

# Anatomy of a Chapter 11

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## Preparation

- Is your client a good fit for a chapter 11?
  - Consider these three factors:
    - Can your client pay all continuing obligations?
    - Is there enough left over to make a commercially reasonable repayment of outstanding secured debt obligations?
    - Is there enough left over to give something to unsecured creditors?

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## Preparation

- Indicia that the case is more than you can handle
  - More than 500 creditors
  - Case is considered complex pursuant to local rules
  - Debtor needs to sell substantially all of its assets

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**Preparation**

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- **Introduce your clients to the bankruptcy process:**
  - Explain the importance of the budget
  - Pre-petition v. post-petition debt
  - Plan and its effect
  - Bankruptcy may taint the value of the company

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**Preparation**

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- **Debtor v. Debtor Principal**
  - Not advisable for Counsel to represent both debtor and debtor principal in bankruptcy proceedings
  - May be an impermissible conflict under:
    - MRPC 1.7
    - 11 U.S.C. §327 (a)
  - Contact UST about why dual representation is necessary
  - Carefully review all conflicts.
  - Recommend an attorney for principal that understands how to deal with the principal's situation

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**Preparation**

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- **Cash Collateral Usage**
  - Does creditor have lien on cash collateral?
  - 11 U.S.C. §363(c)(2) provides:
    - that the debtor may use Cash Collateral if each entity that has an interest in such Cash Collateral consents or
    - if the court authorizes such use after notice and hearing when the debtor must provides adequate protection

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**First Day Motions**

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- **Cash Collateral or DIP Financing**
  - Budgeting issues:
    - ✦ Budget must include all necessary post-petition expenses, including administrative costs
    - ✦ Items that were not in budget or were incorrect cannot be paid without the secured creditors approval, or further order of the court
  - Generally, what will and will not be approved:
    - ✦ See SC Local Rule 4001-4
    - ✦ Out of state secured creditor's counsel may insist on things covered by 4001-4, which gives you an easy "no"

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**First Day Motions**

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- **Employ Professionals:**
  - Professionals that requires court approval are appraisers, accountants, realtors, attorneys, etc.
    - ✦ See Fed. R. Bankr. P. 2014
  - Determine necessity of professionals and benefit to the estate
  - Efficient professionals help mitigate costs
  - Include costs in budget

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**First Day Motions**

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- **Wage Motions:**
  - Most complex first day motion and requires a careful study of the Debtor's employee payments and benefits.
  - Most important to maintain ongoing business operations. Failure to pay employees can cause business to fail after filing.

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**First Day Motions**

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- **Critical Vendors**
  - Necessity of payment doctrine elements
    - See In re CoServ, L.L.C., 273 B.R. 487, 498 (Bankr. N.D. Tex. 2002)

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**Beginning of Case**

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- **Filing Petition for Small Business Case:**
  - Definition of small business found in §101(51D)
  - Check the box if appropriate
  - Differences in small business cases:
    - No creditors committee
    - Additional oversight by UST
    - Different filing deadlines
    - Extensions difficult to obtain
    - Debtor must file reports on profitability, disbursements, and projected cash receipts

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**Beginning of Case**

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- **Initial Debtor Interview**
  - Preparation
    - Client should understand schedules and have reviewing them in detail before the meeting
    - Brief client on what to expect
  - UST wants to gain better understanding of case and Debtor's business before §341
  - Better schedules create shorter initial debtor interview

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Middle of Case

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- **Feasibility**
  - As a practical matter, the critical question is whether the debtor has a reasonable chance to succeed under the plan it proposes
  - If the debtor's financial situation is complex you may want to hire an accountant to represent the estate as they can:
    - Assist in determining the feasibility of the proposed plan
    - Explain the feasibility to the Court in a succinct manner

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Middle of Case

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- **Executory Contracts & Leases**
  - 120 days to accept or reject
    - Order extending the time to assume or reject or an order assuming or rejecting has to be in place **before** expiration of the period
    - Motion will not extend the period
    - See *In Re Tubular Technologies*, C/A No. 06-0028-jw, slip op. (Bankr. D.S.C. July 18, 2006).

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Middle of Case

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- **Credit Bidding**
  - Circuit splits on the issue of rights to credit bid v. indubitable equivalents
    - 3<sup>rd</sup> and 5<sup>th</sup> Circuits have held that the Bankruptcy Code does not require that secured creditors be afforded the right to credit bid in a Chapter 11 plan-based sale if secured creditors are to receive under the plan deferred cash payments or the "indubitable equivalent" of their claims, as provided in Section 1129(b)(2)(A) of the Bankruptcy Code.
    - 7<sup>th</sup> circuit has held absent consent, secured creditors must be afforded the right to credit bid when their collateral is sold pursuant to a Chapter 11 plan.
  - Cert Granted in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*
    - Decision expected in June 2012

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Middle of Case

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- **Reporting Standards**
  - UST requires monthly reports to be filed
    - Small business debtors file on cash basis (Official Form B25 C)
    - Non-Small business debtors file on accrual basis.
  - Due on the 20<sup>th</sup> after the close of each month
  - Record keeping always a problem
  - May need to remind clients of reporting duty
  - Failure to file reports may result in dismissal of case
- **Monthly Operating Reports**
  - Tip: Monitor the reports so you can proactively discover budget issues and quickly address those issues
  - Being proactive can prevent you from discovering reporting issues via motions to dismiss or convert

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Middle of Case

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- **UST's Quarterly Fees**
  - Inform the client of UST quarterly fee structure
  - Fees are calculated using monthly operating reports
  - Failure to pay quarterly fees may result in dismissal of case
- **UST Quarterly Fees Schedule**
  - [http://www.justice.gov/ust/ro2/docs/chapter11/fees/ch11\\_qtrly\\_fee\\_report.pdf](http://www.justice.gov/ust/ro2/docs/chapter11/fees/ch11_qtrly_fee_report.pdf)

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Middle of Case

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- **Insurance Reporting**
  - Debtor must maintain all insurance customary in debtor's line of business and should include those payments in budget
  - Payments may be included in wage motion if it is an employee benefit
  - Types of insurance:
    - Liability
    - Workers Compensation
    - Directors and Officers Liability Insurance
    - Property Insurance
      - No less than fair market value or replacement costs of insured assets

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Middle of Case

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- **Fee Applications**
  - SC Local Rule 2016-1
    - 1<sup>st</sup> fee app can be filed 30 days after petition for relief
    - 2<sup>nd</sup> fee app can be filed 60 later
    - 3<sup>rd</sup> fee app can be filed 90 after 2nd
    - Any additional fee apps are filed every 120 days
  - Tip: Pull a fee application from a complex case and use it as a template
  - Timing is important because big cases may consume all your time and prevent you from being paid monthly

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Middle of Case

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- **Fee Applications (cont.)**
  - UST Guidelines for reviewing fee applications – 28 C.F.R. Part 58, Appendix
  - Fee apps must include:
    - Information regarding the applicant and application
    - Case Status
    - Summary sheet
    - Projected billing format
    - Reimbursement for actual, necessary expenses
  - For more information requirements visit:
    - [http://www.justice.gov/ust/eo/rules\\_regulations/guidelines/docs/feeguide.htm](http://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/feeguide.htm)

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Middle of Case

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- **Fee Applications (cont.)**
  - Nunc pro tunc
    - Retroactive approval to employment of professionals and allowing them to seek payment of fees that were accrued prior to employment.
    - 9 criteria for approval of nunc pro tunc fees (In Re TJN, Inc., 194 B.R. 396 (Bkrcty. D.S.C. 1996)):

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**Preparing for Confirmation**

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- **Disclosure Statement**
  - Should provide **adequate information** necessary to allow creditors and shareholders to make an informed judgment about a plan of reorganization
  - Adequate information definition is found at §1125(a)(1)
  - A few factors courts consider are:
    - Discussion of assets available and their value
    - Accounting and valuation methods used
    - Summary of what the debtor anticipates to do going forward
  - Objections to disclosure statement should be primarily for lack of adequate information

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**Preparing for Confirmation**

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- **Improper Plan Language**
  - Retention of Bankruptcy Courts jurisdiction after closing of the case
  - Property remaining in estate post case closing
  - Creditors who do not file Proof of Claim do not get distribution in contravention of Rule 3003
  - Failure to include that individual debtor is not discharged at confirmation

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**Preparing for Confirmation**

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- **Voting**
  - Convenience Class
    - Convenience Class designation allows unsecured claims below a certain dollar amount to be paid differently than other unsecured claims in the plan
    - §1122(b) provides “a plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience

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**Preparing for Confirmation**

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- **Balloting**
  - Who do they go to?
    - Ballots go to the noticing agent where one has been employed
  - Pre-confirmation ballot summary
    - SC Local Rule 3018-1
      - At least 7 days prior to confirmation the plan proponent shall submit a summary of the ballots, including the following information:
        - Identification of each class
        - For each impaired class the number of ballots received, ballots in favor of the plan, and their aggregate dollar amount
        - Conclusion paragraph stating whether the plan has received sufficient votes for the plan to be confirmed

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**Preparing for Confirmation**

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- **Confirmation**
  - Need to meet all requirements of §1129(a)
  - Problems arise in regard to the following requirements:
    - Proponent of plan disclosing the identity and affiliations of any individual proposed to serve the debtor post confirmation and disclosing any insider to be employed by the reorganized debtor
    - Feasibility
    - Chapter 7 liquidation amounts
    - If there is an impaired class, then at least one impaired class accepts the plan

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**Post Confirmation**

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- **Distributions**
  - Size of distributions can be overwhelming
  - Distribution checks may be returned, so the Plan should have a mechanism with how to deal with how returned checks are handled

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**Post Confirmation**

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- **Administrative Closing of Case**
  - Mechanism to provide relief from paying UST quarterly fees
  - Reduces administrative burden on court
  - If case was administratively closed it must be reopened to obtain discharge upon completion of plan
  - Only close when no issues remain other than plan payments

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**Post Confirmation**

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- **Effectiveness of filing**
  - Evaluate your pre-case strategy
    - Was it effective?
    - Original plan v. what actually happened
    - Could anything have been anticipated?

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**Questions**

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- If you have any additional questions feel free to contact us:
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## Anatomy of a Chapter 11

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### Preparing for Case

- Preliminary evaluation of case – is it worth it?
  - Red Flags: Warning signs your case will be particularly complex
    - 363 Sales – lots of effort to effectuate a sale and many requirements to be fulfilled. In smaller cases, the cost of a 363 sale will outweigh the benefit it brings to the unsecured creditors.
    - Number of Creditors – Numerous creditors also means more work for Debtor’s counsel. Be prepared to spend a significant amount of time just addressing the schedule preparation.
    - Noticing Agents – only required when there are more than 500 creditors in a case. If there is a need for a noticing agent, you will need to plan accordingly and inform the Debtor of this additional administrative burden. The larger the creditor base, the more expensive the noticing costs.
    - You should consider that the more complex the case, the more time you are going to have to devote to the matter and the less time you will have to devote to your other clients. Chapter 11 cases can be very burdensome and if it is a complex case, you may have to reduce your other client load, or hire additional staff, to take on the case.
  - Cost – it is almost impossible to determine the cost of a Chapter 11 case because something unanticipated always comes up. You should still try to estimate the costs because it will help you understand what retainer you should request from your client.
    - Make sure after you have determined the amount you will charge for a retainer that you get a retainer agreement that is signed by the client.
  - Recognize negative consequences of bankruptcy
    - Customer financing may dry up once bankruptcy is filed
    - Customers unwillingness to work with bankrupt entity
    - Diminution in value
  - How much to take as retainer?
    - Fair compensation to do the work
    - Good idea to have money on reserve
    - Likelihood of a successful case
    - Time between fee applications
    - Can’t be more than client can pay now

- Make sure client has future ability to pay future fees
- Introducing client to Bankruptcy process
  - It is important that you explain the bankruptcy process and its burdens to your client. The important items are:
    - The importance of the budget,
    - Extra time associated with duties in bankruptcy and restrictions it will place on them and/or the company
    - Pre-petition v. post-petition debts
    - Plan and its effect
    - Bankruptcy's taint the value of the company
    - Bankruptcy may cause loss of customers, vendors, suppliers, or lenders who finance the purchase of the Debtor's goods. May be other unanticipated side effects
    - Possible negative press
    - Possible negative consequences with employees and continued employment
    - Unanticipated consequences
  - Explain that the schedules are signed under penalty of criminal perjury
  - Quarterly Fees and Reporting Standards
    - UST requires that monthly reports be filed. Client should be preparing these documents in advance of the 20<sup>th</sup> after the close of each month. As is typical with most debtors, record keeping is a big problem and reminding the client each quarter of the need to report is usually necessary.
    - Make sure you inform the client of the UST's quarterly fee structure, that these fees are calculated using the monthly operating reports, and failure to file the report and/or pay the fee is grounds for dismissal of the bankruptcy case.
  - Debtor v. Principal of Debtor
    - Counsel cannot represent both the debtor and the debtor's principal in the bankruptcy proceedings. This is an impermissible conflict and the model rules of professional conduct prohibit this, and the UST will object to this dual representation.
      - 11 U.S.C. §327(a)
      - MRPC 1.7
- Decide plan of action for case
  - Payroll, retainers, utilities, cash collateral usage
    - The client must prepare a budget of expenses it must pay going forward. Make sure you exclude the pre-petition expenses.
      - Is there a critical vendor? This is a defined term so make sure they really are "critical".
    - Make sure you include the administrative fees in the budget.

- Is the budget positive? If not, how are you going to pay those expenses? Do you need a DIP lender? If it is positive, does a creditor have a lien on cash collateral? Check the Uniform Commercial Code in the Debtor's state of incorporation.
  - If there is a cash collateral lien, you need to approach the lien holders before you file the case to discuss the consensual use of this cash collateral.
  - If you are DIP lending or using cash collateral on a negative budget, will you have enough cash to pay all expenses until you get to a sale or finish winding down the business?
- Plan should be formulated in basic concepts before you file
- Schedules
  - The Schedules will inform you of the need to hire a Noticing Agent. If you have more than 500 creditors you need to hire one.
- **Preparing first day motions**
  - *Cash Collateral or DIP financing*
    - Budgeting Issues
      - Budget must include all necessary post-petition expenses, including administrative costs.
      - Items that were not in budget or were incorrect cannot be paid without the secured creditors approval, or further order of the court.
    - Generally, what will and will not be approved
      - See SC Local Rule 4001-4
      - If you have a secured creditor who insists on doing things that are not allowed under 4001-4, you should refer them to the rule and indicate that the Court will not approve those terms.
  - *Employ professionals*
    - Professionals that typically require court approval are appraisers, accountants, realtors, attorneys, etc. See Fed. R. Bankr. P. 2014
      - You should determine necessity of professionals and the corresponding benefit to the estate.
      - Use efficient professionals to help mitigate costs
      - Include those costs in the budget.
  - Application to Employ
    - Must disclose:
      - Professional
      - Reason for employment
      - Reason for selection
      - Services to be rendered
      - Any proposed arrangement for compensation
      - Professional's connection with parties in interest.
    - Affidavit of Professional to be employed – Affidavit typically discloses the:

- Disclosures in the Application, and
    - The professional qualifications of the professional
  - Proposed Order (SC Local Rule 2014-1)
- *Wages*
  - The wage motion is perhaps the most important motion you will file when it comes to maintaining the going concern value for a company. Failure to pay wages when due can have devastating effects on the man power necessary to effectuate the reorganization of a company.
  - These motions are typically filed on an emergency basis since employees are usually paid weekly or bi-weekly.
  - Make sure you understand the Debtor's wage payment system. Typically the employees are paid in arrears and sometimes the arrearages can include more than one pay period. You can only pay what you request from the court and going back a second time to get missed wages is expensive and inconvenient to the court.
  - Also, if the employees are provided insurance as an employment benefit, the payment of those insurance premiums should be included in the wage motion and included in the budget.
- *Utilities*
  - Utilities are usually filed as first day emergency motion along with the wage motion. Typically this motion is continued for several days because the first day the utility provider may shut off service is 20 days after the filing of the case.
  - The motion should provide for the adequate assurance of payment of the utility provider.
- *Noticing Agent*
  - As stated previously, noticing agents are required when the case has more than 500 creditors. See SC Local Rule 2081-1.
  - Noticing agents can be very expensive and can create an administrative burden that can cause a Debtor to be unable to maintain a positive budget during the bankruptcy. The more creditors the more expensive the noticing agent will cost.
  - Noticing agents are notorious for offering unnecessary services. Pay attention to this because the agents are only supposed to serve the Court's documents, the Debtor's documents and any documents for any committee appointed in the case. They are also responsible for maintaining the claims database and may be responsible for the balloting in the case.
    - Before conducting the balloting you should check with chambers to determine if the Judge would prefer the agent receive the ballot or if those documents should go to the Clerk of Court. Different judges have different preferences on this process.
- *Consolidating/ Jointly Administering cases*



- Allows debtor the ability to go in-depth with the court to explain how the debtor operates
- Don't wait until the initial status conference to alert the court to the basic framework of the debtor's business and issues it faces. Court needs to know this from the start.
- *Critical vendors*
  - Many times clients will argue that a vendor is critical. It is up to you to clarify what is a critical vendor and help the client determine if the vendor is really critical as that term is defined.
  - Critical Vendor –
    - Necessity of payment doctrine
      - Recognizes the existence of judicial power to authorize the payment of a pre-petition claim when such payment is essential to the continued operation of the debtor. *In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004)
      - Necessary when payment is the only means to effect a substantial enhancement of the estate. *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex.2002).
    - Local case law:
      - *See In Re BI-LO, LLC et al.*, Case No. 09-02140-hb (Bankr. D.S.C. April 9, 2009).

### Start of Case

- File petition
  - Small business
    - Definition of small business §101(51D)
    - Don't check the box if you do not fit within this designation, and check the box if you fit the designation. The UST is not fooled by your failure to check the box and it won't gain you additional time.
    - What is different in small business cases?
      - No creditors committee
      - Debtor must file reports on profitability, disbursements, and projected cash receipts
      - Additional oversight by UST
      - Different filing deadlines
      - Extensions difficult to obtain
- File first day motions that were prepared beforehand
- Contact the Court before you file emergency matters so you can determine if your emergency constraints work with the Court's schedule or if you are going to have to have a special hearing.
  - Be prepared for an emergency mail-out with little time to complete the notice.



- You should have gathered fax numbers ahead of time and have pre-filled out fed-ex envelopes for service where no fax is available.
- Creditors committee formed?
  - Issues with committees
    - Additional cost estate must bear
    - Powerful influence on case
      - Influences unsecured creditors votes
    - Ally or Enemy
- Initial Debtor Interview with United States Trustee
  - Preparation
    - Client should understand schedules and have reviewed them in detail before the meeting.
    - Brief client on what to expect
  - UST trying to gain understanding of case and Debtor's business before §341 hearing
  - Better schedules create shorter Initial Debtor Interviews
- § 341 Meeting of Creditors
  - Prepare for questions
  - Unlike Chapter 7, in large Chapter 11 cases creditors will likely appear and ask questions.
  - Federal Rules of Evidence are inapplicable
  - Any objections made are generally to preserve decorum

### Middle of Case

- Feasibility - §1129(a)(11) - *Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.*
  - If the complexity of the debtor's financial affairs is great, it may be a good idea to hire an accountant to represent the estate so they can assist with determining the feasibility of the proposed Plan and explaining this to the court in a simple succinct manner.
- Confirmation Issues – Read over §1129 before preparing the plan, after preparing the plan, and prior to confirmation just to make sure the plan is confirmable.
  - Individual debtors and §1129(a)(15)
    - The value of the property to be distributed on account of such claim is not less than such claim; or
    - The value of the property distributed is not less than the projected disposable income of the debtor to be received during the 5 year period
  - Identify class that will vote in favor of plan
    - 1129(b)(2) requires that if a plan is not accepted by every class then for it to be confirmed it must:
      - Have at least one impaired class of claims accepts the plan
      - Not discriminate unfairly

- Be fair and equitable
- Executory contracts & Leases – assumption or rejection
  - 120 days to accept or reject
    - Order extending the time to assume or reject or an order assuming or rejecting has to be in place before expiration of period
      - *In re Tubular Technologies, C/A* No. 06-00228-jw, slip op. (Bankr. D.S.C. July 18, 2006).
  - Single 90 day extension for cause
  - More with consent of parties
    - §365(d)(4)(A)
- Elimination of Credit Bidding
  - Right to credit bid v. Indubitable Equivalent – Circuit Splits
  - Supreme Court of the United States granted Cert. RadLAX Gateway Hotel, LLC v. Amalgamated Bank
    - Decision expected in June
- 363 Sales
  - Generally quite complicated and should not be undertaken unless it adds significant value to the estate and you are familiar with the 363 process.
  - A previous lecture prepared by the McCarthy Law Firm is available at <https://sites.google.com/a/mccarthy-lawfirm.com/bankla-363/>
- Reporting and case maintenance
  - The UST mandates that small business debtors, individual debtors, and non-small business debtors who report their financial activity on a cash basis should file “Official Form B25 C”
  - Non-small business debtors who report their financial activity on an accrual basis should use the “Monthly Operating Report for Debtors Reporting on an Accrual Basis” form on the UST’s website.
  - All reports to the UST should be filed before the 20<sup>th</sup> day of each month
- United States Trustee quarterly fees based on monthly operating reports
  - [http://www.justice.gov/ust/r02/docs/chapter11/fees/ch11\\_qtrly\\_fee\\_report.pdf](http://www.justice.gov/ust/r02/docs/chapter11/fees/ch11_qtrly_fee_report.pdf)
- Insurance Reporting
  - Debtor must maintain all insurance customary in Debtor’s line of business. These insurance policy payments should be included in the budget and may be included in the wage motion if it is an employee benefit.
    - Liability
    - Workers’ Compensation
    - Property Insurance
      - Must be no less than fair market value or replacement cost of insured assets
  - Insurance coverage must be kept throughout entire case

- Additional insurance reports required
  - Before original date set for meeting of creditors, Debtor must submit to the Trustee an insurance report for each policy owned by Debtor
    - Failure to provide may result in dismissal or conversion
    - Report must be filed using the official United States Trustee's form
- Amending schedules
  - Because the Debtor's are typically operating up to, and sometimes through the date of filing, new invoices for pre-petition debts may be received post-petition. These debts should be updated when all expected invoices have been received.
  - Also, the schedules may contain accounting errors or may fail to list a creditor. Those should be updated when the errors are discovered.
- As the Debtor's attorney, you should monitor the monthly operating reports. This is important because you can proactively discover budget issues and quickly address those issues. Being proactive may prevent a creditor or UST from bringing these issues to your attention by way of a motion to dismiss or convert.
- Fee applications
  - Proper procedures
    - Local Rule 2016-1
      - 1<sup>st</sup> Fee App – 30 days after Petition for Relief
      - 2<sup>nd</sup> Fee App – 60 days after first Fee App
      - 3<sup>rd</sup> Fee App – 90 days after second Fee App
      - After 180 days Fee Apps may be filed once every 120 days
    - Retainers must be held in trust accounts and not be drawn against post-petition unless authorized by Court
  - Tip: Pull a fee application from a complex case and use it as a template
  - Make sure you are billing for items which are compensable
  - UST Guidelines – 28 C.F.R. Part 58, Appendix
    - [http://www.justice.gov/ust/eo/rules\\_regulations/guidelines/docs/feeguide.htm](http://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/feeguide.htm)
    - Detailed billing
      - Information regarding Applicant and Application
      - Case Status
      - Summary Sheet
      - Project Billing Format
      - Reimbursement for Actual, Necessary Expenses
  - Retainer Agreements
    - You should always get a retainer agreement before you file the case. The Court may wish to see this before approval of fee application
  - Nunc Pro Tunc
    - Retroactive approval to employment of professionals and allowing them to seek payment of fees that were accrued prior to employment.

- Elements:
  - (1) The debtor, trustee or committee expressly contracted with the professional person to perform the services which were thereafter rendered;
  - (2) The party for whom the work was performed approves the entry of the nunc pro tunc order;
  - (3) The applicant has provided notice of the application to creditors and parties in interest and has provided an opportunity for filing objections;
  - (4) No creditor or party in interest offers reasonable objection to the entry of the nunc pro tunc order;
  - (5) The professional satisfied all criteria for employment pursuant to 11 U.S.C.A. § 327 (West 1979) and Rule 2014 of the Federal Rules of Bankruptcy Procedure at or before the time services were actually commenced and remained qualified during the period for which services were provided;
  - (6) The work was performed properly, efficiently, and to a high standard of quality;
  - (7) No actual or potential prejudice will inure to the estate or other parties in interest;
  - (8) The applicant's failure to seek pre-employment approval is satisfactorily explained; and
  - (9) The applicant exhibits no pattern of inattention or negligence in soliciting judicial approval for the employment of professionals.
    - In re TJN, Inc., 194 B.R. 396 (Bkrtcy.D.S.C. 1996)

### Preparing for Confirmation

- Plan and Disclosure Statement preparation
  - Gather necessary information and work with the client on the solution
    - This is a collaborative effort that requires a business solution that you have to test against the bankruptcy framework.
  - Disclosure statements may be unnecessary if the Court determines there is adequate information in the plan. § 1125(f)
- Disclosure Statement
  - Standard is adequate information necessary to allow creditors and shareholders to make an informed judgment about a plan of reorganization
    - Adequate information is defined at §1125(a)(1)
    - Some Factors Courts consider for adequate information standard
      - the circumstances that gave rise to the filing of the bankruptcy petition
      - a discussion of assets available and their value
      - a summary of what the debtor anticipates to do going forward

- an analysis showing what creditors would receive from the debtor were it liquidated under chapter 7
    - the accounting and valuation methods used in the disclosure statement
    - a summary of the plan of liquidation or reorganization
    - financial information necessary to allow a creditor to decide whether to approve or reject the plan
    - the amount expected for recovery through avoidance actions
  - Should only object to disclosure statement for lack of adequate information
- Plan
  - Designate classes of claims
  - Specify an impaired class
  - Specify the treatment of claims
  - Provide similar treatment for claims of a particular class
  - Provide adequate means for the plans implementation
  - Must be feasible
  - See §1123 for a complete list of what constitutes a confirmable plan.
- Improper Plan Language
  - Retention of BK Court's jurisdiction after closing of the case
  - Property remaining in estate post case closing
  - Creditors who do not file Proof do not get distribution in contravention of Rule 3003
  - Failure to include that individual debtor is not discharged at confirmation
- Balloting
  - Complexities of balloting in large cases
    - Volume
    - Tracing where some votes came from
    - Convenience Class designation allows unsecured claims below a certain dollar amount to be paid differently than other unsecured claims in the plan
      - 1122(b)
  - Strategies for balloting with an eye towards confirmation
    - Get creditors on your side by getting major creditors input on your Plan.
- Voting
  - 5 classes of voting – there can be subclasses within the base classes.
    - Secured Creditors
    - Administrative
    - Priority Unsecured
    - General Unsecured
    - Equity
  - After Disclosure Statement approval, ballots go to creditors.
  - Ballot Tallying
    - A class accepts a plan when two-thirds of the dollar amount and half of the votes are in favor of the plan §1126(c)

- An unimpaired class is deemed to have accepted the plan
    - §1126(f)
  - An impaired class that receives nothing is deemed to have rejected the plan
    - §1126(g)
- Confirmation - §1129
  - Hearing on at least 28 days notice after Disclosure Statement approval
  - 1129(a) - Important requirements for Confirmation:
    - Plan complies with Title 11
    - Proponent of Plan complies with Title 11
    - Good faith
    - Payments to be made are reasonable
    - Proponent of plan has disclosed the identity and affiliations of any individual proposed to serve the debtor post-confirmation and disclosed any insider to be employed by the reorganized debtor, and the nature of the insider's compensation
    - Any governmental entities with jurisdiction over the rates of the debtor have approved any rate changes provided for in the plan
    - Impaired classes have accepted the plan or get will receive as much as they would have under Title 7
    - Each class either accepts the plan or is not impaired under the plan
    - If there is an impaired class, then at least one impaired class accepts the plan
    - Confirmation of the plan is not likely to be followed by liquidation
    - See §1129(a) for a complete list
  - Cram Down – If not every class votes in favor of the plan but all of the requirements of §1129(a) are met then the plan may be confirmed over the creditor's objections if the requirements of §1129 (b) are met, which are:
    - The plan does not discriminate unfairly
    - The plan is fair and equitable

#### Post Confirmation Issues

- Claim review at closure of claim period
  - Claims allowance/objections
- Fees and Reporting – Professionals
  - §330(a)
  - UST Review Guidelines:
    - [http://www.justice.gov/ust/eo/rules\\_regulations/guidelines/docs/feeguide.htm](http://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/feeguide.htm)
- Distribution
  - Distribution Issues
    - Size of distribution is overwhelming
  - Returned checks

- It may be a good idea to put some sort of mechanism into the Plan that provides for how these returned funds are addressed.
  - This can be:
    - Locating the creditor and resending those funds
    - If unable to locate the creditor, after reasonable attempts to locate, then the funds could be distributed to the other creditors.
    - If the funds are not sufficient to justify the cost of an additional distribution those funds are sometimes contributed to a charity.
- Monitoring consummation of plan
- Report Substantial Consummation of Plan
  - When payments finished under reorganizing 11
  - When everything is sold in liquidating 11
- Administrative closing of case
  - Mechanism to provide relief from paying UST quarterly fees
  - Reduces administrative burden on court
- Discharge
  - Individual chapter 11 discharge
    - Does this provide effective relief?
  - If case was administratively closed it must be reopened to obtain discharge upon completion of plan
- Effectiveness of filing
  - Evaluate your pre-case strategy
    - Was it effective?
    - Original plan vs. what actually happened
    - Could anything have been anticipated?