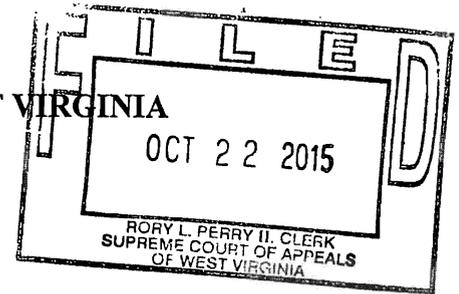


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Karen Adams, Plaintiff Below,
Petitioner

vs.

No. 15-0524

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

**RESPONDENT'S BRIEF IN
OPPOSITION TO PETITIONER'S APPEAL**

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ASSIGNMENTS OF ERROR

The assignments of error stated in Petitioner's Brief differ substantially from and are inconsistent with the assignments of error set forth in Petitioner's Notice of Appeal.¹ The assignments of error set forth in Petitioner's Notice of Appeal verbatim are as follows:

1. Whether the Circuit Court erred in finding the plaintiff's claims preempted by federal law, where the student loan was not a valid in the first instance, and therefore not enforceable.

2. Whether the Circuit Court erred in its application of Brown I and Brown II regarding the application of West Virginia law to the issue of whether federal preemption applied to this case.

3. Whether the Circuit Court erred in its application of West Virginia law regarding the conduct of the defendant was unconscionable.

4. Where the Circuit Court erred in its application of West Virginia law regarding whether the plaintiff had been subject to a contract of adhesion.

Two of the stated assignments of error in Petitioner's brief are grounded upon assertions that the circuit court erred in its application of the Fair Debt Collection Practices Act ("FDCPA").² This Court has previously held that "[o]ur authority to resolve assignments of nonjurisdictional errors is limited 'to a consideration of those matters passed upon by the court below and fairly arising upon the portions of the record designated for appellate review.'" *McConaha v. Rust*, 219 W. Va. 112, 118, 632 S.E.2d 52, 58 (2006)(quoting Syl. Pt. 6, in part, *Parker v. Knowlton Const. Co., Inc.*, 158 W.Va. 314, 210 S.E.2d 918 (1975)). No FDCPA claims were asserted by the Petitioner

¹ Although Rule 10(c)(3) of the West Virginia Rules of Appellate Procedure does not require that Petitioner's assignments of error be identical to the those contained in her notice of appeal the assignments of error must be consistent with the assignments of error reflected in the notice of appeal. In this case, the assignments of error contained in Petitioner's Brief are so divergent from the assignments of error set forth in the notice of appeal that they must be disregarded and this Court should review this matter based upon the assignments of error as reflected in Petitioner's notice of appeal.

² It should be noted that Petitioner specifically drafted her Petition and Complaint so as to avoid federal subject matter of jurisdiction based upon federal question and diversity of citizenship. Had Petitioner asserted claims under the FDCPA, PHEAA would have removed this matter to federal court.

in her complaint in the underlying civil action. Furthermore, no FDCPA based claims or issues were ever brought before the circuit court by the Petitioner. Therefore, the record designated for review does not reflect that Petitioner preserved any purported error relating the FDCPA. Accordingly, this Court should disregard any assignment of error proffered by the Petitioner that is grounded in the FDCPA.

STATEMENT OF THE CASE

On April 18, 2012, Petitioner filed her *Second Amended Petition and Complaint*, requesting: (1) declaratory judgment that the Student Loan is null and void or in the alternative barred by a statute of limitations; and (2) statutory damages in the amount of \$60,000.00 for alleged violations of the West Virginia Consumer Credit Protection Act (“WVCCPA”). PHEAA timely filed an answer denying all asserted claims.

Thereafter, Petitioner served PHEAA with discovery requests. In response, counsel for PHEAA transmitted an email to Petitioner’s counsel on June 7, 2012, stating in part:

I gather from some of your interrogatories that you contend that Ms. Adams is disabled. Reading between the lines, you may be implying that Ms. Adams should not have been admitted to college in the first place. Please be advised that there are administrative remedies available to borrowers who are permanently and totally disabled, or whose school falsely certified that the student met the requirements for admission, I've attached the link to the Dept. of Education's website, and have cut and pasted the language regarding false certification by the school I've also included the form for Ms. Adams to apply for a discharge of her loan on the basis of total and permanent disability. I do not have a form for making application for cancellation for false certification, but probably can assist you in locating such a form if you will agree to dismiss the present action.

I urge you to consider these legitimate administrative remedies which are available to Ms. Adams. PHEAA views actions under the WVCCPA 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.

AdamsApp001340. Despite this email, Petitioner persisted in pursuing her claims under the WVCCPA.

However, in the course of discovery, counsel for PHEAA contacted Educational Credit Management Corporation (“ECMC”), the guarantor of Petitioner’s Student Loan, with information regarding (i) PTC Institute (RETS) (hereinafter “PTC”) in Florida, the school for which the Student Loan was signed by Petitioner, and (ii) the fact that Petitioner apparently had never graduated from high school and did not have a GED. ECMC determined that the school program for which the Student Loan was intended required prospective students to have a high school diploma or a GED as a prerequisite to admission. Further, that PTC was on a “blanket discharge” list, and that Petitioner could obtain an administrative discharge of the Student Loan by submitting a *Loan Discharge Application: False Certification (Ability To Benefit)* to ECMC. Petitioner in fact submitted a *Loan Discharge Application: False Certification (Ability To Benefit)* and thereby obtained a discharge of the Student Loan without judicial action (as suggested by the email quoted above).

Thereafter, PHEAA filed a motion for summary judgment on the basis that the *Loan Discharge Application: False Certification (Ability To Benefit)* contained attestations of fact that were fatally inconsistent with Petitioner’s claims in this action, including (i) that Petitioner had in fact signed the Student Loan, and (ii) the Student Loan was disbursed to PTC. The circuit court granted PHEAA’s motion for summary judgment, and Petitioner timely filed this appeal.

STATEMENT OF FACTS

Respondent Pennsylvania Higher Education Assistance Agency (hereinafter “PHEAA”) is a statutorily-created instrumentality of the Commonwealth of Pennsylvania. 24 P.S. §§ 5101–

5199.9. The business records of PHEAA reflect that Petitioner Karen L. Adams (hereinafter "Petitioner") signed a Guaranteed Student Loan Promissory Note and Application (the "Student Loan") on November 9, 1986. (AdamsApp.000028-00031)(Adams Depo. Exhibit #7, AdamsApp.000951-000954). The proceeds of the Student Loan were used to finance Petitioner's education at the PTC Institute (RETS) (hereinafter "PTC") in Florida. The Student Loan is a federally guaranteed Robert T. Stafford Federal Loan, which is governed by the Higher Education Act of 1965, as amended, 20 U.S.C. § § 1001, et seq. ("HEA").

Petitioner was born and grew up in Lakeland Florida (App. 000628). She attended high school in Lakeland, Florida through the 11th grade, in 1972. (Adams Depo., AdamsApp.000693). Petitioner remained in the area of Lakeland and Tampa, Florida until she moved to West Virginia in or about 1992. (Adams Depo., AdamsApp.000693-000705). Petitioner does not recall signing the promissory note to procure the Student Loan (Adams Depo. Tr. p. 44, AdamsApp.000728), but also testified that it was possible that she signed it and simply could not remember. (Adams Depo. Tr. p. 102, AdamsApp.000786).

After Petitioner initiated this action, PHEAA obtained records from the United States Department of Education ("ED") reflecting that Petitioner defaulted on the Student Loan, and subsequently entered into a loan rehabilitation³ agreement with Collect Corp., as an agent of Educational Credit Management Corporation ("ECMC") and ED, by signing a rehabilitation agreement on October 8, 2007 (the "Rehabilitation Agreement"). (AdamsApp.000046-000061; 000470-000471). Petitioner successfully rehabilitated the Student Loan by making at least nine (9) monthly payments of \$86.00 to ED beginning September 28, 2007, thusly, removing the

³ "Loan rehabilitation" is a process under the federal student lending program by which a defaulted borrower agrees to make nine payments in a ten month period to have the federal student loan re-purchased by a new lender and placed back into good standing. 34 C.F.R. § 682.405.

default status of the Student Loan. (AdamsApp00059-00060). Thereafter, in 2008, the Student Loan was sold to SunTrust Bank, a Georgia state banking corporation (“SunTrust”), pursuant to a *Federal Rehabilitation Loans Lender Participation Agreement* dated October 16, 2007, by and between SunTrust and ED (“FRLLEPA”). (AdamsApp000192-000206). Contemporaneous with SunTrust’s purchase of the Student Loan, PHEAA became the servicer. (Adams Depo. Tr. p. 65, AdamsApp.000749). Until that time, PHEAA was not involved with Petitioner’s Student Loan. From June 23, 2008 through March 15, 2010 Petitioner made twenty-one (21) payments on the rehabilitated Student Loan (*See* Payment History, AdamsApp.000629). Petitioner ultimately stopped making payments on the Student Loan, at which time PHEAA’s activities as servicer ceased. The loan guarantor, ECMC, honored its guaranty and engaged in collection efforts consistent with its role under the HEA.⁴

On several occasions beginning in June, 2008 through April, 2010, Petitioner contacted PHEAA alleging identity theft with respect to the Student Loan. (*See* PHEAA call log history AdamsApp.000293-000396).⁵ On each occasion, PHEAA requested from Petitioner documentation to conduct a fraud investigation, as specifically required by applicable FFEL Regulation (*Id.*) (*See infra*, p. _). Finally, in August of 2010, Petitioner submitted an incomplete set of documents including: (1) an ID Theft Affidavit; (2) five notarized signature samples; (3) a copy of her driving license; and (4) a copy of her social security card (*See* “Fraud Investigation Documentation” AdamsApp.001257-001263). As required by federal law, PHEAA on multiple occasions requested that Petitioner produce a copy of a police report reporting her identity theft claim. (AdamsApp.000350, 000352, 000354, 000359, 000372, 000424-000425). Petitioner never

⁴ For some reason, Petitioner did not sue ECMC.

⁵ Petitioner made this same claim to ED in 2006. ED denied the discharge application because Petitioner failed to provide all required paperwork. (AdamsApp000049).

provided a copy of the requested police report, despite multiple requests from PHEAA. (AdamsApp.000407)

Notwithstanding the fact that Petitioner never submitted a complete set of documents, in June 2010 PHEAA nevertheless conducted a fraud investigation (“Fraud Investigation”). (AdamsApp.417, 000890-000891). David Heckard, a PHEAA investigator, was assigned to conduct the investigation. (Id.) During the Fraud Investigation, Petitioner disputed that the signature from the Promissory Note was her signature. (Id.) During the Fraud Investigation Petitioner provided five (5) notarized signature samples. (AdamsApp.000453). The notarized signature samples are consistent with the signatures on the Rehabilitation Agreement and on the Promissory Note (AdamsApp.000453, 000471, 000951). Petitioner, as a part of the Fraud Investigation, also produced copies of her driving license and social security card both of which also included signatures consistent with the signature on the Promissory Note. (*See* AdamsApp.001266).

During the Fraud Investigation Mr. Heckard explained to Petitioner that one of the legal requirements to support a claim for discharge of the Student Loan based upon identity theft is a copy of the police report. (AdamsApp.000890-000891). Petitioner told Mr. Heckard that she had not filed a police report. (Id.) Mr. Heckard offered to arrange for an officer from the Nitro Police Department to come to Petitioner’s home so that she could file a police report. (*Id.*) In response to the offer, Petitioner asked Mr. Heckard what the penalty would be for filing a false police report. (AdamsApp.000891). Ultimately, Petitioner declined the offer to file a police report and she communicated to Mr. Heckard that she would take responsibility for the Student Loan. (AdamsApp.000891).

Upon review of the signature samples provided during the Fraud Investigation and the signature from the Rehabilitation Agreement, PHEAA concluded that the signature samples were consistent with the signature on Promissory Note. (AdamsApp.417). As a result of its signature analysis and Petitioner's failure to provide the required police report and otherwise cooperate in the investigation, Petitioner's fraud claim was closed. (*Id.*).

In April, 2011, Petitioner asserted to PHEAA that she was unable to pay on the Student Loan because of disability. (AdamsApp.000368-000370).⁶ PHEAA responded by mailing the Petitioner a Total and Permanent Discharge Application in the form prescribed by federal law. (AdamsApp.000370). Thereafter, Petitioner, instead of submitting a completed discharge application as required by law, provided a copy of a *Notice of Decision, Fully Favorable, from the Social Security Administration*, dated November 14, 1997 ("SSA Notice of Decision") (AdamsApp.000438-000446).

On or about September 8, 2011, PHEAA was advised that Petitioner was represented by counsel. (AdamsApp.000383). Subsequent to September 8, 2011, PHEAA continued to directly contact Petitioner as it is affirmatively required to do by applicable federal law governing the federal student loan program. (AdamsApp.000384-000396). *See infra*, p. ___.

On March 6, 2014, after the Student Loan had defaulted and in the middle of this litigation before the circuit court, Petitioner signed, dated and submitted a *Loan Discharge Application: False Certification (Ability To Benefit)* (the "Discharge Application") to Educational Credit Management Corporation ("ECMC")⁷. (AdamsApp.000892-000893). In the

⁶ Petitioner also attempted to obtain a discharge by filing a discharge application with the ED in 2007. The application was denied because Petitioner failed to provide the required physician's certification of disability. (AdamsApp,000047-000048).

⁷ After Petitioner defaulted on the Student Loan, it was transferred by SunTrust Bank to the guarantor, Educational Credit Management Corporation, on approximately October 4, 2012.

Discharge Application Petitioner admitted and certified in writing under penalty of perjury that: (i) she attended PTC from December 30, 1986 to June 16, 1987; and (ii) federally guaranteed student loan funds were distributed to, or for, her benefit while attending PTC⁸ pursuant to the Student Loan. (*Id.*)

SUMMARY OF ARGUMENT

Petitioner's admissions on the Discharge Application conclusively established that the Student Loan is a valid Robert T. Stafford federally guaranteed student loan governed by the HEA and the Federal Family Education Loan Program regulations (34 C.F.R. §§ 682.100 et seq.) ("FFEL Regulations"). ED's "blanket discharge" of the student loans issued by PTC did not render any student loan, including Petitioner's Student Loan, automatically void and/or automatically discharged. The "blanket discharge" rendered the Student Loan voidable and/or dischargeable provided that the Petitioner could establish that all conditions were met in her case to qualify her for a discharge. To establish that she was entitled to a discharge, Petitioner was required to seek an administrative discharge of the Student Loan by submitting the required forms and paperwork with ED. Petitioner only did so when she filed the Discharge Application after the Student Loan defaulted and was being collected by ECMC. Until it was discharged by ED, PHEAA had to consider the Student Loan as the valid and lawful obligation of Petitioner.

All of Petitioner's claims are based upon provisions of the West Virginia Consumer Credit Protection Act (West Virginia Code §§ 46A-1-1 et. seq.) ("WVCCPA") and other state law based theories of recovery. All of Petitioner's WVCCPA and state law based claims conflict with and are thus preempted by the HEA and FFEL Regulations. As a result of Petitioner's admissions on the Discharge Application, there are no genuine issues of material fact that the Student Loan is governed by the HEA and FFEL Regulations. Accordingly, all of Petitioner's

⁸ See AdamsApp 000893, Section 6.

claims are preempted, and the circuit court was correct in granting PHEAA judgment as a matter of law on all of the claims asserted by the Petitioner in the underlying civil action.

**STATEMENT REGARDING
ORAL ARGUMENT AND DECISION**

PHEEA asserts that, under Rule 18 of the West Virginia Rules of Appellate Procedure (“WVRAP”), that oral argument is not necessary because: (i) the appeal is frivolous; and/or (ii) the facts and legal arguments are adequately presented in the briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

I. STANDARD OF REVIEW

This Court is to apply the following three-part standard of review:

In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Mey v. Pep Boys-Manny, Moe & Jack, 228 W. Va. 48, 52, 717 S.E.2d 235, 239 (2011)(quoting Syllabus Point 2, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997)). “Preemption is a question of law reviewed *de novo*.” fn. 12 *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 664, 724 S.E.2d 250, 268 (2011) *cert. granted, judgment vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012)(quoting *Morgan v. Ford Motor Co.*, 224 W.Va. 62, 680 S.E.2d 77 (2009)(“Brown I”).

II. THE CIRCUIT COURT CORRECTLY APPLIED THE PRINCIPLES OF FEDERAL PREEMPTION AS SET FORTH IN BROWN I AND BROWN II AND NUMEROUS OTHER DECISIONS OF THIS COURT

This Court, in *Brown I*, stated the following:

The preemption doctrine has its foundation in the Supremacy Clause of the United States *Constitution*, and ‘invalidates state laws that interfere with or are contrary to federal law.’ A state law is preempted if Congress's command either is expressly stated in the federal statute's language, or is implicitly contained in the statute's structure and purpose. Express preemption occurs when Congress has specifically and plainly stated its intent to occupy a given field, and in such cases any state law falling within that field will be completely preempted. Implied preemption occurs in two ways. ‘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.*’

(Emphasis added.). “[I]n analyzing the question of preemption, the focus is on congressional intent... manifested by express language in a Federal statute or implicit in the structure and purpose of the statute.” *See Chevy Chase Bank v. McCamant*, 512 S.E.2d 217, 222 (W. Va. 1998). “To establish a case of express preemption requires proof that Congress, through specific language, preempted the specific field covered by State law.” *Id.* Conversely, “[t]o prevail in a claim of implied preemption, ‘evidence of a congressional intent to preempt the specific field covered by State law’ must be pinpointed.” *Id.* (quoting *Hartley Marine Corp. v. Mierke*, 196 W.Va. 669, 674, 474 S.E.2d 599, 604 (1996)).

The HEA and the FFEL Regulations provide a detailed statutory and regulatory governance structure for federally-insured student loans. *See* 20 U.S.C. §1082(a); 34 C.F.R. § 682.411. As a part of that governance structure, the HEA and FFEL Regulations establish minimum uniform due diligence requirements for loan collection including the requirement that

loan servicers, like PHEAA, must diligently attempt to contact the borrower by telephone and in writing to “forcefully” demand payment on defaulted student loans. *See* 20 U.S.C. §1078; *See* 34 C.F.R. 682.411.

Section 682.411(o) 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(o). ED’s “Notice of Interpretation” issued in 1990 (the “Notice”) gives further insight into the meaning of Section 682.411(o). *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 [Section 682.411(o)] includes *any* State law that would hinder or prohibit *any* activity taken by these third parties to complete these required steps.” *Id.* at 40121 (emphasis added). In reinforcing the importance and underlying purpose of Section 682.411(o), the Notice recognized that exposing federally guaranteed student loan holders to the laws of fifty states and to lawsuits under fifty separate sets of laws would chill lenders’ willingness to make federally guaranteed student loans. *Id.*

This Court has not directly addressed the preemption of the WVCCPA by the HEA and the FFEL Regulations, but a review of cases law from other jurisdictions that have addressed the preemption issue reveals an overwhelming body of case law that repeatedly reinforces the principle that state law claims based upon pre-litigation collection activities relating to federally-guaranteed student loans are preempted by the HEA and the FFEL Regulations. *Brannan v. United States Aid Funds, Inc.*, 94 F.3d 1260, 1264 (9th Cir. 1996); *Pirouzian v. SLM Corp.*, 396 F. Supp. 2d 1124 (S.D. Cal. 2005); *Kort v. Diversified Collection Servs.*, 270 F. Supp. 2d 1017, 1023 (N.D. Ill. 2003); et al. The same preemption principle has been recognized, adopted and

applied in the Fourth Circuit and in both federal district courts located within West Virginia. *See Seals v. Nat'l Student Loan Program*, 2004 WL 3314948, at 3, 6 (N.D. W. Va. 2004), *aff'd*, 124 Fed. Appx. 182 (4th Cir. 2005) (*per curiam*); *Martin v. Sallie Mae, Inc.*, 2007 WL 4305607 (S.D. W.VA. 2007).⁹

In 2004, Judge Stamp of the United States District Court for the Northern District of West Virginia, in *Seals v. Nat'l Student Loan Program*, considered whether the HEA and FFEL Regulations preempted claims asserted under the WVCCPA.¹⁰ *Seals*, 2004 WL 3314948. In *Seals*, the plaintiff asserted claims against multiple defendants based upon the defendants' pre-litigation collection activities with respect to plaintiff's federally guaranteed student loan. Three of the named defendants filed a motion to dismiss for failure to state a claim. *Id.* at *1-*2. Judge Stamp granted the defendant's motion to dismiss. *Id.* at *6. In so doing, Judge Stamp adopted the reasoning of the Ninth Circuit, in *Brannan v. United Student Aid Funds, Inc.*, which is discussed herein in more detail, *infra. Id.* at *6. In adopting the reasoning of *Brannan*, Judge Stamp held that the HEA preempts *any* state causes of action related to student loan claims. *Id.* On appeal, the Fourth Circuit affirmed Judge Stamp's decision in *Seals* by an unpublished decision. *See Seals v. Nat'l Student Loan. Program*, 124 Fed. Appx. 182 (4th Cir. 2005).

In 2007, District Judge Johnston of the United States District Court for the Southern District of West Virginia, in *Martin v. Sallie Mae, Inc.*, also considered whether the HEA

⁹ *But see, McComas v. Fin. Collection Agencies, Inc.*, 1997 WL 118417 (S.D.W.Va. Mar. 7, 1997); *Snuffer v. Great Lakes Educ. Loan Servs., Inc.*, No. 5:14-CV-25899, 2015 WL 1275455, at *1 (S.D.W. Va. Mar. 19, 2015). In *McComas* and *Snuffer*, cases asserting claims under the WVCCPA, the court found that WVCCPA claims are preempted only to the extent the provisions were actually in conflict with the HEA and FFEL Regulations. "A conflict occurs either because compliance with both federal and state regulations is a physical impossibility or because state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." "[t]he HEA and its regulations require due diligence of debt collectors; they do not authorize fear-inducing statements to collect unauthorized fees." *McComas*, at *4. Here, because the HEA and FFEL regulations specifically require PHEAA to directly contact the borrower, regardless of whether she is represented by an attorney, compliance with both the HEA and WVCCPA 'is a physical impossibility'.

¹⁰ The plaintiff, in *Seals*, also asserted an alternative claim for relief under the federal Fair Debt Collection Practices Act.

preempted the WVCCPA. *Martin v. Sallie Mae, Inc.*, 2007 WL 4305607 (S.D. W.VA. 2007). In *Martin*, the plaintiff alleged that Sallie Mae violated various provisions of WVCCPA in the servicing of his student loans. More specifically, the plaintiff alleged, in pertinent part, that Sallie Mae violated the WVCCPA by: (i) contacting him to collect his student loan after it was notified that he was represented by an attorney; (ii) that Sallie Mae acted in a manner to adversely affect his credit rating; and (iii) Sallie Mae should have directly contacted the Army to collect on the student loan. Sallie Mae filed a motion to dismiss arguing that the HEA and FFEL Regulations preempted the plaintiff's state-law claims. Judge Johnston granted Sallie Mae's motion and dismissed the complaint, relying on 34 C.F.R. §682.411(o). In so doing, Judge Johnston found that the plaintiff had alleged that Sallie Mae engaged in actions that were permissible under the HEA and FFEL Regulations. *Id.* at *9. In so finding, Judge Johnston held that the plaintiff's WVCCPA claims "were in conflict with, and therefore are preempted by, the HEA." Judge Johnston did, however, note that several other courts have held that "the HEA preempts any state causes of action related to student loan claims". *Id.* at 8.

Outside of the Fourth Circuit, in *Brannan*, the Ninth Circuit court of Appeals addressed a nearly identical preemption issue as that addressed in *Martin* and *Seals*. In *Brannan*, the plaintiff alleged violations of the Oregon Unfair Debt Collection Practices Act, an act analogous to the WVCCPA. On a motion for summary judgment, the defendant argued that the HEA and FFEL Regulations preempted state laws relating to pre-litigation loan collection activities. *Id.* at 1265. The trial court granted the defendant's motion for summary judgment and on appeal the Ninth Circuit affirmed the trial court decision. In so doing, the *Brannan* Court thoroughly analyzed ED's preemption announcement in the Notice and correctly concluded that it furthered the Congressional intent of the HEA by ensuring continued access to student loans. In so

concluding, the court weighed public policy concerns and found that, “[p]reemption does deprive some defaulters of the ability to receive damages under state law; however, the congressional purpose in enacting the HEA was not to make it easier for defaulters to get money from loan collectors, but to protect the millions of students who would suffer irremediable loss if Congress had to shut down the [guaranteed student loan] program.” *Id.* at 1265.

Petitioner’s WVCCPA claims are entirely based upon pre-litigation collection activities. All of PHEAA’s contacts with Petitioner were conducted in accordance with and as mandated by the HEA and the FFEL Regulations. *See* 34 C.F.R. § 682.411. Petitioner did not allege that PHEAA engaged in any conduct that is not expressly required by the HEA and FFEL. Clearly, Section 682.411 of the FFEL Regulations require student loan servicers, like PHEAA, to make certain specified minimum collection contacts directly with a person that is delinquent on a federally guaranteed student loan obligation. The FFEL Regulations require PHEAA to (i) directly contact the borrower, and (ii) forcefully demand payment. The failure of a servicer to comply with Section 682.411 is, in itself, a violation of law. All of PHEAA’s pre-litigation collection activities were in accordance with the HEA and FFEL Regulations. Accordingly, Petitioner’s WVCCPA claims are in direct conflict with Section 682.411 and are clearly preempted. Thusly, based upon the above, the circuit court correctly found that Petitioner’s claims were preempted by federal law.

Petitioner complains that PHEAA violated the WVCCPA by continuing to contact her directly after learning that she retained an attorney. The plaintiff in *Martin* and plaintiffs in other cases have made this exact same claim. The *Martin* court dismissed the plaintiff’s claim holding that “under these FFEL Regulations, [the servicer] is required to contact [the plaintiff], and there is nothing that prohibits contact even though the borrower is represented by counsel. Because

these actions are permissible under the regulations, [the plaintiff's] state law causes of action ... are in conflict with, and therefore are preempted by, the HEA." *Martin* at 9. Many other courts that have addressed the same issue have reached the same conclusion as *Martin*.

A review of the overwhelming body of legal precedent leads to the conclusion that Petitioner's WVVCPA and other state law based claims are preempted. Thus, the Circuit court was correct in finding that all of Petitioner's claims are preempted as a matter of a law.

III. THE CIRCUIT COURT WAS CORRECT IN FINDING THAT THE HEA AND FFEL REGULATIONS APPLIED TO PETITIONER'S STUDENT LOAN.

Petitioner argues that the Student Loan was invalid and unenforceable at its execution and thus the HEA and FFEL Regulations should not apply. However, until she submitted the Discharge Application, Petitioner's argument was based upon her claim that the Student Loan was obtained by identity theft. In the Discharge Application, Petitioner acknowledged that she had signed the Student Loan. Thus, Petitioner abandoned the 'identity theft' theory¹¹, and now argues that the Student Loan should be deemed invalid from the time of its execution because PTC falsely certified her for the loan as evidenced by PTC's inclusion on ED's "blanket discharge" list. More specifically, Petitioner argues that PTC's inclusion of the "blanket discharge" automatically rendered the Student Loan void and invalid at the time it was executed. Petitioner does not explain how PHEAA was supposed to know, before this action was filed, that she did not meet the "ability to benefit" ("ATB") criteria under the "blanket discharge". Thus, Petitioner's argument is fatally flawed and misinterprets the legal effect of PTC's inclusion on the "blanket discharge" list.

¹¹ The Court will recall that Petitioner also did not want to pursue the identity theft theory because she did not want to provide a sworn statement to law enforcement reporting allegations of identity theft.

A. The circuit court correctly found that the Student Loan was a legally enforceable federally guaranteed student loan obligation upon its execution.

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)). In cases where a holder of the student loan has instituted a suit to collect on a defaulted student loan, courts have routinely held that to prevail on a claim for a defaulted student loan, a lender “establish[s] a *prima facie* case of a student loan default, ... by prov[ing] three elements: (1) the defendant signed a promissory note for a student loan; (2) the [plaintiff] owns the promissory note signed by the defendant[;] and (3) the defendant has defaulted on the note.” *Pennsylvania Higher Educ. Assistance Agency v. Hoh*, No. 2:14-CV-00748, 2015 WL 1637728, at *3 (S.D.W. Va. Apr. 13, 2015)(citing *United States v. White*, No. 5:08–CV–348–F, 2009 WL 3872342, at *2 (E.D.N.C. Nov. 18, 2009); *United States v. Lawrence*, 276 F.3d 193, 197 (5th Cir.2001); *HICA Educ. Loan Corp. v. Assadi*, Civil Action No. WMN–12–216, 2012 WL 3156828, at *2 n. 1 (D .Md. Aug. 1, 2012); *see also United States v. Beams*, No. 1:07-CV-904-SEB-TAB, 2008 WL 1774423, at *2 (S.D. Ind. Apr. 16, 2008); *United States v. Lawrence*, 276 F.3d 193, 197 (5th Cir. 2001); *Cotton v. United States*, 2006 WL 3313753 (M.D. Fla. 2006); *United States v. Bilal*, 2007 WL 2827511 (M.D.Fla. 2007). In this case, PHEAA did not sue Petitioner to collect on a defaulted student loan. Therefore, the last two elements to establish a *prima facie* case to collect on a defaulted student loan are inapplicable. Accordingly, it is evident that PHEAA only had to produce a signed copy of the promissory note to establish a *prima facie* case of existence of an enforceable student loan obligation. PHEAA has produced multiple copies of a signed promissory note for

the Student Loan and, in so doing, has undoubtedly established the existence of an enforceable student loan obligation.

The United States District Court for the Middle District of Florida considered what proof is necessary to establish a *prima facie* case of an enforceable student loan, in *Cotton v. United States* 2006 WL 3313753 (M.D. Fla. 2006), and *United States v. Bilal* 2007 WL 2827511 (M.D.Fla. 2007). In *Cotton v. United States*, Joseph L. Cotton initiated a suit against ED to overturn the findings of an Administrative Wage Garnishment Proceeding. See *Cotton v. United States*, 2006 WL 3313753 (M.D. Fla. 2006). Mr. Cotton's wages were garnished by ED to collect on a defaulted student loan debt. *Id.* At the administrative hearing, Mr. Cotton argued that he should not have to pay back the student loan because the educational benefits of the school were misrepresented to him. The Hearing Official found Mr. Cotton's student loan was legally enforceable based upon the presentation of a signed promissory note. *Id.* The Hearing Official further found that Mr. Cotton had presented insufficient evidence to prove that promissory note was not enforceable, and held that Mr. Cotton was liable for the student loan even if educational benefits of the school were misrepresented. *Id.* Mr. Cotton subsequently initiated an action in federal district court against ED in an effort to once again challenge the validity of his student loan debt. *Id.* ED filed motions for summary judgment and to dismiss. The *Cotton* Court granted ED's motions. *Id.* at 5. In so ruling, the *Cotton* Court found that the promissory note presented by ED was sufficient to establish a *prima facie* case of an enforceable obligation. *Id.* at 4.

Furthermore, the *Cotton* Court held that that "[f]ailure of consideration is not a defense in student loan cases... ." *Id.* (citing *United States v. Durbin*, 64 F.Supp.2d 635, 637 (S.D.Tex. 1999)); accord *United States v. Robbins*, 819 F.Supp. 672 (E.D.Mich. 1993). Petitioner continues

to argue that PHEAA cannot prove that loan proceeds were disbursed to or for her benefit or that she received educational services. First, the Court should note that Petitioner specifically acknowledged that she received FFEL Program funds, either directly or by PTC. AdamsApp 000893, at Section 6. Second, Petitioner's arguments are based upon lack of consideration arguments, which is simply not a defense in student loan cases.¹²

In *United States v. Bilal* the United States filed a complaint against Rose N. Bilal to turn Ms. Bilal's defaulted student loan¹³ 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 U.S.*, 341 F.Supp.2d 682, 688 (E.D.Mich.2003); *United States v. White*, , 2009 WL 3872342 (E.D.N.C. Nov. 18, 2009).

Petitioner appears to argue that PHEAA had some duty conduct due diligence to determine the validity of the Student Loan. Petitioner is incorrect and she cites to absolutely no

¹² Notably, it must be remembered that PHEAA only began servicing the Student Loan in 2008, after Adams signed the rehabilitation agreement with ED and confirmed the debt belonged to her. There has never been a dispute that Adams signed the rehabilitation agreement. PHEAA had no involvement with the Student Loan when Adams attended PTC.

¹³ Ms. Bilal obtained her student loan in 1987 from Florida Federal Savings and Loan Association, the same lender from which Plaintiff obtained her student loan.

legal authority to support her argument. In *Armstrong v. Accrediting Council for Continuing Education*, the plaintiff made a similar argument. In *Armstrong* the plaintiff filed a complaint against a student loan accreditation company, student loan acquisition company, lender, guarantee agency, and the Secretary of ED seeking to be absolved of liability for a student loan obligation. See *Armstrong v. Accrediting Council for Continuing Education*, 980 F. Supp. 53 (DC 1997). The plaintiff based her arguments to set aside her student loan upon common law contract theories of mistake and illegality. *Id.* The United States District Court for the District of Columbia held that if the school in question was accredited at the time that plaintiff entered into the student loan contract the inquiry as to whether the loan contract was based upon mistake or illegality must end. *Id.* at 62. In so ruling the *Armstrong* Court found that, for the purposes of determining the validity of a student's federally guaranteed student loan, a court is to take a snapshot of the world as it existed at time of student's enrollment. *Id.* 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.

In this case, Petitioner has proffered no evidence that PTC was not accredited at the time the Student Loan was issued. More importantly, PHEAA was merely the servicer of the Student Loan, and only became servicer in 2008 after Petitioner acknowledged the Student Loan and

successfully completed the rehabilitation program. As servicer of the Student Loan, PHEAA's duties are limited to those tasks necessary to service the loan. PHEAA, as servicer, owed no duty to investigate and make a determination of the legality of the Student Loan. Simply, Petitioner is attempting to impose a legal duty upon PHEAA where none exists.

Accordingly, the Circuit court correctly found that PHEAA had established a *prima facie* case that the Student Loan was valid.

B. The circuit court correctly found that the Student Loan was rehabilitated under Section 682.405 of the FFEL Regulations.

In 2007, Section 682.405 of the FFEL Regulations provided, in pertinent part, as follows:

(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--

(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.

(3) After the loan has been rehabilitated, the borrower regains all benefits of the program, including any remaining deferment eligibility under section 428(b)(1)(M) of the Act, from the date of the rehabilitation.

34 C.F.R. § 682.405. In October 2007, Petitioner entered into and successfully completed the loan rehabilitation program with ED by making nine (9) monthly payments on the Student Loan. (AdamsApp.000059-000061). Thereafter, the rehabilitated Student Loan was sold to SunTrust and Petitioner continued to make twenty-one (21) payments under the terms of the rehabilitated Student Loan. (AdamsApp.000240-000281). By completing the rehabilitation program, Petitioner restored the Student Loan to a status whereby she “regain[ed] all benefits of the program, including any remaining deferment eligibility under section 428(b)(1)(M) of the Act, from the date of the rehabilitation.” 34 C.F.R. § 682.405(a)(3).

Thus, Petitioner’s argument that the Student Loan was not valid, is further undermined by her ratification of the Student Loan, by completing the rehabilitation program. “An individual who was not originally bound by an agreement will become bound if he or she ratifies the agreement.” *Clear v. Missouri Coordinating Bd. for Higher Educ.*, 23 S.W.3d 896, 901 (Mo. Ct. App. 2000) (citing *Cohn v. Dwyer*, 959 S.W.2d 839, 844 (Mo.App. E.D.1997)). “An individual ratifies an agreement if he or she either expressly or by implication confirms or adopts the agreement with knowledge of its contents.” *Id.* “The implication may be made even though the individual did not intend to ratify.” *Id.* (citing *American Multi-Cinema, Inc. v. Talayna's N.W., Inc.*, 848 S.W.2d 557, 560 (Mo.App. E.D.1993)). *Corpus Juris Secundum* 17A C.J.S. Contracts § 241 provides as follows:

The injured party may ratify the contract after the duress has been removed not only by his or her silence but also in various other ways, as, for example, by conduct inconsistent with any other hypothesis than that of approval, or by continuing to act in accordance with the contract, or by continuing to accept or claim benefits flowing from it.

17A C.J.S. Contracts § 241. The First Circuit court of Appeals has held that:

To repudiate an agreement on the ground that it had been made under duress, a party must complain promptly of the coercive statements that it claims had forced it into the contract. Silence, acquiescence, or performance of the contract are among the ways in which the defense of duress is waived, or, to put it another way, to ratify the contract claimed to have been entered into under duress.

Gibbs v. SLM Corp., 336 F. Supp. 2d 1, 8-9 (D. Mass. 2004) *aff'd*, No. 05-1057, 2005 WL 5493113 (1st Cir. Aug. 23, 2005). Furthermore, this Court has long recognized that a natural person can ratify, affirm, and validate any contract made or act done on his or her behalf which he or she was capable of making or doing in the first instance. *Goshorn's Ex'rs v. Cnty. Court of Kanawha Cnty.*, 42 W. Va. 735, 26 S.E. 452, 454 (1896).

By entering the loan rehabilitation program and making the required payments within the specified period of time, Petitioner ratified the Student Loan. *See, e.g., Clear v. Missouri Coordinating Bd. for Higher Educ.*, 23 S.W.3d. 896 (Mo. Ct. App. 2000); *Hamilton v. McCall Drilling Co.*, 50 S.E.2d 482 (W. Va. 1948); *Coffman v. Viquesney*, 84 S. E. 1069 (W.Va. 1915); *Hutton v. Dewing*, 26 S.E. 197 (W. Va. 1896); *In re Kuschel*, 365 B.R. 910 (Bankr. E.D. Mo. 2007). The subsequent twenty-one (21) loan payments made by Petitioner to SunTrust further conclusively established Petitioner's ratification of the Student Loan. Undoubtedly, Petitioner's conduct in connection with the rehabilitation of the Student Loan constituted a ratification and/or affirmance of the Student Loan. Accordingly, Petitioner is estopped from now arguing that the Student Loan was invalid and void as of the time of its execution.

C. The circuit court properly applied the HEA and the FFEL Regulations to the Student Loan

As discussed in Sections III.A. and III.B, the signed Student Loan establishes a *prima facie* case that the Student Loan was an enforceable federally guaranteed student loan. Any question as to the Student Loan's enforceability was erased by Petitioner's successful rehabilitation of the loan in 2007 and 2008. Accordingly, the HEA and FFEL Regulations applied to the Student Loan at all times that PHEAA was servicer of the loan.

The HEA and the FFEL Regulations provide numerous administrative remedies that borrowers may utilize to obtain a discharge of a student loan. *See* 34 C.F.R. § 682.402. Specifically, Section 682.402 provides for discharge in instances where a borrower's eligibility to borrow was falsely certified. *See* 20 U.S.C. § 1087(c). *See* 34 C.F.R. § 682.402(e)(3), ¶ (e)(3)(ii)(B), ¶ (e)(13). Section 682.402(e)'s false certification discharge provisions are directly applicable to both Petitioner's identity theft and false certification claims. *Id.* To obtain a discharge of a federally guaranteed student loan based upon false certification the FFEL Regulations require the following:

Except as provided in paragraph (e)(15)¹⁴ of this section, to qualify for a discharge of a loan under paragraph (e) of this section, the borrower must submit to the holder of the loan a written request and a sworn statement. The statement need not be notarized, but must be made by the borrower under penalty of perjury, and, in the statement, the borrower must—

¹⁴ Paragraph (e)(15) of 34 C.F.R. §682.402 provides as follows:

A borrower's obligation to repay all or a portion of an FFEL Program loan may be discharged without an application from the borrower if the Secretary, or the guaranty agency with the Secretary's permission, determines that the borrower qualifies for a discharge based on information in the Secretary or guaranty agency's possession.

34 C.F.R. § 682.402

(i) State whether the student has made a claim with respect to the school's false certification with any third party, such as the holder of a performance bond or a tuition recovery program, and if so, the amount of any payment received by the borrower (or student) or credited to the borrower's loan obligation;

(ii) In the case of a borrower requesting a discharge based on defective testing of the student's ability to benefit, state that the borrower (or the student for whom a parent received a PLUS loan)—

(A) Received, on or after January 1, 1986, the proceeds of any disbursement of a loan disbursed, in whole or in part, on or after January 1, 1986 to attend a school; and

(B) Was admitted to that school on the basis of ability to benefit from its training and did not meet the applicable requirements for admission on the basis of ability to benefit as described in paragraph (e)(13) of this section

34 C.F.R. § 682.402(e)(3). At times, Petitioner has argued that the Student Loan was obtained by identify theft. In the course of PHEAA's loan servicing activities, Petitioner has contended that she did not sign the Promissory Note to procure the Student Loan. In response, PHEAA followed the clear and mandatory mechanism for the discharge of student loans outlined by FFEL Regulations. In that regard, Section 682.402(e)(3) provides, in pertinent part, as follows:

(v) In the case of an individual who is requesting a discharge of a loan because the individual's eligibility was falsely certified as a result of a crime of identity theft committed against the individual—

(A) Certify that the individual did not sign the promissory note, or that any other means of identification used to obtain the loan was used without the authorization of the individual claiming relief;

(B) Certify that the individual did not receive or benefit from the proceeds of the loan with knowledge that the loan had been made without the authorization of the individual;

(C) Provide a copy of a local, State, or Federal court verdict or judgment that conclusively determines that the individual who is

named as the borrower of the loan was the victim of a crime of identity theft by a perpetrator named in the verdict or judgment;

(D) If the judicial determination of the crime does not expressly state that the loan was obtained as a result of the crime, provide—

(1) Authentic specimens of the signature of the individual, as provided in paragraph (e)(3)(iii)(B), or other means of identification of the individual, as applicable, corresponding to the means of identification falsely used to obtain the loan; and

(2) A statement of facts that demonstrate, to the satisfaction of the Secretary, that eligibility for the loan in question was falsely certified as a result of the crime of identity theft committed against that individual.

34 C.F.R. § 682.402(e)(3)(v). As is clear from even a cursory review of the FFEL Regulations, the Secretary of ED has the sole authority to determine if a student loan is dischargeable.¹⁵ As evidence of the Secretary's authority Section 682.402(e)(1)(i) of the FFEL Regulations provides as follows:

The Secretary reimburses the holder of a loan received by a borrower on or after January 1, 1986, and discharges a current or former borrower's obligation with respect to the loan ..., if the borrower's ... eligibility to receive the loan was falsely certified by an eligible school. On or after July 1, 2006, the Secretary reimburses the holder of a loan, and *discharges a borrower's obligation with respect to the loan ..., if the borrower's eligibility to receive the loan was falsely certified as a result of a crime of identity theft.*

34 C.F.R. § 682.402(e)(1)(i). Before she acknowledged that she signed the Student Loan in the Discharge Application, Petitioner attempted to complete the legally required paperwork to obtain a discharge for false certification as provided for in Section 682.402(e)(3)(v) of the FFEL Regulations. Petitioner provided the certifications required in subparagraphs (A) and (B) of Section 682.402(e)(3)(v) of the FFEL Regulations quoted above. To satisfy subparagraph (C)

¹⁵ See generally *In re Bega*, 180 B.R. 642 (BkrctyD.Kan.1995); *United States v. Wright*, 87 F. Supp. 2d 464, 466 (D. Md. 2000) *United States v. Bertucci*, No. CIV. A. 00-0078, 2000 WL 1234560, at *3 (E.D. La. Aug. 29, 2000); *United States v. Hill*, No. C-11-6498 EMC, 2013 WL 1150008, at *2 (N.D. Cal. Mar. 19, 2013).

and/or (D) of Section 682.402(e)(3)(v), ED requires, at a minimum, that a person claiming identity theft must provide a copy of a police report supporting the person's assertion that they were the victim of identity theft. It is undisputed that the Petitioner did not, and in fact refused to, file a police report in support of her identity theft claim. Further, when David Heckard of PHEAA offered to assist Petitioner in filing a police report, she declined to do so. Clearly, Petitioner has failed to comply with the requirements for a false certification discharge based upon identity theft.

In the summer of 2011, after failing to substantiate a discharge based upon false certification, Petitioner attempted to obtain a discharge based upon disability. Upon receiving claims from Petitioner as to her disability, PHEAA promptly mailed her the *Total and Permanent Discharge Application* in the form prescribed by federal law that has to be completed to obtain a discharge based upon disability. The disability discharge application requires that an applicant provide a physician certification of disability. Instead of completing the legal mandated *Total and Permanent Discharge Application* which requires a physician's certification of disability, Petitioner provided the SSA Notice of Decision. PHEAA explained to Petitioner that the SSA Notice of Decision could not be accepted as a substitute for the required physician certification of disability. Nevertheless, Petitioner continued to insist that PHEAA accept the SSA Notice of Decision as a substitute for the physician certification of disability.

Ultimately, in 2014, Petitioner completed and signed the Discharge Application. On the Discharge Application, Petitioner requested a discharge of the Student Loan based upon false certification pursuant to 34 C.F.R. § 682.402(e) of the FFELP Regulations. In signing the Discharge Application, Petitioner certified that she read and agreed to the terms and conditions as specified in Section 6 of the Discharge Application. One of those terms and conditions

required Petitioner to agree that she “received FFEL Program or Direct Program loan funds on or after January 1, 1986, to attend... [PTC Institute (RETS)].” Further, Petitioner agreed that she received loan funds in connection with Student Loan directly or that loan funds were applied for her benefit while she attended PTC Institute (RETS). On the Discharge Application, Petitioner contended that she was entitled to a discharge of the Student Loan based upon her assertion that PTC did not give her an entrance exam to determine her ability to benefit from the Student Loan. On the Discharge Application, Petitioner implicitly admitted that she signed the Student Loan.

D. The circuit court properly found that the “blanket discharge” did not automatically render the Student Loan invalid and unenforceable.

Petitioner argues that the circuit court should not have applied the HEA and FFEL to the Student Loan because the loan should have been deemed invalid and void on the date of its execution by virtue of ED’s “blanket discharge” of the loans generated by PTC. Petitioner misconstrues the import of ED’s “blanket discharge” of the PTC loans. The “blanket discharge” of PTC loans did not automatically discharge and render void all loans issued by PTC. The only reasonable conclusion that can be reached regarding the effect of the “blanket discharge” of the PTC loans is that it merely made certain student loans, including Petitioner’s Student Loan, potentially voidable and/or dischargeable.

This conclusion is supported by the fact that ED agreed to sell Petitioner’s rehabilitated Student Loan to SunTrust in 2007 by execution of a Federal Rehabilitation Loans Lender Participation Agreement (“FRLLP Agreement”) (AdamsApp000192-000206). The FRLLP Agreement was entered well after the audit report of PTC was issued by Inspector of ED that ultimately led to the “blanket discharge” list.

In the FRLLP, ED made the following representations and warranties to SunTrust:

- that the Loans in the Sale portfolio are eligible for guarantee; ..., and are entitled to benefits , in accordance with the requirements of the Higher Education Act of 1965, as amended (the “Act”), for loans of that type[.]
- that ED agrees that, absent information to the contrary, the Lender may consider all borrowers entitled to deferments [under the Act][.]
- 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[.]

(AdamsApp.000192-000193). Based upon the above, as of the date of sale of the Student Loan in 2008, ED considered the Student Loan to be valid and enforceable rehabilitated federally guaranteed student loan obligation.

The conclusion that the “blanket discharge” merely rendered the Student Loan voidable is further supported by the FFEL Regulations. Per the FFEL Regulations, a person -- including the Petitioner -- that is obligated on a questionable PTC loan is legally required to submit an application to ED requesting a discharge. Petitioner did not file the required application until 2014 and well after the filing of the underlying civil action. Accordingly, based upon the above, the circuit court correctly found that “blanket discharge” did not render the Student Loan void upon execution and that the loan had to be considered a valid obligation of the Petitioner until the discharge was granted by ED in 2014.¹⁶

¹⁶ Petitioner includes a lot of material in her Appendix, which in fact is not properly a part of the record in this case. For example, Petitioner baldly suggests that PHEAA knew that PTC had been the subject of the “blanket discharge” determination by ED, and supports this by including a series of letters (apparently sourced from doing a google search with the terms PTC and “ability to benefit”). See Petitioner’s Brief in Support of Appeal at p. 17, and AdamsApp00126-00140. Even though this material is not properly a part of the record in this case, it appears that, in 1991, ED conducted an audit of PTC to investigate if PTC engaged in widespread “false certification” of borrowers at PTC. (AdamsApp000147-000149). The audit period covered July 1, 1987 through June 30, 1989. (AdamsApp.000145-000149). The Inspector General for ED issued a report of findings from the audit in June 1991. (AdamsApp.000145). On May 23, 1995, Irv Ackelsberg, an employee of Community Legal Services, Inc. (“CLS”), sent a letter to Pamela Moran, Chief Loans Branch, Div. of Policy Development, Policy, Training and Analysis Service for ED, that discussed various matters from the Inspector General’s report (AdamsApp000126-000131). In his letter, Mr. Ackelsburg noted that “[t]he false certification regulation provides that ATB students enrolled prior to

E. The circuit court properly found that the Eleventh Circuit's decision in *United States v. Harmas* did not establish good cause to believe that the Student Loan was the result of fraudulent activity.

Petitioner asserts that the Eleventh Circuit's decision in *United States v. Harmas*, 974 F.2d 1262 (11th Cir. 1992), establishes good cause to believe the Student Loan was the result of fraudulent activity. Petitioner's reference to *Harmas* is nothing more than a "smoke screen" utilized by her in an effort to fabricate genuine issues of material fact where none exist. The *Harmas* case involved federal criminal charges against an officer of Florida Federal Savings Bank ("Florida Federal") relating to fraud within the student loan division. The lender on the Student Loan was Florida Federal Savings and Loan Association. The fraudulent activity at issue in *Harmas* involved the creation of fictitious documentation of collection activity. Even if Florida Federal Savings and Loan Association and Florida Federal Savings Bank were one and the same entity, the allegation that someone forged Petitioner's name to the Student Loan Note in this case (and her subsequent argument that her ability to benefit from the Student Loan was falsely certified) is not even remotely similar to the fraudulent activity at issue in *Harmas*.

In 1986 Robert O. Harmas was an officer in Florida Federal's student loan division. In the fall of 1986, Florida Federal discovered a major malfunction with its student loan computer collection system. As a result of the malfunction, Florida Federal faced a potential loss of millions of dollars in insurance coverage on student loan accounts. In an effort to avoid the potential loss of insurance coverage, beginning in 1986 and continuing through 1987,

July 1, 1987 (also the beginning of the PTC audit period) are to be viewed as having the requisite ability to benefit if the student 'was determined by the school to have the ability to benefit from the school's training in accordance with the requirements of 34 C.F.R. 686.6,' i.e., in accordance with the ATB rule in effect as of July 1, 1987." (AdamsApp000127). By letter dated June 30, 1995 to Mr. Akelsberg, Ms. Moran of ED discussed the procedure for the discharge of student loans issues by PTC based upon the results of the Inspector General's findings from the audit of PTC. (AdamsApp001438). With respect to student loans issued during the same time period that the Student Loan was issued (i.e. January 1, 1986 through June 30, 1987), Ms. Moran stated that ED would grant a discharge to an eligible borrower "based upon the sworn statement of the student that PTC improperly determined (or failed to determine the student's ATB [i.e. ability to benefit][.])" (AdamsApp001438). This, of course, is precisely what eventually happened here, when Petitioner finally filed the Discharge Application.

Mr. Harmas and other officers of Florida Federal engaged in a criminal conspiracy to falsify Florida Federal's student collection records. As a part of the criminal activities alleged, there were no assertions that any student loans were fraudulently obtained or generated. All of the fraud related to the falsification of collection records. The fraud was utilized so that Florida Federal, as servicer of student loans, could manufacture the appearance that the Bank was correctly servicing student loans with its existing portfolio. Thus, in the event of a default on a student loan, the Bank was able to use falsified documentation to collect insurance proceeds on that default loan.

In other words, *Harmas* involved insurance fraud relating to student loans already on Florida Federal's books. The fraud was ultimately detected and Mr. Hamas was convicted of various federal fraud and criminal conspiracy related offenses. The fraudulent activity that was at issue in *Harmas* bears absolutely no relation the fraudulent activity that Petitioner has asserted occurred in connection with the Student Loan. Thus, *Harmas* provides absolutely no support whatsoever for the fraud claims asserted by Petitioner in the underlying civil action.

IV. THE CIRCUIT COURT WAS CORRECT IN NOT APPLYING THE PRINCIPLES OF UNCONSCIONABLE CONTRACTS TO THE DISCHARGE APPLICATION

Petitioner asserts that the Circuit court erred in not applying the elements of unconscionable contracts as set forth in this Court's decisions in *Brown I* and *Brown II* to the Discharge Application. Petitioner's claim that the Discharge Application constitutes an unconscionable contract is clearly preempted by the HEA and FFEL Regulations and the Supremacy Clause of the United States Constitution. *Brown I* and *Brown II* involved a determination of whether arbitration clauses contained in consumer nursing home contracts entered into between private persons and non-governmental entities were unconscionable. In

Brown I, this Court addressed whether the Federal Arbitration Act preempted applicable West Virginia law providing that arbitration clauses are void. This Court found that the FAA did preempt West Virginia law. This Court also found that arbitration clauses contained in three nursing home agreements were unconscionable. In so doing, this Court eloquently set forth the principles that must be followed in determining if a contract term is unconscionable. It is important to note that *Brown I* and *Brown II* involved consumer contracts between private parties. This case involves a contract between the federal government and Petitioner. The Discharge Application is a standard form issued by ED pursuant to the FFEL Regulations. A state court is simply not empowered to declare that terms of a federally mandated contract are unconscionable. If a state court were to so rule it would clearly be in violation of the Supremacy Clause of the United States Constitution which “invalidates state laws that interfere with or are contrary to federal law.” See Syllabus Point 1, *Cutright v. Metropolitan Life Ins. Co.*, 201 W.Va. 50, 491 S.E.2d 308 (1997). Therefore, the principles of unconscionable contracts set forth in *Brown I* and *Brown II* are not applicable to the Discharge Application.

Assuming, for the sake of argument, that the principles of unconscionable contracts set forth in *Brown I* and *Brown II* are applicable to the Student Loan, Petitioner has not demonstrated that she is entitled relief under those principles. In *Brown I*, this Court recognized that:

‘[T]he bulk of the contracts signed in this country are contracts of adhesion,’ and are generally enforceable because it would be impractical to void every agreement merely because of its adhesive nature. ‘There is nothing inherently wrong with a contract of adhesion. Most of the transactions of daily life involve such contracts that are drafted by one party and presented on a take it or leave it basis. They simplify standard transactions[.]’

Brown I, 228 W. Va. 646, 683, 724 S.E.2d 250, 286 (quoting John D. Calamari, Joseph M. Perillo, *Hornbook on Contracts*, § 9.43 (6th Ed.2009)). In *Brown II* this Court reiterated the following principles from *Brown I*:

‘Under West Virginia law, we analyze unconscionability in terms of two component parts: procedural unconscionability and substantive unconscionability.’ ‘Procedural and substantive unconscionability often occur together, and the line between the two concepts is often blurred. For instance, overwhelming bargaining strength against an inexperienced party (procedural unconscionability) may result in an adhesive form contract with terms that are commercially unreasonable (substantive unconscionability).’ ‘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.’

Brown v. Genesis Healthcare Corp., 229 W. Va. 382, 392, 729 S.E.2d 217, 227 (2012). In *Brown II* this Court stated the following:

Undertaking ‘[a]n 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.’ ‘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.’ ‘[T]he particular facts involved in each case are of utmost importance since certain conduct, contracts or contractual provisions may be unconscionable in some situations but not in others.’

Brown v. Genesis Healthcare Corp., 229 W. Va. 382, 391-92, 729 S.E.2d 217, 226-27 (2012).

Petitioner argues that the Discharge Application is unconscionable because it is a contract of adhesion and that she had no other practical alternative to obtain relief from the Student Loan but to sign the Discharge Application. The facts do not support Petitioner’s argument. As stated

above, on multiple occasions PHEAA presented Petitioner with paperwork to obtain a discharge of the Student Loan based upon her claims of fraud, identity theft, and total and permanent disability. In each instance, Petitioner failed to provide all the information required to obtain a discharge. PHEAA also presented Petitioner the opportunity to obtain a discharge of her Student Loan based upon her claims of disability. Petitioner repeatedly failed to provide the legally required physician certification of disability. Instead, Petitioner repeatedly insisted that PHEAA accept the SSI Determination even after she was advised that the SSI Determination could be used as a substitute for the physician certification of disability. Therefore, Petitioner did not exhaust all available administrative remedies prior to signing the Discharge Application. Furthermore, it appears that Petitioner executed the Discharge Application under the supervision of and with the advice of her legal counsel. At the beginning of the civil action and prior to executing the Discharge Application, PHEAA moved the Circuit court to dismiss pursuant to Rule 12(b)(6). PHEAA's motion was denied. As the trial date approached, PHEAA moved the Circuit court for summary judgment which was denied. It was not until after the Discharge Application was filed and PHEAA filed a renewed motion for summary judgment based upon its terms that the Circuit court granted PHEAA summary judgment. Accordingly, it is evident that the Circuit court was going to permit the civil action to proceed to trial prior to Petitioner filing the Discharge Application. Therefore, Petitioner could have pursued her day in court in an effort to obtain relief from the Student Loan. Therefore, based upon the above, it is clear that Petitioner's argument that she had no other practical alternative to the Discharge Application is without merit.

Petitioner's argument that the Discharge Application is unconscionable is untenable and inconsistent with her claims. Petitioner is more than willing to accept the benefits afforded to

her under the Discharge Application which provided her a discharge of the Student Loan and a return of funds that she paid pursuant to provisions of the FFEL Regulations. Yet she still wants to argue that the FFEL Regulations and the HEA do not apply to the Student Loan so that she can pursue her preempted WVCCPA claims. In other words, Petitioner is willing to accept the application of the HEA and FFEL Regulations to the Student Loan only when it is to her benefit. Petitioner “wants to have her cake and eat it too.”

In discussing the doctrine of judicial estoppel, this Court stated that “it is generally recognized that ‘[s]ince judicial estoppel precludes parties from misrepresenting the facts in order to gain an unfair advantage, once a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.’ *Riggs v. W. Virginia Univ. Hospitals, Inc.*, 221 W. Va. 646, 674, 656 S.E.2d 91, 119 (2007)(citations omitted.). This Court further noted that “[t]he doctrine was ‘intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories.’” *Id.* Based upon general equitable principles and the principles of judicial estoppel, the Petitioner cannot be permitted to accept the benefits granted to her under the FFEL Regulations by virtue of the Discharge Application and, at the same time, pursue WVCCPA claims against PHEAA which are grounded upon her assertion that the HEA and FFEL Regulations are inapplicable to the Student Loan. Accordingly, the Circuit court did not err in not considering the elements of an unconscionable contract as set forth in *Brown I* and *Brown II*.

CONCLUSION

For the reasons set forth herein, the Petitioner must be denied all the relief she is requesting in this appeal and this Court must affirm the Circuit court’s order granting PHEAA

summary judgment on all the claims asserted by Petitioner against it in the underlying civil action.

Respectfully submitted,

PENNSYLVANIA HIGHER EDUCATION
ASSISTANCE AGENCY, INC.,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Karen Adams, Plaintiff Below,
Petitioner

vs.

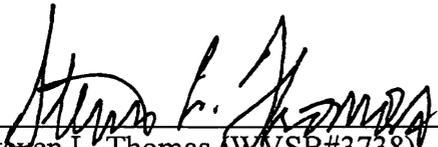
No. 15-0524

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

CERTIFICATE OF SERVICE

The undersigned counsel for Pennsylvania Higher Education Assistance Agency d/b/a American Education Services, a foreign corporation, hereby certifies that on this this 19th day of October, 2015, *Respondent's Brief In Opposition To Petitioner's Appeal* was served by facsimile upon:

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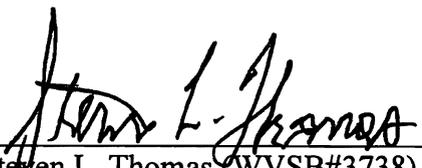
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Pennsylvania Higher Education Assistance Agency,
d/b/a American Education Services, a foreign corporation,
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AMENDED CERTIFICATE OF SERVICE

The undersigned counsel for Pennsylvania Higher Education Assistance Agency d/b/a American Education Services, a foreign corporation, hereby certifies that ***Respondent's Brief In Opposition To Petitioner's Appeal*** filed on the 19th day of October, 2015, was served by First Class U.S. Mail, as follows:

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