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Diane Cherinchak

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CIVIL PROCEDURE—UNDER THREE-FACTOR ANALYSIS FOR SETTING ASIDE DEFAULT JUDGMENTS COURT MUST CONSIDER WHETHER DEFENDANT'S CONDUCT IN FAILING TO RESPOND OR OTHERWISE DEFEND WAS INTENTIONAL OR RECKLESS


In determining whether to set aside a default judgment,1 district courts traditionally have been accorded broad discretion by the Court of Appeals for the Third Circuit.2 However, certain limitations have been placed on the district court's discretion.3 The Third Circuit has recently

1. The Federal Rules of Civil Procedure distinguish between an entry of default, which is an interlocutory matter, and a default judgment, which is a final judicial action. FED. R. CIV. P. 55(c). An entry of default is merely an order preventing the defendant from making any further defense in the case. See 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 55.10[1] (2d ed. 1985) [hereinafter cited as MOORE'S FEDERAL PRACTICE]. This order is entered by the clerk “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by [the Federal Rules] and that fact is made to appear by affidavit or otherwise.” FED. R. CIV. P. 55(a).

After an entry of default, the plaintiff is entitled to have a default judgment entered by the clerk or the court. FED. R. CIV. P. 55(b)(1)-(2). The clerk may enter a default judgment only where (1) the claim is for a sum certain or for a sum which can be made certain by computation, (2) the default is the result of the defendant's non-appearance at trial, and (3) the defendant is neither an infant nor an incompetent person. FED. R. CIV. P. 55(b)(1). In all other situations, the plaintiff must make an application to the court. FED. R. CIV. P. 55(b)(2). A default judgment entered without a contested proceeding is as effective as a judgment rendered in a contested proceeding. See Thomson v. Wooster, 114 U.S. 104 (1885); United States ex rel. Motley v. Rundle, 340 F. Supp. 807 (E.D. Pa. 1972); 6 MOORE'S FEDERAL PRACTICE, supra, ¶ 55.09. See generally Project, Relief from Default Judgment Under Rule 60(b)—A Study of Federal Case Law, 49 FORDHAM L. REV. 956 (1981). For a further discussion of the distinction between a default judgment and an entry of default, see generally 6 MOORE'S FEDERAL PRACTICE, supra, ¶ 55.

2. See, e.g., United States v. $55,518.05 in United States Currency, 728 F.2d 192, 194 (3d Cir. 1984) (decision to set aside default judgment is left primarily to discretion of district court); Farnese v. Bagnasco, 687 F.2d 761, 763 (3d Cir. 1982) (same); Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 244 (3d Cir. 1951) (same). The Third Circuit has recognized that the decision of a district court concerning a default judgment should not be disturbed on review unless there has been an abuse of discretion. See Farnese, 687 F.2d at 762-63; Tozer, 189 F.2d at 244.

3. See Tozer v. Charles A. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951). In Tozer, the Third Circuit established the standards a district court was to follow in determining whether to set aside a default judgment. The Tozer court explained that a meritorious defense "is always an important factor in the consideration of a motion to set aside a default judgment." Id. at 244-45. The Third Circuit also recognized that a district court has to weigh two other factors in
refined these limitations by setting forth three concrete factors\textsuperscript{4} that a district court must consider when deciding whether to set aside a default judgment: (1) whether the defendant has a meritorious defense;\textsuperscript{5}

deciding whether to set aside a default judgment: whether the plaintiff will be prejudiced if the judgment is set aside, and whether the defendant acted "wilfully or negligently" in failing to respond or defend. \textit{id.} at 246.

The Federal Rules of Civil Procedure also limit the district court's discretion. Under rule 55, a district court may set aside an entry of default only for "good cause." \textit{FED. R. Civ. P. 55(c)}. A default judgment may be set aside on the basis of "mistake, inadvertence, surprise, or excusable neglect" as long as the defendant makes his motion "not more than one year after the judgment ... was entered or taken." \textit{FED. R. Civ. P. 60(b)}. A motion based on "any other reason justifying relief" must be made "within a reasonable time." \textit{id.}

\textbf{4.} See United States v. $55,518.05 in United States Currency, 728 F.2d 192 (3d Cir. 1984) (district court was required to consider three factors in exercising its discretion whether to set aside default judgment); Gross v. Stereo Component Sys., Inc., 700 F.2d 120 (3d Cir. 1983) (same); Feliciano v. Reliant Tooling Co., 691 F.2d 653 (3d Cir. 1982) (same); Farnese v. Bagnasco, 687 F.2d 761 (3d Cir. 1982) (same). For a discussion of the decision in Gross, see \textit{infra} note 40 and accompanying text. For a discussion of Feliciano, see \textit{infra} note 40 and accompanying text. For a discussion of Farnese, see \textit{infra} notes 9 & 40 and accompanying text. For a discussion of the three factors, see \textit{infra} notes 28-43 and accompanying text.

It should be noted that although rule 55(c) explicitly distinguishes between an "entry of default" and a "judgment by default," the three factors used by a court in determining whether to open a default judgment are also relevant to a determination of whether "good cause" exists under rule 55(c) for setting aside an entry of default. See \textit{ supra} note 1. For a discussion of the distinction between an entry of default and a default judgment, see \textit{supra} note 1.

\textbf{5.} See \textit{ supra} note 1. Since first announced in \textit{Tozer}, the Third Circuit has consistently held that a meritorious defense is established when "allegations of defendant's answer, if established on trial, would constitute a complete defense to the action." \textit{Tozer}, 189 F.2d at 244. See \textit{ supra} note 1. However, twenty-two years later, the Third Circuit found that "[o]n a motion to set aside a default or a default judgment, the moving party must show that he has a meritorious defense." \textit{Wokan} v. Alladin Int'l, Inc., 485 F.2d 1292, 1234 (3d Cir. 1973) (emphasis added).

The Third Circuit, however, has not always been clear as to the weight to be given to a meritorious defense. In \textit{Tozer}, the Third Circuit found that the issue of whether the defendant has asserted a meritorious defense is "always an important factor in consideration of a motion to set aside a default judgment." \textit{Tozer}, 189 F.2d at 244-45 (emphasis added). However, twenty-two years later, the Third Circuit found that "[o]n a motion to set aside a default or a default judgment, the moving party must show that he has a meritorious defense." \textit{Wokan} v. Alladin Int'l, Inc., 485 F.2d 1292, 1234 (3d Cir. 1973) (emphasis added).

In spite of the Third Circuit's requirement in \textit{Wokan} of a meritorious defense, the court ten years later again categorized this "requirement" as a mere "factor" a
(2) whether the plaintiff will be prejudiced if the default judgment is set aside;\(^6\) and (3) whether the default judgment was a result of the defendant's own culpable misconduct.\(^7\) Prior to the recent line of cases which developed these three factors,\(^8\) the third factor had been a source of confusion for district courts.\(^9\) However, in *Hritz v. Woma Corporation*,\(^10\) district court was required to consider in deciding whether to set aside a default judgment. See *Farnese*, 687 F.2d at 764. See also *Cross*, 700 F.2d at 122; *Feliciano*, 691 F.2d at 657. The Third Circuit has most recently considered a meritorious defense as a threshold requirement in having an entry of default or a default judgment set aside. *Hritz v. Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir. 1984); *$55,518.05 in United States Currency*, 798 F.2d at 195. The Third Circuit's rationale for making a meritorious defense "the critical issue" is that there is no justification to set aside the default judgment if the defendant cannot establish that there is a possibility that he may win at trial. *$55,518.05 in United States Currency*, 728 F.2d at 195. See *id.* at 197 (prejudice and culpable misconduct were not considered since defendant failed to establish meritorious defense). *Contra id.* at 200 (Garth, J., dissenting) (precedent requires that findings be made as to all three factors—prejudice, meritorious defense, and culpable misconduct—even if the defendant cannot establish a meritorious defense).

6. See *Feliciano*, 691 F.2d at 656; *Farnese*, 687 F.2d at 764. A plaintiff will suffer from prejudice if his ability to pursue his claim will be hindered by the opening of the default judgment, as where available evidence has been lost through time. See *Feliciano*, 691 F.2d at 657. See also *Cross*, 700 F.2d at 123. A plaintiff may also be prejudiced by increased potential for fraud or collusion, or the imposition of adverse effects due to the plaintiff's substantial reliance on the judgment. See *Feliciano*, 691 F.2d at 657. Further, increased difficulties of discovery and the imposition of additional costs may constitute prejudice to the plaintiff. See 10 C. WRIGHT, A MILLER & M. KANE, supra note 4, § 2699, at 536-37. However, the Third Circuit has recognized that "[d]elay in realizing satisfaction on a claim rarely serves to establish the degree of prejudice sufficient to prevent the opening a default judgment [sic]." *Feliciano*, 691 F.2d at 656-57.

7. See *Cross*, 700 F.2d at 122; *Farnese*, 687 F.2d at 764. For a discussion of the culpable misconduct factor, see infra notes 9 & 37-43 and accompanying text.

8. For a discussion of the Third Circuit's recent line of cases developing the three factors, see supra note 4 and accompanying text.

9. Compare *Greco v. Reynolds*, 416 F.2d 965, 965 (3d Cir. 1969) (standard for culpable misconduct was excusable versus inexcusable neglect) with *Farnese*, 687 F.2d at 764 (standard was willfulness/bad faith).

Although the first two factors have remained essentially the same since first announced in *Tozer*, the third factor has been modified through case law. See *Tozer*, 189 F.2d at 244-46. In *Tozer*, the Third Circuit recognized that the district court had failed to "weig[h] certain [other] factors" in determining whether to set aside the default judgment, including whether the defendant's conduct was willful or negligent. *Id.* at 246. From this pronouncement, the third factor evolved to a determination of whether the defendant's conduct was the result of "excusable neglect." See *Greco*, 416 F.2d at 965.

"Excusable neglect," as it has been defined by federal courts, has existed when the defendant admitted that he was aware of the suit, but his negligence in not pleading or otherwise defending was excusable. See, e.g., *Medunic v. Lederer*, 533 F.2d 891, 893 (3d Cir. 1976) (defendant admitted to knowledge of plaintiff's claim but alleged that his failure to defend was caused by excusable neglect of his insurance carrier). Federal courts have recognized illness, confusion as to court procedures, presence of related cases, and prior commitments as acceptable excuses for one's neglect. See, e.g., *Rooks v. American Brass Co.*, 263
the Third Circuit clarified the third factor by defining culpable misconduct not in terms of excusable neglect versus inexcusable neglect, but rather as intentional or reckless conduct on the part of the defendant in failing to respond or otherwise defend.

On May 2, 1978, William Hritz was seriously injured when he was struck by a hose that was part of a mine pumping machine. Upon investigation, Hritz’s attorney determined that Woma Corporation (Woma) had either manufactured or distributed the machine. Hritz’s

Despite the Third Circuit’s introduction of the third factor in Tozer, thirty-one years later the court announced: “[a]lthough we have not squarely held that the defendant’s culpability in allowing the default is also a relevant consideration, we believe that it is.” Farnese, 687 F.2d at 764 (emphasis added). The Farnese court abandoned the “excusable neglect” standard used to determine whether the defendant’s conduct was culpable. Id. Instead, the court found it necessary to examine the record for evidence of willfulness or bad faith on the part of the defendant before deciding whether to set aside a default judgment. Id.

Regardles of the Third Circuit’s clear holding in Farnese, district courts are still confused as to this third factor. See Lasky v. Continental Prods. Corp., 97 F.R.D. 716 (E.D. Pa. 1983) (district court considered whether defendant’s failure to answer was excusable). For a discussion of the Farnese standard of culpable misconduct, see infra note 40 and accompanying text. For a discussion of Lasky, see infra note 50 and accompanying text.

10. 732 F.2d 1178 (3d Cir. 1984).

11. For a discussion of the Third Circuit’s original “excusable neglect” standard for culpable misconduct, see supra note 9 and accompanying text.

12. 732 F.2d at 1183. In Hritz, the Third Circuit for the first time gave explicit content to the “bad faith” and “willfulness” standard for culpable misconduct that it had initially articulated in Farnese. For a discussion of the Hritz court’s interpretation of “bad faith” and “willfulness” as requiring intentional or reckless conduct on the part of the defaulting defendant, see infra notes 41-42 and accompanying text.

The court in Hritz remanded the case to the district court to insure that the judgment conformed to the evolved standards for setting aside a default judgment. 732 F.2d at 1185.

13. 732 F.2d at 1179-80. As a result of the accident, Hritz suffered “severe penile lacerations, the loss of one testicle, impaired urinary and sexual functioning, grave emotional harms, stress to his marriage, despondency, and social humiliation.” Id. at 1180. For a summary of the district court’s findings concerning Hritz’s injuries, see id. at 1185-86 app.

14. Id. at 1180. Hritz’s attorney obtained the trademark, model, and serial numbers from the machine and traced them to the Woma Corporation. Id. The Woma Corporation is a subsidiary of a West German manufacturer and the local distributor of the manufacturer’s machines. Hritz v. Woma Corp., 92 F.R.D. 364, 365 (W.D. Pa. 1981).
attorney informed Woma by letter of his clients' claims on January 17, 1979, but received no reply. After waiting more than one year for a reply, Mr. Hritz and his wife filed suit in federal district court on May 1, 1980, one day before the statute of limitations would have barred their claims.

Woma's failure to file an answer to the complaint or otherwise defend prompted the Hritzes to file a petition for an entry of default on August 8, 1980. On December 11, 1980, judgment was entered against Woma for $268,691.45 after Woma failed to respond to notice of a hearing to determine damages under the default judgment. Eleven days after being informed that the Hritzes intended to execute on the judgment Woma filed a motion to set aside the default judgment claiming that it had not distributed the machine that injured

15. 732 F.2d at 1180. Specifically, Woma was informed in the letter of Mr. Hritz's claims regarding his injuries and his ongoing treatment and Mrs. Hritz's claim for loss of consortium. Id. at 1180, 1186 app. Additionally, Woma delayed giving relevant information to its insurance carrier. Id. at 1183. Woma's insurance carrier was notified of the Hritzes' claims and immediately referred the claims to two investigative agencies. Hritz, 92 F.R.D. at 365. Woma did not respond to either investigative agency until nearly nine months after Woma's insurance carrier had initially notified the agencies of the claims. 732 F.2d at 1183.

16. 732 F.2d at 1180. The Hritzes' complaint, which asserted that Mr. Hritz's injuries were due to the "failure of a coupling on a high-pressure hydraulic hose," was filed in the United States District Court for the Western District of Pennsylvania. Id. Plaintiffs were only able to allege that the machine was either manufactured by Woma or sold and distributed by Woma for a West German manufacturer, since the machine's history was unavailable due to Woma's earlier failure to reply. Id. See supra note 15 and accompanying text. However, Woma, through its agents and insurance investigators, apparently knew three months before the instant action was filed that it probably did not manufacture or distribute the machine. Hritz, 92 F.R.D. at 367.

Additionally, Mining Progress, Inc. was later impleaded as a third party defendant due to an insurance investigator's findings. Id. at 365. An insurance investigator for Woma believed that the pump was manufactured by Woma's West German parent and then sold to a German company which installed the pump in a mining system. Id. In turn, the investigator concluded that the mining system was then distributed in the United States by Mining Progress. Id.

17. 732 F.2d at 1180. The Hritzes' motion was filed pursuant to Rule 55 of the Federal Rules of Civil Procedure. Id. For a more detailed discussion of rule 55, see supra notes 1 & 3 and accompanying text.

18. 732 F.2d at 1180. The Third Circuit stated in the text of its Hritz opinion that the judgment for both plaintiffs was for $168,691.45. Id. However, in an appendix to its opinion, the court acknowledged that Mrs. Hritz was awarded $100,000 for loss of consortium in addition to Mr. Hritz's award of $168,691.45. Id. at 1186 app.

19. Id. at 1180. The notice, which advised all parties that a hearing on damages would be conducted on October 1, 1980, was mailed on September 8, 1980. Id.

20. Id. The attorney for the Hritzes informed Woma by telephone on January 19, 1981 that execution would be issued on the judgment. Id. Also, a letter confirming the telephone call was mailed to Woma. Id.
Hritz.\(^{21}\) The district court denied this motion,\(^{22}\) and Woma appealed to the Third Circuit asserting that the district court abused its discretion in entering a default judgment.\(^{23}\)

Judge Adams, writing for a unanimous panel,\(^{24}\) began his analysis by recognizing that the discretionary power of the district court to enter a default judgment\(^{25}\) is balanced against the presumption that cases should be decided on the merits whenever practicable.\(^{26}\) However, Judge Adams noted that the exercise of such discretion is not subject to a rigid formula or a per se rule, but rather to a consideration of three factors.\(^{27}\)

Judge Adams stated that the threshold issue in opening a default judgment is whether the defendant has asserted a meritorious defense.\(^{28}\) The court explained that for purposes of reviewing a default judgment, a meritorious defense is presumptively established when a defendant's answer, if proven at trial, would establish a complete de-
Judge Adams then went on to agree with the district court that Woma's claim that it had not distributed the machine that injured Hritz, if proven at trial, would relieve Woma of liability and thus would establish a meritorious defense.

With respect to the second factor—whether the plaintiff will be prejudiced if the default is set aside—Judge Adams concluded that the trial judge did not fully address this issue because "he found the defendant's conduct to be so irresponsible as to preclude opening the default judgment." Despite the lower court's failure to address the issue of prejudice, Judge Adams suggested that Woma's consistent failure to respond threatened plaintiffs with the "gravest prejudice"—having their claim barred completely by the statute of limitations. Judge Adams nevertheless acknowledged that the district court must consider the effectiveness of alternative "lesser sanctions" against the defendant re-

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29. 732 F.2d at 1181 (quoting Tozer, 189 F.2d at 244). Judge Adams noted that since the defaulting party does not need to establish a meritorious defense beyond doubt in its pleadings, Woma did not have to establish beyond doubt that it did not manufacture or distribute the pump. Id.

30. 732 F.2d at 1181. Based on its allegation that it did not manufacture or distribute the pump, Woma asserted that the West German manufacturer of the machine would be held responsible for Hritz's injury. Id.

31. Id. The court, in a footnote, commented that the relation between Woma and its West German manufacturer should be regarded as an equitable consideration in deciding whether to open the default judgment. Id. at 1181 n.2. The court explained that "[t]he claim that the wrong party was saddled with the judgment would appear to be much less compelling in the case of two inter-related corporate entities fully capable of adjusting any inequities between themselves than in the case of an inadvertently involved, independent party." Id.

32. For a discussion of the prejudice factor, see supra note 6 and accompanying text and infra notes 55-58 and accompanying text.

33. 732 F.2d at 1181. In discussing whether the Hritzes had been prejudiced by Woma's conduct, the district court made such statements as: "it might be argued that plaintiffs' own inaction for two years after the plaintiff husband's accident, and not Woma's failure to plead, precipitated this particular prejudice" and "for the purposes of this motion, we assume the plaintiffs' problem with the statute of limitations is of their own making." Id. (quoting Hritz, 92 F.R.D. at 367) (emphasis added by court). The Third Circuit concluded from the use of language such as "it might be argued" and "we assume" that the district court did not find it necessary to reach the issue of prejudice. 732 F.2d at 1181.

34. 732 F.2d at 1182. Judge Adams noted that Woma's consistent failure to respond when it could have quickly verified its participation in the sale or handling of the specified machine in effect forced the Hritzes to allege Woma's responsibility for the machine. Id. Judge Adams explained that "[g]iven Woma's conduct, it would not have mattered whether plaintiff filed suit one day or six months prior to the expiration of the statute of limitations; Woma's failure to answer any communication would have created a time bar to proceeding against other parties, regardless of the filing date." Id. Judge Adams indicated that prejudice of such high degree, resulting from defendant's own conduct, should "weigh substantially" in favor of upholding a default judgment. Id.
gardless of the seriousness of the prejudice. However, Judge Adams concluded that in Hritz the district court's action in refusing to set aside the default judgment was "consistent with the requirement that the non-defaulting party not be prejudiced."

The Third Circuit then addressed the third factor, which was announced in Farnese v. Bagnasco and reiterated in Feliciano v. Reliant Tooling Co. and Gross v. Stereo Component Systems, Inc.: whether the defendant's conduct in allowing the default was willful or in bad faith.

35. Id. at 1182 (citing Titus v. Mercedes Benz of N. Am., 695 F.2d 746, 749 (3d Cir. 1982), aff'd mem., 723 F.2d 898 (1983); Donnelly v. Johns-Manville Sales Corp., 677 F.2d 339, 342 (3d Cir. 1982); Farnese, 687 F.2d at 765-66). In Titus, the court noted that "dismissal is a drastic sanction and should be reserved for those cases where there is 'a clear record of delay or contumacious conduct' " and also that "it is necessary for the district court to consider whether lesser sanctions would better serve the interests of justice." Titus, 695 F.2d at 749 (quoting Donnelly, 677 F.2d at 342). The court recognized that possible sanctions may include: "a warning, a formal reprimand, placing the case at the bottom of the calendar, a fine, the imposition of costs or attorney fees. . . ." Titus, 695 F.2d at 749 n.6 (citing Zavala Santiago v. Gonzalez Rivera, 553 F.2d 710, 712 n.1 (1st Cir. 1977)). See also Farnese, 687 F.2d at 766 (court suggested that posting security and payment of costs and reasonable counsel fees could constitute sufficient sanctions).

36. 732 F.2d at 1182. The court stated that it came to this conclusion regardless of whether the issue was framed as "a requirement that lesser sanctions be considered or as a rule that a default not be opened at the expense of an innocent plaintiff." Id. Judge Adams specifically voiced concern that because plaintiffs' claims against the West German manufacturer were now time barred, lifting the default judgment would in effect reward Woma for its delay. Id.

The court suggested, however, an alternative means to avoid the harsh result under the statute of limitations. The district court could require that Woma waive the statute of limitations on behalf of its parent, the West German manufacturer, as a condition of opening the default judgment. Id. at 1182 n.3. Additionally, the district court recognized that the plaintiffs could still proceed against Mining Progress, the second defendant to the action. Hritz, 92 F.R.D. at 367. For a discussion of Mining Progress' relationship to the case, see supra note 16 and accompanying text.

37. 687 F.2d 761, 764 (3d Cir. 1982). For a discussion of Farnese, see supra note 9 and accompanying text.

38. 691 F.2d 653 (3d Cir. 1982). For a discussion of Feliciano, see infra note 40 and accompanying text.

39. 700 F.2d 120 (3d Cir. 1983). For a discussion of Gross, see infra note 40 and accompanying text.

40. Farnese, 687 F.2d at 764. The Third Circuit also noted in Farnese that "material bad faith conduct by the defendant subsequent to the entry of default can, if sufficiently egregious, provide the basis for refusing to set aside a default." Id. at 765 (emphasis added).

In Feliciano, the district court entered a default judgment when the defendant, which was incorporated in the United Kingdom, failed to appear at trial or otherwise defend. 687 F.2d at 654. On appeal, the Third Circuit cited Farnese and acknowledged that in deciding whether to set aside the default judgment it had to consider the defendant's culpability, i.e., whether the defendant acted willfully or in bad faith. Id. at 657. The Third Circuit concluded that the defendant's statement that it was "puzzled" by the form of process did not demonstrate any bad faith by the defendant. Id.
The *Hritz* court, in reaffirming the willfulness/bad faith standard, explained that "as a threshold matter more than mere negligence [must] be demonstrated." In clarifying the standard, Judge Adams stated that willfulness or bad faith could exist (1) where the defendant intentionally fails to respond to court notices or (2) where the defendant acts with reckless disregard to repeated requests from the court and plaintiffs, and at the same time fails to investigate the source of a serious injury. However, the Third Circuit concluded that because the district court ruled on the default judgment before the standard for culpable misconduct was developed in *Feliciano* and *Gross*, the case should be remanded so that the district court could evaluate the defendant's "willfulness" or "bad faith."

In *Gross*, a default judgment was entered when the defendant failed to answer. On appeal, the Third Circuit cited *Feliciano* and found that a "serious breakdown in communication" between the defendant's general counsel and its local counsel did not demonstrate willfulness or bad faith. Id. at 124. For a further discussion of the willfulness/bad faith standard, see supra note 9 and infra notes 59-63 and accompanying text.

The court warned that the terms "willfulness" and "bad faith" are simply a means of guiding a district court in establishing what is "culpable conduct," and should not be mistaken for "talismanic incantations" which alone resolve the issue on appeal. Id. at 1182-83. The court further explained that "[t]he entry of a default judgment may be as proper in a case where these terms never appear as it is improper where the terms are invoked in support of arbitrary procedural adjudication." Id. at 1183.

The Third Circuit added that in deciding whether the default judgment was a result of the defendant's own culpable misconduct, the district court should properly consider whether the distributor or manufacturer had "an appropriate internal procedure for processing claims resulting from a malfunctioning product." Id. at 1184. The court stated that a manufacturer and distributor of a product must be aware of the possibility that the product may injure someone. Id. at 1183. However, the court explained that the purchase of liability insurance by the manufacturer or distributor does not end their responsibility for the product. Id. at 1183-84. The Third Circuit equated the absence of an internal procedure for processing claims arising from a malfunctioning product with the manufacturer's or distributor's disregard for the possibilities of injuries resulting from a malfunctioning product. Id. at 1183.

Also, the Third Circuit raised the possibility of another source of culpable misconduct on the part of Woma: reckless disregard by not responding to its insurance carrier. Id. at 1183. For a discussion of Woma's failure to respond to its insurance carrier, see supra note 15 and accompanying text.

*Hritz* in 1981, one year before *Feliciano* and two years before *Gross*. Thus, the Third Circuit concluded that the district court was unaware of the necessity of a finding of willfulness or bad faith in order to establish culpable misconduct on the part of the defendant. *Id.* at 1183. The Third Circuit observed that "[w]hile neglect alone cannot sustain a default judgment, it goes without saying that the Hritzes should not be deprived of a judgment if the district court finds Woma guilty of culpable conduct as set forth above." *Id.* Moreover, the Third Circuit recognized that although "[o]n the face of the record, there is sufficient evidence from which a trial court could have found culpable conduct," the ultimate determination is for the district court. *Id.* For a discussion of the Third Circuit's previous
In a concurring opinion, Judge Garth emphasized that the Third Circuit has adopted a liberal standard\(^\text{44}\) regarding default judgments and stressed that it is the function of the district court, and not the circuit court, to make findings of fact.\(^\text{45}\) Judge Garth devoted the balance of his opinion to reiterate Judge Adams’ reasoning that the case should be remanded to the district court for more explicit factual findings regarding prejudice to the plaintiff\(^\text{46}\) and the willfulness or bad faith of Woma’s conduct.\(^\text{47}\)

The decision in *Hritz* reinforces a line of recent Third Circuit cases which have redefined culpable misconduct from inexcusable neglect to willfulness or bad faith on the part of the defendant.\(^\text{48}\) Under this new standard as interpreted in *Hritz*, only intentional conduct or acts of reckless disregard by the defendant will be sufficient to support a finding of “willfulness” or “bad faith.”\(^\text{49}\) It is submitted that the *Hritz* court’s interpretation will clarify the standard which district courts are to apply in determining whether the defendant’s conduct was culpable.\(^\text{50}\)

“excusable neglect” standard for the third factor, see *supra* note 9 and accompanying text.

\(^{44}\) 732 F.2d at 1186 (Garth, J., concurring) (citing *Gross*, 700 F.2d at 122).

\(^{45}\) 732 F.2d at 1186 (Garth, J., concurring). Judge Garth explained that the Third Circuit’s discussion of the facts in *Hritz* cannot bind the district court in its ultimate findings of fact. *Id.*

\(^{46}\) *Id.* at 1186-87 (Garth, J., concurring). Judge Garth agreed with Judge Adams that the district court’s discussion of prejudice fell short of an unequivocal finding of fact because of the ambiguous phraseology employed by the district court. *Id.* For a discussion of the majority’s analysis of the prejudice issue, see *supra* notes 32-36 and accompanying text.

\(^{47}\) *Id.* at 1187-88 (Garth, J., concurring). Judge Garth recognized, as did Judge Adams, that the district court erred by failing to address whether Woma’s conduct was willful or in bad faith. *Id.* at 1187 (Garth, J., concurring). He noted that the district court instead had used the “excusable neglect” standard and found that there was nothing in the record which supported a finding of “excusable neglect.” *Id.* Judge Garth also noted that the meritorious defense factor required no additional findings because the plaintiffs did not contest the district court’s findings. *Id.* For a discussion of the district court’s findings in regard to Woma’s assertion of a meritorious defense, see *supra* notes 30-31 and accompanying text.

\(^{48}\) See §55,518.05 in *United States Currency*, 728 F.2d at 195; *Gross*, 700 F.2d at 122; *Feliciano*, 691 F.2d at 656; *Farnese*, 687 F.2d at 764. For a discussion of the Third Circuit’s rejection of the “excusable neglect” standard, see *supra* note 9 and accompanying text.

\(^{49}\) See *Hritz*, 732 F.2d at 1183. For a discussion of the *Hritz* court’s interpretation of willfulness or bad faith, see *supra* note 42 and accompanying text.

\(^{50}\) Prior to the *Hritz* decision, the Third Circuit had not attempted to define “willfulness” or “bad faith.” See §55,518.05 in *United States Currency*, 728 F.2d at 195; *Gross*, 700 F.2d at 122-24; *Farnese*, 687 F.2d at 764-66; *Feliciano*, 691 F.2d at 656-57. As a result, there was confusion among district courts in determining how to apply the culpable misconduct standard. *See*, e.g., *Lasky v. Continental Prods. Corp.*, 97 F.R.D. 716 (E.D. Pa. 1983). Even after the Third Circuit adopted the willfulness/bad faith standard in *Farnese*, the United States District Court for the Eastern District of Pennsylvania focused on whether the defendant’s failure to answer was excusable. *Lasky*, 97 F.R.D. at 717 (citing *Farnese*, 687
Despite this clarification of the culpability issue and the equitable appearance of the three-factor analysis, it is submitted that application of the three factors will result in a virtually irrebuttable presumption in favor of setting aside default judgments. First, the Third Circuit recognizes that a meritorious defense is "presumptively established when the 'allegations of defendant's answer, if established on trial would constitute a complete defense to the action.'"\textsuperscript{51} Moreover, the Third Circuit clearly indicated in the \textit{Farnese} court's citation to \textit{Keegle v. Key West & Caribbean Trading Co.}\textsuperscript{52} that a meritorious defense can be established by the defendant if his allegations contain "even a hint of a suggestion" of a complete defense.\textsuperscript{53} As a result of this lenient standard, the defendant will normally have little difficulty in meeting this threshold requirement.\textsuperscript{54}

Second, in most cases the plaintiff will have a difficult time establishing that he will be unduly prejudiced if the default is set aside.\textsuperscript{55} One reason for such difficulty is the Third Circuit's observation that "[d]elay in realizing satisfaction on a claim rarely serves to establish the degree of prejudice sufficient to prevent the opening [of] a default judgment."\textsuperscript{56}

\textbf{F.2d 761; Medunic v. Lederer, 533 F.2d 891 (3d Cir. 1976)). Interestingly, the \textit{Lasky} court cited both \textit{Medunic}, which used the excusable neglect standard, and also \textit{Farnese}, which developed the willfulness/bad faith standard. See \textit{Farnese}, 687 F.2d at 764; \textit{Medunic}, 535 F.2d at 893.

It is submitted that the \textit{Hritz} court's interpretation of the \textit{Farnese} willfulness/bad faith standard will make it easier for district courts to assess the culpability of a defaulting defendant's misconduct under this standard. The \textit{Hritz} decision makes it very clear that willfulness or bad faith, not mere inexcusable neglect, must be present, and it specifically interprets willfulness or bad faith as requiring intentional or reckless conduct. See \textit{Hritz}, 732 F.2d at 1182-84. Similarly, the Third Circuit's clarification of the \textit{Farnese} standard in the \textit{Hritz} opinion should serve as a sufficient guideline for the district court to follow on the remand of \textit{Hritz}.

51. 732 F.2d at 1181 (quoting \textit{Tozer}, 189 F.2d at 244).
52. 627 F.2d at 372 (D.C. Cir. 1980).
53. See \textit{Farnese}, 687 F.2d at 764 (citing \textit{Keegle}, 627 F.2d at 374). In \textit{Keegle}, the court noted that although the defendant's allegation was "somewhat broad and conclusory, those allegations adequately [met] the meritorious defense criterion for setting aside the default." 627 F.2d at 374. See also \$55,518.05 in \textit{United States Currency}, 728 F.2d at 197-98 (Garth, J., dissenting) (discussing \textit{Keegle} court's standard for establishing meritorious defense).
54. See, e.g., \textit{Farnese}, 687 F.2d at 764; \textit{Gross}, 700 F.2d at 123; \textit{Feliciano}, 691 F.2d at 657. But see \$55,518.05 in \textit{United States Currency}, 728 F.2d at 196 (defendant had not established meritorious defense to particular statutory charge involved).
55. Although the Third Circuit has stated the principle that the plaintiff will suffer from prejudice if his ability to pursue his claim will be hindered by setting aside the default, the court rarely makes an actual finding of prejudice. See \textit{Farnese}, 687 F.2d at 764; \textit{Gross}, 700 F.2d at 123; \textit{Feliciano}, 691 F.2d at 657. For a discussion of the prejudice factor, see supra notes 6 & 32-36 and accompanying text.
56. \textit{Feliciano}, 691 F.2d at 656-57 (emphasis added). In \textit{Feliciano}, the court also found that the prejudice that the plaintiff would suffer from the "financial costs associated with enforcing a judgment later vacated," was insufficient to
Consequently, the prejudice issue is usually dealt with summarily by the district court. Additionally, the Third Circuit may be hesitant to focus on the prejudice factor since prejudice often can be rectified through the district court's power under Federal Rule of Civil Procedure 60(b) to impose terms and conditions upon the opening of a default judgment.

As a result of the lack of emphasis by the Third Circuit on the first two factors, the primary focus of the court in deciding whether to set aside a default judgment will be on the third factor. Under the Hritz court's interpretation of culpable misconduct, the defendant's intentional or reckless conduct must be established. It is submitted that this requirement will impose a far greater task upon plaintiffs seeking to sustain default judgments than they experienced under the previous "excusable neglect" standard. Moreover, the Third Circuit in Hritz failed to designate which party has the burden of proof with regard to its weighing against having the default set aside. Id. at 656. The court explained that the plaintiff did not assert "loss of available evidence, increased potential for fraud or collusion, or substantial reliance upon the judgment to support a finding of prejudice." Id. at 657.

57. See, e.g., Gross, 700 F.2d at 123; Farnese, 687 F.2d at 764; Medunic, 533 F.2d at 893; Tozer, 189 F.2d at 246.

58. Feliciano, 691 F.2d at 657 (citing Wokan, 485 F.2d at 1234-35). See Fed. R. Civ. P. 60(b) (court may grant relief from default judgment "[o]n motion and upon such terms as are just").

In Wokan, the Third Circuit recognized that federal courts have rarely had occasion to discuss what terms and conditions should be imposed upon opening a default judgment. Wokan, 485 F.2d at 1234. However, the court did recognize that payment of costs or attorney fees was the most commonly imposed condition. Id. Another condition that the court discussed was the posting of a bond to secure a judgment. Id. See also Hritz, 732 F.2d at 1182 n.3 (on remand district court "could consider requiring, as a condition of opening the default judgment, that Woma waive the statute of limitations on behalf of its parent corporation in Germany"). For a discussion of the Hritz court's suggestion that the statute of limitations may be waived, see supra note 36 and accompanying text.

59. 732 F.2d at 1183. For a discussion of the Hritz court's interpretation of the willfulness/bad faith standard, see supra note 42 and accompanying text.

60. Prosser and Keeton have noted that in its most common usage intent requires three elements:

(1) it is a state of mind (2) about consequences of an act (or omission) and not about the act itself, and (3) it extends not only to having in the mind a purpose (or desire) to bring about given consequences but also to having in mind a belief (or knowledge) that given consequences are substantially certain to result from the act.

W. PROSSER & W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 8, at 34 (5th ed. 1984) (footnotes omitted) (emphasis in original). Also, the usual meaning of reckless is "that the actor has intentionally done an act of an unreasonable character in disregard to a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." Id. § 34, at 213 (footnotes omitted). Consequently, under both the intent and recklessness definitions, the defendant's state of mind must be established. On the other hand, "[n]egligence is conduct, and not a state of mind. In most instances, it is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from his act." Id. § 31, at 169. It is submitted that it
new culpability standard. Unlike an “excusable neglect” standard which seems to place the burden on the defendant to show that his conduct was “excusable”, it is submitted that the Third Circuit’s adoption of the willfulness/bad faith standard implies that the plaintiff has the burden of establishing the defendant’s intentional or reckless conduct. Consequently, most plaintiffs will have an unreasonably difficult task in establishing culpable misconduct under the willfulness/bad faith standard.

It is submitted that as a result of the Third Circuit’s uneven application of the three-factor analysis, an inequitable presumption in favor of setting aside a default judgment is created. It is further submitted that this presumption was reaffirmed in Hritz without adequate consideration of its undesirable ramifications. The Third Circuit failed to consider that, as a result of the presumption, a defendant might fail to concern himself with deadlines for filing pleadings or otherwise defending, because of the relative ease with which he could get a default judgment set aside. It is submitted that this lack of incentive to adhere to court deadlines could result in a serious abuse of court resources.

would be much easier to establish a defaulting defendant’s external conduct than his internal state of mind.

61. See Hritz, 732 F.2d at 1183. See also Farnese, 687 F.2d at 764; Tozer, 189 F.2d at 246.

62. See Hritz, 92 F.R.D. at 367 (“we decline to set aside the default judgment entered against Woma because we believe Woma [the defendant] has utterly failed to indicate its failure to plead was occasioned by excusable neglect”); Reid v. Liberty Consumer Discount Co., 484 F. Supp. 435, 441 (E.D. Pa. 1980) (motion to set aside default judgment denied because “the defendant has failed to carry its burden of showing ‘excusable neglect,’ as required by Rule 60(b”).

63. See Farnese, 687 F.2d at 764 (in vacating default judgment under willfulness/bad faith standard, court considered plaintiff’s failure to “point to” evidence suggesting willfulness or bad faith of defendant).

It is submitted that placing the burden of proving willfulness or bad faith on the plaintiff may encourage fraud or collusion on the part of the defaulting defendant, who will be secure in the knowledge that his default will be set aside unless his dilatory tactics clearly manifest his willfulness or bad faith.

64. Although the Third Circuit has consistently emphasized that “[a]ny doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits,” it is submitted that this presumption may extend to instances where there is not “any doubt.” See Gross, 700 F.2d at 122 (doubtful cases should be resolved in favor of party moving to set aside default judgment); Tozer, 189 F.2d at 245 (same). For a discussion of the Third Circuit’s preference to decide cases on their merits, see supra note 26 and accompanying text.

65. See Hritz, 732 F.2d at 1178-88.

66. The Third Circuit has recognized that default judgments must be available to the district courts in order to penalize those who persistently fail to respond and especially to deter others from such conduct. Id. at 1184 (citing National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642-43 (1976)).

67. It is submitted that the relative ease with which a defendant can set aside a default judgment will enlarge the caseload of the district courts because
ally, the Third Circuit failed to adequately consider the significant loss of time and money a plaintiff faces if his defendant can unduly procrastinate. Despite the Third Circuit's emphasis that equitable principles require that the defendant be given a fair opportunity to litigate, it is submitted that this should not occur at the expense of an innocent plaintiff.

It is suggested that the following measures would help to balance the rights and expectations of parties in default judgment situations. First, the defendant should be required to establish a meritorious defense by more than a mere allegation that such a defense exists. For example, the defendant could be required to demonstrate the likelihood of the success of his defense at trial. Second, the scope of the prejudice factor should be broadened. Specifically, the district court should they will be forced to hear these cases on their merits. See, e.g., Tri-Continental Leasing Corp. v. Zimmerman, 485 F. Supp. 495, 497 (N.D. Cal. 1980) (judicial economy and efficiency would be sacrificed if lenient meritorious defense standard were adopted).

68. In Hritz, for example, Woma was informed of the plaintiffs' claims on January 17, 1979. 732 F.2d at 1180. It was not until January 30, 1981, over two years later, that Woma first responded by seeking a motion to set aside the default judgment. Id. As a result of this motion, the plaintiffs' recovery was further postponed until the district court considered the motion. See Hritz, 92 F.R.D. 364. Even after the district court decided in favor of the plaintiffs and refused to set aside the default judgment, the matter was appealed by the defendant. On April 23, 1984, the Third Circuit remanded the issue back to the district court. 732 F.2d at 1185. Thus, more than four years after the default judgment was entered, the parties are still litigating the issue. As a result, the plaintiffs have undoubtedly lost a significant amount of time and money.

69. For a discussion of the Third Circuit's preference to have cases decided on their merits, see supra note 26 and accompanying text.

70. See $55,518.05 in United States Currency, 728 F.2d at 195 (mere allegation of defense sufficient); Farnese, 687 F.2d at 764 (same); Tozer, 189 F.2d at 244 (same). For a discussion of the criteria used to establish a meritorious defense, see supra notes 29 & 51-54 and accompanying text.

71. See Tri-Continental Leasing Corp. v. Zimmerman, 485 F. Supp. 495 (N.D. Cal. 1980). The Zimmerman court explained that “[c]ontrary authority indicating that the party in default need only allege a meritorious defense... must be disregarded... Such a rule would overemphasize the policy of disposing of cases on the merits at the expense of the counterbalancing considerations of judicial economy and efficiency.” Id. at 497 (citation omitted). The court then proceeded to analyze the merits of the defendant’s claim on the meritorious defense issue. See id. at 498-501. Essentially, the court analyzed the defendant’s defense arguments and searched the record for competent evidence supporting those arguments. Id.

The Tenth Circuit has similarly posited that “the rule relating to relief from default judgments contemplates more than mere legal conclusions, general denials, or simple assertions that the [defendant] has a meritorious defense... The rule requires a sufficient elaboration of facts to permit the trial court to judge whether the defense, if [defendant’s] version were believed, would be meritorious.” Olson v. Stone, 588 F.2d 1316, 1319 (10th Cir. 1978) (citations and footnote omitted).

72. For a discussion of the prejudice factor, see supra notes 6 & 55-58 and accompanying text.
recognize delay in realizing satisfaction on a claim as prejudicial in circumstances where the expense and the loss of time are great. Third, the district court should consider more frequent use of its power to impose terms and conditions upon the opening of a judgment, in particular by awarding the plaintiff attorneys fees or other costs of delay resulting from the defendant’s conduct.

While the aforementioned alternatives could help produce a more equitable result for the parties involved, it is suggested that the most effective solution would be a return to the “excusable neglect” standard. Specifically, the “excusable neglect” standard, unlike the willfulness/bad faith standard, allows the court to consider the defendant’s neglect in determining whether to set aside the default judgment. Furthermore, the “excusable neglect” standard places the burden on the defendant to demonstrate that his conduct was excusable. Thus, a

73. The court currently does not recognize delay as a sufficient degree of prejudice to weigh against having the default set aside. See Tozer, 189 F.2d at 246. It is submitted that one of the reasons the court rarely finds that the plaintiff will be prejudiced if the default is set aside is because the burden of proving prejudice is on the plaintiff. See Gross, 700 F.2d at 123 (plaintiff did not claim it would be prejudiced); Farnese, 687 F.2d at 764 (plaintiff did not “point to” any evidence of prejudice in record). It is suggested that perhaps the court should independently consider whether the plaintiff will be prejudiced when the court finds evidence of prejudice on the face of the record.

74. See Medunic, 533 F.2d at 894 (cost of appeal placed on defendant). For a discussion of the court’s power to impose terms and conditions upon opening a default judgment, see supra note 58 and accompanying text.

75. The majority of the circuits have adopted this standard, consistent with the language of Rule 60(b)(1) of the Federal Rules of Civil Procedure, which lists “excusable neglect” as one reason for relieving a party from a default judgment. See Robinson v. United States, 734 F.2d 735 (11th Cir. 1984); United States v. $48,595, 705 F.2d 909 (7th Cir. 1983); American & Foreign Ins. Ass’n v. Commercial Ins. Co., 575 F.2d 980 (1st Cir. 1978); Clarke v. Burke, 570 F.2d 824 (8th Cir. 1978); Greater Baton Rouge Golf Ass’n v. Recreation & Park Comm’n, 507 F.2d 227 (5th Cir. 1975); Gomes v. Williams, 420 F.2d 1364 (10th Cir. 1970); Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969).

In addition, Pennsylvania state law requires that the defendant’s conduct be “excusable” in order for the default to be opened. See Balk v. Ford Motor Co., 446 Pa. 137, 141, 285 A.2d 128, 131 (1971) (defendant must be able to reasonably excuse or justify his failure to appear or answer); In re McCauley’s Estate, 478 Pa. 83, 88, 385 A.2d 128, 131 (1978) (same).

However, the Third Circuit is not alone in its adherence to the willfulness/bad faith standard. See Falk v. Allen, 739 F.2d 461 (9th Cir. 1984); United Coin Meter Co. v. Seaboard Coastline R.R., 705 F.2d 898 (6th Cir. 1983); Meehan v. Snow, 652 F.2d 274 (2d Cir. 1981); Jackson v. Beech, 636 F.2d 831 (D.C. Cir. 1980).

76. The “excusable neglect” standard makes it easier for the plaintiff to sustain his default judgment because under that standard the defendant’s inexcusable neglect may preclude setting aside the default judgment, whereas the presence of the same inexcusable neglect, in the absence of proven willfulness or bad faith, will not prevent the court from setting aside a default judgment under the Hritz standard. See Hritz, 732 F.2d at 1183. For a discussion of the culpability issue, see supra note 9 and accompanying text.

77. For cases placing on the defendant the burden of proving that his negli-
return to the "excusable neglect" standard would more evenly balance the interests of the plaintiff and defendant.

Although the Hritz court's articulation of the three-factor default analysis will likely be followed without hesitation by the lower courts, it is suggested that future circuit courts must focus more concretely on the implications of the standard for plaintiffs and for the court system as a whole. As it now exists, the Third Circuit's formidable presumption in favor of setting aside default judgments lessens their usefulness in penalizing defendants who persistently fail to respond to the court or to their opponent, and in deterring others from deliberately, recklessly, or negligently engaging in such conduct.\(^{78}\)

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gence was excusable, see _supra_ note 62. It is submitted that the burden of proof for setting aside a default judgment properly belongs on the defendant. This conclusion is warranted by the analogous rationale for placing the burden of proving a defendant's negligence on the plaintiff: "[Plaintiff] is asking the court for relief, and must lose if his case does not outweigh that of the defendant's." _W. Prosser & W. Keeton, supra_ note 60, § 38, at 239 (footnote omitted). Similarly, in seeking to set aside a default judgment, the defendant is asking the court for relief and should not have the default set aside unless his evidence outweighs the plaintiff's.

78. For a discussion of the utility of default judgments, see _supra_ note 66 and accompanying text.