

**INSTRUCTIONS FOR COMPLETING OFFICIAL FORM 5
INVOLUNTARY PETITION**

I. INTRODUCTION

Bankruptcy cases can arise in two ways: 1) an individual, a business, or a municipality may file a voluntary petition, or 2) creditors may file an involuntary petition against an individual or business. A creditor or group of creditors is authorized to file an involuntary case against a debtor if certain criteria are met, as set forth in section 303 of the Bankruptcy Code (11 U.S.C. § 303). The first step in commencing an involuntary case is the filing of an involuntary petition, using Official Form 5, by a creditor or creditors. Creditors that file an involuntary petition against a debtor are also referred to as "petitioners."

The alleged debtor is given an opportunity to respond to the petition and contest it. If the debtor contests the petition, the court will hold a hearing to determine whether the bankruptcy case will proceed.

The requirements for filing an involuntary bankruptcy case are complex, and the penalties for improper filing are harsh. Anyone contemplating such action should consult an experienced attorney. The following information is very general and is not complete.

II. APPLICABLE LAW AND RULES

1. Section 303 of the Bankruptcy Code contains provisions for filing an involuntary petition against a person. The term "person" includes an individual, partnership, and corporation. 11 U.S.C. § 101.
2. Section 303(a) authorizes involuntary petitions to be filed only under chapters 7 and 11 of the Bankruptcy Code. Thus, creditors are prohibited from filing an involuntary petition under chapters 9, 12, and 13. In addition, an involuntary debtor may not be "a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation," (that is, a non-profit or charitable corporation). 11 U.S.C. § 303(a). Moreover, an involuntary petition may not be filed against a husband and wife jointly. 11 U.S.C. § 302(a).
3. Sections 303(b)(1) and (b)(2), provide that the petitioning creditors must hold claims against the debtor that are not contingent as to liability or the subject of a bona fide dispute. A contingent claim is one that depends on the occurrence of a certain event that may never happen. 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 claim(s) of the petitioning creditor or creditors must total at least \$10,775 more than any lien on property of the debtor securing such claim(s). In other words, there must be \$10,775 in unsecured claims, i.e., those that have no collateral and are not secured by any lien on the debtor's property.

4. In a partnership case, all general partners must consent to a voluntary bankruptcy, otherwise, it is an involuntary case. Thus, an involuntary petition against a partnership may be filed by fewer than all the general partners. Moreover, if all the general partners are already in bankruptcy, an involuntary case against the partnership may be filed by a general partner, the trustee of a general partner, or creditors of the partnership. 11 U.S.C. § 303(b)(3). Rule 1004 of the Federal Rules of Bankruptcy Procedure (referred to as "Bankruptcy Rule" or "Fed. R. Bankr. P.") requires the petitioner(s) to either send to or serve on each general partner who is not a petitioner, a copy of the petition and a summons.

5. A foreign representative of the estate in a foreign proceeding may file an involuntary case concerning such person. 11 U.S.C. §§ 303(b)(4), 304.

6. An entity that has transferred or acquired a claim for the purpose of commencing an involuntary case is not qualified to be a petitioner. Fed. R. Bankr. P. 1003(b). Otherwise, if the transfer was not made for that purpose, an entity holding a transferred or acquired claim may be a qualified petitioner if the statements and documents required by Bankruptcy Rule 1003(a) are attached to the petition. Moreover, after the petition is filed, but before the case is dismissed or relief is ordered, a creditor holding a noncontingent unsecured claim, may join in the petition. 11 U.S.C. § 303(c). Creditors will be given a reasonable opportunity to join in the petition if fewer than three creditors filed the petition, and the debtor's answer to the petition reveals the existence of 12 or more creditors. Fed. R. Bankr. P. 1003(b).

7. Bankruptcy Rule 1010 requires that on the filing of an involuntary petition, a summons with a copy of the petition be served on the debtor. Rule 4(b) of the Federal Rules of Civil Procedure (referred to as "Civil Rule" or "Fed. R. Civ. P."), incorporated by Bankruptcy Rule 7004, provides that the clerk shall issue the summons to the petitioning creditor or its attorney. It is then the responsibility of the creditor or the creditor's attorney to serve the summons and a copy of the petition on the debtor. The summons and petition must be served in person or by first class mail, in accordance with Bankruptcy Rule 7004(a) or (b). If service in person or by mail is not possible, the court may order service by mail to the last known address and by publication, as directed by the court. The summons and petition may be served on a debtor anywhere. The provisions of Bankruptcy Rule 7004(e), regarding time, and Civil Rule 4(l), regarding proof of service, apply when service is made or attempted under Bankruptcy Rule 1010. Special procedures must be followed when serving a summons and complaint in a foreign country. See Fed. R. Civ. P. 4(l).

8. The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to an involuntary petition. 11 U.S.C. § 303(d). Bankruptcy Rule 1011 allows the debtor 20 days to respond to the petition. If the debtor fails to respond, the court will enter an order for relief under the appropriate chapter of the Bankruptcy Code. 11 U.S.C. § 303(h); Fed. R. Bankr. P. 1013(b). If the debtor files an answer, the court will conduct a hearing and will only enter the order for relief if the court finds that 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. 11 U.S.C. § 303(h); Fed. R. Bankr. P. 1013(a). Bankruptcy Rule 1018 sets forth the procedure to be followed in the event of a contested involuntary petition.

9. Section 303(i) authorizes the court to order creditors that file an improper involuntary petition to pay the costs or a reasonable attorney's fee of the debtor. If the court finds that the involuntary petition was filed in bad faith, the court can order the petitioning creditors to pay for all damages proximately caused by the filing or may assess punitive damages.

III. DIRECTIONS

United States Bankruptcy Court

Petitioning creditors must identify the federal judicial district in which they will file the involuntary petition, for example, "Eastern District of California." To find the correct name of the district, creditors may refer to the local telephone directory, which should have a listing in the blue pages for "United States Government." Petitioners should look under category "C" (for courts) and locate the listing for "District Court for the" The bankruptcy court will be listed under the district court. Some telephone directories may list courts for more than one federal judicial district. If a petitioner is in doubt about the name of the district, the petitioner should check with the bankruptcy court clerk's office before proceeding.

Names/Identification Numbers

Bankruptcy Rule 1005 requires the petition to "include the name, social security number and employer's tax identification number of the debtor and all other names used by the debtor within six years before filing the petition. If the petition is not filed by the debtor, it shall include all names used by the debtor which are known to petitioners." For example, and to the extent known to the creditors, all names used by the debtor, including trade names, names used in doing business, former married name(s), and maiden name should be furnished in the spaces provided. If there is not sufficient room for all such names and identification numbers on the form itself, the list should be continued on an additional sheet attached to the petition.

Addresses/Location of Principal Assets

Petitioners are asked to list both a street address and any separate mailing address used by a debtor. Thus, the petitioner must include the complete street address and mailing address, if different, in the appropriate boxes. Zip codes should be included. If the debtor is an individual, the petitioner must state the debtor's county of residence within the box provided. If the debtor is a business, the petitioner should state the county where the principal place of business is located. Petitioners should designate the location of the principal assets of a business debtor, if different from the street address.

Chapter of Bankruptcy Code Under Which the Petition is Filed

Section 303(a) authorizes involuntary petitions to be filed only under chapters 7 and 11. Thus, creditors are prohibited from filing an involuntary petition under chapters 9, 12, and 13. Moreover, an involuntary debtor may not be "a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation." 11 U.S.C. § 303(a). That is, a creditor should not file an involuntary petition against a farmer or a non-profit or charitable corporation. Moreover, a creditor should not file an involuntary petition against a husband and wife jointly.

Although the case can be converted to another chapter later in the proceeding, it is important to file under the appropriate chapter and under which the debtor would be legally able to file. Section 109 of the Bankruptcy Code states the eligibility requirements for filing under various chapters. The following is a brief summary of the eligibility requirements of chapters 7 and 11:

I. **Chapter 7:** A "person" (defined by section 101 of the Bankruptcy Code, to include an individual, partnership, and corporation, but not a governmental unit) may be a debtor under chapter 7 only if that person is not a (1) railroad or (2) domestic or foreign insurance company, bank, or credit union. 11 U.S.C. § 109. Stockbrokers and commodity brokers can file only under this chapter, which contains special provisions governing cases involving them.

II. **Chapter 11:** Only a person that may be a debtor under chapter 7 (except a stockbroker or a commodity broker) and a railroad may be a debtor under chapter 11.

Petitioners should check the box next to the chapter of the Code under which the petition is filed.

Information Regarding Debtor

Petitioners should check the applicable boxes in the following four categories:

Type of Debtor

A debtor can be an individual, a partnership, a publicly held corporation, or a non-publicly held corporation. If a debtor does not fit into any of these categories, a box entitled "other" is provided. In partnership cases, Bankruptcy Rule 1004 requires that all general partners consent to the filing of a "voluntary" bankruptcy petition; if they do not, the case must be filed as an "involuntary" bankruptcy, using Official Form 5.

Petitioner's Belief Regarding Nature of Debt

A consumer debt is defined in section 101 of the Bankruptcy Code as a debt incurred by an individual primarily for a personal, family, or household purpose. If most of the debtor's obligations meet these criteria, petitioners should check the box marked "[d]ebts are primarily consumer debts." If the debtor is not an individual or if most of an individual's debt arises from operation of a business, the petitioners should check the box marked "[d]ebts are primarily business debts." Petitioners should complete Parts A and B for business debtors.

A. Type of Business

Petitioners should check the box that represents the type of business enterprise of the debtor. If none of the boxes accurately describe the type of business, the petitioners may check the box labeled "Other."

B. Briefly Describe Nature of Business

Petitioners should describe the nature of a business debtor's business in the space provided.

Venue

Petitioners should file an involuntary bankruptcy case in the federal judicial district in which the individual debtor has resided or maintained a domicile, or (in a business case) a principal place of business, or in which the debtor's principal assets have been located for the 180 days before filing or for a longer part of those 180 days than in any other district. 28 U.S.C. § 1408. This provision applies also to a corporation or partnership. A corporation or partnership also can file in any district in which its "affiliate," as defined by section 101 the Bankruptcy Code, general partner, or partnership has a bankruptcy case pending. Petitioners should check the appropriate box, to indicate that a proper venue was chosen for the case.

Pending Bankruptcy Case Filed By Or Against Any Partner Or Affiliate Of This Debtor

Pending cases are those that are open, *i.e.*, not dismissed or closed. To the extent known to the petitioners, the following information should be listed regarding any and all pending bankruptcy cases filed by or against any partner or affiliate of this debtor. Petitioners should list the name of the debtor, case number, date the petition was filed against the partner or affiliate, relationship to the debtor, the district where the case is pending, and the judge that was assigned the case in the appropriate spaces. The name of the "district," which is the judicial district in which the pending bankruptcy case was filed, should be placed in the space provided, for example, "District of Maryland." Petitioners are asked to report the information for all pending bankruptcy cases and attach additional sheets, if necessary. The information about pending, related bankruptcy cases signals the clerk to assign the case to the judge to whom any related case has been assigned.

Allegations

Petitioners should check the appropriate boxes in the following categories:

1. Petitioners should be sure that the requirements of 11 U.S.C. § 303(b) are met regarding the number of creditors, the type of claims, and the amount of claims. The requirements of section 303 are discussed above under "Applicable Law and Rules."
2. The debtor must be a person, as defined in section 101 of the Bankruptcy Code, against whom an order for relief may be entered under the Bankruptcy Code. A "person" under section 101 of the Bankruptcy Code includes an individual, partnership, and corporation, but not a governmental unit.
3.
 - a. The petitioner should be sure that the requirements of 11 U.S.C. § 303(h) are met. At least one of the two boxes (3.a. or b.) must be applicable. If the debtor is not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute, petitioners should check box 3.a.
 - b. 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, petitioners should check box b.

Transfer Of Claim

Bankruptcy Rule 1003(a) governs the treatment of transferred claims held by petitioning creditors in an involuntary case. Petitioners should check the box if there has been a transfer of any claim against the debtor by or to any petitioner. All documents evidencing the transfer and any statements that are required under Bankruptcy Rule 1003(a) should be attached. Any entity that has transferred or acquired a claim for the purpose of commencing an involuntary case is not qualified to be a petitioner. Id. If the transfer was not made for the purpose of commencing an involuntary case, a signed statement to that effect must be attached to the petition, along with a statement disclosing the consideration given for the claim and the terms of the transfer. Id.

Request For Relief

This section states that the petitioner requests that an order for relief be entered against the debtor under the chapter of the Bankruptcy Code specified in the petition. This section requires a petitioner to represent, by signing the petition in the space provided, that the information provided in the petition is true and correct according to the best of each petitioner's knowledge, information, and belief.

Signatures

It is very important that the petitioner(s) or representative(s) of the petitioner(s) sign the involuntary petition in all the appropriate places. Bankruptcy Rule 1008 requires all petitions to be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746. The unsworn declaration on page two of the petition conforms with section 1746, which permits the declaration to be made in the language provided with the same force and effect as a sworn statement. In other words, by signing the petition, the petitioner(s) is declaring, under penalty of perjury, that the information provided in the petition is true and correct according to the best of each petitioner's knowledge, information, and belief.

If a petitioning creditor is a corporation or partnership, the individual authorized by the entity (corporation, partnership, etc.) to file the petition should sign the petition and include the individual's title, name of the petitioning creditor, and the date on the lines provided. The name and mailing address of the individual signing in a representative capacity should be placed on the lines provided. By signing the petition, the authorized individual is representing that the information provided in the petition is true and correct according to the best of the individual's knowledge, information, and belief, and that the individual has been authorized to file the petition on behalf of the named petitioner.

Signature of Attorney/Name and Address of Law Firm or Attorney

The attorney representing the petitioner(s) must sign and date the petition and print the name, address, and telephone number of the attorney or law firm on the lines provided.

Petitioning Creditors

Petitioning creditors are asked to print their names and addresses in the spaces provided. The nature of each claim and the amount of each claim should also be included. The total amount of petitioners' claims should be placed in the box provided. If there are more than three petitioners, additional sheets with the declaration under penalty of perjury, petitioners' signatures, attorneys' signatures, names, addresses, and telephone numbers of attorneys, and petitioning creditors' information, using the same format as the official form, should be attached to the petition. Photocopies of Official Form 5 may be used for this purpose.

Filing Fee

Every case requires the payment of a filing fee. Filing fees for all chapters of the Bankruptcy Code are prescribed in section 1930 of title 28, United States Code (28 U.S.C. § 1930). As of January 1, 2000, a petitioner filing an involuntary case under chapter 7 must pay a filing fee of \$155, plus a \$30 administrative fee and a \$15 trustee surcharge, which is a total of \$200. A petitioner filing an involuntary case under chapter 11 must pay a filing fee of \$800 plus an administrative fee of \$30.