

## ENTRY OF DEFAULT

### Applicable Law and Rules

1. Fed. R. Bankr. P. 7012(a) provides that the defendant in an adversary proceeding must serve an answer within 30 days of the 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, an answer must be served within 35 days of the issuance of the summons. (Fed. R. Bankr. P. 9006 provides that if the last day is a Saturday, Sunday or legal holiday, the deadline is extended to the next business day following the Saturday, Sunday, or legal holiday.)
2. Rule 7012(b) incorporates by reference Fed. R. Civ. P. 12(b)-(h). These provisions permit 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. Although Rule 7012(a) requires that the answer or motion be served, Fed. R. Civ. P. 5(d), which is incorporated by reference by Fed. R. Bankr. P. 7005, requires that all papers which are to be served also "shall be filed with the court within a reasonable time after service ." (emphasis added)
4. If the defendant serves neither an answer nor one of the motions described in Rule 12(b) - (h) within the time fixed by Rule 7012(a), the defendant is in default.
5. 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 B 260.
6. The Soldiers' and Sailors' Civil Relief Act requires that, before entering a default judgment, the plaintiff must file an affidavit stating whether or not the defendant is in the military service. If the defendant is in the military, or may be, the defendant is afforded certain protections. 50 U.S.C. App. § 520.
7. The court may set aside an entry of default for good cause shown. Fed. R. Civ. P. 55(c) as incorporated by Fed. R. Bankr. P. 7055.

### Instructions

#### Affidavit

The clerk is permitted to enter a default only upon being presented with an affidavit or affirmation setting forth the facts. These facts should normally include:

1. Date of issuance of the summons;
2. Statement of whether the court fixed a deadline for serving an answer or motion, or whether the 30 (or 35) day time limit applies;
3. Date of service of the complaint;
4. Date of filing of an affidavit of service; and
5. Statement that no answer or motion has been received within the time limit fixed by the court or by Fed. R. Bankr. P. 7012(a).
6. Statement that the defendant is not in the military service, as required by 50 U.S.C. App. § 520. If the defendant is, or may be, in the military service, the defendant is afforded certain protections which must be addressed prior to the entry of a default.
7. Statement that the defendant is not an infant or incompetent person, as is required by Fed.R.Civ.P. 55(b)(1).

The affidavit or affirmation should be attached to form B 260 and filed with the court.

### **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.

### **Box**

The name of the defendant who is in default must be set forth in the space provided. This is particularly important in an adversary proceeding where there is more than one defendant, and the entry of a default is not sought against all defendants.

### **Setting Aside the Entry of Default**

Fed. R. Civ. P. 55(c) as incorporated by Fed. R. Bankr. P. 7055, states that "For good cause shown the court may set aside an entry of default . . ." The usual practice is to request an order from the court setting aside the default.

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

Fed. R. Civ. P. 55, as incorporated by Fed. R. Bankr. P. 7055, authorizes the clerk to enter the default of a party. This can only be done upon a showing by the party seeking the entry of the default "by affidavit or otherwise" that a default has in fact occurred.

Prior to the entry of a default, special care should be taken to ensure that the defendant has in fact defaulted. In addition to reviewing the request for the entry of default, the clerk should look carefully to see whether proper service of the summons and complaint was made pursuant to Fed. R. Civ. P. 4, as incorporated by Fed. R. Bankr. P. 7004(a), and whether the time to answer or file a motion has passed. In most instances the time is 30 days from the issuance of the summons. The United States, its agencies, and its officers have 35 days. Also, the court may have entered an order extending or reducing the time. (If the last day is a Saturday, Sunday or legal holiday, the deadline is extended to the next business day following the Saturday, Sunday, or legal holiday. Fed. R. Bankr. P. 9006.)

The failure of the defendant to file an answer or motion within the prescribed time does not necessarily mean that the defendant is in default. Fed. R. Civ. P. 5(d), made applicable by Fed. R. Bankr. P. 7005, permits the defendant to file the answer or motion with the court "within a reasonable time after service." Thus, an answer or motion may have been timely served but not yet filed with the court. The clerk will therefore have to rely upon the application seeking the entry of the default for proof that the plaintiff has not been served with an answer or motion.

One additional note of caution. If the defendant served the plaintiff with an answer or motion by mail, Rule 5(b), as made applicable by Rule 7005, states that service by mail is complete upon the mailing, not upon receipt. Thus, if the request for entry of default is made the day after the time to answer expires, the clerk should postpone entry of the default for one or two days to see whether the answer or motion is in the mail. (If the default is entered and it subsequently develops that an answer or motion was delayed in the mail, the defendant can seek to have the entry of the default revoked by the court.)

50 U.S.C. App. § 520 affords protection against default to those in the military service. If the affidavit does not contain a statement that the defendant is not in the military, the clerk should not enter the default without prior direction from the judge.