern equipment in good working condition, qualified instructors, and computer training. Additionally, some students indicated that CenCor was contractually obligated to provide advanced training at no additional cost, but in fact charged extra for the advanced training. Drawing reasonable inferences in favor of the non-moving party, the plaintiffs,

[117] *Id.* at 398-99 (internal citations omitted).
[118] *Id.* at 399.
[119] *Id.*

the Court found that the allegations were sufficient to withstand a motion for summary judgment and that the issues had to be resolved at trial.[120]

The lessons from *CenCor*, as to breach of contract claims, turn out to be very similar to the lessons from analyzing actions for fraud - breach of contract claims should be specific. A plaintiff who wishes to be successful will likely have to point to the precise promise, one that can be definitively identified as having been broken, in order to distinguish his or her claim from one of educational malpractice. But remember, as pointed out in *Jamieson v. Vatterott Educational Center, Inc.* "*CenCor* rejected 'contract claims that in fact attack the general quality of educational experiences' because 'they raise questions concerning the reasonableness of conduct by educational institutions in providing particular educational services.'"[121]

To some extent, breach of contract claims may be even less forgiving than fraud claims. Courts analyzing claims for fraud seem more likely to take a holistic view in determining whether the defendant misrepresented a material fact. Such leeway is generally unavailable in the context of a contract.

The general principles enunciated in *CenCor* are applied in the majority of cases. In *Malone v. Academy of Court Reporting*, a case where students brought an action against their school alleging, *inter alia*, consumer fraud and breach of contract, an Ohio appellate court explained that breach of contract claims against schools had been recognized in Ohio for some time.[122] Despite the defendants' efforts to classify the plaintiffs' claims as educational malpractice in disguise, the court held that the plaintiffs had stated valid claims of breach of contract.[123] However, plaintiffs must

[120] *Id.* at 400.
[121] 473 F.Supp.2d 1153 (D. Kan. 2007).
[122] 582 N.E.2d 54, 58-59 (Ohio App. 1990).
[123] *Id.*

beware to avoid pleading that the defendant failed to provide a quality education. Such a pleading is likely to be seen as an educational malpractice claim, which is rarely cognizable.[124]

c. Consumer Fraud Acts and Deceptive Trade Practices Acts

At this point, this article has demonstrated some of the available common law remedies for plaintiffs who are able to point to specific shortcomings. The specificity required by an action for fraud or breach of contract may provide a large barrier to recovery for many plaintiffs who are unable to point to specific promises but who nonetheless were taken advantage of. For these plaintiffs, state statutes covering deceptive trade practices or consumer fraud may provide some relief.[125] Such statutes usually follow the statutory schemes of the Uniform Deceptive Trade Practices Act (UDTPA), the Uniform Consumer Sales Practices Act (UCSPA), the Federal Trade Commission Act (FTCA), or the Uniform Consumer Credit Code (UCCC).[126] Typically, a plaintiff will be able to recover under a consumer fraud statute once he or she is able to demonstrate that the defendant made some misrepresentation as to the characteristics of the goods or services at issue.[127] Some statutes are more general, prohibiting "unfair or deceptive acts or practices in the conduct of any trade or commerce."[128]

One example of a consumer fraud statute is the Illinois Consumer Fraud Act (ICFA),[129] a "regulatory and remedial statute intended to protect consumers, borrowers, and business person

[124] *See, e.g.*, Paladino v. Adelphi Univ., 454 N.Y.S.2d 868, 870 (N.Y. App. Div. 1982).
[125] *See, e.g.*, Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. 505/1 *et seq.* (West 2012); Minnesota Consumer Fraud Act, MINN. STAT. §§ 325F.69 *et seq.* (2012); Minnesota Deceptive Trade Practices Act, MINN. STAT. §§ 325D.43 *et seq.* (2012); New Jersey Consumer Fraud Act, N.J. STAT. ANN. §§ 56:8-1 to 56:8-184 (West 2000).
[126] Linehan, *supra* note 8, at 775 (internal citations omitted).
[127] *Id.*
[128] *Id.*
[129] Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. 505/1 *et seq.* (West 2012).

against fraud, unfair methods of competition, and other unfair and deceptive business practices."[130] The statute provides, in part:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act" . . . .[131]

Although the ICFA permits a court to compensate the plaintiff for the harm suffered,[132] it does not provide for mandatory attorney's fees. Rather, it only provides that a court "may" award such fees.[133] In order to demonstrate unfairness in Illinois, a plaintiff will have to show that the complained of conduct satisfies to a significant degree at least one, or to a lesser extent all three, of the factors enumerated in *Federal Trade Comm'n v. Sperry & Hutchinson Co.*[134] and summarized by *Robinson v. Toyota Motor Credit Corp.* as: "(1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers."[135]

Although the ICFA may provide some measure of relief, it does not provide for mandatory attorney's fees and, as such, some plaintiffs may find it difficult to obtain an attorney willing to take on the case.[136] This is especially true if the statute provides a limitation on damages.[137] Leaving

[130] Robinson v. Toyota Motor Credit Corp., 775 N.E.2d 951, 960 (Ill. 2002).
[131] 815 ILL. COMP. STAT. 505/2 (West 2012).
[132] 815 ILL. COMP. STAT. 505/10a(a) (West 2012).
[133] 815 ILL. COMP. STAT. 505/10a(c) (West 2012).
[134] 405 U.S. 233 (1972)
[135] *Robinson*, 775 N.E.2d at 961.
[136] Linehan, *supra* note 8, at 776-77.
[137] *Id.*

attorney's fees to the discretion of the trial court is common among such statutes and therefore many students who have suffered harm will be left without representation.[138]

An example of a consumer fraud statute that provides significantly improved protection is New Jersey's Consumer Fraud Act (NJCFA).[139] It is no surprise that the NJCFA provides strong protection as it was amended in 1971 specifically in order "[t]o give New Jersey one of the strongest consumer protection laws in the nation."[140] For a plaintiff to recover under the NJCFA, the plaintiff will have to show that the merchant involved violated the NJCFA and an "ascertainable loss" that was caused by the violation.[141] For conceptual purposes, there are three ways in which a merchant can violate the NJCFA that might to lead to liability. They are "affirmative acts, knowing omissions, and regulatory violations."[142] In the context of this article, a student would most likely pursue his or her school based on an "affirmative act" or "knowing omission." These violations include:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice . . . .[143]

Thus, the NJCFA provides a similarly broad wording to the ICFA and its use therefore permits plaintiffs who cannot point to a specific fraudulent statement to still be able to recover. The term "unconscionable commercial practice" is applied very broadly in New Jersey. The New Jersey Supreme Court has described the phrase to be an "amorphous concept obviously designed to

---

138 *Id.* at 777.
139 New Jersey Consumer Fraud Act, N.J. STAT. ANN. §§ 56:8-1 to 56:8-184 (West 2000).
140 Cox v. Sears Roebuck & Co., 647 A.2d 454, 460 (N.J. 1994) (quoting *Governor's Press Release for Assembly Bill no. 2402*, at 1 (Apr. 19, 1971)).
141 Bosland v. Warnock Dodge, 964 A.2d 741, 748 (N.J. 2009).
142 *Id.*
143 New Jersey Consumer Fraud Act, N.J. STAT. ANN. § 56:8-2 (West 2000).

establish a broad business ethic."[144] Further, the phrase "is generally interpreted liberally to 'effectuate the public purpose of the [NJCFA]'. . . . [i]t implies a 'lack of good faith, honesty in fact and observance of fair dealing.'" [145] Additionally, a claim under the NJCFA may also apply to the performance of the parties involved in the transaction and not only to the events at the inception of the relationship.[146] Finally, as to "affirmative acts," a plaintiff does not have to establish that the defendant intended to deceive the plaintiff, but intent is required to be shown for "knowing omissions."[147] In New Jersey "a person who makes an affirmative misrepresentation 'is liable even in the absence of knowledge of the falsity of the misrepresentation, negligence, or the intent to deceive.'"[148] The importance of this last sentence should not be lost on the reader. In fact, that principle is so powerful that in one New Jersey case, a realtor who was falsely told by the builder of a house that the house was located in the "Montville section" of Montville Township violated the NJCFA by repeating the information to her clients even though she did not know that the home was in Montville and not Montville Township because she knew that the house's location was crucial to the clients.[149]

The realtor must have been unhappy with this result because, in addition to the NJCFA's broad application, and perhaps most importantly, it provides for a mandatory award of treble damages and reasonable attorney's fees and costs.[150] The mandatory nature of this statute means that plaintiffs with small value cases can still find attorneys willing to represent them.

In the education context, these broad principles were recently used in *Suarez v. Eastern International College* to help a plaintiff survive a motion for summary judgment in a case where the

---

144 *Cox*, 647 A.2d at 462.
145 Galli v. Key Motorcars, LLC 2012 WL 1605222, at*5 (N.J. Super. May 09, 2012) (some internal quotations omitted).
146 *Id.*
147 Suarez v. Eastern Int'l. College, 50 A.3d 75, 87 (N.J. Super. 2012).
148 *Id.*
149 *Id.* at 88 (describing the facts and conclusion of Vagias v. Woodmont Properties, 894 A.2d 68 (N.J. App. Div. 2006).
150 New Jersey Consumer Fraud Act, N.J. STAT. ANN. §§ 56:8-19 (West 2000).

plaintiff alleged that she was falsely told by Eastern International College, a for-profit technical school, that upon graduation she would be able to perform ultrasounds in hospitals and earn $65,000 per year.[151] These statements turned out to be false, and even though the school may not have had the ability to know that they were false, the school knew that the representations were material to the student's decision to enroll, the school therefore could be held liable for them. Such broad statements provide another mechanism for aggrieved students to be able to recover for their harm.

III. ARGUMENT

These three available sources of remedies provide ample mechanisms for an aggrieved student. For the student who is able to point to specific broken promises or misrepresentations, he or she will be able to rely on a cause of action for fraud or breach of contract. For the student who is unable to point to specific broken promises or misrepresentations, he or she will have access to state consumer fraud statutes or state deceptive practices acts. Thus the current legal regime covers the vast majority of students who have a bona fide complaint.

The problem with solely relying on private causes of action is that many students will remain unprotected and uncompensated. First, under either common law or statutory approaches, many students will be unable to retain an attorney to prosecute their action. Many students have suffered relatively small damages in terms of tuition and thus an attorney pursuing an action for fraud stands to earn small fees unless he or she is able to wrest punitive damages from the defendant. The situation is obviously worse for breach of contract claims. Similar problems may exist as to state statute based claims. In states such as Illinois, an attorney bringing an action runs the risk that the court will apply the proverbial "American Rule" and insist that each party bear its own legal expense. If the plaintiff is not awarded legal fees, the attorney will only be able to rely on his or her client for

[151] *Suarez*, 50 A.3d at 79.

payment (if the fee agreement so provides), the same client who, as explained earlier, is likely not in a strong financial position. In states like New Jersey, though, an attorney who is confident of the action being brought may proceed boldly. A victory under the NJCFA will lead to reasonable attorney's fees for the successful plaintiff.

Despite these problems, state courts and state legislatures are likely still in the best position to fashion and provide remedies to individual students. Further, assuming that congress or federal agencies are in the best position to create mechanisms to prevent harm to students, they should exercise caution when fashioning such mechanisms as the mechanisms of prevention may themselves work to undermine the available remedies. A look at some of the proposed solutions may help to demonstrate why this is so.

Title IV of the HEA of 1965, as amended, provides for many student aid programs, each administered by the DOE.[152] To participate in Title IV programs, a school must qualify as an "institution of higher education."[153] An "institution of higher education" is defined as an educational institution that "is legally authorized within such State to provide a program of education beyond secondary education."[154] The HEA also provides that proprietary institutions of higher education and postsecondary vocational institutions may qualify as institutions of higher education.[155] In order to participate in Title IV programs, each school must execute a program participation agreement that commits the school to a variety of statutory, regulatory, and contractual conditions.[156]

In 2009, the DOE began looking into creating new regulations with the goal of ensuring that federal money was going to proprietary schools and programs that were effective. Pursuant to this

[152] 20 U.S.C. § 1070 *et seq.*
[153] 20 U.S.C. § 1001 (2012).
[154] *Id.* § 1001(a)(2).
[155] *Id.* § 1002.
[156] *Id.* § 1094.

effort, the DOE has recently released three new sets of regulations: Program Integrity Issues,[157] Program Integrity: Gainful Employment – New Programs,[158] and Program Integrity: Gainful Employment – Debt Measures.[159] The first set, Program Integrity Issues, was designed to improve program integrity by amending the regulations for HEA eligibility, the DOE's recognition of accrediting agencies, the DOE's recognition for state agencies, the Student Assistance General Provisions, as well as for several loan and grant programs.[160] For the most part, it took effect July 1, 2011.[161] The second, Program Integrity: Gainful Employment – New Programs, which took effect July 1, 2011, was designed to improve HEA programs by establishing a process under which an educational institution applies for approval to offer an educational program that leads to gainful employment.[162] The third, Program Integrity: Gainful Employment – Debt Measures, effective July 1, 2012, was designed to improve HEA programs by amending the Student Assistance General Provisions to improve disclosure of relevant information to students and to establish minimal measures for determining whether certain programs lead to gainful employment in recognized occupations, and the conditions under which these programs remain eligible for Title IV funds.[163] Thus, these three new sets of regulations are designed to improve performance of participating schools and to prevent harm to students from schools that may not provide a financially beneficial service. They are designed to improve outcomes, protect federal money, and to protect students.

[157] 75 Fed. Reg. 66832 (Oct 29, 2010).
[158] 75 Fed. Reg. 66665 (Oct 29, 2010).
[159] 76 Fed. Reg. 34386 (Jun 13, 2011).
[160] 75 Fed. Reg. at 66832.
[161] *Id.*
[162] 75 Fed. Reg. at 66665.
[163] 76 Fed. Reg. at 34386.

Relevant to this article, the regulations tightened restrictions on merit-based compensation to school employees.[164] They also strengthened the misrepresentation regulations by enlarging the scope of statements that are defined as misleading, eliminating a safe harbor for minor misrepresentations, and enlarging the scope of persons to whom an enforceable misrepresenting statement may be made.[165] Further, new regulations were put in place that tested compliance with 20 U.S.C. §§ 1001(b)(1) and 1002(b)(1)(A)(i), which requires that schools "prepare students for gainful employment in a recognized occupation."[166] These new regulations assessed whether a program leads to gainful employment by applying a debt-to-income ratio test and a test based upon employment rates.[167] Combined, these two measures may be referred to as "debt measures." The DOE also issued disclosure requirements that were reliant on these debt measures.[168]

Recently, the entire debt measure rule was vacated because the DOE did not demonstrate a reasonable justification for parts of the rule.[169] However, the disclosure requirements survived.[170] The disclosure regulations require that institutions provide prospective students with information on, *inter alia*, the on-time graduation rate for students completing the program, the costs associated with completing the program within normal time, the placement rate for students completing the program, and the median loan debt for students.[171] This information is supposed to be made available to prospective students in promotional materials and on the institution's website (on the home page).[172] Thus, Aaron N. Taylor's suggestion that the FTC should require disclosures warning

---

[164] For a more full discussion of the changes to the regulations surrounding merit-based scholarship, *see* Career College Ass'n v. Duncan, 796 F.Supp.2d 108 (D.C. 2011), *overruled in part by* Association of Private Sector Colleges and Universities v. Duncan, 681 F.3d 427 (D.C. Cir. 2012).
[165] *Id.* § 668.71(c).
[166] 20 U.S.C. § 1001(b)(1) (2012); 1002(b)(1)(A)(i) (2012).
[167] Program Integrity: Gainful Employment, 75 Fed. Reg. 43616, 43618 (July 26, 2010).
[168] Program Integrity Issues, 75 Fed. Reg. 34806, 34809, 34873 (June 18, 2010).
[169] Association of Private Colleges and Universities v. Duncan, 2012 WL 2505237 (D.C. June 30, 2012).
[170] 34 C.F.R. § 668.6(b)-(c).
[171] *Id.* § 668.6(b).
[172] *Id.*

students that most will not complete the program and that completing the program does not guarantee a job has somewhat come to fruition. Despite this apparent improvement, we should be aware that such a disclaimer might increase the evidentiary hurdles for a plaintiff. Although it will undoubtedly provide increased information with which a student can attempt to make a better decision, it is also likely to be but a few drops in the fire hose of information coming the student's direction. Saddled with a thick packet of marketing material and disclosures, a student may only remember some vague guarantees of his or her success or some comment about quality job prospects and such a disclosure, especially if it is a signed disclosure, will likely be used against a student in the courtroom with the colloquy reading something like:

> Attorney: Do you remember receiving this disclosure?
> Student: No.
> Attorney: Is this your signature?
> Student: Yes.
> . . .

Although Joyner, discussed earlier, was able to overcome the effect of the disclaimer, some students may not. Perhaps a better solution would be to require schools to direct students to the DOE or FTC website (or some non-internet-based source) where such disclosures are readily available. It would likely not be extremely difficult to require prospective students to acknowledge through the DOE website that they have read the disclosures before the relevant school can receive any Title IV funds for that particular student. Further, the DOE or the FTC could launch a public education campaign that urged those interested in post-secondary education to contact the DOE.

Another concern with requiring disclaimers and disclosures is that making such disclaimers and disclosures may quickly begin to be viewed as a safe harbor provision insulating the school from allegations of misrepresentation. This would, once again, harm the very students the regulation is designed to protect.

Finally, Patrick F. Linehan, in *Dreams Protected*, suggests that proprietary schools are not sufficiently deterred from engaging in dishonest and predatory practices and suggests that the DOE can change this.[173] It is clear that the DOE is in a strong position to be able to increase deterrence. After all, the DOE oversees eligibility for Title IV funds – the source of guaranteed student loans.[174] However, it is not clear though that the DOE should permit private causes of action. If the DOE permitted private causes of action, many defense litigators would immediately argue that the DOE remedies preempt state law remedies. Any reader that believes that this is an unlikely result should look to *Shaw v. Delta Air Lines, Inc.*,[175] *Perkins v. Time Ins. Co.,*[176] *Massachusetts Casualty Ins. Co. v. Reynolds*,[177] or any of the other cases dealing with ERISA preemption. If a court were to conclude that DOE remedies preempted state law remedies, considering some of the robust protections at the state level, many students would be worse off, not better.

The solutions proposed in the Linehan and Taylor articles are potentially very good. However, considering that the current regime covers the majority of harmed individuals, should they choose to seek redress, additional work may not be necessary. Where the current legal regime is weak, state statutory solutions may be best. A state's consumer fraud statute or deceptive trade practices act may be modified to increase available damages, provide for fee shifting, and alleviate evidentiary burdens when there is only "fraud in the air."[178] Such modifications will likely be more appropriately addressed to the needs of the citizens of that state and are also more likely to fit in with the state's general statutory scheme.

---

[173] Linehan, *supra* note 8, at 755.
[174] Taylor, *supra* note 10, at 768.
[175] 463 U.S. 85 (1983).
[176] 898 F.2d 470 (5th Cir. 1990);
[177] 113 F.3d 1450 (6th Cir. 1997).
[178] This is an oft-repeated phrase referring to an occasionally tenuous link between various misrepresentations and the harm suffered by a plaintiff. *See, e.g.*, White v. Nielsen (*In re* Nielsen), 383 F.3d 922, 925 (9th Cir. 2004).

Similarly, courts are likely the best sources for modification of the common law. The common law regarding fraud has developed over hundreds of years. It may change with the times and it may change based upon the facts in front of the court at the time. This constant move towards rational laws applied with precision could be hampered by requiring courts to instead wait on the often stagnant political process.

IV. CONCLUSION

It is apparent that the current proprietary school system is flawed. A glance at the numbers demonstrates that. Solutions may be found in a variety of locations: federal legislation, federal administrative agencies, state regulatory agencies, and courtrooms. Although enhanced regulation from the federal level may be the appropriate solution to help decrease the overall negative impact associated with the unethical behavior among some proprietary schools, using federal regulations to protect an aggrieved individual may actually serve to undermine the very goal it seeks to serve. Additionally, such regulation is likely to undercut a state-level remedial system that is designed to function as a whole. As such, this article is not arguing that the system is fine as it is; rather, it is arguing that as to a single harmed individual, the current legal framework is sufficient and, where it is weak, states and courts are in the best position to make the necessary changes.

As attorneys, we have the capacity to generate change. We can campaign on behalf of legislative solutions. We can help to have the student loan discharge provision changed. We can lobby to have greater regulations on proprietary schools. Beyond a legislative solution, we also have access to courtrooms. Our courts are the keystone of our legal system and, in the end, any healthy approach to this problem will have to run through them. As explained in *Stad v. Downs Model & Air Career School*, where a student brought an action against her former school based on the school's misrepresentation that she would get a job in the airline industry:

> just as the courts and our legal system are designed as bulwarks to protect individual rights as against the arrayed might of the State in criminal actions, so must they be bulwarks in civil actions for the individual to prevent his rights as a consumer from being overwhelmed by the mighty array of businessmen competitively and alluringly advertising their wares and services. After all, what protective devices does the consumer have as against modern merchandising techniques? These techniques are an onslaught upon the senses, a brainwashing of advertising blandishments puffing the products to be sold and to which the consumer eventually succumbs, since he has been overstimulated to buy. He often becomes a compulsive purchaser lulled into a sense of euphoria by the repetition of half-truth slogans and luring come-ons which produce the desired conditioned reflex leading to a signature on the "dotted line" . . . .[179]

[179] Stad v. Downs Model & Air Career School, 319 N.Y.S.2d 918, 918-19 (N.Y. Civ. Ct. 1971).