

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) Cross-claim against codefendant; rights of third-party plaintiffs and defendants. (1) In any action 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 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.

K(3) 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.

K(4) An answer containing a cross-claim shall be served upon the parties who have appeared and who are joined under subdivision (6) of this rule.

K(5) (a) At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. Such leave shall not be given if it would substantially prejudice the rights of existing parties. The person served with the summons and third-party complaint,

hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in ORS 16.290 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in this section. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule J and his counterclaims and cross-claims as provided in this rule. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this section would entitle a defendant to do so.

K(6) Joinder of additional parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules N and O. The parties so joined may respond to the claim by reply, answer or motion.

K(7) Separate trial. Upon motion of any party, the court may order a separate trial of any counterclaim, cross-claim or third-party claim so alleged

if to do so would:

- (a) Be more convenient;
- (b) Avoid prejudice; or
- (c) Be more economical and expedite the matter.

L. AMENDED AND SUPPLEMENTAL PLEADINGS

L(1) Amendments. A pleading may be amended by a party once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. Whenever an amended pleading is filed, it shall be served upon all parties who are not in default, but as to all parties who are in default or against whom a default previously has been entered, judgment may be rendered in accordance with the prayer of the original pleading served upon them; and neither the amended pleading nor the process thereon need be served upon such parties in default unless the amended pleading asks for additional relief against the parties in default.

L(2) Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court

statements are permitted. Thus, in Pruett v. Lininger, 224 Or. 614 (1960), a defendant was allowed to allege that a worker was employed by two different people in the same pleading. Therefore, the only alternative or inconsistent pleading not allowed is where the statements are simple expository fact clearly within the knowledge of the pleader. This limit would be retained because the obligations of Rule F regarding truthful pleading apply, e.g. a party could not file a pleading alleging that he had mailed a letter on two different dates if he clearly knew the correct date because one of the statements would be untruthful. Requiring any more consistency at the pleading stage is unrealistic and does not appear to be required under present Oregon law; this rule will eliminate useless motions to elect and make more definite and certain and simplify pleading. The language used was taken from Michigan Rule 112.9(2).

(4) This is Federal Rule 10(c). There are some old Oregon cases discussing the necessity of specific incorporation of exhibits, but this rule seems more sensible.

RULE F

This is the new subscription rule adopted by the Council.

RULE G

This is the crucial rule retaining fact pleading. It follows a federal rule format of stating the requirements for any type of pleading asserting a claim (Chapter 16 deals only with complaints).

(1) Differs from the federal rules in requiring the pleading of ultimate facts rather than merely a statement of a claim. The language is based upon existing ORS 16.210 but substitutes the word, claim, for cause of action and says "ultimate" facts. Most of the recently enacted Oregon statutes in the

pleading and joinder area and the balance of these rules use the word, claim, rather than cause of action: retaining cause of action here would be confusing and is unnecessary. It is the reference to pleading ultimate facts that will retain the present level of specificity in pleading.

Of the jurisdictions with modern pleading rules, only three do not utilize to the federal description of pleading (Texas, Michigan and Florida). Texas and Michigan retain the use of cause of action. The language of this rule is adapted from Florida Rule 1.110 (b) (2), "A short and plain statement of the ultimate facts showing that the pleader is entitled to relief". The Oregon courts have developed the required level of pleading specificity through a series of cases distinguishing ultimate facts from evidentiary facts and conclusions of law, and this rule would retain the existing court-defined level of specificity.

Subsection (2) is based on existing ORS 16.210 (c). The last sentence was added. The word, plaintiff, will be changed to party to conform to the broader scope of the rule.

RULE H

This rule governs all responsive pleadings. The language is that of Federal Rule 8 (b) through (d), slightly modified to fit Oregon practice. Except as pointed out below, it is consistent with existing Oregon practice.

(1) The only substantial change here would be the last clause of the last sentence which authorizes a general denial only when a pleader truly intends to controvert all allegations in an opponent's pleading. Since few cases would arise when a pleader would truly be able to deny absolutely all

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.

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.

K(3) Third party practice. (a) At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. Such leave shall not be given if it would substantially prejudice the rights of existing parties. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule J and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in sections (1) and (2) of this rule. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule J and his counterclaims and crossclaims as provided in this rule. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third-party defendant.

(b) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which under this section would entitle a defendant to do so.

K(4) Joinder of additional parties. Persons other than those made parties to the original action may be made parties to a counterclaim or crossclaim in accordance with the provisions of Rules N and O. The parties so joined may respond to the claim by reply, answer or motion.

K(5) Separate trial. Upon motion of any party, the court may order a separate trial of any counterclaim, crossclaim or third-party claim so alleged if to do so would: (a) be more convenient; (b) avoid prejudice; or (c) be more economical and expedite the matter.

L. AMENDED AND SUPPLEMENTAL PLEADINGS

L(1) Amendments. A pleading may be amended by a party once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. Whenever an amended pleading is filed, it shall be served upon all parties who are not in default, but as to all parties who are in default or against whom a default previously has been entered, judgment may be rendered in accordance with the prayer of the original pleading served upon them; and neither the amended pleading nor the process thereon need be served upon such parties in default unless the amended pleading asks for additional relief against the parties in default.

L(2) Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the

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E(4) Adoption by reference; exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

F. SUBSCRIPTION OF PLEADINGS

F(1) Subscription by party or attorney, certificate. Every pleading shall be subscribed by the party or by a resident attorney of the state, except that if there are several parties united in interest and pleading together, the pleading must be subscribed by at least one of such parties or his resident attorney. When a corporation, including a public corporation, is a party, and if the attorney does not sign the pleading, the subscription may be made by any officer thereof upon whom service of a summons might be made; and when the state or any branch, department, agency, board or commission of the state or any officer thereof in its behalf is a party, the subscription, if not made by the attorney, may be made by any person to whom all the material allegations of the pleading are known. Verification of pleadings shall not be required. The subscription of a pleading constitutes a certificate by the person signing that such person has read the pleading, that to the best of the person's knowledge, information and belief there is a good ground to support it and that it is not interposed for delay.

F(2) Pleadings not subscribed. Any pleading not duly subscribed may, on motion of the adverse party, be stricken out of the case.

G. COMPLAINT, COUNTERCLAIM, CROSSCLAIM AND THIRD PARTY CLAIM

A pleading which asserts a claim for relief, whether an original claim, counterclaim, cross-claim or third party claim, shall contain: (1) a plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition; (2) a demand of the relief which the party claims; if

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recovery of money or damages is demanded, the amount thereof shall be stated; relief in the alternative or of several different types may be demanded; (3) a statement specifying whether the party asserts that the claim, or any part thereof, is triable of right by a jury.

H. RESPONSIVE PLEADINGS

H(1) Defenses; form of denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the allegations upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an allegation, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the allegations denied. When a pleader intends in good faith to deny only a part or a qualification of an allegation, the pleader shall admit so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the allegations of the preceding pleading, the denials may be made as specific denials of designated allegations or paragraphs, or the pleader may generally deny all the allegations except such designated allegations or paragraphs as he expressly admits; but, when the pleader does so intend to controvert all its allegations, the pleader may do so by general denial subject to the obligations set forth in Rule F.

H(2) Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, comparative or contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, unconstitutionality, waiver, and any other matter constituting an

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 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 ^{or} ~~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

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Regmt. on

Rule 22

BACNSud note

ORS ~~22C~~ sections superseded:

13,180, 16.305, 14.315, 14.325

COMMENT:

This rule is almost identical to the provisions of existing ORS Sections. The Council added the ~~language~~ the fourth sentence of Subsection 22C(1) to make clear that the trial judge should not give leave for a late impleader if ~~language~~ this would delay disposition of the matter to the prejudice ~~of~~ existing parties. Section 22E was also changed slightly to allow the ~~trial judge to order~~ a separate trial on the courts own initiative.

4. COUNTERCLAIMS, CROSS CLAIMS AND THIRD PARTY CLAIMS

^{22 A}
~~(1)~~ Counterclaims. Each defendant may set forth as many counterclaims, both legal and equitable, as such defendant may have against the plaintiff.

^{22 B}
~~(2)~~ Cross-claim against codefendant. (A) in any action 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 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.

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~~(B)~~ 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.

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~~(C)~~ An answer containing a cross-claim shall be served upon the parties who have appeared, ~~and who are joined under subdivision (4) of this Rule.~~

^{2C}
~~(3)~~ Third party practice. (A) At any time after commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to

all parties to the action. Such leave shall not be given if it would substantially prejudice the rights of existing parties. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule ²¹ ~~2~~ and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in sections ^A ~~(A)~~ and ^B ~~(B)~~ of this Rule. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule ²¹ ~~2~~ and his counterclaims and cross-claims as provided in this Rule. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third-party defendant.

⁽²⁾ ~~(B)~~ A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which under this section would entitle a defendant to do so.

22D

~~224~~) Joinder of persons in contract actions. (d) As used in this section of this Rule:

(a) "Maker" means the original party to the contract which is the subject of the action who is the predecessor in interest of the plaintiff under the contract; and

(b) "Contract" includes any instrument or document evidencing a debt.

(c) The defendant may, in an action on a contract brought by an assignee of rights under that contract, join as a party to the action the maker of that contract if the defendant has a claim against the maker of the contract arising out of that contract.

(3) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097.

(4) In any action against a party joined under this section of this Rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule ~~3~~⁷.

22E

~~225~~) Separate trial. Upon motion of any party or upon the court's own motion, the court may order a separate trial of any counterclaim, cross-claim or third-party claim so alleged if to do so would: (d) be more convenient; (e) avoid prejudice; or (f) be more economical and expedite the matter.

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~~22~~ AMENDED AND SUPPLEMENTAL PLEADINGS

~~22A~~ ^{23A} Amendments. A pleading may be amended by a party once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may so amend it at any time within 20 days

RULE 22

COUNTERCLAIMS, CROSS-CLAIMS AND THIRD PARTY CLAIMS

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

B. Cross-claim against codefendant. (1) In any action 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 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.

B.(3) An answer containing a cross-claim shall be served upon the parties who have appeared.

C. Third party practice. (1) At any time after commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than

10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. Such leave shall not be given if it would substantially prejudice the rights of existing parties. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 21 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in sections A. and B. of this rule. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 21 and his counterclaims and cross-claims as provided in this rule. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third-party defendant.

C. (2) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which ~~under this~~ section would entitle a defendant to do so ^{under}

subsection (1) of this section

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D. Joinder of persons in contract actions. (1) As used in this section of this rule:

D.(1)(a) "Maker" means the original party to the contract which is the subject of the action who is the predecessor in interest of the plaintiff under the contract; and

D.(1)(b) "Contract" includes any instrument or document evidencing a debt.

D.(2) The defendant may, in an action on a contract brought by an assignee of rights under that contract, join as a party to the action the maker of that contract if the defendant has a claim against the maker of the contract arising out of that contract.

D.(3) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097.

D.(4) In any action against a party joined under this section of this Rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

E. Separate trial. Upon motion of any party or upon the court's own motion, the court may order a separate trial of any counterclaim, cross-claim or third party claim so alleged if to do so would: (1) be more convenient; (2) avoid prejudice; or (3) be more economical and expedite the matter.

BACKGROUND NOTE

ORS sections superseded: 13.180, 15.210, 16.305, 16.315, 16.325.

COMMENT

This rule is almost identical to the provisions of existing ORS sections. The Council added the fourth sentence of subsection 22 C.(1) to make clear that the trial judge should not give leave for a late impleader if this would prejudice existing parties. Section 22 E. was also changed slightly to allow a separate trial on the court's own initiative.

RULE 22

COUNTERCLAIMS, CROSS-CLAIMS AND THIRD PARTY CLAIMS

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B. Cross-claim against codefendant. (1) In any action 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 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.

B.(3) An answer containing a cross-claim shall be served upon the parties who have appeared.

C. Third party practice. (1) At any time after commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than

10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. Such leave shall not be given if it would substantially prejudice the rights of existing parties. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 21 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in sections A. and B. of this rule. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 21 and his counterclaims and cross-claims as provided in this rule. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third-party defendant.

C. (2) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which would entitle a defendant to do so under subsection C. (1) of this section.

D. Joinder of persons in contract actions. (1) As used in this section of this rule:

D.(1)(a) "Maker" means the original party to the contract which is the subject of the action who is the predecessor in interest of the plaintiff under the contract; and

D.(1)(b) "Contract" includes any instrument or document evidencing a debt.

D.(2) The defendant may, in an action on a contract brought by an assignee of rights under that contract, join as a party to the action the maker of that contract if the defendant has a claim against the maker of the contract arising out of that contract.

D.(3) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097.

D.(4) In any action against a party joined under this section of this Rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

E. Separate trial. Upon motion of any party or upon the court's own motion, the court may order a separate trial of any counterclaim, cross-claim or third party claim so alleged if to do so would: (1) be more convenient; (2) avoid prejudice; or (3) be more economical and expedite the matter.

BACKGROUND NOTE

ORS sections superseded: 13.180, 15.210, 16.305, 16.315, 16.325.

COMMENT

This rule is almost identical to the provisions of existing ORS sections. The Council added the fourth sentence of subsection 22 C.(1) to make clear that the trial judge should not give leave for a late impleader if this would prejudice existing parties. Section 22 E. was also changed slightly to allow a separate trial on the court's own initiative.

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 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.

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

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.

B.(3) An answer containing a cross-claim shall be served upon the parties who have appeared.

C. Third party practice. (1) At any time after commencement of the action or proceeding, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action or proceeding who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. Such leave shall not be given if it would substantially prejudice the rights of existing parties. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall assert any defenses to the third-party plaintiff's claim as provided in Rule 21 and counterclaims

against the third-party plaintiff and cross-claims against other third-party defendants as provided in sections A. and B. of this rule. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 21 and his counterclaims and cross-claims as provided in this rule. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third-party defendant.

C.(2) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which would entitle a defendant to do so under subsection C.(1) of this section.

D. Joinder of persons in contract actions. (1) As used in this section of this rule:

D.(1)(a) "Maker" means the original party to the contract which is the subject of the action who is the predecessor in interest of the plaintiff under the contract; and

C.(1)(b) "Contract" includes any instrument or document evidencing a debt.

D.(2) The defendant may, in an action on a contract brought by an assignee of rights under that contract, join as a party to the action the maker of that contract if the defendant has a claim against the maker of the contract arising out of that contract.

D.(3) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097.

D.(4) In any action against a party joined under this section of this rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

E. Separate trial. Upon motion of any party or upon the court's own motion, the court may order a separate trial of any counterclaim, cross-claim or third party claim so alleged if to do so would: (1) be more convenient; (2) avoid prejudice; or (3) be more economical and expedite the matter.

BACKGROUND NOTE

ORS sections superseded: 13.180, 15.210, 16.305, 16.315, 16.325.

COMMENT

This rule is almost identical to the provisions of existing ORS sections. The Council added the fourth sentence of subsection 22 C.(1) to make clear that the trial judge should not give leave for a late impleader if this would prejudice existing parties. Section 22 E. was also changed slightly to allow a separate trial on the court's own initiative.

outside
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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

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A. Counterclaims. Each defendant may set forth as many counterclaims, both legal and equitable, as such defendant may have against ^a 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 ^{such defendant's} his 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.

B.(3) An answer containing a cross-claim shall be served upon the parties who have appeared.

C. Third party practice. (1) At any time after commencement of the action ~~or~~-proceeding, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action ~~or~~-proceeding who is or may be liable to ~~him~~ the third party plaintiff for all or part of the plaintiff's claim ~~against him.~~ (the third party plaintiff) The third-party plaintiff need not obtain leave to make the service if ~~he files~~ is filed the third-party complaint not later than 10 days after service of the third party plaintiff's ~~he serves his original answer.~~ Otherwise ~~he~~ the third party plaintiff must obtain leave on motion upon notice to all parties to the action. Such leave shall not be given if it would substantially prejudice the rights of existing parties. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall assert any defenses to the third-party plaintiff's claim as provided in Rule 21 and counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in sections A. and B. of this rule. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against

the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert the third party defendant's the third party defendant's defenses as provided in Rule 21 and his counter-claims and cross-claims as provided in this rule. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third-party defendant.

C.(2) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which would entitle a defendant to do so under subsection C.(1) of this section.

D. Joinder of persons in contract actions. (1) As used in this section of this rule:

D.(1)(a) "Maker" means the original party to the contract which is the subject of the action who is the predecessor in interest of the plaintiff under the contract; and

C.(1)(b) "Contract" includes any instrument or document evidencing a debt.

D.(2) The defendant may, in an action on a contract brought by an assignee of rights under that contract, join as a party to the action the maker of that contract if the defendant has a claim against the maker of the contract arising out of that contract.

D.(3) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097.

D.(4) In any action against a party joined under this section of this rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

E. Separate trial. Upon motion of any party or upon the court's own ^{initiative} motion, the court may order a separate trial of any counterclaim, cross-claim, or third party claim so alleged if to do so would: (1) be more convenient; (2) avoid prejudice; or (3) be more economical and expedite the matter.

COMMENT

This rule is almost identical to the provisions of existing ORS sections. The Council added the fourth sentence of subsection 22 C.(1) to make clear that the trial judge should not give leave for a late impleader if this would prejudice existing parties. Section 22 E. was also changed slightly to allow a separate trial on the court's own initiative.

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 a plaintiff.

B. Cross-claim against codefendant.

B.(1) In any action where two or more parties are joined as defendants, any defendant may in 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.

B.(3) An answer containing a cross-claim shall be served upon the parties who have appeared.

C. Third party practice.

C.(1) At any time after commencement of the action, a defending party, as a third party plaintiff, may cause a summons

and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff. The third party plaintiff need not obtain leave to make the service if the third party complaint is filed not later than 10 days after service of the third party plaintiff's original answer. Otherwise the third party plaintiff must obtain leave on motion upon notice to all parties to the action. Such leave shall not be given if it would substantially prejudice the rights of existing parties. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in sections A. and B. of this rule. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant

thereupon shall assert the third party defendant's defenses as provided in Rule 21 and the third party defendant's counter-claims and cross-claims as provided in this rule. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.

C.(2) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which would entitle a defendant to do so under subsection C.(1) of this section.

D. Joinder of persons in contract actions.

D.(1) As used in this section of this rule:

D.(1)(a) "Maker" means the original party to the contract which is the subject of the action who is the predecessor in interest of the plaintiff under the contract; and

D.(1)(b) "Contract" includes any instrument or document evidencing a debt.

D.(2) The defendant may, in an action on a contract brought by an assignee of rights under that contract, join as a party to the action the maker of that contract if the defendant has a claim against the maker of the contract arising out of that contract.

D.(3) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to

that action all or any persons liable for attorney fees under ORS 20.097.

D.(4) In any action against a party joined under this section of this rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

E. Separate trial. Upon motion of any party or on the court's own initiative, the court may order a separate trial of any counterclaim, cross-claim, or third party claim so alleged if to do so would: (1) be more convenient; (2) avoid prejudice; or (3) be more economical and expedite the matter.

COMMENT

This rule is almost identical to the provisions of existing ORS 13.180, 15.120, 16.305, 16.315, and 16.325. The Council added the fourth sentence of subsection 22 C.(1) to make clear that the trial judge should not give leave for a late impleader if this would prejudice existing parties. Section 22 E. was also changed slightly to allow a separate trial on the court's own initiative.