

# TWELVE QUESTIONS REGARDING INDIVIDUAL CHAPTER 11 CASES

Judge Eduardo Rodriguez  
Judge Tony Davis  
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These questions were derived from materials prepared by the Hon. Scott Clarkson for a Federal Judicial Center program presented by Judges Clarkson, Blumenstiel, Davis, Montali, Novack and Santoro.

# Question 1

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How do I determine if the debtor's case is a small business case?

# Discussion Points for Question 1

- Is the debtor a salaried or wage employee?
- Does the debtor operate a business?
  - Is the business an entity (corporation, partnership, LLC, etc.)?
  - Is the business operated as a sole proprietorship?

## Question 2

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What documents do counsel often forget to file in individual chapter 11 cases?

# Discussion Points for Question 2

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- Chapter 11 Statement of Your Current Monthly Income (Form B122B)
- Periodic Report Regarding Value, Operations and Profitability of Entities in Which the Estate of [Name of Debtor] Holds a Substantial or Controlling Interest (Fed. R. Bankr. P. 2015.3 and Form B26)

## Question 3

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Must an individual chapter 11 debtor obtain court approval to pay personal expenses pre-confirmation?

# Discussion Points for Question 3

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- No code requirement except for section 363. Is it cash collateral?
- Ordinary course of personal business?
- It might be prudent to begin to establish expenses that will be claimed under the plan.
- There is always a good faith limitation.



## Question 3a

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May an individual chapter 11 debtor's attorney be paid for defending nondischargeability complaints?

For defending exemptions?

For divorce representation?

## Discussion Points for Question 3a

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- Section 1115(a)(2) states property of estate includes earnings from services performed by the debtor.
- Section 330 (a)(4)(b) implies a problem for Chapter 7.
- Maybe the only avenue is selling exempt property - but, oops, *Frost* and *Smith* will thwart that angle.

## Question 3b

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Does it matter if a portion of the debtor's postpetition wages would be exempt under non-bankruptcy state or federal law?

# Discussion Point for Question 3b

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- If section 522(c) takes wages out of the estate, does section 1115 bring them back in?

# Question 4

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If an unsecured creditor objects to an individual chapter 11 debtor's plan, how is the value of the required projected disposable income under section 1129(a)(15) calculated?

# Discussion Points for Question 4

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- Section 1129(a)(15) defines the debtor's income as it is defined in section 1325(b)(2); most courts interpret this direct reference to 1325(b)(2) to require the application of the means test.
- When the means test is applied to an above-median income debtor, secured debt is properly deducted for regardless of whether the expense is “reasonably necessary.”

## Question 4a

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Is there a difference between voting against a plan and objecting to confirmation?

If so, should the individual's disclosure statement disclose the difference?

# Discussion Points for Question 4a

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- Yes, there is a difference between voting against a plan and objecting to confirmation.
- An objection brings the disposable income issue into play; a no vote brings in the best interests test.
- Yes, the individual's disclosure statement should disclose the difference.



# Question 5

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Is there a minimum or maximum period of time during which payments under section 1129(a)(15) have to be made?

# Discussion Points for Question 5

- 5 years is the minimum, but no maximum unlike Chapter 13s.
- And maybe no minimum, if subsection 1129(a)(15)(A) can be met.

# Question 5a

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Does it matter if the debtor has long term debt like a 30-year mortgage?

# Discussion Point for Question 5a

- No, secured debt is a separate issue for purposes of cramdown.

# Question 6

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To what extent must an individual chapter 11 debtor comply with the absolute priority rule as to a dissenting class of unsecured creditors?

# Discussion Points for Question 6

- In the *Lively* case, the Fifth Circuit says statutory exception to absolute priority rule applies only to postpetition earnings and property acquired postpetition.
- Most circuits agree.
- It is now a disclosure and recruitment issue.

# Question 7

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Given section 1123(b)(5), should a lender secured by the debtor's principal residence burn more calories than necessary to file a one-page opposition if the plan attempts to impair its claim?

# Discussion Points for Question 7

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- No, section 1123(b)(5) should be construed the same as section 1322(b)(2)'s anti-modification rule because the statutory language is identical.
- But, when do you determine the property's status as a residence when the debtor is renting?



# Question 7a

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Should a secured creditor make a section 1111(b) election and if so, when?

# Discussion Point for Question 7a

- Seems like the same analysis as any other chapter 11.

## Question 8

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Is it possible to deny a discharge to an individual chapter 11 debtor that otherwise could complete his or her plan?

Does section 727 apply?

# Discussion Point for Question 8

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- What is the relationship between section 1141(d)(3) and section 1141(d)(5)?

# Question 9

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Can a secured creditor, an unsecured creditor or the U.S. Trustee cause a confirmed plan to be modified to require an individual chapter 11 debtor to pay more in than was specified in the plan as confirmed?

# Discussion Points for Question 9

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- Yes, but not a secured creditor. See section 1127(e) and (f).
- But do you need to reballoon?

## Question 9a

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If the plan provides as part of the treatment of unsecured claims that creditors waive the right to modify the plan post confirmation, is the waiver effective?

# Discussion Point for Question 9a

- Should be evaluated with other Chapter 11 waiver authority.



# Question 10

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May an individual chapter 11 debtor's case be closed before completion of payments under the plan?

# Discussion Points for Question 10

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- No, since section 1127(e) allows parties in interest to seek a modification of the plan.
- However, some courts have been receptive to this and have granted relief.
- What does the plan provide upon default?

# Question 11

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When can an individual chapter 11 debtor receive a discharge before completion of payments under the plan?

# Discussion Points for Question 11

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- Under very specific circumstances of section 1141(d)(5).
- Can the plan provide otherwise, and apply with no objection?

# Question 12

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Are the involuntary aspects of chapter 11 for individuals unconstitutional?

# Discussion Points for Question 12

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- How can they be when filing is an option? Or is it? *In re Karlinger-Smith*, 544 B.R. 126 (Bankr. W.D. Tex. 2016).
- Chapter 11 debtor may not be able to dismiss or convert as easily as a Chapter 13 debtor.

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Thank You