

Introduction to Individual Chapter 11 Cases: Part 1 (Chapter Choice; First-Day Motions)

Hannah M. McCollum, Moderator
Gold, Lange & Majoros, P.C.; Southfield, Mich.

Hon. Daniel S. Opperman
U.S. Bankruptcy Court (E.D. Mich.); Flint and Bay City

Alicia S. Schehr
Jaffe Raitt Heuer & Weiss, PC; Southfield, Mich.

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Part 1 (Chapter Choice; First Day Motions)**

**Hannah M. McCollum, Moderator
Gold Lange & Majoros, PC
Southfield, Michigan**

**Honorable Daniel S. Opperman
U.S. Bankruptcy Court, Eastern District of Michigan
Bay City and Flint, Michigan**

**Alicia S. Schehr
Jaffe, Raitt, Heuer & Weiss, PC
Southfield, Michigan**

Chapter 11 For Individuals – Planning, Filing and Surviving

1. Planning

a. Debtors

i. Chapter choice

1. Chapter 7 – this chapter presents potentially the most risk for debtors. If a debtor chooses to file a chapter 7, then any non-exempt assets must be turned over to the Chapter 7 Trustee. This includes land (including potential equity in a primary residence), vehicles (car collections, cars not subject to financing contracts), other recreational vehicles (boats, motorcycles, motor homes, all-terrain vehicles), art, book or stamp collections, memorabilia collections (baseball cards, dolls) and ANY OTHER ITEMS of personal property not fully exempted.

a. Benefits: Automatic stay stops litigation. If debtor truly has no assets, case is quick and simple, with an approximate 90-day time frame between filing and discharge. Competent attorneys are relatively inexpensive. A debtor may be able to file the case without counsel (although, because we are bankruptcy lawyers, we discourage this).

- b. Disadvantages: The case is completely in the hands of the Chapter 7 Trustee – the debtor retains little to no discretion and influence over the direction of the case, including pursuit of litigation against third parties, recovery of assets, etc. Aggressive creditors can pursue expensive non-dischargeability actions and slow down the case.
 - c. Debtors must understand that ALL of their assets are “part of the bankruptcy”.
 - d. State vs. federal exemptions – state exemptions useful for entireties property and retirement accounts. Federal exemptions useful for everything else.
2. Chapter 13 – individual debt repayment plan. This chapter offers a chance for debtors to repay their creditors. However, chapter 13 debtors may not have more than \$360,475 of unsecured debt and \$1,081,400 of secured debt, which greatly limits the availability of this relief. Chapter 13 plans are also very rigid and there is limited ability to negotiate class treatment. Chapter 13 budgets are also very circumscribed, and may be, from the debtor’s point of view, too rigid to survive the ordinary course ups and downs of life.
- a. Benefits: Much cheaper than a chapter 11, while still allowing debtor to retain control over some aspects of the case’s direction. Automatic stay prevents continued litigation and sometimes the co-debtor stay is also helpful.

- b. Disadvantages: Plan is rigid, as is DMI calculation. Plans are an almost-mandatory 60 months. Can be expensive, especially if debtors have to attempt plan modifications to address changes in circumstances
- 3. Chapter 11 –the most flexible chapter, but also the most expensive. Debtors can expect to pay between \$20,000 and \$60,000 (at a minimum) to file a chapter 11 case that is done correctly. Debtors retain full control of assets and plan of reorganization, which debtors have the exclusive right to propose in the first 120 days of the case. The plan is flexible, and creditor treatment is negotiable. Debtors also retain the control to choose (after evaluation under the business judgment standard) whether to pursue preferences, insider transactions, fraudulent conveyances and other litigation on behalf of the estate.
 - a. Benefits: Taxes can be paid over five years. Debtors have the ability to retain assets if their value is contributed to the plan. No debt limits. More flexible. Secured collateral (excepting primary residence) can be crammed down to its value.
 - b. Negatives: If case precipitated by one creditor pursuing litigation, that creditor (depending on plan structure) could hold a blocking vote against confirmation. Single asset real estate cases with no other debt present confirmation

difficulties. If debtor is high-income, plan payments will be concomitantly high. The value of non-exempt assets (ex: annuity payments, equity in primary residence) must be contributed to the plan. Primary residence cannot be crammed down to value. Potential absolute priority problem (much more likely if debtor attempts to “keep all of the toys” to the detriment of payments to creditors).

b. Creditors

- i. What to look for when a large-balance debtor files a chapter 11
 1. Assets, including receivables
 2. Undisclosed assets
 3. Undisclosed liabilities
 4. Inflated or underreported income or expenses in Bankruptcy Schedules I and J.
 5. Inappropriate exemptions
 6. Potential non-dischargeability issues
 - a. General discharge (difficult for an individual creditor to pursue)
 - b. Dischargeability of certain debts – fraud, false financial statements, transfer of assets in attempt to hinder/defraud/delay creditors, willful and malicious injury. Pay particular attention to the wording of any governing state court judgment – it may preclude a debtor from

excepting the debt from discharge if it contains an explicit finding of fraud

ii. The Plan

1. Some debtors file plans immediately in an attempt to disconcert creditors or force them to react more quickly than is optimal (for the creditor)
2. Comparison of plan projections with monthly operating reports – on target? Consistent? Wildly divergent?
3. Full explanations of debtor's situation
4. All litigation/assets/liabilities disclosed and discussed?
5. Joint cases disclosed?
6. All income after expenses contributed to plan?
7. How reasonable are expenses? Permitted variances from chapter 13 expenses?
8. If jointly administered with a company, is individual debtor's DMI also contributed to plan payments?
9. Is full liquidation value of assets contributed to plan? Does plan fully satisfy liquidation test?
10. Are preferential/fraudulent transfer causes of action specifically reserved?

iii. Schedules/SOFA

1. Are all assets disclosed?
2. Are all transfers, especially insider transfers, disclosed?

c. The Judge

- i. What to do after you file your case
- ii. How to request a first day hearing
- iii. Communications with chambers after filing
- iv. Initial Status Conference
- v. Educating your Judge about your case – strategies and tips
 1. First day affidavit
 2. Request for first day hearing
 3. Detailed background sections

2. Filing - First Day Motions

a. Motion to Extend Time to File Schedules & Statement of Financial Affairs

-Generally it is preferred to have all the schedules and statements fully prepared prior to filing. If this is not the case, however, the Debtor can file a Motion to Extend the deadline to file the schedules and statement of financial affairs.

- i. When is this appropriate for an individual?
- ii. Is this a pre-bankruptcy planning issue rather than a first day motion issue?

b. Motion to Use Cash Collateral

-if the individual debtor owns and operates rental real estate, or is self-employed then the use of cash collateral may be at issue. Section 363(a) defines “cash collateral” as “cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products,

offsprings, rents or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.”

- i. Know the universe of liens against estate property
- ii. Is collateral adequately protected?
- iii. Are taxes paid/being paid?
- iv. Consider paying taxes as adequate protection if there is a large past-due balance
- v. Replacement liens as adequate protection

c. Motion for Joint Administration

-Bankruptcy Rule 1015(b) provides that if a joint petition or two or more petitions are pending in the same court by or against (1) a husband and wife, or (2) a partnership and one more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates.

- i. Pros and Cons of Filing?

d. Motion to Assume or Reject Leases

-An early determination to reject nonresidential leases that are no longer needed can reduce the administrative expense obligations that arise under section 365(d)(3) that require the debtor to timely perform pre-rejection lease obligations compared to the unsecured claim that arises from a rejection claim.

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i. Determine early whether to assume or reject leases

e. Motion for Continued Use of Bank Accounts

-The United States Trustee has established certain operating guidelines for Chapter 11 debtors-in-possession that include requiring them to open new bank accounts and close all existing accounts. The primary reason behind this guideline is to prevent banks from honoring checks drawn prior to the filing of the petition.

i. Is it worth filing the motion or should debtors just open new accounts?

f. Critical Vendor Motion

i. Is this ever appropriate for an individual?

g. Motion to Provide Adequate Assurance to Utilities

i. Requests for deposits

ii. Termination or threatened termination of accounts

iii. Request to extend stay to a non-debtor (ex: wholly-owned company) to stop utility shut-off?

h. Motion to Employ Counsel and Other Professionals

-One of the most important motions to file in a chapter 11 case pursuant to 11 U.S.C. § 327(a) and Bankruptcy Rule 2014 is an Application to Employ Counsel and other applicable professionals for a debtor-in-possession. Some of the other professionals may include accountants, appraisers and/or brokers.

i. Pre-funded retainer

ii. Interim monthly payments (75%/escrow)

(a) Procedure to Obtain Interim Payments – file Motion for Order Modifying the Court’s Proposed Order Establishing Deadlines and Procedures and Approving Interim Fee Procedures

(b) Do Courts and US Trustee’s Office Approve these Requests?

i. Motion to Approve a Budget

-While chapter 13 specifically lets debtors spend estate funds on living expenses, chapter 11 does not have a similar provision. An open question is whether section 363(c)(1) permits the use of property of the estate to pay ordinary course of business nonbusiness living expenses. Debtors may seek to file a motion under section 363(b) to allow such expenditures along with a proposed budget.

- i. What do you do with ordinary business expenses?
- ii. Comparison with monthly reports?
- iii. Look back period? Comparison with plan projections? Comparison with I/J?
- iv. How should a creditor monitor?
- v. Where is the line drawn between expenses that are considered in the ordinary course of business compared to being out of the ordinary course of business?
- vi. What course of action does a creditor have if unapproved expenses have been made?

j. Motion to Convert

- i. Two debtors – one previously filed – convert previous case to an 11 and jointly administer? Convert previously filed 7 to 11?

k. Valuation Motion

- i. Collateral if disputed

ii. Claims for voting purposes

iii. Timing?

l. Motion to Prohibit Utility Companies from Altering, Refusing or Discontinuing Services

-Section 366(a) prohibits utilities from altering, refusing, or discontinuing service to a debtor for the first thirty days of a bankruptcy case. After the 30th day, however, Section 366(b) provides that a utility company may terminate services if a debtor has not provided such utility with adequate assurance of payment.

i. Will likely need to file if Debtor is not current with utility companies

m. Motion to Extend or Impose Stay

-Under Section 362(c)(3), if the Debtor had a prior bankruptcy case that was dismissed within one year of the current filing, then the automatic stay terminates with respect to the debtor on the 30th day after filing the case unless the court “after notice and a hearing completed before the expiration of the 30-day period” extends the stay.

i. When should the Motion be filed?

ii. What is required in the Motion?

iii. Does the termination of the stay apply to actions against property of the estate as opposed to actions against the debtor?

3. Views from the Bench

a. Practice Pointers

b. Best Practices

c. Worst Case Scenarios

d. What Not To Do

- i. Don't include the same 5-page background statement in all motions
- ii. If you have a jointly administered case, use a short caption with a footnote
- iii. Update your background statement to reflect the real-time status of your case
- iv. Gamesmanship with other attorneys is never attractive

	CHAPTER 7	CHAPTER 11	CHAPTER 13
Monetary Limitations for Eligibility Under 11 USC §109	No. But must meet “means test” if primarily consumer debt	No	Yes
Filing Fees	\$306.00*	\$1046.00*	\$281.00*
Credit counseling required?	Yes. 11 USC § 109(h)(1)	Yes. 11 USC § 109(h)(1)	Yes. 11 USC § 109(h)(1)
Creditor Committee?	Can be under §705 but rare	Possibility of a creditors committee. Unusual in individual cases	No creditors committee
Who supervises?	Chapter 7 Trustee & US Trustee	US Trustee	Chapter 13 trustee
Is Post-petition income property of the estate?	No	Yes. 11 USC §1115(a)	Yes. 11 USC §1306(a)
Co-Debtor Automatic Stay	No	No, but possibly under 11 USC § 105	Yes. 11 USC §1301
Plan Commitment	N/A	Five year commitment period if creditors object to other treatment in order to confirm plan over objection. 11 USC §1129(a)(15). Plans can be longer than 5 years. “Projected disposable income” uses definition in 11 USC § 1325(b)(2)	Commitment period determined by the means test. 11 USC § 707 and 11 USC §1322(d) (three or five years). Plans cannot exceed 5 years.
Voting Rights by Creditors?	N/A	Voting by creditors; plan confirmation over objection by creditors as provided by 11 USC	No voting. Creditors file objections to Plan under 11 USC § 1325.

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	CHAPTER 7	CHAPTER 11	CHAPTER 13
Modifications to Plan?	N/A	<p>§ 1129.</p> <p>Unsecured creditors, the debtor, trustee or UST may seek to modify confirmed plan any time before completion of plan payments. 11 USC §1127.</p>	<p>Unsecured creditors, the debtor or Chapter 13 trustee may seek to modify plan at any time before completion of plan payments. 11 USC §1329.</p>
Payments toward Plans?	N/A	<p>Payments start after confirmation</p>	<p>Payments start prior to confirmation</p>
Retail Valuation	<p>Retail valuation 11 USC §506(a)(2)</p>	<p>Retail valuation does <u>not</u> apply in Chapter 11</p>	<p>Retail valuation 11 USC §506(a)(2)</p>
Home Mortgages	<p>Reaffirm, surrender or redeem</p>	<p>Plan can provide for cure of any arrears on a home mortgage. §1123(a)(5)(G), (b) & (d). Unmatured, unaccelerated claims secured only by the debtor's home cannot be modified. §1123(b)(5). The exception to the anti-modification rule in chapter 13, §1322(c), is not applicable in chapter 11. As a result, it does not appear that a matured or accelerated home loan can be extended unless permitted by nonbankruptcy law.</p>	<p>Plan can provide for cure of any arrears on a home mortgage. §1322(b)(3). Unmatured, unaccelerated claims secured only by the debtor's home cannot be modified. §1322(b)(2). Section 1322(c) permits chapter 13 debtors to cure defaults under a home mortgage unless and until the home is sold at a foreclosure sale. Notwithstanding the maturity of a home loan, the plan may provide for payment of the home loan through the plan pursuant to §1325(a)(5)(B).</p>
Treatment of Secured Claims in Plan	N/A	<p>Unlike chapter 13, nothing in chapter 11 prevents an</p>	<p>Plan may not bifurcate certain undersecured claims into secured</p>

	CHAPTER 7	CHAPTER 11	CHAPTER 13
		individual debtor from stripping down an unsecured claim into its secured and unsecured parts and treating each part as a separate and distinct claim. §1129(b)(1)(A). Periodic payments to secured creditors need not be in equal installments. But see §1129(a)(9)(D).	and unsecured parts. See §1325(a)(5). If secured claim is being paid through the plan in periodic payments, such payments shall be in equal installments. §1325(a)(5)(B)(iii)(I)
Financial management course required to obtain discharge?	Yes. 11 U.S.C. § 727(a)(11)	No	Yes. 11 USC § 1328(g)
Hardship Discharge	N/A	After confirmation but before completion of plan payments, § 1141(d)(5)(B) permits an individual debtor to request a hardship discharge.	After confirmation but before completion of plan payments, § 1328(b) permits an individual debtor to request a hardship discharge.
Super Discharge	N/A	N/A	Chapter 13 super discharge includes a debt for willful and malicious injury (§523(a)(6)) and domestic nonsupport obligations (§523(a)(15)). See § 1328(a). But § 1328(a)(4) excepts for restitution or damages awarded in a civil action against the debtor as a result of willful or malicious injury that caused personal injury or death.
Discharge	Yes	No discharge at confirmation.	After completion of plan

	CHAPTER 7	CHAPTER 11	CHAPTER 13
		Section 1141(d)(5)(A) provides that an individual Chapter 11 debtor generally cannot obtain a discharge until all plan payments have been made except under limited circumstances.	payments. 11 USC § 1328(a).

**Includes miscellaneous administrative fee of \$46.00*