UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

TIMOTHY WAYNE TIPTON, LYLE BREECE, GEORGE W. LEESON, JR., and JOHN WILBURN, individually and on behalf of all others similarly situated,

Plaintiffs

v. Civil Action No. 2:86-1280

NORTHEASTERN BUSINESS COLLEGE, INC.; CHARLESTON NATIONAL BANK, N.A., a national banking association; and AETNA CASUALTY AND SURETY COMPANY, a corporation,

Defendants

MEMORANDUM ORDER

This matter is before the court upon the following motions filed by defendant Charleston National Bank: motion to strike plaintiffs' first amended complaint; motion to dismiss plaintiff's first amended complaint; motion for a more definite statement; and motion for a protective order.

I. Factual Background

Plaintiff Timothy Wayne Tipton initiated this civil action against defendants Northeastern Business College and

Charleston National Bank (hereinafter "the Bank") pursuant to the Truth-in-Lending Act to recover damages for defendants' alleged violations of the Act, Regulation Z, and state law. Tipton filed the complaint as a class action under Rules 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure, describing the class generally as consisting of all students who have entered into a contractual relationship with Northeastern within the five years preceding the filing of the complaint. Complaint, ¶ 7.

The complaint alleged that Tipton enrolled in a computer aided drafting course at Northeastern, paying the total cost of $4,370 as follows: $1,300 from a Pell grant, $2,400 from a guaranteed student loan arranged through the Bank, and the balance to be paid directly to Northeastern in monthly installments of $55. Complaint, ¶¶ 10-14. Less than three months after the start of the eighteen-month course, Tipton terminated his relationship with Northeastern because the classes allegedly had not been as represented. Complaint, ¶¶ 18-21. The complaint asserts claims for relief under the Truth-in-Lending Act (Count I), 20 U.S.C. §§ 1094 and 1082 (Count II), and W. Va. Code §§ 46-2-302, 46A-6-104, 46A-6-101, and 46A-2-121 (Count III). Finally, the complaint alleges that "the defendant Bank is liable for all claims and defenses that the plaintiff and others similarly situated have against the defendant Northeastern Business College." Complaint, ¶ 34.

In response to the complaint, the Bank elected not to file a responsive pleading in the form of an answer but did file a motion to dismiss, motion for a more definite statement, and motion for a protective order. Without responding to the Bank's motions and without leave of court, Tipton filed a first amended complaint adding Lyle Breece, George W. Leeson, Jr., and John Wilburn as plaintiffs and Aetna Casualty and Surety Company as a defendant. The first amended complaint also adds allegations of: (1) violations of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq., on the part of all the defendants; (2) improper delegation of loan-making functions by the Bank to Northeastern; and (3) failure to cease collection activity on the loans by the Bank, in violation of 34 C.F.R. § 682.515. First Amended Complaint, ¶¶ 38, 49, 51. In response to the first amended complaint, the Bank has filed a motion to strike, motion to dismiss, motion for a more definite statement, and motion for a protective order.

II. Motion to Strike

Rule 15(a) of the Federal Rules of Civil Procedure provides that "[a] party may amend his pleadings once as a matter of course at any time before a responsive pleading is served . . . [o]therwise a party may amend his pleading only by leave of court

or by written consent of the adverse party; and leave shall be freely given when justice so requires." The Bank has not filed an answer, and its motion to dismiss is not a responsive pleading for purposes of Rule 15(a). Smith v. Blackledge, 451 F.2d 1201, 1203 n.2 (4th Cir. 1971). See 3 J. Moore, Moore's Federal Practice, ¶ 15.07[2] (1985).

However, the first amended complaint adds parties to this action. The Bank argues that a party seeking to drop or add parties to an action must comply with Rule 21, which states in pertinent part that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." The Bank contends that because plaintiffs failed to seek leave of court to add parties pursuant to Rule 21, the amended complaint should be stricken. Thus, the issue before the court is whether Rule 15 or Rule 21 governs the addition of parties.

There is little agreement on this issue among the courts and commentators who have addressed the question. As one commentator has noted:

> Most courts have held that the specific provision relating to joinder in Rule 21 governs over the more general text of Rule 15, and that an amendment changing parties requires leave of court even though made at a time when Rule 15 indicates it could be done as of course. . . . However, it has been held that if plaintiff files an amended complaint without first obtaining leave to add an additional party, the defect

> may be corrected and does not require dismissal of the action.

7 C. Wright & A. Miller, Federal Practice & Procedure, § 1688 (1987). See J. Moore, Moore's Federal Practice ¶ 15.07[3] (1985) (majority follows Rule 21 rather than Rule 15, but noting that the Fifth Circuit has followed opposite route); Annot., Necessity of Leave of Court to Add or Drop Parties by Amended Pleading Filed Before Responsive Pleading is Served, Under Rules 15(a) and 21 of the Federal Rules of Civil Procedure, 31 A.L.R. Fed. 752 (1977).

Nevertheless, the same commentator noted that it can be argued that Rule 15(a) is the preferable rule governing this situation, viewing Rule 15 as actually more specific because it sets forth a particular means of adding parties, and stating that applying Rule 15 in this context serves the purpose of the rules by ensuring that the court avoids the necessity of passing on pleadings at an early stage of the litigation. See 6 Wright & Miller, Federal Practice & Procedure § 1479 (1971); McClellan v. Mississippi Power & Light Co., 526 F.2d 870, 873 (5th Cir. 1976) (following Wright & Miller's rationale), vacated in part, 545 F.2d 919 (5th Cir. 1977) (en banc). Indeed, recent decisions appear to favor applying Rule 15 in this situation. See, e.g., DeMalherbe v. International Union of Elevator Constructors, 438 F. Supp. 1121 (N.D. Cal. 1977); Ahmad v. Independent Order of Foresters, 81 F.R.D. 722 (E.D. Pa. 1979). The DeMalherbe court reasoned as follows:

> Plaintiffs have complete freedom to name parties when they commence an action, and the interests of defendants will not be substantially prejudiced in the early stage of a lawsuit by any delay in adding parties. Indeed, courts would grant motions to add parties at the early stages of litigation almost as a matter of course since the liberal standard of Rule 15 also applies to Rule 21 motions. Consequently, involving the court in these matters serves no useful purpose and simply imposes an unnecessary burden on courts and litigants alike.

438 F. Supp. at 1128 (citation omitted).

Other courts, while not stating that Rule 15 governs, reach similar results. For example, in Joseph v. House, 353 F. Supp. 367 (E.D. Va. 1973), the plaintiff sought to add parties by filing an amended complaint. The court stated that:

> Rule 21, Fed.R.Civ.Pro., provides that parties to an action may be added by order of the Court at any stage of the proceedings. This rule precludes the plaintiffs from being able to file their amended complaint as of right, which they seek to do. The plaintiffs would ordinarily be able to do so under Rule 15(a) because of the failure of Falls Church to file a responsive pleading. However, the main purpose of the amended complaint is to add new plaintiffs. While the original plaintiffs are not to be permitted so blandly to defeat the requirement that the Court must order such additions by proceeding under Rule 15, 3 Moore's Federal Practice ¶ 15.07[2] at 858 (1972), the Court concludes it appropriate to exercise the discretion vested in it by Rules 15 and 21 and permit the filing of the amended complaint. The addition of parties is not made at a late stage of the proceedings. The Court recognized [sic] that it is sought for the primary purpose of hopefully defeating a plea of res judicata

> by the Falls Church defendants. To disallow the joinder, and perhaps also to uphold the Falls Church defendants' plea of res judicata, would doubtless produce the filing of another suit raising identical issues by the new plaintiffs. This result is repetitive litigation which this Court is bound to avoid. The amended complaint will be filed.

353 F. Supp. at 371. Accord, Texas Energy Reserve Corp. v. Department of Energy, 535 F. Supp. 615, 621 (D. Del. 1982); Zarate v. State Department of Health, 347 F. Supp. 1004, 1006 (S.D. Fla. 1971).

The court recognizes that parties should not be permitted to circumvent the requirements of the Rules of Civil Procedure. Nonetheless, given the split of authority, the court is unprepared to hold in this context that the addition of parties by amending the complaint before a responsive pleading has been filed violates the rules. As another court has noted, "[i]t would serve no useful purpose to require the plaintiffs to seek leave of the court to do that which they could have done without such leave in their original complaint." Ahmad v. Independent Order of Foresters, supra at 728. For these reasons, the Bank's motion to strike is denied and the amended complaint is deemed filed.[1]

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[1] It is observed that subsequent to the Bank's motion to strike, plaintiffs filed a motion to amend the complaint and add parties. Although the court's disposition of the Bank's motion to strike renders moot the plaintiffs' motion, it is noted that

III. Motion to Dismiss

The Bank also has moved to dismiss the first amended complaint pursuant to Rules 12(b)(4) and (6) for insufficiency of service of process and failure to state a claim upon which relief can be granted.

With respect to the first ground, Rule 4(d) provides in pertinent part:

> (d) Summons and Complaint: Person to be Served. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
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> . . . .
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> (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

The record reveals that the first amended complaint was served on Freda Moore, Executive Secretary of the Bank, on

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the court would have granted the motion to amend had the court reached it.

February 18, 1987. The record further reveals that service of the first amended complaint on the Bank was made via mail on the same date, pursuant to Rule 4(c)(2)(C)(ii). It is therefore apparent that service of process on the Bank is sufficient.

The Bank's second ground for dismissal is more complex. The Bank asserts that the allegations of the amended complaint concerning violations of (1) the Truth-in-Lending Act and Regulation Z; (2) 18 U.S.C. § 1961 et. seq.; (3) 20 U.S.C. §§ 1082 and 1094; (4) state law; and (5) improper delegation of loan making functions and failure to cease collection activity on student loans fail to state a claim upon which relief can be granted against the Bank.

Initially, plaintiffs state that their allegations of violations of the Truth-in-Lending Act and Regulation Z were directed against defendant Northeastern Business College rather than the Bank. See First Amended Complaint, ¶ 50; Plaintiffs' response to defendants' multiple motions, p. 2. Accordingly, this issue is moot. Each of the remaining portions of the Bank's motion to dismiss for failure to state a claim will be considered separately.

A. RICO

With respect to RICO, 18 U.S.C. § 1961, et. seq., the sole allegation of the first amended complaint is as follows:

> 38. For their first claim, the plaintiffs allege, on behalf of themselves and all others similarly situated, that the defendants have violated 18 U.S.C. §1962 by the pursuit of a pattern of racketeering activity as defined by 18 U.S.C. §1961 through use of mails and telephone and otherwise.

First Amended Complaint, Count I, ¶ 38.

The preceding factual allegations which refer to the Bank shed no light on the Bank's role in the alleged activity. The only factual allegations pertaining to the Bank are that (1) it extended guaranteed student loans pursuant to 20 U.S.C. § 1082; (2) it was the bank through which Northeastern arranged plaintiff Tipton's guaranteed student loan; (3) Northeastern has not forwarded to the Bank any of plaintiff Tipton's refund in partial payment of the guaranteed student loan; and (4) plaintiffs Wilburn, Breece and Leeson signed guaranteed student loan papers which were payable to the Bank. First Amended Complaint, ¶¶ 8, 17, 24, 35. These are the only factual allegations in the entire first amended complaint which refer to the Bank.

The Bank has moved to dismiss plaintiffs' RICO claims against it on the grounds that plaintiffs have failed to properly

plead a racketeering activity, a pattern of racketeering activity, and an enterprise.

"Racketeering activity" is defined by the statute to encompass specified federal and state offenses, including mail fraud and wire fraud. 18 U.S.C. § 1961(1). As noted, paragraph 38 of the amended complaint alleges that "the defendants have violated 18 U.S.C. §1962 by the pursuit of a pattern of racketeering activity as defined by 18 U.S.C. §1961 through use of mails and telephone and otherwise." No other allegations of racketeering activity are set forth. Plaintiffs' response to the Bank's motion to dismiss attempts to illuminate this matter by stating that "[t]he plaintiffs alleged in ¶ 38 of the First Amended Complaint that there was a pattern of racketeering activity as defined by 18 U.S.C. § 1961 through the use of mails and telephone. Wire fraud and mail fraud are common frauds in violation of Title 18 of the United States Code. The specific acts of the defendant which constitute the actual basis of this pattern will be developed during the discovery process." Plaintiffs' response to defendant's multiple motions, p. 2. The Bank asserts that to the extent that mail and wire fraud are the substance of plaintiffs' allegations of racketeering activity, the first amended complaint is deficient and fails to properly state a claim upon which relief can be granted because the allegations of fraud are not pleaded with sufficient particularity as required by Rule 9(b).

Rule 9(b) states that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally." Rule 9(b), Fed. R. Civ. P. Although Rule 9(b) clearly requires that fraud be pleaded with particularity, it must be read in conjunction with the concept of notice pleading contained in Rule 8.[2] Tomera v. Galt, 511 F.2d 504, 508 (7th Cir. 1975); Pridgen v. Farmer, 567 F. Supp. 1457 (E.D.N.C. 1983); see generally 5 Wright & Miller, Federal Practice and Procedure § 1298 (West 1969).

The sufficiency of a particular pleading under Rule 9(b) depends upon a number of factors. For example, the sufficiency of a fraud pleading varies with the complexity of the transaction and the relationship of the parties. 5 Wright & Miller at § 1298

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[2] Rule 8 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(citing cases). When the transaction is complicated, the courts tend to require less specificity. Id. Further, if the defendant has greater access to the relevant facts, the particularity requirement may be relaxed. Id.

It is well-established that in a civil RICO claim which is based upon allegations of mail and wire fraud, the racketeering activities must be pleaded with particularity as required by Rule 9(b). Bender v. Southland Corp., 749 F.2d 1205, 1216 (6th Cir. 1984); Haroco, Inc. v. American National Bank and Trust Co., 747 F.2d 384, 403-04 (7th Cir. 1984); Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 792 (3d Cir. 1984); Bennett v. Berg, 685 F.2d 1053, 1062-63 (8th Cir. 1982), aff'd en banc, 710 F.2d 1361, cert. denied sub nom, Prudential Insurance Co. v. Bennett, 464 U.S. 1008 (1983); Gregoris Motors v. Nissan Motor Corp., 630 F. Supp. 902, 912 (E.D.N.Y. 1986); Systems Research, Inc. v. Random, Inc., 614 F. Supp. 494, 499-500 (N.D. Ill. 1985). Indeed, some courts have required a particularly high standard of specificity in pleading fraudulent racketeering activity because a violation of the RICO statute may result in an indictment under criminal law. See, e.g., Grant v. Union Bank, 629 F. Supp. 570, 575 (D. Utah 1986); Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank and Trust, 558 F. Supp. 1042, 1044-47 (D. Utah 1983); Taylor v. Bear Stearns & Co., 572 F. Supp. 667 (N.D. Ga. 1983). But cf. Haroco, Inc., 747 F.2d at 403-04

(rejecting view that more than the ordinary particularity must be set forth in RICO complaints).

At the very least, the complaint should put the defendant on fair notice of the time, place and contents of the alleged false representations. See, e.g. Haroco, Inc., 747 F.2d at 405; Bender 749 F.2d at 1216; Van Dorn Co. v. Howington, 623 F. Supp. 1548, 1555 (N.D. Ohio 1985). Further, in the event of multiple defendants, the identity of the person making the misrepresentation should be averred. Bennett v. Berg, 685 F.2d at 1063; Van Dorn Co., 623 F. Supp. at 1555. When numerous individual acts of fraud are alleged, it is not necessary that the date of each purported misrepresentation be given, but the general time frame within which the alleged frauds occurred should be articulated. Haroco, 747 F.2d at 405.

Finally, the complaint must contain a contention that the defendant acted with intent to defraud. Bender, 749 F.2d at 1216 (although intent to defraud may be averred generally for purposes of alleging fraud, it must be alleged).

With the foregoing principles in mind, it is apparent that the RICO count of the first amended complaint, set forth in its entirety at page 10, supra, is deficient. Nowhere does the first amended complaint describe the contents of the alleged mail and wire fraud, nor does it put the defendants on fair notice of the time and place of the instances of such fraud. Further, the

role of each of the three defendants in the alleged fraud is not articulated. The bare allegation of a RICO violation, in conjunction with equally inadequate factual allegations, is insufficient to state a RICO claim. Waldo v. North American Van Lines, 102 F.R.D. 807, 819 (W.D. Pa. 1984).

Similarly, the plaintiffs have failed to adequately plead a pattern of racketeering activity and the existence of an enterprise, both of which are essential elements of a RICO claim. Under 18 U.S.C. § 1961(5), a plaintiff must, at a minimum, allege two acts of racketeering activity to plead a "pattern of racketeering." This requirement is commonly known as the predicate act requirement; that is, the plaintiff must allege at least two predicate acts to form a RICO claim. International Data Bank, Ltd. v. Zepkin, No. 86-2052 (4th Cir., Feb. 20, 1987).

The RICO count of plaintiffs' complaint simply alleges that the defendants have pursued a pattern of racketeering activity, failing to specify the acts which form this pattern. The RICO count does not even allege the existence of an "enterprise," defined in § 1961(4) to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Moreover, the statute requires that the activity of the enterprise must have some effect on interstate commerce. United States v. Nerone, 563 F.2d 836, 852-54 (7th Cir. 1977), cert.

denied, 435 U.S. 951 (1978). A "nexus of the enterprise to interstate or foreign commerce, albeit minimal," must be shown. United States v. Rowe, 598 F.2d 564, 573 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

Plaintiffs assert in their response to defendants' multiple motions that the activities of Northeastern Business College are an enterprise, and this appears to be the enterprise which plaintiffs seek to allege in their first amended complaint. However, a valid claim under § 1964 based upon § 1962(a) must allege that the Bank acquired, established or operated the enterprise. It must also allege that the Bank acquired or maintained an interest in or control of the enterprise. It must further allege that the Bank was employed or associated with defendant Northeastern Business College and that the Bank conducted or participated in the conduct of defendant Northeastern Business College's affairs. Finally, a valid claim under § 1962(d) must allege that the Bank conspired to violate any of the three substantive subsections of § 1962. The first amended complaint makes no such allegations.

It thus is plain that the RICO count of plaintiffs' first amended complaint is wholly deficient. The Bank's motion to dismiss the RICO count is accordingly granted.

B. 20 U.S.C. §§ 1082 and 1094

Count II of plaintiffs' first amended complaint alleges as follows:

> 39. For their second claim, the plaintiffs allege, on behalf of themselves and all others similarly situated, that the defendant Northeastern Business College misrepresented the employability of graduates in violation of 20 U.S.C. § 1094 and implementing regulations, 34 C.F.R. § 668.65.
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> 40. For their third claim, the plaintiffs allege, on behalf of themselves and all others similarly situated, that the defendant Northeastern Business College violated 20 U.S.C. § 1082 and implementing regulations, 34 C.F.R. § 682.602, by not providing prospective students with a written statement containing complete and accurate information about the school prior to the time that they become obligated to pay any tuition or fees. Specifically, Northeastern Business College failed to provide information concerning:
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> (a) The school's current academic or training programs in which the plaintiff has expressed interest.
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> (b) The school's faculty in the computer aided drafting program.
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> (c) The school's facilities relating to computer aided drafting.
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> (d) Employment data including the percentage of previously enrolled students who entered positions of employment directly related to their enrollment at the school and data regarding the average starting salaries of those students or comparable regional or national student employment data.
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> 41. For their fourth claim, the plaintiffs allege, on behalf of themselves and all

> others similarly situated, that the defendant Northeastern Business College failed to include in its refund policy the procedure a student would follow to obtain a refund in violation of 20 U.S.C. § 1082 and implementing regulations, 34 C.F.R. § 682.608(a)(2).
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> 42. For their fifth claim, the plaintiffs allege that in violation of 20 U.S.C. § 1082 and implementing regulations, 34 C.F.R. § 682.610, defendants did not provide an appropriate portion of plaintiffs' refund or provide simultaneous written notice to plaintiffs of the same.

First Amended Complaint, ¶¶ 39-42.

Title 20, United States Code, Section 1082 prescribes the functions, powers and duties of the Secretary of Education, which include the power to sue and be sued. The requirements, standards and payments for schools that participate in the guaranteed student loan program are set forth in 34 C.F.R. § 682.600, et. seq. In particular, § 682.602 requires schools to provide certain information to prospective students; § 682.608(a)(2) requires schools to state their refund policies clearly in writing; and § 608.610 concerns payment of a portion of a student's refund to the lender. The program participation agreements for participating schools are covered in 20 U.S.C. § 1094, and 34 C.F.R. § 668.65 defines misrepresentation by an institution regarding the employability of its graduates.

The plaintiffs' allegations concerning violations of 20 U.S.C. §§ 1082 and 1092 and their implementing regulations appear

to be directed solely at defendant Northeastern Business College. The only suggestion of any liability for these claims on the Bank's part is the use of the plural "defendants" in paragraph 42, supra p. 20, and plaintiffs' unexplained allegation in paragraph 48 that the Bank "is liable for all claims and defenses that the plaintiffs and others similarly situated have against the defendant Northeastern Business College."

Plaintiffs assert that a private cause of action exists for enforcement of these statutes and regulations, citing DeJesus Chavez v. LTV Aerospace Corp., 412 F. Supp. 4 (N.D. Tex. 1976), while the bank contends that only the Secretary of the Department of Education can bring an action for their enforcement. The DeJesus Chavez case, like the instant action, involved allegations of violations of 20 U.S.C. § 1071 et. seq., the Higher Education Act of 1965. Specifically, the plaintiff alleged that defendants charged plaintiffs for items not authorized by the statutes and regulations promulgated pursuant thereto; that defendants charged plaintiffs sums not applied to their tuition but rather passed on to the lenders, and that these charges exceeded the maximum interest rate allowable for their student loans; and that defendants passed on the costs of making the loan to plaintiffs in the form of higher tuition charges or otherwise in violation of 20 U.S.C. § 1077 and 45 C.F.R. § 177.

The court observed that while § 1082 provides for suits to be brought by or against the Commissioner of Health, Education and Welfare (now the Secretary of the Department of Education), neither the statutory language nor the legislative history indicates whether or not a private cause of action exists under 20 U.S.C. § 1071 et. seq. The district court analyzed the question in the framework set forth in Cort v. Ash, 422 U.S. 66 (1975), where the Court stated that several factors are relevant in determining whether a private remedy is implicit in a statute not expressly providing one:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted, Texas & Pacific Railroad Co. v. Rigsby, 241 U.S. 33, 39 (1916) (emphasis supplied) -- that is does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, e.g., National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 458, 360 (1974) (Amtrak). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, e.g., Amtrak, supra; Securities Investor Protection Corp. v. Barbour, 421 U.S. 412; Calhoon v. Harvey, 379 U.S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 95.

The district court then held that under the Cort v. Ash test, a private cause of action existed under 20 U.S.C. § 1071 et. seq.. First, the court found that the plaintiff was one of the class for whose especial benefit the statute was enacted, inasmuch as the entire federal student loan program is based on the needs of the student borrower and exists for his benefit. Second, because the statute affords certain rights to student borrowers, the court found that Congress made no explicit attempt to deny a private cause of action. Third, the court ruled that implying such a remedy for the plaintiff was consistent with the underlying purpose of the legislative scheme, since "[t]he maintenance and regulation of interest subsidies and loan guarantees for student borrowers can and should be advanced by vigorous prosecution of claims such as plaintiff's claim, since obviously the Commissioner cannot investigate and prosecute every violation within his area of expertise." 412 F. Supp. at 7.

Finally, the court found that violations arising under the federal regulation of commerce are not traditionally relegated to state law, and thus it was appropriate that a federal forum determine the outcome of the plaintiffs' claims.

The only other reported decision which the court has found on this issue, Phillips v. Pennsylvania Higher Education Assistance Agency, 497 F. Supp. 712 (W.D. Pa. 1980), rev'd on other grounds, 657 F.2d 554 (3d Cir. 1981), reached a contrary result.

There, the plaintiffs alleged that the defendant, an agency created by the State of Pennsylvania to administer its guaranteed student loan program, was not exercising due diligence in its efforts to collect loans insured by the Federal Guaranteed Student Loan Program, in violation of 20 U.S.C. § 1071. The plaintiffs, citing DeJesus Chavez, argued that a private remedy existed in their favor for such a violation. The court disagreed, distinguishing DeJesus Chavez as follows:

> The Chavez case involved a violation of statutory provisions enacted for the benefit of students, specifically interest rate regulations. The provision in dispute in the case sub judice, however, was enacted for the benefit of the federal government. The states were required to exercise due diligence in the collection of delinquent monies so as to minimize federal guarantee obligations. A statute such as the Higher Education Act with many beneficiaries must be analyzed in terms of the provisions alleged to be the basis of action. The due diligence provision, unlike the interest rate regulations in Chavez, was enacted for the benefit of the federal government. It would be anomolous [sic] to hold that a provision enacted for the benefit of the federal government creates a private cause of action for defaulting students. Accordingly, plaintiffs' claim under the due diligence provision of the Higher Education Resources and Assistance Act of 1965 will be denied.

497 F. Supp. at 723.

Unlike Phillips, the regulations in dispute here appear to be enacted primarily for the benefit of students. The scope of misrepresentation by an institution regarding the employability

of its graduates, an offense for which the Secretary is authorized to initiate a fine or suspension or termination proceedings against the institution, is defined by 34 C.F.R. § 668.65; 34 C.F.R. § 602 requires schools to provide each of its prospective students with a complete and accurate statement containing information about the school, including its current academic or training programs in which the student has expressed interest, its faculty in those programs, and its facilities relating to those programs; 34 C.F.R. § 682.608(a)(2) requires the school to state its refund policy clearly in writing, including the procedure a student should follow in obtaining a refund; and 34 C.F.R. § 682.610 sets forth procedures regarding payments of refunds to lenders and students. Inasmuch as these regulations plainly appear enacted to benefit students, a private cause of action for their enforcement would exist under both DeJesus Chavez and Phillips.

However, even if a private cause of action exists for the enforcement of 20 U.S.C. §§ 1082 and 1094 and their implementing regulations, plaintiffs have failed to specify the basis for the Bank's liability, if any, for their claims under these statutes. Accordingly, the court will defer ruling on the Bank's motion to dismiss plaintiffs' 20 U.S.C. §§ 1082 and 1094 claims, and plaintiffs will be required to provide a more definite statement regarding the Bank's liability, if any, for these claims. The Bank's motion for a more definite statement is granted in

this respect and the statement shall be filed within twenty (20) days of the date of entry of this order.

C. State Law Claims: Fraud and Misrepresentation

In Count III of their first amended complaint, plaintiffs allege that Northeastern engaged in various acts of fraud and misrepresentation in violation of state common law and W. Va. Code § 46A-6-101 et seq. The role of the Bank in these alleged acts, if any, is not specified. Indeed, these allegations appear to be directed solely at Northeastern. Count III reads as follows:

> 43. (a) For their sixth claim, the plaintiffs allege that the defendant Northeastern Business College, in its course of conduct, made the misrepresentations hereinbefore alleged in the allegations of fact for the purpose of inducing the named plaintiffs and all others similarly situated into a contract and thereupon engaged in fraud and misrepresentation in violation of the common law of the State of West Virginia.
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> (b) For their seventh claim, the plaintiffs allege that the defendant Northeastern Business College has engaged in fraud by suppressing the inadequacy of the courses, faculty, equipment, and lack of course content.
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> (c) Paragraphs containing the misrepresentations hereinbefore alleged in the allegations of fact are incorporated by reference.
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> 44. The misrepresentations hereinbefore alleged were not believed by the defendants on reasonable grounds to be true, were made

with the intent to defraud, and were acted upon by the plaintiffs who were ignorant of their falsity, to the damage of the plaintiffs.

45. For their eighth claim, the plaintiffs allege that the contracts entered into under the procedures, processes, and representations are in all facets unfair and deceptive, in violation of Article 6, Chapter 46A of the West Virginia Code.

46. For their ninth claim, the plaintiffs allege that the agreements entered into under the procedures, processes, and representations as alleged are in fact unfair and deceptive, in violation of W. Va. Code §46A-6-104 incorporating the applicable federal regulations through ¶46A-6-101, specifically:

(a) Defendant Northeastern Business College violated 16 C.F.R. §2.54.4 by directly misrepresenting the nature or efficiency of the school's facilities, equipment, training devices, and methods.

(b) Defendant Northeastern Business College violated 16 C.F.R. §2.54.10 by not affirmatively disclosing the following information prior to the enrollment of the plaintiffs:

(i) a description of the school's physical facilities and equipment to be used in the class and the usual class size;

(ii) a detailed and explicit description of the extent and nature of its placement service for graduates.

47. For their tenth claim, the plaintiffs allege that the contracts are unconscionable, in violation of W. Va. Code §46-2-302, and W. Va. Code § 46A-2-121.

Count IV of the first amended complaint goes on to allege at paragraph 48 that the Bank "is liable for all claims and defenses

that the plaintiffs and others similarly situated have against defendant Northeastern Business College," but fails to describe the basis for this alleged liability.

The Bank has moved to dismiss plaintiffs' Count III allegations, arguing that the first amended complaint is based upon the Bank acting as a lender of guaranteed student loans under the Higher Education Act, and that federal law rather than state law governs the rights and liabilities of parties under the Act. The Bank cites only United States v. Tilleraas, 538 F. Supp. 1 (N.D. Ohio 1981), aff'd, 709 F.2d 1088 (6th Cir. 1983), for this proposition. Alternatively, the Bank argues that the Count III allegations are directed solely against Northeastern, and that because it was not a party to the alleged fraudulent acts, it cannot be held liable for them.

Tilleraas, supra, was an action by the federal government pursuant to 28 U.S.C. § 1345 to recover principal plus interest on a defaulted student loan insured by the government under the Higher Education Act. In considering whether the action was barred by the six-year statute of limitations contained in 28 U.S.C. 2415(a), the court stated that "[f]ederal law, not state law, governs the rights and liabilities of the government and the defendant under the Act." 538 F. Supp. at 2. The court did not consider whether federal law governs the rights and liabilities of private plaintiffs under the Act, nor whether federal law would apply to

preempt a private plaintiff's claim for state law fraud. For this reason, the application of Tilleraas in the present context is questionable. Moreover, as with Count II of plaintiffs' first amended complaint, the Bank's role, if any, in the alleged fraud and misrepresentation is not specified. Plaintiffs merely use the plural "defendants" in paragraph 44, supra, pp. 24-25, as well as the broad allegation of liability in paragraph 48. Accordingly, the court will also defer ruling on the Bank's motion to dismiss Count III of plaintiffs' first amended complaint, and plaintiffs will be required to provide a more definite statement regarding the basis of the Bank's liability, if any, for the claims made in Count III. The Bank's motion for a more definite statement is granted in this respect, and the statement shall be filed within twenty (20) days of the date of entry of this order.

D. Improper Delegation of Loan Making Functions and Failure To Cease Collection Activity

Paragraphs 49 and 51 of the first amended complaint state as follows:

> 49. The plaintiffs further allege that the defendant Charleston [National] Bank improperly delegated its loan making functions to the defendant Northeastern Business College.
>
> 51. For their twelfth claim, the plaintiffs allege, on behalf of themselves and all others similarly situated, that the defendant

> Charleston National Bank has failed and refused to cease collection activity on the loans notwithstanding the fact that the school has terminated its teaching activities involving certain named plaintiffs and members of the plaintiff class during the academic period covered by the loan, in violation of 34 C.F.R. § 682.515.

Under 34 C.F.R. § 682.515(a), a lender is required to cease collection activity on the loan and file a default claim with the Secretary within 60 days after the lender determines that any of the following conditions exist:

> (1) The school in which the borrower enrolled terminated its teaching activities involving that borrower during the academic period covered by the loan.
>
> (2) The Secretary --
>
> (i) Has instituted an action to limit, suspend, or terminate the eligibility of the school in which the borrower was enrolled for the academic period covered by the loan, or the eligibility of any lender that has held the loan; and
>
> (ii) Has directed that a claim be filed on the loan.
>
> (3)(i) A school or a lender is the subject of a lawsuit or Federal administrative proceeding and the Secretary determines that the proceeding involves allegations that, if proven, would entitle the borrower to refuse to repay all or a portion of the loan, or to obtain a judgment to recover payments made on the loan; and
>
> (ii) The Secretary has directed that a claim be filed on the loan.

34 C.F.R. § 682.515 (a)(1)-(3).

Plaintiffs' response to defendant's multiple motions states without further elaboration that "[d]uring the summer and fall of 1986, the defendant Bank continued collection activity on certain of these loans despite the fact that the school terminated its teaching activities involving the academic period covered by the loan." Plaintiffs' response to defendant's multiple motions, p. 4.

Plaintiffs do not allege the date on which the school terminated its teaching activities and whether the Bank determined that the school had terminated its teaching activities, nor do they allege that the Secretary has instituted any action against the school. Further, plaintiffs do not specify on which of these loans the Bank continued collection activity.

Moreover, the conclusory allegation of improper delegation of loan making functions is not even addressed in plaintiffs' response to defendant's multiple motions, nor is it supported by any factual allegations.

In sum, paragraphs 49 and 51 of the first amended complaint are so vague and ambiguous that the Bank cannot reasonably be required to frame a responsive pleading. See Rule 12(e), Fed. R. Civ. P. Accordingly, the Bank's motion for a more definite statement is granted insofar as it pertains to paragraphs 49 and 51.

The more definite statement shall be filed within twenty (20) days of the date of entry of this order.

Conclusion

In accordance with the foregoing, it is ORDERED that the motion to strike filed by defendant Charleston National Bank be, and it hereby is, denied.

It is further ORDERED that the motion to dismiss filed by defendant Charleston National Bank be, and it hereby is, granted with respect to plaintiffs' RICO allegation contained in paragraph 38 of the first amended complaint.

It is further ORDERED that the plaintiffs be granted twenty (20) days from the date of entry of this order within which to provide a more definite statement with respect to (1) the basis for the liability of the Bank, if any, for their claims under 20 U.S.C. §§ 1082 and 1094 contained in Count II; (2) the basis for the Bank's liability, if any, for the alleged fraud and misrepresentations contained in Count III; and (3) the allegations of improper delegation of loan making functions and failure to cease collection activity contained in paragraphs 49 and 51. Failure to file the required more definite statement as directed herein

shall result in the dismissal of the claim for which such statement is required by this decree.

The Clerk is directed to forward certified copies of this order to all counsel of record.

ENTER: January 12, 1988

JOHN T. COPENHAVER, JR.
United States District Judge

A TRUE COPY, Certified this

JAN 12 1988

RONALD D. LAWSON, CLERK
BY DEPUTY