

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 commenced 1) 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 90 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 90 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.

Rule 7004. Process; Service of Summons, Complaint

(a) Summons; Service; Proof of Service.

(1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)(5), (e)–(j), (l), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service under Rule 4(e)–(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

(2) The clerk may sign, seal, and issue a summons electronically by putting an "s/" before the clerk's name and including the court's seal on the summons.

(b) Service by First Class Mail. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)–(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid 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 abode or to the place where the individual regularly conducts a business or profession.

(2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the 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. The summons and complaint in that case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

(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 receive service of process and, if the agent is one authorized by statute to 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. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States.

(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. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States. If the United States trustee 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 the 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) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons and complaint is mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such a defendant in the court of general jurisdiction of that state.

(8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by mailing also a copy of the summons and complaint to the defendant as provided in this subdivision.

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

(c) Service by Publication. If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule 4(e)–(j) F.R.Civ.P. or subdivision (b) of this rule, the court may order the summons and complaint to be served by mailing copies thereof by first class mail, postage prepaid, to the party's last known address, and by at least one publication in such manner and form as the court may direct.

(d) Nationwide Service of Process. The summons and complaint and all other process except a subpoena may be served anywhere in the United States.

(e) Summons: Time Limit for Service Within the United States. Service made under Rule 4(e), (g), (h)(1), (i), or (j)(2) F.R.Civ.P. shall be by delivery of the summons and complaint within 7 days after the summons is issued. 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. This subdivision does not apply to service in a foreign country.

(f) Personal Jurisdiction. If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

(g) Service on Debtor's Attorney. If the debtor is represented by an attorney, whenever service is made upon the debtor under this Rule, service shall also be made upon the debtor's attorney by any means authorized under Rule 5(b) F.R.Civ.P.

(h) Service of Process on an Insured Depository Institution. Service 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 unless—

(1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;

(2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or

(3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

For service required on the civil process clerk at the office of the United States attorney for the district of Hawaii, this address may be used:

Office of the United States Attorney
300 Ala Moana Blvd, Room 6-100
PJJK Federal Building
Honolulu, HI 96850

RULE 4 F.R.CIV.P., PROCESS

(a) Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

(b) Same: Form. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of the defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint. When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.

(c) Service.

(1) [Not applicable.]

(2) (A) [Not applicable.]

(B) [Not applicable.]

(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) [Not applicable.]

(D) [Not applicable.]

(E) [Not applicable.]

(3) [Not applicable.]

(d) Summons and Complaint: Person To Be Served. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail 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 agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

(e) Summons: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

(f) [Not applicable.]

(g) Return. The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or deputy United States marshal, such person shall make affidavit thereof. If service is made under subdivision (c)(2)(C)(ii) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. Failure to make proof of service does not affect the validity of the service.

(h) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(i) Alternative Provisions for Service in a Foreign Country.

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to the individual personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.