CHALLENGING A STUDENT LENDER HEAD-ON

Even lawyers, it turns out, can get tripped up by the fine print.

[BY VICTOR LI]

BUY A CELL phone, apply for a credit card, sign a lease, or borrow money, and invariably you're confronted with a block of text that requires you to waive all liability. In those rare circumstances under which you can sue, you must agree to do so on the seller's terms and according to the state laws of its choosing. These "take-it-or-leave-it" adhesion provisions are usually printed in a font so small you almost need a magnifying glass to read them, and in language so obtuse you practically need a law degree to understand it.

JOSHUA FENSTERSTOCK TAKES A RUN AT A STUDENT LOAN CLASS ACTION.

JORDON HOLLENDER

Actually, having a law degree may not help. That's what Joshua Fensterstock learned after consolidating three private loans he'd taken out to attend Hofstra Law School in Hempstead, New York. "When I graduated, I had over $100,000 worth of student loans," says Fensterstock, who graduated in 2003 and worked as a real estate lawyer at New York–based real estate, corporate, and litigation boutique Isaac & Associates for five years before opening his own New York practice last July. His debt load was hardly unusual: The American Bar Association estimates that students attending private law schools took out, on average, more than $90,000 in loans during the period when Fensterstock was enrolled.

In 2006, Fensterstock decided to merge the remaining balances on the three private loans. The lender he chose—Education Finance Partners, a student loan company serviced by California-based Affiliated Computer Services, Inc.—gave him a 30-year loan of $52,915.49 at a fixed interest rate of 9.32 percent. "They e-mailed me a complete package of documents, and in order to be approved, I had to sign a promissory note that came with the application." He read the fine print and agreed to the note's terms.

Fensterstock soon noticed that though he was making regular payments, the balance on his monthly statements was rising, not falling. When he contacted ACS to report the problem in August 2007, he was told that if he didn't pay precisely on the fourteenth of each month, his payment would apply only to the interest due on the

loan, not toward reducing the principal. "That wasn't in the agreement," he says.

Fensterstock filed suit against ACS and EFP on behalf of himself and any other affected borrowers, claiming the two entities had engaged in fraudulent and deceptive practices. One catch: Filing suit violated a provision of the promissory note he signed under which he waived the right to pursue class actions or other representative claims and agreed that arbitration decide all individual claims. Fensterstock challenged that provision in his suit as well.

"We alleged that this class waiver would discourage people from standing up for their rights," says his lawyer, Orin Kurtz of New York–based law firm Abbey Spanier Rodd & Abrams, noting that Fensterstock claims ACS and EFP have cheated a large number of borrowers out of small sums. "After all, how many individuals would bother going to arbitration for a few hundred dollars? A class action is the opportunity for many individuals banding together to take on a big corporation. That raises the stakes and may encourage the defendant to address the issue more squarely."

Edward Lenci of Hinshaw & Culbertson, a Chicago-based firm that represents ACS, is unsympathetic. "There's a big difference between an 18-year-old kid who signs a cell phone agreement because he doesn't know any better and he's under pressure from a salesman, and a 35-year-old lawyer," Lenci says. "He should have known what he was signing."

So far, the courts have disagreed. In July, the U.S. Court of Appeals for the Second Circuit upheld a lower court ruling that the promissory note's class waiver and arbitration clauses were "unconscionable" under California law (the disputed promissory note specified the laws of ACS's home state as the ultimate authority), rejecting the defendants' argument that, as a lawyer, Fensterstock should have known better. "We have seen nothing in his education, experience, or expertise to suggest that he had any meaningful opportunity to negotiate that clause out of the contract," Judge Amalya Kearse wrote on behalf of a unanimous three-judge panel.

Many lawyers don't understand their loan terms, says Heather Jarvis, senior program manager at Equal

SHINING A LIGHT ON LAW SCHOOL EMPLOYMENT DATA

A new nonprofit aims to find out what becomes of graduates after they leave school.

IN THE SPRING OF 2008, AN ONLINE discussion board geared to would-be law students misreported some employment data about Vanderbilt University School of Law alumni. The school's reaction surprised Patrick Lynch, a Vanderbilt 1L at the time who had volunteered to field questions from potential students. "They actually distributed a full list of about 90 percent of the students who graduated from Vanderbilt's class of 2007, and gave it out to every accepted student at their admitted students weekend."

PATRICK LYNCH

Producing the list—a gold mine for comparison shoppers—was an unusual move for a law school. Vanderbilt detailed where its graduates worked, when they'd started, and a range for what they were earning—employment-related data well beyond what law schools historically provided to the main distributors of such information, *U.S. News & World Report,* the National Association of Law Placement, and the American Bar Association's Standard 509 subcommittee.

KYLE McENTEE

Kyle McEntee, who'd spoken with Lynch while weighing which law school to attend, was impressed by the list. Ultimately, it helped persuade him to enroll at Vanderbilt. Once there, the two reconnected and decided to try to pry similar information out of all 199 American Bar Association–accredited law schools. Thus was born Law School Transparency (LST).

Launched in July 2009, the nonprofit LST aims to share law school employment data about which, Lynch says, "prospective students are still left mostly in the dark." An absence of comprehensive, reliable information, he says, forces students to decide which school to attend based on whether one is "5 percentage points higher in placement than another one." Adds Lynch: "That's not enough information to make an informed decision."

To advance their mission, last July, Lynch, now graduated

Justice Works, a Washington, D.C.–based nonprofit organization that encourages lawyers to pursue public service careers. "They're sophisticated people, and even they have a very difficult time understanding their loans and their options," she says. "Certainly, when they were students, they did not understand what they were getting into."

In its ruling, the Second Circuit found that arbitration was an inadequate remedy because it didn't give Fensterstock enough of a chance to negotiate with the lender, and created a disincentive for individuals to sue.

Lenci, who has filed a petition asking the Second Circuit to rehear the case, is adamant that, in line with the Federal Arbitration Act (FAA), the disputed clauses should be upheld. "Hopefully, the Second Circuit will grant rehearing and decide that the FAA preempts California law on its own," Lenci says. "Otherwise, we would have to petition the Supreme Court for certiorari." Lenci notes that the Court is set to decide whether the arbitration act does indeed preempt state unconscionability laws like the one at issue in Fensterstock's suit when it considers *AT&T Mobility LLC* v. *Concepcion* in the upcoming term. "The Second Circuit might decide to wait and see what the Supreme Court does in *Concepcion*," says Lenci. "It's unlikely but possible."

As for Fensterstock, he's preparing for the discovery phase of what he hopes will be certified as a class action suit—and making regular loan payments, though not always on the fourteenth. "Some months they apply it to the principal, some months they don't," he says. "The problem is when you send a payment either through mail or electronically, you have no control over when they post the payment. I don't understand what they're doing. Hopefully, we'll clear it up once we start discovery." ■

"Some months they apply it to the principal, some months they don't," Fensterstock says. "I DON'T UNDERSTAND WHAT THEY'RE DOING."

and preparing for a career in environmental advocacy, and McEntee, a 3L, sent an e-mail to all 199 schools asking that they share the more comprehensive data LST hopes to make widely available. The additional information the pair seeks includes statistics about law journal placement and details about who is paying graduates' salaries, which are sometimes subsidized by foundations and schools themselves.

As of LST's September 10 deadline, only three of the targeted schools—those at Vanderbilt, American University, and the University of Michigan—had said they were considering providing the requested data. Eight others said they wouldn't cooperate. The rest didn't reply.

David Yellen, dean and professor of law at Loyola University Chicago School of Law, as well as chair of the ABA's Standard 509 panel, agrees with Lynch and McEntee that current disclosure standards fall short. Yellen, who says the ABA panel does offer additional employment data provided by the schools to prospective students, also agrees that the information is crucial. "It's to help people assess those two things," he says. "'Should I go to law school? And, where should I go to law school?' "

What other information would Yellen like to see schools disclose? Whether jobs are part- or full-time, permanent or temporary, how much they pay, and whether they even require a J.D. "Under the silly system right now," Yellen says, "if someone is working in a fast food restaurant, they simply get reported as being employed."

Yellen says the ABA panel will soon begin working toward making a declarative judgment on acceptable disclosure standards, with schools that don't comply risking a loss of accreditation. He says the ABA is unlikely to take an official position on LST's mission, and that he believes Lynch and McEntee's request may place too great a burden on law schools without offering enough of a benefit to prospective students. Still, he applauds LST's efforts. Lynch and McEntee, he says, "have done a service in keeping this issue on the front burner."

—TOM HUDDLESTON JR.