

# Concurrent Session

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## Individual Chapter 11 Cases

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**HIGH INCOME INDIVIDUALS: CHAPTER 11 BY AND FOR THE PEOPLE**

**AMERICAN BANKRUPTCY INSTITUTE  
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Individuals have always been eligible for relief under chapter 11, but few took advantage of it. It was cheaper and simpler for individuals who had large amounts of unsecured debt to file under chapter 7. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) changed that.

First, individuals who have primarily *consumer debts*<sup>1</sup> and whose income exceeds the median for their state and household size<sup>2</sup> must face the dreaded means test of section 707(b). As a risk, some high earning debtors may have their chapter 7 cases dismissed.

Second, one of the stated purposes of section 707(b) was to force high earning individuals to file chapter 13 cases rather than chapter 7. Congress did not, however, change the eligibility requirements for chapter 13. Therefore, some people will find themselves unable to employ either chapter 7 or 13, and may be forced to consider chapter 11 instead.

Third, perhaps in order to deal with an influx of chapter 11 cases filed by individual debtors, BAPCPA attempted to deal with some of the shortcomings of chapter 11 as a remedy for individuals and to bring a chapter 11 case for an individual more in line with that of a case under chapter 13. *See* chart attached hereto. In doing so, however, Congress probably created as many problems as it solved.

The most important changes for individuals and pre-filing considerations<sup>3</sup> are as follows:

1. **Credit Counseling.** All individual debtors, regardless of chapter choice and regardless of whether their debts are primarily consumer debts, must obtain a certificate demonstrating the individual attended a group or individual briefing on credit counseling and budget analysis. § 109(h)(1). The credit counseling session is required in order to be eligible for relief under chapter 11 or any other chapter. Congress apparently thought an individual who has the sophistication to choose chapter 11 and the wherewithal to pay tens of thousands of dollars to chapter 11 counsel really needed a fifty dollar, ninety minute counseling session, conducted over the phone or online.

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<sup>1</sup> *See Toibb v. Radloff*, 111 S. C. 157 (1991).

<sup>2</sup> Individual filings for professionals and other high net-worth individuals with business debt, which are most likely to be abusive, will still be eligible for chapter 7 because the debts are not primarily consumer debts.

<sup>3</sup> These materials do not deal with whether some changes made in chapter 11 for individual debtors are unconstitutional under the Thirteenth Amendment. *See In re Clemente*, 409 B.R. 288 (Bankr. D.N.J. 2009); Grassgreen, Debra, *Individual Chapter 11 Cases After BAPCPA: What Happened to the “Fresh Start?”*, 2006 Ann. Surv. Bankr. Law Part I, § 12, at 324 (Sept. 2006) (“The changes to individual Chapter 11 may run afoul of the constitutional prohibition on involuntary servitude.”); Keach, Robert J., *Dead Man Filing Redux: Is the New Individual Chapter Eleven Unconstitutional?*, 12 Am. Bankr. Inst. L. Rev. 483 (Winter 2005); Chemerinsky, Erwin, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 571, 583-90 (Summer 2005). The constitutional issues would be particularly acute in an involuntary chapter 11 case against an individual.

Individual debtors must also file copies of all payment advices or evidence of payment from an employer for the sixty days preceding the petition date and certain tax returns.

2. **Expanded Definition of Estate Property.** In an individual chapter 11 case, property of the estate includes the individual debtor’s postpetition personal service income and all property the debtor acquires during the case, § 1115. This is the same as in a chapter 13 case, § 1306(a). This change has far-reaching implications.

**a. Payment of Postpetition Expenses**

- i. Under § 1115, the debtor will have no property or earnings that are not property of the estate. How can the debtor pay expenses prior to plan confirmation?
- ii. One court has noted that, under § 363(c), the debtor can use estate property in the ordinary course of business. Although an individual debtor could presumably buy food, as such a purchase would be in the ordinary course of the debtor’s business, many other transactions may not be. In *In re Goldstein & Goldstein*, 383 B.R. 496, 499 (Bankr. C.D. Cal. 2007), the bankruptcy court held that the ordinary course of business provision “authorizes a debtor to buy bread and probably to purchase a ticket to travel to a court hearing,” but that joint debtors who were filing for divorce after they filed their chapter 11 bankruptcy petition could not use their postpetition income to pay divorce counsel unless such an expense is authorized for property of the bankruptcy estate *Id.*
- iii. Where is the line drawn between expenses in the ordinary course of business or out of the ordinary course of business? Will chapter 11 individual debtors need court permission to use postpetition income to take a family vacation to the beach, pay for their children’s’ orthodontia, buy a new television, etc.? What about legal fees for divorce cases, nondischargeability complaints, and other work that benefits the debtor but does not seem to benefit the estate?
- iv. Does it matter that a portion of the debtor’s postpetition wages would be exempt under applicable state and federal nonbankruptcy law?
- v. Should counsel file and obtain court approval of a budget at an early stage in the case?

- b. **Plan Funding.** Section 1123, “Contents of plan,” has been amended to account for the funding of an individual’s plan with earnings acquired postpetition. The plan must “provide for the payment to creditors under the plan of all or such

portion of the individual debtor's postpetition personal service earnings . . . or other future income of the debtor as is necessary for the execution of the plan." § 1123(a)(8). This section appears to provide flexibility for funding an individual debtor's plan.. The following choices seem to be available:

- i. Monthly payments are not required, only enough to provide for execution of the plan;
- ii. All earnings are not required, only enough to provide for execution of the plan;
- iii. No earnings are apparently required if the plan can be funded out of "other future income." There is indication of what this may mean, but it does provide flexibility for individuals who do not have periodic income or may be able to develop or are entitled to receive income out of an alternative source to traditional earnings. This is an important provision because it may make chapter 11 the only available option to an individual who does not have "regular income," is therefore ineligible for chapter 13 under § 109(e), and who fails the means test.

3. **Minimum Plan Payments.** If an unsecured creditor objects to confirmation of a plan, the debtor must either pay unsecured creditors in full or distribute property of a value not less than the debtor's projected disposable income, as defined at § 1325(b)(2), for the longer of five years or the term of the plan. § 1129(a)(15).

- a. **Chapter 13 Distinguished.** The test is different from the disposable income requirement under § 1325(b) of the Code. Section 1325(b)(1) provides that if the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not confirm the plan unless, as of the effective date of the plan, the present value of the plan distributions equals the amount of the claim, or "the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan."
  - i. There is a raging dispute in the case law about whether the reference to the "applicable commitment period" creates a temporal requirement (the duration of the plan payments) or a requirement of dollar amount. There is no comparable language in § 1129(a)(15).
- b. **Allowable Expenses.** Section 1129(a)(15)(B) says that projected disposable income of the debtor is "defined in § 1325(b)(2). That section says that "disposable income" (note that *projected* disposable income is nowhere defined)

current monthly income received by the debtor, less amounts reasonably necessary to be expended for the maintenance or support of the debtor or a dependant of the debtor. Section 1325(b)(3) goes on to provide that, if the debtor's income exceeds the applicable median for the debtor's state of residence and family size, the debtor's expenses are determined in accordance with the mechanical means test of § 707(b)(2)(A) and (B). But § 1129(a)(15)(B) incorporates only § 1325(b)(2), not § 1325(b)(3). At least two courts have held that a chapter 11 debtor's expenses are determined based upon judicially determined standards, as opposed to the chapter 7 means test deductions specified by § 1325(b)(3). See *In re Roedemeier*, 374 B.R. 264 (Bankr. D. Kan. 2007), and *In re Gray*, 2009 WL 2475017 (Bankr. N.D.W.Va. 2009).

i. The mechanical test may actually favor some debtors. Under the judge-made standard, courts frequently held that the debtor's secured debt service was excessive and required debtors to dispose of extravagant homes, vehicles, and the like rather than continue to make the payments. Under § 707(b)(2)(A)(iii), all payments on secured debts are deductible for purposes of computing projected disposable income. Debtors with high secured debt service thus may face lower plan payments, and may find it easier to retain extravagant and heavily encumbered property, under the mechanical test.

c. **Mechanical or Forward Looking Test.** In *Hamilton v. Lanning* (*In re Lanning*), \_\_\_ U.S. \_\_\_ (2010), the Supreme Court resolved a controversial issue in chapter 13 cases under BAPCPA: Whether "projected" disposable income (not defined in BAPCPA) allows a "forward-looking approach based on a debtor's historical earnings and expenses" or only a "mechanical approach." The Court resolved a split in the circuits. In *Lanning*, the Tenth Circuit adopted the "forward-looking approach," as did the Fifth, Seventh and Eighth Circuits. *In re Nowlin*, 576 F. 3d 258 (5th Cir. 2009); *In re Turner*, 574 F.3d 349 (7th Cir. 2009); and *Coop v. Frederickson* (*In re Frederickson*), 545 F.3d 652 (8th Cir. 2008). The Ninth Circuit adopted the "mechanical approach" in *Maney v. Kagenveama* (*In re Kagenveama*), 541 F.3d 868 (9th Cir. 2008). The Supreme Court selected the forward-looking approach, under which a chapter 13 debtor's six-month, prepetition "disposable income" (as defined by statute) is presumed to be the debtor's "projected disposable income," but that the plan payments can be adjusted to reflect changes in the debtor's income or expenses that are "known or virtually certain at the time of confirmation." The forward-looking approach allows courts to consider the debtor's actual financial circumstances at the time of plan confirmation in determining the any required contribution of earnings. The forward looking approach will give individual chapter 11 debtors substantially more latitude in their plans.

- d. **Responding to Objections.** If there is an objection based on § 1129(a)(15), several responses may be available.
- i. If the objecting creditor holds a disputed claim, the debtor could object to the claim and attempt to obtain a hearing on the objection within the time frame required for confirmation of a plan. This may be difficult in certain cases.
  - ii. While case law concerning § 1325(b)(1), the chapter 13 corollary, may be of assistance, can the debtor buy off the objection by simply paying the objecting creditor's claim in full, without running afoul of §§ 1122 and 1123(a)(4)?
  - iii. Can the debtor defer the first payment due under the plan in order to increase or decrease the amount required to be paid to creditors or to meet the best interest test, since funding with disposable income is for five years from the date the first payment is due under the plan, not the effective or confirmation date?
  - iv. What if the debtor has little or no "disposable income" as defined? Note that "disposable income" means "current monthly income" minus specified expenses. Section 1325(b)(2)(B) allows debtors engaged in business to deduct "expenditures necessary for the continuation, preservation, and operation of such business." (This appears to be a case where Congress has borrowed from chapter 13 without adjusting for the fact that chapter 13 is only available for individuals with "regular" income which is not the case in chapter 11).
  - v. Note that neither a creditors committee nor the U.S. Trustee may raise this issue. Only a creditor holding an allowed unsecured claim may object to plan confirmation on this basis. But a creditor can probably object even if the creditor's class has accepted the plan.

4. **Absolute Priority and Cramdown for Individual Debtors.**

- a. Prior to BAPCPA, section 1129(b)(2) provided that the court could confirm a plan over the objection of a dissenting class of unsecured creditors if the plan was "fair and equitable" with respect to the dissenting class. One component of the "fair and equitable" test is the "absolute priority" rule; unless the plan provides for full payment to the dissenting class, no junior class (including equity holders) could receive or retain anything under the plan. The absolute priority rule poses obvious problems where the debtor is an individual.

- b. BAPCPA modified the absolute priority rule in cases involving individual debtors. Section 1129(b)(2)(B)(ii) allows the debtor to “retain property included in the estate under section 1115” subject to the required payment of postpetition domestic support obligations. There are at least three ways to read this section.
- i. Some courts hold that Congress intended to exempt individual chapter 11 debtors from the absolute priority rule altogether. *See In re Johnson*, 402 B.R. 851, 852-53 (Bankr. N.D. Ind. 2009), *In re Roedemeier*, 374 B.R. 264 (Bankr. D. Kan. 2007); *In re Tegeder*, 369 B.R. 477, 480-81 (Bankr. D. Neb. 2007). According to these courts, a chapter 11 debtor may retain prepetition and postpetition property and still cram down a plan of reorganization over the objection of a creditor.
  - ii. One court has held that an individual debtor may not satisfy the absolute priority rule while retaining exempt property. *In re Gosman*, 282 B. R. 45, 49-52 (Bankr. S.D. Fla. 2002). Despite the amendment to § 1129, the *Gosman* case may still be good law. *But see In re Bullard*, 358 B.R. 541, 545 (Bankr. D. Conn) (plan can be confirmed notwithstanding that the Debtor retains exempt property of the estate.) The rationale is that § 1129 only permits the chapter 11 debtor to retain property included in the estate under § 1115 and that exempt property is not property of the estate (at least once the deadline for objecting to exemptions has run).
  - iii. Another interpretation would hold that individual debtors can retain any property included in the estate only by virtue of § 1115, and not property included in the estate under § 541. In other words, the debtor could retain postpetition personal services income without violating the absolute priority rule, but not other property. This view is hard to reconcile with section 1115's inclusion of the phrase “in addition to the property specified in section 541.”
5. **Domestic Support Obligations.** Section 1129(a)(14) provides that a debtor who is required to pay a domestic support obligation by virtue of a judicial or administrative order or statute, must have paid all postpetition payments required to be paid before the plan may be confirmed. This provision is new verbiage but in reality the requirement always existed. A postpetition domestic support obligation is an administrative expense claim which always had to be paid on the effective date of the plan. § 1129(a)(9).
6. **Tax Provisions.** Section 1129(a)(9)(C) has clarified the payment of priority tax payments under a plan. (This section applies to all chapter 11 cases.) The claim holder must receive: a) “regular installment payments in cash”; b) of a total value as of the effective date of the plan, equal to the allowed amount of the claim; and c) over a period

not longer than five years after the date of the order for relief. No longer will the debtor and counsel have to puzzle over the six-year from the date of assessment provision and the differing payment terms it created for taxes assessed in different years. In addition, the payments must be made in a manner “not less favorable than the most favored nonpriority unsecured claim provided for by the plan.” Given the likely treatment of unsecured creditors this should not be a hard test to meet.

7. **Small Business Cases.** In certain cases, an individual chapter 11 debtor may be considered a small business debtor. The Code defines a small business debtor as a person engaged in commercial or business activities with total debt under \$2,190,000 (excluding debt to insiders) and for which there is no active committee. § 101(51D). Section 1129(e) requires that in a small business case, the court “shall confirm a plan” that complies with all the applicable confirmation requirements within forty-five days of the date on which the plan is filed, unless the time for confirmation is extended under § 1121(e)(3).
  - a. Section 1121(e)(1) is the exclusivity period for small business cases. It provides that only the debtor may file a plan for the first 180 days of the case, unless extended or the court orders otherwise. Section 1121(e)(2) goes on to provide that the plan and a disclosure statement, if any, shall be filed not later than 300 days following the entry of the order for relief. These provisions appear to mean that while the debtor may enjoy the exclusivity period for the first 180 days of the case, a plan does not have to be filed within this period.
  - b. Does the 300 day limit apply to only to the debtor’s plan or also to a creditor’s plan? One court has held that the answer is no; there is no statutory deadline for any party in interest other than the debtor to file a plan. *In re Florida Coastal Airlines, Inc.*, 361 B.R. 286, 290-91 (Bankr. S.D. Fla. 2007).
    - i. The issue of a creditor’s competing plans raises constitutional issues including a violation of the 13th Amendment. Theoretically a creditor could propose a plan which subjects the debtor’s disposable income, for a minimum of five years, to distribution in favor of creditors against the debtor’s will. Query, however, whether or not the debtor would remain income-producing through employment or otherwise during the term of the plan.
  - c. Failure to comply with the time periods may constitute “cause” for conversion or dismissal. § 1112(b)(4)(F), (J).
  - d. These time periods may only be extended if the debtor demonstrates, following notice to parties in interest, that “it is more likely than not” that the court will

confirm “a plan” within a reasonable period of time. The debtor must prove this point by a preponderance of the evidence. The order extending time must be entered before the existing deadline expires and the court must set a new deadline when the order is signed. § 1121(e)(3).

- e. Timing is everything in these cases. The plan confirmation hearing must occur within forty-five days of the date on which the plan is filed. The disclosure statement may be conditionally approved and final approval may occur at the confirmation hearing. However, a conditionally approved disclosure statement must be mailed to creditors no later than twenty-five days before the confirmation hearing. Assuming the plan and disclosure statement are filed on the same day, the disclosure statement must be conditionally approved and mailed within twenty days. Creativity may get you around this problem. Try filing the disclosure statement with the plan attached as an exhibit. This would enable you to argue that the plan has not been “filed” and that the 45-day period has not begun to run. You would file the plan only after conditional or final approval of the disclosure statement is granted.
8. **Discharge Issues.** BAPCPA added special provisions to section 1141 that govern the discharge of individuals under chapter 11. § 1141(d)(5).
- a. **Full Payment Before Discharge.** An individual will not receive a discharge until all plan payments are completed “unless after notice and a hearing the court orders otherwise for cause.” § 1141(d)(5)(A). This will generally take five years, although it is easy to contemplate plans extending beyond this time frame. This is a substantial change from prior law, under which all chapter 11 debtors, including individuals, received a discharge upon plan confirmation. The statute gives no hints about what might constitute cause for an earlier discharge.
  - b. **Closing The Case.** Must the debtor leave the case open (and continue paying quarterly fees to the UST) for the five years, or can the debtor close the case following plan confirmation with the right to reopen at the end of five years in order to obtain the discharge? If the case is closed, who would monitor the debtor’s compliance and bring defaults to the attention of the court? At least four courts have considered this issue, with varying results. The Northern District of West Virginia, in *In Re Ball*, rejected the debtor’s request for a discharge and to close the plan prior to the completion of all payments under the plan. 2008 WL 2223865 (Bankr. N.D.W.Va. 2008). Similarly, in *In re Belcher*, the Western District of Virginia denied an individual debtor’s motion for an early discharge and simultaneously found that it was inappropriate to close the case prior to the completion of all payments. 410 B.R. 206 (Bankr. W.D.Va. 2009). Compare these cases to *In re Sheridan*, 391 B.R. 287 (Bankr. E.D.N.C. 2008), and *In re Johnson*, 402 B.R. 851 (Bankr. N.D. Ind. 2009), in which the *Sheridan* court granted a discharge upon confirmation and the *Johnson* court closed the case prior

to the completion of plan payments, thereby eliminating the requirement of quarterly payments to the UST.

- c. **Early Discharge.** The debtor may apply for a discharge, on notice and hearing, before all payments are made under the plan if several elements are met: a) the value of property already distributed to unsecured creditors is equal to what they would have received in a chapter 7 case, as of such date; b) modification of the plan is not practicable; and c) the court finds after notice and hearing 10 days before discharge, § 522(q) provisions relating to securities law crimes are not applicable. (Note that the debtor does not have to have been convicted.) § 1141(d)(5)(B). The test is less stringent than the chapter 13 test, which additionally requires the debtor to demonstrate that the failure to complete payments is due to circumstances beyond the debtor’s control. § 1328(b).
  - d. **Section 523 Exceptions to Discharge Applicable.** Chapter 11 does not discharge an individual debtor from any debt excepted from discharge under § 523. § 1141(d)(2). Thus, an individual debtor in chapter 11 gets a narrower discharge than a chapter 13 debtor. § 1328(a).
  - e. **Extra Credit Question.** What if anything does § 1141(a)(5)(C) mean?
9. **Plan Modification.** The plan may be modified at any time after confirmation but before payments are completed. § 1127(e). (In a nonindividual case, modification is not allowed after the plan is “substantially consummated,” which usually occurs long before the plan payments are completed. § 1127(b).) As in a chapter 13 case, the modifications may increase or reduce payments to creditor classes or alter the time period for plan payments. § 1127(e). Adequate disclosure of an amendment is required. § 1127(c). The debtor, the UST or a creditor holding an allowed unsecured claim may request a modification.
- a. Fed. R. Bankr. P. 3019(b) governs the notice and hearing procedure for postconfirmation amendments.
  - b. There is tension between § 1129(a)(15) and § 1127(e). Under § 1129, the plan payments are based on “projected” income as of the confirmation date. Does a creditor then have the right to seek modification of a plan to recover actual income received in excess of projections? This excess is allowed to be retained by the debtor under § 1129(b)(2).
10. **Dismissal.** The grounds for dismissal or conversion of a chapter 11 case are found at § 1112. Many of the grounds for dismissal or conversion could apply to an individual case. These selected grounds include the failure of the debtor to: a) maintain appropriate

insurance that poses a risk to the estate or to the public; b) unexcused failure to satisfy timely any filing or reporting requirement established under Title 11 or the Bankruptcy Rules; c) failure to attend a 341 meeting or Rule 2004 examination, without good cause shown by the debtor; d) failure to timely provide information or attend meetings reasonably requested by the US Trustee; e) failure to timely pay taxes owed postpetition or file postpetition tax returns; and f) failure to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.


- a. Section 1112(b)(1) and (2) appear to make it clear that conversion or dismissal is not required if, due to unusual circumstances specifically identified by the court, conversion or dismissal is not in the best interests of creditors and the estates. The debtor may be able to avoid conversion or dismissal by establishing that there is a reasonable likelihood that a plan will be confirmed within the timeframes established under sections 1121(e) and 1129(e) or, if these time periods don't apply, within a reasonable time.

	CHAPTER 11	CHAPTER 13
<b>Fees</b>		
Filing Fees	\$1,039	\$274
Trustee's Fees	None unless trustee appointed. If appointed, compensation based on "commission" set by Bankruptcy Code §§ 326(a), 330(a)(7).	Up to 10% of plan payments made by the trustee 28 USC § 586(e)(1)(B)(I).
UST Fees	Minimum \$325 per quarter; increases as disbursements increase.	None.
Attorney's Fees	Depends on complexity: \$100,000 to \$1,000,000+	\$4,000 to \$4,500 normal (Yikes! if fee apps filed)
Committee Fees	Committee authorized to employ attorney and other professionals at estate's expense, Bankruptcy Code §§ 330(a), 503(b)(2), 1103(a). Small business debtors may ask that no committee be appointed.	No committees, no fees.
<b>Financial Reporting</b>		
Prepetition Counseling	All individual Debtors must go through credit counseling prior to filing a prepetition. Bankruptcy Code § 109 (b)(1)	
Prepetition Tax Return	If requested by the UST, Court, or party in interest, federal income tax returns for the 3 years prior to the petition and unfiled when the case was commenced must be filed with the Court. Bankruptcy Code § 521 (f)(2), (g)(2).	Ditto  Plus, not later than 7 days before the first date set for the creditors' meeting, a chapter 13 debtor must provide the trustee, and any creditor making a timely request, with a copy of the federal income tax return or transcript for the most recent pre-petition tax year for which a return was required § 521 (e); Interim Rule 4002(b)(3) & (4).  Plus, § 1308(a) requires that all delinquent tax returns due for tax periods ending during the 4-year period prior to the filing of the petition be filed with the appropriate tax entity no later than the day before the first scheduled date for the meeting of

	<b>CHAPTER 11</b>	<b>CHAPTER 13</b>
		creditors.
Postpetition Tax Returns	If requested by the UST, Court, or party in interest, federal tax income tax returns filed while the case is pending must be filed with the Court. Bankruptcy Code § 521 (f)(1), (g)(2).	Ditto.  Plus, if requested by UST, court, or any party in interest, an annual statement of income and expenditures identifying the amount and sources of income, those responsible for the support of a dependent of the debtor, and those who contributed and the amounts contributed to the debtor's household § 521 (f)(4) & (g)(1).
Statements & Schedules	11 USC § 521 (a)(1) requires all debtors to file a list of creditors, schedule of assets and liabilities, schedule of current income and current expenditures, and statement of financial affairs, Bankruptcy Code § 342(b) certificate (only if debts are primarily consumer debts) copies of employer payment advices, statement of monthly net income, and statement of reasonably anticipated increases in income or expenditures.	Ditto.  But, in chapter 13 cases, if these documents are not filed within 45 days of the filing of the petition, the case is "automatically" dismissed on the 46th day § 521 (l). Not so in chapter 11 cases.
Disclosure Statement	If the debtor is not a small business debtor, the plan must be accompanied by a disclosure statement. It must be approved as including "adequate information" necessary for a "hypothetical investor" to make an informed judgment about the plan before acceptances to the plan are solicited. Bankruptcy Code § 1125. In Central District of California, the form plan and disclosure statement should be used (and certain judges have individual forms).  In a small business case, the court may permit a combined plan and disclosure statement; or use of a form disclosure statement. The court may also conditionally approve the disclosure statement, subject to final approval at the confirmation hearing. Bankruptcy Code § 1125(f); Rules 3016(b), 3017.1.	None.

	CHAPTER 11	CHAPTER 13
Financial Reports	When Bankruptcy Code § 308 becomes effective, small business debtors must report their current and recent financial status, profitability, cash flow projections, comparisons of actual and projected receipts and disbursements, compliance with the postpetition requirements imposed by the Bankruptcy Code and the Bankruptcy Rules, filing of tax returns, and payment of all administrative expenses and taxes. To a degree, this information is included in the monthly operating reports required by the Office of the United States Trustee.	Section 308 will not apply in chapter 13 cases.
Disposable Income	Official Form 22B must be filed. Rule 1007(b)(5). This form is much less detailed than Official Form 22C. Means test deductions required by Bankruptcy Code § 1325(b)(3) are not applicable in a chapter 11.	Official Form 22C must be filed Interim Rule 1007(b)(6)
Property of the Estate	All property is included in the bankruptcy estate 11 U.S.C. § 541 (a). The estate includes property acquired after the petition is filed as well as an individual debtor's earnings from services Bankruptcy Code §§ 1115 (a) and (b).	Ditto.
<b>The Plan</b>		
Who May File a Plan and When it Must be Filed	<p>In a small business case, only the debtor may propose a plan in the first 180 days of the case. Thereafter, any party may file a plan. All plans must be proposed by the 300<sup>th</sup> day. Bankruptcy Code § 1121 (e).</p> <p>In all other cases without trustees, only the debtor may file the plan in the first 120 days. If filed, the debtor has until the 180<sup>th</sup> day to solicit acceptances of the plan. If a trustee is appointed and no plan is filed in the first 120 days, or if the debtor fails to obtain the acceptance of the plan by the 180<sup>th</sup> day, any party in interest may propose a plan Bankruptcy</p>	Only the debtor may propose a plan § 1321. It must be filed within 15 days of the filing of the petition. Rule 3015(b).

	<b>CHAPTER 11</b>	<b>CHAPTER 13</b>
	<p>Code § 1121(a), (c), &amp; (d).</p> <p>These time periods can be extended for up to 18 months after petition date (to file a plan) and 20 months after petition date (for acceptances).</p>	
<b>Earliest Confirmation Date</b>	<p>A meeting of creditors may occur no earlier than 20 days and no later than 40 days after the order for relief. Bankruptcy Rule 2003(a). However, nothing in chapter 11 requires that the meeting occur or be completed prior to confirmation. If the debtor solicited prepetition acceptances to a “prepackaged” plan, the court may even dispense with the meeting Bankruptcy Code § 341 (e).</p> <p>25 days notice of a hearing on disclosure statement and deadline to object to disclosure statement and 25 days’ notice of a confirmation hearing and deadline to object to confirmation must be given. (Total process = 60 to 90 days). Rule 2002(b).</p> <p>If a small business debtor files a plan with the petition, if conditional approval is given to the disclosure statement on the 1<sup>st</sup> day of the case, and if objections may be raised at the confirmation hearing, the hearing could take place as early as the 25<sup>th</sup> day. Bankruptcy Code § 1129(e) requires that the plan of a small business debtor be confirmed no later than 45 days after the plan is filed.</p>	<p>A meeting of creditors may occur no earlier than 20 days and no later than 50 days after the order for relief Rule 2003(a).</p> <p>Parties must receive 20 days’ notice of the meeting. Rule 2002(a)(1)/</p> <p>25 days’ notice of a confirmation hearing and deadline to object to confirmation must be given Interim Rule 2002(b).</p> <p>Confirmation hearing may take place no earlier than 20 days and no later than 45 after meeting of creditors § 1324(b)</p> <p>Assuming: notice of the meeting served on the first day of the case; a meeting on the 20<sup>th</sup> day; notice of the confirmation hearing served on 15<sup>th</sup> day; and objections raised at the confirmation hearing, confirmation could occur as early as the 40<sup>th</sup> day.</p>
<b>Confirmation Standards</b>		
<b>Priority Debt</b>	<p>Must be paid in full Bankruptcy Code § 1129(a)(9).</p> <p>Tax priority claims may be paid in installments. If so, interest must be paid, the installments must be regular, and be over a period ending not later than 5 years after the order for relief Bankruptcy Code</p>	<p>Must be paid in full but if the plan has a term of 5 years and provides for the payment of all disposable income to creditors, the plan may provide for less than full payment of a domestic support obligation assigned to, owed directly to, or recoverable by, a governmental unit §§</p>

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	<p>§ 1129(a)(9)(C). Nontax priority claims must be paid on the effective date unless the class accepts deferred cash payments. When paid deferred cash payments, interest must be paid Bankruptcy Code § 1129(a)(9)(B)</p> <p>Debtor must be current on all post-petition domestic support obligations in order to confirm plan. Section 1129(a)(14).</p>	<p>507(a)(1)(B), 1322(a)(4).</p> <p>§ 1322(a)(2) does not require that interest be paid on priority claims when they are paid in installments. No restrictions on the debtor's ability to pay over the length of the plan.</p>
Voting	Creditors with impaired claims may vote. A class of claims accepts the plan when 1/2 in number and 2/3 in amount of the claims voting accept the plan Bankruptcy Code §§ 1124, 1126, 1129(a)(8).	Creditors may not vote.
Absolute Priority Rule	<p>If at least one impaired class of claims accepts the plan, it may be confirmed over the rejection of a class of unsecured claims if all claim holders in the rejecting class will be paid in full, or if no holder of a claim or interest junior to the rejecting class will receive or retain anything on account of such claim or interest. Bankruptcy Code § 1129(b)(1)(B)(I)-(ii).</p> <p>Bankruptcy Code § 1129(b)(2)(B)(ii) carves out an exception to the absolute priority rule permitting individual chapter 11 debtors to retain post-petition earnings except to the extent necessary to pay post-petition domestic support obligations.</p>	<p>Because creditors may not vote, there is no absolute priority rule.</p> 
Best interests	Unless the claim holder makes an election under Bankruptcy Code § 1111(b), a chapter 11 plan must provide to each holder of a claim in an impaired class not less than the present value of the amount that would be paid on such claim if the estate were liquidated under chapter 7 § 1129(a)(7).	A chapter 13 plan must provide to each allowed unsecured claim not less than the present value of the amount that would be paid on such claim if the estate were liquidated under chapter 7 § 1325(a)(4).
Best Efforts	If the holder of an allowed unsecured claim objects to confirmation, the plan must either pay unsecured claims in full, or the value of the property distributed	If the holder of an allowed unsecured claim or the trustee objects to confirmation, the plan must either pay the unsecured claims in full, or all projected disposable income must

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	<p>under the plan must be no less than the projected disposable income of the debtor. Bankruptcy Code § 1129(a)(15).</p> <p>Disposable income must be projected over the longer of the 5-year period following the first plan payment, or the entire period the plan provides for payments. Bankruptcy Code § 1129(a)(15).</p> <p>To project disposable income, the debtor's actual expenses, provided they are reasonably necessary for the maintenance or livelihood of the debtor, are deducted from current monthly income. The "presumed expenses" deducted from current monthly income under Bankruptcy Code § 1325(a)(3) are not applicable Bankruptcy Code §§ 1129(a)(15)(B) &amp; 1325(b)(2).</p>	<p>be applied to make payments to unsecured creditors § 1325(b)(1).</p> <p>Disposable income projected over 3 years must be devoted to the payment of unsecured creditors if the debtor's annualized current monthly income is less than median family income. If it is more, the commitment period increases to 5 years. §§ 1322(d), 1325(b)(1)(B) &amp; (b)(4).</p> <p>The method of projecting disposable income hinges on whether the debtor's <u>annualized current monthly income is greater than median family income</u>. If greater, the expenses deductible from debtor, current monthly income are limited by the presumed expenses used in the means test § 707(b)(2), 1325(a)(3) If less than or equal to median family income, actual expenses that are reasonably necessary for the maintenance or livelihood of the debtor are deductible from current monthly income as under § 1129(a)(15)(8) § 1325(b)(2).</p>
<b>Treatment of Certain Claims</b>		
Home Mortgages	<p>The plan may provide for the cure of any arrears on a home mortgage. Bankruptcy Code § 1123(a)(5)(G), (b)&amp;(d). "Curing" a default is distinct from modification of a claim <i>In re Lenington</i>, 288 B.R. 802 (Bankr N.D. III 2003).</p> <p>Unmatured, unaccelerated claims secured only by the debtor's home cannot be modified. Bankruptcy Code § 1123(b)(5).</p> <p>The exception to the anti-modification rule in chapter 13, Bankruptcy Code § 1322(c), is not applicable in chapter 11. As a result, it does not appear that a matured or accelerated home loan can be extended unless such is permitted by</p>	<p>The plan may provide for the cure of any arrears on a home mortgage. § 1322(b)(3).</p> <p>Unmatured, unaccelerated claims secured only by the debtor's home cannot be modified. § 1322(b)(2).</p> <p>§ 1322(c) permits chapter 13 debtors to cure defaults under a home mortgage unless and until the home is sold at a foreclosure sale. Also, notwithstanding the maturity of a home loan, the plan may provide for payment of the home loan through the plan pursuant to § 1325(a)(5)(8).</p>

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	applicable nonbankruptcy law.	
Other Secured Claims	<p>Unlike chapter 13, nothing in chapter 11 prevents an individual debtor from stripping down an undersecured claim into its secured and unsecured parts, and treating each part as a separate and distinct claim. Bankruptcy Code § 1129(b)(1)(A).</p> <p>Periodic payments to secured creditors need not be in equal installments. But see secured tax claims below.</p>	<p>Plan may not bifurcate certain undersecured claims into secured and unsecured constituent parts. § 1325(a)(9). This prohibition extends to claims secured by purchase money debt incurred within 910 days of the petition and secured by motor vehicles acquired for the personal use of the debtor or incurred during the 1-year period preceding the petition and secured by any other thing at value.</p> <p>If a secured claim is being paid through the plan in periodic payments, “such payments shall be in equal installments.” § 1325(a)(5)(B)(iii)(I).</p>
Secured Tax Claims	Secured tax claims that would otherwise be priority tax claims under Bankruptcy Code § 507(a)(8) were they not secured must be paid regular installments over a period ending 5 years after the order for relief and “in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan.” Bankruptcy Code § 1129(a)(9)(D).	No similar limitation.
Long Term Debt	<p>There is no limitation on the maximum duration of a chapter 11 plan. Consequently, it is possible to provide in the plan for the conversion of short-term debt to long-term debt.</p> <p>However, unless court orders otherwise, an individual chapter 11 debtor is not entitled to a discharge until the “completion of all payments under the plan.” Bankruptcy Code § 1141(d)(5)(A). Second, if an unsecured creditor objects, Bankruptcy Code § 1129(a)(15)(B) requires an individual chapter 11 debtor to commit all projected disposable income “during the period for which the plan provides payments.”</p>	<p>The only debt that may be treated as long-term debt is a debt that matures after the completion of the plan and is not modified by the chapter 13 plan. (Cure permissible)</p> <p>Provided a chapter 13 plan seeks only to cure an arrearage, long-term debt may continue beyond the length of the plan. § 1322(b)(3) &amp; (5).</p>

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<b>Duration of Plan</b>		
Minimum Length	<p>There is no mandatory minimum chapter 11 plan length. However, if the holder of an allowed unsecured claim objects to a plan that does not pay unsecured claims in full, “the value of the property distributed under the plan [must be] 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 payments, whichever is longer.” Bankruptcy Code § 1129(a)(15)(B).</p>	<p>There is no mandatory minimum chapter 13 plan length. But if the plan does not provide for payment of unsecured claims in full and if the trustee or an unsecured creditor objects, the plan must run 3 to 5 years depending on whether annualized current monthly income exceeds state median family income §§ 1322(d), 1325(b)(4)(A)(ii).</p>
Maximum Length	<p>Chapter 11 does not limit the length of chapter 11 plans.</p> <p>However, if an unsecured creditor objects, Bankruptcy Code § 1129(a)(15)(B) requires an individual chapter 11 debtor to commit all projected disposable income for 5 years or, if longer, “during the period for which the plan provides payments.”</p> <p>Also, unless the court orders otherwise, no discharge will be issued until the “completion of all payments under the plan.” Bankruptcy Code § 1141(d)(5)(A).</p>	<p>Absent good cause, a plan cannot require payments for more than 3 years if annualized current monthly income is less than the state median family income. § 1322(d)(2). If there is good cause to exceed 3 years, the plan’s length may not exceed 5 years. § 1322(d)(1)(C). If annualized current monthly income is equal to or more than median family income, a chapter 13 plan may not require payments for more than 5 years § 1322(d)(1).</p>
<b>Modification of Plan</b>		
Pre-Confirmation	<p>Only the proponent of the plan may modify it prior to confirmation. Bankruptcy Code § 1127(a).</p>	<p>Only the debtor may modify the plan prior to confirmation. § 1323(a).</p>
Post-Confirmation	<p>If the debtor is an individual, after confirmation of the plan, and whether or not the plan has been substantially consummated, the debtor, any trustee, the United States Trustee, or the holder of an unsecured claim may propose a modification. This right ends when the</p>	<p>After confirmation, the debtor, the trustee, or the holder of an unsecured claim may propose a modification. This right ends when the plan payments have been completed. § 1329(a).</p>

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	plan payments have been completed. Bankruptcy Code § 1121(e).	
<b>Discharge</b>		
Timing	After completion of plan payments. Bankruptcy Code § 1141 (d)(5)(A). But, court may order otherwise.	After completion of plan payments § 1328(a)
DSOs	Individual chapter 11 debtor with a “domestic support obligation” is not required to certify that he or she is current on all required payments.	Debtor with a “domestic support obligation” also must certify that he or she is current on all required payments before the discharge will be entered § 1328(a).
Financial Management Course	Individual chapter 11 debtor not required to take course to obtain discharge.	Debtor must complete a financial management course. § 1328(g).
Hardship Discharge	After confirmation but before completion of plan payments, Bankruptcy Code § 1141(d)(5)(B) permits an individual debtor to request a hardship discharge.	After confirmation but before completion of plan payments, § 1328(b) permits an individual debtor to request a hardship discharge.
Super-Discharge	Not available.	Available but watered down. May discharge a debt for willful and malicious injury, <i>see</i> § 523(a)(6), as well as domestic nonsupport obligations, <i>see</i> § 523(a)(15). But § 1328(a)(4) excepts for restitution or damages awarded in a civil action against the debtor as a result of “willful or malicious injury” that caused personal injury or death.
<b>Consequences When the Case is Unsuccessful</b>		
Small Business Debtor Exception to Automatic Stay	The automatic stay does not apply to cases filed by a small business debtor if the debtor was a debtor in an earlier small business, case that remains pending, or it was previously a debtor in a small business that was dismissed or had a plan confirmed within the 2 years preceding the latest petition. Also, an entity that acquires substantially all of the assets of a small business having a petition dismissed or plan confirmed in the preceding 2 years cannot acquire the automatic stay in its	Nothing similar in chapter 13.

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	own bankruptcy case petition unless it proves by a preponderance of the evidence that the acquisition was not for the purpose of evading Bankruptcy Code §362(n).	
One Case Pending in Prior Year	<p>If an individual was a debtor in a prior case under chapter 7, 11, or 13, if that prior petition was dismissed, and if the prior petition was pending within 1 year of the new petition, the automatic stay with respect to a debt, property securing such debt, or any lease terminates as to the debtor (but not the estate) on the 30<sup>th</sup> day after the filing of new case. However, Bankruptcy Code § 362(c)(3) does not apply if the new case was filed under a chapter other than chapter 7 after the prior case was dismissed pursuant to Bankruptcy Code § 707(b).</p> <p>Bankruptcy Code § 362(c)(3)(B) permits any party in interest to file a motion to extend the stay as to all or some creditors. Such a request must be made with notice and a hearing and must be made within 30 days of the filing of the petition.</p>	<p>If an individual was a debtor in a prior case under chapter 7, 11, or 13, if that prior petition was dismissed, and if the prior petition was pending within 1 year of the new petition, the automatic stay with respect to a debt, property securing such debt, or any lease terminates as to the debtor (but not the estate) on the 30<sup>th</sup> day after the filing of new case. However, section 362(c)(3) does not apply if the new case was filed under a chapter other than chapter 7 after the prior case was dismissed pursuant to section 707(b).</p> <p>§ 362(c)(3)(B) permits any party in interest to file a motion to extend the stay as to all or some creditors. Such a request must be made with notice and a hearing and must be made within 30 days of the filing of the petition.</p>
Two Cases Pending in Prior Year	<p>When an individual debtor has filed 2 or more prior cases that were pending during the previous year, but were dismissed, the automatic stay never goes into effect. Once again, there is an exception for a case “refiled” under Bankruptcy Code § 707(b).</p> <p>A party in interest may request that the court impose the automatic stay despite the filing and dismissal of multiple prior petitions Bankruptcy Code § 362(c)(4)(B). Such a request must be made with notice and a hearing and must be made within 30 days of the filing of the petition.</p>	<p>When an individual debtor has filed 2 or more prior cases that were pending during the previous year, but were dismissed, the automatic stay never goes into effect. Once again, there is an exception for a case “refiled” under § 707(b).</p> <p>A party in interest may request that the court impose the automatic stay despite the filing and dismissal of multiple prior petitions § 362(c)(4)(B). Such a request must be made with notice and a hearing and must be made within 30 days of the filing of the petition.</p>