THE HONORABLE VERONICA ALICEA-GALVÁN
Department 21

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Petitioner, v. NAVIENT CORPORATION, et al., Defendant/Respondents.	No. 17-2-01115-1 SEA DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT

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I. INTRODUCTION

Throughout its brief, the State repeatedly insists that it does not allege improper-disclosure claims, but instead alleges "unfair and deceptive practices." With respect to its federal loan servicing claims, this is precisely the argument that was considered—and rejected—in *Chae*. *See Chae v. SLM Corp.*, 593 F.3d 936, 943 (9th Cir. 2010) (rejecting borrowers' claims that "they do not seek specific disclosures, but merely seek to stop Sallie Mae from fraudulently and deceptively misleading borrowers"). By simply reciting this conclusory claim, the State ignores the central thrust of *Chae*—that even "restyled" disclosure claims are preempted by the HEA. Without any basis to distinguish *Chae*, the State resorts to arguing *Chae* was wrongly decided and is non-binding. But *Chae* is directly on point, and it should be followed here to dismiss the State's federal servicing claims in ¶¶ 7.3(f)-(j).

With respect to the State's origination claims, the Court should invoke the "primary jurisdiction" doctrine and dismiss the claims in ¶¶ 9.4(a)-(b) because they satisfy the three-part *Vogt* test, including—importantly—that they directly implicate TILA's "pervasive [federal] regulatory scheme." *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 554, 817 P.2d 1364, 1371-72 (1991). If these origination claims were allowed to proceed, "danger exists that judicial action would conflict with the regulatory scheme." *Id.* Nowhere does the State dispute that *Vogt* and *Miller* set forth the proper test for primary jurisdiction. Yet inexplicably, the State fails to apply the test or justify why its state law claims should proceed despite interfering with TILA's regulatory scheme.

Finally, the State fails to explain how a number of its claims amount to "unfair" or "deceptive" conduct as a matter of law even when, for example, its failure-to-disclose claims do not actually allege failure to disclose material facts. For these reasons, and as set forth in Navient's motion, the Court should reject the State's effort to "backdoor" brand new disclosure

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rules in place of a comprehensive federal regulatory scheme, and should dismiss the claims in Counts I-III pursuant to CR 12(b)(6).

II. ARGUMENT

A. <u>The State Cannot Avoid Preemption Under The HEA Simply By "Re-Styling" Its Otherwise-Preempted Servicing Claims</u>

The State does not dispute, nor can it, that disclosures to federal student loan borrowers are extensively regulated by the HEA. Nor does the State dispute that 20 U.S.C. § 1098g expressly preempts state disclosure laws. Rather, the State argues that its allegations simply have ***nothing to do with disclosures***. This is semantics. The State's federal servicing claims both expressly allege and are premised upon improper disclosures. Specifically, the State alleges that Navient failed to disclose the available "federal loan repayment options"; a "date certain" for recertifying IDR plans; and the "need to recertify" eligibility for an IDR plan. Compl. ¶ 7.3(f)-(j). The State's brief recites the same conclusory argument that these claims "neither arise[] from nor [are] related to any federal disclosure requirement." State's Opp. at 14. But the State fails to explain how these claims are any different from the "restyled improper-disclosure claims" that the *Chae* court concluded were expressly preempted by § 1098g. *Chae*, 593 F.3d at 943. And "preemption cannot be avoided simply by re-labeling an otherwise-preempted claim." *Chae*, 593 F.3d at 943.

Unable to avoid *Chae*'s clear holding, the State resorts to arguing it was wrongly decided. State's Opp. at 18-24 (dedicating six pages of its brief to argue how *Chae* "should have been decided"). First, the State argues that the "plain language" meaning of the word "disclosure" in § 1098g means only those disclosures related to origination, not servicing. *Id.* at 21-22. This is the opposite of a plain reading of the statute, which explicitly says "***any*** disclosure requirements," not "origination" or "some" disclosure requirements. The State's argument also has no basis in law. The HEA enumerates other "disclosure" regulations that do, in fact, apply to servicing. *See, e.g.*, 20 U.S.C. § 1083(e) ("Required disclosures during repayment"); 34 C.F.R.

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§ 682.205(a)(4) ("Required disclosures for borrowers having difficulty making payments"). The argument that both Congress and ED enacted "required disclosures" for federal loans under the HEA that do not fall within the meaning of "any disclosure requirement" lacks any basis in logic or law.

In its effort to re-construe § 1098g, the State also appeals to "Ninth Circuit case law." State's Opp. at 18. The irony, of course, is that the State cites Ninth Circuit cases to construe § 1098g when the Ninth Circuit has already directly construed § 1098g in *Chae*. None of the other Ninth Circuit cases cited by the State even concern § 1098g. And the State simply ignores cases from other jurisdictions interpreting § 1098g, all of which reach the same conclusion as the Ninth Circuit in *Chae*. *See*, *e.g.*, *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1226 (11th Cir. 2002) ("Congress specifically intended for the HEA to preempt any State disclosure requirements relating to [federal loans]."); *United States v. Gorski*, No. CV 11-4252 AG, 2012 WL 12886823, at *7 (C.D. Cal. Mar. 22, 2012) (dismissing state law claims related to federal student loans); *Washkoviak v. Student Loan Mktg. Ass'n*, 849 A.2d 37, 40-41 (D.C. 2004) (affirming dismissal of a consumer protection act claim alleging Sallie Mae misrepresented facts to student borrowers).

To rescue its claims, the State maintains for the first time in its brief that it alleges "affirmative deceptive statements." State's Opp. at 13. But the State's federal servicing claims do not actually allege that. Instead, its allegations are limited to failures to disclose. For instance, the State alleges that Navient "present[ed] the federal loan repayment options . . . in a deceptive manner." Compl. ¶ 7.3(f). At bottom, this is an allegation that Navient failed to disclose ***all*** available repayment options or ***more details*** about those options. By contrast, an "affirmative deceptive statement" would be a claim that Navient disclosed ***false or incorrect*** repayment options. Likewise, the State alleges that Navient failed to disclose:

- a ***date certain*** (not that it disclosed the ***wrong date***), *id.* ¶ 7.3(g)-(h);

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- the ***need to recertify*** (not that it represented that borrowers ***need not certify***), *id.* ¶ 7.3(i); and
- the suitability of ***alternatives to forbearances*** (not that it represented to borrowers that ***forbearances are not available*** or ***falsely described forbearances***), *id.* ¶ 7.3(j).

The State's claims are therefore disclosure claims, not "affirmative deceptive statements." Indeed, they are no different than the "misrepresentation claims" that the *Chae* court concluded are preempted "improper-disclosure claims." *Chae*, 593 F.3d at 942.

The unpublished *Genna* decision cited by the State is not to the contrary—in fact, that court noted that *Chae*'s logic "is unassailable." *Genna v. Sallie Mae, Inc.*, No. 11 CIV. 7371 LBS, 2012 WL 1339482, at *8 (S.D.N.Y. Apr. 17, 2012). But the facts of *Genna* are extreme: Sallie Mae allegedly repeatedly failed to enroll the borrower in a requested payment plan, falsely confirmed that he was enrolled, falsely reported him to credit agencies when he missed his payment, and a call center representative finally "declined further cooperation and expressly invited Genna to bring suit." *Id.* at *2. The *Genna* court simply held that the HEA does not preclude state laws prohibiting affirmative false statements, but as explained above, the State does not allege affirmative false statements.

B. <u>The State Wrongly Dismisses The Doctrine Of "Primary Jurisdiction" Even Though Its Origination Claims Implicate TILA's Pervasive Regulatory Scheme</u>

The State cavalierly dismisses the applicability of "primary jurisdiction" principles to this case, arguing that even the possibility of deferring to a federal agency "makes no sense." State's Opp. at 12. Contrary to the State's contention, those principles are not limited to instances where "an authorized agency 'took overt affirmative actions specifically to permit the actions or transactions.'" *Id.* (quoting *In re Real Estate Brokerage Litig.*, 95 Wn.2d 297, 301, 622 P.2d

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1185, 1187 (1980)). The Washington Supreme Court long ago made clear that primary jurisdiction is designed to ensure uniformity of state and federal law, and to avoid interference with complex federal regulatory schemes. *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 544, 817 P.2d 1364, 1371 (1991) ("The court will usually defer … if enforcement of a private claim … involves an area where a uniform determination is desirable."). Under this long-standing doctrine, courts apply a three-part test to determine whether to dismiss a claim. *Miller v. U.S. Bank of Wash., N.A.*, 72 Wn.App. 416, 420-21, 865 P.2d 536, 540 (1994). The State does not dispute that *Vogt* and *Miller* set forth the proper test, and makes no serious effort to explain why its claims fail that test.

All three elements support the conclusion that this Court should dismiss the origination claims and defer to federal agency enforcement of TILA's regulatory scheme. First, as Navient's original motion explained, 15 U.S.C. § 1607 authorized several federal agencies to enforce disclosure-related claims arising from private education loans during the 2003-2007 time period.[1] And under Section 5(a) of the Federal Trade Commission Act, those agencies retain the authority to prosecute "unfair or deceptive acts or practices in or affecting commerce" from that time period. One of those agencies is the Federal Trade Commission ("FTC"). *See* FTC Performance and Accountability Report Fiscal Year 2007, 2007 WL 5415663, at *8 ("***[T]he FTC's challenge is to combat unfair and deceptive practices involving***, among other things, mortgages, credit cards, payment cards, debt collection, and ***student loans***." (emphases added)); *see also Miller*, 72 Wn.App. at 421-22 ("the Comptroller of the Currency has primary jurisdiction because a bank's relationship with its customers is regulated and the Comptroller has the power to grant relief").

[1] Today, the CFPB regulates private education lending. 75 Fed. Reg. 57252-02; 15 U.S.C. § 1607. For pre-July 21, 2011 private education lending, a number of federal agencies, including the FTC, retain enforcement authority.

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Second, these agencies, including the FTC, developed special competence in this area.[2]

Third, and critically, allowing this state law action to continue would directly interfere with TILA's complex regulatory scheme. Imposing new requirements on lenders or servicers to disclose, for example, graduation rates, credit scores, and the likelihood of default from certain schools—retroactively, and on a state-by-state basis—would destroy any semblance of concision, clarity, or consistency regarding origination of private education loans. Indeed, "Congress . . . has already vested responsibility for determining whether [TILA] should require additional disclosures . . . exclusively with the Federal Reserve Board." *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1121 (9th Cir. 2009). As the Supreme Court of the United States held in the TILA context:

> The concept of "meaningful disclosure" that animates TILA cannot be applied in the abstract. ***Meaningful*** disclosure does not mean ***more*** disclosure. Rather, it describes a balance between "competing considerations of complete disclosure . . . and the need to avoid . . . [informational overload.]" . . . Administrative agencies are simply better suited than courts to engage in such a process.

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568-69 (1980).

In light of the existing, comprehensive federal regulatory scheme, the Court should decline the State's invitation to gallop into the field of student lending, and dismiss the State's origination claims.

C. <u>The State Fails To Address The Legal Deficiencies That Render Its Claims Inadequate As A Matter Of Law</u>

The State fails to explain or justify a number of legal defects in its claims. Despite characterizing Navient's loans as "monstrously harsh" and "exceedingly calloused," the State has

[2] FTC, *Annual Report to Congress* (May 2007), https://www.ftc.gov/sites/default/files/documents/reports/college-scholarship-fraud-prevention-act-2000-sixth-annual-report-congress-department-justice/2006collegescholarshipfraudpreventionreport.pdf (FTC

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yet to explain how these private loans are any more "unfair" or "deceptive" than any other loans made to student borrowers, who are often, in the State's words, "young, uneducated, with low-to-no incomes and credit scores." State's Opp. at 9. The State claims that the real issue is that borrowers were allegedly treated as "loss leader[s]" and that Navient "believed it was more likely they would default." State's Opp. at 3. Yet nowhere does the State explain how the existence of contractual arrangements are "material," or how ***projected*** default rates or ***projected*** graduation rates are "facts." *West Coast, Inc. v. Snohomish County*, 112 Wn.App. 200, 206, 48 P.3d 997, 1000 (2002) (holding that fraudulent misrepresentation claims must allege an "existing fact" that is "material").[3] And if it is "unfair" to lend to "borrowers at schools with graduation rates below 50 percent," State's Opp. at 9-10, then the CPA, unlike federal law, prohibits lending to freshmen at Eastern Washington University, which has a graduation rate of 44%.[4]

With respect to its servicing claims, the State has yet to justify how it can sustain a failure-to-disclose claim that does not even allege failure to disclose. *See* Compl. ¶¶ 5.146, 5.148 (alleging only that Navient failed to "engag[e] in lengthy and detailed conversations" by phone, not that Navient failed to provide the relevant information to student borrowers). Likewise, the State fails to justify how it can purportedly hold Navient liable for alleged "misrepresentations" that consist of "promises of future performance." *West Coast*, 112 Wn.App. at 206.

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annual report describing its enforcement authority regarding student loan practices) (last accessed June 22, 2017).

[3] A plaintiff must satisfy pleadings standards for common law fraud where it is bringing a CPA claim "sound[ing] in fraud." *Vernon v. Qwest Comm'ns Int'l, Inc.,* 643 F. Supp. 2d 1256, 1264 (W.D. Wash. 2009).

[4] Dept. of Ed., *College Scorecard: Eastern Washington University*, https://collegescorecard.ed.gov/school/?235097-Eastern-Washington-University (last accessed June 22, 2017). *See also* Navient's Original Brief at 4 n.4 (judicial notice is proper).

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III. CONCLUSION

The Court should dismiss Counts I-III pursuant to CR 12(b)(6).

I certify that this memorandum contains 2,246 words, in compliance with the Local Civil Rules.

DATED this 23rd day of June, 2017.

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CERTIFICATE OF SERVICE

I, Mary J. Klemz, declare that I am employed by the law firm of Calfo Eakes & Ostrovsky PLLC, a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On June 23, 2017, I caused a true and correct copy of the foregoing document to be served on counsel listed below in the manner indicated.

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