Local Bankruptcy Rules: Michigan (E.D. Mich.)

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A Practice Note summarizing selected local rules of the US Bankruptcy Court for the Eastern District of Michigan (E.D. Mich.).

AUTOMATIC STAY

BACKGROUND/FEDERAL REQUIREMENTS

An automatic stay:

- Except as provided in section 362(b) and (c) of the Bankruptcy Code, is triggered immediately on filing of the bankruptcy petition.
- Automatically stops substantially all acts and proceedings against the debtor and its property.
- Is a nationwide injunction barring almost all actions against the debtor and its property, including the exercise of remedies regarding collateral, enforcement of prepetition judgments, litigation, collection efforts, and acts to create, perfect, and enforce liens granted before the petition date.
- Generally applies only to prepetition events and does not, for instance, bar suit against a debtor based on a cause of action arising postpetition. The stay's broad scope applies to all creditors, whether secured or unsecured, and to all of the debtor's property, wherever located.
- Forbids creditors from pursuing both formal and informal actions and remedies against the debtor and its property. It also covers remedies that could be exercised outside of the US.

For more information about the stay, see Practice Note, Automatic Stay: Overview (9-380-7953).

LOCAL RULES

Relief from stay may be sought by motion or by stipulation.

A motion must be served on:

- The parties required to be served under Federal Rule of Bankruptcy Procedure 4001.
- The debtor.
- Any trustee.
- Any other parties asserting an interest in the property that is the subject of the motion.
- Any other party who has requested notice.

(E.D. Mich. LBR 4001-1(a).)

A stipulation for entry of an order approving an agreement regarding relief from stay must be signed by:

- The debtor.
- Any trustee.
- Any other parties asserting an interest in the property that is the subject of the agreement.

(E.D. Mich. LBR 4001-1(a).)

The court requires a separate order and stipulation to entry of the order. The proposed order that is to be signed by the judge should not contain signatures of the stipulating parties. The parties instead should sign a separate stipulation to entry of the order and may attach the proposed order as an exhibit to the stipulation. Once a stipulation to entry of an order is filed, counsel may submit a Word or WordPerfect version of the order for entry using the procedure available on the court's website (E.D. Mich. Administrative Procedures for Electronic Case Filing, ECF Procedure 7).

In a Chapter 11 case, a motion for relief from stay must be accompanied by a brief not more than 25 pages in length (E.D. Mich. LBR 9014-1(f)(2)).

If applicable, a motion for relief from stay must:

- Identify the property.
- State the names and purported interest of all parties that are known or discoverable on a reasonable investigation to claim an interest in the property.
- State the amount of outstanding indebtedness.
- State the fair market value of the property.
- Have attached copies of any relevant agreements and documents establishing perfection.

(E.D. Mich. LBR 4001-1(b).)

Unless the court notifies the parties otherwise, the preliminary hearing on a motion for relief from stay will not be an evidentiary hearing. At the preliminary hearing, the court may decide issues of law or define the factual or legal issues to be determined at the final hearing and may issue appropriate scheduling orders (E.D. Mich. LBR 4001-1(c)).

BANKRUPTCY APPEALS

BACKGROUND/FEDERAL REQUIREMENTS

Procedural Rules Applicable to Bankruptcy Appeals

Section 158 of the Judicial Code (28 U.S.C. § 158) generally governs bankruptcy appeals, but counsel must also review:

- The Federal Rules of Bankruptcy Procedure.
- The Federal Rules of Appellate Procedure.
- The Official Bankruptcy Forms.
- The E.D. Mich. Local Civil Rules and Administrative Orders.
- The E.D. Mich. Local Bankruptcy Court Rules and Administrative Orders.
- The Rules of the US Court of Appeals for the Sixth Circuit.
- The policies and procedures of the assigned judge.

Consider whether the bankruptcy order is final or interlocutory (see Final Versus Interlocutory Orders). If it is interlocutory, review Federal Rule of Bankruptcy Procedure 8004 on motions for leave to appeal an interlocutory order (see Permission for Interlocutory Appeals).

For:

- Timing on filing the notice of appeal, review Federal Rule of Bankruptcy Procedure 8002 (see Timing Issues).
- Instructions on filing and the contents of the notice of appeal, review Federal Rule of Bankruptcy Procedure 8003 and Official Bankruptcy Form B417A (see Notice of Appeal).
- Disputes relating to the record on appeal, review Federal Rule of Bankruptcy Procedure 8004 (see Correcting or Modifying Record).
- Obtaining a stay of a bankruptcy court order or judgment pending appeal, review Federal Rule of Bankruptcy Procedure 8007 (see Stay Pending Appeal).
- Designating the record on appeal and the statement of the issues on appeal, review Federal Rule of Bankruptcy Procedure 8009 (see Designation of Record and Statement of Issues and Record on Appeal).
- Certifying an appeal directly to the Sixth Circuit, review 28 U.S.C. Section 158, Federal Rule of Bankruptcy Procedure 8006, and Official Bankruptcy Form B424 (see Direct Appeals to Sixth Circuit).
- Alternatives to an appeal, including motions for amended or new findings or to seek relief from a bankruptcy court order or judgment, review Federal Rules of Bankruptcy Procedure 7052, 9023, and 9024 (see Alternatives to Appeal).
- Page limitations and other rules relating to appellate briefs, review Federal Rules of Bankruptcy Procedure 8014 to 8016 (see Other Appeal Responsibilities). See also the policies and procedures of the assigned judge regarding page limitations, courtesy copies, and other requirements.

Final Versus Interlocutory Orders

Under 28 U.S.C. Section 158, when an order is final, it is appealable as a matter of right. When an order is interlocutory, it is appealable only with leave of the court (see Permission for Interlocutory Appeals).

The US Supreme Court has articulated a general rule in ordinary civil litigation that only an order that "ends the litigation on the merits and leaves nothing more for the court to do but execute judgment" is final (see *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994)). The Sixth Circuit applies this rule more flexibly in bankruptcy cases to resolve issues quickly that are central to the progress of a bankruptcy case (see *Huntington Nat'l Bank v. Richardson (In re Cyberco Holdings, Inc.)*, 734 F.3d 432, 437 (6th Cir. 2013); but see *Lindsey v. Pinnacle Nat'l Bank (In re Lindsey)*, 726 F.3d 857, 859 (6th Cir. 2013)).

Notice of Appeal

Regardless of whether a bankruptcy court order is final or interlocutory, a party seeking to appeal must file a notice of appeal that substantially conforms to Official Bankruptcy Form B417A, attaching a copy of the order, judgment, or decree (Fed. R. Bankr. P. 8003(a)(3)). The notice of appeal must be electronically filed in the bankruptcy court from which the appeal is taken.

The appellant must also:

- Include in the notice of appeal the names of all parties to the order, judgment, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys, if any.
- Pay the docket fee when the notice of appeal is filed (see Bankr. E.D. Mich.: Fee Schedule).
- Complete the district court bankruptcy matter civil cover sheet (see E.D. Mich.: District Court Bankruptcy Matter Civil Cover Sheet).

Effect of Appeal on Bankruptcy Jurisdiction

The doctrine of exclusive appellate jurisdiction confers exclusive jurisdiction on the appellate court of the aspects of the case involved in the appeal (see *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982)). This rule applies in bankruptcy cases but does not prevent the balance of the bankruptcy case from proceeding. The bankruptcy court retains jurisdiction over all aspects of the bankruptcy case that are not the subject of the appeal.

The rule of exclusive jurisdiction does not prevent a bankruptcy court from issuing an opinion consistent with an order that is pending appeal (Fed. R. Bankr. P. 8007(e)).

The bankruptcy court may also grant relief that enforces an order being appealed unless the appellant has obtained a stay of the order pending appeal.

Timing Issues

The notice of appeal must be filed within 14 days after entry of a bankruptcy order or judgment on the bankruptcy court docket unless the appellant obtains a time extension (Fed. R. Bankr. P. 8002(a), (d); see Extension of Time to File Notice of Appeal).

The time for appeal begins to run from the date the bankruptcy court order is entered on the court docket, not from the earlier date when

the order is signed (Fed. R. Bankr. P. 8002(a)). Attorneys cannot rely on the date of mailing or service of the order and instead must monitor the docket to determine when the order to be appealed was entered. This is particularly crucial because the requirements of Bankruptcy Rule 8002 are jurisdictional. The failure to timely file a notice of appeal results in a loss of the right to appeal.

The notice of appeal is effective once it is docketed with the bankruptcy court. This effective date triggers the 14-day period for designating the record and statement of issues on appeal (see Designation of Record and Statement of Issues).

A notice of appeal filed after:

- A decision or order is announced but before it is entered on the docket is treated as filed on the day of entry of the decision or order on the docket.
- Entry of judgment, but before the last of the motions listed in Federal Rule of Bankruptcy Procedure 8002(b)(1) is decided, is treated as filed when the order determining the last of the motions is entered.

Extension of Time to File Notice of Appeal

The bankruptcy court may extend the time to file a notice of appeal on request by motion within:

- The 14-day period for filing the notice of appeal.
- 21 days after the 14-day period if the party shows excusable neglect.

(Fed. R. Bankr. P. 8002(d).)

An extension of time to file a notice of appeal for excusable neglect is not granted for orders:

- Granting relief from the automatic stay.
- Approving the sale or lease of property or the use of cash collateral.
- Authorizing DIP financing.
- Authorizing the assumption or assignment of an executory contract or unexpired lease.
- Approving a disclosure statement.
- Confirming a plan.

(Fed. R. Bankr. P. 8002(d)(2).)

Docket Fee

The filing fee for a notice of appeal can be found on the bankruptcy court's website (see Bankr. E.D. Mich.: Fee Schedule). Payments may be made by money order, certified check, or cash. All money orders, certified checks, and attorneys' checks must be made payable to "Clerk, U.S. Bankruptcy Court." These fees are not refunded if the appeal is dismissed or denied.

An appellant that cannot afford to pay the fee may apply to the district court for in forma pauperis (IFP) status (see US Courts: Fee Waiver Application Forms).

Docketing of Appeal in District Court

On receipt of the notice of appeal, civil cover sheet, and docket fee, the clerk of the bankruptcy court transmits the appeal to the district court. The clerk of the district court then dockets the appeal under the title of the bankruptcy case and the title of any adversary proceeding, if applicable. (Fed. R. Bankr. P. 8003(d).)

The appeal is effective once docketed with the district court.

Stay Pending Appeal

Filing a notice of appeal does not affect the enforceability of a bankruptcy court order while the appeal is pending. For example, an approved sale or confirmed plan may be consummated while an appeal is pending, which may render the appeal moot.

Sections 363(m) and 364(e) of the Bankruptcy Code provide additional justification for seeking a stay pending appeal. Under section 363(m), the reversal or modification on appeal of an order authorizing the sale or lease of property does not affect its validity to a good faith purchaser or lessee. Under section 364(e), reversal or modification of an order authorizing DIP financing or the priority of a lien does not affect the validity of that financing, priority, or lien to the entity providing the financing or lien in good faith.

The mechanism to prevent an order pending appeal from taking effect is to seek a stay pending appeal.

A party typically must first move in the bankruptcy court for a stay pending appeal or other intermediate request for relief specified in Federal Rule of Bankruptcy Procedure 8007(a) either before or after the notice of appeal is filed.

Motions for a stay pending appeal or for other intermediate relief may also be made in the court where the appeal is pending if the movant shows or states:

- That moving first in the bankruptcy court is impracticable.
- If a motion was first made in the bankruptcy court, that the bankruptcy court has not yet ruled on the motion.
- If the bankruptcy court has ruled on the motion, the reasons given for the bankruptcy court's ruling.

The motion must also include:

- The reasons for granting a stay pending appeal and the facts relied on.
- Affidavits or other sworn statements supporting the facts that are subject to dispute.
- Relevant parts of the records.

(Fed. R. Bankr. P. 8007(b).)

A motion for a stay pending appeal cannot be filed in the district court (or court of appeals in the case of a direct appeal) unless a notice of appeal has already been filed with the bankruptcy court.

If a stay is sought from the district court after a notice of appeal has been filed but before the appeal appears on the district court docket, the movant must:

- Obtain from the clerk of the bankruptcy court the district court civil case number and the name of the district judge assigned to the appeal.
- File the motion for relief with the clerk of the district court.

Motions for a stay pending appeal or other relief specified in Federal Rule of Bankruptcy Procedure 8007(a) are not assigned separate

miscellaneous case numbers. The movant must give reasonable notice of these motions to all parties affected by the order from which the appeal is being taken.

A stay pending appeal may be conditioned on filing a bond or other security with the bankruptcy court (Fed. R. Bankr. P. 8007(c), (d)). Neither the US nor any of its agencies are required to file a bond.

Sixth Circuit's Four-Part Test for Stays Pending Appeal

The Sixth Circuit follows an established four-part test for determining whether to grant a stay pending appeal. The test considers whether:

- The appellant has made a strong showing of a likelihood of success on the merits.
- The appellant is likely to suffer irreparable injury absent a stay.
- A stay is likely to substantially harm other parties with an interest in the litigation.
- A stay is in the public interest.

(See *Service Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012).)

Permission for Interlocutory Appeals

If a bankruptcy court order is interlocutory (see Final Versus Interlocutory Orders), the party seeking to appeal the order must file a district court cover sheet with the notice of appeal and a motion for leave to appeal (28 U.S.C. § 158(a)(3); Fed. R. Bankr. P. 8004(a), (b)).

A motion for leave to appeal must include:

- The facts necessary to understand the question presented.
- The question itself.
- The relief sought.
- The reasons why leave should be granted.
- A copy of the interlocutory order or decree and any related opinion.

(Fed. R. Bankr. P. 8004(b).)

A party responding to a motion for leave to appeal must file a response in opposition or a cross-motion in the district court within 14 days of service of the motion (Fed. R. Bankr. P. 8004(b)(2)).

An authorization of direct appeal by the Sixth Circuit (see Direct Appeals to Sixth Circuit) acts as a grant of leave to appeal if the district court has not already granted leave (Fed. R. Bankr. P. 8004(e)).

Direct Appeals to Sixth Circuit

Certification for direct review by the Sixth Circuit when a matter is pending may be requested by a party or by the court's own motion. In limited circumstances, where the criteria in Section 158(d)(2)(A) of the Judicial Code (28 U.S.C. § 158(d)(2)(A)) are met, a direct appeal to the court of appeals is possible (Fed. R. Bankr. P. 8006). For more information on these criteria, see Practice Note, Appealing a Bankruptcy Court Order: Overview: Appealing a Bankruptcy Court Order Directly to the Court of Appeals in Limited Circumstances (W-001-3320).

An appellant must file a certification of a bankruptcy court order, judgment, or decree for direct appellate review under Section 158(d)(2)(A) with the clerk of the court where the matter is pending using Official Bankruptcy Form B424. Once a certification of direct appeal is filed under Federal Rule of Bankruptcy Procedure 8006(b), the matter remains pending in the bankruptcy court for 30 days after the appeal's effective date in order to provide the judge with an opportunity to decide the issue of certification.

Once the bankruptcy court has certified the direct appeal, the appellant must request permission to take a direct appeal with the circuit clerk within 30 days of the certification date under Federal Rule of Appellate Procedure 6(c) (Fed. R. Bankr. P. 8006(g)). The Federal Rules of Appellate Procedure govern any further proceedings in the court of appeals.

Record on Appeal

Under Federal Rules of Bankruptcy Procedure 8003 and 8009, the appellant must establish the record and issues on appeal by designating the documents from the bankruptcy proceeding relevant to the appeal, including:

- Items to be included in the record (see Designation of Record and Statement of Issues).
- A statement of issues to be presented on appeal (see Designation of Record and Statement of Issues).
- Transcripts to be relied on during the appeal (see Transcripts).
- Documents placed under seal by the bankruptcy court to be relied on during the appeal (see Sealed Documents).
- Any changes needed to ensure that the record accurately reflects what occurred in the bankruptcy court (see Correcting or Modifying Record).

Designation of Record and Statement of Issues

Appellants must file with the bankruptcy court and serve on the appellee a designation of items to be included in the record on appeal and a statement of the issues to be presented within 14 days after the notice of appeal is filed with the bankruptcy court (Fed. R. Bankr. P. 8002).

The designation of the record includes a list of the items from the bankruptcy docket and adversary proceeding docket that are relevant to the issues on appeal. The designation also includes:

- The docket entry number.
- The title of the docket entry.
- The date the item was entered on the docket.

In choosing the docket items to designate for the record on the appeal, appellants should:

- Include all items that are relevant to the issues on appeal.
- Include all items that may be helpful to their argument even if the item is not directly relevant to the issues on appeal.
- Omit items that are not helpful to their argument unless directly relevant to the issues on appeal.

Within 14 days after being served with the designation, the appellee may file with the bankruptcy court and serve on the appellant a designation of additional items to be included in the record and a statement of issues to be presented on cross-appeal.

On receipt of the complete record, the bankruptcy clerk then transmits to the district court clerk the record or notice that the

record is available electronically (Fed. R. Bankr. P. 8010(b)(1)). The district court must notify all parties that the record has been entered on that court's docket.

No paper copies of designated items are required, except as may be required by the district court (Fed. R. Bankr. P. 8010(b)(4)).

Transcripts

The duties of the parties to provide copies of transcripts are set out in Federal Rule of Bankruptcy Procedure 8009(b). If a transcript has been docketed in the case, a party may simply add the document number to the designation (see Bankr. E.D. Mich.: Court Transcripts). Transcript designations filed by counsel must be electronically filed.

Sealed Documents

A document placed under seal by the bankruptcy court may be designated as part of the record on appeal. A party must identify the sealed document without revealing confidential or secret information. Under Federal Rule of Bankruptcy Procedure 8009(f), the bankruptcy court cannot transmit a sealed document to the district court without permission. A party instead must file a motion with the district court to accept the document under seal. If the motion is granted, the movant must notify the bankruptcy court of the ruling. The bankruptcy court then transmits the sealed document to the district court.

Correcting or Modifying Record

If a party believes that the record contains a discrepancy and does not accurately reflect what occurred in the bankruptcy court, the discrepancy must be submitted to and settled by the bankruptcy court and the record conformed according to Federal Rule of Bankruptcy Procedure 8009(e).

Alternatives to Appeal

There are alternatives that parties may wish to exhaust before filing an appeal, such as filing a motion to reconsider or reargue with the bankruptcy court. Federal Rule of Civil Procedure 59, made applicable to bankruptcy proceedings under Federal Rule of Bankruptcy Procedure 9023, permits a party to make a motion to alter or amend a judgment. The Sixth Circuit has held that the major grounds justifying reconsideration are:

- An intervening change in controlling law.
- The availability of new evidence.
- The need to correct clear error of law or prevent manifest injustice.

(See *Clark v. United States*, 764 F.3d 653, 661 (6th Cir. 2014).)

A party may also file a motion seeking new or amended findings with the bankruptcy court within 14 days of the entry of the court's order (Fed. R. Bankr. P. 7052).

Other Appeal Responsibilities

To avoid missing important deadlines, appellants and appellees must record important appeal-related dates in their calendars, including that:

- The notice of appeal must be filed within 14 days of entry on the docket of the order to be appealed (see Notice of Appeal).
- The filing and service of the designation of the record and statement of issues on appeal must be filed within 14 days after the notice of appeal is entered on the bankruptcy court docket (see Designation of Record and Statement of Issues).

Although the Federal Rules of Bankruptcy Procedure set out the time for filing and serving briefs and appendices by all parties (Fed. R. Bankr. P. 8018), many courts issue a briefing schedule and consider consensual schedules proposed by the parties to the appeal.

Parties must be aware of any page limitations imposed by their local bankruptcy, civil, or appellate rules or by the particular judge overseeing the appeal, in addition to those imposed by Federal Rule of Bankruptcy Procedure 8015(a)(7) (including 30 pages for principal brief and 15 pages for reply brief).

Appellants and appellees must also carefully review Federal Rules of Bankruptcy Procedure 8014 to 8016 and any applicable rules particular to the judge assigned to the appeal before drafting appellate briefs. Appellate briefs have specific formatting requirements that must be met.

For more information on bankruptcy appeals generally, see Practice Note, Appealing a Bankruptcy Court Order: Overview (W-001-3320).

LOCAL RULES

There are no local rules governing bankruptcy appeals, except that when filing a notice of appeal or a motion for leave to appeal, the filing party must also file with the bankruptcy court the form District Court Bankruptcy Matter Civil Case Cover Sheet (E.D. Mich. LBR 8001-1). Parties should refer to Federal Rules of Bankruptcy Procedure 8001 to 8028.

There is no bankruptcy appellate panel for the E.D. Mich. Appeals are to the district court, absent an appeal directly to the Sixth Circuit (see Direct Appeals to Sixth Circuit).

CASH COLLATERAL

BACKGROUND/FEDERAL REQUIREMENTS

The bankruptcy court, after notice and a hearing, may approve a debtor's request for use of cash collateral (§ 363(a), (c)(2), Bankruptcy Code). A debtor-in-possession or trustee seeking permission to use cash collateral must comply with:

- Section 363 of the Bankruptcy Code (see Section 363(c) of the Bankruptcy Code).
- Federal Rule of Bankruptcy Procedure 4001(b) (see Bankruptcy Rule 4001(b)).
- Any applicable local bankruptcy court rules (see Cash Collateral: Local Rules).

This Note assumes that the prepetition lender is not providing DIP financing and, therefore, does not discuss any provisions that normally apply when the prepetition lender is the DIP lender.

For more information on the use of cash collateral in bankruptcy, see Practice Note, Cash Collateral: Overview (3-618-3450).

Section 363(c) of the Bankruptcy Code

A debtor-in-possession can continue to use noncash property that has been pledged as collateral in the ordinary course, such as equipment, inventory, or other tangible assets, without the need to

obtain permission from the bankruptcy court (§ 363(c)(1), Bankruptcy Code). However, a debtor-in-possession that seeks to use its lender's cash collateral must either obtain:

- The consent of all lenders holding security interests in the cash collateral.
- An order from the bankruptcy court permitting use of cash collateral, usually based on a showing that the secured creditor is adequately protected (see Practice Note, Cash Collateral: Overview: Adequate Protection (3-618-3450)).

(§ 363(c)(2), Bankruptcy Code.)

The limitations on the use of cash collateral, such as lender consent or bankruptcy court approval, help ensure that the secured lender's interest in cash collateral is adequately protected and that the lender is afforded due process.

To use cash collateral, the following requirements must be satisfied:

- **Notice and a hearing.** The court must determine that reasonable notice has been given to parties in interest regarding the motion and hearing, to the extent one is necessary (§ 363(c)(2), (c)(3), Bankruptcy Code). The court may hold an interim cash collateral hearing on the first day of the case to avoid immediate and irreparable harm to the debtor but cannot hold a final hearing earlier than 14 days from the date the cash collateral motion is filed (Fed. R. Bankr. P. 4001(b)(1), (3) and see *In re Dynaco Corp.*, 158 B.R. 552 (Bankr. D. N.H. 1993); *In re Post-Tron Sys. Corp.*, 106 B.R. 345, 346 (Bankr. D. R.I. 1989)).
- **Adequate protection.** On request of a party with an interest in the debtor's cash collateral, the debtor must show that such party's interest is adequately protected from any diminution in the value of its collateral caused by using cash collateral (§ 363(e), Bankruptcy Code). The adequate protection provided depends on the circumstances of the case (see Practice Notes, Cash Collateral: Overview: Adequate Protection (3-618-3450) and Adequate Protection: Overview (8-382-8989)).

Though not required, a debtor may submit a written declaration from a business person or a financial advisor to the debtor in support of the debtor's need to use its lender's cash collateral (see Standard Document, Declaration: General (Federal) (5-507-4700)). It is common practice and sometimes required by local bankruptcy court rules for the declarant, a business person from the debtor (who may also be the declarant), and a lender representative to attend the cash collateral hearing or be reasonably available by telephone to address questions and, if necessary, authorize revisions to the proposed use of cash collateral.

Bankruptcy Rule 4001(b)

A request to use cash collateral in any jurisdiction must comply with Bankruptcy Rule 4001(b), which contains requirements regarding:

- The contents of a cash collateral motion (see Contents of Cash Collateral Motion).
- Service of the cash collateral motion (see Service of the Cash Collateral Motion).
- Notice and hearing on the cash collateral motion (see Notice and Hearing on the Cash Collateral Motion).

Contents of Cash Collateral Motion

In all jurisdictions, a cash collateral motion must be:

- Brought as a contested matter under Federal Rule of Bankruptcy Procedure 9014 (Bankruptcy Rule 9014).
- Accompanied by a proposed form of order.

(Fed. R. Bankr. P. 4001(b)(1)(A).)

The cash collateral motion must include a concise statement of the relief requested that summarizes and identifies the location within the relevant documents of all the material provisions of the proposed cash collateral agreement and form of order, including:

- The name of each secured lender with an interest in the cash collateral.
- The purposes for using the cash collateral.
- The material terms of the agreement, including the duration of the debtor's use of cash collateral.
- Any liens, cash payments, or adequate protection that the secured lender is to receive or an explanation of why each secured creditor's interest is adequately protected.

(Fed. R. Bankr. P. 4001(b)(1)(B).)

Service of the Cash Collateral Motion

The cash collateral motion must be served on:

- Any entity with an interest in the cash collateral.
- Any committee or its authorized agent formed under:
  - section 705 of the Bankruptcy Code in a Chapter 7 case; or
  - section 1102 of the Bankruptcy Code in a Chapter 11 case (see Practice Notes, Chapter 11 Creditors' Committees (1-508-8252) and Chapter 11 Equity Committees (6-608-2869)).
- The top 20 unsecured creditors identified on the list filed under Federal Rule of Bankruptcy Procedure 1007(d) if the case is a Chapter 9 municipality case or a Chapter 11 case in which no committee has been appointed (see Standard Document, List of Largest Unsecured Creditors (3-610-4108)).
- Any other entity that the court may direct.

(Fed. R. Bankr. P. 4001(b)(1)(C).)

A cash collateral motion is a contested matter for which a motion must be made under Bankruptcy Rule 9014 (Fed. R. Bankr. P. 4001(b)(1)(A)). Under Bankruptcy Rule 9014, the debtor must serve the motion in the same manner provided for service of a summons and complaint under Federal Rule of Bankruptcy Procedure 7004.

The debtor need not submit a written declaration in support of its cash collateral motion, but may choose to do so if the circumstances of the case and the need for use of cash collateral warrant further support. If the motion is supported by an affidavit or declaration, the debtor must serve them together and any written response must be served no later than one day before the hearing, unless otherwise permitted by the court (Fed. R. Bankr. P. 9006(d)) (see Section 363(c) of the Bankruptcy Code).

Notice and Hearing on the Cash Collateral Motion

The court may hold an interim hearing to authorize the immediate access to cash collateral to the extent necessary to avoid immediate

and irreparable harm to the estate, but it cannot hold a final hearing earlier than 14 days from the date the debtor serves the cash collateral motion (Fed. R. Bankr. P. 4001(b)(2)).

The debtor must give notice of the cash collateral hearing to all parties it must serve with the cash collateral motion and any other entities as the court may direct (Fed. R. Bankr. P. 4001(b)(3) and see Service of the Cash Collateral Motion).

LOCAL RULES

Cover Sheet

A motion to use cash collateral must be accompanied by a Cover Sheet for Motion to Use Cash Collateral or to Obtain Financing (E.D. Mich. LBR 4001-2(b)(1)). The cover sheet is used to identify the location in the proposed order of various provisions (for example, provisions that grant liens on Chapter 5 causes of action or provisions regarding the validity or perfection of a secured creditor's liens). An amended cover sheet is required if a proposed order is submitted with provisions that differ from those disclosed in the initial cover sheet (E.D. Mich. LBR 4001-2(b)(2)). The items specified in the cover sheet are not necessarily prohibited. The cover sheet is intended to make it easier for the court and other parties to identify the provisions in the body of the proposed order.

Contents of the Cash Collateral Motion

A motion to use cash collateral must explicitly state the moving party's position about the value of each of the secured interests to be protected and must summarize pertinent appraisals and projections (E.D. Mich. LBR 4001-2(a)).

Interim Relief

If prepetition secured creditors have consented, a motion to approve an agreement for use of cash collateral on an expedited basis may be granted without a hearing if the motion complies with Federal Rule of Bankruptcy Procedure 4001(d)(1)(B) and if:

- The proposed order is approved by:
  - all creditors who may have an interest in the cash collateral to be used;
  - the chairperson or attorney for each official committee; and
  - the US Trustee.
- The proposed order provides for the debtor to use cash collateral in a maximum specified dollar amount necessary to avoid immediate and irreparable harm only until the earlier of the date:
  - of the final hearing; or
  - that the order would become a final order.
- The proposed order provides for a final hearing, the date and time for which will be filled in by the court.
- The proposed order provides that the debtor must, within 24 hours of its entry, serve a copy of the motion and the interim order on all parties required to be served by Federal Rule of Bankruptcy Procedure 4001(d).
- The proposed order provides that:
  - the deadline to object to the interim order is 14 days from the entry of the order, except that a committee may object within 14 days after it is served with the order;
  - if an objection is timely filed, the final hearing will be held; and
  - if no objection is timely filed, the interim order may become a final order.
- The motion is accompanied by an affidavit or declaration of the debtor stating the facts on which the debtor relies in seeking entry of the proposed order on an expedited basis and the amount of money needed to avoid immediate and irreparable harm.

(E.D. Mich. LBR 4001-2(c).)

Where the prepetition secured creditors have consented to use of cash collateral, an interim order may include language stating that if no objections are timely filed, the order will become a final order without a final hearing (and without entry of a separate final order).

If a debtor files a motion to approve use of cash collateral but the prepetition secured creditors have not consented, the court may enter an interim order on an expedited basis if:

- The debtor serves the motion on the non-consenting secured creditors by:
  - ECF transmission (in the case of a registered filer or user);
  - hand delivery;
  - overnight delivery;
  - fax transmission; or
  - email.
- The court holds a hearing where the non-consenting secured creditors are given an opportunity to be heard.
- The proposed order complies with E.D. Mich. Local Bankruptcy Court Rule 4001-2(c)(2)-(6).
- The court makes a specific finding of fact that the secured creditors are adequately protected.

(E.D. Mich. LBR 4001-2(d); E.D. Mich. LBR 9013-1(b).)

Effect of Interim Order

If the court enters an interim cash collateral order over the objection of a secured creditor or if a secured creditor does not appear at the interim hearing or object to the motion, the secured creditor retains the right to object to the interim order within 14 days after it is entered (E.D. Mich. LBR 4001-2(e)).

Reducing or Enlarging Time for Objections

On timely motion, the court may enlarge or reduce the time within which an objection must be filed, except that a court cannot reduce the 14-day period for a non-consenting secured creditor to object to an interim order (E.D. Mich. LBR 4001-2(f)).

CHAPTER 15

BACKGROUND/FEDERAL REQUIREMENTS

Chapter 15 of the Bankruptcy Code, enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), is designed to help the US recognize foreign insolvency proceedings and increase international cooperation among courts in multinational insolvency cases to more effectively address cross-border insolvency issues. Chapter 15 expands the scope of its predecessor, section 304 of the Bankruptcy Code, which is now

repealed. It codifies the Model Law on Cross-Border Insolvency in substantially the same way it was written by the United Nations Commission on International Trade Law (UNCITRAL). In the US, Chapter 15 is the exclusive remedy for a foreign representative seeking injunctive relief against litigation in US courts that would interfere with a foreign bankruptcy proceeding.

The following Bankruptcy Rules apply in Chapter 15 cases:

- Federal Rule of Bankruptcy Procedure 1002.
- Federal Rule of Bankruptcy Procedure 1004.2.
- Federal Rule of Bankruptcy Procedure 1007(a)(4).
- Federal Rule of Bankruptcy Procedure 1010.
- Federal Rule of Bankruptcy Procedure 1011.
- Federal Rule of Bankruptcy Procedure 1012.
- Federal Rule of Bankruptcy Procedure 2002(q).
- Federal Rule of Bankruptcy Procedure 2015(d).
- Federal Rule of Bankruptcy Procedure 3002.
- Federal Rule of Bankruptcy Procedure 5012.

For more information on Chapter 15, see Practice Note, Chapter 15 Overview: US Bankruptcy Cases Ancillary to Foreign Proceedings (7-520-4512).

LOCAL RULES

The E.D. Mich. does not have any local rules directly addressing Chapter 15 proceedings.

DIP FINANCING

BACKGROUND/FEDERAL REQUIREMENTS

The bankruptcy court, after notice and a hearing, may approve a debtor's DIP financing arrangements (§ 364(c), (d), Bankruptcy Code). A debtor-in-possession or trustee seeking DIP financing must comply with:

- Section 364 of the Bankruptcy Code (see Section 364(d) of the Bankruptcy Code).
- Federal Rule of Bankruptcy Procedure 4001(c) (see Bankruptcy Rule 4001(c)).
- Any applicable local bankruptcy court rules (see DIP Financing: Local Rules).

This Note assumes that the DIP financing does not include provisions regarding use of cash collateral.

For more information on DIP financing, see Practice Note, DIP Financing: Overview (1-383-4700) and Timeline of DIP Financing Process (9-383-6738).

Section 364(d) of the Bankruptcy Code

A DIP financing request in any jurisdiction must provide:

- **Notice and a hearing.** The court must determine that reasonable notice has been given to parties in interest and that there has been a hearing, to the extent one is necessary (§ 364(c), (d), Bankruptcy Code and see Notice and Hearing on the DIP Financing Motion).
- **A showing of the inability to obtain credit on less onerous terms.** The debtor must demonstrate that it made efforts to obtain financing elsewhere on better terms (§ 364(c), (d)(1)(A), Bankruptcy Code). The debtor's efforts do not have to be exhaustive, just sufficient under the circumstances, which means that for:
  - non-priming DIPs, the debtor tried but was unable to obtain financing on an unsecured, administrative priority basis (see Practice Note, DIP Financing: Overview: Non-Priming DIPs (1-383-4700) and Box: Unsecured Postpetition Financing (1-383-4700)); and
  - priming DIPs, the debtor tried but was unable to obtain a non-priming DIP (see Practice Note, DIP Financing: Overview: Priming DIPs (1-383-4700)).
- The debtor commonly submits a written declaration of a business person or a financial advisor in support of its motion that discusses the debtor's efforts to obtain financing on better terms (see Standard Document, Declaration: General (Federal) (5-507-4700)). It is also common practice and sometimes required by local bankruptcy court rules for the declarant, a business person from the debtor (who may also be the declarant), and a lender representative to attend the hearing or be reasonably available by telephone to address questions and, if necessary, authorize revisions to the proposed financing.
- **Adequate protection.** This requirement only applies to priming DIPs. The debtor must show that the holder of the existing lien on property on which a senior or equal lien is granted is adequately protected from any diminution in the value of its collateral caused by the priming of its lien (§ 364(d)(1)(B), Bankruptcy Code). This requirement is usually difficult to satisfy if the primed lender objects, unless there is a substantial equity cushion (see Practice Note, DIP Financing: Overview: Perspective of the Primed Lender (1-383-4700)). The adequate protection provided depends on the circumstances of the case (see Practice Note, Adequate Protection: Overview: What Constitutes Adequate Protection? (8-382-8989)).

Bankruptcy Rule 4001(c)

A DIP financing request in any jurisdiction must comply with Bankruptcy Rule 4001(c), which sets out requirements regarding:

- The contents of a DIP financing motion (see DIP Financing Motion Attachments and Contents).
- Service of the DIP financing motion (see Service of the DIP Financing Motion).
- Notice and hearing on the DIP financing motion (see Notice and Hearing on the DIP Financing Motion).

DIP Financing Motion Attachments and Contents

A DIP financing motion must be accompanied by:

- A copy of the proposed DIP financing credit agreement.
- The proposed form of order.

(Fed. R. Bankr. P. 4001(c)(1)(A).)

The DIP financing motion must include a concise statement of the relief requested, summarizing, and setting out the location within relevant documents of, all the material provisions of the proposed credit agreement and form of order, including:

- The interest rate.
- Maturity.
- Events of default.
- Liens.

- Borrowing limits.
- Borrowing conditions.

(Fed. R. Bankr. P. 4001(c)(1)(B).)

If the proposed credit agreement or form of order includes any of the provisions below, the concise statement must also:

- Briefly list or summarize each provision.
- Identify their location in the proposed agreement or form of order.
- Identify any provision that is proposed to remain in effect if interim approval is granted, but final relief is denied, as provided under Bankruptcy Rule 4001(c)(2).

(Fed. R. Bankr. P. 4001(c)(1)(B).)

The motion must also describe the nature and extent of each of the following provisions:

- A grant of priority or a lien on property of the estate under:
  - section 364(c) of the Bankruptcy Code, which addresses non-priming DIPs (see Practice Note, DIP Financing: Overview: Non-Priming DIPs (1-383-4700)); or
  - section 364(d) of the Bankruptcy Code, which addresses priming DIPs (see Practice Note, DIP Financing: Overview: Priming DIPs (1-383-4700)).

(Fed. R. Bankr. P. 4001(c)(1)(B)(i).)

- The method of providing adequate protection or priority for a prepetition claim, including:
  - granting a lien on property of the estate to secure the claim (see Practice Note, Adequate Protection: Overview: Additional or Replacement Lien (8-382-8989)); or
  - using property of the estate or credit obtained under section 364 of the Bankruptcy Code to make cash payments on account of the claim (see Practice Note, Adequate Protection: Overview: Cash Payment or Periodic Cash Payments (8-382-8989)).

(Fed. R. Bankr. P. 4001(c)(1)(B)(ii).)

- A determination of the validity, enforceability, priority, or amount of a prepetition claim or of any lien securing the claim (Fed. R. Bankr. P. 4001(c)(1)(B)(iii)).
- A waiver or modification of the automatic stay (Fed. R. Bankr. P. 4001(c)(1)(B)(iv) and see Practice Note, Automatic Stay: Overview: Relief from the Stay (9-380-7953) and Waivers of the Stay (9-380-7953)).
- A waiver or modification of any party's authority or right to:
  - file a plan (see Practice Note, Chapter 11 Plan Process: Overview: Who May File a Plan? (0-502-7396));
  - seek an extension of the debtor's exclusivity period to file a plan (see Practice Note, Chapter 11 Plan Process: Overview: Contesting Exclusivity (0-502-7396));
  - request the use of cash collateral under section 363(c) of the Bankruptcy Code (see Practice Note, Cash Collateral: Overview (3-618-3450)); or
  - request authority to obtain credit under section 364 of the Bankruptcy Code (see Practice Note, DIP Financing: Overview (1-383-4700)).

(Fed. R. Bankr. P. 4001(c)(1)(B)(v).)

- The setting of a deadline for:
  - filing a plan of reorganization;
  - approval of a disclosure statement;
  - a hearing on confirmation; or
  - entry of a confirmation order.

(Fed. R. Bankr. P. 4001(c)(1)(B)(vi) and see Practice Note, Chapter 11 Plan Process: Overview (0-502-7396)).

- A waiver or modification of the applicability of non-bankruptcy law relating to:
  - the perfection of a lien on property of the estate; or
  - the foreclosure or other enforcement of the lien.

(Fed. R. Bankr. P. 4001(c)(1)(B)(vii).)

- A release, waiver, or limitation on any claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to file an action (Fed. R. Bankr. P. 4001(c)(1)(B)(viii)).
- The indemnification of any entity (Fed. R. Bankr. P. 4001(c)(1)(B)(ix)).
- A release, waiver, or limitation of any right to surcharge collateral under section 506(c) of the Bankruptcy Code (Fed. R. Bankr. P. 4001(c)(1)(B)(x) and see Practice Note, The Section 506(c) Surcharge on Collateral (9-565-5645)).
- The granting of a lien on any claim or cause of action arising under:
  - section 544 of the Bankruptcy Code (transfers avoidable under applicable state law);
  - section 545 of the Bankruptcy Code (avoidable statutory liens);
  - section 547 of the Bankruptcy Code (transfers avoidable as preferences);
  - section 548 of the Bankruptcy Code (transfers avoidable as fraudulent conveyances);
  - section 549 of the Bankruptcy Code (transfers avoidable as postpetition transactions);
  - section 553(b) of the Bankruptcy Code (setoffs made during the 90-day period before bankruptcy that improve a creditor's position);
  - section 723(a) of the Bankruptcy Code (claims against general partners who are personally liable for any deficiency of the partnership debtor's property to meet claims against the partnership); and
  - section 724(a) of the Bankruptcy Code (avoidable liens that secure a fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, but not to the extent that these liens secure claims for actual pecuniary loss).

Service of the DIP Financing Motion

The DIP financing motion must be served on:

- Any committee or its authorized agent formed under:
  - section 705 of the Bankruptcy Code in a Chapter 7 case; or
  - section 1102 of the Bankruptcy Code in a Chapter 11 case (see Practice Notes, Chapter 11 Creditors' Committees (1-508-8252) and Chapter 11 Equity Committees (6-608-2869)).

- If the case is a Chapter 9 municipality case or a Chapter 11 case in which no committee has been appointed under section 1102, the top 20 unsecured creditors identified on the list filed under Federal Rule of Bankruptcy Procedure 1007(d) (see Standard Document, List of Largest Unsecured Creditors (3-610-4108)).
- Any other entity that the court may direct.

(Fed. R. Bankr. P. 4001(c)(1)(C).)

A DIP financing motion is a contested matter for which a motion must be made under Federal Rule of Bankruptcy Procedure 9014 (Fed. R. Bankr. P. 4001(c)(1)(A)). Under Bankruptcy Rule 9014, the motion must be served in the manner provided for service of a summons and complaint by Federal Rule of Bankruptcy Procedure 7004.

If the motion is supported by an affidavit, the debtor must serve them together and any written response must be served no later than one day before the hearing, unless otherwise permitted by the court (Fed. R. Bankr. P. 9006(d)). The debtor commonly submits a written declaration of a business person or financial advisor in support of its DIP financing motion (see Section 364(d) of the Bankruptcy Code).

Notice and Hearing on the DIP Financing Motion

The court may hold an interim hearing to authorize the immediate access to financing to the extent necessary to avoid immediate and irreparable harm to the estate, but it cannot hold a final hearing earlier than 14 days from the date the debtor serves the DIP financing motion (Fed. R. Bankr. P. 4001(c)(2)).

The debtor must give notice of the hearing to all parties it must serve with the DIP financing motion (Fed. R. Bankr. P. 4001(c)(3) and see Service of the DIP Financing Motion).

LOCAL RULES

Cover Sheet

A motion to obtain DIP financing must be accompanied by a Cover Sheet for Motion to Use Cash Collateral or to Obtain Financing (E.D. Mich. LBR 4001-2(b)(1)). The cover sheet is used to identify the location in the proposed order of various provisions (for example, provisions that grant liens on Chapter 5 causes of action or provisions regarding the validity or perfection of a secured creditor's liens). An amended cover sheet is required if a proposed order is submitted with provisions that differ from those disclosed in the initial cover sheet (E.D. Mich. LBR 4001-2(b)(2)). The items specified in the cover sheet are not necessarily prohibited. The cover sheet is intended to make it easier for the court and other parties to identify the provisions in the body of the proposed order.

Contents of the DIP Financing Motion

A DIP financing motion must explicitly state the moving party's position about the value of each of the secured interests to be protected and must summarize pertinent appraisals and projections (E.D. Mich. LBR 4001-2(a)).

Interim Relief

If prepetition secured creditors have consented, a motion to obtain DIP financing on an expedited basis may be granted without a hearing if the motion complies with Federal Rule of Bankruptcy Procedure 4001(d)(1)(B) and if:

- The proposed order is approved by:
  - all creditors who may have an interest in the credit to be extended;
  - the chairperson or attorney for each official committee; and
  - the US Trustee.
- The proposed order provides for the debtor to obtain credit in a maximum specified dollar amount necessary to avoid immediate and irreparable harm only until the earlier of the date:
  - of the final hearing; or
  - that the order would become a final order.
- The proposed order provides for a final hearing, the date and time for which will be filled in by the court.
- The proposed order provides that the debtor must, within 24 hours of its entry, serve a copy of the motion and the interim order on all parties required to be served by Federal Rule of Bankruptcy Procedure 4001(d).
- The proposed order provides that:
  - the deadline to object to the interim order is 14 days from the entry of the order, except that a committee may object within 14 days after it is served with the order;
  - if an objection is timely filed, the final hearing will be held; and
  - if no objection is timely filed, the interim order may become a final order.
- The motion is accompanied by an affidavit or declaration of the debtor stating the facts on which the debtor relies in seeking entry of the proposed order on an expedited basis and the amount of money needed to avoid immediate and irreparable harm.

(E.D. Mich. LBR 4001-2(c).)

Where the prepetition secured creditors have consented to DIP financing, an interim order may include language stating that if no objections are timely filed, the order will become a final order without a final hearing (and without entry of a separate final order).

If a debtor files a motion to approve DIP financing but the prepetition secured creditors have not consented, the court may enter an interim order on an expedited basis if:

- The debtor serves the motion on the non-consenting secured creditors by:
  - ECF transmission (in the case of a registered filer or user);
  - hand delivery;
  - overnight delivery;
  - fax transmission; or
  - email.
- The court holds a hearing where the non-consenting secured creditors are given an opportunity to be heard.
- The proposed order complies with E.D. Mich. Local Bankruptcy Court Rule 4001-2(c)(2)-(6).
- The court makes a specific finding of fact that the secured creditors are adequately protected.

(E.D. Mich. LBR 4001-2(d); E.D. Mich. LBR 9013-1(b).)

Effect of Interim Order

If the court enters an interim DIP financing order over the objection of a secured creditor or if a secured creditor does not appear at the interim hearing or object to the motion, the secured creditor retains the right to object to the interim order within 14 days after it is entered (E.D. Mich. LBR 4001-2(e)).

Reducing or Enlarging Time for Objections

On timely motion, the court may enlarge or reduce the time within which an objection must be filed, except that a court cannot reduce the 14-day period for a non-consenting secured creditor to object to an interim order (E.D. Mich. LBR 4001-2(f)).

FIRST DAY DECLARATIONS

BACKGROUND/FEDERAL REQUIREMENTS

The first day declaration is an independent document executed by a key executive or senior officer of the debtor, providing an explanation of the debtor's business, the events leading to the Chapter 11 case, the basis for the relief sought in the first day motions, and often the debtor's future intentions for the Chapter 11 case.

The transition into bankruptcy can be difficult for most companies, as their board of directors and management are forced to accept new limitations on their authority to operate the business and adapt to their new fiduciary duties to the debtor's secured creditors and unsecured creditors. The transition is equally difficult for a debtor's employees, lessors, creditors, and customers.

A first day declaration can help mitigate these concerns by providing an explanation for the events that led to the bankruptcy and a road map for the Chapter 11 case.

For more information on first day declarations, see Practice Note, Chapter 11 First Day Declaration (7-617-7678).

LOCAL RULES

The E.D. Mich. does not have any local rules concerning first day declarations.

FIRST DAY MOTIONS

BACKGROUND/FEDERAL REQUIREMENTS

A Chapter 11 debtor typically files several motions on or soon after the petition date to seek relief necessary to ease the debtor's transition into bankruptcy. These first day motions address both administrative and operational issues and may seek relief on an interim or final basis.

For more information on first day motions, see Practice Note, First Day Motions: Overview (W-000-5994) and First Day Relief: Debtor Checklist (W-000-6011).

LOCAL RULES

Definition of First Day Motion

E.D. Mich. Local Bankruptcy Court Rule 9001-1(b) provides that a first day motion is a motion:

- Filed within the first 14 days after an order for relief in a Chapter 11 case and designated as this under E.D. Mich. Local Bankruptcy Court Rule 9013-1.
- That the debtor believes is so important to the initial stages of the case that the best interests of the bankruptcy estate warrant granting a hearing on the motion on shortened or limited notice.

Filing of First Day Motions

E.D. Mich. Local Bankruptcy Court Rule 9013-1(a) provides that:

- The title of each first day motion and of each proposed order granting a first day motion must contain the words "First Day."
- When filing the motion through ECF, the debtor's counsel must select the prefix "First Day."
- Debtor's counsel must promptly notify the judge's courtroom deputy that first day motions have been filed.

The term "First Day" must also be included on all:

- Exhibits.
- Budgets.
- Proposed orders.
- Affidavits.
- Other papers filed in support of a first day motion.

(E.D. Mich. LBR 9013-1(a).)

Service of First Day Motions

A first day motion and all related papers must be served by:

- ECF transmission (in the case of a registered filer or user).
- Hand delivery.
- Overnight delivery.
- Fax transmission.
- Email.

(E.D. Mich. LBR 9013-1(b).)

Service must be made on:

- The US Trustee.
- All secured creditors.
- The 20 largest unsecured creditors.
- Any adverse party relative to the relief sought.

(E.D. Mich. LBR 9013-1(b).)

Service must be completed within 24 hours of filing the motion, even if a hearing has not yet been scheduled, and the movant must promptly file a certificate of service.

Scheduling a Hearing

E.D. Mich. Local Bankruptcy Court Rule 9013-1(c) provides that:

- A separate motion for an expedited hearing on first day motions is not required. The movant instead must submit a proposed order scheduling the first day motions for hearing, leaving the hearing date and time blank.
- The court determines whether each motion qualifies as a first day motion and sets a hearing date.
- The order may specify the means and deadline for service of notice of the hearing.

- The movant must serve the order scheduling the hearing on the parties and by the means identified in E.D. Mich. Local Bankruptcy Court Rule 9013-1(b) (see Service of First Day Motions) and file a certificate of service.

Critical Vendor Motions

A motion requesting authority to pay prepetition claims of creditors that a debtor deems critical to its operations or to the preservation of the estate will not be considered a first day motion (E.D. Mich. LBR 4001-3(b) and see Practice Note, Critical Vendor Status in Bankruptcy (1-518-9996)).

Guidelines

At the end of the E.D. Michigan Local Bankruptcy Court Rules available on the court's website, there is a list of guidelines for practitioners. E.D. Mich. Guideline 1 states that before filing a Chapter 11 case that is accompanied by first day motions, counsel for the debtor is encouraged to discuss relevant issues in the case with:

- The US Trustee's office (for example, the nature of the first day relief to be requested, description of the debtor's cash management system, issues under section 345 of the Bankruptcy Code, and extensions of time to file schedules).
- The clerk of the court (the number of creditors and any special needs due to the size of the case, need for a noticing vendor for the notice of the meeting of creditors, and need for clerk or staff outside of ordinary business hours).

This item is styled as a guideline rather than a rule because the court recognizes that it is not always practical or possible to disclose certain private information about a debtor before a case is filed.

PREPACKS

BACKGROUND/FEDERAL REQUIREMENTS

Prepackaged bankruptcies, typically known as "prepacks," have become more popular since the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). The BAPCPA has promoted the use of prepacks and has made traditional Chapter 11 bankruptcy cases more difficult and expensive. A prepack is a Chapter 11 bankruptcy in which the debtor negotiates the terms of and solicits votes on a plan before it files its Chapter 11 bankruptcy petition. Prepacks allow a company to emerge more quickly and efficiently from bankruptcy, while reducing the risks and uncertainties involved with negotiating a traditional plan during bankruptcy proceedings.

For more information on prepacks, see Practice Note, The Prepackaged Bankruptcy Strategy (9-503-4934) and Timeline of a Prepackaged Bankruptcy Case (9-504-0794).

LOCAL RULES

Immediately on filing a prepackaged Chapter 11 plan, the debtor must file a motion to:

- Set a deadline to object to confirmation of the plan.
- Schedule a confirmation hearing not more than 90 days following the petition date.

The motion must be accompanied by a copy of the plan and the disclosure statement or other solicitation document (E.D. Mich. LBR 3016-1).

PROFESSIONAL FEE REQUESTS

BACKGROUND/FEDERAL REQUIREMENTS

There are three components to getting paid as a professional to a Chapter 11 estate:

- The bankruptcy court must approve the professional's retention on notice to the US Trustee and key creditors. For information on getting retained as a professional to the DIP, see Practice Note, Getting Retained as a Professional to the Debtor-in-Possession (0-616-6522).
- Once a retention is approved, professionals have ongoing fiduciary duties and statutory obligations. For information on a DIP professional's ongoing duties and obligations, see Practice Note, Fiduciary Duties and Statutory Obligations of Professionals to the Debtor-in-Possession (6-616-6524).
- A DIP professional's fees and expenses must be approved under section 330 of the Bankruptcy Code and, if applicable, section 328 of the Bankruptcy Code (see Practice Note, Getting Paid as a Professional to a Chapter 11 Debtor or Trustee (8-616-5137)).

The fees and expenses of a professional retained under section 327 of the Bankruptcy Code are subject to court approval under sections 330 and 331 of the Bankruptcy Code. Section 328(a) of the Bankruptcy Code provides a mechanism for seeking preapproval of reasonable terms and conditions for compensation of professionals employed under section 327 (see Practice Note, Getting Retained as a Professional to the Debtor-in-Possession: Preapproval of Fee Arrangements (0-616-6522)).

Individual judges and local court rules also contain requirements relating to fee requests. The US Trustee has also issued fee guidelines with detailed requirements (see Practice Note, Getting Paid as a Professional to a Chapter 11 Debtor or Trustee: US Trustee Fee Guidelines (8-616-5137)).

Under section 503(b)(2) of the Bankruptcy Code, compensation awarded under section 330(a) is classified as an administrative claim.

For more information on professional fee requests, see Practice Note, Getting Paid as a Professional to a Chapter 11 Debtor or Trustee (8-616-5137).

LOCAL RULES

Approval of Fees

Fee applications must:

- State separately:
  - the total compensation sought;
  - the amount of expenses; and
  - the balance of any retainer on hand.
- This statement must be incorporated into the notice of the fee application served on all parties in interest.
- Identify the time period during which the services were rendered.
- Provide a narrative summary of services performed and how they benefitted the estate.
- Unless unduly burdensome, for each adversary proceeding or other litigation, describe:
  - the matter in detail;

  - the dollar amount involved; and
  - the results obtained since the prior fee application.
- Describe the current status of the bankruptcy case and state whether all monthly operating reports have been timely filed and whether a plan has been or will be timely filed.
- Describe the nature of any professional services to be provided in the future.
- State the amount and nature of accrued unpaid administrative expenses.
- Identify each specific instance where an award is sought for services of more than one professional or paraprofessional and the justification for that specific instance.
- State the amount of compensation sought in prior applications by the applicant and the court's disposition of each application.
- State that:
  - the applicant's client was given the opportunity to review the application at least seven days before it was filed and state the substance of the client's response; or
  - the applicant has obtained written approval of the application from the client before filing the fee application.

(E.D. Mich. LBR 2016-1(a)(1)-(10).)

Fee applications must also include:

- The proposed order granting the application as Exhibit 1.
- A copy of the order approving the employment of the applicant as Exhibit 2.
- A copy of the applicant's statement under Federal Rule of Bankruptcy Procedure 2016(a) or, if none was filed, a copy of the applicant's retention agreement as Exhibit 3.
- A summary statement of the number of hours of service and hourly rate of each individual professional or paraprofessional, and the blended hourly rate of the professionals, as Exhibit 4.
- An itemized time record in chronological order of each service rendered as Exhibit 5. In a Chapter 11 case, if the cumulative amount of fees in the fee application and the applicant's prior fee applications is less than $20,000, the time record must:
  - show the date of each service rendered;
  - identify the attorney or paralegal who performed the service;
  - describe the services rendered; and
  - state the time spent in increments of a tenth of an hour.
- If the cumulative fees sought exceed $20,000, the application must comply with the US Trustee Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses, 28 C.F.R. Part 58 Appendix A (for example, project-based billing).
- A brief biographical statement for each professional, including a list of all continuing professional education programs taught or attended by each professional in the two years before the application, as Exhibit 6.
- An itemized statement of expenses, including the date incurred and a description of the nature and purpose of the expense, as Exhibit 7.

(E.D. Mich. LBR 2016-1(a)(11)-(17).)

Interim Payment of Fees

A professional may file a motion for an order authorizing interim monthly payments of up to 80% of fees and 100% of expenses pending a formal fee application (E.D. Mich. LBR 2016-2(b)(3)). If interim payments are allowed, the professional must file fee applications every 120 days (E.D. Mich. LBR 2016-2(b)(5)).

PROFESSIONAL RETENTION APPLICATIONS

BACKGROUND/FEDERAL REQUIREMENTS

A debtor-in-possession (DIP) must obtain bankruptcy court approval in order to retain professionals. Those professionals must demonstrate disinterestedness and a lack of any interest adverse to the estate. Court approval of the retention of the DIP's professionals is subject to significant disclosure obligations and conflict-of-interest rules.

To ensure the disinterestedness of the DIP's professionals, conflicts of interest are more strictly interpreted in bankruptcy than in other areas of the law. Certain conflicts that a client can waive after full disclosure outside of bankruptcy (such as simultaneous representation of a client and a client's creditor) cannot be waived in bankruptcy. Even potential conflicts must be avoided. The Bankruptcy Code's strict conflict-of-interest requirements help ensure undivided loyalty and promote public confidence in the bankruptcy process.

For more information on the rules and procedures related to the DIP's retention of professionals, see Practice Note, Getting Retained as a Professional to the Debtor-in-Possession (0-616-6522).

LOCAL RULES

Disclosing Connections

An application for approval of employment of a professional must include or be accompanied by a statement of the professional that:

- The employment complies with section 327(a) of the Bankruptcy Code.
- Discloses all connections of the professional and associates of the professional with:
  - the debtor;
  - creditors;
  - any other party in interest; and
  - the respective attorneys and accountants of the above-named parties, as required by Federal Rule of Bankruptcy Procedure 2014.

(E.D. Mich. LBR 2014-1(a).) The term "connection" is defined also to include any family relationship as defined in section 101(45) of the Bankruptcy Code.

US Trustee Concurrence

E.D. Mich. Local Bankruptcy Court Rule 2014-1(b) provides that:

- If the US Trustee concurs in an application to employ a professional, it must sign a statement of concurrence to the proposed order, which must be filed.
- If a statement of concurrence is filed, the proposed order may be submitted for entry.

- If the US Trustee does not concur within seven days of filing the application, the applicant may contact the judge's courtroom deputy and obtain a hearing date on the application.
- The order will be deemed effective as of the date of filing the application, unless the court orders otherwise.

E.D. Mich. Local Bankruptcy Court Rule 9014-1

Alternatively, a party may seek employment of a professional by using the procedure set out in E.D. Mich. Local Bankruptcy Court Rule 9014-1, which is the rule governing motion procedure generally (E.D. Mich. LBR 2014-1(e)). This would include, for example, filing a motion to approve employment, accompanied by a notice of motion and opportunity to object. If no response is timely filed, the movant may file a certification of no response and submit the proposed order for entry (E.D. Mich. LBR 9014-1(d)). If a response is timely filed, the court will schedule a hearing unless it determines that a hearing is not necessary to resolve the motion (E.D. Mich. LBR 9014-1(e)).

Auctioneers, Appraisers, or Real Estate Sale Agents

An application for appointment of an auctioneer, appraiser, or real estate sales agent must also contain a statement of the fee or commission proposed to be paid. Concerning an auctioneer or appraiser, the application must also contain a statement about the amount of expenses and the number of hours of labor anticipated (E.D. Mich. LBR 2014-1(d)).

Prohibited Conduct Regarding Selection of Committee Professionals

Neither the debtor nor an attorney or accountant for or insider of the debtor may attempt directly or indirectly to influence the selection of attorneys, accountants, or other agents by any official committee. It is the affirmative duty of any member of the bar of the court to inform the US Trustee in writing of any conduct in violation of this rule (E.D. Mich. LBR 2014-2).

REMOVAL, REMAND, AND ABSTENTION IN BANKRUPTCY

BACKGROUND/FEDERAL REQUIREMENTS

Removal, remand, and abstention are important tools to be considered during a bankruptcy proceeding for transferring claims to another court or to prevent that court from determining an issue that it should not hear and decide.

A party can unilaterally remove an action pending in state court to either the district court or the bankruptcy court. After removal, on motion of a non-removing party, the court can remand the matter back to state court or the court, on its own motion or a motion of a party, can abstain from hearing a matter because the state court is capable of hearing and deciding the matter. Abstention is either mandatory or permissive.

For more information on removal, remand, and abstention in bankruptcy cases, see Practice Note, Notice of Removal, Remand, and Abstention in Bankruptcy (W-000-7148).

LOCAL RULES

E.D. Mich. Local Bankruptcy Court Rule 9015-1(b) provides that:

- In an adversary proceeding removed from state court in which a jury trial was timely demanded, the jury demand need not be refiled in the bankruptcy court.
- A party is deemed to have consented to the bankruptcy judge conducting the jury trial unless, within 28 days after removal, the party files a statement indicating that it does not consent to the bankruptcy judge conducting the jury trial.

E.D. Mich. Local Bankruptcy Court Rule 9015-1(c) provides that in an adversary proceeding removed from state court in which a jury trial demand was not filed and the time to file a jury demand under applicable state law has not expired:

- The deadline to file a jury demand is 28 days after the removal.
- Any other party must file a statement indicating whether it consents to the bankruptcy judge conducting the jury trial by 14 days after the later of:
  - service of the jury demand; or
  - the deadline to file an answer or another responsive pleading.
- If a party does not timely respond otherwise, it will be deemed to have consented to the bankruptcy judge conducting the jury trial (E.D. Mich. LBR 9015-1(a)).

RETAINING A CLAIMS AGENT

BACKGROUND/FEDERAL REQUIREMENTS

To relieve administrative pressure on both debtors and the bankruptcy clerk, Congress enacted 28 U.S.C. Section 156(c) to permit outside vendors (claims agents), at the expense of the bankruptcy estate, to assume certain specified administrative functions mandated by the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

Section 156(c) limits the function of the claims agent to that of a delegee of the clerk of court to perform the following tasks:

- Managing the claims process.
- Providing noticing services.
- Disseminating information to the public and responding to requests for case information.

Claims agents, however, may also be retained as administrative agents under section 327 of the Bankruptcy Code to provide services beyond the constraints of 28 U.S.C. Section 156(c), including:

- Assisting with the preparation of schedules of assets and liabilities (schedules) and statements of financial affairs (statements) (see Practice Note, Schedules and Statements of Financial Affairs: Overview (W-000-9982)).
- Aggregating, sorting, and analyzing proofs of claims.
- Assisting with the reconciliation of claims and analysis of executory contracts and unexpired leases, including issues such as the cure, assumption, and rejection of contracts and leases.
- Soliciting and tabulating votes on plans of reorganization.
- Making distributions according to the terms of the plan.

For more information on the role and responsibilities of a claims agent, see Practice Note, The Retention and Role of a Claims Agent in Bankruptcy (W-001-1117).

LOCAL RULES

The order approving appointment of a claims agent must contain specific language providing that on completion of the administration of the case, the claims agent must:

- Deliver to the clerk of the court electronic images of the claims register and all claims.
- File an affidavit:
  - attesting that the electronic images delivered to the court are true and correct copies; and
  - stating the contact information of the individual or entity in possession of the claims.
- Retain the claims register and claims and not destroy them unless authorized to do so by the court.

(E.D. Mich. LBR 2002-1(e).)

RETENTION OF LOCAL COUNSEL

BACKGROUND/FEDERAL REQUIREMENTS

As a general rule, attorneys not admitted in the jurisdiction where a bankruptcy case is pending must be admitted *pro hac vice* to appear before the bankruptcy court in that case. To be admitted *pro hac vice*, an attorney must often certify or attest to certain facts, including that the attorney is:

- Eligible for admission to the bankruptcy court.
- Admitted and in good standing as a member of the bar in the attorney's state of practice.
- Willing to submit to the disciplinary jurisdiction of the bankruptcy court for any alleged misconduct in the course of the case for which the attorney is admitted.
- Generally familiar with the court's local rules.

Applicable rules also frequently require the attorney seeking *pro hac vice* admission to pay a fee.

Counsel must review rules and practices of the relevant jurisdiction in which a case is filed or will be filed to determine whether to retain local counsel and the requirements for *pro hac vice* admission.

LOCAL RULES

Admission to District Court

Pro hac vice admissions are not permitted. To appear before the E.D. Mich. bankruptcy court, an attorney must first be admitted to the E.D. Mich. district court (E.D. Mich. LBR 9010-1(a)(1)). E.D. Mich. Local Civil Rule 83.20 sets out the procedure for admission to that court. A person who is admitted to practice in another state and who is in good standing generally is eligible for admission to the bar of the district court. An applicant must pay a fee (currently $300) and submit an application, together with a certificate of good standing from another court of record. A local sponsor is generally not required unless the applicant has previous disciplinary issues or wants to receive the oath of office by telephone or video conference.

In the bankruptcy court, admission to the district court is not required for counsel to perform actions that do not constitute the practice of law, such as:

- The signing or filing of a request for notice.
- The signing or filing of a proof of claim or a ballot.
- The attendance and participation at a meeting of creditors or of an official committee.
- The signing or filing of a pleading or paper resolving an objection to a proof of claim.
- The signing or filing of a stipulation adjourning a hearing or extending a deadline.
- The filing of an appearance.

(E.D. Mich. LBR 9010-1(a)(1).)

Local Counsel Not Required

Local counsel are not required in the bankruptcy court. Although E.D. Mich. Local Civil Rule 83.20(f) requires local counsel in matters before the district court, the official comments to that local rule state that subsection (f) does not apply to bankruptcy cases.

SECTION 363 SALES

BACKGROUND/FEDERAL REQUIREMENTS

After notice and a hearing, the bankruptcy court may approve a section 363 sale of a debtor's assets, other than in the ordinary course of business (§ 363(b), Bankruptcy Code). A debtor-in-possession or trustee seeking approval of a section 363 sale must comply with:

- Section 363(b) of the Bankruptcy Code (see Section 363(b) Requirements and Section 363(b)(1)(A) and (B): Sale of PII Requirements).
- Federal Rule of Bankruptcy Procedure 2002 (see Bankruptcy Rule 2002 Notice Requirements).
- Federal Rule of Bankruptcy Procedure 6004 (see Bankruptcy Rule 6004 Requirements and Bankruptcy Rule 6004(g): Sale of PII Requirements).
- Section 365 of the Bankruptcy Code to the extent that the sale involves the assumption, assignment, or rejection of any executory contracts or leases (see Section 365 Requirements).
- Any applicable local bankruptcy court rules (see Section 363 Sales: Local Rules).

Debtors-in-possession and trustees have great discretion over the method of conducting the sale and are not required to use any specific sale or bidding procedures (§ 363(b), Bankruptcy Code). However, they must comply with certain procedural requirements under Bankruptcy Rules 2002 and 6004 regardless of the form of sale and any applicable local bankruptcy court rules.

For more information on section 363 sales, see Practice Note, Buying Assets in a Section 363 Bankruptcy Sale: Overview (1-385-0115), Timeline of a Section 363 Sale (3-385-0751), and Article, Strategies for Purchasing and Selling Assets in Chapter 11 (W-001-4106).

Section 363(b) Requirements

After a notice and a hearing, the trustee (including a debtor-in-possession) may use, sell, or lease property of the estate outside of the ordinary course of business. Therefore, the debtor must provide adequate and reasonable notice of a proposed sale (§ 363(b), Bankruptcy Code and see Bankruptcy Rule 2002 Notice Requirements).

Additionally, courts have held that the sale must:

- Be in the best interests of the estate and its creditors. The debtor generally has a fiduciary duty to obtain the highest or best price

for the assets (see *Cello Bag Co., Inc. v. Champion Int'l Corp. (In re Atlanta Packaging Prods., Inc.)*, 99 B.R. 124, 130 (Bankr. N.D. Ga. 1988)). To satisfy this requirement, the sale is usually subject to an auction. The highest price is not always the best price, and it is unnecessary to show that the purchase price was the highest possible price obtainable under the circumstances.

- Be proposed in good faith (see *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 150 (3d Cir. 1986)).
- Have a legitimate business justification (see *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983)).

Section 363(b) sales of all or substantially all of the debtor's assets also require a court to find that the sale is not a *sub rosa* plan (see Practice Note, Buying Assets in a Section 363 Bankruptcy Sale: Overview: Sales of All or Substantially All Assets (1-385-0115)). A *sub rosa* plan is a transaction that has the practical effect of predetermining the essential terms of a plan of reorganization.

For more information on section 363 requirements, see Practice Note, Buying Assets in a Section 363 Bankruptcy Sale: Overview: Legal Requirements (1-385-0115).

Section 363(b)(1)(A) and (B): Sale of PII Requirements

Because of privacy issues, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) restricted the use, lease, and sale of personally identifiable information (PII). These restrictions do not apply to other forms of estate property.

Specifically, a debtor cannot sell or lease PII outside the ordinary course of business unless either:

- The sale or lease does not violate the debtor's privacy policy. The transfer of PII is allowed if permitted by the debtor's privacy policy and the transfer complies with all the terms of the privacy policy.
- A consumer privacy ombudsman is appointed under section 332 of the Bankruptcy Code and the court approves the sale or lease after considering the facts, circumstances, and conditions of the sale or lease, and finding that the sale or lease does not violate applicable non-bankruptcy law.

(§ 363(b)(1), Bankruptcy Code.)

For additional requirements for the sale of PII, see Bankruptcy Rule 6004(g): Sale of PII Requirements.

For more information on the sale of PII, see Practice Note, Property of the Estate: Special Intangible Property Interests: Customer Data (3-616-3701).

Bankruptcy Rule 2002 Notice Requirements

Bankruptcy Rule 2002 sets out notice requirements for section 363 sales regarding:

- **Length and method of notice.** The clerk of the bankruptcy court or another person directed by the court must give parties at least 21 days' notice of the sale by mail, unless the court limits or shortens the time or directs another method of giving notice (Fed. R. Bankr. P. 2002(a)(2)).
- **Content of notice.** The notice must include:
  - the time and place of any public sale;
  - the terms and conditions of any private sale;
  - the time fixed for filing objections; and
  - a general description of the property to be sold. The notice of a proposed sale of PII must state whether the sale is consistent with the debtor's privacy policy (see Section 363(b)(1)(A) and (B): Sale of PII Requirements).

(Fed. R. Bankr. P. 2002(c)(1).)

- **Parties served.** The notice of the sale must be served on:
  - the debtor;
  - the trustee, if any;
  - all creditors;
  - any indenture trustees;
  - any official creditors' committees and equity committees, or their authorized agents;
  - the Securities and Exchange Commission (SEC), if appropriate;
  - the Commodity Futures Trading Commission, in a commodity broker case;
  - the Internal Revenue Service (IRS);
  - the US attorney for the district where the case is pending, if a debt is owed to the US other than for taxes, and on the department, agency, or instrumentality of the US through which the debtor became indebted;
  - the Secretary of the Treasury, if the US has a stock interest;
  - the US Trustee;
  - equity security holders, in sales of all or substantially all assets, unless the court orders otherwise; and
  - entities who have requested notice under Federal Rule of Bankruptcy Procedure 2002.

(Fed. R. Bankr. P. 2002(a)(2), (d), (g), (i), (j), (k).)

- **Additional parties served.** Notice must also be served on:
  - the consumer privacy ombudsman, if applicable (§ 332(a), Bankruptcy Code and see Section 363(b)(1)(A) and (B): Sale of PII Requirements and Bankruptcy Rule 6004(g): Sale of PII Requirements);
  - all parties to executory contracts or unexpired leases to be assumed and assigned, or rejected as part of the sale (see Section 365 Requirements) (Fed. R. Bankr. P. 6006(c));
  - all parties known or reasonably believed to have asserted a lien, encumbrance, claim, or other interest in the assets to be sold (Fed. R. Bankr. P. 6004(c) and see Bankruptcy Rule 6004 Requirements); and
  - the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, if the sale implicates the antitrust laws of the US (§ 363(b)(2), Bankruptcy Code).

Bankruptcy Rule 6004 Requirements

Bankruptcy Rule 6004 sets out requirements for:

- **Notice.** Notice of a proposed sale of estate property outside the ordinary course of business, other than cash collateral, must be given consistent with Bankruptcy Rule 2002 (Fed. R. Bankr. P. 6004(a) and see Bankruptcy Rule 2002 Notice Requirements).

- **Objections.** Objections to the proposed sale must be filed and served at least seven days before the date of the sale or within the time fixed by the court (Fed. R. Bankr. P. 6004(b)). An objection gives rise to a contested matter governed by Federal Rule of Bankruptcy Procedure 9014 (Bankruptcy Rule 9014).
- **Sale free and clear of liens.** A sale free and clear of liens or other interests under section 363(f) of the Bankruptcy Code is a contested matter for which a motion must be made under Bankruptcy Rule 9014 and served on the parties who have liens or other interests in the property to be sold (Fed. R. Bankr. P. 6004(c)). The notice must include the date of the sale hearing and the deadline to file and serve objections on the debtor or the trustee. Under Bankruptcy Rule 9014, the motion must be served in the manner provided for service of a summons and complaint by Federal Rule of Bankruptcy Procedure 7004.
- **Hearing.** If a timely objection is made, the hearing date may be set out in the original notice of the sale (Fed. R. Bankr. P. 6004(e)). No hearing is required if there are no objections. If the original sale notice does not contain a hearing date, the objecting party commonly obtains a hearing date and time from the court and states it on the objection.
- **Public or private sale.** The sale may be by private sale or public auction. On the completion of the sale, unless it is impracticable, the trustee or the debtor must file and transmit to the US Trustee an itemized statement of:
  - the property sold;
  - the name of each purchaser; and
  - the price received for each item or lot or for the property as a whole if sold in bulk.

(Fed. R. Bankr. P. 6004(f)(1).)

- If an auctioneer sells the property, then the auctioneer must file the statement and provide a copy to the US Trustee and the debtor or the trustee.
- **Execution of instruments.** The debtor or the trustee must execute any instrument necessary or ordered by the court to effectuate the transfer to the purchaser (Fed. R. Bankr. P. 6004(f)(2)).
- **Stay of sale order.** Sale orders are stayed for 14 days, unless the court orders otherwise (Fed. R. Bankr. P. 6004(h)). This gives any objecting parties time to seek a further stay while they appeal the sale order. Courts can waive or reduce the 14-day appeal period, on request of the parties, if there is a reason to close the sale early.

Bankruptcy Rule 6004(g): Sale of PII Requirements

A motion to sell PII outside of the terms of the debtor's privacy policy:

- Must include a request for an order directing the US Trustee to appoint a consumer privacy ombudsman under section 332 of the Bankruptcy Code, whom it must appoint at least seven days before the sale hearing.
- Is a contested matter governed by Bankruptcy Rule 9014 and must be transmitted to the US Trustee and served on:
  - any official creditors' and equity committees;
  - the creditors included on the list of the 20 largest creditors filed under Federal Rule of Bankruptcy Procedure 1007(d), if no creditors' committee has been appointed (see Standard Document, List of Largest Unsecured Creditors (3-610-4108)); and
  - any other entity that the court may direct.

(Fed. R. Bankr. P. 6004(g)(1).)

If a consumer privacy ombudsman is appointed, then at least seven days before the sale hearing, the US Trustee must file a notice of the appointment, including:

- The name and address of the person appointed.
- A verified statement of that person setting out their connections with:
  - the debtor;
  - creditors;
  - any other party in interest;
  - the respective attorneys and accountants of the above entities;
  - the US Trustee; and
  - any person employed in the office of the US Trustee.

(Fed. R. Bankr. P. 6004(g)(2).)

Section 363(b)(1)(A) and (B) of the Bankruptcy Code contains additional requirements for the sale of PII (see Section 363(b)(1)(A) and (B): Sale of PII Requirements).

For more information on the sale of PII, see Practice Note, Property of the Estate: Special Intangible Property Interests: Customer Data (3-616-3701).

Section 365 Requirements

Executory contracts and unexpired leases may be assumed by the debtor and assigned to buyers either as a stand-alone section 363 sale of just contracts and leases or as part of a larger section 363 sale of other assets.

To assume and assign an unexpired lease or executory contract:

- The debtor must cure all defaults, including all non-monetary defaults, or provide adequate assurance that the default will be cured promptly, except for incurable non-monetary breaches of unexpired real property leases and defaults based on breaches of *ipso facto* provisions (§ 365(b)(1)(A), (2), Bankruptcy Code).
- The debtor must compensate or provide adequate assurance that it will promptly compensate the non-debtor for any actual monetary loss caused by the default (§ 365(b)(1)(B), Bankruptcy Code).
- The purchaser must provide adequate assurance of future performance, even if there are no defaults (§ 365(b)(1)(C), (f)(2)(B), Bankruptcy Code).

Federal Rule of Bankruptcy Procedure 6006(c) and Bankruptcy Rule 9014 govern the timing and procedure for giving notice of the proposed assumption, assignment, or rejection of a lease or executory contract, including providing notice to the other parties to the lease or contract, as well as to the US Trustee.

For more information on the assignment of executory contracts and unexpired leases, see Practice Note, Executory Contracts and Leases: Overview: Assignment (8-381-2672).

LOCAL RULES

Sale by Notice

E.D. Mich. Local Bankruptcy Court Rule 6004-1(a) provides that if a debtor or trustee wants to sell, use, or lease property of the estate but is not requesting a sale free and clear of liens and interests (for example, in an instance where an asset is unencumbered):

- No motion or order is required if notice is given and there are no objections timely filed.
- A notice of use, sale, or lease of property of the estate must include a statement that the deadline to object is 14 days from the date the notice is served.
- Neither a court proceeding nor an order is necessary to authorize the transactions set out in the notice unless an objection is timely filed and is not withdrawn.
- The 14-day period begins to run contemporaneously with the 21-day notice in Federal Rule of Bankruptcy Procedure 2002(a)(2).

Sale by Motion

A motion for authority to sell property free and clear of liens and other interests must be filed under E.D. Mich. Local Bankruptcy Court Rule 9014-1 (E.D. Mich. LBR 6004-1(b); E.D. Mich. LBR 9014-1).

A motion to approve procedures for the sale of assets must be accompanied by a Cover Sheet for Motion to Approve Sale Procedures (E.D. Mich. LBR 6004-1(c)). The cover sheet is used to identify the location in the proposed order of various provisions (for example, provisions concerning qualifications of bidding parties, provisions concerning bid deadlines, required deposits, back-up bids, break-up fees, or bidding increments).

SETTING BAR DATES IN CHAPTER 11 CASES

BACKGROUND/FEDERAL REQUIREMENTS

A bankruptcy court presiding over a Chapter 11 case must issue an order setting a deadline by which all creditors must file proofs of claim to evidence and preserve a claim against the debtor (Fed. R. Bankr. P. 3003). This deadline is known as a bar date. Both unsecured creditors and secured creditors holding claims against the bankruptcy estate must either be scheduled as creditors by the debtor or file a proof of claim by the bar date to receive a distribution under a plan of reorganization or a plan of liquidation.

By fixing a bar date, a debtor can begin the process of analyzing creditors' claims and determine how to expeditiously administer and conclude its Chapter 11 case.

The Federal Rules of Bankruptcy Procedure, together with the local rules of the bankruptcy court where the bankruptcy case is filed, dictate the requirements for setting bar dates and providing notice to creditors. Many bankruptcy courts across the country have adopted their own local procedural guidelines for debtors seeking entry of an order setting a bar date. Debtors and their counsel must check the local rules of the bankruptcy court when preparing to request that the court set a bar date. Some local rules permit bar date motions to be decided without a hearing provided notice is given and parties in interest do not request a hearing.

For more information on the purpose of bar dates and the various bar dates in Chapter 11 cases, see Practice Note, Bar Dates in a Chapter 11 Bankruptcy Case (0-617-4008).

LOCAL RULES

In a Chapter 11 case, unless the court orders otherwise, the deadline for filing a required proof of claim or equity interest or a motion for allowance of a claim under section 503(b)(9) of the Bankruptcy Code is 90 days after the first date set for the meeting of creditors (E.D. Mich. LBR 3003-1). The bar date is typically specified in the section 341 notice that the clerk of the court mails to all creditors.

The E.D. Mich. does not have any local rules regarding bar date notices to mass tort claimants.

WITHDRAWAL OF THE REFERENCE

BACKGROUND/FEDERAL REQUIREMENTS

General orders of reference issued by a district court enable the district court to automatically refer cases under 28 U.S.C. Section 1334(b) to the bankruptcy court for that district (28 U.S.C. § 157(a)). If there are issues in a case that has been automatically referred that are beyond the scope of the bankruptcy court's expertise, the district court can, on its own motion or the motion of a party in interest, withdraw the reference and bring the case back to the district court (28 U.S.C. § 157(d)).

Withdrawal of the reference is either mandatory or discretionary. A party seeking discretionary withdrawal must show cause for that withdrawal. A party seeking mandatory withdrawal must show that the case requires consideration of bankruptcy laws and other federal laws regulating organizations or activities affecting interstate commerce.

For more information on withdrawal of the reference, see Practice Note, Withdrawal of the Reference (W-000-9965).

LOCAL RULES

When filing a motion to withdraw the reference, the filing party must also file the Bankruptcy Matter Civil Case Cover Sheet (E.D. Mich. LBR 5011-1).

When a party has demanded a jury trial in an adversary proceeding or contested matter, if all parties do not consent to the bankruptcy judge conducting the jury trial, at the initial hearing or status conference, the court may consider setting a deadline for the filing of a motion to withdraw the reference or a motion to strike the jury demand (E.D. Mich. LBR 9015-1(d)).

E.D. Mich. Local Civil Rule 83.50(b) provides that district court judges will hear motions to withdraw cases or proceedings and that the district court clerk will serve a copy of the order on the bankruptcy court clerk and the bankruptcy judge. While a case is pending before the bankruptcy judge, all papers, including removal notices and motions to withdraw the reference, must be filed with the bankruptcy court (E.D. Mich. LR 83.50(d)(1)). The bankruptcy court clerk submits the necessary papers to the district court clerk when a party files a motion to withdraw the reference, and sends a notice to the parties identifying the papers sent to the district court. (E.D. Mich. LR 83.50(e)). After a contested matter or proceeding is assigned to

a district court judge, all papers must bear a civil case number in addition to the bankruptcy case number and must be filed with the district court clerk (E.D. Mich. LR 83.50(d)(2)).

OTHER TOPICS

LARGE BANKRUPTCY CASES

On a motion or the court's own initiative, the court may enter an order without a hearing designating a Chapter 11 case as a Large Bankruptcy Case (E.D. Mich. LBR 9001-1(a)). There are several special local rules that are applicable to Large Bankruptcy Cases.

Fixed Hearing Dates

On motion of the debtor, the court may schedule fixed hearing dates and times for consideration of all motions and contested matters in a Large Bankruptcy Case (E.D. Mich. LBR 9013-2(a)).

If the court establishes fixed dates:

- Any notice of an opportunity to object must contain above the title of the notice the date and time that the hearing will be held if an objection is filed.
- Any motion or contested matter filed and properly served about which the applicable response time will elapse at least three business days before a fixed hearing date may be set for hearing on that fixed hearing date.
- If no response is timely filed, the movant may file a certificate of no response and submit the proposed order for entry.
- The debtor's counsel must file and serve on all affected parties at least seven days before the hearing a list of all matters scheduled to be considered by the court, which must set out all motions and responses and whether the matter is resolved.
- If a party intends to present a proposed order at the hearing different from the proposed order attached to the motion, the debtor's counsel must state on the list that a different proposed order will be presented for entry.
- The debtor's counsel together with any affected party may, without leave of the court, unless the court orders otherwise, adjourn any matter to a later fixed hearing date, in which case the debtor's counsel must update the list of scheduled matters.
- On request, the court may allow counsel to participate in any hearing by telephone.

(E.D. Mich. LBR 9013-2(b)(1)-(7).)

Expedited Formation of Committee

In a Large Bankruptcy Case, the US Trustee's office is encouraged to appoint a committee within three business days after receiving the information from the debtor required by E.D. Mich. Local Bankruptcy Court Rule 2003-3 (the debtor is to immediately provide to the US Trustee a contact person and email address or, if an email address is not available, the address and telephone number of the 20 largest unsecured creditors) (E.D. Mich. Guideline 2).

Special Service List

In a Large Bankruptcy Case, the debtor's counsel may submit a proposed order for a Special Service List, limiting required service of certain motions to:

- The US Trustee.
- The debtor and its counsel.
- Committee counsel.
- Any secured creditors and their counsel.
- All taxing authorities.
- Parties requesting to be added to the Special Service List.

(E.D. Mich. LBR 2002-1.) The Special Service List must be updated at least every 14 days during the first 56 days of the case and thereafter at least every 28 days.

Post-Confirmation Procedures in a Large Bankruptcy Case

Unless the court orders otherwise, within 14 days after entry of an order confirming a Chapter 11 plan in a Large Bankruptcy Case, the plan proponent or other responsible person under the plan must file a statement that contains a timetable with the steps proposed for achieving substantial consummation of the plan and entry of a final decree, including resolution of claims and other contemplated litigation (E.D. Mich. LBR 3021-1(a)). A progress report then must be filed no less frequently than every six months after entry of the confirmation order (E.D. Mich. LBR 3021-1(b)).

EMAIL ADDRESSES FOR 20 LARGEST UNSECURED CREDITORS

According to Administrative Order 13-09, in all Chapter 11 cases, the debtor must immediately email, fax, or hand deliver to the US Trustee an email address for each of the 20 largest unsecured creditors, if and to the extent that the debtor has these email addresses in its possession.

SUBMITTING ORDERS

According to E.D. Mich. Administrative Procedures for Electronic Case Filing, ECF Procedure 7, when submitting proposed orders for entry:

- The proposed order must be submitted in Word or WordPerfect format, and not in PDF, using the procedure available on the court's website.
- The proposed order must not contain a signature block for the judge's signature. Six single-spaced lines must be left blank after the text of the proposed order for the court to insert the judge's signature block and date stamp.
- Proposed orders should not include party or attorney signatures (if the parties are stipulating to an order, a separate stipulation should be filed with the court), text boxes, linked fields, or attached templates.

US TRUSTEE OPERATING GUIDELINES AND REPORTING REQUIREMENTS

The US Trustee, a representative of the US Department of Justice, oversees the administration of bankruptcy cases and supervises a panel of private bankruptcy trustees for Chapter 11 and Chapter 7 cases (28 U.S.C. § 586(a)). In particular, the US Trustee must extensively monitor a debtor-in-possession's Chapter 11 estate (see Practice Note, Property of the Estate: Overview (5-613-8145)).

The Executive Office for US Trustees in Washington, D.C. supervises the US Trustee Program and provides general policy and legal guidance to US Trustees, as well as substantive and administrative support. There are 21 regional US Trustee offices throughout the US, and each has

instituted its own guidelines derived from the policies of the Executive Office for US Trustees as well as the US Trustee's duties listed in the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the US Code. While the guidelines are similar in each region, they differ in various ways, including the timing for a debtor's compliance and the amount of detailed information required from each debtor.

The US Trustee's office for Region 9 serves the federal bankruptcy courts located in the states of:

- Michigan.
- Ohio.

This Note discusses the general operating guidelines and procedural requirements enacted by the US Trustee for Region 9 (Region 9 Guidelines) as they apply to Chapter 11 cases filed in the E.D. Mich.

The following is a summary of the US Trustee Guidelines for Chapter 11 cases filed in the E.D. Mich.

For more information on the US Trustee's role in Chapter 11 cases and the general US Trustee requirements for Chapter 11 debtors, see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors (W-000-5977).

GENERAL REQUIREMENTS

In the E.D. Mich., the debtor must:

- Serve the US Trustee with all notices, pleadings, stipulations, and proposed orders.
- Pay in full and when due all postpetition obligations.
- File all federal, state, and local tax returns when due.
- Obtain court approval before paying a professional.
- Obtain appropriate authority before paying prepetition obligations.
- Promptly alert the US Trustee of any change of address.

FIRST DAY REQUIREMENTS

Once the debtor files its Chapter 11 petition, it immediately owes certain fiduciary duties to the estate. For this reason, US Trustees in nearly all districts across the country have implemented guidelines requiring a Chapter 11 debtor-in-possession to monitor its postpetition activities and preserve the enterprise value for the benefit of the estate.

The following table summarizes the US Trustee guidelines for Chapter 11 cases filed in the E.D. Mich. concerning a debtor's initial Chapter 11 obligations and reporting requirements during the first few days of a case (see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: First Day Duties of the Debtor (W-000-5977)). A request to modify or waive any of these guidelines must be made in writing and approved in writing by the US Trustee.

US Trustee Operating Requirements	E.D. Mich. Bankruptcy Court Requirements
Books and Records	The debtor must: ■ Close the books and records of the debtor as of the petition date and open new books and records. ■ Provide separate accounting concerning prepetition and postpetition accounts and transactions. (See Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Postpetition Books and Records (W-000-5977)).
Bank Accounts	The debtor must: ■ Immediately close all prepetition bank accounts. ■ Furnish proof of closing of the accounts and final statements for closed accounts to the US Trustee. ■ Maintain separate accounts (though only a general account is required if the debtor issues five or fewer payroll checks per pay period) for: • a general account; • a payroll account; and • a tax account. ■ Provide initial statements for each new account and a voided copy of the first check from each account to the US Trustee. ■ Ensure that the signature card for the DIP accounts indicate that the debtor is a "debtor in possession." ■ Indicate on checks and statements for DIP accounts: • that the debtor is a "debtor in possession"; • the case name; and • the case number. ■ Ensure that if sums above $250,000 will be held in any DIP account, the excess funds are adequately collateralized through bonding or a pledge of securities by the financial institution holding the funds, as required by section 345 of the Bankruptcy Code. ■ Ensure that the new bank is directed to send copies of monthly bank statements to the US Trustee. ■ Obtain prior authorization from the US Trustee before opening any additional accounts. (See Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Bank Accounts (W-000-5977)).

US Trustee Operating Requirements	E.D. Mich. Bankruptcy Court Requirements
Insurance	The debtor must: ■ Maintain insurance coverage, as appropriate, including: • casualty; • unemployment; • workers' compensation (see Practice Note, Workers' Compensation: Common Questions (0-504-9497)); • general liability; • product liability; and • other coverages customarily required in the debtor's industry or business. ■ Provide to the US Trustee proof that insurance is being maintained by providing a copy of the first page of the binder of all policies, certificates of insurance, or declaration sheets for each policy. Affirmance that appropriate insurance is being maintained must also be filed with each monthly operating report (see Monthly Operating Reports). ■ Instruct insurance companies to change the loss payee/beneficiary of each policy to make reference to the debtor as "debtor in possession." ■ Immediately notify the US Trustee of any change, cancellation, or expiration of insurance coverage. (See Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Insurance (W-000-5977)).
Taxes	The debtor must: ■ File all prepetition and postpetition tax returns when due and pay all postpetition taxes. ■ Deposit cash on a monthly prorated basis into a tax account for taxes that enjoy a priority lien against assets of the estate but for which there is no specific prepayment requirement (for example, real estate taxes) in an amount that equals or exceeds the prorated amounts. (See Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Taxes (W-000-5977)).

DIP CONFERENCE

The US Trustee holds an initial conference with the debtor and its counsel shortly after commencement of the case. In addition to items summarized above regarding bank accounts and insurance (see First Day Requirements), the debtor is instructed to furnish to the US Trustee at least two business days before the initial conference:

- An inventory of all physical assets and personal property (including any recent real or personal property appraisals).
- Annual financial statements and tax returns for each of the three calendar or fiscal years preceding the petition date.
- A case status questionnaire in the form provided by the US Trustee.

MEETING OF CREDITORS

Federal Rule of Bankruptcy Procedure 2003 and sections 341 and 343 of the Bankruptcy Code govern the date, place, and order of section 341 meetings in all districts that have a US Trustee.

For more information on section 341 meetings, see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Section 341 Meeting (W-000-5977).

In the E.D. Michigan:

- Where the debtor remains in possession, the signatories of the petition and schedules, as well as the persons in control of the debtor within the meaning of Federal Rule of Bankruptcy Procedure 9001(5) must attend the meeting.
- Corporate debtors must be represented by legal counsel throughout the Chapter 11 proceedings, including at the section 341 meeting.
- After notice has been mailed, a meeting cannot be cancelled or rescheduled to accommodate scheduling conflicts. After the initial meeting, the US Trustee may continue the meeting to another date and time until the case is dismissed or converted or a plan is confirmed.

COMPENSATION OF PRINCIPALS, OFFICERS, AND DIRECTORS

The debtor must disclose to the US Trustee at or before the section 341 meeting:

- All compensation to be paid from estate assets to principals, officers, and directors.
- The name and position of each individual principal, officer, and director, a description of the individual's duties, the amount of compensation paid on a weekly or monthly basis (including all perquisites, benefits, and other consideration of any kind), and the individual's salary history for the year immediately preceding the petition date.

BUSINESS PLAN

Within 60 days after the petition date, the debtor must provide the US Trustee with a detailed written business plan, including a six-month profit and loss projection.

PERIODIC STATUS CONFERENCES

During the pendency of the case, the US Trustee may conduct periodic status conferences with:

- The debtor and its counsel.
- The creditors' committee and its counsel.

The purpose of these conferences is to:

- Ascertain the financial status of the debtor.
- Generally monitor the debtor's progress.
- Determine when a plan may be filed.

If warranted, the US Trustee's office may also conduct on-site inspections of the debtor's business premises.

INVENTORY

Within 15 days of filing the petition, the debtor must provide the US Trustee with an inventory of all physical assets and personal property of the debtor, including:

- Fixtures.
- Equipment.
- Machinery.
- Vehicles and inventory.

All inventory must be itemized and valued at the debtor's cost.

MONTHLY OPERATING REPORTS

The debtor-in-possession must file operating reports each month throughout the pendency of the Chapter 11 case. The timely filing of reports of operations is crucial to the efficient administration of Chapter 11 cases. These reports are designed to provide the US Trustee, the court, creditors, and other parties in interest with reliable information concerning the debtor's current financial performance. US Trustees use the information contained in the reports to identify cases lacking a realistic prospect of reorganization and to evaluate the feasibility of a proposed plan of reorganization (see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Monthly Operating Reports (W-000-5977)).

In the E.D. Mich., the debtor must file signed copies of operating reports with the court and the US Trustee's office by the 20th of each month following the reporting period. The debtor should also serve these reports on:

- The chairperson of the creditors' committees.
- Counsel for the committees.

The monthly operating reports must include:

- The Operating Statement (Profit & Loss Statement).
- The Balance Sheet.
- The Summary of Financial Operations.
- The Monthly Cash Statement.
- The Statement of Compensation.
- The Schedule of In-Force Insurance.
- The Transmittal and Certification form, signed by the debtor, verifying that:
  - necessary insurance is being maintained;
  - postpetition taxes are being paid timely; and
  - the financial information provided is accurate, complete, and prepared in conformity with generally accepted accounting practices (GAAP).

The debtor must prepare these reports on the accrual basis of accounting, and falsification of any of the contents of the operating reports is punishable by law. The reports must be completed, even if to report no activity.

Monthly operating reports must be accompanied by reconciled bank statements, which the signatory to the Chapter 11 petition should review and initial.

After the confirmation of a Chapter 11 plan, the reorganized debtor must submit monthly post confirmation reports to the US Trustee until the court enters an order closing, dismissing, or converting the case.

QUARTERLY FEES

Each Chapter 11 debtor is responsible for paying a quarterly fee to the US Trustee Program (28 U.S.C. § 1930(a)(6)). Quarterly fees accrue throughout the course of the Chapter 11 case until the case is:

- Closed.
- Dismissed.
- Converted to another chapter.

The fees are payable on a quarterly basis and are due on the last day of the month following the end of each calendar quarter. For example, fees for the first calendar quarter ending March 31 are due on April 30. Failure to pay quarterly fees may result in the court converting or dismissing the Chapter 11 case (§ 1112(b)(4)(K), Bankruptcy Code). A court cannot confirm a Chapter 11 plan unless the plan provides for payment of all unpaid quarterly fees accrued by the effective date (§ 1129(a)(12), Bankruptcy Code). For more information on the required fees, see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: US Trustee Fee Guidelines (W-000-5977).

The quarterly fee varies depending on the dollar amount of all disbursements made during the calendar quarter, and a minimum fee of $325 is due even if there are no disbursements made during a calendar quarter. A schedule of the required quarterly fees is set out in 28 U.S.C. Section 1930(a)(6).

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