

OREGON LAW UPDATE

Set Aside Default Judgment? Be Prepared to Explain Everything

From the desk of Josh Hayward: There are several risks involved with being a defendant in a lawsuit, including protecting your interests and avoiding a default judgment. What do you do when something slips through the cracks and you are defaulted?

Claims Pointer: Under ORCP 71 B(1), a court can set aside a default judgment obtained through “mistake, surprise, or excusable neglect.” A party seeking relief from a default judgment on excusable-neglect grounds must offer evidence that at the very least identifies who made the mistake and demonstrates how the person’s conduct varied from the procedures in place for responsibly responding to lawsuits. Failure to do so will result in the court affirming the default judgment.

case in point...

Portland Gen. Elec. Co. v. Ebasco Servs., Inc., CV05120776, 2014 WL 2119213 (Or. Ct. App. May 21, 2014)

Portland General Electric (“PGE”) settled a personal injury lawsuit filed by a former employee who had been exposed to asbestos. PGE then sued a number of its own insurers, alleging that PGE had tendered the personal injury claim to its insurers and that they had breached their contractual duty to indemnify PGE for the settlement. One of the policies was an excess liability policy providing coverage up to \$5 million. Defendant Lexington Insurance Company (“Lexington”) had subscribed to a 16 percent share of the policy, giving it a maximum exposure of \$800,000.

PGE served the complaint on a New York law firm specified in the policy as an authorized agent for service of process on the subscribing insurers. The New York firm contacted Certain Underwriters at Lloyd’s of London (“Certain Underwriters”) to determine which defense firm to forward the summons and complaint to. Certain Underwriters identified an Oregon law firm, which filed an answer on behalf of several insurers, but not an answer on behalf of Lexington because it was not directed to represent Lexington. PGE then moved for a default judgment against Lexington for the policy limits and attorneys fees. The default judgment was entered by the trial court. Lexington moved to set aside the judgment arguing excusable neglect under ORCP 71B. The trial court denied the motion.

Lexington appealed, claiming the trial court abused its discretion by failing to set aside the default. Lexington argued that it established excusable neglect by showing that its service agent, the New York law firm, followed established procedures when it received the summons and complaint by contacting Certain Underwriters for instructions and then sending the papers to the Oregon law firm pursuant to those

instructions. Lexington contended that it met its burden by explaining that the New York law firm received incorrect information from Certain Underwriters about where to send the summons and complaint. Lexington further asserted that in its motion to set aside it did not need to explain why Certain Underwriters’ failed to direct the New York firm to hire the proper defense counsel for Lexington. Lexington’s position was that when determining whether a failure to appear resulted from excusable neglect, the court’s focus should solely be on the service agent, and, therefore, the defendant “need only explain what took place and that its agent’s actions were objectively reasonable.”

The Court of Appeals rejected Lexington’s argument, stating that any excusable-neglect analysis takes into account the actions of all individuals who bear ultimate responsibility for some aspect of responding to litigation, whether it is the service agent, a corporate officer with responsibility for overseeing lawsuits, the responsible claims supervisor at the defendant’s insurer, the defendant’s attorney, or other individuals with similar responsibilities. To analyze excusable neglect, a court must consider the totality of the circumstances surrounding the defendant’s failure to respond to the complaint or other filing, and that may often require the defendant to establish who the responsible individual was at each significant step in the defendant’s efforts to respond to litigation and what those individuals did.

The Court found no evidence in the record to establish that any neglect by Lexington in responding to PGE’s complaint was excusable because the record did not identify the party responsible for the mistake, the position of the party responsible, any established procedures for handling such legal matters, or whether any procedures it may have had were followed. Based on this lack of evidence, the Court affirmed the default judgment.



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