STATE OF COLORADO
DEPARTMENT OF LAW

OREGON DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

April 1, 2021

The Honorable Miguel A. Cardona
Secretary of the U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

RE: Application for Borrower Defense on Behalf of ITT Students

Dear Mr. Secretary:

We write to you to request that the U.S. Department of Education (ED) grant borrower defense to repayment loan forgiveness to anyone who borrowed a federal student loan to pay the cost of attendance for any student who enrolled in ITT Technical Institute between at least 2007 and 2010. For at least four years ITT misled students about the value of an ITT degree, inducing students to enroll and borrow student loans that they could not afford. The school's deceptive behavior violated our state consumer protection laws.

We urge ED to consider the evidence we are submitting to the Borrower Defense Unit, in conjunction with this group application, to grant full discharge and refund of moneys paid on federal student loans taken out by the tens of thousands of students who enrolled at ITT in our respective states.

Our group application on behalf of ITT student borrowers is enclosed. We respectfully request a written response to the application with a clear indication of whether ED approves or denies discharge and refunds, and the basis for its decision.

Sincerely,

ATTORNEY GENERAL FOR THE
STATE OF COLORADO

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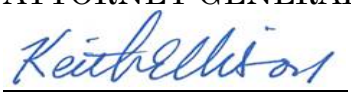

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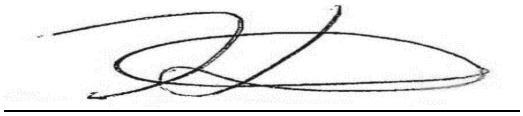

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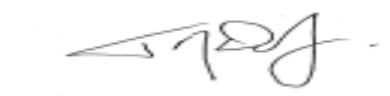

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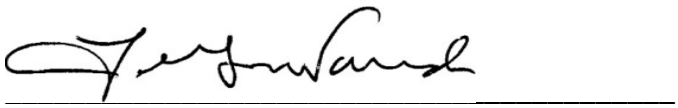

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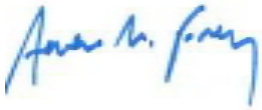

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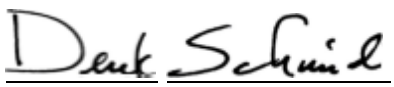

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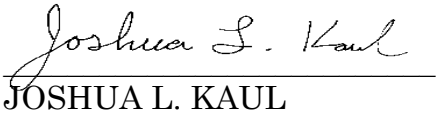

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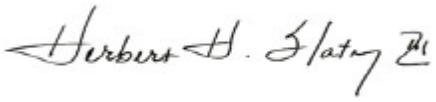

HERBERT SLATERY, III

To: Miguel A. Cardona
Secretary of the U.S. Department of Education

Cc: Colleen Nevin
Director of the Borrower Defense Unit, U.S. Department of Education

From: The Attorneys General of Colorado, Oregon, Connecticut, District of Columbia, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Tennessee, Vermont, Virginia, Washington, and Wisconsin; and the State of Hawaii's Office of Consumer Protection

Date: April 1, 2021

RE: Application for Borrower Defense to Repayment Discharge on behalf of ITT Borrowers

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ATTACHMENT A: STATE LAW ANALYSIS

INTRODUCTION

We, the State Attorneys General,[1] write to request loan discharge and refunds for student borrowers who enrolled in ITT Technical Institute ("ITT") in our respective states between at least 2007 and 2010. During this four-year period, ITT consistently represented to potential students across the country through its Value Proposition Chart that by enrolling in an ITT program, students could expect to see significant salary growth over the course of their lifetimes. This claim was false, misleading, and designed to induce students to enroll.

As set forth below, the State Attorneys General request full relief for borrowers in our respective states,[2] who (1) enrolled at any ITT campus between 2007 and 2010,[3] and (2) who were promised, guaranteed, or otherwise assured by the Value Proposition Chart that they would see an expected salary over the course of their lifetime upon graduation from ITT ("Eligible Borrowers").

I. ITT MISREPRESENTED TO STUDENT BORROWERS A GROSSLY INFLATED RETURN ON INVESTMENT

In the course of advertising an ITT education, ITT guaranteed or otherwise assured prospective students that they would achieve an expected salary over their lifetimes. Specifically, ITT created a document entitled "Value Proposition for Employed Graduates" (see Attachment B, Appendix B) to indicate the alleged value of an ITT degree to prospective students to convince them to enroll at ITT.

The Value Proposition Chart was shown to tens of thousands of prospective students and was used across ITT's 130 campuses over a span of at least four years. The Value Proposition Chart represented to students that the value of an ITT education would be substantial: students would get high-paying jobs and would continue to significantly increase their earnings over their lifetimes.

The impact of such representations is self-evident. It is well accepted that one of the main reasons that individuals attend institutions of higher education is better jobs and increased income. ITT used the Value Proposition Chart to persuade students that the cost of an ITT degree would be outweighed by the future income they would earn. Prominently featured in the document is a chart that depicts the projected annual salary over an estimated work life. The Value Proposition

[1] Colorado, Oregon, Connecticut, the District of Columbia, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Tennessee, Vermont, Virginia, Washington, and Wisconsin. Hawaii is represented in this matter by its Office of Consumer Protection, an agency which is not part of the state Attorney General's Office, but which is statutorily authorized to undertake consumer protection functions, including legal representation of the State of Hawaii. For simplicity purposes, the entire group will be referred to as the "Attorneys General" or individually as "Attorney General" and the designations, as they pertain to Hawaii, refer to the Executive Director of the State of Hawaii's Office of Consumer Protection.

[2] For purposes of this application for relief, Parent PLUS borrowers are included in the definition of student borrowers.

[3] Although this application only addresses borrowers who enrolled between 2007-2010, additional evidence may support future relief for applicants who enrolled prior to 2007 or after 2010. State Attorneys General may update the request for relief accordingly.

Chart indicates that ITT graduates' salaries grow exponentially, increasing at a constant rate every year. ITT used misleading methodology to project the salary growth of ITT graduates. ITT makes deceptive claims on the Value Proposition Chart, in violation of state laws, including:

- Deceptively representing a high and constant rate of salary growth over the course of ITT graduates' careers.

- Misrepresenting the projected annual earnings for ITT graduates at $100,000 more than the average earnings of workers with the same credentials.

- Misrepresenting the ability of prospective students to achieve the expected salary as most ITT enrollees fail to graduate.

- Misrepresenting aggregate salary income as achievable for all students across locations and programs.

As more fully laid out in the expert report of Dr. Jordan Matsudaira,[4] an Associate Professor of Economics and Education Policy at Teachers College, Columbia University, the misrepresentations in ITT's Value Proposition would have been especially misleading to the prospective students—often just high school graduates—who viewed them and undoubtedly took the financial benefit of an ITT education into account when deciding to enroll.

II. EXPERT REPORT BY JORDAN D. MATSUDAIRA, PH.D.

A. Overview

State Attorneys General retained Dr. Matsudaira to analyze and evaluate the accuracy of ITT's Value Proposition Chart. Dr. Jordan Matsudaira's expert report (see Attachment B) assessed the accuracy and methodology of the Value Proposition Chart, including the soundness of its methodology and whether it created a misleading impression of the financial benefit of attending an ITT program. Dr. Matsudaira incorporated analyses of public data showing the earnings of a sample of workers in the United States as well as of post-secondary institution data reported to the U.S. Department of Education ("ED"), to provide context for the claims embedded in ITT's Value Proposition Chart.

Dr. Matsudaira found that the Value Proposition Chart appeared to base the starting salary for ITT graduates on a survey the school conducted of 2006 graduates. He also found that the chart then appears to assume rates of salary increases close to four percent. As Dr. Matsudaira explains, the projected salaries are unrealistic and information available at the time the chart was created would have proven the chart made misrepresentations.

The Value Proposition Chart showed annual earnings levels for ITT graduates near the end of their working career at more than 250 percent higher for associate's degree holders, and more

[4] Dr. Matsudaira was appointed Deputy Under Secretary for the U.S. Department of Education after completing his expert report and analyzing and evaluating the accuracy of ITT's claims in the Value Proposition Chart.

than 150 percent higher for bachelor's degree holders, than the average earnings of working graduates from all other institutions. In both instances, the Value Proposition Chart showed the average salary levels for ITT graduates near the end of their working careers were greater than about 95 percent of all other workers with the same degree.

As Dr. Matsudaira states, it is simply implausible that the average earnings of workers from ITT would be that much higher than the average for all other workers with the same educational attainment: "Anyone with a modicum of experience using labor market statistics would immediately recognize from these data the implausibility of the earnings projections depicted in the [Value Proposition Chart]." ITT massively overestimated the financial gains that borrowers could reasonably expect from enrolling in an ITT program.

ITT overestimated financial gains borrowers could reasonably expect. The numbers presented in the Value Proposition Chart are inaccurate and misleading for several reasons, including: 1) the methodology for projecting future salary based on the initial salary level was unsound; 2) the methodology used to estimate the starting salary was unsound; and 3) the chart failed to use the most accurate available data to inform prospective borrowers.

B. ITT used The Value Proposition Chart to Wrongly Represent that Graduates' Earnings Would Constantly Rise

According to Dr. Matsudaira, the most consequential flaw in the methodology is the unsound method used to project salary growth over individuals' work lives. Since the 1950s, economists have shown that earnings rise over the initial years of workers' careers, but then the rate of increase slows. Earnings eventually level off and remain relatively constant over the later years of careers. Dr. Matsudaira found that the Value Proposition Chart's method results in earnings projections that overestimate the likely earnings of graduates by an increasingly large margin because of an incorrect assumption of constant wage growth.

The implausibility of the earnings values late in graduates' careers should have been obvious to ITT. The same published data tables used in the construction of the Value Proposition Chart also reported the mean income of workers separately by ages. The data tables showed that the mean income of workers aged 55 to 64—the ages when earnings are highest—in 2005 with an associate's degree was $40,811, and the mean income for a bachelor's degree holder was $56,243. However, ITT's Value Proposition Chart depicted ITT graduates' income at *over $100,000 more* than the mean income of workers in those data tables.

Dr. Matsudaira emphasized that the evolution of workers' earnings over a lifecycle is one of the most studied empirical phenomena in labor economics. Since the 1960s, economists have recognized the best way to estimate the profile of earnings over the average individual's working career is to use the cross-sectional relationship between workers' earnings at different ages for workers with various levels of education.

C. ITT Used the Value Proposition Chart to Deceptively Represent High Base Salary Levels

Dr. Matsudaira's report also explains that the Value Proposition Chart used flawed methodology to calculate the starting salary of graduates, which in turn misrepresented the financial benefit of attending ITT.

According to College Scorecard data, the average graduation rate across all ITT programs was about 36 percent. Only around one-third of borrowers who enrolled at ITT could expect to be paid the wages of an ITT graduate. Since the Value Proposition Chart was used in recruitment to enroll borrowers, the statistic relevant to a borrower was the financial benefit of enrolling at ITT. The borrower should have been informed about the earnings outcomes of all borrowers who enroll, including the earnings outcomes of borrowers who do not graduate, since those who enroll but do not graduate earn substantially less than graduates. The substantial likelihood of not completing a degree at ITT lowers the average earnings a borrower should expect. This was not reflected in the Value Proposition Chart.

For most borrowers, the earnings of ITT graduates shown in the Value Proposition Chart represent a misleadingly high estimate of the financial benefits of ITT, and ITT misrepresented these prospective students' abilities to achieve these results.

D. ITT Deceptively Represented Aggregated Earnings Outcomes in the Value Proposition Chart

Dr. Matsudaira's report outlines further deception within the Value Proposition Chart, including that the Value Proposition Chart aggregated the earnings outcomes of borrowers across more than 100 campuses, and across many disparate majors. Showing aggregated information was misleading because the earnings of graduates of higher education programs vary significantly across geographic regions, as well as across programs.

The Value Proposition Chart could have incorporated that information to convey a more accurate sense of the financial benefit of an individual's enrolling in a specific program at a specific location. ITT was aware of the region in which a graduate was likely to work based on the location of where the school recruited the borrower. ITT was also aware of the program of interest of the prospective borrower and was able to measure the earnings outcomes of graduates in a specific program.[5] Earnings outcomes can vary dramatically across programs even within the same institution. The Value Proposition Chart could have used initial earnings of its graduates to create a chart that was tailored to the program interests of prospective borrowers, but it did not.

E. ITT used The Value Proposition Chart to Misrepresent Earnings Outcomes Over Time

These inherent problems with the Value Proposition Chart were not singular mistakes. The Value Proposition Chart was revised over time. According to Dr. Matsudaira, subsequent revisions contained less dramatic overestimates of expected income as ITT used slightly different

[5] For example, see Appendix E of the Expert Report, "Graduate Employment Information: Criminal Justice Associate of Applied Science Degree."

estimates of the first-year earnings of high-school and ITT graduates, and lower estimates of the compound annual growth rate, to project earnings later in workers' careers.[6]

However, Dr. Matsudaira nevertheless found that these revisions remained based on the same flawed methodologies described above. The resulting revised Value Proposition Chart that was drafted in 2011 still substantially overstated the late career earnings of ITT graduates. It inaccurately assumed that earnings grow at a constant rate throughout workers' careers, therefore misrepresented the "Potential Average Return on Investment" to attend ITT.

F. ITT Knew that High Projected Earnings Induced Borrowers' to Enroll

ITT used deceptive methodology to create the Value Proposition Chart, which produced an inaccurate and misleading estimate of the earnings that prospective borrowers could have expected over their working careers because of attending ITT. Given how incorrect these projections were, there is no realistic doubt that ITT was not aware of their inaccuracy.

As Dr. Matsudaira noted, the methodology used by ITT ran contrary to economists' understanding of lifetimes earnings from as early as the 1950s and ran contrary to data contained in the very same tables relied upon in ITT's construction of the Value Proposition Chart. As Dr. Matsudaira stated, "[the projections in ITT's VP are] at odds with data that was available at hand, and a wealth of research evidence on the dynamics of workers' salaries over their life-cycle."[7] Dr. Matsudaira further concluded: "No reasonable data analyst would view the VP's projections as reasonable in light of this data that they relied on."[8]

Further, there can be no doubt what the likely consequences would be of showing borrowers the Value Proposition Chart.[9] In general, borrowers report that earnings information is very important to them and plays an important role in deciding where to attend college.[10] Borrowers tend to be poorly informed about the employment and earnings outcomes of college graduates and perform poorly when trying to rank the earnings outcomes of colleges. As a result, providing borrowers with information can substantially change their views on the financial consequences of their college choices, and thus change their behavior.[11] Moreover, borrowers tend to be overly optimistic when presented with data that shows a range of data on average

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[6] See Appendix C of the Expert Report, "Internal E-mail from Jon Patterson," and Appendix F of the Expert Report, "The 2011 Value Proposition Disclosure."
[7] Attachment B at 21.
[8] *Id*.
[9] Dr. Matsudaira drew upon his experience working on the development of ED's College Scorecard tool with the staff members of the U.S. Digital Service. Their purpose was to better understand how prospective borrowers interpret data on the financial return to colleges. They conducted focus groups with borrowers, showing them different types of information to better understand how borrowers interpret and are likely to respond to different types of data. Several of their findings are relevant here.
[10] This finding regarding the importance of earnings outcomes in borrowers' choice of whether and where to enroll in college is supported by broader representative surveys of college borrowers, as well as ethnographic research.
[11] Dr. Matsudaira cites studies supporting this claim. One study showed that providing information to borrowers leads them to shift enrollment towards schools with better labor market outcomes. Another study conducted an experiment among community college borrowers in the U.S. It found that borrowers' choice of majors responds to providing borrowers information on earnings. According to Dr. Matsudaira, based on this evidence, it's probable that the misleading data in the Value Proposition Chart led to ITT enrollment.

earnings over time. When borrowers are presented with information about the distribution of outcomes, borrowers tend to view the top range as if it was the prediction of their likely earnings outcome. Similarly, borrowers tend to focus on the highest value of earnings shown (earnings several years into one's career instead of early career earnings). The Value Proposition Chart's misrepresentations of late career earnings misled borrowers to believe they would be among the top earners in the country.

G. Conclusions of Dr. Matsudaira's Expert Report

In conclusion, Dr. Matsudaira found:

1. The projected salaries for ITT graduates in the Value Proposition Chart misrepresent what a student at ITT could expect to earn. For both associate's and bachelor's degree graduates, the projected earnings for ITT graduates at the end of their working careers are more than $100,000 higher than the average earnings of individuals with similar credentials.

2. Data relied on by ITT in creation of the Value Proposition Chart show that associate's and bachelor's degree holders at the end of their working career have average earnings that are substantially lower than the salary projections depicted in the Value Proposition Chart.

3. The Value Proposition Chart's assumption of constant earnings growth is at odds with data that was available at the time.

4. The Value Proposition Chart used a starting salary estimate that misrepresents the likely earnings of ITT enrollees by ignoring that most ITT borrowers never complete a degree.

5. Research on borrowers' enrollment decisions suggest that the Value Proposition Chart would have been persuasive to borrowers.

In sum, the Value Proposition Chart misrepresented the expected salary potential of ITT graduates to induce borrowers to enroll.

III. BORROWER DEFENSE REGULATION SUPPORTS ELIGIBILITY AND FULL RELIEF FOR ITT BORROWERS

ITT's misrepresentations and omissions in its Value Proposition Chart violated State Consumer Protection Laws.[12] Student borrowers who enrolled at ITT between at least 2007

[12] Colorado (C.R.S. §§ 6-1-101, *et seq*.); Oregon (ORS 646.605, *et seq.*); Connecticut (Conn. Gen. Stat. § 42-110a, *et seq*.); the District of Columbia (11. D.C. Code §§ 28-3901 to 28-3913); Hawaii (Haw. Rev. Stat. Chpt. 481A and Haw. Rev. Stat. Sect. 480-2); Idaho (Idaho Code § 48-601, *et seq*.); Illinois (815 ILCS 505/1 *et seq*.); Iowa (Iowa Consumer Fraud Act, Iowa Code §714.16); Kansas (K.S.A. 367.100, *et seq*.); Maine (5 M.R.S.A. § 207 of Maine's Unfair Trade Practices Act (5 M.R.S.A. §§ 205-A through 214)); Maryland (Md. Code Ann., Com. Law § 13-101, *et seq*.); Massachusetts (M.G.L. c. 93A, 940 C.M.R. 3.10 *et seq.*, and 940 C.M.R 3.16 *et seq.*); Minnesota (Minn. Stat. 325F.68, Minn. Stat. § 325D.44, and Minn. Stat. 325F.67); Nebraska (Neb. Rev. Stat. §§ 59-1601 *et seq.* and 87-301

through at least 2010 are eligible for relief under Borrower Defense.[13] All Eligible Borrowers should be granted full loan discharges and refunds of amounts already paid.[14]

Upon consideration of common facts, the Secretary has the authority to determine whether a group qualifies for loan discharge.[15] The Secretary can identify a group eligible for discharge from any source.[16] The State Attorneys General are authorized to bring this group application on behalf of all ITT borrowers in their respective states, and ED is required to consider it.[17] Given the mandates of the State Attorneys General to enforce their respective state consumer protection laws and to obtain relief on behalf of consumers,[18] the State Attorneys General seek borrower defense relief on behalf of consumers harmed by ITT.[19]

A. ED Should Apply State Law to ITT Borrowers

The Higher Education Act directs the Secretary to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment"

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et seq.); Nevada (NRS 598.0903 et seq); New Jersey (N.J.S.A. 56:8-1 to 56:8-226); New Mexico (NMSA 1978, Sections 57-12-1 to -26 (2003 as amended through 2019)); New York (New York Executive Law § 63(12) and General Business Law § 349); North Carolina (N.C. Gen. Stat. §§ 75-1.1 et seq.); Pennsylvania (73 P.S. § 201-1, *et seq*.); Tennessee (Tenn. Code Ann. §§ 47-18-101 to -132); Vermont (9 V.S.A. chapter 63); Virginia (Va. Code Ann. §§ 59.1-196 to 59.1-207); Wisconsin (Wis. Stat. § 100.18(1)).

[13] According to a 2012 Senate HELP Committee Report, over 282,000 students enrolled at ITT nationwide between 2007 and 2010. For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success, at 559 https://www.govinfo.gov/content/pkg/CPRT-112SPRT74931/pdf/CPRT-112SPRT74931.pdf.

[14] *See, Vara v. DeVos*, 2020 WL 3489679, at **32-33 (D. Mass. June 25, 2020) (holding that whether the Secretary grants full loan discharge is based on state law under the pre-2017 borrower defense rule; it is not left to the discretion of the Secretary); *see also*, 34 C.F.R. § 685.206(c).

[15] *See* 34 C.F.R. § 685.222(f).

[16] 34 C.F.R. § 685.222(f)(1)(i). States believe that ED may identify ITT borrowers eligible for borrower defense to repayment loan forgiveness using loan disbursement and enrollment information in the National Student Loan Data System, as well as enrollment information reported by ITT during the relevant period. We also believe that loan information reported by the borrower's loan servicer may be used to determine if loans were disbursed during the period the borrower enrolled at ITT.

[17] *See Vara*, at *26 and *28 (D. Mass. June 25, 2020) (in rejecting the claim that a group discharge process did not exist for loans taken out prior to 2017, the court found "overwhelming record evidence, which demonstrates that the agency repeatedly exercised its discretion to initiate group discharge processes upon receipt of group applications."); *see also Williams v. DeVos*, 2018 WL 5281741, at *12 (D. Mass. Oct. 24, 2018) ("In short, the Court finds that Attorney General Healey's DTR submission was sufficient to require the Secretary to determine the validity of the plaintiffs' borrower defense.").

[18] *See* C.R.S. § 6-1-103 and 110; ORS 646.605, *et seq.*; Conn. Gen. Stat. §§ 42-110d(d), 42-110k, 42-110m(a), and 42-110o(a); 17. D.C. Code §§ 28-3909(a)-(b) and 28-3909.01; Haw. Rev. Stat. Sect. 487-5; 815 ILCS 505/7; Iowa Consumer Fraud Act, Iowa Code §714.16; K.S.A. 367.100 *et seq.*; Md. Code Ann., Com. Law § 13-201, §13-204; 5 M.R.S.A. § 209; M.G.L. c. 93A § 4; Minn. Stat. s 8.31; Neb. Rev. Stat. §§ 59-1608 and 87-303.05; NRS 598.0963(3) and (4); N.J.S.A. 56:8-3 to 4, and 8-8; New York Executive Law § 63(12) and General Business Law § 349; N.C. Gen. Stat. §§ 75-15 and 15.1; Pennsylvania Unfair Trade Practices and Consumer Protection Law §§ 201-4 and 201-4.1; 9 V.S.A. § 2458; Tenn. Code Ann. §§ 47-18-108, -114; Va. Code Ann. §§ 2.2-517 and 59.1-203; Wis. Stat. § 165.25(4)(ar) and Wis. Stat. § 100.18(11)(a), (d).

[19] In *Vara*, the court rejected ED's argument that the Massachusetts Attorney General's group application on behalf of Corinthian borrowers was defective because it lacked signed attestation forms from students consenting to the Attorney General's representation. The court noted: "This argument fundamentally misunderstands [] the scope of the AGO's authority and its capacious role in protecting the public interest." *Vara* at *28.

of a federal student loan.[20] Given that ITT's misrepresentations described herein occurred prior to June 30, 2017, the applicable borrower defense regulation states that "the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law."[21]

For the reasons set forth below, borrowers who enrolled at ITT have valid claims under their state consumer protection laws and are therefore eligible for borrower defense. It is appropriate to grant relief to the thousands of individual borrower applicants who attended ITT and generally claimed they were misled about wage outcomes. It is also appropriate to grant relief without individual applications in this case because the States have identified the eligible cohort of borrowers that were subjected to ITT's consequential misrepresentations.[22] ED has previously granted Group Discharge Applications.[23]

B. Full Borrower Defense Relief Should Be Provided to Eligible Borrowers

ITT operated over 130 campuses in 38 states and enrolled students in online programs nationwide. Between 2007 and 2010, approximately 282,000 students were enrolled in ITT programs.[24] The Value Proposition Chart was shown consistently to prospective ITT students, many of whom enrolled, and was used pervasively across ITT's 130 campuses, over a span of at least 4 years. Given the widespread dissemination of ITT's extensive misrepresentations, all Eligible Borrowers should be granted full loan discharges and refunds of amounts already paid.[25]

"[S]ince its promulgation, the borrower defense regulation has encompassed the right to assert a defense to repayment at any time during repayment of a loan, including before a borrower is in default."[26] ED will order discharge of the student borrower's outstanding obligations at any time if a borrower defense application is approved, and return "payments made or otherwise

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[20] 20 USC § 1087e(h).
[21] 34 C.F.R. § 685.206(c)(1).
[22] *See Vara* at *28 (finding that the Massachusetts AGO was not required to provide borrowers' social security numbers to comply with the borrower defense rule). To ensure ED's ability to adjudicate this group application, the States are willing to work with the Secretary to obtain a list of eligible ITT students from the ITT Bankruptcy Trustee.
[23] American Career Institute, https://www.ed.gov/news/press-releases/american-career-institute-borrowers-receive-automatic-group-relief-federal-student-loans; Letter from Kwame Raoul, Att'y Gen., Ill., and Phil Weiser, Att'y Gen., Colo., to Betsy DeVos, Sec'y, U.S. Dep't of Educ., Loan Discharge for Illinois Institute of Art and Art Institute of Colorado Students (June 3, 2019), https://illinoisattorneygeneral.gov/pressroom/2019_06/Letter_to_ED_Re_Group_Discharge_for_Illinois_Institute_of_Art_and_Art_Institute_Coloradostudents.pdf.
[24] *See* FN 13, *supra.*
[25] *See*, 34 C.F.R. §§685.212(k) and 685.206(c); see also, FTC, Commission Advisory Opinion on 16 C.F.R. Part 433: Federal Trade Commission Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses (The Holder Rule) (May 3, 2012), https://www.ftc.gov/system/files/documents/advisory_opinions/16-c.f.r.part-433-federal-trade-commission-trade-regulation-rule-concerning-preservation-consumers-claims/120510advisoryopinionholderrule.pdf ("Thus, to give full effect to the Commission's original intent to shift seller misconduct costs away from consumers, consumers must have the right to recover funds already paid under the contract if such recovery is necessary to fully compensate the consumer for the misconduct . . . . Otherwise, whether a consumer is able to be fully compensated would depend on how much the consumer paid under the contract at the time of the dispute.").
[26] *Vara* at *17.

recovered on the loan that exceed the amount owed on that portion of the loan not discharged" if the claim is asserted not later than "the limitation period under applicable [state] law to the claim on which relief was granted."[27]

In terms of ITT's specific wage outcome projections, it is highly unlikely any borrower could have been aware of the misleading nature of the school's Value Proposition marketing that was used to induce them to enroll. Without access to the school's internal documents and conducting a longitudinal study or retaining an expert economist to analyze ITT's Value Proposition representations, students—often with just a high school education at the time of enrollment—had no ability to test the information they were given at the time of their enrollment.[28]

Lastly, ED should not undertake a case-by-case analysis of borrowers to determine their salary in relation to the promises made by ITT. The school's misrepresentations went to the overall value of the education and were substantial regardless of a borrower's current salary trajectory. It is settled that the relevant state law determines the measure of relief for a successful borrower defense.[29]

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[27] 34 CFR §685.212(k)(1)(ii) (discussing the limitations period for loans disbursed during prior to June 30, 2017, defining the available relief). In discussing its rationale for preserving this dual system when transitioning to the federal framework of borrower defenses in 2017, ED explained that "this rule comports with the FTC Holder Rule 30 and general State law principles, as well as general principles relating to the defense of recoupment." 81 Fed. Reg. 75,959 (Nov. 1, 2016). (*But see*, FN 25, *supra*.). ED also cited the Supreme Court's decision in *Bull v. United States* for further authority. *Id,* quoting 295 U.S. 247, 262 (1935) ("Recoupment is in the nature of a defense arising out of some feature of a transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely"). Thus, the position advanced by ED is that a borrower is never barred from asserting a defense to outstanding obligations but may only recover past payments or amounts recovered by ED if the claim is brought within the relevant statute of limitations under State law. For private litigants, no borrower defense claims are time barred because a defendant may plead a set-off or counterclaim as a defense, regardless of whether the statute of limitations has expired on the set-off or counterclaim. *See, e.g.* 735 ILCS 5/13-207; *See City of St. Paul, Alaska v. Evans*, 344 F.3d 1029, 1033-35 (9th Cir. 2003) ("courts generally allow defendants to raise defenses that, if raised as claims, would be time-barred."); *see also Ottaviano v. Home Depot, Inc., USA,* 701 F. Supp. 2d 1005, 1013 (N.D. Ill. 2010); *Household Fin. Corp. v. Pugh*, 288 N.W.2d 701, 702 (Minn. 1980) (holding that TILA violation alleged as a "defense to a creditor's" claim for money owed under a loan obligation even if statute of limitations would bar affirmative case on the same claim); *Reynolds v. Reynolds*, 458 N.W.2d 103, 105 (Minn. 1990) ("The general rule is that the statute of limitations may be used as a shield, not as a sword, and that the statute of limitations does not bar a party from raising a pure defense."); Va. Code Ann. § 8.01-422 ("fraud in such contract's procurement" a ground for recoupment); *see also Cummings v. Fulghum*, 261 Va. 73, 80 (2001) ("[A] plea of recoupment under Code § 8.01-422 is not subject to a statute of limitations defense . . . ."); Wis. Stat. Sec. 893.14.

[28] The earliest that any ITT borrower reasonably could have become aware of any *general* legal claims against ITT would have been in August 2016, when ED announced that it was imposing restrictions on ITT's ability to enroll new student and access to Title IV funds. *See*, August 25, 2016 Letter from Ron Bennet to Kevin Modany, at https://www2.ed.gov/documents/press-releases/itt-letter-08252016.pdf. ED cited to ITT's accreditor, Accrediting Council for Independent Colleges and Schools ("ACICS"), and its determination that ITT was out of compliance with its standards, including meeting certain outcome metrics. However, neither ED nor ACICS made public the underlying evidence of their legal determinations. Shortly thereafter, ITT announced its closure on September 6, 2016. See, Important Information Regarding ITT Educational Services, Inc., at https://studentaid.gov/announcements-events/itt.

[29] *See, Vara*, at *32.

C. ITT Borrowers have Valid Claims Under the State Consumer Protection Laws

State law analyses for the states of Colorado, Oregon, Connecticut, the District of Columbia, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Tennessee, Vermont, Virginia, Washington, and Wisconsin are compiled in Attachment A to this request.

D. This Information Should Apply to Prior ITT Borrower Defense Applications

We urge the Secretary to reopen any borrower defense applications submitted by individuals or groups of ITT borrowers prior to ED receiving the information referenced within this request for relief, and reconsider all denied applications and partial relief applications with the new information provided by the State Attorneys General.[30]

IV. CONCLUSION AND REQUEST FOR RELIEF

All ITT borrowers described herein have a valid claim under their State laws and are therefore eligible for discharge and refunds of their student loans under borrower defense. ITT engaged in extensive deceptive behavior that resulted in long-ranging financial harm to thousands of students, many of whom continue to suffer. ITT's conduct was not limited to just a few students. The school's deceptive Value Proposition Chart was utilized across the ITT system of campuses.

Based on the forgoing, the State Attorneys General urge the Secretary to grant full loan discharges and refunds of amounts already paid by eligible ITT borrowers. We further request a written response to this group application with a clear indication of whether and why the Secretary denies or approves the relief requested.

[30] *See* 34 C.F.R. §§ 685.222(e)(5), (g)(4).

ATTACHMENT A:

STATE LAW ANALYSIS

Violations of Colorado Law

In addition to the Attorney General's enforcement powers under the Colorado Consumer Protection Act (C.R.S. § 6-1-103) ("CCPA"), the Colorado legislature granted a private right of action to individual consumers to recover damages for violation of the act.[1] Here, both the Colorado Attorney General and individual students have cognizable claims for relief against ITT.

To prevail in a civil enforcement action under the CCPA, a party must establish by a preponderance of the evidence that: (1) the defendant engaged in an unfair or deceptive trade practice; (2) the challenged practice occurred in the course of defendant's business, vocation, or occupation; (3) the practice significantly impacted the public as actual or potential consumers of the defendant's goods, services, or property; (4) the plaintiff suffered injury in fact to a legally protected interest; and (5) the challenged practice caused the plaintiff's injury.[2] The Colorado Attorney General need only establish the first two elements, while the remaining three—that the conduct significantly impacts the public as actual or potential consumers of the defendants' goods, services or property; that the plaintiff suffered injury in fact to a legally protected interest; and that the conduct caused the plaintiff's injury—do not apply to an enforcement action.[3]

ITT engaged in unfair or deceptive trade practices in the course of its educational operations:

> Claim I: ITT knowingly made a false representation as to the characteristics, uses, or benefits of goods or services they offered. C.R.S. §6-1-105(1)(e); and
> Claim II: ITT failed to disclose material information concerning goods or services, which information was known at the time of an advertisement or sale when such failure to disclose such information was intended to induce the consumer to enter into a transaction. C.R.S. §6-1-105(1)(u).

The Colorado Supreme Court concluded that a false representation must either induce a party to act, refrain from acting, or have the capacity or tendency to attract consumers.[4] *In People ex rel. Dunbar v. Gym of America, Inc.*, the Colorado Supreme Court noted that deceptive trade practices can induce parties to act on the basis of false or misleading information.[5] The *Rhino Linings* court further found that a misrepresentation is actionable when it is made "either with knowledge of its untruth, or recklessly and willfully made without regard to its consequences, and with an intent to mislead and deceive the plaintiff."[6]

Per the Colorado Jury Instructions, the finder of fact may consider the following factors among others in gauging public impact in a CCPA claim brought by a private plaintiff: 1. The

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[1] *Hall v. Walter*, 969 P.2d 224, 229 (Colo. 1998).
[2] *Hall*, 969 P.2d at 234; *Accord Brodeur v. Am. Home Assur. Co.,* 169 P.3d 139, 155 (Colo. 2007); *Crowe v. Tull*, 126 P.3d 196, 200 (Colo. 2006).
[3] The Colorado legislature amended section 103 of the CCPA in 2019 such that an action brought under the CCPA by the Attorney General does not require proof that a deceptive trade practice has a significant public impact. *See*, C.R.S. §6-1-103; 2019 Colo. Legis. Serv. Ch. 268 (H.B. 19-1289) (West).
[4] *Rhino Linings USA Inc. v. Rocky Mountain Rhino Lining, Inc.,* 62 P.3d 142, 146 (Colo. 2003).
[5] *People ex rel. Dunbar v. Gym of America, Inc.*, 493 P.2d 660, 667 (Colo. 1972).
[6] *Rhino Linings*, 62 P.3d at 146, *citing Parks v. Bucy*, 21 P. 638, 639 (1922).

number of consumers directly affected by the challenged trade practice(s); 2. The relative sophistication of the consumers directly affected by the challenged trade practice(s); 3. The bargaining power of the consumers directly affected by the challenged trade practice(s); 4. Evidence that the challenged trade practices have previously impacted other consumers; (and) 5. Evidence that the challenged trade practices have significant potential to impact other consumers in the future.[7]

ITT operated campuses in Westminster and Aurora, Colorado, and enrolled many more Coloradans in its online division. ITT uniformly used the Value Proposition chart during admissions to induce prospective Colorado students to enroll and borrow federal student aid, based on the false promise of a high and constant rate of salary growth over the course of ITT graduates' careers. ITT would have known that such projections were unreasonably high,[8] but it used the false information anyway in order to enroll as many students as possible, without regard to the consequences.[9]

The CCPA describes a limitation period of "three years after the date on which the false, misleading, or deceptive act or practice occurred or the date on which the last in a series of such acts or practices occurred or within three years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice." C.R.S. §6-1-115. Colorado courts have held that "'[t]he critical inquiry of when an action accrues is knowledge of the facts essential to the cause of action, not knowledge of the legal theory upon which the action may be brought.'"[10] Most ITT students would have no knowledge of the "facts essential to the cause of action" until now, and only because of Dr. Matsudaira's report.

In Colorado, a consumer need not show individual reliance on a representation to receive full relief under the borrower defense rule.[11] Colorado courts do not limit restitution awards to only those consumers who testified, as it would be inconsistent with "the broad legislative purpose [of the CCPA] to provide prompt, economical, and readily available remedies against consumer fraud."[12]

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[7] Colo. Pattern Jury Instr. Civ. 29:4 (Jun. 2020).
[8] *See*, pp. 4-5, *supra.*
[9] *Gym of America*, 493 P.2d at 667.
[10] *Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 854 (Colo.App.2007) (*quoting Winkler v. Rocky Mountain Conference*, 923 P.2d 152, 159 (Colo.App.1995)).
[11] *See Rhino Linings, supra n. 6.*
[12] *W. Food Plan, Inc. v. Dist. Court In & For City & Cty. of Denver*, 598 P.2d 1038, 1041 (Colo. 1979); *see also, FTC v. Freecom Comm., Inc.,* 401 F.3d 1192, 1206 (10th Cir. 2005); *FTC v. Kuykendall*, 371 F.3d 745, 765 (10th Cir. 2004); *McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000); *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997); *FTC v. Figgie Int'l, Inc.,* 994 F.2d 595, 605 (9th Cir. 1993), cert. denied, 510 U.S. 1110 (1994); *FTC v. Security Rare Coin & Bullion Corp*., 931 F.2d 1312, 1316 (8th Cir. 1991); *People, ex rel. Lockyer v. Fremont Ins. Co.*, 128 Cal. Rptr. 2d 463, 482 (Cal. App. 2003).Colorado courts may infer that a company engaged in numerous uniform, material misrepresentations or omissions based on circumstantial evidence. *Bp Am. Prod. Co. v. Patterson*, 263 P.3d 103, at 109-10 (Colo. 2011); *see also Garcia v. Medved Chevrolet, Inc.*, 263 P.3d 92, 94 (Colo. 2011).

Violations of Oregon Law

The Oregon Unlawful Trade Practices Act ("UTPA") defines and prohibits various types of unfair or deceptive practices in trade or commerce.[13] It places enforcement power with the Oregon Attorney General, and authorizes the recovery of civil penalties and damages, as well as injunctive relief. The UTPA also authorizes consumers the right to bring a private action.[14] As a consumer protection statute, the UTPA is to be interpreted liberally in favor of consumers.[15]

The UTPA applies to any person who, in the course of a business, vocation, or occupation, commits an unlawful trade practice as defined by the UTPA. "The general policy of the … UTPA is to discourage deceptive trade practices and to provide a viable remedy for consumers who are damaged by such conduct."[16] ITT's misleading statements about the projected annual earnings of ITT graduates, as well as about the projected growth rate of those annual earnings over the course of ITT graduates' careers, violate the UTPA.

Through its false and misleading misrepresentations and omissions in its Value Proposition Chart, ITT violated the UTPA, specifically ORS 646.608(1)(e) and ORS 646.608(1)(g). ITT represented that their services had sponsorship, approval, characteristics, ingredients, uses, benefits, quantities, or qualities that their services did not have, in violation of ORS 646.608(1)(e). In addition, ITT represented that their services were of a standard, quality, or grade, when in fact they were not, in violation of ORS 646.608(1)(g). The UTPA defines representations as "any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact."[17] This definition, coupled with the wide range of conduct prohibited by the UTPA, demonstrates the "legislature's intent to broadly prohibit misrepresentations materially bearing on consumer purchasing choices."[18]

The State need not prove actual confusion or misunderstanding in an action under the UTPA.[19] Further, the State does not need to show individual reliance to establish a violation of the UTPA. For private litigants, whether reliance is an element of a UTPA claim depends on the type of violation and type of loss alleged, and reliance is not required in cases of non-disclosure.[20]

In addition to the enforcement power given to the Oregon Attorney General, the UTPA provides that a private party who suffers any ascertainable loss of money or property, real or personal, as a result of the willful use of an unlawful trade practice may recover actual damages.[21]

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[13] ORS 646.605, *et seq.*
[14] ORS 646.638 allows private parties the right to bring a civil action for ORS 646.608 violations and provides for statutory, actual, and punitive damages.
[15] *See Denson v. Ron Tonkin Gran Turismo, Inc.*, 279 Or 85, 90 n 4, 566 P2d 1177 (1977).
[16] *Raudebaugh v. Action Pest Control, Inc*., 59 Or App 166, 171, 650 P2d 1006 (1982) (citing *Wolverton v. Stanwood*, 278 Or 341, 345, 563 P2d 1203 (1977)). Most of the proscribed trade practices involve real estate, goods, or services obtained primarily for personal, family, or household purposes. The UTPA does not define the terms goods or services, other than to specify that the goods and services (as well as real estate) "be obtained primarily for personal, family or household purposes." ORS 646.605(6)(a).
[17] ORS 646.608(2).
[18] *State ex rel. Rosenblum v. Johnson & Johnson*, 362 P.3d 1197, 1203 (Or. App. 2015).
[19] ORS 646.608(3).
[20] *Pearson v. Philip Morris, Inc.*, 361 P.3d 3, 27 (Or. 2015); *Sanders v. Francis*, 561 P.2d 1003 (Or. 1971).
[21] ORS 646.638(1).

The purpose of this private enforcement provision is to provide another mechanism for restitution for economic loss suffered by a person because of a deceptive trade practice.[22]

The word ascertainable has been defined as "capable of being discovered, observed or established."[23] Only a minimal amount of cognizable loss is needed to satisfy the ascertainable-loss requirement.[24] The difference between the represented value of a good or service and the actual value of a good or service can qualify as an ascertainable loss.[25] ITT's conduct caused Oregon borrowers an ascertainable loss, and as Dr. Matsudaira's expert report outlines, there is a significant difference between the value of an ITT education as ITT represented, and the actual value.

A willful violation occurs when "the person committing the violation knew or should have known that the conduct of the person was a violation."[26] The statute requires "no more than proof of ordinary negligence by a defendant in not knowing, when it should have known, that a representation made by him was not true."[27] ITT acted willfully at the time it made representations about lifetime earnings in its Value Proposition Chart. As Dr. Matsudaira explains in his expert report, ITT should have known that the representations in its Value Proposition Chart were not true: "Anyone with a modicum of experience using labor market statistics would immediately recognize from these data the implausibility of the earnings projections."

Although private actions are subject to a one-year statute of limitations, the limitation does not commence until the discovery of the unlawful trade practice.[28] Discovery occurs when the plaintiff has sufficient knowledge to "'excite attention and put a party upon his guard or call for an inquiry.'"[29] This requires a survey of what facts consumers had access to, whether knowledge of those facts would spur an inquiry or further investigation, and whether such an inquiry or investigation would likely reveal fraud.[30] Dr. Matsudaira's report provides the crucial analysis of the representations within ITT's Value Proposition Chart. Representations of statistical data require an expert analysis of the underlying data and the methodologies used, and borrowers almost certainly were unqualified to assess the veracity of the data presented.

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[22] *See Allen v. G.D. Searle & Co*., 708 F Supp 1142, 1157–1158 (D Or 1989).
[23] *Scott v. Western International Surplus Sales, Inc.*, 267 Or 512, 515 (1973).
[24] *See Hedrick v. Spear*, 138 Or App 53, 57–58 (1995).
[25] Private parties can prove ascertainable loss under different theories. Under the typical UTPA scenario, the loss is evidenced by the difference in value between the good or service as represented by the defendant and as actually received by the consumer. *See Paul v. Providence Health System-Oregon*, 240 P.3d 1110, 1121 (Or. Ct. App. 2010); *Pearson v. Philip Morris, Inc.*, 361 P.3d 3, 23–24 (Or. 2015); *Solano v. Kroger Co*., No. 3:18-CV-01488-AC, 2020 WL 7028473, at *3 (D. Or. Nov. 30, 2020).
[26] ORS 646.605(10).
[27] *State ex rel. Redden v. Discount Fabrics, Inc*., 289 Or 375, 385 (1980).
[28] ORS 646.638(6). Notwithstanding this limitation, if the State filed a complaint to prevent, restrain or punish a violation of ORS 646.608, the complaint tolls the statute of limitations with respect to every private right of action.
[29] *Bodin v. B. & L. Furniture Co.*, 42 Or App 731, 734–735 (1979) (quoting *Forest Grove Brick Works, Inc. v. Strickland*, 277 Or 81, 86 (1977)).
[30] *Saenz v. Pittenger*, 715 P.2d 1126, 1128 (Or. App. 1986) (citing *Mathies v. Hoeck*, 588 P.2d 1, 3 (Or. 1978): "[f]irst, it must appear that plaintiff had sufficient knowledge to 'excite attention and put a party upon his guard or call for an inquiry [and second,] [i]f plaintiff had such knowledge, it must also appear that a reasonably diligent inquiry would disclose the fraud'").

Violations of Connecticut Law

The Connecticut Unfair Trade Practices Act ("CUTPA") prohibits unfair or deceptive practices in the conduct of any trade or commerce.[31] CUTPA authorizes the Connecticut Attorney General, at the request of the Commissioner of the Connecticut Department of Consumer Protection, to seek to prohibit unfair or deceptive acts, as well as to seek civil penalties, restitution, and other forms of relief for violations of CUTPA on behalf of the State of Connecticut.[32] CUTPA further provides for a private right of action, allowing individual consumers to obtain relief from unfair and deceptive practices.[33] The legislature intended CUTPA to be remedial[34] and the Connecticut Supreme has held that CUTPA is remedial in character and must be liberally construed in favor of those whom the legislature intended to benefit."[35]

Connecticut consumers are not required to demonstrate that they relied on a deceptive practice to make a CUTPA claim, as long as they demonstrate ascertainable loss that was a result of deceptive representations.[36]

The statute of limitations period applicable to CUTPA claims brought as a private cause of action is three years.[37] The statute of limitations begins to run on a CUTPA claim brought by an individual consumer from the date of the occurrence of the violation, but a continuing course of conduct may toll the statute of limitations.[38] There is no statute of limitations with respect to CUTPA actions initiated on behalf of the State of Connecticut.

ITT's misleading statements about the projected annual earnings of ITT graduates, as well as about the projected growth rate of those annual earnings over the course of ITT graduates' careers, violate the CUTPA. Through its false and misleading misrepresentations and omissions in its Value Proposition Chart, ITT violated CUTPA. ITT represented that their services had sponsorship, approval, characteristics, ingredients, uses, benefits, quantities, or qualities that their services did not have, in violation of CUTPA. In addition, ITT represented that their services were of a standard, quality, or grade, when in fact they were not, in violation of CUTPA. Each of these unfair and deceptive acts would permit the Connecticut Attorney General or affected Connecticut consumers to sue under Connecticut law.

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[31] Conn. Gen. Stat. § 42-110b(a).
[32] Conn. Gen. Stat. §§ 42-110d(d), 42-110k, 42-110m(a), and 42-110o(a).
[33] Conn. Gen. Stat. § 42-110(g).
[34] Conn. Gen. Stat. § 42-110b(d)
[35] *Service Road Corp.* v. *Quinn*, 241 Conn. 630, 637 (1997).
[36] *Hinchliffe v. American Motors Corp.,* 184 Conn. 607, 617 (1981)
[37] Conn. Gen. Stat. § 42-110g(f).
[38] *Fichera v. Mine Hill Corp.*, 207 Conn. 204, 209-17 (1988).

Violations of District of Columbia Law

The District of Columbia's Consumer Protection Procedures Act ("DCCPPA")[39] is a comprehensive statute designed to "assure that a just mechanism exists to remedy all improper trade practices."[40] The DCCPPA is enforced by the District of Columbia Office of the Attorney General ("D.C. OAG"),[41] and authorizes D.C. OAG's recovery of restitution and other economic damages, civil penalties, and injunctive relief against any merchant[42] who violates the DCCPPA. D.C. Code § 28-3909(a)-(b). The statute also provides for a private right of action and recovery by injured consumers[43] on their own behalf or in a representative capacity. D.C. Code § 28-3905(k)(1).[44] Both the D.C. Office of the Attorney General and individual borrowers in the District of Columbia (the "District") have valid claims for relief against ITT under the DCCPPA.

The DCCPPA is a remedial statute that is "construed and applied liberally to promote its purpose" and establishes a consumer's "right to truthful information about consumer goods and services" that are purchased or received in the District.[45] The District of Columbia Court of Appeals has held that the DCCPPA reaches retail transactions in goods and services to consumers.[46] This reach encompasses ITT's sales and provision of educational products and services to District borrowers.

The DCCPPA protects consumers from specific "unlawful trade practices" enumerated in D.C. Code § 28-3904, as well as practices prohibited by other statutes and common law. By making false and misleading statements and omissions about projected earnings of ITT graduates in its Value Proposition Chart, ITT engaged in at least the following enumerated unfair and deceptive trade practices:

- representing that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have (D.C. Code § 28-3904(a));
- representing that goods or services are of particular standard, quality, grade, style, or model, when in fact they are of another (D.C. Code § 28-3904(d));
- making misrepresentations of material facts which have a tendency to mislead; and (D.C. Code § 28-3904(e)); and

[39] D.C. Code §§ 28-3901 to 28-3913.
[40] D.C. Code § 28-3901(b)(1).
[41] D.C. Code § 28-3909.01.
[42] Because ITT sells educational goods and services to consumers, ITT is a "merchant" under the DCCPPA. D.C. Code § 28-3901(a)(3) defines a "merchant" as "a person, whether organized or operating for profit or for a nonprofit purpose, who in the ordinary course of business does or would sell, lease (to), or transfer, either directly or indirectly, consumer goods or services, or a person who in the ordinary course of business does or would supply the goods or services which are or would be the subject matter of a trade practice."
[43] Under D.C. Code § 28-3901(a)(2)(A), a "consumer" is a person who "does or would purchase, lease (as lessee), or receive consumer goods or services…."
[44] An individual may recover treble damages (or $1500 per violation, if greater), punitive damages, and attorney's fees, as well as an injunction against the unlawful trade practice. D.C. Code § 28-3905(k)(2)(A)-(D). In representative actions, a consumer may also obtain restitution. D.C. Code § 28-3905(k)(2)(E).
[45] D.C. Code § 28-3901(c).
[46] *See Adam A. Weschler & Son, Inc. v. Klank,* 561 A.2d 1003 (D.C. 1989).

- failing to state material facts where such failure tends to mislead (D.C. Code § 28-3904(f)).

To prevail in a civil action under the DCCCPA, neither D.C. OAG nor a private plaintiff must prove that a consumer was actually "misled, deceived, or damaged" by the defendant's unfair and deceptive trade practices or that a consumer relied on defendant's misrepresentation or failure to disclose.[47] Furthermore, neither D.C. OAG nor a private plaintiff must prove intentional misrepresentations or intentional failures to disclose to prevail.[48]

To establish liability under D.C. Code § 28-3904(e) and (f), a plaintiff must prove [49] that the defendant made an affirmative or implied misrepresentation or omission of a "material fact" had a "tendency to mislead."[50] A fact is material if: "a reasonable person 'would attach importance to its existence or nonexistence in determining his or her choice of action in the transaction' or 'the maker of the representation knows or has reason to know' that the recipient likely 'regard[s] the matter as important in determining his or her choice of action.'"[51] Furthermore, "express claims" and deliberately-made implied claims by a defendant, as well as claims and omissions that go to "central characteristics of the product or service," such as the "cost," "quality," or "efficacy" of the product or service, can be presumed to be material.[52]

Here, ITT's express false claims about ITT students' future earnings potential, expected base salary, and expected wage growth can be presumed to be material.[53] Further, the prospective financial benefit of enrolling in a particular higher education program is a "central characteristic" of such a program from a consumer's perspective. A consumer's return on his or her investment in an ITT education, in the form of annual earnings, is a material fact to which a consumer would presumptively attach importance in determining whether to borrow federal student loans to enroll in an ITT school, because it goes to the quality, efficacy, and ultimate cost of an ITT education. In addition, the States have submitted evidence that the information in the Value Proposition Chart would have been important to borrowers in their higher education choices.[54]

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[47] D.C. Code § 28-3904. *See Frankeny v. Dist. Hosp. Partners, LP*, 225 A.3d 999, 1004 (D.C. 2020); *Grayson v. AT & T Corp*., 980 A.2d 1137, 1157 (D.C. 2009), reh'g en banc granted, opinion vacated, 989 A.2d 709 (D.C. 2010), and amended in part, 140 A.3d 1155 (D.C. 2011), and on reh'g en banc, 15 A.3d 219 (D.C. 2011) ("To state a claim under the [DC]CPPA, a plaintiff need not allege reliance.").

[48] *Frankeny*, 225 A.3d at 1004.

[49] The burden of proof for DCCPPA claims is clear and convincing evidence. *Frankeny*, 225 A.3d at 1005 (citing *Pearson v. Chung,* 961 A.2d 1067, 1073 (D.C. 2008)).

[50] *See Beck v. Test Masters Educ. Servs. Inc.,* 994 F. Supp. 2d 90, 96 (D.D.C. 2013); *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013).

[51] *Frankeny*, 225 A.3d at 1005 (D.C. 2020) (citing *Saucier*, 64 A.3d at 442).

[52] *See* 1983 FTC Policy Statement on Deception ("Deception Statement"), *available at* https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt. pdf; *Novartis Corp. v. F.T.C.,* 223 F.3d 783, 786 (D.C. Cir. 2000) (citing and discussing Deception Statement). *See also* D.C. Code § 28-3901(d) (*"*In construing the term 'unfair or deceptive trade practice' due consideration and weight shall be given to the interpretation by the Federal Trade Commission and the federal courts of the term 'unfair or deceptive act or practice.'").

[53] *See* Deception Statement, *available at* https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt. pdf.

[54] *See* Section III.F.

Claims for DCCPPA violations brought by the D.C. Office of the Attorney General are not subject to a statute of limitations. D.C. Code § 28-3909, which authorizes the Attorney General to seek remedies under the DCCPPA, includes no time limitations. Per D.C. Code § 12-301, the District of Columbia is not subject to the statute of limitations that would otherwise apply to an analogous private right of action.[55]

Claims for DCCPPA violations brought by private litigants carry a statute of limitations of three years.[56] Courts in the District of Columbia apply the "discovery rule" to determine when a cause of action accrues. Under this rule, a cause of action accrues when the plaintiff has knowledge of (or by the exercise of reasonable diligence should have knowledge of) (1) the existence of the injury, (2) its cause in fact, and (3) some evidence of wrongdoing.[57] Absent Dr. Matsudaira's expert analysis of the representations within ITT's Value Proposition Chart, and the internal ITT documents supporting it, borrowers did not know, could not have known, and were unqualified to ascertain the falsity of ITT's statements and omission.

[55] D.C. Code § 12-301 (default statute of limitations for private actors "does not apply.... to actions brought by the District of Columbia government); *see also Dist. of Columbia v. CashCall, Inc*., No. 2015 CA 006904 B, 2016 WL 4017191, at *4 (D.C. Super. June 13, 2016).
[56] D.C. Code § 12-301(8) (setting the statute of limitations for claims "for which a limitation is not otherwise specially prescribed" at three years).
[57] *Goldman v. Bequai,* 19 F.3d 666, 671-72 (D.C. Cir. 1994); *Diamond v. Davis,* 680 A.2d 364, 370-81 (D.C. 1996).

Violations of Hawaii Law

The State of Hawaii Office of Consumer Protection is statutorily authorized to enforce state consumer protection laws and obtain consumer restitution.[58] Students may also bring a private action against ITT for unfair or deceptive trade practices.[59]

ITT's business practices, in this case, were unfair and deceptive in violation of Haw. Rev. Stat. § 480-2(a) and Haw. Rev. Stat. §§ 481A-3(5) and (12).

The consumer protection statutes were constructed in broad language to constitute a flexible tool to stop and prevent fraudulent, unfair or deceptive business practices.[60] "A practice is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."[61]

ITT through its use of an unrealistic Value Proposition Chart, misrepresented the value of an ITT education, misrepresenting that it would lead to high paying jobs and that it would significantly increase the students' income over the students' lifetime. ITT's projections were based upon unrealistic models and not based in fact. ITT's business practices unfairly duped consumers into paying large amounts of money to enroll in ITT classes.

ITT's business practices were unfair and prohibited by Haw. Rev. Stat. § 480-2(a), which states that "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

ITT's business practices were not only unfair but also deceptive. ITT misrepresented the benefits of an ITT education and the prospective earnings of ITT students, leading to confusion and misunderstanding in violation of Haw. Rev. Stat. § 481A-3.

A person engages in a deceptive trade practice when, in the course of the person's business, the person represents that services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or engages in any other conduct which creates likelihood of confusion or of misunderstanding.[62]

ITT students, in this case, are entitled to have their contracts voided, the money they paid refunded and any remaining debt discharged. The ITT contracts violated Haw. Rev. Stat. Chpt. 480 and are void and unenforceable.[63] Actions brought by the State of Hawaii under Haw. Rev. Stat. Chpt. 481A and Haw. Rev. Stat. Sect. 480-2 are not subject to a statute of limitations.[64]

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[58] See Haw. Rev. Stat. §§ 487-5 and 487-14.
[59] Haw. Rev. Stat. §§ 480-1 and 480-3.
[60] Ai v. Huff Agency, Ltd., 61 Haw. 607, 607 P.2d 1304, 1311 (1980).
[61] Rosa v. Johnston, 3 Haw. App. 427, 651 P.2d 1234 (1982).
[62] Haw. Rev. Stat. §§ 481A-3 (5) and (12).
[63] Haw. Rev. Stat. § 480-12.
[64] Haw. Rev. Stat. Sect. 657-1.5.

Violations of Idaho Law

The Idaho Consumer Protection Act (ICPA)[65] protects "consumers and businesses against unfair methods of competition and unfair and deceptive practices in the conduct of trade or commerce."[66] "Trade and commerce," as defined in Idaho Code § 48-602(2), includes, among other things, advertising and selling education-related goods or services in Idaho.[67] A person who advertises and sells educational services engages in trade and commerce.[68]

The Idaho Rules of Consumer Protection (ICPR), which have "the force and effect of law,"[69] supplement the ICPA and define additional acts or practices that constitute unfair or deceptive acts or practices.[70] As remedial legislation, the ICPA and the ICPR are construed liberally to deter sellers from engaging in any act or practice defined as an unfair and deceptive trade practice within the ICPA and ICPR.[71]

A person disobeys the ICPA or ICPR if "he or she knows, or in the exercise of due care should know, that he or she engaged in" one or more of the acts or practices specified in the ICPA or ICPR.[72] The ICPA and ICPR do not require the perpetrator to have "actual knowledge" that he or she violated the ICPA or ICPR.[73] On the contrary, it is sufficient that the offender knows or knew that he or she engaged in the conduct that the ICPA or ICPR prohibits.[74]

Both the Attorney General and private persons have authority to enforce the ICPA and ICPR. Idaho Code § 48-606 authorizes the Attorney General to file an enforcement action on behalf of the state of Idaho, while section 48-608 of the ICPA grants individuals authority to file a private action.

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[65] Title 48, chapter 6, Idaho Code. Idaho Code § 48-603 includes 17 specific acts or practices deemed per se unfair and deceptive. A "catch-all" provision in Idaho Code § 48-603(17) prohibits acts or practices that are "misleading, false or deceptive to consumers," and Idaho Code § 48-603(18) prohibits any "unconscionable methods, acts or practices in the conduct of trade or commerce, as provided in Idaho Code § 48-603C. Other sections of the ICPA address more particular practices like door-to-door sales.

[66] *In re Wiggins*, 273 B.R. 839, 855 (Bankr. D. Idaho 2001). *See also* Idaho Code § 48-601.

[67] Idaho Code § 48-602(2) defines "trade and commerce" as advertising, offering for sale, or selling, goods or services either to or from locations within Idaho.

[68] *See, e.g., Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 474-75 (Minn. Ct. App. 1999) (holding that course instruction at a for-profit educational institution is a service under the state's Consumer Fraud Act); *Brody v. Finch Univ. of Health Serv.*, 698 N.E.2d 257, 268 (Ill. App. Ct. 1998) (reiterating the Consumer Fraud Act applies to the sale of educational services); *State ex rel. Douglas v. Ledwith,* 281 N.W. 2d 729, 737 (Neb. 1979) (allowing the attorney general to bring a consumer protection action against fashion modeling school).

[69] *ASARCO v. State*, 69 P.3d 139, 143 (Idaho 2003).

[70] The Rules must be "construed liberally and applied to promote the general purposes and policies of [the Act]." IDAPA 04.02.01.003.

[71] *See Western Acceptance Corp., Inc. v. Jones,* 788 P.2d 214, 216 (Idaho 1990).

[72] Idaho Code § 48-603.

[73] *See Federal Trade Comm'n v. Figgie Internat'l*, 994 F.2d 595, 603 (9th Cir. 1993) (discussing the Federal Trade Commission Act's knowledge requirement and finding that a defendant's "actual knowledge" is unnecessary to establish a violation).

[74] *See* IDAPA 04.02.01.09.

To prove a violation of the ICPA and ICPR, the Attorney General must show by a preponderance of the evidence that the violator (1) engaged in trade and commerce within Idaho, and (2) knew, or in the exercise of due care should have known, that the violator has in the past, or is, engaging in an act or practice that violates the ICPA or ICPR.[75] It is unnecessary for the Attorney General to show an intent to deceive, [76] actual deception, [77] consumer reliance, [78] or actual damages.[79] A court's order granting restitution to consumers "may be applied to all consumers affected by the same trade practices found by the court to be unfair or deceptive under the ICPA.[80] Equitable relief need not be limited to the consumer witnesses who testified at trial."[81]

For a private individual, Idaho Code § 48-608 requires proof by a preponderance of the evidence that he or she suffered an "ascertainable loss of money or property, real or personal, as a result of" another's violation of the ICPA or ICPR. Individuals may recover their actual damages or $1,000, whichever is greater.[82]

An individual has two years "after the cause of action accrues" to bring an ICPA lawsuit.[83] A cause of action accrues when one party may sue another.[84] Idaho's courts have held that the statute of limitation begins to run when an individual "[knows] or, with the exercise of reasonable diligence, should have been able to know, that a cause of action under the [ICPA] might exist."[85]

Idaho Code § 48-603(5) and (17) and IDAPA 04.02.01.030 prohibit sellers from misrepresenting the benefits of their goods or services. In the case of ITT, the service it sold in Idaho—an education guaranteed to earn students a salary over $100,000—was nothing but false, and to make money from selling its misrepresentation, ITT preyed upon unsuspecting high school grads.

Through its Value Proposition Chart, an advertisement containing information that ITT knew or should have known was based on unsound data and research methods, ITT falsely advertised and misrepresented prospective students' base salary levels and salary growth after graduation. Student-borrowers burdened themselves with long-term student loans and enrolled in ITT based on the school's multiple misrepresentations: ITT's graduation rates, its graduates' lucrative employment opportunities, and its graduates' ultimate ability to earn over $100,000.

The unfortunate reality for student-borrowers, however, and the facts that ITT failed to disclose to them, was that ITT's average graduation rate across all programs was about 36 percent

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[75] Idaho Code § 48-603.
[76] *See State ex rel. Kidwell v. Master Distrib., Inc.*, 615 P.2d 116, 122-23 (Idaho 1980).
[77] *See id.* at 122.
[78] *See id.* at 123.
[79] *See In re Edwards,* 233 B.R. 461, 470 (Bank. D. Idaho 1999).
[80] *Master Distrib., Inc.*, 615 P.2d 116, 125.
[81] *Id.*
[82] Idaho Code § 48-608.
[83] Idaho Code § 48-619.
[84] *Beach v. Bank of Am. (In re Beach)*, 447 B.R. 313 (Bankr. D. Idaho 2011).
[85] *Performance Chevrolet, Inc. v. Market Scan Info. Sys., Inc.*, 402 F. Supp.2d 1166, 1172 (D. Idaho 2005); *Lancaster v. Nutter*, 2017 WL 10775069 at *3 (D. Idaho 2017).

and the mean income of workers with an ITT associate's degree at their *peak earning potential* was $40,811.

ITT's repeated misrepresentations of the benefits of its educational programs between 2007 and 2010 constitute multiple and separate violations of the ICPA and the ICPR. These misrepresentations have caused Idaho ITT student-borrowers to incur hundreds of thousands of dollars in debt that they cannot repay. The injuries that ITT's callous and unlawful business practices have caused these individuals qualifies them for full loan discharges and refunds of amounts already paid to ITT.

Violations of Illinois Law

a. ITT's Misrepresentations in the Value Proposition Chart Violate Illinois Law

Illinois' Consumer Fraud and Deceptive business Practices Act ("Illinois Consumer Fraud Act") prohibits:

> [u]nfair 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… *whether any person has in fact been misled, deceived or damaged thereby*.[86]

"[T]he intent of the Consumer Fraud Act is to curb fraudulent abuses and to provide a remedy to persons thereby injured."[87] The Illinois Consumer Fraud Act should be liberally construed to further its purposes.[88]

An act or practice is deceptive under §2 of the Illinois Consumer Fraud Act, 815 ILCS 505/2, if it has the tendency or capacity to deceive,[89] or if it involves a material fact on which a consumer could be expected to rely in determining whether to engage in a transaction.[90] Good or bad faith or intent to deceive is irrelevant under the Consumer Fraud Act, and a plaintiff can recover even for innocent misrepresentations.[91]

The Illinois legislature empowered the Illinois Attorney General to enforce the prohibitions in the Consumer Fraud Act.[92] To prove a claim for deceptive conduct under Section 2 of the Illinois Consumer Fraud Act, the Illinois Attorney General needs to show that the defendant is: (1) engaged in trade or commerce; and (2) committed unfair or deceptive acts or practices in the conduct of that trade or commerce.[93] The Illinois Attorney General must also show that the defendant intended the consumer to rely on his omissions or misrepresentations.[94] However, the Illinois Attorney General is not required to show actual consumer reliance to recover under the act.[95] The Act allows for the Illinois Attorney General to recover restitution for harmed consumers.[96]

Private individuals are also provided a right of action under the Act.[97] The Illinois Supreme Court has noted the elements necessary to allege a cause of action under the Consumer Fraud Act

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[86] 815 ILCS 505/2 (emphasis added).
[87] *People v. Lann*, 225 Ill. App. 3d 236, 240 (1st Dist. 1992).
[88] *Id.*; 815 ILCS 505/11a.
[89] *Hartigan v. Knecht Services, Inc.*, 216 Ill.App.3d 843 (2d Dist. 1991).
[90] *Heastie v. Community Bank of Greater Peoria*, 727 F. Supp. 1133 (N.D. Ill. 1989).
[91] *Carl Sandburg Village Condominium Association No. 1 v. First Condominium Development Co.*, 197 Ill.App.3d 948 (1st Dist. 1990).
[92] 815 ILCS 505/7.
[93] *People v. Stianos*, 131 Ill. App. 3d 575, 580 (2nd Dist. 1985).
[94] *People v. United Const. of Am., Inc.*, 2012 IL App (1st) 120308, ¶ 9.
[95] *Id.*; see also *Dwyer v. American Exp. Co.*, 273 Ill. App. 3d 742, 750 (1st Dist. 1995).
[96] 815 ILCS 505/7(a).
[97] 815 ILCS 505/10a.

for a private litigant: "(1) a deceptive act or practice, (2) intent on the defendants' part that plaintiff rely on the deception, and (3) that the deception occurred in the course of conduct involving trade or commerce. Significantly, the Act does not require actual reliance."[98] However, the plaintiff need not show that the defendant intended to deceive, but only that it intended that the plaintiff rely on its act or information.[99] The Illinois Consumer Fraud Act allows private litigants to recover actual damages.[100]

There is no doubt that ITT was engaged in "trade or commerce" in Illinois under the Illinois Consumer Fraud Act. The term "trade or commerce" is defined as "the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this State."[101] ITT had four campuses in Illinois: Arlington Heights, Oak Brook, Orland Park and Springfield. ITT offered educational services to Illinois students within Illinois, thereby engaging in trade or commerce.

Further, ITT's misleading statements about the projected annual earnings of ITT graduates and their projected growth rate are unquestionably deceptively false and misleading. As Dr. Matsudaira notes, prospective earnings information is important to students in deciding to enroll at an institution. Dr. Matsudaira specifically found that the projected earnings were more than $100,000 higher than wages of individuals with similar credentials, an unreasonable conclusion.[102] Dr. Matsudaira also concluded that these representations were contrary to the very data that ITT relied upon.[103] Such misrepresented, material facts are undoubtedly false and misleading.

Finally, intent that a consumer rely on a misrepresentation or omission is distinct from intent to deceive.[104] A defendant's "good or bad faith is not important[,]" and "[e]ven innocent misrepresentations may be actionable."[105] The "statute requires only that a violator intend for a purchaser to *rely* on his misrepresentations," and intent to rely is properly established by evidence of the act itself.[106] Circumstantial evidence may be used to establish intent.[107] As Dr. Matsuidaira notes, prospective earnings information is important to students in deciding to enroll at an institution. ITT provided the Value Proposition Chart to potential students as a promotional sales device to induce students to enroll. Clearly, ITT intended for potential students to rely on this information.

b. No Statute of Limitations Applies to this Group Discharge Application under Illinois Law

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[98] *Siegel v. Levy Organization Development Co.*, 153 Ill.2d 534 (1992).
[99] *Check v. Clifford ChryslerPlymouth of Buffalo Grove, Inc.*, 342 Ill.App.3d 150 (1st Dist. 2003).
[100] 815 ILCS 505/10a(a).
[101] 815 ILCS 505/1(f).
[102] *See* Report at 21.
[103] *Id*.
[104] *See Elder v. Coronet Ins. Co.*, 201 Ill. App. 3d 733, 752 (1st Dist. 1990).
[105] *Id*. (internal quotations omitted).
[106] *Id*. (internal citation and quotation omitted).
[107] *Miller v. William Chevrolet/GEO, Inc.,* 326 Ill. App. 3d 642, 658 (2001).

The Illinois Attorney General submits this Group Discharge Application on behalf of Illinois consumers pursuant to his law enforcement powers under the Illinois Consumer Fraud Act. The Illinois Consumer Fraud Act provides that the Attorney General may bring an action "*[w]henever* [he] has reason to believe that any person is using, has used, or is about to use any method, act or practice declared by this Act to be unlawful".[108] Illinois courts have further held that the state suing in its sovereign capacity to enforce public rights is not bound by any statute of limitations.[109] As such, no statute of limitation applies to this Application.

c. Private Litigants Would Be Well Within the Applicable Statute of Limitations for Individual Claims under Illinois Law

However, even private litigants would be well within the applicable statute of limitations here *if* such limitation applied (it does not). For private litigants, Section 10a(e) of the Consumer Fraud Act states: "Any action for damages under this Section shall be forever barred unless commenced within 3 years after the cause of action accrued."[110] However, the three-year statute of limitations period begins running when the plaintiff first discovers all the elements of the injury.[111] A cause of action under the Consumer Fraud Act accrues when the plaintiff knows or reasonably should know of the injury and also knows that it was wrongfully caused.[112]

Consumers would not have known of the deceptive statements contained in the Value Proposition Chart until now. Dr. Matsudaira's report provides the crucial analysis of the representations within ITT's Value Proposition Chart, finding that such representations were, in fact, deceptive. Consumers did not have access to the statistical data much less knowledge of the underlying data and the methodologies used. As such, all consumers' claims fall well within the Illinois statute of limitations for claims under the Illinois Consumer Fraud Act.

Furthermore, no borrower defense claims are time barred because a defendant in Illinois may plead a set-off or counterclaim as a defense, regardless of whether the statute of limitations has expired on the set-off or counterclaim.[113] The same rule applies in federal court.[114] Thus, because these set-off claims are raised as a defense to the collection actions of ED, they are not subject to a statute of limitations. Therefore, private litigants would not be time-barred from asserting such a defense individually, although such law is inapplicable to the context of this Group Discharge Application submitted under the Illinois Attorney General's law enforcement powers.

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[108] 815 ILCS 505/7 (emphasis added).
[109] *Whittemore v. People*, 227 Ill. 453 (1907); *Hickey v. Illinois Central R.R.*, 35 Ill.2d 427 (1966); *In re Estate of Bird*, 410 Ill. 390 (1951); *Winakor v. Annunzio*, 409 Ill. 236 (1951).
[110] 815 ILCS 505/10a(e).
[111] *Chicago Board Options Exchange, Inc. v. Connecticut General Life Insurance Co.*, 553 F. Supp. 125 (N.D. Ill. 1982).
[112] *Highsmith v. Chrysler Credit Corp.*, 18 F.3d 434 (7th Cir. 1994). *See also Kremers v. Coca-Cola Co.*, 712 F. Supp. 2d 759 (S.D.Ill. 2010); *Pirelli Armstrong Tire Corp. v. Walgreen Co.*, No. 09 C 2046, 2009 WL 2777995 (N.D. Ill. Aug. 31, 2009); *Gamboa v. Alvarado*, 407 Ill. App. 3d 70 (1st Dist. 2011).
[113] 735 ILCS 5/13-207.
[114] *See City of St. Paul, Alaska v. Evans*, 344 F.3d 1029, 1033-35 (9th Cir. 2003) ("courts generally allow defendants to raise defenses that, if raised as claims, would be time-barred."); *see also Ottaviano v. Home Depot, Inc., USA*, 701 F. Supp. 2d 1005, 1013 (N.D. Ill. 2010).

Violations of Iowa Law

The Iowa Consumer Fraud Act ("ICFA"), Iowa Code §714.16 (2021), was enacted in 1965 to protect the public from deceptive and unfair business practices.[115] The Attorney General is charged with enforcing the Iowa Consumer Fraud Act.[116] The Iowa Supreme Court has held that the ICFA, a law which is "conducive to public good and welfare, such as suppression of fraud, is ordinarily remedial," is to be liberally interpreted.[117]

The ICFA provides in pertinent part:

> The act use or employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any merchandise ... whether or not a person has in fact been misled, deceived, or damaged is an unlawful practice.[118]

The ICFA further defines "unfair practice" and "deception." An "unfair practice" is an "act or practice which causes substantial, unavoidable injury to consumers that is not outweighed by any consumer or competitive benefits which the practice produces."[119] The Iowa Supreme Court has held that "unfair practice" is "nothing more than conduct a court of equity would consider unfair."[120] Statutes that prohibit unfair practices are designed "to infuse flexible equitable principles into consumer protection law so that it may respond to the myriad of unscrupulous business practices modern consumers face."[121] The ICFA defines "deception" as "an act or practice which has the tendency or capacity to mislead a substantial number of consumers as to a material fact or facts."[122]

The Iowa Consumer Fraud Act defines "person" and "merchandise" broadly.[123] The term "person" includes any natural person or the person's legal representative, partnership, corporation... company ... [or] business entity or association...and any agent, salesperson…member… associate… thereof."[124] The Act defines "merchandise" as "any objects, wares, goods, commodities, intangibles, securities, bonds, debentures, stocks, real estate or services."[125] Under the ICFA, ITT is clearly a person (company or corporation) involved in the selling of merchandise (education and education services).

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[115] *State ex rel. Miller v. Hydro Mag, Ltd*., 436 N.W.2d 617, 620 (Iowa 1989).
[116] Iowa Code §714.16 (2021).
[117] *State ex rel. Turner v. Koscot Interplanetary, Inc*., 191 N.W.2d 624, 629 (Iowa 1971).
[118] Iowa Code §714.16(2)(a).
[119] Iowa Code section 714.16 (1)(n).
[120] *State ex rel. Miller v. Vertrue, Inc*., 834 N.W.2d 12, 34 (Iowa 2013).
[121] *Id.*
[122] Iowa Code § 714.16(1)(f).
[123] *State ex rel. Miller v. Cutty's Des Moines Camping Club, Inc.* 694 N.W.2d 518, 525, 530-31 (Iowa 2005).
[124] Iowa Code § 714.16(1)(j); *State ex rel. Miller v. New Womyn*, 679 N.W.2d 593, 597 (Iowa 2004); *Cutty's*, 694 N.W.2d at 530-31 (incorporated camping club is a "person" under the Consumer Fraud Act).
[125] Iowa Code § 714.16(1)(i).

Iowa Code § 714.16(7) provides that except in the case of a material omission, it is not necessary for the Attorney General to prove reliance, damages, intent, or knowledge. The ICFA does not contain a statute of limitations. As the Iowa Supreme Court has noted, a statute of limitations does not run against the State unless specifically provided by statute.[126]

To determine if violations of the CFA have occurred, the court is to examine the solicitations and business practices employed to determine whether they utilized unfair or deceptive components.[127] In determining whether the act at issue is likely to mislead, courts evaluate the "overall or 'net impression'" created by the representation.[128] Upon a finding that a person has violated the Iowa Consumer Fraud Act, the court may award restitution on behalf of all consumers.[129]

ITT violated the ICFA through its use of the deceptive and misleading Value Proposition Chart. The Value Proposition Chart contained wildly inflated and inaccurate lifetime earnings projections. ITT utilized the chart and its misrepresentations to entice students to enroll. Students entered ITT with the false impression that they would achieve high lifetime salary upon graduation. Instead, they left ITT riddled with debt and without the promised earnings. Pursuant to the ICFA, because of ITT's deceptive and unfair conduct, Iowa consumers should have complete restitution in the form of discharge of their entire federal student loan debt and any outstanding balances.

[126] *Fennelly v. A-1 Machine & Tool Co.*, 728 N.W.2d 163 (Iowa 2007).
[127] *Vertrue*, 834 N.W.2d at 33.
[128] *Vertrue*, 834 N.W.2d at 34. (citations omitted).
[129] *State ex rel. Miller v. New Womyn*, 679 N.W.2d 593, 597 (Iowa 2004). Iowa Code § 714.16(7).

Violations of Kansas Law

The Kansas Consumer Protection Act ("KCPA") defines and prohibits various types of unfair and deceptive practices in consumer sales acts.[130] It places enforcement power with the Kansas Attorney General, and authorizes the recovery of civil penalties, damages, and other forms of injunctive relief.[131] As a consumer protection statute, the KCPA's general policy is to promote the protection of consumers from suppliers who commit deceptive and unconscionable practices.[132] The KCPA shall be construed liberally to promote this policy.[133]

The KCPA applies to any supplier who, in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer.[134] ITT's misleading statements about the projected annual earnings of ITT graduates, as well as about the projected growth rate of those annual earnings over the course of ITT graduates' careers, violate the KCPA.

Through its false and misleading misrepresentations and omissions in its Value Proposition Chart, ITT violated the KCPA, specifically K.S.A. 50-626(b)(2) and K.S.A. 50-626(b)(3). ITT also represented that their services had sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have, in violation of K.S.A. 50-626(b)(1)(A).[135] In addition, ITT represented that their services were of a particular standard, quality, grade, style or model, if they are of another which differs materially from the representation, in violation of K.S.A. 50-626(b)(1)(E). This wide range of conduct prohibited by the KCPA demonstrates ITT's violations of the legislature's clear intent to further advance the interest of consumers.[136]

In addition to the enforcement power given to the Kansas Attorney General, the KCPA provides that an aggrieved consumer who has suffered loss or injury by a violation of the KCPA may also recover actual damages through a private right of action.[137] The purpose of the private right of action is to provide another adequate remedy of law and an additional method for the recovery of damages.[138] While the State does not have a statute of limitations under the KCPA,

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[130] K.S.A. 50-626 and K.S.A. 50-627.
[131] K.S.A. 50-628 and K.S.A. 50-632.
[132] K.S.A. 50-623(b) and *Stair v. Gaylord*, 232 K. 765, 768, 775, 659 P.2d 178 (1983), "Purpose of act in part to protect consumers…from suppliers who commit deceptive practices."
[133] K.S.A. 50-623(b).
[134] "Supplier" means a manufacturer, distributor, dealer, seller, lessor, assignor, or other person…K.S.A. 50-624(l).
[135] The KCPA defines "services" under K.S.A. 50-624(k) as including: 1) work, labor and other personal services; 2) privileges with respect to transportation, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals and cemetery accommodations; and 3) any other act performed for a consumer by a supplier.
[136] *Ray v. Ponca/Universal Holdings, Inc.*, 22 Kan. App. 2d 47, 50, 913 P.2d 209, 212 (1995).
[137] K.S.A. 50-634, Gonzalez v. Pepsico, Inc., 2007, 489 F.Supp.2d 1233, and *Griffin v. Security Pacific Automotive Financial Services Corp.*, 1998, 25 F.Supp.2d 1214. The term "aggrieved," for purposes of provision of the KCPA requiring consumers to be aggrieved in order to recover damages, refers to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of some burden or obligation. *Robbins v. Dyck O'Neal, Inc.*, 2020, 447 F.Supp.3d 1100. However, a consumer need not establish measurable monetary damages to qualify as "aggrieved" under the KCPA. *Via Christi Regional Medical Center, Inc. v. Reed*, 2013, 314 P.3d 852, 298 Kan. 503. An aggrieved consumer is not required for the attorney general to be able to recover civil penalties. K.S.A. 50-636.
[138] K.S.A. 50-634.

private rights of action are subject to a three year statute of limitations, which starts running with the occurrence of the alleged conduct constituting the violation.[139]

The KCPA prohibits misrepresentations made knowingly or with reason to know that they are so. K.S.A. 50-626(b)(1).[140] A consumer need not prove that they had, in fact, been misled during the consumer transaction in order to prove a KCPA violation.[141] ITT acted both willfully and knowingly at the time it made representations about lifetime earnings in its Value Proposition Chart. As Dr. Matsudaira explains in his expert report, ITT should have known that the representations in its Value Proposition Chart were not true: "Anyone with a modicum of experience using labor market statistics would immediately recognize from these data the implausibility of the earnings projections." Therefore, the Department should grant discharge of all eligible Kansas ITT borrowers' outstanding obligations.

[139] *State ex rel. Stephan v. Brotherhood Bank and Trust Co.*, 8 Kan. App. 2d 57 (1982), *Skeet v. Sears, Roebuck & Co.*, 760 F. Supp. 872, 875 (1991), and *Louisburg Bldg. & Development Co., L.L.C. v. Albright*, 2011, 252 P.3d 597, 45 Kan.App.2d 618.

[140] Intent to deceive is not an element necessary to prove a deceptive act or practice under the Kansas Consumer Protection Act; it is sufficient to prove that the representation was made "knowingly or with reason to know." K.S.A. 50-626(b)(1). *Moore v. Bird Engineering Co.*, P.A., 2002, 41 P.3d 755, 273 Kan. 2. Violations under K.S.A. 50-626(b)(2) and K.S.A. 50-626(b)(3) prohibit suppliers from willfully misrepresenting information. A willful act under the KCPA is one performed with a designed purpose or intent on the part of a person to do wrong or to cause injury to another. *Tufts v. Newmar Corp.*, 1999, 53 F.Supp.2d 1171. There is no requirement that person or entity willfully violate the KCPA in order court to find violation of the KCPA; rather, the KCPA prohibits suppliers from engaging in deceptive acts, including the willful use, in any oral or written representation, of a falsehood as to any material fact. K.S.A. 50-626. *York v. InTrust Bank, N.A.*, 1998, 265 Kan. 271, 962 P.2d 405.

[141] K.S.A. 50-626(b).

Violations of Maine Law

The Maine Unfair Trade Practices Act (the "MUTPA") prohibits unfair or deceptive practices in trade or commerce.[142] "Trade" and "commerce" are broadly defined to include "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed. . .wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State."[143] In construing section 207, the courts are directed to look to interpretations of the Federal Trade Commission Act given by the federal courts and the Federal Trade Commission.[144]

An act or practice is unfair if it (1) causes, or is likely to cause, substantial injury to consumers; (2) that is not reasonably avoidable by consumers; and (3) that is not outweighed by any countervailing benefits to consumers or competition.[145] "An act or practice is deceptive if it is a material representation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances."[146] A material representation or omission involves information that is important to consumers and will therefore likely influence their choice of, or behavior regarding, a product.[147] A statement can be deceptive even though the defendant had no intent to deceive.[148]

Pursuant to Section 209 of the MUTPA, the Attorney General may bring an action on behalf of the State in the public interest when the Attorney General has reason to believe that a person's business practices are in violation of the MUTPA. There is no statute of limitations to limit such an action brought by the Attorney General. The relief sought by the Attorney General may include a permanent injunction, restitution for consumers who have suffered an ascertainable loss because of the unlawful practices, and a civil penalty of up to $10,000 for each intentional violation. Once the State proves that an act or practice is unfair or deceptive under the MUTPA, the Court must fashion appropriate remedies to do "complete justice."[149] "The court's equitable powers assume an especially broad and flexible character when, as here, the public interest is involved."[150]

The MUTPA also provides for a private right of action to any person who sustains a loss or money or property, purchased or leased for personal or household purposes, that was caused by an act or practice in violation of the MUTPA.[151] The claimant may seek actual damages, restitution, and such other equitable relief deemed appropriate by the court.[152] The claimant may also recover his or her attorney's fees and costs, subject to certain conditions.[153] Prior to filing an

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[142] The Maine Unfair Trade Practices Act can be found in 5 M.R.S.A. §§ 205-A through 214.
[143] 5 M.R.S.A. § 206(3).
[144] 5 M.R.S.A. § 207(1).
[145] *State v. Weinschenk*, 2005 ME 28, ¶ 16, 868 A.2d 200, 206.
[146] *State v. Weinschenk*, 2005 ME at ¶ 17.
[147] *Id.*
[148] *Binette v. Dyer Library Ass'n*, 688 A.2d 898, 906 (Me. 1996).
[149] *State v. Bob Chambers Ford, Inc.*, 522 A.2d 362, 366 (Me. 1987).
[150] *Id.* at 366-367.
[151] 5 M.R.S.A. § 213(1).
[152] *Id.*
[153] 5 M.R.S.A. § 213(2).

action, the claimant must make a written demand for relief to the respondent who may respond with a written offer of settlement.[154] If a subsequent judgment by the court is not more favorable than the respondent's offer of settlement, the claimant cannot recover his or her attorney's fees and costs. Any cause of action that the ITT borrowers in Maine might have under the MUTPA against ITT for student loans taken between 2007 and 2010, however, would be barred by the 6-year statute of limitations for civil actions.[155]

Dr. Jordan Matsudaira, who was retained by the State Attorneys General to analyze and evaluate the accuracy of the claims made in ITT's "Value Proposition Chart" (the "Chart"), found a number of misrepresentations contained therein. The Chart was shown to thousands of prospective students – usually high school graduates – as a recruitment tool, and it was also used at ITT's 130 campuses over at least a 4-year period. According to Dr. Matsudaira, the misrepresentations were that 1) ITT graduates' earnings would constantly rise; 2) ITT graduates' projected annual earnings were much higher than the average earnings of others with similar credentials; 3) prospective students would achieve an expected salary (despite the fact that most ITT students failed to graduate); and 4) aggregate salary income would be achievable for all students across different locations and programs. These misrepresentations were material because they likely influenced a potential student's decision to enroll in ITT. Those who enrolled in ITT acted reasonably by factoring into their decision the Chart's misrepresentations which promised them that getting their education at ITT would be rewarded by substantial earnings over their careers. ITT's misrepresentations are therefore deceptive and in violation of Section 207 of the MUTPA.

ITT's misrepresentations in the Chart are also unfair within the meaning Section 207 of the MUTPA. Many students who saw the Chart and enrolled in ITT had to get financial aid, including federally guaranteed loans. The students suffered substantial injury by taking on this student loan debt which was unavoidable in undertaking their education at ITT. This injury was not outweighed by countervailing considerations because the benefits promised to ITT students of substantial future earnings were false and, in any event, did not apply to the many students who did not graduate from ITT, according to Dr. Matsudaira.

[154] 5 M.R.S.A. § 213(1-A).

[155] 14 M.R.S.A. § 752. However, there is an exception for a defendant's counterclaim that arises from the same transaction relating to the plaintiff's claim to the extent of the demand in the plaintiff's claim. "The time of such limitation shall be computed as if an action had been commenced therefor at the time the plaintiff's action was commenced." 14 M.R.S.A. § 865.

Violations of Maryland Law

The Maryland Consumer Protection Act ("MCPA") prohibits unfair, deceptive, and abusive trade practices in the sale or offer of sale of consumer goods and services.[156] Consumer goods and services, for purposes of the MCPA, are those "which are primarily for personal, household, family, or agricultural purposes" and specifically include the offer for sale of course credit or other educational services.[157] The Consumer Protection Division of the Office of the Attorney General of Maryland ("CPD") is authorized to enforce this statute[158] and is directed by the Maryland General Assembly to "take strong protective and preventive steps to investigate unlawful consumer practices, to assist the public in obtaining relief from these practices, and to prevent these practices from occurring in Maryland."[159] The MCPA also provides a private right of action for any person to recover for injury or loss sustained as the result of a practice prohibited by MCPA.[160] Regardless of the party bringing the action, the MCPA is "construed and applied liberally to promote its purpose."[161]

The MCPA provides a non-exclusive list of unfair or deceptive trade practices,[162] which include false or misleading oral or written statements or other representations that have the capacity, tendency, or effect of deceiving or misleading consumers and the failure to state a material fact if the failure deceives or tends to deceive.[163] The question of "whether a statement is misleading under the MCPA "is judged from the point of view of the unsophisticated consumer."[164] The provisions of the MCPA referenced above do not require any showing that the person charged with a violation knew that the representation was false or that the person had any intent to deceive consumers.[165]

The CPD is authorized to bring an enforcement action for a practice that violates the MCPA, without any finding that a consumer in fact has been misled, deceived, or damaged as a result of that practice, and without any consumer testimony.[166] The CPD also does not need to show that consumers actually relied upon on a misrepresentation or omission in order to prove a violation of the MCPA.[167]

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[156] Md. Code Ann., Com. Law § 13–101*, et seq.*
[157] Md. Code Ann., Com. Law § 13-101(d); § 13-303(3).
[158] Md. Code Ann., Com. Law § 13-201; § 13-204
[159] Md. Code Ann., Com. Law § 13-102(b)(3).
[160] Md. Code Ann., Com. Law § 13-408.
[161] Md. Code Ann., Com. Law § 13-105.
[162] Md. Code Ann., Com. Law § 13-301. *Golt v. Phillips*, 308 Md. 1, 8 (1986) (noting nonexclusivity).
[163] Md. Code Ann., Com. Law § 13–301(1), (3).
[164] *Golt v. Phillips*, 308 Md. 1, 517 A.2d 328 (1986); *Luskin's, Inc. v. Consumer Prot. Div.,* 353 Md. 335, 356–57 (1999).
[165] *Golt*, 308 Md. at 10-11. ("In other words, [Md. Code Ann., Com. Law] § 13-301(1), (2), and (3) does not require scienter…the subsections require only a false or deceptive statement that has the capacity to mislead…").
[166] Md Code Ann., Com. Law § 13-302 ("Any practice prohibited by this title is a violation of this title, whether or not any consumer in fact has been misled, deceived, or damaged as a result of that practice"); C*onsumer Prot. Div. v. Consumer Publ'g Co., Inc.*, 304 Md. 731, 770-71 (1986) (holding that the Consumer Protection Division can determine that an advertisement is deceptive in the absence of any supporting testimony from a consumer or an expert); *Consumer Prot. Div. v. Morgan*, 38 Md. 125, 162-63 (2005) ("Consumer testimony is not required to prove a statutory violation….").
[167] *Morgan*, 38 Md. at 162; Md Code Ann., Com. Law § 13-302.

ITT Tech engaged in unfair or deceptive trade practices in violation of Maryland law related to the Value Proposition Chart when, among other things, it: (a) made representations capable of misleading consumers as to the projected annual earnings of ITT graduates and their projected growth rate; and (b) failed to state material facts that deceived or tended to deceive Maryland consumers regarding the data it was relying upon for its projected earnings. These violations are supported by the attached July 6, 2020 report prepared by Jordan D. Matsudaira, which concluded that prospective earnings information is important to students in deciding to enroll at an institution of higher education and that ITT Tech's Value Proposition Chart misled consumers by using "an egregiously misleading overestimate of the salary students would earn" when enrolling in ITT Tech. Dr. Matsudaira's report establishes that Maryland consumers reasonably relied upon ITT Tech's misrepresentations or omissions of material fact when choosing to attend the school and were harmed when they enrolled at ITT.

This group application asserts a defense to repayment for borrowers affected by ITT Tech's misrepresentations, based upon state law violations that could be brought pursuant to the CPD's law enforcement authority under the MCPA or asserted by individual consumers under the private right of action in the MCPA. In either case, the statute of limitations does not bar a defense to repayment that is asserted at any time while the loan is in repayment.[168]

Under Maryland law, ITT Tech students for whom the Department agrees that a defense to repayment exists for the deceptive conduct discussed herein would also be entitled to a refund for any amounts paid on the applicable federal student loans. If the CPD were to seek such refunds using its administrative authority, Maryland's statute of limitations does not apply.[169] For consumers bringing an action for a violation of the MCPA, the cause of action would not accrue until the plaintiff "knew or reasonably should have known about the wrong."[170] Accordingly, the consumers' private cause of action and ability to seek refunds for amounts paid would not accrue until after the creation of Dr. Matsudaira's report, after which consumers would have three years to bring an action for refunds.[171]

[168] *See Vara v. DeVos*, No. CV 19-12175-LTS, 2020 WL 3489679, at *17 (D. Mass. June 25, 2020) (stating "since its promulgation, the borrower defense regulation has encompassed the right to assert a defense to repayment at any time during repayment of a loan, including before a borrower is in default").
[169] *Maryland Security Commissioner v. U.S. Securities Corporation*, 122 Md. App. 574 (1998).
[170] *Poffenberger v. Risser*, 290 Md. 631, 636 (1981).
[171] Md. Code Ann., Cts. & Jud. Proc. § 5-101.

Violations of Massachusetts Law

The Massachusetts Consumer Protection Act prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce."[172] Chapter 93A is an expansive statute, designed to make business practices unlawful beyond those already barred by common law.[173]

The Massachusetts Attorney General's Office ("AGO") may bring claims under Chapter 93A on behalf of all similarly situated persons. In *DeCotis*, the Massachusetts Supreme Judicial Court noted that class actions allow for relief for similarly situated individuals and determined there was no reason to limit actions brought by the AGO to specific named individuals.[174] The court stated that "[t]he very purpose of the Attorney General's involvement is to provide an efficient, inexpensive, prompt and broad solution to the alleged wrong" and gave relief to all the tenants of the defendants, even those not specifically listed in the complaint.[175] Chapter 93A is designed to provide broad relief for all wronged parties and so proof of widespread deceptive marketing is sufficient to allow relief for all purchasers. In addition to the AGO's enforcement power, Chapter 93A allows private individuals to bring an enforcement action under Chapter 93A § 9. Section 9 allows a plaintiff to sue for any "distinct injury or harm that arises from the claimed unfair or deceptive act."[176]

Standards for unfairness and deception under the Massachusetts Consumer Protection Act are created through ever-evolving case law, which takes into account "those unexpressed standards of fair dealing which the conscience of the community may progressively develop,"[177] and by regulatory prescriptions promulgated by the AGO.[178] Massachusetts courts have found that an act is "unfair" if it is "(1) within the penumbra of a common law, statutory, or other established concept of unfairness; [or] (2) immoral, unethical, oppressive, or unscrupulous."[179] Courts have construed unfairness broadly.[180] Transactions may be unfair even if consumers enter into them willingly and with full information and knowledge.[181]

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[172] M.G.L. c. 93A, § 2(a).
[173] *Kattar v. Demoulas*, 433 Mass. 1, 12 (2000) (quoting *Commonwealth v. DeCotis*, 366 Mass. 234, 244 n.8 (1974) (noting that Chapter 93A "mak[es] conduct unlawful which was not unlawful under the common law or any prior statute")).
[174] 366 Mass. at 245–46.
[175] *Id*. at 245.
[176] *Tyler v. Michaels Stores, Inc.*, 464 Mass. 492, 503 (2013); *see Hershenow v. Enter. Rent-A-Car Co. of Boston, Inc.*, 445 Mass. 790, 802 (2006).
[177] *DeCotis*, 366 Mass. at 242.
[178] *See* M.G.L. c. 93A, § 2(c).
[179] *Gossels v. Fleet Nat'l Bank*, 453 Mass. 366, 373 (2009) (internal quotation marks and citation omitted).
[180] *See Levings v. Forbes & Wallace, Inc.,* 8 Mass. App. Ct. 498, 503 (1979) ("It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field.") (*quoting* H.R. Conf. Rep. No. 1142, 63rd Cong., 2d Sess. (1914)).
[181] *See DeCotis*, 366 Mass. at 243 ("The willingness of [the relevant consumers] to pay [certain] fees, and even to contract knowingly to pay those fees, does not make the collection of such a fee fair."); *American Shooting Sports Council* 429 Mass. at 877 (1999) (where "risks or dangers inherent in [a] product, or latent performance inadequacies, cannot be detected by the average user or cannot be avoided by adequate disclosures or warnings," the product's sale is unfair) (internal citation omitted).

Deception under the Consumer Protection Act is likewise broadly construed.[182] A "practice is 'deceptive' if it could reasonably be found to have caused a person to act differently from the way he otherwise would have acted."[183] Even if a business merely omits material information when marketing or selling a product, this omission violates Chapter 93A.[184] Any failure to provide information that would be relevant to a purchaser is a violation of the Consumer Protection Act.[185]

Both by case law and by AGO regulations, various practices relevant to for-profit schools are prohibited under Massachusetts law. Most pertinently, any type of misleading marketing will violate the statute. Such marketing, if it either omits material information or actively misleads potential students, is a violation of Chapter 93A.[186] Furthermore, the AGO issued regulations that make certain conduct by for-profit schools in the Commonwealth a *per se* violation of Chapter 93A.[187] The regulation, 940 C.M.R. 3.10, prohibits, in pertinent part, false advertising and false representations as to earnings.[188] 940 C.M.R. 3.16 is also relevant to for-profit schools. Section 3.16 provides that an act or practice is a violation of M.G.L. c. 93A § 2 if an entity fails to disclose to a buyer or a prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction.

To prove a violation of Chapter 93A, neither the Commonwealth nor a private plaintiff is required to show a business intended or even knew that its acts or practices were unfair or deceptive.[189] Indeed, "[n]either intent to engage in an unlawful act nor knowledge of its unlawfulness is required in order to establish liability" under Chapter 93A.[190] Moreover, in a

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[182] *See Aspinall v. Philip Morris Cos., Inc.*, 442 Mass. 381, 394 (2004) ("In determining whether an act or practice is deceptive, regard must be had, not to fine spun distinctions and arguments that may be made in excuse, but to the effect which [the act or practice] might reasonably be expected to have upon the general public.") (internal quotation marks and citations omitted).

[183] *Lowell Gas Co. v. Attorney Gen.*, 377 Mass. 37, 51 (1979).

[184] *See Schwartz v. Rose*, 418 Mass. 41, 43 (1994). *See also Commonwealth v. AmCan Enters., Inc.*, 5 Mass.L.Rptr. 53, *3 (1996) ("[A] solicitation package is deceptive if it contains material . . . omissions which are likely to mislead the recipients."), *aff'd*, 47 Mass. App. Ct. 330 (1999).

[185] *Grossman v. Waltham Chem. Co.*, 14 Mass. App. Ct. 932, 933 (1982) ("[F]ailure to disclose any fact, the disclosure of which may have influenced a person not to enter into a transaction, is a violation of c. 93A.").

[186] *See Aspinall*, 442 Mass. at 402 (holding that "the deceptive advertising, as alleged by the plaintiffs in this case, if proved, effected a per se injury on consumers" who purchased the relevant product); *AmCan Enters, Inc.*, 5 Mass.L.Rptr. at *3 ("[A] solicitation package is deceptive if it contains material . . . omissions which are likely to mislead the recipients."), *aff'd*, 47 Mass. App. Ct. 330 (1999); 940 C.M.R. 3.05(1) (failure to disclose information that has the "capacity or tendency or effect of deceiving" consumers in any material respect).

[187] 940 C.M.R. 3.10: Private Home Study, Business, Technological Social Skills and Career Schools, was repealed and replaced by 940 C.M.R. 31.00: For-Profit and Occupational Schools, on June 30, 2014. 940 C.M.R. 31.00 further defines what constitutes unfair or deceptive conduct by for-profit schools under Chapter 93A, but is not discussed herein because the allegations against ITT are for conduct that occurred prior to June 30, 2014.

[188] 940 C.M.R. 3.10(1),(2).

[189] *See Drakopoulos v. U.S. Bank Nat'l. Ass'n*, 465 Mass. 775, 786 n.15 ("A successful G.L. c. 93A action based on deceptive acts or practices does not require proof . . . that the defendant intended to deceive . . . or even knowledge on the part of the defendant that the representation was false." (internal citation omitted)).

[190] *Equitable Life Assur. Soc. Of the U.S. v. Porter-Englehart*, 867 F.2d 79, 89 (1st Cir. 1989) (*quoting Linthicum v. Archambault*, 379 Mass. 381, 388 n.12 (1979) (internal citation omitted)).

matter alleging deception, plaintiffs need not establish reliance. Instead, plaintiffs need to prove only that the defendants' actions had a "tendency or capacity to deceive."[191]

Chapter 93A has a four-year statute of limitations from the date the cause of action accrues.[192] Under the discovery rule, which applies to claims brought under Chapter 93A, the statute of limitations period is tolled until the cause of action is discovered or reasonably should have been discovered by the plaintiff.[193] Here, where representations of statistical data require an expert analysis of the underlying data and the methodologies used, it would likely have been impossible for borrowers to determine the veracity of ITT's representations.

ITT used the Value Proposition Chart to misrepresent the benefits of its educational programs and induce borrowers to enroll and take on federal student loans to attend its Massachusetts campuses. ITT's misleading statements about the projected annual earnings of ITT graduates, as well as about the projected growth rate of those annual earnings over the course of ITT graduates' careers, constitute violations of M.G.L. c. 93A, 940 C.M.R. 3.10, and 940 C.M.R. 3.16. The Massachusetts Attorney General respectfully requests the Secretary of Education grant full discharges of all eligible Massachusetts ITT borrowers' outstanding loan obligations and provide full refunds of amounts paid.

[191] *See Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 690-91 (proof of actual reliance by the plaintiff on a representation is not required).
[192] *See* M.G.L. c.260, § 5A.
[193] *See Anawan Ins. Agency, Inc. v. Division of Ins.*, 459 Mass. 592, 598, (2011); *see also Lambert v. Fleet National Bank*, 449 Mass. 119, 126, (2007).

Violations of Minnesota Law

The Minnesota Attorney General has broad authority under both statute and common law to take legal action to remediate violations of Minnesota consumer-protection laws. Such laws include Minnesota's Consumer Fraud Act ("MCFA"), Minn. Stat. § 325F.69, which prohibits any "misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise."[194] Minnesota's Uniform Deceptive Trade Practices Act ("MUDTPA") similarly outlaws "deceptive trade practices," including misrepresenting the "characteristics, . . . uses, [and] benefits" of a product and any other "conduct that "creates a likelihood of confusion or of misunderstanding."[195] The MCFA and MUDTPA "are commonly read together so as to prohibit the use of deceptive and unlawful trade practices."[196] In addition, Minnesota's False Advertising Act ("MFSAA") prohibits any person from using any material representations in marketing or advertising that are "untrue, deceptive, or misleading."[197]

"[T]he term 'deceptive practice' refers to conduct that tends to deceive or mislead a person."[198] The statutes do not require intent to defraud.[199] The statutes were enacted "to address the unequal bargaining power often present in consumer transactions."[200] They "are generally very broadly construed to enhance consumer protection."[201]

The statute of limitations in Minnesota provides for a six-year limitation period for actions on consumer-protection statutes.[202] No borrower defense claims are time barred because a defendant in Minnesota may allege a set-off or counterclaim as a defense, regardless of whether the statute of limitations has expired on the set-off or counterclaim.[203]

ITT violated the MCFA, MUDTPA, and MFSAA through its use of the Value Proposition Chart. As detailed above, ITT consistently represented to potential students in Minnesota—both through recruiting students for online learning and for instruction at ITT's Brooklyn Park and Eden Prairie campuses—that by enrolling in an ITT program, students could expect to see significant

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[194] Minn. Stat. § 325F.69, subd. 1. "[A]ny person injured by a violation" can also bring a cause of action under section 8.31, subd. 3a. To plead such a private claim, a plaintiff "the plaintiff need only plead that the defendant engaged in conduct prohibited by the statutes and that the plaintiff was damaged thereby." *Grp. Health Plan, Inc. v. Phillip Morris, Inc*., 621 N.W.2d 2, 12 (Minn. 2001).
[195] Minn. Stat. § 325D.44, subd. 1(1)-(13).
[196] *Liabo v. Wayzata Nissan, LLC*, 707 N.W.2d 715, 724 (Minn. App. 2006).
[197] Minn. Stat. § 325F.67.
[198] *Graphic Comms. Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp.,* 850 N.W.2d 682, 694-95 (Minn. 2014).
[199] *See 301 Clifton Place LLC v. 301 Clifton Place Condo. Ass'n*, 783 N.W.2d 551, 563 (Minn. App. 2010) ("Liability [under the CFA] does not require that the false statement be intentional."); Minn. Stat. § 325D.44, subd. 1 ("[I]ntent to deceive is not required.").
[200] *Ly v. Nystrom*, 615 N.W.2d 302, 308 (Minn. 2000).
[201] *State by Humphrey v. Philip Morris Inc.,* 551 N.W.2d 490, 495-96 (Minn. 1996).
[202] Minn. Stat. § 541.05, subd. 1(2).
[203] *Household Fin. Corp. v. Pugh*, 288 N.W.2d 701, 702 (Minn. 1980) (holding that TILA violation alleged as a "defense to a creditor's" claim for money owed under a loan obligation even if statute of limitations would bar affirmative case on the same claim); *Reynolds v. Reynolds*, 458 N.W.2d 103, 105 (Minn. 1990) ("The general rule is that the statute of limitations may be used as a shield, not as a sword, and that the statute of limitations does not bar a party from raising a pure defense.").

salary growth over the course of their lifetimes. This claim was false, misleading, and designed to induce students to enroll in violation of Minnesota's consumer-protection statutes.

Minnesota's consumer-protection statutes provide for financial redress to all purchasing consumers when the fraud is part of a pervasive and systematic scheme.[204] To obtain this relief, the plaintiff need not show "individualized direct proof of reliance," but rather some "causal nexus" that can be demonstrated from "the facts surrounding the consumer fraud . . . [including whether] the fraud [was] longstanding, pervasive, and widespread, . . . [whether] the seller intend[ed] and underst[ood] that consumers would rely on the misrepresentations . . . [and whether] the information [was] of a kind on which consumers would typically rely."[205] Accordingly, the facts above—including the pervasive use of the Value Proposition Chart, the materiality and significant of the chart in informing student decisions, and ITT's intent for consumers to rely on the chart in making enrollment decisions—demonstrates the need for full financial relief here.

[204] *See, e.g., Alpine Air*, 490 N.W.2d at 896 n.4.
[205] *State v. Minn. Sch. of Bus., Inc.,* 935 N.W.2d 124, 137 (Minn. 2019).

Violations of Nebraska Law

The Nebraska Attorney General is responsible for enforcement of Nebraska consumer protection laws, including, the Nebraska Consumer Protection Act ("CPA")[206] and the Uniform Deceptive Trade Practices Act ("UDTPA")[207], as well as other state and federal laws that affect Nebraska consumers. The CPA prohibits: "[U]nfair or deceptive acts or practices in the conduct of any trade or commerce[.]"[208] Neb. Rev. Stat. §§ 87-302(a)(5) and (8), respectively, outline the following business practices as deceptive: "Represent[ing] that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have;" and "Represent[ing] that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another[.]"

Under the CPA and UDTPA, specifically Neb. Rev. Stat. §§ 59-1614 and 87-303.11, the state of Nebraska is entitled to recover civil penalties. Additionally, the court may make such additional orders or judgments as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by violating the CPA; and restore to any other person any money or real or personal property which may have been acquired by means of any such practice deceptive trade practice in violation of the UDTPA.[209]

ITT made false, confusing, and/or misleading representations to prospective and then-current students as to the projected annual earnings a student could make by graduating from ITT. ITT further made false, confusing, and/or misleading representations to prospective and then-current students as to the projected growth rate of those annual earnings after students graduated from ITT and into their careers.

Furthermore, ITT's "Value Proposition for Employed Graduates" chart was an earnings disclosure, however, it failed to disclose material information regarding actual earnings post-graduation from ITT. A material omission is a failure to state a fact, the omission of which tends to mislead consumers. In determining if a given representation is deceptive, the test is the net impression which the representation, or statement, is likely to make upon a person of average intelligence.[210] "Even accurate information may be deceptive 'if there is a representation omission or practice that is likely to mislead."[211]

ITT's false, confusing, and/or misleading representations to consumers, prospective and then-current students were material and deceived or had the tendency or capacity to deceive or mislead students, inducing them to enroll at, or remain enrolled at, ITT and to make tuition and fee payments to ITT. ITT acquired tuition and fee payments, many in the form of federal student loans, from students as a result of ITT's illegal conduct, causing those students to suffer an

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[206] Neb. Rev. Stat. §§ 59-1601 et seq.; 59-1608.01.
[207] Neb. Rev. Stat. §§ 87-301 et seq.; 87-303.03.
[208] Neb. Rev. Stat. § 59-1602.
[209] Neb. Rev. Stat. §§ 59-1608; 87-303.05; and State ex rel. Stenberg v. American Midlands, 244 Neb. 887 (1994).
[210] *Commonwealth v. Foster*, 57 Pa. D. & C.2d 203, 207 (Allegheny Co. 1972), citing *Kalwajtys v. FTC*, 237 F.2d 654 (7th Cir. 1956) cert. denied, 352 U.S. 1025 (1957).
[211] *State v. Kaiser*, 161 Wash.App. 705 (2011) (quoting *Panag v. Farmers Ins. Co. of Wash.*, 166 Wash.2d 27 (2009)).

ascertainable monetary loss and/or incur student loan debts. Furthermore, ITT knew, or should have known, that the representations made to consumers, prospective and then-current students were false and/or misleading in violation of the Nebraska CPA and UDTPA.

Historically, scienter, reliance, intent, and injury are not elements the Federal Trade Commission, are required to prove under § 5 of the Federal Trade Commission Act, and state Consumer Protection and Unfair and Deceptive Trade Practices Acts and statutes have been interpreted similarly.[212] Furthermore, Neb. Rev. Stat. § 87-303(a), states, in part, "A person likely to be damaged by a deceptive trade practice of another may bring an action for, and the court may grant, an injunction under the principles of equity against the person committing the deceptive trade practice…Proof of monetary damage, loss of profits, or intent to deceive is not required."[213]

Nebraska's consumer protection statutes also lay out a pathway for private rights of action. A person who is injured due a violation of Neb. Rev. Stat. § 59-1602, may bring a civil action in the district court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee, and the court may in its discretion, increase the award of damages to an amount which bears a reasonable relation to the actual damages which have been sustained.[214] A private right of action is permitted so long as the unfair or deceptive act or practice had an impact upon the public interest.[215] In the instant matter involving ITT, there are approximately 750,000 students, across the country, who were defrauded by ITT; and therefore, this case would more than meet the public interest standard in Nebraska.

The CPA and the UDTPA both set-out a four-year statute of limitations to bring a cause of action under the respective Acts. The CPA states a claim for damages must be brought within four years after the cause of action accrues.[216] Although Nebraska lacks case law specifically for when a cause of action "accrues" under consumer protection statutes, it has been litigated in similar cases such as tort actions. The Nebraska Supreme Court has held that a cause of action accrues when the act or omission occurs.[217] However, the court also found that "In certain categories of cases, the injury is not obvious and the individual is wholly unaware that he or she has suffered an injury or damage and, in such cases, it is manifestly unjust for the statute of limitations to begin to run before a claimant could reasonably become aware of the injury."[218] ITT's Value Proposition chart was a projection of a high and constant rate of salary growth over the course of ITT graduates' careers. This means that students are likely unaware of ITT's deceptive and misleading conduct until they began their careers after studying at ITT, stayed in the career over a period of time, and then discover that their income does not match what they were told they would be earning based

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[212] See e.g., *State by Humphrey v. Alpine Air Prods., Inc*, 500 N.W.2d 788, 790 (Minn. 2013); *Group Health Plan, Inc. v. Phillip Morris, Inc.*, 621 N.W.2d 2, 12-14 (Minn. 2001); *Hageman v. Twin City Chrysler-Plymouth*, 681 F. Supp. 303 (M.D.N.C. 1988); *Moore v. Bird Engineering Co.*, 41 P.3d 755 (Kan. 2002).
[213] Neb. Rev. Stat. § 87-303(a).
[214] Neb. Rev. Stat. § 59-1609.
[215] *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678 (2000).
[216] Neb. Rev. Stat. § 59-1612.
A. [217] Shlien v. Board of Regents, University of Nebraska, 263 Neb. 465 (2002).
[218] *Id*.

upon ITT's Value Proposition chart. This could be potentially years after the deceptive conduct occurred. Therefore, ITT students would not have been able to truly assert ITT's deceptive and misleading conduct regarding the "Value Proposition for Employed Graduates" until Dr. Matsudaira's report. Nebraska would argue that it would be manifestly unjust for the statute of limitations to begin to run for ITT students prior to receiving Dr. Matsudaira's report.

Under the UDTPA, a cause of action must be brought within four years of the purchase date of goods or services.[219] Many ITT students are still making payments on their federal student loans. Therefore, under the UDTPA, the statute of limitations has not expired and each time a student makes a payment toward their federal student loan, the clock should be set-back.

Additionally, the statute of limitations issue has been raised in many jurisdictions throughout the country, and Nebraska would respectfully request that the Department of Education consider the statute of limitations analyses made in this Application by Colorado, Oregon, the District of Colombia, Massachusetts, Nevada, New Jersey, Vermont, Washington, as well as Nebraska.

For all the reasons aforementioned and stated herein, all eligible Nebraska ITT students should have the entirety of their federal student loan debt and/or any outstanding balances discharged as a result of ITT's violations of Nebraska's consumer protection laws. ITT students had no reason to doubt the representations that were being made to them regarding the "Value Proposition for Employed Graduates" chart, yet ITT showed a blatant disregard to the laws in place to protect consumers and to the students themselves.

[219] Neb. Rev. Stat. § 87-303.10.

Violations of Nevada Law

The Nevada Deceptive Trade Practices Act ("NDTPA") prohibits persons, including businesses, from knowingly making a false statement or representation or failing to disclose material facts about their products or services. The NDTPA is broad in its application and defines violations of a "deceptive trade practice" to include acts committed in the course of his or her business or occupation.[220]

The NDTPA authorizes the Nevada Attorney General to bring an action in the name of the State of Nevada against a person to obtain a temporary restraining order, a preliminary or permanent injunction, or other appropriate relief if the Attorney General has reason to believe that a person has engaged or is engaging in a deceptive trade practice.[221] In addition to the enforcement power given to the Nevada Attorney General, victims of consumer fraud may bring a private right of action against someone who has engaged in a deceptive trade practice.[222]

NRS 598.0923(2) provides that "[a] person engages in a 'deceptive trade practice' if, in the course of his or her business or occupation, he or she . . . knowingly fails to disclose a material fact in connection with the sale or lease of goods or services."[223] NRS 598.0915(15) stipulates that "[a] person engages in a 'deceptive trade practice' if, in the course of his or her business or occupation, he or she . . . knowingly makes any other false representation in a transaction."[224]

It is further alleged that ITT created a disclosure called the "Value Proposition for Employed Graduates" (VP) to convey the financial benefits associated with investing in an ITT education. The Nevada Attorney General alleges that ITT engaged in deceptive trade practices by failing to disclose material facts regarding its educational services and misleading students into believing that ITT would guarantee a return on their educational investment in the form of enhanced earnings. Dr. Matsudaira's expert report demonstrates that the VP assumption of constant earnings growth over individuals' work career is inaccurate and leads to a misleadingly high salary projection for ITT graduates late in their career. The average earnings of ITT graduates were likely to be nowhere near as high as represented by the VP. As a result, the estimated "rate of return" used to summarize the financial benefits in the VP of "25% Potential Return on Investment" (seen in ITT VP figure)[225] would arguably be valued too high and would be significantly lower if a reasonable methodology was used.

The Nevada Court of Appeals in a recent decision, *Poole v. Nevada Auto Dealership Investments, LLC*, 135 Nev. Adv. Op. 39 (Sept. 5, 2019), provided further clarification to the applicability of the NDTPA to acts conducted by persons or businesses. It its decision, the Court opined that under NDTPA, (1) "knowingly" means that "the defendant is aware that the facts exist that constitute the act or omission", and (2) that a fact is "material" if either (a) "a reasonable person would attach importance to its existence or nonexistence in determining a choice of action

[220] NRS 598.0903 et. Seq.
[221] NRS 598.0963 (4)
[222] NRS 41.600(3)
[223] NRS 598.0923(2)
[224] NRS 598.0915 (15)
[225] ITT "Value Proposition for Employed Graduates"

in the transaction in question," or b) "the defendant knows or has reason to know that the consumer regards or is likely to regard the matter as important in determining a choice of action, although a reasonable person may not so regard it."[226]

Dr. Matsudaira's report indicates that in all likelihood, ITT was aware that the methodology used to construct the VP was seriously flawed because no reasonable data analyst would view the VP's projections as realistic in light of the data that they relied upon. Moreover, Dr. Matsudaira indicated it was doubtful that the average earnings of workers from ITT would be higher than the average for all other workers with the same educational attainment. The Nevada Attorney General believes that ITT's conduct is tantamount to a false representation when ITT provided consumers with these statements because a reasonable student would attach the importance of the VP associated with their money investment in determining an overly positive impression of the financial benefit to enroll in ITT.

While an action against a person alleged to have committed a deceptive trade practice in violation of NRS 598.0903 to 598.0999 is subject to four-year statute of limitations, Nevada law permits an argument to be made that the statute of limitations does not commence until the aggrieved party discovers, or by the exercise of due diligence should have discovered, the facts constituting the deceptive trade practice.[227] The Nevada Attorney General would proceed under the discovery rule and would therefore assert the statute of limitations did not run during the period before the victims discovered or should have discovered the injuries.

The Nevada Attorney General would also rely on the findings and expert analysis in Dr. Matsudaira's report to demonstrate that the VP misrepresented the financial potential earnings of ITT students in violation of the NDTPA. Additionally, the Nevada Attorney General would assert under the definition of the *Poole* decision, that the VP misrepresentation was used by ITT to garner enrollment for profit, leading prospective students and borrowers to rely on this data and metrologies to make decisions pertaining to the return on their educational investment. Accordingly, The Nevada Attorney General respectfully requests ED grant discharge of all eligible Nevada ITT borrowers' outstanding obligations.

[226] *Pucci, Petya, "Poole v. Nev. Auto Dealership Inv.'s, LLC, 135 Nev. Adv. Op. 39 (Sept. 5, 2019)" (2019). Nevada Supreme Court Summaries. 1252. https://scholars.law.unlv.edu/nvscs/1252*
[227] NRS 11.190 (d)

Violations of New Jersey Law

The New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to 56:8-226 ("CFA"), applies to "all consumer transactions that involve the sale of consumer merchandise or services generally sold to the public at large." The legislative sponsors to the CFA acknowledged that the Attorney General must be allowed to "combat the increasingly widespread practice of defrauding the consumer[]" and that the CFA was enacted to provide the "effective machinery to investigate and prohibit deceptive and fraudulent advertising and selling practices[.]"[228] Thus, when a person[229] defrauds a consumer in connection with the sale or advertisement of merchandise[230], such is an "unlawful practice" and the CFA is implicated.[231]

In 1971, the Legislature amended the CFA to expand the definition of "unlawful practice" to include "unconscionable commercial practices[232]."[233] As part of these same reforms, the Legislature added provisions allowing for a private cause of action, and further, requiring treble damages of those found in violation of the CFA.[234] ITT's use of the Value Proposition Chart constitutes an unconscionable commercial practice, as it contained incomplete disclosures and set the stage for unfair bargaining in seeking tuition and enrollment from prospective students. The CFA provides a mechanism by which the State of New Jersey and private consumers might hold ITT responsible for these acts.

ITT made material misrepresentation to prospective students in order to induce them to enroll, including representations of inflated earning potential and an unnatural constant rate of salary growth. ITT further omitted material facts in information supplied to prospective students, by omitting the high number of ITT enrollees who failed to graduate in calculating performance statistics. These factors were not reflected in ITT's Value Proposition Chart, leaving prospective students unrealistic expectations and often unobtainable goals. The CFA includes protections against these two categories of unlawful practices: "[t]he first category (unconscionable commercial practice, deception, […] or misrepresentation) consists of affirmative acts, and the second category (concealment, suppression or omission of any material fact) consists of acts of omission."[235]

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[228] *Sponsor's Statement to Senate Bill No. 199*, April 11, 1960. In accordance with this legislative history, New Jersey State courts consistently find that the CFA must be broadly applied "in order to accomplish its remedial purpose, namely, to root out consumer fraud." *Lemelledo v. Beneficial Mgmt. Corp.*, 150 N.J. 255, 264 (1997); *see also Barry v. Arrow Pontiac, Inc.*, 100 N.J. 57, 69 (1985); *Fenwick v. Kay American Jeep, Inc.*, 72 N.J. 372, 376-77 (1977).

[229] The CFA defines "person" to include "any natural person . . . partnership, corporation, company . . . business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate . . . ." N.J.S.A. 56:8-1(d).

[230] The CFA defines "merchandise" as "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." N.J.S.A. 56:8-1(c).

[231] N.J.S.A. 56:8-2.

[232] Unconscionable commercial practices was a term intended to describe unlawful practices including "exorbitant prices, unfair bargaining advantages and incomplete disclosures." *Skeer v. EMK Motors, Inc.,* 187 N.J. Super. 465, 472 (App. Div. 1982) (quoting legislative history).

[233] *Cox v. Sears Roebuck & Co.,* 138 N.J. 2, 15 (1994) (citing legislative history).

[234] *Lettenmaier v. Lube Connection, Inc.*, 162 N.J. 134, 139 (1999).

[235] *Chattin v. Cape May Greene, Inc.,* 243 N.J. Super. 590, 598 (App. Div. 1990).

"[A]n affirmative misrepresentation is 'one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase.'"[236] A statement or matter is "material" where: (1) a reasonable person found it important in deciding their course of action; or (2) the person making the misrepresentation "knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it."[237] ITT engaged in unconscionable commercial practices, deception or misrepresentation, by making affirmative misrepresentations to consumers, misrepresentations including that the prospective student would make large sums of money by attending ITT, a fact that ITT should have known would induce that consumer to enroll on a false basis. When the alleged fraud consists of an affirmative act, intent is not an essential element. Plaintiff need not prove that the defendant intended to commit an unlawful act.[238]

A showing of intent is only required in allegations of consumer fraud by way of omission.[239] ITT knowingly and intentionally omitting facts that a reasonable person would have found important in deciding whether or not to attend ITT, such as graduation rate. ITT omitted that information which would have reflected poorly on the school and thus skewed the post-graduation statistics in its favor. ITT used these falsehoods to sell a product, an ITT degree.

The standard of conduct that the term "unconscionable" implies is lack of "good faith, honesty in fact and observance of fair dealing."[240] As such, "[t]he word 'unconscionable' must be interpreted liberally so as to effectuate the public purpose of the CFA."[241] "Whether a particular practice is unconscionable is fact specific and must be determined on a case-by-case basis."[242] ITT acted in bad faith, and dishonestly, preventing any fair dealings in their interactions with potential enrollees. These facts surely fit into the broad definition envisioned by the CFA.

In contrast to private actions, the State need not prove an ascertainable loss[243] in the form of money or property to succeed on a CFA claim.[244] A showing of reliance by a consumer is thus unnecessary in CFA claims initiated by the State. A practice can be unlawful even if no person was in fact misled or deceived thereby.[245] Despite this, enrollees of ITT would likely be able to demonstrate an ascertainable loss, such as missed opportunity, costs, etc., to meet this additional burden.

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[236] *Mango, Mango v. Pierce-Coombs*, 370 N.J. Super. 239, 251 (App. Div. 2004) (citation omitted, emphasis added).
[237] *Ji v. Palmer*, 333 N.J. Super. 451, 462 (App. Div. 2000) (citation omitted).
[238] *Chattin*, 124 N.J. at 522 (1991) (Stein, J. concurring).
[239] *Cox*, 138 N.J. at 17-18.
[240] Id. at 19.
[241] *Associates Home Equity Services. Inc. v. Troup*, 343 N.J. Super. 254, 278 (App. Div. 2001).
[242] *Id*. at 278; *see also Mango*, 370 N.J. Super. at 250.
[243] *See Thiedemann v. Mercedes-Benz, USA, LLC.,* 183 N.J. 234, 248 (2005) (defining "ascertainable loss" as a damage that can be quantified or measured).
[244] *Weinberg v. Sprint Corporation*, 173 N.J. 233, 237 (2002) (citing *Meshinsky v. Nichols Yacht Sales, Inc.,* 110 N.J. 464, 473 (1988)).
[245] *D'Ercole Sales v. Fruehauf Corp.,* 206 N.J. Super. 11, 22 (App. Div. 1985); *Skeer*, 187 N.J. Super. at 470.

A six-year statute of limitations is imposed on private rights of actions for violations under the CFA.[246] A more expansive right is granted to the Attorney General, permitting a ten year look back period.[247] Nonetheless, New Jersey follows the discovery rule for purposes of the accrual of an action. As such, the clock does not start ticking on the timeline for possible suit until the consumer discovers, or reasonably should have discovered, the facts that form the basis of their cause of action.[248] Because Dr. Matsudaira's report and analysis of ITT's Value Proposition Chart is critical in demonstrating ITT's wrongdoings, it should be treated as the watershed moment that informed consumers of ITT's misdeeds. As such, only now should the statute of limitations on ITT's prior actions begin to run for purposes of an action under New Jersey's CFA.

[246] N.J.S.A. 2A:14-1.
[247] N.J.S.A. 2A:14-1.2.
[248] Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 334 (2010).

Violations of New Mexico Law

The New Mexico Unfair Practices Act ("NMUPA") defines and prohibits various types of unfair or deceptive practices and unconscionable practices in trade or commerce.[249] The act makes the New Mexico Attorney General responsible for its enforcement,[250] and authorizes the recovery of restitution, provides for injunctive relief,[251] and for civil penalties for willful violations.[252] The NMUPA also grants consumers a private right of action.[253] Here, both the New Mexico Attorney General and individual student borrowers have cognizable claims for relief against ITT.

An unfair or deceptive trade practice means "an act specifically declared unlawful pursuant to the [act], a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services . . . by a person in the regular course of the person's trade or commerce, that may, tends to or does deceive or mislead any person."[254] The New Mexico courts have stated that the NMUPA is to be interpreted liberally in favor of consumers.[255] ITT's misleading statements about the projected annual earnings of ITT graduates, as well as about the projected growth rate of those annual earnings over the course of ITT graduates' careers, violate the NMUPA.

To prevail in a civil enforcement action under the NMUPA, a party must establish by a preponderance of the evidence that: (1) the defendant made an oral or written statement, a visual description or a representation of any kind that was either false or misleading; (2) the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant's business; and (3) the representation was of the type that may, tends to, or does deceive or mislead any person.[256] The plaintiff does not have to prove that the misrepresentation actually deceived any person.

In the ITT Value Proposition Chart, ITT made false and misleading written representations about the earnings of ITT graduates. ITT made these representations in the regular course of its business. As Dr. Matsudaira explains in his expert report, ITT should have known that the representations in its Value Proposition Chart were not true: "Anyone with a modicum of experience using labor market statistics would immediately recognize from these data the implausibility of the earnings projections." Moreover, the representations made by ITT were of the type that may, tend to, or actually deceived or misled any person. Prospective students may have been deceived into believing they could earn the salaries put forth by ITT in the Value Proposition Chart when the data ITT used was false.

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[249] New Mexico Unfair Trade Practices Act, NMSA 1978, Sections 57-12-1 to -26 (2003 as amended through 2019).
[250] § 57-12-8; § 57-12-15.
[251] § 57-12-8(B).
[252] § 57-12-11.
[253] § 57-12-10.
[254] § 57-12-2(D).
[255] *State ex rel. Stratton v. Gurley Motor Co.*, 1987-NMCA-063, 105 N.M. 803, 808, 737 P.2d 1180, 1185 cert. denied, 105 N.M. 781, 737 P.2d 893 (Because the Unfair Practices Act constitutes remedial legislation, its provisions are liberally interpreted to facilitate and accomplish its purposes and intent.)
[256] *Dollens v. Wells Fargo Bank*, 2015-NMCA-096, 356 P.3d 537.

Through its false and misleading misrepresentations and omissions in its Value Proposition Chart, ITT violated the NMUPA, specifically section 57-12-2(D)(5) (representing that services have characteristics or benefits that they do not have); section 57-12-2(D)(7) (representing that services are of a particular quality if they are of another); section 57-12-2(D)(14) (using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive); and section 57-12-2(D)(17) (failing to deliver the quality of services contracted for). ITT represented that its services had characteristics, benefits, and qualities that its services did not have. In addition, ITT exaggerated material facts about the future earnings of its graduates thereby deceiving prospective students. Moreover, ITT failed to deliver the quality of services that it advertised.

The State need not prove actual confusion or misunderstanding in an action under the NMUPA.[257] Further, the State does not need to show individual reliance to establish a violation of the NMUPA.[258] For private litigants, proof of monetary damage, loss of profits or intent to deceive or take unfair advantage of any person is not required.[259] Furthermore, the NMUPA permits relief for unfair or deceptive trade practices in addition to remedies otherwise available against the same conduct under the common law or other New Mexico statutes.[260]

In addition to the enforcement power given to the New Mexico Attorney General, the NMUPA provides that a private party who suffers any loss of money or property, real or personal, as a result of an unlawful trade practice may recover actual damages.[261] ITT's conduct caused New Mexico student borrowers losses, and as Dr. Matsudaira's expert report outlines, there is a significant difference between the value of an ITT education as ITT represented, and the actual value.

The NMUPA does not impose any statute of limitations for bringing actions against persons who violate the act. New Mexico courts have not ruled whether a four-year statute of limitations applies to private litigants under the act[262] and statutes of limitation ordinarily do not run against the state.[263] If a statute of limitations applied, the limitation does not run until the discovery of the unlawful practice. Dr. Matsudaira's report provides the crucial analysis of the representations within ITT's Value Proposition Chart. Representations of statistical data require an expert analysis of the underlying data and the methodologies used, and student borrowers almost certainly were unqualified to assess the veracity of the data presented by ITT.

ITT used its Value Proposition Chart to induce prospective students to enroll in its programs. By doing so, ITT engaged in unfair or deceptive trade practices in the course of its educational operations thereby violating the NMUPA. Therefore, ED should grant discharge of all eligible New Mexico ITT borrowers' outstanding obligations.

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[257] § 57-12-2(D).
[258] *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, 142 N.M. 437, 444, 166 P.3d 1091, 1098 cert. denied, 2007-NMCERT-005, 141 N.M. 762, 161 P.3d 259 (An unfair practices claim need not allege detrimental reliance by the claimant on a deceptive statement by the defendant).
[259] § 57-12-10(A).
[260] § 57-12-10(D).
[261] § 57-12-10(B).
[262] NMSA 1978, § 37-1-4 (the statute of limitations for claims of fraud).
[263] *N.M. Dep't of Labor v. Valdez*, 136 Bankr. 874, 876 (Bankr. D.N.M. 1992).

Violations of New York State Law

ITT's misrepresentations concerning expected salary outcomes in the "Value Proposition for Employed Graduates" chart violates New York Executive Law ("Exec. Law") § 63(12) and General Business Law ("GBL") § 349. Exec. Law § 63(12) authorizes the New York Attorney General ("NYAG") to bring an action to enjoin repeated or persistent fraud or illegality in the transaction of business in New York.[264] Exec. Law § 63(12) empowers the NYAG to seek an injunction, restitution, and damages for repeated or persistent fraudulent or illegal acts.[265] The definition of "fraud" under Exec. Law § 63(12) is broad: the term "fraud" includes "any device, scheme or artifice to defraud" and "any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contract provisions."[266] To be "repeated" under Exec. Law § 63(12), the misconduct must affect more than one person.[267] Exec. Law § 63(12) protects not only the "average" consumer, but also the "ignorant, unthinking, or credulous" consumer.[268] The test of fraudulent conduct under Exec. Law § 63(12) is "whether the targeted act has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud."[269] ITT's misrepresentations concerning salary outcomes in the "Value Proposition for Employed Graduates" chart have the capacity or tendency to deceive prospective students. Accordingly, the misrepresentations constitute fraudulent and illegal conduct under Exec. Law § 63(12).

ITT's misrepresentations about salary outcomes in the "Value Proposition for Employed Graduates" chart also constitute violations of GBL § 349, which prohibits deceptive acts or practices in the conducting of business in New York.[270] Under GBL § 349, deceptive acts and practices are "those likely to mislead a reasonable consumer acting reasonably under the circumstances."[271] GBL § 349 authorizes the NYAG to bring an action to enjoin violations of the statute and to seek restitution and civil penalties.[272] It also provides a private right of action for individuals harmed by violations of the statute to recover damages.[273] Like Exec. Law § 63(12), GBL § 349 is "intended to be broadly applicable, extending beyond the reach of common law fraud."[274] Accordingly, the elements of common law fraud, such as reliance and intent, need not be established to demonstrate a violation of GBL § 349.[275]

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[264] Executive Law § 63(12).
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] *People v. Applied Card*, 27 A.D.3d 104, 107; *People v. Gen. Elec. Co.*, 302 A.D.2d 314; *People v. Moss*, 2013 N.Y. Misc. LEXIS 5607, at *5 (Sup. Ct. Suffolk Cnty. Nov. 12, 2013); *People v. Amerimod, Inc.*, 2010 N.Y. Misc. LEXIS 2433, at *4 (Sup. Ct. N.Y. Cnty. Apr. 7, 2010).
[269] *Applied Card*, 27 A.D.3d at 107; *Gen. Elec. Co*., 302 A.D.2d at 314; *see also* State v. E.F.G. Baby Products Co., 40 A.D.2d 364, 368 (3d Dep't 1973).
[270] GBL § 349.
[271] *See Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A*., 85 N.Y.2d 20, 26 (1995).
[272] *See* GBL § 350-d.
[273] *See* GBL § 349(h).
[274] *State v. Feldman*, 210 F. Supp. 2d 294, 301 (S.D.N.Y. 2002).
[275] *Oswego Laborers Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26 (1995); *Applied Card*, 27 A.D.3d at 107; *Gen. Elec. Co.*, 302 A.D.2d at 315; *People v. Network Assocs.*, 195 Misc. 2d 384, 389 (Sup. Ct. N.Y. Cnty. 2003).

GBL § 349 claims are subject to a three-year statute of limitations.[276] Exec. Law§ 63(12) claims are subject to a six-year statute of limitations.[277]

[276] *See Gaidon v. Guardian Life Ins. Co. of Am.*, 750 N.E.2d 1078, 727 N.Y.S.2d 30 (2001).
[277] S*ee* C.P.L.R. § 213(9).

Violations of North Carolina Law

The misrepresentations in ITT's Value Proposition Chart violate North Carolina law and entitle students to recovery.

1. The North Carolina Unfair and Deceptive Trade Practice Act

The North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA") prohibits "unfair or deceptive act or practices in or affecting commerce."[278]

Both the Attorney General and private litigants are separately entitled to bring actions to remediate violations of the UDTPA.[279] Both types of actions, if successful, can result in court-ordered restitution for affected consumers.[280]

2. ITT's Misrepresentations Regarding Its Value Proposition Violated the UDTPA

ITT's misrepresentations about the school's value proposition are clearly actionable under North Carolina law.

To succeed on a UDTPA claim, the Attorney General must show that defendant: (1) committed an unfair or deceptive act or practice; (2) in or affecting commerce.[281]

An act or practice "is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required."[282] Even a truthful statement can be deceptive, if it has the capacity or tendency to deceive the average consumer.[283]

ITT violated the UDTPA by using a "simple, but egregiously misleading methodology" in its Value Proposition Chart to extol the benefits of its programs in order to convince students to enroll.[284] As Dr. Matsudairia explained, ITT overstated the earnings of their graduates by $100,000, while the data in ITT's possession did not support those conclusions.[285]

North Carolina courts have specifically held that misrepresentations made while soliciting a student to enroll in a school are actionable under state law.[286] Misrepresentation and deception

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[278] N.C. Gen. Stat. § 75-1.1(a).
[279] *See* N.C. Gen. Stat. § 75-9 (Attorney General duty to investigate); § 75-15 (Attorney General empowered to bring enforcement actions in the name of the state); § 75-16 (private right of action).
[280] N.C. Gen. Stat. §§ 75-15.1, 75-16.
[281] N.C. Gen. Stat. § 75-1.1; *see First Atl. Mgmt. Corp. v. Dunlea Realty Co*., 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998) (stating the 3-pronged test for private litigants); *Mayton v. Hiatt's Used Cars, Inc*., 45 N.C. App. 206, 211, 262 S.E.2d 860, 863 (Attorney General need not prove actual injury), cert. denied, 300 N.C. 198, 269 S.E.2d 624 (1980).
[282] *Marshall v. Miller,* 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981).
[283] *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 265, 266 S.E.2d 610, 622 (1980).
[284] Matsudairia Report at 4.
[285] Matsudairia Report at 21.
[286] *See Herrera v. Charlotte Sch. of Law, LLC*, 2018 NCBC LEXIS 35 (Apr. 2018) (holding for-profit college misrepresentations are actionable under Chapter 75).

claims are distinguished from nonjusticiable "educational malpractice" claims, which focus on an assessment of the quality of the education provided.[287]

ITT's actions were in or affecting commerce under North Carolina law. The General Assembly has instructed that "'commerce' includes all business activities, however denominated."[288] As noted by the North Carolina Supreme Court more than once, "this statutory definition of commerce is expansive."[289] The North Carolina Supreme Court defines "business activities" thus: "a term which connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized."[290] The misrepresentations alleged herein, induced numerous North Carolinians to incur tens of thousands of dollars to buy the educational goods ITT was selling, affecting the commerce of this state.

3. ITT Students Would Not Be Barred from Recovery By a Statute of Limitations.

North Carolina ITT students are not barred from recovery by the statute of limitations. First of all, an action by the Attorney General is not subject to any limitations period.[291] Furthermore, while private UDTPA actions must generally be brought within four years, that period does not begin to run for actions based on fraud until the fraud is discovered or should have been discovered through reasonable diligence.[292] Here, students had no reasonable evidence to question the veracity of ITT's value proposition claims until Dr. Matsudairia made his report. Neither type of state UDTPA action would be barred by the statute of limitations.

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[287] *Arnold v. Univ. of N.C.*, 798 S.E.2d 442, 2017 N.C. App. LEXIS 292, at *9 (N.C. App. 2017).
[288] N.C. Gen. Stat. § 75-1. l(b).
[289] *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 593, 403 S.E.2d 483, 492 (1991); *see also Bhatti v. Buckland*, 328 N.C. 240, 245, 400 S.E.2d 440, 443 (1991) ("[t]he term 'business' generally imports a broad definition") (citation omitted).
[290] *HAJMM*, 328 N.C. at 594, 403 S.E.2d at 493.
[291] *See Rowan Cty. Bd. of Educ. v. United States Gypsum Co*., 332 N.C. 1, 8, 418 S.E.2d 648, 653 (1992) (governmental actions not subject to the statute of limitations applicable to private parties unless the statute expressly includes the State); N.C. Gen. Stat. 75-16.2 (not expressly including actions by the Attorney General in its limitations period).
[292] N.C. Gen. Stat. 75-16.2; *Nash v. Motorola Communications & Elecs., Inc*., 96 N.C. App. 329, 385 S.E.2d 537 (1989), *aff'd*, 328 N.C. 267, 400 S.E.2d 36 (1991) (discovery rule for actions based on fraud).

Violations of Pennsylvania Law

ITT's conduct as set forth in this Application for Borrower Defense on Behalf of ITT Students ("Application") violates the Pennsylvania *Unfair Trade Practices and Consumer Protection Law*, 73 P.S. § 201-1, *et seq*. ("UTPCPL"). Section 201-3 of the UTPCPL declares as unlawful "unfair methods of competition and unfair or deceptive acts or practices."[293] Section 201-2(4) lists twenty-one (21) instances of such conduct, including the following:

(v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

. . .

(vii) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another; [and]

. . .

(xxi) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.[294]

In its seminal decision interpreting the UTPCPL, the Pennsylvania Supreme Court pronounced that the statute is to be construed liberally to affect its object of preventing unfair or deceptive acts or practices and protecting the public.[295] Pennsylvania courts have also consistently held that "[n]either the intention to deceive nor actual deception must be proved; rather, it need only be shown that the acts and practices are capable of being interpreted in a misleading way."[296] Further, the Pennsylvania Superior Court has held that the applicable standard of proof is a preponderance of the evidence, as the language and purpose of the UTPCPL support this standard.[297]

In addition to ensuring the fairness of market transactions, the UTPCPL was designed to promote full disclosure of information to consumers.[298] Consistent with this expansive treatment, the Commonwealth Court of Pennsylvania has held that a failure to disclose material facts may constitute a violation of the UTPCPL.[299]

Sections 201-4, 201-4.1 and 201-8 of the UTPCPL permit the Pennsylvania Attorney General's Office to commence proceedings to restrain violations of the UTPCPL, seek restitution

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[293] 73 P.S. § 201-3.
[294] 73 P.S. § 201-2(4)(v), (vii), and (xxi).
[295] *Commonwealth, by Creamer v. Monumental Properties, Inc.*, 329 A.2d 812, 815-817 (Pa. 1974) (stating that the UTPCPL attempts to place on more equal terms seller and consumer and is predicated on a legislative recognition of the unequal bargaining power of opposing forces in the marketplace).
[296] *Commonwealth ex rel. Corbett v. Peoples Benefit Servs, Inc.*, 923 A.2d 1230, 1236 (Pa. Commw. Ct. 2007) (citing *Commonwealth ex rel. Zimmerman v. Nickel*, 26 Pa. D. & C.3d 115, 120 (Pa. Com. Pl. 1983).
[297] *Boehm v. Riversource Life Ins. Co*., 117 A.3d 308 (Pa. Super. Ct. 2015).
[298] *Gabriel v. O'Hara*, 534 A.2d 488, 491 n.6 (Pa. Super. Ct. 1987).
[299] *Commonwealth by Zimmerman v. Bell Tel. Co. of Pennsylvania,* 551 A.2d 602, 604 (Pa. Commw. Ct. 1988).

on behalf of consumers and seek civil penalties of up to $1,000.00 per violation or $3,000.00 per violation if the victim is age 60 or older.[300]

Of particular note, Section 201-4.1 of the UTPCPL states, "Whenever any court issues a permanent injunction to restrain and prevent violations of this act as authorized in section [201-4]…, the court may in its discretion direct that the defendant or defendants restore to any person in interest any moneys or property, real or personal, which ***may*** have been acquired by means of any violation of this act, under terms and conditions to be established by the court." [301] Use of the word "may" indicates the legislature did not intend for the Commonwealth to prove reliance as to each consumer who is awarded restitution.[302]

Section 201-9.2 provides a private cause of action for violations of the UTPCPL for any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use of a method, act or practice declared unlawful.[303]

The expansive judicial interpretation of the UTPCPL applies not only to actions initiated by the Commonwealth, but also to the aforementioned private right of action.[304] Further, when applying Section 201-2(4)(xxi), commonly referred to as the "catchall provision" of the UTPCPL, the test for establishing deceptive conduct is merely whether the conduct has the "tendency or capacity to deceive."[305] As recently articulated in *Gregg*, under Section 201-9.2 of the UTPCPL,

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[300] 73 P.S. §§ 201-4, 201-4.1 and 201-8. The UTPCPL does not set forth an applicable statute of limitations. Therefore, the Commonwealth's ability to initiate an action under the UTPCPL is not subject to a statute of limitations under the doctrine of *nullum tempus occurrit regi* ("time does not run against the king") which is well-established in Pennsylvania. *See*, *e.g.*, *Com., Dept. of Transp. v. J.W. Bishop & Co.*, 439 A.2d 101, 102 (Pa. 1981) ("This Court has always adhered to the 'old and well known rule that statutes which in general terms divest pre-existing rights or privileges do not bind the sovereign without express words to that effect.'") (citations and footnote omitted); *Commonwealth v. Musser Forests, Inc.*, 146 A.2d 714, 720 (Pa. 1959) (citing *Bagley v. Wallace*, 1827 WL 2701, at *6 (Pa. 1827)) ("It has long since been established that the statute of limitations does not run against a sovereign in a civil proceeding.").

[301] 73 P.S. § 201-4.1 (emphasis added).

[302] *See,* e.g., *Weinberg v. Sun Co.*., 777 A.2d 442 (Pa. 2001) (drawing a distinction between the proof required in UTPCPL cases brought by the Commonwealth and those initiated by private citizens pursuant to section 201-9.2).

[303] 73 P.S. § 201-9.2(a). The private cause of action under the UTPCPL is governed by a six-year statute of limitations. *Lesoon v. Metro. Life Ins. Co.*, 898 A.2d 620, 627 (Pa. Super. Ct. 2006). Nevertheless, if the injured party is reasonably unaware of its right to sue, the statute of limitations can be tolled by the discovery rule and the doctrine of fraudulent concealment. *See Drelles v. Manufacturers Life Ins. Co.*, 881 A.2d 822, 832 n.6 (Pa. Super. 2005) (involving a private action based on violations of the UTPCPL). Further, the Pennsylvania Supreme Court has held it is inappropriate for the statute of limitations to inhibit the achievement of the desired goal of a statute where a claim is asserted defensively. *See Household Consumer Disc. Co. v. Vespaziani* 415 A.2d 689, 696 n.14 (Pa. 1980) (citing *United States v. W. Pac. R. Co.*, 352 U.S. 59 (1956) and *Burnett v. New York Cent. R. Co.*, 380 U.S. 424 (1965)) (holding that the one-year statute of limitations contained in the Truth In Lending Act ("TILA"), 15 U.S.C. § 1640(e), did not bar the consumer-borrower's equitable recoupment defense, where said defense claimed plaintiffs violated TILA and the application of the statute of limitations to bar the defense would inhibit TILA's desired object of protecting prospective borrowers).

[304] *Gregg v. Ameriprise Fin., Inc.*, No. 29 WAP 2019, 2021 WL 607486 at *9 (Pa. Feb. 17, 2021) (citing *Monumental Properties*, 329 A.2d at 817) (recognizing the need to construe the UTPCPL liberally in a private action commenced by insureds involving alleged misrepresentations by a sales person).

[305] *Id*. at *10; *see also Commonwealth by Shapiro v. Golden Gate Nat'l Senior Care LLC*, 194 A.3d 1010 (Pa. 2018).

the legislature established a statutory claim for anyone who demonstrates that: (1) they purchased or leased "goods or services primarily for a personal, family, or household purpose"; (2) they suffered an "ascertainable loss of money or property"; (3) the loss occurred "as a result of the use or employment by a vendor of a method, act, or practice declared unlawful by" the UTPCPL; and (4) the consumer justifiably relied upon the unfair or deceptive business practice when making the purchasing decision.[306]

Gregg went on to hold that deceptive conduct during a consumer transaction that creates a likelihood of confusion or misunderstanding and upon which consumers rely to their detriment does not depend upon the actor's state of mind and therefore, consistent with the requirement to liberally construe the UTPCPL, commercial vendors have a duty to comply, without regard to their intent.[307] In essence, the Court observed, without a state of mind requirement, a violation of the catchall provision "may be characterized as a strict liability offense."[308]

In light of the breadth and purpose of the UTPCPL as outlined above, there can be no question that ITT's use of the "Value Proposition for Employed Graduates" ("Value Proposition") reviewed in Dr. Matsudaira's expert report violated Pennsylvania's preeminent consumer protection statute and that relief is warranted.[309] As the Report indicates, the Value Proposition was intended to be relied upon as part of ITT's student recruitment efforts and was based on an "egregiously misleading methodology" that greatly overestimated the salary students would earn by attending ITT.[310] Further, at the time the Value Proposition was used, students could not have been expected to discover its underlying failings—failings that have only just now been revealed in an expert report. As such, and without limitation, the Value Proposition had a tendency or capacity to deceive, thus violating the UTPCPL's "catchall" provision at Section 201-2(4)(xxi) (engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding) as well as Sections 201-2(4)(v) (misrepresentations involving characteristics and benefits) and 201-2(4)(vii) (misrepresentations involving quality of goods or services).[311]

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[306] *Gregg*, 2021 WL 607486 at *8-9.
[307] *Id*. at *11.
[308] *Id*.
[309] *See* Jordan D. Matsudaira, *An Assessment of ITT Technical Institute's "Value Proposition for Employed Graduates"* (July 6, 2020) ("Report").
[310] *See* Report at 4, Executive Summary.
[311] 73 P.S. § 201-4(v), (vii), and (xxi).

Violations of Tennessee Law

The Tennessee Consumer Protection Act (TCPA) prohibits "unfair or deceptive acts or practices affecting the conduct of any trade or commerce."[312] The TCPA grants the Tennessee Attorney General broad enforcement powers, including the ability to obtain civil penalties and restitution in addition to other injunctive relief.[313] As the statute is explicitly remedial, it is to be construed liberally by courts in order to protect consumers.[314] The Tennessee Attorney General could bring a viable claim for relief against ITT for its use of the deceptive Value Proposition Charts, which misled potential students into enrolling in ITT and incurring substantial student loan debt as a result.

Under the TCPA, a deceptive act is one that "causes or tends to cause a consumer to believe what is false or that misleads or tends to mislead a consumer as to a matter of fact."[315] Specifically, the TCPA prohibits an entity from representing that "goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have" or "representing that goods or services are of a particular standard, quality, or grade . . . if they are of another."[316] The Attorney General may also bring claims related to "any other act or practice which is deceptive to the consumer or to any other person."[317]

Deceptive acts are not required to be knowing or intentional,[318] and even negligent misrepresentations may violate the TCPA.[319] Reliance is not required in order to bring a case under the Act.[320] Moreover, it is not necessary that actual deception occur,[321] and disclaimers do not legitimize otherwise unlawful and deceptive misrepresentations.[322] Additionally, there is no

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[312] Tenn. Code Ann. §§ 47-18-101 *et seq.*

[313] Tenn. Code Ann. §§ 47-18-108, -114. The TCPA also contains a private right of action, however, such a claim would likely be barred by the five-year statute of repose. Tenn. Code Ann. § 47-18-109, -110.

[314] Tenn. Code Ann. §§ 47-18-102; *Fayne v. Vincent*, 301 S.W.3d 162, 172 (Tenn. 2009); *Tucker v. Sierra Builders*, 180 S.W.3d 109, 115 (Tenn. Ct. App. 2005); *State v. Heath*, 806 S.W.2d 535, 537 (Tenn. Ct. App. 1990) ("As the chief law enforcement officer of the state, the attorney general may exercise such authority as the public interest may require and may file suits necessary for the enforcement of state laws and public protection.").

[315] *Morrison v. Allen*, 338 S.W.3d 417, 439 (Tenn. 2011); *Sierra Builders*, 180 S.W.3d at 116.

[316] Tenn. Code Ann. §47-18-104(b)(5), (7).

[317] Tenn. Code Ann. § 47-18-104(b)(27).

[318] *Sierra Builders*, 180 S.W.3d at 115; *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 925 (6th Cir. 1968); Federal Trade Commission ("FTC") opinions and federal court decisions under the FTC are especially instructive as the TCPA specifically requires that the statute be construed and applied according to both FTC opinions and decisions. *See* Tenn. Code Ann. § 47-18-115; *Fayne v. Vincent*, 301 S.W.3d at 172.

[319] *Fayne v. Vincent*, 301 S.W.3d at 177.

[320] *Messer Griesheim Indus., Inc. v. Cryotech of Kingsport, Inc.*, 131 S.W.3d 457, 469 (Tenn. Ct. App. 2003); *Harvey v. Ford Motor Credit Co.*, No. 03A01-9807-CV-00235, 1999 WL 486894, at *2 (Tenn. Ct. App. July 13, 1999).

[321] *FTC v. EM.A. Nationwide, Inc.*, 767 F.3d 611, 633 (6th Cir. 2014) (applying caselaw stating that "[w]hile proof of actual deception is unnecessary to establish a violation of Section 5, such proof is highly probative to show that a practice is likely to mislead consumers acting reasonably under the circumstance") (quoting *FTC v. USA Fin., LLC*, 415 415 F. App'x 970, 973 (11th Cir. 2011)).

[322] *Id.* at 631 (The overall "net impression that [an advertisement] is likely to make on the general populace" is the issue in a case brought under Section 5 of the FTC Act.) (quoting *Nat'l Bakers Servs., Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964)); *id*. at 632 ("Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave

explicit statute of limitations for claims brought by the Attorney General pursuant to the TCPA, nor are any broader statutes of limitation applicable.[323]

The Tennessee Attorney General can show that ITT's use of the Value Proposition Chart was deceptive insofar as it misled or tended to mislead ITT students into believing that their ITT education—and the loans they took out to pay for such an education—would lead to unrealistically high lifetime earnings.[324] According to Professor Matsudaira's report, ITT created its Chart regarding projected earnings using unsound methodologies and inaccurate data. Specifically, the Chart did not use accepted economic methodology to calculate earnings growth, ignored the fact that most ITT students did not graduate, and misleadingly aggregated earning outcomes across disparate campuses and majors despite ITT's possession of more accurate data. As a result, the Chart represented that an ITT education had "characteristics," "uses," or "benefits" that it did not have as well as that it was of a "particular standard, quality, or grade" when such was not the case. The evidence therefore supports a cognizable claim under the TCPA, and the Department should grant discharge of all eligible Tennessee ITT borrowers' outstanding obligations and refund any applicable payments.

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an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.") (quoting *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989)).

[323] *See* Tenn. Code Ann. § 28-1-113 (providing that "[t]his title [pertaining to statutes of limitation] does not apply to actions brought by the state of Tennessee, unless otherwise expressly provided"). The Tennessee Supreme Court has stated, "This doctrine is not to be lightly regarded, as we have repeatedly stated that statutes of limitation are looked upon with disfavor in actions brought by the State, and will not be enforced in the absence of clear and explicit statutory authority to do so." *Hamilton Cty. Bd. of Educ. v. Asbestospray Corp.*, 909 S.W.2d 783, 785 (Tenn. 1995); *see In re Estate of Tanner*, 295 S.W.3d 610, 627–28 (Tenn. 2009) (same).

Vermont Law Violations

The Vermont Consumer Protection Act ("CPA") prohibits unfair or deceptive practices in trade or commerce.[325] The CPA authorizes the Vermont Attorney General or a Vermont State's Attorney to seek to prohibit unfair or deceptive acts, as well as to seek civil penalties, restitution, and other forms of recourse from violators of the CPA.[326] The CPA further provides for a private right of action, allowing individual consumers to obtain relief from unfair and deceptive practices.[327] The Vermont Supreme Court has held that the CPA has a remedial purpose and will thus be applied liberally to accomplish its purpose.[328]

Vermont consumers are not required to demonstrate that they relied on a deceptive practice to make a CPA claim, as long as they demonstrate that they sustained injuries as a result of false or fraudulent representations.[329]

The statute of limitations period applicable to CPA claims is six years.[330] The statute of limitations begins to run on a CPA claim "when the plaintiff has notice of information that would put a reasonable person on inquiry."[331]

ITT's misleading statements about the projected annual earnings of ITT graduates, as well as about the projected growth rate of those annual earnings over the course of ITT graduates' careers, violate the CPA. Through its false and misleading misrepresentations and omissions in its Value Proposition Chart, ITT violated the CPA. ITT represented that their services had sponsorship, approval, characteristics, ingredients, uses, benefits, quantities, or qualities that their services did not have, in violation of the CPA. In addition, ITT represented that their services were of a standard, quality, or grade, when in fact they were not, in violation of the CPA. Each of these unfair and deceptive acts would permit the Vermont Attorney General or affected Vermont consumers to sue under Vermont law.

[325] 9 V.S.A. § 2453.
[326] 9 V.S.A. § 2458.
[327] 9 V.S.A. § 2461.
[328] *Carter v. Gugliuzzi*, 168 Vt. 48, 52, 716 A.2d 17, 21 (1998).
[329] *Foti Fuels, Inc. v. Kurrle Corp.*, 195 Vt. 524, 534, 90 A.3d 885, 891 (2013), *citing* 9 V.S.A. § 2461(b).
[330] *Galfetti v. Berg, Carmolli & Kent Real Estate Corp.*, 171 Vt. 523, 756 A.2d1229, *citing* 12 V.S.A. § 511.
[331] *Id*. at 524.

Violations of Virginia Law

In addition to the Virginia Attorney General's enforcement powers under the Virginia Consumer Protection Act ("VCPA"), Virginia Code §§ 59.1-196 to 59.1-207, the Virginia General Assembly granted a private right of action to individual consumers to recover damages for violations of the VCPA.[332]

Here, both the Virginia Attorney General and individual students have cognizable claims against ITT. Pursuant to Virginia Code § 59.1-200, to prevail in a civil enforcement action under the VCPA, the Virginia Attorney General and private litigants must prove the statutory requirements: (1) that ITT is a "supplier[;]" (2) that ITT engaged in "consumer transaction[s]" with Virginians; and (3) that ITT committed one or more "unlawful" "acts or practices[,]" e.g., made one of the enumerated misrepresentations listed in § 59.1-200 in connection with a "consumer transaction[.]"[333]

As a supplier engaged in consumer transactions with Virginians, ITT violated the VCPA, without limitation, as follows:

Claim I: As further described in §§ II and III of this group application, ITT misrepresented through its Value Proposition Chart that its "goods or services [had] certain . . . characteristics . . . or benefits" in violation of § 59.1-200(A)(5) of the VCPA;

Claim II: As further described in §§ II and III of this group application, ITT misrepresented through its Value Proposition Chart that its "goods or services [were] of a particular standard [or] quality . . . ." in violation of § 59.1-200(A)(6) of the VCPA; and

Claim III: For the same reasons identified in Claims I and II, ITT violated § 59.1-200(A)(14) by using "any other deception, fraud, false pretense, false promise, or misrepresentation . . . ."

VCPA actions brought by the Virginia Attorney General are not subject to statutes of limitations.[334] However, an "individual action" under the VCPA must be "commenced within two years after *accrual*."[335] The time of "accrual" means the time when "such fraud, mistake, misrepresentation, deception, or undue influence is discovered or by the exercise of due diligence reasonably should have been discovered[.]"[336] Due diligence is measured by "an examination of the facts and circumstances unique to each case[,]" but, as this group application details, Virginia's student borrowers (like all student borrowers nationwide) were likely unable to assess the veracity of the data ITT provided through its Value Proposition Chart.[337]

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[332] Va. Code Ann. § 59.1-204.
[333] Va. Code Ann. §§ 59.1-198 and 59.1-200. *See also Ballagh v. Fauber Enters*., 290 Va. 120 (2015); and *Owens v. DRS Auto. Fantomworks, Inc*., 288 Va. 489 (2014).
[334] Va. Code Ann. § 8.01-231.
[335] Va. Code Ann. § 59.1-204.1 (emphasis added).
[336] Va. Code Ann. § 8.01-249.
[337] *STB Mktg. Corp. v. Zolfaghari*, 240 Va. 140, 145 (1990).

Finally, individual consumers are additionally required to prove "reliance" *to recover damages* under the VCPA, even if such consumers were able to prove that ITT violated § 59.1-200.[338] But this group application does not seek damages available under § 59.1-204 of the VCPA—it seeks borrower defense relief, i.e., loan discharge. In any event, the Virginia Attorney General has no such requirement to prove reliance.[339] Nor does the VCPA require the Virginia Attorney General to allege or to prove particular, individualized misrepresentations when seeking relief for a class of affected consumers.[340]

[338] *Owens*, 288 Va. at 497 (noting that Virginia Code § 59.1-204(A) provides, in pertinent part, that "[a]ny person who suffers loss *as a result* of a violation of this chapter shall be entitled to initiate an action to recover damages or $500, whichever is greater") (emphasis added).
[339] Va. Code Ann. § 59.1-205 (court may make such additional orders "as are necessary to restore to any identifiable person any money or property . . . which *may* have been acquired from such person by means of an act or practice declared unlawful in § 59.1-200") (emphasis added).
[340] *Id.*

Violations of Washington Law

The Washington Consumer Protection Act (CPA) provides for a private right of action and public enforcement through the Attorney General.[341] Here, both the Attorney General and individual students have valid claims for relief against ITT.

In a private right of action under the CPA, a party must establish five elements: (i) an unfair or deceptive act or practice, (ii) in or affecting trade or commerce, (iii) public interest impact (iv) injury to plaintiff's property or business, and (v) causation.[342] However, the Attorney General need only establish the first three elements to establish a violation of the CPA in an enforcement action.[343] As a consumer protection statute, the CPA is to be interpreted liberally in favor of consumers.[344]

A practice may violate the CPA if it is either unfair *or* deceptive. However, ITT's use of the Value Proposition Chart was both unfair *and* deceptive. An act or practice can also violate the CPA if it is unfair, even if is not deceptive.[345] Washington courts have held that an "unfair" act is one that (a) "without unnecessarily having been previously unlawful, [it] offends public policy as it has been established by statutes, the common law or otherwise—whether , in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness," (b) is "immoral, unethical, oppressive, or unscrupulous," or (c) "causes substantial injury to consumers (or competitors or other businessmen)."[346] Here it was immoral and unethical to induce aspiring students to enroll at ITT under the false assertions contained in the Value Proposition Chart. Further, it caused substantial injury to consumers, including inducing students to take on astronomical amounts of student debt without any reasonable chance to attain the earnings promised in the Value Proposition Chart. Additionally, an act or practice is "deceptive" under the CPA if the act or practice has a "tendency or capacity to deceive a substantial portion of the general public."[347] It is not necessary to prove actual deception or an intent to deceive.[348] As demonstrated by Dr. Madsudiara's report, the chart used "egregiously misleading methodology to project the salary growth of students." Thus, the chart had a capacity to deceive as it misrepresented one of the primary reasons a student would attend a school.

RCW 19.86.010(2) defines "trade" and "commerce" to include "the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington."[349] Here, the sale of secondary education to Washington residents was within trade or commerce.

When determining whether a claim had a public interest Washington law asks (1) Were the alleged acts committed in the course of defendant's business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff?

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[341] R.C.W. §19.86.080 and §19.86.093.
[342] *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85 P.2d 531 (1986).
[343] R.C.W. 19.86.080; *see State v. Mandatory Poster Agency, Inc.*, 199 Wn. App. 506, 518, 398 P.3d 1271 (2017).
[344] See *State v. Ralph Williams' NW Chrysler Plymouth, Inc.,* 82 Wash. 2d 265, 277, 510 P.2d 233, 241 (1973).
[345] *See Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013).
[346] *Magney v. Lincoln Mut. Sav. Bank*, 34 Wn. App. 45, 57, 659 P.2d 537 (1983) (quoting *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)).
[347] *Fisher v.World-Wide Trophy Outfitters*, 15 Wn. App. 742, 748, 551 P.2d 1398 (1976).
[348] *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785 P.2d 531 (1986).
[349] See *Nordstrom, Inc. v. Tampourlos*, 107 Wash. 2d 735, 740, 733 P.2d 208, 210 (1987).

(4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?[350] Here, the use of the chart to deceive potential students was committed in the course of the defendant's business, was part of generalized course of conduct and numerous consumers were impacted by the behavior, which is sufficient to show the public interest impact.

Finally, Washington courts define causation as a causal link between the unfair or deceptive acts and the plaintiff's injury.[351] The defendant's acts must be the proximate cause of the plaintiff's damages.[352] Causation is established if a plaintiff loses money as a result of an unfair or deceptive practice, and actual reliance is not required.[353] Here, ITT induced students to enroll and incur significant debts based on a sales pitch that promised unrealistic future earnings. The use of the Value Proposition Chart satisfies the requirement of causation under the Washington law.

While the CPA bars private claims for damages unless the action is brought within four years, the tolling does not accrue until the plaintiff discovers or should have discovered the act giving rise to the claim. Under the "discovery rule of accrual," a cause of action accrues when the plaintiff discovers, or in the reasonable exercise of diligence should discover, the elements of the cause of action, rather than immediately when the wrongful act occurs if the plaintiff is then unaware of the harm sustained.[354] There is no statute of limitations for a claim from the Attorney General when seeking restitution.[355] Thus, all of the elements of a CPA violation, for both a private claim and an enforcement claim, are met and are not barred by the statute of limitations, and the Department should discharge all of outstanding balances for the eligible Washington ITT borrowers.

[350] See *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 790, 719 P.2d 531, 538 (1986).
[351] *Id.*
[352] See *Fisons* at 296, 858 P.2d 1054. See also *Lidstrand v. Silvercrest Indus*., 28 Wash. App. 359, 368, 623 P.2d 710, 716 (1981).
[353] See *Pickett*, 145 Wash.2d 178, 196-199, 35 P.3d 351 (2001).
[354] See *1000 Virginia LTD. Partnership v. Vertecs Corp,* 158 Wash.2d, 566, 576 (2006).
[355] *State v. LG Electronics, INC.*,186 Wash.2d 1, 9, 375 P.3d 636, 640 (2016).

Violations of Wisconsin Law

The Wisconsin Deceptive Trade Practices Act (DTPA), Wisconsin Statute § 100.18(1), prohibits any person or firm, with intent to sell merchandise or a service, from making any assertion, representation or statement of fact which is untrue, deceptive or misleading. The Attorney General of Wisconsin has enforcement power over violations of the DTPA.[356] The DTPA also authorizes consumers to bring a private right of action for harm caused by violations of the DTPA.[357]

To constitute an untrue, deceptive, or misleading representation, there are three elements that must be proved by the consumer. First, the consumer must prove that ITT made, published, or placed before one or more members of the public an advertisement, announcement, statement or representation concerning the sale or use of ITT's educational services.[358] Second, the consumer must show that the advertisement or announcement contained an assertion, representation, or statement that was untrue, deceptive, or misleading.[359] An assertion, representation, or statement is untrue if it is false, erroneous, or does not state or represent things as they are.[360] An assertion, representation, or statement is deceptive or misleading if it causes a reader or listener to believe something other than what is in fact true or leads to a wrong belief.[361] The assertion, representation, or statement need not be made with knowledge as to its falsity or with intent to defraud or deceive so long as it was made with the intent to sell or distribute the educational services or with the intent to induce the purchase or use of the educational services.[362] And, third, the consumer must show that he or she sustained monetary loss as a result of the assertion, representation, or statement.[363]

The purpose of the DTPA is to deter entities, such as ITT, from making false and misleading representations in order to protect the public.[364] Therefore, the DTPA does not require proof that a consumer relied upon the misrepresentation in order to prove a violation of the DTPA.[365]

ITT made untrue, deceptive and/or misleading statements to prospective students for the purpose of enrolling students in ITT Tech including, but not limited to, the statements made in its Value Proposition Chart. As explained by Dr. Jordan D. Matsudaira, the Value Proposition Chart violates Wisconsin's DTPA by depicting an egregiously misleading overestimate of the salary students would earn as a consequence of attending ITT. These facts are sufficient to prove the first two elements discussed above. Dr. Matsudaira also explained that the Value Proposition Chart likely led more students to enroll in ITT than would have enrolled if ITT had presented accurate

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[356] *See* Wis. Stat. § 165.25(4)(ar) and Wis. Stat. § 100.18(11)(a), (d).
[357] *See* Wis. Stat. § 100.18(11)(b)2.
[358] See Wis JI—Civil 2418 (2020).
[359] *See id*.
[360] *See id.*
[361] *See id.*
[362] *See id*.
[363] *See id*.
[364] *See Novell v. Migliaccio*, 2008 WI 44, ¶ 29, 309 Wis.2d 132 (2008).
[365] *See id.*

information to prospective students. This fact is sufficient to prove the third and final element discussed above. Therefore, the evidence presented proves that ITT violated Wisconsin's DTPA each time that it utilized the Value Proposition Chart. Consequently, the Department should grant discharge of all eligible Wisconsin ITT borrowers' outstanding obligations.