Report on Defaults -
How to Set Aside a Default Judgment
When You're Sued for Debt

Many debt law cases are determined by "default." If this has happened to you, you may be able to get that default "vacated" (basically, erased) so that you can defend yourself. Because of the nature of most of these cases, that may very well mean you will win the case.

Default Orders and Judgments

Default is **first** a court *order* that the party being sued has failed to respond to the lawsuit within the time permitted by law and therefore "waives" (lets go) the opportunity to defend, and then **second**, often after some waiting period, a *judgment* for a specific amount of money (or other court remedy) which the plaintiff can use to start garnishing wages or seizing bank accounts. Sometimes the "order" phase and the "judgment" phase are merged, and both the order and judgment are rendered the same day – and actually this is not unusual in debt cases. In that case the whole thing might be called a "default judgment" or "order and judgment."

Analytically, however, default orders and judgments are different. Upon failure of a defendant to respond to a petition and summons, the court can enter an order of default. This establishes that the facts alleged in the petition are taken as proved – liability (the fact that the defendant did something wrong and "owes" the plaintiff) is legally established.

The plaintiff must still prove the *amount* of damages, though , in order to get a judgment. Beware, however – a defaulting defendant is *not entitled to notice* of the hearing for damages, so unless the defendant somehow hears of the case, the plaintiff is allowed to present its case without the defendant being present. For all practical purposes that means that any evidence the plaintiff chooses to use will be allowed, and the plaintiff will, in general, get whatever it wants. In debt cases it is not unusual for damages to be established by the petition itself. The debt collectors try to streamline the process as much as they can get away with. If the defendant does become aware of the default and does appear at the damages hearing, however, things can become a good bit more complicated. In my experience it has been wise for a defaulting party to defend at the damages hearing when it found out about it.

In debt cases, the order of default and judgment of default often occur on the same day at the same hearing – and this is why plaintiffs will often attach (bogus) affidavits and "statements" of account to their petition – so that they can proceed to judgment on the date set for the first appearance (by the summons). If the evidence attached to the petition is not legally valid it may very well furnish a claim under the Fair Debt Collection Practices Act (FDCPA). If the defendant appears and defends, it could be a counterclaim. If the defendant does not appear or defend, it will probably be allowed as evidence of damages, but it may ***still*** form the basis for a separate action under the FDCPA.

What You "Win" if You Get the Judgment or Order of Default Set Aside

Whether there is merely an order of default or a judgment of default, you need to get the order vacated in order to defend yourself. Vacating the order or judgment basically just starts the case over and gives you an opportunity to respond. You cannot, officially, win or lose your case by getting the judgment vacated, although, practically speaking, you will lose the case if you cannot get the default vacated, and your legal position could be much improved if the plaintiff was using a false affidavit

attached to its petition and you point that out. **Likewise, as I pointed out above, if the plaintiff used a false affidavit in its petition, you may have a claim against it under the Fair Debt Collection Practices Act (FDCPA) even if you are not able to vacate the default, and in practical terms this may go a long way towards driving the debt collector away if you pursue it quickly**.

Vacating a Default

In general, it is much easier to persuade a court to reverse an *order* than a *judgment*, and it is also easier to persuade a court to reverse a *new* order than an *old* one. In other words, you should remember that **time is of the essence in attempting to "vacate" or "set aside" any default.** Whatever amount of time you take for filing your motion will be noted by the debt collector and judge. It is probably safe to say that time is first measured in hours or days – meaning that if you arrive late in court on the date set and find out you have defaulted, you are better off filing a motion that very day than you would be the next day. And the following day is better than the day after that. After a week or two, time is measured in longer increments, but again, every minute that passes is likely to be noted, and there is no advantage in delaying that I have ever seen.

You should *also remember* that in general the law favors decisions on the "merits" of a case (what is really just) rather than on technicalities, so you have a good chance of setting aside a default if you give it your best effort even if you've let some time pass. There are two important, opposing public policy considerations that must be considered regarding default judgments. **First**, the policy in favor of hearing cases on their merits, but **second**, there is a policy favoring "finality" - an end to litigation. The more time passes, the more important finality becomes, and after a year or so it may be impossible to set aside a judgment. Where the court lacked jurisdiction to act at all, however, this is not the case – I am not aware of any jurisdiction that puts a time limit on vacating default judgments from courts that lacked the jurisdiction to enter them.

What is a "Default Judgment" for Purposes of a Motion to Vacate?

Remember that a default judgment is a judgment entered by a court **upon failure of the defendant to respond** to a lawsuit. (A court can also award a default upon a plaintiff's failure to respond to a counterclaim, but this happens much less often.) Anything else is *not* a true default. Sometimes a court will punish a party to a case by "striking" its pleadings and awarding a "default," but this is not a true default. You would have to attack such a judgment by an appeal or other motion *rather than* a motion to set aside a default.

Reasons for Setting Aside a Default

People can give two main reasons for setting aside defaults. The most common is that there was some sort of excusable behavior—they lost the summons, got lost on the way to court, were somehow disabled from going to court by illness or accident, or similar basis. In most jurisdictions this behavior can include "neglect" of some minor sort – a lawyer or paralegal misplacing files or forgetting to file an answer, for example. The clock seems to tick faster on these cases, and in general the more wrongful the failure to respond is, the less time is reasonable to fix it by answering, and no jurisdiction regards any sort of "gamesmanship" or intentional failure to file for strategic purposes as excusable (as far as I know).

The other reason for setting aside a default would involve wrongful behavior by the plaintiff: deceit of some sort (although this can merge into the first category), new evidence which could not

have been available when the suit was filed, failure to obtain proper service, or the like. As a general rule, the more wrongful the plaintiff's behavior, the longer amount of time you have to set aside the judgment.

In a way, then, there's a common sense principle of justice at play. The courts do not want to reward either side for wrongful behavior and are reluctant to penalize them for mistakes that are quickly corrected. Thus, the more sympathetic your excuse, or the more blameworthy the behavior of the plaintiff, the more likely you are to have the judgment set aside.

Where the reason is some sort of excusable behavior, almost all states (possibly all do) require the motion to set aside be brought *no later than a year* of the entry of judgment, although New York starts that clock "after service of a copy of the judgment or written notice of its entry." **Civil Practice Law and Rules (CPLR)** ***5015(a) (1)***. Where the reason involves some sort of wrongful behavior by the plaintiff, the time requirement is generally more forgiving, although you should not delay. In some states (New York, for example), the court retains power in theory to vacate defaults far beyond the year limit if very strong justice requirements are met. But this is rare, and the courts will usually not allow you to delay unnecessarily. This policy is not likely to apply to a debt law case under any normal conditions.

Procedure for Motions to Set Aside

Motions to set aside or "vacate" a default judgment generally must follow specific rules that are prescribed by your jurisdiction's Rules of Civil Procedure. To find your state's Rules of Civil Procedure, click here. Or do a search with your state's name and "rules of civil procedure." Once in the Rules of Civil Procedure, search for the terms "default," "vacate" and "set-aside." The results from these searches should start you well on the way to knowing what you need to know.

The Rule for setting aside defaults usually contains some rules for *how* you would bring the motion ("procedure"). ***Rule 5015(a)*** specifies that the request be brought "by motion...with such notice as the court may direct." According to the "Generally" comment in ***McKinney's***, for Rule 5015 for Subdivision (a), there is some question about what the notice requirement actually is. Must you petition the court for guidance as to how much notice is required? The comment suggests that rather than the usual notice of motion, one should proceed by "notice to show cause," which involves the court establishing the time of notice. In all likelihood, though, the comment further notes, the normal notice requirement will be enough. In many states this is simply ten business days from the date of service of the motion. "Service" of the motion means that you give a copy to the other side and tell the court you did. You should look up your state's notice requirements.

A big question for motions to set aside is what must be "alleged" in the motion, and what evidence is required. The answers to these questions lie a little more deeply in the comments or annotations, because they are largely determined by "precedent" (what previous courts have determined) and specific rules. We'll get to that below. For now let me reemphasize that motions to set aside (that we're talking about here) are designed for cases that are actual default judgments. That means the case was *not contested.* One *cannot appeal a default judgment*—the rule is you must bring a motion to set it aside (in most if not all jurisdictions). But you can appeal a denial of the court to vacate a default.

What You Must Show

In addition to filing the Motion to Vacate within a certain amount of time, your motion must show certain things. These things can differ according to jurisdiction and amount of time passing before the motion is filed. In Missouri, all that is required, in general, for a motion to set aside a default that is filed within 30 days of the entry of judgment is some form of excuse for not answering – and in general this excuse is very liberally permitted. This is probably simply because in Missouri a judgment does not become "final" until 30 days after it is entered. Until that time the trial court has very broad discretion to change the ruling for any reason that seems just and fair. After thirty days, however, a different standard applies.

After thirty days from entry of judgment (in Missouri) - and in all other jurisdictions I'm aware of immediately – you must show some sort of defense to the claim against you in order to set aside the default. Just how much of a defense is a big question.

The Motion to Set Aside

In getting ready to respond to a default judgment and trying to set it aside, my first move would simply be to google the term "motion to set aside default judgment." This is actually not a rare search, but the results were not, in my opinion, very helpful. Nevertheless, you should keep that in mind, as the information you can get through google will help give you some perspective and a little "feel" for the topic. But what I'm giving you here is far better than that, I think.

As noted above, the big question for motions to set aside is what must be alleged in the motion. I look in ***McKinney's Consolidated Laws of New York, Annotated,*** under Note 81 (titled, "Burden of Proof, application for relief—In general")(there's a table of contents for the notes, so you can get a good idea of which ones you're looking for). The note contains little extracts of cases that tell you what you must do. McKinney's refers to several cases. The first case cited is ***Goldman v. Cotter 781 N.Y.S.2d 28***. That means the case is published in a book called the New York State Supplement, 2nd Series, volume 781, starting on page 28. It says there that: "A party seeking relief from an order or judgment on the basis of excusable default must provide a reasonable excuse for the failure to appear and demonstrate the merit of the cause of action or defense." Reasonable excuse, demonstrate the merit.

Further, "to overcome a default judgment, a movant is only required to make a "prima facie" showing of legal merit and is not required to establish a defense as a matter of law." ***Chase Manhattan Automotive Finance Corp. v. Allstate Ins. Co. 708 NYS2d 174 (3 Dept. 2000)***. That means you just have to state the facts (by affidavit in NY) that would constitute a defense—you don't have to prove them.

In some states, there is no need to show a defense if the motion to set aside is brought quickly enough. You should check your own state's laws on this question carefully. And even in New York the parties often forego such formalities if the time late is short enough. But don't count on this in your case.

So let's be careful.. Let's suppose we failed to respond to the summons because we became very ill, were hospitalized, and unable to attend court. Is this enough to establish the "excusable" part of the test? I couldn't actually find a case on this, but I did find one holding that the mortal sickness of a

spouse could provide the excuse: ***Zaidi v. New York Bldg. Contractors, Ltdl (2 Dept. 2009), 877 N.Y.S.2d 381***,

The ***Goldman*** case is instructive. In that case, a paralegal failed to file some papers required to defend (and later to appeal) a real estate judgment. There was some indication in the record, although the court is pretty vague about it, that the paralegal was acting intentionally in hiding his or her actions. The defense addressed the correctness of the amount of money in the judgment as well as the question of whether any amount was appropriate. The court of appeals held that (1) "the determination of the sufficiency of the proffered excuse and the statement of merits rests within the sound discretion [judgment] of the court;" and (2) the trial court should have granted the motion to set aside the judgment.

The paralegal's wrongful conduct was considered excusable from the point of view of the defendant. The court noted that "law office failure" did not rule out "excusable" mistake. Reading through the case, I found another case or two discussing the trial court's discretion. I wanted a statement of public policy favoring decisions on the merits. I found that in ***Mediavilla v. Gurman, 707 N.Y.S.2d 432, 434 (A.D.1 Dept. 2000)***: "While the reason given by counsel for...failing to appear...is short on detail, law office failure does not preclude the court from excusing a default or delay [citations left out]...in consideration of the strong public policy of this State that matters be decided on their merits." (Citing ***J.R. Stevenson Corp. v. Dormitory Auth., 492 N.Y.S.2d 385.***)

You can find this statement of public policy in any state if you look. And you should, because generally where it is stated you will find the best examples of excused behavior.

Other types of excuses found sufficient in New York involve the illness and death of the defendant's wife, ***Zaidi v. New York Bldg. Contractors, Ltdl (2 Dept. 2009), 877 N.Y.S.2d 381***, dissolution of business, ***Garcia v. Pepe (2 Dept. 2007), 839 N.Y.S.2d 544***, or simple clerical error, ***Perez v. Travco Ins. Co. (2 Dept. 2007), 843 N.Y.S.2d 390***.

There is an open question about whether you must attack all liability, absolutely, or whether you can just attack the amount of the judgment. Logic strongly suggests that an attack on the amount will be enough, and pragmatically I believe almost all courts would accept that at some point. But some say otherwise.

In New York, at least, the rule is that an attack on the amount will suffice.

Mediavilla casts some light on how you can allege a defense. In ***Mediavilla***, the movant provided a "conclusory" affidavit backed up by medical records. That suggests that an attack on the amount of the judgment will be enough, and simple (sworn) allegations will be enough if accompanied by some records. ***Goldman v. Cotter, 781 N.Y.S.2d at page 31*** contains a similar clue, and very strongly. The attack in ***Goldman*** was on the amount and correctness of some attorneys fees awarded, and all the defendant did was raise questions about the evidence supporting it. The court held there that "the finance charges ...would only be appropriate if a clear showing is made that the use of credit was the only avenue open,... and plaintiffs **should have the opportunity to submit opposition on the point**." That last sentence suggests that there was no evidence or specific allegations made by defendant on the point, simply arguments. A similar holding was rendered in ***Bilodeau-Redeye v. Preferred Mut. Ins. Co. (4 Dept. 2007) 831 N.Y.S.2d 815***. That involved an attack on the amount of damages at issue: whether the plaintiff was partially at fault, or had been previously injured. Also see, ***On Assignment v. Medasorb Technologies, LLC (1 Dept. 2008) 855 N.Y.S.2d 98*** (failure to allege that

debt had been at least partially paid made vacatur improper).

The point is, your defense may, or may not, need to be against all the liability. You should find out what kind of rule you have, but the more of the judgment you attack, the more likely you are to prevail as a practical matter.

In the debt law context this may prove a bit of a challenge, since most people do not have their financial records. Here is how I would go about getting around that requirement. You can find the judgment entered against you, and all the evidence submitted as part of that judgment. This will include allegations that the debt collector is the owner of the debt, and it will set forth the amount of the debt, something it claims as the basis for the debt, some claims that the debt was properly incurred. In short, it must include all the facts necessary to support the debt against you.

You must examine this file very carefully. Since the debt is brought by a debt collector, you can allege that the debt was not incurred by you to them. Further, you can say that you never received notice by them that they owned or had bought the debt. You will probably find charges that show up without explanation—look through the records for anything that is out of the ordinary or raises suspicions. Then allege if you can that isn't so.

For example, if the judgment contains finance charges (including interest) that arose after the alleged default, or if it includes any interest charges in its amount and also requests interest “up to the date of judgment”), this would be seeking compound interest. If the contract submitted in evidence does not include a right to compound interest, that is not only a basis for attacking the judgment but also a violation of the Fair Debt Collection Practices Act. If the judgment contains late fees after the alleged default, that would very likely be the same. You must look at the evidence very carefully and make your arguments both against the right of the debt collector to win at all and the amount won. You should note that an unjust ruling as to liability generally would subject you to multiple claims, and you should attack the amount of the judgment. And you should stress the importance of the policy favoring judgments on the merits.

Finally, you must attach evidence to your motion. That evidence should be an affidavit (sworn statement) by you or someone else who knows from actual experience about what happened and what the evidence is. You can either make reference to the record or copy it—I would copy it, and include the allegation in my affidavit that it was a “true copy” of a record supporting the judgment and part of the record. You make an affidavit by swearing to the facts in front of a notary public. Most banks will provide notaries free to their account holders, but you can also look up “notary public” in the Yellow Pages.