

A builder brought a federal diversity action against a homeowner for breach of contract, seeking \$115,000 in damages. The homeowner answered and counterclaimed for \$93,000 in damages for breach of warranty. Four weeks later, when the homeowner had not received any responsive pleading from the builder, the homeowner moved for entry of default and a default judgment on the counterclaim. After the clerk entered default, the homeowner asked the clerk to enter a default judgment.

May the clerk enter a default judgment?

- A. No, because only the court can enter a default judgment under these circumstances.
- B. No, because the builder's time to respond has not expired.
- C. Yes, because the builder has failed to defend himself against the counterclaim.
- D. Yes, because the damages the homeowner seeks are a sum certain.

## Explanation:

A **default** generally occurs when a defendant fails to timely **serve an answer** to a plaintiff's complaint. However, it can also occur when a **plaintiff fails to timely answer** a defendant's **counterclaim within 21 days** after it was served. When this failure is shown to the court clerk, the clerk must enter the default into the record. Since the builder has failed to respond to the homeowner's counterclaim four weeks after it was asserted, the clerk properly entered the builder's default **(Choice B)**.

A default judgment can then be sought from the clerk or the court. The **clerk may enter a default judgment** only when:

- the claim is for a **sum certain** or a sum that can be made certain by calculation
- the request for default judgment **includes an affidavit** establishing the amount due
- the **defaulting party failed to appear**—ie, did not file a motion or otherwise act before the court—and
- the defaulting party is **not legally incompetent or a minor**.

Here, the homeowner's \$93,000 counterclaim is for a sum certain and there is no indication that the builder is legally incompetent or a minor. However, there is no indication that the homeowner included an affidavit in the request, and the builder appeared before the court by filing his complaint. This means that only the court, not the clerk, can enter a default judgment under these circumstances **(Choice D)**.\*

\*Since the builder has appeared in the action, the court may enter a default judgment if the builder is served with written notice of the homeowner's application for default judgment at least seven days before a hearing on the matter.

**(Choice C)** The fact that the builder failed to timely defend himself against the homeowner's counterclaim allows the clerk to enter the builder's *default* into the record. However, the clerk may not enter a *default judgment* since the homeowner failed to include an affidavit in the request and the builder has appeared in the action.

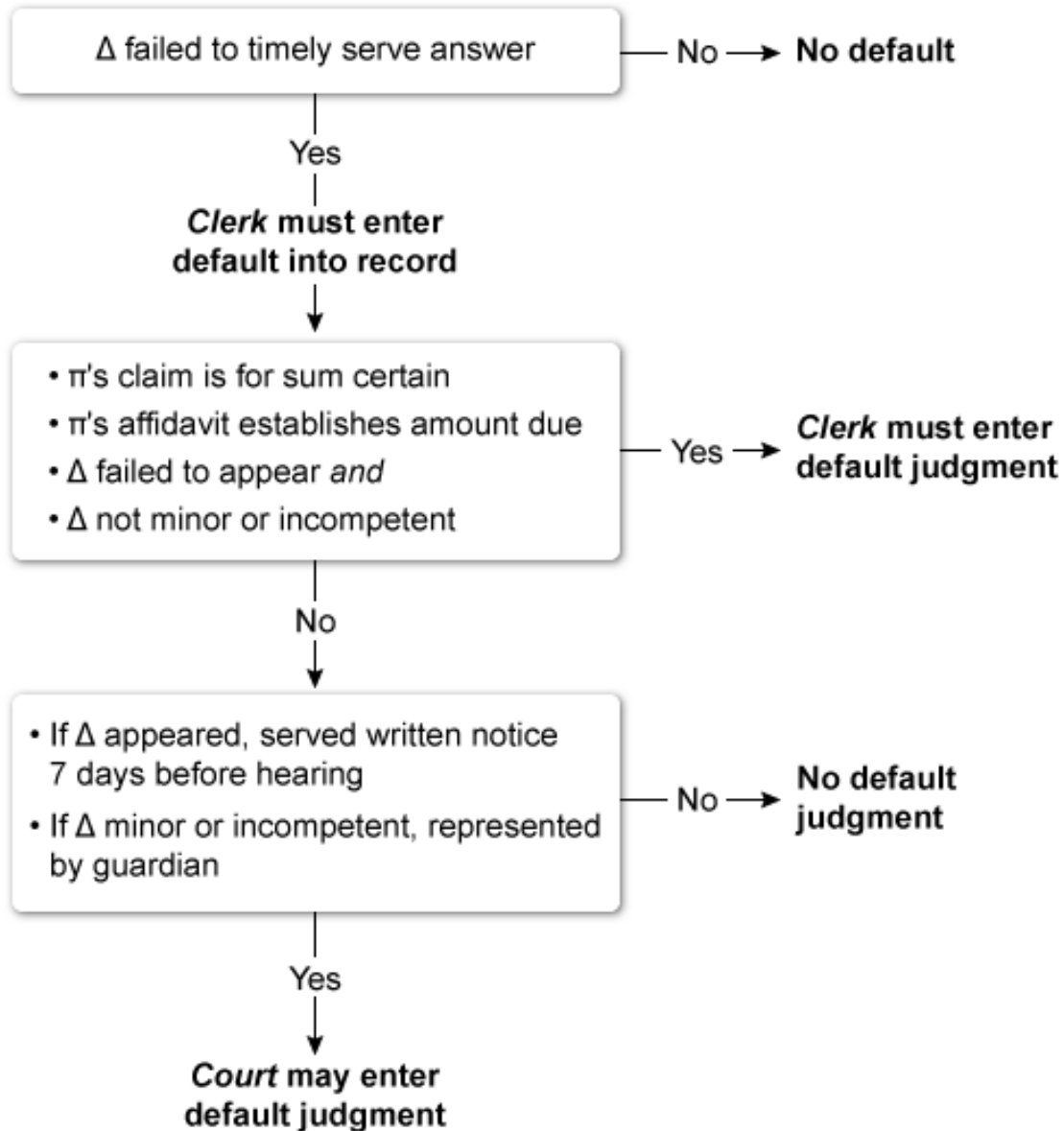
## Educational objective:

A clerk may enter a default judgment when (1) the claim is for a sum certain, (2) the request includes an affidavit establishing the amount due, (3) the defaulting party failed to appear, and (4) the defaulting party is not legally incompetent or a minor. Otherwise, only the court may enter a default judgment.

## References

- Fed. R. Civ. P. 55 (default judgments).
- 10A Charles Alan Wright et al., Federal Practice and Procedure § 2683 (4th ed. 2020) (explaining when a court clerk may enter a default judgment).

## Entering default judgment



Δ = defendant; π = plaintiff