# SUB V AND NON-COMPLEX CHAPTER 11 COURT PROCEDURES

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**UNITED STATES BANKRUPTCY JUDGE**
https://www.txs.uscourts.gov/page/united-states-bankruptcy-judge-jeffrey-p-norman

## Employment of Professionals

Pursuant to Fed. R. Bank. P. 2014 and 6003(a), the Court approves attorney employment in Chapter 11 cases on an interim basis, retroactive to the petition date during the 21-day waiting period proscribed by Fed. R. Bank. P. 6003. Therefore, counsel should set any Application to Employ for hearing and seek, if desired, expedited consideration. Thereafter, the Court will grant an interim order approving employment until the scheduled hearing on an *ex parte* basis. Service is governed by Fed. R. Bank. P. 2014(a) and only requires service on the United States Trustee. Debtors should always request emergency consideration of first day motions. The United States Trustee has reporting requirements in all Chapter 11 cases. The Court requires compliance with the United States Trustee's reporting requirements in all Chapter 11 cases. Questions regarding this reporting should be directed to the office of the United States Trustee.

## Guidelines on Chapter 11 Cash Collateral Motions/Orders and Debtor in Possession Financing Orders

The following guidelines are provided to assist Chapter 11 debtors with the submission of motions and proposed orders approving motions for emergency use of cash collateral and requests for debtor in possession financing ("Emergency Cash Collateral and DIP Financing Orders"). These guidelines are not intended to limit requests for relief in motions requesting final approval of the use of cash collateral and/or debtor in possession financing where all creditors and parties in interest have been provided appropriate notice and an opportunity for hearing.

## Motions for Authorization to Use Cash Collateral

A motion for authorization to use cash collateral must consist of a concise statement of the relief requested and must include:

(i) the name of each entity with an interest in the cash collateral;

(ii) the purposes for the use of the cash collateral;

(iii) the material terms, including duration, of the use of the cash collateral; and

(iv) any liens, cash payments, or other adequate protection that will be provided to each entity with an interest in the cash collateral or, if no additional adequate protection is proposed, an explanation of why each entity's interest is adequately protected [i.e., why additional protection is not required].

(v) Any relationship of the creditor to the debtor, the nature and source of the cash collateral, and budgets or cash flow projections.

All motions must comply with Federal Rule of Bankruptcy Procedure 4001(b).

The court, with or without hearing, shall prohibit or condition use of cash collateral as is necessary to provide adequate protection of the creditor's security interest in the cash collateral. The movant, typically the debtor, has the burden of proof on adequate protection. **The debtor should specifically plead and must, at hearing, by a preponderance of the evidence, demonstrate that the proposed adequate protection will adequately protect the creditor's interest in the collateral.**

**Proposed adequate protection shall be sufficient to provide that the creditor's lien position shall not be jeopardized by the ongoing use of cash collateral at any time post-petition**. Adequate protection may be provided by an equity cushion, periodic cash payments and/or a post-petition replacement lien on estate assets but only to the extent, priority, and validity as existed on such categories of assets and property of the Debtor(s) as of the Petition Date. Proposed adequate protection should safeguard the interest of creditors with liens on cash collateral against future reduced balances in cash, accounts receivable, inventory or any other assets considered cash collateral.

The Court encourages the movant to conduct a UCC search and to file the results on the Court's docket or include it in its motion for use. Emergency Motions for Use of Cash Collateral should include the name of each creditor with an interest in cash collateral, the amount of indebtedness owed, the lien position of the creditor [if there are multiple liens] and the value of the collateral securing each lien. The motion should include a budget, typically on an interim hearing of not less than eight weeks and on a final hearing for the duration of the use of cash collateral. Typically, the Court will set a hearing 48 hours after filing of an emergency motion as to provide notice to lenders with a security interest in cash collateral prior to the hearing. Final or additional interim hearings are typically set between 30 to 45 days after the first emergency hearing.

**General Guidelines**

These guidelines provide: (i) general reminders and requirements for Emergency Cash Collateral and DIP Financing Orders, (ii) a general description of factual findings that should be included in a motion for emergency use of cash collateral, (iii) examples of decretal provisions the Court will ordinarily approve in connection with Emergency Cash Collateral and DIP Financing Orders, and (iv) examples of provisions the Court generally will not approve in connection with Emergency Cash Collateral and DIP Financing Orders without providing notice and opportunity for hearing to all creditors and parties in interest.

1. Debtor must provide no less than 48 hours' notice of the motion and any expedited hearing thereon to the United States Trustee and Subchapter V Trustee [if appointed], debtor's twenty largest unsecured creditors, the attorneys for any committee that may be appointed by the Court, any creditor asserting a secured claim or other interest in cash collateral against debtor (and its attorneys if known), the Internal Revenue Service, any potentially affected taxing authorities, and any other creditor or party in interest directly affected by the relief sought on an emergency or first day basis. At a minimum, such notice should be provided by email, telephone, or fax and in the manner provided under Fed. R. Bank. P. 7004.

2. Even if parties have agreed and consented to the relief requested, approval of such relief remains subject to the discretion of the Court.

**Factual Findings That May Be Included in Emergency Cash Collateral and DIP Financing Orders**

1. That debtor has complied with all applicable service requirements.
2. That the secured creditor asserts a lien or interest in cash collateral, the priority of any such lien or the nature of any such interest, and the amount of indebtedness allegedly secured by the cash collateral or the extent of such interest.
3. Identification of the assets that are generating or will generate cash collateral.
4. That debtor has an immediate need for the use of cash collateral or debtor in possession financing, as applicable, including the reason for that immediate need (e.g. to preserve assets of the estate, to fund business operations, to purchase inventory, etc.).
5. That debtor reaffirms the existing terms and conditions of financing documents with secured creditor or other applicable documents establishing an interest in cash collateral.

**Provisions That Are Ordinarily Approved in Emergency Cash Collateral and Dip Financing Orders**

1. Granting and defining adequate protection to the secured creditor, and its successors and assigns, pursuant to §§ 361 and 363 of the Bankruptcy Code.
2. Granting the secured creditor replacement liens in post-petition assets to the same extent and priority as existed prepetition to the extent of diminution in value.
3. Granting the secured creditor, a super-priority administrative claim to the extent that adequate protection proves inadequate.
4. Providing for creation of a segregated debtor in possession account into which cash collateral shall be deposited.
5. Restricting use of cash collateral to pay specific categories of operating expenses, per budgets to be attached to the order or subsequently filed with the Court.
6. Requiring debtor to maintain insurance.
7. Requiring the submission of periodic reports regarding use of cash, aging of accounts receivable, etc.
8. Providing equality of treatment for carve-outs as between professionals for the debtor and professionals for any 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.
9. Providing that the order is sufficient and conclusive evidence of priority and validity of the security interest in liens, including replacement liens, on the assets of the estate granted to the secured creditor, without the necessity of filing, recording, or serving any financing statements or other documents which may be otherwise 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. Providing however, that the secured creditor may, in its discretion, file such financing statements or other documents with respect to such security interest and liens, and that debtor is

authorized and directed to execute, or cause to be executed, all such financing statements or other documents upon the secured creditor's reasonable request.
10. Providing a period for which an order authorizing the use of cash collateral is applicable.
11. Providing that even if authorization to use cash collateral expires, adequate protection/liens will continue to be effective unless or until modified by the Court.
12. Providing that upon a material default under an order authorizing the use of cash collateral, the secured creditor is entitled to an expedited hearing.
13. Setting a deadline for the secured creditor to file documents evidencing a perfected security interest with the Court.
14. Setting a further hearing date.

**Provisions That Will Generally Not Be Approved on an Emergency Basis**

1. Stipulations reducing the time period for parties in interest to 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 to less than 90 days from the commencement of the case if there is no committee of unsecured creditors in the case.
2. Stipulations as to the perfection, validity, or priority of secured claims that are binding on any party other than the debtor.
3. Including a provision in cases where the secured creditor asserts liens on accounts receivable pursuant to asset based revolving credit facilities that recharacterizes the "use of cash collateral" as a "post-petition advance" without regard to whether the "post-petition advance" is a new loan or the use of a prepetition receivable.
4. Provisions which release potential claims or causes of action by the estate against the secured creditor without providing parties in interest the opportunity to challenge any such releases.
5. Provisions which grant automatic relief from stay upon a material default under an order authorizing the use of cash collateral.
6. Provisions which grant cross-collateralization on unencumbered assets, absent extraordinary circumstances.
7. Provisions which authorize a purportedly post-petition credit facility, the proceeds of which satisfy any or all the secured creditor's prepetition debt.
8. Provisions that grant a lien on avoidance actions.
9. Provisions which purport to dictate the terms of any proposed or confirmed plan.

**Motions for Payment of Pre-Petition Wages**

The Court will generally grant ex parte any motion in a Chapter 11 case to pay non-insider pre-petition wages up to the statutory priority claim cap of 11 U.S.C. § 507(a)(4). Insider pre-petition wage claims are subject to a hearing.

**Motions for Payment of Critical Vendors**

Motion for the payment of critical vendors are subject to strict scrutiny by the Court. Only vendors that are indispensable to the debtor's reorganization are considered critical vendors. There must be no other alternative for the same or similar goods and must be crucial to the business and not easily replaceable. Convenience to the debtor is not grounds for a critical vendor designation. Critical vendors must continue to provide goods or services to the debtor under the same terms as

any pre-petition agreement. Critical vendors may not be protected from claw backs or preference claims. Motions should plead specific facts that the vendor is indispensable, and that there are no other alternatives for goods and services provided by the critical vendor.

**Motions for Utility Service**

The Court will typically grant Emergency Motion for Order (i) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Services and (ii) Establishing Procedures for Determining Requests for Additional Adequate Assurance ex parte.

The debtor motion should include a chart of all utility providers with the amount of pre-petition debt it owed as of the petition date. The chart shall additionally address how many months the debtor is in payment arrears and the debtor's expected ongoing monthly utility charges. The chart may be formatted as follows:

| Utility Provider | Amount owed Pre-Petition | Number of months in arrears | Estimated future billing |
|---|---|---|---|
| Name | $(debt at filing) | Enter as number of months or partial months (example 2.5) | $(monthly amount) |

The chart shall be verified by debtor affidavit. The Court may then ex-parte enter an order pursuant to 11 U.S.C. § 366.

**Chapter 11 Sub V Plans and Sub V Confirmation Hearings**

There is no required form Sub V Chapter 11 Plan, however, the Court requires that the plan includes Financial Projections [**Exhibit A**] and a Liquidation Analysis [**Exhibit B**], recommended forms are available for download on the Court's website.

A Ballot Summary and proposed Confirmation Order must be filed at least three working days prior to the scheduled confirmation hearing. A Ballot Summary form [**Exhibit C**] and form Confirmation Orders [**Confirmation under § 1191(a), Exhibit D**], [**Confirmation under § 1191(b), Exhibit E**] are also available for download on the Court's website. These again are highly suggested forms.

A Witness and Exhibit List is not required for uncontested confirmation hearings. A Witness and Exhibit List should be filed for contested confirmation hearings at least three business days prior to the confirmation hearing. The Court never requires the filing of hearing agendas or proffers and will not compensate counsel for time expended on unnecessary or duplicative tasks.

The Court will review the Sub V Plan, service, the Ballot Summary and proposed Confirmation Order in anticipation of the confirmation hearing. Should the Court have objections to the Plan, Ballot Summary or proposed Confirmation Order they will be announced at the confirmation hearing and the confirmation hearing will be reset. If the Court has no objections, there are no creditor objections, or they are withdrawn at or before the hearing, and the Sub V Trustee

recommends confirmation, then the presentation of evidence is not required, and the Court will confirm the Sub V Plan.

**Fee Applications.**

Fee Applications do not require a cover sheet. Fee applications must recite the following:

a. The date the debtor filed the petition;
b. The date the court authorized the employment of the applicant (where required);
c. Whether this is the first, second, etc., or final application;
d. If it is the first application, it shall recite the retainer received by the applicant. If it is a subsequent application, it shall state the date of all prior applications and the amounts approved by the court;
e. A list of extraordinary circumstances involved in the case. *See generally*, *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974),
f. A statement of the legal experience of the attorneys and paralegals involved;
g. Attached to the application shall be a chronological listing of all the time for which the application is requesting compensation,
h. An itemization of expenses.