

**PRESENTED AT**

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**Securing Post-Petition Financing and Rebuilding  
Client Credit**

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# Motion to Incur Debt

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## Federal Rule Bankruptcy Procedure Rule 4001(c)

- The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the proposed credit agreement and form of order, including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions. If the proposed credit agreement or form of order includes any of the provisions listed below, the concise statement shall also: briefly list or summarize each one; identify its specific location in the proposed agreement and form of order; and identify any such provision that is proposed to remain in effect if interim approval is granted, but final relief is denied, as provided under Rule 4001(c)(2).

*In re Clemens*, 358 B.R. 714 (Bankr.W.D.Kentucky 2007).

- Debtors wanted to obtain new automobile post-confirmation.
- “The requirement for obtaining prior approval for **post-confirmation credit** is very important. It protects debtors from entering into ill-advised credit arrangements, such as those at issue. With the help of the trustee, it is hoped that debtors will be able to break the “cycles of poor financial judgment” that may have led to the filing of their petitions in the first place.... This protects not only the debtor, but all creditors whose claims are provided for in the confirmed plan.”
- Court will not grant motions to incur post-confirmation credit when the motion does not address (1) terms of credit agreement, (2) what alternatives to proposed credit agreement were considered, (3) description of automobile that debtor seeks to purchase, detailing make, model, mileage, condition, value (Kelly Bluebook), (4) a copy of a current budget that includes the proposed credit payments.
- Furthermore, when interest rate for proposed credit agreement is 20 percent per annum or more, court will require debtor to appear in court at hearing on motion to ensure that debtor understands what he is getting into.
- “Examination of the Debtors' payment history under the Chapter 13 plan reveals some difficulty with their ability to make payments to certain creditors after confirmation.”

*In re Brown*, 170 B.R. 362 (Bankr.S.D. Ohio 1994).

- Debtor wanted to replace nine year old vehicle that required maintenance expenditures of \$150.00 per month.
- Debtor made arrangements with car dealership to obtain financing for \$10,000 with \$1,500 down. The max interest rate would be 23%, and the payments would not exceed \$330.00 per month for 48 months.
- “If chapter 13 debtors are to be rehabilitated, they must be educated and encouraged to enter into transactions that are in both their long-term and short-term best interests. The current

transaction would have the Debtor purchase a vehicle at a rate of interest so high that the balance due and ultimately payable in all likelihood dramatically exceeds the value of the vehicle. Where this happens, debtors will pay long term for the difference between the principal and interest balance and the value of the automobile. If they try to trade the vehicle, they will have to finance the “negative equity,” or if they try to sell the automobile it will be difficult to obtain a price that covers the amount paid for the car. In this manner, the initial bad judgment becomes self-perpetuating, and has a continuing adverse impact upon debtors. (p. 365-366)

- While the Court believes that market forces should be allowed to prevail within the legal limits established under the usury laws of the state of Ohio, debtors should be viewed individually; i.e., percentage to be paid to creditors under the plan, length of time in a confirmed plan, and the post-confirmation payment history. This will require that debtors' counsel do more than prepare and file the papers requesting leave to enter into post-petition credit transactions. They must scrutinize the terms of the arrangement and educate and assist the debtors in finding the best possible transactions. It will also require the continuing efforts of the Trustee to persuade and educate the credit community in terms of their lending policies and practices.” (p. 366)
- “In future cases before this Court, prior to filing post-petition credit motions, debtors' counsel must know all of the terms and actively participate in aiding the debtor in obtaining the best arrangement possible. Applications should detail and include:
  - 1. automobile dealers contacted and results of these contacts;
  - 2. the vehicle under consideration, its cost, mileage, and existence and nature of any factory warranty;
  - 3. the financing terms, including name of the financing entity, annual percentage rate, monthly payment and number of payments;
  - 4. where the interest rate is built into the price of the automobile, the sum attributable to finance charges must be disclosed;
  - 5. the existence and cost, including financing charges, for any extended warranties; and
  - 6. a copy of a current budget should be attached. (p. 366)
- “It is hoped that debtors' counsel will actively seek the assistance of the Trustee in locating alternative financing resources at reasonable rates.” (p. 366)
- “Where the plan proposes a significant dividend of between seventy and one hundred percent, and there has been a favorable payment history for a significant period (one or two years), this Court will not approve financing arrangements with excessive interest rates.” (p. 366)

*In re Gonzales*, 2009 WL 1939850 (Bankr.N.D.Iowa 2009).

- “Courts must know the details of the collateral as well as the financing agreement in order to review post-confirmation financing. The debtor should disclose the make, model, mileage, condition and value of the collateral and whether better financing alternatives are available.”