COUNCIL ON COURT PROCEDURES

Saturday, October 17, 1992, Meeting
9:30 a.m.

Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

A G E N D A

1. Approval of minutes of meeting held September 26, 1992

2. Proposed amendments to Rule 69 (see attached memorandum) (Executive Director)

3. Proposed amendments to Rule 36 (Chair)

4. Proposed amendments to Rule 32 (Janice Stewart)

5. OLD BUSINESS

6. NEW BUSINESS

# # # # #

October 5, 1992

TO: Chair and Members, Council on Court Procedures

FM. Maury Holland, Executive Director

Re: Some Problems with ORCP 69 - Defaults

At our Aug. 1 meeting there was a tentative consensus that the Council should consider the asserted difficulty with ORCP 69 raised by Judge Mattison in his June 26 letter to our Chair (Attachment A), and I was asked to prepare a draft amendment for consideration at our 9/26/92 meeting (Attachment B). The question raised by Judge Mattison was whether it made sense to apply the requirement of R. 69 A that, unless shortened by the court, a defendant must be given written notice of application for a default order at least 10 days prior to entry thereof when the default takes the form of defendant's failure to appear, personally or by counsel, at a trial as to which he had notice. Judge Mattison based his conclusion that, wisely or not, this 10-day notice requirement does apply in this situation on a Court of Appeals decision per Judge De Muniz, Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990) (included with Judge Mattison's letter). This decision reversed the judgment entered by Circuit Court Judge Deiz in a case also involving a failure of a defendant to defend at a trial as to which it had notice. There is no way I can be sure, but it appears that the reason Judge Deiz was led to commit what turned out to be reversible error was because she did not believe that what the non-appearing defendant had done was a "default" within the meaning of R. 69, a position with which many might intuitively agree. Judge De Muniz's opinion, however, reached the contrary conclusion,

largely upon the basis of some unequivocal Staff Comment in Fred Merrill's *ORCP Handbook*, to the effect that failure to attend at trial was intended by the Council to be among the defaults governed by R. 69.[1]

Judge Mattison's letter at least suggests he followed the Van Dyke holding somewhat reluctantly because he could not see what purpose would be served by giving a defendant who failed to show up at trial 10-day notice of entry of a default order (in contrast with a default judgment) His letter asks the Council to reconsider a change made to R. 69 as recently as 1988, that is, the notice requirement now incorporated in R. 69 A as applied to a failure to appear personally or by counsel for trial, etc. I emphasize "now," because the Council has been tinkering with R. 69 during both of the preceding biennia, and, at the risk of being impolitic, appears to have confused things a bit.

At the time of the trial court ruling in Van Dyke, R 69 A contained no notice requirement for entry of a default order. R. 69 B(2), concerning entry of default judgment, apart from the very narrow circumstances prescribed by R. 69 B(1) where such

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[1]This leads me to wonder how authoritative Staff Comments, which appear only in the Handbook published biennially by Butterworths, are generally regarded by Oregon judges. I shall check to see whether there are any explicit statements on point by the Supreme Court or Court of Appeals. Judge De Muniz's treatment of this particular comment in Van Dyke as akin to legislative history brings home to me the necessity that any Staff Comments prepared by me must reflect the intent of the Council majority rather than just my own understanding. This is one important reason why we must continue to have full transcripts of Council meetings. It might clarify matters for others if the designation "Council Notes," similar to the Advisory Committee Notes to the FRCP were adopted in lieu of "Staff Comments." I also wonder if there is a problem, and if so what might be done about it, arising from the fact that some Oregon judges and lawyers presumably rely upon the Butterworths Handbook, which includes Staff Comments, while others rely upon the West Publishing edition, which does not. It is difficult to believe that Judge Deiz would have ruled as she did in Van Dyke had the Staff Comments in the Handbook been brought to her attention. It might be difficult to persuade West to start including Staff Comments or Council Notes, since they do not include Advisory Committee Notes in their trade edition of the FRCP, although they do include them in their educational edition.

judgment may be entered either by the judge or the clerk, provided for 10-days written notice of the hearing on plaintiff's application for default judgment, but only if defendant had appeared in the action and only if evidence was to be taken at the hearing. This feature was added to R. 69 B(2) by the Council in the 1986 biennium. In the 1988 biennium, however, the Council for some reason deleted the notice requirement from R. 69 B(2) and added it to R. 69 A. However, as added to R. 69 A, the notice prescribed was simply of claimant's application for a default order, with no reference to any hearing, since of course there need be no hearing in connection with a mere default order unless the defaulting party subsequently takes the initiative to set it aside pursuant to R. 69 C. This change was effective 1/1/90, and hence controlled the proceedings before Judge Mattison about which he wrote. Since Judge Mattison almost certainly thought he was moving in the direction of entering a default judgment, he might well have been confused by the relocation of the notice requirement to R. 69 A. Had he succumbed to such confusion, he would almost certainly have committed reversible error, since one cannot imagine our appellate courts allowing a judge to move from entry of a default order all the way to entry of a default judgment with no notice and opportunity to be heard, except presumably on the part of a defendant who neglected to enter any appearance, since the summons warning contains an explicit warning of that possibility.

My perusal of the 1988 biennium minutes has not disclosed the reasoning which led the Council to move the notice and hearing provision from R. 69 B(2) to R. 69 A, while dropping any reference to a hearing. The Council appears to have simply acted upon a recommendation the the OSB Practice and Procedure Committee, and I should probably have a look at whatever reasoning was provided in support of this recommendation. Pending that look, my preliminary conclusion is that the 1988 amendment was ill-considered and likely to foster confusion. My revised draft (Attachment C), for consideration at our Oct. 17

meeting or whenever it can be reached, draws upon the current FRCP 55 (Attachment D) and R. 69 B(2) as it existed prior to the 1988 amendment (Attachment E), although it is by no means identical to either of them..

The draft amendment presented at the 8/1/92 meeting (Attachment B) sought to deal with the problem identified by Judge Mattison by simply engrafting onto R. 69 A an exception to its 10-day notice requirement for cases involving failure to show up for trial. But it now seems to me that what is needed is to return essentially to the pre-1988 amendment situation, delete the notice provision from R. 69 A where it does not belong, and restore a substantially modified notice-and-hearing provision to R. 69 B(2).

FRCP 55(a) (Attachment D) seems to me clearly correct in not requiring either notice or any sort of hearing for mere "entry" of default, whether, as is most frequently the case, default is entered by the clerk or, as occasionally happens, by the judge. The reason is, as suggested from the brief excerpt from Friedenthal et al. on *Civil Procedure* (Attachment F), that the usually ministerial notation that defendant (or other opponent of a claim for affirmative relief) is in default is "no big deal," and cannot by itself result in any court action prejudicial to the substantive interests of the defaulting litigant. Entries of default most often happen because claimant's attorney has become exasperated with opponent's neglect to file an answer or file a responsive motion, and finally applies to the clerk for a notation of such neglect. The ORCP do not spell out many consequences of a delinquent litigant being thus placed in this kind of procedural "penalty box." R. 7 D(4)(c) does provide that a defendant served under that subsection may not be placed in default without a special showing by the plaintiff. R. 9 A provides that no papers need be served on a defendant who is in default, but this applies only to one who is in default for failure to appear in the action. R. 23

A provides that amended pleadings need not be served on parties in default unless such pleadings add a new claim against such a party. Default judgments arising out of refusals to make discovery are separately dealt with in R. 46 B(2)(c), although the latter does contain a possibly confusing reference to R. 69..

My impression from practice in Massachusetts many years ago is that there is a kind of "common law" by which clerks will refuse to accept filings from parties while they are in default until they are cured and set aside, but I find no authority for this in either the ORCP or the FRCP. It is also my impression that mere entries of default, or what R. 69 A inadvisedly calls "order[s) of default" (inadvised because nothing is really being ordered) seldom reach the stage of being formally set aside by the judge, because counsel who has applied for entry of default will most often subsequently agree with opposing counsel to filing of a stipulation authorizing the clerk to remove it upon getting assurance that the matter will be rectified The obvious reason for this is that, in cases where the defaulting party is represented by counsel, nearly every attorney would recognize that to persist in failure to cure the default would risk professional discipline and possibly even professional liability. Where defaulting parties are proceeding pro se, it is believed by most trial lawyers that trial judges are understandably reluctant to allow an entry of default to ripen into a default judgment, except as the very last resort and only when it becomes clear that defendant will not do anything to contest the claim. In summary, it strikes me as wholly unnecessary to attach a notice requirement to something as provisional and normally inconsequential as mere entry of default, especially when the notice would not relate to any hearing, but would simply apprise the delinquent party or counsel that his or her delinquency had been noted. If the delinquent party then does nothing, plaintiff's counsel will either proceed under R. 69 B(1) under the very narrow circumstances where that is permitted without involvement of the judge, or make application to the

judge under R. 69 B(2) for default judgment. If, on the other hand, the defaulting party or attorney wants to get back in the game, claimant's counsel will probably stipulate to removal of the entry of default. If not, the delinquent party will have to move pursuant to R. 69 C to have the default set aside, and the judge will be in the familiar posture of having to weigh the interest in enforcing reasonable compliance with procedural requirements against the interest in having cases decided on their merits.

If, as my revised draft proposes, there is to be no notice of mere entry of default, it would seem to me that due process might well require both notice and a hearing upon such notice in any case where claimant goes so far as to apply under R. 69 B(2) for default judgment, and that therefore R. 69 B(2) should expressly require this. The pre-1988 version of R. 69 B(2) seems to me defective in requiring a hearing upon notice only if the judge will hear evidence, especially since judges are given discretion to determine any outstanding issues on the basis of affidavits. In fact, judges are given, and should be given, very wide discretion as to how to proceed at such hearings, ranging from determining outstanding issues, most often concerning damages or other form of relief, upon affidavits, making an order of reference, hearing evidence themselves, or even directing that certain issues be tried to a jury, although, as far as I know, there is no constitutional or other legal right to jury trial in default cases. But whatever else judges do at such hearings, their instinct would probably be to give the delinquent party, by counsel or otherwise, one last chance to persuade them, by motion pursuant to R. 69 C, to excuse and set aside their delinquency and get on with defense against the claim. FRCP 55 provides for a minimum of 3 days notice, but my revised draft retains the 10 days that has been traditional under this rule through all of its many amendments, back to statutory days. One important consideration is that if judges are not prepared at such pre-judgment hearings to consider motions to set aside entries of default, they will more often be confronted under R. 69 C with a post

facto motion to set aside a default judgment, something that would be even more frustrating and disruptive of smooth judicial procedure.

In connection with R. 69 C, and contrary to its federal counterpart, FRCP 55(c), my revised amendment proposes another change that the Council should consider carefully, since if adopted, it would break some new ground. By reference to R. 71 B(1), R. 69 C makes clear that a judge can grant relief from a default judgment unconditionally or only "upon such terms as are just." Members of the Council will know better than I, but my assumption is that the "terms" referred to most often require that the party relieved from a default judgment compensate the claimant for any extra expenses to which the latter has been directly put on account of the moving party's neglects. My draft amendment would modify the present R. 69 C to give judges authority to impose "such terms as are just" as a condition of setting aside an entry of default. This authority would probably be seldom used in the case of "garden variety" defaults that take the form of failure to file an answer or responsive motion. But consider the situation described by Judge Mattison and the similar one confronting Judge Deiz in Van Dyke. A defendant having notice of a trial fails to show up with no apparent excuse, but the plaintiff is in court, prepared to put on witnesses and so forth. The judge would then enter defendant's default under R. 69 A, at least if plaintiff's counsel applies for it. Although it is not clear on the face of ORCP 69 as presently structured, federal cases construing FRCP 55 generally hold that a FRCP 55(a) entry of default, whether by the judge or the clerk, is a prerequisite for a FRCP 55(b)(2) application for a default judgment. So, under the circumstances supposed, the judge would direct the clerk to enter defendant's default simply on the basis of his or her failure to defend at trial. Plaintiff's counsel could then simultaneously apply to the judge for a default judgment, which under my proposed amended R. 69 B(2) would require a hearing upon notice to defendant. If defendant appears at the hearing, personally or by attorney, and persuades the

judge to excuse the rather serious and disruptive default of having failed to show up for a scheduled trial as to which he or she had notice, would it not make as much sense, or at least almost as much sense, to give judges discretionary authority to impose reasonable terms in granting relief from the default entered at the time of the original trial, as it does to grant such authority when defendant fails to show up at the hearing, default judgment is entered, and then defendant later on shows up to file a post-judgment motion under R. 69 C/71 B(1)? Because I am inclined to think the answer to this query is yes, I have drafted amended R. 69 C accordingly. But this matter might well be very sensitive, so the Council will want to consider this proposal carefully.

cc. Mr. Dennis Hubel

Hon. Jack Mattison

ATTACHMENTS TO MEMORANDUM TO COUNCIL

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Attachment A

CIRCUIT COURT OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
EUGENE, OREGON 97401

JACK L. MATTISON
JUDGE

687-4257

June 26, 1992

Mr. Henry Kantor
Attorney at Law
900 SW 5th Avenue, Suite 1437
Portland, OR 97204

Re: ORCP 69A

Dear Henry:

The case of Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990), which interprets ORCP 69A, was brought to my attention this morning during our trial call, and it may be that the Counsel should take a hard look at 69A in light of the holding in that case. I should have been aware of it prior to today, but was not, and I would guess that my ignorance has a lot of company among members of both our bench and bar.

My situation this morning was as follows. A domestic relations case involving a decree modification issue was on today's trial docket. The responding party was pro se, but had made an appearance and had received a written trial notice from our calendar clerk. I was told that he had informed the moving party yesterday that he would not be appearing for trial, but that is not of much legal significance except perhaps as an indication that he had, in fact, received the trial setting notice. When I advised the moving party's attorney I would assign the case out to a judge for a prima facie hearing, he allowed as how he would like to do that, but under the Van Dyke ruling, he believed he had to give the respondent ten days notice of his intent to take a default before he could proceed any further. I then read the opinion, and while 69A has been amended since the case was decided, it is pretty clear that he is right.

As a consequence, although the case was set for trial and proper notice was given to all parties, the only effect the trial date has had was to trigger the mailing of a ten day notice of intent to take a default - to a party who voluntarily chose not to appear for trial. So, the case is now in a state of limbo until the plaintiff's attorney jumps through the ORCP 69 hoops.

Attachment A

This section was amended while I was on the Counsel, and I do not recall any discussion about it having this effect in this not uncommon fact situation, but if anything, the changes that were made from the 1988 version strengthen the Van Dyke interpretation.

I would appreciate the Counsel considering amending 69A in a manner that would eliminate any requirement for any notices of any kind in the situation I had this morning, and the situation Judge Deiz had in Van Dyke. When a defendant has been served, has filed an appearance, has received notice of the trial date, and then fails to appear for trial, a court should be able to allow the moving party, who has appeared ready for trial, to proceed to put on a case in support of the allegations of the complaint or petition, and the court should also be able to enter an appropriate judgment. ORCP 71 is always available to the other side.

A copy of the Van Dyke opinion is attached, and thank you for your consideration of this request.

Very truly yours,

Jack Mattison
Presiding Judge

JM/rl

cc: Hon. Win Liepe

EDMONDS, J.

Petitioner moves for reconsideration of our opinion in *Mercer Industries v. Rose*, 100 Or App 252, 785 P2d 385 (1990). We held that the Board erred when it refused to award attorney fees to claimant after claimant actively litigated the issue of responsibility. Petitioner argues that claimant is not entitled to an employer-paid attorney fee, because his right to compensation was never in jeopardy.

Claimant's entitlement to receive compensation was resolved before the hearing when an order of responsibility under *former* ORS 656.307,[1] was issued. ORS 656.386(1) provides, in pertinent part:

> "In all cases involving accidental injuries where a claimant finally prevails in an appeal to the Court of Appeals or petition for review to the Supreme Court from an order or decision *denying the claim for compensation*, the court shall allow a reasonable attorney fee to the claimant's attorney. In such rejected cases where the claimant prevails finally in a hearing before the referee or in a review by the board itself, then the referee or board shall allow a reasonable attorney fee." (Emphasis supplied.)

Because claimant did not seek review from an order denying compensation, he is not entitled to attorney fees under ORS 656.386(1). *Shoulders v. SAIF*, 300 Or 606, 611, 716 P2d 751 (1986). To the extent that *SAIF v. Phipps*, 85 Or App 436, 737 P2d 131 (1987), is inconsistent with this opinion, it is overruled.

Motion for reconsideration allowed; former opinion modified to affirm on cross-petition and adhered to as modified.

[1] ORS 656.307 was amended in 1987, after the hearing in this case, to include a provision for award of attorney fees in responsibility hearings. *See* ORS 656.307(5).

Argued and submitted May 25, reversed and remanded for further proceedings August 6, reconsideration denied September 26, 1990, petition for review denied October 23, 1990 (310 Or 476)

Lyle H. VAN DYKE,
Myrtle R. Van Dyke, Frederick G. Witham
and Rest-A-Phone Corporation,
Respondents,

v.

VARSITY CLUB, INC.,
Appellant.

(A8606-03623; CA A60891)

796 P2d 382

Action was brought alleging conversion, trespass and interference with business. When defense counsel did not appear on trial date for which notice had been mailed to counsel for both sides, the Circuit Court, Multnomah County, Mercedes Deiz, J., entered judgment for plaintiffs and defendant appealed. The Court of Appeals, De Muniz, J., held that: (1) evidence including presumption of receipt from correctly mailed notice of trial date supported conclusion that defendant received sufficient notice of scheduled trial that defense counsel's failure to appear was not excusable neglect warranting setting aside of judgment, but (2) trial court did not have authority to proceed with trial in absence of defendant that had engaged in extensive motion practice, but rather, should have proceeded under rule governing default that requires ten days' written notice of intent to apply for judgment when party has appeared in action.

Reversed and remanded.

1. **Evidence—Presumptions—Rebuttal of presumptions of fact**

Evidence permitted conclusion that civil defendant did not defeat presumption of delivery of notice of trial date which arose from showing that court properly mailed notice to defense counsel at his correct address and notice was not returned undelivered to court, although defense counsel claimed that he never received notice, so failure of defense counsel to appear at scheduled trial would not be considered excusable neglect warranting setting aside of judgment for plaintiffs. ORCP 71B.(1)(a); OEC 311(1)(b, m, p, q).

2. **Trial—Course and conduct of trial in general—Presence of parties and counsel—Judgment—By default—Requisites and validity**

Trial court did not have authority to proceed with scheduled trial in absence of defendant, where defendant had engaged in extensive motion practice, but failed to appear and defend at trial; rather, court should have proceeded under rule providing for default, which requires giving ten days' written notice of intent to apply for judgment with respect to party who has appeared in action. ORCP 69.

3. **Judgment—By default—Requisites and validity**

Failure of litigant who has pled to appear and defend at trial is regulated by civil rule providing for default. ORCP 69.

CJS, Evidence § 115.

Appeal from Circuit Court, Multnomah County.

Mercedes Deiz, Judge.

Patrick N. Rothwell, Portland, argued the cause for appellant. With him on the briefs was Hallmark, Keating & Abbott, P.C., Portland.

Craig D. White, Portland, argued the cause and filed the brief for respondents.

Before Riggs, Presiding Judge, and Edmonds and De Muniz, Judges.

DE MUNIZ, J.

Reversed and remanded for further proceedings not inconsistent with this opinion.

DE MUNIZ, J.

Defendant did not appear for trial, and the court entered a judgment for plaintiffs. Defendant contends that the trial court should have granted its motion to set aside the judgment under ORCP 71B. We reverse.

On June 19, 1986, plaintiffs filed a complaint alleging conversion, trespass and interference with plaintiffs' business by defendant. After a series of ORCP 21 motions by defendant and repleadings by plaintiffs, plaintiffs filed a third amended complaint on July 20, 1987. Defendant filed its answer on July 28, 1987.

A trial date was set for March 13, 1989. The circuit court sent computerized trial notices to the correct addresses of the attorneys for both sides. Plaintiffs' counsel received the notice and appeared in court on March 13, 1989. Defendant's counsel did not appear. The trial court telephoned defense counsel's office but did not reach him. After waiting two hours, the trial court proceeded without defense counsel, took plaintiff's testimony and entered a judgment against defendant. Subsequently, defendant moved under ORCP 71[1] for relief from the judgment. The court denied the motion.

1. Defendant maintains that its motion to set aside the judgment should have been granted, because its counsel never received notice of the trial and, therefore, counsel's failure to appear was "excusable neglect." ORCP 71B(1)(a). The record shows that the circuit court properly mailed the notice to defendant's attorney at his correct address. The notice was not returned undelivered to the court, which was shown as the sender address on the notice. When a notice is duly directed and mailed, it is presumed to have been received in the regular course of the mail. OEC 311(1)(q); *see also* OEC 311(1)(b), (m) and (p). The trial court considered that presumption in regard to defendant's counsel's claim that he never received the notice. It concluded that the motion to set aside the judgment should be denied. There were sufficient grounds for the trial

[1] ORCP 71B provides, in pertinent part:

"(1) On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (a) mistake, inadvertance, surprise, or excusable neglect; * * * or (d) the judgment is void[.]"

court to conclude that defendant did not defeat the presumption of delivery of the notice. Therefore, the court acted within its discretion in concluding that defendant received sufficient notice. *Pacheco v. Blatchford*, 91 Or App 390, 392, 754 P2d 1219, *rev den* 306 Or 660 (1988).

Defendant next contends that "[t]he March 13 proceeding resulted in a judgment by default" and that the judgment was void, ORCP 71B(1)(d), because "[p]laintiff failed to comply with the notice requirements of ORCP 69 * * *."[2] Despite the fact that defendant mischaracterizes what happened in the trial court, he is correct. Although the word "default" was used several times at the March 13 proceeding, the trial judge clarified the type of judgment that she intended to enter:

> "An order of default may be entered against Varsity Club—well, actually, strike that. *There's no order of default.* They made an appearance. They've appeared, but they haven't appeared before the trial—for the trial itself." (Emphasis supplied.)

2, 3. The trial court did not intend to act under ORCP 69, but, rather, intended to proceed with the trial in the absence of defendant. However, the trial court had no authority to proceed in that manner. This is not the usual ORCP 69 case where a party fails to plead or to appear properly at any stage

[1] At the time of trial, ORCP 69 provided, in pertinent part:

"A. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, and these facts are made to appear by affidavit or otherwise, the clerk or court shall order the default of that party.

"* * * * *

"B.(2) In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against a minor or an incapacitated person unless they have a general guardian or they are represented in the action by another representative as provided in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits. In the event that it is necessary to receive evidence prior to entering judgment, and if the party against whom judgment by default is sought has appeared in the action, the party against whom judgment is sought shall be served with written notice of the application for judgment at least 10 days, unless shortened by the court, prior to the hearing on such application."

of the proceeding. Rather, defendant engaged in extensive motion practice but failed to appear and defend at trial. Although the phrase "otherwise defend" in ORCP 69 logically could be read not to include a situation when a litigant fails, after pleading, to appear and defend at trial, *see, e.g., 6 Moore's Federal Practice* 55-13, ¶ 55.03(1) (2d ed 1988) the commentary to the rule indicates that, in Oregon, the failure to appear and defend *is* regulated by ORCP 69.

ORCP 69 was meant to be broader than the statute that it replaced, *former* ORS 18.080, which merely addressed default for failure to answer.[3] The commentary to the proposed rule noted that "[t]his rule would apply to anyone required to file a responsive pleading to a claim and to any person who failed to appear and defend at trial." *Council on Court Procedures, Oregon Rules of Civil Procedure and Amendments, Preliminary Drafts and Final Draft,* Commentary to Draft of Proposed Rules 67-74 at page 40 (October 15, 1979). Moreover, the commentary to the final rule provides, in pertinent part:

> "This rule is a combination of ORS 18.080 and Federal Rule 55. Under section 69A. *all* defaults by a party against whom judgment is sought would be covered by this rule. ORS 18.080 referred only to failure to answer. A failure to file responsive pleading, *or failure to appear and defend at trial,* or an ordered default under Rule 46, *would be regulated by this rule.*" Commentary to Rule 69, reprinted in Merrill, *Oregon Rules of Civil Procedure: 1990 Handbook* 217. (Emphasis supplied.)

Thus, under the circumstances existing here, where the defendant and counsel, without explanation, failed to appear for trial, the court should have proceeded under ORCP 69. Although an order of default could have been entered, ORCP 69B(2) required that plaintiffs give defendant 10 days written notice of the intent to apply for a judgment. That was

[3] *Former* ORS 18.080(1) provided, in relevant part:

"Judgment may be had upon failure to answer, as prescribed in this section. When it appears that the defendant * * * has been duly served with the summons, and has failed to file an answer with the clerk of the court within the time specified in the summons, or such further time as may have been granted by the court or judge thereof, the plaintiff shall be entitled to have judgment against such defendant * * *."

not done. The trial court erred in not proceeding under ORCP 69.

Reversed and remanded for further proceedings not inconsistent with this opinion.

Argued and submitted May 30, reversed August 8, 1990

STATE OF OREGON,
Respondent,
v.
MATTIE ANN MARTZ,
Appellant.
(10-88-04062; CA A61146)
795 P2d 616

Appeal from Circuit Court, Lane County.

George J. Woodrich, Judge.

Henry M. Silberblatt, Salem, argued the cause for appellant. With him on the brief was Sally L. Avera, Public Defender, Salem.

Michael Livingston, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Before Joseph, Chief Judge, and Warren and Rossman, Judges.

PER CURIAM

Reversed.

Attachment B

DRAFT FOR 9-26-92 MEETING

RULE 69
DEFAULT ORDERS AND JUDGMENTS

A. Entry of order of default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for [an] **such** order [of default] at least 10 days, unless shortened by the court, prior to entry [of the order of default] **thereof[.], except that no prior notice is required for entry of an order of default against a party who, having proper notice thereof, fails to defend at trial.** These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit or otherwise, and upon such a showing, the clerk or the court shall enter the order of default

B. Entry of default judgment.

B.(1) **By the court or the clerk.** The court or the clerk upon written application of the party seeking judgment shall enter judgment when:

* * * * *

B.(1)(c) The party against whom judgment is sought has been defaulted for failure to [appear] **plead or otherwise defend**;

* * * * *

REVISED DRAFT AMENDMENT OF ORCP 69 (10-5-92)

RULE 69
[DEFAULT ORDERS AND JUDGMENTS]
DEFAULT

A. [Entry of order of default.] **Default.** When a party against whom a judgment for affirmative relief is sought [has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and] has failed to plead or otherwise defend as provided [in] **by** these rules [the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for an order of default at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit or otherwise, and upon such a showing, the clerk or the court shall enter the order of default] **and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default or the court may order that such entry be made.**

B. Entry of default judgment.

B.(1) **By the court or the clerk.** The court or the clerk **shall** upon written application [of] **by** the party seeking **default** judgment [shall] enter **such** judgment when:

(B.(1)(a) to B.(1)(g) unchanged.)

B.(2) **By the court.** In all other cases, the party seeking a judgment by default shall apply to the court therefor[e], but no judgment by default shall be entered against a minor or an incapacitated person as defined by ORS 126.003(4) unless the minor or incapacitated person has a general guardian or is represented in the action by another representative as provided in Rule 27. [If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits.] **Unless waived in a writing filed with the clerk by the party against whom it is sought, no judgment shall be entered under this subsection except at or following a**

hearing on notice served upon said party, unless the court for cause shown shortens the time, not less than 10 days prior to such hearing, but no notice or hearing is required in the case of a party who has neither filed an appearance in the action nor provided the party applying for judgment with written notification of intent to do so. Unless taken under advisement at the hearing required by this subsection the court shall then rule upon whether any motion made under section 69 C. of this rule should be granted and, if not, whether default judgment should be entered. If necessary in order to enter judgment or carry it into effect, to take an account, to determine damages, to establish the truth of any averment, or to investigate any pertinent matter, the court may at such hearing or any adjournment therefrom receive evidence, direct that specified issues be tried by jury, and order such references as it deems necessary, but may also determine the truth of any matter upon affidavits.

B.(3) **Amount of judgment.** [The] Judgment shall be entered for the amount due as shown by affidavit or otherwise; and may include costs and disbursements and attorney fees entered pursuant to Rule 68.

(B.(4). Unchanged.)

C. **Setting aside default.** For good cause shown and upon such terms as are just, the court may set aside an [order] entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71 B and C

(D. Unchanged.)

(E. Unchanged.)

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1987 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 55. Default

(a) **Entry.** 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.

(b) **Judgment.** Judgment by default may be entered as follows:

(1) ***By the Clerk.*** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) ***By the Court.*** In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appear-

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ing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment Against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES
1937 ADOPTION

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). For dismissal of an action for failure to comply with these rules or any order of the court, see Rule 41(b).

Note to Subdivision (a). The provision for the entry of default comes from the Massachusetts practice, 2 Mass.Gen. Laws (Ter.Ed., 1932) ch. 231, § 57. For affidavit of default, see 2 Minn.Stat. (Mason, 1927) § 9256.

Note to Subdivision (b). The provision in paragraph (1) for the entry of judgment by the clerk when plaintiff claims a sum certain is found in the N.Y.C.P.A. (1937) § 485, in Calif.Code Civ.Proc. (Deering, 1937) § 585(1), and in Conn. Practice Book (1934) § 47. For provisions similar to paragraph (2), compare Calif.Code, *supra*, § 585(2); N.Y.C.P.A. (1937) § 490; 2 Minn.Stat. (Mason, 1927) § 9256(3); 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 411(2); U.S.C., Title 28, § 1874, formerly § 785 (Action to recover forfeiture in bond) and similar statutes are preserved by the last clause of paragraph (2).

Note to Subdivision (e). This restates substantially the last clause of U.S.C., Title 28, former § 763 (Action against the United States under the Tucker Act). As this rule governs in all actions against the United States, U.S.C., Title 28, former § 45 (Practice and procedure in certain cases under the interstate commerce laws) and similar statutes are modified in so far as they contain anything inconsistent therewith.

SUPPLEMENTARY NOTE OF ADVISORY COMMITTEE REGARDING THIS RULE

Note. The operation of Rule 55(b) (Judgment) is directly affected by the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C., Appendix, § 501 et seq. Section 200 of the Act [50 U.S.C.A. Appendix, § 520] imposes specific requirements which must be fulfilled before a default judgment can be entered, e.g., *Ledwith* v. *Storkan*, D.Neb.1942, 6 Fed.Rule Serv. 60b.24, Case 2, 2 F.R.D. 539, and also provides for the vacation of a judgment in certain circumstances. See discussion in Commentary, Effect of Conscription Legislation on the Federal Rules, 1940, 3 Fed.Rules Serv. 725; 3 Moore's Federal Practice, 1938, Cum.Supplement § 55.02.

1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Attachment E

RULE 69. DEFAULT ORDERS AND JUDGMENTS

A. Entry of Default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, and these facts are made to appear by affidavit or otherwise, the clerk or court shall order the default of that party.

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B. Entry of Default Judgment.

B(1) *By the Court or the Clerk.* The court or the clerk upon written application of the party seeking judgment shall enter judgment when:

B(1)(a) The action arises upon contract;

B(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain;

B(1)(c) The party against whom judgment is sought has been defaulted for failure to appear;

B(1)(d) The party against whom judgment is sought is not a minor or an incapacitated person and such fact is shown by affidavit;

B(1)(e) The party seeking judgment submits an affidavit of the amount due;

B(1)(f) An affidavit pursuant to subsection B(3) of this rule has been submitted; and

B(1)(g) Summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7D(3)(a)(i), 7D(3)(b)(i), 7D(3)(e) or 7D(3)(f).

B(2) *By the Court.* In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against a minor or an incapacitated person unless they have a general guardian or they are represented in the action by another representative as provided in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits. In the event that it is necessary to receive evidence prior to entering judgment, and if the party against whom judgment by default is sought has appeared in the action, the party against whom the judgment is sought shall be served with written notice of the application for judgment at least 10 days, unless shortened by the court, prior to the hearing on such application.

B(3) *Amount of Judgment.* The judgment entered shall be for the amount due as shown by the affidavit, and may include costs and disbursements and attorney fees entered pursuant to Rule 68.

B(4) *Non-military Affidavit Required.* No judgment by default shall be entered until the filing of an affidavit on behalf of the plaintiff, showing that affiant reasonably believes that the defendant is not a person in military service as defined in Article 1 of the "Soldiers' and

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Sailors' Civil Relief Act of 1940," as amended, except upon order of the court in accordance with that Act.

C. Setting Aside Default. For good cause shown, the court may set aside an order of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71B and C.

D. Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of Rule 67B.

E. "Clerk" Defined. Reference to "clerk" in this rule shall include the clerk of court or any person performing the duties of that office.

[Effective January 1, 1982; § B amended by Laws 1981, c. 898, § 8; amended by Council on Court Procedures, effective January 1, 1988.]

Attachment F

WESTLAW REFERENCES
170ak2544 & 170ak2548

B. DEFAULT JUDGMENT

§ 9.4 The Entry of Default and Default Judgment

It is important to keep in mind the difference between the entry of a default and a default judgment.[1] An entry of default does not constitute a judgment; it is merely a notation by the court clerk precluding the defaulting party from making any new defenses regarding liability.[2] The notation of default records the fact that the defending party has failed to plead or otherwise defend against a claim.

Default judgments may be entered in three types of situations. In the first, the defendant never appears or answers in response to the plaintiff's complaint. In the second, defendant makes an appearance, but fails to file a formal answer or appear at trial.[3] In the third, the defendant fails to comply with some procedural requirement, time frame or court order during the pretrial proceedings and the court enters a default judgment as a penalty. As is discussed elsewhere, authority for penalty defaults may be found in most discovery rules [4] and they have been recognized as within the inherent power of the court in order to force compliance or cooperation at the pretrial conference stage.[5] The other two default situations are dealt with in specially designed rules present in each court system and are discussed below.[6]

Default judgments are a drastic action because they confront the judicial preference for disposition of litigation on the merits, especially when the defendant has been otherwise diligent. The actual judgment

support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to such fact • • •.").

§ 9.4

1. The distinction between defaults and default judgments becomes important when relief is sought. As might be expected, relief from the entry of default is more readily granted than from a default judgment. Jackson v. Beech, 636 F.2d 831 (D.C.Cir.1980); Peebles v. Moore, 48 N.C. App. 497, 269 S.E.2d 694 (1980), modified and affirmed 302 N.C. 351, 275 S.E.2d 833 (1981).

2. Citizens Nat. Bank of Grant County v. First Nat. Bank in Marion, Indiana, 165 Ind.App. 116, 331 N.E.2d 471 (1975).

3. A failure to answer or defend should be distinguished from a failure to appear at trial after answering the complaint. In the former situation, the case never has been placed formally at issue and a default judgment may be entered. In the latter, issue has been joined, and the trial proceeds, but without the absent party. See Coulas v. Smith, 96 Ariz. 325, 395 P.2d 527 (1964).

4. See § 7.16, above.

5. See § 8.2, above.

6. A penalty default may not be governed by all the protections set out in the rules governing default judgments. Thus, for example, the damages may not be limited to the amount claimed in the complaint. See text at note 17, below; Aljassim v. S.S. South Star, 323 F.Supp. 918 (S.D.N.Y. 1971); Sarlie v. E.L. Bruce Co., 265 F.Supp. 371 (S.D.N.Y.1967). However, the defending party will be entitled to notice and a right to appear at the default hearing. See Eisler v. Stritzler, 535 F.2d 148 (1st Cir. 1976).

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is based on a prior entry of default by the court clerk as provided by rule or statute.[7] The judgment may be entered either by the clerk or by the court, depending on the governing rule or statute and the nature of the underlying claim.

If default has been entered and it is clear from the complaint that a certain sum and only that sum is due to the complainant, most rules provide that the clerk then may enter a default judgment for that amount.[8] This requirement typically is satisfied when the damages claimed are for a liquidated amount and the amount requested is reasonable under the circumstances, conditions commonly fulfilled only in some contract actions.[9]

Aside from these few instances, most rules give the court discretion to decide whether or not to enter a default judgment. In exercising its discretion the court will consider various factors,[10] including whether the default is largely technical and the defendant now is ready to defend,[11] whether the plaintiff has been prejudiced by defendant's delay in responding,[12] and the amounts involved or the significance of the issues at stake.[13] These factors will be evaluated in light of the general preference for decisions rendered after a full adjudication on the merits.[14]

When deciding whether to enter a judgment, the court may hold a hearing.[15] Indeed, Federal Rule 55(b)(2) empowers the district judge to hold hearings or "order such references as it deems necessary and proper." A hearing often is particularly appropriate because defendant's default serves only to concede the factual allegations in the complaint regarding liability.[16] Pursuant to most default rules,[17] once

7. See, e.g., Fed.Civ.Proc.Rule 55(a); West's Ann.Cal.Code Civ.Proc. §§ 585(a) and (b), 586; Md.Civ.Proc.Rule 310; Ohio Rules Civ.Proc., Rule 55(a).

8. Fed.Civ.Proc.Rule 55(b)(1); West's Ann.Cal.Code Civ.Proc. § 585(a); Idaho Rules Civ.Proc., Rule 55(b)(1).

9. Compare Galanti v. Emerald City Records, Inc., 144 Ga.App. 773, 242 S.E.2d 368 (1978) (damages for breach of rental agreement by tenant were liquidated because easily calculable), with Ford v. Superior Ct. for Orange County, 34 Cal.App.3d 338, 109 Cal.Rptr. 844 (1973) (clerk could not enter default judgment on a promissory note secured by a trust deed on real property because complaint alleged that the security had become "worthless" and court must hear that evidence).

10. For a more detailed listing of the factors considered, see 10 C. Wright, A. Miller & M. Kane, Civil 2d § 2685.

11. See McKnight v. Webster, 499 F.Supp. 420 (E.D.Pa.1980); Franzen v. Carmichael, 398 N.E.2d 1379 (Ind.App.1980).

12. See Davis v. Mercier-Freres, 368 F.Supp. 498 (E.D.Wis.1973) (no prejudice); Seanor v. Bair Transport Co. of Delaware, Inc., 54 F.R.D. 35 (E.D.Pa.1971) (prejudice).

13. See Hutton v. Fisher, 359 F.2d 913 (3d Cir.1966); General Motors Corp. v. Blevins, 144 F.Supp. 381 (D.Colo.1956).

14. This preference for a full adversary presentation also influences the decision to allow relief from a default judgment. See § 12.6, below.

15. Ariz.Rules Civ.Proc., Rule 55(b)(2); Fla.—West's F.S.A.Civ.Proc.Rule 1.500(e). See generally 10 C. Wright, A. Miller & M. Kane, Civil 2d § 2688.

16. See Thomson v. Wooster, 114 U.S. 104, 5 S.Ct. 788, 29 L.Ed. 105 (1885); Southern Arizona School for Boys, Inc. v. Chery, 119 Ariz. 277, 580 P.2d 738 (1978).

17. E.g., Fed.Civ.Proc.Rule 54(c); Ariz. Rules Civ.Proc., Rule 54(d); Official Code Ga.Ann. § 9-11-54(c)(1).

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there has been a default the claimant cannot recover more than the amount demanded or the type of relief requested in the complaint. But the default does not concede plaintiff's right to the relief requested; [18] the amount of damages to be awarded must be determined by the court.[19] A default hearing to determine damages then may proceed like any other trial.[20] However, witnesses usually do not appear in person at a default judgment hearing. Rather, evidence is submitted by affidavit.[21]

An important issue is whether the defaulting party is entitled to notice of an impending judgment and hearing.[22] The resolution of this question varies depending on what type of default is involved. The entry of default usually is without notice, as is a default judgment entered by the clerk.[23] However, if the default judgment is to be entered by the court, then most jurisdictions follow the approach of Federal Rule 55(b)(2), which provides for three days' notice of a motion for default judgment if, but only if, the defendant has "appeared" in the case.[24] This distinction between "appearing" and "nonappearing" defendants recognizes that the former have taken some action in the case—shown some interest—so that it is thought appropriate to provide them the opportunity to contest the amount, extent, or type of relief granted at the hearing or, if the pleadings are insufficient, to argue that plaintiff's claims should be dismissed because the pleadings fail to assert a claim upon which relief may be granted.[25]

18. The defendant may claim at the default hearing that the facts, even taken as true, will not support a judgment for plaintiff. Ohio Cent. R. Co. v. Central Trust Co., 133 U.S. 83, 91, 10 S.Ct. 235, 237, 33 L.Ed. 561 (1890); Productora E Importadora De Papel, S.A. v. Fleming, 376 Mass. 826, 383 N.E.2d 1129 (1978). But see Trans World Airlines, Inc. v. Hughes, 449 F.2d 51 (2d Cir.1971), reversed on other grounds 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973).

19. Pope v. U.S., 323 U.S. 1, 65 S.Ct. 16, 89 L.Ed. 3 (1944); Insurance Co. of N. America v. S/S "Hellenic Challenger," 88 F.R.D. 545 (S.D.N.Y.1980); Kelly Broadcasting Co. v. Sovereign Broadcast, Inc., 96 Nev. 188, 606 P.2d 1089 (1980).

20. Defendant may obtain a jury trial on the question of damages if the court decides it would be appropriate. See Barber v. Turberville, 218 F.2d 34 (D.C.Cir. 1954). But neither side has a right to demand a jury trial on the issue of damages. Eisler v. Stritzler, 535 F.2d 148 (1st Cir.1976). But compare Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc., 155 Cal. App.3d 381, 202 Cal.Rptr. 204 (1984) (defendant may not participate in default judgment hearing determining punitive damages).

21. See West's Ann.Cal.Code Civ.Proc. § 585(d).

22. The failure to provide the required notice justifies the reversal or setting aside of a default judgment. See Marshall v. Boyd, 658 F.2d 552 (8th Cir.1981); Wilver v. Fisher, 387 F.2d 66 (10th Cir.1967). The failure does not mean that the judgment is void and subject to collateral attack, however. See Radioear Corp. v. Crouse, 97 Idaho 501, 547 P.2d 546 (1975). See also Winfield Assocs., Inc. v. Stonecipher, 429 F.2d 1087 (10th Cir.1970). But see Bass v. Hoagland, 172 F.2d 205 (5th Cir.1949), certiorari denied 338 U.S. 816 (1949). For a more detailed discussion of notice, see 10 C. Wright, A. Miller & M. Kane, Civil 2d § 2687.

23. Harp v. Loux, 54 Or.App. 840, 636 P.2d 976 (1981), review denied 292 Or. 589, 644 P.2d 1130 (1982); Zettler v. Ehrlich, 384 So.2d 928 (Fla.App.1980).

24. Ala.Rules Civ.Proc., Rule 55(b)(2); Ariz.Rules Civ.Proc., Rule 55(a), (b)(1); Idaho Rules Civ.Proc., Rules 55(a)(1), (b)(1). See also S.C.Code 1962, § 15–9–970; Wis. Stat.Ann. 806.02(1) (notice required to any appearing party).

25. See Lutomski v. Panther Valley Coin Exchange, 653 F.2d 270 (6th Cir.1981);

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Serious questions arise as to what constitutes an appearance sufficient to trigger these notice requirements.[26] One example is when a party has defended solely on a procedural ground such as lack of jurisdiction and, after losing that challenge, fails to defend the merits of the case.[27] But even less formal activity on the part of a defendant may constitute an appearance,[28] such as the exchange of letters between the parties concerning settlement.[29] The liberal approach of many courts in determining what constitutes an appearance reflects, once again, the general distaste for judgments entered without an adversary presentation and the desire to provide notice before a judgment is entered to encourage defaulting parties to appear and defend.

WESTLAW REFERENCES
di default judgment
170ak2411
170ak2417