



Individual Chapter 11

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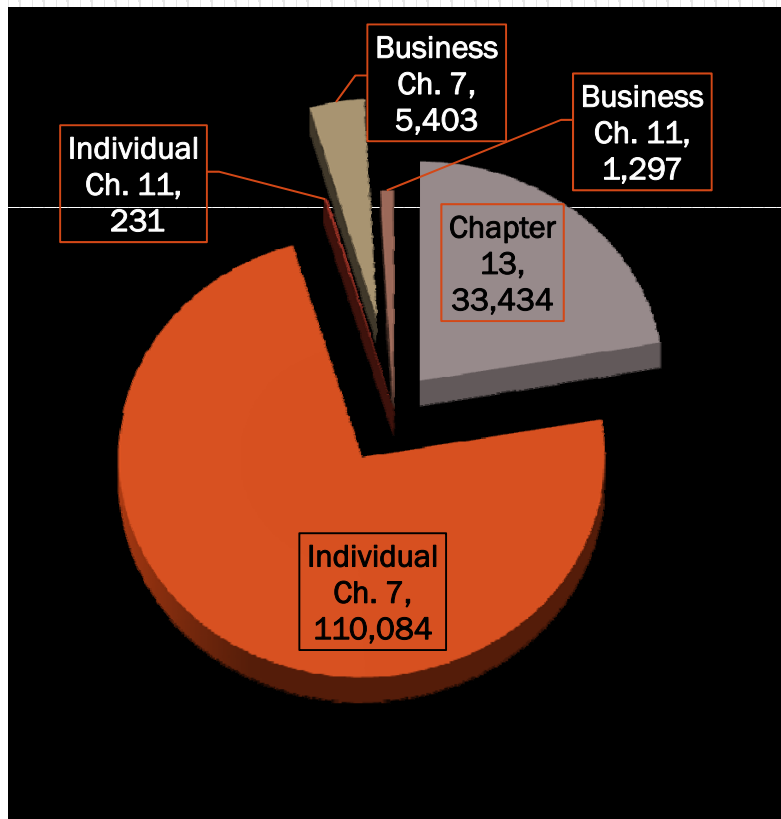
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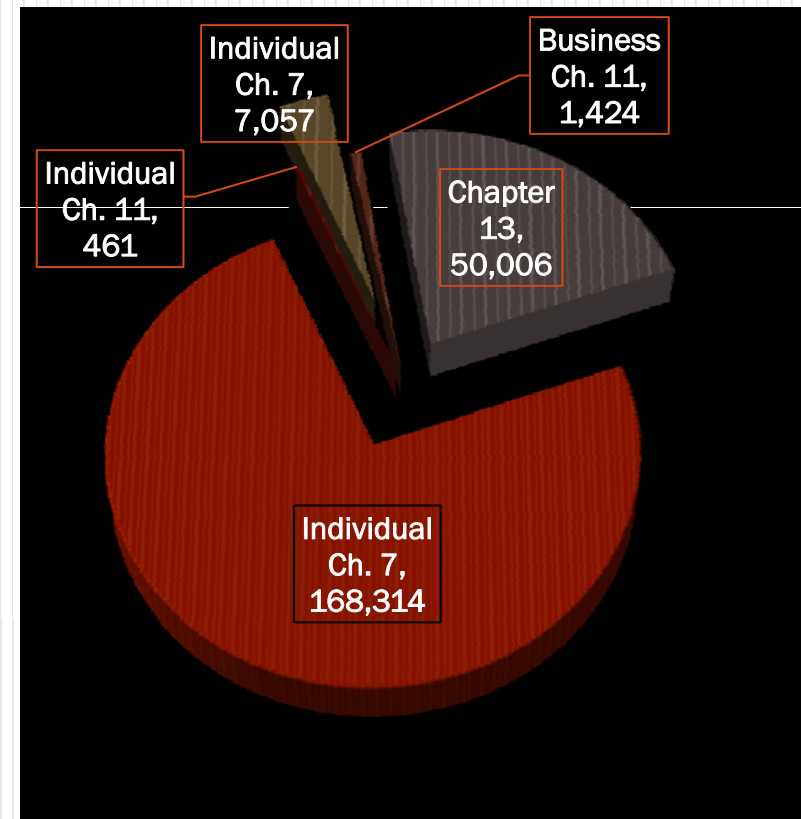
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Case Comparison

2009



2010



Case Comparison: Involuntary Petition

	Individual Ch. 11	Business Ch. 11	Chapter 13
<u>Involuntary Petition?</u>	Maybe	Yes - § 303(a)	No - § 303(a)

Is § 303(a) as applied to Individual Ch. 11 Unconstitutional?

[The 13th Amendment to the U.S. Constitution:](#)

- **Section 1:** “Either slavery nor *involuntary servitude*, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction”

[Report of the House Judiciary Committee to the 1978 Bankruptcy Code \(H. R. Rep. No. 95-595, at 120\):](#)

As under current law, chapter 13 is completely voluntary. The Committee firmly rejected the idea of mandatory or involuntary chapter XIII in the 90th Congress. The thirteenth amendment prohibits involuntary servitude. Though it has not been tested in a wage earner plan context, it has been suggested that a mandatory chapter 13, by forcing an individual to work for creditors, would violate this provision.

Is § 303(a) as applied to Individual Ch. 11 Unconstitutional?

The Bankruptcy Code:

- [§ 303\(a\)](#) permits the creditors to initiate an involuntary Ch. 11.

Also see *Toibb v. Radloff*, 501 U.S. 157 (1991)(where the court found that individuals are eligible for Ch. 11 even though Ch. 11 can be commenced involuntarily since in [pre-BAPCPA era](#), “there is no comparable provision in Ch. 11 requiring a debtor to pay future wages to a creditor).

The Bankruptcy Code (Post-BAPCPA Amendments):

- [§ 1115\(a\)\(2\)](#) includes an individual Ch. 11 debtor’s post-petition earnings in the definition of property of the estate
- [§ 1123\(a\)\(8\)](#) provides that an individual Ch. 11 debtor shall commit his post-petition earnings as is necessary to execute the plan
- [§ 1129\(a\)\(15\)](#) requires an individual Ch. 11 debtor to commit his projected disposable income over 5 years should an unsecured creditor objects to his plan

Is § 303(a) as applied to Individual Ch. 11 Unconstitutional?

In re Clemente, 409 B.R. 288 (Bankr. N.J. 2009) - only reported opinion dealing with the 13th Amendment in regard to individual Ch. 11:

- The debtor in *Clemente* did not qualify for Ch. 13, could not get his Ch. 11 plan confirmed due to numerous outstanding objections by his creditors, and lost his right to convert to Ch. 7 because a trustee had been appointed. The court could not dismiss the case because it would not be in the best interest of creditors or the estate.
- The court recognized that the debtor's liberty under the Thirteenth Amendment will be infringed if the court does not, *sua sponte*, treat the debtor's motion to convert as a request to terminate the trustee for the limited purpose of converting the case to Ch. 7 because the debtor would otherwise be forced to work for his creditors.
- The court further noted that the debtor does not waive his 13th Amendment protection by filing a voluntary petition and does not have to choose between obtaining "fresh start" and becoming an indentured servant.

Case Comparison: Debt Limits

	Individual Ch. 11	Business Ch. 11	Chapter 13
Involuntary Petition?	Maybe	Yes - § 303(a)	No - § 303(a)
<u>Debt Limits</u>	None - but small business debtor cap at \$2,343,300	None	\$1,081,400 secured; \$360,475 unsecured

Small Business Debtor

- Many individual Ch. 11 debtors may qualify as “small business debtors”
- § 101(51D) defines a “small business debtor” as a person (i.e. not necessarily an individual) engaged in a commercial or business activity
- The plan and disclosure statement must be filed within the first 300 days of the case
- The plan must be confirmed within 45 days after it is filed, subject to extension

Small Business Debtor: Check the Box

- There is no longer an election to be made
- Instead you check the box

Chapter 11 Debtors	
Check one box:	
<input checked="" type="checkbox"/>	Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D).
<input type="checkbox"/>	Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D).
Check if:	
<input type="checkbox"/>	Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than \$2,343,300 (<i>amount subject to adjustment on 4/01/13 and every three years thereafter</i>).

Check all applicable boxes:	
<input type="checkbox"/>	A plan is being filed with this petition.
<input type="checkbox"/>	Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).

- If no one objects, your designation controls

Case Comparison: Trustee?

	Individual Ch. 11	Business Ch. 11	Chapter 13
Involuntary Petition?	Maybe	Yes - § 303(a)	No - § 303(a)
<u>Debt Limits</u>	None - but small business debtor cap at \$2,343,300	None	\$1,081,400 secured; \$360,475 unsecured
<u>Trustee?</u>	No, debtor is in possession subject to § 1104	No, debtor is in possession subject to § 1104	Yes

Case Comparison: Attorney Compensation

	Individual Ch. 11	Business Ch. 11	Chapter 13
Involuntary Petition?	Maybe	Yes - § 303(a)	No - § 303(a)
<u>Debt Limits</u>	None - but small business debtor cap at \$2,343,300	None	\$1,081,400 secured; \$360,475 unsecured
<u>Trustee?</u>	No, debtor is in possession subject to § 1104	No, debtor is in possession subject to § 1104	Yes
<u>Attorney Compensation</u>	Maybe	§ 330(a)(1) & Local Rules	§ 330(a)(4)(B) & Local Rules

Attorney Compensation in Chapter 13

- **§ 330(a)(4)(B):**

- “In a chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor’s attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.”

- **See Guidelines for Payment of Attorneys' Fees in Chapter 13 Cases for the United States Bankruptcy Court for the Eastern District :**

- Counsel may seek approval for fees in the order confirming the plan up to the amounts set forth in Paragraph 2 without filing a detailed application if:
 1. Counsel has filed an executed copy of the “Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys,” attached hereto; and
 2. No objection to the requested fees has been raised
- The maximum fee which can be approved through the procedure described in [the above paragraph] is #3,500 in nonbusiness cases, and \$5,000 in business cases.

Attorney Compensation in Business Ch. 11

- **§ 330(a)(1):**
 - After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103--
 - (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
 - (B) reimbursement for actual, necessary expense
- **See Local Rules for the United States Bankruptcy Court for the Eastern District**

Attorney Compensation in Individual Ch. 11

- *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004)
 - The Supreme Court held that counsel for corporate Ch. 11 debtor could be compensated from the estate after the case was converted to Ch. 7 only if the counsel is retained by the trustee or an official committee.
- *In re Goldstein*, 383 B.R. 496 (Bankr. C.D. Cal. 2007)
 - The court allowed joint-debtors to each hire separate divorce counsel because doing so would benefit their two bankruptcy estates.
- *In re Dixon*, No. 09-11851 (Bankr. N.D. Cal. 2010)
 - The bankruptcy court found a blatant conflict of interest when the estate counsels defended debtor's exemptions against creditors' objections which placed the counsel in direct conflict against the estate.
 - The court noted that counsels for the estate must keep firmly in mind that they represent the estate and not the debtor individually. (citing *In re Perez*, 30 F.3d 1209, 1219 (9th Cir. 1994)).

How can an Individual Chapter 11 attorney receive compensation for service provided solely for the debtor's personal benefits in light of the above-referenced cases?

Case Comparison: Property of Estate

	Individual Ch. 11	Business Ch. 11	Chapter 13
Involuntary Petition?	Maybe	Yes - § 303(a)	No - § 303(a)
<u>Debt Limits</u>	None - but small business debtor cap at \$2,343,300	None	\$1,081,400 secured; \$360,475 unsecured
<u>Trustee?</u>	No, debtor is in possession subject to § 1104	No, debtor is in possession subject to § 1104	Yes
<u>Attorney Compensation</u>	Maybe	§ 330(a)(1) & Local Rules	§ 330(a)(4)(B) & Local Rules`
<u>Property of Estate</u>	§ 541(a) + § 1115	§ 541	§ 541(a) + § 1306(a)

Case Comparison: Absolute Priority Rule

	Individual Ch. 11	Business Ch. 11	Chapter 13
Involuntary Petition?	Maybe	Yes – § 303(a)	No – § 303(a)
<u>Debt Limits</u>	None - but small business debtor cap at \$2,343,300	None	\$1,081,400 secured; \$360,475 unsecured
<u>Trustee?</u>	No, debtor is in possession subject to § 1104	No, debtor is in possession subject to § 1104	Yes
<u>Attorney Compensation</u>	Maybe	§ 330(a)(1) & Local Rules	§ 330(a)(4)(B) & Local Rules`
<u>Property of Estate</u>	§ 541(a) + § 1115	§ 541	§ 541(a) + § 1306(a)
<u>Absolute Priority Rule</u>	<u>Maybe</u> § 1129(b)(2)(B)(ii) provides “... <i>except that in a case in which the debtor is an individual</i> , the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.”	<u>Yes</u> § 1129(b)(2)(B)(ii) generally provides that junior claim holders are not entitled to receive anything if senior unsecured creditors do not receive full payment of their claims	<u>No</u> A debtor may retain pre-and post-petition property interest without paying unsecured creditors the full amount of their claims and his plan will be confirmed if it satisfies the requirements of § 1325.

BAPCPA modification of Absolute Priority Rule

- “§1129(b)(2)(B)(ii) now states:

- that a plan may be “fair and equitable” even though the debtor retains “property included in the estate under §1115...” See *In re Gbadebo*, 431 B.R. 222 (Bankr. N.D. Cal. 2010).

- §1115 provides:

(a) In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in section 541--

(1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.

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

Split of Authority

No Absolute Priority Rule

In re Tegeder, 369 B.R. 477 (Bankr. D. Neb. 2007)

- The court held §1129(b)(2)(B) to mean that a debtor can retain both pre- and post-petition property under a plan rejected by his unsecured creditor since §1115 makes reference to § 541.

In re Roedemeier, 374 B.R. 264 (Bankr. D. Kan. 2007)

- The court found the language of §1115 to be ambiguous, and concluded, based on Congressional intent, that language of §1129(b)(2)(B) and §1115 should be interpreted broadly to permit the debtor to retain property owned when he filed his bankruptcy petition; thus eliminating the “absolute priority” as applied to individual debtors under Chapter 11.

In re Shat, 424 B.R. 854, 2010 Bankr. LEXIS 584, 2010 WL 702443 (Bankr. D. Nev.)

- The court did not find the BAPCPA's legislative history to be instructive, but it noted the changes in Chapter 11 were an effort to make an individual Chapter 11 cases to be more like Chapter 13, and Chapter 13 has no “absolute priority rule.” *Shat* court, like the court in *Roedemeir*, also found §1115's reference to §541 meant that both pre- and post-petition property were to be included in the bankruptcy estate. As a result, the “absolute priority rule” does not apply.

Split of Authority

Absolute Priority Rule:

In re Gbadebo, 431 B.R. 222 (Bankr. N.D. Cal. 2010)

- The court found the language of both §1115 and §1129(b)(2)(B) to be unambiguous, and §1115's reference to §541 can be reconciled by reading the phrase "included in the estate under §1115" to mean "added to the bankruptcy estate by §1115."

In re Mullins, 2010 Bankr. LEXIS 2826 (Bankr. W.D. Va. June 22, 2010)

- The court "considered the result reached by the majority of these cases to be a very practical one and to make imminent sense from a bankruptcy policy perspective," nevertheless, it concluded "that the result reached by Judge Tchaikovsky in *Gbadebo* is more consistent with the language of the statute." *Id.* at 14.

Case Comparison: Plan Payments & Terms

	Individual Ch. 11	Business Ch. 11	Chapter 13
<u>Plan Payments & Terms</u>	No minimum or maximum, but consider § 1129(a)(15)(B)	No minimum or maximum	3 or 5 years §1325(b)(4)

Plan Payments & Terms

Chapter 11

- Upon objection by unsecured creditors to plan confirmation, §1129(a)(15) requires that the value of the property to be distributed is not less than five years of the debtor's projected disposable income.
- The five-year period is a benchmark and not a timeline.
- §1129(a)(15) allows the debtor use his projected disposal income to pay all creditors under the plan and not just to the unsecured creditors.

Chapter 13

- Only upon an unsecured creditor's objection, the debtor must provide all of his or her projected disposable to payments to unsecured creditors
- §1325(b)(1)(B):

“If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.”

“Projected Disposable Income” Defined

U.S. Supreme Court in *Hamilton v. Lanning*, 2010 WL 2243704 (June 7, 2010) held:

- “Projected Disposable Income” is forward looking, and the court should take into account of known or virtually certain significant changes in a Chapter 13 debtor’s financial circumstances.

Facts:

- 6 months before the debtor’s Ch. 13 bankruptcy, the debtor received a one-time buy-out from her former employer which inflated her gross income.
- The debtor used a forward looking approach to calculate her “projected disposable income” for the purpose of her plan while the trustee adopted the mechanical approach by multiplying her “disposable income” by 60.

What does it mean for Chapter 11 cases?

The Bankruptcy Code:

- § 1129(a)(15)(B): “the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2))”

The Supreme Court in *Hamilton v. Lanning*:

- “It is evident that §1129(a)(15)(B) refers to the defined term “disposable income,” see §1325(b)(2), but that fact offers no insight into the meaning of the word “projected” in §§1129(a)(15)(B) and 1325(b)(1)(B). We fail to see how that word acquires a specialized meaning as a result of this cross-reference—particularly where both §§1129(a)(15)(B) and 1325(b)(1)(B) refer to projected disposable income “to be received” during the relevant period. See *supra*, at 11.” (2010 WL 2243704 at 9).

Case Comparison: Plan Process

	Individual Ch. 11	Business Ch. 11	Chapter 13
<u>Plan Payments & Terms</u>	No minimum or maximum, but consider § 1129(a)(15)(B)	No minimum or maximum	3 or 5 years §1325(b)(4)
<u>Plan Process</u>	<ul style="list-style-type: none"> • 120 days of exclusivity • § 1129(a)(8) impaired claims 	<ul style="list-style-type: none"> • 120 days of exclusivity • § 1129(a)(8) impaired claims 	<ul style="list-style-type: none"> • Plan due 14 days after commencement of the case • No Voting

Take advantage of the 120-day exclusivity period under § 1121(b)

- Ask for extension if necessary
- Order granting extension must be signed before the existing deadline expires
- Look to Dow Corning & Express One Factors to determine “cause” for extension

Aggressive with classifying claims

- Identify which classes are impaired
- Classes not impaired will be deemed to accept the plan
- Impaired classes need to vote
 - Need $\frac{1}{2}$ in number of claimants that hold at least $\frac{2}{3}$ in amount of allowed claims to affirm the plan
- Creditors classification is always done with an eye towards voting & confirmation

Case Comparison: Secured Claims

	Individual Ch. 11	Business Ch. 11	Chapter 13
<u>Plan Payments & Terms</u>	No minimum or maximum, but consider § 1129(a)(15)(B)	No minimum or maximum	3 or 5 years §1325(b)(4)
<u>Plan Process</u>	<ul style="list-style-type: none"> • 120 days of exclusivity • § 1129(a)(8) impaired claims 	<ul style="list-style-type: none"> • 120 days of exclusivity • § 1129(a)(8) impaired claims 	<ul style="list-style-type: none"> • Plan due 14 days after commencement of the case • No Voting
<u>Secured Claims</u>	§ 1111(b) election	§ 1111(b) election	<p>§ 1322(b)(2) prohibits modification of a secured interest on the debtor's principal residence.</p> <p>The debtor <i>may</i> strip fully unsecured liens or claims not secured by the debtor's principal residence.</p>

Case Comparison: Taxes

	Individual Ch. 11	Business Ch. 11	Chapter 13
<u>Plan Payments & Terms</u>	No minimum or maximum, but consider § 1129(a)(15)(B)	No minimum or maximum	3 or 5 years §1325(b)(4)
<u>Plan Process</u>	<ul style="list-style-type: none"> • 120 days of exclusivity • § 1129(a)(8) impaired claims 	<ul style="list-style-type: none"> • 120 days of exclusivity • § 1129(a)(8) impaired claims 	<ul style="list-style-type: none"> • Plan due 14 days after commencement of the case • No Voting
<u>Secured Claims</u>	§ 1111(b) election	§ 1111(b) election	<p>§ 1322(b)(2) prohibits modification of a secured interest on the debtor's principal residence.</p> <p>The debtor <i>may</i> strip fully unsecured liens or claims not secured by the debtor's principal residence.</p>
<u>Taxes</u>	Separate Estate	Separate Estate	No Separate Estate

Case Comparison: Discharge

	Individual Ch. 11	Business Ch. 11	Chapter 13
<u>Plan Payments & Terms</u>	No minimum or maximum, but consider § 1129(a)(15)(B)	No minimum or maximum	3 or 5 years §1325(b)(4)
<u>Plan Process</u>	<ul style="list-style-type: none"> • 120 days of exclusivity • § 1129(a)(8) impaired claims 	<ul style="list-style-type: none"> • 120 days of exclusivity • § 1129(a)(8) impaired claims 	<ul style="list-style-type: none"> • Plan due 14 days after commencement of the case • No Voting
<u>Secured Claims</u>	§ 1111(b) election	§ 1111(b) election	<p>§ 1322(b)(2) prohibits modification of a secured interest on the debtor's principal residence.</p> <p>The debtor <i>may</i> strip fully unsecured liens or claims not secured by the debtor's principal residence.</p>
<u>Taxes</u>	Separate Estate	Separate Estate	No Separate Estate
<u>Discharge</u>	Open Question	Upon Confirmation	Upon Completion of Payments