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SETTING ASIDE ENTRIES OF DEFAULT: SOUTH CAROLINA SHOULD REQUIRE A REASON

I. INTRODUCTION

An entry of default officially records a party's "failure to answer or otherwise respond."[1] For "good cause," a court can set aside an entry of default and permit the action to proceed.[2] In 1989, the South Carolina Court of Appeals established three factors to be considered in determining whether good cause exists to grant relief from an entry of default.[3] These factors, known as the "*Wham* factors," examine the timing of the motion for relief, the merit of the defaulting party's defense, and the degree of prejudice suffered by the other party if relief is granted.[4] *Wham* does not require the party seeking relief to present a reason, excuse, or explanation for the default. In three recent opinions, the South Carolina Court of Appeals has inconsistently applied the *Wham* factors, at times requiring some degree of reason or excuse before setting aside the entry of default.[5] Relief from an entry of default is within the discretion of the trial court, but an error of law or lack of evidentiary support for the relief is grounds for reversal.[6] This inconsistent application of the factors to be examined when considering a motion to set aside a default entry confuses the bar and increases the likelihood of reversal on appeal. This Comment analyzes the court of appeals' recent variations on the *Wham* factors and recommends that a threshold reason explaining the default should be required before a court analyzes the *Wham* factors.

Part II of this Comment provides an overview of the default process, discusses the rules for opening both an entry of default and a default judgment, and reviews the *Wham* factors. Part III analyzes recent court of appeals decisions that have applied inconsistent standards for setting aside entries of default. Part IV argues that courts should require a showing of the reason for the default before setting aside an entry of default. Part V recommends a method for evaluating the justification offered for reversing the entry of default. This Comment concludes by suggesting that the reason for the default should serve a threshold function to be considered before analysis of the *Wham* factors.

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1. JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 440 (2d ed. 1996).
2. S.C. R. CIV. P. 55(c).
3. Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989).
4. *Id.* at 465, 381 S.E.2d at 502.
5. *See* discussion *infra* Part III.
6. Ricks v. Weinrauch, 293 S.C. 372, 374-75, 360 S.E.2d 535, 536-37 (Ct. App. 1987).

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II. DEFAULT PROCESS AND RULES

A. Default Process

The path to obtaining a judgment by default is usually a two-step procedure requiring the entry of default and a subsequent default judgment.[7] An entry of default is simply "the ministerial act recognizing that a party has not completed a required action in the time provided under the rules."[8] The clerk will enter default for "fail[ure] to plead or otherwise defend as provided by the[] rules."[9] Entries of default can result from failure to meet pleading deadlines, comply with rules, or appear in court, among other reasons.[10] If the claim involves a liquidated or sum certain amount, then, on motion of the entitled party, the court can enter a default judgment against the defaulting party after the entry of default.[11] However, in claims involving an unliquidated amount, the non-defaulting party must apply for the default judgment, and the court will generally conduct a damages hearing to ascertain the measure of recovery before entering the default judgment.[12] Accordingly, when the claim is for an unascertained amount, the entry of default merely serves as an "interlocutory act,"[13] while the default judgment reflects the "final disposition of the case."[14]

B. Setting Aside the Entry of Default and the Default Judgment

State and federal rules provide mechanisms to set aside both an entry of default and a default judgment. Rule 55(c) of the South Carolina Rules of Civil Procedure provides that for "good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."[15] Opening an entry of default erases the entry made in the courthouse file book and "allows a defaulting defendant to file an answer in the pending action."[16] While Rule 55(c) provides the good cause standard for opening entries of default, Rule 60(b) specifies the standard for setting aside a default judgement.[17] Rule 60(b) permits the court to "relieve

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7. S.C. R. CIV. P. 55.

8. FLANAGAN, *supra* note 1, at 436; *see* West v. Marko, 541 S.E.2d 226, 230 (N.C. Ct. App. 2001) (noting that entry of default deems allegations admitted and "denies the responding party the opportunity to answer the complaint").

9. S.C. R. Civ. P. 55(a).

10. 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2692, at 84 (3d ed. 1998).

11. S.C. R. CIV. P. 55(b)(1).

12. S.C. R. CIV. P. 55(b)(2).

13. Estate of Teel v. Darby, 500 S.E.2d 759, 762 (N.C. Ct. App. 1998).

14. WRIGHT ET AL., *supra* note 10, § 2692, at 84.

15. *See also* FED. R. CIV. P. 55(c) (stating the same rule).

16. West v. Marko, 504 S.E.2d 571, 573 (N.C. Ct. App. 1998).

17. Ricks v. Weinrauch, 293 S.C 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987).

a party or his legal representative from a final judgment, order, or proceeding for the following reasons: 1) mistake, inadvertence, surprise, or *excusable neglect*; 2) newly discovered evidence . . .; 3) fraud . . .; 4) the judgment is void; 5) [a satisfied judgment]."[18]

When applying the vague good cause requirement of Rule 55(c) for opening a default judgment, courts often look to the more articulated "excusable neglect" standard of Rule 60(b).[19] However, courts are more lenient in setting aside an entry of default than they are in reversing a default judgment. In considering a Rule 55(c) motion, the court exercises a "broader, more liberal discretion"[20] than the "more rigorous"[21] standard of a Rule 60(b) motion. The difference in scrutiny applied to each motion reflects the nature of each action. Rule 55(c) reverses an interlocutory clerical annotation, while Rule 60(b) upsets a final judgment. The opening of default judgments "destroys the finality of the judgment and is contrary to the strong policy that litigation should be concluded and the parties be able to rely on judgments that have been obtained."[22] Thus, one seeking to open a default judgment under Rule 60(b) bears a "heavier burden" than one attempting to set aside an entry of default under Rule 55(c).[23]

C. Conflicting Policies Behind What Constitutes Good Cause

In defining the good cause that Rule 55(c) requires for setting aside an entry of default, courts confront conflicting policies. The South Carolina Court of Appeals has held that Rule 55(c) should be "liberally construed to promote justice and dispose of cases on the merits."[24] South Carolina favors "the disposition of issues on their merits rather than on technicalities."[25] A "preference for trials on the merits" suggests a lenient interpretation of good

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18. S.C. R. CIV. P. 60(b) (emphasis added).

19. *See* William H. Danne, Jr., Annotation, *What Constitutes "Good Cause" Allowing Federal Court to Relieve Party of His Default Under Rule 55(c) of Federal Rules of Civil Procedure*, 29 A.L.R. FED. 7, 14 (1976); *see also* Singh v. Mortensun, 30 P.3d 853, 857 (Colo. Ct. App. 2001) (Roy, J., concurring) (illustrating the confusion surrounding standards for Rule 55(c) motions). In *Singh* the majority defined "good cause" in terms of "excusable neglect," 30 P.3d at 856-57; the concurring opinion noted that "good cause" was a more lenient standard than the "excusable neglect" standard of Rule 60(b) and rejected the majority's commingling of the two standards. *Id.* at 857-58.

20. Top Value Homes, Inc. v. Harden, 319 S.C. 302, 306, 460 S.E.2d 427, 429 (Ct. App. 1995).

21. *Ricks*, 293 S.C. at 374, 360 S.E.2d at 536; *see also* RC Assocs. v. Regency Ventures, Inc., 432 S.E.2d 394, 398 (N.C. Ct. App. 1993) (noting the "showing required to set aside an entry of default is less stringent than that required to set aside a default judgment").

22. FLANAGAN, *supra* note 1, at 440.

23. Palmetto Fed. Sav. Bank of S.C. v. Indus. Valley Title Ins. Co., 756 F. Supp. 925, 931 (D.S.C. 1991).

24. Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995).

25. Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001).

cause that will readily permit reversal of entries of default in meritorious cases.[26] On the other hand, court deadlines and rules "serve important social goals, and a party should not be permitted to flout them with impunity."[27] Respect for judicial guidelines and judicial economy and efficiency suggests a more stringent interpretation of good cause to make setting aside entries of default more difficult than the lenient standard outlined in *Wham*.

D. Traditional South Carolina Factors Considered for a Rule 55(c) Motion

In 1989, the South Carolina Court of Appeals established a framework for determining when a defaulting party has shown good cause for setting aside an entry of default. In *Wham v. Shearson Lehman Brothers*[28] the court of appeals reprimanded the trial court for incorrectly applying Rule 60(b)'s "excusable neglect" standard to a defendant's Rule 55(c) motion.[29] Remanding the case for reconsideration, the court directed the trial court to note three factors in considering whether to relieve the defendant from the entry of default: "(1) the timing of [defendant's] motion for relief [after the entry of default]; (2) whether [defendant] has a meritorious defense; and (3) the degree of prejudice to [the non-defaulting party] if relief is granted."[30] Although the court noted that trial courts "shall consider" these factors, the opinion was unclear whether the *Wham* factors are the exclusive considerations or just some of the factors that should be considered.[31] The *Wham* court did not explicitly require an examination of the reason, justification, or excuse for the defaulting party's failure to respond in a timely manner. Subsequent decisions have reiterated the three *Wham* factors as indicia of good cause.[32]

The court cited two sources for the *Wham* factors: Wright, Miller and Kane's *Federal Practice and Procedure*, and Lightsey and Flanagan's *South Carolina Civil Procedure*.[33] The Wright treatise lists only the three factors prescribed by the *Wham* court,[34] but Lightsey and Flanagan include "the reasons for the failure to act promptly" as a factor relevant to a Rule 55(c)

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26. *Palmetto Fed. Sav. Bank*, 756 F. Supp. at 931 (quoting Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 811 (4th Cir. 1988)).

27. Brown v. Lifford, 524 S.E.2d 587, 590 (N.C. Ct. App. 2000) (quoting Howell v. Haliburton, 205 S.E.2d 617, 619 (N.C. Ct. App. 1974)).

28. 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989).

29. *Id.* at 465, 381 S.E.2d at 501.

30. *Id.*, 381 S.E.2d at 502.

31. *See id.*, 381 S.E.2d at 501.

32. *See* Maxwell v. Genez, 350 S.C. 563, 568-69, 567 S.E.2d 496, 499 (Ct. App. 2002); Weeks v. Drawdy (*In re* Weeks), 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997); Top Value Homes, Inc. v. Harden, 319 S.C. 302, 306, 460 S.E.2d 427, 429 (Ct. App. 1995).

33. *Wham*, 298 S.C. at 465, 381 S.E.2d at 502.

34. 10 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2694, at 493 (2d ed. 1983).

inquiry.[35] Prior to the most recent spate of Rule 55(c) opinions, which are discussed below, only one state court decision noted the discrepancy. In 1994, the South Carolina Court of Appeals included a reason requirement in addition to the three *Wham* factors as relevant to the determination of good cause.[36]

III. INCONSISTENT APPLICATION OF THE *WHAM* FACTORS

Recent decisions by the court of appeals have applied various permutations of the *Wham* factors in deciding whether good cause exists for relief under Rule 55(c), providing trial courts and the bar unclear guidance on the applicable standards. This inconsistency leaves trial courts and the bar guessing about the proper standards to apply, and the application of different standards causes inconsistent results in both trial and appellate courts.

In May 2001, the court evaluated the reason for the default, as well as the three *Wham* factors, in considering a Rule 60(b) motion. In *Hill v. Dotts*[37] the court affirmed the denial of a motion for relief from a default judgment.[38] The court found the defendant's "failure to understand the legal process" to be an insufficient reason to qualify as excusable neglect under Rule 60(b).[39] The court noted that Lightsey and Flanagan's four factors, including the reason requirement, "were originally utilized to help determine whether an entry of default should be set aside" and were "applicable to both" Rule 55(c) and Rule 60(b) motions.[40] The court cited *Wham* for the proposition that the four factors should also be used in evaluating a Rule 55(c) motion.[41]

The June 2002 court of appeals decision in *Maxwell v. Genez*[42] ignored the reason requirement and focused solely on the three *Wham* factors. In *Maxwell* the court reversed the denial of a plaintiff's Rule 6(b) motion for enlargement of time.[43] The plaintiff failed to meet a deadline because of a mixup resulting from a new paralegal in the office of plaintiff's counsel.[44] The court noted the

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35. HARRY M. LIGHTSEY & JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 82 (1985).

36. N.H. Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993). The court used the four factors enumerated in LIGHTSEY & FLANAGAN, *supra* note 35, in deciding a Rule 60(b) motion but noted that the same factors were relevant for Rule 55(c) motions.

37. 345 S.C. 304, 547 S.E.2d 894 (Ct. App. 2001).

38. *Id.* at 311, 547 S.E.2d at 898.

39. *Id.*, 547 S.E.2d at 897.

40. *Id.* at 310 n.1, 547 S.E.2d at 897 n.1 (emphasis omitted). One month after *Hill*, the court of appeals reiterated its search for both a reason and the *Wham* factors when considering a Rule 60(b) motion. *See* Mictronics, Inc. v. S.C. Dept. of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). However, in *Mictronics*, the court did not specifically note that the same factors could be applied to a Rule 55(c) motion. *Id.*

41. *Hill*, 345 S.C. at 310, 547 S.E.2d at 897.

42. 350 S.C. 563, 567 S.E.2d 496 (Ct. App. 2002).

43. *Id.* at 572, 567 S.E.2d at 501. Rule 6(b)(2) permits the court to extend deadlines after the expiration of a specified period for "good cause" shown. The good cause standard of Rule 6(b) is the same standard as good cause under Rule 55(c). *See* FLANAGAN, *supra* note 1, at 440.

44. *Maxwell*, 350 S.C. at 566, 567 S.E.2d at 498.

good cause standard of Rule 6(b) "is the same standard applied . . . pursuant to Rule 55(c)."[45] In its good cause review, the court relied exclusively on the three *Wham* factors, finding the plaintiff satisfied *Wham* and thus warranted relief. The court did not mention that a reason for the default was an essential element for finding good cause.

Fifteen days following *Maxwell*, the court of appeals abandoned the *Wham* factors and searched only for a reason behind the default in considering a Rule 55(c) motion. In *Pilgrim v. Miller*[46] the court, on rehearing of its earlier decision in the same case, affirmed the denial of Rule 55(c) relief to a defendant whose insurance company failed to answer timely.[47] After the defendant delivered the suit papers to her insurer, she did not inquire further about the case.[48] Although the court mentioned the *Wham* factors, it focused its analysis on the lack of reason for the default: "[B]ecause no explanation was offered for [the insurer's] failure to respond to the complaint, we find no abuse of discretion here and affirm the trial court's refusal to set aside the default."[49] In affirming the trial court's finding of "no specific reason . . . for the lack of response to the Summons and Complaint," the court noted the defendant's attempted explanation: "*I've got no excuse . . . . I have no idea* [why a response was not given] and I have no way of telling *because no one knows*."[50] The court did not address or examine any of the *Wham* factors.

Within a thirteen month period, the court changed the elements of its good cause analysis from *Wham* factors plus a reason, to *Wham* factors alone, and then to a reason alone. These conflicting standards for relief from an entry of default make it difficult for the bench and the bar to consistently resolve Rule 55(c) applications. For example, if the *Pilgrim* court had applied the factors used by the *Maxwell* court (only the three *Wham* factors), then the court would likely have reached a different conclusion.[51] Conversely, if the *Maxwell* court

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45. *Id.* at 568, 567 S.E.2d at 499.

46. 350 S.C. 637, 567 S.E.2d 527 (Ct. App. 2002).

47. *Id.* at 642, 567 S.E.2d at 529. Earlier, in January 2002, the court of appeals considered the same case, yet reversed the entry of default. Pilgrim v. Miller, No. 3435, 2002 S.C. App. LEXIS 4 (Ct. App. Jan. 14, 2002). In its first consideration of the case, the court held the defendant-insured had demonstrated good cause by conferring with a lawyer and giving the suit papers to her insurer. *Id.* at *2. The court seemingly held that the party's duty ends with delivery of papers to the insurer: "Once an insurer is made aware of a pending court action against its insured, the insured should be able to rely on the insurer to protect his or her rights." *Id.* In May 2002, the court of appeals re-heard the issue and held that no good cause existed. *Pilgrim*, 350 S.C. at 642, 567 S.E.2d at 529.

48. Final Brief of Respondent at 7, Pilgrim v. Miller, 350 S.C. 637, 567 S.E.2d 527 (Ct. App. 2002) (No. 00-CP-42-0458).

49. *Pilgrim*, 350 S.C. at 642, 567 S.E.2d at 529.

50. *Id.* at 641, 567 S.E.2d at 529.

51. In *Pilgrim* all three *Wham* factors apparently were satisfied. The defaulting party filed its motion to open the entry of default less than two months after the entry was executed. Respondent's Brief at 5, *Pilgrim* (No. 00-CP-42-0458). It is unlikely the plaintiff suffered any prejudice by the two month delay, considering over three years had already passed since the accident. *Id.* at 2. Defendant apparently met the meritorious defense threshold, alleging that much

had applied the *Pilgrim* standard (reason alone), then the outcome is uncertain.[52]

The shifting standards to adjudicate a Rule 55(c) motion make it difficult for a trial court to anticipate how the court of appeals will rule on appeal and present attorneys with contradictory requirements for relief. This Comment suggests that courts include analysis of the reason or explanation for the default as a threshold consideration for Rule 55(c) applications and proposes a methodology for evaluating the merit of that reason.

IV. RULE 55(C) MOTIONS SHOULD REQUIRE A SHOWING OF A REASON FOR THE DEFAULT

South Carolina courts should consider the defaulting party's reason or justification for the failure to timely respond as a factor when deciding Rule 55(c) motions. Good cause suggests an explanation for the delay, and reliance on the *Wham* factors alone fails to consider the policy justification for opening an entry of default.

A. Natural Meaning of Good Cause Requires a Reason

The text of Rule 55(c) requires a showing of "good cause" to set aside an entry of default.[53] Good cause suggests a reason or justification; legal dictionaries define the term as a "legally sufficient reason" which "show[s] *why* a request should be granted or an action excused."[54] Good cause "requires the moving party to provide an explanation for the default or to give reasons why vacation of the default entry would serve the interests of justice."[55] Accordingly, the good cause requirement embodies both the reason for the default and the justification for setting aside the entry; if the explanation for the default is unacceptable, then there is no justification to reverse. The *Wham* factors fail to address the cause or explanation of the default in only considering the promptness of the motion for relief after the entry of default, the defaulting party's defense, and the possible resulting prejudice.

B. Other Jurisdictions' Conceptions of Good Cause Include a Reason

Other jurisdictions whose rules include a good cause standard for opening entries of default consider the reason or circumstances for failure to timely

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of the plaintiff's medical bills related to another accident. Final Brief of Appellant at 10-14, Pilgrim v. Miller, 350 S.C. 637, 567 S.E.2d 527 (Ct. App. 2002) (No. 00-CP-42-0458).

52. In *Maxwell v. Genez* the plaintiff failed to meet a deadline due to a paralegal mix-up. 350 S.C. 563, 566, 567 S.E.2d 496, 498 (Ct. App. 2002). Applying *Pilgrim* to the facts in *Maxwell*, relief could be granted if the court determined that the mix-up constituted good cause.

53. S.C. R. CIV. P. 55(c).

54. BLACK'S LAW DICTIONARY 213 (7th ed. 1999) (emphasis added).

55. WRIGHT ET AL., *supra* note 10, § 2696, at 141.

respond.[56] North Carolina's good cause requirement implicitly examines who was responsible for the default.[57] While Georgia's default statute does not specifically require a good cause for opening a prejudgment default, Georgia courts nonetheless require "some legal excuse for failing to answer."[58]

Notwithstanding their generally more liberal approach to opening entries of default, federal courts in South Carolina recognize the necessity of showing a "reason" in Rule 55(c) motions. In *Palmetto Federal Savings Bank of South Carolina v. Industrial Valley Title Insurance Co.*[59] the district court reviewed the Fourth Circuit's standards for Rule 55(c) motions and concluded that "'good cause' should also address why the defendant was tardy in responding to the plaintiff's complaint."[60] The federal courts have interpreted the rules for opening a default judgment more broadly than the state courts.[61] It would indeed be unusual if the federal system had a more strict standard to open an entry of default than South Carolina state courts, given the federal courts' more lenient propensity to reverse default judgments.

C. The Wham *Factors are an Inadequate Test for Good Cause*

The three *Wham* factors alone are an insufficient guide for determining whether to set aside an entry of default. As indicia of equity, the *Wham* factors' limited scope is too easy to satisfy. It is perhaps no coincidence that the South Carolina state court decisions applying only the *Wham* factors almost always set aside the entries of default.[62] If Rule 55(c) intended to be a perfunctory standard, then relief would likely be a matter of right.[63] However, the South

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56. *See* DeFillippo v. Neil, 51 P.3d 1183, 1189 (N.M. Ct. App. 2002) (requiring good cause and looking for whether there is "'good cause' for failing to answer"); Multiple Resort Ownership Plan, Inc. v. Design-Build-Manage, Inc., 45 P.3d 647, 651 (Wyo. 2002) (requiring good cause and analyzing it as a "reason for relief").

57. Auto. Equip. Distribs., Inc. v. Petroleum Equip. & Serv., Inc., 361 S.E.2d 895, 896-97 (N.C. Ct. App. 1987) (opening entry of default after noting the defendant's diligence in keeping abreast of the case negated the attorney's negligence).

58. Conseco Fin. Servicing Corp. v. Hill, 556 S.E.2d 468, 475 (Ga. Ct. App. 2001). In *Conseco* the court refused to open a prejudgment default after the insurer "temporarily misplaced" the complaint. *Id.* at 471.

59. 756 F. Supp. 925 (D.S.C. 1991).

60. *Id.* at 934; *see also* Carl B. Schultz, *Sanctioning Defendants' Non-Willful Delay: The Failure of Rule 55 and a Proposal for its Reform*, 23 U. RICH. L. REV. 203, 214 n.56 (1989) ("Courts are required to consider the defendant's excuse for the delay by the express provisions of Rule 55 .... Both the 'good cause' and the 'excusable neglect' standards look to whether the default was deliberate or merely negligent.").

61. LIGHTSEY & FLANAGAN, *supra* note 35, at 7.

62. *See* Maxwell v. Genez, 350 S.C. 563, 567 S.E.2d 496 (Ct. App. 2002); Weeks v. Drawdy (*In re* Weeks), 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997).

63. *See, e.g.*, GA. CODE ANN. § 9-11-55 (1993) (permitting the reversal of a prejudgment default "as a matter of right" within fifteen days of default).

Carolina Court of Appeals has repeatedly emphasized that trial courts have broad discretion in determining Rule 55(c) motions.[64]

The *Wham* factors' low level of scrutiny conflicts with the policy considerations behind Rule 55(c).[65] Although South Carolina courts have held that the rule should be "liberally construed to see that justice is promoted and to strive for disposition of cases on their merits,"[66] the specter of default is a useful tool: "The threat of judgment by default serves as an incentive to meet"[67] a "standard of diligence in observing the courts' rules of procedure."[68] Without the realistic threat of default, "the sanctions for noncompliance would lose their deterrent effect."[69] Because the *Wham* factors will almost always permit the opening of an entry of default, the deterrent effect of default entries in South Carolina is muted: "[I]f default is to be an effective sanction, relief under Rule 55(c) cannot be granted too readily."[70] With the threat of sanction abated, parties are more likely to flout court deadlines, taxing judicial economy and efficiency. Accordingly, an overly permissive standard to adjudicate Rule 55(c) motions undermines the purpose of the default process.

As an analytical tool, the *Wham* factors are vague and could allow abuse of motions to open entries of default. Because the *Wham* factors do not take into account the reasons for the default, a tactical failure to timely respond could go undetected. A purposeful default that otherwise met the three *Wham* factors would be set aside, essentially rewarding the strategy.[71]

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64. *See Maxwell*, 350 S.C. at 568, 567 S.E.2d at 499; *Weeks*, 329 S.C. at 259, 495 S.E.2d at 459.

65. *See* discussion *supra* Part II.C.

66. Ricks v. Weinrauch, 293 S.C. 372, 374-75, 360 S.E.2d 535, 536 (Ct. App. 1987).

67. Multiple Resort Ownership Plan, Inc. v. Design-Build-Manage, Inc., 45 P.3d 647, 655 (Wyo. 2002) (quoting Vanasse v. Ramsay, 847 P.2d 993, 1000 (Wyo. 1993)).

68. *Id.*

69. *Id.* (quoting Davis v. Immediate Med. Servs., Inc., 684 N.E.2d 292, 296-97 (Ohio 1997)).

70. WRIGHT ET AL., *supra* note 10, § 2693, at 99.

71. For example, a defendant could willfully fail to answer or respond in order to control or limit the cost of litigation. *See* Breuer Elec. Mfg. Co. v. Toronado Sys. of America, 687 F.2d 182, 185 (7th Cir. 1982). Yet if the defendant made a motion to set aside the entry of default soon after the entry was recorded, then the court would likely find the Rule 55(c) motion timely. Because the delay created by the default was brief, a court would likely find that the default does not prejudice the plaintiff. *But see* WRIGHT ET AL., *supra* note 10, § 2699, at 169 (listing various ways litigant could be prejudiced by delay, such as "thwart[ing] plaintiff's recovery," losing evidence, or making discovery difficult). Assuming the defendant had a meritorious defense, the *Wham* factors would likely excuse this default despite the defendant's willful delay.

D. Wham *Court Reasoning*

The *Wham* court erred in omitting the reason requirement from its list of factors to be considered in a Rule 55(c) motion. As noted above, the court of appeals derived the *Wham* factors from two sources: Lightsey and Flanagan's *South Carolina Civil Procedure*, and Wright, Miller and Kane's *Federal Practice & Procedure*. While both sources included the three *Wham* factors, Lightsey and Flanagan also included the defaulting party's reason as a factor to consider.[72] The court perhaps omitted Lightsey and Flanagan's reason factor by mistakenly equating "reason" with the "excusable neglect" requirement that is contained in Rule 60(b) but not in Rule 55(c). Yet the absence of a comparable "excusable neglect" term in Rule 55(c) does not preclude a Rule 55(c) inquiry from examining the party's reason, justification, or explanation for the default. Procedural similarities between the two motions suggest that Rule 55(c) maintains a "reason" standard of its own; as a "practical matter, the same factors are relevant in both" Rule 55(c) and Rule 60(b) motions.[73] Rule 60(b)'s excusable neglect requirement inherently requires a showing of the justification for the default. If similar factors are relevant in both motions, Rule 55(c) should also require consideration of the moving party's reason for the default.

V. EVALUATING THE REASON THROUGH A WILLFUL AND DILIGENCE LENS

A party's bare assertion that he has a reason or justification for a default is, of course, insufficient to reverse an entry of default. After the reason is established, a court should deny relief for willful conduct or lack of diligence. This entails a two-step filtering process. Initially, a court should determine whether the delay was willful or in bad faith; if so, a court should reject the Rule 55(c) motion. Then, if a court finds that the default is non-willful, it should consider the moving party's diligence before the default. In this manner, the court can evaluate the defaulting party's reason for default to determine if good cause exists for setting aside the entry. A party's diligent attention to the legal proceeding should strongly encourage a court to reverse an entry of default.

A. Willful Defaults

As a threshold consideration, a court should inquire whether the defaulting party's delay was a purposeful, willful act. An intentional delay designed to

72. LIGHTSEY & FLANAGAN, *supra* note 35, at 82; WRIGHT ET AL., *supra* note 34, § 2694, at 493. Federal courts in South Carolina do require a reason when considering relief from the entry of default. *See* Palmetto Fed. Sav. Bank of S.C. v. Indus. Valley Title Ins. Co., 756 F. Supp. 925, 934 (D.S.C. 1991).

73. LIGHTSEY & FLANGAN, *supra* note 35, at 82.

gain a tactical advantage reflects "obstructionist tactics [that] hinder[]"[74] the judicial process and undermine judicial economy and efficiency.[75] Courts in numerous jurisdictions have noted how willful defaults to gain time or to prejudice the plaintiff evidence a disregard for the judicial process.[76] Rejection of Rule 55(c) motions when the delay stems from a willful act is a proper sanction and an effective deterrent. However, because few cases will present evidence of the defaulting party's obstructionist intent, a second consideration will generally be required.

B. The Diligence Analysis of Rule 55(c)

1. Diligence and Imputed Negligence

Assuming a court finds no evidence of willful default, a court should then closely examine the reason in order to determine whether the defaulting party was "diligent in pursuit of [the] matter" before the entry of default.[77] This inquiry considers the "degree of attention or inattention shown by [the defaulting party] to be a particularly compelling factor" in determining whether to reverse an entry of default.[78] Such an analysis examines the party's actions prior to the default, and it should focus on the action of the defaulting party, rather than the party's attorney or insurer. The focus should be on the defaulting party because that party will bear the monetary burden of the judgment, as well as any preclusive effect that the judgment may have on other claims or issues. The equitable nature of Rule 55(c) motions suggests a consideration of the defendant's own actions leading up to the default.[79]

However, many entries of default stem from mistakes by the defendant's attorney or insurance company.[80] South Carolina courts "have consistently held that the negligence of an attorney or insurance company is imputable to a

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74. Men's Sportswear, Inc. v. Sasson Jeans, Inc. (*In re* Men's Sportswear, Inc.), 834 F.2d 1134, 1139 (2d Cir. 1987).

75. The Second Circuit considers whether the moving party's delay was willful when deciding a Rule 55(c) motion. *See* Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993); Niepoth v. Montgomery County Dist. Attorney's Office, 177 F.R.D. 111, 112 (N.D.N.Y. 1998).

76. *See, e.g.*, Widmer-Baum v. Chandler-Halford, 162 F.R.D. 545, 552-53 (N.D. Iowa 1995) (discussing various federal circuit courts' treatment and consideration of willful defaults).

77. Auto. Equip. Distribs., Inc. v. Petroleum Equip. & Serv., Inc., 361 S.E.2d 895, 896-97 (N.C. Ct. App. 1987).

78. Brown v. Lifford, 524 S.E.2d 587, 590 (N.C. Ct. App. 2000).

79. *See* Ricks v. Weinrauch, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987) (noting that Rule 55(c) is "liberally construed to see that justice is promoted"); FLANAGAN, *supra* note 1, at 440 (discussing the equitable nature of Rule 55(c) motions).

80. *See* Follmer v. Perry, 493 S.E.2d 631, 633 (Ga. Ct. App. 1997) (insurance agent); Pinehurst Baptist Church, Inc. v. Murray, 450 S.E.2d 307, 308 (Ga. Ct. App. 1994) (insurance carrier); Pilgrim v. Miller, 350 S.C. 637, 639, 567 S.E.2d 527, 528 (Ct. App. 2002) (insurance company); Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 163, 375 S.E.2d 321, 323 (Ct. App. 1988) (lawyer); *Ricks*, 293 S.C. at 373, 360 S.E.2d at 536 (insurance agent).

defaulting litigant,"[81] but such a policy should not automatically preclude a finding of good cause to set aside an entry of default. The South Carolina cases cited for the imputation of negligence theory deal with efforts to set aside *default judgments*, not *entries of default*. In considering a *default judgment* that stemmed from an employer's mistake, the court of appeals has noted the negligence of an attorney or insurer can be imputed to *defaulting* defendants.[82] However, defendants against whom an entry of default has been made are not defaulting defendants.[83]

Similarly, in *Mitchell Supply Company, Inc. v. Gaffney*,[84] the Court of Appeals cited the negligence of the defendant's attorney in denying his motion to open the *default judgment*.[85] *Mitchell* cited as authority *Simon v. Flowers*,[86] a 1957 case in which the South Carolina Supreme Court also denied a motion to open a *default judgment* resulting from the attorney's mistake.[87] However, entries of default do not signify a default judgment; thus, different standards should be applied when considering a motion to open an *entry of default*. As the Court of Appeals has noted, a court has "greater liberality" in determining whether to open an entry of default than in overturning a default judgement.[88]

Furthermore, South Carolina courts have inconsistently applied the imputed negligence theory to Rule 55(c) motions. In *Ricks v. Weinrauch*[89] the defendant failed to respond after her insurance agent's "closure and bankruptcy" precluded delivery of the suit papers to the insurer.[90] In an attempt to prevent the default after learning of the insurance agent's problems, the defendant contacted her attorney twice and her insurer once.[91] Noting the defendant "acted reasonably," the court set aside the entry of default despite the insurance agent's negligence.[92] However, in *Pilgrim v. Miller*, the court imputed an insurer's failure to answer a complaint to the defendant and denied the Rule 55(c) motion.[93] This apparent inconsistency, coupled with the questionable applicability of the imputed negligence theory to Rule 55(c)

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81. Roberts v. Peterson, 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct. App. 1987).

82. *Id.*

83. WRIGHT ET AL., *supra* note 10, § 2682, at 20 ("[A]n entry of default is merely a formal matter and does not constitute the entry of judgment.").

84. 297 S.C. 160, 375 S.E.2d 321 (Ct. App. 1988).

85. *Id.* at 165, 375 S.E.2d at 324. In *Mitchell* the court suggested that the South Carolina Supreme Court "may wish to reexamine the requirements for setting aside default judgments with an eye toward liberalizing them to more closely comport with the interpretations" that distinguish between the negligence of the defendant and the negligence of his lawyer or insurer. *Id.* at 164 n.2, 375 S.E.2d at 324 n.2.

86. 231 S.C. 545, 99 S.E.2d 391 (1957).

87. *Id.* at 551, 99 S.E.2d at 394.

88. Hill v. Dotts, 345 S.C. 304, 310 n.1, 547 S.E.2d 894, 897 n.1 (Ct. App. 2001).

89. 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987).

90. *Id.* at 373, 360 S.E.2d at 536.

91. *Id.*

92. *Id.* at 375, 360 S.E.2d at 537.

93. Pilgrim v. Miller, 350 S.C. 637, 642, 567 S.E.2d 527, 529 (Ct. App. 2002).

motions, suggests that the negligence of the defendant's agent is not necessarily dispositive of good cause.

Even when considering the negligence of the attorney or insurance company, the defendant's diligence in pursuit of the legal matter reflects an effort to counteract the agent's misdeeds. In evaluating the party's reason for default, the court should examine the defendant's responsiveness, attention, and diligence to the legal matter prior to the default. A showing of commitment to the matter should appeal to the court's sense of equity and counter-balance the agent's negligence.[94]

Furthermore, diligence approximates a reasonable standard of conduct for parties to a legal action:[95] "[P]arties who have been duly served . . . are required to give their defense that attention which a man of ordinary prudence usually gives his important business."[96] A showing of diligence (or lack thereof) permits the court to identify the more egregious instances of delay. Mindful of the state's strong preference for resolution on the merits, only extreme instances of delay are appropriate for the "drastic remedy" of default.[97] A drastic sanction should not befall one who acts reasonably. However, a lack of diligence reflects disregard for judicial efficiency and undermines the purpose of court deadlines.

South Carolina courts have implicitly noted the defaulting party's efforts to keep abreast of the suit as a factor when considering whether to set aside the entry of default. In *Ricks v. Weinrauch*[98] the court of appeals reversed an entry of default after noting the defaulting party made numerous efforts to contact both her insurer and attorney about the suit.[99] Such efforts contrast sharply with the actions of the defaulting party in *Pilgrim* who made no effort to contact her agent after delivering the suit papers. However, the court did not discuss this

94. *See* Estate of Teel v. Darby, 500 S.E.2d 759, 764 (N.C. Ct. App. 1998) (finding no demonstration of diligence or commitment to "prevent the imputation of the inexcusable negligence of [the insurer]" to the defendant).

95. *See* Grant v. Cox, 415 S.E.2d 378, 381 (N.C. Ct. App. 1992) (comparing defendant's conduct to the actions of a "man of ordinary prudence . . . [dealing with] his important business affairs").

96. Kirby v. Asheville Contracting Co., Inc., 180 S.E.2d 407, 410 (N.C. Ct. App. 1971) (citation omitted); *see also Darby*, 500 S.E.2d at 764 (quoting Hayes v. Evergo Tel. Co., 397 S.E.2d 325, 330 (N.C. 1990) ("A defendant must give its litigation matters that level of attention one gives important business matters.").

97. Beard v. Pembaur, 313 S.E.2d 853, 856 (N.C. Ct. App. 1984).

98. 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987).

99. *Id.* at 375, 360 S.E.2d at 537. In briefs for *Pilgrim*, the respondent distinguished *Ricks* by noting that the defaulting party in *Pilgrim* had failed to stay apprised of the legal proceeding because she never followed up after delivering the suit papers to the insurer. Final Brief of Respondent at 7, Pilgrim v. Miller, 350 S.C. 637, 567 S.E.2d 527 (Ct. App. 2002) (No. 00-CP-42-0458).

lack of action in its opinion.[100] While the court of appeals granted relief in *Ricks*,[101] it denied the Rule 55(c) motion in *Pilgrim*.[102]

2. *Neighboring Jurisdictions' Use of Diligence in Rule 55(c) Motions*

Both North Carolina and Georgia courts, as well as the Fourth Circuit, consider the defendant's diligence when ruling on a motion to open an entry of default. Like South Carolina, North Carolina's rule concerning the opening of an entry of default is modeled after Rule 55(c) of the *Federal Rules of Civil Procedure*.[103] In deciding whether to set aside an entry of default, North Carolina courts consider three factors: (1) the defendant's diligence "in pursuit of th[e] matter;" (2) whether the plaintiff suffered "any harm by virtue of the delay;" and (3) whether the defendant would suffer "a grave injustice by being unable to defend the action."[104] Summarizing previous cases concerning motions to open an entry of default, the North Carolina Court of Appeals noted in a 2000 case that "the degree of attention or inattention shown by the defendant . . . [is] a particularly compelling factor."[105]

Georgia's default process lacks a formal entry of default; instead, a case goes into default upon the failure to file.[106] The defaulting party may open the default as a matter of right within fifteen days of the deadline, but, after the fifteen days pass, "the plaintiff at any time thereafter . . . [is] entitled to verdict and judgment by default."[107] However, at any point prior to the default judgment, the defaulting party may open the prejudgment default by a showing of certain conditions and on certain grounds.[108] Under Georgia's default process,

> a prejudgment default may be opened on one of three grounds *if* four conditions are met. The three grounds are: (1) providential cause, (2) excusable neglect, and (3) proper case; the four [pre]conditions are: (1) showing made under oath, (2) offer to plead instanter, (3) announcement of ready to proceed with trial, and (4) setting up a meritorious defense.[109]

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100. Pilgrim v. Miller, 350 S.C. 637, 641, 567 S.E.2d 527, 528 (Ct. App. 2002).
101. 293 S.C. at 375, 360 S.E.2d at 537.
102. 350 S.C. at 643, 567 S.E.2d at 530.
103. N.C. R. CIV. P. 55(d).
104. Auto. Equip. Distribs., Inc. v. Petroleum Equip. & Serv., Inc., 361 S.E.2d 895, 896-97 (N.C. Ct. App. 1987).
105. Brown v. Lifford, 524 S.E.2d 587, 590 (N.C. Ct. App. 2000).
106. GA. CODE ANN. § 9-11-55(a) (2002).
107. *Id.*
108. *Id.* § 9-11-55(b).
109. Follmer v. Perry, 493 S.E. 2d 631, 632 (Ga. Ct. App. 1997) (citation omitted).

The three grounds are broadly defined, and the "proper case" justification has been characterized to "take in every conceivable case where injustice might result if the default were not opened."[110] To narrow the decision making, courts also consider the prejudice to the opposing party and whether or not the party moved promptly to set aside the default.[111] The Georgia Court of Appeals has noted that "decisions [considering the opening of pre-judgment defaults] have focused on the defendant's diligence and the insurer's assurance that it is handling the case."[112]

Finally, the Fourth Circuit has interpreted good cause under Rule 55(c) to include a consideration of the "personal responsibility of the party" and the difference between instances where the party is at fault and where the attorney or insurer is to blame.[113] Harmonizing several Fourth Circuit decisions on Rule 55(c), a South Carolina federal district court noted that "[p]articular attention should be paid to whether the defaulting party or their counsel bears the responsibility for the delay."[114] Such factors reflect an interest in the relative culpability of the defendant versus the culpability of his attorney or insurer.

3. *Application of the Diligence Standard*

Generally, courts have found diligence and have set aside the entry of default if the defendant's explanation for the delay reflects that he has been attentive to his case. When the default is the defendant's fault, the court is less likely to open the entry of default. In *Grant v. Cox*[115] the North Carolina Court of Appeals considered a defendant's motion to reverse an entry of default that resulted from his confusion regarding multiple summons.[116] Holding the defendant to a standard of "ordinary prudence," the court noted that the legal requirements of the document were plainly stated and denied the motion.[117]

Similarly, the Georgia Court of Appeals has denied a motion to open a prejudgment default after the defendants completely failed to comply with or respond to any of the requests or orders or to "otherwise participate in the litigation."[118] The "lengthy period of inattention to the litigation" justified the denial.[119] In *Ellis v. Five Star Dodge, Inc.*[120] the court denied relief after the

110. Boggs Rural Life Ctr., Inc. v. IOS Capital, Inc., 567 S.E.2d 94, 95 (Ga. Ct. App. 2002) (quoting Axelroad v. Preston, 209 S.E.2d 178, 179 (Ga. 1974)).

111. Albee v. Krasnoff, 566 S.E.2d 455, 458 (Ga. Ct. App. 2002) (quoting Ford v. St. Francis Hosp., Inc., 490 S.E.2d 415, 419 (Ga. Ct. App. 1997)).

112. *Follmer*, 493 S.E.2d at 633.

113. United States v. Moradi, 673 F.2d 725, 728 (4th Cir. 1982).

114. Palmetto Fed. Sav. Bank of S.C. v. Indus. Valley Title Ins. Co., 756 F. Supp. 925, 932 (D.S.C. 1991).

115. 415 S.E.2d 378 (N.C. Ct. App. 1992).

116. *Id.* at 379-80.

117. *Id.* at 381.

118. Carter v. Ravenwood Dev. Co., 549 S.E.2d 402, 405 (Ga. Ct. App. 2001).

119. *Id.*

120. 529 S.E.2d 904 (Ga. Ct. App. 2000).

defendants failed to refer the action to their insurer, although they thought they had.[121] The court focused on the fact that the defendants failed to take "any affirmative action to ensure that an answer was filed in the lawsuit," and that there was no communication between the defendant and their insurance carrier:[122] "[T]he defendant did nothing to ensure that the case had been received by the insurance company or that an answer would be filed. This Court cannot condone such inaction."[123]

However, where the default stems from the action (or lack thereof) of the defendant's insurer or lawyer, courts generally examine the defendant's communication and cooperation with the agent for evidence of attentiveness to the litigation. In *Pinehurst Baptist Church v. Murray*[124] the trial court had entered an entry of default after the defendant's insurance carrier missed the deadline to answer.[125] Despite this, the Georgia Court of Appeals granted relief, noting that the defendant contacted the insurance agent five times and "was assured that nothing else was required of him."[126] Similarly, the North Carolina Court of Appeals granted relief from an entry of default, which resulted from an insurer's mistake, after noting that the defendant "made numerous contacts with his insurance agent" and "did everything that could reasonably have been required to demonstrate diligent attention to the case."[127] In *Automotive Equipment Distributors, Inc. v. Petroleum Equipment & Service, Inc.*[128] the North Carolina Court of Appeals opened an entry of default, which resulted from defense counsel's error, after noting that the defendant participated in legal strategy and received an assurance that the lawyer would prepare an answer.[129]

It is when the defendant does not follow-up after delivering the suit papers to his lawyer or insurer that a court is less likely to grant relief. *Estate of Teel v. Darby*[130] is an example of the typical scenario in which default is entered after both the defendant's lawyer and insurer failed to answer.[131] In denying relief, the court noted that the defendant did nothing after turning the legal matter over to his attorney.[132] Since the "record [was] devoid of any evidence of [the defendant's] follow-up," the court denied relief on the basis that the

121. *Id.* at 905.
122. *Id.* (emphasis omitted).
123. *Id.* at 906.
124. 450 S.E.2d 307 (Ga. Ct. App. 1994).
125. *Id.* at 308.
126. *Id.* at 309.
127. Brown v. Lifford, 524 S.E.2d 587, 590 (N.C. Ct. App. 2000).
128. 361 S.E.2d 895 (N.C. Ct. App. 1987).
129. *Id.* at 897; *see also* Shortnacy v. N. Atlanta Internal Med., P.C., 556 S.E.2d 209, 213 (Ga. Ct. App. 2001) (granting relief after default due to insurer's mistake when defendant inquired as to status of matter and "was assured . . . that the matter was being attended to").
130. 500 S.E.2d 759 (N.C. Ct. App. 1998).
131. *Id.* at 763-64.
132. *Id.* at 764.

party abdicated his duty of attending to the litigation.[133] In denying relief after an insurer's error, the North Carolina Court of Appeals has noted that the defendant "took no further action to inquire into the progress of the case" after delivering suit papers to the insurer.[134] In a similar fact scenario, the court has faulted the defendant for failing to "pa[y] . . . further attention to the lawsuit" after transmitting the matter to the insurer.[135] In other decisions denying relief from an entry of default when the insurer or attorney is at fault, North Carolina courts have focused on the defendant's failure to take any action after delivering the suit to his representative.[136] Georgia courts have followed a similar logic.[137]

4. *Relationship Between the Willful and Diligence Tests and the* Wham *Factors.*

In considering a Rule 55(c) motion, the willful and diligence analysis provides a threshold function. The defaulting party's reason or explanation must show that the delay was not willful and must demonstrate diligence in pursuing the case. Consideration is given to the three *Wham* factors after the reason passes the willful and diligence tests. One factor, the existence of a meritorious defense, reflects the practical concern of whether the outcome on the merits would be any different than the outcome produced by a default judgment.[138] Therefore, the party moving for relief must demonstrate a meritorious defense to the action.[139] The remaining two factors, the timeliness of the motion for relief and the degree of prejudice suffered by the other party, are related. While there is no express time requirement to file a Rule 55(c) motion after an entry of default, prompt action will influence the court's discretionary power because it can reflect the defaulting party's degree of

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133. *Id.*

134. Cabe v. Worley, 536 S.E.2d 328, 330 (N.C. Ct. App. 2000).

135. Howell v. Haliburton, 205 S.E.2d 617, 618-19 (N.C. Ct. App. 1974).

136. *See, e.g.*, RC Assocs. v. Regecy Ventures, Inc., 432 S.E.2d 394, 399 (N.C. Ct. App. 1993) (finding the defendants took no action after their attorney withdrew from the case); Pryse v. Strickland Lumber & Bldg. Supply, Inc., 311 S.E.2d 598, 599 (N.C. Ct. App. 1984) (finding defendant never did anything after mailing summons and complaint to company's office in Atlanta); Bailey v. Gooding, 299 S.E.2d 267, 271 (N.C. Ct. App. 1983) ("There is nothing in the record to indicate what actions defendants took . . . to defend the case other than to deliver the suit papers to the insurance carrier.").

137. *See, e.g.*, Follmer v. Perry, 493 S.E.2d 631, 633 (Ga. Ct. App. 1997) (noting the defendant "never spoke with the [insurance] agent or received assurance that the insurer was proceeding with the defense").

138. WRIGHT ET AL., *supra* note 10, § 2697, at 163.

139. *Id.* at 156. A majority of courts consider "meritorious defense" to include a "presentation of some factual basis for the supposedly meritorious defense." *Id.* at 160. The Fourth Circuit defines "meritorious defense" to comprise "a presentation or proffer of evidence, which, if believed, would permit either the Court or the jury to find for the defaulting party." United States v. Moradi, 673 F.2d 725, 727 (4th Cir. 1982).

attention and urgency to his case.[140] Prompt action will also reduce the possible prejudice to the opposing party. Such prejudice stems from the delay created by the default; during that time, evidence may be altered or more difficult to find, and the plaintiff may incur increased litigation costs.[141] Delay alone is "an inevitable part of the American judicial process and not a sufficient basis for establishing prejudice."[142] Instead, the opposing party must show "evidence of prejudice that is substantial and cannot be relieved by imposing terms or conditions."[143]

VI. CONCLUSION

The current factors that South Carolina courts consider for relief from entries of default are applied inconsistently, and they inadequately reflect the concept of good cause. South Carolina courts should require the party requesting the reversal the entry of default to make a threshold showing of the reason or justification for his delay. If the delay is found to be willful, then a denial of relief is appropriate. Absent a willful delay, the court should evaluate the justification to determine if there was a lack of diligence on the part of the defaulting party prior to the default. A lack of attention, diligence, or communication with the defendant's agents suggests that little effort was put forth in order to stay apprised of the legal matter. This lack of diligence supports the denial of relief. Conversely, evidence of the party's follow-up and attention to the matter supports the grant of relief. The court should engage in the *Wham* analysis only after this threshold inquiry.

Requiring the moving party to show a reason for the default will deter bad faith tactical delays and will permit the court to evaluate the reason according to the willful and diligence tests. The reason factor is not an exact test and does not supplant the trial court's discretion in considering a Rule 55(c) motion. Instead, it provides an additional factor for the court to consider in its discretionary judgment. Requiring the trial court to consider the reason for the default will add a degree of consistency and predictability now lacking in Rule 55(c) decisions.

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140. WRIGHT ET AL., *supra* note 10, § 2698, at 164; *see* Maxwell v. Genez, 350 S.C. 563, 570, 567 S.E.2d 496, 500 (Ct. App. 2002) (noting the brief, nineteen-day period of time between the entry of default and the Rule 55(c) motion reflects the defaulting party's "alacrity and urgency").

141. WRIGHT ET AL., *supra* note 10, § 2699, at 169.

142. *Id.* at 170.

143. *Id.*