

## MEMORANDUM

Date: January 27, 2006

To: All counsel and parties appearing before Judge Arthur I. Harris

From: Judge Arthur I. Harris

Re: Applications for entry of default and motions for default judgments under Rule 7055 of the Federal Rules of Bankruptcy Procedure and Rule 55 of the Federal Rules of Civil Procedure

The Court is issuing this memorandum to ensure compliance with the procedures governing default judgments in adversary proceedings, including the provisions of the Servicemembers Civil Relief Act, Public Law 108-189, codified at 50 U.S.C. app. § 501 *et seq.* This memorandum is not intended to add requirements to existing law. Rather it merely summarizes existing requirements, including some honored more in the breach than the observance. The Court acknowledges that insisting on these requirements may take some adjustments in current practices; however, as the Supreme Court has noted, “[I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.” *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

Rule 55 of the Federal Rules of Civil Procedure applies in adversary proceedings pursuant to Bankruptcy Rule 7055. Rule 55 contains a two-step process: (1) entry of default under Rule 55(a), and (2) default judgment under Rule 55(b). *See O.J. Distributing, Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 352-53 (6th Cir. 2003) (summarizing the case law in this circuit governing Rule 55). A party seeking a default judgment must first file an application for an entry of default under Rule 55(a). Once the clerk has entered default under Rule 55(a), a party may move for a default judgment under Rule 55(b). A default judgment may be entered *by the clerk* when the claim “is for a sum certain or for a sum which can by computation be made certain.” In all other cases (and presumably in most adversary proceedings), the default judgment shall be made *by the court*.

While there are no official forms for the entry of default or for default judgments under the Federal Rules of Civil Procedure or Bankruptcy Procedure, the Administrative Office of the U.S. Courts has issued procedural forms and instruction. The use of these forms is not mandatory, but they do provide useful guidance for parties and counsel. These forms currently can be found at the U.S. Courts' website:

[http://www.uscourts.gov/bkforms/bankruptcy\\_forms.html#procedure](http://www.uscourts.gov/bkforms/bankruptcy_forms.html#procedure).

Copies of Form B 260 "Entry of Default" and Form B 261B "Judgment by Default" with accompanying instructions are attached to this memorandum. Form B 261A, which addresses default judgments *by the clerk*, is available at the U.S. Courts' website but is not attached to this memorandum.

By way of example, a party seeking entry of default would typically file an *Application for Entry of Default* and accompanying declaration.

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[Caption for Adversary Proceeding]

*Application for Entry of Default*

Pursuant to Bankruptcy Rule 7055 and Fed. R. Civ. P. 55(a), plaintiff requests that the Clerk of this Court enter the default of defendant(s), [name(s)], for failure to defend or otherwise defend in this action. A declaration is also being submitted in support of this application for entry of default.

Signature block; certificate of service.

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*Declaration*

I, [declarant], pursuant to 28 U.S.C. § 1746, declare the following:

1. I am attorney for plaintiff in this adversary proceeding.
2. The statements set forth are based upon my personal knowledge, and are true and correct to the best of my knowledge, information, and belief.
3. The summons of defendant [name] was issued by the court on [date of issuance].
4. The summons and complaint were served on defendant [name] on [date of service] and on counsel for the defendant-debtor on [date of service].
5. A responsive pleading was due within 30\* days of [calendar date summons was issued]. [\*35 days if defendant is United States or officer or agency of United States]
6. Defendant [name] has failed to plead or otherwise defend in this action, and the time to do so has expired.
7. To the best of my knowledge, information, and belief, defendant [name] is neither an infant or incompetent person, nor is defendant in the military service within the purview of the Servicemembers Civil Relief Act, 50 U.S.C. app. § 501 *et seq.*

I declare under penalty of perjury that the foregoing is true and correct.

Executed on [date].      Signature block; certificate of service

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After an entry of default has been made by the clerk, plaintiff would then file a motion for a default judgment. Although a defaulting defendant is deemed to admit every well-pleaded allegation in the complaint, the Court is still required to make an independent determination of whether the well-pleaded allegations in the complaint support the relief being sought. *See, e.g., Ryan v. Homecomings Fin. Network*, 253 F.3d 778, 780-81 (4th Cir. 2001).

By way of example, a party moving the court for a default judgment would typically file a *Motion for Default Judgment*.

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[Caption for Adversary Proceeding]

*Motion for Default Judgment*

Pursuant to Bankruptcy Rule 7055 and Fed. R. Civ. P. 55(b), plaintiff requests that the Court enter default judgment against defendant(s), [name(s)]. The specific relief sought is [explain].

Signature block; certificate of service.

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Notice

A party moving for a default judgment may file a Notice of Hearing with a seven day clause consistent with Administrative Order 03-5 “Use of Seven Day Clauses in Noticing Hearings On Motions and Objections in the Cleveland Court. In the alternative, the party may comply with Local Rule 9013-1. Pursuant to Local Rule 9013-1, counsel would not notice the motion for hearing but would instead include a notice “that any objection must be filed within 10 days” from the date of service as set forth on the certificate of service and “that the Court is authorized to grant the relief requested without further notice unless a timely objection is filed.”

The party seeking a default judgment should also submit a proposed default judgment by e-mail to [OrdersAIH@ohnb.uscourts.gov](mailto:OrdersAIH@ohnb.uscourts.gov), consistent with the ECF Administrative Procedures Manual. The proposed default judgment should follow the format contained in Form B 261B

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[Caption for Adversary Proceeding]

*JUDGMENT BY DEFAULT*

Default was entered against defendant [name] on [date]. Therefore, on motion of the plaintiff, judgment is entered against that defendant in favor of the plaintiff as follows. [explain specific relief being sought]

IT IS SO ORDERED.

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Arthur I. Harris  
United States Bankruptcy Judge

submitted by  
signature block for movant

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# United States Bankruptcy Court

\_\_\_\_\_ District Of \_\_\_\_\_

In re _____,	)	
Debtor	)	Case No. _____
	)	
	)	Chapter _____
_____	)	
Plaintiff	)	
	)	
v.	)	
_____	)	Adv. Proc. No. _____
Defendant	)	

## ENTRY OF DEFAULT

It appears from the record that the following defendant failed to plead or otherwise defend in this case as required by law.

Name: _____
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Therefore, default is entered against the defendant as authorized by Federal Rule of Bankruptcy Procedure 7055.

\_\_\_\_\_  
*Clerk of the Bankruptcy Court*

\_\_\_\_\_  
*Date*

By: \_\_\_\_\_  
*Deputy Clerk*

## 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:

B 260  
continued

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.



## 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 B 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 B 261A or by the court on Form B 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 B 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 the [the plaintiff]."
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 three 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 averment by evidence, or to make an investigation of 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. 50 U.S.C. Appendix § 520 affords to those in military service certain protections against entry of a default judgment. The statute states, in part, that,

In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act.

14. 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 B 261B after the phrase "IT IS ORDERED THAT."

Form B 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 B 261A and Form B 261B contemplates that a default already has been entered.

50 U.S.C. App. § 520 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.