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Individuals and Small Business Debtors in Chapter 11

Speakers:

Stephanie D. Curtis

Mark A. Castillo

C.D. Shamburger, Jr.

Author contact information:

Stephanie D. Curtis
Mark A Castillo
Christopher W. Elsberry
THE CURTIS LAW FIRM, PC

C.D. Shamburger, Jr
XIT SOLUTIONS, LLC

901 Main Street, Suite 6515
Dallas, Texas 75202

scurtis@curtislaw.net
mcastillo@curtislaw.net
cdshamburger@xitsolutions.net

214-752-2222

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Introduction

It's no secret that the United States' economy was built on the backs of small business. Unfortunately, when the economy comes crumbling down these so called "Mom and Pops" often get caught in the gears and crushed under the weight. In the first quarter of 2009, there were 14,713 business bankruptcy filings, compared to only 8,713 bankruptcy filings in the same period of 2008 – a 65% increase.¹ In tough economic times, filing for protection from creditors through bankruptcy has, in many cases, gone from *an* option to the *only* option.

Added to the stresses of a business failing and the potential for subjection to the public stigma that remains around filing for bankruptcy, most of these small business owners and entrepreneurs are first-time bankruptcy filers who are entirely unfamiliar with the Bankruptcy Code, the options available to them therein, and the consequences associated with such options. Even those with past experience are not likely to be familiar with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and its sweeping changes to the Bankruptcy Code.

This paper attempts to shed light on the options—and sometimes the restraints—for those who have decided their best chance at future success is to apply for bankruptcy protection, but are not sure how to proceed further. The focus of the paper is primarily on those debtors who have no choice but to file under a chapter 11 of the Bankruptcy Code as a "Small Business Debtor," or otherwise liquidate under a chapter 7.² Through a discussion of (i) the limitations on chapter 13 filing options; (ii) the requirements of a Small Business Debtor in a chapter 11 reorganization; and (iii) a brief comparison of chapter 11 versus chapter 13, the authors intend to provide a helping hand to the debtor (or the debtor's attorney) who finds itself on the precipice of bankruptcy: ready to make the plunge, but unsure where to aim.

What is 11 U.S.C. § 109(e) and How does it Affect Me?

11 U.S.C. § 109 determines what individuals and entities qualify as "debtors" under the various titles of 11 U.S.C. § 101, et seq. (the "Bankruptcy Code"). Specifically relevant to this paper is Section 109(e), which determines who may file for protection under chapter 13 of the Bankruptcy Code.

Per the provisions of Section 109(e), "only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$336,900 and noncontingent, liquidated, secured debts of less than \$1,010,650 ... may be a debtor under chapter 13 of this title." The maximum amount of debt, then, that an individual can owe to qualify as a debtor under chapter 13 of the Bankruptcy Code is \$1,347,550, and even then only if neither of the two numbers cited in the provision are exceeded individually.

¹ The American Bankruptcy Institute, *Quarterly Business Filings By Year (1994-2009)*.

² While the authors will include some information about chapter 7 liquidation in this paper, such information will primarily refer to the fact that chapter 7 is an *option* for debtors otherwise designated as "Small Business Debtors" in chapter 11. For purposes of paper length and breadth, most discussion of chapter 7 liquidation will be omitted. Potential debtors are well advised to seek the advice of counsel to determine if liquidation under chapter 7 of the Bankruptcy Code is a better or more viable option for them.

Chapter 13 was designed as a “streamlined” rehabilitative bankruptcy to allow those individuals with relatively little debt to proceed through bankruptcy without the often cumbersome requirements imposed by chapter 11.

Pursuant to Section 104(b) of the Bankruptcy Code, the caps are adjusted every three years on April 1 to reflect change in the Consumer Price Index for All Urban Consumers, which is published by the Department of Labor. As the current iteration of 109(e) was last adjusted in April 1, 2007, an adjustment will be made on April 1, 2010, which should see the amounts increase in their normal fashion in accordance with an increase in the cost of living.

What kinds of Debts are Included in the Calculation?

An important distinction in 109(e) is that, for purposes of calculation of the maximum amount of debt allowed of a chapter 13 debtor, only *noncontingent* and *liquidated* secured and unsecured debts count toward the caps.

A contingent debt, it has been held, is one which a debtor will be called upon to pay only upon the occurrence or happening of a future extrinsic event which will trigger liability to the alleged creditor.³ Therefore, a noncontingent debt is one for which the “triggering event” has occurred prior to the filing of the petition.

A liquidated debt is one that is undisputed as to amount and existence. Such a debt is one that is typically easily determined by reference to a document, agreement, or judgment. Debts which are not “liquidated” commonly include claims for damages not based on contract or agreement, such as tort claims. While the damages alleged may be astronomical, such an amount cannot count towards the 109(e) debt cap prior to entry of a judgment for that amount unliquidated until final judgment has been entered.

A secured debt is one where the creditor holds a perfected secured interest. Provided the secured interest is perfected, the question next revolves around the value of the underlying collateral. The value of the collateral will determine the amount of the secured claim. If the gross claim exceeds that secured value, the balance of the claim is deemed to be unsecured.

Why won't they let me file a Chapter 13?

As previously, albeit briefly, discussed, Congress had a specific purpose in mind when they limited the class of debtors eligible to file under chapter 13.

The drafters of the Bankruptcy Code wanted to ensure that the estates of large debtors with many creditors—often with very large claims—were administered in a way to provide protection to such creditors and a more transparent estate administration. Accordingly, the requirements of a chapter 11 debtor-in-possession are stringent. However, the drafters knew that if smaller debtors were forced to adhere to the full set of compliance requirements of a chapter 11, then the administrative expense could prove too much for the already struggling individual. Rather than force a choice between the administrative expense of a chapter 11 – that might not

³ *In re Sylvester* 19 BR 671 (9th Cir. BAP 1982); *In re Hatzenbuehler*, 282 B.R. 828 (Bankr. N.D. Tx. 2002).

even be a realistic option for a small entity – and liquidation under chapter 7, chapter 13 provides a viable and efficient alternative to the small debtor that qualifies under Section 109(e).

Ok, So I Don't Qualify to File Under Chapter 13...What *Can* I Do?

Just because a debtor is excluded from chapter 13 doesn't mean it's out of options for bankruptcy filing. Two other chapters are available to such a debtor: chapter 7 and chapter 11.

Chapter 7 may be the best option for many small businesses, especially those whose business model is flawed or is no longer viable. Chapter 7 is the process whereby the debtor enters bankruptcy with the express goal of liquidating the assets of the business in order to generate as much cash as possible for the payment of secured and unsecured debts. The bankruptcy court will appoint a third party neutral, called a "Trustee" to the case, and this trustee will be responsible for taking actions designed to elicit the greatest return from the estate for the benefit of the creditors. The Trustee is even incentivized to generate the maximum possible return by linking the amount of fees he is entitled to be paid in the case to the amount of cash that he is able to generate for the estate.

A chapter 7 debtor's burdens are relatively low, and include such things as generating accurate schedules and statements of financial affairs and attending the "341 meeting" where the Trustee and the debtor's creditors are permitted to ask questions of the debtor in order to understand why the debtor entered into bankruptcy.

A chapter 7 provides a "clean slate" to the debtor. When it exits chapter 7 bankruptcy, its debts are almost entirely discharged, and its creditors are provided a pro rata share of the money the Trustee was able to generate from liquidation of the estate. Excepting a handful of notable exemptions, the "clean slate" applies to assets as well. If the chapter 7 debtor was an entity, that entity no longer exists. If the debtor was a sole proprietorship, then the proprietorship exits chapter 7 with no assets. In short, the chapter 7 debtor exits bankruptcy and must start from scratch.

Chapter 11, in contrast, requires a (i) a solution for the debtor's systematic, business problems and (ii) a strategy for paying off creditors, generally at a reduced rate and over a long period of time. Resolving the business problems of the debtor is often referred to as "turnaround." Resolving the debt problems of the debtor is "restructuring."

The chapter 11 debtor accomplishes both by generating a "plan" which includes each class, or group, of creditors and how it intends to repay the debt owed to them, as well as other provisions such as additional litigation the debtor intends to initiate, and how it will handle payment of future debts. Along with this plan, the debtor must generate a detailed disclosure statement designed to provide full disclosure of the debtor's Plan and intentions.

If this plan is accepted by creditors, and the court subsequently approves the plan, the debtor may begin to perform under the plan, and if the plan is drafted well and contingencies hold true, the debtor has a very good chance at a swift recovery and return to profitability with a much more manageable debt structure.

One trade-off for reorganization, rather than liquidation, is that the amounts the debtor pays off over the period of the plan will likely be much greater than the amounts the same debtor would have to pay if it liquidated under chapter 7. The higher payout is a result of the design of chapter 11, whereby debtors who reorganize are expected to use future proceeds and earnings of their employment or businesses to pay off old debts according to their plan of reorganization.

Indeed, the higher payout is the entire point of chapter 11. Chapter 11 is intended to be mutually beneficial to creditors and to debtor. Creditors are to receive as much or more than they would have received under a chapter 7. Debtor has the opportunity to continue its existence and operations, albeit, in an altered post-confirmation form.

Another trade-off is that the burden is much more stringent on the debtor in a chapter 11 than the debtor in a chapter 7. The major additional burden to the debtor is that there is no “Trustee” in a chapter 11, and the debtor is instead a “debtor-in-possession,” with all the rights, capabilities, and duties of a Trustee under the Bankruptcy Code to administer the estate in the manner that is most beneficial to its creditors. This means the debtor and its attorneys must be much more involved and proactive in the bankruptcy. Furthermore, because the debtor will continue to operate its business throughout the bankruptcy, chapter 11 debtors must provide a Monthly Operating Report to the United States Trustee assigned to the case. The United States Trustees are attorneys within a branch the Department of Justice whose duty it is to oversee all bankruptcy cases in an attempt to provide a powerful voice to oversee the debtor’s conduct and ensure that a the bankruptcy estate is administered fairly and with the creditors’ best interests in mind.

Many other additional burdens are piled upon a chapter 11 debtor in possession. However, as the debtor endures this “forged by fire” process, the debtor and its creditors are able to get a much greater grasp of their capabilities and a strong foothold on their future, and if all goes as planned, the debtor will emerge from the bankruptcy stronger and ready to proceed into the future.

Due to the “live-or-die” contrast between the two chapters, most debtors already know which of the two they intend to choose given the radical difference.

I Don’t Know if I Can Handle a Chapter 11 Case!

Many smaller debtors are often afraid of the stringent requirements of chapter 11 and what it may do to the sophisticated entrepreneur with sizeable assets and liabilities, or the small business owner who is already working overtime to make ends meet. In recognition of this common concern, the Bankruptcy Code provides special treatment for “Small Business Debtors” in chapter 11. This designation will lessen many of the burdens on the debtor and may provide a more speedy recovery.

A Small Business Debtor, as defined in Section 101(51D) of the Bankruptcy Code, is “a person engaged in commercial or business activities ... that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition ... in an amount not more than \$2,190,000 ... for a case in which the United States trustee has not appointed ... a committee of unsecured creditors or where the court has determined the committee is not

sufficiently active and representative to provide oversight of the debtors.” Right away potential debtors will notice the noncontingent and liquidated debt cap. Additionally, because the Small Business Debtor cap is only \$2,190,000, and the caps under Section 109(e) for limitations on filing in chapter 13 were an aggregate of \$1,347,550, the window for an *individual* Small Business Debtor to file under chapter 11 (while unable to file under chapter 13) is relatively narrow. However, though the margin is small, many debtors fall within this range, including incorporated entities not eligible under Chapter 13, which is limited to “Individuals.”

First, consider that the \$1,347,550 is a *theoretical maximum*. To qualify for this maximum the debtor would need to have precisely the maximum allowed secured debt (i.e., less than \$1,010,650) and the maximum amount of unsecured debt (i.e., less than \$336,900). As a practical matter and for most situations, the chapter 13 limit might be closer to \$1,000,000 given that *the debtor cannot exceed either category and still qualify*. Second, consider the multitude of entities that have business debt more than \$1,000,000 and less than \$2,000,000. Entities of this size are numerous and are typical of closely-held, small businesses having perhaps 5 to 20 employees. Third, consider that small businesses – from a statistical standpoint – are more likely to fail than are large businesses.

As one might imagine, the \$2,190,000 limitation on the Small Business Debtor designation was a reasoned decision. Because the Small Business Debtor designation provides additional protections to and eases some of the burdens placed upon chapter 11 debtors, the drafters intended to limit this classification to actual small businesses.

The Small Business Debtor definition was recently added by BAPCPA. The definition is a revision of the “small business” definition that was added by the Bankruptcy Reform Act of 1994. Prior to 1994 no opportunity existed to elect small business status in chapter 11.

In addition to the debt cap, the other requirement for Small Business Debtor election is whether or not a creditors’ committee has been appointed, and whether that committee is “sufficiently active and representative to provide oversight to the debtor.” Creditors’ committees are relatively rarely in small cases, and sometimes are not appointed in medium sized cases, especially when individual claims are small or creditors do not otherwise desire to participate.

How Do I Designate as a Small Business Debtor if I Qualify?

The designation as a Small Business Debtor is as simple as indicating so in the appropriate check box of the bankruptcy petition. Rule 1020 of the Federal Rules of Bankruptcy Procedure provides for such designation in the debtor’s petition to provide notice to the Trustee and the Court of the designation. In the case of an involuntary bankruptcy, where the debtor files no petition, the debtor must make the designation within 15 days after the entry of an order for relief. Additionally, per Rule 1020(a), the debtor’s designation as a Small Business Debtor is controlling “unless the court enters an order finding the statement is incorrect.”

Following The Bankruptcy Reform Act of 1994, but prior to BAPCPA, Small Business Debtors were allowed to “elect” the small business debtor designation. The designation was not compulsory for debtors who qualified. Today debtors are required to designate themselves as

Small Business Debtors. Because bankruptcy petitions are signed under penalty of perjury, debtors are well advised to accurately and honestly complete their petitions!

What If Someone Thinks I Designated Incorrectly?

If there is a question as to whether the Small Business Debtor designation was selected correctly, Rule 1020(b) provides that the “United States trustee or a party in interest may file an objection to the debtor’s statement under subdivision (a) no later than 30 days after the conclusion of the meeting of creditors held under Section 341(a) of the Code, or within 30 days after the amendment to the statement, whichever is later.” Such an objection is governed by Rule 9014 and must be served and noticed, and the court ultimately will enter an order determining the debtor’s status and whether the designation was incorrect.

Objections to the designation might result from a party in interest believing the debtor is exhibiting bad faith in its designation or from disputes over the amount of claim that a creditor believes it is owed. For instance, a creditor that believed it was owed \$4 million dollars by a debtor would be well served to object to a statement that the debtor owed less than \$2 million in the aggregate!

Additionally, objections can be made by the United States trustee who has appointed a committee. A party might even object that a debtor did *not* designate itself a Small Business Debtor. Presumably such objection would be raised regarding the unnecessarily high administration expenses to be incurred by an estate that *should* designate itself as a Small Business Debtor, but has not..

Ultimately, an honest debtor who has evaluated its assets and liabilities and who is making such designation at the time of filing of the petition—before any creditors committee could possibly be appointed—should have little to no worries regarding such objections.

What is Required of a Small Business Debtor in Chapter 11?

In many respects the Small Business Debtor has fewer requirements and burdens versus an ordinary chapter 11 debtor. In other respects the requirements are more strict. The additional requirements of a Small Business Debtor are set forth in Section 1116 of the Bankruptcy Code, and were added by BAPCPA in 2005. These requirements include:

- Appending to the voluntary petition the debtor’s most recent balance sheet, statement of operations, cash flow statement, and Federal income tax return, or file such financial documents separately in a case of an involuntary petition;
- Attending, through senior management personnel and counsel, all meetings scheduled by the court or the United States Trustee;
- Timely filing schedules and statement of financial affairs, which time may, absent extraordinary circumstances, be extended to a maximum of 30 days after entry of an Order for Relief;
- Filing all financial and other post-petition reports as required by federal and local rules;

- Maintaining “customary and appropriate insurance;”
- Timely filing all tax returns and other government filings, and timely pay all taxes entitled to administrative priority; and
- Allowing the United States Trustee to inspect the debtors’ business premises, books, and records at reasonable times.

While these requirements are not especially onerous on the Small Business Debtor, they are designed to provide a more transparent and expedited chapter 11 administration. The aim is that the Small Business Debtor may move quickly through and out of bankruptcy.

These requirements are in addition to the other duties that apply to all chapter 11 debtors, which include:

- the duty to account for all property received,
- the duty to file a list of creditors,
- the duty to file schedules of assets and statement of financial affairs,
- the duty to examine proofs of claim,
- the duty to furnish information to parties in interest,
- the duty to file a final report and account,
- the duty to file a plan; and
- the duty to file a post confirmation report.

How Does a Chapter 11 Benefit Me?

Considering the list of additional requirements and duties imposed upon a Small Business Debtor, a potential debtor might be skeptical of the net benefits of the designation. Put simply, being a Small Business Debtor is a trade off, and, unfortunately, the bad must be taken with the good. Some of the procedural changes will amount to a benefit and others will not.

While labeling a procedural change in a small business case “good” or “bad” is to grossly oversimplify, the designation is useful to get a bigger picture of how the case is treated differently, and what a debtor has in store. Furthermore, for the debtors who may qualify for a chapter 13 (i.e. by being below the debt cap under Section 109(e) *and having a regular source of income, also under Section 109(e)*, as explained above) but is also contemplating chapter 11 as an alternative, this breakdown should provide some additional guidance.

Changes in procedure (especially those related to timing) can have a major impact from a business standpoint. Therefore, the business implications of these changes will be addressed where applicable.

What are the “Good” Changes for a Small Business Debtor?

Among the overall group of procedural changes, three stand out from the rest as generally beneficial to the Small Business Debtor.

First, the Small Business Debtor has an automatically extended exclusivity period to file a plan of reorganization than other chapter 11 debtors. Small business debtors have the exclusive right to file a plan or reorganization for 180 days after the date of the order for relief under chapter 11. Other chapter 11 debtors have only a 120 day exclusivity period in which to file their plan. However, the maximum time period for filing a plan in a small business case, including the non-exclusive period, is 300 total days after the order for relief has been entered.

This change provides the small business debtor some additional exclusive time to draft a plan and determine what will best benefit the business and its estate, and ensures that other parties in interest who may file a plan after the debtor's exclusivity period expires will do so expeditiously within the 120 day period following such expiration.

The 60 additional days of exclusivity afforded to the small business debtor is the lone departure from the other provisions all aimed at accelerating the overall process of reorganization. By definition a small business debtor has \$2,190,000 or less in debt, and less than that in assets. A small business debtor is a small entity that is managed by a small group of people that often includes the entity's founder. If the entity is to pay creditors via a successful plan of reorganization, then the debtor's exclusivity period, as a practical matter, is the one shot at that success. In a majority of cases, it would be impractical for creditors to pull off – *or even care to pull off* – the reorganization of a small business debtor. As a practical matter, either the small business debtor's plan will prove acceptable, or the case will be converted to Chapter 7. In certain cases the additional 60 days could prove useful toward reaching the terms of that acceptable plan.

Second, a small business debtor may request that a creditors committee not be appointed in its case. Such a request must come in the form of a motion, and although such a request can be made by any party in interest, the debtor is the most obvious candidate to file such a motion. This provision is helpful because, for most small businesses, no creditor or small group of creditors has a large enough claim to justify the extra expense to the estate that a creditors committee can often bring. The court may “for cause” designate that no committee shall be appointed in a small business case, preventing such waste to the estate. While the non-appointment of a creditors committee is a fairly rare occurrence, a small business case is the most likely type of case to go without a committee.

A creditors' committee, while valuable and integral to the normal functioning and related negotiations between estate and creditors, is expensive. Travel, professional fees, and administrative costs ordinarily associated with a creditors' committee might quickly exceed the financial wherewithal of the small business debtor. Spoken plainly, the existence of a committee might ensure the failure of the small business debtor in those cases where resources are particularly limited. Instead of a successful reorganization, the estate is administered by a structure thicker and more expensive than it can support. Predictably, such a case often ends in liquidation.

Third, the monthly operating reports that all debtors are required to submit to the United States trustee are modified significantly for a small business debtor. These modified monthly

operating reports substantially lessen the burden placed upon a small business debtor, and the amount of time saved every month—or the amount of fees saved by not needing additionally sophisticated professionals to prepare such reports—could literally make or break many small businesses that have little margin for error in the reorganization process.

Ordinarily, the Chapter 11 debtor completes an eight page long monthly operating report that resembles full financial statements, except required monthly, not quarterly or annually. By comparison, the “US Trustee Basic Monthly Operating Report” is a four page questionnaire. Completed, the report’s 42 incisive questions provide the U.S. Trustee a clear picture of the small business debtor and its status.

These modified monthly operating reports substantially lessen the burden placed upon a small business debtor, and the amount of time saved every month—or the amount of fees saved by not needing additionally sophisticated professionals to prepare such reports—could literally make or break many small businesses that have little margin for additional fees in the reorganization process.

The effects of these various changes are positive for the small business debtor and its creditors alike. The changes are aimed at lightening the administrative load that must be borne by the small business debtor and are aimed at improving the chances of a successful reorganization.

What are the “Bad” Changes for a Small Business Debtor?

Similar in format to the “Good” Changes listed above, three “Bad” Changes are listed below. It’s noteworthy that a change that may present a challenge to one debtor might prove an advantage to another debtor.

First, while the exclusivity period of filing a plan or reorganization is extended for a small business debtor, the time for confirmation of the plan is shortened. In fact, the plan-confirmation period for a small business debtor is only 45 days from the date of filing the plan. If the small business debtor fails to have the plan confirmed within the 45 day time frame, and unless an extension is granted on the confirmation deadline (as explained below), the court is required to dismiss the case upon a motion by a party in interest, pursuant to Section 1112(b)(4)(J) of the Bankruptcy Code.

Confirmation of a plan in non-small business debtor chapter 11 cases, in contrast, may continue over the period of many months, and even the smoothest of confirmation procedures may require greater than the 45 days allotted to a small business case.

This relatively short time frame indicates the drafter’s belief that the small business debtor should be able work out any objections with its creditors and elicit the necessary votes to confirm its plan within the shortened time frame due to the relatively few number of creditors and relatively low dollar amounts of their claims. However, the short time frame can cause some headaches for the debtor if they are having problems getting the plan confirmed, especially

because failure to confirm could result in dismissal of their case entirely. As a result, debtors should endeavor to have a plan worked out with creditors in advance of filing, and should be prepared to move forward with confirmation immediately, to avoid last minute scares or possible failures due to unexpected or unforeseen problems.

The negative consequences of a shortened confirmation period are obvious. The confirmation period represents “sink or swim” time. The small business debtor is afforded less time to clear the hurdle of confirmation versus an ordinary Chapter 11 debtor.

The positive consequences are more subtle. As already discussed, the resources of the small business debtor are extremely finite. A lengthy window of time to evaluate the proposed plan necessarily entails an increase in administrative expenses. Furthermore, the proposed plan is not likely to be overly complex given the very small size of the debtor. In other words, the plan is either acceptable or it is not.

Creditors must be afforded a window of time reasonably sufficient to evaluate the propose plan, to form an opinion, and to cast a vote. That same window of time should be cut to a minimum in order to better reduce administrative expenses. Congress determined that a confirmation period shortened to 45 days strikes this balance.

Second, and as mentioned above, while there are procedures in place for getting extensions to some of the critical deadlines and time periods for small business debtors, the standard for approval of such extensions is much higher on a small business debtor.

Specifically, if the debtor desires to extend the exclusivity period for filing its plan beyond 180 days, the debtor must “demonstrate by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time.” Additionally, a new deadline must be imposed, and the order granting the extension must be entered prior to the expiration of the existing deadline.⁴ In contrast, a non-small business debtor may receive an extension of the deadline “for cause,” with no further explicit showing or standard of proof—a clearly less-stringent burden.⁵

Additionally, the debtor may have the deadline extended for filing its schedules and statement of financial affairs “for cause,” pursuant to Rule 1007(c), for only 30 days after entry of the order for relief.⁶ If the debtor needs additional time beyond the 30 day time frame to file its schedules and statements of financial affairs, the debtor must show that “extraordinary and compelling circumstances” necessitate the extension of time.

These standards are much greater than those placed upon the non small business debtor, in order to assure quick and efficient administration of the estate. Allowing debtors to easily extend deadlines would severely limit the impact of a small business case. Because small business debtors typically have fewer creditors, less debt, and presumably fewer problems,

⁴ 11 U.S.C. § 1121(e)(3).

⁵ 11 U.S.C. § 1121(d).

⁶ 11 U.S.C. § 1116(3).

Congress believed that the shortened time frames were appropriate, and that additional time could be granted in exceptional cases, but that extensions should not be granted simply because the debtor so desired.

Speed is a key ingredient to the successful reorganization of a small business debtor. Resources are limited. The issues confronting small business debtor and its creditors should not be overly complex. And even if complex, the debt still adds up to no more than \$2,190,000.

The small business debtor and its creditors, collectively, have their feet held to the fire by way of the shortened confirmation period. The same is true with requests for extensions. A rapid, expedited schedule is set and is expected to be maintained.

Third, the requirement placed upon Small Business Debtors that senior management attend meetings can be taxing and time consuming, and can cause a fair bit of headache for the debtor. Because the debtor is presumably a truly small business or an entrepreneurship, the system is designed to have the person most readily able to answer questions or testify on behalf of the debtor on hand when needed. Additionally, requiring senior management to attend allows additional transparency for the creditors, as well as providing the creditors access to direct information “from the source.”

When a business is already struggling, the time it takes for senior management to attend such meetings could create a strain for the debtor. With the concern in mind, the court may grant senior management leave not to attend based on a showing of “extraordinary and compelling circumstances,” but this is a rather lofty burden, and such leave should not be expected in most situations.

A streamlining of the process, a reduction in expense, and an improved shot at a successful reorganization are guiding principles where the small business debtor is excused from requirements that would apply to a larger debtor in Chapter 11.

In certain instances, a non-compulsory meeting with creditors could prove very strategic for the small business debtor to attend. Meetings with creditors, if and when affordable, are often effective tools in forging a solution that debtor and creditor can both live with.

I qualify under 109(e) to File for Chapter 13, but Should I consider a Chapter 11 Instead?

Generally, §109(e) requires a debtor have (a) unsecured debt less than \$336,900, (b) secured debt less than \$1,010,650, and (c) “regular income” to qualify under Chapter 13. A debtor that meets the requirements of §109(e), *including the requirement of regular income*, is nearly certain to be better served filing under Chapter 13 and not Chapter 11.

The administrative burdens of a Chapter 13 are substantially less than those of a Chapter 11 debtor. Chapter 13 has more strict guidelines governing the amount of payments to be made to creditors. Consequently, a Chapter 13 debtor might be required to pay incrementally more to

unsecured creditors than would have been the case under chapter 11. However, this benefit to the debtor is likely to be more than offset by the increased administrative expense associated with 11.

Conclusion

While no one ever opens their own business dreaming of someday entering into bankruptcy, in these trying economic times, sometimes seeking bankruptcy protection is inevitable. However, individual entrepreneurs and small businesses can rest assured that with proper planning and assistance of competent counsel, systems are in place to help them back onto the road to prosperity.

By establishing a plan for the future, creating goals to get there, and thoroughly examining the Bankruptcy Code to determine the best path to meeting those goals, a small business may find itself rejuvenated and ready to succeed after the bankruptcy is completed. And with the shortened time frames and less taxing requirements on the debtor, a small business debtor under chapter 11 may find itself on that road faster than it originally imagined.