University of Texas Law School
2024 Consumer Bankruptcy Seminar
July 11 and 12, 2024

Are Brunner and Gerhardt Now Irrelevant?

Michael Baumer
Law Office of Michael Baumer
PO Box 1818
Liberty Hill, Texas 78642
michael@baumerlaw.com
512-476-8707
BaumerLaw.com

Presented With:

Heidi McLeod
Heidi McLeod Law Office PLLC
3355 Cherry Ridge Dr #214
San Antonio, TX 78230
heidimcleodlaw@gmail.com
210-853-0092
HeidiMcleodLaw.com

THE NEW (11/22) DOJ GUIDANCE ON
STUDENT LOAN DISCHARGE LITIGATION

Fun Facts

I spoke at a seminar about student loan debt in November, 2012 and the paper started with thre following information:

- Total outstanding student loan debt recently passed $1trillion.
- Total outstanding student loan debt now exceeds total outstanding revolving credit card debt.
- Total outstanding student loan debt now exceeds total outstanding secured consumer debt. (Cars, furniture, appliances, etc.)
- The average student loan debt obligation for 2011 graduates was $26,600, (but one third of the graduates had no student loan debt.)
- More than 5,000,000 student loan borrowers are in default. (The highest rate in 15 years.)

The most recent data (and there is a wide range of what data is "recent" ranging from year end 2019 to year end 2023) is:

- Total student loan debt as of June, 2023 was $1.77 trillion dollars.
- Total outstanding student loan debt still exceeds total outstanding revolving credit card debt.
- Total outstanding student loan debt still exceeds total outstanding secured consumer debt. (Cars, furniture, appliances, etc.)
- Total federal student loan debt is now 91.8% of all student loan debt.
- In January 2020 (pre-Covid) 2.7M federal student loan borrowers were in forbearance. More recently (post-Covid) I found conflicting information on current repayment status rates, but…

* Standard	10.5M
Alternative:	
o Graduated .	3.1M
o Income-contingent (ICR) .	.8M
o Income-based	2.8M
o Pay as You Earn (PAYER)	1.5M
o Revised Pay as You Earn (REPAYER)	3.3
	18.9M

Historical Background

Brunner and *Gerhardt*

In 1987 the Second Circuit issued its opinion in *Ir re Brunner*, 831 F.2d 395 (2d Cir. 1987) which became the seminal case establishing the standard for obtaining discharge of student loans based on "undue hardship" under 11 U.S.C. §523(a)(8). It is perhaps worthy of note that the actual opinion is two whole pages long. *Brunner* adopted a three part test:

> **(1) that the debtor cannot maintain, based on current income and expenses, a minimal standard of living of herself and her dependents if forced to repay the loans;**
> **(2) that additional circumstance 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 the debtor has made a good faith effort to repay the loans.**

The court ruled on the second and third prongs so there is no analysis of the application of the first prong. (What is a "minimal standard of living"?) With respect to the second prong, the court correctly (I believe) held that the record failed to demonstrate additional circumstances that indicated that the state of affairs would likely persist during the repayment period of the loans. The court stated:

> In fact, at the time of the hearing, only ***ten months*** has elapsed since Brunner's graduation from her Master's program. [Emphasis added.]

Let me suggest that *Brunner* is a "bad facts make bad law" case. With respect to the third prong (if the second prong wasn't bad enough), the court stated:

> Finally, as noted by the district court, Brunner filed for the discharge within ***one month*** of the date the first payment of her loans came due. Moreover, she did so without first requesting a deferment of payment, a less drastic remedy available to those unable to pay because of prolonged unemployment. Such conduct does not evidence a good faith attempt to repay her student loans. [Emphasis added.]

To get a fuller understanding of the facts, I would commend you to the District Court opinion, *In re Brunner*, 46 B.R. 752, (D.S.D.N.Y.1985). It is six pages long. I would also

Title search: Are Brunner and Gerhardt Now Irrelevant?

Also available as part of the eCourse
2024 eConference on Consumer Bankruptcy Practice

First appeared as part of the conference materials for the
2024 Consumer Bankruptcy Practice session
"Are Brunner and Gerhardt Now Irrelevant? "