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Laura B. Bartell
Wayne State University

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Section 707(b) Standing for Parties in Interest - Who Cares?

by

Laura B. Bartell*

Much attention has focused on the “means testing” provisions of Bankruptcy Code § 707(b)(2) aimed at preventing consumer abuse of chapter 7 by debtors who could make a meaningful repayment of their debts in a chapter 13 case. But less attention has focused on the particular provisions that granted expanded standing to bring a § 707(b) motion to dismiss. For the first time, the 2005 amendments gave all parties in interest (as opposed to only the court and the United States trustee) the ability to move for dismissal based on abuse. This article examines how those amendments came

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


2These provisions were added by the Bankruptcy Abuse Protection and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005). All future references to “§” or “section” will refer to Title 11, United States Code, unless expressly stated otherwise.

3The court must presume that abuse exists if the chapter 7 debtor’s “current monthly income” (as defined in § 101(10A) of the Code) reduced by certain specified monthly expenses and multiplied by sixty is not less than certain dollar amounts specified in the legislation. 11 U.S.C. § 707(b)(2)(A)(i) (Supp. IV 2016). The deductions are described in § 707(b)(2)(A)(ii)-(iv), which include “the debtor’s applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor’s actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides” (§ 707(b)(2)(A)(ii)), the “debtor’s average monthly payments on account of secured debts” (§ 707(b)(2)(A)(iii)), and the “debtor’s expenses for payment of all priority claims” (§ 707(b)(2)(A)(iii)).

4The term “party in interest” is not defined in the Bankruptcy Code, and there is some inconsistency between sections of the Code in indicating whether the United States trustee constitutes a “party in interest.” Compare 11 U.S.C. § 1121(e)(3)(A) (“after providing notice to parties in interest (including the United States trustee)” with 11 U.S.C. § 330(a)(1) (“notice to the parties in interest and the United States Trustee”). When a section of the Code uses the term “party in interest” without mentioning the United States trustee, it is left to the courts to decide whether the United States trustee should be considered a party in interest for purposes of that provision. See, e.g., In re South Beach Securities, 606 F.3d 366 (7th Cir. 2010) (holding U.S. trustee is a party in interest entitled to oppose plan of reorganiza-
about, and whether expanded standing has resulted in a meaningful new check on chapter 7 abuse. In Part I, I trace the legislative history of these amendments. In Part II, I look at how many creditors have brought motions to dismiss, the grounds asserted for dismissal, the types of creditors bringing the motions, and how the courts have ruled on their motions. In Part III, I set forth my views on why creditors do and do not seek dismissal and make further observations about the types of creditors who file motions to dismiss and where they file them. In the conclusion, I discuss the overall impact of the expanded standing provisions.

I. THE LEGISLATIVE PATH TO EXPANDED STANDING

The Bankruptcy Code has always permitted the bankruptcy judge to dismiss chapter 7 cases under certain circumstances. In the original Bankruptcy Code of 1978, Congress provided that any party in interest could bring a motion to dismiss a chapter 7 case and the bankruptcy court could grant it but "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."

According to the legislative history of the provision, the debtor's ability to repay creditors did not constitute "cause" for dismissal. As a result, in the early years of its existence, § 707 was rarely used in consumer cases, and when it was, it was almost always invoked by the debtor seeking to dismiss his or her own case. When creditors or the

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3Pub. L. No. 95-598, § 707, 92 Stat. 2549, 2606 (1978). Comparable provisions permitting dismissal of chapter 11 and chapter 13 cases "for cause" were also included. See 11 U.S.C. §§ 1112(b)(1) and 1307(c).


trustee brought a motion to dismiss under § 707 in consumer cases, they invariably were unsuccessful.\textsuperscript{8}

In the following sections, I discuss the legislative history of § 707(b) from its enactment in the Bankruptcy Amendments and Federal Judgeship Act of 1984,\textsuperscript{9} its initial amendment in 1986 to expand standing to bring a motion to dismiss, and its subsequent amendment by the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005 which expanded standing and changed the standard for dismissal.

A. The 1984 Amendments

Creditors had long hoped for the inclusion in the Bankruptcy Code of a provision that would force a consumer debtor out of chapter 7 and into a repayment plan under chapter 13 if the debtor had the ability to pay his or her debts.\textsuperscript{10} For several years, bills were introduced in both the House and the Senate to amend the Bankruptcy Code to deny access to chapter 7 to debtors who had the means to pay their creditors in chapter 13.\textsuperscript{11} These efforts were unsuccessful until Representative Rodino submitted H.R. 5174 in March 1984.\textsuperscript{12} His bill proposed to amend §707 to insert a new clause (b) that would read as follows:

\begin{quote}
(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
\end{quote}

\begin{footnotes}
\item[10]Even before enactment of the Bankruptcy Code, three bills, H.R. 292, 89th Cong. (1965), H.R. 1057, 90th Cong. (1967), and H.R. 5771, 90th Cong. (1967) were proposed to amend section 55(b) of the Bankruptcy Act. These bills would have required the judge or referee at the first meeting of creditors to determine whether the debtor had shown that "adequate relief cannot be obtained under chapter XIII of this title" whenever the debtor was a "wage earner." \textit{See Wage Earner Plans Under the Bankruptcy Act, Hearings Before Subcomm. No. 4 of the H. Comm. on the Judiciary, 90th Cong. 9, 134 (1967).} If the debtor could not make that showing, the bills required the judge or referee to dismiss the petition unless the debtor amended it to bring it under chapter XIII. \textit{Id.} Congressional hearings were held on the two later bills, see \textit{id.}, but the bills did not emerge from the Committee, perhaps due to the objections of the Bankruptcy Division of the Administrative Office of the United States Courts and the National Bankruptcy Conference (represented by Professor Vern Countryman). See \textit{id.} at 9, 136. Subsequent efforts to amend the Bankruptcy Act to provide for compulsory chapter 13 are described in the testimony of Frank R. Kennedy to the Senate Judiciary Committee. \textit{See Bankruptcy Improvements Act: Hearing on S. 333 and S. 445 Before the S. Comm. on the Judiciary, 98th Cong. 339-341 (1983).}
\end{footnotes}
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.13

Although originally referred to the House Judiciary Committee, the Committee was later discharged and the bill came back to the floor for debate. It passed by voice vote on March 21, 1984.14 The Senate made amendments to the bill and then passed it as amended.15 Senator Metzenbaum made the only recorded comment in the Senate. He praised the elimination of any eligibility language for chapter 7 based on future income:

I also am extremely pleased that this bill prohibits creditors from filing motions attempting to deny bankruptcy relief to individuals because of substantial abuse. If a creditor asks a court to dismiss a case claiming that there has been substantial abuse of the [bankruptcy laws by the debtor,] the court would not be ... allowed to do so. Only a bankruptcy court, acting on its own initiative, could dismiss a case involving substantial abuse. This will preclude creditors from making bankruptcy too expensive for the debtor by filing harassing motions alleging substantial abuse.16

A conference was held on the bill, and the conferees produced a report17 that was later approved by both the House and Senate.18 The conference suggested no further changes to the new § 707(b).19 The bill, known as the Bankruptcy Amendments and Federal Judgeship Act of 1984, became law on July 10, 1984.20

B. FIRST EXPANSION OF STANDING IN 1986

Unsurprisingly, following the enactment of § 707(b) there were only a handful of instances in which the court on its own motion challenged the debtor’s ability to remain in chapter 7 based on substantial abuse. Between October 8, 1984 (the effective date of the new law adding § 707(b))21 and November 27, 1986 (the effective date of the 1986 amendments to § 707(b)
described below), the court ordered the debtor to show cause why his or her chapter case should not be dismissed under the new § 707(b) in only twenty-eight reported decisions, nine of which were entered in the District of North Dakota. In only thirteen of those decisions (four in the District of North Dakota) did the bankruptcy judge dismiss the case. Two of those dismissals were reversed on appeal, both on the basis that the debtor did not have primarily consumer debts.

Despite the low volume of challenges, Congress did not revisit § 707(b) until it was considering a more extensive revision of the Code in 1983 and 1986. At that time, three different constituencies were proposing amendments to the Code. First, some bill sponsors wished to provide for additional bankruptcy judges to address an increased volume of bankruptcy cases. A second group sought to create a new chapter in the Bankruptcy Code to deal with the financial problems of family farmers. And a third group sought to expand the appointment of United States trustees to serve in bankruptcy

\[\text{22Pub. L. No. 99-554, § 302(a), 100 Stat. 3088 (1986).}\]

\[\text{24See Webb, 75 B.R. 264; Peluso, 72 B.R. 732; Bruno, 68 B.R. 101; Cord, 68 B.R. 5; Hudson, 64 B.R. 73; Hettich, No. 85-05752, 1986 WL 713512; Kelly, 57 B.R. 536; Tibbitts, No. 85-05778, 1986 WL 713515; Shands, 63 B.R. 121; Kress, 57 B.R. 874; Adams, No. 85-05554, 1985 WL 660467; Grant, 51 B.R. 385; Bryant, 47 B.R. 21. In most cases in which the court declined to dismiss the case, the court found no substantial abuse, but in a few cases the court concluded that the debtor's debts were not primarily consumer debts. See Almendinger, 56 B.R. 97; Larson, No. 85-05583, 1985 WL 660510; White, 49 B.R. 869.}\n
\[\text{25See In re Kelly, 70 B.R. 109 (B.A.P. 9th Cir. 1986); In re Bell, 65 B.R. 575 (Bankr. E.D. Mich. 1986).}\n
\[\text{26See H.R. 4128, 99th Cong. (1986); H.R. 4140, 99th Cong. (1986); H.R. 5265, 99th Cong. (1986); S. 1923, 99th Cong. (1986); H.R. 5316, 99th Cong. (1986).}\n
cases in districts throughout the United States.\textsuperscript{28}

H.R. 5316, introduced by Representative Rodino, included both increased bankruptcy judgeships and an expanded United States trustee program.\textsuperscript{29} The bill also proposed an amendment to § 707(b) to permit the United States trustee to bring a motion to dismiss a consumer debtor chapter 7 case for substantial abuse.\textsuperscript{30} The bill was reported out of the House Judiciary Committee with no changes to the § 707(b) amendment.\textsuperscript{31} The bill passed the House by voice vote and, after amendment in the Senate to add provisions relating to family farmers, went to conference where no further changes were made to the amendment.\textsuperscript{32}

Several members of Congress spoke in favor of the conference report, and three specifically addressed the revisions to § 707(b). Representative Fish stated:

[Section 707(b)] was never intended to prevent a panel trustee or a U.S. trustee from bringing evidence or information pertaining to "substantial abuse" to the attention of the court. These individuals, after all, are the most likely persons to be familiar with those types of facts in these cases. The "party in interest" phrase in section 707(b) was intended to mean creditors - not panel trustees or U.S. trustees. . . . That is why the conferees agreed to include language in section 707(b) making it clear that the U.S. trustee may move to dismiss based on substantial abuse. Although the U.S. trustee brings the motion under this new provision, the conferees recognize that panel trustees are in a unique position to become aware of abuses in the course of performing statutory duties. Consequently, the conferees anticipate that frequently panel trustees will appear in support of motions filed by the U.S. trustees under section 707(b) as amended. It is also my hope that the Executive Office for U.S. trustees will issue uniform guidelines to U.S. trustees and panel trustees for identifying cases of substan-


\textsuperscript{29}H.R. 5316, 99th Cong. (1986).

\textsuperscript{30}H.R. 5316, § 216. As amended, § 707(b) would begin, "After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest . . . ." Id.


tial abuse and making section 707(b) motions – and for panel trustees to bring evidence of fraud or abuse to the attention of the U.S. trustees.\textsuperscript{33}

Senator Hatch spoke in favor of the conference report on the floor of the Senate, saying with respect to the proposed amendment to § 707(b):

I have already indicated my concern over the precise wording of section 707(b) of the Bankruptcy Code. Several courts, primarily in Ohio, have taken the position that the bankruptcy trustee is technically “a party in interest” and may not bring evidence of abuse to the attention of the court. This was not the result we intended to achieve in the 1984 Bankruptcy Act. As a result of this conference bill, the U.S. trustee will have the opportunity to inform the court of fraud or abuse. This explicit authority will go a long way toward improving the current confusion and clarifying the real intent of the 1984 legislation.\textsuperscript{34}

He later added that he expected “that the Executive Office for U.S. Trustees will take all appropriate steps to facilitate close cooperation between the U.S. trustee and the panel trustees in these matters” to “ensure the ability of the U.S. trustee to carry out his statutory responsibilities under section 707(b).”\textsuperscript{35}

Even though the proposed amendment only granted additional standing to the U.S. trustee, Senator Thurmond also viewed the new language of § 707(b) as empowering the panel trustee as well:

This provision explicitly allows the U.S. trustee not only to bring [information relating to substantial abuse] to the court's attention, but also to allow the U.S. trustee to move to dismiss the case on the grounds of substantial abuse. Obviously the panel trustee will also be involved in this process, since he has important access to information concerning fraud and abuse. In order to further facilitate our intent and our goal in this area – protecting the integrity of the process by ensuring that the court receives all relevant information from objective sources – we expect the panel trustee to advise the U.S trustee of all such pertinent information. The

\textsuperscript{34}132 CONG. REC. S15092 (daily ed. Oct. 3, 1986).
panel trustee would appear on behalf of any motion filed in this regard.36

The conference report was approved by voice vote in both the House and Senate and signed into law on October 27, 1986.37

C. FURTHER EXPANSION OF STANDING IN 2005 AMENDMENTS

In expressly permitting the United States trustee to bring motions to dismiss for substantial abuse, Congress undoubtedly expected that more such motions would be brought. Such was not the case. Because the amended § 707(b) retained the statutory presumption in favor of permitting the consumer debtor to remain in chapter 7, the United States trustees and bankruptcy administrators38 rarely brought such motions.39 When they did file

36Id.
motions, the bankruptcy courts denied them in a significant number of the cases. As was true before the latest amendment, judges themselves rarely
sought dismissal under § 707(b),\textsuperscript{41} and often declined to dismiss even when they had filed a \textit{sua sponte} motion.\textsuperscript{42}

The issue of alleged consumer abuse of chapter 7 did not resurface again until the National Bankruptcy Review Commission, established pursuant to the Bankruptcy Code in 1997.\textsuperscript{43} 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 debtors had the resources to fund a chapter 13 plan (so-called “means testing” provisions).\textsuperscript{45} But dissenting commissioners James I. Shepard and the Honorable Edith H. Jones recommended various approaches for implementing a means test, including eligibility tests that would preclude debtors with certain incomes from filing for chapter 7, or an amendment to § 707(b) to “require that the court dismiss or convert the case of a debtor who has filed for Chapter 7 if, on the motion of a party in interest or the U.S. Trustee, it is found that the debtor has the ability to repay a portion of his debts in Chapter 13.”\textsuperscript{46}

Apart from the general means testing suggestions, the dissenting commissioners specifically proposed that § 707(b) be amended “to provide procedurally that . . . motions to dismiss for inappropriate use of Chapter 7 may be brought by creditors and panel trustees, as well as U.S. Trustees and the court.”\textsuperscript{47} As they explained:

\begin{enumerate}
\item The court dismissed pursuant to § 707(b) in Sanseverino, 171 B.R. 46; Tudor, No. 94-50025, 1994 WL 16001758; Boyd, 143 B.R. 237; Berndt, 127 B.R. 222; Palmer, 117 B.R. 443; Byrne, No. 89-71610, 1989 WL 268880; Brady, 95 B.R. 1004 (rev’d on appeal); Strong, 84 B.R. 541; Krohn, 78 B.R. 829; Martin, No. 87-05878, 1987 WL 857313; Day, 77 B.R. 225; Antal, 74 B.R. 8 (vacated on reconsideration); Struggs, 71 B.R. 96; Newsom, 69 B.R. 801.
\item Id. at 36. They also proposed: (1) eliminating the requirement that the debtor must have primarily
The current restrictions on standing to bring a motion under this section should be relaxed. Creditors and panel trustees should be allowed to participate in the policing of the bankruptcy system to prevent the sorts of abuse contemplated by this provision. They are the parties most likely to uncover the information necessary to pursue a dismissal on account of abuse. While U.S. Trustees have stepped into the breach, their resources and basic knowledge of each individual case are limited. Courts are ill-suited ethically and informationally to initiate § 707(b) actions and should have this responsibility lifted from their shoulders. Because creditors may make inappropriate use of § 707(b) actions to harass debtors unfairly, a fee-shifting provision, like that contained in § 523(d), should be added to balance the opposing interest involved.48

The views of the dissenting commissioners prompted the introduction of a series of bills in both the House49 and Senate,50 most of which included provisions to expand standing under § 707(b) to include all parties in interest.51 One of these bills, H.R. 3150, passed the House52 but, when the Senate took up the bill, it substituted its own language53 before passage.54 The Senate bill introduced a new significant restriction on filing motions to dismiss. Under a new proposed § 707(b)(5), a party in interest would be precluded from bringing a motion to dismiss for abuse “if the debtor and the debtor’s spouse combined, as of the date of the order for relief, have current monthly total income equal to or less than the national median household monthly income calculated on a monthly basis for a household of equal size.”55

The bill also included several fee shifting provisions. Some were designed to provide incentives to encourage the trustee to file motions to dismiss or convert for abuse. The trustee who brought such a motion and prevailed could recover all reasonable costs for prosecuting the motion (including rea-

49Id. at 37-38 (footnote omitted).
52See H.R. 2500 § 115; H.R. 3150 §103; S. 1301 § 102(a)(2)(B). The bills differed over whether to retain the standard of “substantial abuse” or some other standard.
56S. Rep. No. 105-253, 105th Cong. (1998) (proposed § 707(b)(5)). If the debtor had a household of more than four individuals, the median income was to be increased over the median income for a household of four by $583 for each additional member. Id.
sonable attorneys' fees) from counsel for the debtor, if debtor was represented by counsel.\textsuperscript{56} In addition, the bill included potential sanctions against debtor's counsel. If the court found the attorney had violated Fed. R. Bankr. P. 9011, the court would be required to assess a civil penalty against the attorney, payable to the trustee or the United States trustee.\textsuperscript{57} On the other hand, if a party in interest (other than a panel trustee) brought a motion to dismiss and was unsuccessful, the court was allowed (but not required) to award all reasonable costs in contesting the motion, including reasonable attorneys' fees and actual damages not less than $5,000, but only if the court found that "(i) the position of the party that brought the motion was not substantially justified; or (ii) the party brought the motion solely for the purpose of coercing a debtor into waiving a right guaranteed to the debtor under this title."\textsuperscript{58} No such award could be made against a party in interest with a claim in an amount less than $1,000.\textsuperscript{59}

Other significant changes to H.R. 3150 emerged from conference. These included the creation of a presumption of abuse whenever an individual debtor failed the means test.\textsuperscript{60} Even if an individual passed the means test, the debtor's chapter 7 case could be dismissed on either of two additional grounds added by the conferees: "[whenever] the debtor filed the petition in bad faith" or "[whenever] the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse."\textsuperscript{61} Finally, the conferees inserted an explicit reference to the "panel trustee" as one of the parties who could bring a motion to dismiss so that the language of § 707(b)(1) would direct the court, "on its own motion or on a motion by the United States trustee, panel trustee or a party in interest," to dismiss for abuse.\textsuperscript{62} The House passed this conference report,\textsuperscript{63} but the Senate failed to act on it before the end of the legislative session and, therefore, it died.

\textsuperscript{56} Id. (proposed § 707(b)(3)(A)).

\textsuperscript{57} Id. (proposed § 707(b)(3)(B)). The attorney who signed a petition on behalf of the debtor was deemed to certify that the attorney had "performed a reasonable investigation into the circumstances that gave rise to the petition and . . . determined that the petition - (I) is well grounded in fact; and (II) is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law and does not constitute an abuse." Id. (proposed § 707(b)(3)(C)).

\textsuperscript{58} Id. (proposed § 707(b)(4)).

\textsuperscript{59} Id. (proposed § 707(b)(4)(A) and (B)).

\textsuperscript{60} The presumption of abuse would be triggered if the debtor's current monthly income, as defined, less the sum of monthly expenses, determined using the applicable IRS allowances, monthly payments on secured debt, and expenses for priority claims, multiplied by sixty, was not less than the lesser of 25% of the debtor's non-priority unsecured claims or $5,000. See H.R. Rep. No. 105-794, at 5 (1998) (Conf. Rep.).

\textsuperscript{61} Id. § 102(a)(2)(B)(ii) (proposed § 707(b)(3)).

\textsuperscript{62} Id. § 102(a)(2)(B)(i)(I) (proposed § 707(b)(1)).

\textsuperscript{63} 144 CONG. REC. H10239-40 (daily ed. Oct. 9, 1998).
Representative Gekas introduced H.R. 833 early in the next session, which proposed language substantially identical to the conference report on H.R. 3150 from the prior session. After a series of hearings on the bill, H.R. 833 emerged from the House Judiciary Committee. Throughout the hearing process, there were extensive critiques of the general means-testing provisions, but few who testified objected to the expanded standing provisions. One of those who did object to expanded standing, Bankruptcy Judge Carol J. Kenner of the District of Massachusetts, said that she saw "a danger in expanding [the standing provision]" because "there is a danger that some debtors may become embroiled in litigation that they simply can't understand or defend against." Professor Elizabeth Warren of Harvard Law School also opined that "[a]llowing creditors' motions under 707(b) means that creditors who have much more money and much more leverage can just squeeze debtors harder." Two bankruptcy attorneys testified that, while trustees should be allowed to bring motions to dismiss, creditors should not. On the other hand, Judith Greenstone Miller, representing the Commercial Law League of America, objected to the provision precluding creditor standing to bring motions to dismiss if the debtor was a below-median income debtor.

When H.R. 833 emerged from the House Judiciary Committee, the proposed amendments on means testing had changed dramatically, but those relating to standing had changed in only minor respects. The House passed

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65 Id. at § 102(b)(2)(iii).
68 Joint Hearings at 80.
69 Joint Hearings at 105.
70 See Hearings Part I at 114-15 (testimony of Ralph R. Mabey, LeBoeuf, Lamb, Greene & MacRae); Hearings Part I at 166 (statement of Leon S. Forman, Blank, Rome, Comisky & McCauley).
71 See Joint Hearings at 94 (prepared statement of Judith Greenstone Miller representing the Commercial Law League of America).
72 In § 707(b)(1), the Committee shortened the name of the "panel trustee" to "trustee" in the list of parties permitted to file a motion to dismiss or convert for abuse. See Bankruptcy Reform Act of 1999, H.R. REP. No. 106-123, Part 1, 106th Cong. (1999), §102(a)(2)(B)(i)(I). The Committee also modified the fee-shifting inducement provisions, by providing that a successful motion by a panel trustee or bankruptcy administrator could lead to sanctions, including reimbursement of costs (including reasonable attorneys' fees), or civil penalties against counsel for the debtor payable to the panel trustee, bankruptcy administrator, or U.S. trustee, but only if the action of counsel in filing the chapter 7 case "violated Rule 9011." Id. § 102(a)(2)(B)(ii) (proposed § 707(b)(4)(A)). Sanctions against a party in interest (not including a trustee...
the revised bill on May 5, 1999\textsuperscript{73} and sent it to the Senate. The Senate had been working on its own bankruptcy reform bill, S. 625, introduced by Senator Grassley in March.\textsuperscript{74} The Senate bill was sent to the Senate Judiciary Committee, which amended it and reported the amended bill to the Senate on May 11, 1999.\textsuperscript{75} The Judiciary Committee Report emphasized that:

\begin{quote}
[U]nder S. 625, creditors and private trustees are now explicitly given the power to present evidence of abuse to the bankruptcy judge. Moreover, S. 625 gives trustees important new financial incentives for ferreting out bankrupts who have repayment capacity and provides for appropriate penalties for bankruptcy attorneys who recklessly steer individuals with repayment capacity to chapter 7 bankruptcy. S. 625 contains penalties for creditors who attempt to harass or intimidate bankrupts by filing, or threatening to file, motions under section 707(b). Thus, contrary to the assertions of some, there are real and meaningful reasons why creditors will not use their right to file 707(b) motions to harass or coerce debtors.\textsuperscript{76}
\end{quote}

With respect to the standing provisions of § 707(b), the amended Senate bill closely tracked the language in H.R. 3150 previously agreed to by the House and Senate conferees. The only modifications of substance appeared in the section precluding anyone other than the judge, the United States trustee, bankruptcy administrator, or panel trustee from bringing a means-testing motion to dismiss against a below-median debtor. In defining a below-median income debtor, it also changed the reference from median "household" income to median "family" income, a change consistent with the similar provision in H.R. 833.

\begin{footnotes}
\textsuperscript{74}S. 625, 106th Cong. (1999).
\textsuperscript{75}Bankruptcy Reform Act of 1999 - S. 625, S. Rep. No. 106-49, 106th Cong. (1999) [hereinafter S. Rep. No. 106-49]. The Committee did so over the objection of the Office of Legislative Affairs of the U.S. Department of Justice, which sent a letter to Orrin Hatch, Chairman of the Committee, expressing its objection to the bill. Letter from Dennis K. Burke, Acting Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to Orrin Hatch (April 9, 1999) (on file with author). Although the Department of Justice criticized many aspects of the bill, with respect to the expanded standing provisions it only objected to the increased duties on debtors' counsel and the exclusion of claimants with claims less than $1,000 from the risk of sanctions for filing an improper motion. Despite these objections, the Judiciary Committee changed neither provision.
\textsuperscript{76}S. Rep. No. 106-49, at 8.
\end{footnotes}
The Senate replaced the text of H.R. 833 with the text of S. 625 and passed the amended bill. However, instead of sending the bill to conference committee with the House, a series of informal discussions took place between House and Senate proponents of bankruptcy reform, after which Senator Grassley introduced a compromise bill, S. 3186. In the compromise bill, § 707(b)(1) specified that the “trustee” or “bankruptcy administrator” could bring a motion under § 707(b)(1). It also amended the exclusions from the sanctions provision for small claimants bringing an improper motion to dismiss to exclude only a “small business” with a claim aggregating less than $1,000 (rather than any small claimant) and inserted a definition of “small business.” The text of S. 3186 was incorporated into the conference report on H.R. 2415, an unrelated bill, with no changes from the language of the proposed amendments to § 707(b), and the conference report was passed by both the House and Senate.

However, President Clinton declined to sign the bill within ten days, during a period when Congress was adjourned, effectively vetoing it. Then Congress failed to enact any law incorporating modifications to § 707(b) during the following four years, although several new bills were introduced and one made it as far as a conference committee.

Means-testing reform efforts were not resurrected until 2005. At that time, Senator Grassley, on behalf of himself and seven other senators, introduced S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The proposed amendment to § 707(b)(1) and the sanctions provisions included in the bill were identical to versions that had previously passed the House. When the bill emerged from the Senate Judiciary Com-
committee and was placed on the calendar of the Senate, the language of these provisions remained unchanged. The Senate passed the amended bill without making any change to the expanded standing language in §707(b)(1) or the sanctions provisions. The House Judiciary Committee quickly considered the bill and recommended no changes to §707(b). Pursuant to H. Res. 211, which did not allow any amendments, the House debated the bill and passed it on April 14, 2005. President George W. Bush signed it into law on April 20, 2005.

II. EMPIRICAL STUDY OF CREDITOR MOTIONS TO DISMISS UNDER SECTION 707(B)

The legislative history of the amendments to §707 demonstrate that expanded standing to permit parties in interest other than the United States trustee or bankruptcy administrator to bring a motion to dismiss was a central goal of those who sought more restricted access to chapter 7 for consumer debtors. I set out to discover whether this expanded standing changed in any meaningful way the number or nature of motions to dismiss under §707(b) after the 2005 amendments. In this Part of this paper I set out my methodology, the results of my research, and the limitations of my results.

A. METHODOLOGY

In order to find cases in which parties in interest and not the United

court to convert the chapter 7 case to a chapter 13 or chapter 11 case with the consent of the debtor; (3) it changed the standard for dismissal from “substantial abuse” to “abuse;” and (4) it deleted the presumption in favor of permitting the debtor to remain in chapter 7. Id. § 102(a). The amended §707(b)(1) reads as follows:

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

Id. The bill also included the new sanctions provisions of §707(b)(4) & (5) and barred parties from bringing motions to dismiss under §707(b) against below-median debtors in §707(b)(6). Id.

94151 CONG. REC. H2076-77 (daily ed. April 14, 2005).
States trustee or a bankruptcy administrator had filed a motion to dismiss under §707(b), I researched all reported cases between the effective date of the 2005 amendments through the end of 2017 in which §707(b) motions (or motions to dismiss for bad faith or abuse) had been filed. I also looked for any references to these types of motions discoverable through a search of chapter 7 dockets on Bloomberg Law (Bankruptcy Court dockets). There were literally hundreds of cases involving these motions, but almost all of them had been filed by either the United States trustee or a bankruptcy administrator.

After eliminating those cases, I identified only ninety-nine cases in which a party in interest (not the U.S. trustee or bankruptcy administrator) had filed the motion or requested dismissal in an adversary proceeding. The

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96Bankruptcy court dockets are searchable on Bloomberg Law only to the extent that they have been updated to include the reference for which one is searching. Therefore, it is quite possible that motions to dismiss under §707(b) have been filed by creditors in chapter 7 cases in which the decision was not reported and which do not appear in a docket search. There is no way to determine how many such motions exist.

97I excluded one case in which a creditor joined a motion previously filed by the U.S. trustee. See In re Frontera, No. 08-15277 (Bankr. D. Ariz. Jan. 30, 2009), ECF No. 18. I did include a case in which the creditor not only "intervened" in a prior motion filed by the U.S. trustee but also filed its own motion. See In re Lapke, No. 07-81140 (Bankr. D. Neb. 2007), ECF Nos. 33, 34.

the creditor mentioned

June 10660, 2007
17525, 2008
Securities America, Inc. v. Tallman
Or. [2009] (Bankr. Smith); In re [N.D.]
2012), ECF No. 868 (Bankr. N.D. Ohio
2012); In re Jenkins, No. 12-50413, 2012
2564901 (Bankr. W.D.N.C. July 2, 2012);
Boyle v. Pizzuti (In re Pizzuti), No. 10-12098
(Bankr. M.D. Fla. June 13, 2012); In re Freibol, No. 11-00650, 2012 WL 1759327
(Bankr. D. Alaska May 15, 2012); Cloninger v. Cloninger (In re Cloninger), No. 11-83163, 2012
Smith); In re Kops, No. 11-41153, 2012 WL 438623 (Bankr. D. Idaho Feb. 9, 2012); In re Boyette, No. 09-
July 13, 2011), ECF No. 31; In re Hernandez, No. 11-50218, 2011 WL 1541691 (Bankr. E.D. Ky. Apr. 21,
2011); In re Ceniceros, No. 10-16363 (Bankr. C.D. Cal. Mar. 17, 2011), ECF Nos. 79, 90, aff’d sub nom.
Ceniceros v. Yaqup (In re Ceniceros), 2012 WL 2017969 (B.A.P. 9th Cir June 5, 2012); In re Blok, No. 11-
90753 (Bankr. S.D. Ind. Sept. 15, 2011), ECF No. 53; In re Victoria, No. 10-42087, 2011 WL 2580106
Apr. 26, 2012); In re Lew, No. 11-10346 (Bankr. S.D.N.Y. Apr. 29, 2011), ECF No. 8, In re Adolph, 441
In re Watson, No. 10-1292 (Bankr. N.D.W. Va. Nov. 1, 2010), ECF No. 32; In re Riley, No. 09-10096
B.R. 631 (Bankr. W.D. Wis. 2010); In re Kilian, 422 B.R. 903 (Bankr. N.D. Ill. 2009); In re Palmer, 419
B.R. 762 (Bankr. M.D. Tenn. 2009); In re Justice, 404 B.R. 506 (Bankr. W.D. Ark. 2009); GMAC Mortgage,
In re Lapke, No. 09-80317 (Bankr. D. Neb. Dec. 8, 2009), ECF No. 76, aff’d sub nom. Lapke v. Mutual
of Omaha Bank (In re Lapke), 428 B.R. 839 (B.A.P. 8th Cir. 2010) (Lapke II); In re Mirabile, No. 09-04687,
2009 WL 3710727 (Bankr. M.D. Fla. Nov. 3, 2009); Southwick Real Estate LLC v. Ades (In re Ades),
No. 08-86062, 2009 WL 6498520 (Bankr. N.D. Ga. July 2, 2009); In re Stewart, 410 B.R. 912 (Bankr. D.
Or. 2009); Long v. Smith (In re Smith), No. 09-30474 (Bankr. E.D. Tenn. May 6, 2009) (Catherine Smith),
ECF No. 23; In re Yager, No. 08-14501 (Bankr. W.D.N.Y. Jan. 20, 2009), ECF No. 21-1; In re Jones, No.
08-05676, 2009 WL 1024442 (Bankr. E.D.N.C. Jan. 12, 2009); In re Dereb, No. 08-20432 (Bankr. W.D.N.Y.
Securities America, Inc. v. Tallman (In re Tallman), 417 B.R. 568 (N.D. Ind. 2009); In re Russo, No. 07-
June 16, 2008), ECF No. 87; In re Curcio, 387 B.R. 278 (Bankr. N.D. Fla. 2008); In re Marino, 388 B.R.
679 (Bankr. E.D.N.C. May 20, 2008); In re Kennedy, No. 07-82609 (Bankr. D. Neb. Apr. 8, 2008), ECF
No. 34; In re Lapke, No. 07-81140 (Bankr. D. Neb. Mar. 31, 2008) (Lapke I), ECF No. 76; In re Ashraf,
367 B.R. 151 (Bankr. D. Ariz. 2007); In re Curtner, No. 07-50289 (Bankr. M.D.N.C. Oct. 25, 2007), ECF
No. 57; In re Edwards, No. 07-43398 (Bankr. E.D. Mo. Aug. 3, 2007) (Catherine Edwards), ECF No. 23;
In re Reavis, No. 06-11721, 2007 WL 2219159 (Bankr. N.D. Okla. July 30, 2007); In re Freifeld, No. 06-
06361 (Bankr. M.D. Fla. June 29, 2007), ECF No. 88; In re Victoria, No. 06-31225 (Bankr. M.D. Ala. June
27, 2007), ECF No. 70, aff’d sub nom. Victoria v. Greeneville Hospital Corp. (In re Victoria), 389 B.R. 250
(M.D. Ala. 2008) ("Victoria I"); In re Jarrell, 364 B.R. 899 (Bankr. N.D. Tex. 2007); In re Sudderth, No. 06-
10660, 2007 WL 119141 (Bankr. M.D.N.C. Jan. 9, 2007); In re Barajas, No. 06-10598, 2006 WL 3254483
(Bankr. E.D. Cal. Nov. 8, 2006); In re Bradley, No. 06-00959 (Bankr. E.D.N.C. Oct. 24, 2006) (Jason
Bradley), ECF No. 30; In re Swope, No. 06-50636 (Bankr. N.D. Ohio Oct. 18, 2006), ECF No. 41; In re
Fiarkoski, No. 06-10629 (Bankr. D. Kan. Oct. 4, 2006), ECF No. 42. I did not include one case in which
the creditor mentioned § 707(b)(1) and (3) in its motion, but later said that it intended to refer to §706(b).
small number of § 707(b) motions initiated by such parties in interest over the past twelve years is striking. The drafters of the amended standing provisions of § 707(b) undoubtedly assumed that chapter 7 trustees and creditors would assist the United States trustees and bankruptcy administrators in policing abusive filings (of which the drafters believed there were many) and force these debtors out of chapter 7. These statistics can be interpreted in one of two ways: (1) there are very few debtors who inappropriately access chapter 7 whose dismissal is not already sought by the United States trustees and bankruptcy administrators; or (2) there are very few parties in interest who care enough to bring a § 707(b) motion.

B. RESULTS OF THE STUDY

I then examined the ninety-nine cases in the study to determine the statutory bases of the motions filed by parties in interest, when, where, and by whom the motions were filed, and how the court resolved the motions.

(1) What Was the Statutory Basis of the Motions?

Section 707(b)(1) permits dismissal or conversion of a chapter 7 case if the court “finds that the granting of relief would be an abuse of the provisions of this chapter [7].” However, there are three different bases for asserting abuse. First, § 707(b)(2) creates a presumption of abuse under § 707(b)(1) if the debtor has the means to pay a statutorily-specified portion of the debtor’s unsecured nonpriority debts (the so-called “means test”). However, if the “current monthly income” of the debtor and the debtor’s spouse combined, multiplied by twelve, is not greater than the median family income of the applicable state for a family of the same size (i.e., the debtor is not an above-median income debtor), no one may seek dismissal under § 707(b)(1) based on the presumption of abuse created by § 707(b)(2). This bar includes the judge, the United States trustee, the bankruptcy administrator, and any other party in interest.

In only thirty-three of the cases included in this study did the creditor explicitly mention § 707(b)(2) as a basis for the motion. In eighteen of those cases, the court concluded that the motion was improper either because the debtor had below-median income, the motion was untimely, the

See In re Snyder, No. 13-12719 (Bankr. D.N.M. Apr. 4, 2014), ECF No. 50. All further citations to these cases in this paper are made by reference to the names of the debtors.

§ 707(b)(1) (Supp. IV 2016)

§ 707(b)(2)(A)(i).

Current monthly income” is defined in 11 U.S.C. § 101(10A).

§ 707(b)(2).

See Ades; Blok; Bennett; Richard Bradley; Burdett; Campbell; Ceniceros; Chovev; Curtner; Catherine Edwards; Fiaraki; Freifeld; Grillo; Gutierrez; Hernandez; Jenkins; Justice; Kops; Melcher; Nguyen; Owens; Piazza; Reavis; Sasse; Tallman; Toome; Virani; Victoria II; Victoria I; Vorel; Watson; Watts; West.

See Kops; Owens; Virani.
debtor did not have primarily consumer debts, or the presumption of abuse did not arise. In two additional cases, the creditor withdrew the motion, and in two other cases the parties settled prior to court resolution.

The low number of cases in which a creditor sought dismissal under § 707(b)(2) is unsurprising for two reasons. First, the attorneys for above-median consumer debtors who are more likely to be challenged under the means test undoubtedly counsel their clients to file under chapter 13 to avoid litigation and likely dismissal. Second, the United States trustees and bankruptcy administrators are now statutorily required to file either a motion to dismiss or convert under § 707(b) or a statement setting forth the reasons they are declining to do so if they determine that an above-median consumer debtor’s case is presumptively abusive. As a result, creditors have little need to involve themselves in this endeavor. In nine of the eleven cases where parties other than the United States trustee or bankruptcy administrator brought a motion based on the presumption of abuse under §707(b)(2) and the claim was not barred, the court dismissed or the debtor voluntarily converted the case to chapter 13 to avoid being ordered to do so. In two cases, the court declined to dismiss despite the existence of a presumption of abuse.

Second, if the presumption of abuse does not arise, a case may still be dismissed under § 707(b)(1) if, as described in § 707(b)(3)(A), “the debtor filed the petition in bad faith.” Many of the ninety-nine motions in this

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105 See Sasse; Vorel.
106 See Ades; Blok; Chovev; Grillot; Gutierrez; Hernandez; Piazza; Reavis; Tallman; Virani; Watson; West.
107 See Bennett; Killian.
108 See Curtner; Fiarkoşi.
109 See Catherine Edwards; Freifeld.
111 See Burdett; Ceniceros; Nguyen; Toome; Victoria I; Victoria II. In Ceniceros, the record does not disclose whether the court granted the motion on the basis of §707(b)(2) or § 707(b)(3). The creditors sought dismissal on both grounds and the court granted their motion without stating its grounds for doing so. The bankruptcy court in Victoria I did not specify the section of 707 pursuant to which it dismissed the case, but the creditor argued for dismissal under § 707(b)(2). On appeal, the district court concluded that it was not clear whether the debtor had primarily consumer debts because of new federal tax claims that might be characterized as consumer or business, but the court affirmed the dismissal on the alternative grounds of “bad faith” under § 707(b)(3). Because § 707(b)(3) is inapplicable unless the debtor has primarily consumer debts, the district court must have intended to rely on § 707(a). Debtor’s second case, Victoria II, was also dismissed by the bankruptcy court based on § 707(b)(2).
112 See Campbell; Justice; Melcher.
113 See Richard Bradley; Jenkins. In Richard Bradley, the court concluded that the debtor had shown special circumstances to rebut the presumption. In Jenkins, the bankruptcy administrator had filed a statement under 11 U.S.C. § 704(b)(2) that dismissal was not appropriate.
study alleged “bad faith.”\textsuperscript{115} However, none of the courts relied solely on bad faith in granting the motion.

Third, as directed by § 707(b)(3)(B), a case may be dismissed under § 707(b)(1) if “the totality of the circumstances . . . of the debtor’s financial situation demonstrates abuse.”\textsuperscript{116} In nine cases in the study, the court concluded that the debtor’s case should be dismissed on this basis.\textsuperscript{117} The reasons most often cited by courts were a lack of candor on the part of the debtor, either in the debtor’s schedules or at the meeting of creditors,\textsuperscript{118} or the debtor’s ability to repay his or her debts under a chapter 13 plan.\textsuperscript{119} In five of the nine cases, the court may have been influenced by the fact that the debtor was a serial filer, having had at least one prior bankruptcy case dismissed within the recent past.\textsuperscript{120}

(2) When Were the Motions Filed?

I looked at when the motions were filed to see if I could find a trend in the timing of such motions. If there was a pent-up demand for the new standing provision, perhaps there would be an explosion of creditor motions to dismiss after BAPCPA became effective. In fact, more motions were filed in 2011 and 2012 than in any other years, and the trend has been lower since then, as the following chart demonstrates.\textsuperscript{121}

Creditor Motions to Dismiss for Abuse by Year

\begin{center}
\begin{tabular}{lcccccccccccc}
\hline
 7 & 10 & 10 & 4 & 13 & 16 & 10 & 9 & 5 & 6 & 3 & \textbf{0} \\
\hline
\end{tabular}
\end{center}

\textbf{707(b) Motions by Creditors}

\textsuperscript{115}See, e.g., Adolph; Ajunwa; Barajas; Chovev; Curtner; Evatt; Grullon; Gutierrez; Hiller; Lew; Lusane; Marino; Owens; Pagan; Palmer; Piazza; Tallman; Virani;


\textsuperscript{117}See Ashraf; Citta; Brenda Edwards; Hanson; Lapké I; Lapké II; Miller; Price; Watts.

\textsuperscript{118}See Ashraf; Citta; Brenda Edwards; Miller; Price.

\textsuperscript{119}See Hanson; Lapké I; Miller.

\textsuperscript{120}See Citta; Brenda Edwards; Lapké II; Miller; Price.

\textsuperscript{121}The cases are listed by the filing date of the motion, not the date of the court’s decision.
These numbers are very small, and it is difficult to draw any conclusions from the changes over time. I had expected that the number of § 707(b) motions might rise and fall with the number of consumer (nonbusiness) bankruptcy filings each year, but there is no strong correlation, as can be seen when comparing the following chart with the previous one.\(^{134}\)

### Non-business Chapter 7 Filings by Year

<table>
<thead>
<tr>
<th>Year</th>
<th>Filings</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>77(^{122})</td>
</tr>
<tr>
<td>2007</td>
<td>110(^{123})</td>
</tr>
<tr>
<td>2008</td>
<td>66(^{124})</td>
</tr>
<tr>
<td>2009</td>
<td>110(^{125})</td>
</tr>
<tr>
<td>2010</td>
<td>44(^{126})</td>
</tr>
<tr>
<td>2011</td>
<td>113(^{127})</td>
</tr>
<tr>
<td>2012</td>
<td>116(^{128})</td>
</tr>
<tr>
<td>2013</td>
<td>110(^{129})</td>
</tr>
<tr>
<td>2014</td>
<td>99(^{130})</td>
</tr>
<tr>
<td>2015</td>
<td>55(^{131})</td>
</tr>
<tr>
<td>2016</td>
<td>66(^{132})</td>
</tr>
<tr>
<td>2017</td>
<td>33(^{133})</td>
</tr>
</tbody>
</table>

\(^{122}\)See Ashraf; Barajas; Jason Bradley; Fiařkoski; Jarrell; Sudderth; Swope.

\(^{123}\)See Curcio; Curtner; Catherine Edwards; Freifeld; Justice; Killian; Lapke I; Reavis; Tallman; Victoria I.

\(^{124}\)See Derek; Jones; Kennedy; Marino; Russo; Stewart.

\(^{125}\)See Ades; Bennett; Bowen; Lapke II; Mirabile; Palmer; Riley; Catherine Smith; Vanderford; Yager.

\(^{126}\)See Adolph; Ceniceros; Sasse; Watson.

\(^{127}\)See Ajunwa; Basler; Blok; Boyette; Freibel; Hernandez; Hiller; Kops; Lew; Lowe; Piazza; Pizzuti; Victoria II.

\(^{128}\)See Bogart; Burdett; Casey; Citta; Cloninger; Brenda Edwards; Ellis; Hardigan; Harth; Jelinger; Jenkins; Lusane; McFadden; Owens; Rosales; Gregory Smith.

\(^{129}\)See Richard Bradley; Campbell; Chemett; Chouev; Evatt; Gandy; Martin; Miller; Matthews; Wilcox.

\(^{130}\)See Dini; Grulkin; Gutierrez; Hanson; Phillips; Price; Vorel; Westbrook; Williams.

\(^{131}\)See Beinhauer; Bryant; Nguyen; Pagan; Pirani.

\(^{132}\)See Grillot; Norenberg; Takano; Toome; Watts; West.

\(^{133}\)See Melcher; Nouell; Strong.

\(^{134}\)The data for this chart was obtained from Table F-2, U.S. Bankruptcy Courts – Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, Since the 12-Month Period Ending December 31 for the relevant year, which is posted online at https://www.uscourts.gov/report-name/bankruptcy-filings?tn=&pt=All&c=All&v=5D&%20month=5D&year=5D=12&m=5D=value=5D&=y=5D=value=5D&y=5D=year=5D=Apply [https://perma.cc/39K8-GJ6Q].
Nonbusiness consumer bankruptcy filings peaked in 2009 and 2010, and although some of the motions to dismiss filed in 2011 and 2012 related to cases filed in 2009 and 2010, there were not enough of them to explain the higher numbers of motions in those years. And the trend in nonbusiness consumer bankruptcy filings has been consistently lower since 2010, unlike the trend in the number of motions to dismiss filed by creditors.

(3) Where Were the Motions Filed?

I also looked at where these motions were filed to see if any pattern would develop. Creditor motions were filed in almost every circuit, but far more motions were filed in the Fourth and Ninth Circuits than in any other. The number of cases in the study from each circuit is shown below:

<table>
<thead>
<tr>
<th></th>
<th>1st</th>
<th>2nd</th>
<th>3rd</th>
<th>4th</th>
<th>5th</th>
</tr>
</thead>
<tbody>
<tr>
<td>D.C.</td>
<td>221</td>
<td>137</td>
<td>771</td>
<td>140</td>
<td>221</td>
</tr>
<tr>
<td>1st</td>
<td>331</td>
<td>138</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2nd</td>
<td>110</td>
<td>139</td>
<td></td>
<td>117</td>
<td>141</td>
</tr>
<tr>
<td>3rd</td>
<td></td>
<td>771</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4th</td>
<td></td>
<td></td>
<td>140</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5th</td>
<td></td>
<td></td>
<td></td>
<td>141</td>
<td></td>
</tr>
<tr>
<td>6th</td>
<td></td>
<td>143</td>
<td>771</td>
<td>144</td>
<td></td>
</tr>
<tr>
<td>7th</td>
<td></td>
<td></td>
<td>145</td>
<td>146</td>
<td>147</td>
</tr>
<tr>
<td>8th</td>
<td></td>
<td></td>
<td></td>
<td>146</td>
<td>148</td>
</tr>
<tr>
<td>9th</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>148</td>
</tr>
<tr>
<td>10th</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>11th</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Had there been a correlation between the number of nonbusiness bankruptcy filings in a circuit and the number of motions to dismiss filed by creditors, the high number of motions filed in the Sixth, Ninth and Eleventh Circuits would be expected, because those circuits have consistently had the three highest numbers of nonbusiness bankruptcy filings in the country during the period of this study. However, there was a high number of motions filed in the Fourth Circuit, which generally has fewer than half the number of nonbusiness bankruptcy filings as the Ninth Circuit every year. And the

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135 See Boyette; Bennett.
136 See Citta; Pizzuti; Ceniceros; Victoria; Basler.
137 See Bryant; Lusane;
138 See Hiller; Pagan; Riley.
139 See Ajumua; Beinhauer; Chovev; Derek; Grullon; Gutierrez; Hanson; Lew; Williams; Yager.
140 See Casey; Citta; Jenkins; Russo; Toome; Vanderford; Vorel.
141 See Burdett; Bogart; Boyette; Jason Bradley; Campbell; Curtner; Ellis; Evatt; Jones; Marino; Matthews; Nouell; Price; Strong; Sudderth; Watson; Wilcox.
142 See Jarrell; Martin.
143 See Bowen; Brenda Edwards; Gandy; Hernandez; Feling; Lowe; McFadden; Melcher; Palmer; Catherine Smith; Gregory Smith; Swope; Westbrook.
144 See Adolph; Blok; Dini; Killion; Sasse; Tallman; Watts.
145 See Basler; Catherine Edwards; Justice; Kennedy; Lapke I; Lapke II; West.
146 See Ashraf; Barajas; Bennett; Ceniceros; Cherrett; Freibel; Kops; Miller; Norenberg; Stewart; Takano.
147 See Fiarkoski; Grillot; Harth; Nguyen; Reavis; Rosales.
148 See Ades; Richard Bradley; Clominger; Curcio; Freifeld; Hardigan; Mirabile; Owens; Piazza; Pizzuti; Pirani; Victoria I; Victoria II.
149 The number of nonbusiness filings in each circuit every year is reported on Form F-2, supra note 134.
Fifth Circuit has very few motions notwithstanding that its annual nonbusiness bankruptcy filings exceed those of the First, Second, Third, Eighth and Tenth Circuits, all of which have more motions to dismiss, and far exceed those of the D.C. Circuit, which has the same number of motions.

If the number of motions to dismiss is not tied to the absolute number of nonbusiness consumer bankruptcy filings, I thought perhaps more creditor motions might be filed in districts in which the bankruptcy bar files most consumer bankruptcy cases under chapter 13 rather than chapter 7, because in such districts the debtor who files for chapter 7 might be more of a target for a motion to dismiss for abuse to force the debtor into the preferred chapter 13, and the court might be more willing to grant such a motion. However, I found that this too was not the case.

Listed below are the districts in which creditors filed more than one motion to dismiss for abuse, the years in which those motions were filed, and the percentage of all nonbusiness bankruptcy filings made under chapter 13 in that district during the relevant year.\textsuperscript{150}

<table>
<thead>
<tr>
<th>District</th>
<th>Year(s) Motion Made</th>
<th>% Chapter 13</th>
</tr>
</thead>
<tbody>
<tr>
<td>C.D. Cal.</td>
<td>2010;\textsuperscript{151} 2013(2);\textsuperscript{152}</td>
<td>23%; 19%</td>
</tr>
<tr>
<td>D.D.C.</td>
<td>2012;\textsuperscript{153} 2015;\textsuperscript{154}</td>
<td>16%; 20%</td>
</tr>
<tr>
<td>M.D. Fla.</td>
<td>2007;\textsuperscript{155} 2009;\textsuperscript{156} 2011;\textsuperscript{157}</td>
<td>40%; 26%; 25%</td>
</tr>
<tr>
<td>N.D. Ga.</td>
<td>2009;\textsuperscript{158} 2012(2);\textsuperscript{159} 2015;\textsuperscript{160}</td>
<td>37%; 37%; 48%</td>
</tr>
<tr>
<td>N.D. Ill.</td>
<td>2007;\textsuperscript{161} 2010;\textsuperscript{162} 2014;\textsuperscript{163} 2016;\textsuperscript{164}</td>
<td>37%; 24%; 38%; 45%</td>
</tr>
<tr>
<td>D. Kansas</td>
<td>2006;\textsuperscript{165} 2015;\textsuperscript{166} 2016;\textsuperscript{167}</td>
<td>33%; 43%; 41%</td>
</tr>
<tr>
<td>E.D. Ky.</td>
<td>2011;\textsuperscript{168} 2017;\textsuperscript{169}</td>
<td>26%; 30%</td>
</tr>
</tbody>
</table>

\textsuperscript{150}These percentages are derived from the Form F-2 for the relevant year, supra note 134.

\textsuperscript{151}See Ceniceros.

\textsuperscript{152}See Cherrett; Miller.

\textsuperscript{153}See Lusane.

\textsuperscript{154}See Bryant.

\textsuperscript{155}See Freifeld.

\textsuperscript{156}See Mirabile.

\textsuperscript{157}See Pizzuti.

\textsuperscript{158}See Ades.

\textsuperscript{159}See Cloninger; Owens.

\textsuperscript{160}See Viranti.

\textsuperscript{161}See Killian.

\textsuperscript{162}See Adolph.

\textsuperscript{163}See Dini.

\textsuperscript{164}See Watts.

\textsuperscript{165}See Fiaroski.

\textsuperscript{166}See Nguyen.

\textsuperscript{167}See Grillot.

\textsuperscript{168}See Hernandez.

\textsuperscript{169}See Melcher.
<table>
<thead>
<tr>
<th>State/Region</th>
<th>Case Years</th>
<th>Standing Percentages</th>
</tr>
</thead>
<tbody>
<tr>
<td>D. Md.</td>
<td>2013, 2014</td>
<td>25%; 27%</td>
</tr>
<tr>
<td>D. Mass.</td>
<td>2009, 2011</td>
<td>18%; 25%</td>
</tr>
<tr>
<td>E.D. Mich.</td>
<td>2011, 2012</td>
<td>17%; 17%</td>
</tr>
<tr>
<td>D.N.J.</td>
<td>2012, 2014, 2016</td>
<td>24%; 26%; 35%</td>
</tr>
<tr>
<td>E.D.N.Y.</td>
<td>2013, 2014, 2015</td>
<td>10%; 14%; 20%</td>
</tr>
<tr>
<td>S.D.N.Y.</td>
<td>2011, 2014</td>
<td>15%; 18%</td>
</tr>
<tr>
<td>W.D.N.Y.</td>
<td>2008, 2009</td>
<td>29%; 27%</td>
</tr>
<tr>
<td>M.D.N.C.</td>
<td>2006, 2007</td>
<td>59%; 56%</td>
</tr>
<tr>
<td>N.D. Ohio</td>
<td>2006, 2012, 2014</td>
<td>33%; 18%; 18%</td>
</tr>
<tr>
<td>E.D. Tenn.</td>
<td>2009, 2010, 2013</td>
<td>37%; 45%</td>
</tr>
<tr>
<td>W.D. Va.</td>
<td>2013, 2014, 2017</td>
<td>33%; 40%</td>
</tr>
</tbody>
</table>

170 See Campbell.
171 See Price.
172 See Riley.
173 See Hiller.
174 See Lowe.
175 See Brenda Edwards.
176 See Lapke I.
177 See Kennedy.
178 See Lapke II.
179 See Basler.
180 See Citta.
181 See Vorel.
182 See Toome.
183 See Chovev.
184 See Hanson.
185 See Beinhauer.
186 See Ajunwa; Piazza.
187 See Grullon; Williams.
188 See Derek.
189 See Yager.
190 See Jason Bradley.
191 See Jones; Marino.
192 See Boyette.
193 See Phillips.
194 See Strong.
195 See Sudderth.
196 See Curtner.
197 See Swope.
198 See Jelinger; McFadden.
199 See Westbrook.
200 See Catherine Smith.
201 See Gandy.
202 See Bogart; Burdett; Ellis.
203 See Matthews.
204 See Wilcox.
Historically, the nineteen districts that have ever had more than fifty-five percent of their consumer bankruptcy filings made under chapter 13 in any year since 2006 are the District of Puerto Rico, the Eastern and Middle Districts of North Carolina, the District of South Carolina, the Northern, Eastern and Southern Districts of Texas, the Middle and Western Districts of Tennessee, the Eastern District of Arkansas, the Eastern and Western Districts of Louisiana, the Northern and Southern Districts of Mississippi, the Northern, Middle and Southern Districts of Alabama, and the Middle and Southern Districts of Georgia.206

Only sixteen of the cases in this study were filed in these districts, one in the District of Puerto Rico,207 six in the Eastern District of North Carolina,208 two in the Middle District of North Carolina,209 one in the District of South Carolina,210 one in the Northern District of Texas,211 one in the Southern District of Texas,212 one in the Middle District of Tennessee,213 one in the Southern District of Georgia,214 one in the Northern District of Alabama,215 and one in the Middle District of Alabama.216 In eleven of those cases, the courts denied the § 707(b) motions to dismiss217 and in two the creditor withdrew the motions.218 In one, the court granted the motion to dismiss under § 109(g) rather than under § 707(b).219 In only two of these sixteen cases did the bankruptcy court grant the motion to dismiss under § 707(b).220 In one of the two dismissed cases, the appellate court concluded that the bankruptcy court’s reliance on § 707(b) was erroneous.221 Thus, there is no pattern supporting the suggestion that there is a correlation between the prevalence of chapter 13 filings in a district and the likelihood that

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203See Nowell.
204The percentages are based on data included in 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 for the relevant year, which is posted online at http://www.uscourts.gov/report-name/bankruptcy-filings?tn=&pt=All&%5Bvalue%5D%5Bmonth%5D=12&y%5Bvalue%5D%5Byear%5D=2012&=Apply [https://perma.cc/39K8-GJ6Q].
205See Pagan.
206See Boyette; Jason Bradley; Jones; Marino; Phillips; Strongs.
207See Curtner; Sudderth.
208See Evatt.
209See Jarrell.
210See Martin.
211See Palmer.
212See Hardigan.
213See Victoria II.
214See Victoria I.
215See Boyette; Jason Bradley; Evatt; Hardigan; Jarrell; Jones; Marino; Martin; Palmer; Phillips; Sudderth.
In Marino the court dismissed the case under § 707(a).
216See Curtner; Pagan.
217See Strong.
218See Victoria I; Victoria II.
219See Victoria I.
a creditor will bring a motion to dismiss under § 707(b), let alone succeed on such a motion.

So what does explain the disparity between circuits? There is no obvious reason why some circuits have more creditor motions filed than others. It may be that there are more aggressive creditor lawyers in those circuits (although, as discussed in section 4, there is no single institutional creditor that has generated multiple motions). It may be that debtor lawyers in some jurisdictions are more likely to file cases under chapter 7 that should have been directed to chapter 13. It may be totally random. There is nothing about the motions themselves that explains the data.

(4) Who Were the Parties Filing the Motions?

A chapter 7 panel trustee filed the motion in only four of the cases in the study. In one of those four cases, a creditor had also filed a motion to dismiss. In the remaining ninety-five cases, a creditor filed the motion. What type of creditor files these motions? I had expected to find that most movant creditors would be institutional lenders, as they would presumably be more sophisticated in their awareness of the new standing provisions of § 707(b). Although there were certainly some creditors in the study who fell in that category, most did not. Some were corporations or other institutions, but not the type that typically engage in credit transactions. Almost half of the creditors filing motions to dismiss were individuals rather than banks or corporations. This suggests that many creditors who bring these motions are personally invested in the outcome and do so for reasons that are not purely financial in nature.

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222 See Beinhauer; Richard Bradley; Hanson; Strong. In Strong, a motion was filed both by the chapter 7 trustee and a creditor. The trustee in Strong subsequently withdrew the motion under § 707(b) and pursued dismissal under § 109(g).

223 See Strong.

224 See Basler; Blok; Jason Bradley; Citta; Curtner; Derek; Catherine Edwards; Ellis; Fiarkowski; Grillot; Gutierrez; Hardigan; Hernandez; Jarrell; Killian; Lapke I; Lapke II; Martin; Melcher; Nguyen; Price; Gregory Smith; Swope; Vanderford; Watts; Tager.

225 See Ades (Southwick Real Estate LLC); Cherrett (Aspen Skiing Company); Brenda Edwards (Wexford Parkhomes Condominium Association); Grullon (Mount Calvary Pentecostal Church); Gutierrez (Catamount Holding Co. II); Jelinger (AFF Ohio, LLC); Jones (The Business Backer LLC); Justice (Advanced Control Solutions, Inc.); Lowe (Sheehan & Associates, PLC); Lusane (Arc Construction Services, Inc.); Marino (McGill & Hampson, P.A.); Norenberg (Elksa, Inc.); Nowell (Dulles Motorcars, Inc.); Palmer (1720 Entertainment LLC); Piazza (Neuterra Healthcare Physical Therapy, LLC); Reavis (Quapaw Tribe of Oklahoma); Russo (Pirola Pennuta Zai & Associates); Sasse (Rice, Heitman & Davis, S.D.); Strong (Biomedical Applications of North Carolina, Inc.); Sudderth (J.M. Smith Corporation); Tallman (Securities America, Inc.); Victoria I (Greenville Hospital Corporation); Victoria II (Community Health Systems); Watson (Stonewall Jackson Memorial Hospital).

226 See Adolph; Ayaume; Ashraf; Barajas; Bennett; Bogart; Bowen; Boyette; Bryant; Burdett; Campbell; Casey; Ceniceros; Chonou; Cloninger; Cunco; Dini; Exatt; Freibed; Freifeld; Gandy; Hart; Hillen; Jenkins; Kennedy; Kops; Lew; Matthews; McFadden; Miller; Mirabile; Owens; Pagan; Phillips; Pizzuti; Riley; Rosales; Catherine Smith; Stewart; Takano; Toone; Virani; Vorel; West; Westbrook; Wilcox; Williams.
Although it was not always possible to determine the source of the debtor/creditor relationship based on the filings, in twelve cases the creditor was a former business associate, employer or employee of the debtor, whose relationship had soured before the bankruptcy filing.227 In six of the cases, the moving creditor was the debtor’s former spouse.228 In two others it was the debtor’s daughter,229 or a sister-in-law.230 In another it was the representative of the debtor’s deceased father’s estate, who was likely her brother.231 Six motions were filed by lawyers or law firms who were themselves creditors of the debtor based on a past representation of the debtor in divorce or other non-bankruptcy proceedings.232 In twenty-one cases, the motion was filed by a party to a real estate transaction, such as a mortgagee, a buyer, seller or builder of a home, or a landlord or condominium association.233 In one instance, the debtor owed the creditor on a mobile home purchase.234 In another, the debtor was the creditor’s former investment advisor who had improperly invested the creditor’s funds.235 Five motions were filed by tort claimants.236 In twenty-nine of the cases, the motion was filed by a judgment creditor holding a large unsecured claim against debtor.237 In eighteen cases (nineteen percent of the total), the creditor filed the motion pro se (two by a law firm or a lawyer238 and another by a prisoner),239 but none of the pro se motions were granted.240 In six cases, the creditors filed motions against a pro se debtor. Two were granted241 and four were denied.242

(5) How Did the Bankruptcy Court Dispose of the Motions?

In the vast majority of cases studied, the court never reached a decision on the merits of the § 707(b) challenge, although the courts sometimes dis-
missed the case under §707(a)\textsuperscript{243} or § 109(g).\textsuperscript{244} In most cases, the movants filed under circumstances precluded by rule or by statute. For example, under the Federal Rules of Bankruptcy Procedure, a motion to dismiss under § 707(b) “may be filed only within 60 days after the first date set for the meeting of creditors under § 341(a).”\textsuperscript{245} Yet, in ten cases in the study, the creditor motion was filed too late and was denied as untimely.\textsuperscript{246} In five cases, the court denied the motion because the creditor did not properly plead a cause for dismissal under § 707(b).\textsuperscript{247}

Section 707(b) permits dismissal of a case filed by an individual debtor “under this chapter,” referring to chapter 7 of the Bankruptcy Code. Yet one creditor attempted to file a § 707(b) motion in a chapter 13 case.\textsuperscript{248} And § 707(b) is applicable only if the debts of the debtor “are primarily consumer debts.”\textsuperscript{249} In twenty-five cases in the study, the motion was denied because the court concluded that the debtor’s debts were not “primarily consumer debts.”\textsuperscript{250} In two other cases, the original motion sought dismissal under § 707(a) or (b) and the court denied the motion under § 707(a) and ignored § 707(b), presumably because the debtor’s response to the motion asserted that his or her debts were not primarily consumer debts.\textsuperscript{251}

Even when the debtor is an individual with primarily consumer debts who files a case under chapter 7, if the “current monthly income”\textsuperscript{252} of the debtor (or in a joint case, the debtor and the debtor’s spouse) multiplied by twelve is not greater than the median family income in the applicable state for a family of the same size (i.e., the debtor is not an above-median debtor), only the judge, United States trustee or bankruptcy administrator - not any
other party in interest – may bring a motion to dismiss under § 707(b). In eleven cases, the motion to dismiss was denied because the debtor was a below-median debtor and, therefore, the creditor did not have standing to bring the motion pursuant to § 707(b)(6).

Some properly-filed § 707(b) motions were never decided on the merits for other reasons. In nine cases, the §707(b) motion was withdrawn or never pursued after filing, or the dispute settled before a judicial decision. In two cases, the judge decided the motion on another basis and did not reach the §707(b) claim.

The courts did reach the merits in thirty-nine of the ninety-nine cases in this study. In only nineteen of those cases did the court dismiss or indicate that it would grant the motion to dismiss unless the debtor converted the case to one under chapter 13. It should be noted that in two of those cases the motions had been filed by the panel trustee and the debtors had not opposed the motions. In one case, the United States trustee had previously filed a motion to dismiss and the creditor filed a similar motion, and in two others the same debtor filed a second chapter 7 case after the first one had been dismissed on motion by the same creditor. The nineteen cases in which motions to dismiss were granted were filed in fifteen different districts, and were decided by eighteen different judges. The only two cases decided by the same judge were filed by the same debtor, and the motion to

254 See Ajunwa; Bryant; Cloninger; Curcio; Gandy; Hiller; Nowell; Owens; Sasse; Virani; Westbrook. In one case, the court acknowledged that the creditor was not the proper party to bring the motion because of §707(b)(6), but decided “in light of [debtor’s] history and present circumstance” to consider the motion anyway. See Jarrell. In another case, the debtor failed to raise the creditor’s lack of standing, and the court concluded that that the issue had been waived. See Miller.
255 See Chovev; Curtner; Fiarkoski; Pagan; Vanderford.
256 See Lew.
257 See Derek; Catherine Edwards, Freifeld.
258 See Evatt; Strong.
259 See Ashraf; Beinhauer; Bennett, Bogart; Boyette; Jason Bradley; Richard Bradley; Burdett; Campbell; Casey, Ceniceros; Citta; Brenda Edwards; Ellis; Frebel; Hanson; Hardigan; Jarrell; Jenkyns; Justice; Kennedy; Kilian; Kops; Lapke I; Lapke II; Lowe; Melcher; Miller; Nguyen; Norenberg; Price; Riley; Catherine Smith; Stewart; Toone, Victoria I; Victoria II; Watts; Wilcox. In Hardigan, the U.S. trustee had also filed a motion to dismiss for abuse, and the two motions were considered together.
260 See Ashraf; Beinhauer; Burdett; Campbell; Ceniceros; Citta; Brenda Edwards; Hanson; Justice; Lapke I; Lapke II; Melcher; Miller; Nguyen; Price; Toone; Victoria I, Victoria II; Watts.
261 See Beinhauer; Hanson.
262 See Lapke I.
263 See Lapke II; Victoria II.
264 See Ashraf (D. Ariz.); Beinhauer and Hanson (E.D.N.Y.); Burdett (E.D. Va.); Campbell (D. Md.); Citta and Toone (D.N.J.); Ceniceros and Miller (C.D. Cal.); Brenda Edwards (E.D. Mich.); Justice (W.D. Ark.); Lapke I and Lapke II (D. Neb.); Melcher (E.D. Ky.); Nguyen (D. Kan.); Price (D. Md.); Victoria I (M.D. Ala.); Victoria II (N.D. Ala.); Watts (N.D. Ill.)
dismiss was filed by the same creditor.265

There appears to be no discernable pattern in the disposition of the motions. The following chart shows the number of cases by year in which the court granted or denied a motion to dismiss for abuse filed by a party in interest (not the United States trustee or a bankruptcy administrator). The years shown are based on the date of the bankruptcy court’s opinion, not the filing date of the motion. Only in 2016 did the court grant more motions than it denied, but the numbers are so small as to be statistically insignificant.

<table>
<thead>
<tr>
<th>Year</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
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<tr>
<td>Granted</td>
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<td>2266</td>
<td>1267</td>
<td>2268</td>
<td>0</td>
<td>2269</td>
</tr>
<tr>
<td>Denied</td>
<td>4270</td>
<td>6271</td>
<td>7272</td>
<td>9273</td>
<td>3274</td>
<td>8275</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Granted</td>
<td>2276</td>
<td>2277</td>
<td>0</td>
<td>3278</td>
<td>3279</td>
<td>2280</td>
</tr>
<tr>
<td>Denied</td>
<td>1281</td>
<td>10282</td>
<td>7283</td>
<td>4284</td>
<td>2285</td>
<td>6286</td>
</tr>
</tbody>
</table>

C. LIMITATIONS OF STUDY

Admittedly, my research did not include a nationwide search of all chapter 7 consumer cases filed in the years of this study. It is difficult to reach any definitive conclusions about § 707(b) motions filed by panel trustees and creditors without a more exhaustive search, which would be extremely time consuming because current electronic databases impose significant limitations. Westlaw allows searches only of published decisions. With Bloomberg, I was

265See Lapke I; Lapke II.
266See Ashraf; Victoria I.
267See Lapke I.
268See Justice; Lapke II.
269See Ceniceros; Victoria II.
270See Baragas; Jason Bradley; Fiarkoski; Swope.
271See Curtner; Catherine Edwards; Freifeld; Jarrell; Reavis; Sudderth.
272See Bowen; Cuncio; Derek; Kennedy; Marino; Russo; Tallman.
273See Ades; Jones; Kilian; Mirabile; Palmer; Catherine Smith; Stewart; Vanderford; Yager.
274See Riley; Sasse; Watson.
275See Adolph; Basler; Bennett; Blok; Hernandez; Lew; Lowe; Piazza.
276See Citta; Brenda Edwards.
277See Burdett; Campbell.
278See Hanson, Miller, Price.
279See Nguyen; Toone; Watts.
280See Benhauer; Melcher.
281See Ajunwa; Bogart; Boyette; Cloninger; Freibel; Hiller; Jenkins; Kops; Lusane; McFadden; Owens; Pizzuti; Gregory Smith.
282See Richard Bradley; Casey; Ellis; Evatt; Gandy; Hardigan; Martin; Matthews; Rosales; Wilcox.
283See Cherrett; Crullon; Gutierrez; Harth; Jellinger; Vorel; Westbrook.
284See Bryant; Dini; Virani; Williams.
285See Choven; Norenberg.
286See Grillot; Nowell; Fagan; Phillips; Takano; West.
able to search complete dockets, but only through the date on which the
docket was last updated. Therefore, this source offered only limited data as
well. Presently there is no user-friendly way to search dockets on Pacer.

Confirmation of my results would require a researcher to look at all chapter
7 dockets on Pacer for cases filed in a particular year, or by circuit or
district, to see if the patterns found in my limited sample hold up. My study
does, however, offer some interesting conclusions.

III. CONCLUSION

The most important lesson to be drawn from this study is that, contrary
to the expectations of those who proposed an expansion of standing, very few
private parties exercise this right. There are several explanations for their
reluctance. First, the United States trustee and bankruptcy administrator
are now obligated to monitor filings by above-median debtors287 and file mo-
tions to dismiss or a statement as to why a motion is not appropriate.288
Creditors and panel trustees have little incentive to object to abusive chapter
7 filings when these officials are already carrying the water. Furthermore, the
cost-shifting provisions of § 707(b)(4)(A), which allow an award of costs (in-
cluding reasonable attorneys’ fees) upon successful prosecution of a § 707(b)
motion, permit an award only to “the trustee,” not to a creditor.289 Even
those awards are rarely made.290 Private parties are likely to avoid incurring
the cost of pursuing a § 707(b) motion and will more likely rely on the
United States trustee or bankruptcy administrator to address the issue of
abuse.

Second, a private party would likely have to conduct discovery before
filing such a motion. A movant may only file a motion to dismiss if the
debtor has primarily consumer debts291 and above-median income.292 These

289 U.S.C. § 707(b)(4)(A) reads as follows:

(4)(A) The court, on its own initiative or on the motion of a party in interest, in
accordance with the procedures described in rule 9011 of the Federal Rules of
Bankruptcy Procedure, may order the attorney for the debtor to reimburse the
trustee for all reasonable costs in prosecuting a motion filed under section 707(b),
including reasonable attorneys’ fees, if -

(i) a trustee files a motion for dismissal or conversion under this subsection; and
(ii) the court -

(I) grants such motion; and

(II) finds that the action of the attorney for the debtor in filing a case under
this chapter violated rule 9011 of the Federal Rules of Bankruptcy Procedure.

290 There was only one instance in the studied cases in which the trustee successfully obtained costs
under § 707(b)(4)(A). See Beinhauer In one other case, the trustee requested costs, but the court denied
the request. See Hanson.
291 See supra text accompanying notes 249-251.
factors often cannot be determined simply by reviewing the petition. Thus, a creditor may need to conduct preliminary examinations of the debtor just to determine whether a motion would be well grounded. Failure to do so might expose the creditor to sanctions. Discovery takes time and costs money, which creditors may be unwilling to invest.

Third, the time constraints imposed by Fed. R. Bank. P. 1017(e) give a creditor very little time to file a § 707(b) motion. None of the other Bankruptcy Code provisions under which a party in interest may file a motion to dismiss or convert is subject to a time limit on when it may be filed. The time limit is not in the text of § 707(b), but was included in the rule when it was amended in 1991 to reflect the 1986 amendments to § 707(b). The drafters noted that “the facts that are the basis for a motion to dismiss under § 707(b) exist at the time the case is commenced and usually can be discovered early in the case by reviewing the debtor’s schedules and examining the debtor at the meeting of creditors.” Because dismissal under § 707(b) “has the effect of denying the debtor a discharge in the chapter 7 case based on matters which may be discovered early,” the drafters characterized the §707(b) motion as “analogous” to an objection to discharge and imposed the same time limit on both under Fed. R. Bankr. P. 1017(e) and Fed. R. Bankr. P. 4004(a). The time period is subject to extension, but only “on request filed before the time has expired” and only “for cause.”

Fourth, although courts have not yet used the power conferred on them to sanction parties in interest for filing motions to dismiss under § 707(b)(5)(A), no lawyer for a creditor is likely to risk such a penalty in a

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292 See supra text accompanying notes 252-254.
293Debtors frequently report that they are below-median debtors when they are not, or have primarily business debts when they do not. This may be due to misunderstanding the meaning of these terms rather than an intentional misrepresentation. Some more accurate information may be elicited at the meeting of creditors under § 341, but creditors may be forced to conduct an examination of the debtor under Fed. R. Bankr. P. 2004 to obtain more information.
295See supra text accompanying note 245.
296Motions to dismiss may be filed by a party in interest under §§707(a), 1112(b), 1307(b), and 1307(e). Motions to convert may be filed by a party in interest under §§706(b), 707(b), 1112(b), 1307(b), and 1307(d).
297See Fed. R. Bankr. P. 7015 advisory committee’s note to 1981 amendment
298Id.
299FED. R. BANKR. P. 4004(a) provides:
   (a) Time for filing complaint objecting to discharge; notice of time fixed. In a chapter 7 liquidation case a complaint objecting to the debtor’s discharge under § 727(a) of the code shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). . . .
301Section 707(b)(5)(A) allows
marginal case, especially as a prerequisite for an award of costs under that provision is a finding that the attorney acted improperly.

Finally, although Congress removed the sentence in §707(b) that created a presumption that a chapter 7 debtor should be allowed the relief sought in that chapter, courts continue to evidence a firm allegiance to the notion that debtors are entitled to seek a chapter 7 discharge except in the most egregious circumstances.

A second lesson to be learned from this study is that, if a creditor does intend to file a motion to dismiss for abuse under §707(b), that creditor should do so with the assistance of counsel. Even if the creditor is a lawyer or a law firm, the creditor should retain bankruptcy counsel to represent its interests. Not a single party in interest who filed a motion to dismiss for abuse on a pro se basis obtained the desired dismissal of the debtor’s case.\(^{302}\)

Third, private parties who have availed themselves of the opportunity to seek dismissal for abuse are probably not the parties Congress intended or expected to be champions of the integrity of the chapter 7 bankruptcy system. Most of them are disgruntled individuals who are former business associates or who have had personal or family relationships with the debtor, who are probably taking every opportunity to make life difficult for someone who has “done them wrong.”\(^{303}\) These individuals could best be described as the

the court, on its own initiative or on the motion of a party in interest, . . . [to] award a debtor all reasonable costs including reasonable attorneys’ fees in contesting a motion filed by a party in interest (other than a trustee or United States trustee (or bankruptcy administrator, if any)) under this subsection if—

(i) the court does not grant the motion; and

(ii) the court finds that—

(I) the position of the party that filed the motion violated rule 9011 of the Federal Rules of Bankruptcy Procedure; or

(II) the attorney (if any) who filed the motion did not comply with the requirements of clauses (i) and (ii) of paragraph (4)(c), and the motion was made solely for the purpose of coercing a debtor into waiving a right guaranteed to the debtor under this title.

Id. Clauses (i) and (ii) of §707(b)(4)(c) provide that the signature on a written motion, among other pleadings, constitutes a certification that the attorney has

(i) performed a reasonable investigation into the circumstances that gave rise to the . . . written motion; and

(ii) determined that the . . . written motion—

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

Id. In only three cases in the study did the debtor seek sanctions under § 707(b)(5)(A) after prevailing on the motions to dismiss, and the court denied the motion in all three cases. See Harth, Pizutti, Gregory Smith.

\(^{302}\)See supra text accompanying notes 238-240.

\(^{303}\)See supra text accompanying notes 227-237.
"Ex Factor." A realistic, less subjective, analysis of the debtor's financial position would probably lead more sophisticated creditors to the conclusion that a dismissal of the debtor's chapter 7 case or conversion to a chapter 13 case would not likely result in an increased return on their debts.

Finally, private parties in interest have filed motions to dismiss under §707(b) in every circuit and before many different judges in different districts in every year since the effective date of BAPCPA. To some extent, the number of motions to dismiss has risen or fallen along with the number of nonbusiness bankruptcy filings, but that correlation is not strong.\textsuperscript{304} For the most part, however, circuits with a higher volume of nonbusiness chapter 7 filings saw more motions to dismiss and those with a lower volume saw fewer such motions.\textsuperscript{305} But there is no obvious correlation between the percentage of nonbusiness bankruptcy cases filed under chapter 13 in a particular district and the likelihood that a private party would file a motion to dismiss a chapter 7 case as abusive in that district.\textsuperscript{306} Nor is there any evidence in the cases studied that there are any bankruptcy judges who have shown a particular predilection for granting motions to dismiss for abuse.\textsuperscript{307}

In summary, no one looking at the data in this study could reach the conclusion that the expansion of standing to bring motions under §707(b) has had a significant impact on chapter 7 practice. However dramatic the changes wrought by the means-testing provisions of §707(b)(2) in combatting perceived abuse, the evidence shows that the expansion of standing to private parties in the 2005 amendments to §707(b)(1) has proven almost completely ineffective as a means for pushing consumer debtors out of chapter 7. The verdict is in: creditors don't care.

\textsuperscript{304}See supra text accompanying notes 121-136.
\textsuperscript{305}See supra text accompanying notes 137-149.
\textsuperscript{306}See supra text accompanying notes 150-221.
\textsuperscript{307}See supra text accompanying notes 264-265.