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Very Special Circumstances—The Almost Irrebuttable Presumption of Abuse Under Section 707(b)(2)

by

Laura B. Bartell*

In bankruptcy cases filed under chapter 7 of the Bankruptcy Code,¹ an individual debtor turns over the debtor's nonexempt property to the trustee in bankruptcy.² The trustee then sells that property³ and distributes the proceeds to creditors in accordance with their respective priorities.⁴ In most chapter 7 cases, unsecured creditors receive virtually nothing on account of their claims.⁵ In a chapter 13 case, by contrast, the trustee does not collect and sell property of the estate, including debtor's nonexempt property,⁶ but the debtor must pay his or her creditors out of future earnings or other future income⁷ over the duration of the plan, generally three to five years.⁸

The centerpiece of the "bankruptcy abuse prevention" aspect of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)⁹ was the addition to the Bankruptcy Code of provisions dealing with what Congress called "Needs-Based Bankruptcy"¹⁰ and what others have familiarly called "means-testing."¹¹ Through these amendments Con-

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¹11 U.S.C. §§ 101-1532 (2006).

²11 U.S.C. § 542(a).

³11 U.S.C. § 704(a)(1).

⁴11 U.S.C. § 726.

⁵See Teresa A. Sullivan et al., *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* 303-04 (1989) (reporting that 87% of chapter 7 debtors surveyed paid nothing to unsecured creditors from the sale of assets).

⁶11 U.S.C. § 1302(b)(1) (omitting duties specified in § 704(a)(1) from duties of chapter 13 trustee).

⁷11 U.S.C. § 1322(a)(1).

⁸11 U.S.C. § 1322(d).

⁹Bankruptcy Abuse Protection and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

¹⁰*Id.*, Title I.

¹¹See, e.g., Luke Welmerink, *Cleaning the Mess of the Means Test: The Need for a Case-by-Case Analysis of 401(K) Loans in Chapter 7 Bankruptcy Petitions*, 41 *GOLDEN GATE U. L. REV.* 121 (2010); Robert J. Landry, III, *The Means Test: Finding a Safe Harbor, Passing the Means Test, or Rebutting the Presumption of Abuse May Not Be Enough*, 29 *N. ILL. U. L. REV.* 245 (2009); Ned W. Waxman & Justin H. Rucki, *Chapter 7 Bankruptcy Abuse: Means Testing is Presumptive, but "Totality" is Determinative*, 45

gress provided that the court may dismiss a chapter 7 bankruptcy case filed by an individual debtor whose debts are primarily consumer debts¹² if the granting of relief under chapter 7 “would be an abuse of the provisions of [chapter 7].”¹³ In applying the standard of abuse, the court is directed to presume that abuse exists if the debtor’s “current monthly income” (as defined in § 101(10A) of the Bankruptcy Code)¹⁴ reduced by certain specified monthly expenses¹⁵ and multiplied by sixty is not less than certain thresholds set forth in the statute.¹⁶ If the debtor’s income available to pay unsecured creditors at least equals these levels, Congress has determined that the individual debtor should not be able to take advantage of chapter 7, and must instead file under chapter 11 or chapter 13.

While creating a presumption of abuse, Congress also included a provision setting forth the standards for rebutting that presumption. Under § 707(b)(2)(B)(i):

HOUS. L. REV. 901 (2008); Charles J. Tabb & Jillian K. McClelland, *Living with the Means Test*, 31 S. ILL. U. L.J. 463 (2007); Eugene R. Wedoff, *Means Testing in the New § 707(B)*, 79 AM. BANKR. L.J. 231 (2005).

¹²Alternatively, the court may, with the consent of the debtor, convert the case to one under chapter 11 or 13. See 11 U.S.C. § 707(b)(1).

¹³11 U.S.C. § 707(b)(1).

¹⁴11 U.S.C. § 101(10A) states that “current monthly income”—

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor’s spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor’s spouse), on a regular basis for the household expenses of the debtor or the debtor’s dependents (and in a joint case the debtor’s spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

¹⁵The deductions are described in § 707(b)(2)(A)(ii)-(iv), which include “the debtor’s applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor’s actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides,” § 707(b)(2)(A)(ii), the “debtor’s average monthly payments on account of secured debts,” § 707(b)(2)(A)(iii), and the “debtor’s expenses for payment of all priority claims,” § 707(b)(2)(A)(iii).

¹⁶11 U.S.C. § 707(b)(2)(A)(i).

the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that [sic] justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.¹⁷

The debtor may show such special circumstances only if the debtor “itemize[s] each additional expense or adjustment of income”¹⁸ and “attest[s] under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.”¹⁹ Even if the debtor meets these requirements, the presumption may only be rebutted if those additional expenses or adjustments to income cause the debtor to pass the means test (meaning the debtor’s income available to pay unsecured creditors is less than the statutory amounts).²⁰

In Part I of this article I discuss the history of the means-testing provisions and the standards for rebutting the presumption of abuse. In Part II, I look at how courts are actually resolving efforts by chapter 7 debtors to rebut the presumption created by § 707(b)(2). I found that debtor efforts to rebut the presumption of abuse are almost always doomed to fail, either because the debtors fail to satisfy the documentation requirements set forth in the Bankruptcy Code for establishing special circumstances, or because courts interpret the standard very narrowly. Finally, I conclude that the rebuttable presumption of § 707(b)(2) is a safety valve that provides very little safety to the debtor who fails the means test, and should not be seen as a viable alternative to enable the debtor to remain in a chapter 7 case.

I. CREATING A REBUTTABLE PRESUMPTION OF ABUSE²¹

When the Bankruptcy Code was originally enacted in 1978,²² it contemplated that a chapter 7 case could be dismissed “only for cause, including – (1) unreasonable delay by the debtor that is prejudicial to creditors; and (2) non-payment of any fees and charges required under chapter 123 of title 28.”²³ In

¹⁷11 U.S.C. § 707(b)(2)(B)(i).

¹⁸11 U.S.C. § 707(b)(2)(B)(ii). The debtor must also provide documentation for the expense or adjustment to income and a detailed explanation of the special circumstances that make such expense or adjustment to income “necessary and reasonable.” 11 U.S.C. § 707(b)(2)(B)(ii)(I) and (II).

¹⁹11 U.S.C. § 707(b)(2)(B)(iii).

²⁰11 U.S.C. § 707(b)(2)(B)(iv).

²¹A very complete history of the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005), can be found in Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005).

²²Pub. L. No. 95-598, 92 Stat. 2549 (1978).

²³*Id.* § 707, 92 Stat. 2606.

1981, Representative Evans introduced a bill, H.R. 4796,²⁴ that would have amended § 109 to make an individual eligible to be a debtor under chapter 7 "only if such individual cannot pay a reasonable portion of his debts out of anticipated future income."²⁵ The bill would also have permitted the court to dismiss a chapter 7 case upon the motion of any party in interest filed not later than thirty days after the meeting of creditors if the debtor were ineligible for relief under chapter 7 pursuant to this new provision.²⁶

The House Judiciary Committee conducted a series of hearings on consumer bankruptcy in 1981 and 1982 in connection with H.R. 4796,²⁷ during which some of those who testified expressed concern about debtors taking advantage of the easy discharge afforded by chapter 7 when they could afford to pay their debts out of their future income over time under chapter 13.²⁸ Following those hearings, when the Bankruptcy Code was next modified in 1984,²⁹ Congress included an amendment to § 707³⁰ to permit a bankruptcy court to dismiss an individual consumer chapter 7 bankruptcy case for "substantial abuse."³¹ However, even under the new provision, there was a statutory presumption in favor of permitting a debtor to remain in chapter 7, and only the court (and not any party in interest) could move for such a dismissal.³²

Upon implementation of a nationwide program of United States trustees in 1986, Congress was concerned that the United States trustee might be considered a "party in interest" who would be precluded from moving for dismissal of a chapter 7 case under § 707(b), and amended the provision again to permit the United States trustee (but no other party in interest) to bring a motion to dismiss a chapter 7 case for substantial abuse.³³ In 1998, as part of

²⁴H.R. 4786, 97th Cong. 1st Sess. (Oct. 20, 1981).

²⁵*Id.* at § 2.

²⁶*Id.* at § 3.

²⁷*Personal Bankruptcy: Oversight Hearings before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, 97th Cong., 1st & 2d Sess. (1981-82).*

²⁸*See, e.g.,* Statement of Rep. Hal Daub, *id.* at 423; Prepared Statement by Commercial Law League of America, *id.* at 563-64; Testimony of Eugene Cline, Senior Attorney, Regional Credit Office, J.C. Penney Co., Inc., Atlanta, Georgia, *id.* at 753.

²⁹Pub. L. No. 98-353 (1984). The most pressing reason for the amendment was to remedy the constitutional infirmity of the statutory jurisdiction of the bankruptcy courts under the 1978 version of the Code after *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

³⁰Pub. L. No. 98-353, § 312(2).

³¹*Id.* The amendment added a new subsection (b) to § 707, which read as follows:

(b) After notice and a hearing, the court, on its own motion and not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

³²*Id.*

³³Pub. L. No. 99-554, § 219(b) (1986).

the Religious Liberty and Charitable Donation Protection Act of 1998,³⁴ Congress added new language at the end of § 707(b) to bar a court from considering a debtor's contributions to charitable organizations in deciding whether to dismiss a chapter 7 case for substantial abuse.³⁵

Meanwhile, pursuant to the Bankruptcy Reform Act of 1994,³⁶ Congress established a National Bankruptcy Review Commission to review the operation of the Bankruptcy Code.³⁷ The Commission held hearings beginning in 1995 and issued its lengthy report on October 20, 1997.³⁸ The report contained 172 recommendations with respect to proposed changes to the Bankruptcy Code, including thirty-four recommendations bearing on consumer bankruptcy, which were adopted by a 5-4 vote.³⁹ Those consumer bankruptcy recommendations did not include any modifications to § 707 or any other provision that would compel debtors to file under chapter 13 rather than chapter 7 if they had the ability to pay creditors out of future income (means-testing).

The failure of the Commission to include any means-testing provisions and its failure to amend § 707(b) (or modify the Bankruptcy Code in other respects to curb abuse) prompted objections from the four dissenting commissioners who believed the majority did not "go far enough to penalize or deter abuse."⁴⁰ In a strongly-worded dissent to the Commission's report by the Hon. Edith H. Jones and Commissioner James I. Shepard, the two commissioners characterized the majority as "deaf to the public debate over and frus-

³⁴Pub. L. No. 105-183 (1998).

³⁵The new language, inserted at the end of § 707(b), reads as follows:

In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

³⁶Pub. L. No. 103-394, 108 Stat. 4106, 4147-50 (1994).

³⁷*Id.* at § 603. The duties of the Commission were described as follows:

The duties of the Commission are—

- (1) to investigate and study issues and problems relating to title 11, United States Code (commonly known as the "Bankruptcy Code");
- (2) to evaluate the advisability of proposals and current arrangements with respect to such issues and problems;
- (3) to prepare and submit to the Congress, the Chief Justice, and the President a report in accordance with section 608; and
- (4) to solicit divergent views of all parties concerned with the operation of the bankruptcy system.

³⁸See REPORT OF THE NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS (Oct. 20, 1997) ("REVIEW COMMISSION REPORT").

³⁹*Id.*

⁴⁰Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners, REVIEW COMMISSION REPORT, Vol. I, ch. 5, at 3.

tration with this nation's bankruptcy system."⁴¹ These dissenters recommended that § 707(b) be amended to "require that the court dismiss or convert the case of a debtor who has filed for Chapter 7 if . . . it is found that the debtor has the ability to repay a portion of his debts [suggesting that an appropriate amount might be 10% of unsecured debts over five years] in Chapter 13."⁴² They also proposed institution of a "presumptive income ceiling for the availability of Chapter 7 relief" in the absence of "extraordinary and compelling circumstances."⁴³ Circumstances justifying resort to chapter 7 "should include no less than serious and costly medical or health conditions; unique family circumstances (large number of dependents); being a fraud victim; or being out of work and unemployable for a sustained period of time."⁴⁴

Even before the Commission issued its final report, Representatives McCollum and Boucher introduced a bill in the House of Representatives, H.R. 2500, to implement amendments to the Bankruptcy Code to further so-called "needs based bankruptcy" reforms.⁴⁵ Called the "Responsible Borrower Protection Bankruptcy Act,"⁴⁶ the bill would have amended § 109 of the Bankruptcy Code to make certain individuals (and their spouses in joint cases) ineligible for chapter 7 if they had:

- (1) "current monthly income" (defined to be the average monthly income received in the six months prior to the date of determination) of 75% or more of the national median family income for a family of the same size,
- (2) projected monthly net income (determined by subtracting from current monthly income expense allowances under the Internal Revenue Service National Standards, Local Standards and Other Necessary Expenses, average monthly payments on secured debt and average monthly payments on priority claims) of at least \$50, and
- (3) projected monthly net income sufficient to repay 20% or more of unsecured non-priority claims over five years.⁴⁷

The bill would have permitted a prospective debtor to establish that "extraordinary circumstances" required allowance of additional expenses in computing projected monthly net income by filing a written statement itemizing

⁴¹Hon. Edith H. Jones & Commissioner James I. Shepard, Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law, REVIEW COMMISSION REPORT, Vol. I, ch. 5, at 1.

⁴²*Id.* at 16-17.

⁴³*Id.* at 17.

⁴⁴*Id.* at 17-18.

⁴⁵H.R. 2500, 105th Cong. 1st Sess. § 101 (Sept. 18, 1997).

⁴⁶*Id.* at § 1(a).

⁴⁷*Id.* at § 101.

the additional expenses and describing the extraordinary circumstances requiring their allowance, accompanied by a sworn statement of the debtor with respect to its accuracy.⁴⁸ No illustrations of “extraordinary circumstances” were provided in the bill.

Shortly after the Commission issued its report, Senator Grassley introduced a Senate bill, S. 1301, which had the same objective.⁴⁹ The bill proposed amending § 707 in three major ways. First, it would allow any party in interest to seek conversion or dismissal of a chapter 7 case (not just the court and the United States trustee). Second, it would change the standard for conversion of a chapter 7 case from “substantial abuse” to “abuse.” Third, it would require the court to consider (in determining whether the granting of relief under chapter 7 would be an abuse of that chapter) whether “the debtor could pay an amount greater than or equal to 20 percent of [non-priority] unsecured claims.”⁵⁰

After both the House and Senate Judiciary Committees held hearings on the report of the National Bankruptcy Review Commission, Representative Gekas introduced another bill, H.R. 3150, to implement “needs-based bankruptcy” reforms, as well as business bankruptcy amendments.⁵¹ This bill incorporated the substance of H.R. 2500, and proposed amendments to the eligibility requirements of § 109 to limit access to chapter 7 based on ability to pay creditors (measured by median income, projected monthly net income, and ability to pay at least 20% of unsecured non-priority claims).⁵²

Representatives Nadler, Conyers and Hilliard introduced their own bill, H.R. 3146,⁵³ which did not include any sort of means test, but would also modify the standard for dismissal in § 707(b) from “substantial abuse” to “abuse.” The bill would have required that the court consider a chapter 7 case to be abusive “if, after providing a reasonable standard of living for the debtor and the debtor’s dependents that is not excessive, . . . the debtor is able to pay the debtor’s unsecured nonpriority debts as they come due or to pay them in full over a 36-month chapter 13 plan, and the court after consideration of all the circumstances finds the case to be an abuse of this chapter.”⁵⁴ The bill would have immunized from motions to dismiss any debtor whose household income did not exceed \$60,000 (adjusted upward for each household member exceeding 4).⁵⁵

⁴⁸*Id.*

⁴⁹S. 1301, 105th Cong. 1st Sess. (Oct. 21, 1997).

⁵⁰*Id.* at § 102.

⁵¹H.R. 3150, 105th Cong. 2d Sess. (Feb. 3, 1998). The bill was cosponsored by Representatives McCollum, Boucher and Moran.

⁵²*Id.* at § 101.

⁵³H.R. 3146, 105th Cong. 2d Sess. (Feb. 3, 1998).

⁵⁴*Id.* at § 8.

⁵⁵*Id.*

The House Judiciary Committee marked up H.R. 3150 and reported it out of committee as amended in May 1998.⁵⁶ The only change from the proposed limitations on eligibility in § 109 from those proposed by H.R. 2500 and the originally-introduced H.R. 3150 was raising the median income level for purposes of determining whether the debtor had income available to pay creditors (and therefore was barred from chapter 7) from 75% of the national median family income to "the highest national median family income" for a family of the same size.⁵⁷ The House of Representatives passed the bill, as amended, on June 10, 1998,⁵⁸ and sent it to the Senate for consideration.

Meanwhile, the Subcommittee on Administrative Oversight and the Courts of the Senate Judiciary Committee held hearings on S. 1301 and favorably reported the bill, as marked up, to the Senate Judiciary Committee,⁵⁹ which in turn favorably reported the bill, as further marked up, to the Senate.⁶⁰ The major change in the means-testing provisions from those included in the bill at the time of its introduction was a new § 707(b)(5) which would exempt debtors from creditor-initiated motions under § 707(b) if the debtor had a monthly total income equal to or less than the national median family income for a family of the same size.⁶¹ The Senate replaced the text of H.R. 3150 with that of S. 1301, and passed the bill on September 23, 1998.⁶² The House refused to accept the Senate version of H.R. 3150, and the two bodies sent representatives to conference to attempt to resolve their differences.

The conference issued its report on October 7, 1998.⁶³ With respect to the means test, the conference committee stated in its joint explanatory statement as follows:

The House version contained a pre-filing formula to steer debtors with repayment capacity into Chapter 13 repayment plans. The Senate bill directed bankruptcy judges to consider the repayment capacity of debtors who had filed in Chapter 7 bankruptcy to determine whether they were appropriately filed. The compromise combines the best aspects of both approaches. It adopts the procedural approach of the Senate bill directing bankruptcy judges to consider repay-

⁵⁶H.R. REP. NO. 105-540, 105th Cong. 2d Sess. (1998).

⁵⁷*Id.* at § 101. In addition, as under H.R. 2500, the debtor was barred only if the debtor had projected monthly net income greater than \$50 and projected monthly net income sufficient to repay at least 20% of non-priority unsecured claims over five years under chapter 13. *Id.*

⁵⁸144 CONG. REC. H4442 (daily ed. June 10, 1998).

⁵⁹S. REP. NO. 105-253, 105th Cong. 2d Sess. 32 (July 21, 1998).

⁶⁰*Id.* at 34.

⁶¹*Id.* at 3-4. This was inserted by an amendment proposed by Senator Durbin when the bill was in the Subcommittee. *Id.* at 31.

⁶²144 CONG. REC. S10767 (daily ed. Sept. 23, 1998).

⁶³H.R. REP. NO. 105-794, 105th Cong. 2d Sess. (Oct. 7, 1998).

ment capacity, while instructing that such repayment capacity shall be presumed by the judge if the individual meets certain bright-line standards for measuring such repayment capacity. This approach preserves the right of a debtor in bankruptcy to have a judge review his or her individual case so that the debtor's unique circumstances could be taken into account.⁶⁴

The text of the amended version of H.R. 3150, like S. 1301, implemented the means test through modification of § 707(b), rather than § 109. But instead of merely requiring the court to consider whether the debtor could pay at least twenty percent of his or her non-priority unsecured claims in assessing whether the granting of relief under chapter 7 would be an abuse, as under S. 1301, the new H.R. 3150 for the first time required the court to *presume* that abuse existed if the debtor failed the means test. This new presumption of abuse would be triggered if the debtor's current monthly income⁶⁵ less certain monthly expense deductions,⁶⁶ multiplied by sixty (to reflect a five-year chapter 13 plan), was not less than the lesser of twenty-five percent of the debtor's non-priority unsecured claims or \$5,000.⁶⁷

The presumption of abuse could be rebutted "only by demonstrating extraordinary circumstances that require additional expenses or adjustment of

⁶⁴*Id.* at 121.

⁶⁵"Current monthly income" was to be defined as "the average monthly income from all sources derived which the debtor, or in a joint case, the debtor and the debtor's spouse, receive without regard to whether it is taxable income, in the 180 days preceding the date of determination, and includes an amount paid by anyone other than the debtor or, in a joint case, the debtor and the debtor's spouse, on a regular basis to the household expense of the debtor or the debtor's dependents and, in a joint case, the debtor's spouse if not otherwise a dependent." *Id.* at § 102(a) (proposed § 101(10A)). The definition closely tracks that included in the House version of H.R. 3150.

⁶⁶The deductions were those described in clauses (ii), (iii) and (iv) of proposed § 707(b)(2)(A), which were the following:

(ii) The debtor's monthly expenses shall be the applicable monthly expenses under National Standards, Local Standards, and Other Necessary Expenses allowance (excluding payments for debts) issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the entry of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent.

(iii) The debtor's average monthly payments on account of secured debts shall be calculated as the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition, and dividing that total by 60 months.

(iv) The debtor's expense for payment of all priority claims (including priority child support and alimony claims), which shall be calculated as the total amount of debts entitled to priority, and dividing the total by 60 months.

Id. Similar deductions were included in the definition of "projected monthly net income" in H.R. 2500, and were incorporated into the provisions of the House version of H.R. 3150.

⁶⁷*Id.* (proposed § 707(b)(2)(A)(i)).

current monthly total income."⁶⁸ The debtor would be required to itemize and document each additional expense or adjustment to income and provide a detailed explanation of the extraordinary circumstances making the expenses "necessary and reasonable."⁶⁹ Both the debtor and the debtor's attorney would be required to attest under oath to the accuracy of that information, and the presumption would be rebutted only if the additional expenses or adjustment to income caused the debtor to pass the means test.⁷⁰

Although, consistent with S. 1301, any party in interest could bring a motion to dismiss or convert a chapter 7 case under the modified H.R. 3150,⁷¹ the conference committee included the new § 707(b)(5) from S. 1301, which provided that only the judge, the United States trustee or a bankruptcy or panel trustee could bring such a motion if the debtor had a current monthly total income equal to or less than the national median household monthly income for a household of the same size.⁷²

The House promptly passed the conference report,⁷³ but the Senate did not take action on the conference report before the end of the congressional session. Soon after the beginning of the 106th Congress, Representative Gekas introduced H.R. 833,⁷⁴ which (with respect to the means test) was virtually identical to the conference report on H.R. 3150 which had passed the House in the 105th Congress.⁷⁵ When H.R. 833 emerged from the House Judiciary Committee, the bill included some modifications to the means test itself, most notably in establishing that if the debtor's available income met or exceeded a fixed number (\$6,000), abuse of chapter 7 would be established without regard to the percentage of debtor's non-priority unsecured debts could be paid.⁷⁶ The only changes to proposed § 707(b)(2)(B), allowing rebuttal of the presumption, were to make clear that debtor's detailed explanation with respect to extraordinary circumstances could include both additional expenses and adjustments to income, and to remove the requirement that debtor's attorney attest under oath to the accuracy of the information provided to support an assertion that extraordinary circumstances justified an adjustment of income or additional expenses in the computation.⁷⁷

⁶⁸*Id.* (proposed § 707(b)(2)(B)).

⁶⁹*Id.*

⁷⁰*Id.*

⁷¹*Id.* (amended § 707(b)(1))

⁷²*Id.* (proposed § 707(b)(5)).

⁷³144 CONG. REC. H10239-40 (daily ed. Oct. 9, 1998).

⁷⁴H.R. 833, 106th Cong. 1st Sess. (Feb. 24, 1999).

⁷⁵*Id.* at § 102(a)(2) (proposed § 707(b)(2)).

⁷⁶H.R. REP. NO. 106-123, 106th Cong. 1st Sess., pt. 1, § 102(a)(2) at 5 (April 29, 1999) (proposed § 707(b)(2)(A)).

⁷⁷*Id.* (proposed § 707(b)(2)(B)).

The bill passed the House on May 5, 1999,⁷⁸ and was sent to the Senate. In the meantime, Senator Grassley had introduced S. 625, the Bankruptcy Reform Act of 1999.⁷⁹ The version of the means test included in this bill returned to the approach of presuming abuse if the debtor's available income to pay non-priority unsecured claims over five years at least equaled twenty-five percent of those claims, or \$15,000, whichever is less.⁸⁰ The Senate bill modified the provisions of proposed § 707(b)(2)(B), permitting rebuttal of the presumption of abuse "by demonstrating special circumstances that justify additional expense or adjustments of current monthly total income."⁸¹ The purpose of this provision was "to protect debtors from rigid and arbitrary application of a means-test," and the Senate Judiciary Committee intentionally rejected the "extraordinary circumstances" standard that had been included in the conference report on H.R. 3150 "to provide a different standard of when a debtor may overcome the presumption of abuse."⁸² However, the Committee emphasized that the "special circumstances" test was intended to "establish a significant, meaningful threshold which a debtor must satisfy in order to receive the preferential treatment."⁸³ The Senate Report also stated:

The debtor's ability to overcome the presumption of abuse must be based solely on financial considerations (i.e., adjustments to income or expenses required by special circumstances) and not of factors unrelated to a chapter 7 debtor's ability to repay his or her debts. The Committee believes that the relief sought by a debtor who files for bankruptcy is financial in nature and the debtor's right to obtain preferential relief under the special circumstances provision should be assessed based on financial considerations only. In addition, special circumstances adjustments must not be used as a convenient way for debtors to choose a more expensive lifestyle. The special circumstances provision must be reserved only for those debtors whose special circumstances require adjustments to income or expenses that place them in dire need of chapter 7 relief.⁸⁴

As was true for the "extraordinary circumstances" standard in H.R. 3150, the debtor was required to itemize each item of expense or adjustment to

⁷⁸145 CONG. REC. H2654 (daily ed. May 5, 1999).

⁷⁹S. 625, 106th Cong. 1st Sess. (Mar. 16, 1999).

⁸⁰*Id.* § 102(a)(2) (proposed § 707(b)(2)(A)).

⁸¹*Id.* (proposed § 707(b)(2)(B)).

⁸²S. REP. NO. 106-49, 106th Cong. 1st Sess., at 6-7 (May 11, 1999).

⁸³*Id.* at 7.

⁸⁴*Id.*

income and provide documentation and a detailed explanation of the extraordinary circumstances making any expenses necessary and reasonable.⁸⁵ Both the debtor and the debtor's attorney were required to attest under oath to the accuracy of the information provided, and the presumption would not be rebutted unless the additional expenses or adjustment to income caused the debtor to pass the means test.⁸⁶

The Senate replaced the text of H.R. 833 with the text of S. 625, and passed H.R. 833 on Feb. 2, 2000.⁸⁷ The Senate version of H.R. 833 was dramatically different from the bill that passed the House, and the Senate was unlikely to support a motion to send the bill to conference with the House. As a result of informal conference negotiations, a compromise bill, S. 3186, was introduced by Senator Grassley,⁸⁸ and incorporated into an unrelated bill, H.R. 2415, as to which the Senate had already agreed to go to conference, to circumvent a filibuster threat from Senator Wellstone.⁸⁹ In Senator Grassley's bill, the threshold for the presumption of abuse was changed to "the lesser of - (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or \$6,000, whichever is greater; or (II) \$10,000."⁹⁰ The bill retained the Senate term of "special circumstances" for rebutting the presumption of abuse, but inserted an additional limitation on the concept. Under the Grassley bill, the special circumstances would have to "justify additional expenses or adjustments of current monthly income *for which there is no reasonable alternative.*"⁹¹ No explanation for the new language was provided. The bill deleted the requirement that the debtor's attorney attest under oath to the accuracy of information supporting the assertion of special circumstances.⁹² Those provisions were unchanged in the bill that emerged from conference,⁹³ and both the House⁹⁴ and Senate⁹⁵ subsequently passed the conference report for what was then called the Bankruptcy Reform Act of 2000. On December 19, 2000, President Clinton vetoed the bill by declining to sign it into law within ten days while Congress was adjourned.⁹⁶

Shortly after the 107th Congress convened in January 2001, Representative Gekas introduced H.R. 333, which was virtually identical to the confer-

⁸⁵S. 621, § 102(a)(2) (proposed § 707(b)(2)(B)).

⁸⁶*Id.*

⁸⁷146 CONG. REC. S255 (daily ed. Feb. 2, 2000).

⁸⁸S. 3186, 106th Cong. 2d Sess. (Oct. 11, 2000).

⁸⁹See Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 535 (2005).

⁹⁰S. 3186, 106th Cong. 2d Sess. § 102(a)(2) (proposed § 707(b)(2)(A)).

⁹¹*Id.* (proposed § 707(b)(2)(B)(i)) (emphasis supplied).

⁹²*Id.* (proposed § 707(b)(2)(B)(iii)).

⁹³See H.R. REP. NO. 106-970, 106th Cong. 2d Sess. (Oct. 11, 2000), at 7-9.

⁹⁴146 CONG. REC. H9840 (daily ed. Oct. 12, 2000).

⁹⁵146 CONG. REC. S11730 (daily ed. Dec. 7, 2000).

⁹⁶See U.S. Const. art. I, § 7, cl. 2.

ence report that had been vetoed a month earlier.⁹⁷ At the same time, Senator Grassley introduced S. 220, also virtually identical to the conference report.⁹⁸ The thresholds for abuse, and the terms of the requirements to rebut the presumption, remained unchanged from those in the conference report. The House passed H.R. 333 on March 1, 2001.⁹⁹ After Senate Judiciary Committee hearings on S. 220,¹⁰⁰ Senator Grassley introduced and placed in the Senate calendar a revised bill, S. 420,¹⁰¹ on March 1, 2001 and the Senate passed S. 420 on March 15, 2001.¹⁰² Because the Senate had passed a separate bill rather than taking up H.R. 333 and replacing its text with that of S. 420, neither bill was ready for conference to reconcile differences. In July 2001, the Senate replaced the text of H.R. 333 with the text of S. 420, and passed the amended bill.¹⁰³ The bill was then sent to conference to reconcile differences in H.R. 333 between the House and Senate versions. The conference committee met over the course of many months to deal with differences on the bill; no changes to the threshold figures for the means test or the language on rebutting the presumption of abuse were made. The conference report was submitted on July 26, 2002.¹⁰⁴

For procedural reasons the House was not able to vote on the conference report,¹⁰⁵ but Representative Gekas introduced a new bill, H.R. 5745, which incorporated all the text of the conference report with the exception of language involving abortion protesters and a provision authorizing additional bankruptcy judgeships.¹⁰⁶ The language of the new bill was inserted into H.R. 333 and passed by the House on November 14, 2002.¹⁰⁷ However, the Senate adjourned without considering the revised H.R. 333.

As the 108th Congress began, Representative Sensenbrenner introduced H.R. 975, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2003.¹⁰⁸ The language related to the figures establishing a presumption of abuse and the requirements for rebutting that presumption was unchanged from that included in H.R. 5745. The bill passed the House on March 19,

⁹⁷H.R. 333, 107th Cong. 1st Sess. (Jan. 31, 2001).

⁹⁸S. 220, 107th Cong. 1st Sess. (Jan. 30, 2001).

⁹⁹147 CONG. REC. H600 (daily ed. Mar. 1, 2001).

¹⁰⁰S. Hrg. No. 107-195, Bankruptcy Reform Act of 2001, Haring Before the Comm. on the Judiciary, U.S. Senate, 107th Cong. 1st Sess., Serial No. J-1072 (Feb. 8, 2001).

¹⁰¹S. 420, 107th Cong. 1st Sess. (Mar. 1, 2001).

¹⁰²147 CONG. REC. S2379 (daily ed. Mar. 15, 2001).

¹⁰³147 CONG. REC. S7742 (daily ed. July 17, 2001).

¹⁰⁴H.R. REP. NO. 107-617, 107th Cong. 2d Sess. (July 26, 2002).

¹⁰⁵See Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 557-558 (2005).

¹⁰⁶H.R. 5745, 107th Cong. 2d Sess. (Nov. 14, 2002).

¹⁰⁷148 CONG. REC. H8876 (daily ed. Nov. 14, 2002).

¹⁰⁸H.R. 975, 108th Cong. 1st Sess. (Feb. 27, 2003).

2003.¹⁰⁹ When the Senate seemed disinclined to consider H.R. 975, the House replaced the text of S. 1920, a bill dealing with the proposed extension of chapter 12, with that of H.R. 975 and passed the amended S. 1920.¹¹⁰ However, the Senate failed to deal with the amended S. 1920 either, and the bill died with the end of the 108th Congress.

Senator Grassley introduced S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on February 1, 2005,¹¹¹ which contained proposed amendments to § 707(b) that were identical to those included in H.R. 975. The only change to the means-testing language made by the Senate Judiciary Committee during its mark-up was the addition of a sentence specifying that the debtor's expenses used in computing the presumption of abuse "shall include reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor."¹¹²

The Senate considered the bill over the course of ten days, rejecting twenty-four amendments and accepting eight.¹¹³ One of the amendments that was accepted was a response to a failed amendment proposed by Senator Durbin, which would have made the presumption of abuse under § 707(b)(2)(A)-(C) inapplicable to servicemembers or veterans or their spouses.¹¹⁴ Senator Sessions dismissed the need for such an amendment, saying it was not needed:

The bill contains a rebuttal to this means test application when a court finds special circumstances. These are the ones I think we are discussing. A special circumstance that a military member could assert under this bill as it now exists - this bankruptcy bill - would include the fact that their in-

¹⁰⁹149 CONG. REC. H2099-2100 (daily ed. Mar. 19, 2003).

¹¹⁰150 CONG. REC. H218-19 (daily ed. Jan. 28, 2004).

¹¹¹S. 256, 109th Cong. 1st Sess. (Feb. 1, 2005).

¹¹²S. 256, § 101(a)(2) (proposed § 707(b)(2)(A)(ii)(I)), Calendar No. 14.

¹¹³See Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 563-564 (2005).

¹¹⁴Amendment No. 16 to S. 256, 151 CONG. REC. S1821 (daily ed. Mar. 1, 2005), provided, with respect to the means test, that:

Subparagraphs (A) through (C) [of § 707(b)(2)] shall not apply, and the court may not dismiss or convert a case based on any form of means testing, if - (i) the debtor or the debtor's spouse is a servicemember (as defined in section 101 of the Servicemembers Civil Relief Act (50 App. U.S.C. 511(1))); (ii) the debtor or the debtor's spouse is a veteran (as defined in section 101(2) of title 38, United States Code); or (iii) the debtor's spouse dies while in military service (as defined in section 101(2) of the Servicemembers Civil Relief Act (50 App. U.S.C. 511(2))).

Senator Durbin amended the proposed amendment to insert the phrase "and the indebtedness occurred in whole or in part while they were on active military duty" at the end of clause (ii) before the amendment was rejected. 151 CONG. REC. 1828 (daily ed. Mar. 1, 2005).

come dropped in recent months due to a call to active duty or there have been excessive expenses arising as a result of being called to active duty. That assertion would keep the means test from applying to the military debt. No special exemption, it would appear, would be necessary for military members on this basis because a call to active duty that causes a drop in income, to me, would be clearly a special circumstance. The bill currently contemplates that, although I think, frankly we could explicitly state that as a mandatory circumstance.¹¹⁵

Senator Sessions then proposed his own amendment to insert after the words “special circumstances” in § 707(b)(2)(B) of S. 256 the words “, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances.”¹¹⁶ The purpose of the amendment was to “clarify the safe harbor” for debtors subject to these types of events.¹¹⁷ Senator Sessions explained:

I believe . . . that we can be more explicit in the legislation and make sure that soldiers, certain persons with medical conditions, and veterans with low income can qualify under the safe harbor of the bill. I am offering an amendment which clarifies that these individuals who may fall under the special circumstances provisions of the bill are explicitly allowed to be covered under the special circumstances provisions of the bill to give them certain advantages.¹¹⁸

Senator Biden, in supporting the Sessions amendment (and opposing the Durbin amendment), characterized the Sessions amendment as:

mak[ing] it crystal clear that [] special circumstances include service in the armed forces – if that service puts you into a situation where you are unable to pay your legal debts. That can happen to someone called up in the reserve, and it is precisely why that category of special circumstances was put into the bill in the first place.¹¹⁹

No Senator speaking either in favor of or in opposition to the Sessions amendment suggested that the inclusion of language expressly singling out soldiers and veterans in the “special circumstances” language was intended to limit

¹¹⁵151 CONG. REC. S1827 (daily ed. Mar. 1, 2005).

¹¹⁶Amendment 23 to S. 256, 151 CONG. REC. S1849 (daily ed. Mar. 1, 2005).

¹¹⁷*Id.*

¹¹⁸151 CONG. REC. S1845 (daily ed. Mar. 1, 2005).

¹¹⁹151 CONG. REC. S1848 (daily ed. Mar. 1, 2005).

special circumstances to ones that were similar in nature to those experienced by those soldiers and veterans. The Sessions amendment passed,¹²⁰ and the Durbin amendment failed.¹²¹ (Senator Durbin subsequently successfully proposed an amendment to make the means test inapplicable to disabled veterans under certain circumstances.)¹²²

The Senate passed S. 256, as amended, on March 10, 2005.¹²³ In his final remarks on the bill, Senator Grassley emphasized that the means test “is fair and flexible enough to take into account all the unique circumstances a debtor and his family face.”¹²⁴ In particular,

[t]he bill has a safeguard that will allow judges to consider extenuating circumstances in each bankruptcy case. After determining this means test calculation, the judge can then take any “special circumstances” into consideration before making a decision to shift the debtor into chapter 13. This will allow judges to consider cases where catastrophic illnesses or other unexpected financial calamities that have impacted a family or individual to the point where their debts are too heavy a loan to carry. This provision made many of the amendments considered on this bill redundant In addition to this safeguard, I supported an amendment to the bill that clarified the circumstances that might be considered by a judge. That language provided specific examples a judge might consider including “a serious medical condition or a call to order to active duty in the armed forces.” I voted for this amendment because it provided an improvement, in the form of clarity on special circumstances.¹²⁵

The House Judiciary Committee marked up S. 256 and reported the bill to the House without adopting any amendments.¹²⁶ The House considered

¹²⁰151 CONG. REC. S1853-1854 (daily ed. Mar. 1, 2005).

¹²¹151 CONG. REC. S1854 (daily ed. Mar. 1, 2005).

¹²²Amendment No. 112, 151 CONG. REC. S2139 (daily ed. Mar. 7, 2005), inserted a new § 707(b)(2)(D) which provided that:

Subparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of means testing, if the debtor is a disabled veteran (as defined in section 3741(1) of title 38), and the indebtedness occurred primarily during a period during which he or she was – (i) on active duty (as defined in section 101(d)(1) of title 10); or (ii) performing a homeland defense activity (as defined in section 901(1) of title 32).

The amendment was unanimously approved. 151 CONG. REC. S2427 (daily ed. Mar. 10, 2005).

¹²³151 CONG. REC. S2474 (daily ed. Mar. 10, 2005).

¹²⁴151 CONG. REC. S2469 (daily ed. Mar. 10, 2005).

¹²⁵151 CONG. REC. S2470 (daily ed. Mar. 10, 2005).

¹²⁶H.R. Rep. No. 109-31, pt. 1, 109th Cong. 1st Sess. (Apr. 8, 2005). Among the proposed amend-

the bill pursuant to a House Resolution that did not permit any amendments,¹²⁷ and passed S. 256 on April 14, 2005.¹²⁸ President George W. Bush signed the bill into law on April 20, 2005.¹²⁹

II. SPECIAL CIRCUMSTANCES - AN EMPIRICAL STUDY

In trying to determine how courts deal with the rebuttable presumption of abuse created by § 707(b)(2), as amended by BAPCPA, I searched for all cases since 2005 in which the trustee filed a motion to dismiss based on the presumption of abuse, and the debtor sought to rebut the presumption by claiming special circumstances.

I searched the dockets and opinions for all chapter 7 cases in which there was a “motion to dismiss” under § 707(b)(2), and a mention of “special circumstances.” I first eliminated all cases in which the motion to dismiss was not actually made on the basis of the presumption of abuse,¹³⁰ or in which the debtor’s defense to the motion was that the motion was not timely.¹³¹ Next, I eliminated all cases in which the trustee moved to dismiss under § 707(b)(2), but the court concluded (without considering special circumstances) that the presumption of abuse did not apply,¹³² whether or not the

ments that were rejected were amendments offered by Rep. Scott that would have made the means test inapplicable “if a substantial portion of the indebtedness was incurred as a result of illness of the debtor, a dependent of the debtor, or the debtor’s spouse if not a dependent of the debtor, *id.* at 475, or “if a substantial portion of the indebtedness is due to business losses incurred by a spouse who has died or deserted the debtor,” *id.* at 478, or “if a substantial portion of the indebtedness was a result of unforeseen loss of employment through no fault of the debtor,” *id.* at 479. Also rejected was a proposed amendment offered by Rep. Meehan which would have made the means test inapplicable to disabled veterans whose indebtedness was incurred primarily during active duty or was the result of an injury or disability occurring during active duty, *id.* at 482. In all cases, the amendments were rejected because the “special circumstances” language purportedly already covered the situations described. *Id.* at 476, 481, 485, 4889.

¹²⁷H.R. Res. 211, 109th Cong. 1st Sess. (Apr. 14, 2005); *see* H.R. REP. NO. 109-43, 109th Cong. 1st Sess. (Apr. 13, 2005).

¹²⁸151 CONG. REC. H2076-77 (Apr. 14, 2005).

¹²⁹Bankruptcy Abuse Protection and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

¹³⁰Often the court mentioned § 707(b)(2), but the trustee made a motion to dismiss for abuse based on the totality of the circumstances under § 707(b)(1) and (b)(3). *See, e.g., In re Rowell*, 536 B.R. 245 (Bankr. E.D. Wis. 2015); *In re Swanigan*, No. 12-33476 (Bankr. E.D. Mich. Aug. 24, 2012); *In re Calhoun*, 396 B.R. 270 (Bankr. D.S.C. 2008), *aff’d sub nom. Calhoun v. U.S. Trustee*, 650 F.3d 338 (4th Cir. 2011); *In re Booker*, No. 08-30999 (Bankr. D. Mass. July 8, 2008); *In re Felske*, 385 B.R. 649 (Bankr. N.D. Ohio 2008); *In re Thurston*, No. 07-35092 (Bankr. N.D. Ohio Aug. 8, 2008); *In re Henebury*, 361 B.R. 595 (Bankr. S.D. Fla. 2007); *In re Mestemaker*, 359 B.R. 849 (Bankr. N.D. Ohio 2007).

¹³¹*See, e.g., In re Wise*, 453 B.R. 220 (Bankr. D. Vt. 2011); *In re Jasper*, 414 B.R. 83 (Bankr. E.D. Va. 2009); *In re Clark*, 393 B.R. 578 (Bankr. E.D. Tenn. 2008); *In re Perrotta*, 390 B.R. 26 (Bankr. D.N.H. 2008); *In re Ansar*, 383 B.R. 344 (Bankr. D. Minn. 2008); *In re Granger*, No. 07-13276 (Bankr. D.N.M. Dec. 27, 2007); *In re Reed*, No. 06-10901 Dkt. 27 (Bankr. C.D. Cal. May 29, 2007), *aff’d sub nom. Reed v. Anderson (In re Reed)*, 422 B.R. 214 (C.D. Cal. 2009); *In re Close*, No. 06-20195 (Bankr. D. Kan. Feb. 28, 2006), *aff’d sub nom. Turner v. Close*, 384 B.R. 856 (D. Kan. 2008).

¹³²*See, e.g., In re Jackson*, 537 B.R. 238 (Bankr. E.D.N.C. 2015); *In re Navin*, 526 B.R. 81 (Bankr. N.D.

case was dismissed on another basis.¹³³ Other cases were eliminated because the trustee withdrew the motion to dismiss before the court ruled on it.¹³⁴ I

Ga. 2015); *In re Gregory*, No. 10-09739, 2011 WL 5902884 (Bankr. E.D.N.C. Aug. 17, 2011), *aff'd sub nom.* Bankruptcy Administrator v. Gregory, 471 B.R. 823 (E.D.N.C. 2012); *In re Babson*, No. 11-00673, 2011 WL 5902664 (Bankr. E.D.N.C. Nov. 1, 2011); *In re Cole*, 427 B.R. 467 (Bankr. C.D. Ill. 2010); *In re Guerriero*, 383 B.R. 841 (Bankr. D. Mass. 2008); *In re Boatright*, No. 08-30442 (Bankr. W.D. Mo. May 30, 2008); *In re Castillo*, No. 08-10878, 2008 WL 454467 (Bankr. S.D. Fla. Oct. 10, 2008); *In re Ly Chang*, No. 07-50484, 2007 BL 132086 (Bankr. N.D. Cal. Oct. 15, 2007); *In re Megginson*, No. 06-12034, 2007 WL 2609783 (Bankr. D. Md. Sept. 4, 2007); *In re Hice*, 376 B.R. 771 (Bankr. D.S.C. 2007); *In re Hayes*, 376 B.R. 55 (Bankr. D. Mass. 2007); *In re Kelvie*, 372 B.R. 56 (Bankr. D. Idaho 2007); *In re Kogler*, 368 B.R. 785 (Bankr. W.D. Wis. 2007); *In re Ragle*, No. 06-30208, Dkt. 30 (Bankr. E.D. Ky. Mar. 23, 2007), *aff'd sub nom.* Clippard v. Ragle, 395 B.R. 387 (E.D. Ky. 2008); *In re Longo*, 364 B.R. 161 (Bankr. D. Conn. 2006); *In re Haar*, 360 B.R. 759 (Bankr. D. Ohio 2007); *In re Hartwick*, 359 B.R. 16 (Bankr. D.N.H. 2007) *In re Wilson*, 356 B.R. 114 (Bankr. D. Del. 2006).

¹³³*Compare In re Braathun*, No. 07-00771, 2011 WL 1299605 (Bankr. S.D. Iowa Apr. 4, 2011); *In re Vecera*, 430 B.R. 840 (Bankr. S.D. Ind. 2010); *In re Stewart*, 410 B.R. 912 (Bankr. D. Or. 2009); *In re Norwood-Hill*, 403 B.R. 905 (Bankr. M.D. Fla. 2009); *In re Cutler*, No. 08-15568, 2009 WL 2044378 (Bankr. S.D. Ind. July 9, 2009); *In re Boatright*, No. 08-30442 (Bankr. W.D. Mo. May 30, 2008); *In re Vandenberg*, No. 07-82291, 2008 WL 2020186 (Bankr. D. Neb. May 8, 2008); *In re Richardson*, No. 07-60057, 2008 BL 357094 (Bankr. W.D. Va. Mar. 19, 2008); *In re Wright*, 364 B.R. 640 (Bankr. N.D. Ohio 2007); *In re Sorrel*, 359 B.R. 167 (Bankr. S.D. Ohio 2007); *In re McDaniel*, No. 06-62786, 2007 WL 7142479 (Bankr. N.D. Ga. Aug. 24, 2007); *In re Smith*, No. 06-30261, 2007 WL 1836874 (Bankr. N.D. Ohio June 22, 2007); *In re Gilligan*, No. 06-00885, 2007 WL 6370887 (Bankr. E.D.N.C. Jan. 24, 2007) (declining to dismiss case under either § 707(b)(2) or (b)(3)) *with In re Johnson*, 503 B.R. 447 (Bankr. N.D. Ind. 2013); *In re Holmes*, No. 12-01801 (Bankr. M.D. Pa. Mar. 29, 2012); *In re Kreiling*, No. 09-21000, 2010 WL 1707501 (Bankr. D. Wyo. Apr. 26, 2010); *In re Brady*, 419 B.R. 479 (Bankr. M.D. Fla. 2009); *In re Phillips*, 417 B.R. 30 (Bankr. S.D. Ohio 2009); *In re Perelman*, 419 B.R. 168 (Bankr. E.D.N.Y. 2009); *In re Goble*, 401 B.R. 261 (Bankr. S.D. Ohio 2009); *In re Altman*, No. 09-70328, 2009 BL 343412 (Bankr. M.D. Ga. Dec. 18, 2009); *In re Davis*, No. 09-32507, 2008 WL 4279547 (Bankr. N.D. Ohio Sept. 12, 2008); *In re Parada*, 391 B.R. 492 (Bankr. S.D. Fla. 2008); *In re Augenstein*, No. 06-13867, 2007 WL 6374910 (Bankr. N.D. Ohio June 14, 2007); *In re Davis*, 378 B.R. 539 (Bankr. N.D. Ohio 2007); *In re Walker*, No. 05-15010 (Bankr. N.D. Ga. Oct. 26, 2005) (declining to dismiss case under § 707(b)(2) but dismissing case under § 707(b)(3)); *cf. Masur v. Fokkena*, No. 07-04167, 2009 WL 3150891 (D.S.D. Sept. 30, 2009); *In re Vanhooose*, No. 06-31813, 2007 WL 6383334 (Bankr. N.D. Ohio May 21, 2007); *In re Billie*, 367 B.R. 586 (Bankr. N.D. Ohio 2007); *In re Zaporski*, 366 B.R. 758 (Bankr. E.D. Mich. 2007); *In re Nockerts*, 357 B.R. 497 (Bankr. E.D. Wis. 2006); *In re Wilson*, 356 B.R. 114 (Bankr. D. Del. 2006) (declining to dismiss under § 707(b)(2) and ordering another hearing to determine whether case should be dismissed under § 707(b)(3)). *Cf. also In re Jaramillo*, No. 13-11090 (Bankr. D.N.M. Mar. 31, 2013) (declining to consider § 707(b)(2) because court dismissed case under § 707(b)(3)).

¹³⁴*See, e.g., In re Harlin*, No. 15-51635 (Bankr. E.D. Mich. Aug. 4, 2015); *In re Purse*, No. 13-43784 (Bankr. W.D. Mo. Oct. 2, 2013); *In re Chandler*, No. 13-53964 (Bankr. E.D. Mich. July 19, 2013); *In re Plotchev*, No. 13-45030 (Bankr. E.D. Mich. Mar. 14, 2013); *In re Vandermaas*, No. 08-28854 (Bankr. D. Colo. Nov. 25, 2008); *In re Green*, No. 08-14721 (Bankr. S.D. Ind. Nov. 24, 2008); *In re Stelljes*, No. 08-09166 (Bankr. D. Ariz. July 23, 2008); *In re Sundin*, No. 09-54526 (Bankr. E.D. Mich. May 7, 2008); *In re Pareja*, No. 08-12217 (Bankr. N.D. Ohio Mar. 30, 2008); *In re Hill*, No. 08-50941 (Bankr. S.D. Ohio Feb. 5, 2008); *In re Perkins*, No. 08-01222 (Bankr. M.D. Fla. Jan. 31, 2008); *In re Almaro*, No. 07-19631 (Bankr. N.D. Ohio Dec. 20, 2007); *In re Hobbs*, No. 07-03099 (Bankr. E.D. Wash. Sept. 23, 2007); *In re Crockett*, No. 07-22566 (Bankr. N.D. Ind. Sept. 21, 2007); *In re Fryson*, No. 07-40369 (Bankr. N.D. Fla. July 13, 2007); *In re Mendez*, No. 07-11092 (Bankr. D.N.M. May 8, 2007); *In re Gay*, No. 06-08570 (Bankr. S.D. Ind. Dec. 29, 2006); *In re Diaz*, No. 06-19371 (Bankr. D. Colo. Dec. 14, 2006); *In re Brown*, No. 06-33253 (Bankr. N.D. Ohio Nov. 10, 2006); *In re Bullington*, No. 06-11303 (Bankr. W.D. Tex. Aug. 29, 2006). *Cf. In re Molitor*, No. 07-11472 (Bankr. S.D. Ga. Aug. 23, 2007) (court ruled that motion was timely filed, and

have, however, included one case in which the bankruptcy court ruled in favor of dismissal, the debtor appealed, but the trustee then agreed to withdraw the motion and the district court vacated the bankruptcy court order of dismissal.¹³⁵ I also eliminated cases in which the debtor voluntarily dismissed the case or converted the case to chapter 13 or chapter 11 after the filing of the motion, so there was no ruling on the substance of the motion.¹³⁶

It was striking that in a large number of the cases in which the trustee made a motion to dismiss based on the presumption of abuse, the debtor did not claim “special circumstances” to rebut the presumption.¹³⁷ I also ex-

trustee withdrew it after receiving debtor’s statement of special circumstances); *In re Cadwallder*, No. 06-36424 (Bankr. S.D. Tex. Nov. 16, 2006) (court ruled that the motion was timely filed, and trustee then withdrew it); *In re Thomas*, No. 06-21108 (Bankr. D. Kan. July 27, 2006) (bankruptcy court denied motion to dismiss, district court reversed *sub nom.* *Wieland v. Thomas*, 382 B.R. 793 (D. Kan. 2008), and motion was then withdrawn).

¹³⁵*In re Pampas*, No. 06-10936 (Bankr. M.D. La. Oct. 27, 2006).

¹³⁶See, e.g., *In re Sookhram*, No. 15-15228 (Bankr. W.D. Wash. Aug. 29, 2015); *In re Cook*, No. 15-40373 (Bankr. E.D. Mich. Jan. 13, 2015); *In re Patrick*, No. 14-11203 (Bankr. W.D. La. May 28, 2014); *In re Ruffino*, No. 14-30460 (Bankr. S.D. Tex. Jan. 22, 2014); *In re Tuel*, No. 13-52180 (Bankr. M.D. Ga. Mar. 14, 2012); *In re Popalzai*, No. 10-12664 (Bankr. C.D. Cal. Jan. 25, 2010); *In re Gillespie*, No. 08-10279 (Bankr. D.R.I. Jan. 31, 2008); *In re Barrett*, No. 07-01496 (Bankr. W.D. Mich. Mar. 2, 2007). See also *In re Szymanski*, No. 08-04806 (Bankr. M.D. Fla. Dec. 27, 2007) (debtor converted to chapter 13 after motion filed, reconverted to chapter 7 three months later, and motion to dismiss was withdrawn).

¹³⁷In these cases, the U.S. trustee was generally challenging whether certain expenses or income amounts claimed by the debtor were appropriate. However, two debtors challenged § 707(b)(2)(A)(ii) as unconstitutionally delegating legislative power to the Internal Revenue Service. See *In re Williams*, No. 11-61683, 2012 WL 930245 (Bankr. D. Or. Mar. 19, 2012); *In re Wedblad*, No. 10-65055, 2012 WL 245967 (Bankr. D. Or. Jan. 26, 2012). In some cases, the issue was not the computation of the means test, but whether the debtors were individuals with debts that were primarily consumer debts to whom the means test applied. See, e.g., *Modi v. Virani (In re Virani)*, No. 15-61378, 2015 WL 6145508 (Bankr. N.D. Ga. Oct. 15, 2015); *In re Davis*, No. 12-11122, 2015 WL 260708 (Bankr. S.D. Ga. Jan. 20, 2015); *In re Fish*, No. 13-05783, 2014 WL 657247 (Bankr. E.D.N.C. Feb. 20, 2014); *In re De Cuna*, No. 12-37424, 2013 WL 6389205 (Bankr. S.D. Tex. Dec. 6, 2013); *In re Grover*, No. 12-01069, 2013 WL 3994608 (Bankr. N.D. Iowa Aug. 2, 2013); *In re Terzo*, 502 B.R. 553 (Bankr. N.D. Ill. 2013); *In re St. Jean*, 515 B.R. 864 (Bankr. M.D. Fla. 2011); *In re Victoria*, No. 10-42087, 2011 WL 2580106 (Bankr. N.D. Ala. June 22, 2011); *In re Rucker*, 454 B.R. 554 (Bankr. M.D. Ga. 2011); *In re Beasley*, No. 08-14081 (Bankr. W.D. Wash. June 30, 2008).

Many cases involve whether the debtor may deduct payments on secured debts if the debtor intends to surrender the collateral. See, e.g., *In re Powers*, 534 B.R. 207 (Bankr. N.D. Fla. 2015); *In re Navin*, 526 B.R. 81 (Bankr. N.D. Ga. 2015); *In re Hamilton*, 513 B.R. 292 (Bankr. M.D.N.C. 2014); *In re White*, 512 B.R. 822 (Bankr. N.D. Miss. 2014); *In re Johnson*, 503 B.R. 447 (Bankr. N.D. Ind. 2013); *In re Holmes*, No. 12-01801 (Bankr. M.D. Pa. Mar. 29, 2012); *In re Fredman*, 471 B.R. 540 (Bankr. S.D. Ill. 2012); *In re Sterenberg*, 471 B.R. 131 (Bankr. E.D.N.C. 2012); *In re Ng*, No. 10-02001 (Bankr. D. Hawaii Nov. 28, 2011); *In re Grinkmeyer*, 456 B.R. 385 (Bankr. S.D. Ind. 2011); *In re Vecera*, 430 B.R. 840 (Bankr. S.D. Ind. 2010); *McDow v. Harvey (In re Harvey)*, 407 B.R. 867 (Bankr. W.D. Va. 2009); *In re Altman*, No. 09-70328, 2009 WL 5200522 (Bankr. M.D. Ga. Dec. 22, 2009); *Masur v. Fokkena*, No. 07-04167, 2009 WL 3150891 (D.S.D. Sept. 30, 2009); *In re Phillips*, 417 B.R. 30 (Bankr. S.D. Ohio 2009); *In re Cutler*, No. 08-15568, 2009 WL 2044378 (Bankr. S.D. Ind. July 9, 2009); *In re Norwood-Hill*, 403 B.R. 905 (Bankr. M.D. Fla. 2009); *In re Parada*, 391 B.R. 492 (Bankr. S.D. Fla. 2008); *In re Guerriero*, 383 B.R. 841 (Bankr. D. Mass. 2008); *In re Stelljes*, No. 08-09166 (Bankr. D. Ariz. July 23, 2008); *In re Vandenberg*, No. 07-82291, 2008 WL 2020186 (Bankr. D. Neb. May 8, 2008); *In re Louis*, No. 07-13019, 2008 WL 1777461 (Bankr.

E.D. Va. Apr. 16, 2008); *In re Richardson*, No. 07-60057, 2008 BL 357094 (Bankr. W.D. Va. Mar. 19, 2008); *In re Ly Chang*, No. 07-50484, 2007 BL 3034679 (Bankr. N.D. Cal. Oct. 16, 2007); *In re Smale*, No. 07-11396 (Bankr. D. Del. Sept. 27, 2007); *In re McDaniel*, No. 06-62786, 2007 WL 7142479 (Bankr. N.D. Ga. Aug. 24, 2007); *In re Hayes*, 376 B.R. 55 (Bankr. D. Mass. 2007); *In re Kelvie*, 372 B.R. 56 (Bankr. D. Idaho 2007); *In re Augenstein*, No. 06-13867, 2007 WL 6374910 (Bankr. N.D. Ohio June 14, 2007); *In re Wright*, 364 B.R. 640 (Bankr. N.D. Ohio 2007); *In re Maya*, No. 07-01561 (Bankr. S.D. Cal. Mar. 30, 2007); *In re Vanhooe*, No. 06-31813, 2007 WL 6383334 (Bankr. N.D. Ohio May 21, 2007); *In re Kogler*, 368 B.R. 785 (Bankr. W.D. Wis. 2007); *In re Wilkins*, No. 07-11180 (Bankr. C.D. Cal. Mar. 8, 2007); *In re Leary*, No. 07-31370 (Bankr. S.D. Tex. Mar. 1, 2007); *In re Ray*, 362 B.R. 680 (Bankr. D.S.C. 2007); *In re Haar*, 360 B.R. 759 (Bankr. N.D. Ohio Feb. 20, 2007); *In re Sorrell*, 359 B.R. 167 (Bankr. S.D. Ohio 2007); *In re Hartwick*, 359 B.R. 16 (Bankr. D.N.H. 2007); *In re Melin*, No. 06-32652 (Bankr. N.D. Ohio Sept. 27, 2006); *In re Nockerts*, 357 B.R. 497 (Bankr. E.D. Wis. 2006); *In re Mundy*, No. 06-00875 (Bankr. M.D. Pa. May 5, 2006); *In re Rudler*, No. 06-10982 (Bankr. D.N.H. Aug. 15, 2006), *aff'd sub nom.* *Morse v. Rudler*, 576 F.3d 37 (1st Cir. 2009); *In re Walker*, No. 05-15010 (Bankr. N.D. Ga. Oct. 26, 2005). *Cf. In re Byers*, 501 B.R. 82 (Bankr. E.D.N.C. 2013) (debtor could not deduct payments on mortgage he did not intend to pay); *In re Brandenburg*, No. 07-20244, 2007 WL 1459402 (Bankr. E.D. Wis. May 15, 2007) (holding debtor could not deduct payments on debt secured by real property surrendered before bankruptcy filing).

Another issue was whether unemployment payments should be excluded from the computation of "current monthly income." *See, e.g., In re Bryant*, No. 08-32261 (Bankr. W.D.N.C. Oct. 21, 2008); *In re Sorrell*, 359 B.R. 167 (Bankr. S.D. Ohio 2007); *In re Munger*, 370 B.R. 21 (Bankr. D. Mass. 2007).

Other cases, predating the Supreme Court's decision in *Ransom v. FIA Card Services, N.A.*, 562 U.S. 61 (2011), dealt with the issue of whether the debtor could deduct transportation ownership expenses for vehicles on which the debtor had no lease or loan payments. *See, e.g., In re Kafi*, 413 B.R. 544 (Bankr. E.D. Tex. 2009); *In re Koch*, 408 B.R. 539 (Bankr. S.D. Fla. 2009); *Masur v. Fokkena*, No. 07-04167, 2009 WL 3150891 (D.S.D. Sept. 30, 2009); *In re Meade*, 384 B.R. 132 (Bankr. W.D. Tex. 2008); *In re Brown*, 376 B.R. 601 (Bankr. S.D. Tex. 2007); *In re Hice*, 376 B.R. 771 (Bankr. D.S.C. 2007); *In re Megginson*, No. 06-12034, 2007 WL 2609783 (Bankr. D. Md. Sept. 4, 2007); *In re McDaniel*, No. 06-62786, 2007 WL 7142479 (Bankr. N.D. Ga. Aug. 24, 2007); *In re Smith*, No. 06-30261, 2007 WL 1836874 (Bankr. N.D. Ohio June 22, 2007); *In re Billie*, 367 B.R. 586 (Bankr. N.D. Ohio 2007); *In re Leary*, No. 07-31370 (Bankr. S.D. Tex. Mar. 1, 2007); *In re Tate*, No. 07-50028 (Bankr. S.D. Miss. Jan. 10, 2007); *In re Thomas*, No. 06-21108 (Bankr. D. Kan. July 27, 2006), *rev'd sub nom.* *Wieland v. Thomas*, 382 B.R. 793 (D. Kan. 2008); *In re Garcia*, No. 07-00268, 2007 WL 2692232 (Bankr. D. Ariz. Sept. 11, 2007); *In re Wilson*, 356 B.R. 114 (Bankr. D. Del. 2006); *In re Ross-Tousey*, No. 06-24573 (Bankr. E.D. Wis. Aug. 18, 2006), *rev'd sub nom.* *Neary v. Ross-Tousey*, 368 B.R. 762 (E.D. Wis. 2008), *rev'd sub nom.* *Ross-Tousey v. Neary*, 549 F.3d 1148 (7th Cir. 2008); *In re Deadmond*, No. 06-60512, 2008 WL 346111 (Bankr. D. Mon. June 29, 2006); *In re Talmadge*, No. 06-50001 (Bankr. M.D. Fla. Jan. 3, 2006); *In re Harris*, 353 B.R. 304 (Bankr. E.D. Okla. 2006); *In re Skaggs*, 349 B.R. 594 (Bankr. E.D. Mo. 2006).

Still others deal with the treatment of payments on loans from or contributions to retirement (401(k)) accounts. *See, e.g., In re Lancaster*, No. 09-12269 (Bankr. D.N.M. Feb. 3, 2011); *In re Brace*, 430 B.R. 513 (Bankr. N.D. Ill. 2010); *In re Harrison*, No. 09-51072, 2010 WL 398975 (Bankr. M.D.N.C. Jan. 25, 2010); *In re Koch*, 408 B.R. 539 (Bankr. S.D. Fla. 2009); *Masur v. Fokkena*, No. 07-04167, 2009 WL 3150891 (D.S.D. Sept. 30, 2009); *In re Lewis*, No. 07-32371, 2007 WL 2742854 (Bankr. N.D. Ohio Sept. 17, 2007); *In re Whitaker*, No. 06-33109, 2007 WL 2156397 (Bankr. N.D. Ohio July 25, 2007); *cf. In re Otero*, No. 06-30691, Dkt. 22-1 (Bankr. W.D. Tex. Nov. 2, 2006), *rev'd sub nom.* *McVay v. Otero*, 371 B.R. 190 (W.D. Tex. 2007); *In re Melin*, No. 06-32652 (Bankr. N.D. Ohio Sept. 27, 2006).

In one case, the trustee argued that the IRS expense standards were not applicable to a debtor whose actual expenses in the relevant category were less. *See In re Jackson*, 537 B.R. 238 (Bankr. E.D.N.C. 2015).

In other cases the trustee disputed particular items of the debtors' claimed income or expenses. *See, e.g., In re Cayan*, No. 07-42354 (Bankr. N.D. Cal. July 27, 2007). *See, e.g., In re Kruse*, 545 B.R. 581 (Bankr. W.D. Wis. 2016); *In re Burgher*, 539 B.R. 868 (Bankr. D. Colo. 2015); *In re Montalto*, 537 B.R. 147 (Bankr. E.D.N.Y. 2015); *In re Molina*, No. 14-21469, 2014 WL 1243664 (Bankr. E.D. Ky. Mar. 12, 2015); *In re Wenzel*, No. 14-32432, 2015 WL 1087409 (Bankr. N.D. Ohio Mar. 9, 2015); *In re Terzo*, 502 B.R. 553 (Bankr. N.D. Ill. 2013); *In re Clary*, No. 11-04556, 2012 WL 8687171 (Bankr. M.D. Fla. Mar. 14,

cluded those cases, unless the court expressly considered whether the debtor should be deemed to have established special circumstances despite the debtor's failure to mention those words in any filed document. Conversely, in some cases the debtor filed a response to the motion to dismiss that seemed to claim special circumstances, but the court's ruling on the motion did not address the debtor's attempt to rebut the presumption.¹³⁸ I have also excluded these cases.

Although I limited my search to chapter 7 cases, the search turned up a large number of cases originally filed under chapter 13 and later converted to chapter 7. I did not include these cases because the debtor was seeking to modify his or her calculation of projected disposable income for purposes of the chapter 13 plan¹³⁹ by claiming that "special circumstances" warranted the

2012); *In re Hammer*, No. 11-12287, 2012 WL 162303 (Bankr. N.D. Okla. Jan. 19, 2012); *In re Sturm*, 483 B.R. 312 (Bankr. N.D. Ohio 2012); *In re Rable*, 445 B.R. 826 (Bankr. N.D. Ohio 2011); *In re Lancaster*, No. 09-12269, 2011 BL 28320 (Bankr. D.N.M. Feb. 3, 2011); *In re St. Jean*, 515 B.R. 864 (Bankr. M.D. Fla. 2011); *In re Auger*, No. 10-31450, 2011 BL 391268 (Bankr. N.D. Ohio Jan. 3, 2011); *In re Urban*, 432 B.R. 302 (Bankr. D. Wyo. 2009); *McDow v. Williams (In re Williams)*, 424 B.R. 27 (Bankr. W.D. Va. 2010); *In re Okorowski*, No. 09-36108, 2010 BL 376391 (Bankr. N.D. Ohio Feb. 8, 2010); *In re Gray*, No. 09-10120, 2009 WL 3486658 (Bankr. M.D.N.C. Oct. 21, 2009); *In re Woodruff*, 416 B.R. 369 (Bankr. D. Mass. 2009); *In re Justice*, 404 B.R. 506 (Bankr. W.D. Ark. 2009); *In re Burks*, No. 08-20346, 2009 WL 103618 (Bankr. N.D. Tex. Jan. 13, 2009); *In re Marsh*, No. 07-35576, 2008 WL 3200255 (Bankr. N.D. Ohio Aug. 5, 2008); *In re Jones*, No. 08-90194, 2008 WL 2676841 (Bankr. E.D. Cal. July 3, 2008); *In re Boehlke*, No. 07-26788, 2008 WL 276499 (Bankr. E.D. Wis. Jan. 30, 2008); *In re Burden*, 380 B.R. 194 (Bankr. W.D. Mo. 2007); *In re Hale*, No. 07-32744, 2007 WL 2990760 (Bankr. N.D. Ohio Oct. 10, 2007); *In re Blausey*, No. 06-10826 (Bankr. N.D. Cal. May 3, 2007), *aff'd sub nom. Blausey v. U.S. Trustee*, 552 F.3d 1124 (9th Cir. 2009); *In re Munger*, No. 07-40439 (Bankr. D. Mass. Feb. 6, 2007).

In one case, the debtors originally claimed "special circumstances" but explicitly abandoned that argument. See *In re Nabulsi*, No. 11-65698, 2013 WL 3784188, at *3 (Bankr. E.D. Mich. July 16, 2013). I have not included that case. In another, debtors claimed special circumstances when they originally filed under chapter 13, but after they converted the case to chapter 7, did not attempt to rebut the presumption when the trustee filed a motion to dismiss for abuse. See *In re Seymour*, No. 07-09005 (Bankr. M.D. Fla. Sept. 28, 2007).

¹³⁸See *In re Meyer*, 467 B.R. 451 (Bankr. E.D. Wis. 2012); *In re Leary*, No. 07-31370 (Bankr. S.D. Tex. Mar. 1, 2007); *In re Martinez*, 391 B.R. 424 (Bankr. E.D. Wis. 2008); *In re Meade*, 384 B.R. 132 (Bankr. W.D. Tex. 2008); *In re Ragle*, No. 06-30208, Dkt. 30 (Bankr. E.D. Ky. Mar. 23, 2007), *aff'd sub nom. Clippard v. Ragle*, 395 B.R. 387 (E.D. Ky. 2008). Cf. *In re Otero*, No. 06-30691, Dkt. 22-1 (Bankr. W.D. Tex. Nov. 2, 2006), *rev'd sub nom. McVay v. Otero*, 371 B.R. 190 (W.D. Tex. 2007) (debtor claimed that son's medical condition and anticipated medical expenses were special circumstances, but the court ruled that repayment of 401(k) loan was special circumstances, a ruling that was reversed by the district court).

¹³⁹Under § 1325(b)(1), if the trustee or an unsecured creditor objects to confirmation of a chapter 13 plan, the plan cannot be confirmed unless the plan either pays unsecured creditors in full or provides that "all of the debtor's projected disposable income to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors under the plan." 11 U.S.C. § 1325(b)(1)(B).

The term "disposable income" is defined to mean "current monthly income," see note 14 *supra*, with certain exclusions, less (among other things) amounts "reasonably necessary to be expended," 11 U.S.C. § 1325(b)(2), for maintenance or support of the debtor or a dependent of the debtor." 11 U.S.C. § 1325(b)(2)(A)(i). Congress directed that amounts "reasonably necessary to be expended," must be "determined in accordance with subparagraphs (A) and (B) of section 707(b)(2)," 11 U.S.C. § 1325(b)(3), if

the debtor is an above-median debtor. An above-median debtor is one that satisfies the provisions of § 1325(b)(3), which means that the debtor has:

current monthly income, when multiplied by 12, greater than –

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3 or 4 individuals, the highest median family income for the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest mean family income for the applicable State for a family of 4 or fewer individuals, plus \$625 per month for each individual in excess of 4.

Id. (The \$625 figure in clause (C) is subject to adjustment for changes in the cost of living every three years pursuant to 11 U.S.C. § 104(a), and was adjusted effective April 1, 2016 to \$700.)

Section 707(b)(2)(A) is the provision creating the presumption of abuse, which is, of course, rebuttable by a showing of “special circumstances” under § 707(b)(2)(B). Therefore, in determining whether an above-median chapter 13 debtor has correctly computed his or her projected disposable income, courts have allowed the debtor to submit evidence that there are “special circumstances” justifying modifications to the calculation of projected disposable income mandated by § 707(b)(2)(A). *See, e.g., In re Zahringer*, No. 07-30217, 2008 WL 2245864, at *3 (Bankr. E.D. Wis. May 30, 2008); *In re Crego*, 387 B.R. 225, 228 (Bankr. E.D. Wis. 2008); *In re Sadler*, 378 B.R. 780, 786 (Bankr. E.D. Tex. 2007); *In re Knight*, 370 B.R. 429, 435-36 (Bankr. N.D. Ga. 2007); *In re Crabtree*, No. 07-60543, 2007 WL 3024030, at *5 (Bankr. D. Mont. Oct. 12, 2007); *In re Sparks*, 360 B.R. 224, 229 (Bankr. E.D. Tex. 2006); *In re Tranmer*, 355 B.R. 234 (Bankr. D. Mon. 2006). *But see In re Clemons*, 404 B.R. 577, 582 (Bankr. N.D. Ga. 2006) (holding “special circumstances” not applicable to chapter 13 case).

Many of the chapter 13 cases dealing with “special circumstances” predate the Supreme Court’s decision in *Hamilton v. Lanning*, 560 U.S. 505 (2010), in which the Court held that “when a bankruptcy court calculates a debtor’s projected disposable income [pursuant to Section 1325(b)(1)], the court may account for changes in the debtor’s income or expenses that are known or virtually certain at the time of confirmation.” *Id.* at 524. Prior to *Lanning*, some courts were attempting to deal with differences between the debtor’s actual historic income used in computing “disposable income” and the income debtor anticipated receiving in the future by utilizing the “special circumstances” doctrine. *See, e.g., In re Pak*, 378 B.R. 257, 272 (9th Cir. BAP 2007); *In re DeThamplé*, 390 B.R. 716, 725 n.49 (Bankr. D. Kan. 2008); *In re Parulan*, 387 B.R. 168, 173 (Bankr. E.D. Va. 2008); *In re Schley*, No. 08-26146, 2008 WL 3895562, at *2 (Bankr. E.D. Wis. Aug. 22, 2008); *In re Jones*, No. 07-81646, 2007 WL 4893472 (Bankr. D. Neb. Dec. 14, 2007); *In re Moore*, 367 B.R. 721, 727 (Bankr. D. Kan. 2007); *In re Hanks*, 362 B.R. 494, 501-02 (Bankr. D. Utah 2007); *In re Jass*, 340 B.R. 411, 418-19 (Bankr. D. Utah 2006). *But see In re Wilson*, 397 B.R. 299, 314-15 (Bankr. M.D.N.C. 2008); *In re Briscoe*, 374 B.R. 1, 17 (Bankr. D. Colo. 2007) (holding that “special circumstances” doctrine is applicable only to expenses, not income). Because of the Supreme Court’s interpretation of “projected disposable income,” use of the “special circumstances” doctrine in chapter 13 cases is no longer necessary to reflect anticipated changes in the debtor’s income.

Although *Lanning* involved a change in the debtor’s anticipated income, arguably the language of *Lanning* (which referred to “changes in the debtor’s income or expenses that are known or virtually certain at the time of confirmation”), 560 U.S. at 524, also suggested that the above-median debtor need not invoke special circumstances to modify the expenses allowed by the computation of allowable expenses under §§ 1325(b)(2) and 707(b)(2)(A) and (B) as long as the modified amounts are “known or virtually certain.” *See, e.g., In re Wiley*, No. 10-19988, 2011 WL 10656548, at *5 (Bankr. E.D. Cal. Sept. 20, 2011) (directing debtors to amend plan consistent with *Lanning* to reflect ways in which their “personal and financial condition may have changed in a way that makes the allowance or disallowance of certain expenses more appropriate or irrelevant.”). *Cf. In re Mansfield*, No. 11-28949, 2012 WL 877105, at *4 (Bankr. D. Colo. Mar. 15, 2012) (finding it uncertain whether special circumstances doctrine is applicable at all in chapter 13 after *Lanning*). Nevertheless, bankruptcy courts since *Lanning* have consistently

exclusion of certain income or the inclusion of additional expenses.¹⁴⁰ None involved an attempt to rebut the presumption of abuse in the chapter 7 after conversion.¹⁴¹

After eliminating all these cases and other cases that did not satisfy my criteria, I found 129 cases in which: (1) the trustee made a motion to dismiss

utilized the special circumstances doctrine in analyzing whether expenses in excess of those allowed by the provisions of § 707(b)(2) may be reflected in computing projected disposable income.

Courts in chapter 13 cases appear to be somewhat more generous in interpreting “special circumstances” than those considering motions to dismiss in chapter 7. See, e.g., *In re Brown*, 500 B.R. 255, 269 (Bankr. S.D. Ga. 2013) (private school tuition for child with auditory and speech disorders was special circumstance); *In re Barbuttes*, 436 B.R. 518 (Bankr. M.D. Tenn. 2010) (finding the fact that debtors lived in twenty-year-old house in need of repair was a special circumstance justifying additional home maintenance expenses, fact that debtor was fifty-two years old and had a limited period of future employment constituted special circumstances for allowing Roth IRA contributions); *In re Daniel-Sanders*, 420 B.R. 102 (Bankr. W.D.N.Y. 2009) (expenses of second car needed for father’s use constituted special circumstances); *In re Stubbs*, No. 07-61165, 2007 WL 4287579 (Bankr. D. Mont. Dec. 6, 2007) (inability to find housing at lesser cost constituted special circumstances); *In re Knight*, 370 B.R. 429, 438 (Bankr. N.D. Ga. 2007) (student loan payments constitute special circumstances). But see *In re Brown*, 500 B.R. 255 (Bankr. S.D. Ga. 2013) (nondischargeable student loans do not constitute special circumstances for including payment amounts in computing projected disposable income); *In re Johnson*, 446 B.R. 921 (Bankr. E.D. Wis. 2011) (same); *In re Martellaro*, 404 B.R. 548 (Bankr. D. Mont. 2008) (same); *In re Zahringer*, No. 07-30217, 2008 WL 2245864 (Bankr. E.D. Wis. May 30, 2008) (same); *In re Knight*, 370 B.R. 429 (Bankr. N.D. Ga. 2007) (same); cf. *In re Harris*, 522 B.R. 804, 819 (Bankr. E.D.N.C. 2014) (suggesting that special circumstances for a higher house expense or car expense might be shown if “debtor could demonstrate the need for a larger house or that the car only has one more payment and is in a state of disrepair”). This is not surprising. If a debtor fails to demonstrate special circumstances in a chapter 7 case, the result is that the debtor is forced to file a chapter 13 or a chapter 11 case. If a debtor fails to demonstrate special circumstances in a chapter 13 case, the result may be that the debtor cannot get a chapter 13 plan confirmed, and therefore may be denied the benefit of bankruptcy entirely.

¹⁴⁰It should also be noted that some bankruptcy courts consider whether there are “special circumstances” in connection with their analysis of whether a chapter 13 debtor has proposed its plan in good faith, as required by § 1325(a)(3). These courts apply a multi-factor approach, including “the existence of special circumstances such as inordinate medical expenses.” See, e.g., *Hardin v. Caldwell* (*In re Caldwell*), 895 F.2d 1123, 1126-327 (6th Cir. 1990); *Smyrnos v. Padilla* (*In re Padilla*), 213 B.R. 349, 352-53 (9th Cir. BAP 1997); *In re Lofty*, 437 B.R. 578, 586 (Bankr. S.D. Ohio 2010); *In re McDonald*, 437 B.R. 278, 285 (Bankr. S.D. Ohio 2010); *In re Stitt*, 403 B.R. 694, 700 (Bankr. D. Idaho 2008). This is, of course, a different concept than that embodied in § 707(b)(2)(B).

¹⁴¹Courts disagree about whether the means test applies to a case filed under another chapter and converted to chapter 7. Compare *Fokkena v. Chapman* (*In re Chapman*), 447 B.R. 250 (8th Cir. BAP 2011); *In re Kruse*, 545 B.R. 581 (Bankr. W.D. Wis. 2016); *In re Burgher*, 539 B.R. 868 (Bankr. D. Colo. 2015); *In re Summerville*, 515 B.R. 651 (Bankr. M.D. Fla. 2014); *In re Lassiter*, 2011 WL 2039363, 2011 Bankr.LEXIS 1927 (Bankr. E.D. Va. May 24, 2011); *In re Willis*, 408 B.R. 803 (Bankr. W.D. Mo. 2009); *In re Kellett*, 379 B.R. 332 (Bankr. D. Or. 2007); *In re Reece*, 498 B.R. 72 (Bankr. W.D. Va. 2013); *In re St. Jean*, 515 B.R. 864 (Bankr. M.D. Fla. 2011); *In re Perfetto*, 361 B.R. 27 (Bankr. D.R.I. 2007) (means test applicable) with *In re Thoenke*, 2014 Bankr.LEXIS 451 (Bankr. M.D. Fla. 2014); *In re Layton*, 480 B.R. 392 (Bankr. M.D. Fla. 2012); *In re Pate*, 2012 WL 6737814, 2012 Bankr.LEXIS 5926 (Bankr. S.D. Tex. Dec. 28, 2012); *McDow v. Dudley* (*In re Dudley*), 405 B.R. 790 (Bankr. W.D. Va. 2009); *In re Miller*, 381 B.R. 736 (Bankr. W.D. Ark. 2008); *In re Fox*, 370 B.R. 639 (Bankr. D.N.J. 2007) (means test applies only to cases filed under chapter 7, not those converted to chapter 7). See generally Kathleen Murphy & Justin H. Dion, “Means Test” or “Just a Mean Test”: An Examination of the Requirement that Converted Chapter 7 Bankruptcy Debtors Comply with Amended Section 707(b), 16 ABI L. REV. 413 (2008).

on the basis of the presumption of abuse, (2) the debtor then made some attempt to rebut the presumption under § 707(b)(2)(B) by claiming “special circumstances” or, if not, the court treated the motion as if the debtor had done so, and (3) the court resolved the motion under § 707(b)(2) and substantively addressed the issue of “special circumstances.”¹⁴² As demonstrated

¹⁴²The cases that met these criteria were the following (the dates listed are their filing dates): *In re Fudge*, No. 15-51518 (Bankr. E.D. Mich. Jan. 22, 2016); *In re Mathews*, No. 15-31680 (Bankr. E.D. Wis. Oct. 20, 2015); *In re Haskins*, No. 15-40736 (Bankr. D. Mass. Apr. 15, 2015); *In re Ervin*, No. 15-70467 (Bankr. W.D. Va. Apr. 7, 2015); *In re Alther*, No. 14-62429 (Bankr. W.D. Va. Dec. 19, 2014); *In re Chabre*, No. 14-4981 (Bankr. M.D. Fla. Oct. 9, 2014); *In re Wilson*, No. 14-30234 (Bankr. E.D. Mich. Jan. 31, 2014); *In re Tedford*, No. 14-00008 (Bankr. S.D. Iowa Jan. 2, 2014); *In re Hurst*, No. 13-05987 (Bankr. E.D.N.C. Sept. 23, 2013); *In re Mittelstaedt*, No. 13-50225 (Bankr. D.S.D. Aug. 2, 2013); *In re Martin*, No. 13-01872 (Bankr. S.D. Iowa June 28, 2013) (*Patrick Martin*); *In re Strickland*, No. 13-42820 (Bankr. D. Minn. May 31, 2013); *In re Bradley*, No. 13-01390 (Bankr. S.D. Ala. Apr. 24, 2013); *In re Hartley*, No. 13-61182 (Bankr. D. Or. Apr. 4, 2013); *In re Kowal*, No. 12-82897 (Bankr. D. Neb. Dec. 28, 2012); *In re Taborski*, No. 12-23966 (Bankr. W.D. Pa. Aug. 8, 2012); *In re Thomas*, No. 12-12205 (Bankr. D. Del. July 27, 2012); *In re Robinson*, No. 12-02313 (Bankr. S.D. Miss. July 18, 2012); *In re Barker*, No. 12-32954 (Bankr. N.D. Ohio June 25, 2012); *In re Grover*, No. 12-01069, 2013 WL 3994608 (Bankr. N.D. Iowa Aug. 2, 2013); *In re Persaud*, No. 12-43602 (Bankr. E.D.N.Y. May 17, 2012); *In re Copeland*, No. 12-32287 (Bankr. N.D. Ohio May 14, 2012); *In re Burdett*, No. 12-12066 (Bankr. E.D. Va. Mar. 30, 2012); *In re Edwards*, No. 12-00603 (Bankr. N.D. Ala. Feb. 9, 2012) (*Marcus Edwards*); *In re Moose*, No. 11-51816 (Bankr. M.D.N.C. Dec. 11, 2011); *In re Weinert*, No. 11-69840 (Bankr. E.D. Mich. Nov. 18, 2011); *In re Mansfield*, No. 11-06867 (Bankr. E.D.N.C. Sept. 8, 2011); *In re Howell*, No. 11-12685 (Bankr. W.D.N.Y. Aug. 2, 2011); *In re Grenardo*, No. 11-25401 (Bankr. D. Colo. June 28, 2011); *In re Campbell*, No. 11-51573 (Bankr. E.D. Ky. May 31, 2011); *In re Thompson*, No. 11-01403 (Bankr. M.D. Fla. Feb. 2, 2011) (*Michael Thompson*); *In re Inghilterra*, No. 11-11776 (Bankr. D. Colo. Jan. 31, 2011); *In re DeJoy*, No. 11-10268 (Bankr. N.D.N.Y. Jan. 3, 2011); *In re Greer*, No. 10-63833 (Bankr. E.D. Cal. Nov. 30, 2010); *In re Fechter*, No. 10-62688 (Bankr. D. Mont. Nov. 16, 2010); *In re Hodson*, No. 10-62666 (Bankr. E.D. Cal. Oct. 30, 2010); *In re Enriquez*, No. 10-62662 (Bankr. E.D. Cal. Oct. 30, 2010); *In re Lunn*, No. 10-62282 (Bankr. E.D. Cal. Oct. 25, 2010); *In re Sanders*, No. 10-11939 (Bankr. M.D. Ala. Sept. 30, 2010); *In re Katz*, No. 10-50721 (Bankr. C.D. Cal. Sept. 23, 2010); *In re Wise*, No. 10-32441 (Bankr. S.D. Ill. Sept. 22, 2010); *In re Maura*, No. 10-68295 (Bankr. E.D. Mich. Sept. 10, 2010); *In re Ross*, No. 10-81200 (Bankr. M.D. Ala. Aug. 3, 2010); *In re Harmon*, No. 10-15329 (Bankr. E.D. Pa. June 30, 2010); *In re Leggett*, No. 10-03383 (Bankr. E.D.N.C. Apr. 28, 2010); *In re Burggraf*, No. 10-32297 (Bankr. N.D. Ohio Apr. 7, 2010); *In re Anderson*, No. 10-11161 (Bankr. W.D.N.Y. Mar. 26, 2010); *In re Conlee*, No. 10-31243 (Bankr. N.D. Ohio Mar. 4, 2010); *In re Chambers*, No. 10-00856 (Bankr. S.D. Iowa Mar. 1, 2010); *In re Polkinghorn*, No. 10-31093 (Bankr. N.D. Ohio Feb. 28, 2010); *In re Rudnick*, No. 10-30484 (Bankr. D. Minn. Jan. 26, 2010); *In re Smith*, No. 10-30243 (Bankr. N.D. Ohio Jan. 19, 2010) (*Steven Smith*); *In re Hammock*, No. 09-11485 (Bankr. E.D.N.C. Dec. 31, 2009); *In re Miller*, No. 09-07528 (Bankr. N.D. Ala. Dec. 31, 2009); *In re Meyers*, No. 09-77897 (Bankr. E.D. Mich. Dec. 11, 2009); *In re Stanley*, No. 09-09265 (Bankr. D.S.C. Dec. 10, 2009); *In re Roach*, No. 09-76184 (Bankr. E.D. Mich. Nov. 24, 2009); *In re Siler*, No. 09-33227 (Bankr. W.D.N.C. Nov. 20, 2009); *In re Edwards*, No. 09-09250 (Bankr. E.D.N.C. Oct. 23, 2009) (*Judith Edwards*); *In re Robrock*, No. 09-36740 (Bankr. D. Minn. Sept. 25, 2009); *In re Linville*, No. 09-14121 (Bankr. D.N.M. Sept. 11, 2009); *In re Rieck*, No. 09-35677 (Bankr. D. Minn. Aug. 14, 2009); *In re Carrillo*, No. 09-13658 (Bankr. D. Ariz. June 17, 2009); *In re Cotto*, No. 09-43772 (Bankr. E.D.N.Y. May 7, 2009); *In re Taylor*, No. 09-32681 (Bankr. N.D. Ohio Apr. 24, 2009); *In re Willson*, No. 09-02811 (Bankr. M.D. Pa. Apr. 14, 2009); *In re Womer*, No. 08-04779 (Bankr. M.D. Pa. Dec. 23, 2008); *In re Murzyn*, No. 08-15279 (Bankr. D. Ariz. Oct. 29, 2008); *In re Applegate*, No. 08-15936 (Bankr. E.D. Cal. Sept. 22, 2008); *In re Mravik*, No. 08-28754 (Bankr. E.D. Wis. Aug. 12, 2008); *In re Hunt*, No. 08-06916 (Bankr. S.D. Ind. June 12, 2008); *In re Meade*, No. 08-70942 (Bankr. W.D. Va. May 23, 2008); *In re Fonash*, No. 08-01856 (Bankr. M.D. Pa. May 22, 2008); *In re Willis*, No. 08-41820 (Bankr. W.D. Mo. May 9, 2008); *In re*

below, although some courts entertain many more such motions than others, bankruptcy judges uniformly are reluctant to conclude that special circumstances overcome the presumption of abuse in a chapter 7 case.

1. Courts in Which Debtors Attempt to Overcome Presumption of Abuse

Because the rate of chapter 7 filings for consumer debtors is higher in certain parts of the country than in others, one might expect that more motions to dismiss based on the presumption of abuse – and more efforts by debtors to overcome that presumption – would be made in those jurisdictions than in areas where most consumer bankruptcies are filed under chapter 13 initially. The data does not support this assumption.

Hernandez, No. 08-31588 (Bankr. N.D. Ohio Apr. 3, 2008); *In re Smith*, No. 08-31131 (Bankr. W.D.N.C. June 2, 2008) (*Carrie Smith*); *In re Samson*, No. 08-80615 (Bankr. D. Neb. Mar. 11, 2008); *In re Tauter*, No. 08-1106 (Bankr. M.D. Fla. Feb. 29, 2008); *In re Showers*, No. 08-30359 (Bankr. E.D. Va. Jan. 29, 2008); *In re Graham*, No. 06-54764 (Bankr. S.D. Ohio Dec. 13, 2007); *In re Rold*, No. 07-14259 (Bankr. S.D. Iowa Dec. 12, 2007); *In re Pignotti*, No. 07-04109 (Bankr. S.D. Iowa Nov. 30, 2007); *In re Wagner*, No. 07-42262 (Bankr. D. Neb. Nov. 29, 2007); *In re Watkins*, No. 07-6317 (Bankr. D. Ariz. Nov. 27, 2007); *In re Darling*, No. 07-10746 (Bankr. D. Vt. Nov. 6, 2007); *In re Budig*, No. 07-02042 (Bankr. N.D. Iowa Nov. 6, 2007); *In re Smith*, No. 07-82462 (Bankr. C.D. Ill. Nov. 1, 2007) (*Earl Smith*); *In re Stocker*, No. 07-05100 (Bankr. M.D. Fla. Oct. 18, 2007); *In re Patterson*, No. 07-17224 (Bankr. S.D. Fla. Sept. 4, 2007); *In re Cribbs*, No. 07-41342 (Bankr. S.D. Ga. Aug. 29, 2007); *In re Jackson*, No. 07-21717 (Bankr. D. Kan. Aug. 8, 2007); *In re Mowris*, No. 07-61100 (Bankr. W.D. Mo. July 31, 2007); *In re Pageau*, No. 07-11366 (Bankr. D.N.H. June 29, 2007); *In re Shinkle*, No. 07-20852 (Bankr. E.D. Ky. June 11, 2007); *In re Witek*, No. 07-32236 (Bankr. N.D. Ohio May 25, 2007); *In re Vaccariello*, No. 07-41034 (Bankr. N.D. Ohio May 4, 2007); *In re Champagne*, No. 07-10913 (Bankr. D. Kan. Apr. 24, 2007); *In re Goodall*, No. 07-30219 (Bankr. D.N.D. Mar. 23, 2007); *In re Ryder*, No. 07-40538 (Bankr. D. Neb. Mar. 20, 2007); *In re Naut*, No. 07-20280 (Bankr. E.D. Pa. Feb. 20, 2007); *In re Binnering*, No. 07-11203 (Bankr. N.D. Iowa Feb. 16, 2007); *In re Herbert*, No. 07-40224 (Bankr. D. Neb. Feb. 5, 2007); *In re Littman*, No. 07-20034 (Bankr. D. Idaho Feb. 5, 2007); *In re Tamez*, No. 07-60047 (Bankr. W.D. Tex. Jan. 22, 2007); *In re Egebjerg*, No. 06-12592 (Bankr. C.D. Cal. Dec. 31, 2006), *aff'd sub nom. Egebjerg v. Anderson*, 574 F.3d 1045 (9th Cir. 2009); *In re Ferando*, No. 06-81855 (Bankr. D. Neb. Nov. 15, 2006); *In re Starkey*, No. 06-81473 (Bankr. D. Neb. Sept. 26, 2006); *In re Heath*, No. 06-51407 (Bankr. E.D. Mich. Aug. 21, 2006); *In re Haman*, No. 06-10857 (Bankr. D. Del. Aug. 15, 2006); *In re Pampas*, No. 06-10936 (Bankr. M.D. La. Oct. 27, 2006); *In re Martin*, No. 06-71461 (Bankr. C.D. Ill. Oct. 20, 2006) (*Chad Martin*); *In re Delbecq*, No. 06-04785 (Bankr. S.D. Ind. Aug. 18, 2006); *In re Delunas*, No. 06-43133 (Bankr. E.D. Mo. July 19, 2006); *In re Templeton*, No. 06-11567 (Bankr. W.D. Okla. July 7, 2006); *In re Lightsey*, No. 06-40896 (Bankr. S.D. Ga. July 5, 2006); *In re Armstrong*, No. 06-31414 (Bankr. N.D. Ohio June 13, 2006); *In re Batzkiel*, No. 06-00355 (Bankr. N.D. Iowa Apr. 21, 2006); *In re Scarafiotti*, No. 06-11402 (Bankr. D. Colo. Mar. 31, 2006); *In re Castle*, No. 06-30266 (Bankr. N.D. Ohio Feb. 28, 2006); *In re Lenton*, No. 06-10520 (Bankr. E.D. Pa. Dec. 15, 2006); *In re Melin*, No. 06-32652 (Bankr. N.D. Ohio Sept. 27, 2006); *In re Turner*, No. 06-10877 (Bankr. D.N.H. July 27, 2006); *In re Mordis*, No. 06-42590 (Bankr. E.D. Mo. June 15, 2006); *In re Robinette*, No. 06-10585 (Bankr. D.N.M. Apr. 17, 2006); *In re Oliver*, No. 06-10134 (Bankr. Feb. 6, 2006); *In re Singletary*, No. 06-30339 (Bankr. S.D. Tex. Feb. 1, 2006); *In re Barraza*, No. 06-40220 (Bankr. N.D. Tex. Jan. 31, 2006); *In re Thompson*, No. 06-10024 (Bankr. N.D. Ohio Jan. 5, 2006) (*Gregory Thompson*); *In re Johns*, No. 05-87034 (Bankr. E.D. Okla. Dec. 9, 2005).

In one case the court concluded that the presumption of abuse was satisfied, but deferred consideration of special circumstances to a subsequent hearing, and the debtor voluntarily converted the case to one under chapter 13 before the court could rule on whether special circumstances existed. See *In re Bohnenblusch*, No. 10-79097, 2011 WL 1102809 (Bankr. E.D.N.Y. Mar. 21, 2011). I have not included that case.

The following chart shows the percentage (rounded to the nearest whole number) of total nonbusiness filings in each circuit made under chapter 7 during the 3-month period ending March 31, 2016, the last period for which statistics are available:¹⁴³

% Nonbusiness filings under chapter 7 for 3 mos. ending 3/31/2016											
D.C.	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th
84	60	76	64	56	39	66	64	69	75	73	50

Compare these figures to the number of the cases in the sample for each circuit:

D.C.	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th
0	3 ¹⁴⁴	6 ¹⁴⁵	9 ¹⁴⁶	17 ¹⁴⁷	6 ¹⁴⁸	24 ¹⁴⁹	7 ¹⁵⁰	23 ¹⁵¹	13 ¹⁵²	9 ¹⁵³	12 ¹⁵⁴

The Sixth and Eighth Circuits have the highest number of cases in which the trustee has brought a motion to dismiss based on the presumption of abuse and in which the debtor attempted to rebut. Neither has a very high (or very low) rate of chapter 7 filings compared to the other circuits. The Eleventh Circuit, with the lowest percentage of chapter 7 filings, has double the number of motions to dismiss in which special circumstances are considered than the Second Circuit, with the highest percentage of nonbusiness chapter 7 cases (other than the D.C. Circuit where the numbers are very small).

Within those circuits, the bankruptcy courts in the Northern District of

¹⁴³These percentages were derived from Table F-2, U.S. Bankruptcy Courts - Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the Three-Month Period Ending March 31, 2016, available at <http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2016/03/31>.

¹⁴⁴Haskins; Pageau; Turner.

¹⁴⁵Anderson; Cotto; Darling; DeJoy; Howell; Persaud.

¹⁴⁶Fonash; Haman; Harmon; Lenton; Naut; Taborsh; Thomas; Willson; Womer.

¹⁴⁷Alther; Burdett; Judith Edwards; Ervin; Hammock; Hurst; Leggett; Mansfield; Meade; Moose; Mittelstaedt; Mordis; Mowris; Showers; Siler; Carrie Smith; Stanley.

¹⁴⁸Barraza; Oliver; Pampas; Robinson; Singletary; Tamez.

¹⁴⁹Armstrong; Barker; Burggraf; Campbell; Castle; Conlee; Copeland; Fudge; Graham; Heath; Hernandez; Maura; Melin; Meyers; Polkinghorn; Roach; Shinkle; Steven Smith; Taylor; Gregory Thompson; Vaccariello; Weinert; Wilson; Witek.

¹⁵⁰Delbecq; Hunt; Chad Martin; Mathews; Mravik; Earl Smith; Wise.

¹⁵¹Bimminger; Batzkiel; Budig; Chambers; Delunas; Ferando; Goodall; Grover; Herbert; Kowal; Patrick Martin; Pignotti; Rieck; Robrock; Rold; Rudnick; Ryder; Samson; Starkey; Strickland; Tedford; Wagner; Willis.

¹⁵²Applegate; Carrillo; Egebjerg; Enriquez; Fechter; Greer; Hartley; Hodson; Katz; Littman; Lunn; Murzyn; Watkins.

¹⁵³Champagne; Grenardo; Inghilterra; Jackson; Johns; Linville; Robinette; Scarafioti; Templeton.

¹⁵⁴Bradley; Chabre; Cribbs; Marcus Edwards; Lightsey; Miller; Patterson; Ross; Sanders; Stocker; Tauter; Michael Thompson.

Ohio entertained twice as many such motions (fourteen) as any other district.¹⁵⁵ The next most represented districts are the District of Nebraska,¹⁵⁶ and the Eastern District of Michigan,¹⁵⁷ each with seven cases.

2. Threshold Requirements

In order to rebut the presumption of abuse, the debtor must satisfy both the requirements set forth in § 707(b)(2)(B)(ii)-(iv). These mandate that the debtor submit certain documentation with respect to each additional expense or adjustment to income that the debtor wishes the court to consider,¹⁵⁸ and the debtor must attest under oath to the accuracy of that submitted information.¹⁵⁹ The presumption of abuse may be rebutted only if the additional expenses and/or adjustments to income would cause the debtor to pass the means test.¹⁶⁰

In many cases the court refuses to find special circumstances exist because the debtor has failed to submit the required documentation,¹⁶¹ or the modifi-

¹⁵⁵*Armstrong; Barker; Burggraf; Castle; Conlee; Copeland; Hernandez; Melin; Polkinghorn; Steven Smith; Taylor; Thompson; Vaccariello; Witek.*

¹⁵⁶*Ferando; Herbert; Kowal; Ryder; Samson; Starkey; Wagner.*

¹⁵⁷*Fudge; Heath; Maura; Meyers; Roach; Weinert; Wilson.*

¹⁵⁸11 U.S.C. § 707(b)(2)(B)(ii) requires that the debtor provide "(I) documentation for such expense or adjustment to income; and (II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable." *Id.*

¹⁵⁹11 U.S.C. § 707(b)(2)(B)(iii).

¹⁶⁰11 U.S.C. § 707(b)(2)(B)(iv).

¹⁶¹*See Robbins v. Ervin (In re Ervin)*, No. 15-70467, 2016 WL 721043, at *12 (Bankr. W.D. Va. Feb. 23, 2016) (debtor failed to provide evidence as to itemized expenses and adjustment to income with respect to two residences and long commutes); *Robbins v. Alther (In re Alther)*, 537 B.R. 262, 269 (Bankr. W.D. Va. 2015) (concluding that debtors failed to provide documentation substantiating anticipated income reduction); *In re Hartley*, No. 13-61182, 2014 WL 1329407, at *2 (Bankr. D. Or. Mar. 28, 2014) (debtors failed to document unreimbursed health care costs); *In re Martin*, 505 B.R. 517 (Bankr. S.D. Iowa 2014) (*Patrick Martin*) (debtors failed to submit adequate documentation relating to claim that student loans were special circumstances); *In re Tedford*, No. 14-00008, 2014 WL 3851129, at *4 (Bankr. S.D. Iowa Aug. 5, 2014) (debtors failed to provide sufficiently detailed information on their monthly expenses); *In re Robinson*, No. 12-02313, 2013 BL 279994, at *11-12 (Bankr. S.D. Miss. Oct. 9, 2013) (debtor failed to document deductions to account for spouse's individual expenses); *In re Grover*, No. 12-01069, 2013 WL 3994608 (Bankr. N.D. Iowa Aug. 2, 2013) (debtor failed to show why expenses for personal clothing, housing cost, and travel expenses were required by her job); *In re Burdett*, No. 12-12066, 2013 WL 865575, at *5 (Bankr. E.D. Va. Mar. 7, 2013) (debtor failed to demonstrate decline in commission income based on new job); *In re Grenardo*, No. 11-25401, 2012 Bankr. LEXIS 6302 (Bankr. D. Colo. May 2, 2012) (debtor provided no documentary evidence as to monthly student loan amount); *In re Inghilterra*, No. 11-11776, 2012 WL 1137008, at *8 (Bankr. D. Colo. Apr. 4, 2012) (increased child care expenses were not documented); *In re Mansfield*, No. 11-06867, 2012 WL 627786, at *4 (Bankr. E.D.N.C. Feb. 24, 2012) (debtor did not provide itemized account for each additional commuting expense); *In re DeJoy*, No. 11-10268, 2011 WL 5827319, at *5 (Bankr. N.D.N.Y. Nov. 18, 2011) (debtors failed to provide sufficient documentation to support establish that support to aging family members constituted special circumstances); *In re Greer*, Nos. 10-63833, 10-62282, 10-62662, 10-62666, 2011 WL 10676936 (Bankr. E.D. Cal. Sept. 30, 2011) (debtors Greers, Lunn, Enriquezes and Hodsons failed to provide evidence to establish that their expenses above the Internal Revenue Service allowances constituted "special circumstances"); *In re Katz*, 451 B.R. 512 (Bankr. C.D. Cal. 2011) (debtor failed to provide adequate documentary evidence to

cations to income or expenses for which the debtor argues would not permit the debtor to pass the means test.¹⁶²

support claims that additional housing rental, car, education, childcare and healthcare expenses were special circumstances); *In re Leggett*, No. 10-03383, 2011 WL 802806, at *9 (Bankr. E.D.N.C. Mar. 2, 2011) (debtor failed to provide documentation relating to wife's diagnosis with Graves disease); *In re Ross*, No. 10-81200, 2011 WL 482815, at *3 (Bankr. M.D. Ala. Feb. 7, 2011) (debtor failed to provide any documentation with respect to additional expenses); *In re Stanley*, 438 B.R. 860, 866 (Bankr. D.S.C. 2010) (debtors failed to show connection between wife's illness and excess expenses); *In re Miller*, No. 09-07528, 2010 WL 2670796, at *4-5 (Bankr. N.D. Ala. June 30, 2010) (debtor failed to document alleged reduction in employment income and rental income); *In re Robrock*, 430 B.R. 197, 210 (Bankr. D. Minn. 2010) (debtor failed to provide documentation with respect to 401(k) loan payments, among other expenses); *In re Taylor*, 417 B.R. 762, 765 (Bankr. N.D. Ohio 2009) (debtor failed to submit documentation with respect to claimed expenses); *In re Applegate*, No. 08-15936-B-7, 2009 WL 9085555 (Bankr. E.D. Cal. Apr. 3, 2009) (noting that debtors failed to produce any documentation relating to their anticipated income tax liability or student loan obligation); *In re Willis*, 408 B.R. 803, 810 (Bankr. W.D. Mo. 2009) (debtors failed to offer documentary evidence on child care costs or corroboration that decline in income was permanent); *DeAngelis v. Fonish (In re Fonash)* 401 B.R. 143, 148 (Bankr. M.D. Pa. 2008) (debtor failed to provide documentation regarding his student loan expenses); *In re Watkins*, No. 07-6317, 2008 WL 2475749, at *7 (Bankr. D. Ariz. June 18, 2008) (debtors failed to show that 401(k) loan repayments were necessary and reasonable); *In re Goodall*, No. 07-30219, 2007 WL 4868303 (Bankr. D.N.D. Sept. 14, 2007) (debtor did not substantiate that she has serious medical condition); *In re Witek*, 383 B.R. 323, 329-330 (Bankr. N.D. Ohio 2007) (debtor failed to show how pending pregnancy would affect income or expenses); *In re Martin*, 371 B.R. 347, 356-357 (Bankr. C.D. Ill. 2007) (*Chad Martin*) (debtors provided insufficient details about excessive transportation costs and 401(k) loan repayments, but did provide adequate detail about drop in income, payment of student loan, and birth of child); *In re Pampas*, 369 B.R. 290 (Bankr. M.D. La. 2007) (even if debtor's pregnancy were special circumstances, debtor failed to itemize additional expenses resulting from that pregnancy); *In re Mordis*, No. 06-42590, 2007 WL 2962903, at * 5 (Bankr. E.D. Mo. Oct. 9, 2007) (debtor did not provide necessary documentation with respect to loan repayment or voluntary contributions to thrift savings plan); *In re Singletary*, 354 B.R. 455, 473-474 (Bankr. S.D. Tex. 2006) (debtors filed declaration of special circumstances, but provided no evidence and did not address issue at hearing); *In re Oliver*, 350 B.R. 294, 303 (Bankr. W.D. Tex. 2006) (debtor failed to provide documentary evidence of how medical conditions affected income or expenses); *In re Barraza*, 346 B.R. 724, 734 (Bankr. N.D. Tex. 2006) (debtor failed to sustain evidentiary burden to establish that \$400 support payment for girlfriend was special circumstance). *Cf. In re Barker*, No. 12-32954, 2013 WL 796171 (Bankr. N.D. Ohio Mar. 1, 2014) (discussing debtor's failure to establish special circumstances, although debtor filed no response to motion to dismiss); *In re Batzkeil*, 349 B.R. 581 (Bankr. N.D. Iowa 2006) (concluding that debtor had special circumstances, despite debtor's failure to file any response to motion to dismiss).

¹⁶²See *Robbins v. Ervin (In re Ervin)*, No. 15-70467, 2016 WL 721043, at *12 (Bankr. W.D. Va. Feb. 23, 2016) (finding medical deductions insufficient to permit debtor to pass means test); *Robbins v. Alther (In re Alther)*, 537 B.R. 262, 269-70 (Bankr. W.D. Va. 2015) (declining to consider whether payments for disability insurance, life insurance or a health savings account constitute special circumstances because even if deductions were taken debtors would still fail means test); *In re Haskins*, No. 15-40736, 2015 WL 7283059 (Bankr. D. Mass. Nov. 16, 2015) (allowing student loan deduction would not allow debtors to pass means test); *In re Strickland*, 504 B.R. 542 (Bankr. D. Minn. 2014) (deductions for student loan payments would not permit debtors to pass means test); *In re Kowal*, No. 12-82897, 2013 WL 5442018, at *3 (Bankr. D. Neb. Sept. 27, 2013) (allowing payments on 401(k) loan did not permit debtors to pass means test); *U.S. Trustee v. Taborski (In re Taborski)*, No. 12-23966, 2013 WL 211116 (Bankr. W.D. Pa. Jan. 18, 2013) (allowing deductions for child support payments would not permit debtor to pass means test); *In re Polkinghorn*, 436 B.R. 484, 490 (Bankr. N.D. Ohio 2010) (student loan payments and 401(k) loan repayments would not allow debtor to pass means test); *In re Rieck*, 427 B.R. 141, 148 (Bankr. D. Minn. 2010) (claimed special circumstances for chapter 13 administrative expenses, excess transportation costs and receipt of savings bond income would not allow debts to pass means test); *McDow v. Meade (In*

3. Grounds for Rebutting Presumption of Abuse

If the debtor establishes that the debtor has a serious medical condition or a call to active duty, the language of § 707(b)(2)(B)(i) expressly states that special circumstances exist.¹⁶³ However, for circumstances not so enumerated, courts have followed one of two different approaches to applying the statutory standard. Most courts have embraced what is commonly called the “strict” or “narrow” approach, which requires the special circumstances to be “out of the ordinary,”¹⁶⁴ “unanticipated” or “unexpected” or “unforeseeable,”¹⁶⁵ “uncommon, unusual, exceptional, distinct, peculiar, particular,”¹⁶⁶ “of a more severe nature than ordinary job changes or income fluctuations,”¹⁶⁷ “beyond the control of the debtor,”¹⁶⁸ “highly unusual, and of a type not

re Meade, 420 B.R. 291, 313 (Bankr. W.D. Va. 2009) (expenses to support drug-addicted son and four minor grandchildren would not allow debtor to pass means test); *In re Showers*, No. 08-30359, 2008 WL 5786900 (Bankr. E.D. Va. Nov. 19, 2008) (deduction for student loan would not permit debtors to pass means test); *In re Robinette*, No. 06-10585, 2007 WL 2955960, at *5 (Bankr. D.N.M. Oct. 2, 2007) (deductions for one-time job bonus, travel for child visitation, and student loan expenses do not allow debtors to pass means test); *In re Vaccariello*, 375 B.R. 809, 816 (Bankr. N.D. Ohio 2007) (even including payment on student lots debtors still had disposable income); *In re Johns*, 342 B.R. 626, 629 (Bankr. E.D. Okla. 2006) (even if all debtors' figures were used, they would not pass means test).

¹⁶³See *Robbins v. Ervin* (*In re Ervin*), No. 15-70467, 2016 WL 721043, at *14 (Bankr. W.D. Va. Feb. 23, 2016) (debtor had ruptured spleen, weakened immune system and torn Achilles tendon and had hypersomnia); *In re Chabre*, 531 B.R. 875, 879-880 (Bankr. M.D. Fla. 2015) (debtor had medical problems with disks in her neck, was diabetic, and had a stomach bypass); *In re Edwards*, No. 09-09250, 2010 WL 1006890 (Bankr. E.D.N.C. Mar. 17, 2010) (debtor suffered a massive brain stem stroke and was totally disabled).

¹⁶⁴See *In re Miller*, No. 09-07528, 2010 WL 2670796, at *4 (Bankr. N.D. Ala. June 30, 2010); *In re Armstrong*, No. 06-31414, 2007 WL 1544591, at *2 (Bankr. N.D. Ohio May 24, 2007); *In re Delbecq*, 368 B.R. 754, 756-757 (Bankr. S.D. Ind. 2007); *In re Tauter*, 402 B.R. 903 (Bankr. M.D. Fla. 2009); *In re Patterson*, 392 B.R. 497 (Bankr. S.D. Fla. 2008); *In re Smith*, 388 B.R. 885 (Bankr. C.D. Ill. 2008); *In re Cribbs*, 387 B.R. 324 (Bankr. S.D. Ga. 2008); *In re Witek*, 383 B.R. 323, 330 (Bankr. N.D. Ohio 2007); *In re Pageau*, 383 B.R. 221, 226 (Bankr. D.N.H. 2008).

¹⁶⁵See, e.g., *In re Ross*, No. 10-81200, 2011 WL 482815, at *3 (Bankr. M.D. Ala. Feb. 7, 2011); *In re Miller*, No. 09-07528, 2010 WL 2670796, at *4 (Bankr. N.D. Ala. June 30, 2010); *In re Sparks*, 360 B.R. 224, 230 (Bankr. E.D. Tex. 2006).

¹⁶⁶*In re Martin*, 371 B.R. 347, 352 (Bankr. C.D. Ill. 2007).

¹⁶⁷See *Robbins v. Ervin* (*In re Ervin*), No. 15-70467, 2016 WL 721043, at *12 (Bankr. W.D. Va. Feb. 23, 2016); *In re Burdett*, No. 12-12066, 2013 WL 865575, at *4 (Bankr. E.D. Va. Mar. 7, 2013).

¹⁶⁸See, e.g., *In re Fudge*, No. 15-51518, 2016 WL 285449, at *1 (Bankr. E.D. Mich. Jan. 22, 2016); *In re Mittelstaedt*, No. 13-50225, 2014 WL 814038, at *3 (Bankr. D.S.D. Feb. 28, 2014); *In re Greer*, Nos. 10-63833, 10-62282, 10-62662, 10-62666, 2011 WL 10676936, at *7 (Bankr. E.D. Cal. Sept. 30, 2011); *In re Ross*, No. 10-81200, 2011 WL 482815, at *3 (Bankr. M.D. Ala. Feb. 7, 2011); *In re Smith*, 436 B.R. 476, 481 (Bankr. N.D. Ohio 2010) (*Steven Smith*); *In re Polkinghorn*, 436 B.R. 484, 490 (Bankr. N.D. Ohio 2010); *In re Roach*, No. 09-76184, 2010 BL 217714, at *2 (Bankr. E.D. Mich. Aug. 25, 2010); *In re Miller*, No. 09-07528, 2010 WL 2670796, at *4 (Bankr. N.D. Ala. June 30, 2010); *In re Fechter*, 456 B.R. 65, 74 (Bankr. D. Mont. 2010); *In re Rieck*, 427 B.R. 141, 146-147 (Bankr. D. Minn. 2010); *In re Stocker*, 399 B.R. 522, 530 (M.D. Fla. 2008); *In re Lightsey*, 374 B.R. 377, 382 (Bankr. S.D. Ga. 2007); *In re Tranmer*, 355 B.R. 234, 251 (Bankr. D. Mont. 2006).

normally encountered by most debtors,”¹⁶⁹ and “leave[] the debtor with no reasonable alternative but to incur the expense.”¹⁷⁰ Under this approach, courts interpret the language to “set this bar extremely high, placing it effectively off limits for most debtors.”¹⁷¹ These courts view the insertion of the explicit inclusion for “a serious medical condition or a call or order to active duty in the Armed Forces” as limiting the nature of events constituting special circumstances under the canon of statutory interpretation *ejusdem generis*.¹⁷²

The other school of thought is sometimes called the broad approach. These courts see the examples of special circumstances provided in the statute as mere examples rather than limiting in nature,¹⁷³ and do not require that the special circumstances be outside of the debtor’s control,¹⁷⁴ or unanticipated.¹⁷⁵ The broad approach, with which commentators have generally agreed,¹⁷⁶ is more consistent with the legislative history for two reasons.

¹⁶⁹See *In re Maura*, 491 B.R. 493, 512 (Bankr. E.D. Mich. 2013); *In re Polkinghorn*, 436 B.R. 484, 490 (Bankr. N.D. Ohio 2010); *In re Burggraf*, 436 B.R. 466, 472 (Bankr. N.D. Ohio 2010).

¹⁷⁰See *In re Armstrong*, 2007 WL 1544591, at *2 (Bankr. N.D. Ohio May 24, 2007).

¹⁷¹*In re Haar*, 360 B.R. 759 (Bankr. N.D. Ohio Feb. 20, 2007); see also *In re Wagner*, No. 07-42262, 2008 BL 53424, at *2 (Bankr. D. Neb. Mar. 14, 2008); *In re Parulan*, 387 B.R. 168 (Bankr. E.D. Va. 2008); *In re Samson*, No. 08-80615, 2008 WL 2949250, at *2 (Bankr. D. Neb. July 28, 2008).

¹⁷²Latin for “of the same kind,” the canon suggests that when certain examples are listed (as in a statute), and a more general phrase is also used that may include other things, the other things must be of the same kind as the specific examples provided. See, e.g., *In re Fudge*, No. 15-51518, 2016 WL 285449, at *1 (Bankr. E.D. Mich. Jan. 22, 2016); *In re Mittelstaedt*, No. 13-50225, 2014 WL 814038, at *3 (Bankr. D.S.D. Feb. 28, 2014); *In re Martin*, 491 B.R. 493, 511 (Bankr. E.D. Mich. 2013); *In re Burggraf*, 436 B.R. 466, 471 (Bankr. N.D. Ohio 2010); *In re Taylor*, 417 B.R. 762, 765 (Bankr. N.D. Ohio 2009); *In re Smith*, 388 B.R. 885, 888 (Bankr. C.D. Ill. 2008) (*Earl Smith*); *In re Naut*, No. 07-20280, 2008 WL 191297, at *10 (Bankr. E.D. Pa. Jan. 22, 2008).

¹⁷³See, e.g., *In re Champagne*, 389 B.R. 191, 202 (Bankr. D. Kan. 2008) (stating that “the two statutory circumstances are mere examples to assure protection of debtors in the referenced categories from a finding of abuse”); *In re Robinette*, No. 06-10585, 2007 WL 2955960, at *4 (Bankr. D.N.M. Oct. 2, 2007) (opining that the two examples “are not the only circumstances that debtors may cite, nor even archetypal circumstances”); *In re Delbecq*, 368 B.R. 754, 758 (Bankr. S.D. Ind., 2007) (noting that examples were not “intended to define, qualify or otherwise limit the meaning of ‘special circumstances.’”).

¹⁷⁴See *In re Martin*, 505 B.R. 517, 520-521 (Bankr. S.D. Iowa 2014); *In re Armstrong*, 2007 WL 1544591 at *3 (Bankr. N.D. Ohio May 24, 2007); *In re Turner*, 376 B.R. 370, 378 (Bankr. D.N.H. 2007); *In re Littman*, 370 B.R. 820, 831 (Bankr. D. Idaho 2007); *In re Haman*, 366 B.R. 307, 313 (Bankr. D. Del. 2007); *In re Graham*, 363 B.R. 844, 850 (Bankr. S.D. Ohio 2007); *In re Tamez*, No. 07-60047, 2007 WL 2329805 (Bankr. W.D. Tex. Aug. 13, 2007); *In re Thompson*, 350 B.R. 770, 777 (Bankr. N.D. Ohio 2006).

¹⁷⁵See, e.g., *In re Robinette*, No. 06-10585, 2007 WL 2955960, at *4 (Bankr. D.N.M. Oct. 2, 2007); *In re Armstrong*, 2007 WL 1544591 at *3 (Bankr. N.D. Ohio May 24, 2007).

¹⁷⁶See, e.g., 6 COLLIER ON BANKRUPTCY ¶ 707.05[2][d] (Alan N. Resnick et al. eds., 15th ed. rev. 2006) (suggesting that special circumstances could be established for “high commuting costs, the increased price of gas, security costs in dangerous neighborhoods, or the cost of infant formula and diapers” or any other “legitimate expense that is out of the ordinary for an average family, or that may have increased since the IRS guidelines were calculated”); Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4th ed., § 487.1, at ¶ [4], Sec. Rev. Apr. 14, 2009, www.Ch13online.com (identifying as potential special circumstances “lost jobs, domestic relations problems, children in trouble, natural disasters, car wrecks” and stating that special circumstances is not as “demanding or difficult as an undue hardship”); Roma Perez,

First, Congress used the term “special circumstances,” intentionally rejecting the phrase “extraordinary circumstances” which, as discussed above, had been proposed in prior versions of the means test.¹⁷⁷ This change in nomenclature suggests that Congress intended the facts that would overcome the presumption of abuse to be something less than extraordinary. In fact, the report of the Senate Judiciary Committee emphasized that the standard was “to protect debtors from rigid and arbitrary application of a means-test.”¹⁷⁸ While the special circumstances doctrine was “not [to] be used as a convenient way for debtors to choose a more expensive lifestyle,”¹⁷⁹ it was to be available to “those debtors whose special circumstances require adjustments to income or expenses that place them in dire need of chapter 7 relief.”¹⁸⁰

Second, the courts that apply the doctrine of *ejusdem generis* fail to understand the genesis of the explicit statutory inclusion for “a serious medical condition or a call or order to active duty in the Armed Forces” in § 707(b)(2)(B)(i). As discussed above,¹⁸¹ it was inserted specifically because members of Congress believed that the phrase “special circumstances” might be read too narrowly and exclude such events as those described in that phrase, not because they were trying to define the types of events that could constitute special circumstances. As one of the courts adopting the broad approach to special circumstances noted, the examples were intended to be “*expansive* – not limiting.”¹⁸²

One of the most frequently-invoked bases for asserting that special circumstances exist relates to retirement accounts. Under § 1322(f), added by BAPCPA,¹⁸³ amounts required to repay a loan from a qualified pension plan do not constitute “disposable income” for purposes of § 1325.¹⁸⁴ Debtors argue that, because such amounts would not be available to creditors in chapter 13, they should not be considered in computing the presumption of abuse

Not “Special” Enough for Chapter 7: An Analysis of the Special Circumstances Provision of the Bankruptcy Code, 61 CLEV. ST. L. REV. 983, 1014 (2013) (stating that the “more moderate approach” to the interpretation of § 707(b)(2)(B) is “better-reasoned analysis”); Charles J. Tabb & Jillian K. McClelland, *Living with the Means Test*, 31 S. ILL. U. L.J. 463, 498 (2007) (suggesting that “almost anything could qualify, as long as the debtor can show necessity, reasonableness, and lack of a reasonable alternative”).

¹⁷⁷See text at note 83 *supra*.

¹⁷⁸S. REP. NO. 106-49, 106th Cong. 1st Sess., at 7 (May 11, 1999).

¹⁷⁹*Id.*

¹⁸⁰*Id.*

¹⁸¹See text at notes 114-118 *supra*.

¹⁸²See, e.g., *In re Haman*, 366 B.R. 307, 314 (Bankr. D. Del. 2007) (emphasis in original); see also *In re Sanders*, 454 B.R. 855, 859-861 (2011).

¹⁸³Pub. L. No. 109-8, § 224(d) (2005).

¹⁸⁴Section 1322(f) states that a chapter 13 plan “may not materially alter the terms of a loan described in section 362(b)(19) and any amounts required to repay such loan shall not constitute ‘disposable income’ under section 1325.” Section 362(b)(19) allows withholding of income from debtor’s wages for the benefit of a qualified pension plan “to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan”

in chapter 7 either. To do otherwise would force debtors into chapter 13 even when creditors would not receive any additional distribution under that chapter, which constitutes “special circumstances.” Although some courts have found that the need to repay 401(k) loans constitutes “special circumstances,”¹⁸⁵ others reject that argument, unless the circumstances surrounding the underlying loan were themselves special.¹⁸⁶

A related claim is that voluntary contributions to pension plans should be considered special circumstances, especially when the debtor is older and re-

¹⁸⁵See, e.g., *In re Kowal*, No. 12-82897, 2013 WL 5442018, at *3 (Bankr. D. Neb. Sept. 27, 2013); *In re Cribbs*, 387 B.R. 324 (Bankr. S.D. Ga. 2008); *In re Herbert*, No. 07-40224, 2007 WL 6363172, at *6 (Bankr. D. Neb. May 21, 2007); *In re Lenton*, 358 B.R. 651, 662 (Bankr. E.D. Pa. 2006), *appeal dismissed as moot*, *Lenton v. U.S. Trustee*, No. 007-178, 2009 WL 1872667 (E.D. Pa. June 29, 2009); *In re Thompson*, 350 B.R. 770 (Bankr. N.D. Ohio 2006) (*Gregory Thompson*), *rev'd sub nom.* *Eisen v. Thompson*, 370 B.R. 762 (N.D. Ohio 2007).

¹⁸⁶See, e.g., *Egebjerg v. Anderson (In re Egebjerg)*, 574 F.3d 1045, 1053 (9th Cir. 2009) (reversing bankruptcy court on this issue); *In re Weinert*, No. 11-69840, 2013 WL 1694482, at *5 (Bankr. E.D. Mich. Apr. 11, 2013); *In re Barker*, No. 12-32954, 2013 WL 796171, at *5 (Bankr. N.D. Ohio Mar. 1, 2013); *In re DeJoy*, No. 11-10268, 2011 WL 5827319, at *5 (Bankr. N.D.N.Y. Nov. 18, 2011); *In re Polkinghorn*, 436 B.R. 484, 490 (Bankr. N.D. Ohio 2010); *In re Siler*, 426 B.R. 167, 173 (Bankr. W.D.N.C. 2010); *In re Roach*, No. 09-76184, 2010 BL 217714, at *3 (Bankr. E.D. Mich. Aug. 25, 2010); *In re Tauter*, 402 B.R. 903, 907 (Bankr. M.D. Fla. 2009); *In re Jackson*, No. 07-21717, 2008 WL 5539790, at *3 (Bankr. D. Kan. Dec. 5, 2008); *In re Samson*, No. 08-80615, 2008 WL 2949250, at *2 (Bankr. D. Neb. July 28, 2008); *In re Watkins*, No. 07-6317, 2008 WL 2475749, at *7 (Bankr. D. Ariz. June 18, 2007); *In re Smith*, 388 B.R. 885, 888 (Bankr. C.D. Ill. 2008) (*Earl Smith*); *In re Darling*, No. 07-10746, 2008 WL 2278901, at *1 (Bankr. D. Vt. May 19, 2008); *In re Mowris*, 384 B.R. 235, 240-241 (Bankr. W.D. Mo. 2008); *In re Turner*, 376 B.R. 370, 379 (Bankr. D.N.H. 2007); *In re Scarafioti*, 375 B.R. 618 (Bankr. D. Colo. 2007); cf. *McVay v. Otero*, 371 B.R. 190, 205 (W.D. Tex. 2007) (remanding for evidentiary hearing on whether 401(k) loan repayments were special circumstances in this particular case); *In re Montalto*, 537 B.R. 147, 160 (Bankr. E.D.N.Y. 2015) (although debtor did not claim special circumstances, court stated that 401(k) loan repayment would not constitute special circumstances under facts of the case); *In re Nabulsi*, No. 11-65698, 2013 WL 3784188, at *3 (Bankr. E.D. Mich. July 16, 2013) (debtor abandoned argument of special circumstances, but court noted that 401(k) loan repayments are “ordinarily insufficient to constitute special circumstances.”).

Courts have also rejected attempts to deduct 401(k) loan repayments from the computation of the means test itself, holding that such payments are not payments on a “debt,” see *McVay v. Otero*, 371 B.R. 190, 203 (W.D. Tex. 2007); *Eisen v. Thompson*, 370 B.R. 762, 772 (N.D. Ohio 2007); *Robbins v. Alther (In re Alther)*, 537 B.R. 262, 267-68 (Bankr. W.D. Va. 2015); *In re Montalto*, 537 B.R. 147, 159 (Bankr. E.D.N.Y. 2015); *In re Hartley*, No. 13-61182, 2014 WL 1329407, at *3 (Bankr. D. Or. Mar. 28, 2014); *In re Robrock*, 430 B.R. 197, 210 (Bankr. D. Minn. 2010); *In re Smith*, 388 B.R. 885, 888 (Bankr. C.D. Ill. 2008) (*Earl Smith*); *In re Mowris*, 384 B.R. 235, 238 (Bankr. W.D. Mo. 2008); *In re Samson*, No. 08-80615, 2008 WL 2949250, at *2 (Bankr. D. Neb. July 28, 2008); *In re Mordis*, No. 06-42590, 2007 WL 2962903, at *3 (Bankr. E.D. Mo. Oct. 9, 2007); *In re Turner*, 376 B.R. 370, 375 (Bankr. D.N.H. 2007); *In re Lewis*, No. 07-32371, 2007 WL 2742854 (Bankr. N.D. Ohio Sept. 17, 2007); or an “other necessary expense,” see *In re Koch*, 408 B.R. 539 (Bankr. S.D. Fla. 2009); *In re Mowris*, 384 B.R. 235, 238-239 (Bankr. W.D. Mo. 2008); *In re Turner*, 376 B.R. 370, 375 (Bankr. D.N.H. 2007); *In re Mordis*, No. 06-42590, 2007 WL 2962903, at *3 (Bankr. E.D. Mo. Oct. 9, 2007); *In re Barraza*, 346 B.R. 724, 730-31 (Bankr. N.D. Tex. 2006). See generally Luke Welmerink, *Cleaning the Mess of the Means Test: The Need for a Case-by-Case Analysis of 401(k) Loans in Chapter 7 Bankruptcy Petitions*, 41 GOLDEN GATE U. L. REV. 121 (2010).

lyng on that pension upon retirement.¹⁸⁷ Under § 541(b)(7), also added to the Bankruptcy Code by BAPCPA,¹⁸⁸ “any amount . . . withheld by an employer from the wages of employees for payment as contributions . . . to . . . [a qualified] employee benefit plan” is excluded from property of the estate and “such amount . . . shall not constitute disposable income as defined in section 1325(b)(2).”¹⁸⁹ No similar exclusion applies to chapter 7, and the argument that special circumstances exist in a chapter 7 case because voluntary contributions to pension plans might be excludable from the computation of disposable income in a chapter 13 case is uniformly unsuccessful.¹⁹⁰

Another frequent assertion is that the debtor’s obligation to make payments on nondischargeable student loans constitutes special circumstances that rebut the presumption of abuse. The issue has divided the bankruptcy courts. Some courts have accepted this position,¹⁹¹ and other courts have disagreed, at least under the circumstances present in the case before them.¹⁹²

¹⁸⁷See, e.g., *In re Anderson*, 444 B.R. 505, 507 (Bankr. W.D.N.Y. 2011).

¹⁸⁸Pub. L. No. 109-8, § 323 (2005).

¹⁸⁹11 U.S.C. § 541(b)(7).

¹⁹⁰See *Robbins v. Alther* (*In re Alther*), 537 B.R. 262, 268-269 (Bankr. W.D. Va. 2015); *In re Anderson*, 444 B.R. 505, 508 (Bankr. W.D.N.Y. 2011); *In re Fechter*, 456 B.R. 65, 73 (Bankr. D. Mont. 2010); *In re Siler*, 426 B.R. 167, 173 (Bankr. W.D.N.C. 2010); *In re Tauter*, 402 B.R. 903, 906 (Bankr. M.D. Fla. 2009); *In re Mravik*, 399 B.R. 202, 206 (Bankr. E.D. Wis. 2008); *In re Mordis*, No. 06-42590, 2007 WL 2962903, at *4 (Bankr. E.D. Mo. Oct. 9, 2007); *In re Robinette*, No. 06-10585, 2007 WL 2955960, at *5 (Bankr. D.N.M. Oct. 2, 2007); *In re Scarafioti*, 375 B.R. 618 (Bankr. D. Colo. 2007); *In re Herbert*, No. 07-40224, 2007 WL 6363172, at *5 (Bankr. D. Neb. May 21, 2007). Cf. *In re Thomas*, No. 12-12205 (Bankr. D. Del. July 27, 2012) (court granted motion to dismiss without specifying reasoning, but debtor had claimed that need to make voluntary 401(k) contributions was special circumstance).

¹⁹¹See *In re Bradley*, No. 13-01390, 2013 WL 4663215 (Bankr. S.D. Ala. Aug. 30, 2013); *In re Howell*, 477 B.R. 314, 317 (Bankr. W.D.N.Y. 2012); *In re Thompson*, 457 B.R. 872, 882 (Bankr. M.D. Fla. 2011) (*Michael Thompson*); *In re Sanders*, 454 B.R. 855 (Bankr. M.D. Ala. 2011); *In re Martin*, 371 B.R. 347, 356 (Bankr. C.D. Ill. 2007); *In re Delbecq*, 368 B.R. 754, 759 (Bankr. S.D. Ind. 2007); *In re Robinette*, No. 06-10585, 2007 WL 2955960, at *5 (Bankr. D.N.M. Oct. 2, 2007); *In re Haman*, 366 B.R. 307, 318 (Bankr. D. Del. 2007); *In re Templeton*, 365 B.R. 213, 216-217 (Bankr. W.D. Okla. 2007). Cf. *In re Thurston*, No. 07-35092 (Bankr. N.D. Ohio Aug. 8, 2008) (refusing to dismiss case under § 707(b)(3) because of nondischargeable student debt).

¹⁹²See *In re Fudge*, No. 15-51518, 2016 WL 285449 (Bankr. E.D. Mich. Jan. 22, 2016); *In re Maura*, 491 B.R. 493, 512 (Bankr. E.D. Mich. 2013); *In re Edwards*, No. 12-00603, 2012 WL 3042233, at *7 (Bankr. N.D. Ala. July 25, 2012); *In re Grenardo*, No. 11-25401, 2012 Bankr. LEXIS 6302 (Bankr. D. Colo. May 2, 2012); *In re Campbell*, No. 11-51573, 2012 WL 162287 (Bankr. E.D. Ky. Jan. 18, 2012); *In re Harmon*, 446 B.R. 721, 729-733 (Bankr. E.D. Pa. 2011); *In re Hammock*, 436 B.R. 343, 356 (Bankr. E.D.N.C. 2010); *In re Conlee*, 435 B.R. 490 (Bankr. N.D. Ohio 2010); *In re Rold*, No. 07-04259, 2010 WL 4065082, at *5 (Bankr. S.D. Iowa Oct. 15, 2010); *In re Polkinghorn*, 436 B.R. 484, 490 (Bankr. N.D. Ohio 2010); *In re Burggraf*, 436 B.R. 466, 471 (Bankr. N.D. Ohio 2010); *In re Womer*, 427 B.R. 334, 337 (Bankr. M.D. Pa. 2010); *In re Siler*, 426 B.R. 167, 173 (Bankr. W.D.N.C. 2010); *In re Willson*, No. 09-02811, 2010 WL 1509288, at *1 (Bankr. M.D. Pa. Apr. 14, 2010); *In re Carrillo*, 421 B.R. 540, 546 (Bankr. D. Ariz. 2009); *In re Patterson*, 392 B.R. 497, 507 (Bankr. S.D. Fla. 2008); *In re Champagne*, 389 B.R. 191, 200-201 (Bankr. D. Kan. 2008); *In re Pageau*, 383 B.R. 221, 228 (Bankr. D.N.H. 2008); *In re Wagner*, No. 07-42262, 2008 BL 53424, at *4 (Bankr. D. Neb. Mar. 14, 2008); *In re Vaccariello*, 375 B.R. 809, 816 (Bankr. N.D. Ohio 2007). See generally Benjamin A. Cohen-Kurzrock, *It’s Not Abusive or Personal: Student Loans and 11 U.S.C. § 707*, 52 Hous. L. Rev. 1197 (2015); Antony P. Cali, Note, *The “Special Circumstance” of*

A debtor's claim that his or her other ongoing expenses in excess of those allowed by the means test should be considered special circumstances have rarely succeeded.¹⁹³ However, some debtors have established special circumstances when the excess expenses are attributable to family exigencies. The following facts have been cited in finding special circumstances on the basis of increased expenses:

- The cost of maintaining separate households borne by debtors who

Student Loan Debt Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 52 ARIZ. L. REV. 473 (2010).

¹⁹³See, e.g., *Robbins v. Ervin* (*In re Ervin*), No. 15-70467, 2016 WL 721043, at *13 (Bankr. W.D. Va. Feb. 23, 2016) (rejecting as special circumstances expenses related to ninety-seven mile round trip commute, need to get new car, purchase of partnership interest, tax liability on partnership income); *In re Hurst*, No. 13-05987, 2014 WL 2809026, at *3 (Bankr. E.D.N.C. June 20, 2014) (expenses related to debtors' commutes of seventy miles and ninety-five miles, respectively, do not create special circumstances); *In re Hartley*, No. 13-61182, 2014 WL 5474295, at *3 (Bankr. D. Or. Mar. 28, 2014) (proposed expenses to make badly needed repairs to bathroom in home were not special circumstances because there was reasonable alternative, giving up the home); *In re Kowal*, No. 12-82897, 2013 WL 5442018, at *2 (Bankr. D. Neb. Sept. 27, 2013) (additional expenses for automobiles, home repairs, not special circumstances); *In re Maura*, 491 B.R. 493, 511 (Bankr. E.D. Mich. 2013) (Catholic school tuition not special circumstances); *In re Thomas*, No. 12-12205 (Bankr. D. Del. July 25, 2012) (court did not accept debtor's claim of need for extra cars and extra expenses for commuting); *In re Pignotti*, No. 07-04109, 2011 WL 1299616 (Bankr. S.D. Iowa Apr. 1, 2011) (excess transportation costs because of long commute from house to which debtors moved not special circumstances); *In re Thompson*, 457 B.R. 872, 882 (Bankr. M.D. Fla. 2011) (*Michael Thompson*) (prospective medical expenses not special circumstances); *In re Fechter*, 456 B.R. 65, 73-74 (Bankr. D. Mont. 2010) (real estate business expenses do not constitute special circumstances); *In re Wise*, No. 10-32441, 2011 WL 2133843 (Bankr. S.D. Ill. May 27, 2011) (desire to save for children's education expenses not special circumstances); *In re Rieck*, 427 B.R. 141, 148 (Bankr. D. Minn. 2010) (excess transportation costs for automobiles used by debtors' children to travel to school not special circumstances); *In re DeJoy*, No. 11-10268, 2011 WL 5827319, at *4 (Bankr. N.D.N.Y. Nov. 18, 2011) (rejecting claim that expenses of older model vehicles demonstrate special circumstances); *In re Linville*, 446 B.R. 522 (Bankr. D.N.M. 2011) (college expenses of adult children do not create special circumstances); *In re Ross*, No. 10-81200, 2011 WL 482815, at *3 (Bankr. M.D. Ala. Feb. 7, 2011) (amounts debtor wished to put aside for future home, car, education not special circumstances); *In re Taylor*, 417 B.R. 762, 765 (Bankr. N.D. Ohio 2009) (expenses incurred as a result of divorce not special circumstances); *In re Tauter*, 402 B.R. 903, 907 (Bankr. M.D. Fla. 2009) (potential need to replace fourteen-year-old vehicle not special circumstances); *In re Patterson*, 392 B.R. 497, 505-506 (Bankr. S.D. Fla. 2008) (expenses of storage unit, food expenses for truck driver while on the road, and living expenses for adult college student not special circumstances); *In re Shinkle*, 382 B.R. 85 (Bankr. E.D. Ky. 2008) (additional housing expenses for house larger than debtors currently needed not special circumstances); *In re Naut*, No. 07-20280, 2008 WL 191297, at *10 (Bankr. E.D. Pa. Jan. 22, 2008) (debtor's inability to run a profitable business and to sell home at a profit not special circumstances); *In re Lightsey*, 374 B.R. 377, 382 (Bankr. S.D. Ga. 2007) (obligation to pay large deficiency judgment relating to car loan incurred during prior marriage not special circumstances); *In re Starkey*, No. 06-81473, 2007 WL 6364773, at *3 (Bankr. D. Neb. Jan. 25, 2007) (living in an expensive area does not constitute special circumstances); *In re Herbert*, No. 07-40224, 2007 WL 6363172, at *5 (Bankr. D. Neb. May 21, 2007) (finding no special circumstances in debtors' housing expenses in excess of those allowed by local standard); *In re Delunas*, No. 06-43133, 2007 WL 737763, at *2 (Bankr. E.D. Mo. Mar. 6, 2007) (no special circumstances requiring family to live in house large enough to give each child own bedroom); *In re Ferando*, No. 06-81855, 2007 WL 6364774 (Bankr. D. Neb. Mar. 1, 2007) (unusually high commissions during six months prior to bankruptcy filing not special circumstances).

were living apart, either because of a legal separation,¹⁹⁴ or the requirements of employment.¹⁹⁵

- High vehicle operation expenses for debtors who lived in a rural area and needed to commute significant distances to their respective places of employment, beginning at 4:30 a.m., when they had a history of collisions with deer.¹⁹⁶
- Providing substantial support to debtor's eighty-one-year-old mother, and her sister who was in chronically poor health, a disabled niece and nephew, and an elderly aunt.¹⁹⁷
- Increased postpetition medical and automotive expenses.¹⁹⁸
- Debtor's pre-bankruptcy pregnancy and postpetition birth of additional child.¹⁹⁹
- Child support payment obligations imposed on debtor pursuant to post-filing divorce decree.²⁰⁰
- Transportation expenses to visit children.²⁰¹
- Modest increase in housing allowance for home in safe neighborhood where child with mental and emotional difficulties could attend school where he was thriving and where debtors could access after-school child care assistance of extended family.²⁰²

Prior to *Hamilton v. Lanning*,²⁰³ some courts were sympathetic to arguments that special circumstances exist if the debtor's projected income was substantially lower than that used to compute "current monthly income" for purposes of the means-test computation.²⁰⁴ But in general arguments relating

¹⁹⁴See *In re Armstrong*, No. 06-31414, 2007 WL 1544591, at *2 (Bankr. N.D. Ohio May 24, 2007).

¹⁹⁵See *In re Graham*, 363 B.R. 844, 850 (Bankr. S.D. Ohio 2007). *But see* *Robbins v. Ervin (In re Ervin)*, No. 15-70467, 2016 WL 721043, at *12 (Bankr. W.D. Va. Feb. 23, 2016) (suggesting that need to maintain separate address because of employment would not constitute special circumstances).

¹⁹⁶See *In re Batzkeil*, 349 B.R. 581 (Bankr. N.D. Iowa 2006). *But cf. In re Mansfield*, No. 11-06867, 2012 WL 627786, at *3 (Bankr. E.D.N.C. Feb. 24, 2012) (concluding that because debtor could use a more fuel efficient vehicle for his commute, high costs were not special circumstances); *In re Tranmer*, 355 B.R. 234, 251 (Bankr. D. Mont. 2006) (suggesting that long commute could be avoided by chapter 13 debtors if they relocated their residence, and did not constitute special circumstances).

¹⁹⁷See *In re Chabre*, 531 B.R. 875 (Bankr. M.D. Fla. 2015).

¹⁹⁸See *In re Hunt*, No. 08-06916, Dkt. 35 (Bankr. S.D. Ind. Dec. 18, 2008).

¹⁹⁹See *In re Inghilterra*, No. 11-11776, 2012 WL 1137008, at *8 (Bankr. D. Colo. Apr. 4, 2012); *In re Martin*, 371 B.R. 347, 355 (Bankr. C.D. Ill. 2007).

²⁰⁰See *In re Littman*, 370 B.R. 820 (Bankr. D. Idaho 2007).

²⁰¹See *In re Robinette*, No. 06-10585, 2007 WL 2955960, at *5 (Bankr. D.N.M. Oct. 2, 2007).

²⁰²See *In re Scarafioti*, 375 B.R. 618 (Bankr. D. Colo. 2007).

²⁰³*Hamilton v. Lanning*, 560 U.S. 505 (2010). See discussion at notes 142-148 *supra*.

²⁰⁴See *In re Murzyn*, No. 08-15279, Dkt. 56 (Bankr. D. Ariz. June 22, 2009); *In re Smith*, No. 08-31131, 2008 WL 6069509 (Bankr. W.D.N.C. Oct. 6, 2008) (*Carrie Smith*); *In re Binninger*, No. 07-00203, 2007 WL 3091584, at *3 (Bankr. N.D. Iowa Oct. 19, 2007); *In re Robinette*, No. 06-10585, 2007 WL 2955960, at *5 (Bankr. D.N.M. Oct. 2, 2007); *In re Tamez*, No. 07-60047, 2007 WL 2329805 (Bankr. W.D. Tex. Aug. 13, 2007); *In re Heath*, 371 B.R. 806 (E.D. Mich. 2007); *In re Melin*, No. 06-32652 (Bankr. N.D. Ohio Sept. 27, 2006).

to the debtor's lower income have not been successful.²⁰⁵ One debtor successfully claimed special circumstances to allow the debtor to exclude unemployment benefits received by debtor's alcoholic brother who was living with debtor when debtor claimed that the benefits were not used for household expenses.²⁰⁶ Another successfully argued that an adjustment in income constituted special circumstances because the debtor was retiring from her high-paying job.²⁰⁷ But a debtor who attempted to exclude a civil service retirement system pension that was paid in lieu of social security benefits as special circumstances was not successful.²⁰⁸

And although the purpose behind the means test was to compel a consumer debtor into a chapter 13 or chapter 11 case when the computations demonstrated that the debtor had the ability to make a meaningful payment on his or her unsecured debts through dedication of future income, courts have also almost uniformly rejected the contention that the fact that a chap-

²⁰⁵See *In re Mittelstaedt*, No. 13-50225, 2014 WL 814038, at *3 (Bankr. D.S.D. Feb. 28, 2014) (debtor's decreased income because debtor chose to retire and move to Florida not special circumstances); *In re Wilson*, No. 14-30234 (Bankr. E.D. Mich. Jan. 31, 2014) (debtor claimed reduced overtime, but actual income was higher); *In re Kowal*, No. 12-82897, 2013 WL 5442018, at *2 (Bankr. D. Neb. Sept. 27, 2013) (decreased income and child support payments not special circumstances); *In re Copeland*, No. 12-32287, 2013 WL 1289154, at *5 (Bankr. N.D. Ohio Mar. 26, 2013) (rejecting argument that temporary decline in income due to post-petition unemployment and depression over death of wife constituted special circumstances); *In re Burdett*, No. 12-12066, 2013 WL 865575, at *4 (Bankr. E.D. Va. Mar. 7, 2013) (finding \$13,160 decline in income insufficient to establish special circumstances); *In re Chambers*, No. 10-00856, 2011 WL 4479690, at *4 (Bankr. S.D. Iowa June 7, 2011) (concluding debtor failed to show that overall income decreased significantly since filing bankruptcy petition); *In re Wise*, No. 10-32441, 2011 WL 2133843 (Bankr. S.D. Ill. May 27, 2011) (debtor's anticipated loss of child support payments not special circumstances); *In re Smith*, 436 B.R. 476, 481 (Bankr. N.D. Ohio 2010) (*Steven Smith*) (fluctuations in income because debtors no longer getting overtime did not constitute special circumstances); *In re Fechter*, 456 B.R. 65, 73-74 (Bankr. D. Mont. 2010) (prospective loss of child support payments does not constitute special circumstances); *In re Rieck*, 427 B.R. 141, 148 (Bankr. D. Minn. 2010) (one-time receipt of savings bond income not special circumstances); *In re Cotto*, 425 B.R. 72, 77-78 (Bankr. E.D.N.Y. 2010) (receipt of non-recurring wage settlement not special circumstances); *In re Rudnick*, 435 B.R. 613, 615 (Bankr. D. Minn. 2010) (decreased income because of prospective demotions not special circumstances); *In re Showers*, No. 08-30359, 2008 WL 5786900 (Bankr. E.D. Va. Nov. 19, 2008) (potential reduction in income due to reduced overtime not special circumstances); *In re Hernandez*, No. 08-31588, 2008 WL 5441279, at *5 (Bankr. N.D. Ohio Dec. 1, 2008) (debtor's decision to decrease number of hours worked was not special circumstances); *In re Budig*, 387 B.R. 12 (Bankr. N.D. Iowa 2008) (claim of less income because of abnormally harsh winter was not special circumstances); *In re Binninger*, No. 07-00203, 2007 WL 3091584, at *3 (Bankr. N.D. Iowa Oct. 19, 2007) (rejecting contention that debtor would not have as much overtime in the future as during the six month prior to the bankruptcy filing); *In re Ryder*, No. 07-40538, Dkt. 29 (Bankr. D. Neb. July 20, 2007) (debtor voluntarily quit second job, so loss of income was not special circumstances); *In re Herbert*, No. 07-40224, 2007 WL 6363172, at *6 (Bankr. D. Neb. May 21, 2007) (reduction in debtors' overtime income not special circumstances). Cf. *In re Nabulsi*, No. 11-65698, 2013 WL 3784188, at *3 (Bankr. E.D. Mich. July 16, 2013) (debtor abandoned argument for special circumstances, but court stated that "a reduction in employment compensation does not constitute a special circumstance, but rather is quite a common occurrence for those who file Chapter 7 bankruptcies.").

²⁰⁶See *In re Meyers*, No. 09-77897, 2010 BL 217090 (Bankr. E.D. Mich. Sept. 2, 2010).

²⁰⁷See *In re Mathews*, No. 15-31680 (Bankr. E.D. Wis. Oct. 20, 2015).

²⁰⁸See *In re Moose*, No. 11-51816, 2012 WL 954713 (Bankr. M.D.N.C. Mar. 20, 2012).

ter 13 plan would provide creditors no additional payout does not constitute special circumstances rebutting the presumption of abuse.²⁰⁹

4. Success of Attempts to Rebut Presumption of Abuse

In most cases in which the debtor attempts to rebut the presumption of abuse, the debtor is unsuccessful. Of the 129 cases in the study, in only twenty-seven did the court conclude that the debtor had presented special circumstances sufficient to rebut the presumption,²¹⁰ one of which was reversed on appeal,²¹¹ and in two others the court ordered that the case be converted or dismissed under § 707(b)(3).²¹² In another case, the court de-

²⁰⁹See *In re DeJoy*, No. 11-10268, 2011 WL 5827319, at *6 (Bankr. N.D.N.Y. Nov. 18, 2011); *In re Fechter*, 456 B.R. 65, 71 (Bankr. D. Mont. 2010); *In re Tauter*, 402 B.R. 903, 908 (Bankr. M.D. Fla. 2009); *In re Darling*, No. 07-10746, 2008 WL 2278901, at *1 (Bankr. D. Vt. May 19, 2008); *In re Smith*, 388 B.R. 885, 889 (Bankr. C.D. Ill. 2008) (*Earl Smith*); *In re Pageau*, 383 B.R. 221, 230 (Bankr. D.N.H. 2008); *In re Castle*, 362 B.R. 846, 850-851 (Bankr. N.D. Ohio 2006); *In re Johns*, 342 B.R. 626, 629 (Bankr. E.D. Okla. 2006); but see *In re Delbecq*, 368 B.R. 754, 760 (Bankr. S.D. Ind. 2007) (stating “there is simply no logic to essentially forcing a debtor into a Chapter 13 case if the distribution in that case will yield nothing to unsecured creditors.”); cf. *In re Harmon*, 446 B.R. 721, 731-732 (Bankr. E.D. Pa. 2011) (concluding that debtor failed to establish that unsecured creditors would not receive meaningful distribution in chapter 13); *In re Siler*, 426 B.R. 167, 177 (Bankr. W.D.N.C. 2010) (to use means test to deny chapter 7 relief to debtors who cannot pay unsecured creditors in chapter 13 “is absurd and contrary to the purpose of the Means Test.”); *In re Barraza*, 346 B.R. 724, 731-733 (Bankr. N.D. Tex. 2006) (declining to decide whether the fact that debtor would have no projected disposable income in chapter 13 constitutes special circumstances). Cf. also *In re Persaud*, 486 B.R. 251, 264 (Bankr. W.D.N.Y. 2013) (fact that a majority of household income is not controlled by debtor and thus may not be available to fund chapter 13 plan not special circumstances); *In re Stocker*, 399 B.R. 522, 532 (M.D. Fla. 2008) (antenuptial agreement under which husband would not be liable for debts of debtor/wife under chapter 13 plan is not special circumstances); *In re Oliver*, 350 B.R. 294, 303 (Bankr. W.D. Tex. 2006) (debtor’s past failure with a debt consolidation plan does not constitute special circumstances).

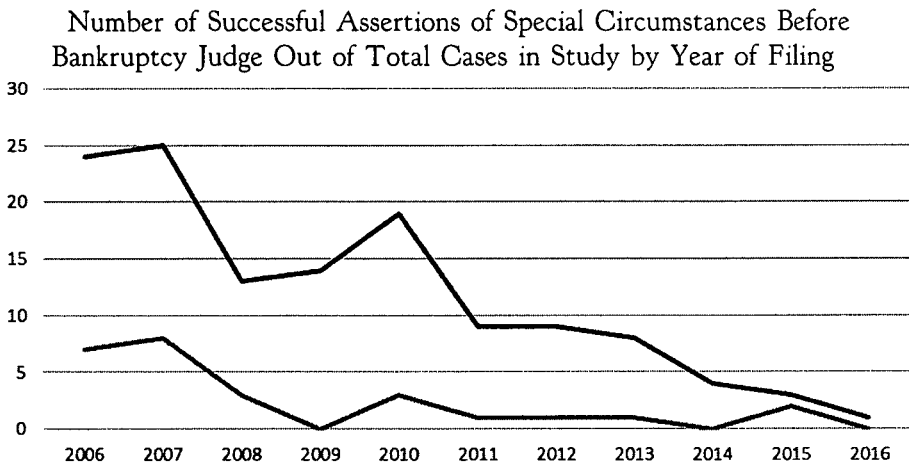
²¹⁰See *In re Chabre*, 531 B.R. 875 (Bankr. M.D. Fla. 2015); *In re Mathews*, No. 15-31680 (Bankr. E.D. Wis. Oct. 20, 2015); *In re Bradley*, No. 13-01390, 2013 WL 4663215 (Bankr. S.D. Ala. Aug. 30, 2013); *In re Howell*, 477 B.R. 314 (Bankr. W.D.N.Y. 2012); *In re Sanders*, 454 B.R. 855 (Bankr. M.D. Ala. 2011); *In re Siler*, 426 B.R. 167 (Bankr. W.D.N.C. 2010); *In re Meyers*, No. 09-77897, 2101 BL 217090 (Bankr. E.D. Mich. Sept. 2, 2010); *In re Edwards*, No. 09-09250, 2010 WL 1006890 (Bankr. E.D.N.C. Mar. 17, 2010) (*Judith Edwards*); *In re Murzyn*, No. 08-15279, Dkt. 56 (Bankr. D. Ariz. June 22, 2009); *In re Hunt*, No. 08-06916, Dkt. 35 (Bankr. S.D. Ind. Dec. 18, 2008); *In re Cribbs*, 387 B.R. 324 (Bankr. S.D. Ga. 2008); *In re Smith*, No. 08-31131, 2008 WL 6069509 (Bankr. W.D.N.C. Oct. 6, 2008) (*Carrie Smith*); *In re Turner*, 376 B.R. 370 (Bankr. D.N.H. 2007); *In re Scarafiotti*, 375 B.R. 618 (Bankr. D. Colo. 2007); *In re Heath*, 371 B.R. 806 (Bankr. E.D. Mich. 2007); *In re Tamez*, No. 07-60047, 2007 WL 2329805 (Bankr. W.D. Tex. Aug. 13, 2007); *In re Martin*, 371 B.R. 347 (Bankr. C.D. Ill. 2007) (*Chad Martin*); *In re Littman*, 370 B.R. 820 (Bankr. D. Idaho 2007); *In re Delbecq*, 368 B.R. 754 (Bankr. S.D. Ind. 2007); *In re Haman*, 366 B.R. 307 (Bankr. D. Del. 2007); *In re Templeton*, 365 B.R. 213 (Bankr. W.D. Okla. 2007); *In re Graham*, 363 B.R. 844 (Bankr. S.D. Ohio 2007); *In re Lenton*, 358 B.R. 651, 662 (Bankr. E.D. Pa. 2006), appeal dismissed as moot, *Lenton v. U.S. Trustee*, No. 07-178, 2009 WL 1872667 (E.D. Pa. June 29, 2009); *In re Thompson*, 350 B.R. 770 (Bankr. N.D. Ohio 2006) (*Gregory Thompson*), *rev’d sub nom. Eisen v. Thompson*, 370 B.R. 762 (N.D. Ohio 2007); *In re Batzkiel*, No. 06-00355 (Bankr. N.D. Iowa Apr. 21, 2006); *In re Armstrong*, No. 06-31414 (Bankr. N.D. Ohio June 13, 2006).

²¹¹*Eisen v. Thompson*, 370 B.R. 762 (N.D. Ohio 2007).

²¹²*Lenton v. U.S. Trustee*, No. 07-178, 2009 WL 1872667 (E.D. Pa. June 29, 2009); *In re Meyers*, No. 09-77897 (Bankr. E.D. Mich. Dec. 11, 2009).

clined to dismiss despite the fact that the debtor had failed to rebut the presumption of abuse,²¹³ an exercise of discretion that most courts have concluded they do not have.²¹⁴ That means that in only twenty-five cases (fewer than one in five of all those cases in which the debtor attempted to rebut the presumption), the debtor prevailed on the motion to dismiss and was permitted to remain in chapter 7.

As the following chart demonstrates, successful efforts to rebut the presumption of abuse before bankruptcy judges have tracked the total number of cases in which the trustee has filed motions to dismiss based on the presumption, and both have declined dramatically since 2007.



5. Disposition of Case

One might expect that in most cases in which a motion to dismiss is made based on the presumption of abuse in which the debtor fails to rebut the presumption, the debtor would convert the case to one under chapter 13 in order to obtain the benefits of bankruptcy protection. In fact, such a conversion occurs only about half the cases. In the other cases, the chapter 7 case is simply dismissed.²¹⁵

²¹³*In re Mravik*, No. 08-28754 (Bankr. E.D. Wis. Aug. 12, 2008).

²¹⁴See, e.g., *Justice v. Advanced Control Solutions, Inc.*, No. 07-5231, 2008 WL 4368668 (W.D. Ark. Sept. 22, 2008), *aff'd*, 639 F.3d 838 (8th Cir. 2011); *In re Woodruff*, 416 B.R. 369, 373 (Bankr. D. Mass. 2009); *In re Witek*, 383 B.R. 323 (Bankr. N.D. Ohio 2997); *In re Haman*, 366 B.R. 307, 311 (Bankr. D. Del. 2007). *But see In re Siler*, 426 B.R. 167, 177 (Bankr. W.D.N.C. 2010); *In re Skvorecz*, 369 B.R. 638, 642 (Bankr. D. Colo. 2007) (concluding that the court need not dismiss the case if chapter 13 would not benefit creditors).

²¹⁵In one case, the court granted the motion of the U.S. trustee to dismiss the case, the debtor appealed the order, and the U.S. trustee petitioned the district court to remand to the bankruptcy court because debtor's circumstances had changed. When the case was remanded, the U.S. trustee withdrew the motion to dismiss. See *In re Pampas*, No. 06-10936 (Bankr. M.D. La. Oct. 27, 2006).

Converted to chapter 13	Converted to chapter 11	Dismissed
52 ²¹⁶	2 ²¹⁷	46 ²¹⁸

Even in those cases in which the debtor agreed to convert the case, some resulted in dismissal of the converted case, often within a very short time.²¹⁹ Some were subsequently reconverted to chapter 7 where they were successfully concluded with a discharge.²²⁰ When the debtor's chapter 7 case was dismissed, in some cases the debtor filed yet another chapter 7 case within the next year or so, and the trustee did not move to dismiss the second case,²²¹ or moved to dismiss under § 707(b)(3) and the debtor converted the case.²²² In others, although the debtor did not convert the case to avoid dismissal, the debtor filed a chapter 13 case shortly after dismissal,²²³ or reopened the dismissed case in order to file a motion to convert.²²⁴

So is the means test, with its rebuttable presumption of abuse and special circumstances doctrine successfully forcing debtors into chapter 13 and chap-

²¹⁶Anderson; Barker; Barraza; Budig; Champagne; Conlee; Darling; DeJoy; Delunas; Enriquez; Ervin; Fechter; Fonash; Goodall; Greer; Hammock; Harmon; Hartley; Herbert; Hodson; Hurst; Inghilterra; Jackson; Kowal; Leggett; Lightsey; Linville; Lunn; Mansfield; Patrick Martin; Maura; Meade; Moose; Mouris; Pageau; Patterson; Polkinghorn; Robinson; Rudnick; Samson; Earl Smith; Stanley; Starkey; Stocker; Tauter; Thomas; Vaccariello; Wagner; Willis; Willson; Wise; Womer.

²¹⁷Campbell; Strickland.

²¹⁸Alther; Applegate; Binninger; Burdett; Burggraf; Carrillo; Castle; Chambers; Copeland; Cotto; Marcus Edwards; Egebjerg; Ferando; Fudge; Grenardo; Grover; Haskins; Hernandez; Johns; Katz; Miller; Mittelstaedt; Mordis; Naut; Oliver; Persaud; Pignotti; Rieck; Roach; Robrock; Robinette; Rold; Ross; Ryder; Shinkle; Showers; Singletary; Steven Smith; Taborski; Taylor; Tedford; Michael Thompson; Watkins; Weinert; Wilson; Witek.

²¹⁹Anderson (dismissed less than two months after conversion); Conlee (dismissed seven months after conversion; debtor filed another chapter 7 case nineteen months later in which trustee did not file motion to dismiss); Enriquez (dismissed nine months after conversion); Hammock (dismissed ten months after conversion); Linville (dismissed three months after conversion); Maura (dismissed four months after conversion); Mouris (dismissed one month after conversion); Stanley (dismissed one month after conversion); Stocker (dismissed eleven months after conversion); Wise (dismissed three months after conversion); cf. *In re Applegate*, No. 10-16193 (Bankr. E.D. Cal. May 31, 2010) (after initial chapter 7 case was dismissed, debtor filed second chapter 7 in which trustee filed motion to dismiss based on presumption of abuse and debtor converted case to chapter 13, and chapter 13 was dismissed five months later; debtor filed a third chapter 7 four months later and trustee did not file motion to dismiss).

²²⁰Goodall; Moose; Willis. Willis was actually filed as a chapter 13 case, converted to chapter 7 where the trustee moved to dismiss based on the presumption of abuse, the debtor converted back to chapter 13, and then converted back to chapter 7 where no motion to dismiss was made.

²²¹*In re Carrillo*, No. 11-20321 (Bankr. D. Ariz. Jul. 14, 2011); *In re Witek*, No. 08-31040 (Bankr. N.D. Ohio Mar. 10, 2008); *In re Oliver*, No. 07-12311 (Bankr. W.D. Tex. Dec. 11, 2007); *In re Ferando*, No. 07-81147 (Bankr. D. Neb. June 11, 2007); *In re Singletary*, No. 06-37257 (Bankr. S.D. Tex. Dec. 26, 2006).

²²²*In re Pignotti*, No. 11-02140 (Bankr. S.D. Iowa May 23, 2011).

²²³*In re Wilson*, No. 15-30951 (Bankr. E.D. Mich. Apr. 13, 2015); *In re Showers*, No. 09-35035 (Bankr. E.D. Va. Aug. 4, 2009); *In re Castle*, No. 06-33130 (Bankr. N.D. Ohio Oct. 31, 2006). Wilson was subsequently converted to chapter 7 and the trustee declined to file a motion to dismiss.

²²⁴Fudge.

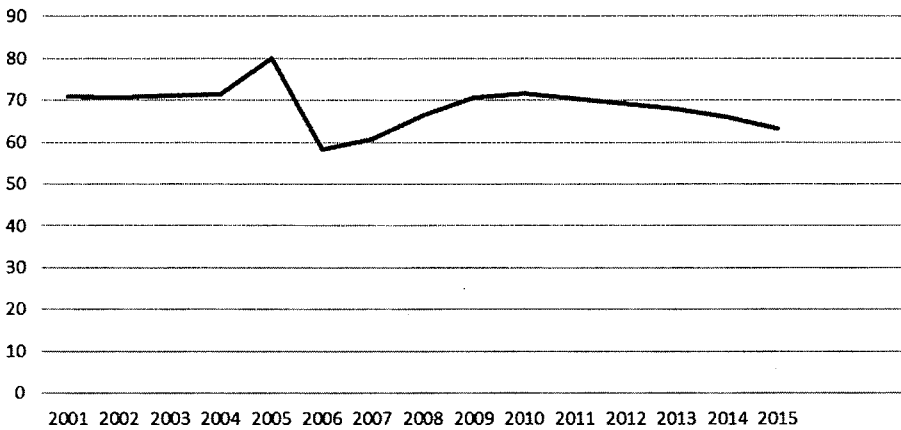
ter 11 where they theoretically can pay their unsecured creditors more than those creditors would have received in the original chapter 7 case? Without looking at the actual recoveries obtained by creditors in the converted cases, I suggest that a successful outcome requires that (1) the chapter 7 case is converted rather than dismissed because of the presumption of abuse (or, if it is dismissed, the debtor then files a chapter 13 or chapter 11 case), and (2) the chapter 13 or chapter 11 case into which it was converted is not subsequently dismissed or reconverted to chapter 7. Looking just at the cases in this study in which the debtors attempted to rebut the presumption, and applying this test of success, only 43 of the 129 cases in this study (one-third) demonstrated a successful application of the means test.²²⁵

One might argue that the success of the means test is demonstrated not only by the number of cases converted to chapter 13 or chapter 11 that result in a discharge in the converted chapter, but in the number of cases that are brought under chapter 13 or 11 in the first instance because the debtor realizes that the means test will preclude relief in chapter 7. If the means test has had that result, we should see that the filing rates for consumer 7 cases go down significantly since the enactment of the means test in 2005. When we look at the chapter 7 filings as a percentage of the total nonbusiness filings,²²⁶ we find that the percentage of nonbusiness filings made under chapter 7, while declining slightly since 2010, has not changed dramatically since the presumption of abuse was created. For the three months ended March 31, 2016, 62.6% of all nonbusiness filings were made under chapter 7.

²²⁵See *Barker*; *Barraza*; *Campbell*; *Castle*; *Champagne*; *Darling*; *DeJoy*; *Delunas*; *Ervin*; *Fechter*; *Fonash*; *Fudge*; *Harmon*; *Hartley*; *Herbert*; *Hurst*; *Inghilterra*; *Jackson*; *Kowal*; *Leggett*; *Lightsey*; *Mansfield*; *Patrick Martin*; *Meade*; *Pageau*; *Patterson*; *Polkinghorn*; *Robinson*; *Rudnick*; *Samson*; *Earl Smith*; *Starkey*; *Strickland*; *Tauter*; *Thomas*; *Vaccariello*; *Wagner*; *Willson*; *Womer*.

²²⁶These percentages were derived from Table F-2, U.S. Bankruptcy Courts - Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, [of the applicable year], available at <http://www.uscourts.gov/report-name/bankruptcy-filings>.

Percentage of Nonbusiness Chapter 7 Cases Since 2001



III. CONCLUSION

What are the implications of this study on the application of the rebuttable presumption of abuse under § 707(b)(2)? The first conclusion that I reach is that, although it is difficult to rebut the presumption of abuse, debtors (and their attorneys) are missing an opportunity by not making an effort to do so if there are circumstances that might support that claim. As previously mentioned, in most of the cases I found in which the trustee brought a motion to dismiss based on the presumption of abuse, the debtor never attempted to rebut the presumption by claiming special circumstances. That makes the decision for the court an easy one. When debtors actually claim special circumstances, in almost 20% of the cases they prevail before the bankruptcy judge.

Second, if the debtor wishes to make the attempt to rebut the presumption, the debtor should carefully comply with the procedural requirements of § 707(b)(2)(B)(ii), that is, present documentation with respect to the additional expense or adjustment to income and a detailed explanation of the special circumstances that make the expense or income adjustment “necessary and reasonable.”²²⁷ The debtor must attest to the accuracy of that information,²²⁸ and must ensure that, if the court accepts the debtor’s arguments, the debtor will be able to pass the means test.²²⁹ In thirty-five of the cases in this study, the debtor failed to provide adequate documentation to substantiate one or more of the adjustments the debtor sought,²³⁰ and in another

²²⁷11 U.S.C. § 707(b)(2)(B)(ii)(I) and (II).

²²⁸11 U.S.C. § 707(b)(2)(B)(iii).

²²⁹11 U.S.C. § 707(b)(2)(B)(iv).

²³⁰See cases cited in note 159 *supra*.

eleven cases,²³¹ the adjustments did not allow the debtor to pass the means test. Procedural compliance is as important as satisfaction of the substantive standard.

Finally, courts should recognize that the purpose behind the special circumstances doctrine was to allow debtors to remain in chapter 7 who had "dire need" of chapter 7 relief.²³² Those courts that apply the "narrow" interpretation of "special circumstances" not only ignore the legislative history of the phrase, but defeat the over-arching objective of the means test. Congress intended to funnel a consumer debtor into a case commenced under the appropriate chapter of the Bankruptcy Code to maximize creditor returns, not to prevent that debtor from taking advantage of bankruptcy at all. If chapter 13 and chapter 11 are not realistic alternatives for a debtor, the court should conclude that the debtor has "dire need" of chapter 7 relief. It is a simple concept, but one many courts have failed to grasp.

²³¹See cases cited in note 160 *supra*.

²³²See text at note 184 *supra*.
