

CREDITOR'S RIGHTS TOOLKIT

What Are First-Day Motions and the First-Day Hearing, and Why Should I Care?

Once a company files for Chapter 11 bankruptcy, it must sort through a myriad of potential issues and transition into operating as a business subject to the Bankruptcy Code. To smooth the otherwise rough transition into bankruptcy, a company generally will file a series of motions shortly after filing the bankruptcy petition that commences the case. Aptly referred to as “First-Day Motions,” these motions seek immediate relief to avoid a complete shutdown of the company’s operations and reduce the administrative burdens associated with bankruptcy. First-Day Motions, which can be ministerial or substantive in nature, are addressed at a “First-Day Hearing,” which typically occurs one or two days after the case has been commenced.

First-Day Motions — whether ministerial or substantive — set the stage for the bankruptcy. The relief a company seeks through these motions may directly or indirectly affect or prejudice a party’s rights, particularly with respect to the substantive First-Day Motions. As such, it is critical that a creditor carefully review the First-Day Motions, and object where appropriate, to ensure its rights are fully protected.

Key Issues

MINISTERIAL FIRST-DAY MOTIONS

Ministerial First-Day Motions seek procedural or administrative relief that assists a company as it transitions into bankruptcy. Given the ministerial nature of the relief sought, they are often unopposed and can be heard and granted at the First-Day Hearing on a final basis. Ministerial First-Day Motions may include the following:

- **Motion for Joint Administration.** If two or more affiliated companies file for bankruptcy, this motion may request that the court combine the cases for procedural purposes only.
- **Motion to Extend the Time to File Schedules and Statements.** A company may seek to extend the statutory deadline to disclose, among other things, information concerning the company’s assets and liabilities.
- **Motion to Establish Noticing and Case Management Procedures.** A company may seek to establish procedures that provide interested parties with notice and details of the case.
- **Motion to Retain a Claims Agent.** This motion requests court authority to hire an outside company to serve on certain parties’ important documents filed in the case and provide notice of significant events within the case.

SUBSTANTIVE FIRST-DAY MOTIONS

Substantive First-Day Motions seek relief to ensure, to the extent possible, that the company continues to operate post-petition and are designed to “keep the lights on.” The substantive relief sought in these motions is generally grounded in Rule 6003 of the Federal Rules of Bankruptcy Procedure, which permits a bankruptcy court to grant relief within 21 days after the filing of a case if such relief is necessary to avoid immediate and irreparable harm. These motions often seek (i) interim relief at the First-Day Hearing (which means the court would approve the relief for a short period of time but provide interested parties the opportunity to object to the relief **before approving the relief on a final basis**), and (ii) relief on a final basis at a subsequently scheduled hearing. As these motions contemplate relief that could directly affect other parties’ rights, they are more likely to be the subject of an objection. Substantive First-Day Motions may include the following:

- **Motion to Pay Employee Wages and Other Benefits.** This motion alleviates employees’ likely concerns regarding wages and other benefits by seeking to pay certain prepetition wages notwithstanding the bankruptcy.
- **Motion to Pay Critical Vendors.** This motion seeks authority to pay certain vendors the company deems critical or irreplaceable, because without such payments these vendors may choose to forego engaging in further business with the company.
- **Motion to Obtain Financing and/or Use Cash Collateral.** A company often funds its bankruptcy and post-petition operations by (i) borrowing new money from a lender, (ii) using cash it has on hand that is subject to a security interest, or (iii) a combination of the foregoing. These motions, which are generally the most substantive and disputed First-Day Motions, seek approval of the company’s source(s) of funding and the related protections provided in connection with such funding.
- **Motion to Continue Insurance.** This motion seeks authority to continue the company’s insurance coverage, including paying the necessary premiums as they become due, and may also request the ability to obtain replacement coverage to the extent necessary.
- **Motion to Pay Utility Providers.** This motion seeks to establish procedures for notifying and providing utility providers with adequate assurance of payment so that a utility provider does not turn off its service(s) during the bankruptcy case.
- **Motion to Maintain Cash Management System.** This motion seeks, among other things, a waiver of certain rules requiring a company to close its bank account(s) and instead seeks authority to continue using the same bank accounts and its existing cash management system.

Takeaway

Every First-Day Motion is a critical piece to the company’s smooth transition into, and survival in, bankruptcy. Consequently, First-Day Motions should not be ignored. Given the timing, the relief sought, and potential consequences of First-Day Motions, creditors should immediately consult competent legal counsel regarding the filing of First-Day Motions to ensure their rights are adequately protected.