

**UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT**

BAP No. RI 98-015

IN RE: CHRISTINE PHELPS

**CHRISTINE PHELPS,
Plaintiff/Appellee,**

v.

**NEW YORK STATE HIGHER EDUCATION SERVICE CORP.,
Defendant/Appellant.**

**Appeal from the United States Bankruptcy Court
for the District of Rhode Island
(Hon. Arthur N. Votolato, U.S. Bankruptcy Judge)**

**Before
de Jesús, Hillman and Carlo, U.S. Bankruptcy Judges**

John N. Taylor, Jr. for the appellant.

Jason D. Monzack of Kirshenbaum & Kirshenbaum for appellee.

October 8, 1998

Per Curiam.

Plaintiff Christine Phelps ("Phelps") originally commenced this adversary proceeding against Sallie Mae Loan Servicing Center ("Sallie Mae") seeking a determination that her student loans were dischargeable pursuant to 11 U.S.C. § 523 and Fed. R. Bankr. P. 4007. *Appellee's Appendix 1*. Subsequently, New York State Higher Education Services Corporation ("HESC") notified Phelps's counsel that it "is the 'governmental unit' which guaranteed the student loans and which is referenced in 11 USC §523(a)(8)." *Appellee's Appendix 2*. HESC was added as a party defendant by stipulation. After trial the Bankruptcy Court held that the student loans in question were discharged. This appeal followed.

In its brief and argument before us HESC raised for the first time a defense to the action on the basis of Eleventh Amendment immunity, based upon the decision of the United States Supreme Court in *Seminole Tribe v. Florida*, 517 U.S. 609 (1996). That issue may be raised at any time. *Edelman v. Jordan*, 415 U.S. 657, 677-78 (1974); *Ford Motor Co. v. Dept. of the Treasury*, 323 U.S. 459, 467 (1945). On the record before us we are unable to determine whether HESC is an entity entitled to claim the protection of the Eleventh Amendment. Further, we believe that a factual record should be developed and conclusions of law reached below upon which a review could be made intelligently and efficiently on appeal.

For that reason, we vacate the decision below declaring the

loan here in question to be dischargeable and remand this matter for further proceedings consistent with this opinion.