

Accessibility of Individual Chapter 11s - Michael Li, Esq.

In the post-recession era, the combination of easy credit and recovering jobs market leaves many potential consumer bankruptcy filers in a precarious situation. On the one hand, these filers enjoy a sufficiently high level of income that preclude them from qualifying under the Chapter 7 Means Test. On the other hand, the same individuals carry an overwhelming level of debt beyond what Chapter 13 is designed to manage. Enter Chapter 11 bankruptcy for your “average joe” consumer debtor. While traditionally reserved for individuals with complex investments or financial backgrounds, Individual Chapter 11 has steadily increased in popularity in recent years.¹

Part of this trend may be explained by BAPCPA’s effect of synchronizing the processes under these distinct chapters under the Code, resulting in a more efficient process for executing some of the more tedious and costly tasks associated with Chapter 11 cases (e.g. preparing and approving disclosure statements, reorganization plans and solicitation procedures). In fact, the Code recognizes an entire subspecies of Chapter 11 cases known as “Small Business Cases (“SBC”),”² which provides the reorganizing debtor with a shorter and less onerous timeline for completing the solicitation process and confirming the reorganization plan. Designation as a SBC is automatic so long as the debtor is engaged in commercial and business activities and has outstanding debts of not more than \$2,490,925 as of this writing.

Perhaps another reason why more consumer debtors are turning to the embrace of Chapter 11 protection lies in the absence of any restrictions on strip-down of unsecured claims. While Chapter 13 specifically prohibits bifurcation of certain undersecured claims such as purchase-money claims incurred within 910 days secured by debtor’s personal car and mortgages on debtor’s primary residence, Chapter 11 allows separate treatment of unsecured portion of these claims for purposes of plan confirmation. When combined with “cramdown” provisions under 1129(b), it provides an alternative to the often frustrated attempts of Chapter 13 debtors to circumvent the strictures of Dewsnup and Section 1322(b)(2). Notwithstanding their similarities, the following chart highlights some of the prominent differences between individual 13s and 11s for a meaningful assessment of the cost of pursuing each course:

	Chapter 11	Chapter 13
Automatic Stay (Codebtor Stay)	The stay is generally triggered by both voluntary and involuntary petition against (1) commencement or continuation of actions or proceedings against the debtor; (2) other acts of enforcing the debt obligation against debtor or against the debtor’s property; and (3) actions to obtain control or possession over debtor’s property	The stay operates the same, except (1) there is no involuntary petition process under Chapter 13 and (2) filing of the petition operates as a stay protecting co-debtors (e.g. guarantors, co-signers, etc.)
“Disposable Income”	Disposable income is determined pursuant to Section	Disposable income is determined pursuant to Section

¹ According to the United States Trustee Program databases, Individual Chapter 11 filings increased by over 59% from 2002 to 2008, observing the largest increase after passage of BAPCPA in 2005. Available at http://www.justice.gov/ust/eo/public_affairs/articles/docs/2009/abi_200905.pdf

² Section 101(51C) and (51D)

	1325(b)(2) - i.e. the actual, reasonably necessary expenses rather than allowable expenses in accordance with IRS Collection Financial Standards.	707(b)(2)(A) and (B), if the debtor's annualized current monthly income exceeds the state median depending on household size; otherwise, the same formula applies as under Chapter 11.
Disclosure Statement	A Disclosure Statement is required to be filed with the Chapter 11 plan of reorganization and must contain "adequate information" necessary for a hypothetical investor to make an informed judgment about the plan before acceptances to the plan are solicited under 1125.	None, but the standing trustee is obligated to investigate the debtor's financial affairs and may request disclosures of similar information to test whether the proposed plan satisfies Code requirements.
Financial Reporting	The United States Trustee's office will oversee debtor's obligation to file monthly reports concerning postpetition business operations, including information such as cash flow, expenses, profit, liabilities, professional fees expenditures, etc.	None, but as with Disclosure Statements, the Court or trustee's office may require reports of increases in income and expenses.
Plan Process	Generally, debtor has 120 days in which debtor is the only party entitled to propose a plan of reorganization. Past this period, any party-in-interest may propose a reorganization plan. The Chapter 11 plan tends to be highly customized to the financial situation of individual debtors. Objection by holder of allowed unsecured claims triggers a 5 year minimum commitment period under Section 1129(a)(15)(B).	Only debtor may propose a plan of repayment under Section 1321 within 14 days of filing the petition. Each trustee's office usually promulgates its own form plans to be used by debtors. Most plans must run between 3 to 5 years depending on the state median test. <u>See</u> Sections 1322(d) and 1325(b)(4)(A).
Creditor's Rights	In addition to Chapter 13 methods of contesting the proposed plan, creditors can also object by voting to reject the plan and/or propose a competing plan of reorganization upon lapse of the exclusivity period. Under 1126(c), the debtor needs one-half in number and two-thirds in amount of interest of each impaired creditor's classes to vote in favor of the proposed plan as a precondition to	Creditors are limited to objecting to the proposed plan of repayment as there is neither provision for proposing a competing plan nor an obligation to solicit creditor acceptances.

	confirmation. <u>See</u> 1129(a)(7)(A)(i).	
Special Notice Requirements	None under Federal Rules of Bankruptcy Procedure 3002.1	Creditors holding claims secured by principal residence must (1) notify debtor of changes in payment before charging the same; (2) notify debtor of postpetition fees and costs that holder of the claim asserts are recoverable against the estate within 180 days after such fees and costs are incurred; (3) respond to trustee's notice of final cure payment within 21 days after service of trustee's notice per 3002.1(g), even if creditor agrees with trustee.