

SUMMARY OF CHAPTER 11

of the

Bankruptcy Code as Amended by
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

January 10, 2006

TABLE OF CONTENTS

TABLE OF CASES	v
SECTION 1102	1
Summary of Amendment	1
Litigation Points	1
Cross References	2
New Defined Terms	2
Bankruptcy Code	2
Applicable Nonbankruptcy Statutes	2
Interim Rules	2
SECTION 1104	3
Effective Date	3
Summary of Amendment	3
Cross References	3
Bankruptcy Code	3
Interim Rules	3
SECTION 1106	4
Summary of Amendment	4
Litigation Points	5
Cross References	5
New Defined Terms	5
Bankruptcy Code	5
Applicable Nonbankruptcy Statutes	5
Drafting Issues and Problems	5
SECTION 1112	7
Summary of Amendment	7
Litigation Points	8
Cross References	10
Bankruptcy Code	10
Applicable Nonbankruptcy Statutes	10
Drafting Issues and Problems	10
Administrative Burdens Imposed on Court	10
SECTION 1114	11
Effective Date	11
Summary of Amendment	11
Case Authority Impacted by the Amendment	11
SECTION 1115	13

Summary of Amendment	13
Cross References	13
Bankruptcy Code	13
National Rules	14
Administrative Burdens Imposed on Court	14
 SECTION 1116	 15
Summary of Amendment	15
Litigation Points	15
Cross References	16
New Defined Terms	16
Bankruptcy Code	16
Interim Rules	16
Administrative Burden Imposed on Court	16
 SECTION 1121	 17
Summary of Amendment	17
Litigation Points	17
Cross References	18
New Defined Terms	18
Bankruptcy Code	18
Applicable Nonbankruptcy Statutes	18
Interim Rules	18
 SECTION 1123	 19
Summary of Amendment	19
Cross References	19
Bankruptcy Code	19
 SECTION 1124	 20
Summary of Amendment	20
Cross References	20
Bankruptcy Code	20
 SECTION 1125	 21
Summary of Amendment	21
Cross References	22
New Defined Terms	22
Bankruptcy Code	22
Applicable Nonbankruptcy Statutes	22
 SECTION 1127	 23
Summary of Amendment	23
Cross References	23
Bankruptcy Code	23

SECTION 1129	24
Effective Date	24
Summary of Amendment	24
Litigation Points	26
Cross References	27
New Defined Terms	27
Bankruptcy Code	27
Official Forms	27
 SECTION 1141	 28
Effective Date	28
Summary of Amendment	28
Litigation Points	29
Cross References	29
Bankruptcy Code	29
Applicable Nonbankruptcy Statutes	29
Drafting Issues and Problems	29
Administrative Burdens Imposed on Court	30
 SECTION 1146	 31
Effective Date	31
Summary of Amendment	31
Cross References	32
Bankruptcy Code	32
Applicable Nonbankruptcy Statutes	32

TABLE OF CASES

United States Bankruptcy Courts

In re Doskocil Cos., Inc., 130 BR. 870, 874-77 (Bankr. D. Kan. 1991) **11**

In re North American Royalties, Inc., 276 B.R. 860, 866-68
(Bankr. E.D. Tenn. 2002) **11**

SECTION 1102

Creditors' and Equity Security Holders' Committees

Summary of Amendment

Section 1102(a)(3) contains a conforming amendment to change the reference to “small business” to “small business debtor.” This conforms to the amendment to section 101(51D). A small business debtor is a person engaged in commercial or business activities not including a person whose primary activity is the business of owning or operating real properties or activities incidental thereto. The aggregate noncontingent, liquidated secured and unsecured debts of a small business debtor may not exceed \$2,000,000, excluding debts owed to affiliates or insiders.

Even when a debtor meets this definition, the case will not be considered a small business case if the United States Trustee has appointed a committee of unsecured creditors unless the court determines that the committee is not sufficiently active and representative to provide effective oversight of the debtor. See 11 U.S.C. § 101(51D).

Thus, if a party in interest wishes a case otherwise meeting the definitional requirements of section 101(51D) to proceed as a small business case, that party should move under section 1102(a)(3) for an order that a committee not be appointed. Otherwise, if a committee is appointed, the party must attempt to establish that the committee has not been sufficiently active and representative to provide effective oversight of the debtor. See Interim Rule 1020(c).

New section 1102(a)(4) authorizes the court to order the United States Trustee to adjust committee composition when a change in committee membership “is necessary to ensure adequate representation of creditors or equity security holders.” The court may also order the United States Trustee to increase the number of members of a committee by adding a creditor that is a “small business concern” if the claim held by the small business concern is disproportionately large in comparison with the annual gross revenue of that potential committee member [not in comparison to the claims of the other committee members].

New section 1102(b)(3) imposes duties on the committee to non-members who hold claims of the kind represented by the committee. The committee is directed to provide its constituency with “access to information” and to “solicit and receive comments” from non-members. The committee may be compelled by the court to provide additional reporting or disclosure to non-members.

Litigation Points

1. It is not clear what kinds of information the committee is required to disclose. It is not uncommon for committee members to sign confidentiality agreements with the debtor as a condition to receiving sensitive financial data and confidential trade information, the general dissemination of which would place the debtor at a competitive disadvantage. How will a committee be able both to obtain necessary confidential information to carry out its duties and at

the same time meet its obligation to provide information to non-member creditors?

2. The new provisions are silent as to what issues or subject areas the committee must solicit and receive comments from creditors and how the committee goes about soliciting comments when there may be hundreds or thousands of non-member creditors. The new provisions are also silent as to the consequences of a committee's failure to comply. Parties in interest who are opportunistic and assert positions adverse to the committee, may attempt to undercut arguments advanced by the committee if the committee does not have in place a working mechanism to solicit non-member input.

Cross References

New Defined Terms

small business case, 11 U.S.C. § 101(51C)

small business debtor, 11 U.S.C. § 101(51D)

Bankruptcy Code

11 U.S.C. § 308 [additional reporting requirements of small business debtors]

11 U.S.C. § 1116 [duties of trustees and debtors in small business cases]

Applicable Nonbankruptcy Statutes

15 U.S.C. § 632(a)(1) ["small business concern"]

Interim Rules

Interim Rule 1020 [requiring a debtor to state whether or not the debtor is a small business debtor and setting a deadline for contesting the debtor's statement]

Interim Rule 1020(c) [if committee is appointed, the case shall not proceed as a small business case unless the debtor otherwise satisfies all requirements and the court determines that the committee has not been sufficiently active]

SECTION 1104

Appointment of Trustee or Examiner

Effective Date

With one exception, amended section 1104 is effective in cases filed on or after October 17, 2005. New section 1104(e), requiring the United States Trustee to move for the appointment of a chapter 11 trustee if there are reasonable grounds to suspect fraud, dishonesty or criminal conduct, is effective as of the date of enactment, April 20, 2005, but only in cases filed on or after that date.

Summary of Amendment

New section 1104(a) permits the appointment of a trustee or examiner when grounds exist to convert or dismiss the case under section 1102 but the court concludes that the appointment of a trustee or examiner is preferable to conversion or dismissal and is in the best interest of creditors and the estate.

New section 1104(b)(2) provides direction on how to implement the election of a trustee at a meeting of creditors. The United States trustee shall file a report certifying any such election. Upon the filing of the report, the elected trustee shall be considered to have been selected and appointed for all purposes under section 1104 and services of any previously appointed trustee shall terminate. The court is specifically given the power to resolve any dispute arising out of the election of a trustee at a meeting of creditors.

New section 1104(e) directs the United States Trustee to move for appointment of a trustee if reasonable grounds exist to suspect that current members of management participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting. This amendment is effective on April 20, 2005, as to cases filed on or after that date.

Cross References

Bankruptcy Code

11 U.S.C. § 1112	[grounds for conversion or dismissal]
11 U.S.C. § 1121(c)(1)	[exclusivity expires upon trustee's appointment]

Interim Rules

Interim Rule 2007.1	[modifies existing rules to provide for United States Trustee certification of election of trustee and for filing of verified statement by person elected]
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SECTION 1106
Duties of Trustee and Examiner

Summary of Amendment

Modification of section 1106(a)(1) and the addition of section 1106(a)(8) impose on a chapter 11 trustee or debtor in possession significant new notice requirements relating to domestic support obligation claims, as defined as in section 101(14A). If the case involves a claim for a domestic support obligation, the trustee or debtor in possession is obligated to provide the following written notices:

- Notice to the holder of a domestic support obligation claim that (i) such claim exists and (ii) that the holder has the right to use the services of a State child support enforcement agency established under sections 464 and 466 of the Social Security Act, of the State in which the holder resides, and to include in such notice the address and phone number of such State child support enforcement agency.
- Notice to the State child support enforcement agency that the claim for domestic support obligation exists and the name, address and telephone number of the holder of the claim.
- Once the debtor is granted a discharge, notice to both the holder of the claim and the State child support enforcement agency of the granting of the discharge, the last known address of the debtor, the last recent known name and address of the debtor's employer and the name of each creditor that holds a claim that was not discharged under sections 523(a)(2), (4) or (14A) or that was reaffirmed by the debtor under section 524(c).

New section 1106(c)(2) provides that the holder of a domestic support obligation claim or the State child enforcement support agency in which the holder resides may request from a creditor who holds a claim which is not discharged under sections 523(a)(2), (4) or (14A) or a claim that was reaffirmed by the debtor under section 524(c), the last known address of the debtor. If the creditor makes a disclosure of the last known address of the debtor pursuant to such a request, the creditor shall not be liable for making such disclosure.

Although section 1104 does not incorporate section 1505, section 103(k)(1) makes section 1505 applicable in all title 11 cases.

Section 1505 permits the court to authorize a trustee appointed under any chapter, or an examiner appointed under section 1104(c), to act in a foreign country on behalf of the bankruptcy estate. When authorized to so act, the trustee or examiner may act as authorized by applicable foreign law.

Litigation Points

1. If the trustee or debtor in possession fails to provide any of the required notices and the ability of the holder of a domestic support obligation claim or the child support services agency to recover the domestic support obligation is impaired as a result, what action, if any, may be taken against the trustee or debtor in possession?

2. Is a creditor holding one of the designated classes of non-dischargeable claims or a reaffirmed claim, who refuses to provide the last known address of the debtor, subject to sanctions or other penalties? The language of the statute only states that the holder of the claim or child enforcement support agency may request the last known address of the debtor and does not specifically impose on the creditor an obligation to respond.

Cross References

New Defined Terms

domestic support obligation, 11 U.S.C. § 101(14A)

Bankruptcy Code

11 U.S.C. § 103(k)(1)	[makes section 1505 applicable to trustee appointed under all chapters]
11 U.S.C. § 523(a)(2)	[non-dischargeability based on false representation, fraud, false financial statement and certain credit card abuse]
11 U.S.C. § 523(a)(4)	[non-dischargeability based on fraud or defalcation of a fiduciary, embezzlement or larceny]
11 U.S.C. § 523(a)(14A)	[nondischargeability of loan incurred to pay a non-dischargeable tax]
11 U.S.C. § 524(c)	[debt excepted from discharge by agreement]
11 U.S.C. § 1107	[debtor in possession has same duties as trustee]
11 U.S.C. § 1505	[authority of trustee or examiner to act in a foreign country]

Applicable Nonbankruptcy Statutes

42 U.S.C. §§ 664 and 666	[Social Security Act – establishment of child support enforcement agencies]
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Drafting Issues and Problems

Section 1106(a) requires a chapter 11 trustee to perform certain duties imposed by section 704 on chapter 7 trustees. Section 1106(a) requires chapter 11 trustees to perform the new duties set out in paragraphs (2), (5), (7), (9), (10), (11), and (12) of section 704. However,

the 2005 Act made these subparagraphs of paragraph (a). The Act failed to include a conforming amendment to section 1106(a). Section 1106(a) merely refers to the six paragraphs mentioned above without reference to paragraph (a).

SECTION 1112 Conversion or Dismissal

Summary of Amendment

Overview. Section 1112 is amended to add additional grounds for the dismissal or conversion of a chapter 11 case, to provide that the court “shall” dismiss or convert absent “unusual circumstances,” and to provide that motions to dismiss or convert must be decided quickly.

Section 1112(b)(1). This section is amended to provide that, “absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of the creditors and the estate, the court shall” (not “may”) convert a chapter 11 case to chapter 7, or dismiss the case, “if the movant establishes cause” (defined below). As before, if cause is shown, the court may convert to chapter 7, dismiss, or by way of a reference to new section 1104(3), appoint a trustee or examiner.

Section 1112(b)(2). This section provides that the court shall not grant a motion to dismiss or convert a chapter 11 petition if the following is established:

- (a) that “there is a reasonable likelihood that a plan will be confirmed within the timeframes established in section 1121(e) and 1129(e) of this title [relating to small business debtors and requiring that a plan be filed within 300 days of the petition, and confirmed within 45 days of filing, unless these deadlines are extended], or if such sections do not apply, within a reasonable period of time;”
- (b) that the grounds for granting the motion include an act or omission of the debtor not involving a substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;
- (c) there is a reasonable justification for the debtor’s act(s) or omission(s);
and
- (d) the debtor will cure the act(s) or omission(s) within a reasonable period of time fixed by the court.

Section 1112(b)(3). This new section provides that the court “shall” commence the hearing on a motion to dismiss or convert “not later than 30 days after the filing of the motion, and shall decide the motion not later than 15 days after the commencement of the hearing,” unless: (1) “the movant expressly consents to a continuance for a specific period of time”; or (2) “compelling circumstances prevent the court from meeting the time limits established by this paragraph.”

Section 1112(b)(4). This amended section provides for several new circumstances that will constitute “cause” to dismiss or convert a chapter 11 case, as follows:

- (A) “substantial or” continuing loss to the estate and no 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 1 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 section 341 meeting or a 2004 examination “without good cause shown by the debtor;”
- (H) failure to timely provide information or attend meetings reasonably requested by the United States Trustee;
- (I) “failure to timely 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) – (O) are essentially a restatement of the existing factors [former section 1112(b)(4)-(9)]; and
- (P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

Litigation Points

1. Section 1112(b)(2) is confusing. It provides that “[t]he relief requested in paragraph (1) [i.e., conversion or dismissal of the case] shall not be granted absent unusual circumstances . . . if the debtor [shows a reasonable likelihood that a plan will be confirmed, etc.]” Thus, section 1112(b)(1) provides that the court shall convert the case absent unusual circumstances, and section 1112(b)(2) provides that the court shall not convert the case absent unusual circumstances. It appears that section 1112(b)(2) should be read to provide that “[t]he relief provided in paragraph (1) shall not be granted if there are (as opposed to “absent”) unusual circumstances specifically identified by the court that establish such relief is not in the best interests of the creditors and the estate, and if (not just “if”) the debtor . . . [establishes a

reasonable likelihood that a plan will be confirmed, etc. . . .]”

2. It appears that once the movant makes a showing of “cause” for conversion or dismissal, the burden falls on the opposing party to demonstrate that the relief should be denied. The opposing party must show justification for the debtor’s acts or omissions, that such acts will be promptly cured, and a likelihood of timely plan confirmation. The court must “specifically identify unusual circumstances that establish that the requested conversion or dismissal is not in the best interests of the estate.” The “unusual circumstances” language presumably was intended to increase the burden on the party opposing conversion or dismissal, but it is not clear what will qualify as “unusual circumstances.” Is the requirement of unusual circumstances similar to a requirement of compelling circumstances? Is the likelihood of a pending viable chapter 11 plan itself a sufficient unusual circumstance?

3. The opposing party is required to show, presumably in its opposition to a motion to convert or dismiss, that the debtor will cure its act or omission “within a reasonable period of time fixed by the court.” This could be an issue since at the time the opposition is filed, no time to cure will have been fixed by the court.

4. In order to oppose a motion to convert in a small business case the debtor must show a reasonable likelihood that a plan will be confirmed “within the timeframes established in sections 1121(e) and 1129(e).” This appears to be a reference to the requirement that, in a small business case, a plan must be filed within 300 days [section 1121(e)], and confirmed within 45 days of filing [section 1129(e)]. These dates may be extended prior to the expiration of the deadlines. Presumably if these dates are extended, the extensions would be included “within the timeframes” for purposes of opposing a motion to convert or dismiss.

5. The court must commence the hearing on a motion to convert or dismiss within 30 days of filing, unless compelling circumstances prevent the court from meeting this time limit. If a motion is filed but set for hearing more than 30 days after filing, the status of the motion is unclear. Does the court have to find compelling circumstances that justify hearing the motion more than 30 days after it was filed?

6. Under section 1112(b)(4), the revision specifies several broad additional circumstances under which a case “shall” be converted or dismissed, including, among many others, any “unexcused failure to satisfy timely any filing or reporting requirements,” and “gross mismanagement.” Given the detailed requirements for chapter 11 debtors, including new filing and reporting requirements, and given the new mandatory language of section 1112(b)(1), is there any implied requirement that a failure be material before it is cause for mandatory dismissal or conversion? If “technical” violations constitute cause, is the burden of the debtor when opposing the motion less? If it appears to be in the interests of creditors and the estate, does the court have greater discretion to excuse noncompliance by a debtor?

Cross References

Bankruptcy Code

11 U.S.C. § 1104(a)(3)	[trustee may be appointed for cause in lieu of conversion or dismissal]
11 U.S.C. § 1121(e)	[small business debtor must file plan within 300 days]
11 U.S.C. § 1129(e)	[small business debtor's plan must be confirmed within 45 days]
11 U.S.C. § 1144	[revocation of a chapter 11 plan]

Applicable Nonbankruptcy Statutes

28 U.S.C. § 123	[U.S. Trustee fees]
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Drafting Issues and Problems

Section 1112(b)(2) provides that relief shall not be granted, and it appears that the intention was to provide that relief shall be granted.

Administrative Burdens Imposed on Court

The court must commence the hearing on a motion to convert or dismiss within 30 days of filing. If a motion is filed but set for hearing more than 30 days after filing, the court arguably has to find compelling circumstances that justify hearing the motion more than 30 days after it was filed.

The court must decide the motion within 15 days after commencement of the hearing, unless movant “expressly” consents or there are “compelling circumstances” that delay the court from ruling.

SECTION 1114

Payment of Insurance Benefits to Retired Employees

Effective Date

New section 1114(l) is effective as to all cases filed on or after April 20, 2005. The other amendments to section 1114 are effective in cases filed on or after October 17, 2005.

Summary of Amendment

Section 1114(d) provides that upon the motion of a party in interest and after notice and a hearing the court shall order the appointment of a committee of retired employees if the debtor seeks to modify retirement or not pay retirement benefits or if the court otherwise deems the appointment of such a committee appropriate. The change from prior law is that the members of such committee are appointed by the United States Trustee. Previously, they were appointed by the court.

New section 1114(l) provides that upon the motion of a party in interest and after notice and a hearing the court shall order the reinstatement of retirement benefits modified within 180 days of the petition date if the debtor was insolvent on the date such benefits were modified. However, such reinstatement – which is retroactive to the date of the original modification – may stand if “. . . the court finds that the balance of the equities clearly favors such modification.”

Former section 1114(l) is now section 1114(m). There are no substantive changes.

Case Authority Impacted by the Amendment

Section 1114 permits the modification of retirement benefits only after the debtor has complied with a number of procedures designed to foster negotiation, and a consensual resolution failing, only upon a showing that the modification “. . . is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities. See 11 U.S.C. § 1114(g). The cases are relatively clear that the requirements of section 1114(g) do apply to a retirement plan that, by its own terms, may be amended unilaterally by the company. See, e.g., In re Doskocil Cos., Inc., 130 BR. 870, 874-77 (Bankr. D. Kan. 1991); In re North American Royalties, Inc., 276 B.R. 860, 866-68 (Bankr. E.D. Tenn. 2002). Such plans generally impact management rather than union retirees. While the amendment does not expressly resolve the split of authority, new section 1114(l) would appear to apply to *all* modifications within 180 days of the petition date, as Congress could easily have begun the new section by providing: “Unless the applicable health and retirement plan provides for the unilateral modification of retiree benefits by the employer. . . .”

It is ironic that a solvent company may unilaterally modify a plan within 180 days of the petition date, while an insolvent company – the debtor most in need of increasing its cash flow – cannot.

SECTION 1115
Property of the Estate

Summary of Amendment

Section 1115 is a new addition to the Bankruptcy Code. It applies only to individual chapter 11 debtors. It does not apply to corporate or partnership debtors.

Section 1115(a) tracks the provisions of section 1306, defining property of the chapter 13 estate by providing that property of the estate in a chapter 11 case filed by an individual includes all property specified in section 541 as well as the following:

All property of the kind specified in section 541 that is acquired by the individual 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; and

Earnings from personal 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.

Section 1115(b) specifies that a debtor shall remain in possession of property of the estate, except as provided in section 1104 (dealing with the appointment of a trustee or examiner) and except as otherwise provided in a confirmed plan or order confirming a plan.

This section will have an impact on the content of disclosure statements filed by individuals. Their disclosures must now include information concerning post-petition earnings and the assets acquired with those earnings

Cross References

Bankruptcy Code

11 U.S.C. § 541	[property of the estate]
11 U.S.C. § 1104	[appointment of a trustee or examiner]
11 U.S.C. § 1123(a)(8)	[when a chapter 11 debtor is an individual, plan required to devote post-petition earnings as is necessary for the execution of the plan]
11 U.S.C. § 1129(a)(16)	[requirement that post-petition earnings be used to fund chapter 11 plan when debtor is an individual]
11 U.S.C. § 1129(b)(2)(B)(ii)	[exception to the “absolute priority rule for post-petition earnings]

11 U.S.C. § 1306

[additional property of the estate in a chapter 13 case]

National Rules

Rule 1007(h)

[obligation to file supplemental schedules]

Administrative Burdens Imposed on Court

By including post-petition earnings in the bankruptcy estate of individual chapter 11 debtors, section 1115(a) may compel such debtors to file frequent supplemental schedules throughout the case in order to disclose changes in income and the acquisition of assets with post-petition earnings. See Fed. R. Bankr. P. 1007(h).

SECTION 1116
Duties of Trustee or Debtor in Possession in Small Business Cases

Summary of Amendment

Section 1116 imposes additional duties upon a trustee or a debtor in possession in a small business case. These are:

The most recent balance sheet, statement of operations, cash flow statement, and federal income tax return must be “appended” to the petition (or, in an involuntary case, filed within 7 days of the order for relief). If any such document has not been prepared or filed, a statement under penalty of perjury to that effect is to be appended to the petition. See 11 U.S.C. § 1116(1).

The debtor’s “senior management personnel and counsel” must attend all meetings scheduled by the court or the United States Trustee, including initial debtor interviews, scheduling conferences, and meetings of creditors unless the court, after notice and a hearing, finds that “extraordinary and compelling circumstances” warrant waiving such requirement. See 11 U.S.C. § 1116(2).

Extensions of time in which to file schedules and the statement of financial affairs are limited to 30 days absent “extraordinary and compelling circumstances”. See 11 U.S.C. § 1116(3). Interim Rule 1007(c) makes clear that this standard must be satisfied if a small business debtor or a trustee in a small business case requests an extension beyond 30 days.

All postpetition financial and other reports required by either the Federal Rules of Bankruptcy Procedure or the local rules of procedure must be filed. See 11 U.S.C. § 1116(4).

Subject to section 363(c)(2), insurance customary and appropriate to the debtor’s industry must be maintained. See 11 U.S.C. § 1116(5).

All tax returns and other required government filings must be made and, subject to section 363(c)(2), all administrative priority taxes must be timely paid, except those being contested and diligently prosecuted in an appropriate proceeding. See 11 U.S.C. § 1116(6).

The United States Trustee or designee must be allowed to inspect the debtor’s business premises, books, and records at reasonable times, after reasonable prior written notice, unless such notice is waived by the debtor. See 11 U.S.C. § 1116(7).

Litigation Points

1. Determining if a debtor is a “small business debtor” will involve the determination of several factual questions any one of which may lead to litigation. For instance, does the debtor have more than \$2.0 million of “noncontingent, liquidated secured and unsecured debt?” Determining when and how affiliate debt is included will give rise to disputes.

2. Whether a debtor is a “small business debtor” is to some extent in the United States Trustee’s control because the United States Trustee must not have appointed a committee. Or, the court must have determined that the committee is not sufficiently active and representative to provide effective oversight of the debtor. Therefore, can a debtor revert “back and forth” between being a small business debtor and not, depending upon the committee? How does the court determine if the committee is providing “effective oversight?”

Cross References

New Defined Terms

small business case, 11 U.S.C. § 101(51C).

small business debtor, 11 U.S.C. § 101(51D).

Bankruptcy Code

11 U.S.C. § 308	[reporting requirements that pertain only to small business debtors]
11 U.S.C. § 1112(b)	["cause" for dismissal or conversion to chapter 7 including failure to maintain insurance, to file timely report, to attend § 341(a) meeting or Rule 2004 exam, to provide information or attend meetings reasonably requested by the U.S. Trustee]

Interim Rules

Interim Rule 1007(c)	[indicating that extensions of time beyond 30 days to file statements and schedules are limited by the standard set in section 1116(3)]
Interim Rule 1020	[requiring a debtor to state whether or not the debtor is a small business debtor and setting a deadline for contesting the debtor’s statement]

Administrative Burden Imposed on Court

This section increases the amount of required filings. This will impose a significant burden on debtors and trustees as well as some burden on the clerk’s office and the United States Trustee.

SECTION 1121 Who May File a Plan

Summary of Amendment

Paragraph (d) has been split into two distinct parts. Subdivision (1) is former paragraph (d) amended to make it subject to the limitations in new subdivision (2).

Former paragraph (d) authorized the court, for cause, to reduce or extend the exclusive periods to file a plan (120 days) and achieve acceptance (180 days).

New subdivision (2) prohibits extensions of the exclusive period to file a plan beyond 18 months after the petition date and extensions of the exclusive period to achieve acceptance beyond 20 months after the petition date.

Paragraph (e) is completely revised. In a small business case, the debtor has a 180-day exclusive period to file a plan [see 11 U.S.C. § 1121(e)(1)] and must file a plan within 300 days [see 11 U.S.C. § 1121(e)(2)]. These deadlines may be extended after notice and a hearing. See 11 U.S.C. §§ 1121(e)(1)(A) & (e)(3)(A). The debtor must demonstrate by a preponderance of the evidence that it is more likely than not to confirm a plan in a reasonable time. See 11 U.S.C. § 1121(e)(3)(A). The order granting an extension must set a new deadline. See 11 U.S.C. § 1121(e)(3)(B). Further, the order granting the extension must be signed before the existing deadline expires. See 11 U.S.C. § 1121(e)(3)(C).

“The expeditious filing and confirmation of the plan in chapter 11 has been a frequent theme of creditor concern and Congressional action in the past. The amendments of 2005 are no exception. Again Congress has responded to the comments of a variety of creditors who wish to expedite the administration of chapter 11 cases by focusing on the debtors’ exclusive right to file a plan under 11 U.S.C.A. § 1121, and the Bankruptcy Code now substantially limits a debtor’s ability to obtain extension of its time to file and confirm its plan.” Hon. William Houston Brown and Lawrence R. Ahern III, *2005 Bankruptcy Reform Legislation with Analysis*, p. 91 (Thompson/West 2005).

Litigation Points

1. The extension motion must be filed in time for the order to be signed before expiration of the deadline.
2. Section 1121(e)(1) concerns extension of the 180-day period for filing a plan and authorizes an extension after notice and a hearing [see section 1121(e)(1)(A)], as provided in section 1121(c) or the court, for cause, orders otherwise [see section 1121(e)(1)(B)]. What the court may “order otherwise” and what is “cause” is undefined.

3. In addition the phrase “after notice and a hearing” is used in regards to section 1121(c)(1) concerning the 180-day period, but not in section 1121(e)(3) which does not use the phrase.

4. The consequences for missing a deadline are not spelled out. One supposes it may be grounds for conversion, appointment of a trustee, or dismissal. See 11 U.S.C. § 1112. Could it also mean that a late filed plan is unconfirmable because the debtor as proponent cannot satisfy section 1129(a)(2)?

Cross References

New Defined Terms

small business case, 11 U.S.C. § 101(51C)

small business debtor, 11 U.S.C. § 101(51D)

Bankruptcy Code

11 U.S.C. § 308 [additional reporting requirements of small business debtors]

11 U.S.C. § 1116 [duties of trustees and debtors in small business cases]

Applicable Nonbankruptcy Statutes

15 U.S.C. § 632(a)(1) [“small business concern”]

Interim Rules

Interim Rule 1020 [requiring a debtor to state whether or not the debtor is a small business debtor and setting a deadline for contesting the debtor’s statement]

SECTION 1123 Contents of Plan

Summary of Amendment

Section 1123 is amended in two ways.

First, in section 1123(a)(1), the references to the statutory descriptions of priority claims are amended to conform to the renumbering of former sections 507(a)(1) and (2) to sections 507(a)(2) and (3), respectively.

Second, section 1123(a)(8) is added and requires individual chapter 11 debtors to pay creditors “all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income . . . as is necessary for the execution of the plan.”

There are three other amendments related to section 1123(a)(8). Section 1115(a) now provides that when a chapter 11 debtor is an individual, the debtor’s post-petition earnings from personal services are property of the estate. Also, section 1129(a)(15)(B) permits an unsecured creditor to compel an individual chapter 11 debtor to distribute all disposable income to creditors unless the plan will pay all claims in full. Finally, section 1129(b)(2)(B)(ii) carves out an exception to the absolute priority rule by permitting individual chapter 11 debtors to retain post-petition earnings except to the extent necessary to pay post-petition domestic support obligations. See 11 U.S.C. § 1129(a)(14).

Cross References

Bankruptcy Code

11 U.S.C. § 1115(a)	[post-petition earnings are property of the estate in an individual’s chapter 11 case]
11 U.S.C. § 1129(a)(14)	[payment of post-petition domestic support obligations a condition to confirmation of chapter 11 plan]
11 U.S.C. § 1129(a)(15)	[devotion of post-petition earnings to chapter 11 plan filed by individual]
11 U.S.C. § 1129(b)(2)(B)(ii)	[exception to the “absolute priority rule for post-petition earnings]

SECTION 1124 Impairment of Claims

Summary of Amendment

If a class of claims or interests are not impaired by a chapter 11 plan, that class is conclusively presumed to have accepted the plan. See 11 U.S.C. § 1126(f). Section 1124 defines when a class of claims or interests is impaired.

The 2005 Act has not altered the basic definition of impairment found in section 1124(1). A class is not impaired if the plan “leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest.” See 11 U.S.C. § 1124(1). When a default permits a claim holder to accelerate the debtor’s obligation to it, the plan will impair the claim unless it provides for payment in full in accordance with the contract on the plan’s effective date.

However, in some instances, section 1124(2) permits the plan to change the rights of a creditor under a contract by de-accelerating an obligation without also impairing the claim. Section 1124(2)(A) permits the de-acceleration of a claim without curing a default under a contract provision of the kind specified in section 365(b)(2) [defaults under insolvency, bankruptcy, financial condition, and appointment of a trustee/custodian *ipso facto* clauses] or of a kind that section 365(d)(2) does not require to be cured [satisfaction of a penalty rate or a penalty provision relating to a failure to perform a nonmonetary obligation].

In addition, section 1124(2)(D) provides that a claim is not impaired by a chapter 11 plan because it fails to provide for the cure of a nonmonetary default under an unexpired lease of real property if it was impossible for the debtor in possession or the trustee to make a cure at or after the time of assumption of the lease. However, if the unexpired lease concerns nonresidential real property, the lessor (unless the lessor is the debtor or an insider of the debtor) is entitled to recover pecuniary losses resulting from a nonmonetary default such as the failure to remain in continuous operations. See the discussion of 11 U.S.C. § 365(b)(1)(A) in the summary of section 365.

Finally, former section 1124(1)(D) is now section 1124(1)(E).

Cross References

Bankruptcy Code

11 U.S.C. § 365(b)	[assumption of defaulted executory contracts and unexpired leases]
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SECTION 1125 Postpetition Disclosure and Solicitation

Summary of Amendment

Section 1125 mandates that a disclosure statement contain “adequate information” so as to enable those voting to accept or reject the plan to make an informed judgment about the plan. Section 1125 (a)(1) continues to define “adequate information” to mean “information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records” to make such a decision. The amendments to section 1125(a)(1) add two concepts, one that adds an additional burden on the plan proponent, and one that gives the court broad discretion to tailor the level of disclosure in each case.

The first change is that adequate information now includes “a discussion of the potential material Federal tax consequences of the plan” to the debtor or any successor *and* to a “hypothetical investor typical of the holders of claims or interests in the case.” See 11 U.S.C. § 1125(a)(1).

The second change provides that in a determination that adequate information is provided in the disclosure statement, “the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information” Id.

The tax information requirement imposes a significant and potentially costly burden on the plan proponent. The latter amendment permits the court to determine the proper amount of disclosure in each case, enumerating important factors to be considered in making such a decision.

Substantially revised section 1125(f) gives the court and the debtor in a small business case substantial flexibility as to the form of disclosure. The court may determine that the plan itself provides adequate information and therefore that no disclosure statement is necessary [section 1125(f)(1)], that a standard form disclosure statement approved by the court or adopted pursuant to 28 U.S.C. § 2075 is sufficient [section 1125(f)(2)], or that a conditionally approved disclosure statement mailed at least 25 days prior to the confirmation hearing should be approved at the confirmation hearing [section 1125(f)(2)].

The addition of section 1125(g) is supportive of prepackaged plans, providing that notwithstanding section 1125(b) [no postpetition solicitation of ballots unless a disclosure statement has been approved], acceptances and rejections may be solicited post-petition if the solicitation process began pre-petition provided that solicitation complied with applicable nonbankruptcy law. In other words, the filing of the petition and prepackaged plan does not stop the solicitation initiated prior to the petition.

In addition, section 419 of the 2005 Act, which is uncodified, directs the Judicial Conference to propose a bankruptcy rule mandating disclosure regarding the value, operations, and profitability of any entity in which the debtor holds a substantial or controlling interest.

Cross References

New Defined Terms

small business case, 11 U.S.C. § 101(51C)

Bankruptcy Code

§ 419 of the 2005 Act [uncodified provision requiring the adoption of a Bankruptcy Rule covering disclosure of information about certain affiliates]

Applicable Nonbankruptcy Statutes

28 U.S.C. § 2075 [Supreme Court may prescribe rules and forms]

SECTION 1127
Modification of plan

Summary of Amendment

New sections 1127(e) and (f) are added.

Section 1127(e) applies only to chapter 11 debtors who are individuals. It provides that a confirmed plan (whether or not substantially consummated) may be modified any time prior to the completion of the payments in order to (i) increase or reduce the amount of payments on claims of a particular class; (ii) extend or reduce the time period for such payments; or (iii) alter the payment to a particular creditor who has been paid on its claim by a source other than the plan. With this amendment, the ability of an individual chapter 11 debtor to modify a plan is substantially similar to the ability of a debtor to modify a chapter 13 plan. See 11 U.S.C. § 1329.

New section 1127(f) clarifies prior law by providing that the requirements of sections 1121 through 1128 and section 1129 apply to any modification under section 1127(a). See 11 U.S.C. § 1127(f)(1). Any modified plan “shall become the plan” only after there has been disclosure under section 1125, notice and a hearing, and court approval.

Cross References

Bankruptcy Code

11 U.S.C. § 1101(2) [definition of “substantial consummation”]

SECTION 1129 Confirmation of Plan

Effective Date

The amendment to section 1129(a)(16) is effective in all cases pending on or after the date of enactment, April 20, 2005. However, section 1221(d) of the 2005 Act directs the court to not confirm a plan without first considering whether application of section 1129(a)(16) to a pending case would substantially affect the rights of a party in interest who first acquired rights with respect to the debtor after the petition date. All other amendments are effective in cases filed on or after October 17, 2005.

Summary of Amendment

The treatment of section 507(a)(8) tax claims has been modified by section 1129(a)(9)(C) in the following respects:

- a. “regular installment payments in cash” are now specified rather than just “deferred cash payments.”
- b. The time period for payment has been changed to 5 years and is measured from the order for relief (rather than 6 years from the date of assessment of the claim).
- c. A “most favored nation” clause has been added that requires such tax claims to be treated no less favorably than “the most favored nonpriority unsecured claim (other than an administrative convenience class) provided for by the plan”

Section 1129(a)(9)(D) requires secured tax claims that, but for the security, would fall with section 507(a)(8) to be treated in the manner provided in section 1129(a)(9)(C).

Section 1129(a)(14) requires, as a condition to plan confirmation, the payment of all post-petition amounts payable under a domestic support obligation.

If a plan proposed by an individual chapter 11 debtor will not pay unsecured claims in full, and if an unsecured creditor demands it, “the value . . . distributed under the plan [must be] not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides for payments, whichever is longer.” See 11 U.S.C. § 1129(a)(15)(B).

The reference to section 1325(b)(2) in section 1129(a)(15)(B) means that the calculation of projected disposable income begins with the debtor’s “current monthly income.” “Current monthly income” is defined by section 101(10A) as average income, whether or not taxable, for

the 6-month period prior to the petition date. It is an average of income from all sources, including amounts received on a regular basis for household expenses of the debtor or the debtor's dependents, but excluding social security benefits. "[A]mounts reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, for charitable contributions . . . and for the continuation, preservation, and operation" of the debtor's business are then deducted from current monthly income. See 11 U.S.C. § 1325(a)(2). The remainder is the debtor's projected disposable income.

Note that section 1129(a)(15) does not incorporate all of section 1325(b). So, the requirement of section 1325(b)(1) that all projected disposable income "be applied to make payments to unsecured creditors under the plan" is not applicable under chapter 11. Instead, section 1129(a)(15)(B) provides only for the distribution over a minimum 5-year period of a "value" that will eventually total an amount that is "not less than projected disposable income." See 11 U.S.C. § 1129(a)(15)(B). In chapter 13, monthly projected disposable income apparently must be paid to unsecured creditors as it is generated.

Section 1325(a)(3) is also not incorporated by section 1129(a)(15). As a result, an individual chapter 11 debtor's expenses will not be limited by the means test of section 707(b)(2) as they are in a chapter 13 case when the debtor's current monthly income exceeds median family income. See 11 U.S.C. § 1325(a)(3). Instead, an individual chapter 11 debtor's actual expenses, provided they are reasonably necessary to the debtor's support, maintenance, or livelihood, will be deducted from current monthly income when calculating projected disposable income.

Official Form 22B is for use by individual chapter 11 debtors when calculating their current monthly income.

All property transfers pursuant to a plan must be made in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation or trust that is "not a moneyed, business, or commercial corporation or trust." See 11 U.S.C. § 1129(a)(16).

Sections 363(d)(1) and 541(f) contain related amendments. Section 541(f) has been added to the Bankruptcy Code to make clear that property of a debtor that is a nonprofit corporation as defined in Internal Revenue Code section 501(c)(3) may be transferred to an entity that is not a nonprofit corporation to the extent such a transfer could take place outside of a bankruptcy proceeding. Similarly, section 365(d)(1) permits a trustee to use, sell, or lease property of the estate only "in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust. . . ."

Sections 363(d)(1), 541(f), and 1129(a)(16) may have their most significant impact on health care businesses operated by nonprofit debtors. Applicable nonbankruptcy law will determine whether such a debtor may transfer such a business or business asset to for-profit entities. Section 1221(d) of the 2005 Act confers standing on the attorney general of the state in

which the debtor is incorporated or does business to appear and be heard in connection with such sales.

Section 1129(b)(2)(B)(ii) is amended to provide that an individual debtor may retain property of the estate as defined in new section 1115 [post-petition earnings] subject to new section 1129(a)(15).

Section 1129(e) is a small business case provision that requires a plan, if filed pursuant to the terms of section 1121(e), be confirmed within 45 days after the plan is filed unless extended in conformance with section 1121(e)(3). A plan may not be confirmed if the small business debtor has not complied with the “applicable provisions” of title 11. Presumably, this will include compliance with new reporting requirements of section 308.

Litigation Points

1. Section 1129(a)(9)(C)(ii) may actually reduce litigation because the time period of its commencement, namely the date of the order for relief, is more easily determined than the date of assessment (prior law).

2. Determining the most favored unsecured creditor for purposes of section 1129(a)(9)(C)(iii) could be problematic. What is most favored is in the “eye of the beholder.”

3. “Disposable income,” as defined by section 1325(b)(2) and incorporated by section 1129(a)(15), undoubtedly will be the subject of litigation. For instance, does this section set a minimum plan length of at least five years? Or, is it a formula? That is, does it merely require that plan payments be measured against, and equal, projected disposable income over at least 5 years? Or, must plan payments, which include the debtor’s projected disposable income, actually be made over a 5-year or longer period? The phrase “the value of property to be distributed” in section 1129(a)(15)(B) suggests the former. The comparable provision in section 1325(b)(1)(B) omits this phrase, suggesting that under chapter 13, plan payments must actually continue for at least a 3-year period.

4. Suppose a chapter 11 plan provides that a secured claim will be paid in full over 15 years. Does section 1129(a)(15)(B) compel an individual debtor to commit all projected disposable income for 15 years to the plan? If it has this meaning, the ability of a chapter 11 debtor to amortize secured debt over an extended period may come at a very high price. Suppose the plan does not impair a long-term secured debt, requiring the debtor to maintain contract payments over the remainder of a contract term longer than 5 years. Must all disposable income be contributed for the contract term?

5. New section 1129(a)(16) probably will generate litigation over the requirements of applicable nonbankruptcy law that governs transfers of property.

Cross References

New Defined Terms

current monthly income, 11 U.S.C. § 707(b)

Bankruptcy Code

11 U.S.C. § 707(b)(2)	[chapter 7 means test]
11 U.S.C. § 1121(e)	[who may file a plan in a small business case and when they may file]
11 U.S.C. § 1325(b)(1)	[chapter 13 requirement that all projected disposable income be applied to make payments to unsecured creditors]
11 U.S.C. § 1325(b)(2)	[disposable income]
11 U.S.C. § 1325(b)(3)	[chapter 13 requirement that individuals with current monthly income greater than median family income calculate amounts reasonably necessary for support and livelihood under section 707(b)(2)]

Official Forms

Official Form 22B	[to be used by individual chapter 11 debtors to calculate current monthly income]
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SECTION 1141 Effect of Confirmation

Effective Date

The amendment made to section 1141(d)(5)(C) is effective in cases filed on or after the date of enactment, April 20, 2005. All other amendments to section 1141 are effective in cases filed on or after October 17, 2005.

Summary of Amendment

Section 1141(d)(5) is new. It carves out an exception to the general rule that confirmation of a plan discharges all debts that arose prior to confirmation. See 11 U.S.C. § 1141(d)(1). If the debtor is an individual, the discharge must now wait until the debtor completes all payments under the plan. See 11 U.S.C. § 1141(d)(5)(A). However, there is an exception to the exception. “[F]or cause,” and after notice and a hearing, section 1141(d)(5)(A) permits the court to order that confirmation of the plan discharges an individual debtor’s debts. What constitutes cause is not delineated.

After confirmation but before completion of plan payments, section 1141(d)(5)(B) permits an individual debtor to request what amounts to a hardship discharge. Cf. 11 U.S.C. § 1328(b). If the debtor demonstrates that holders of allowed unsecured claims have received the present value of what they would have received in a chapter 7 liquidation and that modification of the plan under section 1127 is not practicable, the discharge may be issued.

Note that unlike the hardship discharge under section 1328(b), an individual chapter 11 debtor need not prove that the debtor’s failure to complete payments “is due to circumstances for which the debtor should not justly be held accountable.”

An individual chapter 11 debtor seeking a discharge must prove at a hearing held not more than 10 days before the date of entry of the discharge order that “there is no reasonable cause to believe” that section 522(q)(1) may be applicable and that there is a “pending 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).”

Section 522(q) imposes a \$125,000 cap on homestead exemptions that applies if the debtor has been convicted of a felony demonstrating that the petition was an abuse of title 11, or the debtor owes a debt for violation of state or federal securities laws or a debt arising from a criminal act, a civil remedy under the RICO statute (18 U.S.C. § 1964), or an intentional tort, criminal act, or other willful misconduct causing serious physical injury or death to another in the preceding 5 years. See 11 U.S.C. § 522(q)(1)(A) & (B). By virtue of section 1141(d)(5)(C), these same circumstances will delay and may ultimately bar a discharge in favor of an individual chapter 11 debtor.

As discussed below under Drafting Issues and Problems, section 1141(d)(5)(C) is ambiguous. It might be read as a third element of what must be proved before an individual chapter 11 debtor is entitled to a hardship discharge. Or, section 1141(d)(5)(C) could be an independent limitation on an individual chapter 11 debtor's discharge.

There is also a new exception at section 1141(d)(6) to the chapter 11 discharge that may be granted to a corporate debtor. A corporate debtor may not discharge a debt arising out of a fraud of the type specified in section 523(a)(2)(A) & (B) and owed to a domestic governmental unit. Nor may a corporate chapter 11 debtor discharge a debt for a tax or customs duty with respect to which the debtor has filed a fraudulent return or willfully attempted to evade or defeat the tax or duty.

Litigation Points

1. What constitutes cause under section 1141(d)(5)(A) to order entry of a discharge in favor of an individual chapter 11 debtor contemporaneously with plan confirmation and without completion of plan payments?

Cross References

Bankruptcy Code

11 U.S.C. § 522(q)	[cap on homestead exemptions]
11 U.S.C. § 523(a)(2)	[debts arising from fraud nondischargeable in chapter 7 cases]

Applicable Nonbankruptcy Statutes

31 U.S.C. §§ 3721, et seq.	[false claims]
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Drafting Issues and Problems

The structure of subparagraphs (d)(5)(B) and (d)(5)(C) is awkward. By virtue of the word “and” appearing at the end of subparagraph (d)(5)(B)(ii), subparagraph (d)(5)(C) could be construed as the third requirement for a chapter 11 hardship discharge. The first two requirements are found at subparagraphs (d)(5)(B)(i) & (ii). If so, subparagraph (d)(5)(C) would more logically be (d)(5)(B)(iii).

If section 1141(d)(5)(C) is not a requirement for a chapter 11 hardship discharge and instead is a separate requirement that must be satisfied before a chapter 11 discharge of any type may be issued in favor of an individual debtor, the “and” at the end of section 1141(d)(5)(B)(ii) must be an error. This also means that section 1141(d)(5)(C) is not grammatical. Without section 1141(d)(5)(B) as part of its structure, section 1141(d)(5)(C) is an incomplete sentence.

Section 1141(d)(5)(C) is effective from the date of enactment, April 20, 2005. Section 1141(d)(5)(B) is effective on and after October 17, 2005. If section 1141(d)(5)(C) is relevant only to the hardship discharge permitted by section 1141(d)(5)(B), there was no need to provide for the early effectiveness of section 1141(d)(5)(C). Section 1141(d)(5)(C) could never become an issue in a case filed on or after April 20 but before October 17 because a hardship discharge is only possible after October 17. This suggests that section 1141(d)(5)(C) should be construed as a limitation on any discharge an individual chapter 11 debtor might seek, not just on a hardship discharge.

Administrative Burdens Imposed on Court

Delaying the discharge of an individual chapter 11 debtor may have a significant impact on the clerk. It will mean that some chapter 11 cases will remain open far beyond the confirmation of the plan. To enter a discharge, a determination that all plan payments have been paid will be necessary. In the chapter 12 and 13 context, this same determination is made but there is a trustee monitoring the debtor's performance of the plan. In most chapter 11 cases with confirmed plans, there is no trustee. Consequently, it will be incumbent on the court to monitor chapter 11 cases and, perhaps, set hearings to determine that the plan has been completed.

SECTION 1146 (and sections 346, 728, 1231) Special Tax Provisions

Effective Date

The amendments to section 1231 are effective in all cases filed on or after April 20, 2005. The other amendments to sections 346, 728, 1146, and 1231 are effective in cases filed on or after October 17, 2005.

Summary of Amendment

In 1978, prior to the enactment of the Bankruptcy Code, early drafts of sections 346, 728, and 1146 applied to federal as well as state and local taxes. However, when the Bankruptcy Code ultimately was enacted, these sections dealt only with state and local taxes. A possible reason for the state and local limitation was a jurisdictional conflict over the federal tax provisions between the House Judiciary Committee (which was responsible for the bankruptcy legislation in general) and the House Ways and Means Committee (which had jurisdiction over federal tax matters). Eliminating federal taxes from coverage under section 346, 728, and 1146 essentially meant that the House Ways and Means Committee did not need to weigh in on the tax provisions, easing the way for the enactment of the Bankruptcy Code.

The House Ways and Means Committee eventually did take up these tax issues. In 1980, Congress passed and the President signed the Bankruptcy Tax Act of 1980, enacting 26 U.S.C. §§ 108, 1398, and 1399.

Section 346 as it existed prior to the 2005 Act has been repealed and replaced by an entirely new section 346. Section 346 now consolidates the former special tax provisions in chapter 7 (section 728), chapter 11 (section 1146), and chapter 12 (section 1231). Section 346 also brings state and local bankruptcy tax provisions into line with the bankruptcy tax provisions set out in the Internal Revenue Code, 26 U.S.C. §§ 108, 1398, and 1399. These tax provisions provide certain rules in the following areas:

- (1) Whether the estate of the debtor is treated as a separate taxable entity;
- (2) Who has the responsibility for filing returns for or on behalf of the debtor;
- (3) How should the bankruptcy estate be taxed;
- (4) What tax attributes does the estate succeed to and what tax attributes does the debtor acquire or re-acquire after the bankruptcy is over;
- (5) Under what circumstances is relief of indebtedness treated as income for tax purposes.

Section 728 was repealed in its entirety by the amendment. Now, under section 346, the taxable year of a chapter 7 debtor is not automatically terminated upon the filing of a petition. The taxable year terminates for state and local taxes in the same fashion as provided under the Internal Revenue Code (26 U.S.C. § 1398). In addition, there are conforming provisions of section 346 which deal with the requirements for filing various types of income and informational returns.

Sections 1146 and 1231 were amended to eliminate the duplicate provisions dealing with the termination of taxable years and the requirements that returns be filed. The remainder of section 1146 was unchanged by the 2005 Act. However, section 1231 was further amended to allow for debtor, after obtaining bankruptcy court permission, to seek a determination from any governmental entity concerning the tax treatment of a proposed chapter 12 plan. The bankruptcy court is given the authority to rule upon the tax treatment after the governmental authority has had the opportunity to make a determination. The similar provision contained in section 1146 only allowed for the request to be made to the state or local taxing authority.

These amendments makes the tax rules applicable to bankruptcy uniform around the country. Now, a tax advisor does not need to be concerned about two potentially different sets of rules when advising a debtor.

Cross References

Bankruptcy Code

11 U.S.C. § 346	[special tax provisions relating to the treatment of state and local taxes]
11 U.S.C. § 728	[repealed special tax provision applicable in chapter 7 cases]
11 U.S.C. § 1146	[special tax provisions applicable in chapter 11 cases]
11 U.S.C. § 1231	[special tax provisions applicable in chapter 11 cases]

Applicable Nonbankruptcy Statutes

26 U.S.C. § 108	[see Summary of Amendment above for brief discussion of this section]
26 U.S.C. § 1398	[see Summary of Amendment above for brief discussion of this section]
26 U.S.C. § 1399	[see Summary of Amendment above for brief discussion of this section]