

## **U.S. Trustee Spotlight**

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### **Filing under Seal**

It is a truism that the open and honest disclosure of information is integral to the success of the bankruptcy process. So much so that 11 U.S.C. § 107(a) expressly provides that papers filed in a case under Title 11 and in the dockets of a bankruptcy court are public records and available for examination by any party. By contrast, motions to file pleadings and documents “under seal” are disfavored and should only be granted when there is an actual need to protect a party from harm. 11 U.S.C. § 107(a).

But where and when appropriate, 11 U.S.C. § 107(b) authorizes the bankruptcy court to enter an order to protect a person or entity from the disclosure of trade secrets, confidential research, development, or commercial information, or from the disclosure of scandalous or defamatory information within a paper filed with the court. And Federal Rule of Bankruptcy Procedure 9018 provides that, upon motion or its own initiative, and with or without notice, the bankruptcy court may make any order “which justice requires” to protect any person with respect to a trade secret, confidential research, development, or commercial information, or to protect against any scandalous or defamatory information in a filing, or to protect governmental matters made confidential by statute or regulation. But, even if filed under seal, such information will remain accessible to the United States Trustee, the bankruptcy administrator, a trustee, and any auditor appointed by the United States Trustee under 28 U.S.C. § 586(f). 11 U.S.C. § 107(c)(3).

Within the Middle District of Florida, the United States Bankruptcy Court’s Local Rule 5005-4 governs the filing of papers under seal. Local Rule 5005-4 creates two categories of papers that may be filed under seal: 1) papers that may be filed under seal without the entry of a prior order; and 2) papers for which an order must be entered prior to filing under seal. In the first category are motions for a writ of garnishment, writ of attachment, or writ of execution; adversary complaints seeking emergency injunctive relief; trustee’s motions to inspect or enter upon property without notice; and motions for temporary restraining orders that are requested to be entered without notice. For all other filings, an order granting a motion to file under seal must be entered before the paper is filed under seal. As with § 107 and Rule 9018, the United States Trustee, the bankruptcy administrator, a trustee, and any auditor appointed by the United States Trustee under 28 U.S.C. § 586(f) shall continue to have access to the papers filed under seal.

Finally, the Court will consider, on a case-by-case basis, who may have access to the sealed papers and related orders, and if and when restrictions on access should be terminated.

So best practices dictate that parties carefully review § 107, Rule 9018, and Local Rule 5005-4 before submitting papers under seal; consider the scope and extent of the protections they are seeking; and ensure that they strictly observe the protocols established by Local Rule 5005-4 during the filing process.