



Where did the defendant go? An overview on seeking default

Getting a rapid recovery for your client while avoiding the pitfalls that arise with obtaining a default judgment.

BY DAVID L. CHENG

In these tough economic times, more and more companies are finding it easier to simply ignore litigation rather than face huge costs and expenses fighting lawsuits. As a result, it is critical to know what procedures we must follow in order to preserve our clients' rights.

Obtaining a default judgment

The first step to preserve your client's rights is to obtain a default judgment. Obtaining default against a party that has chosen to simply ignore your client's lawsuit provides your client with many procedural advantages. In California, entry of default completely cuts off a party's right to appear in the action (*e.g.*, take discovery, file motions other than a motion for relief from default or contest the material allegations of the complaint for purposes of the action). (See *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385-86.) Most importantly, however, a default judgment provides your client the opportunity and ability to preserve all relief sought against that party.

Notwithstanding these benefits, seeking default judgment is no easy task. The procedures by which default judgments may be obtained implicate a vast – and somewhat arcane – complex set of rules. Failing to follow just *one* of these rules will permit the defaulting

party to set aside any default judgment obtained.

What follows is a general overview on what you should consider when obtaining a default judgment on your client's behalf.

When can you get a default judgment?

Typically, the default process begins when the defendant has not responded to a properly served summons and complaint. When this happens, a defendant is "in default," and the plaintiff can take the first step to obtain an entry of default against the defendant. (See Cal. Rules of Court, rule 3.110.)

Getting a default is not just limited to situations where a defendant does not respond. A court can enter a default for the defendant not providing further responses to discovery, for discovery abuses or for conduct violating local court rules. (See Cal. Rules of Court, rule 3.1320(g); Code Civ. Proc., § 2023.030(d) and §575.2(a).)

However, you should keep two things in mind. First, while the defendant may technically be "in default," until the court clerk actually enters the default, the defendant can still file pleadings or motions with the court. (See *Fiorentino v. City of Fresno* (2007) 150 Cal.App.4th 596, 605.)

Second, if counsel represents the defendant, or you know that the defendant

has counsel, you may be under an ethical obligation to warn the defendant and his or her counsel before seeking an entry of default. In past court decisions, failing to warn opposing counsel of a pending default judgment provided a basis for setting aside any default judgment later on. (See *Pearson v. Continental Airlines* (1970) 11 Cal.3d 613, 619.)

Make sure you plead your claims well

One of the most important factors to consider before seeking default is to make sure that you have drafted a well-written complaint. This is because a defaulting defendant admits only the facts that have been well pled in the complaint. Consequently, if a court finds that your complaint does not state a cause of action, the court can determine that the default judgment was erroneous and can set it aside. (See *Molen v. Friedman* (1998) 64 Cal.App.4th 1149, 1153-54.)

Know the procedures for seeking entry of default, especially what needs to be filed and when

Generally, getting a default judgment has two phases: (1) seeking entry of default, as mentioned above; and (2) the application or motion for default judgment.

The first step in obtaining a default judgment is for the plaintiff to formally request an entry of a defendant's default. In California, the entry of default is not



automatic. To get the entry of default, the plaintiff must file an application for default judgment with the court clerk.

The following documents should be filed along with the application for default judgment:

- A request to enter default form (Judicial Council form CIV-100);
- Proof of service of summons;
- Notice of order fixing time for further response; and
- Under certain circumstances, a Code of Civil Procedure section 425.11 statement of damages *and* a proof of service attached.

With respect to the statement of damages, although the code states that it is required only under certain circumstances, it is usually a good idea to submit a statement regardless of whether one is required. As indicated above, a proof of service for the statement of damages must accompany any request for entry of default. If the defaulting party has not appeared in the action, the statement of damages must be served in the same manner as a summons. If the party has already appeared in the case, the notice may be served by mail on the defendant's attorney of record or on defendant if the defendant is not represented by an attorney. (See Code Civ. Proc., § 425.11(d).)

A very important fact you should keep in mind is that California courts do impose a timeline for seeking entry of a default judgment. Specifically, a request for entry of default must be filed *within 10 days* following a defendant's failure to timely file and serve a responsive pleading. (See Cal. Rules of Court, rule 3.110(g).) A defendant that does not file a timely response allows the Court to issue an Order to Show Cause why the court should not impose sanctions. (*Ibid.*)

From a practical standpoint, courts rarely impose an Order to Show Cause for not timely filing a request for entry of default. Nevertheless, you should make sure that you have all necessary documents prepared and ready for filing.

Courts are split on when the statement of damages must be served. Some

courts treat the damages statement as an amendment to the complaint and the court will not enter a default until at least 30 days after the damages statement has been served. (See *Plotitsa v. Superior Court* (1983) 140 Cal.App.3d 755, 761.)

Other courts, including the California Supreme Court in *dictum*, have held that a defendant is entitled to a reasonable time following actual notice of the liability to which he or she may be subjected. (See *Schwab v. Rondel Homes, Inc.* (1991) 53 Cal.3d 428, 435 (*dictum*).)

Know what you need to do to "prove up" the request for default

Once the court clerk has received the documents for the entry of default, the court is under a mandatory duty to enter a default judgment against the defaulting party. (See Code Civ. Proc., § 585(a), (b), (c).)

Usually, several days will pass from the time the default was filed to the date that the court clerk actually enters the default in the register of actions. Once the default is deemed "entered," you must get an entry of default *within 45 days* if you intend to obtain a default judgment.

Sometimes a default is deemed "entered" when the clerk signs the appropriate box on the request form. However, the current policy in many courts is to backdate the entry in the register of actions to the filing date on the plaintiff's request. Given the time constraints for obtaining default once default is entered, *it is always a good idea to follow up with the court clerk once your request for entry of default has been filed.* You should check to see if the default has been entered and whether you can obtain the default judgment through the court clerk.

In most cases, you can obtain a default judgment only through an application or motion with the court and upon an evidentiary showing "proving up" the recovery you seek for your client.

However, in certain cases, the court clerk has the authority to issue a judgment

against the defaulting party without a court hearing or judicial action. However, this only applies if the action arises from a contract or judgment; seeks recovery of a fixed amount of money or damages; *and* the defaulting party was not served by publication. (See Code Civ. Proc., § 585(a).)

Before preparing your case for court judgment, you should first look at the local court's rules and policies to see if the court regulates the time and place in which default judgments may be sought.

Like entry of default, you must file certain documents and evidence before default judgment may be granted:

- A request to enter default form (Judicial Council form CIV-100);
- Supporting documentation that proves up the recovery you are seeking; and
- Any additional requirements resulting from the summons being served by publication or in actions affecting land.

Needless to say, "proving up" your client's damages presents the biggest hurdle at this stage. Under the rules, a court's ability to render default judgment is limited "for such sum ... as appears to be just." Consequently, without such evidence, the court may refuse to grant a default judgment for any amount. (See Code Civ. Proc., § 585(b); *Taliaferro v. Hoogs* (1963) 219 Cal.App.2d 559, 560.)

The court, in determining whether it will grant a default judgment, can consider all forms of evidence, including live testimony. Normally, it is good practice to check with the clerk of the department to determine the judge's preferences in evidence. In most cases, however, the application or motion for default judgment usually is supported by declarations submitted by the plaintiff. These declarations must contain:

- A brief summary of the case that identifies the parties and the nature of plaintiff's claims;
- Declarations or other *admissible* evidence supporting the judgment request;
- Interest computations if necessary;
- A memorandum of costs and disbursements (This requirement is usually met



DECEMBER 2008

through Paragraph 7 found on the request for entry of default form.)

- A declaration of non-military status for each defendant against which the plaintiff seeks judgment;
- A proposed form of judgment;
- A dismissal of all parties against whom judgment is not sought or an application for separate judgment against specified parties under Code of Civil Procedure section 579, supported by a showing of grounds for each defendant;
- Any exhibits, if necessary; and
- A request for attorney fees if allowed by statute or the parties' agreement. (See Cal. Rules of Court, rule 3.1800.)

When you prepare your supporting documentation, be sure to carefully consider the admissibility of your evidence

and whether the evidence you introduce is related to the claims or relief pleaded in the complaint.

Consequently, a defaulting defendant may not be subjected to liability in a greater amount or on different claims than those that were pled in the complaint to which the defendant has defaulted. (See *Jackson v. Bank of America* (1986) 188 Cal.App.3d 375, 387.)

Also, keep in mind that where a cause of action is stated sufficiently in the complaint, you merely need to introduce evidence establishing a *prima facie* case for damages – *not liability*.

Conclusion

Hopefully, this brief overview will enable you to successfully obtain a de-



Cheng

fault judgment against the defendant in your client's case. By following the suggestions stated above, you will be on your way to getting a rapid recovery for your client while avoiding the many pit-

falls that may arise with obtaining a default judgment.

David L. Cheng is currently an associate at Waters & Kraus LLP. His practice focuses primarily on consumer class actions and elder financial abuse cases brought both nationwide and in California. He received his Juris Doctor from Boston College School of Law. Recently, he was appointed to AAJ's New Lawyers Division Board of Governors.