37TH Annual Jay L. Westbrook Bankruptcy Conference

INDIVIDUAL CHAPTER 11 CASES AND THE TWISTS AND TURNS THEY CAN PRESENT

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Overview of Individual Chapter 11

a) What is an individual Chapter 11
   - Voluntary option for an individual lacking other options (11 USC § 109(d))
     - Chapter 13 / debt limits and regular income requirement (11 USC § 109(e))
     - Chapter 7 / means test (11 USC 707(b))
   - Involuntary option for creditors (11 USC § 303(a))

b) Where we see it most often (wealthier individuals, more complex)
   - "Wealthier" individuals with larger debt loads / valuable assets to protect
   - Sole proprietorship business problems
   - Complex financial situations (*e.g.*, tax, litigation, divorce, etc. problems)
   - Longer-term debt restructuring necessity (*i.e.* 5 years not enough)

Overview of Individual Chapter 11 *(cont'd)*

c) No initial trustee

- In Chapter 11, a trustee is not appointed at the outset; instead, after case commencement but before plan confirmation, a trustee will be appointed by the Court, on request of a party, and after notice and hearing, for reasons such as fraud, dishonesty, incompetence, gross mismanagement, and the like. A trustee may also be appointed under such circumstances if its in the best interest of creditors, equity security holders, and other estate interests. *See* 11 USC § 1104.
- *Compare* – A debtor-in-possession has all rights, other than rights to compensation under 11 USC § 330, and powers and is obligated to perform all functions and duties of a trustee serving in a Chapter 11 case, except for those duties specified in 11 USC § 1106(a)(2), (3), and (4). *See* 11 USC § 1107.

Overview of Individual Chapter 11 *(cont'd)*

d) No co-debtor stay

- In an individual Chapter 11, there is no co-debtor stay as there is in a Chapter 13. *See generally* 11 USC §§ 362 (automatic stay); 11 USC § 1301 (stay of action against co-debtor). If a party who is co-obligated on a debt with the debtor wants the benefit of the automatic stay, then such party can seek bankruptcy relief or the debtor may move to expand (extend) the automatic stay to include others. If you represent the creditor, then this can give you some additional opportunity for recovery when the stay does not apply to others.

e) Unspecified Chapter 11 plan duration; more flexibility v. Chapter 13

- Chapter 13; 3 to 5 year plan depending upon disposable income
- Chapter 11 can be longer; 11 USC § 1129(a)(15)(B)

General Deadlines and Considerations

a) Cash collateral

- In Chapter 11, cash collateral is a 1st day motions to carefully consider. Agreements reached or outcomes of cash collateral determinations can impact the case greatly going forward and can establish precedent in other ways. Important to consider future/subsequent liens and be sure to capture all of your collateral and lien rights, in many forms. Important to review the cash collateral definition under 11 USC § 363(a) as you are working through your cash collateral order(s) (and as you consider any plan proposed in connection with the Chapter 11 case).
- There are limitations on cash collateral use to keep in mind, as well. *See, e.g.*, § 363.

General Deadlines and Considerations *(cont'd)*

b) Plan deadlines; exclusive right to propose the plan

- Debtor has the exclusive right to propose a plan within the 120 days after the order of relief (or 180 days in a small business case). Other persons may propose a plan, as well, as provided in 11 USC § 1121.
- 11 USC § 1129; *In re Lively*, 717 F.3d 406 (5th Cir. 2013) (absolute priority rule applies to individual Chapter 11's).
- *Note*: After notice and hearing, the 120 day period of time (or 180 day period for small business cases) within which a debtor may file a plan may be enlarged or reduced as provided in 11 USC § 1121(d). However, the period of time may not be expanded beyond 18 months from the order of relief (or 20 months in a small business case).

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