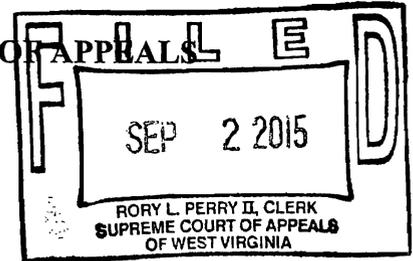


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS



Karen Adams, Plaintiff Below,

Petitioner

vs.)

Case No. 15-0524

**Pennsylvania Higher Education Assistance Agency,
d/b/a American Education Services, a foreign corporation,
Defendant Below,**

Respondent

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

Whether the Circuit Court erred in holding that there is no genuine issue of material fact.

Whether there is genuine issue of material fact that defendant violated the Fair Debt Collection Practices Act by undertaking to collect a debt which was not enforceable as a matter of law.

Whether the Circuit Court erred in finding that plaintiff's claims brought under the Fair Debt Collection Practices Act were pre-empted by federal law.

Whether the Circuit Court erred in failing to find the underlying debt loan and debt rehabilitation agreement unconscionable.

STATEMENT OF THE CASE

This case is about Karen Adams, a West Virginia resident since about 1992, who was the victim of an extensive effort by the Respondent, the Commonwealth of Pennsylvania¹ (Pennsylvania) to collect a student loan from 1986.² During the course of litigation, the loan was deemed unenforceable by the United States Department of Education, through its contractor, Education Credit Management Corp, (ECMC). Prior to the filing of this case, Ms. Adams made repeated statements to Pennsylvania that she did not have the benefit of the education. During discovery, the record shows that Pennsylvania knew it could not locate a cancelled check to show the loan was made. Pennsylvania knew that the purported educational provider had been the subject of a "blanket discharge" determination by the United States Department of Education in 1995, due to a pattern of fraudulently certifying that students could benefit from the education. The loan was forgiven by the United States Department of Education, acting through one of its

¹ As set forth below, the Pennsylvania Higher Education Assistance Agency (PHEAA) is an agency of the Commonwealth of Pennsylvania, operating under "fictional" names (its term) including American Education Services (AES), and FedLoan Servicing. Obviously, AES and FedLoan Servicing do not tell the reasonable person that these are in fact "fictional" names for the Commonwealth of Pennsylvania.

² This case presents significant legal and factual issues, and therefore the Statement of the Case and the Statement of Facts are necessarily extensive.

contractors, in 2014, thereby establishing as a matter of law that the underlying loan was not enforceable.³ 34 CFR 682.405 requires that loans be enforceable in order to be rehabilitated.

In light of the finding by the United States Department of Education, the issue is now simplified. This confirms the argument of plaintiff below that the conduct of Pennsylvania was unconscionable under the West Virginia Consumer Credit and Protection Act, (WVCCPA) §46A-2-121. The essence of plaintiff's argument has been, and is confirmed by the finding of the United States Department of Education, that there was no underlying federal student loan and therefore, first, there is no federal preemption, and second, Pennsylvania undertook to collect a non-existent loan. This conduct violated multiple provisions of the WVCCPA.

The Order granting summary judgment stated at its conclusion:

- a. At all times relevant, the Student Loan is and was a valid federally guaranteed Robert T. Stafford Federal Loan governed by The Higher Education Act of 1965 (20 U.S.C. §§1001 et. seq.) and the FFEL Regulations.
- b. The claim asserted by Ms. Adams in this civil action that PHEAA is barred to collect on the Student Loan by the applicable limitations period is dismissed on the grounds that said claim is preempted by 20 U.S.C. §1091a;
- c. All of Ms. Adams' WVCCPA based claims against PHEAA for unlawful collection activity are in conflict with the HEA and the FFEL Regulations and are hereby dismissed on the grounds that said claims are preempted by the HEA and FFEL. Appendix 000022.

SUMMARY OF ARGUMENT

In 2007, SunTrust Bank⁴ purchased from the United States Department of Education a “bundle” of over 600 loans, purportedly rehabilitated by the Department, and therefore subject to collection. A loan purportedly made to Karen Adams was one of the loans in the “bundle.”

³ Statutes of limitation have been pre-empted in cases of collection actions based on delinquent student loans. 20 U.S.C. §1091a.

⁴ SunTrust was a defendant below, and dismissed pursuant to settlement.

Appendix 000191. SunTrust thereafter retained defendant Pennsylvania Higher Education Assistance Agency, d/b/a American Education Services, an agency of the Commonwealth of Pennsylvania, hereafter “Pennsylvania,” to collect the debt. Pennsylvania thereafter contacted Ms. Adams on various occasions to collect the debt. Its correspondence and statements over the phone on various occasions from Ms. Adams to the effect that she did not know the basis for the collection, had not had any higher education, did not possess a GED, and was living on Supplemental Security Income (SSI) due to mild retardation, minimal literacy, and dependent personality syndrome. Appendix 000150. Over time, Ms. Adams paid approximately \$78.00 per month, out of her SSI income of about \$, to Pennsylvania.

Ms. Adams stopped making payment, and instituted the underlying case, the purpose of which to relieve Ms. Adams of the burden of this debt, and recover damages for violation of the WVCCPA. After stopping payments, and initiating this suit, Karen received a default notice that as of October 8, 2012, the principal amount of the loan was six thousand, four hundred eighty dollars and thirty cents. (\$6,480.30). Pennsylvania contended that this action was preempted by federal law governing student loans. Ms. Adams contended that the loan was not enforceable, as required by federal law, and therefore was not subject to federal preemption.

Ultimately, a contractor for the Department of Education contacted Ms. Adams in 2014, through Counsel, and advised that the loan would be discharged on the grounds that the subject school was on a “blanket discharge list” for fraudulently certifying that students would benefit from the proposed education. Appendix 000116. As a result, the loan was forgiven, and Ms. Adams was repaid the money she had paid due to collection efforts, not including interest.

The Circuit Court granted summary judgment on the grounds that the claims were preempted, that there was no genuine issue of material fact regarding the claims of plaintiff and that the acceptance of the forgiveness was evidence that the underlying loan was a “student loan.”

Plaintiff’s argument is that, as found by the Department of Education in 1995, the loan was unenforceable at the time it was rehabilitated by the Department of Education. As a result, Pennsylvania undertook to collect an unenforceable loan, after the statute ran, ignoring claims from Ms. Adams that the loan was not valid, that she was disabled on SSI, and collecting money from by threatening to garnishee her \$710.00 a month SSI benefits. Pennsylvania knowingly failed to adequately investigate the claims of Ms. Adams.⁵

The plaintiff’s argument is that since there was not a valid loan, preemption does not apply. Further, in light of the obviously unconscionable conduct of Pennsylvania, the Circuit Court erred as a matter of law in not applying *Brown I* and *Brown II* properly when analyzing the preemption issue. Plaintiff contends the acceptance of the forgiveness by Ms. Adams was not a concession that the underlying loan was valid, but rather was a classic case of a contract of adhesion, in that Ms. Adams, living on \$710.00 a month SSI, had no choice but to accept the forgiveness, rather than risking the liability of the debt, accumulated interests and costs. The original loan was for \$2,500.00, the loan and accumulated interest at the time of purchase by SunTrust was about \$5,000.00. At \$65.00 a month, Ms. Adams in essence would never have been able to pay it off in her expected life time.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

⁵ Indeed, Pennsylvania not only ignored the “red flags” raised by the plaintiff and her counsel, but threatened plaintiff counsel with sanctions if the case was not dismissed. Appendix000403-0404.

This case raises important issues regarding federal pre-emption and the West Virginia Consumer Credit and Protection Act, (WVCCPA) §46A-2-121. The Court would benefit from oral argument and the Plaintiff requests that oral argument be granted in this case.

STATEMENT OF FACTS

PLAINTIFF

Plaintiff was born in Florida in 1955. Appendix 000625, 000695. She lived with her mother and step-father, until he took a job overseas, sometime in the early 1980's. Appendix 000697-698. She was in a homeless shelter for a period of time, (Appendix 000698-699) and, in 1992, moved to West Virginia with a friend she met in Florida. Appendix 000705-707. In 1997 she was awarded SSI for minimal literacy, mild retardation and dependent personality disorder. Appendix 000712. Plaintiff did not graduate from high school (Appendix 000695), does not have a GED, and never attended college or vocational training. Appendix 000429, 000653 (high school grade record), Appendix 000795.

She remembers first being called about the loan and told them she had never been to school in Pennsylvania, and had not been in Pennsylvania. Appendix 000734-735. Karen testified that she began making payments because she didn't want to go to jail. Appendix 000737. Karen testified that she believed that someone had used her name, and reported it to the Nitro police, who laughed at her. Appendix 000739. She also reported it to the police in Florida. Appendix 000741. At her deposition, Karen was asked about a response from Pennsylvania which stated that it had made a "comprehensive review" of her account. Appendix 000756. Karen testified that she was also told that she could lose her SSI benefits, which at the time of her deposition were \$710.00. Appendix 000794.

THE 1986 LOAN FROM FLORIDA FEDERAL SAVINGS AND LOAN, INC.

Pennsylvania first produced only a promissory note purportedly signed by plaintiff in December 9, 1986. Appendix 000028. The note was made to Florida Federal Savings and Loan, for \$2,500.00, for a loan to finance an educational program. Later, after suit was filed, Pennsylvania produced an application also dated December 9, 1986, for schooling at “PTC Institute (RETS).”⁶ Appendix 000030. These documents raise more questions than are answered. The portion of the application for applicants’ handwritten personal information is illegible. The references are illegible. Section B shows that the claimant has no income, that the loan will be for \$2,500.00, that the estimated cost for the educational program, which is unidentified, is \$7173.00, the estimated financial aid for the period is \$1,400.00, family contribution is \$1,200.00 and the difference, presumably to be provided by the applicant, is \$4,573.00. There is no evidence that any of these amounts of money were actually paid by anyone. Portions of the documents, including section C of the application, and a portion of the back of the promissory note are obstructed. Appendix 000029. The passage of time has obviously complicated the ability of the parties to sort out the exact events at the time of the original loan.

These documents are not authenticated. They contain substantial areas which are illegible. Lastly, there is no evidence that any money was ever actually paid by the original lender, to the school. Discovery revealed an email dated July 7, 2012, in which Pennsylvania confirmed that it could not locate a cancelled check to show that the loan was actually paid to the PTC Institute (RETS). Appendix 000395, 000475. As of September 14, 2010, the amount of the loan with interest was \$5,441.60. Appendix 000455. Interestingly, the Department of Education

⁶ As will be shown below, in 1995 the United States Department of Education found that PTC Institute (RETS) was subject to a “blanket discharge” for fraudulently certifying that students would benefit from its programs, when it knew they would not. In 2014, plaintiff was contacted by ECMC on behalf of the department and, after application, the loan was forgiven.

at one point claimed having no records pertaining to Karen Adams. Appendix 000658. RETS was reported in August, 1987, to be bankrupt. Appendix 000189.

FLORIDA FEDERAL SAVINGS AND LOAN

Florida Federal was a failed savings and loan from the S&L crisis.⁸ In addition, Florida Federal and two executives were convicted in the early 1990's of fraudulently submitting 17,000 student loans to the Federal Government for payment as defaulted guaranteed loans under the student loan program. *United States v. Harmas*, 974 F.2d 1262, 1992 U.S. App. LEXIS 25155, 6 Fla. L. Weekly Fed. C 1215 (11th Cir. Fla. 1992). Florida Federal entered into a consent decree to repay the money to the government. Appendix 000225-229. The alleged loan to plaintiff was made during the time of the fraudulent activity.⁹ The plaintiff has attempted to locate the list through various FOIA requests but has not been able to get it. Appendix 000654-655. *See also*, Appendix 000665, 000675. One of the issues raised in *Harmas* was that a summary of the list of 17,000 loans was offered and admitted into evidence, rather than the entire list. It is not possible at this date to retrieve from the trial record a list of the 17,000 cases. Plaintiff has not been able to determine whether the Adams loan was one of the 17,000, although it was submitted to the United States Department of Education for payment as a guaranteed student loan on July 14, 1988. Appendix 000467. In short, the school was determined to be a fraudulent provider by the Department of Education in 1995, after the lender had been convicted of criminal fraud in 1990.

THE LOAN REHABILITATION PROCESS

⁸ *See*, Resolution Trust Company, news release re sale of Florida Federal Savings and Loan, Inc. assets, August 2, 1991, 1991 RTC LEXIS 471.

⁹ The period of time over which the illegal scheme operated was reported to be 9 months beginning in November, 1986. The "loan" here was allegedly made in December 1986.

In 2007 Ms. Adams was contacted by yet another government contractor, Collectcorp Corporation, regarding an outstanding balance on a student loan from 1986 of two thousand, five hundred dollars (\$2,500.00), which at that time had an accrued a balance of eight thousand, one hundred, twenty four dollars and 72 cents. (\$8,142.72). Appendix 000230-231 She agreed to make payments of eighty six dollars (\$86.00) per month beginning in September, 2007 and began making payments. The regulations provide a method under which the United States Department of Education can “rehabilitate” a defaulted loan. 34 CFR 682.405. These regulations allow a debtor to restore their credit and satisfy the terms of valid, enforceable loans. It is undisputed that Ms. Adams had not been contracted directly for payment prior to 2007. The plaintiff contends that she was told that if she did not begin making payments, she would lose her SSI benefits, so she began making payments.¹⁰ Appendix 000737, 000794. The call logs show that she consistently complained that the loan was fraudulent. It is difficult at this time to reconstruct what happened, but a reasonable inference is that persons unknown either used her identity information from the homeless shelter, or taking advantage of her mental and emotional state, had her sign forms for the loan, without having any intention of providing any services.¹¹ Clearly, Plaintiff nearly 30 years later and having her documented impairments has difficulty recalling the events.¹²

¹⁰ Plaintiff was first contacted by another company, which obtained a rehabilitation agreement. However, the call logs include statements by Pennsylvania representatives to the effect that the plaintiff was told her SSI would be taken if she did not make payments. As of at least March, 2010, the plaintiff, by her representative payee, was making payments of seventy eight dollars, 95 cents (\$78.95). Appendix 000241. Karen kept call records also, including the multiple companies involved in this transaction. Appendix 000632 *et seq.*

¹¹ The payment, if it were made, would have been to the school.

¹² The statute of limitations is not available as a defense as a matter of law in student loan collection cases. The extent of the abolition is not settled, as set forth later in this pleading.

The loan was “rehabilitated” by the Department of Education and sold to SunTrust, which in turn retained AES/Pennsylvania to collect the debt.¹³ Correspondence to Karen Adams, dated May 20, 2008. Appendix 000504.¹⁴ Pennsylvania contends that the loan was rehabilitated after the claimant made nine monthly payments of \$88.00.¹⁵ Pennsylvania did not make any independent investigation of confirm whether the loan was enforceable.

Under the rules and regulations, before a loan is considered rehabilitated the borrower must have made nine (9) payments. Ms. Adams testified that she was contacted by a government contractor, now known to be ECMC, to enter into a rehabilitation agreement. Ms Adams testified that she did so only because she was afraid she would be sent to jail if she didn’t and was told that if she didn’t she would lose her SSI benefits. Appendix 000737, 000794.

The regulation provides:

34 CFR 682.405 Loan rehabilitation agreement.

(a) General. (1) A guaranty agency that has a basic program agreement must enter into a loan rehabilitation agreement with the Secretary. The guaranty agency must establish a loan rehabilitation program for all borrowers **with an enforceable promissory note for the purpose of rehabilitating defaulted loans**, except for loans for which a judgment has been obtained, loans on which a default claim was filed under §682.412, and loans on which the borrower has been convicted of, or has pled *nolo contendere* or guilty to, a crime involving fraud in obtaining title IV, HEA program assistance, so that the loan may be purchased, if practicable, by an eligible lender and removed from default status.

(2) A loan is considered to be rehabilitated only after --

¹³ The loan was bought back by the Department of Education as non-performing, since the plaintiff stopped making payments after consulting with counsel. It was then forgiven.

¹⁴ Nothing in the correspondence from Pennsylvania advises the reader of the relationship between AES and Pennsylvania. 000214. On occasion the letterhead included SunTrust’s name. Appendix 000577.

¹⁵ The interest rate charged was 8%. Appendix 000543. After paying \$78.95 from June, 2008 to March, 2010, the principal had been reduced from \$6,126.41 to \$5,315.77. Thereafter, she was granted a temporary “hardship” forbearance, but interest continued to accrue, and as of September 9, 2011, the principal was back up to \$5,979.96. Appendix 000570.

(i) The borrower has made and the guaranty agency has received nine of the ten payments required under a monthly repayment agreement.

(A) Each of which payments is --

(1) **Made voluntarily;**

(2) In the full amount required; and

(3) Received within 20 days of the due date for the payment, and

(B) All nine payments are received within a 10-month period that begins with the month in which the first required due date falls and ends with the ninth consecutive calendar month following that month, and

(ii) The loan has been sold to an eligible lender.¹⁶

The agreement from the plaintiff to begin payments is dated October 4, 2007. The Department of Education sold, and SunTrust purchased, the loan as part of a bundle. However, as Ms. Adams contended below, and ECMC ultimately determined, the promissory note was not enforceable, and had not been at least since the date of the blanket discharge in 1995. Hence, the rehabilitation and subsequent sale to SunTrust, and the collection efforts of Pennsylvania, were in pursuant of voided loan. The loan was invalid.

This failure should not come as a surprise to Pennsylvania, given its expertise in the field. It should not fall to Plaintiff to pay for the failure of Pennsylvania to exercise due care in the collection of this loan. Pennsylvania certainly knew that the reaffirmation was not valid, as indeed, it knew that a crucial element of a valid contract, payment of consideration, could not be proven here. Appendix 000395, 000475.

¹⁶ See also 20 USCS §1078-6, “(a) Other repayment incentives. (1) Sale or assignment of loan. (A) In general. Each guaranty agency, upon securing 9 payments made within 20 days of the due date during 10 consecutive months of amounts owed on a loan for which the Secretary has made a payment under paragraph (1) of section 428(c) [20 USCS §1078(c)], shall-- (i) if practicable, sell the loan to an eligible lender...” See also, “The federal loan rehabilitation program into which Ellis and Hamilton entered allows a borrower in default to make a certain number of payments, at which point the default status on the borrower’s credit report will be removed, and the loan will be resold to a new lender.” *Ellis et al v GRC*, RULING ON MOTION FOR CLASS CERTIFICATION AND MOTION FOR SUMMARY JUDGMENT 3:09-cv-1089 (USDC Conn. March 23, 2011.)

The purchase agreement between SunTrust and the United States Department of Education provides:

Delivery of Loans. ED either has delivered or will deliver to the Lender all the necessary data to service the Loans in compliance with the Act, including, but not limited to the following: an electronic file containing the borrower's and co-signer's/co-maker's: social security number, name, address, telephone number, original Loan amount, disbursement date, identification number for each Loan, interest rate, qualifying monthly payment amount, interest accrued through sale date, total principal amount outstanding, **and two references**. ED shall also provide a Bill of Sale Roster and listing of Loans that accurately reflects the principal balance and interest outstanding on the Loans as of the sale date. Paragraph 3, Federal Rehabilitation Loans Lender Participation Agreement, Exhibit B to Memorandum of Law. Emphasis added. Appendix 000192.

Defendants have not provided the identity of the two references required under the agreement. This is not a trivial issue in the current case. The plaintiff is living on approximately \$710.00 a month Supplemental Security Income benefits, based on mild retardation, minimal literacy and psychological problems.

The agreement further provides,

4. Representations and Warranties. ED and Lender each represent that this Agreement is duly executed by their authorized representatives, and is a valid, binding obligation of each party enforceable in accordance with its terms. ED further represents that the Loans are not subject to any liens or encumbrances; that as of the date of sale **the Loans in the sale portfolio are eligible for guarantee**; that the Loans bear the interest rate, **and are entitled to the benefits**, in accordance with the requirements of the Higher Education Act of 1965, as amended (the "Act"), for loans of that type; that any information on Loan balances and periods of prior deferments provided to Lender with respect to the Loans is accurate, but that ED agrees that absent information to the contrary, the Lender may consider all borrowers entitled to all deferments; that the Loans, as of the sale date, are not more than thirty (30) days overdue in payment of principal or interest; that the Loans qualify for sale under the provisions set forth in Section

428F of the Act and applicable rules and regulations issued by the Secretary of Education there under; that Lender has 'discretion to establish a repayment schedule designed to pay off the Loan **within the time period appropriate for the particular Loan type beginning with the first of the nine full payments received by ED that qualified the Loans for sale under Section 428F of the Act.** Paragraph 3, Federal Rehabilitation Loans Lender Participation Agreement, Exhibit B to Memorandum of Law. Emphasis added. Appendix 000192-193

In short, the foundation of the rehabilitation, subsequent sale to SunTrust and collection efforts by Pennsylvania all rest on the enforceability of the original loan. In light of the finding of the Department of Education in 1995 that there was a blanket discharge, the loan, and the subsequent rehabilitation and sale, and efforts of Pennsylvania have no basis in law or fact. There was no loan to collect.

THE PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY

Defendant is the Pennsylvania Higher Education Assistance Agency, d/b/a American Education Services. Pennsylvania Higher Education Assistance Agency (Pennsylvania) is an agency of the Commonwealth of Pennsylvania. It is registered with the West Virginia Secretary of State under American Education Services as a non-profit corporation.¹⁷ Pennsylvania was created in 1963, and its activities are governed by Pa. Code 22 § 121, et seq. This agency is a very sophisticated, large organization.¹⁸ Shelly Bowman testified

¹⁷ <http://apps.sos.wv.gov/business/corporations/organization.aspx?org=212961>. The Secretary of State's website indicates that the registration was terminated December 31, 2014, for failure to file an annual report.

¹⁸ The penetration of Pennsylvania in the student loan collection business is reflected in the many jurisdictions in which it is of record in litigation: *Pennsylvania Higher Education Assistance Agency v. Kaminsky*, 08-402-GPM. Dist. Court, SD Illinois 2014; *Oberg v. PENNSYLVANIA HIGHER EDUC. ASSIS. AGENCY*, 745 F. 3d 131 - Court of Appeals, 4th Cir; *Hedlund v. Educational Resources Institute Inc.* and Pennsylvania Higher Education Assistance Agency, 718 F. 3d 848 - Court of Appeals, 9th Circuit 2013; *In re Rumer*, 469 BR 553 - Bankr. Court, MD Pennsylvania 2012; *OGUNMOKUN v. AMERICAN EDUCATION SERVICES/PHEAA*, Dist. Court, ED New York 2014; *PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY v. Reinhart*, Dist. Court, ED Tennessee; *IN RE REYNOLDS*, Bankr. Court, ED Michigan 2013; *US EX REL. OBERG v. PENNSYLVANIA HIGHER EDUCATION AUTHORITY*, Civil Action No. 01:07-cv-960, United States District Court, E.D. Virginia; *Solis v. TRANS UNION LLC and FEDLOAN SERVICING*, Dist. Court, ND California 2013 (FedLoan Servicing is fictitious)

that she is employed at Pennsylvania and is Assistant Vice President of Loan Operations. Appendix 001381. She is an employee of the Commonwealth of Pennsylvania. Appendix 0001382. She has been employed by Pennsylvania for 22 years. Appendix 0001383. Pennsylvania services 58 billion dollars in commercial loans and 90 billion dollars in federal loans. Appendix 001410. The servicing includes all loans, delinquent and current. Another witness, David Heckard, testified for Pennsylvania. Likewise an employee of Pennsylvania, he works in the investigation unit of Pennsylvania. Appendix 001340. Heckard testified that approximately two thousand people work for all divisions of PHEAA. Appendix 001365. Heckard testified that the state agency started in the 1960's and grew from there. Appendix 001365.

Bowman testified that as a loan servicer, Pennsylvania would not verify any payments or other events that occurred with a loan before Pennsylvania started servicing the loan. Appendix 001408. Heckard also testified that he investigated the loan made to Karen Adams, and that, to his understanding,

Under -- well, with the preparing of the report, the -- it determines -- it says in the regulation how somebody can be discharged from a student loan, and it makes note that, you know, that there must be a notarized statement and a criminal or civil judgment that shows that the person alleging student loan fraud was shown as a victim in a civil or criminal judgment, and that the perpetrator has been arrested or -- along those lines.

Appendix 001343-1344.

Heckhardt later agreed that it would be difficult for Karen Adams to meet that standard, given the passage of time. Appendix 001359. He testified that he did not know of any other collections older than the Adams collection. Appendix 001359 Heckard testified that he

business statement of the Pennsylvania Higher Education Assistance Agency, which is a statutorily-created instrumentality of the Commonwealth of Pennsylvania (PHEAA), among many others.

identifies himself as “AES State Investigator,” that he carries a gun and non-lethal weapons, Id. page 26, and that he had been to West Virginia in the course of his work. Appendix 001344-1345.

Shelly Bowman described a sophisticated system to record information regarding calls to and from debtors. She testified that they use an automated calling system, Appendix 001389-001393. She testified that if a borrower fails to answer the system makes a notation that the call was not answered.

This state agency reports managing over \$327,000,000,000 in loans in 2014, with an operating income (operating revenues less operating expenses) of \$221,944,000.00¹⁹ In short, Pennsylvania is a very large, if not the dominant, participant the student loan servicing business, and a very sophisticated operation. It is currently not licensed in West Virginia, due to failure to file a non-profit report, but appears to represent the “non-profit” corporation which indeed produces substantial “profit” for its managers and own use.

THE LOAN COLLECTION EFFORTS

The phone log produced by Pennsylvania showed 82 phone contacts between June 17, 2008, and February 8, 2012. The following contacts, a portion of the total, show significant information being given to Pennsylvania::

1. 06/02/08 phone contact borrower advised that rehab process with ECMC was complete, **borrower stated she never graduated from high school, never went to college, loan not hers...** Appendix 000294.
2. 01/20/09 phone contact, caller advised loan was taken out in her name fraudulently, **advised borrower that if she did not fill out the paperwork she would lose her rights.** Appendix 000298.
3. 07/13/10 borrower advised never attended school, advised borrower to contract school Appendix 000330

¹⁹ <https://www.pheaa.org/about/pdf/financial-reports/annual/2014AuditedFinancialStatements.pdf>, pages 5 and 9.

4. 07/13/10 phone contact plaintiff advised loan was not fraudulent Appendix 000331
5. 07/15/10 phone contact plaintiff advised we do not believe it is fraud Appendix 000333
6. 07/23/10 phone contact plaintiff advised fraud packet finished and loan is hers Appendix 000336
7. 09/09/10 fraud claims deemed unfounded Appendix 000340
8. 10/01/10 fraud summary Appendix 000345
9. 10/28/10 **phone contact advised borrower she is responsible, SSI could be garnished** Appendix 000347
10. 10/28/10 fraud packet denied Appendix 000349
11. 02/22/11 file note re disability application Appendix 000364
- 12.
13. 06/15/11 phone contact advised borrower loan was hers Appendix 000369
14. **08/09/11 phone contact advised she has attorney** Appendix 000374; Appendix 000376
15. 08/12/11 file note re request for documents Appendix 000376.
16. 08/19/11 phone contact advised borrower of consequences of default Appendix 000377
17. 08/19/11 per conference with VIP there is no fraud Appendix 000380
18. **09/08/11 Fax from Skaggs/Carnegie to AES** Appendix 000382
19. 09/28/11 phone contact, borrower requested payment history Appendix 000383
20. 09/29/11 response to attorney disproved fraud allegation Appendix 000384
21. 10/07/11 phone contact Appendix 000386
22. 10/29/11 answering machine message Appendix 000387
23. 11/04/11 phone contact Appendix 000388
24. 12/27/11 phone contact (dead air) Appendix 000389
25. 01/10/12 left message with third party Appendix 000390
26. 01/26/12 called, phone out of service Appendix 000391
27. **02/15/2012 Complaint Filed**
28. 02/21/12 called third party left message
29. 02/28/12 phone contact

Emails produced also show that Pennsylvania could not locate evidence that the funds had ever been dispersed:

1. 04/27/12 email SunTrust has received summons and needs evidence of disbursement PHEAA000183 Appendix
2. 05/14/12 SunTrust attorneys request proof of payment back to beginning Appendix 000394

3. 6/28/12 email requesting copy of disbursement check to school PHEAA000186 Appendix 000395
4. **7/3/12 email stating that AES/PHEA cannot confirm disbursement of loan** Appendix 000395, 000475.

The file shows that the SSI determination was received February 22, 2011. Stamped received copy of Disability Determination, Appendix 000429, 000146. In addition to the phone calls, Karen Adams wrote Pennsylvania on multiple occasions describing her impairments, financial difficulty and reasons for claiming the loan was not hers. Appendix 000418, 000421, 000424, 000465.

Ultimately, Karen stopped making payments in 2012, and the loan was again placed in default. During litigation, as set forth below, the loan was finally forgiven. Appendix 00066, Appendix 000675. Under the process, when a loan is deemed in default, it is repurchased from the holder, in this case SunTrust.

THE “BLANKET DISCHARGE” LIST

Long after the initiation of this case, Plaintiff was contacted by a government contractor, Educational Claims Management Corp. (ECMC), regarding the discharge of her loan. The date of the contact was February 24, 2014. Appendix 000116-117. The basis of the discharge was plaintiff was not a high school graduate, did not obtain a GED, and the school which she was purported to have attended, PTC Institute (RETS), was on a United States Department of Education list of “blanket discharge” schools Appendix 000116. The application was “pre-populated” by ECMC. Ms. Adams signed the form and returned it. Ultimately, she was refunded the total amount that she had paid to ECEM and Pennsylvania in the attempt to collect the debt, less interest.

The basis of the discharge was that the initial loan in 1986 was not valid because Ms. Adams did not have a high school diploma or a GED, and could not benefit from the proposed educational program.²⁰ The school had been found to have committed pervasive and serious violations of Ability to Benefit Regulations. By letter dated June 30, 1995, the Department of Education so designated the school at issue here, PTC Institute (RETS). Appendix 000125, 001430. Pennsylvania had been provided with a copy of the petition asking that the school be found to engaged in fraudulent practices on March 7, 1995 and another on May 24, 1995. Appendix 000131, 000140.

The initial contact with Ms. Adams in this case was in 2007 and the initial contact by Pennsylvania was in 2008. Hence, 13 years before Pennsylvania began its collection effort, the school has been designated by the United States Department of Education as presumptively unable to demonstrate the plaintiff would benefit from its educational program.

Ms. Adams had provided ECMC and Pennsylvania with a copy of her Social Security Disability ruling which showed that she was not a high school graduate and did not have a GED. Appendix 000429.

Therefore, Pennsylvania knew or should have known that Ms. Adams did not have a GED or high school diploma. It knew that the school at issue was PTC (RETS) from the loan application. It knew that the originating lender was Florida Federal Savings and Loan. It therefore knew that it was pursuing an invalid loan in its collection activity against Ms. Adams, that at the least, the loan was likely to be fraudulent.

ARGUMENT

²⁰ The Court will recall that the educational program which the loan allegedly paid for has never been identified.

PLAINTIFF'S CLAIMS

It would be helpful to state the basis of the plaintiff's claim as it stands following the completion of discovery. The claimant seeks statutory relief for the conduct of Pennsylvania in collecting this debt from her. This is not a claim for fraud, fraudulent inducement, breach of contract or other type of claim. It is limited to the relief available under the statute for unconscionable debt collection practices. The statute provides:

§46A-2-127. Fraudulent, deceptive or misleading representations.

No debt collector shall use any fraudulent, deceptive or misleading representation or means to collect or attempt to collect claims or to obtain information concerning consumers. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:

...

(d) Any false representation or implication of the character, extent or amount of a claim against a consumer, or of its status in any legal proceeding;

(e) Any false representation or false implication that any debt collector is vouched for, bonded by, affiliated with or an instrumentality, agent or official of this state or any agency of the federal, state or local government;

§46A-2-128. Unfair or unconscionable means.

No debt collector shall use unfair or unconscionable means to collect or attempt to collect any claim. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:

...

(e) Any communication with a consumer whenever it appears that the consumer is represented by an attorney and the attorney's name and address are known, or could be easily ascertained, unless the attorney fails to answer

correspondence, return phone calls or discuss the obligation in question or unless the attorney consents to direct communication.

§46A-5-105. Willful violations.

If a creditor has willfully violated the provisions of this chapter applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice, in addition to the remedy provided in section one hundred one of this article, the court may cancel the debt when the debt is not secured by a security interest.

§46A-5-106. Adjustment of damages for inflation.

In any claim brought under this chapter applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice, the court may adjust the damages awarded pursuant to section one hundred one of this article to account for inflation from the time that the West Virginia consumer credit and protection act became operative, specifically 12:01 a.m. on the first day of September, one thousand nine hundred seventy-four, to the time of the award of damages in an amount equal to the consumer price index. Consumer price index means the last consumer price index for all consumers published by the United States department of labor.

Plaintiff contends that the conduct of Pennsylvania constituted a violation of the West Virginia Statute and therefore is entitled to statutory damages, as adjusted for inflation. The specific violations are continuing to contact the plaintiff by telephone after Pennsylvania knew she was represented and collected the debt without confirming that the original loan had in fact been disbursed.

Discovery disclosed that in an email dated May 14, 2012, Pennsylvania for the first time attempted to find out if the alleged loan had in fact been paid and discovered that it could not show disbursement of the funds. Appendix 000394. The call log produced in discovery shows that the first call was made June 2, 2008, (Appendix 000294) and the last call was February 28,

2012. Appendix 000395.²¹ Pennsylvania was first put on notice that plaintiff was represented on August 9, 2011. Appendix 000376. Plaintiff alleges that Pennsylvania acted in an unconscionable manner in the following ways:

1. Failing to determine whether this rehabilitated loan was in fact “enforceable” as required by the governing regulations;
2. Failing to determine whether funds had been disbursed pursuant to the alleged loan in 1986;
3. Contacting plaintiff by telephone after Pennsylvania had been advised that she was represented by counsel ;
4. Contacting plaintiff by telephone after Pennsylvania had been sued;
5. Accepting payments totaling \$1,600.00 from plaintiff’s social security representative;
6. Continuing to contact and demand payment from plaintiff after receiving the Social Security Disability determination which found that plaintiff required a representative payee, and was mildly retarded, minimally literate, and suffering from dependent personality syndrome.

Each of these is a clearly a genuine issue of material fact. The state defines contacting a debtor after notice of attorney representation as unconscionable. It is also unconscionable that Pennsylvania proceeded to collect this loan in the face of clear evidence that the original loan could not be proven.

²¹ A question of fact is apparent on the face of the record regarding the call practices. Shelly Bowman testified that automated calls which are not answered are noted on the computer log. However, the log produced by Pennsylvania contains no references to unanswered calls. Karen Adams, on the other hand, testified that she maintained a list of unanswered calls, which shows calls made to her and identified by caller id, which she did not answer. Appendix 000632 *et seq.*

This only further supports the claim that pursuing this loan, which Mr. Heckard testified was the oldest he worked on,(Appendix 001359) was unconscionable. Plaintiff had submitted credible and un-contradicted evidence from her social security proceeding that she has mental retardation and autism, received February 22, 2011, marginal literacy, migraine headaches, severe hypertension, and dependent personality traits. The Social Security Administrative Law Judge also required the appointment of a representative payee, based on inability to manage money. Despite this notice, Pennsylvania continued to deal with Karen directly, and collected in excess of \$1,600.00 dollars from her. The failure of Pennsylvania to consider the documented impairments demonstrated by the Social Security finding, which it had in its possession since at least February 22, 2011 is unconscionable. Equally unconscionable is its conduct in raising these issues now, after failing to take any effort to investigate either the disbursement of the underlying loan until after it was sued, and failing to take into consideration the findings of the Administrative Law Judge. That Pennsylvania takes this approach only confirms Plaintiff's claim that the State agency operates without any restraint whatsoever in collecting debts.

**WEST VIRGINIA LAW DOES NOT
SUPPORT THE PRE-EMPTION OF FEDERAL LAW IN A CASE
WHERE THE UNDERLYING STUDENT LOAN WAS NOT VALID,
AS DETERMINED BY THE UNITED STATES DEPARTMENT OF
EDUCATION**

The law in West Virginia regarding preemption has been stated numerous times:

1. "The Supremacy Clause of the United States Constitution, Article VI, Clause 2, invalidates state laws that interfere with or are contrary to federal law." Syllabus Point 1, *Cutright v. Metropolitan Life Ins. Co.*, 201 W.Va. 50, 491 S.E.2d 308 (1997).
2. "When it is argued that a state law is preempted by a federal law, the focus of analysis is upon congressional intent. Preemption is compelled whether Congress' command is explicitly stated in

the statute's language or implicitly contained in its structure and purpose." Syllabus Point 4, *Morgan v. Ford Motor Co.*, 224 W. Va. 62, 680 S.E.2d 77 (2009).

3. "To establish a case of express preemption requires proof that Congress, through specific and plain language, acted within constitutional limits and explicitly intended to preempt the specific field covered by state law." Syllabus Point 6, *Morgan v. Ford Motor Co.*, 224 W. Va. 62, 680 S.E.2d 77 (2009).

4. "There are two recognized types of implied preemption: field preemption and conflict preemption. Implied field preemption occurs where the scheme of federal regulation is so pervasive that it is reasonable to infer that Congress left no room for the states to supplement it. Implied conflict preemption occurs where compliance with both federal and state regulations is physically impossible, or where the state regulation is an obstacle to the accomplishment or execution of congressional objectives." Syllabus Point 7, *Morgan v. Ford Motor Co.*, 224 W. Va. 62, 680 S.E.2d 77 (2009).

Syllabus Points 1- 4, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250, 2011 W. Va. LEXIS 61, 2011 WL 2611327 (W. Va. 2011); Syllabus Point 21 reversed, by *Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 729 S.E.2d 217, 2012 W. Va. LEXIS 311, 2012 WL 2196090 (W. Va. 2012)

The application of these well established provisions regarding preemption to the case leads to the conclusion that the West Virginia Consumer Credit and Protection Act, (WVCCPA) §46A-2-121 is not preempted in this case. There is nothing inconsistent with the application of the WVCCPA in a case where the United States Department of Education has deemed the student loan discharged due to fraud by the school.

The Federal Statute provides:

20 U.S.C. §1091a. Statute of limitations and State court judgments
(a) In general.

(1) It is the purpose of this subsection to ensure that **obligations to repay loans and grant overpayments are enforced without regard to any Federal or State statutory, regulatory, or administrative limitation on the period within which debts may be enforced.**

(2) Notwithstanding any other provision of statute, regulation, or administrative limitation, **no limitation shall terminate the**

period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by--

(A) an institution that receives funds under this title that is seeking to collect a refund due from a student on a grant made, or work assistance awarded, under this title;

(B) a guaranty agency that has an agreement with the Secretary under section 428(c) [20 USCS §1078(c)] that is seeking the repayment of the amount due from a borrower on a loan made under part B of this title [20 USCS §§1071 et seq.] after such guaranty agency reimburses the previous holder of the loan for its loss on account of the default of the borrower;

(C) an institution that has an agreement with the Secretary pursuant to section 453 or 463(a) [20 USCS §1087c or 1087cc(a)] that is seeking the repayment of the amount due from a borrower on a loan made under part D or E of this title [20 USCS §§1087a et seq. or §§1087aa et seq.] after the default of the borrower on such loan; or

(D) the Secretary, the Attorney General, or the administrative head of another Federal agency, as the case may be, for payment of a refund due from a student on a grant made under this title, or for the repayment of the amount due from a borrower on a loan made under this title that has been assigned to the Secretary under this title.

The regulations are of course much broader. 55 Fed. Reg. 40120 is an interpretive statement by the Department of Education published in 1990.²² The very purpose of the regulation pertains to student **guaranteed** loans. The Summary says:

SUMMARY: The Secretary interprets regulations issued for the Stafford Loan Program (formerly the Guaranteed Student Loan Program), the Supplemental Loans for Students (SLS) Program, the PLUS Program, and the Consolidation Loan Program, collectively referred to as the Guaranteed Student Loan (GSL) Programs, **that prescribe the actions lenders and guarantee agencies must take to collect loans guaranteed under the GSL Programs.** The substance of the interpretation is that these regulations preempt State law regarding the conduct of **these loan collection activities.** Emphasis added.

²² The defendants offer no explanation for their failure to act on this loan, if in fact it exists, from 1986 until 2007, despite the fact that it relies on regulations enacted beginning in 1986 to make its claim 25 years later. Plaintiff was awarded Social Security Supplemental Income Benefits for mental retardation, illiteracy and dependant personality traits in 1997, so the Federal Government has long known where she lives. The decision notes that she first applied for benefits in 1987. Appendix _____.

The supplementary information in the interpretive statement reads,

Questions have recently arisen about whether regulations issued by the Secretary to prescribe the actions that lenders must take to exercise due diligence in collecting delinquent GSL obligations, 34 CFR 682.411, and that guarantee agencies must take to collect defaulted GSL obligations, 34 CFR 682.410(b)(4), preempt State law. **The Secretary issues this interpretation that 34 CFR 682.410(b)(4) and 34 CFR 682.411 preempt State law, including State case law, statutes, and regulations that are inconsistent with the provisions of these GSL regulations.** Emphasis added.

The very first issue is whether this is a student loan. The language of the policy quoted above refers to “loan collection activities.” It says nothing about the determination of whether, in the first instance, a loan exists. This authority does not support the argument that the determination of the existence of a contract is preempted. Regulation of “loan collection activities” are preempted, not the determination of the existence of contract under well established principals of contract law. In light of the determination of the Department of Education that this loan was subject to a blanket discharge, there is no federal collection with which to interfere. Further, they are only preempted where the loan is **valid**. Here, the loan was deemed invalid by the Department of Education years before Pennsylvania undertook to collect it.

There was no evidence that the alleged loan that it was ever consummated, much less was made for an educational purpose. It is now conclusive that the loan was subject to a pre-existing finding by the United States Department of Education that the school referenced in the loan at issue here was engaged in fraudulent activity. There is no evidence that the loan was approved, whether the amount of the loan was \$2,500.00 or some lesser amount, and whether the loan had in fact been paid. With the discovery of the blanket discharge, it is undisputed that the loan in fact had NO educational purpose.

Again, the condition predicate to the application of the statute is that the loan be for an **educational purpose**. There has to be a “loan obligation.” Here, there was no obligation at the time of the collection activity, because the United States Department of Education had deemed the loan fraudulent, and issued the “blanket” discharge.

Evidence that the preemption claimed by the defendants is limited and not broad is found in 20 C.F.R. §682.410, Fiscal, administrative, and enforcement requirements. Section 8 thereof states:

(8) Preemption of State law. The provisions of paragraphs (b)(2), (5), and (6) of this section preempt any State law, including State statutes, regulations, or rules, that would **conflict with or hinder satisfaction** of the requirements of these provisions.

20 C.F.R. 20 C.F.R. §682.410(b)(2) pertains to collection charges. (b)(5) pertains to the requirement for guaranty agencies to report insurance payments to consumer reporting (credit) agencies; (b)(6) pertains to collection agencies. Likewise, the preemption language in §682.411, Lender due diligence in collecting guaranty agency loans, does not address the issue of the determination of the existence of a valid contract. Nothing in these sections says a party subjected to collection efforts based on a loan subject to a blanket discharge is barred from proceeding against the collection agency.

Additional evidence that preemption does not apply is found in the Federal Fair Debt Collection Practices Act, which the Department of Education states applies to the activities of collectors of federal educational debt. This act states,

§816. Relation to State laws

This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with

any provision of this title, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title. 15 USC 1692 n.

Again, the preemption applies only to debt collection laws and only to the extent they are inconsistent with the federal law. There is no mention of preemption of actions taken by consumers against entities which collect loans, where there is as a matter of law no loan to collect.

Applying the principals of *Brown I* regarding preemption, state law in this case does not interfere with federal law in any way. Indeed, taken together, it is consistent. Plaintiff is arguing that where the underlying loan was not valid, claims under the WVCCPA are not preempted. Congress' explicit statement is that preemption is limited only to statutes of limitation. Finally, there is no evidence of implicit field preemption where the terms of the preemptive statute are limited to statutes of limitation, and the operation of state law in this instance not only does not conflict with but compliments the federal action. The Federal Government has no interest in the subsidy of fraudulent schools. Preemption in this case would only serve to benefit fraudulent loans.

**THE "REAFFIRMATION" OR NOVATION UPON
WHICH DEFENDANTS RELY IS NOT VALID BECAUSE
IT MUST BE BASED ON A VALID ORIGINAL CONTRACT OF INDEBTEDNESS**

Defendants rely on a reaffirmation or novation which they obtained in 2008. As alleged in the complaint, Plaintiff made payments because she was threatened with the loss of her social security supplemental income check if she did not do so. See Appendix 000478, et seq. for a listing of payments. As Defendants point out, for purposes of this motion, the Court must take this allegation as true.

In West Virginia, a novation is defined as follows:

1. “Novation is generally defined as a mutual agreement among all parties concerned for discharge of a **valid existing obligation** by the substitution of a new binding obligation on the part of the debtor or another. Thus, the necessary elements of a novation are (a) a **previous valid obligation**, (b) a **consent by all parties to the new contract**, (c) an **abatement of the old contract** and (d) a **new contract which is valid and enforceable**. Without any of these essential elements, there is no novation.” Syl. Pt. 2, *Perlick & Co. v. Lakeview Creditor’s Trustee*, W. Va. , 298 S.E.2d 228 (1982). Cited in *Ray v. Donohew*, 177 W. Va. 441, Syl. Pt. 1.

The reaffirmation on which Defendants rely must be based on a **previous valid obligation**. Here, as set forth above, there is no previous valid obligation. Under the law and facts as alleged, the 2008 “agreement” is null and void. Further, fraud and duress is always a defense. Here, the complaint alleges fraud and duress and in the obtaining of the reaffirmation.

THERE IS GOOD CAUSE TO BELIEVE THAT THE 1986 LOAN IS THE RESULT OF FRAUD AND/OR THERE IS NO FEDERAL GOVERNMENT GUARANTEE OF THE LOAN DUE TO FRAUDULENT CONDUCT BY FLORIDA FEDERAL SAVINGS AND LOAN, INC.

As set forth above, the alleged loan was made by Florida Federal Savings and Loan, Assn. on December 9, 1986. In 1988, two executives and Florida Federal were indicted for fraudulently submitting 17 thousand student loans to the federal government for guarantee payments as non-performing loans.²³ The period of time during which the fraud was perpetrated was at least November, 1986 to June, 1987. The 1990 criminal convictions were upheld on appeal. *United States v. Hamas*, 974 F2d 1262.

²³ Plaintiff’s counsel has requested the list through FOIA and was told by the United States Department of Education that it did not have the list of 17,000 fraudulently submitted loans.

Crucially, the loans which were submitted and for which guarantee payments were made by the government were the subject of a restitution agreement between Florida Federal and the government, such that the money was repaid by Florida Federal. Appendix 000225 *et seq.* Thus, it is highly likely that this loan, even if it were the subject of a claim for coverage by a guarantee agency, was covered by the restitution agreement. In light of the uncertainties surrounding this transaction, the Court cannot take it on faith that the December 9, 1986, loan here was in fact a valid student loan, which was the subject of a guarantee payment by the government. See, *Eric Stattin, et al, Plaintiff v. Resolution Trust Corporation*, 883 F. Supp. 678; 1995 U.S. Dist. LEXIS 6036, for a general description of the seizure of Florida Federal.

**DEFENDANT DID NOT MEET
THE MINIMUM REQUIREMENTS FOR
FEDERAL REGULATIONS PERTAINING TO
STUDENT LOANS AND THEREFORE IS NOT
ENTITLED TO PREEMPTION**

As set forth in the following, while plaintiff does not concede the applicability of the regulations in this case, in light of defendants reliance on them, it may help the Court to have a brief review of the applicable standards. Clearly, there is nothing about the conduct of defendant here which is defensible under the federal standards.

The PCA Procedures Manual, 2009, states, “The Manual establishes many of the day-to-day procedures and policies necessary for Private Collection Agencies to collect defaulted federal student loans and grant overpayments under the U. S. Department of Education collections contract.” Appendix 001431 The PCA specifically states that while the Federal Fair Debt Collections Practices Act does not apply to government employees, it does apply to collection agencies. Page 19. Regarding contact, the PCA provides:

Cease collection activity requires the PCA to stop all collection activity, letters, phone calls, and contact with the borrower or employer. Cease collection activity is different from the suspension of collection activity in that suspension is temporary. Ceasing collection activity typically occurs when the borrower requests in writing that the PCA stop all communications with them. In such cases the PCA is allowed *one final contact*. Page 32.Appendix 001433.

The conduct here is in stark contrast to that in the government standards and the referenced cases. If defendants are acting as government contractors on this loan, they have clearly violated the standards required for such contracts by the Department of Education. It further confirms that the application of state law here is not contrary to the implementation of the federal process.

The Fair Debt Collections Practices Act clearly prohibits the conduct by defendants in this case, including the continued contact with a represented debtor, which is prohibited by 15 U.S.C. 1692c(a)(2); making phone calls with the intent to annoy, abuse or harass, 15 U.S.C. 1692d(5); false representation of the status of the character, amount or legal status of the debt, where defendants cannot show the original debt is valid and have reason to believe it is fraudulent; 15 U.S.C.1592e(2)(A) and other sections of the Act.

The relevant sections of the regulations require defendants to use “due diligence” in the collection of a student debt. The first question of course is whether the debt is valid. Minimal due diligence would reveal that the single page relied upon by defendants is inadequate to support the claim of a contract. Minimal research would lead to the 1990 convictions and the restitution agreement. Defendants exercised no due diligence in investigating the validity of the underlying claim.

34 CFR § 682.411 (2) provides:

At no point during the periods specified in paragraphs (c), (d), and (e) of this section may the lender permit the occurrence of a gap in collection activity, as defined in paragraph (j) of this section, **of more than 45 days (60 days in the case of a transfer).**

Here, defendants show that no payments were made on the alleged loan from 1986 to 2008. Hence, defendants failed likewise to meet the mandatory requirements of the regulations requiring their diligence in collecting the debt.²⁵

Defendant seeks the protection of the federal law but have blatantly violated it. Here, plaintiff denies the loan. The paperwork produced to date does not reflect the education purpose of the loan, much less that the lender complied with the provisions of the applicable regulations

²⁵ There are also minimum educational requirements for a borrower to be eligible for loans:
(13) Requirements for certifying a borrower's eligibility for a loan. (i) For periods of enrollment beginning between July 1, 1987 and June 30, 1991, a student who had a general education diploma or received one before the scheduled completion of the program of instruction is deemed to have the ability to benefit from the training offered by the school.

(ii) A student not described in paragraph (e)(13)(i) of this section is considered to have the ability to benefit from training offered by the school if the student—

(A) For periods of enrollment beginning prior to July 1, 1987, was determined to have the ability to benefit from the school's training in accordance with the requirements of 34 CFR 668.6, as in existence at the time the determination was made;

(B) For periods of enrollment beginning between July 1, 1987 and June 30, 1996, achieved a passing grade on a test—

(1) Approved by the Secretary, for periods of enrollment beginning on or after July 1, 1991, or by the accrediting agency for other periods; and

(2) Administered substantially in accordance with the requirements for use of the test;

(C) Successfully completed a program of developmental or remedial education provided by the school; or

(D) For periods of enrollment beginning on or after July 1, 1996 through June 30, 2000—

(1) Obtained, within 12 months before the date the student initially receives title IV, HEA program assistance, a passing score specified by the Secretary on an independently administered test in accordance with subpart J of 34 CFR part 668; or

(2) Enrolled in an eligible institution that participates in a State process approved by the Secretary under subpart J of 34 CFR part 668. See, 34 CFR §682.402(e)(13). Defendants have here offered no evidence that their due diligence disclosed plaintiff qualified for a loan, such that it was ever approved or accepted.

pertaining to collection of student loans. It is an unfair practice to collect money under a novation obtained by false threats based on an underlying obligation/loan? which cannot be proven.

Despite their efforts to find protection in the federal law, defendants fail to note for the Court that their handling of this debt violates those standards. The policies governing the collection of these federal loans specifically state that the Federal Fair Debt Collections Practices act applies to these cases. Further, the making of calls, misrepresentation of the legal rights, the pursuit of a “non-contract” all amount to fraudulent consumer transactions. There is nothing technical or trivial about defendants continuing to contact plaintiff by telephone after she told them she was represented by a lawyer.

As set forth below in more detail, plaintiff finds that the documents provide more questions than answers. There is still no evidence that the original lender did in fact pay money to an educational provider at the time of the loan. There is no evidence that plaintiff received educational services or would at the time of the loan benefit from any educational program. The additional documents do not show evidence of the existence of a contract, including offer, acceptance and payment of consideration, in 1986. In addition, the documents provided regarding the alleged “rehabilitation” of the loan by the Department of Education and its sale to SunTrust did not conform to the regulations and the terms of the sell, and therefore are invalid. The sales document provided by SunTrust on its face states that the loan has been rehabilitated by the debtor making nine (9) monthly payments before the sale. As set forth below in more detail, the records provided by defendants show that no payments were made by plaintiff until after the transfer. The sale by the Department of Education to SunTrust is therefore null and void.

In order for the reaffirmation/notation to be valid, under both common law and regulations governing the reaffirmation, the original loan must be valid.²⁷ In this case, there is no evidence to show the loan is valid, due to the absence of evidence of payment and plaintiff's lack of capacity. As the Court is aware from the Social Security disability finding previously filed, the Federal Government required plaintiff to have a representative payee in 1997, when benefits were granted for mild mental retardation, marginal illiteracy and dependant personality disorder. Defendants have not shown that all of the elements of a valid contract have been met. Since there is no valid student loan, the statutory West Virginia Debt Collection Act applies.

In short, defendant below failed to show that the loan in 1986 was valid, that plaintiff would benefit from the educational program and that indeed any money was actually paid by the failed Florida Federal Savings and Loan. Further, the reaffirmation is on its face invalid. The loan was not rehabilitated, which is a condition precedent to its sale. There are no references identified. The government determined ten (10) years before that plaintiff required a representative payee due to her inability to manage her affairs.

These documents also demonstrate the grave prejudice suffered by plaintiff as a result of the delay in defendants in bringing their claim. Plaintiff is ill suited to recall details from nearly 30 years ago. The handwritten portions of the documents are illegible, for the most part. The school is closed, the bank is closed and the people having knowledge of the transaction are undoubtedly long dispersed. The cost and expense of finding even a single person with recollection of plaintiff and the events at issue would be large. plaintiff has been living hundreds

²⁷ Plaintiff asserts, the Court will recall, that the reaffirmation was obtained by duress. Plaintiff referred the Court to the *Brown* decision, with which it was familiar, which holds that the defense of unconscionability is not preempted.

of miles away for over 20 years. She is effectively prevented from discovering the facts necessary to defend her case by the delay in bringing the claim to her attention.

**PLAINTIFF DID NOT WAIVE HER
CLAIM OF PREEMPTION BY AGREEING TO
THE DISCHARGE OF THE LOAN**

The Circuit Court erred by not considering the elements of an unconscionable contract as set forth in *Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 729 S.E.2d 217, 2012 W. Va. LEXIS 311, 2012 WL 2196090 (W. Va. 2012) (*Brown II*):

4. "The doctrine of unconscionability means that, because of an overall and gross imbalance, one-sidedness or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written. The concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case." Syl. Pt. 12, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011).

5. "An analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole." Sil. Pt. 3, *Troy Mining Corp. v. Itmann* [386] ., 176 W.Va. 599, 346 S.E.2d 749 (1986).

6. "A determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and 'the existence of unfair terms in the contract.'" Syl. Pt. 4, *Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, Inc.*, 186 W.Va. 613, 413 S.E.2d 670 (1991).

7. "Unconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court." Syl. Pt. 1, *Troy*

Mining Corp. v. Itmann Coal Co., 176 W.Va. 599, 346 S.E.2d 749 (1986).

8. "If a court, as a matter of law, finds a contract or any clause of a contract to be unconscionable, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause to avoid any unconscionable result." Syl. Pt. 16, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011).

9. "A contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a 'sliding scale' in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa." Syl. Pt. 20, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011).

10. "Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract." Syl. Pt. 17, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011).

11. "A contract of adhesion is one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive terms, and only the opportunity to adhere to the contract or reject it. A contract of adhesion should

receive greater scrutiny than a contract with bargained-for terms to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person." Syllabus Point Syl. Pt. 18, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011).

12. "Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns." Syl. Pt. 19, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011).

13. "Provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable. In any challenge to such a provision, the responsibility of showing the costs likely to be imposed by the application of such a provision is upon the party challenging the provision; the issue of whether the costs would impose an unconscionably impermissible burden or deterrent [387] is for the court." Sly. Pt. 4, *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (2002).

After years of contesting this situation, Karen Adams was presented by ECMC with a resolution of the underlying loan. By submitting the application, she would be relieved of the obligation, and receive back the money she had paid, without attorney's fees or interest. There was no practical alternative; this was an offer she could not refuse. Under all the circumstances, this was clearly as contract of adhesion, and did not represent a waiver of the preemption

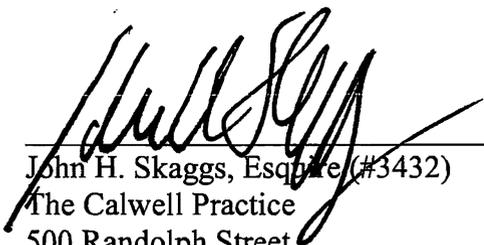
argument. A reasonable review of the factors regarding unconscionability as set forth in *Brown I* and *Brown II* would result in a finding that the application for discharge of the student loan agreement was obtained with no alternative to plaintiff.

It is also worth noting that on multiple previous occasions, Karen Adams, before and after retaining counsel, had protested that the loan was fraudulent and she did not have the ability to repay, in light of her disability. On each occasion, Pennsylvania refused her request. Even after claiming to have investigated the claim fraud, Pennsylvania refused to discharge the claim, or assist her in obtaining that relief from the Department of Education. The fraud investigation conducted by this 2000 person agency, managing 130 **billion** dollars in loans for both the government and private lenders did not attempt to check the “blanket discharge list.” A few minutes on an internet search engine would have revealed the information needed to know that Florida Federal was at a minimum a red flag about the validity of the loan, not to mention the other circumstances of plaintiff. Pennsylvania has not demonstrated any entitlement to the protection of preemption.

CONCLUSION

The Circuit erred in its application of the law of preemption and unconscionable contracts, as set forth in *Brown I* and *Brown II*. The Circuit Court’s conclusions, as set forth in its Order, are clearly wrong. The ruling of the Circuit Court should be reversed and the claim remanded for further proceedings.

KAREN ADAMS
By Counsel



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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

Karen Adams, Plaintiff Below,

Petitioner,

vs.)

Case No. 15-0524

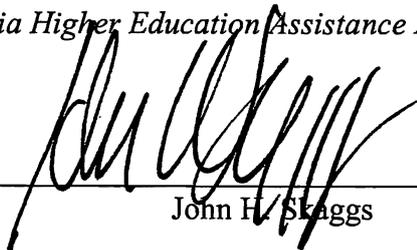
**Pennsylvania Higher Education Assistance Agency,
d/b/a American Education Services, a foreign corporation,
Defendant Below,**

Respondent

CERTIFICATE OF SERVICE

The undersigned, John H. Skaggs, counsel for Petitioner, hereby certifies that the foregoing “**APPELANT BRIEF**” and “**APPENDIX**” was served by sending a true copy thereof, via U.S. Mail, postage prepaid, to the following on this 2nd day of September, 2015, as follows:

Steven L. Thomas, Esquire
Kay Casto & Chaney, PLLC
Post Office Box 2031
Charleston, WV 25327
Counsel for Pennsylvania Higher Education Assistance Agency



John H. Skaggs