

**Presented:**

37th Annual Page Keeton Civil Litigation  
October 24–25, 2013  
Austin, TX

## **Default Judgments**

**Written by:**

**Alex Wilson Albright**

# DEFAULT JUDGMENTS

BY ALEX WILSON ALBRIGHT<sup>1</sup>

**“O**VERTURNING DEFAULT JUDGMENTS” was the first item on the syllabus in Professor Bernie Ward’s Texas Civil Procedure class in the Spring of 1979. I remember wondering why in the world we were spending time on this—surely default judgments were few and far between. Why would anyone not respond to service of process? And, the distinctions between “void” and “voidable” judgments, and between “direct” and “collateral” attacks on them, seemed arcane, complicated, and ridiculous.

Of course, when I began practice, I learned that defendants often do not respond to service of process, and knowing “how to overturn a default judgment” was a valuable skill. Defendants fail to answer for a variety of reasons—sometimes the defendant simply has no defense, sometimes the defendant doesn’t get notice of the proceeding, and sometimes the defendant just forgets to respond—making the facts of default judgment opinions some of the most entertaining available.

Recently, the Texas Supreme Court has decided a number of default judgment cases.<sup>2</sup> In this article, I will discuss those recent opinions and, in the process, acquaint you with the procedures for obtaining and overturning default judgments in Texas state court.

## Obtaining a Default Judgment

When a defendant is served with process, he is obligated to respond by answer or other appearance by the Monday next following 20 days after service of process.<sup>3</sup> If he does not, the plaintiff may ask the court to render a judgment by default—a “no-answer” default judgment. The non-answering party “is said to have admitted both the truth of facts set out in the petition and the defendant’s liability on any cause of action properly alleged by those facts. The defendant’s default thus established liability, but a trial may still be necessary if the plaintiff’s damages are unliquidated.”<sup>4</sup>

To obtain a default judgment, the plaintiff should file a motion for default judgment, informing the court that the return of service has been on file for more than 10 days<sup>5</sup> and providing

the defendant’s last known address.<sup>6</sup> Check the local rules, as some may require you to serve this motion on the defendant. Additionally, the Texas Lawyer’s Creed requires you to inquire about counsel’s “intention to proceed” when you “know the identity of an opposing counsel.”<sup>7</sup>

The best practice is to have the court sign the default judgment on liability as soon as possible, and, if damages are unliquidated, schedule a hearing and present evidence of damages.<sup>8</sup> Usually, the defendant will not appear at this hearing, although he is entitled to if he learns of it.<sup>9</sup>

**Defendants fail to answer for a variety of reasons. . . making the facts of default judgment opinions some of the most entertaining available.**

After the hearing, the judge awards damages according to the evidence, and renders a final default judgment. The clerk is supposed to send notice of the judgment to the defendant at the defendant’s last known address, but the clerk’s failure to do so is not alone a technical ground for overturning

the default.<sup>10</sup> The plaintiff can then begin the process of executing on the judgment.

Sometimes a defendant will file an answer, but will not show up for trial, setting up a post-answer default. The post-answer default differs from the no-answer default because an answer puts the merits of the claim at issue. Therefore, a post-answer default judgment cannot be rendered on the pleadings, and the plaintiff must prove liability as well as damages at the default judgment hearing.<sup>11</sup>

## Overturning a Default Judgment

The procedure by which a defendant seeks to overturn a default judgment is largely dependent upon when the defendant learns of the judgment and acts upon that knowledge. Earlier is almost always better—overturning a judgment after it has become finally final (it disposes of all claims and all parties, and the time periods for appeal have expired) is more difficult because of a “fundamental public policy favoring the finality of judgments.”<sup>12</sup>

If the defendant receives notice of the judgment fairly soon after the judgment is signed, the defendant will have a plethora of methods by which to overturn the default, and is likely to

be fairly successful at doing so. But, if the defendant does not hear of the judgment until the plaintiff begins to attempt execution, which can be long after the judgment was signed and becomes finally final, the methods available to challenge it are limited, as are the chances of success.

### **Void Judgments and Collateral Attacks**

The first thing one should ask when faced with a default judgment is whether it is “void” or merely “voidable.” The distinction is important, because a void judgment may be attacked either directly or collaterally.<sup>13</sup> A direct attack, such as an appeal, is a proceeding brought for the purpose of attacking a judgment, and must be filed within strict deadlines. (More on direct attacks below.) In contrast, a collateral attack is an attack on a judgment brought in a proceeding brought for some other purpose.<sup>14</sup> For example, whenever a judgment creditor brings an enforcement action, the judgment debtor may collaterally attack the judgment by claiming that it is void and not enforceable. There is no time limit for collaterally attacking a void judgment—a void judgment is void, is always void, and can never be enforced.

The Texas Supreme Court tells us in *PNS Stores v. Rivera* that a judgment is void when “the court rendering judgment had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act.”<sup>15</sup> In other words, the judgment is void when the court rendering that judgment had no power over the parties or the controversy, and it is merely voidable when the court did have such power.

*PNS* also makes clear that there must be a lack of due process to void a judgment for service problems. The failure to fill out the certificate of service properly under Rules 106 and 107, as alleged in *PNS*, and other technical problems with service of process are not jurisdictional and do not render a judgment void.<sup>16</sup> But publication notice in a parental termination case, given to a mother who was in touch with CPS, is a violation of due process, rendering the judgment void.<sup>17</sup> “A judgment entered without notice or service is constitutionally infirm.”<sup>18</sup> And “some form of attack must be available when defects in personal jurisdiction violate due process.”<sup>19</sup>

### **Voidable Judgments and Direct Attacks**

If the judgment is not void, it nevertheless may be “voidable,” which means that it is erroneous and reversible. While a voidable judgment cannot be collaterally attacked, it may be attacked directly. “A direct attack—such as an appeal, a motion for new trial, or a bill of review—attempts to correct, amend, modify or vacate a judgment and must be brought

within a definite time period after the judgment’s rendition.”<sup>20</sup>

There are three methods to directly attack a default judgment in Texas: (1) the motion for new trial filed in the trial court which, if denied, will be appealed; (2) writ of error review, which is a special appeal to the court of appeals; and (3) the bill of review, an equitable proceeding filed in the trial court. Remember, a defaulting defendant may use these procedures to directly attack a judgment for *any* errors (including an error that renders the judgment void) within the time allowed.

### **Motion for New Trial and the Craddock Test**

Any party seeking to overturn a default judgment should quickly determine when the judgment was signed and hope there is time to file a timely motion for new trial. If there is time to file a motion for new trial, the judgment is not finally final, and the presumption favoring final judgments is not in place.

A Motion for New Trial must be filed within 30 days after the date on which the judgment is signed.<sup>21</sup> But, if the defendant received notice of the judgment between 20 and 90 days after the judgment was signed, a motion for new trial may be filed as late as 30 days after the date that the defendant learned of the judgment.<sup>22</sup> And, if the defendant was served by publication, a motion for new trial may be filed until 2 years after the date on which the judgment was signed.<sup>23</sup>

It is almost impossible to reverse a trial judge’s order *granting* a timely motion for new trial, primarily because new trial orders are not appealable.<sup>24</sup> But all is not lost if the trial court denies the motion, because the order can be reversed for abuse of discretion if the defendant satisfies the venerable *Craddock* test<sup>25</sup> discussed in two of the recent Texas Supreme Court opinions.

The *Craddock* test famously has three parts:

Under *Craddock*, a trial court is required to set aside a default judgment if (1) “the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident”; (2) “the motion for a new trial sets up a meritorious defense”; and (3) granting the motion “will occasion no delay or otherwise work an injury to the plaintiff.”<sup>26</sup>

### **Motion for New Trial: The defendant was not served.**

Of course, a trial court must grant the motion for new trial if the default judgment is void. As the supreme court has noted, the “critical question” in any default judgment

Also available as part of the eCourse

[Civil Litigation Texas Updates 2013: Recent Decisions and New Rules of Procedure; Dismissal on the Pleadings; plus Obtaining and Overturning Default Judgments](#)

First appeared as part of the conference materials for the  
37<sup>th</sup> Annual Page Keeton Civil Litigation Conference session  
"Obtaining and Overturning Default Judgments"