



2007

Individual Chapter 11 Reorganizations: Big Problems with the New "Big" Chapter 13

Robert J. Landry III

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Bankruptcy Law Commons](#)

Recommended Citation

Robert J. Landry III, *Individual Chapter 11 Reorganizations: Big Problems with the New "Big" Chapter 13*, 29 U. ARK. LITTLE ROCK L. REV. 251 (2007).

Available at: <https://lawrepository.ualr.edu/lawreview/vol29/iss2/2>

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

INDIVIDUAL CHAPTER 11 REORGANIZATIONS: BIG PROBLEMS WITH THE NEW "BIG" CHAPTER 13

*Robert J. Landry, III**

I. INTRODUCTION

After nearly a decade of political battles¹ and a long legislative road,² the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005³ (BAPCPA) was finally signed into law on April 20, 2005.⁴ Much of the focus in the media and among commentators on the BAPCPA has been on the "means-testing" aspects of the new law⁵ and its impact on a debtor's eligibility for relief and choice between Chapters 7 and 13.⁶ Beyond those very

* Assistant Professor of Finance, College of Commerce and Business Administration, Jacksonville State University. B.S., University of North Alabama; M.P.A., Jacksonville State University; J.D., *magna cum laude*, The University of Alabama School of Law; Ph.D., Auburn University.

1. For a discussion of the political battles over recent bankruptcy reform, see generally Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091 (2004); Robert J. Landry, III, *The Policy and Forces Behind Consumer Bankruptcy Reform: A Classic Battle over Problem Definition*, 33 U. MEM. L. REV. 509 (2003).

2. For a detailed discussion of the legislative history, see generally Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005).

3. Pub. L. No. 109-8, 119 Stat. 23 (2005).

4. The bill was passed by the Senate on March 10, 2005, and the House of Representatives on April 14, 2005. HON. WILLIAMS HOUSTON BROWN & LAWRENCE R. AHERN III, 2005 BANKRUPTCY REFORM LEGISLATION WITH ANALYSIS 11 (2005).

5. Richard Levin & Alesia Ranney-Marinelli, *The Creeping Repeal of Chapter 11: The Significant Business Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 603, 603 (2005) ("Most press coverage of the Bankruptcy Abuse Protection Act of 2005 (BAPCPA) has focused on the provisions affecting consumer debtors."); Charles J. Tabb, *The Brave New World of Bankruptcy Preferences*, 13 AM. BANKR. INST. L. REV. 425, 425 (2005) ("While the consumer amendments garnered the lions' share of public attention, significant changes were made to almost every area of bankruptcy law.").

6. Essentially, the means test is a methodology to determine if a Chapter 7 debtor can fund a plan under chapter 13, and, if so, dismiss the case or to convert the case to Chapter 13. Richard L. Wiener, Susan Block-Lieb, Karen Gross & Corinne Baron-Donovan, *Unwrapping Assumptions: Applying Social Analytic Jurisprudence to Consumer Bankruptcy Education Requirements and Policy*, 79 AM. BANKR. L.J. 453, 458 (2005) ("BAPCPA seeks to curb access . . . to chapter 7 . . . by imposing an income-based test intended to insure that only those individual debtors who could not repay their unsecured debt through a repayment plan are entitled to access chapter 7."). For a detailed explanation of the mechanics of the means test, see generally Robert J. Landry, III & Nancy Hisey Mardis, *Consumer Bankruptcy Reform: Debtors' Prison Without Bars or "Just Desserts" for Deadbeats?*, 36 GOLDEN GATE

important changes are a host of changes to the Bankruptcy Code (Code)⁷ applicable in individual Chapter 11 cases.⁸ Congress has, whether intentionally or not, made individual Chapter 11 cases operate in ways very similar to Chapter 13 cases.⁹ In several respects, individual Chapter 11 cases can now be characterized as “big Chapter 13” cases, with some big problems.¹⁰

The changes applicable to individual Chapter 11 cases are important for several reasons. First, just as the “means-test” approach to consumer

U. L. REV. 91, 107–12 (2006); Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231 (2005); Landry and Mardis provide the following summary of the means test:

If a debtor can pay \$100 a month and has \$24,000 in unsecured debt, the bankruptcy filing will be presumed an abuse of Chapter 7. Over a [sixty]-month period[,] this will fund a repayment plan with \$6,000, which is [twenty-five percent] of the unsecured general debt. Then, on the high end, if the debtor has \$166.66 a month to pay and has at least \$39,998.40 in general unsecured debt, it will also be presumed to be an abuse of Chapter 7. Over a [sixty]-month period[,] this will fund a repayment plan with \$9,999.60, which is [twenty-five percent] of the unsecured general debt.

Landry & Mardis, *supra*, at 109–10. If the case is presumed an abuse and the debtor does not rebut the presumption, the case will be dismissed, unless the debtor voluntarily converts the case to one under Chapter 11 or Chapter 13. *Id.* at 108.

7. 11 U.S.C. §§ 101–1527 (2006). Unless otherwise noted, all references to Bankruptcy Code, Code, or section are to Title 11 of the United States Code, including amendments made by BAPCPA that will be codified.

8. In *Toibb v. Radloff*, the Supreme Court concluded that the Bankruptcy Code permits individual debtors not engaged in business to file for protection under Chapter 11. 501 U.S. 157, 166 (1991).

9. See, e.g., Eugene R. Wedoff, Major Effects of the Consumer Provisions of the 2005 Bankruptcy Reform Legislation 28 (July 11, 2005) (unpublished manuscript, on file with the author) Judge Wedoff recognized that “[i]n several different respects, Chapter 11 is modified for cases brought by individuals so as to make the case much more like one under Chapter 13.” *Id.* He points to four specific Code provisions amended by or added by the BAPCPA to illustrate his assertion: 11 U.S.C. § 1115 (modifying property of the estate); 11 U.S.C. § 1123(a)(8) (funding of plans from individual debtor’s earnings); 11 U.S.C. § 1129(a)(5) (imposing a best efforts test); and 11 U.S.C. § 1141(d)(5) (discharge in individual Chapter 11s delayed until completion of plan). *Id.*; see also Bart B. Burnett, *Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 upon Individual Chapter 11 Debtor Cases*, American Bankruptcy Institute’s 11th Annual Rocky Mountain Bankruptcy Conference, Jan. 26–28, 2006, at 1 (on file with author) (“[T]he new Act will arguably bring a Chapter 11 case for individuals more in line with that of a case under Chapter 13.”). Similar inferences can be drawn from analysis of prior versions of the bankruptcy reform. Randolph J. Haines & William L. Norton, *Summary of the Bankruptcy Reform Act of 2001*, NORTON BANKR. REFORM ACT NEWSL., May 10, 2001, available at 2002 WL 533346, *7 (“Chapter 11 will be amended to add a new section for individuals to provide similar provisions in individual Chapter 11 cases that currently exist in Chapter 13 cases.”).

10. For an excellent overview of the problems with the amendments to individual Chapter 11 debtors, see Bruce A. Markell, *The Sub Rosa Subchapter: Individual Debtors in Chapter 11 After BAPCPA*, U. ILL. L. REV. (forthcoming), available at <http://ssrn.com/abstract=893582> (last visited Feb. 26, 2007).

bankruptcy may limit the options available to individual consumer debtors under Chapters 7 and 13, the changes to individual Chapter 11 cases in some respects limit the flexibility available under the Code for individual Chapter 11 debtors.¹¹ One of the hallmarks of Chapter 11 has been its flexibility to deal with financial troubles without the rigid deadlines or rules found in many aspects of the Chapter 11 process itself. This flexibility allows Chapter 11 debtors to formulate plans that fit their situation, subject to minimum legal standards and safeguards of other interested parties and creditors, on a time frame consistent with the complexity and requirements of the case. Thus, limiting flexibility may have a significant detrimental impact on the utility of Chapter 11 for individual debtors.

Second, Chapter 11 cases are often filed by individual debtors. A recent study found that about fifty-five percent of all Chapter 11s in a mainly rural region were filed by individuals.¹² Other studies have estimated that individual Chapter 11s represent as little as ten to fifteen percent of all Chapter 11 filings.¹³ Still other studies have estimated the percentage of individual Chapter 11s at about thirty-six percent.¹⁴ Table 1 sets forth the total number of filings, the total number of Chapter 11s, and the estimated number of individual Chapter 11s based on the range of estimates in prior research. Regardless of the exact percentage individual Chapter 11s comprise of the total number of Chapter 11s, they represent a significant number of petitions annually.¹⁵ Some have theorized that in the post-BAPCPA era, the number of individual Chapter 11 cases may rise due to the changes made to

11. That flexibility is important when we consider the role that bankruptcy plays, especially in individual Chapter 11 cases, as a safety valve to financial distress. Professor Kropp recognized this role in consumer bankruptcy law, but his observation is equally appropriate to individual Chapter 11 cases, consumer as well as business. See Steven H. Kropp, *The Safety Valve Status of Consumer Bankruptcy Law: The Decline of Unions as a Partial Explanation for the Dramatic Increase in Consumer Bankruptcies*, 7 VA. J. SOC. POL'Y & L. 1, 4-5 (1999).

12. A recent study of all Chapter 11 cases from 1998 to 2002 in the Eastern Division of the Northern District of Alabama, a nine-county region, reported the characteristics of Chapter 11 cases filed. Robert J. Landry, III, Bill Scroggins & Bill Fielding, *Proposed Chapter 11 Reform: An Application of Economic Analysis in the Evaluation of Small Business Debtor*, 30 J. BUS. & ECON. PERSP. 27, 30 (2004) (unpublished LSF Study, on file with the author). Relying on the data collected in the LSF Study, there were ninety-two Chapter 11 cases filed over the five-year period. *Id.* Forty-one of the filings (44.6%) were corporations or other legal entities. *Id.* The remaining fifty-one cases (55.4%) were either individual or joint cases.

13. Markell, *supra* note 10, at 1 (citing Ed Flynn, *Bankruptcy by the Numbers: Who Is Filing Chapter 11?*, 18 AM. BANKR. INST. L. REV. 30 (1999)).

14. *Id.* (citing Elizabeth Warren & Jay L. Westbrook, *Financial Characteristics of Business in Bankruptcy*, 73 AM. BANKR. L.J. 303, 336-39 (1999)).

15. *Id.* at 2 ("This means that last year, which saw an all-time low of some 6,600 [C]hapter 11 filings, that at least 660, and maybe as many as 2375[] individuals filed [C]hapter 11 during the twelve months end[ing in] September 2005.").

Chapters 7 and 13.¹⁶ Regardless of the exact number of individual Chapter 11s, the modifications to individual Chapter 11 cases will impact a significant number of future Chapter 11 cases.

Estimated Individual Chapter 11 Filings: 1980–2005¹⁷					
Year	Total	Chapt. 11	Est. Indiv. Chapt. 11s		
	Filings	Filings	Low	Mid	High
1980	331,265	6,753	675	2,431	3,741
1981	363,946	10,042	1,004	3,615	5,563
1982	380,252	18,821	1,882	6,776	10,427
1983	348,881	20,284	2,028	7,302	11,237
1984	348,521	20,325	2,033	7,317	11,260
1985	412,510	23,376	2,338	8,415	12,950
1986	530,438	24,773	2,477	8,918	13,724
1987	577,999	20,078	2,008	7,228	11,123
1988	613,465	17,684	1,768	6,366	9,797
1989	679,461	18,281	1,828	6,581	10,128
1990	782,960	20,783	2,078	7,482	11,514
1991	943,987	23,989	2,399	8,636	13,290
1992	971,517	22,634	2,263	8,148	12,539
1993	875,202	19,174	1,917	6,903	10,622
1994	832,829	14,773	1,477	5,318	8,184
1995	926,601	12,904	1,290	4,645	7,149
1996	1,178,555	11,911	1,191	4,288	6,599
1997	1,404,145	10,765	1,077	3,875	5,964
1998	1,442,549	8,386	839	3,019	4,646
1999	1,319,465	9,315	932	3,353	5,161
2000	1,253,444	9,884	988	3,558	5,476
2001	1,492,129	11,424	1,142	4,113	6,329
2002	1,577,651	11,270	1,127	4,057	6,244
2003	1,660,245	9,404	940	3,385	5,210
2004	1,597,462	10,132	1,013	3,648	5,613
2005	2,078,415	6,800	680	2,448	3,767
Source: Administrative Office of U.S. Courts					

16. Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 589 (2005) (“[T]he new means test for filing a Chapter 7 case coupled with the unchanged eligibility requirements for Chapter 13 may result in many more individual Chapter 11 cases being filed.”).

17. Estimated individual Chapter 11 filings are based on various estimates in prior research. The low, mid, and high estimates are ten, thirty-six, and fifty-five percent. See *supra* notes 12–16 and accompanying text.

Third, beyond the direct impact of these changes on individual Chapter 11 debtors, many of these changes will effect the panoply of the players in the Chapter 11 arena, including creditors, trustees, the United States Bankruptcy Administrator (BA), the United States Trustee (UST),¹⁸ judges, and other interested parties.¹⁹ Finally, and perhaps most importantly, the changes to individual Chapter 11 debtors arguably represent a shift in bankruptcy policy back to involuntary servitude²⁰ and “debtors’ prisons”²¹ for individual Chapter 11 debtors.

Although the focus of this paper is on changes to the Bankruptcy Code that impact individual Chapter 11 cases, readers should be cognizant that beyond the changes specific to individual Chapter 11 cases, changes in three other aspects of the Bankruptcy Code by the BAPCPA, which are beyond the scope of this paper, must be considered.²² First, many of the changes that apply to all cases involving individual debtors regardless of chapter, such as changes to exemptions,²³ the automatic stay,²⁴ pre-petition credit counsel-

18. The United States Trustee program operates in all judicial districts other than those in Alabama and North Carolina, which have the United States Bankruptcy Administrator program. Both agencies perform largely the same functions in the administration and oversight of the bankruptcy system. For a discussion of the role and function of both programs, see Dan J. Schulman, *Constitutionality of the United States Trustee/Bankruptcy Administrator Programs*, 4 J. BANKR. L. & PRAC. 319 (1995); Dan J. Schulman, *The Constitution, Interest Groups, and the Requirement of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs*, 74 NEB. L. REV. 91 (1995).

19. For a brief examination of the “panoply” of parties in a Chapter 11 case, see Robert J. Landry, III & James R. Higdon, *Ethical Considerations in Appointment and Compensation of an Attorney for a Chapter 11 Debtor-in-Possession*, 66 MISS. L.J. 355, 355–56 (1996).

20. Other scholars have raised the notion of the reforms to individual Chapter 11 as a return to involuntary servitude. See, e.g., Robert J. Keach, *Dead Man Filing Redux: Is the New Individual Chapter Eleven Unconstitutional?*, 13 AM. BANKR. INST. L. REV. 483, 502 (2005) (citations omitted).

21. Some scholars have argued that the BAPCPA is a return to an archaic view of consumer bankruptcy as a “debtors’ prison.” See generally Landry & Mardis, *supra* note 6; John E. Matejkovic & Keith Ruckinski, *Bankruptcy “Reform”: The 21st Century’s Debtors’ Prison*, 12 AM. BANKR. INST. L. REV. 473 (2004).

22. For a concise overview of the major changes in the law, see generally WILLIAM HOUSTON BROWN & LAWRENCE AHERN III, 2005 BANKRUPTCY REFORM LEGISLATION WITH ANALYSIS (2005).

23. Individual debtors have exemption rights under the Code. See 11 U.S.C. § 522 (2006). The BAPCPA made various amendments to the exemption rights available to individual debtors. See *id.* For a detailed analysis of these changes and potential problems, see generally Lawrence R. Ahern, III, *Homestead and Other Exemptions Under the Bankruptcy Abuse Prevention and Consumer Protection Act: Observations on “Asset Protection” After 2005*, 13 AM. BANKR. INST. L. REV. 585 (2005); Margaret Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost*, 79 AM. BANKR. L.J. 397 (2005).

24. For an overview of the modifications to the automatic stay applicable to individual debtors, see generally Lisa A. Napoli, *The Not-So-Automatic Stay: Legislative Changes to the Automatic Stay in a Case Filed by or Against an Individual Debtor*, 79 AM. BANKR. L.J. 749 (2005).

ing,²⁵ and post-petition debtor education requirements in limited circumstances,²⁶ will apply to individual Chapter 11 cases. Second, changes that apply to Chapter 11 generally²⁷ also apply to individual Chapter 11 cases. And, third, the changes to small business cases²⁸ will likely apply to most individual Chapter 11 cases.²⁹

This article is organized by Bankruptcy Code sections amended by the BAPCPA³⁰ that specifically impact individual Chapter 11 cases. The major changes are examined, with an emphasis on those amendments that make individual Chapter 11 cases similar to Chapter 13. Potential problems with the changes, several of which have not been addressed in prior literature, are

25. Section 109(h) requires individual debtors, unless the debtor qualifies for a very limited exemption, to obtain pre-petition creditor counseling. See Landry & Mardis, *supra* note 6, at 106–07; Karen Gross & Susan Block-Lieb, *Empty Mandate or Opportunity for Innovation: Pre-Petition Credit Counseling and Post-Petition Financial Management Education*, 13 AM. BANKR. INST. L. REV. 549, 550 (2005).

26. Chapters 7 and 13 expressly require debtors to complete a post-petition debtor education course. 11 U.S.C. §§ 727(a)(11), 1328(g)(1) (2006). There is no corresponding, express provision for individual Chapter 11 debtors. Markell, *supra* note 10, at 15. However, individual Chapter 11 debtors are still required to have the post-petition debtor education course in order to obtain a discharge in limited circumstances. Under § 1141(d)(3)(C), if an individual debtor is liquidating all or substantially all of his or her assets, is not continuing in the operation of a business, and would be denied a discharge under § 727(a), then the Chapter 11 debtor would not be entitled to discharge. 11 U.S.C. § 1141(d)(3)(c) (2006). Section 727(a)(11) provides that the failure to complete debtor education after the filing of the petition is grounds for denial of a discharge. Therefore, in situations in which the individual debtor is liquidating all or substantially all of his or her assets and is not operating a business, then the individual debtor will need to complete post-petition debtor education. *Contra* Markell, *supra* note 10, at 15 (“[N]o such [financial] education requirement is applicable to chapter 11 debtors.”).

27. The BAPCPA has several changes that are applicable to all Chapter 11 debtors, whether individual or a legal entity. See 11 U.S.C. §§ 1102(a)(4), (b)(3); 1104(a)(3), (b)(2)(A)–(C), (e); 1121(d)(1), (2); 1124(2)(D); 1125(a), (f), (g); and 1146(a)–(b) (2006).

28. 11 U.S.C. § 101(51C) (2006) (“The term ‘small business case’ means a case filed under chapter 11 of this title in which the debtor is a small business debtor.”).

29. For example, new § 1116 and amended § 1121 that address small business debtors will quite often apply to individual Chapter 11 debtors. Section 101(51D)(A) defines a small business debtor as “a person engaged in commercial or business activities.” Section 101(41) defines a person so as to include an individual as well as entities. As such, the small business debtor provisions are applicable to individual Chapter 11 debtors, provided they meet all the statutory requirements of § 101(51D): they are a person engaged in commercial or business activities (excluding owning or operating real estate property or related activities as a primary activity), have debt in excess of \$2 million, and meet committee requirements.

For a primer on the changes applicable to small business debtors, see generally Thomas E. Carlson & Jennifer Frasier Hayes, *The Small Business Provisions of the 2005 Bankruptcy Amendments*, 79 AM. BANKR. L.J. 645 (2005); James B. Haines, Jr. & Philip J. Hendel, *No Easy Answers: Small Business Bankruptcies After BAPCPA*, 47 B.C. L. REV. 71 (2005).

30. Most of the changes specific to individual Chapter 11 debtors are in section 321 of the BAPCPA, but some are included in the general small business provisions.

highlighted. The impact of these changes on Chapter 11 effectively addressing the financial distress of individual debtors is unknown.³¹ Empirical research examining the impact of the changes to individual Chapter 11 cases made by the BAPCPA is needed to help guide policymakers. Empirical research should not be conducted, however, without a clear examination of the potential problems with the current legislative framework.³² This paper intends to serve as a foundation and guide for future empirical research in the area of individual Chapter 11s.

II. IMPORTANT CHANGES

A. New Chapter 11 Trustee Duties

Section 219 of the BAPCPA adds additional duties to Chapter 11 trustees,³³ applicable to individual Chapter 11 debtors-in-possession under § 1107(a),³⁴ that mirror provisions added for Chapter 7, 12, and 13 trustees.³⁵ Sections 1106(a)(8) and (c)³⁶ require Chapter 11 trustees to provide several

31. Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 170 (2005) (recognizing that the “real life” impact of bankruptcy reform is unclear).

32. Further research on Chapter 11 should not focus solely on large or business organizational filings, but should also examine the individual Chapter 11 debtor and do so with “a more careful, textured view of the bankruptcy system.” See, e.g., Katherine Porter, *Going Broke the Hard Way: The Economics of Rural Failure*, 2005 WIS. L. REV. 969, 971–72 (citations omitted). Professor Porter makes the observation that bankruptcy research needs to be more focused and consider specific demographic and other attributes of those seeking relief. *Id.* Future empirical research on individual Chapter 11s should be cognizant of the specific attributes of debtors and other specific factors leading to the filing. *Id.*

33. Section 1104 provides for the appointment of a Chapter 11 trustee for cause, if the appointment is in the interest of the parties or if grounds exist for dismissal or conversion. 11 U.S.C. § 1104(a)(1), (3) (2006). In most Chapter 11 cases, there is no trustee; rather, the debtor operates as a debtor-in-possession under § 1107(a).

34. 11 U.S.C. § 1107(a) (2006) (debtors-in-possession generally have the rights and duties of a Chapter 11 trustee, including the noticing domestic support requirements added by the BAPCPA).

35. See 11 U.S.C. §§ 704(a)(10), 1201(a)(6), 1302(d)(1) (2006).

36. Section 1106(a)(8) provides that a trustee must provide notice if there is a claim for a domestic support obligation, as required by the new § 1106(c). Section 1106(c) provides as follows:

(c)(1) In a case described in subsection (a)(8) to which subsection (a)(8) applies, the trustee shall—

(A)(i) provide written notice to the holder of the claim described in subsection (a)(8) of such claim and of the right of such holder to use the services of the State child support enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder resides, for assistance in collecting child support during and after the case under this title; and

notices. First, the Chapter 11 trustee must provide written notice to a domestic support creditor of the right to use child support enforcement agencies.³⁷ Second, the Chapter 11 trustee is required to provide written notice of such domestic support obligations, as well as contact information about the claimholder, to the state child support enforcement agency.³⁸ Third, at the time of discharge, the Chapter 11 trustee must provide notice to the child support claimholder and the state child support enforcement agency of the discharge, contact information regarding the debtor and debtor's employer, and the name of creditors whose claims are not discharged under § 523(a), (2), (4), or (14A), or reaffirmed.³⁹

The failure to comply with these complex notice provisions can present problems for individual Chapter 11 debtors in at least three contexts. First, it may very well constitute a basis for dismissal or conversion of a case for "cause" under § 1112, particularly if the Chapter 11 case is primarily being used to deal with domestic support obligations.⁴⁰ Second, it does not appear that a plan can be confirmed in cases in which the individual debtor has not

(ii) include in the notice required by clause (i) the address and telephone number of such State child support enforcement agency;

(B)(i) provide written notice to such State child support enforcement agency of such claim; and

(ii) include in the notice required by clause (i) the name, address, and telephone number of such holder; and

(C) at such time as the debtor is granted a discharge under section 1141, provide written notice to such holder and to such State child support enforcement agency of—

(i) the granting of the discharge;

(ii) the last recent known address of the debtor;

(iii) the last recent known name and address of the debtor's employer; and

(iv) the name of each creditor that holds a claim that—

(I) is not discharged under paragraph (2), (4), or (14A) of section 523(a); or

(II) was reaffirmed by the debtor under section 524(c).

(2)(A) The holder of a claim described in subsection (a)(8) or the State child enforcement support agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.

(B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under subparagraph (A) shall not be liable by reason of making such disclosure.

11 U.S.C. § 1106(c) (2006).

37. *Id.* § 1106(c)(1)(A)(i)–(ii).

38. *Id.* § 1106(c)(1)(B)(i)–(ii).

39. *Id.* § 1106(c)(1)(C)(i)–(iv). This is in effect a legal opinion, and it is likely that there may be litigation if the notices and opinions are considered wrong. This can be quite problematic for trustees in Chapters 7, 11, 12, and 13, as well as individual Chapter 11 debtors-in-possession. Hopefully, absent gross negligence, trustees and debtors-in-possession will not be held liable when the content of the notice is incorrect or notice is not properly conveyed.

40. See *infra* notes 49–52 and accompanying text.

complied with these notice requirements, and the individual debtor is the plan proponent.⁴¹ Third, at the time the individual debtor is granted a discharge, which is now upon completion of payments under a plan as discussed below,⁴² a party in interest may be able to object to a final decree and closing of the case if the noticing requirements have not been met.⁴³

Through the notice requirements, as well as other statutory changes, Congress has attempted to elevate the protections afforded to domestic support obligations in bankruptcy.⁴⁴ Whether these statutory changes will have any meaningful, positive impact in this area is a matter of debate.⁴⁵ For these changes to have the opportunity for a positive impact, the UST and BA will need to aggressively ensure that the requirements regarding domestic support obligations are followed by debtors. This is an important role for the UST and BA because enforcement will largely be left to their discretion in light of the fact that in most Chapter 11 cases, the noticing duties will be the debtor-in-possession's, since trustees are normally not appointed.⁴⁶

41. See *infra* note 87–89 and accompanying text.

42. See *infra* notes 132–33 and accompanying text.

43. See *supra* note 39 and accompanying text.

44. See, e.g., *In re Gonzalez*, 342 B.R. 165, 169–70 (Bankr. S.D.N.Y. 2006). The bankruptcy court succinctly summarized the treatment of domestic support obligations as follows:

Domestic support obligations . . . have recently been elevated to first in priority among unsecured debts pursuant to the 2005 Amendments to the Bankruptcy Code. See 11 U.S.C. §§ 523(a), 507(a). The Bankruptcy Code, as amended, offers additional protections to children by, *inter alia*, (i) rendering the failure to pay post-petition domestic support obligations cause for conversion or dismissal[,] (ii) requiring that individual plans of reorganization provide for the payment in full of post-petition domestic support obligations, and (iii) providing exceptions to the automatic stay to permit the commencement or continuation of certain proceedings related to the enforcement of a domestic support obligation. 11 U.S.C. §§ 362(b)(2)(A), 1112(b)(4)(O), 1129(a)(14), 1208(c), 1225(a)(7), 1307(c)(11), 1325(a)(8).

Id.

45. For an analysis of how the BAPCPA may actually harm the interests of women and children, often the parties impacted by domestic support obligations, see generally Peter C. Alexander, “*Herstory*” Repeats: *The Bankruptcy Code Harms Women and Children*, 13 AM. BANKR. INST. L. REV. 571 (2005).

46. See, e.g., *In re Texasoil Enters., Inc.*, 296 B.R. 431, 435 (Bankr. N.D. Tex. 2003) (appointing a trustee is a draconian measure); *In re Microwave Prods. of Am., Inc.*, 102 B.R. 666, 670 (Bankr. W.D. Tenn. 1989) (“The appointment of a trustee is the exception rather than the rule in chapter 11 cases, and is an extraordinary remedy”); *In re Tyler*, 18 B.R. 574, 577 (Bankr. S.D. Fla. 1982) (recognizing that authorities agree that appointing a Chapter 11 trustee is an “extraordinary remedy”); see also Jeffery A. Deller Esq., *Examining the Examiner: Waiver of the Attorney-Client Privilege and the Outer Limits of an Examiner’s Powers in Bankruptcy*, 43 DUQ. L. REV. 187, 188 (2005) (“It is widely recognized that the appointment of a trustee or examiner in a Chapter 11 bankruptcy is an extremely rare event.”).

B. Grounds for Dismissal or Conversion

Section 442 of the BAPCPA expands the grounds for dismissal or conversion by amending § 1112. Individual Chapter 11 debtors are subject to the general grounds for dismissal or conversion of a case found in the amended § 1112.⁴⁷ These enumerated grounds are largely a codification of the case law that developed under the Code, which defined “cause.”⁴⁸

47. 11 U.S.C. § 1112 provides in pertinent part as follows:

(b)(1) Except as provided in paragraph (2) of this subsection, subsection (c) of this section, and section 1104(a)(3), on request of a party in interest, and after notice and a hearing, absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, if the movant establishes cause.

(2) The relief provided in paragraph (1) shall not be granted absent unusual circumstances specifically identified by the court that establish that such relief is not in the best interests of creditors and the estate, if the debtor or another party in interest objects and establishes that—

(A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and

(B) the grounds for granting such relief include an act or omission of the debtor other than under paragraph (4)(A)—

(i) for which there exists a reasonable justification for the act or omission; and

(ii) that will be cured within a reasonable period of time fixed by the court.

(3) The court shall commence the hearing on a motion under this subsection not later than [thirty] days after filing of the motion, and shall decide the motion not later than [fifteen] days after commencement of such hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits established by this paragraph.

(4) For purposes of this subsection, the term ‘cause’ includes—

(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;

(B) gross mismanagement of the estate;

(C) failure to maintain appropriate insurance that poses a risk to the estate or to the public;

(D) unauthorized use of cash collateral substantially harmful to [one] or more creditors;

(E) failure to comply with an order of the court;

(F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;

(G) failure to attend the meeting of creditors convened under section 341(a) or an examination ordered under rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor;

(H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any);

Beyond those general grounds for dismissal, the new § 1112(b)(4)(P)⁴⁹ applies specifically to individual Chapter 11 debtors, and is not merely a codification of prior case law interpreting “cause.” This provision, which is identical to the new § 1307(c)(11)⁵⁰ applicable to Chapter 13 cases, provides that “cause” includes the failure of the debtor to pay post-petition domestic support obligations.⁵¹ Some scholars theorize that this provision will decrease individual Chapter 11 filings designed to adjust alimony or support obligations.⁵²

Even if a debtor is current with post-petition domestic support obligations, as noted above, the failure of individual Chapter 11 debtors to comply with the new notice requirements of § 1106 may rise to a level of “cause.”⁵³ In light of the strong policy throughout the BAPCPA emphasizing the importance of domestic support obligations, it seems that failing to provide the required notices, particularly in a case in which the primary purpose of the filing is to address domestic support obligations, may rise to a level of “cause.” Even if failing to provide the required notices does not rise to a level of “cause,” the failure to provide adequate notice may actually fall within the parameters of the new § 1112(b)(f), which provides for the dis-

(I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;

(J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;

(K) failure to pay any fees or charges required under chapter 123 of title 28;

(L) revocation of an order of confirmation under section 1144;

(M) inability to effectuate substantial consummation of a confirmed plan;

(N) material default by the debtor with respect to a confirmed plan;

(O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan

11 U.S.C. § 1112(b) (2006).

48. For example, prior to passage of the BAPCPA, courts found that “cause” under the prior versions of § 1112(b) was satisfied when a debtor failed to timely file operating reports, and for the failure to pay post-petition taxes. *In re Whitehurst*, 198 B.R. 981, 983–84 (Bankr. N.D. Ala. 1996). These two examples of “cause” are now specifically included by the BAPCPA. 11 U.S.C. § 1112(b)(2)(F) & (I).

49. 11 U.S.C. § 1112(b)(4)(P) (“[f]ailure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.”).

50. *Id.* § 1307(c)(11).

51. *Id.* § 1112(b)(4)(P).

52. BROWN & AHERN, *supra* note 21, § 6:17 (“Many individual chapter 11 cases have been filed for a purpose of adjusting alimony or support obligations, and the changes in the Code concerning domestic support obligations and their nondischargeability will decrease the likelihood of success of such filings.”).

53. Prior to the passage of the BAPCPA courts had discretion to find “cause” even if a specific ground listed in § 1112(b) is not found in a particular case. *In re TCR of Denver, LLC*, 338 B.R. 494, 500 (Bankr. D. Colo. 2006). Courts, may in their discretion, find that failure to comply with the new noticing requirements of § 1106 constitute cause in a case, particularly if the case is filed largely to address domestic support obligations.

missal or conversion of a case for the unexcused failure of a debtor to abide by the reporting and filing requirements.⁵⁴

Beyond the expanded grounds for dismissal or conversion highlighted above, the changes have greatly curtailed the discretion of courts in determining to dismiss or convert a case. Congress replaced the language "may convert . . . or dismiss a case . . . for cause"⁵⁵ with "shall convert . . . or dismiss . . . if the movant establishes cause."⁵⁶ 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.⁵⁷ The legislative history to the original language in § 1112(b)(1) expressly recognized that courts have this discretion.⁵⁸ This is a significant change from prior law that makes Chapter 11 less flexible than Chapter 13 because the dismissal and conversion provision for Chapter 13, § 1307(c), was not amended by the BAPCPA and uses the permissive language "may convert . . . or may dismiss . . . for cause."⁵⁹

If there is an objection by the debtor or party in interest, courts have limited discretion not to dismiss or convert upon a showing of cause.⁶⁰ With an objection, the court must specifically identify "unusual circumstances" that show dismissal or conversion is not in the best interest of the estate.⁶¹ Further, the objecting party must establish (1) that there is a reasonable likelihood that a plan will be filed in time fixed by the Code or a reasonable time, (2) that there is a reasonable justification for the debtor's act or omissions, and (3) that the debtor will be cured in a reasonable time fixed by the court.⁶² It will be interesting to see the case law develop applying this provision and whether courts give a limited or expansive meaning to "unusual circumstances."

54. 11 U.S.C. § 1112(b)(f) (2005).

55. *Id.* § 1112(b)(1).

56. *Id.*

57. See, e.g., *In re RCR of Denver, LLC*, 338 B.R. 494, 498 (Bankr. D. Colo. 2006) ("[I]t appears that Congress has purposefully limited the role of this [c]ourt in deciding issues of conversion or dismissal, such that this [c]ourt has no choice, and no discretion, in that it 'shall' dismiss or convert a case under Chapter 11 if the elements for 'cause' are shown under 11 U.S.C. § 1112(b)(4).").

58. See House Report (Reform Act of 1978) ("Subsection (b) gives wide discretion to the court to make an appropriate disposition of the case when a party in interest requests. The court is permitted to convert . . . or dismiss The court will be able to . . . use its equitable powers to reach an appropriate result in individual cases."). S. REP. NO. 989, 95th Cong., 2d Sess. 117-18 (1978).

59. 11 U.S.C. § 1307(c). The BAPCPA does limit the discretion to dismiss or convert a case when a Chapter 13 debtor fails to file a tax return as required by new § 1308. See *id.* § 1307(e).

60. 11 U.S.C. § 1112(b)(2) (2006).

61. *Id.* § 1112(b)(1).

62. *Id.* § 1112(b)(2)(A)-(B).

A recent decision pertaining to the amended § 1112(b) illustrates another potential problem with dismissal or conversions under Chapter 11. In *In re Denver*,⁶³ the bankruptcy court was presented with a corporate debtor's motion to dismiss for cause under § 1112(b)(4).⁶⁴ The court had to interpret the amended § 1112(b)(4)(O), which lists items for "cause" with the conjunctive "and" instead of the disjunctive "or," as used under the prior version of the statute.⁶⁵ Based on the conjunctive language, the specific issue was whether the debtor had to show all of the elements of "cause."⁶⁶ As absurdly as the statute reads, a plain reading leads to the result that a "perfect storm" of all the elements constituting cause is required for dismissal under § 1112(b).⁶⁷ The court concluded that such a reading would render dismissal under § 1112(b) a nullity.⁶⁸ Despite the conjunctive language, the court concluded that the debtor did not have to show that all the elements of "cause" were met in order to have the case dismissed.⁶⁹ Although this one court interpreted the elements to be disjunctive despite the plain meaning of the statute, it is not clear that all courts will adopt such a permissive interpretation of the requirements for cause, making the debtor's ability to have a case dismissed uncertain in light of the new law.

C. Property of the Estate

Section 321(a) of the BAPCPA adds § 1115⁷⁰ to the Bankruptcy Code. Section 1115 provides that the estate for an individual Chapter 11 debtor includes all property described in § 541 acquired after the commencement of the case and post-petition earning up until the closing, dismissal, or conver-

63. *In re RCR of Denver*, 338 B.R. 494 (Bankr. D. Colo. 2006).

64. *Id.* at 497.

65. *Id.* at 498.

66. *Id.* at 497.

67. *Id.* at 499.

68. *Id.*

69. *In re Denver*, 338 B.R. at 500–01.

70. Section 1115 provides as follows:

(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.

(b) Except as provided in section 1104 or a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

11 U.S.C. § 1115 (2006).

sion of the case.⁷¹ This statutory addition mirrors the definition of property of the estate in Chapter 13⁷² and treats post-petition earnings of an individual debtor under Chapter 11 and 13 the same. Prior to the BAPCPA, an individual Chapter 11 debtor's post-petition earnings were not property of the estate.⁷³ The practical impact of the prior definition of property of the estate was limited if an individual Chapter 11 debtor sought confirmation of a plan. Even though post-petition earnings were not property of the estate, those earnings often would be needed to fund a plan,⁷⁴ and the use of those post-petition earnings in funding a plan impacted the good faith requirements for confirmation.⁷⁵ The difficulty under the prior law was that if the case was converted, then those post-petition earnings, up to conversion, were not part of the Chapter 7 estate.⁷⁶ This amendment prevents this from happening. The more important aspect of this change arises in the context of discharge and case closing, as discussed below in Section VIII, and it raises serious constitutional questions, as discussed below in Section V.

D. Contents of the Plan

Section 321(b) of BAPCPA amends Bankruptcy Code § 1123(a) by adding subsection (8).⁷⁷ The new § 1123(a)(8) states that an individual Chapter 11 debtor's plan should provide for payment to creditors from all or

71. *Id.*

72. *Id.* § 1306(a).

73. Property of the estate is broad and includes "all legal or equitable interests of the debtor in property as of the commencement of the case." *Id.* § 541(a)(1). Section 541 goes on to expressly include in the estate "[p]roceeds, product, offspring, rents, and profits of or from property of the estate," subject to one limitation applicable to individual debtors: "except such as are earned from services performed by an individual debtor after the commencement of the case." *Id.* § 541(a)(6). As such, the earnings of an individual Chapter 11 debtor were excluded from the Chapter 11 estate prior to the enactment of the BAPCPA. *Id.*

74. Prior to the BAPCPA, a debtor at confirmation would need to show feasibility of a plan. 11 U.S.C. § 1129(a)(11). Courts consider the use of post-petition wages in the context of feasibility, as well as good faith and other confirmation issues. *See Roland v. Unum Life Ins. Co. of Am.*, 223 B.R. 499, 506 (E.D. Va. 1998).

75. An objection to confirmation could be raised based on a lack of good faith if the debtor was not funding a plan and repaying creditors to the fullest extent possible with post-petition earnings.

76. *See In re Griseuk*, 165 B.R. 956, 959 (Bankr. M.D. Fla. 1994) ("[P]roperty interests acquired after the filing of [the Debtor's] Chapter 11 petition and prior to the conversion to Chapter 7 will be excluded from the Chapters 11 and 7 bankruptcy estates *only to the extent* that such property can be considered 'earnings from services performed . . . after the commencement of the case.'" 11 U.S.C. § 541(a)(6) (emphasis added).

77. Section 1123(a)(8) states that in individual Chapter 11 cases the plan shall "provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan." 11 U.S.C. § 1123.

a portion of the debtor's earnings for personal services after the commencement of the case or other future income necessary to execute the plan.⁷⁸ This provision is essentially the same requirement as is contained in § 1322(a)(1).⁷⁹ The addition of § 1123(a)(8) does not change in any practical way what the practice was prior to the BAPCPA because individual Chapter 11 debtors' earnings were still a relevant consideration at the time of confirmation of a plan.⁸⁰ The funding of a plan is critical to the feasibility analysis⁸¹ and good faith requirement⁸² necessary to achieve confirmation of a plan. As such, in individual Chapter 11 cases, an individual debtor prior to the BAPCPA often devoted post-petition earnings necessary to execute the plan.⁸³ The new § 1123(a)(8) expressly requires this and, when coupled with other provisions as highlighted below, raises serious constitutional concerns.⁸⁴

Additionally, several other areas will now need to be carefully addressed in the disclosure statement and plan. First, the disclosure statement will need to address new domestic support obligations, including the notice requirements and the status of the post-petition domestic support obligations. Second, as discussed in the next section, the plan should provide for a scenario in which an unsecured claimholder objects, and the mandates of the new § 1129(a)(15) are triggered. To be prepared to address this new provision, a more detailed feasibility analysis that considers the requirements of § 1325(b) will need to be included. Third, the new requirements for discharge and case closing, as discussed in Section VIII, need to be addressed in the disclosure statement and plan.

E. Confirmation of the Plan

1. *Domestic Support Obligations*

Section 213 of the BAPCPA adds an additional confirmation requirement for individual Chapter 11 debtors that owe post-petition domestic sup-

78. *Id.* § 1123(a)(8).

79. *Id.* § 1322(a)(1) ("The plan shall—(1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan . . .").

80. *Roland v. Unum Life Ins. Co. of Am.*, 223 B.R. 499, 506 (E.D. Va. 1998).

81. 11 U.S.C. § 1129(a)(11).

82. *Id.* § 1129(a)(3) ("The plan has been proposed in good faith . . .").

83. Courts have generally not expressly required this to confirm a plan. *See Keach*, *supra* note 20, at 484–85 ("In most jurisdictions, there is no requirement to use such earnings to fund a plan of reorganization in the individual chapter 11 case. Some courts refused to confirm plans relying on future earnings for funding (and feasibility), reasoning that such confirmation orders, at the least, would be unenforceable.").

84. *See infra* Part II.E.2.b.

port obligations.⁸⁵ Individual Chapter 11 debtors may not obtain confirmation unless post-petition domestic support obligations are current. New § 1325(a)(8) places the same requirement for confirmation of Chapter 13 plans.⁸⁶

Additionally, although not expressly stated in the Code, it appears a plan cannot be confirmed in cases in which the individual debtor, who is also the plan proponent, has failed to comply with the notice requirements of § 1106(c).⁸⁷ Section 1129(a)(2) requires the plan proponent to comply with the applicable provisions of the Code.⁸⁸ Failure to provide the required notices by a plan proponent will likely constitute non-compliance with the provisions of the Code and block confirmation of a plan.⁸⁹

While some courts have likewise adopted a relatively strict interpretation of § 1129(a)(2),⁹⁰ other courts have adopted a more flexible approach to § 1129(a)(2), reserving its application to more serious violations of the Code.⁹¹ In light of the importance of domestic support obligations in the Code, however, failure to comply with the notice requirements would likely rise to a level that violates § 1129(a)(2).

85. Section 1129(a)(14) provides, "[I]f the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition." 11 U.S.C. § 1129(a)(14).

86. *Id.* § 1325(a)(8).

87. *See supra* notes 33–41 and accompanying text.

88. 11 U.S.C. § 1129(a)(2) ("The court shall confirm a plan only if all the following requirements are met: . . . (2) The proponent of the plan complies with the applicable provisions of this title.").

89. *See, e.g., In re Malkus, Inc.*, No. 03-07711-GLP, 2004 WL 3202212, at *3 (Bankr. M.D. Fla. Nov. 15, 2004) ("While § 1129(a)(2) is typically thought to address issues of plan solicitation and disclosure, debtor conduct [that] violates other Bankruptcy Code provisions may also warrant a finding that § 1129(a)(2) has not been met.").

90. *See, e.g., Cothran v. United States*, 45 B.R. 836, 838 (Bankr. S.D. Ga. 1984) (The court expressly concluded that a debtor's compliance with the applicable provisions of Chapter 11 and other Code provisions applicable to cases under Chapter 11 are a condition to confirmation of a plan in light of § 1129(a)(2). The court denied confirmation because of debtor's violation of § 363(c)(2) by spending cash proceeds from sale of collateral without court permission.); *In re Wermelskirchen*, 163 B.R. 793, 798 (Bankr. N.D. Ohio 1994) (failure to include all creditors in the debtor's schedules as required by § 521(1) constituted violation of § 1129(a)(2)).

91. *See In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 237 (Bankr. D.N.J. 2000). *See also In re Dow Corning Corp.*, 244 B.R. 721, 734 (Bankr. E.D. Mich. 1999); *In re Landing Assocs., Ltd.*, 157 B.R. 791, 810–11 (Bankr. W.D. Tex. 1993).

2. *Disposable Income Test*

a. A shift in policy

New § 1129(a)(15), added by section 321(c) of the BAPCPA, provides that when an allowed, unsecured claimholder objects to confirmation, the plan must provide one of the following.⁹² The plan should provide that the value of property distributed under the plan to that claimholder must be no less than the value of that unsecured claim.⁹³ If this requirement is not met, individual Chapter 11 debtors will be required to commit all disposable income to the plan over a five-year period, or a longer time frame if the plan so provides.⁹⁴ The five-year limit essentially provides a presumption of a five-year plan when an unsecured creditor objects and is not paid in full in individual Chapter 11 cases.⁹⁵

It is important to note that under Chapter 13, disposable income is defined in § 1325(b)(2).⁹⁶ As such, the analysis of what is disposable income

92. Section 1129(a)(15) provides as follows:

(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—

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(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 [five]-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).

93. *Id.* § 1129(a)(15)(A).

94. *Id.* § 1129(a)(15)(B).

95. See generally BROWN & AHERN, *supra* note 22.

96. 11 U.S.C. § 1325(b)(2) provides as follows:

(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 section 548(d)(3) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed [fifteen] percent of gross income of the debtor for the year in which the contributions are made; and

for confirmation of a plan in an individual Chapter 11 case will be essentially the same as in the confirmation of a Chapter 13 plan. Determining disposable income under § 1325(b)(2) requires reference to § 1325(b)(3),⁹⁷ which, in turn, references the § 707(b) analysis.⁹⁸ Therefore, the disposable income analysis in Chapter 13 brings in much of the analysis under the new § 707(b)(2).⁹⁹ Even attorneys that exclusively practice in the Chapter 11 arena will not be able to avoid many of the consumer-oriented changes to the Code made by the BAPCPA, at least in individual Chapter 11 cases.

This change represents a dramatic shift in Chapter 11 policy. The confirmation of a Chapter 11 plan is often the result of negotiation and is achieved only if the creditors vote that the plan meets the statutory requirements for confirmation.¹⁰⁰ In this process, some creditors may be subject to "cram-down" and forced to accept the plan.¹⁰¹ In effect, the Chapter 11 process operated as a type of "creditor democracy."¹⁰² The creditor democ-

(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).

97. 11 U.S.C. § 1325(b)(3) provides as follows:

(3) Amounts reasonably necessary to be expended under paragraph (2) shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by [twelve], greater than—

(A) in the case of a debtor in a household of [one] person, the median family income of the applicable State for [one] earner;

(B) in the case of a debtor in a household of [two], [three], or [four] individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding [four] individuals, the highest median family income of the applicable State for a family of [four] or fewer individuals, plus \$525 per month for each individual in excess of [four].

11 U.S.C. § 1325(b)(3).

98. See *id.* §§ 1325(b)(2) & (3), 707(b).

99. *Id.* § 707(b)(2).

100. Section 1129(a)(10) requires that at least one class of impaired creditors accept the plan. See *id.* § 1129(a)(10).

101. If one class of creditors has accepted the plan, § 1129(b) provides for the "cram-down" of the plan. See *id.* § 1129(b)(1)–(2).

102. Courts have recognized that the Bankruptcy Code in Chapter 11 reorganizations implies a policy of "creditor democracy." See *In re DRW Prop. Co.*, 54 B.R. 489, 497 (Bankr. N.D. Tex. 1985) ("Subchapter II of Chapter 11, 11 U.S.C. §§ 1121–29, delineates the basic machinery [that] Congress has provided for creditor democracy within the debtor reorganization process. These sections allow creditors to vote on proposals [that] will affect substantive rights for which they have contractually bargained."); see also *In re Mother Hubbard, Inc.*, 152 B.R. 189, 195 (Bankr. W.D. Mich. 1993) (recognizing the policy of creditor democracy through the Chapter 11 provisions permitting to file a competing plan and allowing creditors to cast ballots for plans); *In re Barrington Oaks Gen. P'ship*, 15 B.R. 952, 957 (Bankr. D. Utah 1981) (In the context of a Chapter 11 reorganization while discussing the absolute priority rule, the court "questioned whether this degree of judicial control [strikes] a

racy model of Chapter 11 is now replaced with the “single creditor modification rule” of § 1129(a)(15).¹⁰³

b. Constitutional concerns

The requirement of devoting post-petition earnings to fund a plan,¹⁰⁴ coupled with the new definition of property of the estate,¹⁰⁵ raises grave constitutional concerns for individual Chapter 11 cases.¹⁰⁶ Individual Chapter 11 cases can be filed as involuntary cases.¹⁰⁷ In an involuntary Chapter 11 case, a debtor could be forced to repay debt through his post-petition earnings, which arguably is peonage.¹⁰⁸ Peonage, a form of involuntary servitude, is forbidden by federal law¹⁰⁹ and may violate the Thirteenth Amendment’s prohibition of involuntary servitude and slavery.¹¹⁰ In the context of an involuntary, individual Chapter 11, a court may very well view the confirmation of a plan as forcing a debtor into peonage, that is, an involuntary servitude. This problem does not arise in Chapter 13 because an involuntary case cannot be filed against debtors,¹¹¹ and debtors always have the right to dismiss

proper balance between creditor democracy and the fairness of a plan.”). The policy of “creditor democracy” has also been recognized in the Chapter 7 process. *See In re Lindell Drop Forge Co.*, 111 B.R. 137, 143 (Bankr. W.D. Mich. 1990) (“The court acknowledges a policy [that] favors a creditors’ democracy in Chapter 7 cases. The Bankruptcy Code recognizes and grants rights to the creditors to elect a Chapter 7 trustee.”).

103. *See* Keach, *supra* note 20, at 499 (“What is the point of solicitation and voting in [C]hapter 11 if a single creditor can force a different plan notwithstanding the outcome of the vote? The single creditor modification rule conflicts with the “creditor democracy” aspect fundamental to chapter 11.”).

104. 11 U.S.C. § 1129(a)(15).

105. *Id.* § 1115.

106. For a discussion of the constitutional concerns regarding individual Chapter 11s post-BAPCPA, *see generally* Keach, *supra* note 20; *see also* Chemerinsky, *supra* note 16, at 583–90.

107. 11 U.S.C. § 303(a) (“An involuntary case may be commenced only under [C]hapter 7 or 11 of this title, and only against a person, except a farmer, family farmer[,], or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.”).

108. *See* Chemerinsky, *supra* note 16, at 584 (“[T]he required devotion of five years’ disposable earnings to a Chapter 11 plan may raise Thirteenth Amendment peonage issues.”).

109. *Id.*

110. The Thirteenth Amendment provides as follows: “Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.” UNITED STATES CONST. amend. XIII, §§ 1–2.

111. *See* 11 U.S.C. § 303(a) (Involuntary cases can be filed only under Chapter 7 or Chapter 11.); *see also* Chemerinsky, *supra* note 16, at 583.

or convert their case to another chapter.¹¹² Congress must either amend the Code as it pertains to involuntary individual Chapter 11 or run the risk of the courts finding the current statutory framework unconstitutional.

3. *Absolute Priority Rule*

Section 1129(b)(2)(B)(ii) has been amended by the BAPCPA to make confirmation of a plan in an individual Chapter 11 case easier than it was under the Code prior to the BAPCPA. Prior to the BAPCPA, individual Chapter 11 debtors had problems obtaining confirmation of a plan due to the "absolute priority rule."¹¹³ Under this rule, higher, priority-impaired claims generally had to be paid in full before lower priority claims could be paid at all, unless those classes of claims consented to such a treatment.¹¹⁴ This rule often arose when a plan did not provide for full payment to the unsecured creditors class, and the individual debtor was retaining his or her interest in his or her property.¹¹⁵ In virtually all individual Chapter 11 reorganization cases, the debtor retains his or her property.¹¹⁶ As such, unless all classes were paid in full or accepted the plan treatment, the "absolute priority rule"

112. A Chapter 13 case that has not been previously converted from another chapter may be voluntarily dismissed or converted to a case under Chapter 7 by the debtor as a matter of right. See 11 U.S.C. § 1307(a)–(b); see also *In re Baker* 289 B.R. 764, 769 (Bankr. M.D. Ala. 2003) (recognizing the right to dismiss or convert); *In re Dulaney*, 285 B.R. 10, 14 (Bankr. D. Colo. 2002) (recognizing right to dismiss).

113. See Keach, *supra* note 20, at 487–88.

114. For a succinct summary of the "absolute priority rule" see Susan A. Schneider, *Bankruptcy Reform & Family Farmers: Correcting the Disposable Income Problem*, 38 TEX. TECH L. REV. 309, 312 n.28 (Winter 2006) ("In Chapter 11, either the creditors must vote to approve the debtor's plan pursuant to § 1129(a)(8), or the plan must comply with the absolute priority rule in § 1129(b), which prevents debtors from retaining an interest in their property over the objection of unsecured creditors unless the debtor pays them in full. *Id.* § 1129(b)(2)(B)."); see also Anthony L. Miscioscia, Jr., *The Bankruptcy Code and the New Value Doctrine: An Examination into the History, Illusions, and the Need for Competitive Bidding*, 79 VA. L. REV. 917, 918 (1993) ("The absolute priority rule provides that a junior claimant or interest holder may not receive or retain any property under a reorganization plan on account of such prior claim or interest unless all senior classes of creditors consent to the plan or are paid in full the allowed amounts of their claims."). The "absolute priority rule" is rooted in the common law requirement that a plan be "fair and equitable" to dissenting creditors. *Case v. L.A. Lumber Prod. Co.*, 308 U.S. 106, 118–19 (1939).

115. See Keach, *supra* note 20, at 486.

116. See *id.* at 485 (recognizing that individual chapter 11 debtor's retention of any property will trigger the absolute priority rule). The Supreme Court recognizes that receiving or retaining property based on a prior claim or interest is quite broad. See *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle*, 526 U.S. 434, 451 (1999) (The Supreme Court recognized that § 1129(b)(2)(B)(ii) states that "a causal relationship between holding the prior claim or interest and receiving or retaining property is what activates the absolute priority rule.").

would be violated,¹¹⁷ and the debtor could not obtain confirmation under the “cram-down” provisions of § 1129(b).¹¹⁸

When an individual debtor was presented with an “absolute priority rule” issue under the former rules, the debtor had to try to confirm the plan by satisfying the “new value exception” to the absolute priority rule.¹¹⁹ The new value exception¹²⁰ provides that a “a debtor’s owner, the equity holder, [can] receive or . . . retain an equity interest in the reorganized business through a contribution of new value, even if all senior claimants are not paid in full.”¹²¹ Courts have generally concluded that the contribution must be money or a reasonable equivalent value in property retained or received.¹²² In the context of an individual Chapter 11 case, the type and valuation of contribution has been very problematic because courts have required new investment, unrelated to the debtor’s earning capacity or future income.¹²³ With these stringent requirements, the confirmation of a nonconsensual plan has been nearly impossible. One commentator summarized the dilemma of the individual Chapter 11 debtor as follows:

Depending on the jurisdiction, the individual chapter 11 debtor and his or her creditors faced a dilemma. A plan relying on future income might be unconfirmable. However, since cramdown might be practically unachievable, creditors needed an inducement to consent to plans providing less than full payment and leaving the debtor with material assets, such as the promise of payments from future income. Many individual chapter 11 plans, therefore, were liquidating plans or otherwise confirmed on a fully consensual (and sometimes disadvantageous) basis.¹²⁴

117. See *id.* at 486 (“Unless the individual chapter 11 debtor proposed a 100% plan, the debtor, faced with an objecting, impaired class, had to resort to the new value corollary to the APR, since it was, of course, nearly impossible for the individual debtor to avoid retention of some ‘property’ . . .”).

118. *Id.* at 488.

119. *Id.* at 485.

120. The new value exception was created by the United States Supreme Court in *Case v. L.A. Lumber Products Co.*, 308 U.S. 106, 121–22 (1939). There has been some dispute regarding whether the “new value exception” survived the enactment of the Bankruptcy Code; however, many courts have concluded that the “new value exception” is incorporated in the Code. See generally RICHARD F. BROUDE, REORGANIZATIONS UNDER CHAPTER 11 § 13.05 (2005).

121. Linda J. Rusch, *The New Value Exception to the Absolute Priority Rule in Chapter 11 Reorganizations: What Should the Rule Be?*, 19 PEPP. L. REV. 1311, 1313 (1992).

122. Keach, *supra* note 20, at 486 n.18 (“Under the typical formulation of the doctrine, the new value must be a contribution in money or money’s worth, reasonably equivalent in view of all circumstances to the value of the participation interest of the equity holder.”).

123. *Id.*

124. *Id.* at 487–88.

Amended § 1129(b)(2)(B)(ii)¹²⁵ creates an exception to the “absolute priority rule” applicable to individual Chapter 11 debtors. In individual cases a debtor may now retain post-petition earnings and property of the estate as defined under the new § 1115, provided he complies with all post-petition domestic support obligations,¹²⁶ even when the unsecured creditors class does not accept the plan and is not paid in full.¹²⁷ This provision, along with the disposable income test in the new § 1129(a)(15), and the new § 1123(a)(8), which requires individual debtors to devote earnings and other future income, makes the confirmation of a plan in an individual Chapter 11 case closely mirror Chapter 13 in terms of overcoming an unsecured creditor’s objection to confirmation.¹²⁸ The problem is that the same constitutional protections¹²⁹ afforded a Chapter 13 debtor are not available to individual Chapter 11 debtors under the BAPCPA.¹³⁰

125. Amended § 1129(b) provides in pertinent part as follows:

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if 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.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

...
(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain 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; or

(ii) 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 subsection (a)(14) of this section.*

11 U.S.C. § 1129(b)(1), (2)(B) (2006) (emphasis added).

126. The exception to the absolute priority rule (§ 1129(b)(2)(B)) expressly makes the exception applicable to the requirements of § 1129(a)(14). 11 U.S.C. § 1129(b)(2)(B). Section 1129(a)(14) provides as follows: “If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.” *Id.* § 1129(a)(14).

127. *Id.* § 1129(b)(2)(B)(i)–(ii).

128. Chapter 13 does not contain an absolute priority rule. The disposable income test applicable to individual Chapter 11 cases as amended by the BAPCPA is essentially the same as the test employed in Chapter 13 under 11 U.S.C. § 1325(b)(1)–(3).

129. See *supra* notes 104–12 and accompanying text.

130. See Keach, *supra* note 20, at 502 (“BAPCPA’s amendments relating to individual chapter 11 cases, by paralleling chapter 13 but not prohibiting involuntary cases or forced conversions, and by not providing the option of escape through dismissal or conversion, therefore, raise genuine Thirteenth Amendment concerns.”).

F. Discharge and Case Closing

1. Discharge

The BAPCPA significantly curtails the ability of individual Chapter 11 debtors to obtain a discharge. Prior to the BAPCPA, Chapter 11 debtors typically obtained a discharge of dischargeable debts at the time of confirmation of the plan.¹³¹ Now individual Chapter 11 debtors will not be able to obtain a discharge at confirmation. The new § 1141(d)(5)(A)¹³² provides that an individual Chapter 11 debtor generally cannot obtain a discharge until all plan payments have been made, which is similar to the Chapter 13 requirement of completion of plan payments prior to a discharge in Chapter 13.¹³³

Alternatively, § 1141(d)(5)(B)¹³⁴ provides that an individual Chapter 11 debtor can obtain a discharge prior to completion of plan payments only in very limited circumstances that constitute a “hardship discharge.”¹³⁵ To prove hardship discharge, there must be a showing that (1) the property actually distributed under the plan for each unsecured claim is at least as much as such claimholders would have received under Chapter 7 and (2) modification of the plan is not practicable.¹³⁶ Chapter 13 has a similar provision in

131. Alan M. Ahart & Stacy M. Hopkins, *The Role of Nonbankruptcy Law in Dischargeability Proceedings: Unenforceable Obligations Must Not Survive Discharge While Enforceable Obligations May Be Excepted from Discharge*, 7 J. BANKR. L. & PRACT. 161 (Jan./Feb. 1998) (citing 11 U.S.C. § 1141(d) (1997)).

132. Section § 1141(d)(5) provides as follows:

(5) In a case in which the debtor is an individual—

(A) 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).

133. *Id.* § 1328(a).

134. Section 1141(d)(5)(B) provides as follows:

(B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if—

(i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is 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 on such date; and

(ii) modification of the plan under section 1127 is not practicable[.]

Id. § 1141(d)(5)(B).

135. “Hardship discharge” has traditionally referred to the discharge available under § 1328(b). See generally WILLIAM L. NORTON, NORTON BANKRUPTCY LAW AND PRACTICE § 126:2 (2006).

136. 11 U.S.C. § 1141(d)(5)(B).

§ 1328(b),¹³⁷ but a Chapter 13 debtor can obtain a hardship discharge more easily than an individual Chapter 11 debtor.¹³⁸ If the Chapter 13 debtor can show that she failed to make payments under a plan "due to circumstances for which the debtor should not justly be held accountable," that modification is not practicable, and that the distribution under the plan is as much as the allowed unsecured claims would have been under Chapter 7, then the Chapter 13 debtor can get a hardship discharge.¹³⁹ There is no similar provision for circumstances in which a Chapter 11 debtor should not be held accountable.¹⁴⁰ As such, although there is a hardship discharge for individual Chapter 11 debtors, it is more rigorous than the hardship discharge under Chapter 13.¹⁴¹

Furthermore, to obtain a discharge by completion of payments or by meeting the alternative requirements for an early discharge, new § 1141(d)(5)(C)¹⁴² provides an additional hurdle for individual Chapter 11 debtors. Courts are now required, upon notice and hearing not more than ten days prior to entry of a discharge order, to find (1) that there is no reasonable basis to believe that § 522(q)(1) applies to the debtor, (2) that there is no pending proceeding in which the debtor could be found guilty of a felony, demonstrating that the filing of the case was an abuse of title 11, and (3) that the debtor does not owe a debt based on violation of securities law.¹⁴³ New §

137. *Id.* § 1328(b).

138. Markell, *supra* note 10, at 26.

139. *Id.*

140. *Id.*

141. *Id.* at 26-27.

142. Section 1141(d)(5)(C) provides the following:

(C) unless after notice and a hearing held not more than [ten] days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that—

(i) section 522(q)(1) may be applicable to the debtor; and

(ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

11 U.S.C. § 1141(d)(5)(C).

143. 11 U.S.C. § 522(q) provides as follows:

(q)(1) As a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) which exceeds in the aggregate \$125,000 if—

(A) the court determines, after notice and a hearing, that the debtor has been convicted of a felony (as defined in section 3156 of title 18), which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of this title; or

(B) the debtor owes a debt arising from—

1328(h),¹⁴⁴ applicable to Chapter 13 debtors, mirrors the statutory provisions in § 1141(5)(C).

2. *Case Closing*

The limitation of no discharge until completion of plan payments in most cases and the expanded definition of property of the estate until closing, dismissal, or conversion impacts closing of individual Chapter 11 cases. Prior to the BAPCPA, an individual chapter 11 case, when fully administered, was closed pursuant to § 350¹⁴⁵ and Rule 3022 of the Federal Rules of Bankruptcy Procedure (Rules).¹⁴⁶ The Code and Rules do not define “fully administered.” However, the Committee Note to Rule 3022 provides a list of non-exclusive factors to guide a determination on whether an estate is fully administered.¹⁴⁷ Rule 3022 is flexible and allows the court to determine on a

(i) any violation of the Federal securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws;

(ii) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 or under section 6 of the Securities Act of 1933;

(iii) any civil remedy under section 1964 of title 18; or

(iv) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding [five] years.

(2) Paragraph (1) shall not apply to the extent the amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) is reasonably necessary for the support of the debtor and any dependent of the debtor.

11 U.S.C. § 522(q).

144. *Id.* § 1328(h).

145. Section 350(a) provides that “[a]fter an estate is fully administered[,] and the court has discharged the trustee, the court shall close the case.” *Id.* § 350.

146. Federal Rule of Bankruptcy Procedure 3022 provides that “[a]fter an estate is fully administered in a [C]hapter 11 reorganization case, 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.

147. The Advisory Committee Note on Rule 3022 provides as follows:

Entry of a final decree closing a [C]hapter 11 case should not be delayed solely because the payments required by the plan have not been completed. Factors that the court should consider in determining whether the estate has been fully administered include (1) whether the order confirming the plan has become final, (2) whether deposits required by the plan have been distributed, (3) whether the property proposed by the plan to be transferred has been transferred, (4) whether the debtor or the successor of the debtor under the plan has assumed the business or the management of the property dealt with by the plan, (5) whether payments under the plan have commenced, and (6) whether all motions, contested matters, and adversary proceedings have been finally resolved.

FED. R. BANKR. P. 3022 advisory committee note.

case-by-case basis when an estate is fully administered.¹⁴⁸ It is clear that within this discretion, a case may be deemed fully administered for final decree purposes, even if all the enumerated factors are not present.¹⁴⁹ The factors subsume the requirements of substantial consummation as defined in § 1101(2),¹⁵⁰ and as such, courts often look to see if a case has been substantially consummated as a de facto test for full administration.¹⁵¹ Regardless of the exact factors courts consider, the intent of Rule 3022 is to close Chapter 11 cases as soon as possible after confirmation of a plan.¹⁵²

It seems inconsistent with the new definition of property of the estate and delayed discharge in individual Chapter 11 cases to close cases prior to completion of plan payments.¹⁵³ Both the expanded definition of property of the estate and delayed discharge provide greater control and oversight of individual Chapter 11 cases. Closing individual Chapter 11 cases would eliminate oversight once the case is closed. Additionally, as discussed below in Section IX, closing individual Chapter 11 cases early is inconsistent with the ability to effectively file motions to modify a confirmed plan as permitted by the new § 1127(e).

It is important to recognize that requiring individual Chapter 11 cases to remain open post-confirmation, which in most instances will be five years or longer, impacts debtors in a very important respect. Debtors will be required to file quarterly reports and pay quarterly fees,¹⁵⁴ post-confirmation,

148. *In re Jay Bee Enters., Inc.*, 207 B.R. 536, 539 (Bankr. E.D. Ky. 1997).

149. *In re Mold Makers, Inc.*, 124 B.R. 766, 768–69 (Bankr. N.D. Ill. 1990).

150. *In re Jordan Mfg. Co.*, 138 B.R. 30, 32–33 (Bankr. C.D. Ill. 1992).

151. It is important to recognize that even if a case has been substantially consummated, a court may still deny entering a final decree if other factors indicate that the case has not been fully administered. *See generally, e.g., In re SLI, Inc.*, No. 02-12608, 2005 WL 1668396 (Bankr. D. Del. June 24, 2005) (recognizing it is not necessarily appropriate to close a case at substantial consummation).

152. The Advisory Committee Note on Rule 3022 expressly states that “closing a Chapter 11 should not be delayed solely because payments required by the plan have not been completed.” FED. R. BANKR. P. 3022 advisory committee note. It further states that a court “should not keep the case open only because of the possibility that the court’s jurisdiction may be invoked in the future.” *Id.* As one commentator observed, “As is evident by the Committee note, the Advisory Committee interprets ‘fully administered’ very loosely.” NORTON BANKRUPTCY LAW AND PRACTICE 2D, BANKRUPTCY RULES 2006–2007 Edition 286 (William L. Norton, Jr. & William L. Norton, III eds., 2006).

153. It is also inconsistent with the closing procedure in Chapter 13 cases, which has a similar definition of property of the estate and a delayed discharge as well. 11 U.S.C. §§ 1306(a) & 1328(a) (2006). However, closing Chapter 13 cases is governed by Rule 5009, not Rule 3022.

154. Under 28 U.S.C. § 1930(a)(6), Chapter 11 debtors must pay a quarterly fee to the United States trustee based on disbursements made by the debtor. The Judicial Conference of the United States has authority to require chapter 11 debtors in those districts not part of a United States trustee region to pay fees equal to those imposed by § 1930(a)(6). 11 U.S.C. § 1930(a)(7).

for years if the case remains open until all payments are made.¹⁵⁵ Depending on the posture the UST/BA takes, this may be a highly contested issue.¹⁵⁶

The timing of closing has ramifications in the disclosure statement phase and plan formulation phase because the disclosure statement and plan will need to take into account how long a case will remain open. If the case is going to remain open until discharge, the payment of post-confirmation quarterly fees will impact feasibility, and a provision will need to be included in all plans for the post-confirmation payment of quarterly fees. On the other hand, if a plan contemplates closing a case very soon after confirmation—as was done before the BAPCPA in individual Chapter 11 cases—information will need to be included in the disclosure statement regarding the debtor (1) re-opening the case pursuant to § 350(a), (2) filing a final report, and (3) showing that the plan and other statutory requirements have been satisfied, so that the court can enter an order granting a discharge.

We are left with a conflict between the body of case law on closing Chapter 11 cases upon substantial consummation, or as soon as possible after confirmation, and the new provisions of the BAPCPA, which do not seem to contemplate closing individual Chapter 11 cases early. Perhaps the Advisory Committee on Bankruptcy Rules will amend Rule 3022 to address the closing of individual Chapter 11 cases; however, Rule 3022 was not modified in the Interim Rules.

G. Modification of Confirmed Plan

Section 321(e) of the BAPCPA expands the class of parties that have standing to request a modification of a confirmed plan.¹⁵⁷ Prior to the BAPCPA, post-confirmation modification was limited to the proponent of the plan and the reorganized debtor.¹⁵⁸ The new § 1127(e) expands the abili-

155. The payment of quarterly fees are required to be paid on all disbursements, pre- and post-confirmation, whether made in the ordinary course of business or pursuant to a confirmed plan. See *In re Jamko, Inc.*, 240 F.3d 1312, 1316 (11th Cir. 2001) (The Eleventh Circuit held that “the UST fee . . . [applies] to all disbursements made during the entire process, including ordinary expenses, before or after confirmation.”); *In re Celebrity Home Entm’t, Inc.*, 210 F.3d 995, 998 (9th Cir. 2000) (“disbursements” include payments made by reorganized debtor post-confirmation).

156. Beyond the fact that debtors will likely not want to file post-confirmation reports, the real battle will be on attempting to avoid paying quarterly fees. The litigation on issues associated with quarterly fees has largely been resolved during the last several years. The amendment to the Code may start a new round of litigation on quarterly fees due to possible impact of individual Chapter 11 cases pending for years post-confirmation.

157. There is no change to the procedure for modification by the proponent of the plan prior to confirmation under § 1127(a). See 11 U.S.C. § 1127(a).

158. Section 1127(b) provides as follows:

The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of

ty to modify a confirmed plan to include the debtor, the trustee, the UST, and unsecured claimholders.¹⁵⁹ These parties can file motions to modify a plan (1) to adjust the amount of payments to a class of claims in the plan, (2) to extend or reduce time for such payments, or (3) to alter the distribution to a creditor due to any payment of that claim made other than under the plan.¹⁶⁰ This provision mirrors § 1329(a),¹⁶¹ which is applicable to Chapter 13 bankruptcies and represents a departure, at least in part, from the "creditor democracy" model of Chapter 11 for individual cases.¹⁶²

This ability to modify plans post-confirmation by a host of parties further indicates that closing cases prior to discharge was not contemplated in the post-BAPCPA era. It seems that post-confirmation reporting and monitoring of the debtor and the estate would be required for parties other than the debtor to know that a modification was in order. Granted, a motion to reopen can be filed pursuant to § 350,¹⁶³ but without information about material changes in the debtor's post-confirmation financial condition and compliance with the plan, the ability to know when to bring such a motion is missing.

such plan Such plan as modified . . . becomes the plan only if circumstances warrant such modification[,] and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

Id. § 1127(b).

159. Section 1127 (e) and (f) provide as follows:

(e) If the debtor is an individual, the plan may be modified at any time after confirmation of the plan but before the completion of payments under the plan, whether or not the plan has been substantially consummated, upon request of the debtor, the trustee, the United States trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time period for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim made other than under the plan.

(f) (1) Sections 1121 through 1128 and the requirements of section 1129 apply to any modification under subsection (a).

(2) The plan, as modified, shall become the plan only after there has been disclosure under section 1125 as the court may direct, notice and a hearing, and such modification is approved.

Id. § 1127(e), (f).

160. *Id.* § 1127(e).

161. *Id.* § 1329(a).

162. See *supra* notes 102–03 and accompanying text.

163. Section 350(b) provides that "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350.

III. CONCLUSIONS AND FUTURE RESEARCH

As highlighted at the beginning of this article, it cannot be emphasized enough that the changes specific to individual Chapter 11 cases must be considered along with many of the general changes to the Bankruptcy Code. Working through these changes will be challenging.¹⁶⁴ There will be a great increase in litigation and scores of new, sometimes conflicting, court decisions¹⁶⁵ that will help clarify aspects of the BAPCPA that are unclear, internally inconsistent,¹⁶⁶ or in conflict with the Rules or prior case law.

As gaps and problems with the BAPCPA in individual Chapter 11 cases become apparent in practice, there will inevitably be legislative reforms to address them. Prior to any reform, policymakers need solid empirical research and policy analysis to guide legislative decisions. In light of the magnitude of the changes to individual Chapter 11 cases, there is an array of issues that warrant an empirical examination. Some issues cannot be effectively examined until years down the road, but others can be examined in the near future as data becomes available. The following are a few issues ripe for empirical examination:

1. Is there a significant change in the number of individual Chapter 11 filings in light of the changes made by the BAPCPA?¹⁶⁷ Chapter 11 filing rate changes should be examined by type of filings (business or consumer)

164. See Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes & Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 482 (Winter 2005) (recognizing that the BAPCPA has made the already complex United States personal bankruptcy system even more complex for bankruptcy practitioners to deal with).

165. In the post-BAPCPA era there will be three kinds of decisions that have to be considered when approaching bankruptcy issues. First, there will be areas in which there is no controlling authority. In this area, we will see new decisions interpreting the amendments to the Code. This is the focus of this article. Second, some decisions will no longer be valid in light of the BAPCPA. And, third, some substantive decisions handed down prior to the BAPCPA will still be good law and control the outcome of some issues. See Brad A. Goergen, *The Post-Reform Bankruptcy Code: Is It Just a Pig in a Dress?*, 49-JAN ADVOCATE (IDAHO) 15, 16 (Jan. 2006); see also Braucher, *supra* note 164, at 482 (theorizing that in some areas, such as valuation of collateral, there may be continued conflicting decisions).

166. For a discussion of the significant drafting problems in the BAPCPA generally, see Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, 24 AM. BANKR. INST. J. 1, 70 (Sept. 2005); Henry J. Sommer, *Trying to Make Sense of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191, 191-92 (Spring 2005). For a discussion of the drafting problems specific to individual Chapter 11 cases, see Markell, *supra* note 10, at 15-26.

167. The parallels between individual Chapter 11 cases and Chapter 13 tend to limit the incentives of a debtor to choose Chapter 11 over Chapter 13 when a debtor meets the eligibility requirements of Chapter 13. This is particularly true since the advent of Chapter 11 quarterly fees, which can be quite costly to individual Chapter 11 debtors. The incentive to choose Chapter 11 over Chapter 13 so as to avoid trustee fees has been largely curtailed.

for both pre- and post-BAPCPA periods and should include a state-level analysis of the variation in filing rates by type of filings for both pre- and post-BAPCPA periods.¹⁶⁸

2. Is amended Chapter 11 a more or less effective tool to deal with the financial distress of individual debtors? There is great dispute about whether Chapter 11s are successful or not.¹⁶⁹ A body of literature has developed with various approaches to measure whether Chapter 11 is effective or successful.¹⁷⁰ That body of research should be expanded to specifically analyze individual Chapter 11s in both pre- and post-BAPCPA time periods.

3. Does the elimination of the absolute priority rule lead to higher confirmation rates? If so, are the reorganizations successful?

4. Does the limitation on the "creditor democracy model" impact the ability to confirm plans? Does this provision lead to a higher return to unsecured creditors?

5. What are the costs, both direct and indirect, of delaying discharge until all payments are made under plan?¹⁷¹ The impact of the increased costs may actually have a negative impact on the success of individual Chapter 11 cases.

The reforms made by the BAPCPA may enhance and make individual Chapter 11 cases more effective. Time, as well as our own predisposition toward a particular policy stance, will guide our conclusions regarding the impact of the BAPCPA. Policymakers must take hold of theoretically sound, empirical research as it develops and give it due consideration. Policymakers should take a breath and let researchers have an opportunity to carefully analyze the changes before making incremental modifications to the Code. Otherwise, incremental changes not based on sound empirical research may actually confound the impact of the changes made by the BAPCPA, and we may be left with a situation in which we do not know what statutory change led to a particular result. Even more concerning, we may end up with a sta-

168. Examining state-level variation of the filing rates can shed light on why rates have or have not changed in the post-BAPCPA era. For an analysis that employed state-level analysis in the variation of consumer bankruptcy filing rates, see Robert J. Landry, III, *An Empirical Analysis of the Causes of Consumer Bankruptcy: Will Bankruptcy Reform Really Change Anything?*, 3 RUTGERS BUS. L.J. 2 (March 2006).

169. See, e.g., Hon. Lief M. Clark et al., *What Constitutes Success in Chapter 11? A Roundtable Discussion*, 2 AM. BANKR. INST. L. REV. 229 (Winter 1994).

170. See Haines & Hendel, *supra* note 29, at 75 (recognizing that the National Bankruptcy Review Commission wrestled with what is a successful Chapter 11).

171. There have been several studies on the costs associated with Chapter 11. For a thorough review of these studies to date, see Stephen J. Lubben, *The Microeconomics of Chapter 11*, Jan. 3, 2006, Seton Hall Pub. Law Research Paper No. 47, at 6–15, available at <http://ssrn.com/abstract=869817> (last visited Feb. 26, 2007). These studies and others are useful, but many studies do not compare direct and indirect costs. And, some studies limit the sample to larger cases or exclude individual Chapter 11 cases.

tutory framework worse than the one we have. Incremental policymaking often leads us to a place we never intended. The best advice for Congress and the President is to be careful and base any reform efforts on sound empirical data.

