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Section 704(b)(2) — The Back Door into Chapter 7 for the Above-Median Debtor

by

*Laura B. Bartell**

In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA),[1] which made extensive changes to the provisions of the Bankruptcy Code[2] governing chapter 7 bankruptcies filed by individual debtors. Most significant were modifications to § 707(b), a section which allows the court, "on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest"[3] to dismiss a chapter 7 bankruptcy case "filed by an individual debtor . . . whose debts are primarily consumer debts"[4] if the granting of relief under chapter 7 "would be an abuse of the provisions of [chapter 7]."[5] In applying the standard of abuse, Congress inserted new language (often called the "means-testing" provision[6]) that requires that "the court shall presume abuse exists"[7] if the debtor's "current monthly income" (as defined in § 101(10A) of the Code[8]) reduced by certain specified monthly expenses[9]

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*Professor of Law, Wayne State University Law School. My thanks to Beth Applebaum for her assistance on this article.

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

[2]11 U.S.C. §§ 101-1532 (2006).

[3]11 U.S.C. § 707(b)(1) (Supp. 2016).

[4]*Id.* Alternatively, the court may, with the consent of the debtor, convert the case to one under chapter 11 or 13. *See id.*

[5]*Id.*

[6]*See, 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, 123 n.15 (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, 248 n.16 (2009); Ned W. Waxman & Justin H. Rucki, *Chapter 7 Bankruptcy Abuse: Means Testing is Presumptive, but "Totality" is Determinative*, 45 HOUSTON L. REV. 901, 903 (2008); Charles J. Tabb & Jillian K. McClelland, *Living with the Means Test*, 31 S. ILL. U. L.J. 463, 464 (2007); Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 231 (2005).

[7]11 U.S.C. § 707(b)(2)(A)(i) (Supp. 2016).

[8]Section 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

and multiplied by sixty[10] is not less than certain dollar amounts specified in the legislation.[11] A motion based on the presumption of abuse may be brought only against an above-median debtor. If the "current monthly income of the debtor . . . and the debtor's spouse combined, as of the date of the order for relief, when multiplied by 12, is equal to or less than"[12] the median family income of the applicable state for a family of the same size as the debtor's family, neither the judge, United States trustee (or bankruptcy administrator, if any),[13] trustee, or other party in interest may file a motion to dismiss based on the presumption of abuse.[14]

In order to alert the court and all parties in interest to potential cases of abuse, the United States trustee is required by § 704(b)(1) to "review all materials filed by the [individual] debtor and, not later than 10 days after the

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> 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.

11 U.S.C. § 101(10A) (Supp. 2016).

[9]The deductions, described in § 707(b)(2)(A)(ii)-(iv), 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," 11 U.S.C. § 707(b)(2)(A)(ii)(I), the "debtor's average monthly payments on account of secured debts," 11 U.S.C. § 707(b)(2)(A)(iii), and the "debtor's expenses for payment of all priority claims," 11 U.S.C. § 707(b)(2)(A)(iv).

[10]The reason for multiplying by sixty is that, if the trustee or the holder of an allowed unsecured claim objects to confirmation of a chapter 13 plan for an above-median debtor, either payments under the plan must pay unsecured claims in full or "the plan [must] provide[ ] that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan." 11 U.S.C. § 1325(b)(1)(B) (Supp. 2016). The "applicable commitment period" for an above-median debtor is not less than five years (sixty months). 11 U.S.C. § 1325(b)(4)(A)(ii).

[11]11 U.S.C. § 707(b)(2)(A)(i). These dollar amounts are also subject to adjustment every three years to reflect changes in the Consumer Price Index. 11 U.S.C. § 104(a) (Supp. 2016).

[12]11 U.S.C. § 707(b)(6).

[13]All references to the United States trustee in this paper should be read to include the bankruptcy administrator in those jurisdictions where the bankruptcy administrator fulfills the role of the United States trustee.

[14]11 U.S.C. § 707(b)(7)(A).

date of the first meeting of creditors, file with the court a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b)."[15] The court is directed to provide a copy of the statement to all creditors not later than seven days after receiving it.[16] In addition, if the debtor is an above-median debtor and the United States trustee determines that the debtor's chapter 7 case is presumed to be abusive under § 707(b), the United States trustee must, pursuant to § 704(b)(2), either file a motion to dismiss not later than thirty days after filing the initial statement of abuse, or alternatively, file another statement "setting forth the reasons the United States trustee . . . does not consider such a motion to be appropriate."[17]

If the United States trustee (or the court, trustee, or any other party in interest) files a motion to dismiss the debtor's chapter 7 case, the debtor may attempt to rebut the presumption created by § 707(b)(2), but the grounds for rebutting the presumption are narrow:

> [T]he 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.[18]

The debtor may show such special circumstances only if the debtor "itemize[s] each additional expense or adjustment of income"[19] and "attest[s] under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required."[20] Even if the debtor meets these requirements, the debtor may rebut the presumption only 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).[21]

One might assume that the United States trustee would bring a motion to dismiss the chapter 7 case of an above-median debtor whenever the bankruptcy petition and associated schedules filed by such a debtor demonstrates failure of the means test, that is, when the computations described in

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[15] 11 U.S.C. § 704(b)(1)(A) (Supp. 2016).

[16] 11 U.S.C. § 704(b)(1)(B).

[17] 11 U.S.C. § 704(b)(2).

[18] 11 U.S.C. § 707(b)(2)(B)(i).

[19] 11 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).

[20] 11 U.S.C. § 707(b)(2)(B)(iii).

[21] *See* 11 U.S.C. § 707(b)(2)(B)(iv).

§ 707(b)(2)(A), which are included in Official Form 122A-2,[22] result in a dollar amount available to pay unsecured creditors in excess of the amount specified by Congress as creating a presumption of abuse. At the very least, one would think that the United States trustee would decline to file a motion to dismiss under § 704(b)(2) only if the debtor establishes to the satisfaction of the United States trustee that the debtor would be able to rebut the presumption of abuse under § 707(b)(2)(B)(i). But in fact, that is not the case. In most cases, the United States trustee does not bring a motion to dismiss a chapter 7 case filed by an above-median debtor even if the above-median debtor cannot pass the means test and even if nothing in the record demonstrates that the debtor would be able to meet the stringent requirements necessary to rebut the presumption of abuse.

In Part I of this article, I discuss the history of the role of the United States trustee in implementing the means-testing provisions. I note that, under the language adopted by Congress, the strict standards for rebutting a presumption of abuse in § 707(b)(2)(B)(i) apply only to the court, not to the United States trustee. Therefore, even if an above-median chapter 7 debtor would be unable to rebut the presumption of abuse, the United States trustee is free to determine under § 704(b)(2) not to file a motion to dismiss. In Part II, I look at a sample of the actual decisions made by United States trustees in chapter 7 cases of above-median debtors who fail to satisfy the means test. I found that, in most cases in the sample, even if the debtor failed the means test, the United States trustee declined to bring a motion to dismiss. In the cases in the study in which the debtor filed a document explaining why the debtor believed that he or she should be allowed to remain in chapter 7 before the United States trustee decided whether to file a motion to dismiss (what I call a "preemptive rebuttal of presumption"), the United States trustee declined to file such a motion in a very high percentage of the cases. In all cases in the study, the United States trustee most often explained a decision not to file a motion to dismiss by noting that the debtor had experienced a reduction in income from that used to make the computation of "current monthly income" under the means test. Therefore, I conclude that the United States trustees are utilizing their discretion under § 704(b)(2) to provide access to chapter 7 to those debtors whose financial circumstances differ from those reflected in the mathematical computations used to determine the presumption of abuse, discretion that Congress removed from the bankruptcy judges when it amended § 707(b) in 2005.

[22]Official Form 122A-2 must be filed by an above-median individual debtor in a chapter 7 case either with the bankruptcy petition or within fourteen days after the petition is filed. Fed. R. Bankr. P. 1007(b)(4), (c).

I. CREATING A ROLE FOR THE UNITED STATES TRUSTEE IN IMPLEMENTING THE MEANS TEST

From the time of its enactment in 1978, the Bankruptcy Code has permitted the bankruptcy judge to dismiss chapter 7 cases under certain circumstances. The original standard enacted by Congress in § 707 of the Code was dismissal "only for cause, including - (1) unreasonable delay by the debtor that is prejudicial to creditors; and (2) nonpayment of any fees and charges required under chapter 123 of title 28."[23] After a series of oversight hearings on consumer bankruptcy,[24] Congress added a new provision to § 707, allowing the court to dismiss a chapter 7 bankruptcy case filed by an individual debtor whose debts were primarily consumer debts for "substantial abuse."[25] However, under the new provision only the court on its own motion (but not at the request of a party in interest) could seek such a dismissal, and Congress directed that there would be a presumption in favor of allowing the debtor to remain in chapter 7.[26]

When the nationwide program of United States trustees was implemented in 1986, Congress amended § 707(b) to permit the United States trustee to bring a motion to dismiss a consumer debtor chapter 7 case for substantial abuse, thus giving the Office of the United States Trustee authority to implement the means test.[27] Nevertheless, because of the statutory presumption in favor of permitting chapter 7 filings by consumer debtors, the United States trustees rarely brought such motions.[28] When the United

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[23] Act of Nov. 6, 1978, Pub. L. No. 95-598, § 707, 92 Stat. 2549, 2606 (1978).

[24] *See Personal Bankruptcy: Oversight Hearings Before the H. Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. (1981-1982).

[25] Bankruptcy Amendments & Federal Judgeship Act of 1984, Pub. L. No. 98-353, sec. 312(2), § 707(b), 98 Stat. 333, 355 (1984).

[26] Section 707(b), as originally enacted, 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."

Id.

[27] Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, sec. 219, § 707(b), 100 Stat. 3088, 3101 (1986).

[28] For the first ten years after the effective date of the 1986 amendments to § 707 to permit the United States trustee to move to dismiss a case for substantial abuse, there were fewer than 100 reported bankruptcy cases in which a United States trustee brought such a motion and the bankruptcy court ruled on it. *See In re* Stewart, 201 B.R. 996 (Bankr. N.D. Okla. 1996); U.S. Trustee v. Duncan (*In re* Duncan), 201 B.R. 889 (Bankr. W.D. Pa. 1996); *In re* Matias, 203 B.R. 490 (Bankr. S.D. Fla. 1996); *In re* Oswald, No. 96-70914, 1996 WL 33406627 (Bankr. C.D. Ill. Aug. 29, 1996); *In re* Mathes, No. 96-32602, 1996 WL 1055813 (Bankr. D. Minn. Aug. 21, 1996); *In re* Schmidt, 200 B.R. 36 (Bankr. D. Neb. 1996); *In re* Higuera, 199 B.R. 196 (Bankr. W.D. Okla. 1996); *In re* Haffner, 198 B.R. 646 (Bankr. D.R.I. 1996); *In re*

Stallman, 198 B.R. 491 (Bankr. W.D. Mich. 1996); *In re* Mastromarino, 197 B.R. 171 (Bankr. D. Me. 1996); *In re* Ontiveros, No. 95-82072, 1996 WL 33401160 (Bankr. C.D. Ill. Feb. 27, 1996), *rev'd*, 198 B.R. 284 (C.D. Ill. 1996); *In re* Dickerson, 193 B.R. 67 (Bankr. M.D. Fla. 1996); *In re* Braithwaite, 192 B.R. 882 (Bankr. N.D. Ohio 1996); *In re* Vianese, 192 B.R. 61 (Bankr. N.D.N.Y. 1996); *In re* Balaja, 190 B.R. 335 (Bankr. N.D. Ill. 1996); *In re* Richardson, No. 95-41052, 1995 WL 17005102 (Bankr. S.D. Ga. Sept. 28, 1995); *In re* Gentri, 185 B.R. 368 (Bankr. M.D. Fla. 1995); *In re* Dempton, 182 B.R. 38 (Bankr. W.D. Mo. 1995); *In re* Blair, 180 B.R. 656 (Bankr. N.D. Ala. 1995); *In re* Jarrell, 189 B.R. 374 (Bankr. M.D.N.C. 1995); *In re* Tylvasky, No. 94-31061, 1995 WL 1032564 (Bankr. N.D. Ind. Mar. 20, 1995); *In re* Messenger, 178 B.R. 145 (Bankr. N.D. Ohio 1995); *In re* Smith, No. 94-01953, 1995 WL 20345 (Bankr. D. Idaho Jan. 11, 1995); U.S. Trustee v. Gavita (*In re* Gavita), 177 B.R. 43 (Bankr. W.D. Pa. 1994); *In re* Hill, No. 94-01881, 1994 WL 738663 (Bankr. D. Idaho Dec. 22, 1994); *In re* Farris, No. 94-40882, 1994 WL 16865633 (Bankr. S.D. Ga. Sept. 29, 1994); *In re* Christie, 172 B.R. 233 (Bankr. N.D. Ohio 1994); *In re* Ragan, 171 B.R. 592 (Bankr. N.D. Ohio 1994); *In re* Martens, 171 B.R. 43 (Bankr. N.D. Ohio 1994); *In re* Tindall, 184 B.R. 842 (Bankr. M.D. Fla. 1994); *In re* Dominguez, 166 B.R. 66 (Bankr. E.D.N.C. 1994); *In re* Wilkinson, 168 B.R. 626 (Bankr. N.D. Ohio 1994); *In re* Fessler, 168 B.R. 622 (Bankr. N.D. Ohio 1994); *In re* Faulkner, 165 B.R. 644 (Bankr. W.D. Mo. 1994); *In re* Morse, 164 B.R. 651 (Bankr. E.D. Wash. 1994); *In re* Lee, 162 B.R. 31 (Bankr. N.D. Ga. 1993); *In re* Rogers, 168 B.R. 806 (Bankr. M.D. Ga. 1993); U.S. Trustee v. Bacco (*In re* Bacco), 160 B.R. 283 (Bankr. W.D. Pa. 1993); *In re* Buntin, 161 B.R. 466 (Bankr. W.D. Mo. 1993); U.S. Trustee v. Bush (*In re* Bush), No. 93-10771, 1993 WL 13004595 (Bankr. S.D. Ga. Oct. 15, 1993); *In re* McCormack, 159 B.R. 491 (Bankr. N.D. Ohio 1993); *In re* Marshalek, 158 B.R. 704 (Bankr. N.D. Ohio 1993); *In re* Barnes, 158 B.R. 105 (Bankr. W.D. Tenn. 1993); *In re* Laury-Norvell, 157 B.R. 14 (Bankr. N.D. Ohio 1993); *In re* Hutton, 158 B.R. 648 (Bankr. E.D. Ky. 1993); *In re* Fitzgerald, 155 B.R. 711 (Bankr. W.D. Tex. 1993); *In re* Williams, 155 B.R. 773 (Bankr. D. Idaho 1993); *In re* Smith, 157 B.R. 348 (Bankr. N.D. Ohio 1993); *In re* Morris, 153 B.R. 559 (Bankr. D. Or. 1993); *In re* Dickerson, 166 B.R. 480 (Bankr. N.D. Ga. 1993); *In re* Smurthwaite, 149 B.R. 409 (Bankr. N.D.W. Va. 1992); U.S. Trustee v. Rowell (*In re* Rowell), No. 92-50228, 1992 WL 12004006 (Bankr. S.D. Ga. Dec. 16, 1992); *In re* Butts, 148 B.R. 878 (Bankr. N.D. Ind. 1992); *In re* Shepherd, 147 B.R. 422 (Bankr. N.D. Ohio 1992); *In re* Farrell, 150 B.R. 116 (Bankr. D.N.J. 1992); *In re* Hampton, 147 B.R. 130 (Bankr. E.D. Ky. 1992); *In re* Richmond, 144 B.R. 539 (Bankr. W.D. Okla. 1992); *In re* Veenhuis, 143 B.R. 887 (Bankr. D. Minn. 1992); *In re* Traub, 140 B.R. 286 (Bankr. D.N.M. 1992); *In re* Nolan, 140 B.R. 797 (Bankr. D. Colo. 1992); U.S. Trustee v. Wray (*In re* Wray), 136 B.R. 122 (Bankr. W.D. Pa. 1992); *In re* Beles, 135 B.R. 286 (Bankr. S.D. Ohio 1991); *In re* Goodson, 130 B.R. 897 (Bankr. N.D. Okla. 1991); *In re* Fortune, 130 B.R. 525 (Bankr. C.D. Ill. 1991); U.S. Trustee v. Baribeau (*In re* Baribeau), No. 91-20140, 1991 WL 11767173 (Bankr. S.D. Ga. July 26, 1991); *In re* Elliston, No. 91-50048, 1991 WL 11002685 (Bankr. S.D. Ga. July 15, 1991); *In re* Scheinberg, 132 B.R. 443 (Bankr. D. Kan. 1991), *aff'd*, 134 B.R. 426 (D. Kan. 1992); *In re* Stratton, 136 B.R. 804 (Bankr. C.D. Ill. 1991); *In re* Hammer, 124 B.R. 287 (Bankr. C.D. Ill. 1991), *vacated sub nom. In re* Pilgrim, 135 B.R. 314 (C.D. Ill. 1992); *In re* Harris, 122 B.R. 744 (Bankr. D.S.D. 1990), *rev'd*, 125 B.R. 254 (D.S.D. 1991), *aff'd sub nom.* U.S. Trustee v. Harris, 960 F.2d 74 (8th Cir. 1992); *In re* Dubberke, 119 B.R. 677 (Bankr. S.D. Iowa 1990); *In re* Helmick, 117 B.R. 187 (Bankr. W.D. Pa. 1990); *In re* Johnson, 115 B.R. 159 (Bankr. S.D. Ill. 1990); *In re* Vesnesky, 115 B.R. 843 (Bankr. W.D. Pa. 1990); *In re* Piontek, 113 B.R. 17 (Bankr. D. Or. 1990); *In re* Cook, 110 B.R. 544 (Bankr. N.D. Okla. 1990); *In re* Roth, 108 B.R. 78 (Bankr. W.D. Pa. 1989); *In re* Martin, 107 B.R. 247 (Bankr. D. Alaska 1989); *In re* Wilkes, 114 B.R. 551 (Bankr. W.D. Tenn. 1989); *In re* Woodhall, 104 B.R. 544 (Bankr. M.D. Ga. 1989); *In re* Tefertiller, 104 B.R. 513 (Bankr. N.D. Ga. 1989); *In re* Braley, 103 B.R. 758 (Bankr. E.D. Va. 1989), *aff'd*, 110 B.R. 211 (E.D. Va. 1990); *In re* Clark, 100 B.R. 821 (Bankr. W.D. Va.), *appeal dismissed*, 108 B.R. 566 (W.D. Va. 1989), *rev'd*, 927 F.2d 793 (4th Cir. 1991); *In re* Gyurci, 95 B.R. 639 (Bankr. D. Minn. 1989); *In re* Busbin, 95 B.R. 240 (Bankr. N.D. Ga. 1989); *In re* Andrus, 94 B.R. 76 (Bankr. W.D. Pa. 1988); *In re* Wegner, 91 B.R. 854 (Bankr. D. Minn. 1988); *In re* Gaskins, 85 B.R. 846 (Bankr. C.D. Cal. 1988); *In re* Strange, 85 B.R. 662 (Bankr. S.D. Ga. 1988); *In re* Goulding, 79 B.R. 874 (Bankr. W.D. Mo. 1987); *In re* Restea, 76 B.R. 728 (Bankr. D.S.D. 1987); *see also* Stuart v. Koch (*In re* Koch), 109 F.3d 1285 (8th Cir. 1997) (reversing unreported bankruptcy court decision declining to dismiss for substantial abuse); Fonder v. United States, 974 F.2d 996 (8th Cir. 1992) (affirming decision of bankruptcy court granting motion to dismiss for substantial abuse); Green v. Staples (*In re* Green), 934 F.2d 568 (4th Cir. 1991) (reversing unreported

States trustees did file motions, the bankruptcy courts denied them in a significant number of the cases.[29]

The National Bankruptcy Review Commission, established pursuant to the Bankruptcy Reform Act of 1994,[30] issued its report on the operation of the Bankruptcy Code in 1997.[31] Over the objection of four dissenting commissioners, the report included no suggestions to curb abuse by consumer debtors, such as a mechanism for determining whether such debtors had resources to fund a chapter 13 plan (so-called "means-testing" provisions).[32] Dissenting commissioners James I. Shepard and The Hon. Edith H. Jones 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 in Chapter 13."[33]

Over the next two years, various members of Congress introduced a series of bills intended to limit access to chapter 7 by debtors who could afford to pay creditors in chapter 13. The bills generally either sought to amend § 109(b) to limit chapter 7 access to individual debtors who had income available to pay creditors (as determined by some sort of a means test)[34] or to

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bankruptcy court decision granting motion to dismiss for substantial abuse); Heller v. Foulston (*In re* Heller), 160 B.R. 655 (D. Kan. 1993) (affirming unreported bankruptcy court decision granting motion to dismiss for substantial abuse); Wilson v. U.S. Trustee (*In re* Wilson), 125 B.R. 742 (W.D. Mich. 1990) (affirming unreported bankruptcy court decision granting motion to dismiss for substantial abuse); *In re* Herbst, 95 B.R. 98 (W.D. Wis. 1988) (reversing unreported bankruptcy court decision denying motion to dismiss for substantial abuse); *cf. In re* Ploegert, 93 B.R. 641 (Bankr. N.D. Ind. 1988) (granting motion brought under § 707(b) by bankruptcy trustee rather than United States trustee).

[29]In almost one-third of the reported cases for the first ten years, listed in note 28 *supra*, the bankruptcy judge denied the motion to dismiss. *See Koch*, 109 F.3d 1285; *Herbst*, 95 B.R. 98; *Higuera*, 199 B.R. 196; *Ontiveros*, 1996 WL 33401160; *Dickerson*, 193 B.R. 67; *Balaja*, 190 B.R. 335; *Richardson*, 1995 WL 17005102; *Gentri*, 185 B.R. 368; *Messenger*, 178 B.R. 145; *Hill*, 1994 WL 738663; *Martens*, 171 B.R. 43; *Fessler*, 168 B.R. 622; *Marshalek*, 158 B.R. 704; *Laury-Norvell*, 157 B.R. 14; *Williams*, 155 B.R. 773; *Rowell*, 1992 WL 12004006; *Butts*, 148 B.R. 878; *Shepherd*, 147 B.R. 422; *Farrell*, 150 B.R. 116; *Beles*, 135 B.R. 286; *Fortune*, 130 B.R. 525; *Hammer*, 124 B.R. 287; *Harris*, 122 B.R. 744; *Martin*, 107 B.R. 247; *Wilkes*, 114 B.R. 551; *Tefertiller*, 104 B.R. 513; *Braley*, 103 B.R. 758; Clark, 100 B.R. 821; *Wegner*, 91 B.R. 854; *Goulding*, 79 B.R. 874; *Restea*, 76 B.R. 728. Some of those decisions were reversed on appeal. *See Koch*, 109 F.3d 1285; *Herbst*, 95 B.R. 98; *Ontiveros*, 198 B.R. 284; *Hammer*, *vacated sub nom, In re* Pilgrim, 135 B.R. 314; *Harris*, 125 B.R. 254; *Clark*, 927 F.2d 793.

[30]National Bankruptcy Review Commission Act, Pub. L. No. 103-394, § 602, 108 Stat. 4106, 4147 (1984).

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

[32]*See* Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners, REVIEW COMMISSION REPORT, at 1043.

[33]Hon. Edith H. Jones & Commissioner James I. Shepard, Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law, REVIEW COMMISSION REPORT, at 1123, 1139.

[34]*See* Responsible Borrower Protection Bankruptcy Act, H.R. 2500, 105th Cong. (1997); Consumer Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. (1998). The Senate approved an amendment to H.R. 3150 by way of substituting the language of S. 1301 before it passed the bill, 144 CONG. REC. S10767 (daily ed. Sept. 23, 1998), so H.R. 3150 ultimately adopted the approach of the bills listed in note 36 *infra*.

provide grounds for dismissing a filed chapter 7 case if the debtor failed such a test.[35] The early bills also proposed to modify § 704 of the Code to impose a duty on the bankruptcy trustee to review the debtor's filing and report if the debtor's case should be dismissed.[36] Ultimately this review-and-report function was supplemented with an affirmative obligation on the part of the trustee confronted with a chapter 7 debtor who failed the means test either to bring a motion to dismiss the chapter 7 case or to file an explanation as to why the trustee thought such a motion inappropriate under the circumstances.[37]

In 1999, Senator Grassley introduced a new bankruptcy reform bill, S. 625, that modified the language of the proposed amendment to § 704, changing it in some significant ways. Most importantly, for the first time in any means-testing bill, Senate or House, S. 625 imposed the duty of reviewing materials filed by an individual chapter 7 debtor not on the bankruptcy or panel trustee, but on the United States trustee.[38] This difference from the conference version of H.R. 3150, which had previously passed the House,[39] was not even mentioned by the Senate Judiciary Committee in the section of its report entitled, "Major Differences Between S. 625 and the H.R. 3150 Conference Report."[40] No other provision of § 704 (which is entitled "Duties of trustee," referring to the panel or case trustee), purports to impose duties on the United States trustee, whose functions are generally spelled out in 28 U.S.C. § 586. The Department of Justice criticized this change, noting that "in addition to all the duties that are currently performed (such as ensuring that trustees are appointed and notified, section 341 meetings are set and noticed, papers are filed, emergent issues are addressed, and cases evaluated for possible abuse and section 707(b) issues), the limited time and resources of the United States Trustee and court clerk will be diverted to evaluating and noticing these statements."[41]

Despite the objections of the Department of Justice, the House and Sen-

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[35] *See* Bankruptcy Reform Act of 1999, S. 625, 106th Cong., § 102(b)(2)(B) (Mar. 16, 1999); Bankruptcy Reform Act of 1999, H.R. 833, 106th Cong., § 102(b)(2)(iii) (Feb. 24, 1999); Consumer Lenders and Borrowers Bankruptcy Accountability Act of 1998, H.R. 3146, 105th Cong., § 8(a)(3) (Feb. 3, 1998); Consumer Bankruptcy Reform Act of 1997, S. 1301, 105th Cong., § 102(a)(2)(B)(ii) (Oct. 21, 1997).

[36] *See* S. 625, 106th Cong., § 102(b)(2)(B) (Mar. 16, 1999); H.R. 833, 106th Cong., § 102(b)(2)(iii) (Feb. 24, 1999); H.R. 3150, 105th Cong. § 101(5) (Feb. 3, 1998); H.R. 2500, 105th Cong. 1st Sess., § 101(5) (Sept. 18, 1997); *see also* H.R. 3146, 105th Cong., § 8(a)(3) (Feb. 3, 1998) (proposing to amend § 707(b) to require the case trustee to review and refer to the United States trustee for dismissal motion).

[37] *See* H.R. REP. NO. 105-794, at 6-7 (1998) (Conf. Rep.) (concerning H.R. 3150).

[38] S. 625, § 102(b)(2)(B).

[39] *See* 144 CONG. REC. H10239-40 (daily ed. Oct. 9, 1998).

[40] S. REP. NO. 106-49, at 13-14 (1999).

[41] *See* Letter from Dennis K. Burke, Acting Assistant Att'y Gen., U.S. Dep't of Justice, Office of Legislative Affairs, to Orrin Hatch, Chairman of Comm. on the Judiciary, U.S. Senate, 5 (Apr. 9, 1999) (on file with author) [hereinafter "DOJ letter"]. Given the "substantial burdens" the bill would impose on the

ate approved a compromise bill, S. 3186,[42] which included a provision imposing this obligation on the United States trustees.[43] President Clinton declined to sign the bill within ten days after it was submitted to him, during a period when Congress was adjourned, effectively vetoing it.[44] Nevertheless, the duties of the United States trustee remained in every version of § 704 in all subsequent Congressional bills, both in the House[45] and the Senate.[46] The last bill to be introduced, S. 256, was enacted into law as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[47]

The only subsequent amendment to the language of § 704, as enacted in 2005, was made by H.R. 1626, the Statutory Time-Periods Technical Amendments Act of 2009.[48] That act changed all references in title 11 to "5 days," including in § 704(b)(1)(B), to "7 days" to conform to the new revisions to the Federal Rules of Bankruptcy Procedure. The bill was passed by both House[49] and Senate,[50] and signed into law on May 7, 2009.[51]

II. EXERCISING THE DUTIES OF THE UNITED STATES TRUSTEE

Under the language of § 704(b)(1), the United States trustee is required to review all materials submitted by an individual debtor filing a case under chapter 7 to determine "whether the debtor's case would be presumed to be an abuse under section 707(b)."[52] To facilitate that examination, Federal Rule of Bankruptcy Procedure 1007(b)(4) requires that all individual chapter 7 debtors who are not exempt from the means test under § 707(b)(2)(D)[53]

United States Trustee program, the Department of Justice requested that a special appropriation be authorized to implement this provision, among others. *Id.* at 33.

[42]*See* Bankruptcy Reform Act of 2000, S. 3186, 106th Cong. (2000).

[43]The text of S. 3186 was incorporated into the conference report on H.R. 2415, an unrelated bill, H.R. REP. NO. 106-970 (2000), at 1 (Conf. Rep.), and the conference report was passed by both the House, 146 CONG. REC. H9840 (daily ed. Oct. 12, 2000), and the Senate, 146 CONG. REC. S11730 (daily ed. Dec. 7, 2000).

[44]U.S. Const. art. I, § 7, cl. 2.

[45]*See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, H.R. 975, 108th Cong. (Feb. 27, 2003); Bankruptcy Abuse Prevention and Consumer Protection Act of 2002, H.R. 5745, 107th Cong. (2002); Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. (Jan. 31, 2001).

[46]*See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, 109th Cong. (Feb. 1, 2005); Bankruptcy Reform Act of 2001, S. 420, 107th Cong. (Mar. 1, 2001); Bankruptcy Reform Act of 2001, S. 220, 107th Cong. (2001).

[47]Pub. L. No. 109-8, 119 Stat. 23 (2005).

[48]H.R. 1626, 111th Cong. (Mar. 19, 2009).

[49]155 CONG. REC. H4665 (Apr. 22, 2009).

[50]155 CONG. REC. S4763 (Apr. 27, 2009).

[51]Pub. L. No. 111-16, 123 Stat. 1607 (2009).

[52]11 U.S.C. § 704(b)(1)(A) (Supp. 2016).

[53]11 U.S.C. § 707(b)(2)(D) (Supp. 2016) makes § 707(b)(2)(A) through -(C) inapplicable to a disabled veteran with respect to indebtedness incurred primarily during a period of active duty or service of a

file a statement of current monthly income on Official Form 122A-1,[54] and if that form shows that the debtor is an above-median debtor,[55] such a debtor must prepare Official Form 122A-2, which is the chapter 7 means-test calculation. The front page of the form includes a box at the upper right-hand corner in which the debtor, after completing the means test computations, must check the appropriate box, either "[t]here is no presumption of abuse" or "[t]here is a presumption of abuse." However, after the portion of Form 122A-2 in which such computations are made, the debtor is asked whether there are "any special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative," citing § 707(b)(2)(B).[56]

Whether or not a debtor includes language in the special circumstances section of the applicable form, some debtors also file a document explaining why their chapter 7 case should not be presumed to be abusive even before the United States trustee files a notice of presumed abuse, what I call a "preemptive rebuttal of presumption." Since 2007, this document, called "Rebuttal of Presumption of Abuse," has been included in the set of forms available from Best Case Bankruptcy software, used by many bankruptcy lawyers for petition preparation. Indeed, some lawyers file a rebuttal of presumption of abuse or affidavit regarding special circumstances even when their Form 122A-2 does not show a presumption of abuse.[57]

The United States trustee reviews the debtor's filings and, not later than ten days after the date of the first meeting of creditors under § 341, must file

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homeland defense activity or with respect to a debtor on and during the 540-day period following active duty or performing a homeland security activity. As a result, such a debtor is not subject to a motion to dismiss or convert on the basis of the means test.

[54]Federal Rule of Bankruptcy Procedure 1007(b)(4) requires the filing of "a statement of current monthly income prepared as prescribed by the appropriate Official Form." FED. R. BANKR. P. 1007(b)(4).

[55]*Id.* (stating, "if the current monthly income exceeds the median family income for the applicable state and household size, [an individual debtor in a chapter 7 case shall file] the information, including calculations, required by § 707(b), prepared as prescribed by the appropriate Official Form").

[56]Official Form 122A-2, pt. 4. In the prior comparable bankruptcy form, Official Form 22A (Dec. 2010), Part VII of the form asked only if there were "any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(1)."

[57]*See, e.g.*, Debtor's Statement of Special Circumstances, *In re* Fernandez, No. 14-42778 (Bankr. N.D. Cal. June 27, 2014), ECF No. 5; Affidavit of Special Circumstances, *In re* Gonzalez, No. 13-47096 (Bankr. E.D. Mich. Apr. 8, 2013), ECF No. 9; Debtor's Statement of Special Circumstances, *In re* Coppola, No. 12-70958 (Bankr. E.D.N.Y. Mar. 9, 2012), ECF No. 8-2; Affidavit of Special Circumstances, *In re* King, No. 12-01731 (Bankr. W.D. Mich. Feb. 29, 2012), ECF No. 5; Debtor's Statement of Special Circumstances, *In re* Peixoto-Lyons, No. 12-41747 (Bankr. N.D. Cal. Feb. 27, 2012), ECF No. 5; Affidavit of Special Circumstances, *In re* Price, No. 12-43086 (Bankr. E.D. Mich. Feb. 13, 2012), ECF No. 9; Affidavit of Thomas Gerard Husson, *In re* Husson, No. 12-42567 (Bankr. E.D. Mich. Feb. 6, 2012), ECF No. 9; Debtor's Statement of Special Circumstances, *In re* Birnbaum, No. 11-50359 (Bankr. E.D.N.Y. Dec. 29, 2011), ECF No. 9; Affidavit of Special Circumstances, *In re* Little, No. 08-51372 (Bankr. E.D. Mich. Oct. 21, 2008), ECF No. 37.

a statement with the court as to whether the debtor's case would be presumed to be an abuse under § 707(b).[58] Not later than thirty days after filing that statement, the United States trustee must either file a motion to dismiss the case for abuse or file a statement setting forth the reasons why the United States trustee does not consider that such is motion is "appropriate."[59] Section 704(b), which imposes these obligations, gives no guidance as to when the United States trustee should decline to file a dismissal motion.

Section 707(b)(2)(B), by contrast, sets stringent statutory standards for rebutting the presumption of abuse.[60] However, those provisions are applicable only after a motion to dismiss the case has been filed. Thus, the United States trustee is not bound by any interpretation of "special circumstances" when deciding whether to file a motion to dismiss in the first instance. Although not bound by the statutory special circumstances doctrine, I had assumed that that the United States Department of Justice would nonetheless take special circumstances into account when deciding whether to file a motion to dismiss. I further assumed that the United States trustees would decline to bring a motion to dismiss only in those cases in which the debtors would be able to rebut the presumption of abuse. I set out to discover if my assumptions were accurate.

Given the absence of statutory guidance, my first task was to see if the Department of Justice had formal guidelines to assist the United States trustees, that is, some sort of list of factors that they should be considering in determining whether to file a motion to dismiss under § 704(b)(2). I requested any such guidelines both informally and through a Freedom of Information Act (FOIA) request. In the formal response to my FOIA request, the Department of Justice stated that there were eighteen pages of documents that met my request for information, but that all such materials were being withheld in their entirety pursuant to FOIA Exemption 5 (which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"),[61] and as "attorney work product."[62] In discussions with the FOIA counsel, I was told that the Department was relying on the "deliberative

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[58]11 U.S.C. § 704(b)(1)(A).

[59]11 U.S.C. § 704(b)(2).

[60]Section 707(b)(2)(B)(i) states that, in any such proceeding, "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 [ ] justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative." 11 U.S.C. § 707(b)(2)(B)(i) (Supp. 2016).

[61]*See* 5 U.S.C. § 552(b)(5) (Supp. 2016).

[62]*See* Letter from Paul Bridenhagen, FOIA Counsel, U.S. Dep't of Justice, to author (Jan. 27, 2017) (on file with author).

process privilege" in withholding the documents.[63]

Because the Department would not disclose its own guidelines, I was left with reviewing the cases in which the United States trustees had filed a motion to dismiss to see if I could discern any patterns. I initially searched for all cases in which the United States trustee filed a § 704(b)(1) statement of presumed abuse or a motion based on the presumption of abuse.[64] I discovered that in hundreds of those cases in which there was a presumption of abuse, the United States trustees filed statements indicating that a motion to dismiss was not appropriate. Feeling somewhat overwhelmed by the number of cases, I decided to look at cases in which the United States trustee submitted a statement of presumed abuse under § 704(b)(1) or filed a motion to dismiss based on presumed abuse if the case was filed during any of two specific months of each year from 2005 through 2016. I looked at a different two-month filing period for each successive year to avoid any bias based on the calendar month of filing.[65] The cases, therefore, included twenty-four months of filings.

From that group, I eliminated any cases in which the United States trustee ultimately concluded that the presumption of abuse either was not present or not applicable (i.e., because debtor did not have primarily consumer debts).[66] Also excluded were cases in which (for whatever reason) the

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[63]The "deliberative process privilege" is intended to protect the decision-making process of a government agency. *See, e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975).

[64]I searched the bankruptcy court dockets using Bloomberg Law. I included searches for "presumed abuse" as well as "704(b)(1)," "704(b)(2)," "presumption of abuse," and "motion to dismiss" for the relevant months.

[65]A comparison of quarterly filings from the United States Courts website (Table F-2) over the years 2005 through 2016, UNITED STATES COURTS, BANKRUPTCY FILINGS, http://www.uscourts.gov/report-name/bankruptcy-filings, revealed that the number of chapter 7 filings did not vary dramatically between quarters so that sampling from different two-month periods during those years would not result in a skewed sample. The cases I examined were those filed during November and December 2005; January and February 2006; March and April 2007; May and June 2008; July and August 2009; September and October 2010; November and December 2011; January and February 2012; March and April 2013; May and June 2014; July and August 2015; and September and October 2016.

[66]In some cases, the United States trustee reached that conclusion only after filing a motion to dismiss for abuse that was later withdrawn. *See, e.g.*, Motion to Dismiss Case for Abuse, *In re* Pollock, No. 13-51115 (Bankr. E.D. Ky. July 12, 2013), *withdrawn*, Aug. 26, 2013; Motion of United States Trustee to Dismiss Case for Abuse, *In re* Fletcher, No. 10-53109 (Bankr. E.D. Ky. Dec. 16, 2010), *motion under § 707(b)(2) resolved by stipulation*, Sept. 22, 2011; Motion to Dismiss Chapter 7 Case, *In re* Aniol, No. 08-26810 (Bankr. E.D. Wis. Sept. 26, 2008), *withdrawn*, Dec. 16, 2008; United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. §§ 707(b)(1) and (b)(2) and Brief in Support Thereof, *In re* Coughlin, No. 08-31310 (Bankr. S.D. Ill. Sept. 22, 2008), *withdrawn*, Dec. 4, 2008; United States Trustee's Motion to Dismiss Case Subject to 11 U.S.C. § 707(b)(2) or § 707(b)(3), *In re* Burch, No. 08-07526 (Bankr. D. Ariz. Sept. 5, 2008), *withdrawn*, Nov. 17, 2008; United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. Section 707(b)(1), *In re* Stanley, No. 08-05906 (Bankr. S.D. Ind. Aug. 18, 2008), *withdrawn*, Feb. 24, 2009; Motion to Dismiss Debtors' Case Under 11 U.S.C. § 707(b)(1) and § 707(b)(2) or (b)(3), *In re* Melvin, No. 08-17147 (Bankr. D. Colo. Aug. 6, 2008), *withdrawn*, Dec. 30, 2008; Motion to Dismiss Pursuant to § 707(b)(2) for the Presumption of Abuse or, in the Alternative, Dismiss Pursuant to 11

U.S.C. § 707(b)(3), *In re* Malucci, No. 08-12369 (Bankr. W.D.N.Y. July 25, 2008), *withdrawn*, Oct. 20, 2008; United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. § 707(b)(2) and 707(b)(3), *In re* Ryan, No. 08-40994 (Bankr. D. Neb. July 14, 2008), *withdrawn*, Aug. 25, 2008; Motion of the United States Trustee to Dismiss Pursuant to 11 U.S.C. Sections 707(b)(2) & (3), *In re* Beougher, No. 07-51080 (Bankr. N.D. Ohio Aug. 9, 2007), *withdrawn*, Oct. 24, 2007; United States Trustee's Motion to Dismiss or Convert Pursuant to 11 U.S.C. § 707(a) and (b), *In re* Wilborn, No. 07-10724 (Bankr. D. Kan. July 6, 2007), *withdrawn*, Sept. 4, 2007; United States Trustee's Motion to Dismiss, *In re* Johnson, No. 07-31404 (Bankr. D. Or. July 2, 2007), *withdrawn*, July 24, 2007; Motion, Memorandum of Law and Notice of Motion to Dismiss Chapter 7 Case Pursuant to 11 U.S.C. § 707(b)(2) and/or § 707(b)(3), *In re* Troxell, No. 07-11187 (Bankr. S.D. Ohio May 24, 2007), *withdrawn*, Oct. 4, 2007; Motion to Dismiss; and Notice, *In re* Goodwin, No. 07-60250 (Bankr. D. Mont. May 11, 2007), *withdrawn*, May 25, 2007; United States Trustee's Motion to Dismiss Case Pursuant to 11 U.S.C. Sections 707(b)(2) and 707(b)(3), *In re* Kelder, No. 06-00455 (Bankr. W.D. Mich. June 2, 2006), *withdrawn*, Feb. 20, 2007; United States Trustee's Motion to Dismiss Under 11 U.S.C. § 707(b)(2) & (3), *In re* Sloan, No. 06-30231 (Bankr. S.D. Ohio May 17, 2006), *withdrawn*, Dec. 20, 2006; Motion of U.S. Trustee to Dismiss Chapter 7 Case Pursuant to 11 U.S.C. §§ 707(b)(2) & (3) and Memorandum in Support, *In re* Langford, No. 06-30238 (Bankr. S.D. Ohio May 15, 2006), *withdrawn*, July 28, 2006; Motion of United States Trustee to Dismiss Case Pursuant to 11 U.S.C. § 707(b)(2), *In re* Dahle, No. 06-20310 (Bankr. D. Utah Apr. 24, 2006), *withdrawn*, Aug. 18, 2006; United States Trustee's Motion to Dismiss Pursuant 11 U.S.C. §§ 707(b)(2) & (3), *In re* McConnell, No. 06-00057 (Bankr. S.D. Iowa Mar. 10, 2006), *withdrawn*, Oct. 19, 2006; United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. § 707(b)(2), *In re* Hoffman, No. 05-11176 (Bankr. S.D. Iowa Jan. 11, 2006), *withdrawn*, Feb. 3, 2006; United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. § 707(b)(2), *In re* Allison, No. 05-11163 (Bankr. S.D. Iowa Dec. 16, 2005), *withdrawn*, Feb. 3, 2006; United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. § 707(b)(2), *In re* Holland, No. 05-11139 (Bankr. S.D. Iowa Dec. 14, 2005), *withdrawn*, Feb. 2, 2006.

In other cases, the United States trustee had initially concluded that there was a presumption of abuse based on a rejected interpretation of permissible deductions under the means test and chose to file a statement declining to file a motion to dismiss rather than withdrawing the statement of presumption. *See, e.g.*, Notice, *In re* Williams, No. 13-53353 (Bankr. S.D. Ohio June 12, 2013); United States Trustee's Declination Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Evangelista, No. 10-25378 (Bankr. M.D. Fla. Jan. 21, 2011); Notice of United States Trustee's Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Gates, No. 08-14805 (Bankr. N.D. Ohio Dec. 1, 2008); United States Trustee's Statement That a Motion to Dismiss is Not Appropriate Pursuant to 11 U.S.C. § 704(b)(2), *In re* Booher, No. 08-52334 (Bankr. N.D. Ohio Oct. 6, 2008); United States Trustee's Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Steltenkamp, No. 08-13556 (Bankr. S.D. Ohio Sept. 11, 2008); Notice of United States Trustee's Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Richmond, No. 08-14856 (Bankr. N.D. Ohio Sept. 5, 2008); Notice of United States Trustee's Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Redmond, No. 08-14856 (Bankr. N.D. Ohio Sept. 5, 2008); United States Trustee's Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Dowalter, No. 08-55701 (Bankr. S.D. Ohio Sept. 3, 2008); United States Trustee's Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Artola, No. 08-18334 (Bankr. S.D Fla. Aug. 27, 2008); United States Trustee's Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Duquette, No. 08-12921 (Bankr. W.D. Wis. Aug. 22, 2008); Notice of United States Trustee's Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Bunch, No. 08-52003 (Bankr. N.D. Ohio Aug. 8, 2008); Notice of United States Trustee's Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Davis-Fox, No. 08-51746 (Bankr. N.D. Ohio July 28, 2008); United States Trustee's Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Williams, No. 08-54267 (Bankr. S.D. Ohio July 23, 2008); Notice of United States Trustee's Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Dietz, No. 08-14575 (Bankr. N.D. Ohio July 21, 2008); Notice of United States Trustee's Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Harries, No. 08-14447 (Bankr. N.D. Ohio, 2008; Notice of United States Trustee's Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Lamar, No. 07-13075 (Bankr. N.D. Ohio June 27, 2007); United States Trustee's Statement That a Motion to Dismiss is Not Appropriate Pursuant to 11 U.S.C. § 704(b)(2), *In re* Gilner, No. 08-51607 (Bankr. N.D. Ohio June 22, 2008); Notice of United States Trustee's Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Hess, No. 07-31689 (Bankr. N.D. Ohio Aug. 1, 2007) (in which trustee disagreed with court decisions permitting

United States trustee filed neither a motion to dismiss based on the presumption of abuse nor a statement declining to do so. (These included cases in which the trustee filed a motion to dismiss on grounds other than the presumption of abuse.[67]) I also eliminated any cases in which, after the United States trustee filed a notice of presumed abuse, the debtor elected to convert the case to one under chapter 13 or 11 before a motion to dismiss was filed.[68] This left me with a pool of 395 cases in which the United States trustee either filed a motion to dismiss based on the presumption of abuse or filed a statement that the United States trustee was declining to file such a motion despite the existence of the presumption.[69]

In reviewing those cases, I discovered that, contrary to my initial assumptions, in cases filed by above-median debtors the United States trustees have declined to bring motions to dismiss far more often than they filed motions to dismiss. When they declined to bring such motions, their reasons for doing so appeared to be unaffected by the special circumstances doctrine. In fact, although the debtors frequently attempted to assert the existence of "special circumstances" in their statements seeking to convince the United States trustee not to bring a motion to dismiss,[70] in the declination filings made by the United States trustee, I found that the words "special circumstances" were almost never used.[71] Instead, the United States trustee referred to

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debtor to deduct secured payments on property to be surrendered); *see also* Notice of United States Trustee's Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Marmol, No. 08-13836 (Bankr. N.D. Ohio July 2, 2008) (in which trustee disagreed with decision allowing deduction of transportation ownership for car owned free and clear).

I also eliminated one case in which the debtor's petition showed no presumption of abuse, but the United States trustee initially filed a statement of presumed abuse and then filed on the same day a statement that no motion to dismiss would be appropriate, without stating any reasons. I suspect the United States trustee realized the initial notice had been filed in error. *See* Notice, *In re* Bryant, No. 12-50068 (Bankr. N.D. Ohio Mar. 7, 2012).

[67]*See, e.g., In re* Cromwell, No. 14-03707 (Bankr. E.D.N.C. Sept. 4, 2014).

[68]*See, e.g., In re* Jones, No. 07-10902 (Bankr. D. Kan. Oct. 12, 2007).

[69]For ease of reference, the 395 cases that serve as my sample are identified in Appendix A, listed alphabetically by the last name of the debtor (or in a joint case, by the last name of the first-listed debtor), with the case number, court name, and petition date. Citations herein to these cases generally is solely by reference to the last name of the debtor.

These 395 cases, of course, are only a very small percentage of the chapter 7 cases filed by consumers during the relevant months. For example, according to statistics published by the Department of Justice, in October, 2016 there were 37,141 nonbusiness chapter 7 filings. *See* Table F-2, U.S. Bankruptcy Courts - Business and Nonbusiness Cases Commenced by Chapter of the Bankruptcy Code, During the One-Month Period Ending October 31, 2016, Based on Data Current as of December 31, 2016, http://www.uscourts.gov/statistics/table/f-2-one-month/bankruptcy-filings/2016/12/31. Of those cases, only 11 appear in the study. Most chapter 7 cases are filed by debtors who pass the means test.

[70]*See* Part B *infra*.

[71]Indeed, I found only 5 filings by a United States trustee that used the term "special circumstances." *See* United States Trustee's Declination Statement (With Certificate of Service), *In re* Kuceris, No. 13-11567 (Bankr. D. Mass. Dec. 21, 2015), ECF No. 61; United States Trustee's Declination Statement Pursuant to 11 U.S.C. § 707(b)(2), *In re* Neuman-Pouncy, No. 08-06315 (Bankr. D. Ariz. Apr. 30, 2009),

"compelling circumstances," "change of circumstances," or just "circumstances," although they often added language from § 707(b)(2)(B)(i) suggesting there was "no reasonable alternative."

In the following sections I will analyze the cases in the study to see how often the United States trustee filed a motion to dismiss or convert, the reasons described by the United States trustee for not filing a motion to dismiss, the impact on that decision of the filing of a preemptive rebuttal of presumption, and how the frequency of such determinations varied by region and by year.

A. Filing a Motion to Dismiss

Of the 395 cases in the study, all involved chapter 7 filings by above-median debtors for whom the presumption of abuse arose. The United States trustee filed a motion to dismiss based on the presumption of abuse in only 168 of them (i.e., 42.5%).[72] Even more remarkable, of those cases in which motions were filed, the United States trustee withdrew or abandoned forty-nine (other than by reason of mootness on conversion of the case from chapter 7 to chapter 13 or chapter 11),[73] and the bankruptcy courts denied

ECF No. 46; United States Trustee's Declination Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Alexander, No. 2:08-bk-18093 (Bankr. C.D. Cal. Apr. 1, 2009), ECF No. 33; United States Trustee Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Walter, No. 08-20365 (Bankr. W.D. La. Aug. 11, 2008), ECF No. 26; *cf.* United States Trustee's Statement Pursuant to 11 U.S.C. § 704(b)(2), *In re* Anderson, No. 09-02142 (Bankr. N.D. Iowa Apr. 28, 2011), ECF No. 103 (citing § 707(b)(2)(B)(i) in the declination statement when using the phrase "additional expenses or adjustments of current monthly income for which there is no reasonable alternative").

[72]*See Acosta; Albrecht; Allen; Allison; Banks James; Barber; Barker; Barraza; Barrett; Bearshak; Beasley; Bell; Bishop; Boatright; Braathun; Bradley; Brosius; Bushinski; Camp; Castle; Chamness; Champagne; Champine; Chan; Cherniak; Clinton; Close; Courtney; Coverstone; Cox; Crego; Curtis; Davis; Degree; Diezi; Connie Donovan; Joseph Donovan; Edwards; Enriquez; Erickson; Escano; Thomas Evans; Fletcher; Fonash; Foster; Fudge; Goodall; Grabarczyk; Sheila Green; Grinkmeyer; Groves; Haddock; Hampton; Harlin; Harper; Harris; Jammie Hartley; Steven Hartley; Heslop; Hickman; Vernon Hinkle; Hitchcock; Hodson; Holliday; Holmes; Hull; Josephine Hunt; Hutchinson; Harold Jackson; Jadhav; Jaramillo; Jennings; Jessup; Johns; Dwayne Johnson; Katz; Knepper; Krahn; Krawczyk; Labruno; Leary; Lenton; Lunn; Maertens; Makres; Mancera; Manley; Masur; Maura; Maya; McCain; McCarville; McKay-Polly; McMillan; Meade; Merino; Guy Miller; Linda Miller; Vede Miller; Millikan; Milton; Carrie Mitchell; Moose; Moranz; Mortakis; Nebres; Nichols; Niles; Northcutt; Daniel Oliver; Olson; Oriti; Parker; Patrick; Pearce; Plotchev; Russell Pollock; Rapp; Renteria; Rey; Rieck I; Rieck II; Roman; Rongione; Ryder; St. Jean; Samaro; Sanders; Sekardi; Senez; Shaffer; Shahidi; Ronald Sharpe; Simmons; Singer; Singletary; Skaggs; Carrie Smith; Douglas Smith; Louie Smith; Richard Smith; Sookhram; Speakman; Spearman; Springer; Steers; Sterkel; Sterrenberg; Stoltman; Swanson; Talmadge; Thelen; Gregory Thompson; Thorien; Tomlinson; Townsend; Uder Lopez; Vanek; VanMeter; Vidis; Weber; Weinert; Wilkins; Willis; Wise; Wiseman; Woods; Wright.*

[73]*See Allison; Barker; Bearshak; Bell; Brosius; Bushinski; Chamness; Clinton; Grabarczyk; Haddock; Hampton; Harlin; Harper; Jammie Hartley; Steven Hartley; Heslop; Vernon Hinkle; Hitchcock; Holmes; Jadhav; Knepper; Krahn; Maertens; Mancera; Manley; Masur; McCarville; Meade; Merino; Guy Miller; Millikan; Milton; Plotchev; Russell Pollock; Rapp; Samaro; Sekardi; Speakman; Spearman; Springer; Sterkel; Stoltman; Tomlinson; Weber; Wiseman; Woods; cf. Barber* (motion filed on "precautionary" basis and not pursued after United States trustee successfully obtained denial of discharge); *Dwayne Johnson* (motion stayed and never renewed); *Vidas* (motion dismissed with prejudice). This does not include cases in which

twenty-four others.[74] In twenty-seven of the 168 cases, the debtor either converted the chapter 7 case to a chapter 13 or chapter 11 reorganization proceeding or dismissed the bankruptcy filing before the court reached a decision on the motion.[75] Only sixty-eight of the motions were granted, generally leading to dismissal or conversion.[76] If the United States trustees' success on their § 707(b)(2) motions includes both a court order dismissing the case or the debtor's agreement to voluntarily dismiss or convert, then the United States trustees succeeded in only ninety-five of the 168 cases (i.e., 57%).

It is interesting to note that the United States trustees have filed many fewer motions to dismiss in recent years (as compared to the three years after the effective date of BAPCPA, 2006, 2007 and 2008), but they have realized a much higher success rate, as the following chart demonstrates:

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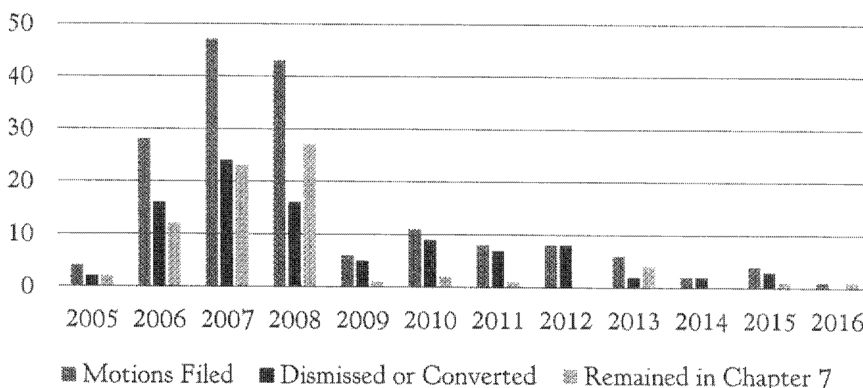
the trustees seem to have concluded, based on filed submissions from the debtors, that the cases did not present a presumption of abuse. *See supra* note 66. The United States trustee withdrew the motions in *Millikan* and *Masur* after they were granted and affirmed on appeal.

[74] *See Boatright; Braathun; Bradley; Close; Thomas Evans; Foster; Holliday; Josephine Hunt; Hutchinson; Harold Jackson; Jessup; Labruno; Makres; Nebres; Parker; Rongione; Sanders; Ronald Sharpe; Simmons; Carrie Smith; Louie Smith; Thelen; Gregory Thompson; Wilkins.* In *Holliday*, the court denied the motion, but the debtor converted the case to chapter 13.

[75] *See Acosta; Albrecht; Allen; Barrett; Chan; Coverstone; Cox; Curtis; Degree; Sheila Green; Groves; Leary; Carrie Mitchell; Moose; Moranz; Mortakis; Nichols; Niles; Northcutt; Oriti; Patrick; Senez; Singer; Uder Lopez; Vanek; VanMeter; Wright.*

[76] In sixty of the cases, the court dismissed the case under § 707(b)(2). *See Banks James; Barraza; Beasley; Bishop; Castle; Champagne; Champine; Cherniak; Courtney; Crego; Davis; Diezi; Connie Donovan; Joseph Donovan; Edwards; Erickson; Escano; Fletcher; Fonash; Fudge; Goodall; Grinkmeyer; Harris; Jammie Hartley; Hickman; Hull; Jennings; Johns; Katz; Krawczyk; Lenton; Maura; McCain; McKay-Polly; McMillan; Linda Miller; Vede Miller; Oliver; Olson; Renteria; Rieck I; Reick II; Rey; Roman; Ryder; St. Jean; Shaffer; Shahidi; Singletary; Skaggs; Douglas Smith; Sookhram; Swanson; Steers; Talmadge; Thorien; Townsend; Weinart; Willis; Wise.* These include cases in which the courts stated that they would grant the motions unless the debtors converted the cases within a short time. In one more, *Maya*, the court denied the motion to dismiss under § 707(b)(2) but granted it under § 707(b)(3). In five more cases, *Camp, Jaramillo, Pearce, Richard Smith,* and *Sterrenberg*, the courts did not address the § 707(b)(2) motions but dismissed the cases based on § 707(b)(3). In two cases, *Millikan* and *Masur*, the bankruptcy courts granted the motions, and those decisions were affirmed on appeal, but the United States trustees then withdrew the motions.

Motions to Dismiss by Year and Results



B. Declining to Bring a Motion to Dismiss

In 230 cases in the study, i.e., 58% of the 395 cases, the United States trustees declined to bring motions to dismiss.[77] They used two methods to identify the reasons for declining to file a motion to dismiss. In some cases, the trustees file a document with the courts called a "declination statement" or a "statement that a motion to dismiss is not appropriate" or a "statement pursuant to 11 U.S.C. § 704(b)(2)." In many other cases, the trustees made docket entries without filing a separate document. The docket entry typically reads as follows:

> The United States Trustee previously filed a statement pursuant to 11 U.S.C. Section 704(b)(1)(A) indicating that this case is presumed to be an abuse of the provisions of chapter 7 of Title 11 of the United States Code. Notice is hereby provided that the United States Trustee, based on currently available information, does not consider a motion under 11 U.S.C. Section 707(b) to be appropriate for the following reasons: [reasons described].

The declination statements generally appear in a uniform style. The typical version describes when the case was filed, when it was converted if it was not originally filed as a chapter 7 case, and when the United States trustee filed a statement of presumed abuse. The statement generally quotes verbatim the language of § 704(b)(2). The United States trustee then expresses

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[77]This includes all cases listed in Appendix A other than those listed in note 72 *supra*, plus *Nichols*, *Senez*, and *Willis*. In *Nichols*, *Senez*, and *Willis*, the debtors converted to chapter 13 after the motions to dismiss were filed, but subsequently reconverted to chapter 7 and the United States trustees declined to file motions to dismiss. Therefore, those cases are included as both ones in which motions were filed and ones in which the United States trustees declined to file motions.

the opinion that a motion to dismiss is not appropriate, sets forth the reasons for that decision, and describes the facts that gave rise to that conclusion.

By far the most frequently cited reason for declining to bring a motion to dismiss was the fact that the debtor's actual monthly income at the time of the filing, or anticipated monthly income in the future, did not correspond to the "current monthly income" figure utilized in determining whether there was a presumption of abuse. As previously discussed,[78] the computations contained in § 707(b)(2) begin with the debtor's "current monthly income" as defined in § 101(10A). That definition specifies that current monthly income is the average monthly income for the six-month period ending on the last day of the calendar month before the case was filed.[79] If income received during that historic period was higher than debtor's actual current or anticipated monthly income, the debtor will not be able to devote the amount of income derived from the means test to fund a chapter 13 plan.

The Supreme Court recognized this problem in the context of the "projected disposable income" test for confirmation of a chapter 13 plan[80] in *Hamilton v. Lanning*.[81] The Court there determined that in applying the projected-disposable-income test in chapter 13, a bankruptcy court "may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation."[82] To interpret the test to require the debtor to apply income that will not actually be received to make plan payments would be "a hollow command."[83]

The chapter 7 debtor is faced with the same problem. The means test is intended to ascertain whether the debtor has the means to fund a chapter 13 plan, but if the income or expense figures used in the test are not a realistic picture of the debtor's available net income, the test does not serve its intended purpose. Unfortunately, the usual statutory means to rebut the pre-

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[78]*See supra* text accompanying note 8.

[79]*See supra* note 8.

[80]Generally, a chapter 13 plan cannot be confirmed unless the plan 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) (Supp. 2016). Unless the debtor's plan provides for payment in full of all allowed unsecured claims over a shorter period, the "applicable commitment period" is either three years or not less than five years, depending on whether the debtor's income is below or above the median income for the applicable state. 11 U.S.C. § 1325(b)(4)(A). "Disposable income" is defined as "current monthly income" (with certain exclusions) "less amounts reasonably necessary to be expended" for maintenance or support of the debtor or a dependent of the debtor, charitable contributions, and (if debtor is engaged in a business) business expenses. 11 U.S.C. § 1325(b)(2). If the debtor is an above-median debtor, amounts reasonably necessary to be expended for maintenance or support must be determined in accordance with the deductions allowed in the means test under §707(b)(2)(A) and (B). 11 U.S.C. § 1325(b)(3).

[81]560 U.S. 505 (2010).

[82]*Id.* at 524.

[83]*Id.* at 519.

sumption of abuse by showing "special circumstances"[84] has almost never been interpreted to include the circumstance of an ordinary loss of income or increased living expenses.[85] Indeed, in *Hamilton*, the Court noted that the "petitioner direct[ed the Court] to no authority for the proposition that a prepetition decline in income would qualify as a 'special circumstance.'"[86]

In 181 of the 230 cases in which the United States trustees declined to file motions to dismiss, i.e., 79%, the trustees cited a loss of or reduction in income from employment or support payments that had been included in completing the means test[87] or otherwise described circumstances under which debtors received income during the six-month period that was used to compute "current monthly income" that they did not expect to receive in the future.[88] In another sixteen cases, the United States trustees noted some anticipated expenses that were not considered in the means test.[89]

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[84]*See* 11 U.S.C. § 707(b)(2)(B) (Supp. 2016).

[85]*See* Laura B. Bartell, *Very Special Circumstances - The Almost Irrebutable Presumption of Abuse Under Section 707(b)(2)*, 91 AM. BANKR. L.J. 393, 421 (2017).

[86]560 U.S. at 524.

[87]*See Altaffer; Baker; Bells; Benson; Boyd; Brand; Brandon; Branscom; Branscome; Braud; Braunreiter; Bray; Brooks; Chanel Brown; Rose Brown; Buford; Burgmeier; Byers; Caban; Calhoun; Cali; Carruth; Cast; Cavazos; Cleveland; Colbath; Colbert; Collins; Colucci; Conroy; Corpus; Correll; Coulombe; Coyle; Crow; Curtin; Dickmann; Diephof; DiThomas; Dowl; Drake; Duffin; Durrington; Alice Evans; Fausto; Ferbrache; Ferraro; Fitting; Ford; Glover; Gordan-Dickson; Guettler; Guidry; Habets; Haider; Hancock; Holahan; Ivancic; Angela Jackson; Johar; John-Lewis; Dwight Johnson; Nancy Johnson; Johnston; June Jones; Justice; Kalal; Kalata; Kane; Kendrick; Kimberlin; Kirkham; Koupal; Kryza; Kuceris; Lindsay; Long; Lull; Lustick; Maloy; Marbury; Marisay; Mason; Mayo; Mays; McCaulley; McCollough-Bushey; McCollum; McCullough; McKee; McLean; McNelly; Meyer; Mielke; Mier; Steven Miller; Montanez; Myles; Navejar; Neibauer; Neubert; Neuman-Pouncy; Nguyen; Nichols; Niedermier; Odden; Michael Oliver; Ortego; Ost; Partin; Pasquale; Passino; Amy Pollock; Pope; Reed; Riley; James Roberts; Ralph Roberts; Robinson; Rodgers; Rodriguez; Rogers; Rubner; Sanford; Schmolke; Senez; Sharp; Anthony Sharpe; Shelley; Shriner; Slupski; Donald Smith; Tim Smith; Sparrow; Stoiber; Susko; Taylor; Thies; Thome; Truman Thompson; Bernita Turner; Unruh; Voong; Vu; Wagner; Weathers; Weeden; Weissenfels; Whitesell; Whitlow; Whittaker; Widner; Willis; Young.*

[88]*See Antonowsky* (one-time income from sale of two pieces of property); *Barlett* (lump sum distribution of back child support); *Boller* (one-time bonus); *Catron* (proceeds from sale of home); *Clark* (proceeds from sale of home); *Croft* (withdrawals from 401(k) account); *Demmons* (payments from husband to help pay mortgages on properties she was surrendering); *Devenport* (proceeds from sale of home); *Duffield* (payments under an annuity contract); *Faulkner* (workers' compensation settlement); *Fields* (withdrawal from 401(k) accounts); *Gehl* (foster child payments); *George* (proceeds from retroactive pay); *Donnell Green* (back overtime pay); *Hansen* (one-time IRA distribution); *Haskins* (lump sum retroactive VA benefits); *Warren Hunt* (proceeds from liquidation of a business); *Maguire* (withdrawals from retirement accounts); *Navejar* (one-time retirement account withdrawal); *Ransom* (distributions from sale of savings bonds); *Richter* (withdrawal from value of exempt life insurance policy and an annuity and proceeds from sale of real estate); *Schreiber* (proceeds from sale of home); *Stern* (inheritance); *Szekeres* (signing bonus); *Eric Thompson* (severance and 401(k) proceeds); *Michelle Turner* (sale of car); *Whitney* (IRA distributions); *Williams* (severance package).

[89]*See Christensen* (additional transportation expenses); *Corbin* (increased child support obligation and additional family expenses); *Gregory Evans* (providing support of grandchildren while son was on active duty); *Mary Hinkle* (relocation expenses); *Imhoff* (expenses of replacing vehicles); *Pellegrin* (replacing home and belongings destroyed in Hurricane Katrina and related storage and relocation expenses); *Pollmann*

The United States trustees have relied on other circumstances in fewer cases, such as medical conditions,[90] divorce or separation,[91] the existence of assets to be administered in the chapter 7 case,[92] or the uncertain outcome of litigation.[93] In some cases, the reasons for the decision were not clearly identified.[94]

In sixty-six cases, or almost 29%, the United States trustees declined to file dismissal motions in cases converted from a chapter 13 proceeding to a chapter 7 case.[95] In these cases, they rarely noted the conversion from an unsuccessful chapter 13 as a basis for declining to file a dismissal motion.[96] In only ten cases converted from chapter 13 did the United States trustees file motions to dismiss based on a presumption of abuse.[97] This suggests that the United States trustee is reluctant to seek dismissal of a chapter 7 case when the debtor has previously been unsuccessful in completing a chapter 13 plan,

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(expenses of replacing vehicle); *Pospy* (unusually high transportation expenses and expenses associated with job); *Robbins* (business expenses necessary to generate business income received during six-month period used to compute means test); *Rupp* (debtor was pregnant, which would increase household size and associated expenses); *Schroeder* (expenses in connection with replacement vehicle); *Sellman* (extra nursing home expenses); *Slattery* (student loan payments); *Weins* (additional telecommunications expenses); *Willis* (increased household size); *Wills* (unidentified additional expenses).

[90]*See Alexander*; *Berryman*; *Correll*; *George*; *Gibbs*; *Haider*; *Metcalf*; *Schroeder*; *Walp*. Medical conditions would also necessarily affect future income and expenses.

[91]*See Lee Anderson*; *Randall Anderson*; *Barnes*; *Thomas Bryant*; *Elmore*; *Haworth*; *Jermel Jackson*; *Yvette Jones*; *Lucey*; *Willie Mitchell*; *Pickeral*; *Schievelbein*; *cf. Metcalf* (referring to undescribed "marital situation"). Divorce or separation would necessitate separate living arrangements, which increase expenses.

[92]*See Amir*; *Baldwin*; *Bernardo*; *Cicalese*; *Hoffman*; *Lloyd*; *Purcell*.

[93]*See Mancini*; *Mrowczynski*.

[94]*See Bjornstad* (in which the declination statement is not available on the docket); *Bolin* (stating, "Debtors have demonstrated to the United States Trustee that circumstances in this case do not warrant the filing of a Motion to dismiss" when debtors argued that they would be allowed additional expense deductions in a chapter 13 case so that presumption would not be triggered); *Prater* (in which the docket simply indicates that United States trustee "declines to file a motion to dismiss" and the debtor's affidavit to rebut the presumption indicated a loss of job and payments towards a non-dischargeable student loan); *Walter* (citing "special circumstances"); *Wicker* (stating "because the United States Trustee does not consider such a motion to be appropriate").

[95]*See Alexander*; *Amir*; *Lee Anderson*; *Randall Anderson*; *Barnes*; *Bells*; *Brandon*; *Braud*; *Brooks*; *Burgmeier*; *Calhoun*; *Cast*; *Cavazos*; *Cicalese*; *Cleveland*; *Corbin*; *Coulombe*; *Dickmann*; *DiThomas*; *Drake*; *Durrington*; *Ferbrache*; *Ferraro*; *Gibbs*; *Guettler*; *Guidry*; *Hancock*; *Imhoff*; *Ivancic*; *Johar*; *John-Lewis*; *Yvette Jones*; *Justice*; *Kalal*; *Kalata*; *Kendrick*; *Kimberlin*; *Kryza*; *Kuceris*; *Lloyd*; *Mason*; *McLean*; *Steven Miller*; *Myles*; *Neuman-Pouncy*; *Nguyen*; *Nichols*; *Niedermier*; *Odden*; *Michael Oliver*; *Passino*; *Pickeral*; *Amy Pollock*; *Pratt*; *Reed*; *Riley*; *Rodriguez*; *Rubner*; *Schievelbein*; *Senez*; *Sparrow*; *Truman Thompson*; *Bernita Turner*; *Weissenfels*; *Wicker*; *Willis*.

[96]The court did so in *Niedermier*.

[97]*See Curtis*; *Diezi*; *Heslop*; *Northcutt*; *St. Jean*; *Shaffer*; *Shahidi*; *Richard Smith*; *Steers*; *Townsend*. This does not include cases in which the debtor originally filed under chapter 7, converted to chapter 13, and then reconverted to chapter 7. The United States trustees often do not even file a statement of abuse in those reconverted chapter 7 cases. *See, e.g.*, *Acosta*; *Cox*; *Davis*; *Goodall*; *Sheila Green*; *Moose*; *Mortakis*; *Oriti*; *VanMeter*. *But see Maura* (ordering dismissal of original chapter 7 unless the debtor converted the case to chapter 13, and dismissing the case pursuant to the original order on reconversion to chapter 7).

often because of a reduction in income or increase in expenses after confirmation of that plan.[98] It may also suggest that the existence of the means test is driving a significant number of debtors into chapter 13 who do not have the ability to complete a chapter 13 plan and who would have been better off in chapter 7 from the beginning.

C. Attempts to Rebut the Presumption

In ninety-three (or 23%) of the cases studied, the debtors filed documents frequently called a "rebuttal of presumption" or "affidavit re: special circumstances" or "statement of special circumstances" before the United States trustee determined whether to file a motion to dismiss, what I will refer to as a "preemptive rebuttal of presumption."[99] In most of those cases, the debtors filed the documents as part of the first-day filings.[100] In a very few cases, the debtors filed documents in response to the statements of presumed abuse.[101]

Shortly after BAPCPA became effective, a few pioneers began filing a preemptive rebuttal, but this trend did not really catch on until 2012, as the following chart demonstrates.

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[98]Some scholars have suggested that the means test is not applicable to a debtor who converts his or her case from one under chapter 13. *See* 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). Courts disagree on the issue. *Compare In re* Thoemke, No. 9:12-bk-17027-FMD, 2014 WL 443890 (Bankr. M.D. Fla. Feb. 4, 2014); *In re* Layton, 480 B.R. 392 (Bankr. M.D. Fla. 2012); *In re* Fox, 370 B.R. 639 (Bankr. D.N.J. 2007) (finding § 707(b) inapplicable to converted case) *with In re* Burgher, 539 B.R. 868 (Bankr. D. Colo. 2015); *In re* Croft, 539 B.R. 122 (Bankr. W.D. Tex. 2015); *In re* Reece, 498 B.R. 72 (Bankr. W.D. Va. 2013) (finding §707(b) applicable to converted cases).

[99]*See Baker; Beasley; Benson; Bishop; Bolin; Boller; Bradley; Braunreiter; Bray; Chanel Brown; Rose Brown; Thomas Bryant; Caban; Cali; Carruth; Catron; Colbath; Colucci; Coyle; Curtin; Degree; Devenport; Diephof; Alice Evans; Fausto; Fields; Ford; Glover; Donnell Green; Haider; Hampton; Harlin; Haskins; Holahan; Hull; Angela Jackson; Dwight Johnson; June Jones; Kane; Kirkham; Leary; Lindsay; Long; Maloy; Marbury; Marisay; Maura; Mayo; Mays; McCollum; McNelly; Meyer; Mielke; Mier; Willie Mitchell; Montanez; Navejar; Daniel Oliver; Ortego; Ost; Partin; Pasquale; Plotchev; Russell Pollock; Pope; Pospy; Prater; Robinson; Rogers; Sanford; Sellman; Singletary; Slattery; Slupski; Tim Smith; Sookhram; Speakman; Stern; Stoltman; Szekeres; Talmadge; Thome; Thorien; Michelle Turner; Voong; Vu; Walp; Weathers; Whitlow; Whitney; Widner; Willis; Young.*

[100]*See Baker; Benson; Boller; Braunreiter; Bray; Chanel Brown; Rose Brown; Thomas Bryant; Caban; Cali; Carruth; Catron; Colbath; Colucci; Coyle; Curtin; Degree; Devenport; Diephof; Alice Evans; Fausto; Fields; Ford; Glover; Donnell Green; Haider; Hampton; Harlin; Haskins; Holahan; Hull; Dwight Johnson; Kane; Kirkham; Lindsay; Long; Maloy; Marbury; Marisay; Mayo; Mays; McCollum; McNelly; Meyer; Mielke; Mier; Willie Mitchell; Montanez; Navejar; Ortego; Ost; Partin; Pasquale; Plotchev; Pope; Pospy; Prater; Robinson; Rogers; Sanford; Sellman; Slattery; Slupski; Tim Smith; Sookhram; Stern; Szekeres; Thome; Michelle Turner; Voong; Vu; Walp; Weathers; Whitlow; Whitney; Widner; Young; cf. Thorien; Willis* (rebuttal filed on conversion to chapter 7).

[101]*See Beasley; Bishop; Maura; Singletary; Speakman; Stoltman; Talmadge.* All of these filings were in cases in which the United States trustees brought motions to dismiss.

Number of Cases in which Debtor filed Early Rebuttal of Presumption (by Year)					
2005	2006	2007	2008	2009	2010
0	6[102]	1[103]	3[104]	0	1[105]
2011	2012	2013	2014	2015	2016
0	11[106]	28[107]	8[108]	13[109]	22[110]

Utilization of the preemptive rebuttal, however, has not yet caught on nationwide. A review of the sampled cases shows that certain regions see far more such submissions than others, as the following chart illustrates:

Region[111]	Number of Cases in Study with Preemptive Rebuttal Filings	Total Number of Cases in Study by Region	Percentage of Cases by Region with Preemptive Rebuttal Filings
1	0	6[112]	0
2	0	2[113]	0
3	1[114]	4[115]	25%

[102]*See Daniel Oliver*; *Singletary*; *Speakman*; *Stoltman*; *Talmadge*; *Thorien*.

[103]*See Leary*.

[104]*See Beasley*; *Bishop, Willis*.

[105]*See Maura*.

[106]*See Colucci*; *Ford*; *Hull, Lindsay*; *Long*; *Mielke*; *Pospy*; *Slattery*; *Walp*; *Whitlow*; *Young*.

[107]*See Baker*; *Benson*; *Boller*; *Bradley*; *Caban*; *Carruth*; *Catron*; *Colbath*; *Diephof*; *Haider*; *Holohan*; *June Jones*; *Maloy*; *Marisay*; *Mayo*; *Mier*; *Willie Mitchell*; *Montanez*; *Navejar*; *Partin*; *Pasquale*; *Plotchev*; *Russell Pollock*; *Rogers*; *Sanford*; *Slupski*; *Michelle Turner*; *Whitney*.

[108]*See Bolin*; *Braunreiter*; *Rose Brown*; *Degree*; *Fields*; *Glover*; *Meyer*; *Ortego*.

[109]*See Alice Evans*; *Harlin*; *Haskins*; *Dwight Johnson*; *Kirkham*; *McCollum*; *McNelly*; *Ost*; *Pope*; *Sookhram*; *Stern*; *Thome*; *Voong*.

[110]*See Bray*; *Chanel Brown*; *Thomas Bryant*; *Cali*; *Coyle*; *Curtin*; *Devenport*; *Fausto*; *Donnell Green*; *Hampton*; *Angela Jackson*; *Kane*; *Marbury*; *Mays*; *Prater*; *Robinson*; *Sellman*; *Tim Smith*; *Szekeres*; *Vu*; *Weathers*; *Widner*.

[111]These are the regions of the United States trustee system, plus Alabama and North Carolina that use bankruptcy administrators. The twenty-one regions of the United States trustee system are as follows: Region 1: Massachusetts, Maine, New Hampshire, and Rhode Island; Region 2: New York, Connecticut, and Vermont; Region 3: Delaware, New Jersey, and Pennsylvania; Region 4: Maryland, South Carolina, Virginia, West Virginia, and the District of Columbia; Region 5: Louisiana and Mississippi; Region 6: the Northern and Eastern Districts of Texas; Region 7: the Western and Southern Districts of Texas; Region 8: Tennessee and Kentucky; Region 9: Michigan and Ohio; Region 10: Indiana and the Central and Southern Districts of Illinois; Region 11: the Northern District of Illinois and Wisconsin; Region 12: Iowa, Minnesota, North Dakota, and South Dakota; Region 13: Arkansas, Missouri, and Nebraska; Region 14: Arizona; Region 15: the Southern District of California, Hawaii, Guam, and the Northern Mariana Islands; Region 16: the Central District of California; Region 17: the Eastern and Northern Districts of California and Nevada; Region 18: Alaska, Idaho, Montana, Oregon, and Washington; Region 19: Colorado, Utah, and Wyoming; Region 20: Kansas, New Mexico, and Oklahoma; Region 21: Georgia, Florida, Puerto Rico, and the Virgin Islands.

[112]*See Coulombe*; *Conovan*; *Green*; *Kueris*; *Pratt*; *Purcell*.

[113]*See George*; *Maguire*.

[114]*See Talmadge*.

[115]*See Cicalese*; *Fonsah*; *Lenton*; *Talmadge*.

4	1[116]	15[117]	6.67%
5	0	10[118]	0
6	0	3[119]	0
7	19[120]	24[121]	79.17%
8	5[122]	15[123]	33.33%
9	15[124]	71[125]	21.13%
10	3[126]	26[127]	11.54%
11	18[128]	27[129]	66.67%
12	1[130]	16[131]	6.25%
13	9[132]	17[133]	52.94%
14	0	13[134]	0

[116]*See Walp.*

[117]*See Acosta; Croft; Groves; Holliday; Jackson; McCain; Meade; Niles; Olson; Pickeral; Rongione; Ronald Sharpe; Vidas; Walp; Whittaker.*

[118]*See Guidry; Johar; John-Lewis; Lustick; Patrick; Pellegrin; Schmolke; Senez; Smith; Walter.*

[119]*See Barraza; Camp; Susko.*

[120]*See Caban; Carruth; Colbath; Diephof; Holahan; Leary; Long; Maloy; Marisay; Mays; Meyer; Navejar; Daniel Oliver; Ost; Partin; Sellman; Singletary; Weathers; Whitney.*

[121]*See Antonowsky; Caban; Carruth; Cavazos; Colbath; Diephof; Holahan; Leary; Long; Maloy; Marisay; Mays; Meyer; Navejar; Daniel Oliver; Ost; Partin; Samaro; Schreiber; Sellman; Singletary; Townsend; Weathers; Whitney.*

[122]*See Baker; Bishop; Catron; Fields; Russell Pollock.*

[123]*See Baker; Bell; Bishop; Catron; Clinton; Correll; Fields; Fletcher; Gibbs; Kendrick; Mitchell; Pearce; Russell Pollock; Riley; Weeden.*

[124]*See Colucci; Coyle; Degree; Alice Evans; Harlin; Maura; Mayo; Pasquale; Plotchev; Pope; Pospy; Slattery; Speakman; Whitlow; Young.*

[125]*See Altaffer; Amir; Barrett; Bearshak; Bells; Boyd; Brandon; Branscom; Burgmeier; Byers; Calhoun; Castle; Colucci; Conroy; Cox; Coyle; Curtis; Davis; Degree; Alice Evans; Ferbrache; Fudge; Gordan-Dickson; Grabarczyk; Harlin; Harper; Heslop; Hinkle; Imhoff; Ivancic; Jennings; Jones; Justice; Kalal; Kimberlin; Maertens; Mancini; Mason; Maura; Mayo; McCarville; McKay-Polly; Linda Miller; Steven Miller; Mrowczynski; Neubert; Niedermier; Oriti; Pasquale; Plotchev; Pope; Pospy; Rapp; Roman; Schwin; Sekardi; Simmons; Slattery; Smith; Sparrow; Speakman; Spearman; Stoiber; Thompson; Tomlinson; Turner; Weinert; Whitlow; Williams; Wiseman; Young.*

[126]*See Benson; Bolin; Glover.*

[127]*See Benson; Bolin; Chamness; Courtney; Elmore; Evans; Glover; Grinkmeyer; Hunt; Jermel Jackson; Jessup; Dwayne Johnson; Johnston; Manley, McCullough; McKee; Millikan; Pollmann; Richter; Roberts; Singer; Thompson; VanMeter; Whitesell; Wills; Wise.*

[128]*See Braunreiter; Chanel Brown; Rose Brown; Cali; Curtin; Haider; Hampton; Angela Jackson; June Jones; Kane; Marbury; McCollum; Mielke; Montanez; Ortego; Robinson; Szekeres; Widner.*

[129]*See Bjornstad; Braunreiter; Chanel Brown; Rose Brown; Cali; Crego; Curtin; Haider; Hampton; Angela Jackson; Nancy Johnson; June Jones; Kalata; Kane; Krahn; Lucey; Marbury; McCollum; Mielke; Montanez; Mortakis; Ortego; Robinson; Rodgers; Szekeres; Thies; Widner.*

[130]*See Stoltman.*

[131]*See Allison; Anderson; Braathun; Bushinski; Erickson; Gehl; Goodall; Masur; Neibauer; Reed; Rieck I; Rieck II; Schievelbein; Stoltman; Unruh; Weins.*

[132]*See Boller; Hull; Dwight Johnson; Willie Mitchell; Prater; Rogers; Sanford; Michelle Turner; Willis.*

[133]*See Boatright; Boller; Crow; Dowl; Hull; Dwight Johnson; Willie Mitchell; Nichols; Prater; Rogers; Ryader; Sanford; Skaggs; Swanson; Michelle Turner; Willis; Wright.*

[134]*See Barker; Cast; Cherniak; Hartley; Hitchcock; Hutchinson; Lull; McMillan; Metcalf; Neuman-Pouncy; Shelley; Springer; Sterkel.*

15	0	3[135]	0
16	3[136]	11[137]	27.27%
17	1[138]	12[139]	8.33%
18	12[140]	45[141]	26.67%
19	1[142]	18[143]	5.56%
20	3[144]	19[145]	15.79%
21	0	29[146]	0
Ala.	1[147]	3[148]	33.33%
N.C.	0	7[149]	0

To analyze whether filing the preemptive rebuttal had any impact on the decision of the United States trustee to file a dismissal motion, I looked for cases in which the debtors filed a preemptive rebuttal but the United States trustee nevertheless filed a dismissal motion. I found only eighteen cases[150] (i.e., 19%). These eighteen cases included nine cases in which the debtors did not file the rebuttals until after the United States trustees had filed a statement of presumed abuse.[151] In four of the eighteen cases, the trustees' motions were subsequently withdrawn based on the same grounds they used to

[135]*See Thomas Evans; Maya; McCollough-Bushey.*

[136]*See Ford; Mier; Slupski.*

[137]*See Alexander; Chan; Ford; Katz; Koupal; Mier; Moranz; Renteria; Slupski; Richard Smith; Wilkins.*

[138]*See Lindsay.*

[139]*See Brand; Braud; Corpus; DiThomas; Enriquez; Escano; Hodson; Lindsay; Lunn; Nebres; Truman Thompson; Vanek.*

[140]*See Beasley; Bray; Thomas Bryant; Devenport; Fausto; Haskins; Kirkham; Sookhram; Stern; Thorien; Voong; Vu.*

[141]*See Albrecht; Allen; Lee Anderson; Baldwin; Barber; Barnes; Beasley; Bray; Brooks; Thomas Bryant; Corbin; Coverstone; Devenport; Dickmann; Durrington; Faulkner; Fausto; Habets; Hancock; Hartley; Haskins; Haworth; Hickman; Hoffman; Holliday; Kirkham; Knepper; McCaulley; McLean; Guy Miller; Northcutt; Odden; Oliver; Robbins; Schroeder; Sharp; Shriner; Sookhram; Stern; Thorien; Uder Lopez; Voong; Vu; Wagner; Weissenfels.*

[142]*See Tim Smith.*

[143]*See Berryman; Branscome; Brosius; Champine; Christensen; Colbert; Duffin; Hansen; Hinkle; Hunt; Merino; Vede Miller; Ransom; James Roberts; Shaffer; Tim Smith; Weber; Woods.*

[144]*See Donnell Green; McNelly; Thome.*

[145]*See Barlett; Buford; Champagne; Clark; Cleveland; Close; Collins; Donovan; Fitting; Donnell Green; Harris; Jadhav; Jaramillo; Johns; Makres; McNelly; Rupp; Taylor; Thome.*

[146]*See Banks James; Demmons; Diezi; Drake; Duffield; Ferraro; Foster; Guettler; Haddock; Holmes; Kryza; Labruno; Lloyd; Mancera; Milton; Myles; Nguyen; Passino; Amy Pollock; Rey; Rodriguez; Rubner; St. Jean; Shahidi; Anthony Sharpe; Douglas Smith; Starnes; Steers; Wicker.*

[147]*See Bradley.*

[148]*See Bradley; Edwards; Sanders.*

[149]*See Bernardo; Krawczyk; Moose; Parker; Carrie Smith; Sterrenberg; Thelen.*

[150]*See Beasley; Bishop; Bradley; Degree; Hampton; Harlin; Hull; Leary; Maura; Daniel Oliver; Plotchev; Russell Pollock; Singletary; Sookhram; Speakman; Stoltman; Talmadge; Thorien.*

[151]*See Beasley; Bishop; Leary; Maura; Singletary; Speakman; Stoltman; Talmadge; Thorien.*

decline filing in the first instance.[152] In one other case, the court denied the motion.[153] This means that the United States trustees did not move to dismiss in seventy-five of the ninety-three cases in which preemptive rebuttals were filed, or 81%, and the debtors were ultimately able to remain in chapter 7 in eighty of the ninety-three cases, or 87%.[154]

By comparison, in the 302 cases in which the debtors did not file preemptive rebuttals, the United States trustees filed dismissal motions based on the presumption of abuse in 150 cases, or about 50% of the cases.[155] The trustees withdrew (or did not pursue) the motions in forty-four cases,[156] often for reasons that would have justified decisions to decline filing motions in the first place.[157] In twenty-three cases, the motions were denied.[158] Therefore,

[152]*See Hampton* (debtor's non-filing spouse moved out); *Russell Pollock* (debtor was unemployed); *Speakman* (debtor had insufficient disposable income to fund chapter 13 plan); *Stoltman* (debtor had no disposable income).

[153]*See Bradley*.

[154]Notably, the cases in which the United States trustees filed motions to dismiss despite the debtors having filed rebuttals of presumption include all those filed in 2006 and 2007, and ten of the eleven filed before 2012. In seventy-four of the eighty-one cases filed since 2012, the United States trustees declined to file motions to dismiss (and withdrew the motions in two of the cases in which motions were filed), meaning that the debtors were able to remain in chapter 7 in seventy-six of those eighty-one cases (94%).

[155]*See Acosta*; *Albrecht*; *Allen*; *Allison*; *Banks James*; *Barber*; *Barker*; *Barraza*; *Barrett*; *Bearshak*; *Bell*; *Boatright*; *Braathun*; *Brosius*; *Bushinski*; *Camp*; *Castle*; *Chamness*; *Champagne*; *Champine*; *Chan*; *Cherniak*; *Clinton*; *Close*; *Courtney*; *Coverstone*; *Cox*; *Crego*; *Curtis*; *Davis*; *Diezi*; *Connie Donovan*; *Joseph Donovan*; *Edwards*; *Enriquez*; *Erickson*; *Escano*; *Thomas Evans*; *Fletcher*; *Fonash*; *Foster*; *Fudge*; *Goodall*; *Grabarczyk*; *Sheila Green*; *Grinkmeyer*; *Groves*; *Haddock*; *Harper*; *Harris*; *Jammie Hartley*; *Steven Hartley*; *Heslop*; *Hickman*; *Vernon Hinkle*; *Hitchcock*; *Hodson*; *Holliday*; *Holmes*; *Josephine Hunt*; *Hutchinson*; *Harold Jackson*; *Jadhav*; *Jaramillo*; *Jennings*; *Jessup*; *Johns*; *Dwayne Johnson*; *Katz*; *Knepper*; *Krahn*; *Krawczyk*; *Labruno*; *Lenton*; *Lunn*; *Maertens*; *Makres*; *Mancera*; *Manley*; *Masur*; *Maya*; *McCain*; *McCarville*; *McKay-Polly*; *McMillan*; *Meade*; *Merino*; *Guy Miller*; *Linda Miller*; *Vede Miller*; *Millikan*; *Milton*; *Carrie Mitchell*; *Moose*; *Moranz*; *Mortakis*; *Nebres*; *Nichols*; *Niles*; *Northcutt*; *Olson*; *Oriti*; *Parker*; *Patrick*; *Pearce*; *Rapp*; *Renteria*; *Rey*; *Rieck I*; *Rieck II*; *Roman*; *Rongione*; *Ryder*; *St. Jean*; *Samaro*; *Sanders*; *Sekardi*; *Senez*; *Shaffer*; *Shahidi*; *Ronald Sharpe*; *Simmons*; *Singer*; *Skaggs*; *Carrie Smith*; *Douglas Smith*; *Louie Smith*; *Richard Smith*; *Spearman*; *Springer*; *Steers*; *Sterkel*; *Sterrenberg*; *Swanson*; *Thelen*; *Gregory Thompson*; *Tomlinson*; *Townsend*; *Uder Lopez*; *Vanek*; *VanMeter*; *Vidis*; *Weber*; *Weinert*; *Wilkins*; *Willis*; *Wise*; *Wiseman*; *Woods*; *Wright*. These do not include cases in which the debtors converted to chapter 13 or chapter 11 after filing the statements of presumed abuse but before motions to dismiss were filed. In *Willis*, the debtor did not file a rebuttal the first time his chapter 13 case was converted to chapter 7, and the United States trustee filed a motion to dismiss, but the second time the debtor converted his chapter 13 case to chapter 7, he filed a rebuttal, and the trustee did not file a motion to dismiss. In *Nichols*, the United States trustee brought a motion to dismiss the first time the case was converted from chapter 13 to chapter 7 but declined the second time. The debtor never filed a rebuttal.

[156]*See Allison*; *Barber*; *Barker*; *Bearshak*; *Bell, Brosius*; *Bushinski*; *Chamness*; *Clinton*; *Grabarczyk*; *Haddock*; *Harlin*; *Harper*; *Jammie Hartley*; *Steven Hartley*; *Heslop*; *Vernon Hinkle*; *Hitchcock*; *Holmes*; *Jadhav*; *Dwayne Johnson*; *Knepper*; *Krahn*; *Maertens*; *Mancera*; *Manley*; *Masur*; *McCarville*; *Meade*; *Merino*; *Guy Miller*; *Millikan*; *Milton*; *Plotchev*; *Rapp*; *Samaro*; *Sekardi*; *Spearman*; *Springer*; *Sterkel*; *Tomlinson*; *Weber*; *Wiseman*; *Woods*. The United States trustees withdrew the motions in *Millikan* and *Masur* after they were granted and affirmed on appeal.

[157]*See, e.g.*, *Allison* (additional expenses for older vehicles); *Barker* (assets available for distribution); *Bearshak* (reduction in income); *Bell* (assets available to administer); *Brosius* (debtor and spouse divorcing); *Bushinski* (one-time bonus prior to filing); *Chamness* (available assets for distribution); *Clinton* (assets

the debtors were able to remain in chapter 7 in 219 of the 302 cases (or 73%), despite not filing a preemptive rebuttal. But compared to the 81% rate when debtors filed a presumptive rebuttal, a debtor's chance of remaining in chapter 7 despite the presumption of abuse arising is significantly enhanced by filing a preemptive rebuttal.

D. When and Where the United States Trustees Decline to Bring Motions

The cases chosen for the study were not selected based on any factor other than the month in which they were filed, so I first decided to sort them by year to see if there were any trends. The results follow:

Filing Year	Cases in which Motions to Dismiss Were Filed	Cases in which U.S. Trustee Declined to File Motion to Dismiss	Total Cases	Percentage of Cases in which Motions to Dismiss Were Filed
2005	4[159]	9[160]	13	30.77%
2006	28[161]	8[162]	36	77.78%
2007	47[163]	38[164]	85	55.29%

available for distribution); *Haddock* (decline in income); *Harper* (current residential, marital and financial circumstances); *Heslop* (loss of income); *Vernon Hinkle* (medical condition resulting in decreased income); *McCarville* (pending dissolution of marriage, and existence of assets to administer); *Mancera* (loss of income); *Manley* (one-time receipt of bonus); *Masur* (loss of income); *Merino* (income is below amount triggering presumption); *Guy Miller* (loss of income); *Rapp* (assets to administer); *Samaro* (available assets to distribute); *Sekardi* (available assets to distribute); *Spearman* (available assets to administer); *Sterkel* (no disposable income); *Tomlinson* (assets available for administration); *Weber* (based on severe medical problems impairing ability to secure future employment); *Woods* (debtor changed jobs to new location, needs two residences until house sold).

[158]See *Boatright*; *Braathun*; *Close*; *Thomas Evans*; *Foster*; *Holliday*; *Josephine Hunt*; *Hutchinson*; *Harold Jackson*; *Jessup*; *Labruno*; *Makres*; *Nebres*; *Parker*; *Rongione*; *Sanders*; *Ronald Sharpe*; *Simmons*; *Carrie Smith*; *Louie Smith*; *Thelen*; *Gregory Thompson*; *Wilkins*.

[159]*See Allison*; *Harris*; *Johns*; *Simmons*.

[160]*See Branscom*; *Buford*; *Christensen*; *Cicalese*; *Colbert*; *Imhoff*; *Lloyd*; *Lustick*; *Pellegrin*.

[161]*See Acosta*; *Barraza*; *Bell*; *Castle*; *Close*; *Curtis*; *Connie Donovan*; *Erickson*; *Vernon Hinkle*; *Hitchcock*; *Lenton*; *McCarville*; *Guy Miller*; *Linda Miller*; *Daniel Oliver*; *Renteria*; *Samaro*; *Singletary*; *Skaggs*; *Louie Smith*; *Speakman*; *Steers*; *Stoltman*; *Talmadge*; *Gregory Thompson*; *Thorien*; *Townsend*; *Weber*.

[162]*See Hansen*; *Justice*; *Kendrick*; *Lull*; *Michael Oliver*; *Pollmann*; *Schreiber*; *Bernita Turner*.

[163]*See Banks James*; *Barber*; *Barrett*; *Bearshak*; *Bishop*; *Braathun*; *Brosius*; *Chamness*; *Champagne*; *Champine*; *Cherniak*; *Courtney*; *Crego*; *Goodall*; *Sheila Green*; *Hickman*; *Holmes*; *Hutchinson*; *Jadhav*; *Jennings*; *Dwayne Johnson*; *Knepper*; *Krahn*; *Leary*; *Maertens*; *Makres*; *Mancera*; *Masur*; *Maya*; *Merino*; *Millikan*; *Milton*; *Moranz*; *Nichols*; *Northcutt*; *Oriti*; *Rapp*; *Roman*; *Ryder*; *Senez*; *Shaffer*; *Singer*; *Richard Smith*; *Uder Lopez*; *Wilkins*; *Wiseman*; *Woods*.

[164]*See Lee Anderson*; *Antonowsky*; *Barlett*; *Bjornstad*; *Burgmeier*; *Byers*; *Cleveland*; *Collins*; *Conroy*; *Corbin*; *Correll*; *Demmons*; *Dowl*; *Duffield*; *Gregory Evans*; *George*; *Guettler*; *Habets*; *John-Lewis*; *Johnston*; *Kalata*; *Maguire*; *Steven Miller*; *Nguyen*; *Nichols*; *Pratt*; *Purcell*; *Ransom*; *Rupp*; *Schmolke*; *Senez*; *Starnes*; *Eric Thompson*; *Wagner*; *Weins*; *Whitesell*; *Whittaker*; *Williams*.

2008	43[165]	65[166]	108	39.81%
2009	6[167]	18[168]	24	25%
2010	11[169]	1[170]	12	91.67%
2011	8[171]	4[172]	12	66.67%
2012	8[173]	16[174]	24	33.33%
2013	6[175]	27[176]	33	18.18%
2014	2[177]	11[178]	13	15.38%
2015	4[179]	12[180]	16	25%
2016	1[181]	21[182]	22	4.76%
Total	168	230	398	42.21%

Looking at the data in a graphic form, one can see a strong pattern. In the first six or seven years after the effective date of BAPCPA, United States

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[165]*See Albrecht; Allen; Barker; Beasley; Boatright; Bushinski; Camp; Clinton; Cox; Davis; Diezi; Joseph Donovan; Escano; Fonash; Foster; Haddock; Harper; Steven Hartley; Heslop; Holliday; Josephine Hunt; Harold Jackson; Jessup; Labruno; Manley; McCain; McMillan; Meade; Mortakis; Nebres; Parker; Rongione; Sekardi; Ronald Sharpe; Carrie Smith; Spearman; Springer; Sterkel; Swanson; Tomlinson; VanMeter; Vidis; Willis.*

[166]*See Alexander; Altaffer; Amir; Bernardo; Berryman; Boyd; Brand; Branscome; Cavazos; Clark; Corpus; Croft; DiThomas; Durrington; Elmore; Faulkner; Ferbrache; Fitting; Gehl; Gibbs; Guidry; Haworth; Mary Hinkle; Hoffman; Warren Hunt; Jermel Jackson; Johar; Yvette Jones; Kalal; Kimberlin; Kryza; Lucey; Mancini; Mason; McCaulley; McCullough; McKee; McLean; Metcalf; Mrowcznski; Myles; Neibauer; Neubert; Neuman-Pouncy; Passino; Pickeral; Amy Pollock; Richter; Riley; James Roberts; Ralph Roberts; Rodriguez; Rubner; Schievelbein; Schroeder; Schwin; Sharp; Anthony Sharpe; Sparrow; Stoiber; Taylor; Truman Thompson; Walter; Willis; Wills.*

[167]*See Coverstone; Groves; Rieck I; St. Jean; Shahidi; Thelen.*

[168]*See Randall Anderson; Barnes; Bells; Brandon; Braud; Brooks; Calhoun; Coulombe; Dickmann; Duffin; Hancock; Ivancic; Odden; Rodgers; Shelley; Shriner; Weissenfels; Wicker.*

[169]*See Chan; Enriquez; Fletcher; Grabarczyk; Grinkmeyer; Hodson; Katz; Lunn; Maura; Sanders; Wise.*

[170]*See Reed.*

[171]*See Thomas Evans; Krawczyk; Moose; Rieck II; Douglas Smith; Sterrenberg; Vanek; Weinert.*

[172]*See Cast; Ferraro; McCollough-Bushey; Susko.*

[173]*See Edwards; Hull; McKay-Polly; Niles; Olson; Pearce; Rey; Wright.*

[174]*See Baldwin; Colucci; Drake; Ford; Koupal; Lindsay; Long; Mielke; Niedermier; Pospy; Robbins; Slattery; Thies; Walp; Whitlow; Young.*

[175]*See Bradley; Jammie Hartley; Jaramillo; Vede Miller; Plotchev; Russell Pollock.*

[176]*See Baker; Benson; Boller; Caban; Carruth; Catron; Colbath; Diephof; Haider; Holahan; June Jones; Kuceris; Maloy; Marisay; Mayo; Mier; Willie Mitchell; Montanez; Navejar; Partin; Pasquale; Rogers; Sanford; Slupski; Donald Smith; Michelle Turner; Whitney.*

[177]*See Degree; Patrick.*

[178]*See Bolin; Braunreiter; Rose Brown; Crow; Fields; Glover; Gordan-Dickson; Meyer; Ortego; Unruh; Weeden.*

[179]*See Fudge; Harlin; Carrie Mitchell; Sookhram.*

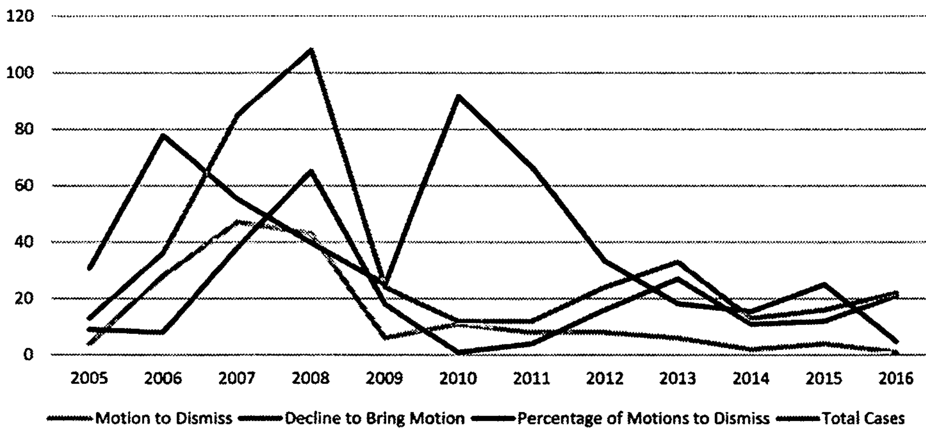
[180]*See Alice Evans; Haskins; Dwight Johnson; Nancy Johnson; Kirkham; McCollum; McNelly; Ost; Pope; Stern; Thome; Voong.*

[181]*See Hampton.*

[182]*See Bray; Chanel Brown; Thomas Bryant; Cali; Coyle; Curtin; Devenport; Fausto; Donnell Green; Angela Jackson; Kane; Marbury; Mays; Prater; Robinson; Sellman; Tim Smith; Szekeres; Vu; Weathers; Widner.*

trustees tended to bring more motions to dismiss cases filed by above-median debtors (reaching a height of almost 90% in 2010). Since 2013, United States trustees have generally become more likely to decline to file a motion to dismiss. One can also see that the total number of cases in which the United States trustee was forced to make any decision under § 704(b)(2) has declined dramatically since 2008, which suggests that fewer above-median debtors are filing bankruptcy cases under chapter 7.

Decision by U.S. Trustee under Section 704(b)(2) by Year



In reviewing the same data by regions of the United States Trustee program (or the districts with bankruptcy administrators), additional patterns emerge.

Region	Cases in which Motions to Dismiss were Filed	Cases in which U.S. Trustee Declined to file Motion to Dismiss	Total Cases	Ratio of Motions to Dismiss to Total Cases
1	2[183]	4[184]	6	33.33%
2	0	2[185]	2	0
3	3[186]	1[187]	4	75%
4	11[188]	4[189]	15	73.33%

[183] *See Joseph Donovan*; *Sheila Green*.

[184] *See Coulombe*; *Kuceris*; *Pratt*; *Purcell*.

[185] *See George*; *Maguire*.

[186] *See Fonash*; *Lenton*; *Talmadge*.

[187] *See Cicalese*.

[188] *See Acosta*; *Groves*; *Holliday*; *Harold Jackson*; *McCain*; *Meade*; *Niles*; *Olson*; *Rongione*; *Ronald Sharpe*; *Vidis*.

[189] *See Croft*; *Pickeral*; *Walp*; *Whittaker*.

5	2[190]	9[191]	11	18.18%
6	2[192]	1[193]	3	66.67%
7	5[194]	19[195]	24	20.83%
8	7[196]	8[197]	15	46.67%
9	32[198]	38[199]	70	45.71%
10	11[200]	15[201]	26	42.31%
11	4[202]	23[203]	27	14.81%
12	9[204]	7[205]	16	56.25%
13	8[206]	11[207]	19	42.11%
14	8[208]	5[209]	13	61.54%
15	2[210]	1[211]	3	66.67%
16	6[212]	5[213]	11	54.55%

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[190]*See Patrick; Senez.*

[191]*See Guidry; Johar; John-Lewis; Lustick; Pellegrin; Schmolke; Senez; Donald Smith; Walter.*

[192]*See Barraza; Camp.*

[193]*See Susko.*

[194]*See Leary; Daniel Oliver; Samaro; Singletary; Townsend.*

[195]*See Antonowsky; Caban; Carruth; Cavazos; Colbath; Diephof; Holahan; Long; Maloy; Marisay; Mays; Meyer; Navejar; Ost; Partin; Schreiber; Sellman, Weathers; Whitney.*

[196]*See Bell; Bishop; Clinton; Fletcher; Carrie Mitchell; Pearce; Russell Pollock.*

[197]*See Baker; Catron; Correll; Fields; Gibbs; Kendrick; Riley; Weeden.*

[198]*See Barrett; Bearshak; Castle; Cox; Curtis; Davis; Degree; Fudge; Grabarczyk; Harlin; Harper; Heslop; Vernon Hinkle; Jennings; Maertens; Maura; McCarville; McKay-Polly; Linda Miller; Oriti; Plotchev; Rapp; Roman; Sekaradi; Simmons; Louie Smith; Speakman; Spearman; Gregory Thompson; Tomlinson; Weinert; Wiseman.*

[199]*See Altaffer; Amir; Bells; Boyd; Brandon; Branscom; Burgmeier; Byers; Calhoun; Colucci; Conroy; Coyle; Alice Evans; Ferbrache; Gordan-Dickson; Imhoff; Ivancic; Yvette Jones; Justice; Kalal; Kimberlin; Mancini; Mason; Mayo; Steven Miller; Mrowczynski; Neubert; Niedermier; Pasquale; Pope; Pospy; Schwin; Slattery; Sparrow; Stoiber; Bernita Turner; Whitlow; Williams.*

[200]*See Chamness; Courtney; Grinkmeyer; Josephine Hunt; Jessup; Dwayne Johnson; Manley; Millikan; Singer; VanMeter; Wise.*

[201]*See Benson; Bolin; Elmore; Gregory Evans; Glover; Jermel Jackson; Johnston; McCullough; McKee; Pollmann; Richter; Ralph Roberts; Eric Thompson; Whitesell; Wills.*

[202]*See Crego; Hampton; Krahn; Mortakis.*

[203]*See Bjornstad; Braunreiter; Chanel Brown; Rose Brown; Cali; Curtin; Haider; Angela Jackson; Nancy Johnson; June Jones; Kalata; Kane; Lucey; Marbury; McCollum; Mielke; Montanez; Ortego; Robinson; Rodgers; Szekeres; Thies; Widner.*

[204]*See Allison; Braathun; Bushinski; Erickson; Goodall; Masur; Rieck I; Rieck II; Stoltman.*

[205]*See Randall Anderson; Gehl; Neibauer; Reed; Schievelbein; Unruh; Weins.*

[206]*See Boatright; Hull; Nichols; Ryder; Skaggs; Swanson; Willis; Wright.*

[207]*See Boller; Crow; Dowl; Dwight Johnson; Willie Mitchell; Nichols; Prater; Rogers; Sanford; Michelle Turner; Willis.*

[208]*See Barker; Cherniak; Steven Hartley; Hitchcock; Hutchinson; McMillan; Springer; Sterkel.*

[209]*See Cast; Lull; Metcalf; Neuman-Pouncy; Shelley.*

[210]*See Thomas Evans; Maya.*

[211]*See McCollough-Bushey.*

[212]*See Chan; Katz; Moranz; Renteria; Richard Smith; Wilkins.*

[213]*See Alexander; Ford; Koupal; Mier; Slupski.*

17	6[214]	6[215]	12	50%
18	13[216]	31[217]	44	29.55%
19	7[218]	11[219]	18	38.89%
20	8[220]	11[221]	19	42.11%
21	13[222]	16[223]	29	44.83%
Ala. B.A.	3[224]	0	3	100%
N.C. B.A.	6[225]	1[226]	7	85.71%
Total	168	230	398	42.21%

This regional breakdown reflects a dramatic difference from one region to another, but it does not necessarily explain the differences. There is no correlation between regions which have a relatively large number of nonbusiness chapter 7 cases and the likelihood that the United States trustee in that region will file a dismissal motion. For example, Region 9 (Michigan and Ohio) has far more of these cases than any other region,[227] and yet its percentage of dismissal motions is lower than 50%. The rate of motions to dismiss does not vary significantly between regions with a comparatively moderate number of above-median debtor chapter 7 cases (i.e., Regions 7, 10,

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[214]*See Enriquez; Escano; Hodson; Lunn; Nebres; Vanek.*

[215]*See Brand; Braud; Corpus; DiThomas; Lindsay; Truman Thompson.*

[216]*See Albrecht; Allen; Barber; Beasley; Coverstone; Jammie Hartley; Hickman; Knepper; Guy Miller; Northcutt; Sookhram; Thorien; Uder Lopez.*

[217]*See Lee Anderson; Baldwin; Barnes; Bray; Brooks; Thomas Bryant; Corbin; Devenport; Dickmann; Durrington; Faulkner; Fausto; Habets; Hancock; Haskins; Haworth; Hoffman; Kirkham; McCaulley; McLean; Odden; Michael Oliver; Robbins; Schroeder; Sharp; Shriner; Stern; Voong; Vu; Wagner; Weissenfels.*

[218]*See Brosius; Champine; Merino; Vede Miller; Shaffer; Weber; Woods.*

[219]*See Berryman; Branscome; Christensen; Colbert; Duffin; Hansen; Mary Hinkle; Warren Hunt; Ransom; James Roberts; Tim Smith.*

[220]*See Champagne; Close; Connie Donovan; Harris; Jadhav; Jaramillo; Johns; Makres.*

[221]*See Barlett; Buford; Clark; Cleveland; Collins; Fitting; Donnell Green; McNelly; Rupp; Taylor; Thorne.*

[222]*See Banks James; Diezi; Foster; Haddock; Holmes; Labruno; Mancera; Milton; Rey; St. Jean; Shahidi; Douglas Smith; Steers.*

[223]*See Demmons; Drake; Duffield; Ferraro; Guettler; Kryza; Lloyd; Myles; Nguyen; Passino; Amy Pollock; Rodriguez; Rubner; Anthony Sharpe; Starnes; Wicker.*

[224]*See Bradley; Edwards; Sanders.*

[225]*See Krawczyk; Moose; Parker; Carrie Smith; Sterrenberg; Thelen.*

[226]*See Bernardo.*

[227]The statistics for cases included in the study are representative of filing rates in the various regions. For the twelve-month period ended December 31, 2016, total nonbusiness chapter 7 filings for each of the regions were as follows: Region 1: 9666; Region 2: 25,897; Region 3: 29,832; Region 4: 30,003; Region 5: 8944; Region 6: 6205; Region 7: 6372; Region 8: 23,991; Region 9: 50,761; Region 10: 22,835; Region 11: 35,824; Region 12: 12,955; Region 13: 19,205; Region 14: 12,381; Region 15: 7228; Region 16: 29,083; Region 17: 22,959; Region 18: 23,303; Region 19: 17,468; Region 20: 13,954; Region 21: 51,392; North Carolina: 5753; Alabama: 9321. 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, 2016, http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2016/12/31.

11, and 21) from the rate in Region 9, with its significantly higher number of such cases. Nor is there any apparent correlation between the regions with similar lower total numbers of cases in the study. For those regions with fewer than ten cases in the study (i.e., Regions 1, 2, 3, 6, 15, and Alabama and North Carolina), the range of percentages varies widely from a low of 0% to a high of 100%.

There also appears to be no correlation between regions in which most consumer bankruptcy filings are made under chapter 13 and the rate at which the United States trustee brings motions to dismiss in above-median chapter 7 cases. For example, chapter 13 is the preferred bankruptcy chapter in Regions 5, 6, and 7 (all in the Fifth Circuit),[228] yet Regions 5 (Louisiana and Mississippi) and 7 (the Western and Southern Districts of Texas) have very low rates of dismissal motions, while Region 6 (the Northern and Eastern Districts of Texas) has a high rate. Alabama and North Carolina have relatively low rates of consumer chapter 7 filings because most consumer bankruptcy filings in those states are made under chapter 13,[229] but they have a very high rate of motions to dismiss.

In thirteen regions (out of twenty-three, including the two administered by bankruptcy administrators), an above-median debtor is more likely to remain in chapter 7 without facing a motion to dismiss. The difference is most pronounced in four regions in which the statistics reveal that it is very likely that an above-median debtor will not face a motion to dismiss for abuse - Regions 1, 5, 7, and 11, where four times as many cases produced declination statements than dismissal motions.

In only nine regions is a motion to dismiss more likely than not (Regions 3, 4, 6, 12, 14, 15, 16, and Alabama and North Carolina). The United States trustees in Regions 3 and 4 and the bankruptcy administrators in Alabama and North Carolina seem the least willing to exercise their discretion to permit an above-median debtor to remain in chapter 7. Finally, in Region 17, the United States trustee was equally likely to bring motions to dismiss and file statements declining to bring a motion to dismiss.

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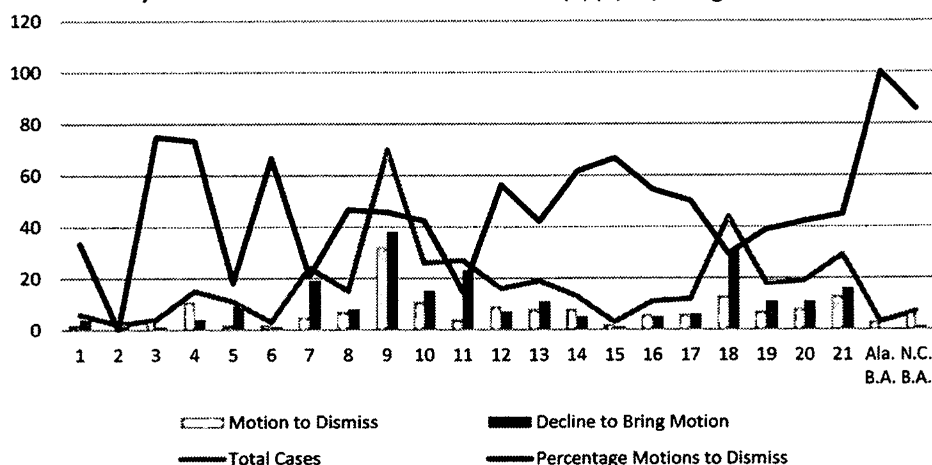
[228]For the twelve-month period ended December 31, 2016, total nonbusiness bankruptcy filings in the Fifth Circuit were 55,622, of which 34,057 were made under chapter 13. *See* Table F-2, *supra* note 227.

[229]For example, for the twelve-month period ended December 31, 2016, districts in North Carolina had 5,759 nonbusiness filings under chapter 7, as compared to 8,685 filings under chapter 13. *See id.* Similarly, for the same period, districts in Alabama had 9,321 nonbusiness chapter 7 filings, as compared to 16,673 chapter 13 filings. *Id.*

Decision by U.S. Trustee under Section 704(b)(2) by Regions



III. CONCLUSION

This study has demonstrated that the United States trustees are making use of their discretion under § 704(b)(2) to provide relief from (and some might say to circumvent) the means test of § 707(b)(2), which imposes a strict mathematical test to determine whether a debtor is abusing the bankruptcy system by filing under chapter 7 rather than chapter 13. That mathematical test is based on a definition of "current monthly income," which in many cases has no relationship to the actual income available to a debtor to satisfy creditor claims. In the past, bankruptcy judges took into consideration in deciding whether to dismiss a chapter 7 case for abuse whether the debtor could actually fund a meaningful repayment plan in chapter 13. But the means test was designed to limit the discretion of the bankruptcy judges in making that decision.

What Congress failed to grasp during the drafting process for BAPCPA is that it was not removing all discretion. It only shifted the exercise of that discretion from bankruptcy judges to the United States trustees. Whether the United States trustees are exercising that discretion differently from the bankruptcy judges is beyond the scope of this study. It may also be undiscernible due to the Department of Justice's refusal to reveal its internal criteria. In any event, the moral of this study is that chapter 7 remains open to above-median debtors who can explain to the United States trustees why the results of the means test do not accurately reflect their ability to repay unsecured creditors under a chapter 13 plan.

It is also clear that the above-median debtors should proactively attempt to provide that explanation. Whether or not debtor's counsel uses the Best Case Bankruptcy software for preparing chapter 7 petitions, which includes a

preemptive rebuttal filing, counsel representing above-median debtors are well-advised to file preemptive rebuttals, even if the rebuttal fails to satisfy the standards for rebutting the presumption of abuse once a motion is before the bankruptcy court. This is not to suggest that the United States trustees are unable to elicit similar information from the schedules and from Official Form 122A-2, which form now includes an area for explanation of "special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative." However, as previously discussed, in seventy-four of the ninety-three cases in this study in which the above-median debtor filed a preemptive rebuttal of presumption, i.e., 81%, the United States trustees declined to file dismissal motions,[230] despite filing an initial notice of presumed abuse. When the debtors did not file a preemptive rebuttal, the United States trustees declined to file dismissal motions in only 50% of the cases.[231] Therefore, all above-median chapter 7 debtors who have any credible argument for remaining in chapter 7 should file such a rebuttal document. The odds are greatly in their favor.

[230]*See supra* text accompanying note 154. Indeed, in many cases in which above-median debtors filed documents to rebut the presumption before the United States trustees were required to file statements of presumed abuse under 11 U.S.C. § 704(b)(1), the trustees never even filed such a statement. *See, e.g.*, *In re* Kikos, No. 16-34846 (Bankr. N.D. Ill. Oct. 31, 2016); *In re* Gonio, No. 16-34824 (Bankr. N.D. Ill. Oct. 31, 2016); *In re* Moreno, No. 16-34739 (Bankr. N.D. Ill. Oct. 31, 2016); *In re* McNamara, No. 16-31107 (Bankr. N.D. Ill. Sept. 29, 2016); *In re* Barrass, No. 15-30352 (Bankr. E.D. Ky. Aug. 26, 2015); *In re* Grey, No. 15-12570 (Bankr. E.D. Va. July 24, 2015); *In re* Frazier, No. 15-11827 (Bankr. S.D.N.Y. July 13, 2015); *In re* Harper, No. 13-41414 (Bankr. W.D. Mo. Apr. 19, 2013); *In re* Kraft, No. 13-24270 (Bankr. E.D. Wis. Apr. 9, 2013); *In re* Ngo, No. 13-10825 (Bankr. E.D. La. Mar. 31, 2013); *In re* Brown, No. 13-13934 (Bankr. D. Md. Mar. 7, 2013); *In re* Starr, No. 12-21992 (Bankr. E.D. Wis. Feb. 23, 2012); *In re* Armstrong, No. 12-12419 (Bankr. C.D. Cal. Jan. 31, 2012); *In re* Aguilar, No. 11-62784 (Bankr. C.D. Cal. Dec. 30, 2011); *In re* Chavolla, No. 11-47698 (Bankr. C.D. Cal. Dec. 15, 2011). The rebuttal document is not always so successful. In one case, *In re* Bradley, No. 13-01390 (Bankr. S.D. Ala. Apr. 24, 2013), although the United States trustee did not file a statement under § 704(b)(1), the trustee filed a motion to dismiss (ECF No. 18, filed July 11, 2013) after the above-median debtor filed a rebuttal of presumption (ECF No. 6, filed April 24, 2013). The court, however, denied the trustee's motion to dismiss. Order Denying Trustee's Motion to Dismiss Chapter 7 Case Pursuant to 11 U.S.C. § 707(B)(2), *id.* (Aug. 30, 2013), ECF No. 31.

[231]*See supra* text accompanying note 155.