

THRIVING ON ADVERSITY: CORPORATE TREATMENT
AND MISTREATMENT OF CONSUMERS IN THE WAKE
OF HURRICANE KATRINA

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I. Introduction: Ordinary Provisions in Extraordinary Times

Many of the everyday contracting practices that sellers and lenders use when they sell and lend are unfair. The unfairness is too often discounted by academics and deemed insufficient for redress by courts, legislatures, or agencies, mainly because the impact is marginal and scattered, rather than concentrated and devastating. According to widely accepted views of contract formation and enforcement, consumers should bear the economic costs associated with the form agreements to which they commit themselves; the underlying assumption here being that market forces over time will discipline sellers who try to overreach by using adhesive contract terms in standard-form consumer contracts.

At moments of extreme social dislocation, however, the impact of the routine ‘kicks and shoves’ that consumers endure because of adhesive terms is magnified, and the classical assumptions—however appropriate they may be in ordinary periods—come into greater doubt. The adhesive contract terms

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which insulate sellers from costs that are associated with unforeseen catastrophic events and distribute them entirely to consumers may seem exceptionally unjust; so also may the terms which excuse sellers of responsibilities for continuing to provide services but do not excuse consumers of their payment obligations; or the debt collection rules which insist on the satisfaction of regular payment obligations notwithstanding greatly altered circumstances. These commonplace provisions pile relatively small economic injuries on top of the very large ones that are generated by the catastrophe. The aggregated violence of these financial injuries will be large, and the sting of all these “minor” costs will no longer seem as bearable by consumers.

When a hurricane strikes or a flood rises, therefore, unfair practices that typically are hidden or dismissed as minor can become visibly painful and obviously undesirable from a social point of view. Not only are small injuries capable of exacerbating the debt burdens of individual consumers, but these injuries are experienced collectively, so that they potentially become more apparent to the public at large than at other times. Losses that consumers normally endure atomistically and sporadically occur simultaneously under the circumstances of a catastrophe. In the wake of Hurricane Katrina — the most severe domestic American catastrophe in modern memory — it is perhaps surprising that consumer financial losses attributable to seller exertions of rights based on form agreements did not receive closer attention.

It is true that reports about the misfortunes of the victims caught in the path of Hurricane Katrina drew a great amount of media attention in newspapers and on nightly television news broadcasts. For months after the hurricane passed and the worst flooding subsided, daily press coverage documented both the flawed recovery efforts and the overwhelming difficulties that many Gulf State residents experienced, including obtaining the restoration of essential services, finding decent temporary housing, applying for relief payments, and obtaining payment on insurance claims.

Outside of the Southern states, however, most of the attention to “consumer” and “marketplace” problems — on television and radio news coverage, on the Internet, and also in newspapers and magazines — was devoted to warning immediate victims of the storm about construction scammers and con artists (and warning the wider public about flood-damaged

cars and charity frauds).¹ This coverage, which was typical of the coverage of many previous hurricanes, focused on the exploitation of victims or donors to relief funds by fraudulent and disreputable fringe operators. In the midst of natural disasters and catastrophes, fringe actors pitch scams and con schemes involving unworthy products at susceptible populations. There is no question that raising awareness about salvage vehicles and charity frauds during such trying times are important pieces of the consumer education puzzle.² But compared to other equally-grave consumer problems connected with the hurricanes and their aftermath, these are not the problems upon which the press or leaders of the consumer movement or even attorney generals in the affected states should have been focusing.

If they had focused their attention on the debt collection practices and other predatory policies of well-established businesses, as well as fringe actor misbehavior, then opinion leaders, government officials, and consumer advocates would probably have been shocked with the results. It is the conclusion of this study after examining corporate consumer credit practices during and after the hurricane that, measured in terms of the aggregate impact on general consumer welfare, it was the action of mainstream mortgagees, bank loan officers, credit card issuers, utility companies, and health care provider payment collectors that more adversely affected the lives of the victims of the storm than did fringe actors. The payment creditors collectively diminished access to home ownership, health services, leisure

¹ See, e.g., Pbs.org, Katrina Charity Scams, http://www.pbs.org/newshour/bb/weather/july-dec05/charities_9-13.html (last visited Oct. 16, 2009); Msnbc.com. Cars of Katrina, http://risingfromruin.msnbc.com/2005/11/cars_of_katrina.html (last visited Oct. 16, 2009).

² National news reports about construction scams and phony charity schemes were abundant after Hurricanes Katrina and Rita. One indication of the interest in charity schemes and construction frauds in aftermath of the hurricanes is that a search going back one year, combining in the Lexis databases on March 10, 2006, ["fraud" and "Katrina" and "New Orleans"] produced ninety magazine stories, 587 major newspaper stories, and 2,216 local newspaper articles. The search: [hurricane and Katrina and "New Orleans" and charity and (scam or phony or scheme)], turned up eight magazine stories, sixty-eight stories in major papers, and 329 local newspaper articles. But stories about problems with major banks, insurance companies, and utilities were much less common: the search [hurricane and Katrina and "New Orleans" and problems and "insurance checks"] turned up only five magazine stories, twenty-six articles in major papers, and sixty-eight stories in local newspapers.

time enjoyment, and the ability to purchase basic necessities of life.

With few exceptions the aggregate debt collection activity of the major commercial actors, especially in the financial sector, has not been studied, even four years after the cataclysmic event.³ This article therefore reviews some of the hardships imposed by corporate credit, sales, and leasing agreements which aggravated the more tangible injuries brought about by Hurricane Katrina. It examines how mainstream housing, banking, lending, and select basic utility companies responded to consumer problems in the wake of the hurricanes, in order to learn about the costs and burdens that commercial entities imposed. It also suggests certain reforms to the laws of consumer credit, which would apply only in times of catastrophes, and other reforms, which, exposed by catastrophic events, might be proposed on a more general basis.

Parts II-IX explore the way vendors and lenders handled consumer service and credit agreements. Part X examines the limited effectiveness of government responses. Part XI concludes that the normal financial impact of the natural catastrophe was magnified substantially by lenders and vendors who took advantage of credit agreements by transferring and externalizing payment risks. The adverse impact on consumers was further exacerbated by the aversion of regulators and other actors in the legal system to alleviate the debt burdens thus created. Part XII also sketches an agenda for consumer reform to address both the

³ It deserves noting that there were some groups who focused their criticism on mainstream commercial creditor practices. . See discussions in the text, *infra*. ACORN (The Association of Community Organizations for Reform Now), later maligned for alleged unlawful activities in other locations, engaged in repeated efforts in Texas and Louisiana to educate the press and the public about the ways mortgage lenders contributed to consumer distress. ACORN played an important role in calling “town hall meetings” to discuss problems created by Katrina and Rita; it created a Hurricane Survivor’s Association; and it fought to improve the housing of evacuees. See <http://comm-org.wisc.edu/pipermail/colist/2005-September/004010.html> (visited Oct. 30, 2009). Consumers Union and the Consumer Federation of America issued joint letters calling upon state insurance commissioners to protect insurance consumers, see Letter from J. Robert Hunter, Director of Insurance for the Consumer Federation of America and Rob Schneider, Senior Staff Attorney for Consumers Union, to J. Robert Wooley, Commissioner for the Louisiana Department of Insurance; Walter Bell, Commissioner for the Alabama Department of Insurance; and George Dell, Commissioner for the Mississippi Insurance Department (Sept. 16, 2005), available at <http://www.consumersunion.org/pdf/katrina-insurance.pdf> (last visited Oct. 16, 2009).

extraordinary and ordinary problems illuminated by recent events.

II. Monetary Limits to Corporate Compassion: The Mortgage Lenders

Phyllis Agee's mortgage lenders told her last week that she will get another ninety-day deferment on payments - unless she starts working before that, and then they want her to resume payments on her ruined house.

With car payments and other bills coming due, she wants to start working. . . But she doesn't think she can juggle mortgage and rent if she doesn't get an insurance check soon. Even if she had that money, she isn't sure it makes sense to start rebuilding her house before the levees are repaired. . .⁴

After the hurricane struck, hundreds of thousands of homes were damaged or completely destroyed; and hundreds of thousands of lives were disrupted for indefinite periods. In Louisiana alone, approximately 217,000 homes were lost. To make matters worse, many of the affected homeowners were poor. In fact, roughly 26,000 families in the city had been living in poverty — and had little insurance.⁵ The Mortgage Bankers Association estimated that as many as 100,000 of those who were affected had no federal flood insurance.⁶ Thousands of people living in South Louisiana did have flood insurance; nevertheless, many were underinsured and did not get enough in benefits to pay off the mortgages on their ruined homes.⁷

⁴ Phyllis Agee, a 39-year-old single mom, as portrayed by Anna Varela, *Living in Limbo: Resources, Patience Begin to Run Out; Three Months after Katrina, Evacuees Wait on Insurance, Fend off Bill Collectors.*, ATLANTA J.& CONST., Dec. 18, 2005, at 1D.

⁵ Editorial, *Try to See it Our Way*, TIMES-PICAYUNE (New Orleans), Jan. 22, 2006 at 6.

⁶ *Storm Victims' Loans in Jeopardy: Borrowers, Lenders in Areas Hit by Hurricane Wait to See What Federal Help's Available*, TIMES UNION (Albany), Dec. 27, 2005 at E1, available at <http://archives.timesunion.com/mweb/wmsql.wm.request?oneimage&imageid=6314806> [hereinafter *Loans in Jeopardy*].

⁷ Editorial, *supra* note 5.

In gestures of compassion immediately after the hurricanes hit, mortgagees informed homeowners that their minimum mortgage payment obligations would be suspended. Virtually all the major home lenders granted victims an initial ninety-day reprieve from payments, late fees, and damaging reports to credit agencies.⁸ The Federal Financial Institutions Examination Council⁹ (“FFIEC”) urged financial institutions to “consider all reasonable and prudent steps to assist customers’ and credit union members’ cash and financial needs in areas affected by Hurricane Katrina.”¹⁰ A press release issued by the

⁸ *Id.* at 6; *see, e.g.*, Press Release, JPMorgan Chase, Chase, Bank One Announce Disaster Relief for Customers Affected by Hurricane Katrina (Sept. 3, 2005), *available at* <http://files.shareholder.com/downloads/ONE/794015441x0x17160/36740589-f28b-4cf3-8730-5b7fddade49c/172182.pdf> (last visited Oct. 16, 2009). *See also* Company Policies for Katrina Victims, http://clarkhoward.com/topics/katrina_policies.html (last visited Oct. 16, 2009).

⁹ The Federal Financial Institutions Examination Council (FFIEC) Interagency is a governmental body designed to promote uniformity in the supervision and examination of financial institutions by the Federal Deposit Insurance Corporation (FDIC), National Credit Union Administrations (NCUA), Office of the Comptroller of the Currency (OCC), and the Office of Thrift Supervision (OTS). It is also charged with facilitating public access to data which lenders are required to disclose under the Home Mortgage Disclosure Act of 1975.

¹⁰ In the immediate aftermath of Hurricane Katrina, almost everybody experienced a problem related to disruptions of the financial payment system, including: problems getting checks cashed; using ATM machines; locating credit cards, important financial records, and identification cards; wiring money to friends and relatives; and similar problems. The FFIEC recommended *but could not mandate* that banks and other financial institutions take such steps as waving ATM machine fees, increasing ATM cash limits, easing restrictions on cashing out-of-state and non-customer checks, delaying delinquency notices to credit bureaus, and easing credit card limits and terms for new loans. *See* Joint Release, Bd. Of Governors of the Fed. Reserve Sys., Conference of State Bank Supervisors, Fed. Deposit Ins. Corp., Nat’l Credit Union Admin., Office of the Comptroller of the Currency, and Office of Thrift Supervision to All Depository Institutions (Sept. 2, 2005), *available at* <http://www.occ.treas.gov/toolkit/newsrelease.aspx?JNR=1&Doc=64B58LZM.xml> (last visited Oct. 16, 2009). Later, in November, the same group urged forbearance “*when appropriate*” by financial institutions when dealing with individual consumers. While recognizing that deferral programs and individual workout arrangements would vary, the agencies encouraged institutions “to provide flexible repayment terms at the end of the deferral period, such that lump sum payments of all deferred interest and principal do not become due immediately when payments resume.” Press Release, Federal Financial Institutions Examination Council (Nov. 30, 2005), *available at*

FFIEC asked government agencies to “continue to encourage lenders to work with both individual and commercial borrowers who were affected by the storms.”¹¹ The FFIEC further acknowledged that:

[U]ncertainty exists for many borrowers and it will take time to work through each individual situation. Granting additional deferral periods for some borrowers in accordance with sound risk management practices may be appropriate given that the timing and amount of insurance payments, disaster payments, and other assistance may still be unknown.¹²

With respect to tenant evictions, there were mandatory *freezes* imposed on tenant evictions; but in all other respects, the government did not impose any mandatory rule of leniency on creditors. The voluntary nature of these FFEIC requests for lenders to provide credit relief stood in sharp contrast to the compulsory behavior government entities expected of the ordinary citizenry in other respects: there were mandatory emergency decrees of many sorts including evacuation demands and mandatory curfews.¹³

Creditors complied with the voluntary exhortation to defer payments and late fees during the initial 90-day period after the hurricane. They used language suggestive of benevolence rather than of expedience or of public relations necessity to describe their deferrals,¹⁴ and they widely advertised and received

<http://www.ffiec.gov/press/pr113005.htm> (last visited Oct. 16, 2009). In cases where principal and interest payments were temporarily deferred, the agency recommended that at the end of the deferral period “the lender should accord the account the same payment status it had before the deferral period began. In such circumstances, loans that were current before Katrina would be current when the deferral period ended and loans that were past due prior to the storm would be past due the same number of days they were past due when the deferral was made.”

¹¹ Press Release, *supra* note 10.

¹² *Id.*

¹³ In a number of cases, tenants were able to secure temporary restraining orders on evictions when the eviction was based upon rent being in default for periods where the dwelling was uninhabitable. Trymaine Lee, *N.O. Judge Temporarily Halts Evictions: Lawsuit Says Tenants Need Local Hearings*, *TIMES-PICAYUNE* (New Orleans), Oct. 25, 2005, Metro at 1.

¹⁴ In many of the affected areas, the displacement of the local population was to such a degree that oftentimes those employees who would have been responsible for the preparation of billing statements were unavailable.

attention in the free media for their decision to waive late fees—which, they made clear, could legally have been assessed during the ninety-day period.¹⁵ In numerous cases, these deferrals amounted to sincere gestures of relief. In many cases, however, early waivers were unavoidable because demands for payment and assessments of late fees were not feasible in light of the practical impossibility of sending statements.

Beyond deferring late fees and initial payments, the policies of the lenders reflected little kindness, benevolence, charity, empathy, or forgiveness toward consumers, at least in the ordinary sense of the words. Lenders might have eliminated interest payment obligations on pre-existing balances for three, six, or even twelve months, thereby stretching the duration of open-end (revolving credit) and closed-end loans accordingly. They might have reduced interest charges during the aftermath of the hurricane. They might have announced general policies designed to reduce the anxieties of consumers about adverse credit reports. They might have collectively convinced the Federal Reserve Bank to add sufficient liquidity to the system to increase the availability of consumer credit. But none of these or similar approaches were employed.¹⁶

Alarming and perhaps most economically damaging, of course, was the underlying and largely underappreciated fact that the suspension of obligations in the overwhelming number of cases merely postponed payment obligations with respect to

Significant difficulties also existed in regard to identifying customers' whereabouts. Furthermore, the postal infrastructure in these areas had been so compromised that even if the statements could have been prepared for those whose whereabouts were known, actual delivery would have been impossible. See David Von Drehle & Jacqueline Salmon, *Displacement of Historic Proportions*, WASH. POST, Sept. 2, 2005 at A01 (noting that Hurricane Katrina created the largest displacement of Americans since the Civil War with over a half million people relocating after the storm); see also Michelle Hunter, *NEITHER RAIN NOR SLEET?: The Storm Has Passed, the Cleanup is Under Way and Local Residents Want at Least One Piece of Their Normal, Pre-Katrina Lives Back: Their Mail*, TIMES-PICAYUNE (New Orleans), Nov. 23, 2005, National at 1 (Following the initial restoration of postal service, mail oftentimes arrived weeks late).

¹⁵ Whether late fees could have been collected during the first 90 days if they had not been waived is uncertain. In addition to the bad will that might have been generated, it is possible that courts might have disallowed late fees or foreclosure actions immediately after the disaster, based on equitable principles; it is also possible that the failure to waive such fees would have elicited regulatory responses.

¹⁶ See *infra* notes and accompanying text.

principal and interest on loans. The obligations to pay principal amounts and to pay interest on outstanding balances continued to run, even during the time they were postponed.¹⁷

For several months, payment obligations were deferred, and late payment fees were waived, but interest on outstanding balances and payment of principal were not to be forgiven. The payments that were due in September, October, and November continued to accrue regardless of whether they related to uninhabitable properties, and regardless of whether people lived in them or were allowed to live in them.¹⁸ Thus, for example, while the grace period ran for home mortgage borrowers, tens of thousands who were affected faced mounting indebtedness, while the equity in their houses shrank.

As the three-month “holiday” period came to a close, lenders began to prepare their borrowers for the impending need to catch up. Chase Home Finance mailed a letter to customers in November of 2005 explaining that the “initial moratorium period on the account . . . will be expiring soon,” and that it was “attempting to contact . . . customers on moratoriums in an effort to establish a longer term solution for their accounts.”¹⁹

The impact of “moratoria without forgiveness” was to increase the effective rate of interest on consumer debt. Banks which offered these deferral periods to their customers typically acknowledged, but did not highlight, this truth. One sample news release reads, in pertinent part:

In response to the overwhelming and deepening human
need in areas affected by Hurricane Katrina, AmSouth

¹⁷ Jody Shen, *Prepayment Fees Latest Issue in Gulf*, AMERICAN BANKER, Dec. 23, 2005, Mortgages at 1.

¹⁸As a consequence of these waivers, thousands who should have walked away from their homes the day after the flood were encouraged by the grace period, as well as by their traditional commitment to honor their financial commitments, to agree to make payments and/or incur liability for interest payments or possibly principal payments as well. See Martha Waggoner, *N.C. Victims of '99 Hurricane Are Still Weathering Woes*, WASH. POST, Dec. 27, 2005, at A02 (reporting on misguided encouragement to remain, quoting Jessie Murphy: “Because had I been thinking right . . . I probably wouldn’t even have come back here. . . . Then I got to thinking about how my husband built this house. . . . But see, he’s not here. I’m the one left with the bills.”).

¹⁹ Letter from Chase Home Finance to customers (Nov. 14, 2005) (on file with the author). The letter requested that the borrower contact Chase offices within 30 days and be “prepared to provide” answers to basic questions including: “was your property affected” by the hurricanes?; “are you living in your home?”; and “what is your current employment situation?”. *Id.*

is automatically deferring consumer and small business loan payments for up to sixty days for customers in any county designated for individual assistance by the Federal Emergency Management Agency... For residential mortgage loans, customers are asked to contact 1-800-AmSouth in order to discuss possible payment extension options. Customers who choose to make their scheduled payments will have those payments applied in normal fashion... **In all cases, interest on accounts will continue to accrue and payments will be applied in the normal fashion [Emphasis added].**²⁰

No magic wand mitigated the problems of consumers within the ninety days of grace. By the time the ninety-day grace period ended on December 1, 2005, 24.63 percent of all Louisiana mortgages were behind by at least one payment, compared to 4.4 percent nationally.²¹ And although a number of banks — New Century Financial and Wells Fargo, to name a few — extended the grace period three months further, most did not.

During and directly after the grace period ended, displaced homeowners tried to recover on their insurance policies (both homeowners' and flood insurance policies) in order to meet their mortgage obligations, but these efforts were impeded by most insurers whose practices placed mortgagees ahead of homeowners. Writing in *USA TODAY*, Kathy Chu explained in greater detail the difficulties faced by those who tried to recover insurance payments with which to rebuild or keep their loan payments current.²² Typically, insurance companies issued checks for damaged homes which were made out to the homeowner *and* the mortgage company that provided the loan, and then mailed the checks to the mortgage company for distribution to the consumer. The banks and mortgage companies typically released the funds all at once, or else decided to send them out in progressive phases.²³

²⁰ TheFreeLibrary.com, AmSouth Offers to Automatically Defer Payments for Customers Severely Impacted by Hurricane Katrina, <http://www.thefreelibrary.com/AmSouth+Offers+to+Automatically+Defer+Payment+for+Customers+Severely...> - a0135769568 (last visited Oct. 11, 2009).

²¹ *Loans in Jeopardy*, *supra* note 6.

²² Kathy Chu, Louisiana Attorney General Probes Insurance Check Issues; Mortgage Companies Involved in Disputes, *USA TODAY*, Dec. 30, 2005, at 2B.

²³ The Insurance Commissioner of Louisiana took pains to explain to consumers why it was reasonable for insurance companies to issue checks

Contending that they wanted to be sure that funds were actually used to rebuild the homes they insured, however, more than a few mortgage lenders delayed mailing out the checks. The Louisiana Attorney General opened an investigation into unacceptable delays, and, in particular, began investigating mortgage lender Countrywide Financial. Countrywide deflected the blame, however, and attributed its behavior chiefly to high volumes of claims it had received and faulty computer systems.

During December 2005, the grace period for payments of principal passed — earlier, in some cases, and later, in others. But at about this time, mortgage lenders began to issue demands. Pursuant to their standard form agreements, lenders demanded that borrowers make up their previous months of missed payments, including interest and principal for the preceding months; if they did not, they faced foreclosure. They further pressed with demands that consumers “cure” their defaults by catching up with all the previous months during which their payment obligations had been postponed, along with interest charges on the principal amount outstanding as of December (which was larger than it would otherwise have been). *The New Orleans Times-Picayune* provided the account of Barbara Smith, age 67, who in November received a notice at her temporary living quarters in Kentucky from Green Tree Servicing LLC, her mortgage company, demanding that she “cure the default” of \$792 on her New Orleans 9th Ward home mortgage within thirty days or the company would foreclose and report her to credit

which were made out jointly to lenders: “When you bought the house, you took out a loan, and as a part of that transaction the lender required that you purchase an insurance policy to protect the lender’s financial interest in your home as well as your own. Yet many people are taken by surprise when the insurance payment for damages to their homes was made out to them and the lender. When you think about it, though, the company holding the mortgage has to have some way of protecting its financial interests. When you got the check, you were no doubt concentrating on having your home repaired and getting on with your life. Your first thought was of getting those repairs done as quickly and effectively as possible. But the lender has no guarantee that everyone will act responsibly when paying their bills.” United Policy Holders, Ask Robert Wooley, Your Commissioner of Insurance, <http://www.unitedpolicyholders.org/pdfs/mortgagecompanysettlement.pdf> (last visited Oct. 16, 2009). It should be noted that there are alternative mechanisms which would provide consumers with incentives to “act responsibly” (however one interprets that phrase), apart from giving the lender such control, which the Insurance Commissioner’s letter does not consider. The approaches taken in directives issued in the European Union, for example, generally favor standard form protections against excessive control by sellers.

agencies.²⁴ Upon calling the company, Ms. Smith received a hostile warning to pay up or lose her house.²⁵

Major housing lenders behaved somewhat better than “sub-prime” lenders, but complaints about both flowed into the office of Louisiana’s officials. Government officials indicated that they were receiving hundreds of complaint letters about banks requesting huge balloon payments of past-due principal and interest to bring their mortgage payments up to date.

Of course, the consequence of these payment demands was to shower misery on those whose lives had already been torn up by disaster. These demands persisted for several years, with interest continuing to accumulate, and in tens of thousands of cases resulting in larger and larger outstanding balances, and eventually defaults, until foreclosure proceedings were commenced.²⁶

In a substantial number of cases, weary homeowners were asked to continue (and catch up on) mortgage payments for homes that had been demolished. The lump sum demands were, essentially, forcing many consumers to make payments covering periods during which their homes were uninhabitable, and they came at a time when many homeowners had relocated to other housing to find work or were still not employed.

In another large set of cases, consumers were encouraged by mortgage lenders to bring their mortgages current, notwithstanding the fact that the intrinsic value of their homes had plummeted so much that their additional payments did not provide any increased equity in their property. In essence, many consumers were being encouraged to make payments which redistributed the economic losses of the hurricane onto themselves and away from the banks and lenders. Many lenders thereby avoided the necessity to foreclose on devalued collateral before they had extracted the maximum possible amount of

²⁴ Bill Walsh, *More Bad News at a Bad Time: Subprime Lenders Are Getting Nasty*, TIMES-PICAYUNE (New Orleans), Dec. 11, 2005, Money at 2.

²⁵ *Id.*

²⁶ Kirstin Downey, *Mortgage Payments Lag in Katrina Zone*, WASH. POST, Mar. 15, 2006 at A03; see also BayouBuzz.com, *Louisiana Business Shorts: New Orleans Recovery, Katrina Lawsuits, Real Estate Foreclosures, Internet Security*, Aug. 6, 2007, http://www.bayoubuzz.com/News/Louisiana/Business/Louisiana_Business_Shots_New_Orleans_Recovery_Katrina_Lawsuits_Real_Estate_Foreclosures_Internet_Security__4374.asp (last visited August 27, 2007) (noting that foreclosure numbers were expected to balloon in areas affected by Hurricane Katrina).

revenue possible from homeowners. In hindsight, if these vulnerable consumers had had access to better information, many of those who made the payments demanded would not have done so, and instead would have found it best to simply walk away.

At another extreme, consumers who wanted to pay off their mortgages using insurance proceeds were charged fees for doing so that the Attorney General believed were excessive.²⁷ The consumer group ACORN presented evidence that several lenders — including Ocwen Financial Corp. and a subsidiary of Bear Stearns — were assessing large prepayment penalties.²⁸ Ocwen — a company which had been investigated and condemned for predatory lending practices in the past — announced that its policy was “to issue payoff quotes with all amounts due. . . and then work with customers who have special circumstances, especially those affected by natural disasters.”²⁹

Other lenders, including Countrywide Financial Corp., Wells Fargo & Co., Citigroup Inc., National City Corp., and Ameriquest Mortgage Co., told reporters that their “current policy” was “to waive the penalties if a homeowner pays off the mortgage on a home hit by the hurricanes with insurance proceeds.”³⁰ The director of housing counseling for ACORN, however, suggested that the mainstream banks actually engaged in the practice of charging payoff fees and then backing off when challenged.³¹

The result of the predatory policies pursued by banks and insurers was personally and economically devastating: citizens were forced to walk away from their properties because they were unable to juggle their bills while waiting in temporary homes for insurance payments – payments which were not even guaranteed to cover the mortgage(s) on their homes.³² Another unfortunate result was that people had been induced to make both principal and interest payments on homes (or wrecks of houses) which were uninhabitable without major investments; and on properties whose equity would not have increased regardless of whether payments were up to date.³³

To avoid mortgage foreclosures, debtors have historically

²⁷ Chu, *supra* note 22, at 2B.

²⁸ Shenn, *supra* note 17, Mortgages at 1.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Varela, *supra* note 4, at 1D.

³³ *See supra.*

resorted to filing petitions in bankruptcy. A large number of consumers who were hoping to avoid foreclosures through such judicial safeguards, however, were confronted with a difficult revelation: bankruptcy was a more difficult path than ever before.

Shortly before Hurricanes Katrina and Rita landed, Congress — in what amounted largely to capitulation for commercial credit card issuers and other banking interests — passed the Bankruptcy Abuse Prevention and Consumer Protection Act.³⁴ Under this legislation, consumer credit card and installment debt is harder to discharge. Furthermore, bankruptcy protection is, in general, harder for consumers to obtain. The law favors creditors at the expense of debtors, particularly poor consumer debtors. Following Katrina, restrictive measures were introduced in Congress to delay the implementation of the Act or, at least, to exclude from its reach those affected by the hurricanes.

None of those bills passed, however.³⁵ Recourse for the victims of the hurricanes was made less valuable than in previous calamities. And while proponents of the Act responded to these concerns by noting that the legislation already contained provisions for storm victims, in practice these provisions often could not be utilized by those they were intended to benefit because the Act put the burden of proof squarely on the debtor. For individuals whose homes were destroyed along with their contents, producing the required financial records and funneling them through a costly legal process was just not possible.³⁶ In the absence of substantive modification, the Act aggravated the misfortune of the consumer-debtors who were crippled financially by the disaster.³⁷

There are many anti-consumer-debtor provisions in the Act, but three changes were particularly damaging for Katrina victims. One major change from prior law required debtors to repay at least a portion of their debts over five years if they earn

³⁴ The Act was signed by President Bush on April 20, 2005; most provisions apply to bankruptcy cases filed after October 17, 2005. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

³⁵ See *id.*

³⁶ Howard Karger, *The Financial Storm After the Hurricanes*, ALTERNET, Sept. 29, 2005, available at <http://www.alternet.org/katrina/26089/> (last visited Oct. 20, 2009).

³⁷ See Ryan T. Murphy, *The Bankruptcy Reform Act: The Fundamental Changes For Lenders*, NORTHWESTERN FINANCIAL REVIEW, Dec. 15, 2005, at A2.

more than the state median income. This provision – in more than a few instances – compelled the repayment of mortgages on uninhabitable and worthless land. Another provision essentially prevented debtors from filing more than one petition per year by removing in the event of other filings the automatic stay of suits by creditors. Avoiding foreclosure on homes became more difficult as a result. Debtors who filed for personal bankruptcy were also required by the new law to undergo credit counseling (often funded directly or indirectly by creditors) within six months before they filed their petition.³⁸ This provided an additional burden and proved difficult for debtors in the early months after the storm.

Hoping to get the federal government to address the mortgage lending crisis, members of the Louisiana Congressional delegation proposed a massive expenditure program through which the government would buy back thousands of severely damaged homes. This plan, however, was never implemented.³⁹ Although extremely popular in the affected region, the proposal was opposed by the Bush Administration and ultimately never materialized after it stalled on the Senate floor.⁴⁰ At the federal level, this problem was addressed through a senatorial

³⁸ The requirement that a debtor consult with a credit counselor prior to filing for bankruptcy was temporarily waived in some jurisdictions affected by Hurricane Katrina. See Press Release, U.S. Dep't of Justice, *U.S. Trustee Program Announces Approval of Credit Counseling Agencies for Bankruptcy Filers and Waiver of Credit Counseling Requirement in Areas Affected By Hurricane Katrina*, Oct. 4, 2005, available at http://www.usdoj.gov/ust/eo/public_affairs/press/docs/pr20051004.pdf (last visited Oct. 20, 2009).

³⁹ Editorial, *Don't Leave Us to Foreclosure*, TIMES-PICAYUNE (New Orleans), Jan. 29, 2006, at 6 (U.S. Rep. Richard Baker is not giving up on his proposal for a federally backed buyout [at 60 percent of equity based on pre-Katrina value] of flooded-out homeowners and small business owners. He wants Congress to create a corporation that would release Hurricane Katrina's victims from their mortgages, sell bundles of property to developers and get storm-ravaged land back into commerce). See also Editorial, *What Mr. Powell Doesn't Get*, TIMES-PICAYUNE (New Orleans), Feb. 3, 2006, at 6 (contending that reconstruction czar Powell should get behind Baker's proposal).

⁴⁰ Bill Walsh, *Ball Now in La. Court, Bush Says; State Needs a Plan for Recovery, He Says* TIMES-PICAYUNE (New Orleans), Jan. 27, 2006, National at 1 (Governor opposed to Bush Administration's opposition to buyout proposals, noting that White House proposal would only help one in ten damaged homeowners). See also Stephanie Grace, *Forest of Red Tape Leaves Feds Unmoved*, TIMES-PICAYUNE (New Orleans), May 8, 2007, Metro-Editorial at 7 (avoidance of federal bureaucracy, a key talking point in President Bush's opposition stance, was not accomplished).

exhortation introduced by Senator Mary Landrieu, D-La., “expressing the sense of the Senate that lenders holding mortgages on homes in communities of the Gulf Coast . . . should extend current voluntary mortgage payment forbearance periods and not foreclose on mortgages in those communities.”⁴¹ Proposals to permit personal debtors to write down the value of their home mortgages in bankruptcy proceedings also were rejected after intense lobbying efforts by the mortgage industry.⁴²

The portrayal above is not intended to demonize mortgage lenders, most of whom were understandably acting to preserve the financial viability of their companies and looking after the interests of their shareholders. Lenders, too, “took a hit” when Katrina made its landfall.⁴³

Nonetheless, in allocating the costs of Hurricane Katrina between consumers and lenders, it seems evident that lenders, by a large margin, gained the upper hand through the enforcement of standard form contracts, policies, and credit agreements.⁴⁴

III. Resisting Payment of Claims: The Insurance Companies

I lived in eastern New Orleans and lost everything in the storm. All of my damage is considered flood damage, but I didn't have flood insurance. On top of this, my mortgage company is asking that I make payments covering the last three months. I don't have the money to fix my home or even catch up on payments. . . Should I let my home go into foreclosure? And if I do, will I be able to buy a home again in the near future? Will this situation devastate my credit for life?⁴⁵

⁴¹ S. 347, 109th Cong. (2006).

⁴² See, e.g., Leslie Wayne, *Lobbyists for Financial Institutions Swarming All Over the Bailout Bill*, N.Y. Times, Sept. 26, 2008 (discussing anti-cram-down lobbying efforts of Chief of American Banker's Association).

⁴³ *Id.*

⁴⁴ Editorial, *Sounds like a plan for rebuilding New Orleans*, ARK. DEMOCRAT-GAZETTE, Jan. 4, 2006.

⁴⁵ Answer Spot, *Insurance Company Holds Purse Strings*, TIMES-PICAYUNE (New Orleans), Dec. 4, 2005, Money at 1.

I have replacement insurance on my second home in Bay St. Louis. But my insurance company is holding back some of my settlement until I show proof that the work is being done. Is this legal?⁴⁶

In 2006, the vice-chair of the Insurance Coverage Litigation Committee in the Insurance Practice Section of the American Bar Association Journal predicted that it would “be a long time coming before people down here will be paid significant amounts of money for anything besides flood damage.”⁴⁷ That prediction proved largely accurate. Insurers effectively distinguished “storm” damage (hurricane wind and rain) for which most homeowners’ policies provide coverage, from “flood” damage, which was excluded under standard form policies. They further distinguished between damage done to the interior of homes by rain, wind-driven rain, and rain coming through openings caused by wind damage and other forces.⁴⁸

In New Orleans in particular, it proved a challenge for homeowners to demonstrate that their houses were ruined by the rain and wind *before* they were devastated by the flood waters which came pouring into the city when the levees gave way.⁴⁹ The majority of insurance carriers resisted payments in the absence of such proof.⁵⁰ Oftentimes, insurers relied on “anti-concurrent” clauses written into a large portion of policies held in the area. Essentially, these clauses provided that if any of the damage was caused concurrently by an “excluded peril” such as water damage, then the insurer was under no obligation to pay even if some of the damage was sustained by forces which would have otherwise been covered. This enforcement became especially contentious when applied to policies of “slab cases” — homes that were completely flattened by the storm, but with little evidence left behind as to whether the damage was caused by

⁴⁶ *Id.* (Yes, this is legal).

⁴⁷ Steve Seidenberg, *Insurance: No Sure Thing*, 92 A.B.A.J. 51, 51 (2006) (quoting Mark Daniel Mese, an attorney in Baton Rouge, La.).

⁴⁸ Regarding the subtle law pertaining to the distinction between wind and rain damage, *see, e.g.*, *Turner Constr. Co. v. Ace Prop. & Cas. Ins. Co.* 429 F.3d 52 (2d Cir. N.Y. 2005); this case is discussed on INSURANCE SCRAWL, NOV. 10, 2005, *available at* http://www.insurancescrawl.com/archives/katrina_rita_related/ (last visited Oct. 20, 2009). *See also* *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 423-42 (5th Cir. Miss. 2007).

⁴⁹ *Id.*

⁵⁰ *Turner*, 29 F.3d at 52.

water or wind.⁵¹

Intransigence regarding the obligation of insurance carriers to pay, based on interpretations of their right to investigate further under standard form contractual agreements, was by no means limited to New Orleans. In February 2006, the Cable News Network broadcasted a special documentary report which focused on the town of Bay St. Louis, Mississippi. The week prior to Christmas 2005, some four months after Hurricane Katrina, consumers expressed “betrayal” by their insurance companies. In fact, some customers had been waiting two to three months for their insurance adjuster to simply return their phone calls. As late as February 2006, according to the documentary — more than a year and a half later — several companies were still unresponsive to some claims. One report indicated that an older couple had been offered \$16,000 for their home but nothing for their restaurant, which more than two dozen witnesses saw destroyed in the wind.⁵² Under such circumstances, the non-binding recommendations made by the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), Board of Governors of the Federal Reserve System (BOG), the Office of Thrift Supervision (OTS), and the Office of the Comptroller of the Currency (OCC) to waive availability restrictions on insurance checks were unhelpful.⁵³

⁵¹ Joe Nocera, *Talking Business; A Contract is a Contract, Right?*, N.Y. TIMES, Feb. 24, 2007 at C1; see Jay S. Goldblum, *Katrina and Beyond: Judicial Treatment of Boilerplate Language in Standardized Insurance Contracts*, 2007 MICH. ST. L. REV. 453, 461 (2007). (“The emergence of contracts of adhesion in the insurance industry has left the insured in a vulnerable position. Knowing that the terms of the contract are standardized and non-negotiable, the insured rarely reads its terms. . . . The assumption follows that the insurance company would ‘take advantage of the superior bargaining position to slip in terms . . . [that] would not be reasonably expected by a party to that contract’); see also Kenneth S. Abraham, *The Hurricane Katrina Insurance Claims*, 93 VA. L. REV. IN BRIEF 173 (2007) (“Certain policies not only exclude coverage of loss caused by flood, but also of “waves” and “tidal water,” “whether or not driven by wind.” Whether damage from the storm surge is excluded depends on the meaning both of these policy provisions and of the anti-concurrent causation clause which precludes coverage of loss resulting from an excluded cause “regardless of any other cause or event contributing concurrently or in any sequence to the loss”).

⁵² Kathleen Koch reporting on Bay. St. Louis, Mississippi, (*CNN Special Broadcast*, Feb. 2006).

⁵³ Julia S. Cheney & Sherrie L.W. Rhine, *How Effective Were the Financial Safety Nets in the Aftermath of Hurricane Katrina?*, Jan. 2006,

The routine power of creditors to report delinquencies to credit reporting agencies gave considerable leverage to home lenders to demand amounts above insurance payoffs, which had a negative impact on the size of the payments insurers were inclined to settle on. A news account told of a younger couple expecting a child, who made concerted efforts to recover from Nationwide Insurance for damage done to their house by wind. Although neighbors on either side had already recovered from their carriers, Nationwide “stone-walled” them, claiming the need to investigate further whether the damage was caused by flooding or, as Nationwide *hoped*, some other cause not coverable. “Nationwide is not on our side,” the couple bitterly exclaimed. The young couple did receive some flood settlement from the federal government, but the payout covered only half of their damage. Nevertheless, the report indicated, “they keep on paying on their destroyed home because they can’t afford to lose [their] credit rating.”⁵⁴

IV. Evictions Without Notice: The Landlords

Do I owe rent on my apartment for the period in August and September when we were under a mandatory evacuation order? My apartment wasn’t damaged much, but I couldn’t stay there because of the evacuation order and because there were no utilities.⁵⁵

Prior to the hurricanes, the housing stock of New Orleans consisted of approximately 53 percent rentals. Because as much

available at <http://www.phil.frb.org/payment-cards-center/publications/discussion-papers/2006/HurricaneKatrinaJan06.pdf> (last visited Oct. 23, 2009); *see also* Jeanne Sahadi, *Lenders Lend a Hand to Katrina Victims*, CNN MONEY, Sept. 8, 2005, *available at* http://money.cnn.com/2005/09/07/pf/katrina_financial_relief/index.htm (last visited Oct. 23, 2009). Other recommendations offered by these agencies included: waiving ATM fees; increasing daily ATM cash withdrawal limits; easing restrictions on cashing out-of-state and non-consumer checks; waiving late fees, overdraft fees, and early withdrawal penalties; allowing loan customers to skip or defer some payments; easing credit card limits and credit terms for new loans; and delaying reporting delinquent payments to credit bureaus. The forgiveness of interest payments was not among their recommendations.

⁵⁴ Special Broadcast, *supra* note 51.

⁵⁵ The Answer Spot, *Handling the Money*, TIMES-PICAYUNE (New Orleans), Nov. 6, 2005, Money at 1.

as one-fifth of that rental stock was destroyed by the hurricanes in late August, the price of livable housing naturally shot upward. Katrina knocked out more than 184,000 rental units statewide.⁵⁶ Landlords were faced with unpleasant choices, most of which led to the decision to evict tenants. Some re-rented deserted apartments under lease where tenants had not paid rent. Other landlords succumbed to the temptation to find technical justifications for breaking leases with good tenants to extract higher rents. Others chose to evict tenants so they could make apartment repairs.⁵⁷

The Mayor asked the city council to consider placing caps on permissible rental increases, but that did not happen. The number of eviction notices steadily increased. Instead of providing renters with a chance to defend themselves from evictions, landlords throughout the region gave notice only by tacking eviction papers to doors, "knowing full well that residents had been scattered by the region's mandatory hurricane evacuation," and thus, would not see the notice.⁵⁸

The Governor issued an order on September 6, 2005, which delayed legal action, including evictions, until September 25, 2005. According to the *Times-Picayune*, a daily newspaper published in New Orleans, this was generally greeted as "a sensible step to prevent confusion and to protect the rights of parties in lawsuits."⁵⁹ Governor Blanco later extended the order into a moratorium on evictions that would last until October 25, 2005. By this time, it had become very unpopular with landlords who believed that, given the housing shortage in the city, there was little reason not to extract high rents, fix buildings up, and rent out vacant apartments (notwithstanding pre-existing leases).⁶⁰

The day after the moratorium ended, constables in the

⁵⁶ Gwen Filosa, *Housing Shortage Hits Labor Market; Working Poor Mostly Left to Fend for Themselves*, TIMES-PICAYUNE (New Orleans), Mar. 12, 2006, National at 1.

⁵⁷ See, e.g., Mary Swerczek, *Kenner Complex Tenants Appeal Eviction Notices; 'Squatters' in Damaged Units Seek Council's Help*, TIMES-PICAYUNE (New Orleans) Jan. 21, 2006, Metro at 1.

⁵⁸ Gwen Filosa, *Lawsuit Takes on Post-Storm Evictions; Groups Want Judge to Rein in Landlords*, TIMES-PICAYUNE (New Orleans), Nov. 18, 2005, Metro at 1.

⁵⁹ Robert Travis Scott & Greg Thomas, *Landlords Say Blanco Order Worsens Housing Shortage; They Can't Evict People Who Aren't Returning*, TIMES-PICAYUNE (New Orleans), Oct. 15, 2005, Metro at 1.

⁶⁰ *Id.*

New Orleans area served “record numbers of notices telling tenants to leave.”⁶¹ Ten days after the moratorium ended, more than 700 eviction notices had been filed. As the fall of 2005 gave way to winter, thousands of tenants were served with judicial process for eviction hearings.⁶² It was estimated that 10,000 eviction notices were filed in November alone.⁶³ In housing complexes across New Orleans, tearful tenants joined forces to prevent the displacement of their family, friends, and neighbors.⁶⁴

Landlords seeking eviction were required to serve tenants at their current addresses, and, if unknown, to ask the Federal Emergency Management Agency (FEMA) to provide last known address information. Eviction proceedings were set for forty-five days after service of process. Unfortunately, FEMA, which was ordered in November 2005 to go through its lists to find persons served with eviction notices, had, by the end of January 2006, checked only 99 out of 1,000 requested. The result of this inefficiency was an outcome neither landlords nor tenants wanted — hearings on hundreds of eviction notices were postponed indefinitely.⁶⁵

When tenants eventually did get to court, they generally lost. Although many judges were sympathetic to tenants, the law provided little to no leeway for them if rent payments were not made.⁶⁶ One of the few areas where judges could demonstrate some discretion involved granting an allowance for extra time for

⁶¹ Matt Scallan, *State's Cease-fire on Evictions Ends; Landlords Flood Courts; Hearings to Start Next Week*, TIMES-PICAYUNE (New Orleans), Oct. 26, 2005, National at 1; Adam Nossiter, *New Orleans Landlords Are Pitted Against Tenants in Court*, N.Y. TIMES, Nov. 4, 2005, at 20.

⁶² James Podgers, Siobhan Morrissey, Geri I. Dreiling & G.M. Filisko, *Real Estate: The Clock is Ticking*, 92 A.B.A.J. 50, 50, (2006).

⁶³ Gwen Filosa & Michelle Hunter, *Rental Quandary*, TIMES-PICAYUNE (New Orleans), Dec. 12, 2005, National at 1.

⁶⁴ Filosa, *supra* note 57.

⁶⁵ Susan Finch, *Court: FEMA Reply Comes Up Short; It Seeks Addresses in Eviction Lawsuits*, TIMES-PICAYUNE (New Orleans), Jan. 21, 2006, Metro at 1; *see also* Bill Barrow, *N.O. Leadership Lacking, Report Says; Housing Shortage Also Hindering Recovery, It Says*, TIMES-PICAYUNE (New Orleans), Apr. 25, 2007, National at 2 (progress was hindered because demand for labor outstrips supply, largely due to a lack of affordable housing); *see also* Bruce Egler, *Proposal to Limit New Housing Dropped; Moratorium on Apartments Forsaken*, TIMES-PICAYUNE (New Orleans), March 16, 2007, National at 1 (displaced residents unable to return due to high cost of rent and alleged plans for gentrification).

⁶⁶ Real Estate: The Clock is Ticking, *supra* note 61.

now-evicted tenants to go in and retake their possessions.⁶⁷ Perhaps more devastating, state and local laws allowed eviction without cause for those on month-to-month leases, or in cases where the landlord claimed the dwelling was destroyed.⁶⁸ “It’s terrible,” a lawyer was quoted as saying. “Louisiana law is so favorable to landlords that tenants really have no recourse if they do not have a term lease.”⁶⁹

A measure that passed the Louisiana House of Representatives on November 9 after the storm would have permitted a landlord to evict tenants who left under mandatory evacuation and hadn’t made rent payments for the time they were to be away. The *Washington Post* interviewed an associate professor at Tulane who referred to the legislation as a “landlord immunity bill.”⁷⁰ And yet the *New York Times* reported that housing experts were saying that many landlords were not trying to gouge. “It’s a real conundrum,” said a spokesman for the Greater New Orleans Fair Housing Action Center. “The landlords make their money off renters, and renters, not unreasonably, object to paying rent when they are not even there.”⁷¹

⁶⁷ *Id.*

⁶⁸ Josh P. Hamilton, *Housing Shortage Is Slowing Down Louisiana Recovery; Soaring Rents Drive Out Residents*, WASH. POST, Nov. 19, 2005, at F37.

⁶⁹ See Rental Quandary, *supra* note 62.

⁷⁰ Hamilton, *supra* note 67.

⁷¹ Adam Nossiter, *New Orleans Landlords Are Pitted Against Tenants in Court*, N.Y. TIMES, Nov. 4, 2005, at 20; see also Shaila Dewan, *Road to New Life After Katrina Is Closed to Many*, N.Y. TIMES, Jan. 12, 2007 (Low income tenants, comprising the majority of evictees, will find returning to their homes difficult due to doubling and tripling of rents; only 21% of the 77,000 rental units in the five parishes of New Orleans are slated to be rebuilt through government grants and tax credits while HUD goes forward with plans to demolish 3,000 lower-income apartments and replace them with units that cater to middle income families); Two years after Katrina devastated the Gulf Coast, renters are left with few options to resettle in their former communities. Furthermore, funding programs set aside to benefit renters are few and far between. Landlords who own from one to four rental units can tap into \$869 million in public funding, which pales in comparison to the \$7.5 billion devoted to owners of damaged homes. Eloisa C. Rodriguez-Dod & Olympia Duhart, *Evaluating Katrina: A Snapshot of Renters’ Rights Following Disasters*, 31 NOVA L. REV. 467, 484 (2007).

V. Price Increases and Power Usage: The Electric Utility Providers

The difficulties which faced utility companies after the September hurricanes were immense—almost as immense as those which faced each of the thousands of individual consumers as they tried to put their lives back together in the wake of the storms. In Mississippi, the Mississippi Power Company lost electric service to all of its 195,000 customers and suffered extensive damage to its facilities. The company's workers spent day and night trying to rebuild lines and reconnect customers.⁷² Nearly 65 percent of the company's transmission and distribution facilities needed to be replaced or repaired.

Customers were generally treated with care, especially during the initial period. During the storm and its immediate aftermath, the company suspended all meter readings, both due to a shortage of manpower and also because of a desire to give its customers a breathing spell. But soon afterward, by mid-September, the company began reading meters again and sought to return to its normal billing schedules. The company waived many of its normal fees, including connection fees, late fees, and deposits. But when the company was not able to read a meter (for example, when a house had been totally destroyed) it nonetheless endeavored to "estimate a customer's usage in order to determine the bills" for September and October. "We estimated a customer's usage based on their historical patterns. If that's the case the next month's bill will make up for any difference—of course, customers are charged only for the electricity they use."⁷³ To

⁷² The Mississippi Power Company is a subsidiary of the Southern Company. See Mississippi Power Customer Information, <http://newsinfo.southernco.com>.

⁷³ In Louisiana, the Entergy Corporation, serving more than a million customers in 58 parishes, faced problems of a comparable magnitude. The company tried to return to the normal billing process as soon as possible. It took a different approach to meter reading, however. As of March 2, 2006, the company's website stated that for areas significantly affected by Katrina, the company's estimates would assume no usage for the period after August 29, and for Rita, no usage would be assumed after September 24, 2005. On its Frequently Asked Questions web page, in answer to the question, "Will my service be interrupted if I do not make another payment," the company replied: "Any subsequent bills you receive would show the amount in question as a previous balance if payment has not been delivered by the Postal Service. However, we would mail you a late notice, sometimes called a disconnect notice, before your service is ever interrupted." <http://www.entropy-louisiana.com/faq/katrinarita.aspx> (last visited July 17, 2007). Entergy also

apply historical September figures as post-hurricane September figures amounted to significant initial overbilling.

By November, the Company had initiated further steps to regain its economic footing. It made “fuel adjustment” rate increase filings to account for the increase in price of both natural gas and coal. To reflect these increases, the company raised its prices by 10 percent.

At roughly the same time, the Mississippi Power Company announced to its shareholders on January 26, 2006, that its returns for the preceding year not only met expectations, but exceeded them. The company reported that its pro forma 2005 earnings were \$1.5 billion, or \$2.14 per share – higher than the previous year and in excess of analysts’ expectations. The CEO, David Ratcliffe, said that the performance was strong because the company delivered “outstanding results” to its customers.⁷⁴ At the same time, it posted on its website a notice to consumers which suggested that it would not automatically provide any relief to hurricane victims but would ask for a demonstration of hardship:

If you are experiencing financial hardship and are unable to pay the full amount of your bill by the due date, it may be possible to extend your payment date beyond the current due date. Not all customers are eligible for payment arrangements. If you proceed, we

operates in Mississippi. It estimated the average bill for a customer would in 2006 be 18 percent higher for the same amount of electricity than it was in 2005: http://www.entergy-mississippi.com/features/02_06.aspx (last visited Oct. 30, 2007). Entergy later resumed normal billing operations, notifying customers that they would be billed for their actual energy consumption. In regard to those who were still unable to receive service, but still had active accounts, a “minimum bill” of \$8.00 for residential electric service and \$7.00 for residential gas service was to be issued, notwithstanding the non-delivery of any actual services. Additional fees were levied against customers with commercial or other non-residential accounts, Letter from Entergy to customers (Jan. 2005). Entergy’s stock price rose substantially in each year between 2005 and 2008.

⁷⁴ Southern Company Reports Solid Fourth Quarter Earnings; Strong Economy in Region Helps Drive 2005 Results, available at <http://files.shareholder.com/downloads/SO/0x0x79570/7c124967-9e49-44b0-aae8-d2f3f7afe130/185477.pdf> (last visited Sept. 22, 2009). In the time following this report, Southern Company has continued to do well for itself, notwithstanding economic difficulties precipitated by the sub-prime crisis. See Southern Company Reports Solid 2008 Earnings Despite Weak Economy, Mild Weather, <http://investor.southerncompany.com/releasedetail.cfm?ReleaseID=361845> (last visited Sept. 22, 2009).

will review your account to determine if you are eligible.⁷⁵

As of February 2006—half a year after the hurricane—Mississippi Power reported that 20,217 customers, or 10.38 percent of its pre-Katrina residential clientele, were still disconnected from the company's power grid.⁷⁶

VI. Preserving Recurring Charges: Cable and Internet Services

Cox Communications, a giant national media conglomerate and the largest provider of cable, broadband, and internet phone service in New Orleans, faced a large number of problems related to the disruption of its services in affected areas. Customers whose homes were uninhabitable, customers who left the region, and customers who moved into temporary housing could no longer use Cox services, either at their old or their new residences. As it was, cable connections were down throughout the area.

Soon after the hurricane struck, the company developed an action plan, which it referred to as a plan for “hurricane transition.”⁷⁷ Under the plan, customers who learned about the plan could, for a “reduced monthly rate,” suspend their services. If these same customers found temporary housing through FEMA or otherwise, Cox charged \$12.50 to send technicians to relocate their prior cable service. Practical problems connected with service interruptions and customers moving from one location to another abounded. For example:

Q: My house is being rebuilt and I want to leave my phone on in my house but transfer my other services to my new apartment.

⁷⁵ Southern Company website, available at <http://customerservice.southerncompany.com/PmtArrangement/PmtArrangementIntro.aspx> (last visited June 13, 2007).

⁷⁶ *Id.* According to a media relations spokesperson for the Southern Company, full power was restored 12 days after the storm for “anyone in a position to utilize it.” The figure of “20,217 disconnected” represented, the company maintained, customers whose homes were damaged to the point where power could not safely be connected. As of Oct. 6, 2007, 15,269 (7.84% of pre-Katrina clientele) were still unable to take power (telephone interview with Southern Company media relations, Oct. 18, 2007).

⁷⁷ Cox Communications, available at <http://www.cox.com/louisiana/hurricaneupdate.asp> (last visited Feb. 15, 2006).

*A: Unfortunately, we can only transfer all or none at this time.*⁷⁸

Although the company stated that it would not bill customers for their suspended service until it was restored,⁷⁹ there were many problems. Complaints of slow recovery and wrongful charges were not exceptional.⁸⁰ Cox found itself warning customers that if they did not plan on returning to New Orleans, they should contact the company “in order for you to avoid being charged for services you are NOT utilizing.”⁸¹

Along with every other consumer creditor, Cox charged interest on balances that were outstanding at the time of the storm for the continuous period thereafter; and, as the balances grew, interest charges were compounded. As the financial impact of the storm, including the impact of its own service charges, began to affect demand, the company announced that it would not change the price for its standard cable service for customers.

Cox also established a visible philanthropic presence. It donated more than \$1.6 million to the Red Cross, United Way, Boys & Girls Clubs of America, and Habitat for Humanity as part of its efforts to rebuild the stricken community. It also took advantage of the need for widespread repairs in the area to upgrade its systems.⁸²

VII. Rate Hikes and the Protection of Investor Returns: Telephone and Wireless Communication Companies

BellSouth, the dominant supplier of landline telephone services in Louisiana, faced immense problems in reconstructing

⁷⁸ Cox Communications, *available at* <http://www.cox.com/louisiana/damaged.asp> (last visited Feb. 15, 2006).

⁷⁹ Cox Communications, *available at* <http://www.cox.com/louisiana/damaged.asp> (last visited Feb. 15, 2006).

⁸⁰ See, e.g., *Cox Cable Comes Back Quickly For Many*, ST. CHARLES HERALD, Sept. 11, 2008, *available at* http://www.heraldguide.com/details_archive.php?id=4628 (comparison of 2008 favorable to Katrina).

⁸¹ Cox Communications, *available at* <http://www.cox.com/louisiana/trailer.asp> (last visited Feb. 15, 2006).

⁸² Linda Moss, *Putting a Perfect Storm Behind Them; After Katrina, Cox's Louisiana Systems Faced Recovery and Consolidation in 2006*, MULTICHANNEL NEWS, Feb. 19, 2007, at 18; *available at* http://www.multichannel.com/article/127922-Putting_a_Perfect_Storm_Behind_Them.php.

the phone system. The company stated that it had lost 810,000 lines, or one-sixth of its lines in its service area. To put this figure in context, more than 1.75 million lines were affected by the storm.⁸³ BellSouth implemented a disaster relief plan and issued scores of news releases as soon as it became apparent that a significant storm was approaching. The company estimated repair costs of between \$700 million to \$900 million. BellSouth took advantage of this need for repairs; instead of merely replacing lines, the company upgraded most of its lines and generally modernized its equipment.

In the immediate aftermath of the storm, wireless cellular phone companies provided relief to customers. Sprint Nextel issued free credits for monthly service to customers directly impacted by the hurricane. The company offered free long-distance calling, and also waived roaming, text messaging, and overage charges.⁸⁴ Cingular similarly waived charges for roaming, extra minutes, long distance and texting, and provided a one-time 50% credit on monthly fees to customers in the affected areas. T-Mobile, too, relaxed its service charges, and offered free wireless internet (Wi-Fi) hotspots in affected areas.⁸⁵ BellSouth waived a number of fees and attempted to help consumers handle problems related to the restoration of service; the company also made arrangements to extend the time for payment in many cases.⁸⁶ Nonetheless, thousands of BellSouth customers became embittered by their experience with the company as time passed and their payments became due while service, on the other hand, did not return to pre-hurricane conditions.

As was the case with providers of other essential services,

⁸³ Jim Duffy, *Katrina Could Cost BellSouth \$600 Million*, NETWORK WORLD, Sept. 6, 2005, available at <http://www.networkworld.com/news/2005/090605-bellsouth-katrina.html> (last visited Oct. 20, 2009).

⁸⁴ Business Wire, *Sprint Nextel Implements Pricing and Billing Relief Plan for Customers Impacted by Hurricane Katrina; Network Restoration Efforts Continue*, Sept. 7, 2005, available at http://www.redorbit.com/news/technology/233331/sprint_nextel_implement_pricing_and_billing_relief_plan_for_customers (last visited Oct. 20, 2009).

⁸⁵ The Internet Portal, *T-Mobile Provides Free Wifi to Hurricane Katrina's Victims*, Aug. 30, 2005, available at <http://www.theinternetpatrol.com/t-mobile-provides-free-wifi-to-hurricane-katrinavictims/> (last visited Oct. 20, 2009).

⁸⁶ See AT&T Newsroom, available at <http://att.centralcast.net/BellSouthNewsArchive/Release.aspx?ID=4309> (last visited Oct. 20, 2009).

waivers of penalties for nonpayment (or even late payment) were beyond the scope of telephone and wireless company generosity. Balances on accounts that existed prior to the storm continued to accrue interest throughout the storm and its aftermath; there is no evidence that these interest accruals were reduced or written down on any routine basis.⁸⁷

As service providers began to notice that many residents were not returning to the affected areas, feelings emerged within the industry that a complete restoration of networks to full pre-Katrina capacity might not be financially or economically viable. An industry insider, on condition of anonymity, observed that the phone company might “cover New Orleans with 50 cell sites instead of 200.”⁸⁸

In terms of its own economic performance, and despite the costs incurred, BellSouth recovered quickly from the hurricane, partly due to new DSL operations and its proportionate share of Cingular Wireless.⁸⁹ In January 2006, BellSouth reported that its consolidated revenue from continuing operations edged up to \$5.2 billion, while net income from continuing operations rose by more than 33 percent.

VIII. Interest Postponed but Not Forgiven: The Credit Card Issuers

After the hurricane, standard credit card agreements permitted issuers wide latitude in determining the degree to which they could waive or suspend interest payments on pre-existing balances or post-hurricane card use. Nothing in the standard form agreement provided cardholders any exceptional payment terms or modification rights that would be triggered in the event of a natural disaster.⁹⁰ Representative of this rule in

⁸⁷ Telecom Digest Online, *Cingular, Sprint, Others Give Hurricane Victims Phone Bill Help*, Sept. 10, 2005, available at http://massis.lcs.mit.edu/telecom-archives/TELECOM_Digest_Online2005-2/1498.html (last visited Oct. 20, 2009).

⁸⁸ Mark Rockwell, *Retrenching After Katrina; Carriers Take a Crash Course on Security and Scale After the Storm. (AFTER THE STORM: TIER 1 CARRIERS)*, WIRELESS WEEK, Oct. 1, 2005 at 11.

⁸⁹ CedMagazine.com, *BellSouth Reports Healthy DSL, DBS Gains in Q4*, Jan. 25, 2006, available at <http://www.cedmagazine.com/toc-bbdirect/2006> (last visited Oct. 20, 2009); 2005 BellSouth Annual Report, <http://www.ticker.com/annualreport/bls/bls-2005.pdf> (last visited Oct. 20, 2009).

⁹⁰ *See infra*.

standard card agreements was a default provision in a VISA agreement, which, upon any delinquency, entitled the issuer to immediately demand not only interest but the full balance of indebtedness:

If you are in default, we have the right to demand immediate payment of your full Account Balance at once without notice to you... In the event of a default, you agree to pay all costs of collecting the amount you owe under this agreement including, if the unpaid balance under this plan is greater than Three Hundred Dollars (\$300) at the time of collection, reasonable attorney's fees if the debt is referred for collection to an attorney who is not our employee and if suit is filed, court costs.⁹¹

The consequence of such unyielding default provisions was to leave to unbridled creditor discretion the exercise of leniency or forgiveness.⁹² Indeed, the "business as usual" approach was not unheard of in the aftermath of Hurricane Katrina. In a perspective column echoing the plight of numerous displaced storm victims, Michael Allweis, a New Orleans attorney, provided the following account:

Yesterday I made calls to ask for some delay on behalf of our employees, but I was turned down flat. Despite the circumstances, credit card companies insisted upon payment and, on at least two separate occasions, confirmed that accounts will continue to accrue interest

⁹¹ Family Security Credit Union, Visa Credit Card Agreement, available at <http://www.myfcsu.com/VISAapplication.pdf>.

⁹² While the Office of the Comptroller of the Currency noted that credit card lenders had latitude to work with borrowers in affected areas through, among other things, lowered interest rates (they did not suggest forgiving interest), such suggestions had no binding effect. *See* News Release, Comptroller of the Currency, (last updated Mar. 20, 2006), *available at* <http://www.occ.gov/HurricaneQA.htm> (last visited Oct. 20, 2009). In light of the encouragement offered by this and other governmental entities, the Louisiana Office of Financial Institutions explicitly highlighted that credit modifications, restructuring, and extensions given by financial institutions to hurricane victims would not be necessarily indicative of imprudent lending practices by regulatory agencies. *See* Bulletin BL-01-2006, Office of Financial Institutions, Feb. 3, 2006, *available at* <http://www.ofi.louisiana.gov/BL-01-2006-supervisory%20guidance%20for%20hurricane%20katrina2.pdf> (last visited Oct. 20, 2009).

and that they will charge fees for late payment. In the face of this overwhelming tragedy, which has left over one million people with uncertain futures, such a position is scandalous.⁹³

This approach also rang true in the case of Discover, which sent the following e-mail to its cardholders couched with the words “Hurricane Relief Information” in the subject line:

I’m very sorry to hear about the recent disaster that affected your community. Please know that Discover Card is here to help you through this difficult time.

We can assist you with locating ATMs, issue emergency PINs to access cash, and provide additional/replacement cards for immediate use. You can also view your statement summary online and make an immediate payment or schedule a payment in advance – whenever it’s most convenient for you. We also have additional services for qualified accounts that may be helpful.

Thanks for being a Discover Cardmember. If there is anything we can do to serve you better, please let us know. Knowledgeable Account Managers are available to assist you 24 hours a day, 7 days a week at 1-888-668-8767, or you can always visit Discover.com.⁹⁴

Magnanimity varied according to a consumers’ previous business relationship with an issuer.⁹⁵ For instance, holders of

⁹³ Jason Spitalnik, *Guest Post: The Financial Impact of Hurricane Katrina*, TPMCAFE, Sept. 2, 2005, available at http://tpmcafe.talkingpointsmemo.com/2005/09/02/guest_post_the_financial_impact/ (last visited Oct. 20, 2009).

⁹⁴ JLP, *Discover Card’s Idea of “Hurricane Relief”*, ALLFINANCIALMATTERS, Sept. 18, 2008, available at <http://allfinancialmatters.com/2008/09/18/discover-cards-idea-of-hurricane-relief/> (last visited Oct. 20, 2009).

⁹⁵ NCUA, *Hurricane Katrina Relief: What is NCUA doing to provide regulatory relief and forbearance for federally insured credit unions impacted by Hurricane Katrina*, available at <http://www.ncua.gov/Resources/Hurricane/Katrina/Relief.aspx> (Noting a joint ruling by the National Credit Union Association (NCUA) and various banking

BellSouth's ordinary MasterCard were allowed to skip a month's worth of payments. Their treatment by the company, however, did not compare with the treatment of holders of the BellSouth *Platinum* MasterCard and the BellSouth *Platinum Business* MasterCard. All calls from these customers were directly transferred to Chase customer service teams "with special training to assist hurricane victims."⁹⁶ Thus, the "best" BellSouth MasterCard customers were afforded the following benefits: "emergency credit line increases; removal of minimum payment requirements; courtesy fee waivers; overnight emergency card replacements in areas where either the USPS or UPS can deliver; and Telephone authorization of charges without cards at point of purchase, or . . . cash advances at any participating banks."⁹⁷ These preferred MasterCard holders could defer payments for 50 days, and also received waivers of late and over-limit fees for an unspecified period of time. Most significantly, none of their accounts would be reported to credit bureaus as delinquent, and delinquencies would be removed on accounts that were not originally identified as platinum accounts.⁹⁸ Such privileges, however, were not conferred upon all of Chase's customers.

Some banks behaved in a more egalitarian fashion than others. Regions Bank, for example, appears to have adopted a common approach for all customers. Immediately following the storm, Regions noted in a news release that it was:

[S]howing its support for the communities impacted by Hurricane Katrina by offering special services to the residents and customers in those emergency relief areas. The bank has waived ATM and check-cashing fees for residents and customers in the affected area, and Regions Bank customers in those same impacted areas can defer some loan and credit card payments, increase credit limits on credit cards and get special discounts

agencies regulating FDIC insured institutions allowed federal credit unions discretion to allow their customers to "skip" or "defer" some payments) (last visited Oct. 20, 2009).

⁹⁶ BellSouth Platinum MasterCard Users, <http://www.bellsouth.com/residential/hurricaneMC.html> (last visited Oct. 20, 2009).

⁹⁷ *Id.*

⁹⁸ Burney Simpson, *Issuers Cut Consumers Slack, For Now*, CARDS & PAYMENTS, Nov. 1, 2005 at 32, available at http://goliath.ecnext.com/coms2/gi_0198-170670/Payments-on-hold-Katrina-floods.html.

and introductory rates on new equity loans and lines of credit.⁹⁹

Variations on the theme of Regions' payment deferral option were offered by other issuers as well. Both Provident and Citibank suspended payment of principal, interest, and fees for thirty days to those located within FEMA's declared disaster zones. The consumer finance arm of General Electric (responsible for numerous store brand credit cards) waived fees and froze penalties and charges to those in the affected areas on a similar schedule. In most of the cases studied, however, even if late charges were waived and payment obligations were suspended until December of the following year, interest charges on pre-existing balances nevertheless continued to accrue – not to mention the charges that also mounted from card use necessitated during the emergency period.¹⁰⁰

However, not all lenders were predatory in the wake of Hurricane Katrina. The Army and Air Force Exchange Service (AAFES), an organization that provides goods and services of necessity and convenience to members of the armed forces, stood in strong contrast to other consumer finance lenders for its sensible and fair treatment of borrowers. Most notably, AAFES announced its intention to waive interest *and* suspend monthly

⁹⁹ Regions, News Release, *available at* <http://phx.corporate-ir.net/phoenix.zhtml?c=65036&p=irol-newsArticle&ID=751298&highlight=> (last visited Oct. 20, 2009).

¹⁰⁰ A characteristic message contained in credit card mailing statements read: "Due to Hurricane Katrina, we have granted you a payment holiday for your next payment. Your account will not be reported as late and will not receive a late fee, but finance charges will accrue." MasterCard Statement from Hibernia to a New Orleans Customer (Sept. 5, 2005) (on file with author). In regards to payment deferral, a typical letter from a bank read: "All other terms of your account remain unchanged. At the end of the deferral period, all required minimum monthly payments will resume and the finance charge waiver will expire. Any arrearage or payments due on your account prior to this four month deferral program will be due and payable in January 2006." Letter from AIG Bank to a New Orleans Customer (Sept. 28, 2005) (on file with author). Some additional variations include Bank of America's waiver of late fees, over limit fees and finance charges; American Express's "special procedures for impacted Cardmembers to address additional spending needs, delayed payments and associated fees;" Capital One's waiver of fees and deferred interest; Chase and Bank One's minimum 30-day payment deferral and waiver of late fees together with their 90-day grace period on negative credit reporting; MBNA's waiver of late fees; and Wells Fargo's 90-day payment deferral and late fee waiver. Company Policies for Katrina Victims http://clarkhoward.com/topics/katrina_policies.html (last visited Oct. 20, 2009).

payment requirements to its cardholders displaced by Hurricane Katrina, with this suspension applying to both old and new purchases.¹⁰¹ It is the only such lender uncovered by this study.

IX. Protecting Dealerships Before Borrowers: The Automobile Finance Companies

The story of how consumers fared at the hands of auto lenders closely resembles the story of how consumers fared at the hands of mortgage lenders. Tens of thousands of automobiles were damaged or lost entirely as a result of the hurricanes. In a fleeting act of empathy, General Motors Acceptance Corporation (GMAC) offered an extension of up to ninety days after the disaster for customers who wished to defer their loan payments.¹⁰² GMAC offered to waive late fees during this period. At the end of the 90-day period, however, GMAC began to once again charge interest on the accumulated principal, and subsequently began to assess late fees.

Ford Credit customers were given the opportunity to defer “up to two vehicle payments without paying extension fees” under the company’s Disaster Relief Program. In order to receive this grace, customers were required to register within sixty days, and were told that the amount of the deferred payments was “due at the end of the term,” indicating that Ford would not permit customers to carry forward balances attributable to the grace period.¹⁰³

DaimlerChrysler’s charitable fund donated more than \$1.1 million to Katrina relief, but its policy toward its debtors was less magnanimous. In an indication that DaimlerChrysler Financial Services may have been more immediately concerned about the economic well-being of its dealers than its customers, its financial

¹⁰¹ U.S. Dep’t of Defense, *AAFES Waives Interest, Suspends Payments for Katrina Victims*, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=17407> (last visited Oct. 20, 2009).

¹⁰² Personal banking help for hurricane victims, <http://www.msnbc.msn.com/id/9146146> (last visited Oct. 20, 2009). See also *Hurricane Katrina is Over*, THE NEW YORKER, MAY 7, 2007, available at http://www.newyorker.com/online/blogs/neworleansjournal/2007/05/hurricane_katri.html (last visited Oct. 20, 2009) (Hurricane victim facing automobile repossession due to an inability to pay her final \$437 payment discusses plight with GMAC collections agent; she is ultimately told that “GMAC has determined that Hurricane Katrina is over”).

¹⁰³ *Id.*

services division sent a crisis team to help its dealers affected by the storm, but told hurricane victims to call a toll-free number if they wished to work out a payment plan.¹⁰⁴ It announced that special circumstances payment extensions and deferrals for customers were available, but only up to ninety days.¹⁰⁵ Defaults and repossessions of cars in the region spiked after the deferral period ended and continued to severely increase in the Katrina-affected states for years after the storm.¹⁰⁶

In the months following the hurricane, many consumers were forced to purchase cars because of the very large number of vehicles that were destroyed or washed out in the New Orleans and Houston-Galveston markets. In the aftermath of the storm, however, thousands of consumers were bumped down into lower credit categories as a result of both negative credit reports and indications of lost housing and unemployment. In addition, so many people were priced out of the new car market that it became necessary for them to resort to sub-prime lending to support their used car purchases. The result was a boom “in used-car sales, nonprime financing, and, accordingly, buy-here-pay-here operations.”¹⁰⁷ The significant consequence of such higher-cost borrowing and restricted shopping alternatives was to place already-burdened consumers into further financial jeopardy.

X. Short Term Relief: The Response by FEMA and Federal Agencies

The extent to which the relief agencies of the federal government responded promptly and efficiently to appeals for assistance immediately after the storm has received nearly

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* See also *DaimlerChrysler Commits \$1.1 Million to Hurricane Katrina Humanitarian Efforts*, Sept. 1, 2005, <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/09-01-2005/0004098814&EDATE=> (last visited Oct. 20, 2009).

¹⁰⁶ See Liz Opsitnik, *Transunion.com: Auto Debt Up, Highest in Heavy Populations*, <http://www.autoanddaily.com/loan-news/auto-loan-dail/52-transunioincom-auto-debt-up-highest-in-heavy-populations> (May 16, 2008)(Quoting Ezra Becker, a principal consultant in Transunion’s financial service group: “From a risk perspective, auto loan delinquency seems to mirror the continued economic downturn that has plagued southeastern states like Louisiana and Mississippi in the long wake of Hurricane Katrina, and has been indirectly exacerbated by the continuing mortgage crisis”).

¹⁰⁷ See Mac Gordon, *Subprime Is Growing*, WARD’S DEALER BUSINESS, Nov. 1, 2005, at 20, available at http://wardsdealer.com/ar/auto_subprime_growing/ (last visited Oct. 21, 2009).

universal attention. For the purposes of this study, however, it is noteworthy that virtually all of the FEMA relief focused away from consumer issues. Helping consumers address their credit problems was, at best, a secondary or indirect concern.

Understanding FEMA's historical mission makes this point evident. In 1979, President Carter issued an executive order which merged the separate disaster -related responsibilities of the Federal Insurance Administration, the National Fire Prevention and Control Administration, the National Weather Service Community Preparedness Program, the Federal Preparedness Agency of the General Services Administration, the Federal Disaster Assistance Administration activities from HUD, and the Defense Department's Defense Civil Preparedness' responsibilities, into what became FEMA.¹⁰⁸ FEMA developed an "all-hazards approach" to catastrophe relief, with systems of assistance "common to the full range of emergencies from small isolated events to the ultimate emergency - war."¹⁰⁹ More than three decades later, federal disaster relief efforts have been streamlined to meet the immediate survival needs of persons whose lives are disrupted by natural and man-made catastrophes. FEMA's central mission has been efficient hurricane relief and the provision of temporary food and housing during emergencies.¹¹⁰

In the case of Hurricane Katrina, FEMA, as deployed, stood true to this mission. Disaster unemployment assistance was activated. Emergency supplies of food and water were distributed. Checks in amounts of approximately \$2,300 were provided to individual victims for their immediate food and shelter needs. FEMA even offered some crisis counseling.

Congress enacted special legislation, the "American Recovery and Reinvestment Act of 2009," which provided Mississippi with \$14.3 million and Louisiana with \$26.1 million for the Homelessness Prevention and Rapid Re-Housing program.¹¹¹ The Recovery Act assisted families by providing

¹⁰⁸ Exec. Order No. 12127, 44 Fed. Reg. 19367 (Mar. 31, 1979), *available at* <http://www.fas.org/irp/offdocs/eo/eo-12127.htm> (last visited Oct. 21, 2009).

¹⁰⁹ *See Generally* FEMA History, <http://www.fema.gov/about/history.shtm> (last modified May 29, 2009) (providing a description of FEMA's origins and history).

¹¹⁰ *See* Finding Long-Term Housing Solutions for Hurricane Victims, http://www.fema.gov/media/fact_sheet/longterm_housing_hurr (last visited Oct. 21, 2009).

¹¹¹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 11-4, Title XII, 123 Stat. 221-22 (2009).

rental assistance, security deposits, and additional services.¹¹² This assistance prevented immediate defaults and kept some families housed, but it failed to address consumer debt.

Furthermore, there were many limitations on the size and types of consumer assistance that would be provided by FEMA. For instance, FEMA would not pay evacuation hotel bills which exceeded the one-time general assistance checks. Funds were advanced for minor home repairs, but seldom for major ones. FEMA provided money for medical expenses directly incurred due to the hurricane but not for those indirectly incurred. There was some limited assistance for car repairs, but not for the purchase of cars. FEMA's help with mortgage payments lasted only a few months at best.¹¹³

Housing was the primary focus of FEMA's intermediate-term relief efforts.¹¹⁴ Approximately 276,000 families filed applications for low-interest government loans in order to rebuild their homes and their lives.¹¹⁵ In the months after the storm, however, there was insufficient government assistance to enable many victims to rebuild their homes. More than three months after Hurricane Katrina, the Small Business Administration, which ran the government's disaster recovery program for homeowners, had only processed one-third of applications.¹¹⁶ More distressingly, at one point, the government rejected 82 percent of applications (more than 77,000), a higher percentage than in previous disasters.¹¹⁷ According to the *New York Times*, a principal reason for this high rejection rate was that the creditworthiness standards applied by the government had not been adjusted to account for the large number of low-income

¹¹² See Finding Long-Term Housing Solutions, *supra* note 108.

¹¹³ See Press Release, Secretary Napolitano Announces \$100 Million in ARRA Funds for Emergency Food and Shelter Program (April 9, 2009), available at http://www.dhs.gov/ynews/releases/pr_1239302787726.shtm (last visited Oct. 21, 2009).

¹¹⁴ See Finding Long-Term Housing Solutions, *supra* note 108.

¹¹⁵ Leslie Eaton & Ron Nixon, *Federal Loans to Homeowners Along Gulf Lag*, N.Y. TIMES, Dec. 15, 2005 at A1.

¹¹⁶ *Id.* It was not until mid-2006 that the brunt of the remaining two-thirds of loan applications had been processed. See Press Release, U.S. Small Business Administration, SBA Recovery Loans for Gulf Coast Residents Surpass \$10 Billion (June 20 2006), available at <http://www.sba.gov/news/pressmain/index.html> (follow "Year 2006" hyperlink; then open news_arch_2006.zip; then open 2006-06-20) (last visited Oct. 21, 2009).

¹¹⁷ Eaton & Nixon, *supra* note 113.

individuals affected by the disasters.¹¹⁸

The *Times* provided as an illustration the case of Albertha Hastens, a 55 year-old member of the school board in White Castle, Louisiana, who lived principally on social security payments. Strong winds damaged the roof and side of her house, but the Small Business Administration turned down her request for a loan, citing her low income.¹¹⁹ “It makes you tired and disgusted,” Ms. Hastings was quoted as saying. “For poor working people, you don’t know what to do.”¹²⁰

It is well-reported that FEMA horribly mishandled many aspects of the immediate and long-term delivery of services and essential supplies to storm victims, particularly in New Orleans.¹²¹ Explanations of the many failures are largely attributed to incompetence, negligence, cronyism, and possibly racism; indeed, the Hurricane Katrina relief effort has been characterized as a humanly-caused disaster that compounded a natural one.¹²² In the four years after Hurricanes Katrina and Rita struck in 2005, FEMA has struggled to provide Gulf Coast households with temporary housing assistance, such as trailers or manufactured housing. In 2009, FEMA finally reported that its temporary program had ended, and that 139,000 households had been moved from temporary units into long-term housing.¹²³

Even if these humanly-caused administrative failures had not occurred, the relief provided by FEMA during and after Hurricane Katrina was, as indicated, institutionally limited and largely irrelevant to the consumer debt issues discussed above. As one FEMA official recently put it, “federal assistance is not designed to make someone whole again ... federal disaster assistance is designed by Congress to be a helping hand, to be a leg up to help people get back on the road to recovery.”¹²⁴ “It’s not

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* There have also been other possibilities for actual or proposed assistance. See, e.g., Editorial, *Big Oil Can Share its Big Profits*, DES MOINES REGISTER, Nov. 5, 2005, at A12 (proposal to supplement fuel programs for Hurricane victims using excess oil company profits).

¹²¹ See, e.g., Kevin Drum, FEMA’s Failures, WASHINGTON MONTHLY, Sept. 22, 2005, available at http://www.washingtonmonthly.com/archives/individual/2005_09/007104.php (last visited Oct. 21, 2009).

¹²² See Dan Farber & Jim Chen, DISASTERS AND THE LAW: KATRINA AND BEYOND (2006); Douglas Brinkley, THE GREAT DELUGE (2007).

¹²³ See Finding Long-Term Housing, *supra* note 108.

¹²⁴ See Meg Farris, *Meg Farris Explains FEMA Assistance Program*,

designed to make someone like they were before the disaster.”¹²⁵ Certainly, there was no government program designed to help consumers reduce their consumer debt or defray the growth of carrying charges that consumers paid to merchants and lenders while they were forced out of their homes and away from their jobs.

XI. The Aggregate Impact On Consumer Default: Bankruptcy and Personal Hardship

As low and moderate-income consumers faced mounting demands by mainstream lenders and service providers (especially in regard to catch-up payments and increased interest charges), and as consumers were further scarred by bad credit ratings connected with late payments and defaults, it was inevitable that many more consumers would turn to alternative financial markets, markets where the contract terms were even harsher and rates more expensive.¹²⁶ Mainstream banks and mortgage lenders stopped lending to many low and moderate-income consumers because of defaults (defaults which the banks and lenders partially precipitated).¹²⁷

Soon after the New Orleans levees were breached, Fair Isaac Corp. (FICO) was approached by six major consumer organizations who sought a modification in its credit scoring model.¹²⁸ Their proposal was to include a table of “pre-disaster

WWL-TV, Sept. 5, 2008, available at <http://www.wwltv.com/topstories/stories/wwl090408bhfemaexplained.44380534.html> (with reference to Hurricane Gustav) (last visited Oct. 21, 2009).

¹²⁵ *Id.*

¹²⁶ See Ronald H. Silverman, *Toward Curing Predatory Lending*, 122 BANKING L.J. 483, 533 (2005).

¹²⁷ See Amy Hoak, *No More Easy Mortgage Money as Lenders Tighten Standards*, MarketWatch, Mar. 21, 2007 (Lenders now imposing tougher underwriting standards, borrowers with a credit score below 620 hit hardest).

¹²⁸ Credit scores are statistical evaluations of a person’s creditworthiness, based on credit reports compiled at credit bureaus. Lenders rely on credit scores to determine whether a potential applicant will qualify for a loan, what interest rate they will receive, the level of income and asset verification necessary for approval, and what credit limit shall be imposed. Numerous credit scoring methodologies exist, but by far the most relied upon is the “FICO” score. An acronym abbreviating “Fair Isaac Corporation,” the FICO score is designed to measure a person’s default risk. While the exact formula is a closely guarded secret, it has been disclosed that the score is approximately determined through a weighted contribution of 35% past payment punctuality, 30% debt to credit ratio, 15% length of credit history, 10% type of credit that

information” within the credit reports of consumers who were located in the counties affected by Katrina. Given that the widespread financial hardship imposed by the storm was so unexpected, the organizations argued that a pre-Katrina score was a better indicator of credit worthiness than a score that was artificially depressed due to missed payments in the wake of the disaster. Decisions to include “pre-disaster” scores were (and are) entirely discretionary, as there are currently no laws regulating credit reporting on disaster victims.

Because FICO indicated that such a change would require considerable time to develop a system (over a year), the consumer organizations requested direct assistance from the three largest credit reporting groups, Equifax, Experian, and TransUnion. Their hope was that a pre-disaster score would, at the very least, be included in the notes section of the credit report.

According to academics involved in this request, TransUnion did not respond to the proposal. Equifax and Experian, on the other hand, declined, stating that it was up to the creditors themselves to make the decision about whether or not negative information would be reported in disaster-affected areas; and if so, whether they would like the report to reflect that late payments were disaster related.¹²⁹

In the following months, therefore, the credit scoring system did little to ameliorate the scarring impact of Katrina-related indebtedness. The number of people whose credit scores were adversely affected by the hurricane grew, and they faced ever greater difficulty as many of the delayed payment programs offered by creditors ended. Further, because many borrowers had been placed into temporary payment deferral programs, many delinquencies precipitated by the storms were reported to credit reporting agencies months after the storms had ended, thereby complicating consumer credit risk analyses.¹³⁰ The acquisition of apartment leases, car loans, mortgages, insurance, credit cards,

has been utilized in the past, and 10% recent searches for credit and recent credit obtained.

¹²⁹ See Daniel Solove, *Hurricane Katrina and Credit Scores*, Oct. 10, 2005, [available at http://concurringopinions.com/?s=hurricane+Katrina+and+credit+scores](http://concurringopinions.com/?s=hurricane+Katrina+and+credit+scores) (last visited Oct. 21, 2009) (Quoting Rob Sullivan of MSNBC). Credit Reporting agencies indicated that they were, however, asking lenders to include a special “disaster recovery code” on Katrina-related overdue payment and default entries, in which case a late payment entry would include the designation “AW” on consumer credit reports.

¹³⁰ Cheney & Rhine, *supra* note 52.

and even jobs became progressively more difficult.¹³¹

Many consumers were reclassified as “subprime borrowers” and were locked out of further borrowing from the preferred or even usual lending rates of regular banks.¹³² Given the circumstances, pawnshops, check-cashing outlets, rent-to-own stores, tax refund anticipation lenders, car-title pawnshops, cash leasing operations, and other “second tier” credit providers became more attractive than ever before.¹³³ Payday loans for an amount of \$300 often carry a nominal interest rate of up to 20% but a much higher 521% APR.¹³⁴ Consumer bankruptcy, repossession and foreclosure rates increased as these forms of borrowing became more prevalent.¹³⁵

XII. Addressing the Need for Reform

The study above permits drawing several conclusions about the application of traditional consumer law rules under the circumstances of a major catastrophe, although an extended analysis of possible solutions to the problems exposed by the experience of Katrina consumers waits for another discussion.¹³⁶

¹³¹ See, e.g., *Credit Reporting Agencies Reject an Important Step to Help Hurricane Survivors*, Oct. 6, 2005, available at http://www.consumer-action.org/news/articles/credit_reporting_agencies_reject_an_important_step/ (providing overview of proposal) (last visited Oct. 21, 2009). See also *Credit Agencies Won't Give Katrina Victims A Break*, Oct. 6, 2005, available at http://www.consumeraffairs.com/news04/2005/katrina_credit.html (explaining credit scoring impact on hurricane victims) (last visited Oct. 21, 2009); Gail Hillebrand et al., *Request To Develop “Disaster Information Shield,”* http://www.consumersunion.org/pub/core_financial_services/002656.html (Sept. 12, 2005); Sullivan, *supra* note 124 (discussing “second wave of hurricane”). Additionally, because those in the lower income brackets are statistically less likely to obtain copies of their credit reports, and because the contents of these reports may be missing key information or be outdated, current credit scoring methodologies will have imposed further difficulties upon victims of Hurricane Katrina as a class. See Todd B. Hilsee et al., *Hurricanes, Mobility, and Due Process: The “Desire-To-Inform” Requirement for Effective Class Action Notice is Highlighted by Katrina Hurricanes*, 80 TUL. L. REV. 1771, 1793 (2006).

¹³² *Id.*

¹³³ *Id.* See also, e.g., Paul Chessin, *Borrowing From Peter To Pay Paul: A Statistical Analysis of Colorado’s Deferred Deposit Loan Act*, 83 DENV. U.L. REV. 387, 406 (2005) (reporting an inverse relationship between income and the likelihood of payday loan patronage).

¹³⁴ Paul Chessin, *supra* note 131 at 390.

¹³⁵ See discussion of the amendments to the Bankruptcy Code, *infra*.

¹³⁶ See Norman I. Silber, *Ameliorating Consumer Finance Problems*

We have seen that the interruption of normal business-to-consumer relationships by Hurricane Katrina (whether or not exacerbated by human incompetence) happened outside the control of affected consumers. In a country where the rules are expected to promote fairness and efficiency, the impact of the disaster should have excused consumers from the duty to meet pre-established payment deadlines on their consumer contracts. It should have simultaneously prevented creditors from extracting interest charges against consumers during the period when even basic services were unavailable (or, at a minimum, during the three-month formal state of emergency which followed the storm).

But the law did not operate that way. Although the FFIEFC encouraged private sector entities to “contribute in ways that are, in many cases, key to a community’s successful recovery after a catastrophic event,” and urged them to contact local chapters of community organizations to coalesce in cooperative recovery efforts, the FFIEFC nevertheless failed to proscribe any uniform principals or standards for doing so.¹³⁷

We have seen that the proposals which were advanced in Congress to address the national residential mortgage “melt-down,” and which would have allowed bankruptcy courts to write down mortgage obligations in consumer cases, were unsuccessful. These would have been especially helpful and appropriate to address the inequitable treatment of mortgagors who were caught up in Hurricane Katrina.¹³⁸ Perhaps the Bankruptcy Code could have been amended more broadly to govern disaster-related bankruptcies differently and more empathetically than those resulting from routine business conditions.¹³⁹

Caused By Catastrophes: The Case for Social Credit Insurance and Mandatory Force Majeure Provisions in Consumer Financial Agreements, (forthcoming, New York University Review of Law and Social Change, 2010).

¹³⁷ Federal Financial Institutions Executive Council, *Lessons Learned from Hurricane Katrina: Preparing Your Institution for a Catastrophic Event*, http://www.ffiec.gov/pdf/katrina_lessons.pdf (last visited Oct. 21, 2009).

¹³⁸ See, e.g., David Herszenhorn, *Senate Rejects a Proposal to Allow Bankruptcy Judges to Alter Home Mortgages*, N.Y. TIMES, Apr. 4, 2008 at C5; Jack Guttentag, *U.S. Must Attack Foreclosure Rates*, WASH. POST, Jan. 31, 2009, at G2.

¹³⁹ Michael A. Sabella, *The Category 5 Crisis: How Hurricanes Katrina And Rita Exposed Deficiencies In The Bankruptcy Abuse Prevention And Consumer Protection Act Of 2005*, 15 AM. BANKR. INST. L. REV. 321, 324 (2007).

We have seen that payment defaults were reported without differentiation according to the calamitous cause, and that these reports affected credit scores and dragged consumers into predatory subprime borrowing. Creditors, when they reported to credit scoring and reporting agencies, should have been obligated to distinguish those cases arising from disastrous circumstances. Scoring and ratings agencies, when they issued reports, should have reported pre-disaster and post-disaster results and analyses separately. The nonpayment or late payment by debtors of their financial obligations during and immediately following Hurricane Katrina was, for a very large number of storm victims, fundamentally different, both financially and economically, from those same payments in calmer periods (not to mention significantly less useful to creditors in reflecting the underlying creditworthiness of individuals in ordinary times).

The payment creditors failed to take into account the dire circumstances facing consumers, and drove them further into financial and economic distress. They displayed superficial generosity in the wake of the storm, and were generous only when government regulations and a calculation of interest mandated such generosity. Most payment creditors, therefore, returned to customary practices at the earliest opportunity - at a time, unfortunately, when consumer susceptibility to taking on greater debt was at its highest.

As a result, the impact of insufficiently discriminating credit reporting appears to have been a more significant problem for consumers than actual foreclosures, at least for the first two years after the storm. Professor Brooke Overby reported that "while mortgage defaults soared [in New Orleans in the first two years] after Katrina, foreclosure rates elsewhere actually stalled during the same period,"¹⁴⁰ In the time since Professor Overby's observation, however, it appears that in 2008 and 2009, the problem of foreclosures along the length of the Gulf Coast outpaced the rest of the nation. The delay in foreclosures outside of New Orleans due to market forces was probably only a temporary reprieve.¹⁴¹

¹⁴⁰ A. Brooke Overby, *Mortgage Foreclosure in Post-Katrina New Orleans*, 48 B.C. L. REV. 851, 854 (2007).

¹⁴¹ See Christian Moises, *Numbers Game: N.O. Area Foreclosure Spike Fueled by More Than Recession, Experts Say*, NEW ORLEANS CITY BUSINESS, Aug. 5, 2009, available at <http://www.allbusiness.com/banking-finance/banking-lending-credit/12622447-1.html> (indication that postponed Katrina-related foreclosures exacerbated the impact of the recession).

The interest expenses generated by the massive interruption of life along the Gulf Coast was attributable neither to fault of the debtors, nor the creditors who lived along the Gulf Coast. Why then would debtors be saddled with legal responsibility for all of these costs?

The opportunity cost to the creditors who might have loaned out money received from consumers during that period should have been apportioned evenly between creditors and consumers; subsidized partially by government relief payments dedicated to that purpose; absorbed through a government-sponsored risk-sharing program; or insured by creditors as a cost of doing business. If the analysis advanced above is correct—concerning the fundamental injustice of continuing interest accruals—then the calculation of most account balances due was faulty and should have provided grounds for reducing payment obligations.

* * *

The story about what happened and is still happening to consumers in the Gulf since Hurricanes Katrina and Rita is, to a certain degree, a model of what happens when social equilibrium is disturbed. A natural disaster destroys lives and property, creating losses for the whole community. Governments, corporations, families, and individuals all suffer. Each is adversely affected based heavily upon wealth, status, race, the choices they have made, and pure chance; each is left differently situated after the disaster. Almost every group suffered a loss due to Hurricanes Katrina and Rita, but some hardly lost anything while others were devastated.

Through the lens of consumer welfare, a disturbing pattern emerges. Most of the mainstream corporations tried to establish that they were good corporate citizens using such customary techniques as “cause” marketing, charitable giving and revamped customer relations. The payment creditors took this approach, making efforts to project corporate compassion and to emphasize their tolerance of delay if there were good faith efforts to bring payment schedules back to normal.

Most large retail merchants understood from the beginning that their customers would have a very limited ability to meet their recurring obligations, and that aggressive debt-collection efforts in the early phases would have been counterproductive.

Businesses in the affected areas also realized that economic performance and, in some cases, survival, depended

upon delaying rather than forgiving payment obligations. Companies understood that long-term success would require waiting for customers to rebuild their income and a normal routine before imposing new “catch-up” burdens on them. They understood that they would have to play tough with respect to their own contractual obligations and try to make the most of the harsh contracts their customers had signed. They took advantage of the standard form contractual provisions in their customer agreements which consumers did not actually bargain for in the first place.

After a decent interval, most creditors took the tough collection efforts they believed were necessary and legal to shift losses from their shareholders and management onto their customer base. This shift was made possible by standard-form contract provisions, judicial remedies, and self-help repossessions, which applied regardless of natural disasters or other catastrophes. Provisions which, in ordinary times, would have been applied on an individual basis were applied wholesale.

Today, the websites of the commercial groups discussed above are by-and-large devoid of web pages addressed to accommodating the consumer problems of victims of the hurricanes.¹⁴² A return to “business as usual,” or as close to usual as possible, became imperative for the weary business community and the devastated local population. This return to normalcy, however, required consumers to continue to bear misfortunes of the past that were not of their own making.

The enforcement of standard form consumer payment instruments and credit agreements worked to the benefit of many companies—but it brought a second-wave financial catastrophe to consumers. Preventing financial storms from so painfully descending on consumers presents a daunting challenge for the future.¹⁴³

¹⁴² Indeed, the web pages relating to corporate policies toward storm victims have largely been pulled down, requiring a large amount of the research for this paper to be accomplished through the use of the “Wayback Machine,” see <http://www.archive.org/index.php>, follow “Take me Back” hyperlink, a website which allows for a view of websites as they appeared in the past.

¹⁴³ Approaches to meeting this challenge are considered in Norman I. Silber, *Ameliorating Consumer Finance Problems Caused By Catastrophes: The Case for Social Credit Insurance and Mandatory Force Majeure Provisions in Consumer Financial Agreements*, (forthcoming, NEW YORK UNIVERSITY REVIEW OF LAW AND SOCIAL CHANGE, 2010).