UNITED STATES OF AMERICA

FEDERAL RESERVE SYSTEM

CONSUMER FINANCIAL PROTECTION BUREAU

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY	2023-MISC-Pennsylvania Higher Education Assistance Agency-0001

DECISION AND ORDER ON PETITION BY PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY TO SET ASIDE CIVIL INVESTIGATIVE DEMAND

The Pennsylvania Higher Education Assistance Agency ("PHEAA") has petitioned the Consumer Financial Protection Bureau ("Bureau") for an order setting aside a civil investigative demand ("CID") issued to it. For the reasons set forth below, the petition is **DENIED**.

I. BACKGROUND

On June 21, 2023, the Bureau served PHEAA with a CID seeking documents and responses to interrogatories concerning whether PHEAA failed to maintain policies and procedures to determine whether loans it services are dischargeable in bankruptcy, and whether PHEAA therefore made collection attempts on loans that were discharged via bankruptcy court orders in a manner that constitutes unfair, deceptive, or abusive acts or practices in violation of the Consumer Financial Protection Act (CFPA). The CID further discloses that the Bureau seeks to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

PHEAA met and conferred with staff from the Bureau's Office of Enforcement on June 30, 2023, and advised Enforcement staff that PHEAA intended to submit a petition to set aside the CID. On July 11, 2023, PHEAA timely filed its petition to set aside the Bureau's CID.

II. LEGAL DETERMINATION

PHEAA argues that the CID should be set aside because the Bureau lacks authority to enforce the United States Bankruptcy Code. Petition at 1. PHEAA further argues that "even if the CFPB had authority to enforce or administer the Bankruptcy Code," the interpretation of the Bankruptcy Code that PHEAA anticipates the Bureau would advance is incorrect. *Id*.

For the reasons set forth below, PHEAA's petition is denied.

A. The Bureau is properly investigating potential violations of the Consumer Financial Protection Act, not the Bankruptcy Code.

PHEAA's initial objection—that the Bureau lacks authority to enforce the Bankruptcy Code—misconstrues (or misunderstands) the Bureau's investigation. The Bureau does not seek to investigate potential violations of the Bankruptcy Code, but rather potential violations of the CFPA. Collecting and attempting to collect amounts that consumers do not owe can violate the CFPA's prohibition on unfair, deceptive, and abusive acts and practices, regardless of the reasons consumers do not owe the debt. And, contrary to PHEAA's contention, the Bankruptcy Code does not displace the CFPA or the Bureau's authority to enforce the CFPA when a bankruptcy discharge is the reason a consumer does not owe a debt.

1. Collecting and attempting to collect debts that consumers do not owe can violate the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts and practices.

Collecting and attempting to collect amounts that consumers do not, in fact, owe can violate the CFPA's prohibition on unfair, deceptive, and abusive practices. And that is what the Bureau seeks to investigate in this matter. The CID at issue here notified PHEAA that:

> The purpose of this investigation is to determine whether a student loan servicer or associated persons, in connection with student loan servicing, have [1] failed to maintain policies and procedures to determine whether the education loans it services are dischargeable in bankruptcy and [2] therefore made collection attempts on loans that have in fact been discharged, in a manner that is unfair, deceptive, or abusive in violation of Sections 1031 and 1036 of the Consumer Financial Protection Act, 12 U.S.C. §§ 5531, 5536. The purpose of this investigation is also to [3] determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

Put plainly, the Bureau's notification of purpose tells PHEAA that the Bureau seeks to investigate whether PHEAA committed unfair, deceptive, or abusive acts or practices in failing to determine whether loans it serviced were dischargeable in bankruptcy and, accordingly, making collection attempts on loans that consumers did not owe because the loans had been discharged in bankruptcy. Attempting to collect debts that consumers do not owe can violate the CFPA's prohibition on unfair, deceptive, and abusive acts and practices. This is not a novel idea.

Courts have repeatedly held that the Bureau can bring CFPA claims based on companies' attempts to collect debts that consumers do not owe due to the impact of some other statute. For example, in *CFPB v. NDG Financial Corp.*, the Bureau brought CFPA deception, unfairness, and abusiveness claims where a lender sought to collect on loans that consumers did not owe because the finance charges exceeded state usury caps, which rendered the loans void. *Consumer Fin. Prot. Bureau v. NDG Fin. Corp.*, No. 15-CV-5211 (CM), 2016 WL 7188792, at *18 (S.D.N.Y. Dec. 2, 2016), *reconsideration denied*, No. 15-CV-5211 (CM), 2016 WL 7742784, at *1 (S.D.N.Y. Dec. 19, 2016). In response to defendants' argument that the claim improperly sought to enforce state law, the district court agreed that "the CFPB is not empowered by Congress to enforce state law," but explained that the relevant claims "seek relief for *misrepresentations* to consumers about their legal obligation to repay loans that were, in fact, invalid due to state usury laws." *Id.* at *18. "Just as lying about committing a prior crime can

constitute a separate offense of perjury, misrepresenting to consumers the legal status of an invalid loan agreement can constitute a separate violation of consumer protection law." *Id.*

Similarly, in the Bureau's enforcement against CashCall, Inc., the Ninth Circuit held that demanding payment from consumers "under the pretense that the consumers had a valid obligation to pay" when "in fact under their States' laws they did not" was "easily encompasse[d]" in the meaning of a deceptive practice. *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, 35 F.4th 734, 746-47 (9th Cir. 2022). That the debts were not owed due to provisions of state licensing or usury laws did not matter: "In this case, of course, the reason that the debts were invalid happens to involve state law. But we see no reason why that should make the statute inapplicable." *Id.* at 746. Other courts have likewise recognized that it can violate the CFPA to collect or attempt to collect debts that consumers do not owe because state law voids the obligation. *See, e.g.*, *Consumer Fin. Prot. Bureau v. Think Fin., LLC*, No. CV-17-127-GF-BMM, 2018 WL 3707911, at *3 (D. Mont. Aug. 3, 2018) (holding that the Bureau had stated a claim that defendant had violated the CFPA's prohibition on unfair, deceptive, and abusive acts and practices by collecting on loans that state law rendered void and explaining that "[t]he fact that state law may underlie the violation . . . does not relieve Defendants, or any other covered person or service provider, of their obligation to comply with the CFPA"); *Commonwealth of Pennsylvania v. Think Fin., Inc.*, No. 14-CV-7139, 2016 WL 183289, at *26 (E.D. Pa. Jan. 14, 2016) (denying motion to dismiss CFPA abusiveness claim based on allegation that lender collected loans that were void under state law); *Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 777 (S.D.N.Y. 2018) (holding Bureau had stated claim that defendant had violated CFPA's prohibition on deception by "collecting on contracts that are void under state laws" and explaining that "[c]ollecting on loans that are void is materially misleading because it gives Consumers the impression that borrowers were obligated to repay . . . when in

reality . . . the borrowers were not legally obligated to pay" (internal quotation marks and citation omitted)), *rev'd on other grounds,* 828 F. App'x 68 (2d Cir. 2020).

Indeed, it is common for violations of one law to be predicated on whether another law was violated. It is, for example, the "uniform view" of courts of appeals that "a debt collector violates the [Fair Debt Collection Practices Act] when it attempts to collect a debt that state law has made invalid." *CashCall*, 35 F.4th at 746. The Federal Trade Commission (FTC) has similarly repeatedly brought actions asserting unfairness claims under the FTC Act predicated on a violation of some other law. For instance, in one case, the FTC claimed that a company committed an unfair practice in violation of the FTC Act by selling consumers' telephone records, which are protected from disclosure under the Telecommunications Act—a statute the FTC had no authority to enforce. *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1190 (10th Cir. 2009). The FTC claimed, and the Tenth Circuit agreed, that "the subversion of consumer privacy protections afforded by the Telecommunications Act" could constitute "substantial injury," an element of an unfairness claim. *Id.* at 1194. The fact that "the Telecommunications Act was relevant to that [unfairness] claim" did not mean that the FTC was enforcing the Telecommunications Act. *Id.* at 1195. The court held that, in any event, "the FTC may proceed against unfair practices even if those practices violate some other statute that the FTC lacks authority to administer." *Id.*

The conduct that the Bureau seeks to investigate is no different. Here, the Office of Enforcement seeks to investigate whether a student loan servicer engaged in unfair, deceptive, or abusive acts or practices in violation of the CFPA in failing to assess whether loans it serviced where dischargeable and, accordingly, in attempting to collect debts that had been discharged and that consumers therefore did not owe. That is not an attempt to enforce the Bankruptcy Code. Rather, the Bureau is seeking to determine what a servicer is (or isn't) doing, and whether

those activities meet the elements of an unfair, deceptive, or abusive practice under the CFPA. That the inquiry concerns the servicer's policies and procedures and collection activities with respect to loans subject to bankruptcy discharges does not change the fact that attempting to collect debts that consumers do not owe, or putting them at risk of such debt collection, can meet the elements set out in the CFPA.

2. The Bankruptcy Code does not implicitly repeal the Consumer Financial Protection Act's protections when a bankruptcy discharge is the reason a consumer has no obligation to pay a debt.

PHEAA does not appear to dispute that collecting amounts that consumers do not in fact owe could violate the CFPA's prohibition on unfair, deceptive, and abusive acts and practices. Instead, PHEAA argues, in effect, that the Bankruptcy Code implicitly displaces the CFPA's prohibition if the reason a debt that is not owed is a bankruptcy discharge.

PHEAA's argument is unpersuasive. No provision in either statute says that the Bankruptcy Code in any way supersedes the CFPA. So, PHEAA apparently means to suggest that the Bankruptcy Code *implicitly* displaces the CFPA in some way. But it does not explain why. To the extent that PHEAA means to contend that the Bankruptcy Code implicitly repeals the CFPA, that contention fails because the CFPA was enacted after the relevant provisions of the Code, and only a "later act" can operate as an "implied repeal of the earlier one[,]" not vice versa. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936) (in both categories of repeal by implication, the later act repeals the earlier one). And, besides, "[i]t is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (citing *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976)).

Nor could PHEAA support a claim of implied displacement by resorting to the canon that "where a specific provision conflicts with a general one, the specific governs," *Edmond v. United States*, 520 U.S. 651, 657 (1997). Even if the provisions of the Bankruptcy Code barring the collection of discharged debts could be considered more specific, it does not trump the CFPA because there is no conflict between the two. Quite the contrary, both statutes prohibit the same thing—collecting amounts that consumers do not owe.

This understanding, that the Bankruptcy Code does not displace the CFPA, is consistent with decisions of at least three courts of appeals that have held that the Bankruptcy Code does not displace similar protections in the Fair Debt Collection Practices Act (FDCPA), a federal consumer protection statute that prohibits misrepresentations and unfair or unconscionable activities in debt collection. The Second, Third, and Seventh Circuits have each considered FDCPA claims based on lenders' attempting to collect debts for which the Bankruptcy Code barred collection, and each found that the Code did not preclude the claims. As the Seventh Circuit opined in *Randolph v. IMBS, Inc.*, "[R]epeal by implication is a rare bird indeed. . . . It is easy to enforce both [the FDCPA and the Bankruptcy Code], and any debt collector can comply with both simultaneously." 368 F.3d 726, 730 (7th Cir. 2004). The Second Circuit similarly held that "the Bankruptcy Code does not broadly repeal the FDCPA for purposes of FDCPA claims based on conduct that would constitute alleged violations of the discharge injunction" in a case where a consumer claimed that a debt collector had violated the FDCPA by attempting to collect a discharged debt. *Garfield v. Ocwen Loan Servicing, LLC*, 811 F.3d 86, 91 (2d Cir. 2016). The court allowed those claims to proceed because "there is no conflict"; the debt collector "can avoid violating both the [FDCPA] and the Bankruptcy Code simply by not attempting to collect the discharged debt," and if it tries to collect that debt, "it risks violation of both the [FDCPA] and the Bankruptcy Code." *Id.* at 92, 93. The Third Circuit, following the Seventh Circuit's

approach in *Randolph*, likewise has held that when "FDCPA claims arise from communications a debt collector sends a bankruptcy debtor in a pending bankruptcy proceeding, and the communications are alleged to violate the Bankruptcy Code or Rules, there is no categorical preclusion of the FDCPA claims"; if there is no "direct conflict," both can be given effect. *Simon v. FIA Card Servs., N.A.*, 732 F.3d 259, 274 (3d Cir. 2013).

In arguing that there can be no CFPA claim for seeking to collect a debt that has been discharged in bankruptcy, PHEAA cites *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002). Petition at 13. There, the Ninth Circuit—contrary to three other federal circuit courts of appeals—held that attempting to collect a debt in violation of a bankruptcy discharge cannot be the basis for a claim under the FDCPA. *Walls*, 276 F.3d at 508. The court reasoned that the Bankruptcy Code did not give debtors a private right of action to enforce the discharge, and that a debtor must instead address wrongful attempts to collect a discharged debt by pursuing a claim for civil contempt of the relevant bankruptcy court's discharge order. *Id.* at 506-10. The court then held that no FDCPA claim was available either because, "[t]o permit a simultaneous claim under the FDCPA would allow through the back door what [the debtor] cannot accomplish through the front door—a private right of action." *Id.* at 510. According to the court, applying the FDCPA "would circumvent the remedial scheme of the Code under which Congress struck a balance between the interests of debtors and creditors by permitting (and limiting) debtors' remedies for violating the discharge injunction to contempt." *Id.* Relying on a case finding that the Bankruptcy Code preempted a state law malicious prosecution claim, the court reasoned that the Code's "comprehensive" provisions displaced the FDCPA. *Id.*

On this issue, the Ninth Circuit is an outlier; three other circuit courts have subsequently disagreed with the *Walls* analysis.[1] *See Garfield*, 811 F.3d at 91; *Simon*, 732 F.3d at 275;

[1] Beyond the courts of appeals that have openly disagreed with the Ninth Circuit's holding in

Randolph, 368 F.3d at 733. And the *Walls* analysis is unpersuasive. There is no conflict between allowing a debtor who faces the improper collection of a discharged debt to pursue civil contempt in the bankruptcy proceeding or to pursue claims under a statute that bars attempts to collect unowed debt—and *Walls* does not explain how there would be. Moreover, as the Second and Seventh Circuits pointed out, *Walls* relies on "precedent involving federal statutory preemption of a state-law claim," but relying on that precedent "to decide whether a federal statute precludes a federal-law claim is misplaced." *Simon*, 732 F.3d at 275 (citing *Randolph*, 368 F.3d at 733). State-law "[p]reemption is more readily inferred," while it is "rare" for one federal statute to implicitly displace another. *Randolph*, 368 F.3d at 730. And *Walls* points to no convincing reason why the Bankruptcy Code should be read to implicitly displace the FDCPA. It is well-established that "overlapping and not entirely congruent remedial systems can coexist," *Randolph*, 368 F.3d at 731 (compiling cases), and *Walls* points to no conflict or any other reason to think that the Bankruptcy Code's contempt remedy cannot coexist with the FDCPA (much less the CFPA protections at issue here).

Moreover, there would be even less reason to find that the Bankruptcy Code implicitly displaces the Bureau's claims under the CFPA. Unlike the FDCPA, the CFPA contains no private right of action, mooting the Ninth Circuit's concern over providing a private right of action to borrowers when the Bankruptcy Code did not. Moreover, the violations the Bureau is

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Walls, district courts have limited the case to a narrow reading of its facts. *See, e.g., Rios v. Bakalar & Assocs., P.A.*, 795 F. Supp. 2d 1368, 1369-70 (S.D. Fla. 2011) (distinguishing between the *Walls* FDCPA claim of unfair and unconscionable collection practices and an FDCPA claim of false or misleading representation); *Burkhalter v. Lindquist & Trudeau, Inc.*, No. 4:04-CV-01803, 2005 WL 1983809, at *1 (E.D. Mo. Aug. 16, 2005) (distinguishing between the *Walls* claim and FDCPA violations concerning harassing, oppressive, or abusive conduct and inconvenient contacts). More courts still have simply declined to follow it. *See, e.g., Drnavich v. Cavalry Portfolio Serv., LLC*, No. 05-1022, 2005 WL 2406030, at *1-2 (D. Minn. Sept. 29, 2005); *Wells v. Recovery Sols. Corp.*, No. 3:09-CV-00254, 2010 WL 11632643, at *2 (S.D. Ohio Mar. 17, 2010).

investigating here go beyond violations that individual debtors could pursue through a contempt claim in the bankruptcy proceeding. The Bureau seeks to determine whether a student loan servicer violated the prohibition on unfair, deceptive, and abusive acts and practices not just by making individual attempts to collect discharged debts from individual debtors, but also, more globally, by having no policies and procedures in place to determine whether loans in the servicer's portfolio are dischargeable in bankruptcy via standard bankruptcy orders, a practice that could put entire populations of borrowers at risk of harmful and unlawful collection efforts.

For all these reasons, the Bureau can properly pursue claims that a servicer violated the CFPA by failing to assess whether debts have been discharged in bankruptcy and by attempting to collect debts that consumers do not actually owe as a result. And, in any event, PHEAA's argument to the contrary faces a particularly steep incline in the context of a challenge to an investigative subpoena. While an agency's subpoena power is not limitless, courts have recognized that a subpoena enforcement proceeding is not the proper avenue for resolving questions about an agency's substantive regulatory authority. Even when a subpoena recipient argues that an agency's potential cause of action is barred by other federal laws, "[u]nless it is patently clear that an agency lacks the jurisdiction that it seeks to assert, an investigative subpoena will be enforced." *FTC v. Ken Roberts Co.*, 276 F.3d 583, 584 (D.C. Cir. 2001) (enforcing subpoenas despite arguments that FTC lacked statutory authority to regulate due to express preemption and implied repeal under two federal statutes). Here, PHEAA cannot show that the Bankruptcy Code expressly or impliedly displaces the CFPA—much less that it is "patently clear" that it does so.

B. PHEAA's objections to the Bureau's presumed interpretation of the Bankruptcy Code are not relevant.

PHEAA next argues that the Bureau's understanding of what student loan debts are discharged in bankruptcy is wrong. But that argument is irrelevant at this stage. PHEAA does

not dispute that student loans can be discharged in bankruptcy in various circumstances. And the Bureau's investigation seeks to determine whether a student loan servicer had policies and procedures in place to determine whether the student loans it services had been discharged and whether it attempted to collect loans that had been discharged. That inquiry is appropriate regardless of whether the Bankruptcy Code is interpreted to discharge more categories of loans serviced by PHEAA or fewer.[2] PHEAA's argument about precisely which student loans are dischargeable under the Bankruptcy Code simply has no relevance at this stage.

PHEAA similarly argues that the Bureau lacks the authority to interpret the Bankruptcy Code. Petition at 3. PHEAA misses the point that the Bureau does not assert any such authority.[3] Instead, the Bureau seeks to investigate possible violations of the CFPA's prohibition on unfair, deceptive, and abusive acts and practices—an authority it undisputedly has. The meaning of the Bankruptcy Code will be relevant to that inquiry because it controls whether debts were discharged such that consumers did not owe them. But in considering the Bankruptcy Code in

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[2] PHEAA also objects in passing (Petition at 12) that the CID seeks information on federal loans. It is unclear what relevance this has because the Bureau can investigate whether a servicer continued to collect on federal student loans that had been discharged. In any event, to the extent that PHEAA's Petition suggests that the CID should be modified to not seek information about federal loans, it has waived any such argument by failing to raise it in the meet-and-confer process prior to submission of the Petition. *See* 12 C.F.R. § 1080.6(c)(3) (providing that, in considering a petition to modify or set aside a CID, the Bureau "will consider only issues raised during the meet and confer process"). However, should PHEAA believe that the CID's requests can be narrowed consistent with the Bureau's need for documents or information, PHEAA is welcome to discuss with Enforcement staff possible modifications, which may be adopted by the Assistant Director of the Office of Enforcement or a Deputy Assistant Director of the Office of Enforcement, *see* 12 C.F.R. § 1080.6(d).

[3] For this reason, PHEAA's reliance on *Freedom Mortgage Corp. v. Dean,* 647 B.R. 780 (M.D. Fla. 2023) is misplaced. PHEAA points out that, there, a district court refused to grant *Chevron* deference to what the court considered "the CFPB's interpretation of the bankruptcy code's automatic stay provisions as embodied in" a sample mortgage statement the agency had promulgated "because Congress never charged the CFPB with administering the bankruptcy code." *Id.* at 783. Those statements by the court are beside the point here because the Bureau does not claim to have authority to administer the Bankruptcy Code, nor does it claim that its understanding of the Code is entitled to *Chevron* deference.

that way, the Bureau does not claim any authority to authoritatively interpret it, just as the Bureau claims no authority to authoritatively interpret state law or any other law that might supply background rules governing what debts are owed. In interpreting the Bankruptcy Code, the Bureau seeks only to do what many types of parties must. Indeed, this is what creditors and servicers must do routinely in order to understand the effect of consumer bankruptcy declarations on the loans on their books.

III. CONCLUSION

For the foregoing reasons, the petition to set aside the CID is **DENIED**. PHEAA is directed to comply in full with the CID within 21 days from the date this Order is served by email on counsel for PHEAA. PHEAA is welcome to engage in discussions with Bureau staff about another date for compliance that may be acceptable to the Assistant Director or Deputy Assistant Director of the Office of Enforcement.

IT IS SO ORDERED.

Dated: September 7, 2023

Rohit Chopra
Director