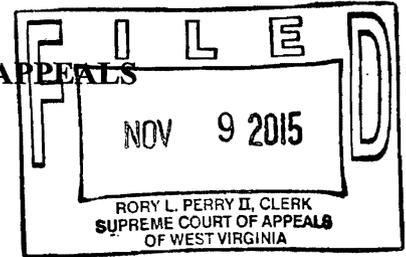


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS



**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 REPLY BRIEF TO THE  
RESPONDENT'S RESPONSE BRIEF**

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## INTRODUCTION

This is the reply to the response filed by PHEAA in opposition to the petitioner's appeal. As set forth below in more detail, the respondent, hereafter Pennsylvania, fails address the significant arguments made by the petitioner, hereafter Karen Adams, in support of her claims. Foremost, the loan could only have been rehabilitated if it were enforceable. In that the loan was subject to a blanket discharge, it was not enforceable at the time it was rehabilitated and not enforceable when Pennsylvania undertook to collect it. The issue here is whether West Virginia has lost its ability to provide its citizens any protection from clearly unlawful, *ultra varies* extra judicial conduct by Pennsylvania.

The issue first is whether enforcing state law against a common bill collector where the underlying loan was illegal, and found by the Department of Education to be fraudulent, years before the collection, hinders the collection of lawful loans. As set for the below, preemption in this field is conflict based. Pennsylvania nowhere explains how enforcing consumer protection laws against its collection of an unlawful loan affects in any way its management of lawful loans. The answer is that of course, lawful collection practices are not affected in any way by providing Karen a remedy where she has been victimized by the collection of an unlawful loan.

First, the petitioner will address certain factual assertions made by respondent regarding the claims of the petitioner that she was disabled. In addition, it is clear from an entire reading of the complaint, order and appeal papers that the petitioner asserted claims against the defendant arising from the West Virginia Consumer Protection and Fair Debt Collection Act. The essence of the petitioner's argument has been that the Respondent violated these provisions, by

undertaking to collect what was in effect a non-existent loan.<sup>1</sup> Further, the Circuit Court failed to properly apply *Brown I*, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011), and *Brown II*, *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) in its determination that the underlying state claim was preempted.

Pennsylvania argues first that its lawyer offered Karen the information necessary to make a disability application for the loan to be forgiven. As set forth below, Karen made multiple applications to Pennsylvania before she filed her case, asking that the claim be forgiven based on her disability. They had all been denied. The post suit email was not a settlement offer, but an invitation to be rejected again. The email stated,

I urge you to consider these legitimate administrative remedies which are available to Ms. Adams. PHEAA views actions under the WVCCP A to be plainly wrong and abusive, based on well settled case law directly on point in WV. I routinely assist borrowers with their administrative remedies, **but PHEAA will aggressively defend and seek remedies for abusive litigation.** Response, page 2.<sup>2</sup>

As set forth below, there was no reason, absent a clear agreement to discharge the invalid loan, to again make a futile application for discharge.<sup>3</sup> Pennsylvania should have spent more time investigating the validity of the underlying loan and less time threatening counsel.

## STATEMENT OF FACTS

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<sup>1</sup> The complaint alleged violations based on contact with the Karen Adams after she notified Pennsylvania that she was represented. With the completion of discovery, it is obvious that there are numerous other violations, including misrepresenting the facts of the debt, among others. See §46A-2-127, and Appellant's Brief, page 18-19.

<sup>2</sup> This corresponds to the letter sent from the general counsel, which also threatened sanctions. Appendix 000404. On September 8, 2011, Counsel requested the payment record and documentation for the loan. Appendix 000412. On September 27, 2011, Counsel advised Pennsylvania of Karen's disability and her claim that she had not received any education. Appendix 000410. On August 21, 2012, this Counsel wrote Pennsylvania and advised them of Karen's disability, the issue regarding lack of documentation, the underlying fraud of Florida Federal, and that she did not attend any vocational school. The letter asked that Pennsylvania not contact her. Appendix 000170. Earlier, Pennsylvania responded to an inquiry that it had denied the fraud claim on three occasions. Appendix 000406.

<sup>3</sup> It would not help Karen, having already been denied for a disability discharge, to have it again rejected.

It is necessary to review the facts regarding a statement made by the Respondent regarding the petitioner's disability. Pennsylvania quotes an email between counsel regarding the disability status of the petitioner. The Court will recall that it is undisputed that the claimant was awarded Social Security Disability in 1997, Appendix 000150, which was some ten years before the Respondent initiated its collection activities. Karen was determined by a Social Security judge to be disabled due to low literacy, mild retardation, and dependent personality syndrome.<sup>4</sup>

After Pennsylvania started its collection activities, Karen made multiple pleas that the loan was not hers and further made multiple applications, formally and informally, that she was disabled. The record shows:

1. Borrower stated loan not hers and sent fraud packet PHEAA000002 Appendix 295
2. Borrower stated loan not hers and sent fraud packet PHEAA000003 Appendix 296
3. Borrower stated loan not hers and sent fraud packet PHEAA000006 Appendix 298
4. Borrower stated loan not hers and sent fraud packet PHEAA000007 Appendix 299
5. Borrower advised loan not fraudulent PHEAA 000009 Appendix 301

Karen made numerous repeated complaints after that to Pennsylvania that the loan was the result of fraud. On September 10, 2010, Karen filed a fraud affidavit which was denied. Appendix 000426- Appendix 000430.

On July 1, 2013, AES recorded in its call log, that the borrower reported disability, and would be sent a disability packet. PHEAA000069, Appendix 361; PHEAA000070, Appendix 362; PHEAA000071, Appendix 363. While this was post filing of the suit, it was by no means the first time Karen raised the issue of her disability.

On September 27, 2011, Karen's counsel advised Pennsylvania that that Karen was on SSI for disabilities. Appendix 000410. On November 6, 2010, Karen wrote AES and told them

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<sup>4</sup> The decision was stamped received by AES Servicing, February 22, 2011. Appendix 000150.

she was under a doctor's care and gave them his name and address if they needed more information.. AdamsApp000419. She sent Pennsylvania a copy of her SSI decision, which is stamped "Received February 22, 2011." Appendix 000431, et seq.

Despite multiple requests, Karen's disability application was denied. Further, the offer to make yet another futile request for disability discharge was not meaningful. The offer did not include an agreement that the disability discharge would be granted. This was not a meaningful offer, and nothing more than self serving, post suit gratuity.

As the response notes, ultimately, on February 26, 2014, a Department of Education Contractor did determine that the loan from Florida Federal Savings and Loan was indeed unenforceable due to the "blanket discharge" of the school. Respondent's Brief, page 5. Appendix 000116, 0001438. <sup>5</sup> Unspoken by Pennsylvania is any explanation why, after conducting its own fraud investigation, despite its employment of 2000 people and management of billions of dollars in student loans, and last but not least, the review of this loan by many individuals, including a fraud investigator, the many people who spoke with Karen, and the General Counsel, no one before 2014 advised the plaintiff of the blanket discharge or undertook the minimal investigation necessary to confirm Karen's pleas for relief.<sup>6</sup>

Consistent with the bureaucratic response which characterized all of Karen's interaction with Pennsylvania, it blames Karen for its insistence in collecting an unenforceable loan. Response, Page 5. Unstated by Pennsylvania is the means by which Karen was going to meet the impossible requirements made by Pennsylvania. She did attempt to obtain a police report, as

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<sup>5</sup> Under the terms of the discharge, Karen was refunded without interest the money she had paid. The June 30, 1995 discharge letter defined the time at issue to include January 1, 1986 to June 30, 1987. Appendix 001438. This expanded the original finding to an earlier period. The original period began the date of the federal audit, June 30, 1987, Hence, Karen's alleged attendance fell within the time frame.

<sup>6</sup> Pennsylvania notes that "for some reason" ECMC was not sued. ECMC was a direct government contractor, and able to raise the government contractor defense. Pennsylvania is a contractor for SunTrust, and has independent duties in the management of its claims collections.

requested by Pennsylvania. The response was as expected when reporting a 25 year old ‘crime’ in a far away state. Even the state investigator for Pennsylvania admitted that that it would be very difficult for Karen to prove the person responsible for her claim.<sup>7</sup> Appendix 001366, 001375. Yet, this same agency, requiring this high degree of compliance from Karen, failed to investigate the lender, Florida Federal Savings and Loan, find the conviction of it and its executives for fraud and failed to identify the bankrupt trade school as being on the blanket discharge list.<sup>8</sup> Last but not least, Pennsylvania knew that the check showing payment to the school could not be located.<sup>9</sup> Hence, it knew that it could not prove that any money had actually been paid. The attempt to shift the burden to Karen, in her circumstances, by Pennsylvania, with its resources, expertise and experience, and its undertaking to investigate the claim by its “state” investigator, is an outrage. Pennsylvania offers no explanation for its complete failure to reasonably investigate this claim and its persistence in collecting an unlawful debt.

### **PREEMPTION DOES NOT APPLY WHERE THE LOAN WAS UNLAWFUL**

The petitioner argued at length in the opening brief regarding the failure of the Circuit Court to properly apply *Brown I*. Here, the preemption language states,

Section 682.411 (0) of the FFEL Regulations provides that: “The provisions of this section preempt any State law, including State statutes, regulations, or rules, that would conflict with or hinder satisfaction of the requirements or frustrate the purposes of this section.” See 34 C.F.R.682.411(0). ED’s “Notice of Interpretation” issued in 1990 (the “Notice”) gives further insight into the meaning of Section 683.411(0). See Stafford Loan, Supplemental Loan for Students, PLUS, and Consolidation Loan Programs, 55 Fed. Reg. 40120 (Oct. 1, 1990). The Notice explains that: “[T]his preemption

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<sup>7</sup> The investigator testified that he identifies himself as “PHEAA state investigator.” Appendix 001366.

<sup>8</sup> Appendix 000126-131 is a letter to the Department of Education regarding PTC(RETS) failure to comply with the regulations. A copy went to Pennsylvania.

<sup>9</sup> Appendix 000395, 000475. At the time of the alleged loan, the check would have been sent directly to the school. 34 CFR 682.607 (1986).

[Section 682.411(0)] includes any State law that would hinder or prohibit any activity taken by these third parties to complete these required steps.” Id at 40 121 (emphasis added).

The issue here is whether the enforcement of West Virginia Consumer Protection law against a bill collector, acting under contract from a non-governmental entity, here SunTrust Bank, where the bill collector was collecting a patently illegal loan, conflicts with or hinders in any way the management and collection of lawful loans. The answer must be no. Pennsylvania, after its recital of the law, does not answer the question. The question is not whether there is pre-emptive law. The issue is whether there is any reasonable relationship between enforcing remedies against the collection of unlawful loans and impairment of collection of lawful loans. There is no such connection. There is no deterrence against lawful conduct from enforcing remedies against collection practices for unlawful loans. That is the true distinction here. The Circuit Court erred in finding preemption in essence from providing the plaintiff a remedy for the practices of Pennsylvania in collecting an unlawful loan. That is the issue here. Not whether there was some action which violated relevant statutes in the collection of a lawful loan, but whether there was action in the collection of an unlawful loan. Pennsylvania offers no explanation for how it is contrary to the interests of the student loan program to all Karen the remedy at law for the collection of an unlawful loan.

Pennsylvania cites various cases for the proposition that aspects of state law are pre-empted by the student loan scheme. None of them, of course, apply the principals of *Brown I* and *Brown II* and none of them address the issue here, which is whether pre-emption applies when the underlying loan is not an enforceable loan, in violation of the regulations.

In *Pirouzian v. SLM Corp.*, 396 F. Supp. 2d 1124, 2005 U.S. Dist. LEXIS 38135 (S.D. Cal. 2005), cited by Pennsylvania, the court stated,

**There is an actual conflict between state and federal law when it is impossible for a party to comply with both state and federal law or where state law acts as an obstacle to the full purposes and objectives of the federal law.** *Id.* Defendant argues that Plaintiff's CFDCPA claims, if allowed, would hinder the achievement of Congress' goals to encourage participation of private entities in the student loan system and to ensure the student loan system's viability.

Pennsylvania has not identified any way that the achievement of Congress' goals for the student loan program would be hindered by the application of state law, where the rehabilitation was not based on an enforceable loan. In other words, it cannot interfere the collection of lawful loans to provide a remedy for those who have been the subject of collection activities based on unlawful loans. In the *Pirouzian* case, the court held that a claim of inaccurate reporting to credit agencies was preempted. Other cases relied on by Pennsylvania are similarly differentiated: *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1996 U.S. App. LEXIS 22405, 96 Cal. Daily Op. Service 6478, 96 Daily Journal DAR 10685 (9th Cir. Or. 1996), no allegation that the underlying loan was unlawful; *Kort v. Diversified Collection Servs.*, 270 F. Supp. 2d 1017, 2003 U.S. Dist. LEXIS 11688 (N.D. Ill. 2003) alleged violations in notices pertaining to default and garnishment.

In *Seals v. Nat'l Student Loan Program*, 2004 U.S. Dist. LEXIS 31910 (N.D. W. Va. Aug. 16, 2004), affirmed by, *Seals v. Nat'l Student Loan Program*, 124 Fed. Appx. 182, 2005 U.S. App. LEXIS 4695 (4th Cir. W. Va. 2005) non-published, also cited by Pennsylvania, the district court stated,

The Fair Debt Collection Practices Act specifically excludes from its scope "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due to the extent such activity (i) is incidental to a **bona fide** fiduciary obligation or a bona fide escrow arrangement ...

Again, the issue there was collection practices associated with a *bona fide* debt. Here, Adams argues that the loan was not enforceable, not *bona fide* and therefore is not subject to preemption. Again, this is not a typical student loan case. That is why it is not pre-empted.

Pennsylvania cites the case of *Martin v. Sallie Mae, Inc.*, 2007 U.S. Dist. LEXIS 90418, 2007 WL 4305607 (S.D. W. Va. Dec. 7, 2007). As with the other cases, this is distinguishable. In *Martin*, the student was a lawyer who contended that he had relied on the military to pay his tuition, as part of his agreement to serve. This is wholly different from the case at hand, where the plaintiff has now shown as a matter of law that the underlying student loan was not valid. Again, the issue of preemption under the circumstances faced by Karen Adams was not addressed.

**THE PLAINTIFF HAS NOT ABANDONED  
IDENTITY THEFT AS A CLAIM; RATHER  
ADDITIONAL BASES FOR CONTESTING THE LOAN  
AROUSE DURING LITIGATION**

The Court will recall that the events surrounding the original loan occurred in 1986. Karen testified she had no recollection of the loan. She testified that she did not receive a GED, or any kind of post high school education.<sup>10</sup> Given her established and uncontradicted impairments, that is not unreasonable. In her first interactions with Pennsylvania, Karen consistently stated these basic facts, and concluded that she had been a victim of “identity theft.” Despite the contention of Pennsylvania, Karen did not “abandon” this claim. The reality is that the passage of time and her impairments deprive her of a fair ability to contest the claim. Pennsylvania investigated the signatures, but fails to point out a crucial distinction. The signatures on the application and the promissory note are difficult to compare. Appendix 000029, Appendix 000030.

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<sup>10</sup> It was a requirement that the student be able to benefit from the program. 34 CFR 682.201 (1986). See also, 34 CFR 668.8 (1987) required to have the ability to benefit, a high school diploma or GED.

The issue became irrelevant when two subsequent facts came to light. First, Pennsylvania could not locate a copy of the cancelled check, to show that the loan amount was in fact paid. Secondly, the discharge appeared, which established conclusively that the loan was unenforceable, hence not subject to rehabilitation.

The facts regarding the 1986 transaction are impossible to discern at this late date. It may be she signed the forms, but that did not change the fact that Karen would not benefit from the proposed educational program. Indeed, on multiple occasions during the litigation, the plaintiff contended that she was not a person who would benefit from vocational education. The fact that Karen Adams, with her impairments characterized what happened to her as identity theft, does not excuse these highly sophisticated entities from failing to act on what they knew or should have known-the loan was not subject to rehabilitation.

**THE DEPARTMENT OF EDUCATION DETERMINED  
IN 1995 THAT THE LOAN WAS SUBJECT TO A ‘BLANKET DISCHARGE’  
AND THEREFORE PENNSYLVANIA UNDERTOOK TO COLLECT  
A NON-EXISTENT OR “UNLAWFUL” LOAN;  
WHETHER THE LOAN WAS ENFORCEABLE ON ITS  
EXECUTION IN 1986 IS IRRELEVANT**

Under the regulations, as argued in the opening brief, the key issue in rehabilitating a loan is that the loan be legally enforceable. Here, the loan was not legally enforceable, since it had been determined by the Department of Education to be subject to a blanket discharge, based on misconduct by the school, PTC(RETS) Institute. In light of the blanket discharge, the loan could not, as a matter of law be enforced. Pennsylvania argues that at the time of the rehabilitation in 2007 and 2008, the loan was legally enforceable. That cannot be the case, since the finding by the Department of Education was made in 1995, over ten years before the rehabilitation. The loan was unenforceable at the time of its rehabilitation.

**THE CIRCUIT COURT ERRED IN  
APPLYING THE FEDERAL REGULATIONS  
TO THIS LOAN**

This is not the typical student loan. It is not a case where a knowledgeable person used loans to obtain an advanced education. The preemptive effect and the regulations do not apply to an unenforceable loan. Here, the loan was unenforceable as a matter of law, based on the administrative "blanket" discharge. The regulations are not therefore applicable to this loan.

The very quotes in the response support the plaintiff's argument. On page 16 of its brief, Pennsylvania states:

**A prima facie case of valid student loan** is established by the production of a signed promissory note. *Kirk v. ED Fund*, No. 06-4205-CV-C-WAK, 2007 WL 2226046, at \*4 (W.D. Mo. Aug. 1, 2007)(citing to *United States v. Irby*, 517 F.2d 1042 (5th Cir.1975); *United States v. Manning*, 2002 WL 193699 (S.D.Ohio, Jan. 30, 2002) (unpublished)).

The key of course is *prima facie*. It is well established in West Virginia that establishing a *prima facie* case simply shifts the burden of proof. *Conaway v. Eastern Associated Coal Corp.*, 358 SE 2d 423 (age discrimination); *Shamblin v. Nationwide Mut. Ins. Co.*, 396 SE 2d 766 (insurance bad faith); *Sanders v. Georgia-Pacific Corp.*, 225 SE 2d 218, citing, *Kirkhart v. United Fuel Gas Co.*, 86 W. Va. 79 (independent contractor relationship). The cases cited by Pennsylvania on page 18 of its response comport with this law. A showing of the signed promissory note creates only a *prima facie* case. It may be rebutted.<sup>11</sup> Here, Karen Adams

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<sup>11</sup> In *United States v. Bilal* the United States filed a complaint against Rose N. Bilal to turn Ms. Bilal's defaulted student loan J3 into a judgment. See *United States v. Bilal*, 2007 WL 2827511 (M.D.Fla. 2007). In *Bilal*, the Court found that the United States had established a prima facie case of valid student loan obligation by introducing a copy of the actual promissory note signed by Ms. Bilal and a certificate of indebtedness. *Id.* The court further held that once the prima facie case was established the burden shifted to Ms. Bilal to "prove the nonexistence or extinguishment of the debts ...." *Id.* at 2 (quoting *United States v. Irby*, 517 F.2d 1042,1043 (5th Cir. 1975); accord *United States v. Jacob*, 2006 WL 1063704 (M.D. Fla. Apr. 21, 2006) (holding that the United States established a prima facie case that the defendant is indebted in connection with Health Education Assistance Loans by the introduction of the promissory notes and certificate of indebtedness); *Guillermety v. Secretary of Education of US.*, 341 F.Supp.2d 682, 688 (E.D.Mich.2003); *United States v. White*, , 2009 WL 3872342 (E.D.N.C. Nov. 18,

rebutted any *prima facie* claim that the underlying loan was valid. Beyond the poor quality of the original documents, in 1995 the Department of Education found that the school acted with such bad faith that students attending it were entitled to a “blanket discharge”. The cases cited by Pennsylvania do not address this issue, that is, whether the effort to collect an unenforceable loan still is preempted.

Pennsylvania cites the case of *Armstrong v. Accrediting Council for Continuing Education*, 980 F. Supp. 53 (DC 1997). Pennsylvania argues,

The *Armstrong* Court correctly reasoned that “[b]ecause state law claims based upon mistake and illegality would require the courts to enter the educational evaluation business, and Congress has by statute provided that the Secretary via accrediting agencies are to make these determinations, the state law claims conflict with the federal claim, and are thereby preempted.” *Id.* at 63. The *Armstrong* Court correctly recognized that to allow plaintiff to proceed on her mistake and illegality claims would place the Court in the position of having to determine if, at the time of the signing of the loan contract, eligibility requirements were met despite the fact that school was accredited. *id.* at 62.

Again, that case does not address the same facts as here. Here, in 1995, years before the loan was rehabilitated, the Department of Education deemed the loans to be subject to the blanket discharge. Despite that, and despite the multiple claims of Karen Adams that something was wrong with this loan, Pennsylvania persisted in collecting this debt.

The federal courts are not uniform in finding field preemption:

Neither the HEA nor its related regulations expressly preempt state laws on fraud, IIED or defamation. Further, courts have concluded that the HEA does not occupy the field of higher education loans and loan repayment. *Coll. Loan Corp. v. SLM Corp.*, 396 F.3d 588, 596 (4th Cir. 2005); [6] *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1125-26 (11th Cir. 2004); *Armstrong v. Accrediting Council for Continuing Educ. and Training, Inc.*, 168 F.3d 1362, 1369, 335 U.S. App. D.C. 62 (D.C. Cir. 1999); *Keams v. Tempe*

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2009).” Response Brief, page 18.

*Tech. Inst., Inc.*, 39 F.3d 222, 225 (9th Cir. 1994). The Court is left to consider only whether Murungi's state law claims actually conflict with the HEA. *Murungi v. Tex. Guar. Sallie Mae*, 646 F. Supp. 2d 804, 2009 U.S. Dist. LEXIS 61469 (E.D. La. 2009), summary judgment granted under state law on different issue.

In *Bland v. Educ. Credit Mgmt. Corp.*, 2012 U.S. Dist. LEXIS 23006, 2012 WL 603194

(D. Md. Feb. 22, 2012), the district court stated,

In my view, the HEA does not preempt plaintiff's state law claims such that they are "in reality based on federal law." *Beneficial*, supra, 539 U.S. at 8. See *Career Care Inst., Inc. v. Accrediting Bureau of Health Educ. Schs., Inc.*, No. 08-1186, 2009 U.S. Dist. LEXIS 23651, 2009 WL 742532, \*4 (E.D.Va. Mar. 18, 2009) (holding that plaintiff's Breach of Contract, Negligence, Tortious Interference with Contract, and Tortious Interference with Prospective Business or Economic Advantage claims were "state law claims that are not expressly or by necessary implication preempted by the HEA" and denying defendant's motion to dismiss on that ground); *Murungi v. Texas Guaranteed*, 646 F.Supp.2d 804, 808-09 (E.D.La. 2009) (denying motion [16] to dismiss on preemption grounds because "[n]either the HEA nor its related regulations expressly preempt state laws on fraud, IIED or defamation. Further, courts have concluded that the HEA does not occupy the field of higher education loans and loan repayment," and "[n]either defendant has demonstrated an actual conflict...."). Accordingly, I am satisfied that this case is not one "arising under" federal law for removal purposes. As diversity jurisdiction is not satisfied, this Court is without subject matter jurisdiction to hear the case.

The is no federal law cited by Pennsylvania that finds that there is field preemption of all state law by the federal student loan law. There is no impediment to this Court finding that the application of state law where a bill collector has undertaken to collect a non-existent loan is preempted. See also, *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 2004 U.S. App. LEXIS 5594, 58 Fed. R. Serv. 3d (Callaghan) 297, 17 Fla. L. Weekly Fed. C 337 (11th Cir. Fla. 2004) (The preemptive clause in 20 U.S.C.S. § 1095a preempted only those state laws that would

hinder or otherwise obstruct a guaranty agency from employing the wage garnishment remedy made available by the HEA. Further, Fla. Stat. ch. 559.72(9) did not actually conflict with the HEA because third-party debt collectors could comply with both the HEA and ch. 559.72(9) and because a cause of action under ch. 559.72(9) did not stand as an obstacle to the accomplishment of Congress's objectives for the HEA.); *Peete-Bey v. Educ. Credit Mgmt. Corp.*, 2015 U.S. Dist. LEXIS 122456 (D. Md. Sept. 14, 2015) (ECMC's failure to support its argument with adequate legal authority is especially significant where, as here, it seeks to preclude the enforcement of state consumer protection laws. "When addressing questions of express or implied preemption, [courts] begin [their] analysis 'with the assumption that the historic police powers of the State [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008) (last alteration in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)). "[C]onsumer protection is a field traditionally regulated by the states . . . ." *Cliff*, 363 F.3d at 1125. In that context, "when the text of a preemption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors preemption.'" *Altria Grp.*, 129 S. Ct. at 543 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S. Ct. 1788, 161 L. Ed. 2d 687 (2005)). Those observations counsel a narrow understanding of the scope of a guaranty agency's authority when a putative guarantor invokes that authority to preempt state law.); *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 2015 U.S. App. LEXIS 14503 (7th Cir. Ind. 2015) (mere possibility that court would have to interpret statute does not establish conflict preemption); *Snuffer v. Great Lakes Educ. Loan Servs.*, 2015 U.S. Dist. LEXIS 34030 (S.D. W. Va. Mar. 19, 2015)(claims of preemption denied, citing the reasoning of Judge Haden in *McComas v. Financial Collection Agencies*, 1997 U.S.

Dist. LEXIS 2725, 1997 WL 118417 (S.D. W. Va. Mar. 7, 1997). In short, there is no compelling authority for preemption other than reviewing each case on a case by case basis.

The regulations place clear responsibilities on lenders:

(7) Lender responsibilities.

(i) A lender shall comply with the requirements prescribed in paragraph (d) of this section. In the absence of specific instructions from a guaranty agency or the Secretary, **if a lender receives information from a source it believes to be reliable indicating that an existing or former borrower may be eligible for a loan discharge** under paragraph (d) of this section, the lender shall immediately notify the guaranty agency, and suspend any efforts to collect from the borrower on any loan received for the program of study for which the loan was made (but may continue to receive borrower payments). 34 CFR 682.402(ii)(H),

Here, prior to suit, Pennsylvania had been notified of her concerns by Karen Adams. As reflected in the Appendix, it was advised on multiple occasions regarding her lack of a GED, the status of the school and the disability finding. Pennsylvania undertook to investigate her claims and failed to adequately do so.

The appropriate standard to apply was stated by this Court in *Brown I*.

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).

Here the issue is whether the collection of a non-existent loan is preempted. There is no basis for preemption under the student loan program where the conduct at issue was the collection of a loan which was not, as a matter of administrative finding, enforceable. The general scheme of the student loan program will be adversely affected in any way by allowing a remedy under West Virginia law for a person who has been the victim of the collection of a unenforceable loan. This state action does not in any way implicate a limit on federal law where the underlying loan is enforceable. The Court therefore clearly erred in failing to properly apply the holding of *Brown I. 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) affirmed in part, reversed in part, *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).

In that the regulation requires that a rehabilitated loan to be enforceable, it is not an impedance to federal action to provide a remedy to a person where the collection has been for an unenforceable loan. The Court erred by failing to find that this action is not preempted.

**THERE WAS AMPLE BASIS ON WHICH TO CONCLUDE  
THAT THE LOAN WAS THE RESULT OF FRAUDULENT ACTIVITY**

There was an ample basis throughout the prosecution of the collection efforts by Pennsylvania to support a conclusion that the loan was fraudulent. These may be summarized as follows:

1. The lender was a failed savings and loan, as a matter of public record.

2. The public record shows that two officers and the savings and loan were convicted of operating a scheme to fraudulently submit loans as uncollectable during the time the loan was made. Appendix 000225, 000227, 000229
3. Karen Adams provided evidence in the form of the SSI disability finding that she had no GED and would not benefit from vocational training. Appendix 000150
4. The Department of Education had issued a blanket discharge for students of the alleged school in 1995. Appendix 000116
5. Karen Adams told Pennsylvania that she never attended the school, did not have any education, did not know what the collection was about. Appendix 361; 362; 363; 410; 419. Appendix 000431, et seq.
6. The PTC (RETS) was a failed vocational school. Appendix 000189;

Again, the Court should recall the relative positions of the parties. Pennsylvania wants to treat Karen Adams as if she had the same level of sophistication as it. However, they are not in remotely similar situations. Further, Karen repeated on many occasions her contentions regarding the loan. With its resources, expertise, experience Pennsylvania had every reason to think that this loan was not the typical student loan and there was reason to believe that it was fraudulent.

**THE CIRCUIT COURT ERRED IN FAILING TO CONSIDER  
UNCONSCIONABILITY IN ITS ANALYSIS OF THE CASE**

The issue of unconscionability arises in the context of the rehabilitation agreement and the agreement to discharge the loan. The plaintiff alleged that the rehabilitation agreement in 2007 was obtained by duress. The plaintiff alleges that she was told she would lose her SSI benefits if she did not comply with the rehabilitation agreement. Further, the agreement was illegal since it was obtained to rehabilitate a loan which had been deemed by the Department of Education to be subject to a blanket discharge. See brief in support of appeal, page 16 *et seq.* and Appendix 000116.

In 2014, as set forth in the Appeal and Response, the plaintiff was advised that she could apply for a discharge under the blanket discharge for students of PTC(RETS). After assurance

that the discharge would be granted, the plaintiff agreed to make the application. Appendix 000116.

Under the circumstances, given the magnitude of the loan, and the recurring interest, the only option Karen had was to get the loan discharged. This application only served to confirm her consistent position that the loan was unenforceable. The Circuit Court erred in failing to apply the requirements set forth in *Brown II*. There this Court held that:

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 [5] 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 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." Syllabus Point 19, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011).<sup>13</sup>. "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 [6] 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." Syllabus Point 4, *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (2002).

Here there is no comparison between the relative positions of the parties. Rather than using its superior position to assist Karen Adams, Pennsylvania used it to threaten, bully, harass, and ultimately extract \$86.00 a month from a person living on \$750.00 a month SSI benefits. The rehabilitation agreement was unconscionable, and to the extent that the discharge application could be said to submit Karen to the application of the student loan provisions, it is likewise unconscionable.

### CONCLUSION

Preemption in the student loan field is only conflict based. There is no authority for the conclusion that the entire field has been preempted. Pennsylvania has not shown that the collection of student loan debt would be interfered with by providing a remedy to Karen Adams where the loan was not enforceable according to Department of Education rules and regulations. Nothing about this claim puts Pennsylvania in a position where it cannot satisfy its duties and manage student loan debt. Indeed, Pennsylvania had every opportunity to do the right thing and didn't.

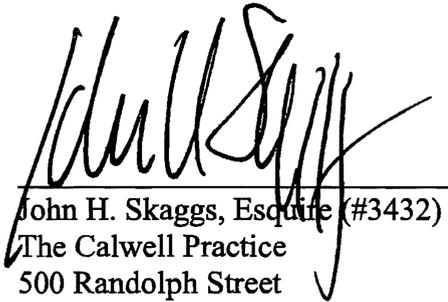
The reliance upon the reaffirmation<sup>12</sup> and the discharge application is also misplaced. Both are classic examples of contracts of adhesion. The first was obtained under duress. The second was one which the plaintiff had no choice but to make. Karen Adams had no choice but to get the loan discharged.

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<sup>12</sup> See APPELLANT'S BRIEF, page 26 for the argument in behalf of Karen Adams regarding the reaffirmation issue.

The Court erred in its application of preemption and unconscionability when it granted the motion for summary judgment. The judgment 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**

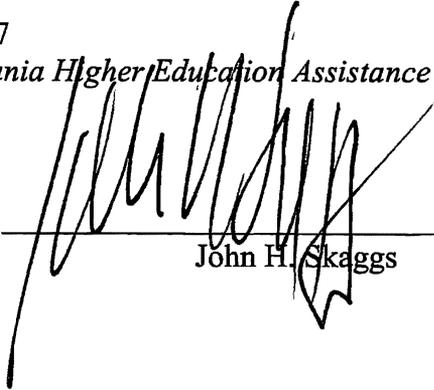
**Pennsylvania Higher Education Assistance Agency,  
d/b/a American Education Services, a foreign corporation,  
Defendant Below,**

**Respondent**

**CERTIFICATE OF SERVICE**

The undersigned, John H. Skaggs, counsel for Petitioner, hereby certifies that the foregoing **“APPELLANT’S REPLY BRIEF TO THE RESPONDENT’S RESPONSE BRIEF”** was served by sending a true copy thereof, via U.S. Mail, postage prepaid, to the following on this 9<sup>th</sup> day of November, 2015, as follows:

Steven L. Thomas, Esquire  
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Post Office Box 2031  
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*Counsel for Pennsylvania Higher Education Assistance Agency*

  
\_\_\_\_\_  
John H. Skaggs