

ENTRY OF DEFAULT

Applicable Law and Rules

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.

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 a time limit applies;
3. Date of service of the complaint;
4. Date of filing of an affidavit of service;
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. § 521. 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; and
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 Director's Form 2600 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 “The court may set aside an entry of default for good cause....” 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.

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, Fed. R. Civ. P. 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.

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 without prior direction from the judge.