

CONSUMER BANKRUPTCY

Is another wave of bankruptcy reform ahead?

Senator-elect Elizabeth Warren may push for change

By Craig D. Robins

For eight years leading up to 2005, the banking and credit card industries lobbied Congress incessantly, urging them to believe that American consumers who sought bankruptcy relief were essentially deadbeats. That year, Congress bought into this perception and promulgated a great number of strict changes to the Bankruptcy Code which made it much harder for the typical consumer to discharge debt obligations in bankruptcy. Consequently, Congress enacted BAPCPA — The Bankruptcy Abuse Prevention and Consumer Protection Act.

This bankruptcy reform was designed to pull every last dollar out of hardworking but suffering middle class families who appeared to have an extra dollar or two to spare — at least on paper, according to a series of controversial calculations called the bankruptcy Means Test — a new eligibility requirement for those seeking Chapter 7 relief. This law was a major victory for the banks, and unfortunately created an inequitable situation for many consumers.

A respected Harvard University bankruptcy law professor at the time, who I deemed a hero to the typical middle class families I usually represent in my Long Island bankruptcy practice, was a very outspoken critic of these proposed laws. That was Elizabeth Warren, who was this country's foremost authority on the sociology of Americans who file bankruptcy.

Warren became known for her critical opinions of the practices of the banking and credit card industries, and I have written about her previously in this column. In 2000 she co-authored a book, *The Fragile Middle Class and The Two-Income Trap: Why Middle-Class Mothers and Fathers Are Going Broke*, in 2003.

In the latter book, she stated, "This year, more people will end up bankrupt than will suffer a heart attack. More adults will file for bankruptcy than will be diagnosed with cancer. More people will file for bankruptcy than will graduate from college. And, in an era when traditionalists decry the demise of the institution of marriage, Americans will file more petitions for bankruptcy than for divorce."

Some commentators have said Warren has become the countries most respected and resonant voice on consumer issues since Ralph Nader's zealous quest to protect consumers in the 1970s.

Warren Goes to Washington

Now it looks like the Senate Banking Committee is about to get a serious dose of bankruptcy expertise from the protector of the middle class. Ms. Warren defeated her Republican rival last month in one of the most expensive and most watched Senate campaigns of the year — for the Massachusetts seat previously held by the late Ted Kennedy. It is expected that



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Warren will land a seat on the high-profile Senate Banking Committee.

More importantly, as a staunch advocate of protecting the consumer, an ardent critic of the banking industry and an outspoken critic of BAPCPA, there is a high likelihood that Ms. Warren, now as a lawmaker, will take the initiative to

introduce legislation to reform the problems and inequities created by the Bankruptcy Reform Act of 2005. There is no doubt that Ms. Warren will bring her liberal, pro-consumer views to the Senate.

Warren created the U.S. Consumer Protection Bureau, a federal agency established in 2010, not only to prevent risky mortgage practices, but also to stop credit card companies from continuing to engage in unfair and predatory business practices.

A great many bankruptcy judges across the country, including several in our own district, have officially and unofficially expressed their frustration with many aspects of the new bankruptcy laws. Sometimes their personal opinion is that many parts of the law are a disaster.

In addition to making it harder for the middle class to get bankruptcy relief, BAPCPA is flawed and poorly drafted. This has resulted in many decisions which have caused judges to stray from a strict interpretation of its hastily drafted words, which can result in an absurd result and instead, focus on a more commonsense analysis. BAPCPA was drafted primarily by lobbyists, rather than bankruptcy professionals. A significant problem continues to be a lack of consistency among courts in different jurisdictions for enforcing its provisions.

Warren has pledged to stand up for the little guy against the financial forces of Wall Street. I predict that when Warren goes to Washington, the likelihood is that we will see her introduce some substantive pro-debtor legislation to amend the Bankruptcy Code, in which she will seek to reform some of the ill conceived and poorly drafted aspects of BAPCPA. She will also likely address issues concerning student loan debt relief, mortgage debt relief, as well as the debt burden on consumers.

Ms. Warren's election to the Senate is wonderful news for bankruptcy attorneys and middle-class Americans alike.

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