

JUDGMENT BY 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 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. 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. 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, the clerk may enter a judgment by default upon receipt of a request by the plaintiff with an affidavit of the amount due. Rule 55(b)(1). 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.
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)(2) requires that the default judgment be entered by the court. Entry of a judgment by default by the court is discussed in the following material on Form 261B.

9. The Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501 - 596, provides protections for members of the military in judicial and administrative proceedings in state and federal courts and agencies.
10. If the defendant has not made an appearance in the proceeding, the plaintiff must file an affidavit stating whether or not the defendant is in military service, or that the plaintiff is unable to determine whether the defendant is in military service, before the court may enter a default judgment. If the defendant is in the military, or may be, the defendant is afforded 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.
11. 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.
12. 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

Affidavit

The clerk is permitted to enter a default judgment only upon being presented with an affidavit setting forth the amount owed and stating that the defendant is not in the military service. Fed. R. Civ. P. 55(b)(1) also requires that the affidavit state that the defendant is not an infant or incompetent person. This affidavit should be attached to the proposed judgment.

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 261A after the phrase “judgment is entered against this defendant in favor of the plaintiff as follows:”

General Information to the Clerk

Rule 55(b), as incorporated by Rule 7055, authorizes the clerk to enter a default judgment if the complaint seeks a sum certain, and the defendant is neither an infant nor an incompetent person. In all other circumstances, a judgment by default must be entered by the court.

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

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.

If the clerk is being asked to execute the judgment, the clerk should make certain that the relief being ordered in the judgment is the same as that which was sought in the complaint.

50 U.S.C. App. § 521 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 unless directed to do so by court order.