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## **Undue Hardship in the Fifth Circuit What Does the Law Require?**

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## Undue Hardship in the Fifth Circuit- What Does the Law Require? Chrystin Ondersma

This memo discusses the legal landscape of the undue hardship doctrine in the Fifth Circuit. If, as seems likely, the Brunner test will not be abandoned any time soon, each prong of it must nevertheless be interpreted in a manner consistent with section 523(a)(8), which provides for a discharge of student loans when debtors demonstrate that repayment would impose an “undue hardship” on the debtor and his or her dependents.

### Background

The Fifth Circuit, like most circuits, uses the Brunner test to determine whether the “undue hardship” test is met. This test is three-pronged, and requires that debtors demonstrate that they 1) “cannot maintain, based on current income and expenses, a ‘minimal’ standard of living” for themselves and dependents if required to repay their loans; 2) that “additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans,” and 3) that they have made “good faith efforts to repay the loans.”<sup>1</sup>

Most debtors seeking relief of their student loans today are facing situations that are substantially more grave than those facing debtors in 1987, when Brunner was decided. By fall of 2016, student loan debt had grown to 1.4 trillion dollars, and is swelling by 100 billion each year.<sup>2</sup> Over forty-four million Americans owe student loan debt.<sup>3</sup> Average student loan debt doubled between 2005 and 2013 from \$15,350 to \$32,096.<sup>4</sup> The average debt load for the class of 2016 was \$37,172.<sup>5</sup> Student loan debt is taking up increasing shares of debtors’ income. In 2005, only 5.4% of bankruptcy filers had student loans that totaled more than 50% of their annual income, but by 2014 16% of

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<sup>1</sup> See U.S. Dept. of Educ. v. Gerhardt (*In re Gerhardt*), 348 F.3d 89, 91 (5th Cir. 2003) (citing *Brunner v. N.Y. Higher Educ. Servs. Corp. (In re Brunner)*, 831 F.2d 395, 396 (2d Cir. 1987)).

<sup>2</sup> *Consumer Credit – G.19*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (Aug. 7, 2017), <https://www.federalreserve.gov/releases/g19/current/>.

<sup>3</sup> Zack Friedman, *Student Loan Debt In 2017: A \$1.3 Trillion Crisis*, FORBES: INVESTING (Feb. 21, 2017), <https://www.forbes.com/sites/zackfriedman/2017/02/21/student-loan-debt-statistics-2017/#fd388205daba>.

<sup>4</sup> Daniel A. Austin, *Student Loan Debt in Bankruptcy: An Empirical Assessment*, 48 SUFFOLK U. L. REV. 577, 581 (2015).

<sup>5</sup> Zack Friedman, *Student Loan Debt In 2017: A \$1.3 Trillion Crisis*, FORBES: INVESTING (Feb. 21, 2017), <https://www.forbes.com/sites/zackfriedman/2017/02/21/student-loan-debt-statistics-2017/#fd388205daba>.

filers—or triple the rate of filers—had student loans totaling more than 50% of their annual income.<sup>6</sup> The default rate in 2016 was 11.2%.<sup>7</sup> This is a higher default rate than the default rate for auto loans, of which only 8.5% are at least thirty days delinquent.<sup>8</sup> Further, the cost of college tuition has increased far faster than inflation—if car prices had increased as much as college prices, the average new car would cost \$80,000 today instead of just over \$30,000.<sup>9</sup>

The modern reality of the depth of student indebtedness relative to capacity to repay has led several judges to question the continued suitability of Brunner.<sup>10</sup> For example, Judge Jim D. Pappas of the Ninth Circuit called the Brunner test “a relic of times long gone.”<sup>11</sup> He points out that, in 1987, when Brunner was decided, student debt loans were substantially smaller than the “mammoth costs of a modern education.”<sup>12</sup> Additionally, debtors were entitled to a discharge after seven years in any event, so the consequence of a “no undue hardship” determination was a delay in relief rather than a life sentence of loan repayment.<sup>13</sup> Judge Pappas pointed out the stark contrast between the debtor in Brunner, who sought the discharge of \$9,000 less than a year after graduating, and the debtor in Roth, who was struggling to pay \$95,000 after fifteen years in repayment.<sup>14</sup>

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<sup>6</sup> 48 SUFFOLK U. L. REV. at 588.

<sup>7</sup> Zack Friedman, *Student Loan Debt In 2017: A \$1.3 Trillion Crisis*, FORBES: INVESTING (Feb. 21, 2017), <https://www.forbes.com/sites/zackfriedman/2017/02/21/student-loan-debt-statistics-2017/#fd388205daba>.

<sup>8</sup> *Id.*

<sup>9</sup> Paul F. Campos, *The Real Reason College Tuition Costs So Much*, NEW YORK TIMES: SUNDAY REVIEW (Apr. 4, 2015) [https://www.nytimes.com/2015/04/05/opinion/sunday/the-real-reason-college-tuition-costs-so-much.html?\\_r=0](https://www.nytimes.com/2015/04/05/opinion/sunday/the-real-reason-college-tuition-costs-so-much.html?_r=0).

<sup>10</sup> Tara Siegel Bernard, *Judges Rebuke Limits on Wiping Out Student Loan Debt*, NEW YORK TIMES: YOUR MONEY (Jul. 17, 2005) <https://www.nytimes.com/2015/07/18/your-money/student-loans/judges-rebuke-limits-on-wiping-out-student-loan-debt.html>.

<sup>11</sup> *Roth v. Educ. Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908, 920 (B.A.P. 9th Cir. 2013).

<sup>12</sup> *Id.* at 922.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

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