A Day Late and a Dollar Short:
Beware of Default Judgments in Wisconsin!

by Alon Stein

A Comparison Between Illinois and Wisconsin as to How Motions to Vacate Default Judgments Within 30 Days are Evaluated

Your client is served with a Complaint and Summons for a case pending in the Law Division of the Circuit Court of Cook County. The Summons provides that the client has 30 days to file an Answer or otherwise file an Appearance and pay the required fee. Your client sends you a copy of that Complaint, but 45 days after service. The client is technically in default. Is that a problem?

Similarly, your client is served with a Complaint and Summons for a case pending in the Circuit Court of Milwaukee County in the State of Wisconsin. Your client visits you one day after an Answer is due and tells you about the Complaint. Is that a problem?

The short answer is that, for Illinois, it is not a huge concern but in Wisconsin, it is a major concern. This is because Wisconsin has no rule that allows default judgments to be vacated with ease if filed within 30 days, as in Illinois. The client served with the Wisconsin lawsuit should be very concerned because Wisconsin has no mechanism similar to a "2-1301 Motion."

2-1301 Motions to Vacate Default Judgments in Illinois

In Illinois, courts routinely grant motions to vacate when brought within 30 days. Indeed, Section 2-1301(e) of the Code of Civil Procedure provides:

> The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable.

735 ILCS 5/2-1301(e). It has long been held that, in considering whether or not "to set aside a default judgment, it is only required that a just result be achieved and the question is whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits." *Patrick v. Burgess*, 25 Ill. App. 3d 1083 (2d Dist. 1975).

When ruling on a motion to vacate, the predominant concern is whether substantial justice is being done between the parties and whether it is reasonable under the circumstances to proceed to a trial on the merits. Larson v. Pederson, 349 Ill. App. 3d 203, 207-08 (2d Dist. 2004); *In re Marriage of Ward*, 282 Ill. App. 3d 423 (1st Dist. 1996). The Illinois Supreme Court explained the importance of the policy for granting motions to vacate defaults filed within 30 days in *In re Haley,* 2011 IL 110886, ¶¶ 57, 69:

> Where a litigant seeks to set aside a default under section 2–1301(e), which governs before final judgment has been entered or within 30 days thereafter, the litigant need not necessarily show the existence of a meritorious defense and a reasonable excuse for not having timely asserted such defense. Rather, the overriding consideration is simply whether or not substantial justice is being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits.

Where, as here, a request to set aside a default has been made before final order or judgment has been entered in a case, section 2–1301(e) provides that the decision as to whether the default should be set aside is discretionary. 735 ILCS 5/2–1301(e) (West 2008). In exercising that discretion, courts must be mindful that entry of default is a drastic remedy that should be used only as a last resort. The law prefers that controversies be determined according to the substantive rights of the parties. The provisions of the Code of Civil Procedure governing relief from defaults are to be liberally construed

toward that end. When a court is presented with a request to set aside a default judgment under section 2–1301(e), the overriding consideration, as we have already observed, is simply whether or not substantial justice is being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits.

It should also be noted that a trial court's determination to grant or deny a motion under 735 ILCS 5/2-1301(e) lies within its sound discretion and will not be disturbed on appeal absent an abuse of discretion **or a denial of substantial justice**. *Jackson v. Bailey*, 384 Ill. App. 3d 546, 548 (1st Dist. 2008) [emphasis added]. Thus, in Illinois, vacating a default judgment within 30 days is a relatively easy thing to do. It is almost unheard of to have the entry of a default judgment not vacated for being a couple of days late if a motion to vacate the default is brought within 30 days. This is very different in Wisconsin.

Motions to Vacate Default Judgments in Wisconsin

In Wisconsin, if a party is one day late, a default judgment will most likely be entered, unless "excusable neglect" is found. Specifically, Wis. Stat. § 801.15(2) provides:

> "(2)(a) When an act is required to be done at or within a specified time, the court may order the period enlarged but only on motion for cause shown and upon just terms. The 90 day period under s. 801.02 may not be enlarged. If the motion is made **after the expiration of the specified time,** it shall not be granted unless the court finds that the failure to act was the result of **excusable neglect.** The order of enlargement shall recite by its terms or by reference to an affidavit in the record the grounds for granting the motion."

[emphasis added]

In addition, Wis. Stat. § 806.07 also covers motions to vacate:

> 806.07. Relief from judgment or order.
> (1) On motion and upon such terms as are just, the court . . . may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
> (a) Mistake, inadvertence, surprise, or excusable neglect;
> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15 (3);
> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
> (d) The judgment is void;
> (e) The judgment has been satisfied, released or discharged;
> (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
> (g) It is no longer equitable that the judgment should have prospective application; or
> (h) Any other reasons justifying relief from the operation of the judgment.

Whether there was excusable neglect is a legal conclusion determined by applying "interests of justice factors," on a case by case basis, to make that determination. In Wisconsin, the "interests of justice factors" include whether: (1) the party seeking an enlargement of time has acted in good faith; (2) the opposing party has been prejudiced by the delay; (3) the party promptly sought to remedy the situation caused by the failure to file timely; (4) the failure to file timely was the result of a conscientious, deliberate, and well-informed choice; (5) the party seeking enlargement received the effective assistance of counsel; (6) whether there was a consideration of the merits; and (7) whether the claim has merit, but for the failure to timely file. *See Hedtcke v. Sentry Ins. Co.,* 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982); *Rutan v. Miller,* 213 Wis. 2d 94, 101-02, 570 N.W.2d 54 (Ct. App. 1997); *State Ex Rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 552-53, 363 N.W.2d 419 (1985); *Binsfeld v. Conrad*, 2004 WI App 77, 272 Wis. 2d 341, 679 N.W.2d 851 (Ct. App. 2004); *see also Miller v. Hanover, Ins.* 2010 WI 75; 326 Wis. 2d 640; 785 N.W.2d 493, ¶ 36 (2010).

Thus, to determine whether there was excusable neglect, the decision-maker must consider a wide range of factors—the totality of circumstances—including all of the above factors bearing on the equities in the matter. *See Casper v. American International; Miller v. Hanover,* 2010 WI 75, 326 Wis. 2d 640 (2010).

While the Wisconsin Supreme Court has held in *Casper v. American International*, 2011 WI 81, ¶ 38, 336 Wis. 2d 267, 286, 800 N.W.2d 880 (2011) that "a court must also consider the interests of justice implicated by the grant or denial of the

motion and what effects such a ruling would have on the proceedings," in practice, the vacating of default judgments within 30 days of entry has been anything but routine.

One example of how a party's case could be in trouble if an Answer is not filed on time is the case *Hedtcke v. Sentry Ins. Co.*, 109 Wis.2d 461 (1982). In *Hedtcke*, the Wisconsin Supreme Court reversed an order that vacated the default judgment when the Defendant was only ***12 days late*** in filing an Answer to the Complaint. It also reversed the order granting the motion to extend the time for the Defendant to answer, and to allow the already-filed answer to be accepted.

Therefore, when handling a case in Wisconsin, it is extremely important to file an Appearance (called a Notice of Retainer in Wisconsin) along with an Answer on time, or risk getting defaulted and not being able to get that default judgment vacated. Arguing "But it is only a day late!" is not grounds to vacate the default judgment in Wisconsin. Indeed, in *Hedtke*, the defendant was only 12 days late. It is extremely important to be aware of differences in civil procedure between Illinois and Wisconsin when practicing in Wisconsin, because the differences can be deadly to a case.

Alon Stein is Founder of Stein Law Offices of Illinois and Wisconsin.