Any Which Way You Can: Unique and Perplexing Issues Involving Individual Chapter 11 Cases

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TABLE OF CONTENTS

II. INTRODUCTION

Chapter 11 is rarely the best option for debt relief and financial restructuring of an individual's finances. Chapter 7 is the most popular choice. Chapter 13 is used by most debtors who desire to retain assets beyond those which can be claimed as exempt, or whose income is too high to "pass" the Means Test. Chapter 13 also enables a debtor the opportunity to cure defaults on a home mortgage or other secured loan.

The debt limits for chapter 13[1] exclude many investors, business owners and other high-debt individuals. Chapter 11 provides more flexibility for the restructuring of debt, and may be preferable for a business person or entrepreneur who would be constrained by chapter 13, since chapter 13 presumes that the debtor has regular income and only ordinary financial transactions. Chapter 11 is the best option in rare cases.

Individual chapter 11 cases can be more challenging because of unique and perplexing issues. These materials discuss some of the unique and perplexing issues. Because of the number of issues and the limited time available for discussion, we have been selective. Written materials from other ABI conferences are an excellent resource. There are more than a dozen sets of recent ABI conference materials on individual chapter 11 cases available at ABI.org. Use the search function on the site to search for "individual chapter 11". The search function searches not just the titles but also the text, so narrow the search to find particular materials by subject.

The views of the writer changed frequently during the preparation of these materials, and they may change again. Feel free to disagree.

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[1] 11 U.S.C. §109. Subsequent citations to Title 11 will indicate just the section.

II. A BRIEF HISTORY OF INDIVIDUAL CHAPTER 11 CASES

Debtors and creditors have been working out repayment plans for as long as there have been debtors and creditors. Formal reorganizations under U.S. bankruptcy law have been available for about 139 years.

A. 1800 to Reconstruction.

Our first national bankruptcy law, the Bankruptcy Act of 1800, provided only for involuntary bankruptcies of merchants. Because it provided for a discharge, some debtors encouraged creditors to commence proceedings. The 1800 Act was in effect only until 1803. The 1841 Act was also short lived. Although it permitted voluntary petitions, it did not make provision for reorganization.

B. 1867 and the development of modern law.

Section 43 of the 1867 Act was entitled "Of Superseding the Bankruptcy Proceedings by Arrangement." That section allowed for creditors to meet and agree that "the estate of the bankrupt should be wound up and settled, and distribution made among the creditors by trustee, under the inspection and direction of a committee of the creditors." The debtor was not afforded a formal role in such arrangements, but one can assume that debtors often participated in the process.

C. Compositions come on the scene.

The first provision in United States bankruptcy law which provided a process analogous to a plan of reorganization was enacted with the 1874 amendments to the 1867 Bankruptcy Act. The wording reveals the origin of the process of plan confirmation under chapter 11. Section 17 of the 1874 amendments modified section 43 of the 1867 Act. It allowed the creditors, at a duly-convened meeting, to accept a "composition proposed by the debtor." Acceptance by a

"majority in number, and three-fourth in value of the creditors… assembled at such meeting either in person or by proxy" and "confirmed by the signatures thereto of the debtor and two-thirds in number [excluding those owed $50 or less] and one-half in value of all [unsecured] creditors" would result in a court hearing. If the court was satisfied that it was "in the best interest of all concerned" and that other requirements were met, the composition would be binding on the creditors.

D. **1898 begins the modern era.**

The 1898 Bankruptcy Act made a sweeping update of bankruptcy law, and its procedure for confirmation of a composition more closely resembled current practice. Under the 1898 Act, specifically section 12, terms of a composition could be offered by a debtor to his creditors "after, but not before" he had testified at the meeting of creditors and filed "the schedule of his property and list of his creditors." Once the composition had been accepted in writing by a majority in number of creditors whose claims had been allowed (and majority in amount of their claims), the court could confirm the composition if satisfied that "it is for the best interests of the creditors," the debtor had performed his duties and was entitled to a discharge, and acceptances were procured properly and in good faith.

E. **Limited availability for individual debtors.**

Under the 1898 Act, only Chapter XII (real estate arrangements) and Chapter XIII (wage-earner arrangements) were available for individual reorganization.[2] The 1898 Act was amended from time to time but remained in effect until the Bankruptcy Code took effect on October 1,

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[2] *High Rollers - 7 or 11* (section on Pre-BAPCPA Chapter 11 Law), NCBJ 2012 Convention, available at http://html.documation.com/cds/NCBJ12/Begin.html. Note that the 1898 Act, which was in effect for 80 years, was amended a number of times. This statement is not applicable to the entire life of the act. *See* Leibell, *The Chandler Act – Its Effect Upon the Law of Bankruptcy*, 9 Fordham L. Rev. 380 (1940).

1979. Under the Bankruptcy Code, Chapters X, XI and XII were combined into a single new chapter, chapter 11.[3]

F. **Chapter 11 for all.**

The Supreme Court, in *Toibb v. Radloff,*[4] made short work of rejecting the argument that there is an "ongoing business" requirement for chapter 11 reorganization, ruling that the plain language of §109 imposed no restriction on a consumer debtor's eligibility for chapter 11. Because chapter 13 is generally less complex and less expensive than chapter 11, relatively few debtors who meet the debt limitations for chapter 13 choose chapter 11 instead unless they have a business to reorganize. Some say that *Toibb v. Radloff* resulted in an increased number of individual chapter 11 filings.

G. **BAPCPA and jumbo 13s.**

BAPCPA resulted in further restrictions on chapter 7 relief and reduced the scope of the "super discharge" of chapter 13. Individual chapter 11s received a boost in popularity as a result, at least with respect to debtors who, absent BAPCPA, would have chosen chapter 7 or 13.

H. **Future improvements.**

Bankruptcy Judge Bruce Markell of the District of Nevada argued in his article,[5] which surveyed BAPCPAs changes to individual chapter 11 cases, that a subchapter for individual chapter 11 cases is warranted. After reading these materials you will agree that if chapter 11 were better organized, individual chapter 11 cases would be less perplexing.

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[3] *High Rollers, supra*.

[4] 501 U.S. 157 (1991).

[5] Markell, Bruce A. *The Sub Rosa Subchapter: Individual Debtors in Chapter 11 after BAPCPA,* 2007 U. Ill L. Rev. 67 (2007).

I. **Current statistics.**

Apparently the courts do not differentiate in their statistics between individual chapter 11 cases and corporate filings. Estimates of the numbers of individual chapter 11 cases vary.[6]

III. PRE-FILING CONSIDERATIONS.

A. The choice between 7, 11 and 13.

Because chapter 7 is a possible outcome of an unsuccessful chapter 11, the first question is whether the debtor is better off in a chapter 7 liquidation than not in a bankruptcy case. If not, the choice of chapter 7 or chapter 11 should be exercised with added caution. Since a chapter 13 case can be voluntarily dismissed[7], a chapter 13 petition is not the same irrevocable decision.

Chapter 7 is the most popular choice because of its simplicity and lower cost. For the "no-asset" debtor, it is the usual choice. When the debtor's income is above the "median" and the debts are primarily consumer debts, or when the debtor has assets which are not clearly exempt and which the debtor does not want to have administered by a trustee (such as a business or any asset which the debtor does not want the trustee to interfere with), when the discharge might be denied under §727, or when a payment plan imposed by a confirmation order is necessary to reinstate a home mortgage or other secure loan, chapter 11 or 13 should be considered.

Chapter 13 is typically less expensive than chapter 11 for debtors who qualify (i.e. within the debt limits and have regular income). There are nevertheless reasons to choose chapter 11 over chapter 13, such as the increased flexibility offered with a chapter 11 plan. For example, it

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[6] *See* Landry, R. *Individual Chapter 11 Reorganizations: Big Problems with the New "Big" Chapter 13,* 29 U. Ark. Little Rock L. Rev. 251 (winter 2007); Flynn, Ed. et al., *Chapter 11 Filing Trends in History and Today,* 28 ABI Journal 14 (May 2009).

[7] §1307(b).

may be possible under chapter 11 to prepay plan obligations and close the case sooner than would be possible with a chapter 13 case. A debtor who foresees a significant improvement in his or her finances within five years of plan confirmation may be better able to obtain a truly fresh start in a chapter 11, rather than being subject to continued supervision in a 13.

The individual chapter 11 debtor needs income or other financial resources to be able to pay the higher cost of administrating a chapter 11 case and to pay priority claims. Domestic support obligations must be brought current by confirmation of the plan, and priority tax claims must be paid in full, with interest, within five years from the order for relief. Because creditors vote on a chapter 11 plan, a decent relationship with creditors is important. It may not be necessary to have creditors actually support the plan so long as they are resigned to it, but a debtor whose creditors are militantly opposed to any reorganization may find it difficult to successfully reorganize under chapter 11. Improving financial prospects for the debtor, as well as an ability to obey the rules and a desire to succeed, are positive signs for an individual reorganization. A debtor who is likely to slide back into the mire of insolvency is an unlikely candidate for successful chapter 11 reorganization.

A chart showing differences between chapter 7, chapter 11 and chapter 13 is included in the appendix.[8]

B. **Tax issues.**

1. Treatment under the plan. Priority tax claims must be paid in full, with interest, within five years from the order for relief.[9] This is true even if the tax claim is secured.[10]

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[8] Chart prepared by Alicia S. Schehr, Jaffe Raitt Heuer & Weiss, P.C.

[9] §1129(a)(9)(C).

[10] §1129(a)(9)(D).

2. The estate and the debtor as separate entities. The filing of any bankruptcy case creates an estate.[11] As with a chapter 7 case, the estate is a separate taxable entity.[12] Bankruptcy tax considerations, which include income tax resulting from a gain on the transfer of property, short-year elections, and the management of tax liabilities and attributes, apply not only in chapter 7 cases, but also in individual chapter 11 cases.

The debtor in possession, even in an individual chapter 11 case, is required to obtain an EIN for the estate and to complete and file an IRS Form 1041 tax return on behalf of the estate. A "Notice 2006-83 Statement" must also be filed in the year that the bankruptcy case was commenced. The statement is for the purpose of allocating the debtor's compensation during the calendar year. Pre-petition compensation is allocated to the debtor, and post-petition compensation is allocated to the estate.

Even if the debtor is married, the estate uses tax rates for a married individual filing separately. This can lead to higher taxes for married debtors.[13] Included in the appendix are pages 3-7 of IRS Publication 908, Bankruptcy Tax Guide. Petitioners are encouraged to consult the full Bankruptcy Tax Guide and to consider furnishing a copy to any client contemplating a bankruptcy case. Tax considerations in individual chapter 11 cases are complex and broad enough to merit ABI seminar materials covering just that topic.[14]

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[11] §541(a).

[12] 26 U.S.C. §1398(e)(1).

[13] 26 U.S.C. §1398(c)(2).

[14] See, e.g. Kapila & Co., *Tax Considerations for Individual Chapter 11 Debtors*, ABI Caribbean Insolvency Symposium, Feb. 2012.

C. **Attorney-client privilege.**

1. Different approaches. There are different approaches which have been taken by the courts with respect to the right of a trustee to exercise control over an attorney-client privilege of an individual debtor.[15] Whether these views are actually different is questionable. The three main views are as follows:

a. **That the privilege automatically passes to the trustee as property.** The case most often cited for this proposition, *In re Smith*,[16] does state that "[a]ny attorney-client privilege which the debtor had passes by operation of law to the bankruptcy trustee."[17] However, the case involved only communications regarding a cause of action which was property of the estate, so the blanket statement was dicta and may have been intended to apply only to the attorney-client privilege at issue.

b. **That the privilege does not automatically pass to the trustee.** *In re Hunt*[18] is cited for this proposition. This case involved a request by the trustees in two cases for a blanket ruling that all attorney-client privileges related to files in the possession of the debtors' attorneys and accountants would be exercised by the trustees. The holding was that control of the privileges did not transfer to the trustees even though ownership of the files did pass to them. It is not clear that a request by the trustees for a more narrow ruling would not have been successful.

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[15] *See In re Basler*, 2011 WL 3236079 (Bankr. D. Neb. 7/26/2011).

[16] 24 B.R. 3, 5 (Bankr. S.D. Fla. 1982).

[17] Id at 4.

[18] 153 B.R. 445, 453 (Bankr. N.D. Tex. 1992) (Extensive discussion of *Weintraub*).

c. **Balancing test.** Other courts have used a balancing test or a case-by-case approach. *See, e.g. In re Wittmer*.[19] That case involved a legal-malpractice action by the trustee, so a balancing test made sense in that the cause of action was an asset of the estate, but the privilege may have nevertheless deserved protection because there may have been privileged communications which could remain confidential while still allowing the trustee to pursue the cause of action. The Supreme Court's decision in *Swindler & Berlin v. United States* stands for the proposition that the balancing test may be inappropriate because using hindsight to evaluate a privilege "introduces substantial uncertainty into the privilege's application."[20]

2. **The cases appear to be reconcilable.** Normally, a trustee for an individual exercises the individual's attorney-client privilege *only* with respect to a particular asset which is property of the estate to be administered by the trustee. For example, if the individual has a cause of action which the trustee is going to pursue for the estate, the trustee holds the privilege related to the cause of action. In other words, the trustee exercises a privilege for an individual only to the extent that the privilege is property rather than a personal right.

3. **Unique and perplexing privilege issues** mine the field to be crossed by an individual chapter 11 debtor. Consultations with the debtor's attorney, whether pre- or post-petition, may relate to the administration of the estate or assets of the estate (e.g. the resolution of an ambiguity in the plan or the pursuit of a preference). Moreover, the debtor serves as DIP, so a subsequent trustee, as successor to the DIP, controls privileges related to the administration of the estate. In *In re Bame*[21], where the debtor asserted a privilege against the trustee's inquiries,

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[19] 2011 Bankr. LEXIS 4727 *8 (Bankr. N.D. Ohio 11/30/2011).

[20] 524 U.S. 399, 409 (1998).

[21] 251 B.R. 367 (Bankr. D. Minn. 2000).

the court imposed on the debtor the burden of establishing that a matter related to him individually and not as DIP.

4. **A corporation is different** of course, since it is not human. All privileges owned by a corporation pass to its bankruptcy trustee. *Commodity Futures Trading v. Weintraub*.[22]

IV. PETITION, SCHEDULES AND OTHER DOCUMENTS.

A. Schedules and SOFA as normally required.

The petition, schedules and other documents to be filed in an individual chapter 11 are not unique or peculiar when compared to those required in a 7 or 13. Credit counseling is required.[23] But if there is a business involved, the handling of the case requires some of the same skills as required for a small-business reorganization. For example, a motion for the use of cash collateral may be required.[24]

B. Multi-level businesses.

1. If the business is a sole-proprietorship not recognized under state law as a separate entity, the assets and income are simply the debtor's assets and income.

2. If the business qualifies as a separate entity (LLC or corporation, for example), the following considerations apply:

a. Assets are not listed in the schedules, nor are its transactions. Creditors may want to request this information from the debtor.

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[22] 471 U.S. 343 (1985)

[23] §109(h)(1).

[24] For a discussion of the steps required, see Jones, Leon, *Fitting a Square Peg into a Round Hole: A "How To" Toolbox for the Individual Chapter 11 Attorney*, ABI Memphis Consumer Bankruptcy Conference, (2012); and *Introduction to Individual Chapter 11 Cases: Part 1 (Chapter Choice; First Day Motions)*, ABI Detroit Consumer Bankruptcy Conference (2012).

b. Income and expenses are not included in the monthly operating report, and the entity's disbursements are not assessed for quarterly UST fees. However, the UST may require a separate monthly report for the business.

c. The financial projections for the plan should include information to enable creditors to assess the business, even though it is a "layer" separate from the individual debtor.

C. **Is the debtor a "small business debtor?"**

Pursuant to §101(51D). If so, the following (sometimes inflexible) rules apply:

1. §1116 – additional filing and reporting requirements.

2. §1121(e) – exclusivity and deadline for filing of plan.

3. §1125(f) – disclosure requirements possibly simplified.

4. §1129(e) – plan *must be confirmed* within 45 days of the filing of the plan, unless extended pursuant to §1121(e)(3).

V. OPERATIONAL ISSUES.

A. Budgets.

Under both chapter 11[25] and chapter 13[26], post-petition income is property of the estate. Chapters 11 and 13 both provide for the debtor to "remain in possession of property of the estate."[27] Neither chapter explicitly says that a debtor can pay his or her living expenses using property of the estate. In chapter 13, a plan is to be filed and confirmed relatively quickly. There is no statutory plan deadline in chapter 11. Both chapters contain a requirement that

[25] §1115.

[26] §1306.

[27] §1322(b); §1115(b).

"projected disposable income" be devoted to the plan.[28] (Whether in practice this means all actual disposable income is discussed below in Section VIII(E)(2)). The DIP, as trustee, is permitted to use property of the estate in the ordinary course of business.[29] Therefore, there is an implication that, prior to confirmation, the debtor will be able to pay his or her expenses.[30]

Neither chapter 11 nor chapter 13 specifies what expenses can be paid or what creditors can do if they disagree with the debtor's budget or lifestyle choices. In a large complex case, such as a case where the debtor sought approval pursuant to §364(b) to obtain a line of credit to finance the reorganization,[31] approval of a budget may be litigated. In modest-size cases where expenses are not unreasonable, discussion and disclosure at the DIP meeting/initial interview, and review by the UST of the monthly reports, will probably suffice for approval of the debtor's pre-confirmation budget.

B. Payment of professional fees.

A fee application is required for the allowance and payment of professional fees incurred by the DIP.[32] Are dischargability-defense costs allowable under §330? Probably not. Services not "reasonably likely to benefit the debtor's estate" or not "necessary to the administration of the case" are not compensable. However, in *In re Goldstein*[33], the court allowed each of two

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[28] §1129(a)(15)(B); §1325(b).

[29] §363(b). This is by negative implication as this section states that the trustee may not use property other than in the ordinary course of business without approval.

[30] *In re Goldstein*, 383 B.R. 496 (Bankr. C.D. Cal. 2007) (Estranged joint individual debtors each allowed to retain separate divorce counsel as special counsel.)

[31] *In re Villalobos*, 2011 WL 4485793 (9th Cir. BAP 2011). The opinion provides a comprehensive discussion of the budget issue. The facts make for interesting reading. Expenses included maintenance of two Bentleys, one Hummer, one Mercedes and one BMW.

[32] §§330, 331; F.R.B.P. 2016.

[33] 383 B.R. 496 (Bankr. C.D. Cal. 2007)

married joint debtors to retain separate divorce counsel. In chapter 12 and 13 cases (but not chapter 11), compensation for the debtor's attorney may also be allowed for "representing the interests of the debtor."[34] This means that the attorney for a an individual chapter 11 debtor must justify all fees to be paid from assets of the estate (including post-petition income) as "reasonably likely to benefit the debtor's estate" or "necessary to the administration of the case."[35] *In re Reed*[36] is an example of a decision which denied compensation to an individual chapter 11 debtor's attorney for the defense of a dischargeability complaint. *In re Deihl*[37], which allowed compensation, is in a lonely minority.

1. Services rendered to the debtor after conversion to chapter 7 are not compensable from the estate. *Lamie v. U.S. Trustee*.[38]

2. In the event of conversion to chapter 7, any claim for compensation for post-petition services which is not allowable under §330(a) will be treated as a pre-petition debt and presumably be discharged.[39]

VI. TERMS OF THE PLAN.

A. Sample plans, disclosure statement and exhibits.

A set of sample plans and disclosure statements is available in recent seminar materials

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[34] §330(a)(4)(B).

[35] §330.

[36] 890 F.2d 104 (8th Cir. 1989).

[37] 80 B.R. 1 (Bankr. D. Me. 1987).

[38] 540 U.S. 526 (2004).

[39] §348(d).

from the ABI Western Consumer Bankruptcy Conference.[40] Check your local court or particular judge's requirements. Many courts or judges post on the court's website a sample of a plan, disclosure statement, liquidation analysis and financial projection, or a list of required elements. Follow the recommended form and include the elements which the judge or the judge's clerk will look for in the documents. Make their job easier and your case will proceed more smoothly.

B. **Sticky or tricky debts.**

1. Domestic support obligations. Confirmation requires payment in full. §1129(a)(14).

2. Non-dischargeable non-priority debts probably cannot be preferred in the plan. Most courts have held that under chapter 13, mere non-dischargeability is not a justification for favored treatment of a debt. Most of the cases involve student loans. Under chapter 11, favorable treatment of non-dischargeable debt may also constitute "unfair discrimination" in violation of §1123(a)(4) ("contents of plan") and §1129(b)(1) (applicable in cram down). The issue is whether the discrimination is "unfair". *In re Sutton,*[41] provides an extended discussion of the chapter 11 issue and citations to minority cases which have allowed favored treatment of non-dischargeable non-priority debts.

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[40] *Individual Chapter 11: Not Just Chapter 13 on Steroids*, ABI Western Consumer Bankruptcy Conference, (2013).

[41] 2012 WL 433480 (Bankr. E.D.N.C. 2012).

VII. CONFIRMATION OF THE PLAN.

A. Confirmation is governed by §1129.

Other ABI materials have provided a step-by-step guide to confirmation of an individual chapter 11 plan.[42] Local practice will determine whether a combined plan and disclosure statement is favored, in which case the procedure will be to file the combined document and obtain preliminary approval of the plan and disclosure statement prior serving it on creditors with a ballot and an order governing the confirmation process.

B. Cramdown:

The confirmation of a plan notwithstanding the rejection of the plan by one or more classes of creditors is referred to as a "cramdown" and is governed by §1129(b). The unique and most perplexing issue related to this procedure in an individual chapter 11 case is the absolute priority rule, which is discussed below in moderate detail. Other ABI materials provide a discussion of other "cramdown" issues.[43]

C. The "absolute priority" rule.

The issue faced in the confirmation of an individual chapter 11 plan which most readily qualifies as unique and perplexing is the "absolute priority" rule. The rule is that if a class of unsecured creditors has not accepted the plan, the plan cannot be confirmed if any "holder of a claim or interest that is junior to the claims of such class will receive or retain under the plan on

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[42] *See, e.g.,* Jones, Leon, *Individual Chapter 11 Cases; A "How To" Guide*, ABI Memphis Consumer Bankruptcy Conference (2012).

[43] See *Introduction to Individual Chapter 11 Cases Part 2:* Rockhind, Louis, *Cramdown Under a Plan of Reorganization; Early Discharge; Negotiation of a Plan of Reorganization,* ABI Detroit Consumer Bankruptcy Conference (2012). See also *Introduction to Individual Chapter 11 Cases Part 2:* Kapitan, John, *The Antimodification Provision of 11 U.S.C. § 1323(b)(5)*, ABI Detroit Consumer Bankruptcy Conference (2012).

account of such junior claim or interest, any property."[44] In an individual chapter 11 case, the following exception, added by BAPCPA, applies: "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 [§1129(a)(14) which apply to domestic support obligations]."[45]

1. Application to individual case. In *Norwest Bank Worthington v. Ahlers*[46], the Supreme Court held that the absolute priority rule applied to the individual debtors, family farmers who filed a chapter 11 plan. Their promise to provide future services for the farm operation was held to be insufficient "new value" to invoke the "new value" exception to the absolute priority rule. (See below for a discussion of the "new value" exception).

2. Does the rule still apply after BAPCPA?

a. Minority position: Rule no longer applies to individual debtors. This is the "broad" view of §1129(b)(2)(B)(ii). "Broad" in this context means that §1115 has the broad effect of stating what property is included in the estate. Section 1115 provides that "Property of the estate includes… in addition to the property specified under section 541, [all post petition earnings]". Cases include *In re O'Neal*[47]; *In re Friedman*[48]; *In re Shat*[49]; and *SPCP Group, LLC v. Biggins*.[50]

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[44] §1129(b)(2)(B).

[45] *Id*.

[46] 485 U.S. 197, 108 S.Ct. 963 (1988).

[47] 2013 WL 1506763 (Bankr. W.D. Ark. 2013).

[48] 466 B.R. 471 (9th Cir. BAP 2012).

[49] 424 B.R. 854 (Bankr. D. Nev. 2010).

[50] 465 B.R. 316 (M.D. Fla. 2011).

b. Majority position: The absolute priority rule still applies to individual chapter 11 debtors. This is the "narrow" view which interprets the term "included" narrowly. To the subscribers of this view the phrase "Property included in the estate under section 1115" means "property included in the estate *only* under section 1115 and not under section 541 alone." Both court-of-appeals decisions on the question adopt this view: *In re Stephens*[51]; *In re Maharaj*.[52] The latest cases from the Sixth and Seventh Circuits are: *In re Lindsey*[53] (follows *Maharaj*); *In re Hockenberry*[54] (issue not reached; split in authority recognized); *In re Draiman*[55] (Rule applies; new-value exception successfully applied); *In re Johnson*[56] (Statement in *dicta* that rule no longer applies). Two unreported oral decisions from the Eastern District of Michigan also agreed with *Majaraj*: *In re Grose*[57] and *In re Marino*.[58]

3. Does the absolute priority rule preclude the retention of exempt property? The Courts are divided on this question.

a. No, an exemption is not a "junior interest" and it's retained pursuant to §522, not pursuant to a plan. *In re Steedly*[59]; *In re Bullard*[60]; *In re Henderson*.[61]

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[51] 704 F.3d 1279 (10th Cir. 2013).

[52] 681 F.3d 67 (4th Cir. 2012).

[53] 453 B.R. 886 (Bankr. E.D. Tenn 2011, 2012 WL 4854718 (E.D. Tenn. 2012).

[54] 457 B.R. 646 (Bankr. S.D. Ohio, 2011).

[55] 450 B.R. 777 (Bankr. N.D. Ill. 2011).

[56] 402 B.R. 851, 852-853 (Bankr. N.D. Ind. 2009).

[57] No. 11-69990 (Bankr. E.D. Mich. July 9, 2012, Judge Rhodes).

[58] No. 11-55026 (Bankr. E.D. Mich. July 16, 2012, Judge Shefferly).

[59] 2010 WL 3528599 (S.D. Ga. 2011).

[60] 358 B.R. 541 (Bankr. D. Conn. 2007).

b. Yes, *In re Gosman*.[62]

4. Post-petition earnings clearly can be retained. Section 1129(b)(2)(B)(ii) explicitly provides that property included in the estate under §1115 (i.e. property acquired post-petition) can be retained.

5. The new value exception in individual chapter 11 cases. Since the debtor is permitted to retain post-petition earnings, can post-petition earnings and post-confirmation earnings be contributed as new value? Sections 1123(a)(8) and 1129(a)(15) seem to support that argument. *In re Eagan*[63] is an example of the successful invocation of the new-value exception. The new value met the test of being substantial and reasonably equivalent to the interest retained, in accordance with *In re Bonner Mall Partnership*.[64] The new value included funds from an outside source. *In re Tucker*[65] disallowed the new-value exception, citing *Ahlers* without much discussion. Other courts have stated that new value must come from an "outside source". *In re Lee Min Ho Chen*[66]; *In re Draiman*[67]; *In re Cipparone*.[68] (pre-BAPCPA decision). In *In re*

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[61] 341 B.R. 783 (M.D. Fla. 2006).
[62] 282 B.R. 45 (Bankr. S.D. Fla. 2002).

[63] 2013 WL 237812 (Bankr. W.D.N.C. 2013).

[64] 2 F.3d 899 (9th Cir. 1993).

[65] 2011 WL 5926757 (Bankr. D. Or. 2011).

[66] 482 B.R. 473 (Bankr. D. Puerto Rico 2012).

[67] 450 B.R. 777 (Bankr. N.D. Ill. 2011) (Judge Squires).

[68] 175 B.R. 643 (Bankr. E.D. Mich. 1994).

Henderson[69] the debtor obtained funding from an outside source and satisfied the new value exception. Other ABI materials provide sample briefs[70] and additional discussion.[71]

D. **Denial of Discharge.**

An individual chapter 11 debtor faces several hurdles in obtaining a discharge. The first, found in §1141(d)(3), is discussed here as a confirmation issue because it takes the form of an adversary proceeding brought under §727(a) filed no later than the confirmation hearing. The second hurdle, found in §1141(d)(5)(C), is discussed below as a post-confirmation discharge issue. Note that a §523 complaint is due 60 days after §341 meeting, but a §727 complaint is not due until date of confirmation hearing.[72]

1. Elements of denial under §1141(d)(3) and §727(a). It would seem that it would be uncommon for a debtor to be denied a discharge for liquidating substantially all assets of the estate, not engaging in business, and running afoul of §727(a) (for example by filing false schedules). Be aware that some of the courts have interpreted the elements of §1141(d)(3) to the disadvantage of the debtor in order to carry out a policy of eliminating the advantage which chapter 11 might otherwise offer to a debtor who would be denied a discharge in chapter 7. The elements are as follows:

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[69] 341 B.R. 783, 791 (M.D. Fla. 2006).

[70] *Mock Appellate Argument: Individual Chapter 11 – Does the Absolute Priority Rule and Preconfirmation Use of the Debtor's Disposable Income Apply in Individual Chapter 11 Cases,* ABI Midwestern Bankruptcy Institute and Consumer Forum, 2012.

[71] For a recent discussion of the cases, see *The Absolute Priority Rule: Does it Apply in Individual Chapter 11 Cases?* ABI Detroit Consumer Bankruptcy Conference (2012).

[72] F.R.B.P. 4007(c); 4004(a).

a. "The plan provides for the liquidation of all or substantially all of the property of the estate."[73] At least one court has interpreted this to mean substantially all *non-exempt* assets of the estate.[74]

b. "The debtor does not engage in business after consummation of the plan."[75] An individual who earns a living as an employee or consultant would not be "engaged in business."[76]

c. "The debtor would be denied a discharge under §727(a)" if the case were a chapter 7 case.[77]

d. Where a creditor alleges the types of facts which support a complaint under §727(a) (usually fraudulent conduct by the debtor), it seems likely that dismissal or conversion would also be sought.

VIII. **POST-CONFIRMATION ISSUES.**

A. **How to get a discharge.**

Prior to BAPCPA, a chapter 11 discharge was normally granted in the confirmation order. Now, an individual will not receive a discharge until all plan payments are completed "unless after notice and a hearing the court orders otherwise for cause."[78] This change brought individual chapter 11 cases into conformity with chapter 13's discharge provision, §1328.

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[73] §1141(d)(3)(A).

[74] *In re Miller,* 80 B.R. 270, 271 (Bankr. W.D.N.Y. 1987) (quoting 5 *Collier on Bankruptcy* ,¶ 1141.01[4][a](15th ed. 1985).).

[75] §1141(d)(3)(B).

[76] *In re Grausz*, 63 Fed. Appx. 647, 650, 2003 WL 1904417 (4th Cir. 2003) (Continuation of *pre-petition* business required).

[77] §1141(d)(3)(C).

[78] §1141(d)(5)(A).

However, chapter 13 cases remain open until a discharge is entered. The entry of a discharge in individual chapter 11 cases is made complicated by the imposition of UST quarterly fees and the resulting practice of closing chapter 11 cases as soon as possible after confirmation. Reopening a chapter 11 case currently requires payment of a fee of $1167.

Some districts have adopted local rules which navigate between the twin shoals of UST fees and reopening fees. Others leave practitioners to chart their own course. Check the local rules (3022 or 4004), local bankruptcy administrative orders and guidelines before pondering how to solve this conundrum.

1. UST quarterly fees encourage prompt closing of the case.

If it were not for UST fees, individual chapter 11 cases would simply be kept open until the plan was completed and the discharge entered. Chapter 11 debtors are required to pay UST quarterly fees until the case is "converted or dismissed."[79] Quarterly fees range from $325 to $30,000, depending upon the amount of "disbursements," and the filing of financial reports is required so that the UST can calculate and assess fees. Therefore, the usual practice is to get a chapter 11 case closed as soon as possible after confirmation of the plan. (Closure of a case is considered to be close enough to dismissal to stop the accrual of UST fees. Confirmation of a plan is not.) Plans often continue for five years or more, particularly because of mortgage debt and the "projected disposable income" requirement.

[79] 28 U.S.C. §1930(a)(6).

2. The problems with closing the case before entry of a discharge.

a. **Fee for reopening may be payable.**

Reopening a chapter 11 case to have the discharge entered upon completion of the plan payments requires the payment of a fee of $1167. See 28 U.S.C. §1930 and the fee schedule. There is in some districts a solution to that, so read on.

b. **Termination of automatic stay.** Once the case is closed, the automatic stay terminates. This was a problem for the debtors in *In re Houlik*[80], whose truck was repossessed following confirmation of their plan. The BAP held that debtors were entitled to enforce the plan, just not in the bankruptcy court. And since there was no violation of the stay and no violation of a discharge, there was little prospect of receiving sanctions from a non-bankruptcy court. This reduced the debtors' negotiating leverage with the creditor who took the truck. Possible solution: Include the necessary injunction in the plan.

c. **Potential prejudice to creditors.**

The termination of the automatic stay might also prejudice a creditor. Once the stay terminates, periods of limitation are no longer tolled under §108, potentially leaving the creditor with only the plan obligation if the debtor were to default.

3. A sampling and survey of local rules.

Some of the bankruptcy courts have adopted local rules or procedures to deal with the delayed discharge problem. Attached is a survey of relevant Sixth and Seventh Circuit local bankruptcy rules and the texts of several of the more comprehensive local rules. Beware of the risk of your client experiencing a gap between the automatic stay and the discharge.

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[80] 481 B.R. 661 (10th Cir. BAP 2012).

4. Other approaches.

a. Keep the case open.

If the plan is of a short duration, it may be easiest to keep the case open until the plan is completed and the discharge can be entered as contemplated by §1141.

b. The "rich uncle" plan provision.

Consider a provision which allows the debtor the option to prepay the plan payments if he or she is able to get his or her rich uncle (for example) to make a loan. Or perhaps the debtor will liquidate an exempt asset to prepay the creditors. That way, the discharge might be available sooner, saving the debtor either quarterly fees or the reopening fee.

c. "Cause" for an early discharge.

The satisfaction, by prepayment or otherwise, of most of the debts, in particular the unsecured debts, should constitute "cause" for the court to enter a discharge promptly. If there is a long-term debt, such as a mortgage loan, the plan could provide that the mortgage loan obligation is not discharged. If there is priority tax debt, the plan would recognize that the debt is not discharged. This should satisfy any concerns that the debtor was gaining an unfair benefit by an early discharge. Procedural query: Will including a provision in the plan for the early discharge constitute sufficient notice so that no separate motion is required? Consider a separate notice to creditors that the confirmation order will provide for an early discharge. Serve the proposed order on the creditors if possible.

d. "Administrative closing" of case.

The fee for reopening the case will normally be payable if the choice is made to let the case be closed without a discharge. The fee can be waived "under appropriate circumstances"

but "must be charged when a case has been closed without a discharge being entered."[81] One potential problem with closing the case without a discharge is that the automatic stay terminates.[82] The plan of course is a contract governing the relations between the debtor and the creditors, and it can be enforced by the debtor. However, a creditor might be prejudiced by the expiration of a period of limitation once the stay terminates, leaving the creditor with only the plan obligation if the debtor were to default. Also, if a case is closed without a discharge a notice to that effect is mailed to creditors.[83] This could ignite creditor action. The court in *In re Mendez*[84] solved these problems by entering an order directing the clerk not to send a "no discharge" notice, keeping the automatic stay in effect, but suspending the accrual of UST fees by administratively closing the case. The Middle District of Florida is credited with developing the "administrative closing" approach, which allows for the case to be reopened without a fee.[85]

e. A self-executing plan provision?

Could the plan provide that the discharge is automatically effective upon completion of the plan payments? The problem is that §1141(d)(5)(a) states that confirmation alone is not adequate. The statute contemplates that the court will affirmatively grant "a discharge upon completion of all payments under the plan." However, an explicit provision in the confirmation order, entered for "cause" and after "notice and a hearing" should be effective. Verification of the completion of plan payments would be a potential future issue, but there is always the potential for a creditor to take issue with the application of a discharge to its particular claim, so

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[81] Fee Schedule, 28 U.S.C. §1930.

[82] *See In re Houlik*, *supra*.

[83] F.R.B.P. 4006.

[84] 464 B.R. 63 (Bankr. D. Mass. 2011).

[85] *See* www.flmb.uscourts.gov/procedures (last visited 4.1.2013).

if the debtor keeps good records of the payments, the risk of later litigation is probably no greater than is the case with any discharge.

f. The legislative solution.

Get Congress to amend 28 U.S.C. §1930(a)(6) to provide that UST fees cease upon confirmation of a plan, and the chapter 11 debtors' bar will forever honor you.

B. **The additional discharge hurdle.**

A discharge is not available for a debtor who claims a homestead exemption of more than $155,675 under state law **and** is guilty of bankruptcy fraud or who owes debts arising from A discharge murder, mayhem, RICO or securities violations.[86]

1. §1141(d)(5)(C) in more detail:

If the debtor:

a. Elects the state exemptions; and

b. Claims an exemption of more than $155,675 in a residence, homestead or burial plot; then

c. Pursuant to F.R.B.P. 1007(b)(8), the debtor is required to file a statement as to whether there is:

i. Any proceeding pending in which the debtor might be found guilty of a felony "which demonstrates that the filing of the case was an abuse" or

ii. Any debt arising from a securities violation, RICO or "any criminal act, intentional tort, or willful or reckless conduct that caused serious physical injury or death to another individual in the preceding 5 years."

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[86] §1141(d)(5)(C).

2. Potential issue: Could the liability be vicarious liability? A debt can be non-dischargeable under §523 even though the debtor is not guilty of wrongdoing. Standards for non-dischargeable vicarious liability differ: *See, e.g., In re Ledford*[87] (Debtor benefited from partner's fraud); *In re Reuter*[88] (Minimum of reckless indifference required on the part of debtor); *In re M.M. Winkler & Associates*[89] (Unconditional vicarious liability for fraud of partner).

3. F.R.B.P. 1007(b)(8) does not require that a statement is to be filed by every debtor, only those who should have checked the box on Schedule C regarding the jumbo homestead exemption. The local rules for the Eastern District of Kentucky call for a statement in every case. The required language is in the local form.[90] The best practice when applying for a discharge may be to file a statement which denies that any of the conditions applies. If §1141(d)(5)(C) applies, the debtor must make a choice between amending the exemption and not receiving a discharge.

C. The financial management course is normally not required.

Note that the Bankruptcy Court for the Eastern District of Kentucky (perhaps just to simplify things) requires that an individual debtor take the financial management course and file the certificates in order to receive a discharge. No other court in the sixth or seventh circuits imposes this requirement.

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[87] 970 F.2d 1556 (6th Cir. 1992).

[88] 686 F.3d 511 (8th Cir. 2012).

[89] 239 F.3d 746 (5th Cir. 2001).

[90] See local form 4004-3a.

D. **Rule 1107(b)(7) statement.**

F.R.B.P. 4004(c)(4) states that "In a chapter 11 case in which the debtor is an individual, or a chapter 13 case, the court shall not grant a discharge if the debtor has not filed any statement required by Rule 1007(b)(7)." Rule 1007(b)(7) says that the statement is required in a chapter 11 case if §1141(d)(3) applies. As explained above, §1141(d)(3) only applies if the debtor would be denied a discharge under §727(a), the plan calls for the liquidation of substantially all of the property of the estate, and the debtor does not engage in business after consummation of the plan. Therefore, if no complaint under §727(a) was filed by the date of the confirmation hearing, and the other conditions for denial of the discharge under §1141(d)(3) are not met, the Rule 1007(b)(7) statement is not required.[91]. To make the court's job easier, consider an affirmative statement in the papers filed to request a discharge that §1141(d)(3) does not apply.

E. **Reopening the case to rake in "disposable income."**

1. Creditors now have standing to seek modification of the plan. BAPCPA's addition of §1127(e) allows for creditors to seek an increase in payments after confirmation and before completion of payments. Before BAPCPA, "substantial consummation" barred modification.

2. But "projected" disposable income does not mean "actual" disposable income! As with §1129(a)(15)(B), §1325(b)(1)(B) calls for "projected disposable income" to be devoted to a chapter 13 plan. In *Anderson v. Satterlee*[92], the Ninth Circuit Court of Appeals held "projected" to mean "projected" not actual. Therefore, the debtors were not required to allow the

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[91] Assuming that Rule 1007(b)(7) is not interpreted as requiring a confession of allegations not raised by an adversary.

[92] 21 F.3d 355 (9th Cir. 1994).

chapter 13 trustee to revisit their actual results and require additional payments if the debtors' actual disposable income exceeded projections. This was really only a procedural victory for those chapter 13 debtors because, as in an individual chapter 11, creditors or the chapter 13 trustee may seek an increase in payments if disposable income increases. §1329(a). *Petro v. Mishler*.[93]

3. What standards apply to plan modification? The cases have not developed standards for creditor requests for plan modification in individual chapter 11 cases. There are numerous cases applying §1329, including two Supreme Court cases.[94] In *Ransom v. FIA Card Services, N.A.*, the Court explained that the plan could be modified if the debtor paid off his car loan and therefore had higher disposable income. Typically, an increase in the debtor's income will be the issue.[95] See *Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011).

4. What to do?

a. Negotiate a consensual plan.

b. Include language in the plan which purports to block the creditors' right to modify the plan. Is this permissible?

c. Complete payments under the plan ASAP.

d. Close the case ASAP so that a creditor seeking to modify the plan would have to pay a fee to reopen the case.

e. Wait until after plan payments are completed before becoming financially successful.

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[93] 276 F.3d 375 (7th Cir. 2002).

[94] *Ransom v. FIA Card Services, N.A.*, 131 S. Ct. 716, 729 (2011); *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010).

[95] *See Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011).

f. Always provide for prepayment of claims.

g. Use any significant increase in disposable income to prepay the claims (at the amount required under the plan) before creditors seek a plan modification based upon the debtor's increased ability to pay.

5. Tips for creditors.

a. Monitor the debtor's post-confirmation income by insisting that the plan require the debtor to submit tax returns. Section 1123(a)(5) requires that a plan contain "adequate means for the plan's implementation".

b. Object to a plan provision which seeks to abrogate the right of the creditors to seek modification.

c. Object to prepayment provision? A creditor might argue against any provision in the plan which allows for the debtor to complete payments in less than five years where that might cut off the opportunity for creditors to seek a plan modification. In *Baud v. Carroll*[96], the Sixth Circuit held that a chapter 13 debtor is required to have a plan with a duration from three to five years (the "applicable commitment period") and could not shorten that period. Rather, all disposable income during the applicable commitment period had to be devoted to the plan.

d. No. Don't bother, the counter argument is stronger: Section 1129(a)(15)(B) is worded differently than §1325(b). Section 1129(a)(15)(B) says that "the value of the property to be distributed under the plan" is to be not less than the debtor's five-year "projected disposable income." (Emphasis added). In the terms used by the *Baud v. Carroll* court, chapter 11 allows the use of the "monetary approach," meaning that the "projected

[96] 634 F.3d 327 (6th Cir. 2011).

disposable income" requirement is met by paying the creditors an amount equal to the projected disposable income. The Sixth Circuit recognized that chapter 11 allows for the monetary approach, and used that observation as support for its conclusion that §1325(b) is purposely different.[97]

F. **Constitutional issues.** BAPCPA brought chapter 11 more in line with chapter 13, but some of the protections afforded by chapter 13 were not included. Does §1127(e) violate the Thirteenth Amendment by imposing involuntary servitude? No court has ruled on this question, but scholars have discussed it more extensively[98]. A partial answer is that the debtor could always convert to chapter 7 and get a fresh start (foregoing the other benefits of the plan) if the modification is intolerable. However, if the chapter 11 case is commenced with an involuntary petition, the debtor has no automatic right to conversion or dismissal.[99] In order to avoid the constitutional issue, a court would presumably permit the debtor threatened with "involuntary servitude" to convert the case to chapter 7. It therefore seems unlikely that the potential constitutional issue will ever ripen into a constitutional case. This unique and cruel-sounding issue is therefore not as perplexing as some of the others.

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[97] *Id*. at 340-341.

[98] Keach, Robt. J. *Dead Man Filing Redux: Is the New Individual Chapter Eleven Unconstitutional?* 13 A. Bankr. Inst. L. Rev. 483 (2005); Chemerinsky, Edwin *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L. J. 571, 583-590 (2005).

[99] Compare §1112 with §1307.

Appendix

Local bankruptcy rules (Sixth and Seventh Circuit) regarding entry of discharge in individual chapter 11 cases.

1. Guideline 11, L.B.R., Eastern District of Michigan.

This is a simple and inexpensive procedure because it provides for a waiver of the fee for reopening.

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, 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.

2. L.R. 3022, Southern District of Illinois.

Requires payment of reopening fee if the case has been closed. Same problem as in the E.D.M. in that the automatic stay terminates if the case is closed without a discharge. The Southern District of Indiana rule is similar.

> ***Final Decree in Chapter 11 Cases where Debtor is an Individual. (Applicable to cases filed on or after October 17, 2005.)***
> *A. **Application for Final Decree/Reports/Motion.** If the debtor in a chapter 11 case is an individual and has completed all plan payments, then the debtor shall file the following documents:*
> *1. a report with the Court certifying that debtor has complied with the terms and conditions of the plan and that debtor is otherwise eligible for a discharge under Section 1141(d)(5) of the Bankruptcy Code;*
> *2. a motion for entry of discharge order; and*
> *3. an application for final decree pursuant to Rule 3022 of the Federal Rules of Bankruptcy Procedure.*
> *In addition, debtor shall certify that all monthly operating reports have been filed. If the debtor is otherwise eligible, the Court shall issue a discharge as soon as practicable.*

*B. **Request for Discharge under Bankruptcy Code § 1141(d)(5)(B).** If a discharge is sought under Section 1141(d)(5)(B) of the Bankruptcy Code, the debtor shall request entry of discharge by filing a motion for discharge, which shall be a contested matter governed by Rule 9014 of the Federal Rules of Bankruptcy Procedure. If the motion is granted, and if the debtor is otherwise eligible, the Clerk shall issue the discharge and the final decree closing the case.*

*C. **Closing Case before Plan Payments Completed.** If the debtor proposes to close the case before plan payments have been completed, and intends to reopen the case after plan completion to obtain a discharge, then the debtor shall file a motion to close the case and shall include in that motion a statement of the debtor's intent to reopen. The motion shall be accompanied by a notice giving all creditors 21 days from the date of filing within which to object to the motion. Upon the filing of a motion to reopen, the debtor shall be required to pay any fees due for reopening the case. After reopening, the debtor shall file the application for final decree and supporting documentation as required in subsection A of this Rule.*

D. **Other local rules:**

If you are handling a case in one of these districts, double check the rules to see if there is an administrative order or guideline. If not, contact the court to encourage adoption of a procedure.

Illinois, Northern: Rule 3022-1 requires notice of a motion to close the case but does not address the unique issues in individual chapter 11 cases**.**

Illinois, Central: No applicable local rule found.

Illinois, Southern: L.R. 3022, included above.

Indiana, Northern: See Local Rule B-4004-3, which provides a detailed choice of procedures for obtaining entry of the discharge.

Indiana, Southern: L.R. 3022.

Michigan, Eastern: Guideline 11, included above.

Michigan, Western: LBR 3022 provides for a final decree upon substantial consummation of the plan, but does not address the unique issues in individual chapter 11 cases**.**

Ohio, Northern: No applicable local rule found.

Ohio, Southern: No applicable local rule found.

Kentucky, Eastern: Rule 4004-3 requires a motion for entry of discharge. The local forms, 4004-3a and 3b, go beyond the statutory requirements by requiring, in all cases, a statement of completion of the financial management course and a statement that domestic support obligations have been paid.

Kentucky, Western: No local rule, but the eastern district's form 4004-3 is used and named Form S.

Tennessee, Eastern: No applicable local rule found.

Tennessee, Middle: No applicable local rule found.

Tennessee, Western: No applicable local rule found.

Wisconsin, Eastern: No applicable local rule found.

Wisconsin, Western: No applicable local rule found.

	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.

	CHAPTER 7	CHAPTER 11	CHAPTER 13
		§ 1129.	
Modifications to Plan?	N/A	Unsecured creditors, the debtor, trustee or UST may seek to modify confirmed plan any time before completion of plan payments. 11 USC §1127.	Unsecured creditors, the debtor or Chapter 13 trustee may seek to modify plan at any time before completion of plan payments. 11 USC §1329.
Payments toward Plans?	N/A	Payments start after confirmation	Payments start prior to confirmation
Retail Valuation	Retail valuation 11 USC §506(a)(2)	Retail valuation does not apply in Chapter 11	Retail valuation 11 USC §506(a)(2)
Home Mortgages	Reaffirm, surrender or redeem	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.	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).
Treatment of Secured Claims in Plan	N/A	Unlike chapter 13, nothing in chapter 11 prevents an	Plan may not bifurcate certain undersecured claims into secured

	CHAPTER 7	CHAPTER 11	CHAPTER 13
		individual debtor from stripping down an undersecured 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*

Chart prepared 2012 by Alicia S. Schehr, *Jaffe Raitt Heuer & Weiss, P.C., Southfield, Michigan.*

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Internal Revenue Service

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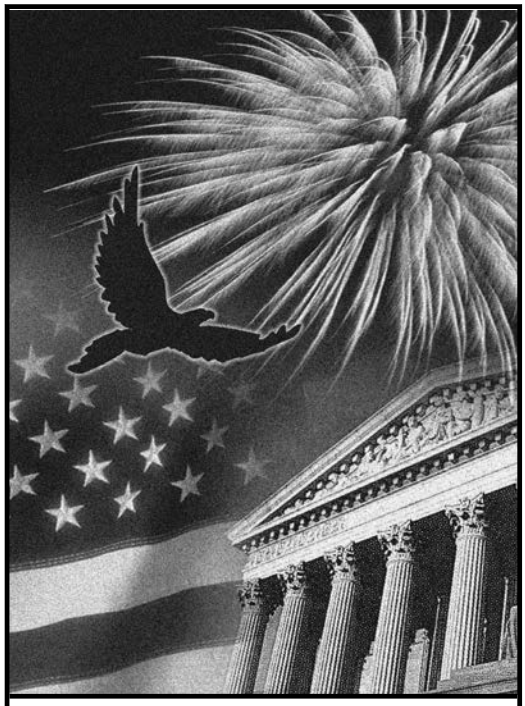

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Contents

Future Developments

For the latest information about developments related to Publication 908, such as legislation enacted after it was published, go to *www.irs.gov/pub908*.

Oct 17, 2012

What's New

Expiration of provision for catch-up contributions for IRC section 401(k) participants whose employer filed bankruptcy. The Pension Protection Act of 2006, P.L. 109-280, previously allowed additional contributions of up to $7,000 in a traditional or Roth IRA for employees who participated in an IRC section 401(k) plan of an employer that filed bankruptcy in an earlier year. This provision was not extended for tax years beginning on or after January 1, 2010.

Automatic 6-month extension of time to file a bankruptcy estate return now available for individuals in Chapter 7 or 11 bankruptcy. Beginning June 24, 2011, the IRS clarified in T.D. 9531 that there is available an automatic 6-month extension of time to file a bankruptcy estate income tax return for individuals in Chapter 7 or Chapter 11 bankruptcy proceedings upon filing a required application. The previous extension of time to file a bankruptcy estate return was 5 months.

Reminders

The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005. The changes to the U.S. Bankruptcy Code enacted by BAPCA are incorporated throughout this publication.

Debtors filing under chapters 7, 11, 12, and 13 of the Bankruptcy Code must file all applicable federal, state, and local tax returns that become due after a case commences. Failure to file tax returns timely or obtain an extension can cause a bankruptcy case to be converted to another chapter or dismissed.

In chapter 13 cases, the debtor **must** file all required tax returns for tax periods ending within **4 years** of the filing of the bankruptcy petition.

Photographs of missing children. The IRS is a proud partner with the National Center for Missing and Exploited Children. Photographs of missing children selected by the Center may appear in this publication on pages that would otherwise be blank. You can help bring these children home by looking at the photographs and calling 1-800-THE-LOST (1-800-843-5678) if you recognize a child.

Introduction

CAUTION *This publication is not intended to cover bankruptcy law in general, or to provide detailed discussions of the tax rules for the more complex corporate bankruptcy reorganizations or other highly technical transactions. Additionally, this publication is not updated on an annual basis and may not reflect recent developments in bankruptcy or tax law. If you need more guidance on the bankruptcy or tax laws applicable to your case, you should seek professional advice.*

This publication explains the basic federal income tax aspects of bankruptcy.

A fundamental goal of the bankruptcy laws enacted by Congress is to give an honest debtor a financial "fresh start". This is accomplished through the bankruptcy discharge, which is a permanent injunction (court ordered prohibition) against the collection of certain debts as a personal liability of the debtor.

Bankruptcy proceedings begin with the filing of either a voluntary petition in the United States Bankruptcy Court, or in certain cases an involuntary petition filed by creditors. This filing creates the bankruptcy estate.

- The bankruptcy estate generally consists of all of the assets the individual or entity owns on the date the bankruptcy petition was filed.
- The bankruptcy estate is treated as a separate taxable entity for individuals filing bankruptcy petitions under chapter 7 or 11 of the Bankruptcy Code, discussed later.
- The tax obligations of taxable bankruptcy estates are discussed later under *Individuals in Chapter 7 or 11.*

Generally, when a debt owed to another person or entity is canceled, the amount canceled or forgiven is considered income that is taxed to the person owing the debt. If a debt is canceled under a bankruptcy proceeding, the amount canceled is not income. However, the canceled debt reduces other tax benefits to which the debtor would otherwise be entitled. See *Debt Cancellation,* later.

Useful Items

You may want to see:

Publication

- ❑ **225** Farmer's Tax Guide
- ❑ **525** Taxable and Nontaxable Income
- ❑ **536** Net Operating Losses (NOLs) for Individuals, Estates, and Trusts
- ❑ **538** Accounting Periods and Methods
- ❑ **544** Sales and Other Dispositions of Assets
- ❑ **551** Basis of Assets
- ❑ **4681** Canceled Debts, Foreclosures, Repossessions, and Abandonments

Form (and Instructions)

- ❑ **SS-4** Application for Employer Identification Number, and separate instructions
- ❑ **982** Reduction of Tax Attributes Due to Discharge of Indebtedness (and Section 1082 Basis Adjustment)
- ❑ **1040** U.S. Individual Income Tax Return, and separate instructions
- ❑ **Schedule SE (Form 1040)** Self-Employment Tax
- ❑ **1040X** Amended U.S. Individual Income Tax Return, and separate instructions
- ❑ **1041** U.S. Income Tax Return for Estates and Trusts, and separate instructions
- ❑ **1041-ES** Estimated Income Tax for Estates and Trusts
- ❑ **1041-V** Payment Voucher
- ❑ **4506** Request for Copy of Tax Return
- ❑ **4506-T** Request for Transcript of Tax Return
- ❑ **4852** Substitute for Form W-2, Wage and Tax Statement, or Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.
- ❑ **4868** Application for Automatic Extension of Time To File U.S. Individual Income Tax Return
- ❑ **7004** Application for Automatic Extension of Time To File Certain Business Income Tax, Information, and Other Returns

See *How To Get Tax Help,* later, for information about getting these publications and forms.

Bankruptcy Code Tax Compliance Requirements

Tax Returns Due for Periods Ending Before the Bankruptcy Filing in Chapter 13 Cases

The Bankruptcy Code requires chapter 13 debtors to **file all required tax returns for tax periods ending within 4 years of the debtor's bankruptcy filing**. All such federal tax returns must be filed with the IRS before the date first set for the first meeting of creditors. The debtor may request the trustee to hold the meeting open for an additional 120 days to enable the debtor to file the returns (or until the day the returns are due under an automatic IRS extension, if later). After notice and hearing, the bankruptcy court may extend the period for another 30 days.

CAUTION *Failure to timely file the returns can prevent confirmation of a chapter 13 plan and result in either dismissal of the chapter 13 case or conversion to a chapter 7 case.*

Note. Individual debtors should use their home address when filing Form 1040 with the IRS. Returns should **not** be filed "in care of" the trustee's address.

Ordering tax transcripts and copies of returns. Trustees may require the debtor to submit copies or transcripts of the debtor's returns as proof of filing. The debtor can request free transcripts of the debtor's income tax returns by filing Form 4506-T, Request for Transcript of Tax Return, with the IRS or by placing a request on the IRS's free Automated Delivery Service (ADS), available by calling 1-800-829-1040. If requested through ADS, the transcript will be mailed to the debtor's most current address according to the IRS's records. Transcripts requested using Form 4506-T may be mailed to any address, including to the attention of the trustee in the debtor's bankruptcy case. Transcripts are normally mailed within 10 to 15 days

of receipt of the request by the IRS. A transcript contains most of the information on the debtor's filed return, but it is not a copy of the return. To request a copy of the debtor's filed return, file Form 4506, Request for Copy of Tax Return. It may take up to 60 days for the IRS to provide the copies after receipt of the debtor's request, and there is a fee of $57.00 per tax return for copies of the returns.

Tax Returns Due After the Bankruptcy Filing

For debtors filing bankruptcy under all chapters (chapters 7, 11, 12, or 13), the Bankruptcy Code provides that if the debtor does not file a tax return that becomes due after the commencement of the bankruptcy case, or obtain an extension for filing the return before the due date, the taxing authority may request that the bankruptcy court either dismiss the case or convert the case to a case under another chapter of the Bankruptcy Code. If the debtor does not file the required return or obtain an extension within 90 days after the request is made, the bankruptcy court **must** dismiss or convert the case.

Tax returns and payment of taxes in chapter 11 cases. The Bankruptcy Code provides that a chapter 11 debtor's failure to timely file tax returns and pay taxes owed after the date of the "order for relief" (the bankruptcy petition date in voluntary cases) is cause for dismissal of the chapter 11 case, conversion to a chapter 7 case, or appointment of a chapter 11 trustee.

Disclosure of debtor's return information to trustee. In bankruptcy cases filed under chapter 7 or 11 by individuals, the debtor's income tax returns for the year the bankruptcy case begins and for earlier years are, upon written request, open to inspection by or disclosure to the trustee. If the bankruptcy case was not voluntary, disclosure cannot be made before the bankruptcy court has entered an order for relief, unless the court rules that the disclosure is needed for determining whether relief should be ordered.

In bankruptcy cases other than those of individuals filing under chapter 7 or 11, the debtor's income tax returns for the current and prior years are, upon written request, open to inspection by or disclosure to the trustee, but only if the IRS finds that the trustee has a material interest that will be affected by information on the return. Material interest is generally defined as a financial or monetary interest. Material interest is not limited to the trustee's responsibility to file a return on behalf of the bankruptcy estate.

However, the U.S. Trustee (an officer of the Department of Justice, responsible for maintaining and supervising a panel of private trustees for chapter 7 bankruptcy cases) and the standing chapter 13 trustee (the administrator of chapter 13 cases in a specific geographic region) generally do not have a material interest in the debtor's return or return information.

Disclosure of bankruptcy estate's return information to debtor. The bankruptcy estate's tax return(s) are open, upon written request, to inspection by or disclosure to the individual debtor in a chapter 7 or 11 bankruptcy. Disclosure of the estate's return to the debtor may be necessary to enable the debtor to determine the amount and nature of the tax attributes, if any, that the debtor assumes when the bankruptcy estate terminates.

Individuals in Chapter 12 or 13

Only individuals may file a chapter 13 bankruptcy. Chapter 13 relief is not available to corporations or partnerships. The bankruptcy estate is **not** treated as a separate entity for tax purposes when an individual files a petition under chapter 12 (Adjustment of Debts of a Family Farmer or Fisherman with Regular Annual Income) or 13 (Adjustment of Debts of an Individual with Regular Income) of the Bankruptcy Code. In these cases the individual continues to file the same federal income tax returns that were filed prior to the bankruptcy petition, Form 1040, U.S. Individual Income Tax Return.

On the debtor's individual tax return, Form 1040, report all income received during the entire year and deduct all allowable expenses. Do not include in income the amount from any debt canceled due to the debtor's bankruptcy. To the extent the debtor has any losses, credits, or basis in property that were previously reduced as a result of canceled debt, these reductions must be included on the debtor's return. See *Debt Cancellation*, later.

Interest on trust accounts in chapter 13 cases. In chapter 13 proceedings, do **not** include interest earned on amounts held by the trustee in trust accounts as income on the debtor's return. This interest is not available to either the debtor or creditors, it is available only to the trustee for use by the U.S. Trustee system. The interest is also not taxable to the trustee as income.

Individuals in Chapter 7 or 11

When an individual debtor files for bankruptcy under chapter 7 or 11 of the Bankruptcy Code, the bankruptcy estate is treated as a new taxable entity, separate from the individual taxpayer.

The bankruptcy estate in a chapter 7 case is represented by a trustee. The trustee is appointed to administer the estate and liquidate any nonexempt assets. In chapter 11 cases, the debtor often remains in control of the assets as a "debtor-in-possession" and acts as the bankruptcy trustee. However, the bankruptcy court, for cause, may appoint a trustee if such appointment is in the best interests of the creditors and the estate.

During the chapter 7 or 11 bankruptcy, the debtor continues to file an individual tax return on Form 1040. The bankruptcy trustee files a Form 1041 for the bankruptcy estate. However, when a debtor in a chapter 11 bankruptcy case remains a debtor-in-possession, he or she must file both a Form 1040 individual return and a Form 1041 estate return for the bankruptcy estate (if return filing requirements are met).

Although a husband and wife may file a joint bankruptcy petition whose bankruptcy estates are jointly administered, the estates are be treated as two separate entities for tax purposes. Two *separate* bankruptcy estate income tax returns **must** be filed (if each spouse separately meets the filing requirements).

For information about determining the tax due and paying tax for a chapter 7 or 11 bankruptcy estate, see *Bankruptcy Estate Tax Return Filing Requirements and Payment of Tax Due*, later.

Debtor's Election To End Tax Year – Form 1040

Short tax years. An individual debtor in a chapter 7 or 11 case may elect to close the debtor's tax year for the year in which the bankruptcy petition is filed, as of the day before the date on which the bankruptcy case commences. If the debtor makes this election, the debtor's tax year is divided into 2 short tax years of less than 12 months each. The first tax year ends on the day *before* the commencement date and the second tax year begins on the commencement date.

If the election is made, the debtor's federal income tax liability for the first short tax year becomes an allowable claim against the bankruptcy estate arising before the bankruptcy filing. Also, the tax liability for the first short tax year is not subject to discharge under the Bankruptcy Code.

If the debtor does not make an election to end the tax year, the commencement of the bankruptcy case does not affect the debtor's tax year. Also, no part of the debtor's income tax liability for the year in which the bankruptcy case commences can be collected from the bankruptcy estate.

Note. The debtor cannot make a short tax year election if no assets, other than exempt property, are in the bankruptcy estate.

Making the Election - Filing Requirements

First short tax year. The debtor can elect to end the debtor's tax year by filing a return on Form 1040 for the first short tax year. The return must be filed on or before the 15th day of the fourth full month after the end of that first tax year.

Second short tax year. If the debtor elects to end the tax year on the day before filing the bankruptcy case, the debtor must file the return for the first short tax year in the manner discussed above.

If the debtor makes this election, the debtor must also file a separate Form 1040 for the second short tax year by the regular due date. To avoid delays in processing the return, write "Second Short Year Return After Section 1398 Election" at the top of the return.

Example. Jane Doe, an individual calendar year taxpayer, filed a bankruptcy petition under chapter 7 or 11 on May 8, 2012. If Jane elected to close her tax year at the commencement of her case, Jane's first short year for 2012 runs from January 1 through May 7, 2012. Jane's second short year runs from May 8, 2012, through December 31, 2012. To have a timely filed election for the first short year, Jane must file Form 1040 (or an extension of time to file) for the period January 1 through May 7 by September 15.

To avoid delays in processing the return, write "Section 1398 Election" at the top of the return. The debtor may also make the election by attaching a statement to Form 4868, Automatic Extension of Time to File an U.S. Individual Tax Return. The statement must state that the debtor elects under IRC section 1398(d)(2) to close the debtor's tax year on the day before filing the bankruptcy case. The debtor must file Form 4868 by the due date of the return for the first short tax year. The debtor's spouse may also elect to close his or her tax year, see *Election by debtor's spouse,* below.

Election by debtor's spouse. If the debtor is married, the debtor's spouse may join in the election to end the tax year. If the debtor and spouse make a joint election, the debtor **must** file a joint return for the first short tax year. The debtor must elect by the due date for filing the return for the first short tax year. Once the election is made, it cannot be revoked for the first short tax year. However, the election does not prevent the debtor and the spouse from filing separate returns for the second short tax year.

Later bankruptcy of spouse. If the debtor's spouse files for bankruptcy later in the same year, he or she may also choose to end his or her tax year, regardless of whether he or she joined in the election to end the debtor's tax year.

As each spouse has a separate bankruptcy, one or both of them may have 3 short tax years in the same calendar year. If the debtor's spouse joined the debtor's election or if the debtor had not made the election to end the tax year, the debtor can join in the spouse's election. However, if the debtor made an election and the spouse did not join that election, the debtor cannot then join the spouse's later election. The debtor and the spouse are precluded from this election because they have different tax years. This results because the debtor does not have a tax year ending the day before the spouse's filing for bankruptcy, and the debtor cannot file a joint return for a year ending on the day before the spouse's filing of bankruptcy.

Example 1. Paul and Mary Harris are calendar-year taxpayers. Paul's voluntary chapter 7 bankruptcy case begins on March 4.

If Paul does not make an election, his tax year does not end on March 3. If he makes an election, Paul's first tax year is January 1–March 3, and his second tax year begins on March 4. Mary could join in Paul's election as long as they file a joint return for the tax year January 1–March 3. They must make the election by July 15, the due date for filing the joint return.

Example 2. Fred and Ethel Barnes are calendar-year taxpayers. Fred's voluntary chapter 7 bankruptcy case begins on May 6, and Ethel's bankruptcy case begins on November 1 of the same year.

Ethel could elect to end her tax year on October 31. If Fred did not elect to end his tax year on May 5, or if he elected to do so but Ethel had not joined in his election, Ethel would have 2 tax years in the same calendar year if she decided to close her tax year. Her first tax year is January 1–October 31, and her second year is November 1–December 31.

If Fred did not end his tax year as of May 5, he could join in Ethel's election to close her tax year on October 31, but only if they file a joint return for the tax year January 1–October 31.

If Fred elected to end his tax year on May 5, but Ethel did not join in Fred's election, Fred cannot join in Ethel's election to end her tax year on October 31. Fred and Ethel cannot file a joint return for that short tax year because their tax years preceding October 31 were not the same.

Example 3. Jack and Karen Thomas are calendar-year taxpayers. Karen's voluntary chapter 7 bankruptcy case began on April 10, and Jack's voluntary chapter 7 bankruptcy case began on October 3 of the same year. Karen elected to close her tax year on April 9 and Jack joins in Karen's election.

Under these facts, Jack would have 3 tax years for the same calendar year if he makes the election relating to his own bankruptcy case. The first tax year would be January 1–April 9; the second, April 10–October 2; and the third, October 3–December 31.

Karen may join in Jack's election if they file a joint return for the second short tax year (April 10–October 2). If Karen does join in, she would have the same 3 short tax years as Jack. Also, if Karen joins in Jack's election, they may file a joint return for the third tax year (October 3–December 31), but they are not required to do so.

Annualizing taxable income. If the debtor elects to close the tax year, the debtor must annualize taxable income for each short tax year in the same manner a change in annual accounting period is calculated. See *Short Tax Year* in Publication 538, for information on how to annualize the debtor's income and to figure the tax for the short tax year.

Dismissal of bankruptcy case. If the bankruptcy court later dismisses an individual chapter 7 or 11 case, the bankruptcy estate is no longer treated as a separate taxable entity. It is as if no bankruptcy estate was created for tax purposes. In this situation, the debtor must file amended tax returns on Form 1040X, to replace all full or short year individual returns (Form 1040) and bankruptcy estate returns (Form 1041) filed as a result of the bankruptcy case. Income, deductions, and credits previously reported by the bankruptcy estate must be reported on the debtor's amended returns. Attach a statement to the amended returns explaining why the debtor is filing an amended return.

Taxes and the Bankruptcy Estate

Property of the bankruptcy estate. At the commencement of a bankruptcy case a bankruptcy estate is created. Bankruptcy law determines which of the debtor's assets become part of a bankruptcy estate. This estate generally includes all of the debtor's legal and equitable interests in property as of the commencement date. However, there are exceptions and certain property is exempted or excluded from the bankruptcy estate.

Note. Exempt property and abandoned property are initially part of the bankruptcy estate, but are subsequently removed from the estate. Excluded property is never included in the estate.

Transfer of assets between debtor and bankruptcy estate. The transfer (other than by sale or exchange) of an asset from the debtor to the bankruptcy estate is not treated as a disposition for income tax purposes. The transfer does not result in gain or loss, acceleration of income or deductions, or recapture of deductions or credits. For example, the transfer of an installment obligation to the estate would not accelerate gain under the rules for reporting installment sales. The estate assumes the same basis, holding period, and character of the transferred assets. Also, the estate generally accounts for the transferred assets in the same manner as debtor.

When the bankruptcy estate is terminated or dissolved, any resulting transfer (other than by sale or exchange) of the estate's assets back to the debtor is also not treated as a disposition for tax purposes. The transfer does not result in gain or loss, acceleration of income or deductions, or recapture of deductions or credits to the estate.

Abandoned property. The abandonment of property by the estate to the debtor is a nontaxable disposition of property. If the debtor received abandoned property from the bankruptcy estate, the debtor assumes the same basis in the property that the bankruptcy estate had.

Separate taxable entity. When an individual files a bankruptcy petition under chapter 7 or 11, the bankruptcy estate is treated as a separate taxable entity from the debtor. The court appointed trustee or the debtor-in-possession is responsible for preparing and filing all of the bankruptcy estate's tax returns, including its income tax return on Form 1041, U.S. Income Tax Return for Estates and Trusts, and paying its taxes. The debtor remains responsible for filing his or her own returns on Form 1040, U.S. Individual Income Tax Return, and paying taxes on income that does not belong to the estate.

Employer identification number. The trustee or debtor-in-possession must obtain an EIN for a bankruptcy estate. The trustee or debtor-in-possession uses this EIN on all tax returns filed for the bankruptcy estate with the IRS, including estimated tax returns. See *Employer identification number,* under *Bankruptcy*

Estate Tax Return Filing Requirements and Payment of Tax Due, later.

The social security number of the individual debtor cannot be used as the EIN for the bankruptcy estate.

Income, deductions, and credits – Form 1040. In an individual chapter 7 or 11 bankruptcy case, do not include the income, deductions, and credits that belong to the bankruptcy estate on the debtor's individual income tax return (Form 1040). Also, do not include as income on the debtor's return the amount of any debt canceled by reason of the bankruptcy discharge. The bankruptcy estate must reduce certain losses, credits, and the basis in property (to the extent of these items) by the amount of canceled debt. See *Debt Cancellation*, below.

Note. The debtor may not be able to claim certain deductions available to the bankruptcy estate such as administrative expenses. Additionally, the bankruptcy exclusion cannot be used to exclude income from a cancelled debt if the discharge of indebtedness was not within the bankruptcy case, even though the debtor was under the bankruptcy court's protection at the time. However, other exclusions, such as the insolvency exclusion, may apply.

Bankruptcy Estate – Income, Deductions, and Credits

Bankruptcy Estate Income

Income of the estate in individual chapter 7 cases. The gross income of the bankruptcy estate includes gross income of the debtor to which the estate is entitled under the Bankruptcy Code. Gross income also includes income generated by the bankruptcy estate from property of the estate after the commencement of the case.

Gross income of the bankruptcy estate does not include amounts received or accrued by the debtor *before* the commencement of the case. Additionally, in chapter 7 cases, gross income of the bankruptcy estate does not include any income that the debtor earns *after* the date of the bankruptcy petition.

Income of the estate in individual chapter 11 cases. In chapter 11 cases, under IRC section 1398(e)(1), gross income of the bankruptcy estate includes income that the debtor earns for services performed after the bankruptcy petition date. Also, earnings from services performed by an individual debtor after the commencement of the chapter 11 case are property of the bankruptcy estate under section 1115 of the Bankruptcy Code (11 U.S.C. section 1115).

Note. A debtor-in-possession may be compensated by the estate for managing or operating a trade or business that the debtor conducted before the commencement of the bankruptcy case. Such payments should be reported by the debtor as miscellaneous income on his or her individual income tax return (Form 1040).

Amounts paid by the estate to the debtor-in-possession for managing or operating the trade or business may qualify as administrative expenses of the estate. See *Administrative expenses*, below.

Conversion or dismissal of chapter 11 cases. If a chapter 11 case is converted to a chapter 13 case, the chapter 13 estate is not a separate taxable entity and earnings from post-conversion services and income from property of the estate realized after the conversion to chapter 13 are taxed to the debtor. If the chapter 11 case is converted to a chapter 7 case, 11 U.S.C. section 1115 does not apply after conversion and:

- Earnings from post-conversion services will be taxed to the debtor, rather than the estate, and
- The property of the chapter 11 estate will become property of the chapter 7 estate.

Any income on this property will be taxed to the estate even if the income is realized after the conversion to chapter 7. If a chapter 11 case is dismissed, the debtor is treated as if the bankruptcy case had never been filed and as if no bankruptcy estate had been created.

Bankruptcy Estate Deductions and Credits

A bankruptcy estate deducts expenses incurred in a trade, business, or activity, and uses credits in the same way the debtor would have deducted or credited them had he or she continued operations.

Note. Expenses may be disallowed under other provisions of the IRC (such as the disallowance of certain capital expenditures or expenses relating to tax-exempt interest).

Administrative expenses. Allowable expenses include administrative expenses.

Administrative expenses can only be deducted by the estate, never by the debtor.

The bankruptcy estate is allowed deductions for bankruptcy administrative expenses and fees, including accounting fees, attorney fees, and court costs. These expenses are deductible on Form 1040, Schedule A as miscellaneous itemized deductions **not** subject to the 2% floor on miscellaneous itemized deductions, because they would not have been incurred if property had not been held by the bankruptcy estate. See IRC section 67(e). Administrative expenses of the bankruptcy estate attributable to conducting a trade or business for the production of estate rents or royalties are deductible in arriving at adjusted gross income on Form 1040, Schedules C, E, and F.

Note. The bankruptcy estate uses Form 1041 as a transmittal for the tax return prepared using Form 1040 and its schedules. See *Transmittal for Form 1040* under *Tax Return Filing Requirements and Payment of Tax*, later.

Administrative expense loss. If the administrative expenses of the bankruptcy estate are more than its gross income for a tax year, the excess amount may be carried back 3 years and forward 7 years. The amounts can only be carried to a tax year of the estate and never to a debtor's tax year. The excess amount to be carried back or forward is treated like a net operating loss (NOL) and must first be carried back to the earliest year possible. For a discussion of NOLs, see Publication 536.

Attribute carryovers. The bankruptcy estate may use its tax attributes the same way that the debtor would have used them. These items are determined as of the first day of the debtor's tax year in which the bankruptcy case begins. The bankruptcy estate assumes the following tax attributes from the debtor:

1. NOL carryovers,
2. Carryovers of excess charitable contributions,
3. Recovery of tax benefit items,
4. Credit carryovers,
5. Capital loss carryovers,
6. Basis, holding period, and character of assets,
7. Method of accounting,
8. Passive activity loss and credit carryovers,
9. Unused at-risk deductions, and
10. Other tax attributes provided in the regulations.

Certain tax attributes of the bankruptcy estate must be reduced by the amount of income that was previously excluded as a result of cancellation of debt during the bankruptcy proceeding. See *Debt Cancellation*, later.

When the bankruptcy estate is terminated (for example, when the case ends), the debtor assumes any remaining tax attributes previously taken over by the bankruptcy estate. The debtor also generally assumes any of the tax attributes, listed above, that arose during the administration of the bankruptcy estate.

Note. The debtor does not assume the bankruptcy estate's administrative expense losses because they cannot be used by an individual taxpayer filing Form 1040. See *Administrative expense loss*, above.

Passive and at-risk activities. For bankruptcy cases beginning after November 8, 1992, passive activity carryover losses and credits and unused at-risk deductions are treated as tax attributes passing from the debtor to the bankruptcy estate, which the estate then passes back to the debtor when the bankruptcy estate terminates. Additionally, transfers to the debtor (other than by sale or exchange) of interests in passive or at-risk activities are treated as non-taxable exchanges. These transfers include the return of exempt property and abandonment of estate property to the debtor.

Carrybacks from the debtor's activities. The debtor cannot carry back any NOL or credit carryback from a tax year ending after the bankruptcy case has begun to any tax year ending before the case began.

Carrybacks from the bankruptcy estate. If the bankruptcy estate has an NOL that did not pass to the estate from the debtor under the

Notice 2006-83 Statement

Pending Bankruptcy Case

The taxpayer, _____, filed a bankruptcy petition under chapter 11 of the Bankruptcy Code in the bankruptcy court for the District of _____ . The bankruptcy court case number is _____. Gross income, and withheld federal income tax, reported on Form W-2, Forms 1099, Schedule K-1, and other information returns received under the taxpayer's name and social security number (or other taxpayer identification number) are allocated between the taxpayer's TIN and the bankruptcy estate's EIN as follows, using [describe allocation method]: _____.

	Year	Taxpayer	Estate
1.	Form W-2, Payor: _____	$ _____	$ _____
	Withheld income tax shown on Form W-2	$ _____	$ _____
2.	Form 1099-INT Payor: _____	$ _____	$ _____
	Withheld income tax (if any) shown on Form 1099-INT	$ _____	$ _____
3.	Form 1099-DIV Payor: _____	$ _____	$ _____
	Withheld income tax (if any) shown on Form 1099-DIV	$ _____	$ _____
4.	Form 1099-MISC Payor: _____	$ _____	$ _____
	Withheld income tax (if any) shown on Form 1099-MISC	$ _____	$ _____

attribute carryover rules, the estate can carry the loss back not only to its own earlier tax years but also to the debtor's tax years before the year the bankruptcy case began. The estate may also carry back excess credits, such as the general business credit, to the pre-bankruptcy tax years.

Tax Reporting – Chapter 11 Cases

Allocation of income and credits on information returns and required statement for returns for individual chapter 11 cases. In chapter 11 cases, when an employer issues a Form W-2 reporting all of the debtor's wages, salary, or other compensation for a calendar year, and a portion of the earnings represent post-petition services includible in the estate's gross income, the Form W-2 amounts **must** be allocated between the estate and the debtor. The debtor-in-possession or trustee must allocate the income amount reported in box 1 and the income tax withheld reported in box 2 between the debtor and the estate. These allocations must reflect that the debtor's gross earnings from post-petition services and gross income from post-petition property are, generally, includible in the estate's gross income and not the debtor's gross income. The debtor and trustee may use a simple percentage method to allocate income and income tax withheld. The same method must be used to allocate the income and the withheld tax.

Example. If 20% of the wages reported on Form W-2 for a calendar year were earned after the commencement of the case and are included in the estate's gross income, 20% of the withheld income tax reported on Form W-2 must also be claimed as a credit on the estate's income tax return. Likewise, 80% of wages must be reported by the debtor and 80% of the income tax withheld must be claimed as a credit on the debtor's income tax return. See IRC section 31(a).

If information returns are issued to the debtor for gross income, gross proceeds, or other reportable payments that should have been reported to the bankruptcy estate, the debtor-in-possession or trustee must allocate the improperly reported income in a reasonable manner between the debtor and the estate. In general, the allocation must ensure that any income and income tax withheld attributable to the post-petition period is reported on the estate's return, and any income and income tax withheld attributable to the pre-petition period is reported on the debtor's return.

IRS Notice 2006-83 requires the debtor to attach a statement to his or her individual income tax return (Form 1040) stating that the return is filed subject to a chapter 11 bankruptcy case. The statement must also:

- Show the allocations of income and income tax withheld,
- Describe the method used to allocate income and income tax withheld, and
- List the filing date of the bankruptcy case, the bankruptcy court in which the case is pending, the bankruptcy court case number, and the bankruptcy estate's EIN.

Note. The debtor-in-possession or trustee must attach a similar statement to the bankruptcy estate's income tax return (Form 1041).

The model Notice 2006-83 Statement, shown above, may be used by debtors, debtors-in-possession, and trustees to satisfy the reporting requirement.

Self-employment taxes in individual chapter 11 cases. IRC section 1401 imposes a tax upon the self-employment income, that is, the net earnings from self-employment of an individual. Net earnings from self-employment are equal to the gross income derived by an individual from any trade or business carried on by such individual, less deductions attributable to the business.

Neither section 1115 of the Bankruptcy Code nor IRC section 1398 addresses the application of self-employment tax to the post-petition earnings of the individual debtor. Therefore, if the debtor continues to derive gross income from the performance of services as a self-employed individual after the commencement of the bankruptcy case, the debtor must continue to report the debtor's self-employment income on Schedule SE (Form 1040) of the debtor's income tax return. This schedule includes self-employment income earned post-petition and the attributable deductions. The debtor must pay any self-employment tax imposed by IRC section 1401.

Employment taxes and employer's obligation to file Form W-2 in individual chapter 11 cases. In chapter 11 cases, post-petition wages earned by a debtor are generally treated as gross income of the estate. However, section 1115 of the Bankruptcy Code (11 U.S.C. section 1115) does not affect the determination of what are deemed wages for Federal Insurance Contributions Act (FICA) tax, Federal Unemployment Tax Act (FUTA) tax, or Federal Income Tax Withholding purposes. See Notice 2006-83.

The reporting and withholding obligations of a debtor's employer also do not change. An employer should continue to report the wages and tax withholding on a Form W-2 issued under the debtor's name and social security number.

Notice to persons required to file information returns (other than Form W-2, Wage and Tax Statement) in individual chapter 11 cases. Within a reasonable time after the commencement of a chapter 11 bankruptcy case, the trustee or debtor-in-possession should provide notification of the bankruptcy estate's EIN to all persons (or entities) that are required to file information returns for the bankruptcy estate's gross income, gross proceeds, or other types of reportable payments. See IRC section 6109(a)(2). As these payments are the property of the estate under section 1115 of the Bankruptcy Code, the payors should report the gross income, gross proceeds, or other reportable payments on the appropriate information return using the estate's name and EIN as required under the IRC and regulations (see IRC sections 6041 through 6049).

The trustee or debtor-in-possession should not, however, provide the EIN to a person (or entity) filing Form W-2 reporting the debtor's wages or other compensation, as section 1115 of the Bankruptcy Code does not affect the determination of what constitutes wages for purposes of federal income tax withholding or FICA. See Notice 2006-83. An employer should continue to report all wage income and tax withholding, both pre-petition and post-petition, on a Form W-2 to the debtor under the debtor's social security number.

The debtor in a chapter 11 case is not required to file a new Form W-4 with an employer solely because the debtor filed a chapter 11 case and the post-petition wages are includible in the estate's income and not the debtor's income. However, a new Form W-4 may be necessary if the debtor is no longer entitled to claim the same number of allowances previously claimed because certain deductions or credits now belong to the estate. See Employment Tax Regulations section 31.3402(f)(2)-1. Additionally, the debtor may wish to file a new Form W-4 to increase the income tax withheld from post-petition wages allocated to the estate to avoid having to make estimated tax payments for the estate. See IRC section 6654(a).

Notice required in converted and dismissed cases. When a chapter 11 bankruptcy case is closed, dismissed, or converted to a chapter 12 or 13 case, the bankruptcy estate ends as a separate taxable entity. The debtor should, within a reasonable time, send notice of such event to the persons (or entities) previously notified of the bankruptcy case. This

helps to ensure that gross income, proceeds, and other reportable payments realized after the event are reported to the debtor under the correct TIN rather than to the estate.

When a chapter 11 case is converted to a chapter 7 case, the bankruptcy estate will continue to exist as a separate taxable entity. Gross income (other than post-conversion income from the debtor's services), gross proceeds, or other reportable payments should continue to be reported to the estate if they are property of the chapter 7 estate. However, income from services performed by the debtor after conversion of the case to chapter 7 is not property of the chapter 7 estate. After the conversion, the debtor should notify payors required to report the debtor's nonemployee compensation that compensation earned after the conversion should be reported using the debtor's name and TIN, not the estate's name and EIN.

Employment taxes. The trustee or debtor-in-possession must withhold income and social security taxes and file employment tax returns for any wages paid by the trustee or debtor, including wage claims paid as administrative expenses. See Publication 15, Circular E, Employer's Tax Guide, for details on employer tax responsibilities.

The trustee also has the duty to prepare and file Forms W-2 for wage claims paid by the trustee, regardless of whether the claims accrued before or during bankruptcy. For a further discussion of employment taxes, see *Employment Taxes*, later.

Bankruptcy Estate Tax Return Filing Requirements and Payment of Tax Due

Filing Requirements

Filing threshold. If the bankruptcy estate has gross income that meets or exceeds the minimum amount required for filing, the trustee or debtor-in-possession must file an income tax return on Form 1041. This amount is equal to the sum of the personal exemption amount plus the basic standard deduction for a *married individual filing separately*.

For 2012, the threshold filing amount for a bankruptcy estate is $9,750 (the sum of the $3,800 personal exemption plus the $5,950 standard deduction for married individuals filing separately).

These amounts are generally adjusted annually. See the present year Form 1041 Instructions at www.irs.gov/form1041 for the current dollar amounts.

Accounting period. A bankruptcy estate may have a fiscal year. However, this period cannot be longer than 12 months.

Change of accounting period. The bankruptcy estate may change its accounting period (tax year) once without IRS approval. This rule allows the bankruptcy trustee to close the estate's tax year early, before the expected termination of the bankruptcy estate. The trustee can then file a return for the first short tax year to get a quick determination of the estate's tax liability.

Employer identification number. The trustee or debtor-in-possession must obtain an EIN for a bankruptcy estate. The trustee or debtor-in-possession uses this EIN on all tax returns filed for the bankruptcy estate with the IRS, including estimated tax returns.

CAUTION *The social security number of the individual debtor cannot be used as the EIN for the bankruptcy estate.*

Obtain an EIN for a bankruptcy estate by applying:

- Online by clicking on the EIN link at www.irs.gov/businesses/small. The EIN is issued immediately once the application information is validated.
- By telephone at 1-800-829-4933 from 7:00 a.m. to 7:00 p.m. in the trustee's or debtor-in-possession's local time zone. Assistance provided to callers from Alaska and Hawaii will be based on the hours of operation in the Pacific time zone, or
- By mailing or faxing Form SS-4, Application for Employer Identification Number.

If the trustee or debtor-in-possession has not received the bankruptcy estate's EIN by the time the return is due, write "Applied for" and the date you applied in the space for the EIN. For more details, see Pub. 583, Starting a Business and Keeping Records.

Trustees representing ten or more bankruptcy estates (other than estates that will be filing employment or excise tax returns) may request a series or block of EINs.

Figuring tax due. The bankruptcy estate figures its taxable income the same way an individual figures taxable income. However, the estate uses the tax rates for a *married individual filing separately* to calculate the tax on its taxable income. The estate is entitled to one personal exemption and may either itemize deductions or take the basic standard deduction for a married individual filing a separate return. The estate cannot take the higher standard deduction allowed for married persons filing separately who are 65 or older or blind.

CAUTION ***Tax rate schedule.*** *The tax on income for bankruptcy estates is calculated using the tax rate schedule for Married Individuals Filing Separately* ***not*** *the Estates and Trusts tax rate schedule.*

When to file. Calendar year bankruptcy estates must file Form 1041 by April 15th. Fiscal year bankruptcy estates must file on or before the 15th day of the 4th month following the close of its tax year. For example, an estate that has a tax year that ends on June 30th must file Form 1041 by October 15th of the tax year. If the due date falls on a Saturday, Sunday, or legal holiday, file on the next business day.

Note. The bankruptcy estate is allowed an automatic 6-month extension of time to file the bankruptcy estate tax return upon filing the required application, Form 7004, Application for Automatic Extension of Time To File Certain Business Income Tax, Information, and Other Returns.

Transmittal for Form 1040. Form 1041 is used as a ***transmittal*** for Form 1040. If a return is required, the trustee or debtor-in-possession must complete the identification area at the top of Form 1041 and indicate the chapter under which the bankruptcy estate filed, either chapter 7 or chapter 11.

Prepare the bankruptcy estate's return by completing Form 1040. In the top margin of Form 1040, write "Attachment to Form 1041 — **DO NOT DETACH.**" Then, attach Form 1040 to the Form 1041 transmittal. Enter the tax and payment amounts on lines 23 through 29 of Form 1041, then sign and date the return. An example of a bankruptcy estate's tax return is prepared below.

Note. The filing of the bankruptcy estate's tax return does not relieve a debtor from the requirement to file his or her individual tax return on Form 1040.

Payment of Tax Due

Payment methods. Payment of tax due may be made by check or money order or by credit or debit card. For information on how to make payments electronically by credit or debit card, go to irs.gov/e-pay.

Payments may also be made electronically using the Electronic Federal Tax Payment System (EFTPS), a free tax payment system that allows you to make payments online or by phone. To enroll in EFTPS, go to eftps.gov or call 1-800-555-4477. For more information see Publication 966, Electronic Federal Tax Payment System: A Guide to Getting Started.

Payment voucher – Form 1041-V. Form 1041-V accompanies payments made by check or money order for Form 1041. The voucher includes information about the bankruptcy estate, including the name of the bankruptcy estate, trustee, EIN, and amount due. Using Form 1041-V assists the IRS in processing the payment more accurately and efficiently. We recommend the use of Form 1041-V; however, there is no penalty if the voucher is not used.

Estimated tax – Form 1041-ES. In most cases, the trustee or debtor-in-possession **must** pay any required estimated tax due for the bankruptcy estate. See the Form 1041-ES Instructions for information on the minimum threshold amount required for filing Form 1041-ES, paying the estimated tax, and exceptions to filing.

Employment Taxes

The trustee or debtor-in-possession must withhold income and social security taxes and file employment tax returns for any wages paid by the trustee or debtor, including wage claims paid as administrative expenses. Until these employment taxes are deposited as required by the IRC, they should be set aside in a separate bank account to ensure that funds are available to satisfy the liability. If the employment taxes

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION (DETROIT)

In re:

Chapter 11
Case No. 13-00000
Hon.

Debtors.

_____/

MOTION FOR ENTRY OF DISCHARGE

***NOW COME*_____**, ("Debtors"), by and through their attorneys, Silverman & Morris, P.L.L.C., and hereby move pursuant to 11 U.S.C. § 1141(b)(5), F.R.B.P. 4004 and Guideline 11 of the Local Rules for the entry of an order granting each of the Debtors a discharge. In support of their motion, the Debtors state as follows:

1. A proposed order granting the relief sought in this motion is attached hereto as Exhibit 1.

2. A notice of motion and opportunity to object is attached hereto as Exhibit 2.

3. A certificate of service showing service on those parties entitled to service under ECF procedure 12(b) is attached hereto as Exhibit 3.

4. On [date] the Court entered an order confirming the Debtors' Combined Plan of Reorganization and Disclosure Statement (the "Plan").

5. [the following language is to explain that the debtor(s) has/have "completed payments under the plan". The language included here is an example.] Following confirmation of the Plan, the Debtors exercised their right under § 3.8.3 of the Plan to prepay all Class VIII claims under the Plan. In addition, Debtors prepaid all other claims under the Plan, with the exception of Class IV. Class IV consists of the secured claim of Mortgage Bank. That claim is secured by a mortgage on the Debtors' home. The Debtors are performing their obligation to pay Mortgage Bank pursuant to

the terms of the Plan and the terms of the loan modification agreement entered into between the Debtors and Mortgage Bank.

6. Guideline 11 of the Local Rules provides as follows:

> **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, 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.

7. The following statements are made to fulfill the requirements of 11 U.S.C. § 1141(b)(5)(C):

a. Section 522(q)(1) is not applicable to the Debtors. The Debtors elected the federal exemptions and not the state exemptions.

b. There is not pending any proceeding to which either of the Debtors may be found guilty of a felony or liable for a debt of the kind described in § 522(q)(1)(B).

c. The Debtors have satisfied all obligations to creditors under the Plan, apart from payments still owing to Mortgage Bank pursuant to their home mortgage. The Plan provides for payment in full of Mortgage Bank's claim in accordance with the terms of the applicable loan documents. The proposed order attached hereto provides that the Debtors will not be discharged of their obligation to Mortgage Bank.

d. The value, as of the effective date of the Plan, of property actually distributed under the Plan on the account of each allowed unsecured claim was 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. (See the liquidation analysis included with the Plan).

e. Modification of the Plan under Section 1127 is not practicable. No modification is necessary for the reasons explained above.

8. The Debtors request that the Court make the findings required by 11 U.S.C. § 1141(b)(5)(C).

9. The Debtors are entitled to a discharge pursuant to 11 U.S.C. § 1141.

WHEREFORE, _____, Debtors, respectfully request that the Court enter an order for the discharge of each of them.

Respectfully submitted,

SILVERMAN & MORRIS, P.L.L.C.

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Dated: June 14, 2013

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION (DETROIT)

In re:	Chapter 11 Case No. 13-00000- Hon.
Debtors.	
_____/	

ORDER FOR ENTRY OF DISCHARGE

The Debtors having filed a motion pursuant to 11 U.S.C. § 1141, F.R.B.P. 4004 and Guideline 11 of the Local Bankruptcy Rules, and it appearing from the certification filed pursuant to L.B.R. 9014-1 that notice of the motion was duly served, and that no timely objection thereto was filed and served, and the Court finding there is no reasonable cause to believe that § 522(q)(1) is applicable to the Debtors; and the Court having found that the requirements of 11 U.S.C. § 1141(b)(A) and (B) are met; and the Court finding that there exists cause to enter this order for the discharge of the Debtors; and the Court having been otherwise fully advised in the premises;

NOW, THEREFORE,

IT IS HEREBY ORDERED as follows:

1. The reopening fee for the filing of the motion is hereby waived pursuant to Guideline 11.

2. The case is reopened for the purpose of the entry of a discharge in favor of each of the Debtors.

3. The Court hereby grants a discharge to [John Debtor] and [Jeanne Debtor], Debtors, pursuant to 11 U.S.C. § 1141(b)(5).

4. No additional United States Trustee quarterly fees are owed for the period of time during which this case was reopened for the purpose of the entry of this order.

5. The chapter 11 case is hereby closed.