

## Message From The Firm

We are excited to share recent changes at the Firm. The most obvious is our name: we are now Reish & Reicher. We've also restructured our practice groups to better serve our clients' needs. We now have eight practice groups, each chaired by one or more attorneys with at least 25 years of experience. We have recently included a Financial Services practice.

What hasn't changed? Our commitment to excellence, to providing legally sound yet practical solutions to client problems, and to personalized service that has been a cornerstone of the firm since it was founded over 20 years ago.

Our business litigation practice remains vibrant. As always, our litigation attorneys represent companies and affluent individuals in all aspects of business litigation through arbitration, trial and appeal, remaining mindful of alternative dispute resolution and potential settlement opportunities.

This edition focuses on things that our clients should do to protect their interests at the onset of litigation. In our first article, Gary Wexler discusses an all-too-frequent mistake of a client ignoring a summons and complaint. The consequences of failing to respond to a summons and complaint include suffering a default judgment for the full amount of the damages claimed in the complaint. In the case discussed, our firm successfully set aside a default judgment in the amount of \$10 Million after a new client and previous counsel failed to respond to a complaint.

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## \$10 Million Default Judgment Set Aside: Never Ignore a Summons and Complaint



*By Gary Wexler, Esq. (GaryWexler@Reish.com)*

Nobody wants to be sued. However, putting your head in the sand and ignoring service of a summons and complaint, or otherwise failing to timely respond, can have disastrous repercussions. Generally speaking, a party, once served with a summons and complaint, must respond within thirty (30) days. Failure to respond may result in entry of default and a default judgment for the full amount of the damages claimed in the complaint.

We recently represented a California corporation with substantial net worth owned, controlled and operated by foreign nationals who sought our help after suffering entry of a \$10 million (\$10,000,000) default judgment.

The corporation's representatives admitted that a summons and complaint had been "delivered" to the main office, but they had taken the position that the court "lacked jurisdiction," that service was "improper," and that the corporation therefore need not respond to the complaint. We quickly learned that the source of that advice was former counsel. We also learned that the corporation had subsequently received by mail copies of a request for entry of default, the default entered by the Court, the default judgment and an abstract of judgment. Neither the corporation nor the former attorney had taken any action.

We advised the corporation's representatives that the legal advice

from the prior attorney was erroneous (one should never ignore a summons and complaint). Upon receipt of service (even mere "delivery") of a summons and complaint, the recipient should note on a copy of the document served the date, time and place of service, upon whom service was made and the manner or method of service. The recipient should then immediately contact and make an appointment with competent counsel to (1) analyze the summons and complaint, and service issues (if any), (2) review the underlying facts, documents, witnesses, claims and defenses, (3) investigate the applicability of any insurance policies and (4) file and serve a response within the prescribed time.

If a recipient fails to file a response (*e.g.*, an answer, demurrer, motion to strike, motion to quash or other permitted response) within the prescribed time, and has not obtained a stipulation or court-order extending or excusing such filing, the recipient is technically in "default." Once a recipient is in default, the opposing party may request entry of a default by the court clerk. Entry of a default cuts off any right by the defaulted party to appear in the action. After a default has been entered against a party, the opposing party may apply for a judgment based on said default.

In the case of our client, the opposing party secured a default judgment in

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## Managing Electronically Stored Information



By Joe Faucher, Esq. ([JoeFaucher@Reish.com](mailto:JoeFaucher@Reish.com)) and  
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The last subject that we would ordinarily address in our newsletters is the court rules that govern litigation: the Federal Rules of Civil Procedure and, in California, the California Code of Civil Procedure. However, our clients cannot afford to ignore recent changes in these rules if there is any chance they may find themselves parties to litigation. The Federal rules originally introduced a new concept: Electronically Stored Information or ESI. On June 29, 2009, following the lead of the Federal rules, California also introduced rules concerning ESI as part of amendments to the California Code of Civil Procedure.

What do the changes mean for your business? The rules are intended to ensure that you comply with your duty to preserve ESI, such as e-mails and/or other electronic documents, during the discovery process in a lawsuit, i.e., when the litigants are required to produce evidence before trial. As such, the rules affect every business that stores any information or data in any kind of electronic format. That is, when you store data on computers, CDs, DVDs, disks, tapes or handheld devices, you are affected by these changes.

The rules apply to both plaintiffs and defendants in lawsuits. Indeed, the rules apply to you even if you are a non-party where, for example, you are required to respond to a simple subpoena for records. As such, you need to ensure that you are not only aware of these rules changes, but you are also taking the necessary steps to conform to them.

A detailed discussion of the rules and the differences between the federal and the California rules is beyond this newsletter.

There are, however, some critical points to keep in mind. First, parties should address discovery issues at the initial stages of the litigation and discuss, for example, how information is preserved, the types of electronic documents that exist, and the form in which the information will be produced (this is required under the federal rules). Second, the rules require parties to provide ESI that is “reasonably accessible,” such as current documents readily available on a computer, as compared to ESI that is “not reasonably accessible because of undue burden or cost.” Third, while the rules include a “safe harbor” provision (meaning that parties will not be sanctioned or punished by the Court if a party fails to produce information lost in “good faith”), “good faith” requires that a party take measures to prevent destruction of documents during the litigation.

How can one strike a balance between preserving evidence, while at the same time continuing the normal day-to-day operations of the business? There are a number of steps that you should consider implementing even before litigation strikes to efficiently and cost-effectively facilitate compliance with these rules:

1. Prepare a summary of the types of ESI you use in your business by listing all of the computer systems and describe the hardware and software programs you use to create and store information. Periodically update the list to ensure that it is current.
2. Review your retention and destruction policies with respect to documents. Take steps to insure that you are complying with your own internal policies, particularly in the event litigation arises. Retention periods can vary significantly depending on the types of records at

issue, especially in the employment arena.

- a) Are your retention and destruction policies reasonable and applied uniformly?
  - b) Are your retention and destruction policies strictly enforced? Any inconsistency can prove problematic if it can be shown that documents were destroyed for an illegitimate purpose.
  - c) How do you communicate your document retention and destruction policy to your employees?
  - d) Do you have a person in charge of making sure that your retention and destruction policies are implemented?
3. Consider storing electronic documents that contain highly sensitive and confidential information (which may be irrelevant to litigation) in a separate manner so that they can be easily retrieved and identified to avoid inadvertent production.
  4. If you don't already have one, consider a backup system for your electronic documents.

Should you have any question, please do not hesitate to contact us. ❖

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*In our second article, Joe Faucher and Pascal Benyamini address the obligation of the client to preserve Electronically Stored Information or “ESI” under the rules governing litigation in federal and state courts. The rules are intended to ensure that ESI such as e-mails and/or other electronic documents, are preserved. The client must not only be aware of these rules, but also take necessary steps to conform to them.*

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## Default Judgement

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the amount of \$10 million against the corporation. The corporation engaged our services after the opposing party initiated enforcement proceedings.

We determined that service of the summons and complaint was regular, and that the default and default judgment were properly entered. There are, however, procedures whereby the trial court may vacate a default and/or default judgment if the defaulted party establishes a proper ground for relief and follows the proper procedure within the statutory time limit. The applicable time limit varies depending upon the grounds for relief, which include, mistake, inadvertence, surprise or excusable neglect, in which event, relief is discretionary with the Court. Another ground (which we relied upon in this case) is an attorney sworn affidavit of fault. Whenever an application for relief from default and/or default judgment is made no more than six (6) months after entry of judgment, in proper form and accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise or neglect, the court shall vacate any resulting default

or default judgment, unless the Court finds that the default "was not, in fact, caused by the attorney's mistake, inadvertence, surprise or neglect.

We contacted the opposing counsel and proposed a stipulation to set aside the default and default judgment on the basis of an attorney's sworn affidavit of fault. Plaintiff resisted in an effort to preserve its \$10 million default judgment. We analyzed the available evidence, researched the applicable law and presented opposing counsel with evidence and law that, if our motion to set aside default and default judgment was granted and the case proceeded to trial, the corporation might well be able to defend the entire action. When opposing counsel balked, we proceeded with the motion. Prior to the time of hearing, we entered into settlement negotiations.

The case settled for approximately one percent (1.0%) of the amount of the default judgment. Because the default judgment already had been entered and an abstract of judgment filed, the motion had to be re-filed as a motion to set aside default and default judgment and enter a settlement agreement. Since good grounds existed and the motion was pursuant to stipulation, the Court granted the motion. Needless-to-say, our client

was extraordinarily pleased with the outcome.

The lessons to be learned are as follows:

- Don't ignore a summons and complaint because you think that it was improperly served, "delivered" or is otherwise defective.
- Upon receipt of a summons and complaint, note on a copy of the document served the date, time and place of service, upon whom service was made and the manner or method of service. The company should then immediately contact and make an appointment with competent counsel.
- Make sure that a response is filed within thirty days of services, or that there is a stipulation or order extending or excusing that date.
- If you or your attorney makes a mistake and you suffer a default and/or default judgment, there may still be legal avenues to help you.
- Don't wait after suffering a default and/or default judgment. Contact competent counsel immediately. ❖

## Around the Firm

**Speeches:** On March 26th, **Joe Faucher and Mike Vanic** presented "Issues in ERISA Litigation: Settlor Functions vs. Fiduciary Functions" to the Chubb Group of Insurance Companies in Los Angeles.

**Quotes:** **Mark Terman** was quoted in the articles "Benefits: Notification Deadlines Loom On New COBRA Subsidy," published on *Treasury&Risk.com* on April 1st; "Laid Off? Get Your COBRA Premiums Reduced," published on *MainStreet.com* on April 6th; and "Competing with a Former Employer," published in the *Los Angeles Times* on April 7th.

**Articles:** In the April and May issues of the California Furniture Manufacturers Association's *Furnishings Industry News*, **Pascal Benyamini** wrote the articles "Providing Make-Up Time To Your Employees: What You Should Know" and "Reductions in Workforce: Unpleasant, but Sometimes Unavoidable. Are You Prepared?" published respectively.

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