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# Consumer Issues in the New Congress

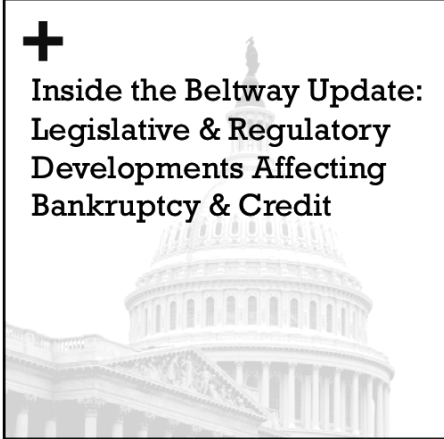
Samuel J. Gerdano | Executive Director  
American Bankruptcy Institute  
Alexandria, Va


**Educational  
Materials**

2011


**+**

**Inside the Beltway Update:  
Legislative & Regulatory  
Developments Affecting  
Bankruptcy & Credit**





Samuel J. Gerdano\*  
Executive Director, American Bankruptcy Institute  
ABI Northeast Consumer Forum  
January 17, 2011





\*Views expressed are those of presenter, not the ABI.

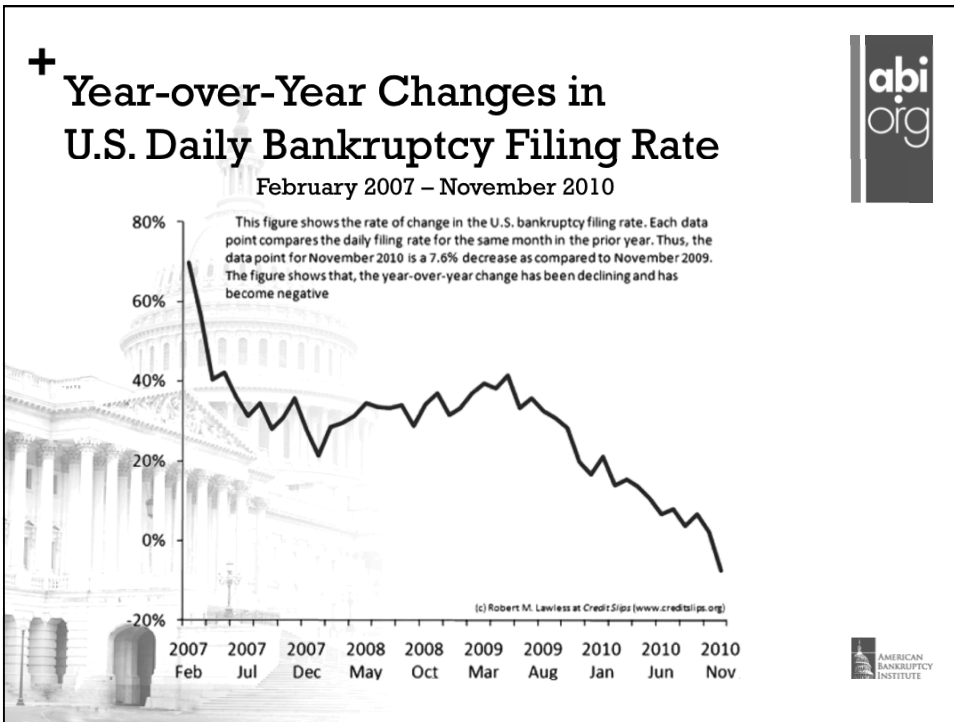
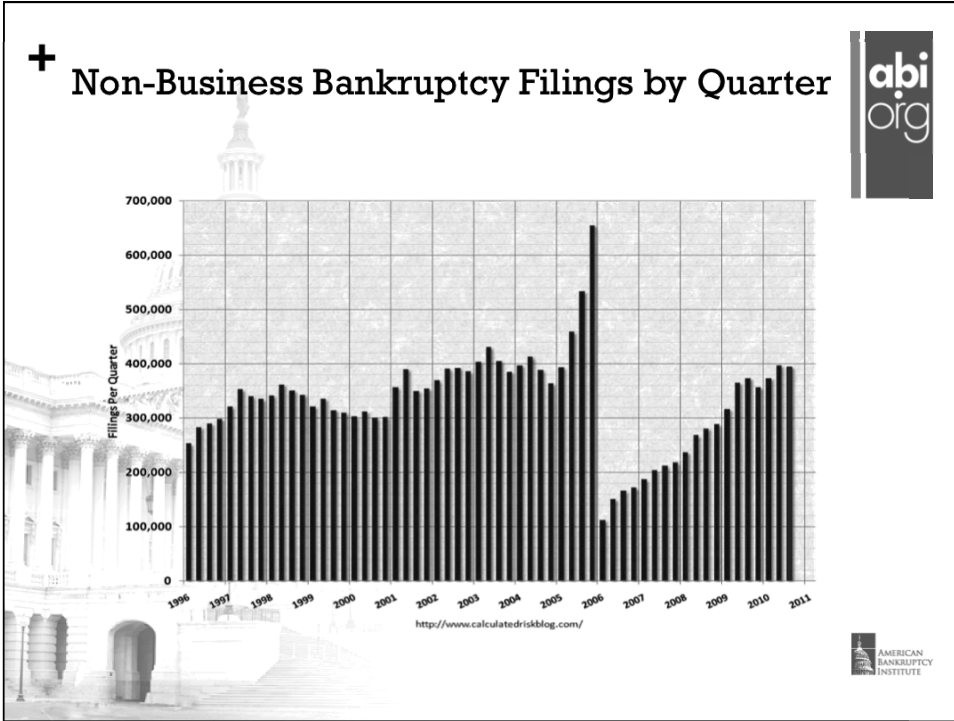
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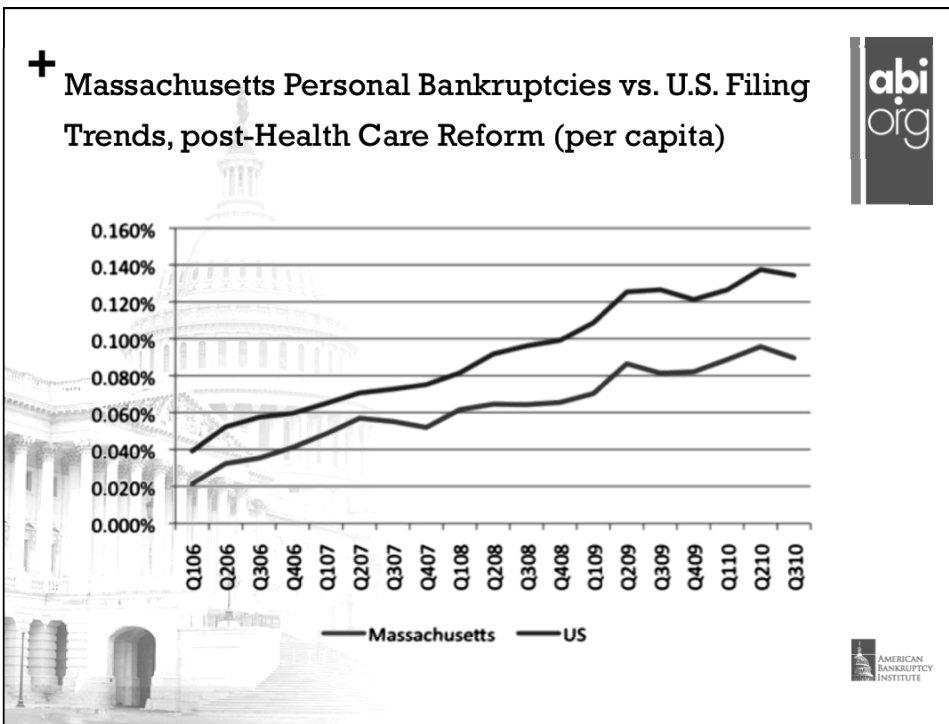
## Elections Have Consequences

- Washington’s new agenda, orientation (111<sup>th</sup> Congress)
  - “Never Let a Good Crisis Go to Waste”
  - Need for speed sacrifices transparency, regular order
  - New sources of power and influence; others on defensive
    - Center for American Progress; Center for Responsible Lending; U.S. Chamber of Commerce
  - Activist government role has impact on businesses, consumers, debtors, creditors and stakeholders, in addition to U.S. taxpayers
    - Stimulus, auto and GSE takeover, health care, student loans, resolution authority for “too big to fail” financial entities
    - Lame duck refused to go quietly
    - Congressional job approval: 19.6% Disapproval 74% (-54.4%)
- New Congress – Effect of a new GOP majority (112<sup>th</sup> Congress)

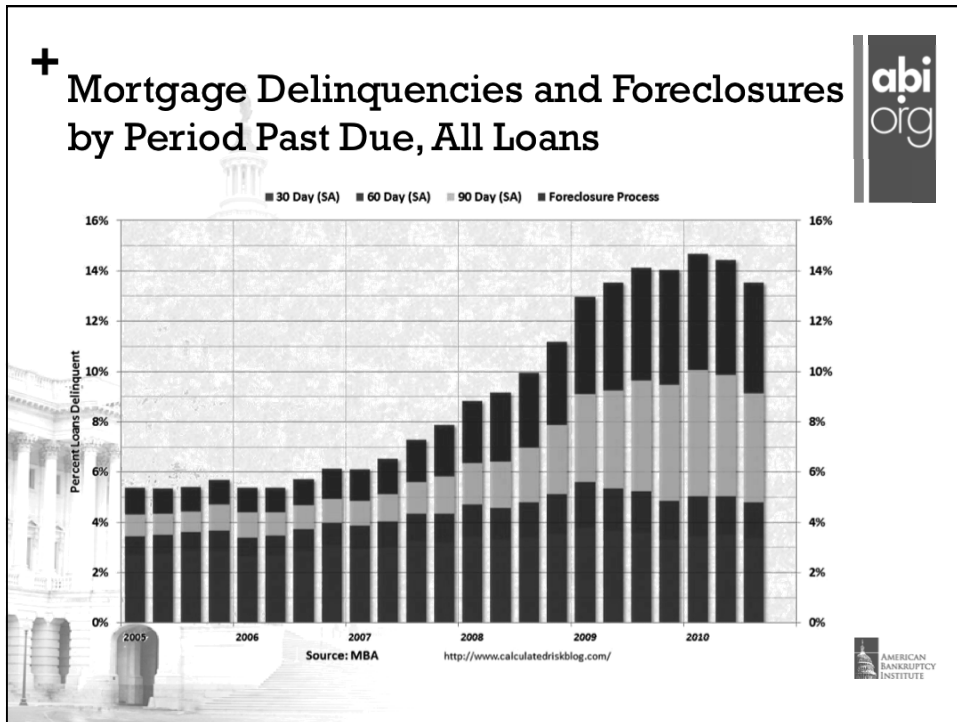
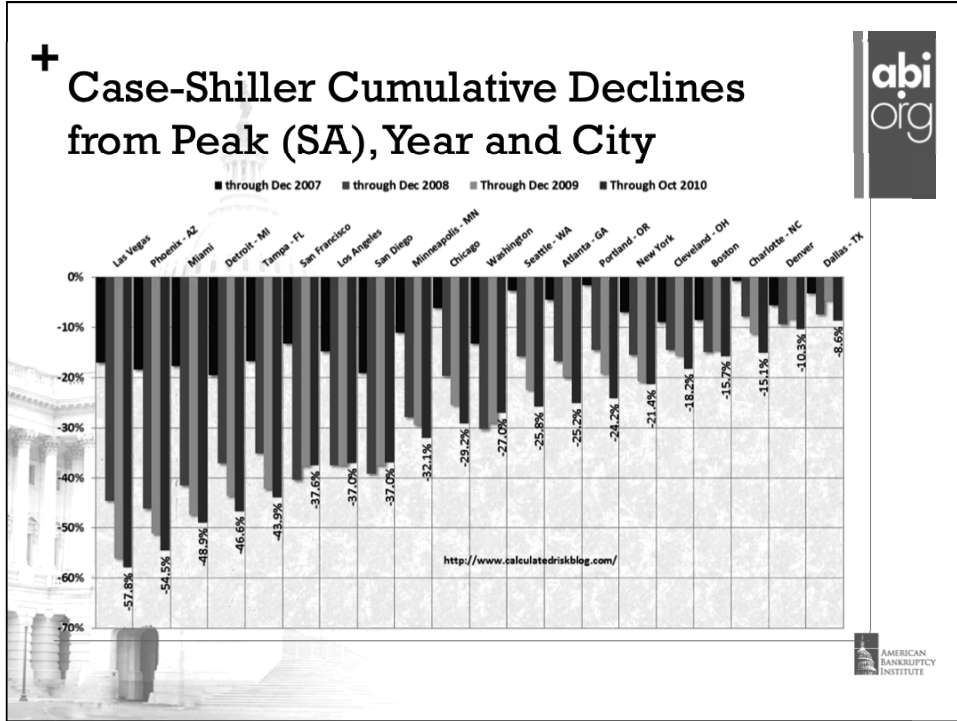








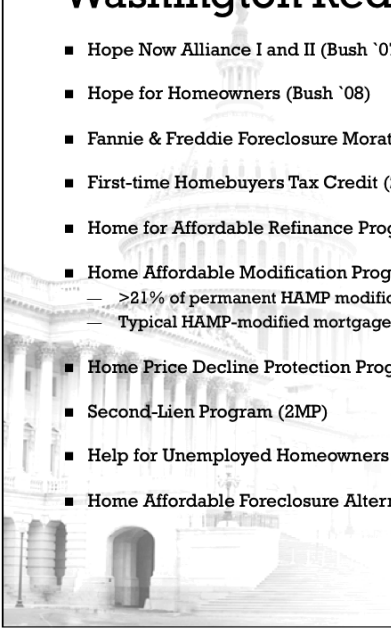
- ### + Washington Manufactures a Permanent Mortgage Crisis
- "Fannie Mae Eases Credit to Aid Mortgage Lending"  
- *NY Times*, Sept. 30, 1999
  - "New Agency Proposed to Oversee Freddie Mac and Fannie Mae"  
- *NY Times*, Sept. 11, 2003
  - "These two entities are not facing any kind of financial crisis."  
- B. Frank, Sept. 11, 2003
  - "I do not want the same kind of focus on safety and soundness... I want to roll the dice a little bit more towards subsidized housing."  
- B. Frank, Sept. 25, 2003
  - HUD regulations (2007) required that 55% of all GSE loans acquired had to be to borrowers at or below median income
  - By end of 2008, GSEs hold/guarantee 10M subprime or Alt-A mortgages and MBS @ \$1.6T exposure
  - By end of 2009, GSEs takeover by Treasury complete
  - Dodd-Frank punts; GSE reform left to new Congress
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## + Washington Redefines Insanity

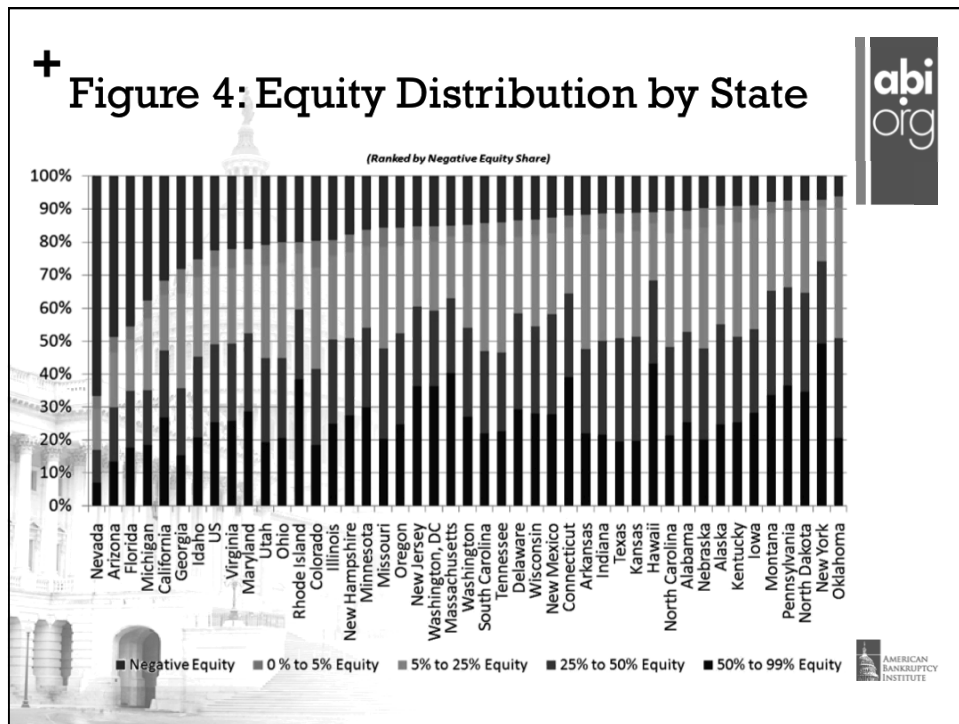
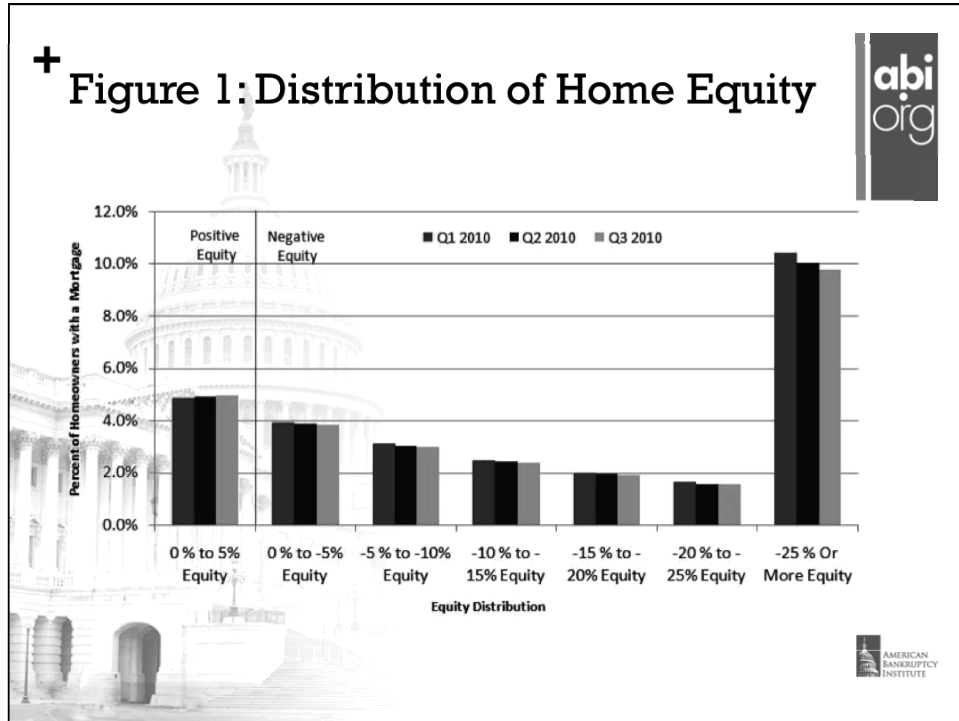


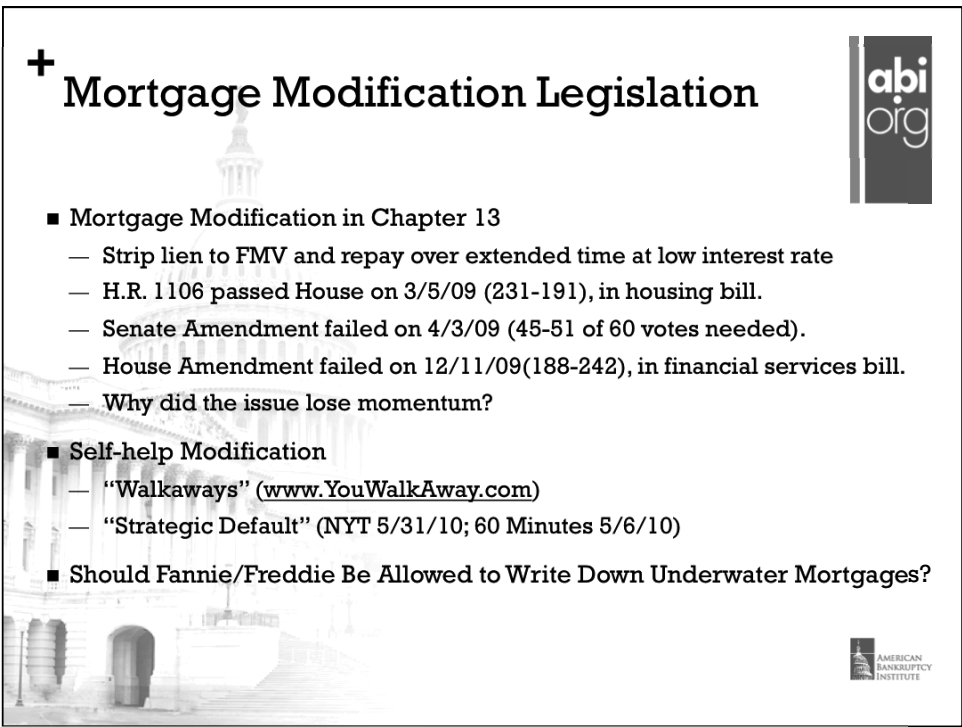
- Hope Now Alliance I and II (Bush '07)
- Hope for Homeowners (Bush '08)
- Fannie & Freddie Foreclosure Moratoriums (Obama '09)
- First-time Homebuyers Tax Credit (2x)
- Home for Affordable Refinance Program (HARP)
- Home Affordable Modification Program (HAMP spent \$4B of available \$50B of TARP funds)
  - >21% of permanent HAMP modifications redefault already
  - Typical HAMP-modified mortgage is still 25 percent underwater (60-80% redefault possible)
- Home Price Decline Protection Program (HPDP) for "hardest hit" areas
- Second-Lien Program (2MP)
- Help for Unemployed Homeowners
- Home Affordable Foreclosure Alternative (HAFA)



## + Face of Foreclosure Victim?






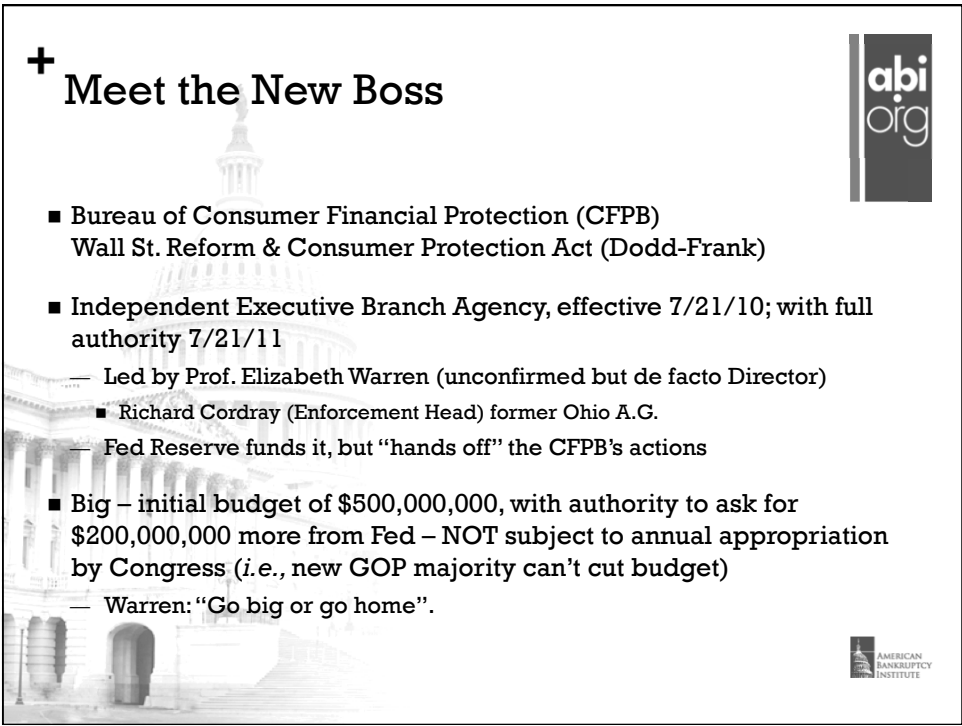





## + Mortgage Modification Legislation

- **Mortgage Modification in Chapter 13**
  - Strip lien to FMV and repay over extended time at low interest rate
  - H.R. 1106 passed House on 3/5/09 (231-191), in housing bill.
  - Senate Amendment failed on 4/3/09 (45-51 of 60 votes needed).
  - House Amendment failed on 12/11/09(188-242), in financial services bill.
  - Why did the issue lose momentum?
- **Self-help Modification**
  - “Walkaways” ([www.YouWalkAway.com](http://www.YouWalkAway.com))
  - “Strategic Default” (NYT 5/31/10; 60 Minutes 5/6/10)
- **Should Fannie/Freddie Be Allowed to Write Down Underwater Mortgages?**








## + Meet the New Boss

- **Bureau of Consumer Financial Protection (CFPB)**  
Wall St. Reform & Consumer Protection Act (Dodd-Frank)
- **Independent Executive Branch Agency, effective 7/21/10; with full authority 7/21/11**
  - Led by Prof. Elizabeth Warren (unconfirmed but de facto Director)
    - Richard Cordray (Enforcement Head) former Ohio A.G.
  - Fed Reserve funds it, but “hands off” the CFPB’s actions
- **Big – initial budget of \$500,000,000, with authority to ask for \$200,000,000 more from Fed – NOT subject to annual appropriation by Congress (i.e., new GOP majority can’t cut budget)**
  - Warren: “Go big or go home”.



## + Expansive Authority



- 18 Federal laws enforced by 7 agencies now under one roof.
- Power to “prescribe rules ... as may be necessary or appropriate to carry out the purposes and objectives of Federal consumer protection laws, and to prevent evasions thereof.” Further, to ensure that:
  - all consumers have access to consumer financial products and services that are fair, transparent and competitive;
  - consumers get timely and understandable information about consumer financial products;
  - outdated and burdensome regulations are modified to reduce regulatory burdens; and
  - consumers are protected from discrimination and unfair and deceptive or abusive practices.
- Is it unfair, abusive or deceptive?




## + CFPB Director Required to Establish Several Units, Including:



- Research unit;
- Community Affairs unit;
- Consumer Complaints unit;
- Office of Fair Lending and Equal Opportunity;
- Office of Financial Education;
- Office of Service Member Affairs;
- Office of Financial Protection of Older Americans.




**+ “Covered Person” Means:**




- Person or service provider who offers or provides a consumer financial product or service;
- A “related person” who is a director, officer, employee of a covered person, any controlling shareholder, agent of a covered person, shareholder, consultant or other who materially participates in the affairs of a covered person, an independent contractor (including any attorney, appraiser or accountant) who knowingly or recklessly participates in a violation of law or breach of fiduciary duty
  - But does not apply to depository institutions.


“Related persons” coverage provides for full enforcement authority of CFPB, including civil and criminal sanctions.



**+ “Financial Product or Service” Means:**



- Credit (extending, servicing, acquiring, purchasing, selling, brokering)
- Leasing
- Real estate settlement services and appraisals of real/personal property
- Checks (cashing, collecting, guarantying)
- Financial data and payment processing
- Financial advisory services, including credit counseling, debt management and debt settlement
- Consumer reports (collecting, analyzing, maintaining or providing, with some exceptions)
- Debt collection
- Any other financial product or service as determined by the CFPB, including mortgage originators, brokers, servicers; private student lenders, payday lenders



## + Exclusions from Coverage



- Merchants, retailers, sellers of non-financial goods or services, unless also offering financial products and services
- Merchants, retailers, sellers who extend credit directly in order to enable the consumer to buy the non-financial good or service
- Licensed real estate brokers
- Manufactured home retailers and modular home retailers
- Accountants and tax preparers
- Lawyers, but only incidental to the practice of law and within the attorney-client relationship
- Persons regulated by state insurance regulator, state securities commission, SEC, CFTC, Farm Credit Administration
- Charitable fundraising

Major exclusions: (1) sale, servicing and leasing of motor vehicles (but *c.f.*, not GMAC) and (2) usury limits.

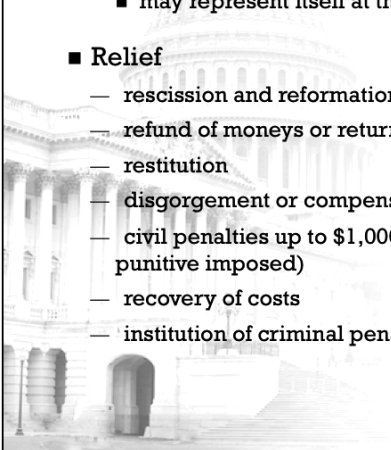




## + Powers (con't.)



- Exclusive Rulemaking Authority Over All Federal Consumer Financial Laws
  - entitled to “Chevron deference” by courts when they interpret these laws
- May Require Covered Persons to Register with CFPB, and Report or Submit to Periodic Examination
  - includes specifically loans secured by real estate, loan modification or foreclosure relief services in connection with RE loans
  - includes specifically payday loans or “other conduct that poses risks to consumers”
- Coordinate with State A.G.’s to Detect Fraud, Enforce New Rules
- Authority to Restrict Mandatory Arbitration








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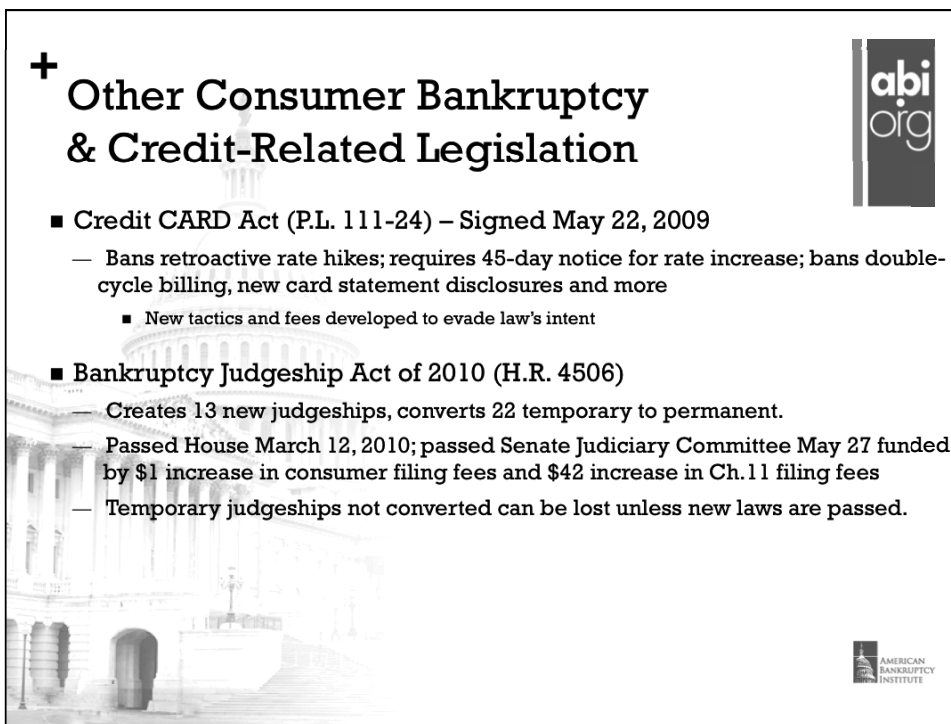
- **Enforcement Powers**
  - subpoena power
  - civil investigative demands
  - hearings and cease & desist orders
  - independent litigation authority
    - may represent itself at the Supreme Court
  
- **Relief**
  - rescission and reformation of contracts
  - refund of moneys or return of property
  - restitution
  - disgorgement or compensation for unjust enrichment
  - civil penalties up to \$1,000,000 per day for knowing violations (no punitive imposed)
  - recovery of costs
  - institution of criminal penalties (through U.S. Attorney)



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- **Preemption**
  - Inconsistent State Law Preempted
    - But state law that affords greater protection to consumers is not preempted
  - Authority under 12 U.S.C. 85 that allows for the charging of interest by a national bank at the rate allowed by the laws of the state where the bank is located is preserved. (*Marquette* decision survives, consistent with the “no usury” limit on powers).
  
- **Early CFPB Targets**
  - Private student loans
  - Credit reporting
  - Overdraft protection
  - Payday loans
  - Reverse mortgages
  - Debt-reduction services

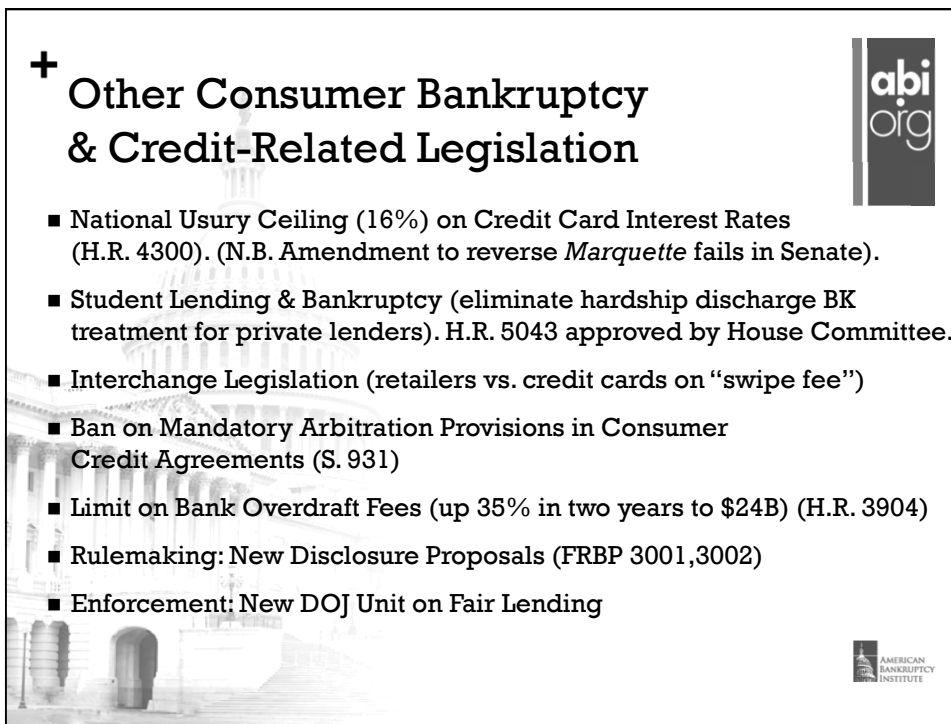


**+ Other Consumer Bankruptcy & Credit-Related Legislation**

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- **Credit CARD Act (P.L. 111-24) – Signed May 22, 2009**
  - Bans retroactive rate hikes; requires 45-day notice for rate increase; bans double-cycle billing, new card statement disclosures and more
    - New tactics and fees developed to evade law's intent
- **Bankruptcy Judgeship Act of 2010 (H.R. 4506)**
  - Creates 13 new judgeships, converts 22 temporary to permanent.
  - Passed House March 12, 2010; passed Senate Judiciary Committee May 27 funded by \$1 increase in consumer filing fees and \$42 increase in Ch. 11 filing fees
  - Temporary judgeships not converted can be lost unless new laws are passed.

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**+ Other Consumer Bankruptcy & Credit-Related Legislation**

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- **National Usury Ceiling (16%) on Credit Card Interest Rates (H.R. 4300). (N.B. Amendment to reverse *Marquette* fails in Senate).**
- **Student Lending & Bankruptcy (eliminate hardship discharge BK treatment for private lenders). H.R. 5043 approved by House Committee.**
- **Interchange Legislation (retailers vs. credit cards on “swipe fee”)**
- **Ban on Mandatory Arbitration Provisions in Consumer Credit Agreements (S. 931)**
- **Limit on Bank Overdraft Fees (up 35% in two years to \$24B) (H.R. 3904)**
- **Rulemaking: New Disclosure Proposals (FRBP 3001,3002)**
- **Enforcement: New DOJ Unit on Fair Lending**

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## + New DOJ Unit Raises Stakes for Fair Lending Disputes



- Enforcement unit to address claims of credit bias in: credit denials, wrongly handled loan applications, denials of loan modifications
- Current economy creates fertile ground for complaints of disparate impact among protected classes
- Is more selective/careful lending evidence of discrimination?

“Lending discrimination is discrimination with a smile... the corrosive power of fine print is every bit as destructive as the cross burned in a neighborhood.”

– AAG Civil Rights Div.



## + Supreme Court Bankruptcy Docket (“...where policy is made.” – Sonia Sotomayor)



- *Schwab v. Reilly*: on scope of trustee’s power to sell assets claimed as fully exempt by debtor, without first objecting to debtor’s valuation (Decided 6/17/10).
- *Milavetz*: Court holds that debtor attorneys are “debt relief agencies” under BAPCPA and that advice to incur more debt can be prohibited (Decided 3/8/10).
- *Espinosa*: Creditor’s failure to timely object precludes relief for student loan lender, even where bankruptcy court’s failure to find undue hardship was a legal error. (Decided 3/23/10).
- *Hamilton v. Lanning*: In calculating disposable income, court can consider evidence of future income (the “forward-looking” test) (Decided 6/7/10).
- *Ransom v. MBNA* (9<sup>th</sup> Cir): on whether above-median debtor can take vehicle deduction even if car owned outright. (Argument 10/4/10).
- *Stern v. Marshall* (9<sup>th</sup> Cir): on whether compulsory counterclaims may be decided by bankruptcy courts. (Argument 1/18/11).



The logo for abi.org is centered on a dark gray rectangular background. The text "abi" is in a bold, lowercase, sans-serif font, and "org" is in a lighter, lowercase, sans-serif font. The two words are stacked vertically, with the "i" in "abi" and the "o" in "org" sharing a common vertical axis.

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