DEFAULT AND DEFAULT JUDGMENTS

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The path to a default judgment offers opportunity for missteps.

This article attempts to be useful by a review of the parameters of default and default judgment procedures including an important difference between personal injury/wrongful death cases and other cases.

Some cases do not require a statement of damages. Not every excuse or test that applies to timely motions for relief are considered, as they can be readily found in The Rutter Group's Civil Procedure Before Trial.

At the pleading stage:

Defendants sometimes forget the right to choose not to defend a poorly pleaded case. In fact, a lawyer might face a malpractice claim by answering a complaint alleging no dollar figures, and not merely for waiving jurisdictional issues! For example, if you sue for fraud, omit to file a statement of damages, allege no damages at all, but only generalized facts reserving the right to prove damages at trial, you will not be able to get a judgment for anything. See Heidary v. Yadollahi (2002) 99 Cal.App.4th 857. [Court may not enter judgment for any figure greater than is pleaded and noticed, or any resulting judgment is void on its face and subject to attack at any time.] Such a judgment is not solidified by CCP § 473's six month limitation on setting aside judgments, though it would be if specific numbers can be found in the complaint (more importantly contained in factual averments in the complaint than in the prayer of the complaint). See also, Dhawan v. Biring (2015) 241 Cal.App.4th 963 [default judgment void for failing to specify a dollar amount in the complaint].

Thus, it critical to state in the original complaint all the dollar figure damages you can justify, and to do so with as much specificity as possible, ignoring nominal damages details that would invite over-attention if small.

A defendant in an accounting action is entitled to notice of potential liability prior to entry of default. Warren v. Warren (2015) 240 Cal.App.4th 373. So specify identifiable liability amounts in the complaint.

Another example: astute defense counsel might be aware of what happened in Ponce v. Tractor Supply Co. (1972) 29 Cal.App.3d 500. There, a default was entered against an employee of defendant. Before trial, a default hearing was held and judgment granted for $160,000 in general damages against the employee only. The case went to trial against the employer and a jury awarded plaintiffs $184,000. This judgment was predicated solely on *respondeat superior*, and thus held collaterally estopped by the prior judgment.

Punitive damages cannot be noticed after a default has been taken. Behm v. Clear View Technologies (2015) 241 Cal.App.4th 1.

In personal injury cases, the next critical step toward a default judgment is to serve the mandatory Judicial Council form "Statement of Damages" with the complaint. It contains the required punitive damages allegations that formerly were not included in the forms for general and special damages. Having done this, a default could lead to a judgment for the sum of those numbers. You need not file this form until the day you seek to enter a default, but you have to have served it on the defendant. Filing it after taking a default is too late. Behm v. Clear View Technologies (2015) 41 CA4th 1.

After you have served a Statement of Damages:

Once a default or default judgment is entered you will want to be aware of the two types of relief available to defendants under CCP § 473, and the two separate time limits that start to run at each event.

As to all discretionary relief under § 473 (not just for defaults) a motion "must be made within a reasonable time" and before the absolute limit of six months from default entry. The limit is jurisdictional in the sense that the court has no power to grant any discretionary relief irrespective of whether an "attorney affidavit of fault" (5:292 ff.) is filed or how reasonable the excuse for the delay. Davis v. Thayer (1980) 113 Cal.App.3d 892, 901 ["six months" means 182 days.] The six-month limit for discretionary relief runs from the date the clerk entered the original default, not the date on which default judgment is entered. Thus, any delay between entry of the default and obtaining the default judgment will not extend the defendant's time to seek discretionary relief under § 473(b). Rutan v. Summit Sports, Inc. (1985) 173 Cal.App.3d 965, 970.

More recently: a complaint failed to allege a specified amount of damages and was not one for personal injury and therefore void (not voidable). In personal injury, cases, one cannot plead actual dollar figure damages, which are otherwise required to prevent a default judgment being void and subject to attack at any time. The § 580 problem in personal injury cases doesn't exist because the procedure is to use a statement of damages. CCP §§ 425.11 or 425.115.

In a case only involving no personal injury claim or wrongful death, the judgment was vacated beyond the time limit for voidable judgments. Dhawan v. Biring (2015) 241 Cal.App.4th 963. The Dhawan case gives no guidance in a complaint that alleges more than one kind of damages. We think the best advice is to not plead amounts as to personal injury, but serve a statement of damages on just those counts, and then expressly state dollar amounts of damages on the other types of causes of action.

Be sure to give notice before taking a default.

Notice should be given to a party before a default is taken and failure to give that notice is grounds to set aside the default. When a plaintiff and a defendant both have counsel, it is common that a plaintiff provide a courtesy notice to defendant's counsel before requesting that defendant's default. A party requesting a default should give notice to the other party before requesting the default. Wells Properties v Popkin (1992) 9 Cal.App.4th 1053.

The law looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. The "quiet speed" of a plaintiff's counsel in seeking a default has been deemed a sufficient ground for setting aside a default under CCP § 473. (Citation omitted.) Robinson v. Varela (1977) 67 Cal.App.3d 611, 616.

Defendants are entitled to know their potential liability prior to entry of default. Warren v. Warren (2015) [action for an accounting]. It is suggested to plead a specific number, and if unsure or if number is one discretionary with the Court, allege just the number on information and belief.

Not showing up at trial is not a basis for default.

Once a defendant has answered but fails to appear for trial, the procedure to follow does not involve taking a default. It simply makes the trial short and one-sided. CCP §594 subd. 1. In that case make sure you have in hand or filed a proof of service of at least 5 days' notice to defendant of the trial date. Heidary v. __ (2002) 99 Cal.App.4th 857, 863.

Relief from a default judgment is a separate procedure.

Relief may be granted from the judgment only—for example, leaving the default in effect if for reasons other than default by attorney fault. The time limit for that relief runs from the date of the default judgment and can only reach the default on one condition not here present, to which we turn first. Frequently, a party may allow default to be entered before seeking counsel, for example, where he tenders to an insurer who immediately denies coverage (perhaps as standard operating procedure).

Defendant entitled to relief from court clerk's erroneous entry of default. Bae. T.D. Service Co. of Arizona (2016) 4 Cal.App.5th 698.

Affidavit in support of motion for relief from default need not state attorney's reasons for mistake inadvertence, surprise or neglect. Martin Potts and Assoc., Inc. v. Corsair, LLC (2015) 244 Cal.App.4th 432.

Will the defendant be entitled to mandatory relief?

Statutory foundational requirements for renewed motions to set aside default based on attorney error must be met. Even Zohar Constr. & Remodeling Inc. v. Bellaire Townhouses LLC (2015) 61 Cal.4th 830.

Defendants are not entitled to mandatory relief under CCP § 473(b) for attorney fault if their lawyer was not hired until after the default was entered. A defendant might try to rely on dicta in Benedict v. Danner Press (2001) 87 CA4th 923--easily distinguished because the lawyer there admitted it was his fault the default was taken. The apt case is Cisneros v. Vueve (1995) 37 Cal.App.4th 906, 912 (lawyer hired after default). Cisneros clearly holds that for mandatory relief the attorney must represent the defendant at time of default. Accord, Rogalski v. Nabers Cadillac, 11 Cal.App.4th 816, 821, fn. 5. The holding: There is no policy favoring "neglectful clients who allow their default to be entered simply because that neglect is compounded by attorney neglect in permitting the judgment to be

perfected." Cisneros, at 908 [Attorney was hired to represent defendant whose default had already been entered, forgot about the matter and did nothing for over 6 months, even attorney's affidavit of fault did not compel relief from the judgment (or the default).] If the attorney confesses by affidavit to being at fault in allowing default to enter, there is no longer any timeliness requirement, just the six months from date of entry of default judgment, the default date being immaterial.

Discretionary relief is a different story.

"The trial court has discretion to vacate the judgment or default that preceded it only if the defendant establishes a proper ground for relief, by the proper procedure, and within the time limits." Wegner, Fairbank, Epstein & Chernow, The Rutter Group Cal. Prac. Guide: Civ. Trials & Evidence, Ch. 18, ¶5.27. Defendants may seek discretionary relief from default under CCP § 473(b) on grounds of "mistake, inadvertence, surprise or excusable neglect" and assert "surprise and excusable mistake [sic]." The motion for discretionary relief must be filed within 6 months after the clerk's entry of default. The motion is ineffective if filed thereafter, even if it is within 6 months after entry of the default judgment. If you took the default before filing a statement of damages all is not lost, and you may have laid a trap for a deliberately delaying defendant.

Next, the failure to serve a statement of damages before taking a default is not always fatal to a case. Failure to file a CCP §§ 425.11 and 425.115 Statement of Damages, Judicial Council Form 962(a)(24), prior to taking a default is not fatal to a default judgment for property or claims other than personal injury and wrongful death. Most esoteric torts, like contract breaches, can be coupled with a negligent infliction of emotional distress claim or other incidental causes of action that would lack merit without those property and contract based injuries. Schwab v. Rondel Homes Inc. 53 Cal3rd 428, fn. 7, notes that "where defendant has been given actual notice, though no document entitled "statement of damages" has been served upon the defendant, the Courts of Appeal have sometimes sustained an entry of default. Thus in Uva v. Evans 83 Cal.App. 3d 356, a default was entered against the defendant when damages were stated in the complaint contrary to CCP § 428.10." [Emotional distress claim was merely incidental to the gravamen of the complaint]. As a consequence plaintiffs are entitled to the relief sought in the complaint and the Court is required to grant it. Also, in Barragan v. Banco BCH (1986) 188 Cal.App.3d 283, 304-305,

failure to serve a CCP § 425.11 statement of damages for emotional distress did not void the default judgment in favor of both spouses. [Fraud and conversion causes of action supported judgment, notwithstanding false imprisonment cause of action.]

Civil Code § 3291 uses the identical language as CCP § 425.11, language directly interpreted by our Supreme Court (discussed infra) in a manner that will dictate that plaintiff is entitled to judgment but no prejudgment interest. Section 3291 allows the plaintiff in "any action brought to recover damages for personal injury sustained by any person resulting from or occasioned by the tort of any other person, corporation, association, or partnership" (italics added) to claim 10 percent interest. CCP § 425.11(b) provides: “When a complaint is filed in an action to recover damages for personal injury or wrongful death...” [Emph. Added]. Neither section refers to or governs property damage and contract injury cases, as the Supreme Court has held, even if the case includes pendant personal injury causes of action. Moreover, this conclusion is separately born out in a way that precludes requiring a Statement of Damages by CCP § 585(b) as well. CCP § 585(b) requires the Court to grant judgment in a contract breach or property damage default case. Because plaintiff sought injunctive relief, CCP § 585(a) does not apply. Instead § 585(b) applies, providing:

> In other actions, if the defendant has been served, other than by publication, and no answer, demurrer, notice of motion to strike (of the character hereinafter specified), notice of motion to transfer pursuant to Section 396b, notice of motion to dismiss pursuant to Article 2 (commencing with Section 583.210) of Chapter 1.5 of Title 8, notice of motion to quash service of summons or to stay or dismiss the action pursuant to Section 418.10 or notice of the filing of a petition for writ of mandate as provided in Section 418.10 has been filed with the clerk or judge of the court within the time specified in the summons, or such further time as may be allowed, the clerk, or the judge if there is no clerk, upon written application of the plaintiff, shall enter the default of the defendant. The plaintiff thereafter may apply to the court for the relief demanded in the complaint; the court shall hear the evidence offered by the plaintiff, and shall render judgment in his or her favor for such sum (not exceeding the amount stated in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115), as appears by such evidence to be just. ....

CCP § 425.11 is no obstacle to the mandatory duty to grant default judgment to plaintiff in a property or contract case. Trial Courts are bound to follow the Supreme Court of California, en banc, in Gourley v. State Farm Mutual Automobile Insurance Company, (1991) 53 Cal.3d 121 rehg. den. (opinion attached hereto on green paper) and particularly its ruling that in "...actions ...brought primarily to recover economic loss caused by the tortious interference with a property right, ... any damages recovered for actual personal injury, including emotional distress, are incidental...." This is because, in the words of Justice Lucas, such actions are brought primarily to recover economic loss caused by the tortious interference with a property right, and any damages recovered for actual personal injury, including emotional distress, are incidental to the award of economic damages. Accordingly,[53 Cal.3d 124] we conclude that an action for breach of the implied covenant of good faith and fair dealing is not an action "to recover damages for personal injury" under section 3291.

In Gourley, the plaintiff sought recovery based on property rights involving contracts. As a result of the breach of these property and contract rights, Ms. Gourley also suffered personal injury, and had the case been one for personal injury, would have recovered prejudgment interest. The Supreme Court did not limit the rationale to prejudgment interest. It also explained by way of example how it affects the statute of limitations as well. It noted the tort pleadings do not make it a personal injury case. Gourley states [citations in quote omitted]:

> "we have allowed the insured to recover in tort for emotional distress damages flowing from the insurer's breach. In so doing, however, we recognized that the bad faith action is not a suit for personal injury, but rather "relates to financial damage.... We emphasized that "[s]uch awards are not confined to cases where the mental suffering award was in addition to an award for personal injuries; damages for mental distress have also been awarded in cases where the tortious conduct was an interference with property rights without any personal injuries apart from the mental distress." [¶] We observed that damages for emotional distress are compensable as incidental damages flowing from the initial breach, not as a separate cause of action "[because] we are concerned with mental distress resulting from a substantial invasion of property interests of the insured and not with the independent tort of intentional infliction of emotional distress, we

> deem [the requirements of outrageous conduct and severe emotional distress] to be inapplicable." ... Thus, once the threshold requirement of economic loss is met, the insured need not show additional loss or injury to recover damages for his mental distress as long as such damages were proximately caused by his insurer's breach of the implied covenant. ... [¶] The Richardson v. Allstate Ins. Co. court ... reversed the trial court's decision and held that a cause of action for an ...insurer's breach of the implied covenant is subject to the two-year statute of limitations...because such an action is based on the infringement of property rights, not personal injury, notwithstanding the fact that plaintiff there had alleged a cause of action for emotional distress resulting from the insurer's bad faith. Relying on Gruenberg, ..., the court noted that an "action against an insurer for bad faith is conceptually similar to an action for interference with contractual relations, for in both actions the primary interest of the plaintiff which is invaded by the defendant's wrongful conduct is the plaintiff's right to receive performance under an existing contract." ... The court also observed that it is the nature of the right sued upon, not the form of the action or relief demanded, that controls what statute of limitations applies. ... In conclusion, the Richardson v. Allstate Ins. Co. court reasoned it would be erroneous to find "a tort action against an insurer for bad faith is based upon an alleged interference with a personal right merely because mental distress is alleged. Breach of the implied covenant of good faith is actionable because such conduct causes financial loss to the insured, and it is the financial loss or risk of financial loss which defines the cause of action. Mental distress is compensable as an aggravation of the financial damages, not as a separate cause of action."

The Supreme Court made clear that it is the basic nature of the case that determines whether it is one for personal injury or not. Thus, CCP § 425.11 has no application to the present case and judgment should be entered. Thus Court clerks correctly enter defaults without a statement of damages having been filed in property based cases.

Some older cases suggest that a Statement of Damages is akin to an amendment to the complaint; however these cases are easily distinguished not just because they involved defaults that “must be set aside for lack of personal service, it is appropriate to point out that the parallel between an amended complaint seeking increased damages and a ‘statement of

damages' pursuant to section 425.11 requires that the personal injury or wrongful death defendant be allowed the same period of time within which to respond to the 'statement of damages' as other defendants are allowed to respond to such amended complaints. Plotitsa v. Superior Court, (Cal.App. 2 Dist. 1983) 140 Cal.App.3d 755, [comparing personal injury case increased damages to amended pleading]. Cautioning about the danger to a defendant to rely on the Plotitsa line is The Rutter Group Civil Procedure Before Trial CHAPTER 5, B. ENTRY OF DEFAULT (page 850) § 5:99: "Reasonable" time sufficient: But there is also authority holding that since ... § 425.11 does not itself specify how much notice is required before entry of default, only "reasonable" notice is required. Connelly v. Castillo (1987) 190 Cal.App.3d 1583, 1589-1590, ...--default judgment entered 27 days after service of damages statement not void: whether 27 days' notice is "reasonable" can be determined on timely motion for relief under CCP § 473(b); see California Novelties, Inc. v. Sokoloff (1992) 6 Cal.App.4th 936, 945...[17 days' notice prior to entry of default "reasonable"].

At the prove-up hearing stage:

Courts have a not-disregardable discretion to give a *pro se* plaintiff neutral and accurate guidance to a party trying to prove up a default such as the "reasonable steps, appropriate under the circumstances, to enable the litigant to be heard." Austin v. Valverde (2012) 211 Cal.App.4th 546, 550 ["failure to exercise discretion is itself an abuse of discretion"]. Holloway v. Ouetel (2015) 242 Cal.App.4th 1425.

Adding defendants post default judgment:

Corporate officer improperly added as judgment debtor on default judgment against company. Wolf Metals Inc. v. Rand Pacific Sales Inc. (2016) 4 Cal App 5th 698.

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