

House Considers Additional Bankruptcy Judgeships, Creation of Consumer Financial Protection Agency

Editor's Note: *The House considered two very important matters to the bankruptcy community in June. On June 16, 2009, the Commercial and Administrative Law Subcommittee of the House Judiciary Committee held a hearing on "Bankruptcy Judgeship Needs" regarding the Judicial Conference's 2009 Bankruptcy Judgeship Recommendations to Congress. The witnesses were: Hon. Barbara M. G. Lynn, U.S. District Court for the Northern District of Texas, on behalf of the Judicial Conference; Hon. David S. Kennedy, U.S. Bankruptcy Court for the Western District of Tennessee, on behalf of the National Conference of Bankruptcy Judges; William Jenkins, Jr., Ph.D., Director of Homeland Security and Justice Issues, U.S. Government Accountability Office; and Carey D. Ebert, Ebert Law Offices PC, Hurst, Texas, on behalf of the National Association of Consumer Bankruptcy Attorneys. Reprinted below are excerpts from the written testimony of Chief Judge Kennedy. For his complete testimony and that of the other witnesses, please go to http://judiciary.house.gov/hearings/hear_090616.html. On June 24, 2009, the House Financial Services Committee held a hearing on "Regulatory Restructuring: Enhancing Consumer Financial Products Regulation." During this hearing, ABI member and Harvard University Leo Gottlieb Professor of Law Elizabeth Warren testified regarding her proposed solution to fix the credit-product markets by creating a Consumer Financial Protection Agency. Reprinted below are excerpts from her written testimony. For her complete testimony and that of the other witnesses, please go to www.house.gov/apps/list/hearing/financialsvcs_dem/hrfc_062409.shtml.*

Bankruptcy Judgeships **Testimony of Hon. David S. Kennedy** *U.S. Bankruptcy Court Memphis, Tenn.*

The Judicial Conference has recently recommended that Congress authorize 13 new additional bankruptcy judgeships in the following judicial districts: AR (E and W)-(1); FL (M)-(1); GA (N)-(2); MI (E)-(3); MS (N)-(1), NV-(1), CA (E)-(1); WV (S)-(1) FL (N)-(1); and NC (W)-(1). The Judicial Conference also has recommended that

Congress convert 22 existing temporary bankruptcy judgeships to permanent status in 15 judicial districts and extend two existing temporary bankruptcy judgeship for five years. All these recommendations are based upon criteria discussed hereinafter through a process established by the Judicial Conference and its Bankruptcy Committee with great input from the Federal Judicial Center.

It is pursuant to 28 U.S.C. §152(b) (2), which was enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, that the Judicial Conference has submitted its current recommendation to Congress concerning the number and status of bankruptcy judges now needed for various judicial districts. These judgeships are truly necessary and essential, and this recommendation is not made lightly. Moreover, it is based on a thorough quantitative analysis using the respective

judicial districts' caseloads as starting points, in addition to consideration of numerous objective and subjective factors in each requesting district.

The applicable case weight formula currently utilized is based upon a Federal Judicial Center study that includes a detailed analysis of the amount of judicial time it takes to address all the bankruptcy cases filed in a judicial district.

In 1991, the Judicial Conference determined that an annual weighted caseload of at least 1,500 per judgeship should be the demarcation point or threshold to commence the early stages of the examination of whether an additional judgeship is justified. This is approximately 15 to 20 percent higher than the national workload average. In other words, by the time the district requests additional judgeships, those judges ordinarily are already working beyond the level the Judicial Conference deemed to be the standard in 1991.

The work of the bankruptcy judges today is more complex and more time consuming than it was in 1991 and also

the attorneys for debtors and creditors are more sophisticated. Bankruptcy judges know the increased volume of work that is reflected, on the court's dockets; and in individual bankruptcy cases, the work is significantly above the levels from almost two decades ago. Furthermore, the existing case weight formula does not take into account approximately 35 additional proceedings (*i.e.*, new motions) that have been added by virtue of the enactment of the 2005 Bankruptcy Act.

The case weight formula and case filing data, however, are only starting points to determine the recommendations to Congress on the number of judgeships currently needed; the case weight is one of a number of many factors....In addition to the raw case filing data used to determine the case weights for a district, the Judicial Conference's Bankruptcy Committee and the AO

review extensively the information that is readily on hand (e.g., local rules and standing orders, and other relevant demographic and social data), before ordinarily sending an onsite survey/visit team to the requesting district for an in-depth analysis of the overall situation in the district relevant to the judgeship requirements.

There is a significant amount of research that goes into the survey before the team ever visits the district.

Once the survey team arrives in the district, it reviews many aspects of the local court's and the individual judge's practices, from calendaring to docket management.

The survey team generally interviews local judges, key court personnel, members of the local debtor/creditor bar, the U.S. Trustee (or Bankruptcy Administrator), panel trustees and others including local industry leaders and economists or academics.

Legislative Update

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Before leaving the requesting district, the judge member of the survey team meets with the judges of the local court and furnishes a candid oral preliminary evaluation of the court's practices....After the onsite survey, the survey team reviews the data gathered and carefully and methodically considers all factors and all methods, which could assist in, or resolve the need for, additional assistance. After a consensus is reached, the survey team's recommendation is documented.

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In addition to voluminous case filings and the increased Bankruptcy Code requirements for each case, in the current economic climate the courts are seeing some of the largest and most complex cases come across their dockets. Along with landmark cases, there are also many honest but unfortunate financially distressed consumer/individual and small and large business debtors who also seek the protection under the Bankruptcy Code to ensure that they are afforded an opportunity, for example, to keep their home, minimize the impact that financial stress can have on their families, and reorganize their businesses.

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The courts' current overloaded dockets' affect more than the judges. Members of the court staff and court security officers also are overworked in their efforts to assist the judges to attend to every matter on the docket in a timely and fair manner.

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In conversations with fellow bankruptcy judges around the country, I consistently hear that the bankruptcy system is under stress. We bankruptcy judges need your help in order to accomplish the judicial goal set forth in Fed. R. Bankr. P. 1001 "to secure the just, speedy, and inexpensive determination of every case and proceeding." Adequate judicial resources are crucial. We again are nearing historic case filing levels, and need the additional resources requested in order to continue to provide fair and accessible justice to all parties in bankruptcy cases and proceedings.

Creation of Consumer Financial Protection Agency

Testimony of Prof. Elizabeth Warren
Harvard Law School; Cambridge, Mass.

Washington is a complicated place, and this Committee deals with its fair share of complicated issues. But we are here today because of a problem that can be explained in five blunt words: The credit market is broken.

That problem not only caused the current financial crisis, but it threatens to perpetuate the crisis and also trigger similar economic tragedy in the future.



Prof. Elizabeth Warren

I'm not here today to talk about everyone who has gotten into trouble on a credit card or who has a mortgage that is too big. The need for personal responsibility is as strong as ever. If someone goes to the mall and charges thousands of dollars to buy things they can't afford, they should have to deal with the consequences. And if someone signs on to buy a five-bedroom home with a spa bath and a media room that they can't afford, they should lose it.

We are here today to talk about broken markets—and about the consequences of those broken markets for hard-working, play-by-the-rules families, for financial institutions competing on a skewed playing field and for our entire economy.

We all know the value of a well-functioning market. It increases efficiencies and produces prosperity. But when a market is broken, the cost is enormous—not just for consumers, but for everyone.

I'm happy to be here today to talk about how I think we can help fix the broken credit market. And I can sum it up in four words: Consumer Financial Protection Agency.

What a Consumer Financial Protection Agency Can Do

I am here today because I believe that the establishment of a Consumer Financial Protection Agency is the best way to get things right. Specifically, I believe it will do four things:

Reduce Systemic Risk

First, it will reduce systemic risk. If we don't feed high-risk, high-profit loans into the system, those risks will not get sliced and diced into questionable asset-backed securities and sold throughout the financial system. If we had had a Consumer Financial Protection Agency five years ago, Liar's Loans and no-doc loans would never have made it into the financial marketplace—and never would have brought down our banking system. The economic system took on so much risk—one household at a time—that it destabilized our entire economy. If we stop feeding these high risk loans into the system on the front end, then we're all safe, and we will not need as much new regulation elsewhere in the system.

Reduce Regulatory Burdens

Second, a single regulatory agency watching out for families and individuals can reduce the overall regulatory burden. Right now, we have layers of contradictory, expensive, and sometimes flat-out useless regulations. We need to cut through all that, to authorize one agency to encourage and help develop some plain-vanilla, safe-harbor mortgages, credit cards, car loans and the like that will automatically pass regulatory muster. Picture it—a credit card contract that is two pages long, clear and easy to read, and that has a few well-lit blanks—the interest rate, the penalty rate, when a penalty will be imposed, and how to get the free gift. Each lender can decide how to fill in the blanks for the cards it wants to sell, and each customer can make quick comparisons to see who is offering the best deals. That is a market that works—cheap for the card issuer and good for the customer. Yes, banks could offer something else, but they have to show it meets basic safety rules—things like whether a customer can read it in four minutes or less. It is time to spend less time and less money on regulations that don't work and pass those savings on to the customers.

Foster Innovation

Third, the Consumer Financial Protection Agency will foster innovation. It is important to distinguish good innovation and bad innovation. Figuring out one more trick that boosts company revenues while picking a customer's pocket

is not good innovation. Again, the analogy to physical products is useful. The Consumer Product Safety Commission does not permit manufacturers to “innovate” by cutting down on insulation or removing shut off switches. Safety is the baseline, so toaster manufacturers compete by coming up with better products at lower prices. That’s innovation that works. Likewise, the proliferation of bad products can in fact hinder the innovation of good products. When the FDA began keeping sugar pills off the market, the pharmaceutical industry had more incentive to innovate and develop those safe products. Again, that is a market that works.

Some are arguing that the Agency will limit consumer choice. They say that consumers should choose the products they want for themselves without Big Brother stepping in. But how can consumers pick the products they want when they are unable to make real comparisons between them? What kind of choice is presented by stacks of paper with incomprehensible legalese—and a billion-dollar ad campaign to sell consumers on the highest-profit items? The Agency will fix the market by

putting consumers in a position to make the best decisions for themselves. The financial institutions who have profited from hiding tricks and traps in the fine print may not like reform, but that is what happens when markets work like they should.

Level the Playing Field by Putting Someone on the Consumer’s Side

Fourth, the Agency will provide a regulatory home for specialists who care about this issue and whose priority is to level the playing field and give American families a fair shake. We need an agency that allows regulators to make consumers their first priority—not where consumer protection plays second fiddle to bank profitability. We need specialists who won’t just be on the bottom rung of an agency dedicated to other priorities.

If you have any doubts about whether a Consumer Financial Protection Agency can work, just look to history.

The FDIC was opposed by the big banks.¹ Would we be better off today if it hadn’t been set up to insure deposits?

The FDA gets its fair share of criticism, but would we better off if

we could still buy pharmaceuticals from anyone with a bathtub and some chemicals or if no one checked for carcinogens in our cosmetics?

The Consumer Product Safety Commission isn’t perfect, but would we be better off with fewer protections over infant car seats, bb guns, or lead in children’s toys?

People are alive today because agencies made sure that products were safe. Markets work better today because agencies put basic safety regulations in place, so that competition is about things consumers can see. People who charge too much or who buy houses they cannot afford shouldn’t be bailed out, but everyone should have a fighting chance to make good financial decisions.

You have a rare opportunity—in this committee and in this Congress—to get things right. Now is the time for a Consumer Financial Protection Agency to repair a broken market, to give families the properly functioning credit market that they deserve, to level the playing field among financial institutions, and to prevent the next economic crisis. ■

¹ Mark D. Flood, “The Great Deposit Insurance Debate,” Federal Reserve Bank of St. Louis (July/August 1992) (online at www.research.stlouisfed.org/publications/review/92/07/Deposit_Jul_Aug1992.pdf).