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Recent Amendments to the Bankruptcy Code—A Politically Motivated Less Fresh Start?

I. INTRODUCTION

A fundamental principle of bankruptcy is that honest debtors should be given a fresh start by relieving them of the burden of their debts.¹ There are those who believe, however, that this principle is abused by debtors who should not be entitled to the benefit of a discharge of their debts in bankruptcy. As a result, Congress has recently acted to eliminate some of the benefits received by certain debtors who file bankruptcy.

These congressional changes in the bankruptcy law: a) eliminate the dischargeability of student loans in Chapter 13 proceedings; b) expand the exception to discharge for drunk driving debts to include those arising from driving while under the influence of drugs; c) expand the exception to discharge for drunk and drugged driving to include Chapter 13 filings; d) eliminate the dischargeability of criminal restitution orders in Chapter 13; and e) severely restrict the discharge of debts incurred in operating a federally insured financial institution.

These changes are significant not only for the limitations they impose, but also for what they signal. Before enacting these changes, Congress did not undertake an analysis of bankruptcy law, nor did it even enact these changes as a package. Rather, it incorporated them into different bills that were dealing with other issues. It is important, and unlikely a coincidence, that all three areas of reform--student loans, drunk driving, and savings and loan scandals--are highly visible on the front pages of today's newspapers and in the lead stories of today's television newscasts. The changes appear to be politically motivated changes to the bankruptcy laws, and signal that Congress may change the bankruptcy laws whenever it is politically beneficial to do so.

These changes may provide a prelude to future changes in the bankruptcy laws, which may be very significant in today's fluctuating economy. Personal bankruptcies are increasing, up 16 percent in 1990.² This increase is the

¹ Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
sharpest since 1986, when filings increased 31 percent.\(^3\) Further, an additional increase in filings may occur as the threat of a recession looms.\(^4\)

At a minimum, the bankruptcy changes will further lessen the popularity of Chapter 13 filings.\(^5\) Now two debts that used to be dischargeable in Chapter 13, student loans and drunk driving judgments, are no longer treated differently in Chapter 13 than in Chapter 7 proceedings. These changes, coupled with the alleged failure of Chapter 13,\(^6\) may influence debtors to file Chapter 7 and receive a full discharge of their debts.\(^7\) There is no longer a "head start" to be gained by filing Chapter 13, but simply the same "fresh start" as Chapter 7.\(^8\)

Individuals who are contemplating bankruptcy because of debts incurred in operating a federally insured financial institution may also be discouraged from filing bankruptcy. These debts are simply not dischargeable. Most importantly, property that would otherwise qualify for an exemption in a bankruptcy proceeding is not beyond the reach of creditors holding the debts incurred in operating a financial institution.

Overall, the bankruptcy laws are no longer as forgiving to debtors as they once were. Further, Congress was less forgiving to the most popular abusers

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5. T. SULLIVAN, E. WARREN & J. WESTBROOK, AS WE FORGIVE OUR DEBTORS 213-24 (1989) (showing empirical research indicating that Chapter 13 was not working prior to these amendments). The authors concluded that their data showed the following:
Debtors in Chapter 13 fail at extraordinary rates, with fewer than a third still making payments an average of two years after confirmation. On average, those who are paying have proposed plans that promise to pay only about half their debts. This is not surprising, considering how little they have. And some might say that a debtor who repays something is better than a debtor who does not. But with plans paying considerably less than 100%, it is not possible to know whether Chapter 13’s pay creditors more than Chapter 7’s.

Id. at 222.
6. Id.
7. It is possible, however, that this "carrot and stick" approach has no impact on what chapter a debtor chooses to file bankruptcy under. See id. at 230-56.
8. There are, however, still some debts that are dischargeable in Chapter 13 but not dischargeable in Chapter 7. Examples are debts incurred as a result of willful and malicious injury, loans obtained by fraud, and debts arising from embezzlement. See 11 U.S.C. §§ 1328, 523(a) (1988).

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of the bankruptcy laws: former students who used student loans to finance their education; drunk and drugged drivers; and savings and loan bandits.

II. STUDENT LOAN DEBTS

Congress removed one incentive to file Chapter 13 bankruptcy when it made student loan debts nondischargeable in Chapter 13 proceedings. This enactment was not part of any bankruptcy or judicial bill, but rather part of the Omnibus Budget Reconciliation Act of 1990. Congress' amendment adds student loans to alimony and child support payments as nondischargeable debts in Chapter 13 under section 1328(a).

The amendment affects any Chapter 13 bankruptcy case filed after November 5, 1990.

By amending section 1328(a), which is the Chapter 13 general discharge provision, to include those debts falling within paragraph 8 of section 523(a) as nondischargeable, Congress made student loans in Chapter 13 subject to the same treatment they receive in Chapter 7 bankruptcies. This treatment would have meant that student loans could only be discharged if: (i) they first

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10. Id. § 3007(b)(1) (to be codified at 11 U.S.C. § 1328(a)(2)). The wording used is as follows:

(b) TREATMENT OF CERTAIN EDUCATION LOANS IN BANKRUPTCY PROCEEDINGS.---(1) Section 1328(a)(2) of title 11, United States Code, is amended by striking "section 523(a)(5)" and inserting "paragraph (5) or (8) of section 523(a)."

Id.

One court has noted, however, that the public policy of student loan repayment is not as strong as the payment of child support and alimony payments. In re Scheiber, No. 4-91-2496 (Bankr. D. Minn. Aug. 1, 1991) (WESTLAW, Allfeds, Bankr.).

11. Student Loan Act, supra note 9, § 3007(b)(2). The wording used in the amendment is as follows:

(2) The amendment made by paragraph (1) shall not apply to any case under the provisions of title 11, United States Code, commenced before the date of enactment of this Act.


became due five years before the date of filing the bankruptcy petition;\(^\text{13}\) or (ii) the debtor would otherwise experience undue hardship.\(^\text{14}\)

Just twenty-four days later, and in a different bill, the terms of section 523(a)(8) were changed.\(^\text{15}\) The Federal Debt Collection Procedures Act of 1990\(^\text{16}\) amended the section. The section previously disallowed a discharge of any debt:

for an educational 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 a nonprofit institution, unless-

(A) such loan first became due before five years (exclusive of any applicable suspension of the repayment plan) before the date of the filing of the petition . . . .\(^\text{17}\)

The amended section 523(a)(8) does not allow a discharge of a debt:

for an educational benefit overpayment or loan made, insured, 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 (exclusive of any applicable suspension of the repayment period) before the date of filing of the petition . . . .\(^\text{18}\)

This amendment clarifies that student loans are exempted from discharge if they are benefit overpayments, loans from the government, or loans from


\(^{16}\) Id.


\(^{18}\) Crime Control Act of 1990, Pub. L. No. 101-647, § 3621, 104 Stat. 4964, 4965 (1990) (to be codified at 11 U.S.C. § 523(a)(8)). The change in the statute was not intended to affect the discharge of student loans administered by federal agencies that have their own statutory regulation (e.g. Public Health Service Act). The intent was to "cover only those debts which are now covered by section 523(8) of the Bankruptcy Code, rather than by these more specific statutes." The specific statutes still govern the dischargeability of their respective student loans. 136 CONG. REC. H13,288-02 (daily ed. October 27, 1990) (statement of Rep. Brooks).
programs funded by the government or nonprofit organizations. The amendment also expands the current limitation period from five to seven years. The amendment, however, did not alter the exception to the nondischarge of student loans if an undue hardship would result.

Previously, the five-year provision meant that student loans could be discharged if the first installment payment became due five years or more before the bankruptcy petition was filed. This same reasoning should apply to the new seven-year time limitation. Congress made no attempt to provide otherwise. Additionally, this seven-year period will also now apply to student loan debts in Chapter 13 bankruptcies. A possible reason for the time expansion is simply to give the government two more years to catch up with debtors who have defaulted on their student loans.

Student loans can also be discharged in Chapter 7, and now in Chapter 13, if not discharging the debt would "impose an undue hardship on the debtor and the debtor's dependents." Courts have not been anxious to grant a discharge for student loans under this exception. The debtor's situation must be practically hopeless; the mere inability to pay currently or in the immediate future is not enough to receive discharge by hardship. One federal circuit court of appeals has put forth a three part test for a debtor to qualify for 'undue hardship.' The test requires:

(1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself or and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

This strict test will likely be incorporated as the standard for Chapter 13 discharges of student loans, and it could have ramifications beyond the plain language of the amendment.

19. Id.
20. Id.
22. In re Nunn, 788 F.2d 617, 619 (9th Cir. 1986).
23. Student Loan Act, supra note 9, § 3007(b) (to be codified at 11 U.S.C. § 1328(a)(2)).
One of the few courts to discuss the nondischargeability of student loans since the amendments were enacted suggested that it will reevaluate its standard of determining "undue hardship" under section 523(a)(8)(B). In that jurisdiction the court had developed a very strict test for "undue hardship." The test required a preliminary finding that the debtor's income was below the poverty level before the court would even consider other factors. This strict test was based on the availability of a complete discharge of student loans in Chapter 13. Now that the Chapter 13 discharge is not a possibility, courts may reevaluate the undue hardship requirement and possibly make the requirement less stringent.

The unanswered question, particularly for people with large student loan debts who were contemplating filing a Chapter 13 bankruptcy petition, is "WHY?". The answer is not clear. The legislative history of the student loan amendments is minimal. A possible reason for extending the nondischargeability of student loans to Chapter 13 is that student loans, and defaults on them, are popular political topics. The delinquency rate for student loans is increasing and is a great concern in Congress and the press. This increase in student loan delinquencies is an anomaly; people using student loans to fund advanced education are some of the country's best educated people, and they are unable, or unwilling, to pay off their debts. Although Congress did not act with any statistical study or report at hand, the message is clear from its action: If you receive an education at the government's expense, you are not going to avoid repaying the loan to the government.

The timing of these amendments is particularly interesting. The changes come when tuition is rapidly increasing and student loans are becoming an ever more necessary and popular way of financing an education. According to the Department of Education, the number of student borrowers has "nearly doubled to 4.5 million in the fiscal year ended last September from a decade earlier, and the amount borrowed, adjusted for inflation, rose 61% to $12.35 billion." Defaults last year totalled $2.4 billion, and are expected to increase if a recession occurs. With the fear of a recession, Congress is

29. *Id.* at 917.
34. *Id.*
35. *Id.*
concerned with a general increase in delinquencies of all debt owed to the federal government. Of these delinquencies, student loan debts are no exception to congressional concern. With the mounting government debt, Congress may simply be looking to decrease delinquencies and defaults on government loans, particularly those loans whose default rates are popular political topics.

At the same time it made the amendment preventing the discharge of student loans in Chapter 13, Congress also altered the treatment of the institutions making student loans. The automatic stay statute and the property of the estate statute were amended. The automatic stay statute

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37. Id. at 7.
40. Student Loan Act, supra note 9, § 3007(a) (to be codified at 11 U.S.C. § 362(b) and 11 U.S.C. § 541(b)). The relevant text of the statute is as follows:

(a) AUTOMATIC STAY AND PROPERTY OF THE ESTATE.

(1) Section 362(b) of title 11, United States Code, is amended—

(C) by inserting immediately following paragraph (13) the following new paragraphs:

"(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

"(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution; or

"(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.) or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act.".

(2) Section 541(b) of title 11, United States Code, is amended

... [by adding]:

"(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution.".

Id.
was amended so that the filing of a bankruptcy petition does not operate as a stay, and thereby a prevention, of any action by an agency determining the institution’s eligibility to participate in student loan programs. Congress also made a conforming amendment to the property of the estate section. This amendment provides that the bankruptcy estate does not include any property rights in the eligibility of the debtor to participate in guaranteed student loan programs or in an accreditation status as an educational institution. As a result, the filing of a bankruptcy petition does not protect an educational institution from inspection by entities involved in guaranteeing student loans. These amendments were enacted to protect the federal government’s from abuses and losses by institutions involved in guaranteed student loan programs. These concerns are great considering the increased bankruptcy of educational institutions, particularly smaller schools and trade schools.

Congress made these bankruptcy amendments, except for the seven year extension, subject to a sunset provision. The amendments cease to be effective on October 1, 1996. Apparently Congress wants to force itself to reevaluate the amendments at that time. Congress also ordered the Comptroller General to prepare a report analyzing discharges of student loans in bankruptcy. The study is to provide an in-depth analysis of student loan

The amendments to section 362(b) reflect careless drafting. See infra note 54. The amendment adds paragraph (14) to section 362(b). Paragraph (14), however, had already been added earlier in 1990. Bankruptcy: Swap Agreements and Forward Contracts, Pub. L. No. 101-311 § 102, 104 Stat. 267 (1990) (to be codified at 11 U.S.C. § 362(b)(14) (discussing treatment of swap agreements and forward contracts in bankruptcy proceedings). As a result, section 362(b) now apparently has two paragraphs numbered "(14)." It is unlikely Congress meant to replace the previously enacted paragraph (14) since it made no mention of it and the two paragraphs discuss distinct issues. More likely, the drafters of the later amendment (the educational institution amendment) were simply not aware of the prior amendment.

41. Student Loan Act, supra note 8, § 3007(a) (to be codified at 11 U.S.C. § 362(b) and 11 U.S.C. § 541(b)).
42. Id.
43. 136 CONG. REC. S5400 (daily ed. May 1, 1990) (exhibit 1, attachment 1, to statement by Sen. Graham) argues the following:

The large number of banks, state agencies, and schools participating in guaranteed student loan programs coupled with poor systems to protect the federal government’s financial interest creates the potential for significant abuses and losses. A high proportion of defaults and publicized abuse by certain proprietary schools suggest the need for improved program controls.

Id.
44. See, e.g., Moore, Trade Schools Could Be Hurt by Student Loan Crackdown, ST. LOUIS BUS. J., Jan. 21, 1991, at 6A.
45. Student Loan Act, supra note 9, § 3008.
debtor under Chapter 13 and how they compare to other debtors. The report is due in 1993. Presumably Congress will use this report to evaluate whether the amendments should be reenacted after the sunset provision calls for their termination.

III. INTOXICATED OR IMPAIRED DRIVING

Legislation was also enacted that stiffened the treatment of debtors in bankruptcy who have debts arising from drunken or drugged driving. The purpose of the changes is to protect victims of crimes; the law is known as the "Criminal Victims Protection Act of 1990." The law became effective on

46. 136 CONG. REC. H5705 (daily ed. Jul. 27, 1990) (clerk reading bill) recites the following study:
Sec. 517. STUDY OF DISCHARGE OF STAFFORD STUDENT LOANS IN BANKRUPTCY.
(a) STAFFORD STUDENT LOAN DISCHARGE STUDY.- The Comptroller General shall conduct a study relating to the discharge of student loan indebtedness in proceedings in bankruptcy. Such study shall include-
(1) an evaluation of the treatment of student loan debtors under chapter 13 of title 11, United States Code, including-
   (A) the frequency of attempts to discharge or the discharging of such loans compared to such attempts to discharge or the discharging of other consumer loans by such students; and
   (B) the number and amount of such loans discharged;
(2) an evaluation of the effect of students who attempt to or do discharge such loans relative to the costs of the Stafford Student Loan Program and the institutional costs of the Perkins Loans Program; and
(3) an evaluation of the behavior of student loan debtors who discharge such loans as compared to other debtors who discharge debts in bankruptcy by evaluating such factors as-
   (A) the average age of the debtors in each group;
   (B) the amounts and types of debts sought to be discharged by each group; and
   (C) the percentage of discharge of other types of consumer debts by each group.

Id.

47. Id.

November 15, 1990, and applies to any bankruptcy proceedings commenced after that date.\(^49\)

The law amends the exception to discharge for debts arising from drunken driving, which appears in section 523(a)(9).\(^50\) Formerly, the exception precluded discharge of a debt that arose from a judgment or consent decree entered in a court of record against the debtor wherein liability was incurred by such debtor as a result of the debtor's operation of a motor vehicle while legally intoxicated under the laws or regulations of any jurisdiction within the United States or its territories wherein such motor vehicle was operated and within which such liability was incurred.\(^51\)

The amended section 523(a)(9) prohibits a discharge of any debt "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 another substance."\(^52\)

These amendments affect Chapter 7 bankruptcies and expand the exception to discharge to Chapter 13 filings as well.\(^53\) Apparently debts arising from drunken driving were never supposed to be exempt from discharge in Chapter 7 but dischargeable in Chapter 13. The published Senate


\(^{51}\) Id.

\(^{52}\) Victims Act, supra note 48, § 2(a), 104 Stat. at 2865 (to be codified at 11 U.S.C. § 523(a)(9)).

\(^{53}\) Id. § 2(b), 104 Stat. at 2865 (to be codified at 11 U.S.C. § 1328(a)(2)). The law amended 11 U.S.C. § 1328(a)(2), which is the exception to discharge clause in Chapter 13, to include the amended section 523(a)(9), thereby also exempting debts arising from drunken and drugged driving from Chapter 13 proceedings. Victims Act, supra note 48, § 2(a), 104 Stat. at 2865. This points out an example of the lack of cohesiveness in enacting these amendments. See supra note 40. In the student loan provisions, section 1328(a)(2) was amended "by striking 'section 523(a)(5)' and inserting 'paragraph (5) or (8) of section 523(a).'" Student Loan Act, supra note 9, § 3007(b). In the drunk driving provisions, section 1328(a)(2) was amended "by inserting 'or 523(a)(9)' after '523(a)(5).'" Victims Act, supra note 48, § 2, 104 Stat. at 2865. Taken literally, since the student loan amendment was enacted November 5, 1990, and the drunk driving amendment was enacted November 15, 1990, section 1328(a)(2) would not be readable. After the student loan amendment it would read as "of the kind specified in paragraph (5) or (8) of section 523(a) of this title." There is, however, no "523(a)(5)" to insert the "523(a)(9)" after. It is likely that Congress intended section 1328(a)(2) to include paragraphs (5), (8), and (9) of section 523(a). This oversight, though, reflects the lack of planning that went into enacting these amendments.
Report discussing the recent amendments states that the bankruptcy amendments in 1984 making drunken driving debts nondischargeable were intended to include Chapter 13 as well as Chapter 7 discharges. The Senate Report, in keeping with the theme of victim protection, explained that

"Bankruptcy laws have historically given the honest and financially distressed debtor a fresh start. However, those victimized by drunk or drugged drivers will never have a fresh start, and therefore, drivers found liable in a civil court should not be granted a fresh start until sufficient reparations are made to the innocent victim or the surviving family."

In addition to the expansion of this provision to Chapter 13, the amendments have two significant ramifications. First, drivers impaired by drugs other than alcohol are included within section 523(a)(9), and are thereby precluded from discharging debts that arise from driving while impaired. Second, victims of drunken or drugged drivers are no longer impeded by what has been termed the "race to courthouse." Each of these ramifications is discussed below.

The previous wording of section 523(a)(9) prevented only a discharge for debts arising from "intoxicated" driving. "Intoxication" was commonly defined as being drunk or inebriated. Section three of the new bill, by defining intoxication as both alcohol and drug induced, eliminates any ambiguity of whether a debt resulting from drug induced impairment is an exception to discharge. Such a debt is now clearly excepted from discharge.

What is a debt incurred from the operation of a motor vehicle where the "operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance"? A strict construction of the statute indicates that the "operation" itself must have been unlawful, and not the induced drug or substance that resulted in the illegal operation. This reading is in accord with the new law's Senate legislative history which states that the

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54. This was an amendment to section 523(a)(9) that was proposed by Senator Danforth of Missouri that was enacted as Pub. L. No. 98-353, 98 Stat. 353-54 (1984). S. REP. No. 434, 101st Cong., 2d Sess. 3 reprinted in 1991 U.S. CODE CONG. & ADMIN. NEWS, 4065, 4065.
55. Id. at 4-5, 1991 U.S. CODE CONG. & ADMIN. NEWS, at 4067-69.
56. Id. at 5, 1991 U.S. CODE CONG. & ADMIN. NEWS, at 4069.
57. Id. at 5, 1991 U.S. CODE CONG. & ADMIN. NEWS, at 4068.
58. Id. at 5, 1991 U.S. CODE CONG. & ADMIN. NEWS, at 4068.
60. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1302 (2d ed. 1934).
61. Victims Act, supra note 48, § 2(a), 104 Stat. at 2865 (to be codified at 11 U.S.C. § 523(a)(9)).
"term 'drugs' includes both controlled substances and other drugs which may render a driver impaired or intoxicated." For example, drivers who ingested a prescription drug, such as valium, that rendered them unable to operate a motor vehicle in a lawful manner would be treated the same as drivers whose operation of the vehicle was unlawful because they ingested cocaine or marijuana. The question of whether the driver was "impaired or intoxicated is one for the State or Federal trial court and not within the scope of review of the bankruptcy court." This conclusion suggests there must be a prior judgment against the debtor based on state or federal law finding that the debtor operated the vehicle in an unlawful manner.

In Missouri, unlawful operation of a motor vehicle occurs when a person fails to operate a vehicle in a careful and prudent manner, or operates the vehicle at a speed that endangers the life or property of any person, or fails to exercise the highest degree of care. If that unlawful operation is caused by the ingestion of alcohol or drugs, a judgment resulting from the unlawful operation is not dischargeable in bankruptcy.

Another reading of the statute, however, would require the debtor to be found guilty of "operating a motor vehicle while intoxicated." This requirement could be a higher standard than failing to operate the vehicle in a careful and prudent manner. In Missouri, intoxicated driving occurs when the driver "operates a motor vehicle in an intoxicated or drugged condition." Because Missouri had already included "drugged" within the definition of intoxicated, the new amendment would not have a significant effect under this reading.

In addition, the amendment addresses a timing problem that resulted from the requirement that an injured party obtain a prior judgment before a debt for drunken or drugged driving becomes nondischargeable. Section 523(a)(9) required that the "debt arise from a judgment or consent decree." Some courts interpreted this to mean that for the debt to be nondischargeable in bankruptcy, the victim must have reduced her damages claim to a judgment before the driver filed a bankruptcy petition. This interpretation allowed the debtor-driver to avoid paying damages to his victim by filing bankruptcy before the creditor-victim could receive a judgment for his damages resulting from the drunk driving. The amendment addresses this problem by

63. Id.
64. Mo. REV. STAT. § 304.010.1 (Supp. 1990).
65. Mo. REV. STAT. § 577.010 (1986).
eliminating the "race to the courthouse," which resulted from courts interpreting the former language of section 523(a)(9).

Although the race to the courthouse was eliminated in earlier versions of the bill by exempting these debts from the automatic stay, this provision did not become part of the final version of the bill that became law. Presumably the drafters' intent to prevent a race to the courthouse was carried out by deleting from section 523(a)(9) the wording "from a judgment or consent decree entered in a court of record against the debtor" that was used in the prior section. This wording was what courts relied on when interpreting the previous section 523(a)(9) as requiring the damage claim be reduced to a judgment prior to the debtor's bankruptcy.69

The published Senate Report makes it clear that the race to the courthouse does not exist any longer. Senator Biden stated to the Senate just prior to the passage of the current version of the bill that "although the technical bankruptcy mechanism for addressing the race to the courthouse problem has been changed, the intended effect of the original legislation remains unchanged."70 The elimination of the race to the courthouse is further evidenced by the published Senate Report, which expressly adopted71 the conclusion put forth by the Ninth Circuit in In re Hudson72 that the purpose of section 523(a)(9) is "(1) to deter drunk driving; (2) to ensure that those who caused injury by driving drunk did not escape civil liability through the bankruptcy laws; and (3) to protect victims of drunk driving."73 The purpose of the change in the wording of section 523(a)(9) was "to prevent 'drunk' or 'drugged' drivers from escaping payment of civil judgments to their victims by filing for bankruptcy."74 Now debtors will not be able to

Ohio 1987)).

68. 136 CONG. REC. S13,390-02 (daily ed. Sept. 18, 1990) (clerk reading S. 1931). Section 362(b) was to be changed by adding a new paragraph that prevented the automatic stay from operating in cases of drunk driving under 11 U.S.C. § 523(a)(9).


72. 859 F.2d 1418 (9th Cir. 1988).

73. Amendment, supra note 66, at 6, 1990 U.S. CODE CONG. & ADMIN. NEWS 4065, 4069 (citing Hudson, 859 F.2d at 1423).

discharge a civil judgment related to damages caused as a result of driving a motor vehicle while legally intoxicated or impaired by the use of alcohol or drugs . . . . [This] will force drunk or drugged drivers to pay on their civil judgments, and will provide victims or their families with a measure of compensation.75

Although at first glance the amendment may seem to bring about sweeping benefits for the victims of drunk driving, the amendment also limits slightly what is exempt from discharge. This limitation is found in the wording "for death or personal injury,"76 thereby eliminating the possibility of an exception to discharge for debts arising as a result of property damage caused by a drunken or drugged driver. This wording indicates Congress' intent to protect the victims of crimes, victims meaning those people who are personally physically or mentally harmed by a motor vehicle driven by an impaired driver, and not those sustaining only a financial or property loss.

IV. CRIMINAL RESTITUTION ORDERS

In the same enactment that it passed the drunk and drugged driving amendment, Congress also made certain debts for restitution imposed on debtors who committed crimes nondischargeable in Chapter 13.77 Criminal restitution orders were already nondischargeable in Chapter 7.78 Section 1328(a), which includes the list of nondischargeable debts in Chapter 13, was amended to include any debt "for restitution included in a sentence on the debtor's conviction of a crime."79 The purpose of this enactment was to "make civil and criminal restitution orders arising from actions brought by the government nondischargeable in bankruptcy."80

An earlier version of the amendment included provisions amending section 362(b), making the automatic stay inapplicable to criminal restitution, and section 523(a), making criminal restitution a general exception to discharge.81 These provisions, however, were not included in the final

77. Id. § 3, 104 Stat. at 2865, (to be codified at 11 U.S.C. § 1328(a)(3)).
amendment that was signed into law. The published Senate Report, however, clearly states that criminal restitution orders payable to the government are not dischargeable in bankruptcy, with no mention of the chapter under which the petition is filed. The amendment purportedly has the effect of codifying *Kelly v. Robinson*, which holds that criminal restitution orders are not dischargeable in a Chapter 7 proceeding, and of overruling *Pennsylvania Department of Public Welfare v. Davenport*, which holds that criminal restitution orders are dischargeable in a Chapter 13 proceeding.

An amendment disallowing discharge of criminal restitution debts in Chapter 7 under section 523(a) may not have been necessary considering case law. In *Kelly*, the Supreme Court specifically held that section 523(a)(7) included criminal restitution orders, thereby making restitution orders an exception to dischargeable debts in Chapter 7. If this decision were wrong, then Congress clearly would have clarified its meaning in section 523 when making these amendments. Also, Congress certainly would not have expanded the exceptions to discharge to Chapter 13 if it did not intend such exception to exist in Chapter 7 as well.

The *Kelly* court based its decision making criminal restitution orders nondischargeable in Chapter 7 partly on the historical treatment of restitution orders in bankruptcy proceedings. The court noted that restitution orders have generally not been dischargeable debts. The court also noted underlying federalism principles, and expressed its reluctance for federal bankruptcy courts to intrude on state criminal proceedings.

The amendment regarding discharge of criminal restitution orders in Chapter 13, however, apparently became necessary when the Supreme Court decided *Davenport*. The court in *Davenport* holds that the exception to discharge for criminal restitution orders did not extend to Chapter 13. This holding was based on a broad definition of "debts" and Congress’ specific limitation of dischargeable debts listed in section 1328(a). By amending

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84. *Id.* at 50.
88. *Id.* at 44-47.
89. *Id.* at 47-49.
90. *Davenport*, 110 S.Ct. at 2129.
91. 110 S.Ct. at 2133.
section 1328(a), Congress has made its intention clear that criminal restitution orders are not dischargeable in Chapter 13 proceedings.

V. FINANCIAL INSTITUTION DEBTS

The bankruptcy laws were also affected extensively in another law dealing with a popular political topic when the Crime Control Act of 1990 became law on November 29, 1990. Once again, Congress chose to be less forgiving to debtors by: i) adding debts for fraud in operating a financial institution and debts for maliciously or recklessly failing to maintain the capital of a financial institution to the list of nondischargeable debts in section 523(a); ii) by adding debts resulting from certain abuses of financial institutions to those debts that may be satisfied from the debtor's exempt property under section 522; and iii) by having a trustee in Chapter 11 assume any capital maintenance agreements made by the financial institution. These amendments were enacted in response to growing savings and loan industry failures and scandals.

The amendments add two new paragraphs to the list of nondischargeable debts in section 523(a). The first new paragraph under section 523(a) prevents discharge for any debt:

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union.

This amendment appears unnecessary when section 523(a)(4) is considered. Section 523(a)(4) already disallows discharge of any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." There is, however, a possible way to reconcile the two paragraphs, which

93. Id. § 2522, 104 Stat. at 4865-68.
94. These amendments "will ensure that those who defrauded [the savings and loans] will be made to pay the price. This is a tough and effective answer to a pressing national problem and it deserves the support of all Members." 136 CONG. REC. H13,288-02 (daily cd. Oct. 27, 1990) (statement of Rep. Brooks).
provide apparently similar provisions for the nondischargeability of debts arising from fraud. This reconciliation considers section 523(c) and its amended provisions.

Section 523(c) grants the bankruptcy court exclusive jurisdiction to determine the dischargeability of debts for fraud arising under section 523(a)(4) and requires the creditor to initiate proceedings to exempt such debts from discharge. The creditor must begin the proceeding to determine the nondischargeability of a debt under section 523(a)(4) within 60 days after the first date set for the meeting of creditors. Section 523(c), and the burden it places on creditors, does not apply to the new paragraph (11). Therefore, a creditor claiming fraud under paragraph (11) would not have the burden of initiating proceedings within 60 days to have the debt declared nondischargeable. The tradeoff, however, is that the creditor must have a "final judgment, unreviewable order, or consent order or decree" for the fraud. This situation would presumably arise if the creditor, probably a financial institution regulatory agency, missed the deadline to have the debt declared nondischargeable under section 523(a)(4), but had a judgment for the debt that arose from fraud and could therefore have the debt declared nondischargeable under section 523(a)(11).

In addition, a new paragraph was added to section 523(c) which makes it easier for the creditor to have the debt declared nondischargeable under section 523(a)(4), and this declaration would lessen the need for a judgment for fraud under paragraph (11). According to section 523(c)(2), when a regulatory agency has taken over a depository institution, section 523(c)(1) and the burdens it imposes on creditors does not apply unless the regulatory agency was appointed in time to comply in a reasonable manner with the section.

103. Id. § 2522(a)(3), 104 Stat. at 4865-66 (to be codified at 11 U.S.C. § 523(c)).

The current section 523(c) is numbered paragraph (1), and another paragraph is added: (2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent.
A caveat, however, is necessary to this analysis. In the new section 523(c)(2), Congress says that section 523(c)(1) will not apply to debts described in subsections (a)(2), (a)(4), (a)(6), or (a)(11) unless the regulatory agency has a reasonable time to comply with the requirements of section 523(c)(1). Section 523(c)(1), however, does not apply at all to the new paragraph (a)(11). This inconsistency raises the possibility that Congress may have intended the new paragraph (a)(11) to be subject to section 523(c)(1), which would apparently make paragraph (a)(11) redundant with paragraph (a)(4).

For the purpose of "fiduciary capacity," as used in the new paragraph (11) of section 523, and in the traditional exception to discharge for fraud while acting in a fiduciary capacity in section 523(a)(4), "an institution affiliated party of a depository institution or insured credit union" will qualify.

Another paragraph added to the exceptions to discharge does not allow a debtor to discharge any debt:

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency.

This paragraph could also seem redundant, simply readdressing what is covered in section 523(a)(6), which disallows discharge of any debt "for willful and malicious injury by the debtor to another entity or to the property to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

Id.

106. This argument could be supported, or refuted, by noting the other mistakes in the drafting of these recent amendments, thus making an inference that Congress intended to amend section 523(c)(1) but did not, or conversely that the inclusion of (a)(11) in section 523(c)(2) was unintentional. See supra notes 40, 53.
of another entity.\textsuperscript{109} The new amendment, however, may have significant ramifications simply by including the word "or." Section 523(a)(6) uses "and," requiring the strict standard of having both a malicious \textit{and} reckless act. The use of "or" in the statutory amendment suggests a more relaxed standard when dealing with federally insured financial institutions; the usage requires only willful \textit{or} malicious acts, but not both, for a debt to be exempted from discharge.

With few exceptions, creditors with nondischargeable debts cannot fulfill those debts by taking the debtor's exempt property.\textsuperscript{110} In an additional effort to make financial institution insiders pay for their debts incurred in mismanaging the institution, however, Congress gave creditors the right to gain compensation from otherwise exempt property. Added to the exceptions to the general rule that a creditor cannot go against exempt property are those debts owed by an "institution-affiliated party" to a regulatory agency arising from fraud while acting in a fiduciary capacity, embezzlement or larceny, and debts for willful and malicious injury by the debtor to another.\textsuperscript{111} This amendment is very important in states with large property exemptions, particularly large homestead exemptions.\textsuperscript{112} Now the exempt property of a person who looted a financial institution is not beyond the reach of the creditors holding these debts even if the debtor files bankruptcy.

Capital, the cushion for the depositors of financial institutions, also received a boost from recent changes in the bankruptcy laws. In a Chapter 11 reorganization filing, the bankruptcy trustee is now deemed to have assumed any executory contract made to a financial institution's regulatory agency that creates a commitment to maintain capital of the financial institution.\textsuperscript{113} This

\begin{itemize}
  \item \textsuperscript{110} 11 U.S.C. § 522 (1988).
  \item \textsuperscript{111} Control Act, \textit{supra} note 92, § 2522(b), 104 Stat. at 4866 (to be codified at 11 U.S.C. § 522(c)(3)). Section 522(c), listing exceptions to exempted property, is amended by adding the following new paragraph:
    \begin{quote}
      (3) a debt of a kind specified in section 523(a)(4) or 523(a)(6) of this title owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution.
    \end{quote}
  \item \textsuperscript{112} For example, Texas has no dollar limit for a homestead exemption. \textit{Tex. Code Ann.} § 41.002 (Supp. 1991).
  \item \textsuperscript{113} Control Act, \textit{supra} note 92, § 2522(c), 104 Stat. at 4866-67, (to be codified at 11 U.S.C. § 365(o)). Added to the end of section 365 is the following language:
    \begin{quote}
      (o) In a case arising under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to the Federal Deposit Insurance Corporation, the
\end{itemize}
removes the possibility of the holding company or shareholders filing bankruptcy to avoid a capital maintenance agreement. Once an organization or individual enters into a capital maintenance agreement, bankruptcy will not provide an escape from complying with that agreement.

Moreover, any commitments to maintain the capital of a financial institution are treated as an eighth priority claim, to be paid after distribution to secured creditors but before any payments to general unsecured creditors.114

These amendments expand the ways to reach the assets of the savings and loan and bank bandits who looted taxpayers by destroying insured financial institutions; if the debts arise from fraud, embezzlement or larceny, even exempt property will not be outside of the government’s reach.115 These amendments will "close off the bankruptcy escape hatch for bank and

Resolution Trust Corporation, the Director of the Office of Thrift Supervision, the Comptroller of the Currency, or the Board of Governors of the Federal Reserve System, or its predecessors or successors, to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

Id.

114. Control Act, supra note 92, § 2522(d), 104 Stat. at 4867 (to be codified at 11 U.S.C. § 507(a)(8)). Added to the priority list of section 507(a) is the following paragraph:

(8) Eighth, allowed unsecured claims based upon any commitment by the debtor to the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Director of the Office of Thrift Supervision, the Comptroller of the Currency, or the Board of Governors of the Federal Reserve System, or their predecessors or successors, to maintain the capital of an insured depository institution.

Id.

115. Another possible result of these amendments is that regulatory agencies will be able to use them to enforce net worth maintenance commitments obtained from savings and loan holding company applicants. In pending litigation, the Resolution Trust Corporation argues that the recent amendments expressly and implicitly recognize that a net worth commitment can constitute an enforceable contract, and therefore, the Resolution Trust Corporation seeks to enforce the contract as a third party beneficiary. The other side maintains that the amendments have no application outside of bankruptcy proceedings. See RTC Says Crime Control Act Governs Tetco Net Worth Maintenance Commitment, 56 BNA’S BANKING REPORT 120 (Jan. 21, 1991); Federal Courts Refuse to Enforce Net Worth Maintenance Commitments, 10 BANKING EXPANSION REPORTER 2 (February 18, 1991) (both discussing Resolution Trust Corp. v. Tetco, Inc., No. SA-89-CA-0847, (W.D. Tex. filed Dec. 14, 1990).
thrift insiders whose acts of financial fraud and malice will end up adding perhaps half a trillion dollars to the Federal debt."

VI. CONCLUSION

These changes in the bankruptcy laws will have wide ranging effects. No longer are student loans dischargeable in a Chapter 13 proceeding. No longer are judgments from drug or alcohol induced automobile accidents dischargeable in Chapter 13 proceedings. No longer are criminal restitution orders dischargeable in Chapter 13. No longer can people who destroy federally insured financial institutions use bankruptcy proceedings to avoid their obligations to restore assets to the institution.

For such far reaching changes in the Bankruptcy Code, there was very little planning by Congress. Indeed, the text and legislative history of the enactments show no signs of empirical research, no signs of consultation or input from the judiciary or the bar, and no signs of a general scheme to amend and improve the bankruptcy laws. In fact, the areas that the amendments address were enacted in completely separate bills, and the student loan changes came from two distinct bills.

This lack of rhyme or reason suggests that these changes in the Bankruptcy Code did not result from a calculated plan to alter the bankruptcy laws, but rather were motivated by good public relations. Members of Congress can now say that they are tough on deadbeats who do not pay back their federally guaranteed student loans, that they are protecting victims of crime, that they are aggressively fighting the war on drugs, and that the savings and loan insiders are going to pay for the industry bailout before the taxpayers have to pay one cent. The remarks made by Senators and Representatives in support of the bills on the floors of Congress evidenced these political motivations. For example, regarding the student loan changes, Senator Grassley said, "this country is plagued with doctors, lawyers, and other professionals who have the ability to repay their student loans and other debts, but prefer not to."117

The discussions about the drunk driving changes contained the most political rhetoric. There were many compliments accorded Mothers Against Drunk Driving (MADD), who received credit, along with Senator Danforth, for first proposing the amendments.118 These compliments attest to the

lobbying power of MADD. Taking nothing away from MADD nor Senator Danforth, and in no way discounting the severity of drunk and drugged driving related injuries,\textsuperscript{119} these drunk driving changes in the bankruptcy law were especially politically motivated. If Congress really wanted to help the victims of crimes, and not just to respond to a public outrage over drunk driving, it would have included judgments from intentional torts in the exceptions to discharge of debts in Chapter 13 proceedings.\textsuperscript{120} As it stands now, drunk drivers who injure plaintiffs cannot avoid the judgment rendered against them by filing bankruptcy. Criminals, however, who intentionally harm victims and cause severe injury can generally avoid a judgment against them by filing bankruptcy.\textsuperscript{121} Neither group of perpetrators is deserving of the protection granted by bankruptcy, and neither group of victims is more worthy of the protection granted them by disallowing the discharge of one debt and not the other.

The savings and loan changes also appear to be largely motivated by political reasons. Banks and savings and loans have been failing at increasing rates throughout the 1980s.\textsuperscript{122} Now that the savings and loan fiasco is topping the news, however, Congress has responded. When discussing the financial institution changes, Representative Annunzio said:

\begin{quote}
[There are two things the American people want to see when it comes to the crooks that looted the failed savings and loans. First, the American people want to see the crooks in jail for their crimes . . . . The American people also want to see the money the S&L crooks stole taken away from the crooks. Every cent recovered from the crooks is one less cent that the American people will have to pay as part of the savings and loan bail-out.\textsuperscript{123}
\end{quote}

With the possible exception of the student loan amendments, these enactments appear to be based on political reasons, and not on a belief that

\textsuperscript{119} See Amendment, \textit{supra} note 66, at 2, 1991 U.S. \textsc{Code} Cong. \& Admin. News 4065, 4066 (noting that there were 23,352 alcohol-related highway deaths in 1988).

\textsuperscript{120} See Note, \textit{Chapter 13 Bankruptcy: A Foolproof Mechanism for Avoiding Payment of Civil Penalties Arising out of Criminal Conduct?}, 56 Mo. L. Rev. 803 (1991) (Although plaintiffs who receive tort judgments are small in number, their judgments represent a significant dollar amount of debt in bankruptcy. T. Sullivan, E. Warren \& J. Westbrook, \textit{supra} note 5, at 294-96.).

\textsuperscript{121} But see In re LeMaire, 898 F.2d 1346 (8th Cir. 1990).


people who can pay are using the bankruptcy laws to avoid paying their debts. Whatever the reason for these changes, they are now law. For attorneys, the signal is to be wary—the bankruptcy laws could change again, and news headlines could signal the coming changes.

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124. At least one recent empirical study, however, took issue with the notion that the bankruptcy system is subject to abuse by people who are not really insolvent. A statistical analysis showed that those who seek the protection of bankruptcy are indeed the ones who should-insolvent individuals. T. SULLIVAN, E. WARREN & J. WESTBROOK, supra note 5, at 76-77.