

PROCEDURE FOR OBTAINING DEFAULT JUDGMENTS

Chief Judge Nakagawa, Judge Riegle, Judge Markell, Judge Beesley, and Judge Zive

August 2011

Obtaining a default judgment is a three-step process under Fed. R. Civ. P. 55, which is incorporated by Fed. R. Bankr. P. 7055.

I. Step One: Obtain an Entry of Default.

(1) File a written request for the entry of a default. (Fed. R. Civ. P. 55(a); Fed. R. Bankr. P. 7055.)

(2) File an affidavit in support of the request that proves the party against whom default is sought has failed to plead or otherwise defend. (Fed. R. Civ. P. 55(a); Fed. R. Bankr. P. 7055.)

(3) Submit an "Entry of Default." The court clerk enters the default. (Official Bankruptcy Form No. B 260.)

II. Step Two: File a Motion for Entry of Default Judgment.

(1) Motion for Default Judgment.

After the default has been entered, file a motion requesting the entry of a default judgment. The motion must be supported by an affidavit that contains, among other things, facts showing that the party against whom the default is taken is not in the military service, and is not an infant or incompetent. (Fed. R. Civ. P. 55(b)(2); Fed. R. Bankr. P. 7055; 50 U.S.C. Appx. § 521.)

While the federal rules permit the clerk to enter the default judgment, currently all default judgments must be entered by the court.

(2) Affidavit of Military Service.

The Servicemembers Civil Relief Act, U.S.C. 50 App. § 521, protects military servicemembers from the entry of a default judgment. The Act requires a plaintiff who seeks a default to file an affidavit stating whether or not the defendant is in the military service and showing "necessary facts to support the affidavit" or, if the plaintiff is unable to determine military service, an affidavit which states that fact. 50 U.S.C. App. § 521(b)(1).

(a) How to Verify Active Military Service.

(i) Telephone.

Information by telephone on how to verify active duty service can be

obtained from the “Defense Manpower Data Center Military Verification Information Line” at 703-696-6762.

(ii) Website.

Information on how to verify active duty service can also be found at <https://www.dmdc.osd.mil/appj/scra/scraHome.do>.

(3) Service and Notice Requirements.

The summons and complaint must be timely served, and there must be proof that service has been properly executed.

(a) Time Limit for Service.

There are time limits for service of the summons and complaint. A new summons must be issued if service is not timely mailed or delivered. (Fed. R. Bankr. P. 7004(e).)

(i) 14 Days After Summons Issued.

If service is by mail, the summons and complaint must be deposited in the mail within 14 days after the summons is issued. (Fed. R. Bankr. P. 7004(e).)

If the summons and complaint is delivered under Fed. R. Civ. P. 4(e), (g), (h)(1), (i), or (j)(2), then delivery must be made within 14 days after the summons is issued.

(ii) 120 Days After Filing Complaint.

If service of the summons and complaint is not made upon a defendant within 120 days after filing the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, must dismiss the action without prejudice or direct that service be effected within a specified time. If a plaintiff shows good cause, the court shall extend the time for service for an appropriate period. (Fed. R. Civ. P. 4(m); Fed. R. Bankr. P. 7004(a)(1).)

(b) Proof of Service.

The person effecting service must file a certificate of service showing the date of service, the name of the person served, and the manner of service. (Fed. R. Civ. P. 4(l); Fed. R. Bankr. P. 7004(a)(1); Local Bankruptcy Rule 7005.)

(c) Service Upon Debtor’s Attorney.

Service must be made upon the debtor's attorney if the debtor is a defendant and is represented by counsel. (Fed. R. Bankr. P. 7004(g).)

(d) Notice of Motion for Default Judgment.

The defendant (and the defendant's attorney) are entitled to at least 3 days' written notice of the request for default judgment if the defendant has appeared. (Fed. R. Civ. P. 55(b)(2); Fed. R. Bankr. P. 7055.)

A debtor who is named as a defendant in an adversary proceeding in his own bankruptcy case is deemed to have "appeared" in the adversary proceeding, and is therefore entitled to notice of the motion for a default judgment.

III. Step Three: Submit a Proposed Default Judgment.

(1) Judgment.

Submit a proposed judgment when the motion for a default judgment is filed. (Fed. R. Civ. P. 55(b); Fed. R. Bankr. P. 7055; Official Bankruptcy Form No. B 261B.)

(2) Prove-Up Hearing.

The court may hold a prove-up hearing to determine the appropriate amount of damages or to establish the truth of an allegation by evidence. (Fed. R. Civ. P. 55(b)(2); Fed. R. Bankr. P. 7055.)

(3) Damages.

A default judgment must not be different in kind from or exceed the amount prayed for in the demand for judgment. (Fed. R. Civ. P. 54(c); Fed. R. Bankr. P. 7054(a).)

(4) Attorneys' Fees.

Pursuant to the "American Rule," attorneys' fees are ordinarily not recoverable absent a specific statutory authority, a contractual right, or aggravated conduct. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Cohen v. De La Cruz*, 523 U.S. 213 (1998). A request for attorney's fees must be supported by an affidavit showing that the fees are both allowable and reasonable.

(5) Costs.

Costs may be allowed to a prevailing party except when a statute or rule provides otherwise. Costs may be taxed by the clerk on one day's notice. On motion served within five days thereafter, the action of the clerk may be reviewed by the court. (Fed. R. Bankr. P. 7054(b); Local Bankruptcy Rule 7054; Bankruptcy Form No. B 263.)