

**Small Business and Individual Chapter 11 Cases Under the
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005**

I. Individual Chapter 11 Cases

A.A **Property of the Estate – Section 1115**

1.1 In a Chapter 11 proceeding in which the debtor is an individual, property of the estate includes:

a.a All property specified in § 541 acquired by the debtor after the commencement of the case and before the case is closed, dismissed or converted.

a.b Earnings from services performed by the debtor after the commencement of the case but before closure, dismissal or conversion. (Proposed Interim Rule 1007(b)(5) would require an individual debtor in a Chapter 11 case to file a Statement of Current Monthly Income on the appropriate official form.)

1.2 The debtor remains in possession of property of the estate except as might be provided in connection with an order appointing a trustee or an order confirming a plan.

A.B **Dismissal/Conversion**

2.1 Among the many new grounds for dismissal or conversion of a Chapter 11 proceeding, which is likely to be applicable in a Chapter 11 proceeding filed by an individual is that provision which requires the court to convert or dismiss the case for failure to pay any domestic support obligation that becomes payable after the date of the filing of the petition. § 1112(b)(4)(P).

A.C **Plan Contents – § 1123(a)(8)**

3.1 A Chapter 11 plan filed by an individual must provide for the payment of all or that portion of earnings for personal services performed after the commencement of the case or other future income as is necessary for the execution of the plan.

A.D **Plan Modification – § 1127(e)**

4.1 A confirmed Chapter 11 plan may be modified by the debtor, the trustee, the U.S. Trustee or the holder of an allowed unsecured claim after confirmation and before completion of payments, but regardless of whether the plan has been substantially consummated, to
4.2

- b.a Increase or reduce the amount of payments on claims of a particular class;
 - b.b Extend or reduce the time period for such payments; or
 - b.c Alter the amount of the distribution to a creditor whose claim is included in the plan to the extent necessary to take into consideration any payment of a claim other than under the plan.
- 4.3 This provision parallels a similar provision in existing § 1329.
- 4.4 Proposed Interim Rule 3019(b) specifies the procedures for modification of a plan under § 1127(e) in an individual case. Such a request must identify the proponent and be filed with the proposed modification. Twenty days notice must be given of the deadline for filing objections and of the hearing to consider the modification and any objections. A proceeding on such an objection is a contested matter governed by Rule 9014. Proposed Interim Rule 3019(b).

A.E Plan Confirmation

- 5.1 The court may not confirm a Chapter 11 plan in an individual case unless the debtor has paid all amounts coming due after the date of the filing of the petition for a domestic support obligation required by a judicial or administrative order or statute. § 1129(a)(14).
- 5.2 In a new provision paralleling § 1325(b), if the holder of an allowed unsecured claim objects to confirmation of the plan, the court may not confirm the plan unless
- b.a The value, as of the effective date of the plan, of the property to be distributed under the plan on account of the claim is not less than the amount of the claim; or
 - b.b The value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in § 1325(b)(2)) for the entire period during which the plan proposes that payments be made or for a period of five years from the date the first payment under the plan is due, whichever is longer. § 1129(a)(15).
- 5.3 If the debtor seeks to confirm a plan over the objection of a class of unsecured creditors, pursuant to § 1129(b)(2)(B), the debtor may nonetheless retain property included in the estate pursuant to § 1115, subject to only the requirement that domestic support obligations be

current. § 1129(b)(2)(B)(ii). This amendment does not seem to address the question of whether an individual debtor may retain exempt or non-exempt property owned at the time of the filing of the petition and confirm a plan over the objection of a class of unsecured creditors which does not provide for complete payment of their claims.

A.F Discharge

- 6.1 For an individual debtor, discharge no longer occurs upon the entry of an order of confirmation, but is not entered until completion of all plan payments. § 1141(d)(5)(A).
- 6.2 The Act includes a provision authorizing the grant of a hardship discharge if: (a) the debtor has paid to unsecured creditors at least as much as they would have received if the debtor had been liquidated under Chapter 7 of the Code; and (b) modification of the plan is not practicable. § 1141(d)(5)(B). This provision is similar to the provision for hardship discharge contained in Chapter 13, but omits the requirement that the debtor's failure to complete payments is due to circumstances for which the debtor should not justly be held accountable.
- 6.3 Delay/denial of discharge – The court may not enter an order of discharge unless it determines, after notice and hearing, held not more than ten days before the date of the entry of that order, that there is no reasonable cause to believe § 522(q)(1) may be applicable to the debtor and that a proceeding is pending in which the debtor might be found guilty of a felony of the kind described in § 522(q)(1)(A) or liable for a debt of the kind described in § 522(q)(1)(B) (certain securities act or RICO violations, criminal, intentional, willful or reckless conduct causing serious physical injury or death within the previous five years). § 1141(d)(5)(C).
 - c.a A similar provision is added to the sections governing discharge in other chapters of the Code. *See, e.g.*, § 727(a)(12), § 1228(f) and § 1328(h).
 - c.b This provision (and its counterparts), already one of the more impenetrable in the Act, is made all the more confusing by the fact that its Chapter 11 version does not even appear to be a complete sentence.
 - c.c This provision is subject to different interpretations. Was it intended to authorize the denial of discharge in the event that debtor is guilty of one of the acts or liable on one of the debts described or merely delay the entry of discharge until the debtor's liability for such acts can be determined in subsequent proceedings. Given the language (e.g., "may be applicable," "may

be found guilty . . . or liable for a debt . . .”) and the location of the provision in a section of the Act labeled “Delay of Discharge During Pendency of Certain Proceedings.” (§ 330), the latter interpretation is probably preferable. *See* W. Brown, *Taking Exception to a Debtor’s Discharge: The 2005 Bankruptcy Amendments Make it Easier*, 79 *American Bankruptcy Law Journal* 419 (2005).

II. Small Business Cases

B.A. Definitions

- 1.1 A “small business case” is a case filed under Chapter 11 in which the debtor is a “small business debtor.” § 101(51C).
- 1.2 The term “small business debtor” is defined to mean a person engaged in commercial or business activity (excluding a person whose primary activity is the business of owning or operating real estate or incidental activities) with aggregate, non-contingent, liquidated, secured and unsecured debts not more than \$2 million in which the United States Trustee has not appointed a committee of unsecured creditors or where the court has determined that the committee is insufficiently active and representative to provide effective oversight of the debtor. The term does not include any member of a group of affiliated debtors that has aggregate, non-contingent, liquidated, secured and unsecured debt in excess of \$2 million. § 101 (51D).
- 1.3 In contrast to prior law, under which a debtor had to elect to be a small business debtor, a debtor meeting the definition under the Act is automatically governed by the provisions on small business cases and small business debtors.
- 1.4 Because of the definitional provisions regarding the appointment and status of a committee, the debtor’s status with respect to those provisions of the Code applicable to small business debtors may change as the case progresses. This presents problems with compliance with new reporting requirements discussed below, especially if the case only becomes subject to these requirements after the deadlines have expired.
- 1.5 Procedural aspects of this issue are dealt with in Proposed Interim Rule 1020 which provides as follows:
 - e.a The debtor state in the petition whether it is a small business debtor. In an involuntary case, the designation has to be filed within 15 days after entry of the order for relief. Rule 1020(a).
 - e.b A party in interest may object to the debtor’s designation, but must

do so 30 days after the conclusion of the meeting of creditors or 30 days after any amendment to the statement. Rule 1020(b).

- e.c If the United States Trustee has appointed a committee of unsecured creditors, the case may proceed as a small business case only if the court has entered an order determining that the committee is not sufficiently active or representative to provide effective oversight of the debtor. A request for such a determination may be filed by any party in interest within a “reasonable time” after the failure of the committee to be sufficiently active and/or representative. Debtor may file such a request at any time. Rule 1020(c). A request for a determination under this rule is a contested matter governed by Rule 9014. Rule 1020(d).

B.B Reporting Requirements – § 308

- 2.1 The numerous new reporting requirements contained in § 308 do not become effective until 60 days after the promulgation of rules prescribing appropriate forms for the required reports. Section 435 of the Act directs the Bankruptcy Rules Committee to create forms to implement the new reporting requirements contained in § 308.
- 2.2 When effective, § 308(b) requires that a small business debtor provide periodic reports with the following information:
 - b.a The debtor’s “profitability,” defined in § 308(a) to mean earnings or losses during the current and recent fiscal periods,
 - b.b Projections of receipts and disbursements for a reasonable period,
 - b.c Comparisons of actual receipts and disbursements with projections,
 - b.d Status of debtor’s compliance with post-petition requirements imposed by the Code and the Federal Rules of Bankruptcy Procedure, filing of tax returns and other required governmental filings and payment of taxes and other administrative expenses.
 - b.e If debtor is not in compliance with tax return or other filing and payment requirements, the debtor must identify the failures and make proposals for remedying them.
- 2.3 By its terms, § 308(b) applies to all small business debtors regardless of whether they are in a small business case. Accordingly, this requirement theoretically applies to entities meeting the definition of a small business debtor in cases under chapters of the Code other than Chapter 11.

B.C Initial Interview – 28 U.S.C. § 586(a)(7)

- 3.1 The U.S. Trustee's duties are expanded to include conducting an initial interview with the small business debtor prior to the § 341 meeting of creditors.
- 3.2 The purpose of this meeting appears to be to evaluate the debtor's viability and to create a schedule for required reports and other filings. H.R. Rep. No. 109-31, pt. 1, at 93 (2005).

B.D Debtor Duties – § 1116 – A new § 1116 specifies new duties of the trustee or debtor-in-possession in a small business case. The small business debtor is required to:

- 4.1 Submit with the petition:
 - a.a The most recent balance sheet, financial statements and federal tax returns; or
 - a.b A statement under penalty of perjury that no such documents have been prepared or filed;
- 4.2 Attend, through senior management and counsel, meetings scheduled by the court or the United States Trustee including the initial debtor interview and the § 341 meeting of creditors;
- 4.3 Timely file schedules and statements, unless an extension is granted which may not extend the period to a date later than 30 days after the date of the order for relief, absent extraordinary and compelling circumstances. A proposed amendment to Rule 9006(b)(3) is made to implement this restriction on the power to grant extensions of the time for filing schedules and statements in such cases.
- 4.4 File all post-petition financial and other reports required either by the Federal Rules of Bankruptcy Procedure or by the court's local rules;
- 4.5 Maintain customary and appropriate insurance;
- 4.6 Timely file tax returns and other required governmental filings and timely pay all taxes entitled to administrative expense priority, except those that might be contested;
- 4.7 Allow the trustee to inspect the debtor's premises, books and records at reasonable times.

B.E Automatic Stay – § 362(n)

- 5.1 The automatic stay imposed by subsection (a) of § 362 does not apply in a case in which the debtor is a debtor in a small business case and:
- a.a Is a debtor in a small business case already pending;
 - a.b Was a debtor in a small business case that was dismissed in the two-year period prior to the entry of the order for relief; or
 - a.c Was a debtor in a small business case in which a plan was confirmed in the two-year period prior to the entry of the order for relief; or
 - a.d Is an entity that acquired substantially all of the assets or business of a small business debtor which met any of the above requirements, unless that entity establishes by a preponderance of the evidence that the assets were acquired in good faith and not for the purpose of evading the limitations contained in § 362(n)(1).
- 5.2 The limitations on the automatic stay do not apply if:
- b.a The case is an involuntary one and the court finds no collusion between the debtor and creditors;
 - b.b The debtor demonstrates by a preponderance of the evidence that the filing resulted from circumstances beyond the debtor's control and not foreseeable at the time the previous case was filed and it is more likely than not that the court will confirm a feasible plan (but not a liquidating plan) within a reasonable period of time.

B.F Plan Formulation

- 6.1 Exclusivity – § 1121(e)
- a.a In a small business case, only the debtor may file a plan within the first 180 days after the date of the order for relief;
 - a.b The plan and a disclosure statement (if applicable) must be filed no later than 300 days after the date of the order for relief;
 - a.c Either of these time periods may be extended, but only if the order granting the extension is entered before the expiration of the original time period and imposes a new deadline and the debtor demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time.

- 6.2 Disclosure – § 1125 – Several provisions offer increased flexibility in small business cases with regard to the requirement of filing and approval of a disclosure statement. Specifically:
- b.a The court may determine that the plan itself is sufficient to supply adequate information to creditors and dispense with the requirement of the filing of a disclosure statement. An amendment to Rule 2002(b) would require that a 25-day notice be provided of a request to make a determination that the plan has adequate information and a disclosure statement is unnecessary. Rule 3016 is amended to provide an exception to the requirement that a disclosure statement be filed with the plan, if the plan is intended to provide adequate information. If the plan is so intended, it is to be designated as such and Rule 3017.1 applies as if the plan is a disclosure statement. Rule 3016(b).
 - b.b The court may approve the filing of disclosure statement based on a standard form. Section 433 of the Act directs the Bankruptcy Rules Committee to propose standard form disclosure statements and plans of reorganization for small business debtors.
 - b.c The court may conditionally approve the disclosure statement and authorize solicitation based upon that conditional approval; and
 - b.d The court may combine the final hearing on approval of the disclosure statement with the hearing on confirmation of the plan.
- 6.3 Confirmation – If a debtor files a plan that complies with the applicable provisions of the title within the period specified in § 1121(e), the court must confirm the plan no later than 45 days after the plan is filed, unless that date is extended in accordance with the provisions of § 1121(e)(3).