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Case Study

A Default Judgment is Void if the Plaintiff Fails to Allege a Specific Amount of Damages in the Complaint

By **Jeffrey D. Eberhard**

Claims Pointer: A default judgment based on a complaint which does not contain an allegation as to the specific amount of damages sought is void.

When a default judgment has been entered, the defaulted party is obligated to pay the amount of the judgment unless it is able to set aside the judgment. In most cases, the amount of the default judgment is the full amount of the damages sought by the plaintiff in the complaint. So, what happens when the complaint does not contain any allegation as to the amount of damages sought by the plaintiff? In a recent decision entitled Portland General Elec. Co v. Ebasco Services, Inc., the Oregon Court of Appeals addressed whether a default judgment based on a complaint without a specific damages allegation was valid. (Case No. A143752, February 8, 2012).Relying on its prior interpretation of ORCP 67C, the Court of Appeals held that the trial court did not have jurisdiction to enter a default judgment in any amount when the complaint did not contain specific damages allegations and the non-appearing defendant was not provided reasonable notice and an opportunity to be heard.

After settling a personal injury claim involving asbestos exposure at one of its plants, PGE sued its insurance carriers for breaching their policies by refusing to indemnify PGE with regard to this claim. One of PGE's insurers, Lexington Insurance Company, contracted to provide a 16% share of an excess liability policy which provided coverage of up to $5,000,000. Thus, Lexington's maximum exposure under this policy was $800,000.

In its complaint, PGE alleged that it settled the personal injury claim for a "reasonable amount." The complaint did not contain any allegation or damage prayer stating how much money PGE was seeking in this lawsuit. The complaint did reference the $5,000,000 excess liability policy which was attached to the complaint. However, the complaint did not allege that PGE was seeking damages in the amount of the full limits of coverage available under the policy.

After Lexington failed to timely appear in the case, PGE moved for entry of a limited judgment against Lexington in the amount of $800,000, plus costs and attorney fees. The trial court granted PGE's motion and entered a default judgment against Lexington. After Lexington unsuccessfully attempted to set aside the default judgment at the trial court level, it filed an appeal seeking vacation of the default judgment.

On appeal, Lexington argued that the trial court lacked jurisdiction to enter a default judgment because PGE's complaint did not contain an allegation as to the amount of damages it was seeking. Previously, in Montoya v. Housing Authority of Portland, 192 Or App 408, 416 (2004), the Court of

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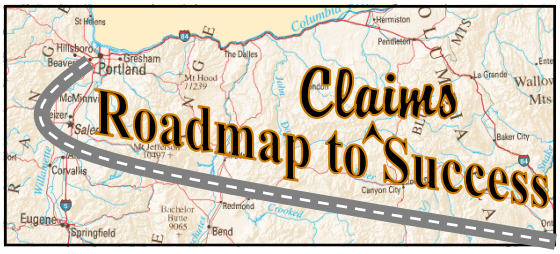

OCAA Spring Symposium Stuffed Toy Drive a Success!

Every child who is admitted to the **Randall Children's Hospital at Legacy Emanuel** gets to pick a stuffed animal. And thanks to the many attendees at this years Spring Symposium on April 13 who donated to our project, the hospitals supply of stuffed animals grew by 75! It was an overwhelming response and we thank everyone for supporting this project! Thank you to ***911 Restoration*** for collecting and delivering the stuffed animals to the hospital and for providing an **iPod Touch w/ Docking Station** as an incentive to donate.

OCAA made a difference in the life of a child because of you! Thank you!

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Appeals held that, under ORCP 67C, default judgments are void to the extent the judgment awards damages exceeding those sought in the complaint unless reasonable notice and an opportunity to be heard is provided. ORCP 67C provides the following:

> "Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled. A judgment for relief different in kind or exceeding the amount prayed for in the pleadings may not be rendered unless reasonable notice and an opportunity to be heard are given to any party against who judgment is to be entered."

Lexington submitted that the judgment was void because PGE's complaint did not seek any damages and no notice was provided before entry of the Judgment. In response, PGE argued that the complaint's reference to the attached policy which provided that its policy limits were $5,000,000 was a sufficient allegation as to the amount of damages it was seeking because Lexington knew that it was responsible for 16% of the coverage available under the policy.

The Court of Appeals agreed with Lexington and found that PGE's reference to the policy was not sufficient when PGE did not allege that it was seeking the full limits of coverage available under the policy. Relying on its interpretation of ORCP 67C in Montoya, the Court held that the default judgment against Lexington was void because PGE failed to allege a specific amount of damages in its complaint and no notice was provided to Lexington. ❖

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PERSPECTIVES ON THE LAW

Lachenmeier Enloe Rall & Heinson
Attorneys at Law

2,663 Jury Verdicts through 2011

By Jay D. Enloe

Thirty-five years of defending personal injury cases at trial, together with 20 years of studying jury verdicts in cases tried by others in the Portland tri-county area, have combined to allow me to draw certain conclusions and make observations about jury verdicts in such cases in this part of the world. I believe some of these conclusions and observations may be useful in considering what other personal injury cases are "worth"—and to assist lawyers and claims professionals with resolving cases without the costs and risks of taking cases to trial.

My law firm has collected and archived jury verdicts in personal injury cases since 1992 and has maintained a searchable database of such verdicts on our website, at www.lerlaw.com. I have previously written about these verdicts in publications on the firms website; in September 2002 ("Jury Verdicts After September 11"), in April 2004 ("Jury Verdict Trends – 18 Months Later"), in November 2007 ("Jury Trials v. ADR"), and in July 2008 (Case Evaluation – What is a Personal Injury case Really Worth?"). Now that we have collected nearly 20 years of verdict history, another discussion of jury verdict trends in the Portland tri-county area seems timely.

Over the last 35 years in Oregon, there have been many changes in the handling and resolution of personal injury litigation. In 1976, state courts in Oregon were split between District Court and Circuit Court (depending on which side of $10,000 the claimed damages fell). ADR was essentially unknown—although arbitration and mediation certainly existed in concept, it was rarely employed in such cases. Medical record discovery was minimal. Chart notes, especially pre-accident, were not easily discovered. Cases often went to trial with very little information known to either side of the case. Trial was often interesting from that standpoint and much was learned about the case at trial. Jury verdicts were difficult to forecast.

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Trial in the 21st century is considerably different than it was in the 20th. We now usually get to trial with much more information about the plaintiff and the plaintiff's medical history. Opportunities for settlement discussions abound. Arbitration and mediation operate as productive alternative dispute resolution mechanisms, diverting many cases that would otherwise need to be decided by jury trial. Since we know so much more about the case before trial, the ability to forecast what a jury would award is much greater than it once was. The downside of resolving more cases and trying fewer of them is that individual lawyers and claims professionals tend to have less trial experience than once was the case—making their access to jury verdict results all the more critical to an understanding of what juries are awarding for personal injury cases on an ongoing basis.

At the time of this writing, the firm's website contains information on 2,663 jury verdicts. These cases were all tried to verdict in Multnomah, Clackamas and Washington Counties. General information about these verdicts is available on the firm's website.

Over the years, Multnomah County has had the reputation of being the county with the largest verdicts. The conventional wisdom has been that this is due largely to the fact that this county is felt to be a more liberal venue, because so many Multnomah County jurors live in Portland. That reputation may be correct, but large verdicts may also be a function of venue selection—it may be that lawyers with known large cases with an option to file in Multnomah County choose to file there instead of another county, even if the case would have resulted in a large verdict in one of the other counties. It is certainly true that conservative verdicts are common in Multnomah County, as in the other counties. Cases in large part do depend on their own facts, without regard to where they are tried.

The overwhelming theme of jury verdicts in the Portland tri-county area is that in a high percentage of cases the plaintiff ends up disappointed after going to the expense and trouble of a jury trial. This is true whether the case is tried in any of the three counties. For example, in Washington County from 2004 through 2008, 35.8% of the trials resulted in full defense, zero dollar, verdicts. This means more than a third of the plaintiffs had likely spent thousands of dollars to "roll the dice" and had nothing to show for it other than large trial costs owed to their attorneys and cost bill judgments owed to defendants. Even in the cases when plaintiffs did receive a verdict against defendants, 27% of the verdicts over the same 8 year period were between $1 and $10,000—still an unlikely amount to compensate their attorneys and repay trial costs—and frequently in those cases they would also still owe the defendants a cost bill judgment, as a result of failing to obtain a verdict exceeding a statutory Offer to Allow Judgment. A full 62.8% of the trials, in Washington County, were thus cases in which the plaintiffs should have settled their cases if they had the opportunity to do so.

Clackamas County verdicts over the same 8 year period were similar. An even greater percentage of cases were full defense, zero dollar, verdicts—46%. Another 13% were between $1 and $10,000, for a total of 59% of verdicts equaling $10,000 or less. Again, these plaintiffs would most certainly have preferred, at least in retrospect, not to have spent the time, and the money, to ask a jury to decide the case.

There is one category of cases in which Clackamas County juries have been somewhat more generous to plaintiffs than in Washington County—cases with verdicts of $50,000 or more. In Clackamas County from 2004 through 2011, 22.6% of trials resulted in verdicts in this category. In contrast, Washington County trials resulted in these verdicts 11.9% of the time. Neither percentage, however, translates to large numbers of trials, in either county. In Washington County, on average 2.375 verdicts per year were $50,000 or higher. In Clackamas County, the average was 3.25 verdicts per year. Two of the four high verdicts in 2011, however, were unusual cases relating to claims by school district employees against their employers for emotional distress type claims. The remaining two were MVA cases.

Multnomah County has shown greater volatility over the same 8 year period. In part, this is a function of many more cases going to trial in Portland than in Hillsboro or Oregon City. Multnomah County saw 764 injury trial verdicts over this pe-

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riod. This is in contrast to 159 verdicts in Washington County and 115 in Clackamas County. The percentage of verdicts favoring defendants was similar in Multnomah County to what it was in Washington and Clackamas. In Multnomah County, 38.6% of the 764 verdicts were full defense, zero dollar, verdicts. Verdicts between $1 and $10,000 resulted in 19.5% of the trials, meaning juries returned verdicts between $0 and $10,000 in 58.1% of the trials—very close to the 62.8% and 59% in the other two counties.

It should be noted that several very high verdicts ($1 million or more) were returned in Multnomah County but far fewer in the other counties (although there was one Washington County verdict in 2007 for just under $1 million, for a very serious construction site accident, and one in Clackamas County in 2005 for $2.57 million). In the 8 year period, there were 9 very high verdicts in Multnomah County in personal injury cases. Another way of looking at this statistic is that in Multnomah County there were almost 7 times as many trials of all types as in Washington County and nearly 5 times as many as in Clackamas County. To the extent a greater number of very high verdicts resulted in Multnomah County, that may be a function of plaintiff attorneys choosing to file in a venue with a reputation for high verdicts, in other words a self-fulfilling prophecy, rather than more liberal tendencies of Multnomah County jurors. After all, we have seen that Multnomah County juries return full defense, zero dollar, verdicts, and verdicts of $10,000 or less, as often as juries in Washington County and Clackamas County.

The main lesson from this review of 1,038 tri-county verdicts over the most recent 8 year period is that cases truly do rise and fall on their own facts. Without understanding those facts, and the people involved in the case, it is difficult to forecast what a jury will award in the case. Also, without knowing what jurors in the particular jurisdiction tend to award in similar cases, there is really no background against which to forecast the result in any given case. ❖

— Anyone interested in learning more about the verdicts awarded by Portland tri-county juries is invited to visit the LER&H Jury Verdict website at www.lerlaw.com/verdictsearch.php. Please also feel free to contact the author, trial attorney Jay Enloe, at jay@lerlaw.com.