

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS

STANDING ORDER AND GUIDELINES



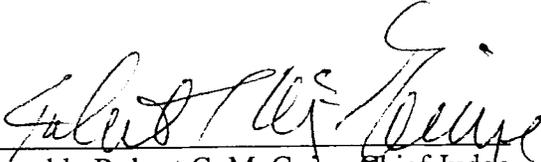
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the early dispositions of assets in Chapter 11 cases, and to motions and orders pertaining to the use of cash collateral and post-petition financing.

SO ORDERED.

Signed this _____ day of December, 2000.



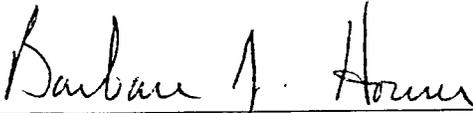
Honorable Robert C. McGuire, Chief Judge



Honorable Massie M. Tillman



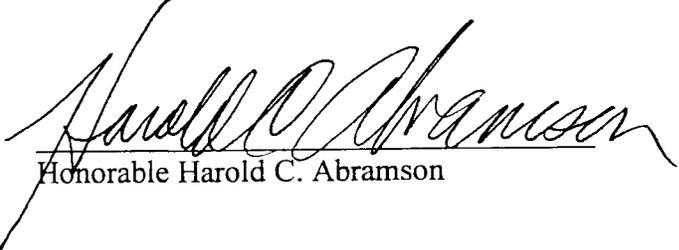
Honorable Steven A. Felsenthal



Honorable Barbara J. Houser



Honorable Robert L. Jones



Honorable Harold C. Abramson

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS



GUIDELINES FOR
COMPENSATION AND EXPENSE
REIMBURSEMENT OF PROFESSIONALS

EFFECTIVE JANUARY 1, 2001

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NOTICE

The following are guidelines governing the most significant issues related to applications for compensation and expense reimbursement. The guidelines cover the narrative portion of an application, time records, and expenses. It applies to all professionals with the exception of chapter 7 and chapter 13 trustees, but is not intended to cover every situation. All professionals are required to exercise reasonable billing judgment, notwithstanding total hours spent.

If, in a chapter 11 case, a professional to be employed pursuant to section 327 or 1103 of the Bankruptcy Code desires to have the terms of its compensation approved pursuant to section 328(a) of the Bankruptcy Code at the time of such professional's retention, then the application seeking such approval should so indicate and the Court will consider such request after an evidentiary hearing on notice to be held after the United States trustee has had an opportunity to form a statutory committee of creditors pursuant to section 1102 of the Bankruptcy Code and the debtor and such committee have had an opportunity to review and comment on such application. At a hearing to consider whether a professional's compensation arrangement should be approved pursuant to section 328(a), such professional should be prepared to produce evidence that the terms of compensation for which approval under section 328(a) is sought comply with the certification requirements of section I.G(3) of these guidelines.

I. NARRATIVE

A. Employment and Prior Compensation

The application should disclose the date of the order approving applicant's employment and contain a clear statement itemizing the date of each prior request for compensation, the amount requested, the amount approved, and the amount paid.

B. Case Status

With respect to interim requests, the application should briefly explain the history and the present posture of the case, including a description of the status of pending litigation and the amount of recovery sought for the estate.

In chapter 11 cases, the information furnished should describe the general operations of the debtor; whether the business of the debtor, if any, is being operated at a profit or loss; the debtor's cash flow; whether a plan has been filed, and if not, what the prospects are for reorganization and when it is anticipated that a plan will be filed and a hearing set on the disclosure statement.

In chapter 7 cases, the application should contain a report of the administration of the case including the disposition of property of the estate; what property remains to be disposed of; why the estate is not in a position to be closed; and whether it is feasible to pay an interim dividend to creditors.

In both chapter 7 and chapter 11 cases, the application should state the amount of money on hand in the estate and the estimated amount of other accrued expenses of administration. On applications for interim fees, the applicant should orally supplement the application at the hearing to inform the Court of any changes in the current financial status of the debtor's estate since the filing of the application. All retainers, previous draw downs, and fee applications and orders should be listed specifying the date of the event and the amounts involved and drawn down or allowed.

With respect to final requests, applications should meet the same criteria except where a chapter 7 trustee's final account is being heard at the same time, the financial information in the final account need not be repeated.

Fee applications submitted by special counsel seeking compensation from a fund generated directly by their efforts, auctioneers, real estate brokers, or appraisers do not have to comply with the above. For all other applications, when more than one application is noticed for the same hearing, they may, to the extent appropriate, incorporate by reference the narrative history furnished in a contemporaneous application.

C. Project Billing

This is required in all cases where the applicant's professional fee is expected to exceed \$10,000.00. The narrative should be categorized by subject matter, and separately discuss each professional project or task. All work for which compensation is requested should be in a category. Miscellaneous items may be included in a category such as "Case Administration." The professional may use reasonable discretion in defining projects for this purpose, provided that the application provides meaningful guidance to the Court as to the complexity and difficulty of the task, the professional's efficiency, and the results achieved. With respect to each project or task, the number of hours spent and the amount of compensation and expenses requested should be set forth at the conclusion of the discussion of that project or task. In larger cases with multiple professionals, efforts should be made by the professionals for standard categorization.

D. Billing Summary

Hours and total compensation requested in each application should be aggregated and itemized as to each professional and paraprofessional who provided compensable services. Dates of changes in rates should be itemized as well as reasons for said changes.

E. Paraprofessionals

Fees may be sought for paralegals, professional assistants and law clerks only if identified as such and if the application includes a resume or summary of the paraprofessional's qualifications.

F. Preparation of Application

Reasonable fees for preparation of a fee application and responding to objections thereto may be requested. The aggregate number of hours spent, the amount requested, and the percentage of the total request which the amount represents must be disclosed. If the actual time spent will be reflected and charged in a future fee application, this fact should be stated, but an estimate provided, nevertheless.

G. Certification

Each application for compensation and expense reimbursement must contain a certification by the professional designated by the applicant with the responsibility in the particular case for compliance with these guidelines ("Certifying Professional") that 1) the Certifying Professional has read the application; 2) to the best of the Certifying Professional's knowledge, information and belief, formed after reasonable inquiry, the compensation and expense reimbursement sought is in conformity with these guidelines, except as specifically noted in the application; and 3) the compensation and expense reimbursement requested are billed at rates, in accordance with practices, no less favorable than those customarily employed by the applicant and generally accepted by the applicant's clients.

H. Interim Compensation Arrangements in Complex Cases

In a complex case, the Court may, upon request, consider at the outset of the case approval of an interim compensation mechanism for estate professionals that would enable professionals on a monthly basis to be paid up to 80% of their compensation for services rendered and reimbursed up to 100% of their actual and necessary out of pocket expenses. In connection with such a procedure, if approved in a particular complex case, professionals shall be required to circulate monthly billing statements to the US Trustee

and other primary parties in interest, and the Debtor in Possession or Trustee will be authorized to pay the applicable percentage of such bill not disputed or contested by a party in interest.

II. TIME RECORDS

A. Time Records Required

All professionals, except auctioneers, real estate brokers, and appraisers must keep accurate contemporaneous time records.

B. Increments

Professionals are required to keep time records in minimum increments no greater than six minutes. Professionals who utilize a minimum billing increment greater than 1 hour are subject to a substantial reduction of their requests.

C. Descriptions

At a minimum, the time entries should identify the person performing the service, the date(s) performed, what was done, and the subject involved. Mere notations of telephone calls, conferences, research, drafting, etc., without identifying the matter involved, may result in disallowance of the time covered by the entries.

D. Grouping of Tasks

If a number of separate tasks are performed on a single day, the fee application should disclose the time spent for each such task, i.e., no “grouping” or “clumping.” Minor administrative matters may be lumped together where the aggregate time attributed thereto is relatively minor. A rule of reason applies as to how specific and detailed the breakdown needs to be. For grouped entries, the applicant must accept the Court inferences therefrom.

E. Conferences

Professionals should be prepared to explain time spent in conferences with other professionals or paraprofessionals in the same firm. Relevant explanation would include

complexity of issues involved and the necessity of more individuals' involvement. Failure to justify this time may result in disallowance of all, or a portion of, fees related to such conferences.

F. Multiple Professionals

Professionals should be prepared to explain the need for more than one professional or paraprofessional from the same firm at the same court hearing, deposition, or meeting. Failure to justify this time may result in compensation for only the person with the lowest billing rate. The Court acknowledges, however, that in complex chapter 11 cases the need for multiple professionals' involvement will be more common and that in hearings involving multiple or complex issues, a law firm may justifiably be required to utilize multiple attorneys as the circumstances of the case require.

G. Travel Time

Travel time is compensable at one-half rates, but work actually done during travel is fully compensable.

H. Administrative Tasks

Time spent in addressing, stamping and stuffing envelopes, filing, photocopying or "supervising" any of the foregoing is generally not compensable, whether performed by a professional, paraprofessional, or secretary.

III. EXPENSES

A. Firm Practice

The Court will consider the customary practice of the firm in charging or not charging non-bankruptcy/insolvency clients for particular expense items. Where any other clients, with the exception of pro-bono clients, are not billed for a particular expense, the estate should not be billed. Where expenses are billed to all other clients, reimbursement should be sought at the least expensive rate the firm or professional charges to any client for comparable services or expenses. It is recognized that there will be differences in billing practices among professionals.

B. Actual Cost

This is defined as the amount paid to a third party provider of goods or services without enhancement for handling or other administrative charge.

C. Documentation

This must be retained and made available upon request for all expenditures in excess of \$50.00. Where possible, receipts should be obtained for all expenditures.

D. Office Overhead

This is not reimbursable. Overhead includes: secretarial time, secretarial overtime (where clear necessity for same has not been shown), word processing time, charges for after-hour and weekend air conditioning and other utilities, and cost of meals or transportation provided to professionals and staff who work late or on weekends.

E. Word Processing

This is not reimbursable.

F. Computerized Research

This is reimbursable at actual cost. For large amounts billed to computerized research, significant explanatory detail should be furnished.

G. Paraprofessional Services

These services may be compensated as a paraprofessional under §330, but not charged or reimbursed as an expense.

H. Professional Services

A professional employed under §327 may not employ, and charge as an expense, another professional (e.g., special litigation counsel employing an expert witness) unless the employment of the second professional is approved by the Court prior to the rendering of service.

I. Photocopies (Internal)

Charges must be disclosed on an aggregate and per-page basis. If the per-page cost exceeds \$.20, the professional must demonstrate to the satisfaction of the Court, with data, that the per-page cost represents a good faith estimate of the actual cost of the copies, based upon the purchase or lease cost of the copy machine and supplies therefor, including the space occupied by the machine, but not including time spent in operating the machine.

J. Photocopies (Outside)

This item is reimbursable at actual cost.

K. Postage

This is reimbursable at actual cost.

L. Overnight Delivery

This is reimbursable at actual cost where it is shown to be necessary. The court acknowledges that in complex chapter 11 cases overnight delivery or messenger services may often be appropriate, particularly when shortened notice of a hearing of a hearing has been requested.

M. Messenger Service

This is reimbursable at actual cost where it is shown to be necessary. An in-house messenger service is reimbursable, but the estate cannot be charged more than the cost of comparable services available outside the firm.

N. Facsimile Transmission

The actual cost of telephone charges for outgoing transmissions is reimbursable. Transmissions received are reimbursable on a per-page basis. If the per-page cost exceeds \$.20, the professional must demonstrate, with data, to the satisfaction of the Court, that the per-page cost represents a good faith estimate of the actual cost of the copies, based upon the purchase or lease cost of the facsimile machine and supplies

therefor, including the space occupied by the machine, but not including time spent in operating the machine.

O. Long Distance Telephone

This is reimbursable at actual cost.

P. Parking

This is reimbursable at actual cost.

Q. Air Transportation

Air travel is expected to be at regular coach fare for all flights.

R. Hotels

Due to wide variation in hotel costs in various cities, it is not possible to establish a single guideline for this type of expense. All persons will be required to exercise reasonable discretion and prudence in connection with hotel expenditures.

S. Meals (Travel)

Reimbursement may be sought for the reasonable cost of breakfast, lunch and dinner while traveling.

T. Meals (Working)

Working meals at restaurants or private clubs are not reimbursable. Reasonable reimbursement may be sought for working meals only where food is catered to the professional's office in the course of a meeting with clients, such as a Creditors' Committee, for the purpose of allowing the meeting to continue through a normal meal period.

U. Amenities

Charges for entertainment, alcoholic beverages, newspapers, dry cleaning, shoe shines, etc. are not reimbursable.

V. Filing Fees

These are reimbursable at actual cost.

W. Court Reporter Fees

These are reimbursable at actual cost.

X. Witness Fees

These are reimbursable at actual cost.

Y. Process Service

This is reimbursable at actual cost.

Z. UCC Searches

These are reimbursable at actual cost.

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS**

**GUIDELINES FOR EARLY DISPOSITION OF ASSETS
IN CHAPTER 11 CASES
THE SALE OF SUBSTANTIALLY ALL ASSETS UNDER SECTION 363
AND OVERBID AND TOPPING FEES**

The following guidelines are promulgated as a result of the increasing use of pre-negotiated or pre-packaged plans and 11 U.S.C. § 363 sales to dispose of substantially all assets of a Chapter 11 debtor shortly after the filing of the petition. The guidelines recognize that parties in interest perceive the need at times to act expeditiously on such matters. In addition, the guidelines are written to provide procedural protection to the parties in interest. The court will consider requests to modify the guidelines to fit the circumstances of a particular case.

OVERBIDS & TOPPING FEES

1. Topping Fees and Break-up Fees. Any request for the approval of a topping fee or break-up fee provision shall be supported by a statement of the precise conditions under which the topping fee or break-up fee would be payable and the factual basis on which the seller determined the provision was reasonable. The request shall also disclose the identities of other potential purchasers, the offers made by them (if any), and the nature of the offer, including, without limitation, any disclosure of their plans as it relates to retention of debtor's employees.
2. Topping fees, break-up fees, overbid amounts and other buyer protection provisions will be reviewed on a case by case basis and approved if supported by evidence and case law. Case law may not support buyer protection provisions for readily marketable assets.
3. In connection with a request to sell substantially all assets under §363 within 60 days of the filing of the petition, buyer protections may be considered upon motion, on an expedited basis.

THE SALE OF SUBSTANTIALLY ALL ASSETS UNDER SECTION 363 WITHIN 60 DAYS OF THE FILING OF THE PETITION

1. The Motion to Sell. In connection with any hearing to approve the sale of substantially all assets at any time before 60 days after the filing of the petition, a motion for an order authorizing a sale procedure and hearing or the sale motion itself when regularly noticed, should include factual information on the following points:
 - a. Creditors' Committee. If a creditors' committee existed pre-petition, indicate the date and manner in which the committee was formed, as well as the identity of the members of the committee and the companies with which they are affiliated.

b. Counsel for Committee. If the pre-petition creditors' committee retained counsel, indicate the date counsel was engaged and the selection process, as well as the identity of committee counsel.

c. Sale Contingencies. Statement of all contingencies to the sale agreement, together with a copy of the agreement.

d. Creditor Contact List. If no committee has been formed, a list of contact persons, together with fax and phone numbers for each of the largest 20 unsecured creditors.

e. Administrative Expenses. Assuming the sale is approved, an itemization and an estimate of administrative expenses relating to the sale to be incurred prior to closing and the source of payment for those expenses.

f. Proceeds of Sale. An estimate of the gross proceeds anticipated from the sale, together with an estimate of the net proceeds coming to the estate with an explanation of the items making up the difference. Itemize all deductions that are to be made from gross sale proceeds and include a brief description of the basis for any such deductions.

g. Debt Structure of Debtor. A brief description of the debtor's debt structure, including the amount of the debtor's secured debt, priority claims and general unsecured claims.

h. Need for Quick Sale. An extensive description of why the assets of the estate must be sold on an expedited basis. Include a discussion of alternatives to the sale.

i. Negotiating Background. A description of the length of time spent in negotiating the sale, and which parties in interest were involved in the negotiation, along with a description of the details of any other offers to purchase, including, without limitation, the potential purchaser's plans in connection with retention of the debtor's employees.

j. Marketing of Assets. A description of the manner in which the assets were marketed for sale, including the period of time involved and the results achieved.

k. Decision to Sell. The date on which the debtor accepted the offer to purchase the assets.

l. Relationship of Buyer. A statement identifying the buyer and setting forth all of the buyer's (including its officers, directors and shareholders) connections with the debtor, creditors, any other party in interest, their respective attorneys,

accountants, the United States Trustee or any person employed in the office of the United States Trustee.

n. Post Sale Relationship with Debtor. A statement setting forth any relationship or connection the debtor (including its officers, directors, shareholders and employees) will have with the buyer after the consummation of the sale, assuming it is approved.

o. Relationship with Secured Creditors. If the sale involves the payment of all or a portion of secured debt(s), a statement of all connections between debtor's officers, directors, employees or other insiders and each secured creditor involved (for example, release of insider's guaranty).

p. Insider Compensation. Disclosure of current compensation received by officers, directors, key employees or other insiders pending approval of the sale.

q. Notice Timing. Notice of the hearing on the motion to approve the motion to sell will be provided as is necessary under the circumstances.

2. Proposed Order Approving Sale. A proposed order approving the sale must be included with the motion or the notice of hearing. A proposed final order and redlined version of the order approving the sale should be provided to chambers twenty-four hours prior to the hearing.
3. Good Faith Finding. There must be an evidentiary basis for a finding of good faith under 11 U.S.C. §363(m).
4. Competing Bids. Unless the court orders otherwise, competing bids may be presented at the time of the hearing. The motion to sell and the notice of hearing should so provide.
5. Financial Ability to Close. Unless the court orders otherwise, any bidder must be prepared to demonstrate to the satisfaction of the court, through an evidentiary hearing, its ability to consummate the transaction if it is the successful bidder, along with evidence regarding any financial contingencies to closing the transaction.
6. Hearing and Notice Regarding Sale. Unless the court orders otherwise, all sales governed by these guidelines, including auctions or the presentation of competing bids, will occur at the hearing before the court. The court may, for cause, including the need to maximize and preserve asset value, expedite a hearing on a motion to sell substantially all assets under §363.

[Attorney's Name]
[Texas Bar No.]
[Firm Name]
[Address]
[Telephone Number]

[Identification of role in case]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
_____ DIVISION

IN RE:

§
§
§
§
§

CASE NO. _____

DEBTOR.

HEARING: _____

**ATTORNEY CHECKLIST CONCERNING MOTIONS AND ORDERS
PERTAINING TO USE OF CASH COLLATERAL AND
POST-PETITION FINANCING
(WHICH ARE IN EXCESS OF TEN (10) PAGES)**

Motions and orders pertaining to cash collateral and post-petition financing matters tend to be lengthy and complicated. Although the Court intends to read such motions and orders carefully, it will assist the Court if counsel will complete this checklist. All references are to the Bankruptcy Code (§) or Rules (R). PLEASE NOTE:

- * Means generally not favored by Bankruptcy Courts in this District.
- ** Means generally not favored by Bankruptcy Courts in this District without a reason and a time period for objections.

If your motion or order makes provision for any of the following, so indicate in the space provided:

CERTIFICATE BY COUNSEL

This is to certify that the following checklist fully responds to the Court's inquiry concerning material terms of the motion and/or proposed order:

Yes, at Page/Exhibit
Y means yes; N means no
N/A means not applicable
(Page Listing Optional)

1. Identification of Proceeding:

- (a) Preliminary or final motion/order _____
(circle one)
- (b) Continuing use of cash collateral (§ 363) _____
- (c) New financing (§ 364) _____
- (d) Combination of §§ 363 and 364 financing _____
- (e) Emergency hearing (immediate and irreparable harm) ... _____

2. Stipulations:

- (a) Brief history of debtor's businesses and status of debtor's prior relationships with lender _____
- (b) Brief statement of purpose and necessity of financing _____
- (c) Brief statement of type of financing (i.e., accounts receivable, inventory)..... _____
- ** (d) Are lender's pre-petition security interest(s) and liens deemed valid, fully perfected and non-avoidable _____
 - (i) Are there provisions to allow for objections to above? _____
- (e) Is there a post-petition financing agreement between lender and debtor? _____
 - (i) If so, is agreement attached? _____
- ** (f) If there is an agreement, are lender's post-petition security interests and liens deemed valid, fully perfected and non-avoidable? _____
- (g) Is lender undersecured or oversecured? _____
(circle one)
- (h) Has lender's non-cash collateral been appraised? _____
 - (i) Insert date of latest appraisal _____
- (i) Is debtor's proposed budget attached? _____
- (j) Are all pre-petition loan documents identified? _____

Yes, at Page/Exhibit
Y means yes; N means no
N/A means not applicable
(Page Listing Optional)

- (k) Are pre-petition liens on single or multiple assets? (circle one) _____
- (l) Are there pre-petition guaranties of debt? _____
 - (i) Limited or unlimited? (circle one) _____

3. Grant of Liens.

- * (a) Do post-petition liens secure pre-petition debts? _____
- * (b) Is there cross-collateralization? _____
- ** (c) Is the priority of post-petition liens equal to or higher than existing liens? _____
- ** (d) Do post-petition liens have retroactive effect? _____
- (e) Are there restrictions on granting further liens or liens of equal or higher priority? _____
- * (f) Is lender given liens on claims under §§ 506(c), 544-50 and §§ 522? _____
 - ** (i) Are lender's attorneys fees to be paid? _____
 - (ii) Are debtor's attorneys fees excepted from §506(c) _____
- * (g) Is lender given liens upon proceeds of causes of action under §§ 544, 547 and 548? _____

4. Administrative Priority Claims:

- (a) Is lender given an administrative priority? _____
- (b) Is administrative priority higher than § 507(a)? _____
- (c) Is there a conversion of pre-petition secured claim to post-petition administrative claim by virtue of use of existing collateral _____

5. Adequate Protection (§ 361):

- (a) Is there post-petition debt service? _____
- (b) Is there a replacement/additional 361(i) lien? (circle one or both) _____
- ** (c) Is the lender's claim given super-priority? _____

Yes, at Page/Exhibit
Y means yes; N means no
N/A means not applicable
(Page Listing Optional)

- (§ 364(c) or (d)) [designate] _____
(d) Are there guaranties? _____
(e) Is there adequate insurance coverage? _____
(f) Other? _____

6. Waiver/Release Claims v. Lender:

- ** (a) Debtor waives or release claims against lender, including,
but not limited to, claims under §§ 506(c), 544-550, 552,
and 553 of the Code? _____
** (b) Does the debtor waive defenses to claim or liens
of lender? _____

7. Source of Post-Petition Financing (§ 364 Financing):

- (a) Is the proposed lender also the pre-petition lender? _____
(b) New post-petition lender? _____
(c) Is the lender an insider? _____

8. Modification of Stay:

- ** (a) Is any modified lift of stay allowed? _____
** (b) Will the automatic stay be lifted to permit lender to
exercise self-help upon default without further order? _____
(c) Are there any other remedies exercisable without
further order of court? _____
(d) Is there a provision that any future modification of order shall
not affect status of debtor's post-petition obligations
to lender? _____

9. Creditors' Committee:

- (a) Has creditors' committee been appointed? _____
(b) Does creditors' committee approve of proposed
financing? _____

10. Restrictions on Parties in Interest

- ** (a) Is a plan proponent restricted in any manner, concerning
modification of lender's rights, liens and/or causes? _____

Yes, at Page/Exhibit
Y means yes; N means no
N/A means not applicable
(Page Listing Optional)

- ** (b) Is the debtor prohibited from seeking to enjoin the lender in pursuit of rights?
- ** (c) Is any party in interest prohibited from seeking to modify this order?
- (d) Is the entry of any order conditioned upon payment of debt to lender?
- (e) Is the order binding on subsequent trustee on conversion?

11. Nunc Pro Tunc.

- ** (a) Does any provision have retroactive effect?

12. Notice and Other Procedures.

- (a) Is shortened notice requested?
- (b) Is notice requested to shortened list?
- (c) Is time to respond to be shortened?
- (d) If final order sought, have 15 days elapsed since service of motion pursuant to Rule 4001(b)(2)?
- (e) If preliminary order sought, is cash collateral necessary to avoid immediate and irreparable harm to the estate pending a final hearing?
- (f) Is a Certificate of Conference included?
- (g) Is a Certificate of Service included?
- (h) Is there verification of transmittal to U.S. Trustee included pursuant to Rule 9034?
- (i) Has an agreement been reached subsequent to filing motion?
- (i) If so, has notice of the agreement been served pursuant to Rule 4001(d)(1)?
- (ii) Is the agreement in settlement of motion pursuant to Rule 4001(d)(4)?
- (iii) Does the motion afford reasonable notice of material provisions of agreement pursuant to Rule 4001(d)(4)?
- (iv) Does the motion provide for opportunity for hearing pursuant to Rule 9014?

Yes, at Page/Exhibit
Y means yes; N means no
N/A means not applicable
(Page Listing Optional)

SIGNED this the _____ day of _____, 199__.

[Firm Name]

By:

[Attorney's Name]

[Texas Bar No.]

[Address]

[Telephone Number]

[Identification of role in case]

cd\bankrupt\cash-collis

COMMENTS TO CASH COLLATERAL AND DIP FINANCING CHECKLIST

1. Interim vs. Final Orders
 - a. Stipulations in preliminary or interim orders should be minimized. Notice is generally not adequate to test the validity of stipulations, and they should be avoided to the extent not absolutely necessary to the interim approval process.
 - b. Simply state the nature of notice given; do not recite notice was “sufficient and adequate” since that is usually not the case particularly on the first day. The order should simply note that the financing is being approved pursuant to Bankruptcy Rule 4001(c)(2) authorizing such financing to avoid immediate and irreparable harm.
 - c. Adequate protection for the use of pre-petition cash collateral may be granted to the extent of a diminution of collateral. The court will not approve on an interim basis language that adequate protection is granted in the form of replacement liens on post-petition assets based on stipulations that “use of cash collateral shall be deemed a dollar for dollar decrease in the value of the pre-petition collateral.” At the final hearing the court will consider evidence to determine the extent to which the lender’s pre-petition collateral has or is likely to diminish in value. That evidence will inform the extent to which adequate protection will be granted.
 - d. The court expects that other parties in interest will be involved in the process of developing an interim cash collateral order to the extent practicable. If the court finds that the debtor and lender have not made reasonable efforts to afford the best notice possible, preliminary relief will not be granted until parties in interest have had a reasonable opportunity to review and comment on any proposed interim order.
 - e. Bankruptcy Rule 4001(b) and (c) limit the extent to which the court may grant relief on less than 15 days’ notice. The debtor and the lender must negotiate interim orders within the confines of that authority. Interim orders shall be expressly without prejudice to the rights of parties in interest at a final hearing.
2. Stipulations
 - a. The lender may request a stipulation as to the amount, validity, priority and extent of the pre-petition documents. The stipulation will only be approved if the order provides the stipulation is binding on other parties in interest only after the passage of an appropriate period of time (customarily 90 days) during which

the parties in interest will have the opportunity to test the validity of the lien and the allowance of the claim.

3. Grant of Liens

- a. Liens granted in the cash collateral and DIP financing orders may not secure pre-petition debts. Financing orders should not be used to elevate a pre-petition lender's collateral inadequacy to a fully secured status.
- b. Avoidance actions are frequently one of the few sources of recovery for creditors other than secured lenders. Orders granting liens on these unencumbered assets for the benefit of the lender will require a showing of extraordinary circumstances. In most cases the adequate protection grant will protect the lender since the lender will have a superpriority under § 507(b) that will give the lender who suffers a failure of adequate protection a first right to payment out of the proceeds from such actions before payment of any other expenses of the Chapter 11 case. Avoidance actions in the event of a conversion to Chapter 7 may be the only assets available to fund the trustee's discharge of his or her statutory duties.
- c. Similarly, limitations on the surcharge of the lender's collateral under § 506(c) are disfavored. The secured creditor may be the principal beneficiary of the proceedings in Chapter 11. Since the burden to surcharge requires a showing of direct benefit to the lender's collateral, lenders are not unreasonably exposed to surcharges of their collateral. And in light of the decision in Hartford Underwriter's Insurance Co. v. Union Planters Bank N.A. (In re Hen House Interstate Inc.), ___ U.S. ___, 120 S.Ct. 1942 (2000), only the DIP or the trustee may recover under § 506(c).

4. Modification of Stay

- a. Authority for unilateral action by lender without necessity to return to court to establish post-petition default or breach or at least a notice to parties in interest will not be approved. If the cash collateral or financing order provides for a termination of the automatic stay in the event of a default, parties in interest must have an opportunity to be heard before the stay lifts.

5. Restrictions on Plan Process

- a. The court will not approve cash collateral orders (or post-petition financing orders that are in substance cash collateral orders that have the effect of converting all the pre-petition liens and claims to post-petition liabilities under the guise of collecting pre-petition accounts and readvancing them post-petition) that have the effect of converting pre-petition secured debt into post-petition

administrative claims that must be paid in full in order to confirm a plan. That type of provision unfairly limits the ability and flexibility of the debtor and other parties in interest to formulate a plan. That type of provision, granted at the outset of a case, effectively compels the debtor to pay off the secured lender in full on the effective date and has the consequence of eviscerating § 1129(b).

- b. On the other hand, persons who are advancing new money to the debtor post-petition may include in financing orders provisions that the post-petition loans have a § 364(c)(1) super-super priority.

6. Loan Agreements

- a. If there will be a loan agreement, the language of the financing order does not need to restate all of the terms of the loan agreement. The financing motion should, however, summarize the essential elements of the proposed borrowing or use of cash collateral, such as, amount of loan facility, sublimits on availability, borrowing base formula, conditions to new advances, interest rate, maturity, events of default, limitation on use of funds and description of collateral.

7. Professional Fees

- a. To the extent consistent with the market for similar financings, the lender may request reimbursement of reasonable professional fees. The lender should provide reasonably detailed invoices to the debtor and the committees so a proper assessment of reasonableness can be made.
- b. The parties may agree on carve-outs for estate professionals. Lenders may exclude from the carve-out payment of professional fees for litigation of the extent, validity or perfection of the lender's claim as well as prosecution of lender liability suits. The carve-out should not, however, exclude the due diligence work by the committee or its professionals to determine whether a challenge to the lender is justified.

8. Work Fees/Loan Fees

- a. Underwriting a substantial DIP loan may involve both direct out-of-pocket expenses and, at times, a certain lost opportunity cost. The debtor may move for the reimbursement of its lender's direct out-of-pocket expenses. The debtor and lender must be prepared to establish actual out-of-pocket costs, the reasonableness of the costs, and that the type of costs are actually paid in the market. On a case-by-case basis, the court will consider on an expedited basis the debtor's request to pay a reasonable up-front fee to a prospective DIP lender to reimburse it for direct out-of-pocket costs. In addition, in connection with approving a DIP loan facility, on motion of the debtor, the court will consider

evidence of market rates and pricing for comparable loans in determining whether commitment fees, facility or availability fees, and other up-front or periodic loan charges are appropriate. The lender must provide evidence that it actually has provided or will provide the services customarily associated with these fees.