

## **Practice Pointers: Representing the Individual Chapter 11 Debtor**

In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") changed provisions relating to individuals in Chapter 11. There are significant differences between Chapter 13 and Chapter 11, and some similarities. The following is intended to highlight the major distinctions between individual Chapter 11 and Chapter 13 cases. It is neither an exhaustive list, nor a replacement for counsel reading the Code and Rules.

### **Getting Started:**

**Attorney Representation:** In Ch. 11, counsel must file an application to employ debtor's counsel under § 327(a) and file a detailed fee application subject to court approval before receiving payment for services. Fed. R. Bankr. P. 2016. A Rule 2016 statement is required in Ch. 13.

**Debtor in Possession ("DIP"):** In Ch. 11 the term is used to refer to the debtor when no trustee has been appointed to manage the estate. 11 U.S.C. § 1101(1). A Debtor in possession must perform the list of duties imposed upon the trustee and identified in § 704. Because a debtor in possession is empowered to perform the duties of a trustee, a debtor in possession is a fiduciary.

**"DIP" Account:** A Ch. 11 Debtor is ordinarily required to close existing bank accounts and open one or more "DIP" Accounts immediately after filing. No bank account changes are required in Ch. 13.

**Small Business Debtor:** An individual Ch. 11 debtor may be a small business debtor under § 101(51)(D). If so, numerous other requirements apply and important deadlines are shortened. See the handout located on the Court's website: <http://www.ganb.uscourts.gov/judges/hagenau/SmallBusinessGuideline.pdf>

**United States Trustee ("UST"):** The UST is charged with monitoring Ch. 11 cases. A Ch. 11 debtor must file monthly operating reports, submit quarterly reports, and pay quarterly fees to the UST. Failure to do so may result in the UST filing a Motion to Dismiss. 11 U.S.C. § 1112(b)(4). Additionally, if requested, a Ch. 11 debtor is required to participate in an "initial debtor interview" with the UST. Fed. R. Bankr. P. 2015. A Ch. 11 case may require a creditor's committee. Whenever appropriate, the UST will appoint the committee. 11 U.S.C. § 1102. Please refer to the UST Operating Guidelines and Reporting Requirements and UST Fee Guidelines, as well as instructions on how to complete monthly operating reports, located: [http://www.justice.gov/ust/r21/reg\\_info.htm](http://www.justice.gov/ust/r21/reg_info.htm)

**Co-Debtor Stay:** In Ch. 13, § 1301 provides for a stay applicable to co-debtors. Ch. 11 has no similar provision.

**20 Largest Creditors:** Counsel for a Ch. 11 debtor must file a list of the 20 largest creditors. Fed. R. Bankr. P. 1007(d). There is no similar requirement in Ch. 13.

**Bar Date:** An attorney representing an individual in Ch. 11 must file a motion requesting the court set the bar date and upload a proposed order. Fed. R. Bankr. P. 3003(c)(3). In Ch. 13, the bar date is set in the Notice of Bankruptcy, 90 days after the first date set for the meeting of creditors. Fed. R. Bankr. P. 3002(c).

**Necessity of Filing Proofs of Claim:** Unsecured creditors in Ch. 13 cases in the Northern District of Georgia are required to file a proof of claim to participate in distribution. A creditor need not file a proof of claim in Ch. 11 since claims are "deemed filed" unless they are unsecured or listed as disputed, contingent, or unliquidated. Fed. R. Bankr. P. 3002; Fed. R. Bankr. P. 3003(c)(2); 11 U.S.C. § 1111(a).

**Cash Collateral:** Under § 363, debtors are required to obtain a creditor's consent or court permission to use cash collateral in both Ch. 11 and Ch. 13. A proposed budget should be included in any motion seeking authority to use cash collateral. Using cash collateral without permission is a basis for appointment of a trustee, dismissal or other sanctions.

**Pre-Confirmation Adequate Protection:** In Ch. 13, debtors are required to make adequate protection payments to creditors secured by personal property within 30 days of the order for relief. 11 U.S.C. § 1326(a)(1)(c). In Ch. 11, a debtor is not required to automatically commence adequate protection payments to secured creditors, but a failure of adequate protection is a basis to lift the automatic stay. The debtor is required to provide adequate assurance under § 365 to lessors of personal property.

### ***Conversion or Dismissal:***

**Conversion to Ch. 7 by the Debtor:** § 1112 allows an individual in Ch. 11 to convert to a Ch. 7 case unless he or she is not a DIP, the case was commenced involuntarily in Ch. 11, or the case was converted to Ch. 11 other than by the Debtor's request. Ch. 13 debtors may convert to a Ch. 7 at anytime. 11 U.S.C. § 1307 (a). Both Ch. 11 and Ch. 13 debtors must file additional items upon conversion to Ch. 7. Fed. R. Bankr. Proc. 1019(5).

**NOTE:** Whether property acquired post petition becomes Property of the Estate when an individual in Ch. 11 converts to Ch. 7 is unsettled. When a Ch. 13 debtor converts to Ch. 7, § 348(f) expressly excludes post petition acquired property and earnings from the estate. 11 U.S.C. §§ 1115, 1308.

**Dismissal by the Debtor:** In Ch. 13, the debtor has an absolute right to dismiss, provided the case was not first converted from another chapter. 11 U.S.C. § 1307(b). A debtor in Ch. 11 has no absolute right to dismiss.

### ***Plan and Disclosure Statement:***

**Time Limits for Filing a Plan and Disclosure Statement:** Other than for small business debtors, a deadline for filing a plan and disclosure statement is not set by statute, but may be set by the Court. A disclosure statement is filed with the plan. In Ch. 13, the plan must be filed within 15 days of the date of the petition. Fed. R. Bankr. P. 3015.

**Filing the Plan:** In Ch. 11, the DIP has the exclusive right to file a plan for the first 120 days. This may be reduced or extended although no longer than 18 months after the order for relief. 11 U.S.C. § 1121(b). In Ch. 13, only the debtor may file a plan. 11 U.S.C. § 1321.

**Timing of Pre-Confirmation Plan Payments:** In Ch. 11, plan payments do not commence until the plan is confirmed. Ch. 13 debtors must make payments as provided by their plans commencing not later than 30 days after filing the plan or entry of the order for relief, whichever is earlier. 11 U.S.C. § 1326(a)(1).

**Maximum Duration of Plan Payments:** Ch. 11 plans may exceed the 60 months allowed in Ch. 13.

**Minimum Duration of Plan Payments:** § 1322(d) determines the applicable commitment period or minimum plan length. There is no minimum time for plan payments in Ch. 11 except under § 1129(a)(15), which imposes a 5-year minimum.

**Classification of Claims or Interests:** Ch. 11 plans must designate classes of claims or interests. A Ch. 11 plan may place a claim or interest into a particular class only if the claim is substantially similar to the others in the class. The only exception is that a plan may designate a separate "administrative convenience" class of general unsecured claims. 11 U.S.C. §§ 1122, 1123(a). The plan must provide the same treatment for each claim or interest in a class unless the holder of the claim or interest agrees to a different treatment. 11 U.S.C. § 1123(a)(4). Ch. 13 debtors are not required to designate classes of claims, but if the debtor chooses to do so, then each claim in the class must be treated the same. 11 U.S.C. § 1322(3).

**Designation of Impaired Classes:** In Ch. 11 a claim may be "impaired" as defined by § 1124. A Ch. 11 plan must specify any class of claims or interests that is not impaired under the plan and specify the treatment of any class of claims or interests that is impaired under the plan. 11 U.S.C. § 1123(a)(2),(3). Ch. 13 has no similar requirements.

**Treatment of Tax Claims:** In Ch. 13, § 1325(a)(9) requires the filing of all applicable Federal, State, and local tax returns as required under § 1308. Payment in full over time is permitted. In Ch. 11, § 1129(a)(9)(C)(i)-(iii) specifies the treatment permitted for § 507(a)(8) priority tax claims. There is no Ch. 11 provision comparable to § 1308.

**"Hanging Paragraph" Prohibition:** The hanging paragraph prohibiting use of § 506 valuation for certain purchase money security interests acquired within the 910-day or 1-year period prior to filing only appears in Ch. 13. 11 U.S.C. § 1325.

**The Disclosure Statement:** In Ch. 11, but not Ch. 13, attorneys are required to prepare a disclosure statement that must be filed with the plan. Fed. R. Bankr. P. 3016; 11 U.S.C. § 1125 (b). The disclosure statement must contain "adequate information", as defined in § 1125(a)(1). (*See In re Metrocraft Pub. Services, Inc.*, 39 B.R. 567 (Bankr. N.D. Ga. 1984) for a discussion of the type of information which should be included in a disclosure statement). A form of disclosure statement is on the Court's website as official form B25.

**Disclosure Statement Approval/Distribution:** Debtor's counsel must schedule a hearing on 28 days notice to approve a disclosure statement. (Small business debtors' disclosure statements are conditionally approved without hearing.) If

approved, the court will enter an order approving the disclosure statement, setting a deadline for creditors to vote to accept or reject the plan and to object to the plan, and setting the date of the confirmation hearing. Upon entry of the order, debtor's counsel must send the disclosure statement, plan, order, and ballot to all parties in interest. Counsel must not solicit an acceptance or rejection of a plan by distributing ballots before the court has approved the disclosure statement.

**Voting:** There is no voting requirement in Ch. 13. Affirmative votes must be obtained for a Ch. 11 plan. 11 U.S.C. § 1126. Reference Local Rule 3018-1 (procedure for filing and counting ballots) and Bankruptcy Form B14 (ballot form).

**Hearing on Confirmation of the Plan:** In Ch. 11 and Ch. 13, the court is required to hold a hearing on confirmation of the plan after 28 days notice. Fed. R. Bankr. P. 2002 (b); 11 U.S.C. §§ 1128, 1324. In Ch. 13, the court must hold a confirmation hearing no later than 45 days after the 341 meeting. Fed. R. Bankr. P. 2002 (b).

**Objection to Confirmation:** In both Ch. 13 and Ch. 11, if the holder of an unsecured claim objects, the court may not confirm the plan unless (1) "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 value of the claim" or (2) the debtor meets the disposable income requirement. 11 U.S.C. §§ 1129(a)(15)(A), 1325(b)(1)(A). The Code applies the disposable income requirement to individuals in Ch. 11 and Ch. 13 differently.

**Distinction Regarding the Disposable Income Requirement:** A Ch. 11 plan may be confirmed over an unsecured creditor's objection, if the debtor distributes to both unsecured and secured creditors, property with a value of at least the amount of the individual's disposable income as determined by § 1325(b)(2) for the longer of the 5 year period after the first payment is due or the time the plan provides for payments. A Ch. 13 plan may be confirmed over the trustee or unsecured creditor's objection if it provides that all of the debtor's projected disposable income to be received during the applicable commitment period will be applied to make payments to unsecured creditors only. 11 U.S.C. §§1129(a)(15), 1325(b)(1)(B).

**NOTE:** In Ch. 11 individual cases, a distinction is drawn between an objection by the holder of an allowed unsecured claim under § 1129(a)(15) and a cram down on an unsecured class under § 1129(b)(2)(B). Under § 1129(a)(15) a single holder may object thereby triggering the disposable income requirement in the individual's Ch. 11 case. By contrast, § 1129(b)(2)(B) becomes applicable when an entire class of holders of unsecured claims is both impaired and non-accepting. Theoretically, both the disposable income requirement of 1129(a)(15) and cram down under 1129(b)(2)(B) could occur in the same individual Ch. 11 case.

**"Cram Down":** In Ch. 13, § 1325(a)(5)(B) provides the cram down procedure for holders of secured claims while the disposable income requirement of § 1325(b) is the mechanism by which a Ch. 13 plan is crammed down over objections of unsecured creditors. In Ch. 11, § 1129(b) imposes a "fair and equitable" requirement which differs depending upon whether the plan is cramming down the claims of a class of secured or unsecured creditors.

**Absolute Priority Rule:** In a cram down in Ch. 11, the absolute priority rule prohibits a junior class of claims or interests from receiving or retaining any property or interest unless all classes of senior claims either receive full value of their claims or give their consent. Whether the absolute priority rule still applies to individual Ch. 11 debtors after BAPCPA is unsettled.

### ***Plan Completion:***

**Plan Completion:** Generally, for both Ch. 13 debtors and individuals in Ch. 11, the court will not grant a discharge until completion of all payments. 11 U.S.C. §§ 1141, 1328.

### **Final Report and Entry of a Final Decree:**

After confirmation, once a case has been fully administered under Rule 3022, Ch. 11 Debtors must make a final report and file a final account of the administration of the estate with the court and with the United States trustee. Thereafter, the Court on its own motion or on motion of a party in interest, shall enter a final decree, closing the case. Fed. R. Bankr. P. 3022. A Ch. 11 case may be "fully administered" even if payments are still being made. Ch. 13 does not require a final decree for a case to be closed. 11 U.S.C. §350, 704 (9), 1106(a)(1).

**Hardship Discharge:** In Ch. 13 a debtor may receive a hardship discharge if the debtor meets the requirements of § 1328(b). An early discharge for individuals in Ch. 11 is provided in § 1141(d)(5).

## Practice Pointers: Representing the individual Chapter 11 Debtor

In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") changed provisions relating to individuals in Chapter 11. There are significant differences between Chapter 13 and Chapter 11, as well as some similarities. The following information is intended to highlight the major distinctions between individual Chapter 11 and Chapter 13 cases. It is neither an exhaustive list, nor a replacement for counsel reading the Code and Rules.

### 1. Getting Started:

#### ▪ **Attorney Representation:**

Chapter 11 attorneys represent the estate, not the individual. Chapter 13 attorneys represent the individual debtor. Retention of professionals in both chapters must be approved. In Chapter 11, this is accomplished by filing an application to employ the professional, including debtor's bankruptcy counsel, under Section 327(a). Additionally, before receiving payment for services, attorneys representing Chapter 11 debtors must file a detailed fee application subject to court approval. Fed. R. Bankr. P. 2016. In Chapter 13, Debtor's counsel files a Rule 2016 affidavit and fees are approved when the plan is confirmed. Fed. R. Bankr. Proc. 2016. Any other professional retained by the debtor in a Chapter 13 must be approved by the Court after application under 11 U.S.C. § 327(a).

#### ▪ **Debtor in Possession ("DIP"):**

Section 1101(1) defines the term "debtor in possession" to refer to the debtor when no trustee has been appointed to manage the estate. A debtor in possession must perform the list of duties imposed upon the trustee and indentified in 11 U.S.C. § 704. Because a debtor in possession is empowered to perform the duties of a trustee, a debtor in possession is a fiduciary. The "debtor in possession" is not used in Chapter 13 although a similar concept would be a "debtor engaged in business" under Section 1304.

#### ▪ **"DIP" Account:**

A Chapter 11 Debtor is ordinarily required to close existing bank accounts and open one or more "DIP" Accounts immediately after filing. There is no similar requirement in Chapter 13.

#### ▪ **Small Business Debtor:**

An individual Chapter 11 Debtor may be a small business debtor under Section 101(51)(D). If so, numerous other requirements apply and important deadlines are shortened. See the

Court's guidelines on small business debtors on the Court's website:

<http://www.ganb.uscourts.gov/judges/hagenau/SmallBusinessGuideline.pdf>

- **United States Trustee ("UST"):**

The UST is charged with monitoring Chapter 11 cases. An individual Chapter 11 debtor must submit quarterly reports to the UST. A Chapter 11 debtor is additionally expected to file monthly operating reports. Fed. R. Bankr. P. 2015. Please refer to the UST Operating Guidelines and Reporting Requirements and UST Fee Guidelines, as well as instructions on how to complete monthly operating reports located: [http://www.justice.gov/ust/r21/req\\_info.htm](http://www.justice.gov/ust/r21/req_info.htm)

- **UST Fees:**

Chapter 11 debtors must pay quarterly fees to the UST based upon the total amount of disbursements in that quarter. Failure to do so may result in the UST filing a motion to dismiss. 11 U.S.C. § 1112 (4). UST Fees are owed until the case is closed.

- **Initial Debtor Interview:**

If requested, a Chapter 11 debtor is required to participate in an "initial debtor interview" which is conducted by the UST prior to the 341 meeting of creditors. Chapter 13 debtors are not expected to have an initial debtor interview with the UST. For more information on initial debtor interviews, visit: <http://www.usdoj.gov/ust>

- **Creditor Committees:**

Chapter 13 does not have a provision for creditor's committees, but a Chapter 11 case may have a committee. Whenever appropriate, the UST appoints the committee. 11 U.S.C. § 1102.

- **Co-Debtor Stay:**

In Chapter 13, Section 1301 provides for a stay applicable to co-debtors. Chapter 11 has no similar provision.

- **Statement of Current Monthly Income ("CMI"):**

A Chapter 13 debtor must complete a statement of Current Monthly Income, and compare it to the median family income in the state for a comparable household size. Fed. R. Bankr. P. 1007(b)(6). Counsel to an individual in Chapter 11 must also prepare a Statement of Current Monthly Income, but does not need to compare it to the median family income for purposes of Section 1325(b). Fed. R. Bankr. P. 1007(b)(5).

- **20 Largest Creditors:**

Counsel to a Chapter 11 debtor is required to file a list of the 20 largest creditors. Chapter 13 has no such requirement. Fed. R. Bankr. P. 1007(d).

- **Credit Counseling:**

Section 109(h) applies equally to Chapter 13 debtors and individuals in Chapter 11.

- **Bar Date:**

An attorney representing an individual in Chapter 11 must file a motion requesting the Court set the bar date and upload the proposed order. Fed. R. Bankr. P. 3003(c)(3). In Chapter 13, the bar date is set in the notice of bankruptcy, 90 days after the first date set for the meeting of creditors. Fed. R. Bankr. P. 3002(c).

- **Necessity of Filing Proofs of Claim:**

Unsecured creditors in Chapter 13 cases are required to file a proof of claim to participate in distribution. A creditor need not file a proof of claim in Chapter 11 since claims are "deemed filed" unless they are unsecured or listed as disputed, contingent, or unliquidated. Fed. R. Bankr. P. 3002; Fed. R. Bankr. P. 3003(c)(2); 11 U.S.C. § 1111(a).

- **Cash Collateral:**

Section 363 defines and governs the use of cash collateral. Generally, the debtor must obtain a creditor's consent or court permission for the debtor to use cash collateral in both Chapter 11 and Chapter 13. A proposed budget should be included in any motion seeking authority to use cash collateral. Using cash collateral without permission is a basis for the appointment of a trustee, dismissal or other sanctions.

- **Pre-Confirmation Adequate Protection:**

In Chapter 13, debtors are required to make adequate protection payments to a creditor holding an allowed claim secured by personal property within 30 days of the order for relief. 11 U.S.C. § 1326(a)(1)(c). In Chapter 11, a debtor is not required to automatically commence adequate protection payments to secured creditors, but a failure of adequate protection is a basis to lift the automatic stay. A Chapter 11 debtor is required to provide adequate assurance under Section 365 to lessors of personal property.

2. <b><u>Conversion or Dismissal:</u></b>
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- **Conversion to Chapter 7 by the Debtor:**

Section 1112 allows an individual in Chapter 11 to convert to a Chapter 7 case unless he or she is not a DIP, the case was commenced involuntarily in Chapter 11, or the case was converted to Chapter 11 other than by the Debtor's request. Chapter 13 debtors may

convert to a Chapter 7 at anytime. 11 U.S.C. § 1307 (a). Both Chapter 11 and Chapter 13 debtors must file additional items upon conversion to Chapter 7. Bankr. R. Proc. 1019(5).

- **Note:** Whether property acquired post petition becomes Property of the Estate when an individual in Chapter 11 converts to Chapter 7 is unsettled. When a Chapter 13 debtor converts to Chapter 7, Section 348(f) expressly excludes post petition acquired property and earnings from the estate. 11 U.S.C. §§ 1115, 1308.

- **Dismissal by the Debtor:**

In Chapter 13, the debtor has an absolute right to dismiss, provided the case was not first converted from another chapter. 11 U.S.C. § 1307(b). An individual in Chapter 11 has no absolute right to dismiss.

- **Dismissal or Conversion to Chapter 7 by the Court or a Party in Interest:**

In Chapter 11, Section 1112(b) states that "absent unusual circumstances", the Court "shall" dismiss or convert the case to Chapter 7 if in the best interest of creditors and for "cause". The use of "shall" limits the Court's discretion. However, a court may determine that it is in the best interests of creditors and the estate to allow the case to proceed in Chapter 11 upon the appointment under Section 1104(a) of a trustee or examiner. In Chapter 13, Section 1307(c) states that the Court "may" dismiss or convert if in the best interest of creditors and for "cause" unless required to dismiss or convert by Sections 1307(e) or 1308.

- **Converting between Chapters 11 and 13:**

The Court may convert a Chapter 11 case to Chapter 13 only if the Debtor requests such conversion and has not been discharged under 1141(d). 11 U.S.C. § 1112(d). The Court may convert a Chapter 13 case to Chapter 11 case upon request of a party in interest or the UST after notice and hearing if a plan has not yet been confirmed. 11 U.S.C. § 1307(d).

<b>3. <u>Plan and Disclosure Statement:</u></b>
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- **Time Limits for Filing a Plan and Disclosure Statement:**

In Chapter 11, unless the individual is a small business debtor, where the time limit for filing a plan and disclosure statement is within 300 days after the order for relief (see the small business debtor handout on the Court's website), a deadline for filing a Chapter 11 plan and disclosure statement is not set by statute, but may be set by the Court. By contrast, in Chapter 13, a plan must be filed within 15 days of the date of the petition under Fed. R. Bankr. P. 3015.

- **Filing the Plan:**

In a Chapter 11 case, the DIP has the exclusive right to file a plan for the first 120 days. This may be reduced or extended although no longer than 18 months after the order for relief. 11 U.S.C. § 1121(b). However, any party in interest may file a plan if a trustee has been appointed, or the debtor has not filed a plan within 120 days after the order for relief, or if the debtor's plan has not been accepted by all impaired classes after 180 days after the order for relief. 11 U.S.C. § 1121(c). In Chapter 13, only the debtor may file a plan. 11 U.S.C. § 1321.

- **Pre-Confirmation Plan Payments:**

Chapter 11 debtors do not begin to make plan payments until the plan is confirmed. Chapter 13 debtors must make payments as provided by their plans commencing not later than 30 days after filing the plan or entry of the order for relief, whichever is earlier. 11 U.S.C. § 1326(a)(1). The Chapter 13 trustee holds these payments until the plan is confirmed, and then begins disbursement in accordance with the terms of the confirmed plan.

- **Contents of Plan:**

- **Mandatory Plan Contents:**

Section 1123(a) sets out the required contents of a Chapter 11 plan. Section 1322(a) governs Chapter 13 plans. Both require submission of all or such portion of future earnings and income of the debtor as is necessary for the execution of the plan.

- **Classification of Claims or Interests:**

In Chapter 11, plans must designate classes of claims or interests. A Chapter 11 plan may place a claim or interest into a particular class only if the claim is substantially similar to the others in the class. The only exception is that a plan may designate a separate "administrative convenience" class of general unsecured claims. 11 U.S.C. §§ 1122, 1123(a). The plan must provide the same treatment for each claim or interest in a particular class unless the holder of the claim or interest agrees to a less favorable treatment. 11 U.S.C. § 1123(a)(4). In Chapter 13, a plan is not required to designate classes of claims, but if the plan does so, then each claim in the class must be treated the same. 11 U.S.C. § 1322(3).

- **Designation of Impaired Classes:**

An individual's Chapter 11 plan must specify any class of claims or interests that is not impaired under the plan and specify the treatment of any class of claims or interests that is impaired under the plan. 11 U.S.C. § 1123(a)(2),(3). Determining impairment under Section 1124 is important in the Chapter 11 plan confirmation



process. In Chapter 13 plans, there are no similar requirements relating to the identification or treatment of impaired classes.

- **Impairment:**

In Chapter 11, the concept of "impairment" is defined in Section 1124. A claim is considered unimpaired if the plan leaves unaltered the legal, equitable, and contractual rights which such claim or interest entitles the holder. 11 U.S.C. § 1124(1). If a contract or applicable law provides the holder with rights of acceleration upon default, the claim may still be considered unimpaired if the debtor meets the requirements of Section 1124(2).

- **Maximum Duration of Plan Payments:**

Chapter 11 plans may exceed the 60 months allowed for debtor's plans in Chapter 13.

- **Minimum Duration of Plan Payments:**

In Chapter 13, Section 1322(d) requires an analysis of the debtor's current monthly income and comparison to median family income for a similar household size for purposes of determining the applicable commitment period or minimum length of the plan. If the Chapter 13 debtor is above the median, then the plan must last 5 years. If the Chapter 13 debtor is below the median, then the plan must last at least 3 years. By contrast, in Chapter 11, there is no minimum time for plan payments unless the holder of an allowed unsecured claim objects to confirmation of the plan.

- **Minimum Imposed upon Objection by Unsecured Creditor:**

If the holder of an unsecured claim objects to confirmation of an individual's Chapter 11 plan, then Section 1129(a)(15)(B) imposes a 5-year minimum by requiring the debtor to ensure the value of the property distributed under the plan is not less than the projected disposable income of the debtor to be received during the longer of the 5-year period beginning on the date that the first payment is due under the plan, or the period for which the plan provides payments.

- **Permissive Contents:**

See 11 U.S.C. §§ 1123(b), 1322(b).

- **Modification of the Rights of Secured Creditors:**

In both Chapters 11 and 13, a plan may modify the rights of holders of secured claims, other than a claim secured by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims. 11 U.S.C. §§ 1123(b)(5), 1322(b)(2).

- **Curing or Waiving Default:**

A Chapter 13 plan may provide for the cure of any default within a reasonable time and maintenance of payments while the case is pending for secured or unsecured claims on which the last payment is due after the date on which the final payment is due. A Chapter 11 plan may provide for the cure or waiver of any default especially if it provides adequate means for the plan's implementation. 11 U.S.C. §§ 1123(b)(5), 1322(b)(2).

- **Use Sale or Lease of Exempt Property:**

Under Section 1123(c), if the plan is proposed by an entity other than the individual debtor (see 1121 for who may file the plan), the plan cannot provide for the use, sale, or lease of property exempted under Section 11 U.S.C. § 522 unless the individual consents.

- **Treatment of Tax Claims:**

A Chapter 13 plan must provide for deferred cash payments of all priority claims under Section 507 unless the holder agrees to a different treatment. 11 U.S.C. § 1322(a)(2). Section 1325(a)(9) requires that the debtor have filed all applicable Federal, State, and local tax returns as required under Section 1308. In Chapter 11, the treatment of Section 507(a)(8) priority taxes is governed by Section 1129(a)(9)(C)(i)-(iii). This section permits payment with regular installment payments in cash of a total value as of the effective date of the plan equal to the allowed amount of such claim. The period of time for disbursement of the cash payments must not exceed five years from the date of the order for relief. Lastly, the treatment of any 507(a)(8) claim must not be less favorable than the manner of treatment of the most favorable non-priority unsecured claim provided for by the plan. There is no Chapter 11 provision comparable to Section 1308.

- **"Hanging Paragraph" Prohibition:**

The hanging paragraph prohibiting use of Section 506 valuation for certain purchase money security interests acquired within the 910-day or 1 year period prior to filing only appears in Chapter 13. 11 U.S.C. § 1325.

- **The Disclosure Statement:**

In Chapter 11, a disclosure statement must be filed with the plan. Fed. R. Bankr. P. 3016; 11 U.S.C. § 1125(b). Chapter 13 contains no similar requirement and counsel is not expected to file a disclosure statement. The disclosure statement must contain "adequate information", as defined in Section 1125(a)(1). *See In re Metrocraft Pub. Services, Inc.*, 39 B.R. 567 (Bankr. N.D. Ga. 1984) for a thorough discussion of the type of adequate information which should be included in a Chapter 11 debtor's disclosure statement.

- **Hearing on the Disclosure Statement:**

The Debtor's counsel must schedule a hearing on the disclosure statement at which the Court determines if the disclosure statement contains adequate information. 28 days notice is required for the hearing. For small business debtors, the disclosure statement is conditionally approved without a hearing and finally approved simultaneously with plan confirmation (see Small Business Debtor handout on the Court's website).

- **Order Approving Disclosure Statement:**

If approved, the Court will enter an order approving the disclosure statement, setting a deadline for creditors to vote to accept or reject the plan and to object to the plan, and setting the date of the confirmation hearing. Upon entry of the order, debtor's counsel must send the disclosure statement, plan, order, and ballot to all parties in interest. The disclosure statement and plan must not be mailed to creditors until the disclosure statement is approved.

- **Voting:**

There is no voting requirement in Chapter 13. However, holders of claims or interests in Chapter 11 may vote to accept or reject the plan. A class is deemed to have accepted a plan if holders of 2/3 in number and more than 1/2 in amount of those voting have voted to accept the plan. 11 U.S.C. § 1126(c). Local Rule 3018-1 sets out the procedure for filing and counting ballots. The ballot should conform to Bankruptcy Form B14. See <http://www.ganb.uscourts.gov> under "Forms", "Official Bankruptcy Forms".

- **Affirmative Vote Requirement:**

Affirmative votes must be obtained on a Chapter 11 plan. A Chapter 11 debtor need not solicit votes from members of unimpaired classes because acceptance is presumed. 11 U.S.C. § 1126(f) (See 11 U.S.C. § 1124 for determining whether a class is impaired.) A class in which holders of claims will receive or retain nothing under the plan is deemed to have rejected the plan. 11 U.S.C. § 1126(g).

#### 4. Confirmation:

- **Hearing on Confirmation of the Plan:**

In Chapter 11, the Court is required to hold a hearing on confirmation of the plan after 28 days notice. Fed. R. Bankr. P. 2002 (b); 11 U.S.C. §§ 1128. In Chapter 13, the Court is also required to hold a hearing on confirmation after 28 days notice, but no longer than 45 days after the 341 meeting. Fed. R. Bankr. P. 2002 (b); 11 U.S.C. § 1324.

- **Standards for Confirmation:**

In a Chapter 11 case, the Court may not confirm a plan unless the requirements of Section 1129(a)(1)-(16) are met. In Chapter 13, the Court may not confirm a plan unless the requirements of Section 1325(a)(1)-(9) are met.

- **Objection to Confirmation:**

In both Chapter 13 and Chapter 11, if the holder of an unsecured claim objects, the Court may not confirm the plan unless (1) "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 value of the claim" or (2) the debtor meets a disposable income requirement. 11 U.S.C. §§ 1129(a)(15)(A), 1325(b)(1)(A). The Code applies the disposable income requirement to individuals in Chapter 11 and Chapter 13 differently.

- **Distinction Regarding Disposable Income Requirement:**

A Chapter 11 plan may be confirmed over the unsecured creditor's objection if the individual debtor distributes to both unsecured and secured creditors, property with a value equaling at least the amount of the individual's disposable income as determined by Section 1325(b)(2) for the longer of the 5 year period after the first payment is due or the time the plan provides for payments. A Chapter 13 plan may be confirmed over the trustee or unsecured creditor's objection if it provides that all of the debtor's projected disposable income to be received during the applicable commitment period beginning on the date the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan. Thus in Chapter 13 unlike Chapter 11, the debtor's disposable income is distributed only to the unsecured creditors and cannot exceed a 60 month period.

- **Note:** In Chapter 11 individual cases, a distinction is drawn between an objection by the holder of an allowed unsecured claim under Section 1129(a)(15) and a cram down on an unsecured class under Section 1129(b)(2)(B). Under Section 1129(a)(15), a single holder may object thereby triggering the disposable income requirement in the

individual's Chapter 11 case. By contrast, Section 1129(b)(2)(B) becomes applicable when an entire class of holders of unsecured claims is both impaired and unaccepting. Theoretically, both the disposable income requirement of Section 1129(a)(15) and cram down under Section 1129(b)(2)(B) could occur within the same individual Chapter 11 case.

- **"Cram Down":**

Both Chapter 11 and Chapter 13 contain provisions by which a debtor may "cram down" holders of secured or unsecured claims. In Chapter 11, Section 1129(b) provides for cram down over the rejection of a class of secured or unsecured creditors as long as the plan "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." The Chapter 11 "fair and equitable" requirement has a different meaning depending on whether the objecting class holds secured or unsecured claims. In Chapter 13, Section 1325(a)(5)(B) provides the cram down procedure for holders of secured claims. The disposable income requirement of 1325(b) is the mechanism by which a Chapter 13 debtor must respond to objections by unsecured creditors.

- **Comparison of Cram Down of Secured Creditors under 1325(a)(5)(B) and 1129(b)(2):**

In Chapter 13, Section 1325(a)(5)(B) is the "cram down" procedure. The plan may be confirmed if it provides for the holder to both retain its lien until the earlier of payment of the underlying debt under applicable non-bankruptcy law or discharge under Section 1328, and receive property of a value as of the effective date of the plan equaling the allowed amount of such claim. Notably, if the property to be distributed pursuant to subsection (B) is accomplished by periodic payments, such payments must be in equal monthly amounts. There is no similar requirement in Chapter 11. Also, if the holder of the claim is secured by personal property of the debtor then the amount of the payments must not be less than an amount sufficient to provide adequate protection to the holder. The Till approach to determining the proper rate of interest is used in a cram down under Section 1325(a)(5)(B).

In Chapter 11, Section 1129(b)(2) provides three options for a debtor to meet the "fair and equitable" cram down standard for holders of secured claims. Under 1129(b)(2)(A)(i), holders must retain their liens up to the allowed amount of such claims and receive deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property. It is also "fair and

equitable" under Section 1129(b)(2)(A)(ii) if a plan provides for the sale, subject to Section 363(k), of property subject to the liens securing such claims free and clear of such liens with such liens to attach to the proceeds of the sale. Lastly, a Chapter 11 plan may allow for the realization by such holders of the indubitable equivalent of such claims under Section 1129(b)(2)(A)(iii).

- **Selecting the Appropriate Cram Down Rate of Interest:**

In Chapter 13, if counsel proposes a plan which seeks to cram down the claim of a secured creditor pursuant to 1325(a)(5)(B), counsel should select an interest rate which meets the standard set in Till v. SCS Credit Corp., 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004), where the Court held a formula approach resulting in a "prime-plus" rate of interest is appropriate in Chapter 13 cram downs. Till is a Chapter 13 case. Each court will decide the appropriate cram down rate in a Chapter 11 case.

- **Cram Down of Unsecured Class in Chapter 11:**

As noted, in Chapter 13, the objection of an unsecured creditor triggers the disposable income requirement. 11 U.S.C. § 1325(b). However in Chapter 11, Section 1129(b)(2)(B) requires "fair and equitable" treatment of impaired unaccepting classes, as distinct from a single objecting unsecured creditor. The plan may be confirmed notwithstanding the lack of acceptance by a class of unsecured creditors if each holder of a claim of such class receives or retains on account of such claim, property of a value as of the effective date of the plan, equal to the allowed amount of such claim (full payment) or the debtor complies with the "absolute priority rule" contained in Section 1129(b)(2)(B)(ii). The absolute priority rule is a concept unique to Chapter 11.

- **Absolute Priority Rule:**

Generally, the absolute priority rule prohibits a junior class of claims or interests from receiving or retaining any property or interest unless all classes of senior claims either receive the full value of their claims or give their consent. This means, for example, that debtors cannot retain their interest in property if unsecured creditors are not paid in full and do not accept the plan as a class. Whether the absolute priority rule still applies to individual Chapter 11 debtors after BAPCPA is unsettled.

- **Section 1115 and "Property of the Estate" for Individuals in Chapter 11:**

The debate over whether BAPCPA eliminates the absolute priority rule in individual Chapter 11 cases begins with an analysis of the text of Section

1129(b)(2)(B)(ii). BAPCPA added Section 1115 at the same time it modified Section 1129(b)(2)(B)(ii). The phrase "included in the estate under 1115" may only be referring to post petition property added to the estate by Section 1115. Alternatively, it may also be referring to the prepetition property of the debtor since Section 1115(a) specifically references the property "specified in Section 541".

- **Note:** Whether an individual debtor may avoid the absolute priority rule by claiming the prepetition property it seeks to retain as exempt under Section 522 is unsettled in the Northern District of Georgia and the Eleventh Circuit.

## 5. Effect of Confirmation and Discharge:

- **Effect of Confirmation:**

In Chapter 13, Section 1327 sets out the effect of confirmation. In Chapter 11, Section 1141 governs the effect of confirmation.

- **Plan Completion:**

Generally, for both Chapter 13 debtors and individuals in Chapter 11, the Court will not grant a discharge until completion of all payments. 11 U.S.C. §§ 1141, 1328.

- **Final Report and Entry of a Final Decree:**

After confirmation, once a case has been fully administered as set out in Rule 3022, Chapter 11 Debtors must make a final report and file a final account of the administration of the estate with the Court and with the UST. Thereafter, the Court, on its own motion or on motion of a party in interest, shall enter a final decree, closing the case. Fed. R. Bankr. P. 3022. A Chapter 11 case may be "fully administered" even if payments are still being made. Chapter 13 does not require a final decree for a case to be closed and a Chapter 13 case is not closed until all payments are complete. 11 U.S.C. §§ 350, 704 (9), 1106(a)(1).

- **Hardship Discharge:**

A Chapter 13 debtor may receive a hardship discharge if the debtor meets the requirements of Section 1328(b). A Chapter 11 debtor may seek a discharge prior to completion of payments under Section 1141(d)(5). Proof of "hardship" is not required - only "cause".