

## SUMMONS TO DEBTOR IN INVOLUNTARY CASE

### **Purpose of the Form**

Bankruptcy cases can arise in two ways: An individual or business or municipality may file a voluntary petition, or creditors may file an involuntary petition against an individual or business.

The first step in commencing an involuntary bankruptcy proceeding is the filing of a petition by a creditor or creditors, using Official Form 5. The summons is the notice which accompanies the petition, advising of the names of the debtor and the attorney for the petitioning creditor(s), the court in which the proceeding was filed, and the time limits for responding to the petition.

### **Applicable Law and Rules**

1. The primary statutory provisions for an involuntary bankruptcy proceeding are found in Section 303 of the Bankruptcy Code (11 U.S.C. § 303). These provisions are complex, and there are substantial penalties for filing an improper involuntary petition. Section 303 should therefore be read in its entirety prior to the filing of an involuntary petition.
2. Section 303(a) limits an involuntary petition to chapters 7 and 11. It further provides that the involuntary debtor may not be a farmer, family farmer, or a corporation which not is a moneyed, business, or commercial corporation.
3. Section 303(b) provides that each of the petitioning creditors must hold claims against the debtor which are not contingent as to liability and which are not the subject of a bona fide dispute. Although there are several complex criteria, the two basic ones are: 1) if the debtor has fewer than 12 creditors, only one creditor need file the involuntary petition, whereas if the debtor has 12 or more creditors, at least three of the creditors must join in the petition; and 2) the claims of the petitioning creditor or creditors must total at least \$16,750.<sup>1</sup>
4. Fed. Bankr. P. 1010 states:

On the filing of an involuntary petition . . . the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor . . . . The summons shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b).

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<sup>1</sup>The amount is subject to adjustment in 4/01/22, and every three years thereafter with respect to cases commenced on or after the date of adjustment.

If service cannot be so made, the court may order that the summons and petition to be served by mailing copies to the party's last known address, and by at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004(e) and Rule 4(l) [of the Federal Rules of Civil Procedure] apply when service is made or attempted under this rule.

5. Fed. R. Bankr. P. 7004(a) adopts portions of Fed. R. Civ. P. 4 and sets forth other provisions for the issuance and service of a summons. These rules are detailed and complex, and should be read in their entirety.
6. Rule 4(a) specifies the information that the plaintiff's attorney (or the plaintiff) must provide on the summons form. Rule 4(b), provides that the clerk shall issue the summons to the petitioning creditor or its attorney. It is then the responsibility of the petitioning creditor (i.e., the "plaintiff") or the attorney to serve the summons on the debtor. On a summons to a debtor in an involuntary case, the petitioning creditor's attorney (or petitioning creditor) must fulfill the responsibilities of the plaintiff's attorney (or the plaintiff) described in Rule 4.
7. A copy of the petition must be served with the summons. Rule 4(b).
8. It is a good idea to submit several copies of the summons to the court with the petition, so that each copy may be signed by the court: one for the court records, one for service on the debtor, one for each of petitioning creditor's records (or the creditor's attorney's records), and one to be returned to the court after the certificate of service has been completed.
9. The summons and petition may be served in a variety of ways which are set forth in Rules 1010, 7004, and 4. When the debtor is an individual, other than an infant or incompetent person, the easiest method is for the summons and petition to be mailed by first class mail postage prepaid to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession. Rule 7004(b)(1).
10. If service is made by personal service, by residence service, or pursuant to state law, the service must be made by someone who is not a party, and who is at least 18 years of age. Rule 7004(a).
11. The summons and petition must be served 7 days after the summons is issued. Service is complete upon mailing, not upon delivery by the Postal Service. If more than 7 days pass before service is completed, a new summons will be issued for service. Rule 7004(e) and Fed. R. Bankr. P. 9006(e).

12. If the summons and petition are not served within 90 days of the filing of the complaint, the court may dismiss the action. Rule 4(m).
13. On the back of the summons is a certificate of service of the summons. After service has been made, this certificate should be completed, and filed with the court.
14. Rule 1011 grants the debtor 21 days from the service of the summons to reply to the petition. Under the provisions of Section 303(h), if the debtor fails to timely reply to the involuntary petition, the court will enter an order for relief under the appropriate chapter of the Bankruptcy Code. See Form B 2530. If the debtor timely files an answer, the court will conduct a trial and will only enter the order for relief if the debtor is not generally paying its undisputed debts as they become due, or if within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession. Fed. R. Bankr. P. 1018 sets forth the procedures to be followed in the event of a contested involuntary petition.
15. Section 303(i) authorizes the court to order creditors that file improper involuntary petitions to pay the costs and attorney's fees of the debtor. If the court finds that the involuntary petition was brought in bad faith, it can also order the petitioning creditors to pay for all damages proximately caused by the filing, and may assess punitive damages.

### **Instructions**

#### **Caption**

1. Identify the Judicial District in which the bankruptcy case was filed. Example: "Eastern District of California."
2. "In re": Insert the name of the debtor as it appears in the bankruptcy petition including all names, including trade names, used by the debtor within the last eight years.
3. "Case No.": Insert the bankruptcy case number assigned by the court at the time of filing.
4. "Chapter No.": Insert the chapter of the Bankruptcy Code under which the case was filed.

#### **Address of Clerk:**

Be sure to indicate the proper address for the clerk's office.

**Name and Address of Petitioner's Attorney:**

The complete mailing address of the attorney for the petitioning creditor must be set forth in the space provided, including zip code. If the street address is different, that must also be stated, including room number. If the petitioning creditor is not represented by an attorney, the petitioning creditor's mailing and street address should be placed in the space.

**Certificate of Service**

1. Line 1 (name) is to be completed with the full name of the person who served the summons and petition.
2. Line 1 (date) is to be completed with the month, day and year service was perfected.
3. Describe the mode of service and the address at which the debtor was served in the space provided.

If personal service was made, also include the name of the person to whom the summons and petition were given. If residence service was made, also include the name of the adult to whom the summons and petition were given. If service was made by publication, also describe the steps take to perfect service. If service was made pursuant to state law, also include the name of state under whose laws the summons and petition were served and a brief description of the method of service, including the name of the person served.

4. Date: Insert on this line the month, day and year the certificate is signed.
5. Signature: The person who completed service of the summons and petition must sign. This must be an ORIGINAL signature.
6. In the space directly the Signature line, print or type the name and business address of the person who signed the certificate.

**General Information for the Clerk**

Fed. R. Bankr. P. 1010 requires a summons to be issued every time an involuntary petition is filed. The procedure is the same as in an adversary proceeding except that the petitioning creditor stands in for the "plaintiff" and debtor for the "defendant".

Fed. R. Bankr. P. 7004 incorporates by reference Rule 4(b) of the Federal Rules of Civil Procedure, which in combination with Rule 1010, provide that the clerk is to issue the summons to the petitioning creditor or the petitioning creditor's attorney upon or after the filing of the petition. If requested, more than one copy can be issued. In the instructions to the public, it is

recommended that the petitioning creditor seek the issuance of several copies of the summons: one for the court to file with the original petition; one for service on the debtor; one for each petitioning creditor's records (or the creditor's attorney's records), and one to be returned to the court after the certificate of service has been completed. The attorney representing the petitioning creditor or creditors is responsible for serving the summons and involuntary petition, not the clerk.

There is no charge for the issuance of a summons, beyond the fee for commencing the involuntary proceeding.

The petitioning creditor should have filled in the attorney's address in the appropriate space on the form. As the debtor may choose to serve an answer by mail or in person, the space should contain both the street and mailing address of the attorney, if the addresses are different. If the petitioning creditor is not represented by an attorney, the address of each petitioning creditor should be supplied.

The clerk may wish to fill in the space marked "Address of Clerk" before providing the form to the petitioning creditors.

As is set out in detail in the instructions to the public, there are a series of deadlines for actions to be taken in the involuntary proceeding. The most important of these are:

1. If the summons is not served within 7 days, a new summons must be issued. Rule 7004(e).
2. If no summons is served within 90 days, the court is authorized by Rule 4(m) to dismiss the proceeding on its own motion, after notice to the plaintiff.
3. If the defendant does not answer or make a motion pursuant to Fed. R. Bankr. P. 1011 within 21 days, or such time as court may fix, section 303(h) provides that the court shall enter an order for relief.
4. If the debtor timely files an answer or a motion pursuant to Rule 1011, section 303(h) requires that a trial be held to determine whether an order for relief is warranted. Bankruptcy Rule 1013 provides that "the court shall determine the issues of a contested petition at the earliest practicable time and forthwith enter an order for relief, dismiss the petition, or enter any other appropriate order."