

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CONTINENTAL SERVICE GROUP, INC.,
Plaintiff-Appellee

PIONEER CREDIT RECOVERY, INC.,
Consolidated-Plaintiff-Appellant

**COLLECTION TECHNOLOGY, INC., PROGRESSIVE FINANCIAL
SERVICES, INC.,**
Intervenor-Plaintiffs-Appellees

ALLTRAN EDUCATION, INC.,
Intervenor-Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellant

**CBE GROUP, INC., GC SERVICES LIMITED PARTNERSHIP,
FINANCIAL MANAGEMENT SYSTEMS, INC.,
VALUE RECOVERY HOLDINGS, LLC,**
Intervenor-Defendants-Appellees

**PREMIERE CREDIT OF NORTH AMERICA, LLC, WINDHAM
PROFESSIONALS, INC., AUTOMATED COLLECTION SERVICES, INC.**
Intervenor-Defendants

2017-2155, -2215, -2342

Appeal from the United States Court of Federal Claims in Nos. 1:17-cv-00449-SGB and 1:17-cv-00499-SGB, Chief Judge Susan G. Braden.

ACCOUNT CONTROL TECHNOLOGY, INC.,
Plaintiff-Appellee

v.

UNITED STATES,
Defendant-Appellant

**PREMIERE CREDIT OF NORTH AMERICA, LLC, AUTOMATED
COLLECTION SERVICES, INC., WINDHAM PROFESSIONALS, INC.,
TEXAS GUARANTEED STUDENT LOAN CORP.,**
Intervenor-Defendants

**GC SERVICES LIMITED PARTNERSHIP, FINANCIAL MANAGEMENT
SYSTEMS, INC.,
VALUE RECOVERY HOLDINGS, LLC, CBE GROUP, INC.,**
Intervenor-Defendants-Appellees

ALLTRAN EDUCATION, INC.,
Intervenor-Defendant-Appellant

2017-2156, -2210

Appeal from the United States Court of Federal Claims in No. 1:17-cv-00493-SGB, Chief Judge Susan G. Braden.

ALLTRAN EDUCATION, INC.,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellant

**PREMIERE CREDIT OF NORTH AMERICA, LLC, WINDHAM
PROFESSIONALS, INC.,**

Intervenor-Defendants

**GC SERVICES LIMITED PARTNERSHIP, FINANCIAL MANAGEMENT
SYSTEMS, INC., CBE GROUP, INC., VALUE RECOVERY HOLDINGS,
LLC,**

Intervenor-Defendants-Appellees

2017-2157, -2216

Appeal from the United States Court of Federal
Claims in No. 1:17-cv-00517-SGB, Chief Judge Susan G. Braden.

PROGRESSIVE FINANCIAL SERVICES, INC.,
Plaintiff-Appellee

PERFORMANT RECOVERY, INC.,
Intervenor-Plaintiff

**COLLECTION TECHNOLOGY, INC., VAN RU CREDIT
CORPORATION, ALLIED INTERSTATE LLC,**
Intervenor-Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellant

PREMIERE CREDIT OF NORTH AMERICA, LLC,
Intervenor-Defendant

GC SERVICES LIMITED PARTNERSHIP,
Intervenor-Defendant-Appellee

ALLTRAN EDUCATION, INC.,
Intervenor-Defendant-Appellant

2017-2158, -2214

Appeal from the United States Court of Federal
Claims in No. 1:17-cv-00558-SGB, Chief Judge Susan G. Braden.

COLLECTION TECHNOLOGY, INC.,
Plaintiff-Appellee

PROGRESSIVE FINANCIAL SERVICES, INC.,
Intervenor-Plaintiffs-Appellee

v.

UNITED STATES,
Defendant-Appellant

CBE GROUP, INC.,
Intervenor-Defendant-Appellee

PREMIERE CREDIT OF NORTH AMERICA, LLC,
Intervenor-Defendant

ALLTRAN EDUCATION, INC.,
Intervenor-Defendant-Appellant

2017-2159, -2212

Appeal from the United States Court of Federal
Claims in No. 1:17-cv-00578-SGB, Chief Judge Susan G. Braden

VAN RU CREDIT CORPORATION,
Plaintiff-Appellee

PROGRESSIVE FINANCIAL SERVICES, INC.,
Intervenor-Plaintiff-Appellee

v.

UNITED STATES,
Defendant-Appellant

PREMIERE CREDIT OF NORTH AMERICA, LLC,
Intervenor-Defendant

ALLTRAN EDUCATION, INC.,
Intervenor-Defendant-Appellant

2017-2160, -2221

Appeal from the United States Court of Federal
Claims in No. 1:17-cv-00633-SGB, Chief Judge Susan G. Braden

**Brief of Amicus Curiae Consumer
Financial Protection Bureau in Support
of Defendant-Appellant United States**

Mary McLeod

General Counsel

John R. Coleman

Deputy General Counsel

Steven Bressler

Assistant General Counsel

Nandan M. Joshi

Counsel

Consumer Financial Protection Bureau

1700 G Street, NW

Washington, D.C. 20552

(202) 435-7269

nandan.joshi@cfpb.gov

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Continental Service Group, Inc.

v.

United States

Case No. 17-2155

CERTIFICATE OF INTEREST

Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

Consumer Financial Protection Bureau

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10 % or more of stock in the party
Consumer Financial Protection Bureau	None	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

None

Aug 21, 2017

Date

/s/ Nandan M. Joshi

Signature of counsel

Please Note: All questions must be answered

Nandan M. Joshi

Printed name of counsel

cc: _____

Reset Fields

TABLE OF CONTENTS

Table of Authorities	ii
Interest of Amicus Curiae.....	1
Introduction.....	3
Background.....	6
Argument.....	13
Conclusion	22

TABLE OF AUTHORITIES

Statutes

12 U.S.C. § 5511(a)	1
12 U.S.C. § 5511(b)(1).....	1
12 U.S.C. § 5511(b)(2)	1
12 U.S.C. § 5511(b)(5)	1
12 U.S.C. § 5511(c)	2
12 U.S.C. § 5535(a)	2
12 U.S.C. § 5535(c).....	2
12 U.S.C. § 5535(d)	2

Regulations

34 C.F.R. § 34.26(b)	13
34 C.F.R. Part 685	9
34 C.F.R. § 685.102(b).....	13
34 C.F.R. § 685.200(d).....	9
34 C.F.R. § 685.207	9
34 C.F.R. § 685.211(f)	10
34 C.F.R. § 685.211(f)(8)	10
34 C.F.R. § 685.211(f)(11)	13

34 C.F.R. § 685.220(d)	10
34 C.F.R. § 685.220(d)(1)(i)(A)(3)	13
12 C.F.R. § 1090.105	2
12 C.F.R. § 1090.106	2

Other Authorities

<i>Annual Report of the CFPB Student Loan Ombudsman</i> (Oct. 2016), (https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/102016_cfpb_Transmittal_DFA_1035_Student_Loan_Ombudsman_Report.pdf)	4, 5, 6, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 21
<i>Defining Larger Participants of the Student Loan Servicing Market</i> , 78 Fed. Reg. 18,902 (Mar. 28, 2013)	6
<i>Update from the CFPB Student Loan Ombudsman</i> (May 16, 2017), (https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201705_cfpb_Update-from-Student-Loan-Ombudsman-on-Redefaults.pdf)	19

INTEREST OF AMICUS CURIAE

The Consumer Financial Protection Bureau (CFPB or Bureau), an agency of the United States, files this brief pursuant to Rule 29(a) of the Federal Rules of Civil Procedure.

The Bureau was established to “implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.” 12 U.S.C. § 5511(a). Among other things, Congress has authorized the Bureau “to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services . . . consumers are provided with timely and understandable information to make responsible decisions about financial transactions.” *Id.* § 5511(b)(1). Additionally, the Bureau is charged with ensuring that “consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination” and that “markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.” *Id.* § 5511(b)(2), (5). The Bureau has authority to supervise nonbank

larger participants in the student-loan servicing and debt-collection markets for compliance with Federal consumer financial law and other purposes. 12 C.F.R. §§ 1090.105, 1090.106. The Bureau also has authority to collect complaints, issue rules and guidance, “tak[e] appropriate enforcement action to address violations of Federal consumer financial law” and monitor markets, including those for servicing and collection of student loans. 12 U.S.C. § 5511(c).

To assist the Bureau in carrying out its responsibilities with respect to student loans, Congress created the position of Student Loan Ombudsman (Ombudsman) “within the Bureau . . . to provide timely assistance to borrowers of private education loans.” 12 U.S.C. § 5535(a). The Ombudsman is charged with addressing consumer complaints relating to student loans and making appropriate recommendations to congressional and executive branch officials. *Id.* § 5535(c). The Ombudsman also prepares an annual report describing his activities. *Id.* § 5535(d). The trial court in this case referred to an opinion piece that cited the Ombudsman’s recent student-loan reports

as a basis for extending the preliminary injunction currently under review in this Court. Appx2.¹

In addition, as part of its consumer-education mission, the Bureau provides guidance to consumers about student loans, including information about repayment options.² Among other things, the Bureau's guidance advises borrowers who are in default to "[c]ontact your servicer or debt collector immediately to learn more about your options and to make arrangements to bring your loan out of default."³ To the extent the trial court's preliminary injunction precludes the Department of Education from assigning or reassigning a debt collector to a borrower's student-loan account, that injunction implicates the Bureau's consumer-education mission.

INTRODUCTION

Since its establishment, the Bureau has sought to raise awareness and to address a broad range of debt collection and student loan

¹ Citations to "Appx." in this brief refer to the Appendix to the Corrected Brief of the United States (ECF 143), *Continental Services Group, Inc. v. United States*, No. 17-2155 (Fed. Cir. Aug. 15, 2017).

² <https://www.consumerfinance.gov/paying-for-college/repay-student-debt/> (visited Aug. 21, 2017).

³ <https://www.consumerfinance.gov/paying-for-college/repay-student-debt/#federal:yes:yes:yes:no:no:no> (visited Aug. 21, 2017).

servicing practices that may pose risks to student loan borrowers, particularly economically distressed borrowers. Much of this work has focused on obstacles faced by borrowers who have defaulted on federal student loans and are seeking access to key consumer protections established under federal higher education law. Access to these consumer protections is critical — offering a pathway for many of the most economically vulnerable student loan borrowers to find stronger financial footing and successfully satisfy outstanding student debt.

In October 2016, the Bureau’s Student Loan Ombudsman (Ombudsman) issued his annual report (2016 Ombudsman Report), which explained that the most common complaints for federal student loan servicing were about access to income-driven repayment plans and payment processing.⁴ This report highlighted “complaints about the transition from default into an [income-driven repayment] plan, as reported by the most economically distressed consumers.”⁵ The Bureau also reported on the approximate 2,300 debt collection

⁴ Annual Report of the CFPB Student Loan Ombudsman (Oct. 2016), at 8 (available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/102016_cfpb_Transmittal_DFA_1035_Student_Loan_Ombudsman_Report.pdf).

⁵ *Id.* at 3.

complaints it received related to student loans.⁶ To the extent the trial court's preliminary injunction in this case prevents the Department of Education (Education) from assigning debt collectors to federal student loans in default, the Bureau is concerned that borrowers will face greater obstacles when seeking to exercise their right under federal law to cure their default and enroll in an income-driven repayment plan.

To be sure, as the trial court observed, the 2016 Ombudsman Report recommended reforms to the process for collecting and restructuring federal student loan debt. But as that process is currently structured, debt collectors are the primary contact for borrowers seeking information about how to rehabilitate, consolidate, or otherwise manage their federal student-loan debt. Debt collectors are also the primary contact for borrowers seeking to make any payment toward defaulted federal student loan debt — debt which continues to accrue interest daily when in default. By preventing Education from assigning debt collectors to loans in default, and thus impeding or preventing borrowers from managing their federal student loan debt, the preliminary injunction leaves some borrowers

⁶ *Id.* at 14.

worse off — potentially interfering with access to important consumer protections and preventing some borrowers from making payments toward accruing interest charges — while doing nothing to advance the reforms proposed by the Ombudsman.

BACKGROUND

1. Collection of student loan debt is generally handled by two separate but related types of entities: servicers and debt collectors. “Servicing, in general, is the day-to-day management of loans on behalf of loan holders.” Defining Larger Participants of the Student Loan Servicing Market, Proposed Rule, 78 Fed. Reg. 18,902, 18,904 (Mar. 28, 2013). “Servicers receive scheduled periodic payments from borrowers,” and “[w]hen appropriate, servicers may also make borrowers aware of alternative payment arrangements such as consolidation loans or deferments.” *Id.* at 18,905.

Debt collectors become involved when a student loan is reported to be in default — which, for most federal student loans, occurs after 360 days of delinquency.⁷ Upon default, “the entire balance of the

⁷ <https://studentaid.ed.gov/sa/repay-loans/default#default> (visited Aug. 21, 2017). Typically, default typically occurs at 270 days, but federal student loans are not reported as in default or assigned to a debt collector until the loan has been delinquent for 360 days. See 2016 Ombudsman Report at 18-19 n.8.

loan (principal and interest) becomes immediately due” and the “loan holder may place [the] loan with a collection agency.”⁸ With respect to federal student loans, once a loan is placed with a collection agency, the government or the debt collector, as appropriate, may seek to collect the loan by withholding tax refunds or other federal payments, garnishing the borrower’s wages, or initiating a collection action against the borrower.⁹

Education’s system of collecting student loan debt follows this pattern of using servicers for performing loans and debt collectors for loans that have fallen into default.¹⁰ As the Leith Declaration explains (at 42 ¶ 5), Education’s loan servicers “manag[e] loans which are *not in default*.” Loan servicers “contact borrowers . . . to determine the desired repayment plan,” “set up payment methods,” “provide borrowers with billing statements, process payments, and offer

⁸ <https://studentaid.ed.gov/sa/repay-loans/default#default> (visited Aug. 21, 2017).

⁹ *Id.*

¹⁰ See Declaration of William Leith, Chief Business Operations Officer, Federal Student Aid, United States Department Of Education (Leith Declaration) (ECF 137-3), *attached to* Defendant-Appellant United States’ Motion For Leave To File Updated Declaration Of Harm In Support Of Its Cross-Motion For Relief From Stay Pending Appeal, *Continental Service Group, Inc. v. United States*, No. 17-2155 (Fed. Cir. Aug. 14, 2017).

services to borrowers such as processing changes to repayment plans, forbearance and deferments, and the like.” *Id.*

By contrast, Education’s debt-collection contractors “perform services on only defaulted loans.” *Id.* at 42 ¶ 6. These are loans that have been assigned from the servicer to Education’s “Debt Management Collections Systems” or DMCS. *Id.*; *see also id.* at 51. From the DMCS, loans in default are “periodically assigned” to debt-collection contractors, who then “contact borrowers seeking to collect, explain various options available for curing the default, including loan rehabilitation programs, and set up rehabilitation payment plans.” *Id.* at 42 ¶ 6. Debt collectors also “process administrative wage garnishment procedures, if applicable.” *Id.*

2. Defaulting on a federal student loan — and having the loan assigned to a debt collector for collection — results in a variety of negative financial consequences for the borrower. “Private collection agencies earn a commission for any payments [the borrower] make[s] on loans that [Education] has referred for collection,” which, once collection costs are passed on to the borrower, “significantly

increase[s] the total cost of [those] loans.”¹¹ Defaults (along with delinquencies) are reported to credit reporting agencies, which impairs the borrower’s ability to obtain additional credit or increases the cost of such credit. Borrowers in default are also prohibited from accessing new grants or loans made under the Higher Education Act (HEA), effectively preventing many borrowers from pursuing additional education opportunities. 34 C.F.R. § 685.200(d).¹² And borrowers in default are barred from accessing the array of income-driven repayment options, which tailor a borrower’s “monthly student loan payment . . . to be affordable based on [the borrower’s] income and family size.”¹³ All the while, interest continues to accrue on federal student loan debts in default. 34 C.F.R. § 685.207.

The HEA, however, offers two ways to help borrowers in default get “back on track.” 2016 Ombudsman Report at 19. First,

¹¹ <https://studentaid.ed.gov/sa/repay-loans/default/collections#other-costs> (visited Aug. 21, 2017).

¹² In discussing federal student loan programs, this brief will primarily cite the regulations applicable to the William D. Ford Federal Direct Loan Program, 34 C.F.R. Part 685, which is the “largest federal student loan program.” <https://studentaid.ed.gov/sa/types/loans> (visited Aug. 21, 2017).

¹³ <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven> (visited Aug. 21, 2017).

“[b]orrowers can ‘rehabilitate’ their debt by entering into an agreement with a debt collector to make a series of nine on-time monthly payments, set based on their financial circumstances.” *Id.*¹⁴ If those payments are made, the “loans will no longer be in default,” and the borrower will “regain eligibility for benefits that were available on the loan” before default, including “a choice of repayment plans, and loan forgiveness” as well as new “federal student aid.”¹⁵ The fact of default (although not the history of missed payments) is also removed from a borrower’s credit report.¹⁶

Second, certain borrowers (whether in default or not) may have the option of consolidating their loans.¹⁷ As explained in the 2016 Ombudsman Report (at 44), the consolidation process “effectively refinances a defaulted loan and extends a new credit obligation to the borrower through the Direct Loan program.” Like the rehabilitation

¹⁴ *See also* 34 C.F.R. § 685.211(f); <https://studentaid.ed.gov/sa/repay-loans/default/get-out#loan-rehab> (visited Aug. 21, 2017).

¹⁵ *See* 34 C.F.R. § 685.211(f)(8).

¹⁶ *Id.*

¹⁷ *See* <https://studentaid.ed.gov/sa/repay-loans/default/get-out#loan-consolidation> (visited Aug. 21, 2017). Generally, borrowers under administrative wage garnishment and borrowers who have defaulted on a Direct Consolidation Loan are not eligible for consolidation. 34 C.F.R. § 685.220(d).

option, consolidation makes the borrower “eligible for benefits such as deferment, forbearance, and loan forgiveness” and for new federal student aid.¹⁸ Consolidation, however, does not remove the fact of default from a borrower’s credit report.¹⁹ With consolidation, “[b]orrowers experiencing financial hardships can immediately cure default without making any payments to a debt collector by completing the required paperwork to enroll their new Direct Consolidation Loan in an [income-driven repayment] plan.” 2016 Ombudsman Report at 44.

3. Although information about rehabilitation and consolidation is made available to borrowers on Education’s and the Bureau’s websites, many borrowers in default will depend on the debt collector assigned to their debt for information about their options for transitioning their loans from default to “performing” status. For borrowers pursuing rehabilitation, borrowers typically depend on collection personnel to facilitate the completion of a rehabilitation agreement, accept and validate income documentation, accept and apply required payments

¹⁸ <https://studentaid.ed.gov/sa/repay-loans/default/get-out#loan-consolidation> (visited Aug. 21, 2017); *see also* <https://studentaid.ed.gov/sa/repay-loans/consolidation> (visited Aug. 21, 2017).

¹⁹ *Id.*

made during the rehabilitation process, and verify that the borrower has completed all required terms at the conclusion of rehabilitation. 2016 Ombudsman Report at 24-26. Although borrowers seeking to cure default through consolidation can initiate the consolidation process directly through Education’s website, *see id.* at 41,²⁰ the Bureau believes that borrowers infrequently utilize this ‘self-help’ process due to lack of awareness, confusion, or other barriers. For the vast majority of borrowers in default, an assigned debt collector can facilitate the application process by providing them with basic information about consolidation and accepting and transmitting applications as well as necessary income documentation.²¹

Finally, access to a debt collector may be necessary for borrowers currently subject to administrative wage garnishment or otherwise seeking to make payments to mitigate interest charges on defaulted debt. The general rule is that garnishment terminates only “[a]fter

²⁰ Generally, a borrower can obtain a consolidation loan by working with the servicer or debt collector or applying directly with the Department of Education on studentloans.gov. The Bureau is uncertain whether a consolidation application that is submitted directly through studentloans.gov can be processed if no debt collector has been assigned to manage loans that are in default.

²¹ *See* Leith Declaration at 42, 51 (noting that debt collectors “explain various options available for curing the default,” including “[a]ssist[ing] with consolidation”).

[Education has] fully recovered the amounts owed by the debtor, including interest, penalties, and collection costs.” 34 C.F.R.

§ 34.26(b). But garnishment may terminate sooner for borrowers who make “satisfactory repayment arrangement[s],” 34 C.F.R.

§ 685.102(b), commonly through rehabilitation or consolidation. *See id.* § 685.211(f)(11) (rehabilitation); *id.* § 685.220(d)(1)(i)(A)(3) (consolidation). In either case, a debt collector can facilitate the ability of borrowers in default to terminate garnishment (or otherwise make payments to reduce their liability) by serving as a point of contact for borrowers seeking information about their options and as a conduit for receiving repayments.

ARGUMENT

In the decision on review, the trial court extended its preliminary injunction “until the viability of the debt collection contracts at issue is resolved.” Appx2. In doing so, the trial court sought support from what it described as a “recent press report, based on a Consumer Financial Protection Bureau Report, concluding that, ‘[t]he value added by the private collection agencies working for the Department of Education is highly questionable[,] but unquestionably expensive. Student loan borrowers deserve to understand their options and be set

up for success. Taxpayers deserve to get their money's worth.” *Id.* (quoting Appx9). Based in part on that press report, the trial court discredited arguments that the preliminary injunction worked “‘so-called’ harm to the student debtors.” *Id.*

To the extent the preliminary injunction precludes Education from assigning debt collectors to federal student loans in default, the trial court was mistaken in suggesting that the 2016 Ombudsman Report supported that outcome. Consistent with his statutory responsibilities, the Ombudsman has evaluated and made various recommendations for improving the process for collecting federal student loan debt. Principally, the Ombudsman recommended that lawmakers “consider ways to improve repayment success for previously defaulted borrowers that include immediate access to a stable and long-term [income-driven repayment] plan.” 2016 Ombudsman Report at 5. As an interim step, the Ombudsman recommended strengthened communications with borrowers to facilitate their ability to bring their loans current. *See* 2016 Ombudsman Report at 46. But the preliminary injunction does exactly the opposite: it eliminates a point of contact for borrowers in default seeking information for bringing their student loans out of

default. Contrary to the conclusion of the trial court, the harm to borrowers is real and does not support the preliminary injunction in this case.

1. Under the current collections regime, preventing Education from assigning debt collectors to borrowers in default can lead to real world harm for some borrowers — potentially interfering with access to important consumer protections and preventing some borrowers from making payments toward accruing interest charges. “A borrower in default on a federal student loan has a right under federal law to work with a collector to rehabilitate their debt,” and a “debt collector facilitates this process by collecting information from the borrower necessary to set up a monthly rehabilitation payment amount.” 2016 Ombudsman Report at 24-25. Because “[t]he majority of borrowers who cure a default and seek to enroll in [income-driven repayment] do so by first rehabilitating their defaulted debt,” *id.* at 4, the absence of an assigned debt collector with whom the borrower can deal delays their ability to begin the rehabilitation process. Moreover, because a borrower is barred from obtaining additional federal student loans while in default status, such delays may impair the borrower’s ability to pursue further educational opportunities. And because federal

student loans are daily simple interest loans, interest accrues on this debt every day a borrower remains in default. Consequently, for most borrowers, such delays likely foreclose the most widely-available means to make payments toward accruing interest charges.

It is no answer to suggest that borrowers without an assigned debt collector should simply consolidate their loans directly through studentloans.gov. First, not all borrowers are eligible for consolidation.²² Second, even if a borrower is eligible, consolidation may not necessarily offer the borrower better financial terms than rehabilitation.²³ Finally, even when consolidation is available and makes financial sense, many borrowers in default today depend on a collector assigned to their debt to inform them of its availability.

Indeed, the Bureau is concerned that many borrowers seeking to navigate their options under the current system may be enticed by private “debt relief” scams that promise to assist borrowers with

²² See, e.g., *supra* note 17. As noted above (at note 20), the Bureau is unsure whether a direct consolidation application can be processed if no contractor is assigned to the loan.

²³ <https://studentaid.ed.gov/sa/repay-loans/consolidation> (visited Aug. 21, 2017) (listing pros and cons of consolidation); see also 2016 Ombudsman Report at 42 (“Both rehabilitation and consolidation offer similar and different (mutually exclusive) benefits for consumers.”).

managing their debts but in fact offer little benefit. These scams “prey on distressed borrowers who run into trouble and struggle to figure out what comes next” because “[i]n some cases, [they] do not think their student loan servicers can help them.”²⁴ Borrowers in default who do not, in fact, receive basic information about key consumer protections and the opportunity to arrange repayment are more likely to turn to one of these outfits for assistance, and may potentially end up paying “hundreds of dollars or more” in unnecessary fees.²⁵

2. The trial court was incorrect in suggesting that the 2016 Ombudsman Report supported the preliminary injunction.

The trial court did not rely on the 2016 Ombudsman Report directly. Rather, it cited an opinion piece that in turn relied on that report to support the author’s proposal that Education should end all contracting with private debt collectors and bring those functions in-

²⁴ Consumer Advisory: Student loan debt relief companies may cost you thousands of dollars and drive you further into debt (Dec. 11, 2014), available at <https://www.consumerfinance.gov/about-us/blog/consumer-advisory-student-loan-debt-relief-companies-may-cost-you-thousands-of-dollars-and-drive-you-further-into-debt/>.

²⁵ *Id.* The Bureau has brought enforcement actions against “debt relief” companies that charged borrowers “illegal advance fees” and made false promises of “quick relief from default or garnishment.” CFPB Takes Action to End Student “Debt Relief” Scams, News Release (Dec. 11, 2014), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-end-student-debt-relief-scams/>.

house. Appx10 (“The Department of Education should end this billion dollar boondoggle to enrich private collection agencies and instead set up a system where borrowers can get unbiased and accurate information to resolve their student loan defaults.”). This litigation, however, has nothing to do with ending debt-collecting contracting; rather, it is about which companies will be awarded those debt-collection contracts.

The 2016 Ombudsman Report itself made a number of recommendations to improve the current system. The principal recommendation was that access to income-driven repayment for all federal student loan borrowers (including those in default) should be streamlined in connection with reauthorizing the HEA. For the near term, the report recommended assisting borrowers by strengthening communications during transition from rehabilitation to income-driven repayment to address complaints from borrowers who pursued rehabilitation to get out of default. The report explains that “borrowers complain about communications and paperwork processing breakdowns throughout the rehabilitation payment-setting process.” 2016 Ombudsman Report at 25. The report also described

problems associated with assigning an account from the debt collector to the servicer once the loan is rehabilitated. *Id.* at 26-27.

Perhaps most significantly, the report highlights issues in getting rehabilitated borrowers into an income-driven repayment plan, which would aid the borrower in avoiding future default. *Id.* at 27-29. A follow-up report by the Ombudsman revealed that more than 90 percent of rehabilitated borrowers “were not enrolled and making [income-driven repayment] payments within the first nine months after ‘curing’ a default.”²⁶ The 2016 Ombudsman Report explained that these problems lead to “poor repayment outcomes over the medium and long term,” 2016 Ombudsman Report at 31, with nearly half of rehabilitated borrowers projected to re-default, *id.* at 33. The report also observed that consolidation may be a better alternative for many borrowers, in part because “borrowers may apply to enroll in [income-driven repayment] at the time of the application for consolidation.” *Id.* at 41-42.

²⁶ Update from the CFPB Student Loan Ombudsman (May 16, 2017), at 3 (available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201705_cfpb_Update-from-Student-Loan-Ombudsman-on-Redefaults.pdf).

As a long term solution to these concerns, the Ombudsman recommended that policymakers “[s]implify and streamline access to an income-driven repayment for all borrowers, irrespective of default status.” *Id.* at 46 (formatting altered). For the near term, the report recommended “improv[ing] borrower communication[s] throughout the transition from rehabilitation into an [income-driven repayment] plan” and “initiat[ing] and assist[ing] borrowers seeking to complete applications for [income-driven repayment] plans during the final months of the rehabilitation process. *Id.* at 48. The report further recommended reexamination of the compensation structure for debt collectors and servicers so that pay is linked more closely to long-term borrower success. *Id.* at 50.

The trial court’s preliminary injunction is wholly divorced from these concerns and recommendations and is, in fact, inconsistent with them. For the reasons explained above, depriving borrowers in default of access to basic information about key consumer protections and the opportunity to arrange repayment — functions performed by debt collection contractors under Education’s current collections regime — does not facilitate, but impedes, borrowers’ ability to enter into income-driven repayment plans, whether through rehabilitation or

consolidation. Nor does it “improve borrower communication[s]” (2016 Ombudsman Report at 48) to cut borrowers off from communications altogether. And any reforms that need to be made to debt collectors’ compensation structure or to the “default-to-IDR transition,” broadly, will not be addressed through this litigation, which, again, concerns only which companies will be entitled to compensation and not the manner in which they are compensated.

In sum, the Bureau respectfully submits that borrowers in default will be better off if they have access to Education’s debt-collection contractors during the pendency of this litigation than if they do not. To the extent the trial court’s preliminary injunction forecloses Education from assigning such borrowers to debt collectors, the preliminary injunction is contrary to the public interest and, therefore, cannot be supported on that basis.

CONCLUSION

For the foregoing reasons, the Bureau urges this Court, in reviewing the trial court's preliminary injunction, to conclude that precluding Education from assigning debt collectors to loans in default is inconsistent with the public interest.

August 21, 2017

/s/ Nandan M. Joshi

Mary McLeod

General Counsel

John R. Coleman

Deputy General Counsel

Steven Bressler

Assistant General Counsel

Nandan M. Joshi

Counsel

Consumer Financial Protection Bureau

1700 G Street, NW

Washington, D.C. 20552

(202) 435-7269

nandan.joshi@cfpb.gov

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of [Federal Rule of Federal Circuit Rule 32\(a\)](#) or [Federal Rule of Federal Circuit Rule 28.1](#).

This brief contains *[state the number of]* 3866 words, excluding the parts of the brief exempted by [Federal Rule of Appellate Procedure 32\(f\)](#), or

This brief uses a monospaced typeface and contains *[state the number of]* _____ lines of text, excluding the parts of the brief exempted by [Federal Rule of Appellate Procedure 32\(f\)](#).

2. This brief complies with the typeface requirements of [Federal Rule of Appellate Procedure 32\(a\)\(5\)](#) or [Federal Rule of Federal Circuit Rule 28.1](#) and the type style requirements of [Federal Rule of Appellate Procedure 32\(a\)\(6\)](#).

This brief has been prepared in a proportionally spaced typeface using *[state name and version of word processing program]* Microsoft Word 2010 in

[state font size and name of type style] 14-point Georgia, or

This brief has been prepared in a monospaced typeface using *[state name and version of word processing program]* _____ with

[state number of characters per inch and name of type style] _____.

/s/ Nandan M. Joshi

(Signature of Attorney)

Nandan M. Joshi

(Name of Attorney)

Amicus Curiae, Consumer Financial Protection Bureau
(State whether representing appellant, appellee, etc.)

Aug. 21, 2017

(Date)

Reset Fields

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF SERVICE

I certify that I served a copy on counsel of record on August 21, 2017

by:

- U.S. Mail
- Fax
- Hand
- Electronic Means (by E-mail or CM/ECF)

Nandan M. Joshi

/s/ Nandan M. Joshi

Name of Counsel

Signature of Counsel

Law Firm Consumer Financial Protection Bureau

Address 1700 G Street, NW

City, State, Zip Washington, DC 20552

Telephone Number (202) 435-7269

Fax Number _____

E-Mail Address nandan.joshi@cfpb.gov

NOTE: For attorneys filing documents electronically, the name of the filer under whose log-in and password a document is submitted must be preceded by an "/s/" and typed in the space where the signature would otherwise appear. Graphic and other electronic signatures are discouraged.

Reset Fields