



Written Testimony of Edward C. Boltz
National Association of Consumer Bankruptcy Attorneys

Before the Subcommittee on Antitrust, Commercial and Administrative Law
Judiciary Committee
U.S. House of Representatives

Subject: Oversight of Bankruptcy Law and Legislative Proposals

June 19, 2019

Introduction

Chairman Cicilline, Ranking Member Sensenbrenner and Members of the Subcommittee:

My name is Edward Boltz and I am a consumer bankruptcy attorney, practicing in North Carolina. I am appearing on behalf of the National Association of Consumer Bankruptcy Attorneys (NACBA), where I currently serve as its vice president of and co-chair of its legislative committee. I have also previously served as the president of this same association. NACBA is the only national organization dedicated to serving the needs of consumer bankruptcy attorneys and protecting the rights of consumer debtors in bankruptcy. Formed in 1992, NACBA has nearly 3,000 members located in all 50 states and Puerto Rico. NACBA's members represent a large percentage of the American consumers who file bankruptcy cases in the United States Bankruptcy Courts.

On behalf of NACBA, I want to thank Chairman Nadler and Ranking Member Collins of the Judiciary Committee and Chairman Cicilline and Ranking Member Sensenbrenner of this Subcommittee for the opportunity to offer our views on the state of consumer bankruptcy and also pending legislative proposals. Over the past 25 years NACBA members have greatly appreciated the bi-partisan interest and support of Congress. While there are many issues relating to consumer bankruptcy currently in play both in the courts and throughout the economy as a whole, I will limit my remarks to currently pending legislation directly related to bankruptcy, as well as several other important topics as to which other proposed legislation may serve as effective vehicles for essential change.

1. Restore Bankruptcy Discharge for Student Loans¹

NACBA, through its members and their clients, is often the first to see economic trouble affecting Americans. In 2007, NACBA released with the Consumer Federation of America

¹ All statutory references are to Title 11 of the United States Code, unless otherwise specified.

National Association of Consumer Bankruptcy Attorneys

2200 Pennsylvania Avenue NW 4th Floor East Washington, D.C. 20037

TELEPHONE 800.499.9040

FACSIMILE 202.331.8535

WEB www.nacba.org

and the Center for Responsible Lending a national survey find a sharp rise in subprime mortgage related problems.² In 2012,³ NACBA first forecast the coming “Student Loan Debt Bomb.”⁴ Since then student loan debt has skyrocketed to over \$1.5 trillion.⁵ The amount of student loan debt now surpasses all other types of consumer debt, with the sole exception of mortgage debt.⁶ Student loans have the highest delinquency rate of any other type of household debt.⁷ A significant number of borrowers have fallen into default⁸ and are unable to make meaningful payments.⁹ Growing evidence indicates that student loan debts not only severely restrict borrowers’ futures, but also are choking economic productivity.¹⁰

The history of student loans in the context of bankruptcy is one of ever-increasing restrictions on discharge through legislation often unrelated to bankruptcy, passed with little direct oversight or hearings by this Subcommittee or even Congress more generally. Originally, under the Bankruptcy Code enacted in 1978, student loans were dischargeable after five years in Chapter 7, sooner upon a showing of undue hardship,¹¹ and without a waiting period in Chapter 13. But then, in 1990, through separate legislation not directly related to bankruptcy and subject to scant legislative inquiry, the waiting period in Chapter 7 was extended from five to seven years¹² and later made applicable in Chapter 13.¹³ The waiting period was then completely eliminated in 1998, making covered student loans

² See https://consumerfed.org/pdfs/Bankruptcy_Press_Release041207.pdf

³ See <https://www.nacba.org/wp-content/uploads/2015/06/020712-NACBA-student-loan-debt-report.pdf>

⁴ For regular updates regarding the Student Loan crisis, see <https://www.studentdebtbomb.com/>

⁵ From the Federal Reserve’s G.19 release on consumer credit, available at: <https://www.federalreserve.gov/releases/g19/current/default.htm>.

⁶ See Federal Reserve Bank of New York, Quarterly Report on Household Debt and Credit (2018:Q2), at 3 (Aug. 2018) https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2018Q2.pdf.

⁷ See *id.* at 12-14.

⁸ In the context of student loans, “default” means there have been no payments for more than 270 days, whereas a student loan is “delinquent” if there has not been a payment within 30 days.

⁹ See Kristen Blagg, “Underwater on Student Debt,” (Aug. 2018), https://www.urban.org/research/publication/underwater-student-debt/view/full_report; Ben Miller, “Getting Repayment Rates Right,” Center for American Progress (July 10, 2018), <https://www.americanprogress.org/issues/education-postsecondary/reports/2018/07/10/453199/getting-repayment-rates-right/>; Judith Scott-Clayton, “The Looming Student Debt Crisis Is Worse Than We Thought,” Economic Studies at Brookings (Jan. 10, 2018), <https://www.brookings.edu/wp-content/uploads/2018/01/scott-clayton-report.pdf>.

¹⁰ The negative impacts of student loans have been found to include: (1) lower earnings of college graduates; (2) lower levels of homeownership; (3) fewer automobile purchases; (4) higher household financial distress; (5) lower probability of students choosing public-service careers; (6) poorer psychological functioning; (7) delayed marriage; and (8) lower probability of continuing education through graduate school. For a survey of these findings, see Lawless, Robert M., “Final Report of the ABI Commission on Consumer Bankruptcy” (2019), at 3, fns. 6-13.

¹¹ It was under these statutory provisions that the test for discharge of student loans in the majority of jurisdictions was developed in *Brunner v. New York State Higher Educ. Serv. Corp. (In re Brunner)*, 46 B.R. 752 (S.D.N.Y. 1985), *aff’d*, 831 F.2d 395 (2d. Cir. 1987). Ms. Bruner, the debtor in the case, was forced to seek the discharge of her student loans less than a year after her college graduation. **As interpreted by the courts based on that decision, the undue hardship provision has proved to be a nearly insurmountable barrier to the discharge of student loans in bankruptcy.**

¹² See Crime Control Act of 1990, Pub L. No. 101-647, § 3621, 104 Stat. 4789, 4965.

¹³ See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3007(b)(1), 104 Stat. 1388, 1388-28.

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FACSIMILE 202.331.8535

WEB www.nacba.org

nondischargeable in all cases absent a showing of undue hardship.¹⁴ Most recently, in 2005, the student loan nondischargeability provisions were extended to include private student loans.¹⁵

In response to the unabated growth of the student loan crisis and the greater questions about higher education, there have been numerous proposals large and small. While the Department of Justice, after consultation with NACBA, among others, has published guidelines for allowing Chapter 13 debtors to participate in the various Income Driven Repayment (“IDR”) plans during their bankruptcy,¹⁶ such plans have often faced resistance from bankruptcy courts as purportedly constituting “unfair discrimination.”¹⁷ Additionally, in February 2018, the Department of Education issued a Request for Information regarding its application of the undue hardship standard.¹⁸ Despite the more than 400 responses highlighting the harsh effects of this standard,¹⁹ submitted over a year ago, no results, let alone actual changes in procedures, by the Department of Education have been forthcoming. (Additional congressional oversight of the Department of Education in this regard would be welcome.²⁰) These minimal efforts show the inadequacy of piecemeal, non-comprehensive changes that stop short of restoring the general dischargeability of student loans in bankruptcy.

Furthermore, while government student loan programs generally lend to borrowers without regard to credit worthiness, private student loans are underwritten largely on the same basis as other unsecured consumer loans, with lending risks reflected in the interest rate offered, as well as requirements for co-signers (usually parents or even elderly grandparents), among other demands for security. Research indicates that the nondischargeability of private loans made under BAPCPA did not, however, result in lower interest rates for

¹⁴ See Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837. This Act also eliminated the previous ten year Statute of Limitations for collection of government student loans, making them perhaps the only debt without any such limitation.

¹⁵ See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59. This preclusion of dischargeability, currently codified at § 523(a)(8)(B), refers to any educational loan that is a “qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986,” a category that includes educational loans made by private entities regardless of whether they have a governmental or nonprofit insurance guaranty.

¹⁶ See Anderson, Amanda L. and Redmiles, Mark A., Federal Student Loan Debt in Bankruptcy: Recent Movement Towards Income-Driven Repayment Plans in Chapter 13, United States Attorneys’ Bulletin, Vol. 66, Number 2, pp. 53-71 (March 2018), available at <https://www.justice.gov/usao/page/file/1046201/download>

¹⁷ For a survey of cases related to the separate classification of student loans and the more persuasive reasons that such plans should be allowed, see *In re Engen*, 561 B.R. 523 (Bankr. D. Kan. 2016).

¹⁸ See <https://www.federalregister.gov/documents/2018/02/21/2018-03537/request-for-information-on-evaluating-undue-hardship-claims-in-adversary-actions-seeking-student>

¹⁹ The comments submitted by NACBA can be found at <https://www.regulations.gov/document?D=ED-2017-OPE-0085-0366>

²⁰ The February 2018 RFI may have been a delayed response to the 2014 letter from, among others, several members of this Committee. See Press Release, “Cohen, 6 Members of Congress Urge Education Secretary to Bring More Fairness to Struggling Students” (May 16, 2014) <https://cohen.house.gov/press-release/cohen-6-members-congress-urge-education-secretary-bring-more-fairness-struggling>.

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2200 Pennsylvania Avenue NW 4th Floor East Washington, D.C. 20037

TELEPHONE 800.499.9040

FACSIMILE 202.331.8535

WEB www.nacba.org

student borrowers,²¹ in large part because there is a lack of evidence showing strategic default by borrowers prior to the enactment of BAPCPA.²²

Restoration of the discharge in bankruptcy for government and private student loans would help the most debt-burdened borrowers of these loans economically functional once again. At the same time, bankruptcy is a serious financial step, which subjects debtors to strict scrutiny of not only their income, but also their assets.²³ Further, bankruptcy not only carries a severe social and moral stigma, but also has a dramatic and lasting effect on debtor's credit score for as long as 10 years. These impacts ensure that any release from student loan indebtedness is not without severe cost, avoiding the moral hazard concerns potentially present under other forgiveness plans.

For these reasons, NACBA supports the following:

- **Student Borrower Bankruptcy Relief Act**, H.R. 2648 & S. 1414: This bipartisan bill would return discharge rights to debtors for student loans.
- **Private Student Loan Bankruptcy Fairness Act of 2019**, H.R. 885: This bill would restore discharge rights for debtors for non-governmental student loan.
- Continued and expanded oversight of the Department of Education and its handling of undue hardship under current law.
- To the extent that student loans remain nondischargeable, expressly affirm that Chapter 13 plans may separately classify student loans to allow maintenance of payments for borrowers in income-driven repayment plans.

2. Treat Veterans' Benefits the Same as Social Security Benefits by Excluding Them From Current Monthly Income

The Bankruptcy Code uses a “means test” in chapter 7 and a “projected disposable income test” in chapter 13 a measure of the debtor's ability to pay creditors. Both tests are based on “current monthly income,”²⁴ which excludes benefits received under the Social Security Act. Both Social Security disability and retirement benefits²⁵ are excluded based upon the protection that such benefits have from seizure or assignment for creditors.²⁶ Debtors

²¹ Alexei Alexandrov & Dalie Jiménez, *Lessons from Bankruptcy Reform in the Private Student Loan Market*, 11 HARV. L. & POL'Y REV. 175 (2017).

²² See Rajeev Darolia & Dubravka Ritter, *Strategic Default Among Private Student Loan Debtors: Evidence from Bankruptcy Reform* (2017), <https://ssrn.com/abstract=3064662>.

²³ Unlike the various IDR plans, which look solely to a borrower's income without regard to assets, a bankruptcy filing only allows debtors to retain exempt assets without paying claims, including those for student loans, for such nonexempt assets.

²⁴ 11 U.S.C. § 101(10A) (B)

²⁵ Other benefits provided under the Social Security Act include: Medicaid, 42 U.S.C. § 1396b; programs in Guam, Puerto Rico, and the Virgin Islands providing old age benefits, *id.* at §§ 301-306; the Stephanie Tubbs Jones Child Welfare Services Program, *id.* at §§ 620-628; programs for family support, family preservation, family reunification, and adoption support services, *id.* at §§ 629-629i; foster care and adoption assistance, *id.* at §§ 670-679c; and aid to the blind in Puerto Rico, Guam, and the Virgin Islands, *id.* at §§ 1201-1206.

²⁶ 42 U.S.C. § 407(a).

receiving Social Security benefits are protected from being worse off in bankruptcy than outside of it.²⁷ Veteran's retirement and disability benefits, however, are not excluded, despite having virtually identical purposes, functions and protections outside of bankruptcy.²⁸ Congress should extend the same protections to disabled and retired veterans as civilians currently have. (Indeed, depending on the type of employment, some civilians may not even be eligible to participate in the Social Security and must instead rely upon other sources of retirement and/or disability benefits that also have virtually identical purposes, functions and protections outside of bankruptcy.²⁹) Because the amount of a veteran's retirement is based on the service member's final rank and can potentially be substantial, this exclusion should not exceed the maximum available Social Security benefit.³⁰

For these reasons, NACBA supports the following:

- **Honoring American Veterans in Extreme Need Act of 2019** or the **HAVEN Act**, H.R. 2938 and S. 679: As currently proposed, the HAVEN Act would exclude “any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37 or 38 [of the United States Code] in connection with a disability, combat related injury or disability, or death of a member of the uniformed services except that retired pay excluded under this subclause shall include retired pay under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.” This legislation would exclude only veteran's disability benefits, but is a modest improvement over current law.
- NACBA strongly supports expanding the proposed protections under the HAVEN Act to exclude “any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37 or 38 in connection with a disability, combat related injury or disability, **retirement** or death of a member of the uniformed services except that retired pay excluded under this subclause shall include retired pay under chapter 61 of title 10 only to the extent that such retired pay exceeds the **maximum Social Security retirement benefit amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.**” This version would best promote and implement the goals of the proposed legislation by providing retired veterans the full scope of the same protections afforded civilians, and no more.

²⁷ See the remarks of Senator Edward Kennedy, 145 CONG. REC. 29,929 (1999).

²⁸ See 38 U.S.C. §§ 1101-1163 (service-connected military disability benefits); *id.* at §§ 1501-1543 (nonservice-connected disability benefits).

²⁹ See, for example, 3 See 5 U.S.C. § 8346 (exempting civil service retirement benefits from legal process); 22 U.S.C. § 4060(c) (exempting foreign service retirement and disability payments from attachment); 33 U.S.C. § 916 (exempting longshoremen's and harbor workers' pensions from assignment and legal process); 38 U.S.C. § 1562 (exempting Congressional Medal of Honor pension from legal process); 38 U.S.C. § 5301(a)(1) (exempting veterans benefits from assignment and legal process); 45 U.S.C. § 231m (exempting railroad retirement benefits from assignment).

³⁰ This amount is currently \$2,788.00 a month or \$33,456.00 a year.

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2200 Pennsylvania Avenue NW 4th Floor East Washington, D.C. 20037

TELEPHONE 800.499.9040

FACSIMILE 202.331.8535

WEB www.nacba.org

- For the same reasons, these protections should be extended to the other pension and disability benefits discussed herein that have virtually identical purposes, functions and protections outside of bankruptcy as Social Security benefits.

3. **Reduce Paperwork and Pre-Bankruptcy Counseling Requirements That Needlessly Increase Costs and Unfairly Inhibit Access to Bankruptcy**

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 created many new wasteful requirements for debtors in need of bankruptcy relief, which act as barriers to the courts and restrict access to justice for lower income debtors who cannot afford the increased costs that they have caused. Prominent among these is the requirement that individual debtors obtain credit counseling prior to filing bankruptcy.³¹ Particularly for debtors facing exigent circumstances, such as a pending foreclosure, wage garnishment, or vehicle repossession, this credit counseling requirement, aimed at providing alternatives related solely to unsecured debts, provides little, if any, benefit.³² Further, as at least 85-90% of debtors that complete an approved credit counseling course ultimately do file bankruptcy,³³ the utility of this requirement is negligible, particularly as the cost of credit counseling can be a deterrent for debtors with below median income.

For these reasons, NACBA recommends the following:

- **Credit Counseling:**
 - **Exception for Exigent Circumstances:** A waiver of the pre-bankruptcy credit counseling requirement should be made available in cases where the counseling offers no real benefit or where any potential benefit is outweighed by the need to permit filing without such counseling in order to preserve the ability to obtain the fundamental benefit of a fresh start, such as in cases involving pending foreclosures, wage garnishments, and vehicle repossessions.
 - **Elimination for Debtors with Below Median Income:** As debtors with family income below the median are presumed to be entitled to bankruptcy relief and not subject to Means Testing, they should similarly not be required to undergo credit counseling.

4. **Exclude Earned Income Tax Credits (EITC) Exclusion From Disposable Income and Property of the Estate**

Congress intended the EITC to be available to low income working families who need those funds for basic necessities of life. However, many states' exemption laws do not

³¹ 11 U.S.C. § 109(h).

³² See Michael D. Sousa, Just Punch My Ticket: A Qualitative Study of Mandatory Debtor Financial Education, 97 MARQ. L.REV. 391, 463 (2013).

³³ See U.S. TRUSTEE PROGRAM, DIRECTOR ADDRESSES THE 52ND ANNUAL SEMINAR OF CHAPTER 13 TRUSTEES (July 31, 2017), <https://www.justice.gov/ust/speeches-testimony/director-addresses-52nd-annual-seminar-national-association-chapter-13-trustees>

protect EITC funds, which often means they can be seized by bankruptcy trustees. This results in lower income families losing this valuable resource at the time they need it most in filing for bankruptcy relief. The EITC should be treated the same as Social Security benefits and protected in bankruptcy.

For these reasons, NACBA supports the following:

- **Working Families Tax Relief Act of 2019**, H.R. 3157 and S. 1138:³⁴ Bankruptcy protections for the EITC should be added with an amendment to this proposal.

5. Adjust Chapter 13 Debt Limits

Many urban areas have experienced enormous increases in home prices in the past several years, far in excess of the index used to adjust dollar amounts in the Bankruptcy Code. In some of these areas, the resulting home mortgage debt necessary for families to buy a home disqualifies them from eligibility for Chapter 13 relief because of the secured debt eligibility limit in 11 U.S.C. § 109(e).³⁵ Despite being adjusted for inflation every three years,³⁶ to maintain Chapter 13 eligibility for homeowners, the secured debt limit needs to be adjusted accordingly.

In a similar vein, student loan debt has also, as mentioned previously, skyrocketed in the last several years. Particularly since there is no longer a statute of limitations on federal student loans, many loans have continued to accumulate interest and collection costs over decades. The balances owed on these loans can easily prevent individual student borrowers from qualifying for Chapter 13 under the § 109(e) debt limits and thus present a further basis for adjusting the debt limit to ensure meaningful access to bankruptcy relief.

For these reasons, NACBA recommends the following:

- **Family Farmer Relief Act of 2019**, H.R. 2336 & S.897: This bipartisan bill would increase the debt limit for family farmers in Chapter 12 from \$4.2 million to \$10 million. This bill should be amended to similarly double, or substantially increase, the debt limit for consumer debtors in Chapter 13.

6. Clarify That Late-Filed Tax Returns are Considered Returns in Bankruptcy

The Bankruptcy Code has long permitted debtors to discharge certain tax debts not incurred by fraud.³⁷ More specifically, tax debts based on late-filed returns have been dischargeable

³⁴ The latter entitled “A bill to amend the Internal Revenue Code of 1986 to expand the earned income and child tax credits, and for other purposes.”

³⁵ Currently, the debt limit for noncontingent, liquidated unsecured debt is \$419,275.00 and for noncontingent, liquidated secured debt it is \$1,257,850.00

³⁶ 11 U.S.C. § 104(a).

³⁷ See *United States v. Hindenlang (In re Hindenlang)*, 164 F.3d 1029 (6th Cir. 1999), which established a four-part test to determine if a filing is a “return” if it (1) purports to be a return, (2) is executed under penalty of perjury,

in carefully articulated circumstances. In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), added a confusing and unnumbered paragraph to the Code³⁸ which several circuit courts³⁹ have interpreted as preventing the discharge of *any* tax debt pursuant to a late-filed return. Under this “one-day late” rule, a tax debt based on a return filed even a single day late is no longer dischargeable under any circumstances. Because other Code language was not amended and still indicates that tax debt based late-filed returns may be discharged, it is likely that the unnumbered, hanging paragraph was the result of an unintentional drafting error. The IRS continues to allow the discharge of certain tax debt related to late-filed returns, but some state authorities have taken a more aggressive view.⁴⁰ When strictly applied, the effect of the “one-day late” rule renders all such debt nondischargeable forever. The American Bar Association,⁴¹ the American Bankruptcy Institute,⁴² and the National Bankruptcy Conference⁴³ have corrective proposals to clarify the law.

For these reasons, NACBA recommends the following:

- **Taxpayer First Act of 2019, H.R.1957:** This bill could be a vehicle for amending 11 U.S.C. § 523(a)* to include the following taken from the American Bar Association:

“For purposes of this subsection, the term ‘return’ means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements **other than timeliness**).” (Additional language in bold.)

Conclusion

On behalf of the National Association of Consumer Bankruptcy Attorneys, our members, and our clients, I thank you for this opportunity to testify before the Subcommittee on Courts, Commercial and Administrative Law of the Judiciary Committee, regarding your oversight of bankruptcy law and pending legislative proposals. NACBA stands ready to continue to work with this Subcommittee and other interested parties in devising effective solutions regarding Student Loan discharge, the equitable treatment of Veteran’s retirement and disability benefits in bankruptcy, the lowering of barriers to filing bankruptcy, the protection of the Earned Income Tax Credit, the

(3) contains sufficient data to allow calculation of tax, and (4) represents an honest and reasonable attempt to satisfy the requirements of the tax law. In that case, where the debtor did not file any document until after the IRS had completed its assessment with a Substitute for Return (“SFR”), such document was not considered a return.

³⁸ Commonly referred to as either 11 U.S.C. § 523(a)* or the 523(a) Hanging Paragraph.

³⁹ See *McCoy v. Mississippi State Tax Comm’n*, 666 F.3d 924 (5th Cir. 2012), *Mallo v. IRS (In re Mallo)*, 774 F.3d 1313 (10th Cir. 2014), and *Fahey v. Mass. Dep’t of Revenue (In re Fahey)*, 779 F.3d 1 (1st Cir. 2015).

⁴⁰ See *Giacchi v. IRS (In re Giacchi)*, 856 F.3d 244, 247 (3^d Cir. 2017) (“The government notes that this approach, called the ‘one-day-late rule,’ fails to harmonize provisions of § 523 that contemplate some late-filed forms are “returns.”).

⁴¹ See <https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/072914letter.pdf>

⁴² See Lawless, Robert M., “Final Report of the ABI Commission on Consumer Bankruptcy” (2019), at 21-25.

⁴³ See <http://nbconf.org/wp-content/uploads/2015/07/NBC-Ltr-S-Jensen-re-ABA-Taxation-Proposal-523a.pdf>

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2200 Pennsylvania Avenue NW 4th Floor East Washington, D.C. 20037

TELEPHONE 800.499.9040

FACSIMILE 202.331.8535

WEB www.nacba.org

increase of Chapter 13 debt limits, and clarifications of the definitions of tax returns, as well as any other important bankruptcy issues affecting consumer debtors.

Speaker:

Edward Charles Boltz

Vice President, NACBA

National Association of Consumer Bankruptcy Attorneys

2200 Pennsylvania Avenue NW 4th Floor East Washington, D.C. 20037

TELEPHONE 800.499.9040

FACSIMILE 202.331.8535

WEB www.nacba.org