I. INTRODUCTION

An obscure procedural rule is about to become profoundly important. The rule is Federal Rule of Civil Procedure 62(b)(4), the context is setting aside default judgments, and a modern exigency that this Article calls "default-by-design" will remove Rule 62(b)(4) from anonymity.¹ Though this Article’s topic is narrow — Rule 62(b)(4) motions to stay within the default judgment context — the application is wide, given our weakened economy, the untold number of debts that may never be paid, and the tension that exists between defiant debtors and determined creditors.²

All told, Rule 62(b)(4) demands a judicial balancing act between protecting assets and legitimizing default judgments. This balancing takes place amidst a scenario that pits diligent plaintiffs against dilatory defendants.

The scenario is as follows: a plaintiff sues a defendant, seeking money damages. Service is effectuated properly; the defendant receives the summons and complaint. Nonetheless, despite proper service, regardless of a plaintiff’s diligent pursuit of the law, the defendant intentionally or otherwise, does not participate in litigation.

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² See, e.g., John Collins Rudolf, Pay Garnishments Rise as Debtors Fall Behind, N.Y. TIMES, Apr. 1, 2010, at B1 (“One of the worst economic downturns of modern history has produced a big increase in the number of delinquent borrowers, and creditors are suing them by the millions . . . . Most consumers never offer a defense, and creditors win their lawsuits without having to offer proof of the debts . . . .”); see also Dennis McCoy, Dutch Pension Fund Wins $15M Default Against Dunmore Capital, SACRAMENTO BUSINESS JOURNAL, Dec. 18, 2009, available at http://cincinnati.bizjournals.com/sacramento/stories/2009/12/21/tidbits1.html?printable (Dutch pension fund obtained multi-million dollar judgment against California business entity in a federal court in Delaware).
After the requisite time period, default is entered, followed by a default judgment.3

When a plaintiff obtains a default judgment, collection is imminent.4 Asset attachment and wage garnishment actualize a judgment.5 They also cause defendants to act; seized assets and diminished salaries almost inevitably prompt participation in the judicial process. A defaulted defendant may only become interested in litigation when property is attached.6 Property loss, threatened or actualized, causes defendants to rush to court and file a Federal Rule of Civil Procedure 60 motion to set aside.7

Defendants will assert a variety of reasons to explain previous non-participation, including excusable neglect or mistake.8 Some defendants choose an alternate route, admitting intentional non-participation; though they knew a lawsuit existed and understood that a default judgment may be entered, they still refused to participate in a case.9 No matter the reason, Rule 60 is invoked, ushering in a time period within which Rule 62(b)(4) can and will play a pivotal role. This role has yet to be realized because of a common mistake that attorneys make, owing perhaps to Rule 62(b)(4)'s inconspicuousness.

Some attorneys, and clients, assume that if they file a Rule 60 motion, collection efforts must cease.10 This is false – the primary way

3. Compare Fed. R. Civ. P. 55(a) (default) with Fed. R. Civ. P. 55(b) (default judgment); see also Lowe v. McGraw-Hill Cos., Inc., 361 F.3d 335, 339-40 (7th Cir. 2004) (reviewing distinction between defaults and default judgments as evidenced by Rule 55(a) and Rule 55(b)(2)).

4. But see Fed. R. Civ. P. 62(a) (“Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry.”); cf. Fed. R. Civ. P. 62(f) (“If a judgment is a lien on the judgment debtor’s property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.”).

5. See Fed. R. Civ. P. 69(a)(1) (“A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution – and in proceedings supplementary to and in aid of judgment or execution – must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.”).

6. See, e.g., Nunley v. Ethel Hedgeman Lyle Acad., No. 4:08-CV-1664 CAS., 2010 WL 501465, at *1 (E.D. Mo. Feb. 8, 2010) (“Defendant claims that it was not made aware of this litigation prior to receiving notice on December 14, 2009 from its bank, U.S. Bank, that defendant’s operating fund was going to be garnished.”).

7. See also Fed. R. Civ. P. 55(c) (defaults set aside for good cause while default judgments set aside under Rule 60(b)).


9. See Ungar, 613 F. Supp. 2d at 222 (defendants’ one-time attorney, former United States Attorney General Ramsey Clark “stated in open court that he had spoken personally to Yasser Arafat, the leader of both the PA and the PLO, and was instructed not to file an answer or defend this case on the merits because Arafat would not recognize the jurisdiction of . . . any American court over the PA or PLO.”).

10. See, e.g., United States v. One 1962 Ford Galaxie Sedan, 41 F.R.D. 156, 157-58 (S.D.N.Y. 1966) (unless litigant files Rule 62(b) motion to stay, judgment enforcement may proceed once Rule 62(a)’s mandatory time period ends); see also Boehringer In-
that judgment execution or enforcement can be paused is through Rule 62(b)(4). This rule, not Rule 60, is the mechanism through which defendants can stay judgment enforcement and execution. Rule 62(b)(4) provides that "in appropriate terms for the opposing party's security, the court may stay the execution of a judgment—or any proceedings to enforce it—pending disposition of any of the following motions: . . . under Rule 60, for relief from a judgment or order." Rule 62(b)(4) embodies dueling objectives. On the one hand, it legitimizes default judgments. On the other hand, it recognizes that occasionally judgment enforcement and execution should cease temporarily. As a result, both plaintiff and defense attorneys can use Rule 62(b)(4) to a client's advantage.

Defense attorneys can invoke this rule to protect defendants' assets and restrict disclosure of information. Plaintiff attorneys can use it to require security during a stay, ensuring that a defendant does not transfer or hide assets. Regardless, a rule's efficacy, its capacity to benefit litigants, depends on judicial construction and application — both of which are missing from the Rule 62(b)(4)-default judgment context.

Few Rule 62(b)(4) precedents exist, published opinions are sparse, with the rule's development occurring almost exclusively at the district court level, perhaps the juridical arena most suited for such a task. In fact, the rule is so underdeveloped that no uniform set of
elements has emerged to guide courts in determining a stay's propriety. And while Rule 62(b) has been interpreted within other contexts, its specific role in conjunction with a Rule 60 motion to set aside a default judgment has rarely been assessed by courts. The same can be said about legal scholarship, until now.

This Article explores Rule 62(b)(4) within the default judgment context. First, this Article explains how attorneys can use this rule to benefit their clients. Next, this Article focuses on courts by construing the rule's text and reviewing courts' historical stay discretion, a traditional power vital to fully understanding Rule 62(b)(4). The Article also offers a series of elements to help courts determine a stay's appropriate power vital to fully understanding Rule 62(b)(4). The Article also offers a series of elements to help courts determine a stay's appro-

1. See United States v. Moyer, C 07-00510 SBA, 2008 WL 3478063, at *6 (N.D. Cal. August 12, 2008) (noting that the Ninth Circuit has yet to articulate factors that identify a Rule 62(b) stay's propriety).


16. The most recent Rule 62(b)(4)-default judgment decision is Cooper, 2010 WL 1729127.
priateness. Finally, the Article examines default-by-design, the modern exigency that will push Rule 62(b)(4) into prominence.

Thus, this Article’s objective is clear: to remove Rule 62(b)(4) from anonymity. It is too important a rule to be glossed over by practitioners, thereby minimizing judicial constructions. The rule is significant because it impacts people during a vulnerable period.\(^\text{19}\) When a judgment exists against someone, a life is subject to scrutiny, property is open to seizure, and private financial information is susceptible to disclosure.\(^\text{20}\) At the same time, duly obtained judgments, default or otherwise, must be respected. When a diligent plaintiff has invested time and money in gaining a judgment, collection should not be stayed automatically.\(^\text{21}\) The dueling objectives that animate Rule 62(b)(4) go to the essence of a society struggling to maintain its dignity without sacrificing its law, all occurring during an era bleak from uncertainty.\(^\text{22}\)

And so, this Article is the first step in what will be a much longer journey and ever-developing effort to reconcile Rule 62(b)(4)’s dueling objectives: legitimizing default judgments and acknowledging that sometimes judgment execution and enforcement should be stayed momentarily. Achieving a balance between these conflicting goals, a necessarily judicial task, is but one of the many remarkable circumstances where law strives to be efficient and fair, involving a give and take between competing interests and desires.\(^\text{23}\)

II. PROTECTING CLIENT ASSETS: HOW DEFENSE ATTORNEYS CAN USE RULE 62(b)(4)

From a defendant’s perspective, Federal Rule of Civil Procedure 62(b)(4) has two tactical benefits. First, it strengthens a Federal Rule

\(^{19}\) See, e.g., Nunley, 2010 WL 501465, at *1 (school would be ruined financially if court did not stay default judgment’s execution and enforcement).

\(^{20}\) See Fed. R. Civ. P. 69(a)(2) (“In aid of the judgment or execution, the judgment creditor... may obtain discovery from any person... as provided in these rules or by the procedure of the state where the court is located.”).

\(^{21}\) See Butler, 101 F. Supp. at 379 (“The plaintiff by this motion seeks to prevent further process by way of execution pending the outcome of this cause, and the request seems to be reasonable provided the legal rights of this defendant are not thereby put in jeopardy.”) (emphasis added); but cf. Fed. R. Civ. P. 62(a) (providing fourteen-day automatic stay after judgment’s entry).

\(^{22}\) See Rudolf, supra note 2, at B1 (reviewing current conflict between creditors and debtors).

\(^{23}\) See generally Oliver Wendell Holmes, Law in Science and Science in Law, 12 Harv. L. Rev. 443, 460 (1899) (“whenever a doubtful case arises, with certain analogies on one side and other analogies on the other... what really is before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way.”).
of Civil Procedure 60 motion to set aside.24 Without a stay, the mere request to set aside will not stop a plaintiff from executing or enforcing a default judgment.25 Second, Rule 62(b)(4) shields assets from execution pending a Rule 60 motion’s resolution; execution and enforcement are prohibited during a stay.26

These benefits, however, will go unrealized unless defense attorneys use Rule 62(b)(4) effectively. Defense attorneys can do so by being cognizant of Rule 60’s significance within Rule 62(b)(4) and by pursuing a stay diligently.

A. DEFENDANTS CAN UTILIZE RULE 62(b)(4) EFFECTIVELY IF THEIR ATTORNEYS APPRECIATE RULE 60’S ROLE

Federal Rule of Civil Procedure 62(b)(4)’s text indicates Federal Rule of Civil Procedure 60’s significance. Under Rule 62(b)(4), courts have discretion to stay a default judgment’s execution, “[p]ending disposition of... [a] Rule 60 [motion]...”27 Rule 60 motions to set aside are textual prerequisites, to be filed before or with a motion to stay.28

Rule 60 motions also demarcate a Rule 62(b)(4) stay’s duration.29 Execution and enforcement are stayed until a court disposes a Rule 60 motion.30 As a result, a stay will last for as long as a court takes to decide a Rule 60 motion.31 Defendants can use Rule 62(b)(4) effectively if their attorneys appreciate Rule 60’s role.

29. See Geddes, 559 F.2d at 560.
30. See, e.g., Combustion Sys. Servs., Inc., 153 F.R.D. at 74 (“Fed. R. Civ. P. 62(b) provides inter alia that if a Rule 50 or Rule 60 post trial motion is filed, a court may, in its discretion, stay the execution of a judgment pending the disposition of such motions.”).
31. See In re Zapata Gulf Marine Corp., 941 F.2d at 295 (“In sum, Rule 62(b) grants authority to the district court to stay a judgment while it considers and disposes of Rule 60 motions. This Rule gives the court no authority to stay execution of the judgment on appeal after it has disposed of the Rule 60 motions.”).
B. Defense Attorneys Should Pursue Stays Diligently

In addition to appreciating Federal Rule of Civil Procedure 60's significance, defense attorneys should seek stays diligently. Default judgments are available because of litigation non-participation. Absent a contrary explanation, courts may conclude that a defendant is simply defying law by not responding to a complaint. The defendant's delay wastes judicial resources and impedes litigation's orderly progress.

Rule 60 motions to set aside are a defendant's first opportunity to dispel the image of an indifferent and dilatory litigant. As such, every filing after a default judgment's entry must be prompt, indicating a desire to litigate diligently.

For instance, one way that Federal Rule of Civil Procedure 62(b)(4) stays can be pursued diligently is by filing them on orders shortening time. Requesting an early hearing or disposition date will indicate a willingness to litigate seriously, to participate in a way that does not drain judicial resources, or further postpone a case's prompt resolution. Defense attorneys should pursue Rule 62(b)(4) stays diligently.

C. Using Rule 62(b)(4) Effectively Will Actualize Its Tactical Benefits

In sum, comprehending Federal Rule of Civil Procedure 60's significance within Federal Rule of Civil Procedure 62(b)(4) and pursuing a stay diligently will help defendants realize Rule 62(b)(4)'s tactical benefits – strengthening the utility of a Rule 60 motion to set aside a judgment and insulating assets from execution. These benefits coincide with a defendant's goals of eliminating a default judgment and retaining property.

These goals reflect the reality that when faced with a default judgment, when assets are attached, a one-time non-participant will desperately try to participate in a case by filing a Rule 60 motion to set aside followed by a Rule 62(b)(4) motion to stay. If a stay is granted,

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32. See Fed. R. Civ. P. 55(a) (providing default may be entered when party fails to plead or otherwise defend a case).
34. See id. ("They [defendants] have disregarded our orders, and have failed to comply with the Federal Rules of Civil Procedure. . . . The plaintiffs have been diligent and responsible in their actions, despite considerable delay in connection with the relief they have lawfully obtained and to which they are entitled."). Id.
35. But cf. Ungar, 599 F.3d at 81, 84 (1st Cir. 2010) (rejecting a categorical rule automatically prohibiting Rule 60(b)(6) relief for defaults-by-design).
36. See, e.g., Tradewinds Airlines, Inc., 2009 WL 435298, at *3 (recounting delayed efforts to set aside default judgment).
then property will be protected; neither judgment enforcement nor execution can occur during a stay. Using Rule 62(b)(4) effectively will actualize its tactical benefits for defendants.

III. LEGITIMIZING DEFAULT JUDGMENTS: HOW PLAINTIFF ATTORNEYS CAN USE RULE 62(b)(4)

Plaintiffs perceive Federal Rule of Civil Procedure 62(b)(4) differently from defendants. Once armed with a valid default judgment, plaintiffs anticipate that collection will be proper. In the plaintiffs’ estimation, judgment and collection constitute the price a defendant pays for avoiding law and dodging procedural rules and requirements. Yet, Rule 62(b)(4) challenges this understanding. Even though an attorney prosecuted a case diligently, litigation’s orderly progress can stall under Rule 62(b)(4); it does not matter that a default judgment is a legitimate product of the judicial process, entitling a plaintiff to redress. Consequently, Rule 62(b)(4) threatens a default judgment’s legitimacy in two ways.

First, a stay stops execution—a binding decision’s consequences are put on hold. Second, a stay provides defendants with an opportunity to transfer or hide property, all in an effort to frustrate future collection. Hence, Rule 62(b)(4) presents two dangers to a default judgment’s legitimacy: halting execution and giving defendants an opportunity to conceal assets.

However, plaintiff attorneys can protect their clients from these dangers. Default judgments can be legitimized by reminding courts about Rule 62(b)(4)’s discretion, which intimates that stays are not automatic. Regarding attempts to frustrate collection, Rule 62(b) requires courts to issue Rule 62(b)(4) stays “[o]n appropriate terms for the opposing party’s security . . . .”

37. See generally Lowe, 361 F.3d at 341-42 (“Security of property rights and other holdings—and a legal judgment is a form of property right . . . would be greatly undermined if a judgment could be challenged a decade or more after it had been entered, on the ground that the judge had been mistaken to render it.”) (internal citations omitted).
40. See Butler, 101 F. Supp. at 379 (“The plaintiff by this motion seeks to prevent further process by way of execution pending the outcome of this cause, and the request seems to be reasonable provided the legal rights of this defendant are not thereby put in jeopardy.”); see also Ebeling & Reuss, Ltd., 1990 WL 96128, at *1.
A. **Plaintiff Attorneys Can Turn To Rule 62(b)(4)'s Discretion To Perpetuate a Default Judgment's Legitimacy**

Courts are generally reluctant to embrace a default judgment's full legal import.\(^{42}\) In part, this hesitancy emanates from the judicial policy to decide cases on their merits.\(^{43}\) Default judgments are perceived to be procedurally-driven outcomes as opposed to substantively-based determinations.\(^{44}\) Courts depict default judgments as consequences of non-participation rather than dispositions based on the causes of action and available defenses.\(^{45}\)

Nonetheless, this general reluctance, while admittedly understandable especially when service is not effectuated, diminishes default judgments' stature; it promotes the proposition that default judgments are almost inherently less legitimate than other judgments.\(^{46}\) This view is unfortunate because it overlooks the values that default judgments foster and symbolize.\(^{47}\)

\(^{42}\) See, e.g., Tradewinds Airlines, Inc., 2009 WL 435298, at *3; see also Abreu v. Nicholls, No. 08-3567-pr, 2010 WL 726520, at *1 (2nd Cir. Mar. 3, 2010) (decision to set aside default judgment guided by principles that courts have strong preference to decide cases on their merits, a recognition that default judgments are the most severe sanctions a court can apply, and every doubt must be resolved in favor of party moving to set aside default judgment); Stewart v. Astrue, 552 F.3d 26, 28 (1st Cir. 2009) (Federal law favors disposing cases on their merits and as such default judgments are drastic sanctions).

\(^{43}\) See Westchester Fire Ins. Co. v. Mendez, 585 F.3d 1183, 1189 (9th Cir. 2009) ("As a general rule, default judgments are disfavored; cases should be decided upon their merits whenever reasonably possible.") (internal citations omitted); see also Stewart, 552 F.3d at 28; Harad v. The Aetna Cas. & Sur. Co., 839 F.2d 979, 982 (3d Cir. 1988) (policy disfavoring default judgments and encouraging decisions on the merits).

\(^{44}\) See Int'l Painters & Allied Trades Union & Indus. Pension Fund v. H.W. Ellis Painting Co., Inc., 288 F. Supp. 2d 22, 25 (D.D.C. 2003) ("Default judgments are generally disfavored by courts, because entering and enforcing judgments as a penalty for delays in filing is often contrary to the fair administration of justice."); see also Jackson v. Beech, 636 F.2d 831, 835 (D.C. Cir. 1980) ("Default judgments are not favored by modern courts, perhaps because it seems inherently unfair to use the court's power to enter and enforce judgments as a penalty for delays in filing."); Tozer v. Charles A. Kraus Milling Co., 189 F.2d 242, 245 (3d Cir. 1951) ("Matters involving large sums should not be determined by default judgments if it can reasonably be avoided. Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on [their] merits.") (citation omitted).


\(^{46}\) See generally Burger King Corp. v. Rudzewicz, 471 U.S. 462, 485-86 (1985) (increasing number of default judgments would be a negative consequence of extending Federal jurisdiction).

\(^{47}\) See KPS & Assocs., Inc. v. Designs by FMC, Inc., 318 F.3d 1, 12-13 (1st Cir. 2003) (policies and values underlying defaults include (i) serves as a useful remedy for litigant who is seeking redress against an obstructionist adversary, (ii) maintains orderly administration of justice, (iii) provides incentive for parties to comply with court orders and procedural rules, (iv) encourages expeditious litigation, and (v) promotes finality).
Principally, default judgments foster the values of efficient and expeditious litigation. Indeed, plaintiffs have a duty to prosecute their cases diligently. From filing a complaint to procuring a case's resolution, ensuring that the case does not languish on the court's docket is incumbent upon a plaintiff. In turn, this duty of diligence necessitates courts' commitment to expeditious litigation, a value that courts are now especially aware of and committed to achieving. Default judgments foster these values; they also symbolize procedural regularity, a critical component of the rule of law. Those who follow the law, who heed its commands, have legitimate and reasonable expectations that certain results will follow. In the case of default judgments, execution and enforcement are the anticipated outcomes.

Federal Rule of Civil Procedure 62(b)(4) is the break, however temporary, on a plaintiff's reasonable expectation that a judgment will be followed by collection. And, because a default judgment is involved, courts might be tempted to apply Rule 62(b)(4) in sync with the general reluctance to embrace a default judgment's legitimacy, leaning towards granting a stay in most instances. Plaintiff attorneys can counteract this tendency by reminding courts that Rule 62(b)(4) requires the exercise of discretion and that stays are not automatic.


49. See Moneymaker v. CoBen (In re Eisen), 31 F.3d 1447, 1454 (9th Cir. 1994) ("Although there is indeed a policy favoring disposition on the merits, it is the responsibility of the moving party to move towards that disposition at a reasonable pace, and to refrain from dilatory and evasive tactics.") (quoting Morris v. Morgan Stanley & Co., 942 F.2d 648, 652 (9th Cir. 1991)).

50. See Anderson v. Air West, Inc., 542 F.2d 522, 524 (9th Cir. 1976) ("This court has consistently held that the failure to prosecute diligently is sufficient by itself to justify a dismissal, even in the absence of a showing of actual prejudice to the defendant from the failure. The law presumes injury from unreasonable delay.").

51. See Milam v. Dominick's Finer Foods, Inc., 588 F.3d 955, 958-59 (7th Cir. 2009) ("In the interest of justice and economy, every effort should be made by the district court from the start of a case to determine its likely merit and guide it to as swift a conclusion as is consistent with doing justice to the parties.").

52. See generally Burdeau v. McDowell, 256 U.S. 465, 476-77 (1921) (Brandeis, J., dissenting) ("In the development of our liberty insistence upon procedural regularity has been a large factor.").

53. See generally Lowe, 361 F.3d at 341-42 ("[p]eople justifiably rely on judgments that they have obtained and that have become final.").


56. See Harad, 839 F.2d at 982 (policy disfavoring default judgments and encouraging decisions on the merits).

57. See generally Donellan Jerome, Inc., 270 F.Supp. at 999 ("Rule 62(b) does not require the court to grant a stay in all cases, but provides that the court may grant relief
According to Rule 62(b)(4), discretion is embodied in the word "may" and iterated with the phrase, "[t]he court may stay." As such, when plaintiff attorneys draft their responses to a defendant's Rule 62(b)(4) motion to stay, their responses should emphasize that automatic stays would circumvent Rule 62(b)(4) by ignoring the rule's discretionary text. The responses should also note that the rule implies that some instances do not warrant stays.

When such instances occur and a court refuses to stay execution or enforcement, a court legitimizes default judgments and reinforces their values and symbolism. Denying a motion to stay means that a default judgment's legal import and significance remains intact until a court concludes otherwise by virtue of granting a Rule 60 motion. It sends the message that default judgments, no less than any other judgment, remain valid determinations until a contrary judicial decree. Diligent prosecution, expeditious litigation, and procedural regularity are promoted when courts permit plaintiffs to continue their execution and enforcement efforts. Plaintiff attorneys can turn to Rule 62(b)(4)'s discretion to perpetuate a default judgment's legitimacy.

B. Even If A Stay Is Granted Courts Must Secure Plaintiffs From Efforts To Frustrate Collection

When a stay is in place, a defendant's assets should remain where they are; defendants cannot take action that could threaten a plaintiff's future ability to collect a judgment. Likewise, financial information cannot be deleted, altered, or removed.

Yet, stays give defendants time to transfer or hide assets that would otherwise be used to satisfy a judgment. Information describing a defendant's assets and their locations are also susceptible to de-

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59. See generally Van Huss v. Landsberg, 262 F. Supp. 867, 870 (W.D. Mo. 1967) ("Rule 62, taken in its entirety, indicates a policy against any unsecured stay of execution after the expiration of the time for filing a motion for new trial.")
60. See Donnellan Jerome, Inc., 270 F. Supp. at 999; see also Butler, 101 F. Supp. at 380.
61. See Butner v. Neustadter, 324 F.2d 783, 785 (9th Cir. 1963) (default judgments are valid until set aside).
63. See generally In re Owyn Loan Servicing, LLC, 491 F.3d 638, 648 (7th Cir. 2007) (district court judges should avoid protracting litigation).
64. See Slip N' Slide Records, Inc., 2007 WL 1489810, at *2 (judgment creditor's ability to enforce judgment should not be put at risk during stay).
struction. If a defendant hides assets or deletes information, then executing or enforcing a default judgment will become difficult, sometimes impossible.65

For example, these concerns are acute when a defendant is an international company, with bank accounts throughout the world capable of transferring funds from one corporate entity to another.66 The same holds for individuals who incur a debt in one state but reside in another, their assets’ primary location.67 Following a money or information trail is difficult when both wind their way through multiple jurisdictions, oftentimes triggering varying laws that may restrict a creditor’s ability to collect.68 These concerns, though legitimate, can be addressed through Federal Rule of Civil Procedure 62(b)(4). Plaintiff attorneys should insist that if a court issues a stay, then the court must do so “on appropriate terms for the opposing party’s security . . . .”69 Courts secure plaintiffs’ judgments through a variety of ways, including bonds and other measures that fit a case’s facts.70

Regardless of the security measure, Rule 62(b)(4) makes plain that courts, when issuing a stay, must do so on terms that do not threaten a judgment creditor’s execution or enforcement capacity.71 As such, even if a stay is granted, plaintiff attorneys should emphasize that courts must secure plaintiffs from a defendant’s efforts to frustrate collection.72 In short, appropriate security measures address plaintiffs’ concerns about future collectability.

65. See Lincoln Elec. Co., 2009 WL 3246936, at *1 (“The defendant must show that, in the absence of standard security, the plaintiff will be properly secured against the risk that the defendant will be less able to satisfy the judgment subsequent to disposition of the post-trial motions.”).
66. See Ebeling & Reuss, Ltd., 1990 WL 96128, at *1 (“Except for Swarovski America Limited, defendants are foreign entities, and enforcing the judgment against them may involve protracted proceedings and complicated questions of foreign law.”).
67. See Coleman, 57 F.R.D. at 148-49 (defendant was New York resident and default judgment entered in Texas).
68. See Ungar, 344 Fed. App’x at 632-33 (recounting efforts to execute and enforce default judgment obtained against terrorist organization).
70. See Ssangyong, 2000 WL 1339229, at *1 (based on case’s facts court determined that a brief stay was permissible as it would not threaten ability to collect judgments); Ebeling & Reuss, Ltd., 1990 WL 96128, at *1 (“The circumstances of this case warrant a stay of execution of judgment but only on the condition that the defendants post a bond from an approved surety company in the amount of the verdict.”).
71. See Ireland v. Dodson, No. 07-4082-JAR, 2009 WL 1559784, at *1 (D. Kan. May 29, 2009) (“In Rule 62(b), the conditional ’may’ applies to the Court’s discretion of issuing the stay, not the requirement of the appropriate security. While the Court must consider ’adequate terms’ for plaintiff’s security in granting the stay, it appears that the appropriate terms need not necessarily include a supersedeas bond.”).
72. See Am. Family Ins. Co. v. Miell, No. C04-0142, 2008 WL 746604, at *1 (N.D. Iowa Mar. 19, 2008) (“In Rule 62(b), the conditional ’may’ applies to the Court’s discretion of issuing the stay, not the requirement of the appropriate security. While Ameri-
IV. CONSTRUING RULE 62(b)(4): TEXT, HISTORY, AND WHY RESPECT FOR THE PAST REQUIRE FLEXIBILITY FOR THE FUTURE

Few courts have interpreted Federal Rule of Civil Procedure 62(b)(4) within the default judgment context. Modern exigencies, such as an ever growing number of default judgments owing in part to a deteriorating economy, will change this. More defense attorneys will begin to cite Rule 62(b)(4) with greater frequency, in the hopes of staying judgment execution and enforcement in addition to trying to set aside a default judgment.

Increasing the number of Rule 62(b)(4) motions will correspondingly increase the instances necessitating judicial construction and application, eventually resulting in a robust body of precedent. As that day has yet to arrive, federal district courts, faced with the task of construing and applying Rule 62(b)(4) without precedential guidance, will use the traditional methods of construction that apply to federal procedural rules: text and history.

Consequently, this Article reviews Rule 62(b)(4)'s text and then considers the history that the rule draws upon and which should influence the rule. But, ascertaining meaning is only half of the judicial battle—application is the remaining responsibility, identifying a legitimate approach to apply Rule 62(b)(4) consistently with its text and mindful of its past. This Article proposes several elements which courts can use in applying Rule 62(b)(4) to a given case.

Practically speaking, the ultimate decision that a court makes within the Rule 62(b)(4)-default judgment context, is whether to stay execution and enforcement or to allow a plaintiff to effectuate a default judgment. Both Rule 62(b)(4)'s text and historical ties stress
that this pivotal determination rests with a court's discretion—the reasoned exercise of choice\textsuperscript{79}—which demands nothing less than a thoughtful approximation of how best to balance the competing objectives of legitimizing default judgments with identifying instances when execution and enforcement should cease temporarily.\textsuperscript{80}

Notably, default judgments’ unique characteristics, such as courts’ general ambivalence towards them, ought to shape and influence the factors that courts turn to in assessing a stay’s advisability. Because of such uniqueness, alternative contexts, such as stays pending appeals or stays pending post-trial motions, provide only limited guidance to courts when interpreting and applying Rule 62(b)(4) in the default judgment context.\textsuperscript{81} What worked in these scenarios may not be suited for the considerations and principles that animate the default judgment arena.\textsuperscript{82}

For example, this means that the elements courts use to determine a stay's propriety pending an appeal should not be mindlessly draped over Rule 62(b)(4). Though convenient, borrowing these elements would be conceptually awkward because the considerations that led to these elements are distinct from those at play within default judgments.\textsuperscript{83} Creativity, rather than convenience, will drive courts’ development of Rule 62(b)(4)’s elements, a process which this Article begins, but by no means ends.\textsuperscript{84} With this in mind, we now

\textsuperscript{79} See generally Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 533 (1947) (judges are “[l]awgivers in any but a very qualified sense. Even within their area of choice the courts are not at large . . . Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration.”); see also Learned Hand, The Speech of Justice, 29 HARV. L. REV. 617, 621 (1916) (“Like every public functionary, in the end they are charged with the responsibility of choosing but of choosing well.”).

\textsuperscript{80} See Butler, 101 F. Supp. at 380 (“Authority to grant the desired stay must be found in F.R.C.P. Rule 62, if at all, and it seems that subdivision (b) applies in that this court in the exercise of a judicial discretion . . . .”).

\textsuperscript{81} See Int'l Wood Processors, 102 F.R.D. at 215 (identifying differences between Rule 62(b) and stays pending appeals).

\textsuperscript{82} See id. (“Unlike the stay pending appeal under Rule 62(d), a stay pending disposition of a motion for judgment n.o.v. and/or a new trial will generally be resolved in far less time than the lengthy process of briefing, argument and disposition which an appeal entails.”); see also Ireland, 2009 WL 1559784, at *1 (“[t]he risk of adverse change in the status quo is less when comparing adequate security pending post-trial motions with adequate security pending appeal; that is, the post-trial motions will generally be resolved in far less time than an appeal and, therefore, the risk to plaintiffs' security is diminished.”).

\textsuperscript{83} See generally One Box & Plastic Bags Containing about $1.2 Million in Mutilated U.S. Currency, 2009 WL 5184411, at *1 (“Ms. Hurdle's motion, however, is not properly viewed as a motion for a stay pending appeal given her citation to Rule 62(b) . . . .”).

\textsuperscript{84} See generally Di Santo v. Pennsylvania, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting) (“In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such
assess the rule's text, followed by history, closing with a proposed set of elements.

A. RULE 62(b)(4)'S MANDATORY AND DISCRETIONARY TEXT

Courts construe procedural rules according to their plain meanings. Federal Rule of Civil Procedure 62(b)(4)'s words, when read and understood within the default judgment context, enunciate a clear directive, one which includes mandatory and discretionary components. Specifically, Rule 62(b)(4) states, "[o]n appropriate terms for the opposing party's security, the court may stay the execution of a judgment—or any proceedings to enforce it—pending disposition of any of the following motions: . . . under Rule 60, for relief from a judgment or order." Mandatory provisions concern a stay's duration and a plaintiff's "security." In contrast, discretion looms large within the actual decision to grant or deny a motion to stay.

1. Rule 62(b)(4)'s Text Ensures Plaintiffs' Security And Demarcates A Stay's Duration

While discretion predominates Federal Rule of Civil Procedure 62(b)(4), the rule identifies two mandatory areas. First, the phrase "on appropriate terms for the opposing party's security" asserts that if the judge issues a stay, then the stay's conditions, details, or requirements cannot threaten a plaintiff's future capacity to collect a judgment. As such, courts must develop mechanisms to "secure" plaintiffs, such as having defendants post bonds.

questions which prove to have been mistaken."), overruled by California v. Thompson, 313 U.S. 109 (1941); see also Jaybird Mining Co. v. Weir, 271 U.S. 609, 619 (1926) (Brandeis, J., dissenting) ("It is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation and that an expression in an opinion yields later to the impact of facts unforeseen."); Washington v. W.C. Dawson & Co., 264 U.S. 219, 236 (1924) (Brandeis, J., dissenting) ("The process of inclusion and exclusion, so often applied in developing a rule, cannot end with its first enunciation. The rule as announced must be deemed tentative. For the many and varying facts to which it will be applied cannot be foreseen. Modification implies growth. It is the life of the law."); BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 138 (Yale University Press 1963) (1924) (referencing Justice Brandeis' process of inclusion and exclusion) (quoting W.C. Dawson & Co., 264 U.S. at 236).

87. See Ireland, 2009 WL 1559784, at *1; Miell, 2008 WL 746604, at *1.
88. See Cooper, 2010 WL 1729127, at *2-3 (discretion exercised in fashioning security "on appropriate terms"); Silver, 1992 WL 163285, at *1-2 (securing a stay is left to a court's discretion).
Second, a stay's duration is textually fixed by the words, "pending disposition of any of the following motions." Stays exist until a court disposes of a Federal Rule of Civil Procedure 60 motion; disposition terminates a stay. If a default judgment is not set aside, execution and enforcement proceed. Rule 62(b)(4)'s text ensures plaintiffs' security and demarcates a stay's duration.

2. According To Rule 62(b)(4)'s Text, Discretion Governs The Decision To Stay Which, If Granted, Will Protect A Defendant's Assets And Information

A court's decision to issue or deny a stay sounds in discretion. And Federal Rule of Civil Procedure 62(b)(4)'s text, while having two mandatory provisions, is predominantly discretionary in nature. Stays are not compulsory; they are optional, left to a court's reasoned and thoughtful judgment.

Stays' discretionary nature, the implication that execution and enforcement will not always be stayed, comes through in the rule's text; discretion's presence is evidenced by the word "may" and the phrase "the court may stay." "May" indicates choice, room within which courts may roam before determining a stay's propriety or impropriety.

Furthermore, the rule speaks to consequences, what will happen if a stay is granted. The words "the execution of a judgment" and "any proceedings to enforce it," when read in conjunction with "the court may stay," demonstrate that execution and enforcement must cease

89. Fed. R. Civ. P. 62(b)(4); see Geddes, 599 F.2d at 560 ("Rule 62 ... is very explicit concerning the protection afforded to litigants who seek a stay at various stages of the proceedings. The presence of such comprehensive protection implies the absence of such power in time periods not covered by the Rules.") (citation omitted).

90. See Breed, 2004 WL 1824358, at *13 ("Defendants' Rule 60 motion having been disposed of, Rule 62(b) has no office to perform.").

91. See Silver, 1992 WL 163285, at *1-2. In passing, before December 1, 2007, Rule 62(b)(4) began with the phrase "in the court's discretion" – a phrase currently missing from the rule. However, discretion's significance and presence within Rule 62(b)(4) is not altered by this phrase's omission as "[t]he Rule was amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The change was intended to be stylistic only." Miell, 2008 WL 746604, at *1 n.1.

92. See Nunley, 2010 WL 501465, at *1 ("The decision to grant the stay is within the court's discretion . . . ").

93. See Ireland, 2009 WL 1559784, at *1; Miell, 2008 WL 746604, at *1.

94. See Butler, 101 F.Supp. at 380 ("Authority to grant the desired stay must be found in F.R.C.P. 62, if at all, and it seems that subdivision (b) applies in that this court in the exercise of a judicial discretion . . . may so intervene . . . "); see also Moyer, 2008 WL 9478963, at *6 ("As the term 'may' denotes, the decision whether or not to grant a stay is within the Court's discretion.") (internal citations omitted).
during a stay, which, in turn, protects a defendant's assets and information.

B. Courts' Historical Stay Discretion And Rule 62(b)(4)

As with many legal rules, Federal Rule of Civil Procedure 62(b)(4) has a historical lineage, an identifiable link with a traditional set of principles and guidelines that predate its enactment—federal district courts' historical and traditional stay discretion.\(^9\)\(^5\) Respect ing the historical developments that occurred before Rule 62(b)(4)’s existence will assist courts in grasping the rule’s nuances and parameters in ways that will further elucidate text, the meaning and implications of which are admittedly already clear. Equally as important, courts’ historical stay discretion sheds light on how courts can balance Rule 62(b)(4)’s dueling objectives.

1. Federal District Courts' Historical Stay Discretion

Federal district courts have inherent authority to stay litigation.\(^9\)\(^6\) This power emanates from courts’ ability to control their dockets, to advance litigation expeditiously in order to pursue efficient and fair justice.\(^9\)\(^7\)

Efficiency is actualized by ensuring that cases do not linger and that dilatory litigants do not hold an opponent and a court in abeyance.\(^9\)\(^8\) District courts are familiar with a case's history, a litigant's willingness to advance a case from inception to resolution.\(^9\)\(^9\) This fa-

95. See CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962) (“A district court has inherent power to control the disposition of the causes on its docket in a manner which will promote economy of time and effort for itself, for counsel, and for litigants. The exertion of this power calls for the exercise of a sound discretion.”); see also Katz v. Feinberg, No. 99 Civ. 11705 (CSH), 2001 WL 1132018 *2 (S.D.N.Y. Sept. 24, 2001) (recounting district courts’ historical stay discretion and distinguishing it from Rule 62(b)(4) discretion).

96. See Landis, 299 U.S. at 254-55 (“[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”); see also Volmar Distribrs., Inc. v. N.Y. Post Co., Inc, 152 F.R.D. 36, 39 (S.D.N.Y. 1993) (“It is well settled that district courts have the inherent power, in the exercise of discretion, to issue a stay when the interests of justice require such action.”).

97. See Rhines v. Weber, 544 U.S. 269, 276 (2005) (“District courts do ordinarily have authority to issue stays . . . .”); see also Clinton v. Jones, 520 U.S. 681, 706 (1997) (“The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.”).

98. See Cooper, 2010 WL 1729127, at *2.

99. See Ssangyong, 2000 WL 1339229, at *1 (familiarity with case's facts warranted stay); Ebeling & Reuss, Ltd., 1990 WL 96128, at *1 (“Defendants have not always participated meaningfully in these court proceeding. . . . Defendants' conduct does
miliarity aids courts in exercising their discretion with the general aim of avoiding prejudice and promoting fair justice.100

Fair justice is realized by understanding that instances arise when a case's orderly progress should be halted temporarily.101 The identification of such instances cannot be quantified or captured with mathematical precision, as if nothing more than a sterile calculation.102 Experience, a case's facts, and surrounding circumstances guide a court in adjusting several factors before reaching a decision to stay.103 Efficiency and fair justice are achieved through individualized adjudication.104

Individualized adjudication is when courts apply a flexible set of elements to a case's particular circumstances.105 It is the sound recognition that in determining whether to issue a stay, a court is not bound by rigid rules, but rather is guided by factors, drawn from experience, susceptible to further development.106 Consequently, the traditional understanding is that inherent stay authority favors flexibility over rigidity, what warranted a stay in the past may not in the present. Fluidity, however, comes with a price: less predictability. If a standard is susceptible to change, then it may produce inconsistent and conflicting outcomes, making predicting whether a court will

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101. See id.
103. See generally Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 10-11 (1942) (inherent authority to stay administrative agency's order "[i]s an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case.") (citations omitted).
104. See id. (a case's individual circumstances influence how courts exercise judicial discretion); Nken, 129 S.Ct. at 1760-61 (courts' traditional stay discretion embraces individualized judgments) (quoting Hilton v Braunskill, 481 U.S. 770, 777 (1987)); Landis, 299 U.S. at 254-55 ("[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance."); see also Fed. R. Civ. P. 1 (Federal Rules of Civil Procedure "[s]hould be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").
106. See Hilton, 481 U.S. at 777 ("Since the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules.").
grant or deny a stay request challenging for attorneys and their clients.

Yet, predictability is not a value that courts' historical stay authority and discretion promote. In part, this is because the inherent authority is entrenched in the present, more concerned about how a decision will impact specific parties than trying to fit an outcome within what seems to be a larger project or body of precedents, where similar facts are presumed to yield similar results. The elements are not fixed; they are subject to constant reassessment and adjustment.

Additionally, predictability depends on steadfast adherence to fixed guidelines; uniform application yields consistent outcomes. Not so in the stay arena, too much give exists, both in the traditional elements that guide courts and in the results that these elements produce.

2. The Traditional Stay Elements

Courts typically identify five traditional stay elements:

(1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest.

These elements are prefaced with the proviso that each stay decision depends on a case’s facts, a case-by-case determination. And, in balancing these elements, the overarching goal is to avoid prejudice.

Evading prejudice compels courts to recalibrate these elements in light of a case’s surrounding circumstances. The goal is to balance competing interests, to assess whether a case’s orderly progress should be halted temporarily.

107. See Landis, 299 U.S. at 256 (“We must be on our guard against depriving the processes of justice of their suppleness of adaptation to varying conditions.”); see also supra note 84 (Justice Brandeis’ process of inclusion and exclusion).

108. See Hilton, 481 U.S. at 777 (“Since the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules.”).


111. See Kappel, 914 F. Supp. at 1058.
Pursuing this goal demands an acute awareness of and familiarity with a case's litigants, facts, and procedural posture. It also requires flexibility, adapting traditional elements to modern circumstances. It is this dynamic commitment to foregoing fixity in favor of fluidity, an outgrowth of courts' historical stay discretion, that should inform Federal Rule of Civil Procedure 62(b)(4) interpretations and applications.

This is so because the decision to stay litigation, whether made pursuant to a court's inherent authority or through Rule 62(b)(4), depends on a court's assessment of whether the benefits gained and interests served are worth the price of delaying finality and of deviating from expeditious litigation. It is this evaluation that connects Rule 62(b)(4) with courts' historical stay discretion.

3. Respect for the Past Requires Flexibility for the Future

Courts can maintain Federal Rule of Civil Procedure 62(b)(4)'s connection with courts' historical stay discretion by applying a series of elements, all susceptible to recalibration and refinement, that both recognizes a default judgment's validity and accepts the occasional need to momentarily delay judgment execution or enforcement.

Such elements will comprise a variant of the historical stay discretion factors, necessarily adjusted to fit the default judgment context and sufficiently flexible to allow courts to reach an individualized decision that balances competing interests. In so doing, the traditional principle of advancing litigation expeditiously in order to pursue efficient and fair justice will endure; respect for the past will be obtained through flexibility in the future.

However, a uniform series of elements does not currently exist to guide courts in an effort to perpetuate Rule 62(b)(4)'s historical

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112. See Ssangyong, 2000 WL 1339229, at *1 (Case's facts permitted stay); Ebeling & Reuss, Ltd., 1990 WL 96128, at *1 (Case's facts cautioned against granting a stay without defendant providing some security for plaintiff).

113. See generally Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 213 n.1 (1890) ("The application of an existing principle to a new state of facts is not judicial legislation. To call it such is to . . . deny that the principles . . . exist at all. It is not the application of an existing principle to new cases, but the introduction of a new principle, which is properly termed judicial legislation.").

114. See Cooper, 2010 WL 1729127, at *2; Nunley, 2010 WL 501465, at *1; Tradewinds Airlines, Inc., 2009 WL 435298, at *3-4; Fleming, 215 F.R.D. at 8; Bros. Trading Co., 2001 WL 64751, at *3; Collex II, 69 F.R.D. at 22-23; Coleman, 57 F.R.D. at 149; Butler, 101 F. Supp. at 380; see also Johnston, 2006 WL 563003, at *2 ("The harm to these plaintiffs in granting a stay would clearly outweigh any harm to defendants in not granting a stay, particularly when the School District argued at trial in favor of reinstatement rather than front-pay.").
ties.\footnote{115} As a result, this Article will now provide a set of elements that respect the past by requiring flexibility for the future.

V. APPLYING RULE 62(b)(4): GUIDELINES FOR EXERCISING DISCRETION

This Article's proposed elements are not intractable verities; they are guidelines that help courts exercise their stay discretion. The goal is to balance dueling interests involved in the Federal Rule of Civil Procedure 62(b)(4)-default judgment context. Such interests are first recounted. This Article next suggests elements and then explores their contours.

A. COMPETING INTERESTS IN THE RULE 62(b)(4)-DEFAULT JUDGMENT CONTEXT

Within the Federal Rule of Civil Procedure 62(b)(4)-default judgment context, plaintiffs, defendants, and courts often have conflicting interests. Plaintiffs want to execute and enforce default judgments; they seek assurance that their default judgments are legitimate court decrees. Stays threaten future collectability and challenge legitimacy by giving defendants an opportunity to transfer assets, thus frustrating collection and enforcement.\footnote{116}

At the same time, defendants want to protect their property; they do not want to disclose sensitive information.\footnote{117} This is especially so when a defendant believes that a court will ultimately set aside a default judgment.

Lastly, courts want to expedite litigation, achieving disposition promptly.\footnote{118} In pursuing this end, rule-adherence and respect for the judicial process are critical.\footnote{119} Nonetheless, courts are also cognizant of their authority to protect a litigant's assets.

All of these interests are at play in Rule 62(b)(4). As a result, the exercise of discretion, determining when a stay is appropriate, should be made with these interests in mind.

\footnote{115} See Moyer, 2008 WL 3478063, at *6 (Ninth Circuit has yet to identify elements for Rule 62(b)(4)'s applicability).
\footnote{116} See Butler, 101 F. Supp. at 379; see also Ebeling & Reuss, Ltd., 1990 WL 96128, at *1.
\footnote{117} See In re Zapata Gulf Marine Corp., 941 F.2d at 295 ("In sum, Rule 62(b) grants authority to the district court to stay a judgment while it considers and disposes of Rule 60 motions.").
\footnote{118} See Milam, 588 F.3d at 958-59.
\footnote{119} See Collex II, 69 F.R.D. at 22-23.
B. The Default Judgment Context Should Influence Courts' Rule 62(b)(4) Discretion

Moreover, the Federal Rule of Civil Procedure 62(b)(4)-default judgment context should impact discretion's exercise. On the one hand, a plaintiff has obtained a default judgment through litigation participation and rule adherence, both of which demonstrate respect for the judicial process. On the other hand, a defendant's non-participation and rule defiance, disrespect the judicial process. Importantly, some defendants will only begin to participate after their assets have been threatened. This context and its attendant realities should influence the decision to grant a Rule 62(b)(4) stay.

C. The Proposed Elements For Exercising Rule 62(b)(4) Discretion

This Article articulates five elements that can guide courts in exercising their Federal Rule of Civil Procedure 62(b)(4) stay discretion, but not every case will utilize each element. The multiplicity of considerations is merely a manifestation of the diversity of interests at play.

As such, some elements have a particular participant in mind. Specifically, the second and third considerations focus on defendants. The first and fifth factors implicate plaintiffs. The fourth element deals with courts. The elements are enumerated below:

1. What will happen if a court stays execution or enforcement?
2. What will happen if a court does not stay execution or enforcement?
3. Is a defendant willing to submit damaging information to a court in-camera?
4. What is the estimated amount of time that will elapse between a Rule 62(b)(4) determination and a court's resolution of a Rule 60 motion to set aside a default judgment?

120. See generally Gen. Star Nat'l Ins. Co., 289 F.3d at 440 (judgments binding until set aside); Audette, 1992 WL 220910, at *4 (judgments are binding until reversed or vacated).
121. See Collex II, 69 F.R.D. at 24; see also Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993) ("Default procedures, of course, provide a useful remedy when a litigant is confronted by an obstructionist adversary. Under such circumstances those procedural rules play a constructive role in maintaining the orderly and efficient administration of justice." (internal citation omitted).
123. For an example of a court applying this element see Nunley, 2010 WL 501465, at *1-2.
5. How much time has passed since the plaintiff obtained the default judgment and the plaintiff's commencement of execution or enforcement efforts?

D. EXPLORING THE SUGGESTED ELEMENTS

The proposed elements internalize and draw from the competing interests involved in the Federal Rule of Civil Procedure 62(b)(4)-default judgment context. They also reflect the default judgment context itself and its related realities. In part, this is achieved by linking an element with a particular participant. Furthermore, each factor perpetuates Rule 62(b)(4)'s connection with courts' historical stay discretion by being amenable to modification, as a case's facts may warrant.124

1. What Will Happen If A Court Stays Execution Or Enforcement?

This element forces courts to gauge a stay's consequences.125 Granting a stay will prevent a plaintiff from collecting or enforcing a default judgment during a specified time period. Yet, an additional consequence looms.

If a court issues a Federal Rule of Civil Procedure 62(b)(4) stay, then a defendant may try to hide its assets or destroy sensitive information in an effort to frustrate future collection. This outcome would unduly benefit a defendant, disrespect the judicial process, and harm a plaintiff. It is a consequence worth avoiding.126

At the same time, plaintiffs cannot merely assert that a defendant is likely to hide property during a stay.127 Reliable evidence should be offered, documentation that intimates the defendant's intent to transfer property.

For instance, documentation of corporate structuring may indicate the capacity to insulate a defendant from collectability by being able to move property with minimal notice, detection, or effort from

124. See generally Virginian Ry. Co. v. United States, 272 U.S. 658, 672-73 (1926) ("A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case.").

125. See Nunley, 2010 WL 501465, at *1-2 (evaluated how a stay's denial would impact a school and its students); see also Cooper, 2010 WL 1729127, at *1 (refusing to stay post-judgment discovery based on agreement that did not include party requesting stay).

126. See Miell, 2008 WL 746604, at *2 ("The United States District Court for the Southern District of Iowa has recognized a 'policy' against unsecured stays during the pendency of post-trial motions.") (citing Seangyong, 2000 WL 1339229, at *1).

127. See Ebeling & Reuss, Ltd., 1990 WL 96128, at *1 (identifying complexities that arose because most of the defendants were foreign entities and had previously failed to participate in litigation meaningfully).
one corporate body to another.\textsuperscript{128} Recent financial transactions could be indicative of a defendant's intent. Identifying where a defendant's assets are located might also be beneficial in giving a court an idea of how difficult executing and enforcing a judgment may prove to be.\textsuperscript{129} Either way, a court should anticipate what will happen if a stay is issued.

2. What Will Happen If A Court Does Not Stay Execution Or Enforcement?

Absent a stay, collection may continue. If a court does not grant a Federal Rule of Civil Procedure 62(b)(4) stay, then a plaintiff may make good on its default judgment—assets may be taken and information may be disclosed.\textsuperscript{130} For some defendants, collection could cause financial ruin, a drastic consequence depending on a case's facts and evidence about a defendant.\textsuperscript{131}

Furthermore, for corporate defendants, informational disclosure could harm non-parties, such as subsidiaries or even stockholders; the leaking of a company's financial wellbeing, or lack thereof, might prompt investors to doubt a company's long-term stability, thereby harming an entity's reputation. Without a stay, debtor examinations are permissible, raising the possibility of information disclosure, which for the corporate and non-corporate defendant could be humiliating.\textsuperscript{132}

Nevertheless, as with the first element, the defendant should not be able to prove the second element with unsubstantiated pronouncements.\textsuperscript{133} Defendants cannot just forecast financial and reputational ruin.\textsuperscript{134} Rather, defendants should present documentary evidence, fact-specific affidavits, statistical studies, and other tangible proof. Courts should contemplate what would happen if they do not stay execution or enforcement.

\textsuperscript{128} See Tradewinds Airlines, Inc., 2009 WL 435298, at *2.
\textsuperscript{129} See Ebeling & Reuss, Ltd., 1990 WL 96128, at *1.
\textsuperscript{130} See Dubey, 2010 WL 1525863, at *1.
\textsuperscript{131} See, e.g., Nunley, 2010 WL 501465, at *1-2.
\textsuperscript{132} See FED. R. CIV. P. 69(a)(2) ("In aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person—including the judgment debtor—as provided in these rules or by procedure of the state where the court is located.").
\textsuperscript{133} See Collex II, 69 F.R.D. at 23.
\textsuperscript{134} See, e.g., Schmude v. Sheahan, No. 00 C 4580, 2004 WL 1157841, at *5 (N.D.Ill. May 21, 2004) ("Theobald's motion seeking relief pursuant to Federal Rules of Civil Procedure 59 and 61 has been denied, and Rule 62(b) is no longer applicable. Furthermore, the motion is silent with respect to any facts or reasons that would support such relief, and thus, is reduced to a mere request . . . .").
3. Is A Defendant Willing To Submit Damaging Information In-Camera?

As just mentioned, denying a Federal Rule of Civil Procedure 62(b)(4) stay request may cause financial ruin. Proving financial ruin would require defendants to submit sensitive information to a court, the very data that a plaintiff seeks. Thus, defendants could be placed in a difficult position, revealing that which they want to conceal from a plaintiff. But, claims of financial ruin should be verifiable, not merely predictions uttered to avoid property loss.\textsuperscript{135}

Hence, courts need to establish whether financial ruin is indeed a possibility and determine a defendant's sincerity in claiming dire consequences.\textsuperscript{136} A court can do so by compelling a defendant to submit sensitive information in-camera, for the court's eyes only.

In-camera reviews would also test a defendant's willingness to subject itself to a court's jurisdiction, something a defaulted defendant has yet to do. At the least, a court should ask a defendant if it is willing to submit damaging information to a court in-camera. If met with an affirmative response, then a defendant should file such information under seal.

4. When Will A Court Decide A Motion To Set Aside A Default Judgment?

Courts should consider a stay's potential time-span. This period, as the rule explicates, lasts until a court decides a motion to set aside.\textsuperscript{137} Notably, the longer a stay, the more opportunity a defendant would have in hiding or transferring assets. Duration will also influence the type of measure needed to secure a plaintiff.\textsuperscript{138} As a result, courts should approximate when they will determine a motion to set aside.

\begin{itemize}
\item \textsuperscript{135} See generally Standard Havens Prods., Inc., 897 F.2d at 515 ("the affidavits of both its Executive Vice President and independent accountant corroborate, that without a stay it is likely to suffer irreparable harm in the form of employee layoffs, immediate insolvency, and, possibly, extinction.").
\item \textsuperscript{136} See Ireland, 2009 WL 1559784, at *1 ("Defendants do not offer any justification for the Court granting an unsecured stay, other than to state generally that it is within the Court's discretion to do so."). \textit{See generally Int'l Wood Processors}, 102 F.R.D. at 214 ("Thus, if an unsecured stay is to be granted, the burden is on defendants to demonstrate affirmatively that posting a bond or otherwise providing adequate security is impossible or impractical.").
\item \textsuperscript{137} See Moser, 2005 WL 1677907, at *3 ("In addition, Defendants' Motion to Stay is DISMISSED AS MOOT because Defendants only requested a stay pending the decision of the motion to set aside."); Breed, 2004 WL 1824858, at *13 ("Defendants' Rule 60 motion having been disposed of, Rule 62(b) has no office to perform.").
\item \textsuperscript{138} See, e.g., Sabatini, 2009 WL 3878245, at *2 ("Also, the Court notes that it will expeditiously decide Plaintiffs' post-trial motion to ensure that any harm of the stay Defendants may suffer will be greatly minimized.").
\end{itemize}
5. How Much Time Has Passed Since The Plaintiff Obtained The Default Judgment And The Commencement Of Execution Or Enforcement Efforts?

Interest may accrue on some default judgments. With every passing day, the judgment’s total could increase, by virtue of the applicable interest rate. Arguably, plaintiffs have an incentive to allow time to pass before initiating execution or enforcement efforts.

However, plaintiffs are still bound by a duty to prosecute their cases diligently. This duty, the persistent pursuit of finality, continues to bind plaintiffs during the collection process.

Therefore, the amount of time that has passed since a plaintiff obtained a default judgment and commenced collection indicates a plaintiff’s continued commitment to prosecuting its case diligently. It also evidences the extent to which a plaintiff perceives a default judgment as being a legitimate and binding judicial declaration.

Prompt action would also be a natural reaction if a plaintiff truly believed that a defendant will try to hide assets. That is, if a plaintiff feared a likelihood of asset transfers, then a plaintiff will act quickly before a defendant can hide its property. Courts should be aware of how much time has elapsed since the plaintiff obtained the default judgment and commenced collection.

E. In Defense Of This Article’s Elements

Alternative approaches exist for determining a stay’s propriety under Federal Rule of Civil Procedure 62(b)(4). Courts could use the historical stay discretion elements, stay-pending-appeal factors, balance the equities, or consider a Federal Rule of Civil Procedure 60 motion’s likelihood of success. Nevertheless, these alternatives are flawed as they are not suited for the Rule 62(b)(4)-default judgment context.

1. The Historical Stay Discretion Elements

Some courts may turn to the traditional stay elements in applying Federal Rule of Civil Procedure 62(b)(4). Again, these factors are

(1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the

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139. See Anderson, 542 F.2d at 524-25 (reviewing the duty of diligent prosecution within the Rule 41(b) context).
140. See In re Eisen, 31 F.3d at 1455 (quoting Morris, 942 F.2d at 652).
courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest.\textsuperscript{141}

Courts might use these factors because of the connection between Rule 62(b)(4) and courts' historical stay discretion. Yet, the traditional elements are based on two assumptions that are at odds with the Rule 62(b)(4)-default judgment context.\textsuperscript{142}

First, the traditional elements assume that both parties have participated in the judicial process, comported with procedural rules, and prosecuted or defended their cases actively. This is not so in the default judgment context – judgment was entered because of non-participation.

Second, the traditional elements are primarily designed to govern cases before a judgment is entered. Whereas, Rule 62(b)(4) stays occur after a default judgment's entry. The traditional elements were developed with an entirely different context in mind, one where parties are participating in litigation and a judgment has yet to be entered.\textsuperscript{143}

In passing, simply applying the traditional stay elements will erode Rule 62(b)(4)'s mandatory provisions. This will occur because Rule 62(b)(4)'s compulsory components, duration and plaintiffs' security, are missing from the traditional elements – they are not explicit considerations.\textsuperscript{144}

Instead of Rule 62(b)(4)'s precise time limits, traditional stays cannot be of "indefinite"\textsuperscript{145} or "immoderate duration."\textsuperscript{146} And, while Rule 62(b)(4) demands that courts "secure" a plaintiff's judgment, traditional stays try to avoid interfering with a plaintiff's diligent prosecution duty – a reminder that a court has yet to enter judgment.\textsuperscript{147} So, using the traditional elements to determine a Rule

\textsuperscript{141} Tradewinds Airlines, Inc., 2009 WL 435298, at *3.
\textsuperscript{142} See, e.g., Ungar, 344 Fed. App'x at 33-634 (differentiating Rule 62(b)(4) stays from courts' traditional inherent stay authority).
\textsuperscript{143} See Landis, 299 U.S. 248.
\textsuperscript{144} But see Lincoln Elec. Co., 2009 WL 3246936, at *1 ("Rule 62(b) is intended to protect the prevailing party's interest in the judgment while preserving the status quo."); Lewis, 2009 WL 1654600, at *1 ("The rule [62(b)(4)] is meant to protect the prevailing party's interest in the judgment while preserving the status quo pending disposition of post trial motions.").
\textsuperscript{145} See Rhines, 544 U.S. at 276; see also LaSala v. Needham & Co., Inc., 399 F. Supp. 2d 421, 430 (S.D.N.Y. 2005) ("Similarly, this stay does not delay the Assigned Claims indefinitely. Rather, the stay will be lifted upon approval or rejection of the Issuers Settlement . . . .").
\textsuperscript{146} See Clinton, 520 U.S. at 707 (a stay's extent cannot be immoderate); see also Landis, 299 U.S. at 256 ("Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.").
\textsuperscript{147} See, e.g., LaSala, 399 F. Supp. 2d at 428 ("Courts are generally reluctant to stay proceedings because they are concerned with vindicating the plaintiff's right to proceed with its case.").
62(b)(4) stay’s advisability would ignore contextual differences and erode Rule 62(b)(4)’s mandatory textual requirements.

2. Stays Pending Appeal

Federal Rule of Civil Procedure 62(c) and (d) concern stays pending appeal. Courts identify a stay’s propriety with four elements:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.148

These considerations are culled from courts’ experiences with the appellate process, reflecting idiosyncrasies that are not present in the Rule 62(b)(4)-default judgment context.

For starters, stays pending appeal involve a substantial time span; such stays exist from final judgment’s entry until an appeal’s resolution.149 Years may pass before an appellate tribunal renders a decision, and during this time, judgment execution and enforcement are halted.150 In contrast, Rule 62(b)(4) stays will generally be much shorter, ending when a court determines a Federal Rule of Civil Procedure 60 motion to set aside.151

Moreover, Rule 62(d) addresses stays pending appeal and supersedeas bonds. Cases construing Rule 62(d) emphasize that a stay’s primary function is to preserve the status quo.152 However, Rule 62(b)(4) stays have a different and more specific function. Rule 62(b)(4) stays are the final product of a court’s struggle to balance the rule’s dueling objectives of legitimizing default judgments and acknowledging the acceptability of pausing execution and enforcement temporarily.153 These dueling objectives are tethered to issues associated with default
judgments but which are missing from the appellate arena. For example, the judicial suspicion towards default judgments is usually not associated with the judgments involved in the appellate context. Thus, stays pending an appeal last longer and serve a different function than Rule 62(b)(4) stays.

3. **Balancing The Equities**

The general understanding is that stays are equitable in nature. They afford individualized relief, granted or denied depending on potential harm or prejudice. Because stays sound in equity, courts may be tempted to utilize a balancing of the equities analysis for Federal Rule of Civil Procedure 62(b)(4). Equitable principles and maxims would identify instances suitable for a stay. An equitable balancing test, however, cannot overcome a major obstacle: dilatoriness.

Dilatoriness precludes equitable relief – equitable maxims and principles do not aid those who procrastinate, who delay participating in the judicial process. A court’s equitable powers assist litigants who have subjected themselves to a court’s authority, followed procedural mandates, and helped, rather than hindered, litigation’s orderly progress.

In the default judgment context, the opposite occurs: a defaulted defendant has not adhered to procedural rigors, even failing to appear before a court. A defendant’s non-participation prevents litigation from following an adversarial trajectory, where both parties attend court, present their arguments and positions, meet all deadlines, and display a commitment to pursuing resolution expeditiously. An equitable balancing test would clash with a defendant’s dilatoriness, a fact central to the Rule 62(b)(4)-default judgment context.

154. See Mitchell Co., Inc. v. Campus, No. 08-0342-KD-C, 2009 WL 2567889, at *21 (S.D. Ala. Aug. 18, 2009) (“The power of granting a stay is equitable in its nature . . . .”) (quoting Ex parte Matthews, 40 So. 78, 79 (Ala. 1906)); see also Landis, 299 U.S. at 256 (“We must be on our guard against depriving the processes of justice of their suppleness of adaptation to varying conditions.”).


156. See, e.g., Butler, 101 F. Supp. at 380 (“On the whole, the equities seem to favor the plaintiff on this motion.”); see also LaSala, 399 F. Supp. 2d at 427; Combustion Sys. Servs., Inc., 153 F.R.D. at 74 (“In exercising this discretion, the Court has balanced the equities . . . .”); Standard Havens Prods., Inc., 897 F.2d at 513.

157. See Baldwin Cnty. Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984) (“One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence.”); see also Rodriguez v. Airborne Express, 265 F.3d 890, 902 n.12 (9th Cir. 2001) (“Diligence is required for the successful invocation of virtually any equitable doctrine.”) (citations omitted).
4. **Likelihood Of A Rule 60 Motion's Success**

A final alternative is assessing a Federal Rule of Civil Procedure 60 motion's likelihood of success. Under this standard, a Federal Rule of Civil Procedure 62(b)(4) stay would be appropriate if the Rule 60 motion had a likelihood of succeeding, whether a default judgment will probably be set aside. The justification would be that if a default judgment is set aside, then a plaintiff's execution and enforcement efforts would be for naught because the judgment's entire basis would dissipate.158

A likelihood of success formula, however, plays off of courts' suspicion of default judgments, which minimizes their legitimacy and devalues their status as binding judicial determinations. Nearly every Rule 60 motion has some potential for success. As such, stays would almost be routine, making in-roads into the judicial discretion that Rule 62(b)(4) speaks to, delegitimizing default judgments, and thereby lessening their standing among other judgments.

Additionally, a likelihood of success standard overlooks Rule 62(b)(4)'s dueling objectives, tips the rule in favor of dilatory defendants, and effectively permits courts to pre-judge Rule 60 motions to set aside. Yet, a court only decides questions presently before it—determining a Rule 60 motion prematurely would combine two rules into one, minimizing Rule 62(b)(4)'s utility.

Importantly, a likelihood of success standard resembles an element in the stays pending appeal formula: an appeal's likelihood of success. Under this consideration, a district court predicts how an appellate court will decide an appeal.

Meanwhile, in the Rule 62(b)(4) context, the court that predicts a Rule 60 motion's likelihood of success, the district court, is the same court that will determine that motion. As a result, a district court would effectively be ruling on a matter not presently before it, under the guise of "predicting" what it, as opposed to another court, will do in the future.

Either way, a Rule 62(b)(4) motion should not be an opportunity for a court to forecast a Rule 60 motion's determination, least of all when the task at hand is to construe and apply Rule 62(b)(4). A court should consider each rule on its own.

5. **Defending This Article's Proposed Elements**

The just-described alternatives are not suited for Federal Rule of Civil Procedure 62(b)(4)'s interests, circumstances, or dueling objec-
DEBTORS, CREDITORS, DEFAULT JUDGMENTS

Contrastingly, this Article’s proposed elements were calibrated to reflect and designed to function within the Rule 62(b)(4)-default judgment context. The elements actualize Rule 62(b)(4)’s competing interests, surrounding circumstances, and dueling objectives. The suggested factors not only serve Rule 62(b)(4)’s current considerations, but they also respect the past and embrace the principles that underlie courts’ traditional stay discretion by valuing flexibility over fixity—no single element is immune from reevaluation and scrutiny. A factor’s future vitality depends upon its present utility. This understanding is critical for effectuating Rule 62(b)(4), for preserving its connection with courts’ historical and traditional stay discretion.159

When considered as a whole, this Article’s elements reflect Rule 62(b)(4)’s textual emphasis on consequences, ascertaining what will happen if a stay is granted or denied. Instead of using terms such as “prejudice” or “harm,” both of which lack readily identifiable definitions, the elements pose a practical question, grounded in reality: what will happen?160 And the answer must be proved, not merely stated. In short, the proposed elements are well suited for a rule that a modern exigency will transform into one of the most important Federal Rules of Civil Procedure.

VI. FROM ANONYMITY TO NOTORIETY: DEFAULT-BY-DESIGN WILL MAKE RULE 62(b)(4) ONE OF THE MOST IMPORTANT FEDERAL RULES OF CIVIL PROCEDURE

Our nation’s economy is enervated.161 Business is down across all sectors, jobs are being lost in all trades and professions, and debt, be it our country’s or our own, has assumed a largesse previously unimaginarable.162 For some, daily necessities have become luxuries, more than their personal finances can bear.

159. See generally Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897) (“if we want to know why a rule of law has taken its particular shape . . . if we want to know why it exists at all, we go to tradition. . . . History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know.”).

160. See generally Holmes, supra note 23, at 455 (“It is not the first use but the tiresome repetition of inadequate catch words upon which I am observing, — phrases which originally were contributions, but which, by their very felicity, delay further analysis for fifty years.”).

161. See Rudolf, supra note 2.

Times are indeed tough, giving way to desperation and likely prompting more than just a few lawsuits. Contractual obligations have been broken, credit card debts have been incurred, and mortgage payments have come due. Consequently, our courts – federal and state – are overwhelmed with unrelentingly growing caseloads. The judicial system is being pushed, dockets are about to burst, and cases are beginning to look more like investments or gambles, instead of cases or controversies, tempting the most honest among us to play lawsuit lotto.

This setting, rife with despair, fear, and frustration, is proving to be fertile ground for an exigency that this Article calls "default-by-design"—the primary force that will make Rule 62(b)(4) one of the most important Federal Rules of Civil Procedure.

A. DEFAULT-BY-DESIGN

Default-by-design is nothing more than a game of catch me if you can. A defendant knows about a lawsuit, has been served with a complaint, but does not answer. Hence, the defendant welcomes and allows the court to enter a default judgment against the defendant.

After a default judgment is entered, a plaintiff will try to collect. If assets are seized, then the dilatory defendant runs to court seeking redress, waiving a Federal Rule of Civil Procedure 60 motion to set

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164. "Default-by-design" describes what some courts have labeled "willful default." See Ungar, 599 F.3d at 85 (defining willful default as the making of a deliberate strategic choice); see also Int'l Painters & Allied Trades Union, 288 F. Supp. 2d at 26 ("A finding of bad faith is not a necessary predicate to the conclusion that a defendant acted 'willfully.' The boundary of willfulness lies somewhere between a case involving a negligent filing error, which is normally considered an excusable failure to respond, and a deliberate decision to default, which is generally not excusable."). "Default-by-design" alludes to the conduct at issue more accurately than "willful default." When a defendant intentionally allows a default judgment to be entered, and becomes involved in litigation only after assets are at risk, the defendant has done so by design.

165. See Canales v. A.H.R.E., Inc., 254 F.R.D. 1, 10 (D.D.C. 2008) ("It was only after Plaintiffs began efforts to collect the default judgment from AHRE, by domesticating the judgment in Virginia . . . that AHRE expressed any intent to respond to this lawsuit.").

166. See Ungar, 613 F. Supp. 2d at 222.
aside, the procrastinator's white flag, a perfunctory pseudo-apology for waywardness.\textsuperscript{167}

The mentality is quite simple; do nothing until a plaintiff attaches something, until property or financial information falls into a plaintiff's hands—then, and only then, will an intentionally dilatory defendant enter court, willing to answer a complaint.\textsuperscript{168} Default-by-design abuses the judicial process, disrespects procedural regularity, and defies the rule of law.\textsuperscript{169}

Meanwhile, a plaintiff has spent countless hours and dollars in order to locate and attach assets. All of this may prove to be fruitless, depending on a Rule 60 motion's outcome. Even though a defendant ignored litigation intentionally, engaging in default-by-design, the defendant may still be able to prevent a plaintiff from effectuating a default judgment.\textsuperscript{170}

Not only will a defendant file a Rule 60 motion to set aside, but it will also seek a Federal Rule of Civil Procedure 62(b)(4) stay. It is at this point where Rule 62(b)(4) will realize its full utility and potential, calling upon courts to exercise reasoned discretion in the face of a default-by-design. At bottom, default-by-design will jettison Rule 62(b)(4) from anonymity into notoriety.

VII. CONCLUSION

This Article is only the first step in developing a method for determining when to issue Federal Rule of Civil Procedure 62(b)(4) stays. The process is gradual, open to change, ever developing—all attributes that ensure Rule 62(b)(4)'s connection with the past, its link with courts' historical and traditional stay discretion.

Maintaining this link depends on courts' willingness to embrace flexibility, to understand that each case, each stay request, brings

\textsuperscript{167} See Gucci Am., Inc. v. Gold Center Jewelry, 158 F.3d 631, 634-35 (2nd Cir. 1998) (linking willful default with deliberateness).

\textsuperscript{168} See Canales, 254 F.R.D. at 10; see also Paramount Packaging Corp. v. H.B. Fuller Co., 190 F. Supp. 178, 181 (E.D. Pa. 1960) ("here the defendant . . . deliberately chose a course of action which it felt was tactically advantageous in the resistance of plaintiff's claim . . . . To permit a defendant to ignore service of the Court's process in a belief that the process is invalid and then ask relief when that belief turns out to be mistaken would be intolerable."). But cf. Wagstaff-El v. Carlton Press Co., 913 F.2d 56, 57 (2d Cir. 1990) (even though motion to set aside filed after plaintiff obtained writ of execution default judgment set aside because it lacked a valid basis).

\textsuperscript{169} See SEC v. McNulty, 137 F.3d 732, 738 (2d Cir. 1998) (district court's refusal to set aside default judgment is justified by judicial interests in expediting litigation and avoiding abuses of process).

\textsuperscript{170} But cf. Glover, supra note 74, at 1118 ("The vast majority of defendants in debt collection matters never respond to the summons and complaint, but in the vast majority of debt buyer lawsuits, the plaintiff's claims are defective.").
with it facts that pull a court in diverse directions. By viewing these facts in light of the interests at stake and within the default judgment context, courts will reach decisions that actualize Rule 62(b)(4)'s full potential.

Such decisions, such exercises of discretion, will respect the past by applying flexibility in the future and will endeavor to balance Rule 62(b)(4)'s dueling objectives of legitimizing default judgments and acknowledging the acceptability of pausing execution and enforcement temporarily. Achieving this balance will not remain theoretical; it will become a practical judicial task because of default-by-design, a modern exigency that requires courts to construe and apply Rule 62(b)(4) – a rule that will no longer be unknown.

171. See generally Scripps-Howard, 316 U.S. at 10-11 (discretion's exercise depends on a case's circumstances); see also Virginian Ry. Co., 272 U.S. at 672-73 ("A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case.").