

THE JANUARY 2014 SUBGROUP OF THE
DELAWARE BANKRUPTCY INN OF COURT

presents....

THE CHAPTER 11 INDIVIDUAL DEBTOR

**A CASE STUDY BASED ON COMPLETELY NORMAL FACTS
AND COMPLETELY GENERIC CLIENTS THAT MIGHT WALK
INTO YOUR OFFICE AND ASK YOU FOR BANKRUPTCY HELP**



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THE CHAPTER 11 INDIVIDUAL DEBTOR
Delaware Bankruptcy Inn of Court

I. An Introduction To The Individual Chapter 11 Debtor.

- a. Why would an individual ever need to go into Chapter 11?
 - i. Chapter 13 may be a non-viable option.

The debtor is eligible for Chapter 13 (“wage earner plans”) only if the Debtor meets both threshold requirements: (1) must earn regular income, and (2) must fall within the statutory debt limits.

- a. **Regular Income.** Per 11 U.S.C. § 101(30), regular income “means an individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 . . .” The source of the income does not matter; it can come from “pensions, public assistance payments, self employment, or investments. . . . [S]upport payments and stable and predictable income from friends and family can sometimes qualif[y].” JEFFREY T. FERRIELL, *UNDERSTANDING BANKRUPTCY*, 171-72 (2013).

- b. **Debt Limits.** Per 11 U.S.C. § 109(e), Chapter 13 debt limits are “noncontingent, liquidated, unsecured debts of less than \$250,000 and noncontingent, liquidated, secured debts of less than \$750,000 . . .” The amount of debt is calculated on the date of petition filing. “In a joint case involving a married couple, debts are aggregated to determine whether they exceed these thresholds.” Ferriell at 171-72.

- (1) **Contingent.** Contingent means the “debtor’s liability depends on the occurrence or non-occurrence of an event that is uncertain at the time of the debtor’s petition.” Ferriell at 173.

- (2) **Liquidated.** A liquidated debt is one that, as of the petition date, “is subject to ready determination and precision in the amount due.” Ferriell at 173 (citing *In re Slack*, 187 F.3d 1070 1073 (9th Cir. 1999); *In re Huelbig*, 299 B.R. 721, 723 (Bankr. D.R.I. 2004)). An example of an unliquidated debt is liability on a personal injury claim.

- (3) **Secured v. Unsecured Debt.** “The valuation test of § 506 is used to determine the extent to which a debt is secured or unsecured.” Ferriell at 175. The value of the portion of debt secured by collateral is counted towards secured debt in the § 109(e) formula. The portion unsecured by collateral is counted towards unsecured debt in the § 109(e) formula.

- ii. Chapter 7 may be a non-viable option.

The debtor cannot remain in Chapter 7 because the individual fails the means test pursuant to 11 U.S.C. § 707(b)(2). Under § 707(b)(2), there is a means test putting

debt limits on individuals primarily with consumer debts to qualify for Chapter 7. This means test was added to the Bankruptcy Code in 2005 under the BAPCPA Amendments to prevent abuse. Abuse is presumed when the debtor fails the means test under § 707(b)(2). (In addition to failing the means test, abuse can also occur with a finding of bad faith or when the totality of the circumstances demonstrates abuse pursuant to § 707(b)(3)) The means test uses the debtor's CMI and deducts expenses allowed under § 707(b) to determine the debtor's disposable monthly income and then makes the comparison to the MFI. The allowed expenses under § 707(b) are the debtor's "applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides." 11 U.S.C. § 707(b)(2)(A)(ii).

b. Differences between Chapter 11 and 13

1. Creditors do not approve Chapter 13 plans.
2. Chapter 13 debtor must be an individual. Business organizations are not eligible for Chapter 13.
3. Eligibility constraints: as above, must have regular income and be within the debt limits of § 109(e).
4. Debtor does not receive a discharge until the reorganization plan has been approved, i.e., confirmed by the court, and the debtor has made the requisite plan payments.
5. Chapter 13 cases are administered by a "standing" trustee. The trustee aids the court in deciding what the debtor's disposable income and collects this income and pays creditors.
6. No initial operating report, monthly operating reports, quarterly operating reports, or other reporting requirements.
7. The filing fee is only \$281, as compared to \$1,213 for Chapter 11.
8. No official committees.
9. Debtor is not a debtor in possession and has no fiduciary duties to creditors.
10. No routine involvement by Office of the United States Trustee.
11. Chapter 13 plan is limited to five years.

c. BAPCPA and the evolution of the Bankruptcy Code's individual Chapter 11 provisions.¹ Congress clearly attempted to make changes to how individuals operate in Chapter 11 cases.

1. Expanded grounds for dismissal or conversion. BAPCPA emphasizes the importance of domestic support obligations with the addition of § 213. Individual Chapter 11 debtors will not receive plan confirmation unless post-petition obligations are current.

2. Diminished courts discretion in determining whether a case should be dismissed or converted. Congress replaced the language “may convert . . . or dismiss a case., for cause” in § 1112(b)(1) with “shall convert. . . or dismiss . . . if the movant establishes cause.” This language greatly limits the discretion of courts to determine the appropriate disposition of a case when presented with a motion to dismiss or convert.

3. Property of the Estate. Added § 1115 to simulate the treatment of property of the estate in Chapter 13. Post-petition earnings prior to BAPCPA were not part of the estate in Chapter 11.

4. Absolute Priority Rule changes. It is unclear how, if at all, Congress changed the impact of the Absolute Priority Rule in individual Chapter 11 cases, as discussed more fully below.

5. Delayed discharge of debts. Individual Chapter 11 debtors under the new § 1141(d)(5)(A) generally do not obtain a discharge until all plan payments have been made. Prior to BAPCPA, discharge was at time of confirmation or whenever provided for in the confirmed plan.

II. Traditional Consumer Issues in the Context of a Chapter 11 Proceeding

a. Personal/family issues.

1. Domestic Support Obligations: § 1129(a)(14): Individual debtor must be current with all domestic support obligations.

2. Need for cash collateral use to pay personal (and family) expenses.

¹ For a more in-depth discussion of this evolution, see Robert J. Landry, *Individual Chapter 11 Reorganizations: Big Problems With The New “Big” Chapter 13*, 27 U. Ark. Little Rock L. Rev. 251 (2007).

i. Nothing in section 363 requires an individual debtor to obtain court approval to pay ordinary living expenses from their earned income. Proposed post-confirmation expenses are relevant under 1129(a)(15).

ii. What constitutes “reasonable” living expenses for purposes of section 363? Should standard of living be considered? Disposable income test? Minimal standard of living?

a. Private School?

b. Recreation and gifts?

c. Non-income producing vacation homes?

b. Joint ownership of earned income – spouse in community property state has an ownership interest in spouse’s earned income.

c. Individual debtors should create a monthly budget and seek court approval for such expenses as “ordinary.”

1. *In re Bradley*, 185 B.R. 7, 11 (Bankr. W.D.N.Y. 1995) (refusing to impose a budget on individual chapter 11 debtor).

2. *In re Rodriguez*, 41 B.R. 774 (Bankr. S.D. Fla. 1984) (approving personal expenses of \$7,000 per month).

3. *In re Cardillo*, 170 B.R. 490 (Bankr. D. N.H. 1994) (refusing to consider status or lifestyle in determining reasonableness of expenses); *In re Jones*, 55 B.R. 462 (Bankr. D. Minn. 1985) (same).

4. *In re Watson*, 403 F.3d 1 (1st Cir. 2005) (private school tuition not reasonable); *In re Gleason*, 267 B.R. 630 (Bankr. N.D. Iowa 2001) (recreation and gift not reasonable); *In re Dick*, 222 B.R. 189 (Bankr. D. Mass. 1998) (vacation home expense not reasonable)

5. *U.S. v. Sutton*, 786 F.2d 1305 (5th Cir. 1986) (incarcerated debtor not permitted to have estate pay living expenses of wife and minor children).

b. Discharge and dischargeability.

i. BAPCPA added special provisions to section 1141 that govern the discharge of individuals under chapter 11. 11 U.S.C. § 1141(d)(5).

1. Full Payment Before Discharge. 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.” 11 U.S.C. § 1141(d)(5)(A). This will generally take five years, although it is easy to contemplate plans extending beyond this time frame. This is a substantial change from prior law, under which

all chapter 11 debtors, including individuals, received a discharge upon plan confirmation. The statute gives no hints about what might constitute cause for an earlier discharge.

2. Early discharge: Debtor may apply for early discharge if (a) value of property distributed already equal to what creditors would have received in chapter 7; (b) modification of plan is not practicable; (c) court finds, after notice and a hearing 10 days before discharge, Section 522(q) provisions re securities law crimes are not applicable. 11 U.S.C. § 1141(d)(5)(B). (note—this test less stringent than chapter 13 test, which requires demonstration that failure to complete plan payments due to circumstances beyond debtor’s control).

ii. Exceptions to discharge apply in individual chapter 11 cases. Individual debtors under chapter 11 are subject to provisions of section 523, though such provisions do not apply to fictitious entities such as partnership, corporation or LLC. Thus, nature of discharge for individual chapter 11 debtor more narrow than that under chapter 13.

iii. Creditors must file complaint within 60 days of date first set for meeting of creditors, regardless of whether meeting actually held on that date.

iv. *In re Ball*, 2008 WL 2223865 (Bankr. N.D. W.Va. 2008) (court denied debtor’s request for discharge and to close plan prior to completion of all plan payments); *In re Belcher*, 410 B.R. 206 (Bankr. W.D. Va. 2009) (same).

v. *In re Sheridan*, 391 B.R. 287 (Bankr. E.D.N.C. 2008) (granting discharge upon confirmation and closing case before completion of payments, eliminating need to pay UST fees); *In re Johnson*, 402 B.R. 851 (Bankr. N.D. Ind. 2009) (same).

c. Exemptions.

i. Assets.

1. Inherent conflict between exemptions (taking property from estate) and fiduciary duty to creditors (distinct from chapters 7 and 13). When a debtor retains his rights in exempt assets, he is only “retaining that which is [his] absolute right to retain in any event.” *In re Egan*, 142 B.R. 730, 733 (Bankr. E.D. Pa. 1992). And when the property sought to be retained is exempt, and no objections to the exemptions are timely filed, the debtor’s claim to such exemptions “is conclusively established.” *Id.* at 733, citing *Taylor v. Freeland & Kronz*, 503 U.S. 638, 643-44 (1992).

2. The retention of exempt property is also consistent with §1129(b)(2)(B) because of the language “receive or retain under the plan.” Exempt property is not retained under a plan; it is retained as an exempt asset outside of the bankruptcy estate.

3. Absolute priority rule does not apply to exempt property.

4. Potential for abuse: Cases in Nevada where two individual Chapter 11 debtors claimed exemptions of \$10 million and \$13 million.

ii. Wages.

1. Can chapter 11 debtor exempt a portion of his post-petition earnings under applicable state exemption law? (Example—in Kentucky, a significant portion of disposable earnings are exempt from garnishment by creditors)

2. Most income related exemptions are time-period based. What is the applicable time period?

3. Debtor may be able to exempt wages and use how he/she sees fit pre-confirmation, but may be required to commit exempt wages to plan funding to be confirmed under 1129.

iii. Cases:

1. *In re Shin*, 306 B.R. 397,404 n.17 (Bankr. D.D.C. 2004) (absolute priority rule does not apply to exempt assets); *In re Henderson*, 321 B.R. 550 (Bankr. M.D. Fla. 2005) (same); *In re Bullard*, 358 B.R. 541, 544-45 (Bankr. D. Conn. 2007) (same).

2. *In re Bradley*, 185 B.R. 7 (Bankr. W.D.N.Y. 1992) (individual debtor may spend proceeds of non-exempt assets for living expenses).

3. *In re Henderson, supra*, (debtor may retain exempt property if sufficient new value from other sources provided under plan); *but compare In re Gosman*, 282 B.R. 45 (Bankr. S.D. Fla. 2002) (1129(b)(2)(B)(ii)’s proscription on debtor’s retention of “any” property for cramdown purposes include exempt property); *In re Yasparro*, 100 B.R. 91 (Bankr. M.D. Fla. 1989) (same).

d. Living Expenses – “Ordinary Course of Business”

i. Prior to the enactment of BAPCPA, post-petition wages were not considered property of the estate.

ii. In 2005, Congress enacted Section 1115(a), which provides:

- (a) **In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in section 541—**
- (1) **all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and**
 - (2) **earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.**

iii. Section 1115(a) implicates the requirements of Section 363(c)(1) – use of estate property for “ordinary course of business expenses.”

iv. One court has held that “the court should recognize that section 363(c)(1) authorizes a debtor in possession to use property of the estate to pay post-petition living expenses without prior court approval, so long as the amounts to be disbursed qualify as “ordinary course” expenses.” *In re Seely*, 492 B.R. 284, 290 (Bankr. C.D.Cal. 2013).

v. One court held that hiring of divorce counsel to obtain a divorce was not considered ordinary course but was within the best interest of the estate and therefore allowed. *In re Goldstein*, 383 B.R. 496, 502 (Bankr.C.D.Cal. 2007); Other court held that hiring of divorce counsel to modify a divorce decree was not in the best interests of the bankruptcy estate and denied the request. *In re Johnson*, 433 B.R. 626, 640 (Bankr. S.D.Tx. 2010).

vi. Luxury expenses need separate court approval before payment is authorized. *See In re Villalobos*, 2011 WL 4485793, at *8-9 (9th Cir. BAP Aug. 19, 2011) (BAP remanded the entry of an order approving a debtor’s request to pay, with estate property, luxury car payments, a sizeable personal allowance and tuition payments for 6 grandchildren for findings that they were necessary for the preservation of the estate). The panel considered whether the means test set forth in Section 1129(a)(15) should be utilized to determine whether personal expenses should be allowed, but stopped short of that conclusion. *Id.* at *8.

vii. Expenses such as optional surgery, a child's tuition, and air conditioning replacement or repair have been denied by the bankruptcy court. *See In re Krause*, 349 B.R. 255 (Bankr. D.Kan. 2006).

viii. *Professional Fees*. If the representation benefits the estate, then yes, the professional fees may be paid for by the debtor. Services that benefit the debtor individually and not the estate are not likely to be permitted to be paid out of the estate. *See In re Engel*, 190 B.R. 206 (D.N.J. 1995).

e. Reaffirmation Agreements.

Section 524(d) of the Bankruptcy Code provides that a debtor may enter into a reaffirmation agreement with a creditor. The plain language of Section 524(d) indicates that reaffirmation agreements are permitted in an individual chapter 11 proceeding by its citation to Section 1141, however, there is very little case law on the subject in the context of an individual chapter 11 debtor.

f. Credit counseling requirements

i. Yes, the credit counseling requirements still apply, even though the average Chapter 11 debtor may be more sophisticated. Section 109(h)(1) conditions the ability to be a debtor upon receiving credit counseling from approved nonprofit budget and credit counseling agency.

ii. Failure to obtain credit counsel is grounds for dismissal of the chapter 11 proceeding. *See, e.g. In re Hedquist*, 342 B.R. 295, 298 (8th Cir. BAP 2006) ("With certain limited exceptions not applicable here, the requirements of section 109(h) are mandatory: failure to meet them is a 'fatal flaw' rendering an individual debtor ineligible for relief"), *In re Fanuzzi*, 2011 WL 6097858, at *3 (Bankr. D.Mont. Dec. 7, 2011) ("Because Debtors did not comply with the § 109(h) pre-bankruptcy credit counseling requirement, Congress has decreed that they were not eligible to be chapter 11 debtors"); *Casey v. United States Trustee*, 2006 WL 2583134, at *2 (N.D.Ga. August 31, 2006) ("Because the record shows a complete lack of compliance by [the debtor] with the requirements of section 109(h), the Bankruptcy Court had no alternative but to dismiss the case based on a conclusion that [the debtor] was ineligible to be a debtor at the time he filed the Petition").

g. Who pays for this stuff?

i. *Yes, the Debtor*. With the enactment of Section 1115, all income earned post-petition is considered estate property. *See, e.g., In re Clemente*, 409 B.R. 288, 293 (Bankr.D.N.J. 2009)("Dr. Clemente is compelled to use his post-petition earnings from individual services to fund his chapter 11 plan, with no available route of escape"), *In re Belcher*, 410 B.R. 206, 219

(Bankr.W.D.Va. 2009)(recognizing Congress' intent to require chapter 11 individual debtors to fund their own plans).

ii. But as noted above, if the professionals' services do not benefit the estate, the debtor cannot use estate funds to pay them. Since property of the estate includes all of property of the debtor on the Petition Date (§ 541), property acquired by the estate after the Petition Date (§ 541), and postpetition wages (§ 1115), this may cause a hardship to the debtor, who may require services for personal reasons but has no source of funds from which to pay the professionals to provide them.

iii. An individual chapter 11 debtor is still required to pay the chapter 11 filing fee and UST expenses.

III. Traditional Commercial Issues in the Context of a Chapter 11 Proceeding.

a. Debtor in possession versus debtor

i. Fiduciary duty.

When individual debtor files chapter 11 petition, the debtor-in-possession, a fictional entity, is created. Debtor-in-possession and counsel therefore have to differentiate between the two. Individual Chapter 11 debtors owe same fiduciary duties to creditors as corporate chapter 11 debtors:

1. *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1219 (9th Cir. 1994) (reminding counsel that client is the estate, and not the debtor individually).

2. *In re Bowman*, 181 B.R. 836 (Bankr. D. Md. 1995) (debtor has fiduciary duty to put creditor interests first in settlement of a lawsuit)

3. *In re Dixon*, No. 09-11851 (N.D. Cal. 2010) (Court disallowed large amount of counsel fees on basis that counsel advocated positions favoring the individual debtor against the interests of the estate)

ii. Privilege.

Does attorney-client privilege belong to the debtor or the estate?

1. *In re Bame*, 251 B.R. 367 (Bankr. D. Minn. 2000) – holding that (i) upon conversion of individual case from chapter 11 to chapter 7, privilege passed to chapter 7 trustee regarding communications between debtor and counsel regarding case administration during time that debtor was debtor-in-possession; and (ii) debtor bore burden of proving that he received counsel individually, rather than as representative of estate)

2. *In re Eddy*, 304 B.R. 591 (Bankr. D. Mass. 2004) (same)

b. Confirmation Issues

i. The Absolute Priority Rule.

1. Section 1129(b)(2)(B)(ii) – BAPCPA changed this section and it now states that with respect to a class of unsecured creditors, “the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, *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 section (a)(14) of this section.*” 11 U.S.C. § 1129(b)(2)(B)(ii).

2. Section 1115 – Provides that in addition to the general definition of “property of the estate” set forth in Section 541, when a debtor is an individual, property of the estate also includes:

a. All property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed or converted to a case under chapter 7, 12, or 13, whichever occurs first; and

b. Earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12 or 13, whichever occurs first.

3. Issue becomes whether a debtor may retain all property of the estate, as defined by both §§ 541 and 1115—due to § 1115’s reference to section 541—or is only property included as property of the estate pursuant to § 1115 exempt from the absolute priority rule set forth in § 1129(b)(2)(B)(ii)?

4. Some cases held that the absolute priority rule does not apply in individual chapter 11 cases. Courts reasoned that debtors needed the use of their assets to perform their chapter 11 plans and a broad interpretation of § 1115 was more consistent with the other BAPCPA amendments affecting individual chapter 11 debtors. *See In re Freidman*, 2012 WL 911545 (9th Cir. B.A.P. Mar. 19, 2012); *SPCP Group LLC v. Biggins*, 465 B.R. 316 (M.D. Fla. 2011); *In re Shat*, 2010 WL 702443 (Bankr. D. Nev. Feb. 22, 2010); *In re Bullard*, 358 B.R. 341 (Bankr. D. Conn. 2007); *In re Tegeder*, 369 B.R. 477 (Bankr. D. Neb. 2007); *In re Roedemeier*, 374 B.R. 264 (Bankr. D. Kan. 2007).

5. Recent circuit level cases have favored a narrow interpretation of § 1115, such that the absolute priority rule still applies in individual Chapter 11 cases and “section 1115 property” is only post-petition earnings or assets acquired post-petition. *In re Stephens*, 704 F.3d 1279 (10th Cir.

20130; *In re Lively*, 717 F.3d 406 (5th Cir. 2013); *In re Maharaj*, 681 F.3d 558 (4th Cir. 2012). This has become the majority rule.

6. There is a split in authority regarding whether the debtor can claim property as exempt without violating the absolute priority rule. Compare *In re Egan*, 142 B.R. 730 (Bankr. E.D. Pa. 1992) (holding that retaining property claimed as exempt does not violate the absolute priority rule) with *In re Gosman*, 282 B.R. 45 (Bankr. S.D. Fla. 2002) (a debtor's retention of property claimed as exempt violates the absolute priority rule).

ii. Disposable Income Test is an additional confirmation requirement for Chapter 11 plans.

1. Section 1129(a)(15) – In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan – (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 section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.” 11 U.S.C. § 1129(a)(15)(b).

2. Compare to Chapter 13? Section 1325(b)(2) – “For purposes of this subsection, the term “disposable income” means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended—(A) (i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and (ii) for charitable contributions (that meet the definition of “charitable contribution” under § 548(d)(3)) to a qualified religious or charitable entity or organization (as defined in § 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.” 11 U.S.C. § 1325(b)(2).

3. Disposable income issues may arise when plan confirmation is contested and disposable or projected disposable income includes business income from a non-debtor. The debtor face an argument that the plan is not feasible or may be accused of manipulating the non-debtor business's cash flow. See *In re Gbadebo*, 2010 WL 1568609 (Bankr. N.D. Cal. Apr. 16, 2010) (court found plan had not been filed in good faith after concluding that debtor's living expenses were unreasonable and created artificially low disposable income).

b. Postpetition income as property of the estate. Section 1115 clearly states that post-petition income is property of the estate. However, regardless of the application of the absolute priority rule, the debtor will be able to retain post-petition income pursuant to a plan of reorganization.

c. Chapter 11 trustee issues

Debtor in possession has responsibilities as set forth in sections 704 and 1106. Failure of the debtor in possession to properly perform his fiduciary duties to the estate may result in the appointment of a trustee pursuant to section 1104. In making a decision to appoint a chapter 11 trustee in an individual case, the court is faced with weighing the benefit to be derived by the estate from the appointment of a trustee against the costs of such appointment.

d. Delayed discharge

i. Prior to BAPCPA, an individual chapter 11 debtor could receive a discharge at plan confirmation, without regard to whether any payments had been made.

ii. Following BAPCPA, section 1141(d)(5) now provides that “unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan. 11 U.S.C. § 1141(d)(5)(A). The court is able to grant a discharge under prior to the completion of the plan if the court finds that the payments already made under the plan are 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. 11 U.S.C. § 1142(d)(5)(B).

iii. This delay in granting a discharge effects the terms of modification, because if assumptions made at confirmation are incorrect, the plan must be modified in order to permit the debtor to receive his discharge. BAPCPA added section 1127(e) which allows individual debtors to modify the plan to increase or reduce payments and to modify the payment periods under the plan, as long as other confirmation requirements are met.

e. Special forms for monthly operating reports. The Office of the United States Trustee has promulgated particular form of monthly operating report for individual chapter 11 debtor (copy attached)

f. Taxation

i. All prepetition tax liabilities are required to be paid

ii. Postpetition, taxes are required to be paid and all postpetition tax returns required to be filed by the laws of the United States or any

other state or political subdivision thereof, must be paid and filed by the debtor in a timely manner as required by the respective taxing authorities.

g. Involuntary chapter 11 petition against an individual: unconstitutional?

i. *Proudfoot Consulting Co. v. Gordon (In re Gordon)*, 465 B.R. 683 (Bankr. N.D. Ga. 2012) – Debtor filed individual chapter 7 case. Creditor moved to dismiss case, which motion was denied. Creditor then moved to convert case to chapter 11. Debtor opposed on grounds that involuntary conversion of an individual debtor’s chapter 7 case to chapter 11 violates the Thirteenth Amendment and the Anti-Peonage Act, 42 U.S.C. § 1994, based on certain aspects of chapter 11 after BAPCPA, including provisions that would treat his postpetition earnings as property of the estate that must be used as necessary for execution of a confirmed plan (new sections 1115 and new paragraph (8) of 1123(a)), that would require the amount of his projected disposable income to be paid under the plan (new subsection (15) of section 1129(a)), that would not allow him to voluntarily convert his case (section 1112(a)(3)), and that would permit a creditor to propose a plan (section 1121(c)). The court held such issues to not be ripe, except that an effect of conversion would be that debtor’s postpetition earnings would be property of the estate. The court rejected the debtor’s argument that conversion would result in involuntary servitude.

ii. *In re Lobera*, 454 B.R. 824 (Bankr. D.N.M. 2011) – Court refused to convert chapter 7 case to chapter 11, court also refused to convert the case to chapter 11, noting that Congress, by enacting BAPCPA and, thus, “allowing creditors to force conversation of a Chapter 7 debtor’s case to Chapter 11, coupled with an inability to voluntarily reconvert or dismiss and the inclusion of the debtor’s post-petition income, . . . may have created the setting for a constitutional challenge.”

iii. *In re Clemente*, 409 B.R. 288 (Bankr. D.N.J. 2009) – Debtor filed individual chapter 11 case, and chapter 11 trustee was appointed. Constitutional issue arose because, as debtor no longer was debtor-in-possession, debtor could not convert case automatically to chapter 7. Court avoided deciding constitutional issue in debtor’s motion to convert case by terminating the chapter 11 trustee and permitting the debtor to convert the case.

iv. *Misuraca v. U.S. Trustee*, 2009 WL 1212471 (D. Ariz. May 4, 2009) – Court declined to rule on issue of whether involuntary chapter 7 would be constitutional, finding issue was not ripe.