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PREVIEW; Reavis v. Pennsylvania Higher Education Assistance Agency d/b/a Fedloan Servicing: *Just what is a “disclosure” anyway?*

Dillon Kato*

The Montana Supreme Court is scheduled to hear oral argument on this matter May 20, 2020 at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana. Robert Farris-Olsen or David Wilson are likely to appear for the Appellant James Reavis (“Reavis”), and Kenneth Lay or Brett Clark are likely to appear for the Appellee the Pennsylvania Higher Education Assistance Agency (“PHEAA”).

I. INTRODUCTION

This case raises the issue of whether the federal Higher Education Act preempts claims under Montana statutory or common law against a student loan servicing company for allegedly fraudulent or misleading statements made to a borrower.¹ Courts around the country are split on the question, and the Montana Supreme Court’s decision could have important implications for student loan borrowers in the state.

II. FACTUAL AND PROCEDURAL BACKGROUND

Reavis took out student loans to fund his pair of graduate degrees.² He later consolidated his loans to ensure they qualified for the Public Student Loan Forgiveness program, under which a borrower can have the remaining balance of loans forgiven after making 120 qualifying payments (while working as a public servant).³ Following his graduation in 2012, Reavis began working at the Montana Office of the Public Defender, and asserts that by the time he filed suit, he had made 65 qualifying payments.⁴

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¹ Appellant’s Opening Br. at 2, *Reavis v. Pennsylvania Higher Educ. Assist. Agency* (Mont. Dec. 16, 2019) (DA 19-0510); Br. of Appellee at 1, *Reavis v. Pennsylvania Higher Educ. Assist. Agency* (Mont. Feb. 14, 2020) (DA 19-0510).

² Appellant’s Opening Br., *supra* note 1, at 4; Br. of Appellee, *supra* note 1, at 6.

³ Appellant’s Opening Br., *supra* note 1, at 4; Br. of Appellee, *supra* note 1, at 3-4 (referencing the requirements of loan forgiveness in 34 U.S.C. § 685.219(c)).

⁴ Appellant’s Opening Br., *supra* note 1, at 5.

However, Reavis claims, among other things, that the PHEAA, the servicer of his loans, has underrepresented the number of payments he has made and given him conflicting information on the amounts he must pay.⁵

Reavis filed suit against PHEAA on August 8, 2018, alleging violations of the Montana Consumer Protection Act, negligence, misrepresentation, and fraud, and sought declaratory relief conclusively establishing the number of payments he had made as of a certain date.⁶ PHEAA responded by filing a pair of motions to dismiss, the second based on the argument that Reavis' claims were preempted under the federal Higher Education Act.⁷ On August 14, 2019—just over a year after the filing of the initial complaint—Judge Michael McMahon of the Montana First Judicial District Court dismissed Reavis' case, finding his claims expressly preempted under federal law, specifically 20 U.S.C. § 1098g.⁸ Reavis appeals.

III. SUMMARY OF ARGUMENTS

A. *Reavis' Arguments*

Reavis argues the District Court erred in finding express preemption of his claims under federal law, and asserts that to reach any contrary conclusion would “deprive Reavis, and all Montana student loan borrowers, of a remedy when servicers make false statements.”⁹

Under federal law: “Loans made, insured, or guaranteed pursuant to a program authorized under Title IV of the Higher Education Act of 1965 shall not be subject to *any disclosure requirements of any state law*.”¹⁰

Reavis' argument on appeal is that this law only expressly preempts state laws “that require specific disclosures, but it does not preempt tort

⁵ Appellant's Opening Br., *supra* note 1, at 6; Br. of Appellee, *supra* note 1, at 6-7 (“Reavis disagrees with PHEAA's provisional counts and believes that he has made some larger number of qualifying payments.”).

⁶ Appellant's Opening Br., *supra* note 1, at 2-3; Br. of Appellee, *supra* note 1, at 1, 7 (“Simply put, Reavis wants the District Court to force PHEAA to modify the qualifying payments counts that have been previously disclosed to him.”).

⁷ Appellant's Opening Br., *supra* note 1, at 3; Br. of Appellee, *supra* note 1, at 2.

⁸ Appellant's Opening Br., *supra* note 1, at 3.

⁹ *Id.* at 12.

¹⁰ 20 U.S.C. § 1098g (emphasis added).

claims or statutory claims based on affirmative misrepresentations.”¹¹ In this case, the request being made is that PHEAA “speak truthfully, non-deceptively and non-fraudulently” and Reavis argues doing so is not requiring a new type of disclosure be made.¹² Reavis draws a distinction between a “disclosure” which he claims is a more specific term of the loan, and a “communication” between the servicer and borrower, saying the latter is at stake here.¹³ The district court, Reavis argues, erred in part by relying on authority from the Ninth Circuit Court of Appeals and a federal district court (since overruled by the Eleventh Circuit) in siding with PHEAA.¹⁴

Because PHEAA has a “responsibility . . . to track the number of qualifying payment[s]”¹⁵ and the plain meaning of “disclosure requirements” and the “majority of cases interpreting the phrase” agree with Reavis, he asks the Court to overturn the lower court’s decision.¹⁶ In support of his argument, Reavis claims a presumption against preemption exists when Congress has not made it clear it is preempting state law, such as in the case of § 1098g.¹⁷ Further, Reavis argues the lower court erred in relying on an interpretation of the scope of § 1098g issued by the U.S. Department of Education (which favors PHEAA’s argument), because the conclusion of the department—that the federal loan program was intended to provide a uniform national standard and preempts state laws—is not universally recognized as a goal Congress had.¹⁸

Agencies and organizations including the Montana Attorney General’s office, Montana Federation of Public Employees, Montana Legal Services Association, Veterans Education Success, National Consumer Law Center and the Student Borrower Protection Center filed amicus briefs in this case supporting Reavis’ arguments on appeal.

Reavis believes the issue of conflict preemption should not be decided by the Court, arguing that the issue cannot be raised for the first

¹¹ Appellant’s Opening Br., *supra* note 1, at 8.

¹² Appellant’s Opening Br., *supra* note 1, at 16; Appellant’s Reply Br., at 2, *Reavis v. Pennsylvania Higher Educ. Assist. Agency* (Mont. April 10, 2020) (DA 19-0510).

¹³ Appellant’s Opening Br., *supra* note 1, at 17-18.

¹⁴ *Id.* at 9.

¹⁵ *Id.*, at 11.

¹⁶ *Id.* at 13.

¹⁷ *Id.* at 13.

¹⁸ Appellant’s Opening Br., *supra* note 1, at 28, 30.

time on appeal.¹⁹ However, Reavis argues that should the Court reach the issue, conflict preemption does not apply to his claims because it is “completely possible for [PHEAA] to both properly account for [Reavis’] payments and provide the required disclosures without undermining the purpose of the [Higher Education Act].”²⁰ Even if the Court does find uniformity to be the purpose of the Higher Education Act, Reavis contends his case survives because a prohibition on false statements of material fact does not impinge on any purpose of uniformity, because accounting for a borrower’s payments is one of the roles of a loan servicer.²¹

B. PHEAA’s Arguments

PHEAA contends that the district court correctly concluded that Reavis’ claims were expressly preempted by the Higher Education Act and in particular 20 U.S.C. § 1098g.²² Additionally, PHEAA believes the claims are also barred by conflict preemption because they interfere with the federal government’s goals in creating a federal student loan program with a uniform process for administering and servicing loans, an issue raised in its briefing in the lower court but not addressed by the district court’s dismissal ruling.²³

On the express preemption front, PHEAA rests its argument on the “any disclosure requirements of any state law” prohibition of 20 U.S.C. § 1098g.²⁴ Because Reavis, in seeking a declaratory judgment forcing PHEAA to determine and report that the borrower had made a certain number of qualifying payments under the loan forgiveness loan, it contends that such a report would be a disclosure requirement expressly prohibited under federal statute.²⁵ Agreeing with the district court’s determination that “claims that [PHEAA] provided [Reavis] inaccurate information or no information [are] no different than a claim that [PHEAA] failed to make proper disclosures”²⁶PHEAA says all of Reavis’ claims essentially boil down to the same concept: “[Reavis] wants to use

¹⁹ *Id.* at 14 n.4.

²⁰ Appellant’s Reply Br., *supra* note 12, at 2, 12.

²¹ *Id.* at 13, 15.

²² Br. of Appellee, *supra* note 1, at 9.

²³ *Id.*

²⁴ *Id.* (citing 20 U.S.C. 1098g) (emphasis added).

²⁵ *Id.* at 9-10.

²⁶ *Id.* at 11 (quoting Order on Defendants’ Dismissal Motions at 7, DV-2018-833).

state law to require PHEAA to tell him something different than what it has previously told him.”²⁷

Because courts should look first to the language of a statute in determining the law’s meaning,²⁸ and the plain meaning of the phrase “any disclosure requirement” is purposefully broad,²⁹ “if a claim is brought under a state statutory regime and used to establish legal obligations on an HEA-contracted student loan servicer . . . that claim imposes a ‘disclosure requirement’ in violation of § 1098g.”³⁰ Reavis bolsters its argument by pointing out that the U.S. Supreme Court has found that the term “requirements” extends to liability under common law.³¹

Because Reavis’ claims are that PHEAA should give him additional or different information than what he has already received, it contends this new information would constitute a disclosure, which under the federal statute would be prohibited by express preemption.³²

The district court relied on a Ninth Circuit Court of Appeals decision on the same issue³³ in ruling in favor of PHEAA, and while such a decision by a federal circuit is not binding, PHEAA argues the Montana Supreme Court has a policy of giving Ninth Circuit opinions deference.³⁴

Reavis’ wish for a presumption against preemption is not appropriate, PHEAA contends, because there is an express preemption clause written into § 1098g,³⁵ and that any state interest in regulating consumer protection does not prevent express preemption by Congress.³⁶ Also, PHEAA says the U.S. Department of Education’s interpretation of § 1098g (in its favor)

²⁷ Br. of Appellee, *supra* note 1, at 22.

²⁸ *Id.*, at 12 (citing *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

²⁹ *Id.* at 16 (“‘Disclosure’ means ‘[t]he act or process of making known something that was previously unknown; a revelation of facts.’ *Black’s Law Dictionary*, 562 (Bryan A. Garner ed., 10th 3d., Thomson Reuters 2014) . . . [T]he term ‘requirement’ . . . is ‘[s]omething that must be done because of a law or rule; something legally imposed, called for, or demanded; an imperative command”).

³⁰ *Id.*

³¹ *Id.* (citing *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008)).

³² Br. of Appellee, *supra* note 1, at 24 (“if a communication conveys, reveals . . . information or facts, it is a disclosure”).

³³ *Chae v. SLM Corporation*, 593 F.3d 936 (9th Cir. 2010).

³⁴ Br. of Appellee, *supra* note 1, at 25 (citing *MacPheat v. Mahoney*, 997 P.2d 753, 758 (Mont. 2000) (“[T]he Ninth Circuit Court of Appeals’ decision should be given deference”).

³⁵ *Id.* at 17 (citing *Puerto Rico v. Franklin California Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016)).

³⁶ *Id.* at 18.

should be given deference by the Court in deciding whether to apply the statute to Reavis' claims.³⁷

Disputing that a rejection of his claims due to express preemption leaves Reavis and those like him with no recourse, PHEAA points to a complaint process under which borrowers can file grievances against their loan servicers with the U.S. Department of Education, but also concludes that “The language Congress chose reflects its intent to preclude state law civil actions—even where those actions might deny consumers the ability to seek recourse through the courts.”³⁸ Further, the number of payments PHEAA has said Reavis has made is merely a preliminary determination, and the final determination of whether a borrower is eligible for forgiveness is not made until they submit a claim to the U.S. Department of Education after believing they had made enough qualifying payments.³⁹

Turning to conflict preemption, PHEAA contends that Congress “intended a uniform system for federal loan servicing” and that allowing borrowers to bring claims under varying state laws would “invade the uniquely federal interests associated with federal student loan servicing.”⁴⁰ Although the lower court did not address the conflict preemption argument in dismissing the case, PHEAA (contrary to Reavis) believes the issue can still be raised on appeal because both parties addressed the issue in their lower court briefing.⁴¹

PHEAA believes Congress' goal in establishing the Direct Loan and loan forgiveness programs was to have a national set of “clear, uniform standards” for servicing loans,⁴² that the federal law has a set of uniform disclosures loan servicers must make⁴³ and specifies that a borrower's redress for failure to receive those disclosures is not a claim for civil damages but rather to report to the U.S. Department of Education.⁴⁴ Calling Reavis' case a “perfect example” of how a state law would interfere with the uniform administration of the national student loan

³⁷ *Id.* at 32-33 (citing *Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009)).

³⁸ *Id.* at 20.

³⁹ Br. of Appellee, *supra* note 1, at 22.

⁴⁰ *Id.* at 10.

⁴¹ *Id.* at 36 n.3.

⁴² *Id.* at 37 (citing *Chae v. SLM Corporation*, 593 F.3d 936, 944-45 (9th Cir. 2010) (“Congress's instructions to [USDOE] on how to implement the student-loan statutes carry this unmistakable command: Establish a set of rules that will apply across the board”).

⁴³ 20 U.S.C. § 1083(e), see also § 1019b(a)(2), § 1019c(a), § 1078e(i), § 1082(1).

⁴⁴ Br. of Appellee, *supra* note 1, at 40 (citing 20 U.S.C. § 1083e).

program, with “courts across the nation . . . weigh[ing] in under a variety of state laws” should his argument prevail, PHEAA contends that the state claims must also be found barred under conflict preemption.⁴⁵

IV. ANALYSIS

A. *Express Preemption*

The Court’s analysis of the express preemption argument will likely turn on two questions: Does requiring a loan servicer to provide accurate information (including having to correct previously issued information) constitute a “disclosure” at all? And if so, does such a requirement fall under Congress’ meaning in § 1098g that prohibits “any disclosure requirements” under state law?

Because courts have been split on the meaning of “any disclosure requirements” in § 1098g, the term could be determined to be vague enough to not constitute an express preemption, leading the Court to look at the case with a presumption against finding preemption.⁴⁶

It’s likely the Court will find that § 1098g does not expressly preempt the types of claims Reavis is making to the extent that a borrower could use state or common law claims to force a loan servicer to give accurate accounts when the company makes a report to the borrower. To answer the first question, the Court could follow the Seventh Circuit Court of Appeals in *Nelson v. Great Lakes Educ. Loan Servs.* in determining that providing accurate information when already providing such information is not an additional “disclosure,” a term that refers instead to “core terms of the loan at origination as well as before and during repayment.”⁴⁷ As an extension, having to correct previously issued erroneous information likewise would not be considered a disclosure. The *Nelson* court also found the DoE’s interpretation “not persuasive,” citing that it “is not particularly thorough” and was a change to the department’s prior litigation positions.⁴⁸

⁴⁵ *Id.* at 42.

⁴⁶ *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 334 (2008) (“Federal law containing a preemption clause do not automatically escape the presumption against preemption”).

⁴⁷ *Nelson v. Great Lakes Educ. Loan Servs.*, 928 F.3d 639, 643 (7th Cir. 2019).

⁴⁸ *Id.* at 651 n.2.

Although the Ninth Circuit has decided a case on the issue at hand⁴⁹ and PHEAA points to precedent that such opinions—though not binding—should be given deference by the Court, Reavis correctly counters that the Court will not follow “poorly reasoned Ninth Circuit decision.”⁵⁰ *Chae*, the Ninth Circuit case that is the primary foundation of PHEAA’s arguments and which was also cited by the District Court, does itself draw a distinction between different types of claims (under the loan system that predated the one at issue in *Reavis*) while finding express preemption applied to some. Most importantly, the *Chae* court found that claims including the breach of the implied covenant of good faith and fair dealing, as well as fraudulent and deceptive practices “are not impacted by any of the [former loan program’s] express preemption provisions”⁵¹ with Reavis concluding that its holding does not actually support the District Court’s result.⁵² However, these remaining claims that weren’t found to be expressly preempted in *Chae* were still found to be preempted under conflict preemption.⁵³

Additionally, after briefing was completed in this case, another of the cases (a federal district court decision) relied on by PHEAA—which itself rested on the lower court opinion in *Nelson* before the Seventh Circuit reversed it—was reversed by the Eleventh Circuit Court of Appeals.⁵⁴

Should the Court take this route in finding no express preemption, the underlying dispute over just how many qualified payments Reavis has made is still unresolved, and the matter would be remanded for further proceedings.

B. Conflict Preemption

Should the Court find that Reavis’ claims were not expressly preempted by federal law, it is likely to remand the case for a further determination regarding the issue of conflict preemption. While conflict preemption was addressed in the parties briefing at both the District Court level and on appeal, the lower court made no finding on the issue in ruling

⁴⁹ *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010).

⁵⁰ Appellant’s Opening Br., *supra* note 1, at 26-27 (citing *State v. Robinson*, 712 P.2d 754, 759-60 (Mont. 2003)).

⁵¹ *Chae*, 593 F.3d at 943.

⁵² Appellant’s Opening Br., *supra* note 1, at 26.

⁵³ *Chae*, 593 F.3d at 950.

⁵⁴ *Lawson-Ross v. Great Lakes Higher Educ. Corp.*, 955 F.3d 908 (11th Cir. 2020).

in favor of PHEAA. A remand following a conclusion that there was no express preemption might be coupled with a request for the District Court to determine if conflict preemption applies to Reavis' claims seeking accurate representation of the number of payments he has made.

V. CONCLUSION

The Court's decision in *Reavis* could have major implications for student loan borrowers across the state. Should the Court choose to side with PHEAA and uphold the lower court's decision, it is certainly possible the lack of remedy when servicers "mislead [borrowers], fail to account for their payments, or even maliciously deceive them" could come to pass.⁵⁵

⁵⁵ Appellant's Opening Br., *supra* note 1, at 32.