

RESOLUTION 10-08-2002

DIGEST

Relief from Default on Insurer's Admission of Mistake

Amends Code of Civil Procedure section 473 to provide that if an insurer swears to its mistake or neglect, the court must vacate a resulting default.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

Reasons:

This resolution amends Code of Civil Procedure section 473 to provide that if an insurer swears to its mistake or neglect, the court must vacate a resulting default. This resolution should be disapproved because carriers are more likely to default abusively than lawyers are.

Courts generally have discretion to vacate defaults for mistake, inadvertence, surprise, or neglect, but they *must* do so if the request is made within six months after judgment and supported by counsel's admission of error. (Code Civ. Proc., § 473, subd. (b).) However, as court officers subject to discipline and concerned about professional standing, few lawyers would routinely default for strategic purposes and accept blame as the price of automatic absolution.

For insurers, however, there is no comparable disincentive to "game" the system to delay paying claims or to wear down the opposition. Liability for compensatory legal expenses and a discretionary \$1,000 penalty (Code of Civ. Proc., § 473, subd. (c)(1)) often would not deter calculated decisions to default, fully intending to compel relief on deadline eve with a perfunctory "mea culpa." For an example of offensive insurer behavior, see *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, which the proponent would legislatively overrule.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Code of Civil Procedure section 473 as follows:

- 1 (a) (1) The court may, in furtherance of justice, and on any terms as may be proper, allow a
- 2 party to amend any pleading or proceeding by adding or striking out the name of any party, or
- 3 by correcting a mistake in the name of a party, or a mistake in any other respect; and may,
- 4 upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its
- 5 discretion, after notice to the adverse party, allow, upon any terms as may be just, an
- 6 amendment to any pleading or proceeding in other particulars; and may upon like terms allow
- 7 an answer to be made after the time limited by this code.
- 8 (2) When it appears to the satisfaction of the court that the amendment renders it necessary,
- 9 the court may postpone the trial, and may, when the postponement will by the amendment be
- 10 rendered necessary, require, as a condition to the amendment, the payment to the adverse party

11 of any costs as may be just.

12 (b) The court may, upon any terms as may be just, relieve a party or his or her legal
13 representative or insurer from a judgment, dismissal, order, or other proceeding taken against
14 him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application
15 for this relief shall be accompanied by a copy of the answer or other pleading proposed to be
16 filed therein, otherwise the application shall not be granted, and shall be made within a
17 reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or
18 proceeding was taken. However, in the case of a judgment, dismissal, order, or other
19 proceeding determining the ownership or right to possession of real or personal property,
20 without extending the six-month period, when a notice in writing is personally served within the
21 State of California both upon the party against whom the judgment, dismissal, order, or other
22 proceeding has been taken, and upon his or her attorney of record, if any, notifying that party
23 and his or her attorney of record, if any, that the order, judgment, dismissal, or other
24 proceeding was taken against him or her and that any rights the party has to apply for relief
25 under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after
26 service of the notice, then the application shall be made within 90 days after service of the
27 notice upon the defaulting party or his or her attorney of record, if any, whichever service shall
28 be later. No affidavit or declaration of merits shall be required of the moving party.

29 Notwithstanding any other requirements of this section, the court shall, whenever an application
30 for relief is made no more than six months after entry of judgment, is in proper form, and is
31 accompanied by an attorney's or insurer's sworn affidavit attesting to his or her mistake,
32 inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against
33 his or her client or insured, and which will result in entry of a default judgment, or (2) resulting
34 default judgment or dismissal entered against his or her client or insured, unless the court finds
35 that the default or dismissal was not in fact caused by the attorney's or insurer's mistake,
36 inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an
37 attorney's or insurer's affidavit of fault, direct the attorney or insurer to pay reasonable
38 compensatory legal fees and costs to opposing counsel or parties. However, this section shall
39 not lengthen the time within which an action shall be brought to trial pursuant to Section
40 583.310.

41 (c) (1) Whenever the court grants relief from a default, default judgment, or dismissal based
42 on any of the provisions of this section, the court may do any of the following:

43 (A) Impose a penalty of no greater than one thousand dollars (\$1,000) upon an offending
44 attorney, insurer or party.

45 (B) Direct that an offending attorney pay an amount no greater than one thousand dollars
46 (\$1,000) to the State Bar Client Security Fund.

47 (C) Grant other relief as is appropriate.

48 (2) However, where the court grants relief from a default or default judgment pursuant to this
49 section based upon the affidavit of the defaulting party's attorney or insurer attesting to the
50 attorney's or insurer's mistake, inadvertence, surprise, or neglect, the relief shall not be made
51 conditional upon the attorney's or insurer's payment of compensatory legal fees or costs or
52 monetary penalties imposed by the court or upon compliance with other sanctions ordered by

53 the court.

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55 (d) The court may, upon motion of the injured party, or its own motion, correct clerical
56 mistakes in its judgment or orders as entered, so as to conform to the judgment or order
57 directed, and may, on motion of either party after notice to the other party, set aside any void
58 judgment or order.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

Existing Law: Code of Civil Procedure section 473 contains the well-known mandatory set aside procedure for a default judgment to be set-aside within six months based upon an attorney's affidavit of fault. The case of *Rogalski v. Nabers Cadillac* (1992) 11 Cal.App.4th 816, 820-821 [14 Cal.Rptr.2d 286] analogized the relationship between an insured and its carrier to the relationship between a litigant and his or her attorney and implied that where the courts have long afforded relief to litigants whose attorney's neglect amounts to "positive misconduct" toward the client, so should relief be granted based upon an insurer's neglect. However, the case of *Stafford v. Mach* (1998) 64 Cal.App. 4th 1174, reached an opposite conclusion holding that nothing in the *Rogalski* court's reasoning supported the leap of logic that relief must be granted to an insurer based upon an insurer's affidavit of its own fault.

This Resolution: This resolution would make the mandatory set-aside procedure based upon attorney's affidavit of fault equally available to insured who provides an affidavit of fault from his insurer. The court would have discretion to impose sanctions upon the insurer when granting the requested relief.

The Problem: An insured, served with a complaint, may tender that complaint to his or her insurer expecting the insurer to retain counsel and timely defend the insured's interest. Insurance claims representatives commonly handle hundreds of claims at any given time and for any number of reasons may fail to take appropriate action, thereby resulting in an insured's default. If the insurer should later deny coverage, an insured may be left with a default judgment against him and no avenue for relief other than new litigation against his or her own insurer. This proposed resolution would provide a mandatory set-aside provision applicable to insurer that is equivalent to the mandatory set-aside provision applicable to a client's attorney, based upon a declaration of fault. The rationale underlying the mandatory set-aside provision is that the "sins of an attorney" should not be imposed upon his or her client and this rationale is equally applicable to the "sins of an insurer."

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

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RESPONSIBLE FLOOR DELEGATE: W. Stuart Home, III

COUNTERARGUMENT

ORANGE COUNTY BAR ASSOCIATION

The fundamental problem with this proposal is it gives special status to an insurance carrier. The insurer is not subject to service of process, is not an agent for service of process, and, unless it accepts coverage responsibility, is off the hook completely, save and except for its own bad faith. This resolution gives insurers an out after failing to comply with the statutory duty to timely and promptly investigate claims and provide defense of claims. Unless and until insurers are willing to accept or be subject to service of process and be directly responsible for their insureds, as the wayward attorney under Code of Civil Procedure Section 473 is to his or her client, this resolution cannot be acceptable.

This resolution elevates an insurer, which has no specific liability to a client for allowing default to be entered against the insured, to the position or equal of legal representative, without the concomitant responsibility. It also provides unwarranted excuse for insurers to delay timely processing of claims tendered by their insured, to the detriment of the insured, as well as the party laying claim against the insured. In short, this resolution gives the insurance industry one more opportunity or excuse to fail in its statutory duties under the Insurance Code. For all these reasons, the resolution should be defeated.