

as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

H(3) Effect of failure to deny. Allegations in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Allegations in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

I. SPECIAL PLEADING RULES

I(1) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

I(2) Judgment or other determination of court or officer, how pleaded. In pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading is bound to establish on the trial the facts conferring jurisdiction.

I(3) Private statute, how pleaded. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

I(4) Corporate existence of city or county and of ordinances or comprehensive plans generally, how pleaded. (a) In pleading the corporate existence of any city, it shall be sufficient to state in the pleading that the city is existing and duly incorporated and organized under the laws of the State of Oregon. In pleading the existence of any county, it shall be sufficient to state in the pleading that the county is existing and was formed under the laws of the State of Oregon.

(b) In pleading an ordinance, comprehensive plan or enactment of any county or incorporated city, or a right derived therefrom, in any court, it shall be sufficient to refer to the ordinance, comprehensive plan or enactment by its title, if any, otherwise by its commonly accepted name, and the date of its passage or the date of its approval when approval is necessary to render it effective, and the court shall thereupon take judicial notice thereof. As used in this subsection "comprehensive plan" has the meaning given that term by ORS 197.015.

I(5) Libel or slander action. (1) In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the plaintiff shall be bound to establish on the trial that it was so published or spoken.

(2) In the answer, the defendant may allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages, and whether he prove the justification or not, the defendant may give in evidence the mitigating circumstances.

I(6) Property distrained, answer in action for. In an action to recover the possession of property, distrained doing damage, an answer that the defendant or person by whose command the defendant acted was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good without setting forth the title to such real property.

I(7) Capacity. It is not necessary to allege the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the pleader shall do so by specific negative allegation, which shall include such supporting particulars as are peculiarly within the pleader's knowledge, or by motion under Rule J(1), and on such issue the party relying upon such capacity, authority or legal existence shall establish the same at trial.

I(8) Official document or act. In pleading an official document or official act it is sufficient to allege that the document was issued or the act done in compliance with law.

I(9) Recitals and negative pregnant. No allegations in a pleading shall be held insufficient on the grounds that they are pled by way of recital rather than alleged directly. No denial shall be held insufficient to raise an issue on the grounds that it contains a negative pregnant.

I(10) Fictitious parties. When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.

J. DEFENSES AND OBJECTIONS - HOW PRESENTED - BY PLEADING OR MOTION - MOTION FOR JUDGMENT ON THE PLEADINGS

J(1) How presented. Every defense, in law or fact, excepting the defense of improper venue, to a claim for relief in any pleading, whether a complaint, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (A) lack of jurisdiction over the subject matter, (B) lack of jurisdiction over the person, (C) that there is another action pending between the same parties for the same cause, (D) that plaintiff has not the legal capacity to sue, where such lack of capacity appears in a pleading, (E) insufficiency of process or insufficiency of service of process, (F) the complaint does not contain ultimate facts sufficient to constitute a claim, (G) that the action has not been commenced within the time limited by statute, and (H) failure to join a party under Rule O. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a

allegations in a pleading, the general denial would be rarely used. (Note there is a typographical error in the draft -- it should read obligations in Rule F instead of Rule J). Existing Oregon practice sanctions use of the general denial, but this is inconsistent with the fact pleading objective of sharpening issues through pleading.

(2) This does not change any existing burden of pleading in Oregon but spells out some common situations of affirmative defenses. ORS 16.290 simply requires affirmative statement of new matter without any specific illustrations. The list of items is not exclusive; for any potential defense not listed, the pleader must decide if this is "any other matter constituting an avoidance or affirmative defense". The defenses listed under the federal rule were modified by addition of "comparative negligence" and "unconstitutionality" which are the subject of existing Oregon cases. There also are Oregon cases on estoppel, failure of consideration, release, res judicata and statute of limitations. Assumption of risk, contributory negligence and fellow servant have generally been replaced in Oregon, but could arise in an occasional case and were not deleted.

(3) Except for the situation where no reply is required, this is the existing rule.

RULE I

Most of these special pleading rules are taken directly from the Oregon statutes; with the exceptions of Sections (6) and (9), similar provisions exist in most other states.

(1) This is Utah Rule 9(c). It is identical to ORS 16.480 except that

the defendant must specify which condition precedent has not been performed. The Oregon statute allows the defendant to generally deny performance of condition precedent. Under the Oregon rule you could then have a general allegation of performance and a general denial, and the pleadings do not reflect a specific issue. This rule seems more consistent with our pleading theory. (Note the word, "aver", should be changed to "allege" in the first sentence).

(2) This is existing ORS 16.490.

(3) This is existing ORS 16.500.

(4) This is existing ORS 16.510

(5) This is existing ORS 16.530.

(6) This is existing ORS 16.540. This rule may not be necessary as the situation described is not one of common occurrence.

(7) This rule is not covered in existing Oregon statutes. Lack of capacity can be asserted in a demurrer, if it appears in the complaint and formerly would be raised by a plea in abatement if it did not (now by affirmative defense). Under Rule J, lack of capacity is grounds for a motion to dismiss if it appears on the face of a complaint or an affirmative defense. The only change may be the necessity to allege; there are some Oregon cases suggesting a plaintiff must plead some types of capacity, particularly corporate. A capacity defect is not common and requiring allegation by the moving party seems wasteful. There is a special rule for cities under I(4).

The last clause of the last sentence does not appear in the federal rule but does in a number of state rules, e.g. Wisconsin and Utah, and is consistent with Rule I(1) and the Oregon law.

(8) This section is Federal Rule 9(d); it does not appear in the existing Oregon statutes. It seems like a sensible rule.

(9) This does not appear in the Oregon statutes but was put in specifically to eliminate a couple of archaic pleading rules from old Oregon cases. There is no logical reason for a distinction between recitals and allegations and few people can even define a negative pregnant much less decide what difference it makes.

(10) This is the equivalent of ORS 13.020. It is placed here because most other states include it as a special pleading rule. It more properly refers to pleading than parties. The language comes from Rule 9(h) of the Alabama Code. The language used in ORS 13.020 is confusing and suggests a possible use of the California John Doe pleading.

RULE J

This rule contains all rules relating to attacks on pleadings and motion practice. It is generally based upon Federal Rule 12(b) through (h), but substantially modified to fit Oregon practice and the retention of fact pleading. It is a critical component of an attempt to eliminate costs and delay in pleading. The rule provides specific rules for order in making motions before pleading, requires that all attacks on an opponent's pleading be made at one time and provides for waiver of defenses.

(1) This section groups together all attacks based on the substance of an opponent's pleading. It replaces the demurrer and other motions. All of the grounds of the demurrer are retained as grounds for the motion to dismiss, except misjoinder of parties, which will result in an order adding parties under Rule P, and misjoinder of causes of action which no longer

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avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

H(3) Assertion of right to jury trial. The party filing the responsive pleading shall, in that pleading, admit or deny the assertions of right to jury trial and affirmatively assert whether the defenses, or any part thereof, asserted in the responsive pleading are triable of right by a jury.

H(4) Effect of failure to deny. Allegations in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Allegations in a pleading to which a reply is permitted but not required shall be taken as denied or avoided unless a permissive reply is filed admitting or denying such allegations. Allegations in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

I. SPECIAL PLEADING RULES

I(1) Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to allege generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

I(2) Judgment or other determination of court or officer, how pleaded. In pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading is bound to establish on the trial the facts conferring jurisdiction.

I(3) Private statute, how pleaded. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

I(4) Corporate existence of city or county and of ordinances or comprehensive plans generally, how pleaded. (a) In pleading the corporate existence of any city, it shall be sufficient to state in the pleading that the city is existing and duly incorporated and organized under the laws of the State of Oregon. In pleading the existence of any county, it shall be sufficient to state in the pleading that the county is existing and was formed under the laws of the State of Oregon.

(b) In pleading an ordinance, comprehensive plan or enactment of any county or incorporated city, or a right derived therefrom, in any court, it shall be sufficient to refer to the ordinance, comprehensive plan or enactment by its title, if any, otherwise by its commonly accepted name, and the date of its passage or the date of its approval when approval is necessary to render it effective, and the court shall thereupon take judicial notice thereof. As used in this subsection, "comprehensive plan" has the meaning given that term by ORS 197.015.

I(5) Libel or slander action. (a) In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out

of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the plaintiff shall be bound to establish on the trial that it was so published or spoken.

(b) In the answer, the defendant may allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages, and whether the defendant proves the justification or not, the defendant may give in evidence the mitigating circumstances.

I(6) Official document or act. In pleading an official document or official act it is sufficient to allege that the document was issued or the act done in compliance with law.

I(7) Recitals and negative pregnant. No allegations in a pleading shall be held insufficient on the grounds that they are pled by way of recital rather than alleged directly. No denial shall be held insufficient to raise an issue on the grounds that it contains a negative pregnant.

I(8) Fictitious parties. When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.

I(9) Designation of unknown heirs in actions and suits relating to real property. When the heirs of any deceased person are proper parties defendant to any suit or action relating to real property in this state, and the names and residences of such heirs are unknown, they may be proceeded against under the name and title of the "unknown heirs" of the deceased.

COMMENT

This rule governs all responsive pleadings. The language comes from Federal Rule 8(b) through (d) modified to fit Oregon practice. The rule is consistent with Oregon practice in most cases. In section 19 A. a general denial could only be used where the pleader intends to controvert absolutely every allegation in the opposing pleading; this is more consistent with specific pleading. Section 19 B. does not change the existing burden of pleading. Several specific affirmative defenses which do not appear in the federal rule but which are the subject of Oregon cases are included. Assumption of risk, ~~contributory negligence~~ and fellow servant are not defenses of much currency under existing Oregon law but were left in the rule for an unusual case or where an Oregon court might be applying foreign law.

RULE 20

SPECIAL PLEADING RULES

A. Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to allege generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

B. Judgment or other determination of court or officer; how pleaded. In pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading is bound to establish on the trial the facts conferring jurisdiction.

C. Private statute; how pleaded. In pleading a private

statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

D. Corporate existence of city or county and of ordinances or comprehensive plans generally; how pleaded.

D.(1) In pleading the corporate existence of any city, it shall be sufficient to state in the pleading that the city is existing and duly incorporated and organized under the laws of the state of its incorporation. In pleading the existence of any county, it shall be sufficient to state in the pleading that the county is existing and was formed under the laws of the state in which it is located.

D.(2) In pleading an ordinance, comprehensive plan or enactment of any county or incorporated city, or a right derived therefrom, in any court, it shall be sufficient to refer to the ordinance, comprehensive plan or enactment by its title, if any, otherwise by its commonly accepted name, ^{or Number} and the date of its passage or the date of its approval when approval is necessary to render it effective, and the court shall thereupon take judicial notice thereof. As used in this subsection, "comprehensive plan" has the meaning given that term by ORS 197.015.

E. Libel or slander action.

E.(1) In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall

be sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the plaintiff shall be bound to establish on the trial that it was so published or spoken.

E.(2) In the answer, the defendant may allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages, and whether the defendant proves the justification or not, the defendant may give in evidence the mitigating circumstances.

F. Official document or act. In pleading an official document or official act it is sufficient to allege that the document was issued or the act done in compliance with law.

G. Recitals and negative pregnant. No allegations in a pleading shall be held insufficient on the grounds that they are pled by way of recital rather than alleged directly. No denial shall be treated as an admission on the ground that it contains a negative pregnant.

H. Fictitious parties. When a party is ignorant of the name of an opposing party and so alleges in a pleading, the opposing party may be designated by any name, and when such party's true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.

I. Designation of unknown heirs in actions relating to real property. When the heirs of any deceased person are proper parties defendant to any action relating to real property in this

state, and the names and residences of such heirs are unknown, they may be proceeded against under the name and title of the "unknown heirs" of the deceased.

Mollis
P 8
personal
property

J. Designation of unknown persons. In any action to determine any adverse claim, estate, lien or interest in real property, or to quiet title to real property, the plaintiff may include as a defendant in such action, and insert in the title thereof, in addition to the names of such persons or parties as appear of record to have, and other persons or parties who are known to have, some title, claim, estate, lien or interest in the real property in controversy, the following: "Also all other persons or parties unknown claiming any right, title, lien or interest in the real property described in the complaint herein."

BACKGROUND NOTE

For provisions relating to service of summons or unknown heirs or persons, see Rule 7 G. (5).

ORS sections superseded: 13.020, 13.060, 13.070, 16.480, 16.490, 16.500, 16.510, 16.530, 16.540.

COMMENT

Except for sections 20 F. and G., these rules are based upon existing Oregon statutes. Section 20 F. comes from Federal Rule 9 (d), and section 20 G. is new and designed to eliminate some ~~archaic~~ archaic pleading rules that remain in old Oregon case law. Section 20 A., based on Utah Rule of Procedure 9(c), is similar to ORS 16.480, except that the defendant must specifically allege the conditions precedent not performed. Section 20 H. has the same effect as ORS 13.020, but the clearer language from Alabama Rule of Civil Procedure 9(h) was used. ORS 16.540 was eliminated.

of limitations, unconstitutionality, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

^{19.C}
~~H.3~~) Effect of failure to deny. Allegations in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Allegations in a pleading to which no responsive pleading is required or permitted shall be taken as denied.

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4. SPECIAL PLEADING RULES

^{20A}
~~I(1)~~ Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to allege generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

20.B

~~I(2)~~ Judgment or other determination of court or officer,

how pleaded. In pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading is bound to establish on the trial the facts conferring jurisdiction.

20.C

~~I(3)~~ Private statute, how pleaded. In pleading a private

statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

20.D

~~I(4)~~ Corporate existence of city or county and of ordinances

or comprehensive plans generally, how pleaded. (A) In pleading the corporate existence of any city, it shall be sufficient to state in the pleading that the city is existing and duly incorporated and organized under the laws of the state of its incorporation. In pleading the existence of any county, it shall be sufficient to state in the pleading that the county is existing and was formed under the laws of the state in which it is located.

(B) In pleading an ordinance, comprehensive plan or enactment of any county or incorporated city, or a right derived therefrom, in any court, it shall be sufficient to refer to the ordinance, comprehensive plan or enactment by its title, if any, otherwise by its commonly accepted name, and the date of its passage or the date of its approval when approval is necessary to render it effective, and the court shall thereupon take judicial notice thereof. As used

in this subsection, "comprehensive plan" has the meaning given that term by ORS 197.015.

^{20.E}
~~15~~) Libel or slander action. (4) In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the plaintiff shall be bound to establish on the trial that it was so published or spoken.

(2) In the answer, the defendant may allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages, and whether the defendant proves the justification or not, the defendant may give in evidence the mitigating circumstances.

^{20.F}
~~16~~) Official document or act. In pleading an official document or official act it is sufficient to allege that the document was issued or the act done in compliance with law.

^{20.G}
~~17~~) Recitals and negative pregnant. No allegations in a pleading shall be held insufficient on the grounds that they are pled by way of recital rather than alleged directly. No denial shall be treated as an admission on the grounds that it contains a negative pregnant.

^{20.H}
~~18~~) Fictitious parties. When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing

Rule 19.

Responsive Pleadings.

Bochard.

one sections superseded

16.290, 16.620.

COMMENT:

This rule governs all responsive pleadings. The language comes from Federal Rule 8(b) through (d) modified to fit Oregon Practice. The rule is consistent with Oregon practice in most cases. In Section 19A a general denial could only be used where the pleader intends to controvert absolutely every allegation in the opposing pleading; this is more consistent with specific pleading. Section 19B does not change the existing burden of pleading. Several specific affirmative defenses ^{which do not appear in the federal rule} ~~which~~ are the subject of ^{but which} Oregon cases are included. Assumption of risk, contributory negligence and fellow servant ~~XXXXX~~ are not defenses of much currency under existing Oregon law but were left in the rule for an unusual case or where an Oregon court might be applying foreign law.

Rule 20.

Special Pleading Rules.

Background note.

one sections superseded.

13.060
13.020, 13.070, 16.480, 16.490, 16.500, 16.510, 16.520

16.540.

Rule 20

COMMENT

Except for Section 20 F and G, these rules are based upon existing Oregon Statutes. Section 20F comes from Federal Rule 9(d) and Section 20G is new and designed to eliminate some archaic pleading rules that remain in old Oregon cases. Section 20A is similar to ORS 16.480, except that the defendant must specifically allege the condition precedent not performed and the language makes it clear that the burden of proof remains with the plaintiff; the language used ~~XXXXXX~~ came from Utah Rule of Procedure 9(c). Section 19H has the same effect as ORS 13.20 020. But the clearer language in Federal Rule 9(h) was used.

Law
based on Utah Rule of Procedure 9(c)
From Alabama Supreme Court Rule 9(h)

RULE 20

SPECIAL PLEADING RULES

A. Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to allege generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

B. Judgment or other determination of court or officer; how pleaded. In pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading is bound to establish on the trial the facts conferring jurisdiction.

C. Private statute; how pleaded. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

D. Corporate existence of city or county and of ordinances or comprehensive plans generally; how pleaded.

D.(1) In pleading the corporate existence of any city, it shall be sufficient to state in the pleading that the city is existing and duly incorporated and organized under the laws of the state of its incorporation. In pleading the existence of any county, it shall be

sufficient to state in the pleading that the county is existing and was formed under the laws of the state in which it is located.

D. (2) In pleading an ordinance, comprehensive plan or enactment of any county or incorporated city, or a right derived therefrom, in any court, it shall be sufficient to refer to the ordinance, comprehensive plan or enactment by its title, if any, otherwise by its commonly accepted name, and the date of its passage or the date of its approval when approval is necessary to render it effective, and the court shall thereupon take judicial notice thereof. As used in this subsection, "comprehensive plan" has the meaning given that term by ORS 197.015.

E. Libel or slander action.

E. (1) In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the plaintiff shall be bound to establish on the trial that it was so published or spoken.

E. (2) In the answer, the defendant may allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages, and whether the defendant proves the justification or not, the defendant may give in evidence the mitigating circumstances.

F. Official document or act. In pleading an official document or official act it is sufficient to allege that the document was issued or the act done in compliance with law.

G. Recitals and negative pregnant. No allegations in a

party may be designated by any name, and when his true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.

^{20 F}
~~19~~) Designation of unknown heirs in actions relating to real property. When the heirs of any deceased person are proper parties defendant to any action relating to real property in this state, and the names and residences of such heirs are unknown, they may be proceeded against under the name and title of the "unknown heirs" of the deceased.

^{20 J}
~~19~~) Designation of unknown persons. In any action to determine any adverse claim, estate, lien or interest in real property, or to quiet title to real property, the plaintiff may include as a defendant in such action, and insert in the title thereof, in addition to the names of such persons or parties as appear of record to have, and other persons or parties who are known to have, some title, claim, estate, lien or interest in the real property in controversy, the following: "Also all other persons or parties unknown claiming any right, title, estate, lien or interest in the real property described in the complaint herein."

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DEFENSES AND OBJECTIONS - HOW PRESENTED - BY PLEADING OR MOTION - MOTION FOR JUDGMENT ON THE PLEADINGS

^{21 A}
~~19~~) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion: (A) lack of jurisdiction over the subject matter, (B) lack of jurisdiction over the person,

(1) that there is another action pending between the same parties for the same cause, (2) that plaintiff has not the legal capacity to sue, (3) insufficiency of process or insufficiency of service of process, (4) failure to join a party under Rule 29, (5) failure to state ultimate facts sufficient to constitute a claim, and (6) that the pleading shows that the action has not been commenced within the time limited by statute. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion asserting defenses (A) through (6), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits and the court may determine the existence or non-existence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits.

21 (3) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

21 (3) Preliminary hearings. The defenses specifically denominated (A) through (6) in ^{section} subdivision (A) of this Rule, whether made in a pleading or by motion and the motion for judgment on the pleadings mentioned in ^{section} subdivision (B) of this Rule, shall be heard and determined before trial on application of any party, unless the court orders

that the hearing and determination thereof be deferred until the trial.

~~21 D~~
~~214~~) Motion to make more definite and certain. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge, defense or reply is not apparent, upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules upon motion by a party within 20 days after service of the pleading, or upon the court's own initiative at any time, the court may require the pleading to be made definite and certain by amendment. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

~~21 F~~
~~145~~) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken: (A) any sham or frivolous or irrelevant pleading or defense; (B) any insufficient defense^{or} or any sham, frivolous, irrelevant or redundant matter inserted in a pleading.

~~21 R~~
~~145~~) Consolidation of defenses in motion. A party who makes a motion under this Rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this Rule but omits therefrom any defense or objection then available to the party which this Rule permits to be raised

by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in ~~subdivision 2(b)~~ ^{Subsection 2(2)} of this Rule on any of the grounds there stated.

^{21G}
~~117~~ Waiver. (A) A defense of lack of jurisdiction over the person, that a plaintiff has not legal capacity to sue, that there is another action pending between the same parties for the same cause, insufficiency of ^{summons on} process, or insufficiency of service of ^{summons on} process, is waived (a) if omitted from a motion in the circumstances described in ~~subdivision (6)~~ ^{Section F} of this Rule, or (2) if it is neither made by motion under this Rule not included in a responsive pleading or an amendment thereof permitted by Rule ~~117~~ ^{23A} to be made as a matter of course; provided, however, the defenses enumerated in ~~subdivision (1)(b) and (2)~~ ^{Subsections A(2) and A(4)} of this Rule shall not be raised by amendment.

(B) A defense of failure to state ultimate facts constituting a claim, a defense that the action has not been commenced within the time limited by statute, a defense of failure to join a party indispensable under Rule ²⁹ 8, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule ^{BB} ~~8(2)~~ or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule ^{23B} ~~117~~ in light of any evidence that may have been received.

(c) If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.

sufficient to state in the pleading that the county is existing and was formed under the laws of the state in which it is located.

D.(2) In pleading an ordinance, comprehensive plan or enactment of any county or incorporated city, or a right derived therefrom, in any court, it shall be sufficient to refer to the ordinance, comprehensive plan or enactment by its title, if any, otherwise by its commonly accepted name, and the date of its passage or the date of its approval when approval is necessary to render it effective, and the court shall thereupon take judicial notice thereof. As used in this subsection, "comprehensive plan" has the meaning given that term by ORS 197.015.

E. Libel or slander action.

E.(1) In an action for libel or slander is shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the plaintiff shall be bound to establish on the trial that it was so published or spoken.

E.(2) In the answer, the defendant may allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages, and whether the defendant proves the justification or not, the defendant may give in evidence the mitigating circumstances.

F. Official document or act. In pleading an official document or official act it is sufficient to allege that the document was issued or the act done in compliance with law.

G. Recitals and negative pregnant. No allegations in a

pleading shall be held insufficient on the grounds that they are pled by way of recital rather than alleged directly. No denial shall be treated as an admission on the grounds that it contains a negative pregnant.

H. Fictitious parties. When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.

I. Designation of unknown heirs in actions relating to real property. When the heirs of any deceased person are proper parties defendant to any action relating to real property in this state, and the names and residences of such heirs are unknown, they may be proceeded against under the name and title of the "unknown heirs" of the deceased.

J. Designation of unknown persons. In any action to determine any adverse claim, estate, lien or interest in real property, or to quiet title to real property, the plaintiff may include as a defendant in such action, and insert in the title thereof, in addition to the names of such persons or parties as appear of record to have, and other persons or parties who are known to have, some title, claim, estate, lien or interest in the real property in controversy, the following: "Also all other persons or parties unknown claiming any right, title, lien or interest in the real property described in the complaint herein."

BACKGROUND NOTE

For provisions relating to service of summons or unknown heirs or persons, see Rule 7 G. (5).

ORS sections superseded: 13.020, 13.060, 13.070, 16.480, 16.490, 16.500, 16.510, 16.530, 16.540.

COMMENT

Except for sections 20 F. and G., these rules are based upon existing Oregon statutes. Section 20 F. comes from Federal Rule 9 (d) and section 20 G. is new and designed to eliminate some archaic pleading rules that remain in old Oregon case law. Section 20 A., based on Utah Rule of Procedure 9(c), is similar to ORS 16.480, except that the defendant must specifically allege the condition precedent not performed and the language makes it clear that the burden of proof remains with the plaintiff. Section 20 H. has the same effect as ORS 13.020, but the clearer language from Alabama Rule of Civil Procedure 9(h) was used. ORS 16.540 was eliminated.

RULE 21

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

A. How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) failure to join a party under Rule 29, (7) failure to state ultimate facts sufficient to constitute a claim, and (8) that the pleading shows that the action has not been commenced within the time limited by statute. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which

COMMENT

This rule governs all responsive pleadings. The language comes from Federal Rule 8(b) through (d) modified to fit Oregon practice. The rule is consistent with Oregon practice in most cases. In section 19 A. a general denial could only be used where the pleader intends to controvert absolutely every allegation in the opposing pleading; this is more consistent with specific pleading. Section 19 B. does not change the existing burden of pleading. Several specific affirmative defenses which do not appear in the federal rule but which are the subject of Oregon cases are included. Assumption of risk, contributory negligence and fellow servant are not defenses of much currency under existing Oregon law but were left in the rule for an unusual case or where an Oregon court might be applying foreign law.

RULE 20

SPECIAL PLEADING RULES

A. Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to allege generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

B. Judgment or other determination of court or officer; how pleaded. In pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading is bound to establish on the trial the facts conferring jurisdiction.

C. Private statute; how pleaded. In pleading a private

statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

D. Corporate existence of city or county and of ordinances or comprehensive plans generally; how pleaded.

D.(1) In pleading the corporate existence of any city, it shall be sufficient to state in the pleading that the city is existing and duly incorporated and organized under the laws of the state of its incorporation. In pleading the existence of any county, it shall be sufficient to state in the pleading that the county is existing and was formed under the laws of the state in which it is located.

D.(2) In pleading an ordinance, comprehensive plan or enactment of any county or incorporated city, or a right derived therefrom, in any court, it shall be sufficient to refer to the ordinance, comprehensive plan or enactment by its title, if any, otherwise by its commonly accepted name, and the date of its passage or the date of its approval when approval is necessary to render it effective, and the court shall thereupon take judicial notice thereof. As used in this subsection, "comprehensive plan" has the meaning given that term by ORS 197.015.

E. Libel or slander action.

E.(1) In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall

be sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the plaintiff shall be bound to establish on the trial that it was so published or spoken.

E.(2) In the answer, the defendant may allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages, and whether the defendant proves the justification or not, the defendant may give in evidence the mitigating circumstances.

F. Official document or act. In pleading an official document or official act it is sufficient to allege that the document was issued or the act done in compliance with law.

G. Recitals and negative pregnant. No allegations in a pleading shall be held insufficient on the grounds that they are pled by way of recital rather than alleged directly. No denial shall be treated as an admission on the grounds that it contains a negative pregnant.

H. Fictitious parties. When a party is ignorant of the name of an opposing party and so alleges in a pleading, the opposing party may be designated by any name, and when such party's true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.

I. Designation of unknown heirs in actions relating to real property. When the heirs of any deceased person are proper parties defendant to any action relating to real property in this

state, and the names and residences of such heirs are unknown, they may be proceeded against under the name and title of the "unknown heirs" of the deceased.

J. Designation of unknown persons. In any action to determine any adverse claim, estate, lien or interest in real property, or to quiet title to real property, the plaintiff may include as a defendant in such action, and insert in the title thereof, in addition to the names of such persons or parties as appear of record to have, and other persons or parties who are known to have, some title, claim, estate, lien or interest in the real property in controversy, the following: "Also all other persons or parties unknown claiming any right, title, lien or interest in the real property described in the complaint herein."

BACKGROUND NOTE

For provisions relating to service of summons or unknown heirs or persons, see Rule 7 G.(5).

ORS sections superseded: 13.020, 13.060, 13.070, 16.480, 16.490, 16.500, 16.510, 16.530, 16.540.

COMMENT

Except for sections 20 F. and G., these rules are based upon existing Oregon statutes. Section 20 F. comes from Federal Rule 9 (d), and section 20 G. is new and designed to eliminate some archaic pleading rules that remain in old Oregon case law. Section 20 A., based on Utah Rule of Procedure 9(c), is similar to ORS 16.480, except that the defendant must specifically allege the conditions precedent not performed. Section 20 H. has the same effect as ORS 13.020, but the clearer language from Alabama Rule of Civil Procedure 9(h) was used. ORS 16.540 was eliminated.

C. Effect of failure to deny. Allegations in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Allegations in a pleading to which no responsive pleading is required or permitted shall be taken as denied, ~~except allegations in a reply to a counterclaim which shall be taken as denied or avoided.~~

COMMENT

This rule governs all responsive pleadings. The language comes from Federal Rule 8(b) through (d) modified to fit Oregon practice. The rule is consistent with Oregon practice in most cases. In section 19 A. a general denial could only be used where the pleader intends to controvert absolutely every allegation in the opposing pleading; this is more consistent with specific pleading. Section 19 B. does not change the existing burden of pleading. Several specific affirmative defenses which do not appear in the federal rule but which are the subject of Oregon cases are included. Assumption of risk, contributory negligence and fellow servant are not defenses of much currency under existing Oregon law but were left in the rule for an unusual case or where an Oregon court might be applying foreign law. To determine when pleadings are required or permitted under section 19 C., see ORCP 13 B.

RULE 20

SPECIAL PLEADING RULES

A. Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to allege generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

B. Judgment or other determination of court or officer; how pleaded. In pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading is bound to establish on the trial the facts conferring jurisdiction.

C. Private statute; how pleaded. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

D. Corporate existence of city or county and of ordinances or comprehensive plans generally; how pleaded.

D.(1) In pleading the corporate existence of any city, it shall be sufficient to state in the pleading that the city is existing and duly incorporated and organized under the laws of the state of its incorporation. In pleading the existence of any county, it shall be sufficient to state in the pleading that the county is existing and was formed under the laws of the state in which it is located.

D.(2) In pleading an ordinance, comprehensive plan, or enactment of any county or incorporated city, or a right derived therefrom, in any court, it shall be sufficient to refer to the ordinance, comprehensive plan, or enactment by its title, if any, otherwise by its commonly accepted name^{or number}, and the date of its

passage or the date of its approval when approval is necessary to render it effective, and the court shall thereupon take judicial notice thereof. As used in this subsection, "comprehensive plan" has the meaning given that term by ORS 197.015.

E. Libel or slander action.

E.(1) In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the plaintiff shall be bound to establish on the trial that it was so published or spoken.

E.(2) In the answer, the defendant may allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages, and whether the defendant proves the justification or not, the defendant may give in evidence the mitigating circumstances.

F. Official document or act. In pleading an official document or official act it is sufficient to allege that the document was issued or the act done in compliance with law.

G. Recitals and negative pregnant. No allegations in a pleading shall be held insufficient on the grounds that they are pled by way of recital rather than alleged directly. No denial shall be treated as an admission on the grounds that it contains a negative pregnant.

H. Fictitious parties. When a party is ignorant of the name of an opposing party and so alleges in a pleading, the opposing party may be designated by any name, and when such party's true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.

I. Designation of unknown heirs in actions relating to ~~real~~ property. When the heirs of any deceased person are proper parties defendant to any action relating to ~~real~~ property in this state, and the names and residences of such heirs are unknown, they may be proceeded against under the name and title of the "unknown heirs" of the deceased.

J. Designation of unknown persons. In any action to determine any adverse claim, estate, lien, or interest in ~~real~~ property, or to quiet title to ~~real~~ property, the plaintiff may include as a defendant in such action, and insert in the title thereof, in addition to the names of such persons or parties as appear of record to have, and other persons or parties who are known to have, some title, claim, estate, lien or interest in the ~~real~~ property in controversy, the following: "Also all other persons or parties unknown claiming any right, title, lien or interest in the ~~real~~ property described in the complaint herein."

COMMENT

For provisions relating to service of summons on unknown heirs or persons, see ORCP 7(D)(c). For jurisdiction in rem, see ORCP 5.

Except for sections 20 F. and G., these rules are based upon existing Oregon statutes. Section 20 F. comes from Federal Rule 9 (d), and section 20 G. is new and designed to eliminate some archaic ~~archaic~~ pleading rules that remain in old Oregon case law. Section 20 A., based on Utah Rule of Procedure 9(c), is similar to ORS 16.480, except that the defendant must specifically allege the conditions precedent not performed. Section 20 H. has the same effect as ORS 13.020, but the clearer language from Alabama Rule of Civil Procedure 9(h) was used. ORS 16.540 was eliminated.

RULE 21

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

A. How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto, except that the following de-
fenses may at the option of the pleader be made by motion: ^{To dismiss} (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of ^{process} summons or process or insufficiency of service of summons or ~~process~~, (6) failure to join a party under Rule 29, (7) failure to state ultimate facts sufficient to constitute a claim, and (8) that the pleading shows that the action has not been commenced within the time limited by statute. ^{To dismiss} A motion/making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based

RULE 20

SPECIAL PLEADING RULES

A. Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to allege generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

B. Judgment or other determination of court or officer; how pleaded. In pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading is bound to establish on the trial the facts conferring jurisdiction.

C. Private statute; how pleaded. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

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county, it shall be sufficient to state in the pleading that the county is existing and was formed under the laws of the state in which it is located.

D.(2) In pleading an ordinance, comprehensive plan, or enactment of any county or incorporated city, or a right derived therefrom, in any court, it shall be sufficient to refer to the ordinance, comprehensive plan, or enactment by its title, if any, otherwise by its commonly accepted name or number, and the date of its passage or the date of its approval when approval is necessary to render it effective, and the court shall thereupon take judicial notice thereof. As used in this subsection, "comprehensive plan" has the meaning given that term by ORS 197.015.

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E.(2) In the answer, the defendant may allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages, and whether the defendant proves the justification or not, the defendant may give

in evidence the mitigating circumstances.

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I. Designation of unknown heirs in actions relating to property. When the heirs of any deceased person are proper parties defendant to any action relating to property in this state, and the names and residences of such heirs are unknown, they may be proceeded against under the name and title of the "unknown heirs" of the deceased.

J. Designation of unknown persons. In any action to determine any adverse claim, estate, lien, or interest in property, or to quiet title to property, the plaintiff may include as a defendant in such action, and insert in the title thereof,

in addition to the names of such persons or parties as appear of record to have, and other persons or parties who are known to have, some title, claim, estate, lien, or interest in the property in controversy, the following: "Also all other persons or parties unknown claiming any right, title, lien, or interest in the property described in the complaint herein."

COMMENT

For provisions relating to service of summons or unknown heirs or persons, see ORCP 7 D.(5)(e). For jurisdiction in rem, see ORCP 5.

Sections 20 B., C., D., and E. are based upon existing ORS 16.490, 16.500, 16.510, and 16.530. Section 20 F. comes from Federal Rule 9(d), and section 20 G. is new and designed to eliminate some archaic pleading rules that remain in old Oregon case law. Section 20 A., based on Utah Rule of Civil Procedure 9(c), is similar to ORS 16.480, except that the defendant must specifically allege the conditions precedent not performed. Section 20 H. has the same effect as ORS 13.020, the clearer language from Alabama Rule of Civil Procedure 9(h) was used. Sections 20 I. and J. are based on ORS 13.060 and 13.070 but are not limited to real property. ORS 16.540 was eliminated.