

# AMERICAN BANKRUPTCY INSTITUTE JOURNAL

The Essential Resource for Today's Busy Insolvency Professional

## News at 11

BY MARK E. HALL AND TARA J. SCHELLHORN

### A Fish Out of Water

#### Streamlining Plan Confirmation for Individual Chapter 11



**Mark E. Hall**  
Riker, Danzig, Scherer,  
Hyland & Perretti LLP  
Morristown, N.J.



**Tara J. Schellhorn**  
Riker, Danzig, Scherer,  
Hyland & Perretti LLP  
Morristown, N.J.

Mark Hall is a partner and Tara Schellhorn is an associate in Riker, Danzig, Scherer, Hyland & Perretti LLP's Bankruptcy and Reorganization Group in Morristown, N.J. Mr. Hall is also chair of the Lawyers Advisory Committee for the Bankruptcy Court for the District of New Jersey.

An individual might be a debtor under chapter 11 of the Bankruptcy Code,<sup>1</sup> but this is a less-than-perfect pairing. Chapter 11 is both complex and expensive, and as a result, individuals typically choose to proceed under chapter 13 or chapter 7. In certain instances, however, a chapter 11 filing might be necessary or preferable.<sup>2</sup> One of the most common reasons for an individual debtor to file for chapter 11 is that the debtor's liabilities exceed the statutory debt limits set forth in § 109(e) of the Bankruptcy Code.<sup>3</sup> In such cases, an individual seeking to reorganize is precluded from filing under chapter 13 and compelled to proceed under chapter 11.<sup>4</sup>

When an individual enters chapter 11, he/she may feel like a fish out of water. The individual debtor is forced to navigate a complex, and often arduous, process that was designed with businesses in mind. Many of the requirements in chapter 11 present unique challenges for individual debtors, particularly the lengthy and expensive plan-confirmation process. Fortunately, shortcuts exist that can help streamline this process for individual chapter 11 debtors.

#### Section 1125(b) Requires Approval of a Disclosure Statement

Section 1125(b) of the Bankruptcy Code requires approval of a disclosure statement prior to the solicitation of votes for acceptance or rejection of a plan.

- <sup>1</sup> See 11 U.S.C. § 109(d).
- <sup>2</sup> An individual with the financial wherewithal may choose to file a chapter 11 case in order to maintain more flexibility and control over the process. For example, the individual may own multiple properties and be seeking to protect non-homestead real estate equity or may have substantial personal assets that would benefit from the chapter 11 process.
- <sup>3</sup> Pursuant to § 109(e), in order to qualify as a debtor under chapter 13, a debtor must be an individual with regular income that owes, as of the petition date, noncontingent, liquidated and unsecured debt of less than \$383,175 and noncontingent, liquidated and secured debt of less than \$1,149,525.
- <sup>4</sup> An individual might also be forced to file under chapter 11 if (1) a presumption of abuse arises under the § 707(b) means test that is not rebutted, and (2) the individual's debts exceed the limits set forth in § 109(e).

This requirement has, however, been modified in certain circumstances to allow for expedited plan confirmation, including in cases involving prepackaged plans and in small business chapter 11 cases.

In the case of prepackaged plans, the Bankruptcy Code permits the pre-petition solicitation of votes on a plan if it was conducted in compliance with applicable nonbankruptcy law governing the adequacy of disclosure or, in the absence of such a law, which occurs after disclosure of "adequate information," as defined in § 1125(a).<sup>5</sup> In these cases, courts have routinely permitted a combined hearing to approve the debtor's plan and disclosure statements.<sup>6</sup> This condensed process can significantly reduce the time and cost of a chapter 11 case.

For small businesses, Congress adopted a set of provisions that are specifically applicable to "small business cases"<sup>7</sup> filed under chapter 11. These special provisions apply only to "small business debtors," which, according to the Bankruptcy Code, are persons or entities engaged in commercial or business activities that owe no more than \$2,490,925 in claims (excluding obligations that are owed to affiliates or insiders).<sup>8</sup> Included among these special provisions is § 1125(f), which specifically provides that a bankruptcy court may, among other things, conditionally approve a disclosure statement — subject to final approval at a later hearing — thereby allowing for a combined hearing on the plan and disclosure statement.<sup>9</sup> These provisions are specifically aimed at reducing the costs of and expediting the plan process for small business debtors.<sup>10</sup>

Through these special provisions, Congress has acknowledged the need for a streamlined chapter

- <sup>5</sup> See 11 U.S.C. § 1126(b).
- <sup>6</sup> See generally 7 Collier on Bankruptcy ¶ 1100.10 (16th ed. 2013).
- <sup>7</sup> See 11 U.S.C. § 101(51C) (defining "small business case").
- <sup>8</sup> See 11 U.S.C. § 101(51D)(A).
- <sup>9</sup> 11 U.S.C. § 1125(f)(1) and (3).
- <sup>10</sup> See H.R. Rep. 109-31, 109th Cong., 1st Sess. 101 (2005).

11 process in small business cases. At this time, no similar provisions exist for individual chapter 11 debtors, who face the same, if not more significant, challenges as small business debtors.

During his testimony to the ABI Commission to Study the Reform of Chapter 11, Prof. **George W. Kuney** (University of Tennessee College of Law; Knoxville, Tenn.) highlighted how the expansion of the small business provisions could benefit middle-market and small business chapter 11 cases. In discussing ways to reduce the administrative costs and burdensome deadlines in such cases, he suggested that “[o]ne possible means of addressing these problems is making the current small business provisions in the Code combining the disclosure statement hearing and plan hearing available on an option basis to all debtors.”<sup>11</sup> This logic is especially applicable to individual chapter 11 debtors. In the absence of such specific provisions, however, individual chapter 11 debtors must look to the Bankruptcy Code, in its current form, for relief.

## General Authority in the Bankruptcy Code for a Combined Approval Process

Section 105(d)(2) of the Bankruptcy Code is an “omnibus provision” that allows courts to “mix and match” opportunities and timing in order to customize the chapter 11 process for a debtor.<sup>12</sup> Pursuant to § 105(d)(2)(B)(vi), a court has the authority to hold a status conference and enter an order “prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that ... provides that the hearing on approval of the disclosure statement may be combined with the hearing on the confirmation of the plan.”<sup>13</sup> Courts nationwide have utilized this provision to conditionally approve disclosure statements, subject to final approval at a combined hearing on such disclosure statements and plan confirmation.<sup>14</sup> In fact, the U.S. Bankruptcy Court for the Southern District of Texas has expressly recognized that § 1125(f) “authorizes combined plans and disclosure statements in small business cases and § 105(d) authorizes the court to combine them in other cases.”<sup>15</sup>

Despite its general acceptance, however, some courts have rejected this application of § 105(d), finding that the use of a combined hearing in a case that neither involves a small business debtor nor a prepackaged plan is inconsistent with § 1125.<sup>16</sup> This approach fails to give proper deference to the well-established canon of statutory interpretation that requires courts to give effect, if possible, to every word of a statute so as to not render any portion of the statute superfluous.<sup>17</sup> Thus, such a reading is improper because it renders § 105(d)(2)(B)(vi) meaningless. The combined process contemplated by § 105(d)(2)(B)(vi) allows a debtor to reduce

its timeline for confirmation, which in turn can significantly diminish administrative costs and allow the reorganized debtor to emerge from chapter 11 earlier — a result that benefits all constituents and parties in interest.

The combined process under § 105(d)(2)(B)(vi) would also benefit individual chapter 11 cases, as recognized by two recent cases. In *In re Van Tassel*,<sup>18</sup> the U.S. Bankruptcy Court for the Eastern District of California addressed the authority of the court to conditionally approve a disclosure statement in an individual chapter 11 case. In *Van Tassel*, the debtor requested that the court apply § 1125(f)’s small-business principles in an individual chapter 11 context and conditionally approve the disclosure statement. The court granted the request, explaining that § 105 of the Bankruptcy Code grants courts sufficient “latitude” to conditionally approve a disclosure statement in an individual chapter 11 case.<sup>19</sup> The court also noted the importance of providing “an economical and expeditious administration” of the case and the lack of prejudice to parties in interest.<sup>20</sup>

The U.S. Bankruptcy Court for the District of New Jersey recently authorized similar relief in another individual chapter 11 case, *In re Barbara Berko*.<sup>21</sup> In *Berko*, the debtor sought conditional approval of her disclosure statement in order to effectuate and consummate the global settlement that was reached with her primary secured creditor, the terms of which required the agreement to take effect on an expedited basis. After notice and a hearing, held on a shortened timeline, the court granted the debtor’s request for conditional approval. Therefore, authority exists for a bankruptcy court to conditionally approve a disclosure statement in an individual chapter 11 case and consider final approval of the disclosure statement and confirmation of the plan at a combined hearing.<sup>22</sup>

## Local Rules and Forms to Streamline the Individual Chapter 11 Plan Process

As previously noted, the Bankruptcy Code does not include any specific provisions addressing the plan-confirmation process in individual chapter 11 cases. However, courts have applied § 105 of the Bankruptcy Code in such cases to tackle plan-confirmation issues. Further, some courts have utilized local rules and forms to help simplify and expedite the plan-confirmation process.<sup>23</sup>

At least two jurisdictions have promulgated standard-form combined plan and disclosure statements for use in individual chapter 11 cases: the U.S. Bankruptcy Court for the Southern District of Texas and the U.S. Bankruptcy Court for the Northern District of California.<sup>24</sup> In addition, the U.S. Bankruptcy Court for the District of New Jersey

18 Case No. 10-11742-A-11, 2011 Bankr. LEXIS 5641 (Bankr. E.D. Cal. June 7, 2011).

19 *Id.* at \*4.

20 *Id.*

21 *See In re Barbara Berko*, Case No. 12-33631, Docket No. 98 (Bankr. D.N.J. Sept. 24, 2013).

22 Notably, in both *Van Tassel* and *Berko*, the request for use of this truncated procedure was unopposed by the creditors. In the face of opposition from creditors, it might be difficult to persuade the court to utilize § 105 to streamline the process.

23 Fed. R. Bankr. P. 9029(a)(1) provides bankruptcy courts with the flexibility and discretion to craft local rules and forms.

24 The Model Individual Chapter 11 Plan that is utilized by the U.S. Bankruptcy Court for the Southern District of Texas is available at [www.tx.uscourts.gov/bankruptcy/individual\\_11\\_plan\\_example.pdf](http://www.tx.uscourts.gov/bankruptcy/individual_11_plan_example.pdf), and the Standard-Form Combined Plan and Disclosure Statement for Individual Chapter 11 Debtors that is utilized by the U.S. Bankruptcy Court for the Northern District of California is available at [www.canb.uscourts.gov/announcements/standardform-combined-plan-and-disclosure-statement-individual-chapter-11-debtors](http://www.canb.uscourts.gov/announcements/standardform-combined-plan-and-disclosure-statement-individual-chapter-11-debtors).

11 Prof. George W. Kuney, ABI Commission Testimony on Nov. 7, 2013, available at [commission.abi.org](http://commission.abi.org).

12 *In re Aspen Limousine Serv. Inc.*, 187 B.R. 989, 995 (Bankr. D. Colo. 1995).

13 11 U.S.C. § 105(d)(2)(B)(vi).

14 *See, e.g., In re HearUSA Inc.*, Case No. 11-23341, Docket No. 706 (Bankr. S.D. Fla. March 16, 2012); *In re General Growth Properties Inc.*, Case No. 09-11977, Docket No. 5863, (Bankr. S.D.N.Y. Aug. 27, 2010); *In re Amelia Island Co.*, Case No. 09-9601, Docket No. 659 (Bankr. M.D. Fla. July 20, 2010); *In re Luminant Mortgage Capital Inc.*, Case No. 08-21389, Docket No. 538 (Bankr. D. Md. May 15, 2009); *In re Cypresswoods Land Partners I*, Case No. 07-32437-H4 11, Docket No. 144 (Bankr. S.D. Tex. Sept. 26, 2008).

15 *In re Gulf Coast Oil Co.*, 404 B.R. 407, 425 (Bankr. S.D. Tex. 2009).

16 *See, e.g., In re Amster Yard Assocs.*, 214 B.R. 122, 124 (Bankr. S.D.N.Y. 1997).

17 *See, e.g., Med. Soc. of N.J. v. N.J. Dep’t of Law and Public Safety*, 120 N.J. 18, 26-27 (N.J. 1990).

recently approved a similar combined form in individual chapter 11 cases, which will likely be available on that court's website at the time of the publication of this article.<sup>25</sup> Further, the U.S. Bankruptcy Court for the Southern District of Texas has also adopted a local rule requiring use of its combined form by all individual chapter 11 debtors.<sup>26</sup> The U.S. Bankruptcy Court for the Central District of California has also addressed the issue through the promulgation of separate standard forms for individual chapter 11 plans and disclosure statements<sup>27</sup> and the adoption of a local rule permitting individual chapter 11 debtors to request authority to utilize these forms.<sup>28</sup>

By contrast, the U.S. Bankruptcy Court for the District of Nevada has taken a more general approach by adopting a rule that might be utilized by any debtor seeking to expedite the confirmation process. Through this local rule, the court specifically sets forth the procedures for obtaining conditional approval of a disclosure statement and a combined hearing on the conditionally approved disclosure statement and confirmation of the plan.<sup>29</sup> The use of these local rules and forms is a tremendous benefit to individual chapter 11 debtors, professionals and courts alike as they expedite plan confirmation, help reduce the expenses that are associated with the plan process, and make chapter 11 cases more accessible for individuals otherwise deterred by the complexity and expense associated with chapter 11.

## Conclusion

While Congress has not yet adopted special provisions in individual chapter 11 cases, mechanisms exist that can aid individual chapter 11 debtors and courts in streamlining the plan-confirmation process. This, in turn, helps to make the chapter 11 process more affordable and attractive for debtors who are otherwise operating like "fish out of water" when plunging into the chapter 11 world. **abi**

**Editor's Note:** *ABI has formed a task force to study individual chapter 11 with an eye toward harmonizing the best practices across the country. C.R. "Chip" Bowles (Bingham Greenebaum Doll LLP; Louisville, Ky.) and David P. Leibowitz (Lakelaw; Chicago) serve as co-chairs, and Prof. Margaret Howard (Washington & Lee Law School; Lexington, Va.) is the reporter. ABI will publish a report of the task force's findings sometime in 2015.*

*Reprinted with permission from the ABI Journal, Vol. XXXIII, No. 6, June 2014.*

*The American Bankruptcy Institute is a multi-disciplinary, non-partisan organization devoted to bankruptcy issues. ABI has more than 13,000 members, representing all facets of the insolvency field. For more information, visit [abi.org](http://abi.org).*

<sup>25</sup> See Minutes of U.S. Bankruptcy Court for the District of New Jersey Lawyer's Advisory Committee Meeting, dated Jan. 28, 2014, p. 1, available at [www.njb.uscourts.gov/sites/default/files/hearingdates/LAC-1.28.14.pdf](http://www.njb.uscourts.gov/sites/default/files/hearingdates/LAC-1.28.14.pdf).

<sup>26</sup> See Bankr. S.D. Tex. L.B.R. 3061-1(b).

<sup>27</sup> See Bankr. C.D. Cal. Forms F 2081-1.DISCLSR.STMT and 2081-1.PLAN — Chapter 11 Disclosure Statement and F 3018-1 — Chapter 11 Plan. Notably, Hon. Alan M. Ahart of the U.S. Bankruptcy Court for the Central District of California permits individual chapter 11 debtors to use either these separate forms or the combined "Disclosure Statement and Plan of Reorganization" form approved for use in his courtroom.

<sup>28</sup> See Bankr. C.D. Cal. L.B.R. 2081-2.

<sup>29</sup> See Bankr. D. Nev. L.B.R. 3017.