BOATING AND AVIATION OPERATION SAFETY ACT

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

H.R. 234

TO AMEND TITLE 11 OF THE UNITED STATES CODE TO MAKE NONDISCHARGEABLE A DEBT FOR DEATH OR INJURY CAUSED BY THE DEBTOR'S OPERATION OF WATERCRAFT OR AIRCRAFT WHILE INTOXICATED

JULY 13, 1995

Serial No. 10

Printed for the use of the Committee on the Judiciary

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BOATING AND AVIATION OPERATION SAFETY ACT

THURSDAY, JULY 13, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL AND
ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:01 a.m., in room 2226, Rayburn House Office Building, Hon. George W. Gekas (chairman of the subcommittee) presiding.

Present: Representatives George W. Gekas, Bob Inglis, Michael Patrick Flanagan, and Jack Reed.

Also present: Charles E. Kern II, counsel; Rebecca Ward, secretary; and Agnieszka Fryszman, minority counsel.

OPENING STATEMENT OF CHAIRMAN GEKAS

Mr. GEKAS. The hour of 10 o'clock having arrived, this hearing is now called to order. We will be compelled to recess until a hearing quorum has arrived, and so we now recess until a quorum shall arrive.

[Brief recess.]

Mr. GEKAS. Noting the presence of our first witness, our colleague, Congressman Ehlers. We will accommodate him as soon as a quorum should appear.

[Brief recess.]

Mr. GEKAS. We note the presence of the gentleman from Rhode Island, Mr. Reed, ranking minority. His presence produces a quorum for the purposes of this hearing, and we welcome all. We will launch into this special issue with an opening statement from the Chair followed by one, if so desired, by the minority ranking member, and then we will hear the testimony of our first witness.

It is a simple issue, one that arises out of law that is already firmly fixed in the books of our Federal Government with respect to bankruptcy. It has to do with whether or not we should be including watercraft and aircraft under the aegis of the definition of motor vehicle; should we take steps to say that any moving object is a motor vehicle, or should we be more specific and simply insert into the language of the law the actual description of the craft about which we speak.

The courts seem to be divided on it, as everyone knows, and giving us even more impetus to act to make certain once and for all that there be no double interpretation, misinterpretation or any

kind of mixup which can cause havoc in and out of the bankruptcy courts.

The testimony that we will be listening to today will cover the waterfront—what a nice way to put it—from the standpoint of the Members of Congress who are concerned about it, such as Congressman Ehlers, to the bankruptcy community, which of course has an important role to play in the outcome of this legislation, and once it is adopted, how it will be effectuated.

[The bill, H.R. 234, follows:]

I

104TH CONGRESS
1ST SESSION

H. R. 234

To amend title 11 of the United States Code to make nondischargeable a debt for death or injury caused by the debtor's operation of watercraft or aircraft while intoxicated.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 1995

Mr. EHLERS introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 11 of the United States Code to make nondischargeable a debt for death or injury caused by the debtor's operation of watercraft or aircraft while intoxicated.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Boating and Aviation Operation Safety Act of 1994".

SEC. 2. AMENDMENT.

Section 523(a)(9) of title 11, United States Code, is amended by inserting ", watercraft, or aircraft" after "motor vehicle".

SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENT.

(a) EFFECTIVE DATE.—Except as provided in subsection (b), this Act and the amendment made by section 2 shall take effect on the date of the enactment of this Act.

(b) APPLICATION OF AMENDMENT.—The amendment made by section 2 shall not apply with respect to cases commenced under title 11 of the United States Code before the date of the enactment of this Act.

○

Mr. GEKAS. I yield to the gentleman from Rhode Island, if he wishes to make a statement.

Mr. REED. Thank you, Mr. Chairman.

I just want to commend you and your counsel for organizing the hearing so well and Mr. Ehlers for his interest in this important topic. I am very interested in hearing the witnesses, so I would yield back to the chairman.

Mr. GEKAS. The Chair will invoke a 5-minute rule for the testimony of witnesses and will adhere strictly to it. We welcome our colleague, Congressman Ehlers, to the witness table. You may proceed.

STATEMENT OF HON. VERNON J. EHLERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. EHLERS. Thank you very much, Mr. Chairman, Mr. Reed.

First of all, I want to thank you and the subcommittee for giving me the opportunity to testify on this legislation, H.R. 234, which would make nondischargeable through bankruptcy a debt incurred as a result of the operation of a boat or airplane while under the influence of alcohol.

I appreciate your comment about covering the waterfront in this hearing. It is very appropriate and I just hope we do not engage in flights of fancy when we deal with the aircraft part of it.

This bill—my bill seeks to correct——

Mr. GEKAS. We may strike that from the record, I am not sure. But you may proceed.

Mr. EHLERS. All right. Thank you. I appreciate your striking that.

My bill seeks to correct what I believe was a bill-drafting oversight involving our bankruptcy laws and, in fact, this bill may be a prime candidate for consideration on the floor on Corrections Day, because I am seeking to correct what I believe was an oversight or, rather, another possibility is that the intent is not being honored by the courts in the interpretations they have made.

Current law states if an individual incurs a debt as a result of their operation of a motor vehicle under the influence of alcohol, they cannot have that debt discharged through a declaration of bankruptcy. Since this law was originally enacted, some courts have interpreted the statute's use of the term "motor vehicle" as meaning automobile.

Mr. Chairman, as you know, my home State of Michigan has an extraordinarily robust boating industry. And one thing I learned during my career in the legislature there is whenever we dealt with drunk driving issues we had to include watercraft and aircraft but particularly watercraft because a great many accidents occur when operators of watercraft are drunk. It seems to somehow be accepted that when you get on a boat it is OK to hold a can of beer in your hand all the time, and we have some very, very serious accidents in my State as a result. I am sure you have the same situation in your State.

Over the years we have worked very hard on the State level—as have many other States—to make it perfectly clear that we view drunk boating as just as serious a crime as drunk driving and we

have consistently written our drunk driving laws to explicitly include drunk boating.

H.R. 234 simply seeks to extend this notion of equal treatment of drunk driving and drunk boating to the Federal level—as it relates to our Federal bankruptcy laws. Since the courts have ruled that the Bankruptcy Code, as it is currently written, only refers to automobiles, my bill specifically adds "watercraft" to this section of the Bankruptcy Code.

In addition, while it has nowhere near the public profile of drunk driving and drunk boating, the operation of aircraft under the influence of alcohol and drugs has also been a problem—with far higher potential for injury and death in the event of an accident. H.R. 234 recognizes this and includes the drunk operation of aircraft as well.

Again now, I recognize there are some opponents of the bill who will argue that this is really not needed; that boating accidents, and particularly aircraft accidents, are so isolated that we do not need to cover this. They also argue that it is simply improper to protect from bankruptcy proceedings certain things and not other things. But I urge you when you listen to those arguments, if they are offered here this morning or elsewhere, to recognize that we already have in law the aspect dealing with automobiles, and I think it is simply inequitable and improper to have it apply to automobiles and not to watercraft or aircraft. I am trying to correct what I regard as an oversight in the original bill.

Again, Mr. Chairman, I want to thank you and the subcommittee for the opportunity to testify today. While this issue may not garner a great deal of public attention, those who have been negatively impacted by the lack of clarity in this section of the Bankruptcy Code have suffered significantly and we ought to protect future victims of drunk boating—and flying—by making the simple fix called for in this bill.

I thank you very much, and I would be happy to answer questions.

Mr. GEKAS. We thank the gentleman.

[The prepared statement of Mr. Ehlers follows:]

PREPARED STATEMENT OF HON. VERNON J. EHLERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. Chairman, first, I want to thank you and the Subcommittee for giving me the opportunity to testify today on my legislation, H.R. 234, which would make nondischargable through bankruptcy a debt incurred as a result of the operation of a boat or airplane while under the influence of alcohol.

My bill seeks to correct what I believe was a bill-drafting oversight involving our bankruptcy laws. Current law states that if an individual incurs a debt as a result of their operation of a motor vehicle under the influence of alcohol, they cannot have that debt discharged through a declaration of bankruptcy. Since this law was originally enacted, the courts have generally interpreted the statute's use of the term "motor vehicle" as meaning "automobile."

Mr. Chairman, as you know, my home state of Michigan has an extraordinarily robust boating industry. Over the years, we have worked hard on the state level—as have many other states—to make it perfectly clear that we view drunk boating as serious a crime as drunk driving and we have consistently written our drunk driving laws to explicitly include drunk boating.

H.R. 234 simply seeks to extend this notion of equal treatment of drunk driving and drunk boating to the federal level—as it concerns our federal bankruptcy laws. Since the courts have ruled that the bankruptcy code, as it is currently written, only

refers to automobiles, my bill specifically adds "water craft" to this section of the bankruptcy code.

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Again, Mr. Chairman, I want to thank you and the Subcommittee for the opportunity to testify today. While this issue may not garner a great deal of public attention, those who have been negatively impacted by the lack of clarity in this section of the bankruptcy code have suffered significantly and we ought to protect future victims of drunk boating—and flying—by making the simple fix called for in this bill.

Mr. GEKAS. We now acknowledge the attendance of the gentleman from Illinois, Mr. Flanagan, and if the gentleman from Michigan would agree, we will pose some questions.

One piece of information that I would like to ask is: did your State sanction this type of action in the criminal statutes, like drunk driving for motor vehicles, with respect to licenses to travel? That is, the motor vehicle codes in most States require suspension of license for offenses of drunk driving of a motor vehicle. Does your State have similar sanctions for watercraft?

Mr. EHLERS. It does not because it does not have the same licensing procedure. And that is the problem. But we do have training requirements and things of that sort for those who are involved in accidents. We have age limits on those who may operate watercraft. So we are approaching the status of licensing, but up to this point we do not have licensing for watercraft operators.

Mr. GEKAS. Have any cases been brought to your attention of people filing bankruptcy who have had a conviction of drunk watercrafting?

Mr. EHLERS. No, I cannot give you examples. I would be happy to do the research and provide those, if you wish.

Mr. GEKAS. I have no further questions. We, by the way, will accept your written statement for the record without objection.

The gentleman from Rhode Island.

Mr. REED. I want to commend Mr. Ehlers for his interest in this topic. I'm from Rhode Island, which is the Ocean State, and we have a lot of boaters. Particularly in the next few weeks, with the weather soaring toward 100, we regrettably will have incidents with people operating while intoxicated. As you suggested, we don't have comprehensive licensing or the thorough regulatory agenda we have with motor vehicles, so this is an issue I think we should look at carefully. Obviously, we will listen to the technical experts from the bankruptcy bar, but I commend you for your interest and your efforts, Mr. Ehlers. Thank you.

Mr. EHLERS. Thank you. I appreciate that.

Mr. GEKAS. Does the gentleman from Illinois have any questions?

Mr. FLANAGAN. Yes, Mr. Chairman.

I also commend you for your efforts. I was a little perplexed about this but you and I have talked a bit about it and I see the value in it at least on the surface.

I have two operational questions on how such a law might be implemented. As you have said in the great State of Michigan, there is no licensing that goes on with boating, but as we are wrestling now in Illinois in redefining what a drunk driver is and to what

level of intoxication he has to be to be defined as a drunk driver. How would that be used from State to State, particularly in Michigan where there is no licensing requirement and apparently, I would assume, no definition of what a drunk boater is?

Mr. EHLERS. No, on the contrary. We have adopted legislation there setting the same level for drunk boating and drunk flying as we set for drunk driving of a motor vehicle. I should correct that and say we actually have more stringent requirements on the drunk flying because it is a more complex operation.

Mr. FLANAGAN. I would think so. And the implementation of it would vary from State to State?

Mr. EHLERS. Yes, presumably it would in terms of the definition of the alcohol content at which you are considered to be either.

Mr. FLANAGAN. Illinois is considering going to .08, which is breathing near a bottle, as far as I am concerned.

Mr. EHLERS. Well, Michigan has considered going to that. We have also considered having different levels for driving under the influence and drunk driving. I expect within the next few years that will be passed.

Mr. FLANAGAN. Just anticipating one question and I will give you a chance to rebut it now before we hear it later, what deterrent effect do you think this will have to drunk boating?

Mr. EHLERS. The deterrent effect is, of course, very hard to measure as it is with many of the laws we pass. It will have a deterrent effect, but it is going to be long term. I don't think anyone who is drunk driving while they are on their boat is going to think I better not do this because I might be hauled into bankruptcy.

However, when these events do happen, and when they know of a friend who has gone through it, then it begins to have a great deterrent effect particularly when their spouse is not drinking says, hey, you better stop, because we may get in trouble the way John Smith did.

So in the long term it has a deterrent effect, but that is only part. The other part is the victim has the opportunity to be made whole by, virtually, whatever judgment they have obtained.

Mr. FLANAGAN. Well, I thank you.

Mr. GEKAS. If the gentleman would yield for just a moment to follow up with some questions?

Mr. FLANAGAN. Certainly.

Mr. GEKAS. The Bankruptcy Code itself talks about coverage for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or other substance. So all we have to do is make sure that that description covers all 50 States in bankruptcy.

Mr. FLANAGAN. So are we looking at a Federal statute that would make it unlawful to operate a boat while intoxicated and then define intoxication?

Mr. GEKAS. We would make it a nondischargeable debt much like that which accompanies an untoward result from a motor vehicle accident and apply it to aircraft and watercraft. That is the thrust of the bill.

Mr. FLANAGAN. Thank you, Mr. Chairman.

Mr. GEKAS. With that, we thank our colleague and we will report to him the outcome of our proceedings.

Mr. EHLERS. Thank you.

Mr. GEKAS. And we invite to the witness table, Mr. Stephen Case, vice chairman of the Committee on Legislation for the National Bankruptcy Conference; Gerald M. O'Donnell, president of the National Association of Chapter 13 Trustees; and Bruce A. Gilmore, director, Boating Administration, Maryland Department of Natural Resources.

I think it might be appropriate to have Mr. Gilmore testify first so he can give us some practical application of the problem and then see how our bankruptcy community will be treating it once we launch the watercraft through the flights of fancy that Mr. Ehlers was describing.

Mr. Gilmore.

STATEMENT OF BRUCE A. GILMORE, DIRECTOR, BOATING ADMINISTRATION, MARYLAND DEPARTMENT OF NATURAL RESOURCES

Mr. GILMORE. Mr. Chairman, members of the subcommittee, thank you for inviting me here today. I very much appreciate being here. Any time that I can promote safe boating in any way, I leap at that opportunity.

Congressman Ehlers was a little modest about the number of registered boats in Michigan. Michigan and Illinois have some of the largest numbers of registered boats, even larger than some of the coastal States, certainly larger than Maryland. We have 190,000 registered and documented vessels, but our numbers pale in relation to those of some of the Midwestern States with their many inland waterways and rivers and lakes.

So this is an issue that attends not only to those traditional areas of boating that may leap to mind, such as the coastal States of Florida or maybe southern California or even the Atlantic coast; this is an issue that really reaches all across the country. And I would like to say that boating is a tremendous industry; it is a tremendous segment of the recreational industry.

In Maryland, which has a rather midlevel number of boats, it is a billion dollar industry, just recreational boating. It generates jobs and revenues that are vital to our State's tourism economy.

By the same token, it is only an industry that is good and fun if it is safe. It is my belief that the safer it is, the more economically viable it is. And the safer it is, the more enjoyable it is.

I have a written statement that is somewhat mundane in terms of facts and figures, but what I would like to do today, if I may, with the chairman's leave, is to demonstrate the appeal of boating as the industry generates that appeal in terms of the kinds of boats that it is manufacturing, the kinds of boats that it is trying very much to sell, and how we have on the scene in the last several years, very few years, the new watercraft called personal watercraft, which are extraordinary machines, lots of fun to ride, but if not operated with a great deal of care, can be very dangerous.

The boat that we all sort of think of as a fast boat, would be something like this formula boat, which is, as you can see, half out

of the water. In fact, most of it is out of the water. I would venture to say that that boat is powered by twin large V–8 engines. It can probably exceed 50 knots, and that boat right now is probably cruising maybe between 40 and 50 knots. That boat probably weighs maybe 8,000 pounds and it is very, very fast. It responds very quickly to maneuvering and it takes a great deal of skill to operate.

And things on the water happen very quickly; as quickly sometimes or even more quickly than in an automobile. The road condition is probably not going to change because of wind. The sea conditions, the bay conditions, the river conditions can change momentarily because of a burst of wind and so you have to be extraordinarily mindful of the other physical phenomena around you.

If you are going at these speeds, you must be sober. You cannot be impaired or intoxicated, because, if you are, then not only do you endanger yourself but you endanger those other of your passengers and other boaters around you.

We have another vessel, a little larger; this vessel is probably not nearly as fast but it probably exceeds 30 knots. Thirty knots is very fast on the water.

Then we have what we call the personal watercraft. And this personal watercraft is a nice little single passenger vessel. It is basically a water pump. It has a water pump that brings the water in and sends it out as a jet. And that is the propulsion. Now a PWC can get up to 40 knots in a matter of yards. And you ride it like you are on a motorcycle. The intent is that the passenger will be in the water because that is the fun of it. You wear a bathing suit to operate the PWC.

Now let me just read you how the industry sells these. This is called the Kawasaki watercraft of the year 1995, and their advertisement says it will "make everything else in the water shrivel up."

And that is my testimony. Thank you.

[The prepared statement of Mr. Gilmore follows:]

PREPARED STATEMENT OF BRUCE A. GILMORE, DIRECTOR, BOATING ADMINISTRATION, MARYLAND DEPARTMENT OF NATURAL RESOURCES

Mr. Chairman, members of the Subcommittee, it is a pleasure to be here today to present testimony on H.R. 234 legislation which would amend Section 523(a)(9) of Title 11, United States Code, to make non-dischargeable a debt for death or injury arising from the debtor's operation of a watercraft or aircraft while intoxicated from using alcohol, a drug, or another substance.

The perspective I wish to share with the Subcommittee today is that recreational boating is the most fun when it is enjoyed with the utmost safety. Therefore, I would suggest that the goal of legislation like H.R. 234 be that it creates another consideration in the mind-set of boaters: that safe boating, particularly alcohol free and drug free, is not only more enjoyable but also financially prudent.

Maryland is a boating state in every sense. We have contributed to the history of boating in the United States whether in construction of Clipper Ships or the design of America Cup vessels and sails. Maryland has about 190,000 registered and documented vessels which places us in the middle range of boating states. However, any of you who have seen Maryland's waterways, particularly the Chesapeake Bay, know that during the boating season, many more than that number utilize our waterways. Indeed, recreational boating is a one-billion dollar industry in Maryland.

Average annual trip expenditures of $1,065.00 and boat maintenance expenditures of $2,833.00 underscore the important economic impact of boating.[1]

Despite the heavy use of our waterways, we are fortunate that our accident rates have been somewhat stable. In calendar 1994, the last year of complete data, we had 387 reported boating accidents and 23 fatalities. Of the accidents, 116 were collisions, involving boats, 51 were collisions with fixed objects, and 9 were collisions with floating objects. significantly, 25% of the 387 accidents involved people with elevated blood alcohol levels.[2]

While numbers cannot always tell a story, these do show the potential for the establishment of liability for property damage or personal injury arising from the use of alcohol. As such, these accidents would be within the ambit of H.R. 234, should it be enacted into law.

Despite these accidents, Maryland has been extraordinarily aggressive in its effort to make boating on our waterways safe. We have the first boating safety certificate requirement: anyone born after July 1, 1972 must pass a boating safety course and possess the boating safety certificate in order to operate a vessel alone. As a result, the 1994 data shows that those who have this certificate are involved in a very small number of accidents.

Our Natural Resource Police (NRP) have coordinated the State-wide boater safety education courses with the Power Squadron, Coast Guard Auxiliary and the Maryland school system. The NRP has also established the "PFD Panda" award program, the "Sober Skipper" and the "Wear Your PFD" program.

On the law enforcement front, the NRP established the nationally recognized "Operation SWAMP" program (Safe Waterways through Alcohol Monitoring Patrols) which focuses on areas of high boating activity for alcohol impaired boaters.

Maryland has also been a leader in establishing regulatory controls over boating. We have undertaken vessel management plans for heavily used waterways which have substantially increased safety. Our personal watercraft (PWC) operating regulations, promulgated five years ago, set safe operation standards as well as a minimum age requirement and also has been nationally recognized. We have also entered into a voluntary agreement with the PWC livery companies in the Ocean City, Maryland area to monitor safety and to enable them to administer a boat safety course aimed at PWC operation. These steps have reduced PWC accidents involving PWC rentals. Unfortunately, we did experience our first two PWC fatalities in June in the Upper Chesapeake Bay area both of which involved PWC owners.

Even with these initiatives, all of which were supported by boating organizations and the Marine Trades Association of Maryland, we are still seeking ways to reduce our accidents and fatalities. This effort is pursued aggressively because we know safe boating is more fun and has a positive impact on Maryland's economy.

I hope this perspective is helpful to the Subcommittee.

Mr. GEKAS. Would you mind passing that to the clerk?

Mr. GILMORE. Be happy to. I have it marked.

Mr. GEKAS. Are they book marked?

Mr. GILMORE. Yes, they were marked with the kind of watercraft. I also have the advertisements that the industry has for the personal watercraft, if you would like to see them.

Mr. GEKAS. All right.

Suppose now we transfer our attention to Mr. Case, and we note the attendance of the gentleman from South Carolina, Mr. Inglis.

STATEMENT OF STEPHEN H. CASE, VICE CHAIR, LEGISLATIVE COMMITTEE, NATIONAL BANKRUPTCY CONFERENCE

Mr. CASE. Thank you, Mr. Chairman. My name is Stephen Case. I am the vice chair of the Legislative Committee of the National Bankruptcy Conference. I have submitted a prepared statement. Could I ask it be taken into the record, please?

Mr. GEKAS. Without objection, it is so ordered.

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[1] Lipton and Miller, "Recreational Boating In Maryland, An Economic Impact Study," 1994. This study was a cooperative venture of the Sea Grant College, University of Maryland, Boating Administration, Maryland Department of Natural Resources, and the Marine Trades Association of Maryland.

[2] Maryland Natural Resources Police, "Report of Boating Accidents and Related Data, 1994."

Mr. CASE. The National Bankruptcy Conference, Mr. Chairman, deplores drunk driving. If somebody is out on a motorboat in the Susquehanna River, or a pilot is flying from Westerly, RI, over to Block Island, he ought not to have any alcohol in the last 24 hours, and the public deserves that protection against substance abuse.

However, with all respect to Congressman Ehlers, we are here to express our opposition to this bill or, in the alternative, a more reasonable version of the bill because of the importance of protecting the broad discharge in bankruptcy for individuals which has been a bedrock of Federal bankruptcy policy since 1898.

I would like to use a couple of minutes of my time to ask you to consider how this law might affect an individual in a hypothetical situation. So, Mr. Chairman, let us suppose this legislation has been enacted. Then let us suppose that a well-regarded, normally sober, hard working man with a wife, a big mortgage, and three kids, earns $400 a week. He has had a tough week, had a fight with his wife. He is tired. Saturday at noon he goes down to the lake to get away from it all. It becomes the worst day of his life. Foolishly, stupidly, he drinks too many beers, gets into his speed boat, rams another boat, and seriously injures a wealthy pleasure boater. This is horrible.

Obviously, in my hypothetical the recent enactment of this bill had no deterrent effect. Our hypothetical perpetrator had probably never heard of the bankruptcy laws. Who in this room, as Congressman Ehlers pointed out, has ever thought before doing or not doing anything whether it was going to be discharged in bankruptcy or not?

Now, what happens in my example is that the wealthy boater collects from his insurance company. The insurance company then wants to collect from our poor perpetrator through subrogation so it sues him. It sues the poor drunken man in the name of the injured wealthy man. A jury returns a verdict of $250,000. I don't have to say to you, Members of Congress, that a man with a family earning $400 week is never going to pay a $250,000 judgment in all his life.

Nevertheless, the insurance company wants recovery. Its regulator is on its neck. So they attempt to garnish the paycheck. They start proceedings to send the sheriff to seize the car, the furniture, and the other belongings and to sell, the house, in foreclosure.

Confused and frightened, our perpetrator files for chapter 7 bankruptcy. The automatic stay stops the enforcement remedies asserted by the insurer. What happens next?

Mr. Chairman, personal bankruptcy is not a walk in the park. The chapter 7 trustees seize all the nonexempt property of the debtor and distributes it equitably to the creditors. The injured boater's insurer will get a little money out of the proceeds. So will the guy's uncle who lent him $300 last week. So will the telephone company. So will the credit card company. But at least they all get a pro rata share.

The chapter 7 discharge will take care of our debtor's liability to his uncle and the phone company, but it will not do anything to stop the subrogated insurance company from continuing to pursue him in Pennsylvania for 20 years, which is the statute of limitations for enforcement of a judgment.

After discharge, our debtor has no assets. He has lost his house and his car. What is he going to pay this verdict with without the protection of a discharge in bankruptcy?

You may remember Governor Connally of Texas who after a distinguished career in public service caught the real estate market in the wrong way in Texas and had to go through the ignominious process of having all his lifetime accumulation of possessions sold at public auction. That is what happens to a chapter 7 debtor with assets.

Now our debtor is at the end of this process. What is he going to do? Hide his car from the repo man every night? The denial of the discharge, faced with 20 years of creditors' rights enforcement, leaves our debtor with antisocial incentives created by this legislation. It creates incentives to hide, to cheat, and to steal.

Mr. Chairman, if your creditors for years to come were going to seize everything you could earn, would you even work? Exceptions to discharge tell the debtor there is no hope. To quote from a popular song, some of us are old enough to remember, from Tennessee Ernie Ford, he "owes his soul to the company store."

Now we recognize, to conclude, may I have two seconds?

Mr. GEKAS. You may proceed.

Mr. CASE. We recognize, to conclude, Mr. Chairman, that the motor vehicle thing is already in the statute and if it is going to be expanded, we suggest a flexible approach and we have appended language to our statement which copies from legislation passed last October about discharge of divorce-related property settlements, and my final point is to say it gives the courts power to give a discharge on facts such as those that I have described but not to give a discharge if the drunken boater is an executive earning a half million dollars a year.

Thank you very much.

Mr. GEKAS. We thank the gentleman. And his statement will be made a part of the record, as we have indicated.

[The prepared statement of Mr. Case follows:]

PREPARED STATEMENT OF STEPHEN H. CASE, VICE CHAIR, LEGISLATIVE COMMITTEE, NATIONAL BANKRUPTCY CONFERENCE

Mr. Chairman, distinguished members of the subcommittee, Congressman Ehlers, staff, fellow panelists and other attendees. Good morning. I am Stephen Case, Vice-chair of the Legislative Committee of the National Bankruptcy Conference. Thank you for inviting us today and considering our views.[1]

We have submitted a prepared statement. May I now please ask that it be taken into the record? I would like now to ask for about five minutes to address the Subcommittee this morning. May I proceed?

Alcohol Abuse Is Deplorable But H.R. 234 Is Unwise. Under present law, the driver of a "motor vehicle" can't get a discharge in bankruptcy from debts to people he hurt or killed while driving drunk. H.R. 234 would expand the definition of "motor vehicle" to include planes and boats.[2] We deplore drunk driving, but we respectfully

[1] The NBC is a 65-member group of judges, professors and lawyers interested in sound federal bankruptcy policy. It operates on a budget of about $50,000 per year. This is funded by members' dues. It has no staff. Since the mid-1930's, the NBC has endeavored to provide the Congress with careful, professional analysis of bankruptcy issues being considered on Capitol Hill.

[2] The precise legal issue under consideration is this: "Is a motorboat or an airplane a 'motor vehicle' within the meaning of 11 U.S.C. §523(a)(9)?" Two courts have said "Yes." One has said "No." *Compare Boyce* v. *Green way (In re Green way),* 180 B.R. 179 (W.D. Tex. 1995) and *Radivoj* v. *Williams (In re Williams),* 101 B.R. 356 (Bankr. S.D. Fla. 1989), *aff'd* 111 B.R. 361 (S.D. Fla.

Continued

oppose the bill. It will have no deterrent effect on drunken boating or flying. It will deny vital relief to some debtors.

Nonetheless, we propose more reasonable language. Our proposal balances the need for debtor relief fairly against abuse of the bankruptcy system by those who can afford to pay.

Please Consider An Example. Mr. Chairman, please suppose that H.R. 234 has been enacted. Next, please suppose that a well-regarded, normally sober, hard-working man with a wife, a big mortgage and three children earns $400 per week. Tired and hot after a tough week, he goes down to the lake to get away from it all. It becomes the worst day of his life. Foolishly, stupidly, he drinks too many beers, gets into a speedboat, rams another boat and injures seriously a wealthy pleasure boater.

This is horrible.

Quite obviously, the recent enactment of H.R. 234 had no deterrent effect. Our hypothetical perpetrator had probably never heard of the bankruptcy laws, let alone the concept of "exceptions to discharge." Who in this room has ever thought about an "exception to discharge" when deciding to do or not to do anything?

In our example, the wealthy boater collects from his insurance company. The insurer wants to collect through subrogation. In the name of the wealthy boater, it sues the drunk driver. A jury returns a verdict of $250,000 against him. Our drunk boat driver will never be able to pay $250,000, in all his life (unless there is hyperinflation or he wins the lottery). Nevertheless, using its rights under state law, the subrogated insurance company attempts to garnish his pay check.[3] It starts proceedings to send the sheriff to seize his car, his furniture and his other belongings. It starts to sell his house in foreclosure. Confused and frightened, the debtor files for Chapter 7 bankruptcy. The automatic stay stops the enforcement remedies asserted by the insurer. What happens next?

Debtors Must Forfeit Most of Their Assets To Get A Discharge. Well, Mr. Chairman, personal bankruptcy is no walk in the park. In Chapter 7, the trustee liquidates the property and distributes it equitably to all creditors. All items of the debtor's property with more than a modest value, generally, will be seized and sold.[4] The injured boater's insurer will get a little money. So will the debtor's uncle who lent him $300 the week before the accident. So will the telephone company and the credit card company. The Chapter 7 discharge will end our debtor's liability to the uncle and the companies. However, in our example, there is no end to paying the judgment due to the injured boater's insurer, just an endless cycle of punishment. The NBC believes that punishment should be imposed by the criminal laws, not the bankruptcy laws.[5]

Under State Law, Creditors Can Seize Paychecks And Most Assets From Debtors With Undischarged Debt. Mr. Chairman, the broad discharge for the honest debtor has been a sound and fundamental principle in our law since 1898. The NBC opposes expansion of exceptions to discharge. The reason is simple. After discharge,

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1989) (motor boats are motor vehicles) *with Willison* v. *Race (In re Race),* 159 B.R. 857 (Bankr. W.D. Mo. 1993) (motor boats are not motor vehicles).

[3] Under Rhode Island law, the jury-verdict winner can force the employer to turn over all but $50.00 of the debtors' paychecks. Under R.I. Gen. Laws § 10–58 (Supp. 1994), "a writ of garnishment . . . shall be effective to attach . . . the salary . . . due and payable . . ., or to become . . . due and payable . . . as is in excess of the amount of . . . salary . . . exempt by law from attachment." Under R.I. Gen. Laws § 9–26–4(8)(C) (Supp. 1994), there is exempt from attachment ". . . salary . . . not exceeding . . . ($50.00)." The sheriff can also seize, among other things: (a) debtor's working tools to the extent they exceed in value $500, and (b) household furniture and family stores, including beds and bedding, over $1,000 in value. R.I. Gen. Laws § 9–26–4 (Supp. 1994). *But see* 42 Pa. Cons. Stat. Ann. § 8127 (Supp. 1995) (no wage garnishment for tort debts). When attachment is allowed in Pennsylvania, the debtor is allowed a general monetary exemption of $300, and an exemption for, among other things, certain apparel or books. 42 Pa. Cons. Stat. Ann. § 8123, 8124 (1982 & Supp. 1995).

These seizures can continue in Pennsylvania for twenty years. 42 Pa. Cons. Stat. Ann. § 5529 (1982 & Supp. 1995). In Rhode Island, the limitation upon execution is "six years from the rendition of the judgment originally or from the return day of the last execution." R.I. Gen. Laws § 9–25–3 (1985). Federal law limits these state statutes by imposing a maximum allowable wage garnishment of the lesser of either (i) 25% of the debtor's weekly disposable earnings, or (ii) the amount by which the debtor's weekly disposable earnings exceed thirty times the Federal minimum hourly wage. 15 § U.S.C. 1673(a) (1982).

[4] Under the federal exemptions, the discharged debtor may retain few assets. For example, he may keep only $1500 in value of tools of the trade, used to make a living after bankruptcy ends. 11 U.S.C. § 522(d)(6) (1993 & Supp. 1995).

[5] In Chapter 13, the debtor may retain his assets, but only if he pays all his disposable income to creditors for a period of as much as five years, but at least three years. Chapter 13, however, would do nothing to conclude the endless cycle of punishment, either, since it has no discharge for drunk-driver debts.

the debtor is typically left with no significant assets to pay undischarged debts. In our example, after bankruptcy, the boater's insurance company can again garnish the paycheck and seize any new property the debtor acquires. State law permits them to do this over and over again, until they are paid in full. This often creates an abysmal, hopeless prospect for living a future daily life.

Denial of the discharge creates antisocial incentives: incentives to hide, to cheat and to steal. Moreover, it reaps catastrophic consequences on the debtor's wife and children, who did nothing to deserve their fate. Why work, Mr. Chairman, if your creditors for years to come will seize nearly everything you have, nearly everything you earn?

Exceptions To Discharge Should Not Be Expanded. Exceptions to discharge undermine the decency of American bankruptcy policy. Exceptions tell the debtor there is no hope. He "owes his soul to the company store," to quote from the Ernie Ford song, *Sixteen Tons.*

Give The Courts Flexibility. Nonetheless, we recognize that present law denies the discharge to intoxicated motor-vehicle drivers. H.R. 234 simply proposes to resolve a dispute in interpretation.

We respectfully urge the Subcommittee to borrow from a wise decision of the last Congress, unanimously approved by this Subcommittee. Last fall Code § 523(a)(15) was passed to create a *flexible* discharge exception for divorce-related property settlements. Under this sensible, new, ability-to-pay law, property-settlement debts are only dischargeable if the court finds either (A) that the debtor is unable to pay them out of his or her income or (B) that discharge would outweigh in benefit to the debtor the harm suffered by the creditor. This is sound policy.

The federal bankruptcy judiciary is an outstanding group of men and women, Mr. Chairman. Let these able and dedicated public servants determine these important issues on a thoughtful case-by-case basis. This resolution is just and fair.

We have appended proposed language to our prepared statement.

Thank you, Mr. Chairman. I invite any questions you may have.

PROPOSED AMENDMENT AND RESTATEMENT OF CODE SECTION 523(a)(9)

In the following proposal, proposed additions to existing law are italicized.

"§ 523. Exceptions To Discharge. (a) A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt—

* * * * * * *

"(9) for death or personal injury caused by the debtor's operation of a motor vehicle, water craft or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance unless—

"(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

"(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences of discharge to the entities entitled to compensation by reason of such operation of a motor vehicle, water craft or aircraft;"

Mr. GEKAS. You may proceed now, Mr. O'Donnell.

STATEMENT OF GERALD M. O'DONNELL, PRESIDENT, NACTT, ALEXANDRIA, VA, ON BEHALF OF THE NATIONAL ASSOCIATION OF CHAPTER 13 TRUSTEES

Mr. O'DONNELL. Thank you, Mr. Chairman, members of the committee. I am here this morning as a little bit of a different tack than my fellow member, Mr. Case, and the chapter 7 debtor. I am here on behalf of the chapter 13 issues, and the fact that this nondischargeability would flow over into 1328(a)(2) by reason of the 1990 amendments which adopted those drunk driving debt and nondischargeability provisions.

The chapter 13 debtor, as you know, is the one that goes on with life. He comes to the court with a proposition to repay his creditors

and he continues to go forward with that repayment over a term of years, of 3 years up to 5 years, and at the end of that he reaches a discharge.

The Congress, of course, has long encouraged the chapter 13 over the chapter 7 liquidation in all of its legislative matters, including the latest amendments in October 1994, where it expanded those provisions for the availability of debtors.

The broad discharge provision of that chapter 13 is the carrot at the end of the stick for the chapter 13 debtor. The association's position, which is set forth in the prepared statement that I would ask to be accepted into the record at this time——

Mr. GEKAS. It would be so accepted, without objection.

Mr. O'DONNELL. In summary, the association's position on that is that any exception to that broad discharge provision of chapter 13 is to be discouraged. We are well aware of the fact that the congressional caution in the 1994 Reform Act stated, in part, that it is not contemplated that an individual who committed a heinous crime would be able in good faith to use chapter 13 solely as a means of discharging a civil obligation owing to a harmed party. Yet, we continue to emphasize that if it ain't broke, don't fix it. And we feel that the Congress gave to the courts that right or that obligation, supposed obligation, to determine whether or not that chapter 13 plan that it is going to approve for repayment to the creditors is, in fact, filed in good faith.

Certainly there are circumstances where there would be a heinous crime committed, but given a similar offense, certain facts may mitigate that. That is where the bankruptcy court, then, enters its discretion to determine whether or not that, in fact, is a good-faith filing that could be approved and would be satisfactory not just for the benefit of that debtor, so that he could go on with his life, but also for the benefit of the creditors that are being dealt with in that plan.

We encourage you to leave the process to the courts and forgo any further carving out of exceptions to the 1328(a) discharge.

I would also comment that Congressman Ehlers indicated the courts' interpretation had been adverse or at least had indicated that these were only vehicle matters, and there are cases that have been reported, two in particular, one out of the district court in Austin, TX, and another out of the district court in Florida, and we have cited those in our prepared text, which have in fact held that the motor vehicle interpretation does cover boat drunk driving charges.

Thank you for letting me have the opportunity to address you.

[The prepared statement of Mr. O'Donnell follows:]

PREPARED STATEMENT OF GERALD M. O'DONNELL, PRESIDENT, NACTT, ALEXANDRIA, VA, ON BEHALF OF THE NATIONAL ASSOCIATION OF CHAPTER 13 TRUSTEES

The National Association of Chapter 13 Trustees is an organization composed of more than a thousand consumer bankruptcy practitioners and trustees that are involved in the consumer bankruptcy and Chapter 13 process. The NACTT provides educational and training services for trustees and practitioners. Because the NACTT is focused on the bankruptcy process itself, the organization has as its members trustees, creditors' representatives and debtors' attorneys: a broad spectrum of all interests in the consumer bankruptcy system. The NACTT does not advocate on behalf of creditors or debtors and attempts to provide the judiciary, members of Congress and its staff as well as its members with an unbiased and objective view that

pending legislation may have upon consumer bankruptcy in this country. In that capacity, the NACTT is pleased to submit this statement in connection with this Committee's consideration of H.R. 234.

Chapter 13 is a bankruptcy system whereby an individual with relatively small levels of debt can formulate a repayment plan, subject to approval of the bankruptcy court, whereby these individuals may restructure their obligations, dedicate all of their available disposable income for a period of at least three to a maximum of five years and repay some, if not all, of their debts. The Chapter 13 bankruptcy process contrasts sharply with Chapter 7 liquidation whereby any individual or business entity must surrender their non-exempt assets to a trustee who then liquidates such assets and distributes the proceeds to unsecured creditors. Because most debtors that file for Chapter 7 relief do not have any significant non-exempt assets, the Chapter 7 process often results in a discharge of indebtedness with little, if any, distribution to unsecured creditors.

Chapter 13, in contrast, can provide significant dividends to unsecured creditors over the life of a plan. Congress has long viewed Chapter 13 as offering a more desirable result for debtors and creditors than the Chapter 7 liquidation option. Congress has struggled to encourage consumer debtors to voluntarily elect Chapter 13 which, by law, must pay more to the unsecured creditors than a Chapter 7 liquidation would. (*See, e.g.,* 130 Cong. Rec. S 8894 (Daily Ed. June 29, 1984)). As recently as the enactment of the Bankruptcy Reform Act of 1994, Congress recognized the general benefits to be obtained from encouraging the use of Chapter 13 as opposed to Chapter 7. *See, e.g.,* 140 Cong. Rec. H 10764 (Daily Ed. Oct. 4, 1994).

Chapter 13, recognizing the significant efforts that many consumer debtors undertake in an effort to repay indebtedness, contains a broader discharge than is available for the quick Chapter 7 liquidation. For those debtors who successfully complete a plan that is approved by the bankruptcy court, a discharge is available of all claims provided for by the Chapter 13 plan except for long-term debts in which maintenance payments only are made under Chapter 13, support and alimony obligations, nondischargeable government-guaranteed student loans, restitution or criminal fines included in a sentence on a debtor's conviction of a crime, and obligations incurred for death or personal injury caused by the debtor's operation of a motor vehicle if the operation was unlawful because the debtor was intoxicated from using alcohol, drug or other substance. Although H.R. 234 seeks to modify only Section 523(a)(9) of Title 11, this section which lists those debts non-dischargeable under Chapter 7, by operation of 11 U.S.C. § 1328(a), the obligation would also be non-dischargeable under Chapter 13.

The NACTT has consistently cautioned Congress against removing the incentives for the repayment of debts under Chapter 13. By filing and proposing a Chapter 13 plan, a consumer debtor is seeking the fresh start bankruptcy often provides, but this fresh start is conditioned upon the willingness and the ability of the debtor to commit all disposable income for a three-to-five-year period. Any effort to weaken the incentive of that fresh start will inevitably result in, to some limited extent, an election by a debtor to select the Chapter 7 remedy as opposed to the Chapter 13. Consistently since the enactment of the Chandler Act in 1935, Congress has sought to encourage the use of Chapter 13.

The NACTT must recognize, however, that Chapter 13 is not intended to be a harbor for individuals that have committed serious criminal acts or inflicted intentional harm. In fact, in a section-by-section analysis of the provisions of the Bankruptcy Reform Act of 1994, Congress cautioned the courts:

> Creditors generally benefit when a debtor elects Chapter 13. Notwithstanding the fee increases in Chapter 13 cases, the Committee does not intend for debtors to be able to utilize Chapter 13 as an office solely to obtain discharge from certain liabilities. For example, it is not contemplated that an individual who committed a heinous crime would be able in good faith to use Chapter 13 solely as a means of discharging a civil obligation owing to a harmed party.

Under current law, the simple proposal of a plan by a debtor does not assure its confirmation. A bankruptcy court must determine that a debtor has proposed the plan "in good faith." This congressional statement seems to indicate that the nature of an offense against another party, whether criminal or civil, is a factor which must be considered by the bankruptcy court to determine whether a particular Chapter 13 plan should be confirmed. It is impossible for Congress to draft a single law which covers all of the various facts which are faced by a debtor. While a certain civil offense may be heinous in one case, a similar type of offense may be strongly mitigated by the facts in another. Giving to the bankruptcy court the discretion to

make the determination on a case-by-case basis strengthens the ability of a debtor to utilize Chapter 13, if appropriate.

In a brief attempt by the NACTT to prepare for this hearing, the organization has failed to uncover any case in which the operation of an aircraft or boat by an intoxicated party was discharged as a result of a confirmed Chapter 13 plan after objections were made to the bankruptcy court at a confirmation hearing. The Committee should also be aware that at least in one case, a bankruptcy court has determined that the provisions of 11 U.S.C. §523(a)(9) already encompass injuries resulting from the wrongful operation of a motorized water craft. *See, Matter of Greenway,* 180 B.R. 179 (W.D. Tex. 1995). As a consequence, we believe that the impact of this legislation on Chapter 13 may well be minimal. We encourage Congress, however, to strengthen the role given to the bankruptcy court confirmation process under 11 U.S.C. §1325 as opposed to carving out exceptions to the discharge of the indebtedness under 1328(a).

The NACTT wishes to express appreciation for the ability to express its views on this important topic.

Mr. GEKAS. Mr. O'Donnell, you are aware that another case goes just exactly the opposite.

Mr. O'DONNELL. I greatly admire Judge Koger. He is one of the best judges on the bench, but it is a very strict interpretation.

Mr. GEKAS. What puzzles me is that you are not advocating changing the bankruptcy proceedings either in chapter 13 or in chapter 7 with respect to motor vehicle accidents that cause death or injury; are you?

Mr. O'DONNELL. No, sir.

Mr. GEKAS. If the thrust of this legislation is simply to add "watercraft" as part of the definitional part of the Bankruptcy Code, what is the big worry on the part that Mr. O'Donnell and Mr. Case in——

Mr. O'DONNELL. There is so minimal impact in a chapter 13 proceeding, Congressman, that it really does pale, and I admit that to you. I have been a chapter 13 trustee in Alexandria for 27 years and I have yet to see a chapter 13 debtor with an airplane.

Mr. GEKAS. Mr. Case, your answer?

Mr. CASE. There is appended to our prepared statement alternative proposed legislative language which would include the addition of the words "watercraft" and "aircraft," but would add the same language that is now in section 523(a)(15), that would give the judge discretion on whether to give the debtor a discharge or not. So we do advocate some modification of the existing law.

Mr. GEKAS. I am not persuaded by the fact that the number of cases might be minimal when we know the potential is becoming greater and greater every day. Mr. Gilmore.

Mr. GILMORE. Mr. Chairman, if I may address the point that was raised by you and also by the sponsor; the way I would answer the issue of what effect this may have is, and I did not make it clear in my oral statement, any legislation or any policy that the Government can encourage sober boating should be commended.

There is a cumulative effect. If this bill passes, one of the things that my agency will do will be to incorporate the passage of this legislation into those materials and public outreach efforts that we make to persuade people to boat sober. Not only is there a moral obligation and a health obligation, but there is a prudent financial consideration.

Most boaters are not wealthy. Most boaters will never be affected by the bankruptcy laws. Some will. And if we touch only a few who may say to themselves the Federal laws and the State laws have

now reached the point where there is no differentiation between automobile operation and vessel operation insofar as impairment or intoxication are concerned, then I think that that is a laudable public policy goal and one that is commendable.

I do not know the intricacies of bankruptcy law. I certainly would defer to my colleagues here today on that score, but I think that the committee would do well if it would at least give some consideration to the possible public policy good that could come from this.

Mr. GEKAS. Mr. Case in his hypothetical was pitiably describing the gentleman who was making $400 a week, who went down to the waterfront to try to assuage his troubles, but if he had chosen a motorcycle or a high speed automobile, what difference would have been made with respect to the adverse consequences?

Mr. CASE. Your question is correct, Mr. Chairman, and we believe that the existing law should be amended to give the courts discretion.

Could I offer briefly this observation? Since the modern era of Federal bankruptcy legislation in the 1930's, the community of professionals that live with the Bankruptcy Code every day has looked to and admired the House Judiciary Committee, Chairman Celler, Chairman Rodino, Chairman Brooks, as an extraordinarily committed, highly professional organization which has year in and year out thoughtfully considered bankruptcy legislation and consistently delivered one of the most outstanding statutes on the Federal statute books. The issue here is less a little fine-tuning about watercraft and motorcraft; the issue is fair bankruptcy policy and sensible bankruptcy policy, which is decent to the overwhelmed debtor.

If you go to Colonial Williamsburg, they still have a debtor's prison down there. Our system is much better. We are anxious at every opportunity and appreciate being heard by this committee for the opportunity to defend the great traditions which your committee has consistently applied in enacting bankruptcy law.

Mr. GEKAS. But isn't it just as much our duty not to be cavalier about the creditors who, like the insurance company that paid off the $250,000 in your hypothetical and then everybody is left stranded because of the debtor? Should we not also be considering the line of recovery of damages or shall we just write it off as an insurance payoff in the hypothetical you gave and say the poor debtor should be left off the hook? Should that be done automatically or should it be left to the discretion of the court? We have creditors too in this world.

Mr. CASE. One of the problems, Mr. Chairman, with discharging everybody else except the insurance company, in addition to the pain suffered by our poor hard working man, is that the telephone company, the credit card company, and the uncle get a few cents on the dollar, and the insurance company over time will collect a lot of cents on the dollar.

One of the other great policies defended by this committee over many decades has been the policy of equal distribution to creditors. And why should the insurance company get more out of the man's bankruptcy than should the telephone company?

Mr. GEKAS. Is it equal or proportional?

Mr. CASE. It is pro rata.

Mr. GEKAS. Pro rata. Well, so that the premium payers for the insurance company and the stockholders of the insurance company and the public-at-large will write off that $250,000 that you are talking about, and will discharge the debtor because it happens to be a large claim.

Mr. CASE. He is bankrupt. He owes more than he has. And so the trustee will take his assets and sell them and if he can raise $25,000 he will pay every creditor 10 cents on the dollar, roughly.

Mr. GEKAS. The gentleman from Rhode Island.

Mr. REED. Thank you, Mr. Chairman.

I want to thank all of the witnesses for their excellent testimony, and just as a preliminary point to get an idea of the different types of bankruptcy filings, on the Chapter 13 that would be an individual and limited to less than $250,000 in debts; is that roughly——

Mr. O'DONNELL. Two hundred fifty thousand dollars in unsecured and 750 in secured, yes.

Mr. REED. So, typically, if it was a serious accident, and the claims would be in the hundreds of thousands of dollars, they would not be seeking relief in chapter 13?

Mr. O'DONNELL. Typically, if the judgment were in excess of the $250,000, they would not.

Mr. REED. That would drive them into chapter 7. Mr. Case, in chapter 7 bankruptcy proceedings, is there anything left after the bankruptcy? Is there anything protected?

Mr. CASE. It is a complicated subject. Yes, the debtor is able to keep his exempt assets.

Mr. REED. Which would be his home?

Mr. CASE. It varies. The Federal statute has its own set of exemptions. For instance, you can keep several hundred dollars worth of tools of the trade. But Federal statute in another provision of the bankruptcy laws that we oppose allows States to opt out. So that, what is it, 30 States or so have opted out, I think.

So it is impossible to give a simple answer to your question.

Mr. REED. One of the more egregious examples of abuse would be if someone was the $500,000 a year executive driving a speedboat crashing into someone else, we are switching roles now, the victim becomes the $400 man that cannot work any more, et cetera, and yet that person sort of gleefully, I don't want to be pejorative, discharges through 13 or 7. If it is a large claim, on that order, it wouldn't be a chapter 13 proceeding. If it was a chapter 7 proceeding, could someone literally walk away with most of their assets and kind of thumb their nose at society?

Mr. CASE. I don't believe under the Federal exemptions the $500,000 a year executive would keep very much, unless he owned a home in Florida or Texas, which would be protected under the existing opt-out provisions.

Mr. REED. The other issue that comes up, and I noticed that at least from your perspective, Mr. Case, you have a consistent policy view that these exemptions for both automobiles and boats should be the same; i.e., there should be discretion with the judge.

Mr. CASE. Yes, sir.

Mr. REED. You would urge a change even in the existing, and Mr. O'Donnell, you are not urging a change in the existing, you are simply saying don't expand it; is that correct?

Mr. O'DONNELL. I think it is in the purview of the judge at this time and I think they are doing a good job with it.

Mr. CASE. Excuse me, I think he is saying there is a good-faith test for confirmation in chapter 13 which gives the discretion there but it is not there in chapter 7.

Mr. REED. So that the legal difference, which is important—what you are saying is in chapter 13, the judge has the discretion to say you are avoiding a valid claim by seeking chapter 13 and you are trying to frustrate the insurance company would you be in favor of clarifying that more in terms of specifying?

In the language I see here, in the statute, it is a heinous crime. I do not know if negligent operation of a boat would be a heinous crime.

Mr. O'DONNELL. It may or may not be a heinous crime, given the circumstance of a particular circumstance, and I think that is once again to be addressed in the discretion of the court in looking at that particular case. Under these circumstances, in this case, is this the type of thing that should be discharged in bankruptcy proceedings?

Mr. REED. It just strikes me that the point that Mr. Ehlers is trying to get at in his legislation is not so much a heinous crime but gross negligence, reckless conduct, et cetera, which a judge, being a very good judge and very literal, would say that is not a heinous crime. I deplore it, but someone is using the system to avoid a legitimate claim.

And I am wondering in terms of proceeding here, perhaps we might provide guidance to the judge's discretion, which I think we do occasionally, or perhaps in the context of giving him discretion. I think this would be similar to Mr. Case's point, if we give the judge discretion but specifically point out that we consider as a public policy matter reckless boating while you are intoxicated to be wrong.

Mr. O'DONNELL. I have read Mr. Case's prepared statement and his recommendation. I am not opposed to the changes he is indicating, my major opposition is to taking another bite at the discharge, which this Congress gave to the chapter 13 debtor in order to encourage him to be in chapter 13 and repay his debts rather than to discharge them in a chapter 7.

Mr. REED. I want to raise two points, if I may, just in a moment, Mr. Chairman.

First of all, there has been discussion about the deterrent effect of changing the Bankruptcy Code, and I must say I think it is so attenuated from the average person's reality that it is probably not the most direct way you can deter reckless conduct on a boat or in a car.

I am wondering if there is any evidence that you have accumulated, Mr. Gilmore, or your colleagues throughout the country, that something like this does have a deterrent effect. And since we have not really broached the issue of watercraft, in the area of automobiles, whether there is any credible evidence that Bankruptcy Code changes have deterred drunk driving or that, in fact, drunken drivers who get in accidents are using the Bankruptcy Code in an abusive way to frustrate a legitimate claim.

I would raise that issue and ask any one of the panelists. At this point I would yield back to the chairman, but if there is any evidence whatsoever that is out there we would very much—I personally would like to see that evidence in the context of an automobile or of watercraft. Thank you.

Mr. GEKAS. The gentleman from Illinois.

Mr. FLANAGAN. Thank you, Mr. Chairman. I have no question other than to urge Mr. Case to include Chairman Hyde in his list of appellations in the future for his comments about the Judiciary Committee. I yield back, Mr. Chairman.

Mr. GEKAS. There being no further questions, we will consider the witnesses' testimony, as has been the history of our subcommittee, very carefully.

I want to end by saying I do not see any deterrent value at all in the work that we are doing, because deterrence means wide publication, despite Mr. Gilmore's feeling that at least in the brochures and the pamphlets and so forth another element in the cumulative effect will have been added, and I agree with that. But what I am trying to say is that I am not going to proceed to enter my opinion into this case on the basis of deterrence, but rather on balancing the equation as it were on the question of motor vehicles that now appears in the bankruptcy court laws. So we will see what happens.

We thank the panel, and we adjourn this hearing.

[Whereupon, at 10:50 a.m., the subcommittee adjourned.]

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