



Cash Collateral Issues and Best Practices

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“Cash Collateral” defined

In this section, “cash collateral” means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title. (11 U.S.C. § 363(a))

Conditions on the Use of Cash Collateral

Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362). (11 USC § (e))

Red Flag Provisions (BLR 4001-2)

- Provisions that grant cross-collateralization protection (other than replacement liens or other adequate protection) to the prepetition secured creditors (e.g., clauses that secure prepetition debt by postpetition assets in which the secured creditor would not otherwise have a security interest by virtue of its prepetition security agreement or applicable law).
- Provisions or findings of fact that bind the estate or all parties in interest with respect to the validity, perfection or amount of the secured creditor's prepetition lien or debt or the waiver of claims against the secured creditor without first giving parties in interest at least seventy-five (75) days from the entry of the order and the creditors' committee, if formed, at least sixty (60) days from the date of its formation to investigate such matters.
- Provisions that seek to waive any rights that the estate may have under § 506(c) of the Bankruptcy Code.

Red Flag Provisions (part 2)

- Provisions that immediately grant to the prepetition secured creditor liens on the debtor's claims and causes of action arising under §§ 544, 545, 547, 548 and 549 of the Bankruptcy Code.
- Provisions that deem prepetition secured debt to be postpetition debt or that use postpetition loans from a prepetition secured creditor to pay part or all of that secured creditor's prepetition debt, other than as provided in § 552(b) of the Bankruptcy Code.
- Provisions that provide treatment for the professionals retained by a committee appointed by the United States Trustee different from that provided for the professionals retained by the debtor with respect to a professional fee carve-out, and provisions that limit the committee counsel's use of the carve-out.

Red Flag Provisions (part 3)

- Provisions that prime any secured lien, without the consent of that lienor.
- A declaration that the order does not impose lender liability on any secured creditor.
- Provisions that grant the lender expedited relief from the automatic stay in § 362 of the Bankruptcy Code or relief from the automatic stay without further order of the court.

The court may deem unenforceable any provision not highlighted as required. LBR 4001-2.

Key Negotiating Points – Uses of Cash

- Permitted Uses:
 - Essential Operating Expenses
 - Capital Improvements
 - Debtor's Professionals
- Variance
 - What percentage?
 - Line Item v. Budget?

Key Negotiating Points – Replacement Liens

- Replacement Liens
 - Scope of collateral grant?
 - Adequate protection for what?
 - How many grants do you need?

Key Negotiating Points – Reporting

- Frequency of reporting
- Cash basis reports from a debtor with an accrual-based system
- Squaring the cash collateral reporting with the MORs

Key Negotiating Issues - Defaults

- Mechanics for terminating the order
 - Grace periods
 - Expedited hearings
 - Automatic terminations
- How many foot-faults make a default?