States Can Apply Established Consumer Protection Theories to Emerging Higher Education Issues

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The more than $1.5 trillion in student debt held by 43 million Americans is not only a significant economic problem, but one that has in part arisen from abusive industry practices. But for attorney general offices, deciding what an office can do to combat the student debt crisis can be challenging.

This is understandable. Higher education is largely governed by a hyper-technical federal regulatory scheme that includes accreditors, state authorizers, and the U.S. Department of Education. But even with this regulatory overlay, there may still be garden variety deception actionable under our consumer protection laws.

And despite arguments that higher education is somehow different, courts have consistently held that state attorney general offices are able to enforce their consumer laws in the higher education space. Under appropriate circumstances, attorneys general should not be reticent to apply a traditional consumer protection lens to “innovations” in higher education – including the emerging issue of income share agreements.

States Have Brought Successful Consumer Actions in Higher Education

Many states have successfully resolved consumer protection actions in the higher education arena, most notably against for-profit schools, student loan debt adjusters, and student loan servicers.

Numerous state attorneys general have resolved actions against for-profit schools.\(^1\) Successful actions have focused on misrepresentations by schools. For example, in the case of Corinthian Colleges, the schools were found to have misled consumers about their job placement rates\(^2\) and the transferability\(^3\) of their credits, amongst other things. Other schools have allegedly

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1. For a list of state and federal actions against for-profit schools see [https://www.republicreport.org/2014/law-enforcement-for-profit-colleges/](https://www.republicreport.org/2014/law-enforcement-for-profit-colleges/)
3. Id.
misrepresented their accreditation or licensure. And just this month 44 attorneys general and the District of Columbia announced $168 million in student debt relief stemming from settlements over deceptive private loans at the now-defunct ITT Tech. Misrepresentation claims differ from claims about educational quality (also known as “educational malpractice claims”), which are disfavored by some courts in some states, including North Carolina.

States have also successfully battled dishonest student loan debt adjusters. As in the mortgage crisis, when debt adjusters preyed on struggling homeowners, debt adjusters have targeted frustrated students with promises of help to get them out of debt. These debt adjusters charge exorbitant fees to, at best, help students apply for various federal programs that they could easily do themselves for free through their loan servicers. In North Carolina, this practice potentially violates the prohibition on charging advanced fees to settle a debt. Predictably, many of these debt adjusters argued that because they dealt with the federal student aid program that they were something different – some even arguing that they were akin to tax preparers. Despite these arguments, states have prevailed. In March 2017, North Carolina settled a student loan debt adjusting case against Student Loan Group resulting in $375,048 in refunds to 377 consumers. SLG had claimed it could reduce a borrower’s student loan debt, but instead illegally charged large upfront fees and failed to perform expert services. Eleven states and the District of Columbia also participated in the FTC’s “Operation Game of Loans” initiative that announced 36 state and federal enforcement actions against student loan debt adjusters.

Finally, several states have brought consumer cases against large student loan servicers. The servicers – and even the U.S. Department of Education – have argued that states are preempted in this area, because the servicers are effectively implementing the federal student loan program. But courts have uniformly allowed these states’ UDAP claims, denying motions to dismiss in Illinois, Washington, and Pennsylvania’s suits against Navient as well as Massachusetts’ suit against FedLoan Servicing. In the words of a Pennsylvania court, the federal

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4 See North Carolina v. N.C. Medical Institute, LLC, Case No. 15-cv-13397 (Wake Cty. Sup. Ct., filed Oct. 6, 2015) (alleging that defendant solicited students for an unlicensed nurse-training program).
6 See Herrera v. Charlotte Sch. of Law, LLC, 2018 NCBC LEXIS 35 (Apr. 2018) (holding private state UDAP claims against former law school focusing on misrepresentations are actionable, whereas claims over educational quality are not).
Higher Education Act “does not preempt the enforcement of a statute of general applicability under a state's traditional police power, here, the Commonwealth's state consumer protection law, the CPL, which proscribes unfair and deceptive acts or practices in commerce.”

Emerging Issue: Income Share Agreements

This backdrop should embolden states to scrutinize emerging “innovations” in higher education finance, including an alternative student debt financing vehicle called an income share agreement (ISA).

Income share agreements vary in their terms, but generally they are financing agreements whereby a student agrees to pay a percentage of their post-graduation income for a fixed period in exchange for a sum of money. Some ISAs charge a different percentage based on the student’s major. Most ISAs have income floors, beneath which a student does not pay anything. Other features include total payment caps - often several times the amount borrowed. Some ISAs are funded directly by the institutions, but outside investors are also interested in the market.

ISAs pose many of the same risks of private student loans. Like private loans, ISAs do not cover the full cost of attendance for most programs. Instead, most ISAs supplement borrowing on top of federal student loans. So while 4-5% of post-graduation income may not sound like much, it could become oppressive on top of the payments due on a student’s federal student loan debt. Numerous groups have also suggested that pricing ISAs based on major could be inherently discriminatory, making degrees typically pursued by women and minorities relatively more expensive.

ISAs do not have the safeguards of federal loans, such as flexible repayment plans or standardized default rehabilitation programs. Some ISAs have acceleration clauses that make the whole debt payable if a borrower defaults. Some programs accelerate the debt to 2.5 times the original amount borrowed. Many ISAs also include class action waivers and forced arbitration clauses that prevent borrowers from having their day in court.

In addition to these risks, a recent analysis concluded that ISAs are almost never economically advantageous when compared with taking out a similar federal loan and enrolling in

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15 The exceptions being some lower-cost credential programs like coding boot camps. See Bair and Cooper, The Future of Income-Share Agreements, Manhattan Institute, Mar. 2019 available at https://media4.manhattan-institute.org/sites/default/files/R-0319-SB.pdf (comparing the terms of ISAs at universities (Fig. 3) versus coding bootcamps (Fig. 4))
16 Letter from Sen. Elizabeth Warren, Rep Ayanna Pressley, and Rep. Katie Porter to Sec. Betsy DeVos, Jun. 4, 2019 at 2 (“we are still deeply concerned that ISAs create significant opportunities for discriminatory practices”)
17 Purdue University, “ISA Sample Contract,” https://www.purdue.edu/backaboiler/disclosure/contract.html
18 Congressional Letter supra n. 17.
a federal income-driven repayment plan.\textsuperscript{19} And while proponents tout income floors as a borrower protection, they are often so low (many as low at $20,000 per year) that they are triggered by even minimum wage jobs that borrowers could have obtained without a degree.

In a familiar turn, ISA proponents argue that ISAs are legally different from other types of student debt and should not be subject to numerous state and federal lending regulations, including the disclosure requirements of the Truth in Lending Act\textsuperscript{20}, the Equal Credit Opportunity Act, the CFPB’s UDAAP authority, and state usury laws.\textsuperscript{21} At the same time, they argue that ISAs should have the same preferential bankruptcy treatment as traditional student debt, which would allow ISAs to survive bankruptcy. Attorney general offices should be skeptical about these arguments until they are adopted by courts.

ISAs currently only occupy a small portion of the higher education finance marketplace, but Secretary DeVos recently suggested that the Department of Education may fund a trial ISA program,\textsuperscript{22} which prompted several members of Congress to request information on ISAs from both the Department and major ISA providers.\textsuperscript{23}

But regardless of what happens on the federal level, now more than ever, attorney general offices must look out for student consumers as the higher education landscape changes with increasing speed. Despite ISA proponents’ predictable arguments that they are different, attorneys general should scrutinize these products under traditional theories of unfair and deceptive practices.

\begin{thebibliography}{99}
\bibitem{kitces} Kitces, Financing College Tuition With Student Loans Vs. “Equity” Via An Income Share Agreement, May 29, 2019, available at \url{https://www.kitces.com/blog/income-share-agreement-purdue-isa-college-tuition-financing-student-loan-equity/}. Income-driven repayment is a program available to most federal Direct Loans that sets payments at a set portion of income for a certain amount of time, after which the remaining balance is forgiven.

\bibitem{morrison} Morrison Foerster, Regulatory Treatment of Educational ISAs Under Federal and Select State Consumer Credit Statutes, Mar. 2019, at 5-7, available at \url{https://media2.mofo.com/documents/190408-regulatory-educational-consumer-credit-statutes.pdf} (arguing that because students are not obligated to repay anything below the income floor that ISAs are not credit agreements).

\bibitem{palacios} Palacios, DeSorrento, and Kelly, Investing in Value, Sharing Risk: Financing Higher Education Through Income Share Agreements, American Enterprise Institute, Feb. 2014, at 12-13 available at \url{http://www.aei.org/publication/investing-in-value-sharing-risk-financing-higher-education-through-income-share-agreements/} (arguing that ISAs should be exempt because “the allocation of risk is such that payments are always affordable”); \textit{but see} State v. Minn. Sch. of Bus., Inc., 899 N.W.2d 467 (Minn. 2017) (finding a school’s internal hybrid credit agreements were subject to state usury laws)

\bibitem{kreighbaum} Inside Higher Ed., Education Department May Offer Income-Share Plans, Andrew Kreighbaum, Apr. 12, 2019.

\bibitem{congressional_letter} Congressional Letter supra n. 17.
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