IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JUANITA SHORTER, et al.,	:	
	:	
Plaintiffs,	:	
	:	CIVIL ACTION
vs.	:	
	:	1:92-cv-1021-RLV
LAMAR ALEXANDER, et al.,	:	
	:	
Defendants.	:	

O R D E R

This is a putative class action in which the plaintiffs, former students at the now-defunct Connecticut Academy, seek declaratory and injunctive relief[1] against the Secretary of the United States Department of Education ("Secretary" or "Department of Education"), the Higher Education Assistance Foundation ("HEAF"), and the Illinois Students Assistance Commission ("ISAC"). The plaintiffs contend that Connecticut Academy promised educational training in the field of Medical Assisting and promised to place them in Medical Assistant externships and to assist them in finding medical assistant jobs upon graduation. The plaintiffs allege that based upon these representations they were induced to take out student loans. Pending before the court are motions to

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[1] Although there are "counts" in the complaint for fraud and breach of contract, the complaint essentially seeks an adjudication that certain fraudulent acts and breaches of contract constitute defenses to the plaintiffs' obligations to pay the student loans they incurred.

dismiss, previously converted into motions for summary judgment, filed by HEAF and ISAC and a motion to dismiss filed by the Secretary.

I. OVERVIEW OF STUDENT LOAN PROGRAM

The Higher Education Act of 1965 ("HEA") was enacted in part in an effort to address the growing need for financial assistance to students in higher education. A variety of financial aid components comprise the HEA, including the Guaranteed Student Loan Program,[2] 20 U.S.C. § 1071, et seq. Pursuant to the provisions of the HEA and regulations promulgated thereunder, private lenders make loans to qualified borrowers in furtherance of their education at eligible post-secondary schools. If a GSL goes into default, the guarantee agency pays the holder of the loan pursuant to the terms of its guarantee, and the guarantee agency is then reimbursed by the Secretary for some or all of the funds which it has expended in paying the default claim to the original lender. Pursuant to the Secretary's regulations, the guarantee agency must pursue, with "due diligence," collection on all defaulted loans for which it has received reimbursement from the Secretary. 20 U.S.C. § 1078(c)(2), 34 C.F.R. § 282.401(b)(10)(D).

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[2] The Guaranteed Student Loan Program has two distinct parts: (1) a guarantee agency program under which a state agency or a private non-profit agency guarantees a student loan, which guarantee is then reinsured in whole or in part by the Secretary and (2) the Federal Insured Student Loan Program, under which the student loans are guaranteed by the federal government directly. It is the first category of student loans which is at issue in this litigation, and for convenience those loans will be referred to as "GSL's." The latter loans will be referred to as "FISL's."

The Guaranteed Student Loan Program ["GSLP"] is a highly regulated program, which is governed by a wide range of statutory and regulatory provisions. For example, to qualify for GSL's students must meet the needs test set out in 20 U.S.C. §§ 78kk-1087uu, and the students must attend an "eligible institution," as defined in 20 U.S.C. §§ 1085(a)-(c). Additionally, an eligible institution must have executed a program participation agreement with the Secretary, which spells out in detail that its participation in the program is conditioned upon total compliance with the provisions of the HEA. 20 U.S.C. § 1094(a).

The term "eligible institution" includes a "vocational school," which is defined as a school which

> (1) admits as regular students only persons who have completed or left elementary or secondary school and who have the ability to benefit . . . from the training offered by such institution;
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> (2) is legally authorized to provide, and provides within that State, a program of post secondary vocational or technical education designed to fit individuals for useful employment in recognized occupations;
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> (3) has been in existence for 2 years or has been specially accredited by the Secretary as an institution meeting the other requirements of the subsection; and
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> (4) is accredited--
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> (a) by a nationally recognized accrediting agency or association listed by the Secretary pursuant to this paragraph. . . .

20 U.S.C. § 1085(c).

To obtain a GSL, a student may either deal directly with a participating lender or he may obtain an application from his chosen school, complete the application, and give the application to the school, which in turn submits it to the participating lender.

Lenders which participate in the GSLP are required to meet certain conditions with regard to disclosing the terms of a loan and making, disbursing, and servicing the loans, 20 U.S.C. § 1083; however, loans made under the GSLP are not subject to the disclosure requirements of state law. 20 U.S.C. § 1099.

Once a participating lender has made a student loan, it typically enters into a guarantee agreement with a private non-profit institution, such as HEAF or ISAC, to protect itself against a default. Pursuant to 20 U.S.C. § 1078(c), the guarantee agency then enters into a guarantee agreement with the Secretary. The HEA specifically provides that the agreement between the Secretary and the guarantee agency must set forth adequate assurances that the guarantee agency will not engage in any practice which discriminates against borrowers or which results in a denial of a borrower's access to loans because of his attendance at a particular eligible institution within the area served by the guarantee agency. 20 U.S.C. §§ 1071(a)(2), 1078(c)(2)(F). In order to increase the funds available to student borrowers, guarantee agencies are required to "encourage maximum commercial lender participation" in the GSLP. 20 U.S.C. § 1072(c)(6)(B).

II. PLAINTIFFS' FACTUAL ALLEGATIONS

The plaintiffs allege that the goal of Connecticut Academy was not to educate but was to collect student loan money. To this end, advertisements were placed on television and in newspapers offering potential students a chance to become medical assistants. Commissioned sales representatives canvased housing projects and low rent areas, telling potential students that the school offered training in the medical assisting field, externships, cash stipends, and placement upon graduation. The plaintiffs contend that they and the class they seek to represent were led to believe that upon completing a 28-week program they would receive certificates from a recognized school and be rewarded with well-paying careers.

After passing pro forma entrance exams, the plaintiffs were given enrollment agreements and student loan applications to sign, after which they were permitted to attend classes. Typically, the plaintiffs had no contact with a lending institution, but school officials met with the students and assisted them in completing the documents necessary to obtain student loans.

According to the plaintiffs' allegations, conditions at the school were abysmal. For example, when giving shots, students were instructed to use the same needles on each other, and students were allowed to take needles home to practice. Additionally, instructors told students to dispose of blood samples simply by throwing them into the trash.

Entering students were placed in the same classroom with students who were ready to graduate. Because of this practice, a class might swell to approximately 20 students on a Monday, decrease to 10 or 12 students by the end of the week (as students "graduated" or dropped out), and rise again the following Monday.

The plaintiffs contend that virtually everyone who enrolled and who did not drop out graduated, regardless of whether they attended and passed the classes. Two of the named plaintiffs received no training in CPR, but both were certified in CPR, with one student receiving a perfect grade. Students were allowed to graduate without having completed all of the "mandatory" classes.

Although the plaintiffs had been promised well-paying jobs upon graduation, they learned that the school's "placement program" consisted primarily of showing them want ads in the newspapers. The plaintiffs further contend that when, based upon their own efforts, they obtained job interviews, they learned that Connecticut Academy's reputation as a substandard diploma mill foreclosed them from serious consideration.

Following an investigation by the Proprietary School Unit of the Georgia Department of Education, Connecticut Academy was directed to undertake numerous steps to meet state regulations. Despite a series of directives over a six to eight month period, the school failed to meet minimum standards of operation required by Georgia law. Eventually, the school was ordered to cease operations, and the school finally closed its doors in June 1990.

The plaintiffs do not allege that the Secretary or the guarantee agencies which are defendants in this action made any misrepresentations regarding Connecticut Academy or actually participated in any of the wrongful activities alleged to have been committed by Connecticut Academy. Rather, the plaintiffs seek to hold the defendants liable for the acts of Connecticut Academy through general principles of agency. The only specific acts of wrongdoing which the plaintiffs contend were committed by the defendants were that they violated provisions of the HEA by allowing Connecticut Academy to participate in the student loan program and failed to monitor adequately the student loan program as it was administered by Connecticut Academy.

III. THE PLAINTIFFS' LEGAL CONTENTIONS

In their complaint the plaintiffs set forth four theories by which they contend the notes they signed are rendered void or unenforceable. Under the plaintiffs' two state law theories, the loan agreements are void or unenforceable because (1) the Connecticut Academy recruiters and student loan officers who procured the loans were acting as agents for the lenders, thereby subjecting the lenders and subsequent holders (viz., the Secretary and the guarantee agencies) to liability for the actions of these agents; and (2) the student loan agreements entered into between the students and the lenders and the educational contracts entered into between the students and the school were "integrated contracts" so that a breach of the educational contract constitutes

a breach of the student loan agreement. Under the plaintiffs' two federal law theories, the student loan agreements are void or unenforceable because (1) the lenders' relationship with the school constituted an "origination relationship" which allows the plaintiffs to assert their defenses against the subsequent holders of the student loans; and (2) the loan agreements fall within the coverage of the Federal Trade Commission's, "Holder Rule", 16 C.F.R. § 433.[3]

IV. LEGAL DISCUSSION

The two guarantee agencies, but not the Secretary, argue that the plaintiffs' attempt to have their student loans declared void under Georgia law must fail because state law is preempted by federal law. It is true that the supremacy clause of Article VI of the United States Constitution provides Congress with the power to preempt state law. Such preemption may result by Congress's explicitly providing for such preemption, by Congress's enacting such pervasive and all-compassing legislation so as to effectively preempt state law, or by a federal agency's acting within the scope of its congressionally delegated authority in passing pervasive and all-encompassing regulations. See Louisiana Public Service Commission v. FCC, 476 U.S. 355, 106 S. Ct. 1890 (1985). In determining whether state law is preempted in a particular area,

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[3] This last theory is a hybrid state/federal law theory because the plaintiffs contend that even though the language required by the FTC's "Holder Rule" was not included in the notes, Georgia law would imply this language into the notes.

the court's task is to ascertain the intent of Congress. See California Federal Savings and Loan Association v. Guerra, 479 U.S. 272, 107 S. Ct. 683 (1987).

It is undisputed that the HEA does not contain a provision explicitly preempting state law with respect to the defenses that may be raised to the repayment of student loans.[4] Consequently, this court must look to the statutory scheme and the regulations promulgated thereunder in seeking to determine congressional intent.

Although the Supreme Court "has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs," United States v. Kimbell Foods, Inc., 440 U.S. 715, 726, 99 S. Ct. 1448, 1457 (1979), the Supreme Court has also recognized a presumption against preemption of state law in areas traditionally regulated by the states. California v. ARC America Corp., 490 U.S. 93, 109 S. Ct. 1661 (1989). Indeed, in Kimbell Foods, which concerned a loan guaranteed by the federal Small Business Administration, the Supreme Court held that federal law would control the government's lien priority rights but then held that state law would provide the rule of decision in such cases. The Supreme Court recognized that federal programs which by their nature must be uniform in character throughout the country would necessitate the formulation of

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[4] Congress did explicitly exempt student loans from state disclosure requirements, 20 U.S.C. § 1099, but interest rate disclosure is not an issue in this litigation.

controlling federal rules. However, the Supreme Court went on to state:

> Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision. Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interests. Finally, our choice-of-law inquiry must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.
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> 440 U.S. at 728-29, 99 S. Ct. at 1458-59 (footnote omitted).

As noted above, the Secretary himself does not argue in favor of federal preemption of state law:

> The Secretary has taken the same general view as that espoused by the plaintiffs on the preemption issue and has asserted, here and elsewhere, that, although Congress has given the Department of Education the authority to issue regulations which preempt state law, "generally . . . such preemption in the area of borrower defenses is not necessary to accomplish the objectives of the Guaranteed Student Loan Program". . . . In this regard, the Secretary has consistently taken the position that rendering GSLP lenders with a close connection to the participating school subject to state law claims and defenses is not inconsistent with the federal interests underlying the HEA, and will not hinder lender participation in the student loan program.
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> Tipton v. Secretary of Education, 768 F. Supp. 540, 553 (S.D. W.Va. 1991).

The guarantee agencies point to 22 U.S.C. § 1087, which provides that a student's loan obligation is discharged in cases of death, disability, or bankruptcy, as showing congressional intent

that it is only under one of these circumstances that a student loan may be discharged. However, a fair reading of that statute does not result in the conclusion that these three bases for discharge are the exclusive bases. Because lending is an area traditionally regulated by the states and because of the presumption against preemption in such areas, this court will not read into 20 U.S.C. § 1087 a preemption of state law defenses. This court declines to read that code section as providing the only three bases for which a student loan may be discharged and holds that section 1087 merely provides three situations which would result in the discharge of a student loan obligation.

Although there is an extensive statutory and regulatory framework with respect to student loans, such statutory and regulatory framework implicitly recognizes that ongoing vitality of state law in the area. For example, 20 U.S.C. § 1077(a)(2)(A) provides that a loan will be insurable by the Secretary only if evidenced by a note or other written agreement which "is made without security and without endorsement, except that if the borrower is a minor and such note or other written agreement executed by the borrower would not, under the applicable law, create a binding obligation, endorsement may be required." This court agrees with the following analysis in Tipton:

> Congress' statutory reference to a binding obligation under the applicable law within this provision implicitly embraces state law as it pertains to the underlying enforceability of loan obligations under the GSLP and negates any inference that Congress intended to stake out the entire field and leave no room for supplementary state laws.

> Indeed, the only law "applicable" to similar loan transactions when the HEA was enacted in 1965 was state law. Consequently, any construction of the language of § 1077 which denies the applicability of state law as it pertains to the enforceability of the promissory note which is central to the federal insurability of GSLP loans would render Congress' plain choice of words meaningless.
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> 768 F. Supp. at 554.

Based upon the foregoing, this court holds that the HEA does not preempt state law with respect to state law defenses that may be raised with respect to the student loans at issue in this litigation. In so holding, this court joins what appears to be the majority of courts which have considered this issue. See Jackson v. Culinary School of Washington, 788 F. Supp. 1233 (D.D.C. 1992); Hernandez v. Alexander, Civil Action No. CV-S-91-705-PMP (D. Nev. May 29, 1992); Tipton v. Secretary of Education, 768 F.2d 540 (S.D. W. Va. 1991). But see Molina v. Crown Business Institute, Civil Action No. 24332/88 (N.Y. Sup. Ct., Sept. 10, 1990); Graham v. Security Savings and Loan Association, 125 F.R.D. 687 (N.D. Ind. 1989), aff'd on other grounds sub nom. Veal v. First American Savings Bank, 914 F.2d 909 (7th Cir. 1990).[5] Of course, this court recognizes that even though a federal law may not completely

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[5] Interestingly, the Court of Appeals affirmed on certain non-preemption grounds but then went on to say in a footnote, "Finally, if sued by a Lender in state court for collection of one of these loans, each of these plaintiff students would be entitled to assert any defenses under state law that are applicable to his or her particular loan." 914 F.2d at 915, footnote 7. Therefore, it would appear that the only viable decision upholding preemption is that by a New York Supreme Court, which, of course, is a trial court, not appellate court, of that state.

supplant state law, "federal law may nonetheless preempt state law to the extent it actually conflicts with federal law," California Federal Savings and Loan Association v. Guerra, 479 U.S. at 281, 107 S. Ct. at 689, i.e., when compliance with both federal and state law is a physical impossibility. See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S. Ct. 1210 (1963).

The defendants contend that even though it is not "physically impossible" to comply with both federal and state law with respect to the guaranteed student loan program, allowing state law defenses could create an "investment nightmare" and, thereby, drive financial institutions away from extending loans. The guarantee agencies argue that applying state law would frustrate the intent of Congress by limiting financial institutions' involvement in the program. They state, "The purpose of the GSLP is to encourage private lenders to loan money to students, secondary markets to purchase those loans, and guarantee agencies to guarantee those loans by assuring lenders, holders, and other guarantee agencies that the loans would be valid and repaid so long as they were made to eligible students attending eligible institutions." Memorandum of Law in Support of Motion to Dismiss at 15. This court believes, however, that the primary purpose of the guaranteed student loan program is to provide eligible students with a way to finance their education. The program is designed to benefit the students, not the lenders. This court does not believe that requiring lenders and guarantee agencies to act responsibly in the handling of student loans would frustrate the goal of the program. Indeed,

abuses of the program would also tend to frustrate the purpose of the program, and making lenders and guarantee agencies act responsibly by making them subject to state law defenses in no way detracts from the efficacy of the program.

In warning of a "investment nightmare" the guarantee agencies assert that allowing state law defenses would render any lender and subsequent guarantor "responsible for the quality of education offered at particular schools." Memorandum in Support of Motion to Dismiss at 16. However, this court notes that the plaintiffs' allegations go far beyond the mere "quality of education" and, instead, allege numerous acts of outright fraud and misrepresentation. This court agrees with the court in Jackson v. Culinary School of Washington, wherein the court noted that although the guaranteed student loan program "depends upon the infusion of capital from the private sector, the program is not designed to insulate wayward vendors and Guaranty Agencies from liability stemming from fraudulent activities or unfair business practices. Rather . . . the HEA permits students to proceed under state law if the actions or omissions of the lender or Guaranty Agency would render recision of the underlying promissory note appropriate. . . . Allowing students to protect themselves from vendors who abuse the GSL program comports with broad social purposes advanced by the HEA." 788 F. Supp. at 1245.

In the instant case the plaintiffs have alleged that the lenders delegated virtually all of their normal loan making functions to recruiters and loan officers of Connecticut Academy.

If the plaintiffs can prove that the lenders did, in fact, allow Connecticut Academy's recruiters and loan officers to perform the functions ordinarily performed by the lenders, the lenders, and their assignees, could be subject to defenses raised because of the fraudulent acts of those recruiters and loan officers. Potomac Leasing Co. v. Thrasher, 181 Ga. App. 833 (1987); W. T. Rawleigh Co. v. Kelly, 78 Ga. App. 10 (1948).

The court recognizes that a lender's use of an intermediary as a channel for transmission of papers and the forwarding of money through the intermediary does not constitute that intermediary as his agent to make the loan and it, therefore, is not chargeable with the consequences of the dealings between the intermediary and the borrower. Davis v. Metropolitan Life Insurance Co., 196 Ga. 304 (1943). If this is all that the plaintiffs can prove in the instant case, they will be unable to rely upon Georgia agency law in their efforts to have their loans declared unenforceable. However, the plaintiffs have alleged that the intermediary, viz., Connecticut Academy, was more than a mere conduit for the papers and money and actually assumed the duties of lender.

The plaintiffs also contend that they may assert their claims and defenses against the defendants based upon principals of Georgia contract law. They contend that they have alleged sufficient facts to show that the education contracts entered into between the school and the students and loan contracts entered into between the lenders and the students are mutually dependent, or

integrated, contracts and the breach of one constitutes the breach of another.

Georgia law recognizes that where contracts are executed at the same time, by the same parties, and in the course of the same transaction, they should be read and construed together. Rizk v. Jones, 243 Ga. 545 (1979); Hardin v. Great Northern Nekoosa Corp., 237 Ga. 594 (1976). Although there may be circumstances wherein the breach of one contract may result in the breach of other contemporaneously signed and mutually dependent contracts, the court notes that none of the cases cited by the plaintiffs reaches such a result. Indeed, this principal of law is generally applied "to ascertain the true intention of the parties" and to require the parties to perform under the terms of all of the integrated contracts rather than seeking to have one contract declared null and void because of the breach of another contract. Employers Commercial Union Insurance Co. v. Wrenn, 132 Ga. App. 287, 288 (1974); see also Dyal v. Foy & Shemwell, Inc., 159 Ga. 848 (1925). Furthermore, this court finds that the cases cited by the defendants dealing with bid agreements and surety agreements are inapposite, for such contracts are construed under principles of surety law wherein the surety's liability is dependent upon the principal's liability. Indeed, a breach of the bid agreement does not result in the surety agreement's becoming unenforceable; rather, exactly the opposite occurs. It is only when the bid agreement is "breached" that the surety agreement becomes enforceable. See Peerless Casualty Co. v. Housing Authority of

City of Hazelhurst, 228 F.2d 376 (5th Cir. 1955); McArthor v. McGilvray, 1 Ga. App. 643 (1907).

Because the education agreements and the loan agreements were entered into by different parties and because each of these agreements contains separate, distinct promises and obligations, this court holds that the contracts are not integrated contracts under Georgia law such that the breach of the education agreements renders the loan agreements unenforceable.

The plaintiffs contend that the defendants are subject to their school-related defenses based upon an "origination relationship" between Connecticut Academy and the lenders. The Secretary's regulations define "origination relationship" as

> a special relationship between a school and a lender in which the lender delegates to the school, or to an entity or individual affiliated with the school, substantial functions or responsibilities normally performed by lenders before making loans. In this situation, the school is considered to have "originated" a loan made by the lender. The Secretary determines that the "origination" exists if, for example--
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> (1) A school determines who will receive a loan and the amount of the loan; or
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> (2) The lender has the school verify the identity of the borrower of complete forms normally completed by the lender.
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> 34 C.F.R. § 682.200(b).

Although the defendants contend that no origination relationship existed between Connecticut Academy and its lenders, this court holds that the plaintiffs' allegations with respect to the role performed by Connecticut Academy's recruiters and student loan

officers are sufficient to withstand a motion to dismiss. Therefore, this court must determine whether the existence of such a relationship permits the plaintiffs to raise their school-related defenses.

In Veal v. First American Savings Bank, 914 F.2d 909 (7th Cir. 1990), the Court of Appeals held that the "origination relationship" regulations applied only to loans under the FISL or Federal PLUS programs and that loans guaranteed by private or state agencies were not subject to those regulations. The Secretary, however, has specifically disavowed such a narrow reading of the regulations. In a letter to the judge presiding in Tipton v. Secretary of Education, Mr. Fred J. Marinucci, in the office of the general counsel in the Department of Education stated:

> Lastly, we note that the Court of Appeals in Veal may have misread the regulations that coined and applied the term "origination relationship" to restrict that concept solely to the Federal Insured Student Loan Program, in which the Department acts as a direct guarantor, rather than a reinsurer. The court notes that those regulations that specifically address the existence and effect of borrower defenses on loans made by a bank with an origination relationship apply to the FISLP. 34 C.F.R. §§ 682.500-682.515. However, certain other limitations attendant to the relationship are found in that portion of the regulations that applies to all lenders and guarantee agencies. 34 C.F.R. §§ 682.200-682.213. The fact that the specific consequences of an origination relationship are spelled out only in those regulations that govern the amount a lender may be paid by the Department does not, we submit, require or prohibit use of the concept in other contexts on other kinds of loans.
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> Letter from Mr. Fred J. Marinucci, Office of the General Counsel of the Department of

Education, Tab 7 in Plaintiffs' Addendum to their brief in opposition to defendants' motions to dismiss.

In both the Jackson and Tipton litigation, the Secretary has stated his position that an origination relationship between a school and a lender may give rise to certain defenses to repayment of the loans. In fact, in the Federal Register on November 20, 1990, the Secretary stated that he was "proposing to codify his long standing view regarding the defenses to a borrower's liability for repayment of a GSL loan." See 55 Fed. Reg. 48,327. That regulation, although proposed to be codified at 34 C.F.R. § 682.215, has yet to be codified.

This court concurs with the conclusions reached by the courts in both Jackson v. The Culinary School of Washington and Tipton v. Secretary of Education that because of the Secretary's "long-standing view" and because governmental agencies are obligated to adhere to their own internal guidelines, see Morton v. Ruiz, 415 U.S. 199, 94 S. Ct. 1055 (1974), students may assert school-based claims arising out of an origination relationship against the Secretary. However, this court also concludes that because this "long-standing view" was never codified, such policy may not be applied to guarantee agencies. Although a federal agency may choose to bind itself to a certain procedure without following the notice and comment procedures required by the Administrative Procedure Act, 5 U.S.C. § 553, such agency may not bind third parties by such procedures. In so holding this court reaches the

same decision as did the Jackson court, although the Tipton court reached a contrary conclusion.

In Tipton the court held that lenders could not be held subject to the borrowers' school-related claims on the origination relationship theory but held, for the reasons outlined above, that such defenses could be asserted as to the Secretary. The court went on to hold, with no analysis that "inasmuch as HEAF is, as a practical matter, the entity which holds the majority of the notes in question and is required to pursue collection activity against the loans with due diligence, the court finds that HEAF should likewise be held subject to the Secretary's apparent policy of non-collection." 768 F. Supp. at 570. This court finds the "practical matter" relied upon by the Tipton court to be an insufficient basis to hold guarantee agencies liable.

The plaintiffs contend that the Federal Trade Commission's "Holder Rule" makes the Secretary and guarantee agencies subject to all defenses they may have against the school with respect to enforcement of their student loans. The Holder Rule, codified at 16 C.F.R. § 433, provides that it is an unfair or deceptive practice for a seller of goods or services to execute a purchase money loan contract or to accept the proceeds of such a contract when the contract does not include language preserving the claims

and defenses that the purchaser has against the seller.[6]

There has been extensive discussion with respect to whether student loans are exempt from the provisions of 16 C.F.R. § 433, and even the FTC has vacillated on this issue. See Jackson v. Culinary School of Washington, 788 F. Supp. 1233 (D.D.C. 1992). However, as noted by the Jackson court, even if the regulation were applicable, it is uncontested that the language was not, in fact, included in the notes executed by the plaintiffs. Because the language was not included, this court holds that the plaintiffs may not rely upon the FTC Holder Rule to assert any defenses they may have against Connecticut Academy against the defendants.

The plaintiffs also argue that even though the Holder Rule language was not included in their loan agreements, this court, pursuant to state law, should imply such language in their loan agreements. The Georgia courts have recognized that the laws which exist at the time and place of the making of a contract enter into and form a part of it, and the parties are presumed to have contracted with reference to such laws and their effect on the

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[6] The specific language required to be in the contract is as follows:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHOULD NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

subject matter. McKie v. McKie, 213 Ga. 582 (1957); Walter v. Orkin Exterminating Co., 192 Ga. App. 621 (1989).

Thus, where a state regulation required a pest control company to notify the local fire department before performing fumigation, required a final inspection to insure that all open flames had been appropriately extinguished, and required that a capable, alert watchman be present at the fumigation site, the pest control company's failure to do so could constitute a breach of contract. However, the federal regulation at issue in the instant case, unlike the state regulation present in Orkin Exterminating does not affirmatively require that the holder in due course language be included in purchase money notes but provides simply that the failure to do so would constitute an unfair or deceptive practice. This court holds that although the plaintiffs may have a cause of action for unfair or deceptive practice against the lending institutions pursuant to Georgia law, they may not use the FTC Holder Rule as a defense to their obligation to repay their student loans.

The plaintiffs also contend that they may assert a private right of action against the defendants for their failure to comply with their duties and obligations under the HEA. The plaintiffs acknowledge that the HEA does not explicitly provide for a private right of action to enforce its provisions, but the plaintiffs urge this court to apply the standards set forth in Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080 (1975), to imply a private right of action under the HEA.

An extensive analysis of the same contention was set forth by the Jackson court, and this court fully agrees with and adopts that analysis. Additionally, this court notes that of the many courts that have confronted this issue, only one has permitted a private right of action pursuant to the HEA. See De Jesus Chavez v. LTV Aerospace Corp., 412 F. Supp. 4 (N.D. Tex. 1976). Again, this court agrees with the Jackson analysis that De Jesus Chavez is of dubious precedential value because of that court's finding that students had a "right" to certain levels of interest on their GSL loans. Consequently, this court holds that the plaintiffs have no implied private cause of action under the HEA.

With respect to the plaintiffs' prayer for injunctive relief, the Secretary correctly points out that the HEA specifically provides that injunctive relief against him is not permitted. 20 U.S.C. § 1082(a)(2). Consequently, the plaintiffs' prayer for injunctive relief insofar as it seeks injunctive relief against the Secretary will be stricken.

V. SUMMARY

The plaintiffs' prayers for injunctive relief insofar as they seek injunctive relief against the Secretary are hereby stricken. The Secretary's motion to dismiss is granted with respect to Counts 2, 3, and all portions of Count 1 other than that portion stating a cause of action for fraud because Connecticut Academy was allegedly acting as the agent of the lenders and because Connecticut Academy had an origination relationship with the

lenders. The motions to dismiss, converted to motions for summary judgment, filed by HEAF and ISAC are granted with respect to Counts 2, 3, 4, and all portions of Count 1 except those stating a cause of action because Connecticut Academy was allegedly acting as the agent of the lenders.

SO ORDERED, this 8th day of DEC., 1992.

ROBERT L. VINING, JR.
United States District Judge