Rule 55 at Trial: The Default Rules Is Not Always Best

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RULE 55 AT TRIAL:
THE DEFAULT RULE IS NOT ALWAYS BEST

INTRODUCTION

It is uncontroversial to say that a default, and corresponding default judgment, is proper after a defendant fails to answer the complaint or if a party fails to comply with a discovery order. When a defendant fails to appear at trial after previously answering the complaint or otherwise filing defenses, however, the proper course of action for a court to take is considerably less clear. Because many federal judges are evaluated on their case disposition rates, the reflex reaction is to clear a case off the docket at the first available opportunity. Even with these concerns affecting the everyday workings of both litigators and the federal judiciary, simply defaulting a party who fails to appear at trial is commonly viewed as the most effective or efficient course of action.

Rule 55(a) of the Federal Rules of Civil Procedure (FRCP) states that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." A question arises regarding how broadly to interpret the phrase "otherwise defend," and whether this phrase applies to trial as opposed to only the earlier pleading stage of litigation. The federal circuits have differed greatly in their interpretation of this simple two-word phrase, from stating that the rule only applies at the pleading stage, to stating that it applies anytime a party fails to take part in any stage of the litigation. This Comment argues that courts should re-

   If a party or a party's officer, director, or managing agent . . . fails to obey an order to provide or permit discovery . . . the court where the action is pending may issue further just orders. They may include the following: . . . (vi) rendering a default judgment against the disobedient party . . . .
   Id.
5. Id.
6. See Solaroll Shade & Shutter Corp. v. Bio-Energy Systems, Inc., 803 F.2d 1130, 1134 (11th Cir. 1986); see also Bass v. Hoagland, 172 F.2d 205, 210 (5th Cir. 1949) ("The words 'otherwise defend' refer to attacks on the service, or motions to dismiss . . . .").
7. See City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 129–30 (2d Cir. 2011); see also Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 917–18 (3d Cir. 1992); Home Port
solve situations in which a defendant fails to appear at trial by holding a trial on the merits in the defendant’s absence, as opposed to defaulting the defendant pursuant to Rule 55. Read plainly, Rule 55 cannot be interpreted to extend beyond the pleading stage.

Part II of this Comment explains the historical background of the FRCP, Rule 55 in particular, and a trial judge’s inherent power to enter a default against a party. Part II also sets out pertinent federal circuit decisions on the matter. Part III analyzes the proper course of action for a court when a defendant fails to appear for trial. Additionally, Part III analyzes whether a trial judge should use his inherent power to default a defendant for failure to appear at trial, regardless of the applicability of Rule 55. Part III further discusses whether some circuits mistakenly entered a default pursuant to Rule 55 when Rule 37 was the proper basis. Finally, Part III argues that the proper course of action for a trial judge, when the defendant fails to appear at trial after actively participating in the litigation up to that point, is to hold a trial on the merits. Part IV argues that limiting Rule 55 defaults to the pleading stage will lead to lower damage awards when a defendant fails to appear at trial. Part IV further argues that if a trial judge continues with a trial on the merits, instead of simply entering a default against a non-showing defendant, fewer judgments will be overturned on appeal. Part V provides a brief conclusion on the issue.

II. BACKGROUND

This Part provides the background of Rule 55, including: (1) the history of the FRCP; (2) the basis for a trial judge’s inherent power to enter a default judgment; and (3) major federal circuit decisions

Rentals, Inc. v. Ruben, 957 F.2d 126, 133 (4th Cir. 1992); Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141 (9th Cir. 1989); Brock v. Unique Racquetball & Health Clubs, Inc., 786 F.2d 61, 64 (2d Cir. 1986).

8. See infra notes 21–29 and accompanying text.
9. See infra notes 30–39 and accompanying text.
10. See infra notes 40–106 and accompanying text.
11. See infra notes 107–24 and accompanying text.
12. See infra notes 125–42 and accompanying text.
13. See infra notes 143–81 and accompanying text.
14. See infra notes 185–91 and accompanying text.
15. See infra notes 192–210 and accompanying text.
16. See infra notes 211–14 and accompanying text.
17. See infra notes 21–29 and accompanying text.
18. See infra notes 30–39 and accompanying text.
regarding the proper use of Rule 55,\textsuperscript{19} including the most recent approach the federal circuits have taken.\textsuperscript{20}

A. The History of the Federal Rules of Civil Procedure and Rule 55

In 1934, after years of discussion by the American Bar Association, Congress empowered the Supreme Court to promulgate a system of uniform rules for actions at law.\textsuperscript{21} Accordingly, the Supreme Court appointed an Advisory Committee, comprised mostly of practicing lawyers, charged with drafting rules of procedure for the district courts.\textsuperscript{22} "The Committee started its work with a study of existing procedure in the federal courts, in the various states, [and] in England . . . ."\textsuperscript{23} The Committee did not shy away from adopting state practices and English procedural tools, and even created completely new procedural rules without any precedent.\textsuperscript{24} The purpose of the FRCP was both "a shift of emphasis from rigid adherence to a prescribed procedure to a distinct effort to bring about the disposition of every case on the merits,"\textsuperscript{25} and a shift in the adversarial system to enhance the duty between the parties to ascertain truth and attain justice.\textsuperscript{26}

Rule 55 represents the Committee's combination of the equity decree pro confesso and the judgment by default at law.\textsuperscript{27} The Committee adopted Rule 55 from a Massachusetts Rule of General Practice,\textsuperscript{28} and developed a rule that allowed the courts leeway in its application.\textsuperscript{29} Most importantly for this Comment, section (a) of Rule 55 has led to significant differences of interpretation and application.

B. The Court's Inherent Power to Enter Default

Separate from the FRCP, trial courts possess the inherent power to dismiss an action with prejudice\textsuperscript{30} or enter a judgment by default.\textsuperscript{31}

\textsuperscript{19} See infra notes 39–90 and accompanying text.
\textsuperscript{20} See infra notes 91–106 and accompanying text.
\textsuperscript{22} Holtzoff, supra note 21, at 1058.
\textsuperscript{23} Id.
\textsuperscript{24} See id. at 1058–59.
\textsuperscript{25} Id. at 1059.
\textsuperscript{26} Id. at 1060.
\textsuperscript{27} Fed. R. Civ. P. 55 committee's note. For purposes of this Comment, the terms "default judgment" and "judgment by default" will be used interchangeably.
\textsuperscript{28} Id. (explaining that subsection (a) comes from the Massachusetts practice, 2 Mass. Gen. Laws (1932) ch. 231, § 57).
\textsuperscript{29} See Fed. R. Civ. P. 55.
\textsuperscript{31} See, e.g., Shepherd v. ABC, 62 F.3d 1469, 1472 (D.C. Cir. 1995).
An example of this power is when a judge dismisses an action due to an attorney's dilatoriness. There is no hard and fast rule limiting a trial judge's inherent powers, but "the dismissal of an action with prejudice or the entry of a default judgment are drastic remedies, and should be applied only in extreme circumstances." Also, when a federal rule governs a particular procedure, a trial court's use of its inherent powers is improper. Such a use of inherent power can only obscure the analysis of the court's determination.

The United States Court of Appeals for the Third Circuit previously employed a factor test to review situations in which a district court entered a default as a sanction through its inherent power. The court stated that the trial judge must consider and balance the following factors before making a determination:

1. the extent of the party's personal responsibility;
2. the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery;
3. a history of dilatoriness;
4. whether the conduct of the party of the attorney was willful or in bad faith;
5. the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and
6. the meritoriousness of the claim or defense.

Though this test is binding on only the Third Circuit, it is extensive in its inclusion of relevant factors and concerns that should be important to any trial judge considering the use of his inherent power to enter a default.

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32. See Link v. Wabash R.R., 370 U.S. 626, 633-34 (1962) (stating that the district court's dismissal of the suit after the plaintiff's attorney failed to appear at a pretrial conference was not an abuse of discretion, although the court refused to acknowledge whether only one failure to appear, without more, would justify such a dismissal).
33. See Eash v. Riggins Trucking Inc., 757 F.2d 557, 561 (3d Cir. 1985) ("The notion of inherent power has been described as nebulous, and its bounds as 'shadowy.'" (citation omitted)).
35. See Societe Internationale Pour Participations Industrielles Et Commerciales v. Rogers, 357 U.S. 197, 207 (1958) (holding that the court's inherent power was an inappropriate justification for a dismissal because of noncompliance with a production order when Rule 37 was available).
36. Id.
38. Id. A trial court's decision to sanction a party with a default judgment is reviewed under an abuse of discretion standard. See, e.g., Comdyne I, Inc. v. Corbin, 908 F.2d 1142, 1148 (3d Cir. 1990).
39. See, e.g., Shepherd v. ABC, 62 F.3d 1469, 1472 (D.C. Cir. 1995) (stating that a court may use its inherent power only if it finds first that abusive behavior occurred and second "that a lesser sanction would not sufficiently punish and deter the abusive conduct while allowing a full and fair trial on the merits"); Estate of Solis-Rivera v. United States, 993 F.2d 1, 2-3 (1st Cir. 1993) ("[Dismissal with prejudice is proper if] there is extremely protracted inaction, disobedi-
C. The Current Split in the Federal Circuit Courts

Since 1949, numerous federal circuits have interpreted the meaning of "otherwise defend" in Rule 55. The trend has moved from limiting Rule 55 to pretrial conduct to including any failures a court deems strong enough to merit default, regardless of the stage of litigation at which they occur.

I. The Fifth Circuit Interprets "Otherwise Defend"

In 1949, the United States Court of Appeals for the Fifth Circuit first determined the meaning of the phrase "otherwise defend" in Rule 55(a). In *Bass v. Hoagland*, the plaintiff sued the defendant for $7,810.70 in damages for a personal injury stemming from a car accident. After receiving the complaint, counsel for the defendant filed an appearance, as well as an answer to the complaint and a demand for jury trial. The defendant's counsel then withdrew from the suit, but did not withdraw the previously filed appearance or answer. On the day of trial, neither the plaintiff nor the defendant appeared, and the only individuals in court were the plaintiff's attorneys. Because of the defendant's absence and previous withdrawal of counsel, the trial judge considered the case to be in default and entered judgment for the exact amount sued for in the complaint. The defendant appealed to the Fifth Circuit to set aside the judgment under Rules 55(c) and 60(b).

The Fifth Circuit held that the default judgment was improper because Rule 55 did not extend to matters of trial. The court reasoned that Rule 55 "does not require that to escape default the defendant must not only file a sufficient answer to the merits, but must also have a lawyer or be present in court when the case is called for a trial." The court went on to define the words "otherwise defend," stating, that they "refer to attacks on the service or motions to dismiss, or for

ence of court orders, ignorance of warnings, contumacious conduct, or some other aggravating circumstance such as prejudice to the defendant, glaring weaknesses in the plaintiff's case, and the wasteful expenditure of a significant amount of the district court's time." (citations omitted) (internal quotation marks omitted).

41. *Id.*
42. *Id.* at 207–08.
43. *Id.* at 207.
44. *Id.*
45. *Id.* at 208; see also FED. R. CIV. P. 55(c) ("The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).").
46. See *Bass*, 172 F.2d at 210.
47. *Id.*
better particulars, and the like, which may prevent default without presently pleading on the merits."\(^\text{48}\)

2. The Eleventh Circuit Follows the Fifth Circuit

In \textit{Solaroll Shade \& Shutter Corp. v. Bio-Energy Systems, Inc.}, the Court of Appeals for the Eleventh Circuit ruled on the meaning of "otherwise defend."\(^\text{49}\) The parties to the suit originally agreed to settle the claim.\(^\text{50}\) Because of the settlement, the District Court for the Southern District of Florida dismissed the suit with prejudice, but retained jurisdiction over the matter to enforce the settlement agreement.\(^\text{51}\) Three years after the agreement was reached, the plaintiff filed a motion to reinstate the action and alleged that the defendant was in violation of the settlement agreement.\(^\text{52}\) The defendant's local counsel in Florida received service on the motion three days after the filing and promptly forwarded the motion to the defendant's permanent counsel in New York.\(^\text{53}\) The defendant's local counsel in Florida spoke with the plaintiff's counsel and promised to send a joint motion for extension of time.\(^\text{54}\) The plaintiff's motion to reinstate the action was never responded to, however, and no communication between the parties occurred after this point.\(^\text{55}\) The trial court eventually granted the plaintiff's motion without opposition and entered the attached order.\(^\text{56}\) One week later, the defendant moved to vacate the judgment under Rule 60(b).\(^\text{57}\) The trial court denied the motion.\(^\text{58}\)

\(^{48}\) \textit{Id.}  
\(^{49}\) \textit{Solaroll Shade \& Shutter Corp. v. Bio-Energy Syst., Inc.}, 803 F.2d 1130 (11th Cir. 1986).  
\(^{50}\) \textit{Id.} at 1131.  
\(^{51}\) \textit{Id.}  
\(^{52}\) \textit{Id.}  
\(^{53}\) \textit{Id.}  
\(^{54}\) \textit{Id.}  
\(^{55}\) \textit{Id.}  
\(^{56}\) \textit{Id.}  
\(^{57}\) \textit{Id.}  
\(^{58}\) Rule 60(b) of the FRCP states:  
On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding for the following reasons:  
(1) mistake, inadvertence, surprise, or excusable neglect;  
(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);  
(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;  
(4) the judgment is void;  
(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or  
(6) any other reason that justifies relief.  
\textit{FED. R. CIV. P. 60(b).}
The Eleventh Circuit held that the reinstatement order was not a proper Rule 55 default judgment. The court reasoned that its authority to enter a default under Rule 55 is limited to situations in which a defendant never appears or fails to answer a complaint, because such failures prevent the case from being judged on its merits. The court explained that although the defendant failed to appear at trial, a default was improper when the defendant answered the complaint because the "issue [had] been joined." Thus, the court could proceed with the trial in the defendant's absence and enter judgment in favor of a plaintiff that is able to prove his case.

3. The Ninth Circuit Holds that Defaulting at Trial is Proper

In 1989, the Court of Appeals for the Ninth Circuit provided its answer to the question of a Rule 55 default at the trial stage. In Ringgold Corp. v. Worrall, the plaintiff sued for breach of a franchising license. On two separate occasions, the plaintiff's attorneys withdrew from representation, citing numerous difficulties with their client, including failure to pay legal fees, uncooperativeness, and refusal or failure to respond to discovery requests. The hearing on the final request for withdrawal of representation occurred without the plaintiff present, though a notice of the trial dates was mailed to the plaintiff's Houston address. The plaintiff failed to respond in any manner. Furthermore, the plaintiff failed to retain new counsel and was absent from multiple pretrial conferences. At this time, the dis-

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58. Solaroll Shade & Shutter Corp., 803 F.2d at 1131. The trial court made its determination after Bio-Energy filed its motion to vacate, attached affidavits pursuant to Rule 60(b), and requested oral argument. Id. The trial court received briefs from both parties, but did not respond to the request for oral argument before it denied Bio-Energy's motion. Id.
59. Id. at 1134.
60. Id.
61. Id.
62. Id.
63. Ringgold Corp. v. Worrall, 880 F.2d 1138, 1139 (9th Cir. 1989).
64. Id. On both occasions, the attorneys claimed that they had not been adequately paid, and the Ninth Circuit noted from the trial court's record that "[t]here had been a 'breakdown of communications between [the attorney] and Ringgold' which 'severely and detrimentally' affected the ability of [the attorney] to represent Ringgold." Id. at 1139–40.
65. Id. at 1140.
66. Id. The hearing resulted in an order from the court, granting the attorney's request for withdrawal. Id. The order also stated the following: (1) that no continuances would be granted in the future; (2) that Ringgold Corporation would need to appear with local counsel for the next court date; (3) that the attorney was required to notify the Worralls of the last-known contact information for Ringgold Corporation in order to allow the Worralls to serve Ringgold Corporation with pleading or papers in the future; and (4) that default was a possible sanction if Ringgold Corporation did not follow the order. Id.
67. Id.
district court directed the defendants to file a motion for default with a hearing set for the original trial date. The plaintiff also failed to appear for the default judgment hearing, and the court took evidence on the issue of damages for defendants, eventually finding for them in an amount over $800,000. The plaintiff responded three weeks later with a motion to set aside the default judgment for inadequate notice of the hearing date. The district court denied the motion and the plaintiff appealed.

The Ninth Circuit held that though this was “not a typical default judgment, where a party show[ed] no interest in defending a claim,” it was a proper Rule 55 default all the same. The court analogized its decision to a prior Second Circuit decision that deferred to the judgment of the trial judge in matters of maintaining “the orderly and expeditious conduct of the litigation” and opined that judges must be given significant latitude to impose sanctions upon parties that fail to attend after a trial has begun.

4. The Third Circuit Follows the Ninth Circuit

In 1992, the United States Court of Appeals for the Third Circuit interpreted Rule 55 in Hoxworth v. Blinder, Robinson & Co. In Hoxworth, three separate class action suits were filed on behalf of investors, claiming fraud “in connection with the purchase and sale of various penny stocks.” The case had originally come before the Third Circuit on an appeal of a preliminary injunction that was

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68. Id.
69. Ringgold Corp., 880 F.2d at 1140. This amount was the total of the requested damages and the Worralls' attorney's fees. Id. In addition to granting a judgment for the Worralls, the trial court also dismissed Ringgold Corporation's complaint against the Worralls. Id.
70. Id.
71. Id. at 1140. The district court construed Ringgold Corporation's motion to set aside the default judgment as a Rule 59(e) motion for reconsideration. Rule 59(e) simply states, “A motion to alter or amend a judgment must be filed not later than 28 days after the entry of judgment.” FED. R. CIV. P. 59(e).
72. Ringgold Corp., 880 F.2d at 1141.
73. Id. (quoting Brock v. Unique Racquetball & Health Clubs, Inc., 786 F.2d 61, 64 (2d Cir. 1986)). In Brock, the Secretary of Labor sued the defendant, on behalf of the defendant's employees, for failure to pay the employees minimum wage or overtime. See Brock v. Unique Racquetball & Health Clubs, Inc., 786 F.2d 61, 62 (2d Cir. 1986). The trial court entered a default when neither the defendant nor its attorney appeared for the second day of trial. Id. at 62-64. The court further stated that had the trial been proceeding on consecutive days and defendant had not appeared, there would be “no question” that the court could enter a default, and the delay between proceedings did not change that fact. Id. at 64.
75. Id. at 914. “Penny stocks are low-priced, high-risk equity securities for which there is frequently no well-developed trading market.” Id. at 914 n.1.
deemed "fatally overbroad," and therefore vacated and remanded.\textsuperscript{76} Following the remand, the suit only continued against three named individuals who were control persons of the firm.\textsuperscript{77} The classes of investors then filed an amended complaint that added one defendant and removed any claims for relief against the investment company.\textsuperscript{78} The new defendants, the executives of the investment company, answered this complaint by denying all allegations and raising numerous affirmative defenses.\textsuperscript{79}

After a year, in an attempt to move the case to trial, the trial judge entered a scheduling order that included a discovery deadline.\textsuperscript{80} Over one month later, the attorney for the executives moved to withdraw from the case due to a fee dispute.\textsuperscript{81} The court granted counsel's request for withdrawal but did not grant the executives' request to stay action on all pending matters.\textsuperscript{82} Over the ensuing months, the executives were uncooperative in the discovery process and failed to designate an officer for depositions or produce subpoenaed documents.\textsuperscript{83} When the executives finally appointed an officer to testify in response to a subpoena, the individual stated that he had absolutely no knowledge of the situation.\textsuperscript{84} Later, none of the three defendants complied with a court order to file a pretrial memorandum or other orders regarding production of documents.\textsuperscript{85} The classes of investors then moved for default judgment pursuant to Rule 37(b)(2)(C).\textsuperscript{86} The trial judge entered the default, held a hearing to determine damages, and eventually granted over $73 million to the plaintiffs.\textsuperscript{87}

\textsuperscript{76} Id. at 915 (quoting Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 201 (3d Cir. 1990)).

\textsuperscript{77} Id. After the remand, a new suit had been filed against the corporation by the Securities Investors Protection Corporation (SIPC) under the Securities Investors Protection Act of 1970 (15 U.S.C. § 78aaa (2006)).

\textsuperscript{78} See id.

\textsuperscript{79} Id. at 915.

\textsuperscript{80} Hoxworth, 980 F.2d at 915. The order also gave a date by which the parties were required to file a pretrial memorandum. Id.

\textsuperscript{81} Id. at 915–16. The defendants did not object to the withdrawal of their counsel, provided that the court would stay action for sixty days to allow them to obtain new counsel. Id. at 916.

\textsuperscript{82} Id.

\textsuperscript{83} Id.

\textsuperscript{84} Id. at 916. The individual that was appointed claimed that the only person with the company that would have knowledge pertaining to the events that were to be covered by the deposition had been fired from the company four days prior. Id. Hoxworth's counsel then suggested that Blinder would have knowledge of the requisite information and he should go through with the deposition. Id. Blinder refused to be deposed citing his rights under the Fifth Amendment. Id.

\textsuperscript{85} Hoxworth, 980 F.2d at 916.

\textsuperscript{86} Id.

\textsuperscript{87} Id. at 917.
On appeal, the Third Circuit noted that the trial court had explicitly referenced Rule 55 as authority for its action. The court held that the default was proper, reasoning that, on its face, the language "otherwise defend" was much broader than a mere failure to plead. Further, through analogy to precedent, both within and outside its jurisdiction, the court held that a failure to appear at trial justified default as a proper sanction.

5. The Second Circuit Continues with the Current Trend

In May 2011, the United States Court of Appeals for the Second Circuit became the most recent federal circuit to interpret "otherwise defend." In *City of New York v. Mickalis Pawn Shop, LLC*, the City of New York sued fifteen federally licensed firearms dealers operating out of Georgia, Ohio, Pennsylvania, South Carolina, and Virginia. Of the two stores that were the subject of the appeal, neither received revenue from sales within the State of New York and both required individuals to be physically present at their stores to complete gun purchases. The city brought suit against the gun dealers alleging that they engaged in unlawful sales practices that contributed to a public nuisance within the city because they engaged in "strawman purchases." Mickalis Pawn Shop (Mickalis), Adventure Outdoors, and other defendants moved to dismiss for lack of personal jurisdiction, arguing that New York's long-arm statute was not satisfied. The trial court denied the motions to dismiss.

Roughly two months later, Mickalis's owner was indicted on federal gun charges and Mickalis's counsel moved to withdraw from the civil suit, citing the owner's intentions to concentrate on his criminal defense. The district judge held a status conference on the motions to withdraw, at which time Mickalis's counsel stated that Mickalis under-

88. Id.
89. Id. at 919. The court stated that the district court permissibly relied on Rule 55 to enter a default against the defendants, but noted that it may not have been the only basis for the default. Id.
90. Id. at 917–19.
91. See City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114 (2d Cir. 2011).
92. Id. at 118.
93. Id. at 119.
94. Id. at 120. In a "straw" purchase, an individual purchases a firearm intending to transfer it to another individual who is not legally allowed to purchase the gun. Id. at 120 n.4. The true buyer is not able to complete the required form, ATF Form 4473, so the stand-in buyer completes the form and submits to the federally required background check. Id.
95. Id. at 120.
96. Id. at 121.
stood default to be a possible consequence of this decision, but did not expressly consent to the entry of default.\textsuperscript{98} The judge granted the withdrawal of counsel and granted the city’s request for a default to be entered.\textsuperscript{99}

Adventure Outdoors, the other defendant in the suit, completed the discovery stage, even going so far as to reach jury selection, before its counsel moved to withdraw from the representation, citing Adventure Outdoor’s choice “not to engage in the futile exercise of defending itself at a bench trial.”\textsuperscript{100} The district judge denied counsel’s motion to withdraw because the trial was already underway, and cautioned Adventure Outdoors that if it failed to go forward with the case, that action would “constitute a default” under FRCP 55.\textsuperscript{101} Adventure Outdoors still refused to proceed with the trial, and the district judge noted Adventure Outdoors’s default on the record and conditionally granted the city’s motion for default judgment.\textsuperscript{102}

The Second Circuit affirmed the default judgments against both defendants.\textsuperscript{103} The court stated that it embraced a broad understanding of the phrase “otherwise defend” and reasoned that “‘a trial judge, responsible for the orderly and expeditious conduct of litigation, must have broad latitude to impose the sanction of default for non-attendance occurring after a trial has begun.’”\textsuperscript{104} Each defendant affirmatively expressed its intention to stop defending the suit, failed to retain a substitute for its withdrawn counsel, and made clear that it was aware that its conduct could result in a default.\textsuperscript{105} Therefore, the trial judge’s entry of default was proper.\textsuperscript{106}

III. Analysis

Once a dispute reaches the trial stage, it is rarely proper for a trial judge to enter a default judgment against one of the parties. This Part discusses what the proper course of action is in a scenario in which one party fails to appear at trial after having participated in the lawsuit up to that point. Though trial judges have the inherent ability to

\textsuperscript{98} Id. at 122.
\textsuperscript{99} Id. at 123. Pursuant to the entry of default, the district court also entered a permanent injunction against Mickalis. Id.
\textsuperscript{100} Id. at 123–24.
\textsuperscript{101} Id. at 124.
\textsuperscript{102} Id.
\textsuperscript{103} Mickalis Pawn Shop, 645 F.3d at 130.
\textsuperscript{104} Id. at 129 (quoting Brock v. Unique Racquetball & Health Clubs, Inc., 786 F.2d 61, 64 (2d Cir. 1986)).
\textsuperscript{105} Id. at 130.
\textsuperscript{106} Id.
enter a default regardless of the FRCP, using this power at the trial stage is most likely a mistake, and simply holding a trial on the merits in the defendant’s absence is a better vehicle through which to properly effectuate justice. Furthermore, the basis for the growing sentiment that a default is proper at trial may come from misinterpreting the precedent of cases in which a default judgment was properly entered under Rule 37. Thus, when a defendant fails to appear at trial after having been an active participant in the suit up to that point, the court should hold a trial on the merits in the defendant’s absence.

A. A Trial Judge Should Not Use His Inherent Power to Default Defendants that Fail to Appear at Trial

Historically, trial judges have been given wide latitude to sanction parties for “bad-faith conduct.”\(^{107}\) Though there is some sentiment that this power should not be used in ways that subvert either the FRCP or other governing statutes,\(^{108}\) the trial judge can use it to fill gaps that have been left open by the legislature.\(^{109}\)

After applying the Third Circuit’s test for use of inherent power to a situation in which a defendant fails to appear at trial, after having been diligent in all pretrial work, it seems clear that a default is improper.\(^{110}\) Factors (1), (4), and (6) of the test are extremely fact-specific—they would entail an in-depth examination into individual cases and, therefore, are not applicable to this hypothetical look at whether use of a trial court’s inherent power is proper in general.\(^{111}\) Factors (2), (3), and (5), however, provide some insight into the proper analysis in which a court should engage.\(^{112}\)

The second factor, “the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery,”\(^{113}\) weighs

\(^{108}\) See id. at 61 (Kennedy, J., dissenting); cf. Societe Internationale Pour Participations Industrielles Et Commerciales v. Rogers, 357 U.S. 197, 207 (1958).
\(^{109}\) Chambers, 501 U.S. 32 at 46 (“We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions . . . . At the very least, the inherent power must continue to exist to fill in the interstices.”).
\(^{110}\) To reiterate, the factors of the Third Circuit’s test are as follows:

(1) the extent of the party’s personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.


\(^{111}\) See id.
\(^{112}\) See id.
\(^{113}\) Id.
heavily against entry of a default. If a defendant fails to appear at a properly scheduled trial, the plaintiff could not have been prejudiced by failures with regard to scheduling orders or discovery because discovery is a necessary prerequisite to trial. In fact, any violations of the court's orders or failures in discovery can be cured at the time they occur without resorting to the court's inherent power. The fact that a defendant has managed to reach the trial without the invocation of the judge's inherent power surely weighs against default.

The third factor, "a history of dilatoriness," also disfavors the entry of default once the litigation has reached the trial stage for reasons similar to the second factor. If the defendant has been diligent until his failure to appear at trial, then the missed court date is most likely the first instance of dilatory behavior. The Third Circuit, in applying this test, stated that "a history of dilatoriness" implied more than one failure to comply in a timely manner. The court stated that the plaintiff's counsel had caused delay numerous times, and violated numerous time limits imposed by both the rules of civil procedure and the court. This extensive record of delay should not be equated to a single missed appearance, even at a date as late as trial. As previously mentioned, if the party has missed previous dates for conferences, discovery orders, and other court mandated actions, the court may avail itself of tools other than its inherent power.

The fifth factor of the test to determine whether default pursuant to a court's inherent power is proper—"the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions"—also disfavors the entry of default. Even if a trial judge were to disagree with the analysis and determine that use of his inherent power was proper, one failure to appear at the trial stage does not seem to reach the high level of impropriety that warrants a default. The Third Circuit explicitly mentioned two possible alternatives to a default: levying fines or imposing attorney's fees on the violating party. In any situation in which a party causes undue delay or otherwise improperly causes its adversary to incur excess costs, simply

114. See FED. R. CIV. P. 37(b)(2).
115. Poulis, 747 F.2d at 868.
116. See id. (citing Donnelly v. Jones-Manville Sales Corp., 677 F.2d 339 (3d Cir. 1982)).
117. Id.
118. See supra note 114 and accompanying text.
119. Poulis, 747 F.2d at 868. Though some federal circuits have failed to find alternative sanctions to be a significant factor, recent academic discussion on the topic has argued that the effectiveness of alternative sanctions is an essential element to any analysis of whether a default is proper, through inherent power or otherwise. See, e.g., Arthur J. Park, Fixing Faults in the Current Default Judgment Framework, 34 CAMPBELL L. REV. 155, 164 (2011).
120. Poulis, 747 F.2d at 869.
sending the bill to the offending party is both a proper deterrent for future misconduct and a punishment that is directly proportional to the harm caused. Surely, this sanction is enough to attain the desired effect that the default would accomplish. In any event, either of these alternatives is preferable to a default, which "must be a sanction of last, not first, resort."  

As shown above, a failure to appear at trial does not seem to merit a default pursuant to a trial court's inherent power. Though some of the factors are extremely fact-specific and, as such, are not analyzed in this Comment, it seems clear that an overall balancing would weigh against default. The plaintiff is not overly prejudiced by the defendant's actions, the requisite reoccurrence of dilatory acts is likely lacking, and lesser sanctions would properly punish the defendant, thereby reducing the need for default.

B. Courts Have Openly Ignored Default Under Rule 37 in Favor of Default Under Rule 55

Rule 55 is not the exclusive vehicle within the FRCP that allows the imposition of default. Rule 37 allows the trial court to "render [a] default judgment against [the] disobedient party" who "fails to obey an order to provide or permit discovery." The court orders governed by this rule include, but are not limited to, orders for: (1) conferences between the parties; (2) physical and mental examinations; and (3) disclosure or discovery. In fact, Rule 37 governs failures regarding all pretrial discovery rules, the importance of which cannot be overstated. Prior to the creation of the rules, and under English common law, pretrial civil procedure consisted solely of pleading. There were no means of testing any of the allegations or defenses contained within the complaint and answer until the matter

121. Id.
122. See supra notes 113–114 and accompanying text.
123. See supra notes 115–118 and accompanying text.
124. See supra notes 119–121 and accompanying text.
125. Fed. R. Civ. P. 37(b)(2)(A)(vi). The entry of default is only one of seven permitted sanctions at the court's disposal under this rule.
130. See Hickman v. Taylor, 329 U.S. 495, 500 (1947) ("The pretrial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure.").
came to trial. Federal civil trials now have adequate discovery procedures in place to support an efficient litigation schedule by permitting all "parties to obtain the fullest possible knowledge of the issues and facts before trial." In Ackra Direct Marketing Corp. v. Fingerhut Corp., a magistrate judge ordered discovery to be closed and for any outstanding discovery materials to be completed by a set future date. The defendants never produced any outstanding discovery responses, ignored final pretrial and settlement conference requirements, and failed to attend the final pretrial conference. The plaintiffs filed for a default judgment against the defendants, which the magistrate judge granted in its entirety. On appeal, the Eighth Circuit treated the default as falling under Rule 55(b)(2), while explicitly rejecting the contention that the default judgment was a sanction under Rule 37, because the default was ordered in response to the defendants' "failure to defend."

Unfortunately, such a rejection of a Rule 37 default in favor of a Rule 55 default is a relatively common occurrence. Judges seem reluctant to grant case-dispositive sanctions against parties who fail to comply with discovery rules, while simultaneously deeming that action sufficient to merit a failure to "otherwise defend." This reluctance seems counterintuitive, especially when viewed from the position of the opposing party. The plaintiff has been diligently gathering documents, attending depositions, and appearing in court for conferences, while his adversary has created difficulties for the plaintiff at every turn. The FRCP specifically enable a trial judge to order a default as a sanction against such misconduct. To ignore the express provision of Rule 37 in order to grant the same remedy under a more broadly interpreted rule, such as Rule 55(a), is unnecessary.

132. See id. ("The great weakness of pleading as a means for developing and presenting issues of fact for trial lay in its total lack of any means for testing the factual basis for the pleader's allegations and denials.").
135. Id. "From July 1992 to April 1994, ... [defendants] delayed the discovery process by submitting late and non-responsive discovery answers and by failing to produce some discovery altogether." Id. at 854.
136. Id. at 855.
137. See id. at 855–56.
138. See, e.g., Home Port Rentals, Inc. v. Ruben, 957 F.2d 126, 133 (4th Cir. 1992) (relying upon an apparent "failure... to participate in prosecution or defense" of the action to warrant a default despite the trial court's mention of failure to participate in discovery); Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 916–17 (3d Cir. 1992) (entering default pursuant to Rule 55 despite the plaintiffs' explicit reliance upon Rule 37 in its request for a default judgment).
Though the outcome and the standard of review are the same under both Rule 55 and Rule 37, the underlying review on appeal will differ between a default granted for discovery abuses and a default granted for other reasons. Courts look much less favorably upon discovery abuses than other abuses, as well they should. When a defendant deserves to be defaulted, there is no reason to attribute the default to a basis that may be more easily overturned by a reviewing court, especially when that basis has caused a split between the circuits over its proper usage.

C. Conducting a Trial on the Merits is the Proper Course of Action

Although judges are “responsible for the orderly and expeditious conduct of litigation, [and] must have broad latitude to impose the sanction of default for non-attendance,” trial courts have a greater duty to give due regard and adequate opportunity for both parties to be heard in all instances. These competing interests have caused dissension between the federal circuit courts.

From the standpoint of statutory interpretation, it seems clear that Rule 55 applies only to the pleadings stage of litigation; once a pleading or other affirmative motion has been filed, the opposing party can no longer avail itself of this procedural tool. Though there is room

141. See Ackra Direct Mktg. Corp., 86 F.3d at 856 n.4. For an additional discussion of alternative rules within the FRCP that may better serve as the basis for a default judgment, see Josiah A. Contarino, Note, Playing By the Rules: FRCP 55(A) and the Circuit Split Regarding Its Meaning, 25 REGENT U. L. REV. 209, 234–35 (2012–2013).
142. See Everyday Learning Corp. v. Larson, 242 F.3d 815, 817–18 (8th Cir. 2001) (holding that in cases in which a defendant exhibits actions designed to delay and evade discovery proceedings, a trial judge does not need to investigate the propriety of a less extreme sanction); see also Avionic Co. v. Gen. Dynamics Corp., 957 F.2d 555, 558 (8th Cir. 1992) (“[W]hen the facts show willfulness to bad faith [in delaying discovery], the selection of a proper sanction, including dismissal, is entrusted to the sound discretion of the court.”).
144. As explained in Bass v. Hoagland:
The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have an inherent power to deny all right to defend an action and to render decrees without any hearing whatever is in the very nature of things to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

Bass v. Hogland, 172 F.2d 205, 210 (5th Cir. 1949) (internal quotation marks omitted).
145. FED. R. CIV. P. 55(a); see also Bass, 172 F.2d at 210 (“[Rule 55] does not require that to escape default the defendant . . . must also have a lawyer or be present in court when the case is called for trial. The words ‘otherwise defend’ refer to attacks on the service, or motions to dismiss, or for better particulars, and the like, which may prevent default without presently pleading to the merits.”); cf. Smith v. Comm’r of Internal Revenue, 926 F.2d 1470, 1478 (6th Cir. 1991) (stating that the language “otherwise defend” refers only to defenses and objections available to a defendant prior to filing an answer).
for some interpretation of the meaning of the rule, as evidenced by
the current federal circuit split, it can be argued that the correct inter-
pretation of "otherwise defend" is much narrower than the circuit
courts have adopted in recent years. In any event, the Supreme
Court has long held that when a statute is clear, as Rule 55 appears to
be, courts should follow the plain language of the statute.

As stated above, the trial court's main duty is to give an adequate
chance for a hearing whenever possible, and to bring a judgment to
every case on the merits without worrying about procedural law.
Continuing with the litigation and allowing a trial on the merits in a
defendant's absence meets both of these goals. Unless the party's
prior conduct warrants such an action, there appears to be no justifica-
tion to default a party that fails to appear at trial. Assuming discov-
er has been completed, there should be sufficient evidence to permit
the plaintiff to both support his case and provide the judge with an
adequate record to render a decision. In this sense, Hoxworth, in
which the court stated that there was no difference between the effect
of delay at the pleading stage and the effect of delay at trial, is almost
certainly wrong. It seems unreasonable to think that a failure to
appear at trial poses the same impediment to the orderly progress of a
case as the failure to plead. When a trial date has been set, presum-
ably, all of the necessary legwork is complete. Plaintiffs completed
discovery and formulated their theory of the case. In contrast, if

146. See D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 107 (2d Cir. 2006) (stating in dicta that
Rule 55 is only meant to apply to a civil suit in which only a complaint has been filed thereby not
giving the court any evidence with which to proceed); see also 10A CHARLES ALLEN WRIGHT ET
AL., FEDERAL PRACTICE AND PROCEDURE § 2682 (3d ed. 1998) ("The Bass conclusion seems
preferable. A defendant who has participated throughout the pretrial process and has filed a
responsive pleading, placing the case at issue, has not conceded liability."). But see Seven Elves,
Inc. v. Eskenazi, 635 F.2d 396, 400 n.2 (5th Cir. 1981) (noting that Bass has been criticized on
multiple grounds).

147. See Caminetti v. United States, 242 U.S. 470, 485 (1917) ("Where the language [of a
statute] is plain and admits of no more than one meaning the duty of interpretation does not
arise . . . .").

148. See Holtzoff, supra note 21, at 1058 (giving one of the underlying philosophies behind the
creation of the new FRCP, and thus one of the underlying philosophies the drafters expected of
the trial courts).

(11th Cir. 1986) (stating that a court can proceed with trial in defendant's absence and allow a
judgment in favor of plaintiff if he adequately proves his case); see also Bass, 172 F.2d 205 at 210
(stating that when the defendant failed to show at trial, the plaintiff could proceed, but would
have to prove his case on the merits).

150. Such behavior could consist of a failure to comply with an order to permit or provide
discovery under Rules 26(f), 35, or 37(a), or failing to previously plead or otherwise defend as
required by Rule 55(a).

a defendant fails to even answer a complaint, the plaintiff has nothing with which to develop a record upon which it can argue for judgment. 152 A default against a party that delays its adversary from completing its half of the litigation is more proper than a default against a party that merely waives its right to proffer a defense at trial. 153

The simplest way to illustrate the effective differences between the two types of Rule 55 defaults is through a hypothetical. In the first case, a plaintiff properly files a complaint and serves notice to the opposing party pursuant to the FRCP. 154 The attentive defendant retains counsel and responds to the complaint. 155 At this point, both parties will likely appear in court on a hearing associated with the filing of the complaint. 156 The trial judge has the opportunity to schedule future status conferences and hearings. 157 After a hearing, and before trial, both parties engage in discovery to ascertain any and all information pertinent to their case. This may involve depositions of witnesses, 158 interrogatories, 159 production of documents, 160 requests for admission, 161 and more as provided by the FRCP. In this scenario, every aspect of the litigation has occurred without error up to this point. After all pretrial discovery has been completed and a date has been set for trial, however, the defendant stops actively litigating and fails to appear in court on the date of trial. Accordingly, upon the judge’s order, or motion by the plaintiff, a default is entered against the defendant. 162

The second hypothetical scenario is more straightforward. Here, as is more typical in discussions of “default” within the context of civil litigation, the defendant fails to respond to a complaint that has been properly filed and served. After the defendant fails to respond within

152. See Sunderland, supra note 131, at 218 (stating that the fundamental problem prior to trial is to determine what needs to be tried and that cannot be done without examination of the pleadings).
153. See supra note 38 and accompanying text.
154. See Fed. R. Civ. P. 4(c)(1) (“A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.”).
155. See Fed. R. Civ. P. 8(b)–(c) (providing that a defendant may deny or set out affirmative defenses to the allegations set out in the pleading); see also Fed. R. Civ. P. 12(b).
the twenty-one days required by Rule 12, the plaintiff applies for entry of a default against the defendant with the clerk of the court.\textsuperscript{163}

In the first hypothetical, the parties create the impression of having equal interests and investment in the litigation up to the point at which the defendant fails to appear at the trial. Both parties are active in the litigation, and discovery has not been substantially impeded for either side. The plaintiff is able to obtain documents,\textsuperscript{164} witness testimony,\textsuperscript{165} medical records,\textsuperscript{166} and any other pertinent materials with which it can formulate a theory of the case and ascertain what defenses the defendant may have. The plaintiff enters the courthouse on the day of trial prepared to litigate his case against an active opponent who is prepared in his defense.

The critical difference between the first and second hypotheticals is that, in the second, the default occurs at a stage of litigation in which the plaintiff has been unable to substantiate any of the allegations in the complaint. In this scenario, the basis for Rule 55 appears obvious. The drafters wanted a system that motivated parties to "ascertain the truth" and "attain justice" after "all available data [has been] laid before the tribunal trying the case in order to enable it to do justice."\textsuperscript{167} This rule envisions a scenario in which the court is unable to collect such data. Thus, the only proper course of action is to punish the party that impedes the court's goal: the dilatory defendant. It is impossible for the plaintiff to prove his case on the merits as the drafters wished, so a default is a necessary evil. This is the ideal situation for a trial judge to enter a "generally disfavored" default.\textsuperscript{168}

While defaults "provide a useful remedy when a litigant is confronted with an obstructionist adversary,"\textsuperscript{169} the question is one of determining the point at which a party becomes so obstructionist as to merit such a "severe sanction."\textsuperscript{170} The previous hypotheticals illustrate a stark contrast in the levels of obstruction imposed upon a diligent plaintiff, depending upon the point at which the defendant fails to actively defend the suit. A defendant that obstructs a plaintiff from pursuing any discovery efforts by foregoing the filing of any pleading

\begin{itemize}
\item \textsuperscript{163} See \textit{id}.
\item \textsuperscript{164} See \textit{FED. R. CIV. P.} 34.
\item \textsuperscript{165} See \textit{FED. R. CIV. P.} 30, 31.
\item \textsuperscript{166} See \textit{FED. R. CIV. P.} 34.
\item \textsuperscript{167} Holtzoff, \textit{supra} note 21, at 1060.
\item \textsuperscript{168} See \textit{Enron Oil Corp. v. Diakuhara}, 10 F.3d 90, 96 (2d Cir. 1993).
\item \textsuperscript{169} \textit{Id}.
\item \textsuperscript{170} \textit{Cody v. Mello}, 59 F.3d 13, 15 (2d Cir. 1995) (describing default judgments as "the most severe sanction which the court may apply").
\end{itemize}
warrants a "severe sanction."\textsuperscript{171} Once again, the drafters of the FRCP specifically envisioned situations in which a party has failed to comply with discovery orders and provided useful remedies for such situations.\textsuperscript{172} But a defendant that has complied with discovery orders before missing a trial date has not impeded a plaintiff from developing his case. In such an instance, the defendant has merely hindered his own ability to defend the case on the merits.

There is a more direct route the court can pursue to protect the plaintiff's interests without the sledgehammer effect that a default would impose on a mildly uncooperative defendant. That alternative is to allow the plaintiff to present its case in the defendant's absence.\textsuperscript{173} The advantages of this technique benefit both parties and the court.

First, the plaintiff is permitted to present the court with the case that he has diligently prepared. After presenting the evidence upon which he builds his claim for relief, the plaintiff does not have to defeat any defenses that an active defendant would impose during the course of a standard trial. Also, if the defendant later realizes the error of his ways and appeals the case, he must overcome a judgment on the merits that the appellate court cannot overturn without a finding of clear error,\textsuperscript{174} as opposed to "mistake, inadvertence, surprise, or excusable neglect."\textsuperscript{175} This higher standard will help the plaintiff maintain his judgment going forward.\textsuperscript{176}

Second, the defendant receives a benefit, whether deserved or not. In a trial on the merits, the plaintiff has to prove his case by a preponderance of the evidence. In a typical default judgment proceeding, on the other hand, findings on liability are deemed true and the only action taken by the court is to conduct a hearing to determine the amount of damages owed to the plaintiff.\textsuperscript{177} Though this advantage

\textsuperscript{171} Id.
\textsuperscript{172} See FED. R. CIV. P. 37(b)(2)(A); see also infra notes 125–42 and accompanying text.
\textsuperscript{173} See Solaroll Shade & Shutter Corp. v. Bio-Energy Systems, Inc., 803 F.2d 1130, 1134 (11th Cir. 1986); see also Bass v. Hoagland, 172 F.2d 205, 210 (5th Cir. 1949).
\textsuperscript{174} See FED. R. CIV. P. 52(a)(6).
\textsuperscript{175} FED. R. CIV. P. 60(b)(1).
\textsuperscript{176} See infra notes 192–210 and accompanying text.
\textsuperscript{177} See FED. R. CIV. P. 55(b)(2). Admittedly, Rule 55(b) explicitly provides that a trial judge may conduct a hearing to "establish the truth of any allegation by evidence," but it is common for a judgment to be given to the plaintiff close to or at the amount sued for, and circuit courts seem to acknowledge that it is uncommon to require a plaintiff to present evidence in a default judgment proceeding. See Bass, 172 F.2d at 208; see also United States v. DiMucci, 879 F.2d 1488, 1497 (7th Cir. 1989) ("As a general rule, a default judgment establishes, as a matter of law, that defendants are liable to plaintiff as to each cause of action alleged in the complaint"); Brockton Savings Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5, 13 (1st Cir. 1985) ("[T]here is no question that, default having been entered, each of [plaintiff's] allegations of fact must be
may be minimal because of the defendant's inability to proffer a defense, it is an added benefit above the standard acceptance of the allegations that occurs in most default judgment proceedings.

Finally, there is a benefit to the judge who conducts a trial on the merits, as opposed to entering a default. A primary concern cited by the federal circuit courts in favor of allowing Rule 55 defaults at the trial stage is "the orderly and expeditious conduct of litigation." If a trial judge, however, grants an application for entry of default to a plaintiff, and the defendant has previously appeared, notice must be given to the defendant at least seven days before the default judgment hearing can occur. Further, a period is recommended, if not required, in jurisdictions that have adopted "civility codes," which require more notice as an ethical obligation. In this scenario, the trial judge has a prepared plaintiff and a previously scheduled window of time to conduct a trial that are essentially wasted because a second court date is now required. The trial judge should instead proceed with the plaintiff's case on the scheduled date. A second date may not be necessary and the trial judge can clear one more case off of the court's docket. Also, the trial will assuredly be shorter than originally assumed because only one party will present its case. It is unlikely that the "orderly and expeditious conduct of litigation" can be preserved more efficiently.

Although this shift in practice may appear to limit the trial judge's power, the motivation behind the existing sentiment to allow default is better served by a trial on the merits. When the improvements to a judge's docket are accompanied by the previously stated advantages to both the plaintiff and the defendant, the theoretical result can be properly characterized as win-win-win.

taken as true and each of its seven claims must be considered established as a matter of law.

Further, the trial-court would be required to wait at least seven days after serving notice upon the defaulting defendant before conducting any hearing on the allegations or damages. See infra notes 179–180 and accompanying text.

178. Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141 (9th Cir. 1989) (quoting Brock v. Unique Racquetball & Health Clubs, Inc., 786 F.2d 61, 64 (2d Cir. 1986)).

179. See FED. R. CIV. P. 55(b)(2). This concern is inapplicable to the second hypothetical above because the notice and hearing provisions of Rule 55 apply only to parties who have made an appearance. See Arango v. Guzman Travel Advisors, 761 F.2d 1527, 1531 (11th Cir. 1985). This does not have to be a court filing, but some affirmative act must be made by the party in order for the court to be required to acknowledge its presence. See, e.g., Traveltown, Inc. v. Gerhardt Inv. Grp., 577 F. Supp. 155, 157 (N.D.N.Y. 1983).


181. Ringgold Corp., 880 F.2d at 1141 (quoting Brock v. Unique Racquetball & Health Clubs, Inc., 786 F.2d 61, 64 (2d Cir. 1986)).
IV. IMPACT

This Comment does not argue that a default against the defendant after the pleading stage is always improper. Rather, it suggests that certain stages of the litigation process more readily provide for default opportunities that better address the competing interests of judicial efficiency and the disposition of cases on the merits.182 This Part examines the effect of a trial on the merits in the defendant’s absence upon damage awards,183 and then explains the effect it would have upon the finality of judgments in cases in which a defendant fails to appear for trial.184

A. Trials on the Merits will Result in Lower Damage Awards

In a standard default judgment scenario, the well-pleaded allegations in the complaint are taken as true, with no burden on the plaintiff to prove them beyond a preponderance of the evidence.185 Presumably, there will be cases in which this will lead to damage awards that are higher than what would have been granted had the plaintiff been required to prove the damages at trial. This is not to say that the plaintiff must be unethical or dishonest to receive higher damages. It is not uncommon for a complaint to contain allegations that, though reasonable and “well-pleaded” under the FRCP,186 would not survive if evidence were required to support them.187 Although not every trial on the merits would result in a lower damage award than a

182. See Brock v. Unique Racquetball & Health Clubs, Inc., 786 F.2d 61, 64 (2d Cir. 1986) (concluding that a trial judge’s responsibilities with regard to the orderly and expeditious conduct of litigation allow for broad sanctions for non-attendance); see also Park, supra note 119, at 159–60 (stating that judicial preference for “just resolution of disputes on the merits” is the competing policy with speedy determination of pending litigation).
183. See infra notes 185–191 and accompanying text.
184. See infra notes 192–210 and accompanying text.
185. See Nishimatsu Constr. Co. v. Houston Nat’l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975) (“The defendant, by his default, admits the plaintiff’s well-pleaded allegations of fact, is concluded on those facts by the judgment, and is barred from contesting on appeal the facts thus established.”); see also Nw. Yeast Co. v. Broutin, 133 F.2d 628, 630 (6th Cir. 1943) (“Appellant being in default for answer, we take the allegations of the petition as true.”); Int’l Painters & Allied Trades Indus. Pension Fund v. R.W. Amrine Drywall Co., 239 F. Supp. 2d 26, 30 (D.D.C. 2002).
186. Cf. Int’l Painters & Allied Trades, 239 F. Supp. 2d at 30 (“A defaulting defendant is deemed to admit every well-pleaded allegation in the complaint.”).

The great weakness of pleading as a means for developing and presenting issues of fact for trial lay in its total lack of any means for testing the factual basis for the pleader’s allegations and denials. They might rest upon the soundest evidence, or they might rest upon nothing at all.

Id.
standard default proceeding, there are numerous instances in which this change would limit the damage award in a manner that better effectuates justice.

There have been many attempts over the past few decades to limit damage awards, even those that have been awarded by juries. Whether or not areas of the American judicial system actually need to be "reformed" to prevent injustice, there is merit to the belief that the system should limit damage awards to those that are actually deserved and provable beyond a preponderance of the evidence. A simple way to accomplish this is to prohibit default judgments when the plaintiff has completed sufficient discovery to offer his case.

B. Trials on the Merits Will Result in an Increase in the Finality of Judgments

Modern commentators have cited the readiness with which courts are willing to set aside default judgments as a major problem with the default judgment system. Along with the significant variation between the courts in applying Rule 60(b) to appeals of default judgments, a general liberality in applying the "excusable neglect" standard has created a system in which appeals are commonly granted.

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188. One can think of any number of examples, such as a standard contract claim with an obvious breach. E.g., Cnty. of Morris v. Fauver, 707 A.2d 958, 972 (N.J. 1998) ("Most contract actions presume that the parties to a contract know the terms of their agreement and a breach is generally obvious and detectable with any reasonable diligence.").

189. The obvious example, especially to those in support of tort reform, would be a medical malpractice suit in which pain and suffering, loss of enjoyment of life, and the like are claimed in the complaint. See, e.g., Yako v. United States, 891 F.2d 738, 746 (9th Cir. 1989) (affirming an award of $1.3 million for "pain, suffering, and loss of the enjoyment of life").

190. See Michael P. Allen, A Survey and Some Commentary on Federal "Tort Reform", 39 AKRON L. REV. 909, 909-10 (2006) (noting that for several decades there have been attempts to reform the American tort system and though these efforts have been concentrated at the state level, significant efforts have also been made at the national level).


192. See generally Park, supra note 119, at 155 (discussing the liberal application of the "excusable neglect" standard for vacating a default judgment under Rule 60(b) as a major issue in current appeals of default judgments).

193. See id. at 164-65 (illustrating the divide between the circuits that applied Rule 60(b) in all situations except those that involved willful or culpable conduct or bad faith, and the circuits that expressly rejected the use of Rule 60(b) in situations that resulted from carelessness or negligence).

194. See id. at 166-67 nn.79-80 (listing federal circuit court cases that apply a liberal analysis of excusable neglect under Rule 60(b)(1) with express consent from the Supreme Court).
Rule 55(c) explicitly states that Rule 60(b) is the standard by which a default judgment may be set aside.\textsuperscript{195} Rule 60(b)(1) states that a court can relieve a party from any final judgment, order, or proceeding for “mistake, inadvertence, surprise, or excusable neglect.”\textsuperscript{196} The Supreme Court, in \textit{Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership}, held that, using the ordinary meaning of the words, Congress intended to allow trial courts to consider “both simple, faultless omissions to act and, more commonly, omissions caused by carelessness.”\textsuperscript{197} This minimal standard allows for countless circumstances that will permit for a default judgment to be set aside.\textsuperscript{198}

Instead, if a trial judge were to continue with a trial on the merits in the defendant’s absence, a different appellate standard would apply. Continuing with the original trial would necessarily include findings of fact upon which the trial judge could make a determination of both liability and damages. These findings of fact would be in the record and permit the appellate court to determine the basis for the trial court’s judgment. When a factual basis exists for a trial judge’s determination, Rule 52 applies on appeal.\textsuperscript{199} Any determination of fact made by a trial judge sitting without a jury that is “amply supported by the record” is binding upon the appellate court.\textsuperscript{200} This standard is very deferential to the trial judge and has even been adhered to in situations in which the trial court failed to comply with every applicable rule.\textsuperscript{201}

The practical implications of the choice between a default and a trial on the merits involve a stark contrast to the deference given to the judgment at the trial level. If a trial court were to simply default a defendant that failed to appear at trial, and hold a hearing on damages, the time and resources expended on that initial determination...

\textsuperscript{195} \textit{FED. R. CIV. P. 55(c)} (“The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).”).

\textsuperscript{196} \textit{FED. R. CIV. P. 60(b)(1)}.


\textsuperscript{198} \textit{See, e.g., Cheney v. Anchor Glass Container Corp.}, 71 F.3d 848, 850 (11th Cir. 1996) (holding that a failure in communication between lead counsel and associate counsel was carelessness enough to set aside the default judgment).

\textsuperscript{199} \textit{See FED. R. CIV. P. 52(a)(6)} (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”).

\textsuperscript{200} \textit{See Vessella v. United States}, 405 F.2d 599, 600 (4th Cir. 1969).

\textsuperscript{201} \textit{See Olson v. Philco-Ford}, 531 F.2d 474, 476 (10th Cir. 1976) (stating that as long as the appellate court was provided with a limited record to determine credibility of the opinion, the trial court’s findings should be left to stand unless “clearly erroneous”).
could be rendered irrelevant. An appeal of a default judgment is relatively likely to succeed, in part because it is based upon issues that are entirely separate from the trial judge's determinations.\(^{202}\) Any determination that the trial judge makes in a default hearing is irrelevant to the appellate court's review of that decision. The trial judge could enter a default against the defendant after determining that the defendant failed to appear for a properly scheduled trial, and that same determination could be set aside due to confusion caused by withdrawal of counsel,\(^{203}\) clerical errors,\(^{204}\) or any number of other reasons.\(^{205}\) These concerns may not have been within the purview of the trial court and have now completely negated the trial judge's previous determination.

If, however, the trial judge simply completes the previously scheduled trial, the judgment is much more likely to stand. If sufficient discovery has been completed, the trial judge has the ability to allow information, upon which he can base a decision, into the record. It would be unwise to ignore this mechanism for a sustainable and just decision by blindly ignoring the viability of the issues of the case. Not only would such an approach go against the system, which was designed by the framers to allow "all available data [to] be laid before the tribunal trying the case in order to enable it to do justice,"\(^{206}\) but the judgment appears expected to be set aside on appeal.

A parallel to the idea that a judge's decision should be based upon all available data is the current approach to appellate review of trial court findings.\(^{207}\) Under Rule 52, "[f]indings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."\(^{208}\) The Supreme Court has held that this "clearly erroneous" standard is only violated when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."\(^{209}\) In applying this standard, however, some circuit courts have found that a trial judge's failure to weigh all relevant

\(^{202}\) See Fed. R. Civ. P. 60(b)(1).


\(^{205}\) See 10A Charles Alan Wright et al., Federal Practice and Procedure § 2695 (3d ed. 1998).

\(^{206}\) Holtzoff, supra note 21, at 1060.

\(^{207}\) Id.

\(^{208}\) Fed. R. Civ. P. 52(a)(6).

Though there are clear procedural differences between an appeal of a trial court's factual findings and a trial judge's decision whether or not to default a defendant, the policy concerns are strikingly similar. The judicial system requires the courts to make the correct determination to the best of their abilities, and this determination dictates that in doing so, all relevant and available evidence must be considered. Thus, there is ample justification to extend this fundamental preference for a trial on the merits to the situation at hand. As such, for interests of both justice and finality of judgments, a trial on the merits is superior to a default when a plaintiff fails to appear at trial after dutifully taking part in litigation prior to that point.

V. Conclusion

Since 1949, the federal judiciary has tried to determine whether the phrase "otherwise defend" extends Rule 55 beyond the pleading stage and has been conflicted in its determinations on the issue. In particular, the proper course of action for a trial judge when a defendant fails to appear at trial after complying with all prior aspects of the litigation is one which the courts have not fully developed. Inherent in every opinion on the issue is the choice between the principles of judicial efficiency and the preference for judgment on the merits.

Despite these concerns, courts will ignore obvious opportunities to default defendants who fail to actively participate in discovery; instead, they apply a Rule 55 default at a later instance of misconduct. If judicial efficiency is a proper justification to default a party at trial, it is certainly also proper to default a party for discovery violations
prior to the trial date. Hence, if trial judges were more willing to wield their default powers under Rule 37, many judicial efficiency concerns could be addressed without the use of Rule 55 at trial.

If these dueling concerns are the main issues that a trial judge must address in any default situation, a default at trial is not the best course of action. Judicial resources are a constant concern for the federal judiciary, and this concern is not aided by the delay that comes with defaulting a defendant at trial. Continuing with a trial on the merits is the option that best promotes efficiency and justice.

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