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Includes Amendments effective August 3, 2009

RULE 55. DEFAULT

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(1) *Foreclosure Actions*. No default or default judgment shall be entered in a foreclosure action filed pursuant to Title 14, Chapter 713 of the Maine Revised Statutes except after review by the court and determination that (i) the service and notice requirements of 14 M.R.S. § 6111 and these rules have been strictly performed, and (ii) the plaintiff has properly certified proof of ownership of the mortgage note and produced evidence of the mortgage note, the mortgage, and all assignments and endorsements of the mortgage note and the mortgage.

(b) Judgment. Subject to the limitations of Rule 54(c), judgment by default may be entered as follows:

(1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk shall, upon request of the plaintiff and upon affidavit of the amount due and affidavit that the defendant is not a minor or incompetent person, enter judgment for that amount and costs against the defendant, if the defendant has been defaulted and has failed to appear.

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against a minor or incompetent person unless represented in the action by a guardian, guardian ad litem, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment in the same manner and subject to the same response requirements as for motions pursuant to Rule 7; provided that, if the reason for default is a party's failure to appear at trial, such notice need be served only if ordered by the court. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take

an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall in the Superior Court accord a right of trial by jury to the plaintiff if the plaintiff so requests.

(3) *Judgment on Negotiable Obligation.* No judgment by default shall be entered upon a claim based on a negotiable instrument or other negotiable obligation unless an original or copy of the instrument or obligation is filed with the clerk or unless the court for cause shown shall otherwise direct on such terms as it may fix.

(4) *Affidavit Required.* Notwithstanding the foregoing, no judgment by default shall be entered until the filing of an affidavit made by the plaintiff or the plaintiff's attorney, on the affiant's own knowledge, setting forth facts showing that the defendant is not a person in military service as defined in the Service Members Civil Relief Act of 2003, as amended, except upon order of the court in accordance with that Act, and setting forth facts showing that venue was properly laid at the place where the action was brought.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim.

(e) Collections Fee. A request or motion for a default that seeks a judgment for a sum certain, or for a sum that can, by computation of costs and interest, be made certain, shall be accompanied by a fee set in the Court Fees Schedule which shall be paid when the request or motion is filed. The fee payment requirement shall apply only when a judgment of $10,000 or more is sought.

Advisory Note – August 2010

The amendment recognizes the change in the law with the "Service Members Civil Relief Act" of 2003, 108 P.L. 189, 117 *Stat.* 2835, having repealed

and replaced the "Soldiers and Sailors Civil Relief Act" of 1940. *See* 50 U.S.C. app. §§ 501-706.

Advisory Note
August 2009 (Amended October 2009)

This amendment to Rule 55[a] is designed to assure that, prior to entry of any default in a foreclosure action, the trial court reviews the record and determines that, as required by law, the notice and service requirements of law have been complied with. Because court review of the record in foreclosure actions is required prior to entry of a default, defaults and default judgments in such actions must be entered by the court and not by a clerk.

Advisory Note
April 2008

This amendment to Rule 55 compliments the amendment to Rule 7(b)(1)(C) and is designed to assure that in foreclosure and other major debt collection matters, responsibility for payment of the fee for a motion to decide a case is not avoided by a practice of use of a default to obtain a final judgment. Major debt collection matters are those with a requested judgment of $10,000 or more.

Advisory Committee's Notes
May 1, 2000

Subdivision (b)(1) and (2) are amended to substitute "minor" for "infant."

Subdivision (b)(2) is changed to make the service requirements for request for judgment, in a case where a defaulted party has appeared, the same as the service requirements for a motion. The three day requirement is a carry-over from the original rules which may have anticipated prescheduled motion days on which any motion or request for judgment might be heard. With current scheduling practices, the three days prior to hearing requirement is not really appropriate as hearings are scheduled well in advance of three days, absent special emergencies that would be unlikely in a default judgment situation. Rule 7, governing motion practice, also allows matters to be heard on shorter notice, if ordered by the court.

Subdivision (b)(3) is amended to allow either an original or a copy of the negotiable instrument upon which a default is sought to be filed with the court. This will limit the practice, that now exists, of regularly filing motions to be permitted to file copies in lieu of originals in such circumstances.

Advisory Committee's Notes
1990

Rule 55(b)(2) is amended to eliminate the requirement of three days' notice for hearing on default in a case not involving a sum certain when the default is occasioned by defendant's failure to appear at trial.

The vast majority of defaults are due to other circumstances. In those cases, the three-day notice requirement is entirely appropriate. Where the case has been called for trial, however, the notice of trial puts the defendant on notice that all issues involved in the litigation are ripe for hearing. In such cases the three-day notice requirement may create a significant inequity. For example, where plaintiff appears for trial with witnesses ready to testify, defendant fails to appear, and plaintiff then for the first time applies for default, the present rule precludes immediate consideration of damages by the court. Since notice of trial has already been given, delay for further notice serves no useful purpose. Such delay also may cause significant unfairness if damages witnesses have traveled great distances or are not readily available on the date set for hearing in the further notice. Under the amended rule, the court retains the power to order notice if circumstances indicate that defendant might have grounds to reopen the default judgment by motion under Rule 60(b).

Advisory Committee's Note
November 1, 1969

Under the amendment to Rule 55(b) (4) no default judgment will be entered without receipt of an affidavit which asserts facts showing that the venue was properly laid in the county where the action was commenced. The amendment is designed to prevent a potential abuse of small collection suits being brought in a county distant from the residence of both the plaintiff and the defendant for the very purpose of discouraging the unrepresented defendant from getting representation and defending. It is well settled under the Federal Rules that a defendant who, validly served with process, submits to default judgment without answer or appearance, thereby waives any objection to the venue. *Commercial Cas. Ins. Co. v. Consolidated Stone Co.*, 278 U.S. 177, 49 S.Ct. 98, 73 L.Ed. 252

(1929); *Clover Leaf Freight Lines v. Pacific Coast Wholesalers Ass'n,* 166 F.2d 626 (7th Cir.1948), *certiorari denied* 335 U.S. 823, 69 S.Ct. 46, 93 L.Ed. 377; *Bavouset v. Shaw's of San Francisco*, 43 F.R.D. 296 (S.D.Tex.1967). The danger of this abuse is particularly great in collection suits for relatively small amounts, and the danger exists both in the Superior Court and the District Court. The amendment is taken over automatically into D.C.C.R. 55 through incorporation by reference.

The affidavit required by the amendment would appear to protect adequately against the abuse. Unless the affidavit is filed, no default judgment can be obtained in a collection suit brought in an improper venue. On the other hand, if a false affidavit is filed, grounds would exist for the defaulted defendant to get relief from the default judgment under Rule 60(b).

Explanation of Amendment
February 1, 1960

Rule 55(b) (1) in its original form appeared to place upon the clerk responsibility for determining that the defendant was not an infant or incompetent person. The amendment provides that the clerk in entering a default judgment may rely upon an affidavit stating that the defendant is neither an infant nor an incompetent. The amendment merely serves to eliminate reluctance to enter default judgments which had developed on the part of some clerks. Needless to say, falsity of the affidavit not only may involve serious consequences for the affiant, but also may be a ground for setting aside the judgment in accordance with Rule 60(b).

Reporter's Notes
December 1, 1959

This rule is closely similar to Federal Rule 55. Rule 55(a) provides for the entry of a default by the clerk for failure to plead or otherwise defend as provided by the rules. The typical situation for a default is the failure to file an answer within 20 days as required by Rule 12, but it may also result from the failure to "otherwise defend." It is comparable to a default under R.S.1954, Chap. 113, Sec. 3 (repealed in 1959).

Judgment by default may be entered by the clerk only under the circumstances set forth in Rule 55(b) (1).

When a default judgment must be rendered by the court, rather than by the clerk, Rule 55(b) (2) requires an application for judgment with at least 3 days written notice in any case where the defendant has appeared.

Rule 55(b) (2) provides for assessment of damages by a jury in a default cause if the plaintiff so requests. This is in accord with Revised Rules of Court 39. The defaulted defendant is entitled to be heard on damages but is not entitled to a jury.

Rule 55(b) (3) and (4) is not in Federal Rule 55. Rule 55(b) (3) requires the filing with the clerk of a negotiable obligation upon which a default judgment is rendered. The court may dispense with this requirement, however, for cause shown. This makes possible recovery upon an instrument which has been lost or destroyed. Rule 55(b) (4) preserves the substance of Revised Rules of Court 46, and is required in any event by the Soldiers' and Sailors' Civil Relief Act of 1940, as amended.

Rule 55(c) permits a default to be set aside for good cause shown. If a default judgment has been rendered, it may be set aside only in accordance with Rule 60(b), which replaces the Maine provisions for review as of right within one year in such a case. R.S.1954, Chap. 113, Sec. 5 (repealed in 1959).