

NOTES

THE CATEGORY 5 CRISIS: HOW HURRICANES KATRINA AND RITA EXPOSED DEFICIENCIES IN THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

INTRODUCTION

For all of mankind's accomplishments, stopping the power of Mother Nature has not been one of them. In August and September of 2005 the people along the Gulf Coast of the United States learned this lesson when Hurricane Katrina and Hurricane Rita descended on the region. Both storms created a broad swath of destruction, using water surges and 155 mph winds to flood the region and batter the buildings. In New Orleans, levees designed to protect the city from flooding gave way under the onslaught of the storms, leaving the region twenty-eight feet under water. The storms affected millions, and washed away homes, jobs, vehicles, buildings, documents and financial records.¹

Like previous victims of disasters, the survivors will have to rebuild their lives and recover from their devastating losses. However, Hurricane Katrina and Hurricane Rita did not completely wash away all the remnants of their past lives. Mortgages, credit card bills and other debts still remained. Survivors still had to contend with the costs of escaping the hurricanes, as well as credit card bills and new mortgages to replace the items and homes they used to have. Some will be able to overcome this adversity and meet their financial obligations. However, for

¹ See Letter from Louisiana to United States Congress (Sept. 2005), <http://www.bostonbar.org/pub/bw/0506/092605/katrinaletter.pdf> ("What is known as of now . . . is that many hundreds of thousands of households have been virtually destroyed by wind, surge, and flooding. Perhaps as many as a million people have been forced to evacuate their homes and businesses. There may be as many as 500,000 heads of households who are unemployed . . . Many will not be able to return to home or jobs, or to re-open their business, for months, or longer."); see also AP, *Number of Jobs Lost to Storms Totals 478,000*, N.Y. TIMES, Oct. 21, 2005, at C13 (reporting on increase in unemployment claims filed as result of Hurricane Katrina and Rita); Press Release, U.S. Census Bureau, *Census Bureau Estimates Nearly 10 Million Residents Along Gulf Coast Hit By Hurricane Katrina*, (Sept. 2, 2005) (on file with author) [hereinafter *Press Release 1*] (stating 9.7 million people were estimated to have been affected by Hurricane Katrina and noting little over two million of them lived below poverty level); U.S. Census Bureau, *Special Population Estimates for Impacted Counties in the Gulf Coast Area: Methodology*, http://www.census.gov/Press-Release/www/emergencies/impacted_gulf_methodology.html (last visited Mar. 12, 2007) (stating U.S. Census indicated one hundred and seventeen counties in Gulf Region after Hurricanes Katrina and Hurricane Rita were eligible for Individual and Public Assistance ("IPA") based on disaster declarations issued by FEMA).

those unable to overcome their financial burden, attaining relief by filing for bankruptcy will not be the same as it was for previous victims.²

In October of 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005³ ("BAPCPA"), which amended the Bankruptcy Code ("Code"). The motives behind BAPCPA can either be attributed to a desire to reduce the number of fraudulent chapter 7 filings,⁴ or to appease the credit industry and make it harder for individuals to receive a discharge.⁵ Despite whatever motive is subscribed to, the fact remains that some members of Congress and other groups expressed concern over whether the new Code would hamper the ability of survivors to file for bankruptcy successfully.⁶ These parties argued that requiring

² For example, prior to the BAPCPA amendments, 11 U.S.C. § 707(b) favored granting discharge for debtors. 11 U.S.C. § 707(b) (2000) ("There shall be a presumption in favor of granting the relief requested by the debtor."). BAPCPA removed such presumption from section 707(b). See 11 U.S.C. § 707(b) (2006); see also Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is The Means Test The Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 668 (2005) (commenting on changes to section 707(b)).

³ Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified in 11 U.S.C.).

⁴ See *In re Parker*, 351 B.R. 790, 790 (Bankr. N.D. Ga. 2006) (stating primary purpose of BAPCPA was "to counteract the perceived abuse of the Bankruptcy Code by debtors."). Numerous members of Congress asserted that BAPCPA was necessary in order to prevent fraudulent filings. See 151 Cong. Rec. E704 (daily ed. Apr. 14, 2005) (statement of Rep. Moore) ("[W]hile this legislation is not perfect, it is a serious, good faith effort to reform our bankruptcy laws and reduce the worst abuses in the consumer bankruptcy system"); 151 Cong. Rec. S2459 (daily ed. Mar. 10, 2005) (statement of Sen. Hatch) (stating BAPCPA "will discourage such abusive filings by restricting access to chapter 7 liquidation by those with relatively high incomes"); Culhane & White, *supra* note 2, at 668 (noting section 707(b) was "the home of 'substantial abuse'" under the old Code). *But see* 151 Cong. Rec. H1981 (daily ed. Apr. 14, 2005) (statement of Rep. Waters) ("S. 256 presumes that bankruptcy filers are simply bankruptcy abusers looking to game the system and avoid paying their bills, ignoring the clear evidence that the overwhelming majority of people in bankruptcy are in financial distress because of job loss, medical expense, divorce, or a combination of these causes.").

⁵ It is interesting to note that there was a strong feeling that the credit card industry had pushed to get BAPCPA passed and effective. See 151 Cong. Rec. S1836 (daily ed. Mar. 1, 2005) (statement by Sen. Kennedy) ("We are spending our time on a bill that was written by the credit card industry for the benefit of the credit card industry."); Robert M. Lawless, *Bankruptcy Filing Rates After a Major Hurricane*, 6 NEV. L.J. 7, 16 (2005) (noting strong credit industry support worked to prevent any amendments being made to BAPCPA five months before Hurricane Katrina); see also 151 Cong. Rec. H1981 (daily ed. Apr. 14, 2005) (statement of Rep. Lee) ("I rise in opposition . . . to this morally bankrupt bill that puts corporate greed over fairness for ordinary folks. This bill takes the phrase 'kick them when they are down' to a whole new level."); Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under The 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 457 (2005) (commenting credit industry "paid" for 2005 BAPCPA amendments); Stephen Labaton, *Senate Reject Efforts to Alter Bankruptcy Legislation*, N.Y. TIMES, Mar. 4, 2004, at C4 (showing different rejected amendments to BAPCPA, including one which would have exempted people from debt if debt was caused by identity thieves, and noting Republican leadership instructed all members to oppose any amendments to BAPCPA).

⁶ See 151 Cong. Rec. E1811-12 (daily ed. Sept. 8, 2005) (statement of Rep. Jackson-Lee) ("We are concerned that just as survivors of Hurricane Katrina are beginning to rebuild their lives, the new bankruptcy law will result in a further and unintended financial whammy. Unfortunately, the new law is likely to have the consequence of preventing devastated families from being able to obtain relief from massive and unexpected new financial obligations they are incurring by forcing them to repay their debt with income they no longer have, but which is counted by the law."); Letter from Louisiana to United States Congress, *supra* note 1, at 1 (requesting Congress to delay effective date of BAPCPA because it would preclude access of Katrina victims to bankruptcy courts "on a horrifically broad scale."); Press Release, Consumer Fed'n of Am, CFA, Attorneys: Congress Should Give Katrina Victims Financial Relief by Delaying Severe New

debtors who had just lost all of their assets because of a disaster to attend credit counseling and financial management classes was inappropriate since the debtors' financial condition was through no fault of their own.⁷ They also argued that the means test would operate to prevent debtors who needed chapter 7 from being able to file successfully and that debtors whose financial records, such as payment advices and statements of income, were destroyed because of the disaster would be unable to produce the necessary documents required under some sections of the Code.⁸ Others argued that the new requirements in the Code would require bankruptcy attorneys to raise their fees, making it harder for disaster victims to attain representation in their bankruptcy filings.⁹ As this Note will discuss, some of these arguments are valid and must be addressed, while others may be more academic.

After Hurricane Katrina, legislation was introduced to Congress to address some of the concerns, but the bills have not progressed since October of 2005.¹⁰ The U.S. Trustee Program ("USTP") attempted to aid Hurricane Katrina victims when it issued enforcement guidelines for the U.S. Trustees in the Gulf Coast Region to apply to the Code.¹¹ One of the guidelines said the U.S. Trustee would not file enforcement motions against debtors who were unable to file the necessary documents under BAPCPA because they were victims of a natural disaster.¹² However, while the U.S. Trustees may have some flexibility in how they interpret certain sections of the Code, their guidelines are not enough to aid debtors who seek bankruptcy after a disaster.

Bankruptcy Law, Sept. 7, 2005 (on file with author) [hereinafter *Press Release 2*] (commenting bankruptcy is "safety net" families hit by "unforeseen circumstances" depend upon, and BAPCPA's "harsh provisions" should be waived for victims of Hurricane Katrina seeking bankruptcy).

⁷ See *infra* Part II (arguing disaster victims should be given additional exemptions under credit counseling requirements).

⁸ See *infra* Part II (discussing difficulty disaster victim has in establishing "special circumstances" to rebut presumption of abuse under means test and producing documents necessary under Code).

⁹ See *infra* Part II (pointing to lack of documentation as reason for increased difficulty in investigative process and thus in attaining an attorney at a reasonable fee).

¹⁰ See Financial Safeguards for Hurricane Survivors Act of 2005, H.R. 3662, 109th Cong. (2005) (proposing to delay effective date of BAPCPA by two years); see also S.Amdt. 1678, 109th Cong. (2005) (extending effective date of BAPCPA by one year); Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, H.R. 3697, 109th Cong. (2005) (making substantive changes to BAPCPA such as exempting victims of natural disasters from having to endure credit counseling and debtor expenses incurred as result of being victim of natural disaster to be used in "means test"); Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, S. 1647, 109th Cong. (2005) (providing natural disasters to be considered when debtor files for bankruptcy).

¹¹ Press Release, U.S. Tr. Program, U.S., U.S. Trustee Program Announces Enforcement Guidelines For Bankruptcy Debtors Affected By Natural Disasters, (Oct. 5, 2005) (on file with author) [hereinafter *Press Release 3*] (announcing the relaxation of BAPCA requirements for those affected by a natural disaster); see Clifford J. White III, Director, Executive Office of United States Trustees, Oversight of the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act (Dec. 6, 2006), http://www.usdoj.gov/ust/eo/public_affairs/testimony/docs/testimony061206.pdf, at 8 (characterizing United States Trustee exemption of debtors in districts most heavily affected by Katrina as "[a]nother important, positive sign that there is adequate capacity to serve the debtor population . . .").

¹² *Press Release 3*, *supra* note 11.

Hurricane Katrina and Hurricane Rita revealed that it was not just victims of natural disasters that can be harmed by the Code. In a post-9/11 world, the threat of a disaster is a constant fear. Rogue nations are developing nuclear weapons, and terrorist organizations, like al-Qaeda, continually threaten the United States. A major terrorist attack can have a crippling effect on the country and can prevent debtors from being able to comply with the necessary document requirements of the Code, meet mandatory statutory deadlines, or pass the means test under BAPCPA.¹³ Additionally, there are individual disasters that can also occur, such as a home burning down, that also need to be addressed. Hurricane Katrina and Hurricane Rita showed the potential pitfalls and dangers of BAPCPA and notified the bankruptcy community that real change must be enacted to the Code before another devastating disaster occurs.¹⁴

This Note contends that the BAPCPA provisions, perhaps inadvertently, place an undue hardship on the ability of victims of disasters to file successfully for bankruptcy. The Code should provide assistance to honest debtors who are attempting to rebuild their lives by surrendering their property and attaining a discharge, while also preventing individuals from abusing the process.¹⁵ However, disaster victims are not "abusers" of the process; they are unfortunate victims of circumstances beyond their control. By subjecting them to the harsh provisions of BAPCPA, Congress is expounding upon an already devastating state of affairs.

Part I of this Note will focus on the connection between natural disasters and bankruptcy filings in the region months and years following the disaster. In Part II this note will analyze the hardships that victims of disasters will have when attempting to comply with requirements of the Code. Part III provides a discussion on the bills and amendments introduced by Congress with the intention of assisting both victims of Hurricane Katrina and future victims of disasters. Part IV highlights and analyzes the powers of the USTP in the light of its efforts to assist victims of Hurricane Katrina and Hurricane Rita. Finally Part V discusses possible solutions and changes that can be made to both the Code and the USTP in order to assist future disaster victims. Legislative language changes are suggested in the Appendix to this note.

¹³ See Amy Cortese, *New York, Badly Battered But Stronger Than In The 1970's*, N.Y. TIMES, Dec. 17, 2001, at C4 (commenting 9/11 devastated N.Y. economy and cost many jobs); see also Wash. Post Staff Writer, *Bush, Democrats Press Cases in Insurance Stalemate*, WASH. POST, Oct. 4, 2002, at A16 (expressing need for insurance in event of terrorist attack in order to prevent unnecessary bankruptcies).

¹⁴ Throughout this Note, in describing the problems that may arise with filing bankruptcy, the author will be using the term "disaster victims" almost exclusively. The term "disaster victims" includes victims of natural disasters, terrorist attacks and other non-natural disasters.

¹⁵ See *Cohen v. De La Cruz*, 523 U.S. 213, 217 (1998) ("The Bankruptcy Code has long prohibited debtors from discharging liabilities incurred on account of their fraud, embodying a basic policy animating the Code of affording relief only to an 'honest but unfortunate debtor'"); *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (acknowledging Code's purpose is to "provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life"); *Local Loan v. Hunt*, 292 U.S. 234, 244 (1934) ("[I]t gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.").

I. BANKRUPTCIES AND NATURAL DISASTERS

The destructive impact of a natural disaster on the United States has been seared into the minds of Americans following the aftermath of Hurricane Katrina and Hurricane Rita. Since the enactment of the Code in 1978, there have been eighteen hurricanes in the United States that have each caused over \$1 billion in damages.¹⁶ While many in the path of a natural disaster can physically escape its wrath, there are others that are either killed or injured.¹⁷ In addition, businesses and companies are also destroyed, which eliminates jobs and substantially harms the economy.¹⁸ Some argue that areas affected by disasters experience an "economic boom" due to the federal aid and construction money that comes into the affected area.¹⁹

¹⁶ See Eric S. Blake et al., *Costliest U.S. Hurricanes 1900-2004*, Aug. 1, 2005 <http://www.nhc.noaa.gov/pastcost.shtml> (last visited Mar. 11, 2007) (reporting first major hurricane after 1978 Act was Hurricane Alicia in 1983, which cost \$ 2 billion, and most expensive was Hurricane Andrew, which cost about \$27 billion); see also Lawless, *supra* note 5 at 11 (listing eighteen hurricanes and tropical storms which caused over 1 billion dollars); NAT'L RESEARCH COUNCIL, *THE IMPACTS OF NATURAL DISASTERS: A FRAMEWORK FOR LOSS ESTIMATION* 6 (National Academy Press 1999) (noting Hurricane Andrew cost about \$30 billion). Two other natural disasters that, in terms of cost, have been the most devastating are the 1993 Midwest Floods and the 1994 Northridge earthquake. See *id.* (stating 1993 Midwest Floods cost about \$19 billion and Northridge earthquake cost about \$44 billion); see also Michelle E. Boardman, *Known Unknowns: The Illusion of Terrorism Insurance*, 93 GEO. L.J. 783, 831 (2005) (determining damages of Northridge earthquake around \$20 billion for property damage alone); Bryant J. Spann, *Going Down for the Third Time: Senator Kerry's Reform Bill Could Save the Drowning National Flood Insurance Program*, 28 GA. L. REV. 593, 593 (1994) ("Official estimate that the Midwestern Flood over 1993 caused over \$15 billion in property damage.").

¹⁷ See NAT'L RESEARCH COUNCIL, *supra* note 16, at 3 (noting people are often killed and injured by natural disasters); see also Alfred J. Sciarrino, *The Grapes of Wrath and the Speckled Monster, Part III: Epidemics, Natural Disasters and Biological Terrorist—The Federal Response*, 10 MICH. ST. U. J. MED. & L. 429, 438 n.34 (2006) (stating six disasters in U.S. history resulted in 1000 or more fatalities).

¹⁸ See NAT'L RESEARCH COUNCIL, *supra* note 16, at 5; see also Elisabeth Belmont et al., *Emergency Preparedness, Response & Recovery Checklist: Beyond the Emergency Management Plan*, 37 J. HEALTH L. 503, 559 (2004) ("According to the Insurance Information Institute, more than 30% of businesses never reopen following closure due to hurricane, tornado, flood, or other disaster."); Marie Ellen Haynes, *Single-Employer Profit Sharing Plans: Should a Break in Service that Occurs Because of a Natural Disaster Result in the Forfeiture of a Plan Participant's Nonvested Profit Sharing Benefit?*, 42 CLEV. ST. L. REV. 509, 510-13 (1994) (describing natural disaster effects upon employment).

¹⁹ See Lawless, *supra* note 5, at 9 (indicating after hurricanes, some commentators argue there will be an economic boom for the area due to federal aid and construction money); Anne M. Simmons, *Mayor Nagin Foresees an 'Unprecedented' Boom for the Devastated City in His Second Term. He Says Housing and Trash Removal Are Priorities*, L.A. TIMES, May 22, 2006, at A4 (quoting New Orleans Mayor Nagin when he predicted 300,000 people would be living in New Orleans at end of 2006 and city would experience "economic boom [that] would make New Orleans a 'vibrant city.'"); Joseph B. Treaster, *Officials Forecast Hope for Victims of Hurricane*, N.Y. TIMES, Aug. 22, 2004, at 1.12 (quoting Antonio Villamil, chairman of Florida Governor Jeb Bush's Council of Economic Advisers, who stated 2004 hurricane season would be "temporary jolt" to Florida economy by causing "a boom in new construction and repairs and road building" and "re-employ[ment] in reconstruction."). Some economists compared New York City after September 11, 2001 to cities affected by natural disasters. Cortese, *supra* note 13, at C4. The attacks on New York City were estimated to have cost between fifty and sixty billion dollars. *Id.* However, some economists predicted that the city's economy would "rally" because of building booms. *Id.* (believing initial slumps would be followed by "building booms that . . . revived economies"). However, these booms may be short-lived and

However, these booms will not assist debtors who, having lost their documents because of the disaster, are unable to successfully declare bankruptcy and are placed in a position where they cannot participate in the boom. In the aftermath of these disasters, victims will often endure by turning to their savings and credit cards, further compounding their debt.²⁰ As the population of the United States continues to grow, more and more people run the risk of facing a disaster and having to survive in the aftermath.²¹

Only a few studies have been conducted on the effects of natural disasters on bankruptcy filings, two of which came to opposing conclusions. One study conducted by Edward Flynn, indicated that there "has not been a strong relationship between major natural disasters and bankruptcy filings."²² He argued that natural disasters did not result in an increase in bankruptcy filings in a region after the disaster.²³ Flynn supported his conclusion by analyzing local bankruptcy filings in the quarters immediately following certain natural disasters in regions and comparing them with the national average.²⁴ However, Professor Robert Lawless' study showed the opposite. Lawless' study concluded that bankruptcy filings drastically increase in the second and third year following a natural disaster.²⁵ Lawless posited that the reason for this is because most survivors are still attempting to rebuild their lives in the quarter after the disaster and are not focused on their financial affairs or even contemplating bankruptcy.²⁶ However, there are

the long-term losses could offset any short-term gains. *See* Lawless, *supra* note 5, at 9 (commenting short-term economic gains may be due to accelerated repairs and investments which would have been made regardless of the attacks); Cortese, *supra* note 13, at C4 (positing building boom for post-9/11 New York would not help city's economy because city is too big for construction jobs to make impact).

²⁰ *See* Lawless, *supra* note 5, at 7 (commenting after disasters, victims still had to deal with everyday expenses); Elizabeth Warren, *Natural Disasters and Bankruptcy: A Perspective*, CMYTS. & BANKING 3 (2005) (noting after 2005 hurricane season, hundreds of thousands of middle class families may deplete life savings and use credit cards to supplement government aid); Jeanette Steele, *Sadness, Frustration, Despair Creep in for Victims*, SAN DIEGO UNION-TRIBUNE, Feb. 15, 2004, at B1 (describing family who relied on credit cards to replace furniture after becoming disaster victims).

²¹ *See* Hector Becerra & David Pierson, *No Counting on the Identity of 300 Millionth Resident*, L.A. TIMES, Oct. 18, 2006, A1 (noting U.S. Census predicted 300 millionth resident would be born on Oct. 17. at 4:46 in the morning); John McCormick, *Next Stop for U.S. Population: 300,000,000*, CHICAGO TRIBUNE, Oct. 5, 2006, C1 (reporting U.S. population will soon pass 300 million); *see also* Robert H. Jerry II, *Insurance, Terrorism, and 9/11: Reflections on Three Threshold Questions*, 9 CONN. INS. L.J. 45, 105 (2002) ("In some respects, we have been fortunate that severe natural disasters have avoided dense population centers.").

²² Edward Flynn, *Bankruptcy and Natural Disasters*, 23-JAN. AM. BANKR. INST. J. 20, 76 (2005) (studying effects of Hurricane Hugo and the San Francisco Earthquake in 1989, Hurricane Andrew in 1992, the Midwest Floods of 1993, Red River Floods in North Dakota in 1997, and Hurricane Floyd in 1999).

²³ *See id.* ("Generally, filing trends in a state or district keep on about the same pattern as they were before the disaster.").

²⁴ For example, when discussing Hurricane Hugo, Flynn's data indicated that bankruptcy filings spiked for one quarter. *Id.* at 20.

²⁵ Lawless, *supra* note 5, at 14 (commenting his data showed in twenty-four to thirty-six months after major hurricane, affected states had significantly higher increase in bankruptcy filings than non-affected states).

²⁶ *Id.* at 15 ("[A]reas hit by major hurricanes will suffer great financial distress and that distress will linger long after the media glare has disappeared."); *see* Letter from Louisiana to United States Congress, *supra*

still debtors that are financially unable to postpone their filing, and are forced, after the disaster, to file for bankruptcy. While both studies point to different outcomes, it is Lawless' study that appears to be more persuasive.

Flynn utilized the national average of bankruptcy filings in his study to see if a natural disaster impacted the number of bankruptcy filings in the affected region.²⁷ However, this was faulty. The national average would have already included the number of filings in areas affected by the natural disaster. This distorts his base rate since the national numbers would have already been raised by a higher number of bankruptcy filings in the affected region.²⁸ But Flynn's own charts show that the region affected by the natural disaster experienced higher growth in bankruptcy filings in the two years following the storm.²⁹ By focusing on just "short-term spikes" in bankruptcy filing trends, Flynn would seem to invalidate his own study.³⁰ Furthermore, since this study was conducted prior to the passage of BAPCPA, there is an argument that the number of filings might not increase if debtors cannot comply with the new requirements under the Code. But this does not mean that these people do not need to file for bankruptcy, just that they cannot.

Lawless' study showed that it is usually in the second and third year following a major disaster that the number of bankruptcy filings drastically increase.³¹ He supports his conclusion by focusing on the increase in bankruptcy filings in the twelve, twenty-four and thirty-six month period following a major hurricane.³² For example, after Hurricane Elena hit Mississippi in 1985 there was a 71.8% increase in bankruptcy filings within three years of the storm.³³ Lawless' concluded that the

note 1, at 3 ("Most of Katrina's victims will not be able to reasonably ascertain if they really need some sort of bankruptcy relief until long after BAPCPA is set to become effective."); *see also* Warren, *supra* note 20, at 4–5 (noting bankruptcy filings generally increased 50% two to three years after disaster in affected areas, which is likely due to many families attempting to recover as best as they can, while only afterwards "confront[ing] their overall financial condition").

²⁷ Flynn, *supra* note 22, at 20.

²⁸ Lawless, *supra* note 5, at 10 (dismissing Flynn's analysis because the data was distorted "by the precise effect [Flynn] is trying to observe").

²⁹ When Flynn looks at the affect of Hurricane Hugo in South Carolina he remarked that the state "recorded modest increases in filings for about a year after Huger, followed by much higher increases in the subsequent year." Flynn, *supra* note 22, at 20.

³⁰ Lawless, *supra* note 5, at 10 ("In drawing his conclusion, Flynn looked for very short-term spikes in filings; specifically, Flynn looked at filing rates in the quarters immediately following the natural disaster."); *see* Flynn, *supra* note 22 (focusing on quarters immediately following natural disaster).

³¹ Lawless, *supra* note 5, at 14 (commenting data showed significant increase in bankruptcy filings two to three years after natural disaster); *see* Warren, *supra* note 20, at 4 (noting in states affected by hurricane, bankruptcy filings generally increased about 50% more than in non-affected states). Interestingly, Flynn confirmed this notion after looking at the affect of Hurricane Hugo in South Carolina, and finding that the state "recorded modest increases in filings for about a year after Huger, followed by much higher increases in the subsequent year." Flynn, *supra* note 22, at 20.

³² It should be noted that some of the problems described in this note will be mitigated by the passage of time, such as compliance with the means test, which makes it more likely that debtors will be able to file for bankruptcy.

³³ Warren, *supra* note 20, at 4; *see* Lawless, *supra* note 5, at 13 (showing twelve months after Hurricane Elena bankruptcy filings increased 22.1%, followed by 51.4% twenty four months after Elena, and by 71.8% thirty six months after Elena).

lingering effects of the storm were still present because the bankruptcy filing rates in the affected states increased roughly fifty percent more than in states that were not affected by the storm, and that for "two new filings in an unaffected state, there are three new filings in the landfall state."³⁴ Regrettably, many victims of natural disasters are unable to overcome their mounting debt and will eventually seek to file bankruptcy.³⁵ However, as Part II will discuss, some of the new provisions of the Code can hinder and delay honest debtors from being able to file for bankruptcy successfully, which is something the Code should not do.

II. DISASTER VICTIMS AND BAPCPA AMENDMENTS

Disaster victims will have to comply with the same statutory provisions of BAPCPA as unaffected debtors, but the Code's flexibility to accommodate these victims is questionable.³⁶ The Congressional Research Service ("CRS") prepared a report for Congress noting that the provisions of BAPCPA would place a hardship on disaster survivors, specifically Hurricane Katrina victims.³⁷ Unless there is a change, future disaster victims will likely find bankruptcy courts under the new Code to be less sympathetic than previous victims did.

A. Do the Credit Counseling and Financial Management Requirements Under the Code Impair the Ability of Disaster Victims to File for Bankruptcy Successfully?

One section of the Code that provides for little flexibility is the credit counseling requirement. Under BAPCPA, a debtor must file a certificate from an approved nonprofit budget and credit counseling agency with the bankruptcy court indicating that the debtor had received credit counseling within six months prior to filing for bankruptcy.³⁸ If the debtor fails to attend credit counseling, the bankruptcy

³⁴ Lawless, *supra* note 5, at 13.

³⁵ See *supra* Part I and accompanying text; see, e.g., *Suber v. Alaska State Bond Comm.*, 414 P.2d 546, 551 (Alaska 1966) (illustrating "crushing financial burden" resulting from natural disasters).

³⁶ The Code does not provide for natural disaster victims to be exempted from the credit counseling requirements. 11 U.S.C. § 109(h) (2006); see Letter from Senate Judiciary Comm., to David M. Walker, Comptroller Gen. (Oct. 18, 2005), http://www.house.gov/judiciary_democrats/letters/gaobankimpactstudyltr101805.pdf (asking Comptroller General to study BAPCPA and its effects on victims of Hurricane Katrina due to concerns BAPCPA is too strict on them); Warren, *supra* note 20, at 5 (noting lack of flexibility in BAPCPA).

³⁷ Robin Jeweler, *Bankruptcy Relief and Natural Disaster Victims*, summary, CRS REPORT FOR CONGRESS, Order Code RL 33082, Sept. 14, 2005 ("Bankruptcy Relief and Natural Disaster Victims") ("To some extent, the new goals of the BAPCPA, which is [sic] designed to restore personal responsibility to individual's financial affairs and reduce the number of chapter 7 filings, *may be at odds* with the goals of those who want to assist Katrina victims through a speedy financial rehabilitation procedure under chapter 7 of the U.S. Bankruptcy Code . . ." because "bankruptcy law does not and never has made major substantive or procedural distinctions based on *why* the debtor files. . ."); see *In re Sandra Luella Battle*, No. 06-50454-C, 2006 Bankr. LEXIS 3522, at *5 (Bankr. W.D. Tex. Dec. 12, 2006) (showing BAPCPA rule was designed to prevent forum shopping, which is something clearly not on minds of Katrina victims).

³⁸ 11 U.S.C. § 109(h) (2006); Letter from Louisiana to United States Congress, *supra* note 1, at 1 (noting BAPCPA requires credit counseling as precondition to filing); see *In re Parker*, 351 B.R. 790, 797 (Bankr.

court cannot grant him or her a discharge under chapter 7. In addition, a debtor in chapter 7 must also attend a personal financial management course. If the regional U.S. Trustee's Office determines that the credit counseling agencies and financial management agencies in the region are unable to provide the required services, as the USTP did after Hurricane Katrina, then a debtor that files for bankruptcy after said determination is not required to attend either program.³⁹

It has been argued that subjecting debtors seeking bankruptcy to the credit counseling and financial management requirements after they have lost their possessions, jobs, and financial documents due to a disaster is unfair because their debt was caused by living in a region struck by a disaster, not by misusing credit.⁴⁰ As noted in Part IV, the USTP has the authority to waive these requirements for a region if the credit counseling and financial management agencies are unable to provide the services.⁴¹ However, if the USTP does not make this determination, then it falls to the bankruptcy court to assist the debtor.

While a bankruptcy court can grant a forty-five day waiver of the credit counseling requirement if a debtor shows exigent circumstances, the waiver cannot be extended past forty-five days, and the debtor must still attend the different programs. Congress created an explicit exemption from credit counseling for a debtor if the bankruptcy judge determines that the debtor is incapacitated,⁴² disabled⁴³ or on active military duty in a military combat zone.⁴⁴ The statutory language indicates that a bankruptcy judge will have very little discretion in interpreting the credit counseling requirement and may determine that it lacks the ability to waive the requirement for disaster victims beyond the forty-five days. Since the USPT, as discussed below, has waived the credit counseling and financial management requirements for the regions affected by Hurricane Katrina, there are

N.D. Ga. 2006) (commenting BAPCPA requires debtor to receive credit counseling from approved agency, and debtor waived his right to raise section 109(h) issue when he continued to participate in his case even after becoming aware of problem).

³⁹ 11 U.S.C. § 111(d) (2006); *id.* § 727(a)(11) (preventing court from granting discharge if debtor has not completed instructional course concerning personal financial management); *see* 1-1 COLLIER ON BANKRUPTCY ¶ 1.02[5][a] (Alan N. Resnick et al. eds., 15th ed. rev. 2006) (indicating debtor must attain financial education as condition of discharge).

⁴⁰ *See* Letter from Louisiana to United States Congress, *supra* note 1, at 2 ("One component of the ACT, the credit counseling precondition to filing, is particularly devoid of relevance."); *see also* Lawless, *supra* note 5, at 8 (noting irrelevance of credit counseling in natural disaster related bankruptcies). *See generally* Howard B. Hoffman, *Consumer Bankruptcy Filers and Pre-Petition Consumer Credit Counseling: Is Congress Trying to Place the Fox in Charge of the Henhouse?*, 54 BUS. LAW. 1629, 1640 (Aug. 1999) (arguing credit counseling should be personal decision of debtors and not required).

⁴¹ *See infra* Part IV.

⁴² 11 U.S.C. § 109(h)(4) defines "incapacity," for purposes of section 109(h)(4) to mean "the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities." 11 U.S.C. § 109(h)(4) (2006).

⁴³ The Code defines "disability" to mean "the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1)." *Id.*

⁴⁴ *Id.* (stating court must go through notice and hearing to determine if an exception applies).

no cases where this has been an issue.⁴⁵ However, an ad hoc approach of courts interpreting this section of the Code to determine who will and will not qualify, while meritorious, can be resolved by adding disaster victims to the list of exempted parties.

B. Do the Bankruptcy Courts Have the Flexibility to Assist Debtors With the Means Test?

As one of the biggest changes to the Code, the means test was formulated to determine whether a bankruptcy case should be dismissed as an abusive filing by "measuring the debtor's ability to fund a hypothetical chapter 13 plan."⁴⁶ Under the previous version of the Code, when a bankruptcy judge considered dismissing a chapter 7 case for abuse, the statutory presumption was in favor of granting the discharge.⁴⁷ However, BAPCPA removed this language from the Code and replaced it with the means test.⁴⁸ The debtor must average his or her income from the past six months, and then compare that figure to the median income of the state where the debtor resides.⁴⁹ If the debtor is below that amount, then he or she will be allowed to file in chapter 7, unless precluded from doing so by any other provision of the Code. But, if the debtor is above that amount, then he or she is presumed to be abusing chapter 7, and the bankruptcy court will either dismiss the case or convert it, with the debtor's consent, to a chapter 13 case.⁵⁰ The debtor may rebut the presumption of abuse by showing special circumstances.⁵¹

Suppose Debtor A had a job and income six months before a disaster, but he decided to file for bankruptcy six months after the disaster. He will find that the means test will likely preclude him from filing for chapter 7 successfully. However, if Debtor B was unemployed in the five or six months prior to a disaster, then she would have a better chance of filing for chapter 7 successfully. Even though both Debtor A and Debtor B are in theoretically the same position since both of their homes and possessions were destroyed by the disaster, Debtor B would likely be able to file for chapter 7 successfully, while Debtor A cannot. This hardly seems fair. Furthermore, consider Debtor C. Debtor C had a job and income in the

⁴⁵ See *infra* Part IV.

⁴⁶ 11 U.S.C. § 707(b) (2006); see *In re Renicker*, 342 B.R. 304, 308 (Bankr. W.D. Miss. 2006) (highlighting new use of means test for chapter 7 plan); Culhane & White, *supra* note 2, at 665 ("The much heralded means test now guards the gates of chapter 7.").

⁴⁷ 11 U.S.C. § 707(b)(1) (2000) ("A presumption in favor of granting the relief requested by the debtor.").

⁴⁸ See Bankruptcy Relief and Natural Disaster Victims, *supra* note 37, at 4 (The new means test imposes a "significantly higher burden of legal and evidentiary proof for prospective debtors"); Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under Section 707(b)(3)*, 71 MO. L. REV. 1035, 1036 (2006) (stating means test as way to "crack down" on fraud); Robyn L. Meadows, *Bankruptcy Reform and the Elderly: The Effect of Means-Testing on Older Debtors*, 36 IDAHO L. REV. 227, 234 (2000) (explaining means test as attempt to distinguish debtors who can pay from those who cannot).

⁴⁹ 11 U.S.C. § 707(b)(2)(A) (2006) (outlining requirements of means test).

⁵⁰ *Id.* § 707(b)(1) ("granting of relief would be an abuse of the provisions."); Bankruptcy Relief and Natural Disaster Victims, *supra* note 37, at 4 (describing new presumption).

⁵¹ See *infra* note 54 and accompanying text.

five to six months before a disaster, but is unable to get a job post-disaster. He would not be able to file for chapter 7 and would also be unable to file for chapter 13.⁵² This is because Debtor C's lack of a job and lack of a monthly income will prevent him from creating a payment plan under chapter 13. This places Debtor C between the proverbial rock and a hard place, since he is unable to file for either chapter and is unable to meet his or her financial obligations.

Congress automatically exempted two groups of people from having to comply with the means test: debtors with income below their state's median level⁵³ and disabled veterans whose indebtedness occurs while they are on active duty or performing a homeland defense activity.⁵⁴ The presumption of abuse can only be rebutted by a showing of special circumstances "such as a serious medical condition or a call or order to active duty."⁵⁵ If the debtor's income under the means test is above the median average of the state, then these special circumstances will allow him or her to deduct "additional expenses . . . for which there is no reasonable alternative."⁵⁶

The phrase "such as" from section 707 in the Code is ambiguous, and could lead different courts to different results. In *In re Thompson* the bankruptcy court determined "special circumstances" existed when the debtor took a loan on his 401(k) in an attempt to remedy a personal financial emergency.⁵⁷ Other courts have determined situations like unemployment, inability to find a high paying job, high cost of housing, and high transportation costs did not constitute "special circumstances."⁵⁸ In order to prove "special circumstances" the debtor must itemize his or her additional items of income or expense, document them, and explain his or her special circumstances, in detail, to the court.⁵⁹ Such documentation may consist

⁵² 11 U.S.C. § 1322 (2006) (limiting bankruptcy plans when income exceeds certain levels).

⁵³ *Id.* § 707(b)(7)(A) ("No judge, United States trustee, . . . trustee, or other party in interest may file a motion under paragraph (2) if the current monthly income of the debtor . . . is equal to or less than" median income of applicable state); see Shawn Zeller, *Bankruptcy Law Affords Little Shelter from the Storm*, CQ WEEKLY 2459, 2459 (2005) (noting if debtor's income is below median state income in debtor's state then debtor is exempt from means test).

⁵⁴ 11 U.S.C. § 707(b)(2)(D) (2006).

⁵⁵ *Id.* § 707(b)(2)(B)(i) (emphasis added); see *In re Johns*, 342 B.R. 626, 629 (Bankr. E.D. Okla. 2006) (commenting medical expenses and call to active duty are not only types of special circumstances which could rebut presumption of abuse).

⁵⁶ 11 U.S.C. § 707(b)(2)(B)(i).

⁵⁷ *In re Thompson*, 350 B.R. 770, 777-78 (Bankr. N.D. Ohio 2006) (holding debtor's 401-K loan was taken out in order to assist family's longstanding financial difficulties in order satisfy an "emergency financial need," and therefore constituted "special circumstances").

⁵⁸ *In re Hanks*, No. 06-22777, 2007 Bankr. LEXIS 46, *22 (Bankr. D. Utah Jan. 9, 2007) (stating "statutory examples of serious medical conditions and active military service, although not exhaustive, are instructive of the kinds of 'special circumstances' that would justify deviations," but debtor's inability to find high paying job does not rise to the level of "serious medical condition" or "active military duty"); *In re Renicker*, 342 B.R. 304, 310 (Bankr. W.D. Miss. 2006) (noting while debtor did have serious disease, debtor failed to produce any evidence connecting it with extraordinary expenses claimed).

⁵⁹ 11 U.S.C. § 707(b)(2)(B)(ii) (2006); see *In re Demonica*, 345 B.R. 895, 903 (Bankr. N.D. Ill. 2006) (sustaining trustee's objection to confirmation of plan because debtor failed to either document or explain his additional expenses). The debtor would have to produce the documents necessary to show that the expenses were incurred regularly and paid. See Alan N. Resnick and Henry J. Sommer, eds., *The Bankruptcy Abuse*

of receipts, bills, and other documents that would prove the debtor's expenses. Since this language is mandatory, a bankruptcy court would be unable to waive this requirement for disaster victims whose financial records have been destroyed and who are, therefore, unable to provide the necessary documentation to validate their additional expenses.⁶⁰ As a result, while their additional expenses might have qualified for special circumstances and could have lowered their income to below the state average under the means test, they may not be able to prove this, precluding them from filing under chapter 7.

In both *In re Renicker*⁶¹ and *In re Demonica*,⁶² the bankruptcy courts noted that the debtors' failure to provide documentation precluded the courts from finding special circumstances.⁶³ The court in *In re Renicker* noted that while it sympathized with the debtor-spouse's disease, the debtor's failure to provide documentation showing a connection between the debtor-spouse's disease and the expenses incurred by the debtor precluded the court from finding special circumstances.⁶⁴ In fact, the court expressed relief in not having to define "special circumstances."⁶⁵ However, if disaster victims file for bankruptcy two to three years after the disaster, which most do, then the argument that the requirement is onerous is not so persuasive. This is because debtors who have waited to file for bankruptcy will have likely acquired the necessary new financial documentation by then because of the amount of time that has passed. The document requirement is really burdensome for those disaster victims who file for bankruptcy within the six months after a disaster.

Prevention and Consumer Protection Act of 2005: A Section-by-Section Analysis, COLLIER ON BANKRUPTCY (Alan N. Resnick et al. eds., 15th ed. 2006) (stating debtors must prove to bankruptcy judge their income, and expenses "should be adjusted to account for special circumstances for which there is no reasonable alternative and such adjustments bring the means test result below the minimum payment thresholds").

⁶⁰ See Bankruptcy Relief and Natural Disaster Victims, *supra* note 37, at 5; see also 11 U.S.C. § 707(b)(2)(B)(ii) (2006); Lawless, *supra* note 5, at 17 ("[I]t makes little sense to subject victims of a natural disaster to a means test to ensure they truly need bankruptcy. Moreover, victims of a natural disaster often will have lost the documents necessary to a claim of special circumstances.").

⁶¹ 342 B.R. 304, 310 (Bankr. W.D. Miss. 2006).

⁶² 345 B.R. 895, 903 (Bankr. N.D. Ill. 2006).

⁶³ *In re Demonica*, 345 B.R. at 903 (stating debtor failed to either document or explain his additional expenses and therefore sustained trustee's objection to confirmation of plan); *In re Renicker*, 342 B.R. at 310 (noting while debtor did have serious disease, debtor failed to produce any evidence connecting disease with extraordinary expenses claimed).

⁶⁴ *In re Renicker*, 342 B.R. at 310 n.15.

⁶⁵ *Id.* at 310 ("In this case, the Debtors' failure to submit any documentation in support of their extraordinary expenses relieves the Court from having to develop, possibly from whole cloth, a detailed definition of 'special circumstances,' or to distinguish between 'reasonably necessary' and 'necessary and reasonable.'").

C. Do the Document Requirements of Section 521 Prevent a Debtor from Filing for Bankruptcy Successfully?

The mandatory documents required under BAPCPA places an unintentional burden on debtors/victims of disasters. As noted above, the document requirement can be harmful for debtors filing in the months after a disaster. Additionally, BAPCPA requires debtors to produce documentation to establish their financial circumstances, such as payment advices, which provide evidence of any payment received by the debtor, and statements of income.⁶⁶ Under section 521(i)(1), a debtor's bankruptcy case is automatically dismissed if he or she fails to file all of the required information under (a)(1) within forty-five days of the filing.⁶⁷ There are two divergent views on section 521: one view asserts that the courts lack discretion in assisting debtors, while the other view indicates that the Code already gives the courts discretion.

Some bankruptcy courts have taken a hard-line view on the automatic dismissal of section 521. The court in *In re Ott*⁶⁸ held that it had no discretion to enlarge the time limitations of section 521(i)(1) where the debtor failed to file, within sixty days before the filing of the petition, all of the payment advices and other evidence of payment received.⁶⁹ The Court stated its "hands [were] tied by the operation of the express language of 11 U.S.C. § 521(i), as it was written and intended to be implemented by Congress."⁷⁰ BAPCPA also requires dismissal of bankruptcy cases

⁶⁶ 11 U.S.C. §§ 707, 521(i) (2006); Warren, *supra* note 20, at 5 (noting examples of such documentation are six months of paycheck stubs, tax returns, and a full accounting of debtor's the monthly budget). See generally *Press Release 3*, *supra* note 11.

⁶⁷ 11 U.S.C. § 521(i)(1) (2006) (stating bankruptcy court must dismiss case on forty-sixth day if debtor fails to file necessary paperwork); see *id.* § 521(a)(1) (requiring debtor to file list of creditors, schedule of assets and liabilities, schedule of current income and current expenditures, statement of debtor's financial affairs, an attorney certificate, copies of all payment advices or other evidence of payment received within 60 days before bankruptcy filing, statement of amount of monthly net income, and a statement disclosing any reasonable anticipated increase in income or expenditures); see also *In re Riddle*, 344 B.R. 702, 703 (Bankr. S.D. Fla. 2006) ("What is the clue on the 46th day?/ Is the case still here, or gone away?/ And if a debtor did not do/ what the Code had told him to/ and no concerned party knew it,/ Still the Code says the debtor blew it."); *In re Fawson*, 338 B.R. 505, 510 (Bankr. D. Utah 2006) (holding bankruptcy case is automatically dismissed on 46th day if debtor fails to file all section 521(a)(1) papers since the court has no discretion to extend period).

⁶⁸ 343 B.R. 264 (Bankr. D. Colo. 2006).

⁶⁹ *Id.* at 265; see 11 U.S.C. § 521(a)(1)(B)(iv) (2006); see also *In re Cloud*, 356 B.R. 544, 545 (Bankr. D. Colo. 2006) (dismissing bankruptcy case because debtor failed file payment advices within statutory deadline). But see *In re Parker*, 351 B.R. 790, 801 (Bankr. N.D. Ga. 2006) (commenting language of section 521 is confusing and positing section 521 does not require automatic dismissal since "[i]f the case had already been 'automatically dismissed' . . . [t]he Court could not dismiss a case that already has been dismissed").

⁷⁰ *In re Cloud*, 356 B.R. at 545 (stating court had "no discretion to extend 45-day period"); see *In re Ott*, 343 B.R. 264, 268 (Bankr. D. Colo. 2006) ("After the expiration of the specified period set forth in 11 U.S.C. § 521(i)(1), there are no exceptions, no excuses, only dismissal and the consequences that flow therefrom."); *In re Young*, No. 06-80397, 2006 WL 3524482, at *3 (Bankr. S.D. Tex. Dec. 6, 2006) (describing section 521(i) as containing no language of discretion, so if filing requirements of section 521(a)(1) are not timely met, case shall be automatically dismissed).

if the debtor has failed to produce old tax returns, payment advices, and other financial records at the time of filing, upon request of a party in interest, i.e. a creditor.⁷¹

The Code only allows a bankruptcy court to consider a debtor's good faith effort in producing his or her payment advices.⁷² The bankruptcy court in *In re Fawson*⁷³ stated that in order for the court to consider the good faith effort of the debtor, either the chapter 7 trustee or the debtor had to request this consideration within forty-five days after filing for bankruptcy.⁷⁴ The court held that since neither the debtor nor the trustee requested this consideration, the statute prevented the court from considering it, and dismissed the debtor's bankruptcy case.⁷⁵ Numerous courts have taken a hard-line approach to the interpretation of section 521, holding that it requires automatic dismissal if the debtor fails to comply.⁷⁶

However, not all districts take this hard-line approach; several districts have pointed to the language of section 521(a)(1)(B), which mandates the filing of

⁷¹ 11 U.S.C. § 521(f) (2006) (requiring debtors to file certain paperwork in bankruptcy proceedings); see *In re Calhoun*, No. 06-40512-293, 2007 WL 117725, at *1 (Bankr. E.D. Mo. Jan. 17, 2007) (asserting failure to file required paperwork within 45 days of petition date results in cases being "automatically . . . dismissed . . . on the 46th day").

⁷² 11 U.S.C. § 521(i)(4) (2006) ("Notwithstanding any other provision of this subsection, on the motion of the trustee filed before the expiration of the applicable period of time specified in paragraph (1), (2), or (3), and after notice and a hearing, the court may decline to dismiss the case if the court finds that the debtor attempted in good faith to file all the information required by subsection (a)(1)(B)(iv) and that the best interests of creditors would be served by administration of the case.").

⁷³ 338 B.R. 505 (Bankr. D. Utah 2006)

⁷⁴ *Id.* at 512 ("[11 U.S.C. § 521(i)(4)] require[s] action within 45 days of the date of the filing of the petition and prior to dismissal by operation of the statute."); see *In re Lovato*, 343 B.R. 268, 269 (Bankr. D.N.M. 2006) ("While 11 U.S.C. section 521(i)(3) permits a court to grant up to a 45-day enlargement of time to file the papers required by section 521(a)(1), the request for such an enlargement must be made within the first 45-day period."); *In re Williams*, 339 B.R. 794, 795 (Bankr. M.D. Fla. 2006) (concluding Court had no discretion to extend time within which to file documents required under 11 U.S.C. § 521(a) where debtor did not request extension within initial 45 day period).

⁷⁵ *In re Fawson*, 338 B.R. at 512 (mandating dismissal of cases when debtors fail to timely comply with requirements of section 521(a)(1)); see 11 U.S.C. § 521(a)(1)(B)(iv), (i)(4) (2006). Even though the debtor's bankruptcy case is dismissed under section 349, the debtor is not precluded from making a subsequent petition to the court. *Id.* at 349 ("Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.").

⁷⁶ See *In re Wilkinson*, 346 B.R. 539, 546 (Bankr. D. Utah 2006) (commenting Congress may have intended for harsh results when BAPCPA provisions were not followed since "[f]or better or worse, a harsh result is not the same as an absurd result. . . ."); *In re Fawson*, 338 B.R. at 515 (holding debtors request for time extension was time barred due to neglect because they failed to timely file their payment advices, and did not timely file request for extension of time); see also *In re Conner*, No. 06-40061-LMK, 2006 Bankr. LEXIS 1224, at *3 (Bankr. N.D. Fla. May 16, 2006) (alleging employee income records were not filed with the Court in time because "due to a misunderstanding regarding the recent changes in the bankruptcy law . . ." no party would be prejudiced by granting the motion; however, Court has no discretion in this matter and dismissed claim); *In re Lovato*, 343 B.R. at 270 ("Had the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ('BAPCPA') left the Court with any discretion, the Court would deny the Chapter 7 Trustee's motion with leave to allow the Debtor to submit the required payment advices."); *In re Williams*, 339 B.R. at 795 (allowing no discretion for court to grant debtor relief).

payment advices and other documentation only if the court does not order otherwise. These courts assert discretion in determining what documents must be filed in order to avoid automatic dismissal. For example, the Northern District of Illinois has issued a standing order providing that the debtor does not have to file the payment advices otherwise required under section 521(a)(1)(B)(iv), but rather should simply supply these documents to the case trustee.⁷⁷ Under this reading of section 521(a)(1)(B), a debtor whose documents were lost in a disaster could seek a court order excusing the filing of the documents in a particular case.⁷⁸ However, because the courts are not uniform in this interpretation, a debtor, depending on his or her location, may or may not be able to avoid automatic dismissal for failure to provide documentation.

The document requirements place a significant hurdle in the way of debtors seeking a chapter 7 discharge in the months after a disaster.⁷⁹ Access to these documents is extremely limited for disaster victims that file for bankruptcy immediately following the disaster because their financial records and documents may be missing or destroyed. For debtors who try to recover, but eventually succumb to their mounting debt more than two months after the disaster and file for chapter 7, the document requirement is not very onerous because by then they will have either acquired the necessary documents through a new job or they did not get a new job and have no payment advices to turn over. While some districts do not strictly enforce the automatic dismissal, others do, and this lack of uniformity in the application of the Code is unfair to debtors. Therefore, the Code should be

⁷⁷ The standing order regarding the filing of payment advices, states:

IT IS HEREBY ORDERED, effective as to cases filed on or after October 17, 2005, that copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition by the debtor from any employer of the debtor, (1) shall not be filed with the court unless otherwise ordered, and (2) shall be provided to the trustee (or, if no trustee has been appointed to the United States trustee), and to any creditor who timely requests copies of the payment advices or other evidence of payment, at least seven days before the time of the meeting of creditors conducted pursuant to 11 U.S.C. § 341. To be considered timely, a creditor's request must be received at least 15 days before the first date set for the meeting of creditors.

Filing of Payment Advices Pursuant to 11 U.S.C. § 521(a)(1)(B)(iv) (July 2005), http://www.ilnb.uscourts.gov/GeneralOrders/Filing_of_Payment_Advices_Pursuant.pdf.

⁷⁸ The only filing requirement in section 521(a)(1) that is not subject to the "unless the court orders otherwise" clause is the requirement of section 521(a)(1)(A) that the debtor file a list of creditors. Interview with Eugene R. Wedoff, Chief Judge U.S. Bankr. Court, N. Dist. of Ill. (Apr. 23, 2007).

⁷⁹ Zeller, *supra* note 53, at 2459 (showing consumer advocates are calling on Congress to lift rules requiring bankruptcy filers to provide paperwork documenting their income, assets, and expenses); Press Release, Nat'l Ass'n of Consumer Bankr. Attorneys, Statement of the National Association of Consumer Bankruptcy Attorneys (NACBA) In Response To The EOUST Action Today, (Oct. 5, 2005) (on file with author) [hereinafter *Press Release 4*] (noting USTP cannot help debtors because creditors could petition bankruptcy courts to dismiss debtors' filing if debtors fails to provide necessary documents); see Bankruptcy Relief and Natural Disaster Victims, *supra* note 37, at 8 (noting addition of definition of "victim of natural disaster" to the Code would allow courts to help debtors).

modified to help those debtors who choose to file within the first sixty days after a disaster.

D. Are There Peripheral Problems with the Code that Make It Harder for Debtors to File for Bankruptcy?

BAPCPA increased both the filing fee⁸⁰ and an attorney's investigatory duties,⁸¹ which results in greater costs for debtors seeking bankruptcy.⁸² Section 707 states that attorneys must certify a debtor's bankruptcy petition by stating that they have both performed a reasonable investigation of the debtor's bankruptcy filing and determined that the filing was "well grounded in fact" and "warranted by existing law."⁸³ If attorneys do not conduct a reasonable investigation into the debtor's petition, then they will face sanctions.⁸⁴ Such is the concern of an attorney with New Orleans Legal Assistance, who expressed trepidation when dealing with post-Katrina and BAPCPA consumer bankruptcy filings, due to his increased duties and the threat that if he failed to make a thorough enough investigation, he could face penalties.⁸⁵ Furthermore, bankruptcy attorneys, under section 526(a), cannot recommend to their clients that they take on more debt if they are contemplating

⁸⁰ 28 U.S.C. § 1930 (2006) (stating new filing fees for chapter 7 are \$200); Bankruptcy Relief and Natural Disaster Victims, *supra* note 37, at 6 (noting bankruptcy filing fees were increased to reflect new responsibilities of court, Department of Justice, and trustees).

⁸¹ According to 11 U.S.C. § 707(b)(4)(C) (2006):

The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—

- (i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and
- (ii) determined that the petition, pleading, or written motion—
 - (I) is well grounded in fact; and
 - (II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

Id.

⁸² Bankruptcy Relief and Natural Disaster Victims, *supra* note 37, at 6–7 (increasing duties of attorneys in bankruptcy filings means attorneys will have to charge clients more money to cover amount of time attorney worked on case); Steve Seidenberg, *Strange New World: Lawyers, Debtors and Creditors Are Struggling to Absorb Sweeping Changes in Bankruptcy Law*, 93 A.B.A. J. 49, 52 (Jan. 2007) (noting attorneys have raised their fees for handling consumer bankruptcies, up to sometimes double what they charged before BAPCPA).

⁸³ 11 U.S.C. § 707(b)(4)(C) (2006).

⁸⁴ *Id.* §§ 707(b)(4)(B), 110; *see* Bankruptcy Relief and Natural Disaster Victims, *supra* note 37, at 6 (commenting increased responsibility means attorneys will need to devote more time and expenses to performing investigation).

⁸⁵ Interview with Jay Welch, Staff Attorney, New Orleans Legal Assistance, in New Orleans, La. (Jan. 3, 2007). The author was one of thirty students from St. John's University School of Law that went down to New Orleans in the winter of 2006 as part of the Student Hurricane Network. The author was assigned to the office of New Orleans Legal Assistance, where he met staff attorney Jay Welch. Mr. Welch was an attorney in the consumer benefits section of the organization who helped consumers file for bankruptcy.

bankruptcy.⁸⁶ This restriction prevents attorneys from counseling their clients who have been victims of disasters from taking on more debt in an attempt to keep them from ultimately filing.⁸⁷ As a result, the cost of representation has increased since many attorneys have raised their fees by at least fifty percent or double what the attorney charged prior to BAPCPA.⁸⁸ A disaster victim's lack of documentation will make it harder for the debtor to assist the attorney in the investigation, which may cause more attorneys to turn debtors away.⁸⁹ The increased costs of filing for bankruptcy, attorneys' fees and court fees, make it extremely difficult for those debtors who may need bankruptcy the most.⁹⁰

⁸⁶ 11 U.S.C. § 526(a) (2006).

⁸⁷ See *Hersh v. United States*, 347 B.R. 19, 24 (N.D. Tex. 2006) ("[I]t seems quite possible that sometimes taking on more debt could be the most financially prudent option for someone considering bankruptcy. That situation could be the case when: (1) refinancing at a lower rate to reduce payments and forestall and even prevent entertaining bankruptcy, or (2) taking on secured debt such as loan on an automobile that would survive bankruptcy and also enable the debtor to continue to get to work and make payments. Thus, section 526(a)(4) prevents lawyers from giving clients their best advice."); Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 579 (2006) (noting attorneys appear to be prohibited for such counseling under section 526(a)(4), even when such advise is accurate, legal, and desirable); Robert Wann, Jr., Note, "Debt Relief Agencies: Does The Bankruptcy Abuse Prevention and Consumer Protection Act Violate Attorneys' First Amendment Rights?", 14 AM. BANKR. INST. L. REV. 273, 284-85 (2006) (discussing problems of section 526(a) and commenting bankruptcy attorneys are unable to help debtor avoid filing for bankruptcy).

⁸⁸ See Seidenberg, *supra* note 82, at 52 (noting attorneys have raised their fees for handling consumer bankruptcies, up to sometimes double what they charged before BAPCPA); Michelle J. White, *Abuse or Protection? Economics of Bankruptcy Reform Under BAPCPA*, 2007 U. ILL. L. REV. 275, 287 (reporting prediction of greatly increased attorney fees under BAPCPA); see also Michele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919, 952 (2006) (noting lawyers have had to increase their fees because of BAPCPA).

⁸⁹ Bankruptcy Relief and Natural Disaster Victims, *supra* note 37, at 7 (indicating bankruptcy attorneys might not be willing or able to take responsibility for accuracy of client-approved information). As a result, many attorneys may refuse to represent victims of natural disasters for fear of malpractice suits or possible sanctions. Marcia Coyle, *Debtor's Attorneys See Red in Bankruptcy Bill; They See Malpractice Premium and Overhead Hikes; Judges' Workload Would Increase*, 179 N.J. L.J. 1126, Mar. 21, 2005, at 1 (stating new requirements and new liability on debtors' attorneys may cause many attorneys to decide it is not worth risk of practicing in bankruptcy field); see Catherine E. Vance, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 330 (2005) (stating cumulative effect of BAPCPA will be to drive lawyers who file consumer bankruptcies out of business).

⁹⁰ Hon. Keith N. Lundin, *Ten Principles of BAPCPA. Not what was advertised*, 24-Sept. AM. BANKR. INST. J. 1, at 70 (2005) (stating some debtors will simply be priced out of bankruptcy due to cost of more work by debtor's attorneys for filing bankruptcy); Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 395 (2007) (stating even most desperately insolvent must delay bankruptcy till they can save amount necessary for filing fee and attorney's fees); Seidenberg, *supra* note 82, at 53 ("The effect may be to put bankruptcy beyond the reach of those who need it the most. The effect of the law is to drive out the bottom branch of filers because of the cost . . . The poorest people can't afford to go broke. They can't afford lawyers." (quoting Henry E. Hildebrand III)); see Bankruptcy Relief and Natural Disaster Victims, *supra* note 37, at 7 (commenting new legal requirements under BAPCPA need to be fleshed out to help guide judges, trustees, professionals and attorneys).

III. CONGRESSIONAL RESPONSE TO HURRICANE KATRINA⁹¹

As the country was coming to terms with the aftermath of Hurricane Katrina and Hurricane Rita it was becoming clear that for the victims there was another possible storm on the horizon because BAPCPA was set to go into effect on October 17.⁹² Within days after Hurricane Katrina Congressional representatives, acting on calls to help the victims, had introduced three bills and a proposed amendment in an attempt to respond to the theoretical problem. As noted above, the changes in the Code may have inadvertently placed a hardship on the victims whose homes, businesses and financial documents were literally washed away in the storm, and politicians and academics were concerned about the ability of these people to file for bankruptcy successfully.⁹³

A. House Resolution 3662 and Senate Amendment 1678

The first bill, H.R. 3662, was introduced to the House of Representatives on September 6, 2005.⁹⁴ It would have amended section 1501(a) of BAPCPA by delaying the Code's effective date until October 2007.⁹⁵ A similar provision was found in S. Amdt. 1678, which would have delayed the effective date of BAPCPA by one year.⁹⁶ By postponing the effective date of BAPCPA, the harsh provisions in the Code would not have applied to either Hurricane Katrina victims or other debtors that were already dreading the new Code.⁹⁷ These individuals would be

⁹¹ None of the bills or amendments that were proposed was introduced in response to Hurricane Rita since it made landfall in mid-September.

⁹² See *supra* INTRODUCTION and accompanying text (pointing out some members of Congress had expressed concern of the ability of survivors to file successfully for bankruptcy).

⁹³ Warren, *supra* note 20, at 5 (marking paperwork of many debtors was buried in mud and therefore inaccessible to Hurricane Katrina victims); *U.S. Trustee Program Relaxes Enforcement for Hurricane Victims*, 24-Nov. AM. BANKR. INST. J. 3 (2006) (stating there was temporary waiver of statutory requirements for credit counseling for bankruptcy filers in Louisiana and Southern District of Mississippi due to effects of Hurricane Katrina).

⁹⁴ Financial Safeguards for Hurricane Survivors Act of 2005, H.R. 3662, 109th Cong. (2005).

⁹⁵ *Id.* (proposing striking "180 days" from BAPCPA and inserting "910" days). Since BAPCPA was enacted on April 20, 2005, the effective date for most of its provisions was October 17, 2005, which was 180 days after enactment. *Id.*

⁹⁶ S. Amdt. 1678, 109th Cong. (2005). S. Amdt 1678 was a proposed, but rejected, amendment to H.R. 2862, which was an appropriations bill for the Department of Commerce, Justice and other related agencies. See CONGRESSIONAL RESEARCH SERVICE, *Proposed Bankruptcy Legislation to Address Natural Disaster Victims*, CRS Code RS 22275 (Sept. 22, 2005).

⁹⁷ This can be seen in the record high number of bankruptcy filings that occurred before the Oct. 17 effective date of BAPCPA. *In re Renicker*, 342 B.R. 304, 307 (Bankr. W.D. Miss. 2006) (noting debtors filed for bankruptcy after enactment of BAPCPA in period of time that now can be called "the good old days"); see also Terrence O'Hara, *A Rush to Beat Bankruptcy Deadline; Filings Spike on Last Weekday Before Tougher Law Takes Effect*, WASH. POST, Oct. 15, 2005, at D01 (reporting massive rush by debtors to file for bankruptcy after BAPCPA was passed by Congress); Kathy M. Kristof, *Debt Law Changes Spur Rise in Filings; Bankruptcy rules get tougher Oct. 17*, CHI. TRIB., Sept. 5, 2005, at 1 (noting bankruptcy courts around country were flooded with bankruptcy filings as effective date of BAPCPA loomed).

allowed to file for either chapter 7, 11, or 13 under the then-current provisions of the Code.

However, if either of these proposals had been enacted, they would not be very effective because most debtors/victims involved in a disaster situation will not file for bankruptcy until a couple of years after the disaster.⁹⁸ By pushing back the effective date of BAPCPA, both H.R. 3662 and S. Amdt. 1678 would have only been temporary solutions. Under S. Amdt. 1678 only debtors that filed within the additional year would have been assisted, while H.R. 3662 would have helped only those debtors who filed for bankruptcy within the additional two years.⁹⁹ Both of these solutions would have been completely ineffective for debtors that attempted to get their lives back on track and decided to file for bankruptcy past October 2007. Also, neither the proposed amendment nor the bill took into consideration any future disasters. If another disaster struck a region of the United States two years and a day after the expiration date of the proposed bill, then BAPCPA, in its present form, would still be in place. The public outcry and unity that is required to make these types of bills a reality might be lacking in later cases of disasters, leaving those debtors defenseless against the strict provisions of BAPCPA.

B. H.R. 3697 and S. 1647

Both H.R. 3697 and S. 1647 were companion bills introduced on September 8, 2005 to the House of Representatives and the Senate.¹⁰⁰ They were both aimed at assisting Hurricane Katrina victims and victims of future disasters by making substantive changes to the Code.¹⁰¹ The bills proposed to exempt natural disaster victims from the credit counseling requirement and would have allowed debtors to use expenses they incurred due to the natural disaster in the "means test."¹⁰² The

⁹⁸ Lawless, *supra* note 5, at 16, 20 (suggesting a thirty-six month delay to BAPCPA's implementation date would resolve some problems because "[b]ankruptcy filings tend to rise in the period twelve to thirty-six months after a major hurricane. When hurricanes have struck in the past, victims turned to the bankruptcy courts for help. So that natural disaster victims will continue to have this assistance, exceptions need to be made to recent legislation that would restrict access to bankruptcy's fresh start"); *see also* Ed Flynn, *Bankruptcy by the Numbers, Bankruptcy and Natural Disasters*, 23-Jan. AM. BANKR. INST. J. 20 (2005) (stating South Carolina had modest increases in filings for a year after Hurricane Hugo and this was followed by much higher increases in the subsequent year).

⁹⁹ *See supra* note Part II.D (pointing out attorneys are prevented from counseling their clients who have been victims of disasters from taking on more debt under section 526(a)).

¹⁰⁰ Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, H.R. 3697, 109th Cong. (2005); Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, S. 1647, 109th Cong. (2005); *see* Daphne Retter, *Senate Democrats Propose Array of Hurricane Relief Steps*, CQ TODAY (Sept. 8, 2005) (indicating among proposed bills to assist "storm survivors" Democrats would introduce legislation to ease bankruptcy laws for victims).

¹⁰¹ H.R. 3697; S. 1647; Zeller, *supra* note 53, at 2459 (noting proposed bills would exempt hurricane victims from some provisions of BAPCPA). If passed, either bill would have gone into effect the day after BAPCPA went into effect, and would also apply to any bankruptcy filings that occurred on October 17, 2005.

¹⁰² *See* H.R. 3697; S. 1647; *see* Retter, *supra* note 100 (advocating lowering of bankruptcy filing requirements for Katrina victims).

bills would have also added the term "natural disasters" to the Code as defined by section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act.¹⁰³ While both bills were targeted at future victims of natural disasters and contained language that would have assisted debtors affected by them, they did not address other problems.

One problem with the bills is that neither bill contained provisions that would assist debtors who were unable to acquire the necessary documents under the Code.¹⁰⁴ As noted above, this requirement places an onerous burden on disaster victims since their financial records would likely have been destroyed. While under the previous version of the Code, and in those districts that still assert discretion under the amended Code, a bankruptcy judge was able to consider all the facts and circumstances surrounding a debtor's case when deciding if the debtor was abusing chapter 7, some districts say they lack the discretion to assist debtors under the BAPCPA amendments.¹⁰⁵

One criticism of adding the term "natural disasters" to the Code is that it does not actually assist debtors because the President would have to make a disaster declaration, which is only done upon a determination that damages to a region were of "sufficient severity and magnitude to warrant major disaster assistance."¹⁰⁶ However, this criticism carries little weight. When a Governor requests a disaster declaration, the President would most likely grant it since refusal would not be politically expedient.¹⁰⁷ As a result, if the term was added to the Code, it would

¹⁰³ See Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143 (amending 42 U.S.C. §§ 5121-5206) (defining natural disaster as "any natural catastrophe (including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States"). The bills provisions would apply to a situation similar to a natural disaster made in accordance with State law. H.R. 3697; S. 1647.

¹⁰⁴ See *supra* Part II.C (determining whether document requirements of section 521 prevent debtors from filing for bankruptcy successfully).

¹⁰⁵ See *supra* Part II.C.; see also 11 U.S.C. §§ 109(h)(4), 707(b)(2)(d), 521 (2006).

¹⁰⁶ 42 U.S.C. § 5122(2) (2000). When a disaster is beyond the ability of both state and local government, the governor of the affected state can make a request through the regional FEMA office to have the president make a Presidential Disaster Declaration. An assessment of the extent of the disaster and its impact on the state is conducted by both state and federal officials before the request is made. However, if there is a severe or catastrophic event, then the governor's request can be submitted before the assessment. After receiving the governor's request and the information from the assessment, the president may declare that a major disaster or emergency exists. This results in federal programs and resources being used to assist the state in the response and recovery effort. FEMA, A GUIDE TO THE DISASTER DECLARATION PROCESS AND FEDERAL DISASTER ASSISTANCE, http://www.fema.gov/pdf/rebuild/recover/dec_proc.pdf; see Michelle A. Daubert, Comment, *Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights*, 54 BUFF. L. REV. 1299, 1308 (2007) (highlighting law allowing governor of affected state to obtain Presidential disaster declarations); cf. John D. Blum, *Too Strange to Be Just Fiction: Legal Lessons from a Bioterrorist Simulation, the Case of TOPOFF 2*, 64 LA. L. REV. 905, 906-07 (2004) (discussing scenario where Governor of Illinois "requested an expedited Presidential Disaster Declaration").

¹⁰⁷ See FEMA, NUMBER OF DECLARATIONS PER CALENDAR YEAR SINCE 1998, <http://www.fema.gov/government/grant/pa/stat1.shtm> (showing in 2006 there were 65 declarations of major disasters and 9 declarations of emergencies which required Federal assistance); see also Samuel Goldberg, Comment, *Falling into the Pacific: California Landslides and Land Use Controls*, 16 S. CAL. REV. L. & SOCIAL JUSTICE 95, 149 (2006) (citing study where findings show "states with competitive electoral races can expect

assist debtors affected by such a disaster. The bill also proposed amending the means test to have a flat waiver for victims of natural disasters.¹⁰⁸ However, the waiver would apply to both debtors in genuine need of assistance and income rich consumers that the Code was amended to preclude.¹⁰⁹ The blanket waiver would likely defeat the purpose of the amended Code, and should not be enacted.

Currently in the Code, in addition to lacking provisions specifically for victims of large-scale disasters, there are no provisions for other types of localized disasters, such as a fire in a neighborhood that destroys several blocks. It would not be a far cry to say that this scenario would fail to qualify as a "major disaster" on the federal level. The proposed amendment to section 101(40)(A)(B), which extends the provisions of the proposed legislation to "a situation similar to such a major disaster (as so defined), with respect to which a determination is made in accordance with State law that such situation exists"¹¹⁰ may provide relief. However, a state government would not determine that a localized fire or a flood in a single home, or set of homes, would qualify as a "major disaster," even though debtors could have their records, possessions and homes destroyed. Regretfully, none of these provisions have been added to the Code since they were proposed and the last time there was any activity on one of these bills was on October 17, 2005, the day that BAPCPA went into effect.¹¹¹

IV. THE U.S. TRUSTEE PROGRAM PRESS RELEASE

The role of the United States Trustee Program is to protect and maintain the integrity of the nation's bankruptcy system, which is done by enforcing the bankruptcy laws through litigation and overseeing case administration.¹¹² The level of involvement of the U.S. Trustee in a bankruptcy filing is contingent on the

up to 60% more disaster declarations that states that are uncompetitive"); Ellen P. Hawes, *Coastal Natural Hazards Mitigation: The Erosion of Regulatory Retreat in South Carolina*, 7 S.C. ENVTL. L.J. 55, 85 (1998) (noting ease in which to obtain presidential disaster declarations).

¹⁰⁸ Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, H.R. 3697, 109th Cong. (2005) (adding at the end section 707(b)(2) the following "(E) Subparagraphs (A), (B), (C) shall not apply, and the court may not dismiss or convert a case under this subsection, if the debtor is a victim of a natural disaster or localized disaster").

¹⁰⁹ Zeller, *supra* note 53, and accompanying text.

¹¹⁰ S. 1647, § 3(b)(2); H.R. 3697, § 2(b)(2).

¹¹¹ According to Thomas.loc.gov no action has been taken on the aforementioned bills. www.thomas.loc.gov (last visited Apr. 21, 2007).

¹¹² In a chapter 7 case, debtors are attempting to get a discharge of their debts and will forego most of their assets to do so. See 11 U.S.C. § 727 (2006). However, not all of the debtor's property is taken by the trustee to satisfy the claims of creditors. There are exceptions in the Bankruptcy Code that allow the debtor to exempt some of their property. *Id.* § 522. In a chapter 13 filing debtors will usually keep their property, but they must earn wages or some source of regular income and establish a payment plan to pay part of their income to creditors. *Id.* § 109(e) (stating jurisdictional limits for debtors to reorganize: at most \$307,675 in unsecured debt and \$922,975 in secured debt); U.S. Tr. Program, *Bankruptcy Information Sheet*, Oct. 2005, http://www.usdoj.gov/ust/uo/ust_org/bky-info/index.htm.

chapter under which the debtor files.¹¹³ When Congress passed BAPCPA, it enacted numerous changes to the Bankruptcy Code, most of them focusing on consumer bankruptcy, but some of them adding to the duties of the USTP in both title 11 and title 28.

In a chapter 7 bankruptcy filing, one of the first duties of the U.S. Trustee is to arrange a creditors' meeting a "reasonable time" after the order for relief.¹¹⁴ In a chapter 7 case, an interim trustee is selected by the U.S. Trustee,¹¹⁵ but the permanent trustee in the case will be voted upon by eligible creditors at the initial creditors' meeting.¹¹⁶ If a trustee is not selected, then the interim trustee will serve as the trustee in the case.¹¹⁷ Either the creditors or the U.S. trustee can examine the debtor at the meeting.¹¹⁸ Once selected, the trustee will then lead an investigation of the debtor and collect his or her assets on behalf of the estate.¹¹⁹ In a chapter 13 filing, the court will approve the debtor's repayment plan and budget, while the role of the appointed trustee is to collect the payment from the debtor, pay off the creditors, and ensure that the debtor follows the terms of the repayment plan.¹²⁰

In the aftermath of the devastation caused by Hurricanes Katrina and Rita, the USTP took steps to alleviate the perceived burden that BAPCPA would place on debtors affected by the hurricanes.¹²¹ On October 5, 2005, the USTP issued a Press

¹¹³ Peter C. Alexander, *A Proposal to Abolish the Office of the United States Trustee*, 30 U. MICH. J.L. REFORM 1, 6 (1996) (commenting different types of bankruptcies result in different duties to be carried out by U.S. Trustee). Individual debtors typically use chapters 7 and 13, and the U.S. Trustee supervises the trustees that manage these cases. *Id.* (noting in chapter 7 cases officers are known as "panel trustees" and in chapter 13 cases they are known as "standing trustees"); see Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 826 (2000) (comparing and contrasting U.S. Trustee involvement in chapter 7 and chapter 11 cases).

¹¹⁴ 11 U.S.C. § 341(a) (2006); see *In re C.P.M. Constr.*, 124 B.R. 335, 337 (Bankr. D.N.M. 1991) (discussing argument based on failure to timely schedule meeting). The U.S. Trustee is supposed to preside over the meeting, and orally examine the debtor to ensure that the debtor, in a chapter 7 case, is aware of the potential consequences and effects of seeking a discharge in bankruptcy, the debtor's ability to file a petition under a different chapter, and the effect of reaffirming a debt. 11 U.S.C. § 341(d) (2006).

¹¹⁵ 11 U.S.C. § 701(a)(2) (2006) (stating if no member of panel of private trustees is willing to serve as interim trustee, then U.S. Trustee may so serve, but this position will terminate upon election of trustee).

¹¹⁶ *Id.* § 702 (outlining election rules of trustee at creditors' meeting).

¹¹⁷ *Id.* § 702(d). If the U.S. Trustee has to serve as the trustee, then they will also be subject to the duties of the trustee, as outlined in 11 U.S.C. § 704.

¹¹⁸ *Id.* § 343.

¹¹⁹ NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 708 (William S. Hein & Co., Inc. 2000) (1997). When a debtor has filed chapter 7 and is petitioning the bankruptcy judge for a discharge, the U.S. Trustee or another party in interest has the right to object to the discharge. If the debtor used fraud to obtain the discharge then the court will revoke it. 11 U.S.C. § 727(c)-(d)(1) (2006).

¹²⁰ 28 U.S.C. § 586(a)(3)(c) (2000) (stating trustee must monitor plans filed under chapter 13); NAT'L BANK. REV. COMM'N, *supra* note 119, at 708; see 28 U.S.C. § 586(a)(3)(c) (2000) (remarking trustee must oversee plans filed under chapter 13); Alexander, *supra* note 113, at 6 (commenting United States Trustee monitors debtors' reorganization plans in both chapter 12 and chapter 13); U.S. Tr. Program, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), <http://www.usdoj.gov/ust/eo/bapcpa/index.htm>.

¹²¹ *Press Release 3*, *supra* note 11 (outlining enforcement guidelines that the U.S. Trustee was implementing to respond to the hardships experienced by Hurricane Katrina and Rita survivors); see *supra* INTRODUCTION and accompanying text.

Release, which set forth bankruptcy Enforcement Guidelines for U.S. Trustees to follow.¹²² The guidelines would consider the hardships experienced by victims of natural disasters when dealing with the bankruptcy filings of victims in the region.¹²³ While some groups and academics hailed the Press Release as a positive step in assisting debtors in Hurricane Katrina- and Hurricane Rita-affected areas, they argued that the USTP lacked the authority to assist debtors.¹²⁴ They argued that some of the provisions of BAPCPA only applied to what the USTP could do and did not preclude creditors from seeking either a dismissal or conversion of a debtor's bankruptcy case due to a debtor's failure to comply with the statutory obligations of the Code.¹²⁵ Thus, the question remains: what aid do the USTP's enforcement guidelines give to victims of disasters?¹²⁶

A. Credit Counseling and Personal Financial Management Services

Congress clearly gave the USTP the power to approve credit counseling agencies and personal financial management courses.¹²⁷ The USTP must then

¹²² Although the USTP addressed problems experienced by small business chapter 11 debtors, the focus of this note is not on these parties, and the author leaves this area to other papers and articles. This note is focused on addressing the problems faced by consumers after a disaster.

¹²³ *Press Release 3*, *supra* note 11. The five areas addressed by the USTP were a debtor's mandatory attendance at creditors' meetings, the venue of the bankruptcy case, the document requirements, the means test, and small business chapter 11 bankruptcies. *See Warren, supra* note 20, at 5 (stating that trustees would certify that credit counseling was unavailable, and that trustee would not object if debtor did not produce necessary paperwork or meet statutory guidelines).

¹²⁴ *See infra* note 118 and accompanying text.

¹²⁵ *See Press Release 4, supra* note 79 ("No serious consumer or legal expert will agree that the UST steps are enough. There are many provisions of the new law that the UST is powerless to change, provisions that could cause debtors to lose their homes, their cars or even the right to obtain a bankruptcy discharge In addition, even if the United States Trustee exercises discretion not to move for dismissal under the means test or for failure to file documents normally required, creditors may still move to dismiss cases for these reasons and the UST has no power to stop them."); *see also Warren, supra* note 20, at 5 (noting debtor's attorneys hailed acknowledgement of problem, but it was not within power of U.S. Trustees to waive statutory requirements); Letter from Senate Judiciary Comm., to David M. Walker, Comptroller Gen., *supra* note 36, at 4 (questioning ability of USTP to eliminate threat BAPCPA poses to hurricane victims and stating "[i]n particular there are many provisions of the new law that the UST is powerless to change, provisions that could cause debtors to lose their homes, their cars, or even the right to obtain a bankruptcy discharge").

¹²⁶ The author believes that if the Code is not changed, as noted in Part V, the USTP will continue to issue Press Releases similar to what they did post-Katrina and Rita, which will not truly assist bankruptcy filers/victims of disasters. *See Warren, supra* note 20, at 5 (questioning ability of USTP to really help victims of Hurricane Katrina); *Press Release 4, supra* note 79 (arguing USTP lacks authority to protect debtors from creditors despite promulgation of enforcement guidelines).

¹²⁷ *See Press Release, U.S. Tr. Program, U.S. Trustee Program Announces Approval of Debtor Education Course Providers for Bankruptcy Filers and Waiver of Debtor Education Requirement in Areas Affected by Hurricane Katrina* (Oct. 7, 2005) (on file with author) [hereinafter *Press Release 5*] ("The BAPCPA authorizes the United States Trustees to approve such course providers"); 2 COLLIER ON BANKRUPTCY ¶ 111.03 (Alan N. Resnick et al. eds., 15th ed. 2006) ("Section 111 provides that credit counseling can be conducted only by approved nonprofit budget and credit counseling agencies."). *See generally* 11 U.S.C. § 111 (2006) (outlining criteria nonprofit budget and credit counseling agency must meet in order to be approved by United States Trustee).

monitor the agency every successive year to ensure that it still meets the applicable standards.¹²⁸ As noted above, the USTP can waive these requirements if the debtor resides in a region where it has been determined that the agencies are unable to provide these services.¹²⁹ The USTP must review its decision to waive the requirements one year after it was made and determine if the time period should be extended.¹³⁰

¹²⁸ See 11 U.S.C. § 111(b)(4) (2006) ("United States trustee . . . may only approve for an additional 1-year period, and for successive 1-year periods thereafter, an agency . . . that has demonstrated . . . that such agency . . . (A) has met the standards set forth under this section"); see also 2 COLLIER ON BANKRUPTCY ¶ 111.03[1] (Alan N. Resnick et al. eds., 15th ed. 2006) ("Section 111(b)(4) is clear in terms of the length of approvals; they cannot exceed one year, suggesting that there will be some ongoing evaluation process"); cf. 2 COLLIER ON BANKRUPTCY ¶ 111.14 [2] (Alan N. Resnick et al. eds., 15th ed. 2006) ("Section 111(b)(5) provides that within 30 days after final decisions are made under section 111(b)(4), they can be reviewed by an appropriate district court."). The district court may also review a nonprofit budget and credit counseling agency at any time, and can remove it from the approved list if it fails to meet the required qualifications. See 11 U.S.C. § 111(e) (2006) (warning that credit counseling agency may be removed from approved list "upon finding [that] such agency does not meet the qualifications of subsection (b)"); *In re Piontek*, 346 B.R. 126, 132 n. 3 (Bankr. D. Pa. 2006) (noting section 111(e) as an oversight provision of the Bankruptcy Abuse Prevention and Consumer Protection Act); see also 2 COLLIER ON BANKRUPTCY ¶ 111.14 [4] (Alan N. Resnick et al. eds., 15th ed. 2006) (noting that, "[w]ith respect to prebankruptcy counseling, removal is also possible under section 111(e); however, that section does not extend to providers of financial management courses."). If the agency is removed from the list, the U.S. Trustee is required to notify the clerk who will then remove it from the publicly available list of approved agencies. See 11 U.S.C. § 111(f) (2006) ("The United States trustee . . . shall notify the clerk that . . . [an] agency . . . is no longer approved, in which case the clerk shall remove it from the list maintained under subsection (a)."); cf. 2 COLLIER ON BANKRUPTCY ¶ 111.03 (Alan N. Resnick et al. eds., 15th ed. 2006) ("Section 111(a)(1) provides that the clerks of court are required to maintain a list of eligible approved agencies.").

¹²⁹ See 11 U.S.C. § 109(h)(2) (2006) (stating that debtor counseling requirements do not apply if credit counseling agencies are "not reasonably able to provide adequate services to . . . individuals who would otherwise seek credit counseling from such agencies"); see also *In re Petit-Louis*, 344 B.R. 696, 699 (Bankr. D. Fla. 2006) (holding that there is "ample authority to waive the requirement of prepetition credit counseling for the Debtor under section 109(h)(2) of the Bankruptcy Code" when the waiver is premised upon the unavailability of services in the debtor's native language); cf. Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 181–82 (2005) (suggesting that, under certain circumstances, credit counselors may abandon the enterprise, thus leaving United States trustees "little choice but to declare services insufficient in certain districts"). This provision also protects a debtor from being denied a discharge under section 727(a)(11) for failure to complete an instructional course concerning personal financial management provided that they reside in a district where the U.S. Trustee determines that the approved instructional courses are not adequate to service the district. See *In re Trembulak*, No. 06-19993, 2007 WL 420188, at *1 (Bankr. D.N.J. Feb. 6, 2007) ("Debtors who meet the description contained in Section 109(h)(4) of the Bankruptcy Code are exempted from the requirements of Section 727(a)(11)."); see also Samuel K. Crocker & Robert H. Waldschmidt, *Impact of the 2005 Bankruptcy Amendments on Chapter 7 Trustees*, 79 AM. BANKR. L.J. 333, 370 (2005) (discussing section 727(a)(11) requirement that debtors complete financial education course as a condition to discharge). See generally 11 U.S.C. § 727(a)(11) (2006) (affirming that discharge will not be denied for debtor "who resides in a district for which the United States trustee . . . determines that the approved instructional courses are not adequate to service" the debtor.);

¹³⁰ See 11 U.S.C. § 109(h)(2)(B) (2006) ("The United States trustee . . . who makes a determination described in subparagraph (A) shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter."); see also 2 COLLIER ON BANKRUPTCY ¶ 109.09 [2] n.8 (Alan N. Resnick et al. eds., 15th ed. 2006) (noting that such requirement upon United States trustee is "effective in cases commenced on or after October 17, 2005."); cf. 11 U.S.C. § 111(b)(4) (2006)

In the aftermath of Hurricane Katrina and Hurricane Rita, it was clear that the Gulf Coast was unable to provide these required services to debtors. As a result, Region 5 of the USTP waived these requirements for the Eastern, Middle, and Western Districts of Louisiana and the Southern District of Mississippi.¹³¹ About one year later, on September 21, 2006, the USTP reviewed its decision and extended it due to "the continued effects of Hurricane Katrina in those areas."¹³² The USTP clearly acted within its discretion, and are able to assist natural disaster victims under its Enforcement Guidelines.

B. Venue

In its Press Release, the USTP stated that it would not raise or support a creditors' objection to venue if the debtor was displaced due to Hurricane Katrina and had to file for bankruptcy in a state other than his or her legal domicile. The debtors may intend to return to their home state, but are unable to in the months following the disaster due to the damages to the region.¹³³ BAPCPA states that a bankruptcy filing may be commenced in the district court where the debtor resides, or has their principle place of business, one hundred and eighty days before he or she files for bankruptcy.¹³⁴ Obviously this requirement places an onerous burden for

(imposing additional, concurrent obligation on United States trustee to conduct annual approval of counseling agency).

¹³¹ See *Press Release 5*, *supra* note 127 (announcing "temporary waiver of the statutory requirement for an instructional course in personal financial management" for applicable debtors); see also *Credit Counseling, Debtor Education Waiver Extended in Hurricane Katrina-Affected Areas*, 18 BANK. L. REP. 860, 860 (2006), available at http://subscript.bna.com/SAMPLES/bky.nsf/4f3bbdd2_678ce8e785256b5700595575/3aa7ab6a7aef4c1b852571f6007b04dc?OpenDocument ("[I]n September 2005, the U.S. Trustee for Region 5 made this [waiver] determination with respect to the Eastern, Middle, and Western Districts of Louisiana and the Southern District of Mississippi"); American Bankruptcy Institute, *U.S. Trustee Program Relaxes Enforcement for Hurricane Victims*, <http://www.abiworld.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=41824> (last visited Mar. 14, 2007) (discussing temporary waiver for debtor financial-management education requirement).

¹³² Press Release, U.S. Tr. Program, U.S. Trustee Program Extends Waiver of Credit Counseling and Debtor Education Requirements in Areas Affected by Hurricane Katrina, (Sept. 21, 2006) (on file with author) (extending the waiver of the credit counseling and debtor education requirements in areas affected by Hurricane Katrina).

¹³³ See *Press Release 3*, *supra* note 11 ("U.S. Trustees will not raise or support venue objections in cases in which the debtor was displaced due to a natural disaster, unless the filing constitutes a systemic abuse or presents extraordinary circumstances."); see also Press Release, Center on Budget and Policy Priorities, *Rebuilding Aid for Neediest Katrina Victims Should Be Retained in Final Supplemental Funding Bill*, May 9, 2006, <http://www.cbpp.org/5-9-06hous-pr.pdf> ("Many businesses are reluctant or unable to reopen until more of their workers and customers return, and many modest-income families are unable to return because they cannot find affordable housing."). See generally Press Release, Center on Budget and Policy Priorities, *Bringing Katrina's Poorest Victims Home: Targeted Federal Assistance Will Be Needed to Give Neediest Evacuees Option to Return to Their Hometowns*, Nov. 3, 2005, <http://www.cbpp.org/11-2-05hous.pdf>. (discussing broad implications of reconstruction efforts in areas damaged by Hurricane Katrina on "tens of thousands of low-income families displaced by the storm").

¹³⁴ 28 U.S.C. § 1408(1) (2000); see Letter from Senate Judiciary Comm. to David M. Walker, Comptroller Gen., *supra* note 36, at 4–5 (expressing concern about ability of debtors displaced by natural disasters to file their bankruptcy cases in their new state).

debtors that file for bankruptcy in the months after a disaster. If debtors, displaced from their home, have to move to another state and decide to file for bankruptcy before making that state their primary residence, then their creditors will be able to object to this new venue.

In the aftermath of Hurricane Katrina about a million people were displaced,¹³⁵ making them unable to file for bankruptcy in their home state. If the debtor, post-disaster, has temporarily relocated to another state and files for bankruptcy in that state rather than his or her home state, then the creditors could object. However, according to the Code, a district court can transfer a case under title 11 to another district "in the interest of justice or for the convenience of the parties."¹³⁶ As a result, debtors under title 11 may be protected by the venue objections of creditors if they were forced to relocate due to a disaster. While the USTP's Enforcement Guideline as it pertains to venue is valid, it is really the Code that protects debtors in this situation.

C. Attendance at Creditors' Meetings

The USTP's Press Release after Hurricane Katrina also addressed how U.S. Trustees should deal with the creditors' meeting requirement.¹³⁷ It stated that the U.S. Trustee will exercise flexibility and provide an alternate means for the debtor to attend the creditors' meeting if the debtor cannot personally attend and participate. As noted above, debtors must attend the creditors' meeting and can be questioned by their creditors or the U.S. Trustee.¹³⁸ The appearance requirement

¹³⁵ See *supra* note 1 and accompanying text; see also Thomas Gabe, et al., *Hurricane Katrina: Social-Demographic Characteristics of Impacted Areas*, 14 (CRS Report for Congress, Nov. 4 2005), <http://www.gnocdc.org/reports/crsrept.pdf> (asserting that media reports two months after Katrina's landfall estimated displacement figures at 1.2 million); *Press Release 1*, *supra* note 1 ("Mississippi, with a population of approximately 2.5 million . . . has been the largest land area impacted . . . [and] approximately 3.2 million people have been affected in Louisiana.").

¹³⁶ 28 U.S.C. § 1412 (2000); see *Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.)*, 896 F.2d 1384, 1391 (2d Cir. 1990) ("The 'interest of justice' component of § 1412 is a broad and flexible standard which must be applied on a case-by-case basis. It contemplates a consideration of whether transferring venue would promote the efficient administration of the bankruptcy estate, judicial economy, timeliness, and fairness-factors . . .").

¹³⁷ *Press Release 3*, *supra* note 11 ("[USTP will] exercise flexibility and provide alternative means for a debtor to attend the mandatory meeting of creditors if, due to the adverse effects of a natural disaster, the debtor cannot appear personally and testify under oath in the district where the case is filed."); see *Press Release*, U.S. Tr. Program, Bankruptcy Meeting in Louisiana and Southern Mississippi Are Scheduled and Relocated; Communications Centers for Debtors and Attorneys Are Established, (Oct. 21, 2005), http://www.usdoj.gov/ust/r05/pdfs/PR_10212005.pdf ("The U.S. Trustee will be flexible and provide alternative means for debtors to attend the mandatory meeting of creditors if, due to the adverse effects of Hurricane Katrina . . . the debtor cannot appear personally . . . in the federal judicial district where the case is filed.").

¹³⁸ 11 U.S.C. § 343 (2006) ("[A]ny trustee or examiner in the case, or the United States trustee may examine the debtor."); *id.* § 524(d) ("[T]he court may hold a hearing at which the debtor shall appear in person [to] inform the debtor that a discharge has been granted or the reason why a discharge has not been granted."). The debtor can also be questioned by any indenture trustee, any trustee or examiner in the case. *id.* § 343 (2006) ("[A]ny indenture trustee, any trustee or examiner in the case . . . may examine the debtor."); see *In re Maloney*, 249 B.R. 71, 73 (Bankr. M.D. Pa. 2000) (explaining role of Trustee at

would be problematic for disaster victims since many of them are displaced after the disaster. However, in the aftermath of Hurricane Katrina and Hurricane Rita some debtors were unable to make a personal appearance for the creditors' meetings, so the meetings were held telephonically in the U.S. Trustee's office of the region to where the debtors had relocated.¹³⁹ The USTP clearly has the authority to provide for alternative means to rectify these situations.

D. Document Requirements

With regard to the documents requirement under BAPCPA, the Code states that debtors must provide documents, such as payment advices and statements of income.¹⁴⁰ The U.S. Trustee has the authority to petition the bankruptcy court to dismiss a chapter 7 case for "cause" if the debtor failed to file the required documents under section 521(a)(1).¹⁴¹ However, the USTP stated in its Press Release that it would not file enforcement motions against debtors who were unable to produce the documents.¹⁴² While the U.S. Trustee is within its right to choose not to ask the bankruptcy court to enforce this requirement, there are two problems with this. The first problem is that creditors can petition the bankruptcy court to dismiss the case due to the debtor's failure to provide the necessary documents.¹⁴³ Secondly, the Code, as noted above, requires an automatic dismissal of a bankruptcy case under section 521 if the debtor fails to provide the required documents. While some bankruptcy courts assert that they do have discretion to keep a case open, others have argued that they lack such discretion.¹⁴⁴ While the U.S. Trustee can choose not

creditor's meeting); *In re Sochia*, 231 B.R. 158, 160 (Bankr. W.D.N.Y. 1999) (noting debtor must "fully cooperate with the Trustee [and the] U.S. Trustee . . .").

¹³⁹ See Interview with Jay Welch, Staff Attorney, New Orleans Legal Assistance, in New Orleans, La. (Jan. 3, 2007 (discussing how after numerous attempts at having debtors return to Louisiana for their creditor meeting, U.S. Trustee finally allowed them to conduct meeting telephonically); see also *In re Sven*, No. 05-74660, 2006 Bankr. LEXIS 765, at *3 (Bankr. C.D. Ill. May 4, 2006) (demonstrating situation where debtor appears telephonically); *In re Sochia*, 231 B.R. at 161 ("Bankruptcy Courts have held that for a good and sufficient reason, or cause, a Court has the discretion to waive the personal appearance of the debtor at a meeting of creditors, and may permit the required examination of the debtor to be accomplished telephonically.")

¹⁴⁰ See *supra* Part II.C.

¹⁴¹ 11 U.S.C. § 707(a)(3) (2006). Under section 521(a)(1), debtors must file a list of their creditors. *Id.* § 521(a)(1). In addition, unless waived by the court, the debtor must also file a schedule of assets and liabilities, a schedule of current income and current expenditures, a statement of the debtor's financial affairs, copies of all payment advices or other evidence of payment from the debtor's employer, an itemized statement of the amount of monthly net income, and a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition. *Id.* § 521(b). If the debtor has primarily consumer debts, then they must also file a certificate that either states that the attorney for the debtor or the bankruptcy petition preparer delivered notice to the debtor as required by section 342(b) or if neither are applicable a certificate of the debtor that such notice was received and read by the debtor. *Id.* § 521(a)(1)(iii).

¹⁴² *Press Release 3*, *supra* note 11.

¹⁴³ 11 U.S.C. § 521(i)(2) and (3) (2006).

¹⁴⁴ See *supra* Part II.C and accompanying text (discussing divergent views on automatic dismissal on 46th day of bankruptcy case if debtor fails to file all section 521(a)(1) papers).

to ask a bankruptcy court to dismiss the case, depending on the location of the bankruptcy court, the bankruptcy court may choose to grant an automatic dismissal anyway. The USTP's guidelines in this area do not offer any assistance to debtors and since there is a lack of uniformity amongst the bankruptcy courts in addressing section 521, these debtors would need Congressional assistance.

E. The Means Test

As noted above, one of the most significant additions BAPCPA made to the Code was the "means test."¹⁴⁵ After the debtor files the mandatory paperwork in a chapter 7 filing, the regional U.S. Trustee will review it and then file a statement with the court stating whether the debtor is attempting to abuse the Code.¹⁴⁶ In order to come to this conclusion, the U.S. Trustee must conduct the means test.¹⁴⁷ The debtor can rebut the presumption of abuse if he can show "special circumstances."¹⁴⁸ In its Press Release, the USTP stated that the effects of Hurricane Katrina, including a debtor's income loss and expense increase, qualified as special circumstances in its determination of whether or not the debtor is abusing chapter 7.¹⁴⁹ Thirty days after filing the statement with the court, the U.S. Trustee must either file a motion to dismiss or convert the case if there is abuse, or file a statement stating why it will not bring such a motion.¹⁵⁰

Under the Code, the U.S. Trustee can also file a statement with the bankruptcy court asserting why he does not feel that a motion to dismiss the case or convert it would be appropriate, even if he concludes that the debtor, under the means test, is abusing chapter 7. However, a creditor may petition the court to dismiss the case or convert it to a chapter 13 case if the debtor fails the means test when it is performed by the court. The U.S. Trustee is unable to prevent this result.

While the Enforcement Guidelines released after Hurricane Katrina and Hurricane Rita were meant to assist the victims, the author believes that they do not carry any authority. Creditors can still petition the court to take action against debtors that fail to meet their statutory duties and the bankruptcy court must still take action against the debtor due to the language of the Code, such as with the automatic dismissal in section 521. Furthermore, the Enforcement Guidelines do not apply to victims of localized disasters. If there was another disaster, the USTP would still take only a reactive approach and issue another set of guidelines based on the then-existing Code, but even with these guidelines the USTP would be limited in the relief it could grant.

¹⁴⁵ See *supra* Part II.B and accompanying text (noting inclusion of means test as guard to chapter 7 filing).

¹⁴⁶ See 11 U.S.C. § 704(b)(1)(A) (2006) (stating U.S. Trustee must file statement ten days after date of the first creditors' meeting).

¹⁴⁷ See *id.* § 704(b)(2).

¹⁴⁸ See *supra* Part II.B and accompanying text (noting medical expenses and call to active duty as examples of "special circumstances").

¹⁴⁹ Press Release 3, *supra* note 11.

¹⁵⁰ See *id.*

V. RECONSTRUCTION: HOW TO HELP DEBTORS POST-DISASTERS

The bankruptcy system should provide "the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."¹⁵¹ However, the Code hinders the ability of victims of disasters to do so. The disaster may leave a debtor without a job or assets, and make him or her unable to recover personally and financially in the aftermath. While the half-steps taken by the USTP in the aftermath of Hurricane Katrina and Hurricane Rita were admirable, they were unable to address completely the needs of the victims. If the same steps were taken in the future after another disaster, it would still be insufficient. Congressional action must be taken to ensure that victims of future disasters are not further harmed by the Code's requirements.¹⁵² The following are a set of statutory changes that should be made to the Code, including commentary on why they should be made.¹⁵³

A. Changes to Chapters 1, 3, 5, and 7

If Congress was to modify the Code to provide relief for debtors, its first step should be to add new terms to section 101 of chapter 1. Since the proposed amendments include terms not found in the present Code, i.e. "natural disaster," "natural disaster zone," "localized disaster," and "victim of natural disaster," they need to be defined in section 101 first. Section 109(h) should be modified with regards to the mandatory credit counseling and the financial education requirements. If a debtor has survived a disaster and is attempting to file for bankruptcy in order to rebuild his or her life, he or she should not be subjected to these requirements "to ensure [he or she] understand[s] how to use credit."¹⁵⁴ Although the USTP has the statutory authority to waive these requirements if a region is unable to provide these mandatory services for debtors, that authority can only be exercised after USTP makes a determination. The Code should be amended

¹⁵¹ *Local Loan v. Hunt*, 292 U.S. 234, 244 (1934).

¹⁵² Lawless, *supra* note 5, at 16–20 (recommending congressional changes to BAPCPA in order to assist victims of natural disasters); Letter from Senate Judiciary Comm., to David M. Walker, Comptroller Gen., *supra* note 36, at 4 ("Congressional action is the only way to ensure that present and future hurricane victims get needed relief."); *see Press Release 4*, *supra* note 79 (calling for Capital Hill to "step in and make the full set of changes required to avoid making victims all over again of these Gulf Coast state residents"); *Press Release 2*, *supra* note 6 ("The federal government should be bending over backwards to help Katrina's victims get back on their feet, not throwing up new barriers to bankruptcy").

¹⁵³ In the November 2006 Congressional Election, the Democrats won both the U.S. House of Representatives and the U.S. Senate. It is possible that the new leadership will take steps to amend the Code to assist consumer debtors, and it is the author's hope that these proposed amendments will provide them with some direction.

¹⁵⁴ Lawless, *supra* note 5, at 17; *see* 11 U.S.C. § 109(h)(2)(A) (2006); *Press Release 2*, *supra* note 6 ("People driven into financial ruin by a natural disaster do not need counseling on how to use their credit more wisely; they need immediate relief from the bankruptcy system.").

to give bankruptcy courts the authority to exempt victims of disasters from having to satisfy the credit counseling and financial education requirement.

Section 341 should be amended affirmatively to give the USTP the power to use alternative methods to facilitate a debtor's attendance at the creditors' meeting. The current statutory language indicates a preference for a debtor to make an in-person appearance at the meeting;¹⁵⁵ however, if the debtor cannot appear in person due to being displaced by a disaster, the USTP should be allowed to facilitate the meeting by other methods, such as by phone or videoconference.

Bankruptcy courts should decide the document requirements of section 521 with a presumption in favor of the debtor in disaster situations.¹⁵⁶ A victim of a disaster, be it a regional disaster or a localized event, may be unable to provide all of the documents required under section 521. As a result, a court will have to determine that the debtor is not in compliance with the Code, and will have to dismiss the case or convert it to chapter 13. While some districts have issued standing orders asserting the bankruptcy court's discretion not to dismiss a debtor's bankruptcy case for failure to provide payment advices and other documentation, other courts have strictly enforced the automatic dismissal rule. This lack of uniformity in the application of the bankruptcy law must be addressed by Congress. Debtors who chose to file for bankruptcy in the months after the disaster should not be unfairly harmed by the Code due to their inability to produce documents that were destroyed in the disaster.

In its attempt to prevent abuse of the Bankruptcy Code, Congress, perhaps inadvertently, also hampered the ability of victims of disasters to attain a chapter 7 discharge. However, these innocent victims were not the targeted group of the new legislation. A debtor can attempt to show that there are special circumstances to rebut the presumption of abuse, but this would be hard for victims of disasters to do if they lack the required itemization and documentation necessary to prove special circumstances. It is not appropriate to subject people that have been through such an ordeal to a costly and tedious test. Accordingly, section 707 of the Code should be revised to include a section that contains a presumption in favor of granting relief requested by a victim of a disaster. Rather than creating a blanket exemption for all disaster victims, some of whom could abuse chapter 7, the Code should be amended to allow bankruptcy courts to conduct a preliminary exam, prior to the means test, in order to determine if the debtor is one of the income rich consumers that the Code was amended to protect against. If so, then those debtors will need to comply with the means test, but will still be able to qualify for special circumstances under the proposed changes to the language in section 707(b)(2)(B)(i). For those debtors who genuinely need assistance under the Code, they should be exempted from

¹⁵⁵ See 11 U.S.C. §§ 109(g)(1), 341(c), 343, 521(a)(5), 524(d), 557(e)(2), 784, 1109, 1113(d), 1114(k)(1), 1164, 1202(b)(3), 1302(b)(2) (2006).

¹⁵⁶ See *id.* § 521; Lawless, *supra* note 5, at 18 (suggesting victims of natural disasters should be given leniency in producing records because many records are likely to have been lost in the disaster). See generally *In re Stewart*, 201 B.R. 996, 1002 (Bankr. D. Okla. 1996) (noting there are provisions in Bankruptcy Code where presumption is in favor of the debtor).

having to comply with the means test, similar to disabled veterans whose indebtedness occurred while on active duty or while performing a homeland defense activity.

Furthermore, in order to prevent the proposed amendments from being overly broad, 707(b)(4) should be amended by adding subsection (E) to the Code. The new subsection would require debtors seeking relief under these proposed amendments to attach an affidavit affirmatively stating that the debtor has actually been affected by a natural disaster. This will work to prevent debtors who have not been affected by a disaster, i.e., a hurricane, but still reside in a region that has been affected by a disaster, from seeking to abuse the proposed amendments.¹⁵⁷

B. Changes in 28 U.S.C. § 586

Another solution to dealing with unexpected disasters would be for Congress to give the USTP the authority to waive certain sections of the Code, specifically sections 341, 521, and 707 for reasons discussed above, namely because they provide the disaster victim with the greatest difficulty of compliance. The addition of this power would be a natural progression of the authority and power of the USTP. The determination could be made similar to how FEMA determines when it will give financial aid and assistance to regions after a natural disaster, which is done when there is a Presidential declaration of a disaster. The proposed amendment would also include a section that would enable the Executive Office of the U.S. Trustee to waive provisions of the Code for a region based on a recommendation by the regional U.S. Trustee. The regional U.S. Trustee would be more in tune with the needs of his or her region, and would have a better idea of the needs of the debtors in the face of a localized disaster. The waiver period would last for one year. The reasons for the time limitation are two-fold: (1) based on Lawless' study most debtors wait till the second and third years following a disaster to file for bankruptcy, so they will not need protection from the harder provisions of the Code; and (2) for those debtors that have to file for bankruptcy following the disaster, they will not be unfairly harmed by the provisions of the current Code.

The impetus for the creation of the USTP arose out of a desire to free bankruptcy judges from having to deal with administrative functions of the court.¹⁵⁸

¹⁵⁷ Another possible amendment would focus on having the debtor's attorney submit an affidavit certifying that the attorney has conducted a review of the debtor's situation and knows that the debtors was affected by a natural disaster. However, this solution leaves out pro se debtors and would require debtors represented by counsel to get an affidavit, while allowing pro se debtors to file for bankruptcy without providing an affidavit that they were affected by the natural disaster. Thus, all debtors should be required to file an affidavit stating that they were materially adversely affected by a natural disaster.

¹⁵⁸ One of the major problems was that bankruptcy referees had become mired in administrative tasks rather than judicial ones, which undermined the confidence that litigants had in the referees' impartiality. The Brookings Report had made a recommendation for the creation of an administrative agency to handle bankruptcy. The staff members would be permanent employees and would perform duties traditionally performed by "referees, trustees, receivers, auctioneers, appraisers, accountants, and attorneys," such as handling voluntary petitions, issuing notices to creditors of significant developments in the case, granting of

While initially starting as a pilot program after the Bankruptcy Reform Act of 1978,¹⁵⁹ the USTP became permanent upon the passage of the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act which made the USTP permanent throughout the country, with the exceptions of Alabama and North Carolina.¹⁶⁰ The House Report that accompanied the Act outlined a broad range of responsibilities for the USTP, including the duties to monitor the debtor's plans in chapters 11 and 13, and ensure that all reports, schedules and fees were filed by the debtor.¹⁶¹ As a permanent program, the USTP was given more authority and more duties in dealing with bankruptcy cases. In 2005, with the passage of BAPCPA, Congress further increased the duties of the USTP by adding to its powers and

discharges (if no objections), and determinations of priority of distribution. COMM'N ON THE BANKR. LAWS OF THE U.S., REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE U.S., H.R. DOC. NO. 93-137, pt. 1, at 109 (1st Sess. 1973) ("The Commission is of the opinion that the creation of an agency to handle the administration of the system including counseling for consumer debtors, is the only means of achieving any substantial economy and uniformity."); see *In re Plaza de Diego Shopping Ctr., Inc.*, 911 F.2d 820, 827 (1st Cir. 1990) (stating it is no longer the function of bankruptcy courts to appoint trustee; instead, it is the function of the United States trustee); Alexander, *supra* note 113, at 4 n.18 (noting trustees are independent from courts); NAT'L BANKR. REV. COMM'N, *supra* note 119, at 713 ("[A]ssigned almost all of the administrative functions that had formerly rested with the bankruptcy court. It furthered the objective of freeing the court from such a role, reserving for the court the judicial role of dispute resolution."). A bankruptcy referee would review the debtor's petition, schedules, and statement of affairs, as well as question the debtor and others at the first meeting of creditors before the referee actually heard the case. Because of this, the Commission felt bankruptcy referees would be influenced by the information and impressions they had previously received and would be too pro-debtor. H.R. REP. NO. 95-595, 95th Cong., 2d Sess. 125, at 4 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6086 (separating administrative functions from judicial functions so judges can focus solely on judicial functions and remain impartial).

¹⁵⁹ For a more detailed and engrossing look at the development of the 1978 Bankruptcy Reform Act, see Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 54 AM. BANKR. L. J. 275 (1980).

¹⁶⁰ See Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 93 (1997) (noting U.S. Trustee program was made permanent and expanded to cover every state, with exception of Alabama and North Carolina.); see also Janet A. Flaccus, *Bankruptcy Trustees' Compensation: An Issue of Court Control*, 9 EMORY BANKR. DEV. J., 39, 41 (1992) (stating favorable report from Attorney General about pilot program led to it becoming permanent of bankruptcy proceedings); Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 35 (1995) (noting 1896 Act established USTP nationwide and relieved bankruptcy judges of administrative duties).

¹⁶¹ The U.S. Trustee was designed to

monitor applications for compensation and reimbursement; to monitor plans and disclosure statements in chapter 11 cases; to monitor plans in chapter 13 cases; to make sure that all reports, schedules, and fees required to be filed by debtors (including the new filing fees due each quarter in chapter 11 cases) are in fact filed; to monitor the functioning of creditors' committees; to notify the U.S. Attorney of possible crimes uncovered and cooperate with the U.S. Attorney in subsequent prosecutions; to monitor progress of bankruptcies and keep cases moving; and, to monitor the employment of professional persons in bankruptcy cases.

H.R. REP. NO. 99-764, at 24 99th Cong., 2d Sess. 18 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5227, 5240-41; see *In re McLean Indus., Inc.*, 70 B.R. 852, 856 (Bankr. S.D.N.Y. 1987) (noting congressional goal of U.S. Trustee program was to separate administrative duties from judicial tasks so judges can resolve disputes untainted by administrative matters); *In re Salant Corp.*, 53 B.R. 158, 161-62 (Bankr. D.N.Y. 1985) (stating U.S. Trustee, and not the court, must appoint additional members of creditors committee).

duties.¹⁶² Since its inception the USTP has become an integral part of the bankruptcy system in the United States. By dealing with the bankruptcy courts administrative duties, it allows the court to focus on the adjudication of cases.

If a bankruptcy court is continuously forced to make rulings that debtors from the same region are exempt from certain provisions, it will slow the efficiency of bankruptcy courts in an affected region to a crawl. However, while there may be criticisms that this would be unconstitutional because it would result in a lack of uniformity in the country's bankruptcy laws, the Supreme Court has held that the requirement for geographic uniformity is flexible.¹⁶³ Specific regional relief by the regional U.S. Trustee could be granted where there is a disaster.

If the USTP is given the power to waive the bankruptcy requirements by Congress in cases of a disaster, then many of the concerns with BAPCPA's flexibility for victims could be eliminated. Those debtors will be able to file for bankruptcy without having to meet the strenuous requirements under the Code, and will not be punished simply for being in the wrong place at the wrong time. However, if this approach is not taken there are other steps that Congress should take in order to provide genuine assistance to victims of disasters.

CONCLUSION

After the fires have been put out, the water has receded, and the sirens have stopped, the aftermath of any disaster is reconstruction. People who have lost everything, their homes, their jobs, and even loved ones, will attempt to rebuild their lives and gain some semblance of what was lost. However, this is not an easy process, and it is further disrupted by a large amount of debt from their past lives that hangs over their heads. With the passage of BAPCPA, the recovery of these individuals was further hampered. BAPCPA was created to stop abusive bankruptcy filings, but it is the victims of disasters that will suffer. Victims seeking relief under the Code will need to contend with stringent documents requirements, the means test, and creditor meetings, all the while attempting to move on with their lives. While both Congressional members and the USTP attempted to alleviate

¹⁶² Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in 11 U.S.C.). While bankruptcy reform legislation was introduced into Congress in 1998, it was stymied because critics of the legislation attached non-bankruptcy issues, such as abortion, to the legislation. It was not until 2005 that the legislation was reintroduced. Robert Zinman, *Precision in Statutory Drafting: The Qualitech Quagmire and the Sad History of Section 365(h) of the Bankruptcy Code*, 38 JOHN. MARSHALL L. REV. 97, 101 n.13 (2004) (stating recommendations had many dissents, which prolonged acceptance of BAPCPA).

¹⁶³ See *Reg'l Rail Reorganization Cases*, 419 U.S. 102, 158 (1974) (striking down argument that Bankruptcy Clause was violated when statute was passed which required reorganization of railroads in single statutorily defined region and stating bankruptcy laws did not have to be uniform because to hold so would overlook "the flexibility inherent in the constitutional provision"); see also *United States v. Ptasynski*, 462 U.S. 74, 84 (1983) (holding uniformity provision of Bankruptcy Clause did not require invalidation of geographically defined class of debtors); *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 177-73 (1946) (Frankfurter, J., concurring) (arguing uniformity clause does not require abolish of all differences among laws of each state).

some of the burden that debtors would face, neither truly gave assistance. While the USTP's Enforcement Guidelines may have allowed people to think they could seek protection, the USTP really lacked the authority to protect them from creditors. The organization was designed to take over the administrative duties of the court system, and to be a "watchdog" over bankruptcy laws, not to make substantive judicial decisions. In reality, the USTP, at best, offered false hope to debtors. Congressional action must be taken on the Code to provide assistance to future debtors in these situations, or those that do not deserve to be harmed under the Code will be ruined because of it.

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APPENDIX

This Appendix contains the suggested amendments to the various sections of the Code to deal with the problems raised in this note.¹⁶⁴ It is hoped that these amendments will be considered and used to help modify the Code to aid victims of disasters.

The proposed amendments are shown in the legislative format, that is, additions are italicized and deletions are shown in brackets. Following each of the sections is a short Comment explaining the purpose of the proposed changes.

§ 101. Definitions

(40) The term "localized disaster" means a situation similar to a major disaster (as so defined), that occurs on a smaller scale, such as a house fire or flood.

(41A) The term "natural disaster" means—

(A) a major disaster, as defined in section 102 of the Robert T. Stafford

Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5122); or

(B) a situation similar to such a major disaster (as so defined), with respect

to which a determination is made in accordance with State law that such situation exists.

(41B) The term "natural disaster zone" means the geographical area included in the determination of a natural disaster.

(57) The term "victim of a localized disaster" means a person whose financial condition is materially adversely affected by a localized disaster.

(58) The term "victim of a natural disaster" means a person—

(A) whose financial condition is materially adversely affected by a natural disaster; and

(B) whose domicile, residence, or principal place of business in the United States, or whose principal assets in the United States, were located in a natural disaster zone immediately preceding the event that caused the natural disaster.

COMMENT: The addition of these terms is designed to define the terms that will be used in the additions set forth below.

§ 109. Who May Be a Debtor

¹⁶⁴ Some of the language for the author's proposed amendments was taken from the Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, H.R. 3697, 109th Cong. (2005) because the author feels that parts of the bill should be utilized to effectuate assistance to disaster victims.

(h)(4) The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, [or] presence in a natural disaster zone, victims of a localized disaster, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and 'disability' means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph.

COMMENT: The change is designed to include victims of natural disasters and localized disasters among the groups that can be exempted by the court from having to attend credit counseling and financial management courses.

§341. Meeting of Creditors and Equity Security Holders

(f) The United States trustee shall provide for the debtor to attend the meeting of creditors by alternative methods, such as by telephone or video conferencing, in case of a natural disaster, as defined in (41A) or (41B).

COMMENT: The addition of this section will affirmatively give the United States Trustee the ability to set up alternative methods for having the creditors' meeting. It is designed to make it easier for disaster victims to attend the creditors' meetings and facilitate the progression of the bankruptcy case rather than constantly trying to set up a meeting with a debtor that has had to move because of a natural disaster.

§ 521. Debtor's Duties

(i)(4) Notwithstanding any other provision of this subsection, on the motion of the trustee filed before the expiration of the applicable period of time specified in paragraph (1), (2), or (3), and after notice and a hearing, the court may decline to dismiss the case if the court finds that the debtor attempted in good faith to file all the information required by subsection (a)(1)(B)(iv), with a presumption in favor of the debtor in cases of natural or localized disaster, and that the best interests of creditors would be served by administration of the case.

COMMENT: This change is designed to allow the Code to affirmatively give bankruptcy courts the discretion to resolve issues of documentation of payment advices in favor of the debtor if the debtor is a victim of either natural or localized disaster.

(k) The Court may extend any time period specified in this section as may be necessary if

- (1) the debtor is a victim of a natural disaster or localized disaster; and
- (2) the debtor's status as a victim of a natural disaster or localized disaster necessitates such extension of time.

COMMENT: This addition would allow the bankruptcy court to extend the deadline for any of the documents under section 521 if the debtor is a victim of a natural or localized disaster. It will provide the debtor the time needed to either recover the paperwork or acquire it from the government or their former employer.

§ 707. Means Test

(b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title or 1301, if it finds that the granting of relief would be an abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor if the debtor was the victim of a natural disaster or localized disaster. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

COMMENT: This revision revives the language removed by Congress in BAPCPA, and conditions it on the debtor being a victim of a natural or localized disaster. It will honor Congress previous revision, as well as carve out an exception for those that have been affected by a disaster.

§ 707. Debtor's Monthly Expenses

(b)(2)(B)(i) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition, [or] a call or order to active duty in the Armed Forces, or a victim of a natural or localized disaster, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

COMMENT: This change will exempt victims of disasters from the means test, conditional on the additions in (b)(2)(E)(i) and (ii).

(b)(2)(E)(i) If the debtor is claiming to be a victim of a natural disaster, then the court shall make an initial determination of whether the debtor possesses assets greater than his or her secured and unsecured debts. If so, then the debtor cannot proceed under subsection (b)(2)(E)(ii), and must proceed under subsection (b)(2)(A)(i).

COMMENT: This addition to the section 707 will act to bar income rich debtors from taking advantage of a disaster and using it to exempt themselves from the means test. It will act to ensure that only those "honest" debtors are able to use chapter 7.

(b)(2)(E)(ii) If the debtor shows that his or her use of chapter 7 would not be an abuse under (b)(2)(E)(i), then subparagraphs (A), (B), (C) shall not apply, and the court may not dismiss or convert a case under this subsection, if the debtor is a victim of a natural disaster or localized disaster and files for bankruptcy within two years after the disaster.

COMMENT: This addition of this section serves to specify which provisions of section 707 with which the debtor will be exempted from having to comply. The two year date was chosen based upon when most people will file for bankruptcy as discussed in the note.

(b)(4)(E) If a debtor is seeking relief under this chapter due to being the victim of a natural or localized disaster, then the debtor shall affix an affidavit to the debtor's petition certifying that the debtor has actually been materially adversely impaired by the disaster.

COMMENT: The addition of this subsection will act to prevent debtors from seeking to abuse this chapter under the exceptions made for disaster victims, but are not themselves affected by the disaster.

28 U.S.C. § 586. Duties; Supervision by Attorney General

(a)(9) upon determination of a natural disaster by the President or by recommendation of a regional United States trustee to the Executive Office of the U.S. Trustee

(A)(i) the Executive Office of the United States Trustee, upon a determination of a Presidential declaration of a disaster, has the authority to waive certain provisions of the title 11 as set forth below for the affected region. If this is done, then the

provisions of the code as of October 16, 2005 shall govern the debtor's bankruptcy case.

(A)(ii) the waiver shall last for a period not longer than three years.

(B) The Executive Office of the United States Trustee will have the authority to waive section 341, 521, and 707.

COMMENT: The addition of this section to the Code would serve to give more authority to the U.S. Trustee's Office and would allow them to waive certain requirements of the Code, as discussed in the note above. By reverting these sections of the Code to the prior version, the victims will not have to comply with the provisions discussed above, and will be able to file for bankruptcy as other prior victims have. The deadline was set based upon the reasons set forth in the note, and should give sufficient time for debtors to have decided whether they will file for bankruptcy and enable them to comply with the Code.