M E M O R A N D U M

TO: Members - Council on Court Procedures February 27, 1978

FROM: Fred Merrill

RE: PLEADING RULES

The attached rules are a revision of Chapter 16 into a logical sequence form. Rules A, C, I, K, L(4)-(7), M and N are almost entirely based on existing statutes. Most other rules have some parallel in the existing Oregon statutes. The modifications are based on federal rules and other jurisdictions. The organization is derived from that used in other jurisdictions. The comparative jurisdictions were Alabama, Florida, Idaho, Iowa, Massachusetts, Michigan, Minnesota, Missouri, New York, Ohio, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, and Wisconsin. Rules N through Q are not strictly pleading rules but were included because they are referred to in the pleading rules. Letters were used rather than numbers because these rules would be preceded by general rules relating to scope of application, form of action, process, time computation, etc. When a final draft of Council rules is developed, the letters will be converted to numbers.

Rule F has already been adopted by the Council. Rule L(3) has been considered and action deferred. Rule D(4) is the notice of appearance procedure requested by the Council.

The general approach in this revision was:

(a) To retain the present level of specificity in Oregon pleading, that is, fact pleading. This was primarily accomplished by retaining a requirement of pleading ultimate facts in Rule G, retaining the motion to strike and motion to make more definite and certain in Rules J(4) and (5), and retaining the requirement for separate statement of claims and defenses in Rule E(2).

(b) To reduce waste of time at the pleading stage by eliminating useless pleading rules and discouraging frivolous motion practice. The primary rules in this area are: B, limiting the number of pleadings; E(3), relating to consistency; J, relating to defenses and motions, and L, relating to amended pleadings. Although these rules eliminate the label of the demurrer, the same function is performed by the motion to dismiss under J(1). Translating the grounds of demurrer into grounds for a motion to dismiss made drafting much simpler and allowed one rule relating to consolidation and waiver, J(6) and (7). A demurrer to an answer is replaced by a motion to strike under J(5).

A section-by-section commentary showing the source of each rule will be furnished at the meeting.

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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

responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense denominated (F), to dismiss for failure of the pleading to contain ultimate facts sufficient to constitute a claim, or to assert the defense denominated (G), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule _____ (summary judgment rule), and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule _____ (summary judgment rule).

J(2) 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. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule _____ (summary judgment rule), and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule _____ (summary judgment rule).

J(3) Preliminary hearings. The defenses specifically denominated (A) through (H) in subdivision 1 of this rule, whether made in a pleading or by motion and the motion for summary judgment mentioned in subdivision 2 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.

J(4) 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.

J(5) 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, frivolous and irrelevant pleading or defense; (B) any insufficient defense or any sham, frivolous, irrelevant or redundant matter inserted in a pleading.

J(6) 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 7 (b) of this rule on any of the grounds there stated.

J(7)(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 process, or insufficiency of service of process is waived (i) if omitted from a motion in the circumstances described in subdivision (6) of this rule, or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule L (1) to be made as a matter of course; provided, however, the defenses enumerated in subdivision (1) (B) and (E) 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 O, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule B(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 L(2) 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.

(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

exists because of the legislative adoption of ORS 16.221. Grounds (A), (B) and (E) are from the federal rule but would come under the Oregon demurrer statute. Grounds (B) and (C) come from the Oregon demurrer statute. Ground F appears both in Federal Rule 12 and the demurrer statute, but the language used is conformed to Rule G. Ground (H) is not covered in the Oregon statutes. The federal rules include venue as a basis for a motion to dismiss; this was eliminated. The choice of motion or defense is up to the pleader, and a motion is not required even if the defect appears on the face of the opponent's complaint.

The elimination of the label, demurrer, was based on several grounds. The single rule approach to motions and defenses and standard rules of preclusion and waiver for pleading attacks are desirable. The demurrer also has acquired some very archaic pleading rules by court interpretation, such as interpreting the pleading against the pleader in the face of a demurrer.

One important side effect of this rule is the elimination of the concept of special appearance. Defects of personal jurisdiction and process are treated the same as any other dilatory defense. Under J(4) these defenses are given special treatment that requires them to be asserted in the first pleading or motion, but the theory of a special appearance is gone. The special-general appearance distinction was required by early jurisdictional concepts but not by present theories of personal jurisdiction and remains only as a procedural trap.

The requirement of specific statement of grounds for defenses comes from the Florida rules.

(2) This section essentially retains the same judgment on the pleadings motion covered in 16.130. The language from Federal Rule 12 (c) is clearer.

(3) This rule gives the court flexibility in handling defenses to avoid a full trial. It is Federal Rule 12 (d).

(4) This rule is identical to the existing motion to make more definite and certain in ORS 16.110. If fact pleading is to be retained, this motion must be retained as it is the primary means of requiring specificity. The federal rules have a motion for more definite statement, 12(e), but it can only be used where a responsive pleading is required and then only when the pleading is so vague that no responsive pleading can be formed. The last sentence is new.

(5) This rule also retains the existing Oregon motion. The language, "sham, frivolous and irrelevant", is not very precise but most other jurisdictions use "redundant, immaterial, impertinent or scandalous", which is not much better. In any case, the Oregon language has been clarified by court interpretation to fit fact pleading. The only change was the addition of "any insufficient defense" to subsection (B) which makes clear that this motion replaces the demurrer to a defense.

(6) This subsection requires consolidation of all attacks to be made against an opponent's pleading into one motion, if any motions are made. It should eliminate one of the primary defects of fact pleading motion practice which is excessive delay from repetitive or consecutive motions against the same pleadings. The rule does not require

defenses to be made by motion or limit the number of defenses or objections that may be raised in the one motion that is allowed. It also does not prohibit attacks by motion against new defects in an amended pleading because it applies only to defenses or motions "then available to a party". Thus, if a motion to make more definite and certain were sustained and the amended pleading became subject to a motion to dismiss for failure to state a claim, this motion could be made; if a motion to strike or make more definite and certain were sustained and the new language still did not meet the fact pleading requirements, another motion could be made. What the rule does prevent is a motion as to form going to part of a pleading followed by other form motions, followed by a demurrer, followed by another demurrer, etc.

(7) This rule governs waiver of defenses. The previous rules cover preclusion or loss of a procedural device. This rule deals with waiver or loss of the underlying defect or objection. There are three categories:

(a) Dilatory defenses which are waived if not made in any motion filed, or if no motion is filed if not raised by a responsive pleading or an amendment allowed as a matter of course. The defects of jurisdiction over the person and relating to process, however, cannot be raised by amendment. This preserves some of the special appearance treatment for these defects and forces the person having such an objection to raise it in the initial pleading or motion. This treatment of jurisdiction is not in the federal rules, but comes from Rule 12(h) of the Tennessee rules of procedure.

(b) Failure to state a claim, statute of limitations, failure to join an indispensable party, and failure to state a defense are treated differently. These are not waived and may be asserted at trial (in other words, may arise as

an issue at trial and be considered either by consent or by amendment by leave under Rule L2) or by a motion for judgment on the pleadings.

(c) Jurisdiction over the subject matter is never waived and is treated separately.

RULE K

This rule is a combination of existing ORS 16.305 and 16.315. There are two changes:

The words, "Such leave shall not be given if it would substantially prejudice the rights of existing parties", were added to the first paragraph of (5)(a). This is intended to encourage trial judges to protect existing parties against late impleader or impleader that would have an adverse effect on existing parties.

The second change is the addition of section (6) which is based on Federal Rule 13(h) and allows a party asserting a crossclaim or counterclaim to join additional parties to respond. This is a fairly limited joinder provision but useful. Oregon statutes already authorize such joinder in the common situation where an action is brought by an assignee under a contract, and the maker of the contract can be joined to respond to the counterclaim. ORS 13.180. A party joined is served with an answer and summons. Rule B specifies the response. Special provisions are required in the summons rule.

Federal Rule 13 has provisions relating to compulsory counterclaims which are not in the existing Oregon statutes and which were not included in this rule. While the compulsory counterclaim rule may have utility in concentrating disputes between parties in one case; this is outweighed by the danger of loss of rights through a procedural error.

MEMORANDUM

TO: PLEADINGS SUBCOMMITTEE April 18, 1978

FROM: Fred Merrill

RE: PLEADING REVISION

Enclosed is a second draft of the pleading rules reflecting the clean-up suggested in the comments and the determinations made at the last Council meeting. Some of the most important changes are in Rules B, G(3), H(3) and (4), and I(9). Chuck Paulson also raised some reasonable objections to the inclusion of Rule O(3) after the meeting. I think these should be passed on by the subcommittee and reported to the Council.

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Encl.

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 responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defenses denominated (F) or (G), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule _____ (summary judgment rule), and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule _____ (summary judgment rule).

J(2) 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. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule _____ (summary judgment rule), and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule _____ (summary judgment rule).

J(3) Preliminary hearings. The defenses specifically denominated (A) through (H) in subdivision (1) of this rule, whether made in a pleading or by motion and the motion for summary judgment mentioned in subdivision (2) 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.

J(4) 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.

J(5) 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 any sham, frivolous, irrelevant or redundant matter inserted in a pleading.

J(6) 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 (7)(b) of this rule on any of the grounds there stated.

J(7) 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 process, or insufficiency of service of process, is waived (i) if omitted from a motion in the circumstances described in subdivision (6) of this rule, or (ii) if it is neither made by motion under this rule not included in a responsive pleading or an amendment thereof permitted by Rule L (1) to be made as a matter of course; provided, however, the defenses enumerated in subdivision (1) (B) and (E) 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 O, and an objection of failure to state a legal defense to a claim, may be made in any pleading permitted or ordered under Rule B(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 L(2) 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.

K. COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

K(1) Counterclaims. Each defendant may set forth as many counterclaims, both legal and equitable, as such defendant may have against the plaintiff.

K(2) Crossclaim against codefendant. (a) In any action where two or more parties are joined as defendants, any defendant may in his answer allege a crossclaim against any other defendant. A crossclaim asserted against a codefendant must be one existing in favor of the defendant asserting the crossclaim and against another defendant, between whom a separate judgment might be had in the action and shall be: (i) one arising out of the occurrence or transaction set forth in the complaint; or (ii) related to any property that is the subject matter of the action brought by plaintiff.

(b) A crossclaim may include a claim that the defendant against whom it is asserted is liable or may be liable, to the defendant asserting the crossclaim for all or part of the claim asserted by the plaintiff.

(c) An answer containing a crossclaim shall be served upon the parties who have appeared and who are joined under subdivision (4) of this rule.

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES

FROM: FRED MERRILL

RE: PLEADING

DATE: May 26, 1978

Attached is a revised version of the PLEADING RULES reflecting changes previously suggested by the Council, changes suggested by the pleading subcommittee and some staff revisions. The rules marked by asterisks have either been modified or require discussion by the full Council.

Rules B(2) and H 4). The subcommittee suggested that the draft of this section was not as clear as it should be. This re-draft is taken from New York CPLR 3011. The proper response of a party summoned under K(4) for a cross-claim is an answer; the proper response of a party summoned under K(4) for a counterclaim is a reply. The re-draft eliminates the court-ordered reply.

The subcommittee also was not clear whether the prior recommendation of the Council relating to the reply was that a reply would always be required where a plaintiff wished to plead new matter in avoidance of affirmative defenses or that a reply would be entirely at the option of the plaintiff unless a counterclaim was asserted. The present draft makes the reply optional. Under Rule H(4), if no reply is filed, any affirmative allegations in the plaintiff's complaint are taken as denied or "avoided."

Rule D(1). Several words were changed for clarity and the last sentence was eliminated because of the elimination of the court-ordered reply.

Rule E(4). This section was not changed, but the subcommittee suggested that the last sentence should be considered carefully by the full Council.

Rule F(1). The subcommittee added the second sentence. It was felt that this should be required to avoid having attorneys evade the ethical obligation by having clients sign pleadings. The last part of the third sentence of the prior draft was eliminated as unnecessary. The state would always have an attorney. The last clause was added to the fourth sentence and the word, "harrassment," was added to the last sentence.

Rules G(3) and H(3). The subcommittee did not change the draft which reflects a change suggested by the Council, but a question was raised whether failure to plead relating to jury trial could be construed as a waiver of jury trial. The draft is intended to require assertions by the parties relating to issues to be tried by jury, and the sanction for failure to plead would be that the complaint or answer is subject to a motion. If no motion is made, however, no penalty results. The subcommittee was concerned (a) that it be clear that failure to plead does not constitute a waiver of jury trial and (b) there should be some way other than motion by an opponent to require an assertion of right to jury trial; if the requirement is for the benefit of the court in docketing, perhaps the court should be allowed to require the proper pleading of jury trial expectation.

Rule I(3). The Council asked whether a private statute existed in Oregon. ORS 43.060 makes this distinction for purposes of evidence, and Article IV, Sec. 27, of the Constitution, states that all laws are public unless the law states otherwise, suggesting that a statute could be private.

Rule I(7). The language of the last sentence was changed. As originally drafted, the subcommittee felt this would suggest that an equivocal denial could not be subject to a motion. The vice of a negative pregnant rule is that assertions intended as denials are treated as admissions, and this is what the rule is intended to eliminate.

Rule I(10). This is ORS 13.070, which is a designation statute which was inadvertently omitted from the prior draft.

Rule J(1). This rule was substantially modified to clarify the procedure for dealing with two different types of defenses which are incorp ated in the rule. Defenses (A) through (B) are technical defenses which may appear on the face of a pleading but are more frequently dependent on the existence of facts outside the pleading. If these facts did not appear on the face of the pleading, the defense was formerly raised by a plea in abatement, and the court decided the existence or non-existence of the facts.

Defenses (H) and (F) go to the merits of the claim. For these defenses, the court cannot pass on the existence or non-existence of any facts but only whether the party has correctly pled facts. If an assertion is made that facts do not exist to support the claim or which require a statute of limitation defense, this can only be considered in the context of a summary judgment and then the court only decides whether there is any factual dispute which must go to the jury.

The prior draft of this rule closely follows Federal Rule 12(b). Under that rule, the technical defenses are treated in the manner described above, but the rule is not clear as to the authority of the court to decide facts and the procedure to be followed in submitting the facts to the court. See 5 Wright and Miller, Sec. 1351, p. 565-567. The rule was re-drafted in the following respects:

1. The defenses were re-ordered to put all technical defensis first, followed by the two defenses which are limited to the face of the pleading.

2. The reference in subpart (D) to capacity appearing only on the face of the pleading was eliminated. If such a defense appears on the face of the pleading, it is raisable simply on motion but if it does not, evidence to establish the defense of capacity can be submitted and the court can pass upon it.

3. The language of defenses (G) and (H) was modified to show that such defenses could go only to material appearing on the face of that pleading.

4. The next to the last sentence of the prior draft was eliminated as unnecessary.

5. The last sentence of the prior draft was eliminated. Although this conversion to summary judgment provision is not required by the other modifications to the rule, the subcommittee suggested that a simpler way to handle the situation would be to require any party who wished to go beyond the face of the pleading to make a summary judgment motion.

6. The last sentence was added to specify the procedure for technical defenses which do not appear on the face of the pleading.

Rule J(2). The summary judgment conversion reference was deleted in accordance with the discussion under Rule J(1) above.

Rule K(4). No change was made in this rule, but the subcommittee suggested that the full Council carefully consider the additional joinder procedure specified in this rule.

Rule K(5). The words, "or upon the court's own motion," were added to give the court more flexibility to avoid confusion or prejudice to the original parties after impleader.

Rule L(5). The last clause of the last section was stricken as it is a rule of appellate procedure.

Rule O(3). One of the Council members has suggested that this provision is confusing and unnecessary and should be eliminated.

The rules in the draft beginning with Rule Q (except for Rule V) have not been considered by the pleading subcommittee. Since the pleading rules in the prior draft incorporated a large portion of Chapter 13, as well as the material in Chapter 16, these additional rules were drafted to incorporate the balance of the material in Chapter 13. The sources for these rules are as follows:

Rule Q. This was the interpleader rule adopted by the Council at the meeting in Pendleton.

Rule R. This is ORS 13.220 to 13.390 which is the existing class action statute in Oregon. The Council has tentatively decided to make no changes. ORS 13.210 was eliminated as unnecessary. ORS 13.400 and 13.410 should be retained as statutes since they relate to appeals. ORS 13.310 should be retained as a statute because it is an evidentiary statute. We should suggest that the Legislature amend this statute to refer to "the provisions of Sec. 10 of Rule R of the Oregon Rules of Civil Procedure," rather than to ORS 13.290.

Rule S. This rule retains the Oregon intervention procedure specified by ORS 13.130. It differs from that statute in organization, recognition of mandatory statutory intervention and specification of procedure.

S(1). This is the second sentence of ORS 13.130. Since it defines intervention, it logically should be the first section.

S(2). This is a new provision. Federal Rule 24 provides for both mandatory and permissive intervention. ORS 13.130 refers only to permissive intervention, but ORS 105.755, 105.760 and 373.060 appear to grant a right to intervene in certain cases. Other mandatory statutes may exist or may be adopted by the Legislature. Federal Rule 24 also provides for mandatory intervention where the intervenor's ability to protect his interests might be impaired by the action. This was not included.

S(3). This was the first sentence of ORS 13.130 and would retain the present intervention procedure and case interpretation. The last sentence of the section is new and is taken from Federal Rule 24(b).

S(4). This section is new. ORS 13.130 does not provide any

procedure and this has created some confusion, including whether intervention can be allowed ex parte and whether a motion is the proper procedure. The statute also refers to intervention by complaint which is inappropriate for a party seeking to intervene to defend. In practice, intervening defendants usually file answers anyway. See cases at 227 Or. 432, 223 Or. 17 and 186 Or. 253.

Rule T. This rule is basically the existing Oregon substitution procedure as set out in 13.080. That statute was revised in 1975 as recommended by the Oregon State Bar Procedure and Practice Committee to provide substitution of parties when a claim was transferred. The Oregon procedure is generally the same as Federal Rule 25 except that the federal rule provides no absolute time limit for substitution but only requires a motion for substitution 90 days after suggestion of death on the record.

T(1). This is ORS 13.080. The only change was the addition of the words, "if the claim survives or continues," in the first sentence. These words appeared in the original Oregon abatement statute but for some unexplained reason were omitted from the 1975 Bar revision. They make clear that the rule refers only to the procedural question of abatement and does not deal with survival of the claim. There is a separate statute, ORS 13.090, dealing with non-abatement after verdict. It seems unnecessary and was eliminated.

T(2). This does not appear in the Oregon statute but was taken from Federal Rule 25(a)(2).

T(3). This does not appear in the Oregon statute but comes from Federal Rule 25(d). Existing Oregon cases provide that the action does not abate but continues in the name of the original official. The federal rule seems more flexible.

T(4). This is a new section. There is some confusion in the case law relating to procedure for substitution. It is not clear who may make the motion; whether substitution may be ordered ex parte; and, if a motion is required, who must be served and how. This section specifies a procedure to cover all these questions.

Rule U. This is Federal Rule 17(a) which appeared as Rule Q in the prior draft. Logically, this rule and Rule V which follows it should be inserted between Rules M and N in the final draft of the rules.

Rule V. This rule is ORS 13.041 and 13.051 without change.

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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 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.

*I(10) Designation of unknown claimants. 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."

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, 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,

(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, (E) insufficiency of process or insufficiency of service of process, (F) failure to join a party under Rule 0, (G) failure to state ultimate facts sufficient to constitute a claim, and (H) 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 (F), 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 nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits.

*J(2) 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.

*J(3) Preliminary hearings. The defenses specifically denominated (A) through (H) in subdivision (I) of this Rule, whether made in a pleading or by motion and the motion for judgment on the pleadings mentioned in subdivision (2) 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.

J(4) 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.

J(5) 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 any sham, frivolous, irrelevant or redundant matter inserted in a pleading.

J(6) 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 (7)(b) of this Rule on any of the grounds there stated.

J(7) 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 process, or insufficiency of service of process, is waived (i) if omitted from a motion in the circumstances described in subdivision (6) of this Rule, or (ii) if it is neither made by motion under this Rule not included in a responsive pleading or an amendment thereof permitted by Rule L(1) to be made as a matter of course; provided, however, the defenses enumerated in subdivision (1) (B) and (E) of this Rule shall not be raised by amendment.

(b) A defense of failure to state ultimate facts consituting 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 O, and an objection of failure to state a legal defense to a claim, may be made in any pleading permitted or ordered under Rule B(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 L(2) 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.

REVISIONS TO PLEADING RULES

Page 1

B(2) Pleadings allowed. Amended this section so that there would be no optional reply.

Page 2

D(2) Pleading after motion. Deleted clause, "or postpones its disposition until trial on the merits."

Page 3

E(1) Captions, names of parties. Changed cross reference to Rule B(1) to Rule B(2).

Page 3a

E(4) Adoption by reference; exhibits. Deleted the words, "or in any motion," from first sentence and deleted second sentence in its entirety.

Page 4

F(1) Subscription by party or attorney, certificate. Deleted sentence, "When a corporation, including a public corporation, is a party, and if the attorney does not sign the pleading, the subscriptior may be made by an officer thereof upon whom service of summons might be made."

Page 5

G. COMPLAINT, COUNTERCLAIM, CROSS-CLAIM AND THIRD PARTY CLAIM. Deleted (3) which read, "a statement specifying whether the party asserts that the claim, or any part thereof, is triable of right by a jury."

Page 6

H(3) Assertion of right to jury trial. Deleted this paragraph in its entirety.

H(4) - changed to H(3) - Effect of failure to deny. Amended to say that all affirmative matter in an answer would be taken as denied without a reply, but not "avoided."

Page 9

I(10) Designation of unknown claimants. "Claimants" changed to "persons."

Page 12

J(7)(b) Inserted "or insufficiency of new matter in a reply to avoid a defense" after "to a claim" in the fifth line. This was not covered at the meeting, but having a reply for new matter requires modification of the motion and waiver rules. The proper way to attack new matter in a reply would be by motion to strike and failure to make such motion would not waive the right to assert insufficiency to avoid a defense at trial. No change was necessary in J(5) on Page 11 because this would be covered by the last clause in J(5)(B) as "sham, frivolous, irrelevant or redundant matter inserted in a pleading."

Page 15

K(4) Joinder of additional parties. Deleted former wording of the draft and substituted for it the language of existing ORS 13.180.

Page 15a. New page because substituted language of K(4) required more space.

Page 20

O(3) Pleading reasons for nonjoinder. This was deleted, thus changing the numbering of Exception of class actions and State agencies, etc.

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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 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.

I(10) 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."

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, 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,

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 7(b) of this Rule on any of the grounds there stated.

J(7) 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 process, or insufficiency of service of process, is waived (i) if omitted from a motion in the circumstances described in subdivision (6) of this Rule, or (ii) if it is neither made by motion under this Rule not included in a responsive pleading or an amendment thereof permitted by Rule L(1) to be made as a matter of course; provided, however, the defenses enumerated in subdivision (1) (B) and (E) 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 O, 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 B(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 L(2) 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.

Rule 21.

Background

ORS sections superceded:

16.100, 16.110, 16.130, 16.140, 16.150, 16.250, 16.260,

16.270, 16.280, 16.320, 16.330, 16.340

Begin

COMMENT:

Although the structure of this rule is based upon Federal Rule 12, much of the language used was drawn from Oregon ORS sections or drafted to fit Oregon Practice.

BEGIN While the council wished to retain fact pleading, it also wanted to curb excessive use of motions for purposes of harrassment and delay. The legislature has already moved in this direction by providing that the pleadings not go to the jury. See rule 59

Retention of fact pleading does not automatically mean retention of existing motion practice. This rule is designed to reduce the time spent on motions through simplification of procedure and a preclusion rule that requires assertion of all grounds for dismissal under this Rule, which are raisable by motion, in a single motion.

Section 21 covers against the maintenance of an oppoenents claim that may be made at the pleading stage. It provides they may all either be made in the form of a motion to dismiss or asserted in a responsive pleading, at the option of the pleader

Section 21 A covers the form of asserting defenses to an oppoenents claim. At the pleaders option these may be asserted in the answer or in ~~the form of~~ a motion to dismiss. ~~If the motion to dismiss is made specific grounds~~ The motion to dismiss ~~then~~ performs the function of the former demurrer or plea in abatement. Specific grounds for the motion (1) through (6) do not go to the merits and are a matter for determination by the court either on the face of a pleading or based upon factual material submitted to the court. Grounds (7) and (8) go to the merits and the court can only decide if a party has pled ~~facts required; that is the court cannot go beyond the~~ face of the pleading. If a party wishes to assert facts showing ~~no~~ ~~right to recover~~ this must be in the form of a summary judgement motion ~~under XXXXXX~~ or at trial. ~~The distinction is clearly covered in the last sentence of the section.~~ ~~XXXXXXXXXXXXXXXXXXXXXXXX~~ Whatever form is used to assert the defenses, ~~under~~ the last sentence of section 21 A and Section 21C the court has the flexibility to dispose of the matter in the most efficient ~~XXXX~~ manner.

This rule eliminates the concept of special appearance and motions to quash. An objection of personal jurisdiction is treated as any other defense and waivable only under the provisions of section 21 G.

The ~~Motions to strike~~ Grounds for motion to strike and motion to make more definate and certain in Sections 21 D and E come from ~~XXX~~ ORS 16.100 and 16.110 and not from the Federal Rule.

The Consolidation and Waiver rules of Sections 21 F and G are modeled upon the federal rule. ~~Note that~~ The consolidation requirement applies to any motion made under this rule; This would include motions under 21 A, B, D and E but not summary judgment or other motions. Special treatment is given to defenses related to personal jurisdiction, ~~and XXXXXXX~~ summons or process under ~~XXXX~~ Section 21 G 4 they may not be asserted in an amended pleading

CHANGES MADE FOR AUGUST 12, 1978, DRAFT

Page 3. Rule 1. Added "pending at the time of or" to last sentence. See July 28, 1978, minutes.

Page 5. Rule 3. Modified first sentence. Deleted last sentence. See July 28, 1978, minutes.

Page 7. Rule 4 D.(2). Inserted "distributed". See July 28, 1978, minutes.

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*Page 9. Rule 4 J. Inserted Rule 4 J., which is taken directly from the language of 59.155, and re-numbered succeeding sections. Although the provision appears in the Oregon Securities Law, it is a single contact jurisdictional statute.

Page 10. Rule 4 L. Inserted section 4 L. See minutes of July 28, 1978.

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*Page 14. Rule 6. Added the words, "insufficiency of summons or process or insufficiency of service of summons or process", near the end of the first sentence. This language is more consistent with that in Rule 21.

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*Page 17. Rule 7 C.(4). Eliminated paragraph (b) and renumbered (c). See minutes of July 28, 1978. Paragraph C.(4)(a) might be changed to say, "if summons is served by any method other than publication...", as the existing language may be too limited.

Page 17. Rule 7 D. Added, "or employee of nor attorney for any party, corporate or otherwise", to first sentence. See minutes of July 28, 1978.

Page 18. Rule 7 D. Changed "shall" to "may" in next to last sentence. See minutes of July 28, 1978.

Page 18. Rule 7 E.(1). Inserted "promptly" in first sentence. See minutes of July 28, 1978.

*Page 18. Rule 7 E.(2)(a). Changed (i) to conform to prohibition against employees and attorneys serving summons in Rule 7 D. and in both (i) and (ii) took out "and shall state such facts as show reasonable diligence in attempting to effect personal service upon the defendant" and inserted "or describe in detail the manner and circumstances of service", to conform to changes in 7 F.

Page 20. Rule 7 F.(1). Inserted new language from committee memorandum. See minutes of July 28, 1978.

*Page 21. Rule 7 F.(3). Took out "shall" at end of sentence and added "either within or without this state may be substantially", to conform to change in F.(1).

Page 21. Rule 7 F.(3)(a)(ii). Took out "if with reasonable diligence the defendant cannot be served under subparagraph (i) of this paragraph" and added "if defendant cannot be found personally at defendant's dwelling house or usual place of abode." See minutes of July 28, 1978.

*Page 23. Rule 7 F.(3)(d)(ii). Eliminated former F.(3)(d)(ii) and redrafted entire paragraph to provide three alternatives if registered agent, etc., cannot be found in county. See minutes of July 28, 1978.

Page 24. Rule 7 F.(3)(c). Eliminated former Rule F.(3)(e) relating to partnerships and renumbered succeeding sections. Eliminated last sentence of renumbered F.(3)(c). See minutes of July 28, 1978.

*Page 24. Rule 7 G.(1). Eliminated first clause of sentence and inserted new first clause from trial committee memorandum. See minutes of July 28, 1978.

Page 25. Rule 7 G.(2). Changed "45 days" to "30 days". See minutes of July 28, 1978.

Page 25. Rule 7 G.(3). Changed "with intervals of at least seven days between each successive publication to "in succcessive calendar weeks." See minutes of July 28, 1978.

*Page 25. Rule 7 G.(5). Took out words, "with due diligence". See minutes of July 28, 1978.

Page 26. Rule 7 H. Took out words, "the manner of service of summons", in first sentence. See minutes of July 28, 1978.

Page 31. Rule 9 B. Eliminated pronouns and changed "of suitable age and description" to "over 14 years of age" and inserted "apparently" before "in charge" in last sentence. See minutes of July 28, 1978.

Page 32. Rule 9 E. Eliminated last clause of first sentence and inserted "the time of day" in second sentence. See minutes of July 28, 1978.

Page 34. Rule 10. Eliminated former section 10 B. and renumbered succeeding sections. See minutes of July 28, 1978.

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*Page 38. Rule 15 A. This section was extensively redrafted because the elimination of the possibility of joining a party to respond to a cross-claim from Rule 22 made much of the language superfluous and there was no reference to time to move against a reply.

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*Page 38. Rule 15 C. This was formerly a subsection of 15 B. but was changed to a separate section as it applies to any amended pleading, not just amended pleading after motions.

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*Page 41. Rule 17. Changed "must" to "may" in first sentence. "Must" did not fit the context.

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*Page 44. Rule 19 C. Added "except allegations in a reply to a counterclaim which shall be taken as denied or avoided" at the end of the section. When this section was revised to require a reply to assert new matter in avoidance of defenses, the reference to allegations in a pleading to which no responsive pleading is required being "avoided" was eliminated. A reply to a counterclaim serves the same function as an answer to a complaint, but there is no further pleading. A counterclaiming defendant might wish to avoid rather than deny defenses in the reply.

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*Page 48. Rule 21 A.(5). Changed "process" to "summons or process".

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*Pages 49 and 50. Rule 21 D. and E. Changed 20 days to 10 days in both sections to be consistent with Rule 15 A.

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*Page 57. Rule 23 D. Added last sentence. The sentence is in ORS 16.400(2), which became 23 E. This may be a codification mistake as it appears intended to apply to any order to strike and should apply under these rules to pleading over after any motion. See ORS 16.330.

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*Page 58. Rule 23 F. Changed "complaint" to "pleading". Application of the section is not limited to complaints.

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*Page 64. Rule 29 A. Added next to last sentence. For some reason the procedure when a necessary plaintiff refuses to join was dropped from this rule. It is covered by both Federal Rule 19 (a) and ORS 13.170. The language used comes from the ORS section.

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*Page 66. Rule 31. Changed "avers" to "alleges" in the second sentence and "statute" to "rule or statute" at the end of the last sentence.

Page 82. Rule 36 B.(2). Substituted new subsection. See minutes of July 28, 1978.

Page 84. Rule 36 B.(4). Inserted approved subsection on experts. See minutes of July 28, 1978.

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*Page 101. Rule 39 G.(1). Changed "writing" to "transcription" near end of second sentence.

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*Page 110. Rule 42 B.(10). This subsection was added. We previously were holding 16.470 as a possible rule if no interrogatories were included in the rule. The description of what could be secured by interrogatory in B.(1) through B.(9) did not clearly cover details on an account.

Page 118. Rule 45. Made changes approved by Council. See minutes of July 28, 1978.

Page 122. Rule 46 A.(2). Added reference to failure to provide insurance policy under Rule 36 B.(2). See minutes of July 28, 1978.

*Page 129. Rule 51 D. Changed "both parties" to "all parties".

*Page 133. Rule 54 B.(2) and (3). Subsection B.(2) is ORS 18.260. It was inadvertently omitted from the earlier draft of this rule. The last sentence of former section 54 B. became subsection B.(3).

*Page 142. Rule 55 H.(2)(b). In subparagraph (ii) the words, "before whom... is to be taken", were removed and "administering the oath for" were inserted to conform to Rule 38.

Page 153. Rule 58 A. Eliminated subsection A.(1) and "when a suit is called for trial" from H.(2). Added "by the court". See minutes of July 28, 1978.

Page 153. Rule 58 B. Changed the order of subsections B.(4) and B.(5). See minutes of July 28, 1978.

Page 156. Rule 59 B. In third sentence changed "given" to "read" and eliminated "as written, without any oral explanation or addition". See minutes of July 28, 1978.

Page 157. Rule 59 C.(5). Changed "may either decide in the jury box or" to "shall" in first sentence. See minutes of July 28, 1978.

Page 158. Rule 59 D. Added words, "either orally or in writing", to second sentence. See minutes of July 28, 1978.

Page 159. Rule 59 G.(1) and (5). Changed, "..he or she shall, on being required, declare the same. The verdict shall be in writing." to "...it shall be read" in the last sentence of G.(1). See minutes of July 28, 1978.

Page 161. Rule 60. Inserted trial committee rule J. as this rule. Eliminated comma and added "or" between "59 C.(2)" and "the" in third line. See minutes of July 28, 1978.

Page 170. Rule 63 E. Added section recommended by trial committee and re-numbered succeeding section. See minutes of July 28, 1978.

Page 173. Rule 64. Subsection H. eliminated. See minutes of July 28, 1978.

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 ~~Supreme Court~~ Rule 9(h) was used.

ORS. 16.540 was eliminated

Rules of Civil Procedure

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

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 (1) 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.

B. 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.

C. Preliminary hearings. The defenses specifically denominated (1) through (8) in section ~~B~~ A. of this rule, whether made in a pleading or by motion and the motion for judgment on the pleadings mentioned in section 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.

D. 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~~ 10 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.

E. 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 10 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken: (1) any sham or frivolous or irrelevant pleading or defense; (2) any insufficient defense on or any sham, frivolous, irrelevant or redundant matter inserted in a pleading.

F. 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 subsection G.(2) of this rule on any of the grounds there stated.

G. Waiver. (1) A defense of lack of jurisdiction over the person, that a plaintiff has not legal capacity to sue, that there is another adtion pending between the same parties for the same cause, insufficiency of summons or process, or insufficiency of service of summons or process, is waived (a) if omitted from a motion in the circumstances described in section F. of this rule, or (b) if it is neither made by motion under this rule nor included in a responsive pleading

or an amendment thereof permitted by Rule 23 A. to be made as a matter of course; provided, however, the defenses ~~unumerated in subsections~~ determinated in section A.01 (2) and ~~B.~~ (3) of this rule shall not be raised by amendment.

G.(2) 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, 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 13 B. 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 23 B. in light of any evidence that may have been received.

G.(3) 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.

BACKGROUND NOTE

ORS sections superseded: 16.100, 16.110, 16.130, 16.140, 16.150, 16.250, 16.260, 16.270, 16.280, 16.320, 16.330, 16.340.

COMMENT

While the Council wished to retain fact pleading, it also wanted to curb excessive use of motions for purposes of harassment and delay. The legislature has already moved in this direction by providing that the pleadings not go to the jury. See, Rule 59. Retention of fact pleading does not automatically mean retention of existing motion practice. This rule is designed to reduce the time spent on motions through simplification of procedure and a preclusion rule that requires assertion of all grounds for dismissal under this rule, which are raisable by motion, in a single motion. Although the structure of this rule is based upon Federal Rule 12, much of the language used was drawn from Oregon ORS sections or drafted to fit Oregon practice.

Section 21 A. covers the form of asserting defenses to an opponent's claim. At the pleader's option, these may be asserted in the answer or in a motion to dismiss. The motion to dismiss performs the function of the former demurrer or plea in abatement. Specific grounds for the motion, (1) through (6), do not go to the merits and are a matter for determination by the court either on the face of a pleading or based upon factual material submitted to the court. Grounds (7) and (8) go to the merits and the court can only decide if a party has pled properly. If a party wishes to assert facts showing lack or merit, this must be in the form of a summary judgment motion or at trial. Whatever form is used to assert the defenses, under the last sentence of section 21 A. and under section 21 C., the court has the flexibility to dispose of the matter in the most efficient manner. This rule eliminates the concept of special appearance and motions to quash. An objection of personal jurisdiction is treated as any other defense and waivable only under the provisions of section 21 G.

The grounds for motion to strike and motion to make more definite and certain in sections 21 D. and E. come from ORS 16.100 and 16.110 and not from the federal rule.

The consolidation and waiver rules of sections 21 F. and G. are modeled upon the federal rule. The consolidation requirement applies to any motion made under this rule; this would include motions under 21 A., B., D., and E., but not summary judgment or other motions. Special treatment is given to defenses related to personal jurisdiction and summons or process; under section 21 G.(1), they may not be asserted in an amended pleading.

For the First Time

PROPOSED OREGON RULES OF CIVIL PROCEDURE

* * *

August 15, 1978

OREGON COUNCIL ON COURT PROCEDURES

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

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 (1) 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.

B. 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.

C. Preliminary hearings. The defenses specifically denominated (1) through (8) in section A. of this rule, whether made in a pleading or by motion and the motion for judgment on the pleadings mentioned in section 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.

D. 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 10 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.

E. 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 10 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken: (1) any sham or frivolous or irrelevant pleading or defense; (2) any insufficient defense on or any sham, frivolous, irrelevant or redundant matter inserted in a pleading.

F. 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 subsection G.(2) of this rule on any of the grounds there stated.

G. Waiver. (1) A defense of lack of jurisdiction over the person, that a plaintiff has not legal capacity to sue, that there is another adtion pending between the same parties for the same cause, insufficiency of summons or process, or insufficiency of service of summons or process, is waived (a) if omitted from a motion in the circumstances described in section F. of this rule, or (b) if it is neither made by motion under this rule nor included in a responsive pleading

or an amendment thereof permitted by Rule 23 A. to be made as a matter of course; provided, however, the defenses denominated (2) and (5) of section A. of this rule shall not be raised by amendment.

G.(2) 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, 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 13 B. 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 23 B. in light of any evidence that may have been received.

G.(3) 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.

BACKGROUND NOTE

ORS sections superseded: 16.100, 16.110, 16.130, 16.140, 16.150, 16.250, 16.260, 16.270, 16.280, 16.320, 16.330, 16.340.

COMMENT

While the Council wished to retain fact pleading, it also wanted to curb excessive use of motions for purposes of harassment and delay. The legislature has already moved in this direction by providing that the pleadings not go to the jury. See, Rule 59. Retention of fact pleading does not automatically mean retention of existing motion practice. This rule is designed to reduce the time spent on motions through simplification of procedure and a preclusion rule that requires assertion of all grounds for dismissal under this rule, which are raisable by motion, in a single motion. Although the structure of this rule is based upon Federal Rule 12, much of the language used was drawn from Oregon ORS sections or drafted to fit Oregon practice.

Section 21 A. covers the form of asserting defenses to an opponent's claim. At the pleader's option, these may be asserted in the answer or in a motion to dismiss. The motion to dismiss performs the function of the former demurrer or plea in abatement. Specific grounds for the motion, (1) through (6), do not go to the merits and are a matter for determination by the court either on the face of a pleading or based upon factual material submitted to the court. Grounds (7) and (8) go to the merits and the court can only decide if a party has pled properly. If a party wishes to assert facts showing lack or merit, this must be in the form of a summary judgment motion or at trial. Whatever form is used to assert the defenses, under the last sentence of section 21 A. and under section 21 C., the court has the flexibility to dispose of the matter in the most efficient manner. This rule eliminates the concept of special appearance and motions to quash. An objection of personal jurisdiction is treated as any other defense and waivable only under the provisions of section 21 G.

The grounds for motion to strike and motion to make more definite and certain in sections 21 D. and E. come from ORS 16.100 and 16.110 and not from the federal rule.

The consolidation and waiver rules of sections 21 F. and G. are modeled upon the federal rule. The consolidation requirement applies to any motion made under this rule; this would include motions under 21 A., B., D., and E., but not summary judgment or other motions. Special treatment is given to defenses related to personal jurisdiction and summons or process; under section 21 G.(1), they may not be asserted for the first time in an amended pleading.

PROPOSED OREGON RULES OF CIVIL PROCEDURE

Tentative Draft

September 15, 1978

Final action on the adoption or modification of the proposed rules, numbered 1 to 64, will be taken by the Council on Court Procedures at a meeting on Saturday, December 2, 1978, at 9:30 a.m. in Judge Dale's Courtroom in the Multnomah County Courthouse, Portland, Oregon.

The Council solicits comments and suggestions relating to these proposed rules. Written comments may be sent to the Executive Director, University of Oregon, School of Law, Eugene, Oregon 97403. The Council will receive oral statements relating to the rules at a public hearing on Friday, November 3, 1978, commencing at 9:30 a.m. in the County Commissioners Meeting Room, (Room 602), Multnomah County Courthouse, Portland, Oregon.

Council Members:

Donald W. McEwen, Portland (Chairman)
Hon. William H. Dale, Portland (Vice Chairman)
James B. O'Hanlon, Portland (Treasurer)
Darst B. Atherly, Eugene
E. Richard Bodyfelt, Portland
Sidney A. Brockley, Oregon City
Hon. Anthony L. Casciato, Portland
Hon. John M. Copenhaver, Bend
Hon. Alan F. Davis, Portland
Hon. Ross B. Davis, Medford
James O. Garrett, Salem
Wendell E. Gronso, Burns
Hon. Lee Johnson, Salem
Garr M. King, Portland
Laird Kirkpatrick, Eugene
Harriet Meadow Krauss, Corvallis
Hon. Berkeley Lent
Charles P. A. Paulson, Portland
Gene C. Rose, Ontario
Randolph Slocum, Roseburg
Hon. Val D. Sloper, Salem
Hon. Wendell H. Tompkins, Albany
Hon. William W. Wells, Pendleton
Fred Merrill (Executive Director)

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 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 proesss, (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 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 (1) 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.

B. 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.

C. Preliminary hearings. The defenses specifically denominated (1) through (8) in section A. of this rule, whether made in a pleading or by motion and the motion for judgment on the pleadings mentioned in section 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.

D. 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 10 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.

E. 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 10 days after the service of the pleading upon such party or upon the court's own initiative at any time, the court may order stricken: (1) any sham or frivolous or irrelevant pleading or defense; (2) any insufficient defense on or any sham, frivolous, irrelevant or redundant matter inserted in a pleading.

F. 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 subsection G.(2) of this rule on any of the grounds there stated.

G. Waiver or preservation of certain defenses. (1) 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 or process, or insufficiency of service of summons or process, is waived (a) if omitted from a motion in the circumstances described in section F. of this rule, or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 23 A. to be made as a

matter of course; provided, however, the defenses denominated (2) and (5) of section A. of this rule shall not be raised by amendment.

G.(2) 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, 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 13 B. 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 23 B. in light of any evidence that may have been received.

G.(3) 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.

BACKGROUND NOTE

ORS sections superseded: 16.100, 16.110, 16.130, 16.140, 16.150, 16.250, 16.260, 16.270, 16.280, 16.320, 16.330, 16.340.

COMMENT

While the Council wished to retain fact pleading, it also wanted to curb excessive use of motions for purposes of harassment and delay. The legislature has already moved in this direction by providing that the pleadings not go to the jury. See, Rule 59. Retention of fact pleading does not automatically mean retention of existing motion practice. This rule is designed to reduce the time spent on motions through simplification of procedure and a preclusion rule that requires assertion of all grounds for dismissal under this rule, which are raisable by motion, in a single motion. Although the structure of this rule is based upon Federal Rule 12, much of the language used was drawn from ORS sections or drafted to fit Oregon practice.

Section 21 A. covers the form of asserting defenses to an opponent's claim. At the pleader's option, these may be asserted in the answer or in a motion to dismiss. The motion to dismiss performs the function of the former demurrer or plea in abatement. Specific grounds for the motion, (1) through (6), do not go to the merits and are a matter for determination by the court either on the face of a pleading or based upon factual material submitted to the court. Grounds (7) and (8) go to the merits and the court can only decide if a party has pled properly. If a party wishes to assert facts showing lack or merit, ths must be in the form of a summary judgment motion or at trial. Whatever form is used to assert the defenses, under the last sentence of section 21 A. and under section 21 C., the court has the flexibility to dispose of the matter in the most efficient manner. This rule eliminates the concept of special appearance and motions to quash. An objection of personal jurisdiction is treated as any other defense and is waivable only under the provisions of section 21 G.

The grounds for motion to strike and motion to make more definite and certain in sections 21 D. and E. come from ORS 16.100 and 16.110 and not from the federal rule. Note, the motion to strike is used to challenge the sufficiency of a defense or new matter asserted in a reply to avoid a defense, and replaces the former demurrer to an answer or a reply.

The consolidation and waiver rules of sections 21 F. and G. are modeled upon the federal rule. The consolidation requirement applies to any motion made under this rule; this would include motions under 21 A., B., D., and E., but not summary judgment or other motions. Special treatment is given to defenses related to personal jurisdiction and summons or process; under section 21 G.(1), they may not be asserted for the first time in an amended pleading.

RULE 22

COUNTERCLAIMS, CROSS-CLAIMS AND THIRD PARTY CLAIMS

A. Counterclaims. Each defendant may set forth as many counterclaims, both legal and equitable, as such defendant may have against the plaintiff.

B. Cross-claim against codefendant. (1) In any action or proceeding where two or more parties are joined as defendants, any defendant may in his answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be

RULE 21

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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 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 (1) 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.

B. 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.

C. Preliminary hearings. The defenses specifically denominated (1) through (8) in section A. of this rule, whether made in a pleading or by motion and the motion for judgment on the pleadings mentioned in section 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.

D. 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 10 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 service 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.

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F. 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 subsection G.(2) of this rule on any of the grounds there stated.

G. Waiver or preservation of certain defenses. (1) 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 or process, or insufficiency of service of summons or process, is waived (a) if omitted from a motion in the circumstances described in section F. of this rule, or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 23 A. to be made as a

matter of course; provided, however, the defenses denominated (2) and (5) of section A. of this rule shall not be raised by amendment.

G.(2) 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, 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 13 B. 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 23 B. in light of any evidence that may have been received.

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BACKGROUND NOTE

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RULE 22

COUNTERCLAIMS, CROSS-CLAIMS AND THIRD PARTY CLAIMS

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PROPOSED OREGON RULES OF CIVIL PROCEDURE

FINAL DRAFT

NOVEMBER 24, 1978

(For consideration at meeting to be held December 2, 1978)

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

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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 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 summons or process or insufficiency of service of summons or ~~process~~ 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 to dismiss 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 to dismiss asserting defenses (1) 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.

B. 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.

C. Preliminary hearings. The defenses specifically denominated (1) through (8) in section A. of this rule, whether made in a pleading or by motion and the motion for judgment on the pleadings mentioned in section 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.

D. 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 10 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~~ service 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.

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F. 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 subsection G.(2).of this rule on any of the grounds there stated.

G. Waiver or preservation of certain defenses. (1) 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 or process, or insufficiency of service of summons or process, is waived (a) if omitted from a motion in the circumstances described in section F. of this rule, or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 23 A. to be made as a matter of course; provided, however, the defenses denominated (2) and (5) of section A. of this rule shall not be raised by amendment.

G.(2) 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, 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 13 B. 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 23 B. in light of any evidence that may have been received.

G.(3) 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.

COMMENT

While the Council wished to retain fact pleading, it also wanted to curb excessive use of motions for purposes of harassment and delay. The legislature has already moved in this direction by providing that the pleadings not go to the jury. See, ORCP 59. Retention of fact pleading does not automatically mean retention of existing motion practice. This rule is designed to reduce the time spent on motions through simplification of procedure and a preclusion rule that requires assertion of all grounds for dismissal under this rule, which are raisable by motion, in a single motion. Although the structure of this rule is based upon Federal Rule 12, much of the language used was drawn from ORS sections or drafted to fit Oregon practice.

Section 21 A. covers the form of asserting defenses to an opponent's claim. At the pleader's option, these may be asserted in the answer or in a motion to dismiss. The motion to dismiss performs the function of the former demurrer or plea in abatement. Specific grounds for the motion, (1) through (6), do not go to the merits and are a matter for determination by the court either on the face of a pleading or based upon factual material submitted to the court. Grounds (7) and (8) go to the merits and the court can only decide if a party has pled properly. If a party wishes to assert facts showing lack or merit, this ~~ths~~ must be in the form of a summary judgment motion or at trial. Whatever form is used to assert the defenses, under the last sentence of section 21 A. and under section 21 C., the court has the flexibility to dispose of the matter in the most efficient manner. This rule eliminates the concept of special appearance and motions to quash. An objection of personal jurisdiction is treated as any other defense and is waivable only under the provisions of section 21 G.

The grounds for motion to strike and motion to make more definite and certain in sections 21 D. and E. come from ORS 16.100 and 16.110 and not from the federal rule. Note, the motion to strike is used to challenge the sufficiency of a defense or new matter asserted in a reply to avoid a defense, and replaces the former demurrer to an answer or a reply. The motion to strike is also the proper procedure to assert failure to state separately claims or defenses.

The consolidation and waiver rules of sections 21 F. and G. are modeled upon the federal rule. The consolidation requirement applies to any motion made under this rule; this would include motions under 21 A., B., D., and E., but not summary judgment or other motions. Special treatment is given to defenses related to personal jurisdiction and summons or process; under section 21 G.(1), they may not be asserted for the first time in an amended pleading.

outside this rule

RULE 22

COUNTERCLAIMS, CROSS-CLAIMS AND THIRD PARTY CLAIMS

A. Counterclaims. Each defendant may set forth as many counterclaims, both legal and equitable, as such defendant may have against ~~the~~ a plaintiff.

B. Cross-claim against codefendant. (1) In any action ~~or proceeding~~ where two or more parties are joined as defendants, any defendant may in ~~his~~ such defendant's answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be one existing in favor of the defendant asserting the cross-claim and against another defendant, between whom a separate judgment might be had in the action and shall be: (a) one arising out of the occurrence or transaction set forth in the complaint; or (b) related to any property that is the subject matter of the action brought by plaintiff.

B.(2) A cross-claim may include a claim that the defendant against whom it is asserted is liable, or may be liable, to the defendant asserting the cross-claim for all or part of the claim asserted by the plaintiff.

OREGON RULES OF CIVIL PROCEDURE

Promulgated By

COUNCIL ON COURT PROCEDURES

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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 defenses 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 summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading shows that the action has not been commenced within the time limited by statute. A motion to dismiss 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 to dismiss asserting defenses (1) through

(7), 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 nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits.

B. 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.

C. Preliminary hearings. The defenses specifically denominated (1) through (9) in section A. of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings mentioned in section 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.

D. Motion to make more definite and certain. 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 10 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 when the allegations of a pleading are so indefinite or

uncertain that the precise nature of the charge, defense, or reply is not apparent. If the motion is granted and the order of the court is not obeyed within 10 days after service 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.

E. 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 10 days after the service of the pleading upon such party or upon the court's own initiative at any time, the court may order stricken: (1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated; (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading.

F. 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 subsection G.(2) of this rule on any of the grounds there stated.

G. Waiver or preservation of certain defenses.

G.(1) 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 or process, insufficiency of service of summons or process, or that the party asserting the claim is not the real party in interest, is waived (a) if omitted from a motion in the circumstances described in section F. of this rule, or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 23 A. to be made as a matter of course; provided, however, the defenses denominated (2) and (5) of section A. of this rule shall not be raised by amendment.

G.(2) 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, 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 13 B. 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 23 B. in light of any evidence that may have been received.

G.(3) 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.

COMMENT

While the Council wished to retain fact pleading, it also wanted to curb excessive use of motions for purposes of harassment and delay. The legislature has already moved in this direction by providing that the pleadings not go to the jury. See, ORCP 59. Retention of fact pleading does not automatically mean retention of existing motion practice. This rule is designed to reduce the time spent on motions through simplification of procedure and a preclusion rule that requires assertion of all grounds for dismissal under this rule, which are raisable by motion, in a single motion. Although the structure of this rule is based upon Federal Rule 12, much of the language used was drawn from ORS sections or drafted to fit Oregon practice.

Section 21 A. covers the form of asserting defenses to an opponent's claim. At the pleader's option, these may be asserted in the answer or in a motion to dismiss. The motion to dismiss performs the function of the former demurrer or plea in abatement. Specific grounds for the motion, (1) through (7), do not go to the merits and are a matter for determination by the court either on the face of a pleading or based upon factual material submitted to the court. Grounds (8) and (9) go to the merits and the court can only decide if a party has pled properly. If a party wishes to assert facts showing lack of merit, this must be in the form of a summary judgment motion or at trial. Whatever form is used to assert the defenses, under the last sentence of section 21 A. and under section 21 C., the court has the flexibility to dispose of the matter in the most efficient manner. This rule eliminates the concept of special appearance and motions to quash. An objection of personal jurisdiction is treated as any other defense and is waivable only under the provisions of section 21 G. If a motion to dismiss is made on the ground of lack of a real party in interest, the court should follow the procedure set out in ORCP 26 before granting the motion.

The grounds for motion to strike and motion to make more definite and certain in sections 21 D. and E. come from ORS 16.090, 16.100, and 16.110, and not from the federal rule. Note, the motion to strike is used to challenge the sufficiency of a defense or new matter asserted in a reply to avoid a defense, and replaces the former demurrer to an answer or a reply. The motion to strike is also the proper procedure to assert failure to state claims or defenses separately.

The consolidation and waiver rules of sections 21 F. and G. are modeled upon the federal rule. The consolidation requirement applies to any motion made under this rule; this would include motions under 21 A., B., D., and E., but not

summary judgment or other motions outside this rule. Special treatment is given to defenses related to personal jurisdiction and summons or process; under section 21 G.(1), they may not be asserted for the first time in an amended pleading.