

# Adversary Proceedings

## A Guide for Filers Not Represented by an Attorney

### I. What is an Adversary Proceeding?

An adversary proceeding is a lawsuit that is somehow related to a bankruptcy case, filed by a party called a "plaintiff" against a party called a "defendant." Adversary proceedings are initiated by filing a document called a "complaint" with the court to resolve both federal and state law issues. Certain types of disputes cannot be handled by motion in the bankruptcy case, but instead require the commencement of an adversary proceeding. **Federal Bankruptcy Rule 7001** lists certain types of actions that require an adversary proceeding.

### I. When an Adversary Proceeding is Required

- A. To recover money or property or for turnover of money or property;
- B. To determine the validity, priority, or extent of lien or other interest in property;
- C. To obtain approval for the sale of both the interest of the estate and of a co-owner of property;
- D. To object to or revoke a discharge;
- E. To revoke an order of confirmation of a plan;
- F. To determine the dischargeability of a debt;
- G. To obtain an injunction;
- H. To subordinate an allowed claim or interest;
- I. To obtain a declaratory judgment (a judgment explaining disputed law) relating to any of the foregoing; or
- J. To determine a claim or cause of action removed from a state court pursuant to 28 U.S.C. Section 1452.

### III. Starting an Adversary Proceeding

An adversary proceeding is commenced by the filing of a complaint. A complaint is a written formal statement in which the party initiating the adversary, the plaintiff, presents the facts as the plaintiff believes them to be and demands the relief to which the plaintiff believes the plaintiff is entitled against the defendant, the person or entity the action is

brought against. Each complaint is unique and there is no specific form provided by the court.

The bankruptcy case must be open at the time the complaint is filed. If the bankruptcy case is closed, it will need to be reopened before the complaint is filed. To reopen the bankruptcy case, you need to file a motion to reopen. There may be a reopening fee due.

If the reopening is for the debtor or other party to file a complaint to determine whether or not a particular debt was discharged or for the debtor to file an action to enforce the discharge, there is no reopening fee. If the reopening is to file a complaint for any other reason, there is a reopening fee due of \$260.00 for a Chapter 7 case and \$235.00 for a Chapter 13 case. The reopening fee is in addition to the adversary filing fee, if due, as described below.

#### **IV. Filing Fees for an Adversary Complaint**

The filing fee for an adversary complaint is \$350. Parties that do not have to pay the filing fee are:

- A. Any U.S. Government agency.
- B. A Chapter 7 or Chapter 13 debtor.
- C. A Chapter 11 individual debtor, or attorney representing debtor, only when filing a Complaint for Dischargeability of a Debt.
- D. A Chapter 7 trustee - the fee is due at the time of filing the complaint unless the trustee files a certification that insufficient estate funds are available. The fee is then deferred until funds become available.
- E. A Chapter 12 or Chapter 13 trustee - the fee is paid from the estate upon confirmation of the plan.
- F. A Chapter 11 trustee - the fee is due at the time of filing the complaint unless a motion and order to defer payment is filed with the complaint.
- G. A creditor owed child support by the debtor or such creditor's representative – the fee is not due provided the creditor or representative files Form 281 – Appearance of Child Support Creditor or Representative (a copy of which is included).

#### **V. What is Required for Filing an Adversary Complaint?**

- A. Filing fee of \$350 (except when the filing fee is not required or is deferred).
- B. An original and one copy of the adversary complaint.

- C. An Adversary Proceeding Cover Sheet (Form B1041; recommended, but not required)
- D. Summons in an Adversary Proceeding. The clerk's office will prepare the summons.

**VI. Issuing the Summons**

At the time the complaint is filed, the clerk's office will prepare the summons and give it to the pro se (party not represented by an attorney) plaintiff if they are present in the intake office or mail the summons to the pro se plaintiff if they are not present.

**VII. Service of Summons and Complaint**

The summons and complaint must be served on all parties that may be affected by the action described in the complaint. This includes the defendant, the trustee in the underlying bankruptcy case and any creditor that may be affected.

The summons and complaint may be served anywhere in the United States. For service in a foreign country, see Bankruptcy Rule 7004.

**A. Service may be made by:**

- 1. Personal Service - By person not less than 18 years of age and not a party to the complaint.
- 2. First Class Mail - Service may be made on defendants within the United States by first class U.S. mail postage pre-paid, except as stated below. Service by first class mail is also subject to the following specific requirements.
  - a. Mail service on an Insured Depository Institution (banks and other financial institutions whose deposits are federally insured) must be by certified mail addressed to a particular officer of the institution.
  - b. If serving the bankruptcy debtor by mail, the summons and complaint must be mailed to the address stated on the bankruptcy petition or to such other address as the debtor may designate in a writing filed with the bankruptcy court. If the debtor is represented by an attorney, service must also be made on the attorney at the attorney's post-office address.

- c. If you have named the United States/or a Federal Agency as a Defendant, you are required to serve the U.S. Attorney and the Attorney General of the United States with a copy of the Complaint and Summons.

For the list of Designated Addresses for the United States, its Departments, Agencies and Instrumentalities, click on this link:

[https://www.mieb.uscourts.gov/sites/mieb/files/Government Mailing Matrix - FRBP 5003\(e\).pdf](https://www.mieb.uscourts.gov/sites/mieb/files/Government%20Mailing%20Matrix%20-%20FRBP%205003(e).pdf)

3. Publication - If a party cannot be served by personal service or first class mail, the court may, on motion of the plaintiff, order at least one publication in such manner and form as the court directs (example: newspaper).

B. Time Limit for Service:

1. Service must be made within seven days following the issuance date of the summons. If the summons is not timely delivered or mailed, a replacement summons (an alias summons) shall be issued upon request of the plaintiff, providing that 120 days have not passed since the filing of the adversary complaint.
2. If service of the summons and complaint is not made within 120 days after the filing of the complaint, and good cause cannot be shown why service was not made within that period, the adversary complaint may be dismissed.

C. Certificate of Service. You may complete the Certificate of Service form provided at the end of these instructions and then file it as your certificate of service. For the service to be valid, the certificate must show that the following requirements were done.

1. The date service was made must be stated. If mailed, the date the copy of the complaint and summons was deposited in the mail is the date to be stated.

2. It must state that a copy of the complaint and summons was served or mailed.
3. If service was made by personal delivery of the summons and complaint, then it must state that the person making service is 18 years or older and is not a party to the case.
4. If service was made by mail, then the names and addresses to which the summons and copy of the complaint were mailed must be stated.
5. If service was made by certified mail, then the certification must be attached to the certificate.

**VIII. What is the Usual Course of an Adversary Complaint?**

- A. An adversary complaint is filed by the plaintiff and the clerk's office issues a summons.
- B. The summons and complaint are served upon the defendant(s) and their attorneys by the plaintiff.
- C. The plaintiff files with the bankruptcy court a certificate of service of the summons and complaint.
- D. If the defendant files an answer to the complaint (see below), the court will set a status hearing and will notice the hearing to the interested parties.
- E. The adversary would then go through its course until the judge renders a decision, judgment, or the parties reach a settlement. The adversary would then be closed.
- F. If an answer is not filed, the plaintiff would file the proper paperwork to have a default entered against the defendant(s).

**IX. The Defendant Must File an Answer to the Complaint or a Default Judgment will be Entered Against the Defendant.**

The defendant has 30 days from the day the summons is issued to respond to the complaint. The defendant responds by filing an "answer" with the court. An answer is a formal written statement filed by the defendant responding to the complaint, setting forth any defenses and objections to the claims by the plaintiff. The answer should admit or deny every allegation in the complaint and set forth any affirmative defenses that may be applicable. When the defendant files the answer with the court the defendant must also send a copy of the answer to the plaintiff and the plaintiff's attorney, if applicable, and file a certificate of service.

If the defendant does not file an answer within the required time frame, the court will likely rule in favor of the plaintiff. If you are the defendant, it is very important that an answer is filed on time.

**X. If the Defendant Files an Answer, Next Steps**

If the defendant files an answer within the appropriate time frame, the court will issue a “Notice of Initial Scheduling Conference” which will inform the parties of the date of the conference and instruct them to file a “Report of Parties Rule 26(f) Conference”. The Report of Parties Rule 26(f) Conference is a local form available on the court’s website. The parties should confer about the timeframes contained in the Report of Parties Rule 26(f) Conference and file the report with the court, signed by all parties. After the initial scheduling conferences, the court will issue a scheduling order detailing the timeline for the trial.

**XI. If the Defendant does not File an Answer, How do I Have the Court Enter a Default Against the Defendant?**

If no answer is filed, the court will issue a “Clerk’s Entry of Default” stating that no response has been filed and directing the plaintiff to file an application for default within 14 days. The Entry of Default will be mailed to all interested parties.

You will prepare your own application for default and a separate “default judgment”; there are no specific forms available. The clerk’s office is permitted to enter a default only upon being presented with an application for default setting forth the facts. These facts normally include the following:

- A. Date the adversary complaint was filed with the court;
- B. Date the summons was signed/issued by the deputy clerk;
- C. Date you served the adversary complaint on the defendant and defendant's attorney;
- D. Date you filed your certificate of service with the court;
- E. Statement that no answer has been received within the time limit fixed by the court on the summons; and
- F. Statement that the defendant is not in the military service. If the defendant is or may be in the military service, the defendant is afforded certain protections which must be addressed prior to the Entry of Default.

If the application for default is deficient, the clerk’s office will notify the plaintiff regarding the deficiency.

## XII. **Default Judgment**

When the application for default is filed, the adversary case will be reviewed and the judge will either sign the default judgment, if appropriate, or set the matter for hearing.

