OVERTURNING DEFAULT JUDGMENTS IN IOWA: A PROPOSAL FOR CHANGE

I. INTRODUCTION

The default judgment is an anomaly in the law. It is a chink in the armor of the advocacy system. While centuries of experience have molded substantive law to ferret out justice among competing interests, the default judgment redistributes thousands of dollars each year without the clash of disagreement. Few results are more welcome to the plaintiff or more painful to the defendant.[1]

Although the definition of default varies among jurisdictions, it is generally recognized as a failure on the part of the defendant to timely respond to any order of the court, usually an original notice.[2] In Iowa, for example, "timely" in most cases means within twenty days of receipt of the original notice.[3] Upon the failure of the defendant to respond within the allotted time, the defendant has defaulted. A judgment entered subsequent to the entry of default has all the validity of a judgment following a complete trial on the merits.[4]

There are several reasons why a party may default. The defendant may simply recognize that the plaintiff's claim is valid and is therefore willing to submit to liability. The party may be without assets, commonly referred to as "judgment proof," and may feel that mounting a defense is not worth the time or expense since any judgment granted will be uncollectable.

On the other hand there are a number of circumstances where the default will not be intentional. Whether it be because the party did not understand the significance of the papers served, because he incorrectly figured the time in which to file an appearance, because he was confused as to whose responsibility it was to answer or even because he has forgotten about the suit altogether, it quite often happens that a default is entered, even though the defendant had planned to contest the plaintiff's claim.

This Note will examine the safeguards which the law has provided to protect those defaulting parties who claim that, but for some kind of mistake, they would have appeared to protect their interests. There are other theories

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1. This is not to say that all default judgments are entered in favor of the plaintiff. Indeed the roles may be reversed as where the court dismisses a suit for want of prosecution. *See* Wharff v. Iowa Methodist Hosp., 219 N.W.2d 18 (Iowa 1974) (applying principles of review for default judgments to the plaintiff's application for reinstatement). *See also* Messenger v. United States, 231 F.2d 328, 331 (2d Cir. 1956).

2. At the outset, it is necessary to understand the distinction between the entry of a default, and a default judgment. *Default* is the technical term used to classify a party who has, in some way, failed to plead or otherwise defend. In contrast, a *default judgment* is a final adjudication entered as a consequence of a party's default.

The determination that a party is in default and a corresponding judgment are two distinct stages of the litigation process. The entry of default, of course, must precede the entry of a default judgment, at least technically. The entry of default is not a final judgment. However, a default and a default judgment may be entered simultaneously. *See* IOWA R. CIV. P. 230-32.

3. IOWA R. CIV. P. 53.

4. Moyer v. Mathas, 458 F.2d 431 (5th Cir. 1972).

upon which to attack default judgments but the discussion herein will be limited to those issues fitting under the broad category of "mistake."[5]

Further, this Note will focus on the Iowa default practices and theories, and compare it with those utilized by the federal judiciary. Finally, the public policy element of default judgments will be considered, and a revision of the existing practices suggested. In this manner, it is hoped that this Note will provide the practicing bar of Iowa with a complete guide on the subject of default judgments.

II. The Role of the Default Judgment in the Iowa Judicial System

A. *Historical Origins of the Default Judgment*

At common law a judgment given against a defendant who failed to answer was termed a judgment *nil dicit*, that is, the defendant "says nothing."[6] In the equity court a default was referred to as a decree *pro confesso* or "for confessed."[7] Upon entry of either, the determination of the amount of damages proceeded without the defendant being represented.[8] The power to set aside default judgments, like any other judgment, was inherent in the court and statutory authorization was not necessary.[9] However, this inherent power was rarely deemed sufficient to provide relief from default judgments entered upon the mistake or inadvertence of the defendant. Statutory authority later supplemented the court's power to vacate judgments.[10]

Iowa's first statutory treatment of default judgments was typical of most early legislative pronouncements.[11] The first Iowa Code in 1851 allowed a default to be overturned "on such terms as to the court may seem just" while requiring an affidavit of merits to accompany the motion and a showing of a "reasonable excuse."[12] This statute also required that the defendant file his motion to set aside during the term of the court in which the default had been

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5. This Note considers the relationship of Iowa rules 236 and 252. Rule 236 covers setting aside defaults and default judgments when the proper motion is filed within 60 days of the entry of the judgment. Rule 252 concerns vacating judgments within a year of their entry. Iowa R. Civ. P. 236, 252. *See generally* Huffman and Mockford, *Setting Aside Judgments Against the Absent Defendant*, 37 Tex. L. Rev. 208 (1958); Note, *Judgment - Vacation Because of Surprise or Neglect*, 31 N.C. L. Rev. 324 (1953).

6. H. Black, The Law of Judgments § 108 (2d ed. 1902).

7. Thomson v. Wooster, 114 U.S. 104 (1885).

8. *Id.* at 108. "[I]n default thereof the plaintiff may, at his election, enter an order (as of course) in the order book, that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*." *Id.* This procedure has been changed in modern practice. Today a defaulting party has the right to be heard at a hearing to set damages following entry of a default although the party does not have a right to notice when he has not made an appearance. Hansman v. Gute, 215 N.W.2d 339, 343 (Iowa 1974).

9. Black, *supra* note 6, at 453.

10. *Id.* at 511.

11. *Id.*

12. Iowa Code § 1827 (1851).

entered.[13] In the 1860 revision of the Iowa Code, a general section to vacate judgments was added.[14] That section allowed a motion to vacate after the court's term had ended when "unavoidable casualty or misfortune prevented the party from prosecuting or defending."[15] Both sections remained substantially unchanged until the adoption of the Iowa Rules of Civil Procedure in 1943.[16]

B. *The Present-Day Statutory Scheme*

In Iowa today, the entry of default and default judgments is governed by Iowa Rules of Civil Procedure 230 through 236.[17] Rule 230 defines default and enumerates those circumstances under which the entry of default is appropriate.[18] In this manner, Rule 230 goes well beyond the simplistic terms of its federal counterpart,[19] while still adhering to the same basic principle. In addition, the Iowa courts have consistently maintained a broad approach in their construction of default. The leading authority on this point is *Kirby v. Holman*,[20] wherein the Iowa Supreme Court defined default as a failure to take a step required in the progress of an action.[21] Thus, a party who files an

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13. *Id.*

14. IOWA CODE § 3499 (1860).

15. *Id.*

16. Section 1827 corresponds to section 11589 of the 1939 code. Section 3499 became section 12787. IOWA CODE §§ 12787, 11589 (1939).

17. IOWA R. CIV. P. 230-36 (1977).

18. Rule 230 provides that:

> A party shall be in default whenever he (a) fails to appear as required in rule 53 or 54, or has appeared, without thereafter filing any motion or pleading as stated in rule 87; or (b) fails to move or plead further as required in rule 86, unless judgment has already resulted under rule 87; or (c) withdraws his pleading without permission to replead, or withdraws his appearance or fails to present himself for trial; or (d) fails to comply with any order of court or do any act which permits entry of default against him under any rule or statute.

IOWA R. CIV. P. 230 (1977).

Effective July 1, 1979, the word "appear" in part (a) will be replaced by "serve, and within a reasonable time thereafter file, a written special appearance, motion or answer." This amendment is designed to avoid the confusion concerning what amounts to an appearance. IOWA R. CIV. P. ANN. 230 (Sept. Pamphlet 1978). *See generally* Annot., 73 A.L.R.3D 1250 (1976).

19. Rule 230 of the Iowa Rules of Civil Procedure is comparable to Federal Rule of Civil Procedure 55(a) in that both rules provide the basic definition of default. Federal Rule 55(a) provides for default whenever a party, against whom affirmative relief is sought, has "failed to plead or otherwise defend." FED. R. CIV. P. 55(a). For a complete comparison of the Iowa and Federal Rules on default, see notes 108-21 *infra* and accompanying text.

20. 238 Iowa 355, 25 N.W.2d 664 (1947).

21. *Id.* at 374, 25 N.W.2d at 674. The *Holman* case is also noteworthy because it demonstrates one of the exceptions to the entry of default. The *United States Code* protects persons serving in the military from default judgments. 50 U.S.C. app. § 520 (1976).

Section 520 requires that an application for a default judgment be accompanied by an affidavit stating that the defendant is not engaged in military service. It also provides that if such an affidavit is not filed, the court may not enter judgment until it is submitted and if the defendant is in military service the court is required to appoint an attorney to represent the defendant. *Id. See also* Brostow v. Pagano, 238 Iowa 1075, 29 N.W.2d 423 (1947) (determining

answer, but fails to appear at trial, is exposed to a possible default judgment.[22]

Rules 231[23] and 232[24] cover the entry of default and default judgments, respectively. Rule 233 provides that when a default judgment is taken in an action, other than one which is in rem, the clerk shall send notice to the defaulting party if the original notice was delivered to another person pursuant to rule 56.1(a).[25] However, failure to give such notice does not invalidate the judgment.[26] Rule 234 states that no personal judgment will be entered against a person served by publication, or by publication and mailing unless

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that the affidavit required under federal law is not jurisdictional but causes a default judgment, entered against a person serving in the military, to be voidable upon application).

Two other exceptions are contained in the Iowa rules. Rule 47 prohibits the entry of a default judgment in a class action. IOWA R. CIV. P. 47. Rule 231 requires that default judgments against persons who are under a legal disability or are prisoners be entered by the judge, not the clerk. IOWA R. CIV. P. 231. *See* IOWA R. CIV. P. 13 (1963) (providing for the appointment of a guardian ad litem before a judgment without a defense can be entered against a minor).

22. Gateway Co. v. Phillips & Phillips, 261 N.W.2d 175 (Iowa 1978); *see* Vaux v. Hensal, 224 Iowa 1055, 277 N.W. 718 (1938).

23. Rule 231 states that:

> If a party not under legal disability or not a prisoner in a reformatory or penitentiary is in default under rule 230(a), the clerk, on demand of the adverse party, must forthwith enter such default of record without any order of court. All other defaults shall be entered by the court.

IOWA R. CIV. P. 231.

24. Rule 232 provides that a:

> Judgment upon default shall be rendered as follows:
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> (a) Where the claim is for a sum certain, or which by computation, can be made certain, the clerk, upon request, shall make such computation as may be necessary, and upon affidavit that the amount is due shall enter judgment for that amount, and costs against the party in default.
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> (b) In all cases the court on request of the prevailing party, shall order the judgment to which he is entitled, and the clerk shall enter the judgment so ordered. . . . The court may, and on demand of any party not in default shall, either hear any evidence or accounting required to warrant the judgment or refer it to a master . . . or submit it to a jury. . . .

IOWA R. CIV. P. 232.

An amendment effective July 1, 1979, replaces "request" in 232(b) with "motion." IOWA R. CIV. P. ANN. 232 (Sept. Pamphlet 1978).

25. Rule 233:

> When any judgment other than one in rem has been taken by default against a party served with notice delivered to another person as provided in rule 56(a), the clerk shall immediately give written notice thereof, by ordinary mail to such party at his last known address, or the address where such service was had. The clerk shall make a record of such mailing. Failure to give such notice shall not invalidate the judgment.

IOWA R. CIV. P. 233.

Rule 56 was renumbered to 56.1 in 1975. It allows the notice to be served on a person residing in the defendant's home, if that person is older than 18 years of age. If the defendant lives in an apartment house, the notice may be served on a member of his family or the manager of the building. IOWA R. CIV. P. 56.1(a) (1977).

26. IOWA R. CIV. P. 233.

that party has appeared.[27] Rule 235 restricts the recovery of a default judgment to the amount demanded as reflected in the original notice unless the defaulting party has appeared.[28] Rule 236 covers the procedures and grounds for setting aside defaults and default judgments. It provides that:

> On motion and for good cause shown, and upon such terms as the court prescribes, but not ex parte, the court may set aside a default or the judgement thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty. Such motion must be filed promptly after the discovery of the grounds thereof, but not more than sixty days after entry of the judgment. Its filing shall not affect the finality of the judgment or impair its operation.[29]

Rule 236 does not distinguish between setting aside entries of default and default judgments. Motions to set aside defaults and subsequently taken default judgments are both tested against the standard of "good cause" which must fit into one of the available rationales—namely "mistake, inadvertence, surprise, excusable neglect or unavoidable casualty."[30] It is generally agreed that the rule has liberalized the pre-rules practice.[31] However, rule 236 places a limitation of sixty days following entry of judgment upon any motion brought under that rule.[32]

If a defendant fails to file a rule 236 motion within the sixty day period, the next step for his consideration is rules 252 and 253. Both rules are identical to their pre-rule statutory counterparts.[33] They allow for a vacation or modification of a judgment for "unavoidable casualty or misfortune," as long as the petition is filed within one year of the judgment.[34]

C. *Entry of Default*

Under normal circumstances, the entry of a default and the corresponding default judgment is not a difficult decision for the trial court to make. In the typical case the defendant has not responded in any form and the rules expressly provide for the proper result.[35] However, in some situations, the conclusion to enter a default judgment is not so easily reached. In such cases the question of whether to enter a default is largely within the discretion of

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27. Iowa R. Civ. P. 234.
28. Iowa R. Civ. P. 235.
29. Iowa R. Civ. P. 236.
30. Flexsteel Indus. Inc. v. Morbern Indus. Ltd., 239 N.W.2d 593, 596 (Iowa 1976); Williamson v. Casey, 220 N.W.2d 638, 639 (Iowa 1974).
31. Davis v. Glade, 257 Iowa 540, 544, 133 N.W.2d 683, 686 (1965); Hobbs v. Martin Marietta Co., 257 Iowa 124, 128, 131 N.W.2d 772, 775 (1964); Edgar v. Armored Carrier Corp., 256 Iowa 700, 705, 128 N.W.2d 922, 925 (1964).
32. For a discussion of the Iowa pre-rule time limitation on the entry of a motion to vacate, see note 13 *supra* and accompanying text.
33. The counterparts to rules 252 and 253 in the Iowa Code of 1939 were sections 12787 and 12790.
34. Iowa R. Civ. P. 252, 253.
35. *See, e.g.*, Kreft v. Fisher Aviation, Inc., 264 N.W.2d 297 (Iowa 1978).

the trial court.[36]

There are several factors which a court should consider before entering a default. Certainly the court must ascertain whether the defendant is within the personal jurisdiction of the court, and whether service of process has been made in accordance with the applicable rules of procedure.[37] Another key factor in the court's analysis should be the potential prejudice which the plaintiff may incur. In *Avery v. Peterson*[38] the Iowa Supreme Court affirmed a trial court's determination to overrule a motion for default where the defendant filed a timely appearance but failed to file a timely answer.[39] The court noted that the defendant was only "nominally" involved in the action, which was primarily directed at a separate party and that the late answer raised no new issues.[40]

Therefore, although the *Avery* plaintiffs failed to make an adequate showing of prejudice, it is evident that, given the appropriate factual situation, the Iowa courts will enter a default judgment on the basis of the potential prejudice to the plaintiff. Conversely, where the prejudice to the plaintiff is slight or not significant to the cause of action, as in *Avery*, the motion for default will normally be denied. Prejudice has also apparently been a key factor in those cases where the plaintiff was deemed to have waived the privilege to enter a default by proceeding with the case without first making a demand for default.[41]

D. *The Operation of Rules 236 and 252*

The victim of a default judgment should look first to rule 236 for relief. If the 60 day filing period for contesting the entry of the default has elapsed, the victim's next procedural consideration is rule 252. The following discussion adopts that order; first, consideration will be given to the fundamentals of a motion under rule 236; second, attacks under rule 236 will be analyzed through various basic factual patterns, and thereafter, what is required to

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36. Avery v. Peterson, 243 N.W.2d 630, 631-32 (Iowa 1976).

37. *See* Yox v. Durgan, 302 F. Supp. 1262 (E.D. Tenn. 1969) (denying a motion for default judgment where service of process was improper).

38. 243 N.W.2d 630 (Iowa 1976).

39. *Id.* at 631. It should be noted that two of the four *Avery* defendants, the Dickinson County Board of Review and the Dickinson County Auditor, did eventually file an answer. However, said answer was filed several months after the action was instituted, and only after the plaintiff's motion for default was filed. *Id.*

40. *Id.* at 631-32.

41. City of Des Moines v. Barnes, 237 Iowa 6, 20 N.W.2d 895 (1946). *See* Lanning v. Landgraf, 259 Iowa 397, 143 N.W.2d 644 (1966) (plaintiff's acquiescence in defendant's delay meant that the motion for default, which was filed after answer, should not be sustained). Professors Wright and Miller have suggested the following additional factors which should be considered in determining whether or not to enter a default judgment: the amount of money involved, whether the grounds for the default are clearly established, whether the default is largely technical and how harsh an effect a default judgment would have. *See* C. WRIGHT AND A. MILLER, FED. PRAC. AND PRO. § 2685 at 265-67 (1973). *See also* text accompanying notes 20-22 *supra*.

establish a meritorious defense will be commented upon. This will be followed by an analysis of cases which have been brought pursuant to rule 252.

The good cause test of rule 236, although restricted to the five grounds listed in the rule,[42] has undergone consistent judicial interpretation by the Iowa courts. The following quote from *Dealers Warehouse Co. v. Wahl & Associates*[43] is typical.

> What constitutes good cause . . . has been settled in our cases. Good cause is a sound, effective, truthful reason, something more than an excuse, a plea, apology, extenuation, or some justification for the resulting effect. The movant must show his failure to defend not due to his negligence or want of care or attention, or to his carelessness or inattention. He must show affirmatively he did intend to defend and took steps to do so, but because of some misunderstanding, accident, mistake, or excusable neglect failed to do so.[44]

Interjection of the concepts of negligence and intent necessarily require a close inspection of the facts in each case. Despite its reliance on these vague concepts, the Iowa Supreme Court has reached substantially consistent results.[45] Examined upon the basis of *who* is alleged to have caused the party's default, the court has followed a clear path of predictable decisions, with a few inevitable exceptions.

A trial court's decision in response to a motion to set aside a default judgment will be reversed only upon a showing that there has been an "abuse of discretion."[46] Generally, abuse of discretion has been found to exist only when there is a lack of substantial evidence to support the trial court's rul-

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42. *See* text accompanying note 30 *supra*.

43. 216 N.W.2d 391 (Iowa 1974).

44. 216 N.W.2d at 394-95 (citing Haynes v. Ruhoff, 261 Iowa 1279, 1281-82, 157 N.W.2d 914, 915-16 (1968)).

45. Besides the analysis development noted here, the Iowa Court has also consistently tended to affirm the trial court's decision. Excluding the cases that turned upon ancillary issues such as discovery, evidence or damages questions, the Iowa court has affirmed the trial court's refusal to set aside a default judgment under rule 236 a total of 10 times. The court has reversed the trial court's refusal to set aside three times, affirmed the trial court's decision to set aside in seven cases and reversed the trial court's decision to set aside only once.

In other fact patterns, the Iowa Supreme Court has reversed trial court decisions more readily. *See, e.g.*, Williamson v. Casey, 220 N.W.2d 638 (Iowa 1974) (incomplete record); Insurance Co. of N. America v. Sperry & Hutchison Co., 168 N.W.2d 753 (Iowa 1969) (improper use of hearsay testimony).

46. Paige v. City of Chariton, 252 N.W.2d 433, 437 (Iowa 1977); Flexsteel Indus. Inc. v. Morbern Indus. Ltd., 239 N.W.2d 593 (Iowa 1976); Hannan v. Bowles Watchband Co., 180 N.W.2d 221, 222 (Iowa 1970). The review of a denial or granting of a motion to set aside is not a *de novo* review but an action at law. Hansman v. Gute, 215 N.W.2d 339, 342 (Iowa 1974).

It was once consistently held that even in dissolution appeals, the review of a default judgment ruling was not *de novo*. Gordon v. Gordon, 200 N.W.2d 527, 528 (Iowa 1972); Svoboda v. Svoboda, 245 Iowa 111, 60 N.W.2d 859 (1953). However, the most recent pronouncement of the Iowa Supreme Court has not accepted the position advanced by *Svoboda* and *Gordon*. In re Marriage of Huston, 263 N.W.2d 697, 699 (Iowa 1978). The *Huston* court found that the proper review standard of a default dissolution decree is *de novo*. *Id.*

ing.[47] The often repeated policy of the Iowa Supreme Court is that the court is more reluctant to interfere with the granting of a motion to set aside a default than a denial of a motion to set aside.[48]

The meritorious defense element is not expressly required by the rules. However, it is clearly necessary that a defaulting party in a motion to set aside or vacate a default judgment allege a meritorious defense to the plaintiff's claim.[49] If it were otherwise, a defaulting party could usually successfully overturn the default, thereby merely delaying the inevitable result. It is clear that the policies of efficient civil procedure justify the grafting of this element upon the rule. An "affidavit of merits" was required prior to the adoption of the rules and generally this policy has been carried over into modern practice.[50]

Other threshold considerations include the nature of the burden placed on the moving party, and the power of precedents as authority. Of course, the burden is on the moving party to meet the standards set out in the rules. However, on at least two occasions, the Iowa Supreme Court has seemingly placed a heavier burden on the defaulting party.[51] In those situations, the court wrote that "the burden is upon the defendant-movant to plead and prove such good cause as will not only permit but require a finding of "mistake, inadvertence, surprise, excusable neglect or unavoidable casualty."[52] In most cases however, the burden has been limited to that needed to establish an abuse of discretion.[53] The authority of analogous factual situations has been somewhat downgraded in the default judgment cases. The court has explained that "precedents are of little aid in proceedings of this kind" and the facts in each case must rule its decision.[54]

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47. Paige v. City of Chariton, 252 N.W.2d 433, 437 (Iowa 1977); Smiley v. Twin City Beef Co., 236 N.W.2d 356, 360 (Iowa 1975). In another context the Iowa Supreme Court discussed "abuse of discretion" as follows:

> "Abuse of discretion" does not necessarily imply a dishonest motive or act; it is not ordinarily a term of reproach. There is no hard and fast rule by which to determine whether a court has abused its discretion. It arises from action beyond the bounds of fair discretion, exceeding the bounds of reason. It has been defined as "an erroneous conclusion and judgment, one clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom (citation omitted)."

Best v. Yerkes, 247 Iowa 800, 815-16, 77 N.W.2d 23, 32 (1956) (considering a motion to bring in third-party defendants). For a further discussion of what constitutes an abuse of discretion, see Fagg, *A Judge's View of Trial Practice*, 28 Drake L. Rev. 1, 4-9 (1979).

48. Flexsteel Indus. Inc. v. Morbern Indus. Ltd., 239 N.W.2d 593, 596 (Iowa 1976) (citing Insurance Co. of N. America v. Sperry & Hutchison Co., 168 N.W.2d 753, 756 (Iowa 1969)).

49. Flexsteel Indus. Inc. v. Morbern Indus. Ltd., 239 N.W.2d 593, 599 (Iowa 1976); Walters v. Williams, 203 N.W.2d 383, 385 (Iowa 1973).

50. *See* text accompanying note 12 *supra*.

51. *See* Hansman v. Gute, 215 N.W.2d 339 (Iowa 1974); Estate of Staab, 192 N.W.2d 804 (Iowa 1971).

52. Hansman v. Gute, 215 N.W.2d at 342; Estate of Staab, 192 N.W.2d at 807.

53. *See* text accompanying note 46 *supra*.

54. Flexsteel Indus. Inc. v. Morbern Indus. Ltd., 239 N.W.2d 593, 596 (Iowa 1976); Wharff v. Iowa Methodist Hosp., 219 N.W.2d 18, 22 (Iowa 1974); Svoboda v. Svoboda, 245 Iowa 111, 118, 60 N.W.2d 859, 863 (1953).

1. *Rule 236—Defendant's Actions As Grounds for Overturning the Default*

In only one case has the Iowa Supreme Court held that a default should be set aside where the defendant's own actions were responsible. In *Gordon v. Gordon*[55] the court reversed the trial court's refusal to set aside an entry of default. Plaintiff sought to modify a divorce decree. Defendant was properly served but mislaid the notice and later incorrectly informed his attorney of the date to appear. The default was entered and on the morning of the next day the defendant filed a motion for rehearing. Later that same day a decree was entered. Several motions for rehearing were denied.[56] On appeal the Iowa court reversed. The court stressed that the facts showed that the defendant had intended to defend and that his counsel was diligent in seeking to set aside the judgment.[57]

To the opposite extreme is *Haynes v. Ruhoff*[58] wherein the court reversed the trial judge's grant of a motion to set aside. This is the only reported case to reverse a trial court's decision to set aside a default where the rationale in setting it aside was based upon rule 236.[59] In *Haynes* criminal and civil actions arose out of a single automobile accident. Defendant Ruhoff confused the notices he received in the civil action as being part of the criminal case. He had decided not to pursue an information filed against the plaintiff, and along with his insurance agent, Ruhoff perceived the civil original notice as part of the criminal proceedings. Thus, Ruhoff did not respond or contact his attorney.[60] A motion was filed 41 days after the entry of default, and the trial court agreed to set it aside. The Iowa Supreme Court reversed. The court emphasized that there was no showing that defendant had intended to appear. It further noted that the failure to correctly comprehend the notice or to seek legal notice was not excusable.[61] In the final analysis the court stated that to set aside a default, where the defendant has taken no reasonable steps to defend "would abrogate completely the rules of civil procedure requiring appearance within a specified time. . . ."[62]

Gordon and *Ruhoff* pose some problems. Both defendants had mistaken the notice which he had received. Both sought relief within the 60 day limitation of rule 236. Gordon lost the notice and forgot the date on which he was to appear. Ruhoff confused a civil notice as being a part of a criminal case.

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55. 200 N.W.2d 527 (Iowa 1972).

56. *Id.* at 528.

57. *Id.* The court also overlooked the fact that the defendant did not refer to rule 236 in any of the motions, finding that said motions were entitled to be treated by the trial court as motions to set aside defaults. *Id.*

58. 261 Iowa 1279, 157 N.W.2d 914 (1968).

59. The Iowa court has reversed a trial court's grant of a motion to set aside in other cases but said cases were primarily based on other considerations. *See generally* note 45 *supra.* Also, the court has reversed the trial court's conclusion to vacate a judgment under rule 252(e). *See* Windus v. Great Plains Gas, 255 Iowa 587, 122 N.W.2d 901 (1963) (dismissal for want of prosecution).

60. 261 Iowa at 1283, 157 N.W.2d at 916-17.

61. *Id.* at 1284-85, 157 N.W.2d at 917-18.

62. *Id.* at 1286, 157 N.W.2d at 918.

The key difference suggested by the opinions is that Gordon called his attorney and Ruhoff did not. At best, this distinction is feeble under the circumstances.

Ruhoff, an out-of-state resident, had been consulting an attorney on the criminal matter and had been advised to disregard an earlier notice of the criminal trial because his travel expenses had not been advanced.[63] Therefore, Ruhoff had sought legal help in the case and he did consult his insurance agent upon receipt of the civil notice but they both misunderstood its significance. Viewed in this light the mistakes of Gordon and Ruhoff are not substantially different. The contrasts are certainly not sufficient to support a reversal of a granting of a motion in one case and a reversal of a denial in the other.

The other cases involving the defendant's actions make up a long string of affirmances of the courts' refusals to set the default aside.[64] *Gordon* and *Ruhoff* represent the two ends of the spectrum in this category.

2. *Rule 236—Actions of Defendant's Attorney As Grounds for Overturning the Default*

Two Iowa cases—*Handy v. Handy*[65] and *Newell v. Tweed*[66]—have held that a mistake of counsel should not be imputed to the defendant and hence a default arising due to the defendant's attorney's mistake should be vacated. However, in the most recent discussion of this fact pattern, the Iowa Supreme Court affirmed the trial court's refusal to set the default aside. Without mentioning the two earlier cases, the court in *Gateway Co. v. Phillips & Phillips*[67] agreed with the trial judge that where counsel misinterpreted the trial assignment it was sufficient "good cause" to warrant vacation of the judgment under rule 236.[68]

In *Handy* the cout affirmed a decision to set the default aside when the defendant's counsel failed to appear, and the defendant was unaware of her counsel's laxity.[69] In *Newell* the court affirmed the grant of a motion to set

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63. *Id.* at 1283, 157 N.W.2d at 916.

64. In re Marriage of Huston, 263 N.W.2d 697 (Iowa 1978) (mere intent to defend without actions is not enough); Dealers Wareouse Co. v. Wahl & Associates, 216 N.W.2d 391 (Iowa 1974) (defendant's special appearance was overruled and defendant failed to heed his counsel's notice of withdrawal); Hansman v. Gute, 215 N.W.2d 339 (Iowa 1974) (confusion between two civil actions arising out of the same set of facts not sufficient to reverse trial court's denial of a motion to set aside where the defendant understood the notice and had been instructed to pass on any litigation papers to his insurance carrier); Walters v. Williams, 203 N.W.2d 383 (Iowa 1973) (defendant failed to answer when given seven days to respond and no showing of meritorious defense); Graynor v. Graynor, 246 Iowa 1039, 70 N.W.2d 923 (1972); In re Estate of Staab, 192 N.W.2d 804 (Iowa 1971) (insufficient evidence); Svoboda v. Svoboda, 245 Iowa 111, 60 N.W.2d 859 (1953); Booth v. Central States Mut. Ins. Ass'n, 235 Iowa 5, 15 N.W.2d 893 (1944).

65. 250 Iowa 879, 96 N.W.2d 922 (1959).

66. 241 Iowa 90, 40 N.W.2d 20 (1949).

67. 261 N.W.2d 175 (Iowa 1978) (reversing trial court on other grounds).

68. *Id.* at 177.

69. 250 Iowa at 881, 96 N.W.2d 924, 926.

the default aside where defendant's counsel lost the notice and later discovered them "under some papers on his desk."[70] Except to say that these cases represent the court's strong tendency to affirm decisions to set a default aside where matters of discretion are involved, it is difficult to reconcile these results. In all three cases the mistake was distinctly that of counsel, not the defendant. In *Handy* there is no explanation for the attorney's failure to appear. In *Newell* the notice was lost. In *Gateway* the defendant's counsel believed their case was the fourth, rather than the first, set for trial on the date in question. As a result, it would seem that one is better off losing the notice than misreading it, if he is to prevail on his motion to set the default aside.[71]

3. *Rule 236—Actions of Defendant's Insurance Carrier As Grounds for Overturning the Default*

While mistakes by the defendant, himself, normally foreclose any opportunity of overturning a default, the cases where the mistake is traceable to the defendant's insurance company indicate that the default will almost certainly be set aside. The court has overturned every case it has considered under this heading. On three occasions it has affirmed the trial court's grant of a motion to set aside by finding that the insurance carrier's negligence was not imputed to the defendant.[72] Twice the court has reversed the lower court's refusal to overturn the default judgment.[73] This general rule, of course, does not include the case where the defendant is itself an insurance company.[74]

A typical example of this type of case is *Hannan v. Bowles Watch Band Co.*[75] In *Hannan* the defendant received the original notice and promptly

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70. 241 Iowa at 94, 40 N.W.2d at 23.

71. Of course, cases should not be decided by placing fact patterns into simple categories and it is not suggested here that in all situations where the attorney makes the mistake the default or default judgment should be set aside. However, where the counsel's mistake is not subject to the defendant's supervision, the equities weigh heavily toward setting it aside. *See* Handy v. Handy, 250 Iowa at 885, 96 N.W.2d at 927. *But see* Wharff v. Iowa Methodist Hosp., 219 N.W.2d 18 (Iowa 1974) (analogizing rule 236 principles to a dismissal for want of prosecution). In *Wharff* the court noted that the distinction between client and attorney error is relevant but not the sole factor and that there should be a limit as to how far this distinction should be carried. Rather, the court wrote that this element should be one part of a number of elements to consider including defendant's prompt attention to the default, the existence of a meritorious defense, reliance on the trial court's discretion and the policy of favoring trials on the merits. *Id.* at 24.

72. Versendaal v. Rose, No. 55999 (Iowa, filed March 8, 1974) (per curiam unreported decision); Hannan v. Bowles Watch Band Co., 180 N.W.2d 221 (Iowa 1970); Edgar v. Armored Carrier Corp., 256 Iowa 700, 128 N.W.2d 922 (1964). *Accord,* Busser v. Noble, 8 Ill. App. 2d 268, 131 N.E.2d 637 (1956); Tousley v. Howe, 263 Minn. 366, 116 N.W.2d 590 (1962); Hinz v. Northland Milk & Ice Cream Co., 237 Minn. 28, 53 N.W.2d 454 (1952). *Contra,* St. Arnold v. Star Expansion Ind., 268 Or. 640, 521 P.2d 526 (1974); Stevens v. Gulf Oil Corp., 108 R.I. 209, 274 A.2d 163 (1971).

73. Flexsteel Indus. Inc. v. Morbern Indus. Ltd., 239 N.W.2d 593 (Iowa 1976); Hobbs v. Martin Marietta Co., 257 Iowa 124, 131 N.W.2d 772 (1964).

74. Booth v. Central States Mut. Ins. Ass'n, 235 Iowa 5, 15 N.W.2d 893 (1944).

75. 180 N.W.2d 221 (Iowa 1970).

delivered it to the claims supervisor of its insurance carrier. For "some unexplained reason" the notice was lost.[76] Both the defendant and his carrier failed to appear and a default was entered. In affirming the trial court's grant of motion to set the default aside, the court pointed out that the carrier was negligent but not to the extent of gross neglect or willful procrastination.[77] Thus, this line of cases does not establish a complete defense for such defendants, but instead, provides a defense only when the actions of the insurance company do not amount to gross or willful neglect.

4. *Rule 236—Actions of Plaintiff's Attorney As Grounds for Overturning the Default*

Two Iowa cases have considered the question of whether the actions of plaintiff's attorney may excuse the defendant's default. In *Davis v. Glade*[78] and *Paige v. City of Chariton*[79] the court affirmed decisions to overturn default judgments. In *Davis* the plaintiff's attorney had assured defendant's counsel that he would not take a default judgment but later did.[80] In *Paige* the court found that the actions of plaintiff's attorney had misled the defendant into believing that the case was proceeding to trial.[81] The plaintiff's attorney sent a letter to the defendant's counsel after the defendant had been in default for nearly six months. The letter did not mention defendant's failure to answer. Four days later the plaintiff filed a certificate of readiness for trial in accordance with rule 181.[82] About three weeks later the plaintiff filed a motion to find the defendant in default. This motion was granted and later set aside.[83] The court found that these actions tended to mislead defendant's counsel into believing that the case was proceeding to trial. Thus, the default was overturned on the basis of surprise and excusable neglect.[84]

5. *The Meritorious Defense Requirement*

Iowa courts, as well as nearly all jurisdictions, require that the defendant make some showing of a meritorious defense before a default or default judgment will be overturned.[85] The court in *Flexsteel Industries Inc. v.*

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76. *Id.* at 222.

77. *Id.* at 223. Justice LeGrand, in dissent, would have refused to affirm because of language found in the trial court's opinion that the neglect of the carrier was inexcusable. *Id.* at 224. The majority contends that the carrier's act may have amounted to negligence but did not constitute gross or willful neglect. Further, the majority suggested that the trial court incorrectly found that earlier decisions had established an absolute protection for defendants whose insurance company failed to properly respond. *Id.* at 223.

78. 257 Iowa 540, 133 N.W.2d 683 (1965).

79. 252 N.W.2d 433 (Iowa 1977).

80. 257 Iowa at 541, 133 N.W.2d at 684.

81. 252 N.W.2d at 437.

82. IOWA R. CIV. P. 181.

83. 252 N.W.2d at 436-37.

84. *Id.* at 437.

85. Flexsteel Indus. Inc. v. Morbern Indus. Ltd., 239 N.W.2d 593, 599-601 (Iowa 1976); Walters v. Williams, 203 N.W.2d 383, 385 (Iowa 1973); Hobbs v. Martin Marietta Co., 257 Iowa

Morbern Industries Ltd.,[86] considered this issue at length and concluded that no general rule is applicable because each situation must be decided on a "case by case basis."[87] The court described three basic approaches by which a meritorious defense could be established. First, a court could require specific facts to be pled; second, general allegations or denials could be deemed sufficient; third, mere oral statements or the court's own assumptions may be sufficient to support a finding of a valid defense.[88]

In the case at bar the court did not appear to rely on any one of its three alternatives, but did find that a meritorious defense existed, even though the defendant had only entered a general denial.[89] However, the court went on to qualify its holding by stating that since only a default was entered, and not a default judgment, no interest of finality was involved.[90] Despite this reservation, the Iowa court has adopted a liberal approach in determining whether a meritorious defense exists. In *Walters v. Williams*[91] the court required a *prima facie* showing of a meritorious defense in affirming the trial court's denial of a motion to set aside.[92] In *Hobbs v. Martin Marietta Co.*,[93] specific facts were alleged to support a finding of a meritorious defense.[94]

Iowa has not reached a firm standard on the question of whether a general denial is sufficient to establish the requisite meritorious defense. Thus, the trial courts are left with the burden of deciding, on a case by case basis, what will suffice. It is suggested that practitioners avoid the general denial in favor of a somewhat more specific recitation of a defense. There is no need to risk an unfavorable decision on a motion to set aside when the defense will eventually be required anyway.[95]

6. *Rule 252*

Rules 252 and 253 cover vacation and modification of judgments generally. Rule 252(e) is most often brought into play when a default judgment has

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124, 135, 131 N.W.2d 772, 778 (1964); Edgar v. Armored Carrier Corp., 256 Iowa 700, 705-06, 128 N.W.2d 922, 925 (1964). *See generally* 40 TEX. L. REV. 905 (1962); Annot., 174 A.L.R. 10 (1948). *See also Wright and Miller, supra* note 41, § 2697.

86. 239 N.W.2d 593 (Iowa 1976).

87. *Id.* at 599-600.

88. *Id.* at 599 (citing WRIGHT AND MILLER, *supra* note 41, § 2697).

89. *Id.* at 599, 601.

90. *Id.* at 601. This observation contrasts with Iowa R. Civ. P. 236 which does not distinguish between defaults and default judgments. *See* text accompanying notes 29-30 *supra*.

91. 203 N.W.2d 383 (Iowa 1973).

92. *Id.* at 385.

93. 257 Iowa 124, 131 N.W.2d 772 (1964).

94. *Id.* at 135, 131 N.W.2d at 778. Plaintiff alleged that defendant's negligence had caused his injuries as a result of a blasting operation conducted by the defendant. In his motion to set aside the default judgment, defendant contended that the plaintiff had been warned and failed to remove himself from the area. *Id.*

95. The pleading of a meritorious defense is likewise required in motions to vacate under rules 252 and 253. Jacobson v. Leap, 249 Iowa 1036, 1041, 88 N.W.2d 919, 923 (1958). Rule 253 specifically states that the petition shall allege a meritorious defense and be supported by affidavit. IOWA R. CIV. P. 253(a).

been granted and the defendant has failed to file a motion to set aside within 60 days.[96] The "unavoidable casualty or misfortune" test of rule 252 is much more difficult to meet than the "excusable neglect" language of rule 236.[97] At one time, prior to the adoption of the rules, the courts recognized little difference between the two forerunners of rules 236 and 252. However, the early cases suggest a stronger tendency to vacate.[98] Today the pendulum has swung back and rule 252(e) is rarely invoked to vacate a default judgment based upon mistake.[99]

The most recent example of the application of rule 252 is *Kreft v. Fisher Aviation, Inc.*[100] The *Kreft* case arose out of a plane crash in which Kreft was injured. The plane was leased from Fisher Aviation and built by Piper Aircraft, a foreign corporation. Piper was served notice pursuant to Iowa's long-arm statute. It received the notice by certified mail on May 13, 1975.[101] A Piper employee mistakenly placed the letter in a dead litigation file and it remained there for nearly six months.[102] The other defendants made their appropriate appearances.

On July 14, 1975, the district court entered a default against Piper and on September 22, 1975, following a hearing on damages, a judgment was entered against Piper for $135,000.[103] On December 12, 1975, three weeks after the 60 day time limit under rule 236 had expired, the plaintiff's attorney directed a letter to Piper requesting satisfaction of the judgment.[104] This was the first correspondence received since the May 13 notice. On December 30, 1975, Piper moved to set aside and vacate the default judgment. Both motions were overruled.[105] On appeal the Iowa Supreme Court affirmed the trial court's holding that the negligence of the employee was imputed to Piper, and that such negligence was not an unavoidable casualty or misfortune sufficient to allow relief under rule 252.[106]

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96. *See* text accompanying notes 29-34 *supra*.

97. Kreft v. Fisher Aviation, Inc., 264 N.W.2d 297, 304 (Iowa 1978); Windus v. Great Plains Gas, 255 Iowa 587, 122 N.W.2d 901 (1963).

98. Windus v. Great Plains Gas, 255 Iowa at 595, 122 N.W.2d at 906.

99. *See* note 95 *supra*. *See also* Lemke v. Lemke, 206 N.W.2d 895 (Iowa 1973); Claeys v. Moldenschardt, 260 Iowa 36, 148 N.W.2d 479 (1967); Jacobson v. Leap, 249 Iowa 1036, 88 N.W.2d 919 (1958).

100. 264 N.W.2d 297 (Iowa 1978).

101. *Id.* at 299.

102. *Id.* at 299, 304.

103. *Id.* at 299.

104. *Id.*

105. *Id.* at 300.

106. *Id.* at 304. Piper made several other arguments, principally concerning notice, which were also overruled. First, Piper attacked the provisions of rules 233 and 234 as a violation of Piper's right to equal protection. Piper asserted that the notice provision of rule 233 treated persons similarly situated in a different manner, because it provides notice of the entry of a default for some persons not personally served but not to defendants such as Piper. Also, rule 234 was alleged to violate the United States Constitution because it restricts the nature of a judgment when the notice is by publication and mailing but it does not restrict a judgment when a defendant is brought into the jurisdiction by a long-arm statute. Secondly, Piper claimed that

Kreft's harsh result is an example of the inflexibility of rule 252(e). The rule is nearly meaningless due to the difficulty of obtaining relief under it. In a concurrence in *Kreft*, Justice Uhlenhopp noted the restrictive nature of rule 252(e) and, while resigned to the outcome required under the rules, he recommended an amendment to the Iowa practice to coincide with the federal rules.[107]

III. Iowa Rules v. Federal Rules

In many ways the Iowa and federal rules regarding defaults and default judgments are similar. What constitutes default is substantially the same, although the Iowa rule is more specific.[108] Whereas the Iowa rule requires a request by the adverse party before a default will be entered, the federal rules provide that the clerk of court shall enter default whenever a party fails to plead or otherwise defend.[109] Both the Iowa and federal rules allow the clerk to enter a default judgment when the amount at issue is readily available or when the computation of the relief sought can be made certain.[110] The court may hold hearings to determine the amount of damages and any other appropriate questions under both sets of rules.[111] The federal rules call for notice of the application for judgment to a defaulting party who has appeared. The Iowa rules require notice of the entry of a default judgment when the defendant has not directly been served with notice.[112]

The most important difference between the two systems is the contrasting methods utilized to set aside defaults or vacate judgments. The Iowa rules, as has been discussed,[113] do not distinguish between setting aside an entry of default or a default judgment when the motion to overturn is filed within sixty days. The federal rules, on the other hand, distinguish sharply between defaults and default judgments in plan but little in practice.[114]

Federal rule 55(c) provides that the court may set aside a default for good

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the 60 day limitation of rule 236 was tolled by the lack of notice. Thirdly, Piper sought reversal on the grounds that it was entitled to receive copies of the documents which were filed by the other parties. The court responded by noting that in each instance the rules had been followed and that the rules served a legitimate public purpose. The court added that any lack of notice had not prejudiced Piper because the original notice was sufficient, even though not effective in this case. *Id.* at 300-04.

107. *Id.* at 305 (Uhlenhopp, J., concurring).

108. *Compare* Iowa R. Civ. P. 230 *with* Fed. R. Civ. P. 55(a). *See* notes 18-19 *supra*.

109. *Compare* Iowa R. Civ. P. 231 *with* Fed. R. Civ. P. 55(a).

110. *Compare* Iowa R. Civ. P. 232(a) *with* Fed. R. Civ. P. 55(b)(1).

111. *Compare* Iowa R. Civ. P. 232(b) *with* Fed. R. Civ. P. 55(b)(2).

112. *Compare* Iowa R. Civ. P. 233 *with* Fed. R. Civ. P. 55(b)(2). The Iowa rules also place several restrictions on the default judgment not included in the federal rules. *See* text accompanying notes 27-28 *supra*.

113. *See* text accompanying notes 29-30 *supra*.

114. *Compare* Iowa R. Civ. P. 236 *with* Fed. R. Civ. P. 55(c). Federal rule 55(c) requires only "good cause" to set aside a default without listing any criteria to evaluate such motions. Federal rule 60(b)(1) lists four basic grounds for "good cause." The federal courts have filled the void in rule 55(c) by applying the 60(b)(1) criteria to 55(b) motions to set aside. *See generally* Annot., 29 A.L.R. Fed. 7 (1977).

cause but does not list the prospective grounds.[115] However, it directs that a default judgment is to be set aside in accordance with rule 60(b).[116]

Federal rule 60(b) lists most of the same criteria for relief from a judgment as Iowa rule 236—mistake, inadvertence, surprise or excusable neglect. The standard of "unavoidable casualty" is not included in the federal rule.[117]

Thus, a defendant, in federal court, who has defaulted may file anytime within a year, to overturn and be subject to the "excusable neglect" test. A similar defendant in an Iowa court has the same one year period to file any motion, but after the first 60 days must meet the difficult burden of "unavoidable casualty."[118] Clearly the federal system gives greater deference to the policy of favoring a trial on the merits than it does to the interests of procedural efficiency.

Beyond this structural slant against default judgments, the federal courts have created a body of case law that liberally grants motions to set aside default judgments. For example, in *Rooks v. American Brass Co.*,[119] the Sixth Circuit Court of Appeals held that where defendant's wife had not given the original notice to him because of his illness, a motion to set aside was warranted.[120] Likewise, the Fourth Circuit has stated that any doubts as to whether relief should be granted, should be resolved in favor of setting aside the default or default judgment.[121]

IV. Conclusion—Proposed Amendments

The *Kreft* case, in this author's view, represents a poor means of achieving the goals which default judgments are intended to serve. The restrictive time of rule 236 coupled with the near impossible burden of rule 252 suggest that a change is necessary. Two possibilities present themselves. Justice Uhlenhopp, in his *Kreft* concurrence, advocates amending the Iowa rules by replacing the "unavoidable casualty" test of rule 252 with the "excusable neglect" standard of the federal rules.[122] In essence, this would amount to a transplant of the rule 236 test into rule 252(e).[123]

A second alternative worthy of consideration is an expansion of the notice requirements. California has recently provided that in cases where the defendant has not appeared, an application for a default judgment must be accom-

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115. Fed. R. Civ. P. 55(c).

116. Fed. R. Civ. P. 60(b).

117. *Compare* Iowa R. Civ. P. 236 *with* Fed. R. Civ. P. 60(b).

118. *See* text accompanying notes 97-107 *supra*.

119. 263 F.2d 166 (6th Cir. 1959).

120. *Id.* at 168.

121. *See* Tolson v. Hodge, 411 F.2d 123, 130 (4th Cir. 1969). *See generally* Wright and Miller, *supra* note 41 § § 2695, 2858.

122. Kreft v. Fisher Aviation Inc., 264 N.W.2d 297, 305 (Iowa 1978) (Uhlenhopp, J., concurring).

123. Changes would be required other than simply rewriting rule 252(e). Without other amendments, rules 236 and 252(e) would amount to "double coverage" during the 60 day period following entry. A logical solution would be to divide the tests for setting aside defaults and vacating default judgments into distinct rules as the federal rules do.

panied by an affidavit attesting that a copy of the application has been sent to the defendant.[124] The statute states that no judgment will be entered without the affidavit, but adds that nonreceipt will not invalidate the judgment.[125] This is a clear break from the Iowa practice where notice is only sent after the judgment is entered and then only to those who are not directly served or have appeared.[126]

Both changes would improve the Iowa rules. The additional notice required by California would be a simple matter but nevertheless would provide an extra safeguard for litigants who wish to defend. It would also provide an additional basis for refusing to overturn default judgments because there would be more of a tendency to find that the defendant had received actual notice and his failure to appear was willful. The "excusable neglect" test would give rule 252(e) new flexibility and thereby create a greater potential for working substantial justice.

The additional notice requirement would simply document what the Iowa Supreme Court considers the preferred method. On several occasions the court has indicated that when a defendant has defaulted and a hearing is set to determine damages, it is the better practice for the plaintiff's attorney to notify the defendant even though the rules do not require it.[127] The suggested amendment would merely make this "better practice" mandatory.

Doug Laird

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124. CAL. CIV. PRO. CODE § 587 (West 1978). *See* Slusher v. Durr, 69 Cal. App. 3d 747, 138 Cal. Rptr. 265 (1977) (holding that § 587 is designed to prevent the taking of a default against an unwary litigant and plaintiff has the duty to make a reasonably diligent search to dicover defendant's address). *See generally* Note, *Judicial Notice After Default: A Semantical Maze*, 37 J. OF AIR LAW AND COMM. 109 (1971).

125. CAL. CIV. PRO. CODE § 587 (West 1978).

126. IOWA R. CIV. P. 233.

127. *E.g.*, Claeys v. Moldenschardt, 260 Iowa 36, 44, 148 N.W.2d 479, 484 (1967).