

**New Clerks of Superior Court
January 8–10, 2013
UNC School of Government**

Civil Matters: Default, Extensions of Time, Confessions of Judgment

I. Entry of Default and Default Judgments. [Clerks' Manual Chapter 31]

A. Summary: The party obligated to respond to allegations has failed to respond, thus the allegations are deemed admitted, and claimant may obtain entry of default and default judgment without further litigation. Clerk enters default. Either clerk or a judge then enters default judgment, depending on nature of allegations.

B. Applicable Rule: Rule of Civil Procedure 55

C. Only applies where affirmative relief sought. Not for use in declaratory judgment actions.

D. Default judgments may not be entered against State of North Carolina, an agency of the State, or an officer sued in his or her official capacity.

E. Two Steps

1. Entry of Default:

a) Clerk has responsibility for entry of default

b) Essentially a notation on the record that one party has defaulted. Sets the stage for a default judgment.

c) Typically presented to clerk by motion (Motion for Entry of Default)

d) Affidavits sometimes accompany motions but are not required

e) Movant must demonstrate "default" – that a party obligated to respond has not responded to the pleading in the time permitted by the North Carolina Rules of Civil Procedure. This may include failure to:

(1) Answer complaint

(2) Reply to counterclaim

(3) Answer cross claim; or

(4) Answer third party complaint.

f) Time for response is typically 30 days from date of service (or Rule 6 extension) unless Rule 12(b) motion has been filed. See Rule 12(a)(1).

(1) Responding party has 20 days to respond after court rules on Rule 12 motion.

g) Typically the record of the pleadings is adequate to demonstrate the relevant dates and the existence of default.

h) Remember: Record must show that responding party has been properly served per applicable rule of civil procedure.

i) If requirements for entry of default are met, clerk must enter default. Ministerial, not discretionary. Elected, assistant, and deputy clerks may perform this task. (A deputy clerk may not enter a default judgment.)

2. Default Judgment

a) Judge may sign any motion for default judgment. Clerk may sign in limited circumstances. When in doubt, send to judge.

b) Presented by motion (Motion for Default Judgment) along with affidavit or verified complaint. Motion may be combined with Motion for Entry of Default. When appropriate, they can be considered at the same time, but entry of default must precede default judgment.

c) Clerk may sign when:

(1) Entry of default has been properly made

(2) Claim is for a "sum certain" or "a sum which can by computation be made certain"

(3) Amount due is shown by affidavit or verified complaint. Unverified pleading alone is not sufficient.

(4) Defaulting party has never made an appearance (examples: filed answer, filed motion to extend time to answer, letter to court, appearance in court)

(5) Defaulting party is not an infant or incompetent or the State of North Carolina (or agency or official thereof)

d) "Sum certain" or ascertainable "by computation" usually involves situations where contract makes it clear and verified pleading/affidavit clearly alleges the amount due (promissory notes, contracts for goods or services sold and delivered)

(1) Caution: Not every contract action will give rise to "certain" damages. Warranties are contracts, but amounts due under breach of warranty are seldom certain. Also, tort and personal injury actions do not lend themselves to "sum certain" pleadings.

(2) Note: When in doubt, ask attorney moving for a copy of the contract if this will help you determine whether the amount due is certain. This is not required, however, and the allegations of the verified pleading or affidavit *may* suffice.

e) Service by publication: Where defaulting party was served by publication, moving party must post bond before clerk may enter default judgment. Bond should suffice to provide compensation for defaulted party should default be set aside and that party incur harm.

f) An assistant clerk may sign a default judgment. A deputy clerk may not.

g) Debt Buyers. Where the plaintiff is a "debt buyer" (a party who purchases delinquent consumer debt for collection purposes), that party must make the following additional showings, by authenticated business records, in order to obtain default judgment:

- (1) Original account number
- (2) Original creditor
- (3) Amount of original debt
- (4) Itemization of charges and fees claimed to be owed
- (5) Original charge-off balance, or, if the balance has not been charged off, and explanation of how the balance was calculated
- (6) Itemization of post charge-off additions, where applicable
- (7) Date of last payment
- (8) Amount of interest claimed and basis for interest charged. G.S. 58-70-155.

F. Setting Aside Entry of Default and Default Judgment

1. Typically upon motion of the defaulted party

2. Setting aside entry

a) Clerk or judge may set aside entry of default "for good cause shown" per Rule 55(d).

b) Entry may be set aside if default judgment has not yet been entered. If default judgment has been entered, default judgment should be set aside first.

3. Setting aside default judgment

a) Per rule 60(c), clerk may set aside default judgments they have entered (not ones a judge has entered).

- b) Clerk holds hearing after notice to party that obtained the default.*
- c) Party moving to set aside default judgment must show grounds as stated in Rule 60(b).*

II. Extending Time to Respond

- A. Summary: Clerk has authority to extend time for parties to perform certain acts beyond the limits provided under Rules of Civil Procedure.**
- B. Applicable Rule: Rule of Civil Procedure 6(b)**
- C. Most common requests: Additional time to answer complaint (respond to counterclaim, etc.) and to file responses to discovery**
- D. Clerk may only extend time if deadline has not already passed. Otherwise, request must go to judge.**
- E. No authority to extend deadlines set by statutes other than the Rules of Civil Procedure.**
- F. No authority to extend time to make motions under Rules 50(b), 52, 59(b), (d), (e), and 60(b), except as those rules specify.**

III. Confessions of Judgment [Clerks' Manual Chapter 30]

- A. Summary: Allows a person to “confess” to the court that he or she owes money without a lawsuit being filed. Confession of judgment has same force and effect of regular judgment if procedure is followed.**
- B. Applicable Rule: Rule of Civil Procedure 68.1**
- C. Procedure:**
 - 1. Prospective defendant signs a sworn or verified statement authorizing the entry of judgment against him or her in the amount stated. Plaintiff must consent.**
 - 2. Statement must name the prospective plaintiff, county of residence, name of defendant, county of residence, and shall state why the defendant is liable to plaintiff (briefly).**
 - 3. May be entered only in county where defendant resides or has real property or county where plaintiff resides.**
 - 4. Upon proper filing by either prospective plaintiff or defendant, clerk enters the judgment in the amount confessed and docketes the judgment as in other cases.**