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*U.S. Bankruptcy Court (D. P.R.); San Juan*

**Hon. Edward A. Godoy**

*U.S. Bankruptcy Court (D. P.R.); Ponce*

**Hon. Enrique S. Lamoutte**

*U.S. Bankruptcy Court (D. P.R.); San Juan*

**Hon. Brian K. Tester**

*U.S. Bankruptcy Court (D. P.R.); San Juan*

# AMERICAN BANKRUPTCY INSTITUTE

## SUMMONS, DEFAULT AND DEFAULT JUDGMENT IN ADVERSARY PROCEEDINGS

By Mildred Cabán

### SUMMONS

Service of process is the formal delivery of the summons and a copy of the complaint. It is the official method by which a plaintiff notifies a defendant that is being sued in a civil action. Service of process accomplishes the following objectives: (1) to give the court jurisdiction over the defendant, (2) to comply with due-process requirements by affording the defendant notice of the lawsuit and (3) to provide the defendant the opportunity to defend against the lawsuit.<sup>1</sup> Without proper service, judgment cannot be entered against a defendant.<sup>2</sup>

With respect to adversary proceedings, Rule 7004 of the Federal Rules of Bankruptcy Procedure adopts a significant portion of the procedural requirements for service of process found in Rule 4 of the Federal Rules of Civil Procedure.<sup>3</sup> Bankruptcy Rule 7004 contains substantial modifications. For example, service of process may be accomplished by first class mail, Fed. R. Bankr. P. 7004(b) and by nationwide service of process, Fed. R. Bankr. P. 7004(d).

#### Form and Issuance of Summons

The summons must strictly comply with Fed. R. Civ. P. 4(a), as incorporated by Fed. R. Bankr. P. 7004(a). A new summons forms for adversary proceedings with instructions was revised on December 1, 2015.<sup>4</sup>

To achieve formal service of process, the plaintiff must obtain a summons from the clerk.<sup>5</sup> The form may be obtained from the clerk or available through various websites.<sup>6</sup> The “plaintiff may present a summons to the clerk for signature and seal. If the summons is

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<sup>1</sup> *Henderson v. United States*, 517 U.S. 654, 672 (1996); *Omni Capital Int’l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987); *Mann v. Castiel*, 681 F.3d 368, 372 (D.C. Cir. 2012); *Precision Etchings & Findings, Inc. v. LGP Gem Ltd.*, 953 F.2d 21, 23 (1st Cir. 1992); *Jardines Bacata, Ltd. v. Diaz-Marquez*, 878F.2d 1555, 1559 (1st Cir. 1989);

<sup>2</sup> *Omni*, 484 U.S. at 104; *Adams v. AlliedSignal Gen. Aviation Avionics*, 74 F.3d 882, 885 (8th Cir. 1996); *Swain v. Moltan Co.*, 73 F.3d 711, 719 (7th Cir. 1996).

<sup>3</sup> The Federal Rules of Bankruptcy Procedure may be referred to as “Bankruptcy Rule” and the Federal Rules of Civil Procedure may be referred to as “Civil Rule.”

<sup>4</sup> Form B2500A (Form 2500A)(12/15).

<sup>5</sup> We will not be addressing the waiver of service of process that is a substitute for formal service of process. Fed. R. Civ. P. 4(d), incorporated by Fed. R. Bankr. P. 7004(a).

<sup>6</sup> These are helpful websites: [www.uscourts.gov/forms/bankruptcy-forms/summons-adversary-proceeding](http://www.uscourts.gov/forms/bankruptcy-forms/summons-adversary-proceeding) and [www.prb.uscourts.gov/?q=forms](http://www.prb.uscourts.gov/?q=forms).

properly completed, the clerk must sign, seal and issue it to the plaintiff for service on the defendant.”<sup>7</sup>

However, both the Civil Rules and Bankruptcy Rules provide for issuance of a summons electronically. In 2013, the Clerk of Court for the U.S. Bankruptcy Court for the District of Puerto Rico announced that CM/ECF users would be allowed to file adversary proceedings via CM/ECF and that the electronic issuance of the summons would be available. Once the adversary complaint is filed, the summons is issued within the next working day bearing the clerk’s electronic signature and the court seal.<sup>8</sup> The summons issued per defendant will appear in a separate docket entry in the case. The plaintiff is then required to download the summons issued and comply with service requirements under Fed. R. Bankr. P. 7004.<sup>9</sup>

If there are multiple defendants, the plaintiff can either obtain a summons for each defendant or serve an original summons on one defendant and copies of the original on the other defendants in the case.<sup>10</sup>

The summons must contain the time period to appear and defend against the allegations of the complaint.<sup>11</sup> The summons must warn that failure to appear and defend will result in a default judgment for the relief sought in the complaint.<sup>12</sup>

#### Time Limit for Service of Summons

Once the clerk issues summons, the plaintiff is responsible for delivering both the summons and the complaint on the defendant(s).<sup>13</sup> Personal service “may be made by any person at least 18 years of age who is not a party.”<sup>14</sup>

Civil Rule 4(m), which is incorporated by Bankruptcy Rule 7004(a), was recently amended to limit the date of service from 120 days to 90 days from the filing of the complaint.<sup>15</sup> “If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own, after notice to the plaintiff—must dismiss the action without prejudice

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<sup>7</sup> Fed. R. Civ. P. 4(b); Fed. R. Bankr. P. 7004(b); Herrick v. Collins, 914 F.2d 228, 230 (11th Cir. 1990).

<sup>8</sup> Fed. R. Bankr. P. 7004(a)(2).

<sup>9</sup> Notice to the Bar and the Public dated May 15, 2013. For additional information regarding the steps to successfully file an adversary proceeding, the Clerk has prepared a captive video, [http://www.prb.uscourts.gov/traning/adv\\_pro/adv\\_pro.htm](http://www.prb.uscourts.gov/traning/adv_pro/adv_pro.htm). Please remember to select all joint debtors or defendant(s) as a party when entering the information requested for preparation of the electronic summons.

<sup>10</sup> Fed. R. Civ. P. 4(b); Fed. R. Bankr. P. 7004(b). See also Bush v. Rauch, 38 F.3d 842, 849 (6th Cir. 1994)(each defendant must be served with process).

<sup>11</sup> Fed. R. Civ. P. 4(a)(1)(D).

<sup>12</sup> Fed. R. Civ. P. 4(a)(1)(E); Fed. R. Bankr. P. 7004(a).

<sup>13</sup> Fed. R. Civ. P. 4(c)(1); Fed. R. Bankr. P. 7004(a).

<sup>14</sup> Fed. R. Bankr. P. 7004(a)(1).

<sup>15</sup> Civil Rule 4(m) does not apply to service in a foreign country.

against that defendant or order that service be made within a specified time.”<sup>16</sup> However, if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. If no good cause is shown, the court has the discretion to dismiss without prejudice or extend the time period.<sup>17</sup>

Bankruptcy Rule 7004(e) indicates that if the defendant is located within the United States, the summons must be served within seven (7) days after the summons is issued.<sup>18</sup> “If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 7 days after the summons is issued. If a summons is not timely delivered or mailed, another summons will be issued for service.”<sup>19</sup> This rule focuses on the date the summons is issued.

Thus, it is important to remember that the plaintiff has seven (7) days after the summons is issued to serve the summons and the complaint and the outer limit to complete proper service is 90 days from the filing of the complaint.

#### Service by First Class Mail

The Civil Rules provide for a number of methods of service upon different types of defendants such as personal service or service pursuant to state law.<sup>20</sup> In addition to these methods of service, Bankruptcy Rule 7004(b) permits nationwide service of process where service may be made by first-class postage prepaid mail for service, as follows:

- (1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual’s dwelling house or usual place of adobe or to the place where the individual regularly conducts a business or profession.
- (2) ...
- (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to

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<sup>16</sup> Fed. R. Civ. P. 4(m); Fed. R. Bankr. P. 7004(a).

<sup>17</sup> 10 Collier on Bankruptcy ¶ 7004.02[13] (Alan N. Resnick & Henry J. Sommer eds.16<sup>th</sup> ed.)[hereinafter “10 Collier on Bankruptcy”].

<sup>18</sup> Bankruptcy Rule 7004(e) applies to service made under Rule 4(e), (g), (h)(1), (i) or (j)(2).

<sup>19</sup> Fed. R. Bankr. P. 7004(e)( does not apply to service in a foreign country).

<sup>20</sup> This paper will not address the myriad of manners to serve an individual, corporation, partnership, associations and the United States, its agencies, corporations, officers or employees or service on foreign, state and local governments. Fed. R. Civ. P. 4(e), (h), (i), (j); Fed. R. Bankr. P. 7004(a). Nor will it discuss service by publication. Fed. R. Bankr. P. 7004(c).

receive service and the statute so requires, by also mailing a copy to the defendant.

- (4) Upon the United States, by mailing a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mailing a copy of the summons and complaint to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to that officer or agency....
- (5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph 4 of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule.... If the United States is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule.
- (6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.
- (7) ...
- (8) ...
- (9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing.
- (10) Upon the United States trustee, when the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, by mailing a copy of the summons and complaint to an office of the United States trustee or another place

## AMERICAN BANKRUPTCY INSTITUTE

designated by the United States trustee in the district where the case under the Code is pending.

Fed. R. Bankr. P. 7004(b).

If the defendant is a debtor and is represented by an attorney, service must be upon the debtor as well as upon debtor's attorney by any means authorized under Civil Rule 5(b),<sup>21</sup> including personal delivery.<sup>22</sup> The address of the debtor as reflected in the petition or at such other address the debtor may designate in a filed writing is sufficient for service of process.<sup>23</sup> This provision is designed to simplify service and avoid problems of service. Even if the debtor moves or changes attorney, the petition address will suffice unless the court was notified of a different address.<sup>24</sup> Failure to serve both debtor and debtor's attorney will render service of process defective.

When serving a corporation, it is important to address service to the proper officer or agent of the defendant.

Failure to address service to the attention of a requisite officer or agent risks having a court determine that service was ineffective and thus vacate any default judgment entered as a result.<sup>25</sup> It is not sufficient to serve just any corporate employee or agent; service must be made on an officer, managing or general agent or agent specifically designated for such purpose by appointment or by law.<sup>26</sup> However, the designation by a creditor in a proof of claim of an attorney to whom notices should be sent, together with participation by that attorney in the underlying bankruptcy case, has been held to implicitly authorize service on that

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<sup>21</sup> Civil Rule 5(b) provides that "[i]f a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party."

<sup>22</sup> Fed. R. Bankr. P. 7004(g).

<sup>23</sup> Fed. R. Bankr. P. 7004(b)(9).

<sup>24</sup> Rodgers v. Preferred Carolinas Realty, Inc. (In re Rodgers), 2011 Bankr. LEXIS 724 (Bankr. E.D.N.C. Mar. 1, 2011); Vergos v. Marinelli (In re Martelli), 2004 Bankr. LEXIS 738 (Bankr. E.D. Ky Mar. 17, 2004)(debtor relocation); In re Shapiro, 265 B.R. 373 (Bankr. E.D.N.Y. 2001)(service at new addresses of debtor and new counsel sufficient where debtor failed to report court of changes).

<sup>25</sup> Sun Healthcare Group, Inc. v. Mead Johnson Nutritional (In re Sun Healthcare Group, Inc.), 2004 Bankr. LEXIS 572, at 18-19 (Bankr. D. Del. Apr. 4, 2004).

<sup>26</sup> See In re Villar, 317 B.R. 88 (B.A.P. 9<sup>th</sup> Cir. 2004); In re Association of Volleyball Professionals, 256 B.R. 313, 317 (Bankr. C.D. Cal. 2000)(no person specified); In re Boykin, 246 B.R. 825, 827-28 (Bankr. E.D. Va. 2000)(service addressed to legal assistant specialist insufficient).

attorney.<sup>27</sup>

10 Collier on Bankruptcy ¶ 7004.03.

Service on an Insured Depository Institution

Bankruptcy Rule 7004(h) requires that “[s]ervice on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution....”<sup>28</sup> However, certain exceptions exist such as if “the institution has appeared by its attorney, in which case the attorney shall be served by first-class mail.”<sup>29</sup> Upon request, the court may order service by first class mail.<sup>30</sup> The institution may waive “in writing its entitlement to service by certified mail by designating an officer to receive service.”<sup>31</sup> There is split of authority over whether officers or agents of depository institutions must be expressly named.<sup>32</sup>

Proof of Service

Once a defendant is served with process, the plaintiff must provide proof of service to the court by submitting the server’s affidavit, pursuant to Fed. R. Civ. P. 4(l) or by filling out the back of the summons that provides a certificate of service that is under oath. Proof of actual receipt by the defendant that is served by mail is not required.<sup>33</sup>

**ENTRY OF DEFAULT**

After a defendant has been properly served, the time period to file a motion or answer to the adversary complaint is 30 days after the date of issuance of the summons, except that the United States and its offices and agencies shall file a motion or answer to the complaint within 35 days, pursuant to Fed. R. Bankr. P. 7012(a). In bankruptcy, the time period begins to run after the issuance of the summons. For example, if service is effectuated on the 7<sup>th</sup> day after issuance of the summons, a defendant could potentially only have 16 days to serve an answer under the Bankruptcy Rule 7004(e). In a civil action before the district court, the time

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<sup>27</sup> In re Wilkinson, 457 B.R. 530, 548 (Bankr. W.D. Tex. 2011); In re Ms. Interpret, 222 B.R. 409, 416 (Bankr. S.D.N.Y. 1998).

<sup>28</sup> The term “depository institution” means any bank or savings associations and the term “insured depository institution” means any bank or savings association the deposits of which are insured by the FDIC. 12 U.S.C.A. § 1813.

<sup>29</sup> Fed. R. Bankr. P. 7004(h)(1).

<sup>30</sup> Fed. R. Bankr. P. 7004(h)(2).

<sup>31</sup> Fed. R. Bankr. P. 7004(h)(3).

<sup>32</sup> In re Franchi, 451 B.R. 604 (Bankr. S.D. 2011)(extending the jurisdictional rule of Rule 7004(b)(3) requiring officers or agents to be named unless three enumerated exceptions apply to service under Rule 7004(h))(citing Carlo v. Orion Omniservices Co. (In re Carlo), 392 B.R. 920, 921 (Bankr. S.D. Fla. 2008)).

<sup>33</sup> In re Vincze, 230 F.3d 297 (7<sup>th</sup> Cir. 2000).

period to answer the complaint is 21 days after service of the summons and complaint, pursuant to Fed. R. Civ. P. 12(a)(1)(A)(i).<sup>34</sup> Upon the defendant's failure to answer or defend against the action, the court or clerk may enter default and may ultimately result in a default judgment without conducting a trial on liability. An appearance in the action will not spare a party from default for failure to file a defensive pleading.<sup>35</sup>

Securing a default judgment is a two-step process involving the entry of default followed by the default judgment.<sup>36</sup> A party may either move for entry of default separately from the default judgment or ask for them in the same motion.

Civil Rule 55 applies in adversary proceedings as incorporated by Bankruptcy Rule 7055. Entry of default is typically entered by the clerk. Fed. R. Civ. P. 55(a). On the plaintiff's request, the clerk is authorized to enter default judgment if the plaintiff's claim is for a sum certain or a sum that can be made certain by computation supported with an affidavit showing the amount due and provides that the defendant is neither a minor nor an incompetent.<sup>37</sup> In all other cases, the court will make the determination on the request for default judgment. Fed. R. Civ. P. 55(b)(2).

The clerk may enter default without notice or hearing provided that the party has "failed to plead or otherwise defend" such as by not answering the complaint or raising certain defenses by motion, within the time period provided. This failure to plead or defend must be shown by affidavit or otherwise.<sup>38</sup>

A request for entry of default must show the following:

- 1) The complaint was filed.
- 2) The summons and complaint were properly served on the defendant on a certain date.<sup>39</sup>
- 3) The defendant did not file a pleading or otherwise defend.<sup>40</sup>

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<sup>34</sup> A different time period applies if service was waived. Fed. R. Civ. P. 12(a)(1)(A)(ii).

<sup>35</sup> Martinez v. Picker Int'l, 635 F.Supp. 658, 659 (D.P.R. 1986).

<sup>36</sup> United States v. \$23,000 in U.S. Currency, 356 F.3d 157, 163 (1st Cir. 2004); Johnson v. Dayton Elec. Mfg., 140 F.3d 781 (8th Cir. 1998)(entry of a default must precede grant of default judgment).

<sup>37</sup> Fed. R. Civ. P. 55(b)(1). Generally, any party seeking relief may request for entry of default, i.e., a third party plaintiff. For simplicity's sake, I will refer to the moving party as the plaintiff and the defaulting party as the defendant because the party seeking default is normally the plaintiff and the default party is generally the defendant.

<sup>38</sup> Fed. R. Civ. P. 55(a).

<sup>39</sup> The process server's affidavit under Civil Rule 4(l) is *prima facie* proof of service. O'Brien v. R.J. O'Brien & Assocs., 998 F.2d 1394, 1398 (7th Cir. 1993).

<sup>40</sup> There is a split of authority at the circuit level on what circumstances constitute a failure to "otherwise defend" under Fed. R. Civ. P. 55(a). Many interpret the phrase broadly and others more narrowly. Howworth v. Blinder,

- 4) The time allowed to file a response expired on a certain date.

O'Connor's Federal Rules \* Civil Trial 638-639.

The request should be accompanied by an affidavit or otherwise demonstrate that the defendant has defaulted. The military affidavit stating whether the default party is in the military service is not required to be filed with a request for entry of default. However, it is required when moving for default judgment. The clerk will be unable to enter default judgment without the military affidavit.<sup>41</sup>

The request should be accompanied by supporting documents that prove the defendant is in default. Even though the return of summons is docketed, the plaintiff should attach copies of those documents to the request for entry of default.

Once the default is entered on the docket, the clerk is not required to give notice to the defaulting party.<sup>42</sup>

The consequence of default is that the allegations of the complaint (except damages) are admitted and cannot be contested. The entry of default blocks the defendant's right to appear in the case with respect to liability issues.<sup>43</sup> If there is a hearing on damages, a defendant is entitled to contest and participate in the hearing.<sup>44</sup> Generally, the court is required to deem as true the well pleaded averments of a complaint but is not required to agree that the allegations of the complaint constitute a valid claim.<sup>45</sup>

A defendant cannot appeal the entry of default, whether by the clerk or by the court because it is not an adjudication of the complaint but must make a motion to set aside the default.<sup>46</sup>

## DEFAULT JUDGMENT

Once the entry of default is entered, on plaintiff's request, the clerk or the court may enter default judgment.<sup>47</sup> The request must be in writing unless made during a hearing or trial.<sup>48</sup>

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Robinson & Co., 980 F.2d 912, 917-18 (3<sup>rd</sup> Cir. 1992)(broad view); Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., 803 F.2d 1130, 1134 (11<sup>th</sup> Cir. 1986)(narrow view).

<sup>41</sup> 50 U.S.C. § 521(b)(1); P.R. LBR 7055-1.

<sup>42</sup> Fed. R. Civ. P. 55(a); Hawaii Carpenters' Trust Funds v. Stone, 794 F.2d 508, 512 (9th Cir. 1986).

<sup>43</sup> Greyhound Exhibitgroup, Inc. v. E.L.U.L. Rlty. Corp., 973 F.2d 155, 160 (2nd Cir. 1992).

<sup>44</sup> Bonilla v. Trebol Motors, 150 F.3d 77, 82 (1st Cir. 1998).

<sup>45</sup> Jasinski v. Monogalia Gen. Hosp. (In re Jasinski), 406 B.R. 653, 656 (Bankr. W.D. Pa. 2009).

<sup>46</sup> Akra Direct Mktg. Corp. v. Fingerhut Corp., 86 F.3d 852, 855 (8th Cir. 1996); Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 95 (2nd Cir. 1993); In re Fineberg, 170 B.R. 276 (E.D. PA 1994).

<sup>47</sup> Fed. R. Civ. P. 55(b)(1) & (2); Fed. R. Bankr. P. 7055.

## AMERICAN BANKRUPTCY INSTITUTE

The clerk may enter default judgment in the following circumstances: (1) when the defendant has failed to appear, (2) when the defendant is not a minor, incompetent person, a servicemen in the armed forces, the United States government, its officers or agencies<sup>49</sup> and (3) the claim is for a sum certain that can be ascertained from figures indicated in the documentary evidence or in detailed affidavits.<sup>50</sup>

Examples of “sum certain” claims are loans, unpaid certificates of deposit and ERISA claims. On the other hand, “tort claims or claims for unliquidated or punitive damages are not for a sum certain.... Amounts specified in pleadings or affidavits do not amount to certainty.”<sup>51</sup> For instance, the clerk can enter a default judgment if the claim includes the following

- 1) Liquidated damages.<sup>52</sup>
- 2) Attorney’s fees, provided the plaintiff is entitled to a specific amount based on contract or statute. If the plaintiff is entitled to “reasonable” fees then the amount is not certain and must be imposed by the court.<sup>53</sup>
- 3) Interest as long as it is a sum certain or can be ascertain by computation. However, prejudgment interest if pleaded in the complaint cannot be determined by the clerk because it falls within the court’s discretion.<sup>54</sup>
- 4) Cost.<sup>55</sup>

O’Connor’s, supra at 646.

To obtain a default judgment against an individual from the clerk, the request for default judgment must be accompanied by an affidavit pursuant to the Servicemembers Civil Relief Act of 1940 showing that the defendant is not currently in service.<sup>56</sup> The Local Rules of the U.S. Bankruptcy Court for the District of Puerto Rico require that at the time of the filing of the request for default judgment, the moving party must file an affidavit which states whether or not the defaulting party is in military service and states the necessary facts to support the affidavit.<sup>57</sup> If the plaintiff is unable to ascertain whether or not the defendant is in military service, or if the defendant is in fact serving in the military, the clerk cannot enter default

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<sup>48</sup> Fed. R. Civ. P. 7(b)(1)(A); Fed. R. Bankr. P. 7007.

<sup>49</sup> Alameda v. Secretary of Health, Educ. & Welfare, 622 F.2d 1044, 1048 (1st Cir. 1980).

<sup>50</sup> Fed. R. Civ. P. 55(b).

<sup>51</sup> 10 Collier on Bankruptcy ¶7055.03[1](citations omitted).

<sup>52</sup> Dundee Cement Co. v. Howard Pipe & Concrete Prods., 772 F.3d 1319, 1323 (7th Cir. 1983).

<sup>53</sup> Hunt v. Inter-Globe Energy, Inc., 770 F.2d 145, 148 (10th Cir. 1985).

<sup>54</sup> United States v. Rainbolt, 543 F.Supp. 580, 580 \* (E.D. Tenn. 1982); Design & Dev., Inc. v. Vibromatic Mfg., 58 F.R.D. 71, 74 (E.D. Pa. 1973).

<sup>55</sup> Fed. R. Civ. P. 55(b)(1).

<sup>56</sup> 50 U.S.C. Appx. § 521(b)(1).

<sup>57</sup> P.R. LBR 7055-1; 50 U.S.C. App. 521(b)(1).

judgment. The Servicemembers Civil Relief Act affords members of the armed forces with certain protections against default judgments in civil litigation.<sup>58</sup>

The request for default judgment addressed to the clerk must state the following:

- 1) Default was entered (or asks for entry of default along with judgment).
- 2) Defendant did not appear.
- 3) Claim is for a sum certain or can be computed.
- 4) Defendant is not a minor, an incompetent, a member of the military, the U.S. government, a federal officer or agency.

O'Connor's, supra at 645.

The request must be accompanied by an affidavit that verifies the attachments and the amount due, excluding costs. The Clerk computes the cost.

The request for default judgment should include copies of all documents proving sum certain or liquidated damages. For example to prove liquidated damages in an action regarding a promissory note then the plaintiff should attach a copy of the note. The attachments should be exhibits to the affidavit. Generally, the plaintiff is not required to give notice to the defendant of the request for default judgment. This is the practice in the Court of First Instance of the Commonwealth of Puerto Rico.<sup>59</sup> However, the Local Rules for the United States District Court for the District of Puerto Rico require that:

Any motion for a default judgment pursuant to Fed. R. Civ. P. 55(b) shall contain a statement that a copy of the motion has been mailed to the last known address of the party from whom such damages are sought. If the moving party knows, or reasonably should know, the identity of any attorney thought to represent the defaulted party, the motion shall also state that a copy has been mailed to that attorney.

P.R. LDR 55.

The court and not the clerk may enter default judgment if any one of the following conditions is satisfied:

- (1) The claim is not for a sum certain.
- (2) The defaulting party has made an appearance in the case.<sup>60</sup>

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<sup>58</sup> 50 U.S.C. § 521(b)(3).

<sup>59</sup> 32 L.P.R.A. App. VII, R. 45.2.

<sup>60</sup> Key Bank v. Tablecloth Textile Co., 74 F.3d 349, 353 n.6 (1st Cir. 1996)(listing actions sufficient to constitute an appearance in an action).

## AMERICAN BANKRUPTCY INSTITUTE

- (3) The defaulting party is a minor or incompetent unless represented by a guardian, conservator or other fiduciary that has appeared.
- (4) The defaulting party is the United States, an officer or agency thereof.
- (5) The defaulting party is an individual and an affidavit has not been filed proving that the individual is not currently in the military.

O'Connor's, supra at 645; 10 Collier on Bankruptcy ¶ 7055.03[2].

A motion for default judgment addressed to the court should state the following:

- 1) Default entered (or ask for default to be entered)
- 2) Defendant did or did not appear. Plaintiff should identify what actions, if any, defendant took to defend.
- 3) Amount of claim alleged in the complaint. If not for a sum certain then the plaintiff should request a hearing to determine damages.
- 4) Military Status
- 5) If the defendant is a minor or incompetent, plaintiff must show that the defendant is represented in the action by a general guardian, conservator or other fiduciary that appeared in the action.

O'Connor's, supra at 647-748.

Like a motion for default judgment addressed to the clerk, the default motion to the court should be accompanied by the affidavit of debt and in the case of an individual defendant a military affidavit as well as documents proving sum certain or liquidated damages.

If the plaintiff is unable to ascertain whether or not the defendant is in military service, it must be stated in the affidavit. If the court is unable to determine a defendant's military status from the presented affidavit, it may require the party to file a bond before entering any default judgment.<sup>61</sup>

A default judgment may be entered against the United States, its officers or its agencies if the plaintiff proves a claim or right to relief by evidence that satisfies the court.<sup>62</sup>

A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared.<sup>63</sup>

The bankruptcy court has wide discretion in entering default judgments.

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<sup>61</sup> P.R. LBR 7055-1.

<sup>62</sup> Fed. R. Civ. P. 55(d). See also Stewart v. Astrue, 552 F.3d 26, 28 (1st Cir. 2009)(disfavor against default judgment is especially strong if the defendant is the U.S. government).

<sup>63</sup> Fed. R. Civ. P. 55(b)(2).

In exercising its discretion, the court may consider a wide variety of factors. A technical failure to plead or otherwise defend or a *de minimis* default should be sufficient to warrant a default judgment. On the other hand, where the default stems from defendant's egregiously bad faith in his or her dealings with the court or opposing party, the court may properly use a default judgment against defendant as a sanction. Other factors which are often considered are the possibility of prejudice to the plaintiff; the merits of the plaintiff's substantive claim; the sufficiency of material facts; whether the default was due to excusable neglect; and the strong policy underlying the Federal Rules of Civil Procedure in favor of decisions on the merits. All other factors being even, a court will be less likely to enter a default judgment against a debtor or other fiduciary.

10 Collier on Bankruptcy ¶7055.03[2].

### Default Hearing

If a hearing is necessary to prove unliquidated damages, the truth of any statement contained in the motion or to make an investigation of any other matter then the plaintiff should request a hearing. Allegations asserting damages in the complaint are not deemed admitted with an entry of default. The court is to conduct hearings to determine the amount of damages or obtain evidence to validate any allegation or investigate any other matter.<sup>64</sup>

If a defaulting party has appeared personally or by a representative in the case, the party is entitled to at least seven (7) days' written notice of the hearing on the motion for entry of the judgment.

The amount of judgment cannot exceed the amount prayed for in the complaint.<sup>65</sup> A default judgment may be appealed or a defaulting party may move to set aside the judgment.<sup>66</sup>

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<sup>64</sup> Fed. R. Civ. P. 55(b)(2)(A)-(D).

<sup>65</sup> Fed. R. Civ. P. 54(c); Fed. R. Bankr. P. 7054(a).

<sup>66</sup> Fed. R. Civ. P. 55(c); \$23,000 in U.S. Currency, 356 F.3d at 164.

**American Bankruptcy Institute – 2016 Caribbean Insolvency Symposium**  
**RECENT CASE LAW ON PUERTO RICO HOMESTEAD ACT**  
**Honorable Edward A. Godoy**  
**United States Bankruptcy Court, District of Puerto Rico**

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The 2011 Homestead Right and Family Home Protection Act, Law 195 of September 13, 2011, as amended on September 15, 2012 by Law 257 (in Spanish titled “Ley del Derecho a la Protección del Hogar Principal y el Hogar Familiar”), P.R. Laws. Ann. tit. 31 §§ 1858 et seq., was enacted to protect the citizens of Puerto Rico from the execution of judgments against their primary residential properties, clarify the exceptions applicable to the homestead, and to establish the corresponding procedure to claim the homestead. The Act was amended on September 2012 to clarify that the homestead exemption is applicable in bankruptcy proceedings. The protection does not extend to mortgages, state and federal taxing authorities, eligible contractors, or other state and federal entities specified in the Act.

The 2011 Homestead Act repealed the Puerto Rico Homestead Act No. 87 of May 13, 1936, P.R. Laws. Ann. tit. 31 §§ 1851-1857, which had in turn repealed a prior homestead law of 1903. The 1936 Homestead Act first provided for a \$500.00 homestead protection, but was later amended to increase it to \$1,500.00 on February 11, 1955, and to \$15,000 on May 2, 2003. See, Rodríguez Ramos v. Pérez Santiago, 161 P.R. Dec. 637, 647 (2004) (discussing the history of the homestead statute in Puerto Rico). The 2011 Homestead Act establishes no monetary cap and protects the physical enjoyment of the residential property of the homesteader.

2014 and 2015 bankruptcy case law from the District of Puerto Rico on the homestead exemption addresses the right to the homestead exemption when there is a partial lease of the residential property and the right to the homestead exemption when more than one individual is claiming it, among others.

**I. PARTIAL LEASE OF THE RESIDENTIAL PROPERTY**

**In re Veguilla Navarro, 504 B.R. 316 dated January 28, 2014 - PRBC Case No. 13-03701**

The question before the court was whether or not partially renting the debtor's principal residence disqualified him from claiming the homestead exemption.

The debtor claimed a homestead exemption over his principal residence. The trustee filed an objection to the exemption given that the debtor had admitted in the 341 meeting to be renting part of the residential property. The trustee argued that Article 3 of the 2011 Homestead Act required that the residential property over which the homestead exemption is claimed must be occupied by “him/her or his/her family exclusively as a principal residence” and that the term “exclusively” limits “the possession, control or use by a single individual or group ... excluding others from participation.”

Article 3 of the 2011 Homestead Act provides the following:

Homestead Right.- Every individual or head of family residing in Puerto Rico shall be entitled to own and enjoy, under the homestead right concept, a parcel and the structure located thereon, or a residence under the regime established in the Condominiums Act, which belongs to him/her or which he/she lawfully owns, and occupied by him/her or his/her family exclusively as a principal residence. For the purposes of this Act, the term domicile shall be defined as provided in Article 11 of the Political Code of 1902, as amended.  
P.R. Laws. Ann. tit. 31 § 1858.

The debtor also claimed that Article 7 of the 2011 Homestead Act allowed him to rent his principal residence and still be entitled to the homestead protection.

Article 7 of the 2011 Homestead Act provides the following:

Homestead protection in case of leasing - As long as the protected homestead beneficiary is alive, the temporary lease of the home which, for work or study reasons, military or diplomatic services, or due to the illness of any member of his/her family up to the third degree of consanguinity or affinity that compels the individual or his/her family to temporarily relocate to another residence in or outside Puerto Rico, shall not terminate the estate of homestead, unless another property is acquired and such property becomes the beneficiary's principal residence in Puerto Rico or in another jurisdiction.  
P.R. Laws. Ann. tit. 31 § 1858d.

The court examined the provisions of Article 7 and reasoned that it applies to instances in which the homesteader is compelled to physically relocate to another residence for the reasons stated therein and does not address when a person partially rents his/her residence while he/she still resides in it. And, because Article 7 does not have a previous counterpart in the 1936 Homestead Act, the court reviewed Texas and Florida case law as the 2011 Homestead Act was based on the homestead acts of those two states.

The court found Florida case law (holding that a partially rented property cannot be totally exempted as homestead) more applicable to the 2011 Homestead Act, and that under Article 3 of the Act, the protection “only extends to the portion of the property used as the principal residence and cannot include any portion rented to and occupied by third parties and/or used for commercial purposes.” *In re Navarro*, 504 B.R. 316, 321 (Bankr. D.P.R. 2014).

Thus, the court partially sustained the objection filed by the chapter 13 trustee held that the debtor cannot claim a full homestead exemption when the residential property is partially leased. The court ordered the debtor to amend his Schedule C accordingly.

**In re Otero Nazario, 533 B.R. 1 dated July 15, 2015 - PRBC Case no. 13-05351**

The question before the court was whether the lease of the lower level of a two-story residence disqualified a bankruptcy debtor from claiming the homestead exemption under Puerto Rico law. The chapter 13 trustee requested the court to deny the exemption, or in the alternative, that the protection be apportioned to the area of the residence occupied only by the debtor, as in In re Navarro—an equitable outcome for both the debtor and his creditors.

The court interpreted the provisions of Article 3 of the 2011 Homestead Act, specifically its occupancy requirement. The court disagreed with the trustee’s argument that a reading of the adverb “exclusively” modified “occupy,” thereby restricting the use that may be given to a claimed residential property in order to qualify for the homestead grant. The court found that upon a plain reading of the statute, the adverb “exclusively” modifies “as a principal residence” and not “occupied”. In re Nazario, 533 B.R. 1, 5 (Bankr. D.P.R. 2015). Based on the fact that Article 3 provides for the homesteader’s “right to own and enjoy,” the court held that:

Section 3 explicitly preserves for every homesteader residing in Puerto Rico the right to own and enjoy a principal residential property under the homestead grant. Intrinsic in the rights and faculties of ownership are the use, enjoyment and alienation of property. The exercise of these rights and faculties, such as homesteader's lease of property and the enjoyment of rents perceived from said lease, do not waive the homestead grant as long as the homesteader occupies the protected property.

Id. at 8.

The court also rejected the trustee’s argument that Article 7 of the Act governs all instances of leasing. Article 7 allows a homesteader to lease the residential property, in its entirety, while residing temporarily outside of Puerto Rico. But under Article 3, “[t]he enjoyment of the property involves the faculties of an owner to lease and receive rents from the lease of property.” Id.

Finally, the court also acknowledged that the statement of purpose of the 2011 Homestead Act makes reference to the homestead acts from Texas and Florida. But, unlike those two states, the legislature in Puerto Rico decided not to limit or restrict the scope or size of what is considered a homestead. The court reasoned that it was the legislature’s intention that, once the exemption has been properly claimed, to allow homesteaders to enjoy an indivisible exemption over the property.

Thus, the court denied the objection filed by the chapter 13 trustee to the homestead exemption claimed by the debtor and held that the debtor was entitled to claim an indivisible homestead exemption.

Note: In re Nazario was appealed on July 29, 2015 by the chapter 13 trustee to the US District Court of Puerto Rico. Civil case no.15-2035

An order was issued by the District Court on August 4, 2015 [at docket number 5] granting the trustee’s emergency motion and staying the confirmation order pending the resolution of the merits of the appeals: “The issue concerning the word “exclusively” and

whether it modifies the word “occupied” or the phrase “as a principal residence” in section 3 of the Puerto Rico Homestead Act, Law 195 of 2011, goes to the merits of the Bankruptcy Appeal which the Court will resolve upon formal briefing by the parties.”

**II. MORE THAN ONE HOMESTEADER CLAIMING THE PROTECTION.**

**In re Díaz Collazo, 524 B.R. 431 dated January 8, 2015 - PRBC Case No. 14-04827**

The debtor and his non-filing spouse claimed the homestead exemption over their residential property. The chapter 13 trustee filed an objection to the exemption alleging that only one individual was entitled to claim the homestead right under the 2011 Homestead Act.

The court denied the objection to exemption filed by the trustee and allowed the debtor to claim the full homestead exemption in bankruptcy on behalf of the conjugal partnership between by him and his wife. In doing so, the court explained that under Puerto Rico law, the debtor's principal residence did not belong to him, but to the conjugal partnership. And under section 541(a)(2) of the Bankruptcy Code, the debtor's filing of the petition passed to the bankruptcy estate conjugal/community property subject to equal or joint management and control by the spouses:

In other words, “[t]he filing of a bankruptcy petition by a spouse in a community property state [like Puerto Rico] results in an estate encompassing all of the noncommunity property of the debtor and all of the community property of the debtor and the debtor's spouse over which the debtor has sole, equal or joint management and control.” 1-2 Collier Family Law and the Bankruptcy Code ¶2.02 (original italics). Hence, “even though only one of the spouses filed this [bankruptcy] case, all of their community property becomes property of the estate”. *In re Perez*, 302 B.R. 661, 662 (Bankr. D. Az. 2003).

In re Diaz Collazo, 524 B.R. 431, 437 (Bankr. D.P.R. 2015)

**In re Martínez Colón, 525 B.R. 1 dated January 12, 2015 - PRBC Case No. 14-05135**

The debtors filed a joint chapter 13 bankruptcy petition and claimed the homestead exemption over their residential property. The trustee argued that only one individual was allowed to claim the homestead right. The question before the court was whether more than one co-debtor could claim the homestead right under Puerto Rico law. The court denied the objection to exemption filed by the trustee.

The court cited to the Puerto Rico Supreme Court in Rivera Garcia v. Registradora de la Propiedad 189 P.R. Dec. 628 (2013) which affirmed the Property Registrar's refusal to record a homestead deed signed only by a widow for a property owned by her and the heirs of her deceased husband, and required under Article 9 of the 2011 Homestead Act that all the titleholders to a property appear in the notarial deed where the right to homestead is claimed.

Harmonizing the provisions of Articles 3 and 9, the court held that “the owner or owners of a real estate property may claim a homestead exemption as long as it constitutes his/her/their principal residence, and therefore, each co-owner is entitled to claim exemptions under 11 U.S.C. § 522(m).” *In re Martínez Colón*, 525 B.R. 1, 4 (Bankr. D.P.R. 2015).

**III. MISCELLANEOUS CASES**

**In re: Caldero Padilla 2014 Bankr. LEXIS 136 dated January 13, 2014 - PRB Case No. 12-09391**

The chapter 7 trustee argued that the 2011 Homestead Act requires the homestead right to be properly recorded in the books of the Property Registry at the time of the bankruptcy filing. The court found that the homestead protection was enforceable within the bankruptcy proceeding because the debtors executed the deed and presented it for recording prior to the filing of the bankruptcy case.

**In re Naveira Melendez, 2014 Bankr. LEXIS 3971 dated September 16, 2014 - PRBC Case No. 10-05297**

The court granted the chapter 7 trustee’s objection to the homestead exemption because it held that the homestead law in effect at the date of the filing of the bankruptcy petition, not the date of conversion to chapter 7, controls the exemptions available to the debtor.

**In re: Caraballo Vélez, 2015 Bankr. LEXIS 2330 dated July 15, 2015 - PRBC Case No. 14-07269**

The trustee filed an objection to the debtor’s homestead exemption because the debtor did not reside in the property and misrepresented to the contrary in the homestead deed, rendering it invalid for the purpose of claiming the exemption. The court concluded that the validity of the deed was a question of Puerto Rico law, that the 2011 Homestead Act did not require the debtor to reside in the property, and thus, the misrepresentation did not render the deed invalid for purposes of claiming the homestead.

**In re: Sosa Santiago, 2015 Bankr. LEXIS 2354 dated July 17, 2015 - PRB Case No. 14-08430**

The debtor filed a section 522(f) motion to avoid Oriental Bank’s judicial lien on her residence. Bankruptcy Rule 4003(d) allowed Oriental to challenge the homestead exemption in response to a motion under section 522(f) even though the time to object to the exemption otherwise expired.

Article 17 of the 2011 Homestead Act provides that the Act “shall apply prospectively.” P.R. Laws. Ann. tit. 31 § 1858. Oriental argued that under Article 17, the debtor was not entitled to the homestead exemption because its lien was recorded before the enactment of the Act.

But, the court found that the Bankruptcy Code “preempts any state limitations to lien avoidance relief, even if the impaired exemption is based on state law.” 2015 Bankr. LEXIS 2354 at \*5 (citing *In re Weinstein*, 164 F.3d 677, 681-82 (1st Cir. 1999)). And, it upheld the exemption.

**PUERTO RICO JUDGES PANEL  
CONSUMER TRACK**

**Enrique S. Lamoutte**  
U. S. Bankruptcy Judge  
District of Puerto Rico

**CHAPTER 13 ATTORNEYS' FEES**

**Introduction**

The views and opinions expressed on this topic are my own and do not necessarily express the ones held by other judges in this district.

Uniformity in consumer cases, and especially in chapter 13 cases, promotes cost efficiency. Individual consideration and evaluation of an application for fees in a chapter 13 case district such as Puerto Rico is, in my opinion, an inefficient use of court resources. In addition, delay in the adjudication of a fee application adversely affects the moving attorney as payment, as well as confirmation in some cases, because disbursement by the chapter 13 trustee may not commence until the application is approved by the court. This is the main reason why most jurisdictions, including Puerto Rico, adopt local rules or general orders establishing what may be labeled as presumptive, routine, flat fee, or no look fees. In some districts the local culture has yielded a similar practice. The approved fees do not require a detailed application under the loadstar method, notice to all creditors or a hearing.

**Background**

I have always been a firm believer of the principle that uniformity of procedures promote the expedient resolution of chapter 13 cases.

On September 26, 1997, I entered Administrative Order 97-03. The same included a maximum attorney's fee that may be charged without filing an application for compensation; the responsibilities that the attorney must discharge for the fee; and the form and content of an application for an award of additional attorney's fees and expenses in a chapter 13 case.

On April 25, 2001, Administrative Order number 01-2001 was entered. The same superseded Administrative Order 97-03. The opening paragraph states that "[t]he procedures and requirements in the order are influenced by Ponoroff's bankruptcy values, that is, "fairness, equality, simplicity, uniformity, efficiency, and a commitment to accommodating the differing interests of diverse participants in the [bankruptcy] system." Ponoroff, Lawrence; "The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons From the Civil Law and Realist Traditions," 74 Am. Bankr. L.J. 173, 177 (2000).

"Clarity and transparency are aspirational goals, predictability for the practicing bar is a more tangible objective."

In the subheading "Bankruptcy Ethics and Attorney's Fees" the court stated that "[t]he issue of fees generates inherent tension between the lawyer's interests and those of the client. Braucher, Jean; 'Counseling Consumer Debtors to Make Their Owned Informed Choices - A Question of Professional Responsibility.' 5 Am. Bankr. L. Rev. 165 (Spring, 1997)." The court also referenced the local rules of the U. S. District Court for the District of Puerto Rico adopting the ABA Model Rules of Professional Conduct, to conclude that "[t]he local rule is an embodiment of the Court's inherent responsibility to enforce the ethical responsibilities of attorneys appearing before it. Enforcement of the canons of ethics is necessary to preserve the decorum of the Court and the respectability of the legal profession. Ex parte Burr, 22 U.S. 529, 530 (1824)."

In a subheading captioned "Court's Expectations" the following was stated: ". . . the Court reaffirms its holding in In re Lopez Rodriguez, 76 B.R. 252 (Bankr. D. P. R. 1987), on its basic expectations from attorneys representing debtors in Chapter 13 cases and who request as attorney's fees the maximum fee allowed without filing an application for compensation under the 'loadstar' analysis. These are:

Of particular interest to this court are the generally accepted factors of quality of representation and results obtained. A Chapter 13 case that reaches the confirmation hearing with all reasonably foreseen problems already solved, or, at least, with the appropriate legal and/or administrative action underway is prima facie evidence that the attorney provided the expected quality of representation and obtained the results relied upon by the debtor when he/she hired the attorney. Those cases that continue to the confirmation hearing with the same problems indicated by the Chapter 13 trustee at the 341 meeting hearing or by an objection to confirmation of the Chapter 13 plan denote a quality of representation that warrants the adjustment 'down' of the agreed rate."

The order includes provisions regarding the attorney's continuing duty of representation, the maximum fee that may be allowed without the need of filing a detailed application for compensation under the "loadstar" analysis, the services required to be performed, and the form and content of an application for award of additional attorney's fees and expenses in a chapter 13 case.

In 2001 the court entered a General Order (01-01), adopting the same requirements, but increasing the maximum fee for non business cases to \$1,500.00.

On February 26, 2004, Administrative Order 2004-2 was entered superseding AO 2001-01. The provisions regarding bankruptcy ethics, court expectations, attorney's continuing duty of representation, maximum fee, and responsibilities inherent to the maximum fee remained unaltered.

On March 6, 2006 the court entered a general order (Misc. Proceeding No. 06-0001) increasing the "flat fee" to \$3,000.00. This amount is the current rate.

On February 17, 2012, the court entered a general order (General Order No. 12-02) implementing uniform confirmation hearing procedures for all cases for the purpose of securing the expeditious resolution of chapter 13 cases. The general order did not change the existing provision regarding attorney's fees in chapter 13 cases.

On May 2, 2013 the U. S. Bankruptcy Court for the District of Puerto Rico amended its local bankruptcy rules. PRLBR 2016-1(e, f) incorporates many of the provisions regarding chapter 13 attorney's fees included in the above administrative orders.

### **Historical Impact**

The above historical account highlights the importance to go back to basic principles, notwithstanding technical and legal developments; that is: never lose perspective of Ponoroff's principles, always adhere to ethical considerations, and be aware of the court's expectations.

### **References**

The decisions referenced below on chapter 13 attorney's fees have considered the exposition and analysis made in the chapter 13 treatise by Keith M. Lundin & William H. Brown, Chapter 13 Bankruptcy, 4<sup>th</sup> Edition, particularly §§ 294.1 and 515.1.

### **Case law**

There are two decisions by this judge which summarize the key controversies concerning chapter 13 attorney's fees: In re Lugo Parrilla, 530 B.R. 1 (Bkrcty. D. P. R. 2015) (Lamoutte, BJ); and In re Medina-Espinosa, 2015 WL 2400092, (Bkrcty. D. P. R. May 18, 2015) (Lamoutte, BJ). Lugo Parrilla provides the overall guidelines and Medina-Espinosa addresses the binding effect of a confirmed chapter 13 plan on chapter 13 fees. In re Pereira Santiago, 457 B.R. 172 (Bkrcty. D.P.R. 2011) (Lamoutte, BJ), discusses prepetition counseling in bankruptcy.

### **Lugo Parrilla**

The following are relevant findings on the topic of chapter 13 attorney's fees:

1. Allowance of attorneys' fees in Chapter 13 cases based on the traditional bankruptcy methodology of applications for compensation under the "Loadstar Method" are impractical and burdensome in any district with a high volume of Chapter 13 cases. In Puerto Rico, approximately 60% of the cases filed are Chapter 13 cases. Therefore, the bankruptcy judges in Puerto Rico would face a difficult challenge if many chapter 13 fee applications are to be reviewed under the loadstar calculation.

Notwithstanding, the challenge must be met as it is inherent to our responsibility as bankruptcy judges. See Keith M. Lundin & William H. Brown, Chapter 13 Bankruptcy, 4<sup>th</sup> Edition, §294.1, at ¶ [27], Sec. Rev. June 17, 2004, [www.Ch13online.com](http://www.Ch13online.com).

2. Section 329(a)<sup>1</sup> of the Bankruptcy Code and Fed. R. Bankr. P. 2016(b)<sup>2</sup> mandate the debtor's attorneys to file complete and accurate disclosures of their fee agreements in every case. 11 U.S.C. §329(a); Fed. R. Bankr. P. 2016(b). Debtor's attorneys must comply with the mandatory disclosure requirements of 11 U.S.C. §329 and Fed. R. Bankr. P. 2016(b) to receive compensation.
3. Section 330(a) (3) sets forth the standards for the determination of reasonable compensation for professionals. Section 330(a) (4) (B) is an exception to the general rule that the professionals' services are compensable to the extent that there is a benefit to the estate. In a Chapter 12 or Chapter 13 case in which the debtor is an individual, the debtor's attorney may receive reasonable compensation for representing the interests of the debtor that are related to the bankruptcy case. See Allan N. Resnick & Henry J. Sommer, 3 Collier on Bankruptcy ¶ 330.03[1] [b] [v] (16<sup>th</sup> ed. 2014).
4. The applicant has the burden of proof to establish an entitlement to the requested fees.
5. Generally, the attorneys' fees are calculated using the lodestar approach which consists in "multiplying the number of hours productively spent by a reasonable hourly rate to calculate a base figure." To compute the number of hours productively spent time spent on unnecessary, duplicative or overworked tasks are discounted. In re Berliner v. Pappalardo (In re Sullivan), 674 F. 3d 65, 69 (1<sup>st</sup> Cir. 2012) citing Torres- Rivera v. O'Neill- Cancel, 524 F. 3d 331, 336 (1<sup>st</sup> Cir. 2008).

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<sup>1</sup> Section 329(a) provides: [a]ny attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation." 11 U.S.C. §329(a).

<sup>2</sup> Fed. R. Bankr. P. 2016(b) provides: "[e]very attorney for a debtor, whether or not the attorney applies for compensation shall file and transmit to the United States Trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by §329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed." Fed. R. Bankr. P. 2016(b).

6. However, in Chapter 13 cases, many courts have adopted the practice of establishing a flat fee for providing a bundle services that are generally required for the completion of consumer cases without requiring the filing of an itemized fee application for every Chapter 13 case. “Some courts have held that routine Chapter 13 cases need not use the loadstar method, but instead can apply a standard rate or flat fee based on the circumstances in a case.” In re Becker, 469 B.R. 121, 123-124 (Bankr. M.D. Fla. 2012); See also; In re Howell, 226 B.R. at 281 (noting “Chapter 13 cases are standardized and systemized, and much of the work is capable of performance by paralegals. These cases are typically handled in high volume practices. Although counsel may lose a few dollars on one case when a standard, fixed fee is approved in a routine case, counsel will make up those dollars in another case.” “Typically, this method assumes that tasks common to all Chapter 13 cases will be covered by a standard fee promulgated in a local rule or guideline. Additional services relating to any unique complexities of the case are then measured through some variant of the lodestar methodology.” See In re Claudio, 459 B.R. 500, 513 (Bankr. D. Mass. 2011). The economics of a Chapter 13 practice require that debtor’s counsel employ appropriate techniques to reduce the costs such as employment of paralegals, associate attorneys and secretarial (clerical) staff. See In re Claudio, 459 B.R. at 515.
7. This court has adopted a flat fee which is promulgated in P.R. LBR 2016-1(f), which provides that: “[t]he court may approve attorneys’ fees in chapter 13 cases at the confirmation hearing without the debtor’s attorney filing a detailed application if the fees, costs and expenses [excluding the filing fee] do not exceed \$3,000.” P.R. LBR 2016-1(f) (1). P.R. LBR 2016-1(f) (2) establishes the responsibilities that counsel for the chapter 13 debtor must comply with under the flat fee. Attorneys who request fees greater than the flat fee established in P.R. LBR 2016-1(f)(1) for Chapter 13 cases must file an application for compensation which will be reviewed by the court pursuant to the factors established in section 330(a)(3) and the loadstar method to determine reasonable compensation. See In re Becker, 469 B.R. 121, 124 (Bankr. M.D. Fla. 2012); In re Bergae, 2014 Bankr. Lexis 1575, \*8 (Bankr. C.D. Ill. 2014)(“And because attorneys may still seek fees in amounts higher than the ‘no-look’ fee simply by filing an itemized request, the practice of setting a fair ‘no-look’ fee has generally been viewed as proper by courts and practitioners alike”). P.R. LBR 2016-1(f) (1) does not discourage the request for greater fee awards for Chapter 13 cases which are more complex and require greater time expenditure. Likewise, the local rule does not discourage the request for fee awards for Chapter 13 cases which are less than the flat fee for simple cases which require lesser time expenditure. See In re Bailey, 2009 Bankr. Lexis 4166, \*12 (Bankr. E.D.N.Y. 2009) citing In re Thorn, 192 B.R. 52, 56 (Bankr. N.D.N. Y. 1984) (“[W]hen the issues are not complex and the process is straightforward, an attorney is expected to exercise ‘billing judgment’ [citation omitted], and is encouraged to reduce its customary fees in appropriate circumstances to reflect a less substantial expenditure of the attorney’s time”). The

purpose of the flat fee is to promote judicial efficiency in managing the volume of Chapter 13 cases. Moreover, it also “aids bankruptcy courts in disposing of run-of-the-mill [C]hapter 13 fee applications expeditiously and uniformly, obviating the need for bankruptcy courts to make the same findings of fact regarding reasonable attorney time expenditures and rates in typical cases for each fee application that they review.” *In re Becker*, 469 B.R. at 124 citing *Cahill v. Walker & Patterson, P.C.*, 428 F. 3d at 541; See also *In re Debtor’s Attys. Fees in Chapter 13 Cases*, 374 B.R. 903 (Bankr. M.D. Fla. 2007).

8. The court concludes that debtors’ attorneys in Chapter 13 cases are not required to adhere to the flat fee. Attorneys in Chapter 13 cases who opt to request fees that are in excess of \$3,000, must file a detailed application of the fees, costs and expenses to enable the court to determine if such fees are reasonable, as the court has an independent judicial responsibility to review the fees of professionals, even in the absence of objections. The requirement of a detailed application of fees, costs and expenses is a safeguard or a control mechanism against excessive and unreasonable attorneys’ fees.
9. Debtors’ attorneys in Chapter 13 cases are not obligated to adhere to the flat fee. If such is the case, then the attorney must file an application for compensation which will be reviewed by the court pursuant to the factors established in section 330(a)(3) and the loadstar method to determine reasonable compensation. Counsel for consumer Chapter 13 debtors should promote judicial efficiency by filing applications under the flat fee in standard Chapter 13 cases. The court is conscious that business Chapter 13 cases may, and generally do, require an application under the loadstar method.

**Medina-Espinosa**

1. Basic factual background:

In the instant case, the court entered an Order Confirming Plan providing attorney’s fees for the Debtors’ counsel as follows:

The application for the allowance of reasonable compensation as authorized by 11 U.S.C. 330, having been considered, the court finds that a reasonable fee for the services performed and undertaken by such attorney is \$3,000.00. Such fee, less any retainer, shall be paid by the trustee from the monies received under the debtor’s plan, provided, however that such payments be deferred in time to payments which may be required to provide adequate protection of the interest of the holders of secured claims.

The order was not appealed.

2. Section 1327(a) of the Bankruptcy Code provides that “[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.” 11 U.S.C. § 1327(a). A confirmed plan binds not only the debtors and creditors, but also the Chapter 13 Trustee. See Bankowski v. Wells Fargo Bank, N.A. (In re Reid), 480 B.R. 436, 444-45 (Bankr. D. Mass. 2012); Boyajian v. Vargas (In re Vargas), 2012 Bankr. LEXIS 2910 at \*15, 2012 WL 2450170 at \*4 (B.A.P. 1st Cir. 2012) (“Although not listed as a party, a chapter 13 trustee is bound by a confirmed plan as well.”). “Plan confirmation is a final order, with *res judicata* effect, and is imbued with the strong policy favoring finality.” Factors Funding Co. v. Fili (In re Fili), 257 B.R. 370, 373 (B.A.P. 1st Cir. 2001) (citations omitted). Absent timely appeal, the confirmed plan is *res judicata* and its terms are not subject to collateral attack.

3. “[T]he confirmation of the plan, in which a specific amount of disbursement to counsel for the debtor as attorney’s fees was required, acted as a final adjudication of the matters set forth in the plan.” In re Young, 285 B.R. 168, 174 (Bankr. D. Md. 2002). Similarly, in In re Hallmark, 225 B.R. 192, 195-196 (Bankr. C.D. Ca. 1998), the court ruled when attorneys’ fees are provided for in the confirmed plan in the amount of \$0.00, the attorney is subsequently prevented from seeking compensation in excess of that for which the plan provided because it would be “in violation of the plan”. Also see In re Black, 116 B.R. 818, 820 (Bankr. W.D.Okla. 1990) (holding that the debtors’ attorney was bound by the order confirming debtors’ chapter 13 plan and was, therefore, prevented from seeking compensation in excess of that for which the plan provided).

### **Practical Considerations**

There are several pending contested matters before this judge which involve determining whether additional fees may be requested after confirmation of the plan. The issue involves several of the matters mentioned before. The fixed/presumptive/no look fee allowed pursuant to PR LBR 2016, the fee that may be allowed under the loadstar method, and the binding effect of an order of confirmation as to the attorney’s fees.

There is a simple solution that has been used and implemented for many years. Since the attorney’s fee are to be determined at the hearing on confirmation, it is at the confirmation hearing that the attorney for the debtor must raise the issue of attorney’s fees. If the fee to be charged is not the standard fee allowed without need to file an application for compensation, it behooves counsel to inform the court that an application under the loadstar method will be filed.

The court may allow the standard fee without prejudice to filing an application under the loadstar method, and which will be considered as a contested matter if objected by any party in interest.

**Rule 2016-1**

**Application for Compensation of Professionals**

(a) Compensation. All professionals, including but not limited to, debtor=s attorneys, accountants, and creditor=s attorneys, seeking interim or final compensation for services and reimbursement of expenses from the estate under 11 U.S.C. §§ 330, 331, 503(b)(2), 503(b)(4), or 506(b) must file an application for compensation and reimbursement, which shall be sufficiently detailed to allow the court to determine whether all the time charged, or any portion thereof, is reasonable and was actual and necessary. The application must conform generally with Fed. R. Bankr. P. 2016. The application and any attachments must comply with the United States Trustee Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses. The following rules also apply:

- (1) Trustee Services. If the trustee is also serving as his/her own attorney, the trustee=s attorney application must contain a certification that no compensation has been or will be sought for services as an attorney which are properly trustee services.
- (2) Contingent Fee Matters. Detailed time records must also be kept on contingent fee matters.
- (3) Travel Time. The court may allow professional travel time at one-half of the professional=s normal hourly rate, unless otherwise justified. This is because time spent traveling is generally unproductive or, if productive, is rarely spent solely on the case for which the professional is traveling. Travel of one (1) hour or less round-trip is not compensable.
- (4) Certification. Each application must contain a certification by the professional that:
  - (A) the professional has read the application;
  - (B) to the best of the professional=s knowledge, information and belief, formed after reasonable inquiry, the compensation and reimbursement of expenses sought conforms with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the United States Trustee Guidelines, and these LBRs; and
  - (C) the compensation and reimbursement of expenses requested are billed at rates no less favorable to the debtor/estate than those customarily employed by the applicant generally.

(b) Expenses. An applicant has the burden of establishing that his/her expenses are reasonable and both actual and necessary. The following rules also apply:

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- (1) Photocopying. An applicant must identify the particular documents copied, the number of copies made, and the actual cost per copy B not to exceed 25 cents per page.
- (2) Computerized Research. Computerized research is reimbursable at actual cost, without markup for handling or administrative charges.
- (3) Messenger Service/Overnight Delivery. Messenger or overnight delivery services should only be used when the use of first-class mail is impractical. If reasonably incurred, reimbursement for these services will be allowed at actual cost. In-house messenger services are not reimbursable for more than the cost of comparable services outside the firm.
- (4) Postage. Postage is reimbursable at actual cost.
- (5) Long Distance Telephone Charges. Long distance telephone charges are reimbursable at actual cost.
- (6) Facsimile Transmissions. Facsimile transmissions are reimbursable at actual cost, if reasonably incurred. For outgoing transmissions, the actual cost of the telephone charges are reimbursable. Facsimile transmissions received are reimbursable at actual cost, not to exceed 25 cents per page.
- (7) Travel - Air transportation. Reimbursement for air travel is limited to the amount spent on coach fare.
- (8) Travel - Within Puerto Rico. Automobile travel within Puerto Rico is reimbursable at a rate to be published by the clerk's office and based upon the mileage information available through the Puerto Rico Highway and Transportation Authority's website, [www.dtop.gov.pr/carretera](http://www.dtop.gov.pr/carretera).
- (9) Travel accommodations and meals. Reimbursement is allowed for reasonable hotel and meal expenses. Luxury accommodations are not reimbursable.
- (10) Meals - Working. Working meals at restaurants or private clubs are generally not reimbursable. Reimbursement may be requested for working meals only when food is catered to the professional's office during a meeting with clients, such as a creditor's committee, to permit the meeting to continue through a normal meal period.
- (11) Amenities. Charges for entertainment, alcoholic beverages, tobacco, newspapers, dry cleaning, etc., are generally not reimbursable.
- (12) Property Inspection Fee. Charges for these inspections (usually drive-by) should be itemized detailing the date the alleged inspection was made.

- (13) Miscellaneous fees. Filing fees, court reporter fees, witness fees, and service of process fees are reimbursable at actual cost.
- (c) Denial For Non-compliance. The court may deny an application for compensation and expenses sua sponte if it does not comply with the requirements set forth in this LBR.
- (d) Sanctions. The failure of an attorney to timely file the plan, schedules, or statements, to attend the meeting of creditors, to timely file amendments, or to appear at confirmation hearings or at any other scheduled meetings or hearings may result in the reduction of the attorney's fee, for each such occurrence, in such amount as the court finds to be appropriate.
- (e) Attorney's Continuing Duty of Representation in Chapter 13 Cases. An attorney who represents a debtor in the bankruptcy court at the time a petition under chapter 13 is filed, or when a case under another chapter of the Bankruptcy Code is converted to chapter 13, has a continuing duty to represent the debtor until the occurrence of the earliest of:
- (1) dismissal of the case;
  - (2) closing of the case; or
  - (3) the entry of an order allowing the attorney to withdraw from further representation of the debtor.
- (f) Attorneys' Fees in Chapter 13 Cases.
- (1) The court may approve attorneys' fees in chapter 13 cases at the confirmation hearing without the debtor's attorney filing a detailed application if the fees, costs and expenses [excluding the filing fee] do not exceed \$3,000.00.
  - (2) When allowing the flat fee, in addition to the requirements of 11 U.S.C. §§ 526 and 527, counsel for the chapter 13 debtor should discharge the following responsibilities:
    - (A) Meet with the debtor to review the debtor's debts, assets, liabilities, income, and expenses.
    - (B) Explain which payments will be made directly by the debtor and which payments will be made through the debtor's chapter 13 plan, with particular attention to mortgage and vehicle loan payments, as well as any other claims that may accrue interest.

## AMERICAN BANKRUPTCY INSTITUTE

- (C) Explain to the debtor how, when and where to make the chapter 13 plan payments.
- (D) Explain to the debtor how the attorney's fees and trustee's fees are paid and provide an executed copy of this document to the debtor.
- (E) Explain to the debtor that the first plan payment must be made to the trustee within 30 days of the date the plan is filed.
- (F) Advise the debtor of the requirement to attend the § 341 Meeting of Creditors, and instruct the debtor as to the date, time and place of the meeting.
- (G) Advise the debtor of the need to file any due tax returns prior to the § 341 Meeting of Creditors.
- (H) Advise the debtor of the necessity of maintaining liability, collision and comprehensive insurance on vehicles securing loans or leases.
- (I) Timely prepare and file the debtor's petition, plan, statements and schedules.
- (J) Appear at the § 341 Meeting of Creditors with the debtor.
- (K) Respond to objections to plan confirmation, and where necessary, prepare an amended plan.
- (L) Prepare, file, and serve necessary amendments to the plan which may include suspending, lowering, or increasing plan payments.
- (M) Prepare, file, and serve necessary amended statements and schedules, in accordance with information provided by the debtor.
- (N) Prepare, file, and serve necessary motions to sell real property when appropriate.
- (O) Object to improper or invalid claims, if necessary, based upon documentation provided by the debtor.
- (P) Represent the debtor in motions for relief from stay and motions to dismiss.
- (Q) If appropriate, prepare, file, and serve necessary motions to avoid judicial liens on real or personal property.

- (R) Provide such other legal services as are necessary for the administration of the present case before the bankruptcy court.
- (3) Post Confirmation Fees. If the compensation for debtor attorney's post confirmation services is in an amount of \$500 or less, then no application for compensation need be filed pursuant to subsections (a) and (b) of this LBR.
- (4) An application that seeks allowance of fees and expenses totaling \$500.00 or less may be approved if it has the endorsed approval of the debtor and the chapter 13 trustee. If the application lacks their approval, it will be noticed to the debtor and chapter 13 trustee. The court may approve the application if no objection is filed within twenty-one (21) days from the date of the notice.
- (5) At the request of any party in interest, or on the court's own initiative, the failure to perform any act required by this LBR in a timely manner may result in a decrease or disgorgement of the amount of attorney's fees allowed by the court for the services rendered.
- (6) Upon the dismissal of a Chapter 13 case wherein a Chapter 13 plan has not been confirmed, the court will retain jurisdiction for a period of twenty one (21) days after the dismissal order becomes final, to determine if any professional fees are an administrative expense under 11 U.S.C. §503(b). See 11 U.S.C. § 1326 (a) (2). The debtor's attorney, and or any duly authorized professional, shall move the court within the twenty one (21) days period for such a determination.

EVIDENTIARY OBJECTIONS

Objections to a question asked to a witness:

- *Ambiguous, confusing, misleading, vague, unintelligible*: the question is not clear and precise enough for the witness to properly answer.
- *Arguing the law*: a fact witness stating or interpreting the law.
- *Argumentative*: the question makes an argument rather than asking a question.
- *Asked and answered*: when the *same attorney* continues to ask the same question and they have already received an answer, albeit an answer that they did not like.
- *Assumes facts not in evidence*: the question assumes something as true for which no evidence has been shown.
- *Badgering*: counsel is antagonizing the witness in order to provoke a response, either by asking questions without giving the witness an opportunity to answer or by openly mocking the witness.
- *Best evidence rule*: requires that the original source of evidence is required, if available; for example, rather than asking a witness about the contents of a document, the actual document should be entered into evidence. Full original document should be introduced into evidence instead of a copy, but judges often allow copies if there is no dispute about authenticity. Some documents are exempt by hearsay rules of evidence.
- *Beyond the scope*: A question asked during cross-examination has to be within the scope of direct, and so on.
- *Calls for a conclusion*: the question asks for an opinion rather than facts.
- *Calls for speculation*: the question asks the witness to guess the answer rather than to rely on known facts.
- *Compound question*: multiple questions asked together.
- *Hearsay*: the witness does not know the answer personally but heard it from another. However, there are several exceptions to the rule against hearsay in most legal systems.
- *Incompetent*: the witness is not qualified to answer the question.
- *Inflammatory*: the question is intended to cause prejudice.
- *Leading question* (Direct examination only): the question suggests the answer to the witness. Leading questions are permitted if the attorney conducting the examination has received permission to treat the witness as a hostile witness. Leading questions are also permitted on cross-examination, as witnesses called by the opposing party are presumed hostile.
- *Narrative*: the question asks the witness to relate a story rather than state specific facts.

- *Privilege*: the witness may be protected by law from answering the question.
- *Irrelevant or immaterial*: the question is not about the issues in the trial.
- *Misstates evidence / misquotes witness / improper characterization of evidence*: this objection is often overruled, but can be used to signal a problem to witness and judge.
- *Counsel is testifying*: this objection is sometimes used when counsel is “leading” or “argumentative” or “assumes facts not in evidence.”

Objections to documentary evidence:

- *Lack of foundation*: the evidence lacks testimony as to its authenticity or source.
- *Incomplete*: opposing party only introducing part of the writing (conversation/act/declaration), taken out of context. Under the evidence rule providing for completeness, other party can move to introduce additional parts. If any documents presented for the review, the judge and other party entitled to a complete copy, not a partial copy, of the document. When a witness is presented with a surprise document, he should be able to take time to study it, before he can answer any questions.
- *Best evidence rule or hearsay evidence*: requires that the original source of evidence is required, if available. However, some documents are self-authenticating under Rule 902, such as (1) domestic public documents under seal, (2) domestic public documents not under seal, but bearing a signature of a public officer, (3) foreign public documents, (4) certified copies of public records, (5) official publications, (6) newspapers and periodicals, (7) trade inscriptions and the like, (8) acknowledged documents (i.e. by a notary public), (9) commercial paper and related documents, (10) presumptions under Acts of Congress, (11) certified domestic records of regularly conducted activity, (12) certified foreign records of regularly conducted activity.
- *More prejudicial than probative*: Under Federal Rule of Evidence 403, a judge has the discretion to exclude evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

Objections to a witness's answer:

- *Narrative*: the witness is relating a story in response to a question that does not call for one.
- *Non-responsive*: the witness's response constitutes an answer to a question other than the one that was asked, or no answer at all
- *Nothing pending*: the witness continues to speak on matters irrelevant to the question.

BEFORE TRIAL

1. During the discovery phase, when defending depositions, object strategically to questions that are objectionable, to preserve your objections for trial and, if the deponent is your client, instruct your client not to answer, when appropriate.
2. During the discovery phase, be vigilant about not disclosing documents within the attorney/client and other privileges and those protected by the work product doctrine. For the scope of the work product privilege, see Fed. R. Civ. P. 26(b)(3). If you make an inadvertent disclosure, be aware of the procedure in FRE 502.
3. Anticipate the testimony of each witness opposing counsel is likely to call at trial and determine what objections you can properly raise. Some pre-trial orders require disclosure of all such witnesses, and procedural rules require disclosure of all testifying expert witnesses [Fed. R. Civ. P. 26(a)(2)].
4. Anticipate all documents opposing counsel will likely seek to put into the record at trial and determine what objections you can properly raise. Some pre-trial orders require disclosure of all documents each side intends to put into the record, giving you advance notice of those documents, except for rebuttal or sur-rebuttal.
5. File motions *in limine* when appropriate, to alert the judge before trial of key evidentiary issues, provide the judge with authorities on those issues, and seek a ruling on those issues before trial. Be aware that often judges reserve decision on motions *in limine* until trial, when they can consider the motion in context. It is appropriate to file a motion *in limine* when you seek to keep something out of the record, or get something into the record, and the evidentiary issue is sufficiently complex that a pre-trial motion and supporting memo would aid the court. Be mindful that filing a motion *in limine* also gives your opponent advance notice of the evidentiary issue and of the authorities you rely on regarding it.
6. If opposing counsel intends to put deposition transcripts into evidence in lieu of live testimony (as when an out-of-state witness has been deposed and will not be appearing at trial, a witness who has been deposed cannot attend the trial, or opposing counsel seeks to put in an admission of a party from a deposition transcript), carefully review the transcript to determine what excerpts from that transcript are objectionable, for which you have preserved your right to object [Fed. R. Civ. P. 29, 30(c)(2), and 32]. In addition, get into the record other excerpts that help your case [FRE 106 and Fed. R. Civ. P. 32(a)(6)].

**DURING TRIAL – TESTIMONY**

**Reasons to object**

1. Exclude prejudicial evidence that is properly excludable.
2. Make a record for appeal.
3. Prevent unfair treatment of a witness.
4. Break up the testimony of an opposing witness, if you have a proper basis to object.
5. Reinforce your theme when objecting, unless the court does not allow speaking objections.

**Common objections as to the *form* of the question**

1. leading question during direct examination, unless preliminary question or necessary to develop the witness's testimony [FRE 104(a), 611(c)]
2. compound
3. ambiguous or unintelligible
4. already asked and answered
5. argumentative
6. too general or calls for a narrative answer
7. misquotes the witness or misstates prior evidence
8. assumes facts not in evidence

**Common objections to the *substance* of testimony**

1. irrelevant [FRE 401, 402]
2. immaterial
3. hearsay [FRE 801, *et seq.*]
4. lack of personal knowledge [FRE 602]

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5. no foundation
6. speculation
7. waste of time or cumulative [FRE 403]
8. prejudice outweighs probative value [FRE 403]
9. confusing or misleading [FRE 403]
10. inadmissible opinion of lay witness [FRE 701]
11. privileged [FRE 501, 502]
12. cross beyond scope of direct [FRE 611(b)]
13. redirect beyond the scope of cross [FRE 611(b)]
14. improper impeachment [FRE 613]
16. prior consistent statement [FRE 801(d)(1)(B)]
17. testimony admissible only for a limited purpose [FRE 105]
18. answer beyond scope of question (motion to strike)

### DURING TRIAL – DOCUMENTS

1. irrelevant [FRE 401, 402]
2. immaterial
3. waste of time or cumulative [FRE 403]
4. no foundation
5. prejudice outweighs probative value [FRE 403]
6. confusing or misleading [FRE 403]
7. inadmissible opinion of lay witness [FRE 701]
8. privileged
9. not authenticated [FRE 901, 902]
10. improper copy [FRE 1003]
11. public record not certified or insufficient supporting testimony [FRE 902(1) to (5) and 1005]

12. summary if underlying documents not made available as required [FRE 1006]
13. not disclosed as required by mandatory disclosure [Fed R. Civ. P. 26(a)]
14. not disclosed as required by a document request to which opposing counsel did not object in the discovery phase [Fed. R. Civ. P. 34(b)]
15. not disclosed as required by a pre-trial order
16. document admissible only for a limited purpose [FRE 105]