PLAYING BY THE RULES: FRCP 55(A) AND THE CIRCUIT SPLIT REGARDING ITS MEANING

INTRODUCTION

American jurisprudence disfavors default judgments.[1] Why? Because default judgments are entered without a trial on the merits.[2] A trial on the merits of the case is essential to the American legal system—"the adversary system."[3]

The adversary system's central precept is that it is more likely that "a neutral and passive decision maker can resolve a litigated dispute in a manner that is acceptable both to the parties and to society" when there

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[1] U.S. Fid. & Guar. Co. v. Petroleo Brasileiro S.A., 220 F.R.D. 404, 406 (S.D.N.Y. 2004) ("The determination of whether to grant a motion for default judgment is within the sound discretion of the district court. However, '[i]t is well established that default judgments are disfavored. A clear preference exists for cases to be adjudicated on the merits.'" (alteration in original) (citations omitted) (quoting Pecarsky v. Galaxiworld.com Ltd., 249 F.3d 167, 174 (2d Cir. 2001))); United States v. Gant, 268 F. Supp. 2d 29, 32 (D.D.C. 2003) ("Because courts strongly favor resolution of disputes on their merits, and because it seems inherently unfair to use the court's power to enter judgment as a penalty for filing delays, default judgments are not favored by modern courts. Accordingly, default judgment usually is available only when the adversary process has been halted because of an essentially unresponsive party[, as] the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights." (alteration in original) (citation omitted) (internal quotation marks omitted)); 10 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 55.02 (3d ed. 2012) ("In considering how courts deal with defaults and default judgments, one must be aware of the conflicting principles at play with default. On the one hand, default promotes efficient administration of justice by requiring a responding party to conform with the requirements set out in the Federal Rules in a timely fashion. Rule 55 provides a mechanism to deal with a party against whom affirmative relief is sought who does nothing or very little to respond to the complaint. . . . On the other hand, there is a strong desire to decide cases on the merits rather than on procedural violations. For this reason, most courts traditionally disfavor the entry of a default judgment. This is a reflection of the oft-stated preference for resolving disputes on the merits.").

[2] *See U.S. Fid. & Guar. Co.*, 220 F.R.D. at 406.

[3] Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 713 (1983) ("Since approximately the time of the American Revolution, courts in the United States have employed a system of procedure that depends upon a neutral and passive fact finder (either judge or jury) to resolve disputes on the basis of information provided by contending parties during formal proceedings. This dispute-resolving mechanism is most frequently termed 'the adversary system.'"); *see also* Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 57 (1998) ("In its simplest terms, an adversary system resolves disputes by presenting conflicting views of fact and law to an impartial and relatively passive arbiter, who decides which side wins what. In the United States, however, the phrase 'adversary system' is synonymous with the American system for the administration of justice—a system that was constitutionalized by the Framers and that has been elaborated by the Supreme Court for two centuries.").

is a "sharp clash of proofs presented by adversaries in a highly structured forensic setting."[4]

Default judgments, however, prevent this "sharp clash of proofs presented by adversaries." In this way, a default judgment is similar to a forfeited game in baseball.[5] A forfeit in baseball prevents the sharp clash of athletic skill presented by the would-be competing athletes; a default judgment prevents the sharp clash of competing proofs. Surely, the American citizenry (or, at least baseball fans) prefer that baseball games be decided by actual play, instead of the technicality that is a forfeited game. Similarly, a legal decision based on a trial on the merits is preferred over a decision by default judgment because a trial on the merits more nearly assures that the victor is victorious for good cause, rather than for some meritless technicality.[6]

Under Rule 55(a) of the Federal Rules of Civil Procedure ("Rule 55(a)"), default judgments are available to a party if the opposing party fails "to plead or otherwise defend."[7] In other words, a default judgment is available to *A* if *B* does not plead or otherwise defend. The federal circuits are split, however, regarding when *A* can win by default judgment under Rule 55(a).[8] Some circuits consider default judgment under Rule 55(a) available to *A* only when *B* neither pleads nor otherwise defends.[9] By contrast, other circuits consider default judgment available when *B* does plead but does not also defend.[10]

Part I of this Note provides a short background on default judgments, generally, and default judgments for failure to "otherwise defend," specifically. Part II summarizes the federal circuits' decisions and rationales regarding the interpretation of failure "to plead or otherwise defend" in Rule 55(a). Part III briefly looks at state courts' interpretations of failure "to plead or otherwise defend" in state procedure rules that parallel Rule 55(a). Finally, Part IV presents

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4 Landsman, *supra* note 3, at 714.

5 COMM'R OF BASEBALL, 2010 OFFICIAL RULES OF MAJOR LEAGUE BASEBALL R. 2.00, at 26 (2010) ("A FORFEITED GAME is a game declared ended by the umpire-in-chief in favor of the offended team by the score of 9 to 0, for violation of the rules."). In other words, the umpire declares the victor even though no baseball was actually played.

This is not a perfect analogy. Certainly, there are many differences between a default judgment and a forfeited game. This analogy is included, however, to immediately paint a picture—however rough—of what a default judgment feels like in some cases. A forfeited game does not allow a game of athletics to begin, and a default judgment does not allow a case on the merits to begin.

6 *See* Jackson v. Beech, 636 F.2d 831, 835 (D.C. Cir. 1980); *Gant*, 268 F. Supp. 2d at 32; MOORE ET AL., *supra* note 1.

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

8 *See infra* notes 33–35 and accompanying text.

9 *See infra* note 34 and accompanying text.

10 *See infra* note 35 and accompanying text.

arguments that show that a narrow construction of Rule 55(a) is the preferable approach.

I. BACKGROUND ON DEFAULT JUDGMENT

A. Default Judgment History

In 1937, the "Supreme Court exercised its statutory rulemaking authority when it adopted the Federal Rules of Civil Procedure,"[11] which included Rule 55.[12] Since its 1938 enactment, Rule 55 has governed default judgments in federal courts.[13] Before 1938, the Equity Rules of 1912 controlled.[14]

Much of the idea for Rule 55's text comes from Rules 16 and 17 of the Equity Rules of 1912.[15] In pertinent part, Equity Rule 16 states that a defendant shall "file his answer or other defense to the bill in the clerk's office within the time named in the subpoena."[16] If the defendant fails to timely file, Equity Rule 17 states that "the court may proceed to a final decree" against the defendant after a specified amount of time has passed.[17]

The similarity between the text of Rule 55 and the text of Equity Rules 16 and 17 is not surprising, as "[t]he policy reasons for allowing default judgments are basically the same now as they were in the early days of English and American practice."[18] In *H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, the United States Court of Appeals for the District of Columbia Circuit explained the policy of default judgments this way:

> [A] default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party. In that instance, the diligent party must be

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11 1 MOORE ET AL., *supra* note 1, § 1.04[2][a]; *see also* FED. R. CIV. P. hist. n. ("The original Rules of Civil Procedure for the District Courts were adopted by order of the Supreme Court on Dec. 20, 1937, transmitted to Congress by the Attorney General on Jan. 3, 1938, and became effective on Sept. 16, 1938.").

12 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2681, at 8 (3d ed. 1998).

13 *See id.* § 2681, at 7, 8.

14 *See id.* § 2681, at 8; *New Federal Equity Rules*, 18 VA. L. REG. 641 (1913).

15 WRIGHT, MILLER & KANE, *supra* note 12; *see also* FED. R. CIV. P. 55 advisory committee's note ("This represents the joining of the equity decree *pro confesso* ([former] Equity Rules 12 (Issue of Subpoena—Time for Answer), 16 (Defendant to Answer—Default—Decree *Pro Confesso*), 17 (Decree *Pro Confesso* to be Followed by Final Decree—Setting Aside Default), 29 (Defenses—How Presented), 31 (Reply—When Required—When Cause at Issue)) and the judgment by default now governed by U.S.C., Title 28, [former] § 724 (Conformity act)." (alterations in original)).

16 *New Federal Equity Rules*, *supra* note 14, at 644.

17 *Id.* at 645.

18 WRIGHT, MILLER & KANE, *supra* note 12, § 2681, at 9.

> protected lest he be faced with interminable delay and continued uncertainty as to his rights. The default judgment remedy serves as such a protection. Furthermore, the possibility of a default is a deterrent to those parties who choose delay as part of their litigative strategy.[19]

Although the policy behind default judgments has remained constant, court construction of default judgments has not.[20] That is, although at one time courts construed strictly the Federal Rules of Civil Procedure, there has been a "modernization of federal procedure" or a "relaxation of restrictive rules which prevent the hearing of cases on their merits."[21] In deciding whether the United States District Court for the District of Columbia erred when it refused to set aside a default judgment, the District of Columbia Circuit Court in *H. F. Livermore* explained that it was "mindful of this [relaxed] policy in its construction of the Rules in order to afford litigants a fair opportunity to have their disputes settled by reference to the merits."[22]

The *H. F. Livermore* court's explanation, although written over forty years ago, is in line with modern juridical sentiment.[23] That is, courts generally disfavor default, preferring, instead, adjudication on the merits.[24]

B. Entry of Default for Failure to Otherwise Defend

The text of Rule 55(a), which addresses the failure to otherwise defend, is straightforward (besides the distance between the subject and its verb): "When a party against whom a judgment for affirmative relief is sought has *failed* to plead or *otherwise defend* . . . the clerk must enter the party's default."[25] Although seemingly plain, the language of Rule 55(a) has led the federal circuits to different results.[26]

In essence, federal circuits take one of two approaches. The first approach does not permit a Rule 55(a) default judgment against a party

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19 432 F.2d 689, 691 (D.C. Cir. 1970).

20 WRIGHT, MILLER & KANE, *supra* note 12, § 2681, at 9.

21 *H. F. Livermore Corp.*, 432 F.2d at 691.

22 *Id.*

23 *See* WRIGHT, MILLER & KANE, *supra* note 12 § 2681, at 9.

24 *See* sources cited *supra* note 1.

25 FED. R. CIV. P. 55(a) (emphasis added).

26 *Compare* Bass v. Hoagland, 172 F.2d 205, 210 (5th Cir. 1949) (ruling that the defendant prevented default judgment because he filed a responsive pleading), *with* City of N.Y. v. Mickalis Pawn Shop, L.L.C., 645 F.3d 114, 129–30 (2d Cir. 2011) (affirming entry of default judgment against defendants who answered plaintiff's complaint, appeared in litigation for several years, moved to dismiss multiple times, and actively defended throughout discovery).

if that party has either (1) pled or (2) otherwise defended.[27] The other approach does permit a Rule 55(a) default judgment if a party does one of those actions (pleads or otherwise defends) but not the other.[28]

According to one Federal Procedure scholar: "The words 'otherwise defend' refer to the interposition of various challenges to such matters as service, venue, and the sufficiency of the prior pleading, any of which might prevent a default if pursued in the absence of a responsive pleading."[29] Another leading expert notes,

> The term "otherwise defend" is not defined in Rule 55, but the term does include the assertion of those defenses that, under Rule 12(b), may be made by motion rather than in the pleadings. These defenses include challenges to subject matter or personal jurisdiction, venue, and sufficiency of process or service of process; motions to dismiss for failure to state a claim on which relief may be granted; and motions raising the issue of failure to join a party under Rule 19.[30]

Unlike these leading experts who agree on the interpretation of Rule 55(a), the federal circuits read "otherwise defend" differently from one another.[31] In other words, the circuits are split regarding their interpretation of failure "to plead or otherwise defend" in Rule 55(a).[32]

II. THE CIRCUITS ARE SPLIT OVER THE MEANING OF FAILURE "TO PLEAD OR OTHERWISE DEFEND" IN RULE 55(A)

A party who is served with a complaint has three options: "[(1)] plead, [(2)] 'otherwise defend,' or [(3)] suffer a default,"[33] according to at least a minority of the circuits.[34] Other circuits seem to read Rule 55(a) to offer only two options: (1) plead and otherwise defend or (2) suffer a default.[35]

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27 *Bass*, 172 F.2d at 207–11 (reversing the district court's grant of default judgment against defendant, holding that defendant's pleading was enough to prevent a Rule 55 default).

28 Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 917–18 (3d Cir. 1992) (affirming the district court's grant of default judgment against defendants for failing to comply with the order to obtain new counsel and to appear at trial).

29 WRIGHT, MILLER & KANE, *supra* note 12, § 2682, at 16–17.

30 MOORE ET AL., *supra* note 1, § 55.11[2][b][i].

31 *See* cases cited *supra* note 26.

32 FED. R. CIV. P. 55(a); MOORE ET AL., *supra* note 1, § 55.11[2][b][iii].

33 MOORE ET AL., *supra* note 1, § 55.11[2][b][iii].

34 *See, e.g.*, Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc., 803 F.2d 1130, 1134 (11th Cir. 1986); Bass v. Hoagland, 172 F.2d 205, 209–10 (5th Cir. 1949); Olsen v. Int'l Supply Co., 22 F.R.D. 221, 222–23 (D. Alaska 1958).

35 *See, e.g.*, City of N.Y. v. Mickalis Pawn Shop, L.L.C., 645 F.3d 114, 129 (2d Cir. 2011) (affirming entry of default against defendants who not only answered plaintiff's complaint, but also appeared in litigation for several years, "repeatedly moved to dismiss," and "vigorously defended" throughout discovery); United States v. $23,000 in U.S. Currency, 356 F.3d 157, 160–63 (1st Cir. 2004) (affirming default judgment in forfeiture

A. Circuits That Do Not Permit Default Judgment Against a Party That Has Pled

1. Fifth Circuit

The Fifth Circuit addressed the responsive but otherwise non-defensive defendant in *Bass v. Hoagland*, a 1949 case.[36] In *Bass*, the Fifth Circuit ruled that there should not have been a Rule 55(a) default judgment when the defendant responded to the complaint with "an answer to the merits" but neither he nor his attorney appeared at trial.[37]

In *Bass*, the plaintiff sued the defendant for personal injury.[38] The defendant "appeared by counsel and filed an answer to the merits."[39] Although the defendant's counsel later withdrew from the case, he "did not withdraw the appearance and answer."[40] At trial, instead of making the plaintiff prove his case, the district court simply ruled the defendant was in default.[41]

The circuit court reversed the district court and thereby ruled that the defendant was not in default, based on the following reasoning:

> Rule 55(a) authorizes the clerk to enter a default "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules." This 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 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. When [defendant] Bass by his attorney filed a denial of the plaintiff's case neither the clerk nor the judge could enter a default against him. The burden of proof was put on the plaintiff in any trial. When neither Bass nor his attorney appeared at the trial, no default was generated; the case was

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action when claimant answered but failed to file verified statement); Ackra Direct Mktg. Corp. v. Fingerhut Corp., 86 F.3d 852, 856 (8th Cir. 1996) (affirming default judgment against defendants who did not participate in litigation); Home Port Rentals, Inc. v. Ruben, 957 F.2d 126, 133 (4th Cir. 1992) (affirming default judgment for failure to defend or participate in discovery); Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 917–19 (3d Cir. 1992) (affirming entry of default against a party who answered but failed to appear at trial); Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141 (9th Cir. 1989) (affirming default judgment against defendants who repeatedly failed to attend pretrial conferences, did not participate in litigation, and did not attend the first day of trial).

[36] *See Bass*, 172 F.2d at 207–08; WRIGHT, MILLER & KANE, *supra* note 12, § 2682, at 17–18 (discussing the Fifth Circuit's early decision in *Bass*).

[37] *Bass*, 172 F.2d at 207–10.

[38] *Id.* at 207.

[39] *Id.*

[40] *Id.* at 207–08.

[41] *Id.* at 208.

> not confessed. The plaintiff might proceed, but he would have to prove his case.[42]

In the *Bass* court's opinion, then, Rule 55(a) does not require a party to "otherwise defend" in addition to pleading, but rather allows a party to "otherwise defend" in place of pleading.[43]

Although the *Bass* decision has been criticized by some,[44] including other circuits,[45] it has been acknowledged as binding precedent within the Fifth Circuit[46] and has been championed by leading experts in federal procedure.[47]

2. Seventh Circuit[48]

The United States District Court for the Eastern District of Wisconsin agreed with the *Bass* court's interpretation of Rule 55(a) and held in *Wickstrom v. Ebert* that a Rule 55(a) default judgment is not appropriate when the defendants did not plead but did move to dismiss the plaintiffs' claim.[49] The *Wickstrom* court did not cite *Bass* directly, but it did cite another case within the Fifth Circuit, *George & Anna Portes Cancer Prevention Center, Inc. v. Inexco Oil Co.*, when it explained Rule 55(a)'s "otherwise defend" language:

> Pursuant to Rule 55 of the Federal Rules of Civil Procedure, default judgment is appropriate when "a party against whom a

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42 *Id.* at 210.

43 *Id.* ("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*." (emphasis added)).

44 *E.g.*, Note, *Extending Collateral Attack: An Invitation to Repetitious Litigation*, 59 YALE L.J. 345, 350 (1950) ("The Fifth Circuit limited the rule to the traditional default situation by interpreting the crucial words 'otherwise defend' to mean only motions made in place of pleadings. . . . Since [defendant] had notice of the trial date, his failure to appear is as much an admission of plaintiff's claim as is failure to plead within the allotted time . . . ." (footnote omitted)).

45 *E.g.*, Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 918 (3d Cir. 1992) ("Although we acknowledge that some courts have stated that a Rule 55 default cannot be based on a failure to appear at trial, *see, e.g.*, *Bass v. Hoagland*, we are not persuaded by their reasoning and decline to follow it." (citation omitted)).

46 Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 400 n.2 (5th Cir. 1981).

47 *See, e.g.*, MOORE ET AL., *supra* note 1, § 55.11[2][b][iii] ("The better view is that Rule 55(a)'s 'otherwise defend' language may not be extended to justify a default once there has been an initial responsive pleading or an initial action that constitutes a defense."); WRIGHT, MILLER & KANE, *supra* note 12, § 2682, at 18 ("Although the Third Circuit has disagreed, the Bass [sic] court's conclusion seems preferable." (footnote omitted)).

48 In the interest of uniformity, Part II.A.2 is captioned "Seventh Circuit." But the included opinion is from a district court within the Seventh Circuit and not from the Seventh Circuit Court of Appeals. As such, the ruling does not per se represent the opinion of the entire Seventh Circuit. Since no other federal court within the Seventh Circuit has ruled otherwise, the opinion included here is a fair representation.

49 Wickstrom v. Ebert, 101 F.R.D. 26, 33 (E.D. Wis. 1984).

> judgment for affirmative relief is sought has failed to plead *or otherwise defend* as provided by these rules . . . ." The words "otherwise defend" presume the absence of some affirmative action on the part of a defendant which would operate as a bar to the satisfaction of the moving party's claim.[50]

As a result, the *Wickstrom* court agreed with the *Bass* rationale that "failure" under Rule 55(a) occurs when the party fails to take some sort of affirmative action, whether it is pleading *or* otherwise defending.[51]

3. Ninth Circuit[52]

Similar to the district court in the Seventh Circuit, the United States District Court for the District of Nevada in *Rashidi v. Albright* found a Rule 55(a) default not permissible when the defendants did not answer the plaintiff's complaint but did move for summary judgment.[53] The *Rashidi* court, just like the district court in the Seventh Circuit, reasoned that "[f]ailure to 'otherwise defend' presumes the absence of some affirmative action."[54] Interestingly, the *Rashidi* court cited *Wickstrom* for the foregoing proposition.[55] Thus, to keep track, *Rashidi* cited *Wickstrom*,[56] *Wickstrom* cited *George & Anna Portes*,[57] and *George & Anna Portes* cited *Bass*[58] to support the logical rationale that a defendant can prevent default judgment under Rule 55(a) if the defendant either pleads or otherwise defends.[59]

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[50] *Id.* at 32 (alterations in original) (citation omitted) (citing George & Anna Portes Cancer Prevention Ctr., Inc. v. Inexco Oil Co., 76 F.R.D. 216 (W.D. La. 1977)). Not surprisingly, *George & Anna Portes* cited *Bass*, 172 F.2d 205, 210 (5th Cir. 1949), to support its interpretation of "otherwise defend." *George & Anna Portes*, 76 F.R.D. at 217.

[51] *Wickstrom*, 101 F.R.D. at 32.

[52] In the interest of uniformity, Part II.A.3 is captioned "Ninth Circuit." The included opinion, however, is from a district court within the Ninth Circuit, and not from the Ninth Circuit Court of Appeals. As such, the ruling does not per se represent the opinion of the entire Ninth Circuit. See also *infra* Part II.B.6 for the discussion of a Ninth Circuit decision that appears to undercut the decision discussed in this Section.

[53] 818 F. Supp. 1354, 1356 (D. Nev. 1993) ("If challenges less strenuous than those pleading to the merits can prevent the entry of default, clearly a summary judgment motion which speaks to the merits of the case and demonstrates a concerted effort and an undeniable desire to contest the action is sufficient to fall within the ambit of 'otherwise defend' for purposes of FED. R. CIV. P. 55."). *But see infra* note 116 and accompanying text.

[54] *Rashidi*, 818 F. Supp. at 1355.

[55] *Id.* at 1356.

[56] *Id.*

[57] Wickstrom v. Ebert, 101 F.R.D. 26, 32 (E.D. Wis. 1984).

[58] George & Anna Portes Cancer Prevention Ctr., Inc. v. Inexco Oil Co., 76 F.R.D. 216, 217 (W.D. La. 1977).

[59] *See* Bass v. Hoagland, 172 F.2d 205, 210 (5th Cir. 1949).

4. Eleventh Circuit

While the Eleventh Circuit has not yet addressed a case with facts that would allow it to follow *Bass's* precedent, in *Solaroll Shade & Shutter Corp. v. Bio-Energy Systems, Inc.* it did make it quite clear that the circuit would follow such precedent if given the chance.[60] Indeed, although it cited *Bass* and discussed the intricacies of Rule 55(a) default, the court ultimately determined that the district court based its decision on the merits of the case.[61] As such, the Eleventh Circuit distinguished the case from *Bass* because the district court's judgment was not a default judgment, and, therefore, Rule 55(a) did not apply.[62]

Although Rule 55(a) did not apply to *Solaroll Shade*, the Eleventh Circuit expressed *Bass's* rationale better than perhaps any other court:

> Rule 55 applies to parties against whom affirmative relief is sought who fail to "plead or otherwise defend." Fed. R. Civ. P. 55(a). Thus a court can enter a default judgment against a defendant who never appears or answers a complaint, for in such circumstances the case never has been placed at issue. If the defendant has answered the complaint but fails to appear at trial, issue has been joined, and the court cannot enter a default judgment. However, the court can proceed with the trial. If plaintiff proves its case, the court can enter judgment in its favor although the defendant never participated in the trial.[63]

B. Circuits Permitting a Default Judgment Against a Party Who Has Pled but Fails to Also "Otherwise Defend"

As mentioned above, one group of circuits reads Rule 55(a) to include three options: (1) plead, (2) "otherwise defend," or (3) suffer a default.[64] This next set of circuits, however, reads 55(a) to include only two options: (1) plead *and* "otherwise defend" or (2) suffer a default.[65]

1. First Circuit

In *Alameda v. Secretary of Health, Education & Welfare*, the United States Court of Appeals for the First Circuit reviewed a district court decision to enter default judgment against a defendant who had answered the plaintiffs' complaint but failed to file supportive documents the Court requested.[66] Although the circuit court remanded to the district court because the district court failed to follow the old Rule

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60 803 F.2d 1130, 1134 (11th Cir. 1986).

61 *Id.*

62 *Id.*

63 *Id.* (citing Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 400 n.2 (5th Cir. 1981); *Bass*, 172 F.2d at 209–10 (5th Cir. 1949)).

64 *See supra* note 34 and accompanying text.

65 *See supra* note 35 and accompanying text.

66 622 F.2d 1044, 1045, 1048 (1st Cir. 1980).

55(e),[67] the circuit court stated that "the . . . [defendant's] failure to file the requested memoranda or even explain the failure after months of delay, amounted to a failure under Fed. R. Civ. P. 55(a) to 'otherwise defend' the suit."[68] Stated more succinctly, had the district court properly applied Rule 55(e), the circuit court likely would have affirmed the Rule 55(a) default judgment.[69] Indeed, other courts within the First Circuit have similarly interpreted *Alameda*.[70]

2. Second Circuit

In one of the more recent encounters with Rule 55(a) default judgments, the Second Circuit in *City of New York v. Mickalis Pawn Shop* affirmed the district court's entry of default judgment against the defendants that not only answered the plaintiff's complaint, but also (1) appeared in litigation for several years, (2) "repeatedly moved to dismiss," and (3) "vigorously defended" throughout discovery.[71] The circuit court highlighted the defendants' withdrawal from litigation as the basis for its decision.[72]

Mickalis Pawn stands in stark contrast to the decisions of the Fifth Circuit,[73] the district court from the Seventh Circuit,[74] the district court from the Ninth Circuit,[75] and the Eleventh Circuit.[76] Indeed, *Mickalis*

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67 *Id.* at 1047 ("The problem of the court's authority to enter these judgments arises from the requirement of FED. R. CIV. P. 55(e) [now (d), based on Dec. 1, 2007 amendment] that a default judgment may issue against the United States only if 'the claimant establishes his claim or right to relief by evidence satisfactory to the court.'").

68 *Id.* at 1048.

69 *See id.*

70 Estates of Ungar & Ungar v. Palestinian Auth., 325 F. Supp. 2d 15, 65 (D.R.I. 2004) ("The First Circuit has also observed that a 'failure to file the requested memoranda or even explain the failure after months of delay, amounted to a failure under Fed. R. Civ. P. Rule 55(a) to "otherwise defend" the suit . . . .'" (quoting *Alameda*, 622 F.2d at 1048)); Santiago v. Sec'y of Health & Human Servs., 599 F. Supp. 722, 723–24 (D.P.R. 1984) ("However, the Secretary's failure to file the requested memorandum or even explain the failure after months of delay amounted to a failure under Rule 55(a) of the Federal Rules of Civil Procedure to 'otherwise defend' the suit." (citing *Alameda*, 622 F.2d at 1048)).

71 645 F.3d 114, 129 (2d Cir. 2011).

72 *Id.* at 130 ("First, each defendant affirmatively signaled to the district court its intention to cease participating in its own defense, even after the defendant was clearly warned that a default would result. . . . Second, in the case of Mickalis Pawn, a Rule 55(a) default was also proper under *Eagle Associates* and like cases insofar as this defendant withdrew its counsel without retaining a substitute. Finally, both defendants clearly indicated that they were aware that their conduct likely would result in a default." (citation omitted)).

73 Bass v. Hoagland, 172 F.2d 205, 207–08, 210 (5th Cir. 1949).

74 Wickstrom v. Ebert, 101 F.R.D. 26, 33 (E.D. Wis. 1984).

75 Rashidi v. Albright, 818 F. Supp. 1354, 1355–56 (D. Nev. 1993).

Pawn might conflict with the First Circuit,[77] which the Second Circuit deems a "sister circuit"[78] (or at least with the First Circuit's rationale in *Alameda*[79]). Perhaps the reason why the *Mickalis Pawn* court did not even cite, let alone analogize, *Alameda* was due to the contrast between the two circuits' rationales.[80] Instead of citing *Alameda*, the *Mickalis Pawn* court cited *Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit International, Inc.*,[81] which—as it turns out—fails to even mention Rule 55(a).[82]

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[76] Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc., 803 F.2d 1130, 1134 (11th Cir. 1986).

[77] *See* Alameda v. Sec'y of Health, Educ. & Welfare, 622 F.2d 1044, 1048 (1st Cir. 1980). Admittedly, this conflict is one of degree, not of kind. Still, there is apparent conflict between *Mickalis Pawn* from the Second Circuit and (at least) *Alameda* from the First Circuit. In essence the Second Circuit in *Mickalis Pawn* extends the scope of 55(a) dramatically more than does the First Circuit in *Alameda*. *Compare Mickalis Pawn*, 645 F.3d at 129 (affirming the district court's 55(a) default judgment entry notwithstanding defendants' pleading (i.e., answering plaintiff's complaint) and otherwise defending (i.e., appearing in litigation for several years, moving to dismiss multiple times, and actively defending throughout discovery)), *with Alameda*, 622 F.2d at 1046–48 (agreeing with the district court that a 55(a) default judgment entry against defendant would be proper (but for the district court's improper ruling on a *different* Federal Rule) because defendant, while she did answer plaintiff's complaint, did not provide the brief the district court requested, which was "essential in helping a judge wend his or her way efficiently through a record sometimes dominated by medical specialists' nomenclature"). The extensive defense exhibited by defendants in *Mickalis Pawn* versus the *Alameda* defendant's lack of defense highlights only one significant difference between the two cases. That *Alameda* was a social security case is an important difference between the cases as well. 622 F.2d at 1046. That is, the proceeding before the Agency was complex in its own right before it ever reached the district court. *Id.* ("We fully agree with the district court that a government brief is often essential in helping a judge wend his or her way efficiently through a record sometimes dominated by medical specialists' nomenclature."). Due to the complexity, it was reasonable for the First Circuit in *Alameda* to require the defendant to provide explanatory memoranda. The same cannot be said for the Second Circuit in *Mickalis Pawn*.

[78] *Mickalis Pawn*, 645 F.3d at 131.

[79] *See supra* note 77.

[80] *See supra* note 77.

[81] *Mickalis Pawn*, 645 F.3d at 131 (citing Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc., 982 F.2d 686, 692–93 (1st Cir. 1993)).

[82] *Medfit Int'l*, 982 F.2d at 687–93. Granted, *Alameda* did not affirm outright the district court's 55(a) default judgment, *see supra* Part II.B.1, which may have caused the *Mickalis Pawn* court not to rely on it. Still, *Alameda* took space to explain its Rule 55(a) "otherwise defend" interpretation, *see* 622 F.2d at 1048, whereas *Medfit International* failed to even give the rule's citation, *Medfit Int'l*, 982 F.2d 686, 692–93 (1st Cir. 1993). Instead, the court in *Medfit International* perfunctorily affirmed the district court's default judgment against defendant for defendant's "failure to appear at trial." *Id.* at 692. It never analyzed whether the defendant surpassed the Rule 55(a) default judgment threshold. *Id.* at 687–93.

In addition to citing the First Circuit, *Mickalis Pawn* did cite other circuits—some for its position, some against.[83] As is expected, the court relied primarily on precedent from its own circuit.[84] It also found the Third Circuit's decision in *Hoxworth v. Blinder, Robinson & Co.* persuasive.[85]

To support its ruling with precedent from its own circuit, the *Mickalis Pawn* court discussed the *Brock v. Unique Racquetball & Health Clubs, Inc.* decision.[86] Like many of the appellate cases discussed thus far, *Brock* reviewed the district court's default judgment entry against the defendants.[87] Interestingly, though, the circuit court remanded the case to the district court to decide on the defendants' motion to vacate the default before entering judgment.[88] But, while it did vacate and remand, the circuit court agreed entirely with the district court's entry of default for the dilatory tactics of the defendants' counsel.[89] It is unclear, however, whether the *Brock* court approved the entry of default judgment based on the failure "to plead or otherwise defend" language of Rule 55(a) or whether it was based instead on sanction principles.[90] This obscurity stems from two things in the *Brock* opinion.

First, while it does begin its default judgment analysis with a passing reference to Rule 55(a),[91] the court never analyzes the breadth of Rule 55(a)'s failure "to plead or otherwise defend" language and, thereby, never decides whether counsel's actions were a failure to "otherwise defend."[92] Second, the court characterizes the judge's authority to enter a default judgment as a "sanction" against counsel for his dilatory ways.[93]

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83 *Mickalis Pawn*, 645 F.3d at 131 (citing, as favorable, the First, Third, Fourth, Eighth, and Ninth Circuits and, as unfavorable, the Fifth and Eleventh Circuits).

84 *Id.* at 129–30.

85 *Id.* at 130 (citing Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 917–18 (3d Cir. 1992)); *see also infra* Part II.B.3.

86 *Mickalis Pawn*, 645 F.3d at 129 (citing Brock v. Unique Racquetball & Health Clubs, Inc., 786 F.2d 61, 63–65 (2d Cir. 1986)).

87 *Brock*, 786 F.2d at 62.

88 *Id.* at 65.

89 *Id.* at 64.

90 *See id.* ("Instead, this is the unusual case where a default is entered because counsel fails to appear during the course of a trial. In this context, 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." (emphasis added)).

91 *Id.* ("Entry of default under Fed. R. Civ. P. 55(a) is proper whenever a defendant has failed to plead 'or otherwise defend.'").

92 *Id.* at 64–65.

93 *Id.* at 64; *see also* Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 918 (3d Cir. 1992) ("Although the [*Brock*] court noted that '[t]his is not the typical Rule 55 case in which a default has entered because a defendant failed to file a timely answer,' it concluded

If the court entered the default as a sanction via the court's inherent powers, or via another federal procedure rule, then it should have been characterized as such.[94]

3. Third Circuit

In *Hoxworth v. Blinder, Robinson & Co.*, the Third Circuit affirmed the district court's Rule 55(a) default judgment against the defendants because the defendants "fail[ed] to comply with the order to obtain counsel and to appear at trial."[95] To start its analysis of Rule 55(a), the court noted that the "or otherwise defend" language in Rule 55(a) "is broader than the mere failure to plead."[96] The court then analogized its opinion to *Farzetta v. Turner & Newall, Ltd.*[97] *Farzetta* is another Third Circuit opinion that ostensibly held legitimate the district court's entry of a default judgment against defendants who failed to defend after filing answers to the complaint.[98]

Hoxworth's reliance on *Farzetta* is troubling on several fronts. First, the *Farzetta* court "assumed" the district court entered a default judgment against the defendants, but was not entirely sure.[99] Second, the *Farzetta* opinion neither cites Rule 55(a) nor references the Rule's "otherwise defend" language.[100] Third, the Rule 55(a) default question—whether a court can enter a Rule 55(a) default against a defendant who has already pled—was not at issue in *Farzetta*.[101] Instead, the issue was

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that the Rule authorizes the entry of default as a *sanction*." (second alteration in original) (emphasis added) (citations omitted) (quoting *Brock*, 786 F.2d at 64)).

94 *See infra* Part IV.C.3; *see also* MOORE ET AL., *supra* note 1, § 55.11[2][b][iii] ("The more expansive reading of 'otherwise defend' is not justified. This does not mean that a court lacks the power to sanction a party for post-pleading misconduct; but rather that the sanctions should be imposed under a more appropriate rule or pursuant to the court's inherent powers.").

95 *Hoxworth*, 980 F.2d at 917–18.

96 *Id.* at 917. While technically true, the language's breadth could actually cut against the court's ruling just as easily. *See* MOORE ET AL., *supra* note 1, § 55.11[2][b][iii] ("Rule 55(a) is phrased disjunctively (plead *or* otherwise defend), showing an intent that either one or the other should be sufficient to avoid a Rule 55 default."). If Moore's interpretation proves persuasive, then the breadth of "or otherwise defend" would make it *easier* for the defendant to satisfy Rule 55(a) and, therefore, *easier* to avoid default.

97 *Hoxworth*, 980 F.2d at 917–18 (citing Farzetta v. Turner & Newell, Ltd., 797 F.2d 151, 155 (3d Cir. 1986)).

98 *Farzetta*, 797 F.2d at 155 (3d Cir. 1986).

99 *Id.* at 153 n.1 ("The appendix that accompanied the parties' appellate briefs does not include a copy of an order entering the default judgment, and there is some question as to whether the district court issued any such order. However, in light of the text of the above-cited transcript and the district court docket sheet, which reflects the entry of judgments against [appellants], we assume that both appellants are subject to default judgments.").

100 *See id.* at 152–55.

101 *See id.* at 154.

framed as follows: "The issue we must resolve is whether there were *proved at trial facts* that as a matter of logic preclude the liability of [defendants]."[102] More simply stated, had there been facts that precluded the defendants' liability, then the Third Circuit would have reversed the district court's entry of default judgment. This analysis focuses not on procedure but on the merits of the case. Because the *Farzetta* court analyzed not the pre-trial procedural aspects of the case but, instead, the facts of the trial, *Hoxworth* was wrong to rely on *Farzetta* as Rule 55(a) default judgment precedent.

4. Fourth Circuit

Although very short on Rule 55(a) analysis, the Fourth Circuit in *Home Port Rentals, Inc. v Ruben* affirmed the district court's entry of default judgment.[103] The court in *Home Port Rentals* was unsure under which Federal Rule the district court entered default judgment.[104] The district court identified three justifications for its order: (1) the defendants' lack of "cooperation in discovery matters"; (2) the defendants' refusal to "submit to depositions"; and (3) the defendants' failure "to participate in prosecution and defense" of the case.[105] While the circuit court determined that the first two justifications fell under Rule 37, it decided Rule 55(a) controlled the last justification.[106]

Where the court went wrong, however, was its failure to cite or discuss a single case—from the Fourth Circuit or otherwise—to support its Rule 55(a) interpretation (hence the "short on analysis" comment above).[107] Instead, the court merely reasoned in the alternative without examining controlling or persuasive authority: "Thus, even if we assume that the district court lacked authority in this case to impose default judgment under Rule 37, its judgment nonetheless would be authorized under Rule 55 because of the defendants' failure to defend."[108]

5. Eighth Circuit

The defendants in *Ackra Direct Marketing Corp. v. Fingerhut Corp.* participated (albeit below par) in litigation for twenty-two months before their counsel withdrew from the case, yet the Eighth Circuit affirmed the district court's Rule 55(a) default judgment against the defendants

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102 *Id.* (emphasis added).

103 957 F.2d 126, 133 (4th Cir. 1992).

104 *Id.* ("The district court did not recite whether it was issuing its default judgment pursuant to Rule 37 or Rule 55.").

105 *Id.*

106 *Id.*

107 *See id.* at 128–33.

108 *Id.*

for "failure to defend."[109] Although the circuit court did not discuss at length—or at all, really—applicable Rule 55(a) case law for determining "failure to defend,"[110] it did refer to *United States v. Harre*.[111] *Harre* is an Eighth Circuit case that the court decided three years earlier.[112] Relying on the *Harre* case, the *Ackra* court opined, "Default judgment for failure to defend is appropriate when the party's conduct includes 'willful violations of court rules, contumacious conduct, or intentional delays.'"[113] Applying this definition to the facts in *Ackra*, the circuit court found that the district court did not abuse its discretion in entering the default judgment against the defendants.[114]

6. Ninth Circuit[115]

The Ninth Circuit, in *Ringgold Corp. v. Worrall*, affirmed the district court's (seemingly unspecified) default judgment against the defendants who did not attend pretrial conferences, did not participate in litigation, and did not attend the first day of trial.[116] The court recognized that the case did not concern "a typical default judgment, where a party shows no interest in defending a claim."[117] "Rather," the court continued, "this case is analogous to *Brock*" because the defendants—like in *Brock*—defended their claims but failed to appear at key stages of the litigation of the case.[118]

III. STATE COURTS' INTERPRETATIONS OF FAILURE "TO PLEAD OR OTHERWISE DEFEND" IN STATE RULES SIMILAR (OR IDENTICAL) TO RULE 55(A)

While many states have interpreted "otherwise defend" in state statutes that parallel Rule 55(a), the brief discussion below serves as only a sample. This sample highlights two different interpretations of *Bass* and its application of Rule 55(a)'s "otherwise defend" language.

A. Colorado

In reviewing the trial court's entry of default judgment against the defendant, the Colorado Court of Appeals in *Rombough v. Mitchell*

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109 86 F.3d 852, 854, 856, 858 (8th Cir. 1996).

110 *Id.* at 852–58.

111 *Id.* at 156 (citing United States v. Harre, 983 F.2d 128, 130 (8th Cir. 1993)).

112 *Harre*, 983 F.2d at 128.

113 *Ackra*, 86 F.3d at 856 (quoting *Harre*, 983 F.2d at 130).

114 *Id.*

115 *But see supra* note 52.

116 880 F.2d 1138, 1141–42 (9th Cir. 1989). *But see supra* Part II.A.3.

117 *Ringgold Corp.*, 880 F.2d at 1141.

118 *Id.* (analogizing to Brock v. Unique Racquetball & Health Clubs, Inc., 786 F.2d 61, 64 (2d Cir. 1986)).

turned to and followed the *Bass* approach.[119] Colorado's 55(a) default judgment rule is "materially identical" to the federal Rule 55(a).[120] Very much like the facts in many of the federal cases discussed in Part II, the facts in *Rombough* involved a defendant who "answered and actively litigated," but who did not appear at trial.[121] At trial, then, the court entered a default judgment against the defendant.[122] The Colorado Court of Appeals, however, disagreed with the decision.[123] Instead, the court reasoned that a defendant has placed its case at issue and not conceded liability if it has participated throughout the pretrial process and filed a responsive pleading.[124] As such, if the trial went on in the absence of the defendant, the court stated, the plaintiff should be required to present evidence supporting liability and damages, and "a judgment should be entered in plaintiff's favor only if the evidence supports it."[125]

The *Rombough* court illustrated the same reasoning by referencing the Colorado Supreme Court case, *Davis v. Klaes*, in which "the trial court heard evidence and entered judgment in the absence of a defendant who had failed to appear for trial."[126] Although the defendant in *Davis* failed to appear, the *Davis* court characterized the case as follows:

> The taking of evidence and entry of judgment on [the day of the trial] in the absence of one of the parties who knows his case is set for trial is not a proceeding under the default provisions of the rules, but is, in fact, a trial on the merits.[127]

Using the *Bass* approach to Rule 55(a) and also citing the reasoning discussed in *Davis*, the *Rombough* court held that because the trial court did not receive evidence of liability in the defendant's absence, the trial court must have entered default solely for the defendant's failure to appear.[128] And "[b]ecause the rules do not authorize entry of default in

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[119] 140 P.3d 202, 205 (Colo. App. 2006). ("Together these cases indicate that Colorado has adopted the approach of *Bass v. Hoagland*." (citing Bass v. Hoagland, 172 F.2d 205, 210 (5th Cir. 1949)).

[120] *Id.* at 204; *see also* COLO. R. CIV. P. 55(a) ("When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.").

[121] *Rombough*, 140 P.3d at 204.

[122] *Id.* at 203.

[123] *Id.* at 204.

[124] *Id.*

[125] *Id.* (quoting WRIGHT, MILLER & KANE, *supra* note 12, § 2682, at 18).

[126] *Id.* at 205 (analogizing to Davis v. Klaes, 346 P.2d 1018 (Colo. 1959)).

[127] *Davis*, 346 P.2d at 1019.

[128] *Rombough*, 140 P.3d at 205.

[that] circumstance,"[129] the *Rombough* court reversed the default judgment and remanded the case for trial.[130]

B. Wyoming

With a decision much more narrow than that of Colorado's *Rombough* court,[131] the Wyoming Supreme Court ruled that the particular facts in *Lawrence-Allison & Associates West, Inc. v. Archer* required the court to reverse the trial court's entry of default judgment against the defendant.[132] *Lawrence-Allison* is an interesting decision. Although the court determined the trial court entered the default (and then later default judgment) under 55(a) of the Wyoming Rules of Civil Procedure[133]—substantively identical to federal Rule 55(a)[134]—and although the court analyzed (thoroughly and uniquely) *Bass*,[135] it ultimately reversed the actions of the trial court based on the Wyoming Constitution.[136] Nevertheless, the *Lawrence-Allison* court's thoughts regarding the federal Rule 55(a) and *Bass* are detailed and interesting.

The *Lawrence-Allison* court opined that the Fifth Circuit in *Fehlhaber v. Fehlhaber* limited the *Bass* decision to the particular facts in *Bass*.[137] The *Lawrence-Allison* court also opined that *Fehlhaber* determined that *Bass* refused to enter default judgment not because of its interpretation of failure "to plead or otherwise defend" in federal Rule 55(a), but because of procedural defects that prevented adequate notice.[138] This interpretation does not appear justified. While *Fehlhaber* may have suggested that it was the "combination of . . . errors"[139] that caused the due process violation in *Bass*, *Fehlhaber* never analyzed Rule

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129 *Id.*

130 *Id.*

131 *See supra* Part III.A.

132 767 P.2d 989, 997–98 (Wyo. 1989).

133 *Id.* at 994. Indeed, the court concluded that "[t]he sole basis for entering default against [defendant] seems to have been the trial court's perception that [defendant] fired its attorney [the day before trial], and thereby failed to 'otherwise defend' under [Wyoming Rules of Civil Procedure] 55(a), when it appeared at trial without counsel." *Id.*

134 *Compare* WYO. R. CIV. P. 55(a) ("When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default."), *with* FED. R. CIV. P. 55(a) ("When 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.").

135 *Lawrence-Allison*, 767 P.2d at 995.

136 *Id.* at 997–98.

137 *Id.* at 995 ("The *Fehlhaber* language arguably limits the due process implications of *Bass* to the facts in that case . . . ." (citing Fehlhaber v. Fehlhaber, 681 F.2d 1015, 1027 (5th Cir. 1982))).

138 *Id.*

139 *Fehlhaber*, 681 F.2d at 1027.

55(a)'s failure "to plead or otherwise defend" language.[140] As such, anything in *Fehlhaber* that could be applied to Rule 55(a) is mere dicta and should not limit *Bass's* precedent.

IV. THE BETTER INTERPRETATION OF RULE 55(A)

Three bases suggest that a narrow interpretation of failure "to plead or otherwise defend" in Rule 55(a) is the better approach: (1) the plain meaning of Rule 55(a); (2) the (better) case law analyzing Rule 55(a); and (3) the Federal Rules of Civil Procedure as a whole. This Part looks at each of these in turn.

A. The Plain Meaning

In its entirety, Rule 55(a) states, "Entering a Default. When 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."[141] To state it more concisely (and pertinent to this Note), Rule 55(a) permits entry of default if the party fails to plead or otherwise defend.

Moore's Federal Practice—probably the most thorough analysis on Federal Civil Procedure available—states that "[t]he better view is that Rule 55(a)'s 'otherwise defend' language may not be extended to justify a default once there has been an initial responsive pleading or an initial action that constitutes a defense."[142] Importantly, Moore's reason for this stance is because "Rule 55(a) is phrased disjunctively, (plead *or* otherwise defend), showing an intent that either one or the other should be sufficient to avoid a Rule 55 default."[143] Based on this, Moore's argument is that "[t]he more expansive reading of 'otherwise defend' is not justified."[144]

As with any textual interpretation, looking back to where the text derives may prove helpful. Here, Equity Rule 16 is useful, if only to show that Rule 55's predecessor was also phrased disjunctively.[145] In relevant part, it states, "It shall be the duty of the defendant . . . to file his answer or other defense . . . ."[146] Equity Rule 16 gave the defendant the option to file its answer or other defense, either of which would prevent default judgment.

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140 *See id.* at 1018–32. Indeed, the opinion is devoid of any mention of "55(a)." *Id.*

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

142 MOORE ET AL., *supra* note 1, § 55.11[2][b][iii].

143 *Id.*

144 *Id.*

145 *New Federal Equity Rules*, *supra* note 14, at 644.

146 *Id.*

The Ninth Circuit, while it has interpreted Rule 55(a) defaults broadly,[147] has read Rule 55(a) as disjunctive.[148] In *Rashidi*, a district court in the Ninth Circuit found a Rule 55(a) default not permissible when the defendants failed to plead but did otherwise defend.[149] While the *Rashidi* court found the Federal Rules of Civil Procedure ambiguous regarding Rule 55(a)'s pleading requirement[150] and admonished that it is better practice to file an answer, it found "little reason to require a long, burdensome and expensive investigation to file an answer when the contents of the answer may be entirely useless by the dispositive nature of the action on the motion."[151] Because the *Rashidi* court ultimately concluded that Rule 55(a) allows a party to avoid default if the party otherwise defends but does not plead—implicitly acknowledging the rule's disjunctive nature—it logically follows that it would conclude a party can avoid a Rule 55(a) default judgment if it pleads but fails to otherwise defend.

Rule 55(a)'s disjunctive "or," however, is not the only language within the rule that suggests a narrow reading was intended. The word "otherwise" is also telling.

Standard statutory interpretation mandates the assumption that every word in any statute has meaning and purpose—that every word in a statute has independent significance, and no word is tautological, meaningless, or redundant. Rule 55(a) could have simply stated that a default can be entered against a party that has "failed to plead or defend." Instead, Rule 55(a) includes "otherwise" in between "plead" and "defend."[152]

The Merriam-Webster Dictionary first defines "otherwise," when used as an adverb, as "in a different way."[153] If this definition were read into the rule's text, Rule 55(a) would look something like this: "The clerk may enter default against a party that has failed to plead or, in a different manner or way, defend." This signifies that a defendant's responsive pleading is merely another type of defense to a plaintiff's claim. That is, if a defendant does not plead—a type of defense—then it can "otherwise defend"—say, via motion—and not risk default under Rule 55(a). Surely, it would be quite silly to require a defendant to both defend (by pleading) *and* defend to avoid default.

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147 *See supra* Part II.B.6. *But see supra* Part II.A.3 (discussing the District Court for the District of Nevada's narrow interpretation of Rule 55(a), which was affirmed in an unpublished opinion).

148 *See supra* Part II.A.3.

149 Rashidi v. Albright, 818 F. Supp. 1354, 1355–57 (D. Nev. 1993).

150 *Id.* at 1356–57.

151 *Id.* at 1357.

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

153 THE MERRIAM-WEBSTER DICTIONARY 511 (6th ed. 2004).

Courts are supposed to read any rule of civil procedure according to its "plain meaning," just like a statute.[154] Therefore, because here the plain meaning supports the narrow reading of Rule 55(a), the courts should apply it as such.

B. Case Law

Without doubt, the majority of federal circuits interpret broadly the "failed to plead or otherwise defend" language in Rule 55(a) and, therefore, permit entry of default unless the party both pleads *and* otherwise defends.[155] The minority of circuits' reasoning,[156] however, which does not allow entry of a Rule 55(a) default if the party *either* pleads or "otherwise defend[s]," is more logically sound, more just, and better reflects the underlying intent of default judgments.[157] That is, "the default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party."[158] The minority approach also represents more accurately the change in court construction of defaults.[159] This change is the "modernization of federal procedure, namely, the abandonment or relaxation of restrictive rules which prevent the hearing of the cases on the merits."[160]

1. The Minority's Narrow Approach to Rule 55(a) Is More Logically Sound, Is More Just, and Better Reflects the Intent of Default Judgments

Similar to a baseball team's forfeit because it did not show up to compete,[161] a Rule 55(a) default because the defendant did not "'otherwise defend' presume[s] the absence of some affirmative action on the part of a defendant which would operate as a bar to the satisfaction of the moving party's claim."[162] As quoted above, a "default judgment must normally be viewed as available *only when* the adversary process

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[154] Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 540 (1991) (quoting Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 123 (1989)); *see also* James J. Duane, *The Federal Rule of Civil Procedure that Was Changed by Accident: A Lesson in the Perils of Stylistic Revision*, 62 S.C. L. REV. 41, 54 (2010) (showing that courts apply the plain meaning of the Rules of Civil Procedure when they are "plain and unambiguous").

[155] *See supra* note 35.

[156] *See supra* note 34.

[157] *See supra* notes 18–19 and accompanying text.

[158] H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970).

[159] *See supra* notes 20–24 and accompanying text.

[160] *H. F. Livermore*, 432 F.2d at 691.

[161] COMM'R OF BASEBALL, *supra* note 5, R. 4.17, at 72 ("A game shall be forfeited to the opposing team when a team is unable or refuses to place nine players on the field.").

[162] Wickstrom v. Ebert, 101 F.R.D. 26, 32 (E.D. Wis. 1984).

has been halted [by] . . . an essentially unresponsive party."[163] (In this case, the unresponsive party is like the baseball team that does not show up to play.) As such, "the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights."[164]

Conversely, when a party *is* responsive (e.g., it files a responsive pleading)—when the baseball team *does* show up to play—default judgment (at least a Rule 55(a) default judgment[165]) should be inappropriate. Otherwise, it would be like an umpire declaring one team the victor via forfeit even though both teams at least initially indicated that they were ready, willing, and able to play.

The Fifth Circuit,[166] a district court of the Seventh Circuit,[167] the Eleventh Circuit,[168] and arguably the Ninth Circuit[169] agree. These courts interpret "otherwise defend" to mean "some affirmative action on the part of a defendant which would operate as a bar to the satisfaction of the moving party's claim."[170] Of course, a defendant's responsive pleading is indeed an affirmative action. These courts, therefore, qualify responsive pleadings as a bar to the satisfaction of the plaintiff's claim.[171] To go back to the baseball analogy, these courts believe that both teams have showed up to play if each party affirmatively acts, which can be done by pleading or otherwise defending. As such, the umpire should not declare a forfeit, just as these courts would not issue a default judgment.

The Eleventh Circuit perhaps said it best: "Rule 55 applies to parties against whom affirmative relief is sought who fail to 'plead or otherwise defend.' Thus a court can enter a default judgment against a defendant who never appears or answers a complaint, for in such

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163 *H. F. Livermore*, 432 F.2d at 691 (emphasis added).

164 *Id.*

165 *See infra* Part IV.C.3. Default judgment based on a rule other than Rule 55(a) might still be appropriate.

166 Bass v. Hoagland, 172 F.2d 205, 209 (5th Cir. 1949).

167 *Wickstrom*, 101 F.R.D. at 33.

168 Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc., 803 F.2d 1130, 1134 (11th Cir. 1986).

169 Rashidi v. Albright, 818 F. Supp. 1354, 1356–57 (D. Nev. 1993) (agreeing with a narrow interpretation of failure "to plead or otherwise defend"). *But see* Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141 (9th Cir. 1989) (affirming default judgment against defendants who did not attend pretrial conferences, did not participate in litigation, and did not attend the first day of trial).

170 *Wickstrom*, 101 F.R.D. at 32 (citing George & Anna Portes Cancer Prevention Ctr., Inc. v. Inexco Oil Co., 76 F.R.D. 216, 217 (W.D. La. 1977)).

171 *See, e.g.*, *Bass*, 172 F.2d at 210 ("Rule 55(a) authorizes the clerk to enter a default 'When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules.' This 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.").

circumstances the case never has been placed at issue."[172] That is, the case is not placed at issue because the defendant did not contest the plaintiff's claims. Simply put, the defendant concedes liability.[173] However, "[i]f the defendant has answered the complaint but fails to appear at trial, issue has been joined, and the court cannot enter a default judgment."[174]

This approach, while possibly less efficient, is more just. And it is in line with judicial reasoning for default judgments in general, expressed over forty years ago: "[A] default judgment must normally be viewed as available only when the adversary process has been halted [by] . . . an essentially unresponsive party."[175] When a defendant affirmatively acts, it has placed the case in issue, and, therefore, the adversary process has not been halted.

Although the adversary process is not technically "halted" if the defendant has affirmatively acted, the plaintiff still should be protected against the defendant's "interminable delay," right?[176] Yes. And a narrow construction of "failed to plead or otherwise defend" does not eliminate this protection. As the Fifth Circuit explained:

> When [defendant] by his attorney filed a denial of the plaintiff's case neither the clerk nor the judge could enter a default against him. The burden of proof was put on the plaintiff in any trial. When neither [defendant] nor his attorney appeared at the trial, no default was generated; the case was not confessed. The *plaintiff might proceed*, but he would have to prove his case.[177]

The Eleventh Circuit explained it, too:

> If the defendant has answered the complaint but fails to appear at trial, issue has been joined, and the court cannot enter a default judgment. However, *the court can proceed with the trial*. If plaintiff proves its case, the court can enter judgment in its favor although the defendant never participated in the trial.[178]

Because the plaintiff can prove its case at trial despite the defendant's absence, the narrow construction of "failed to plead or

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[172] *Solaroll Shade*, 803 F.2d at 1134 (citation omitted).

[173] The Colorado Court of Appeals explains this logic in the converse: "A defendant who has participated throughout the pretrial process and has filed a responsive pleading, placing the case at issue, has not conceded liability." Rombough v. Mitchell, 140 P.3d 202, 204 (Colo. App. 2006) (quoting WRIGHT, MILLER & KANE, *supra* note 12, § 2682, at 18).

[174] *Solaroll Shade*, 803 F.2d at 1134.

[175] H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970).

[176] *Id.* ("[A] default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party. In that instance, the diligent party *must be protected* lest he be faced with *interminable delay* and continued uncertainty as to his rights." (emphasis added)).

[177] Bass v. Hoagland, 172 F.2d 205, 210 (5th Cir. 1949) (emphasis added).

[178] *Solaroll Shade*, 803 F.2d at 1134 (emphasis added).

otherwise defend" (i.e., that the defendant cannot suffer default judgment if it has pled or otherwise defended) is preferable because it assures the plaintiff has evidence to support its claim, yet still protects the plaintiff from interminable delay.[179]

But would this lead to absurd results? Perhaps. For example, if a defendant has filed a responsive pleading but does not participate any further, how exactly would the court conduct a trial? Would the plaintiff *alone* be required to select a jury? Would the plaintiff *alone* be required to gather witnesses? And then once the jury and witnesses are present in court, would the plaintiff *alone* call each and every witness to the stand? This does not seem to parallel an umpire's declaring a forfeit even though both teams have showed up to play; this seems more akin to a referee's (yes, changing sports now) forcing a football team to play the second half even though the other team left the stadium at halftime.

The majority of circuits (i.e., the First,[180] Second,[181] Third,[182] Fourth,[183] Eighth,[184] and possibly Ninth[185]) ostensibly do not find the narrow approach to Rule 55(a) persuasive ("ostensibly" because these circuits do not actually address the foregoing logic). Instead, many of these circuits fail to address the minority's rationale, do little Rule 55(a) analysis, and instead rely on circuits that already had interpreted broadly Rule 55(a)'s failure "to plead or otherwise defend" language.[186] Sometimes this type of analysis (i.e., mere reliance on other courts' opinions) is acceptable. But here, not only has this issue split the circuits, the precedent relied upon by the majority is afflicted.[187] Other circuits—like the Fourth and Eighth—neither analyzed Rule 55(a) thoroughly nor even cited other circuits as persuasive authority.[188]

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[179] WRIGHT, MILLER & KANE, *supra* note 12, § 2682, at 18 ("Although the Third Circuit has disagreed, the Bass [sic] court's conclusion seems preferable. . . . [I]f the trial proceeds in the absence of the defendant, the court should require plaintiff to present evidence supporting liability, as well as damages, and a judgment should be entered in plaintiff's favor *only if* the evidence supports it." (emphasis added) (footnote omitted)).

[180] *See supra* Part II.B.1.

[181] *See supra* Part II.B.2.

[182] *See supra* Part II.B.3.

[183] *See supra* Part II.B.4.

[184] *See supra* Part II.B.5.

[185] *See supra* Part II.B.6.

[186] *See, e.g.*, City of N.Y. v. Mickalis Pawn Shop, L.L.C., 645 F.3d 114, 129–30 (2d Cir. 2011) (relying on the Second Circuit's broad interpretation of Rule 55(a) in Brock v. Unique Racquetball & Health Clubs, Inc., 786 F.2d 61, 64 (2d Cir. 1986), and the Third Circuit's similar interpretation in Hoxworth v. Blinder, Robinson & Co., Inc., 980 F.2d 912, 918 (3d Cir. 1992)); Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141 (9th Cir. 1989) (relying on the Second Circuit's broad interpretation of Rule 55(a) in *Brock*).

[187] *See supra* Parts II.B.2–3.

[188] *See supra* Parts II.B.4–5.

The majority approach not only suffers from dubious reasoning but also fails to address the underlying intent of Rule 55(a). According to civil procedure experts[189] and some federal circuits,[190] the underlying intent of Rule 55(a) requires default judgment only when the defendant has conceded liability by never contesting the plaintiff's claim. When the defendant has responded to the plaintiff's claim, however, the defendant has *not* conceded liability. The majority approach fails to address this inconsistency.

Despite the minority's better reasoning—both in interpreting the text of Rule 55(a) and in reconciling default under Rule 55(a) with the important principle of deciding cases on the merits instead of by rigid procedural rules—the issue remains whether a plaintiff should be required to go through the heavy burden of preparing for and conducting a trial against a defendant who is no longer present. This Note does not go so far as to say that a plaintiff must always prove its case via trial even though the defendant is no longer available. Would such a requirement more nearly represent the truth behind the plaintiff's claim? Probably. Would such a requirement present the plaintiff unreasonable costs to its time and resources? Again, probably.

Tracking this scenario, then, there might be a case where a plaintiff does not have a valid claim (unbeknownst to the judge, of course) against the defendant, yet nevertheless wins by Rule 55(a) default judgment even though the defendant had already pled or otherwise defended. Perhaps in this case it is not appropriate to require the plaintiff to conduct a full-fledged trial. But if a defendant has indeed satisfied Rule 55(a) by either pleading or otherwise defending, the court should instead provide the plaintiff relief outside of Rule 55(a).

2. The Minority's Narrow Approach to Rule 55(a) Better Reflects the Change in Court Construction of Default Judgments

While procedural rules were at one time rigid and unyielding, court construction of the rules has—to an extent—softened in the interest of justice.[191] "The policy underlying the modernization of federal procedure, namely, the abandonment or relaxation of restrictive rules which prevent the hearing of cases on their merits, is central to this issue."[192] At least one federal court has remained "mindful of this policy in its

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189 *See supra* notes 29–30 and accompanying text.

190 *See supra* Part II.A.

191 WRIGHT, MILLER & KANE, *supra* note 12, § 2681, at 9.

192 H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970) (citing Thorpe v. Thorpe, 364 F.2d 692, 694 (D.C. Cir. 1966); Barber v. Turberville, 218 F.2d 34, 36 (D.C. Cir. 1954); Bridoux v. E. Air Lines, Inc., 214 F.2d 207, 210 (D.C. Cir. 1954)).

construction of the Rules in order to afford litigants a *fair opportunity* to have their disputes settled by references to the *merits*."[193]

This strong desire to decide cases on the merits is evidenced not only in judicial opinions like *H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*,[194] but also in several procedural mechanisms that are at a court's disposal.[195] For example, the "presumption for resolving disputes on the merits means that the court of appeals usually affords less deference to the decision of a district judge denying relief from a default than to one granting relief."[196] Also, "greater deference is given [to the] trial judge who finds opportunities for not entering a default, or for giving notice by broadly interpreting what constitutes an appearance."[197] Finally, "any doubts usually will be resolved in favor of the defaulting party."[198] As such, if there is any way for a court to provide appropriate relief outside of default judgment, it should do it. In that same vein, instead of entering default judgment under Rule 55, contravening the Rule's text, the court should decide the case either on the merits or by another rule of civil procedure that would allow the court to *properly* enter default judgment.

C. The Minority's Narrow Approach to Rule 55(a) Better Reflects the Federal Rules of Civil Procedure as a Whole

The narrow approach to Rule 55(a) better reflects the Federal Rules of Civil Procedure as a whole based on three observations. First, there are other rules of civil procedure that are more appropriate if the defendant has already pled or otherwise defended. Second, these "other rules" should be used instead of Rule 55(a) because there is a lower burden to show that default under Rule 55(a) is proper and that lower burden ought to be reserved for defendants who make absolutely no effort to defend their case. Third, the arguments made in favor of the broad reading of Rule 55(a) based on other rules of civil procedure are not entirely persuasive.

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193 *Id.* (emphasis added).

194 *Id.*

195 MOORE ET AL., *supra* note 1 ("[M]ost courts traditionally disfavor the entry of a default judgment. This is a reflection of the oft-stated preference for resolving disputes on the merits. Thus, a defaulting party receive [sic] several benefits from the lack of judicial favor of defaults." (footnote omitted) (citation omitted)).

196 *Id.*

197 *Id.* (citation omitted).

198 WRIGHT, MILLER & KANE, *supra* note 12, § 2681, at 10 (citing Davis v. Parkhill-Goodloe Co., 302 F.2d 489 (5th Cir. 1962); Gen. Tel. Corp. v. Gen. Tel. Answering Serv., 277 F.2d 919 (5th Cir. 1960); Tozer v. Charles A. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951); Rasmussen v. W. E. Hutton & Co., 68 F.R.D. 231 (N.D. Ga. 1975); Sec. & Exch. Comm'n v. Vogel, 49 F.R.D. 297 (S.D.N.Y. 1969); Wallace v. De Werd, 47 F.R.D. 4 (D.V.I. 1969); Bavouset v. Shaw's of San Fransisco, 43 F.R.D. 296 (S.D. Tex. 1967)).

1. Rules Other than Rule 55(a) Under Which Entry of Default Judgment Is More Appropriate if the Defendant Has Already Pled

Although Rule 55(a) is one means to enter default judgment against a party, courts have at their disposal other rules of civil procedure that allow for entry of default judgment also.[199] The minority's narrow approach to Rule 55(a) gives deference to these other procedural mechanisms, which plainly provide for entry of default judgment in various appropriate situations or at a judge's discretion under the court's inherent power.[200] Indeed, entry of judgment based on a federal rule other than Rule 55(a) may be more appropriate in certain situations. Rule 37 is an example of this.[201]

Rule 37 allows a court to enter default judgment against a party who fails to comply with a court order.[202] Of course, a party seeking a Rule 37 sanction, such as entry of default against the other party, will not obtain it by mere request alone. Instead, two things must happen before a Rule 37 sanction is entered.[203] First, the party seeking the sanction must obtain a court order directing the other party to act.[204] The court will enter such an order only upon a party's motion to compel, which itself requires certification that the party has "in good faith conferred or attempted to confer" with the other party.[205] Second, the party must violate that order.[206]

One leading expert argues that an "[e]xpansive interpretation of Rule 55(a) undermines [these] carefully drafted sanction limits in Rule 37(b)."[207] That is, obtaining default judgment against the other party under Rule 55(a) relieves the party from being required to satisfy the Rule 37 two-step process mentioned above. *Home Port Rentals, Inc. v. Ruben* illustrates how an expansive reading of Rule 55(a) guts Rule 37(b).[208] As is evident in *Home Port Rentals*, Rule 37, which "has been

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199 *Id.* § 2682, at 18 ("It must be remembered that Rule 55(a) does not represent the only source of authority in the rules for the entry of a default that may lead to judgment.").

200 *See, e.g.*, FED. R. CIV. P. 5(a)(2); FED. R. CIV. P. 16(f)(1); FED. R. CIV. P. 37; FED. R. CIV. P. 41(b); *see also infra* Part IV.C.3.

201 FED. R. CIV. P. 37; *see also* MOORE ET AL., *supra* note 1, § 55.11[2][b][iii] ("Rule 37, which governs discovery sanctions, has been carefully drafted and provides a number of procedural requirements and safeguards that must be observed before a court may impose particularly extreme sanctions, such as a default sanction.").

202 FED. R. CIV. P. 37(b)(2)(A)(vi).

203 FED. R. CIV. P. 37.

204 FED. R. CIV. P. 37(a)(1).

205 *Id.*

206 FED. R. CIV. P. 37(b)(1), (2)(A)(vi).

207 MOORE ET AL., *supra* note 1, § 55.11[2][b][iii] n.35.

208 *Id.* ("[D]efault under FED. R. CIV. P. 55(a) for failure to participate in discovery was proper because '[t]wo separate provisions of the Federal Rules of Civil Procedure provide for the entry of default judgment. . . . The district court did not recite whether it

carefully drafted and provides a number of procedural requirements and safeguards that must be observed before a court may impose particularly extreme sanctions, such as a default sanction," is "rendered ineffective" in cases in which "a court imposes default as a discovery sanction under the more simple Rule 55 procedures."[209]

In addition to Rule 37, Rule 16 allows a court to impose sanctions, including default judgment, on a party who is dilatory or uncooperative with scheduling, conferences, or pretrial orders.[210] Although Rule 16 does not require the same two-step process found in Rule 37, it does require the *court's* issuance of the order, either *sua sponte* or in response to a party's motion.[211]

Finally, "[c]ourts have inherent equitable powers to . . . enter default judgments for . . . abusive litigation practices."[212] If a court finds that neither Rule 37 nor Rule 16 allow for entry of default after a party has pled, it should turn not to Rule 55(a) but, instead, to its inherent power to enter default judgment.

2. Why It Matters Which Rule Is Used to Enter Default Judgment

It is important that a default judgment entered against a party that has pled or otherwise defended arise under not Rule 55(a) but instead under Rule 37, Rule 16, or the court's inherent power to enter a default because Rule 55(a) has a lower procedural burden than these other procedural mechanisms. That is, Rule 55(a) requires the *clerk*—not the judge—to enter a party's default, based on affidavit alone, if that party failed to plead or otherwise defend.[213]

This stands in stark contrast to Rule 37, which requires multiple steps before the entry of default judgment.[214] First, the party must

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was issuing its default judgment pursuant to Rule 37 or Rule 55. . . . Thus, even if we assume that the district court lacked authority in this case to impose default judgment under Rule 37, its judgment nonetheless would be authorized under Rule 55.'" (all but first alteration in original) (quoting Home Port Rentals, Inc. v. Ruben, 957 F.2d 126, 133 (4th Cir. 1992)).

209 *Id.* § 55.11[2][b][iii].

210 FED. R. CIV. P. 16(f)(1).

211 *Id.*

212 TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 916 (9th Cir. 1987); *see also* Shepherd v. Am. Broad. Cos., 62 F.3d 1469, 1475 (D.C. Cir. 1995) ("The inherent power encompasses the power to sanction attorney or party misconduct, and includes the power to enter a default judgment.").

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

214 FED. R. CIV. P. 37. It also stands in stark contrast to Rule 16. FED. R. CIV. P. 16. The ensuing argument that differentiates Rule 55 and Rule 37 also applies to Rule 16. The court's inherent power, unlike Rules 37 and 16, does not have specified procedural safeguards. *Compare* Chambers v. NASCO, Inc., 501 U.S. 32, 44–45, *with* FED. R. CIV. P. 55, *and* FED. R. CIV. P. 37. Because of the lack of specified procedural safeguards, it should be used by the court in rare circumstances. The rarity of the court using its inherent power

obtain a court order directing the other party to act, only after the first party in good faith has attempted to get from the second party what the first party needed without court action.[215] Second, the second party must violate that order.[216] Both of these Rule 37 determinations—whether to grant the original court order and whether the party violated it—are made by the *judge*, not the clerk.[217] This is a higher burden because the judge has discretion to grant or deny the party's motion and discretion to determine whether the party violated the order.

With a Rule 55(a) default, however, the clerk is not allowed discretion. Instead, the clerk—who is not a judge and who may or may not be an attorney—*must* enter the default if a party has failed to plead or otherwise defend.[218] In other words, if the party has never appeared, the clerk must enter default. But, if the party has appeared through a responsive pleading or other defense, should the clerk still make the decision of whether to enter a Rule 55(a) default? If federal judges do not agree on when a party has failed to plead or otherwise defend, is it reasonable to force a clerk to make that judgment? If instead all the clerk must do is determine whether the party has filed *anything* with the court, then the clerk has a bright line test: If the party has filed anything at any time, do not enter Rule 55(a) default. If the party has not filed anything at any time, enter a Rule 55(a) default.

Because default judgment entered against a defendant upsets the status quo by finding the defendant liable when the defendant did not argue the merits of the case, the procedural burden for this default ought to be very heavy. As such, rules with a burden greater than that of Rule 55(a), like those mentioned in the preceding section, ought to be used in Rule 55(a)'s stead. And if no other rule of civil procedure is appropriate, the court ought to use its inherent power.[219]

3. Other Rules of Civil Procedure That One Could Argue Support the Broad Interpretation of Rule 55(a)

One may argue that Rule 55(a) is simply the converse of Rule 41(b).[220] That is, just as Rule 41(b) allows a court to dismiss a plaintiff's case if, among other things, the plaintiff fails to prosecute, Rule 55(a)

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is a safeguard in itself. That is, because courts should not and do not use their inherent power *carte blanche*, courts in the future should not and will not, either.

215 FED. R. CIV. P. 37(a)(1).

216 FED. R. CIV. P. 37(b).

217 *Id.*

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

219 Also, because courts use their inherent power only when absolutely necessary, default judgments against a defendant who has pled or otherwise defended will not be so freely entered.

220 FED. R. CIV. P. 41(b).

allows a court to enter default judgment against a defendant if the defendant fails to defend. This argument, while certainly logical, is not entirely compelling.

The argument is not entirely compelling because it does not look at the plaintiff's starting position as compared to the defendant's starting position. In other words, the argument does not account for the plaintiff's being the initiator of the case. It is hard to imagine that the plaintiff, as the initiator, would take the time, energy, and resources to sue the defendant but then fail to prosecute, unless the suit was frivolous to begin with. To be sure, the plaintiff is on the offense in its case. The plaintiff has started the ball rolling; the plaintiff is disrupting the status quo. The plaintiff *did* decide it was worth the time, energy, and resources to sue the defendant and, as such, will very rarely have a legitimate reason to fail to prosecute.

The defendant, however, did not decide to sue. The defendant did not decide it was worth the time, energy, and resources to bring suit. Indeed, the defendant surely would much prefer not to be in the litigation whatsoever. So what is the defendant to do? Well, it could either (1) respond to the suit with a pleading or other defense or (2) decide not to respond at all. If the former, then the defendant has certainly contested the plaintiff's claim of the defendant's liability. If the latter, then the defendant has not contested the claim, and default under Rule 55(a) would be proper.

So it may be just to take a plaintiff's case away from the plaintiff if, as the initiator, the plaintiff gives up on the case and thereby fails to prosecute. But it is not equally just to find a defendant, who at one point contested liability, liable simply because the defendant is no longer available (or at least it is not just to do so under Rule 55(a)). Unlike dismissal of a plaintiff's case, the entry of default against a defendant *does* upset the status quo.[221]

One could also argue that Rule 5(a)(2) supports the broad reading of Rule 55(a). In pertinent part, Rule 5(a)(2) provides that "[n]o service is required on a party who is in default for failing to appear."[222] The argument goes: If Rule 5(a)(2) specifies default "for failing to appear," then it must be possible to default for reasons *other than* failing to appear. Said differently, a party that has already appeared can still default—and this supports a broad reading of default under Rule 55(a).

Again, similar to the argument regarding Rule 41(b), this argument is logical. Nevertheless, it is still not quite right because "appearing"

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[221] *See supra* Part IV.B.1–2 (discussing other Federal Rules of Civil Procedure that can be used by the court as Rule 41(b)'s "complement"). Using Rule 55(a), but ignoring the dictates of its language, makes for bad law and unruly analysis.

[222] FED. R. CIV. P. 5(a)(2).

does not necessarily equal "pleading."[223] Indeed, appearance is much broader than pleading.[224] While every pleading is an appearance, not every appearance is a pleading.

Here is an example: According to some courts, mere "informal acts such as correspondence or telephone calls between counsel can constitute the requisite appearance."[225] Now, if the court clerk enters default against this party, one who has appeared only through his counsel's calling opposing counsel, that entry would be appropriate because the defendant neither pled nor otherwise defended. (Surely, a telephone call between counsel does not constitute pleading.) In this example, then, the narrow interpretation of Rule 55(a) would permit the clerk to enter default against this party even though he "appeared." While this party has appeared, he has not pled.

As this example demonstrates, because "appearance" is much broader than "pleading," the narrow reading of Rule 55(a) remains consistent with the language of Rule 5(a)(2). That is, a party may default for failing to *appear*, or a party may default even after it has *appeared*. But it does not necessarily follow that a party may default after it has *pled*.

CONCLUSION

The plain meaning of Rule 55(a), the (better) case law analyzing Rule 55(a), and the Federal Rules of Civil Procedure as a whole support the narrow interpretation of "failed to plead or otherwise defend" in Rule 55(a). While the broad interpretation of Rule 55(a) is more efficient—more efficient because the Rule 55(a) default threshold is lower than the threshold in other civil procedure rules that allow default—efficiency is not the Federal Rules' only concern. Indeed, Rule 1 provides that the federal rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and

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[223] *See* STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN B. CORR, A STUDENT'S GUIDE TO THE FEDERAL RULES OF CIVIL PROCEDURE 1077 (2011) ("A defendant 'appears' in the action by making *some* presentation or submission to the court (*e.g.*, serving a responsive pleading, filing an entry of appearance, serving a Rule 12 motion to dismiss, or having counsel attend a conference on the client's behalf)." (emphasis added) (citing Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n, 874 F.2d 274, 276 (5th Cir. 1989); Hudson v. North Carolina, 158 F.R.D. 78, 80 (E.D.N.C. 1994); Lutwin v. N.Y.C., 106 F.R.D. 502, 504 n.1 (S.D.N.Y. 1985))).

[224] *Id.* ("Some courts have taken an even wider view, ruling that 'appearing' within the meaning of Rule 55(b) is not necessarily limited to a formal event in court." (footnote omitted) (citing New York v. Green, 420 F.3d 99, 105 (2d Cir. 2005); Silverman v. RTV Commc'ns Grp., Inc. 2002 WL 483421, at *3 (S.D.N.Y. 2002))).

[225] *Id.*

proceeding."[226] Perhaps the majority approach places too much emphasis on "speedy" and "inexpensive" and not enough on "just."

If it is impossible and impractical to require a plaintiff to conduct a trial by itself (i.e., without a defendant),[227] a narrow and yet workable reading of Rule 55(a) could still require a court to look to other (more appropriate) rules (i.e., rules other than Rule 55(a)) of civil procedure when entering default against a defendant who has already pled. As this Note attempts to show, this narrow reading of Rule 55(a) would better reflect the intent of the rule, better reflect the current court construction of procedural rules, and better reflect the Federal Rules of Civil Procedure as a whole. While this narrow reading may not always allow the players to "play the game," it will at least ensure that the game is played by the (appropriate) *rules*.

Josiah A. Contarino

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226 FED. R. CIV. P. 1.

227 As is indicated throughout this Note, however, there are at least some federal and state courts that do believe it possible to require a trial on the merits even if the defendant is nowhere to be found.