BANKRUPTCY FILING RATES AFTER A MAJOR HURRICANE

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Abstract: *Twelve to thirty-six months after a major hurricane, bankruptcy filing rates increase for affected areas. The Article draws that conclusion by examining all eighteen hurricanes that hit the fifty United States between 1980 and 2004 and that caused $1 billion or more in damages. Despite substantial limitations in the data that would obscure all but the strongest relationships, distinct patterns emerge. Although further empirical analyses should be done, these findings suggest that Congress should except victims of hurricanes and other natural disasters from recent legislation that will make it more difficult to get bankruptcy relief. Because higher bankruptcy filing rates can be a seen as a symptom of financial distress, this Article also suggests other ideas for legislative relief, including both temporary moratoria on debt collections and adverse credit reporting and more permanent relief such as mandatory debtor-creditor mediation before a creditor could get a court judgment against hurricane victims.*

INTRODUCTION

Many persons who survived Hurricane Katrina's devastation in August 2005 were left without homes, without jobs, and without most of the assets they had accumulated over a lifetime. Although their financial resources were gone, past debts remained, and new obligations arrived. Hurricane Katrina's victims had to pay for housing, food, transportation, health care, and all of the other expenses necessary to sustain themselves. While trying to build a new life, Hurricane Katrina's victims still had to contend with the obligations of a previous one.

Within days of the hurricane, members of Congress had proposed amendments[1] to the federal bankruptcy law that would except those financially devastated by Hurricane Katrina from the harsh provisions of the recently enacted Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

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[1] H.R. 3662, 109th Cong. (2005) (delaying the effective date of the new bankruptcy law by two years); H.R. 3697, 109th Cong. (2005) (proposing permanent exceptions in the bankruptcy laws for victims of natural disasters); S. 1647, 109th Cong. (2005) (also proposing permanent changes in the bankruptcy laws for victims of natural disasters). The contents of H.R. 3697 are detailed in the Press Release of Representative Jerrold Nadler. Nadler, Conyers, Watt, Jackson Lee to Introduce Bill to Relieve Debt Burden on Katrina Survivors (Sept. 1, 2005), http://www.house.gov/apps/list/press/ny08_nadler/DebtreliefKatrina090105.html (last visited Sept. 3, 2005).

("BAPCPA").[2] Defenders of the new statute responded the amendments were unnecessary because BAPCPA prevented only abusive bankruptcy filings.[3]

Both sides of the debate assume the answer to an underlying empirical question about how people use the bankruptcy system. Those who would amend the law to protect Katrina's victims assume that the bankruptcy system helps to provide relief from the financial devastation that follows a hurricane. It is plausible that hurricanes wreak such awful damage that those affected by a hurricane need fundamental financial help beyond what the bankruptcy system can provide, and hence hurricane victims do not turn to the bankruptcy courts. On the other hand, those who defend restrictions on bankruptcy relief assume a consumer's decision to file often is not a reaction to real financial distress and reflects nothing more than a personal preference to abandon one's obligations. Under this view, exogenous economic shocks do not dramatically affect bankruptcy filing rates, and hence there is little need to amend the bankruptcy laws in the wake of a disaster.

This Article examines the effects on bankruptcy filing rates from all eighteen hurricanes that hit the United States between 1980 and 2004 and caused more than $1 billion in damages.[4] Filing rates increase in federal judicial districts and states most affected by these hurricanes, especially in the period twelve to thirty-six months after the hurricane. The number of observations is low, making these conclusions tentative. In the months and years ahead, more exhaustive scholarly analyses may and should follow, but those analyses will come too late to inform the debate about what legal relief should be given to Hurricane Katrina's victims. The goal of this Article is to provide some data for the short-term decisions that must be made as well as to provide a starting point for future studies.

Part I of this Article provides a short review of the existing literature about the effects of natural disasters on bankruptcy filing rates specifically and on consumers generally. Part II then explores the data for bankruptcy filing rates after previous catastrophic hurricanes and finds a pattern of increased bankruptcy filings. The few exceptions occurred where the largest average flood insurance claims had been paid, suggesting the exceptions happen when hurricanes strike relatively wealthier areas. The data reinforce the common-sense intuition that catastrophic natural disasters cause financial distress to their survivors. Finally, Part III of the Article concludes with some recommendations for changes to the bankruptcy law and other federal laws to help the survivors of hurricanes and other natural disasters.

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[2] Pub. L. No. 109-8, 119 Stat. 23 (2005).

[3] Susan Cornwell, *US Dems Urge Easing of Bankruptcy for Katrina Victims*, Wash. Post, Sept. 1, 2005 (on file with Nevada Law Journal), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/01/ (quoting aide to Rep. James Sensenbrenner as claiming the new bankruptcy law did not need amending because it only cracked down on those who abused the system). Previously, Representative Sensenbrenner had defended the statute as "restoring personal responsibility and integrity in the bankruptcy system" and contrasted bankruptcy filers with "those of us who pay our bills." 147 Cong. Rec. H517 (daily ed. Mar. 1, 2001).

[4] Two of the storms actually were denominated tropical storms but, for ease of exposition, the term "hurricane" will be used throughout this article.

I. Prior Literature

The academic literature on the financial consequences of hurricanes principally agrees upon one thing: Hurricanes are complex economic events. It is difficult to specify econometric models that isolate the effects of hurricanes from other events that may be affecting a local economy such as regional or seasonal business cycles. In fact, some commentators will offer the trite analysis that hurricanes create an economic boom by pumping federal aid and construction money into affected areas.[5] The reality is much more complex.

To be sure, studies find short-tem increases in economic activity once the immediate physical destruction and dislocation of a hurricane abates.[6] Over the long term, however, financial losses offset these short term gains. Indeed, the short-term economic gains may consist principally of accelerated repairs and investment that would have been made even in the absence of the hurricane. As long as three years after the hurricane, there can be a negative economic aftershock as purchasing slows.[7] These previous findings suggest that increases in bankruptcy filing rates might be at their strongest several years after the hurricane.

Because the prior studies looked at the broader economic effects of a hurricane, they do not necessarily tell us much about what happens to bankruptcy filing rates. Economic effects averaged across a region mask the effects on particular individuals. To the extent a hurricane might leave some as economic winners—or at least economic "break evens"—it will leave others as economic losers. Rather than tell the story of the average, bankruptcy filing rates help to tell the story of the economic misfortune spread by a hurricane.

For a column in a monthly professional newsletter, Ed Flynn looked specifically at the effect of natural disasters on bankruptcy filing rates.[8] Flynn's analysis consists only of overlaying changes in the quarterly bankruptcy filing rate for particular judicial districts over change in the national quarterly filing rate. After simply eyeballing a series of line and bar graphs, Flynn concludes that bankruptcy filings for a judicial district or state follow the same pattern both before and after a natural disaster.[9]

Flynn's article does not purport to be a serious statistical study of the issue, and there are several reasons why his conclusion is not persuasive. First, many of his graphs show that areas hit by natural disasters have higher filing

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[5] This analysis is often offered in the wake of a hurricane. For example, J Antonio Villamil, chairman of Florida Governor Jeb Bush's Council of Economic Advisers, said the 2004 hurricane season would "be a temporary jolt" to the Florida economy and continued, "We're going to experience a boom in new construction and repairs and road building. We're already seeing people being re-employed in reconstruction." Joseph B. Treaster, *Officials Forecast Hope for Victims of Hurricane*, N.Y. Times, Aug. 22, 2004, at 1.12.

[6] *See* Paulo Guimaraes, Frank L. Hefner & Douglas P. Woodward, *Wealth and Income Effects of Natural Disasters: An Econometric Analysis of Hurricane Hugo*, 23 Rev. Regional Stud. 97, 98 (1993); David G. Lenze, *Dynamic and Spatial Impact of Hurricane Andrew on Florida's Taxable Sales: An Intervention Analysis*, 27 Rev. Regional Stud. 163, 163-64 (1997).

[7] *See* Guimares, Hefner & Woodward, *supra* note 6, at 107; Lenze, *supra* note 6, at 179.

[8] Ed Flynn, *Bankruptcy and Natural Disasters*, 23 Am. Bankr. Inst. J. 20 (Jan. 2005).

[9] *See id.* at 76.

rates than the national average two or more years after the natural disaster, precisely when the prior economic literature would predict. In drawing his conclusion, Flynn looked for very short-term spikes in filings; specifically, Flynn looked at filing rates in the quarters immediately following the natural disaster. Also, by using the national filing rate as the basis for comparison with each locally affected district, Flynn includes areas that may have been affected by the natural disaster he is measuring. His base rate for comparison is distorted by the precise effect he is trying to observe. Finally, Flynn looks only at six natural disasters without an adequate explanation of why he chose those six particular natural disasters.[10] Indeed, by choosing to include the Midwest floods of 1993, Flynn contradicts his claim that he chose disasters that did "a great deal of damage to a state or particular judicial district rather than those with an impact that was spread through an entire region."[11] What happens to bankruptcy filing rates after a hurricane remains very much an open question to which the next section turns.

II. Filing Rates After Past Hurricanes

Because the current Bankruptcy Code went into effect on October 1, 1979, and was such a dramatic change from prior law, the year 1980 is a useful beginning point to study the effects of hurricanes on filing rates. Throughout this analysis, data for total bankruptcy filing rates are used because my own recent work finds that the reliability of the distinction between business and consumer filings has deteriorated over time, and this distinction is essentially meaningless.[12] In any event, if the point is to measure the financial distress following a hurricane, both consumer and business bankruptcies are relevant.

The National Oceanic and Atmospheric Administration ("NOAA") identifies eighteen hurricanes that made landfall in the United States between 1980 and 2004 and caused at least $1 billion in damages.[13] Storms that cause $1 billion in damages should be large enough to cause widespread financial distress. Table 1 arranges these storms in chronological order and states their location of landfall.

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[10] Flynn looks at Hurricane Hugo, the San Francisco earthquake of 1989, Hurricane Andrew, the Midwest floods of 1993, the Red River floods of 1997, and Hurricane Floyd. *See id.* at 20, 76.

[11] *See id.* at 20. After the Midwest floods, 404 counties in nine states were declared federal disaster areas, making it difficult to characterize these floods as localized in effect. *See* Neal Lott, *The Summer of 1993: Flooding in the Midwest and Drought in the Southeast*, National Climatic Data Center paper (September 2003), http://ols.nndc.noaa.gov/plolstore/plsql/olstore.prodspecific?prodnum=C00487-PUB-A0001 (last visited Sept. 3, 2005).

[12] Robert M. Lawless & Elizabeth Warren, *The Myth of the Disappearing Business Bankruptcy*, 93 Cal. L. Rev. 745, 793 (2005).

[13] *See* Tom Ross & Neal Lott, *A Climatology of 1980-2003 Extreme Weather and Climate Events*, Technical Report 2003-01 for the National Oceanic & Atmospheric Admin. (2003), http://www1.ncdc.noaa.gov/pub/data/techrpts/tr200301/tr2003-01.pdf (last visited Sept. 3, 2005).

BILLION-DOLLAR HURRICANES AND TROPICAL STORMS IN THE FIFTY UNITED STATES, 1980-2004
Table 1

Storm Name	Landfall	Date
Hurricane Alicia	Galveston, TX	Aug. 1983
Hurricane Elena	Biloxi, MS	Sept. 1985
Hurricane Juan	Morgan City, LA	Oct. 1985
Hurricane Hugo	Charleston, SC	Sept. 1989
Hurricane Bob	Newport, RI	Aug. 1991
Hurricane Andrew	Dade County, FL	Aug. 1992
Hurricane Iniki	Kauai, HI	Sept. 1992
Trop. Storm Alberto	Destin, FL	Jul. 1994
Hurricane Opal	Pensacola, FL	Oct. 1995
Hurricane Fran	Cape Fear, NC	Sept. 1996
Hurricane Bonnie	Wilmington, NC	Aug. 1998
Hurricane Floyd	Cape Fear, NC	Sept. 1999
Trop. Storm Allison	Galveston, TX	June 2001
Hurricane Isabel	Drum Inlet, NC	Sept. 2003
Hurricane Charley	Cayo Costa, FL	Aug. 2004
Hurricane Frances	Hutchinson Island, FL	Sept. 2004
Hurricane Jeanne[14]	Hutchinson Island, FL	Sept. 2004
Hurricane Ivan	Gulf Shores, AL	Sept. 2004

source: National Oceanic & Atmospheric Administration

To measure bankruptcy filing rates, the Administrative Office of United States Courts' official statistics were used. Statistics were compiled on an annual basis for the twelve-month period ending June 30 of each year. The Census Bureau's annual population estimates as of July 1 of each year were then used to compute annual filing rates. Bankruptcy filing statistics were compiled at both the federal judicial district and state level. All other data in this paper are publicly available, government data.

District- and state-level bankruptcy filing rates are fairly blunt statistical tools. Localized effects on bankruptcy filing rates could easily disappear once the rates were aggregated across a broad geographic area. Two previous studies found localized economic effects from Hurricane Hugo and Hurricane Andrew, but once the data were aggregated across a state, these effects could not be isolated.[15] These studies measured average economic gains and losses and by no means precluded the possibility that more individuals would show up in bankruptcy court after a hurricane. Still, with a small number of observations and with such broadly aggregated data, it seemed unlikely the available data would show much change in bankruptcy filing rates after a hurricane. Only the strongest patterns in the data would show anything meaningful.

In fact, Figure 1 shows a distinct pattern where bankruptcy filing rates generally rise in the years after a major hurricane. Figure 1 compares the aver-

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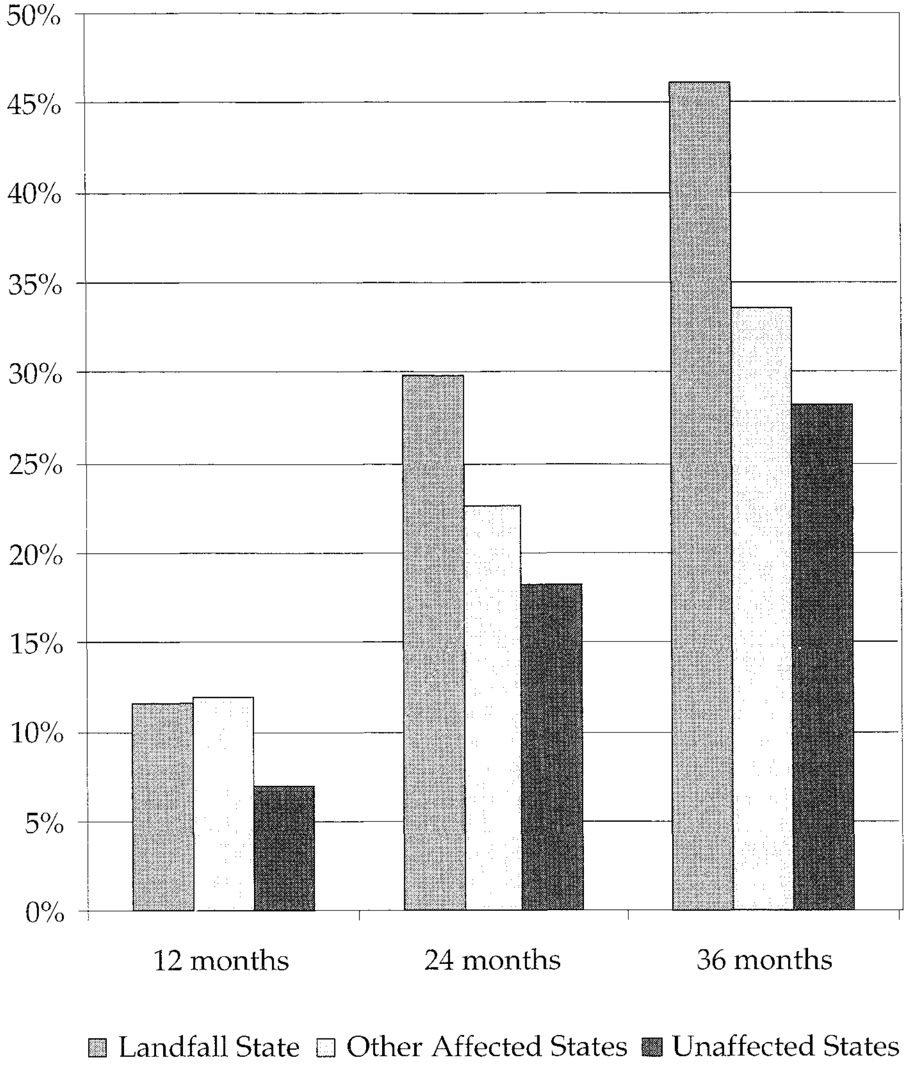
[14] Although alphabetically coming after Ivan, Jeanne did make landfall before Ivan.

[15] *See* Guimares, Hefner & Woodward, *supra* note 6, at 113 n.8; Lenze, *supra* note 6, at 174-76.

AVERAGE INCREASE IN STATE FILING RATES,
LANDFALL STATE VERSUS UNAFFECTED STATES
Figure 1



Sources: Administrative Office of the United States Courts, U.S. Census Bureau

age increase in filing rates for twelve, twenty-four, and thirty-six month periods following the hurricane.[16] The different bars represent (1) the state NOAA

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[16] Because the bankruptcy filing data are not available on a monthly basis, the filing rates actually represent the twelve-month period ending June 30 that encompasses each hurricane and the next two twelve-month intervals. Stated alternatively, for Hurricane Alicia, which occurred in August 1983, the filing rates are for the twelve-month period ended June 30, 1984, the twenty-four month period ended June 30, 1985, and the thirty-six month period ended June 30, 1986. The one exception is for Tropical Storm Allison, which occurred in

identified as the landfall state, (2) other states NOAA identified as affected by the hurricane, and (3) all remaining states.

Because bankruptcy filings have steadily risen through the past twenty-five years,[17] any comparison of filing rates over time will show an upward trend. It is the relative differences in Figure 1 that are important. States primarily affected by hurricanes have an average increase in filing rates that is around fifty percent larger than the increase in unaffected states: For every two new filings in an unaffected state, there are three new filings in the landfall state. Also, landfall states experience a higher increase than states less directly affected by the hurricane, a logical relationship that reinforces the idea that the data reflect real differences among the states. Interestingly, the biggest increases are seen twenty-four and thirty-six months after the hurricane, a finding consistent with the time period where the economic literature found lingering effects.

Averages can always mask individual variation. Therefore, Table 2 arrays the thirteen storms for which there are three years of data in order of the thirty-six month difference in the bankruptcy filing rate between the landfall state and unaffected states. Table 2 also presents the average flood insurance claim paid by the Federal Emergency Management Agency ("FEMA").[18] Bankruptcy filing rates are generally higher for states where the hurricane made landfall,

DIFFERENCE IN BANKRUPTCY FILING RATE
BETWEEN LANDFALL STATE & UNAFFECTED STATES
Table 2

Hurricane	**Landfall State**	**Average Flood Claim Paid (2001 dollars)**	**12 Months**	**24 Months**	**36 Months**
Elena	Mississippi	$16,183	22.1%	51.4%	71.8%
Alicia	Texas	$20,182	13.5%	29.2%	66.8%
Iniki	Hawaii	(< 1,500 claims)	25.9%	34.3%	50.4%
Juan	Louisiana	$24,745	22.3%	40.2%	27.7%
Bonnie	North Carolina	$9,646	1.2%	8.3%	14.6%
Bob	Rhode Island	$22,976	13.1%	19.2%	14.3%
TS Allison	Texas	$36,163	3.0%	7.6%	12.7%
Floyd	North Carolina	$25,079	–0.3%	5.5%	12.6%
Fran	North Carolina	$24,401	2.2%	–5.0%	–3.8%
Hugo	South Carolina	$41,941	–12.8%	–0.2%	–5.4%
Andrew	Florida	$39,102	–3.6%	–6.7%	–8.1%
Opal	Florida	$46,852	–5.2%	–8.0%	–8.6%
TS Alberto	Florida	(< 1,500 claims)	–1.6%	–7.7%	–11.0%

sources: Federal Emergency Management Agency, Administrative Office of U.S. Courts, Census Bureau

June 2001 and for which the data represent a full twelve-month period beginning on June 30, 2002, and every twelve months thereafter.

[17] Lawless & Warren, *supra* note 12, at 751 tbl. 1.

[18] Flood insurance claims for flood events with 1,500 or more claims are collected at Federal Emergency Management Agency, *National Flood Insurance Program—Significant Flood Events*, http://www.fema.gov/nfip/sign1000.shtm (last visited September 3, 2005).

again especially twenty-four and thirty-six months after the hurricane. Three of the hurricanes after which bankruptcy filing rates actually decreased, and defied the overall pattern, were in the state of Florida, suggesting that perhaps the declines stem from some characteristic unique to that state.

The average FEMA flood insurance claim provides some sense of the relative average value of property destroyed by the hurricane. The average flood claim paid for the seven hurricanes after which bankruptcy filings increased most was $19,802. By comparison, the average flood claim paid for the hurricanes after which bankruptcy filings increased least, or even decreased, was $37,692. These amounts are stated in 2001 dollars, and the difference is statistically meaningful ($t = 4.125$, $p = 0.003$). In contrast, the number of FEMA flood insurance claims did not display any clear pattern. Taken together, these statistics suggest that the bankruptcy filing rates do not depend on the scope of the hurricanes' destruction (i.e., the number of flood claims) but what the hurricanes destroyed (i.e., the average value of the flood claims). Poorer areas hit by a hurricane experience more bankruptcy filings than do wealthier areas, a finding that future research especially should explore.

To check the robustness of the state-level results, I compared total bankruptcy filings between federal judicial districts. Each federal judicial district in which a particular hurricane made landfall was matched with a judicial district that was unaffected by any hurricane for the thirty-six month period following the hurricane in question. Matches were based on simple correlation coefficients for bankruptcy filing rates, eliminating duplicates. Thus, the matching produced a control sample of judicial districts that were unaffected by a hurricane but where bankruptcy filings historically most closely followed the patterns of the judicial districts where hurricanes had made landfall.

The results of the control sample analysis again showed that the landfall districts had higher bankruptcy filing rates from twelve to thirty-six months after the hurricane than did the unaffected districts. Twenty-four months after the hurricane, bankruptcy filings had increased 16.4% more in the landfall districts than in the control sample. Thirty-six months after the hurricane, bankruptcy filing rates had increased 25.7% more in the landfall districts than in the control sample. There are only fourteen judicial districts for which twenty-four month data are available (thirteen for the thirty-six month data). Given the small number of observations, it was not surprising that the differences were not statistically significant using simple t-tests. Nonetheless, it was important that the control sample analysis at the judicial district level confirmed the general pattern that had emerged at the state level.

Taken together, the available data indicate that areas affected by a major hurricane experience a marked increase in bankruptcy filing rates twelve to thirty-six months after the hurricane. Given that the data are basic state and judicial-district level filing rates and that the number of observations is few, it is remarkable that such a distinct pattern emerges. The data also suggest there is some relationship between the value of the property destroyed, measured by the value of FEMA flood insurance claims, and increased bankruptcy filings.

Figures were adjusted to 2001 dollars using the Consumer Price Index for All Urban Consumers (CPI-U).

Relatively poorer areas experience a greater increase in bankruptcy filings than do wealthier areas.

The phrase "available data" should be emphasized. Certainly, more sophisticated and larger studies should be done. One obvious extension of the work here would be to look at natural disasters other than hurricanes as well as disasters under the $1 billion threshold. The findings in this Article, however, confirm the common-sense intuition that areas hit by major hurricanes will suffer great financial distress and that distress will linger long after the media glare has disappeared. In the aftermath of Hurricane Katrina, legislators should consider changes to legal rules that could ease the financial distress for its victims and victims of future natural disasters. The next section considers what those changes might be.

III. Recommendations

Federal and state disaster aid may be the most effective assistance that survivors of a hurricane can receive. At the same time, legislators could also amend various statutory regimes so that these regimes account for the special needs of hurricane victims. This section will discuss possible changes to federal law, although states could also make changes to their own parallel statutory regimes where appropriate. Also, although this paper focuses on hurricanes, it is not a very large logical leap to conclude that these legislative proposals would benefit victims of natural disasters similar in geographic scope and destructive power.

The core finding of this Article is that hurricane survivors appear to turn to the bankruptcy courts for relief. Hurricane Katrina struck approximately seven weeks before the October 17, 2005, effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA").[19] Given that the spike in bankruptcy filings does not occur until twelve to thirty-six months after the hurricane, those who will need to use the bankruptcy courts as a result of Hurricane Katrina will have to deal with this new law. Of course, BAPCPA will also be in place for victims of future natural disasters.

Regardless of how one felt about the merits of BAPCPA, it is difficult to characterize the intent behind the statute as anything but intent to reduce the number of bankruptcy filings.[20] The evidence discussed in Part II suggests that hurricane victims turn to the bankruptcy courts to alleviate the financial distress that follows in the wake of natural disaster. This evidence undercuts the notion that rising bankruptcy filing rates are due to consumer abuse rather than reactions to real financial problems. Because of BAPCPA, Hurricane Katrina's

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[19] Bankruptcy Abuse Prevention And Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) [hereinafter BAPCPA].

[20] Supporters of BAPCPA continually cited the rising number of bankruptcy filings as evidence alone that the law was necessary, logical reasoning that implicitly promised the new law would reduce filings. *See, e.g.*, 151 Cong. Rec. E704 (daily ed. Apr. 14, 2005) (statement of Rep. Moore); 150 Cong. Rec. H143 (daily ed. Jan. 28, 2004) (statement of Rep. Sessions); 149 Cong. Rec. H1995 (daily ed. Mar. 19, 2003) (statement of Rep. Goodlatte); 146 Cong. Rec. S5383 (daily ed. June 20, 2000) (statement of Sen. Grassley). Of course, if one believed the bankruptcy courts were clogged with abusive filings, then the solution would necessarily entail a reduction in filings.

victims would find the bankruptcy courts less accessible than previous victims of natural disasters. A delay in the implementation date of BAPCPA for thirty-six months would have preserved accessibility to the bankruptcy courts for Hurricane Katrina's victims. However, such a delay never happened, an unsurprising result given the strong credit industry support for the legislation's passage just five months prior to Hurricane Katrina[21] and the unwillingness of the bill's managers to consider even the most modest amendments.[22]

In the future, a more politically palatable solution might be to excuse areas affected by a particular hurricane from BACPA's most onerous requirements. However, some might contend that such a solution might run afoul of the constitutional requirement for geographic uniformity in the nation's bankruptcy laws.[23] Notably, though, the requirement of geographic uniformity is not absolute. In *Blanchette v. Connecticut General Insurance Corporations*,[24] the Supreme Court held the Regional Rail Reorganization Act did not violate the uniformity requirement although it provided for reorganization of railroads only in parts of the northeastern and midwestern United States. The Court said that although the uniformity argument

> has a certain surface appeal . . . [it] is without merit because it overlooks the flexibility inherent in the constitutional provision. . . .
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> The uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems. "The problem dealt with [under the Bankruptcy Clause] may present significant variations in different parts of the country." We therefore agree with the Special Court that the uniformity clause was not intended "to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions."[25]

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21 *See* Stephen Nunez & Howard Rosenthal, *Bankruptcy "Reform" in Congress: Creditors, Committees, Ideology, and Floor Voting in the Legislative Process*, 20 J. L. ECON. & ORG. 527, 553 (2004) ("We have found striking evidence of the importance of both ideology and interest group interventions in the formation of legislation. While the importance of ideology is generally accepted, it is rare to find such clear evidence of the effects of money (i.e., interest group pressures)."); Donald L. Barlett & James B. Steele, *Soaked by Congress: Lavished By Campaign Cash, Lawmakers Are "Reforming" Bankruptcy—Punishing the Downtrodden to Catch a Few Cheats*, TIME, May 15, 2000, at 64 ("The Bankruptcy Reform Act is typical of legislation that Congress writes for the benefit of special-interest groups that are hefty campaign contributors—at the expense of ordinary Americans who contribute nothing.").

22 *See* Stephen Labaton, *Senate Reject Efforts to Alter Bankruptcy Legislation*, N.Y. TIMES, Mar. 4, 2005, at C4 (detailing rejected amendments in the Senate and noting that Republican senators "were instructed by the leadership to oppose all amendments").

23 The Constitution provides that Congress shall have power to pass uniform laws of bankruptcy. U.S. CONST. art. I, § 8, cl. 4. This requirement generally has been interpreted to mean geographical uniformity. *See* Charles Jordan Tabb, The Law of Bankruptcy § 1.6 (1997).

24 419 U.S. 102 (1974). I am indebted to my colleague, Tuan Samahon, for drawing this case to my attention and suggesting the geographical uniformity requirement might allow for some regional flexibility in an emergency.

25 *Id.* at 158-59 (quoting Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440, 463 n.7 (1937), and *In re* Penn Cent. Transp. Co., 384 F. Supp. 895, 915 (Reg'l Rail Reorg Ct. 1974)) (alteration in original) (internal citations omitted).

Under this reasoning, a court might consider the conditions caused by a natural disaster similar in scope to Hurricane Katrina the type of regional emergency that Congress may remedy by a geographically focused amendment to the bankruptcy laws.

A change in the bankruptcy laws only for victims of a particular natural disaster has two drawbacks. First, despite the Supreme Court's pronouncement in *Blanchette*, the precise scope of the uniformity requirement is unclear, and any regional law runs the risk that a court would find it unconstitutional. Second, a change for victims of a particular natural disaster provides no assistance for victims of other natural disasters who may lack political clout.

A more permanent and less constitutionally risky solution would be to except victims of all natural disasters from the BAPCPA provisions that make the least sense for victims of a natural disaster and most restrict access to the bankruptcy courts. For example, section 102 of BAPCPA imposes a new "means test" that will test whether a debtor has an income over the state median for households of the debtor's size.[26] If so, the debtor generally has to file for chapter 13 bankruptcy if the debtor can afford to pay back $100 per month to creditors. A debtor can rebut the presumption of the means test by showing special circumstances "such as a serious medical condition or call or order to active duty in the Armed Forces."[27] Although we lack experience with what the courts will do with the special circumstances exception, the statutory language appears to call for a very strong evidentiary showing from the debtor. To qualify for the exception, the debtor must itemize additional items of income or expense, provide documentation, make an attestation under oath, and explain in detail the special circumstances.[28] It makes little sense to subject victims of a natural disaster to a means test to ensure they truly need bankruptcy. Moreover, victims of a natural disaster often will have lost the documents necessary to a claim of special circumstances. Congress excepted disabled veterans from the means test[29] and a similar exception should be made for natural disaster victims.

Similarly, it makes little sense to force victims of a natural disaster to undergo consumer credit counseling before filing bankruptcy to ensure they understand how to use credit.[30] Good advice might be to stay out of the path of a hurricane, as if such an event were in debtors' control. Although courts can exempt debtors from this new requirement of credit counseling before bankruptcy, this exemption can last only forty-five days.[31] Military members on active service and persons with physical or mental disabilities can be permanently exempted.[32] Victims of natural disasters should be added to these exceptions and also be eligible for permanent exemptions.

Another provision of BAPCPA requires courts to dismiss cases for debtors who fail to produce old tax returns, payment advices, and other financial

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26 BAPCPA § 102, 119 Stat. 23, 27-31 (amending 11 U.S.C. § 707(b)).
27 *Id.* § 102, 119 Stat. at 29 (adding 11 U.S.C. § 707(b)(2)(B)(i)).
28 *Id.* (adding 11 U.S.C. § 707(b)(2)(B)(ii)).
29 *Id.* (adding 11 U.S.C. § 707(b)(2)(D)).
30 *See id.* § 106, 119 Stat. at 37-38 (amending 11 U.S.C. § 109).
31 *Id.* § 106, 119 Stat. at 37 (adding 11 U.S.C. § 109(h)(3)(B)).
32 *Id.* (adding 11 U.S.C. § 109(h)(4)).

records at the time of filing.[33] Failure to file these records results in automatic dismissal of individual debtors' bankruptcy case after forty-five days.[34] An uncodified provision of BAPCPA provides that a bankruptcy court is not to grant a discharge in chapter 7 or confirm chapter 11 or 13 plans (the precursor to the discharge) for individuals who fail to provide requested tax records.[35] Although BAPCPA says the bankruptcy courts can except debtors from producing some tax returns for "circumstances beyond the control of the debtor," this exception does not apply to the uncodified provision denying discharge or confirmation to debtors who fail to produce tax records.[36] Victims of a natural disaster are likely to have lost many personal financial records and should be excepted from these new requirements of having to produce documents lost in a natural disaster.

BAPCPA also imposes new requirements on consumer bankruptcy attorneys, requiring them to certify that they "performed a reasonable investigation into the circumstances that gave rise" to their clients' bankruptcy petitions.[37] Because many victims of natural disasters will have lost evidence to document their financial circumstances, attorneys may find it difficult to make this certification for a debtor who has been through a natural disaster. The result will be that victims of natural disaster will be unable to find counsel or, perhaps even worse, able to find only counsel willing to sign a certification based on flimsy or nonexistent documentation. Again, an exception should be made to this certification requirement for victims of natural disasters who have lost paperwork.

The difficulty in excepting victims of natural disasters from certain BAPCPA provisions would be in designing the scope of any exception. To reach those who have suffered property loss as well as those who have suffered income disruption, the exception should have both a residence-based and employment-based component. Debtors who reside or work within a region in which a federally declared disaster has occurred could claim eligibility for the exceptions if they suffered an asset loss or income disruption material to their financial circumstances. The usual rules against frivolous pleadings and false statements of fact would deter fraudulent claims of exceptions. Parties in interest would have the opportunity to object and establish that the debtor had not suffered a material asset loss or income disruption.

Because the increased bankruptcy filings after a natural disaster are only symptoms of financial distress, other measures could also be taken to prevent the financial distress from occurring or, at least, worsening. The Servicemembers Civil Relief Act protects members of the military from adverse personal financial consequences stemming from their military service[38] and could serve as a model for the types of protection that might be made available to natural disaster victims. However, natural disaster victims have their own

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[33] *Id.* § 315(b), 119 Stat. at 89-91 (amending 11 U.S.C. § 521(a), (c)-(h)).
[34] *Id.* § 315(b), 119 Stat. at 90-91 (amending 11 U.S.C. § 521(f)).
[35] *Id.* § 1228, 119 Stat. at 200.
[36] *Id.* § 315(b), 119 Stat. at 90 (amending 11 U.S. C. § 521(e)(2)(B)). The language allowing a bankruptcy court to excuse a debtor from producing income tax returns refers only to § 521(e)(2)(A) of the Bankruptcy Code and makes no reference to the uncodified provision mentioned in the text.
[37] *Id.* § 102, 119 Stat. at 30 (adding 11 U.S.C. § 707(b)(4)(C)).
[38] *See* 50 U.S.C. app. §§ 501-529 (2000 & Supp. 2005).

set of special problems that need addressing. In addition to ensuring that bankruptcy is available for those whose economic circumstances continue to deteriorate, it would be helpful for many more families if some of the economic pressure could be alleviated so that they might have a chance to survive without filing for bankruptcy.

For creditors dealing with borrowers having a billing address in an affected disaster area, there should be temporary moratoria of 90 or 120 days on adverse credit actions. During this same time, credit card companies and other consumer lenders should not be able to impose late fees, penalty default interest rates, universal default interest rates, or any other penalty for late payments. Creditors should not be able to institute proceedings or take default judgments in proceedings already underway. Also, there should be a temporary bar on creditors reporting debts as uncollectible to credit reporting agencies.

Natural disaster victims also need laws that would provide more permanent protections. For example, within days of the Hurricane Katrina disaster, some lenders' web sites stated that the lenders flatly refused to accept loan applications from Louisiana, Mississippi, or Alabama.[39] Regardless of their creditworthiness or whether they were even affected by the hurricane, borrowers in these states could not turn to these lenders. Someone who was creditworthy would be unable to buy a car on credit to replace one that had been swept away in the storm. This kind of credit restriction intensifies the economic fallout from natural disaster. The Equal Credit Opportunity Act, which bars certain forms of discrimination in lending,[40] should be amended to bar the denial of credit solely because of a person's residence or employment within a federal disaster area.

Another model for relief comes from the farm crisis of the 1980s, during which many states passed laws requiring mandatory mediation before a lender could foreclose on a family farm. Often, these statutes imposed a stay of court proceedings during the mediation.[41] The purpose was to give borrower and lender a chance to work out a mutually acceptable repayment plan that avoided bankruptcy. Real estate foreclosures were the primary concern in the family farm crisis, but in the natural disaster setting, mediation could be extended to any debt collection efforts. After the expiration of any temporary moratoria on debt collection, mandatory mediation statutes with court stays would give natural disaster victims and their creditors time to search for mutually beneficial solutions that avoid bankruptcy court.

Another major problem for natural disaster victims is the large amounts of debt that might be secured by an asset that has been destroyed. After the natural disaster, the victim not only has to buy a new house or new car but must continue paying for the old house or car that sits under a pile of rubble or in six

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[39] Ameriquest Mortgage, *Loans: Request a Loan Online* (on file with author), https://ameriquestmortgage.com/loan.html;jsessionid=DeikOUKn9lA4XrgLUY1djFfo3PqX9N2NcqJDDDH4MhEctF9g1Mpk!-1676169870?#anchor (last visited Sept. 1, 2005); Netbank, *Auto Loan States at Netbank* (on file with author), http://www.netbank.com/loans_auto_state.htm (last visited Sept. 1, 2005).

[40] *See* 15 U.S.C. §§ 1691-1691f (2000).

[41] *See* Robert M. Lawless, Note, *The American Response to Farm Crises: Procedural Debtor Relief*, 1988 U. ILL. L. REV. 1037, 1050-55 (describing these statutes).

feet of water.[42] BAPCPA exacerbates the problem for individual chapter 7 or chapter 13 debtors who now must pay secured creditors the retail value of any collateral,[43] a value that can exceed any insurance recovery. Federal law could ban deficiency judgments for home or automobile loans when the collateral has been destroyed in a federally declared natural disaster and provide that the value of any secured claim in bankruptcy shall not exceed the value of any insurance recovery on collateral that has been destroyed. To be eligible for such protections, however, the debtor must have maintained all insurance required by the loan agreement and tendered the insurance payment to the lender. If the debtor informs the lender that she is awaiting an insurance payment under these circumstances, federal law additionally should ban any judicial proceedings to collect the debt.

Other statutory enactments would be necessary to make these suggested relief provisions effective. The law would have to ban adverse credit reporting for natural disaster victims who exercise their rights to debt relief. Similarly, creditors should not be allowed to pursue codebtors for unpaid debts stemming from debt relief due to a natural disaster. Federal courts would have to be empowered to enforce any rights to debt relief, including the stay of state court proceedings, and debtors would not be able to waive judicial enforcement of their rights. Finally, given the prevalence of form adhesion contracts in the consumer lending industry, a debtor should not be able to waive any rights to debt relief in the wake of a natural disaster.

IV. Conclusion

Even with blunt statistical tools and few observations, the data in this Article revealed a distinct pattern. Bankruptcy filings tend to rise in the period twelve to thirty-six months after a major hurricane. When hurricanes have struck in the past, victims turned to the bankruptcy courts for help. So that natural disaster victims will continue to have this assistance, exceptions need to be made to recent legislation that would restrict access to bankruptcy's fresh start. Bankruptcy is only a symptom of underlying financial distress, and this Article also offered a number of other measures that could be taken to alleviate the financial devastation visited upon victims of natural disasters. In the immediate aftermath of Hurricane Katrina, this Article has tried to give some suggestions to improve the lot of its victims as well as victims of future natural disasters. In the longer term, bankruptcy and consumer law scholars should consider what other changes need to be made so the existing legal framework does not impose further hardships on those already devastated by natural disasters.

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42 Such a story is told in Evan Halper, *A Fresh Calamity?*, L.A. Times, Aug. 28, 2005, at K1, where a home was heavily damaged in a landslide. The owner had to find the financial resources to secure temporary shelter, pay for repairs to the extent insurance was deficient, and pay the mortgage on the damaged home.

43 *See* BAPCPA § 327, 119 Stat. at 99-100 (adding 11 U.S.C. § 506(a)(2)).