

## **THIRD-PARTY SUMMONS**

### **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 third-party summons is used when the defendant commences a third-party action. This occurs when the defendant seeks to include in the litigation an entity not already a party who may be liable to the defendant for all or part of the plaintiff's claims against the defendant. An easy example is the case of a car accident. The passenger in car A commences an adversary proceeding against the driver of car B. The driver of car B then files a third-party complaint against the driver of car A, to bring driver B's claims against driver A into the adversary proceeding.

In a third-party action, the defendant from the original lawsuit is known as the first-party defendant and the third-party plaintiff. The defendant in the third-party action is known as the third-party defendant.

As with a regular complaint, the filing of a third-party complaint triggers the issuance of a summons, using this form.

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

### **Applicable Law and Rules**

1. Fed. R. Bankr. P. 7014 incorporates by reference Rule 14 of the Federal Rules of Civil Procedure, concerning the conduct of third-party litigation. This rule provides that if the third-party complaint is filed more than ten days after the defendant serves an answer to the primary complaint, the defendant must obtain court approval prior to service. This approval must be obtained through a motion on notice to all of the parties of the original adversary proceeding.
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, including a third-party 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 third-party complaint, the clerk shall issue the summons to the third-party plaintiff's attorney (or the third-party plaintiff). It is then the responsibility of the third-party plaintiff's attorney (or the third-party plaintiff) to serve the summons on the third-party defendant and on the first-party plaintiff.
4. If the debtor is the third-party plaintiff, section 342(c) of the Bankruptcy Code (11 U.S.C. § 342(c)) requires that the debtor's name, address, Social Security number, and taxpayer identification number (if any) be included in the caption. Official Form 16C may be used for this purpose.
5. A copy of the complaint must be served with the third-party summons. Rule 4(c).
6. It is a good idea to submit several copies of the summons to be served with the original complaint, so that each copy may be signed by the court. It is recommended that at least five copies be submitted: one for the court records, one for service on the third-party defendant, one for service on the first-party plaintiff, one for the third-party 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 third-party defendant, each must be served with a separate copy of the summons, so additional copies should be submitted to the court for issuance.
7. The summons and third-party complaint may be served in a variety of ways which are set forth in Rules 7004 and 4. When the third-party 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. 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 the procedure set out in the rule, 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).)
9. 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.
10. Service must be made by someone who is not a party, and who is at least 18 years of age. Rule 7004(a).
11. The summons and third-party complaint may be served anywhere in the United States. Rule 7004(d).
12. The summons and third-party complaint must be served within ten days of the issuance of the summons. Service is complete upon mailing, not upon delivery by the Postal Service. If more than ten days pass before service is completed, a new summons must be issued and served. Rules 7004(e) and 9006(e).
13. If the summons and third-party complaint are not served within 120 days of the filing of the third-party complaint, the court may dismiss the third-party action. Rule 4(m).
14. 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.
15. Fed. R. Bankr. P. 7012(a) provides that once a complaint is served, the third-party defendant has 30 days after the issuance of summons to file an answer or make one of the motions specified in Fed. R. Civ. P. 12 (made applicable by Rule 7012). If the United States or one of its agencies or officers is the third-party 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.

16. Rule 14(a) provides that while the third-party defendant must file an answer or motion to the third-party complaint, the third-party defendant has the option of whether to file an answer or motion to the original complaint, unless the action is grounded in admiralty or maritime law. In that event, the third-party defendant must file an answer or motion to the first-party complaint.

### **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. The name of the third party defendant as it appears on the third party complaint should then be inserted.
3. If the debtor is the third-party plaintiff, include the debtor's name, address, Social Security number, and taxpayer identification number (if any) in the caption. Official Form 16C may be used 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 first-party plaintiff's attorney must be set forth in the box provided, including zip code. If the street address is different, that must also be stated, including room number. If the first-party plaintiff is not represented by an attorney, the first-party plaintiff's mailing and street address should be placed in the box.

#### **Name and Address of Attorney:**

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

**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 4 (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 they were 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 box directly below the Date and Signature lines, print or type the name and address of the person who signed the certificate.

### **General Information for the Clerk**

The third-party summons is used when the defendant commences a third-party action. This occurs when the defendant seeks to include in the litigation an entity not already a party who may be liable to the defendant for all or part of the plaintiff's claims against the defendant. An easy example is the case of a car accident. The passenger in car A commences an adversary proceeding against the driver of car B. The driver of car B then files a third-party complaint against the driver of car A, to bring driver B's claims against driver A into the adversary proceeding.

The third-party complaint does not commence a new action. No new file or docket should be created. Instead, when a third-party complaint is filed, the clerk should simply amend the caption of the pending adversary proceeding.

Fed. R. Bankr. P. 7014 incorporates by reference Rule 14 of the Federal Rules of Civil Procedure regarding the conduct of third-party actions. Although Rule 14 requires the defendant to obtain court approval prior to commencement of a third-party action, if that action is commenced more than ten days after the defendant serves an answer on the plaintiff, this is a jurisdictional issue for the parties to resolve. The clerk should neither refuse to accept a third-party complaint for filing due to the failure of the third-party plaintiff to obtain the necessary court order, nor should the clerk advise any of the parties of the specific requirements of Rule 14 for court authorization for commencing a third-party action.

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 third-party summons to the third-party plaintiff attorney (or the third-party 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 five summons: one for the court to file with the original complaint; one for service on the third-party defendant, one for service on the first-party plaintiff, one for the third-party plaintiff's records (or the third-party plaintiff's attorney'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 third-party 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 third-party plaintiff's attorney (or the third-party plaintiff) is responsible for serving the summons and third-party complaint, not the clerk.

There is no fee for the filing of the third-party complaint, or for the issuance of any third-party summons.

The third-party plaintiff should have filled in his or her address and the address of the third-party plaintiff's attorney in the appropriate boxes on the form. As the third-party defendant may choose to serve an answer or motion on the parties by mail or in person, the boxes should contain both the street and mailing address of the attorneys if the addresses are different. If any of the parties are not represented by an attorney, that party's own name and address(es) should be entered in the appropriate box.

If a stamp is available, the clerk may wish to fill in the box marked "Address of Clerk" before providing the form to the public.

Although the specific direction to "Place seal here" has been deleted, space for the court seal has been provided above the "date" line at the bottom of the form.

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 ten 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 260). 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.

The third-party summons does not include any place for notice of a pretrial conference or trial date. Such notice, if required, should be given by the third-party plaintiff in a separate document.