

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

IN RE:

CLERK’S INSTRUCTIONS REGARDING )  
PROCEDURES FOR ENTRY OF )  
DEFAULT AND DEFAULT JUDGMENT )  
IN ADVERSARY PROCEEINGS )

**ENTRY OF DEFAULT AND DEFAULT JUDGMENT PROCEDURES**

To facilitate entry of default and default judgment, and to inform the bankruptcy bar of the Court’s preferred practices, the Bankruptcy Clerk has promulgated the following, non-binding procedures to assist parties in obtaining a Clerk’s entry of default and default judgment:

a. Form of Request/Motion

The Clerk has sample forms for filing a request for entry of default, and for seeking default judgment from either the Clerk or the Court. These sample forms are located on the Court’s website, [www.wvnb.uscourts.gov](http://www.wvnb.uscourts.gov) under the “forms” tab. The recommended procedure is to separate the Request for Clerk’s Entry of Default from the Motion for Default Judgment. Both forms may be filed contemporaneously. The Clerk first administers the Request for Clerk’s Entry of Default, and then administers the Motion for Default Judgment. If the defaulting party has appeared, the motion for default judgment must be served on the defaulting party.

b. Entry of Default

1. Summons

- A. Upon the filing of an adversary complaint, the Clerk issues a summons to the plaintiff for service on each of the named defendants. The summons is issued through the BNC. Counsel will receive a Notice of Electronic Filing and be able to obtain the Clerk’s electronic summons within minutes of its issuance.
- B. The plaintiff has 7 days from issuance of the summons to serve the summons and the complaint (if the complaint has not already been served) on each of the named defendants. Fed. R. Bankr. P. 7004(e). A “summons service executed” should be filed with the Clerk evidencing service within this 7-day period.

- C. If the summons is not timely served within the 7 day period, the plaintiff should request issuance of a new summons.
- D. If the defendant is not served within 90 days after the complaint is filed, the Court may dismiss the complaint on motion or on its own initiative after notice to the plaintiff, or order that service be made within a specified time. Fed. R. Bankr. P. 7004; Fed. R. Civ. P. 4(m).

2. Answer

- A. Unless otherwise ordered by the Court, once a complaint is served, the defendant has 30 days after the issuance of the summons to file an answer. This 30-day period runs from when the Clerk issues the summons – not from when the defendant receives service of the complaint and summons. If the complaint and summons is served on the United States, then an answer is due 35 days after the issuance of the summons and complaint. Fed. R. Bankr. P. 7012(a).
- B. Under Fed. R. Bankr. P. 9006(b)(1), the Court may enlarge the time in which the defendant has to file an answer. Under that Rule, the request must be filed with the Clerk on or before the 30 or 35-day period expires, unless such failure to request an extension was the result of excusable neglect. The Bankruptcy Rules do not provide for informal agreements between the parties to extend the time in which to file an answer.

3. Otherwise Defend

The Clerk may not enter default if the affected party has failed to file an answer, but has "otherwise defended" the claim. Fed. R. Bankr. P. 7055; Fed. R. Civ. P. 55(a). The term "otherwise defend" is not defined in Rule 55, but the term does include the assertion of those defenses that, under Fed. R. Bankr. P. 7012; Fed. R. Civ. P. 12(b), may be made by motion rather than in the pleadings.

4. Failure to Prosecute

If it appears to the Clerk that the summons was duly issued and no activity is being taken in the adversary proceeding, the Court may enter an Order and Notice providing for the dismissal of the complaint unless cause is shown for non-dismissal. Generally, 30 days is allowed for the plaintiff to show cause, which is deemed present if the Plaintiff initiates default procedures and no separate need exists to respond to the Court's order regarding dismissal for failure to prosecute the case.

5. Request for Clerk's Entry of Default

A. Request for Entry Required

The Clerk will not sua sponte enter default. A party must request that the Clerk enter a default by demonstrating:

1. timely service of the complaint and summons,
2. failure of the responding party to timely appear or otherwise defend.

B. The party requesting entry of default may, but need not, state whether the defaulting party is a minor, incompetent person, or a member of the uniformed services. While such status will not prevent entry of default, such status does affect whether and how default judgment may be entered.

C. If the Clerk is satisfied, the Clerk will enter default. Counsel does not need to provide the Clerk with a form entry for default. The Director of the Administrative Office of the United States Courts has promulgated Bankruptcy Form 2600 (12/2015) for this purpose.

D. A defaulting party that has not appeared is not entitled to notice of future proceedings; provided, however, that the Clerk issues a notice to the defaulting party before default judgment is considered by the Clerk or the Court.

6. Vacating Entry of Default

A. The Court may set aside the entry of default for good cause. Fed. R. Bankr. P. 7055; Fed. R. Civ. P. 55(c).

B. As a general matter, the Court disfavors defaults and prefers that defaults be avoided and claims and defenses be disposed of on the merits. To set aside an entry of default, the Court considers:

- i. whether the moving party has a meritorious defense,
- ii. whether the moving party has acted with reasonable promptness,
- iii. the personal responsibility of the defaulting party,
- iv. the prejudice to the defaulting party,
- v. whether there is a history of dilatory action, and

vi. the availability of sanctions less drastic.

*E.g., Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc.*, 616 F.3d 413, 417 (4<sup>th</sup> Cir. 2010).

c. Default Judgment

1. Objection Period

After the Clerk enters default, proceedings begin on the motion for default judgment. If the motion for default judgment has not already been filed, the plaintiff should file the motion for default with the Clerk. The Clerk generally issues a 21-day notice to the defaulting party of time to respond to the motion for default judgment. The notice is issued to all the parties in the adversary proceeding.

2. Hearing

A. Whether default judgment is to be entered by the Clerk or by the Court, the Court may, in its discretion, require an appearance by the party seeking default judgment to establish a prima facie case of entitlement to relief under the moving party's legal theories of the case. At any such hearing, the moving party should be prepared to present evidence and testimony to the Court. When default judgment is sought against the United States, a hearing may be required. Fed. R. Bankr. P. 7055; Fed. R. Civ. P. 55(d).

B. If a timely objection is filed to the motion for default judgment, the Court, in its discretion, will either dispose of the matter on the papers filed, or will set a hearing on the motion.

3. Multiple Defendants

Before entering default judgment that adjudicates fewer than all the claims, or adjudicates the rights and liabilities of fewer than all the parties, the Court must expressly determine that there is no "just reason" for delay in entering a separate judgment. Fed. R. Bankr. P. 7055; Fed. R. Civ. P. 55(b).

When the Clerk has entered default against one of multiple defendants, and common questions of law or fact exist between the defaulting defendant and the remaining parties, the Court may refuse to enter default judgment against the defaulting party until such time as the common questions of law or fact are judicially determined. Likewise, the Court may refuse to enter default judgment against one defendant when other defendants may be jointly and severally liable.

4. By the Clerk

On request, the Clerk may enter default judgment if the following conditions are met:

- A. The damages are for a sum certain or a sum that can be made certain by computation,
- B. The default is based on a failure to appear,
- C. The defendant is not a minor or an incompetent person,
- D. The defendant is not the United States or an officer or agency of the United States,
- E. The claimant provides an affidavit of the amount due,
- F. Entering default judgment is purely a ministerial act, and
- G. Default judgment resolves all the claims against all the parties and results in a final, appealable judgment.

5. By the Court

A. Amount of Request

The amount requested for default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. The Court determines if the amount of damages is justified by the claims, and may award less than requested.

B. Minors or Incompetent Persons

Only the Court can enter default judgment against a minor or incompetent person. Before entering default judgment, the minor or incompetent person must be represented in the action by a general guardian, conservator, or other similar fiduciary who has appeared in the action. Under Fed. R. Bankr. P. 7017; Fed. R. Civ. P. 17, when a minor or incompetent person is a party and is not represented, the Court must appoint a guardian ad litem or make some other order it deems proper for the protection of the minor or incompetent person.

C. The United States

The Court may not render a default judgment against the United States or an officer or agency of the United States unless the claimant establishes a claim or right to relief by evidence that satisfies the Court. There is no admission of the factual allegations. The Court must determine both liability and damages before rendering a default judgment. Fed. R. Bankr. P. 7055; Fed. R. Civ. P. 55(d).

6. Vacating Default Judgment

The Court may set aside a default judgment under Rule 60(b). Fed. R. Bankr. P. 7055; Fed. R. Civ. P. 55(c).

d. Servicemembers and Civil Relief Act

The Servicemembers Civil Relief Act, 50 U.S.C. § 501 *et seq.*, provides for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

1. Affidavit

The party seeking default judgment must file an affidavit (or other statement submitted under penalty of perjury) stating whether the non-defending party is in active military duty. The affidavit must show the specific facts necessary to support the conclusion stated. If the claimant is unable to determine whether the defendant is in military service, the affidavit must so state, and provide the facts of any investigation that was inconclusive. The affidavit may not state a mere conclusion concerning the defaulting party's military status.

Under 50 U.S.C. § 582(a), (b), a claimant may request from the Adjunct General of the Army, the Chief of Naval Personnel, and from the Major General Commandant of the United States Marine Corps a certificate of military service, which is prima facie evidence of military service. Of course, no affidavit is required if the defendant is a non-individual business entity.

A. A party may verify military service by telephone from the “Defense Manpower Data Center Military Verification Information Line” at 703-696-6762.

B. Information on how to verify active duty service can also be found on the Servicemembers Civil Relief Act (SCRA) Website: <https://www.dmdc.osd.mil/appj/scra>

2. Appointment of Attorney

If the affidavit shows the defaulting party is in military service, the Court must appoint an attorney for the servicemember.

3. Bond

If, based on the affidavits, the Court is unable to determine whether a defendant is in military service, the Court, before entering judgment, may require a bond in an amount approved by the Court. The Court may issue orders or enter judgments as the Court determines necessary to protect the rights of the servicemember under the Act.

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