

P. MISJOINDER AND NONJOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any state of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Q. REAL PARTY IN INTEREST

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought: and when a statute of the state so provides, an action for the use or benefit of another shall be brought in the name of the state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

pleading after a successful motion for judgment on the pleadings was added to give the trial judge discretion where such motion is actually a late blooming motion to dismiss for failure to state a claim. If the motion is denied, the existing statute relating to demurrers gave the trial judge discretion to not allow further pleading. This rule automatically allows pleading over after an unsuccessful motion, absent bad faith.

(5) This is ORS 16.400(2) and covers a motion to strike a part of a pleading.

(6) This is existing ORS 16.410.

(7) The language is taken from Federal Rule 15(d). It does not change the existing rule under ORS 16.360 but the language is clearer.

#### RULE M

This is existing ORS 16.221. (The title should be JOINDER OF CLAIMS).

#### RULE N

This is existing ORS 13.161.

#### RULE O

This is Federal Rule 19. This is one of the best drafted federal rules and seems to be a clear and reasonable elaboration of ORS 13.110. The last section, (5), is ORS 13.190 covering a specific situation.

#### RULE P

This is Federal Rule 21 and replaces all other remedies for party joinder problems with the simple device of dropping or adding parties.

#### RULE Q

This is Federal Rule 17(a) and has the same effect as ORS 13.030, using clearer language. It also provides a procedure for dealing with real party in interest objections.

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Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the state so provides, an action for the use or benefit of another shall be brought in the name of the state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

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 <sup>to dismiss</sup> 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 <sup>to dismiss</sup> 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,

*to dismiss  
on Rem J. D. M.  
the pleading.  
to dismiss*

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.

P13  
Nov 10  
memo  
Procedure on  
motion

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 <sup>service</sup> 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.

Hollis  
p 9

notice  
at issue

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 ~~or~~ 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

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by  
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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.

PS  
rule 13  
memo  
subject  
Miller J.

#### 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, 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 <sup>or</sup> ~~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

Hollis  
pg  
Regmt. on



Rule 21.

Background

ORS sections superseded:

14.130, 16.140

16.100, ~~16.110~~ 16.110, 16.150, 16.250, 16.260,

16.320, 16.330

16.270, 16.280, ~~16.330~~ 16.340

Begin

COMMENT:

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

~~XX~~ While the council wished to  
retain fact pleading, it did wish to curb excessive ~~XXXXXXXXXXXXX~~ <sup>Also wanted</sup> resort <sup>use</sup>  
to ~~motion practice~~ <sup>of motions</sup> for purposes of harrassment and delay. ~~The legislature~~

Retention of fact pleading does not automatically mean retention of existing

The legislature has already moved in this direction by providing that  
pleading motion practice. This rule is designed to reduce the time spent

at the <sup>on motions</sup> pleading stage through simplification <sup>of procedure</sup> of attacks that may be made  
upon an opponents pleading and a preclusion rule that requires ~~grouping~~

pleadings  
not go to  
the jury.

See rule  
59

~~of all XXXXXXXXXXXXXXXXXXXXXXXX attacks the raising of all grounds for dismissal~~

assertion of all grounds for ~~XXXXXX~~ <sup>under this rule</sup> dismissal, which are raisable by motion,  
in a single motion.

Section 21 ~~XXXXXX~~ covers ~~the various attacks~~ against the maintenance  
of an opponents 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

2

Section 21 A covers the form of asserting defenses to an opponents 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 on specific grounds~~

The motion to dismiss ~~then~~ performs the function of the former demurree 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 <sup>the</sup> facts <sup>properly</sup>; ~~that is the court cannot go beyond the~~

face of the pleading. If a party wishes to assert facts showing ~~no~~ <sup>lock on merit,</sup>

right to ~~recover~~ this must be in the form of a summary judgement motion

~~under rule XXXXX~~ or at trial. The ~~distinction is clearly covered in the~~

~~last sentence of the section.~~ ~~XXXXXXXXXXXXXXXXXXXX~~ Whatever form is used

to assert the defenses, <sup>under</sup> ~~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 ~~Motion to strike~~ Grounds for motion to strike and motion to make more definite and certain in Sections 21 D and E come from ~~XXX~~ ORS 16.100 and 16.110 and not from the Federal Rule. ~~The Oregon Rules are more~~

The Consolidation and Waiver rules of Sections 21 F and G are modeled upon the federal rule. ~~Not 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, <sup>and XXXXX summons or process</sup> under ~~XXXX~~ Section 21 G 4 they may not be asserted in an amended pleading

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)~~ <sup>A.</sup> was used.

*ORS. 16.540 was eliminated*

*Official 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 <sup>A</sup>~~B~~ 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~~<sup>10</sup> 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~~<sup>10</sup> 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 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

(5) or an amendment thereof permitted by Rule 23 A. to be made as a matter of course; provided, however, the defenses <sup>deprived minutes</sup> ~~unenumerated in subsections~~ <sup>section A.012</sup> (2) and (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*

4. COUNTERCLAIMS, CROSS CLAIMS AND THIRD PARTY CLAIMS

<sup>22 A</sup>  
~~22 A~~) Counterclaims. Each defendant may set forth as many counterclaims, both legal and equitable, as such defendant may have against the plaintiff.

<sup>22 B</sup>  
~~22 B~~) 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.

<sup>2</sup>  
~~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.

<sup>3</sup>  
~~3~~) 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.~~

<sup>22 C</sup>  
~~22 C~~) 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 <sup>21</sup> ~~2~~ and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in sections <sup>A</sup> ~~(A)~~ and <sup>B</sup> ~~(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 <sup>21</sup> ~~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.

<sup>(2)</sup> ~~(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.

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 ~~XXXXXX~~ 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.

22 D

~~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.

(d) 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.

(e) 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~~<sup>7</sup>.

22 E

~~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.

23

~~22~~ AMENDED AND SUPPLEMENTAL PLEADINGS

23 A

~~22~~) 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 <sup>under</sup>

*subsection c(1) of this section*

*where is rest of Rule  
22. + cont -  
24*

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.

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.

<sup>23B</sup>  
~~1(2)~~ Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of

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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 may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved <sup>102</sup> thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

<sup>23 C</sup>  
~~1(3)~~ Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment <sup>1</sup> (a) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and <sup>2</sup> (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.



23 D

~~L(4)~~ Amendment or pleading over after motion. When a motion to dismiss or a motion to strike an entire pleading or a motion for a judgment on the pleadings under Rule <sup>21</sup> is allowed, the court may, upon such terms as may be proper, allow the party to file an amended pleading. If any motion is disallowed, and it appears to have been made in good faith, the party filing the motion shall file a responsive pleading if any is required.

23 E

~~L(5)~~ Amended pleading where part of pleading stricken. In all cases where part of a pleading is ordered stricken, the court, in its <sup>63</sup> discretion, may require that an amended pleading be filed omitting the matter ordered stricken. By complying with the court's order, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling upon the motion to strike.

23 F

~~L(6)~~ How amendment made. When any pleading or proceeding is amended before trial, mere clerical errors excepted, it shall be done by filing a new pleading, to be called the amended complaint, or by interlineation, deletion or otherwise. Such amended pleading shall be complete in itself, without reference to the original or any preceding amended one.

23 G

~~L(7)~~ Supplemental pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its

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

Order on  
trial 3/2  
Party  
cases  
Oct 30  
p 14

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 <sup>initiative</sup> ~~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.

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Carter  
Troy*

## RULE 23

### AMENDED AND SUPPLEMENTAL PLEADINGS

A. 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.

B. 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 may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining an action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

C. Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, such party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining any defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party brought in by amendment.

D. Amendment or pleading over after motion. When a motion to dismiss or a motion to strike an entire pleading or a motion for a judgment on the pleadings under Rule 21 is allowed, the court may, upon such terms as may be proper, allow the party to file an amended pleading. If any motion is disallowed, the party filing the motion shall file a responsive pleading if any is

required. By filing any pleading pursuant to this section, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling.

E. Amended pleading where part of pleading stricken. In all cases where part of a pleading is ordered stricken, the court, in its discretion, may require that an amended pleading be filed omitting the matter ordered stricken. By complying with the court's order, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling upon the motion to strike.

F. How amendment made. When any pleading is amended before trial, mere clerical errors excepted, it shall be done by filing a new pleading, to be called the amended pleading, or by interlineation, deletion or otherwise. Such amended pleading shall be complete in itself, without reference to the original or any preceding amended one.

G. Supplemental pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Rule 23

Background ✓ For Time For Filing and Responding to motion.  
Motions see Rule 15.

ORS sections Suppended.

16.380 16.400, 16.410, 16.420  
16.360 16.370, 16.390, 16.430,

16.610, 16.620, 16.630, 16.640, 16.650,

16.660

04  
COMMENT:



This is a combination of Federal Rule 15 and existing ORS sections.  
23  
Section A is based upon Federal Rule 15(a) and ORS 16.430. Section B is  
Based on Federal Rule 15(b). Section C is Based on Federal Rule 15(c)X.  
Section D is based upon ORS 16.380 and 400. Section E is based upon  
Ors 16.400. Section F is based upon ORs 16.410 and Section G is  
based upon ORS 16.360 and Federal Rule 15(d).



RULE 23

AMENDED AND SUPPLEMENTAL PLEADINGS

A. 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.

B. 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 may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that

the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

C. Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

D. Amendment or pleading over after motion. When a motion to dismiss or a motion to strike an entire pleading or a motion for a judgment on the pleadings under Rule 21 is allowed, the court may, upon such terms as may be proper, allow the party to file an amended pleading. If any motion is disallowed, and it appears to have been made in good faith, the party filing the motion shall file a responsive pleading if any is required.

*By complying with the Court's order the party filing the amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling.*

E. Amended pleading where part of pleading stricken. In all cases where part of a pleading is ordered stricken, the court, in its discretion, may require that an amended pleading be filed omitting the matter ordered stricken. By complying with the court's order, the party filing such amended pleading shall not be deemed thereby to

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have waived the right to challenge the correctness of the court's ruling upon the motion to strike.

F. How amendment made. When any pleading ~~or proceeding~~ is amended before trial, mere clerical errors excepted, it shall be done by filing a new pleading, to be called the amended <sup>pleading</sup> ~~complaint~~, or by interlineation, deletion or otherwise. Such amended pleading shall be complete in itself, without reference to the original or any preceding amended one.

G. Supplemental pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

#### BACKGROUND NOTE

For time for filing and responding to amended pleadings, see Rule 15.

ORS sections superseded: 16.360, 16.370, 16.380, 16.390, 16.400, 16.410, 16.420, ~~16.430~~, 16.610, ~~16.620~~, 16.630, 16.640, 16.650, ~~16.660~~.

#### COMMENT

This is a combination of Federal Rule 15 and existing ORS sections. Section 23 A. is based upon Federal Rule 15(a) and ORS 16.430. Section B. is based on Federal Rule 15(b). Section C. is based on Federal Rule 15(c). Section D. is based upon ORS 16.380 and 400. Section E. is based upon ORS 16.400. Section F. is based upon ORS 16.410, and Section G. is based upon ORS 16.360 and Federal Rule 15(d).

*motion*

*i note the court is specifically  
asked to ~~allow~~ grant a judgment  
on the pleadings but to allow ~~Repleading~~  
rather than ~~grant~~ a judgment.*

statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

<sup>24</sup>  
M. JOINDER OF CLAIMS 05

<sup>24A</sup>  
M(1) Permissive joinder. A plaintiff may join in a complaint, either as independent or as alternate claims, as many claims, legal or equitable, as the plaintiff has against an opposing party.

<sup>24B</sup>  
M(2) Forcible entry and detainer and rental. If an action of forcible entry and detainer and an action for rental due are joined, the defendant shall have the same time to appear as is now provided by law in actions for the recovery of rental due.

<sup>24C</sup>  
M(3) Separate statement. The claims untied must be separately stated and must not require different places of trial.

N. JOINDER OF PARTIES

<sup>24D</sup>  
N(1) Permissive joinder as plaintiffs or defendants. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded.

RULE 24

JOINDER OF CLAIMS

A. Permissive joinder. A plaintiff may join in a complaint, either as independent or as alternate claims, as many claims, legal or equitable, as the plaintiff has against an opposing party.

B. Forcible entry and detainer and rental. If an action of forcible entry and detainer and an action for rental due are joined, the defendant shall have the same time to appear as is now provided by law in actions for the recovery of rental due.

C. Separate statement. The claims untied must be separately stated and must not require different places of trial.

BACKGROUND NOTE

ORS chapters superseded: 16221.

COMMENT

*Based on*  
This is ~~identical~~ to the existing ORS section.

RULE 25 (RESERVED)

BACKGROUND NOTE

For time for filing and responding to amended pleadings, see Rule 15.

ORS sections superseded: 16.360, 16.370, 16.380, 16.390, 16.400, 16.410, 16.420, 16.610, 16.630, 16.640, 16.650.

COMMENT

This is a combination of Federal Rule 15 and existing ORS sections. Section 23 A. is based upon Federal Rule 15(a) and ORS 16.430. Section B. is based on Federal Rule 15(b). Section C. is based on Federal Rule 15(c). Section D. is based upon ORS 16.380 and 400; note the court is specially authorized to grant a motion for a judgment on the pleadings but to allow repleading rather than enter a judgment. Section E. is based upon ORS 16.400. Section F. is based upon ORS 16.410, and Section G. is based upon ORS 16.360 and Federal Rule 15(d).

RULE 24

JOINDER OF CLAIMS

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A. Permissive joinder. A plaintiff may join in a complaint, either as independent or as alternate claims, as many claims, legal or equitable, as the plaintiff has against an opposing party.

B. Forcible entry and detainer; ~~and~~ rental due If an <sup>claim</sup> action of forcible entry and detainer and an <sup>claim</sup> action for rental due are joined, the defendant shall have the same time to appear as is ~~now~~ provided by law in actions for the recovery of rental due.

Handwritten note: "102 navis memo file" in a box.

C. Separate statement. The claims <sup>joined</sup> ~~united~~ must be separately stated and must not require different places of trial.

BACKGROUND NOTE

ORS chapters superseded: 16.221.

COMMENT

This is based on the existing ORS section.

RULE 25 (RESERVED)

RULE 26

REAL PARTY IN INTEREST

Every action or proceeding shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in <sup>the party's</sup> (their) own name without joining with them the party for whose benefit the action or proceeding is brought; and when a statute of this state so provides, an action or proceeding for the use or benefit of another shall be brought in the name of the state. No action or proceeding shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action or proceeding by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action or proceeding had been commenced in the name of the real party in interest.

BACKGROUND NOTE

ORS sections superseded: 13.030.

COMMENT

This rule is based upon Federal Rule 17(a) but is generally the same as ORS 13.030. The rule specifically deals with guardians and actions in the name of the state and provides a procedure for dealing with real party in interest objections.

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Bailee.

abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

T(3) Public officers; death or separation from office. (a) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(b) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

T(4) Procedure. The motion for substitution may be made by any party or by the successors in interest or representatives of the deceased or disabled party or the successors in interest of the transferor and shall be served on the parties as provided in Rule \_\_\_\_ (service of papers after summons) and upon persons not parties in the manner provided in Rule \_\_\_\_ for the service of a summons.

~~25.~~ 26.

~~##~~ REAL PARTY IN INTEREST

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by



statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the state so provides, an action for the use or benefit of another shall be brought in the name of the state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

27

~~27~~ MINOR OR INCAPACITATED PARTIES

27 A  
V(1)

Appearance of minor parties by guardian or conservator.

When a minor who has a conservator of his estate or a guardian is a party to any action or proceeding, ~~he~~ shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action or proceeding is brought. If the minor does not have a conservator of his estate or a guardian, he shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

stat.

(1)

When the minor is plaintiff, upon application of the minor, if the minor is 14 years of age or older, or upon application of a relative or friend of the minor if the minor is under 14 years of age.

(D) When the minor is defendant, upon application of the minor, if the minor is 14 years of age or older, filed within the period of time specified by law for appearance and answer after service of summons, or if the minor fails so to apply or is under 14 years of age, upon application of any other party or of a relative or friend of the minor.

<sup>22.6</sup>  
(2) Appearance of incapacitated person by conservator or guardian. When an incapacitated person who has a conservator of his estate or a guardian is a party to any action or proceeding, he shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action or proceeding is brought. If the incapacitated person does not have a conservator of his estate or a guardian, he shall appear by a guardian ad litem<sup>108</sup> appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

(1) When the incapacitated person is plaintiff, upon application of a relative or friend of the incapacitated person.

(2) When the incapacitated person is defendant, upon application of a relative or friend of the incapacitated person filed within the period of time specified by law for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the incapacitated person.

Rule 25 - Reserved.

Rule. 26  
Real Party in Interest

Background

ORS. sections Superseded.

13.030

COMMENT:

This rule is based upon Federal Rule 17(a) but is generally the same as ORS 13.030. The rule specifically deals with guardians and actions in the name of the state and provides a procedure for dealing with real party in interest objections.

Rule 27

Minor or Incapable Parties.

Background.

ORS sections Superseded.

13.041, 13.051

XCOMMENT:

This rule is the existing ORS sections without any change.

Rule N should be Numbered as 28-

3-1-1944

1944-1945

1944-1945

1944-1945

1944-1945

1944-1945

1944-1945

1944-1945

1944-1945

1944-1945

1944-1945

RULE 26

REAL PARTY IN INTEREST

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of the state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

BACKGROUND NOTE

ORS sections superseded: 13.030.

COMMENT

This rule is based upon Federal Rule 17(a) but is generally the same as ORS 13.030. The rule specifically deals with guardians and actions in the name of the state and provides a procedure for dealing with real party in interest objections.

RULE 27

MINOR OR INCAPACITATED PARTIES

A. Appearance of minor parties by guardian or conservator. When a minor who has a conservator of his estate or a guardian is a party to any action or proceeding, such minor shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action or proceeding is brought. If the minor does not have a conservator of his estate or a guardian, he shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

A.(1) When the minor is plaintiff, upon application of the minor, if the minor is 14 years of age or older, or upon application of a relative or friend of the minor if the minor is under 14 years of age.

A.(2) When the minor is defendant, upon application of the minor, if the minor is 14 years of age or older, filed within the period of time specified by law for appearance and answer after service of summons, or if the minor fails so to apply or is under 14 years of age, upon application of any other party or of a relative or friend of the minor.

B. Appearance of incapacitated person by conservator or guardian. When an incapacitated person who has a conservator of his estate or a guardian is a party to any action or proceeding, he shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action or proceeding is brought. If the incapacitated person does not have a conservator of his estate or a guardian, he shall appear by a guardian ad litem

appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

B.(1) When the incapacitated person is plaintiff, upon application of a relative or friend of the incapacitated person.

B.(2) When the incapacitated person is defendant, upon application of a relative or friend of the incapacitated person filed within the period of time specified by law for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the incapacitated person.

BACKGROUND NOTE

ORS sections superseded: 13.041, 13.051.

COMMENT

*Based on*  
This rule ~~is~~ the existing ORS section\$ without any changes.

statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

~~M~~ JOINDER OF CLAIMS <sup>24</sup>

<sup>24 A</sup>  
~~M(1)~~ Permissive joinder. A plaintiff may join in a complaint, either as independent or as alternate claims, as many claims, legal or equitable, as the plaintiff has against an opposing party.

<sup>24 B</sup>  
~~M(2)~~ Forcible entry and detainer and rental. If an action of forcible entry and detainer and an action for rental due are joined, the defendant shall have the same time to appear as is now provided by law in actions for the recovery of rental due.

<sup>24 C</sup>  
~~M(3)~~ Separate statement. The claims untied must be separately stated and must not require different places of trial.

~~M~~ JOINDER OF PARTIES <sup>28</sup>

<sup>28 A</sup>  
~~M(1)~~ Permissive joinder as plaintiffs or defendants. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded.



Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

<sup>28B</sup>  
~~28A~~ Separate trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to unnecessary expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

29-

10. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

<sup>29A</sup>  
~~29A~~ Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in that person's absence complete relief cannot be accorded among those already parties, or (2) that person claims an interest relating to the subject of the action and is so situated that the disposition in that person's absence may (a) as a practical matter impair or impede the person's ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest. If such person has not been so joined, the court shall order that such person be made a party. If the joined party objects to venue and the joinder would render the venue of the action improper, the joined party shall be dismissed from the action.

<sup>29B</sup>  
~~29B~~ Determination by court whenever joinder not feasible. If

~~if a person~~ <sup>plaintiff</sup> should join as a ~~party~~ but refuses to do so,

Such person shall be made a defendant, the reason being stated in the complaint.

Subsections A (1) (2)

a person as described in subdivision ~~(1)~~ ~~(3)~~ and ~~(5)~~ of this Rule cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include; first, to what extent a judgment rendered in the person's absence might be <sup>III</sup>prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

<sup>29 C</sup>  
~~0(3)~~ Exception of class actions. This Rule is subject to the provisions of Rule 32 (~~class action rule~~).

<sup>29 D</sup>  
~~0(4)~~ State agencies as parties in governmental administration proceedings. In any action or proceeding arising out of county administration of functions delegated or contracted to the county by a state agency, the state agency must be made a party to the action or proceeding.

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~~B.~~ MISJOINDER AND NONJOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of

RULE 27

MINOR OR INCAPACITATED PARTIES

A. Appearance of minor parties by guardian or conservator.

When a minor, who has a conservator of such minor's estate or a guardian, is a party to any action or proceeding, such minor shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action or proceeding is brought. If the minor does not have a conservator of such minor's estate or a guardian, the minor shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

A.(1) When the minor is plaintiff, upon application of the minor, if the minor is 14 years of age or older, or upon application of a relative or friend of the minor if the minor is under 14 years of age.

A.(2) When the minor is defendant, upon application of the minor, if the minor is 14 years of age or older, filed within the period of time specified by law for appearance and answer after service of summons, or if the minor fails so to apply or is under 14 years of age, upon application of any other party or of a relative or friend of the minor.

B. Appearance of incapacitated person by conservator or guardian. When an incapacitated person, who has a conservator of such person's estate or a guardian, is a party to any action or proceeding, the incapacitated person shall appear by the conservator or guardian as may be appropriate or, if the court so

orders, by a guardian ad litem appointed by the court in which the action or proceeding is brought. If the incapacitated person does not have a conservator of such person's estate or a guardian, the incapacitated person shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

B.(1) When the incapacitated person is plaintiff, upon application of a relative or friend of the incapacitated person.

B.(2) When the incapacitated person is defendant, upon application of a relative or friend of the incapacitated person filed within the period of time specified by law for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the incapacitated person.

BACKGROUND NOTE

ORS sections superseded: 13.041, 13.051.

COMMENT

This rule is based on the existing ORS sections.

RULE 28

JOINDER OF PARTIES

A. Permissive joinder as plaintiffs or defendants. All persons may join in one action or proceeding as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any

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question of law or fact common to all these persons will arise in the action. All persons may be joined in one action or proceeding as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

B. Separate trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to unnecessary expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

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clause.

BACKGROUND NOTE

ORS sections superseded: 13.140, 13.150, 13.161.

COMMENT

This is based on existing ORS 13.161.

RULE 29

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

A. Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive

the court of jurisdiction over the subject matter of the action shall be joined as a party in the action or proceeding if (1) in that person's absence complete relief cannot be accorded among those already parties, or (2) that person claims an interest relating to the subject of the action or proceeding and is so situated that the disposition in that person's absence may (a) as a practical matter impair or impede the person's ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest. If such person has not been so joined, the court shall order that such person be made a party. If a person should join as a plaintiff but refuses to do so, such person shall be made a defendant, the reason being stated in the complaint. If the joined party objects to venue and the joinder would render the venue of the action improper, the joined party shall be dismissed from the action.

B. Determination by court whenever joinder not feasible.

If a person as described in subsections A.(1) and (2) of this rule cannot be made a party, the court shall determine whether in equity and good conscience the action or proceeding should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a

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ons sections succeeded.

13.140, 13.150, 13.161.

Comment:

This is the existing ~~ons~~ <sup>13.161</sup> ~~section~~ without  
change.

29.

Background note  
ons sections succeeded

For a specific Rule relating  
to joint obligations see  
ORS. 13.100

13.110, 13.170, 13.190

COMMENT:

This is based upon Federal Rule 19. The existing Oregon rules do <sup>not</sup>  
~~not have a comprehensive indispensable~~ party rule. This rule directs  
to court to look to the factors relevant to a decision whether X  
a party should be included and whether the case should proceed  
when joinder of an interested person is not feasible. Those factors  
are described in terms of particular consequences to the existing  
parties and the interested person and the ways by which these  
consequences might be ameliorated by shaping relief or other steps.  
The ~~labels necessary party and indispensable party~~ apply only as  
~~conclusions not rules of decision.~~ and

contains on  
adequate  
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definitions

Section 29 Does not appear in the Federal Rule  
and was taken from ORS. 13.190

Rule 30

Bochard rule.

~~Bochard~~ ms. contents suspended.

13.110., 13.260(4)

COMMENT:

This is based on Federal Rule 21. Misjoinder of parties under rule 28 is not a basis for dismissal ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX~~ ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX~~

, Formally raised by demurrer,

Rule 31

Background Note

ms. sections suspended.

13.120.

COMMENT:

This rule is based upon Federal Rule 22. Adoption of this rule was recommended to the last legislature by the Oregon State Bar. Two forms of interpleader are covered by existing Oregon law, ORS 13.120 and Equitable interpleader. The effectiveness of the interpleader device in Oregon ~~XXXXXXXXXXXX~~ under the existing rules is hampered by the ~~XX~~ limited scope of the ~~XXXXXXXXXX~~ OrS 13.120 and the historic limitations on equitable interpleader. This rule is of general application and eliminates the equitable interpleader requirements that the same debt or duty be claimed by all the interpleaded parties, that the claimants' titles or claims be dependent ~~XX~~ on or derive from ~~XXX~~ a common source, that the stakeholder not have or claim any interest in the subject of the interpleader, and that the stakeholder not have incurred any ~~XX~~ independent liability to any one of the claimants.



RULE 28

JOINDER OF PARTIES

A. Permissive joinder as plaintiffs or defendants. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or <sup>n</sup>ore of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

B. Separate trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to unnecessary expnsne by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

BACKGROUND NOTE

ORS sections superseded: 13.140, 13.150, 13.161.

COMMENT

*Based on*  
This ~~is the~~ existing ORS 13.161, ~~without change.~~

RULE 29

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

A. Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in that person's absence complete relief cannot be accorded among those already parties, or (2) that person claims an interest relating to the subject of the action and is so situated that the disposition in that person's absence may (a) as a practical matter impair or impede the person's ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest. If such person has not been so joined, the court shall order that such person be made a party. If a person should join as a plaintiff but refuses to do so, such person shall be made a defendant, the reason being stated in the complaint. If the joined party objects to venue and the joinder would render the value *venue* of the action improper, the joined party shall be dismissed from the action.

B. Determination by court whenever joinder not feasible. If a person as described in subsections A. (1) and (2) of this rule cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be

prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

C. Exception of class actions. This rule is subject to the provisions of Rule 32.

D. State agencies as parties in governmental administration proceedings. In any action or proceeding arising out of county administration of functions delegated or contracted to the county by a state agency, the state agency must be made a party to the action or proceeding.

#### BACKGROUND NOTE

For a specific rule relating to joint obligations, see ORS 15.100.

ORS sections superseded: 13.110, 13.170, 13.190.

#### COMMENT

This is based upon Federal Rule 19. The existing Oregon rules do not contain an adequate indispensable party rule. This rule directs a court to look to the factors relevant to a decision whether a party should be included and whether the case should proceed when joinder of an interested person is not feasible. Those factors are described in terms of particular consequences to the existing parties and the interested person and the ways by which these consequences might be ameliorated by shaping relief or other steps. Section ~~29~~ 29 D does not appear in the federal rule and was taken from ORS 13.190.

judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action or proceeding is dismissed for nonjoinder.

C. Exception of class actions. This rule is subject to the provisions of Rule 32.

D. State agencies as parties in governmental administration proceedings. In any action or proceeding arising out of county administration of functions delegated or contracted to the county by a state agency, the state agency must be made a party to the action or proceeding.

#### BACKGROUND NOTE

For a specific rule relating to joint obligations, see ORS 15.100.

ORS sections superseded: 13.110, 13.170, 13.190.

#### COMMENT

This is based upon Federal Rule 19. The existing Oregon rules do not contain an adequate indispensable party rule. This rule directs a court to look to the factors relevant to a decision whether a party should be included and whether the case should proceed when joinder of an interested person is not feasible. Those factors are described in terms of particular consequences to the existing parties and the interested person and the ways by which these consequences might be ameliorated by shaping relief or other steps. Section 29 D. does not appear in the federal rule and was taken from ORS 13.190.

RULE 30

MISJOINDER AND NONJOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action or proceeding. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any state of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

COMMENT

This is based on Federal Rule 21. Misjoinder or non-joinder are presently asserted by demurrer, motion to strike or pleading.

RULE 31

INTERPLEADER

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff alleges that plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provision<sup>s</sup> of this rule supplement and do not in any way limit the joinder of parties otherwise permitted by rule or statute.

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RULE 30

MISJOINDER AND NONJOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any state of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

BACKGROUND NOTE

ORS chapters superseded: 13.110, 13.260(4).

COMMENT

This is based on Federal Rule 21. Misjoinder of parties under Rule 28, ~~formally raised by demurrer, is not a basis for dismissal.~~

~~Formerly~~ ~~Formerly~~ was formerly raised by demurrer.

RULE 31

INTERPLEADER

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff <sup>alleges</sup> ~~avers~~ that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of crossclaim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties otherwise permitted by <sup>rule on</sup> statute.

RULE 26

REAL PARTY IN INTEREST

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of the state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

BACKGROUND NOTE

ORS sections superseded: 13.030.

COMMENT

This rule is based upon Federal Rule 17(a) but is generally the same as ORS 13.030. The rule specifically deals with guardians and actions in the name of the state and provides a procedure for dealing with real party in interest objections.

## RULE 26

### REAL PARTY IN INTEREST

Every action or proceeding shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in their own names without joining with them the party for whose benefit the action or proceeding is brought; and when a statute of this state so provides, an action or proceeding for the use or benefit of another shall be brought in the name of the state. No action or proceeding shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action or proceeding by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action or proceeding had been commenced in the name of the real party in interest.

#### BACKGROUND NOTE

ORS sections superseded: 13.030.

#### COMMENT

This rule is based upon Federal Rule 17(a) but is generally the same as ORS 13.030. The rule specifically deals with guardians and actions in the name of the state and provides a procedure for dealing with real party in interest objections.



## RULE 26

### REAL PARTY IN INTEREST

Every action or-proceeding shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in their own names without joining with them the party for whose benefit the action or-proceeding is brought; and when a statute of this state so provides, an action or-proceeding for the use or benefit of another shall be brought in the name of the state. No action or-proceeding shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action or-proceeding by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action or-proceeding had been commenced in the name of the real party in interest.

#### COMMENT

This rule is based upon Federal Rule 17(a) but is generally the same as ORS 13.030. The rule specifically deals with guardians and actions in the name of the state and provides a procedure for dealing with real party in interest objections.

## RULE 26

### REAL PARTY IN INTEREST

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that party's own name without joining the party for whose benefit the action is brought; and when a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of the state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

#### COMMENT

This rule is based upon Federal Rule 17(a) but is generally the same as ORS 13.030. The rule specifically deals with guardians, bailees, and actions in the name of the state and provides a procedure for dealing with real party in interest objections. Note, a guardian has a choice of suing in the name of the minor under ORCP 27 or suing in the guardian's own name under this section. The lack of a real party in interest can be asserted by a motion to dismiss under ORCP 21 A.(6) and is waived as provided in ORCP 21 G.