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No. 64192-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON, DIVISION I

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TELEKENEX IXC, INC.,

Respondent/Plaintiff,

v.

CHARLOTTE RUSSE INCORPORATED,

Appellant/Defendant.

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**APPELLANT'S OPENING BRIEF**

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2009 NOV 16 PM 4:21

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## I. INTRODUCTION

In granting a default judgment against Charlotte Russe,<sup>1</sup> and then refusing to vacate it, the trial court rewarded Telekenex's blatant gamesmanship and ignored the law and the equities of this case, which compel the conclusion that the default judgment must be set aside. This Court should reverse the judgment and remand the case for further proceedings.

Charlotte Russe depends on data networking and telecommunications services that, among other things, enable its customers to use credit cards to purchase clothing and other goods in its retail stores. For years, these needs were met pursuant to a Master Services Agreement ("MSA") with a company called AuBeta Networks Corp. ("AuBeta"). The MSA required AuBeta to provide 90 days' notice before it could terminate Charlotte Russe's data services. The MSA also was about to become a month-to-month agreement, giving Charlotte Russe the opportunity to negotiate a new long-term deal with AuBeta or another service provider, when Telekenex bought AuBeta, along with its obligations to Charlotte Russe under the MSA. Almost immediately, Telekenex threatened to shut off data services to more than 200 Charlotte

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<sup>1</sup> "Charlotte Russe" refers to Appellant Charlotte Russe, Inc.; "Telekenex" refers to Respondent Telekenex IXC, Inc.

Russe stores, in flagrant breach of the MSA, if Charlotte Russe wouldn't immediately sign a Contract Amendment (the "Amendment"). Instead of giving the 90 days' notice of termination as required by the MSA, Telekenex issued its ultimatum at 8:48 p.m. the night before the threatened termination. Charlotte Russe signed the Amendment, under protest, because the threatened disconnection of data services would have crippled the company. Thus, instead of enjoying its bargained-for right to have the MSA converted to a month-to-month contract and negotiate a new long-term contract on a reasonable time table and for reasonable rates, Charlotte Russe was forcibly bound to Telekenex for two years.

Charlotte Russe filed suit in California Superior Court to have the Amendment declared unenforceable on grounds of duress, among others. But Telekenex's games continued in court. After Charlotte Russe filed and served its California action, Telekenex filed suit in Washington Superior Court. It served the summons and complaint on Charlotte Russe's registered agent, but by an innocent mistake—which Telekenex doesn't dispute—the papers never made it to the person at Charlotte Russe responsible for processing such documents. Telekenex's counsel had every opportunity to alert Charlotte Russe to that mistake, but didn't do so, choosing instead to try to capitalize on it.

Charlotte Russe sought, and obtained, a temporary restraining order (TRO) in California, and in those papers, explicitly recognized that the Washington action had been filed, and disputed both its allegations and its propriety as a second-filed attempt at forum shopping. But, as Charlotte Russe's counsel said on the record, it did not believe it had been served with the Washington complaint. Telekenex's response? Silence, and a rush to file a motion for default with no notice. Even as Telekenex itself was seeking an extension of time to respond to the California court's order to show cause why a preliminary injunction shouldn't issue, which Charlotte Russe granted as a matter of common professional courtesy, Telekenex was moving the Washington trial court for a default judgment, without any notice whatsoever to Charlotte Russe or its counsel.

The trial court granted the motion for default and, despite the motion to vacate Charlotte Russe filed within days of learning of the default, refused to vacate it. The trial court erred. For well over a century, it has been the oft-expressed policy of Washington's courts to set aside default judgments liberally in the interests of justice. *See, e.g., Hull v. Vining*, 17 Wash. 352, 360, 49 P. 537 (1897). The trial court's judgment violates the spirit of that policy and the letter of the law.

First, Charlotte Russe's many statements in the California court and to Telekenex's counsel acknowledging the Washington action and

expressing Charlotte Russe’s intent to defend itself in court constitute an “appearance” as that term is liberally construed. Accordingly, Charlotte Russe was entitled to notice of Telekenex’s motion for default under CR 55(a)(3). Telekenex’s admitted failure to provide such notice renders the default judgment void as a matter of law, and the trial court was required to set it aside—it had “no discretion to exercise on the question.” *Tiffin v. Hendricks*, 44 Wn.2d 837, 847, 271 P.2d 683 (1954).

Second, the trial court abused its discretion in denying Charlotte Russe’s motion to vacate the default judgment. The cases make clear that the gamesmanship counsel for Telekenex engaged in is, by itself, sufficient grounds for vacating the default judgment. Further, Telekenex does not even dispute three of the four other factors generally taken into account in deciding whether to set aside a default. Telekenex admits that it was simply a mistake that caused Charlotte Russe not to answer the Washington complaint. Telekenex admits that Charlotte Russe was diligent in moving to vacate the default. And Telekenex admits that it will not suffer any cognizable hardship if the default is set aside. Telekenex’s only argument below was against the viability of Charlotte Russe’s defense. But Telekenex—and the trial court—ignored the law that Charlotte Russe need only present a “minimal” defense, and that the evidence and all reasonable inferences from it must be taken in Charlotte

Russe's favor. In fact, Charlotte Russe has presented a very strong defense. The facts show—and certainly raise a prima facie question incapable of final determination in Telekenex's favor on this record—that Charlotte Russe signed the Amendment under duress, and that it is unenforceable. Indeed, in granting the TRO, the California court held that Charlotte Russe not only raised a prima facie case of unenforceability, but that it was likely to succeed on the merits.

For these reasons, as explained in detail below, this Court should reverse the trial court's default judgment, as well as its denial of Charlotte Russe's motion to vacate that judgment, and remand this case for further proceedings.

## **II. ASSIGNMENTS OF ERROR**

(1) The trial court erred in entering the July 14, 2009 Order for Entry of Default Judgment Against Defendant Charlotte Russe, Inc.

(2) The trial court erred in entering the August 27, 2009 Order Denying Defendant's Motion to Set Aside Default Judgment and to Quash Writ of Garnishment.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Does a defendant "appear" in a Washington action, entitling it to notice of a motion for a default judgment under CR 55(a)(3) and invalidating a default judgment entered without notice, where, among

other things: (1) it was the first to file, in California, an action to invalidate the very contract that is the purported basis for plaintiff's claim in the Washington action; (2) it expressly acknowledged and disputed the allegations of the Washington complaint in an application for a TRO in the California action, which plaintiff's Washington counsel admits he read (and which was granted); and (3) its counsel stated on the record at the hearing on the TRO his belief that the defendant had not yet been served in the Washington action—a mistake plaintiff's counsel took no steps to correct? (Assignment of Error 1.)

Does a trial court abuse its discretion in refusing to grant a motion to vacate a default judgment where, among other things: (1) plaintiff's counsel was well aware that defendant was represented by counsel and intended to defend its rights in court—indeed, was doing so in California—and could easily have informed defendant's counsel of the motion for default yet did not; (2) plaintiff admits, and the facts prove, that defendant's failure to timely answer the complaint was the result of excusable neglect, that defendant acted diligently on learning of the default, and that plaintiff will not suffer hardship if the default is vacated; and (3) the contract amendment on which the plaintiff's sole claim is based was obtained by threatening to terminate services that are essential

to the defendant's business, with virtually no notice, in breach of the original agreement? (Assignment of Error 2.)

#### IV. STATEMENT OF THE CASE

**A. Charlotte Russe contracted with AuBeta Networks for essential data networking and telecommunications services.**

Charlotte Russe is a mall-based retailer of women's clothing, with more than 500 stores in the United States. CP 88 ¶ 1. From late 2004 until the spring of 2009, AuBeta provided telecommunications services to more than 200 Charlotte Russe stores. CP 129-30 ¶¶ 2-3. These data services were vital to Charlotte Russe's ability to process credit card purchases, which constitute the vast majority of its sales, and also are necessary for such critical functions as sales, markdowns and price sheets, inventory polling, timekeeping and reporting, and basic Internet and email connectivity. CP 130-31 ¶¶ 5-6. Without these data services, Charlotte Russe's stores essentially cannot operate. *Id.* AuBeta provided these services pursuant to the MSA, which was executed in December 2004 and extended through March 2009. CP 130 ¶ 3, 138-43.

The MSA provided that when its term expired, it would automatically continue on a month-to-month basis until terminated by either party or a new contract was signed. CP 138 ¶ 3. Both during the original term and during any month-to-month continuation, AuBeta

expressly was required to give Charlotte Russe 90 days' written notice before it could terminate the agreement. *Id.* These provisions were very important to Charlotte Russe. First, the notice provision ensured that vital data services would not be abruptly cut off, and that Charlotte Russe would have ample time to convert to another provider if, for some reason, AuBeta was no longer willing or able to provide service. CP 130 ¶ 5. Second, the month-to-month provision meant that after April 1, 2009, Charlotte Russe would be able to negotiate another long-term commitment, at competitive rates, either with AuBeta or with another service provider, but would have guaranteed data services while it shopped around. *Id.* ¶ 4.

**B. Telekenex purchased AuBeta and assumed its obligations under the MSA, but then threatened the abrupt termination of Charlotte Russe's data services in order to force Charlotte Russe to give up its contractual rights.**

Telekenex IXC, Inc. and Telekenex, Inc. (collectively "Telekenex" unless otherwise indicated) provide telecommunications services, and hold themselves out as a single entity. CP 228 ¶ 3, 233, 235-36. Telekenex acquired AuBeta in March of 2009. CP 131 ¶ 9, 147-48. As part of that acquisition, Telekenex assumed, and AuBeta assigned, AuBeta's

“obligations and liabilities . . . under customer and vendor contracts,” including the MSA. Sub No. 53, Ex. D § 1.2(a).<sup>2</sup>

Beginning on March 25, 2009, however – just prior to the MSA’s April 1 conversion to a month-to-month agreement – Telekenex began to threaten to abruptly disconnect Charlotte Russe’s essential data services unless it signed a new long-term contract amendment with a seven-figure price tag. CP 131-33 ¶¶ 9-16, 147-73. To make matters worse, Telekenex only provided the proposed amendment at 8:48 p.m. the day before the threatened disconnection. CP 131-32 ¶¶ 11-12. Charlotte Russe’s Vice President of Technology, Giri Durbhakula, explained that the company could not evaluate and execute a multi-year service contract within hours of first seeing the proposal, and Telekenex said it would “stay” its threatened termination of service until the following business day. CP 132 ¶ 14.

That day, March 30, 2009, Mr. Durbhakula participated in a conference call with Telekenex’s CEO, Brandon Chaney, among others. CP 229 ¶ 7. Telekenex had been claiming that the reason for the sudden necessity for a multi-year contract was that the underlying carriers

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<sup>2</sup> Documents identified by “Sub No.” have been designated in Appellant’s Supplemental Designation of Clerk’s Papers, but have not yet been assigned CP numbers. Once CP numbers have been assigned, Charlotte Russe will submit an Errata that provides corrected citations. See RAP 9.6(a) (permitting a party to supplement the designation of clerk’s papers “prior to or with the filing of the party’s last brief”).

providing digital data services were threatening to cut off service. CP 147. But when Mr. Chaney was asked why, in that case, Charlotte Russe could not rely on the analog back-up system provided by Telekenex, he insisted that if Charlotte Russe did not sign the contract amendment, *all* networks would be shut down, including the analog back-up network. CP 229 ¶ 7. Further, when asked if Charlotte Russe could deal directly with the carriers, and even pay past due amounts for which AuBeta—and hence, Telekenex—were responsible, Mr. Chaney said no, it was “all or nothing.” CP 229-30 ¶ 8.

Mr. Durbhakula explained to Mr. Chaney that Charlotte Russe had a valid agreement with AuBeta, which required 90 days’ notice prior to termination. CP 132 ¶ 15, 172-73. Since Telekenex had acquired AuBeta along with its obligations to its customers, Telekenex had no right to threaten to terminate Charlotte Russe’s service, particularly not as a means to force Charlotte Russe into a long-term service contract. *Id.* But Telekenex did not relent. *Id.* To avoid the extraordinary and irreparable harm that would result from Telekenex’s sudden termination of data services—making the vast majority of transactions in hundreds of Charlotte Russe stores impossible to process, with resulting losses not only in sales, but in goodwill and business reputation—Charlotte Russe signed the Amendment under protest. CP 132-33 ¶¶ 15-17, 172-73.

**C. Charlotte Russe first filed its suit against Telekenex in California, after which, Telekenex filed its complaint in the trial court below, which was served on Charlotte Russe's registered agent, but misplaced before it reached the person responsible for processing legal documents.**

In order to protect itself from further injury, Charlotte Russe filed suit against Telekenex, Inc.<sup>3</sup> in California Superior Court on June 4, 2009, seeking an injunction against Telekenex's threatened termination of Charlotte Russe's data services, and declaratory relief that the Amendment is unenforceable. CP 88-93. Telekenex was served with the complaint in the California action on June 10, 2009. CP 95-96.

The next day, Telekenex filed its own complaint against Charlotte Russe in the Superior Court of Washington for King County. CP 3. In that complaint, Telekenex alleged a single breach of contract claim, and made no mention whatsoever of the original California action already filed by Charlotte Russe. CP 3-21.

Unbeknownst to Charlotte Russe until a month-and-a-half later, Telekenex then served the Washington complaint on Charlotte Russe's registered agent on June 12, 2009. CP 28. The service papers, however, never made it from the registered agent in Washington to the Controller who processes such documents at Charlotte Russe's headquarters in San

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<sup>3</sup> Telekenex IXC, Inc. was added as a defendant later. *See* Request for Judicial Notice Ex. A at 3:10-12.

Diego. Instead, they appear to have been lost in the mailroom. CP 121-22 ¶¶ 1-4, 126 ¶ 7, 134 ¶ 21.

**D. Charlotte Russe sought and obtained a TRO in the California action, demonstrating a likelihood of success on the merits, and acknowledging the Washington action but stating that it had not been served, yet Telekenex’s counsel never mentioned that it had served the Washington complaint.**

On June 19, 2009, Charlotte Russe filed an application for a TRO in the California action. CP 102-17. Charlotte Russe twice provided Telekenex with notice of the TRO application—on June 19 and again on June 25 when the hearing date was continued. CP 81 ¶ 6. Telekenex’s Washington counsel, in particular, admitted that he read Charlotte Russe’s TRO papers. CP 125-26 ¶ 5. Those papers specifically acknowledged that the Washington complaint had been filed in the trial court below. CP 110:10-26. In fact, Charlotte Russe’s brief disputes Telekenex’s allegations in the Washington complaint and characterizes it as an “apparent attempt to forum shop.” CP 110:10-26. Telekenex’s California counsel and counsel for Charlotte Russe had numerous conversations during this timeframe, in which they discussed the Washington action, among other things. CP 125 ¶ 3. Telekenex’s Washington counsel admitted that he was aware of these communications. CP 125-26 ¶ 5. Further, on June 29, 2009, at oral argument on the TRO, Charlotte Russe’s

counsel (Cooley Godward Kronish LLP (“Cooley”)) expressly stated that Charlotte Russe had not yet been served with the Washington summons and complaint. CP 81-82 ¶ 6.

On June 29, 2009, the California Superior Court granted the TRO against Telekenex, necessarily finding that Charlotte Russe was likely to prevail on the merits. CP 81-82 ¶ 6, 119-20. The court also ordered Telekenex to show cause why a preliminary injunction should not issue. *Id.* Telekenex requested and, as a professional courtesy, Charlotte Russe’s counsel granted, an extension of time to respond to the order to show cause. CP 82 ¶ 7, 125 ¶ 3. Telekenex’s counsel never mentioned that, at the same time, it was pursuing a default judgment, without notice, in the Washington action *Id.*

**E. Telekenex sought and obtained a default judgment in the Washington action without providing any notice whatsoever to Charlotte Russe or its counsel, knowing all along that Charlotte Russe intended to defend its rights in court, and was completely unaware that the Washington complaint had been served.**

By July 9, 2009, Telekenex and its Washington counsel were fully aware (1) of the California action, (2) that a TRO had issued against Telekenex preventing Telekenex from terminating services, (3) that Charlotte Russe’s counsel was vigorously defending the company’s rights in the California action, (4) that Charlotte Russe had acknowledged the

Washington action and had every intent of vigorously defending it, and (5) that Charlotte Russe's counsel believed that it had not yet been served with the Washington complaint. CP 102-20, 125-26 ¶ 5. Nevertheless, Telekenex filed its Motion for Default Judgment Against Defendant Charlotte Russe in the Washington case on July 9, 2009, providing no notice to Charlotte Russe or its counsel. CP 22-24, 125-26 ¶ 5. In its motion for default judgment, Telekenex represented that Charlotte Russe had failed "to appear, answer or otherwise defend" against Telekenex's claim and request for relief. CP 22:20-22. Nowhere in this motion or the accompanying declaration did Telekenex or its counsel mention the fact of the earlier complaint filed and served by Charlotte Russe in the California action, or that a TRO had issued against Telekenex in regard to the very contract at issue in both cases. CP 22-26.

The trial court below granted the Motion for Default Judgment the day Telekenex filed it, on July 9, 2009. CP 32. Telekenex then filed a Motion for Entry of Default Judgment against Charlotte Russe on July 13, demanding \$619,353.00 in damages, \$8,638.41 in attorneys' fees, and \$425.97 in costs. CP 36-38. The trial court signed Telekenex's proposed order, without substantive alteration, the same day. CP 34-35. The next day, Telekenex filed another Motion for Entry of Default Judgment, this time asking for \$714,777.71 in damages and the same attorneys' fees and

costs as before. CP 39-41. The court also signed that proposed order unchanged. CP 42-43, 248-49. Again, Telekenex made no mention in any of these filings of the developments and orders in the California action. CP 34-38.

Neither Charlotte Russe nor Cooley received notice of any of these motions, or of the default judgments entered by the trial court. CP 82 ¶ 8, 125-26 ¶ 5. Telekenex's Washington counsel admitted that his failure to provide notice was intentional. CP 125-26 ¶ 5.

**F. When Charlotte Russe learned of the default judgment, it immediately filed a motion to set it aside, which the trial court denied, leading to this timely appeal.**

The first notice Charlotte Russe or its counsel ever received that the Washington action was active was on July 29, 2009, when Mr. Durbhakula received a fax from Wells Fargo (via the Controller at Charlotte Russe), stating that Wells Fargo had received a Writ of Garnishment entered by the King County Superior Court, and that Charlotte Russe's funds were being frozen. CP 134 ¶ 21. Between Charlotte Russe's accounts at Wells Fargo and Bank of America, nearly \$1,000,000 of Charlotte Russe's money was garnished. CP 134 ¶ 22.

Mr. Durbhakula immediately notified one of Charlotte Russe's attorneys at Cooley, K. Phillip Tadlock, about the Writ of Garnishment, and Mr. Tadlock immediately called the King County Superior Court to

determine how a writ could have been obtained prior to service of the summons and complaint. CP 125 ¶ 3-4. He learned at that point that Telekenex had filed—again, without notice to Charlotte Russe or Cooley—a proof of service in June 2009. *Id.* Mr. Tadlock then called Telekenex’s Washington counsel, Jefferson Coulter, who acknowledged that he had read Charlotte Russe’s TRO papers and was aware that Cooley was actively defending Charlotte Russe’s rights, but chose not to provide Charlotte Russe or Cooley with any notice in the Washington action because, in his opinion, Charlotte Russe had not appeared. CP 125-26 ¶ 5.

The next day, July 30, 2009, Mr. Tadlock called Mr. Coulter again to request that Telekenex stipulate to vacate the default judgment. He refused. CP 126 ¶ 6. Charlotte Russe filed its Motion to Vacate and Set Aside Default Judgment and to Quash Writ of Garnishment two business days later, on August 3, 2009. CP 65-79, 126.

Although Charlotte Russe requested oral argument, CP 65, the trial court refused and, on August 27, 2009, denied Charlotte Russe’s motion to vacate. CP 239-40, 245-46. As with the default judgment itself, the trial court signed Telekenex’s proposed order with no substantive changes and no independent analysis or explanation. *Id.* Charlotte Russe timely filed its notice of appeal on September 1, 2009. CP 241-49.

## V. ARGUMENT

It is universally acknowledged that “[d]efault judgments are not favored in the law.” *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). Entering a default judgment is “one of the most drastic actions a court may take to punish disobedience to its commands,” and is contrary to “the policy of the law that controversies be determined on the merits rather than by default.” *Id.* at 582 (quoting *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960)). Of course, that policy is balanced against “the necessity of a responsive and responsible system,” which is not plagued by “continuing delays.” *Id.* (quoting *Widicus v. Sw. Elec. Coop., Inc.*, 26 Ill. App. 2d 102, 109, 167 N.E.2d 799 (1960)). But “a default judgment is normally viewed as proper *only* when the adversary process has been *halted* because of an essentially unresponsive party.” *Norton v. Brown*, 99 Wn. App. 118, 126, 992 P.2d 1019 (1999) (emphases added); *accord Gage v. Boeing Co.*, 55 Wn. App. 157, 160-61, 776 P.2d 991 (1989).

A proceeding to vacate a default judgment “is equitable in its character,” and the trial court, “in passing upon an application which is not manifestly insufficient or groundless, should exercise its authority liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.”

*White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968). Likewise, this Court’s “primary concern is that a trial court’s decision on a motion to vacate a default judgment is just and equitable.” *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004). A motion to vacate a default judgment is addressed to the discretion of the trial court, but “where the determination of the trial court results in the denial of a trial on the merits an abuse of discretion may be more readily found than in those instances where the default judgment is set aside and a trial on the merits ensues.” *White*, 73 Wn.2d at 351-52. Thus, Washington’s higher courts have not hesitated to reverse trial courts that have been less than liberal in the exercise of their discretion to set aside default judgments where the defendant has even a minimal defense to the claims against it.<sup>4</sup>

Furthermore, trial courts have *no* discretion to enter default judgments or to refuse to vacate them where a defendant has appeared in the action but was not given proper notice of the motion for default. *See*,

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<sup>4</sup> *See, e.g., White*, 73 Wn.2d at 357; *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 724, 349 P.2d 1073 (1960); *Tiffin*, 44 Wn.2d at 847; *Paine-Gallucci, Inc. v. Anderson*, 35 Wn.2d 312, 322, 212 P.2d 805 (1949); *Hull*, 17 Wash. at 360; *Sacotte Constr., Inc. v. Nat’l Fire & Marine Ins. Co.*, 143 Wn. App. 410, 419, 177 P.3d 1147 (2008); *Old Republic Nat’l Title Ins. Co. v. Law Office of Robert E. Brandt, PLLC*, 142 Wn. App. 71, 73, 174 P.3d 133 (2007); *Gutz v. Johnson*, 128 Wn. App. 901, 916, 117 P.3d 390 (2005), *aff’d in relevant part sub nom. Morin v. Burris*, 160 Wn.2d 745, 758-60, 161 P.3d 956 (2007); *Norton v. Brown*, 99 Wn. App. 118, 124, 992 P.2d 1019 (1999); *Shreve v. Chamberlin*, 66 Wn. App. 728, 734, 832 P.2d 1355 (1992); *Calhoun v. Merritt*, 46 Wn. App. 616, 622, 731 P.2d 1094 (1986); *C. Rhyne & Assocs. v. Swanson*, 41 Wn. App. 323, 328, 704 P.2d 164 (1985).

*e.g.*, *Tiffin*, 44 Wn.2d at 847. CR 55(a)(3) provides that “[a]ny party who has appeared in the action for any purpose shall be served with a written notice of motion for default and the supporting affidavit at least 5 days before the hearing on the motion.” Thus, “a trial court acts without authority when it purports to enter a default judgment without notice against a party who has previously appeared. As a result, the previously appearing party is entitled as a matter of right to have the judgment set aside.” *Shreve*, 66 Wn. App. at 731. As the Washington Supreme Court explained in *Tiffin*, “where a trial court has authority to enter a default judgment, it is discretionary with the court whether to set such a judgment aside,” but where the court has no such authority due to the plaintiff’s failure to give the requisite notice, “the court has no discretion to exercise on the question of whether the judgment should be set aside. In the latter instance, the defendant may have such a default judgment set aside as a matter of right and no showing of a meritorious defense is necessary.” *Tiffin*, 44 Wn.2d at 847.

Indeed, to enter or uphold a default judgment where the defendant appeared but did not receive notice violates the defendant’s constitutional right to due process, as well as CR 55(a)(3). *See, e.g.*, *Ware v. Phillips*, 77 Wn.2d 879, 884-85, 468 P.2d 444 (1970); *Shreve*, 66 Wn. App. at 732. It also contravenes the “maxim of the law, as old as the law itself, that no

one may reap an advantage by his own wrong,” because to permit a plaintiff to obtain a default judgment without providing proper notice “would be to permit him to reap an advantage by his own wrong.” *Tiffin*, 44 Wn.2d at 845 (quoting *Batchelor v. Palmer*, 129 Wash. 150, 156, 224 P. 685 (1924)).

Here, the judgment must be reversed because (1) the trial court had no authority to enter the default judgment or to refuse to set it aside, and (2) the trial court abused its discretion in denying Charlotte Russe’s motion to vacate the default judgment.

**A. The trial court had no authority to enter the default judgment or to refuse to set it aside.**

This Court should reverse the default judgment, first and foremost, because Charlotte Russe appeared in this action, yet admittedly received no notice of Telekenex’s motion for default. Thus, the trial court had no authority to enter the default judgment, which is void and must be set aside regardless of the merits of Charlotte Russe’s defense.<sup>5</sup> *See Tiffin*, 44 Wn.2d at 847; *Colarcurcio v. Burger*, 110 Wn. App. 488, 497, 41 P.3d 506 (2002) (“Because the default order and default judgment were void, we need not decide whether [defendant’s] motion to vacate was brought

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<sup>5</sup> As demonstrated below, however, Charlotte Russe’s defense is very strong, and, as Telekenex *conceded* in the trial court, Charlotte Russe’s delay in filing a response to the complaint was excusable, it acted with due diligence after notice of entry of the default, and no substantial hardship will result to Telekenex from setting the default aside. *See* Section V.B, *infra*.

within a reasonable time, and whether [defendant] had a defense to the claim for damages.”).

This Court reviews “de novo questions of law, including . . . whether, on undisputed facts, appearance has been established as a matter of law.” *Rosander v. Nightrunner Transport, Ltd.*, 147 Wn. App. 392, 399, 196 P.3d 711 (2008); *see also Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007) (reviewing what constitutes appearance under de novo standard); *Tiffin*, 44 Wn.2d at 847 (abuse-of-discretion standard does not apply if defendant did not receive due notice of default motion). Accordingly, if this Court determines that Charlotte Russe “appeared” in the action below, as that term is liberally construed, the trial court’s judgment must be reversed.

“A defendant appears in an action when he answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance.” RCW 4.28.210. Under the plain terms of the statute, as well as the case law, a defendant need not file anything in court in order to appear in the action. *See id.*; *Tiffin*, 44 Wn.2d at 842-44; *State ex rel. Trickel v. Super. Ct.*, 52 Wash. 13, 14-15, 100 P. 155 (1909). Nor is a defendant required to serve a formal notice of appearance. As the Washington Supreme Court explained in *Morin*, “for over a century this court has applied the doctrine of substantial compliance. We have not

exalted form over substance but have examined the defendants' conduct to see if it was designed to and, in fact, did apprise the plaintiffs of the defendants' intent to litigate the cases." *Morin*, 160 Wn.2d at 755 (citation omitted). Thus, a defendant may appear by taking "some action acknowledging that the dispute is in court." *Id.* at 757.<sup>6</sup>

In *Sacotte*, for example, after the complaint had been served, the defendant's counsel called the plaintiff's counsel to enter an informal telephonic appearance. Nevertheless, the plaintiff moved for a default judgment without giving notice to the defendant or its counsel. The trial court granted the motion and denied the defendant's motion to vacate the default judgment. On appeal, the plaintiff argued that the telephone call did not constitute an appearance. But this Court held that "substantial compliance can be accomplished with an informal appearance if the party shows intent to defend and acknowledges the court's jurisdiction over the matter after the summons and complaint are filed." 143 Wn. App. at 415 (citing *Morin*, 160 Wn.2d at 749). Because the telephone call qualified as an appearance, the trial court "acted outside its authority by entering an order of default without notice in violation of CR 55(a)(3)." *Id.* at 419.

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<sup>6</sup> The court in *Morin* held that a defendant "must go beyond merely acknowledging that a *dispute* exists and instead acknowledge that a dispute exists *in court*." *Id.* at 756 (emphasis in original). Thus, prelitigation contacts, standing alone, do not constitute an appearance. *Id.* at 757. Once litigation has commenced, however, a party substantially complies with the appearance requirement by manifesting its intent to defend the action in court. *See id.*

The court in *Sacotte* found that the trial court’s entry of the default judgment was particularly inappropriate given the guiding principles of equity and the fact that the plaintiff’s counsel knew that the lawyer who entered the telephonic appearance had represented the defendant “in other, similar matters.” *Id.* at 417. An attorney “has a duty as an officer of the court to use, but not abuse the judicial process. This duty includes employing an acceptable level of professional courtesy to fellow attorneys and their clients.” *Id.* Given that the “courts have liberally construed the appearance requirements to allow them to be satisfied by substantial compliance,” plaintiff’s counsel’s strategy of silently deeming defendant’s appearance to be ineffective and then seeking a default judgment without giving notice to the defendant or its counsel was inequitable. *Id.* “Vigorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate.” *Id.* at 418 (quotation marks and brackets omitted); *see also Old Republic*, 142 Wn. App. at 75 (reversing trial court’s denial of motion to vacate default judgment under similar facts).

Moreover, Washington courts repeatedly have found substantial compliance with the appearance requirement where, as here, the parties are, or have been, engaged in closely related litigation in another forum. In *City of Des Moines v. \$81,231 in United States Currency*, 87 Wn. App.

689, 943 P.2d 66 (1997), for example, the City instituted forfeiture proceedings in municipal court, and the owner, Gray, filed a petition to remove the matter to superior court. But instead of answering the removal petition, the City filed another forfeiture action in superior court. Gray then moved for a default judgment in the removal action without providing the City with notice of the motion. *Id.* at 693-94. That was improper. “This is not a case where the City completely failed to respond to an action filed by Gray.” *Id.* at 697. Rather, the City “began the forfeiture action in the first place,” indicating “a clear purpose to defend its suit.” *Id.* Accordingly, “the City constructively appeared in the removal action by filing and serving its own forfeiture action in superior court within the 20-day limit to respond to Gray’s removal petition. The trial court correctly ruled that the City was entitled to notice of the default motion and properly vacated the default judgment for Gray’s failure to provide such notice.” *Id.* at 697-98.

Likewise, in *Gage*, the defendant had vigorously contested the plaintiff’s claims in an administrative proceeding, but failed to formally appear in an appeal from that proceeding in superior court. “Under these circumstances, [plaintiff] can have entertained no illusions regarding [defendant’s] intentions to contest the claims,” and the default judgment entered without notice was set aside. *Gage*, 55 Wn. App. at 162. To hold

otherwise “would elevate form over substance.” *Id.*; *see also Shreve*, 66 Wn. App. at 733 (given that defendant had answered five writs of garnishment, trial court erred in entering default judgment without notice on a sixth, unanswered, writ attempting to collect on the same judgment).

These cases are consistent with authorities interpreting the corresponding federal rule.<sup>7</sup> “When a defendant has appeared in one proceeding (whether formally or by showing an intent to defend), this also constitutes a Rule 55(b) appearance in a second, closely related or identical proceeding. In other words, the defendant’s actions in the first proceeding are taken as showing an intent to defend the second proceeding as well.” 10 James Wm. Moore, *MOORE’S FEDERAL PRACTICE* § 55.33[4][a] (3d ed. 2009) (citing *Civic Ctr. Square v. Ford (In re Roxford Foods)*, 12 F.3d 875, 881 (9th Cir. 1993); *Turner v. Salvatierra*, 580 F.2d 199, 201 (5th Cir. 1978); and *Press v. Forest Laboratories, Inc.*, 45 F.R.D. 354, 356-57 (S.D.N.Y. 1968)).

Here, Telekenex and its Washington counsel were well aware that Charlotte Russe had acknowledged the Washington action and intended to defend its position in court. In fact, Charlotte Russe was *already* in court,

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<sup>7</sup> Washington courts considering the proper application of the Civil Rules commonly look to analyses of the corresponding federal rules for guidance. *See, e.g., Soter v. Cowles Publ’g Co.*, 162 Wn.2d 716, 739, 174 P.3d 60 (2007); *Am. Mobile Homes v. Seattle-First Nat’l Bank*, 115 Wn.2d 307, 313, 796 P.2d 1276 (1990).

on precisely the same issues, in California. CP 88-117. Charlotte Russe's TRO papers in that action expressly acknowledged the Washington action. CP 110:10-26. More than that, the TRO brief makes clear that Charlotte Russe intended, upon service, to mount a vigorous defense to the Washington action. *Id.* The brief explicitly disputes the allegations of the Washington complaint, and strongly implies that, when appropriate, Charlotte Russe would file a demurrer on the grounds that the California action was filed first and pending. *See id.* (describing Washington action as an "apparent attempt to forum shop"). Telekenex's Washington counsel admitted that he read Charlotte Russe's TRO brief. CP 125-26 ¶ 5.

Further, at the hearing on the TRO, Charlotte Russe's counsel stated on the record that it had not been served with a copy of the Washington complaint. CP 81-82 ¶ 6. And, at various times after that, counsel for the parties discussed both actions. CP 125 ¶ 3. Again, Telekenex's Washington counsel was well aware of those conversations. CP 125-26 ¶ 5.

These facts are more than sufficient to establish Charlotte Russe's appearance in the Washington action as a matter of law. *See, e.g., Sacotte*, 143 Wn. App. at 415-18; *Des Moines*, 87 Wn. App. at 697; *Gage*, 55 Wn. App. at 162. Yet Telekenex's counsel never mentioned that the

Washington summons and complaint had been served, and admittedly did not give Charlotte Russe or its counsel notice of the motion for default. CP 82 ¶ 8, 125-26 ¶ 5. That motion, accordingly, is void as a matter of law and the trial court acted without authority both in entering the judgment and in refusing to vacate it. *See Tiffin*, 44 Wn.2d at 847.

Thus, the Court should reverse the judgment and remand the case for further proceedings.

**B. The trial court abused its discretion in denying Charlotte Russe’s motion to vacate the default judgment.**

This Court also should reverse the default judgment for the independent reason that the trial court abused its discretion in denying Charlotte Russe’s motion to vacate it. As stated above, given the disfavored status of default judgments and the strong policy in favor of determinations on the merits, abuse of discretion is “more readily found” where, as here, the trial court refused to vacate a default judgment. *White*, 73 Wn.2d at 352.

Justice between the parties must always be the “fundamental guiding principle” in deciding a motion to vacate a default judgment, “but the grounds and procedures are set forth in CR 60.” *Griggs*, 92 Wn.2d at 582. Under CR 60(b)(1), a default judgment may be set aside if the default was taken as a result of “[m]istakes, inadvertence, surprise,

excusable neglect or irregularity in obtaining a judgment or order.” A judgment may also be set aside for “[f]raud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.” CR 60(b)(4). And a judgment may be set aside for “[a]ny other reason justifying relief from the operation of the judgment.” CR 60(b)(11); *see also* CR 55(c)(1).

In deciding a motion to vacate addressed to the trial court’s discretion—as opposed to a motion on grounds of lack of notice<sup>8</sup>—courts generally consider four factors: (1) whether there is substantial evidence to support a prima facie defense to the claim asserted; (2) whether the default resulted from mistake, inadvertence, surprise, excusable neglect, or irregularity in obtaining the judgment; (3) whether the movant was diligent in asking that the default be set aside; and (4) whether vacating the judgment will result in substantial hardship to the other party. *See White*, 73 Wn.2d at 352; CR 60(b)(1) & (e)(1). The first two factors are the most important “and they, coupled with the secondary factors, vary in dispositive significance as the circumstances of the particular case dictate.” *White*, 73 Wn.2d at 352. Thus, a “strong defense requires less of a showing of excuse, provided the failure to appear was not willful.” *Calhoun*, 46 Wn. App. at 619. On the other hand, “where the defendant

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<sup>8</sup> *See Tiffin*, 44 Wn.2d at 847; Section V.A, *supra*.

moves promptly to vacate and has a strong case for excusable neglect, the strength of the defense is less important to the reviewing court.” *C. Rhyne & Assocs.*, 41 Wn. App. at 328.

The trial court “does not act as a trier of fact when considering a CR 60 motion.” *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 834, 14 P.3d 837 (2000). Rather, “a trial court ***must take the evidence and reasonable inferences in the light most favorable to the CR 60 movant*** when deciding whether the movant has presented ‘substantial evidence’ of a ‘prima facie’ defense.” *Id.* (emphasis added). Thus, a trial court abuses its discretion if it rejects the defendant’s version of the facts, even if the defense presented is “*not* ‘strong’ or ‘conclusive,’ but only ‘minimal,’ ‘prima facie’, and ‘sufficient.’” *Id.* (emphasis in original; quoting *White*, 73 Wn.2d at 353).

Moreover, apart from the four factors listed above and in *White*, “a default judgment should be set aside if the plaintiff has done something that would render enforcing the judgment inequitable.” *Morin*, 160 Wn.2d at 755; *see also* CR 60(b)(4) (default may be vacated due to plaintiff’s fraud, misrepresentation or other misconduct). In *Morin*, for example, the Washington Supreme Court held that “counsel’s failure to disclose the fact that the case had been filed and that a default judgment was pending when the [defendants’] claim representative was calling and trying to resolve

matters, and at a time when the time for filing an appearance was running, appears to be an inequitable attempt to conceal the existence of the litigation.” *Morin*, 160 Wn.2d at 759. The Supreme Court vacated the default judgment and remanded the case to the trial court. *Id.* at 750.

Similarly, in *Hardesty v. Stenchever*, 82 Wn. App. 253, 917 P.2d 577 (1996), after the plaintiff filed an initial action, the defendant hired outside counsel to handle it. The plaintiff then filed a second complaint raising the same issues, serving it on the defendant, but not the outside counsel. The defendant incorrectly assumed its counsel had been served, with the result that the complaint went unanswered, and a default judgment was entered. This Court held that although the defendant and outside counsel “may have been inattentive in failing to answer the complaint in” the second action, “*it would have been inequitable to allow [plaintiff] to prevail on the motion for default where her attorneys could have easily informed the attorneys whom they knew to be representing the defendants of the motion for default.*” *Id.* at 265 (emphasis added); see also *Skilcraft Fiberglass, Inc. v. Boeing Co.*, 72 Wn. App. 40, 863 P.2d 573 (1993) (default judgment vacated and sanctions imposed due to plaintiff’s bad faith).

**1. Telekenex’s inequitable behavior, standing alone, mandates reversal of the default judgment.**

Here, this Court should reverse the trial court, and need not even reach the *White* factors, because Telekenex’s conduct was at least as bad as the conduct held to be inequitable in *Morin* and *Hardesty*. Telekenex and its counsel in both California and Washington knew very well that Cooley represented Charlotte Russe in this matter. CP 125-26 ¶ 5. Indeed, Cooley lawyers had filed a complaint on behalf of Charlotte Russe in California raising precisely the same issues *before* Telekenex filed this action. CP 88-93. It was plainly inequitable for the trial court to allow Telekenex to obtain and retain a default judgment when its attorneys could and should have served Charlotte Russe’s attorneys with the complaint and, at the very least, should have notified them and Charlotte Russe of the motion for default. *See Hardesty*, 82 Wn. App. at 265; *Morin*, 160 Wn.2d at 759; *see also Tiffin*, 44 Wn.2d at 845 (“it is a maxim of the law, as old as the law itself, that no one may reap an advantage by his own wrong”).

**2. Telekenex conceded that Charlotte Russe satisfied three of the four *White* factors.**

Furthermore, Charlotte Russe easily satisfied all of the factors set forth in *White*. Indeed, Telekenex *conceded* that Charlotte Russe satisfied three of the four—all but the “prima facie defense” factor. That

concession is virtually dispositive here because, as stated above, “where the defendant moves promptly to vacate and has a strong case for excusable neglect”—as is admittedly the case here—“the strength of the defense is less important to the reviewing court.” *C. Rhyne & Assocs.*, 41 Wn. App. at 328. Telekenex’s concession, though fatal, is unsurprising. Charlotte Russe clearly established (1) excusable neglect, (2) diligence, and (3) lack of hardship to Telekenex.

*First*, numerous cases hold that a defendant’s failure to answer the complaint is the result of “a mistake, and not inexcusable neglect,” where, as here, the individual responsible for processing legal documents never received the summons and complaint because “someone in the process lost the papers.” *Boss Logger, Inc. v. Aetna Cas. & Sur. Co.*, 93 Wn. App. 682, 689, 970 P.2d 755 (1998). For example, in *Pfaff*, the defendant had timely received the complaint, but “one of its administrative assistants had then faxed the complaint to a wrong number.” *Pfaff*, 103 Wn. App. at 831. The court concluded that it “is apparent that [the defendant’s] failure to answer resulted from a mistake.” *Id.* at 836. Similarly, in *Showalter*, the paralegal who received the summons from the registered agent asked a manager to forward it to the defendant’s internal claims administrator, but he misunderstood and did not do so, with the result that the defendant did not hire counsel and ended up in default. *Showalter*, 124 Wn. App. at 514.

The court held that this “was a mistake, the result of a misunderstanding, and excusable neglect, not a willful intent to ignore the lawsuit.” *Id.*

Here, just as in those cases, “someone in the process lost the papers.” *Boss Logger*, 93 Wn. App. at 689; *see* CP 121-22 ¶¶ 1-4, 126 ¶ 7, 134 ¶ 21. It is undisputed that Charlotte Russe did not intend to ignore the lawsuit—far from it. Charlotte Russe’s inadvertent failure to respond to the complaint was excusable, and Telekenex has never argued otherwise. *See id.*; *Pfaff*, 103 Wn. App. at 836; *Showalter*, 124 Wn. App. at 514. Telekenex certainly has not argued, and cannot argue, that Charlotte Russe was “an essentially unresponsive party” that “halted” the adversary process—one of the basic prerequisites for a valid default judgment. *Norton*, 99 Wn. App. at 126; *Gage*, 55 Wn. App. at 160-61.

**Second**, there is and can be no dispute that Charlotte Russe acted diligently in seeking to vacate the default judgment. Charlotte Russe moved to vacate the default judgment within days of learning of it. CP 65-78, 125-126 ¶¶ 3-6. Given that diligence has been established by parties who took more than a month to move to vacate a default judgment after learning about it, Charlotte Russe certainly demonstrated the requisite diligence. *See, e.g., Calhoun*, 46 Wn. App. at 618, 622.

**Third**, Telekenex never claimed that it would have suffered substantial hardship if the motion to vacate had been granted; nor could it.

Where the record, as here, “shows no hardship other than the prospect of trial, it also shows ‘lack of substantial hardship’ within the meaning of *White*’s fourth factor.” *Pfaff*, 103 Wn. App. at 836.

**3. Charlotte Russe has strong defenses on the merits, and certainly has presented at least a “minimal” defense when the evidence and all reasonable inferences are taken in its favor, as the law requires.**

At bottom, Telekenex’s only argument below was that Charlotte Russe does not have a prima facie defense. CP 185-96. That argument has no merit. And the trial court’s literal rubber stamping of Telekenex’s proposed, and entirely conclusory, finding that “Defendant has no defense on the merits,” CP 246:4 (as amended by Sub No. 68),<sup>9</sup> was a clear abuse of discretion—particularly since the trial court was required to take the evidence and reasonable inferences in the light most favorable to Charlotte Russe. *See White*, 73 Wn.2d at 353-54; *Pfaff*, 103 Wn. App. at 834.

Charlotte Russe has a strong—and certainly a prima facie—defense that the Amendment on which Telekenex’s sole claim is based is invalid and unenforceable. Indeed, the California Superior Court found that Charlotte Russe has much more than a prima facie case that the Amendment is unenforceable. *See* CP 81 ¶ 6, 119-20. In granting the

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<sup>9</sup> The Court initially entered this finding as “Plaintiff has no defense on the merits.” This finding was corrected to read as quoted above by a separate Order Denying Defendant’s Motion to Set Aside Default Judgment and to Quash Writ of Garnishment and Granting Order to Correct Clerical Error Nunc Tunc Pro. Sub No. 68.

TRO, the California court necessarily found that Charlotte Russe was *likely to prevail* in proving the Amendment unenforceable. *See id.*

In particular, Charlotte Russe presented facts below to support *at least* a prima facie defense that Telekenex obtained the Amendment through duress. “Any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without the other’s volition constitutes duress.” *Harstad v. Frol*, 41 Wn. App. 294, 704 P.2d 638 (1985); *see also Pleuss v. Seattle*, 8 Wn. App. 133, 137, 504 P.2d 1191 (1972) (quoting Restatement of Contracts § 497 (1932)). In *Harstad*, for example, this Court reversed the trial court’s grant of summary judgment, holding that there was a triable question of fact on a claim of duress where the respondent “wrongfully refused to close its real estate purchase agreement,” placing the appellant “in an untenable economic position” and thereby extracting additional payments. *Id.*

It is black letter law that a contract or amendment is obtained by duress where it is the result of a “threat [that] is a breach of the duty of good faith and fair dealing under a contract with the recipient.” Restatement (Second) of Contracts § 176 (1981). A prime example of such duress is where—as here—the parties have a service contract and the party providing the service threatens to discontinue it unless the parties

modify their contract. *See id.* cmt. e, ill. 9.<sup>10</sup> Likewise, “a threatened breach [of contract] constitutes duress where the failure to receive the promised performance will result in irreparable injury to the business.” 28 WILLISTON ON CONTRACTS § 71:41 (4th ed. 2009). For example, in *Sunset Copper Co. v. Black*, 115 Wash. 132, 196 P. 640 (1921), the parties had a contract for the sale of a property upon deferred payments. The purchaser had paid nearly the entire purchase price, and made improvements as well, when the seller demanded interest payments to which it was not rightfully entitled under the contract, on threat of forfeiture. The purchaser made the payments under protest, and the court upheld, against a demurrer, its claim that it was entitled to recover the payments because they were made under duress. *Id.* at 133-36.

Here, Telekenex acquired AuBeta and expressly assumed its obligations to Charlotte Russe under the MSA. Sub No. 53, Ex. D, § 1.2(a). That contract was set to convert to a month-to-month commitment beginning on April 1, 2009. CP 138 ¶ 3. It also provided for 90-days’ written notice before it could be terminated by the service provider. *Id.*

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<sup>10</sup> The Restatement illustration is as follows: “A contracts to excavate a cellar for B at a stated price. A begins the excavation and then threatens not to finish it unless B makes a separate contract to excavate the cellar of another building. B, having no reasonable alternative, is induced by A’s threat to make the contract. A’s threat is a breach of his duty of good faith and fair dealing, and the proposed contract is voidable by B.” Restatement (Second) of Contracts § 176 cmt. e, ill. 9.

Nevertheless, after Telekenex acquired AuBeta in late March 2009, it threatened to terminate Charlotte Russe's service unless Charlotte Russe signed the Amendment, extending the MSA in Telekenex's favor by two years, with no consideration to Charlotte Russe. CP 131-33 ¶¶ 9-16, 147-73. Charlotte Russe signed the Amendment under protest because the threatened termination of service would have crippled the retail stores by making them incapable of processing credit card transactions, resulting in irreparable injury to Charlotte Russe, not only in lost sales, but in lost goodwill and business reputation. CP 132-33 ¶¶ 15-17, 172-73. Shortly thereafter, Charlotte Russe instituted an action in the San Diego Superior Court to vindicate its rights. CP 88-93. Under these facts, which must be accepted as true with all inferences taken in Charlotte Russe's favor, Charlotte Russe has established at least a prima facie defense to Telekenex's claim.

In fact, the situation here is essentially identical to the one described in the Restatement (Second) of Contracts as a paradigmatic case of duress. *See* Restatement (Second) of Contracts § 176 cmt. e, ill. 9. Where, as here, a service provider threatens a "captive" client with termination unless she agrees to a contract modification, that "threat *is a breach of his duty of good faith and fair dealing, and the proposed contract is voidable.*" *Id.* (emphasis added). A contracting party also

breaches the covenant of good faith and fair dealing when it acts to deprive the other party of the benefit of its bargain—or threatens to do so. *See, e.g., Lonsdale v. Chesterfield*, 99 Wn.2d 353, 357-60, 662 P.2d 385 (1983). That is exactly what happened here. Telekenex deprived Charlotte Russe of its bargained-for consideration under the MSA, including the impending conversion of the contract to a month-to-month arrangement and, most importantly, the provision for 90-days’ notice prior to termination.

Charlotte Russe therefore has a strong defense of duress to Telekenex’s contract claim, as well as the related defenses that Telekenex itself breached the contract and the covenant of good faith and fair dealing, and that the amendment Telekenex forced Charlotte Russe to sign is not supported by valid consideration.

Moreover, Charlotte Russe also presented evidence that “[t]o date, Charlotte Russe has timely paid all outstanding invoices to Telekenex.” CP 133 ¶ 20. That evidence, which the trial court was required to accept as true, is a complete defense to Telekenex’s claim because it establishes that Charlotte Russe did not breach the contract.

Finally, it is well established under the “priority of action rule” that “the court which first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved. The

reason for the doctrine is that it tends to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and of process.”” *Yakima v. Int’l Ass’n of Fire Fighters, Local 469*, 117 Wn.2d 655, 675, 818 P.2d 1076 (1991) (quoting *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981)).

Telekenex itself is arguing, in its demurrer in the first-filed California action, that the two actions involve exactly the same issues and parties, and that a decision in one will have res judicata effect in the other.

Request for Judicial Notice Ex. A at 5:17-18, 8:3-8. Given that admission, and the admitted fact that the California action was filed first, Charlotte Russe has an iron-clad defense that the action below must be stayed or dismissed under the priority of action rule. *See Yakima*, 117 Wn.2d at 675-76.

For all of these reasons, the trial court abused its discretion in denying Charlotte Russe’s motion to vacate the default judgment.

## VI. CONCLUSION

For all the foregoing reasons, this Court should reverse the trial court’s default judgment, as well as its denial of Charlotte Russe’s motion to vacate that judgment, and remand this case for further proceedings.

Respectfully submitted this 16th day of November, 2009,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys of record for Defendant herein.

On November 16, 2009, I 1) caused a true and correct copy of the foregoing document to be filed with the Clerk of the Court; and 2) caused a true and correct copy of the foregoing document to be duly served legal messenger (hand delivery) on the following party:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: November 16, 2009 at Seattle, Washington.

  
\_\_\_\_\_  
Tammy Miller

No. 64192-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON, DIVISION I

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TELEKENEX IXC, INC.,

Respondent/Plaintiff,

v.

CHARLOTTE RUSSE INCORPORATED,

Appellant/Defendant.

---

**APPENDIX OF NON-WASHINGTON AUTHORITIES  
SUPPORTING APPELLANT'S OPENING BRIEF**

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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 NOV 16 PM 4: 21

Appellant Charlotte Russe Incorporated respectfully submits the following non-Washington authorities in support of Appellant's Opening Brief:

10 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 55.33  
(3d ed. 2009)

WILLISTON ON CONTRACTS § 71:41 (4th ed. 2009)

RESTATEMENT (SECOND) OF CONTRACTS § 176 (1981)

Respectfully submitted this 16th day of November, 2009,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys of record for Defendant herein.

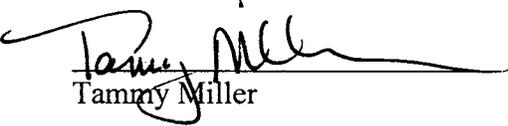
On November 16, 2009, I 1) caused a true and correct copy of the foregoing document to be filed with the Clerk of the Court; and 2) caused a true and correct copy of the foregoing document to be duly served legal messenger (hand delivery) on the following party:

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*Attorneys for Respondent/Plaintiff*

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: November 16, 2009 at Seattle, Washington.

  
Tammy Miller



1 of 1 DOCUMENT

Moore's Federal Practice - Civil

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Volume 10 Analysis: Civil Rules 54 - 55

Chapter 55 Default; Default Judgment

C. DEFAULT JUDGMENT

2. JUDGMENT RENDERED BY COURT

-55 Moore's Federal Practice - Civil § 55.33

**AUTHOR:** by Robert M. Bloom

### **§ 55.33 Parties Who Have Appeared Are Entitled to Notice of Hearing**

#### **[1] Rule 55 Requires Notice of Application at Least Seven Days Before Hearing**

If the defaulting party has appeared in the action, the claimant must serve the defaulting party written notice of any application for default judgment.<sup>n1</sup> A court may render a default judgment against a defaulting party without notice only if the defaulting party failed to appear.<sup>n2</sup>

Rule 55 states that the party or the party's representative must be served.<sup>n3</sup> Thus, the claimant ordinarily should serve notice of an application for a default judgment and of any hearing on the defaulting party's attorney of record.<sup>n4</sup>

While the notice of application for a default judgment and hearing must be written,<sup>n5</sup> Rule 55 does not prescribe any particular form of notice. The notice should be sufficient, however, if the defaulting party is made aware that the court may enter a default judgment against the defaulting party.<sup>n6</sup>

The claimant must give the defaulting party written notice of the application for a default judgment at least seven days before any hearing on the application.<sup>n7</sup> For discussion of the method for computing this seven-day time period according to Rule 6, see Ch. 6, *Computing and Extending Time; Time for Motion Papers*.

Although Rule 55 requires notice only to those parties who have appeared in the action, the court does have discretion to order notice to parties who have not appeared, or to order a greater amount of notice than seven days.<sup>n8-9</sup>

Some courts have ruled that notice is not required when the default judgment is not on application of the opposing party based on a party's failure to plead or defend, but rather is ordered by the court because of the party's failure to appear at trial. These courts have ruled that a default judgment under these circumstances is not improper for lack of the notice required by Rule 55(b)(2). The reasoning is that the defaulting parties did have notice of the trial and knew that their rights could be adjudicated even if they did not participate.<sup>n10</sup>

#### **[2] Failure to Give Notice Justifies Setting Aside Default Judgment, but Does Not Make Default Judgment**

## Void

Failure to provide 55(b)(2) notice, when the notice is required, is a serious procedural irregularity that usually justifies setting aside the default judgment or, on appeal, reversal of a district court's order failing to do so.<sup>11</sup> However, the failure to give the required notice does not render the default judgment void and subject to collateral attack,<sup>12</sup> although some courts have avoided ruling on the issue.<sup>13</sup> It should also be noted that one court has stated differently. Half a century ago, the Fifth Circuit stated that a default judgment obtained without notice was "void," but this court was concerned with a number of other procedural irregularities as well. In this case, the only "default" claimed was the withdrawal of counsel for the defendants, and the defendants pleadings and its demands for a jury trial in the case were ignored when the court rendered a "default" judgment on an unliquidated claim, allegedly without any proof or evidence. The combination of these facts led the Fifth Circuit to state that the judgment rendered without notice was "a denial of due process" and subject to collateral attack in a subsequent enforcement action.<sup>14</sup>

### [3] Any Submission to or Filing With Court Constitutes Appearance

The duty to give notice of an application for a default judgment is coextensive with the concept of when a party has "appeared" in the action (*see* [1], *above*), and courts interpret the concept of appearance quite broadly for Rule 55 notice purposes. Generally, any submission to or filing with the court constitutes an "appearance" for purposes of Rule 55(b).<sup>15</sup> This type of appearance will not only entitle the defaulting party to notice of the application for default judgment (under Rule 55(b)(2)),<sup>16</sup> but service of any papers filed in the case (under Rule 5).<sup>17</sup>

In contrast to its interpretation in the Rule 55(b) context, the concept of "appearance" for the purpose of determining personal jurisdiction is interpreted quite narrowly. In one case, for example, the court held that the defendants had not made a general appearance for personal jurisdiction purposes even though they had filed motions to enlarge the time to respond to the complaint.<sup>18</sup> Thus, cases determining what does and does not constitute an appearance in the jurisdictional context are not valid precedent for determining what does and does not constitute an appearance in the Rule 55(b) context, and vice versa.

### [4] Courts Are Split on Whether Informal Contacts Between Counsel May Constitute Appearance

#### [a] Most Courts Hold That Acts That Show Clear Purpose to Defend Constitute Appearance

The prevailing view is that, in order to obtain a default judgment, a claimant must give Rule 55(b) notice not only to parties who have appeared formally, but also to those parties who have indicated to the moving party, in any manner, a clear purpose to defend against the claims. A party may make a Rule 55(b) "appearance" by any of a variety of informal acts that are responsive to the claims and that may be regarded as sufficient to give the claimant a clear indication of the defendant's intention to contest the claims.<sup>19</sup> The Second Circuit has noted this prevailing view, but has not yet adopted one view or the other.<sup>20</sup> This extremely liberal view of what constitutes an appearance is based on the general policy in favor of the relaxation of restrictive rules that prevent the hearing of cases on the merits (*see* § 55.01). Those parties who have delayed in a formal sense by failing to plead responsively, but who have not completely abandoned or ignored their right to defend, are given the right to notice so that they may appear and contest the default judgment or dispute the amount of damages.<sup>21</sup>

Whether particular conduct demonstrates a "clear intent to defend" is highly fact-specific. The defendant may communicate an intent to defend directly to the plaintiff through phone calls or letters in response to the complaint.<sup>22</sup> In one case, a motion to dismiss that was served on the plaintiff constituted an appearance, even though the court clerk had refused to file it because it did not comply with local rules. The motion was enough to show the plaintiff that the defendant intended to defend.<sup>23</sup> On the other hand, a request to the plaintiff for additional time in which to plead did not show a clear intent to defend.<sup>24</sup>

Settlement discussions or negotiations may show an intent to defend if they indicate that the defendant plans to plead and assert defenses and counterclaims if the negotiations break down.<sup>n25</sup> On the other hand, it is possible to engage in settlement negotiations merely to settle the suit or for purposes of delay, without any plan to mount a defense. If so, there is no appearance and no entitlement to notice.<sup>n26</sup> Nor does engaging in negotiations show an intent to defend if the plaintiff clearly indicates that it will pursue litigation if negotiations break down and the defendant fails to take any steps toward defending the action.<sup>n27</sup>

When a defendant has appeared in one proceeding (whether formally or by showing an intent to defend), this also constitutes an Rule 55(b) appearance in a second, closely related or identical proceeding. In other words, the defendant's actions in the first proceeding are taken as showing an intent to defend the second proceeding as well.<sup>n28</sup> This principle may be applied only when the two proceedings involve the same parties, however. If the plaintiff was not a party to the earlier, related action, the plaintiff has not been made aware of any intent to defend and the defendant has not made an "appearance" in the plaintiff's subsequent action.<sup>n29</sup>

A waiver of service of process under Rule 4, which submits the party to the jurisdiction of the court, does not in any way indicate that a defendant intends to defend and does not constitute an appearance for purposes of Rule 55(b)(2).<sup>n30</sup>

#### **[b] Seventh Circuit Requires Formal Appearance**

In contrast to most other courts, the Seventh Circuit has categorically rejected the idea that a claimant needs to give Rule 55(b) notice to anyone who has not made a formal appearance in the action. The key to the Seventh Circuit's interpretation of a Rule 55(b) "appearance" is some presentation or submission to the court itself. Discussions among or documents exchanged solely among the parties do not fit the Seventh Circuit definition of "appearance":<sup>n31</sup>

[I]t is a disservice to the legal system to distort the meaning of a concrete term such as "appearance" in order to provide a mechanism to save a party from a default judgment. Efficient court management and reliability of judicial process is enhanced by court records which disclose the critical procedural actions of the parties--such as the entry of an appearance. This minimal formal requirement does not deprive a district judge of the opportunity to grant relief from a default judgment where warranted. If, for example, a defaulted party is lulled or induced into inaction by settlement discussions and foregoes filing an appearance and responsive pleading, relief may be sought on the basis of such conduct under the provisions of Rule 60(b)(1)--without artificial reliance on Rule 55(b)(2).

The Seventh Circuit has the better linguistic and practical argument. Its rule is sensible and easy to administer. The "clear purpose to defend" concept is nebulous and bases the necessity of notice on questions of fact and law that are difficult for the parties to determine, even though a failure to give required notice may lead to reversal on appeal. The situation is particularly problematic when a default judgment is sought from the clerk (*see* § 55.21), because the clerk may enter a default judgment only when a party has *not* appeared.<sup>n32</sup> The clerk is in no position to know whether there have been discussions or documents exchanged among the parties and thus, under the majority definition of the term, cannot determine with certainty whether any party has or has not "appeared" in the action. This leaves the party seeking default judgment in the position, merely for safety's sake, of always requesting the court to enter judgment and always sending notice to all defending parties. The drafters of Rule 55 surely did not intend such a result. The provisions of Rule 55 show that the drafters intended that the parties and the clerk would be able to make a simple, bright-line determination as to whether any defaulting party has or has not made an "appearance" in an action.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Bankruptcy Law  
Case Administration  
Notice  
Contracts Law  
Contract Conditions & Provisions  
General Overview  
Real Property Law  
Homestead Exemptions

**FOOTNOTES:**

(n1)Footnote 1. *Fed. R. Civ. P. 55(b)(2)*; *see also Fed. R. Civ. P. 5(a)*; *Florida Physician's Ins. Co. v. Ehlers*, 8 F.3d 780, 784 (11th Cir. 1993) (notice was sufficient when sent to defendants' addresses on file with court, or to addresses where they had been contacted previously, even though defendants contended they had not received notice).

(n2)Footnote 2. **Default without notice only if party did not appear.**

*2d Circuit Bobrow Greenapple & Skolnik v. Woods*, 865 F.2d 43, 44 (2d Cir. 1989) (default judgment was proper without notice when defendants failed to make any appearance in action and never responded to papers served on them).

*7th Circuit Zuelzke Tool Eng'g Co. v. Anderson Die Castings, Inc.* 925 F.2d 226, 230 (7th Cir. 1991) (party who did not formally appear was not entitled to notice of default judgment).

(n3)Footnote 3. *Fed. R. Civ. P. 55(b)(2)*.

(n4)Footnote 4. *Fed. R. Civ. P. 5(b)(1)*; *see generally Ch. 5, Serving and Filing Pleadings and Other Papers* .

(n5)Footnote 5. *Fed. R. Civ. P. 55(b)(2)*.

(n6)Footnote 6. **No prescribed form for notice.**

*1st Circuit See Key Bank v. Tablecloth Textile Co.*, 74 F.3d 349, 353 (1st Cir. 1996) (major consideration is that party be made aware that default judgment may be entered).

*2d Circuit See also Sony Corp. v. S.W.I. Trading, Inc.*, 104 F.R.D. 535, 539 (S.D.N.Y. 1985) (service of motion for default judgment on defendant's former attorney was sufficient when attorney had not officially withdrawn and defendant received actual notice of motion). *9th Circuit Wilson v. Moore & Assocs., Inc.*, 564 F.2d 366, 369 (9th Cir. 1977) (major consideration is that party be made aware that default judgment may be entered).

(n7)Footnote 7. *Fed. R. Civ. P. 55(b)(2)* (as amended effective Dec. 1, 2009); *see Fed. R. Civ. P. 55*, advisory committee note of 2009 (prior to December 1, 2009, rule required three days' notice).

(n8)Footnote 8-9. [Reserved]

(n9)Footnote 10. **Notice requirement does not apply for failure to appear at trial.**

*1st Circuit Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc.*, 982 F.2d 686, 692-693 (1st Cir. 1993) ("By its very terms, therefore, Rule 55(b)(2) does not apply where, as here, there is no motion for default pending and where the court has, on its own motion, found a party to be in default for a failure to appear").

*2d Circuit Brock v. Unique Racquetball & Health Clubs, Inc.*, 786 F.2d 61, 65 (2d Cir. 1986) (when court ordered default because party failed to appear during course of trial that had begun, court was not required to hold separate hearing on damages but was entitled to proceed to take testimony of witnesses and complete trial record).

*7th Circuit Anilina Fabrique de Colorants v. Aakash Chems. & Dyestuffs, Inc.*, 856 F.2d 873, 877 (7th

*Cir. 1988*) (*Fed. R. Civ. P. 55(b)(2)*) notice was not required when court ordered default judgment on own motion, rather than in response to application by plaintiff, based on defendant's failure to be prepared to proceed at scheduled trial).

*9th Circuit Ringgold Corp. v. Worrall*, 880 F.2d 1138, 1141 (*9th Cir. 1989*) (district court had authority to impose default judgment after defendant repeatedly failed to attend pretrial conferences or otherwise participate in or remain informed about the litigation and then failed to attend on first day of trial scheduled months before; notice requirements of *Fed. R. Civ. P. 55(b)(2)* were inapplicable, citing Second Circuit's *Brock* decision).

*11th Circuit See also Solaroll Shade & Shutter Corp. v. Bio-Energy Sys.*, 803 F.2d 1130, 1134 (*11th Cir. 1986*) (when court rendered judgment based on party's failure to respond to motion to enforce settlement agreement, judgment was not default judgment subject to *Fed. R. Civ. P. 55* and notice was not required).

(n10)Footnote 11. **Failure to give notice justifies reversal of default judgment.**

*1st Circuit Key Bank v. Tablecloth Textile Co.*, 74 F.3d 349, 355 (*1st Cir. 1996*) (failure to provide required notice was grave error that, coupled with showing of existence of potentially meritorious defense, required that default judgment be set aside); *Muniz v. Vidal*, 739 F.2d 699, 701 (*1st Cir. 1984*) (failure to give required notice is serious procedural irregularity that, absent special circumstances, requires that default be set aside, citing **Moore's**).

*2d Circuit Press v. Forest Labs., Inc.*, 45 F.R.D. 354, 357 (*S.D.N.Y. 1968*) (when notice of motion for default judgment is required, but not given, judgment entered without notice must be vacated as matter of law).

*5th Circuit Savoretti v. Rodriguez-Jiminez*, 252 F.2d 290, 291 (*5th Cir. 1958*) (district court erred in not setting aside default judgment that had been entered without required notice).

*6th Circuit Lutomski v. Panther Valley Coin Exch.*, 653 F.2d 270, 271 (*6th Cir. 1981*) (judgment reversed when defendant who had appeared was not given notice).

*7th Circuit North Cent. Ill. Laborers' Dist. Council v. S.J. Groves & Sons Co.*, 842 F.2d 164, 168 (*7th Cir. 1988*) ("Failure to provide such notice is a serious procedural error, and absent special circumstances the lack of notice requires that the default be set aside").

*8th Circuit United States ex rel. Time Equip. Rental & Sales, Inc. v. Harre*, 983 F.2d 128, 130 (*8th Cir. 1993*) (judgment reversed for failure to comply with notice provision).

*9th Circuit Civic Ctr. Square v. Ford (In re Roxford Foods)*, 12 F.3d 875, 879-881 (*9th Cir. 1993*) (absent special circumstances, failure to give necessary notice requires that default judgment be set aside when attacked on direct appeal or by motion to vacate judgment, citing **Moore's**); *Wilson v. Moore & Assocs., Inc.*, 564 F.2d 366, 369 (*9th Cir. 1977*) (failure to provide notice when required is serious procedural irregularity that usually justifies setting aside default judgment or reversing for failure to do so).

*10th Circuit Wilver v. Fisher*, 387 F.2d 66, 69 (*10th Cir. 1967*) (failure to give necessary notice requires that judgment be set aside).

(n11)Footnote 12. **Lack of notice does not render default judgment void.**

*7th Circuit Planet Corp. v. Sullivan*, 702 F.2d 123, 126 n.2 (7th Cir. 1983) (default judgment entered without written notice is voidable but not void, citing **Moore's**).

*10th Circuit Winfield Assocs., Inc. v. Stonecipher*, 429 F.2d 1087, 1091 (10th Cir. 1970) (procedural defect such as failure to give required notice may be sufficient to afford relief from default judgment but, by itself, should not be treated as so serious as to render judgment void, citing **Moore's**).

(n12)Footnote 13. **No ruling.** *See, e.g., New York v. Green*, 420 F.3d 99, 107 (2d Cir. 2005) ("we have no occasion to decide, and therefore express no opinion on, whether a default judgment entered without the required notice under Rule 55(b)(2) is void or merely voidable").

(n13)Footnote 14. **Lack of notice of entire case may render "default" judgment void.** *See Bass v. Hoagland*, 172 F.2d 205, 210 (5th Cir. 1949) (default judgment when party had no notice that judgment by default was sought and no reason to believe he was in default was denial of due process).

(n14)Footnote 15. **Submission to court constitutes appearance.**

*1st Circuit United States v. \$23,000 in U.S. Currency*, 356 F.3d 157, 164 (1st Cir. 2004) (filing answer constituted appearance, so that party was entitled to notice under *Fed. R. Civ. P. 55(b)(2)*, even though answer was not sufficient to avoid default when it was not accompanied by verified statement as required by *Fed. R. Civ. P., Supp. R. C(6)*); *cf. Taylor v. Boston & Taunton Transp. Co.*, 720 F.2d 731, 733 (1st Cir. 1983) (party did not enter appearance merely by informing court that he intended to file motion and answer).

*5th Circuit United States v. McCoy*, 954 F.2d 1000, 1003 (5th Cir. 1992) (letter entitled "Special Appearance" that raised four defenses and was filed before hearing constituted appearance); *Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n*, 874 F.2d 274, 277 (5th Cir. 1989) (motion to dismiss mailed to opposing counsel and submitted to court constituted appearance even though clerk had refused to accept it).

*8th Circuit United States ex rel. Time Equip. Rental & Sales, Inc. v. Harre*, 983 F.2d 128, 130 (8th Cir. 1993) (late answer, even though subsequently stricken, constituted appearance, and party was entitled to notice); *Commercial Cas. Ins. Co. v. White Line Transfer & Storage Co.*, 114 F.2d 946, 947 (8th Cir. 1940) (plaintiff who had filed complaint and then defaulted on counterclaims and crossclaims was entitled to notice).

(n15)Footnote 16. *See Fed. R. Civ. P. 55(b)(2)*.

(n16)Footnote 17. *See Fed. R. Civ. P. 5(a)(1), (2)*.

(n17)Footnote 18. **"Appearance" for purposes of personal jurisdiction is more narrow concept.** *Benny v. Pipes*, 799 F.2d 489, 492-493 (9th Cir. 1986) (pre-answer motions were insufficient to constitute general appearance).

(n18)Footnote 19. **Notice must be given to defendants who have indicated "clear purpose to defend suit."**

*1st Circuit Key Bank v. Tablecloth Textile Co.*, 74 F.3d 349, 353 (1st Cir. 1996) (defaulting party has appeared for Fed. R. Civ. P. 55 purposes if it has indicated to moving party clear purpose to defend suit).

*3d Circuit Heleasco Seventeen, Inc. v. Drake*, 102 F.R.D. 909, 912 (D. Del. 1984) ("An appearance may arise by implication from defendant's seeking, taking or agreeing to some steps or proceedings in the cause beneficial to himself or detrimental to plaintiff").

*5th Circuit Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n*, 874 F.2d 274, 276 (5th Cir. 1989) (appearance is defined broadly to include variety of informal acts on defendant's part that are responsive to plaintiff's formal action in court, and which may be regarded as sufficient to give plaintiff clear indication of defendant's intention to contest claims, citing **Moore's**); *see also Rogers v. Hartford Life & Accident Ins. Co.*, 167 F.3d 933, 936-937 (5th Cir. 1999) ("We have taken an expansive view as to what constitutes an appearance under Rule 55(b)(2). We have not construed the phrase 'has appeared in the action' to require the filing of responsive papers or actual in-court efforts by the defendant. Rather, to qualify as an appearance and trigger Rule 55(b)(2)'s notice requirements, the defendant's actions merely must give the plaintiff a clear indication that the defendant intends to pursue a defense and must be responsive to the plaintiff's formal Court action").

*6th Circuit Lutomski v. Panther Valley Coin Exch.*, 653 F.2d 270, 271 (6th Cir. 1981) (informal contacts between parties may constitute appearance if contacts indicate defaulting party intends to defend suit).

*9th Circuit Civic Ctr. Square v. Ford (In re Roxford Foods)*, 12 F.3d 875, 879 (9th Cir. 1993) ("In limited situations, informal contacts between the parties have sufficed when the party in default has thereby demonstrated a clear purpose to defend the suit").

*11th Circuit SEC v. GetAnswers, Inc.*, 219 F.R.D. 698, 700 (D. Fla. 2004) (defendant need not make formal appearance to trigger notice requirement, but must simply manifest clear intention to defend).

*D.C. Circuit H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970) ("The notice requirement contained in Rule 55(b)(2) is, however, a device intended to protect those parties who, although delaying in a formal sense by failing to file pleadings within the 20-day period, have otherwise indicated to the moving party a clear purpose to defend the suit").

(n19)Footnote 20.

**Second Circuit.** *New York v. Green*, 420 F.3d 99, 105-107 (2d Cir. 2005) (noting prevailing view, but finding it unnecessary to choose between prevailing and minority view under circumstances of case).

(n20)Footnote 21. **Rationale of liberal policy.** *See H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970) .

(n21)Footnote 22. **Phone calls or letters demonstrated intent to defend.**

*3d Circuit Heleasco Seventeen, Inc. v. Drake*, 102 F.R.D. 909, 912 (D. Del. 1984) (two telephone conversations with plaintiffs, initiated by defendants' attorney, showed intent to defend and, therefore, constituted appearance).

*5th Circuit Charlton L. Davis & Co. P.C. v. Fedder Data Center, Inc.*, 556 F.2d 308, 309 (5th Cir.1977) (notice was required when plaintiff knew from phone call and letter responsive to the plaintiff's action that defendant "had a clear purpose to defend the suit"); *Dalminter, Inc. v. Jessie Edwards, Inc.*, 27 F.R.D. 491, 493 (D. Tex. 1961) (letter by defendant's president to plaintiff's counsel, which answered summons and set out defense, was appearance even though not filed with court).

*6th Circuit Lutomski v. Panther Valley Coin Exch.*, 653 F.2d 270, 271 (6th Cir. 1981) (informal communications between defendant and plaintiff informed plaintiff that defendant intended to dispute amount of damages).

(n22)Footnote 23. **Motion served on plaintiff.** *Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n*, 874 F.2d 274, 277 (5th Cir. 1989) (motion to dismiss that was served on plaintiff, even though it was rejected by clerk, showed clear intent to defend).

(n23)Footnote 24. **Request for additional time.** *FSLIC v. Kroenke*, 858 F.2d 1067, 1068 (5th Cir.1988) (defendant did not appear when only action was his counsel's request to opposing counsel for informal extension of time in which to plead).

(n24)Footnote 25. **Settlement negotiations showed intent to defend.**

*1st Circuit Key Bank v. Tablecloth Textile Co.*, 74 F.3d 349, 353 (1st Cir. 1996) (defendant appeared when letter to plaintiff initiated settlement negotiations, detailed defenses and counterclaims, and stated intent to file pleadings if settlement negotiations broke down); *Muniz v. Vidal*, 739 F.2d 699, 700-701 (1st Cir. 1984) (when defendant retained attorney, who entered into settlement negotiations with plaintiff and discussed defenses and counterclaims he was prepared to assert, this constituted appearance).

*D.C. Circuit H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 692 (D.C. Cir. 1970) (defendant appeared when parties engaged in written and oral settlement discussions for 75 days before plaintiff, without indicating any previous intent to do so, filed motion for default judgment--"The exchanges between the parties thereafter were the normal effort to see if the dispute could be adjusted by agreement, but neither party was in any doubt that the suit would be contested if the efforts to agree were unavailing.").

(n25)Footnote 26. **Settlement negotiations did not show intent to defend.**

*2d Circuit New York v. Green*, 420 F.3d 99, 105-107 (2d Cir. 2005) (even under most liberal definition of "appearance," defendants had not appeared based merely on communications with plaintiff that did not in any way assert defenses or point out weaknesses in plaintiff's case and at most suggested willingness to settle action, not defend against it).

*9th Circuit Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 689 (9th Cir. 1988) (when defendant disputed bill for services, but only comment possibly indicating intent to defend was statement that he would refer suit to his attorney, this was not enough to constitute appearance).

*11th Circuit SEC v. GetAnswers, Inc.*, 219 F.R.D. 698, 700 (D. Fla. 2004) (settlement negotiations did not constitute appearance when there was no evidence that defendant expressed intent to defend, rather than delay).

(n26)Footnote 27. **No appearance when plaintiff indicates it will pursue action.**

*3d Circuit Port-Wide Container Co. v. Interstate Maint. Corp.*, 440 F.2d 1195, 1196 (3d Cir. 1971) (settlement negotiations do not constitute an appearance if the party seeking a default clearly communicates an intention to seek a default judgment if settlement negotiations do not produce results by a specific deadline).

*9th Circuit Franchise Holding II, LLC v. Huntington Rests. Group, Inc.*, 375 F.3d 922, 928 (9th Cir. 2004) (no appearance when plaintiff warned defendant it was about to pursue litigation, but defendant made no efforts to preserve its interests until plaintiff began to collect on default judgment); *see also Wilson v. Moore & Assocs., Inc.*, 564 F.2d 366, 369 (9th Cir. 1977) (informal letter was not appearance when plaintiff provided actual, unqualified notice that delay in answering complaint would result in default).

(n27)Footnote 28. **Appearance in closely related or identical case is appearance.**

*2d Circuit Press v. Forest Lab., Inc.*, 45 F.R.D. 354, 356-357 (S.D.N.Y. 1968) (contacts in first suit constituted appearance in second when second suit was really only refileing of existing suit).

*5th Circuit Turner v. Salvatierra*, 580 F.2d 199, 201 (5th Cir. 1978) (when complaint was dismissed for failure to prosecute and later refiled, answer to first complaint constituted appearance with respect to second complaint).

*9th Circuit Civic Ctr. Square v. Ford (In re Roxford Foods)*, 12 F.3d 875, 881 (9th Cir. 1993) (claims in bankruptcy action were sufficiently identical to those in declaratory judgment action so that bankruptcy trustee's contacts in regard to bankruptcy action were sufficient to constitute appearance in declaratory judgment action).

(n28)Footnote 29. **Related actions must involve same plaintiff.** *SEC v. GetAnswers, Inc.*, 219 F.R.D. 698, 701 (D. Fla. 2004) (appearance by defendant in related action did not constitute appearance in present action when related action did not involve same plaintiff).

(n29)Footnote 30. **Waiver of service does not show intent to defend.** *Rogers v. Hartford Life & Acc. Ins. Co.*, 167 F.3d 933, 938 (5th Cir. 1999); *see generally Fed. R. Civ. P. 4(d); Ch. 4, Summons.*

(n30)Footnote 31. **Seventh Circuit requires presentation to court.** *Zuelzke Tool & Eng'g Co. v. Anderson Die Castings, Inc.*, 925 F.2d 226, 230-231 (7th Cir. 1991) (defendant who had made no formal appearance before the court was not entitled to notice of hearing).

(n31)Footnote 32. *Fed. R. Civ. P. 55(b)(1).*

## Williston on Contracts

Database updated May 2009

Richard A. Lord

## Chapter

## 71. Duress and Undue Influence

## VII. Methods of Duress or Coercion—Injury to Business or Livelihood

## References

**§ 71:41. Breach of contract****West's Key Number Digest**West's Key Number Digest, Contracts 95, 95(1)**Legal Encyclopedias**

Am. Jur. 2d, Duress and Undue Influence § 16

A threatened breach of contract ordinarily is not in itself coercive.[FN7] Threats by the other party to breach a contract by withholding performance unless the complaining party agrees to a further demand may constitute economic duress.[FN8] A threat to breach a contract or to withhold payment of an admitted debt may constitute the wrongful act required for economic duress.[FN9] Thus, a threatened breach constitutes duress where the failure to receive the promised performance will result in irreparable injury to the business.[FN10]

It follows that a defendant's refusal to deliver a crane in accordance with a contract, insisting upon a higher price for it, will constitute economic duress where no other crane meeting the contract specifications could be readily obtained by the plaintiff, who would have to pay a penalty on its contract with the federal government.[FN11] Conversely, a release obtained by a plaintiff through threats not to complete a roofing contract with the defendant was not obtained under duress because the defendant could have hired another contractor and then sued the plaintiff for damages. There was no threat of irreparable injury to the defendant's business.[FN12]

To further illustrate, in an action to recover in replevin for the detention of certain chattels and for recovery in quantum meruit, the defendant alleged that his agreement with the plaintiff was obtained by duress.[FN13] The court reviewed the facts which indicated that a completion date was included in the contract; a threat of holding the defendant in default would result in it being declared "an irresponsible bidder" which would preclude it from receiving "any future government work." [FN14]

"A concession or an agreement may be exacted under such circumstances of business necessity or compulsion as will render the same involuntary and unenforceable." [FN15] The existence of economic duress is demonstrated by proof that one party to a contract has threatened to breach the contract by withholding performance

unless the other party agrees to some further demand; to establish the economic duress defense, the defendants must establish that they were compelled to agree to the terms of the contract because of a wrongful threat by the plaintiff which precluded the exercise of their free will.[FN16]

Distinguishable from the factual situations discussed above, but also relating to breach, is the situation where a party has breached the contract and uses the breach as leverage to force a settlement or waiver from the other party regarding the breach. Thus, for example, a soft drink producer's refusal to supply diet syrup to its regional bottlers at a time when their right to the syrup under their supply agreements was still in dispute, unless the bottlers agreed to sign temporary supply agreements waiving their right to damages if the soft drink producer was found in breach, did not rise to the level of duress and did not affect the validity of the bottlers' waiver of their right to damages, though the soft drink producer's advertising had created a great demand for diet soda, and though the bottlers' decision to sign the temporary supply agreements may have been prompted by their fear that they might lose goodwill if they did not offer diet soda to their customers.[FN17]

According to the Restatement (Second) of Contracts and cases applying it, a threat is improper, for the purposes of establishing duress, "if the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient." [FN18] The drafters explain further in a Comment: "A threat by a party to a contract not to perform his contractual duty is not, of itself, improper. Indeed, a modification induced by such a threat may be binding, even in the absence of consideration, if it is fair and equitable in view of unanticipated circumstances .... The mere fact that the modification induced by the threat fails to meet this test does not mean that the threat is necessarily improper. However, the threat is improper if it amounts to a breach of the duty of good faith and fair dealing imposed by the contract .... As under the Uniform Commercial Code, the 'extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith .... The test of "good faith" between merchants or as against merchants includes "observance of reasonable commercial standards of fair dealing in the trade" (Section 2-103), and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under Sections 2-615 and 2-616.' Comment 2 to Uniform Commercial Code § 2-209. However, a threat of non-performance made for some purpose unrelated to the contract, such as to induce the recipient to make an entirely separate contract, is ordinarily improper .... Furthermore, a threat may be a breach of the duty of good faith and fair dealing under the contract even though the threatened act is not itself a breach of the contract .... This is particularly likely to be the case if the threat is effective because of power not derived from the contract itself." [FN19]

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[FN7]

**Second Circuit**

DuFort v. Aetna Life Ins. Co., 818 F. Supp. 578 (S.D. N.Y. 1993) (applying New York law)

**Ill.**

Krilich v. American Nat. Bank and Trust Co. of Chicago, 334 Ill. App. 3d 563, 268 Ill. Dec. 531, 778 N.E.2d 1153 (2d Dist. 2002), appeal denied, 202 Ill. 2d 672, 272 Ill. Dec. 358, 787 N.E.2d 173 (2003)

**N.Y.**

Sosnoff v. Carter, 165 A.D.2d 486, 568 N.Y.S.2d 43 (1st Dep't 1991)

Manno v. Mutual Ben. Health and Acc. Ass'n, 18 Misc. 2d 80, 187 N.Y.S.2d 709 (Sup 1959)

30 East End v. World Steel Products Corp., 110 N.Y.S.2d 754 (Sup 1952)

**N.C.**

Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521, 67 A.L.R.3d 1 (1973) (quoting text)

Housing, Inc. v. Weaver, 37 N.C. App. 284, 246 S.E.2d 219 (1978), judgment aff'd, 296 N.C. 581, 251 S.E.2d 457 (1979) (quoting case law quoting text)

**Or.**

Oregon Bank v. Nautilus Crane & Equipment Corp., 68 Or. App. 131, 683 P.2d 95, 38 U.C.C. Rep. Serv. 1163 (1984)

**Pa.**

Tri-State Roofing Co. of Uniontown v. Simon, 187 Pa. Super. 17, 142 A.2d 333 (1958)

[FN8]

**Second Circuit**

Sudul v. Computer Outsourcing Services, Inc., 917 F. Supp. 1033 (S.D. N.Y. 1996) (applying New York law)

**Tenth Circuit**

Misco Leasing, Inc. v. Keller, 490 F.2d 545 (10th Cir. 1974) (citing text)

Reagan v. Bankers Trust Co., 863 F. Supp. 1511 (D. Utah 1994) (actions, not motives, must cause economic duress)

[FN9]

**Tenth Circuit**

Misco Leasing, Inc. v. Keller, 490 F.2d 545 (10th Cir. 1974) (citing text)

**Ala.**

International Paper Co. v. Whilden, 469 So. 2d 560 (Ala. 1985)

**Alaska**

Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Service Co., 584 P.2d 15, 9 A.L.R.4th 928 (Alaska 1978) (citing text)

**Cal.**

Rich & Whillock, Inc. v. Ashton Development, Inc., 157 Cal. App. 3d 1154, 204 Cal. Rptr. 86 (4th Dist. 1984)

[FN10]

**Second Circuit**

U S West Financial Services, Inc. v. Tollman, 786 F. Supp. 333 (S.D. N.Y. 1992)

**Fourth Circuit**

G.E.B., Inc. v. QVC, Inc., 129 F. Supp. 2d 856 (M.D. N.C. 2000) (applying North Carolina law)

**Court of Claims**

James Shewan & Sons v. U.S., 73 Ct. Cl. 49, 1931 WL 2423 (1931)

Hazelhurst Oil Mill & Fertilizer Co. v. U.S., 70 Ct. Cl. 334, 42 F.2d 331 (1930)

**Alaska**

Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Service Co., 584 P.2d 15, 9 A.L.R.4th 928 (Alaska 1978)

**D.C.**

Sind v. Pollin, 356 A.2d 653 (D.C. 1976)

**Ill.**

Pittsburgh Steel Co. v. Hollingshead & Blei, 202 Ill. App. 177, 1916 WL 2572 (1st Dist. 1916)

**Kan.**

Cf.: McCormick v. Dalton, 53 Kan. 146, 35 P. 1113 (1894)

**La.**

Jung v. Gwin, 174 La. 111, 139 So. 774 (1932)

**Mich.**

Cf.: Michigan Portland Cement Co. v. General Builders Supply Co., 240 Mich. 701, 216 N.W. 376 (1927)

**Minn.**

Cf.: Cable v. Foley, 45 Minn. 421, 47 N.W. 1135 (1891)

**N.Y.**

Sosnoff v. Carter, 165 A.D.2d 486, 568 N.Y.S.2d 43 (1st Dep't 1991) (citing text)

Cf.: Gallagher Switchboard Corp. v. Heckler Elec. Co., 36 Misc. 2d 225, 232 N.Y.S.2d 590 (Sup 1962)

Criterion Holding Co. v. Cerussi, 140 Misc. 855, 250 N.Y.S. 735 (Sup 1931)

**N.C.**

Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521, 67 A.L.R.3d 1 (1973) (quoting text)

Housing, Inc. v. Weaver, 37 N.C. App. 284, 246 S.E.2d 219 (1978), judgment aff'd, 296 N.C. 581, 251 S.E.2d 457 (1979) (quoting case law quoting text)

N. C. Monroe Const. Co. v. Coan, 30 N.C. App. 731, 228 S.E.2d 497 (1976) (citing text)

**Pa.**

Tri-State Roofing Co. of Uniontown v. Simon, 187 Pa. Super. 17, 142 A.2d 333 (1958)

**Tex.**

Alexander v. S.A. Trufant Commission Co., 34 S.W. 182 (Tex. Civ. App. 1895), writ refused

**Va.**

Harris v. Cary, 112 Va. 362, 71 S.E. 551 (1911)

**Wash.**

Cf.: White v. T. W. Little Co., 118 Wash. 582, 204 P. 186 (1922)

**Wyo.**

Blubaugh v. Turner, 842 P.2d 1072 (Wyo. 1992)

[FN11]

**Tex.**

King Const. Co. v. W. M. Smith Elec. Co., 350 S.W.2d 940 (Tex. Civ. App. Texarkana 1961), writ refused n.r.e., (Apr. 11, 1962)

[FN12]

**Pa.**

Tri-State Roofing Co. of Uniontown v. Simon, 187 Pa. Super. 17, 142 A.2d 333 (1958)

[FN13]

**N.Y.**

Gallagher Switchboard Corp. v. Heckler Elec. Co., 34 Misc. 2d 256, 229 N.Y.S.2d 623 (Sup 1962) (citing Doyle v. Rector of Trinity Church, 133 N.Y. 372, 31 N.E. 221 (1892))

[FN14]

**N.Y.**

Gallagher Switchboard Corp. v. Heckler Elec. Co., 34 Misc. 2d 256, 229 N.Y.S.2d 623 (Sup 1962) (it appeared that the defendant relied to a certain extent on work that it did for the City of New York; therefore, when the Acting Commissioner of Public Works of New York wrote the defendant that it would be necessary "to complete the work without any further delay" or it would be declared "in default on the contract," the defendant felt obliged to do whatever the City required)

[FN15]

**N.Y.**

Gallagher Switchboard Corp. v. Heckler Elec. Co., 34 Misc. 2d 256, 229 N.Y.S.2d 623 (Sup 1962)

See also:

**S.D.**

Drier v. Great American Ins. Co., 409 N.W.2d 357 (S.D. 1987) (citing text)

[FN16]

**Second Circuit**

Zipper v. Sun Co., Inc., 947 F. Supp. 62 (E.D. N.Y. 1996) (applying New York law)

**N.Y.**

Friends Lumber Inc. v. Cornell Development Corp., 243 A.D.2d 886, 663 N.Y.S.2d 327 (3d Dep't 1997)

**N.C.**

Housing, Inc. v. Weaver, 37 N.C. App. 284, 246 S.E.2d 219 (1978), judgment aff'd, 296 N.C. 581, 251 S.E.2d 457 (1979) (citing text)

[FN17]

**Third Circuit**

Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co., 769 F. Supp. 671 (D. Del. 1991), judgment aff'd, 988 F.2d 414 (3d Cir. 1993)

[FN18] Restatement (Second) of Contracts § 176(1)(d).

See also:

**Colo.**

Vail/Arrowhead, Inc. v. District Court for the Fifth Judicial Dist., Eagle County, 954 P.2d 608 (Colo. 1998)

[FN19] Restatement (Second) of Contracts § 176, Comment e.

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Chapter 7. Misrepresentation, Duress And Undue Influence  
Topic 2. Duress And Undue Influence

## § 176. When A Threat Is Improper

[Link to Case Citations](#)**(1) A threat is improper if**

- (a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,**
- (b) what is threatened is a criminal prosecution,**
- (c) what is threatened is the use of civil process and the threat is made in bad faith, or**
- (d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.**

**(2) A threat is improper if the resulting exchange is not on fair terms, and**

- (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,**
- (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or**
- (c) what is threatened is otherwise a use of power for illegitimate ends.**

**Comment:**

*a. Rationale.* An ordinary offer to make a contract commonly involves an implied threat by one party, the offeror, not to make the contract unless his terms are accepted by the other party, the offeree. Such threats are an accepted part of the bargaining process. A threat does not amount to duress unless it is so improper as to amount to an abuse of that process. Courts first recognized as improper threats of physical violence and later included wrongful seizure or detention of goods. Modern decisions have recognized as improper a much broader range of threats, notably those to cause economic harm. The rules stated in this Section recognize as improper both the older categories and their modern extensions under developing notions of “economic duress” or “business compulsion.” The fairness of the resulting exchange is often a critical factor in cases involving threats. The categories within Subsection (1) involve threats that are either so shocking that the court will not inquire into the fairness of the resulting exchange (see Clauses (a) and (b)) or that in themselves necessarily involve some element of unfairness (see Clauses (c) and (d)). Those within Subsection (2) involve threats in which the impropriety consists of the threat in combination with resulting unfairness. Such a threat is not improper if it can be shown that the exchange is one on fair terms. Of course a threat may be improper for more than one reason. Any threat that comes within Subsection (1) as well as Subsection (2) is improper without an inquiry, under the rule stated in Subsection (2), into the fairness of the resulting exchange.

*b. Crime or tort.* A threat is improper if the threatened act is a crime or a tort, as in the traditional examples of threats of physical violence and of wrongful seizure or retention of goods. See Comment *a*. Where physical violence is threatened, it need not be to the recipient of the threat, nor even to a person related to him, if the threat in fact induces the recipient to manifest his assent. See Illustration 2. The threatened act need not involve harm to person or goods but may, for example, involve a tortious interference with another's contractual rights. Where the crime or tort is a minor one, however, the claim of duress may fail, even though the threat is improper, on the ground that the victim had a reasonable alternative (see Comment *b* to § 175) or that the threat was not an inducing cause (see Comment *c* to § 175). The threatened act need not be a crime or tort if the threat itself would have been one had it resulted in the obtaining of property. Therefore, in jurisdictions where a broad modern extortion statute has been enacted, many of the threats that come within Subsection (2) are elements of the crime of extortion and therefore also fall within Clause (1)(a). See Model Penal Code § 223.4. The fairness of the exchange is immaterial in such cases.

**Illustrations:**

1. A is a good faith purchaser for value of a valuable painting stolen from B. When B demands the return of the painting, A threatens to poison B unless he releases all rights to the painting for \$1,000. B, having no reasonable alternative, is induced by A's threat to sign the release, and A pays him \$1,000. The threatened act is both a crime and a tort, and the release is voidable by B. 2. A threatens B that he will kill C, an employee of B, unless B makes a contract to sell A a tract of land that B owns. B, having no reasonable alternative, is induced by A's threat to make the contract. The threatened act is both a crime and a tort, and the contract is voidable by B. 3. A, a pawnbroker, has possession of a valuable heirloom pledged by B. B offers to redeem the pledge, but A threatens not to surrender it unless B signs a promissory note in compromise of another claim, the validity of which is in dispute. B, having no reasonable alternative, is induced by A's threat to sign the note. The threatened act is a tort, and the note is voidable by B.

*c. Threat of prosecution.* Under the rule stated in Clause (1)(b), a threat of criminal prosecution is improper as a means of inducing the recipient to make a contract. An explanation in good faith of the criminal consequences of another's conduct may not involve a threat. But if a threat is made, the fact that the one who makes it honestly believes that the recipient is guilty is not material. The threat involves a misuse, for personal gain, of power given for other legitimate ends. See Comment *f*. The threat may be to instigate prosecution against the recipient or some third person, who is commonly although not necessarily a relative of the recipient. The guilt or innocence of the person whose prosecution is threatened is immaterial in determining whether the threat is improper, although it may be easier to show that the threat actually induced assent in the case of guilt. A bargain to suppress prosecution may be unenforceable on grounds of public policy. See the Introductory Note to Chapter 8 on agreements against public policy.

**Illustrations:**

4. A, who believes that B, his employee, has embezzled money from him, threatens B that a criminal complaint will be filed and he will be prosecuted immediately unless he executes a promissory note for \$5,000 in satisfaction of A's claim. B, having no reasonable alternative, is induced by A's threat to sign the note. The note is voidable by B. A may, however, have a claim against B for restitution of any money embezzled. See Comment *d* to § 175. 5. A is the payee of a valid \$5,000 promissory note executed by B for the repayment of money embezzled by B. A makes a threat to C, a friend of B, that a criminal complaint will be filed and B will be prosecuted immediately unless C becomes a surety on the note in consideration of an extension of time for its payment. C is induced by A's threat to become a surety. The suretyship contract is voidable by C.

*d. Threat of civil process.* The policy in favor of free access to the judicial system militates against the characterization as improper of threats to commence civil process, even if the claim on which the process is based eventually proves to be without foundation. Nevertheless, if the threat is shown to have been made in bad faith, it is improper. Bad faith may be shown by proving that the person making the threat did not believe there was a reasonable basis for the threatened process, that he knew the threat would involve a misuse of the process or that he realized the demand he made was exorbitant. See Comment *f*. However, a threat to commence civil process, even if improper, may not amount to duress since defense of the threatened action is often a reasonable alternative. See Comment *b* to § 175.

**Illustrations:**

6. A threatens to commence a civil action and file a *lis pendens* against a tract of land owned by B, unless B makes a contract to discharge a disputed claim that B has against A. A knows that the threatened action is without foundation. B, having no reasonable alternative, is induced by A's threat to make the contract. Since A does not believe that there is a reasonable basis for the threatened process, his threat is made in bad faith. A's threat is improper, and the contract is voidable by B. If, however, A believes that there is a reasonable basis for the threatened process and if the proposed contract is not exorbitant, the threat is not improper, and the contract is not voidable by B. 7. A, who has a valid claim for damages against B, threatens to attach a shipment of perishable goods unless B makes a contract to sell a machine to A. As A knows, other non-perishable goods are available for attachment. B, having no reasonable alternative, is induced by A's threat to make the contract. Since A knows that the threatened attachment would involve a misuse of that process to force a settlement rather than to preserve assets, his threat is made in bad faith. A's threat is improper and the contract is voidable by B.

*e. Breach of contract.* A threat by a party to a contract not to perform his contractual duty is not, of itself, improper. Indeed, a modification induced by such a threat may be binding, even in the absence of consideration, if it is fair and equitable in view of unanticipated circumstances. See § 89. The mere fact that the modification induced by the threat fails to meet this test does not mean that the threat is necessarily improper. However, the threat is improper if it amounts to a breach of the duty of good faith and fair dealing imposed by the contract. See § 205. As under the Uniform Commercial Code, the "extortion of a 'modification' without legitimate commercial reason is ineffective as a violation of the duty of good faith.... The test of 'good faith' between merchants or as against merchants includes 'observance of reasonable commercial standards of fair dealing in the trade' (Section 2-103), and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under Sections 2-615 and 2-616." Comment 2 to Uniform Commercial Code § 2-209. However, a threat of non-performance made for some purpose unrelated to the contract, such as to induce the recipient to make an entirely separate contract, is ordinarily improper. See Illustration 9. Furthermore, a threat may be a breach of the duty of good faith and fair dealing under the contract even though the threatened act is not itself a breach of the contract. See Illustrations 10 and 11. This is particularly likely to be the case if the threat is effective because of power not derived from the contract itself. See Comment *f*.

**Illustrations:**

8. A contracts to excavate a cellar for B at a stated price. A unexpectedly encounters solid rock and threatens not to finish the excavation unless B modifies the contract to state a new price that is reasonable but is nine times the original price. B, having no reasonable alternative, is induced by A's threat to make the modification by a signed writing that is enforceable by statute without consideration. A's threat is not a breach of

his duty of good faith and fair dealing, and the modification is not voidable by B. See Illustration 1 to § 89.9. A contracts to excavate a cellar for B at a stated price. A begins the excavation and then threatens not to finish it unless B makes a separate contract to excavate the cellar of another building. B, having no reasonable alternative, is induced by A's threat to make the contract. A's threat is a breach of his duty of good faith and fair dealing, and the proposed contract is voidable by B. See Illustration 5 to § 175.10. A contracts to sell part of a tract of land to B. B, solely to induce A to discharge him from his contract duty on favorable terms, threatens to resell the land to a purchaser whose industrial use will have an undesirable effect on A's remaining land, unless A releases B in return for a stated sum. A, having no reasonable alternative, signs the release. B's threat is a breach of his duty of good faith and fair dealing, and the modification is voidable by A.<sup>11</sup> A makes a threat to discharge B, his employee, unless B releases a claim that he has against A. The employment agreement is terminable at the will of either party, so that the discharge would not be a breach by A. B, having no reasonable alternative, releases the claim. A's threat is a breach of his duty of good faith and fair dealing, and the release is voidable by B.

*f. Other improper threats.* The proper limits of bargaining are difficult to define with precision. Hard bargaining between experienced adversaries of relatively equal power ought not to be discouraged. Parties are generally held to the resulting agreement, even though one has taken advantage of the other's adversity, as long as the contract has been dictated by general economic forces. See Illustration 14. Where, however, a party has been induced to make a contract by some power exercised by the other for illegitimate ends, the transaction is suspect. For example, absent statute, a threat of refusal to deal with another party is ordinarily not duress, but if other factors are present an agreement that results from such a threat may be called into question. Subsection (2) deals with threats that are improper if the resulting exchange is not on fair terms. Clause (a) is concerned with cases in which a party threatens to do an act that would not significantly benefit him but would harm the other party. If, on the recipient's refusal to contract, the maker of the threat were to do the threatened act, it would therefore be done maliciously and unconscionably, out of pure vindictiveness. A typical example is a threat to make public embarrassing information concerning the recipient unless he makes a proposed contract. See Illustration 12 and Model Penal Code § 223.4(g). Clause (b) is concerned with cases in which the party making the threat has by unfair dealing achieved an advantage over the recipient that makes his threat unusually effective. Typical examples involve manipulative conduct during the bargaining stage that leaves one person at the mercy of the other. See Illustration 13. Clause (c) is concerned with other cases in which the threatened act involves the use of power for illegitimate ends. Many of the situations encompassed by clauses (1)(b), (1)(c), (2)(a) and (2)(b) involve extreme applications of this general rule, but it is more broadly applicable to analogous cases. See Illustrations 15 and 16. If, in any of these cases, the threat comes within Subsection (1), as where the threatened act or the threat itself is criminal or tortious (Clause (1)(a)), it is improper without an inquiry into the fairness of the resulting exchange under Subsection 2. See Comment *a*.

#### **Illustrations:**

12. A makes a threat to B, his former employee, that he will try to prevent B's employment elsewhere unless B agrees to release a claim that he has against A. B, having no reasonable alternative, is thereby induced to make the contract. If the court concludes that the attempt to prevent B's employment elsewhere would harm B and would not significantly benefit A, A's threat is improper and the contract is voidable by B.<sup>13</sup> A, who has sold goods to B on several previous occasions, intentionally misleads B into thinking that he will supply the goods at the usual price and thereby causes B to delay in attempting to buy them elsewhere until it is too late to do so. A then threatens not to sell the goods to B unless he agrees to pay a price greatly in excess of that charged previously. B, being in urgent need of the goods, makes the contract. If the court concludes that the

effectiveness of A's threat in inducing B to make the contract was significantly increased by A's prior unfair dealing, A's threat is improper and the contract is voidable by B.14. The facts being otherwise as stated in Illustration 13, A merely discovers that B is in great need of the goods and that they are in short supply but does not mislead B into thinking that he will supply them. A's threat is not improper, and the contract is not voidable by B.15. A operates a fur storage concession for customers of B's store. A becomes bankrupt and fails to pay C \$1,000 for charges for storing furs of B's customers. C makes a threat to B not to deliver the furs to B's customers unless B makes a contract to pay C the \$1,000 plus \$2,000 that A owes C for storage of other furs. B, afraid of offending its customers and having no reasonable alternative, makes the contract. If the court concludes that C's threat to B is a use for illegitimate ends of its power as against B to retain the furs for the \$1,000 owed for the storage of furs for B's customers, C's threat is improper and the contract is voidable by B.16. A, a municipal water company, seeking to induce B, a developer, to make a contract for the extension of water mains to his development at a price greatly in excess of that charged to those similarly situated, threatens to refuse to supply to B unless B makes the contract. B, having no reasonable alternative, makes the contract. Because the threat amounts to a use for illegitimate ends of A's power not to supply water, the contract is voidable by B.

#### **REPORTER'S NOTE**

This Section is new. It replaces and is based in part on former § 493, which dealt with methods of exercising duress. See 13 Williston, Contracts §§ 1601-03, 1606-22 (3d ed.1970).