

DEFAULT JUDGMENTS SIMPLIFIED

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CHAPTER 17

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DEFAULT JUDGMENTS SIMPLIFIED

There are few experiences more demoralizing for an attorney than losing when unopposed. The quintessential example of this is being denied a default judgment. Despite what appears to be common belief, you can't always get what you want, just because no one filed an answer. This article addresses common mistakes and misunderstandings, and provides a roadmap for obtaining valid default judgments.

I. WHAT DOES THE PLAINTIFF REALLY GAIN FROM A DEFENDANT BEING IN DEFAULT?

The answer depends on whether you have a “no-answer” or “post-answer” default.

When a defendant fails to file an answer, he or she admits all facts properly set out in the plaintiff's petition, except for the amount of unliquidated damages. Thus, in a no-answer default, the plaintiff need only prove its unliquidated damages and fees.

When a defendant files an answer but fails to appear for trial, the plaintiff is required to offer evidence and prove *all* aspects of its claim.

II. WHEN IS A DEFENDANT ACTUALLY IN DEFAULT?

A. The defendant must have been properly served.

Defendants must be served in “strict compliance” with the Texas Rules of Civil Procedure: every “t” crossed and every “i” dotted. A no-answer default judgment cannot withstand a direct attack by a defendant who shows that he was not served in strict compliance with the Rules. There is no presumption in support of the judgment when it comes to the validity of service. Because the court's jurisdiction to hear the case is dependent upon service, even the slightest deviation will likely result in reversal.

PRACTICE TIP: Review the rules regarding citation and service before seeking a default judgment!

There are some surprises in the rules that you may have forgotten or never even noticed. For example, personal service on Sunday is prohibited except in cases of injunction, attachment, garnishment, sequestration or a distress warrant. TRCP 6. Objection is waived when the defendant appears in the case, but Sunday service will not support a default judgment.

PRACTICE TIP: Remember, waivers of citation must be signed after the law suit is filed, or they are ineffective.

B. Precise returns of service are required.

There must be a formal service return in every case, even with citation by certified mail. The green card alone is not enough. The clerk must prepare, sign and

file a proper return with the green card attached, in compliance with TRCP 107.

Returns must be complete, precise, legible and accurate. When a defendant is served by certified mail, the green card must reflect the “addressee's signature.” Default judgments will be reversed where the green card bears a different signature from the named defendant – such as the spouse of the addressee. The signature on the green card must match the named defendant in the case, or service is defective and reversal is almost guaranteed. Even an illegible signature has been held to invalidate service.

A different signature with the “agent” box checked also does not effectuate proper service, without evidence in the record that the person was authorized *by the defendant* to accept service by the signatory.

PRACTICE TIP: Have the clerk mark “restricted delivery” on the certified mail green card. The recipient will be required to present proof that they are the named addressee or an authorized agent before they will be permitted to sign for the item.

Scrutinize citations and returns before filing for default judgment. Error cannot be waived, and will result in a void judgment.

PRACTICE TIP: If a return is erroneous, incomplete or absent, consider serving the defendant a second time. This is significantly cheaper than re-litigating the case on remand.

C. Has the defendant filed an answer?

No default judgment may be granted when the defendant has filed a defensive pleading. Always check the clerk's physical file, including the correspondence envelope. (You cannot rely on e-filing events when no attorney has appeared to represent the defendant in the case.) Even a defective answer is sufficient to prevent a default judgment. Remember that courts liberally construe pro se filings. Any correspondence submitted to the clerk or the court by the defendant addressing the claims may constitute an answer. Unsigned letters, documents filed in the wrong cause number, and personal answers for corporate defendants have been held to constitute an “answer,” if they pertain to or address the underlying issues in the case.

PRACTICE TIP: If you are unsure whether a document constitutes an answer, ask the court to make that determination as a preliminary matter.

Many failed defaults fall into this simple category. If a document is filed that has been or could be deemed an answer by the court, consider filing a motion to strike the improper pleading.

D. Was the defendant served by publication?

When a defendant is served by publication, no default judgment is possible. An attorney ad litem must be appointed to defend the case, trial must be held, and all elements of the case must be proved. (Furthermore,

a statement of evidence as required by TRCP 244 must be signed by the court and filed of record. Failure to do so is reversible error.)

III. IS THE DEFENDANT ENTITLED TO NOTICE OF THE DEFAULT HEARING?

A. No Answer, No Appearance.

If the defendant failed to file an answer or make a general appearance, default may be taken without notice to the defendant.

B. No Answer, with Appearance.

Understanding the distinction between an answer and an appearance is critical. A general appearance entitles a defendant to notice of all filings and settings, including the default judgment hearing. No default may be granted without notice when defendant has made a general appearance. And because a default hearing is considered a “final hearing,” the defendant is entitled to no less than 45 days’ notice of the hearing as required by TRCP 245.

C. Has the defendant made a general appearance?

A party enters a general appearance when it (a) invokes the judgment of the court on any question other than the court's jurisdiction, (b) recognizes by its acts that an action is properly pending, or (c) seeks affirmative action from the court, other than an extension of time to file an answer. Physically appearing and addressing the court at a status hearing may constitute a general appearance, depending upon the nature and quality of the party's activities in the courtroom. Mere presence in the courtroom is not enough. A party who silently observes the proceedings does not make a general appearance. On the other hand, presence in the courtroom without being compelled to appear by a previous ruling of the court, and participation in any way other than to assert a lack of jurisdiction, each constitutes a general appearance.

Certain defensive filings have been held not to constitute even a general appearance, such as an unsworn special appearance, a plea to jurisdiction, and a plea in abatement. However, even these temporarily prevent default judgment until the issues are resolved.

PRACTICE TIP: When a defendant has made a general appearance, always file a certificate of service reflecting compliance with Rule 21a and notice of the default hearing to the defendant as part of your request for default judgment.

D. Answer filed, No Appearance.

Where the defendant has filed an answer (a “post-answer default”), trial must be scheduled and notice given in accordance with TRCP 245.

IV. DOES THE LIVE PLEADING SUPPORT THE JUDGMENT REQUESTED?

A. Defendant must be served with the pleading upon which judgment is based.

Amended or supplemental pleadings seeking more onerous relief than the prior pleading, must be served on the other party in accordance with TRCP 21a. Personal service is not necessary (unless required by local rule). Failure to include a Certificate of Service showing that defendant was served with the new pleading in compliance with TRCP 21a invalidates the default judgment.

B. The underlying pleading must assert a valid cause of action.

A default judgment stands upon the plaintiff's live pleading. The petition must assert a legally cognizable cause of action. If no liability exists as a matter of law on the facts alleged in the petition, a default judgment cannot be granted. For example, you cannot obtain a default judgment on a pleading asserting negligent infliction of emotional distress.

C. The court must have jurisdiction over the claim.

The court in which judgment is sought must have jurisdiction over the claim. For example, a constitutional county court cannot award a default judgment granting an easement, which falls exclusively to the district court. A district court cannot grant default judgment as to mere possession, which falls exclusively to the justice court.

D. The pleading must be sufficiently factually precise.

Because failure to answer merely admits the allegations of fact in the underlying pleading, the underlying pleading must contain sufficient factual allegations – if deemed true – to support each element of the cause of action. Mere conclusory allegations of a cause of action are not sufficient to support a judgment by default. General statements such as, “there was a contract between the parties which defendant breached,” or “the defendant was negligent,” may be insufficient to support a default judgment.

However, a petition may support a default judgment despite containing defects of form or substance. The mere fact that the pleadings would have been struck had special exceptions been filed does not necessarily invalidate the default judgment.

E. The factual allegations must uncontroverted and not inherently contradictory.

The petition must not contain internal contradictions of fact, or contradict facts in the exhibits and evidence offered at the default hearing. No default judgment may be granted on that portion of plaintiff's case in which allegations of the petition conflict with the

alleged facts or exhibits, or that are disproved by the alleged facts. This includes venue provisions. While an objection to venue can be waived if not raised, facts in the pleadings or exhibits which affirmatively disprove venue will prevent issuance of a default judgment.

PRACTICE TIP: Review your pleadings carefully! If you plead multiple claims in the alternative, ensure that the enumerated facts supporting the alternative claims do not contradict.

F. The relief sought must be supported by Texas law.

The default judgment can only award damages and remedies that are supported by law. For example, the judgment cannot award attorneys' fees in a tort case, or exemplary damages in excess of the statutory cap. Courts routinely deny default judgments seeking declaratory judgments that do not fall within Chapter 37 of the Texas Civil Practices and Remedies Code.

V. DO YOU NEED A HEARING ON THE RECORD TO PROVE-UP YOUR DAMAGES?

Liquidated damages may be established by default and granted without an evidentiary hearing. For unliquidated damages such as pain and suffering, mental anguish, exemplary damages, attorneys' fees, and lost future profits, there must be sufficient evidence in the record to support the judgment. The evidence submitted must be sufficiently concrete for the court to calculate the damages with certainty. A hearing may be held by submission, so long as sufficient evidence is submitted with the motion. Whether live testimony is required will depend on the judge, and the nature of the case. There is little uniformity across the state on this issue. Some courts require hearings while others rule by submission. Some courts permit conclusory affidavits while others reject them. You may wish to request a hearing in cases where the evidence on damages is unclear, and personally testify in support of an unusually large attorneys' fees request.

PRACTICE TIP: Verify your particular judge's evidentiary requirements before submitting the default judgment. When in doubt, request a hearing!

VI. WHAT DO YOU DO WHEN YOU'RE DONE?

After entry of a default judgment, you must file a Certificate of Last Known Address, and ask the Clerk to send notice of entry of judgment to the defendant at that address. TRCP 239a and 306a. Failure to do so will render the judgment void.

Review the form of judgment carefully, and be wary of finality language. If the judgment states, "all relief not requested herein is denied," or, "this judgment disposes of all parties and claims," then it will be treated as a final judgment even if other claims and parties

actually exist. If you say it's over, it's over whether it's over or not!

Remember that omissions in the judgment are not clerical mistakes subject to correction by nunc pro tunc unless the court first orally rendered a decision on the record that included the missing relief and then signed a written judgment that omitted it. You cannot come back later and request additional relief that was not included in the rendered judgment at the hearing.

When a default judgment is *improperly* rendered, the judgment is void. If challenged on appeal, the case will be remanded and reinstated. When a default judgment is properly rendered but the plaintiff failed to present legally sufficient evidence at the damages hearing, the case will be remanded for a new trial only on the issue of damages.

VII. NEED MORE INFORMATION?

This article is a practical guide to assist you in obtaining valid and enforceable default judgments. For a complete and thoroughly annotated overview of default judgments, I refer you to "Service of Process and Default Judgments – Article and Forms," by Mark P. Blenden, most recently included in the 15th Annual Conference on Collections and Creditors' Rights, State Bar of Texas, May 4-5, 2017.

GUIDE TO OBTAINING DEFAULT JUDGMENTSPrepared by Judge Roy Ferguson, 394th Judicial District Court

1. Ensure that the petition asserts valid causes of action over which the court has jurisdiction, and that sufficient non-contradictory factual allegations (not just legal conclusions) in support of each element of the claims are included or attached.
2. Scrutinize the citation, and verify the accuracy of each entry. Confirm that the name on the citation matches the name on the pleadings, envelope, return and “green card.”
3. Mark “restricted delivery” on the green card, to ensure that only the named defendant is permitted to sign for and claim the envelope.
4. Verify that the signature on the green card matches the name of the defendant, and that all prerequisites of service are scrupulously followed.
5. If service is faulty, have citation re-issued and the defendant served again.
6. If you filed an amended or supplemental pleading that seeks greater relief or additional remedies, serve it on the defendant in accordance with Rule 21a, and file a certificate of service.
7. Review the court’s file, searching for *anything* submitted by the defendant.
8. Seek clarification from the court as to whether any unusual filings constitute an answer.
9. If no answer or response is on file, determine whether the defendant made a general appearance, in writing or in person. Ask the court reporter whether the defendant ever showed up in court.
 - a. If the defendant made a general appearance, serve a copy of the motion for default judgment and notice of the default judgment hearing on the defendant in accordance with Rule 21a.
 - b. Submit a certificate of service, and attach proof of notice to your motion.
10. Ensure that the exhibits do not contradict each other or the allegations in the motion.
11. Request a default hearing. There is no harm in doing so, and failure to do so may have severe consequences.
12. Don’t get complacent! Attend the hearing, and bring evidence or witnesses. Give the judge more evidence than you think is needed. If you are seeking mental anguish or pain and suffering, bring your client to testify in person. Testify as to attorneys’ fees.
13. Review your proposed judgment carefully, and take it to the hearing.
 - a. If you pleaded in the alternative, ensure that the judgment is not inherently contradictory. Do not attempt to double-dip through different but overlapping causes of action.
 - b. Calculate pre- and post-judgment interest, and present it at the hearing.
 - c. Watch out for “finality language.”
14. File a Certificate of Last Known Address and ask the court clerk to immediately
15. send notice of entry of judgment to the defendant at that address.