

**JUDGE KARLIN'S**  
**GUIDELINES FOR OBTAINING A DEFAULT JUDGMENT**  
April 16, 2012

**OBTAINING A DEFAULT JUDGMENT IS A TWO-STEP PROCESS:**

Pursuant to Federal Rule of Civil Procedure 55, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7055, default encompasses two steps: (1) Entry of Default and (2) Default Judgment.<sup>1</sup>

**STEP ONE: Entry of Default**

Local Rule 5075.1 authorizes the bankruptcy clerk to sign and enter default in adversary proceedings. Entry of default is a procedural formality, and a prerequisite to the issuance of a default judgment.<sup>2</sup> The party requesting an Entry of Default should file a "Motion for Entry of Default by the Clerk" with an affidavit, or other unsworn declaration made under penalty of perjury (e.g., under 28 U.S.C. § 1746), attached. That Affidavit or Declaration should set forth the following facts:

1. Date of service of the complaint;
2. Date of issuance of the summons;
3. Date of filing of an affidavit of service;
4. Date a responsive pleading was due by virtue of Fed. R. Bankr. P. 7012 or any order of the Court;
5. Statement that no answer or motion has been received by the date set by Fed. R. Bankr. P. 7012 or an order of the Court;
6. Statement that the party against whom default is requested is not a minor or incompetent person, as required by Fed. R. Civ. P. 55(b)(1); and
7. Statement, pursuant to the Servicemembers Civil Relief Act, "(A) stating whether or not the defendant is in the military service *and showing necessary facts to support the affidavit*; or (B) if the plaintiff is unable to determine whether or not the defendant is in the military service, stating that the plaintiff is unable to determine whether or not the defendant is in the military

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<sup>1</sup> 10 James Wm. Moore et al., Moore's Federal Practice § 55.10[1] (3d ed. 2001).

<sup>2</sup> *Id.*; see also *Garrett v. Seymour*, 217 Fed. App'x 835, 838 (10th Cir. 2007) ("[T]he clerk had not entered default under Rule 55(a), a prerequisite for the entry of a default judgment under Rule 55(b)(1).").

service,”<sup>3</sup> and why plaintiff is unable to so determine. In other words, what good faith effort have you made to determine military status?<sup>4</sup>

A sample “Motion for Entry of Default by the Clerk” with attached supporting Declaration is appended to these Guidelines as Attachment A.

## **STEP TWO: Default Judgment**

The party seeking a default judgment should file a “Motion for Default Judgment” that sets forth that the party seeking default judgment is entitled to the relief sought based upon a proper showing of each element of each claim.<sup>5</sup>

No notice of the Motion for Default Judgment must be provided to the defaulting Defendant unless the party has appeared personally or by a representative (and then did not file an answer or other responsive pleading). If an appearance has been entered, you must serve a copy of the motion at least 7 days before any hearing, as required by Fed. R. Civ. P. 55(b)(2). Accordingly, the Motion for Default Judgment need not be “noticed” unless there has been an appearance. If there has been an appearance, the Court will wait the requisite 21 days for response to the dispositive motion, pursuant to D. Kan. Rule 6.1(d)(2).

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<sup>3</sup> 50 U.S.C. app. § 521 (emphasis added).

<sup>4</sup> A party can request information from the Department of Defense (“DOD”) to determine whether a person is in the military, and the DOD must issue a statement as to military service. 50 U.S.C. app. § 582(b). Verification can be made electronically through the Defense Manpower Data Center (“DMDC”). The DMDC’s web site is located at <https://www.dmdc.osd.mil/scra/ows/home>, and additional contact information is as follows: Defense Manpower Data Center, Attn: Military Verification, 1600 Wilson Boulevard, Suite 400, Arlington, VA 22209-2593, Telephone (703) 696-6762, Fax (703)696-4156.

<sup>5</sup> See *Bixler v. Foster*, 596 F.3d 751, 762 (10th Cir. 2010) (“Even if an entry of default had been appropriate, it would not have been sufficient to entitle plaintiffs to a judgment . . . . Once default is entered, it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law. There must be a sufficient basis in the pleadings for the judgment entered.” (internal quotations and citations omitted)).

The Court will determine whether or not judgment should be entered and may set the matter for hearing in order to make such determination.<sup>6</sup> If, in order to enable the Court to enter judgment, it is necessary to “conduct an accounting,” “determine the amount of damages,” “establish the truth of any allegation by evidence,” or “investigate any other matter,” the Court may conduct such hearings or order such referrals as it deems necessary and proper.<sup>7</sup>

In very limited circumstances, default judgment may be entered by the Clerk under Rule 55(b)(1), but only if the complaint seeks a “sum certain or a sum that can be made certain by computation” and the plaintiff files a request for entry of default judgment with an affidavit or declaration of the amount due.<sup>8</sup> However, in all other circumstances, Rule 55(b)(2) requires that default judgment be entered by the Court. For instance, when a party against whom default is requested has served an answer or motion and then fails to appear at a court hearing, when relief other than money damages is requested, or when evidence is required to establish elements of claims or damages, default judgment, if appropriate, must be entered by the Court.

A form “Motion for Default Judgment” is appended to these Guidelines as Attachment B. A form proposed order titled “Default Judgment” is appended to these Guidelines as Attachment C.

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<sup>6</sup> The Court may require an actual evidentiary hearing when a party seeks a default judgment on allegations of fraudulent intent. *See, e.g., AT&T Universal Card Servs., Corp. v. Sziel (In re Sziel)*, 206 B.R. 490, 495 (Bankr. N.D. Ill. 1997) (expressing the court’s reluctance to “rubber stamp” default judgment motions when allegations of fraudulent intent are conclusory). Even if the party against whom default is requested fails to appear at such hearing, the movant must present evidence of fraud and the requisite intent. *See, e.g., FCC Nat’l Bank v. Roberts (In re Roberts)*, 193 B.R. 828, 831–32 (Bankr. W.D. Mich. 1996) (credit card company denied default judgment because it failed to produce evidence of debtor’s intent to defraud).

<sup>7</sup> Fed. R. Civ. P. 55(b).

<sup>8</sup> This “sum certain” requirement “means that the claim itself must be liquidated or for a fixed and indisputable amount, even if some calculation is needed to determine that amount.” 10 James Wm. Moore et al., *Moore’s Federal Practice* § 55.20[2] (3d ed. 2001). A claim for a specific amount does not necessarily make the sum certain. *World Alliance Consulting, Inc. v. DocPlanet.com, Inc.*, 57 Fed. App’x 390, 392 (10th Cir. 2003).