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Aaron F. Miner
New York Law School

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AARON F. MINER

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ABOUT THE AUTHOR: Aaron F. Miner is a 2007 J.D. candidate at New York Law School.

At the heart of the United States' adversarial system of justice lies a profound concern for parties who are unaware of their involvement in pending litigation and unable to defend themselves in court. Procedural safeguards have been erected to protect their interests, in recognition that "[the] right to be heard has little reality or worth unless one is informed that [a] matter is pending and can choose for himself whether to appear or default, acquiesce or contest."[1] One such safeguard is the requirement that in order for a tribunal to exercise personal jurisdiction over a defendant, the exercise of jurisdiction must satisfy both statutory and constitutional standards.[2] Since *Pennoyer v. Neff*,[3] courts have recognized that judgments can only be entered against parties who have had the opportunity to confront their adversary for fear that they would otherwise be subject to the fraudulent practices of plaintiffs and their agents.[4] It is often necessary, therefore, that efficiency and judicial economy be sacrificed in order to preserve the rights of the absent defendant.[5]

In *Burda Media, Inc. v. Viertel*,[6] the Second Circuit attempted to settle a question that had split the district courts of the circuit: who bears the burden of proof of service when a defendant moves pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure[7] to vacate a default judgment entered against him on the basis of invalid personal jurisdiction?[8] The *Burda* court answered that the burden must be allocated to the defendant if he had actual notice of the plaintiff's original proceeding, forcing the movant to come forward with proof that there was inadequate service of process. However, the court's answer rested, in large part, on a faulty practical assumption and ignored existing legal doctrine and

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1. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

2. *See* U.S. CONST. amend XIV, § 1.

3. 95 U.S. 714 (1877).

4. *Id.* at 726; *see also* 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2851 (2d ed. 1995).

5. *See, e.g.*, H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970) (viewing default judgment as a last resort where an unresponsive party has made it impossible to settle a matter on its merits).

6. 417 F.3d 292 (2d Cir. 2005).

7. FED. R. CIV. P. 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

8. *Burda*, 417 F.3d at 299.

policy. This comment contends that, although the *Burda* court was ultimately correct in rejecting the defendant's motion because of his extraordinary efforts to evade service and the resulting unfairness to the plaintiff, the court adopted a test that will lead to a severe hardship on potentially innocent defendants. Instead, the court should have followed the rule established in *Rockwell International Corp. v. KND Corp.*,[9] and kept the burden on the plaintiff to prove proper service for the following reasons: (1) an "actual notice" test will not separate an innocent defendant from a blameworthy defendant; (2) the substitution of actual notice for service of process is impermissible under Second Circuit precedent; (3) requiring a plaintiff to shoulder the burden promotes diligence in parties who wish to enforce their judgments and aids the court in accurate analysis of personal jurisdiction;[10] and (4) it promotes "horizontal consistency"[11] with Rules 12(b)(5)[12] and 55(c),[13] both of which permit motions to contest adequate service and which require that the plaintiff bear the burden of proof.

Burda Media, Inc. ("Burda") and its affiliates brought a civil action alleging fraud and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") against Christian Viertel in the Southern District of New York. Burda claimed that Viertel and other conspirators attempted to defraud the company by submitting invoices to Burda for services not actually performed by a phony company set up by Viertel.[14] After commencing this action, Burda made several unsuccessful efforts to serve Viertel with notice of the complaint. The first of these efforts was an attempt at personal service in New York, where Viertel was known to reside and where his companies were thought to have operating offices.[15] After this proved unsuccessful, Burda located Viertel in France, where it attempted to serve him by international mail.[16] Having failed in these efforts, Burda initiated service pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

9. 83 F.R.D. 556 (N.D. Tex. 1979). *Rockwell* held that the burden of proving personal jurisdiction under Rule 60(b)(4) is properly on the plaintiff in all circumstances. *Id.* at 559 n.1.

10. Ariel Waldman, *Allocating the Burden of Proof in Rule 60(b)(4) Motions to Vacate a Default Judgment for Lack of Jurisdiction*, 68 U. CHI. L. REV. 521, 544–47 (2001).

11. "Horizontal consistency" is a term used to describe the similarity of effects of Rules 12(b)(5), 55(c), and 60(b)(4), all motions to contest personal jurisdiction at different stages in litigation. *See id.* at 541–44.

12. FED. R. CIV. P. 12(b)(5) provides, in pertinent part:
> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (5) insufficiency of service of process.

13. FED. R. CIV. P. 55(c) ("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).").

14. *Burda*, 417 F.3d at 295.

15. *Id.*

16. *Id.*

("Hague Convention").[17] The Hague Convention allows several methods of service, one of which requires a highly formalistic exchange of documents through the Central Authority[18] of a member state in which the defendant resides. In this case, the Central Authority was the French Ministry of Justice in Paris.[19] When the Ministry of Justice received Burda's package containing the relevant forms under the Hague Convention, it sent local police to personally serve Viertel.[20] The French police reports showed that Viertel at first refused to accept service and, although he appeared to accept and sign for certain documents concerning him directly, he maintained that service was invalid because the period of limitation for service of the documents had expired.[21] Later, Viertel asserted that he had not received service by the French police.[22] In New York, Burda received these police reports in lieu of the completed formal documents and Certificate required by the Hague Convention,[23] and submitted proof of service to the district court.[24] When Viertel failed to appear at the judicial proceedings, Burda secured a default judgment against him.[25]

More than three years after the $2.75 million judgment was entered against Viertel and one of his companies,[26] he moved *pro se* to vacate under Rule 60(b)(4) of the Federal Rules of Civil Procedure. Viertel claimed that because he was inadequately served with process, the district court lacked personal jurisdiction over him.[27] The district court denied this motion, holding that service was proper under the Hague Convention.[28] The Second Circuit affirmed the decision, asserting that service of process complied with the Hague Convention; the

17. *Id.*

18. *Id.*

19. Under the Hague Convention, the Central Authority is an entity designated by a contracting nation which is vested with the authority to evaluate requests of service from foreign parties for conformity with the Convention rules and is given responsibility for effecting the service requested. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Criminal Matters arts. 2–6, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Convention].

20. *Burda*, 417 F.3d at 296.

21. *Id.*

22. *Id.* at 302–03.

23. Whether the failure of the Ministry of Justice to return to Burda a formal Certificate memorializing service on Viertel violated the Hague Convention was a central issue of this case; however, it is not within the scope of this comment.

24. *Burda*, 417 F.3d at 296.

25. *Id.* at 297.

26. Burda sought judgment specifically against the company Telecommunication Partners Ltd. because it had proof that Viertel was the company's managing director. *Id.* at 297 n.2.

27. *Id.* at 297. In the intervening years between the entry of default judgment and Viertel's Rule 60(b)(4) motion, Viertel was tried and convicted of mail and wire fraud and conspiracy to commit mail and wire fraud in federal district court. *See* United States v. Viertel, 2003 WL 367867 (S.D.N.Y. Feb. 12, 2003).

28. Burda Media, Inc. v. Blumenberg, 2004 WL 1110419, at *6–*7 (S.D.N.Y. May 18, 2004).

information contained in the police reports sent to Burda in New York included the same information that would have been found in the Certificate and was, therefore, an adequate substitute.[29]

In addition, the Second Circuit decided a question not reached by the lower court: whether the burden of proof of service rested with the plaintiff or defendant.[30] The court held that the defendant bore the burden because he had "actual notice" of the original proceeding and chose to delay in filing the motion.[31] The court's decision recognized a split of authority among the district courts of the circuit.[32] One line of cases followed the *Rockwell* rule,[33] requiring that the plaintiff retain the burden of proving adequate service.[34] A more recent line of cases follows *Rohm & Haas Co. v. Aries*,[35] which assigned the burden to the defendant if that defendant had actual notice of the original proceeding.[36] The *Burda* court ultimately adopted the *Rohm* rule, identifying four reasons for its decision: (1) the interests of comity among the district courts; (2) the policy in favor of resolving disputes in a single legal proceeding; (3) the plaintiff's interest in selecting the forum; and (4) concern that a rule allowing a defendant an indefinite amount of time to come forward with a Rule 60(b) motion prejudices the plaintiff.[37] Comity concerns are implicated because a defendant can move pursuant to Rule 60(b)(4) in the judgment-registering court rather than the judgment-rendering court, thereby allowing the registering court to invalidate the other court's judgment.[38] Review by the registering court over the original court's decision restricts a plaintiff's right to seek adjudication in the forum of his choice and may lead to inefficiency because, it is asserted, the original court already received evidence and made findings on the jurisdictional question.[39] The concern with prejudice is that the passage of time will hamper the plaintiff's ability

29. *Burda*, 417 F.3d at 295.

30. *Id.* at 298–99.

31. *Id.* at 299.

32. *Id.*

33. 83 F.R.D. 556 (N.D. Tex. 1979).

34. *See, e.g.,* Ocala Waste Disposal Assoc. v. GGC, Inc., 1993 WL 138966 (S.D.N.Y. Apr. 28, 1993); Triad Energy Corp. v. McNell, 110 F.R.D. 382 (S.D.N.Y. 1986); Leab v. Streit, 584 F. Supp. 748 (S.D.N.Y. 1984); Donnely v. Copeland Intra Lenses, Inc., 87 F.R.D. 80 (E.D.N.Y. 1980).

35. 103 F.R.D. 541 (S.D.N.Y. 1984).

36. *See, e.g.,* CSC Holdings, Inc. v. Fung, 349 F. Supp. 2d 613 (E.D.N.Y. 2004); Sartor v. Utica Taxi Ctr., Inc., 260 F. Supp. 2d 670 (S.D.N.Y. 2003); Velez v. Vassallo, 203 F. Supp. 2d 312 (S.D.N.Y. 2002); Miller v. Jones, 779 F. Supp. 207 (D.Conn. 1991).

37. *Burda*, 417 F.3d at 299 (quoting *Miller*, 779 F. Supp. at 210–11).

38. *See* 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2865 (2d ed. 1995); *see also* Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 730 (2d Cir. 1998) (Miner, J.) (noting that an original court's finding of personal jurisdiction "does not preclude the defendant from later contesting jurisdiction in the enforcing court").

39. WRIGHT, MILLER & KANE, *supra* note 38.

to gather evidence of proper service if a defendant moves for relief years after a judgment becomes final.[40] Significantly, in listing these general policy preferences, the court failed to articulate its reasoning for applying the "actual notice" test. The only apparent justification for such a test is that it singles out the defendant who was aware of the original proceeding and has purposely avoided justice, as in the *Burda* case. This is sound as a normative matter, but rests on the practical assumption that methods for finding actual notice differ significantly from methods for finding proper service of process. Following these policy considerations and applying the *Rohm* rule, the court reasoned that because Viertel had actual notice of the proceeding when he was approached by the police in France, the burden rested with him to prove service was improper.[41]

A defendant is given several chances at different stages during the default judgment process to challenge the district court's personal jurisdiction over him. In initiating any civil complaint under the Federal Rules of Civil Procedure, a plaintiff bears the burden to plead sufficient facts to establish the court's jurisdiction over the parties to the dispute; this includes showing proper service of process.[42] To demonstrate personal jurisdiction, the plaintiff must submit to the court a "proof of service"; this may only require the submission of an affidavit in support of his assertion that the defendant was properly served.[43] In response to plaintiff's pleading, a defendant may move pursuant to Rule 12(b)(5)[44] to dismiss for lack of personal jurisdiction because of inadequate service of process. Courts have uniformly held that, at this stage of the litigation, the plaintiff bears the burden of proving adequate service to defeat defendant's Rule 12(b)(5) motion.[45] If the defendant, through ignorance or avoidance, fails to answer the plaintiff's

40. *Rohm*, 103 F.R.D. at 544 ("Should the burden of proof be lodged with the plaintiff, severe prejudice can result when evidence needed to prove jurisdiction is no longer available due to the passage of time."). *But see infra* notes 63–66 and accompanying text.

41. *Burda*, 417 F.3d at 299.

42. FED. R. CIV. P. 8; Theresa L. Kruk, Annotation, *Who Has The Burden of Proof In Proceeding Under Rule 60(b)(4) Of Federal Rules Of Civil Procedure To Have Default Judgment Set Aside On Ground That It Is Void For Lack Of Jurisdiction*, 102 A.L.R. Fed. 811 (1991 & Supp. 2000).

43. FED. R. CIV. P. 4(l)(l) ("If service is not waived, the person effecting service shall make proof thereof to the court. If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof."). The Federal Rules appear to emphasize that the proof of service requirement should not be much of a hindrance on the plaintiff. *See id.* ("Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended."). This is further supported by the general proposition that a plaintiff's material allegations are accepted as true in the event of a default by the defendant. U.S. *ex rel*. Harshman v. County Ct. of Knox County, 122 U.S. 306, 317 (1887); Trans World Airlines, Inc. v. Hughes, 308 F. Supp. 679, 683 (S.D.N.Y. 1969).

44. *See supra* note 12. For a more general challenge to personal jurisdiction, defendant may also move pursuant to FED. R. CIV. P. 12(b)(2) (motion to dismiss for "lack of jurisdiction over the person").

45. *See, e.g.*, Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2d Cir. 1999) (recognizing that the burden of proof remains on a plaintiff when responding to a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction); *see also, e.g.*, Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995).

complaint, the plaintiff may apply for entry of default by the clerk of court under Rule 55(a).[46] Following this first step towards obtaining a default judgment, a defendant may move under Rule 55(c) to set aside the entry of default for lack of personal jurisdiction.[47] Consistent with Rule 12(b)(5), overwhelming authority provides that the burden of proof of service reposes with the plaintiff.[48] If the plaintiff succeeds in overcoming the burden to prove service, or if the defendant fails to make a 55(c) motion, the plaintiff may move for default judgment by the district court under Rule 55(b)(2).[49] At this stage, the defendant's only recourse is to obtain post-judgment relief pursuant to Rule 60(b)(4).[50] To determine whether relief is warranted, courts must mine the landscape of authority for the rule governing which party bears the burden of proving the judgment is void. Considering the topography, this may be a rather difficult task.[51]

Although the recent trend is to apply the *Rohm* rule, the *Burda* court should have adopted the *Rockwell* rule. First, the "actual notice" test is unworkable for the purpose of safeguarding the interests of innocent defendants while punishing those who are blameworthy. To assess whether the *Rohm* rule can accomplish the purpose of distinguishing the innocent from the blameworthy, one must look at how courts determine whether a defendant had actual notice of the original proceeding. Often the analysis used to determine service of process will be identical to, or at least overlap with, the analysis used to determine actual notice.[52] Consider, for example, a scenario where personal service is effected through an agent.[53] Here, an initial showing of service through pleadings or a hearing[54] is the same as a showing of actual notice because the same agent who served the absent party simultaneously informed him of the proceedings against him. The agent may even attest to both proper service and actual notice in the same affidavit. Therefore, allowing the burden shift to turn on the issue of actual notice

46. FED. R. CIV. P. 55(a).

47. FED. R. CIV. P. 55(c).

48. *See, e.g.,* Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993) (finding that, in deciding a 55(c) motion, doubt should be resolved in favor of the defendant because default judgments are generally disfavored); Lichtenstein v. Jewelart, Inc., 95 F.R.D. 511, 513 (E.D.N.Y. 1982).

49. Kruk, *supra* note 42.

50. FED. R. CIV. P. 60(b)(4); Popper v. Podhragy, 48 F. Supp. 2d 268, 271 (1998).

51. *See supra* notes 34, 36.

52. *See, e.g.,* Bally Export Co. v. Balicar, Ltd., 804 F.2d 398, 401 & n.2 (1986) (indicating that timely service of process by itself was sufficient to show defendant had actual notice of original proceedings).

53. This was the scenario in *Burda*, where local law enforcement agents attempted to serve Viertel. *Burda*, 417 F.3d at 296.

54. Rule 8 of the Federal Rules of Civil Procedure requires "a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it." FED. R. CIV. P. 8(a)(1). In the case of *Rohm*, the court found actual notice simply based on an affidavit provided by plaintiff's attorney who allegedly had met the defendant face-to-face. 103 F.R.D. at 545.

gives the misleading appearance that the hardship is placed on the defendant who willfully avoids justice. In fact, as this hypothetical illustrates, it can be just as easy to fabricate actual notice as it is to fabricate proper service; everything hinges on the veracity and integrity of the agent, who may have little or no personal interest in the matter. The blameworthy party in such a case may be the plaintiff, the defendant, or a third party. The actual notice test is not enlightening in this regard. Of course, in cases such as *Burda*, where the record is replete with evidence not only that Viertel learned of the proceedings directly from the French police, but that he actively avoided service and engaged in a pattern of fraud and deceit,[55] the chance is relatively small that courts will mistake such a defendant as an innocent party. A plaintiff who has already established evidence of a defendant's avoidance should not need to shift the burden to the defendant.[56]

Second, even if the assumption were true that the actual notice test consistently targets blameworthy parties, it would, in some situations, allow plaintiffs to substitute actual notice for adequate service of process in securing default judgments. Actual notice focuses on a defendant's subjective knowledge, while service of process focuses objectively on the steps taken by a plaintiff to ensure that a defendant will be notified of a proceeding. Thus, a defendant may have had actual notice of a proceeding even though the plaintiff did not properly serve the defendant. The *Rohm* rule tends to permit this scenario by avoiding the question of adequate service of process: because the burden of proof shifts to a defendant who had actual notice, it may not matter whether he was properly served.[57] Such a result is strictly forbidden by Second Circuit precedent, which has rejected the notion that actual notice can be a substitute for proper service of process.[58] Actual notice alone will not ensure that plaintiffs act reasonably in executing formal service procedures; nor does it provide defendants with sufficient confi-

55. *Burda*, 417 F.3d at 295–97.

56. *See Rohm*, 103 F.R.D. at 545 (finding actual notice where the plaintiff's counsel's affidavit attesting to a settlement meeting with the defendant was judged to be more credible than defendant's affidavits that no such meeting took place). *Burda* did not involve a simple judgment of the truth of one party's word against the word of another. Instead, the plaintiff in *Burda* produced documents allegedly signed by defendant, French police reports confirming a meeting with defendant, and other evidence of avoidance and fraud by the defendant. *Burda*, 417 F.3d at 295–98, 302–03.

57. In other words, under the *Rohm* rule, if the defendant cannot prove service was defective, the plaintiff's judgment against him is secured principally on the basis of actual notice. It may be quite difficult for a defendant to prove improper service. *See* Waldman, *supra* note 10, at 545. Therefore, the result may primarily hinge on actual notice.

58. *See, e.g.,* Martin v. N.Y. State Dep't of Mental Hygiene, 588 F.2d 371, 373 (2d Cir. 1978) ("A showing that defendant has had actual notice of the lawsuit is not sufficient to bar a motion to dismiss under Rule 12(b)(2)."); Di Leo v. Shin Shu, 30 F.R.D. 56, 58 (S.D.N.Y. 1961) ("[Actual notice] may not be deemed a sufficient ground upon which a court can sustain the sufficiency of service of process which has not been effected in the manner prescribed by the relevant provisions of Rule 4(d)(1).").

dence that a proceeding has actually commenced, or with the information they may need to respond.[59]

Third, applying the *Rockwell* test rather than the *Rohm* test promotes diligence in complainants who wish to take advantage of judgments against absent parties.[60] Requiring the submission of accurate and concrete evidence of service would allow courts to make the most accurate assessment of the facts. Additionally, requiring plaintiffs to carefully collect and retain evidence of proper service safeguards the interests of those who may not be able to defend themselves and would not erect a significant hurdle for plaintiffs.[61]

As one of its reasons for adopting the *Rohm* rule, the *Burda* court noted that an unreasonable delay in bringing Rule 60(b)(4) motions may prejudice plaintiffs who have lost evidence of personal jurisdiction.[62] It is, of course, an unfortunate result of the *Rockwell* rule that, through the natural process of entropy, memories fade over time and evidence is not preserved. This is, in effect, a laches argument,[63] which has been rejected by overwhelming authority on the grounds that no passage of time can turn a nullity into a valid judgment.[64] In other words, the primary inquiry is whether a judgment was valid to begin with; if it was not valid, the issue of time delay is moot.[65] Courts have generally been hesitant to place time constraints on Rule 60(b) motions.[66]

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59. One court dramatically explains this danger, that if actual notice could be readily substituted for service of process, "there would be no such thing as service of process, but all that would be necessary to obtain judgment and levy on a man's property and possessions would be to inform him by whatever means that there was in fact a suit pending against him, and throw the burden on him of checking out the rumor, a situation that would indeed lead to the nightmare situations envisioned by Kafka in The Trial." Holloway v. Frey, 202 S.E.2d 845, 847 (Ga. Ct. App. 1973).

60. Waldman, *supra* note 10, at 546–47.

61. *See, e.g., Rohm*, 103 F.R.D. at 545 n.2 (indicating that, even if the plaintiff was saddled with the burden of proving personal jurisdiction, he would have prevailed based on evidence produced during the original proceedings, such as deposition testimony, a contract of employment, and other indications that the defendant was doing business in the jurisdiction in question). Therefore, the burden of proof of service may often be satisfied by a plaintiff through evidence revealed and submitted during the original proceedings.

62. *Burda*, 417 F.3d at 299 (quoting Miller v. Jones, 779 F. Supp 207, 210–11 (D. Conn. 1991)).

63. Laches is an equitable principle, analogous to a period of limitation, where an action may be barred if there is inexcusable delay in bringing the suit and prejudice will result from such a delay. United States v. One Toshiba Color Television, 213 F.3d 147, 157 (3d Cir. 2000). Unlike the *Burda* court's policy argument, however, laches is ordinarily applied only on a case-by-case basis. *See, e.g.,* Burnett v. N.Y. Central R.R. Co., 380 U.S. 424, 435 (1965). Laches has not been applied to absolute rules like the one announced in *Burda* because it is not meant to work as harshly as a statute of limitations. 27A AM. JUR. 2D *Equity* § 148 (2006); *see, e.g.,* Princess Anne Hills Civic League, Inc. v. Susan Constant Real Estate Trust, 243 Va. 53, 58 (1992) (citing Bartsch v. Bartsch, 204 Va. 462, 468 (1963)).

64. A void judgment is considered a nullity because it was invalid even from the start. Therefore, it cannot be constrained by time limits. *Toshiba,* 213 F.3d at 157.

65. *Id.*

66. *See, e.g.,* Klapprott v. United States, 335 U.S. 601 (1949) (allowing Rule 60(b)(4) motion four years after judgment was entered); *Rohm*, 103 F.R.D. at 544 (entertaining Rule 60(b)(4) motion almost

The argument of unreasonable delay also fails because it is less onerous for plaintiffs to retain evidence of proper service than it is for defendants.[67] Plaintiffs initiate actions, and therefore have the greatest interest in securing jurisdiction over all parties in order to ensure adjudication of their claims. It is the plaintiff, rather than the defendant, who decides what mode of service is proper or convenient, how best to effect that service, and who physically serves the defendant with process.[68] In the case of a default judgment, it is the plaintiff's evidence alone which is used to secure jurisdiction over the parties. The defendant, on the other hand, is in the position of proving a negative.[69] If the defendant has indeed been the subject of fraud or forgery, this may not be possible. Further, the availability of default judgment is itself a deterrent to procedural abuse by defendants.[70] Seldom will it be advantageous for a defendant to subject his assets and properties to attachment for a slight chance at some future relief.[71]

Finally, the *Rockwell* rule promotes "horizontal consistency" between Rules 12(b)(5), 55(c), and 60(b)(4) of the Federal Rules of Civil Procedure.[72] It is well-established that of the three motions allowing a defendant to challenge personal jurisdiction, motions brought pursuant to Rule 12(b)(5) or Rule 55(c) leave the burden of proof on plaintiffs to prove adequate service of process.[73] Thus, under the *Rohm* rule, only those challenges to personal jurisdiction made after a default judgment shift the burden to defendants. This may partly be explained by a policy of punishing parties who delay in asserting inadequate service. But Rule 55(c) is so closely related to Rule 60(b)(4) that the process for attacking personal jurisdiction under 60(b)(4) should be consistent with the process under 55(c). Both entry of default and judgment by default occur at about the same stage in the litigation: when a defendant has failed to appear and answer the claims against him and the court has resolved to do justice in his absence.[74] In certain cases, a default judgment may be entered by the clerk rather than by the district

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twenty years after judgment was entered). This has been true even though Rule 60(b) states that motions under this section "shall be made within a reasonable time." FED. R. CIV. P. 60(b).

67. *See* Waldman, *supra* note 10, at 545–46.

68. *See* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 444–46 (6th ed. 2002).

69. *See* Waldman, *supra* note 10, at 545–46.

70. Indeed, one of the primary purposes for default judgment under the Federal Rules was to deter delay tactics as a litigation strategy. *H.F. Livermore Corp.*, 432 F.2d at 691.

71. This is especially true since the Federal Rules give courts wide discretion in entering default judgments. *In re* Villegas, 142 B.R. 742, 746 (B.A.P. 9th Cir. 1991); 10 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2865 (2d ed. 1983). It is generally unnecessary for the plaintiff to prove the merits of his claim. *Villegas*, 142 B.R. at 746; Julie Fritts Kaptur, *Default Judgments in Social Security Claims Litigation*, 49 U. CHI. L. REV. 777, 779 (1982).

72. *See* Waldman, *supra* note 10.

73. *See supra* notes 45, 48.

74. FED. R. CIV. P. 55(a); FED. R. CIV. P. 55(c); FED. R. CIV. P. 60(b)(4); *see also* Kruk, *supra* note 42.

court, as under a 55(a) entry of default.[75] In such a case, the only practical difference is the additional step of submitting to the clerk an affidavit for the amount of the claim.[76] Otherwise, there is little reason for distinguishing between 55(c) and 60(b)(4).[77]

Preserving horizontal consistency here lends stability and predictability to the law and is faithful to the objectives of the Federal Rules of Civil Procedure. The text of the Federal Rules does not demonstrate a substantive distinction between these challenges to personal jurisdiction. Indeed, Rule 55(c) explicitly references 60(b), implying that there is a close relationship between the procedures for setting aside entry of default and the procedures for setting aside default judgment.[78] If the purpose of the Federal Rules was to provide similar relief after default judgment as provided after entry of default, a burden shift represents a radical frustration of that purpose. Shifting the burden to the defendant under Rule 60(b)(4) and not under Rules 12(b)(5) and 55(c) is tantamount to a court-enacted statute of limitations for personal jurisdiction challenges. As under a period of limitation, a defendant who was not properly served, but who cannot produce affirmative evidence of non-service, has only until the district court renders a default judgment to successfully defeat personal jurisdiction. This period may be as short as twenty-one days.[79] As this comment has asserted, where fraud and forgery are employed by a plaintiff or a third party, it may be impossible for a defendant to meet the burden of proving non-service.[80]

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75. FED. R. CIV. P. 55(b)(1).

76. *Id.*

77. Two reasons for a distinction may be the interests articulated by the *Burda* court in adjudicating matters in a single judicial proceeding and allowing a plaintiff to select the forum. *See Burda*, 417 F.3d at 299; WRIGHT, MILLER & KANE, *supra* note 38. However, Rule 60(b)(4) itself allows for relief after judgment is finalized and in courts of registration in foreign jurisdictions to the court in which the original proceeding was held. *See* WRIGHT, MILLER & KANE, *supra* note 38. The *Rohm* rule may possibly deter use of Rule 60(b)(4) but it does not change these fundamental aspects of post-judgment relief.

78. FED. R. CIV. P. 55(c) ("[I]f a judgment by default has been entered, [a party] may likewise set it aside in accordance with Rule 60(b)."). The 2005 proposed amendments to the Federal Rules retain this relationship. FED. R. CIV. P. 55(c) (Proposed Amendment 2005) ("The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).").

79. After a defendant is served with a summons, he must answer within twenty days. FED. R. CIV. P. 12(a)(1)(A). On the twenty-first day, plaintiff may move for entry of default. FED. R. CIV. P. 55(a). If the defendant has never appeared in the litigation and the damages are for a sum certain, the clerk of court can enter a default judgment without notice to the relevant parties. FED. R. CIV. P. 55(b)(1). This can theoretically happen in the same day. Therefore it is possible, at the earliest, that a defendant can have only twenty-one days to successfully challenge personal jurisdiction without evidence sufficient to meet the burden of proof.

80. Indeed, cases analyzed across different jurisdictions show that the burden shifting issue has been outcome-determinative. Waldman, *supra* note 10, at 544–45. As of 2001, in about ninety-two percent of the reported cases where burden-shifting under Rule 60(b)(4) motions was allocated and where personal jurisdiction was the central issue, the burden shift determined the outcome of the case. *Id.* at 545 n.165. In those cases, the party holding the burden of proof lost on the 60(b)(4) motion. *Id.*

The Federal Rules do not contemplate a period of limitation for challenges to personal jurisdiction. Rule 60(b) does state that "a motion shall be made within a reasonable time,"[81] but courts have uniformly held that this provision does not apply to limit 60(b)(4) motions for the same reasons noted above; namely, that time restrictions like the equitable doctrine of laches cannot be imposed on a proceeding that was invalid to begin with.[82] Even if, by its "reasonable time" provision, the architects of Rule 60(b)(4) intended a period of limitation to attach to personal jurisdiction challenges, it is unlikely that this period would be less than the one-year post-judgment period allowed for motions 60(b)(1), (2), and (3).

Because Viertel is an extreme example of a delinquent defendant, the holding in *Burda* is ill-suited to provide an across-the-board rule where Rule 60(b)(4) is applied. This is because the evaluation of actual notice and other findings of unfairness involve value judgments by courts of the level of blameworthiness assigned to a defendant. Use of the *Rockwell* rule, on the other hand, would eliminate subjectivity and create a clear and predictable rule. This is because assigning the burden of proof to the plaintiff does not turn on any test or set of facts; it does not depend on a judgment of whether the plaintiff or defendant, or a third party, is more blameworthy. Even if such a bright line rule would make recovery more difficult for plaintiffs in some cases, this is more desirable than a justice system that mistakes ignorance for avoidance.

81. FED. R. CIV. P. 60(b).

82. *See supra* notes 63–66 and accompanying text.