

# 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:
-------

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 260.
6. 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.
7. The Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501 - 596, provides protections for members of the military in judicial and administrative proceedings in state and federal courts and agencies.
8. If the defendant has not made an appearance in the proceeding, the plaintiff must file an affidavit stating whether or not the defendant is in military service, or that the plaintiff is unable to determine whether the defendant is in military service, before the court may enter a default judgment. If the defendant is in the military, or may be, the defendant is

afforded certain protections, including a stay of the proceedings, the appointment of an attorney to represent the defendant, requiring the plaintiff to post a bond, or vacating a default judgment. 50 U.S.C. App. § 521.

### **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 the 30 (or 35) day 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 form 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 "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. 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

New Jersey Lawyers' Fund for Client Protection  
Richard J. Hughes Justice Complex  
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Trenton, New Jersey 08625-0961  
Ruby D. Cochran, Deputy Counsel  
(609) 633-2434; CPF-1050  
*Attorney for Plaintiff*

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW JERSEY

IN RE	:	
PIETER JAN DE JONG	:	CASE NO. 10-24423-DHS
BERNADETTE HARM DE JONG	:	
	:	
DEBTORS	:	
	:	
NEW JERSEY LAWYERS' FUND FOR	:	ADVERSARY PROCEEDING NO.
CLIENT PROTECTION	:	10-02033-DHS
	:	
PLAINTIFF	:	
	:	
v.	:	<b>AFFIDAVIT IN SUPPORT OF</b>
	:	<b>ENTRY OF DEFAULT</b>
	:	
PIETER JAN DE JONG	:	
	:	
DEFENDANT	:	

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I, Ruby D. Cochran, of full age, being duly sworn upon her oath deposes and says:

1. I am an attorney-at-law of the State of New Jersey and serve as Deputy Counsel to the Plaintiff, New Jersey Lawyers' Fund for Client Protection ("the Fund"). I have been entrusted to handle the captioned case on behalf of Plaintiff.

2. I am submitting this affidavit in support of my Request for Entry of Default against Defendant, Pieter DeJong.

3. The Fund exists as a committee of the Supreme Court of New Jersey pursuant to R. 1:28-1 et seq. for the purpose of compensating the clients of disciplined attorneys who misappropriate money from them. Defendant Pieter DeJong ("Defendant") was such an attorney.

4. Defendant was admitted to the Bar of the State of New Jersey in 1972 and maintained offices for the practice of law in Long Valley, New Jersey. Defendant was suspended on March 10, 2009; and was disbarred on September 29, 2009.

5. The Fund filed the Complaint to Determine Non-Dischargeability of Certain Debts in the captioned Adversary Proceeding on August 17, 2010.

6. The Summons was issued to the Fund for service on Defendant August 18, 2010.

7. The court fixed a deadline of September 17, 2010, for serving an answer or motion.

8. The Complaint, Summons and Notice of Pretrial Conference in an Adversary Proceeding, Instructions, and Joint Order Scheduling Pretrial Proceedings were served on Defendant on August 20, 2010.

9. A certificate of service was filed by the Fund on August 20, 2010.

10. Defendant had a period of thirty (30) days to answer or otherwise to move against the Complaint pursuant to FRBP 7012. More than thirty (30) days have passed since service upon Defendant, and Defendant has not answered.

11. The court fixed a deadline of September 17, 2010, for serving an answer or motion. That deadline has passed.

12. The Defendant is not in the military service. (Exhibit A).

13. The Defendant is not an infant or incompetent person.

14. Because Defendant has failed to answer or otherwise to move, Plaintiff is entitled to the relief sought in this application and therefore requests Entry of Default against Defendant



# United States Bankruptcy Court

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

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

## JUDGMENT BY DEFAULT

Default was entered against defendant \_\_\_\_\_  
(name)  
on \_\_\_\_\_. The plaintiff has requested entry of judgment by default and has filed an  
(date)  
affidavit of the amount due and stating that this defendant is not in the military service.

Furthermore, it appears from the record that this defendant is not an infant or incompetent person.  
Therefore, pursuant to Fed. R. Civ. P. 55(b)(1), as incorporated by Fed. R. Bankr. P. 7055, judgment  
is entered against this defendant in favor of the plaintiff as follows:

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Clerk of the Bankruptcy Court)



## JUDGMENT BY 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 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. This entry of default is accomplished by the execution of Form 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 261A or by the court on Form 261B.
7. 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, the clerk may enter a judgment by default upon receipt of a request by the plaintiff with an affidavit of the amount due. Rule 55(b)(1). 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.
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)(2) requires that the default judgment be entered by the court. Entry of a judgment by default by the court is discussed in the following material on Form 261B.

9. The Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501 - 596, provides protections for members of the military in judicial and administrative proceedings in state and federal courts and agencies.
10. If the defendant has not made an appearance in the proceeding, the plaintiff must file an affidavit stating whether or not the defendant is in military service, or that the plaintiff is unable to determine whether the defendant is in military service, before the court may enter a default judgment. If the defendant is in the military, or may be, the defendant is afforded certain protections, including a stay of the proceedings, the appointment of an attorney to represent the defendant, requiring the plaintiff to post a bond, or vacating a default judgment. 50 U.S.C. App. § 521.
11. Unless the plaintiff files an affidavit that the defendant is not in military service, a judgment by default may be entered only by court order. 50 U.S.C. App. § 521.
12. 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**

#### **Affidavit**

The clerk is permitted to enter a default judgment only upon being presented with an affidavit setting forth the amount owed and stating that the defendant is not in the military service. Fed. R. Civ. P. 55(b)(1) also requires that the affidavit state that the defendant is not an infant or incompetent person. This affidavit should be attached to the proposed judgment.

#### **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 261A after the phrase "judgment is entered against this defendant in favor of the plaintiff as follows:"

### **General Information to the Clerk**

Rule 55(b), as incorporated by Rule 7055, authorizes the clerk to enter a default judgment if the complaint seeks a sum certain, and the defendant is neither an infant nor an incompetent person. In all other circumstances, a judgment by default must be entered by the court.

Form 261A has been designed for entry of a judgment by default by the clerk. A judgment by default by the court may be entered on Form 261B.

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

If the clerk is being asked to execute the judgment, the clerk should make certain that the relief being ordered in the judgment is the same as that which was sought in the complaint.

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 unless directed to do so by court order.



## 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 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 261A or by the court on Form 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 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 those entities specified by the [bankruptcy] rules or . . . [as] the court directs."
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 seven 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 allegation by evidence, or investigate 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. If the defendant has not made an appearance in the proceeding, section 521(b)(1) of the Servicemembers Civil Relief Act (50 U.S.C. Appendix § 521(b)(1)) provides:

the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit –

  - (A) stating whether or not the defendant is in 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 military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.
14. If the defendant is in the military, or may be, the Servicemembers Civil Relief Act provides the defendant certain protections, including a stay of the proceedings, the appointment of an attorney to represent the defendant, requiring the plaintiff to post a bond, or vacating a default judgment. 50 U.S.C. App. § 521.

15. 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 261B after the phrase "IT IS ORDERED THAT."

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

50 U.S.C. App. § 521 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

Form B261B

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the amount due to the plaintiff, along with the plaintiff's application for entry of a judgment by default and the proposed judgment. Unless the plaintiff files an affidavit that the defendant is not in military service, a judgment by default may be entered only by court order. 50 U.S.C. App. § 521.



# United States Bankruptcy Court

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

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

## NOTICE OF ENTRY OF JUDGMENT

On \_\_\_\_\_, the following order (judgment) was entered on the docket:  
(date)

I certify that on this date a copy of this notice was mailed to the following:

_____	_____
Date	Clerk of the Bankruptcy Court
	By: _____
	Deputy Clerk

## NOTICE OF ENTRY OF DEFAULT

### General Information for the Clerk

Fed. R. Bankr. P. 9022(a) provides:

Immediately on the entry of a judgment or order the clerk shall serve a notice of the entry in the manner provided in Rule 5(b) F. R. Civ. P. on the contesting parties and on other entities as the court directs. Unless the case is a chapter 9 municipality case, the clerk shall forthwith transmit to the United States trustee a copy of the judgment or order. Service of the notice shall be noted in the docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002.

Fed. R. Bankr. P. 7005 incorporates Rule 5(b) of the Federal Rules of Civil Procedure. This rule provides that service may be made by ordinary mail. Service upon a party represented by an attorney may be made upon the attorney only, unless the court orders that the party be served directly.

Fed. R. Bankr. P. 5003(a) requires the clerk to enter the judgment on the docket, and to show on the docket the date of the docket entry.

Fed. R. Bankr. P. 5003(c) requires the clerk to keep a separate record containing a correct copy of every judgment affecting title to or a lien on real property, and every judgment for the recovery of money or property, as well as such other judgments and orders as the court directs.