CONCURRENT SESSION

Individual Chapter 11 Cases: A "How To" Guide

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FITTING A SQUARE PEG INTO A ROUND HOLE: A "HOW TO" TOOLBOX FOR THE INDIVIDUAL CHAPTER 11 ATTORNEY

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FITTING A SQUARE PEG INTO A ROUND HOLE: A "HOW TO" TOOLBOX FOR THE INDIVIDUAL CHAPTER 11 ATTORNEY

I. Introduction

Bankruptcy Court typically represents a "last resort" for financially distressed debtors. For certain individuals who do not qualify for relief under Chapter 7 or Chapter 13, Chapter 11 provides a vehicle for restructuring their business affairs and repayment of debt. If the individual seeking to reorganize does not qualify for relief under Chapter 13 or it otherwise does not provide adequate remedies, Chapter 11 will sometimes represent the "last chapter" in the court of last resort.

Chapter 11 was formerly known as the chapter relating to "corporate reorganization." Therefore, as a result, the provisions of Chapter 11 are not necessarily finely tuned to the needs of an individual debtor. Therefore, handling an individual Chapter 11 is sometimes like fitting a "square peg in a round hole." In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") became effective and amended the Bankruptcy Code to include certain provisions specific to individual Chapter 11 debtors. However, the BAPCPA provisions which specifically relate to individual Chapter 11 debtors did not smooth out all of the rough edges. A number of incongruities with respect to individuals in Chapter 11 continue to exist under the statute.

The purpose of these materials is to provide a toolbox, a "how to" guide, for a bankruptcy attorney regarding the basics of an individual Chapter 11 bankruptcy case. Obviously, all of the issues which may be encountered in a Chapter 11 case are outside the scope of this presentation and paper. Rather, the focus of these materials and the speakers' presentation is to highlight various areas most specific to individual Chapter 11 cases within the broader context of Chapter 11.

II. Eligibility

The first consideration for the bankruptcy practitioner regarding representation of an individual in financial distress concerns determination of the appropriate chapter for relief. The following is a brief outline of concerns appropriate to a determination regarding whether an individual should seek relief under Chapter 7, 13, or 11.

A. Chapter 7 Eligibility

Individuals may qualify for relief under three chapters of Bankruptcy Code: Chapter 7, Chapter 13, and Chapter 11. The debtor may qualify for relief under Chapter 7, in which event the individual may well seek the immediate, or at least relatively quick, discharge. The first question in determining whether an individual qualifies under chapter 7 is whether the debtor represents a "consumer debtor" or a "business debtor". Bankruptcy Code §101(a) defines consumer debt as "debt incurred by an individual primarily for personal, family, or household purpose." If the amount of the debtor's

business debt exceeds the amount of the consumer debt, then the debtor may qualify as a "business debtor". [1] In this event, the Debtor does not need to undertake the "means test" which became engrafted into Chapter 7 under BAPCPA. [2]

However, even a business debtor who does not need to qualify under the means test may be subject to dismissal of the chapter 7 "for cause" under §707(a). There are numerous factors that courts have utilized to determine whether a Chapter 7 debtor filed a case in bad faith, including:

- the debtor reduced his creditors to a single creditor in the months prior to filing the petition;
- the debtor made no life-style adjustments or continued living an expansive or lavish life-style;
- the debtor filed the case in response to a judgment, pending litigation, or collection action;
- there is an intent to avoid a large, single debt;
- the debtor made no effort to repay his debts;
- the unfairness of the use of Chapter 7;
- the debtor has sufficient resources to pay his debts;
- the debtor is paying debts of insiders;
- the schedules inflate expenses to disguise financial well-being;
- the debtor transferred assets;
- the debtor is overutilizing the protections of the Code to the unconscionable detriment of creditors;
- the debtor employed a deliberate and persistent pattern of evading a single major creditor;
- the debtor failed to make candid and full disclosure;
- the debtors' debts are modest in relation to his assets and income;
- there are multiple bankruptcy filings or other procedural "gymnastics".

In re Zick, 931 F.2d 1124 (6th Cir. 1991).

Although the means test is not technically applicable to such a business debtor,

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[1] Courts use one of three approaches to evaluate whether debts are primarily consumer debts: (1) calculate overall ratio of consumer to non-consumer debts to determine if greater than 50 percent. *See* In re Stewart, 175 F.3d 796 (10th Cir. 1999); In re Booth, 858 F.2d 1051 (5th Cir. 1988); In re Kelly, 841 F.2d 908 (9th Cir. 1988); (2) compare total number of consumer and non-consumer claims. *See* In re Higgabotham, 111 B.R. 955 (Bankr. N.D. Okla. 1990); (3) consider both the percentage of consumer debt and the number of consumer debts. *See* In re Vianese, 192 B.R. 61 (Bankr. ND.N.Y 1996). Consumer debt generally includes debt on the personal residence of the Debtor. See generally In the matter of Booth, 858 F.2d 1051(5th Cir. 1988); In re Cox, 315 B.R. 850 (BAP 8th Cir. 2004).

[2] Bankruptcy Code §707(b)(1) applies to consumer debtors and provides that the court may "dismiss a case filed by an individual debtor under [Chapter 7] whose debts are primarily consumer debts…if it finds that the granting of relief would be an abuse of the provisions of this chapter.

the debtor's income and expenses (as reflected on Schedules I and J) are subject to scrutiny as evidenced by the factors set forth above[3]. Obviously, the most important aspect of Chapter 7 to individual debtors is that it does not allow the debtor to retain non-exempt assets. Chapter 7 also does not provide a means of proposing a repayment plan in order to retain such assets.

B. Chapter 13 Eligibility

If a debtor does not qualify for relief under Chapter 7, or if other factors weigh against filing a Chapter 7, an individual debtor may seek relief under Chapter 13. Chapter 13 provides a potential debtor the opportunity to cure mortgage arrearages. Chapter 13 also provides a potential debtor what used to be referred to as a "super discharge." Even under BAPCPA, Chapter 13 does provide for discharge of certain debts which might be non-dischargeable in a Chapter 7 or 11 bankruptcy case.[4]

The entire scope of proceedings under Chapter 13 is outside the scope of this presentation. However, the "debt limits" under Chapter 13 are the most common reason a debtor might look to Chapter 11 rather than Chapter 13.[5] Also, Chapter 13 is available only to an individual with "regular income."[6] In addition, Chapter 13 plan

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[3] Perlin v. Hitachi Capital America Corp., 497 F.3d 364, Bankr. L. Rep. (CCH) P 80984 (3d Cir. 2007) (BAPCPA's amendment of § 707(b) to create a presumption of abuse against debtors who have primarily consumer debts and have sufficient income to repay their debts did not prohibit a bankruptcy court from considering a debtor's income and expenses in ruling on a motion to dismiss under § 707(a)).

[4] For example, debts for willful and malicious injuries by the debtor to another or to property of another are not dischargeable in a Chapter 7 or 11. Bankruptcy Code §523(a)(6). Such provision is not a part of the discharge provisions of Chapter 13. Therefore a 13 Debtor may potentially discharge such a type of debt. See Bankruptcy Code § 1328 (a)(2). Cf. Bankruptcy Code § 1328 (a)(4)(excluding discharge of debt for civil awards resulting from willful or malicious personal injury).

[5] Bankruptcy Code §109(e) specifies that only an individual debtor with non-contingent, liquidated, unsecured debts of less than $360,475.00 and non-contingent, liquidated, secured debts of less than $1,081,400.00 qualifies for relief under Chapter 13. "Debt limit" numbers are not static as they are subject to periodic adjustment. In addition, an argument may be made that a common sense reading of Bankruptcy Code §109(e) demonstrates that the debts of each individual joint debtor are counted separately for purposes of determining the debt limits. In other words, if the debts of each joint debtor are under the debt limits, then a debtor's attorney may argue that each debtor qualifies for Chapter 13 separately based on the debt limits requirements, even though the debts of the two joint debtors combined may exceed the debt limits when totaled together. The two estates of married individuals are jointly administered but not substantively consolidated. See Reider v. FDIC, 31 F.3d 1102 (11th Cir. 1994). Therefore, under this argument it is possible that the total amounts reflected on schedule D and F may exceed the Chapter 13 debt limits as long as the debts of each of the debtors, when counted separately, do not exceed the limits.

[6] An individual without "regular income" may file a joint petition with their spouse who has

payment terms cannot exceed 60 months. Therefore, a debtor who needs more than 5 years to service required debt payments may consider opting to file an individual Chapter 11 case.[7]

Alternatively, a specific example of payment of debt in excess of 5 years relates to modification of "long term" debts. A Chapter 13 Debtor may propose a plan which provides for maintenance of existing debts which mature or continue after the expiration of the 5 year Chapter 13 plan. However, a Chapter 13 debtor may not modify these obligations.[8] Therefore, if a debtor seeks to modify long term debt, by reducing the interest rate or extending the term of payments, thereby reducing the amount of the monthly obligation, a debtor may not be able to obtain this result under Chapter 13. However, a debtor may modify long term secured debt obligations under Chapter 11.

Chapter 13 does provide the Debtor the advantage of the "automatic" dismissal. Chapter 13 provides the "absolute right" to dismiss their case.[9] A Chapter 11 Debtor on the other end has no right to seek "automatic" dismissal of their case.[10]

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regular income. See Bankruptcy Code §109(e).

[7] The "applicable commitment period" for a Chapter 13 is generally 5 years, but can be 3 years for individuals with qualifying income. See 11 U.S.C. §1322(d)(1) and (2).

[8] See 11 U.S.C. §1322(d)(1) and (2)(outlining the applicable commitment period under Chapter 13…either 5 or 3 years); see also 11 U.S.C. §1328(a)(1)(providing that secured claims of which the last payment is due after the date on which the final payment under the plan is due will not be discharged).

[9] Bankruptcy Code §1307 states that "on request of the debtor…the court shall dismiss a case under this chapter." This is often referred to as the "absolute right" of the debtor to dismiss the case. Moreover, bankruptcy code §1307(b) provided that "any waiver of the right to dismiss" was unenforceable. However, a split of authority developed regarding what is referred to as the "bad faith" exception to this rule. Specifically, some courts held that the Debtor did not have the "absolute right" to dismiss a case upon a finding of "bad faith." The United States Supreme Court resolved this split in the case of Marramara v. Citizens Bank of Massachusetts, 549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed. 956 (2007) and held that a Chapter 13 debtor who filed in bad faith does not have an absolute right to dismiss. Accordingly, the Chapter 13 debtor's "absolute right" to dismissal has been tempered and is no longer absolute.

[10] Bankruptcy Code §1112(b) provides that the Court shall "covert a case to Chapter 7 or dismiss the case, whichever is in the best interests of creditors and the estate" upon a showing of "cause." Therefore, the Debtor or a creditor may seek conversion or dismissal of the case upon a showing of cause and a determination under the "best interests" test. The chapter 11 debtor does have the right to convert to Chapter 7 unless the debtor is no longer a debtor in possession or the case was originally commenced as an involuntary case or the case has previously been converted to chapter 11 other than on the debtor's request. Bankruptcy Code §1112(a). However, it is doubtful that an individual in Chapter 11 can convert to Chapter 7 if the individual would have been ineligible for relief under Chapter 7 at the time of the original petition. See Bankruptcy Code § 348(a)(effect of conversion).

Generally, in absence of some specific advantage, a debtor will opt to file a Chapter 13 over a Chapter 11 bankruptcy case due to the higher costs and more burdensome procedures incumbent upon an individual Chapter 11 debtor.

C. Chapter 11 Eligibility

Chapter 11 has been referred to as "corporate reorganization." Today, the title of the Chapter is simply "reorganization." In 1991, the US Supreme Court removed any doubt that individuals may file for relief under Chapter 11. Toibb v. Radloff 501 U.S. 157, 111 S.Ct. 2197, 115 L.Ed. 2d 145 (1991).[11] Moreover, BAPCPA added provisions which are specifically addressed to individual debtors under Chapter 11.[12]

D. Small Business Case Qualification/Designation

BAPCPA created a sub category of Chapter 11 cases: "small business cases." Debtors in such cases may be referred to as "small business debtors". Like the Chapter 13 "debt limits", a debt limit ceiling determines whether a Chapter 11 debtor may qualify as a "small business debtor." The debt limit for qualification as a small business debtor is not static and is periodically updated.[13]

In the event that an individual Chapter 11 Debtor falls within the sub-set of "small business debtors", then certain requirements follow. A small business debtor is required to file its most recent balance sheet, statement of operations, cash-flow statement, and Federal Income Tax Returns within seven days of the petition. Bankruptcy Code § 1116(1)(A). A small business debtor in Chapter 11 faces certain other procedural hurdles. The most onerous is the requirement to file a plan within 300

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[11] Some of the legislative history to the 1978 Bankruptcy Code indicated that individuals might file for relief under Chapter 11. S.Rep.No. 95-989, p.3.(1978) U.S. Code Cong. Admin. News 1978, p.5789 (1978)(Chapter 11 is "primarily designed for businesses, although individuals are eligible for relief under [chapter 11]. The procedures for chapter 11, however, are sufficiently complex that they will be used only in a business case and not in the consumer context.") In Toibb, the Supreme Court resolved a split in the circuit authority. See In re Moog 774 F.2d 1073 (11th cir. 1985) (individual qualified) and Wamsganz v. Boatmen's Bank of De Sota, 804 F.2d 503 (8th cir. 1986)(individual ineligible).

[12] See generally Bankruptcy Code §1115 (property of an individual chapter 11 debtor's estate includes earnings from post-petition services) and 1129(b)(2)(B)(ii)(terms and applicability of the absolute priority rule to individual debtors).

[13] Bankruptcy Code § 101(51D) defines a small business debtor as a "person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under the [Bankruptcy Code] and excluding a person whose primary activity is the business of owning or operating real property …) that has aggregate non-contingent liquidated, secured and unsecured debts [of…] not more than $2,343,300.00 (excluding debts owed to one or more affiliates or insiders). In the event that the United States trustee appoints a creditor committee in a chapter 11, the debtor is no longer treated as a "small business debtor".

days of the petition.[14] There are advantages to qualification as a small business debtor, specifically the ability of a small business debtor to consolidate the hearing on final approval of the disclosure statement with confirmation of a proposed plan.[15] This procedural advantage greatly facilitates the debtor's ability to expedite the case and therefore manage the case more economically.

In summary, an individual Chapter 11 debtor, which in and of itself represents a sub-set of Chapter 11 debtors, may also constitute a further sub-sub-set -- individual Chapter 11 debtors who are also small business case debtors.

III. Filing and Case Requirements

The items which are required to initiate a bankruptcy petition are always of paramount importance to the bankruptcy practitioner. Often, bankruptcy petitions must be filed on an emergency basis. Therefore, it is critical that the attorney insure that all steps necessary to properly initiate a bankruptcy petition have been completed. The following may serve as a checklist for items required to initiate the case.

A. Pre-petition Credit Counseling

An individual Chapter 11 debtor, just as an individual Chapter 7 or Chapter 13 debtor, must complete "credit counseling" within the 180-day period prior to the petition date, or qualify for an exemption or waiver of the requirement. Bankruptcy Code §109(h). Typically a bankruptcy practitioner will have an established relationship with a credit counseling service and ensure that the client has completed the pre-petition credit briefing prior to the filing of the case rather than rely upon an exemption or waiver of such requirement. Failure to complete credit counseling prior to the petition date can be fatal to the case.

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[14] Bankruptcy Code § 1121(e)(2). A Chapter 11 small business debtor's "exclusivity period" in which only the debtor may file a plan is 180 days. Bankruptcy Code § 1121(e)(1). Additionally,1129(e) requires confirmation of the Plan in a small business case within 45 days of the Plan's filing date. However, the court may enlarge the 300 day and 45 day deadline and the exclusivity period provided the order extending time is signed before the existing deadline has expired. Bankruptcy code § 1121(e)(1)(B).

[15] Bankruptcy Code § 1125(f)(3). The Court may determine that the Plan itself provides adequate information without the necessity of a separate disclosure statement. Bankruptcy Code § 1125(f)(1). Bankruptcy Code § 1125(f) also provides that in a small business case, the court may "conditionally approve a disclosure statement subject to final approval after notice and a hearing…." Bankruptcy Code § 1125(f)(3)(a). "[T]he hearing on the disclosure statement may be combined with the hearing on confirmation of the plan." Bankruptcy Code § 1125 (f)(3)(C). This consolidated hearing shortens the confirmation process for a small business debtor because two notice periods (one for hearing on approval of the disclosure statement and a second for hearing on actual confirmation of the plan) are not required. "[A]cceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement…." Bankruptcy Code § 1125(f)(3)(b).

B. Filing fee: Chapter 11

The filing fee payable to the Bankruptcy Clerk upon the filing of the Chapter 11 case greatly exceeds the filing fees due upon the filing of a Chapter 7 or Chapter 13. Currently, the filing fee for a Chapter 11 Bankruptcy Case equals $1,046.00 as opposed to the current Chapter 7 filing fee of $306.00 and the Chapter 13 filing fee of $281.00. A bankruptcy practitioner may use this fact to impress upon the potential Chapter 11 individual debtor client the level of commitment which is required in order for the client to succeed in Chapter 11.

C. Pleadings Due on the Petition Date

The following pleadings are due on the petition date: (1) Voluntary Petition; (2) List of Creditors; (3) schedule of the 20 largest Unsecured Creditors; (4) Individual Debtor's Statement of Compliance with Credit Counseling Requirement; and (5) Statement of Social Security Number (official form 21). [16]

D. Pleadings Due within 7 Days of the Petition

As stated and delineated above, certain pleadings are due on the first day of the case. If the debtor represents a Small Business Debtor, additional pleadings are due within 7 days following the petition date. Specifically, a Small Business Debtor must file its most recent balance sheet, statement of operations, cash flow statement, and federal income tax returns within 7 days of the petition. Bankruptcy Code 1116(1)(A). Alternatively, the Small Business Debtor may file a statement under penalty of perjury that no balance sheet, statement of operations, or cash flow statement have been prepared, or no federal tax return has been filed. Bankruptcy Code 1116(1)(B).

E. Pleadings Due within 14 Days of the Petition

Where a debtor has filed only the items set forth above which are absolutely required on the first day of the case, i.e., a skeletal petition, additional pleadings must be filed within 14 days of the petition date. In such event, the debtor must file its Schedules, Statement of Financial Affairs (sometimes referred to as the "SOFA"), Statement of Current Monthly Income and Disposable Income Calculation (individual only – official form 22B), Copies of the Payment Advices (or declaration of the inapplicability of such requirement), and the Attorney Compensation Disclosure Statement per Bankruptcy Rule 2016(b).[17]

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[16]See Bankruptcy Code §§ 301, 521, 1116(3). See also Bankruptcy Rules 1002, 1007, and 3015. See also Official Form B200: Required List of Schedules Statement of Fees.

[17] A corporate Chapter 11 Debtor must also file a Statement of Corporate Ownership and the names and addresses of equity security holders, to the extent applicable. Bankruptcy Rule 1007(a)(1), 7007.1 However, this obviously would not be applicable to an individual Chapter 11 Debtor.

The deadline for filing such pleadings which are due within 14 days of the petition date may be extended. The debtor may request such an extension as long as the extension is requested prior to the expiration of the 14 day deadline. Typically such a request is made by application to the Court and granted for cause. Courts are usually understanding of a need for additional time to timely complete the schedules and SOFA so that the same accurately reflect the financial affairs of the debtor. However, the Court "shall not" extend the 14 day deadline to a date more than 30 days after the petition "absent extraordinary and compelling circumstances." Bankruptcy Code §1116(3). Additionally, courts are usually hesitant to extend such a date after the Section 341 meeting of creditors.

F. Attending the IDI

A Chapter 11 Debtor is also required to attend an "Initial Debtor Interview" (commonly referred to as the "IDI") prior to the meeting of creditors under the Bankruptcy Code §341. Bankruptcy Code §1116(2). Within Districts operating under the U.S. Trustee system, the Office of the United States Trustee (sometimes referred to as the "UST") typically conducts the initial debtor interview in its offices or via telephone and requires the Debtor's presentation of documentary evidence prior to conducting the IDI.[18]

IV. First Day Motions and Cash Collateral Issues

Typically, in a large corporate, i.e. complex, Chapter 11 Bankruptcy Case, the debtor files a multitude of "First Day Motions." The need for such a variety of motions is typically diminished in a smaller individual Chapter 11 Bankruptcy Case. However, certain motions may be helpful or required in certain instances.

A. Maintenance of Pre-Petition Bank Accounts and Payment of Pre-Petition Wages

Upon filing of the bankruptcy case, an individual becomes a debtor-in-possession ("DIP"). An individual Chapter 11 Debtor, like any other DIP, is required to close pre-petition bank accounts and open new post-petition bank accounts commonly referred to as "dip accounts." Under certain circumstances, a debtor may obtain permission from the Court to maintain pre-petition bank accounts. See, e.g. In re Grant Broad, Inc., 75 B.R. 819 (E.D. Pa. 1987). In this event, the debtor should file a motion requesting approval from the Court to do so at the outset of the case. The debtor's attorney would normally consult with the U.S. Trustee in order to determine the U.S. Trustee's position and obtain concurrence, if possible, with respect to the debtor's request to maintain pre-petition bank accounts.

An individual debtor may have employees, especially if an individual debtor operates a business as a sole proprietor. When an individual Chapter 11 Debtor files a

[18] Oftentimes the most time sensitive document requested for the IDI is proof of insurance.

case owing wages to employees on the petition date, the debtor may seek permission to pay pre-petition wages. Corporate Chapter 11 Debtors typically file such a request to pay pre-petition wages along with the myriad of "First Day Motions." The relief is often requested under the "emergency" and "necessity of payment" doctrine and further buttressed by the debtor's arguments that unpaid wages otherwise would be treated as a priority claim under Bankruptcy Code §507, and also by the adverse impact of nonpayment of pre-petition wages on the debtor's post-petition operations. See generally In re Tower Automotive, Case No. 05-10578 (Bankr. S.D.N.Y. February 3, 2005).

B. Cash Collateral Issues

"Cash collateral" includes debtor's cash on hand, deposit accounts (bank accounts), and the proceeds of rents, profits, and accounts receivable. (See generally Bankruptcy Code 363(a) for the complete definition of "cash collateral.") A creditor may hold a lien upon the Debtor's rents or accounts receivable. The most common example in an individual 11 is the circumstance where a Lender holds a lien on the Debtor's income-producing real property (and its rents). Such a creditor will hold a security interest in the Debtor's rent proceeds as cash collateral. In this event, the Debtor may not use its "cash collateral" unless – (a) the creditor holding a security interest in such cash collateral consents to such use, or (b) the Court authorizes the Debtor's use of cash collateral. Bankruptcy Code §363(c)(2). Debtor's counsel should interrogate the Debtor and conduct a pre-petition search of the public records in order to determine whether creditors hold valid perfected security interests in the Debtor's accounts receivable, rents, etc., in order to determine whether a cash collateral issue exists. If a cash collateral issue exists, then the Debtor cannot spend any such money upon the filing of the case. Therefore, it is incumbent upon Debtor's counsel to file a motion to use cash collateral at the outset of the case. Bankruptcy courts usually are receptive to hearing motions to use cash collateral on an emergency basis and therefore very short notice to creditors. The first hearing is considered the "interim hearing"; however, the Court will hold a final hearing after at least a 14 days notice of the hearing is provided. (See Bankruptcy Rule 4001(b) generally with respect to filing and service of cash collateral motions).

C. Payment of Ordinary Living/Household Expenses

As discussed above, the Debtor cannot use cash collateral without permission of the Court where a creditor holds a lien on such property of the estate. Under these circumstances, there is no question that the Debtor must seek leave of Court to spend such money. A more interesting question arises where the Debtor does not have a definitive "cash collateral" problem, but rather the Debtor simply wants to spend money even where the funds on hand do not represent collateral of any creditor.

A Chapter 11 Debtor may operate its business in the "ordinary course." Otherwise stated, a debtor-in-possession may conduct any transaction which is in the

"ordinary course of business" without leave of the Bankruptcy Court. [19] However, the question arises as to whether an individual Debtor's payment of ordinary expenses, such as household expenses, represents operation of a business in due ordinary course. In this instance, an individual Chapter 11 Debtor maintaining an ordinary existence, but doing so in a Chapter 11, represents one of the examples of a "square peg in a round hole."

Prior to the 2005 enactment of BAPCPA, an individual Chapter 11 Debtor's post-petition earnings did not constitute property of the estate. However, BAPCPA's codification of Bankruptcy Code §1115(a) provides that where "the debtor is an individual, property of the estate includes . . . 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." Bankruptcy Code 1115(a)(2). Prior to the enactment of this provision under BAPCPA, an individual Chapter 11 Debtor could assert that such Debtor had a relatively unfettered right to use his post-petition earnings to pay his household or other personal expenses because such post-petition earnings did not constitute property of the estate. Now, under the post-BAPCPA Code, the Debtor is constrained to make such an argument. Rather, a debtor's use of cash on hand, even though it represents the Debtor's post-petition earnings, constitutes use of property of the estate.

However, as stated above, the Debtor may use property of the estate in the ordinary course of business. But usage of such cash on hand to pay household bills such as utilities, mortgage payments, purchases of food and clothing, etc., may be distinguished. Whether or not such expenditures represent ordinary course of business disbursements represents an open issue. The Debtor's position is that it is in the ordinary course of business that an individual pays reasonable and necessary household expenses. A creditor's attorney might argue that payment of household expenses does not represent a "business transaction or expense."

At least one post-BAPCPA Court has published a decision regarding an individual debtor's use of post-petition earnings as estate property. [20] In re Goldstein, 283 B.R. 496, 499 (Bankr. C.D.Cal. 2007). In Goldstein, the Court held that Bankruptcy Code did authorize use of estate property in the form of post-petition earnings to pay reasonable and necessary expenses that are in the ordinary course of business.

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[19] A debtor-in-possession has the rights and duties of a trustee. Bankruptcy Code §1107(a). Furthermore, the Trustee (i.e. the debtor-in-possession) may "operate the Debtor's business" unless the bankruptcy court orders otherwise after notice and a hearing. Bankruptcy Code §1108.

[20] At least one unpublished decision from the Bankruptcy Court for the District of Nevada established that the Debtor is authorized to pay ordinary course living expenses. See In re Robin Lynn Horne, Case No. bk-s-07-15280 (Bankr. D. Nev.). In the Horne case, the Debtor filed a motion requesting the Court's authorization to pay ordinary living expenses. In such motion, the Debtor acknowledged the provisions of Bankruptcy Code §1115 and asserted that the Debtor should be entitled to use estate property to pay "ordinary living expenses." The Horne Court authorized the Debtor to pay budgeted expenses.

According to the Court in Goldstein, the Code "authorizes the Debtor to buy bread and probably to purchase a ticket to travel to a court hearing." However, the hiring of divorce counsel is not typically a transaction in the ordinary course of business. Id.[21]

Certain decisions published pre-BAPCPA may also serve as authority for resolution of this post-BAPCPA conundrum. In the pre-BAPCPA cases, courts were required to rule upon the Debtor's use of estate property to pay the individual Debtor's living expenses. See generally In re Keenan, 195 B.R. 236 Bankr. W.D.N.Y. 1996); In re Bradley, 185 B.R. (Bankr. W.D.N.Y. 1995). These cases are analogous because they involve the individual Debtor's use of estate property to pay living expenses; so such cases may be appropriately considered when a post-BAPCPA individual debtor seeks to use post-petition earnings which now constitute estate property under BAPCPA. In these published decisions, the Court did authorize use of estate property to pay ordinary living expenses.

In short, this is an area which remains unsettled and a shade of grey. The individual in Chapter 11 again seems not quite a round peg in a round hole.

V. Employment of Professionals and Other Operational Issues

A. Professionals

In Chapter 7 and Chapter 13 cases, the Debtor's attorney may be employed without formal authorization or approval from the Court. However, in Chapter 11, the Debtor must obtain the Court's authorization and approval to employ professionals. Therefore, the Debtor's attorney typically files an application for approval of its employment at the outset, if not the first day, of the case. Under BAPCPA, the Court should not approve the Debtor's request for employment of a professional until 21 days after the petition date unless exigent circumstances exist. See Bankruptcy Rule 6003. The resulting procedure in many jurisdictions is that the Debtor files the application to employ attorneys and other required professionals on the first day of the case but the order approving such application is not entered until after the 21st day of the case.

The debtor is typically informed of these requirements regarding professionals by the U.S. Trustee at the Initial Debtor Interview. This procedure serves as a reminder of what has hopefully been the Debtor's prior understanding through conversations and advice of counsel.[22]

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[21] See In re Villalobos, 2011 Bankr. LEXIS 4329 (9th Cir. 2011) for an unpublished decision discussing the possible standards under which this question could be analyzed.

[22] Again, a Chapter 11 Debtor serves as a debtor-in-possession under the provisions of Bankruptcy Code §1107. And such a debtor-in-possession, the Debtor has the rights and obligations of a Trustee. A bankruptcy trustee "with the Court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate and who are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties . . . ." Bankruptcy Code §327(a). In short, because a Trustee must obtain court approval to employ professionals, so

The types of professionals which the debtor must obtain court approval to employ include attorneys, accountants, appraisers, real estate brokers, and auctioneers. A full discussion of the procedures and limitations on who may be employed by a Debtor is outside the scope of this presentation. However, the colloquial rule of thumb is that such a professional should not have a "conflict of interest." More specifically, the Bankruptcy Code provides that such prospective professionals should be "disinterested" and "not hold or represent an interest adverse to the estate." See generally Bankruptcy Code §327. Therefore, the prospective individual Chapter 11 Debtor's attorney should perform a conflicts check and be aware of and otherwise analyze any potential conflicts of interest regarding representation of the Debtor in the Chapter 11 Case. The most important aspect of the employment process lies in a full disclosure of contacts between the professional and the debtor, creditors, and other parties in interest. Professionals should make such disclosure in their Applications for employment and supplement or amend to the extent required.[23]

B. Operating Reports

The Chapter 11 Debtor is required to file what is commonly referred to as Monthly Operating Reports (sometimes abbreviated "MOR"). The Monthly Operating Report is filed on a form provided by the United States Trustee. The MOR includes a cash flow statement which reflects the Debtor's actual income and expenses on a cash basis. As these operating requirements are imposed upon any Chapter 11 Debtor, an individual debtor must likewise comply. The U.S. Trustee has MOR report forms which are applicable to individual debtors and shortened forms for small business debtors. In addition, BAPCPA added specific reporting requirements for Chapter 11 debtors in "small business cases."[24]

C. United States Trustee Fees

A Chapter 11 Debtor must pay a quarterly fee to the U.S. Trustee. This quarterly fee represents a financial burden upon the typical debtor in a smaller case. The requirement of a quarterly fee also distinguishes an individual Chapter 11 Debtor from a Chapter 13 Debtor; however, the Chapter 13 Debtor does pay Trustee's fees on

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must an individual Chapter 11 Debtor.

[23] Prospective debtor professionals should be conscious of the source of payments (i.e. payments from non-debtor sources) as well as the timing of a debtor's pre-petition payments made to professionals. A professional's receipt of payments which constitute preferential transfers under Bankruptcy Code §547 may be cause for disqualification. 11 U.S.C. §101(14).

[24] Specifically, Bankruptcy Code §308(b) provides as follows: A debtor in a small business case "shall file periodic financial and other reports containing information including – (1) the Debtor's profitability; (2) reasonable approximations of the Debtor's projected cash receipts and cash disbursements over a reasonable period; (3) comparisons of actual cash receipts and disbursements with projections and prior reports; (4) whether the Debtor is – (A) in compliance in all material respects with post-petition requirements imposed [by the Bankruptcy Code and Bankruptcy Rules]; and (B) timely filing tax returns and other required governmental filings and paying taxes and other administrative expenses when due . . . ."

disbursements made to creditors under the Plan. The United States Trustee fee is calculated pursuant to a statutory formula and is based upon the Debtor's actual disbursements made each quarter. The Chapter 11 Debtor continues to pay the U.S. Trustee's quarterly fee until entry of a Final Decree, conversion, or dismissal. The continued obligation to pay U.S. Trustee fees represents an incentive for a Debtor to promptly close the case at the earliest opportunity.

VI. The Plan Process

Confirmation of a Chapter 11 Plan of Reorganization normally represents the desired end result in an individual Chapter 11 Bankruptcy Case. In certain corporate reorganization cases, the initial strategy or plan (with a lowercase "p" rather than a capital "P") may be to file and prosecute a motion for sale of the Debtor's assets under Bankruptcy Code §363. However, in an individual Chapter 11 Case, the ultimate goal usually is confirmation of a Chapter 11 Plan. Through confirmation of a plan, the individual Chapter 11 Debtor may restructure his or her debt payments and ultimately receive a discharge of debts. Through this process, an individual may receive a "fresh start."

The full gamut of issues which may arise in the Chapter 11 plan confirmation process are beyond the scope of this presentation. Rather, the goal of this paper is to outline certain key factors which should be taken into account with respect to plan confirmation and highlight certain issues which are peculiar to individual Chapter 11 plans as opposed to plans filed by business entities.

A. Timing of Filing the Plan

With respect to a "regular" Chapter 11 Debtor (i.e. one which is not a small business debtor), the Bankruptcy Code does not provide an absolute deadline by which the Debtor must file a Plan. Different rules apply in a small business case. If the Debtor's case qualifies or otherwise meets the definition of a "small business case," then the Debtor must file a Plan within 300 days of the petition date. Bankruptcy Code 1121(e)(2). Further, the Court is actually directed to confirm (or presumably deny confirmation of) the Plan in a small business case within 45 days after the Plan is filed unless such deadline is extended. Bankruptcy Code §1129(e). The Court should only extend the 300 day deadline for filing the Plan and the 45 day deadline for ruling on Plan confirmation if the Debtor "demonstrates by a preponderance of the evidence that it is more likely than not that the Court will confirm a Plan within a reasonable period of time." Bankruptcy Code §1121(e)(3)(A). The Court must grant any such extension before the original existing deadline has expired and must further provide a new deadline at the same time the extension is granted. Bankruptcy Code §1121(e)(3)(B) & (C).

B. The Exclusivity Period

In a regular Chapter 11 case (one which is not a small business case), the Bankruptcy Code provides that only the Debtor may file a plan at the outset of the case. This is referred to as the "exclusivity period." The exclusive period during which only the Debtor may file a Plan in such cases is 120 days from the Order for Relief. Bankruptcy Code §1121(b)(1). There is also a separate 180 day exclusive period (running from the Order for Relief) for seeking acceptance of a plan filed within the 120 day period.

Otherwise stated, other non-debtor parties may file a plan and the exclusive period is effectively terminated if the Debtor has not filed a plan which has been "accepted" within 180 days after the Order for Relief. Bankruptcy Code §1121(c)(3). The Bankruptcy Court may extend the 120 day exclusive period for filing the Plan and the 180 day exclusive period for obtaining "acceptance" of a plan. The request for such extension must be filed within the deadlines. Bankruptcy Code §1121(b)(1). The Court may not extend the 120 day exclusive period for filing a plan more than 18 months from the Order for Relief. The Bankruptcy Court may not extend the 180 day exclusive period for obtaining acceptance of the plan beyond 20 months after the Order for Relief. Bankruptcy Code §1121(d)(2)(A) & (B).[25]

In a small business case, the exclusivity rule is different. In a small business case, the Debtor's exclusive time for filing a plan is 180 days, unless the Court extends it. However, the Court presumably would not extend the Debtor's exclusive period for filing a plan beyond the 300 day deadline for filing a plan (by any party) discussed above unless the 300 day deadline is likewise extended.

The Court may convert the case to Chapter 7 or dismiss the case, if the Debtor fails to obtain confirmation to the Plan within the required time periods. Bankruptcy Code §1112(b)(4)(J).

C. The Disclosure Statement

A Chapter 11 Debtor must file a Disclosure Statement along with the Plan.[26] The purpose of the Disclosure Statement is to provide "adequate information" to creditors to allow them to determine whether to vote to accept or reject the Plan. The Official Forms now contain a Form Plan and Form Disclosure Statement for Small Business Cases.[27] These templates may be used as a starting point for preparation of a Disclosure Statement and Plan in an individual case, regardless of whether or not the individual

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[25] If a Trustee is appointed, then exclusivity no longer applies. Bankruptcy Code §1121(c)(1). The Court may eliminate or reduce the Debtor's exclusive period upon request by a party. Bankruptcy Code §1121(d)(1).

[26] An exception exists in small business cases where the court may determine that the Plan itself provides sufficient information.

[27] The Standard Official Forms Number 25A and 25B contain the form Disclosure Statement and Plan for small business cases.

Chapter 11 Debtor's case constitutes a small business case.

In a small business case, no separate Disclosure Statement is required if the proposed plan contains sufficient information. Bankruptcy Code §1125(f). In a small business case, the Bankruptcy Court may also conditionally approve the Disclosure Statement and authorize the solicitation of votes on the Plan, subject to a final hearing on approval of the Disclosure Statement at the same time as the hearing on confirmation of the Plan.

In a regular Chapter 11 case (i.e. a case which does not constitute a small business case), the Debtor may not solicit votes seeking confirmation of a plan until the Court has approved the Disclosure Statement. Bankruptcy Code §1125(b). So in these cases, the Debtor files the Plan and Disclosure Statement, and a hearing is set to consider approval of the Disclosure Statement. In the event that the Bankruptcy Court approves the Disclosure Statement, then the Plan is transmitted to creditors and the Court schedules a hearing on the confirmation of the Plan. This procedure requires two noticing procedures, both a 28 day notice of hearing on the Disclosure Statement plus a 28 day notice of hearing on confirmation. Bankruptcy Rule 2002(b).

In a small business case, the process may be streamlined. The Court may hold a "consolidated hearing" to consider both approval of the Disclosure Statement and the Plan at the same time. 11 U.S.C. §1125(f)(3)(A).

D. Content of the Plan (and Classes of Claims)

A Chapter 11 Plan "classifies" claims by placing different claims in different classes. A plan may classify substantially similar claims by class. A plan may designate an administrative convenience class of unsecured claims. Bankruptcy Code §1121(a) & (b). The Plan shall designate classes of claims and interests other than administrative and tax claims. The Plan must specify the treatment of any class of claims and whether it is impaired not impaired. The Plan must provide for the same treatment for each claim in a particular class unless the claimant agrees to a less favorable treatment. Bankruptcy Code §1123(a)(4).[28]

Here, BAPCPA again added a specific provision relating to individual Chapter 11 debtors. Specifically, BAPCPA added Bankruptcy Code §1123(a)(8). It provides as follows: in a case in which the Chapter 11 Debtor is an individual, the Plan shall "provide for the payment to creditors under the Plan of all or such portion of earnings from personal services performed by the Debtor after the commencement of the case or other future income of the Debtor as is necessary for the execution of the Plan." This language is best considered within the context of the "absolute priority rule" relating to individual Chapter 11 cases which is discussed below. The author is unaware of any cases which specifically hinge upon the verbiage of Bankruptcy Code §1123(a)(8) outside the context of the absolute priority rule.

[28] Bankruptcy Code §1123 generally sets forth the requirements regarding the "contents" of the Plan.

The above constitute requirements for a Chapter 11 Plan. (Bankruptcy Code §1123(a) provides that the Plan "shall" fulfill such requirements.) As set forth in Bankruptcy Code §1123(b) the Plan may: impair or leave unimpaired any class of claims, provide for the assumption, rejection, or assignment of executory contracts or leases not previously rejected, provide for the settlement of any claim, or provide for the liquidation of property and distribution of proceeds among holders of claims. Most importantly, the Plan may modify the rights of holders of secured claims and unsecured claims. In other words, provided that the Plan is confirmable based upon the requirements to be discussed below, the Plan may provide for a payment of unsecured creditors on a discounted basis. Also, the Plan may modify the rights of secured creditors by bifurcating the claim into a secured and unsecured claim. Importantly, the prohibition on modification of mortgage claims applies in a Chapter 11 case just as it does in Chapters 7 and 13.[29]

E. Confirmation of the Plan

1. Basic Confirmation Requirements: 1129(a)

As stated above, the presumptive goal of the individual Chapter 11 Debtor is to obtain confirmation of a reorganization/repayment plan. Bankruptcy Code §1129 sets forth the requirements for confirmation. The following do not represent all of the stated requirements but are intended to represent the major issues and oft-encountered stumbling blocks:

The Plan must otherwise comply with the other provisions of the Code.[30] The Plan must be proposed in "good faith."[31] The individual Chapter 11 Debtor's post-petition domestic support obligations must be current and the Debtor must have filed all tax returns which are due.[32] The Plan must provide for a payment of priority tax claims in equal installments, with interest, so that such tax claims are paid within 5 years after

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[29] The Plan may "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 . . . ." Bankruptcy Code §1123(b)(5).

[30] Bankruptcy Code §1129(a)(1), (2).

[31] Bankruptcy Code §1129(a)(3). In finding lack of good faith, courts have looked to whether the Debtor intended to abuse the judicial process and purpose of the reorganization. See In re Albany Partners Ltd., 749 F.2nd 670 (11 Cir. 1984).

[32] Bankruptcy Code §1129(a)(14) provides that if the Debtor "is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the Debtor has paid all amounts payable under such order or such statute for such obligation that first became payable after the date of the filing of petition." Again, this is a BAPCPA provision which was enacted specifically to govern individual Chapter 11 Debtors.

the petition date.[33]

The Plan must provide for a payment of other priority claims in full on the effective date of the Plan unless the class accepts deferred cash payments which must include interest.[34] This provision may constitute a stumbling block for an individual Chapter 11 debtor with domestic relations problems. Specifically a child support or alimony obligation (i.e. domestic support obligation) is entitled to priority status under Bankruptcy Code §507(a)(1). So an individual debtor who files a Chapter 11 owing support arrearages must pay them in full on the effective date of the Plan – unless the spouse agrees to accept payments over time. Relations between the Debtor and the former or soon-to-be former spouse may not be amicable. If this is the case and the Debtor does not have the ability to cure all arrearages on the effective date, then plan confirmation becomes problematic. Perhaps this is another example of fitting a round peg in a misshapen hole. Or perhaps this is the result Congress intended in this particular instance.

The Plan must also meet the "best interest of creditors test" which is also sometimes referred to as the "liquidation test." In short, creditors must receive at least as much under the Plan as they would receive in a Chapter 7 liquidation. Specifically, Bankruptcy Code §1129(a)(7)(A)(ii) provides that with respect to an impaired class of claims, the class will "receive or retain under the Plan on account of such claim or interest property of a value, as of the effective date of the Plan, that is not less than the amount that such holder would so receive or retain if the Debtor were liquidated under Chapter 7 . . . ."

BAPCPA also added a specific §1129(a) provision applicable to individual Chapter 11 Debtors. Specifically, Bankruptcy Code §1129(a)(15) provides that in an individual Chapter 11 Debtor case, where the holder of an allowed unsecured claim objects to confirmation of the Plan, and the Plan is not a 100% payment plan, "the value of the property to be distributed under the Plan [must be] not less than the projected disposable income of the Debtor . . . 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."[35] Disposable income is defined by 11

[33] Bankruptcy Code §1129(a)(9)(C).
[34] Bankruptcy Code §1129(a)(9)(B).

[35] "Projected disposable income" is defined in Bankruptcy Code §1325(b)(2). This is an oft-cited indication that, in enacting BAPCPA, Congress intended individual Chapter 11 cases to look and quack more like Chapter 13 Bankruptcy cases. Importantly, §1129(a)(1) cross-references §1325(b)(2) and not §1325(b)(3), which links expenses to IRS standards rather than actual expenses. In a Chapter 11, unlike a Chapter 13, there is no requirement that payments extend for a minimum or maximum period of time. §1129(a)(15) only requires that the value of the property distributed be not be less than the Debtor's disposable income for 5 years from the first payment under the Plan (or longer if plan payments extend for more than 5 years). Thus, if the Debtor uses property from sources such as gifts, exempt property or other money not included in disposable income to fund the payments to unsecured creditors, the actual payment period may be shorter than 5 years.

USC 1325(b)(2) and calculated on a monthly basis. Disposable monthly income is income received by the individual Debtor (other than child support, foster care, or disability payments for a dependent child) less expenses reasonably necessary for the maintenance or support of the Debtor or a dependent of the Debtor, or for a domestic support obligation payable post-petition.[36]

2. Voting

The Plan is submitted to the vote of creditors. Each creditor holding a claim or interest is entitled to vote to accept, or in the alternative, to reject the Plan. A class of creditors is deemed to have accepted the Plan if both half in number of voting creditors and at least two thirds in amount of claims held by voting creditors (based upon the amount of the claims) have voted to accept the Plan.[37] The Bankruptcy Court may confirm the Plan if each (i.e. every) class of claims has voted to accept the Plan or any non-accepting class is not impaired under the Plan.[38] In the event that all of the classes do not vote to accept the Plan and any such non-accepting class is impaired under the Plan, then the Bankruptcy Court may still confirm the Plan. This is commonly referred to as a "cram down" which is discussed below.

3. Cram Down

As discussed, the Bankruptcy Court may confirm the Plan if every class of claims has voted to accept the Plan or such non-accepting class is otherwise unimpaired. In the event that an impaired class has not voted to accept the Plan, then the Plan proponent may request the Court to confirm the Plan nonetheless. This effort to "cram down" confirmation of the Plan over the non-acceptance of an impaired class is governed by the provisions of Bankruptcy Code §1129(b). Please note that the Court may not confirm the Plan, even by cram down, unless at least one class of impaired claims has voted to accept the Plan without including acceptance by "insiders" within such accepting class. [39]

The Debtor, who is presumably the plan proponent, may seek cram down confirmation of the Plan as to a secured creditor. The Bankruptcy Court may confirm the

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[36] Expenses may include charitable contributions limited to 15% of the Debtor's gross annual income for the applicable year. If the individual Debtor is engaged in business, deduction is allowed for payments necessary for the continuation, preservation, and operation of the business. See also Hamilton v. Lanning, 130 S. Ct. 2464 (2010). In Hamilton v. Lanning, the U.S. Supreme Court considered calculation of a Chapter 13 Debtor's projected disposable income and held that the Bankruptcy Court may account for changes in the Debtor's income that are known or virtually certain at the time of confirmation. This holding would presumptively or arguably apply to an individual Chapter 11 Debtor.

[37] Bankruptcy Code §1126(c).

[38] Bankruptcy Code $1129(a)(8).

[39] Bankruptcy Code §1129(a)(10).

Plan over the rejection of the Plan by an impaired secured class if the Court determines that the Plan is "fair and equitable." In order to be "fair and equitable" as to a secured class, the Plan must provide that (i) the secured creditor retains its lien to the extent of the allowed amount of its claim and will receive payments at least totaling the secured value of the claim, (ii) the collateral is sold and the applicable lien attaches to the proceeds of the sale, or (iii) the secured creditor is provided with the "indubitable equivalent."[40] Again, the Code authorizes bifurcation of a secured claim into a secured portion and an unsecured portion, provided that the secured portion of the claim must be paid with interest.

The Debtor, as the presumptive plan proponent, may also seek to obtain cram down confirmation where an impaired class of unsecured creditors has not voted to accept the Plan. Again, the Bankruptcy Court may confirm or cram down the Plan over the rejection of an unsecured creditor class. With respect to a non-accepting unsecured creditor class, the Plan must be "fair and equitable." With respect to such unsecured creditor class, the Plan is not fair and equitable unless: (i) the Plan represents a 100% payment plan,[41] or (ii) the holders of claims or interests junior to the objecting class do not receive or retain anything on account of their claim or interest.[42] This is a codification of what is commonly referred to as the "absolute priority rule." The absolute priority rule has long been a fundamental tenet of Chapter 11 practice. The application of the absolute priority rule to an individual Chapter 11 case is an issue which is currently in a state of flux and is discussed immediately below.

4. The Absolute Priority Rule

The 2005 BAPCPA amendments to the Bankruptcy Code adopted new verbiage regarding what is colloquially referred to as the "absolute priority rule" for individuals seeking relief under Chapter 11. As discussed in part above, in order to "cram down" the Plan over a dissenting unsecured creditor class, the Court must find that the Plan does not discriminate unfairly and that the Plan is fair and equitable." In order to be fair and equitable regarding a dissenting class of unsecured creditors, the Plan must provide that 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 where the Debtor is an individual, the Debtor may retain property included in the estate under [Bankruptcy Code] §1115, subject to the requirements of subsection (a)(14)."* The portion of such statutory language which is in italics represents the new addition to Chapter 11 under BAPCPA which is specifically designed to control individual Chapter 11 cases. Prior to the enactment of BAPCPA, a

[40] For the exact verbiage, please refer to Bankruptcy Code §1129(b)(2)(A).

[41] Bankruptcy Code §1129(b)(2)(B) provides that "each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the Plan, equal to the allowed amount of such claim."

[42] Except that an individual Chapter 11 Debtor "may retain property included in the estate under 1115, subject to requirements of subsection (a)(14) . . . ." Bankruptcy Code §1129(b)(2)(B)(ii). This exception to the absolute priority rule for individuals is discussed later.

split of authority existed regarding the application of the absolute priority rule in individual Chapter 11 cases.

As stated, a split of opinion existed prior to the enactment of BAPCPA. Some bankruptcy courts ruled that an individual who retained exempt property ran afoul of the absolute priority rule.[43] Other bankruptcy courts ruled that an individual chapter 11 debtor's retention of exempt property was not on account of a "junior interest" in property and therefore did not violate the absolute priority rule.[44] Since the enactment of BAPCPA, a split among the courts has continued regarding the interpretation of §1129 (b)(2)(B)(ii). Some courts have ruled that the absolute priority rule does not apply to individual Chapter 11 debtors.[45] Other bankruptcy courts have held that the absolute priority rule does apply.[46]

On March 19, 2012, the U.S. Bankruptcy Appellate Panel for the 9th Circuit held that "the absolute priority rule does not apply in individual debtor Chapter 11 cases." In re Friedman 2012 Bankr. LEXIS 1703 (Bankruptcy Appellate Panel Ninth Cir.) (Decided March 19, 2012). The 9th Circuit BAP examined the provisions of BAPCPA which had been added and which specifically addressed individual Chapter 11 debtor cases. The 9th Circuit BAP applied a "plain-meaning analysis" and determined that a "plain-meaning of §§1129(b)(2)(B)(ii) and 1115 together mandates that an absolute priority rule is not applicable under individual Chapter 11 Debtor cases."

The Friedman decision represents the only published decision by a court above the trial level regarding application of the absolute priority rule in an individual Chapter 11 Bankruptcy Case post-BAPCPA.[47] Therefore, outside of the 9th Circuit, the viability

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[43] See e.g. In re Gosman, 282 B.R. 45 (Bankr. S.D. Fla. 2002); In re Ashton, 107 B.R. 670 (Bankr. D.N.D. 1989)(dicta); In re Yasparro, 100 B.R. 91 (Bankr. M.D. Fla. 1989).

[44] See e.g. In re Henderson, 321 B.R. 550, 559-60 (Bankr. M.D.. Fla. 2005) aff'd, 341 B.R. 783 (M.D. Fla. 2006).

[45] In re Roedemeier, 374 B.R. 264, 275-76 (Bankr. D. Kan. 2007); In re Tegeder, 369 B.R. 477 (Bankr. D. Neb. 2007); In re Johnson, 402 B.R. 851 (Bankr. N.D. Ind. 2009)(dicta that individual's plan does not need to satisfy the absolute priority rule); and In re Shat, 424 B.R. 854 (Bankr.D.Nev. 2010).

[46] In re Gbadebo, 431 B.R. 222 (Bankr. N.D. Cal, 2010); In re Gelin, 437 B.R. 435, 441-42 (Bankr. M.D. Fla. 2010)("If Congress meant to eliminate the absolute priority rule of §1129 (b)(2)(B)(ii) for individual debtors, it could have simply stated that §1129 (b)(2)(B)(ii) is inapplicable in a case in which the debtor is an individual); In re Mullins, 435 B.R. 352, 2010 WL 3359668 (Bankr. W.D. Va. June 22, 2010)(refusing to strain BAPCPA provisions to make individual chapter 11 cases more similar to chapter 13 cases); In re Steedley, 2010 WL 3528599 (Bankr. S.D. Ga. Aug. 27, 2010).

[47] On February 2011, the Eleventh Circuit issued an opinion which assumes that the absolute priority rule applies to individual chapter 11 debtors and holds that the bankruptcy court has duty to review compliance with the absolute priority rule even in absence of an objection. But this case is actually an appeal regarding a case filed prior to the enactment of BAPCPA. None of

of confirming an individual Chapter 11 Plan remains a very judge-specific and jurisdiction-specific issue. Eventually, it is expected that this issue will continue to bubble until it eventually reaches the Supreme Court, as a split in the circuits may occur based upon the divergence developing in the lower courts. There is also the history of U.S. Supreme Court attention to application of the absolute priority rule in Chapter 11 cases in general. See generally Bank of Am. Nat'l. Trust & Sav. Ass'n v. 203 N. Lasalle St. Partnership, 526 U.S. 434(1998). Until such time as the respective circuits have ruled, or the U.S. Supreme Court provides a final determination, individual debtors must file cases with a level of uncertainty regarding the ability to confirm a plan absent the accepting vote of all unsecured creditor classes.

VII. Obtaining a Discharge and Closing the Case

Following confirmation of an individual Chapter 11 Debtor's Plan, issues still exist regarding obtaining a discharge and the procedure for closing the case.

A. Individual Chapter 11 Debtor Discharge

In a Chapter 11 Case filed by an entity (i.e. a non-individual debtor), discharge occurs at confirmation of the Plan unless the Plan provides for a liquidation of the Debtor or ceasing of the Debtor's business operations.[48] However, BAPCPA provided a new provision regarding the discharge for individual Chapter 11 Debtors. Under the post-BAPCPA code, an individual debtor does not receive a discharge until the individual Chapter 11 Debtor completes all payments under the Plan, unless the Court orders otherwise. The Court may only grant the individual Chapter 11 Debtor an "early" discharge (prior to completion of plan payments) if three requirements are met. First, the Debtor must have satisfied the "liquidation test" in that the property which has been distributed to unsecured creditors is at least the amount that would have been paid under Chapter 7.[49] Second, the Court must determine that the individual Chapter 11 Debtor's modification of the Plan is not practical.[50] Third and finally, the Court must determine that "no reasonable cause" exists to believe that Bankruptcy Code §522(q)(1) may be applicable to the Debtor.[51] In order to receive a discharge, an individual Chapter

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the BAPCPA provisions relating to individual chapter 11 debtors are cited. Therefore, the case is distinguishable.

[48] Bankruptcy Code §1141(b)(1).

[49] Bankruptcy Code §1141(d)(5)(B)(i) states that the Court may grant a discharge to the Debtor who has not completed payments under the Plan if – "the value as of the effective date of Plan of property actually distributed under the Plan on account of each 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."

[50] See Bankruptcy Code §1141(d)(5)(B)(ii) which incorporates the provisions regarding modification of the Plan under Bankruptcy Code §1127.

[51] Please refer to Bankruptcy Code §522(2)(1) for the full text. In general, Bankruptcy Code 522(q)(1) relates to violations of federal security laws. In addition, Bankruptcy Code

11 complete a post-petition financial management. Bankruptcy Code §1141(d)(3)(C).

B. Closing the Case

Following confirmation of the Plan, a Debtor may seek to obtain a "Final Decree" which effectively closes the case. The Debtor may seek a final decree closing the case if the Debtor establishes that there has been "substantial consummation" of the Plan. Bankruptcy Code §1101(2) defines substantial consummation as – (a) transfer of all or substantially all of the property proposed by the Plan to be transferred; (b) assumption by the Debtor or by the successor to the Debtor under the Plan of the business or management of all or substantially all of the property dealt with by the Plan; and (c) commencement of distributions under the Plan. In other words, if a plan provides for transfer of substantially all of the Debtor's property, the Debtor may not obtain a final decree until such has been effectuated. However, the real bellwether for a showing of substantial confirmation usually is whether the Debtor has commenced distributions under the Plan. Once the Debtor has commenced distributions under the Plan, a Debtor may often show that "substantial consummation" exists and thereby obtain a final decree. A motivating factor in obtaining a final decree and closing the case is that the Debtor no longer is required to pay United States Trustee's fees after the case is closed.

An open question exists as to whether a debtor may close the case prior to obtaining a discharge. It is the author's understanding that the policy of the United States Trustee is currently not to require a Debtor to remain in an open, pending Chapter 11 case during the time that all Plan payments are being made. Therefore, it may be prudent for a debtor to seek closure of the case prior to obtaining entry of a discharge and later seek to reopen the case after Plan payments have been concluded and seek a discharge at that time. This procedure may vary by jurisdiction.

VIII. Conclusion

It is impossible to cover all of the law, rules, and requirements of Chapter 11 in a presentation of this size and scope. Therefore, the effort has been to provide an outline of the applicable areas which are often encountered. Representing Individual Chapter 11 Debtors is often a worthwhile and rewarding experience. These individuals often have no other hope of reorganizing their affairs and obtaining a "fresh start" as Chapter 7 may have provided dire consequences and Chapter 13 may not have been available or appropriate for them. It must also be noted that attorneys representing creditors in individual cases may be rewarded, both intellectually and financially, if not otherwise.

With this said, counsel unfamiliar with Chapter 11 should enter the Chapter 11

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§522(2)(1)(B)(iiii) concerns debts arising from "any criminal act, intentional tort, or willful or reckless misconduct that causes serious physical injury or death to another individual in the preceding 5 years." The result seems to be that an individual debtor may not be entitled to an "early" discharge (i.e., prior to completion of plan payments) if the Debtor owes a debt to another individual for an intentional tort occurring within 5 years.

arena with caution. Chapter 11 cases invariably offer unexpected issues and problems. This is especially true in individual Chapter 11 cases because of the inherent nature of representing square peg-like individuals (versus corporate entities) and the fact that BAPCPA did not completely fashion Chapter 11 into a “square hole” easily susceptible to accommodating such individuals.