IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

CASE NO. 19-0874

STATE OF WEST VIRGINIA EX REL.

NAVIENT SOLUTIONS, LLC.

PETITIONER

V.

THE HONORABLE RONALD E. WILSON,

JUDGE OF THE CIRCUIT COURT OF OHIO COUNTY, and

REBECCA L. BROGAN-JOHNSON,

RESPONDENTS

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Filed by REBECCA L. BROGAN-JOHNSON

Counsel for Respondent, Rebecca L. Brogan-Johnson

Frank X. Duff, Esquire
W.Va. Bar ID #1065
fxd@schraderlaw.com
Sandra K. Law, Esquire
W.Va. Bar ID #6071
skl@schraderlaw.com
SCHRADER COMPANION DUFF & LAW, PLLC
401 Main Street
Wheeling, WV 26003
(304) 233-3390

I. TABLE OF CONTENTS

II. TABLE OF AUTHORTIES

RESPONSE OF REBECCA L. BROGAN-JOHNSON IN OPPOSITION TO NAVIENT SOLUTION'S PETITION FOR WRIT OF PROHIBITION

Rebecca L. Brogan-Johnson, (the "Plaintiff" in the underlying Circuit Court Action), pursuant to Rule 16 of the Supreme Court of Appeals of West Virginia, hereby submits her Response in Opposition to the Petition for a Writ of Prohibition filed by Navient Solutions, LLC ("Navient"). Navient has failed to demonstrate a viable basis upon which a Wirt of Prohibition may issue pursuant to this Court's precedence, and the Circuit Court did not commit any legal error in denying entry of Navient's Cross Motion for Summary Judgment.

In the alternative, should this Court determine to review the Circuit Court's Order based on a clear error of law, the uncontested facts on the parties' cross motions for summary judgment clearly support entry of summary judgement in the Plaintiff's favor, and this case should be remanded to the Circuit Court with a direction to enter judgment in favor of the Plaintiff.

III. QUESTIONS PRESENTED

1. Whether Navient has asserted viable grounds upon which to seek a writ of prohibition based on the denial of its Motion for Summary Judgment when the underlying action is a simple, straight-forward, two-party dispute that is awaiting resolution by trial, that raises no novel issues of law, for which Navient has suffered no cognizable damage, and for which the Circuit Court appropriately denied Navient's Motion for Summary Judgment.
2. Whether the Circuit Court committed a clear error of law by concluding that the Plaintiff's causes of action were NOT preempted by federal regulations when: (a) Navient failed to show that the Plaintiff's interest rate calculation on her consolidated student loan was governed by its cited federal regulations, (b) Navient failed to show how its cited regulation required Navient to bill the Plaintiff at a 4.0% repayment rate on a 3.0% fixed contract, (c) Navient itself admitted that the Plaintiff's 3.0% repayment rate complied with any applicable federal regulation, (d) Navient failed to show how the Plaintiff's student loan would not be repaid within its required term and (e) Department of Education instructions for loan servicing were directly inapposite to Navient's actions.

3. Whether the Circuit Court committed a clear error of law by concluding that the Plaintiff is NOT estopped from asserting causes of action when the Plaintiff never appeared before any adjudicatory body before which the law of estoppel might apply, never took any inconsistent position, never made a representation upon which Navient justifiably relied, was never offered a viable, informal resolution by Navient, and who expressly followed the direction given to her by one of Navient's regulatory entities that she could obtain counsel to look into the matter.

4. Whether summary judgment should have been granted to the Plaintiff on her breach of contract claim when the undisputed facts demonstrated that Navient began billing the Plaintiff using a 4.0% repayment rate when the Plaintiff's contractual repayment rate is an undisputed, fixed, 3.0% rate.

5. Whether summary judgment should have been granted to the Plaintiff on her claims under the WVCCPA when the undisputed facts demonstrated that Navient had breached the Plaintiff's contract, lied about the reasons for breach, and has been collecting on her student loan debt based on bogus loan repayment terms.

IV. STATEMENT OF THE CASE

After graduating from law school in May 2002, the Plaintiff began to actively consider the repayment of her student loans. At the time, the Plaintiff was familiar with the availability of student loan consolidation programs and incentives. For example, her student loan disclosure from Direct Loan dated October 27, 2002, expressly stated:

> **Discounts on Interest Rates Are Available for Direct Loans**
>
> . . . .
>
> **Direct Consolidation Loan discount** – If you have a Direct Consolidation Loan that was made under a program to encourage timely repayment, you receive a 0.800% discount on your interest rate. You must make your first 12 monthly payments on time to keep this discount.

(App. 000371).

A question and answer document detailing the implementation of the Direct Loan interest rate incentive program details that during the first twelve months, the former student is billed at the higher interest rate, but after successfully making all twelve payments, the interest rate

reduction is permanent, cannot be lost, and the former student will only be billed at the lower interest rate:

> **16. What will happen to the interest rate of record and the monthly payment amount on my Direct Consolidation Loan when I fulfill the 12-payment requirement?**
>
> After you fulfill the 12-payment requirement by making all of your first twelve required monthly payments on time, the Direct Loan Servicing Center will change the higher interest rate of record to the lower rate. The changing of the interest rate of record to the lower rate is permanent, and you will keep the lower rate throughout the remaining life of your loan.
>
> When the interest rate of record is changed to the lower rate, the Direct Loan Servicing Center also will recalculate your monthly payment amount.

(DLB 00-51, *New Repayment Incentive Benefits – Second Question and Answer Document: Interest Rate Reduction for Direct Consolidation Loan*, November 2000) (App. 000377).

The Plaintiff did not take advantage of the Direct Consolidation Loan discount offering because she took advantage of a better student loan consolidation offer from Collegiate Funding Services, for a fixed, low interest rate consolidation payment that would drop a full 1.0% after 12 months of timely payments. (App. 000070-72). Regarding applicable interest rates, the Plaintiff's original Federal Consolidated Loan Application and Promissory Note states:

> Unless my lender notifies me in writing of a lower rate, the formula for the rate of interest for my Federal Consolidate Loan is specified in the Higher Education Act of 1965, as amended, 20 U.S.C. et seq., and applicable U.S. Department of Education regulations.

(App. 000029) (emphasis added).

As asserted by Navient, the applicable regulation from the U.S. Department of Education governing interest rates on student loan contracts provides:

> For a Consolidation loan for which the application was received by the lender on or after October 1, 1998 and prior to July 1, 2010, the interest rate for the portion of the loan that consolidated loans other than HEAL loans is a fixed rate that is the lesser of – (A) The weighted average of interest rates on the loans consolidated, rounded to the nearest higher one-eighth of one percent; or (B) 8.25 percent.

34 C.F.R. § 682.202(a)(4).

The Plaintiff's Consolidated Loan Application and Promissory Note was dated June 24, 2002 (App. 000028), but the consolidating lender allowed the Plaintiff to take advantage of a graduating student loan deferment grace period and did not actually consolidate the Plaintiff's student loans until October 2002. (App. 000389). The Plaintiff's last, pre-consolidation Direct Loan Statement dated October 27, 2002, consists of two loans: one in the amount of $36,724 having a corresponding interest rate of 4.060%, and the second was in the amount of $13,254.11, having a corresponding interest rate of 4.860%. (App. 000371). As evidenced by the Plaintiff's first billing statement, the consolidated interest rate was a fixed, 3.75%. (App. 000034). There is simply no mathematical circumstance whereby § 682.202(a)(4) can apply to the Plaintiff's consolidated student loan: the weighted average of these two loans, plus 0.125%, cannot equate to the Plaintiff's consolidated loan repayment rate of 3.75%. (App. 000034).

On October 31, 2002, Collegiate Funding Services notified the Plaintiff of her ability to add additional student loans to her consolidation loan if she accomplished that task within the next 180 days. (App. 000389). The Plaintiff also took advantage of that offer and began repaying consolidated loans having a principal balance of $72,241.01 for the payment due on March 8, 2003, and her consolidated loans then carried a 4.0% fixed repayment interest rate. (App. 000038).

Pursuant to her interest rate reduction offer, the Plaintiff completed her 12 months of timely payments with the loan payment due on November 8, 2003, and her interest rate decreased from 4.0% to 3.0%, starting with the loan payment due on December 8, 2003. (App. 000337). Her

corresponding minimum monthly payment dropped from $345.31 to $307.11. (App. 000038, 44, 337).

For the next 13-14 years, the Plaintiff was billed based on her 3.0% repayment rate and there was no dispute as to the Plaintiff's monthly billing statement or her contract terms. During the entirety of that period (and to the present day), the Plaintiff timely made every single payment and nearly always paid more than the monthly amount due. (App. 000043-44). At some time during her repayment period, Sallie Mae took over servicing the Plaintiff's student loan, and at some time thereafter, Navient became the Plaintiff's student loan servicer. The Plaintiff has never negotiated any loan repayment terms with Navient and Navient does not have any records or documents to contradict the Plaintiff's sworn affidavit regarding the terms of her repayment contract and her 1.0% interest rate reduction. (App. 00006, 31). The Plaintiff's affidavit regarding her interest rate reduction is supported by nearly 14 years of conforming performance.

In April 2016, Navient issued a notice to the Plaintiff that her monthly payment would be increasing to $328.89, but it failed to provide any applicable reason for the billing increase. Instead, Navient gave the Plaintiff a list of different options – none of which applied to the Plaintiff – that might have increased her monthly payment. Those options included:

- The deferment of forbearance period used to postpone your monthly payment is about to end,
- You requested a different monthly payment amount,
- Your repayment plan has changed,
- Your school separation date was updated to an earlier date than previously reported,
- Your interest rate has changed,
- Unpaid interest has been capitalized, or
- Due to past delinquency of late payments, the monthly payment amount was insufficient to pay off the loan within the remaining repayment period.

(App. 000046).

Because none of these reasons were applicable to the Plaintiff, she made several informal attempts, from April to July 2016, to resolve the dispute with Navient. (App. 00054-63). Those efforts were unsuccessful due to Navient's failure to disclose information regarding its unilateral action. For example, when the Plaintiff asked why her monthly payment was increasing about $20 a month after 14 years of timely payment, Navient responded:

> [T]he amounts due for each portion of the loan would not pay the loan in full within the remaining number of payments in the repayment term. Your payments have been adjusted accordingly.

(App. 000054).

When this explanation did not make sense given the Plaintiff's spotless loan repayment history, Navient changed its explanation:

> We discovered that the end date was different for each loan. Since your Direct Consolidation Loan is treated as one loan on our system, we had to align the end dates so the final payment due on both loans is the same. Therefore, your loans were redisclosed on April 10, 2016 . . . . Unfortunately, we don't provide amortization schedules.

(App. 000055).

The Plaintiff could not understand how these explanations applied to her fixed rate consolidation loan that had fixed repayment term, thus, in September 2016 the Plaintiff utilized procedures made available to consumers by Consumer Financial Protection Bureau (CFPB) to obtain explanations from companies. (App. 000189-196). The Plaintiff also attached an unsigned, four-count draft complaint against Navient and Citibank (her original consolidation loan servicer) listing four potential causes of action. Navient responded to the CFPB:

> Recently Navient reviewed accounts to ensure that loans will be paid off within their repayment terms. After a review of your loan, we found that the minimum monthly payment amount needed to be modified to allow the loan to be paid off in the available repayment period. This increased your monthly payment amount from $307.11 to $328.89.

> **Your original interest rate is 4.00 percent. You are receiving a 1.00 percent interest rate reduction due to a timely payment customer incentive program. Navient calculates payment amounts based on the original interest rate.** Please note that the increase in your payment amount would allow you to repay less interest over the life of your loan and likely pay your loan off sooner. We have attached a copy of your Promissory Note for your review, the Truth in Lending Disclosure Statement is not available.
>
> **We are willing to recalculate your payment amount using the discounted interest rate of 3.00 percent.** This would decrease your payment to approximately $303.17. Please keep in mind that your payment amount may change if your incentive program benefit is lost or you choose to utilize deferment, forbearance or a repayment option.

(App. 000041) (emphasis added).

After receiving this response, the Plaintiff learned for the first time that Navient had unilaterally increased her repayment rate by billing her as if her loan had a repayment rate of 4.0%. The instructions provided to her by the CFPB following Navient's response informed the Plaintiff:

> What Happens Next:
>
> . . . .
>
> Can I hire my own lawyer to look into this?
>
> Yes. While we can't give legal advice or represent individuals in legal matters, if you want more help you can contact a private attorney . . . .

(App. 000192)

Determined to seek legal counsel, the Plaintiff ceased all direct communications with Navient, and in January 2017, she field a three-count complaint against Navient alleging: (1) breach of contract, (2) violations of § 46A-2-127 of the West Virginia Consumer Credit and Protection Act (WVCCPA), and (3) violations § 46A-2-128 of the WVCCPA.

Then, to the extent federal regulations regarding interest rates apply to the Plaintiff' student loan, Navient admitted that the Plaintiff's 3.0% loan repayment schedule will timely complete within the required 30-year time-period:

> Ms. Johnson['s] . . . payment rate . . . of 3.00% would satisfy federal requirements that her loans be paid off within thirty (30) years . . . .

(App. 000199).

Navient also admitted that it had general knowledge of student loan interest rate incentive reduction offerings, however, it had no specific knowledge of the Plaintiff's incentive rate reduction offer or acceptance and had therefore made changes to the Plaintiff's student loan billing statements without any factual or legal basis. (App. 000159). Navient's assertions regarding the Plaintiff's repayment rate of interest are completely fabricated.

Because Navient had already admitted that it was billing the Plaintiff based on a 4.0% repayment rate on a fixed 3.0% repayment rate contract, because Navient had already admitted that there was no federal regulation that prohibited it from billing the Plaintiff based on her 3.0% contractual repayment rate, because Navient was unable to produce any authority or documentation that required it to bill the Plaintiff at a higher, extra-contractual rate, and because Navient had plainly lied to the Plaintiff in its communications for collection of her student loan debt, the Plaintiff requested entry of summary judgment to obtain a declaration that Navient breached her contract and committed violations of the WVCCPA.

Navient filed a cross motion for summary judgment seeking dismissal of the Plaintiff's complaint based on: (1) its allegation that the Plaintiff had failed to establish a breach of contract, (2) its allegation that federal regulations required it to bill the Plaintiff at a 4.0% repayment rate when her contract rate was 3.0%, and (3) based its theory that the Plaintiff's choice to seek legal counsel following its response to the Plaintiff's CFPB proceeding could form the basis for an estoppel argument.

The Circuit Court denied both motions for summary judgment. Subsequently, the Circuit Court denied Navient's motion for a protective order to keep documents produced in discovery confidential. (App. 000368). This is important because the Plaintiff believes that Navient has a reputation of being a disastrous student loan servicer. *See, e.g.*, U.S. Department of Education, Office of Inspector General, *Federal Student Aid: Additional Actions Needed to Mitigate the Risk of Servicer Noncompliance with Requirements for Servicing Federally Held Student Loans*, February 12, 2019 ("From January 1, 2015, through September 30, 2017, ***61 percent*** (210) of 343 reports on FSA's oversight activities disclosed instances of servicer noncompliance.") (emphasis added) (App. 000381-88). Once judgement is entered in her favor, the Plaintiff intends on refiling a CFPB complaint, contacting CFPB litigation counsel suing Navient for inappropriate servicing, and writing her congressional representatives in hopes of preventing similar loan servicing abuses of former students holding loans that do not proscribe, are non-dischargeable in law, and the payment of which are guaranteed by the American taxpayers.

At the time of the filing of Navient's Writ of Prohibition, the parties are continuing to litigate a discovery dispute, and are awaiting trial.

V. SUMMARY OF THE ARGUMENT

A writ of prohibition is an extraordinary remedy, the grounds for which have not been demonstrated by Navient. In this case the Circuit Court correctly denied entry of Navient's Motion for Summary Judgment because it would have been clear legal error to grant it. A denial of summary judgment is an interlocutory order and an authorized disposition by a Circuit Court. Moreover, there are only two parties to this dispute, which is based on a simple and oft-litigated area of the law, and Navient has not shown any harm by waiting to appeal after entry of a final judgment.

Navient's reliance on federal regulations and preemption are simply not applicable to this case. It has not cited to a single federal regulation that would permit it to bill the Plaintiff at a higher interest rate than her actual, 3.0% contractual repayment rate. Moreover, it references purported governing regulations the actual application of which defies logic, defies the express terms of the Plaintiff's original promissory note application, and even if the regulations did apply, Navient has admitted that Plaintiff's 3.0% repayment rate complies with the cited regulations. Moreover, existing instructions from the Department of Education inform loan servicers to administer loans in a manner that is entirely inapposite to Navient's actions in this case and in complete accord with the Plaintiff's position and loan servicing history.

Navient's theory that the Plaintiff is estopped from filing a complaint in Circuit Court fails to apply the law of estoppel. When Navient failed to provide a cogent explanation as to why it had unilaterally increased the Plaintiff's monthly repayment amount, she utilized the procedures of a regulatory / investigatory body – not an adjudicatory body – to obtain better information from Navient regarding how it was servicing her student loan. After she obtained that information, she followed instructions from the regulatory entity about obtaining counsel, ceased her direct communications with Navient, and filed a complaint in Circuit Court four months later. Far from offering the Plaintiff an adequate pre-lawsuit remedy before the CFPB, Navient only made an offer to honor her contract repayment rate, which is already required by law, it never offered reimbursement of amounts excessively billed, and it never addressed any of its violations of the WVCCPA.

The Plaintiff's breach of contract claim is simple. Her student loan bears a repayment interest rate of 3.0%, and from 2002 to April 2016, she timely made every payment and nearly always paid more than the minimum amount due. (App, 000043-44). In April 2016, Navient began

billing her at a 4.0% repayment rate even though it expressly admitted that: (a) the Plaintiff's repayment rate was 3.0%, (b) that her 3.0% repayment rate complied with any applicable federal regulation, (c) that her loan is currently scheduled to be fully paid *before* the end of her contractual repayment term, (d) that there was not any prohibition on Navient actually billing the Plaintiff based on her contract rate, and (e) that it had no knowledge of the terms of the Plaintiff's agreement in 2002 to consolidate her loans based on the interest rate reduction offer. By billing the Plaintiff at a higher rate than authorized by her contract, Navient has also unilaterally reduced the Plaintiff's contractual repayment period.

The Plaintiff's right to recover damages under the WVCCPA is similarly uncomplicated. Navient increased the Plaintiff's monthly bill based on false pretenses, lied about the reasons for the change, and then continued to bill the Plaintiff at an unauthorized rate. It is fraudulent, deceptive and/or misleading to lie to a consumer about repayment information, and then to bill a consumer at an interest rate that is higher than authorized by the loan agreement. Such conduct also constitutes an unfair or unconscionable means by which to collect a debt.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument on Navient's Petition for a Writ of Prohibition is unnecessary and wasteful. This litigation is a simple, two-party dispute that does not present any complex matter for which this Court may be aided by oral argument. The facts and legal arguments are adequately presented in the papers before this Court. Requiring counsel to appear for oral argument to state what has already been submitted in writing only allows Navient's counsel to excessively bill its client and it unnecessarily increases litigation expenses.

VII. ARGUMENT

This Honorable Court has original jurisdiction in prohibition proceedings pursuant to art. VIII, § 3, of The Constitution of West Virginia. Regarding consideration of a writ of prohibition, this Court stated in the syllabus point of *State ex rel. Vineyard v. O'Brien*, 100 W.Va. 163, 130 S.E. 111 (1925) that "[t]he writ of prohibition will issue only in clear cases where the inferior tribunal is proceeding without, or in excess of, jurisdiction." When determining whether a Circuit Court erred in allowing a complaint to move forward by denying entry of summary judgment, this Court stated in syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996):

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Id.

1. Question Presented No. 1: Whether Navient has asserted viable grounds upon which to seek a writ or prohibition based on the denial of its Motion for Summary Judgment when the underlying action is a simple, straight-forward, two-party dispute that is awaiting resolution by trial, that raises no novel issues of law, for which Navient has suffered no cognizable damage, and in which the Circuit Court appropriately denied Navient's Motion for Summary Judgment.

This Court should deny Navient's Writ of Prohibition because it has failed to establish the existence of any of the elements set forth by this Court for granting a writ of prohibition.

A. This is a Simple Dispute Subject to Resolution by Trial and, as Applicable, Appeal

The Plaintiff's three causes of action against Navient are straight forward: one count for breach of contract and two counts for violations of the WVCCPA. The dispute only involves two parties and is capable of being determined following an uncomplicated trial. If Navient is adversely affected by the outcome, it may avail itself its appeal rights. Navient's Writ of Prohibition for an interlocutory order unnecessarily delays a timely resolution of this matter in the Circuit Court. Trial and appeal are adequate and regular legal procedures that Navient should utilize. *See, e.g.*, *Hinkle v. Black*, 164 W. Va. 112, 116; 262 S.E.2d 744 (1979) ("[W]e are adamantly opposed to being in the interlocutory appeals business.").

B. Navient is Not Damaged by The Circuit Court's Denial of Its Summary Judgment Motion

As discussed below, there was no basis in law or fact upon which the Circuit Court could grant Navient's motion for summary judgement; consequently, Navient cannot be damaged or prejudiced by the Circuit Court's interlocutory decision. Also, Navient may avail itself of its appeal rights following entry of judgement in favor of the Plaintiff. *See, e.g., State ex rel. Owners Ins. Co. v. McGraw*, 233 W. Va. 776, 780 760 S.E.2d 590 (2014) ("[W]e see no indication that any error in the lower court's interlocutory rulings would not be reparable if this matter were directly appealed to this Court.").

C. No Basis Exists to Make a Determination that the Circuit Court's Denial of Summary Judgment is an Oft Repeated Error and/or Manifests Persistent Disregard for Either Procedural or Substantive Law

There is no evidentiary basis in the record to support Navient's theories of federal preemption or estoppel. As this Court stated in Syl. pt. 1, *In the interest of Tiffany Marie S.* 196 W. Va. 223, 470 S.E.2d 177 (1996):

> A finding is "clearly erroneous" when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirely.

Id.

Principally, in the Circuit Court, there was no factual basis on which to apply Navient's theories of federal preemption and estoppel. For example, in support of its Motion for Summary Judgment, Navient wrote 29 paragraphs of alleged facts. As pointed out by the Plaintiff to the Circuit Court, many of those allegations were: (a) unsupported legal conclusions, (b) inaccurate, (c) based on assumptions that are not supported by the record, and/or (d) based on statements that are contradicted by the record. The following factual assertions by Navient, and the Plaintiff's responses, were presented to the Circuit Court with regards to Navient's Motion for Summary Judgment:

> 1. Plaintiff brings this action in relation to the payment amount under her current Federal Consolidation Loan (the "Loan"), which was disbursed on October 24, 2002 in the original principal amount of $72,322.89 ($44,714.87 subsidized, and $27,608.02 unsubsidized).
>
> Response: This statement is inaccurate and the documents speak for themselves. Plaintiff's original consolidated loan application dated June 24, 2002, requested consolidation of William D. Ford Direct Loans with a current balance of $51,039. A Citibank billing statement from December 2002 reflects a principal balance of $53,108.81. Subsequently, in January 2003, three additional loans were consolidated resulting in a new principal balance of $72,322.89.
>
> 3. The interest rates for federally guaranteed student loans made under the Federal Family Education Loan Program (FFELP) are established by Congress and the United States Department of Education. See 34 C.F.R. § 682.402(a). For Federal Consolidation Loans disbursed in October 2002, the regulations provide:
>
> > "For a Consolidation loan for which the application was received by the lender on or after October 1, 1998 and prior to July 1, 2010, the interest rate for the portion of the loan that consolidated loans other than HEAL loans is a fixed rate that is the lesser of – (A) The weighted average of interest rates on the loans consolidated,

rounded to the nearest higher one-eighth of one percent; or (B) 8.25 percent.

34 C.F.R. § 682.202(a)(4).

Response: There is no factual assertion in this Paragraph. Plaintiff agrees that her Promissory Note Application states, "Unless my lender notifies me in writing of a lower rate, the formula for the rate of interest for my Federal Consolidation Loan is specified in the Higher Education Act of 1965, as amended, 20 U.S.C., et seq., and applicable U.S. Department of Education regulations." (emphasis added). As Navient has not disputed that the Plaintiff's contractual rate of repayment was 3.0%, the legal application of the Higher Education Act of 1965 is not material. Moreover, the Plaintiff has no personal knowledge – and Navient has produced no evidence – of whether Citibank calculated her interest rate under the Higher Education Act of 1965 or whether it merely notified her of a lower rate. However, the documentary evidence that does exist in the case indicates that none of the Plaintiff's pre-consolidation student loans had a repayment interest rate of 4.0% or lower; consequently, taking a weighted average for an interest rate of her consolidated loans to reach a 4.0% interest rate pursuant to the quoted Code of Federal Regulations is a mathematical impossibility. (See Ex. 1). This is conclusive evidence that the Plaintiff's interest rate was not calculated under 34 C.F.R. § 682.202(a)(4).

4. When the Loan was initially disbursed, Plaintiff was mailed two "Loan Repayment and Disclosure Schedules for loans guaranteed under the Higher Education Act of 1965" by her consolidating lender, Citibank (New York State), as trustee for The Student Loan Corporation. Copies of the Loan Repayment and Disclosure Schedules (Pl.'s Mem. Ex. 3). Based on the formula set forth in 34 C.F.R. § 682.202(a)(4), Citibank set the interest rate for the Loan at 3.75%. Id.

Response. Disputed. The Plaintiff is not sure to what documents Navient is referring. Pl.'s Mem. Ex. 3 is a billing statement. Plaintiff disputes that Citibank set the Plaintiff's interest rate based on the formula set forth in 34 C.F.R. § 682.202(a)(4) because the Plaintiff has never seen such a calculation, Navient has not produced it, and the conclusion is contrary to the existing documentary evidence. In any event, the dispute is not material because there is no dispute that Plaintiff's loan repayment interest rate is 3.0%.

6. Because the addition of the three student loans to her consolidation increased the weighted average of interest rates on the loans subject to consolidation, the contractual interest rate on the Loan was set at 4.00%. Pl.'s Mem. Ex. 5.

Response: The Plaintiff does not contest that her contractual rate of repayment in January 2003 was 4.0% or that the fixed interest rate repayment was contractually lowered to 3.0% after 12 months of timely payments. The Plaintiff disputes that the January 2003 repayment rate was 4.0% based on "the weighted average of interest rates on the loans subject to consolidation" as there is no evidence to support this conclusion. See the Response to Para. 3. In any event, this

dispute is not material because there is no dispute that Plaintiff's interest rate was 4.0% in January 2003, and was contractually reduced to 3.0% after a year of timely payments.

8. Though not factually established, Plaintiff contends she qualified for a repayment incentive program offer by Citibank, which provided a reduced rate of interest given that Plaintiff maintained certain payment consistencies.

Response: Plaintiff's 3.0% contract repayment rate is factually established through her affidavit, through her billing history, and through Navient's own statements. See, for example, Paragraph 11 of Navient's own Statement of Facts.

12. However, U.S. Department of Education regulations mandate that Plaintiff's Consolidation Loan must be repaid within thirty years. See 34 C.F.R. § 682.209(e)(2).

Response: This is a legal argument and not a statement of fact. Navient has not established that the Code of Federal Regulations govern the interest rate repayment for the Plaintiff's loans or whether Citibank notified the Plaintiff of a lower rate. See the Response to Para. 3. Navient has not established that the Plaintiff's loan would not be repaid in full during its contractual term. However, this issue is not material because there is no dispute that the Plaintiff's repayment interest rate is 3.0% and no dispute that the Plaintiff's loan will be repaid in full during its contractual term at a 3.0% interest rate.

13. In accordance with federal regulations, NSL determined that based on her prior payment history while Plaintiff's Loan was serviced by Citibank, that Plaintiff would be unable to repay the Loan in full within the mandated 30-year period based on her current monthly payment amount. Accordingly, NSL notified Plaintiff by letter dated April 10, 2016, that her monthly payment amount—but not the amount of interest accumulating on the loan—would be changed from $307.11 to $328.89—an increase of $21.78. Among the reasons for the change of loan terms was a list of explanations, that included: "Due to past delinquency or late payments, the monthly payment amount was insufficient to pay off the loan within the remaining repayment period." The letter also contained a disclosure statement which reads: "Review of payment schedule. Periodically, Navient may review your account and adjust your monthly payment amount to ensure that your loan will pay off by its stated loan term end date. We will inform you of any such change before the new monthly payment amount is due." A copy of NSL's letter dated April 10, 2016 is attached to Pl.'s Mem. as Ex. 8.

Response: The Plaintiff disputes that Navient's actions are dictated by or in accordance with federal regulations. Tellingly, Navient has refused to produce any amortization schedules and Navient has not disputed the Plaintiff's amortization schedule (Pl.'s Mem . Ex. 9) demonstrating full payment within the term of the loan. Moreover, Navient specifically informed the Plaintiff by letter dated April 10, 2016 that her loan was increasing based on one of seven specific reasons – none of which was applicable to the Plaintiff and none of which was based on a review of her payment schedule. Such an assertion regarding a review of her payment

schedule is also false because Navient itself has stated that Plaintiff's loan will be paid in full during its contractual term. Because Navient's assertion that it is acting in accordance with federal regulations is a legal conclusion and not a fact, and because the relevant documents speak for themselves, this dispute is not material.

29. Rather, Plaintiff ignored NSL's proposed resolution and the CFPB dispute resolution procedures, and instead filed this lawsuit in January of 2017—four (4) months after the closure of her CFPB Complaint. See Id. Affidavit of James M. Austin; see also Exhibit 4.

Response: This statement is disputed. There was no proposed resolution for the Plaintiff to accept. Her repayment interest rate is 3.0%. Navient said it was 4.0% but would voluntarily only bill her at 3.0% - if she asked. Navient was asserting contract terms that were not known to exist by the Plaintiff and which were contrary to her understanding of the contract and her long-established course of dealing. Moreover, the proposed compromise did not address the preexisting (and continuing) violations of the WVCCPA.

In fact, before receiving Navient's response to her public CFPB complaint, Navient had never previously disclosed to the Plaintiff that it was billing the Plaintiff based on a 4.0% interest rate for a contract that had a 3.0% interest rate. The Plaintiff is under no obligation to request that Navient bill her correctly. Far from ignoring Navient's response to her public grievance, she acted upon it by obtaining counsel to represent her interests.

(Plaintiff's Response to Navient's Motion for Summary Judgment).

Based on the Plaintiff's briefing before the Circuit Court and the record on summary judgment, there were ample disputes regarding the "material facts" alleged by Navient. For example, Navient never established that federal regulations required that it bill the Plaintiff at a 4.0% interest rate when her repayment interest rate was 3.0%, and never established that an increase in the Plaintiff's monthly bill was necessary to ensure that her loans were paid off during her repayment term. Navient itself agreed that Plaintiff's loan had a 3.0% fixed interest rate and would be fully repaid within the repayment period; thus, Navient's own statements were in direct contradiction to its legal arguments. Moreover, Navient never established any factual basis upon which the Circuit Court could apply the law of estoppel in its favor because no fact was in existence showing that the Plaintiff was before an adjudicatory body with her CFPB complaint, that there was any inconsistent position taken by the Plaintiff, that the Plaintiff had any duty to act after

receiving Navient's response to her CFPB complaint, or that Navient ever justifiably relied upon any statement made by the Plaintiff to its detriment.

Consequently, the Circuit Court's denial of Navient's motion for summary judgment is supported by the record. The Circuit Court could not have reached the conclusions of law that were (and are) requested by Navient on its Cross-Motion for Summary Judgment.

D. The Lower Tribunal's Order Does Not Raise New and Important Problems or Issues of Law of First Impression

This case does not present any new or novel issues of law. Breach of contract cases have existed since the common law of England. WVCCPA cases are routinely adjudicated by the Circuit Courts, the federal district courts, and by this Court. Billing the Plaintiff at a 4.0% rate of interest on a 3.0% contract is a simple breach. Lying about an increase in a billing statement that is based on an unauthorized repayment rate is a violation of the WVCCPA.

Navient's alleged legal basis for requesting summary judgment does not raise any new, or important problems or issues of first impression. Federal preemption of the WVCCPA is often litigated, as is the doctrine of estoppel.

E. The Circuit Court's Order Denying Navient's Motion for Summary Judgment was the Correct Ruling and Was Therefore Not Clearly Erroneous

Because the Circuit Court properly denied Navient's Motion for Summary Judgment, it did not commit any clear error.

As further stated below, Navient patently failed to show that federal regulations required it to bill the Plaintiff at a 4.0% repayment rate when her contract rate was 3.0%. To the contrary Navient expressly acknowledged its ability to bill the Plaintiff at an amount commensurate with her undisputed contract rate of interest.

As further stated below, Navient patently failed to show how Plaintiff's loan would not be repaid within its contractual period. To the contrary, Navient admitted that the Plaintiff's loan, repaid at her 3.0% contractual rate, would be paid in full before the end of the Plaintiff's contractual loan period.

As further stated below: (1) the law of estoppel does not apply to a proceeding before an investigatory entity, (2) Navient never made a legitimate offer to the Plaintiff because its proposal was only to comply with the terms of the Plaintiff's contract, which it still has not done, and it never addressed its existing and continuing violations of the WVCCPA, (3) the Plaintiff's actions have never been inconsistent, (4) the Plaintiff never made any representation that caused a justifiable reliance by Navient, and (5) the express instructions from the CFPB informed the Plaintiff that she could hire counsel to look into the matter. (App. 000192). Consequently, there was no basis upon which the Circuit Court could apply the law of estoppel to the Plaintiff's actions.

In summary, based on the criteria set forth by this Court in syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), there is no legitimate basis in this case to grant Navient's Petition for Writ of Prohibition. To the extent that this Court determines not to deny Navient's Writ of Prohibition, the only legal conclusion supported by the record on summary judgment is to direct entry of judgment in favor of the Plaintiff.

Question Presented No. 2: Whether the Circuit Court committed a clear error of law by concluding that the Plaintiff's causes of action were NOT preempted by federal regulations when: (a) Navient failed to show that the Plaintiff's interest rate calculation on her consolidated student loan was governed by its cited federal regulations, (b) Navient failed to show how its cited regulation required Navient to bill the Plaintiff at a 4.0% repayment rate on a 3.0% fixed contract, (c) Navient itself admitted that the Plaintiff's 3.0% repayment rate complied with any applicable federal regulation, (d) Navient failed to show how the Plaintiff's student loan would not be repaid within its required term and (e) Department of Education instructions for loan servicing were directly inapposite to Navient's actions.

Navient asserted that it was (and is) only following federal law and therefore cannot breach the Plaintiff's student loan contract or be held accountable for its actions based on the application of West Virginia's common and statutory law.

In *Adams v. Pa. Higher Educ. Assistance Agency*, 237 W. Va. 312, 320-21 (2016), this Honorable Court held that provisions of the Higher Education Act and the Federal Family Educational Loan Program did not preempt a consumer's action under W. Va. Code § 46A-2-127(d).

> There would appear to be nothing which would conflict with or frustrate the requirements and purposes of the HEA and FFELP by also precluding under State law, making a "false representation" about the "character, extent or amount" of a debt. While certain due diligence collection activities are required by the FFELP regulations, making "false representations" about the nature of a debt is certainly not one of them. We therefore find that the circuit court erred in concluding that this claim was federally preempted.

Adams, 327 W. Va. 321.

In short, there is nothing in any federal regulation that allows Navient to make false representations about the character, extent or amount of the Plaintiff's student loan debt. This issue has already been definitively decided by this Court and other state or federal cases to the contrary are abrogated or invalid.

A. Navient failed to show that the Plaintiff's interest rate calculation was governed by its cited federal regulation

As a preliminary matter, Navient has failed, at the most basic level, to show that the Plaintiff's interest repayment rate is governed by 34 C.F.R. § 682.202(a)(4), which is the source of Navient's argument that it has federal authority to bill the Plaintiff at a 4.0% repayment rate on a 3.0% contract.

After graduating from law school in May 2002, the Plaintiff took advantage of a student loan consolidation offer from Collegiate Funding Services, for a fixed, low interest rate consolidation payment that would drop a full 1.0% after 12 months of timely payments. Regarding applicable interest rates, the Plaintiff's original Federal Consolidated Loan Application and Promissory Note states:

> Unless my lender notifies me in writing of a lower rate, the formula for the rate of interest for my Federal Consolidate Loan is specified in the Higher Education Act of 1965, as amended, 20 U.S.C. et seq., and applicable U.S. Department of Education regulations.

(App. 000029) (emphasis added).

As asserted by Navient, the applicable regulation from the U.S. Department of Education governing interest rates provides:

> For a Consolidation loan for which the application was received by the lender on or after October 1, 1998 and prior to July 1, 2010, the interest rate for the portion of the loan that consolidated loans other than HEAL loans is a fixed rate that is the lesser of – (A) The weighted average of interest rates on the loans consolidated, rounded to the nearest higher one-eighth of one percent; or (B) 8.25 percent.

34 C.F.R. § 682.202(a)(4).

The Plaintiff's Consolidated Loan Application and Promissory Note was dated June 24, 2002, but the consolidating lender allowed the Plaintiff to take advantage of a graduating student loan deferment grace period and did not actually consolidate the Plaintiff's student loans until October 2002. The Plaintiff's last, pre-consolidation Direct Loan Statement dated October 27, 2002, consists of two loans: one in the amount of $36,724 having a corresponding interest rate of 4.060%, and the second was in the amount of $13,254.11, having a corresponding interest rate of 4.860%. As evidenced by the Plaintiff's first billing statement, the consolidated interest rate was a fixed, 3.75%. (App. 000034). There is simply no mathematical circumstance whereby §

682.202(a)(4) can apply to the Plaintiff's consolidated student loan: the weighted average of these two loans, plus 0.125%, cannot equate to the Plaintiff's loan repayment rate of 3.75%. Instead, the only logical conclusion based on the facts is that the Plaintiff's consolidation lender notified her of a different rate.

B. Navient failed to show that any federal regulation required it to bill the Plaintiff based on a 4.0% repayment rate when her contractual rate of interest is 3.0%.

Navient has not cited to a single federal regulation that requires it to bill the Plaintiff at a 4.0% repayment rate when her actual, undisputed repayment rate in 3.0%.

As asserted by Navient, the Secretary of Education may approve interest reduction offers to encourage timely repayment of student loans:

> (b). Repayment incentives. To encourage on-time repayment, the Secretary may reduce the interest rate for a borrower who repays a loan under a system or on a schedule that meets requirements specified by the Secretary.

34 C.F.R. 685.211(b).

Lenders have a regulatory disclosure requirement to provide the borrower with the terms of interest rate reduction incentives:

> The lender shall provide the borrower with - -
>
> . . . .
>
> (ix) If the lender provides a repayment benefit, any limitations on that benefit, any circumstances in which the borrower could lose that benefit, and whether and how the borrower may regain eligibility for the repayment benefit.

34 C.F.R. § 682.205(a)(2)(ix).

Neither the Plaintiff nor Navient has the document that discloses the terms and conditions of the Plaintiff's interest rate reduction. The Plaintiff's affidavit states that she received a 1.0% interest rate reduction after 12 months of timely payments, and this statement is supported by nearly 14 years of conforming performance. Moreover, just before she consolidated her student

loans, the Department of Education published a Question and Answer document regarding how the Direct Loan interest rate consolidation incentive offering was to operate:

> **16. What will happen to the interest rate of record and the monthly payment amount on my Direct Consolidation Loan when I fulfill the 12-payment requirement?**
>
> After you fulfill the 12-payment requirement by making all of your first twelve required monthly payments on time, the Direct Loan Servicing Center will change the higher interest rate of record to the lower rate. The changing of the interest rate of record to the lower rate is permanent, and you will keep the lower rate throughout the remaining life of your loan.
>
> When the interest rate of record is changed to the lower rate, the Direct Loan Servicing Center also will recalculate your monthly payment amount.

(DLB 00-51, *New Repayment Incentive Benefits – Second Question and Answer Document: Interest Rate Reduction for Direct Consolidation Loan*, November 2000).

As the response to this question details, the operation of the program is entirely consistent with the Plaintiff's testimony: the former student is billed at the higher interest rate for the first 12 months, but after successfully making all twelve payments, the interest rate reduction is permanent, cannot be lost, and the former student will only be billed at the lower interest rate.

Navient admits that "[t]he specific terms of this incentive program are unknown [to it] because . . . . NSL itself has no records or documents which provide for these specific terms . . . ." (Pet. Writ of Prohibition, p. 3). Although it has no knowledge of the Plaintiff's interest rate reduction incentive offer or acceptance, Navient does have the audacity to fabricate repayment terms that are entirely unknown to the Plaintiff – such as the Plaintiff's repayment rate actually being 4.0%, and the representation that the Plaintiff could lose her fixed, 3.0% repayment rate if she ever defaulted – when such terms are directly contrary to the Plaintiff's understanding of her loan terms, contrary to nearly 14 years of conforming performance, and contrary to the express direction regarding the implementation of interest rate reduction incentive offerings that were

published by the Department of Education just before the time when the Plaintiff consolidated her student loans.

In sum, Navient has not presented any federal regulatory authority that supports is unilateral action in increasing the Plaintiff's monthly repayment rate. Without basis in law or fact to increase the amount of the Plaintiff's monthly billing statement, there can be no federal preemption for its actions.

C. Navient failed to show how the Plaintiff's consolidated loan would not be paid off during its required repayment term

The Plaintiff's consolidated student loan bears interest at 3.0% and has a 30-year term. As a basis for increasing the Plaintiff's monthly repayment amount, Navient stated that the Plaintiff's loan would not be paid off within the repayment period. Its purported authority for making this determination is 34 C.F.R. § 682.209(e)(2):

> **(e) Consolidation loans.**
>
> (1) For a Consolidation loan, the repayment period begins on the day of disbursement, with the first payment due within 60 days after the date of disbursement.
>
> (2) If the sum of the amount of the Consolidation loan and the unpaid balance on other student loans to the applicant –
>
> . . .
>
> (v) Is equal to or greater than $ 40,000 but less than $ 60,000, the borrower shall repay the Consolidation loan in not more than 25 years; or
>
> (vi) Is equal to or greater than $ 60,000, the borrower shall repay the Consolidation loan in not more than 30 years.

Id.

Navient has utterly failed, however, to demonstrate how the Plaintiff's 3.0% interest rate repayment schedule would fail to meet the payoff requirement of this provision. For example, in responding to the Plaintiff's CFPB complaint, Navient stated:

> Recently Navient reviewed accounts to ensure that loans will be paid off within their repayment terms. After a review of your loan, we found that the minimum monthly payment amount needed to be modified to allow the loan to be paid off in the available repayment period. This increased your monthly payment amount from $307.11 to $328.89.
>
> Your original interest rate is 4.00 percent. You are receiving a 1.00 percent interest rate reduction due to a timely payment customer incentive program. Navient calculates payment amounts based on the original interest rate. **Please note that the increase in your payment amount would allow you to repay less interest over the life of your loan and likely pay your loan off sooner.** We have attached a copy of your Promissory Note for your review, the Truth in Lending Disclosure Statement is not available.
>
> **We are willing to recalculate your payment amount using the discounted interest rate of 3.00 percent. This would decrease your payment to approximately $303.17.** Please keep in mind that your payment amount may change if your incentive program benefit is lost or you choose to utilize deferment, forbearance or a repayment option.

(App. 000041) (emphasis added).

Again, Navient's own affiant stated that the Plaintiff's loan would be repaid within its mandated term at a 3.0% repayment rate, Navient responded:

> Ms. Johnson['s] . . . payment rate . . . of 3.00% would satisfy federal requirements that her loans be paid off within thirty (30) years . . . .

(App. 000199).

Moreover, billing the Plaintiff at a 4.0% interest rate on a 3.0% fixed rate consolidation loan is directly contrary to the Secretary of Education's instructions regarding the implementation of how the interest rate reductions incentive program benefits are implemented:

> **15. Will the lower interest rate be reflected in the monthly payment amount on my Direct Consolidation Loan before I fulfill the 12-payment requirement?**
>
> No. Until you fulfill the 12-payment requirement, the Direct Loan Servicing Center will use the higher interest rate of record to calculate your monthly payment amount. . . . However, the amount of interest that you actually owe for that month would be calculated using the lower rate . . . so more of your monthly payment will be applied to the outstanding principal balance on your loan.
>
> Note: Until you fulfill the 12-payment requirement, you will see the higher interest rate of record--not the lower rate--on statements related to your Direct Consolidation Loan.

> **16. What will happen to the interest rate of record and the monthly payment amount on my Direct Consolidation Loan when I fulfill the 12-payment requirement?**
>
> After you fulfill the 12-payment requirement by making all of your first twelve required monthly payments on time, the Direct Loan Servicing Center will change the higher interest rate of record to the lower rate. The changing of the interest rate of record to the lower rate is permanent, and you will keep the lower rate throughout the remaining life of your loan.
>
> When the interest rate of record is changed to the lower rate, the Direct Loan Servicing Center also will recalculate your monthly payment amount. . . . [T]he interest rate of record would be changed permanently to the lower rate . . . and your monthly payment amount would be recalculated using the [lower rate].

(DLB 00-51, *New Repayment Incentive Benefits – Second Question and Answer Document: Interest Rate Reduction for Direct Consolidation Loan*, November 2000) (emphasis added).

In fact, far from demonstrating that the Plaintiff's consolidation loan would not payoff during the required period, Navient admitted that the Plaintiff's monthly loan payment would actually have to decrease – her payments would only need to be $303.17 per month (App. 000051-52) – not the $307.89 she was paying before Navient unilaterally increased her monthly payment amount to $328.89 (App. 000081) – to ensure that her loan was repaid within the required repayment period.

Consequently, Navient has already admitted that its cited federal regulation did not require it to unilaterally increase the Plaintiff's monthly repayment amount to ensure that her loan was repaid by the established due date. In fact, it stated just the obvious: if Plaintiff made payments at a higher, 4.0% rate, her loan would pay off much earlier than its contractual due date.

Question Presented No. 3: Whether the Circuit Court committed a clear error of law by concluding that the Plaintiff is NOT estopped from asserting causes of action when the Plaintiff never appeared before any adjudicatory body before which the law of estoppel might apply, never took any inconsistent position, never made a representation upon which Navient justifiably relied, was never offered a viable, informal resolution by Navient, and who expressly followed the direction given to her by one of Navient's regulatory entities that she could obtain counsel to look into the matter.

Before filing her civil complaint in the Circuit Court, the Plaintiff submitted her grievances regarding Navient's loan servicing to the federal government's Consumer Financial Protection Bureau ("CFPB") in hopes of obtaining a cogent understanding as to why Navient unilaterally increased the amount of her monthly billing statement after nearly 14 years of on-time payments. Importantly,

> The complaints directed to administrative agencies are sometimes precursors to lawsuits, but that is not required. **The CFPB and most government agencies are not clearinghouses for litigation; there is no administrative exhaustion requirement to file an action for any violation of federal or state consumer law. When it takes complaints from individuals about businesses, the government is not performing an adjudicative function.**
>
> A crisp purpose for the government as complaint handler is largely unarticulated. One expression, in a general form, seems to be that such a role is an outgrowth of democracy. The right to complain to the government about private parties-and to expect the government to be responsive in return-is a way for the government to serve the people. In this way, it supplements core citizen rights such as voting, filing suit against the government in court, or exercising free speech rights.

Katherine M. Porter, *The Complaint Conundrum: Thoughts on the CFPB's Complaint Mechanism*, UCI Law Scholarly Commons, p. 75 Jan. 1, 2012 (emphasis added).

As the CFPB is not an administrative adjudicatory body, there is no exhaustion doctrine, and there is no estoppel to a subsequent lawsuit with a court that has adjudicative authority.

Regarding the law of estoppel, in Syllabus, Pt. 3, of *In re Shiflett*, 200 W. Va. 813 (W. Va. 1997), the Supreme Court of Appeals stated:

> "The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice."

Id. (citation omitted).

Estoppel may apply when a person is silent and is under a duty to speak. Syl. P. 5, *Greco v. Meadow River Coal & Land Co.*, 145 W. Va. 153, 113 S.E.2d 79 (1960) ("To raise an equitable estoppel there must be conduct, acts, language or silence amounting to a representation or a concealment of material facts.").

There is no reasonable application of estoppel to the uncontested facts in this case. The Plaintiff did not make any false representation or conceal any material fact in her CFPB grievance. Navient has never acted upon, nor relied upon any statement made by the Plaintiff. In fact, after admitting that Plaintiff's contract had a 3.0% interest rate and would be paid in full during her repayment period, Navient continued (and continues) to bill the Plaintiff as if her repayment rate were 4.0%.

Moreover, the Plaintiff never made a representation by silence. Her decision not to engage in further direct communications with Navient's self-proclaimed "Consumer Advocate" by telephone is not a representation or a concealment of a material fact. The Plaintiff had obtained the information she requested through the CFPB process and based on that information she determined to seek legal counsel.

In addition, the Plaintiff was under no duty to respond to Navient's request that she call and ask that Navient honor the terms of the repayment contract. When she determined the reason why Navient had increased her monthly billing statement, she saw the following direction from the CFPB:

> What Happens Next:
>
> . . . .
>
> Can I hire my own lawyer to look into this?

> Yes. While we can't give legal advice or represent individuals in legal matters, if you want more help you can contact a private attorney . . . .

(App. 000192).

Pursuant to this direction, the Plaintiff sought the advice of counsel and filed her Civil Court complaint four months later.

Finally, Navient never proposed a resolution for the Plaintiff to accept. Her repayment interest rate is 3.0%. Navient is already under a legal duty to base its monthly billing statements on that repayment amount. A statement that it could bill the Plaintiff at her already authorized repayment rate does not constitute additional consideration or compromise. Navient also asserted different contract terms (that she could lose her interest rate reduction incentive offering) that were not known to exist by the Plaintiff, which were contrary to her understanding of her contract and her long-established course of dealing. Moreover, the proposed compromise did not address the preexisting (and continuing) violations of the WVCCPA that the Plaintiff had asserted in the CFPB process.

There are simply no grounds in this case by which the Plaintiff could be estopped from asserting her breach of contract claim in the Circuit Court.

Question Presented No. 4: Whether summary judgment should have been granted to the Plaintiff on her breach of contract claim when the undisputed facts demonstrated that Navient began billing the Plaintiff using a 4.0% repayment rate when the Plaintiff's contractual repayment rate is an undisputed, fixed, 3.0% rate.

A simple breach of contact occurs when one party to the contract fails to abide by a contract term.

The Plaintiff submitted her affidavit stating that she agreed to consolidate her student loans to take advantage of an incentive offering that would reduce her fixed interest rate loan a full

percentage point after twelve months of timely payments. The Plaintiff timely made all twelve payments, received the incentive offering, and timely made all payments at the established 3.0% rate of interest from 2002 to April 2016.

Terms in the industry regarding interest rate reduction incentive offerings were detailed by the Department of Education.

> **16. What will happen to the interest rate of record and the monthly payment amount on my Direct Consolidation Loan when I fulfill the 12-payment requirement?**
>
> After you fulfill the 12-payment requirement by making all of your first twelve required monthly payments on time, the Direct Loan Servicing Center will change the higher interest rate of record to the lower rate. The changing of the interest rate of record to the lower rate is permanent, and you will keep the lower rate throughout the remaining life of your loan.
>
> When the interest rate of record is changed to the lower rate, the Direct Loan Servicing Center also will recalculate your monthly payment amount. . . . [T]he interest rate of record would be changed permanently to the lower rate . . . and your monthly payment amount would be recalculated using the [lower rate].

(DLB 00-51, *New Repayment Incentive Benefits – Second Question and Answer Document: Interest Rate Reduction for Direct Consolidation Loan*, November 2000) (emphasis added). *See also Olympic Marine Services, Inc. v. United States*, 792 F. Supp. 461, 465 (E.D. Va. 1992) ("Industry custom and trade usage, therefore, is a fundamental part of every contract, including government contracts. . . .").

Navient, who admits to having no knowledge of the Plaintiff's interest rate incentive offering, unilaterally increased the monthly amount required for the Plaintiff to repay her loan by applying a 4.0% repayment interest rate to her student loan. By doing so, Navient is billing the Plaintiff at an unauthorized rate and shortening the term of the Plaintiff's loan repayment period. Significantly:

- Navient agrees that the Plaintiff's repayment rate is 3.0%,
- Navient agrees that her 3.0% fixed loan repayment schedule complies with federal law,
- Navient agrees that it could, if it chose to, honor the Plaintiff's 3.0% contract rate, and
- Navient has failed to produce a single regulation from the Department of Education that provides any support for its action.

These facts are undisputed, originate from Navient, and establish a breach of contract. By failing to enter summary judgment in favor of the Plaintiff on her cause of action for breach of contract, the Circuit Court committed a clear error of law.

Question Presented No. 5: Whether summary judgment should have been granted to the Plaintiff on her claims under the WVCCPA when the undisputed facts demonstrated that Navient had breached the Plaintiff's contract, lied about the reasons for breach, and has been collecting her student loan debt based on bogus loan repayment terms.

Navient had unilaterally increased the Plaintiff's loan repayment amount without any justification in law or fact, it attempted to justify its action based on bogus explanations and bogus contractual terms, and it openly lied to the Plaintiff regarding the reasons for its action. Nevertheless, the Circuit Court did not find sufficient uncontested grounds upon which to grant the Plaintiff's Motion for Summary Judgment on her claims against Navient for violating the WVCCPA. This was a clear error of law by the Circuit Court.

A. Violations of W. Va. Code § 46A-2-127.

Navient issued the Plaintiff eight different debt correspondence letters, each of which is fraudulent, deceptive and/or misleading in violation of W. Va. Code § 46A-2-127. In addition, every monthly billing statement Navient issued to the Plaintiff for payment due on May 8, 2016, and for each month thereafter, constitutes a fraudulent, deceptive and/or misleading debt collection representations in violation of W. Va. Code § 46A-2-127.

In pertinent part, § 46A-2-127 provides:

> No debt collector shall use any fraudulent, deceptive or misleading representation or means to collect or attempt to collect claims . . . . Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:
>
> . . . .
>
> (d) Any false representation or implication of the character, extent or amount of a claim against a consumer . . . .

§ 46A-2-127.

It is axiomatic that inflating a contract rate of interest is a fraudulent, deceptive, or misleading representation. *E.g.*, *Afewerki v. Anaya Law Grp.*, 868 F.3d 771 (9th Cir. 2017) (debt collector violated the FDCPA by stating, among other things, that the contract debtor's interest rate was 9.965% when it was 9.65%); *Terech v. First Resolution Mgmt. Corp.*, 854 F. Supp. 2d 537, 544 (N.D. Ill. 2012) (listing an incorrect interest rate substantially changes the amount due and is a material misstatement under the FDCPA); *Dixon v. Northwestern Mut.*, 146A.3d 780 (Pa. Sup. Ct. 2016) (holding that billing the account debtor using incorrect interest rates, even when coupled with an offer to recalculate payments based on current interest rates, constituted a misrepresentation under Pennsylvania's consumer protection law).

1. Billing Statements for the Payment Due on May 8, 2016 and Continuing:

Since the May 8, 2016 billing statement, every statement Navient sent to the Plaintiff is based on an incorrect interest rate of 4.0% when the Plaintiff's rate of repayment is 3.0%. By Navient's own admission, the application of the Plaintiff's actual interest rate would mean her minimum amount due is $303.17. (App. 0000551-52). Instead Navient is charging her $328.89.

2. Navient's Correspondence of April 10, 2017

Navient's correspondence to the Plaintiff on April 10, 2016, constitutes multiple separate fraudulent, deceptive or misleading representations to collect a debt. These false representations include:

- The deferment of forbearance period used to postpone your monthly payment is about to end,
  - ***The Plaintiff was not in a loan deferment or forbearance period.***
- You requested a different monthly payment amount,
  - ***The Plaintiff never made such a request.***
- Your repayment plan has changed,
  - ***The Plaintiff's repayment plan had been unchanged since February 2002 and none of the terms or conditions of the Plaintiff's consolidated loan had been altered.***
- Your school separation date was updated to an earlier date than previously reported,
  - ***The Plaintiff's school separation date, which occurred in May 2002, had not been changed.***
- Your interest rate has changed,
  - ***The Plaintiff's interest rate had not changed.***
- Unpaid interest has been capitalized, or
  - ***There was no unpaid interest to capitalize.***
- Due to past delinquency of late payments, the monthly payment amount was insufficient to pay off the loan within the remaining repayment period
  - ***There were no past due or delinquent payments.***

(App. 000046).

In addition, the April 20, 2016 letter provides an estimated amount of interest to be paid during the repayment period. That amount is $17,595.33 and is based on a 4% loan interest rate. Because the Plaintiff's loan interest rate is 3.0%, the estimated amount of interest to be paid during the repayment period should have been about $12,789.96. Navient overstated the amount due by $4,805.37.

Therefore, Navient's April 10, 2016 correspondence to the Plaintiff constitutes at least eight separate false representations or implications of the character, extent or amount of its claim

against the Plaintiff because none of the justifications provided were applicable to the Plaintiff and the provided interest calculation was based on an incorrect rate.

3. Navient's Response to Plaintiff's April 17, 2016 Inquiry

Navient's response to Plaintiff's April 17, 2016 correspondence constitutes a fraudulent, deceptive or misleading representation to collect a debt because it stated that the amounts due for each portion of the loan would not pay the loan in full within the repayment term.

This statement constitutes a false representation or implication of the character, extent or amount of its claim against the Plaintiff because it assumes that the Plaintiff's interest rate is 4.0% and not 3.0%. Navient admitted that the Plaintiff's 3.0% loan repayment schedule will timely complete within the required 30-year time-period:

> Ms. Johnson['s] . . . payment rate . . . of 3.00% would satisfy federal requirements that her loans be paid off within thirty (30) years . . . .

(App. 000199).

4. Navient's Response to Plaintiff's May 15, 2016 Inquiry

Navient's response to Plaintiff's May 15, 2016 correspondence constitutes a fraudulent, deceptive or misleading representation to collect a debt because it states that the Plaintiff's loans had different end dates, the loans were "redisclosed" as referenced in its April 20, 2016 letter, and the Plaintiff's payment was $328.89.

In fact, no different end dates were ever disclosed for the Plaintiff's consolidated student loans and Navient admitted that the Plaintiff's student loans would be paid in full within their contractual period based on the Plaintiff's contractual billing rate of 3.0%. Navient's response to

the Plaintiff's May 15, 2016 correspondence provides a false representations or implications of the character, extent or amount of its claim against the Plaintiff.

5. Navient's Response to the Plaintiff's June 5, 2016 Correspondence

Navient's response to the Plaintiff's June 5, 2016 correspondence constitutes a fraudulent, deceptive or misleading representation to collect a debt because it states that the Plaintiff's loans had different end dates, the loans terms were "aligned" to the consolidation loan, and it references a monthly repayment amount at an incorrect interest rate.

In fact, no different end dates were ever disclosed for the Plaintiff's consolidated student loans, the term "aligned the terms of your consolidation loan" is a nonsensical term, and the stated monthly payment amount is based on an improper interest rate. For these three reasons, Navient's response to the Plaintiff's June 5, 2016 correspondence provides a false representation or implication of the character, extent or amount of its claim against the Plaintiff.

6. Navient's Correspondence in Response to Plaintiff's June 7, 2016 Request for Loan Documents

Navient's correspondence to the Plaintiff in response to her June 7, 2016 request for a copy of her loan documents constitutes a fraudulent, deceptive or misleading representation to collect a debt because the loan documents Navient sent to the Plaintiff did not disclose the amount of the Plaintiff's consolidated loan.

More specifically, Navient provided a statement that the Plaintiff had a consolidation loan of $51,039 that had a term of 300 months. In fact, Plaintiff is repaying a consolidated student loan that has a repayment term of 360 months and the principal balance was $72,241.01. (App. 000038). For this reason, Navient's response to the Plaintiff's June 7, 2016 request for a copy of her loan

documents constitutes a false representation or implication of the character, extent or amount of its claim against the Plaintiff.

7. Navient's Response to the Plaintiff's June 17, 2016 Correspondence

Navient's response to the Plaintiff's June 17, 2016 correspondence constitutes a fraudulent, deceptive or misleading representation to collect a debt. More specifically, the Plaintiff inquired as to why her loan documents reflected a $51,039 consolidate loan agreement when Navient was reporting that she had a total original loan balance of $72,322.89. Navient's response was non-responsive: "the information you've received is the loan balance we have." The information the Plaintiff received was that she had a loan balance of $51,039, which constitutes a false representation or implication of the character, extent or amount of its claim against the Plaintiff.

8. Navient's Response to the Plaintiff's June 23, 2016 Correspondence

Navient's response to the Plaintiff's June 23, 2016 correspondence constitutes a fraudulent, deceptive or misleading representation to collect a debt because Plaintiff inquired whether additional loans were added onto her original consolidation loan and Navient failed to affirm or deny the Plaintiff's inquiry. Earlier that month Navient sent the Plaintiff loan documents showing an original principal balance of $51,039. By failing to respond to the Plaintiff's inquiry regarding added-on loans, Navient made a false representation or implication of the character, extent or amount of its claim against the Plaintiff.

9. Navient's Response to Plaintiff's July 5, 2016 Request for a Complete Loan History

Navient's response to the Plaintiff's July 3, 2016 request for a complete loan history from 2002 to the present constitutes a fraudulent, deceptive or misleading representation to collect a debt because Navient stated that it would provide such a history but then failed to carry out its

promise. More specifically, Navient informed the Plaintiff on April 10, 2016, that the estimated amount of interest to be paid over the remaining loan term was $17,595.33, which amount is presumably based on an amortization schedule. When the Plaintiff requested that amortization schedule on May 15, 2016 and June 5, 2016, Navient denied both requests. Then, when she requested a full payment history, Navient only provided the past five years.

Combined with the two failures of Navient to provide amortization schedules, and with its refusal to perform its promise to provide a full loan history, Navient's response to the Plaintiff's July 3, 2016 request for a full loan payment history provides a false representation or implication of the character, extent or amount of its claim against the Plaintiff in that its refusal to provide such information obfuscates the fact that Navient is billing the Plaintiff for a 4.0% interest rate on a loan that bears a 3.0% interest rate.

For the above reasons, no genuine issue of material fact exists that Navient has violated W. Va. Code § 46A-2-127.

B. Violations of W. Va. Code § 46A-2-128

Under W. Va. Code § 46A-2-128(d), Navient engaged in unfair and unconscionable debt collection activities when it sought to bill and collect interest from the Plaintiff at the rate of 4.0% when her contract interest rate was 3.0%. In pertinent part, that statute provides:

> No debt collector may use unfair or unconscionable means to collect or attempt to collect any claim. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section
>
> . . . .
>
> (d) The collection of or the attempt to collect any interest . . . incidental to the principal obligation unless such interest . . . is expressly authorized by the agreement creating or modifying the obligation and by statute or regulation

46A-2-128(d).

Because Navient is billing the Plaintiff based on a loan bearing a 4% interest rate when the Plaintiff's loan bears a 3% interest rate, Navient is attempting to collect interest incidental to the principal obligation at an unauthorized rate. This attempt to collect a debt by unfair or unconscionable means is reflected in the following communications with the Plaintiff:

1. Billing Statements for the Payment Due on May 8, 2016 and Continuing:

Every billing statement Navient sent to the Plaintiff starting with the payment due on May 8, 2016, and continuing, is based on an incorrect interest rate of 4.0% when the Plaintiff's interest rate is 3.0%. Plaintiff is being billed monthly for $328.89 when her correct bill should be $303.17. (App. 000051-52).

2. Navient's Correspondence of April 10, 2017

Navient's correspondence to the Plaintiff on April 10, 2016, states that the Plaintiff's interest rate had changed to 4.0%. In fact, the Plaintiff's interest rate had not changed. Moreover, the correspondence reflected total payment due under the loan that was overstated by approximately $4,805.37.

3. Navient's Response to Plaintiff's April 17, 2016 Inquiry

Navient's response to Plaintiff's April 17, 2016 correspondence constitutes an attempt to collect a debt by unfair or unconscionable means because it stated that the amounts previously due for each portion of the loan would not pay the loan in full within the remaining number of payments in the repayment term. This is a false statement because Navient itself said the monthly amount necessary to pay the loan balance in full was $303.17, (App. 000051-52), not the applied rate of $328.89.

4. Navient's Response to Plaintiff's May 15, 2016 Inquiry

Navient's response to Plaintiff's May 15, 2016 correspondence constitutes an attempt to collect a debt by unfair or unconscionable means because it stated that the Plaintiff's loans had different end dates, the loans were "redisclosed" as referenced in its April 20, 2016 letter, and the Plaintiff's payment was $328.89.

In fact, no different end dates were ever disclosed for the Plaintiff's consolidated student loans and Navient admitted that the Plaintiff's student loans would be paid in full within their contractual period based on the Plaintiff's contractual billing rate of 3.0%.

5. Navient's Response to the Plaintiff's June 5, 2016 Correspondence

Navient's response to the Plaintiff's June 5, 2016 correspondence constitutes an attempt to collect a debt by unfair or unconscionable means because it stated that the Plaintiff's loans had different end dates, the loan terms were "aligned" to the consolidation loan, and it references a monthly repayment amount at an incorrect interest rate.

In fact, no different end dates were ever disclosed for the Plaintiff's consolidated student loans, the term "aligned the terms of your consolidation loan" is a nonsensical term, and the stated monthly payment amount is based on an improper interest rate.

For the above reasons, no genuine issue of material fact exists that Navient has violated W. Va. Code § 46A-2-128.

In summary, Navient breached the Plaintiff's student loan repayment contract by issuing monthly billing statements to the Plaintiff based on an unauthorized interest rate. Billing the Plaintiff at an unauthorized rate, and its explanations for its actions, constitute violations of the

WVCCPA and it was a clear error of law for the Circuit Court not to enter judgment in the Plaintiff's favor regarding a declaration of liability against Navient for violation the WVCCPA. The only remaining issue to be determined on the Plaintiff's causes of action under the WVCCPA is one of damages.

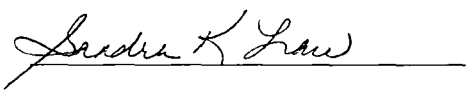
VIII. CONCLUSION

There is no basis in this Court's precedent upon which to grant Navient's Petition for a Writ of Prohibition. Should this Court determine to review the record from the Circuit Court based on a clear error of law, the Circuit Court was correct in denying Navient's Motion for Summary Judgment because there was no basis in the facts or law upon which it could have been granted.

Should this Court review the record for a clear error of law, it was a clear error of law for the Circuit Court not to have granted the Plaintiff's Motion for Summary Judgment to obtain a declaration that Navient breached the Plaintiff's student loan contract and committed violations of the WVCCPA.

WHEREFORE, the Plaintiff respectfully requests that Navient's Petition for a Writ of Prohibition be Denied, or in the alternative that this case be remanded to the Circuit Court with an instruction to grant the Plaintiff's Motion for Summary Judgement.

Rebecca Brogan-Johnson, Respondent,



By Counsel

IX. VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF OHIO, TO WIT:

On this 23rd day of October, 2019, Rebecca L. Brogan-Johnson, appearing personally before the undersigned Notary in Ohio County, West Virginia, and after being duly sworn, upon oath, stated that she had read her Response to Navient's Writ of Prohibition and that the statement, allegations, and averments therein are true and correct, except so far as they are there in stated to be on information then she believes them to be true.

Rebecca Brogan-Johnson
Rebecca L. Brogan-Johnson

Taken, subscribed and sworn before me, Rita S. Gallo a notary public for the State of West Virginia, County of Ohio, this 23rd day of October, 2019.

My Commission expires: August 1, 2021

X. CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2019, I caused the foregoing Response of Rebecca L. Brogan Johnson to Navient's Writ of Prohibition to re served on counsel of record via email and U.S. mail in a postage pre-paid envelope addressed to:

Carte P. Goodwin
Jared M. Tully
Alex J. Zurbuch
Frost Brown Todd, LLC
500 Virginia Street, E. Suite 1100
Charleston WV 25301.

Sandra K. Law

Frank X. Duff, Esquire
W.Va. Bar ID #1065
fxd@schraderlaw.com
Sandra K. Law, Esquire
W.Va. Bar ID #6071
skl@schraderlaw.com
SCHRADER COMPANION DUFF & LAW, PLLC
401 Main Street
Wheeling, WV 26003
(304) 233-3390