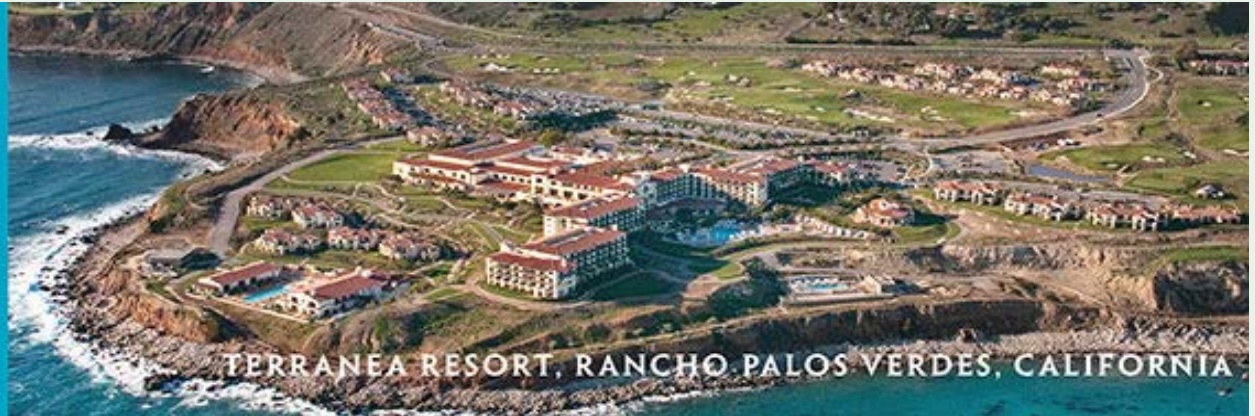


**ABI's 25th
ANNUAL
WINTER
LEADERSHIP
CONFERENCE
December 5-7**



**Friday, December 6, 2013
2:15 p.m. – 3:45 p.m.**

A Chapter 13 Lawyer's Guide to Individual Chapter 11s

This panel will discuss a variety of issues that can arise when dealing with the unique circumstances that individual chapter 11 cases present. This session will be of interest to counsel who ordinarily represent either debtors or creditors in chapter 13 cases, highlighting the changes made to individual chapter 11 cases under BACPA.

James Patrick Shea, Moderator

Armstrong & Teasdale, LLP; Las Vegas

Hon. Brian K. Tester

U.S. Bankruptcy Court (D. P.R.); San Juan

Patricia A. Redmond

Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, PA; Miami

Jennifer Rood

Bernstein Shur; Manchester, N.H.

Rudy J. Cerone

McGlinchey Stafford, PLLC; New Orleans

WARNING!



INDIVIDUAL CHAPTER 11s
ARE NOT
CHAPTER 13s ON STEROIDS

Counsel Take Note – Judicial Warning to the Chapter 13 Bankruptcy Bar



“Notice to Bar Regarding Individual Chapter 11 Cases

There has been a recent spate of individual Chapter 11 cases filed by attorneys who have neither the experience nor the education nor the competence to venture into Chapter 11. I believe that there are very few bankruptcy lawyers other than State Bar certified specialists who should be contemplating representation of Chapter 11 debtors in possession.

I see rampant errors being made in issues relating to **cash collateral, conflicts of interest, and compensation.**

The use of **cash collateral** without permission, even for necessary expenses, is usually fatal to Chapter 11 cases. There are procedures in place to obtain emergency permission to use cash collateral. If you don't know them, you should not be taking Chapter 11 Cases.

A Chapter 11 is not just a big Chapter 13. If you represent a Chapter 11 debtor in possession, **your client is the estate, not the debtor personally**. Failure to understand this results in serious liability exposure.

Forget about trying to fix **your compensation**. You **will be what I allow, period**. I suggest you not spend retainers until your fees are allowed to avoid having to return money you have already spent.

I see frequent malpractice in Individual Chapter 11 cases and I am quick to note it on the record. Your employment will not be approved unless you have substantial current malpractice insurance. If you are going "bare", don't even think about taking a chapter 11 case.

Alan Jaroslovksy
U.S. Bankruptcy Judge"
(emphasis added)

(1) Pre-Filing Issues



(2) Case Administration Issues



(3) Plan, Disclosure Statement
and Confirmation Issues



(4) Post-Confirmation Issues



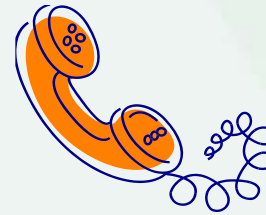
PRE-FILING ISSUES



- Meet Your Client



- Talk with the Creditors



- Schedules and SOFA



- Credit Counseling



- Small Business Debtors



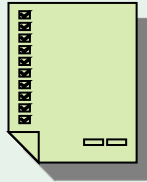
CASE ADMINISTRATION ISSUES



- Get Employed or Don't Get Paid



- Fee Applications



- No Co-Debtor Stay



- Property of the Estate



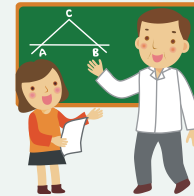
- Cash Collateral Usage



- Disposable Income Calculation



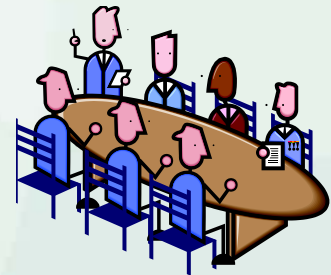
- Case Supervision by UST



- Monthly Financial Reports

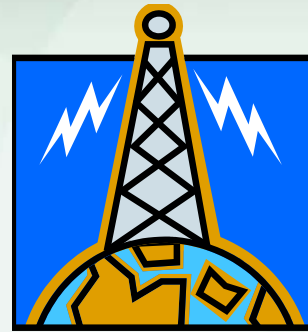


- Unsecured Creditors Committee

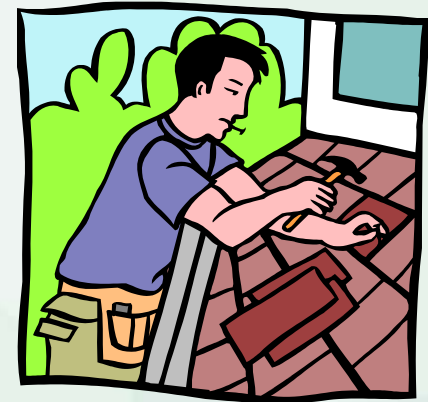


PLAN, DISCLOSURE STATEMENT AND CONFIRMATION ISSUES





- Disclosure Statements
 - Small Business Combined Plans and Disclosure Statements
- Plans of Reorganization
 - Form Plans
 - Mandatory Plan Provisions
 - Permissive Plan Provisions



Plan Confirmation – Contested Issues

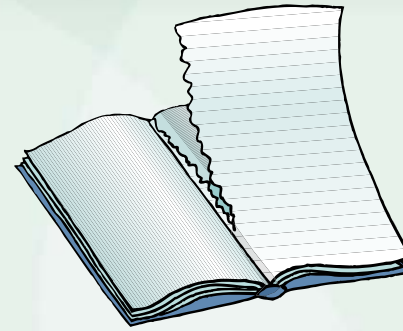


- Plan Commitment Period
- Projected Disposable Income
- Voting and Objections
- Absolute Priority Rule
- Best Interests of Creditors Test
- Best Efforts
- Home Mortgages
- Duration of the Plan

POST-CONFIRMATION ISSUES



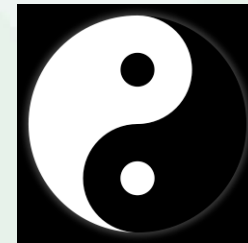
- Plan Modifications
 - Pre-Confirmation
 - Post-Confirmation



- Discharge



- Conversion to Chapter 7



Chapter 11 for Individuals v Chapter 13: A Comparative Analysis

	Chapter 11	Chapter 13
Effect of Bankruptcy Filing and Bankruptcy Basics		
Co-Debtor Stay	There is no co-debtor stay; however, a stay of actions against third parties may be imposed in very limited circumstances. See 11 U.S.C. § 105.	11 U.S.C. § 1301.
Property of the Estate	Post-petition income of the debtor also is property of the estate. 11 U.S.C. § 1115(a).	Same. 11 U.S.C. § 1306(a).

	Chapter 11	Chapter 13
Disposable Income	Disposable income must be calculated pursuant to 11 U.S.C. § 1325(b)(2) rather than through a means test deduction (used for higher income chapter 13 debtors); <u>Official Form 22B</u> must be filed. 11 U.S.C. § 1129(a)(15).	If the debtor's income exceeds the applicable median for their state, then disposable income is determined in accordance with the means test of 11 U.S.C. § 707(b)(2) (A) and (B). <u>Official Form 22C</u> must be filed, which is more detailed than Official Form 22B required in an individual chapter 11 case. 11 U.S.C. § 1325(b)(2).
Supervision of Debtor and Case	The United States Trustee and a chapter 11 trustee, if one is appointed.	The standing chapter 13 trustee.

	Chapter 11	Chapter 13
Financial Filings		
Financial Reports	Monthly reports of the debtor's post-petition business operations are required.	Reports of increases in income and expenses may be required.
Timeline for Filing Proof of Claims	Set by order of the Court. See Bankruptcy Rule 3003(c)(3).	Set by Rule (generally within 90 days after the first date set for the meeting of creditors). See Bankruptcy Rule 3002(c).

	Chapter 11	Chapter 13
Disclosure Statement	<p>The plan of reorganization must be accompanied by a disclosure statement, which must be approved by the court as including “adequate information” necessary for a “hypothetical investor” to make an informed judgment about the plan before acceptances to the plan are solicited. 11 U.S.C. § 1125.</p> <p>In a small business case, a separate disclosure statement is not required; the court may permit a combined plan and disclosure statement or the use of a form disclosure statement. The court also may approve the disclosure statement conditionally subject to the final approval at the confirmation hearing. 11 U.S.C. § 1125(f) and Bankruptcy Rules 3016(b) and 3017.1.</p>	<p>Not applicable. The standing chapter 13 trustee investigates the financial affairs of the debtor.</p>

The Plan

Who May File a Plan and When

In a small business case, only the debtor may propose a plan of reorganization in the first 180 days of the case. Thereafter, any party may file a plan. All plans must be proposed by the 300th day. 11 U.S.C. § 1121(e).

In all other cases without trustee, only the debtor may file the plan in the first 120 days. If filed, the debtor has until the 180th day to solicit acceptances of the plan. If a trustee is appointed and no plan is filed in the first 120 days, or if the debtor fails to obtain the acceptance of the plan by the 180th day, any party in interest may propose a plan. 11 U.S.C. § 1121(a), (c) and (d).

These time periods may be extended for up to 18 months after the petition date (to file a plan) and 20 months after the petition date (for acceptances).

Only the debtor may proposed a payment plan. 11 U.S.C. § 1321. The plan must be filed within 14 days of the filing of the petition. Bankruptcy Rule 3015(b).

	Chapter 11	Chapter 13
Plan Commitment Period	<p>Without creditor objection, any time period. With creditor objection, at least five years. 11 U.S.C. § 1129(a)(15).</p> <p>If a creditor objects to the plan, the individual debtor must pay all of his/her disposable income. See 11 U.S.C. § 1129(a)(15).</p>	<p>Between three to five years; determined by the means test. A plan cannot exceed five years. 11 U.S.C. §§ 707 and 1322(d).</p>
Earliest Confirmation Date	<p>21 day notices are required both for a hearing on approval of the disclosure statement and for the deadline to object to disclosure statement; a 28 day notice is required for the confirmation hearing; and the deadline to object to confirmation must be given (total process = 60 to 90 days). See Bankruptcy Rule 2002(b).</p> <p>In a small business case, the hearing could take place as early as the 25th day of the case, if certain pre-conditions are met. The plan of a small business debtor be confirmed no later than 45 days after the plan is filed. See 11 U.S.C. § 1129(e).</p>	<p>Parties must receive at least 21 days notice of the meeting. See Bankruptcy Rule 2002(a)(1).</p> <p>28 day notice of confirmation hearing and deadline to object to confirmation must be given. Bankruptcy Rule 2002(b).</p> <p>The confirmation hearing may take place no earlier than 20 days and no later than 45 days after the meeting of creditors. 11 U.S.C. § 1324(b).</p> <p>The confirmation hearing could occur as early as the 40th day of the case, if certain pre-conditions are met.</p>

Confirmation Standards

Priority Debt

Must be paid in full. See 11 U.S.C. § 1129(a)(9).

Priority tax claims must bear interest and not exceed five years after the order for relief. 11 U.S.C. § 1129(a)(9)(C).
Non-tax priority claims must bear interest when deferred cash payments are made. 11 U.S.C. § 1129(a)(9)(B).
All post-petition domestic support obligations must be current in order to confirm a plan. 11 U.S.C. § 1129(a)(14).

Generally must be paid in full. 11 U.S.C. §§ 507(a)(1)(b), 1322(a)(4).

No interest required on priority claims and may be paid over the length of the plan. 11 U.S.C. § 1322(a)(2).

Voting and Objections

Creditors with impaired claims may vote. A class of claims accepts the plan when 1/2 in number and 2/3 in dollar amount of the claims voting accept the plan. 11 U.S.C. §§ 1124, 1124, 1129(a)(8).

Creditors and other parties in interest may object to confirmation of the plan if it does not comply with the requirements of the Bankruptcy Code.

Creditors do not vote on the plan; but creditors can file objections pursuant to 11 U.S.C. § 1325.

	Chapter 11	Chapter 13
Absolute Priority Rule	<p>If at least one impaired class of claims accepts the plan, it may be confirmed over the rejection of a class of unsecured claims if all claim holders in the rejecting class will be paid in full, or if no holder of the claim or interest junior to the rejecting class will receive or retain anything on account of such claim or interest. 11 U.S.C. § 1129(b)(1)(B)(i)-(ii).</p> <p>The 4th, 5th and 10th Circuits have held that the absolute priority rule applies to individuals in chapter 11 cases; the remaining circuits either have held the opposite (the 9th Circuit) or have not specifically addressed the issue.</p> <p>For individual debtors, 11 U.S.C. § 1129(b)(2)(B)(ii) carves out an exception to the absolute priority rule permitting them to retain post-petition earnings and income except to the extent necessary to pay post-petition domestic support obligations.</p>	Not applicable.

	Chapter 11	Chapter 13
Best Interests of Creditors Test	Each holder of a claim in an impaired class must receive not less than the present value of the amount that would be paid on such a claim if the estate were liquidated under chapter 7. 11 U.S.C. § 1129(a)(7).	Each allowed unsecured claim must receive not less than the present value of the amount that would be paid on such claim if the estate were liquidated under chapter 7. 11 U.S.C. § 1325(a)(4).
Best Efforts	<p>If the holder of an allowed unsecured claim objects to confirmation, the plan must pay unsecured claims in full or the value of the property distributed under the plan must be no less than the projected disposable income of the debtor. 11 U.S.C. § 1129(a)(15).</p> <p>Disposable income must be projected over at least a five year period following the first plan payment or over the entire period the plan provides for payments, if longer than five years. 11 U.S.C. § 1129(a)(15).</p>	<p>If the holder of an allowed unsecured claim or the trustee objects to confirmation, the plan must pay the unsecured claims in full or all projected disposable income must be applied to make payments to unsecured creditors. 11 U.S.C. § 1325(b)(1).</p> <p>Disposable income projected over three to five years. 11 U.S.C. §§ 1322(d), 1325(b)(1)(B) and (b)(4).</p>

Special Treatment of Certain Claims

Home Mortgages	<p><u>Cure</u>: The plan may provide for the cure of any arrears on a home mortgage. U.S.C. § 1123(a)(5)(G), (b) and (d).</p> <p><u>Modification</u>: Unmatured, unaccelerated claims secured only by the debtor's home cannot be modified. 11 U.S.C. § 1123(b)(5).</p> <p>The exception to the anti-modification rule in chapter 13 (11 U.S.C. § 1322(c)) is not applicable in chapter 11.</p>	<p><u>Cure</u>: The plan may provide for the cure of any arrears on a home mortgage. 11 U.S.C. § 1322(b)(3).</p> <p><u>Modification</u>: Unmatured, unaccelerated claims secured only by the debtor's home cannot be modified. See 11 U.S.C. § 1322(b)(2).</p> <p>Notwithstanding the maturity of a home loan, the plan may provide for payment of the home loan through the plan pursuant to 11 U.S.C. § 1325(c)(2).</p>
Other Secured Claims	<p>No restrictions on strip downs. 11 U.S.C. § 1129(b)(1)(A).</p> <p>Periodic payments need not be in equal installments.</p>	<p>Vehicle loans limitation. 11 U.S.C. § 1325(a)(9).</p> <p>Periodic payments must be in equal installments. 11 U.S.C. § 1325(a)(5)(B)(iii)(I).</p>
Long Term Debt	<p>There is no maximum duration of a chapter 11 plan. Short-term debt may be converted to long-term debt under the Plan.</p>	<p>Provided a chapter 13 plan seeks only to cure an arrearage, payments on long-term debt may continue beyond the length of the plan. 11 U.S.C. § 1322(b)(3) and (5).</p>

	Chapter 11	Chapter 13
Duration of Plan		
Minimum Length	No mandatory minimum chapter 11 plan length. But 11 U.S.C. § 1129(a)(15)(B).	No mandatory minimum chapter 13 plan length. But 11 U.S.C. §§ 1322(d), 1325(b)(4)(A)(ii).
Maximum Length	No mandatory maximum chapter 11 plan length.	A chapter 13 plan may not require payments for more than five years. 11 U.S.C. § 1322(d)(1).
When Debtor Payments Begin	Payments start <u>after</u> confirmation of the plan.	Payments start <u>before</u> confirmation of the plan (usually within 30 days of the bankruptcy filing).
Modification of Plan		
Pre-Confirmation	Only the proponent of the plan may modify if prior to confirmation. 11 U.S.C. § 1127(a).	Only the debtor may modify the plan prior to confirmation. 11 U.S.C. § 1323(a).
Post-Confirmation	The debtor, any trustee, the United States Trustee, or the holder of an unsecured claim may propose a modification. 11 U.S.C. § 1121(e).	After confirmation, the debtor, the trustee or the holder of an unsecured claim may propose a modification. 11 U.S.C. § 1329(a).