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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA

ENTERED

CHARLESTON DIVISION

MAR - 7 1997

CLERK'S OFFICE U.S. DIST.  
COURT, SO. DIST. OF W-VA.  
RONALD D. LAWSON, CLERK

DONNA McCOMAS,

Plaintiff,

vs.

CIVIL ACTION NO. 2:96-0431

FINANCIAL COLLECTION AGENCIES,  
INC.,

Defendant.

APR 3

MEMORANDUM OPINION AND ORDER

Pending is Defendant's motion to dismiss pursuant to Rule 12(b)(6), *Federal Rules of Civil Procedure*. The Court DENIES the motion.

**I. FACTUAL DEVELOPMENT**

Plaintiff Donna McComas received a guaranteed student loan (GSL) while attending Huntington Junior College's Professional

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<sup>1</sup>The complaint originally named as Defendants both Financial Collection Agencies Incorporated (FCA) and Pennsylvania Higher Education Assistance Agency (PHEAA). PHEAA has now been dropped as a party via an amended complaint. A Rule 12(b)(1) motion, which was misfiled as a Rule 12(b)(2) motion, applied only to PHEAA. Accordingly, the Rule 12(b)(1) motion is DENIED without prejudice.

FCA also filed motions (1) to dismiss for insufficiency of process; (2) to supplement its memorandum supporting its motion to dismiss; and (3) to strike allegations from the complaint. Defendant later filed a motion seeking to withdraw the first motion, which the Court GRANTS. The Court further GRANTS the motion to supplement. The Court possesses considerable discretion in ruling on a motion to strike. See, e.g., 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1382 (1990). After careful consideration, the Court DENIES the motion.

Office Assistant Program. She never received her diploma because she failed to pass the required proficiency test. Plaintiff blames her failing efforts on the poor quality of instruction she received at the institution she attended prior to her Huntington Junior College attendance. Plaintiff since has been unable to obtain employment in the fields in which she was supposed to have been trained, working instead at fast food restaurants and gasoline stations.

FCA has made attempts to collect on **McComas'** GSL. She alleges agents of FCA telephoned her and (1) identified themselves as agents of the Justice Department; (2) demanded immediate full payment and threatened a 42% collection fee; (3) refused requests for a reasonable payment schedule; and (4) threatened to garnish her wages.

McComas filed an eight-count complaint accusing FCA of illegal collection activities. Counts One through Four rely on the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 and Counts Five through Eight are premised on the West Virginia Consumer Credit and Protection Act (WVCCPA), *West Virginia Code §§ 46A-2-122 et seq.* FCA asserts the state claims are preempted.

## II. DISCUSSION

### A. *Introduction*

The Stafford Loan Program (SLP) under which Plaintiff obtained

her **GSL** is part of the Higher Education Act of 1965 (**HEA**), 20 U.S.C. §§ 1001 et seq. Pursuant to 20 U.S.C. § 1078 (c)(2)(A), holders of **GSLs** under the SLP are required to exercise due diligence in their collection efforts.

Title 34 C.F.R. §§ 682.410 and .411 establish the minimum collection activities lenders must observe in proceeding to collect delinquent or defaulted **GSLs**. Section 682.411 mandates written and oral contacts holders must make during collection attempts. FCA argues since telephone contacts are mandated specifically by section 682.411, any state law regulating such contacts is preempted.

*B. The Statutes, Regulations and Interpretations*

In determining the preemptive scope of the regulations in question, the Court examines (1) the regulations; (2) an agency interpretation of the regulations; and (3) Congressional intent in enacting the **HEA**.

**1. The Regulation and the Agency Interpretation:**

Section 682.411(n) expressly "preempt[s] any State law, including State statutes, regulations, or rules, that would conflict with or hinder satisfaction of the requirements of or frustrate the purposes of this section." *Id.* (emphasis added). On October 1, 1990 the Department of Education (**DOE**) issued a "Notice of Interpretation" addressing the breadth of preemption under sections 682.410 and .411:

The Secretary promulgated §§ 682.410(b)(4) and 682.411 to establish minimum required collection actions on GSL obligations, and intended these provisions of the GSL regulations to preempt contrary or inconsistent State law to the extent necessary to permit compliance with the Federal regulations.

55 Fed.Reg. 40120, 40121 (1990)(emphasis added). This portion of the Notice is consistent with section 682.411(n) quoted above. Both mandate preemption of conflicting state laws or procedures frustrating the purpose of the HEA regulations. The Notice continues:

These provisions comprehensively regulate the pre-litigation informal collection activity on GSLP obligations, by specifically requiring holders to complete a sequence of collection contacts with debtors. These provisions therefore preempt State law that would prohibit, restrict, or impose burdens on any category of GSLP loans. . . . Moreover, because holders of GSLP loans commonly engage servicers and collection agencies to perform these dunning activities, this preemption includes any State law that would hinder or prohibit any activity taken by these third parties to complete these required steps.

Id. (emphasis added). The underscored passage is more expansive than either the remainder of the Notice or the interpreted preemptive regulations. The passage not only indicates sections 682.410 and ,411 preempt state laws hindering or prohibiting the collection activities required by the regulation, but also suggests an intent to comprehensively regulate prelitigation collection activity regardless of potential conflict, hindrance or frustration.

The isolated passage, however, in a Notice otherwise consistent with the regulations, does not compel the Court to conclude the DOE intended the regulations to preempt all state law related to the collection of student loans. Read in its entirety, the Notice was designed to indicate that sections 682.410 and ,411 preempt only those state laws contrary to or inconsistent with the collection procedures mandated by the regulations or those laws that would frustrate the purpose of the Act.<sup>2</sup>

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'There are many considerations supporting this analysis. First, a contrary reading of the regulation would make it internally inconsistent. Second, even if a contrary interpretation was intended by the DOE, the Court is not bound by it. The Notice is an interpretive rather than a legislative rule and need not be accorded the same deference as a legislative rule pursuant to Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Martin v. OSHRC, 499 U.S. 144, 157 (1991)(noting interpretive rules are only entitled to "some weight"); Shalala v. Guernsey Mem. Hosp., 115 S. Ct. 1232, 1239 (1995). But cf. Auer v. Robbins, No. 95-897, 1997 WL 65558, at \*6 (U.S. Feb. 19, 1997). Third, even interpretations contained in legislative rules are not given controlling weight if they are "plainly erroneous or inconsistent with the regulation." Thomas Jefferson University v. Shalala, 114 s. ct. 2381, 2386 (1994)(quoted authority and marks o m i t t ~~ed~~ also United States v. Bovnton, 63 F.3d 337, 342 (4th Cir. 1995). Such an inconsistency is apparent here. Finally, even if Chevron requires courts to defer to agency action in most instances, courts need not defer to an agency in determining whether a federal statute preempts state law. The Supreme Court recently assumed, without deciding, that the question of whether a statute is preemptive "must always be decided *de novo* by the courts." Smiley v. Citibank, 116 S.Ct. 1730, 1735 (1996).

FCA points out that in Brannan v. United Student Aid Funds, Inc., 94 F.3d 1260 (9th Cir. 1996), petition for cert. filed, 5 U.S.L.W. 3539 (Jan. 29, 1997)(No. 96-1210), two of three judges on a Ninth Circuit Court of Appeals panel rely on the Notice to conclude that the HEA and the GSL regulations preempt the Oregon

2. **Congressional Intent for the HEA:**

In determining whether sections 682.410 and .411 preempt the WVCCPA, the Court also must divine Congress' intent in enacting the HEA. See California Federal Savings & Loan v. Guerra, 479 U.S. 272, 280 (1986).<sup>3</sup>

With some exceptions, federal law generally supersedes state law in three ways: (1) express preemption; (2) Congressional intent to occupy the field, inferable from a comprehensive federal scheme practically displacing supplemental state regulation (field preemption); and (3) preemption only of conflicting state law (conflict preemption). Under the third option, "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." Guerra, 479 U.S. at 280-81.

The HEA does not expressly preempt West Virginia law relating to debt collection. The Court also has little difficulty concluding

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Unfair Debt Collection Practices Act. Without undertaking a wholesale comparison of the Oregon and West Virginia statutory schemes, Brannan is, of course, not binding in this Circuit.

<sup>3</sup>It is important to note that while preemption may result from either congressional or agency action, the latter must act within the scope of its congressionally delegated authority for valid preemption. See Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 368-69 (1985).

the HEA lacks the comprehensive scope necessary for field preemption.<sup>4</sup> The third option thus is the only one conceivably applicable.

A conflict between federal and state law arises when "compliance with both federal and state regulations is a physical impossibility, or because the state law stands as an obstacle to the

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<sup>4</sup>The mere existence of a detailed federal regulatory scheme, like the one at issue here, "does not by itself imply pre-emption of state remedies." English v. General Elec. Co., 496 U.S. 72, 87 (1990). Further, Congress acted expressly to preempt other areas of state law related to the student loan program but did not do so in relation to debt collection. See Tipton v. Secretary of Educ., 768 F. Supp. 540, 554 (S.D. W. Va. 1991). This is persuasive evidence Congress did not intend to preempt state law as it pertains to collection of student loans. (stating "express provisions for preemption of some state laws imply that Congress intentionally did not preempt state law generally, or in respects other than those addressed."). Keams v. Tempe Tech. Institute, Inc., 39 F.3d 222, 225 (9th Cir. 1994). Congress simply did not intend to occupy the entire field of pre-litigation debt collection activities.

It is true preemptive intent may be inferred not only when the regulatory scheme leaves no room for state supplementation, but also when a Congressional act "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). There is, however, a presumption against finding preemption of state laws in areas traditionally regulated by the states. See Medtronic, Inc. v. Lohr, 116 S. Ct 2240, 2250 (1996); Cipollone v. Lissett Group Inc., 505 U.S. 504, 518 (1992); California v. ARC America Corp., 490 U.S. 93, 101 (1989). Consumer protection is a field traditionally regulated by the states, and the WCCPA falls within that category. See, e.g., Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 150 (1963); General Motors Corp. v. Abrams, 897 F.2d 34, 41 (2nd Cir. 1990).

accomplishment and execution of the full purposes and objectives of Congress." Guerra, 479 U.S. at 281 (quotation marks and citations omitted).

First, the WCCPA as a whole does not conflict with the HEA or its accompanying regulations. Several WCCPA provisions complement the applicable federal law. For example, the WCCPA prohibits debt collectors from using "any fraudulent, deceptive, or misleading representation or means to collect or attempt to collect claims or to obtain information concerning consumers." W. Va. Code § 46A-2-127. On the subject of debt collection, the HEA simply provides the guarantee agreement shall "assure that due diligence will be exercised in the collection of loans insured under the program." 20 U.S.C. § 1078(c)(2)(A). There is no cross purpose in requiring due diligence in collection, while also requiring non-fraudulent, non-deceptive or non-misleading representations of the putative collector.

Plaintiff's state claims relate to alleged statements and representations FCA made during telephone conversations. FCA asserts generally that since telephone conversations are required by sections 682.410 and .411, Plaintiff's state law claims conflict with the regulations and are preempted. The Court disagrees. Mandating telephone contacts generally certainly does not give the caller license to use abusive or deceptive methods to harass the

borrower. There is no conflict between the two mandates. As set forth below, this same, basic analysis applies to the specific provisions of the WVCCPA at issue here.

Count V alleges FCA "threatened legal action when such was not intended" in violation of the WCCPA. FCA asserts this claim is preempted by section 682.411(d)(2), which requires the guarantee agency to sue borrowers under certain circumstances. Plaintiff's claim is not based on a threat of legal action alone, but rather on an alleged deceptive threat of legal action. Determination of whether the threat was made or deceptive in fact rests with the trier of fact. The state claim thus is not facially inconsistent with the regulations.

Count VI alleges FCA misled Plaintiff by telling her 33% of her wages would be garnished, without also informing her there must be in effect a judicial order permitting such garnishment, in violation of section 46A-2-124 of the WCCPA. A debt collector can complete the sequence of collection activities required by the regulations while still informing the debtor a judicial order must be in effect before garnishment is permitted. This section of the WCCPA too, then, does not conflict with or frustrate federal law.

Count VII alleges an FCA agent deceptively represented on two occasions she was affiliated with the government in violation of WCCPA section 46A-2-127(f). As above, a debt collector can comply

with the federally required sequence of contacts without employing a false governmental identity.

Count VIII alleges FCA used unfair and unconscionable means to collect a debt. Plaintiff alleges FCA threatened to add 42% in collection costs to her debt, an amount allegedly not authorized by the loan contract, in violation of the WVCCPA § 46A-2-128(d). The HEA and its regulations require due diligence of debt collectors; they do not authorize fear-inducing statements to collect unauthorized fees.

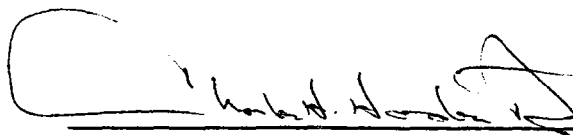
None of Plaintiff's claims are preempted. Accordingly, FCA's motion to dismiss is DENIED.

### III. CONCLUSION

Based on the foregoing, the Court concludes Plaintiff's state claims are not preempted. Accordingly, the Court DENIES Defendant's motion to dismiss.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record.

ENTER: March 7, 1997

  
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Charles H. Haden II, Chief Judge