

CHAPTER 11 INFORMATION

GUIDELINES FOR CONSENSUAL CASH COLLATERAL ORDERS: PROVISIONS THAT SHOULD BE INCLUDED

The Court has determined that these Guidelines for Consensual Cash Collateral Orders would be useful to the bar in improving the content of first-day debtor in possession financing orders. The following is a general description of those factual findings and decretal provisions that the Court will ordinarily approve on an "*ex parte*" basis in connection with an emergency showing of the necessity for the use of cash collateral. At the end of these guidelines, there is a list of provisions that the Court will not ordinarily approve without prior notice and an opportunity for objection. For purposes of these guidelines, "*ex parte*" means without notice to all creditors and parties in interest. The Court expects that every effort will be made to provide notice to the Bankruptcy Administrator and any creditor directly affected by any relief sought on an emergency basis.

Findings of Fact. The following findings of fact are generally appropriate for inclusion in an emergency debtor in possession financing order:

- That there has been compliance with all applicable service requirements, including an attempt to notify the Bankruptcy Administrator, other secured creditors, and the 20 largest unsecured creditors.
- That the secured creditor asserts a priority lien in cash collateral, together with a specific identification of the assets that are or will generate cash collateral, i.e., cash on hand, proceeds of inventory sales, etc., and that amount of the indebtedness allegedly secured.
- That the debtor has an immediate need for the use of cash collateral to preserve its assets, fund its business operations, purchase inventory, etc.
- That the debtor reaffirms the existing terms and conditions of existing financing documents with secured creditors.

Decretal Provisions. The following decretal provisions are generally appropriate for inclusion in a debtor in possession financing order:

- Grant and define adequate protection to secured creditor, and its successors and assigns, pursuant to Sections 361 and 363 of the Bankruptcy Code, including monthly adequate protection payments, if appropriate.
- Grant secured creditor replacement liens in postpetition assets to the same extent and priority as existed prepetition.
- Grant secured creditor super-priority administrative claim to the extent that adequate protection proves inadequate.
- Provide for creation of a segregated DIP account into which cash collateral shall be deposited.

- Restrict use of cash collateral to pay specified categories of operating expenses, per budgets to be attached to the order or subsequently filed with the Court.
- Require that the debtor maintain insurance.
- Require submission of periodic (e.g., weekly, bi-weekly, monthly) reports regarding use of cash, aging of accounts receivable, etc.
- Provide equality of treatment for carve-outs as between professionals for the debtor and professionals for the Committee of Unsecured Creditors, and limiting the use of carve-outs to exclude the pursuit, but not investigation, of claims against the secured creditor providing financing.
- Provide that the order is sufficient and conclusive evidence of the priority and validity of the security interest in and liens, including replacement liens, on the debtor's assets granted to secured creditor without the necessity of filing, recording, or serving any financing statements or other documents which may otherwise be required under federal or state law in any jurisdiction or the taking of any action to validate or perfect the security interests and liens granted to secured creditor, but provided secured creditor may, in its discretion, file such financing statements or other documents with respect to such security interests and liens and that the debtor is authorized and directed to execute, or cause to be executed, all such financing statements or other documents upon secured creditor's reasonable request and the filing, recording, or service.
- Identify the time period to which the order is applicable and provide that, even if authorization to use cash collateral expires, adequate protection/liens will continue to be effective unless or until otherwise modified by the Court.
- Set a final hearing date and set a deadline by which the documents relied upon by the secured creditor in asserting a perfected security interest be filed with the Clerk.

Inappropriate Provisions. The following provisions should not be included on an emergency basis:

- Stipulations which reduce the time period within which parties in interest may challenge the perfection, validity, priority, or amount of secured claims to less than 60 days from the engagement of counsel for the Committee of Unsecured Creditors, or, if no counsel or Committee is appointed, less than 90 days after the case is filed.
- Stipulations as to the perfection, validity, or priority of secured claims that are binding on any party other than the debtor, without affording other interested parties a reasonable time to challenge the same.
- In cases where the secured creditor asserts liens on accounts receivable pursuant to asset based revolving credit facilities, provisions which re-characterize the "use of cash collateral" as "postpetition advance," without

regard to whether the "postpetition advance" is a new loan or the use of a prepetition receivable.

- Provisions which release potential claims or causes of action by the estate against the lender, without the passage of the time periods identified above.
- Provisions which grant automatic relief from stay upon a material default under the cash collateral order; however, the secured creditor's entitlement to an emergency hearing in the event of a material default could be recognized.
- Provisions which grant cross collateralization on unencumbered assets, absent extraordinary circumstances.
- Provisions that grant a postpetition lien on avoidance actions.

The foregoing limitations are not designed to limit the provisions of financing orders that may be presented to the Court after notice and with an opportunity for a hearing. Rather, these limitations apply to orders that are presented on a first day, emergency basis, without notice to all creditors and parties in interest.