Consumer Law Newsletter

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State Bar of Michigan Consumer Law Section

Section Meets With Attorney General on Consumer Priorities

By Laurin' C. Roberts Thomas

Pictured from left to right: Carolyn B. Bernstein, Ian B. Lyngklip, Laurin' C. Roberts Thomas, Jennifer M. Granholm, Clarence R. Constantakis, Frederick L. Miller

We were honored to be able to host our new Attorney General, Jennifer Granholm, at our March 9, 1999, Section meeting. The meeting was held at the Michigan State Library & Historical Museum, which if you have not visited yet, is a lovely facility.

Ms. Granholm, who is on the Consumer subcommittee of the National Association of Attorneys General, advised us that Consumer Issues are high on her list of priorities. She stated that one of her priorities is the creation of an Internet Task Force, which has recently been in the news. Additional priorities are 10 areas, which she identified as resulting in the most frequently registered complaints. Those areas are:

- Travel fraud scams;
- Credit "repair" agencies;
- General retailer complaints such as bait & switch tactics and scanners;
- Fitness club scams;
- Window and home improvement-related issues;
- Warranties, extended warranties and service contracts;
- Auto repair scams;
- Mail order houses/sweepstakes scams;
- Telemarketing;
- Slamming, cramming and spamming. (Slamming is the act of changing a telephone carrier without permission. Cramming is billing people for unordered or unprovided services on phone bills. Spamming is inundating Internet users with unrequested junk e-mail).

Additionally, she discussed and took note of some issued raised by our membership, such as concerns regarding the lack of restraint on the buyout of structured settlements. Currently in Michigan, there is no regulation in this area, however, an Illinois law was recently enacted requiring Court approval before such buyouts can take place.

Finally, Ms. Granholm agreed to look into the matter of the proposed Michigan Consumer Protection Act Jury Instructions, which we drafted when we were still a State Bar Committee. Since they were drafted, the Jury Instructions have been languishing in the State Court Administrative Office's Jury Instruction Committee. We appreciate Ms. Granholm taking the time to meet with us and look forward to a continued positive relationship with her.

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From the Chair

By Laurin' C. Roberts Thomas
Section Chairperson

This has been a big year so far for the Consumer Law Section. We began the year by honoring Michigan's outgoing Attorney General Frank Kelley with the first Frank J. Kelley Consumer Advocacy Award. We have said it before, if you missed the Annual Meeting where he received the award, you missed a real treat. We are seeking nominations for the 1999 award. If you know of a worthy candidate, please provide me with information regarding his or her Consumer activities before May 20, 1999.

We were pleased to welcome our new Attorney General Jennifer Granholm to our March 9, 1999 Section meeting. She gave us some real insight into her priorities as Attorney General, which you can read more about elsewhere in this Newsletter.

It is my understanding that there were a few people who did not receive the notice with the corrected meeting time. I would like to take this opportunity to apologize for any inconvenience the mix-up may have caused.

We are proud to have assisted in compiling articles for the March issue of the Michigan Bar Journal which was dedicated to Consumer Law. A special thank you goes to Fred Miller, who did a great job coordinating the project.

Finally, let me remind you that although it is our plan to continue publishing the Consumer Law Newsletter, we are in need of assistance from our membership. If you would like to write an article for the Newsletter, please contact Fred Miller, chair of the Newsletter Committee at (313) 872-2450.

I am pleased that you have chosen to be a member of the Consumer law Section, and encourage you to become more active. You are cordially invited to join one of the committees or to simply attend the counsel meetings. The next meeting is scheduled for Thursday, May 20, 1999 at 10:00 a.m., in the Lake Superior room at the Michigan State Library & Historical Museum. This will be our last meeting before the Annual Meeting in September.

Speaking of the Annual Meeting, our Section will meet on Thursday September 16, 1999 at 2:00 p.m. This year's meeting will be held in Grand Rapids. We have invited Pat Sturdevant, Executive Director of the National Association of Consumer Advocates to be our speaker. Ms. Sturdevant will be speaking on "Improving your Consumer Practice" and "Enhancing your Recoveries." I have not heard her speak, but reliable sources tell me that she is dynamic. I am looking forward to hearing from her at the Annual Meeting and I am looking forward to seeing you there as well.

Amendments Clarify the Home Solicitation Sales Act

By Fred Miller

The Michigan Home Solicitation Sales Act, MCLA 445.111 et seq, was amended in June of last year, with immediate effect. The amendment was designed to help clarify what constitutes a home solicitation sale in the wake of the **Brown v Jacobs** case.

In **Brown v Jacobs**, 439 Mich 865 (1991), rev'ing 183 Mich App 387 (1990), the Michigan Supreme Court adopted the Court of Appeals dissent. This opinion held that the Act did not apply where the buyer sought out the seller, without any prior solicitation from the seller, even if the sale took place at the buyer's residence. Some initiation of a home sale by the seller is required under **Brown** for the Act to apply. However, the decision did not make clear what acts by sellers would constitute home solicitation, beyond unsolicited door-to-door and telephone sales pitches.

The Legislature amended the definition of "home solicitation sale" in MCLA 445.111. The bill exempted sales "made pursuant to a printed advertisement in a publication of general circulation". If the buyer calls the seller after seeing an ad in a newspaper or magazine, the resulting sale is not covered by the Act, even if the entire deal is handled at the buyer's home.

However, sales resulting from other written communications from sellers will qualify as home solicitation sales, if the agreement is finalized at the buyer's house. The bill added the word "written" to the phrase "the seller engages in personal, written, or telephonic solicitation of the sale". The following sentence was also added: "Home solicitation sale includes a sale arising from a postcard or other written notice delivered to a buyer's residence that requests that the buyer contact the seller or seller's agent by telephone to inquire about a good or service, unless a postcard or other written notice concerns a previous purchase or order or specifies the price of the good or service and accurately describes the good or service".

The result is that, when the buyer calls a contractor or other seller after getting a circular or mailing, and the transaction takes place at the buyer's house, the Act and its cancellation rights will usually apply. Of course, the Act will also continue to apply to unsolicited door-to-door sales, and to unsolicited telephone sales calls received at a residence.

The Act is an important tool for consumers and their advocates. If the Act applies, the buyer must be given a 3-day cancellation notice, in duplicate, with dates filled in. If the seller does not comply with the Act, the cancellation rights continue beyond the 3-day period, until the seller complies. On cancellation, the seller must tender all payments back to the buyer. The seller has a right to the return of goods provided, but the seller is not entitled to any compensation for services provided under the contract prior to cancellation. In addition, if a sale is shown to qualify as a home solicitation sale, the seller must prove compliance with the Act in any collection suit.

Economic Loss Doctrine:
The Missing Citations

An article in the last issue of the Consumer Law Section newsletter examined a federal case holding consumers exempt from the strictures of the economic loss doctrine under Michigan law. Unfortunately, footnotes containing the citations for this and other cases were inadvertently left out of the printed version of the article.

The case is **Republic Insurance Co. v Broan Manufacturing Co.**, 960 F Supp 1247 (ED Mich 1997). In this case, Judge Gadola held that consumers could raise tort claims in defective goods cases where the only loss was economic. Such claims are generally unavailable to businesses bringing suit for economic losses in cases governed by the Uniform Commercial Code, under **Neibarger v Universal Cooperative**, 439 Mich 512 (1992).

Dischargeability of Student Loans I: Undue Hardship

By Barbara Foley

In August, 1998 Congress passed and President Clinton signed The Higher Education Amendments Act of 1998. While the bulk of the Act deals with interest rates and eligibility criteria for student loans, a section of the act amends 11 USC 523(a) (8) (A). This section of the Bankruptcy Code detailed the student loans dischargeable under the Code. Prior to the amendment, the Bankruptcy Code regarding the dischargeability of student loans read in pertinent part:

> *a) A discharge...does not discharge an individual debtor from any debt...*
>
> *(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless*
>
> *(A) such loan, benefit, scholarship or stipend overpayment first became due more than 7 years ... before the date of the filing of the petition; or*
>
> *(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;...*

The amended 11 USC 523 (a) (8) (A) omits the reference to the age of the debt and instead simply states an obligation is dischargeable only if "excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents." The remaining ground for the discharge of student loans then lies in the showing of the hardship to the debtor in repayment of the loan.

The leading case interpreting of the application of the undue hardship standard is *In re Brunner*, 46 B. R. 752, affirmed *Brunner v. New Your State Higher Education Services Corp*, 831 F. 2d. 395 (1985). The Debtor in *Brunner* had obtained a bachelor of arts degree and a master's degree. While obtaining these degrees, she had applied for and received student loans. Withina year of receiving the master's degree, the Debtor filed a chapter 7 bankruptcy. At the time of the filing, the Debtor had made no payment on the loans. She was single, had no dependents and no physical illness. Although she had tried to find work and was currently unemployed, there was no evidence the Debtor would not be employed in the future. On appeal of the Bankruptcy Court's dischargeability determination of the student loans, the District Court Judge reversed, stating the Debtor presented insufficient facts of undue hardship to justify the student loan discharge. In so deciding, the Court laid out a three part test to determine dischargeability.

The *Brunner* three part test to find a student loan dischargeable in a chapter 7 bankruptcy requires:

1. The debtor cannot, based on current income and expenses, maintain a "minimal" standard of living for himself or herself and his or her dependents if forced to repay the loans;

2. This state of affairs is likely to persist for significant portions of the repayment period of the loans and;

3. Debtor has made good-faith efforts to repay the loans.

The Michigan case of note is *In re Healey*, 161 B. R. 389 (E. D. Michigan, 1993), holding the courts must decide not whether payment of loan is a hardship but whether the hardship is undue. In *Healey*, the Debtor was a 28 year old parochial school teacher with a master's degree in education. At filing, her salary was ten thousand dollars a year. The Debtor requested the loans be discharged, claiming continued repayment of the student loans would cause her an economic hardship.

The court found the student loans nondischargeable applying the *Brunner* test. The court found the debtor was healthy, intelligent, articulate and young with no dependents. Based on this, the court reasoned the Debtor's employment could continue or the Debtor could find employment paying more than the current employment or the Debtor could find a second job to pay the student loans. Although paying the student loans was an economic hardship, the Court concluded the Debtor was not limited by physical or intellectual difficulties. She had the ability to repay the loans.

In Re Doherty, 219 B.r. 665 (Bankr, W. D. N. Y. 1998), reviews the test in *Brunner* and suggests clarification of the *Brunner* test, sometimes referred to as the showing of "certainty of hopelessness". *Doherty* states the second prong of the *Brunner* test can be met by "a showing of a presently uncurable impairment of emotional or mental function that is: (1) recognized by the mainstream of medical professionals to be bioneurological, physiological or of other pathological or organic origin; and (2) proven to be the cause of a particular debtor's present inability to maintain a "'minimal' standard of living for herself or her dependents if forced to repay the loans,..."(at 667). Thus, in *Doherty*, a debtor suffering bipolar disease for which lifelong medication was necessary, who could not now nor in the foreseeable future be employed at more than a minimum wage job and whose son suffered the same disease, provided sufficient evidence to meet the second prong of the *Brunner* test.

The final prong of the *Brunner* test requires the debtor to show good faith in attempting to repay the loan. The successful claims include facts establishing the debtor's attempted repayment over the course of several years, even if not the required monthly payment. See, *In Re Doherty, supra*.

There are other cases finding undue hardship and discharging the student loans. *In Re Shankwiler*, 208 B.R. 701 (Bankr C.D. Cal., 1997), provides a discussion of cases allowing the discharge of the student loans. In *Shankwiler*, facts similar to *Healey* emerge. In *Shankwiler*, a thirty-eight year old male with a degree and license of Doctor of Chiropractic Medicine filed chapter 7 bankruptcy including approximately $80,000 in student loans. The Debtor failed to find suitable employment in his licensed field. Employment in other fields provided him with inadequate income to repay the student loans. Based on this, the Debtor claimed the repayment to be a hardship. The court, after reviewing the standards to determine undue hardship, found the student loan repayment to be a hardship. In so doing the Court analyzed the amount of monthly payment needed to fully pay the loans in twenty years. The court then concluded, based on the Debtor's testimony of his work experience presently and expected future work, the Debtor would never earn enough to meet his minimal monthly expenses and repay his loans. Therefore, the Court concluded, Debtor met the second prong of the *Brunner* test. The student loans in *Shankwiler* were discharged.

In Re Pena, 115 F. 3d 1108 (9 Cir., 1998), also analyses the Debtors' current minimal expenses to determine if the repayment of the student loans is a hardship. In *Pena*, husband and wife filed jointly. Debtor husband incurred student loans in the obtaining an associate's degree. Debtor wife was unemployed and unemployable as a result of mental medical condition. In reviewing the facts provided to the bankruptcy court, the appellate court noted Mr. Pena had continued to seek employment and Mrs. Pena was unemployable. The Court in *Pena* as in *Shankwiler*, evaluated the debtors' monthly income available after payment of the minimal monthly expenses. The Court concluded the Debtors had no available income after expenses to repay the student loans. "Subtracting the Penas' average monthly expenses ($1,789) from their net monthly income ($1,748), the Penas were faced with a monthly deficit of $41. Clearly, in these circumstances the Penas could not maintain a minimal standard of living and pay off the student loans." at 1113. On continued evaluation of the remaining factors, the Court decided repayment of the student loans created an undue hardship.

What then are the characteristics of the debtor who can discharge the student loan debts? The ideal debtor will be physically or mentally impaired by disease or disorder. The Debtor will have been only minimally employed in the last several years with the outlook for employment dim to non-existent, despite extensive education. However, out of the minimal wage, the Debtor will have made some payments on the student loan. The debtor should have a spouse and or children equally impaired with the need for specialized treatment or medical care also continuing into the future. The Debtor will have no assets.

However, a debtor in somewhat less dire circumstances may qualify for a hardship discharge of the student loans. The facts presented by a successful debtor would show the income of the debtor equal to or less than the minimal monthly expenses of the debtor. Arguably, the repayment of the student loans, from the funds the debtor would need to meet minimal monthly expenses, creates an undue hardship requiring the discharge of the loans.

Following the *Brunner* test, the Debtor also needs to show the lack of sufficient income is not of the Debtor's making and the Debtor has exhibited good faith in attempting to repay the loans.

The Bankruptcy Code's new limitation on dischargeability of student loans requires a hard look at the income and expenditures of the debtors. Clearly, those debtors in the most extreme cases exhibiting unfortunate life situations should be awarded the student loan discharge. However, even debtors without as compelling circumstances may also qualify for the discharge given a proper evaluation of the debtor's financial situation.

Dischargeability of Student Loans II: The 11th Amendment Problem

By Michael O. Nelson

Student debts are dischargeable in a Chapter 7 bankruptcy now only if repayment of the debt would cause undue hardship to the debtor. 11 USC § 523(a)(8). (See accompanying article). Finding hardship is extremely discretionary.[1] Student loans are not automatically discharged. Absent a determination of dischargeability by the Bankruptcy Court, the creditor remains free to continue collection activity and might not even need to file a lawsuit. Debts owed to state agencies are often collected administratively. Thus, it is generally advisable for the debtor to obtain a determination of dischargeability within the bankruptcy case, by bringing an adversary proceeding.[2]

However, in a recent case,[3] Judge Jo Ann Stevenson, U.S. Bankruptcy Judge for the Western District of Michigan ruled that an adversary proceeding to determine the dischargeability of student loans could not be brought in the Bankruptcy Court against a state agency because the action is prohibited by the Eleventh Amendment to the U.S. Constitution.[4]

Those unfamiliar with Eleventh Amendment jurisprudence and constitutional literalists will be surprised to learn that, despite its terms, the Eleventh Amendment also prohibits suits against one's own state,[5] but doesn't always bar suits in equity.[6]

Until the Supreme Court's decision in *Seminole Tribe of Florida v Florida*,[7] it was commonly thought that Congress could override the states' Eleventh Amendment immunity when it acted pursuant to authority constitutionally delegated to the federal government. *Seminole Tribe* was a case brought under the Indian Gaming Regulatory Act, a statute passed under the Indian Commerce Clause. Although the Court found that Congress had unequivocally expressed its intent to abrogate the states' sovereign immunity, it held that Congress has no power to abrogate a state's Eleventh Amendment immunity except when it legislates under the Fourteenth Amendment.

Judge Stevenson likewise found that, in the Bankruptcy Act, Congress had unequivocally expressed its intent to abrogate the states' sovereign immunity in a Section 523 (a)(8) statutory proceeding, but, under *Seminole Tribe*, Congress' authority under the Bankruptcy clause of Art. I. does not allow it to override the Eleventh Amendment. Therefore, debtors cannot file adversary proceedings against the state or its agencies.

Since the eleventh amendment applies only to federal courts, debtors can still obtain a determination of dischargeability - in state court. Judge Stevenson suggested the Court of Claims, although, if no money damages are sought, a declaratory judgement action in the Circuit Court might be more appropriate. State courts are required to apply federal law.[8] Nevertheless, this option is not attractive to debtors. It requires a new lawsuit, in a forum unfamiliar with bankruptcy law and perhaps not fully comfortable with the notion that valid debts should be discharged. The logic of the opinion means that the

Bankruptcy Court is powerless to afford any other relief against a state agency. For instance, if the state violates the automatic stay by seizing property of the debtor, or refuses the debtor a driver's license because of a debt that has been discharged, the Bankruptcy Court apparently cannot grant relief.

Not mentioned in Judge Stevenson's opinion is *Ex Parte Young*.[9] In that case, plaintiff sought to enjoin the enforcement of an allegedly unconstitutional state law. The Court held that the case was not barred by the Eleventh Amendment. If the state official was acting in violation of the Constitution, he was stripped of his status as a state official and could be sued in federal court, albeit, only for equitable relief. Damage relief is still barred by the Eleventh Amendment,[10] although the equitable relief permitted can require the state to spend considerable amounts of money.[11] In *California v Deep Sea Research*,[12] the court decided that the Eleventh Amendment did not bar a federal court, in admiralty, from adjudicating a state's rights to a shipwreck. In *Seminole Tribe*, the court rejected the argument that *Ex Parte Young* furnished a way around the Eleventh Amendment, but for a different reason: it found that Congress had supplied an alternative remedial scheme that should not be supplanted by a private action.

Since the debtors seeking a determination that their student loans were dischargeable were not seeking damages from the state, arguments based on *Ex Parte Young* and its progeny should be considered.

Footnotes

1 See *Cheesman v Tenessee Student Association*, 25 F.3d 356 (6th Cir. 1994) for test.

2 Fed. r. Bankr. P. 7001 et seq.

3 *In re Scarborough*, Case No. SM 97-90830, Adversary Proceeding No. 98-99008; *In re Rusnton*, Case No. SM 98-90115, Adv P. No. 998-99010; *In re Kirtley*, Case No. SM 97-90801, Adv. P. No. 98-99020

4 "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

5 *Hans v Louisiana*, 134 U.S. 1 (1890)

6 *Ex Parte Young*, 209 U.S. 123 (1908)

7 517 U.S. 44 (1996)

8 *Dudley v Bell* 50 Mich App 678, 213 NW2d 805 (1973)

9 Supra n. 5.

10 *Edelman v Jordan*, 415 U.S. 651 (1974)

11 *Milliken v Bradley*, 433 U.S. 267 (1977)

12 118 S. Ct. 1464 (1998)

Help Build the Section Brief Bank with MTLA

The Consumer Law Section will work with the Michigan Trial Lawyers Association (MTLA) to establish a brief bank for consumer law pleadings and briefs.

The State Bar of Michigan does not have brief bank facilities for sections. MTLA has agreed to add consumer law materials submitted by the Consumer Law Section to its established and well-organized brief bank. Section members will be able to access the Section's consumer law materials in MTLA's brief bank, at the reduced prices paid by MTLA members.

Section members are asked to submit complaints, motions, memos and briefs on Consumer Protection Act and other state and federal consumer law issues to:

Clarence R. Constantakis
Brief Bank Chairperson
5605 Kaufman
Dearborn Heights, MI 48125

Members will be notified when consumer law materials have been filed and indexed in the MTLA brief bank, and are ready to be used. The Section will also provide members with a list of available topics and information on ordering copies.

Help us out by submitting your briefs and pleadings.

Bulletin:

✷ **May 20, 1999 is the deadline to send in nominations for the second annual Frank J. Kelley Consumer Advocacy Award.** The award was given to Frank J. Kelley last year for his life-long dedication and service to consumer affairs. We invite members to submit nominations for the award. Nominations should be sent to any of the following members of the nominating committee:

John Roy Castillo
Consumer Affairs
65 Cadillac Sq., #1600
Detroit, MI 48226

Fred Miller
UAW-GM Legal Services Plan
7430 Second Avenue #200
Detroit, MI 48202-2739

Roger Gross
UAW-GM Legal Services Plan
6500 Mercantile Way #3
Lansing, MI 48911-5971

Laurin' C. Roberts Thomas
UAW-GM Legal Services Plan
6500 Mercantile Way #3
Lansing, MI 48910

✷ The Council invites all members to volunteer for section committee work. Our membership is growing, and we encourage everyone to participate. Current committees include:

Education Committee
Legislative Committee
Newsletter Committee
Nominating Committee
Plain English Committee
Pro Bono Committee
Frank J. Kelley Award Nominating Committee
Web Site Committee

✷ To volunteer for committee work, please specify you are a Consumer Law Section Member and send your name, address, phone number and the committee(s) you would like to work on to: **Karen Williams,** State Bar of Michigan, Michael Franck Building, 306 Townsend Street, Lansing, MI 48933-2083

✷ Consumer Law Section is networking with MTLA to set up a brief bank.

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