

**PROCEDURES FOR  
COMPLEX CHAPTER 11 CASES**

The following procedures shall apply in complex Chapter 11 cases:

1. A “complex Chapter 11 case” is defined as a case filed in this district under Chapter 11 of the Bankruptcy Code that requires special scheduling and other procedures because of a combination of the following factors:
  - a. the size of the case (usually total debt of more than \$10 million);
  - b. the large number of parties in interest in the case (usually more than 50 parties in interest in the case);
  - c. the fact that claims against the debtor and/or equity interests in the debtor are publicly traded (with some creditors possibly being represented by indenture trustees); or
  - d. any other circumstances justifying complex case treatment.
2. “Expedited” means a matter which, for cause shown, should be heard on less than 23 days’ notice. “Emergency” means a matter which, for cause shown, should be heard on less than 5 business days’ notice.
3. If any party filing a Chapter 11 bankruptcy petition believes that the case should be classified as a complex Chapter 11 case, the party shall file with the bankruptcy petition a Notice of Designation as Complex Chapter 11 Case in the form\* attached as Exhibit A.
4. If a party has “First Day” matters requiring emergency consideration by the court, it should submit a Request for Emergency Consideration of Certain “First Day” Matters in the form attached as Exhibit B.
5. Each judge shall arrange the judge's calendar so that “first day” emergency hearings, as requested in the court-approved form entitled Request for Emergency Consideration of Certain First Day Matters, can be conducted consistent with the Bankruptcy Code and Rules, including Rule 4001, as required by the circumstances, but not more than two business days after the request for emergency “first day” hearings.
6. When a party has filed a Chapter 11 case and filed a Notice of Designation as Complex Chapter 11 Case, the Clerk of Court shall:

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\* All order exemplars attached as exhibits are furnished for the purpose of prescribing content. Actual formatting of orders should follow the formatting requirements for the district in which the case is filed.

- a. Generally assign the case to a judge in accordance with the usual procedures and general orders of the district or division;
  - b. Immediately confer with the court about designating the case as a complex Chapter 11 case and about setting hearings on emergency or first day motions. If the court determines that the case does not qualify as a complex Chapter 11 case, the court shall issue an Order Denying Complex Case Treatment in the form attached as Exhibit C. If the court determines that the case appears to be a complex Chapter 11 case, the court shall issue an Order Granting Complex Chapter 11 Case Treatment in the form attached as Exhibit D; and
  - c. Notify and serve counsel for the debtor with the order entered by the court relating to the complex case treatment and notify counsel for the debtor regarding the hearing settings for emergency first day matters.
7. Counsel for the debtor, upon receipt of notice of entry of an order regarding complex Chapter 11 case treatment, shall:
  - a. Serve the order granting or denying complex Chapter 11 case on all parties in interest within seven days.
  - b. Provide notice of the first day emergency hearings in accordance with the procedures shown in the form attached as Exhibit E.
8. Counsel shall follow the agenda guidelines for hearings in complex Chapter 11 cases attached as Exhibit F and the guidelines for mailing matrices and shortened service lists attached as Exhibit G.

**EXHIBIT A.**  
**NOTICE OF DESIGNATION AS**  
**COMPLEX CHAPTER 11 BANKRUPTCY CASE**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
\_\_\_\_\_ DIVISION

IN RE:

§  
§  
§  
§  
§

CASE NO. \_\_\_\_\_

DEBTOR.

NOTICE OF DESIGNATION AS COMPLEX  
CHAPTER 11 BANKRUPTCY CASE

This bankruptcy case was filed on \_\_\_\_\_, 200\_\_\_. The undersigned party in interest believes that this case qualifies as a complex Chapter 11 case because:

- \_\_\_\_\_ The debtor has total debt of more than \$10 million;
- \_\_\_\_\_ There are more than 50 parties in interest in this case;
- \_\_\_\_\_ Claims against the debtor are publicly traded;
- \_\_\_\_\_ Other: (Substantial explanation is required. Attach additional sheets if necessary.)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_, 200\_\_

\_\_\_\_\_  
Name

\_\_\_\_\_  
Address

\_\_\_\_\_  
Telephone, Fax Numbers, and eMail

**EXHIBIT B.**  
**REQUEST FOR EMERGENCY CONSIDERATION**  
**OF CERTAIN "FIRST DAY" MATTERS**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
\_\_\_\_\_ DIVISION

IN RE:

§  
§  
§  
§

CASE NO. \_\_\_\_\_

DEBTOR.

REQUEST FOR EMERGENCY CONSIDERATION  
OF CERTAIN "FIRST DAY" MATTERS

On \_\_\_\_\_, \_\_\_\_\_ filed a petition for relief under Chapter 11 of the Bankruptcy Code. Counsel for the debtor believes that the case qualifies as a "Complex Chapter 11 Case." The debtor needs emergency consideration of the following initial case matters (check those that apply\*):

\_\_\_\_\_ JOINT MOTION FOR JOINT ADMINISTRATION

\_\_\_\_\_ MOTION FOR ORDER EXTENDING TIME TO FILE SCHEDULES AND STATEMENT OF FINANCIAL AFFAIRS

\_\_\_\_\_ MOTION RE MAINTENANCE OF BANK ACCOUNTS AND EXISTING CASH MANAGEMENT, ATTACHING NOTICE OF CONFERENCE WITH U.S. TRUSTEE

\_\_\_\_\_ MOTION TO PAY PRE-PETITION WAGES, SALARIES, *ET AL.*, ATTACHING NOTICE OF CONFERENCE WITH U.S. TRUSTEE AND DETAILED EXHIBIT SHOWING WHO DEBTOR PROPOSES TO PAY AND AMOUNTS

\_\_\_\_\_ MOTION FOR ENTRY OF INTERIM ORDER AUTHORIZING USE OF CASH COLLATERAL

\_\_\_\_\_ MOTION FOR INTERIM APPROVAL OF POST-PETITION SECURED AND SUPER PRIORITY FINANCING PURSUANT TO SECTION 364(c) OF THE BANKRUPTCY CODE

\_\_\_\_\_ MOTION PURSUANT TO 11 U.S.C. § 366, FOR ENTRY OF INTERIM ORDER  
(1) DETERMINING ADEQUATE ASSURANCE OF PAYMENT FOR FUTURE  
UTILITY SERVICES AND (2) RESTRAINING UTILITY COMPANIES FROM  
DISCONTINUING, ALTERING, OR REFUSING SERVICE

\_\_\_\_\_ MOTION TO ESTABLISH INTERIM NOTICE PROCEDURES

\_\_\_\_\_ MOTION FOR ORDER APPROVING INTERIM RETENTION OF  
PROFESSIONALS

\_\_\_\_\_ MOTION FOR ORDER APPROVING PAYMENT OF PRE-PETITION CLAIMS  
OF CERTAIN CRITICAL VENDORS

\_\_\_\_\_ OTHERS (LIST):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_, 200\_\_

\_\_\_\_\_  
Name

\_\_\_\_\_  
Address

\_\_\_\_\_  
Telephone, Fax Numbers and eMail

\* NOTE: The court expects the parties to exercise judgment regarding which motions are applicable.

**EXHIBIT C.  
ORDER DENYING COMPLEX  
CASE TREATMENT**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
\_\_\_\_\_ DIVISION

IN RE:

§  
§  
§  
§  
§

CASE NO. \_\_\_\_\_

DEBTOR.

**ORDER DENYING COMPLEX  
CASE TREATMENT**

This bankruptcy case was filed on \_\_\_\_\_, 200\_\_\_. A Notice of Designation as Complex Chapter 11 Case was filed. After review of the initial pleadings filed in this case, the court concludes that the case does not appear to qualify as a complex Chapter 11 case. Therefore, the case will proceed under the local bankruptcy rules and procedures generally applicable to bankruptcy cases without special scheduling orders. The court may reconsider this determination on motion, after hearing.

IT IS SO ORDERED.

# # #

The Clerk shall notice:  
Debtor  
Debtor's Counsel  
U.S. Trustee

**EXHIBIT D.**  
**ORDER GRANTING COMPLEX**  
**CHAPTER 11 BANKRUPTCY CASE TREATMENT**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
\_\_\_\_\_ DIVISION

IN RE:

§  
§  
§           CASE NO. \_\_\_\_\_  
§  
DEBTOR.     §

ORDER GRANTING COMPLEX  
CHAPTER 11 BANKRUPTCY CASE TREATMENT

This bankruptcy case was filed on \_\_\_\_\_, 200 \_\_\_\_\_. A Notice of Designation as Complex Chapter 11 Case was filed. After review of the initial pleadings filed in this case, the court concludes that this case appears to be a complex Chapter 11 case.

Accordingly, unless the court orders otherwise,

IT IS ORDERED THAT:

1. The debtor shall maintain a service list identifying the parties that must be served whenever a motion or other pleading requires notice. Unless otherwise required by the Bankruptcy Code or Rules, notices of motions and other matters will be limited to the parties on the service list.

a. The service list shall initially include the debtor, debtor's counsel, counsel for the unsecured creditors' committee, the U.S. Trustee, all secured creditors, the

20 largest unsecured creditors of each debtor, any indenture trustee, and any party that requests notice;

- b. Any party in interest that wishes to receive notice, other than as listed on the service list, shall be added to the service list by filing and serving the debtor and debtor's counsel with a notice of appearance and request for service.
- c. Parties on the service list, who have not otherwise consented to service by e-mail, through the act of becoming a registered e-filer in this district, are encouraged to provide an e-mail address for service of process and to authorize service by e-mail; consent to e-mail service may be included in the party's notice of appearance and request for service; in the event a party has not consented to e-mail service, a "hard copy" shall be served by fax or by regular mail.
- d. The initial service list shall be filed within 3 days after entry of this order. A revised list shall be filed 7 days after the initial service list is filed. The debtor shall update the service list, and shall file a copy of the updated service list, (i) at least every 7 days during the first 30 days of the case; (ii) at least every 15 days during the next 60 days of the case; and (iii) at least every 30 days thereafter throughout the case.

2. [The court sets \_\_\_\_\_ of [each week] [every other week, commencing [Month and Day] [each month] at \_\_\_\_\_ am/pm as the pre-set hearing day and time for hearing all motions and other matters in these cases.] The court sets the following dates and times for the next two months as the pre-set hearing date and time for hearing all motions and other matters in these cases [insert dates and times]. Settings for the following months will be published by the court no later than 30 days prior to the first hearing date in the said following months. (There may be exceptions; those exceptions will be noted on the court's internet schedule, available at [www.txwb.uscourts.gov](http://www.txwb.uscourts.gov).)

- a. All motions and other matters requiring hearing, but not requiring expedited or emergency hearing, shall be noticed for hearing, on the next hearing day that is at least 23 days after the notice is mailed. As a preface to each pleading, just below the case caption, in lieu of the language required by any Local Bankruptcy Rule, the pleading shall state:

A HEARING WILL BE CONDUCTED ON THIS MATTER ON \_\_\_\_\_ AT \_\_\_\_\_ AM/PM IN COURTROOM \_\_\_\_\_, [COURTHOUSE NAME & ADDRESS], \_\_\_\_\_, TEXAS.

IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST RESPOND IN WRITING, SPECIFICALLY ANSWERING EACH PARAGRAPH OF THIS PLEADING. UNLESS OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT WITHIN TWENTY-THREE DAYS FROM THE DATE YOU WERE SERVED WITH THIS PLEADING. YOU MUST SERVE A COPY OF YOUR RESPONSE ON THE PERSON WHO SENT YOU THE NOTICE; OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.

- b. All motions and other matters requiring expedited or emergency hearing shall comply with the usual court requirements for explanation and verification of the need for emergency or expedited hearing. Specifically, if a party in interest has a situation that it believes requires consideration on less than 23-days' notice, or an emergency that it believes requires consideration on less than 5 business days' notice, then the party should file and serve a separate, written motion for expedited hearing, with respect to the underlying motion. The court will make its best effort to rule on the motion for expedited or emergency hearing within 24 hours of the time it is presented. If the court grants the motion for expedited or emergency hearing, the underlying motion will be set by the courtroom deputy at the next available pre-set hearing day or at some other appropriate shortened date approved by the court. The party requesting the hearing shall be responsible for providing proper notice in accordance with this order and the Bankruptcy Code and Rules.
3. Emergency and expedited hearings (and other hearings in limited circumstances) in this case may be conducted by telephone or, where available, video. Parties must request permission to participate by telephone by calling the courtroom deputy for the particular division at the number listed on the court's website at [www.txwb.uscourts.gov](http://www.txwb.uscourts.gov).

4. If a matter is properly noticed for hearing and the parties reach a settlement of the dispute prior to the final hearing, the parties may announce the settlement at the scheduled hearing. If the court determines that the notice of the dispute and the hearing is adequate notice of the effects of the settlement, (i.e., that the terms of the settlement are not materially different from what parties in interest could have expected if the dispute were fully litigated) the court may approve the settlement at the hearing without further notice of the terms of the settlement.

5. The debtor shall give notice of this order to all parties in interest within 7 days. If any party in interest, at any time, objects to the provisions of this order, that party shall file a motion articulating the objection and the relief requested. After hearing the objection and any responses the court may reconsider any part of this order and may grant relief, if appropriate.

# # #

The Clerk shall notice:

Debtor  
Debtor's Counsel  
U.S. Trustee

**EXHIBIT E.**  
**PROCEDURES FOR OBTAINING HEARINGS**  
**IN COMPLEX CHAPTER 11 CASES**

**1. Hearing on First Day Matters: Official Form for Request for Expedited Consideration of Certain First Day Matters.** Upon the filing of a complex Chapter 11 case, if the debtor has matters that require immediate emergency consideration (“first day” or “near first day” relief), the debtor should file a “Request for Emergency Consideration of Certain ‘First Day’ Matters” using the form of Exhibit B to the Procedures for Complex Chapter 11 Cases (“First Day Hearing Request”). The first day hearing request will be immediately forwarded by the clerk of court to the judge who has been assigned the complex Chapter 11 case (or if there are multiple, related debtor cases, to the judge assigned to the first-filed case). The court will hold a hearing within 2 business days for the time requested by the debtor’s counsel and the courtroom deputy will notify counsel for the debtor of the time of the setting. If the judge assigned to the complex Chapter 11 case is not available to hold the hearing within 2 business days of the time requested by the debtor’s counsel, an available judge will hold a hearing within 2 business days of the time requested by the debtor’s counsel and the courtroom deputy will notify counsel for the debtor of the time of the setting. If no judge is available to hold a hearing within 2 business days, then a hearing date will be scheduled at the earliest possible date that a judge is available. The debtor’s counsel should (1) serve electronically, if the e-mail address is available (or by facsimile or immediate hand-delivery) a copy of the first day hearing request on all affected parties, including the U.S. Trustee, simultaneously with its filing; and (2) notify electronically, if the e-mail address is available, or by fax or telephonically (or by immediate hand-delivery) all affected parties of the hearing time on first day matters as soon as possible after debtor’s counsel has received confirmation from the court. The court will allow parties in interest to participate telephonically at the hearing on first day matters whenever (and to the extent) practicable, and debtor’s counsel will be responsible for the coordination of the telephonic participation.

**2. Pre-Set Hearing Dates.** The debtor may request (as one of its first day matters or otherwise) that the court establish in a complex Chapter 11 case a weekly/bi-monthly/monthly setting time (“Pre-Set Hearing Dates”) for hearings in the complex Chapter 11 case (*e.g.*, every Wednesday at 1:30 p.m.). The court will accommodate this request for pre-set hearing dates in a complex Chapter 11 case if it appears justified. After pre-set hearing dates are established, all matters in the complex Chapter 11 case (whether initiated by a motion of the debtor or by another party in interest) will be set on pre-set hearing dates that are at least 23 days after the filing/service of a particular motion (unless otherwise requested by a party or ordered by the court) and the movant shall indicate the hearing date and time on the face of the pleading. Movant shall advise the courtroom deputy of all such settings prior to filing, and the courtroom deputy will advise the movant whether there is enough time on the docket that day to accommodate the matter.

**3. Notice of Hearing.** Notice of hearing of matters scheduled for pre-set hearing dates shall be accomplished in the following manner in each district:

**Northern District:** [fill in procedure]

**Western District:** By the moving party, who shall file a certificate that the notice has been accomplished in accordance with these procedures.

**Southern District:** [fill in procedure]

**Eastern District:** By the moving party, who shall file a certificate that the notice has been accomplished in accordance with these procedures.

**4. Case Emergencies (Other Than the First-Day Matters).** If a party in interest has an expedited or emergency situation that it believes requires consideration on less than 23-days' notice, the party must file and serve a separate, written motion for expedited or emergency hearing, with respect to the underlying motion, which must comply with the usual court requirements for explanation and verification of the need for expedited or emergency hearing. The court will make its best effort to rule on the motion for expedited or emergency hearing within 24 hours of the time it is presented. If the court grants the motion for expedited or emergency hearing, the underlying motion will be set by the courtroom deputy at the next available pre-set hearing date or at some other appropriate shortened date approved by the court. Motions for expedited and emergency hearings will only be granted for clear cause shown and presented with particularity in the body of the motion.

**EXHIBIT F.**  
**AGENDA GUIDELINES FOR HEARINGS**  
**IN COMPLEX CHAPTER 11 CASES**

In complex Chapter 11 cases where five or more matters are noticed for the same hearing date, counsel for the debtor-in-possession, the party requesting the hearings, or trustee shall file and serve an agenda describing the nature of the items set for hearing.

**1. Timing of Filing.** Counsel shall file an agenda at least 24 hours prior to the date and time of the hearing. At the same time, counsel shall also serve the agenda (or confirm electronic service has been effectuated) upon all attorneys who have filed papers with respect to the matters scheduled and upon the service list.

**2. Sequence of Items on Agenda.** Uncontested matters should be listed ahead of contested matters. Contested matters should be listed in the order in which they appear on the court's docket.

**3. Status Information.** For each motion filed in the complex Chapter 11 case, each motion filed in an adversary proceeding concerning the Chapter 11 case, each objection to claim, or application concerning the case, the agenda shall indicate the moving party, the nature of the motion, the docket number of the pleadings, if known, the response deadline, and the status of the matter. The status description should indicate whether the motion is settled, going forward, whether a continuance is requested (and any opposition to the continuance, if known) and any other pertinent information.

**4. Information for Motions in the Case.** For each motion that is going forward, or where a continuance request is not consensual, the agenda shall also list all pleadings in support of the motion, and any objections or responses. Each pleading listed shall identify the entity that filed the pleading, and the docket number of the pleading, if known. If any entity has not filed a responsive pleading, but has engaged in written or oral communications with the debtor, that fact should be indicated on the agenda, as well as the status or outcome of those communications. For an omnibus objection to claims, responses to the objection which have been continued by consent may be listed collectively (e.g., "the following responses have been continued by consent:").

**5. Changes in Agenda Information.** After the filing of the agenda, counsel shall notify judge's chambers by phone or letter of additional related pleadings that have been filed, and changes in the status of any agenda matter.

**6.** The requirements listed above should not be construed to prohibit other information of a procedural nature that counsel thinks would be helpful to the court.

ALL MOTIONS AND PLEADINGS SHALL CONTAIN THE HEARING DATE AND TIME BELOW THE CASE/ADVERSARY NUMBER.

**EXHIBIT G.**  
**GUIDELINES FOR SERVICE LISTS AND SHORTENED SERVICE LISTS IN  
COMPLEX CHAPTER 11 CASES**

**I. Bankruptcy Rule 2002 Notice/Service List**

**A. Helpful Hints Regarding Whom to Include on the Service List in a Complex Chapter 11 Case.** There are certain events and deadlines that occur in a Chapter 11 case which Federal Rules of Bankruptcy Procedure 2002 requires be broadly noticed to all creditors, indenture trustees, equity interest holders, and other parties in interest (“Rule 2002 notice list”). To facilitate this, debtor’s counsel shall evaluate and consider whether the following persons and entities need to be included on the Rule 2002 notice list:

1. creditors (whether a creditor’s claim is disputed, undisputed, contingent, non-contingent, liquidated, unliquidated, matured, unmatured, fixed, legal, equitable, secured or unsecured);
2. indenture trustees;
3. financial institutions at which the debtor has maintained accounts (regardless of whether such institutions are creditors);
4. vendors with whom the debtor has dealt, even if the debtor’s records currently indicate no amount is owed;
5. parties to contracts, executory contracts or leases with the debtor;
6. federal, state, or local taxing authorities with which the debtor deals, including taxing authorities in every county in which the debtor owns real or personal property with regard to which ad valorem taxes might be owed;
7. governmental entities with which the debtor might interact (including, but not limited to, the U.S. Trustee and the SEC);
8. any party who might assert a lien against property of the debtor;
9. parties to litigation involving the debtor;
10. parties with which the debtor might be engaged in some sort of dispute, whether or not a claim has formally been made against the debtor;
11. tort claimants or accident victims;
12. insurance companies with whom the debtor deals or has policies;
13. active and retired employees of the debtor;

14. officers or directors of the debtor;
15. customers who are owed deposits, refunds, or store credit;
16. utilities;
17. shareholders (preferred and common), holders of options, warrants or other rights or equitable interests in the debtor;
18. miscellaneous others who, in debtor counsel's judgment, might be entitled to "party in interest" status or who have requested notice.

**B. Flexible ("User Friendly") Format Rules for Mailing Matrix or Creditor List in a Complex Debtor 11 Case in Which Debtor's Counsel Serves Notices.** In a complex Chapter 11 case, where the mailing matrix (or creditor list) is likely to be very lengthy, the following special format rules will apply, [in lieu of any applicable local bankruptcy rule, save and except the Administrative Procedures for the Filing, Signing and Verifying of Documents by Electronic Means in Texas Bankruptcy Courts, adopted by local rule or general order in all federal districts in Texas] whenever it is the debtor's responsibility to serve notices in the case. The debtor (since it will typically be the party serving all notices in the Chapter 11 case rather than the clerk of court) may create the mailing matrix or creditor list in whatever format it finds convenient so long as it is neatly typed in upper and lower case letter-quality characters (in no smaller than 10 point and no greater than 14 point type, in either Courier, Times Roman, Helvetica or Orator font) in a format equivalent to 8 ½ inch by 11 inch blank, unlined, standard white paper. The mailing matrix or creditor list, if lengthy, should ideally include separate subheadings throughout, to help identify categories of parties in interest. By way of example, the following subheadings (among others) might be used:

Debtor and its Professionals

Secured Creditors

Indenture Trustees

Unsecured Creditors

Governmental Entities

Current and Retired Employees

Officers and Directors

Tort Claimants

Parties to Executory Contracts

Equity Interest Holders

Other

Parties in interest within each category/subheading should be listed alphabetically.

Also, the mailing matrix or creditor list may be filed in separate volumes, for the separate categories of parties in interest, if the mailing matrix or creditor list is voluminous. Finally, if there are multiple, related debtors and the debtors intend to promptly move for joint

administration of their cases, the debtors may file a consolidated mailing matrix or creditor list, subject to later being required to file separate mailing matrices if joint administration is not permitted.

**C. When Inclusion of Certain Parties in Interest on a Mailing Matrix is Burdensome.** If inclusion of certain categories of parties in interest on the mailing matrix or creditor list would be extremely impracticable, burdensome and costly to the estate, the debtor may file a motion, pursuant to FRBP. 2002(1), and on notice to the affected categories of parties in interest, requesting authority to provide notices to certain categories of parties in interest and may forego including those categories of parties in interest on the mailing matrix if the court grants the motion.

## **II. Shortened Service List Procedure in a Complex Chapter 11 Case.**

**A. Procedures/Contents/Presumptions.** If the court has entered an order granting complex Chapter 11 case treatment, the debtor shall provide service as required by ¶ 1 of that order. If the court has not entered such an order, the debtor may move to limit notice – that is, for approval of a shortened service list – that will be acceptable for noticing most events in the bankruptcy case, other than those events/deadlines that Federal Rules of Bankruptcy Procedure 2002 contemplates be served on all creditors and equity interest holders. At a minimum, the shortened list should include the debtor and its professionals, the secured creditors, the 20 largest unsecured creditors, any official committees and the professionals for same, the U.S. Trustee, the IRS and other relevant governmental entities, and all parties who have requested notice. Upon the court’s approval of a shortened service list in a complex Chapter 11 case, notice in any particular situation during a case shall be presumed adequate if there has been service on (1) the most current service list on file in the case; plus (2) any other party directly affected by the relief requested and not otherwise included on the service list.

**B. Obligation to Update, File and Serve Service List.** The debtor must update the service list as parties request to be added to it or as circumstances otherwise require. To be added to the list, a party must file a notice of appearance and request for service and serve the notice on debtor’s counsel. Parties should include e-mail transmission information if they wish to receive expedited service of process during the case. Additionally, the debtor must file an updated service list and must serve a clean and redlined copy of the updated service list on all parties on the service list weekly for the first month after filing, then bi-monthly for the next 60 days, then monthly thereafter during the pendency of the case. If, in a particular month, there are no changes to the service list, the debtor must file a notice with the court so stating.

**EXHIBIT H.**  
**GUIDELINES FOR COMPENSATION AND EXPENSE REIMBURSEMENT OF  
PROFESSIONALS IN COMPLEX CHAPTER 11 CASES**

The following are guidelines govern the most significant issues relating 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, 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 had 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 aggregate 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 expenses 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.

**EXHIBIT I.**  
**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.

**A. OVERBIDS AND TOPPING FEES**

1. **Topping Fees and Break-up Fees.** Any request for the approval of a topping fee or a 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.

**B. 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.
- m. *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.
- m. *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).

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

p. *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.



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 mere a replacement/addition 361(I) lien? (circle one or both) ..... \_\_\_\_\_
  - \*\* (c) Is the lender's claim given super-priority?
    - (§ 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? ..... \_\_\_\_\_
  - \*\* (b) Is the debtor prohibited from seeking to enjoin the lender in pursuant 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)(4)? .....
    - (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? .....

SIGNED this the \_\_\_\_ day of \_\_\_\_\_, 200\_\_.

[Enter Firm Name]

By: \_\_\_\_\_  
 [Enter Attorney's Name]  
 [Enter Texas Bar No.]

[Enter Address]  
 [Enter Telephone Number]  
 [Enter Identification Role in Case]

## 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 prepetition 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 postpetition 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,

1. Identification of Proceedings:
  - (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? .....
  - (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? .....

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.