SAVING STATUTE

REPORT

(HB 2284)

Prepared by
Professor Maury Holland
University of Oregon School of Law
Reporter, Saving Statute Work Group

From
The Offices of the Executive Director
David R. Kenagy
and
Assistant Executive Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
November 22, 2002

Saving Statute Work Group[1] Report

I. Introduction: Defects with Current ORS 12.220

Oregon has had a saving statute, in substantially the same form, since statehood. Currently thirty-nine other states have savings statutes which significantly differ in their specifics.[2]

The current ORS 12.220 is in need of substantial amendment in order to overcome at least two important defects. The first of these is its failure to state that its application is limited to situations where the original action is dismissed on a *procedural* as opposed to a *substantive* ground, although it has been so interpreted by the relatively few appellate opinions that have construed it. See, e.g., Tikka v. Martin, 271 Or 287, 532 P2d 18 (1972) and Hatley v. Truck Ins. Exch., 261 Or 606, 494 P2d 1196 (1972). In other words, ORS 12.220 in its present form seems applicable to cases where its application would be futile because the claims and defenses asserted in the original action would be barred by *res judicata*. This anomaly might cause the provision occasionally to be overlooked in cases where its application would be appropriate.

The second defect of the existing statute is that it cannot be applied where the original action is dismissed on the procedural ground most likely to be obviable in connection with a new action and sufficient alias service, namely, dismissal for insufficiency of service of the summons and complaint. See ORCP 21A(5).

II. Purpose of a Saving Statute

The basic premise of a saving statute is that if an action is dismissed without prejudice on some ground not adjudicating its substantive merits and thus not giving rise to claim preclusion, the plaintiff should be entitled to reinstitute the same claim or claims against the same defendant or defendants in a new action whose commencement relates back to the date of filing of the original, dismissed action for purposes of any pertinent limitations period provided the new action is commenced with reasonable promptness following such dismissal. The rationale of saving provisions is that, if a defendant had actual notice of the original, dismissed action, whether by means of sufficient or insufficient service of the summons and complaint or otherwise, that notice fulfills the basic purpose of limitations periods by alerting the defendant

---

[1] This Work Group is comprised of: Prof. Dom Vetri, Chair, Mr. Don Corson, Mr. Joel DeVore, Hon. Don Dickey, and Mr. Dave Heynderickx, members. The Reporter is Professor Maury Holland.

[2] The U.S. Judicial Code also contains the following good example of a saving provision: "The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. § 1367(d).

that a given claim is, or claims are, being asserted against that defendant and that such alert persists for a reasonable time following the dismissal. Provided the plaintiff commences a new action on the same claim or claims against the same defendant or defendants within that time, and further provided the plaintiff is able to overcome whatever procedural defense led to dismissal of the original action, the fundamental policy or purpose of statutes of limitations is in no way offended by allowing the date of commencement of the new action to relate back to the date of filing of the original action.

ORS 12.220 has, of course, no application when adjudication of an action concludes with a judgment determining the merits of claims and defenses asserted therein since a subsequent action asserting the same claims and defenses would be barred by the doctrine of claim preclusion. But, when claims are dismissed on such procedural grounds as lack of personal or subject-matter jurisdiction, or insufficient service of the summons and complaint, the filing of the dismissed action is often followed by the defendant's getting actual notice of it within the 60 days allowed by ORS 12.020(2) by either sufficient or insufficient service or, on rare occasions, by some other means. In that event it seems only fair to give claimants an opportunity to refile the action within a reasonable time after the initial dismissal if the procedural defect which prompted that dismissal can be obviated and a second dismissal on that ground avoided. It should be noted, however, that amended ORS 12.220 does not deprive defendants in a new action of any substantive defense that was available to them in the original action.

III. Comments on Amended ORS 12.220

Amended[3] ORS 12.220 is intended to apply in any case where dismissal without prejudice of the original action is on a procedural ground not adjudicating the merits. An obvious example of such a ground is a dismissal for lack of personal jurisdiction over the defendant. See ORCP 21A(2). While a defendant's lack of amenability to personal jurisdiction in an Oregon court will seldom be obviable in a new action with alias service, sound principles of choice of law dictate that ORS 12.220 be applied by the courts of any other jurisdiction where the defendant might well be thus amenable in a new action on the same claim or claims commenced there. That is because, despite its superficial appearance as a rule of procedure, amended ORS 12.220 is in reality an integral component of Oregon's law of limitations, and thus should be applied according to its terms in any proceeding in state or federal court wherein that law governs as a matter of choice of law. Furthermore, as a matter of choice of law, amended ORS 12.220 should be applied in any case governed by Oregon limitations law even when the original action is dismissed in federal court or a state court other than Oregon's.[4]

An important difference between existing and amended ORS 12.220 is that the former is not, by its terms, applicable to cases where dismissal of the original action is on the procedural ground most likely to be obviable in a new action with alias service, which is dismissal for insufficiency of service. The reason it cannot be applied in that context is because it requires the original action to have been "commenced within the time prescribed therefor." ORS 12.020(2),

[3] "Amended," here and throughout, of course means "as proposed to be amended."

[4] See Hatley v. Truck Ins. Exch., 261 Or 606, 494 P2d 496 (1972) (existing ORS 12.220 applicable where original action dismissed by federal court for lack of subject-matter jurisdiction).

in turn, provides that, for an action to be "commenced," the complaint must be filed with the court and the complaint and summons must be served on the defendant within 60 days of filing. "Served" in this context clearly refers to service that is sufficient in accordance with ORCP 7D. It is for this reason that amended ORS 12.220 uses the word "filed" in lieu of existing ORS 12.220's "commenced." Of course, when the procedural ground for dismissal of the original action is other than insufficiency of service, the original action will have been "commenced" within the meaning of ORS 12.020, but it will necessarily also have been filed, thus making amended ORS 12.220 applicable to any procedural ground of dismissal without prejudice.

Among other situations amended ORS 12.220 is intended to deal with is the not uncommon one where a complaint is timely filed and the defendant is purportedly served with the summons and complaint within the 60 days permitted by ORS 12.020(2), but the action is subsequently dismissed when the court determines that service had been insufficient even though the defendant actually received the papers within that period, by which time the claim or claims asserted in the action have become time-barred. This occurs most frequently in connection with substituted service, ORCP 7D(2)(b), and office service, ORCP 7D(2)(c).

An apt illustration of this situation is afforded by Baker v. Foy, 310 Or 221, 797 P2d 349 (1990), where the server delivered the summons and complaint to the defendant's mother at what the plaintiff's lawyer reasonably believed, from information furnished by the defendant, was the defendant's residence. Despite the fact that the defendant apparently read the papers at that address within 60 days of the summons and complaint being filed, the action was ultimately dismissed for insufficiency of service, long after limitations had run against the claim, because it was found that the defendant no longer resided at his mother's address on the date of service. Under existing ORS 12.220 filing of a new action would have been futile, a result amended ORS 12.220 is intended to overrule. The latter would not, and constitutionally could not, allow a plaintiff to proceed against a defendant without having effected sufficient service, but would give plaintiffs an opportunity to do so by way of a new action in which sufficient alien service could be attempted. In most, though certainly not all, instances where service is found to have been insufficient, the defendant lives or works in Oregon, so the possibility that sufficient alias service can be accomplished within 180 days of dismissal of the original action, and within 60 days of the filing of a new action, will often be reasonably good.

Cases such as Baker, of which there are a considerable number, though correctly decided under existing law, constitute something of a rebuke to Oregon's civil justice system because they involve situations where litigants, often having meritorious, or at least triable, claims, are deprived of their day in court because of procedural mistakes by lawyers or servers against which they cannot protect themselves, even when those mistakes do not appear to have been prejudicial to the rights of defendants. There is no way totally to eliminate such cases, but the effect of amended ORS 12.220 would be to reduce their number.

Another anticipated benefit to Oregon's justice system from amended ORS 12.220 would almost certainly be to reduce the inordinate number of cases where the single issue on appeal is sufficiency of service, and thereby also reduce the delays occasioned in getting to trial when trial court dismissals for insufficiency of service are reversed and the cases are remanded. It would do so because, rather than appealing trial court rulings setting aside service, plaintiffs' lawyers often could, and presumably would, attempt to effect sufficient alias service when that is feasible because they would know that the new action would not be subject to a limitations defense.

Amended ORS 12.220 provides for a period of 180 days following dismissal of the original action during which a new action relates back to filing of the original action for limitations purposes, as opposed to the one-year period provided by existing ORS 12.220. This change is made because the shorter period is regarded as a sufficient time within which the plaintiff should be able to commence a new action and rectify whatever procedural problem prompted the original dismissal, assuming it can be rectified, and also to be a reasonable time during which defendants must cope with the possibility of renewed litigation of dismissed claims. It also makes amended ORS 12.220 consistent with ORS 72.7250 in this respect.

The language of existing ORS 12.220 concerning heirs and personal representatives of plaintiffs who die following dismissal of the original action is omitted from amended ORS 12.220. This omission does not reflect any intent to deny availability of this procedure to heirs or personal representatives of deceased plaintiffs, but is prompted by belief that their rights are adequately dealt with by ORCP 34 and ORS 115.305.