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Notes

Judicial Notice After Default: A Semantical Maze

In the complexities of civil procedure seemingly related judicial doctrines, highly effective when independently applied, often become stumbling blocks to efficient judicial administration when combined. Of the various doctrines, none better demonstrate an unusual combination than the doctrines of judicial notice and default judgment. Both doctrines are designed to expedite litigation, but if applied together in a certain manner can result in delay and more extensive, wasteful litigation of the facts. *Trans World Airlines, Inc. v. Hughes*[1] is illustrative.

In *Hughes* TWA filed a petition under the Clayton Act[2] asking damages from Howard R. Hughes, Hughes Tool Co., and Raymond M. Holliday, alleging an attempt to monopolize interstate and foreign commerce in the supplying of aircraft. Howard Hughes failed to appear for the taking of depositions and the court therefore granted TWA's application for default judgment.[3] The district court appointed a special master to determine damages and entered rulings concerning the effect of the defendant's default on the assessment of damages.[4] The special master submitted his report awarding damages of over $136,000,000, after trebling under section 4 of the Clayton Act.[5] Both parties objected to the acceptance of the report. The defendant contended that allegations made in the complaint were contrary to facts of which the court should take judicial notice. More specifically, it was contended that material contained in the files of the Civil Aeronautics Board showed that Hughes Tool Company never manufactured or engaged in the sale and lease of aircraft as alleged by the plaintiff. The court held that a default judgment precludes the court from taking judicial notice of facts that are not indisputably true; material in CAB files, being merely evidentiary and rebuttable, cannot be considered indisputable.[6] An analysis of the problem resolved by the court in *Hughes* highlights the need for an approach to both the doctrine of default judgment and judicial notice that concentrates on the purposes of the doctrine rather than the mechanical application of a rule.

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[1] 308 F. Supp. 679 (S.D.N.Y. 1969).

[2] 15 U.S.C. §§ 1-33 (1964).

[3] Trans World Airlines, Inc. v. Hughes, 32 F.R.D. 604 (S.D.N.Y. 1963).

[4] Trans World Airlines, Inc. v. Hughes, 38 F.R.D. 499 (S.D.N.Y. 1965).

[5] Clayton Act, 15 U.S.C. § 15 (1964), *formerly* 38 Stat. 731 (1914).

[6] Trans World Airlines, Inc. v. Hughes, 308 F. Supp. 679 (S.D.N.Y. 1969).

I. THE EFFECT OF THE ENTRY OF DEFAULT JUDGMENT

The federal Rules of Civil Procedure allow for a default judgment to be entered against a party who fails to plead or otherwise defend.[7] Failure to obey an order to give deposition is specifically made a ground for the entry of a default judgment.[8] The effect of default under modern practice has been similar to the effect prior to the adoption of the rules;[9] well pleaded allegations of material facts that are necessary to be proved in order to support a recovery are taken to be confessed by a default. The defendant is therefore estopped to deny such allegations.[10] The essence of this estoppel is that there has been a judicial determination of a fact, not that this determination is based on the defendant's failure to plead. When the well pleaded complaint alleges the defendant's liability and the defendant defaults, the liability is established. It is only necessary for the court to establish the damages arising from the admitted liability. The complaint in *Hughes* was tested by the defendant's motion to dismiss for failure to state a claim.[11] The court denied the motion but certified an interlocutory appeal.[12] The court of appeals affirmed the ruling as to the sufficiency of the complaint[13] and the Supreme Court dismissed writs of certiorari as improvidently granted.[14] Thus, the complaint was well pleaded and was sufficient to support the default judgment.

The judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest.[15] The fact that the default is conclusive only to well pleaded allegations constitutes a significant exception to the conclusiveness of a default judgment. Allegations will not stand as admitted if they are "indefinite or vague,"[16] or not susceptible

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[7] FED. R. CIV. P. 55(a).

[8] FED. R. CIV. P. 37(b).

[9] The modern effect of a default judgment finds its foundation in the English courts of chancery and in a bill taken *pro confesso*. Lord Hardwick likened a bill taken *pro confesso* to a judgment *nihil dici* at common law and a judgment for plaintiff on demurrer to the defendant's plea. A bill was taken *pro confesso* when the defendant failed to answer and the effect was that the well pleaded allegations of the bill were taken as admitted or confessed because of the defendant's failure to plead. Tompson v. Wooster, 114 U.S. 104 (1885).

[10] Harsham v. Knox County, 122 U.S. 306 (1887); Last Chance Min. Co. v. Tuler Min. Co., 157 U.S. 683 (1895).

[11] FED. R. CIV. P. 12(b) states in part: ". . . (1) lack of jurisdiction over the subject matter, . . . (6) failure to state a claim upon which relief can be granted, . . ."

[12] Trans World Airlines, Inc. v. Hughes, 204 F. Supp. 106 (S.D.N.Y. 1963).

[13] Trans World Airlines, Inc. v. Hughes, 332 F.2d 602 (2d Cir. 1964).

[14] Trans World Airlines, Inc. v. Hughes, 380 U.S. 248 (1965).

[15] Harshman v. Knox County, 122 U.S. 306 (1887); Last Chance Min. Co. v. Tuler Min. Co., 157 U.S. 683 (1895).

[16] Tompson v. Wooster, 114 U.S. 104 (1885).

to proof by legitimate evidence,[17] or when they are contrary to uncontroverted material in the file of the case,[18] or when they are contrary to facts of which the court will take judicial notice.[19] The final category represents the predominate issue in *Hughes*.

II. JUDICIAL NOTICE

Judicial notice has generally been defined as a court's acknowledgment of the truth of a matter without formal evidence;[20] it has been pointed out that "notice" implies a chargeability with knowledge.[21] In 1222 Brackton mentioned a similar concept in the marginal notes of one of his works,[22] while Bentham in his work on evidence described a procedure where either party might ask the judge to assume a fact as proven when the fact is notoriously true.[23] Both of these references allude, if not by name then by purpose, to the concept of judicial notice, that purpose being to liberate the court from the costly and time-consuming formalities of proof under the rules of evidence in those instances when dispute is unlikely.[24] The application of the doctrine of judicial notice in modern practice represents a varied attempt by the courts to fulfill the purpose of the doctrine.

Generally, judicial notice is taken of matters of law and matters of fact in two situations, when the parties have waived dispute and when the court is justified in declaring the truth of a matter without requiring evidence.[25] The latter situation represents the more controversial area because the contested interests of the litigants are determined.

A court will take judicial notice of various matters of law, and will not be limited to formal evidence in these determinations.[26] Generally, courts will notice the common law, constitutions, public statutes in

[17] Cohen v. United States, 129 F.2d 733 (8th Cir. 1942); Greeson v. Imperial Irr. Dist., 59 F.2d 529 (9th Cir. 1932).

[18] Interstate Nat. Gas Co. v. Southern Calif. Gas Co., 209 F.2d 380 (9th Cir. 1953); *In re* Woodmar Realty Co., 294 F.2d 785 (7th Cir. 1961), *cert. denied*, 369 U.S. 803 (1962).

[19] Glenn Coal Co. v. Dickinson Fuel Co., 72 F.2d 885 (4th Cir. 1934).

[20] "That a matter is judicially noticed means merely that it is taken as true without the offering of evidence." 9 J. WIGMORE, EVIDENCE § 2567(a) (3d ed. 1940).

[21] THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 278 n.1 (1898); Comment, *Presently Expanding Concept of Judicial Notice*, 13 VILL. L. REV. 528 (1968), *citing* Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 11 (1922).

[22] McNaughton, *Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779, 783 (1961), *citing* 2 BRACTON'S N.B., case 194 (1222) (marginal notation).

[23] J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 256-57 (1887); T. STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE 400 (2d ed. 1828). Starkie first used the phrase "judicial notice" in reference to Bentham's views.

[24] MCNAUGHTON, *supra* note 22, at 783.

[25] WIGMORE, *supra* note 20, § 2565.

[26] MCNAUGHTON, *supra* note 22, 787.

force in all jurisdictions, as well as acts and rulings of various other governmental bodies that have the force and effect of law.[27] Although such matters may be labeled legislative facts, they are used exclusively by the judge in developing law and policy.[28]

Adjudicative facts are facts about the particular parties to the controversy, their activities, their property, and their interests.[29] In addition, facts that answer who did what, where, when, why and how are all adjudicative.[30] However, considerable controversy exists about just what type of facts may be judicially noticed. Professor McNaughton, in describing this controversy, states:

> Their [Wigmore and Thayer as opposed to Morgan] difference relates to judicial notice of facts. It is express in Thayer and implicit in Wigmore that (perhaps because the matter is rebuttable) judicial notice may be applied not only to indisputable matters but also to matters of lesser certainty. Morgan on the other hand defines judicial notice more narrowly, and his consequences follow from his definition. He limits judicial notice of fact to matters patently indisputable.[31]

The controversy does not end in a determination of which facts may be judicially noticed, but involves the conclusiveness of a fact once it has been noticed. Wigmore, following Thayer, takes the position that the judicially noticed fact is not conclusive but remains rebuttable. Morgan, on the other hand, asserts that once a fact is judicially noticed, it is conclusively determined.[32]

The areas of application of the doctrine of judicial notice are as broad as the judicial function. A court may take judicial notice of either fact or law at any stage during the litigation.[33] An appellate court may also apply the doctrine on appeal.[34] In taking judicial notice of law or facts in various stages of litigation, the courts are faced with

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[27] *See, e.g.*, UNIFORM RULE OF EVIDENCE 9 which provides in part:

> (1) Judicial notice shall be taken without request by a party, of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States, . . .
>
> (2) Judicial notice may be taken without request by a party, of (a) private acts and resolutions of the Congress of the United States and of the legislature of this state and duly enacted ordinances and duly published regulations of governmental subdivisions or agencies of this state and (b) the law of foreign countries. . . .

[28] McCormick, *Judicial Notice*, 5 VAND. L. REV. 305 (1952).

[29] *Id.*

[30] Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955).

[31] MCNAUGHTON, *supra* note 22 at 779.

[32] *Compare*, WIGMORE, *supra* note 20, § 2567; *with* Ohio Bell Tel. Co. v. Comm'n, 301 U.S. 300 (1937); *and* Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 273-74, 279, 285 (1944).

[33] Comment, *Presently Expanding Concept of Judicial Notice*, 13 VILL. L. REV. 528 (1968).

[34] *Id.*

different procedural problems; they sometimes utilize the doctrine of judicial notice in the manner most fitting to the particular stage of litigation when a question arises. Under this "functional approach," the Wigmorian theory might be applied at trial while the more stringent requirements of the Morgan theory would be utilized after the entry of judgment. Thus, for example, under the functional approach the scope of judicial notice of facts should be limited by the function that the judge is performing when the notice is taken.[35] Whatever approach is utilized, clearly the doctrine of judicial notice represents no explicable doctrine, but rather a combination of concepts with various applications that aid in the accomplishment of expeditious litigation, the purpose of the doctrine.

III. JUDICIAL NOTICE AFTER DEFAULT

The application of the doctrine of judicial notice to facts that dispute allegations made in the complaint after default raises several questions. It appears certain that a court may take notice of such facts,[36] but to what extent is uncertain. In *Glenn Coal Co. v. Dickinson Fuel Co.*[37] the Fourth Circuit took judicial notice of a "mathematically obvious"[38] fact to show certain acts were private rather than public after a default judgment. This decision, however, leaves unanswered an important question: if a court takes judicial notice after default, do the facts have to be indisputable or merely presumptive thus allowing the opposing party to litigate their validity?[39] If rebuttable, the defaulting party would be allowed to litigate issues that stand admitted.[40] Notice of facts after judgment presented a perplexing problem in judicial procedure undecided until *Hughes*.

In accepting the special master's report, the court in *Hughes* ruled that it would not take notice of CAB material, indicating that Hughes Tool Co. had never been involved in the sale or lease of aircraft since this material was not indisputable. The court indicated that nothing less than indisputable facts would justify the taking of judicial notice of facts relating to liability after the entry of default. Thus, within the limited context of default judgment, the court adopted the Morgan approach to judicial notice.[41] Had the court applied the Wigmorian theory, creating a rebuttable presumption of the validity of the ju-

[35] *See, e.g.*, Comment, *Presently Expanding Concept of Judicial Notice*, 13 VILL. L. REV. 528 (1968).

[36] 72 F.2d 889 (4th Cir. 1934).

[37] *Id.*

[38] *Id.* at 889.

[39] MCNAUGHTON, *supra* note 22.

[40] Tompson v. Wooster, 114 U.S. 104 (1885).

[41] *See* note 32 *supra* and accompaning text.

dicially noticed facts, a preliminary hearing would have been essential to afford the plaintiff a chance to rebut the noticed material, thus actually allowing the defendant to litigate issues foreclosed by default. However, the court specifically limited its decision to apply only to situations involving default judgment. Judge Metzner acknowledged the controversy[42] existing as to whether judicial notice at trial may be taken of facts that are not indisputable, but he declined to decide this controversy, preferring instead to limit the application of his decision to situations when the defendant has defaulted. The decision indirectly recognized that a different approach to the subject of judicial notice is necessary at the various stages of litigation. This recognition is significant.

IV. JUDICIAL NOTICE OF ADMINISTRATIVE BODIES

Most authorities agree that courts may take judicial notice of various materials of administrative bodies.[43] The increasing number and importance of administrative regulations in recent years has accentuated the problem of their evidentiary treatment by the courts.[44]

The discussion of administrative agency materials makes necessary the distinction between matters of fact and matters of law. When the matter to which the court is asked to take notice is a formal regulation, it can be argued that judicial notice must be taken since regulations have the force and effect of law, although it is generally considered to be discretionary with the court.[45] If a fact stated in the pleadings is contradicted by a regulation, the court should not blind itself to the truth by refusing to take notice.[46] When, however, the matter involves only information gathered by the administrative agency, and that information merely contradicts a fact, there is little argument that the judicial notice does not rest in the sound discretion of the court.

In *Stasiukevich v. Nicholls*[47] the Second Circuit, in discussing the stature of information promulgated by administrative agencies, stated:

> But though the court may receive the report in evidence, or may take judicial notice of its existence and contents, this does not mean that the court must accept the findings in the report as indisputable truth; the findings are merely evidence of the facts asserted. The credibility of such

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[42] MCNAUGHTON, *supra* note 22.

[43] *See, e.g.*, UNIFORM RULE OF EVIDENCE 9, *supra* note 27.

[44] Note, *Judicial Notice of Administrative Regulations*, 59 HARV. L. REV. 1137 (1946).

[45] Houston Belt and Terminal Ry. v. Davis, 273 S.W. 676 (Tex. Civ. App. 1925).

[46] Southern Pac. R.R. v. Groeck, 68 Fed. 609 (C.C.S.D. Cal. 1895); Livermore v. Beale, 18 Cal. App.2d 535, 64 P.2d 987, *cert. denied*, 302 U.S. 712 (1937).

[47] 168 F.2d 416 (2nd. Cir. 1945), in reference to "judicial notice" taken of reports of Truman Committee; "Even though we took 'notice' of these, the report would not be conclusive, or more than evidence."

> evidence will vary according to the thoroughness and impartiality with which the committee conducted its investigation, the fairness of its procedure, the fullness of opportunity it afforded accused individuals or organizations to develop their side of the story; and, of course, the other party may introduce evidence tending to prove the contrary of the facts accepted in the official report.[48]

This language demonstrates not only that the judicial notice of the factual administrative material rests in the discretion of the court but also establishes criteria for evaluating whether the court should take notice of factual material. In *Lichten v. Eastern Airlines, Inc.*,[49] a case involving the judicial notice of tariffs filed with the CAB, the court stated that judicial notice of the tariffs rests within the discretion of the court, if such facts should be noticed at all. A distinction based on the relative importance of the regulating body is often made; thus regulation of major federal and state administrative agencies usually have been noticed.[50] Cases making the distinctions, however, have generally involved regulations taking the form of law rather than factual materials when the criteria of *Stasiukevich* are more appropriate.

From the foregoing discussion, several generalizations can be drawn. First, a court, when asked to take notice of a regulation of an administrative agency that either interprets a formal statute or dispenses formal regulations, encounters a strong influence to exercise its discretion and notice the regulation. Second, when the material has been merely gathered by, and its validity judged for purposes of, the administrative agency, a court usually will notice it, depending upon the nature of the dispute[51] and the court's judgment concerning the agency's impartiality and thoroughness.[52]

The court in *Hughes*, determining that administrative material was not indisputable and therefore should not be noticed, indicated that it had considered the "nature of the subject matter" and the "apparent justice of the case" and concluded that each of several factors counted against the notice of the administrative material. The first of these factors was that the proposition offered by the defendants was neither scientific, historical, geographic nor statistical—the kind courts are willing to notice; rather it was of a "garden variety," concerning who did what, when and where. The second factor considered was that the CAB material was controlling in an anti-trust suit. The more critical an issue is to a case the more reluctant a court is to notice it. Finally, when the

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[48] *Id.*

[49] 8 F.R.D. 138 (S.D.N.Y. 1948).

[50] Boone v. State, 109 Ohio St. 1, 141 N.E. 841 (1923); WIGMORE, *supra* note 20, § 2573. *See* Note, 29 HARV. L. REV. 786 (1916).

[51] MCNAUGHTON, *supra* note 22, at 779.

[52] Stasiukevich v. Nicolls, 168 F.2d 474 (2d Cir. 1948).

defendant's default had resulted from his willful failure to appear, all doubts should be resolved against him. The court noted that CAB material might be noticed if the material is indisputable, but when it is merely evidence and rebuttable, it can hardly be considered indisputable.[53]

V. CONCLUSION

Judicial notice of facts that dispute allegations of the complaint after default represents a unique situation; however, this situation points out the acute problems judicial notice presents at this stage of litigation. Judicial notice after default, in effect, shows admitted facts to be untenable. While the effect seems to present an insurmountable semantical problem, *Hughes* presents the solution, *i.e.* a balancing of the interests involved. The judicial notice of indisputable facts after default prevents an obvious injustice resulting from the default, without allowing the defaulting party to escape all the results of the actions that resulted in the entry of judgment. Notice under these circumstances does not allow the defendant to litigate all the issues of the complaint that he *might* show to be invalid, as would be the case it the presumptive theory were utilized; rather it takes into account the defendant's opportunity to litigate any and all issues prior to his actions resulting in default. The court's decision in *Hughes* further recognizes the purpose of judicial notice, to expedite litigation, and does not allow the doctrine to be applied in this situation to make the litigation more exhaustive and complicated.

Hughes demonstrates the advantages of using a functional approach of judicial notice. Under this approach notice would be limited in terms of the function that the judge is performing when asked to take judicial notice. This application of the doctrine results in the useful and workable procedure in expediting litigation by allowing an immediate judicial determination of various issues when such determination would not prejudice any of the rights of the parties.

Guy William Anderson, Jr.

[53] Trans World Airlines, Inc. v. Hughes, 308 F. Supp. 679 (S.D.N.Y. 1969).