SUMMONS IN AN ADVERSARY PROCEEDING

Purpose of the Form

Certain categories of relief may be granted in a bankruptcy court only through an adversary proceeding. The usual focus of the adversary proceeding is a trial of the allegations made by the plaintiff against the defendant.

The first step in commencing an adversary proceeding is the filing of a complaint, setting forth the facts and allegations which the plaintiff believes justify the granting of relief against the defendant, and stating the relief which the plaintiff seeks. As each complaint is unique, there is no specific form provided by the court.

The summons is the notice which accompanies the complaint, advising of the names of the parties, the court in which the adversary proceeding was filed, and the time limits for responding to the complaint.

The summons should be prepared by the plaintiff's attorney and signed and issued by the clerk. The plaintiff's attorney is responsible for serving the summons and a copy of the complaint. If the plaintiff does not have an attorney, the plaintiff is responsible for preparing the summons and serving the summons and complaint.

Applicable Law and Rules

1. In general, Fed. R. Bankr. P. 7001 requires that an adversary proceeding be commenced1) to recover money or property; 2) to determine the validity, priority, or extent of a lien or other interest in property; 3) to obtain court approval for the sale of both the interest of the estate and of a co-owner of property; 4) to object to or revoke a discharge; 5) to revoke an order of confirmation of a plan; 6) to determine the dischargeability of a debt;7) to obtain an injunction; 8) to subordinate an allowed claim or interest; 9) to obtain a declaratory judgment relating to any of the foregoing; or 10) to determine a claim or cause of action removed from a state court pursuant to section 1452 of title 28 (28 U.S.C.§ 1452).

2 Fed. R. Bankr. P. 7004 adopts portions of Rule 4 of the Federal Rules of Civil Procedure, and sets forth other provisions for the issuance and service of a summons. These rules are detailed and complex, and should be read in their entirety.

3. Rule 4(a) specifies the information that the plaintiff’s attorney (or the plaintiff) must provide on the summons form. Rule 4(b) provides that, upon or after the filing of the complaint, the clerk shall issue the summons to the plaintiff's attorney (or the plaintiff). It is then the responsibility of the plaintiff's attorney (or the plaintiff) to serve the summons on the defendant.

4. If the debtor is the plaintiff, section 342(c) of the Bankruptcy Code (11 U.S.C. §

342(c)) requires that the caption of the complaint include the debtor's name and address, and the last four digits of the debtor's taxpayer identification number. An individual debtor's social security number is the debtor's taxpayer identification number. In order to satisfy this requirement, the portion of Official Form 416A which sets out the last four digits of the debtor's taxpayer identification number can be inserted in the caption of Form 2500A.

5. A copy of the complaint must be served with the summons. Rule 4(c).

6. It is a good idea to submit several copies of the summons to the clerk with the original complaint, so that each copy may be signed by the clerk. It is recommended that at least four copies be submitted: one for the court records, one for service on the defendant, one for the plaintiff's attorney's records (or the plaintiff's records), and one to be returned to the court after the certificate of service has been completed. Of course, if there is more than one defendant, each must be served with a separate copy of the summons, so additional copies should be submitted to the clerk for issuance.

7. The summons and complaint may be served in a variety of ways which are set forth in Rules 7004 and 4. When the defendant is an individual, other than an infant or incompetent person, the easiest method is for the summons and complaint to be mailed by first class mail postage prepaid to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession. Rule 7004(b)(1).

8. When the debtor is a defendant and the debtor is represented by an attorney, the summons and complaint must be served on both the debtor and the debtor's attorney. Rule 7004(g). Service on the debtor may be made by mailing the summons and complaint to the debtor at the address shown on the petition or to any other address designated by the debtor in a document filed with the court. Rule 7004(b)(9). Service on the debtor's attorney may be made by any means authorized by Federal Rule of Civil Procedure 5(b), including service by electronic means if the attorney has consented in writing to electronic service. Rule 7004(g).

9. Rule 7004(h) provides that service on a bank, savings and loan, or other insured depository institution in a contested matter or adversary proceeding must be made by certified mail addressed to an officer of the institution unless one of three exceptions applies. Those exceptions are 1) the attorney for the depository institution has filed a paper in the matter or has otherwise entered his or her appearance, 2) the court, following the procedure set out in the rule, orders otherwise, and 3) the depository institution has waived the requirement in writing by designating an officer to receive service. (Insured depository institutions are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. § 1813).)

10. Because of the exceptions and the placement of the certified mail requirement in Rule 7004 rather than Fed. R. Bankr. P. 2002, the requirement applies in an adversary

proceeding only to the service of the summons and complaint or the service of the third-party summons and third-party complaint and only if the depository institution is a defendant or third-party defendant.

11. If service was made by personal service, by residence service, or pursuant to state law, the service must be made by someone who is not a party, and who is at least 18 years of age. Rule 7004(a).

12. The summons and complaint may be served anywhere in the United States. Rule 7004(d).

13. The summons and complaint must be served 7 days after the summons is issued. Service is complete upon mailing, not upon delivery by the Postal Service. If more than 7 days pass before service is completed, a new summons will be issued for service. Rule 7004(e) and Fed. R. Bankr. P. 9006(e).

14. If the summons and complaint are not served within 120 days of the filing of the complaint, the court may dismiss the action. Rule 4(m).

15. On the back of the summons is a certificate of service of the summons. After service has been made, this certificate should be completed, and filed with the court.

16. Fed. R. Bankr. P. 7012(a) provides that once a complaint is served, the defendant has 30 days after the issuance of the summons to file an answer or make one of the motions specified in Fed. R. Civ. P. 12 (made applicable by Rule 7012(b)). If the United States or one of its agencies or officers is the defendant, the time to file an answer or make a motion is 35 days. The court can order these time limits shortened or extended. If such an order is entered, the new time limit must be stated in the summons.

Instructions

Caption

1. Identify the Judicial District in which the bankruptcy case was filed. Example: “Eastern District of California.”

2. “In re”: Insert the name of the debtor as it appears in the bankruptcy petition. Then insert the names of the plaintiff(s) and defendant(s) as they appear on the original complaint.

3. If the debtor is the plaintiff, include the debtor’s name and address, and the last four digits of the debtor’s taxpayer identification number in the caption. The portion of Official Form 416A which includes the last four digits of the debtor’s taxpayer identification number can be inserted in the caption of the summons for this purpose.

4. "Case No.": Insert the bankruptcy case number assigned by the court at the time of filing.

5. "Adv. Proc. No.": Insert the number assigned by the court to the adversary proceeding at the time of the filing of the complaint.

Address of Clerk:

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

Name and Address of Plaintiff's Attorney:

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

Certificate of Service

1. Line 1 (name) is to be completed with the full name of the person who served the summons and complaint.

2. Line 2 (date) is to be completed with the month, day and year service was perfected.

3. The appropriate box should be checked to show how service was made.

If mail service, state the mailing address, city, state and zip code of the place to which the summons and complaint were mailed.

If personal service, state both the name of the person to whom the summons and complaint were given, and the address at which this occurred.

If residence service, state both the name of the adult to whom the summons and complaint were given, and the address at which this occurred.

If certified mail service on an insured depository institution, state both the name of the officer to whom the summons and complaint were mailed and the mailing address, city, state, and zip code to which service was mailed.

If service by publication, describe the steps take to perfect service.

If service was made pursuant to state law, fill in the blank with the name of state under whose laws the summons and complaint were served, and describe briefly the method of service, including the name of the person served and the

address at which the person was served.

4. Date: Insert on this line the month, day, and year the certificate is signed.

5. Signature: - The person who completed service of the summons and complaint must sign. This must be an ORIGINAL signature.

6. In the space directly below the Date and Signature lines, print or type the name and business address of the person who signed the certificate.

General Information for the Clerk

There are three basic summons forms, this one and Forms B 2500B and B 2500C. This form does not set a time for either the pretrial conference or the trial, Form B 2500B fixes a time and place for a pretrial conference, and Form B 2500C fixes a trial date. Each court should decide which form or forms is to be used in that district, and make that form or forms available to the bar and parties.

Fed. R. Bankr. P. 7004 incorporates by reference Rule 4(b) of the Federal Rules of Civil Procedure, which provides that the clerk is to issue the summons to the plaintiff's attorney (or the plaintiff) upon or after the filing of the complaint. If requested, more than one copy can be issued. In the instructions to the public, it is recommended that the plaintiff seek the issuance of at least four copies of the summons: one for the court to file with the original complaint; one for service on the defendant, one for the plaintiff's attorney's records (or the plaintiff's records), and one to be returned to the court after the certificate of service has been completed. Of course, if there is more than one defendant, each must be served with a separate copy of the summons, so additional copies are recommended to be submitted to the court for issuance.

The plaintiff's attorney (or the plaintiff) is responsible for serving the summons and complaint, not the clerk.

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

The plaintiff's attorney should have filled in his or her address in the appropriate space on the form. As the defendant may choose to serve an answer or motion on the plaintiff by mail or in person, the space should contain both the street and mailing address of the plaintiff's attorney, if the addresses are different. If the plaintiff is not represented by an attorney, the plaintiff's address(es) should be filled in.

The clerk may wish to fill in the space marked “Address of Clerk” before providing the form to the public.

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

1. If the summons is not served within 7 days, a new summons must be issued. Rule 7004(e).

2. If no summons is served within 120 days, the court is authorized by Rule 4(m) to dismiss the adversary proceeding on its own motion, after notice to the plaintiff.

3. If the defendant does not answer or make a motion pursuant to Fed. R. Bankr. P. 7012 within 30 days, or such time as court may fix, the plaintiff may seek the entry of a default. (See form B 2600). The United States, its agencies, and its officers have 35 days to answer or make a motion.

If the court enters an order changing the last day by which the defendant must answer the complaint or make a motion, that date MUST be stated on the summons, and the superseded information regarding the deadline must be deleted.