Dealing with a Defaulting Co-Defendant when Joint and Several Liability Is at Issue

by Kasey D. Huebner

On several occasions during my practice I have been faced with a situation similar to the following:

> I represent a manufacturer in a multi-defendant personal injury lawsuit. The owner of the product, who has limited or no assets or insurance, is a co-defendant in the lawsuit. He or she has not appeared or answered, and plaintiff has sought entry of a default order or default judgment against the owner. While I have alleged fault on the part of the plaintiff, the jury might not find comparative fault. Thus, under RCW 4.22.070, my client faces potential joint and several liability for any default judgment entered against the owner.

This article addresses how to handle this situation by describing the default process, the inherent risks to a non-defaulting defendant when a default judgment is entered against a co-defendant in a tort action, and recommended strategies for avoiding potential joint and several liability for a defaulting co-defendant.

1. The Difference Between an Order of Default and Default Judgment.

In a tort action, the default process typically occurs in two stages. First, the plaintiff will ask for entry of an order of default against the party that has not appeared. Then, the plaintiff seeks a default judgment, which often includes a damages hearing. Each of these steps in the default process has independent significance, and it is important not to confuse an order of default with a default judgment.

Civil Rule 55(a)(1) provides that "when a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided by these rules and that fact is made to appear by motion and affidavit, a motion for default may be made." Once a motion for entry of default has been filed, a party who has not appeared "may not respond to the pleading nor otherwise defend without leave of court." CR 55(a)(2); *see also Hayworth v. McDonald*, 67 Wash. 496, 500, 121 P. 984 (1912). Parties who have appeared in the action may continue to defend. CR 55(a)(2); *see also* WASH. CIV. PRO. DESKBOOK, § 55.5(4). Consequently, an order of default applies only to defendants who have not appeared and prevents such parties from defending against the lawsuit.

Once default judgment is entered there is a deemed "admission of all factual allegations necessary to establish the plaintiff's claim for relief." *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 333, 54 P.3d 665 (2002). A default judgment does not, however, "admit any conclusions of law contained within the complaint or the amount of damages." *Id.* Thus, it is not until the court has entered a default judgment, as opposed to an order of default, that a non-appearing party is deemed to have admitted the factual allegations of the plaintiff's complaint.

Civil Rule 55(b)(2) provides that, when the amount of damages claimed by the plaintiff is uncertain, the court may require a hearing, trial or other investigation to determine the amount of damages recoverable by the plaintiff. At least one Washington court has determined that an inquiry regarding the amount of plaintiff's damages is a mandatory step in determining damages through the default judgment process. *Smith*, 113 Wn. App. at 333 ("The trial court *must* conduct a reasonable inquiry to determine the amount of damages.") (emphasis added). Pursuant to Washington law, plaintiffs in personal injury actions may not identify the amount of damages sought in their complaints. RCW 4.28.360. Accordingly, until there is a damages hearing, a court typically should not enter default judgment against a defendant in a personal injury action.

2. The Risks to a Non-Defaulting Defendant when Default Judgment Is Entered Against a Co-Defendant.

Washington permits an application of joint and several liability where "the plaintiff is fault-free and judgment has been entered against two or more defendants." *Kottler v. State*, 136 Wn.2d 437, 446, 963 P.2d 834 (1998); *see also* RCW 4.22.070. The "fault-free plaintiff" rule applies only to defendants who have had judgment entered against them. *Kottler*, 136 Wn.2d at 447. A plaintiff may recover the full damages owed by the jointly and severally liable defendants from a single defendant who is jointly and severally liable "to any degree." *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 104, 841 P.2d 1300 (1992). As a result, if default judgment is entered against a co-defendant, then a non-defaulting defendant who later has judgment entered against it would be jointly and severally liable for the default judgment if the plaintiff is fault-free.

There are several serious problems with this scenario, which have not been clearly addressed by Washington courts, but which the United States Supreme Court recognized in *Frow v. De La Vega*, 82 U.S. 552 (1872).

> If the court in such a case as this lawfully can make a final decree against one defendant separately, on the merits, while the cause was proceeding undetermined against the others, then this absurdity might follow: there might be one decree of the court sustaining the charge of joint fraud committed by the defendants; and another decree disaffirming the said charge, and declaring it to be entirely unfounded, and dismissing the complainant's bill. ... Such a state of things is unseemly and absurd, as well as unauthorized by law.

Id. at 554. Other federal courts have held that consistent damages awards "are essential among joint tortfeasors ...

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[o]therwise, plaintiffs armed with joint and several liability on a single claim could seek to execute on a larger damage award from a party against whom the court awarded a much smaller damage verdict." *Hunt v. Inter-Globe Energy, Inc.*, 770 F.2d 145, 148 (10th Cir. 1985); *see also Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc.*, 722 F.2d 1319, 1324 (7th Cir. 1983).

As recognized by these federal courts, entry of default judgment against a defendant who has not appeared and answered can lead to prejudice to a non-defaulting defendant, as well as other unacceptable results, particularly where joint and several liability is at issue. For example:

- The non-defaulting defendant could be jointly and severally liable for a judgment that is entered against a defaulting defendant early in the case, before the non-defaulting defendant has had an opportunity to complete discovery or adequately prepare a defense. Therefore, assuming that a non-defaulting co-defendant were permitted to present evidence at a damages hearing related to a default judgment, that defendant likely would not be as prepared to address damages as it would be at a trial following complete pre-trial discovery.
- Certain facts could be "deemed admitted" as a result of a judgment entered against the defaulting party that could prejudice a non-defaulting defendant at trial or lead to jury confusion. In one product liability case in which I represented the manufacturer, a default judgment against the owner of the product would have deemed admitted the factual allegation that the owner "knew the product was dangerous but failed to warn of this danger." A deemed admission on the part of the co-defendant that the product was dangerous plainly would prejudice the manufacturer in a product liability suit.
- The jury could reach a liability decision that contradicts the default judgment entered against the co-defendant.
- The jury could reach a damages decision that contradicts the damages found by the court following the default damages hearing.
- The damages hearing necessary to enter default judgment against the co-defendant would be duplicative of trial and would waste the court's and the parties' time and resources.

For all of these reasons, it is essential to have a plan of action in place should a plaintiff seek default judgment against one or more of your client's co-defendants.

3. Recommended Strategies for Avoiding Joint and Several Liability for a Defaulting Co-Defendant.

The following are strategies for avoiding default judgment against a co-defendant that I have successfully employed when my clients faced potential joint and several liability with a defaulting co-defendant.

a. Ask for an Appearance and an Answer.

Sometimes avoiding the entry of a default judgment against a co-defendant can be as simple as placing a call to co-defense counsel. Often a default judgment occurs because the attorney representing the party either does not realize that the answer deadline has passed or has failed to appear due to an oversight. If it looks like a co-defendant's deadline to answer is approaching and the co-defendant has not appeared, a telephone call to notify the co-defendant's attorney that the case is at risk of default can prompt an appearance and answer, avoiding the risk of default judgment altogether.

If the defaulting co-defendant is not represented, you can call the party directly to inform him or her that an order of default could be entered. However, in this circumstance you must exercise extreme care to assure that your contact with the defaulting party does not run afoul of RPC 4.2 or 4.3.

b. Explain Your Position to the Court Early and Often.

Entry of an order of default might not negatively impact a non-defaulting defendant, unless that defendant has some reason to want the co-defendant to be able to defend itself against the lawsuit. Nevertheless, I typically file a brief response to a request for an order of default against a co-defendant stating my client does not object to an entry of an order of default, but also noting that my client *will* object to any attempt to have default judgment entered against the co-defendant due to the risk of joint and several liability and the potential inconsistencies between the default judgment and the jury's verdict.

If the plaintiff seeks a formal entry of default judgment against the defaulting defendant, I file a more formal and detailed brief outlining the prejudice my client will experience and the other inherent problems that exist when default judgment is entered against a defendant where joint and several liability is at issue. I cite *Frow* and related cases in support of my argument. Courts generally find such arguments persuasive and have declined to enter default judgment against my clients' co-defendants when joint and several liability potentially was at issue.

c. Provide the Court with a Trial Procedure for Dealing with a Defendant Against Whom a Default Order Has Been Entered.

The court might have concerns regarding how trial will proceed when a default order, but not a default judgment, has been entered against a co-defendant. First, make sure the court understands that entry of a default order means only that the defaulting defendant may not

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Should Juries Be Informed of the Consequences of Their Apportionment Decisions?

by Ian Birk and Lorraine Lewis Phillips

I. Introduction

The jury, as the trier of fact, traditionally determines: 1) liability; 2) the amount of damages; and 3) the percentage of fault attributable to each party. However, courts generally do not instruct juries on the effect of their decisions. Thus, jurors generally are not told that, as a consequence of the apportionment of fault, a 1% at-fault defendant could pay 100% of the judgment, or that assigning 1% fault to the plaintiff could destroy joint and several liability. *Should* juries be informed of the consequences of their apportionment decisions?

II. Joint and Several Liability in Washington

Under common law, multiple tortfeasors were jointly and severally liable for the entire harm and the injured party could sue one tortfeasor and recover all of his or her damages, without naming the other tortfeasors. Joint and several liability arose from "[t]he cornerstone of tort law [which] is the assurance of full compensation to the injured party." *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 236, 588 P.2d 1308 (1978). The Washington Supreme Court held: "[s]o long as each tortfeasor's conduct is found to have been a proximate cause of the indivisible harm, we can conceive of no reason for relieving that tort-feasor of his responsibility to make full compensation for all harm he has caused the injured party." *Id.* Contributory negligence by a plaintiff was a complete bar to recovery.

In 1973, Washington adopted comparative negligence, which permits a plaintiff to recover damages even though he or she may also be partially at fault. 1973 Wash. Laws, 1st Ex. Sess., ch. 138, § 1, codified at RCW 4.22.050-.015.[1] In 1981, the legislature established the right to contribution between tortfeasors. 1981 Wash. Laws, ch. 27, §§ 12–14, codified at RCW 4.22.040-.060. Then, the Washington legislature enacted the Tort Reform Act of 1986 and "generally abolishe[d]" joint and several liability. *Kottler v. State*, 136 Wn.2d 437, 446, 963 P.2d 834 (1998). The stated purpose of the Tort Reform Act of 1986 was "to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for persons injured through the fault of others is available." 1986 Wash. Laws, ch. 305, § 100. Under RCW 4.22.070(1), several liability is the general rule. However, there is joint and several liability among defendants against whom judgment is entered if the plaintiff is without fault. RCW 4.22.070(1)(b); *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 294, 840 P.2d 860 (1992).

III. Apportionment Situations

Joint and several liability matters most when a plaintiff asserts claims against two or more defendants, at least one of whom has insufficient insurance coverage or assets with which to satisfy the plaintiff's claims. Whether the plaintiff is at fault controls both

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Dealing with a Defaulting Co-Defendant when Joint and Several Liability Is at Issue *from previous page*

appear and defend at trial; it does not deem any of plaintiff's factual or legal allegations admitted. After clarifying this, I have successfully argued that the defendant against whom a default order has been entered should be treated as a *de facto* "empty chair" at trial. This means that the defendant's name will appear on the jury verdict form and that the other parties to the lawsuit may argue about the defaulting defendant's fault (or lack of fault) and plaintiff's damages (or lack of damages), but that the defaulting defendant may not appear to defend itself at trial. The only practical difference between a defaulting defendant and a true "empty chair" defendant is that, should the jury determine that the defaulting defendant is liable for plaintiff's damages, it will result in a binding judgment against the defaulting party (and potential joint and several liability with any co-defendants also found to be at fault).

d. Do Not Let the Plaintiff Misuse a Default Order or Default Judgment.

In one case, the plaintiff obtained a default order, but attempted to use it as a default judgment, by asking the court to deem that certain facts had been admitted by virtue of the court's entry of the default order. My client objected, clarifying that the effect of a default order was that the defaulting defendant could not defend itself against the lawsuit. Because no default judgment has been entered (and should not be entered for the reasons stated above in Section 2), no facts had been deemed admitted for any purpose.

Similarly, should the court for some reason enter a default judgment against a co-defendant, make certain that *your client* is not precluded from arguing against any and all facts asserted in the plaintiff's complaint. If your client has appeared and answered, the fact that a default has been entered against a co-defendant should not be used to prevent your client from presenting a full and complete defense to the court and the jury.

Kasey Huebner is an attorney with Mills Meyers Swartling in Seattle. She recently taught Civil Procedure II at the University of Washington School of Law. Her practice focuses on tort and product liability, as well as employment law.