

JUDGE WALKER'S GUIDELINES FOR CASH COLLATERAL AND FINANCING STIPULATIONS

In Chapter 11 cases, judges are often required to rule on requests by debtors (or Chapter 11 trustees) for authority to enter into cash collateral and financing stipulations and agreements with secured creditors (e.g., under §§ 363(c)(2) or 364(c) (all section references are to the Bankruptcy Code, 11 U.S.C.)). These stipulations and agreements frequently contain provisions that Judge Walker will not normally approve. In an effort to provide guidance to debtors and secured creditors in these circumstances, Judge Walker will adopt the following guidelines.

Except as set forth below, these guidelines apply both to interim and to final requests for use of cash collateral or for authority to enter into a financing arrangement.

- A. The following **will not normally be approved in an interim order**, and must be identified and justified in final requests (*see* B, below):
1. Cross-collateralization clauses, i.e., clauses that secure prepetition debt with postpetition assets in which the secured party would not otherwise have a security interest by virtue of its prepetition security agreement.
 2. Provisions or findings of fact that bind the estate (or all parties in interest, or parties not stipulating) with respect to the validity, perfection or amount of the secured party's lien or debt.
 3. Provisions or findings of fact that bind the estate (or all parties in interest, or parties not stipulating) with respect to the relative priorities of the secured party's lien and liens held by persons who are not party to the stipulation. This would include, for example, an order approving a stipulation providing that the secured party's lien is a "first-priority" lien.
 4. Provisions in an **interim order** that permit the secured party's lien to (i) attach to unsecured property of the estate, or (ii) have priority over other existing secured creditors in property of the estate that is already subject to a secured creditor's lien. *See* § 364(c)(2) and (3).
 5. Waivers of § 506(c).
 6. Provisions that operate expressly or as a practical matter to divest the debtor, or any other party in interest, of discretion in the formulation of a plan or administration of the estate, or limit access to the court to seek any relief under applicable provisions of law.

7. Releases of liability by the debtor of any claim or cause of action against the secured creditor, including without limitation (i) for the creditor's alleged prepetition torts, breaches of contract, or lender liability, (ii) releases of prepetition or postpetition defenses and/or counterclaims, and (iii) releases of any avoidance actions arising under the Bankruptcy Code.
8. Automatic relief from the stay of § 362(a) upon the debtor's default under the cash collateral or financing agreement or stipulation, conversion to Chapter 7, or the appointment of a trustee.
9. Adequate protection provisions that create liens on claims for relief arising under the Bankruptcy Code, including without limitation, claims arising under §§ 506(c), 544, 545, 547, 548, and 549.
10. Waivers, effective on default or expiration of the term of the agreement or stipulation, of the debtor's right to move for a court order pursuant to § 363(c)(2)(B) authorizing the use of cash collateral in the absence of the secured party's consent.
11. Carve outs for administrative expenses that do not treat all professionals equally or on a pro rata basis.
12. Provisions that create an unreasonably short limitation period for the debtor or any other party in interest (including a successor trustee) to bring claims or causes of action against the secured creditor.
13. A finding without supportive evidence to the effect that in consenting to the use of cash collateral or postpetition financing, the secured creditor is acting in good faith.
14. Provisions applicable in the event of dispute or default under the agreement that place venue in any other court.
15. Provisions applicable in the event of a dispute or default under the agreement wherein the debtor waives service of process, the doctrine of forum non conveniens, notice and hearing, or the right to a jury trial.
16. Provisions applicable in the event of a dispute or default authorizing the financing party or anyone else to sue in the name of the debtor.

B. **In all applications** for court approval of a cash collateral or financing agreement or stipulation, **counsel for the debtor (or trustee) must certify** whether the agreement

contains any provision listed in part A, identify any such provision, and explain its justification.