BANKRUPTCY BAR ASSOCIATION
For the District of Maryland

# BANKRUPTCY APPEALS MANUAL
(Second Edition)

## Bankruptcy Appeals in Maryland from the U. S. Bankruptcy Court to the U. S. District Court

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Editor
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## ACKNOWLEDGMENT

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## INTRODUCTION

This Manual is intended to assist attorneys and their clients with the process of taking appeals from the United States Bankruptcy Court for the District of Maryland (the "Bankruptcy Court") to the United States District Court for the District of Maryland (the "District Court"). In such matters, the District Court sits as the appellate court of first instance reviewing on appeal decisions of the Bankruptcy Court. Further appeals in bankruptcy matters may be taken under appropriate circumstances from the District Court to the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit").

Issues concerning when the District Court has jurisdiction over an appeal[1] and how to take an appeal from the District Court to the Fourth Circuit are beyond the scope of this Manual.[2]

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1 See generally 28 U.S.C. § 158(a).

2 Pursuant to the recently enacted Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Bankruptcy Reform Act of 2005"), a new set of statutory provisions has been added providing for a direct appeal of certain judgments, orders and decrees of the Bankruptcy Court to the Fourth Circuit. 28 U.S.C. § 158(d) has been amended to provide for such direct appeals upon certification by the Bankruptcy Court or District Court (including certification requested by a majority of the appellants and a

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Anyone taking an appeal in a bankruptcy matter from the Bankruptcy Court to the District Court should be familiar with Part VIII (Rules 8001 through 8020) of the Federal Rules of Bankruptcy Procedure. In addition, Local Rule 404 of the Rules of the United States District Court for the District of Maryland applies to appeals from the Bankruptcy Court to the District Court.

This Manual is intended as a guide to the procedures and practice of taking an appeal from the Bankruptcy Court to the District Court in Maryland. It is, however, not an exhaustive treatment of the subject, and attorneys should not use this Manual as a substitute for doing their own research and reviewing carefully all applicable statutes, rules and case law.

## HOW AN APPEAL IS TAKEN

Because bankruptcy appellate panels have not been established in the Fourth Circuit, appeals from the Bankruptcy Court are taken to the District Court. The

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majority of the appellees), or upon certification by all appellants and appellees, and, in all such cases, authorization of the direct appeal by the Fourth Circuit. The effective date for the new direct appeal provisions of 28 U.S.C. § 158(d) is October 17, 2005. For ease of reference, section 1233 of the Bankruptcy Reform Act of 2005, including the statutory amendments to 28 U.S.C. § 158(c) and (d), and the "procedural rules" enacted with respect to the new direct appeal provisions, is attached as Appendix 1 hereto.

party commencing the appeal is captioned "appellant" and the adversary "appellee."

## COMMENCING THE APPELLATE PROCESS (Bankruptcy Rules 8001-8004)

### A. APPEALS PURSUANT TO 28 U.S.C. § 158(a)(1) FROM FINAL JUDGMENTS, ORDERS AND DECREES OF THE BANKRUPTCY COURT.

Appeals as a matter of right may be taken from a final judgment, order or decree of a bankruptcy judge to the District Court by filing a Notice of Appeal with the clerk of the Bankruptcy Court within the time prescribed. The Notice of Appeal shall conform substantially to the appropriate Official Form[3] and shall contain the names of all parties to the judgment, order or decree appealed from and the names, addresses and telephone numbers of their respective attorneys. Unless the party filing the appeal is exempt from electronic filing[4], the Notice of Appeal should be filed in the Bankruptcy Court electronically through the CM/ECF system. In addition, the Notice of Appeal shall be

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[3] See Official Form 17, a copy of which is included as Appendix 2 hereto.

[4] Appellants who are representing themselves ("pro se"), other than those who are members of the Bar of the District Court, are exempt from the electronic filing requirements and should file their Notice of Appeal with the clerk of the Bankruptcy Court in paper format.

accompanied by the prescribed filing fee.[5] If the Notice of Appeal is being filed electronically through the CM/ECF system, the fee must be paid by credit card as part of the filing process. If the Notice of Appeal is being filed in person at the clerk's office of the Bankruptcy Court, unless the party is exempt from electronic filing the Notice of Appeal shall be submitted on a disk, and as provided in Local Bankruptcy Rule 1006-1, the filing fee may be paid in cash or by cashier's check, certified check or negotiable money order made payable to "Clerk, United States Bankruptcy Court," or if the Notice of Appeal is being filed by counsel, payment of the filing fee may be made by credit card. Payment at the clerk's office by an attorney's check will be accepted only if the check is drawn on the account of the attorney for the appellant or on the account of a law firm of which the attorney is a member, partner, associate or of counsel.

The party taking an appeal shall serve a copy of the Notice of Appeal on all other parties to the appeal. In addition, parties to an appeal who have been using the Bankruptcy Court CM/ECF system in the case in which the appeal is filed should also receive electronic notice of the filing of the Notice of Appeal. At the time of filing the Notice of Appeal, counsel for the appellant is requested to notify the clerk of the Bankruptcy Court if there are any related appeals pending or if there have been any prior appeals taken in the same or any related bankruptcy case.

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[5] As of the date of publication of this Manual, the filing fee for a bankruptcy appeal is $255. To check on the most current information on the filing fee required, consult the website of the U.S. Bankruptcy Court for the District of Maryland, www.mdb.uscourts.gov.

Failure of an appellant to take any step other than the timely filing of a Notice of Appeal does not affect the validity of the appeal, but is ground for such action as the District Court deems appropriate, which may include dismissal of the appeal.

1. Time Prescribed

The Notice of Appeal shall be filed with the clerk of the Bankruptcy Court within 10 days of the date of the entry of the judgment, order or decree appealed from.

If a timely Notice of Appeal is filed by a party, any other party may file a Notice of Appeal within 10 days of the date on which the first Notice of Appeal was filed, or within the time otherwise prescribed, whichever period last expires. A Notice of Appeal filed after the announcement of a decision or order but before entry of the judgment, order or decree shall be treated as filed after such entry and on the day thereof.

If a Notice of Appeal is mistakenly filed with the District Court, the clerk of the District Court shall note thereon the date on which it was received and transmit it to the clerk of the Bankruptcy Court, and it shall be deemed filed with the clerk of the Bankruptcy Court on the date so noted.[6]

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[6] The failure to file an appeal within the 10-day period set forth in Bankruptcy Rule 8002(a) may, except as specifically provided in Bankruptcy Rule 8002(b) and (c)

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2. Effect of Motion on Time for Appeal

If any party makes a timely motion (1) to amend or make additional findings of fact under Bankruptcy Rule 7052, (2) to alter or amend a judgment under Bankruptcy Rule 9023, (3) for a new trial under Bankruptcy Rule 9023, or (4) for relief under Bankruptcy Rule 9024 if such motion is filed no later than 10 days after the entry of judgment, then in such event the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding.

A Notice of Appeal filed after announcement or entry of the judgment, order or decree but before disposition of any of the motions listed above is ineffective to appeal from the judgment, order or decree, or part thereof, specified in the Notice of Appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above listed motions requires the party to amend a previously filed Notice of Appeal. A party

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(discussed in subsections 2 and 3 immediately following), be a jurisdictional defect barring appellate review by the District Court. See In re Silver Oak Homes, Ltd., 169 B.R. 349 (D. Md. 1994). Similarly, an appellee's failure to file a timely notice of cross-appeal may be a jurisdictional defect barring appellate review by the District Court of the issues sought to be raised by cross-appeal. In re Blair, 301 B.R. 181, 184 (D.Md. 2003).

intending to challenge an alteration or amendment of a judgment, order or decree shall file timely a Notice of Appeal, or an amended Notice of Appeal, measured from the entry of the order disposing of the last such motion outstanding.

3. Extension of Time for Appeal

Except as provided hereinafter, the bankruptcy judge may extend the time for filing a Notice of Appeal by any party for a period not to exceed the later of 20 days from the expiration of the time otherwise prescribed or 10 days from the date of entry of the order granting a motion to extend the time for filing a Notice of Appeal. The request to extend the time for filing a Notice of Appeal shall be made by filing a written motion with the Bankruptcy Court and must be made before the time for filing a Notice of Appeal has expired, except that such a motion made no more than 20 days after the expiration of the time for filing a Notice of Appeal may be granted upon a showing of excusable neglect.

As provided in Bankruptcy Rule 8002(c)(1), no extension of time for filing a Notice of Appeal shall be permitted for the following types of judgments, order or decrees: judgments, orders or decrees granting relief from the automatic stay, authorizing the sale or lease of property or the use of cash collateral, authorizing the obtaining of credit, authorizing the assumption or assignment of an executory contract or unexpired lease, approving a disclosure statement or confirming a plan.

B. APPEALS PURSUANT TO 28 U.S.C. § 158(a)(2) FROM INTERLOCUTORY ORDERS AND DECREES INCREASING OR REDUCING THE TIME PERIODS FOR A DEBTOR TO FILE A PLAN AND OBTAIN ACCEPTANCE OF THE PLAN.

An appeal as of right exists with respect to interlocutory orders and decrees issued by the Bankruptcy Court under § 1121(d) of the Bankruptcy Code increasing or reducing the time periods referred to in § 1121(d) for filing a Chapter 11 plan and obtaining acceptance of the plan. An appeal from such order or decree should be filed within the time period and in accordance with the procedure in Section A above.

C. APPEALS PURSUANT TO 28 U.S.C. § 158 (a)(3) FROM OTHER INTERLOCUTORY ORDERS AND DECREES WITH LEAVE OF COURT.

In order to appeal from interlocutory orders and decrees other than those referred to in Section B above, leave of the District Court must be obtained. In addition to timely filing a Notice of Appeal (see Section A above), a motion for leave to appeal under 28 U.S.C. § 158(a)(3) should be filed with the clerk of the Bankruptcy Court. A filing fee of $5.00 shall be paid at the time of filing a motion for leave to appeal. The $250.00 balance of the filing fee shall be due and payable at such time as the District Court grants the motion for leave to appeal.[7]

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[7] The foregoing filing fees are those in effect as of the date of publication of this Manual. For the most

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Copies of the motion must be served on counsel to all parties to the appeal and, if a party is not represented by counsel, on the party itself. Although the motion for leave to appeal should be filed in the Bankruptcy Court, the District Court is the court which will decide the motion seeking leave to appeal.

A motion for leave to appeal shall contain (1) a statement of facts necessary to an understanding of the questions to be presented by the appeal, (2) a statement of those questions and of the relief sought, (3) a statement of the reasons why an appeal should be granted, and (4) a copy of the judgment, order or decree complained of and any opinion or memorandum relating thereto. Within 10 days after service of the motion, an adverse party may file with the clerk of the Bankruptcy Court and serve on all parties an answer in opposition.

The clerk of the Bankruptcy Court will transmit the Notice of Appeal,[4] the motion for leave to appeal and any answer thereto to the clerk of the District Court as soon as all parties have filed answers or the time for filing an answer has expired.

As set forth in Local District Court Rule 404.5, the Bankruptcy Court shall, upon request of the District Court, submit to the District Court a written certification stating whether, in its opinion, the interlocutory order

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current information, consult the website of the U.S. Bankruptcy Court for the District of Maryland, www.mdb.uscourts.gov.

involves a controlling question of law as to which there is substantial ground for difference of opinion and whether an immediate appeal of it may materially advance the ultimate termination of the case. The District Court shall thereafter determine whether to grant or deny the application for leave to appeal. The motion and answer shall be submitted to the District Court without oral argument unless otherwise ordered by the District Court.

If a Notice of Appeal is timely filed and a motion for leave to appeal is required, but is not filed, the District Court may grant leave to appeal or direct that a motion for leave to appeal be filed. The District Court may also deny leave to appeal, but in doing so shall consider the Notice of Appeal as a motion for leave to appeal. If the District Court orders that a motion for leave to appeal be filed, the motion must be filed within 10 days of entry of the order unless such order sets a different time period for filing the motion.

## COMPOSITION OF THE RECORD ON APPEAL AND STATEMENT OF ISSUES (Bankruptcy Rule 8006)

Within 10 days after the later of (1) the date of filing the Notice of Appeal, (2) entry of an order granting leave to appeal, or (3) entry of an order disposing of the last timely motion outstanding of a type referred to in Bankruptcy Rule 8002(b)[8], the appellant shall file with the clerk of the Bankruptcy Court and serve on the appellee a designation of the items to be included in the

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[8] See subsection 2, pp. 6-7 supra.

record on appeal and a statement of the issues to be presented.

Within 10 days after the service of appellant's designation and statement, the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross-appeal, the appellee as cross-appellant shall file and serve a statement of the issues to be presented on the cross-appeal and a designation of additional items to be included in the record. A cross-appellee may, within 10 days of service of the cross-appellant's designation and statement, file and serve on the cross-appellant a designation of additional items to be included in the record.

The record on appeal shall include the items designated by the parties, the Notice of Appeal, the judgment, order or decree appealed from, and any opinion, findings of fact, and conclusions of law of the Bankruptcy Court. The District Court may, upon its own initiative, review the Bankruptcy Court file and direct that additional items be included in the record.

If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing the designation, request the transcript by contacting the Electronic Court Recorder Operator ("ECRO") for the presiding bankruptcy judge. The ECRO will estimate the transcript cost. A check for the estimated cost must be received by the ECRO, payable to the transcription service (whose name will be supplied to counsel by the ECRO), in order for the ECRO to send the record tape for

transcription. A copy of the request for the transcript should be filed with the clerk of the Bankruptcy Court. In addition, all parties shall take such other actions as may be necessary to enable the clerk of the Bankruptcy Court to assemble and transmit the record.

As set forth in Local District Court Rule 404.2, if the appellant fails to designate the contents of the record on appeal or to file a statement of the issues to be presented within the time required by Bankruptcy Rule 8006, the clerk of the Bankruptcy Court shall forward to the clerk of the District Court a partial record consisting of a copy of the order or judgment appealed from, the notice of appeal, a copy of the docket entries and such other documents as the clerk of the Bankruptcy Court deems relevant. In addition, the District Court may order the clerk of the Bankruptcy Court to transmit such other documents as it deems relevant. When the partial record has been filed in the District Court, the District Court may, upon motion of the appellee (which motion shall be filed in the District Court) or upon its own initiative, dismiss the appeal for non-compliance with Bankruptcy Rule 8006 after giving the appellant an opportunity to explain the non-compliance and upon considering whether the non-compliance had a prejudicial effect on the other parties.[9]

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[9] The Fourth Circuit has established criteria that the District Court should follow in determining whether to dismiss an appeal for violating Bankruptcy Rule 8006. The criteria set forth in In re Serra Builders, Inc., 970 F.2d 1309, 1311 (4th Cir. 1992), are as follows:

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## TRANSMITTING THE RECORD AND DOCKETING THE APPEAL
## (Bankruptcy Rule 8007)

Transmission of the record from the Bankruptcy Court to the District Court is the duty of the clerk of the

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> "...the district court must take at least one of the following steps: (1) make a finding of bad faith or negligence; (2) give the appellant notice and an opportunity to explain the delay; (3) consider whether the delay had any possible prejudicial effect on the other parties; or (4) indicate that it considered the impact of the sanction and available alternatives."

The Fourth Circuit has further clarified its test for dismissal stating that while Serra Builders literally only required the district court to take one of the four steps, "a proper application of its test will normally require a district court to consider and balance all relevant factors...." In re SPR Corp., 45 F.3d 70, 74 (4th Cir. 1995). Merely applying "the second step, giving the appellant notice and an opportunity to explain the delay, does not by itself suffice to dismiss an appeal." In re Weiss, 111 F.3d 1159, 1173 (4th Cir. 1997).

Bankruptcy Court.[10] However, if a party has requested a transcript of the proceeding below, the court reporter must advise the clerk of the Bankruptcy Court when the transcript will be completed. If preparation of the transcript will take longer than 30 days, the reporter is required to request an extension of time from the clerk of the Bankruptcy Court, and the parties to the appeal are to be notified of the delay.

Once the record is complete, the clerk of the Bankruptcy Court will transmit it to the clerk of the District Court. The clerk of the District Court is required to docket the appeal and notify the parties of the date of docketing.[11] As more fully described in the section entitled Serving and Filing Briefs, the briefing schedule runs from this date. Counsel are encouraged to check the District Court docket to review what documents were actually included in the record received by the District Court.

## FILING AND SERVICE OF PLEADINGS AND OTHER PAPERS (Bankruptcy Rule 8008)

From and after the date that an appeal is docketed in the District Court, all pleadings and other

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10 Documents are transmitted from the Bankruptcy Court to the District Court either by the forwarding of a paper document or copy thereof or by providing access to an electronic document. Local District Court Rule 403.

11 A copy of the current form of notice is attached as Appendix 3.

papers filed in connection with the appeal should be filed with the clerk of the District Court. Unless otherwise directed by the judge to whom the appeal is assigned, all appeals are subject to electronic filing in the District Court in accordance with the procedures established by the District Court.

Generally, the format of documents filed in the District Court shall comply with Local District Court Rule 102.2.b, including 8½" x 11" pages, appropriate margins, double-spaced lines of text except quotations and footnotes, page numbering at the bottom of each page, and printed or written materials only on the front side of pages.

Counsel should file documents electronically subject to the exceptions in the District Court's electronic filing procedures. A paper courtesy copy of any document filed electronically in the District Court which, including attachments, is longer than fifteen (15) pages should be provided to the District Court for use by the judge to whom the appeal is assigned. The paper copy and a copy of the Notice of Electronic Filing should be sent to the clerk's office of the District Court.

*Pro se* parties, other than members in good standing of the Bar of the District Court[12], should file and serve documents in paper format. The clerk's office

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12 An attorney who is a member in good standing of the Bar of the District Court who is representing himself or herself is subject to the same electronic filing requirements which would be applicable if he or she were represented by counsel.

of the District Court will scan and electronically file documents submitted by *pro se* parties. The scanned version will be the official court record.

When an appeal is assigned to a District Court judge, it may be assigned to a judge in a Division of the Maryland U.S. District Court other than a judge whose chambers are in the courthouse where the bankruptcy case is pending. For example, an appeal in a Greenbelt bankruptcy case may be assigned to a District Court judge sitting in the Northern Division (in Baltimore). In such event, pleadings and other papers filed after the appeal has been assigned to a District Court judge should be filed with the clerk's office of the District Court in the Division where the assigned judge is located, unless the court otherwise directs. Any paper documents to be filed with the District Court and any courtesy copies for the judge should be sent to the clerk's office in the Division where the assigned judge is located.

Copies of all pleadings and other papers filed by a party should, at or before the time of filing, be served by the party, or a person acting on behalf of such party, on all other parties to the appeal. Service on a party represented by counsel shall be made on counsel. Service may be made electronically through the CM/ECF system on counsel who are registered users of the District Court CM/ECF system. If service is made by mail, such service is complete on mailing; if service is made by electronic means, such service is complete on transmission.[13]

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[13] Under Fed. R. Civ. P. 6(e) whenever a party has the

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Proof of service, certified by the person who made service, shall be set forth on or attached to all pleadings and other papers filed with the court, stating the date and manner of service and the name of the persons served. If service is made by the CM/ECF system, the Notice of Electronic Filing constitutes proof of service and a separate certificate of service is not required.

## SERVING AND FILING BRIEFS (Bankruptcy Rules 8009-8010)

Absent a court order to the contrary, the appellant's brief is due within 15 days of the date the appeal is docketed in the District Court. The appellee has 15 days after service of the appellant's brief to respond, and the appellant has 10 days thereafter to file a reply brief. No further briefing is permitted without leave of the District Court. In cases in which the appellee has filed a cross-appeal, its initial brief shall address the issues relevant to both the appeal and the cross-appeal. In addition, in cases where there is a cross-appeal the appellee may file a final reply brief within 10 days after the appellant has filed its reply brief.

As set forth in Local District Court Rule 404.3, if the appellant fails to serve and file a brief within the

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right or is required to do some act within a prescribed period after service of a document, three (3) days are added to the prescribed period if service is made by mail or electronic means.

time required by Bankruptcy Rule 8009, the District Court may, upon motion of the appellee (which motion shall be filed in the District Court) or upon its own initiative, dismiss the appeal after giving the appellant an opportunity to explain the non-compliance and upon considering whether the non-compliance has a prejudicial effect on the other parties.[14]

The Rules provide specific guidelines for the form and length of briefs. Absent court order, the brief of the appellant shall contain the following under appropriate headings and in the order here indicated:

(A) A table of contents, with page references, and a table of cases alphabetically arranged, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(B) A statement of the basis of appellate jurisdiction.

(C) A statement of the issues presented and the applicable standard of appellate review.

(D) A statement of the case. The statement shall first indicate briefly the nature of the

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14 With respect to the criteria to be applied on a motion to dismiss an appeal because of an untimely non-jurisdictional filing, see the Fourth Circuit authorities set forth in footnote 6, supra. Note that In re Weiss, 111 F.3d 1159, 1172-73 (4th Cir. 1997), cited in footnote 6 above, specifically involved a district court's dismissal of an appeal pursuant to Bankruptcy Rules 8001(a) and 8009(a).

case, the course of the proceedings, and the disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record.

(E) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.

(F) A short conclusion stating the precise relief sought.

The brief of the appellee is required to follow the same guidelines except that a statement of the basis of appellate jurisdiction, of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant. If a determination of the issues presented requires the Court to refer to the Bankruptcy Code or other statutes, rules, regulations or similar material, relevant parts of those materials must be reproduced in the brief or in an addendum to the brief.

Unless the District Court orders otherwise, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations or similar materials.

As set forth in Local District Court Rule 404.1.b, the appellant shall append to appellant's opening brief a

copy of the opinion of the Bankruptcy Court that is being appealed from.

Details for filing briefs and other documents in the District Court's CM/ECF system are available on the District Court's website (www.mdd.uscourts.gov).

## PREPARING AND SERVING THE APPENDIX (Bankruptcy Rule 8009)

Where, as in this district, the appeal is to the District Court, the Rules do not require that the Appendix be comprised of any particular items. However, in order to provide the District Court with sufficient information the appellant may want to consider including the following items in its Appendix:

(1) The complaint and answer or other equivalent pleadings;
(2) Any pretrial order;
(3) The judgment, order, or decree from which the appeal is taken;
(4) Any other orders relevant to the appeal;
(5) The opinion, findings of fact or conclusions of law filed or delivered orally by the court and citations of the opinion if published;
(6) Any motion and response on which the court rendered its decision;
(7) The notice of appeal;
(8) The relevant entries in the bankruptcy docket; and
(9) The transcript or any relevant portion thereof.

An appellee may also serve and file an Appendix which contains materials relevant to the Court's review of the appeal but omitted by the appellant.

When using the CM/ECF system, an appendix should be filed as an attachment to the brief. Each item in the appendix should be filed as a separate attachment. Whenever possible attach versions of items which were electronically converted to PDF instead of scanned PDF versions.

## HEARING OF THE APPEAL
## (Bankruptcy Rule 8012)

As provided in Bankruptcy Rule 8012, oral argument of an appeal shall be allowed unless otherwise determined by the District Court after examination of the briefs and record, or appendix to the briefs. Any party may file a statement with the court setting forth the reason why oral argument should be allowed.

Oral argument will not ordinarily be allowed if: (1) the appeal is frivolous, (2) the dispositive issue or set of issues has been recently authoritatively decided, or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

In practice, it is likely that there will not be oral argument of a bankruptcy appeal. With this in mind, counsel should file an appropriate statement with the District Court if there is a compelling reason for oral argument.

## VOLUNTARY DISMISSAL OF APPEAL
## (Bankruptcy Rule 8001)

Until an appeal has been docketed by the District Court, the Bankruptcy Court may dismiss an appeal if the parties file a stipulation of dismissal or on motion and notice by the appellant. Once an appeal has been docketed, the appeal may be dismissed upon motion of the appellant on the terms and conditions fixed by the District Court or by a signed stipulation that includes an agreement to dismiss the appeal and to pay any court costs or fees that may be due.

## EXPEDITED APPEALS
## (Bankruptcy Rule 8011)

In order to obtain an expedited appeal, an emergency motion should be filed with the District Court pursuant to Bankruptcy Rule 8011(d). The motion should contain the word "Emergency" in the caption and should be accompanied by an affidavit setting forth the irreparable harm which will occur if relief is not granted. Every effort practicable should be made to notify opposing counsel of the motion and the affidavit should state the manner in which counsel was notified or why such notice was not practicable.

Depending upon the issues being appealed, counsel may seek both to shorten the time for filing responsive pleadings pursuant to Bankruptcy Rule 9006(c) and for a stay of judgment pending appeal pursuant to Bankruptcy Rule 8005. Refer to the section

entitled Temporary Relief Pending Appeal[15] for the steps necessary to obtain a stay of proceedings.

## CROSS APPEALS AND JOINT APPEALS (Bankruptcy Rule 8002)

The time within which a cross-appeal may be taken is limited to the later of (1) 10 days after the first notice of appeal was filed or (2) the time otherwise set forth in Bankruptcy Rule 8002 (discussed above in the section entitled Commencing the Appellate Process[16]).

The Rules do not specifically address joint appeals. Presumably, when this is the manner of appeal desired by the parties the principal difference will be the caption used and appellants named in the appeal.

As a practice note, if your client is affected by a final order or judgment in the Bankruptcy Court, do not assume that you will be able to participate in an appeal simply because the trustee or a similarly situated party has filed a notice of appeal. "[O]nly a party who files a notice of appeal invokes the appellate jurisdiction of the district court. . . ." Smith v. Dairymen, Inc., 790 F.2d 1107, 1111 (4th Cir. 1986).

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15 See pp. 24-27 infra.

16 See pp. 3-10 supra.

## TEMPORARY RELIEF PENDING APPEAL, INCLUDING STAYS PENDING APPEAL (Bankruptcy Rule 8005)

Upon the entry of an adverse judgment or order in the Bankruptcy Court, counsel may pursue a variety of remedies. Pursuant to Bankruptcy Rule 7062 and Rule 62 of the Federal Rules of Civil Procedure, there is an automatic stay of enforcement of most judgments and orders entered by the Bankruptcy Court in adversary proceedings (i.e., those proceedings that are brought under Part VII of the Bankruptcy Rules, Bankruptcy Rule 7001 et seq.) for a period of 10 days after the entry of such judgment or order.[17] In general, there is no such 10-day automatic stay of enforcement of judgments or orders entered in contested matters. However, there are exceptions to this general rule; there are provisions in the Bankruptcy Rules for the 10-day automatic stay of enforcement of certain orders of the Bankruptcy Court in certain specific contested matters. For example, orders granting relief from the automatic stay provided for in §§ 362, 922, 1201 and 1301 of the Bankruptcy Code, orders

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17 Rule 62 of the Federal Rules of Civil Procedure should be consulted as to what orders and judgments in adversary proceedings are not subject to this 10-day automatic stay. One exception to the 10-day automatic stay is an order or judgment granting, denying or dissolving an injunction. In addition, the 10-day automatic stay provisions of Rule 62, Fed. R. Civ. P., also apply to appeals relating to contested involuntary petitions, contested petitions commencing a case ancillary to a foreign proceeding, and all proceedings to vacate an order for relief. See Bankruptcy Rule 1018.

authorizing the use, sale or lease of property of the estate (other than cash collateral), orders authorizing the assignment of executory contracts or unexpired leases pursuant to §365(f) of the Bankruptcy Code, and orders confirming a plan in a Chapter 11 or Chapter 9 case are all stayed for 10 days after the entry of such order, unless the Bankruptcy Court orders otherwise. See Bankruptcy Rules 4001(a)(3), 6004(g), 6006(d), and 3020(e).

Following the entry of an adverse judgment or order in the Bankruptcy Court, a party may seek relief from the judgment or order pursuant to Bankruptcy Rules 9023 or 9024 or file a notice of appeal pursuant to Bankruptcy Rule 8002. The filing of a notice of appeal does not result in any further stay of proceedings. A motion for a stay or further stay (if the 10-day automatic stay is applicable) must be filed under either the provisions of Rule 62 of the Federal Rules of Civil Procedure (made applicable by Bankruptcy Rules 7062 and 1018) or Bankruptcy Rule 8005.

A motion for stay pending appeal should first be made to the Bankruptcy Court, which may enter relief on such terms as will protect the rights of all parties in interest. A motion for a stay, or modification or termination of relief granted by the Bankruptcy Court, may be made to the District Court, but such motion must show why the relief requested, or the modification or termination of the Bankruptcy Court's order, was not obtained from the Bankruptcy Court.[18] A bond or other

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[18] The factors to be considered when seeking a stay pending appeal have been stated as follows:

Footnote continued on next page

appropriate security may be required by the District Court as a condition for granting a stay of proceedings.[19] Failure to promptly file a motion for stay of proceedings may result in the motion being denied. See Bankruptcy Rule 8011(c).

In the event a motion for a stay is filed directly with the District Court, Local District Court Rule 404.4 (Procedure Regarding Motion to Stay Pending Appeal) requires the appellant seeking a stay to file with the clerk of the District Court copies of all documents in the record of the Bankruptcy Court relevant to the appeal, along with the stay motion. The District Court will then open a civil file and give immediate consideration to the

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Footnote continued from previous page

> "The party seeking such a stay must show: (1) that he will likely prevail on the merits of the appeal; (2) that he will suffer irreparable injury if the stay is denied; (3) that other parties will not be substantially harmed by the stay; and (4) that the public interest will be served by granting the stay." Culver v. Boozer, 285 B.R. 163, 166 (D. Md. 2002) (citing Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970)).

In its consideration of a motion for a stay pending appeal, the court will generally engage in a balancing of these factors.

19 If a bond is required, counsel are encouraged to check with the clerk of the District Court as to the list of approved sureties.

motion to stay. If the appeal is ultimately perfected, it will be assigned the same case number.

It should be noted that with respect to certain orders of the Bankruptcy Court, the failure to obtain a stay pending appeal may result in the appeal being dismissed as moot. For example, courts have dismissed on mootness grounds appeals from confirmation orders, orders to sell or use property of the estate pursuant to § 363 of the Bankruptcy Code and orders to obtain post-petition financing or credit pursuant to § 364 of the Bankruptcy Code. See e.g., §§ 363(m) and 364(e) of the Bankruptcy Code and In re U.S. Airways Group, Inc., 369 F.3d 806 (4th Cir. 2004); In re Adamson Co., 159 F.3d 896 (4th Cir. 1998); Willemain v. Kivitz, 764 F.2d 1019 (4th Cir. 1985). In addition, appeals from orders lifting the automatic stay have been dismissed as moot in situations where there was no stay pending appeal, the party granted relief from stay went forward with a mortgage foreclosure sale and the property was sold before the appeal could be heard, Constructivist Foundation, Inc. v. Bonner, 254 B.R. 863 (D. Md. 2000), and where there was no stay pending appeal and a landlord who had been granted relief from stay had the debtor evicted before the appeal could be heard, In re Foreman, 278 B.R. 92 (D. Md. 2002).

## MOTIONS, INCLUDING EMERGENCY MOTIONS (Bankruptcy Rule 8011)

Before an appeal has been docketed in the District Court, motions to dismiss the appeal should be filed with the clerk of the Bankruptcy Court. The clerk of the

Bankruptcy Court will wait until the response period with respect to such motion has run (14 days from the date of service unless the motion was served by mail or electronically, in which event 17 days from the date of service), and thereafter the clerk of the Bankruptcy Court will transmit the motion and any response to the District Court for disposition.

In general, once an appeal has been docketed in the District Court, unless otherwise stated, motions shall be filed with the clerk of the District Court and shall state the grounds on which the motion is based and the order or relief sought. Any supporting briefs, affidavits or other papers shall be filed and served with the motion. With the exception of motions for procedural orders, which may be acted on at any time without a response or a hearing, a responsive pleading is due within 7 days after service of the motion. A party may request the enlargement or reduction in time for filing a response.

Motions for procedural orders may be acted on at any time without awaiting a response or hearing. However, parties adversely affected may move for reconsideration, vacation or modification of the action taken.

Unless ordered by the District Court, all motions will be decided without oral argument. A motion requesting a stay or other emergency relief must be presented promptly or it may be denied.

All motions requesting expedited action by the District Court shall begin with the word "Emergency" in the title of the motion and in the CM/ECF docket text.

An affidavit must be submitted with the motion setting forth the nature of the emergency and the irreparable harm that will result if the relief requested is not granted. The District Court will expect the moving party to have first requested emergency relief from the Bankruptcy Court. The motion at the District Court level should therefore include all grounds previously submitted to the Bankruptcy Court or, if new grounds are being advanced, why the motion should not be remanded to the Bankruptcy Court for reconsideration. The motion shall include the office addresses and telephone numbers of moving and opposing counsel. Every effort shall be made to notify opposing counsel of the motion prior to filing, and the affidavit submitted with the motion should state the manner of notification or why such notification was not practicable.

## DISPOSITION OF APPEAL AND COSTS
## (Bankruptcy Rules 8013-8014, 8016, 8020)

The District Court on appeal may affirm, modify or reverse the Bankruptcy Court's judgment, order or decree or remand with instructions for further proceedings.

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. Due regard shall be given to the opportunity of the Bankruptcy Court to judge the credibility of witnesses. The Bankruptcy Court's conclusions of law are reviewed de novo on appeal by the

District Court.[20]

If a judgment is not entered by the District Court Judge at the time of rendering decision on the appeal, the clerk of the District Court shall prepare, sign and enter the judgment following receipt of the opinion of the District Court or, if there is no opinion, following the instruction of the District Court. The notation of a judgment in the docket constitutes entry of the judgment.

Immediately on the entry of a judgment or order, the clerk of the District Court shall transmit a notice of the entry of such judgment or order to each party to the appeal, to the United States trustee and to the clerk of the Bankruptcy Court, together with a copy of any opinion respecting the judgment or order, and shall make a note of the transmission in the docket. The clerk of the District Court will mail a paper copy of any order, judgment, opinion or other document entered by the District Court to any *pro se* party. The clerk will not mail paper copies of electronic documents to attorneys as they are presumed to be registered users of the CM/ECF system. Original papers transmitted as the record on

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[20] The Fourth Circuit has stated, "[a] finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." In re Green, 934 F.2d 568, 570 (4th Cir. 1991). See also In re Weiss, 111 F.3d 1159, 1166 (4th Cir. 1997); In re Southeast Hotel Properties Ltd. Partnership, 99 F.3d 151, 154 (4th Cir. 1996); In re Bryson Properties, XVIII, 961 F.2d 496, 499 (4th Cir.), cert. denied, 506 U.S. 866 (1992).

appeal shall be returned to the clerk of the Bankruptcy Court on disposition of the appeal.

Counsel should not assume that the Bankruptcy Court has a copy of the judgment, order, opinion or other disposition of the District Court. Counsel should send a copy of such judgment, order, opinion or other disposition to the Bankruptcy Judge. Counsel are encouraged to request a scheduling conference or hearing in the Bankruptcy Court regarding further proceedings in that Court in light of the disposition of the appeal by the District Court, if appropriate.

Except as otherwise provided by law, agreed to by the parties or ordered by the District Court, costs shall be taxed against the losing party on an appeal. If a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the District Court.

If the District Court determines that an appeal is frivolous, the District Court may, after a separately filed motion or notice from the District Court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Costs shall be taxed by the clerk of the Bankruptcy Court. Costs incurred in the production of copies of briefs, the appendices and the record, and in the preparation and transmission of the record, the costs of the reporter's transcript (if necessary for the determination of the appeal), the premiums paid for the cost of supersedeas bonds or other bonds to preserve rights pending appeal and the fee for filing the Notice of

Appeal shall be taxed by the clerk as costs in favor of the party entitled to costs.

## MOTION FOR REHEARING
## (Bankruptcy Rule 8015)

A motion for rehearing may be filed within 10 days after the entry of judgment by the District Court unless otherwise provided for by court order or local rule. If a timely motion for rehearing is filed, the time for filing a further appeal shall run from the entry of the dispositive order on the motion for rehearing.

## STAY PENDING FURTHER APPEAL
## (Bankruptcy Rule 8017)

Unless otherwise ordered by the District Court, the judgment of the District Court disposing of the appeal is automatically stayed for a period of 10 days after its entry. In addition, a party may file a motion with the District Court to stay its judgment pending an appeal to the Fourth Circuit. The stay shall not extend beyond 30 days after the entry of the judgment of the District Court unless the period is extended for cause shown. If a further appeal to the Fourth Circuit is timely filed, the stay, if granted, shall continue until final disposition by the Fourth Circuit. This continuation of the stay pending appeal to the Fourth Circuit does not apply to the 10-day automatic stay. The District Court may require the filing of a bond or other security as a condition of the stay of judgment.

The power granted to the District Court to stay proceedings pending an appeal to the Fourth Circuit does

not limit the power of the Fourth Circuit or any judge thereof to stay proceedings or to suspend, modify, restore or grant an injunction during the pendency of an appeal or to make any other order appropriate to preserve the status quo or the effectiveness of the judgment to be entered by the Fourth Circuit.

With respect to proceedings and procedures in the Fourth Circuit, counsel should refer to the Federal Rules of Appellate Procedure and the Local Rules and Internal Operating Procedures promulgated by the Fourth Circuit Court of Appeals.

## APPENDIX 1

## BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

### SEC. 1233. DIRECT APPEALS OF BANKRUPTCY MATTERS TO COURTS OF APPEALS.

(a) **APPEALS**--Section 158 of title 28, United States Code, is amended--

(1) in subsection (c)(1), by striking "Subject to subsection (b)," and inserting "Subject to subsections (b) and (d)(2),"; and

(2) in subsection (d)--

(A) by inserting "(1)" after "(d)"; and

(B) by adding at the end the following:

"(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that--

"(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the

Supreme Court of the United States, or involves a matter of public importance;

"(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

"(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

"(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel--

"(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

"(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

"(C) The parties may supplement the certification with a short statement of the basis for the certification.

"(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district

court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or other court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

"(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.".

(b) **PROCEDURAL RULES.**--

(1) **TEMPORARY APPLICATION.**--A provision of this subsection shall apply to appeals under section 158(d)(2) of title 28, United States Code, until a rule of practice and procedure relating to such provision and such appeals is promulgated or amended under chapter 131 of such title.

(2) **CERTIFICATION.**--A district court, a bankruptcy court, or a bankruptcy appellate panel may make a certification under section 158(d)(2) of title 28, United States Code, only with respect to matters pending in the respective bankruptcy court, district court, or bankruptcy appellate panel.

(3) **PROCEDURE.**--Subject to any other provision of this subsection, an appeal authorized by the court of appeals under section 158(d)(2)(A) of title 28, United States Code, shall be taken in the manner prescribed in subdivisions (a)(1), (b), (c), and (d) of rule 5 of the Federal Rules of Appellate Procedure. For purposes of subdivision (a)(1) of rule 5--

(A) a reference in such subdivision to a district court shall be deemed to include a reference to a bankruptcy court and a bankruptcy appellate panel, as appropriate; and

(B) a reference in such subdivision to the parties requesting permission to appeal to be served with the petition shall be deemed to include a reference to the parties to the judgment, order, or decree from which the appeal is taken.

(4) **FILING OF PETITION WITH ATTACHMENT**.--A petition requesting permission to appeal, that is based on a certification made under subparagraph (A) or (B) of section 158(d)(2) shall--

(A) be filed with the circuit clerk not later than 10 days after the certification is entered on the docket of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken; and

(B) have attached a copy of such certification.

(5) **REFERENCES IN RULE** 5.--For purposes of rule 5 of the Federal Rules of Appellate Procedure--

(A) a reference in such rule to a district court shall be deemed to include a reference to a bankruptcy court and to a bankruptcy appellate panel; and

(B) a reference in such rule to a district clerk shall be deemed to include a reference to a clerk of a bankruptcy court and to a clerk of a bankruptcy appellate panel.

(6) **APPLICATION OF RULES**.--The Federal Rules of Appellate Procedure shall apply in the courts of appeals with respect to appeals authorized under section 158(d)(2)(A), to the extent relevant and as if such appeals were taken from final judgments, orders, or decrees of the district courts or bankruptcy appellate panels exercising appellate jurisdiction under subsection (a) or (b) of section 158 of title 28, United States Code.

## APPENDIX 2

## OFFICIAL FORM NO. 17

**Form 17** **Notice of Appeal Under 28 U.S.C. § 158(a) or (b) From a Judgment, Order, or Decree of a Bankruptcy Judge**

*[Caption as in Form 16A, 16B, or 16D, as appropriate]*

**NOTICE OF APPEAL**

_____, the plaintiff [*or* defendant *or* other party] appeals under 28 U.S.C. § 158(a) or (b) from the judgment, order, or decree of the bankruptcy judge (describe) entered in this adversary proceeding [*or other proceeding, describe type*] on the ____ day of (month), (year).

The names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys are as follows:

_____

_____

_____

Dated: _____

Signed: _____
Attorney for Appellant (or Appellant, if not represented by an Attorney)

Attorney Name: _____

Address: _____

_____

Telephone No.: _____

If a Bankruptcy Appellate Panel Service is authorized to hear this appeal, each party has a right to have the appeal heard by the district court. The appellant may exercise this right only by filling a separate statement of election at the time of the filing of this notice of appeal. Any other party may elect, within the time provided in 28 U.S.C. § 158(c), to have the appeal heard by the district court.

*If a child support creditor or its representative is the appellant, and if the child support creditor or its representative files the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.*

## APPENDIX 3

# UNITED STATES DISTRICT COURT
## OFFICE OF THE CLERK
## DISTRICT OF MARYLAND

Felicia C. Cannon, Clerk

Reply to Northern Division Address

Frances E. Kessler, Chief Deputy
Lisa Rosenthal, Chief Deputy

[Date]

RE: [Case Name]
[USDC Case Number]
[Bankruptcy Case Number]

Dear Counsel/Party:

The above-captioned bankruptcy appeal was docketed on [Date Appeal Docketed]. Briefs must be filed and served in accordance with Bankruptcy Rules 8009 and 8010. Appellant's brief is due within fifteen days from the date the appeal was docketed.

The case is subject to this Court's electronic filing requirements and procedures.

[ ] You are not a registered District Court CM/ECF user. To register, go to the Court's web site: www.mdd.uscourts.gov and fill in the on-line registration form. Information about electronic filing procedures and requirements is available on the web site. Please note that if this case is subject to electronic filing, any documents

submitted for filing in paper format may be returned to you. The Court does not mail paper copies of orders and other documents which are filed electronically.

[ ] One or more of the parties in this case is not represented by counsel ("*pro se*"). *Pro se* parties are to file and serve documents in paper format. The court will scan and electronically file any documents submitted by a *pro se* party unless a particular document is exempt from electronic filing. The scanned document shall constitute the official court record. The court will mail paper copies of any orders or other documents entered by the court to any *pro se* party. Counsel shall file electronically with the court and serve paper copies of all documents on any *pro se* party. Documents filed electronically must include a certificate of service stating when and how a paper copy was served on any *pro se* party.

Sincerely yours,

Felicia C. Cannon, Clerk

cc: All counsel/parties

Bankruptcy Letter to Counsel (rev. 11/01/2004)

Northern Division • 4415 U.S. Courthouse • 101 W. Lombard Street • Baltimore, Maryland 21201 • 410-962-2600
Southern Division • 240 U.S. Courthouse • 6500 Cherrywood Lane • Greenbelt, Maryland 20770 • 301-344-0660

**Visit the U.S. District Court's Web Site at www.mdd.uscourts.gov**