Individual Chapter 11 Cases:
A "How To" Guide

Concurrent Session

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A. Eligibility for Chapter 11 Relief

Chapter 11 was an available remedy for debtors pre-BAPCPA however, through BAPCPA Congress enacted several new provisions under Chapter 11 "which appear to make Chapter 11 cases filed by individual debtors more like a Chapter 13 case." *In re Beyer*, 433 B.R. 884, 887 (Bankr. M.D. Fla. 2009). The *Beyer* case outlines some of the substantive changes to individual Chapter 11 under BAPCPA and includes the following:

- "Property of the estate now includes post-petition earnings of an individual Chapter 11 debtor. 11 U.S.C. § 1115."
- "An individual Chapter 11 debtor may use his or her post-petition earnings to fund a plan of reorganization. 11 U. S.C. § 1123(a)(8)."
- "An individual Chapter 11 debtor is subject to the best efforts test of Section 1129(a)(15)."
- An individual Chapter 11 debtor's discharge is not entered until plan payments are complete.

11 U.S.C. §1123 outlines the requirements of a Chapter 11 plan. In particular 11 U.S.C. §1123 (a)(8) requires a debtor to propose the use of future wages to fund the plan:

> In a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after commencement of the case or other future earnings of the debtor as is necessary for execution of the plan.

1. Who May be a Debtor?

In general, parties that are eligible for Chapter 7 relief are also eligible for Chapter 11 relief. This is set forth in 11 U.S.C. §§109(b) & (d). §109(b) reads as follows:

> A person may be a debtor under chapter 7 of this title only if such person is not— (1) a railroad; (2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a New Markets Venture Capital company as defined in section 351 of the Small Business Investment Act of 1958, a small business investment

> company licensed by the Small Business Administration under section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act, except that an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor if a petition is filed at the direction of the Board of Governors of the Federal Reserve System; or (3)(A) a foreign insurance company, engaged in such business in the United States; or (B) a foreign bank, savings bank, cooperative bank, savings and loan association, building and loan association, or credit union, that has a branch or agency (as defined in section 1(b) of the International Banking Act of 1978 [1] in the United States.[1]

§109(d) provides:

> Only a railroad, a person that may be a debtor under chapter 7 of this title (except a stockbroker or a commodity broker), and an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor under chapter 11 of this title.[2]

Family famers and fishermen who are entitled to use of the provisions of Chapter 12, are also entitled to voluntary relief under Chapter 11, if they so choose, though they may not be forced into an involuntary Chapter 11.[3]

Most pertinent to our current discussion is that individual debtors need not, necessarily, be engaged in some form of business to be eligible for Chapter 11. While the common public image is of Chapter 11 being used for corporations to restructure debt, Chapter 11 is also readily available for the individual debtor. In 1991, the United States Supreme Court held that individuals who do not operate a business are still eligible for Chapter 11 relief, as there are no statutory provisions which

[1] 11 U.S.C. §109(b)
[2] 11 U.S.C. §109(d)
[3] 11 U.S.C. §303(a).

restrict eligibility for Chapter 11 relief to businesses alone.[4] Additionally, case law suggests that a debtor need not be insolvent in order to seek relief under Chapter 11. In re Sylmar Plaza, L.P., 314 F.3d 1070 (9th Cir. 2002).

Quarterly fees

All Chapter 11 debtors share certain requirements including requirements and information included in the US Trustee's Operating Guidelines which a debtor receives from the Office of the United States Trustee shortly after the filing of a Chapter 11 petition. U.S. Trustee quarterly fees which are provided for under 28 U.S.C. §1930(a)(6) must be paid by a debtor and range in amount depending on debtor's total disbursements. The fees are provided as follows:

Disbursement Range	Quarterly Fee
$0 to $14,999.99	$325
$15,000 to $74,999.99	$650
$75,000 to $149,999.99	$975
$150,000 to $224,999.99	$1,625
$225,000 to $299,999.99	$1,950
$300,000 to $999,999.99	$4,875
$1,000,000 to $1,999,999.99	$6,500
$2,000,000 to $2,999,999.99	$9,750
$3,000,000 to $4,999,999.99	$10,400
$5,000,000 to $14,999,999.99	$13,000
$15,000,000 to $29,999,999.99	$20,000
$30,000,000 or more	$30,000

Debtor in possession accounts and insurance

When a Chapter 11 petition is filed, a new entity is formed – the debtor in possession. With that, all funds of the debtor must be transferred into a debtor in possession account, and all post-petition earnings and proceeds must be deposited into the debtor in possession account. Those assets which are insured by the debtor must be changed to name the debtor in possession as beneficiary, including homeowners, automobile insurance and any other type of property insurance.

[4] Toibb v. Radloff, 501 U.S. 157 (1991).

Initial Debtor Interview

A case manager from the United States Trustee's office is assigned to perform oversight of the Chapter 11. The case manager's job is to ensure that quarterly fees are paid, monthly operating reports are filed, and debtors otherwise follow the operating instructions supplied by the United States Trustee's office. The case manager performs an initial debtor interview within a few weeks after the case is filed. This interview provides an opportunity for the U.S. Trustee's office to confirm that debtors are in compliance with the operating requirements of debtors in possession and to obtain additional information regarding the cause of the bankruptcy and the debtor's general plan of reorganization.

Status Conference/order establishing deadlines and procedures

Just as in any bankruptcy matter, there are particular dates and deadlines of the court with which a debtor must comply. The Code provides a deadline for the filing of the Chapter 11 plan, and, as a practical matter, other deadlines must be set by the court to ensure a debtor can timely file a Chapter 11 plan. Certain pleadings allowed under Chapter 11 protection allow for remedies only available in Chapter 11. For example, a motion to determine value may assist a debtor in establishing the value of certain assets for which the value may be questionable. Obtaining an order regarding value may have an effect on the best efforts test of the Chapter 11 plan. This can also expedite resolution of valuation issues well in advance of the filing of a plan thereby allowing plan confirmation to be quickly completed. Some judges will hold a status conference to review the dates and deadlines with the debtor and the U.S. Trustee's office in order to obtain an understanding of the cause of the bankruptcy and the debtor's goals for reorganization. This may also be used as an opportunity for the judge to determine whether debtor is in receipt and compliance of the United States Trustee operating instructions.

Section 341 Meeting of the Creditors

Just like all chapters of the Bankruptcy Code, a meeting of the creditors takes place where debtor testifies under oath before an attorney of the office of the United States Trustee and to answer any questions of creditors.

Hiring of professionals

The debtor in possession must obtain court approval to hire professionals, including counsel for the debtor. This ensures that professionals have authority to be compensated for representing debtor and handling specific matters attendant to the chapter 11 bankruptcy.

A darn good retainer agreement.

The debtor's duties under Chapter 11 can be onerous for some individuals and equally onerous for the attorney who wishes to ensure that the debtor complies with court orders to prevent the case from being converted to another chapter or dismissed. The drafting of a clear and detailed retainer agreement that outlines the debtor's duties is a means for the attorney to ensure the debtor understands his or her obligations under Chapter 11 as a condition of representation by counsel.

2. The Means Test

One factor in an individual debtor's decision to file for relief under the provisions of Chapter 11 (and a way in which the court, with the debtor's consent, may convert a case to a Chapter 7 (or Chapter 13)), are the provisions of 11 U.S.C. §707 (hereinafter "§707"). A thorough understanding of the provisions of §707 is vital to the practice of bankruptcy law when dealing with individuals.

§707 of the United States Bankruptcy Code ("Code") deals specifically with dismissal or conversion of a Chapter 7 case. As originally enacted in 1978, §707 consisted only of what is

currently subsection (a), including only parts (1) and (2), providing for dismissal of a case "for cause" including unreasonable delay by the debtor, or failure of the debtor to pay certain charges and fees. The section provided for permissive dismissal but only after notice and hearing.

In 1984, Congress, in an effort to prevent abuse of the bankruptcy system, designated then existing §707 as §707(a) and added what is currently part (b)(1) as subsection (b), providing that a case could be dismissed or converted if the court found that "the granting of such relief would be an abuse of the provisions of this chapter." This was in this author's opinion, however, only a weak subjective standard. It provided that only the United States Trustee or the Court could move for such a dismissal or conversion. Most importantly, it provided a presumption in favor of granting Chapter 7 relief to the debtor.

In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), the most notable change of which was the addition of parts (2)-(7) of §707(b). These additions to the Code have created a mechanical, objective test for determining a presumption of abuse, while leaving to the Court the power of subjective abuse scrutiny, as was always available. Even where your client's financials do not give rise to presumptive abuse under §707(b)(2), or where you are able to effectively rebut that presumption, the Court shall, pursuant to §707(b)(3), consider whether the petition was filed in "bad faith", or abuse, if evidenced by "a totality of the circumstances" of the debtor's financials. §707(b)(1) is still the mainstay provision that authorizes dismissal or conversion of a case for "abuse." As such, all other provisions of §707 that deal with abuse refer to part (b)(1).

The very first analysis of your client's financials that must be done is to determine whether or not his or her debts are "primarily consumer debts." §707(b)(1) provides that a Court may dismiss or convert a case "filed by an individual debtor under this chapter whose debts are primarily consumer debts ... if it finds that the granting of relief would be an abuse of the provisions of this

chapter." If, therefore, your client's debts are not primarily consumer debts, then no further analysis under §707(b) must be done.

11 U.S.C. §101(8) defines "consumer debt" as "debt incurred by an individual primarily for a personal, family or household purpose." Consumer debt is distinguished from business debt, the latter of which is incurred with a "profit motive."[5] To determine whether a debt is a consumer debt, the Court must examine the purposes for which the debt was incurred.[6]

Nothing in §101(8) suggests that a debt meeting this definition nonetheless mutates into a non-consumer debt merely because it is secured by real property. Rather, under the plain language of §101(8), a debt incurred by an individual primarily for a consumer purpose is a consumer debt regardless of whether it is secured or unsecured. The Court must (read should) follow the plain statutory language. Indeed, the majority of courts have held that a debt secured by a debtor's real property is a consumer debt if it is incurred primarily for a consumer purpose. See, e.g., Price v. United States Tr. (In re Price), 353 F.3d 1135, 1138 (9th Cir.2004) ("[T]he statutory scheme so clearly contemplates that consumer debt include debt secured by real property that there is no room left for any other conclusion." (internal quotation marks omitted)); Zolg v. Kelly (In re Kelly), 841 F.2d 908, 912 (9th Cir.1988) ("A literal reading of the [Bankruptcy] Code's simple language leads inexorably to the conclusion that consumer debt includes secured debt."); Cox v. Fokkena (In re Cox), 315 B.R. 850, 855 (8th Cir. BAP 2004) ("With respect to debt secured by real property, if the debtor's purpose in incurring the debt is to purchase a home or make improvements to it, the debt is clearly for family or household purposes and fits squarely within the definition of a consumer debt under § 101(8)."); Morris v. Zabu Holding Co. (In re Morris), 385 B.R. 823, 829 (E.D.Va.2008) (holding that a debt incurred for a personal, family, or household purpose is a consumer debt even

[5] Stewart v. United States Trustee (In re Stewart), 175 F.3d 796, 806 (10th Cir.1999); accord Cypher Chiropractic Center v. Runski (In re Runski), 102 F.3d 744, 747 (4th Cir.1996); In re Booth, 858 F.2d 1051, 1054-55 (10th Cir.1990); In re Miller, 335 B.R. 335, 339 (Bankr.E.D.Pa.2005)

[6] Consumer United Capital Corporation v. Straughter (In re Straughter), 219 B.R. 672, 681-82 (Bankr.E.D.Pa.1998).

though it is secured by the debtor's real property); In re Naut, 2008 WL 191297 at *5 (Bankr.E.D.Pa. Jan. 22, 2008) (same); In re Hoffner, 2007 WL 4868310 at * 1 (Bankr.D.N.D. Nov. 21, 2007) (same); In re Davis, 378 B.R. 539, 546-47 (Bankr.N.D.Ohio 2007) (same); King v. Wells Fargo Bank, N.A. (In re King), 362 B.R. 226, 230 (Bankr.D.Md.2007) (same).

Courts have adopted varying approaches to defining whether debts are "primarily" consumer debts as opposed to business-related or other non-consumer debts. The majority view is that a debtor's liabilities are primarily consumer debts if the aggregate dollar amount of such debts exceeds 50% of the debtor's total liabilities. See Hoffner, 2007 WL 4868310 at *2 ("The majority of courts that have considered the issue have found that 'primarily' means more than half of the total dollar amount owed."). See also Stewart v. United States Tr. (In re Stewart), 175 F.3d 796, 808 (10th Cir.1999) (holding that a debtor has "primarily consumer debts" if the aggregate amount of consumer debt is more than 50% of the total debt); Kelly, 841 F.2d at 913 (holding that when "more than half ... of the dollar amount owed is consumer debt, the statutory threshold is passed"); Naut, 2008 WL 191297 at *7 (same); In re Beacher, 358 B.R. 917, 920 (Bankr.S.D.Tex.2007) (same); In re Victoria, 389 B.R. 250, 254 (M.D.Ala.2008) ("primarily" consumer debt means more than half). If the dollar amount of debtor's consumer debt is greater than the dollar amount of debtor's non-consumer debt, then the case is subject to the provisions of § 707(b).

The profit motive test simply involves ascertaining whether the debt was "incurred with an eye toward profit."[7] A debt incurred with a profit motive clearly is not a consumer debt; however, there are other types of debt that are not business debts, but which also fall outside the category of consumer debt.[8] In that case, the court based its decision on findings that the debt was not incurred voluntarily; it was incurred for a public, rather than a personal purpose; the taxes were

[7] See In re Davis, 378 B.R. 539, 547 (Bankr.N.D.Ohio 2007) (citing In re Booth, 858 F.2d 1051, 1055 (5th Cir.1988); In re Almendinger, 56 B.R. 97 (Bankr.N.D.Ohio 1985)).
[8] IRS v. Westberry (In re Westberry), 215 F.3d 589, 593 (6th Cir.2000) (income taxes are not consumer debt for the purpose of enforcing the co-debtor stay under 11 U.S.C. § 1301).

assessed on earning money, not spending it; and there was no extension of credit involved in the transaction. Id. The court pointed out that the bankruptcy code treats tax debts quite differently from consumer debts. It also noted that the language of the statute was plain; thereby, eliminating the need to go beyond the language of the statute to divine meaning, or intent, from the use of the phrase "consumer debt."

In summarizing the context in which §707(b)(1) was passed, and the policy rationale motivating its enactment, the Sixth Circuit has explained:

> Section 707(b) was among the consumer credit amendments to the Bankruptcy Code enacted in 1984. These amendments were passed in response to an increasing number of Chapter 7 bankruptcies filed each year by non-needy debtors. Under prior practice, aside from potential §523(a) exceptions, §707(a) dismissals, and §727(a) objections to discharge, debtors enjoyed an unfettered right to a "fresh start" under Chapter 7, in exchange for liquidating their nonexempt assets for the benefit of their creditors. Section 707(b) introduces an additional restraint upon a debtor's ability to attain Chapter 7 relief.... Bankruptcy judges now have discretion to dismiss a consumer case when the filing is abusive.
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> In essence, §707(b) allows a bankruptcy court to deal equitably with the unusual situation where an unscrupulous debtor seeks to enlist the court's assistance in a scheme to take unfair advantage of his creditors; it serves notice upon those tempted by unprincipled accumulation of consumer debt that they will be held to at least a rudimentary standard of fair play and honorable dealing.[9]

Once it is determined that a debtor's debts are "primarily consumer debts," the next step in the analysis is to determine whether the debtor's income, at the time of filing, is above or below the applicable median family income for the state in which your client lives.

Sections §707(b)(6) & (7), taken in combination, essentially serve as a gatekeeper to use of the language of §707(b). These sections mandate that if the debtor's income is less then the median family income for the applicable State, then no one, including the Court or the United States Trustee, may bring a motion for presumed abuse under §707(b)(2).

[9] In re Krohn, 886 F.2d 123, 125-26 (6th Cir.1989) (citations & internal quotation marks omitted).

Rule 1007-I(b)(4) of the Federal Rules of Bankruptcy Procedure directs that the state of current monthly income and the analysis under parts (b)(6) & (7) are to be done "on the appropriate Official Form." This analysis is done, for a Chapter 7 case, on Form 22A, promulgated by the bankruptcy court.

§707(b)(1) lays out the general rule that a court may dismiss or, with the debtors consent, convert a case to a Chapter 11 or Chapter 13, if it finds that the granting of relief would be an "abuse." This technically leaves to the Court subjective scrutiny of your client's financial condition and other factors for abuse. In reality, however, following BAPCPA, the first, and automatic, analysis for abuse is done under §707(b)(2).

Section 707(b)(2)(A) defines what is commonly called the "Means Test." The means test is, in essence, an objective and mechanical analysis of the debtor's financial condition, and potential ability to pay against the debts he owes. The language of §707(b)(2)(A) gives rise to a "presumption of abuse" where the debtor has a certain amount of excess monthly income, relative to both the debt he owes, and several fixed figures as amended from time to time, by Congress. The figures used in this comparison are updated every 3 years, and each update is effective April 1 of such year. The most recent update happened in April of 2010.

While the wording of this section is somewhat obtuse, the actual arithmetic is done on Form 22A, in a simple step-by-step manner and submitted as such when filing the petition. The calculation of the Means Test is not meant to provide a detailed picture of the debtor's actual financial condition, but rather a snapshot of his condition, a rough picture, at the time of the of filing. In regards to the debtor, two figures are ultimately utilized. The first is the debtors discretionary income, calculated by taking the debtor's "current monthly income", as provided for in 11 U.S.C.A.§101(10A), which is interpreted very broadly by courts, and subtracting from that certain monthly expenses as provided for by the IRS Standards, and subtracting certain "Other Necessary

Expenses", included in that category by the IRS regulations, but calculated using the debtor's actual expenses. The second figure is that of 25% the debtor's "nonpriority unsecured claims", which is arrived at quite simply. Calculating the debtor's discretionary income is the most labor intensive and often argued part of the Means Test.

Under §704, parts (b)(1)&(2), the United States trustee or the bankruptcy administrator must review all files received from the debtor, (ie: Form 22A), and must file a statement of "presumed abuse" within 10 days of the §341 initial meeting of creditors.

Section 707(b)(2)(B) describes the ways in which this presumption can be rebutted. Specifically, the presumption of abuse may be rebutted through the showing of "special circumstances" which justify additional expenses being deducted from the debtor's discretionary income. Absent effective rebuttal under subpart (b)(2)(B), if a debtor's Means Test gives rise to a presumption of abuse, the court must, according to the statute, dismiss his or her case, unless that debtor consents to conversion to either Chapter 11 or Chapter 13.

Having successfully avoided the peril of §707(b)(2) analysis, by either not giving rise to presumptive abuse, or successfully rebutting that presumption, your client's financials will still be subject to scrutiny under §707(b)(3). This section mandates that in a case where abuse is not presumed, or is successfully rebutted, the court must still dismiss the case where it is determined that either the debtor filled the petition in "bad faith", or where a "totality of the circumstances" of the debtor's financial situation tends to demonstrate abuse.

Section 707(b)(3) is more subjective and equitable assessment of the debtor's circumstances. Much of the assessment is based on a review of Schedules I and J of the debtor's petition. In addition, Federal Rule of Bankruptcy Procedure 1017e, provides a much more lax time frame for bringing a motion under §707(b)(3): 60 days after the §341 meeting.

Essentially, §707(b)(3) makes it clear that passing the automatic means test under §707(b)(2) does not prohibit the court from taking a more subjective and realistic look at the debtor's financials. Unlike the "snapshot" idea of §707(b)(2), under §707(b)(3), the court will look to the debtor's ongoing financial condition and real ability to make payments on his debts.

Because §707(b)(3) relates back to (b)(1) in authorizing dismissal for abuse, it is also bound by the language of that section, and the court is prohibited from taking into consideration whether or not the debtor has or continues to make charitable contributions, as defined in §548(d)(3) of the code.

Much of the case law that arose prior to BAPCPA in determining whether abuse existed under then §707(b), which consisted only of what is now §707(b)(1), is applicable to arguments made under current §707(b)(3). Since 2005, the standard, however, has been mere "abuse," as opposed to the "substantial abuse" which §707(b) had required before. The circuits have varying opinions on the significance of that change, however much of the case law can still be used.

The Means Test is a commonly referenced aspect of the practice of bankruptcy law in general, and its applicability to other provisions of the Bankruptcy Code has been the subject of much case law. As such, an attorney seeking to practice individual bankruptcy law must be thoroughly acquainted with the provisions discussed above, and have an intimate understanding of the actual working process of those provisions.

Ultimately, §707 and more specifically the Means Test, is what will determine your client's eligibility for Chapter 7, and therefore, dictate whether relief must be sought under an alternative provision, such as Chapter 11.

3. Chapter 13 Debt Limitations

Another factor in the determination of which chapter to seek relief under is statutory debt limits. The current debt limits for Chapter 13 relief are stated in 11 U.S.C. §109(e):

> Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $360,475 and noncontingent, liquidated, secured debts of less than $1,081,400, 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 $360,475 and noncontingent, liquidated, secured debts of less than $1,081,400 may be a debtor under chapter 13 of this title.[10]

These amounts are not doubled in the case of a husband and wife filing a joint Chapter 13 case.[11]

A debt is noncontingent if all of the events that are necessary in order to establish liability have occurred before the petition is filed.[12] A contingent debt has been described as a debt that "does not come into existence until the occurrence of a future event".[13] The future event needs to be more than allowing time to pass or the entry of a judgment.

A common example of a contingent debt is a personal guaranty. A guaranty is a contingent debt if the default of the principal is required before the guarantor becomes liable. Review state law and the language of the guaranty carefully; many guaranties are written in such a manner that default by the principal causes the guarantor to be liable *ipso facto*, no demand or any other determination required; some guaranties may be absolute (and hence noncontingent).

Disputing a debt does not render it contingent if all of the events required to establish liability have occurred. Other examples of noncontingent debts are debts for prepetiton tax periods, regardless of whether the tax has been assessed or whether the payment comes due after the petition

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[10] These amounts adjust in three-year intervals beginning April 1, 1998. See 11 U.S.C. §104(b).
[11] 11 U.S.C. §109(e) provides that "Only an individual with regular income…or an individual with regular income and such individual's spouse"
[12] Glance v. Carroll (In re Glance), 487 F.3d 317, 322 (6th Cir. 2007).
[13] Glance at 323.

is filed[14]; responsible person liability for withholding taxes for a debtor's corporation[15]; claims alleging misconduct of the debtor[16]; unmatured debts; and mortgage liens[17]. The more persuasive line of cases holds that tort claims are noncontingent (all of the events that are necessary in order to establish liability have occurred before the petition, even if the question of whether the events actually occurred or the determination of liability remains). If the high-income individual is a professional, potential malpractice claims must be considered.

A more difficult concept is that of a liquidated debt. A debt is liquidated when the amount is known or readily ascertainable.[18] The Courts of Appeals for the Sixth and Seventh Circuits have differing views on how to determine whether a claim is liquidated. The controlling Sixth Circuit case is In re Pearson, 773 F.2d 751 (6th Cir. 1985). As a first stop, it is interesting to note the Sixth Circuit's view of the expansion of Chapter 13 under the Bankruptcy Code to include small businesses, stated as follows:

> Although primarily designed for consumers who overburdened themselves with debt, the Bankruptcy Reform Act of 1978 extended Chapter 13 eligibility to small businessmen who are self-employed because "the distinction between a barber, grocer, or worm digger who is self-employed from one who is an employee is slight. H.R. 8200 eliminates the distinction, in order to afford small sole proprietors as well as wage earners an alternative to Chapter 11." H.R.Rep. No. 595 at 119; reprinted in 1978 U.S.Code Cong. & Ad.News at 6079. Generally, Chapter 13 is simpler, speedier, and less expensive than Chapter 11. Congress desired to give small sole proprietors the benefit of Chapter 13, but also established dollar limits to prevent larger businesses from taking advantage of the provisions. H.R.Rep. at 119; reprinted in 1978 U.S.Code Cong. & Ad.News at 6079. The function of section 109(e) is to separate those small sole proprietors who should have the benefit of Chapter 13 from those larger businesses who should not.[19]

[14] Geary v United States (In re Geary), 2003 WL 68080 (9th Cir. Jan 8, 2003) (unpublished).
[15] Mazzeo v. United States (In re Mazzeo), 131 F.3d 295 (2d Cir. 1997).
[16] In re Faulhaber, 269 B.R. 348 (Bankr. W.D. Mich. 2001).
[17] Glance v. Carroll (In re Glance), 487 F.3d 317, 322 (6th Cir. 2007).
[18] Comprehensive Accounting Corp. v. Pearson (In re Pearson), 773 F.2d 751, 754 (6th Cir. 1985).
[19] Pearson at 753.

It should be noted, however, that Pearson does not limit the §109(e) eligibility analysis to the debtor's Schedules.[20]

The Seventh Circuit's view on determining §109(e) eligibility was stated in In re Day, 747 F.2d 405 (7th Cir. 1984). Most courts read Day to hold that a debtor's schedules are not controlling with respect to the eligibility limits, and that §506(a) valuation hearings may be conducted to determine the debtor's actual eligibility under §109(e).

Read In re Smith, 365 B.R. 770 (Bankr. S.D.Ohio 2007) for a very good discussion of the concept of a "liquidated" debt by a court in the Sixth Circuit. In the Seventh Circuit, review particularly In re Knight, 55 F.3d 231 (7th Cir. 1995), as perhaps modified or explained by In re Sidebottom, 430 F.3d 893, 900-901 (7th Cir. 2005). Disputing a debt does not make it unliquidated if the amount of the debt can be readily ascertained. A debt may still be liquidated even if the claim is or may be disallowed. Similarly, post-petition events do not impact the § 109(e) eligibility analysis.[21]

> Query: Realizing that § 109(e) eligibility counts liquidated, secured debt (as opposed to unliquidated, secured debt), can one argue that a circumstance in which an extensive valuation hearing is required to determine the bifurcation required by § 506(a) renders a debt "unliquidated"?

Debts that fall into both the secured and unsecured categories raise additional issues under §109(e). The majority holds that split claims, as they are commonly known, are counted partially as secured and partially as unsecured. In the Seventh Circuit, Day applies a §506(a) analysis at the eligibility stage.

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[20] In re Rohl, 298 B.R. 95, 99 (Bankr. E.D. Mich. 2003).

[21] See In re Rohl, 298 B.R. 95 (Bankr. E.D. Mich. 2003). The debtor filed a Chapter 7 case and later sought to convert to Chapter 13. The debtor took the position that settling some of the claims post-petition rendered the claims contingent or unliquidated as of the petition date for purposes of §109(e) eligibility calculations. The Court disagreed.

In the Sixth Circuit, Pearson can be read to support the position that an undersecured claim should not be divided.[22] The Supreme Court's decision in Nobleman v. American Savings Bank[23] may provide further support for the Pearson position if the undersecured debt in question is secured solely by a security interest in real property that is used as the debtor's principal residence.[24] Secured debts that are subject to lien avoidance, whether consensual or not, are generally counted as unsecured.[25]

Parenthetically, nearly every case that has considered the issue has determined that 11 U.S.C. §109(e) is not jurisdictional, which means that it is strictly an eligibility standard, which in turn means that it can be waived if no one raises it - probably prior to confirmation of a plan on the theory that confirmation determines compliance with 11 U.S.C. §109(e) by determining that 11 U.S.C. §1325(a)(1) has been satisfied. The Sixth Circuit has relatively directly stated this result in In re Glance, 487 F.3d 317, 321 (6th Cir. 2007). The Seventh Circuit does not appear to have directly decided this issue, but subordinate federal courts in the Seventh Circuit have done so; In re Jones, 129 B.R..1003 (Bankr. N.D.Ill. 1991), aff'd 134 B.R.. 274 (N.D.Ill. 1991). Cases in other jurisdictions which have determined the non-jurisdictional aspect of §109(e) include In re Wenberg, 94 B.R. 631 (9th Cir. BAP 1988); In re Bilter, 2007 WL 2109884 (Bankr. E.D.Va. 2007); and Rudd v. Laughlin, 866 F.2d 1040 (8th Cir. 1989).

[22] Pearson at 758. "The extent to which [the debt] is ultimately found to be secured is relatively immaterial in determining…Chapter 13 eligibility on the date the petition was filed."
[23] 508 U.S. 324, 113 S. Ct. 2106, 124 L.Ed. 2d 228 (1993).
[24] In Nobleman, the Supreme Court held that 11 U.S.C. §1322(b)(2) prohibits splitting a claim into its secured and unsecured parts for confirmation purposes if the claim is secured solely by a security interest in real property that is used as the debtor's principal residence.
[25] See In re Hanson, 275 B.R. 593,597 (Bankr. D. Colo. 2002). "[T]he debt limitations of Section 109(e) must be construed to include claims deemed unsecured by operation of the Bankruptcy Code."

B. General Issues in Individual Chapter 11

1. Calculating Disposable Income

In 2005, Congress modified Chapter 11 of BAPCPA.[26] One of the most significant changes made to the Code was the addition of §1129(a)(15) which provides:

> [t]he court shall confirm a plan only if...[i]n a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan –
>
> (A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claims is not less than the amount of such claim; or
>
> (B) 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 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.

In essence, §1129(a)(15) adds an additional requirement before the court may confirm a plan; the plan must either (A) pay all of the unsecured creditors 100% of their claims, or (B) provide for payments to the unsecured creditors of 100% of the debtor's "projected disposable income" during the "period for which the plan provides payments," or 5 years, whichever is longer.

Though seemingly simple at first, this actually creates two major questions, only one of which has currently been answered by the courts.

(1) How is the debtor's disposable income to be calculated; what factors may be considered?

(2) How long may a debtor be forced to pay over all of his/her disposable income?

"[U]nder 11 U.S.C. §1325(b)(2), 'disposable income' is defined as 'current monthly income' received by the debtor...less amounts reasonably necessary to be expended — (A)(I) for maintenance or support of the debtor or a dependant of the debtor...' 11 U.S.C. § 1325(b)(2). A Debtor's 'current monthly income' (CMI), is calculated pursuant to §101(10A) of the Bankruptcy Code. In that section, Congress prescribed a six-month look back period to determine the CMI of a debtor before

[26] In re Rodemeier, 374 B.R. 264, 275 (Bankr. D. Kan. 2007).

filing bankruptcy; the look back period ends on 'the last day of the calendar month immediately preceding the date of the commencement of the case...' 11 U.S.C. §101(10A)(A)(I)."[27]

Issue: Sometimes a debtor's disposable income following bankruptcy will be very different than it was during the prescribed six month look-back period.

The issue has become whether the court must follow the rigid six month look-back formula for calculating the debtor's disposable income at the time of filing and then simply multiply that number by the length of the plan; or whether the court should take into consideration other factors, particularly factors indicating change of disposable income post filing or post confirmation.

The seeming Chapter 13 equivalent of Chapter 11's §1129(a)(15)(B) is §1325(b)(1)(B). The language is very similar. Both call for the calculation of "projected disposable income."

In Hamilton, Chapter 13 Trustee v. Lanning, 130 S. Ct. 2464 (2010), the United States Supreme Court resolved the issue in the context of a Chapter 13 cases. The Court adopted the "looking forward" approach, as opposed to the mechanical approach described in In re Gray, as discussed above. In doing so, the Court has made clear that the mechanical analysis is no longer the standard, and that courts may take into consideration other external factors which tend to show a change of income of the debtor is likely and to modify the required payments based upon that finding.

2. Applicable Payment Period

Section 1129(a)(15) mandates that in the case of an individual debtor in Chapter 11, where an allowed unsecured claim objects to confirmation of the plan, the court may not confirm a plan

[27] In re Gray, 2009 WL 2475017 (Bankr. N.D.W.Va. 2009)

unless it either (A) pays all of the unsecured creditors 100% of their claims, or (B) provides for payments to the unsecured creditors of 100% of the debtor's "projected disposable income" during the "period for which the plan provides payments," or 5 years, whichever is longer.

This has led to some debate as to the applicable period for paying disposable income. Two recent cases have dealt with the subject of §1129(a)(15)(B) payment periods: In re Tegeder and In re Rodemeier. Though the issue of applicable payment period was not the central issue in either of these cases, the court does address objections regarding the period.

For example, in Tegeder, the debtor proposed a 10-year repayment plan, (well over the minimum 5 years), in which he would pay his unsecured creditors only in the last three years of the plan, an amount totaling 95% of their claims. The court approved the plan over all three creditor's objections, noting that (1) the debtor would have no disposable income until those last three years, so in essence he was paying all of his disposable income for the ten years of the plan, and (2) that the plan called for repayment approximately 95% of the unsecured claims.[28]

In Rodemeier, the debtor proposed to pay his unsecured creditors annual payments of $6,000 over five years. The creditors objected. The court held that it was "convinced" the plan satisfied §1129(a)(15)(B), because the debtor's disposable income had been calculated at zero for those five years, and the plan was offering payment of an amount above that sum.[29]

3. Property of the Estate

Section 541 provides a detailed definition of the "property of the estate," as it is to be used under all chapters of the bankruptcy code. Through this simple setup, the drafters of the Code were able to eliminate the waste of having to redefine property of the estate under each chapter.

[28] In re Tegeder, 369 B.R. 477 (Bankr.D.Neb. 2007)
[29] In re Rodemeier, 374 B.R. 264 (Bankr.D.Kan. 2007)

Any practitioner of bankruptcy law must be familiar with the definition provided by this section. And, if one is practicing personal bankruptcy law, he or she is more than likely also familiar with §1306 of the Code; the expanded definition of property for Chapter 13 debtors. §1306 was part of the original 1978 drafting of the current Chapter 13, and provides as follows:

> (a) Property of the estate includes, in addition to the property specified in section 541 of this title—
>
> (1) all property of the kind specified in such section 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, 11, or 12 of this title, 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, 11, or 12 of this title, whichever occurs first.
>
> (b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

§1306 of Chapter 13 provides an important function, adding to the estate all property acquired "post petition", and simplifying the rules in regards to individual debtors.

In 2005 through the BACPA amendments, Congress sought to make Chapter 11 more amenable to individual use, by individual debtors whose debts exceeded the debt limitations of Chapter 13. It accomplished this goal by adding to the Code certain sections, subsections, and paragraphs, applicable only to individual debtors, which essentially make the bankruptcy process for an individual Chapter 11 debtor more similar to Chapter 13. Added in 2005, §1115 is virtually identical to §1306 and reads as follows:

> (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.

§1115 provides additional clarification for individual Chapter 11 debtors, including in the property of the estate acquired after the commencement of the case (post petition property).

4. The Absolute Priority Rule & Cram Down

§1129 of the Code deals specifically with confirmation of the Chapter 11 plan. Subpart "(a)" of §1129 articulates 16 requirements (numbered 1 through 16) which must be met in order for a plan to be confirmed. Paragraph 8 of Subpart (a) requires that the plan requires that the plan be accepted by each class of claimants, ie: the plan must be approved by each class, or alternatively, such class must not be impaired under the plan.[30]

§1129(b) deals with the situation where all other requirements for confirmation are met, but the plan has not been approved or accepted by one or more classes of creditors.[31] In terms of the code, this means that all of the paragraphs of §1129(a) are met except Paragraph 8. In that situation, Paragraph 1 of Subpart (b) provides:

> Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.[32]

Confirmation of a plan over the objection of certain class(es) of creditors is known commonly as a "cram down."

[30] 11 U.S.C.A. §1129(a)(8)
[31] 11 U.S.C.A. §1129(b)(1)
[32] 11 U.S.C.A. §1129(b)(1)

Paragraph 2 of Subpart (b) spells out the conditions which must be met in order for a plan to be "fair and equitable with respect to a class" under Paragraph 1.[33] In particular, Part (A) deals with secured claims, Part (B) deals with unsecured claims, and Part (C) with general interests.

The part of that code which is most often applicable to individual debtors is §1129(b)(2)(B)(ii), which states what is commonly referred to as the "absolute priority rule."

Prior to the 2005 BACPA amendments, §1129(b)(2)(B)(ii) read as follows:

> the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan[,] on account of such junior claim or interest[,] any property.

The absolute priority rule essentially says that in order for a plan to be fair and equitable, and hence in order for it to be approved over the objections of an unsecured creditor: if that unsecured creditor is not paid in full, no classes of claimants junior to that objecting creditor's class shall receive property of the estate.

Issue: The debtor possesses an interest inferior or junior to that of the unsecured creditors; May the debtor retain property of the estate if all of his creditors are not to be paid in full?

The 2005 amendments, however, amended §1129(b)(2)(B)(ii) to read as follows:

> the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan[,] on account of such junior claim or interest[,] any property, **except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.**[34]

The argument has been made that because the amendment to §1129(b)(2)(B)(ii) makes reference specifically to §1115 it, therefore, is only intended to allow an exception to the absolute

[33] 11 U.S.C.A. §1129(b)(2)
[34] *Emphasis added.*

priority rule for debtors who plan to retain **post-petition property**, but not pre-petition property included in the estate under §541. This narrow interpretation argued that §1115 itself only defines post petition property, and therefore, that is all that the debtor is allowed to maintain. The more expansive interpretation of §1129(b)(2)(B)(ii) is that §1115 redefines property entirely, creating a new definition including the property of the §541, as well as new post-petition property. Under this latter reading of the section, the individual debtor would be allowed to retain both a pre-petition and post-petition property.

The court in In re Roedemeier addressed this issue. In Roedemeier, the court stated clearly that the amendment to §1129(b)(2)(B)(ii) allows an exception to the absolute priority rule for individual debtors, with respect to **all** property of the estate, not just post-petition property.[35]

The court articulated that the combination of the amendment to §1129(b)(2)(B)(ii), allowing debtors to keep property despite the fact that some class(es) of unsecured creditors were not being paid in full, and thereby removing the absolute priority rule for individual debts, coupled with the addition of §1129(a)(15), which requires that the court look to the debtor's proposed use of his post-petition earnings from labor/services to see if he fairly plans to compensate his creditors, is clearly congresses attempt to reconcile the Chapter 11 process for individual debtors with the workings of Chapter 13.[36]

[35] In re Roedemeier, 374 B.R. 264, 274 (Bankr. E.D. Kansas 2007)
[36] Id. at 275

5. Post-Confirmation Modification of the Plan

Once a Plan has been confirmed, it can be modified, consistent with the language of the Code. The Code articulates the requirements for modification of a Plan at 11 U.S.C. §1127.

§1127 reads:

> (a) The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.
> (b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.
> (c) The proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified.
> (d) Any holder of a claim or interest that has accepted or rejected a plan is deemed to have accepted or rejected, as the case may be, such plan as modified, unless, within the time fixed by the court, such holder changes such holder's previous acceptance or rejection.
> (e) **If the debtor is an individual**, the plan may be modified at any time after confirmation of the plan but before the completion of payments under the plan, whether or not the plan has been substantially consummated, upon request of the debtor, the trustee, the United States trustee, or the holder of an allowed unsecured claim, to—
>
> > (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
> > (2) extend or reduce the time period for such payments; or
> > (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim made other than under the plan.
>
> (f)
>
> > (1) Sections 1121 through 1128 and the requirements of section 1129 apply to any modification under subsection (a).
> > (2) The plan, as modified, shall become the plan only after there has been disclosure under section 1125 as the court may direct, notice and a hearing, and such modification is approved.

Subsection "(e)" (11 U.S.C. 1127(e)) is particularly applicable to the individual debtor.

Prior to the 2005 BACPA amendments, section (e) as stated did not exist. At that point, a debtor could modify a confirmed plan at any time after confirmation but before substantial consummation of the plan.[37]

In 2005, as part of their effort to streamline the Chapter 11 process for individual debtors, and make it more similar to the workings of Chapter 13, Congress added §1127(e), which is substantially similar to Chapter 13's §1329(a).

This new section allows for modification, regardless of whether the plan has been substantially consummated, at the request of any party in interest, including a creditor, for the purpose of increasing or decreasing the payment amount or payment period on a claim, or to "alter the amount of a distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claims made other than under the plan."[38]

6. Timing of Discharge

The timing and rules relating to the granting of a discharge under Chapter 11 is governed by the language of 11 U.S.C. §1141. Section 1141 covers generally the effects of confirmation of a plan.

Subsection "(d)" governs the timing of discharge. The basic language and effect of §1141(d)(1) is that confirmation of the Chapter 11 Plan is when discharge of the debts occur. §1141(d)(2)-(4) provide some exceptions to this rule.

The case is drastically different for the individual Chapter 11 debtor. §1141(d)(5) controls the timing of discharge for the individual debtor, and reads:

> (5) In a case in which the debtor is an individual—
> (A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;
> (B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if—
>
> (i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date; and
> (ii) modification of the plan under section 1127 is not practicable; and

[37] *See* 11 U.S.C. §1127
[38] 11 U.S.C. §1127(e)

> (C) unless after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that—
>
> (i) section 522 (q)(1) may be applicable to the debtor; and
>
> (ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522 (q)(1)(A) or liable for a debt of the kind described in section 522 (q)(1)(B).

As a result, the individual debtor is not granted the sought after discharge of his debts until he as successfully completed all payments under the required plan.

7. Good Faith

Black's law dictionary defines "good faith" as follows:

> Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone.

While it has been argued that there is a universal requirement of good faith in any use of the judicial system in this country, such omnipresent requirement has neither been codified nor defined by Congress. The circumstances as they are, if congress wishes to guarantee the imposition of a duty of good faith upon the litigants under any specific code which congress creates, or to clearly authorize the court to dismiss a case for a lack of good faith, congress generally does so specifically within an appropriate rule relating thereto. In the absence of such a statute, the courts often read such a requirement into any provision authorizing dismissal "for cause."

The requirement of good faith in Chapter 11 is codified at §1129(a)(3). As discussed before §1129 deals with confirmation of the Plan. Failure to confirm a plan in Chapter 11 prevents the debtor from obtaining the relief sought.

§1129(a)(3) reads as follows:

> **§ 1129. Confirmation of plan**
> (a) The court shall confirm a plan only if all of the following requirements are met […]
> (3) The plan has been proposed in good faith and not by any means forbidden by law.

In general, "good faith" for the purposes of §1129 is to be determined by a totality of the circumstances.[39]

[39] Sandy Ridge Dev. Corp., 881 F2d 1346 (5th Cir. 1989)

While the Bankruptcy Code does not define term "good faith," case law has developed which views the term as requiring, alternatively that

(1) plan be consistent with objectives of Bankruptcy Code,

(2) plan be proposed with honesty and good intentions and with basis for expecting that reorganization can be achieved, or

(3) there was fundamental fairness in dealing with creditors. [40]

Generally, where there is a reasonable likelihood that a plan will achieve results consistent with the objectives and purposes of the Bankruptcy Code, the plan may be held to be "in good faith," consistent with §1129(a)(3).[41]

Dismissal (as Opposed to Non-Confirmation of the Plan) for Lack of Good Faith

Section 1112 deals with dismissal or conversion of a Chapter 11 case. Interestingly, §1112 does not particularly articulate any rule regarding good faith, the absence of good faith, or bad faith, what it does do is authorize the court to dismiss or convert a Chapter 11 case "for cause."[42]

The general language of §1112 makes it difficult for a court to dismiss a case, or convert it to another Chapter, without the consent of the creditor; however, §1112(b)(1) establishes that, pursuant to a motion by a party in interest, the court may dismiss or convert a Chapter 11 case if the moving party shows "cause."

§1129(b)(4) articulates a non-exhaustive list of various things which constitute "cause", and reads as follows:

> (4) For purposes of this subsection, the term "cause" includes—
> (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;
> (B) gross mismanagement of the estate;

[40] Stonington Partners, Inc. v Official Comm. of Unsecured Creditors, 308 BR 672, (2004, DC Del)
[41] In re Nikron, Inc., 27 B.R. 773 (Bankr. Ct. Ed. Dist. MI 1983)
[42] 11 U.S.C. §1112(b)(1)

> (C) failure to maintain appropriate insurance that poses a risk to the estate or to the public;
> (D) unauthorized use of cash collateral substantially harmful to 1 or more creditors;
> (E) failure to comply with an order of the court;
> (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;
> (G) failure to attend the meeting of creditors convened under section 341 (a) or an examination ordered under rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor;
> (H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any);
> (I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;
> (J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;
> (K) failure to pay any fees or charges required under chapter 123 of title 28;
> (L) revocation of an order of confirmation under section 1144;
> (M) inability to effectuate substantial consummation of a confirmed plan;
> (N) material default by the debtor with respect to a confirmed plan;
> (O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; and
> (P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.[43]

Good faith or the lack there of, is not a factor in this list; however, the Eleventh Circuit has held that a Chapter 11 debtor's case could be dismissed, prior to the debtor even filing his proposed Plan, where the court found that the debtor filed his petition in bad faith, and would ultimately therefore necessarily fail the good faith requirement of §1129.[44]

[43] 11 U.S.C. 1112(b)(4)
[44] In re Natural Land Corp., 825 F.2d 296 (11th Cir. 1987)

Chapter 13 Standards

Several courts have held that the language of §1129(a)(3) is to be interpreted the same as the language of §1325(a)(3); therefore, a discussion of the case law which has developed under Chapter 13 for dismissal for lack of good faith is highly relevant to our discussion of the individual Chapter 11 debtor's good faith requirement.[45]

There are two sub-sections in Chapter 13 of the Bankruptcy Code that contain the term "good faith": §1325(a)(3), "the court shall confirm a plan if the plan has been proposed in good faith…" and §1325(a)(7), "the court shall confirm a plan if the action of the debtor in filing the petition was in good faith…" Good faith in Chapter 13 cases doesn't end there--courts have held that a lack of good faith may constitute "cause" for the dismissal or conversion of a Chapter 13 case under §1307(c).

Section 1325(a)(3)

Courts have followed two general approaches for determining whether a Chapter 13 plan has been proposed in good faith: a non-exhaustive list of factors to be considered, and the "totality of the circumstances" or "honesty of intention" approach.[46]

Some basic tenets of the analysis under §1325(a)(3) from courts within the Sixth Circuit:

- Good faith, in the traditional sense, is essential to the confirmation of any Chapter 13 plan.[47]
- Good faith in incurring the debt should be distinguished from good faith in proposing a plan.[48]
- The basic principles of a good faith analysis are the same whether the issue is raised under §1307(c) or §1325(a), and therefore the same analysis can be used under both sections.[49]

[45] *Cf.* In re Khan, 34 B.R. 574 (BC WD Ky 1983), In re Nelson (BC DC NJ 1986), Cutliff v. Reuter, BC WD Mo 2010)
[46] 3 Keith M. Lundin, Chapter 13 Bankruptcy §177.1 (3d Edition 2000 & Supp. 2004)
[47] In re Rose, 101 B.R. 934 (Bankr. S.D. Ohio, 1989)
[48] In re Riggleman, 76 B.R. 111 (Bankr. S.D. Ohio, 1987)
[49] In re Barnett, 216 B.R. 202 (Bankr. N.D. Ohio, 1997)

- It seems that Congress generally intended for bankruptcy courts, in analyzing good faith, to rely upon common sense and the perception of justice and equality.[50]

In Sixth Circuit made clear, in In re Okoreeh-Baah, that the courts are to take a wide "totality of the circumstances" approach to determining the aspect of good faith on the part of the debtor, in connection with §1325(a)(3).[51]

Under In re Caldwell the Sixth Circuit, in 1990, enumerated a list of factors used to determine whether or not a plan had been proposed in good faith, as follows:

(1) the amount of the proposed payments and the amount of the debtor's surplus;
(2) the debtors employment history, ability to earn and likelihood of future increases in income;
(3) the probable or expected duration of the plan;
(4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
(5) the extent of preferential treatment between classes of creditors;
(6) the extent to which secured claims are modified;
(7) the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7;
(8) the existence of special circumstances such as inordinate medical expenses;
(9) the frequency with which the debtor has sought relief under the Bankruptcy Code;
(10) the motivation and sincerity of the debtor in seeking Chapter 13 relief;
(11) the burden which the plan's administration would place upon the trustee; and
(12) whether the debtor is attempting to abuse the spirit of the Bankruptcy Code.[52]

The plethora of case law available on §1325(a)(3) should make finding a relevant factual situation to your case fairly easy.

Closing case/obtaining discharge

Due to the accrual of quarterly fees an the obligation of monthly operating reports while a Chapter 11 case is open, it is more practical for an individual debtor to ensure the case closes as

[50] In re Hurd, 4 B.R. 551 (Bankr. W.D. Mich, 1980)
[51] In Re Okoreeh-Baah, 836 F.2d 1030 (6th Cir. 1988)
[52] In re Caldwell, 895 F.2d 1123 (6th Cir. 1990)

soon as the order confirming plan becomes a final order. However, that debtor must return to the bankruptcy court to obtain a discharge upon completion of the plan. Section 1141(d)(5) leaves open the possibility to otherwise obtain a discharge for cause. "Unless after notice an a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the pan until the court grants a discharge on completion of all payments under a plan."

What constitutes cause?

Case law is still forming around this issue and was recently addressed in In re Beyer, 433 B.R. 884, 888 (Bankr. M.D. Fla. 2009) which cites to In re Sheridan, 391 B.R. 287, 291 (Bankr. E.D.N.C. 2008) in making its analysis as to cause. At least as outlined by Beyer there are only two reasons for cause: 1) substantial consummation or 2) likelihood of future payment:

> Mr. Sheridan had asked for an early discharge in his plan of reorganization and prominently noticed the request to his creditors. Before actual entry of the discharge, he had turned over all needed properties, made substantial distributions under the confirmed plan, appointed a trustee to administer remaining required payments, and, most importantly, granted the unpaid creditors a security interest in sufficient collateral to all but guarantee payment in the future. Moreover, Mr. Sheridan was a practicing attorney with 'sufficiently reliable income' to infuse new monies if needed to address any future payment default. Under these circumstances, the bankruptcy court found sufficient cause existed to grant an early discharge finding, "The combination of the likelihood of payment and the assurance that the unsecured creditors will receive what they have agreed to accept in satisfaction of their claims gives the court confidence to allow the discharge to take effect upon confirmation of the plan.

The cost to reopen

Of course there is a fee associated with the reopening of any bankruptcy case. Recognizing the conflict between the need for the closing of a Chapter 11 to stop the accrual of quarterly fees and monthly reporting obligation and the requirement that plan payments be complete before an individual debtor can obtain a discharge, the Eastern District of Michigan has implemented

Guideline 11 whereby the court waives the fee for reopening the case for the purpose of obtaining a discharge:

> Guideline 11 Entry of a Discharge in an Individual Chapter 11 Case: 11 U.S.C. §1141(d)(5) provides that in an individual chapter 11 case, a discharge is entered after the completion of all payments under the confirmed plan and after the court makes the findings required by § 1141(d)(5)(C). Rather than await those events to close the case, which may take several years, the Court will close such a case upon plan confirmation and resolution of all post-confirmation litigation. To request the entry of a discharge upon the completion of plan payments, 84 the debtor must file a motion to reopen for that purpose. The Court will waive any applicable reopening fee for such a motion. The motion should request the findings required by § 1141(d)(5)(C) and should be filed under LBR 9014-1 with notice to all parties in interest. (Effective September 10, 2008)

Section 1123(a)(8) Contents of a Plan: "Notwithstanding any otherwise applicable non-bankruptcy law, a plan shall – modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence. . . .*"

C. Involuntary Chapter 11

There is no such thing as an involuntary petition in Chapter 13. This is because Congress decided that to force an individual into a bankruptcy which result in his having to repay his debts over some period of time was akin to involuntary servitude, which is unconstitutional under the Thirteenth Amendment.[53]

Interestingly, a debtor may be forced into involuntary Chapter 11 bankruptcy.[54] The requirements for the filing of Chapter 11 involuntary petition are the same requirements for filing an involuntary Chapter 7 petition, and are laid out in §303 of the Code. Section 303 reads as follows:

> (a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or

[53] 11 U.S.C. §303(a); See also Historical and Revision Notes to Section 303.
[54] See generally 11 U.S.C. §303

commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least $10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724 (a) of this title, by one or more of such holders that hold in the aggregate at least $10,000 of such claims;

(3) if such person is a partnership—

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or

(4) by a foreign representative of the estate in a foreign proceeding concerning such person.

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection(b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

(e) After notice and a hearing, and for cause, the court may require the petitioners under this section to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i) of this section.

(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced.

(g) At any time after the commencement of an involuntary case under chapter 7 of this title but before an order for relief in the case, the

court, on request of a party in interest, after notice to the debtor and a hearing, and if necessary to preserve the property of the estate or to prevent loss to the estate, may order the United States trustee to appoint an interim trustee under section 701 of this title to take possession of the property of the estate and to operate any business of the debtor. Before an order for relief, the debtor may regain possession of property in the possession of a trustee ordered appointed under this subsection if the debtor files such bond as the court requires, conditioned on the debtor's accounting for and delivering to the trustee, if there is an order for relief in the case, such property, or the value, as of the date the debtor regains possession, of such property.

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if—

(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount; or

(2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment—

(1) against the petitioners and in favor of the debtor for—

(A) costs; or

(B) a reasonable attorney's fee; or

(2) against any petitioner that filed the petition in bad faith, for—

(A) any damages proximately caused by such filing; or

(B) punitive damages.

(j) Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section—

(1) on the motion of a petitioner;

(2) on consent of all petitioners and the debtor; or

(3) for want of prosecution.

[(k) Repealed. Pub. L. 109–8, title VIII, § 802(d)(2), Apr. 20, 2005, 119 Stat. 146.]

(l)

(1) If—

(A) the petition under this section is false or contains any materially false, fictitious, or fraudulent statement;

(B) the debtor is an individual; and
(C) the court dismisses such petition,
the court, upon the motion of the debtor, shall seal all the records of the court relating to such petition, and all references to such petition.
(2) If the debtor is an individual and the court dismisses a petition under this section, the court may enter an order prohibiting all consumer reporting agencies (as defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a (f))) from making any consumer report (as defined in section 603(d) of that Act) that contains any information relating to such petition or to the case commenced by the filing of such petition.
(3) Upon the expiration of the statute of limitations described in section 3282 of title 18, for a violation of section 152 or 157 of such title, the court, upon the motion of the debtor and for good cause, may expunge any records relating to a petition filed under this section.