

# Hot Topics in the Collection Industry & The Evolution of Student Agreements

May 15, 2015

Chad V. Echols

[chad.echols@theecholsfirm.com](mailto:chad.echols@theecholsfirm.com)

The Echols Firm, LLC, Owner

Williams & Fudge, Inc., Outside General Counsel

# Disclaimer

- This presentation should be construed as an overview of the issues discussed. The presentation is not legal advice to anyone attending this presentation or reading the accompanying handout. Specific legal questions regarding the concepts and their application to any institution of higher education should be directed to the institution's legal counsel.

# Lawyers, and Regulators, and Congress... OH MY!



# Hot Topics:

- The current legal status of the collection industry;
- TCPA;
- CFPB;
- FDCPA litigation and trends;
- Recent cases on point; and
- SOL (higher education needs to pay attention).

# TCPA

- The Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*;
- 1991 – think about cell phones in 1991;
- **First & third party liability; and**
- Significant penalties.
- Remember – manually dialing a cellular telephone is okay!



# TCPA



- Per violation liability;
- No class cap;
- Defense strategies:
  - Land-line;
  - Definition of dialer;
  - Legislative fix;
  - Scrubbing;
  - Motion to Stay (pending FCC);
  - Etc..
- Insurance issues;
- CONSENT – your help (we will discuss language in the next presentation)

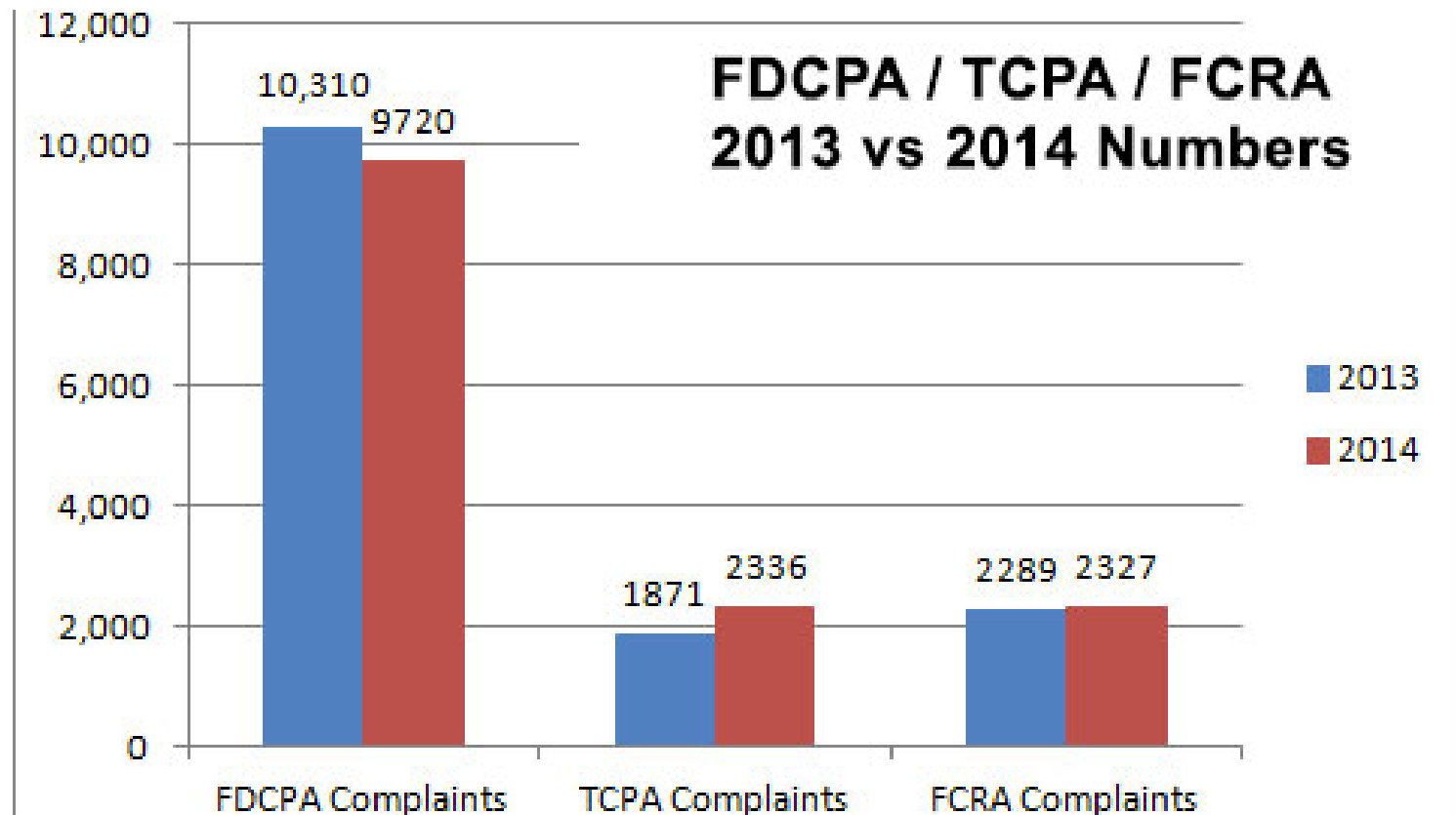
# FDCPA vs. TCPA

- The FDCPA may equal death by a thousand cuts!
- While the TCPA may =



# Collection Industry Litigation Statistics

[dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-december-2014-and-year-in-review/](http://dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-december-2014-and-year-in-review/)





# FDCPA

- Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.*
- *Foti* cases – the problem with voicemails;
- Call volume litigation;
- *McMahon/Delgado*;
- *Douglass v. Convergent*;
- Etc...

Fair  
Debt  
Collection  
Practices  
Act



# FDCPA

- <http://www.denverpost.com/fdcp?unique=1301323052004>
- This article about a consumer attorney in Colorado does a great job of bringing some light to the difficult situation that agencies face in the current litigation environment.


# FDCPA

- Round peg in a square hole – how does legislation from 1978 address the issues of technology in 2011?

- Cell phones;
- Smart phones;
- Email;
- Apps;
- Voice mail;
- Texting;
- Etc....



# *McMahon / Delgado*

 Original Image of 744 F.3d 1010 (PDF)

744 F.3d 1010  
United States Court of Appeals,  
Seventh Circuit.

**Scott McMAHON**, individually and on behalf of a class, Plaintiff–Appellant,

v.

**LVNV FUNDING, LLC**, et al., Defendants–Appellees.


**Juanita Delgado**, individually and on behalf of a class, Plaintiff–Appellee,

v.

**Capital Management Services, LP**, et al., Defendants–Appellants.

Nos. 12–3504, 13–2030. | Argued Sept. 25, 2013. | Decided March 11, 2014.

# *Douglass v. Convergent*

 Original Image of 765 F.3d 299 (PDF)

765 F.3d 299  
United States Court of Appeals,  
Third Circuit.

Courtney DOUGLASS, on behalf of herself and all others similarly situated, Appellant

v.

**CONVERGENT OUTSOURCING**, formerly known as ER Solutions, Inc.

No. 13–3588. | Argued April 8, 2014. | Filed: Aug. 28, 2014.

## **Synopsis**

**Background:** Debtor filed suit against debt collector alleging collector had violated Fair Debt Collection Practices Act (FDCPA) by disclosing her account number through clear plastic window of envelope containing collection letter. The District Court for the Eastern District of Pennsylvania, [Joel H. Slomsky, J., 963 F.Supp.2d 440](#), granted summary judgment in favor of collector. Debtor appealed.

# CFPB


- The Consumer Financial Protection Bureau;
- [www.consumerfinance.gov](http://www.consumerfinance.gov);
- The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 established the CFPB.
- The CFPB has some very unique structural and funding aspects that are concerning to the collection industry and others.

# CFPB

- Prior to the CFPB, the FTC oversaw the FDCPA and did not have the authority to promulgate rules and regulations interpreting and implementing the FDCPA. The CFPB has rule making authority and will therefore have a major impact on the FDCPA going forward.
- There were a series of articles in the Wall Street Journal when the CFPB was being formed that articulated many of the industry's concerns with the oversight and funding of the CFPB.

# CFPB



An official website of the United States Government 

 (855) 411-2372

[HOME](#)[INSIDE THE CFPB](#)[GET ASSISTANCE](#)[PARTICIPATE](#)[LAW & REGULATION](#)[SUBMIT A COMPLAINT](#)

## Helping student borrowers stay afloat

As of 2011, more than \$8 billion of private student loans were in default, representing more than 850,000 loans. We've heard that unmanageable student loan debt might be jeopardizing your ability to climb the economic ladder. What do you think should be done? [Weigh in >>](#)





# CFPB

[http://files.consumerfinance.gov/f/201410\\_cfpb\\_report\\_annual-report-of-the-student-loan-ombudsman.pdf](http://files.consumerfinance.gov/f/201410_cfpb_report_annual-report-of-the-student-loan-ombudsman.pdf)

OCTOBER 16, 2014

## Annual Report of the CFPB Student Loan Ombudsman

# Other state specific issues

- North Carolina, for example, has a bi-furcated collection statutory structure. One portion of North Carolina's law is specifically drafted to govern the actions of entities defined as "collection agencies", but the other portion of the statute (which was recently changed in ways that should be important to creditors) contains very specific collection prohibitions which apply to creditors (schools would, based upon my reading of the statute, be governed by this statute). See N.C. Gen. Stat. § 75-50, *et seq.*

# The web presence of the consumer bar

- One issue that is driving the massive increase in consumer litigation against the industry is the savvy and growing online marketing efforts of the consumer bar. In the process of drafting the previous slide I went to the web to be certain my citation to North Carolina law would be accurate. I searched “North Carolina Debt Collection Statute” and the very first hit was the following website:  
<http://www.northcarolinadebtcollectionact.com/>
- The address appears very plain, but this is a site developed by Weisberg & Meyers who are a national consumer law firm that are committed to suing debt collection agencies. I have personally defended numerous lawsuits filed by this firm.

# Assessing Collection Fees

- It is critical that institutions of higher education understand their role as a “lender”, and how that role requires a proper contractual relationship between the institution and the student. Also, schools should be aware of state laws that impact the assessment of fees.

# Collection Cost Terms

- **Collection Costs** – The mutually agreed upon contract amount that the institution pays the collection agency for collecting accounts on the school's behalf.
- **Institutionally Assessed Fees** – The amount charged to a student subject to an agreement between the student and the school or the amount permitted by law (i.e. the Higher Education Act and Perkins Regulations).

# What are some common misconceptions??

- Collection costs = the amount the student pays the agency;
- The federal regulations allow for collection costs on Perkins loans so it is okay to set up institutional debt the same way;
- Agreements have to be promissory notes;
- Notifying the student in collection letters that a fee will be added if the account is sent to an agency is sufficient;
- BPC applies to institutional debt; and
- There is a “right” to be “made whole” on institutional debt.

# Collection Fee Compliance

- The Fair Debt Collection Practices Act states that it is a violation to collect any amount that is not “ expressly authorized by the agreement creating the debt or permitted by law.” See 15 U.S.C. 1692f.
- Further, state consumer protection statutes and unfair trade practices statutes may implicate creditors (schools) that are not compliant with state requirements regarding the addition of student paid fees.
- Agencies and Schools demand compliance in the contracts that govern the relationship.

# Examples of “permitted by law”

The Higher Education Act creating the Perkins Loan program and the regulations promulgated pursuant to the act specifically provide that the student be responsible for the fees associated with the collection of his/her defaulted loan. See 20 USC §§ 1087aa *et seq.* (1998) and 52 Fed. Reg. 45552(1987).

**Hawaii** – the law initially has some prohibitions on fees, but states in HI Code § 443B-9(b) that the prohibition section “ shall not prohibit a collection agency from collecting, or attempting to collect, from a debtor, a commission authorized under a contract with the University of Hawaii.”

**West Virginia** – specifically allows for the addition of student paid costs on educational loans and states those costs may not exceed 33.3% of the amount due and owing – See W.V. Code § 46A-2-128 – the AG has made clear that “ education loans” do NOT include general tuition receivables.

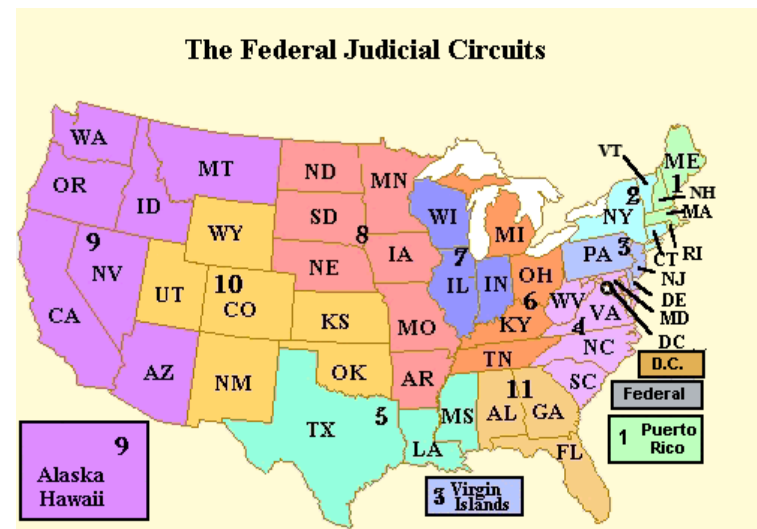


# Student Agreement FAQs????


- Does a handbook count?
- What should it say?
- Do electronic signatures count?
- Can the agreement be in writing and not be a contract?
- How should we proceed to get compliant?

# *Bradley v. Franklin Collection Service, Inc.*

- The opinion in the Bradley case was issued by the 11<sup>th</sup> Circuit Court of Appeals in January of 2014.
- The only federal court higher than a federal appellate court is the U.S. Supreme Court.



# *Bradley*

 Original Image of 739 F.3d 606 (PDF)

739 F.3d 606  
United States Court of Appeals,  
Eleventh Circuit.

Melvin BRADLEY, Plaintiff,  
Dianne Roden Bradley, as executrix for the Estate of Melvin Bradley, Kevin A. Calma, individually  
and on behalf of all others similarly situated, Plaintiffs–Appellants,  
v.  
FRANKLIN COLLECTION SERVICE, INC., Defendant–Appellee.

No. 13–12276 | Non–Argument Calendar. | Jan. 2, 2014.

# *Bradley* Issues

- The core of the Bradley opinion is about contract language.
- The case involved the collection of medical accounts, but the contract issues in the case apply to tuition, institutional loans, and other receivables owed to colleges and universities.
- It would be a mistake to assert that Bradley is not applicable to your institution because the debt originated as a medical account. The medical/education issue is a distinction without a difference. The issue is contract law.

# Contract Language

- The contract language discussed in the Bradley case was as follows:
  - “**costs** of collection” (ruled problematic);
  - “reasonable collection agency **fees**” (not specifically addressed because the applicable plaintiff did not appeal the issue); and
  - “[y]ou agree to reimburse us the fees of any collection agency, **which may be based on a percentage at a maximum of 33% of the debt**, and all costs and expenses, including reasonable attorney’s fees, we incur in such collection efforts.” (court suggests this may be appropriate) (terms were highlighted for emphasis)

# Fees vs. Costs

- The common use of the term “collection costs” along with the term “attorney’s fees” creates a contractual distinction on the face of the document.
- If the intent in both circumstances is to assess a “fee,” then the term should be used in both places.



# Increased Creditor Litigation

- I am beginning to see creditors included in traditional consumer litigation that was once reserved only for agencies. This is an important trend. The inclusion of the creditor is most often the result of state statutes that can create creditor liability. There are contracting issues that should be considered regarding this issue.

# THE EVOLUTION OF STUDENT AGREEMENTS



# Topics for Discussion

- The student agreement;
  - TCPA;
  - Collection fees;
  - Venue selection;
  - Choice of law provision;
  - TILA issues;
  - Electronic signatures;
  - Change of information clause; and
  - Arbitration (pros/cons).
- Proof of Claim;
- Bankruptcy language in student agreements

# Institutional Leverage

- Binding contract language is increasingly important. Additionally, the ever-rising use of on-line registration should make it much easier for schools to craft and implement better contract language.
- Often people discuss the student agreement with me as if the agreement is similar to an adhesion contract. It is not.

# A Strong Student Agreement

- The weakest position a school can be in with their students is a student relationship that ends with a tuition account receivable based solely upon the student's attendance or lack thereof.
- “A verbal contract isn't worth the paper it is written on.” -Sam Goldwyn

# The current view of higher education & debt

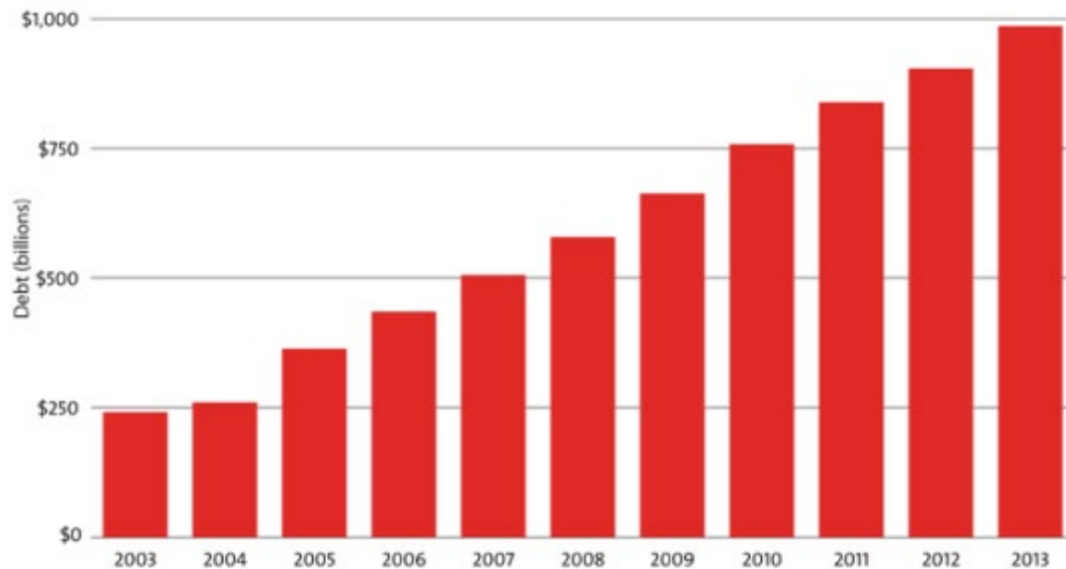


# Scary Statistics and Trends

[www.motherjones.com/politics/2013/05/student-loan-interest-rate-plan-obama-republican-warren](http://www.motherjones.com/politics/2013/05/student-loan-interest-rate-plan-obama-republican-warren)

## Student Loan Debt Has Nearly Quadrupled Since 2003

Total student loan debt



Source: Federal Reserve Bank of New York

Mother Jones

# Telephone Consumer Protection Act

- There is nothing that we will discuss today that can assist your partnering collection agencies and your institution more than obtaining the consent from your students to be contacted on their cellular telephone by automated dialing devices governed by the Telephone Consumer Protection Act (“TCPA”).

# Telephone Consumer Protection Act

- The Department of Education understands the necessity of this consent and includes language in its Perkins loan master promissory note that attempts to obtain the necessary consent.

# Telephone Consumer Protection Act

## FEDERAL PERKINS LOAN MASTER PROMISSORY NOTE

OMB No. 1845-0074 Form Approved Expiration Date 09/30/2015

### Section A: Borrower Section

1. Name (last, first, middle initial) and  
Permanent Address (street, city, state, zip code)

2. Social Security Number

3. Date of Birth (mm/dd/yyyy)

4. Home Area Code/Telephone Number

5. Driver's License Number (List state abbreviation first)

### Section B: School Section

6. School Name & Address (street, city, state, zip code)

7. Annual Interest Rate

5%



# DOE - MPN

- “I authorize the school, the Department, and their respective agents and contractors to contact me regarding my loan request or my loan(s), including repayment of my loan(s), at the current or any future number that I provide for my cellular number or other wireless device using automated telephone dialing equipment or artificial or pre-recorded voice or text messages.” – This MPN is set to expire on 9/30/2015.

# *Meyer v. Portfolio Recovery Assoc.*

(Oct. 2012)

*“...prior express consent is deemed granted only if the wireless telephone number was provided by the consumer to the creditor, and only if it was provided at the time of the transaction that resulted in the debt at issue. Thus, consumers who provided their cellular telephone numbers to creditors after the time of the original transaction are not deemed to have consented to be contacted at those numbers for purposes of the TCPA.”*

# *Meyer v. Portfolio Recovery Assoc.*

*(Dec. 2012)*

*"...prior express consent is consent to call a particular telephone number in connection with a particular debt that is given before the call in question is placed."*

# TCPA

 Original Image of 768 F.3d 1110 (PDF)

768 F.3d 1110  
United States Court of Appeals,  
Eleventh Circuit.

Mark S. MAIS, on behalf of himself and all others similarly situated, Plaintiff–Appellee,  
v.  
GULF COAST COLLECTION BUREAU, INC., Defendant–Appellant.

No. 13–14008. | Sept. 29, 2014.

## Synopsis

**Background:** Patient brought action against radiology provider and debt collector, alleging violation of Telephone Consumer Protection Act (TCPA) based on making of autodialed or prerecorded calls. The United States District Court for the Southern District of Florida, Docket No. 0:11–cv–61936–RNS, [Robert N. Scola, Jr., J., 944 F.Supp.2d 1226](#), granted patient partial summary judgment against debt collector and granted certification of order for interlocutory appeal.

# TCPA problems are expensive!



U.S. CHAMBER

Institute for Legal Reform

[Home](#) > [Resources](#) > [Capital One Agrees to Largest-Ever TCPA Class Action Settlement](#)

## Capital One Agrees to Largest-Ever TCPA Class Action Settlement

July 22, 2014

Capital One and several other collection agencies have agreed to settle class claims that they "called individuals on their mobile devices without their consent" in violation of the Telephone Consumer Protection Act (TCPA), reports *BloombergBNA*. The settlement, of more than \$75 million, was filed July 14 in U.S. District Court for the Northern District of Illinois.

The proposed no-fault pact would require Capital One Bank (USA) NA, Capital One NA, Capital One Financial Corp., Capital One Services LLC, Capital One Services II LLC — along with three other defendants—to pay the "largest settlement cash sum—by far—in the 22-year history of the TCPA — \$75,455,098.74 — into a settlement fund," the plaintiffs said in their amended memorandum in support of the motion for preliminary approval of the settlement.

# The Assessment of Collection Fees

- If a reasonable contingency fee is allowed, then I suggest language similar to:
- “I understand and agree that if I default on my obligation to ABC University, then my account(s), loan(s), and/or any amounts due to the school may be placed with a collection agency, and that I am responsible for the fees (collection fees and/or attorney’s fees) associated with any collection effort. Fees resulting from a default will not exceed X% of my outstanding obligation to the school.”

# The Assessment of Collection Fees

- There have been individual and class action cases advanced against the collection industry on this issue.
- Based upon the current view of student debt, any amount above the principal obligation should be expressly allowed by the contract between the school/student and appropriate pursuant to any applicable law (i.e. – collection fees/late fees/interest/attorney's fees/etc...).

# The Assessment of Collection Fees

- Liquidated Damages Clause – The contractual provision that determines in advance the measure of damages if a party breaches the agreement.
- Liquidated Damages Clause cannot = a penalty.
- This slide is included for states like California.



# Venue/Forum Selection Clause

- The FDCPA limits debt collection entities when they bring suit on an account to the location where the consumer signed the contract sued upon or the location where the consumer resides at the commencement of the action. 15 U.S.C. § 1692i(a)(2).
- While there may be other applicable limitations, this FDCPA limitation does not apply to creditors.

# Venue/Forum Selection Clause

- My suggestion is to use language that allows for an action to be brought in a specific venue without excluding other venue options. This can generally be accomplished by using the word “may” rather than “shall” or “will”.
- Courts may be resistant to an exclusive venue provision when one party to the litigation is a recent student.

# Venue/Forum Selection Clause

- I understand and agree that any legal action brought to enforce the terms of this agreement and/or any other legal action involving the parties to this agreement may be brought in (the applicable court) in (the applicable county) in (the applicable state). I hereby unconditionally consent to the aforementioned forum for the above-described purposes.

# Venue/Forum Selection Clause

- This type of clause allows the institution to implement a much more efficient litigation strategy, and it often provides the institution with a more friendly forum to litigate these matters.

# Choice of Law Provision

- Often, this is a simple provision that states the agreement will be governed by laws of the state of X. I would caution a school in using such a provision if the laws of that school's state are not favorable (see S.C. re: garnishment for example).
- Also, there are important statute of limitation considerations with this type of provision.

# The Truth in Lending Act (TILA)

- We would need a significant amount of time to cover the implications of TILA when creating student agreements. It is critical that any agreement whereby the school is attempting to create a loan be reviewed for compliance with TILA and specifically TILA's disclosure requirements.
- TILA is meant to provide consumers certain disclosures at the time a consumer enters certain loan or consumer credit agreement.

# The Truth in Lending Act (TILA)

- Indiana's website contains user friendly TILA disclosure examples. See <http://www.in.gov/dfi/2583.htm>
- The exceptions for private education loans can be found at 12 C.F.R. § 226.3(b)(1)(i)(B) and 12 C.F.R. § 226.46(b)(5).

# The Truth in Lending Act (TILA)

- Link regarding private student loans:
  - <http://www.law.cornell.edu/cfr/text/12/226/3>
  - This link also contains a link following the term private education loan to § 226.46(b)(5).



# Electronic Signatures

- The E-Sign Act
- The Uniform Electronic Transaction Act (UETA)



# The E-Sign Act

Public Law 106–229  
106th Congress

An Act

June 30, 2000  
[S. 761]

To facilitate the use of electronic records and signatures in interstate or foreign commerce.

Electronic  
Signatures in  
Global and  
National  
Commerce Act.  
15 USC 7001  
note.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## SECTION 1. SHORT TITLE.

This Act may be cited as the “Electronic Signatures in Global and National Commerce Act”.

## TITLE I—ELECTRONIC RECORDS AND SIGNATURES IN COMMERCE

15 USC 7001.

### SEC. 101. GENERAL RULE OF VALIDITY.

(a) IN GENERAL.—Notwithstanding any statute, regulation, or other rule of law (other than this title and title II), with respect to any transaction in or affecting interstate or foreign commerce—

(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

# Change of Information Clause

- I would encourage the addition of a contractual provision that expressly places the burden of keeping contact information current on the student. This is the type of thing that seems reasonable, but is better if the contract specifically identifies who has the burden.



# Arbitration Clause

- PRO - An arbitration clause can be extremely helpful when trying to avoid class action litigation and/or keep litigation confidential.
- CON – If you bring an action to recover outstanding debt, then the consumer can force arbitration. If you do not litigate against consumers, this is not much of a problem.

# Merger Clause

- This is an important provision to understand and properly utilize.
- The use of a merger clause is highly dependent upon how you are set up to have students enter into an agreement with the school.

# Include your vendors, affiliates, etc... in your contract language

- In the definition section or in the body of applicable provisions you should make sure to include your vendors, affiliates, or anyone else working on your behalf.
- If the contract is specifically limited to the school, then very well drafted provisions may leave your vendor partners exposed to unnecessary liabilities.

# Proof of Claim Forms

- The form can be found at:  
[http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK\\_Forms\\_Current/B\\_010.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Current/B_010.pdf)
- Why file a proof of claim?
- Does this influence the student's effort to receive a discharge?

# Is the Agreement a “Student Loan”

- Whether or not your institution’s agreement will be protected by Section 523(a)(8) of the bankruptcy code will be based upon the case law.
- I think it can be helpful to have language that courts have recognized creates a Section 523(a)(8) “student loan.”



# “Student Loan”

- “This agreement is entered into contemporaneously with or prior to ABC University providing educational services. I understand and agree that ABC University is providing me educational services and that ABC University is deferring some or all of the payment due for those services. Therefore, I understand and agree the resulting debt is a student loan as that term is used and defined in 11 U.S.C. § 523(a)(8) of the United States Bankruptcy Code.”

# Questions



# Thank you for attending this presentation

I hope that you have a stronger understanding of the current legal issues facing creditors and your partnering collection agencies.

Chad V. Echols

The Echols Firm, LLC

[chad.echols@theecholsfirm.com](mailto:chad.echols@theecholsfirm.com)

803.329.8970

