

POSITION PAPER SUBMITTED BY
THE NATIONAL BAR ASSOCIATION RELATING
TO THE IMPACT OF HURRICANE KATRINA AND
THE EFFECTIVE DATE OF THE
BANKRUPTCY ABUSE PREVENTION AND
CONSUMER PROTECTION ACT OF 2005

On August 29, 2005, Hurricane Katrina made landfall in Louisiana, Mississippi and Alabama, forever changing the lives of hundreds of thousands of people in the months, and perhaps even years, to come. The devastation caused by Hurricane Katrina has the potential to be even further exacerbated by The Bankruptcy Abuse Prevention and Consumer Protect Act of 2005, Public Law 109-8 (the “Act”), which is scheduled to become effective on October 17, 2005. Many individuals, families, and businesses have already suffered financial ruin of a previously unseen magnitude, with the full economic impact of this catastrophe still undetermined at this time. It is likely that a significant number of individuals will seek bankruptcy relief as they attempt to rebuild and rehabilitate their lives and families. However, some of the requirements imposed by the Act on individual debtors will make it impossible for these individuals to obtain the relief they will need in their darkest hours without having their case automatically dismissed. Accordingly, we strongly believe that the effective date of the Act should be stayed in light of the consequences stemming from Hurricane Katrina and its many victims. Whether a proponent or opponent of the Act, one should realize the crippling and devastating effect that the Act will have on the victims of Hurricane Katrina as these citizens seek to rebuild their lives.

The Act imposes several new requirements and responsibilities on debtors and their attorneys, and codified other observed but unwritten requirements and responsibilities, one of which is Section 521 of the Act, which carries severe penalties for debtors and possibly their attorneys in the event that these requirements are not complied with. Failure to provide the documents requested under Section 521 of the Bankruptcy Code will result in automatic dismissal of a Debtor’s Bankruptcy Case. Section 521 requires that a debtor provide documents such as (1) pay stubs or other evidence of income; (2) a statement of anticipated post-petition income of expenditure increases in the twelve (12) months following filing; (3) an itemized statement of monthly net income; and (4) the debtor’s most recent federal income tax return.

Accordingly, if a debtor files a bankruptcy, their case will automatically be dismissed if they cannot file these documents. For a substantial number of individuals, this information may be irretrievably lost and unable to be recreated, which will cause such individuals to face insurmountable obstacles in the event that they require bankruptcy protection. To illustrate the real-world implications of Section 521 in the post-Katrina environment, envision an individual who lived in New Orleans prior to Hurricane Katrina and worked in a restaurant as a busboy. The busboy’s house has been destroyed by Hurricane Katrina, as has the restaurant where he worked. In the aftermath, not only does this person not have a home to live in, but he no longer has a job. His pay stubs and other financial documentation are likely destroyed, along with all of his other property. His employer’s records might be destroyed as well. Provided that this person

will even be able to locate his employer, there is no conceivable way for him to recreate evidence of his income, especially for an individual working on tips, whose income differs from week to week. He will thus be unable to provide this documentation required by Section 521, and absent a stay of the effective date of the Act, will not be able to avail himself of bankruptcy protection. This type of situation, where the honest but truly unfortunate debtor faces financial ruin, is exactly the type of situation that bankruptcy law is intended to help. Given the current state of affairs in the hurricane-ravaged Gulf Coast region, already one of the nation's most economically depressed, implementation of the Act at this time will make seeking bankruptcy relief all but impossible.

Even assuming that a debtor was able to collect what may be the most basic documents and paperwork required by Section 521, victims of Hurricane Katrina will surely be unable to overcome the presumption of abuse under the "Means Test" of Section 707(b)(2). These victims will have trouble returning to their jobs and finding new work, as many of the jobs that were there before this national disaster are likely to be gone, or, at best, severely damaged and not operational. Since "Current Monthly Income" is calculated by averaging a debtor's income for the six months prior to filing for bankruptcy, countless debtors will be bound to a set of historical facts that are no longer accurate. This set of facts will lead to a requirement of filing for Chapter 13 bankruptcy relief in a situation where it will be clearly ineffective. Balancing the current monthly income derived from a job that the individual may no longer have against household expenses, which will undoubtedly increase exponentially after Hurricane Katrina for repairs and rebuilding, might be an insurmountable feat. Additionally, for some, determining household income for the sixty (60) days preceding and following the bankruptcy as they will be required to under the Act, will now be nearly impossible.

Rebuilding businesses, large and small, will also prove to be an uphill battle should the Act become effective on October 17, 2005. The time frames within which a business debtor must file a Chapter 11 plan under the Act will present a challenge under normal circumstances, but under the economically unviable conditions of the post-Katrina Gulf Coast, this challenge might become an impossibility. If a debtor qualifies as a "small business" debtor as defined by Section 101(51D) of the Act, the case is automatically placed on a fast track, which will not allow for adequate time for the small business to reorganize given the conditions that many small businesses in the Gulf Coast currently face. Specifically, Section 1121(e) only allows a small business debtor a one hundred eighty (180) day exclusive period within which to file a reorganization plan, and, in any event, a small business debtor must file a plan within three hundred (300) days from the date of filing. Larger businesses, too, face unrealistic timeframes within which to propose a Chapter 11 plan. Under Section 1121(d), the Debtor's exclusive period to file a Chapter 11 plan may not be extended beyond a date that is eighteen (18) months after the date of filing. Commentators have suggested that certain of the areas worst impacted by Katrina may be unlivable for years. In addition to the impossible timeframes within which a Chapter 11 plan must be filed, the Bankruptcy Court will have no discretion to extend a business debtor's time to decide whether to assume or reject its executory real property leases, which are often a small business's most important asset, beyond two hundred ten (210) days from filing of the Bankruptcy Case. These provisions eviscerate the chances that a business debtor has to rehabilitate and rebuild after Katrina.

The new requirements and restrictions imposed by the Act on individuals and businesses suffering the effects of Hurricane Katrina are not the only hurdles faced by Katrina victims. Attorneys, as well as courthouses, have necessarily been relocated. Ergo, there is literally no place for these debtors to go to seek assistance for bankruptcy relief. Further, the credit counseling required by Section 521 of the Act as a condition to filing for bankruptcy will be all but impossible to fulfill. Soon, creditors will start obtaining judgments on debts owed by the victims of Hurricane Katrina. Not only will these individuals be unable to defend these suits and judgments, but in the case a judgment is entered, it will difficult and expensive to litigate.

People all across the country have unified and have literally reached into their own pockets to help the victims of Hurricane Katrina. We are asking Congress to do its part in assisting these victims and allow them an opportunity to rebuild their lives by giving them, if necessary, the opportunity to have the fresh start envisioned by the bankruptcy code. These are truly the unfortunate individuals and businesses who will most need the relief that the bankruptcy code was designed to provide. Accordingly, to prevent further devastation to the victims of Hurricane Katrina, the effective date of the Act must be stayed.

Member of the House Judiciary have been quick to respond and address this need. Representatives John Conyers, Jr. (MI-14), Louise McIntosh (NY-28), and Russell D. Feingold (WI) have each submitted bills to amend and/or stay the Act. These bills have been forwarded to the House Judiciary Committee for a ruling. In a Press Release issued on September 1, 2005, Rep. Conyers and Rep. Sheila Jackson Lee concisely stated the effect of the continued effective date of the Act:

[J]ust 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 obligation they are incurring and by forcing them to repay their debt with income they no longer have, but which is counted by the law... Our common sense bill will insure that we do not compound a natural disaster with a man made financial disaster.

As seen with the filings following 9/11, it is impossible to identify a contained set of victims or jurisdictions affected by an overwhelming disaster. Accordingly, the National Bar Association supports a general stay of the effective date of the Act, and further supports the bills sponsored by Reps. John Conyers, Jr., Louise McIntosh and Russell D. Feingold.

Submitted by the National Bar Association

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