

— by **Julie E. Dutton**

*ONCE UPON A TIME* in a land far, far, away worked a fair maiden in an insurance company's home office. One day, while happily going about her daily duties (whistling all the while), the fair maiden received notice that the company's Oregon registered agent had been served with a lawsuit brought against the company by an evil dragon ...um, actually, it was an insured. The registered agent sent her the foul lawsuit papers. The maiden looked at them and determined to which satellite office to send the Summons and Complaint and she sent them. But lo and behold, what should happen next? Plaintiff entered a Default Judgment against the Company! Upon hearing the dreaded news, the maiden spoke with the satellite office, who called an attorney, who found that no answer was ever filed. Upon hearing the news, the fair maiden cried out: "But I followed company protocol! Woe is me. Alas, what am I to do?"

This scenario seems to be surprisingly common for insurance companies, and their insureds. I know, some of you are saying to yourselves: "so what, default judgments are set aside all the time" and, for the most part, you are right. Default judgments are often set aside. However, that is not always the case. Accordingly, insurance companies *and* their insureds need to be aware of the Oregon Rules of Civil Procedure ("ORCP") and the respective company's procedures. However, I would take the position that it is also important that someone be delegated the responsibility to take the affirmative step to follow up and determine the status of the case prior to a default judgment being entered in the first place.

Most of you are aware of the time for filing a response to a lawsuit. However, as a refresher, ORCP 7C(2) allows a defendant 30 days to file a responsive pleading. You calculate the

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30 days from the *date of service*. In our scenario above, our fair maiden would calculate the 30 days from the date the registered agent was served with the Summons and Complaint (not the date she first heard about it). Accordingly, when such papers are received, it is important that the proper date for filing a response be entered into a calendaring program, or noted in a place where those responsible for responding to the Complaint can easily find it.

Even though a default judgment was taken in our story, all was not lost. As stated before, default judgments *can* be set aside under the right circumstances. ORCP 69C provides that "For good cause shown, the court may set aside an order of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71B and C." ORCP 71B says that "the court may relieve a party or such party's legal representative from a judgment for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect..." The rules tend to be more lenient for an individual who fails to appear. However, when a corporation fails to appear, the Court takes a stricter stance that insurance companies and their corporate insureds should be wary of, because corporate defendants should know better.

When a registered agent or a corporate officer is personally served with a summons and complaint and the corporation fails to appear, it is not enough that the registered agent or the corporate officer *believed* that he followed the corporation's usual policy. In order to find excusable neglect, the agent or officer must have acted immediately and he must know what he did with the papers. In other words, there must be some record of what happened. Whether the papers are logged into a database or some other method of tracking them is

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used, the Court will want an explanation of what happened. Further, allowing a summons and complaint to sit for an indefinite period of time before action is taken may lead the Court to find that the officer or agent did not take the lawsuit seriously.

For example, in a case involving an insurance company, the Court of Appeals held that when an experienced employee of the insurance company allowed a summons and complaint to sit for three weeks or more before acting on it, such neglect was inexcusable. As stated by that court: “This case is not a story of a good faith attempt to appear that went awry but of a disregard for the seriousness of the matter.” Walker v. Allied Fidelity Ins. Co., 97 Or. App. 568, 573 (1989). Accordingly, it should always be remembered that time is of the essence when defending a lawsuit. You cannot take it for granted that the courts will summarily grant a motion to set aside a default judgment. However, if affirmative steps are taken to protect against a default in the first place, then the courts may be more likely to grant a defendant relief from the default judgment. If a default judgment is entered, then upon learning of the default, the agent or officer must act quickly. The sooner a motion to set aside a default judgment is filed, the more likely it will be that the court will grant it.

It should also be noted that with regard to lawsuits against insureds, the court will not find excusable neglect simply on a showing that there was a time lag as the summons and complaint were forwarded from one office to another. The mere fact that the papers are tendered by an insured to its insurance company, who then fails to timely file a responsive pleading on behalf of the insured, is not excusable neglect. The courts have stated that because it is the insured who is being sued, not the insurance company, the insured has the responsibility of make sure that a response is filed. Thus, insureds need to understand that their role in the defense of their case is not over simply because they

sent the papers to you. As a practical matter, however, once the insured sends you the papers, dropping the ball becomes your problem.

Now, back to the story of our fair maiden. In her case, upon receiving the summons and complaint from the Oregon registered agent, she logged the papers into the company’s database. She then sent them via Federal Express to the satellite office for handling, but not before she logged the Federal Express tracking number into the database as well. The mail clerk at the satellite office also logged in the receipt of the Federal Express package, noting the corresponding tracking number. She also logged in the department to which the summons and complaint were delivered. The mail clerk could not remember the papers specifically, but stated in her Affidavit that it was her usual practice to deliver documents of that nature to specifically designated clerks. It was the usual practice of those clerks to log lawsuit papers into the database and also note which adjuster was assigned to handle the case. However, the papers were never logged in. Somewhere between the mailroom and the desks of the designees, the papers were lost, and soon thereafter, an order of default was taken.

The good news was that the registered agent and our fair maiden were able to account to the court exactly what happened with the summons and complaint up to the point it was delegated to the satellite office. Further, our fair maiden was even able to state with certainty that the papers were received by that office. Despite this detailed accounting of what happened, the small southern Oregon court that heard the motion to set aside the default was reluctant to grant the motion, and to set aside the default judgment in favor of the southern Oregon plaintiff. The court ultimately did grant the motion for relief from the default, giving our story a happy ending. However, the Judge in that

case may have been swayed by additional facts not discussed here. Thus, it is difficult to tell, given only the above-stated facts, whether a trial court would be inclined in the future to grant the motion for relief from the order of default.

The moral of the story is that if our fair maiden had also entered into the database the date the responsive pleading was due and followed up with the satellite office prior to the due date to determine the status of the case, she may have discovered that the papers were lost and the default may

have been avoided altogether, avoiding the risk that the Court would not grant the motion to set aside the default and saving the company the attorney fees incurred in setting the default aside, as well as the default judgment itself.

Ultimately, however, the insurance company had its day in court and the fair maiden lived happily ever after. — *THE END*.

— *If you have any questions, please feel free to contact the author, Julie E. Dutton, by phone at (503) 768-9600, or by email at [julie@lerlaw.com](mailto:julie@lerlaw.com).*