

## JUDGMENT BY DEFAULT

### Applicable Law and Rules

1. Fed. R. Bankr. P. 7012(a) provides that the defendant to an adversary proceeding must serve an answer within 30 days of issuance of the summons by the court, unless the court prescribes a different time. If the United States or an officer or agency of the United States is the defendant, then an answer must be served within 35 days of the issuance of the summons.
2. Rule 7012(b) incorporates by reference Rule 12(b) - (h) of the Federal Rules of Civil Procedure. This rule permits the defendant to serve several types of motions, including a motion to dismiss the complaint, a motion for a more definite statement, and a motion to strike, in lieu of serving an answer.
3. If the defendant serves neither an answer nor one of the motions described in Rule 7012(b) within the time fixed by Rule 7012(a), the defendant is said to be in default. A defendant may also be in default if an answer or motion is served, but the defendant fails to appear at a court hearing.
4. Fed. R. Bankr. P. 7055 incorporates by reference Fed. R. Civ. P. 55. This rule provides that when the defendant is in default, the plaintiff may seek to have the clerk enter the default on the court docket. This entry of default is accomplished by the execution of Form 260.
5. Once a default has been entered, the plaintiff may seek a default judgment.
6. Rule 55 provides two methods for obtaining a judgment by default. The judgment by default may be entered by the clerk on Form 261A or by the court on Form 261B.
7. The clerk may enter a judgment by default upon receipt of a request by the plaintiff and upon receipt of an affidavit of the amount due if the complaint seeks a sum certain, the defendant is neither an infant nor an incompetent person, and the defendant has been defaulted for failure to appear. By sum certain, the rule means an amount that can be fixed by simple calculation or that can be set by documentation, such as an invoice. Merely because a party claims a specific amount, such as \$3 million for pain and suffering, does not make that amount a sum certain. Entry of a judgment by default by the clerk is discussed in the preceding material on Form 261A.
8. In all other instances, including a defendant who served an answer or motion and then fails to appear at a court hearing, Rule 55(b) requires that the default judgment be entered

by the court. The most common means for seeking a default judgment from the court is for the default judgment to be submitted at the trial. If no trial has been scheduled, or if the plaintiff does not wish to wait until trial, the plaintiff may wish to move for a default judgment.

9. Fed. R. Bankr. P. 9013 provides that “A request for an order . . . shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds thereof, and shall set forth the relief or order sought. Every written motion . . . shall be served by the moving party on the trustee or debtor in possession and on those entities specified by the [bankruptcy] rules or . . . [as] the court directs.”
10. Rule 55(b) requires that a defendant who served an answer or motion and then fails to appear at a court hearing receive at least seven days notice of a motion for a default judgment.
11. Rule 55(b)(2) provides that no judgment by default may be entered against an infant or incompetent person unless the infant or incompetent person is represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein.
12. If, in order to enable the court to enter judgment, it is necessary to take an account, determine the amount of damages, establish the truth of any allegation by evidence, or investigate any other matter, the court may conduct hearings or order such references as it deems necessary and proper and shall accord the right to a jury trial to the parties when and as required by any statute of the United States. Rule 55(b)(2).
13. If the defendant has not made an appearance in the proceeding, section 521(b)(1) of the Servicemembers Civil Relief Act (50 U.S.C. Appendix § 521(b)(1)) provides:

the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit –

  - (A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or
  - (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.
14. If the defendant is in the military, or may be, the Servicemembers Civil Relief Act provides the defendant certain protections, including a stay of the proceedings, the appointment of an attorney to represent the defendant, requiring the plaintiff to post a bond, or vacating a default judgment. 50 U.S.C. App. § 521.

15. Rule 55(c) states that, if a judgment by default has been entered, the court may set it aside in accordance with Fed. R. Civ. P. 60(b). Rule 60(b) authorizes a court to set aside a judgment on account of “mistake, inadvertence, surprise, or excusable neglect.” A motion to set aside the default on these grounds must be made within a reasonable time, but not more than one year after the default judgment was entered.

### **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. “Case No.”: Insert the bankruptcy case number assigned by the court at the time of filing.
4. “Adv. Proc. No.”: Insert the number assigned by the court to the adversary case at the time of the filing of the complaint.

#### **Relief Sought**

The relief sought in the complaint should be restated on Form 261B after the phrase “IT IS ORDERED THAT.”

Form 261B has been designed for entry of a judgment by default by the court. The clerk may enter a judgment by default on Form 261A.

Although the Bankruptcy Rules do not require that a default be entered, such entry of default would appear to be the best practice, especially where the clerk is asked to execute the default judgment. The language used in both Form 261A and Form 261B contemplates that a default already has been entered.

50 U.S.C. App. § 521 affords protection against default to those in the military service. If the plaintiff does not file an affidavit showing that the defendant is not in the military service, the statute provides that no judgment shall be entered until the court takes certain steps to protect the defendant’s rights.

The clerk should present to the judge any affidavit relating to military service or fixing

the amount due to the plaintiff, along with the plaintiff's application for entry of a judgment by default and the proposed judgment. Unless the plaintiff files an affidavit that the defendant is not in military service, a judgment by default may be entered only by court order. 50 U.S.C. App. § 521.