No. 20088 - Mary E. White, v. Everett Berryman and the West Virginia Department of Transportation, Division of Highways, a West Virginia governmental entity.

Neely, J., dissenting:

It is always good sport to stick it to an insurance company, but these days it is getting harder and harder to distinguish the stickor from the stickee. This case would have settled for less than $100,000,[1] but now the plaintiff (and her lawyers) will receive a windfall of over $400,000 because of what is best described as corporate screw-up. The defendant in this case is the State of West Virginia, which is insured by CNA, a large insurer based in Chicago.

The way that stickors and stickees merge seamlessly of late is that insurance companies base their premiums on loss experience. Today's $400,000 gift to the plaintiff is a loss with no more and no less statistical effect on CNA's premium calculations than any other loss. Who, then, is the real stickee? The $400,000 penalty for failing to answer a complaint bears no relationship whatsoever to the seriousness of the offense, serves no public purpose that cannot better be served by more temperate means, and exalts form over substance.

Rule 55, W. Va. R. Civ. P. governing default judgments stems

[1]At one point, Ms. White offered to settle the case for $95,000.

from the federal rules originally drafted in 1936 when telephoning next door was more difficult than telephoning Europe is today, when speedy travel was the National Limited from Grafton to Washington, and when the computer was not even a gleam in Alan Turing's eye. Thus, the law of default judgments, with its antique, result-oriented,[2] nebulous and unpredictable concept of "excusable neglect" needs to be revisited in the age of computers, multi-national corporations, employees hired and retained not for efficiency but to satisfy some government requirement or another, and general lack of clarity in lines of responsibility and lines of communication.[3] In other words,

[2] Can anyone really imagine that if a union coal miner had a default judgment rendered against him for even $50,000, this court would not twist itself into something resembling a pretzel to find some form or other of "excusable neglect?" To realize the extent of the latitude this Court has given itself in deciding default cases, one need consider only two frequently cited syllabus points on the issue. (Both of which we manage to cite in our recent case of County Commission of Wood County v. Hanson, No. 20268, filed February 11, 1992.) In syllabus point 2 of Hamilton Watch Co. v. Atlas Container Co. Inc., 156 W.Va. 52, 190 S.E.2d 779 (1972), we held:

> In as much as courts favor the adjudication of cases on their merits, Rule 60 (b) of the W. Va. R. of Civ. P. should be given a liberal construction.

We have also said in syllabus point 3 of Intercity Realty Co. v. Gibson, 154 W.Va. 369, 175 S.E.2d 452 (1970), that:

> A motion to vacate a default judgment is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion.

Talk about a hole big enough to drive a truck through!

[3] In this State, we do not even have a clear-cut procedure for serving process on the State of West Virginia similar to the detailed procedures set forth in Rule 4(d)(4), Fed. R. Civ. P. for serving the United States.

there needs to be a more reasonable rule to sanction corporate screw-up (as well, probably, as other screw-up.)

Even in cases where the procedures for service of process are clear, courts around the country have never developed predictable standards for "excusable neglect." In one case in which the failure to file an answer was unintentional, the defendant had a meritorious defense, and no harm was caused to the opposing party, a court applied the test of whether there was some excuse, not even necessarily a good excuse, for the failure to file. See Dorsey v. Aguirre, 552 S.W.2d 576 (Tex.Civ.App. 1977). However another court held that neglect equal to mere carelessness would not suffice as excusable neglect. See International Corporate Enterprises, Inc. v. Toshoku Ltd., 71 F.R.D. 215 (N.D. Tex. 1976). Still other courts have applied the classic negligence standard of what a reasonable person would do. See e.g., Kohlbeck v. Handley, 3 Ariz. App. 469, 415 P.2d 483 (1966). Certainly the West Virginia Supreme Court of Appeals has been no model of clarity. In most cases we have simply relied on the trial court's discretion while mouthing some broad and vague principles. See supra note 2. At the least, one must conclude that our decisions have been extremely fact oriented. See e.g., Hinerman v. Levin, ___W.Va.___, 310 S.E.2d 843 (1983); Parsons v. Consolidated Gas Supply Corp., ___W.Va.___, 256 S.E.2d 758 (1979).[4]

[4] A standard such as "excusable neglect," which has no generally accepted perimeters, invites the trial court's discretion to be informed by such objective criteria as: (1) Is one of the litigants politically correct, i.e., a minority member, abused woman,

Failure to answer a complaint is a serious matter. In this society, filing a lawsuit is a way of signaling an amorphous, impersonal entity run through computers operated by minimum wage clerical employees that it is time to produce an intelligent human being with settlement authority.[5] However, if the same gum-snapping, indifferent, low-level employees who don't return phone calls, don't answer letters, and haven't a clue how to proceed even when cornered in their offices are allowed to ignore civil process, then the whole court enterprise falls apart.

Nonetheless, for a corporation the size of CNA there must be

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environmentalist, etc.? (2) Did one or more of the lawyers contribute generously to the judge's last campaign? (3) Is the defendant an out-of-state corporation with no voting employees in West Virginia? (4) Did the defendant's lawyer room with the judge in law school? and finally, (5) Did the judge ever date the plaintiff's or his lawyer's sister?

[5]I once sued Exxon because I was trying to clear title to a cheap piece of land and Exxon had a $500 justice of the peace court judgment lien against the property. I made no less than five long distance telephone calls to New York, Houston, and Pittsburgh trying to discover to whom I could send a certified check for $500 so I could get a release, only to discover that although Exxon is well enough organized to sue every defaulting credit card customer in squire's court, it has absolutely no mechanism to collect judgments and release liens!

My simple complaint in court alleged that (1) Exxon had a lien; (2) we were willing to pay the lien; and (3) Exxon would be required to answer our suit by an attorney who could then accept our money and sign a release. Ironically, however, Exxon did not answer the suit; instead its general counsel sent a letter stating that if I would send $250 to him , I could take a default judgment and clear the title. I did exactly that, but without the availability of court process I would still be waiting for Exxon to figure out who was on first.

a meaningful sanction somewhere between a $500,000 default judgment and blanket exoneration through a finding of "excusable neglect." In the case before us there was general incompetence, but no one deliberately ignored the summons. Law, it should be remembered, is not properly a game of forfeits!

Allowing large default judgments simply creates excess premium costs entirely unrelated to compensating injured victims or furthering other legitimate social purposes. Although I would retain the default judgement sanction for those who deliberately ignore process, in circumstances like the one before us today, where there simply has been a failure of communication among bureaucracies, I would create a new sanction lying somewhere between total default and total exoneration.[6]

Therefore, I would hold today that once a defaulting defendant has demonstrated that there was no intention to ignore process, the defendant should be allowed to pay the plaintiff whatever the trial court determines to be adequate damages for the plaintiff's (and his lawyer's) annoyance, aggravation, inconvenience, and expenses, or the flat sum of $5,000, whichever is the greater. This is a sufficient

[6] Nonetheless, when asking a court to set aside a default judgment, the defaulting party must come before the court as a supplicant. Either blustering argument or reluctance to pay default damages to the plaintiff on the spot would, in my opinion, be good and sufficient grounds for the trial court to harden his heart against the defendant and enforce the default.

sanction to discourage even CNA from the cavalier disregard of civil process, while at the same time not penalizing insurance companies and other corporate defendants out of all proportion to the gravity of their offenses.

Furthermore, for the average plaintiff, $5,000 paid immediately is likely to have a sweetening effect on the fiscal day.

I take the time to write this dissent because this default problem occurs regularly. In the next case, defendant's counsel should offer damages for aggravation, inconvenience, attorneys' fees and expenses or $5,000 to the plaintiff and see what happens. However, even I will have no sympathy for a defaulting defendant who wools the plaintiff around arguing "excusable neglect" and then, only after losing that round, decides to offer the $5,000 (as hereafter adjusted for inflation). To get my vote, the defaulter must offer the $5,000 by tendering a check to the clerk at the same time he files the 60(b) motion. The plaintiff, of course, will undoubtedly prefer the default judgement, but an adventurous trial judge might offer to find excusable neglect upon condition that damages as I describe them be paid, and I would argue for affirmance. And, if the trial judge is reluctant to provide us with a test case, we will, at least, have a record that squarely presents an offer by the defendant to pay the new corporate screw-up sur charge.