

MORTGAGE FORECLOSURE IN POST-KATRINA NEW ORLEANS

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Abstract: Hurricane Katrina caused widespread property destruction in the city of New Orleans. This Article analyzes data gathered from the Orleans Parish Recorder of Mortgages office and the Civil District Court and concludes that foreclosure filing rates in the year after Katrina decreased significantly from the rates for the corresponding period in the year prior to the storm. This Article evaluates in detail the legal and market responses to mortgage default after the storm that contributed to the reduction in foreclosure actions. Secondary mortgage market initiatives provided the principal means for relief; however, even though these initiatives were successful in protecting mortgage debtors after Katrina, their limited scope make them inadequate to address the years of financial distress that might likely follow any future disaster of Katrina's magnitude. Thus, although the experience demonstrates that secondary market interventions can effectively reduce debtor distress after a major disaster, such interventions should not be seen as a substitute for traditional legal responses to mortgage debtor distress after disasters or other economic crises.

INTRODUCTION

Over a short period of a few days that began in the early morning of August 29, 2005, the city of New Orleans, Louisiana, was leveled by the aftereffects of Hurricane Katrina ("Katrina"), a Category Three hurricane that made landfall slightly southeast of the city.¹ Although the city was spared much of the direct damage suffered by the cities and regions to its east, the hurricane's storm surge caused severe flooding in eastern parts of the city and also caused the levee system

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¹ See Nat'l Oceanic & Atmospheric Ass'n, Hurricane Katrina, <http://www.katrina.noaa.gov> (last visited June 24, 2007).

protecting the city to fail.² As a consequence of the levee failure, water from the swollen Lake Pontchartrain poured into the city, flooding vast portions of the city for weeks and stranding many of the residents who had not evacuated prior to the storm. The storm, but more particularly the flooding after Katrina due to the breaches in the defective levees, killed over 1400 Louisiana residents and destroyed much of the city's infrastructure and housing stock.³

After Katrina, scores of New Orleans homeowners were left with ruined or seriously damaged houses, in a devastated city barely able to provide even basic services. Some were displaced for months or longer and were in need of long-term substitute housing because they had no habitable home to which they could return. Many lost jobs as well as their homes.⁴ Many, by choice or circumstance, simply have not yet returned.⁵ In addition to the often overwhelming personal losses, the devastating property damage, and the psychological toll that Katrina exacted from New Orleans citizens, the storm also launched a financial crisis for a significant number of residents. Most New Orleans residents faced enormous expenses related to the lengthy evacuation, the displacement, and the losses that were incurred. It is therefore not surprising that many mortgage debtors in the areas affected by the storm defaulted on their mortgages, which were secured by their real property,

² Critical levee breaches occurred in the 17th Street Canal on the city's western side and in the London Avenue and Industrial Canals on the city's eastern side. SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE, H.R. REP. NO. 109-377, at 95 (2d Sess. 2006). Evidence suggests that the levees were defectively designed and built, and improperly maintained. *See id.* at 87-100 (discussing levee failure). *See generally* 1 U.S. ARMY CORPS OF ENG'RS., PERFORMANCE EVALUATION OF THE NEW ORLEANS AND SOUTHEAST LOUISIANA HURRICANE PROTECTION SYSTEM (2006) (acknowledging that the levee system did not meet specified requirements).

³ La. Dep't of Health & Hosps., Hurricane Katrina, Reports of Missing and Deceased (Aug. 2, 2006), <http://www.dhh.louisiana.gov/offices/page.asp?ID=192&Detail=5248>. The official Louisiana state death toll is 1464. *Id.*

⁴ Harry J. Holzer & Robert I. Lerman, *Employment Issues and Challenges in Post-Katrina New Orleans*, in AFTER KATRINA: REBUILDING OPPORTUNITY AND EQUITY INTO THE NEW NEW ORLEANS 9, 9 (Margery Austin Turner & Sheila R. Zedlewski eds., 2006) [hereinafter REBUILDING OPPORTUNITY] (discussing post-Katrina job loss and the uncertainties of the job market after the storm).

⁵ Meghan Gordon, *N.O. Population Hits 200,000, New Data Show City Nearing 40% of Pre-Katrina Size*, NEW ORLEANS TIMES PICAYUNE, Nov. 29, 2006, at A-1. In November 2006—fifteen months after the disaster—the New Orleans population was estimated to be 200,000, only 40% of its pre-Katrina population. *Id.* Jefferson Parish, bordering to the west of the city, had regained 97% of its population. *Id.* Severely flooded St. Bernard Parish, to the city's east, had only recovered 38% of its prestorm population. *Id.*

in the months following Katrina.⁶ Because of these defaults, the creditors had the ability to seize the property and sell it through the foreclosure process to pay off the debt outstanding under the mortgage.

Throughout U.S. history, jurisdictions have wrestled with the proper legislative solution for responding to concerns over the fairness of foreclosure in the wake of a severe crisis.⁷ Although the rights usually afforded to creditors under the mortgage documentation and under state foreclosure laws may not be a cause for particular worry in ordinary periods, the continuation of those rights unabated when a large number of state citizens and properties are affected, due to unusual changes in the market, is another matter entirely. Moreover, Katrina has sparked renewed inquiry into the relationship between disasters and the affected consumers' or businesses' financial distress.⁸ Research indicates that the years immediately following a disaster-related crisis such as Katrina can be precarious ones for debtors.⁹

The movement in the local New Orleans foreclosure market and the responses to mortgage default after Katrina in New Orleans can inform this wider debate on the appropriate policy response to the financial toll that disasters can extract from their victims. This Article discusses the legal and market responses to mortgage default in the year following Katrina in the city of New Orleans. It analyzes the incidence of foreclosure in Orleans Parish, Louisiana, in the year following the storm, based upon data acquired through a review of the legal actions started during that period. Significantly, Louisiana, unlike Mississippi, does not have a foreclosure moratorium statute that would provide homeowners with protection from foreclosure after a disaster.¹⁰ Louisiana therefore eschewed the more traditional legislative approach

⁶ See Mary Judice, *Katrina Unleashes Flood of Past-Due Mortgages but Foreclosures in La., Miss. are Fewer Than in the Past*, NEW ORLEANS TIMES PICAYUNE, Mar. 15, 2006, at A-1 (discussing past-due mortgages in Louisiana and Mississippi in the fourth quarter of 2005). The percentage of past-due mortgages in Louisiana reached nearly twenty-five in Louisiana following Katrina. *Id.*

⁷ See CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 146–59 (1935) (discussing history of state initiatives curbing foreclosure in cases of serious economic upheaval); see also *infra* note 62 (discussing constitutional constraints on state initiatives).

⁸ See, e.g., Robert M. Lawless, *Bankruptcy Filing Rates After a Major Hurricane*, 6 NEV. L.J. 7, 8 (2005) (finding a pattern of higher bankruptcy filing rates in areas affected by major hurricanes, particularly twelve to thirty-six months after the storm); Geoffrey C. Rapp, *Gouging: Terrorist Attacks, Hurricanes, and the Legal and Economic Aspects of Post-Disaster Price Regulation*, 94 KY. L.J. 535, 553 (2005–2006) (arguing in favor of application of price gouging legislation in disaster areas).

⁹ See generally Lawless, *supra* note 8.

¹⁰ See *infra* notes 137–150 and accompanying text for a discussion of Mississippi's moratorium statute.

to regulating foreclosure in times of crisis in favor of simply allowing the existing legal regime to continue onwards in the disaster context. For many Louisiana mortgage debtors, this meant that the legal system placed them at great risk for foreclosure after the storm, because the Louisiana legal regime for foreclosure normally affords borrowers few protections.¹¹

Nonetheless, while mortgage defaults soared after Katrina, foreclosure rates stalled during the same period.¹² Even though New Orleans debtor homeowners did not receive the benefit of a legal moratorium on foreclosure as did their counterparts in Mississippi, a moratorium on foreclosure in affected areas established by entities in the secondary mortgage market acted to help substantially reduce the foreclosure rate in the year following Katrina.¹³ Moreover, a wrecked legal and community infrastructure, a significant amount of seriously damaged collateral, and the uncertainty surrounding the rebuilding and recovery of the city added more disincentives for creditors in evaluating whether to foreclose on property.¹⁴ Although a decrease in foreclosure in the face of a massive mortgage default is contrary to what would be expected in a usual mortgage lending market—where an increase in the rate of mortgage default would lead to a corresponding increase in the rate of foreclosure—it is therefore not entirely surprising for that phenomenon to occur in post-Katrina New Orleans. Importantly, market initiatives and responses, rather than legal initiatives, provided the much-needed relief for New Orleans mortgage debtors.

The New Orleans experience suggests that nonlegal, secondary market interventions have great promise to be a key mechanism for alleviating the immediate financial distress suffered by the victims of disasters and other severe economic crises in the United States. Secondary market initiatives do, however, have limits as a comprehensive solution to the problem of mortgage default and foreclosure in the wake of widespread financial distress. As will be argued in Part IV of this Article, market initiatives are unlikely to provide a long-term solution for the chronic financial problems that can continue for years after a major disaster.¹⁵ In New Orleans, for example, the secondary market moratoria addressed the acute, short-term concerns of distressed mortgage

¹¹ See *infra* notes 60–135 and accompanying text.

¹² Judice, *supra* note 6; see also *infra* notes 48–55 and accompanying text.

¹³ See *infra* notes 151–169 and accompanying text.

¹⁴ See *infra* notes 171–180 and accompanying text.

¹⁵ See *infra* notes 184–228 and accompanying text.

debtors in the first year following the storm.¹⁶ The long-term financial concerns of Katrina victims who are mortgagors were, for the most part, left unaddressed. Secondary market responses are also limited in scope, because they address most directly the concerns of borrowers in prime mortgage markets. Reliance upon secondary market vehicles for addressing local financial crises can therefore leave the most vulnerable debtors without significant protection, particularly in jurisdictions such as Louisiana, which have legal regimes that overwhelmingly favor creditors. As Part IV discusses, these limitations are a particular cause for concern when evaluating the use of secondary market responses to address the needs of debtors in post-Katrina New Orleans.¹⁷ Predominantly poor, African-American cities such as New Orleans are likely to have a high incidence of subprime and predatory lending. Additionally, the Louisiana foreclosure system is one in which debtors receive few special protections. Secondary market responses do little to protect this large number of vulnerable debtors, who are in a position to be exploited by unscrupulous lenders and are largely unprotected by market responses designed to accommodate the needs of prime borrowers and by the state legal system.

Part I of this Article summarizes the impact that Katrina had on New Orleans residents.¹⁸ Although the storm created an environment which facilitated increased mortgage defaults in the area, as will be discussed in Part II, data from the Orleans Parish Recorder of Mortgages office and from the Parish Civil District Court suggest that foreclosure rates in the year after Katrina in fact decreased significantly from the rates for the corresponding periods in the year prior to the storm.¹⁹ Part III evaluates the legal and market responses to mortgage default after the storm that contributed to this reduction in foreclosure actions.²⁰ As Part IV argues, these responses were successful in checking a rash of foreclosures immediately after the storm, but will do little to assist New Orleans debtors in the years of financial distress that would likely follow any future disaster of Katrina's magnitude.²¹ In upcoming years, absent active government and market intervention to alleviate the financial distress caused by Katrina and the failed levees, the New Orleans area is at risk for an upsurge in foreclosure.

¹⁶ See *infra* notes 151–169 and accompanying text.

¹⁷ See *infra* notes 182–230 and accompanying text.

¹⁸ See *infra* notes 22–40 and accompanying text.

¹⁹ See *infra* notes 41–57 and accompanying text.

²⁰ See *infra* notes 58–181 and accompanying text.

²¹ See *infra* notes 182–230 and accompanying text.

Thus, the successes of the year after Katrina may ultimately provide cold comfort to mortgage debtors in the future.

I. KATRINA'S TOLL ON NEW ORLEANS HOMEOWNERS

Although the focus on the devastation caused by Katrina usually quickly centers on the catastrophic flood damage to the city of New Orleans due to the failure of the defective levees, it is important to begin by noting that Katrina dealt an enormous blow to the entire central Gulf Coast region. New Orleans in fact was spared the direct brunt of the wind damage from the storm and of the accompanying storm surge when Katrina veered slightly eastward prior to landfall. Areas in coastal Mississippi sustained the full force of that blow. Overall, because of the sheer mass and force of the storm, about 650,000 people in the Gulf Coast region lived in areas that were heavily damaged.²²

Because of the population density in the city, and because of the flooding caused by the defective levees, the damage in New Orleans was particularly widespread and cataclysmic. In New Orleans, 73% of the population lived in areas that had damage which ranged from moderate to catastrophic.²³ The city's housing stock was seriously impacted, leading to a housing crisis after the storm. Nearly 228,000 occupied housing units, 45% of the city's total, and 41% of the city's businesses were in flooded areas.²⁴ Of those flooded housing units, 120,000 were owner occupied and 108,000 were renter occupied.²⁵

²² JOHN R. LOGAN, *THE IMPACT OF KATRINA: RACE AND CLASS IN STORM-DAMAGED NEIGHBORHOODS* 6, <http://www.s4.brown.edu/Katrina/report.pdf> (last visited June 25, 2007) ("Nearly 650,000 persons, more than a third of the region's population, lived in heavily damaged areas.")

²³ *Id.* at 6 tbl.1. Using data from the 2000 U.S. Census and from FEMA maps showing areas of flood and wind damage, a Brown University study concludes that 354,045 New Orleans' residents lived in damaged areas, with 130,629 living in other areas. *Id.* at 2-3, 6. The city of New Orleans had the second highest percentage of population living in damaged areas among all of the affected Gulf Coast region, with the highest percentage (78.9%) being that of the New Orleans suburb of St. Bernard Parish. *Id.* at 6. The figures for St. Bernard and the city of New Orleans greatly surpass percentages of population living in damaged areas for other areas in the Gulf Coast. *Id.* For example, the hardest hit area of Mississippi, Hancock County, had 45.1% of its population living in damaged areas. *Id.*

²⁴ BROOKINGS INST., *NEW ORLEANS AFTER THE STORM: LESSONS FROM THE PAST, A PLAN FOR THE FUTURE* 14 (2005) [hereinafter *BROOKINGS REPORT*]; see also Susan J. Popkin, Margery Austin Turner & Martha Burt, *Rebuilding Affordable Housing in New Orleans: The Challenge of Creating Inclusive Communities*, in *REBUILDING OPPORTUNITY*, *supra* note 4, at 17, 17 (discussing the impact of Katrina on New Orleans housing and short- and long-term strategies for addressing the housing crisis).

²⁵ *BROOKINGS REPORT*, *supra* note 24, at 14.

As a majority African-American city,²⁶ it is not surprising that Katrina had a devastating effect on New Orleans' African-American citizens. The location of some historically African-American neighborhoods placed those neighborhoods at a particularly high risk of flooding given the points at which the levee system failed. When the population in New Orleans directly impacted by Katrina is broken down by racial composition, the damaged areas had populations which were quite substantially (75%) comprised of African-American residents.²⁷ By contrast, in undamaged or minimally damaged areas only 46.2% of the residents were African-American.²⁸ Thus, when compared to other regions and cities of the Gulf Coast that were damaged by the storm, Katrina's impact in New Orleans was significantly heavier on the city's African-American citizens than on other racial and ethnic groups living in the area.²⁹ Even when viewed regionally, though, the impact of Katrina on African-Americans was significant. For the total region affected by Katrina, 45.8% of the population living in areas subsequently damaged by the storm was African-American.³⁰ Katrina exacted a devastating toll, but most particularly on the African-American residents of the Gulf Coast.³¹

Though the flooding in New Orleans was a tragic blow for the city's African-American communities, the storm spared few of the city's residents. Flooding also severely damaged many predominantly white and mixed-race neighborhoods in New Orleans. For example, one of the most severely flooded areas of the city was the Lakeview Planning District near the breached 17th Street Canal, where 89.8% of the properties were damaged.³² Only 2.3% of the population in Lakeview is African-American.³³ Conversely, some majority African-American neighborhoods escaped significant harm, with some un-

²⁶ See U.S. Census Bureau, New Orleans, Louisiana Fact Sheet, 2005 American Community Survey, <http://factfinder.census.gov> (search "Fact Access to Information" for "New Orleans" and "Louisiana") (last visited June 24, 2007). Prior to the storm, the U.S. Census Bureau data showed that 67.5% of the city's population (295,259 of 432,949 residents counted) was African-American. *Id.*

²⁷ LOGAN, *supra* note 22, at 7; see also Popkin et al., *supra* note 24, at 17.

²⁸ LOGAN, *supra* note 22, at 7 tbl.2.

²⁹ *Id.* For the total region, in the Biloxi-Gulfport Metro area, 14.8% of the population in damaged areas was black, and in the New Orleans suburbs, 9.1% of the population in damaged areas was black. *Id.*

³⁰ *Id.*

³¹ *Id.* at 14 (concluding that Katrina had a "substantial disproportionate impact on African Americans").

³² *Id.* at 11 tbl.3.

³³ LOGAN, *supra* note 22, at 11 tbl.3.

damaged areas in the city having populations that were overwhelmingly African-American.³⁴

Although less so than race, the storm had a disproportionate impact in the city based upon income level.³⁵ Generally, higher-income neighborhoods such as Uptown and the Garden District, which are located on higher ground near the Mississippi River, escaped significant flooding damage.³⁶ Coupling the impact based on race with the impact based on income, one can conclude that lower-income, African-American residents were statistically more likely to have suffered severe property damage from the storm than their higher-income, majority counterparts.

If homeownership is still considered to be the “American Dream,” the defective levees destroyed that dream for many New Orleans victims. In flooded areas, 53% of the residents owned their own homes.³⁷ The rate of African-American homeownership in the city is slightly lower than the average.³⁸ Prior to Katrina, 41% of African-American households in the city owned their homes.³⁹ In predominantly African-American neighborhoods, owner-occupied housing units ranged from 3.9% in the poorest areas to as high as 92.1% in the city’s wealthiest African-American neighborhood, Pontchartrain Park.⁴⁰ Katrina therefore delivered a significant blow to homeowners in New Orleans, and in light of the serious flooding in many African-American neighborhoods, to African-American homeowners. The storm’s impact on local businesses and the economy, and the consequent widespread job and business losses, raised added financial issues for many residents, over and above the catastrophic losses to property. Furthermore, the losses suffered by many New Orleans homeowners after Katrina raised distinct concerns for those homeowners who were mortgage debtors, in other

³⁴ *Id.* at 12. For example, in the unflooded St. Thomas housing project area in the Garden District, the population was 93.3% black, and in many areas of Algiers, also not flooded, the population was anywhere from 25% to 99% African-American. *Id.*

³⁵ *Id.* at 7 tbl.2.

³⁶ *Id.* at 12 tbl.3 (listing damage rates for Uptown, Garden District, French Quarter, and Central Business District). Even in those areas, however, there was some damage depending on the location of the neighborhood.

³⁷ BROOKINGS REPORT, *supra* note 24, at 18. Slightly under half (47.3%) of residents in flooded areas were renters. *Id.* Neighborhoods that did not flood averaged a 69% homeownership rate (and 31% rental rate). *Id.*

³⁸ See BROOKINGS REPORT, *supra* note 24, at 7 tbl; Popkin et al., *supra* note 24, at 18.

³⁹ BROOKINGS REPORT, *supra* note 24, at 8. By contrast, 56% of white households owned their own homes. *Id.*

⁴⁰ *Id.* at 7 tbl.

words, for those homeowners whose homes served as security for a loan.

II. THE IMPACT OF KATRINA ON MORTGAGE DEBTORS

Although New Orleans has a higher than average rate of homeowners who have paid off their mortgages, 37%,⁴¹ a significant number of the damaged and destroyed properties in flooded areas served as collateral for mortgage loans. After the storm, those debtors were left with destroyed homes and mortgage debts that still required payment. As this Section discusses, although a rash of mortgage defaults occurred in the poststorm environment, foreclosure actions instituted in the year following the storm actually stalled.⁴²

A. *The Local Mortgage Market Before and After the Storm*

Data suggests that the incidence of mortgaged property in Orleans Parish varies slightly from area to area in the city. For example, in the Lower-Ninth Ward, the predominantly lower-income, African-American community decimated by the breach in the defective levee at the Industrial Canal, 57% of the homes were mortgaged to creditors.⁴³ In Lakeview, the predominantly higher-income, white neighborhood with a significant number of elderly residents, that number was 59%, while in Eastern New Orleans the number of mortgaged properties was 70%.⁴⁴ The percentage of homeowners holding destroyed properties who also were mortgage debtors facing potential default on their mortgages thus can differ by neighborhood, based on the volume of outstanding mortgage loans in the area.

For the mortgage debtors whose houses were seriously damaged or destroyed after the storm, the likelihood of default under the mortgage was high, if not in many instances almost assured. The widespread property damage was one factor that increased the probability of default. Unable to return to their homes to live, and in need of substitute housing, debtors with seriously damaged houses had little incentive to make payments under the mortgage. For homeowners who decided to permanently relocate from New Orleans after the storm, the incentive

⁴¹ Popkin et al., *supra* note 24, at 18. The national average is 32%. *Id.*

⁴² See *infra* notes 43–57 and accompanying text.

⁴³ Jeffrey Meitrodt & Rebecca Mowbray, *After Katrina, Pundits Criticized New Orleans, Claiming Too Many Residents Had No Flood Insurance. In Fact, Few Communities Were Better Covered*, NEW ORLEANS TIMES PICAYUNE, Mar. 19, 2006, at A-1.

⁴⁴ *Id.*

to make payments on the now abandoned, destroyed property further decreased.

The increased probability of mortgage default in post-Katrina New Orleans was not limited to homeowners whose property was seriously damaged by the flooding. Even where the mortgaged property escaped serious damage, or even where a debtor with damaged property wanted to maintain or resume their mortgage payments, the storm's impact on debtors' finances contributed to the increased risk of widespread mortgage default. Debtors who had to acquire alternative housing faced an escalating rental market, given the constriction of supply and heightened demand for alternative housing. The damage to the city's economic base led to a sharp rise in unemployment, and many debtors lost their jobs and, thus, their source of income.⁴⁵ The costs of evacuation and relocation placed additional stresses on household finances. Even if a debtor's property was habitable, homeowners faced significant costs in repairing even minor damage. Those who experienced job loss or significant disaster-related expenses faced negative changes in their financial position. Given the impact that Katrina had on many families and small business owners' finances, there often might not be the means available to make payments, even if the debtor wanted to do so. Thus, although the crisis was especially harsh to debtors who lost their homes, all mortgage debtors in the affected areas were potentially impacted by the storm and its effects on the local economy and on family and business finances.

For these reasons, it is not surprising that the months following Katrina brought significantly higher rates of residential mortgage defaults in the affected areas.⁴⁶ Technically, once a mortgage is in default, under the loan documentation and under state law a lender has the ability to foreclose upon the property to satisfy the defaulted debt. As will be discussed in the next Section, however, in the year following Katrina the number of foreclosure actions filed by lenders actually declined.⁴⁷

⁴⁵ See, e.g., Holzer & Lerman, *supra* note 4, at 9 (discussing the impact of Katrina on the city's labor market and the uncertainties in developing strategies to deal with unemployment problems).

⁴⁶ See Judice, *supra* note 6, at A-1. Delinquency rates for Louisiana and Mississippi were more than double the national rate long after the storm. See Roger Capettini, *State-by-State Mortgage Delinquencies*, BANKRATE.COM, Nov. 1, 2006, <http://www.bankrate.com/brm/news/mortgages/states.asp?caret=4> (listing delinquency rates on residential mortgages). The national average delinquency rate for the second quarter of 2006 was 4.39%, while Mississippi's was 11.36% and Louisiana's was 10.66%. *Id.*

⁴⁷ See *infra* notes 48–55 and accompanying text.

B. Foreclosure Activity in New Orleans After Katrina

Foreclosure activity in New Orleans can be monitored in a number of ways. For example, one could monitor the actual number of sheriff's sales of property conducted under the state foreclosure laws.⁴⁸ Alternatively, the civil court records could be searched to identify the complaints filed to determine which actions sound in foreclosure.⁴⁹ To evaluate the foreclosure activity in the city after Katrina, this Article adopted a methodology in between these two alternatives. In Louisiana mortgage law, when a foreclosure sale is started, either a writ of *fiery facias* or a writ of seizure and sale is recorded in the real property records.⁵⁰ Thus, by monitoring the real property records at the Orleans Parish Recorder of Mortgages office, the number of writs issued to start the foreclosure sale process can be ascertained.⁵¹

The following Table 1.A shows the number of writs recorded in the Orleans Parish Recorder of Mortgages office from late October

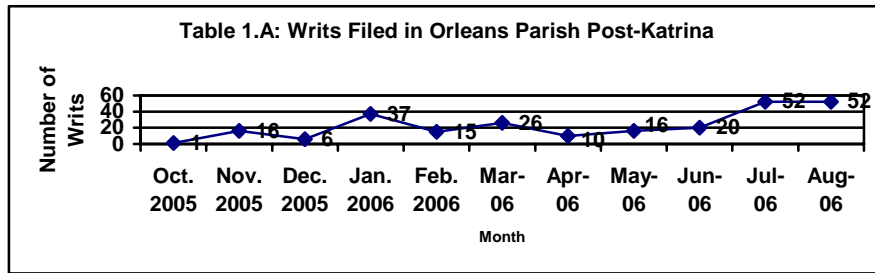
⁴⁸ This approach has the disadvantage of only considering those foreclosures that result in an actual sale of the property. It therefore provides a limited picture of foreclosure activity because it does not include foreclosure actions which are filed, but which do not result in a sale.

⁴⁹ Although this approach would accurately reflect the number of foreclosure actions ongoing in any particular period, it would require researchers to comb through civil court records to determine filings that sound in foreclosure, and thus it has a potentially high rate of error.

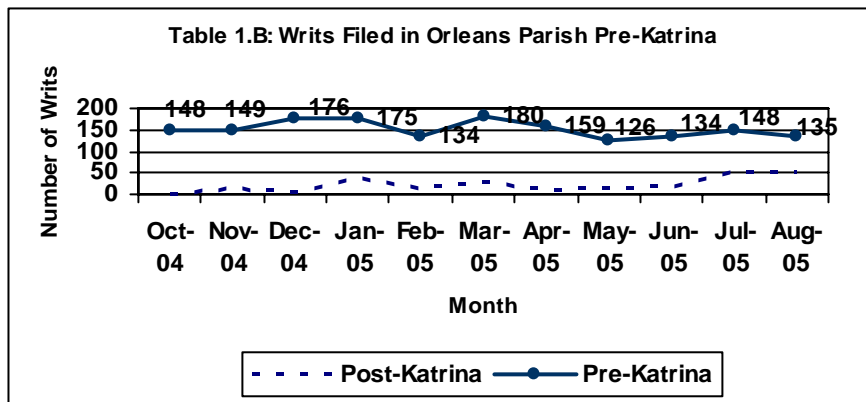
⁵⁰ See *infra* notes 109–110 and accompanying text. *Fieri Facias* translates literally to “that you cause to be done” and refers to a writ of execution that directs a sheriff to seize and sell a defendant’s property to satisfy a money judgment. BLACK’S LAW DICTIONARY 659 (8th ed. 1999).

⁵¹ The data in this article reflecting the rate of filing of real property writs with the Recorder of Mortgages office is based on that available on the office’s computer database, through April 28, 2007. Because of Louisiana’s unique method of foreclosure known as executory process, the writ of seizure and sale recorded in the mortgage office is issued usually within days of the creditor’s institution of foreclosure proceedings. See *infra* notes 73–135 and accompanying text. Thus, for actions begun by executory process, the number of writs recorded in the real property records is highly certain to be roughly indicative of the number of foreclosure actions instituted by creditors. For actions begun by ordinary process, the writ of *fiery facias* is only issued after legal proceedings have occurred and a judgment has been entered against the debtor. See *infra* notes 67–72 and accompanying text. Thus, the number of writs of *fiery facias* ultimately filed at the Recorder of Mortgages office in any time period is not an entirely reliable indicator of the number of possible actions initially filed through ordinary process. Cases brought through ordinary process could be settled or otherwise resolved out of court, or stayed by bankruptcy, before a writ of *fiery facias* first appears on the mortgage records. Nevertheless, because most standard mortgage documentation contains the provisions that allow the use of executory process, reliance upon the data in the Recorder of Mortgages office, although incomplete, gives a good indication of the foreclosure activity in any given period.

2005 (when local government offices were reopened in the city after Katrina) until August 2006.



Comparing the post-Katrina filings in Table 1.A to the activity in the corresponding months for the year prior to Katrina (October 2004 to August 2005), shown below in Table 1.B, there was a dramatic drop in the rate of the filing of real property writs, and thus in the institution of foreclosure proceedings, after Katrina from earlier levels.



Thus, as Table 1.B demonstrates, when compared to the prior year, there was only nominal foreclosure activity in New Orleans in the months immediately following Katrina.

Moreover, of the foreclosure actions which were ongoing in the year after Katrina, only a minority were related to defaults that occurred near to or after Katrina. Table 2.A, below, is based on data compiled from the actual court files tied to the real property writs recorded in the period after Katrina.⁵² Nearly two-thirds of the cases (149 of 241

⁵² Each writ recorded at the Recorder of Mortgages office has a case file maintained at the Civil District Court. That case file usually contains, at a minimum, the pleadings (such as the creditor's petition for executory process), the mortgage, and the note. The plead-

files reviewed, or 61.83%) related to defaults under a mortgage that occurred prior to Katrina, rather than to defaults that occurred after Katrina.⁵³

Table 2.A: Pre-Katrina versus Post-Katrina Defaults Leading to Writs Filed (Oct. 2005-August 2006)

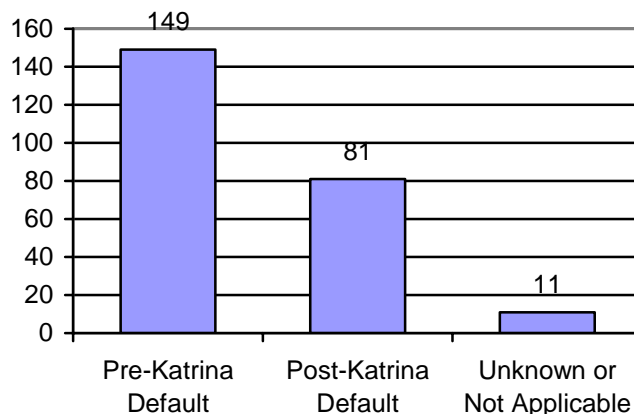


Table 2.A suggests that in most cases, lenders elected to institute or continue foreclosure actions *after* Katrina when the debtor's default existed *prior* to Katrina. Thus, foreclosure in the first year after Katrina in most cases cannot be linked to post-Katrina financial distress, because the majority of loans which were the subject of foreclosure proceedings were in trouble prior to Katrina. In addition, many of the writs that were recorded in the Recorder of Mortgages office in the early months following Katrina related to actions that were ongoing

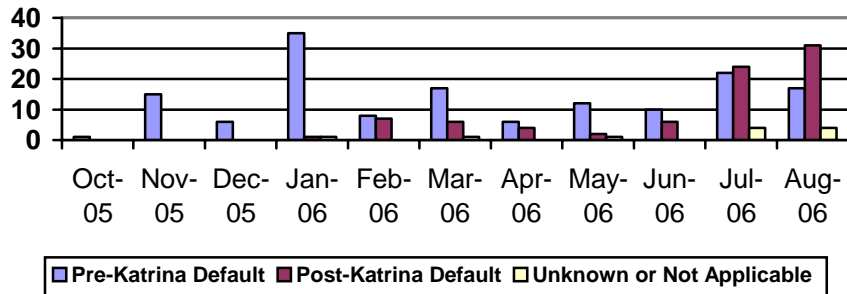
ings usually state a date of default, and the mortgage and note contain the essential information on the loan terms and collateral. These files were reviewed in person.

Although the Recorder of Mortgages office records include 251 writs recorded between October 2005 and August 2006, in a small number of cases the court files in the Orleans Parish Civil District Court were either duplicative of other actions, missing, or otherwise unable to be reviewed. The numbers in Tables 2.A and 2.B are based upon 241 separate court files examined by hand. In Tables 2.A and 2.B the category "Unknown or Not Applicable" refers to files which were reviewed but either were related to nonforeclosure actions or did not contain sufficient documentation to provide information on default.

⁵³ For purposes of this study, where the documentation in the court file stated that the default occurred in August 2005 or thereafter, it was categorized as a "post-Katrina" default.

prior to Katrina, cases which were resumed upon the city's reopening. These types of actions were merely continuing the pre-Katrina state of affairs regarding the loan. In fact, as the month-by-month breakdown in Table 2.B shows, again based on data from available court files, the first foreclosure writ issued for a loan that went into default near to or after Katrina did not occur until January 2006, five months following the storm.

Table 2.B: Month by Month Analysis of Pre- and Post-Katrina Defaults



As Table 2.B also demonstrates, it was not until July 2006—nearly a year following the storm—that foreclosure-related writs which were tied to post-Katrina defaults exceeded those which were tied to pre-Katrina defaults. Nor was this result an unexpected one. At the end of June 2006, a U.S. Office of Housing and Urban Development (“HUD”) moratorium on foreclosure by creditors or servicers under the Federal Housing Administration (“FHA”) and Veterans Affairs (“VA”) Loans expired,⁵⁴ thus contributing to the rise in the rate of recording of general foreclosure writs in July and August, and to the notable increase in the number of actions instituted that were related to post-Katrina defaults.⁵⁵

⁵⁴ See *infra* notes 151–156 and accompanying text.

⁵⁵ In July 2006, twenty-one of the court files for the fifty-two total actions in July reflected in the Recorder of Mortgages office (40.38% of the writs recorded) indicated that the loans involved were either FHA or VA loans. The documentation in such cases will evidence an FHA or VA file number, or have other notations indicating that the loan is a FHA or VA loan. These twenty-one files reflected mortgages that, presumptively, were covered by the HUD moratorium which expired June 30, 2006. Of those files, eleven actions were related to pre-Katrina defaults and ten actions were related to post-Katrina defaults. For August 2006, the case files reveal similar results. Of the fifty-two writs recorded in August 2006, twenty-eight (or 53.85%) were related to FHA or VA loans. Of those twenty-

Thus, even in the face of high mortgage defaults, the Orleans Parish public records provide scant evidence to support the occurrence of a corresponding foreclosure crisis in the year following Katrina in Orleans Parish. In fact, when compared with foreclosure activity in the previous year, local citizens received a respite from foreclosure after the storm. As will be discussed in the next Section, this was the case even though the Louisiana legal system makes foreclosure easily available to creditors under defaulted loans.⁵⁶ The following Part III discusses the legal and market responses that contributed to this result.⁵⁷

III. LEGAL AND MARKET RESPONSES TO THE DEFAULT CRISIS

As Section A of this Part discusses, Louisiana mortgage debtors received little from the State of Louisiana in the way of direct legal relief from possible foreclosure after Katrina.⁵⁸ This legal stance is unlike that assumed toward debtors in Mississippi, a state which has a foreclosure moratorium statute that was swiftly implemented soon after the storm. Louisiana mortgagors, however, were not left entirely without relief from the possibility of imminent foreclosure. As Section C of this Part discusses, Louisiana mortgagors who had loans tied to secondary mortgage markets and to federally assisted loan programs did benefit from structured, market-based initiatives that encouraged modification of home loans in the affected disaster areas and from moratoria on foreclosure instituted by those entities.⁵⁹ Thus, although formal legal intervention was lacking in Louisiana, the efforts of secondary mortgage market organizations provided relief to mortgagors during the immediate crisis.

eight files, eight were related to pre-Katrina defaults and twenty were related to post-Katrina defaults.

As can be deduced from the above, a significant number of the filings which related to post-Katrina defaults (thirty in full) in the period from October 2005 through August 2006 were filings under HUD-related loans where legal action was pursued after the HUD moratorium expired. Prior to July 2006, the tendency of creditors to pursue foreclosure only in the case of pre-Katrina defaults was more pronounced. Of the 139 case files that were reviewed for writs filed between October 2005 and the end of June 2006, prior to the expiration of the HUD moratorium, 110 (79.14%) were related to pre-Katrina defaults.

⁵⁶ See *infra* notes 60–135 and accompanying text.

⁵⁷ See *infra* notes 60–181 and accompanying text.

⁵⁸ See *infra* notes 60–135 and accompanying text.

⁵⁹ See *infra* notes 151–169 and accompanying text.

A. *The Legal Response*

After Katrina, there was no direct, affirmative legal response in Louisiana to address the likelihood of mortgage default and, possibly, foreclosure.⁶⁰ Rather, the stance was to allow the local rules to work as they otherwise had prior to the storm. This is notable because the legal regime in Louisiana allows quick foreclosure upon the initiative of the creditor, with limited debtor protections.⁶¹ The same procreditor regime that was in effect in the pre-Katrina market continued to operate in the post-Katrina crisis.⁶²

⁶⁰ In June of 2006 the Louisiana legislature did enact a statute that prevents lenders from collecting a prepayment penalty otherwise due under the terms of the loan when the prepayment is from insurance proceeds. 2006 La. Acts 188. The statute undermined creditors' possible arguments that, when loans which bore prepayment penalties were paid off from insurance proceeds, the stated prepayment penalties were also due. *See id.* Thus, when the loan documentation provided for a prepayment penalty, a debtor who had received an insurance payout who wished to pay down the mortgage arguably now had to pay a penalty to do so, even though the prepayment was not voluntary in any real respect. Because prepayment penalties are a common feature of subprime loans, the state's most vulnerable debtors were impacted. The new law prohibits the practice by stating:

Notwithstanding any other provision of law to the contrary, no prepayment penalty or similar fee or charge shall be due, assessed, charged, collected, paid, held in escrow, or contracted to be paid if all or part of a prepayment of all or part of an outstanding loan balance is made from proceeds paid in full or partial satisfaction of a claim or claims made under a policy or policies of insurance insuring against casualty, flood, or other loss or damage to property securing the loan being prepaid in connection with a gubernatorially declared disaster.

Id. (revising LA. REV. STAT. ANN. § 6:1096(E) (2005 & Supp. 2007)).

⁶¹ *See infra* notes 73–132 and accompanying text (discussing Louisiana's executory process method of foreclosure).

⁶² Because Louisiana did not have an existing statute to invoke in the case of natural disasters or economic crises, post hoc legislative intervention would raise constitutional concerns. *See, e.g.,* Fed. Land Bank of Omaha v. Arnold, 426 N.W.2d 153, 161 (Iowa 1988) (finding that legislature's response to farm crisis through retroactive extension of redemption periods and revision to procedures for valuing homesteads violated the Equal Protection and Contracts Clauses of the Federal Constitution).

State foreclosure moratorium statutes enacted in response to a local crisis have been subject to constitutional scrutiny for years. *See, e.g.,* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447 (1933) (finding that a Minnesota moratorium law enacted in response to the Great Depression comported with the Contracts Clause); Des Moines Joint Stock Land Bank of Des Moines v. Nordholm, 253 N.W. 701, 708 (Iowa 1934) (upholding as constitutionally permissible an Iowa Depression-era mortgage moratorium statute). The main area of focus is on the limits the Contracts Clause of the Federal Constitution places on such attempts. *E.g.,* *Blaisdell*, 290 U.S. at 424–48; *Nordholm*, 253 N.W. at 705–07. That clause provides that “[n]o state shall . . . pass any . . . law impairing the Obligation of Contracts.” U.S. CONST. art. I, § 10, cl. 1. The constitutionality of retroactive relief statutes is now evaluated under a three-part test: (1) whether the law operates as a substantial impairment of a con-

There are alternatives to the Louisiana approach, which fairly can be characterized as “hands-off” from a regulatory perspective. For example, Louisiana’s stance was a marked contrast to that adopted by Mississippi, a state whose Gulf Coast communities also sustained catastrophic damage from Katrina.⁶³ The month after Katrina, Mississippi implemented an existing moratorium statute that significantly altered the creditors’ ability to foreclose in the two-year period after the storm.⁶⁴ A similar regulatory device to alleviate postdisaster mortgage credit distress, employed during the Farm Crisis of the 1980s, is mandatory mediation.⁶⁵ Legislatively-ordered moratoria or mediation check creditors from exercising wholesale their rights which otherwise would be available under the contractual documents and the precrisis legal regime. By contrast, in Louisiana creditors retained all rights that they had before the storm and, as this Section will discuss, in the case of default could easily and quickly seek foreclosure on the debtor’s property either through ordinary or executory proceedings.⁶⁶

1. Ordinary Proceedings

There are two principal methods of enforcing a real estate mortgage in Louisiana: ordinary and executory proceedings.⁶⁷ Ordinary proceedings in Louisiana are similar to the traditional judicial foreclo-

tractual relationship; (2) if so, whether the state has a significant and legitimate public purpose behind the regulation; and (3) whether the state’s adjustment of the rights and responsibilities of contracting parties is based on reasonable conditions and is of a character that is appropriate to the public purposes. *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983).

In the 1980s, agricultural states began to enact retroactive statutes that impacted creditors’ ability to foreclose. *See generally* Robert M. Lawless, Note, *The American Response to Farm Crises: Procedural Debtor Relief*, 1988 U. ILL. L. REV. 1037. Many of these were struck down as constitutionally impermissible. *See, e.g., Arnold*, 426 N.W.2d at 161 (striking down Iowa act); *Fed. Land Bank of Wichita v. Bott*, 732 P.2d 710, 718–19 (Kan. 1987) (finding that Kansas Farm Family Rehabilitation Act was unconstitutional); *Fed. Land Bank of Wichita v. Story*, 756 P.2d 588, 593 (Okla. 1988) (striking down Oklahoma Mortgage Foreclosure Moratorium Act). Some initiatives, however, did survive constitutional scrutiny. *See, e.g., Laue v. Prod. Credit Ass’n*, 390 N.W.2d 823, 830 (Minn. Ct. App. 1986) (upholding state mandatory mediation requirement).

⁶³ *See infra* notes 137–150 and accompanying text.

⁶⁴ *See infra* notes 137–150 and accompanying text.

⁶⁵ *See* Lawless, *supra* note 8, at 19 (suggesting that mandatory mediation might be appropriate in the post-Katrina context).

⁶⁶ *See infra* notes 67–135 and accompanying text.

⁶⁷ LA. CODE CIV. PROC. ANN. art. 3721 (2003) (“A conventional mortgage is enforced by ordinary or executory proceedings.”).

sure process which is available in common law states.⁶⁸ After a default, the mortgagee can enforce the mortgage by first obtaining a judgment against the mortgagor and then by executing the judgment, which would involve sale of the property through a sheriff's sale after the issuance of a writ of *feri facias*.⁶⁹ Ordinary proceedings may be required where the supporting evidence prevents a mortgagee from using the much more expeditious method of executory proceedings or where, given the underlying mortgage documentation, executory proceedings are not available.⁷⁰ Summary judgment is available, and prejudgment seizure of the property may occur through a writ of sequestration.⁷¹ By requiring a mortgagee, however, to obtain a legal judgment against the debtor and then to execute upon the judgment, ordinary proceedings are costly when measured in terms of time, money, and judicial resources.⁷²

2. Executory Process

In addition to ordinary process, Louisiana has a unique foreclosure process, based in the civil law, known as executory process.⁷³

⁶⁸ Every state makes judicial foreclosure available to foreclosing creditors, and in slightly under half (40%) of the states it is the exclusive or generally used method of foreclosure. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 7.11, at 558 (4th ed. 2001). The remaining states also allow power of sale foreclosures where the property is sold by private sale. *Id.* § 7.19, at 581–85 (discussing the basic elements of private sales). Louisiana does not authorize private sales, although executory process has characteristics similar to private sales, such as less burdensome notice requirements and expedited procedures. *See id.* at 582–83 (discussing “less rigorous” notice requirements and reduced procedures typical of power of sale statutes). The absence of state supervision, the limited opportunities to contest the sale, and the limited notices typical of common law power of sale foreclosures raise policy concerns regarding their basic fairness. *See id.* at 584–85 (outlining limitations in state powers of sale); *id.* § 7.30, at 642 (raising need for a “workable foreclosure system that is efficient, fair and constitutional”).

⁶⁹ LA. CODE CIV. PROC. ANN. art. 3722 (2003 & Supp. 2007) (requiring a mortgagee to obtain first a judgment against the mortgagor and then to execute the judgment). Ordinary proceedings are governed by Book II of the Louisiana Code of Civil Procedure. *See, e.g.*, LA. CODE CIV. PROC. ANN. art. 851 (2005) (setting forth that ordinary proceedings are governed by Book II).

⁷⁰ *See* M. THOMAS ARCENEUX ET AL., MORTGAGE FORECLOSURE IN LOUISIANA 30 (1990) (“[Ordinary] process may be necessary where there are defects in proof that do not permit the use of executory process.”).

⁷¹ *Id.* at 31; *see* LA. CODE CIV. PROC. ANN. art. 3501, 3571 (2003); LA. REV. STAT. ANN. §§ 9:5136–:5140 (2007).

⁷² *See* Patrick S. Ottinger, *Enforcement of Real Mortgages by Executory Process*, 51 LA. L. REV. 87, 90–91 (1990).

⁷³ *See* LA. CODE CIV. PROC. ANN. art. 3721 (2003). Because executory process is a civil law method for realizing on collateral, Louisiana—the only civil law jurisdiction in the United States—stands alone among the states in having the procedure.

Executory process can shorten substantially the period within which a creditor can dispose of the collateral after a default by the mortgagor.⁷⁴ Theoretically, a creditor can cause the sale of a mortgagor's property in as little as forty-five days from initiating legal proceedings, with minimal notice to the debtor and limited opportunities for the debtor to contest the proceedings.⁷⁵ By contrast to ordinary process, the use of executory process to enforce a mortgage can be far more expeditious and cost effective for the creditor because of the procedure's swiftness and the ease with which a sale can be compelled.⁷⁶ As is inherent, however, with most devices that seek to protect creditors' interests and reduce the costs associated with realizing on collateral, executory process exacts a toll on Louisiana mortgage debtors. Although the process has been found by courts to meet the bare constitutional minimums of due process, even in ordinary times the use of executory process to foreclose upon consumer mortgages raises critical policy concerns over basic fairness to consumer debtors.⁷⁷

a. *History and Development*

Executory process, which like ordinary process still involves a sheriff's sale of the property,⁷⁸ derives from Spanish procedural law.⁷⁹

⁷⁴ See Ottinger, *supra* note 72, at 92–94.

⁷⁵ *Id.* (breaking down the steps taken in executory process foreclosures and the time periods allotted for each step).

⁷⁶ See *id.* at 90–91.

⁷⁷ See *infra* note 134 and accompanying text.

⁷⁸ Executory process therefore cannot be viewed as an exact equivalent of powers of sale in common law states because in executory process the state still compels and conducts the sale. By contrast, in a power of sale the state is involved in a private sale only in very limited degrees. See NELSON & WHITMAN, *supra* note 68, § 7.27, at 628–34 (discussing state action in private sales). Many of the expeditious procedures found in executory process, however, mirror those afforded under some power of sale regimes. Compare *infra* notes 93–123 and accompanying text (procedures for executory process), with NELSON & WHITMAN, *supra* note 68, § 7.19, at 581–85 (laying out procedures for typical foreclosure under power of sale). Because the state is unquestionably involved in executory process, there is state action and the constitutional minimums of the Due Process Clause apply. By contrast, some power of sale regimes do not raise constitutional issues, irrespective of the regime's basic fairness, depending on the degree of state involvement over the private sale. See NELSON & WHITMAN, *supra* note 68, § 7.23–.30 (discussing constitutional issues raised by powers of sale).

⁷⁹ Henry G. McMahon, *The Historical Development of Executory Procedure in Louisiana*, 32 TUL. L. REV. 555, 560 (1958). The common law procedure most similar to executory process is the *cognovit actionem* (“he has confessed the action”), which permits a confession of judgment only *after* the debt has matured. *Id.* at 555; see also Michael A. Mayhall, Note, *Executory and Special Proceedings: Executory Process, Attachment and Sequestration*, 22 LOY. L. REV. 190, 192 (1975). Even in those actions, a creditor is still required to obtain a judg-

Unlike common law jurisdictions, historically Louisiana generally recognizes confessions of judgment made prior to the maturity of the obligation and the presumed legal enforceability of predefault confessions of judgment is the justification for the swift procedures allowed under executory process.⁸⁰ The civilian affection toward confessions of judgment and toward expeditious means to enforce debts extends deep into the history of civil law jurisdictions, even though that history admittedly promotes the “[r]uthless severity in the enforcement of indisputable obligations” in a manner that might be considered inconsistent with common law principles of equity and fairness.⁸¹

Executory process is an *in rem* action and does not seek a personal judgment against the debtor.⁸² Where available, it allows the *ex parte* “seizure and sale of property, without previous citation⁸³ and judgment, to enforce a mortgage . . . evidenced by an authentic act⁸⁴ importing a confession of judgment.”⁸⁵ Thus, executory process for the most part circumvents the judicial proceedings normally required prior to seizing and selling the debtor’s property under ordinary process.

ment against the debtor. Mayhall, *supra*, at 192. The confession of judgment found in a *cognovit* note is self proving and allows the creditor’s attorney to have judgment entered against the debtor. *Id.* Defenses available to debtor are limited to those of lack of consent in the execution of the note, such as fraud, error, or duress. *Id.*

⁸⁰ LA. CODE CIV. PROC. ANN. art. 2631 cmt. b (2002) (“The common law rule prohibiting confessions of judgment prior to the maturity of the obligation does not affect executory procedure in Louisiana. In an oblique fashion, the organic law of the state recognizes the validity of confessions of judgment made for the purposes of executory procedure.”).

⁸¹ McMahan, *supra* note 79, at 556–61 (quoting ARTHUR ENGELMANN, A HISTORY OF CONTINENTAL CIVIL PROCEDURE 498–501 (Robert Wyness Millar ed., 1927)) (discussing civil law historical antecedents of modern Louisiana executory process).

⁸² Ottinger, *supra* note 72, at 92. A mortgagee may still obtain a deficiency judgment after executory process, but only where prior to the sheriff’s sale a proper appraisal of the encumbered property had been made. *See id.*; *see also infra* notes 124–132 and accompanying text (discussing appraisals and deficiency judgments). Henry McMahan asserted in 1958 that because executory process does not result in personal judgment against the mortgagor, it provides certain advantages both to mortgagee and mortgagor. McMahan, *supra* note 79, at 570.

⁸³ “Citation” is defined as a court-issued writ that commands a person to appear at a certain time and place to do something demanded in the writ. BLACK’S LAW DICTIONARY 260 (8th ed. 1999).

⁸⁴ An “authentic act” is defined as a “writing executed before a notary of public . . . in the presence of two witnesses, and signed by each party who executed it, by each witness, and by each notary public before whom it was executed.” LA. CIV. CODE ANN. art. 1833 (1987 & Supp. 2007). Thus, a notarized confession of judgment clause inserted in a typical mortgage would serve the purpose of establishing the right to use executory process to enforce a Louisiana mortgage. *See id.*

⁸⁵ LA. CODE CIV. PROC. ANN. art. 2631 (2002).

It is the execution of an authentic (that is, notarized) act that imports a confession of judgment which is the key to a mortgagee's acquisition of the right to use executory proceedings. A mortgage imports a confession of judgment when "the obligor therein acknowledges the obligation secured thereby, . . . and confesses judgment thereon if the obligation is not paid at maturity."⁸⁶ These confessions are usually found in the boilerplate of consumer mortgages.⁸⁷ The effect of the notarized confession of judgment is that a mortgagee may seize the property from the debtor, even without a legal determination that there has been a failure of payment.⁸⁸ This is because the documentation itself provides the proof that "the debtor has already confessed judgment on the obligation before a public officer; that this

⁸⁶ *Id.* art. 2632.

⁸⁷ Although the terminology may vary slightly among mortgages, the following confession from a mortgage studied for this Article provides an example of the confession of judgment that creates a right to use executory proceedings. The clause, Paragraph 23 of a standard form mortgage, is in ordinary font on page ten of a twelve page mortgage. With such placement, it is highly likely that no one but the most sophisticated consumers would even notice the clause, much less ascertain its meaning:

23. **Foreclosure.** Following Lender's acceleration of payment, Lender may commence appropriate foreclosure proceedings under this Security Instrument under ordinary or executory process, under which Lender may cause the Property to be immediately seized and sold; with or without appraisal, in regular session of court or in vacation, in accordance with Applicable Law. For purposes of foreclosure under executory process procedures, Borrower confesses judgment and acknowledges to be indebted to Lender for all sums secured by this Security Instrument, in principal, interest, costs, expenses, attorneys' fees of 25.00% of the sums due under the Note and other fees and charges. To the extent permitted by Applicable Law, Borrower waives: (a) the benefit of appraisal as provided in Article 2332, 2336, 2723 and 2724 of the Louisiana Code of Civil Procedure, and all other laws with regard to appraisal upon judicial sales; (b) the demand and three days' delay as provided in Articles 2639 and 2721 of the Louisiana Code of Civil Procedure; (c) the notice of seizure as provided under Articles 2293 and 2721 of the Louisiana Code of Civil Procedure; (d) the three days' delay provided under Articles 2331 and 2722 of the Louisiana Code of Civil Procedure; and (e) all other benefits provided under Articles 2331, 2722 and 2733 of the Louisiana Code of Civil Procedure and all other articles not specifically mentioned above. Borrower agrees that any declaration of fact made by an authentic act before a notary public and two witnesses by a person declaring such facts to be within his or her knowledge, will constitute authentic evidence of such facts for purposes of foreclosure under Applicable Law and for purposes of La. R.S. § 9:3504(D)(6).

Sample Mortgage Document, ¶ 23 (on file with the Boston College Law Review), available at http://www.bc.edu/schools/law/lawreviews/bclawreview/Past_Issues.html.

⁸⁸ See *McDonough v. Fost*, 1 Rob. 295, 297 (La. 1842). The right to seize immediately the property, however, may not be accomplished through self help. *ARCENEUX ET AL.*, *supra* note 70, at 47.

confession is entitled to at least prima facie judicial recognition; and that its enforcement should be arrested in the same manner as the enforcement of a judgment is arrested."⁸⁹ Thus, a contractual predefault confession of judgment by a mortgagor is effectively viewed as a waiver of the mortgagor's right to a routine adversarial hearing, unless the mortgagor can raise a valid defense.⁹⁰ The state's initial role is largely reduced to verifying whether the documents are in proper form.⁹¹ There must simply be "a determination by a judge or clerk of court that the submitted evidence is both authentic and sufficient to permit the seizure and sale of the encumbered property."⁹²

b. *Procedure and Defenses*

The creditor initiates executory proceedings by filing a petition that is supported by the required authentic evidence in a court of competent jurisdiction and proper venue.⁹³ The basic authentic evidence required in support of the petition is comprised of proof of the debt, proof of security for the debt, and proof of the creditor's right to use executory process.⁹⁴ The documents required to be included in authentic form with the petition are: the note or other document evidencing the obligation; the mortgage, including a confession of judgment clause; and any other act, order of court, or other item necessary to complete the proof of mortgagee's right to use executory process.⁹⁵

Once the necessary evidence is filed along with the creditor's petition in the proper venue, the judge or clerk of court reviews the sufficiency of the evidence in order to determine whether it warrants the issuance of a writ of seizure and sale of the mortgaged property.⁹⁶ Sig-

⁸⁹ McMahon, *supra* note 79, at 556.

⁹⁰ Buckner v. Karmack, 272 So. 2d 326, 330 (La. 1973).

⁹¹ See Mayhall, *supra* note 79, at 191.

⁹² See *id.*

⁹³ LA. CODE CIV. PROC. ANN. art. 2634 (2002). Under Article 2633, an action "may be brought . . . in the parish where the property is situated." *Id.* art. 2633.

⁹⁴ *Id.* art. 2635.

⁹⁵ *Id.*; see also ARCENEUX ET AL., *supra* note 70, at 20–21 (describing documentary evidence required to accompany petition). Although generally the basic mortgage documents need to be authentic, as defined *supra* note 84, certain evidence need not be authentic, such as evidence that supports the breach of the obligations under the mortgage and acceleration thereof. See LA. CODE CIV. PROC. ANN. art. 2637 (2002) (describing categories of evidence which need not be authentic).

⁹⁶ LA. CODE CIV. PROC. ANN. art. 2638 (2002); Mayhall, *supra* note 79, at 196. It is critical that a mortgagee who is seeking to enforce a mortgage via executory process comply with the requirement to submit authentic evidence of each required act. ARCENEUX ET AL., *supra* note 70, at 20. Executory process is recognized as a harsh remedy, which requires

nificantly, to obtain a writ of seizure and sale via executory process, it is unnecessary to serve a copy of the initial petition on the mortgagor.⁹⁷ Thus, if the documents are in order, the writ of seizure can be obtained quickly after filing the petition,⁹⁸ even without advance notice to the debtor, and the process for effecting a sheriff's sale of the mortgaged property can ensue immediately.⁹⁹

Louisiana law does provide a debtor with the ability to raise defenses in an executory proceeding, such as defenses related to the lack of required authentic evidence or defenses related to the underlying debt and default.¹⁰⁰ A debtor's defenses may be raised through a suspensive appeal,¹⁰¹ an injunction,¹⁰² or an action to declare the sheriff's

strict compliance with the letter of law. *See, e.g.*, *Ross v. Brown Title Corp.*, 356 F. Supp. 595, 598 (E.D. La. 1973) (collecting authority), *aff'd*, 412 U.S. 934 (1973); *SAMCO Mortgage Corp. v. Armstrong*, 579 So. 2d 521, 523 (La. Ct. App. 1991). Therefore, to justify an order of seizure and sale "every muniment of title and every link of evidence in an executory proceeding must be in authentic form." *ARCENEUX ET AL.*, *supra* note 70, at 20 (citing *Bank of St. Charles and Trust Co. v. Great S. Coach Corp.*, 424 So. 2d 462 (La. Ct. App. 1982)). If a defect in creditor's evidence exists, such as a variance between the note sought to be enforced and the note described in the mortgage, then the creditor will be denied the use of executory process. Mayhall, *supra* note 79, at 191. In those instances, the creditor must rely on ordinary proceedings to enforce the claim. *Id.*

⁹⁷ *See* *Snow v. Trotter*, 3 La. Ann. 268, at *1 (La. 1848). Prior to the repeal of Louisiana Civil Code of Procedure Article 2639, if the creditor's petition and evidence were prima facie valid, then the court would issue a demand for payment to the debtor. *See* LA. CODE CIV. PROC. ANN. art. 2639 (2002) *repealed by* 2003 La. Acts 1072, § 2. Article 2639 concerned demand for payment and stated that "[b]efore issuing the writ of seizure and sale, the clerk shall issue a demand upon the defendant for payment of the amount due and all costs of court." *Id.*

⁹⁸ LA. CODE CIV. PROC. ANN. art. 2638 ("If the plaintiff is entitled thereto, the court shall order the issuance of a writ of seizure and sale commanding the sheriff to seize and sell the property affected by the mortgage or privilege, as prayed for and according to law."). Hypothetically, the issuance of Notice of Seizure could occur within a day after filing of the petition. Ottinger, *supra* note 72, at 92.

⁹⁹ *See infra* notes 109–123 and accompanying text.

¹⁰⁰ Mayhall, *supra* note 79, at 198. For a detailed discussion of the debtor's available strategies for defending itself in executory proceedings, see *id.* at 197–203.

¹⁰¹ LA. CODE CIV. PROC. ANN. art. 2642 (2002); Mayhall, *supra* note 79, at 198–99. A suspensive appeal "suspends any action in relation to the seizure until the determination of the merits of the appeals." *Ross*, 356 F. Supp. at 599. Raising defenses through a suspensive appeal is often cost prohibitive for the debtor because the debtor must furnish security exceeding by one half the debt secured by the mortgage sought to be enforced. Mayhall, *supra* note 79, at 198. Thus, most frequently the debtor will contest the order of seizure and sale by seeking an injunction. *See id.* at 198–99; *see also Ross*, 356 F. Supp. at 599–600 (discussing the procedures for instituting an action to enjoin the seizure and sale of property and the security requirements in injunction cases).

¹⁰² LA. CODE CIV. PROC. ANN. art. 2642; Mayhall, *supra* note 79, at 199–200. The procedure for obtaining injunctive relief in an executory proceeding is set forth in Articles 3601–3613 of the Louisiana Code of Civil Procedure. Mayhall, *supra* note 79, at 199. An injunction

sale a nullity.¹⁰³ An appellate court also may address evidentiary issues, such as lack of authentic evidence, even where no error was assigned.¹⁰⁴ If the debtor has no defense to the obligation, the proceeding remains an *ex parte* one.¹⁰⁵ If the debtor asserts a defense, the action is converted to a contradictory proceeding, where the debtor bears the burden of proving the defense.¹⁰⁶ In addition to defending or otherwise contesting the executory process action after receiving notice of the proceedings, a debtor has the option of paying the debt up to the time of the actual sheriff's sale, and that payment effectively terminates the executory proceeding.¹⁰⁷

will only be granted where the debt secured by the mortgage is extinguished or is legally unenforceable or where the rules governing executory process have not been adhered to. *Id.* No security is required if the injunction is requested solely for one or more of the following reasons: (1) the debt secured by the mortgage is extinguished or prescribed; (2) the enforcement of the debt secured by the mortgage is premature, either because the original term allowed for payment, or any extension thereof granted by the creditor, had not expired at the time of the institution of the executory proceeding; (3) the act evidencing the mortgage is forged, or the debtor's signature thereto was procured by fraud, violence, or other unlawful means; (4) the defendant in the executory proceeding has a liquidated claim to plead in compensation against the debt secured by the mortgage; or (5) the order directing the issuance of the writ of seizure and sale was rendered without sufficient authentic evidence having been submitted to the court, or the evidence submitted was not actually authentic. *Id.* An injunction may be granted on any other valid ground, but security must be furnished by the applicant. *Id.*

¹⁰³ Mayhall, *supra* note 79, at 200–03 (discussing case law regarding actions to declare a sheriff's sale a nullity). There are limits on postsale actions. A suit to annul the sale based on a fundamental defect may be brought at any time, provided that the property is still possessed by the mortgagee and the prescription period has not passed. Mayhall, *supra* note 79, at 201; *see also* *Lumar v. Mid State Trust II*, 749 So. 2d 712, 714 (La. Ct. App. 1999) (acknowledging that a mortgagor “may bring a direct action to annul the sale if the mortgagee is the adjuducatee at the sale and is still in possession of the property”). Moreover, an action to annul a sale made as a result of defective executory proceedings can be maintained only where the defect concerns the “essential foundation” of the right to use the executory process. Mayhall, *supra* note 79, at 201. Such a foundational defect might exist where the authentic evidence required under the creditor's petition is absent or defective, or where the creditor's right to enforce the mortgage is in question. *See id.*

¹⁰⁴ Mayhall, *supra* note 79, at 197 (citing *Am. Budget Plan, Inc. v. Small*, 229 So. 2d 190, 192 (La. Ct. App. 1969); *Gen. Motors Acceptance Corp. v. Anzelmo*, 64 So. 2d 417, 419 (La. 1953)).

¹⁰⁵ McMahon, *supra* note 79, at 556.

¹⁰⁶ *Id.*

¹⁰⁷ Mayhall, *supra* note 79, at 197; *see also* LA. CODE CIV. PROC. ANN. art. 2340 (2002) (providing that sale of the property may be prevented by payment to the sheriff of the judgment, with interests and costs).

c. *Sale of Property*

Whether proceeding under ordinary or executory process, the actual sale of mortgaged property to satisfy the debt secured occurs through a sheriff's sale.¹⁰⁸ In an executory proceeding, the sale is compelled through a writ of seizure and sale,¹⁰⁹ and in an ordinary proceeding, through a writ of *feri facias*.¹¹⁰ In executory proceedings, after the issuance of a writ of seizure and sale and the sheriff's receipt of the writ, the sheriff can seize the property. At that point, the sheriff is required to give notice to the defendant of the seizure.¹¹¹ This notice to the defendant debtor is mandatory and cannot be waived.¹¹² Because it is not waivable, in executory proceedings this notice conceivably could be the first notice that a debtor receives alerting the debtor that formal legal proceedings have started. A second copy of the notice of seizure is filed for recordation in the mortgage records of the parish in which the property is located.¹¹³ In the real property context, the "seizure" is not actual but rather constructive, through the notices that are served on the debtor and filed in the public record.¹¹⁴

A sale technically can occur soon thereafter. Two advertisements are required prior to the sale.¹¹⁵ The first advertisement must be published at least thirty days before the date of the sale.¹¹⁶ The second advertisement must be published no earlier than seven days nor later than one day prior to the sale.¹¹⁷ If a creditor wishes to pursue a deficiency

¹⁰⁸ For a detailed overview of the sale process, see ARCENEUX ET AL., *supra* note 70, at 27–30.

¹⁰⁹ LA. CODE CIV. PROC. ANN. art. 2638 (2002). It is these writs, together with writs of *feri facias*, that appear in the real property records and that provide the basis for the analysis of post-Katrina foreclosure activity in Part II of this Article.

¹¹⁰ See *id.* art. 2291. As with the writs of seizure and sale, these writs are recorded in the Recorder of Mortgages office, see *infra* notes 113–114 and accompanying text.

¹¹¹ LA. CODE CIV. PROC. ANN. art. 2721 (2002).

¹¹² LA. CODE CIV. PROC. ANN. ch. 4, summary of procedural changes (1960), ¶ 1. Notice is only statutorily required to be given to the defendant in the proceedings. LA. CODE CIV. PROC. ANN. art. 2721(B) (requiring notice of seizure to be served "upon the defendant"). Any person may, for a fee, receive notice of seizure of mortgaged property. LA. REV. STAT. ANN. § 13:3886 (2006). One who desires to be notified of the seizure of specific immovable property may file a request for such notice in the mortgage records of the parish where the immovable property is located. *Id.*

¹¹³ LA. REV. STAT. ANN. § 13:3853 (2006).

¹¹⁴ *Ross*, 356 F. Supp. at 598.

¹¹⁵ LA. CODE CIV. PROC. ANN. art. 2331 (2002) (procedures for notice of sale under writ of *feri facias*); *id.* art. 2722 (2002) (advertisement rules for executory proceedings); see also LA. REV. STAT. ANN. § 43:203(2) (2007) (rules for timing of legally-required notices).

¹¹⁶ LA. REV. STAT. ANN. § 43:203(2).

¹¹⁷ *Id.*

judgment, discussed below, the property must be appraised.¹¹⁸ Appraisal is also required in a sale under ordinary process when the creditor intends to pursue a deficiency judgment.¹¹⁹ The sheriff's sale may take place at the court house, or some other public place in the vicinity of the court house, on any Monday, Wednesday, Friday, or Saturday after the advertisements have properly run.¹²⁰ The property is sold for cash and subject to all encumbrances superior to the lien of the seizing creditor.¹²¹ The minimum price for a bid in an executory proceeding after an appraisal is two-thirds of the appraised value of the property.¹²² Again, at any time prior to the final transfer of the property, a debtor may redeem the property by payment of the debt in full.¹²³

d. *Appraisals and Deficiency Judgments*

After distribution of the proceeds from the judicial sale, a creditor may obtain a judgment against the debtor for any deficiency due on the debt only where the property has been sold after appraisal.¹²⁴ Not less than seven days prior to the sale, the sheriff must:

serve written notice on the debtor and on the seizing creditor
. . . directing each to name an appraiser to value the property
and to notify the sheriff of his appointment prior to the time

¹¹⁸ LA. CODE CIV. PROC. ANN. art. 2723 (2002); LA. REV. STAT. ANN. § 13:4106 (2006) (prohibiting deficiency judgment when sale is made without appraisal).

¹¹⁹ LA. CODE CIV. PROC. ANN. art. 2332 (2002 & Supp. 2007). When the property seized, however, is subject to a mortgage in which the debtor has waived the right to appraisal and the judgment recites that the right of the judgment creditor to enforce the judgment is limited to the collateral or security for the amount of such judgment, there is no requirement that the property seized be appraised prior to the sale. *Id.* art. 2332(A). Thus, if a mortgage on immovable property contains a waiver of appraisal and is sought to be enforced under a writ of *fiery facias* and the plaintiff prays for a sale without appraisal, the sale can be conducted without appraisal. *Id.*

¹²⁰ LA. REV. STAT. ANN. § 13:4341 (A) (2006). The precise timing rules in § 13:4341 do not apply to sales in Orleans parish. *Id.* (excepting Orleans parish from § 13:4341).

¹²¹ ARCENEUX ET AL., *supra* note 70, at 29; *see* LA. CODE CIV. PROC. ANN. art. 2335 (2002).

¹²² ARCENEUX ET AL., *supra* note 70, at 29–30; *see* LA. CODE CIV. PROC. ANN. art. 2336 (2002). In the event that the sale fails to obtain a bid that is at least two-thirds of the appraised price, the sheriff must readvertise the sale of the property in the same manner as for an original sale, and the same delay must elapse. LA. CODE CIV. PROC. ANN. 2336. At the second offering, the property shall be sold for cash for whatever the highest bid brings. *Id.*

¹²³ ARCENEUX ET AL., *supra* note 70, at 30; *see* LA. CODE CIV. PROC. ANN. art. 2340 (2002).

¹²⁴ LA. CODE CIV. PROC. ANN. arts. 2771, 2723 (2002).

stated in the notice, which shall be at least four days, exclusive of holidays, prior to the time of the sale.¹²⁵

Thus, by having a right to name an appraiser, the debtor has the opportunity to participate in the appraisal process. The appraisals of “the debtor and seizing creditor shall be made and delivered to the sheriff at least two days, exclusive of holidays, prior to the time of the sale.”¹²⁶ The law does not require that the appraiser be a disinterested party.¹²⁷ Where appraisal is required but not provided for by a party, the sheriff or any interested party may make an *ex parte* application for the court to designate an appraiser.¹²⁸

The appraisal requirement may be waived in the act of mortgage or in the proceedings.¹²⁹ If the property is not appraised, however, the creditor loses the right to a deficiency.¹³⁰ Thus, waiving the right to an appraisal in effect is a waiver of the right to a deficiency judgment. Where a deficiency is available because an appraisal has occurred and insufficient proceeds have been received from a sheriff’s sale, a creditor may either convert the executory proceeding to an ordinary proceeding¹³¹ or, once a sale of the property has occurred through executory process, proceed by new suit under ordinary process.¹³²

3. Conclusion: Constitutionality and Fairness

As can be seen, Louisiana’s legal regime for foreclosing upon real estate mortgages is, without question, exceptionally procreditor. Few of the common consumer protection mechanisms for real estate fore-

¹²⁵ LA. REV. STAT. ANN. § 13:4363(A) (2006).

¹²⁶ *Id.*

¹²⁷ See *Consol. Loans, Inc. v. Guercio*, 200 So. 2d 717, 728 (La. Ct. App. 1967).

¹²⁸ LA. REV. STAT. ANN. § 13:4363(B).

¹²⁹ LA. CODE CIV. PROC. ANN. art. 2723 (“Prior to the sale, the property seized must be appraised in accordance with law, unless appraisal has been waived . . .”); *id.* art. 2332 (2002 & Supp. 2007) (permitting waiver of appraisal in sales under a writ of *fieri facias*).

¹³⁰ LA. CODE CIV. PROC. ANN. art. 2771 (creditor has the right to a deficiency only if property sold under executory proceedings was appraised pursuant to Article 2723), *id.* 2332 (no appraisal requirement in ordinary process where “the right of the judgment creditor to enforce the judgment is limited to the collateral or security for the amount of such judgment”). In the first year of post-Katrina foreclosure activity in Orleans Parish, waiver of appraisal, and thus waiver of the right to pursue a deficiency, was common although certainly not even close to universal. Of the 241 case files reviewed for actions through August 2006, 104 files (43.15%) indicated that appraisal was waived. Thus, in those cases creditors were left with the sale proceeds as the only source of recovery. See *supra* notes 51–53, 55.

¹³¹ See LA. CODE CIV. PROC. ANN. art. 2644 (2002).

¹³² ARCENEUX ET AL., *supra* note 70, at 31.

closure are present in the Louisiana scheme. For example, devices such as broad antideficiency legislation, extended time periods for the foreclosure process, statutory (postsale) redemption rights, or close judicial supervision of the process are notably absent from the Louisiana scheme. In addition, executory process allows for the quick sale of the property with sparse notice to the debtor. At a minimum, notice need only be given to the debtor when the sale process has in fact begun. The financially distressed debtor has little time to take affirmative steps to stop the action.

Executory process does afford a defaulting debtor some protections, notably the opportunity to raise an appeal, to file an injunction, or to try to annul a sale. Through these devices a debtor can defend against the creditor's attempt to enforce the mortgage and sell the property. Also, filing for bankruptcy protection can temporarily stop the creditor's action through the automatic stay imposed by the Bankruptcy Code.¹³³ The effectiveness of these mechanisms to forestall foreclosure, however, is based upon an assumption that the debtor is well represented, well informed, and able to act quickly. These conditions are unlikely to be present in many of the usual cases, and certainly are even less likely after a disaster of the magnitude of Hurricane Katrina.

As with any process that imposes costs on debtors, there are benefits to the regime that inure principally to Louisiana creditors. For example, executory process offers an expeditious and cost-effective means for enforcing a creditor's mortgage rights available through the mere inclusion of a notarized confession of judgment in the boilerplate of mortgage documents, executed at the time of closing and prior to any default by the debtor. Even though executory process is an *in rem* proceeding, a creditor can preserve its ability to seek a personal deficiency judgment against the debtor by having the mortgaged property appraised prior to the sheriff's sale. Thus, unless a debtor is judgment proof, the creditor can pursue all avenues to recover the full amount of the debt. In sum, the Louisiana scheme is one that preserves and enhances creditors' rights and interests in the foreclosure process, even at a cost to defaulting debtors.

Although harsh to Louisiana mortgagors, the constitutionality of Louisiana's executory process regime has survived challenges. From as early as 1893, the U.S. Supreme Court has recognized the constitution-

¹³³ 11 U.S.C. § 362 (2000).

ality of executory process.¹³⁴ Constitutional minimums aside, however,

¹³⁴ Mayhall, *supra* note 79, at 205. In 1893 in *Fleitas v. Richardson*, the U.S. Supreme Court reviewed an appeal from executory proceedings which had been stayed. 147 U.S. 538, 548 (1893). In dismissing the case for want of jurisdiction, *see id.* at 549, the Court subtly suggested that Louisiana's procedures were constitutionally acceptable. *See id.* at 544 (comparing executory process to common law proceedings "never denied to be due process of law"). In the late 1960s and early 1970s, the Court did begin to strike down state seizure statutes that were somewhat similar to Louisiana's executory process legislation. *See, e.g.,* *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 342 (1969). For example, in 1969, the Court found that a Wisconsin statute allowing prejudgment garnishment of wages failed to meet the due process requirements of the Fourteenth Amendment. *Id.* Soon thereafter, the Court struck down on due process grounds a state statute that allowed suspension of a driver's license and registration when a driver failed to post a security bond covering possible damages claimed by parties injured in an accident. *Bell v. Burson*, 402 U.S. 535, 543 (1971). A majority of the Court in *Bell v. Burnson* in 1971 found that, in order to comport with due process requirements, a hearing must occur as to whether there was a reasonable possibility of a judgment against the driver prior to suspension of the license. *Id.* at 542. A year later in 1972, in *Fuentes v. Shevin*, the Court struck down a state prejudgment replevin statute that authorized summary seizure of consumer goods on *ex parte* application of a creditor under a conditional sales contract. 407 U.S. 67, 96 (1972).

In 1974 in *Mitchell v. W.T. Grant Co.*, however, the Court appeared to back away from its earlier liberality in striking down state summary procedures. *See* 416 U.S. 600, 611–18 (1974). *Mitchell* involved the question of the constitutionality of a Louisiana statute that allowed a state official to seize a consumer buyer's personal property purchased under an installment sales contract upon the seller's *ex parte* application for a writ of sequestration. *See id.* at 601; *see also* LA. CODE CIV. PROC. ANN. art. 3571 (2003). A bare majority of the *Mitchell* Court found that the Louisiana sequestration system met constitutional requirements. 416 U.S. at 619–20. In the Court's view, the regime served an important interest of the seller because without immediate sequestration of the property, the buyer could ostensibly transfer or damage the goods, to the seller's detriment. *See id.* at 608–09. Further, the Court noted that the sequestration procedure limited the harm to the buyer because the buyer could immediately defend the sequestration of the property or sue for damages if the dispossession was found to be wrongful. *See id.* at 606; *see also* LA. CODE CIV. PROC. art. 3506 (2003). Additionally, the sequestration process provided an important protection by allowing the buyer a full hearing on the issue of possession. *Mitchell*, 416 U.S. at 610. The Louisiana sequestration statute was seen as a balanced and constitutional approach toward accommodating the interests of all parties concerned. *Id.* In a concurring opinion, Justice Powell stated that the *Mitchell* decision "withdraws significantly from the full reach of [*Fuentes*], and to this extent I think it fair to say that the *Fuentes* opinion is overruled." *Id.* at 623 (Powell, J., concurring).

Shortly before *Mitchell*, the Louisiana Supreme Court had held that Louisiana's executory process regime met federal due process requirements even in light of the recent U.S. Supreme Court cases of *Sniadach v. Family Financial Corp. of Bay View*, *Bell*, and *Fuentes*. *See Buckner*, 272 So. 2d at 331; *see also Ross*, 356 F. Supp. at 605. Unlike the state statutes at issue in those cases, Louisiana's executory process regime was based upon an execution of an authentic confession of judgment by a debtor, which was held to be similar to *cognovit* clauses recognized as constitutional by the U.S. Supreme Court. *See Buckner*, 272 So. 2d at 331; *see also D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972) (generally upholding the constitutional validity of *cognovit* clauses). Moreover, in the Louisiana Supreme Court's view, the executory process regime allowed a debtor the means to contest the issuance of a writ of seizure and sale prior to the final sale of the property. *See Buckner*, 272 So. 2d at 331.

the overall fairness of executory process as the standard foreclosure mechanism in Louisiana for consumer mortgages must be seen as open to question, even when functioning in a normal real estate market. Use of such a procedure in the context of foreclosure of real property mortgages post-Katrina simply multiplies the fairness concerns that executory process inevitably raises. In the disaster situation, Louisiana's foreclosure regime threatened, and still threatens, to add to the potential victimization of the survivors of Katrina, in the name of creditor ease and efficiency.¹³⁵

There are alternatives. One avenue for limiting the possible impact of procreditor foreclosure regimes when applied to severe local crises is to address the potential fairness problems legislatively. This was the approach the State of Mississippi adopted after Katrina, as the next Section discusses.¹³⁶

B. *A Contrasting Approach to Disasters, Defaults, and Foreclosures:
The Mississippi Moratorium*

Unlike Louisiana, the State of Mississippi—whose Gulf Coast communities were also ravaged by Katrina—had a foreclosure moratorium statute on the books that specifically addressed mortgage default concerns after a disaster.¹³⁷ Under a 1980 Mississippi state law, the Governor has the power after a natural disaster to alter significantly the foreclosure process in the state in order to provide victims

Thus, by contrast to the state statutes struck down on due process grounds by the U. S. Supreme Court, Louisiana's executory process regime met the requirements of the Federal Constitution. *Id.* The U.S. Supreme Court's decision in *Mitchell*, which validated Louisiana's *sequestration* statute, simply acted to validate the conclusion arrived at by the Louisiana Supreme Court after *Sniadach* and *Fuentes* that the state executory process regime comported with the minimum notice and opportunity for a hearing required under the Due Process Clause. *See, e.g.*, *Hood Motor Co. v. Lawrence*, 320 So. 2d 111, 114 (La. 1975) (reaffirming constitutionality of executory process post-*Mitchell*); *see also* Mayhall, *supra* note 79, at 205–09 (arguing in favor of the constitutionality of executory process).

¹³⁵ Executory process was by far the preferred route for foreclosing upon property in Orleans Parish post-Katrina during the period studied for this Article. Of the 241 case files reviewed for the period from October 2005 to August 2006, 225 (93.36%) were brought under the state's executory process procedures. For an explanation of the research conducted to arrive at these figures, see *supra* notes 51–53, 55.

¹³⁶ *See infra* notes 137–150 and accompanying text.

¹³⁷ MISS. CODE ANN. §§ 89-1-301 to -329 (1999). Although Louisiana could consider enacting a statute similar to Mississippi's, that action could implicate federal constitutional issues by altering rights that existed prior to the storm. *See supra* note 62 for a discussion of case law in this area. Mississippi's ban, however, is not a complete bar to foreclosure and, thus, arguably raises less constitutional concerns than an absolute ban.

relief from possible foreclosure.¹³⁸ Once the President of the United States declares that a major disaster exists in Mississippi, the Governor may file a disaster declaration that makes specific reference to the mortgage relief statute, thus making applicable special foreclosure procedures for persons directly damaged by the disaster in counties covered by the Governor's declaration.¹³⁹ After Katrina, Mississippi Governor Haley Barbour invoked this statute by a proclamation issued on October 4, 2005.¹⁴⁰

Under Mississippi's statute, after a proper declaration by the Governor, all foreclosures are required to be started in chancery court, thus suspending private sales otherwise available under a deed of trust.¹⁴¹ This initially allows for more intensive state supervision of the foreclosure process by centering the process in the court system. Moreover, because private sales raise significant fairness concerns even in ordinary times,¹⁴² the disaster relief statute eases the possible amplification of those concerns when applied to the postdisaster context by eliminating routine private sales in the wake of a serious disaster.

Mortgage debtors can obtain lengthy relief from possible foreclosure under the statute. Debtors¹⁴³ may initially enjoin the foreclosure proceedings started by the creditor by filing a sworn petition that affirmatively sets forth that the debtor is unable to pay the sums in arrears; that refinancing of the debt has, after a diligent effort, been unsuccessful; and that "because of the destruction or damage to the improvements on the mortgaged premises or because of economic conditions brought about by the effects of such . . . natural disaster" the property's fair market value has depreciated in value more than 15% from its predisaster value.¹⁴⁴ If the mortgagee moves to dissolve

¹³⁸ MISS. CODE ANN. §§ 89-1-301 to -329. The Mississippi statute is entitled "Relief from Inequitable Mortgage Foreclosures, Execution Sales and the Like after Declared Emergency or Disaster." *See id.* The law was enacted a year after the 1979 flooding of the Pearl River that inundated many homes. JOHN C. UNDERWOOD, JR., CLOSE-UP VIEW OF HURRICANE KATRINA: THE IMPACT ON MISSISSIPPI FORECLOSURES (2006), <http://www.usfi.org/AM/Template.cfm?Section=Home&template=/CM/HTMLDisplay.cfm&ContentID=2760>. The first time a Governor of Mississippi invoked the statute was in October 2005 following Hurricane Katrina. *Id.*

¹³⁹ MISS. CODE ANN. § 89-1-301.

¹⁴⁰ UNDERWOOD, *supra* note 138; *see* Press Release, State of Mississippi Attorney General, Attorney General Announces Mortgage Foreclosure Relief (Dec. 20, 2005), *available at* <http://www.ago.state.ms.us/pressreleases/mortgageforeclosure.pdf>.

¹⁴¹ MISS. CODE ANN. § 89-1-301.

¹⁴² *See supra* note 68.

¹⁴³ The right to stay the foreclosure proceedings also extends to anyone claiming under the mortgagor, or anyone liable for the mortgage debt. MISS. CODE ANN. § 89-1-301.

¹⁴⁴ *Id.*

the injunction, the mortgagor must prove all the material facts averred to in the affidavit by a preponderance of the evidence.¹⁴⁵

If the mortgagor meets his burden of proof, the mortgagor is entitled to have the mortgage foreclosure proceedings enjoined for a period established by the court or chancellor, which may not exceed two years from the date of the Governor's initial declaration.¹⁴⁶ This, in effect, allows a possible two-year stay of any foreclosure, which gives the debtor time to recover, financially and otherwise. The relief afforded is only available, however, if the debtor pays "carrying charges" on the property, comprised of reasonable rental value, taxes, insurance, and interest on the indebtedness.¹⁴⁷ If the debtor defaults on the obligation to pay carrying charges, or commits waste on the property after the injunction is issued, the postponement of the final sale will end thirty days after such default.¹⁴⁸ After the expiration of the two-year period, all past due principal, interest, taxes, and other charges are due and, if not paid, a final order for sale may occur.¹⁴⁹ Finally, actions for deficiency judgments are not permitted until the debtor has had an opportunity to stay the foreclosure proceedings under the preceding sections.¹⁵⁰ If proceedings are in fact stayed, the debtor then can utilize the statute to delay the institution of an action for a deficiency.

The Mississippi statute is incomplete as a form of comprehensive mortgage relief, because it simply allows a sale to be deferred for two years, and in the meantime effectively converts a loan to an interest-only loan. It also applies only where the mortgaged property has been damaged, and thus does not directly address the needs of debtors who have suffered extreme economic downturns, such as job or business loss, due to the disaster. Nonetheless, though limited, the moratorium statute does afford some means to distressed mortgagors for avoiding

¹⁴⁵ *Id.* No bond is required to be posted in order to have the preliminary injunction issued, and attorney's fees incurred by the creditor in seeking to dissolve the injunction are not recoverable unless the "petition was filed solely for the purpose of hindering and delaying collection of the mortgaged debt and without reasonable grounds therefor." *Id.*

¹⁴⁶ *Id.* § 89-1-303 (1999).

¹⁴⁷ *Id.* For some financially distressed debtors, these charges may be a significant burden, nonetheless. The carrying charge payments are to be determined by the court of chancellor and are payable at a time and manner as the judge finds "just and equitable." *Id.*

¹⁴⁸ *Id.* § 89-1-305. The debtor may avoid the resumption of foreclosure if the debtor can explain (to the court's satisfaction) that the default occurred due to "casualty, inevitable accident, or other good reason wholly beyond the control of the defaulter" and that it will be remedied within a "reasonably short period." *Id.*

¹⁴⁹ *Id.* § 89-1-303.

¹⁵⁰ *Id.* § 89-1-305.

foreclosure. The requirement that all property sales must start in the chancery courts gives the state greater control over, and leverage against, possible unfair foreclosures than might otherwise be the case if private sales were to continue in the postdisaster market. If the two-year stay is granted, the lengthy time period allows distressed borrowers the opportunity to address the effects, financial or otherwise, of the disaster without threat of imminent foreclosure and to recover their bearings prior to the possibility arising of being permanently deprived of their property. Finally, the Mississippi statute creates a structured and planned response to the situation of distressed debtors in disaster regions in that state and provides clear rules for defending against default and foreclosure after the disaster.

Even though the relief is limited, Mississippi does provide some structured relief for debtors in the affected areas. As was discussed earlier in this Part, however, Louisiana mortgage debtors were not the beneficiaries of such a structured approach to addressing concerns over postdisaster foreclosure. Rather, New Orleans debtors were left to market forces and the mortgage industry for protection. Many New Orleans debtors, however, received significant relief from these market players, as the data evidencing the stall in foreclosure actions in the year following Katrina, discussed earlier, suggests. The next Section discusses the post-Katrina response of the mortgage industry to default and foreclosure.

C. *The Market Response*

Soon after the widespread damage from Hurricane Katrina became apparent, a number of organizations involved in the national mortgage market announced special disaster policies for mortgages in affected areas.¹⁵¹ A large number of mortgages secured by property in the affected area were governed by these policies. HUD announced a moratorium on foreclosures of FHA- and VA-insured mortgages in areas damaged by Katrina; a moratorium which subsequently was extended through June 30, 2006.¹⁵² If a mortgagor made a written com-

¹⁵¹ See, e.g., News Release, U.S. Dep't of Hous. & Urban Dev., HUD Announces 120-Day Extension of Foreclosure Moratorium to Assist Hurricane Victims in the Gulf Coast Area, (Feb. 27, 2006), available at <http://www.hud.gov/news/release.cfm?content=pr06-022.cfm&CFID=957212&CFTOKEN=35896321> [hereinafter HUD News Release].

¹⁵² *Id.* The extended moratorium applied to all FHA-insured loans in presidentially declared disaster areas eligible for individual assistance as a result of Hurricanes Katrina, Rita, and Wilma. *Id.* After the expiration of the moratorium, there was a sharp increase in the number of foreclosure sales started. See *supra* Table I.A.

mitment with their mortgage holder or servicer “to develop and implement a plan to resolve delinquent loan payments,” foreclosure could not begin while the moratorium was in effect.¹⁵³ HUD also implemented a “Mortgage Assistance Initiative” for affected homeowners who wished to repair their property and continue using it as their residence.¹⁵⁴ For those homeowners, the FHA would advance up to twelve mortgage payments, interest free, for borrowers in default, which in effect would defer the borrower’s mortgage payments for a year.¹⁵⁵ Sums advanced under the program would be secured by a junior mortgage on the property, and the repayment of the sums advanced would not be required until the first mortgage was paid in full.¹⁵⁶

Some initiatives, albeit quite limited, came from the regulators of financial institutions.¹⁵⁷ Federal bank regulators “encouraged” regulated lending institutions to be flexible and to “work with” mortgagors devastated by the storm.¹⁵⁸ For example, immediately after the storm, the Federal Deposit Insurance Corporation, by letter to its regulated entities, suggested that banks consider positively their customers’ requests to extend repayment terms or restructure loans, or for the ability to skip payments or otherwise to ease repayment terms.¹⁵⁹ The regulators’ response, however, was couched only as a vague suggestion

¹⁵³ HUD News Release, *supra* note 151. The written commitment that was required by March 31, 2006 did not have to contain all final terms of the agreed upon repayment plan, but rather only a commitment “to develop a specific plan of action and work with the mortgage holder/servicer to implement it.” *Id.* Borrowers and mortgagees then had until June 30, 2006, to develop a specific plan, which might encompass loan forbearance, mortgage modifications, partial claims, mortgage assistance, or deeds in lieu of foreclosure. *Id.*

For a critique of the HUD program, which focused on assisting homeowners with sufficient resources and employment, see Popkin et al., *supra* note 24, at 21. With such a limited focus, those homeowners who had been financially wrecked by the storm were unlikely to qualify for the program. *See id.*

¹⁵⁴ *See generally* Questions and Answers Regarding the FHA Mortgage Assistance Initiative, <http://www.hud.gov/offices/hsg/sfh/nsc/rep/mai/qas.pdf> (last visited June 24, 2007).

¹⁵⁵ *See id.* at 1. Because financial ability to repay was a key factor in qualifying for the loan assistance, again the initiative’s impact was limited.

¹⁵⁶ *See id.* at 2.

¹⁵⁷ *See, e.g.*, Press Release, Fed. Deposit Ins. Corp. (“FDIC”), Responding to Hurricane Katrina: FDIC Encourages Banks to Work with Those Hit Hard, (Aug. 31, 2005), *available at* <http://www.fdic.gov/news/news/press/2005/pr8405.html> [hereinafter FDIC Press Release].

¹⁵⁸ *Id.*

¹⁵⁹ *See id.*; *see also* Joint Press Release, Office of the Comptroller of the Currency, Bd. of Governors of the Fed. Reserve Sys., Fed. Deposit Ins. Corp., Office of Thrift Supervision & Nat’l Credit Union Admin., Federal Financial Regulators Announce Public Service Campaign to Help Hurricane Victims (Jan. 13, 2006), *available at* <http://www.fdic.gov/news/news/press/2006/pr06006.html>.

that institutions should consider such actions, and the response therefore fell far short of aggressive federal regulatory relief.¹⁶⁰

The responses of the Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac”) were far less vacillating and predatory than those of federal regulators. Fannie Mae and Freddie Mac, government sponsored enterprises (“GSEs”), are key entities in the secondary mortgage market.¹⁶¹ They are active in the purchasing, packaging, and securitization of consumer mortgage loans in the United States. For mortgages in devastated areas that were held by these organizations, significant losses could be borne by the investors who held instruments backed by those mortgages, and, where applicable, the insurers of those securities. The GSEs therefore had an obvious incentive to attempt to reduce or otherwise mitigate those losses.¹⁶²

For Fannie Mae and Freddie Mac borrowers in New Orleans, the GSEs established a moratorium on mortgage foreclosure, which was ultimately extended through August 31, 2006.¹⁶³ In addition to sus-

¹⁶⁰ FDIC Press Release, *supra* note 157. For example, when outlining the possible institutional responses that banks might consider given the impact of the storm on borrowers, the FDIC stated that regulated banks should “do what they can do to assist in the process” and that “[e]ach situation is unique; not all banks will be able to provide [certain options] and some may provide additional services for their customers. The key is for customers to open a dialogue to find out how their bank can help them recover from this natural disaster.” *Id.*

¹⁶¹ See David Reiss, *Subprime Standardization: How Rating Agencies Allow Predatory Lending to Flourish in the Secondary Mortgage Market*, 33 FLA. ST. U. L. REV. 985, 1005–06 (2006). The GSEs are not governmental organizations, but rather are private companies that are federally chartered. *Id.* The GSEs’ former and historical ties to, and the privileges they receive from, the federal government give them a governmental flavor beyond that of a truly private company. *Id.* at 1010.

¹⁶² In 2005 Freddie Mac reported a 28% drop in profit, in part due to losses related to \$133 million in Hurricane Katrina-related charges. Anny Shin, *Freddie Mac Profit Drops 28% on Katrina, Accounting Costs*, WASH. POST, May 31, 2006, at D04. Fannie Mae initially reported estimated after-tax losses associated with Hurricanes Katrina and Rita to be in a range of \$250 million to \$400 million, but later reduced those estimates to a range of \$170 million to \$280 million. Fed. Nat’l Mortgage Ass’n, Notification of Late Filing (Form 12b-25), at 12 (May 9, 2006), available at http://www.fanniemae.com/media/pdf/newsreleases/W20890_2156_C_sub.pdf.

¹⁶³ See Letter from Fannie Mae, to All Fannie Mae Single-Family Mortgage Servicers (May 11, 2006), available at <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2006/110306.pdf> [hereinafter May 11 Fannie Mae Lender Letter]; Press Release, Freddie Mac, Freddie Mac Extends Hurricane Relief Until Aug. 31, 2006 in Hardest Hit Gulf Coast Counties and Parishes (May 2, 2006), available at http://www.freddie.com/news/archives/servicing/2006/20060502_hurricane_relief.html. The moratorium for Orleans Parish (among other severely hit parishes and counties) began immediately after the storm and originally was intended to end December 1, 2005. See Bulletin from Freddie Mac, to All Freddie Mac Sellers and Servicers 6 (Oct. 7, 2005), available at <http://www.freddie.com>.

pending payments due on mortgages for the first three months following Katrina,¹⁶⁴ the GSEs made forbearance and payoff policies for affected loans available to their servicers, streamlined the requirements for loan modifications, addressed the proper handling of insurance proceeds, and prevented reporting of delinquencies to credit reporting agencies.¹⁶⁵ The GSEs also made clear that servicers were not to collect a prepayment penalty when a defaulted mortgage was paid off during the period, regardless of the source of the funds, and strongly encouraged servicers not to collect prepayment penalties allowed under the terms of the documents in other circumstances.¹⁶⁶ Thus, borrowers with mortgages held by GSEs could avoid the operation of prepayment terms in their mortgages.¹⁶⁷ Finally, the GSEs modified their underwriting requirements for new loans in the af-

com/sell/guide/bulletins/pdf/bll100705.pdf [hereinafter Oct. 7 Freddie Mac Bulletin]. As the full scope of the devastation became apparent, the moratoria were incrementally extended. In November 2005 the Freddie Mac moratorium was extended through February 28, 2006. Bulletin from Freddie Mac, to All Freddie Mac Sellers and Servicers 1 (Nov. 30, 2005), *available at* <http://www.freddiemac.com/sell/guide/bulletins/pdf/bll113005.pdf>. In February, it was extended to May 31, 2006. Bulletin from Freddie Mac, to All Freddie Mac Sellers and Servicers 3 (Feb. 10, 2006), *available at* <http://www.freddiemac.com/sell/guide/bulletins/pdf/bll021006.pdf> [hereinafter Feb. 10 Freddie Mac Bulletin]. In May, it was extended to August 31, 2006. Bulletin from Freddie Mac, to All Freddie Mac Sellers and Servicers 4 (May 1, 2006) (on file with the Boston College Law Review), *available at* http://www.bc.edu/schools/law/lawreviews/bclawreview/Past_Issues.html [hereinafter May 1 Freddie Mac Bulletin]. Similar extensions occurred with regard to the Fannie Mae moratorium. *See* May 11 Fannie Mae Lender Letter, *supra*, at 1–2.

Even after the moratoria expired, GSE consent was required prior to the servicer initiating (or continuing) any foreclosure actions in the covered areas. *See* Letter from Fannie Mae, to All Fannie Mae Single-Family Mortgage Sellers and Servicers (Nov. 21, 2006), *available at* <https://www.efanniemae.com/sf/guides/ssg/anmltrs/pdf/2006/110606.pdf> (extending approval requirement until March 31, 2007); Bulletin from Freddie Mac, to All Freddie Mac Sellers and Servicers 2–3 (Nov. 7, 2006), *available at* <http://www.freddiemac.com/sell/guide/bulletins/pdf/bll110706.pdf> (same). Through this requirement, strong secondary market oversight continued even after the moratoria expired.

¹⁶⁴ Those months were September, October, and November. Without any additional forbearance, those payments were required to be paid in December. Thus, on December 1, 2005, New Orleans homeowners were required, absent additional forbearance by the lender or servicer, to tender four months of mortgage payments to make their loans current. For low and moderate income borrowers, and for the financially distressed victims of the storm, this was a significant burden if not, in some cases, simply impossible.

¹⁶⁵ *See generally* Letter from Fannie Mae, to All Fannie Mae Single-Family Mortgage Sellers and Servicers (Feb. 14, 2006), *available at* <https://www.efanniemae.com/sf/guides/ssg/anmltrs/pdf/2006/110106.pdf> [hereinafter Feb. 14 Fannie Mae Lender Letter] (detailing disaster relief policies); Oct. 7 Freddie Mac Bulletin, *supra* note 163 (same).

¹⁶⁶ Feb. 14 Fannie Mae Lender Letter, *supra* note 165, at 6; Feb. 10 Freddie Mac Bulletin, *supra* note 163, at 1.

¹⁶⁷ Legislation ultimately was enacted in Louisiana to bar the collection of prepayment penalties when prepayment was from funds received under insurance. *See supra* note 60.

fectured areas, thereby ensuring that access to poststorm mortgage finance was made available¹⁶⁸ and undertook other initiatives to increase the availability of mortgage credit in distressed regions.¹⁶⁹

In sum, the mortgage industry did provide significant relief for financially distressed borrowers in the year following Katrina. Mortgage debtors who were financed through mainstream credit markets therefore obtained significant protection provided by regulators and the mortgage industry. As will be discussed in Part IV, not all borrowers today are viable participants in the mainstream credit markets.¹⁷⁰ These borrowers received few of the direct benefits of the initiatives discussed in this Section. In addition to the market initiatives discussed in this Section, however, other circumstances such as the possibility of recovery of losses under insurance policies created strong disincentives weighing against the institution of foreclosure actions.

D. *The Role of Insurance and Other Casualty Loss Payments*

Even apart from moratoria and other market interventions, the sheer magnitude of the losses caused by Katrina could itself have played a significant role in checking possible foreclosure on defaulted loans. After the storm and the subsequent mortgage defaults, creditors were left with a highly unattractive option of foreclosing on useless, blighted property in an area where market values were highly uncertain. The lender's purchase of the property at any foreclosure sale¹⁷¹ could bring along with it the real property concerns regarding environmental issues and clean-up responsibilities, and could require decisions regarding gutting or demolishing the property, unusual incidents of ownership not likely to be palatable for many lenders. In cases where insurance proceeds or other casualty loss payments were likely to be received by the mortgagor and thus, as loss payee, by the mortgagee, swift foreclosure on the property was a significantly less attractive option after default than waiting for possible payments re-

¹⁶⁸ See, e.g., May 1 Freddie Mac Bulletin, *supra* note 163, at 1–2.

¹⁶⁹ E.g., Press Release, Freddie Mac, Senators Landrieu, Vitter Hail Freddie Mac, LHFA's \$36 Million (Mar. 13, 2006), available at http://www.freddiemac.com/news/archives/corporate/2006/20060313_lamrb.html (reporting on Freddie Mac's purchase of tax exempt mortgage bonds from the Louisiana Housing Finance Agency, which would provide below-market mortgages and down payment and closing costs for underserved borrowers).

¹⁷⁰ See *infra* notes 182–230 and accompanying text.

¹⁷¹ A likely possibility given the uncertainties of the post-Katrina market in the period immediately following the storm.

lated to casualty losses to the property and for the real property market to begin to recover.

Insurance proceeds provided one typical route for recovery of losses.¹⁷² As was discussed earlier, the predominant type of property damage sustained by New Orleans homeowners was damage due to flooding caused by the defective levees or, in some cases in eastern parts of the city, due to storm surge.¹⁷³ This type of damage generally is covered under a homeowner's flood insurance policy rather than the homeowner's general hazard or windstorm policies.¹⁷⁴ Whether or not a homeowner had flood insurance is therefore a key factor in determining the ultimate property losses borne by the homeowner and, because mortgagees are loss payees on the policies, by the mortgagee.

To illustrate the critical role that insurance can play in the lender's calculus of possible responses to default, compare first the situations of two homeowners who own their property free and clear, and who suffered in each case a loss of \$100,000 due to catastrophic flooding. The uninsured homeowner who desired to rebuild would have the burden

¹⁷² For uninsured or underinsured borrowers with severely damaged property, payments of up to \$150,000 are possible under the state-run program set up to distribute federal grant money. Louisiana's "Road Home" website can be found at <http://www.road2la.org>.

¹⁷³ See *supra* notes 22–40 and accompanying text.

¹⁷⁴ Extensive litigation is underway in the Gulf Coast states that addresses the question of whether the water-related losses under Katrina were excluded under the owners' hazard or windstorm policies. See, e.g., *Broussard v. State Farm Fire & Cas. Co.*, No. 1:06CV6 LTS-RHW, 2007 U.S. Dist. LEXIS 2611, at *5 (S.D. Miss. Jan. 11, 2007); see also *In re Katrina Canal Breaches Consol. Litig.*, 466 F. Supp. 2d 729, 733 (E.D. La. 2006), *rev'd*, No. 07-30119, 2007 WL 2200004 (5th Cir. Aug. 2, 2007). The issue is critical for those homeowners who did not have flood insurance, as suggested in the discussion in the text. Most hazard insurers in the area claimed that the majority of Katrina losses were attributable to rising water and thus were excluded under the terms of a standard hazard or windstorm policy. See, e.g., *Broussard*, at *5. In an important decision in January 2007, the U.S. District Court for the Southern District of Mississippi found that because the insurance company provided no evidence that supported its argument that a homeowners' losses were exclusively attributable to water damage, the homeowners could recover for their losses to the limits of their windstorm policy. *Id.*, at *6–8. The jury in *Broussard v. State Farm Fire & Casualty Co.* awarded the plaintiff owners \$2.5 million in punitive damages. *Id.* at *8. This was later reduced by the court to \$1 million. *Judge Reduces Jury's Katrina Award*, WCCO.COM, Jan. 31, 2007, http://wcco.com/katrina/hurricanekatrina_story_031162354.html. Similar litigation is underway in Louisiana. See generally *In re Katrina Canal Breaches Consol. Litig.*, 466 F. Supp. 2d 729. Because in Orleans Parish most of the water damage was due to the broken levees, property owners argued that the damage caused thereby is not excluded under their policies' rising water exclusion, because that exclusion contemplated *naturally* rising water. E.g., *id.* at 747–53 (construing policies against insurers and finding in favor of coverage where ambiguity exists in policy). The district court agreed with the property owners argument, see *id.*, but the U.S. Court of Appeals for the Fifth Circuit reversed holding that the exclusion unambiguously covered rising water due to any cause. *In re Katrina Canal Breaches Litig.*, 2007 WL 2200004, at *25.

of reconstructing the property, at either their own expense or through government support. By contrast, the insured homeowner would receive \$100,000 in insurance proceeds to help cover the reconstruction cost. In either case, the homeowner could sell the property, assuming that there is a market for it, and not reconstruct or repair the damages.

Insured mortgage debtors are in a similarly advantageous position vis-à-vis uninsured mortgage debtors. Where flood insurance was obtained related to a mortgage, the proceeds paid out under that policy could be used to repair the property or simply to pay off the mortgage loan and avoid foreclosure entirely. The reconstruction costs could then be refinanced through participation in the subsidized lending programs targeted at the victims of Katrina discussed in the previous Section. Thus, a debtor/homeowner with \$100,000 in flood losses and an outstanding \$80,000 mortgage who received \$100,000 in insurance proceeds could simply cure any default and avoid foreclosure by prepaying the mortgage with the insurance proceeds. An uninsured or underinsured debtor (and, thus, their mortgagee), however, is in a more precarious position than their insured counterparts. That debtor is either in default, or facing an imminent default, under the mortgage, yet has no insurance proceeds to pay off the mortgage. At the same time, they are still liable under the terms of the mortgage for the amounts outstanding. It is these uninsured or underinsured debtors, with limited incentives and often little means to repay that debt, who in the abstract are most likely to face possible foreclosure after flood-related disasters. Where catastrophic flooding loss has occurred, the existence of flood insurance for many debtors may mean the difference between default, and possible foreclosure, and being allowed to walk away from a paid-in-full debt.

The New Orleans metropolitan area is one of the most active participants in the national flood insurance program, with almost 67% of property owners participating.¹⁷⁵ In Orleans Parish, 65% of the flooded homes were insured under the flood insurance program.¹⁷⁶ Because most parts of New Orleans lie in a Special Flood Hazard Area, flood insurance was a requirement under many mortgages in the affected areas.¹⁷⁷ For distressed mortgage debtors in these circumstances, de-

¹⁷⁵ Meitrodt & Mowbray, *supra* note 43.

¹⁷⁶ *Id.* The percentage of insured homes in flooded areas of the city ranged from 43% to 78%. *Id.*

¹⁷⁷ See Flood Disaster Protection Act of 1973, 42 U.S.C. § 4012a (2000). Insurance is legally required only “in an amount at least equal to the outstanding principal balance of the loan or the maximum limit of coverage made available under the Act with respect to the

fault and foreclosure is not, in the usual case, an immediate likelihood because the debtor can simply use the insurance proceeds to retire the mortgage loans. Given the high rate of participation in the national flood insurance program by New Orleans residents, the potentially high possibility of foreclosure was reduced.

Some of the most severely flooded areas in Orleans Parish, however, were not designated as those in which flood insurance was required as a condition to obtaining a mortgage.¹⁷⁸ When the matter of securing flood insurance is left to individual choice, rather than required as a condition to a mortgage, evidence suggests that participation rates drop significantly.¹⁷⁹ It is, first and foremost, these unin-

particular type of property, whichever is less." *Id.* at § 4012a(b)(1). Thus, if a homeowner has property valued at \$200,000 but has an outstanding mortgage balance of \$100,000, and insured the property at the legal minimum (\$100,000), the homeowner would receive a maximum insurance payout of \$100,000 for his flooded property. Although the flooded-out homeowner would be able to pay off the mortgage with these proceeds, they would lose much of the equity they had in the property and be left seeking resources for reconstruction.

In recent years, Fannie Mae and Freddie Mac had been raising their flood insurance requirements for the New Orleans area, but Freddie Mac's attempt to impose a requirement that would have required insurance for the *higher* of the unpaid principal balance or 80% of the home's replacement cost was unsuccessful. *See* Rebecca Mowbray, *Flood Insurance Requirement Proves Shrewd for Local Bank but Not All Lenders Mandate Coverage*, NEW ORLEANS TIMES PICAYUNE, Mar. 19, 2006, at A-1. Although this move would have increased a borrower's monthly mortgage costs (and thus negatively impacted housing affordability), it would have protected the borrower's equity in the case of flood loss. *Id.* Local lenders' internal underwriting policies regarding whether flood insurance was required when not mandated by the Flood Disaster Protection Act, and the amount of insurance required beyond the legal minimum, varied. *See id.* Some lenders required flood insurance irrespective of whether insurance was federally required. *Id.* Stricter underwriting standards had a negative impact on such lenders' businesses. *See id.* For instance, Boyd Boudreaux, the president of Fidelity Homestead, a prominent local lender, stated that his company had lost business because it required everyone to spend more money on flood insurance while Fidelity's competitors made customers buy flood insurance only if the government required it. *Id.* Insured borrowers who ultimately paid the added cost, however, were thankful for their choice of lender after Katrina. *Id.* As Boudreaux explained, "[w]e had people come into this office and literally hug us . . ." *Id.*

¹⁷⁸ *See* Meitrodt & Mowbray, *supra* note 43 (discussing current requirements of the Flood Disaster Protection Act and impact on homeowners after Katrina).

¹⁷⁹ *See id.* When homeowners with mortgages were not required to secure flood insurance, the participation rate in the flood insurance program fell to 18%. *Id.* Various reasons (or rationalizations) contribute to such low participation when participation is voluntary. *Id.* When debtors are told that insurance is optional because the property is not in a designated flood area, they perhaps construe the risk as negligible. *See id.* Financial reasons also might contribute to the low rate of participation, because flood insurance, even if voluntary, increases the overall expense of homeownership. *See id.* Where a mortgage has been paid off, economic reasons are frequently cited as a reason for the homeowner to discontinue flood insurance. *Id.*; *see also* Jeffrey Meitrodt, *Adjacent Homes Worlds Apart, Only One*

sured debtors with property in areas where flood insurance was not required who are significantly at risk for possible default and foreclosure. Given that even uninsured debtors are potential beneficiaries of other payments due to their casualty loss, for example, through government programs or through litigation regarding casualty insurance coverage, the possible receipt of proceeds in the future could act to defer creditor foreclosure as an immediate strategy for uninsured properties, because mortgagees could potentially receive repayment of the debt under those programs.¹⁸⁰ Facing a choice between foreclosure on devastated property with an uncertain value or, on the other hand, waiting to determine whether insurance or other recoveries could reduce the losses otherwise likely to be incurred by the lender, it would seem that lenders would evaluate positively the latter option.

E. Summary

To summarize the discussion to this point, after Hurricane Katrina a number of forces created conditions where default and, ultimately, possible foreclosure on New Orleans mortgages was quite likely. The added financial burdens related to the storm and its aftermath enhanced the likelihood of mortgage default. The damage to the city's economic base and resulting loss of employment and income added to the risk of a forthcoming mortgage crisis. Finally, the devastating property damage throughout most of the city created a significant default risk, most particularly for uninsured debtors who were unable to rely upon flood insurance proceeds to pay off their outstanding mortgage debts or to rebuild their property.

For these reasons, in the year following Katrina, mortgage defaults in impacted areas surged.¹⁸¹ For New Orleans residents, this occurred within a legal regime that affords quick and easy foreclosure through the use of executory process. As has been discussed, in spite

Owner Had Optional Flood Policy, NEW ORLEANS TIMES PICAYUNE, Mar. 19, 2006, at A-1 (reporting on two adjacent 9th Ward homeowners, one insured and the other uninsured, with the uninsured homeowner stating: "I thought about it, but I could never get the money together to buy the insurance"). A miscalculation of the financial risk assumed due to flooding, particularly when compared to the catastrophic damage ultimately wrought by the failure of the levees, may also be a contributing factor. See Mowbray, *supra* note 177. Although uninsured homeowners might have expected some moderate damage due to possible flooding and could have seen that as a risk they were willing to assume, the scale of Katrina's damage—in many cases water even up to the ceilings of homes for several weeks—was not contemplated by most homeowners. See *id.*

¹⁸⁰ See *supra* notes 172, 174 and accompanying text.

¹⁸¹ See *supra* notes 6, 46 and accompanying text.

of the procreditor legal regime that ensures creditors easy access to the foreclosure process, foreclosures in Orleans Parish stalled in the first year following Katrina. As has been argued, industry moratoria, insurance, and the natural disincentives which weighed against initiating foreclosure under the circumstances may have acted to check the rise in foreclosures that normally would be expected to accompany increased rates of default.

Legislators and policymakers have struggled for decades over the appropriate response for addressing the concerns of financially distressed citizens in a fair and just manner during and after an economic crisis. The situation in New Orleans after Hurricane Katrina was another event in our history that raised these concerns. As has been discussed earlier in this Part, little was done in the way of formal legal intervention to respond to the rash of mortgage defaults that inevitably would occur after a catastrophe of the magnitude of Katrina. Even in the absence of formal legal intervention, however, a foreclosure crisis did not occur in Orleans Parish in the year following Katrina. This indicates that the secondary market-based initiatives following Katrina, when applied in an environment that weighed against foreclosure, successfully protected distressed New Orleans debtors from an unfortunate situation of defending foreclosure actions while attempting to recover from an enormous personal and community disaster. Therefore, the post-Katrina market-based response that sought to assist mortgage debtors in a time of overwhelming crisis can be viewed, with some important limitations, as a success, as the next Part discusses.

IV. SECONDARY MARKET INITIATIVES AND THEIR IMPORTANCE IN ALLEVIATING DISASTER-RELATED FINANCIAL DISTRESS

If, as has just been suggested, secondary market initiatives can work effectively in the postdisaster context to alleviate consumer financial distress, the experience in Orleans Parish in the year following Katrina also highlights some limitations on their utility. As this Part discusses, nonlegal approaches to debtor relief in the period immediately following a crisis show promise as effective devices for addressing debtors' short-term economic concerns. Secondary market responses are, however, limited in scope and duration. Because of their limitations, market responses should not be viewed as a complete answer to the needs of mortgage debtors after a crisis such as Katrina.

A. *The Promise of Secondary Market Initiatives*

The experience in New Orleans immediately after Katrina demonstrates the success that market initiatives can have in checking foreclosure after a disaster. Even in light of a rash of mortgage defaults, because of the moratoria that extended (in the case of Fannie Mae and Freddie Mac loans) through August 30, 2006, foreclosure actions in Orleans Parish were reduced substantially. The requirement following the moratoria that servicers seek GSE approval prior to initiating foreclosure provided a continued check on foreclosure.¹⁸² For borrowers with FHA and VA mortgages, partial relief also existed through the HUD initiatives discussed earlier.¹⁸³ A three-month deferral on mortgage payments temporarily eased debtors' short-term cash flow crises brought about by the immediate economic impact of the storm.¹⁸⁴ These initiatives provided much-needed relief for debtors who were bearing the burden of great personal and financial distress after the storm.

The secondary mortgage market response in the case of Katrina also provided debtors with a coordinated approach that offered a single, centralized solution to what otherwise would have been an intractably complex problem if addressed locally or on a case-by-case basis. Furthermore, such coordinated action was needed. Absent coordination, debtors would have been left with the responsibility to negotiate with their individual creditors or servicers, without guidance or assistance. Also, creditors and servicers would have had to develop their own policies on contacting absentee debtors, and on loan modifications and forbearance issues, leading to inconsistent results at high cost and effort. By dictating a uniform approach for covered loans, the secondary market entities were able to obtain roughly consistent treatment among similarly situated debtors, and to implement payment forbearance programs that would have been difficult, if not impossible, to accomplish on such a widespread basis if handled more locally. In this way, the secondary mortgage market acted effectively to provide a unified, quick, and, through the moratoria, prodebtor response while reducing the efforts that individual borrowers, creditors, and loan servicers might otherwise have had to expend to devise an appropriate solution regarding individual loans.

¹⁸² See *supra* note 163 and accompanying text.

¹⁸³ See *supra* note 152 and accompanying text.

¹⁸⁴ See *supra* note 164 and accompanying text.

The moratoria also acted to counterbalance the potentially unfair effects that Louisiana's harsh foreclosure regime could have had if applied in the postdisaster context. As discussed earlier in this Article, Louisiana's legal regime is one that favors the creditor, perhaps even to the extreme, through its executory process procedures.¹⁸⁵ Without checks, the Louisiana legal regime could have been utilized by creditors to deprive disaster victims of their property with little opportunity to contest those proceedings.¹⁸⁶ Had a wave of foreclosures immediately occurred, that event could have substantially complicated the early days of recovery by burdening a legal system which itself was trying to recover from the storm. By effectively halting the use of state foreclosure laws, the secondary market moratoria served to counterbalance the unfair results that those laws could have invoked in the postdisaster context.¹⁸⁷

In sum, the secondary market actions post-Katrina allowed coordination between the investors, insurers, loan servicers, lenders, and debtors, and offered a coherent plan for addressing mortgage defaults in a fair and equitable manner. By exercising their power in a concerted manner that balanced the needs of all involved, the secondary market was able to address issues that could not have been handled as effectively at the local level. The successful secondary market responses to financial distress after Katrina should not, however, be considered a complete solution to the concerns over the financial stress brought about by disasters, or a substitute for more formal means of alleviating debtor distress. The experience after Katrina also indicates that secondary market approaches have distinct limits in addressing disaster-related financial distress concerns, an issue to which this Article now turns.

¹⁸⁵ See *supra* notes 67–136 and accompanying text.

¹⁸⁶ See *supra* notes 171–180 and accompanying text. As has been discussed, the grave circumstances in the city after the storm also acted as a natural check on foreclosure actions.

¹⁸⁷ For loans that qualified for the secondary market moratoria, the counterbalancing effect was similar to that accomplished through the Mississippi legislation, discussed above, which prohibits private sales in the postdisaster context. In each case, a legal regime is altered postdisaster to limit the potential harshness of the regime when applied to a serious local crisis. See *supra* notes 137–150 and accompanying text. In fact, the GSE actions were *more* effective than the Mississippi legislation because they completely halted foreclosures rather than simply altering parties' rights in the proceedings.

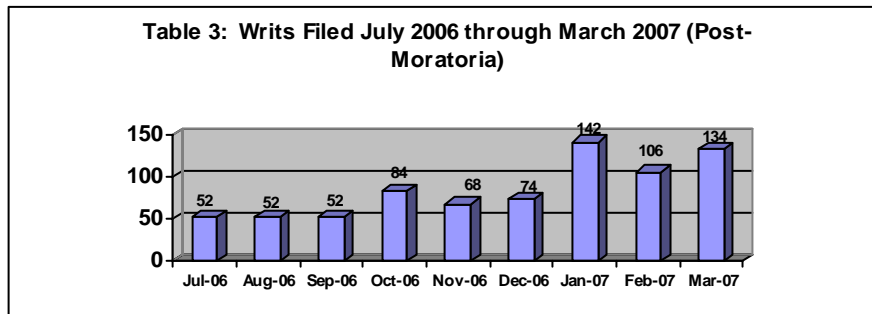
B. *The Limits of Secondary Market Initiatives*

The secondary market initiatives after Katrina no doubt contributed substantially to the reduction of foreclosure actions instituted in Orleans Parish for the year during which moratoria were in effect, if only for the simple reason that foreclosure was not even an option for loans covered by the moratoria. The secondary market, however, was merely dictating to its participants a decision that, under the circumstances, was a quite rational one, and one in the market's own self-interest. After Katrina, it was strongly in the mortgage industry's interest to defer decisions to foreclose upon property. For example, as was discussed earlier, insurance and other casualty loss payments in the end might play a key role in securing the return on mortgage investments, and this possibility points toward adopting a cautious approach to foreclosure.¹⁸⁸ Given the devastation the levee breaches caused in New Orleans, the uncertain real property market, and the uncertainty regarding the value of damaged property, creditors and secondary market entities had every incentive to delay foreclosure. By waiting, matters were not likely to get any worse for creditors and, if time had any effect, it would most likely work to the creditors' advantage. Thus, the secondary market was, for the most part, merely imposing an imminently rational choice generally across the local market.

Simply because secondary market entities acted in the post-Katrina situation does not guarantee that other similar initiatives necessarily will be forthcoming in other circumstances. Nonlegal interventions are obviously always of limited usefulness when compared to formal legal responses for precisely the reason that they are nonlegal, and thus never required. Where the decision to halt or impede foreclosure is not so clearly in the national mortgage market's own interests, similar market approaches to address widespread financial distress that might occur in the future in other circumstances are not assured. In cases where the mortgage market's interests and the debtors' interests are not as closely aligned as they were in the post-Katrina situation, one cannot assume that the secondary market will so aggressively move to assist distressed mortgagors. Although Katrina may have shown that the secondary market *can* effectively address debtor needs in a crisis, the experience says little about whether such initiatives *will* be forthcoming. Secondary market-based initiatives thus suffer from a high risk of uncertainty.

¹⁸⁸ See *supra* notes 171–180 and accompanying text.

In addition, the secondary market moratoria after Katrina offered a short term, albeit much-needed, solution to the immediate concerns of distressed mortgage debtors in the time immediately after Katrina. As was seen in Table 1.A, above, the incidence of the filing of foreclosure-related writs rose as the year progressed.¹⁸⁹ And, when the FHA/VA moratorium expired on June 30, 2006, the number of foreclosure writs jumped substantially.¹⁹⁰ This fact indicates that the moratoria are effective, but it also suggests that moratoria might simply act to delay foreclosure in many cases rather than provide a long-term solution to debtor distress. The following Table 3 shows the incidence of the filing of writs in the Orleans Parish Recorder of Mortgages office after June 30, 2006, continuing through the expiration of the Fannie Mae and Freddie Mac moratoria on August 31, 2006, to the end of January 2007.



The rising number of foreclosures after the moratoria expired, clearly shown in Table 3, suggests that although the moratoria worked well while in effect for the year following Katrina, the industry response did not wholly address the chronic financial distress that may haunt disaster victims for years following the event. Research is beginning to suggest that financial distress does not in many cases manifest itself immediately after the disaster, but rather in the period from two to three years following the disaster.¹⁹¹ The inability of secondary market moratoria to address the long-term concerns of distressed borrowers highlights again their limited utility as a debtor protection device in the postdisaster situation. Though the secondary market moratoria after Katrina may have done much to respond to the short-

¹⁸⁹ See *supra* Table 1.A.

¹⁹⁰ See *supra* Tables 1.A & 1.B.

¹⁹¹ See generally Lawless, *supra* note 8 (finding a pattern of higher bankruptcy filing rates in areas affected by major hurricanes, particularly twelve to thirty-six months after the storm).

term financial effects of the disaster, only the passage of time will demonstrate whether they will contribute effectively toward healing the long-term financial concerns that disaster victims might have.

The upcoming years will reveal whether a foreclosure crisis in Orleans Parish and other affected areas has been averted or merely delayed by the secondary market response after Katrina. Further research is needed on the patterns of foreclosure and bankruptcy in affected areas long after the storm, after the market moratoria of 2005–2006 have passed and creditors are again acting under their own initiative, and while debtors are still laboring under the financial burdens laid on them by the storm. Moreover, given that creditors had little incentive in the period immediately following Katrina to foreclose upon loans and take their losses, it is likely that many loans were restructured in the time immediately following the storm. If so, this was done with highly vulnerable debtors potentially subject to over reaching and abuse. Such further research should also examine whether loan restructurings and modifications entered into after Katrina were conducted in a way that did or did not unfairly impact the debtor. It is an open question, therefore, whether the secondary market initiatives after Katrina provided temporary, but ultimately ineffective, relief for what will turn out to be a long-term chronic problem, or whether they adequately responded to both the short- and long-term concerns of financially distressed debtors.

A final weakness of reliance upon secondary market-based approaches to address financial distress after a disaster is that those approaches are necessarily limited in scope: they only protect debtors who are participants in that market. This limitation is particularly pronounced when evaluating their effectiveness in the New Orleans mortgage market after Katrina, as the next Section discusses.

C. *The Problem of Subprime and Predatory Lending*

The differential impact of Katrina on African-American borrowers and on low- and moderate-income borrowers,¹⁹² when coupled with the secondary market initiatives that emphasized relief to borrowers within traditional prime lending markets, raises another limitation to secondary market responses to debtor distress after disaster. If, as will be discussed, the victims of any particular disaster are likely to be borrowers in markets that do not directly benefit from the initia-

¹⁹² See *supra* notes 26–40 and accompanying text.

tives, the initiatives can fail as an entirely adequate response. The response after Katrina, applied in the context of the New Orleans credit market, illustrates these potential limitations.

1. A Tale of Two Credit Markets

A major development in the home mortgage market since the 1990s has been the explosive growth of the subprime home lending market.¹⁹³ The subprime market acts to fill the demand for credit from higher risk debtors who are unable to qualify for loans from prime creditors. As a general matter, subprime borrowers share one or more of a number of characteristics.¹⁹⁴ Their credit characteristics may prevent them from qualifying for credit from prime lenders under traditional guidelines, due to either a low credit score,¹⁹⁵ nontra-

¹⁹³ See U.S. DEP'T OF HOUS. & URBAN DEV., *UNEQUAL BURDEN: INCOME & RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA* 1-2 (Oct. 18, 2001) <http://www.knowledgeplex.org/kp/report/report/relfiles/usdHUD.pdf> [hereinafter *UNEQUAL BURDEN*] (concluding that from just 1993 to 1998, the number of subprime loans increased ten-fold from 80,000 to 790,000, with a corresponding increase in dollar volume from \$20 billion to \$150 billion). There was a lull in the growth of the subprime origination market during the late 1990s, most likely caused by an industry shakeout that occurred during that period, discussed *infra* note 212, but the market's explosive growth resumed in the early 2000s. See Fed. Deposit Ins. Corp., 2006 Economic Outlook Roundtable: Scenarios for the Next U.S. Recession 43 chart 46 (2006), http://www.fdic.gov/news/conferences/2006_Economic_Outlook/recessionRoundtableTranscript.pdf [hereinafter *FDIC Roundtable*] (bar chart on growth in subprime market from 1996 to 2004); U.S. DEPT. OF HOUS. & URBAN DEV. & U.S. DEPT. OF TREASURY, *JOINT HUD-TREASURY TASK FORCE ON PREDATORY LENDING, CURBING PREDATORY HOME MORTGAGE LENDING* 41, 43-44 (2000), <http://www.huduser.org/publications/hsgfin/curbing.html> [hereinafter *HUD REPORT*] (describing industry shakedown and changing industry fortunes in the late 1990s). In the first half of 2004 subprime lenders had a total market share of 18.2% of total mortgage production. Fed. Reserve Bank of Phila., *Community Development, Subprime Market Reaches Record High Level in First Half of 2004* (2004), <http://phil.frb.org/cca/winter044.html> (summarizing data reported by *Inside B&C Lending*, a subprime trade newsletter).

¹⁹⁴ See *HUD REPORT*, *supra* note 193, at 33-37 (outlining principal characteristics of subprime borrowers).

¹⁹⁵ *Id.* at 33. Although there are a number of credit scoring models, the most common credit score in the consumer credit market is the debtor's "FICO score" (named for Fair Isaac Company, which developed that scoring model). See generally [myFICO.com](http://www.myfico.com), FICO Credit Scores, <http://www.myfico.com/> (Fair Isaac's consumer division). FICO scores range from 350 to 850, and are derived from information on the consumer's credit history available in the consumer's credit report. See *id.* Because there are three consumer credit reporting agencies, a consumer has three credit scores, each based on the information in that report. See *id.* Borrowers with higher scores are considered better credit risks and therefore can qualify for lower interest rate loans. See *id.* By contrast, consumers with lower scores can qualify for credit, if at all, only at much higher rates. See *id.* For example, on February 20, 2007, a consumer with a credit score of 760 or higher could qualify for a thirty year, fixed rate mortgage at a rate of 5.881%. See *id.* A consumer with a credit score

ditional credit or employment histories,¹⁹⁶ or debt-to-income ratios that exceed those of prime borrowers.¹⁹⁷

Although the development of the subprime market in the 1990s has facilitated increased access to credit and expanded opportunities for homeownership,¹⁹⁸ data on the subprime market indicate that the market is centered increasingly on lower income borrowers and on minority borrowers.¹⁹⁹ Low-income and African-American borrowers account for a significant share of the subprime refinance market: for example, government data show that more than half of low-income African-American homeowners refinance their mortgages using subprime loans.²⁰⁰ Some of the overwhelming use of subprime products by minority and low-income borrowers may be related to the higher risk perhaps assumed in lending to such borrowers, based upon legitimate nondiscriminatory credit risk factors. The prevalence of subprime lending among minority and low-income borrowers, however, remains the case even though studies have found that one-third to one-half of all subprime borrowers perhaps could have qualified for prime loans.²⁰¹

of 500–579 would have to pay 9.427% for a similar loan. *See id.* Borrowers with credit scores of less than 650 are typical subprime borrowers. HUD REPORT, *supra* note 193, at 33.

¹⁹⁶ HUD REPORT, *supra* note 193, at 34.

¹⁹⁷ *Id.* A “debt-to-income” ratio measures the amount of the consumer’s income that is dedicated to servicing all consumer debt, including housing debt. *See, e.g.*, Freddie Mac, Buying and Owning a Home, How Much Can You Afford?, http://www.freddiemac.com/corporate/buyown/english/preparing/right_for_you/afford.html (last visited Feb. 27, 2007). Generally a ratio in the mid-thirties is considered ideal. *Id.* (“Mortgage lenders look at whether your total debt is larger than 30–40% of your monthly gross income.”).

¹⁹⁸ FDIC Roundtable, *supra* note 193, at 42 charts 44 & 45. It is estimated that at least 5.1% of mortgagors in the subprime market would not have qualified for a mortgage absent access to subprime credit. *Id.* chart 44. Due to the evolution of the subprime market and other relaxations of traditional underwriting standards (such as allowing high loan to value financing), homeownership expanded almost 8% over the following decade. *Id.* chart 45.

¹⁹⁹ *See* HUD REPORT, *supra* note 193, at 35.

²⁰⁰ *Id.*; *see also* UNEQUAL BURDEN, *supra* note 193, fig.2 (charting the share of subprime refinance mortgages by race of neighborhood). In predominantly white (at least 85% white) neighborhoods, subprime refinance loans constituted 9% of all refinance mortgages. UNEQUAL BURDEN, *supra* note 193, fig.2. By contrast, in predominantly black (at least 75% black) neighborhoods, subprime refinance loans constituted slightly over half (51%) of the total loans. *Id.*

²⁰¹ JAMES H. CARR & LOPA KOLLURI, PREDATORY LENDING: AN OVERVIEW 7 (2001), www.mplp.org/Resources/mplpresource.2006-06-13.4751698248 (discussing Freddie Mac and Fannie Mae estimates (one-third and one-half, respectively) on the number of subprime borrowers who financially could have qualified for prime loans).

In addition, analysis of data released under the Home Mortgage Disclosure Act (“HMDA”)²⁰² also demonstrates that subprime loans are disproportionately concentrated in low-income areas.²⁰³ Yet, even high-

²⁰² 12 U.S.C. §§ 2801–2811 (2000). Since 1989, HMDA has required most lending institutions to disclose “the number and dollar amount of mortgage loans and completed applications involving mortgagors or mortgage applicants grouped according to census tract, income level, racial characteristics, and gender.” *Id.* § 2803(b) (4). HMDA currently applies to many banks, savings associations, or credit unions, with assets in excess of an established threshold, which meet other set requirements regarding location, lending practices, and federal insurance of deposits and/or loans. *See* 12 C.F.R. § 203.2(e) (1) (2002) (definition of “financial institution” under HMDA and implementing regulation). In addition, other types of lending institutions which do significant amounts of mortgage lending may be covered even if they do not meet the test for depository institutions. *See id.* § 203.2(e) (2).

When the HMDA data gathered under the 1989 revisions was compiled and released in the early 1990s, it revealed significant differences in the rate of acceptance and denial of loan applications between racial groups, with black applicants statistically having higher rates of denials than white applicants. *See* Glenn B. Canner & Dolores S. Smith, *Expanded HMDA Data on Residential Lending: One Year Later*, 78 FED. RES. BULL. 801, 806 (1992) (analysis of application data from 1991); Glenn B. Canner & Dolores S. Smith, *Home Mortgage Disclosure Act: Expanded Data on Residential Lending*, 77 FED. RES. BULL. 859, 868 (1991) (analysis of application data from 1990). The implementing regulation for HMDA, Regulation C of the Board of Governors of the Federal Reserve, 12 C.F.R. Part 203, was recently amended to increase the information required to be provided under HMDA. Robert B. Avery, Glenn B. Canner & Robert E. Cook, *New Information Reported Under HMDA and Its Application in Fair Lending Enforcement*, 91 FED. RES. BULL. 344, 344 (2005). Importantly, these amendments to Regulation C require lenders, in the case of higher interest loans, to disclose information regarding loan price data such as interest rates. *See* 12 C.F.R. § 203.4(a) (12) (requiring disclosure of “the difference between the loan’s annual percentage rate (APR) and the yield on Treasury securities having comparable periods of maturity, if that difference is equal to or greater than 3 percentage points for loans secured by a first lien on a dwelling, or equal to or greater than 5 percentage points for loans secured by a subordinate lien on a dwelling”).

The additional information required to be provided with respect to mortgage loans extended in 2004 and beyond is intended to allow regulators “to identify aspects of the higher-priced mortgage market that warrant a closer look to determine whether there is abuse or discrimination.” Press Release, Federal Financial Institutions Examination Council (Sept. 13, 2005), *available at* <http://www.ffiec.gov/hmcrpr/hm091305.htm>. The early data regarding higher cost loans does indicate that “black and Hispanic borrowers taken together are much more likely than non-Hispanic white borrowers to obtain credit from institutions that report a higher incidence of higher-priced loans” and that the incidence of higher priced loans are generally more than twenty percent higher for minority applicants and white applicants. Avery, Canner & Cook, *supra*, at 393–94. Most (but not all) of these differences can be explained by differences among borrowers’ income, the loan amounts, and other characteristics of the borrower that are not discriminatory. *Id.* at 393. On the other hand, the recent data gathered under HMDA do clearly suggest that black applicants for mortgages more than likely will enter into the subprime, rather than prime, mortgage market. *Id.*

²⁰³ UNEQUAL BURDEN, *supra* note 193, fig.3 (charting the share of subprime loans by neighborhood income); HUD REPORT, *supra* note 193, at 47–48. In low-income areas, subprime loans constituted 26% of the total refinance mortgages, in moderate-income areas 11%, and in upper-income areas 7%. UNEQUAL BURDEN, *supra* note 193, fig.3.

income minorities are statistically more likely to obtain subprime loans. Thirty-nine percent of homeowners in high-income black neighborhoods refinance through subprime loans, compared with 6% of borrowers living in high-income predominantly white neighborhoods.²⁰⁴ Similarly, 54% of homeowners in low-income black neighborhoods use subprime loans, contrasted with 18% of homeowners living in low-income predominantly white neighborhoods.²⁰⁵ This suggests that even upper-income African-American borrowers were statistically more likely to use subprime mortgage products than low-income white borrowers.

Beyond race and income, subprime borrowers have been shown to have other common characteristics. For example, single borrowers make up a greater share of the subprime refinance market than they do of the prime market.²⁰⁶ Also, subprime borrowers on average tend to be older than borrowers in the prime market.²⁰⁷

A parallel secondary mortgage market for subprime loans has emerged and the explosive growth of subprime lending that began in the 1990s can in part be attributed to the development of this active secondary market for subprime loans.²⁰⁸ In a secondary market trans-

²⁰⁴ UNEQUAL BURDEN, *supra* note 193, fig.4 (charting share of subprime mortgages by neighborhood race and income).

²⁰⁵ *Id.*

²⁰⁶ HUD REPORT, *supra* note 193, at 35–36.

²⁰⁷ *Id.* at 36–37.

²⁰⁸ See generally Reiss, *supra* note 161 (tracing development of the subprime lending market and the role of ratings agencies in facilitating that market). Fannie Mae and Freddie Mac do have some involvement in the subprime market, but their participation is small in comparison with the total subprime market. See generally KENNETH TEMKIN, JENNIFER E.H. JOHNSON, DIANE LEVY & THE URBAN INST., U.S. DEP'T OF HOUS. & URBAN DEV., SUBPRIME MARKETS, THE ROLE OF GSEs, AND RISK-BASED PRICING 21–26 (2002) (discussing GSE participation in the subprime market and the effects of possible subprime involvement); see also Reiss, *supra* note 161, at 1011–12 (discussing GSE involvement in subprime secondary market). When the GSE is involved in segments of the subprime market, it demands that the documentation for loans purchased comply with higher standards set by the GSE. *E.g.*, Press Release, Freddie Mac, Freddie Mac Promotes Consumer Choice with New Subprime Mortgage Arbitration Policy (Dec. 4, 2003), available at http://www.freddie.com/news/archives/afford_housing/2003/consumer_120403.html (establishing policy against purchasing subprime loans with mandatory arbitration clauses); Press Release, Freddie Mac, Freddie Mac Will No Longer Invest in Subprime Mortgages with Prepayment Penalty Terms Greater Than Three Years (Mar. 1, 2002), available at http://www.freddie.com/news/archives2002/subprime_030102.htm (restricting Freddie Mac purchases of subprime loans with prepayment penalties). The involvement of the GSEs in the subprime market can therefore be seen as a mixed blessing. On the one hand, the involvement can act to check unfair or abusive terms and practices in subprime loans. On the other hand, involvement also insures that a market for subprime loans exists and facilitates the expansion of the subprime origination market. If subprime lending is viewed,

action, the loan is sold (often immediately) and then securitized, with the underwriters being Wall Street investment firms.²⁰⁹ As described by Professors Engel & McCoy, “[i]n securitization, investment banks take pools of home loans, carve up the cash flows from those receivables, and convert the cash flows into bonds that are secured by the mortgages.”²¹⁰ Thus, a subprime loan might, if not usually, end up as a receivable in a pool of other subprime mortgages, with the payments made by the borrower ultimately being distributed to investors in the underlying securities. Though obviously of higher risk than securities backed by prime mortgages, subprime-backed securities also carry the possibility of higher return.²¹¹

In 1994 only \$11 billion in subprime loans were securitized, but that figure increased to \$83 billion in 1998, then dropped to \$60 billion in 1999.²¹² A similar increase in the securitization rate for subprime loans is also evident.²¹³ Today, up to 80% of all subprime loans are securitized.²¹⁴ By providing liquidity to subprime mortgage assets, the development of the secondary subprime market is one factor that might contribute to the explosive increase in subprime lending. Given that loans need no longer be made solely on a portfolio-only basis,

overall, as a negative development in mortgage finance, GSE involvement inappropriately ensures its survival.

²⁰⁹ HUD REPORT, *supra* note 193, at 43 (“The top eight Wall Street underwriters of subprime securities accounted for three-fourths of all subprime issues during 1999. Two affiliates of prime mortgage lenders were ranked in the top ten underwriters of subprime securities in 1999.”).

²¹⁰ Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 *FORDHAM L. REV.* 2039, 2045 (2007).

²¹¹ For an excellent discussion of the technical aspects of subprime securitization, and the ways in which offerings can be structured to reduce the risks involved, see *id.* at 2045–63. Credit enhancement mechanisms can reduce risk (and required yield) and expand the possible market of investors. See HUD REPORT, *supra* note 193, at 42. Common credit enhancement devices are (1) insurance (that acts to guarantee a payment stream) and (2) use of a senior-subordinate structure that distributes the cash flow first to senior classes, thus increasing the rating—and marketability—of those senior classes. See *id.* at 42–43 (briefly describing credit enhancement devices); see also Engel & McCoy, *supra* note 210, at 2046–48 (same).

²¹² HUD REPORT, *supra* note 193, at 41. In the late 1990s, there was a shakeout in the subprime lending market due to eroding investor confidence caused by miscalculation of credit risk, liquidity pressures on subprime originators, and decreased investor confidence. *Id.* at 41, 43–44.

²¹³ *Id.* at 42 tbl.3.4. In 1994 32% of subprime loans were securitized. That rate peaked in the 1990s at 55%. *Id.*

²¹⁴ Engel & McCoy, *supra* note 210, at 2045. During the first half of 2004, 60.3% of subprime loans were part of securitized pools. Federal Reserve Bank of Philadelphia, *supra* note 193 (summarizing data provided by *Inside B&C Lending*, a subprime market trade newsletter).

but rather can be sold off in, and the risk transferred to, the secondary market, originators have greater incentive to originate subprime loans, because they will bear no long-term risk for the loan. Even with the rapid growth of the subprime securitization market, however, some subprime loans can still be portfolio loans held by the originator, given that all loans are not at this point securitized. Yet more likely than not, the subprime loan now is securitized related to an offering of investment securities to global investors.

Subprime loans should be distinguished from predatory loans, which can be viewed as a subset of subprime loans.²¹⁵ Predatory loans are loans, universally subprime, which bear one or more of a number of additional characteristics. The higher interest rates that subprime loans bear reflect in the usual case the higher risk assumed by the lender.²¹⁶ Predatory loans, by contrast, bear harsh or abusive terms that result from the lender's exploitation of the borrower's vulnerabilities, such as lack of access to information, a competitive credit market, or other factors that create an extreme imbalance of bargaining power between the lender and subprime borrower. These terms are unrelated to the higher risk assumed by the lender.

There is some disagreement over the line that demarcates subprime lending from predatory lending. As described by HUD:

In a predatory lending situation, the party that initiates the loan often provides misinformation, manipulates the borrower through aggressive sales tactics, and/or takes unfair advantage of the borrower's lack of information about the loan terms and their consequences. The results are loans with onerous terms and conditions that the borrower often cannot repay, leading to foreclosure or bankruptcy.²¹⁷

²¹⁵ See Carr & Kolluri, *supra* note 201, at 5.

²¹⁶ *Id.* ("Subprime loans carry higher interest rates than prime loans with the justification that borrowers with higher risk factors should pay more to offset their perceived greater risk to the financial institution advancing the loan."). Beyond risk factors, a lack of standardization in underwriting criteria in the subprime market may act to raise the cost of subprime borrowing because borrowers are unable to effectively compare terms and shop for credit. *Id.*

²¹⁷ HUD REPORT, *supra* note 193, at 17; see also CARR & KOLLURI, *supra* note 201, at 2 (defining predatory lending in terms of the existence of fraudulent targeted marketing, abusive loan terms, and/or fraudulent lender behavior). Professors Engel and McCoy identify the following seven qualities as indicators of predatory lending: (1) loans structured to result in seriously disproportionate net harm to borrowers, (2) rent-seeking, (3) loans involving unlawful fraud or deception, (4) other forms of lack of transparency in loans that is not actionable as fraud, (5) provisions requiring borrowers to waive meaning-

Generally, any type of abusive or fraudulent practice or term in a loan transaction might justify a reconceptualization of a subprime loan, which the higher cost to the borrower reflects the higher risk to the lender, into a predatory loan, where the added terms simply exploit the financially vulnerable debtor. Some of these terms and practices include: (1) loan flipping (where the originator continually refinances a loan to secure higher fees); (2) fees that exceed those justified on economic grounds, after considering the added risk assumed by subprime lenders, generally; (3) the foisting onto the borrower of expensive additional products (for example, credit life insurance) along with the loan; and (4) asset-based lending, where the borrower's ability to repay is not considered, and the borrower's home equity is considered the source of repayment.²¹⁸ Predatory lending practices are regulated at the state²¹⁹ and federal levels²²⁰ of government. Louisiana, however, is not one of those states that specifically regulates predatory lending practices.

Subprime lending has other risks and negative externalities beyond the association with predatory lending. As a general matter, subprime loans statistically are more likely to become delinquent and to have a higher rate of foreclosure than prime loans.²²¹ After default,

ful legal redress, (6) exploitative servicing, and (7) discrimination. Engel & McCoy, *supra* note 210, at 2043–45 (summarizing authors' research on predatory lending definition).

²¹⁸ HUD REPORT, *supra* note 193, at 21–22.

²¹⁹ See N.C. GEN. STAT. § 24-1.1 (2005). North Carolina was the first state to address predatory lending directly, with thirty-five other states following to enact predatory lending laws of varying degrees of protection. For a chart (as of January 1, 2006) of state based antipredatory lending initiatives, see <http://www.buteraandrews.com/legislative-updates/directory/State/Legislature/Bills/sbc/State%20Bill%20Chart%202005.pdf>. In a controversial move in early 2004, the Office of the Controllor of the Currency preempted these state initiatives to the extent that they applied to national banks and their subsidiaries. OCC: Consumer Protection News—Combating Abusive Lending, <http://www.occ.treas.gov/Consumer/combat.htm> (last visited June 4, 2007).

²²⁰ The federal Home Ownership and Equity Protection Act of 1994 (“HOEPA”), part of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. 103-325, 108 Stat. 160, is the Federal Government's main source of protection for subprime borrowers. Very few high interest loans are covered by HOEPA, however, given that the statute applies only when loans meet specified criteria. See HUD REPORT, *supra* note 193, at 84–89 (finding that very few subprime loans are covered by HOEPA and recommending amendments to HOEPA and its implementing regulations so as to cover a broader range of potentially predatory practices). In addition, federal consumer lending disclosure laws contained in the Truth in Lending Act, 15 U.S.C. § 1631 (2000), and the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 (2000), provide some protections to borrowers through mandated disclosure of the terms of the transaction.

²²¹ HUD REPORT, *supra* note 193, at 34–35. In the period between January 1998 and September 1999, for example, the delinquency rate for subprime loans averaged 13.5% and the foreclosure rate averaged 2.6%. *Id.* at 34. Prime loans over the same period had an

subprime loans are also more likely to spend a longer period in delinquency than prime loans.²²² The explosion of subprime loan originations from the early 1990s onward has been accompanied by another explosion in the incidence of foreclosure during the same period, with subprime lenders accounting for a large share of those increases.²²³ Given the higher risk inherent in subprime lending it is not at all surprising to see a sharp increase over the last decade in foreclosure by subprime lenders. In addition, the rapid escalation in the practice of subprime lending over the 1990s makes it expected that there would be a similarly sharp escalation in the rate of foreclosure over the same period.²²⁴

average delinquency rate of 2.8% and a foreclosure rate of 0.24%. *Id.* at 34–35. The delinquency rate increases the lower the grade loan. *See id.* at 35.

²²² Anthony Pennington-Cross, *The Duration of Foreclosures in the Subprime Mortgage Market: A Competing Risks Model with Mixing* 3–4 (Fed. Res. Bank of St. Louis, Working Paper 2006–027A, 2006) (discussion of literature that raises the issue of longer delinquency patterns of subprime loans).

²²³ *See* KIMBERLY BURNETT, CHRISTOPHER E. HERBERT & BULBUL KAUL, ABT ASSOCS. INC., TRENDS IN SUBPRIME ORIGINATIONS AND FORECLOSURES IN DOÑA ANA COUNTY, NEW MEXICO 10–11 (2003), http://www.abtassociates.com/reports/2003189088885_3085.pdf (explaining that “[s]ubprime lenders have come to account for an increasingly large share of all *lis pendens* filings in Doña Ana County,” from 8.9% in 1998 to 18.1% in 2002); KIMBERLY BURNETT, CHRISTOPHER E. HERBERT & BULBUL KAUL, ABT ASSOCS. INC., SUBPRIME ORIGINATIONS AND FORECLOSURES IN NEW YORK STATE: A CASE STUDY OF NASSAU, SUFFOLK, AND WESTCHESTER COUNTIES, at vi–viii (2002), http://www.abtassociates.com/reports/Suburban_NY_Foreclosures_study_final.pdf [hereinafter NEW YORK SUBPRIME ORIGINATIONS AND FORECLOSURES] (discussing changes in residential foreclosure patterns in New York state counties from 1998–2001); DEBBIE GRUENSTEIN & CHRISTOPHER E. HERBERT, ABT ASSOCS. INC., ANALYZING TRENDS IN SUBPRIME ORIGINATIONS AND FORECLOSURES: A CASE STUDY OF THE ATLANTA METRO AREA, at iii (2000), <http://www.abtassociates.com/reports/20006470781991.pdf> (finding that between 1996 and 1999, the overall volume of foreclosures in the Atlanta area declined by 7% but the volume of foreclosures initiated by subprime lenders grew 232%); DEBBIE GRUENSTEIN & CHRISTOPHER E. HERBERT, ABT ASSOCS. INC., ANALYZING TRENDS IN SUBPRIME ORIGINATIONS AND FORECLOSURES: A CASE STUDY OF THE BOSTON METRO AREA, at ii (2000) http://www.abtassociates.com/reports/2000804000192_87267.pdf (finding that between 1995 and 1999 the volume of foreclosures declined by 30% in the Boston area, while the overall volume of foreclosures initiated by subprime lenders grew 154%); AMALIA NIETO GOMEZ, JASON KIELY & SHANA KOTELCHUCK, NAT’L TRAINING AND INFO. CTR., PREYING ON NEIGHBORHOODS: SUBPRIME MORTGAGE LENDING AND CHICAGOLAND FORECLOSURES, 17 (1999), <http://www.ntic-us.org/preying/preying.pdf> (finding, in the Chicago area, a 4623% increase from 1993 to 1998 in the number of foreclosures for which subprime lenders were responsible, and an increase in the subprime lender share of foreclosures from 1.4% to 35.7% in the same period).

²²⁴ *See* NEW YORK SUBPRIME ORIGINATIONS AND FORECLOSURES, *supra* note 223, at vi (“Even if subprime loans were no more likely to foreclose than other loans, given the rapid increase in subprime originations, it would be expected that foreclosures of these loans would also increase.”).

Due to the concentration of subprime lending in low-income and minority neighborhoods,²²⁵ the foreclosure of subprime loans has created another problem, along with predatory lending, for those communities. Foreclosure has obvious negative economic, social, physical, and psychological effects on the individual borrower and his or her family. High rates of foreclosure also can have a significant and negative impact on the immediately surrounding neighborhood and the urban area.²²⁶ The municipality must bear the costs of addressing higher incidences of foreclosure.²²⁷ Recent data also suggest that foreclosure can result in decreased neighborhood property values.²²⁸ Municipalities may suffer the loss of tax revenue, businesses may suffer the loss of commerce, and neighbors may suffer the loss of the community involvement of the foreclosed-upon debtor. Thus, subprime lending cannot be understood as entirely beneficial to low-income and minority communities through increased access to credit, and indeed has significant costs to those communities. The negative effects of exploitative and abusive lending practices sometimes associated with types of subprime loans, and with high rates of foreclosure on communities most in need of development and economic stabilization, have to be balanced with any benefits through increased access to credit of historically underserved borrowers.

2. Subprime Markets in the Post-Disaster Context

Even before Katrina, the growth in the subprime credit market from the early 1990s to the present had particular significance for areas such as New Orleans, which have substantial numbers of low- and moderate-income, and African-American, neighborhoods. Large segments of the New Orleans market were likely niche markets for subprime lending, for the simple reason that New Orleans demographics fit attractively with subprime lenders' favored markets. Louisiana's lax

²²⁵ See *supra* notes 200–205 and accompanying text.

²²⁶ See generally Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355 (2006).

²²⁷ DAN IMMERGLUCK & GEOFFREY SMITH, WOODSTOCK INST., *THERE GOES THE NEIGHBORHOOD: THE EFFECT OF SINGLE-FAMILY MORTGAGE FORECLOSURES ON PROPERTY VALUES 2* (2005), <http://www.ntic-us.org/preying/preying.pdf> (discussing research in FHA foreclosures). Average city costs due to a foreclosure perhaps could reach upwards of \$27,000. *Id.*

²²⁸ *Id.* at 1 (estimating that each conventional foreclosure results in a 0.9% decrease in value for properties located within an eighth of a mile of the foreclosed property). In the Chicago area, Immergluck and Smith estimated that the cumulative single-family property value effect of foreclosure reached \$159,000 per foreclosure. *Id.*

regulatory stance both on predatory lending and on debtor protections in the foreclosure process also creates an environment that permits subprime and predatory lending to flourish. It would therefore not be surprising if many of the mortgages of Katrina victims were subprime mortgages, most particularly given that Katrina had a disproportionate impact on low-income and minority homeowners. Thus, when the problem of default and foreclosure after Katrina is at issue, considerations of race, poverty, and subprime and predatory lending practices necessarily must enter into the debate.

The court files reviewed for this Article suggest that many of the loans being foreclosed upon in the year following Katrina were loans traditionally categorized as subprime loans. For example, of the 241 case files surveyed through August 2006, seventy-eight (32.37%) had prepayment penalties, a common feature of subprime loans.²²⁹ This figure suggests that creditors who pursued foreclosure immediately after the disaster were significantly from the subprime market. Given that Tables 2.A. and 2.B, above, demonstrate that many loans foreclosed upon in this period had default dates prior to Katrina, the fairness concerns that might arise over quick foreclosure on the property of distressed hurricane victims is somewhat minimized, even if subprime loans did comprise a significant part of the activity.²³⁰

The important point is that reliance upon the largely mainstream secondary market vehicles to aid distressed *prime* borrowers, which was the focus of the market moratoria after Katrina, provides weak relief when the affected credit markets are comprised significantly of *subprime* borrowers, as is the case in communities like New Orleans. Thus, when considering secondary market interventions as a vehicle

²²⁹ Because HUD-related promissory notes do not contain prepayment penalties as a general rule, *e.g.*, Facts About VA Loans for Veterans, FHA Loans, Conventional Loans and Jumbo Loans, http://www.fha.com/other_loans.cfm (VA loans do not have prepayment penalty) (last visited on July 17, 1007), the percentage of foreclosed loans in the period from October 2005 through August 2006 that contained prepayment penalties increases significantly when the HUD loans are excluded from the data. Of the 192 case files reviewed apart from the HUD-related loans foreclosed upon in the period between July and August 2006, seventy-eight (40.625%) contained prepayment penalties.

²³⁰ Nonetheless, the policy concerns over subprime lending, generally, remain. Although the potential concentration of subprime lending in the New Orleans area did not appear to have a demonstrably detrimental impact in the year following Katrina, at least when measured by foreclosure patterns during that period, such a concentration is cause for concern in upcoming years and could impede the city's recovery. The negative externalities of subprime lending present significant risks for subprime communities such as New Orleans. Given the city's precarious position post-Katrina, a subprime lending crisis—already underway nationwide—could have a uniquely harmful effect on the city.

for addressing the financial distress of disaster victims, care should be taken to acknowledge that a vast segment of borrowers in nontraditional markets are being excluded from these protections. Secondary market initiatives, in other words, do little to assist those debtors who perhaps most need significant assistance: the participants in the subprime and predatory borrowing markets. Most particularly in states such as Louisiana, which have strongly procreditor foreclosure laws and lax predatory lending laws, secondary market interventions such as those that occurred after Katrina leave nontraditional borrowers at the mercy of their largely unregulated creditors.

CONCLUSION

On August 29, 2005, the Gulf Coast population was victimized by one of the largest disasters, in part natural and in part man made, ever to occur in the United States. This Article has discussed the mortgage default and foreclosure activity in Orleans Parish in the year following Katrina. It has argued that the secondary market-based moratoria acted significantly to reduce the incidence of the initiation of foreclosure actions on the property of people already victimized by the storm. Even after considering the success of secondary market initiatives, however, the secondary market response should not be seen as a complete solution to the financial concerns of Katrina victims, or as a replacement for other initiatives, legal or otherwise, that seek to alleviate the financial distress of victims of disasters or other economic crises. Secondary market initiatives are effective when used as a short-term response to the immediate financial concerns of disaster victims. They cannot provide a substitute for a long-term governmental strategy that seeks to address comprehensively the devastating financial impact that events like Hurricane Katrina have on the affected individuals, families, communities, and states. Moreover, given the widespread prevalence of subprime lending markets, the secondary market initiatives after Katrina left largely unprotected those debtors who are, in the end, perhaps most in need of protection. Although a useful tool for addressing some aspects of mortgagor financial distress, secondary market initiatives have decided limitations that render them inadequate as a completely comprehensive solution for the financial damage that inevitably follows in the wake of a crisis such as Katrina.