


Suggestion for Amendment to Civil Rule 55(b)

James Ishida to: Gregg R. Zegarelli
Cc: Peter_McCabe, Jeffrey Barr, LiAnn Shepard, Gale Mitchell

05/16/2011 08:46 AM

Follow Up: Urgent Priority.

Dear Mr. Zegarelli,

Thank you for your email, suggesting an amendment to Civil Rule 55(b). I am forwarding your suggestion to the chair of and reporters to the Advisory Committee on Civil Rules for their consideration. We will post updates on the status of your suggestion on the Federal Rulemaking web site. You may also contact our office via email or telephone at 202-502-1800 for further information.

We will send you shortly a letter formally acknowledging receipt of your suggestion.

Thank you very much for your suggestion, and for your interest in the federal rulemaking process.

Best,

James Ishida

"Gregg R. Zegarelli" | I note that the gist of the suggestion is guided... 05/13/2011 10:28:03 AM

From: "Gregg R. Zegarelli" <gregg.zegarelli@zegarelli.com>
To: <Rules_Support@ao.uscourts.gov>
Cc: <James_Ishida@ao.uscourts.gov>
Date: 05/13/2011 10:28 AM
Subject: RE: Rule 55(b)

I note that the gist of the suggestion is guided but not resolved by Rule 54. The issue is the nature of why the Court should be interposed for matters that are summary in nature, whether or not the basis of the relief is a declaration or a sum certain. It seems that 60(b) would make it naturally a final order (in part) such as otherwise provided in substance in Rule 54. If the defendant does not show under 60(b), it bears the risk of any remain counts in that context. Otherwise, the plaintiff is stuck in the middle: it has a default, it's primary objective is the equitable remedy, but it does not want to eliminate the money counts unless the default judgment become non-appealable. This can all be resolved by the Court, of course, but the goal is to free the docket under 55(b) while providing a full and fair opportunity to defend.

Gregg R. Zegarelli

Z E G A R E L L I

Technology & Entrepreneurial

Ventures Law Group, P.C.

gregg.zegarelli@zegarelli.com

v.412.765.0401 c.412.559.5262

From: Gregg R. Zegarelli
Sent: Friday, May 13, 2011 10:07 AM
To: 'Rules_Support@ao.uscourts.gov'

Cc: 'James_Ishida@ao.uscourts.gov'

Subject: Rule 55(b)

Dear Rules Committee:

My suggestion regards clarification to Rule 55(b). Conceptually, default judgments can be entered by the Clerk or by the Court pursuant to (b)(1) and (b)(2), respectively.

Rule 55(b) tends to deal in damage calculations. I understand the distinction for sum certain liquidated damages versus damages that must be determined by court determination and judgment. There are two issues: multiple parties and multiple claims, more particularly in the context of non-monetary damage, and when this can be managed by the Clerk pursuant to (b)(1). A plaintiff, of course, (and with the purpose of the Rule in mind) prefers any default which is summarily entered by the Clerk, and the Court's schedule may prefer this as well for a dilatory defendant.

I do not have full electronic research. I have found cases, by the court, whereby entire cases were dismissed against one party only and cases for equity defaults. However, the precise question is whether the Clerk can enter an order for default judgment for certain claims against one party not dismissing the entire case. That is, allowing an optional two-step process, whereby the default is entered by the Clerk for less than all counts.

I have an experience in the Pa.WDC where the Clerk was not sure whether it could be done, and I could not locate (so far) authority either way. The presiding judge's law clerk did not know the answer, defaulting to the 55(b)(2) rule. Presumably the question escapes appeal determinations, but nevertheless the Rule remains unclear in text and intention.

For example, assume a trademark infringement case, 3 counts, one defendant: I. Declaratory Relief (declaring a registration valid and/or application invalid); II. Injunction (on further infringement); III. Unfair competition for unliquidated money damages (for passing off). Defendant defaults with an entry pursuant to 55(a). A Rule 55(b)(1) Request for Judgment by the Clerk is filed on Counts I and II, for which there is no money at issue. As a practical matter, a summary default on Counts I and II is divided just as a Court might do it on motion practice, so it would appear consistent with judicial efficiency. Then, plaintiff could move the court for a hearing on any unliquidated counts which would play out in due course, or safely voluntarily withdraw the remaining count having possibly achieved the primary goal on the trademark rights declaration by default. If a plaintiff withdraws counts to acquire the default or easy court order, there is a practical risk.

I suggest a new 55(b)(3), such as, "Subject to the requirements of (b)(1) and (b)(2) hereof, as the case may be, default judgment may be entered by the Clerk or the Court: i) on all counts or less than all counts; ii) for all or less than all parties; and/or c) counts for which money is not the relief sought." Although it is not my suggestion, an express inverse provision, in substance, would also clarify the overall text and intention of the Rule.

Thank you for your consideration.

s/Gregg Zegarelli/

Gregg R. Zegarelli

v.412.765.0401 | c.412.559.5262

gregg.zegarelli@zegarelli.com

www.zegarelli.com/staff/grz

South Hills Administrative Office Preferred

2585 Washington Road Suite 131 | Summerfield Commons Office Park

Pittsburgh, PA 15241-2565 USA

Z E G A R E L L I

Technology & Entrepreneurial

Ventures Law Group, PC

429 Forbes Avenue | Allegheny Building | 7th Floor

Pittsburgh, PA 15219-1616 USA

f.412.765.0531 | www.zegarelli.com | [Twitter](#)

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