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SANCTIONING DEFENDANTS' NON-WILLFUL DELAY: THE FAILURE OF RULE 55 AND A PROPOSAL FOR ITS REFORM

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I. INTRODUCTION

For as long as parties have pursued claims through litigation, those against whom claims are asserted have delayed the litigation process. Defendants, and other parties against whom claims are asserted,[1] (hereinafter collectively referred to as defendants), fail to answer complaints against them in time; they delay in responding to discovery requests, motions and court orders, and they fail to appear for trials and other proceedings.

Defendants' delay subverts the goal of the Federal Rules of Civil Procedure to achieve the "speedy" resolution of disputes.[2] Delay is harmful because it frustrates plaintiffs' ability to vindicate their rights:[3] justice delayed may be justice denied.[4] Moreover, delay in a particular case may divert limited judicial resources from other cases, thereby harming other litigants and potential litigants as

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1. Claims in federal civil litigation are not only asserted by plaintiffs against defendants, but also by defendants against plaintiffs (counterclaims), see FED. R. CIV. P. 13, by defendants against co-defendants (cross-claims), see *id.*, and by defendants as third party plaintiffs against third party defendants (third as party claims), see *id.* R. 14. For the sake of simplicity, this article will speak in terms of claims by plaintiffs against defendants.

2. *Id.* R. 1.

3. Judge Posner has noted that not all "delay" is harmful. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUDIES 399, 445-48 (1973). Delay produces certain benefits. *Id.* at 447. Moreover, some delay between the time the claim arises and the time the case is resolved is necessary in order for the parties to be able to prepare. *Id.*

In the situation with which this article is concerned, i.e., where a plaintiff seeks some sanction against a defendant in order to force the defendant to respond or to redress harm suffered by the plaintiff as a result of the delay, it seems fair to assume that delay is harmful to the plaintiff. If it were not, it is unlikely that the plaintiff would pursue a default judgment or other sanction.

4. *See generally* H. ZEISEL, H. KALVEN & B. BUCHHOLZ, DELAY IN THE COURT at xxi-xxiii (1959).

well. Excessive delay prevents the judicial system from serving its essential function of translating rights "into daily realities for the bulk of citizens."[5]

In order to prevent delay and thereby promote the speedy resolution of disputes, the Federal Rules of Civil Procedure provide for various sanctions for delay,[6] among them the Rule 55 default judgment. In the case of delay by defendants in certain contexts—such as responding to a complaint[7] or appearing for trial—a default judgment is the only sanction for delay provided by the Rules.[8] Consequently, plaintiffs frequently seek default judgments. In 1987 alone, the default judgment sanction was an issue in over seventy reported federal court decisions.[9]

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5. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 913 (1987).

6. Rules 41 and 55 provide sanctions directed specifically at delay. Rule 41 provides for involuntary dismissal of a lawsuit where the plaintiff fails to prosecute the suit. FED. R. CIV. P. 41(b). Rule 55 provides for a default judgment against a defendant who delays in defending the suit. *Id.* R. 55.

Other provisions of the Rules contain sanctions aimed at other conduct that is likely to cause delay. Sanctions are available under Rules 7 and 11 for delay resulting from frivolous motions and other filings, under Rule 16 for delay in connection with pre-trial and scheduling conferences and orders, under Rules 26 and 37 for delay resulting from abuse of the discovery process, and under Rule 68 for delay resulting from a plaintiff's rejection of an offer of judgment more favorable than the result ultimately obtained at trial. *Id.* R. 7, 11, 16, 26, 37, 68.

7. The most common situation in which a default judgment is sought is where a defendant delays in responding to a complaint. *See, e.g.*, Hritz v. Woma Corp., 732 F.2d 1178 (3d Cir. 1984). Although the problem of delay in the litigation process has received considerable attention in recent years, delay in the context of answering complaints has been largely ignored. *Cf.* Posner, *supra* note 3, at 446 (traditional measure of delay is inaccurate because it excludes pre-answer stage). It makes little sense to focus on delay at other stages of the litigation while ignoring delay at the pre-answer stage. "[A]ny delay-reduction effort . . . should be accompanied by controls at *all* stages of the civil process." T. CHURCH, A. CARLSON, J. LEE, & T. TAN, JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS 70 (1978) [hereinafter CHURCH]. It would be of little consequence if we eliminated delay during the discovery process, for example, but failed to insure that such delay was not simply shifted to the pre-answer stage. "[The] uncontrolled segment of case progress . . . may simply absorb any time saved in other parts of the process, leaving no net gain for the litigant." *Id.* at 67.

8. While Rule 12 establishes the time within which a defendant must answer a complaint (20 days from service of the complaint except when the federal government is the defendant), Rule 12 provides no sanction for failure to answer in time. FED. R. CIV. P. 12. Rule 55 expressly provides for entry of a party's default for failure "to plead or otherwise defend as provided by these rules." *Id.* R. 55(a).

9. Decisions at the circuit court of appeals level include United States v. V & E Eng'g Co., 819 F.2d 331 (1st Cir. 1987); Men's Sportswear, Inc. v. Sasson Jeans, Inc., 834 F.2d 1134 (2d Cir. 1987); Lolatchy v. Arthur Murray, Inc., 816 F.2d 951 (4th Cir. 1987); Technical Chem. Co. v. 1G-LO Prods. Co., 812 F.2d 222 (5th Cir. 1987); INVST Fin. Group v. Chem-Nuclear Sys., 815 F.2d 391 (6th Cir. 1987); Passarella v. Hilton Int'l Co., 810 F.2d 674 (7th

The default judgment sanction clearly promotes a speedy resolution of a dispute, yet it does so at the expense of the Federal Rules' goal of resolving cases on their merits. Entry of a default judgment means that a defendant is deemed to admit the allegations of the complaint and is therefore denied the opportunity to defend on the merits. When a default judgment is sought against a defendant who has delayed, the goals of speedily resolving disputes and resolving them on their merits come into conflict.

This conflict is easily resolved when a defendant has delayed willfully.[10] Although the Rules favor resolution on the merits, a defendant who has willfully delayed has, in effect, waived his right to defend on the merits. Thus, a default judgment may be appropriate to protect the plaintiff's interest in a speedy resolution of the dispute. If a defendant's delay is not willful, however, imposition of a default judgment is more difficult to justify. Indeed, relying on the policy favoring resolution on the merits, the federal courts today frequently refuse to impose a default judgment as a sanction for non-willful delay.[11]

While the majority of courts properly refuse to sanction non-willful delay with a default judgment, the Rules fail to provide any alternative sanction. As a result, the Rules provide no sanction at all for those cases in which a default judgment is deemed inappropriate. Absent a sanction, there is no deterrent to such delay, defendants who delay often walk away scot-free and plaintiffs are not

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Cir. 1987); Swink v. City of Pagedale, 810 F.2d 791 (8th Cir.), *cert. denied*, 107 S. Ct. 3274 (1987); Joseph v. Office of Consulate Gen. of Nigeria, 830 F.2d 1018 (9th Cir. 1987); Grandbouche v. Clancy, 825 F.2d 1463 (10th Cir. 1987); Gibbs v. Air Canada, 810 F.2d 1529 (11th Cir. 1987); Combs v. Nick Garin Trucking, 825 F.2d 437 (D.C. Cir. 1987). The reported decisions presumably represent just the tip of the iceberg. As this article later develops, district courts frequently have no choice but to set aside a default judgment despite a defendant's delay. *See infra* notes 68-91 and accompanying text. Because such decisions are generally unremarkable, many district court judges presumably consider their publication unnecessary. *Cf.* Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 VILL. L. REV. 575, 586, n.37 (1987) (reported decisions on Rule 11 sanctions represent only a small fraction of the total number of such decisions). Indeed, even at the circuit court level, there is evidence that decisions on default issues sometimes are not reported. In Knight v. Knight, 833 F.2d 1515 (11th Cir. 1987), *reconsideration denied*, 833 F.2d 1514, the Eleventh Circuit Court of Appeals initially decided not to publish an opinion on a default judgment issue; it published the opinion only after denying a motion for reconsideration. Also, while the "reported" decisions researched in this article include decisions reported on WESTLAW, it should be borne in mind that WESTLAW reports only written opinions from a very limited number of districts. Telephone interview with Greg Perlberg, WESTLAW representative (July 25, 1988).

10. *See infra* text accompanying notes 61-67.

11. *See infra* text accompanying notes 68-92.

compensated for harm they suffer as a result of the delay. Moreover, the current Rule 55 procedure encourages needless litigation of default issues.

This article addresses the failure of the default judgment rule to provide a sanction for the many cases—generally cases of non-willful delay—in which a default judgment is deemed inappropriate.[12] It first briefly reviews the mechanics and the genesis of the current Rule 55 procedure. It then reviews the courts' frequent reluctance to sanction non-willful delay with a default judgment and explains the adverse effects of the lack of an alternative sanction. The article concludes with a proposal to amend Rule 55 to include a fee shifting sanction for those cases where a default judgment is deemed inappropriate.

II. THE RULE 55 PROCEDURE

A. *The Mechanics of the Rule 55 Procedure*

Rule 55 of the Federal Rules of Civil Procedure, the default judgment rule, provides for entry of a default judgment against a party who fails "to plead or otherwise defend as provided by these rules."[13] A default judgment is a final judgment. As between the parties it has the same effect as a judgment rendered after a full trial on the merits.[14]

Rule 55 sets forth a two-step procedure whereby a plaintiff (or other party) can obtain an "entry of default" and default judgment against an unresponsive defendant.[15] Rule 55 also sets forth the

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12. While this article specifically addresses the default judgment procedure under the Federal Rules, the analysis of the article would apply to many states' default judgment procedure as well. The default judgment procedure in many states is either based on or similar to the federal courts' approach under Rule 55. *See, e.g.*, Laughrey, *Balancing Finality, Efficiency, and Truth: A Proposed Reform of the Missouri Default Judgment Provisions*, 51 Mo. L. REV. 63, 76-78 (1986) (proposing to mitigate the harshness of the Missouri courts strict approach to default judgments with, *inter alia*, a fee shifting provision similar to that proposed in this article); Pohl & Hittner, *Judgments by Default in Texas*, 37 SW. L. J. 421, 441-47 (1983); Occhialino, *Civil Procedure*, 14 N.M. L. REV. 17, 31-33 (1984); Comment, *Service of Process—Default Judgment: A Practical Guide for the Arkansas Attorney*, 40 ARK. L. REV. 381, 392-400 (1986); Commentary, *Alabama Rule 60(b): A Problem of Characterization, Limitation and Interpretation*, 36 ALA. L. REV. 1019, 1023 (1985).

13. FED. R. CIV. P. 55(a).

14. 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE part 1, ¶ 55.09 (2d ed. 1988) [hereinafter, MOORE'S FEDERAL PRACTICE]. A default judgment does not have collateral estoppel effect as to other parties. *Id.*

15. Default judgments are available not only to plaintiffs but to other parties as well. "The provisions of [Rule 55] apply whether the party entitled to the judgment by default is

procedure whereby the defendant can seek to have the entry of default or default judgment set aside.[16] The following is a brief outline of the mechanics of the Rule 55 procedure.[17]

1. Entry of Default

Rule 55(a) provides for the entry of a party's default. The rule requires that the clerk of the court enter a party's default when that party "has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise."[18] An entry of default has no independent significance; it "is just the first procedural step on the road to obtaining a default judgment."[19] Once a plaintiff has obtained an entry of default against the defendant, the plaintiff can then move for a default judgment.

2. Default Judgment

Rule 55(b) provides for the entry of a default judgment.[20] The judgment may be entered by either the clerk of the court or by the court.[21] Where the precise amount of damages is not readily ascer-

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a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim." FED. R. CIV. P. 55(d). As noted earlier, this article speaks in terms of plaintiffs' complaints against defendants for the sake of simplicity. *See supra* note 1.

16. FED. R. CIV. P. 55(c). While it might seem odd that a default judgment should be entered in the first instance if it is possible that it will subsequently be set aside, there is no reasonable alternative. Unless and until the defendant responds, the court does not know whether the defendant is simply late—such that the judgment would later be set aside—or is deliberately ignoring the plaintiff's claim. The court could postpone entry of a default judgment, and either wait for the defendant to respond or attempt some form of notice to the defendant in addition to that provided by service of the summons and complaint. Doing so, however, would denigrate the court's authority and the Rule 12 time limit for the defendant's response.

17. Sections (a), (b), and (c) of Rule 55 are relevant to this article and are described in the text. Subsection (d) merely explains that the Rule applies to plaintiffs, third-party plaintiffs, counterclaimants, and cross-claimants. Rule 55(e) sets forth the special requirement for obtaining a default judgment against the United States and will not be discussed in this article.

18. FED. R. CIV. P. 55(a).

19. Shepard Claims Serv. v. William Darrah & Assocs., 796 F.2d 190, 193 (6th Cir. 1986); *see also* Orange Theatre Corp. v. Rayherstz Amusement Corp., 130 F.2d 185, 187 (3d Cir. 1942).

20. FED. R. CIV. P. 55(b).

21. *Id.* The clerk may enter a default judgment where the complaint is "for a sum certain or for a sum which can by computation be made certain." *Id.* Thus, the clerk may enter a default judgment against a defendant when the precise amount of damages sought by the plaintiff is readily ascertainable from the face of the complaint.

tainable from the face of the complaint, only the court has the power to enter a default judgment.[22] If a hearing is necessary "to enable the court to enter judgment or to carry it into effect," the court may conduct such a hearing.[23] Thus, for example, the court may hold a hearing to establish the amount of plaintiff's damages. Following such a hearing, the court will enter the default judgment for the appropriate relief.

3. Setting Aside Defaults

Rule 55(c) sets forth the procedure whereby a party can seek to have an entry of default or default judgment set aside.[24] In the case of an entry of default, Rule 55(c) authorizes the court to set aside the entry "for good cause shown."[25] In the case of a default judgment, Rule 55(c) provides that the court may set aside the judgment "in accordance with Rule 60(b)."[26]

Rule 60(b), which governs relief from final judgments generally, specifies six grounds for relief "[o]n motion and upon such terms as are just."[27] Rule 60(b)(1), on which the majority of defendants rely when seeking to set aside default judgments,[28] provides for relief for "mistake, inadvertence, surprise, or excusable neglect."[29] The majority of defendants who seek relief from a default judgment seek relief under Rule 60(b)(1) on the ground of "excusable neglect."[30] Relief might also be sought under Rule 60(b)(4) on the

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22. *Id.*

23. *Id.* R. 55(b)(2). If the defendant has appeared in the action, the defendant must receive written notice three days prior to the hearing on the plaintiff's application for default judgment. *Id.*

24. FED. R. CIV. P. 55(c).

25. *Id.*

26. *Id.* "Theoretically, [Rule] 60(b) sets stricter standards for reopening a judgment than [Rule] 55(c) provides for setting aside a default. Actually, the few 55(c) cases we have found seem to use the same considerations as the 60(b) cases do . . . ." R. RODES, K. RIPPLE & C. MOONEY, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure*, 49 (1981) [hereinafter RODES, RIPPLE & MOONEY] (footnote omitted); *see also* 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE § 2694 (2d ed. 1983) [hereinafter WRIGHT, MILLER & KANE] (standards that govern whether relief should be granted from entry of default likewise govern whether relief should be granted from default judgment).

27. FED. R. CIV. P. 60(b).

28. *See* Project, *Relief from Default Judgments Under Rule 60(b)—A Study of Federal Case Law*, 49 FORDHAM L. REV. 956, 970 (1981); *see also* MOORE'S FEDERAL PRACTICE part 1, ¶ 55.10[2].

29. FED. R. CIV. P. 60(b).

30. *See* Project, *supra* note 28, at 970-83.

ground that "the judgment is void"[31] where, for example, the defendant was not properly served, or under Rule 60(b)(6) for "any other reason justifying relief."[32]

As the foregoing description suggests, a court may face the issue of whether the defendant's delay warrants a default judgment at any one of the three steps. The issue may arise when the defendant moves to set aside an entry of default,[33] when the defendant contests a plaintiff's motion for a default judgment,[34] or when a default judgment has already been entered and the defendant moves to have the default judgment set aside.[35]

B. *Origin of Rule 55*

Rule 55 was adopted with the rest of the Federal Rules of Civil Procedure in 1938. During its fifty year history, with the exception of a 1987 amendment eliminating gender-specific language,[36] Rule 55 has remained unchanged.

In large measure, Rule 55 adopted the procedure that had been employed in the common law and equity courts since the late seventeenth century.[37] In equity, a decree "pro confesso" and, at com-

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31. FED. R. CIV. P. 60(b)(4).

32. *Id.* 60(b)(6). Rule 60(b)(6) applies only to reasons for relief other than those reasons specified in subdivisions (1) through (5). *See* MOORE'S FEDERAL PRACTICE part. 1, ¶ 55.10[2].

33. In this situation, the court would have entered the defendant's default pursuant to Rule 55(a), but the plaintiff would not yet have moved for a default judgment. *See e.g.*, Wayland v. District Court, 104 F.R.D. 91 (D. Me. 1985). If the court refuses to set aside the entry of default, it is virtually certain that the court ultimately will impose a default judgment against the defendant. A defendant's argument in favor of setting aside a default entry will not differ in substance from a defendant's argument in favor of setting aside a default judgment.

34. The plaintiff would have already: 1) obtained an entry of default against the defendant; and 2) moved for a default judgment. If the defendant appears at this point, the defendant is likely to oppose the motion for default judgment and simultaneously move to have the entry of default set aside. *See, e.g.*, Kuhlik v. Atlantic Corp., 112 F.R.D. 146 (S.D.N.Y. 1986).

35. *See, e.g.*, Standard Enters. v. Bag-It, Inc., 115 F.R.D. 38 (S.D.N.Y. 1987).

36. *See* MOORE'S FEDERAL PRACTICE, part 1, ¶ 55.01[7],[8].

37. Before the late 1600s, a judgment or decree would not be entered against a defendant who failed to appear. Instead, the court employed various means to compel the defendant to appear, including outlawry and sequestration of the defendant's property. In a 1729 case it was stated that "[t]he practice of taking a bill *pro confesso* is not of long standing, the ancient way being to put the plaintiff to make proof of the substance of the bill, though the defendant has stood out to the last process, a sequestration." Hawkins v. Crook, 2 P. Wms. 556, 558 (1729). For a history of the English courts' early efforts to deal with unresponsive defendants, see Williams v. Corwin, 1 Hopkins Ch. 534 (1824). *See also* Thomson v. Wooster, 114 U.S. 104, 110-11 (1885); 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF

mon law, a judgment by default, or "nil dicit," could be entered against an unresponsive defendant.[38] In either case, the defendant's failure to defend would be noted and the defendant would be deemed to admit the allegations of the plaintiff's bill of complaint. Any necessary further proceedings—to ascertain the plaintiff's damages, for example—would be *ex parte*, after which the court would enter the appropriate judgment or decree. Were the defendant to appear and seek to defend, leave of court to do so could be granted in appropriate circumstances. There was little if any difference between the common law and the equity procedure.[39]

The equity rules which governed equity practice in the federal courts from 1822 through 1938 codified this procedure.[40] In the Equity Rules of 1912, the procedure was set forth in Rules 16 and 17.[41] These rules formed the basis for Rule 55 of the Federal Rules of Civil Procedure.[42]

ENGLAND 279-92 (1847); 2 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 578-97 (1895) (13th century practice); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 385-86, 681-84 (5th ed. 1956).

38. *Hawkins*, 2 P. Wms. at 556, *cited in Thomson*, 114 U.S. at 110.

39. *Thomson*, 114 U.S. at 111; *Hawkins*, 2 P. Wms. at 556.

40. *See* J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES, 62-63 (1977); P. BATOR, D. MELTZER, P. MISHKIN, D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 750-51 (3rd ed. 1988); *see also* EQUITY R. OF 1822, at R. 6, 10, 20 U.S. (7 Wheat.) vi-vii; Rules 18 and 19 of the EQUITY R. OF 1842, at R. 18, 19, 42 U.S. (1 How.) xlvi-xlvii; EQUITY R. OF 1912, at R. 16, 17, 226 U.S. 653.

41. EQUITY R. OF 1912, 226 U.S. 653. Equity Rule 16 provided for the entry of an order that the bill (complaint) be taken "pro confesso:"

> It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpoena as required by Rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*.

Id.

Equity Rule 17 provided:

> When the bill is taken *pro confesso* the court may proceed to a final decree at any time after the expiration of thirty days after the entry of the order *pro confesso*, and such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit. No such motion shall be granted, unless upon the payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

Id.

42. *See* FED. R. CIV. P. 55, advisory committee's note; 6 J. MOORE, W. TAGGART, & J. WICKER, MOORE'S FEDERAL PRACTICE part 1, ¶ 55.02[2] (2d ed. 1988) ("[Equity] Rules 16 and 17 are probably the most important sources [of Rule 55].").

The drafters of the Federal Rules chose to retain the basic structure of the pre-Rules default judgment procedure. Nevertheless, adoption of the Rules did effect two changes. First, adoption of the Rules substantially increased the period during which a defendant could have a default judgment set aside. Prior to the Rules, relief from a default judgment—or any judgment—could be had only during the term of court in which the judgment was rendered.[43] If the judgment happened to be entered at the end of the term, relief might be available for only a few days.[44] Under the Rules, however, relief from a default judgment may be granted for up to one year, and sometimes longer, after it is entered.[45] Second, whereas the equity rules had contained provisions requiring the court to take measures to protect the plaintiff's interests if the court set aside a default judgment, Rule 55 contains no similar provision. Rule 17 of the Equity Rules of 1912 provided that no motion to set aside a pro confesso decree could be granted:

> unless upon payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.[46]

It is unclear why the drafters of Rule 55 chose not to retain this or any similar provision.[47] In any event, unlike the equity rule on

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43. Bronson v. Schulten, 104 U.S. 410, 415-18 (1881).

44. In West Disinfecting Co. v. Rosenthal, 56 F.2d 320 (3d Cir. 1932), for example, after the plaintiff failed to answer a counterclaim, a decree *pro confesso* was entered on February 3, 1931. The term of court ended on March 19, 1931 and, 12 days later, the plaintiff moved to set aside the decree. The district court granted the motion. On the defendant's appeal, the circuit court reversed, noting that while the court might be inclined to open the decree, it could not be opened after the end of the court's term. *Id.* at 322.

45. *See* FED. R. CIV. P. 60(b).

46. EQUITY R. OF 1912, 226 U.S. 653. Rule 19 of the Equity Rules of 1842 contained a virtually identical provision. *See* EQUITY RULES OF 1842, 42 U.S. (1 How.) xlxi-xlvii. No similar provision appears in the 1822 Equity Rules. *See* 20 U.S. (7 Wheat.) vi-vii.

47. None of the various sources of information regarding the origin of the Federal Rules explain this change. *See, e.g.*, FED. R. CIV. P. 55, advisory committee's notes; *Rules of Civil Procedure for the District Courts of the United States: Hearings Before the Comm. on the Judiciary*, 75th Cong., 3d. Sess. (March 1-4, 1938); INSTITUTE ON THE FEDERAL RULES OF CIVIL PROCEDURE, AMERICAN BAR ASSOCIATION, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE (1939); Clark & Moore, *A New Federal Civil Procedure—I. The Background*, 44 YALE L.J. 387 (1935); Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057 (1955); 6 J. MOORE, W. TAGGART, & J. WICKER, MOORE'S FEDERAL PRACTICE part 1, ¶¶ 55.01-5513 (2d ed. 1988); WRIGHT, MILLER & KANE, *supra* note 26, § 2681.

which it is based, Rule 55 does not provide for protection of the plaintiff's interests in the event that a default judgment is set aside.

These changes in the mechanics of the default judgment procedure reflected the Federal Rules' general shift toward a predominant concern with resolution of disputes on their merits. In testimony before the House Judiciary Committee regarding the proposed Rules in 1938, the chairman of the Rules Advisory Committee expressed the drafters' strong preference for resolving cases on their merits, unburdened by "technicalities:"

> The books are full of meritorious cases destroyed by technicalities. The whole trouble with our present practice rules is that they are too technical, too much emphasis laid on form and practice, not on the ultimate end. What you are really after is the truth and the merits of the case.[48]

Indeed, the adoption of the Rules in 1938 has been described as the triumph of the view that procedure, and all its "technicalities," should "step aside and let the substance through."[49]

In the default judgment context, this attitude shifted the balance away from protection of the plaintiff's interest in a speedy and efficient resolution of the dispute and expanded protection of the defendant's interest in resolution of the dispute on its merits. Adoption of the Rules gave defendants more time to move to set aside a default judgment and eliminated the requirement that defendants compensate the plaintiff for costs resulting from the default.

III. Default Judgments as a Sanction for Non-Willful Delay

While the changes in the mechanics of the default judgment procedure might not have been significant of themselves, they were not the only changes that resulted from adoption of the Federal Rules. Adoption of the Rules changed the courts' attitude toward use of the default judgment as a sanction for delay. In contrast to

48. *Rules of Civil Procedure for the District Courts of the United States: Hearings Before the House Comm. on the Judiciary*, 75th Cong., 3d Sess. 24 (1938) (statement of Hon. William Mitchell).

49. Subrin, *supra* note 5, at 944; *see also* Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. Rev. 1057, 1059 (1955).

pre-Rules practice, the federal courts today frequently hold that a default judgment is not an appropriate sanction for non-willful delay.

In the late nineteenth century, federal courts showed little sympathy for a defendant whose negligence, or whose attorney's negligence, resulted in a default judgment. In *School District No. 13, Sherman County v. Lovejoy*,[50] for example, the defendant wrote to his attorney to request that the attorney appear for the defendant but, unbeknownst to the defendant, the attorney did not receive the letter until after a default judgment was entered and the term of court had ended. The court found its decision not to set aside a default judgment "abundantly supported by the authorities," and expressed the view that "[l]itigants are, for reasons of great public importance, required to exercise due diligence in . . . defending suits in which they are parties" and that "[c]ourts cannot make rules to aid or relieve those who are guilty of negligence."[51]

In *Allen v. Wilson*,[52] the court expressed its impatience with yet another "unfortunate defendant" seeking relief from the "occasional hardship" of the well-settled rule precluding relief from a default judgment after the end of the court's term. The court opined that a defendant's negligence, "under a correct and logical system of practice, ought to estop him from complaining of the harshness of the rule."[53]

Modern decisions under the default judgment rule by and large reflect a different view. Relying on the policy of the Rules that cases should be decided on their merits, the federal courts today frequently refuse to impose default judgments for non-willful delay.[54]

The federal courts today generally consider three factors in determining whether a default judgment is an appropriate sanction for delay:[55] 1) whether the defendant's delay was willful;[56] 2)

50. 16 F. 323 (C.C.D. Neb. 1882).
51. *Id.* at 323-24.
52. 21 F. 881 (C.C.E.D. Mich. 1884).
53. *Id.* at 882.
54. *See infra* notes 68-92 and accompanying text.
55. *See, e.g.*, Direct Mail Specialists v. Eclat Computerized Technologies, 840 F.2d 685, 690 (9th Cir. 1988); Sony Corp. v. Elm State Electronics, 800 F.2d 317, 320 (2d Cir. 1986); Meehan v. Snow, 652 F.2d 274, 277 (2d Cir. 1981); Keegel v. Key West & Caribbean Trading Co., 627 F.2d 372, 373 (D.C. Cir. 1980); J. MOORE, W. TAGGART & J. WICKER, 6 MOORE'S FEDERAL PRACTICE part 1, ¶ 55.10[2] (2d ed. 1988); WRIGHT, MILLER & KANE, *supra* note 26, §§ 2696-97.

whether the defendant has a meritorious defense; and 3) whether the plaintiff was prejudiced by the delay.[57] When the defendant lacks a meritorious defense, the plaintiff has been substantially prejudiced by the delay, or the defendant's delay was willful, the courts will impose or uphold a default judgment; these cases do not present any conflict between the Federal Rules' goals of reaching the merits and speedy resolution. In cases of non-willful delay, however, where the defendant has a meritorious defense and the plaintiff is not prejudiced by the delay, imposition of a default judgment presents a sharp conflict between the competing policies of the Federal Rules.

Defendants in most cases can easily establish a meritorious defense. Many courts hold that the defendant need only have pleaded a *prima facie* defense to establish a "meritorious defense."[58] More importantly, if the defendant lacks a meritorious defense, imposition of a default judgment does not conflict with the policy favoring trial on the merits. If the defendant lacks a meritorious defense, the policy favoring resolution on the merits

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While the district court's decision on a default issue is said to be "discretionary," the court's discretion is quite narrow. Some courts of appeals state that they will reverse a district court's decision imposing or upholding a default judgment for only a "slight" abuse of discretion. *See, e.g.*, Williams v. New Orleans Pub. Serv., Inc., 728 F.2d 730, 733-34 (5th Cir. 1984); *Keegel*, 627 F.2d at 373-74; *see also* INVST Fin. Group v. Chem-Nuclear Sys., 815 F.2d 391, 397-98 (6th Cir. 1987) (abuse of discretion regarding default issue need not be "glaring" to warrant reversal). Indeed, in 1981, the authors of the Project, *supra* note 28, found that the circuit courts reversed 44% of the reported appeals from denials of set aside motions. While the circuit courts upheld trial court decisions refusing to set aside default judgments 56% of the time, it should be noted that these decisions included not only cases of non-willful delay, but also cases where the defendant had no excuse for the default. Thus, substantially more than half of the district courts' "discretionary" decisions imposing default judgments as a sanction for non-willful delay are reversed on appeal.

56. Courts are required to consider the defendant's excuse for the delay by the express provisions of Rule 55. Rule 55(c) requires the defendant to show "good cause" to have an entry of default set aside. To have a default judgment set aside, Rule 55(c) refers to Rule 60(b), which generally requires that the defendant show that the judgment was entered as a result of the defendant's "excusable neglect." Both the "good cause" and the "excusable neglect" standards look to whether the default was deliberate or merely negligent.

57. Not all courts use precisely this formulation of the test. Also, some courts will consider additional factors such as the amount at stake in the litigation or the promptness with which the defendant sought to rectify her default. *See, e.g.*, Savin Corp. v. C.M.C. Corp., 98 F.R.D. 509, 512 (N.D. Ohio 1983). *See generally* 6 J. MOORE, W. TAGGART & J.W. WICKER, MOORE'S FEDERAL PRACTICE part 1, ¶ 55.10[2] (2d ed. 1988).

58. *See, e.g.*, Hritz v. Woma Corp., 732 F.2d 1178, 1181 (3d Cir. 1984); *see also* WRIGHT, MILLER & KANE, *supra* note 26, § 2697; Project, *supra* note 28, at 999-1002.

requires entry of judgment against the defendant, whether by default or otherwise.[59]

Likewise, courts will impose or uphold a default judgment where a plaintiff is "prejudiced" by the delay. Such "prejudice," however, must be substantial to support imposition of a default judgment; delay itself is not deemed prejudicial.[60] If the plaintiff has been substantially prejudiced by the delay, then the defendant's delay itself has prevented a resolution on the merits. In such a situation, the courts will impose or uphold a default judgment and the plaintiff's interests are adequately protected. When the defendant has a meritorious defense and the plaintiff has not been substantially prejudiced, however, there is a conflict between the Federal Rules' goals of reaching the merits and resolving the dispute speedily. How courts resolve that conflict often turns on whether or not the defendant's delay was deliberate or "willful."

When a defendant has willfully delayed, courts will not hesitate to impose a default judgment. As the Seventh Circuit Court of Appeals has put it: "[W]hen willfulness is clearly apparent, the liberal attitude of vacating default judgments is sharply modified."[61] In *Hal Commodity Cycles Management Co. v. Kirsh*,[62] the Seventh Circuit upheld a default judgment based on the defendant's willful failure to appear at a pre-trial hearing following three years of "egregious dilatory conduct" characterized by the court as "complete disregard for the district court."[63] In *Meadows v. Dominican Republic*,[64] the defendant failed to answer the complaint after receiving service and actual notice and after repeated warnings from the State Department of the consequences of a failure to answer. The Ninth Circuit Court of Appeals upheld the default judgment entered by the district court on the ground that the default was

59. *See, e.g.*, Broadcast Music, Inc. v. M.T.S. Enters., 811 F.2d 278 (5th Cir. 1978); Project, *supra* note 28, at 997-99. Where a defendant has not been properly served, however, the due process clause precludes entry of a default judgment, even against a defendant who lacks a meritorious defense. Peralta v. Heights Medical Center, Inc., 108 S. Ct. 896 (1988).

60. *See, e.g.*, Packard Press Corp. v. Com Vu Corp., 584 F. Supp. 73 (E.D. Pa. 1984); *see also* WRIGHT, MILLER & KANE, *supra* note 26, § 2699.

61. Bieganek v. Taylor, 801 F.2d 879, 882 (7th Cir. 1986) (citing Textile Banking Co. v. Rentschler, 657 F.2d 844, 854 (7th Cir. 1981)); *see also* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 640-43 (1976) (per curiam) (dismissal proper under Rule 37 for plaintiffs' bad faith failure to comply with discovery order); Project, *supra* note 28, at 972-73; Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 208-13 (1958) (Rule 37 does not allow dismissal of a case for plaintiff's non-deliberate failure to comply with a pre-trial discovery order).

62. 825 F.2d 1136 (7th Cir. 1987).

63. *Id.* at 1139.

64. 817 F.2d 517 (9th Cir. 1987).

"intentional, culpable, and inexcusable."[65] In *Hirschkopf & Grad, P.C. v. Robinson*,[66] the Fourth Circuit Court of Appeals upheld a default judgment based on the district court's finding that the defendants had failed to answer after willfully attempting to avoid service.[67]

Where a defendant's delay is not willful, however, courts frequently hold that a default judgment is not an appropriate sanction.[68] In *Hritz v. Woma Corp.*,[69] for example, the Third Circuit Court of Appeals held that an eight month delay in answering a complaint would not in itself justify a default judgment if the defendant's delay was not willful.

In *Hritz*, the plaintiff was seriously injured in a mining accident. Hritz wrote to Woma Corporation, the United States distributor of the equipment that had injured him and when Woma did not respond, Hritz filed a products liability action and properly served the complaint. After Woma failed to answer, Hritz moved for a default judgment and the district court granted the motion. The court held a hearing on damages, at which Hritz presented evidence, and thereafter the court entered judgment for Hritz. Although Woma had notice of all the proceedings, Woma failed to appear. After learning that Hritz would execute on the judgment, however, Woma appeared and moved to set aside the default judgment. Woma thus responded to Hritz's claim over two years after Hritz first attempted to contact Woma, eight months after Hritz filed the complaint, and four months after the court entered a de-

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65. *Id.* at 522.

66. 757 F.2d 1499 (4th Cir. 1985).

67. *Id.* at 1503. Other recent cases upholding imposition of a default judgment based in whole or in part on a finding that the defendant had willfully delayed include Men's Sportswear, Inc. v. Sasson Jeans, Inc., 834 F.2d 1134 (2d Cir. 1987); Technical Chem. Co. v. IG-LO Prods. Corp., 812 F.2d 222 (5th Cir. 1987); Benny v. Pipes, 799 F.2d 489 (9th Cir. 1986); and Allstate Ins. Co. v. Hall, 115 F.R.D. 491 (E.D. Mich. 1986).

68. Courts are not entirely consistent in defining the line that separates conduct that is "willful," "deliberate," or "culpable," i.e., conduct that would warrant imposition of a default judgment, from conduct that would not warrant imposition of a default judgment. While most courts hold that a default judgment should not be imposed as a sanction if the default is attributable to mere negligence rather than the result of "willful" or "deliberate" delay, *see infra* notes 69-92 and accompanying text, a few courts have indicated that negligent conduct can be deemed "culpable" so as to warrant a default judgment. *See, e.g.*, Gibbs v. Air Canada, 810 F.2d 1529, 1537-38 (11th Cir. 1987) (complaint lost after being forwarded by mail and defendant failed to use adequate procedural safeguards to prevent loss); Park Corp. v. Lexington Ins. Co., 812 F.2d 894, 896-97 (4th Cir. 1987) (unexplained loss of complaint); United States v. V. & E. Eng'g & Constr. Co., 819 F.2d 331, 336-37 (1st Cir. 1987).

69. 732 F.2d 1178 (3d Cir. 1984).

fault judgement.[70] The reason for Woma's default was that Woma had referred the suit to its insurer, the insurer had referred the suit to claims investigators, and neither Woma nor the insurer had inquired about the status of the claim until threatened with execution of the judgment.[71]

The district court denied Woma's motion to set aside the default judgment. On appeal, the Third Circuit Court of Appeals held that the district court erred in imposing the default judgment based on its determination that Woma was negligent: "[N]eglect alone cannot sustain a default judgment."[72] The court held that the record was unclear on the question of whether Woma's default was willful[73] and therefore remanded the case to the district court.[74]

In *Shepard Claims Service v. William Darrah & Associates*,[75] the Sixth Circuit Court of Appeals held that the district court abused its discretion in refusing to set aside an entry of default when the defendant's delay was "inexcusable" but not willful.[76] The plaintiff in *Shepard* filed a breach of contract action and served the defendant in February 1985. On February 22, 1985, the defendant requested that the plaintiff agree to give the defendant an additional forty-five days to answer the complaint. Defendant's attorney's secretary confirmed in a letter that plaintiff had agreed to give the defendant "45 days from February 22" to answer the complaint.[77] When the agreed time period had elapsed and the defendant had not yet filed his answer, the plaintiff had the clerk enter defendant's default.

Two weeks later, the defendant filed his answer and moved to set aside the default. The defendant explained that his attorney's

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70. *Id.* at 1180.
71. *Id.* at 1183.
72. *Id.*
73. The court also noted that the record was unclear on whether the statute of limitations had run as to Woma's parent corporation—a potential defendant—and that the plaintiff might be prejudiced as a result. *Id.* at 1181-85. Nevertheless, the court suggested that if this had occurred, Woma could be required to waive the statute of limitations defense on behalf of its parent corporation, thereby remedying the prejudice. *Id.* at 1182 n.3. By implication, then, the possible prejudice noted by the Third Circuit Court of Appeals would not have been sufficient to justify a default judgment.
74. *Id.* at 1185; *see Third Circuit Review, Civil Procedure*, 30 VILL. L. REV. 942, 952 (1985) (concluding that *Hritz* establishes a "virtually irrebuttable presumption" that a default judgment should be set aside).
75. 796 F.2d 190 (6th Cir. 1986).
76. *Id.* at 194-95.
77. *Id.* at 191.

secretary had understood that plaintiff had agreed to an extension of forty-five days from the time the answer otherwise would have been due under the Federal Rules. The defendant stated that the secretary understood this despite the contrary written confirmation, and that his attorney had relied on the secretary's understanding.[78] The district court denied the motion, finding that the defendant's attorney engaged in "culpable conduct" in allowing his secretary to arrange for the extension of time and failing to review the secretary's letter.[79]

On appeal, the Sixth Circuit held that the district court had abused its discretion in refusing to set aside the default.[80] The court began its analysis by noting that because of the "strong preference for trials on the merits in federal courts," the court would review the district court's exercise of discretion on the default issue using a "somewhat modified standard of review." "Trials on the merits are favored in federal courts and a 'glaring abuse' of discretion is not required for reversal of a court's refusal to relieve a party of the harsh sanction of default . . . . '[E]ven a slight abuse [of discretion] may justify reversal.' "[81] The Sixth Circuit characterized the defendant's default as "careless" and "inexcusable,"[82] but went on to find that the default was not willful.

In *Bieganek v. Taylor*,[83] the Seventh Circuit Court of Appeals held that a default judgment should be set aside on the ground of excusable neglect in a case in which the defendant first appeared in the action seven months after the defendant's answer was due. Bieganek sued Taylor and others for commodities fraud and served Taylor in January 1985.[84] Taylor moved to Spain in accordance with plans he had made prior to being served with the complaint. Taylor claimed that before he moved and after receiving the complaint, he mailed an affidavit to the court in which he denied the allegations of the complaint. Taylor also claimed that he understood that his co-defendants would represent his interests in the case. The court never received the affidavit allegedly mailed by

78. *Id.* at 192.
79. *Id.*
80. *Id.* at 193-95.
81. *Id.* at 193 (quoting United Coin Meter Co. v. Seaboard Coastline R.R., 705 F.2d 839, 846 (6th Cir. 1983) and Williams v. New Orleans Pub. Serv., Inc., 728 F.2d 730, 733-34 (5th Cir. 1984)).
82. *Id.* at 194.
83. 801 F.2d 879 (7th Cir. 1986).
84. *Id.* at 879-80.

Taylor and Taylor's co-defendants did not represent Taylor's interests.[85]

The district court granted the plaintiff's motion for a default judgment after Taylor failed to appear or file an answer.[86] The plaintiff presented evidence at a hearing on damages and the court entered a default judgment for roughly $250,000 against Taylor. In August 1985, seven months after Taylor's answer was due and five months after the court entered the default judgment, Taylor appeared and moved to set aside the default judgment. The district court denied the motion on the ground that Taylor's neglect was not excusable.[87]

On appeal, the Seventh Circuit Court of Appeals held that the district court had abused its discretion in refusing to set aside the default judgment.[88] The court noted the need to balance the policy favoring trial on the merits with the goals of efficient administration of justice and avoidance of prejudice to innocent parties, but went on to suggest that the former goal should always prevail: "We are not unmindful of the need for judicial eagerness to expedite cases, to fully utilize the court's time, to reduce overcrowded calendars and to establish finality of judgments. However, these commendable aspirations should never be used to thwart the objectives of the blind goddess."[89] The court concluded that Taylor's neglect was excusable and the default judgment should therefore be set aside.[90]

As the foregoing cases suggest, provided that the defendant has a meritorious defense and the plaintiff is not substantially prejudiced by the delay, a default judgment often is not available as a sanction for non-willful delay. Many appellate court decisions, including those discussed above and several others, expressly reject use of the default judgment sanction for cases of non-willful de-

85. *Id.* at 880.

86. *Id.*

87. *Id.*

88. *Id.* at 881-83.

89. *Id.* at 881 (quoting Boughner v. Secretary of Health, Educ. & Welfare, 572 F.2d 976, 978-79 (3d Cir. 1978)). The quoted language is clearly an overstatement if interpreted to mean that resolution on the merits should *always* be favored over the speedy resolution goal. The seventh circuit has allowed default judgments to be entered in cases involving willful delay. *See, e.g.*, C.K.S. Eng'rs, Inc. v. White Mountain Gypsum Co., 726 F.2d 1202 (7th Cir. 1984).

90. *Bieganek*, 801 F.2d at 883.

lay.[91] Moreover, the district courts frequently refuse to impose a default judgment for non-willful delay and such decisions, if appealed, are virtually always upheld.[92] Forced to choose between the "reach the merits" and "speedy resolution" goals of the Federal Rules, courts understandably opt for the former. Courts generally prefer to resolve a case on its merits, albeit slowly, than to resolve a dispute quickly without regard to the merit of the claim.

Yet because Rule 55 fails to provide any alternative to a default judgment to sanction non-willful delay, it operates to protect a defendant's interest in resolution on the merits at the expense of the plaintiff's interest in speedy resolution of the dispute. Needless to say, the plaintiff's interest should not be sacrificed; there should be a sanction for non-willful delay.

IV. The Need for a Sanction

Non-willful delay—or any delay deemed not to warrant a default judgment[93]—should be sanctioned. Imposition of a sanction would serve to compensate plaintiffs for harm they suffer as a result of

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91. Lolatchy v. Arthur Murray, Inc., 816 F.2d 951, 953-54 (4th Cir. 1987); INVST Fin. Group v. Chem-Nuclear Sys., Inc., 815 F.2d 391, 397-400 (6th Cir. 1987); Passarella v. Hilton Int'l Co., 810 F.2d 674, 678 (7th Cir. 1987); *see also* Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543, 1551 (D.C. Cir. 1987) (default judgment may be improper where failure to answer "was the excusable result of 'a broad divergence in [American and Bolivian] cultural, governmental, and political approaches to the present case' "); Project, *supra* note 28, at 975-81. *See generally* Wright, Miller & Kane, *supra* note 26, § 2693.

92. *See, e.g.*, Swink v. City of Pagedale, 810 F.2d 791 (8th Cir.), *cert. denied*, 107 S. Ct. 3274 (1987); Grandbouche v. Clancy, 825 F.2d 1463 (10th Cir. 1987); Smith & Wesson v. United States, 782 F.2d 1074 (1st Cir. 1986); Dale v. Vermont, 795 F.2d 1004 (2d Cir.), *aff'g* 630 F. Supp. 107 (D. Vt. 1986); Draper v. Coombs, 792 F.2d 915 (9th Cir. 1986); Mendoza v. Wight Vineyard Management, 783 F.2d 941 (9th Cir. 1986); Eitel v. McCool, 782 F.2d 1470 (9th Cir. 1986); Wahl v. McIver, 773 F.2d 1169 (11th Cir. 1985); Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890 (5th Cir. 1984); *see also* Project, *supra* note 28, at 969.

Knight v. Knight, 833 F.2d 1515 (11th Cir. 1987), *reconsideration denied*, 833 F.2d 1514, appears to be one of the only, if not the only, reported decision involving a court reversing a lower court decision *not* to impose a default judgment. In *Knight*, the district court had reversed a bankruptcy court decision to set aside a default judgment. The court of appeals affirmed the district court. Of course, decisions setting aside entries of default or default judgments are not appealable final orders; such decisions pave the way for disposition of the case on its merits. Dimmitt & Owens Fin., Inc. v. United States, 787 F.2d 1186, 1192 (7th Cir. 1986). Nevertheless, a litigant who unsuccessfully sought a default judgment or opposed a set aside request could challenge the district court's decision on the default issue in connection with an appeal from a judgment on the merits. *See* Hoover v. Valley West DM, 823 F.2d 227, 230 (8th Cir. 1987).

93. *See. e.g.*, Lolatchy v. Arthur Murray, Inc., 816 F.2d 951, 955-56 (4th Cir. 1987) (Wilkinson, J., dissenting) (majority decision held default judgment was improper despite district court's finding that defendant's default was willful).

defendants' delay. A sanction should also be imposed to serve the goals of punishment and, more important, deterrence of delay.[94]

The clearest reason for sanctioning non-willful delay is that it imposes direct and indirect costs on innocent plaintiffs that they should not be forced to bear. In some cases indirect costs are easily calculated based on the time value of money. For example, in a case that is ultimately resolved by a judgment or settlement for $100,000, a one-month delay costs the plaintiff over $8,000, assuming a ten percent return. In other cases, the cost of delay may be difficult to quantify but is no less real. Consider, for example, a plaintiff whose disability benefits have been wrongfully terminated or who has been wrongfully discharged from his job. Delaying a plaintiff's ability to vindicate his rights diminishes the value of those rights. Delay may also work to deplete the plaintiff's resources by extending the time that resources must be committed to litigation.[95]

In addition to indirect costs, delay imposes direct costs on the plaintiff by forcing her to incur expenses incident to the delay. If the defendant has not appeared or answered or has otherwise failed to defend, it is up to the plaintiff to take the steps necessary to force the defendant to respond.[96] Carrying this burden requires the plaintiff to incur additional expense. Depending on when the defendant finally appears, the plaintiff must incur some or all of the costs and expense—primarily in the form of attorney's fees—associated with: 1) having the clerk enter the defendant's default; 2) moving for a default judgment; 3) preparing for and participating in a hearing on damages; and 4) litigating the defend-

94. *See* RODES, RIPPLE & MOONEY, *supra* note 26, at 85-86. Sanctions are imposed to serve one or more of the goals of compensation, punishment or deterrence. *See* Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1323-25 (1986); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978).

95. This effect is also a function of the time value of money. If a plaintiff must pay an attorney at the start of the case (which will generally be true, absent a contingency fee arrangement), the longer the case takes to resolve the greater the cost of those funds to the plaintiff. The cost may be direct, in the form of interest due on borrowed funds, or indirect, in the form of inability to devote the funds to other uses.

96. A plaintiff interested in moving the case forward cannot simply wait for the defendant to respond. Likewise, it would be unrealistic for a plaintiff to expect the court to act on its own to force the defendant to respond; courts generally pay no attention to a case in its initial stages. "At most, inactive cases are monitored by some courts through a sporadic attempt to dismiss for lack of prosecution those cases in which no activity has been recorded for a defined period of time, usually one or two years." CHURCH, *supra* note 7, at 67.

ant's set aside motion. Absent a sanction, under the current Rule 55 procedure none of these expenses are reimbursed.[97]

A sanction could also serve to punish defendants who delay. Punishment may be an appropriate response to a defendant who has failed to follow the requirements of the Rules. Nevertheless, while punishment could be achieved to a limited extent by a compensatory sanction, any greater degree of punishment is problematic; punitive sanctions short of a default judgment could not rationally be applied in most cases of non-willful delay.[98]

Finally, a sanction should be imposed in order to deter non-willful delay. The effectiveness of any sanction as a deterrent, of course, depends on its severity and the frequency with which it is imposed. The degree of deterrence that a compensatory sanction might achieve is unclear. Delay can result from many different types of neglect and the cost of a sanction will vary depending on the amount of expense incurred by the plaintiff incident to the delay. Thus, it is difficult to say whether the cost of a sanction would exceed the cost of exercising the greater degree of care required to avoid delay.[99] In any event, it is clear that the current Rule 55 provides no sanction and therefore no deterrent to non-willful delay. To at least increase the possibility of deterrence, some form of sanction is needed.

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97. The point here is that there is nothing in Rule 55 to support a claim by the plaintiff for reimbursement of these expenses. As will be discussed *infra* notes 100-107 and accompanying text, the courts sometimes, though not often, impose a sanction by invoking their "inherent power" or by setting aside a default judgment under Rule 60(b) "upon such terms as are just." FED. R. CIV. P. 60(b).

98. RODES, RIPPLE & MOONEY, *supra* note 26, proposes amending Rule 55 to provide that when a default judgment is set aside, or in lieu of entering a judgment by default, the court may impose any sanction provided for in Rule 37(b). *Id.* at 89.

Rule 37(b) provides for a variety of sanctions, ranging from imposition of costs and fees to a default judgment. FED. R. CIV. P. 37(b). The harsher sanctions, such as a default judgment, obviously would not avoid the problems existing under the current Rule 55. The intermediate sanctions provided under Rule 37(b), such as "an order refusing to allow the disobedient party to support or oppose designated claims or defenses," *id.*, could rarely be selected or imposed in a rational manner at the pre-answer stage or in any other context (other than discovery) where Rule 55 would come into play. Consequently, most of the Rule 37(b) sanctions would be inappropriate as alternatives to a default judgment. In any event, giving the district court discretion to choose among the various Rule 37(b) sanctions would again invite satellite litigation that could result in as much if not more delay than that which gave rise to the sanctions issue. *See infra* note 124.

99. Stated otherwise:

> Cost shifting itself . . . is likely to be effective as a deterrent only to the extent that the costs incurred happen to outweigh the benefits derived, for example, from delay. In all other cases, we must assume that sanctions will be accepted as a cost of litigation and that the conduct will continue. . . .

Nelken, *supra* note 94, at 1325.

Some decisions recognize the need for some alternative sanction. District courts sometimes will impose a fee award against a defendant incident to setting aside a default,[100] relying on the court's "inherent power" to manage its docket[101] or the provision of Rule 60(b) whereby the court may set aside a judgment "upon such terms as are just."[102] Appellate court decisions sometimes refer to a district court's power to impose a fee award in this situation.[103] In *Bieganek v. Taylor*,[104] for example, the Seventh Circuit Court of Appeals stated that the neglect of the defendant that led to the entry of a default judgment "should be excused, but not without a price."[105] The court ordered the defendant to pay the costs of the appeal, including the plaintiff's reasonable attorney's fees, and noted that "the district court, on remand may, in its discretion, impose additional other reasonable sanctions for the impact of Taylor's excusable neglect in that court."[106]

These decisions, however, are uncommon. Of the reported cases in 1987 in which a default or default judgment was set aside, only seven suggested or imposed any alternative sanction.[107] Most of the decisions simply hold that a default judgment is an inappropriate

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100. *See, e.g.*, Joseph v. Office of Consulate Gen. of Nigeria, 830 F.2d 1018, 1020 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1077 (1988) (noting that district court had imposed fees); Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos, 109 F.R.D. 692, 698 (S.D.N.Y. 1986); Kleckner v. Glover Trucking Corp., 103 F.R.D. 553, 556-58 (M.D. Pa. 1984); Savin Corp. v. C.M.C. Corp., 98 F.R.D. 509, 512 (N.D. Ohio 1983); Gerlach v. Michigan Bell Tel. Co., 448 F. Supp. 1168, 1174 (E.D. Mich. 1978); Hanley v. Volpe, 48 F.R.D. 387, 388 (E.D. Wis. 1970); *see also* WRIGHT, MILLER & KANE, *supra* note 26, § 2700; Project, *supra* note 28, at 1007-08 nn. 283-84.

101. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

102. FED. R. CIV. P. 60(b).

103. *See, e.g.*, Bieganek v. Taylor, 801 F.2d 879, 883 (7th Cir. 1986); Lolatchy v. Arthur Murray, Inc., 816 F.2d 951, 953 (4th Cir. 1987). Some courts of appeals will refer to a district court's power to impose a "lesser sanction" in lieu of a default judgment without specifying the nature of such a sanction. *See, e.g.*, Shepard Claims Serv. v. William Darrah and Assocs., 796 F.2d 190, 195 (6th Cir. 1986); Wahl v. McIver, 773 F.2d 1169, 1174 (11th Cir. 1985); Feliciano v. Reliant Tooling Co., 691 F.2d 653, 657 (3d Cir. 1982).

104. *Bieganek*, 801 F.2d at 879.

105. *Id.* at 883.

106. *Id.*

107. Joseph v. Office of Consulate Gen. of Nigeria, 830 F.2d 1018, 1020 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1077 (1988) (noting that district court had imposed fees); Lolatchy v. Arthur Murray, Inc., 816 F.2d 951, 953 (4th Cir. 1987); Kryzak v. Dresser Indus., 118 F.R.D. 12, 14 (D. Me. 1987); Morgan v. Hatch, 118 F.R.D. 6, 9-12 (D. Me. 1987); Levy v. Levy, 75 Bankr. 894 (S.D. Ohio 1987); Farmland Indus., Inc. v. Grain Bd. of Iraq, Civ. A. No. 86-3298 (D.D.C. 1987) (1987 WL 19222); Robert L. Haag, Inc. v. Shasta Beverages, Inc., No. 85 CIV 2985 (S.D.N.Y. 1987) (1987 WL 12408).

sanction for non-willful delay and fail to impose or even consider any lesser sanction.[108]

The current failure of Rule 55 to provide for any sanction for delay other than a default judgment also may encourage needless litigation of default issues. Even if a court might ultimately impose a lesser sanction, a plaintiff might be unaware of, or at least unsure of, the possibility of a lesser sanction given the present "all or nothing" structure of Rule 55.[109] The absence of any express alternative sanction arguably strengthens a plaintiff's incentive to pur-

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108. Some courts completely ignore the fact that there is no sanction for delay when a default judgment is held to be improper. *See, e.g.*, Passarella v. Hilton Int'l, 810 F.2d 674 (7th Cir. 1987); Mendoza v. Wight Vineyard Management, 783 F.2d 941 (9th Cir. 1986); Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890 (5th Cir. 1984); Jackson v. Beech, 636 F.2d 831 (D.C. Cir. 1980); Meehan v. Snow, 652 F.2d 274 (2d Cir. 1981). Some courts give lip service to the adverse effects of the absence of a sanction where a default judgment is held to be improper, but fail to note any practical solution to the problem (such as imposition of a fee award). *See, e.g.*, Bermudez v. Reid, 733 F.2d 18, 21-22 (2d Cir. 1984), *cert. denied*, 469 U.S. 874 (1984) (noting that a habeas petitioner should not be denied a "prompt opportunity to meet his burden of proof" against a defaulting defendant, but failing to suggest how this might be accomplished).

Even if a court does impose or discuss a fee sanction in a particular case, there is no guarantee that the court will do so consistently. In the Seventh Circuit, for example, although the court of appeals expressly approved of imposing fees incident to setting aside a default in two different 1986 decisions, the same court in a 1987 decision completely ignored the possibility of a fee award. In Dimmitt & Owens Fin. Inc. v. United States, 787 F.2d 1186 (7th Cir. 1986), the court approved of the district court imposing a fee award incident to setting aside a default and characterized the $4,000 fee award as "modest." *Id.* at 1193. In Bieganek v. Taylor, 801 F.2d 879 (7th Cir. 1986), discussed *supra* in text accompanying notes 83-90, the court of appeals imposed a fee award for the appeal and suggested the possibility of a fee award in the district court as well.

Despite *Bieganek* and *Dimmitt & Owens*, in 1987 the Seventh Circuit was willing to excuse a defendant's default with no sanction at all. In Passarella v. Hilton Int'l Co., 810 F.2d 674 (7th Cir. 1987), the defendant defaulted after its insurer did not receive suit papers forwarded by the defendant. The district court granted the plaintiff's motion for default judgment and, nearly three months after plaintiff had filed his amended complaint, the plaintiff presented evidence of damages whereupon the court entered a default judgment for $18,000. After the defendant learned that the plaintiff was attempting to garnish the defendant's bank account, the defendant appeared and moved to vacate the default judgment. The district court denied the motion.

On appeal, the Seventh Circuit Court of Appeals held that the default judgment should be vacated because the default was not willful and the defendant had a meritorious defense. *Id.* at 677-78. Notwithstanding the Seventh Circuit's earlier decisions in *Bieganek* and *Dimmitt & Owens*, the *Passarella* court did not suggest or even mention the possibility of assessing costs and fees against the defendant incident to setting aside the default. The *Passarella* court made no mention of the harm suffered by the plaintiff as the result of the delay or the absence of any sanction for the defendant's default.

If the court of appeals in a circuit does not follow its own suggestion that a fee award is desirable, then surely one would not expect the district courts consistently to follow that suggestion.

109. *See* RODES, RIPPLE & MOONEY, *supra* note 26, at 85.

sue a default judgment as a sanction for delay. Even where it appears likely that a default judgment will not be imposed or upheld, the plaintiff has an incentive to seek the only sanction which Rule 55 provides.[110] While this incentive exists regardless of whether or not there is an alternative sanction, the availability of a lesser sanction might lessen a plaintiff's incentive to pursue a default judgment in a marginal case.

Finally, the "all or nothing" sanction provision of Rule 55 lacks the flexibility of the other sanction provisions under the Rules. Rule 11, which provides for sanctions for frivolous filings, allows the district court to impose "an appropriate sanction."[111] The Rules Advisory Committee notes that the court "retains the necessary flexibility to deal appropriately with violations of the rule" and "has discretion to tailor sanctions."[112] Rule 26 likewise provides for imposition of "an appropriate sanction"[113] for inappropriate discovery requests, responses or objections. Rules 16(f) and 37(b)(2) provide the district court with a choice among a variety of sanctions, including a default judgment, for violations of discovery orders and misconduct in the pre-trial process.[114]

Unlike these sanction provisions, Rule 55 gives the district court no choice as to what sanction to impose. According to the terms of the Rule, the district court either imposes a default judgment or it imposes no sanction at all.[115] It is not surprising that given the

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110. Plaintiffs have a strong incentive to pursue a default judgment against a defendant who has delayed but then indicated a desire to defend on the merits. While the plaintiff must incur additional expense and delay to pursue a default judgment, this cost is small in comparison with the benefit the plaintiff could obtain. Not only could the plaintiff obtain a judgment at least as to the defendant's liability, the plaintiff would obtain the judgment without the expense associated with a full trial or even a substantive motion. Moreover, there is no real risk to the plaintiff in pursuing a default judgment. If the plaintiff is unsuccessful, the plaintiff will have lost some time and expended some resources but otherwise will be in the same position as before.

A client or attorney taking a "hardball" approach to the litigation might also pursue a default judgment for tactical reasons. After all, the defendant has violated the rules and this violation has caused some harm to the plaintiff; simply acquiescing in the default might be inconsistent with the posture the plaintiff seeks to maintain.

111. FED. R. CIV. P. 11.

112. *Id.*, advisory committee's note.

113. FED. R. CIV. P. 26(g).

114. *Id.* R. 16(f), 37(b)(2).

115. A court setting aside a default judgment does have the power under Rule 60(b) to set it aside "upon such terms as are just." *Id.* R. 60(b). However, there is no reference in Rule 55 to any alternative to a default judgment and in any event, courts setting aside default judgments only rarely impose terms incident to the set aside, either under Rule 60(b) or otherwise. *See supra* notes 100-07 and accompanying text.

apparent absence of any alternative to the harsh default judgment sanction, courts take a liberal approach toward excusing defendants' non-willful delay.

Rule 55 currently lacks, but should include, some sanction that could be imposed in lieu of a default judgment in those cases in which a default judgment is deemed inappropriate. Rule 55 should provide for a sanction for non-willful delay to deter delay, to compensate plaintiffs for expenses they must incur incident to delay, and to reduce needless litigation of default issues.

V. A Proposal For Reform of Rule 55

Rule 55 should be amended to provide for a generally mandatory award of costs and expenses, including attorney's fees, when an entry of default or default judgment is set aside. This could be accomplished by adding the following language to Rule 55(c), the provision of the Rule governing the setting aside of defaults:[116]

> If the court sets aside an entry of default or default judgment, the court shall require the party against whom the default or default judgment was entered, or the party's attorney, or both, to pay to the other party the costs and reasonable expenses incurred incident to the default, including attorneys' fees, unless the court finds exceptional circumstances that would make an award of costs and expenses unjust.

By providing for a sanction less severe than a default judgment, the proposed amendment would promote the policy of resolving disputes on their merits while at the same time promoting the goal of speedy resolution of disputes and protecting the plaintiff's interests. By providing for a sanction in cases of non-willful delay, the proposed amendment could go further toward deterring delay than the courts' present sporadic imposition of sanctions. More importantly perhaps, the proposed amendment would compensate innocent plaintiffs for the expenses they incur incident to defendants' delay.[117]

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116. Rule 55(c) currently provides that "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Fed. R. Civ. P. 55(c); *see also supra* text accompanying notes 24-32.

117. This proposal does not provide any remedy for indirect costs of the delay which, as noted above, may be substantial. *See supra* text accompanying note 95.

The proposed amendment mandates an award of costs and expenses unless the court finds "exceptional circumstances" that would make an award of costs and expenses unjust. "Exceptional circumstances" that would justify a refusal to impose the fee award would exist where the court lacked jurisdiction to enter the default or default judgment, such as where the defendant was not properly served.[118]

The "exceptional circumstances" provision is *not* intended to support a refusal to impose a fee award in situations where the defendant might be characterized as "innocent." A fee award should be required in such situations for two reasons. First, the plaintiff is no less "innocent" than the defendant; the plaintiff is entitled by the rules to enforce the defendant's obligation to defend. The plaintiff will incur expenses for which he will not be compensated absent the fee award. Moreover, the delay itself will work to the benefit of the defendant and to the disadvantage of the plaintiff.[119] Second, even if both parties are equally innocent, the proposed amendment will simply place some of the cost of the delay on one of the two innocent parties. Thus, the proposed amendment is intended to establish what amounts to a strict liability standard for delay. These principles could be set forth in an advisory committee note to guide the district courts' interpretation of the exceptional circumstances provision.

A mandatory fee award also would be consistent with the sanctions policy underlying the recent 1983 amendments to the Rules.[120] First, in order to deter delay, the 1983 amendments to Rules 7, 11, 16, and 26 made sanctions *mandatory* for violations of

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There is no provision in the Federal Rules that expressly attempts to remedy the indirect costs of delay itself, even in those Rules that provide for an award of direct expenses incident to delay, such as Rules 11 and 37. While various commentators have suggested ways to reform the litigation process to reduce delay, none have addressed the arguably more immediate problem of how to remedy delay in individual cases. For example, what can be done to remedy the cost of delay, *per se*, in the case of a defendant who delays in answering a complaint or in responding to discovery requests? Perhaps this type of cost could be remedied through imposition of a sanction in the form of interest on the judgment ultimately obtained by the plaintiff. Such a proposal, however, is beyond the scope of this article.

118. *See, e.g.*, Stranahan Gear Co. v. NL Indus., Inc., 800 F.2d 53 (3d Cir. 1986). Another example of exceptional circumstances where the court lacked jurisdiction to impose the default judgment is Jackson v. People's Republic of China, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987) (default judgment set aside because defendant was entitled to absolute sovereign immunity).

119. *See supra* text accompanying note 95.

120. *See* FED. R. CIV. P. 7, advisory committee's note; *id.* R. 11, advisory committee's note; *id.* R. 16, advisory committee's note; *id.* R. 26, advisory committee's note.

the Rules.[121] Because Rule 55 provides a sanction for delay in situations not covered by the other rules, such as delay in answering a complaint, the avoidance of delay policy behind the 1983 amendments supports a mandatory sanction under Rule 55.

Second, the 1983 amendments provide for sanctions for non-willful violations of the Rules.[122] While courts had never hesitated to impose sanctions for willful conduct, the 1983 amendments made it clear that sanctions are also appropriate for non-willful conduct in order to deter delay and compensate innocent parties.[123] This policy likewise supports a sanction under Rule 55 for non-willful delay. The willfulness of a defendant's delay is relevant to whether or not a default judgment should be imposed given the harshness of that sanction. A defendant's lack of willfulness, however, does not eliminate the need for a sanction to promote the Federal Rules' goal of speedy resolution of disputes.

In addition to providing a sanction for delay and compensation to innocent plaintiffs, the proposed amendment has the potential to eliminate some of the needless litigation of default-related issues that takes place under the current Rule 55 procedure.[124] Under the present "all or nothing" procedure, the plaintiff must either completely acquiesce in the delay or pursue a default judgment. Under the proposed amendment, the plaintiff would have the option not to pursue the default judgment without having to acquiesce in the defendant's delay. For example, if a defendant defaults and moves to set aside the default, the plaintiff could elect

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121. *See id.* R. 7, advisory committee's note; *id.* R. 11, advisory committee's note; *id.* R. 16, advisory committee's note; *id.* R. 26, advisory committee's note; Nelken, *supra* note 94; Rosenberg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 243, 246 (1984); Subrin, *supra* note 5, at 984.

122. The advisory committee note to Rule 11 specifically notes that "[t]he references in the former text to willfulness as a prerequisite to disciplinary action has been deleted" and that the amended Rule 11 standard "is more stringent than the original good-faith formula." FED. R. CIV. P. 11, advisory committee's note.

123. *Id.* In addition, sanctions under Rule 37 are proper for non-willful conduct according to the 1970 amendment to the Rule. *See* FED. R. CIV. P. 37, advisory committee's note.

124. It is unlikely that providing a mandatory fee-shifting sanction would increase plaintiffs' incentive to pursue default judgments. Plaintiffs have a substantial incentive to pursue a default judgment, even in a case where it appears unlikely that default will be granted, regardless of whether a fee award is available. *See supra* note 109. The guarantee of repayment of fees which would be provided by the rule if it were amended is therefore unlikely to increase significantly, if at all, the frequency with which plaintiffs seek default judgments. Moreover, a plaintiff still must have a reasonable basis for seeking a default judgment. *See* FED. R. CIV. P. 11 (a mere desire to incur fees and costs which the defendant would then have to pay would be improper).

not to oppose the set aside motion but only to seek the expenses to which the plaintiff would automatically be entitled under the rule as amended. By so doing, the plaintiff would eliminate the need to expend additional time and effort in litigating a set aside motion. Moreover, the court could dispose of the motion with little effort by simply granting the unopposed motion to set aside the default judgment and granting the fee award required by the amended rule. Also, because the proposed amendment makes imposition of a sanction mandatory in clearly defined circumstances, it would not create a problem of "satellite litigation."[125]

VI. CONCLUSION

The default judgment sanction ostensibly serves the purpose of insuring that a defendant will respond to a claim against her in a reasonable time. Because a default judgment is so harsh, it frequently is an inappropriate sanction for a defendant's non-willful delay. Such delay, however, should be sanctioned. Absent a sanction and under the current Rule 55 structure, defendants who delay often walk away scot-free. Innocent plaintiffs are not reimbursed for expenses that they must incur incident to the default and courts are burdened with often needless litigation of default issues. Rule 55 should be amended to require an award of expenses incident to a default in cases where the default is set aside. Doing so would promote the Federal Rules' goal of resolving disputes on their merits without sacrificing the plaintiff's interest in speedy resolution of the dispute.

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125. Any sanction designed to speed the litigation process may fail to achieve its purpose if it spawns "satellite litigation" over whether the sanction should be applied. Rule 11, for example, has been criticized for creating a new realm of litigation over the propriety of Rule 11 sanctions. *See, e.g.*, Grosberg, *supra* note 9, at 647-53.

The proposed amendment to Rule 55 poses no danger of satellite litigation for three reasons. First, the rule will come into play automatically when a party defaults and the default is set aside. The sanctions of Rule 11, in contrast, come into play only after the court makes the often difficult determination of whether a paper was legally or factually frivolous. *See id.* at 601-09. Second, the sanction under the proposed amendment is mandatory unless the defendant can show the existence of exceptional circumstances; few defendants will attempt to meet the high standard under the rule for exceptional circumstances. *See supra* text accompanying notes 117-18. Third, in contrast to Rules 16 and 37, for example, under which the court has a wide choice of sanctions to impose, *see* FED. R. CIV. P. 16, 37, the proposed Rule 55 would provide for only two sanctions—either a default judgment or costs and fees incurred by the plaintiff incident to the default. *Cf.* RODES, RIPPLE & MOONEY, *supra* note 26 (proposing that Rule 55 allow for the imposition of any of the sanctions mentioned in Rule 37(b)).