

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT SPR16-07

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<b>Title</b>	<b>Action Requested</b>
Civil Practice and Procedure: Request for Entry of Default	Review and submit comments by June 14, 2016
<b>Proposed Rules, Forms, Standards, or Statutes</b>	<b>Proposed Effective Date</b>
Revise form CIV-100	January 1, 2017
<b>Proposed by</b>	<b>Contact</b>
Civil and Small Claims Advisory Committee Hon. Raymond M. Cadei, Chair	Christy Simons, 415-865-7694 <a href="mailto:christy.simons@jud.ca.gov">christy.simons@jud.ca.gov</a>

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### Executive Summary and Origin

The Civil and Small Claims Advisory Committee proposes two revisions to the form used to request entry of a default judgment in a civil case (form CIV-100): (1) add an item to alert the court and parties that compliance with the Fair Debt Buying Practices Act may be required for a default judgment; and (2) revise the declaration of nonmilitary status to clarify the language and include the state law definition of military service. Both proposals originated from suggestions submitted by the Attorney General's office.

### The Proposal

#### Fair Debt Buying Practices Act

The Fair Debt Buying Practices Act, Civil Code sections 1788.50-1788.64 (the Act), took effect January 1, 2014. The Act imposes a number of requirements on debt buyers pursuing collection efforts including that no default judgment may be entered against a debtor defendant unless the debt buyer plaintiff submits certain documents, authenticated through a sworn declaration, to establish specified facts. (§ 1788.60(a) & (b).) If the debt buyer has not complied with the Act's requirements, the court cannot enter a default judgment for the debt buyer. (§ 1788.60(c).)

Attorneys from the Attorney General's office, which was involved in authoring the Act, suggested adding an item regarding the provisions of the Act relating to default judgments to the form used to request such judgments (form CIV-100) because a large number of default judgments are being entered for parties who have not complied with the Act. The proposed

*The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.*

revisions to form CIV-100 would add such an item addressing situations in which a debt buyer plaintiff is seeking a clerk's default judgment.<sup>1</sup>

Currently, a plaintiff using form CIV-100 to request a default judgment must indicate whether he or she is seeking a court judgment or a clerk's judgment by checking item 1d or item 1e(2), respectively. Where a plaintiff seeks a *clerk's judgment* under Code of Civil Procedure section 585(a), he or she must also complete item 5 on the form and there is a note following item 1e(2) with directions to this effect. Item 5 allows the plaintiff to comply with Code of Civil Procedure section 585.5, which requires that every application to enter a clerk's default judgment must include an affidavit stating certain facts.

To implement the suggestion from the Attorney General's office, the committee proposes revising item 5 to include a new provision addressing whether the action is or is not subject to the Act, plus an instruction that, if the action is subject to the Act, the debt buyer plaintiff must file further documentation. The heading of item 5 would also be revised to include a reference to Civil Code section 1788.60. In addition, the note following item 1e(2), instructing the parties to complete item 5, would be revised to delete reference to any specific code section.

The committee's proposal does not address situations in which a debt buyer plaintiff is seeking a *court judgment* because presumably the court will ensure compliance with the requirements of the Act before entering a default judgment.

### **Declaration of Nonmilitary Status**

Under the Servicemembers Civil Relief Act (SCRA),<sup>2</sup> a declaration of nonmilitary status must be filed before a default judgment can be entered. (50 U.S.C. App. § 3931.) The SCRA also requires that the court appoint an attorney for a non-appearing defendant who is in military service before entering a default judgment against him or her; a default judgment entered without appointing an attorney may be vacated if it appears that the defendant was prejudiced in defending the action because of his/her military service. (*Ibid.*)

Sections 400-409.14 of the California Military and Veterans Code also protect service member defendants from default judgments, but define "military service" to include state service and certain additional types of federal service. Section 402 of the Military and Veterans Code provides that, before entering judgment against a defaulting defendant, the plaintiff must file in court a declaration stating that the defendant is not in the military service.

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<sup>11</sup> Nothing in the Act specifies whether a default judgment should be entered by the court or a clerk. Section 1788.60, which states the requirements a debt buyer plaintiff must satisfy to obtain a default judgment, also states that the section "is not intended to modify or otherwise amend the procedures established in Section 585 of the Code of Civil Procedure," which governs default judgments. According to the Attorney General, some courts handle these matters as court judgments; others, as clerk's judgments. The proposal is intended to allow courts to continue to handle these requests as either court judgments or clerk's judgments.

<sup>2</sup> Effective December 1, 2015, the Servicemembers Civil Relief Act was recodified at 50 U.S.C. § 3901 et seq. That change in numbering is reflected in the proposed revisions.

The declaration of nonmilitary status on current form CIV-100, item 8, references the SCRA, but does not refer to the state law provision.

The committee proposes three revisions to this declaration to more properly reflect the law:

1. Eliminate the “entitled to the benefits” language, which is not required under the statute. This revision would eliminate the confusion that has arisen regarding whether entitlement to the benefits of other provisions of the SCRA affects this declaration.
2. Add the reference to state law.
3. Delete the check box immediately preceding the text of the declaration. The check box is unnecessary because the attorney must also sign the declaration. This revision would eliminate the problems that have resulted when an attorney signs the declaration but fails to check the box.

## **Alternatives Considered**

### **Fair Debt Buying Practices Act**

The committee considered the alternative of making no revisions to the form. However, based on the concerns of the Attorney General’s office that a large number of default judgments are being entered without debt buyer plaintiffs complying with Civil Code section 1788.60, the committee concluded that it was necessary to draw the attention of clerks and litigants to the requirements of the Act.

The committee also considered adding an entirely new item to the form that would ask a series of questions regarding compliance with each individual requirement of the Act. However, because the form is already very full, this alternative would push the form onto another page. The committee concluded that the goal of compliance with the Act could be achieved while keeping the form on one piece of paper.

One other alternative the committee considered was whether to develop a new separate default request form, or an attachment to be used with the current default request form, incorporating the requirements of the Act. Under this alternative, the declaration as to whether the Act is applicable would include an instruction to submit or attach the additional form with the information and documents required by the Act. The committee decided not to pursue this alternative because the cases at issue are brought by collections agencies, which will have attorney representation and thus the ability to draft their own submissions as needed.

### **Declaration of Nonmilitary Service**

The committee considered but rejected the alternative of making no revisions to this item because the changes are needed to comply with state law.

### **Implementation Requirements, Costs, and Operational Impacts**

This proposal will require training of clerks regarding the new item on the form, and the action they are to take if it is checked. The revisions should, however, clarify requirements already

imposed by law, and make it easier for clerks to properly comply with the Act when working on requests for default.

## **Request for Specific Comments**

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

### **Attachments and Links**

Proposed amended form CIV-100, *Request for Entry of Default*

ATTORNEY OR PARTY WITHOUT ATTORNEY: _____ STATE BAR NO: _____ NAME: _____ FIRM NAME: _____ STREET ADDRESS: _____ CITY: _____ STATE: _____ ZIP CODE: _____ TELEPHONE NO.: _____ FAX NO.: _____ E-MAIL ADDRESS: _____ ATTORNEY FOR (Name): _____	<b>FOR COURT USE ONLY</b>  <h1 style="margin: 0;">DRAFT</h1>  <h2 style="margin: 0;">03.02.16</h2>  <h1 style="margin: 0;">NOT APPROVED BY JUDICIAL COUNCIL</h1>
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b> STREET ADDRESS: _____ MAILING ADDRESS: _____ CITY AND ZIP CODE: _____ BRANCH NAME: _____	
Plaintiff/Petitioner: _____ Defendant/Responden: _____	
<b>REQUEST FOR</b> <input type="checkbox"/> <b>Entry of Default</b> <input type="checkbox"/> <b>Clerk's Judgment</b> <b>(Application)</b> <input type="checkbox"/> <b>Court Judgment</b>	CASE NUMBER: _____

1. TO THE CLERK: On the complaint or cross-complaint filed
- a. on (date):
  - b. by (name):
  - c.  Enter default of defendant (names):
  - d.  I request a court judgment under Code of Civil Procedure sections 585(b), 585(c), 989, etc., against defendant (names):

*(Testimony required. Apply to the clerk for a hearing date, unless the court will enter a judgment on an affidavit under Code Civ. Proc., § 585(d).)*

- e.  Enter clerk's judgment
  - (1)  for restitution of the premises only and issue a writ of execution on the judgment. Code of Civil Procedure section 1174(c) does not apply. (Code Civ. Proc., § 1169.)
    - Include in the judgment all tenants, subtenants, named claimants, and other occupants of the premises. The *Prejudgment Claim of Right to Possession* was served in compliance with Code of Civil Procedure section 415.46.
  - (2)  under Code of Civil Procedure section 585(a). ***(Complete the declaration on the reverse (item 5).)***
  - (3)  for default previously entered on (date):

2. **Judgment to be entered.**

	<u>Amount</u>		<u>Credits acknowledged</u>	<u>Balance</u>
a. Demand of complaint .....	\$		\$	\$
b. Statement of damages *				
(1) Special .....	\$		\$	\$
(2) General .....	\$		\$	\$
c. Interest .....	\$		\$	\$
d. Costs (see reverse) .....	\$		\$	\$
e. Attorney fees .....	\$		\$	\$
f. <b>TOTALS</b> .....	\$		\$	\$

- g. Daily damages were demanded in complaint at the rate of: \$ \_\_\_\_\_ per day beginning (date): \_\_\_\_\_
- (\* *Personal injury or wrongful death actions; Code Civ. Proc., § 425.11.*)
- 3.  (Check if filed in an unlawful detainer case) **Legal document assistant or unlawful detainer assistant** information is on the reverse (complete item 4).

Date: \_\_\_\_\_

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PLAINTIFF OR ATTORNEY FOR PLAINTIFF)

<b>FOR COURT USE ONLY</b>	(1) <input type="checkbox"/> Default entered as requested on (date): (2) <input type="checkbox"/> Default NOT entered as requested (state reason): Clerk, by _____, Deputy
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Plaintiff/Petitioner: Defendant/Responden:	CASE NUMBER:
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4. **Legal document assistant or unlawful detainer assistant (Bus. & Prof. Code, § 6400 et seq.).** A legal document assistant or unlawful detainer assistant  did  did **not** for compensation give advice or assistance with this form. *(If declarant has received any help or advice for pay from a legal document assistant or unlawful detainer assistant, state):*

- |  |  |
|--|--|
| a. Assistant's name:<br>b. Street address, city, and zip code: | c. Telephone no.:<br>d. County of registration:<br>e. Registration no.:<br>f. Expires on (date): |
|--|--|

5.  **Declaration under Code Civ. Proc., § 585.5 and Civ. Code, § 1788.60** (for entry of default under Code Civ. Proc., § 585(a)).

This action

- a.  is  is not on a contract or installment sale for goods or services subject to Civ. Code, § 1801 et seq. (Unruh Act).
- b.  is  is not on a conditional sales contract subject to Civ. Code, § 2981 et seq. (Rees-Levering Motor Vehicle Sales and Finance Act).
- c.  is  is not on an obligation for goods, services, loans, or extensions of credit subject to Code Civ. Proc., § 395(b).
- d.  is  is not brought by a debt buyer on a consumer debt sold or resold on or after January 1, 2014. *(If it is, file the materials required under Civ. Code, § 1788.60 of the Fair Debt Buying Practices Act.)*

6. **Declaration of mailing (Code Civ. Proc., § 587).** A copy of this *Request for Entry of Default* was

- a.  **not mailed** to the following defendants, whose addresses are unknown to plaintiff or plaintiff's attorney (names):
- b.  **mailed** first-class, postage prepaid, in a sealed envelope addressed to each defendant's attorney of record or, if none, to each defendant's last known address as follows:
  - (1) Mailed on (date):
  - (2) To (specify names and addresses shown on the envelopes):

I declare under penalty of perjury under the laws of the State of California that the foregoing items 4, 5, and 6 are true and correct.

Date:

(TYPE OR PRINT NAME)	(SIGNATURE OF DECLARANT)
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7. **Memorandum of costs** (required if money judgment requested). Costs and disbursements are as follows (Code Civ. Proc., § 1033.5):

- a. Clerk's filing fees ..... \$
- b. Process server's fees ..... \$
- c. Other (specify): ..... \$
- d. .... \$
- e. **TOTAL** ..... \$ \_\_\_\_\_

- f.  Costs and disbursements are waived.
- g. I am the attorney, agent, or party who claims these costs. To the best of my knowledge and belief this memorandum of costs is correct and these costs were necessarily incurred in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)	(SIGNATURE OF DECLARANT)
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8. **Declaration of nonmilitary status** (required for a judgment). No defendant named in item 1c of the application is in the military service as that term is defined by either the Servicemembers Civil Relief Act, 50 U.S.C. App. § 3911(2), or Military and Veterans Code section 400(b).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)	(SIGNATURE OF DECLARANT)
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