Lawyers (and judges) confused by default judgments

By Mark Wagner

In California, if a party does not file a timely responsive pleading to a lawsuit (e.g., answer or demurrer), a default can be entered by filing an Application to Enter Default. After entry of default, the plaintiff then has to "prove up" the default in court and allow the judge to enter default judgment, though there are certain cases that allow default judgment by the clerk (e.g., contract collection cases with fixed amounts). Despite attempts to streamline the process, appellate courts have repeatedly demonstrated that lawyers (and trial judges) are often confused by the rules of default proceedings.

To ensure that a defendant has notice of maximum potential liability (a due process right as held by the state Supreme Court), a plaintiff seeking monetary damages must state the amount sought in the complaint. Code of Civil Procedure Section 425.10(a)(2). The exceptions to the rule are that a plaintiff may not state the amount of damages sought in a personal injury or wrongful death case, or the amount of punitive damages sought. Section 425.10(b). Instead, Sections 425.11 and 425.115 provide methods for satisfying due process while not violating these exceptions. In a personal injury or wrongful death action, Section 425.11(b) provides that a plaintiff may set forth the nature and amount of damages in a statement. As for punitive damages, Section 425.115(b) provides that the plaintiff can preserve the right to seek punitive damages on a default judgment by serving the defendant a statement identifying the amount of punitive damages the plaintiff intends to seek.

Properly stating the amount of damages in a complaint or in the permissible statements is crucial because the law is clear that in default proceedings the relief granted to the plaintiff cannot exceed those amounts. A default judgment greater than the amount sought is void as beyond the trial court's jurisdiction. Moreover, when a statement of damages is required but not served, the underlying entry of default is invalid. Accordingly, the plaintiff must serve the statements on the defendant before a default may be taken. *Van Sickle v. Gilbert*, 196 Cal. App. 4th 1495 (2011). Further, the state Supreme Court has held that a defendant is entitled to a reasonable period of time after the statements are served before default may be entered. *Schwab v. Rondel Holmes, Inc.*, 53 Cal. 3d. 428 (1991). Thus, 30 days notice is not required like a complaint, but service a few days before default has been repeatedly held insufficient.

In *Gil Kim v. Westmoore Partners, Inc.*, 201 Cal. App. 4th 267 (2011), the Court of Appeal made clear that a statement of damages cannot be relied upon to establish monetary damages except in cases of personal injury or wrongful death. The court noted that in all other cases, when recovering damages in a default judgment, the plaintiff is limited to the damages specified in the complaint. In other words, the plaintiff must be correct in where and how the damages are stated, even if there is a combination of types of damages, and thus cannot just use a statement to plead all damages.

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The requirements for default and default judgments apply even when the default is entered as a discovery sanction. If the court strikes an answer and enters default, the rules to obtain a default judgment are the same. *Greenup v. Rodman*, 42 Cal. 3d 822, 826 (1986). In *Greenup*, the Supreme Court concluded that the due process notice requirement applies even if the defendant willfully committed discovery abuses. The dissent strongly disagreed, however, indicating that public policy did not support such a ruling. Subsequent cases have unfortunately re-affirmed that the same rules apply in defaults through discovery abuses. See e.g., *Electronic Funds Solutions, LLC v. Murphy*, 134 Cal. App. 4th 1161,1175 (2005); *Van Sickle*, 196 Cal. App. 4th at 1521.

In *Van Sickle*, after issuing its ruling, the court provided advice to trial courts and lawyers to help avoid further confusion and more wasting of resources. The court stated that when trial courts are faced with a request to strike a defendant's answer as a terminating sanction, they should determine whether the plaintiff will be able to obtain a valid default and default judgment if the sanction is imposed. Otherwise, judicial resources may be wasted because the default and/or default judgment cannot stand, and the defendant may end up being entitled to simply file a new answer — something that repeatedly happens. The court suggested that trial courts inquire about whether the plaintiff has served a statement of damages on the defendant, and to possibly require proof of service before granting the requested terminating sanction. It also advised moving parties should simply provide this to courts when moving for terminating sanctions.

While the Legislature might have thought these rules seem simple, obviously confusion still occurs. This is the reason appellate courts are trying to provide guidance — so default judgments are not entered and then reversed upon appeal. Still, confusion occurs. For example, in employment cases where there are components that involve emotional distress damages (i.e., personal injury damages), do the damages need to be in the complaint or in a statement of damages? Many practitioners disagree. Choosing wrong could result in a default that is worth zero or that is vacated. Therefore, it is a better practice in all such cases that involve any type of personal injury damages to serve a statement of damages (and for punitive damages) with the complaint so that at least 30 days go by before trying to get a default. For other types, it is best to state the amount of damages as much as possible in the complaint, or at least put a minimum amount to put the defendant on notice. If there is a combination of types of damages, the safest way is to include all non-personal injury and punitive damages in the complaint, and the rest in the permissible statements, and again serve them with the complaint. Even if you think the defendant will answer, a discovery dispute may turn into a terminating sanctions order, and you do not want to have a default that is worth zero because you did not properly allege damages.

The best solution is for the Legislature to make certain changes. It should abandon the prohibition on stating the types of damages in complaints — it makes no practical sense to simply require it be stated in a separate form. Plaintiffs would know to put all damages in the complaint, and there would be no issue of how long the defendant was on notice.

Another option is to adopt a two-step default process, like some other states have implemented. The first step would be to get a default on the issue of liability. Then, at the time for the hearing on default-judgment to prove the damages, the defendant would have an opportunity to contest damages. Even better, this right could only be permitted if the plaintiff failed to allege proper damages in a complaint and/or the statements. It would avoid letting a defaulting defendant off on the issue of liability due to a technicality.

At the very least, the Legislature should abandon the rule that a default as the result of discovery sanctions is subject to the same rules. If a defendant violates the discovery rules (which usually involves refusing to provide information), they should lose the right to contest liability and damages, and the judge could decide if the damages are appropriate during the "prove up" hearing. This would serve as a strong incentive to avoid discovery abuses and avoid rewarding an abusive party.

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