

High Income, High Debt Reorganization

Practical Issues in Individual Chapter 11 Business Cases

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Practical Issues in Individual Chapter 11 Business Cases

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Pendency Issues Facing the Individual Chapter 11 Debtor

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I. INTRODUCTION

The continuing economic turmoil has presented new hardships and challenges for a variety of businesses. Previously successful individuals and small business owners are facing a brave new world where credit is tight and creditors are anxious. In this new economic environment successful individuals will be seeking bankruptcy attorneys not only as legal practitioners but also as business counselors. Nervous lenders are increasingly requiring personal guarantees from small business owners. And those personal guarantees, if the business sours, can lead to individual bankruptcy.

Bankruptcy attorneys, however, are also facing a brave new world—a post-BAPCPA world. The Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”), passed in April 2005, has yet to be tested in the context of a major economic downturn. This piece will be focused on the unique issues facing bankruptcy practitioners representing High Income Debtors during the pendency of their Chapter 11 case, with particular attention paid to the difficulties created by BAPCPA. As would be expected, ambiguities remain and bankruptcy law is still no practice for the weary.

II. HIGH INCOME DEBTORS AND THEIR BANKRUPTCY OPTIONS

For purposes of discussion, “High Income Debtors” are individuals with substantial assets, debts - and most likely living expenses. High Income Debtors will frequently be prevented from filing under Chapter 13 by the statutorily imposed debt ceiling. 11 U.S.C. §

109(e)¹; In re Crawley, 2009 WL 902359 at 5 (Bkrtcy.E.D.Va.). High Income Debtors will also, because of their high income, be unable to meet the means test for filing under Chapter 7. 11 U.S.C. § 707(b).

Assuming a High Income Debtor were able to pass the means test for a Chapter 7 filing, the BAPCPA revisions provide more leeway for the Bankruptcy Courts to nonetheless force a conversion to Chapter 11. 11 U.S.C. § 707(b)²; Crawley at 2. Section 707(b) provides that

[a]fter 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

¹ § 109(e) provides that:

Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$336,900 and noncontingent, liquidated, secured debts of less than \$1,010,650, or an individual with regular income and such individual’s spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than \$336,900 and noncontingent, liquidated, secured debts of less than \$1,010,650 may be a debtor under chapter 13 of this title.

² § 707(b) provides in part that:

(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)).

(2) (A) (i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor’s current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—

- (I) 25 percent of the debtor’s nonpriority unsecured claims in the case, or \$6,000, whichever is greater; or
- (II) \$10,000.

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.

BAPCPA changed the previous standard of “substantial abuse” to the lower threshold of “abuse.” Moreover, standing to bring such motions was given to the U.S. Trustee and “any party in interest.” 11 U.S.C. § 707(b)(1); Crawley at 2.

Crawley exemplifies the difficulties facing individual debtors. In July 2008, a husband and wife filed a Chapter 7 individual bankruptcy after the steep depreciation in value of their real estate investments. Id. at 1. Following a meeting of the creditors, the U.S. Trustee promptly filed a statement that the debtor’s case should be presumed abuse under Section 707(b). Id. The court in its ruling reasoned that although the debtors could not file under Chapter 13, “the debtors have the ability to repay a meaningful portion of their debts in a bankruptcy repayment plan and that allowing them to simply discharge that debt in Chapter 7 would constitute an abuse.” Id. at 10. Despite the court’s discussion of the disadvantages of a Chapter 11 as opposed to a Chapter 13 bankruptcy (i.e. higher filing fees, quarterly fee to the U.S. Trustee and increased legal fees) the court stayed its dismissal of the case in order to give the debtors an opportunity to convert it to a Chapter 11 case. Id. at 6.

In the context of Crawley most, if not all, High Income Debtors seeking to reorganize their debts and business affairs will now be required to file under Chapter 11. See id. Yet High Income Debtors filing under Chapter 11 will encounter unique difficulties.

Many of those difficulties can be traced to Section 1115(a) which is a provision added by BAPCPA. This section states that post-petition income earned by individual debtors during the

pendency of their Chapter 11 case is now considered property of the estate.³ Thus, Bankruptcy Courts will be required to allocate post-petition income between (i) living expenses and certain professional expenses (for the benefit of the debtor) and (ii) property of the estate (for the benefit of the creditors). These allocations, like any allocation of scarce resources, will likely become the subject of intense scrutiny and controversy. Bankruptcy Courts do not want to be perceived as sanctioning either the lifestyle choices of profligate High Income Debtors or costly professional expenses.⁴

Accordingly, Bankruptcy Courts, while grappling with this issue, will seek easily administrable and objective standards by which to make these allocations. In the absence of any new Congressional action, it will be the task of the Bankruptcy Bar to provide the logical underpinnings for such standards while the case law continues to develop.

III. LIVING EXPENSE ALLOCATIONS

A Chapter 11 debtor in possession will be allowed to make ordinary course transactions under Section 363(c). According to In re Goldstein, 383 B.R. 496 (Bankr. C.D. Cal. 2007) food

³ Section 1115(a) provides that:

In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in section 541—

(1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.

⁴ A key case on point is the Pre-BAPCPA In re Weber 209 B.R. 793 at 796 where the debtor, during the pendency of his Chapter 11 case took vacations to China, Bermuda, Florida, Arizona, Utah, Switzerland, Vermont and Bermuda. The court reasoned that “[t]he record could not be more clear that the trips were extravagant in light of the Debtor’s bankruptcy, that the Debtor’s lifestyle was unreasonable, and that the Debtor’s conduct both offends the integrity of the system and sends a wrong message to the public.” Id. at 800.

and rent are considered ordinary course transactions and are permissible under Section 363(c). Ordinary course transactions would not, however, cover items that are necessary but not ordinary such as the hiring of divorce counsel.⁵ Yet for an individual debtor in possession, how far can the definition of ordinary course be stretched? It may be in the ordinary course for a corporate CEO to take his or her chartered plane to the Caribbean for an annual vacation. Yet no Bankruptcy Court would allow this. Thus, the ambiguity lies between the extremes. On the one hand, the breadth Section 363(c) surely permits more than a debtor's merely buying bread and water; on the other hand, what may be ordinary course for a High Income Debtor would likely be deemed extravagant by creditors urging a bankruptcy judge to impose lifestyle limits during the pendency of the debtor's case.

This dilemma suggests that, for individual debtors in Chapter 11, the test for an ordinary course transaction may not be determined by prior practice but rather by a community standard. See In re Weber 209 B.R. 793 at 796. The standard appears to be the ordinary course of business for individuals in the same community. Such a standard would limit the extravagance of High Income Debtors while at the same time providing some leeway. Until the case law is more developed, prudence would dictate that debtors make the *a priori* assumption that every transaction, but for the most spartan, is out of the ordinary course and thus requires prior court approval.

Non-essential living expenses (i.e. daily cappuccino, country club memberships, care for an elderly parent) inhabit the uncomfortable zone of ambiguity under Chapter 11 for individual

⁵ Hiring of divorce counsel for the individual Chapter 11 debtor was allowed under Section 327(e) as a professional expense. In re Goldstein 383 B.R. 496. The court reasoned, “[e]mploying special divorce counsel will assist the debtors in resolving their differences in their marital dissolution and in disentangling their domestic lives during the bankruptcy proceeding.” Id. at 500.

debtors. For purposes of comparison, it is noteworthy that non-essential expenses are allowed under Chapter 13 to the extent necessary to (i) provide support for the debtor, (ii) provide support for the debtor’s dependants, (iii) pay domestic support obligations, and (iv) make limited charitable contributions.⁶ 11 U.S.C. § 1325. Does the absence of comparable language in Chapter 11 suggest that Congress intended to provide a stricter regime for the individuals whose case proceeds under Chapter 11? That may be so. But it also may be a Congressional oversight. Until the issue is resolved, a prudent bankruptcy practitioner will seek court approval for all but the most *de minimus* expenses.

In extreme cases, creditors might seek to avoid expenditures by individual debtors for non-essential living expenses pursuant to Section 549. Section 549(a) provides that “the trustee may avoid a transfer of property of the estate...that occurs after the commencement of the case.” A situation could arise whereby a debtor has been paying rent on his son’s apartment—a situation not entirely beyond the purview of possibility for High Income Debtors. This rent, if paid out of post petition earnings, is property of the estate and could potentially be recovered by creditors. The prospect of a debtor paying the rent of his adult offspring may not tug at one’s

⁶ Section 1325(b)(2) provides that:

(2) For purposes of this subsection, the term “disposable income” means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended—

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of “charitable contribution” under section 548 (d)(3) to a qualified religious or charitable entity or organization (as defined in section 548 (d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

heart strings: but what about support for an ailing parent? This, too, is conceivably recoverable under Section 549.

IV. PROFESSIONAL EXPENSES ISSUE

A. Duality of the Individual Debtor (Debtor as individual v. Debtor as trustee)

The inherent conflicts facing an individual Chapter 11 debtor as a debtor in possession are manifest and inescapable. As the “trustee” of the estate, the debtor is bound by at least an implied fiduciary duty to maximize its value. See In re Gay, 390 B.R. 562 at 569 (“As a trustee, a debtor in possession is bound by all the fiduciary obligations inherent in that role.”). Yet, as an individual, he is simultaneously motivated to maximize his exemptions while consuming the “estate’s” property as the case proceeds.

Attorneys representing individual Chapter 11 debtors must be cognizant of this dual role and carefully advise their clients of the inherent conflicts. Naturally, the debtor will be predisposed to view his Chapter 11 attorney as his advocate. However, the attorney is advising the debtor in two separate capacities: debtor as an individual and debtor as a “trustee.” As this duality presents conflicts for the debtor, it too, presents conflicts for debtor’s counsel. Advice as to exemptions and any portion of plan structuring that allocates property towards the debtor is adverse to the creditors. Similarly, advice that allocates property towards the creditors is adverse to the debtor. This puts debtor’s counsel in a unique position that is foreign to the Anglo-American legal system: he is neither a zealous advocate for the estate nor the individual debtor because they hold interests that compete with each other. See Coquillette, Daniel R., The Anglo-American Legal Heritage. Is it realistic to expect counsel to play the role of a neutral arbiter?

B. Attorney’s Compensation for “Debtor as Trustee”

Attorneys representing individual Chapter 11 debtors look to the statutory authority of Sections 327⁷ and 1107(b)⁸ for their appointment. Section 327 provides that the trustee may, with the court’s approval, employ attorneys to represent the trustee in carrying out the trustee’s duties. An individual Chapter 11 debtor, fulfilling the role and performing the duties of the trustee, will thus, in most cases, file the appropriate motion in his case, seeking court approval to appoint his pre-petition attorney as attorney for the estate. Counsel is not disqualified for employment as counsel to the Chapter 11 debtor because of his or her representation of the debtor prior to the commencement of the case. 11 U.S.C. § 1107(b).

⁷ Section 327 (Employment of professional persons) provides:

- (a) Except as otherwise provided in this section, the trustee, with the court’s approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee’s duties under this title.
- (b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.
- (c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person’s employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.
- (d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.
- (e) The trustee, with the court’s approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.
- (f) The trustee may not employ a person that has served as an examiner in the case.

⁸ Section 1107 (Rights, powers, and duties of debtor in possession) provides:

- (a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106 (a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.
- (b) Notwithstanding section 327 (a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person’s employment by or representation of the debtor before the commencement of the case.

Sections 327 and 1107(b) provide authority for the estate to pay attorneys as counsel for the debtor in possession. But who will pay attorneys performing functions that explicitly benefit the debtor in his individual capacity?

C. Attorney's Compensation for "Debtor as Individual"

Following the enactment of BAPCPA, treatment of attorney's compensation for representing the debtor as an individual is uncertain. Once again, this uncertainty is rooted in Section 1115(a). Section 1115(a) provides that a Chapter 11 individual debtor's post-petition income is now considered property of the estate. Prior to BAPCPA, this post-petition income, by virtue of belonging to the debtor, was used to compensate the attorney for legal advice that benefited the debtor as an individual. In re Gay 390 B.R. 562 at 565 ("Debtor's future income, which is not an estate asset, shall be used to pay the balance of the initial retainer and any additional fees or expenses incurred, subject to the approval of the court.") Now, pursuant to Section 1115, this post-petition income is property of the estate. Thus the attorney, while representing the interests of the debtor as an *individual*, must look to the *estate* as his or her only means of compensation. What assurance does counsel have that the U.S. Trustee, creditors or the court might not view such payments as tantamount to using property of the estate (i.e. post-petition income) in a manner that is adverse to the interests of the estate (i.e. to benefit the individual debtor)? Would such use of property violate the trustee's implied fiduciary duty, a duty that famously requires "not honesty alone, but the punctilio of an honor the most sensitive?" Meinhard v. Salmon, 164 N.E. 545 (1928). Such a violation is no mere punctilio, and thus would seem to require nothing less than express statutory authority. While such statutory authority is provided generally for individual Chapter 12 and Chapter 13 debtors – it is not provided for individual Chapter 11 debtors. 11 U.S.C. § 330(a)(4)(B).

To resolve the conflicts inherent with the duality of an individual debtor under Chapters 12 and 13, we look to Bankruptcy Code Section 330(a)(4)(B)⁹. This section provides for reasonable compensation to the debtor's attorney in individual Chapter 12 and 13 cases for representing the interests of the debtor. *Id.* The provision expressly provides that this is "based on a consideration of the benefit and necessity of such services to the debtor." *Id.* Yet it also begs the question: are those services any less of a benefit or necessity to the individual Chapter 11 debtor?

Presumably, Section 330(a)(4)(B) did not include the individual Chapter 11 debtor because prior to the passage of Section 1115 it was unnecessary. In the pre-BAPCPA era, the individual debtor could use his post-petition earnings to compensate the attorney for protecting the debtor's individual interests. Following the addition of Section 1115 by BAPCPA, the individual debtor no longer has the benefit of a clear statutory predicate whereby he may compensate an attorney for representing his individual interests.

The language of Section 330(a)(4)(B) suggests it alone provides the statutory basis for attorney compensation for representing the interests of the debtor. Thus, the absence of any provision in the Bankruptcy Code expressly allowing property of the estate to be used to protect the interests of the individual Chapter 11 debtor presents a challenge for the debtor and his counsel.

⁹ Section 330(a)(4)(B) provides that:

In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

D. Best Practices and the Implications of Lamie and its Progeny

Section 1115 – when read in conjunction with the implied fiduciary duties of the individual Chapter 11 “debtor as trustee” – has created an apparent legislative drafting error similar to the one addressed in Lamie v. U.S. Trustee, 540 U.S. 526, 124 S.Ct. 1023 (2004).

In Lamie, the Supreme Court held that a debtor’s attorney can only be compensated from the estate to the extent provided by Section 330. Lamie, although addressing a Chapter 7 debtor, noted that Section 330(a)(4) specifically provides for compensation of debtor’s attorneys from property of the estate in Chapter 12 and 13 cases. No such provisions were made in Chapter 7 and 11 cases. As a solution the Supreme Court suggested that, “[s]ection 330(a)(1) does not prevent a debtor from engaging counsel before a Chapter 7 conversion and paying reasonable compensation in advance to ensure that the filing is in order.” This solution is known as the “retainer exception.”

The meaning of the “retainer exception” was further developed in the case of Morse v. Ropes & Gray, LLP (In re CK Liquidation Corp.), 343 B.R. 376 (D. Mass. 2006). This case made clear that the nature of the retainer must be a flat-fee payment from the debtor. Id. at 379 (“[T]he so-called “retainer exception” was inapplicable because it was intended to apply only to flat fee, not *security*, retainers of the sort held by R & G in this case.”) A retainer given to secure payment of future fees is considered property of the estate and will not suffice. Id.

Thus the existing case law, although consisting primarily of dicta, suggests that debtor’s attorney, when advising Chapter 11 debtors in their capacity as individuals (as opposed to as trustee), must be compensated through a pre-petition flat-fee payment from the debtor. See, e.g., Redmond v. Lentz & Clark P.A. (In re Wagers), 514 F.3d 1021 (10th Cir. 2007). Without such a

flat-fee payment, debtor's counsel face potential scrutiny from the Bankruptcy Court for post-petition portions of their legal bills. The Bankruptcy Court could disallow payment of fees for any portion of a bill that benefits the debtor as an individual.

The professional expense issues, as discussed above, were astutely identified by the Honorable Bruce A. Markell, United States Bankruptcy Judge for the District of Nevada to whom I am greatly indebted.

Payment to the debtor's professional agents also presents a concern with respect to the changes wrought by Section 1115. It is quite likely that the debtor's lawyer will have significant postfiling bills and will need to know (and will deserve to know) how to be paid. This is not a problem in a Chapter 13, as there is explicit recognition of the ability of a professional for a Chapter 13 debtor to receive reasonable compensation "for representing the interests of the debtor."

No such provision exists for lawyers representing individual Chapter 11 debtors. The Chapter 11 debtor's lawyer would thus presumably be covered by Lamie, and could not receive compensation from the estate. The zone of noncompensation would appear to cover advice as to exemptions, or advice on plan structuring if the plan allocates some of the estate for the debtor postconfirmation, as expenses in these areas would benefit the debtor, and not the bankruptcy estate. Further, efforts to obtain sufficient funds prepetition to cover anticipated services

may create causes of action under the avoiding actions, and thus raise questions of disinterestedness.

Markell, Hon. Bruce A., The Sub Rosa Subchapter: Individual Debtors in Chapter 11 After BAPCPA, 2007 U. Ill. L. Rev. 67 (2007).

V. RULE 2015.3

As a purely technical matter Rule 2015.3 could potentially pose onerous reporting requirements on High Income Debtors with business interests. Rule 2015.3 provides that

[i]n a Chapter 11 case, the trustee or debtor in possession shall file periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a debtor in a case under title 11, and in which the estate holds a substantial or controlling interest. The reports shall be prepared as prescribed by the appropriate Official Form, and shall be based upon the most recent information reasonably available to the trustee or debtor in possession.

The nature and extent of information required under Rule 2015.3 is still uncertain. What is known is that High Income Debtors with business interests may be forced to provide details concerning non-debtor entities in which they have an interest. One can imagine a High Income Debtor who has sought Chapter 11 protection, but holds investments in businesses that are fundamentally sound. Businesses that have no “public” reporting requirements in their own right may find themselves the subject of public “scrutiny” under Rule 2015.3.

Under Rule 2015.3 control is presumed where the debtor owns at least a twenty percent interest.¹⁰ Alternatively, the debtor is presumed not to control an entity where there is less than a

¹⁰ Rule 2015.3 (Reports of Financial Information on Entities in Which a Chapter 11 Estate Holds a Controlling or Substantial Interest) provides:

- (a) **REPORTING REQUIREMENT.** In a chapter 11 case, the trustee or debtor in possession shall file periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a debtor in a case under title 11, and in which the estate holds a substantial or controlling interest. The reports shall be prepared as prescribed by the appropriate Official Form, and shall be based upon the most recent information reasonably available to the trustee or debtor in possession.
- (b) **TIME FOR FILING; SERVICE.** The first report required by this rule shall be filed no later than five days before the first date set for the meeting of creditors under § 341 of the Code. Subsequent reports shall be filed no less frequently than every six months thereafter, until the effective date of a plan or the case is dismissed or converted. Copies of the report shall be served on the United States trustee, any committee appointed under § 1102 of the Code, and any other party in interest that has filed a request therefor.
- (c) **PRESUMPTION OF SUBSTANTIAL OR CONTROLLING INTEREST; JUDICIAL DETERMINATION.** For purposes of this rule, an entity of which the estate controls or owns at least a 20 percent interest, shall be presumed to be an entity in which the estate has a substantial or controlling interest. An entity in which the estate controls or owns less than a 20 percent interest shall be presumed not to be an entity in which the estate has a substantial or controlling interest. Upon motion, the entity, any holder of an interest therein, the United States trustee, or any other party in interest may seek to rebut either presumption, and the court shall, after notice and a hearing, determine whether the estate’s interest in the entity is substantial or controlling.
- (d) **MODIFICATION OF REPORTING REQUIREMENT.** The court may, after notice and a hearing, vary the reporting requirement established by subdivision (a) of this rule for cause, including that the trustee or debtor in possession is not able, after a good faith effort, to comply with those reporting requirements, or that the information required by subdivision (a) is publicly available.
- (e) **NOTICE AND PROTECTIVE ORDERS.** No later than 14 days before filing the first report required by this rule, the trustee or debtor in possession shall send notice to the entity in which the estate has a substantial or controlling interest, and to all holders – known to the trustee or debtor in possession – of an interest in that entity, that the trustee or debtor in possession expects to file and serve financial information relating to the entity in accordance with this rule. The entity in which the estate has a substantial or controlling interest, or a person holding an interest in that entity, may request protection of the information under § 107 of the Code.

twenty percent interest. Either presumption is rebuttable. The term “control” is not found anywhere else in the Bankruptcy Code or in the Federal Rules of Bankruptcy Procedure. 7 Collier on Bankruptcy ¶ 2015.3.08 (Alan N. Resnick & Henry J. Somme eds., 15th rev. ed. 2008). Thus the Bankruptcy Court will be relying heavily on corporate case law for its definition. Id.

The reports must state the value, operations, and profitability of each entity to which the rule applies. The reports are filed on Official Form 26. If these reports contain confidential information, Rule 2015.3 may provide some protection. An entity in which the estate has a controlling interest may make a request to the Bankruptcy Court under Section 107 for confidential treatment. High Income Debtors, reasonably so, will likely want confidential treatment for reports on their business interests. It is yet to be seen how the Bankruptcy Courts will use their discretion on this matter.

VI. CONCLUSION

In a post-BAPCPA world, bankruptcy for a High Income Debtor is no easy task. Most High Income Debtors will be forced to file under the more onerous Chapter 11 as opposed to Chapter 13. Numerous ambiguities and undelivered case law will leave debtors and practitioners alike guessing how best to operate their businesses before a plan is confirmed.

Michael Pappone would like to thank Daniel J. Blanchard for his assistance in preparing this article.

(f) EFFECT OF REQUEST. Unless the court orders otherwise, the pendency of a request under subdivisions (c), (d), or (e) of this rule shall not alter or stay the requirements of subdivision (a).

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In re Sheridan, 391 B.R. 287 (Bankr. E.D.N.C. 2008)

In re Tegeder, 369 B.R. 477 (Bankr. D. Neb. 2007)

Van Buren Industrial Investors v. Henderson (In re Henderson), 341 B.R. 783 (M.D. Fla. 2006)

Key Statutory References

§ 327. Employment of professional persons

- (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.
- (b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.
- (c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.
- (d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.
- (e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.
- (f) The trustee may not employ a person that has served as an examiner in the case.

§ 330. Compensation of officers

- (a)
 - (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—
 - (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and
 - (B) reimbursement for actual, necessary expenses.
 - (2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.
 - (3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
 - (A) the time spent on such services;
 - (B) the rates charged for such services;
 - (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
 - (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
 - (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
 - (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.
 - (4)
 - (A) Except as provided in subparagraph (B), the court shall not allow compensation for—
 - (i) unnecessary duplication of services; or
 - (ii) services that were not—
 - (I) reasonably likely to benefit the debtor's estate; or
 - (II) necessary to the administration of the case.
 - (B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy

case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

(7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.

(b)

(1) There shall be paid from the filing fee in a case under chapter 7 of this title \$45 to the trustee serving in such case, after such trustee's services are rendered.

(2) The Judicial Conference of the United States—

(A) shall prescribe additional fees of the same kind as prescribed under section 1914 (b) of title 28; and

(B) may prescribe notice of appearance fees and fees charged against distributions in cases under this title; to pay \$15 to trustees serving in cases after such trustees' services are rendered. Beginning 1 year after the date of the enactment of the Bankruptcy Reform Act of 1994, such \$15 shall be paid in addition to the amount paid under paragraph (1).

(c) Unless the court orders otherwise, in a case under chapter 12 or 13 of this title the compensation paid to the trustee serving in the case shall not be less than \$5 per month from any distribution under the plan during the administration of the plan.

(d) In a case in which the United States trustee serves as trustee, the compensation of the trustee under this section shall be paid to the clerk of the bankruptcy court and deposited by the clerk into the United States Trustee System Fund established by section 589a of title 28.

§ 363. Use, sale, or lease of property

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

§ 549. Postpetition transactions

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate—

(1) that occurs after the commencement of the case; and

(2)

(A) that is authorized only under section 303 (f) or 542 (c) of this title; or

(B) that is not authorized under this title or by the court.

(b) In an involuntary case, the trustee may not avoid under subsection (a) of this section a transfer made after the commencement of such case but before the order for relief to the extent any value, including services, but not including satisfaction or securing of a debt that arose before the commencement of the case, is given after the commencement of the case in exchange for such transfer, notwithstanding any notice or knowledge of the case that the transferee has.

(c) The trustee may not avoid under subsection (a) of this section a transfer of an interest in real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of an interest in such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such real property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to such interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected.

(d) An action or proceeding under this section may not be commenced after the earlier of—

- (1) two years after the date of the transfer sought to be avoided; or
- (2) the time the case is closed or dismissed.

§ 1107. Rights, powers, and duties of debtor in possession

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106 (a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

(b) Notwithstanding section 327 (a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

§ 1115. Property of the estate

(a) In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in section 541—

- (1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and
- (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.

(b) Except as provided in section 1104 or a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

Obtaining Confirmation of an Individual Chapter 11 Debtor's Plan of Reorganization¹

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I. Introduction

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") contained important provisions affecting chapter 11 bankruptcy cases for individuals. Congress borrowed certain concepts from chapter 13 in imposing new requirements for chapter 11 individual debtors to dedicate a portion of their post-petition income to repayment of pre-petition debts. An individual debtor's chapter 11 is not a "large" chapter 13 and does not fit neatly within some established chapter 11 concepts; an individual chapter 11 presents its own challenges and issues, particularly in the formation and confirmation of a plan of reorganization.

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II. Property of an Individual Chapter 11 Debtor's Estate

The concept of the property of the estate and the extent of a debtor's resulting bankruptcy estate directly impacts plan formation and the assets available for distribution to creditors. A unique feature of a chapter 13 debtor's estate is the inclusion of "earnings from services performed by the debtor after the commencement of the case" as property of the debtor's estate. 11 U.S.C. § 1306(a)(2). BAPCPA incorporated this concept of property of the estate and expanded the bankruptcy estate of an individual chapter 11 debtor to include both property acquired and earnings for services performed by the debtor after the petition date, but before the earlier of conversion, dismissal or closing of the debtor's bankruptcy case. 11 U.S.C. § 1115. Both section 541 and section 1115 of the Bankruptcy Code are applicable to determine whether an interest is property of the individual debtor's chapter 11 estate. Section 1115, which is almost identical to section 1306 of the Bankruptcy Code, brings such postpetition property within the estate thereby affording the protection of the automatic stay to such interests. While the debtor is presumptively permitted to remain in possession of such postpetition interests in property, the debtor must take care to adequately maintain such property and allocate that property as appropriate to effectuate his or her plan of reorganization.

III. Statutory Requirements for an Individual Chapter 11 Debtor's Plan

Section 1123 of the Bankruptcy Code requires that all chapter 11 plans (1) designate classes of claims, (2) specify whether a class is not impaired, (3) specify the treatment of any impaired class of claims, (4) provide the same treatment of each claim of a particular class, and (5) provide sufficient means for implementation. 11 U.S.C. § 1123(a)(1)-(5). In addition to the requirements applicable to all chapter 11 plans, an individual chapter 11 debtor's plan must also meet the requirements of section 1123(a)(8). Section 1123(a)(8) requires that an individual

chapter 11 debtor's plan "provide for payment to creditors . . . all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan." 11 U.S.C. § 1123(a)(8). As discussed below, section 1129(a)(15) of the Bankruptcy Code governs how much of the debtor's postpetition earnings from personal services or future income must be dedicated to his or her plan.

IV. Confirmation Requirements for Individual Chapter 11 Debtors

a. Section 1129(a)(15) and Disposable Income

Absent an objection from a creditor, an individual chapter 11 plan may provide for any amount – even a minimal amount – of disposable income to fund the plan of reorganization. Unlike the other requirements for confirmation, section 1129(a)(15) appears to apply only if a holder of an allowed unsecured claim objects. Assuming no such creditor objects, an individual chapter 11 debtor should be able to obtain confirmation of a plan that does not meet the requirements of 1129(a)(15). See In re Meyrowitz, 2008 Bankr. LEXIS 1976 (Bankr. N. D. Tex. 2008)(observing that no objections were filed thereby obviating the requirements of 1129(a)(15)). However, where there is an objection by any one unsecured creditor, section 1129(a)(15) permits confirmation of an individual chapter 11 debtor's plan of reorganization, over the objection of that unsecured creditor, only where

the value, as of the effective date of the plan, of property to be distributed under the plan is not less than the amount of such claim; or the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides, whichever is longer.

11 U.S.C. § 1129(a)(15). The central element of section 1129(15) is the concept of "disposable income" and the amount that must be contributed to implementation of the plan.

Section 1129(a)(15) incorporates by reference the definition of “disposable income” in section 1325(b)(2). That section provides that “disposable income” includes current monthly income³ (other than child support, foster care or disability payments made in accordance with applicable nonbankruptcy law but only to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended for maintenance and support of the debtor or dependents (including postpetition domestic support obligations), charitable contributions not to exceed 15% of the debtor’s gross income, and, if the debtor is engaged in business, expenses necessary for the maintaining business operations. 11 U.S.C. 1325(b)(2). Section 1325(b)(3) further provides that the amounts reasonably necessary to be expended under section 1325(b)(2) are to be determined in accordance with the “means test” expenses determined in accordance with section 707(b)(2).

Section 1129(a)(15) refers only to section 1325(b)(2) and not section 1325(b)(3), and some commentators have observed that there is an argument that reference in section 1325(b)(3) to the determination of “disposable income” in section 1325(b)(2) incorporates the means test of section 707(b)(2). See Bruce A. Markell, *The Sub Rosa Subchapter: Individual Debtors in Chapter 11 After BAPCPA*, 2007 U. ILL. LAW REV. 67. Incorporation of the permitted means test deductions of section 707(b)(2) could severely limit what constitutes reasonable expenses in

³ The Bankruptcy Code defines the term “current monthly income” as the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor’s spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—

- (i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521 (a)(1)(B)(ii); or
- (ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521 (a)(1)(B)(ii); and

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

11 U.S.C. § 101(10A).

an individual chapter 11 debtor's case. The Advisory Committee on the Federal Rules of Bankruptcy Procedure appears to disagree, however, with the argument. See 2005-2008 Advisory Committee Note to Official Forms 22A, 22B and 22C (observing that the chapter 11 form is the simplest "since the means-test deductions of section 707(b)(2) are not employed in the determining the extent of an individual chapter 11 debtor's disposable income"). While the Advisory Committee Notes may be entitled to some deference, the applicability of section 1325(b)(3) (and section 707(b)(2)) to an individual chapter 11 debtor remains uncertain. It appears that only one bankruptcy court has issued a written decision on this issue. In re Roedemeier, 374 B.R. 264 (Bankr. D. Kan. 2007)(holding § 1325(b)(3) is not applicable in determining disposable income of individual chapter 11).

The requirements of section 1129(a)(15) differ from chapter 13 in a number of other significant ways. Unlike under chapter 13, section 1129(a)(15) does not establish a minimum period for payments made under the plan. Rather, section 1129(a)(15) merely specifies that the amount to be distributed under the plan is not less than the debtor's projected disposable income for the five years following the effective date of the plan. This allows the debtor to potentially shorten the completion of payments under a plan confirmed pursuant to section 1129(a)(15)(B) if other sources of payment are available to the debtor such as financing, gifts, or exempt property. Section 1129(a)(15) does not establish a maximum length of the plan, but rather conditions confirmation on the longer of payment of disposable income over a five year period or "the period for which the plan provides payment."

It is easy to confuse terms such as "postpetition earnings from services," "other future income," and "disposable income." Prudent practitioners will note that the term "disposable income" used in section 1129(a)(15) is more expansive than "postpetition earnings from personal

services” used in section 1115 and includes other sources of future income as contemplated by section 1123(a)(8). As such, it is not sufficient to dedicate only postpetition service-related income to meet the requirements of section 1129(a)(15). The disposable income requirement would also include other sources of income from property of the debtor’s estate such as rental income pursuant to sections 541(a)(6) and 1115(a)(1).

b. Best Interests Test

Section 1129(a)(7) of the Bankruptcy Code requires that the proposed plan’s treatment of an impaired claim is no less favorable than what the creditor would receive in a liquidation under chapter 7 of the Bankruptcy Code. Commonly referred to as the “best interests” test, each holder of an allowed claim has standing to object notwithstanding acceptance by the class of claims to which such creditor belongs. Individual chapter 11 debtors may more readily meet the “best interests” test because postpetition income from services may not be included in a hypothetical liquidation under chapter 7. An issue unique to individual chapter 11 debtors is how to value, for liquidation purposes, the bankruptcy estate.

As described above, an individual chapter 11 debtor’s bankruptcy estate is similar to that of a chapter 13 debtor as a result of the inclusion of postpetition income from services. Upon conversion of a chapter 13 debtor’s case to one under chapter 7, postpetition income from services revert back to the debtor and are not included in the debtor’s chapter 7 estate. 11 U.S.C. § 348(f)(1). Section 348 does not contain similar language pertaining to the treatment of the debtor’s estate in a converted individual chapter 11 case. Individual chapter 11 debtors must therefore look to section 541(a)(6) and the case law interpreting that section in order to determine the extent of the estate’s valuation in a hypothetical chapter 7 case. See Bruce A. Markell, *The Sub Rosa Subchapter: Individual Debtors in Chapter 11 After BAPCPA*, 2007 U.

ILL. LAW REV. 67 (noting uncertainty in valuation of individual chapter 11 debtor's estate due to continuing vitality of pre-BAPCPA case law); see also Fitzsimmons v. Walsh (In re Fitzsimmons), 725 F.2d 1208 (9th Cir. 1984)(earnings attributable to employees of individual debtor and sole proprietor were property of the estate and section 541(a)(6) excluded only earnings generated from services performed by individual debtor). The individual chapter 11 debtor's liquidation valuation conundrum is only the tip of the iceberg. A significant issue arises if the debtor must convert his or her case following confirmation but prior to completion of all plan payments. What happens to payments made under the plan that included, to some extent, earnings from postpetition services? Is this a windfall for creditors? The Bankruptcy Code does not provide any guidance on how to unscramble the egg in such an instance.

c. Absolute Priority Rule and Individual Chapter 11 Debtors

Unlike their chapter 13 counterparts, creditors in a chapter 11 case get to vote to accept or reject the debtor's plan. If a plan is not accepted by all impaired classes, it may still be confirmed. The Bankruptcy Code permits confirmation of a plan where at least one impaired class of claims has accepted it. A plan of reorganization may be confirmed under the cram-down provisions if, in addition to satisfying the usual requirements of Section 1129 of the Bankruptcy Code, it (i) "does not discriminate unfairly" and (ii) "is fair and equitable," with respect to each class of claims that is impaired under, and has not accepted, the plan.

The "fair and equitable" standard differs according to the type of claim to which it is applied. With respect to unsecured creditors, the standard is met if the unsecured creditor receives payment in the full amount of its claim or, in the event that it receives less than the full amount of its claim, no junior class receives or retains any interest in property of the debtor. The standard as applicable to unsecured creditors is also known as the "absolute priority rule."

The absolute priority rule does not, however, apply to individual chapter 11 debtors. Section 1129(b)(2)(B) permits an individual chapter 11 debtor's retention of property of the estate under section 1115 of the Bankruptcy Code provided that all postpetition domestic support obligations have been paid. 11 U.S.C. § 1129(b)(2)(B). It is unclear as to whether only postpetition property of the estate may be retained or whether ordinary property of the estate as referenced in Section 541 is also included and therefore may be retained. In re Tegeder, 369 B. R. 477 (Bankr. D. Neb. 2007)(debtor's retention of property includes property under section 541 and section 1115 of the Bankruptcy Code). Although not addressing the issue under section 1115, there is some disagreement as to whether exempt property is or is not outside the scope of the section 1129(b)(2). See In re Bullard, 358 B.R. 541 (Bankr. D. Conn. 2007)(debtor may retain exempt property); but see In re Grossman, 282 B.R. 45 (Bankr. S.D. Fla. 2002)(debtor cannot retain exempt property). The reasoning of the court in Bullard appears to address the issue correctly by recognizing that exempt property is beyond the reach of creditors and, as a result, debtors may retain such exempt property.

V. Plan Modifications

Section 1127(e) permits modification of an individual chapter 11 debtor's confirmed plan, even after substantial consummation, to increase or decrease payments, or extend or reduce time period for such payments. The debtor, trustee, United States Trustee or a holder of an allowed unsecured claim may seek post-confirmation modification of a plan. The inclusion of parties in addition to the debtor, permits such party to seek modification of the plan should the debtor's circumstances change for the better or worse.

VI. Discharge Issues**a. Delay of Discharge**

An individual chapter 11 debtor will not receive his or her discharge until all payments under plan have been completed, unless the bankruptcy court permits an earlier discharge for cause. 11 U.S.C. § 1141(d)(5)(A). There is not much case law identifying sufficient cause for obtaining a discharge prior to completion of all payment under the debtor's plan. One court has held that a debtor's desire to avoid post-confirmation reporting requirements to UST and payment of quarterly fees is not "cause" under section 1141(d)(5)(A). In re Ball, 2008 Bankr. LEXIS 1532 (Bankr. N.D. W. Va. 2008)(notwithstanding substantial consummation of the plan, debtor not entitled to discharge when all payments under plan have not been made); but see In re Sheridan, 391 B.R. 287 (Bankr. E.D. Va, 2007)(debtors obtained discharge at confirmation where impaired class would be paid in full with 6% interest secured by second lien on real property).

b. Hardship Discharge? Not so Fast

After confirmation but before the debtor has completed payments under the plan, the bankruptcy court may grant a discharge if the value, as of the effective date of the plan, actually distributed is not less than what each holder of an allowed unsecured claim would receive under a chapter 7 and modification is not practicable. 11 U.S.C. § 1141(d)(5)(B). An individual chapter 11 debtor may not obtain a discharge prior to the completion of all payments under the plan under section 1141(d)(5)(B) of the Bankruptcy Code if the debtor elected state law exemptions which results in the exemption of interests in property in excess of \$136,875 or there is a pending proceeding in which the debtor may be found guilty of a felony. Some states, like Massachusetts, have generous exemptions for homesteads, and the value of such exemptions could prohibit a debtor from obtaining a discharge prior to completion of all plan payment. It is

conceivable that a chapter 11 debtor when faced with the prospect that he or she cannot obtain a discharge, without foregoing a portion of his or homestead, would be forced to convert the chapter 11 to one under chapter 7. Depending on the extent to which postpetition earnings for personal services were included in payments to creditors under the plan, the debtor could be entitled to a refund or rebate given the exclusion of such property from a chapter 7 bankruptcy estate. In the event that the estate lacked sufficient funds to credit the debtor for such postpetition earnings, the debtor may bear the financial burden of the failed plan. The Bankruptcy Code does not contain a provision for recovery of such payments from creditors.

VII. Conclusion

While Congress borrowed chapter 13 concepts when formulating the plan requirement and confirmation provisions for individual chapter 11 debtors, certain ambiguities exist under chapter 11 that are not present in a chapter 13. Notwithstanding BAPCPA enactment nearly four years ago, there are still a number of uncertainties when guiding an individual debtor through the chapter 11 process such as determining reasonable expenses for the purpose of determining “disposable income” and valuing the debtor’s estate for liquidation purposes. While Congress intended to fashion a mechanism by which high net worth (and high debt) individual would be required to dedicate a portion of their future income towards confirmation of a plan, it remains to be seen whether the desired result can be achieved.

WHO, WHAT, WHY & WHEN

**A Timeline of Considerations and Deadlines for an Individual Chapter 11 Debtor
(Including individuals designated as a Small Business or Single Asset Chapter 11)**

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Considerations and actions to be undertaken before the filing:²

PRE-PETITION	ACTIONS AND DEADLINES
10 YEARS	Look-back for intentional fraudulent transfers to hinder, delay or defraud a creditor, for purposes of reducing claimed homestead exemption by value of property transferred. 11 U.S.C. §522(o)
4 YEARS	Look-back for Fraudulent Transfers under Uniform Fraudulent Transfer Act: action to avoid fraudulent transfer must be filed within four years after the date of transfer or if later, within one year of when the transfer was or could have been reasonably discovered. Adopted in whole or in part in all states except Alaska, Georgia, Kentucky, Louisiana, Mississippi, South Carolina and Virginia. ³
1215 DAYS (3 YEARS,3 MONTHS)	Look-back for date on which residence was acquired for state exemption purposes (exemption is limited to \$136,875 if acquisition of residence in the state was less than 1215 days prior to petition date). 11 U.S.C. §522(p)
730 DAYS (2 YEARS)	Beginning of period during which an individual debtor must be domiciled in the state of filing in order to claim exemptions under that state's law. If the debtor has not been domiciled in a single state for the 730 days pre-petition, then the exemption laws of the state in which the debtor was domiciled during the 180 days immediately preceding the 730 day period, or for a longer period during those 180 days than anywhere else, shall apply. 11 U.S.C. §522(b)(3)(A)

¹ The author acknowledges with gratitude the assistance of Kate E. Nicholson, Esq., an associate with Parker & Associates, and the contributions of Kevin C. McGee, Esq., Seder & Chandler, LLP and Kathleen R. Cruickshank, Esq., Hanify & King, PC.

² See Appendix A and Appendix B for a brief overview of the requirements for individual and individuals designated as small business debtors under Chapter 11.

³ Maryland, New York, Tennessee, the Virgin Islands, and Wyoming have adopted in whole or in part, the Uniform Fraudulent Conveyance Act, predecessor to the UFTA.

2009 Northeast Bankruptcy Conference

PRE-PETITION	ACTIONS AND DEADLINES
2 YEARS	Look-back for Fraudulent Transfers. 11 U.S.C. §548
1 YEAR	Beginning of preference period for monies paid to insider creditors. 11 U.S.C. §547(b)(4)(B) Look-back regarding certain acts supporting denial of a discharge. 11 U.S.C. §§727(a)(2) & 1141(d)(3)(C) Look-back for limitations of entry of the automatic stay if previous bankruptcy case(s) dismissed by the debtor. 11 U.S.C. §§362(c)(3) & (4)
180 DAYS (6 MONTHS)	Look-back for residence, domicile or principal place of business, for determining venue of Chapter 11 case in the district filed (if no affiliated Chapter 11 case is already pending in the district). 28 U.S.C. §1408 Earliest time at which individual debtor can complete credit counseling. 11 U.S.C. §109(h)
6 MONTHS (PRECEDING MONTH OF FILING)	Means Testing: Beginning of period during which an individual debtor's average monthly income will be considered for purposes of determining current monthly income for purposes of the means test, determining an individual's eligibility to file under Chapter 11. 11 U.S.C. §109(d), §707(b)
90 DAYS	Commencement of preference period for monies paid or value given to non-insider creditors. 11 U.S.C. § 547(a)(b)(4)(A)
45 DAYS	Reclamation period begins with respect to goods shipped pre-petition. 11 U.S.C. §546(c)
20 DAYS	Administrative claims arise for goods shipped in ordinary course pre-petition. 11 U.S.C. § 503(b)(9)
PRIOR TO THE FILING OF THE PETITION	Record Homestead on primary residence to protect right to claim state exemption 11 U.S.C. §522

Actions and Deadlines that arise on or after the filing:

POST-PETITION	ACTION AND DEADLINES
<p>DAY 1 -- THE PETITION DATE (OR UPON ENTRY OF ORDER FOR RELIEF IN INVOLUNTARY CASE)</p>	<p>Debtor’s counsel must be registered ECF user. Adopted through local rules in all states; See, e.g., MLBR 9036-1</p> <p>Filing fee of \$1,000 + \$39 filing fees due. Individuals can pay in up to four installments. 28 U.S.C. §1930(a); Fed. R. Bankr. P 1006(b)</p> <p>Small business debtors must file balance sheet, statement of operations, cash-flow statement and federal tax return or a statement made under penalty of perjury that no such documents have been prepared and no taxes have been filed in addition to petition and schedules. 11 U.S.C. §1116(1)</p> <p>Debtor must designate himself or herself as an individual debtor, as a small business debtor, or as a single asset real estate debtor where provided on petition. Fed. R. Bankr. P. 1020(a)</p> <p>Debtor shall file with the petition a list containing the name and address of each entity included or to be included on Schedules D, E, F, G, and H and a list of 20 largest unsecured creditors. Fed. R. Bankr. P. 1007(a)(1), 1007(d)</p> <p>Individual debtor shall file statement of current monthly income. Fed. R. Bankr. P. 1007(b)(5)</p> <p>Individual debtor shall file statement of completion of course concerning personal financial management in case which §1141(d)(3) applies. Fed. R. Bankr. P. 1007(b)(7)</p> <p>Individual debtor claiming exemption under §522(b)(3)(A) shall file statement as to proceedings in which may be found guilty of felony described in §522(q)(1)(A) or liable of debt described in §522(q)(1)(B). Fed. R. Bankr. P. 1007(b)(8)</p> <p>Individual debtor shall file statement of social security number. Fed. R. Bankr. P. Fed. R. Bankr. P. 1007(a)(1) & (d) (If these documents are not filed with the petition, the court will issue an “order to update,” setting a filing deadline that is three to ten days after the petition date, depending upon the document).</p>

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POST-PETITION	ACTION AND DEADLINES
	<p>Debtor must open Debtor in Possession accounts and comply with directives of the United States Trustee. 28 U.S.C. §586(a)(3)</p> <p>First Day Motions typically filed:</p> <ul style="list-style-type: none"> • Motion to pay prepetition wages, salaries and benefits 11 U.S.C. §363 • Motion for interim use of cash collateral 11 U.S.C. §363 • Motion for interim DIP financing 11 U.S.C. §364 • Motion for determination regarding adequate assurance to utilities (must be offered within 20 days post-petition) 11 U.S.C. § 366
2 DAYS POST-ORDER FOR RELIEF	<p>Deadline for debtor to file list of 20 largest unsecured creditors in an involuntary case. Fed. R. Bankr. P. 1007(d)</p>
3 DAYS POST-PETITION	<p>Deadline to file Matrix (list of all creditors with addresses), if not filed with the petition.</p>
7 DAYS POST-ORDER FOR RELIEF (IN INVOLUNTARY CASE)	<p>Deadline for small businesses in an <u>involuntary case</u> to file balance sheet, statement of operations, cash-flow statement and federal tax return or a statement made under penalty of perjury that no such documents have been prepared and no taxes have been filed. 11 U.S.C. §1116(1)</p>
<p>7-14 DAYS POST-PETITION (APPROX.)</p> <p>NO SPECIFIC TIME SET</p>	<p>Meet with United States Trustee regarding Operating Requirements (UST may form a Committee of Unsecured Creditors). 28 U.S.C. §586(a)(3)</p> <p>Additional requirements for Small Business Debtor include:</p> <ul style="list-style-type: none"> • Periodic financial reports • Information concerning profitability • Reasonable approximations of cash receipts and disbursements • Comparisons of actual and projected cash receipts and disbursements • Timely file all tax returns, other governmental filings and administrative expenses when due • Shall explain failures to do so and proposed remedies • Disclose such matters as are in the best interest of debtor and creditors and in the public interest for fair and efficient procedures <p>11 U.S.C. §308</p>
14 DAYS POST-PETITION	<p>Application to employ counsel to the Debtor must be filed within 14 days after beginning services for the Debtor. Same is true for other professionals employed in the case. 11 U.S.C. §327; Fed. R. Bankr. P. 2104</p>

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POST-PETITION	ACTION AND DEADLINES
<p>15 DAYS POST-PETITION/ENTRY OF ORDER FOR RELIEF</p>	<p>Deadline in voluntary cases to file all schedules and statement of financial affairs. Fed. R. Bankr. P. 1007(c)</p> <p>Deadline for individual debtor in an <u>involuntary case</u> to file statement of social security number. Fed. R. Bankr. P. 1007(f)</p> <p>Deadline for debtor to file list of equity security holders. Fed. R. Bankr. P. 1007(a)(3)</p> <p>Deadline for debtor to file statement indicating whether it is a small business debtor in an involuntary case. Fed. R. Bankr. P. 1020(a)</p> <p>Deadline for attorney to file statement of attorney compensation as required by §329 of the Code. Fed. R. Bankr. P. 2016(b)</p>
<p>20 DAYS POST-PETITION</p>	<p>Last day to furnish adequate assurance of payment to utilities. 11 U.S.C. §366(b)</p>
<p>15 DAYS PRIOR TO §341 MEETING OF CREDITORS</p>	<p>Deadline to make written request for copy of debtor’s federal tax return. Fed. R. Bankr. P. 4002(b)(4)</p>
<p>7 DAYS PRIOR TO §341 MEETING OF CREDITORS (APPROX. 23 DAYS POST-PETITION)</p>	<p>Deadline to deny existence of tax returns or oppose request for copy of debtor’s tax returns. Fed. R. Bankr. P. 4002(b)(4)</p> <p>Deadline to submit documents required for §341 meeting. 11 U.S.C. §521(e)(2)(A)(i); Fed. R. Bankr. P. 1007(b)(1), 4002(b)(2)</p>
<p>15TH DAY OF THE MONTH FOLLOWING PETITION MONTH</p>	<p>First operating report must be submitted to the United States Trustee on the 15th day of month following filing (<i>and continuing each month thereafter</i>). 28 U.S.C. §586(a)(3)</p>
<p>20-40 DAYS (GENERALLY APPROX. 30 DAYS)</p>	<p>Section 341 Meeting of creditors. 11 U.S.C. §341(a); Fed. R. Bankr. P. 2003</p>
<p>30 DAYS</p>	<p>Deadline for small business to file all schedules and statement of financial affairs upon notice and hearing. 11 U.S.C. §1116(3)</p> <p>Deadline to file motion and complete hearing to extend the automatic stay with respect to an individual debtor with prior case dismissed within one year of re-filing. 11 U.S.C. §362(c)(3)</p> <p>Deadline to request that automatic stay take effect in case where individual debtor has had two prior cases dismissed within one year. 11 U.S.C. §362(c)(4)</p>

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POST-PETITION	ACTION AND DEADLINES
30 DAYS AFTER FIRST MEETING OF CREDITORS (IF CONCLUDED)	Deadline for creditors to object to debtor’s claim of exemptions. Fed. R. Bankr. P. 4003(b)(1) except as to Fed. R. Bankr. P. 4003(b)(2) and (3) for 11 U.S.C. §522(q)
60 DAYS	Extended deadline for the debtor to “file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act” if required to do so by a certain date per non-bankruptcy law, an order entered in a non-bankruptcy proceeding, or an agreement. 11 U.S.C. §108(b) Beginning of period during which debtor must perform under an unexpired lease for personal property, other than personal property leased to an individual primarily for personal, family, or household purposes, until lease is assumed or rejected, unless court, after notice and a hearing and based on the equities, orders otherwise. 11 U.S.C. §365(d)(5)
60 DAYS AFTER FIRST §341 MEETING OF CREDITORS (APPROX. 90 DAYS POST-PETITION)	Deadline to object to discharge of debtor or dischargeability of certain debts. 11 U.S.C. §§523(a)(2),(4) and(6)
90 DAYS	Deadline for single-asset real estate debtor, in order to avoid automatic relief from the automatic stay, either to file plan of reorganization with a reasonable prospect of confirmation within a reasonable time, or to begin making interest payments to secured creditor(s) on the real estate (deadline may also be within 30 days of court’s determination of case as single-asset real estate). 11 U.S.C. §362(d)(3)
120 DAYS	Quarterly fees due to US Trustee. 28 U.S.C. §1930(a)(6) Professionals can apply for fees (at each 120 day interim post-petition). 11 U.S.C. §331 Deadline to assume or reject unexpired lease for non-residential real property 11 U.S.C. § 365(d)(4) OR Deadline to file motion to extend time to assume or reject for an additional 90 days. Extensions beyond that require prior written consent of landlord. 11 U.S.C. §365(d)(4)(A)-(B) Termination of exclusivity period (all debtors other than small business debtors) 11 U.S.C. § 1121(b) UNLESS debtor files a motion to extend the exclusive period prior to the expiration of the period, and has motion allowed. Date may not be extended beyond 18 months after the order for relief. 11 U.S.C. §365(d)(4)(A)

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POST-PETITION	ACTION AND DEADLINES
120 DAYS	Deadline for individuals to make last fee installment payment. Fed. R. Bankr. P. 1006(b)
180 DAYS	<p>Deadline for acceptance of plan filed within exclusivity period OR Debtor must file a motion to extend acceptance period prior to the expiration of the period. Date may not be extended beyond 20 months after the order for relief. 11 U.S.C. § 1121(d)(1)</p> <p>Termination of exclusivity period for small business debtor. 11 U.S.C. §1121(e)(1)</p> <p>Deadline for individual to make final installment payment for cause shown. Fed. R. Bankr. P. 1006(b)</p>
300 DAYS (APPX. 10 MONTHS)	Deadline to file plan and disclosure statement, unless debtor shows by preponderance of evidence that court will confirm plan within a reasonable period of time. 11 U.S.C. §1121(e)(2)-(3)
18 MONTHS	Outside limit for extension of exclusivity period for non-small business debtors to file a plan; absolutely terminates after 18 months post-petition. 11 U.S.C. §1121(d)(2)(a)
20 MONTHS	Deadline for acceptance of plan in exclusivity period for cause shown. 11 U.S.C. §1121(d)(2)(b)
2 YEARS⁴	<p>Deadline for bringing avoidance actions under 11 U.S.C. § 544, 545, 547, 548 or 553. If the “first” trustee is appointed or elected before expiration of the 2 years, another one year period is added on. If case is closed or dismissed prior to these deadlines, the right to bring the actions ends with the case. 11 U.S.C. § 546 (a)</p> <p>Deadline for commencing non-bankruptcy actions if period for commencing has already expired post-petition. 11 U.S.C. § 108(a)</p>

Actions and Deadlines for Achieving Confirmation of Plan of Reorganization:

PLAN CONFIRMATION	ACTION AND DEADLINES
PRIOR TO SOLICITATION OF	Court must approve written disclosure statement, unless the court determines in a small business case that the plan itself provides adequate disclosure, or unless the

⁴ These deadlines usually occur after a plan is filed and confirmed; however, in rare instances, a plan may not be confirmed until after these deadlines pass.

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PLAN CONFIRMATION	ACTION AND DEADLINES
APPROVAL OF PLAN	solicitation began prior to filing the petition. 11 U.S.C. §1125(b), §1125(f), §1125(g); Fed. R. Bankr. P. 3017.1
ANY TIME PRIOR TO CONFIRMATION	<p>Debtor may amend plan. 11 U.S.C. §1127(a)</p> <p>Party in interest or US Trustee can request appointment of case trustee or examiner. 11 U.S.C. §1104(a)</p> <p>Party in interest or US Trustee can request the termination of the appointment of the Trustee. 11 U.S.C. §1105</p> <p>Any time prior to the date of confirmation, the Debtor may assume or reject an executory contract or unexpired lease for personal property (unless counterparty requests earlier date). 11 U.S.C. § 365(d)(2)</p> <p>To extent deadlines have not already passed, Debtor must assume or an unexpired lease for non-residential real property. 11 U.S.C. § 365(d)(2)</p>
25 DAYS PRIOR TO CONFIRMATION HEARING	If the plan itself does not provide adequate disclosure, small business debtor must mail conditionally approved disclosure statement to all holders of a claim or interest. 11 U.S.C. §1125(b), §1125(f), §1125(g); Fed. R. Bankr. P. 3017.1
45 DAYS POST-PLAN FILING	Time by which court must confirm small business plan that conforms with Code, unless debtor demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time, a new deadline is imposed and the order to extend is signed prior to the expiration of the existing deadline. 11 U.S.C. §1129(e); 11 U.S.C. §1121(e)(3)
CONFIRMATION OF PLAN	<p>Plan of individual debtor may be confirmed over objection of unsecured claimant if value to be distributed as of effective date of plan is not less than the amount of the claim or is not less than the projected disposable income as defined by 11 U.S.C. §1325(b)(2) to be received during 5-year period beginning on the date that first payment is due under plan or during period which plan provides payments for, whichever is longer. 11 U.S.C. §1129(a)(15)</p> <p>Complaint objecting to discharge shall be filed no later than first date set for hearing on confirmation. Fed. R. Bankr. P. 4004(a)</p> <p>Debt is discharged unless plan is one of liquidation, the debtor does not engage in business after consummation of plan; or the debtor would be denied a discharge</p>

PLAN CONFIRMATION	ACTION AND DEADLINES
	<p>under 11 U.S.C. §727(a). 11 U.S.C. §1141(c), §1141(d)(3)</p> <p>Discharge under 11 U.S.C. §1141 does not discharge debt excepted from discharge under §523 if debtor is an individual. 11 U.S.C. §1141(d)(2)</p>

Post- Confirmation Actions and Deadlines

POST- CONFIRMATION	ACTION AND DEADLINES
POST- CONFIRMATION	<p>File such reports as necessary or ordered by the court. 11 U.S.C. §1106(a)(7)</p> <p>Plan of individual debtor may be modified at any time after confirmation before completion of payments regardless if substantially consummated, for the purpose of modifying the amount, duration or distribution of plan payments. 11 U.S.C. §1127(e)</p> <p>Debt is discharged under an individual debtor’s plan upon order of the court after all plan payments have been made. 11 U.S.C. §1141(d)(5)(A)</p> <p>Debt of an individual debtor may be discharged prior to completion of all plan payments, after notice and a hearing, if the value distributed to unsecured creditors is not less than what would be received under Chapter 7, modification of the plan is impracticable and the debtor is not subject to §522(q)(1) nor is there a proceeding pending in which the debtor could be found guilty of a felony of the kind described in §522(q)(1). 11 U.S.C. §1141(d)(5)(B)</p> <p>An individual debtor in a Chapter 11 must complete financial management course prior to entry of discharge. 11 U.S.C. §1141(d)(3)(C)</p> <p>Prior to substantial consummation, plan may be modified by its proponent in accordance with §1127(b)—requires court confirmation. 11 U.S.C. §1127(b)</p>
180 DAYS	<p>Party in interest may request revocation of plan if order confirming plan was procured by fraud. 11 U.S.C. §1144</p>
5 YEARS	<p>All presentment or surrender of security or performance of another act must be taken in order to preserve right to distribution. 11 U.S.C. §1143</p>
PRIOR TO FINAL PAYMENT UNDER PLAN OR FILING OF MOTION FOR DISCHARGE	<p>Deadline for individual debtor to complete financial management course. Fed. R. Bankr. P. 1007(c)</p>
NO EARLIER THAN DATE OF FINAL PAYMENT UNDER PLAN OR MOTION	<p>Time at which an individual debtor who is claiming exemption under § 522(b)(3)(A) in property of the kind described in § 522(p)(1) with a value in excess of the amount set out in § 522(q)(1), for the debtor to file a statement as to whether there is any proceeding pending in which the debtor may be found guilty of a</p>

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POST-CONFIRMATION	ACTION AND DEADLINES
FOR DISCHARGE	felony of a kind described in § 522(q)(1)(A) or found liable for a debt of the kind described in § 522(q)(1)(B). Fed. R. Bankr. P. 1007(b)(8), 1007(c)
30 DAYS POST-FILING MOTION TO DISMISS/CONVERT	Court must commence hearing on motion. 11 U.S.C. §1112(b)(3)
15 DAYS POST-COMMENCEMENT OF HEARING ON MOTION TO CONVERT/DISMISS	Court must rule on motion, unless movant consents to continuance. 11 U.S.C. §1112(b)(3)
10 DAYS AFTER BECOMING AWARE OF AN INTEREST IN PROPERTY POST-PETITION	Deadline to amend schedules. Fed. R. Bankr. P. 1007(h)
270 DAYS AFTER REQUEST FOR TAX DETERMINATION MADE TO STATE OR LOCAL AUTHORITY IN THE CASE OF AN ACTUAL CONTROVERSY	Court may declare tax repercussions. 11 U.S.C. §1146(b)

The Individual Debtor in Chapter 11: **An Overview**

Definition

An individual debtor who may be a debtor under Chapter 7 may be a debtor under Chapter 11.
11 U.S.C. §109(d)

An individual with noncontingent liquidated unsecured debts equal to or greater than \$336,900.00 and noncontingent, liquidated, secured debts equal to or greater than \$1,010,650.00 may not be a debtor under Chapter 13 but may reorganize under Chapter 11.
11 U.S.C. §109(e), Toibb v. Radloff, 501 U.S. 157 (1991).

Filing the Petition

An individual debtor in Chapter 11 must complete mandated credit counseling within 180 days prior to the filing of the petition.
11 U.S.C. §109(h)

An individual debtor may pay the bankruptcy filing fees over four installments.
28 U.S.C. §1930(a)(7); Fed. R. Bankr. P 1006(b)

Property of the Estate

The property of the estate in an individual debtor's case under Chapter 11 includes not only the debtor's property as specified under §541 at the commencement of the case, but also any such property acquired after the commencement of the case and prior to its closure, dismissal or conversion and all earnings from services performed after the commencement of the case and prior to its closure, dismissal or conversion.
11 U.S.C. §1115(a)

Plan, Confirmation, and Discharge

An individual debtor in Chapter 11 does not receive a discharge of his/her debt until the court issues an order upon completion of all plan payments.
11 U.S.C. §1141(5)(a)

An individual debtor in a Chapter 11 must complete financial management course prior to entry of discharge.
11 U.S.C. §1141(d)(3)(C)

The debt of an individual debtor may be discharged prior to completion of all plan payments, after notice and a hearing, if the value distributed to unsecured creditors is not less than what would be received under Chapter 7, modification of the plan is impracticable and debtor is not subject to §522(q)(1) and there is no proceeding pending in which the debtor could be found guilty of a felony of the kind described in §522(q)(1).
11 U.S.C. §1141(5)(b)

Confirmation does not discharge an individual's debts excepted from discharge under 11 U.S.C §523; 11 U.S.C. §1141(d)(2).

A complaint objecting to discharge may be filed up to a date no later than the first date set for hearing on confirmation.

Fed. R. Bankr. P. 4004(a)

The plan of an individual debtor may be modified by the debtor, Chapter 11 Trustee, US Trustee, or holder of an allowed unsecured claim after confirmation of the plan but prior to the completion of payment, regardless of whether the plan has been fully consummated, in order to make adjustments to the amount, distribution and duration of payments made under the plan.

11 U.S.C. §1127(e)

The plan of an individual debtor may be confirmed over the objection of an allowed unsecured claimant so long as the value to be distributed as of the effective date of the plan is not less than the amount of such claim, or the value of the property is not less than the projected disposable income of the debtor (as defined in 11 U.S.C.§1325(b)(2)) to be received in the 5-year period beginning on the date on which the first payment is due or during the period for which the plan provides payment, whichever is longer.

11 U.S.C. §1129(a)(15)

The absolute priority rule does not apply to plans of individual debtors who may retain property included in the estate under 11 U.S.C. §1115 subject to the requirements of 11 U.S.C. §1129(a)(14).

11 U.S.C. §1129(b)(2)(B)(ii)

On or after the date of the final plan payment or the motion for discharge, an individual debtor who is claiming an exemption under §522(b)(3)(A) in property of the kind described in §522(p)(1) with a value in excess of the amount set out in §522(q)(1) must file a statement as to whether there is any proceeding pending in which the debtor may be found guilty of a felony of a kind described in §522(q)(1)(A) or found liable for a debt of the kind described in §522(q)(1)(B).

Fed. R. Bankr. P. 1007(b)(8), 1007(c)

The Small Business Debtor in Chapter 11: **An Overview**

Definition

Under the Code, a “small business debtor” is an individual or entity engaged in commercial activities and having total noncontingent liquidated secured and unsecured debt not exceeding \$2,190,000.00, exclusive of debts owed to affiliates or insiders. A person who is primarily engaged in the owning or operating of real property is not a small business debtor under the Code.

11 U.S.C. §101(51D)

A debtor must state on the petition whether the debtor is a small business debtor. In an involuntary case, the debtor has 15 days to file such a statement with the court following entry of the order for relief. The debtor’s self-classification is valid unless and until the court orders a statement that the debtor is incorrect.

Fed. R. Bankr. P. 1020 (a)

If a committee of unsecured creditors has been appointed, the case may be a small business case only if the court enters an order determining that the committee has not provided effective oversight of the debtor and the debtor satisfies all other requirements for a small business debtor. The debtor may at any time file a request for determination of whether the committee has been sufficiently active; the US Trustee or a party in interest may also file such a request within a reasonable time of the committee’s failure.

Fed. R. Bankr. P. 1020(c)

Reporting Requirements

A small business debtor, in addition to fulfilling the filing requirements of all debtors under Chapter 11, must also file periodic reports detailing:

1. The debtor’s profitability, as defined by the Code in 11 U.S.C. §308(a);
2. Projected cash receipts and disbursements;
3. Comparison of actual versus projected cash receipts and disbursements;
4. Whether debtor is in compliance with all Code provisions and has timely filed all tax and other required government filings and timely paid all taxes and expenses, and if not, what the failures are, how and when they will be remedied and at what cost;
5. Such other matters that are in the best interest of the debtor and creditors.

11 U.S.C. §308(b)

At the time of filing or within 7 days of the order of relief in an involuntary case, a small business debtor must submit to the court:

1. Most recent balance sheet;
2. Statement of operations;
3. Cash-flow statement; and
4. Federal income tax return; or
5. A sworn statement that no such documents have been prepared or filed.

11 U.S.C. §1116(1)

A small business debtor must also:

1. Attend all meeting scheduled by the court;

2. Timely file all schedules and statements of financial affairs;
3. File all required post-petition financial and other reports;
4. Maintain insurance in accordance with industry standards;
5. Timely file all tax returns and pay all taxes entitled to administrative expense priority, except those being appropriately contested; and
6. Allow U.S. Trustee or its designate, after reasonable prior written notice, to inspect business premises, books and records.

11 U.S.C. §1116(2)-(7)

Creditor's Committee

On the request of a party of interest and for cause, the court can order that a creditor's committee not be appointed.

11 U.S.C. §1102(a)(3)

Plan and Disclosure Statement

In a small business case, only the debtor can file a plan within the first 180 days after the order of relief, unless the court extends that time to up to 300 days upon notice and a hearing. However, the time may only be extended if the debtor shows by a preponderance of the evidence that the plan will be confirmed within a reasonable time, a new deadline is imposed and the order extending time is signed prior to the expiration of the existing deadline.

11 U.S.C. §1121(e)

A small business debtor may be excused from preparing a separate disclosure statement if the court determines that the plan itself provides adequate information, as defined by §1125(a)(1), and that a separate statement is not necessary.

11 U.S.C. §1125(f)(1)

The court can approve a small business debtor's disclosure statement submitted on standard forms approved by the court.

11 U.S.C. §1125(f)(2)

The court can conditionally approve a disclosure statement subject to approval after notice and a hearing. This hearing can be combined with the plan confirmation hearing. Under such circumstances, a small business debtor may solicit acceptances and rejections based on the conditionally approved statement so long as adequate information is provided to each holder of a claim or interest and the debtor mails the conditionally approved disclosure statement no later than 25 days prior to the hearing.

11 U.S.C. §1125(f)(3)

On or before the conditional approval of a small business debtor's disclosure statement, the court must set a deadline for acceptance or rejection of the plan and for filing objections to the disclosure statement, as well as fix a date for a hearing on final approval of the statement and for a hearing on confirmation.

Fed. R. Bankr. P. 3017.1

The plan in a small business case must be confirmed within 45 days after its filing unless that time period is extended pursuant to §1121(e)(3). 11 U.S.C. §1129(e)