N O T I C E

February 21, 1980

TO: NEWS MEDIA
OREGON STATE BAR BULLETIN

FROM: COUNCIL ON COURT PROCEDURES
University of Oregon Law Center
Eugene, Oregon 97403

The next meeting of the COUNCIL ON COURT PROCEDURES will be held Saturday, March 8, 1980, at 9:30 a.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland. At that time, the Council will decide which rules of Oregon pleading, practice, and procedure are to be considered by the Council during the 1979-81 biennium.

# # # # #

2-29-80

N O T I C E

The next meeting of the Council on Court Procedures has been rescheduled from March 8, 1980, until April 12, 1980. The meeting will be held in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon.

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NOTE TO COUNCIL MEMBERS

FROM: Fred Merrill

The reason for rescheduling the meeting is to allow subcomittees more time to complete their work. There is also some question whether we would have any of the reactions from the various groups to whom rule drafts have been submitted before April.

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held April 12, 1980

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

Present:	Carl Burnham, Jr.	Charles P.A. Paulson
	John Buttler	Frank H. Pozzi
	Austin W. Crowe, Jr.	Val D. Sloper
	Wendell E. Gronso	James C. Tait
	Laird Kirkpatrick	Lyle C. Velure
	Berkeley Lent	William W. Wells
	Donald W. McEwen	David R. Vandenberg, Jr.
Absent:	Darst B. Atherly	Garr M. King
	Anthony L. Casciato	Harriet R. Krauss
	John M. Copenhaver	Robert W. Redding
	William M. Dale, Jr.	Wendell H. Tompkins
	William L. Jackson	

The meeting was called to order by Chairman Don McEwen at 9:30 a.m. in Judge Dale's Courtroom in the Multnomah County Courthouse, Portland, Oregon.

The following guests were in attendance:

Rex E. H. Armstrong
Burl L. Green
Clayton Patrick

The minutes of the meeting held February 16, 1980, were unanimously approved.

Judge Buttler reported for the subcommittee considering Rules 74 - 87 that the subcommitee was continuing to seek comments relating to the Lacy draft.

Austin Crowe stated that the class actions subcommittee had determined that it might be more appropriate to have one hearing dedicated to class actions sponsored by the whole Council which would satisfy the requirement of a public meeting and would also give sufficient background to the Council as a whole, as well as the subcommittee members, regarding any proposals relating to any changes. Mr. Crowe also reported that the majority of the committee felt that the Council did not have the power to provide for attorney fees in all class actions.

After discussion, the Council decided that the public hearing to hear views concerning proposed class action changes should be held Saturday, June 14, 1980, commencing at 9:30 a.m., in the County Commissioners'

Meeting Room, Room 602, Multnomah County Courthouse, Portland, Oregon.

Austin Crowe stated he had received materials from William M. McAllister relating to proposed amendments which had been given to the legislators during the 1979 legislative session.

For summary judgments and third party practice, Chairman Don McEwen stated that some members of the subcommittee had met. He reported that Garr King was unable to attend the Council meeting but had submitted a letter opposing third party practice. He stated that four persons had concluded that summary judgment practice is working even though there are some abuses and made no recommendations.

The Council discussed the various aspects of third party practice. Judge Sloper moved, seconded by Charles Paulson, to abolish third party practice. The motion failed, with Judge Sloper, Wendell Gronso, David Vandenberg, Charles Paulson, and Frank Pozzi voting in favor of it. Justice Lent and Judge Wells pointed out that their negative votes did not reflect their views on the merits but they wished to have further information about problems and possible solutions.

It was suggested that a letter be written to the presiding judge of each judicial district to obtain their views conerning third party practice in their courts. It was also suggested that data representatives of all liability insurance companies in the state be contacted to secure computerized data relating to third party practice costs.

The Executive Director was asked to prepare a background memorandum regarding expenses involved with third party practice and summary judgments in the federal system and other states and any proposed modifications to the existing practices.

Lyle Velure reported a possible problem with 36 B. He stated that in the Medford area attorneys are receiving interrogatories requesting the identity and location of all persons, including expert witnesses, who have discoverable material. It was suggested that a letter be written to the chairman of the discovery subcommittee concerning the matter.

Burl Green spoke in opposition to the proposed rule on experts, stating that he felt it would be impossible to obtain testimony in medical malpractice cases or in any professional negligence case. Clayton Patrick, representing Oregon Trial Lawyers Association, spoke in opposition to the proposed rule on disclosure of expert witnesses. A copy of a letter from Mr. Patrick to the Council members was distributed to the Council members.

The Executive Director also reported that letters had been received from Jere Webb and Kim Buckley commenting on expert discovery.

A motion was made by David Vandenberg that the draft of the amendment to 36 B. relating to the discovery of the names of expert witnesses

not be adopted. Charles Paulson seconded the motion. The motion passed unanimously.

Rex Armstrong spoke in opposition to changing proposed ORCP 68 to require that attorney fees arising from a contract right be pled in the complaint and submitted to the jury. It was decided to defer any action until the next report of the subcommittee considering that portion of the proposed rule. It was also suggested that they consider carefully the procedure for hearings or affidavits for default judgments. The Executive Director distributed a critique from the Oregon State Bar Procedure and Practice Committee relating to proposed ORCP 67 - 73. He also reported that he had received comments from that committee relating to proposed ORCP 75 - 87 and would distribute that critique to the Council.

The Council discussed the material relating to expense statements furnished by the State Court Administrator's Office. The Executive Director stated that while the Council was not strictly bound by the Executive Department guidelines, it would be advisable to adhere to them except in unusual situations.

The next meeting of the Council is scheduled to be held Saturday, May 10, 1980, at 9:30 a.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon.

The meeting adjourned at 12:05 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

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MEMORANDUM REGARDING

the

PROPOSED UNIFORM CLASS ACTIONS ACT

On August 15, 1976, the National Conference of Commissioners on Uniform State Laws at its Annual Meeting in Atlanta approved a proposed Uniform Class Actions Act (or Court Rule). The Conference submitted this proposal to the American Bar Association House of Delegates at the 1977 Midyear Meeting in Seattle. After discussion it was deferred to the Annual Meeting in Chicago in August. There, after full discussion, the House of Delegates voted 139 to 82 not to approve the proposed Uniform Act.

The Proposed Act (or Court Rule) should be opposed because (a) it is neither necessary nor appropriate to single out this area of litigation procedure for uniform treatment in all states, and (b) this particular draft statute contains many ambiguities and unsound and inappropriate provisions and would require extensive revisions even if a uniform statute were considered appropriate on this subject.

Class action litigation is exploding. Indeed, it has been exploding for the past decade. A review of docket entries in the Southern District of New York for the period 1976 through 1971 discloses that class actions almost tripled

over those five years.[1] A review of the cases filed in the United States District Court for the District of Columbia between 1967 and 1972 reveals even more startling figures. Class actions increased by almost 800%.[2] Three years ago Judge Medina noted that:

> "Class actions have sprouted and multiplied like the leaves of the green bay tree. No matter how numerous or diverse the so-called class may be or how impossible it may be even to compensate the individual members of the class, a champion steps forth." Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973), aff'd, 417 U.S. 136 (1974).

In the three years since Judge Medina felt impelled to comment on the proliferation of class actions this procedural device has become even more pervasive.

The increased interest in the class action procedure dates from the 1966 revision of the federal class action rule, Rule 23 of the Federal Rules of Civil Procedure. Since 1966 a number of states have revised their own class action procedures[3] or had them altered by judicial fiat.[4]

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1 Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure at pg. 13, American College of Trial Lawyers (March 15, 1972).

2 Class Action Study at pg. 5, Committee on Commerce of the United States Senate (93d Congress, 2d Session, 1974) (Doc. No. 33378).

3 E. g., Massachusetts, New Jersey, and New York.

4 E. g., Frankel v. City of Miami Beach, (Sup. Ct. Fla. Sept. 23, 1976) (Docket # 73-962), Daar v. YellowCab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

Although most states have some form of class action device, the great majority of class actions have been brought in federal courts. There are three reasons for this: (1) the Federal Rule is more liberal than most of the state statutes or rules, (2) federal courts have nationwide jurisdiction, while state courts have a more limited jurisdiction, and (3) the Federal Rule is generally far better known than the state statutes or rules. As a result, there has been no rush to the state class action device. Even the Supreme Court's decision requiring that each class member individually must satisfy the $10,000 jurisdictional prerequisite, has not substantially increased the number of state class actions.[5] However, the Uniform Act would substantially remove these elements favoring a federal forum. Once the Uniform Act begins to be adopted, class actions in state courts will no doubt increase geometrically.

It is difficult to see why there is any necessity to have uniform state class action procedures throughout the country. The situation entirely lacks the element so important in the case, for example, of the Uniform Commercial Code where uniformity is of great assistance in planning commercial transactions with confidence as to their validity and effect on a broad scale. But why is there any more need for state

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5 Zahn v. International Paper Co., 414 U.S. 291 (1973).

uniformity as to class actions than non-class actions? Why is there any more need for uniformity than in the case of statutes of limitations, discovery procedures, rules of evidence, size and required vote of civil juries, appellate review or other litigation procedures?

It may also be noted that even now there is no great diversity between the states as to class action procedures. Only a few types are in existence - those based on the present[6] or former[7] Federal Rule 23, those based on the former New York Field Code provision[8] and those based on

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6 Alabama, R. Civ. Pro. 23; Arizona, R. Civ. P. 23 (Supp. 1973); Colorado, R. Civ. P. 23; Delaware, 16 Del. Code Ann. 23; Idaho, R. Civ. P. 23; Indiana, R. of Trial Proc. 23; Kansas, Stat. Ann. § 60-223 (1976); Kentucky, R. Civ. P. 23; Massachusetts, R. Civ. Pro. 23; Minnesota, Minn. Ct. R. 23; Missouri, R. Civ. Pro. § 52.08; Montana, R. Civ. Proc. 23 (Supp. 1975); Nevada, R. Civ. P. 23; New Jersey, R. Civ. Proc. 4:32; New York, C.P.L.R. Art. 9; North Dakota, R. Civ. P. 23; Ohio, R. Civ. P. 23; Oregon, Law Chap. 349 (1973); South Dakota, S.D. Comp. Laws § 15-6-23 (Supp. 1976); Tennessee, R. Civ. P. 23 (Supp. 1975); Utah, R. Civ. Pro. 23; Vermont, R. Civ. Pro. 23; Washington, Rules of Pleading, Practice and Procedure 23; Wyoming, R. Civ. P. 23.

7 Alaska, R. Civ. P. 23; Georgia, Ga. Code Ann. § 81A-123 (1972); Iowa, R. Civ. P. 42; Louisiana, Code of Civ. P. Art. 591 (West 1960); Michigan, Gen. Ct. Riles 208; New Mexic R. Civ. P. 23; Texas, R. Civ. P. 42; West Virginia, R. Civ. P. 23.

8 Arkansas, Ark. Stat. Ann. § 27-809 (1962 Replacement); California, Code of Civil P. § 382 (West 1955); Connecticut, Conn. Gen. Stat. Ann. § 52-105 (West 1960); Florida, R. Civ. P. 1.220; Maine, Rules of Ct., Rule 23 (1976); Nebraska, Reissue Rev. Stat. § 25-319 (1943); North Carolina, Gen. Stat. Ann. 1A-1, Rule 23 (1969); Oklahoma, Okla. Ct. Rules & Pro. § 12-223 (1975); Pennsylvania, R. Civ. P. 2230 (1970); Rhode Island, R. Civ. P. 23; South Carolina, Code of Laws of S. C. Ann. § 10-205 (1962); Wisconsin, Stat. Ann. § 260.12 (1957).

common law[9] - and the very distinct trend is toward adoption by more and more states of the equivalent of the present Federal Rule 23. Thus a wholly new Uniform Class Actions Act seems unnecessary.

In the absence of any definite and substantial advantages to be gained from a uniform statute, the individuality of state policy within our federal system should not be disturbed. It is difficult to perceive such advantages in adopting uniformity of procedure in a single isolated type of litigation.

The 1966 federal class action rule is the most used of the various class action procedures. That rule, however, provides a mere outline of the class action procedure. It is, in effect, only a set of highly generalized principles. Judge Frankel of the Southern District of New York has described the present Rule 23 as simply "a broad outline of general policies".

> "The Rule - quite deliberately, I think - tends to ask more questions than it answers. It's neither a set of prescriptions nor a blueprint. It is, rather, a broad outline of general policies and directions. As the commentators have said, it confides to the district judges a broad range of discretion. And this means, as you all know so well, not that we're about to get drunk with power, but that we've been challenged to piece out a huge body

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9 E.g., People ex rel. Aramburu v. City of Chicago, 73 Ill. App.2d 184, 219 N.E.2d 548 (1966); Evans v. Progressive Casualty Insurance Co., 300 So. 2d 149 (Miss. 1974).

of procedural common law by giving all the hard labor and creative imagination we can muster for this purpose." (Footnote omitted.) [Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39 (1968)].

Over the past decade numerous federal judges have, in fact, followed Judge Frankel's advice and expended vast amounts of both hard labor and creative imagination in applying the principles outlined by Rule 23. The Commissioners, however, have decided on a different approach. Although they generally base their proposed model statute on Rule 23 and the cases interpreting it, they have produced a detailed blueprint rather than simply a set of guidelines. They have thus given up the relative simplicity and brevity which has characterized previous class action statutes and rules in favor of a highly complex statute of 22 sections. A tabular comparison of the new Uniform Act with the present Federal Rule is annexed as Appendix A. As will be seen in that Appendix, the proposed Uniform Act very substantially liberalizes the class action device in favor of plaintiffs, but also contains numerous ambiguities and provisions of questionable soundness and doubtful constitutionality.

Each new class action statute has been longer, more complex and less stringent with respect to class certification than its predecessors. The 1849 amendment to the Field Code,

a single paragraph, made class certification less difficult than it had been originally under the common law. The 1938 version of Rule 23 covered a page and a half and made class certification considerably easier than under the Field Code. The 1966 amended Rule 23 was a little over two pages in length and made class certification easier still. Now, the Uniform Class Actions Act is many times the length of Rule 23 and even more charitable to class representatives than was Rule 23.

That the detail and complexity of the Commissioners' proposed model statute will result in uniformity may be desirable but cannot be expected. The area of human experience over which the class action procedure must function is simply top vast to expect uniformity even within a single jurisdiction. The Commissioners have attempted to insure uniformity by creating a detailed statute in the tradition of the Uniform Commercial Code. It may be doubted whether this attempt will succeed. What seems more predictable is that the Uniform Act will further liberalize the availability and scope of class action procedures which are already so broad as to be subject to abuse and to constitute a burden on defendants often disproportionate to any legitimate purpose to be served for plaintiffs.

This is not to say that the proposed Uniform Act is totally without redeeming features. It contains a number of

constructive provisions which are recognized and discussed in Appendix A.

It is the Committee's view, however, that these constructive provisions of the Uniform Act are more than counterbalanced by those which would further complicate class action litigation to the substantial advantage of plaintiffs and disadvantage of defendants.

The opt-out provisions of the Uniform Act are objectionable. The Act purportedly permits members of classes which the Federal Rule would have certified pursuant to § (b)(2) as well as § (b)(3) of Federal Rule 23 to exclude themselves from the class. However, § 8(a) of the Uniform Act prohibits class members from opting out of the action if a joint or common interest exists among the class members. Since every class will have some joint or common interest, this provision would effectively prevent any class member, of whatever category, from opting out of class actions of any category -- even those in which the Federal Rule permits a class member to exclude himself.

This is not the only objection to the opt-out provisions. The Uniform Act flatly prohibits any member of a defendant class from opting out. [§ 8(d)]. Plaintiff class members are, of course, generally permitted to opt out.

Defendant class members should have the same right. Under the Federal Rule a company which is a member of a defendant class may choose to remain in the action and be bound by the result or may decide to opt out. This would no longer be possible under the Uniform Act. Furthermore, defendant class members are not the only class members denied the right of exclusion under the new Act. Even a plaintiff class member may not opt out if there is a counterclaim pending against either him or his class. [§ 8(a)]. Thus an absent class member may be wedded to the action just when he has the most reason for excluding himself.

Perhaps the most objectionable provision of the Uniform Act is Section 6. That section operates to extend the court's jurisdiction to encompass class members resident anywhere in the country and possibly anywhere in the world. The result of this section would be to provide a state court with essentially the territorial jurisdiction of a federal court, without any of the limitations inherent in the federal question, diversity and jurisdictional amount requirements, thereby increasing the potential liability of the defendant under state law many times over. Furthermore, the constitutionalit of the provision is highly doubtful. See Pennoyer v. Neff, 95 U.S. 714 (1877).

The Uniform Act also permits fluid class actions, (i.e. treating the plaintiff class as though it were an individual plaintiff and calculating damages on the basis of injury to the class rather than to the individuals composing it) a procedure which most federal courts have rejected. [§ 15 (c)]. E.g. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973). This provision would permit class actions even where the identities of the individual members of the plaintiff class can never be known. Finally, the Uniform Act specifically provides that the statute of limitations is tolled for all class members upon the commencement of the action. [§ 18]. The Federal Rule has been interpreted to do the same and this is equally objectionable on this point. See American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974).

The objectionable provisions discussed above are only representative. Appendix A identifies many others.

The proposed Uniform Act could also be improved by the addition of new provisions. For example, § 3(a) of the Uniform Act might be expanded to require the court to include two additional factors in determining whether to certify the class: (1) the possibility that non-party defendants may be impleaded into the action and (2) the ability of the named plaintiff to identify individual class members.

A class should never be certified in an action which may turn into a procedural nightmare by use of impleader nor where a substantial number of class members could never be identified. Any Uniform Act should also provide for a non-solicitation or non-communication order to prevent the plaintiff from communicating with the putative class prior to certification. Such orders are recommended by the Manual For Complex Litigation § 1.141.

Certain other provisions might be added to the Uniform Act to reduce the number of frivolous or unmanageable class actions which are brought. The Act could require that a class may be certified only if the representative plaintiffs have an action against each defendant[10] or each member of the defendant class. A provision prohibiting lawsuits in which a class of plaintiffs sues a class of defendants should also be considered. Double class actions generally cause difficult management problems prior to trial and almost insuperable problems during trial. As one district court judge remarked in discussing problems of manageability:

> "the capacities of even the best judges and jurors to absorb the factual situation presented are finite and the capacity of a courthouse does not begin to reach that of a coliseum." Hettinger v. Class Specialty Co., Inc., 59 F.R.D. 286, 294 (N.D. Ill. 1973).

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[10] It has been so held under Rule 23, E.g., LeMar v. H. & B. Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973). There are, however, decisions to the contrary.

Finally, any Uniform Act should provide that the party on the losing side of the class certification motion shall be immediately liable for costs and resonable attorney's fees. Other desirable additional provisions are suggested in the "Comments" section of Appendix A.

In sum, the proposed Uniform Act or Court Rule should be opposed because of the absence of any need for singling out this particular litigation procedure for uniformity among the states and because of the unsound provisions referred to above and in Appendix A.

APPENDIX A

TABULAR COMPARISON OF THE UNIFORM CLASS ACTIONS ACT WITH RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

	UNIFORM ACT	RULE 23	COMMENTS
Section 1			
	One or more members of a class may sue or be sued as representative parties on behalf of all in a class action if:	One or more members of a class may sue or be sued as representative parties on behalf of all only if	
(1)	The class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable.	(a)(1) The class is so numerous that joinder of all members is impracticable.	The phrase "so constituted" in the Uniform Act may eliminate or dilute the numerosity requirement. The phrase "whether or not otherwise required or permitted" in the Uniform Act seems to authorize class certification in cases in which the class members could not, by law, have been joined individually.
(2)	There is a question of law or fact common to the class.	(a)(2) There are questions of law or fact common to the class.	Pursuant to the Uniform Act, a single common question will support certification. The Federal Rule is more stringent, requiring more than one common question. See 7A Wright & Miller, Federal Practice and Procedure § 1763, at page 603-04 (1st ed. 1972).
Section 2			
(a)	Unless deferred by the court, as soon as practicable after the commencement of a class action the court shall hold a hearing and determine whether or not the action is to be maintained as a class action and by order certify or refuse to certify the action as a class action.	(c)(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.	The phrase in the Uniform Act "unless deferred by the court" may permit the judge to defer class determination until after trial. Pursuant to the Federal Rule this can be done, if at all, only with the consent of all parties. Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir. 1974) (en banc). If class determination were deferred until after trial, neither party would be able to judge the importance of the case. Neither party would be able to test the class determination by means of an interlocutory appeal and the party urging the class could avoid liability for notification expenses until after a determination on the merits.

UNIFORM ACT	RULE 23	COMMENTS
tion 2 (cont'd)		
) The court may certify an action as a class action if it finds that	(b) An action may be maintainable as a class action if	
)(1) The conditions under Section 1 have been satisfied.	(b) The prerequisites of subdivision (a) are satisfied,	Section 1 of the Uniform Act does not contain the typicality of claims or defenses requirement found at subdivision (a)(3) in the Federal Rule. Neither does it contain the representational adequacy requirement found at (a)(4) in the Federal Rule. However, this requirement may be found at section (2)(b)(3) in the Uniform Act.
)(2) A class action should be permitted for the fair and efficient adjudication of the controversy.	(b)(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.	The Uniform Act is less stringent to the extent that it does not require the class action to be the superior method of proceeding and to the extent that it does not require a predominance of common questions. However, the Federal Rule is less stringent to the extent that this provision is one of three alternate requirements. The proposed class need meet only one of these requirements: (b)(1), (b)(2) or (b)(3).
b) The representative parties fairly and adequately will protect the interests of the class.	(a)(4) The representative parties will fairly and adequately protect the interests of the class.	
c)(1) If appropriate, the court may (1) certify an action as a class action with respect to a particular claim or issue.	(c)(4)(A) An action may be brought or maintained as a class action with respect to particular issues.	The Uniform Act is more liberal to whatever extent the term "claim" is interpreted to mean something not comprehended by the term "issue".
c)(2) Certify an action as a class action to obtain one or more forms of relief, equitable, declaratory, or monetary.	No equivalent provision.	

UNIFORM ACT	RULE 23	COMMENTS
Section 2 (cont'd)		
(3) Divide a class into subclasses and treat each subclass as a class.	(c)(4)(B) A class may be divided into subclasses and each subclass treated as a class.	
Section 3		
(a) In determining whether the class should be permitted for the fair and efficient adjudication of the controversy, as appropriately limited under Section 2(c), the court shall consider, and give appropriate weight to, at least the following factors:	(b)(3) The matters pertinent to the findings include:	The Uniform Act provision applies to all class actions while the Federal Rule provision applies only to those class actions relying on section (b)(3), the superiority and commonality section. Both provisions imply that other factors may be considered.
(a)(1) Whether a joint or common interest exists among members of the class.	No equivalent provision.	This consideration is probably redundant since one would expect it to be comprehended by the requirement of 2(b)(3) that there exist representational adequacy. To some extent it probably duplicates the intent of subsection (a)(3) of the Federal Rule: "the claims or defenses of the representative parties are typical of the claims or defenses of the claims." However, that provision was a requirement rather than a factor to be considered. Probably this should be a requirement rather than a consideration. If a "joint or common interest" does not exist among members of the class, no class should be certified.

UNIFORM ACT		RULE 23		COMMENTS
Section 3 (cont'd)				
(a)(2)	Whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for a party opposing the class.	(b)(1)(A)	The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.	The Federal Rule treats this provision as an alternate requirement. It or one of the other two alternate requirements must be met for a class to be certified. The Uniform Act treats this provision as simply one of 13 specified factors which the court will consider. The Uniform Act provision should be amended to provide that it can be waived by the party opposing the class. See Kenney v. Landis Financial Group, Inc., 349 F. Supp. 939 (N.D. Iowa 1972).
(a)(3)	Whether adjudications with respect to individual members of the class as a practical matter would be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests.	(b)(1)(B)	The prosecution of separate actions by or against individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.	The Federal Rule treats this provision as an alternate requirement. It or one of the other two alternate requirements must be met for a class to be certified. The Uniform Act treats this provision as simply one of 13 specified factors which the court will consider.
(a)(4)	Whether a party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole.	(b)(2)	The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.	Same as preceding comment.

UNIFORM ACT	RULE 23	COMMENTS
Section 3 (cont'd)		
(a)(5) Whether common questions of law or fact predominate over any questions affecting only individual members.	(b)(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.	Same as preceding comment.
(a)(6) Whether other means of adjudicating the claims and defenses are impracticable or inefficient.	(b)(3) That a class action is superior to other available methods for the fair and efficient adjudication of the controversy.	Same as preceding comment. Moreover, the tone of the Uniform Act may be more susceptible to an interpretation favorable to certification.
(a)(7) Whether a class action offers the most appropriate means of adjudicating the claims and defenses.	No equivalent provision	In general the Uniform Act gives the court considerably less discretion then the Federal Rule. This provision is an exception.
(a)(8) Whether members not representative parties have a substantial interest in individually controlling the prosecution or defense of separate actions.	(b)(3)(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions.	The Uniform Act provision is to be taken into consideration with respect to all class action cases. The Federal Rule provision is to be taken into consideration only with respect to those class actions relying on section (b)(3), the superiority and commonality section. The Uniform Act provision requires the court to take into consideration whether individual members have a <u>substantial</u> interest while the Federal Rule provision requires only that the individual members have an interest.

UNIFORM ACT	RULE 23	COMMENTS
Section 3 (cont'd)		
(a)(9) Whether the class action involves a claim that is or has been the subject of a class action, a government action, or proceeding.	(b)(3)(B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class.	The Uniform Act provision is to be taken into consideration with respect to all class action cases. The Federal Rule provision is to be taken into consideration only with respect to those class actions relying on section (b)(3), the superiority and commonality section. Moreover, while the Federal Rule provision would have the court take account of all litigation commenced, the Uniform Act would have the court take account of only two categories of litigation, other class actions and actions by the government.
(a)(10) Whether it is desirable to bring the class action in another forum.	(b)(3)(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum.	The Uniform Act provision is to be taken into consideration with respect to all class action cases. The Federal Rule provision is to be taken into consideration only with respect to those class actions relying on section (b)(3), the superiority and commonality section.
(a)(11) Whether the management of the class action poses unusual difficulties.	(b)(3)(D) The difficulties likely to be encountered in the management of a class action.	The tone of the Uniform Act would appear to be more liberal with respect to the certification of class actions than the tone of the Federal Rule. The Uniform Act would be more in keeping with the Federal Rule if the word "unusual" were eliminated. Moreover, the Uniform Act provision is to be taken into consideration with respect to all class action cases. The Federal Rule provision is to be taken into consideration only with respect to those class actions relying on section (b)(3), the superiority and commonality section.

UNIFORM ACT	RULE 23	COMMENTS
Section 3 (cont'd)		
(a)(12) Whether the conflict of laws issues involved pose unusual difficulties.	No equivalent provision	In the normal course of events this factor would be comprehended by section (3)(a)(5) "whether common questions of law or fact predominate over any questions affecting only individual members". Moreover, by use of the word "unusual", the provision appears to imply that class certification is favored except where the conflicts issues are overwhelming. It should be sufficient to suggest to the court that it consider the difficulties raised by conflict of law issues.
(a)(13) Whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class.	No equivalent provision	This is a factor which may significantly reduce the number of class suits brought to recover a nominal amount on behalf of a large class. The prime motivation behind such actions is often the expectation of a substantial fee.
(b) In determining under Section 2(b) that the representative parties fairly and adequately will protect the interests of the class, the court must find:	No equivalent provision	While these provisions do not appear in the Federal Rule, they have been read into that Rule by various federal courts.
(1) that the attorney for the representative parties will adequately represent the interests of the class	No equivalent provision	This provision should require not only that the attorney for the representative party be "qualified, experienced and generally able to conduct the proposed litigation" as was demanded by the Court in Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (S.D.N.Y. 1968), it should also require that the representative party's attorney have no interest in the recovery of any particular class member over any other class member. See Stull v. Pool, 63 F.R.D. 702, 704 (S.D.N.Y. 1974) (attorney was the representative plaintiff's husband).

UNIFORM ACT	RULE 23	COMMENTS
ction 3 (cont'd)		
b)		
(2) that the representative parties do not have a conflict of interest in the maintenance of the class action,	No equivalent provision	"It is fundamental that adequacy of representation is essential and the representative must not hold interest[s] that conflict with those of the class that he seeks to represent." Carpenter v. Hall, 311 F.Supp. 1099, 1114 (S.D.Tex. 1970).
(3) that the representative parties have or can acquire adequate financial resources, considering Section 17, to assure that the interests of the class will not be harmed.	No equivalent provision	This consideration has been read into the Federal Rule by some federal courts. Eg. P.D.Q. Inc. of Florida v. Nissan Motor Corp. in U.S.A., 61 F.R.D. 372 (S.D.Fla. 1973). However, other courts have limited discovery on this issue. Sanderson v. Winner, 507 F.2d 477 (10th Cir. 1974), cert. denied, 421 U.S. 914 (1975). This provision should lift some of the limitations which have been placed on financial discovery from representative parties and help to eliminate those class actions which are financed by the representative party's attorney. See also comments to subsection 17(b).
ection 4		
(a) The order of certification shall describe the class and shall state: (i) the relief sought, (ii) whether the action is maintained with respect to particular claims or issues, and (iii) whether subclasses have been created.	No equivalent provision	

UNIFORM ACT	RULE 23	COMMENTS
Section 4 (cont'd)		
(b) The order, certifying or refusing to certify a class action, shall state the reasons for the court's ruling and its findings on the factors listed in Section 3(a).	No equivalent provision.	As a result of section 8(a) of the Uniform Act, the limited opt-out provision, a provision similar to this is necessary. However, to whatever extent this provision may limit the court to considering only the factors listed under Section 3(a), it is not advisable. The facts may be such that factors not enumerated under Section 3(a) should be considered. The court should be permitted to go beyond the standards set out by the Uniform Act if, in its view, class status is inappropriate. See Schneider v. Margossian, 349 F. Supp. 741 (D. Mass, 1972).
(c) An order either certifying or refusing to certify an action as a class action is an appealable order.	No equivalent provision.	Since settlement is more likely once it is finally determined that class certification is either proper or improper than it is before such determination, this provision is to be welcomed. Moreover, in any jurisdiction which subscribes to the "death knell" doctrine, this provision is especially favorable to a corporate defendant opposing the class. In such a jurisdiction refusal to certify a class may be appealable, while class certification rarely would be. The provision does not indicate whether the decision is appealable to a final appellate tribunal or only to an intermediate appellate tribunal. Moreover, it does not indicate whether proceedings shall be stayed pending the appellate decision.
(d) Refusal of certification does not terminate an action, but does cause it to cease to be a class action.	No equivalent provision.	

UNIFORM ACT	RULE 23	COMMENTS
Section 5		
(a) The court may amend the order of certification at any time before entry of judgment on the merits. The amendment may (1) establish subclasses, (2) eliminate from the class any class member who was included in the class as certified, (3) provide for an adjudication limited to certain claims or issues, (4) change the relief sought, or (5) make any other appropriate change in the order.	(c)(1) An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.	The major difference between the Uniform Act and the Federal Rule, aside from the specificity of the Uniform Act, is that under the Federal Rule amendment may only take place prior to a decision on the merits while under the Uniform Act amendment may take place any time prior to entry of judgment.
(b) If notice of certification has been given pursuant to Section 7, the court may order notice of the amendment of the certification order to be given in terms and to those members of the class as it directs.	No equivalent provision	
(c) The reasons for the court's ruling shall be set forth in the amendment of certification order.	No equivalent provision	
(d) An order amending the order of certification is an appealable order. An order denying the motion of a member of a defendant class, not a representative party, to amend the order of certification is an appealable order if the court certifies it for immediate appeal.	No equivalent provision	Is an order denying the motion of a class representative to amend the order of certification appealable? Making it appealable would probably benefit the party opposing the class since he would be more likely to move to amend an order certifying a class than would a plaintiff be to amend an order either certifying or refusing to certify a class.

UNIFORM ACT	RULE 23	COMMENTS
Section 6		
(a) A court of this State may exercise jurisdiction over any person who is a member of the class suing or being sued if:	No equivalent position.	Since the federal system is nationwide in scope, the issue of whether the court has jurisdiction over non-representative class members rarely if ever arises. This issue would arise, however, given the limited territorial jurisdiction of each state. See Klemow v. Time Incorporated, ____ Pa. ____, 352 A.2d 12 (1976). This subsection is objectionable. As it now reads the fact that a class member might be sued in the state in a totally different action brought by some third party is sufficient to provide the court with jurisdiction over him as a class member. This provision is ambiguous and should be completely redrafted so that it is, at the very least, understandable. Assuming that it is ever constitutional for a state court to assert jurisdiction over a non-representative class member residing outside of its jurisdiction, a more rational solution to the jurisdictional problem would be to permit a state court to exercise jurisdiction only over those class members who could have individually sued or been sued in the action pending before the court. Such a provision, of course, would still result in widespread exposure for those companies transacting business in many states. This exposure could be limited by a provision that a class may consist only of state residents or those non-residents who have submitted themselves to the jurisdiction of the court or limiting jurisdiction over class members to those members who were injured or who caused injury by an act which took place within the state.
(1) a basis for jurisdiction exists, or would exist in a suit against the person, under the law of this State;		

UNIFORM ACT	RULE 23	COMMENTS
Section 6 (cont'd)		
[(2) The state of residence of the class member has by class action law, similar to subsection (b), made its residents subject to the jurisdiction of the courts of this State in class actions.]	No equivalent provision	This provision may raise serious due process questions. Moreover, it would result in massive class actions which might conceivably comprehend nationwide classes. The major purposes of the class action device are to promote judicial efficiency and permit the small litigant his day in court. Both of these purposes are well served by a class action statute which restricts itself to the boundaries of traditional state jurisdiction. The kinds of actions which one would expect to necessitate a nationwide class, civil rights, truth-in-lending, securities and antitrust may all secure such a class by being brought in federal court. Those actions which remain have a special local interest and should not be permitted to turn into what one judge has aptly termed a "Frankenstein monster." Eisen v. Carlisle & Jacquelin 391 F.2d 555, 572 (2d Cir. 1968)(Lumbard, J. dissenting).
[(b) A resident of this State who is a member of a class suing or being sued in another state is subject to the jurisdiction of that state if it by similar class action law extends reciprocal power to this State.]	No equivalent provision	Same as above.

UNIFORM ACT	RULE 23	COMMENT
Section 7		
(a) Following certification, the court by order, after hearing, shall direct the giving of notice to the class.	(c)(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.	The Federal Rule by its terms requires notice to be given only to (b)(3) classes. The courts are split over whether notice must also be given to (b)(1) and (b)(2) classes. The Uniform Act requires some form of notice to be given in every instance. Compare Cranston v. Hardin, 504 F.2d 566 (2d Cir.1974), with, Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 254-55 (3d Cir. 1975).
(b) The notice based on the certification order and any amendment of the order, shall include:	(c)(2) The notice shall advise each member that	
(1) A general description of the action, including the relief sought, and the names and addresses of the representative parties;	No equivalent provision.	
(2) A statement of the right under Section 8 of a member of the class to be excluded from the action by filing an election to be excluded, in the manner specified, by a certain date;	(c)(2)(A) The notice shall advise each member that the court will exclude him from the class if he so requests by a specified date.	

UNIFORM ACT		RULE 23		COMMENTS
Section 7 (cont'd)				
(b)	(3) A description of possible financial consequences on the class;		No equivalent provision.	The term financial consequences is quite broad and ambiguous. Most class members are really only interested in the possibility of adverse financial consequences. A notice which details possible beneficial financial consequences may result in a multiplicity of individual lawsuits which would defeat the purpose of the Act.
	(4) A general description of any counterclaim being asserted by or against the class, including the relief sought;		No equivalent provision.	Such a description is necessary for the class member to make an intelligent decision. If there is a possibility of counterclaims against individual class members, this should also be included.
	(5) A statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action.	(c)(2)(B)	The judgment, whether favorable or not, will include all members who do not request exclusion.	
	(6) A statement that any member of the class may enter an appearance either personally or through counsel.	(c)(2)(C)	Any member who does not request exclusion may, if he desires, enter an appearance through his counsel.	Permitting personal appearances in class situations could turn the proceedings into a circus. The Uniform Act authorizes this. The Federal Rule does not.
	(7) An address to which inquiries may be directed.		No equivalent provision.	
	(8) Any other information the court deems appropriate.		No equivalent provision.	

UNIFORM ACT	RULE 23	COMMENTS
Section 7 (cont'd)		
(c) The court's order shall prescribe the manner of notification to be used and specify the members to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.	(c)(2) In any class action maintained under subdivision (b)(3), the court shall direct to the Members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.	
(d) Each class member, not a representative party, whose potential monetary recovery or liability is estimated to exceed $100 shall be given personal or mailed notice if his identity can be ascertained by the exercise of reasonable diligence.	No equivalent provision.	Due process should not be limited so substantially by financial consideration. So long as the ad damnum and value of the other relief sought is at least twice as much as the cost of personal or mailed notice to those class members who can be identified by reasonable effort, such notice should be required. Those who cannot be identified by reasonable effort should be notified by the next best means reasonably calculated to apprise them of the action.
(e) For class members not given personal or mailed notice under Subsection (d), the court shall provide, as a minimum, a means of notice reasonably calculated to apprise other members of the class of the pendency of the action. Techniques designed to assure effective communication of information concerning commencement of the	No equivalent provision.	

UNIFORM ACT	RULE 23	COMMENTS
ection 7 (cont'd)		
action shall be used which may include personal or mailed notice, notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest or other appropriate groups.		
(f) The plaintiff shall advance the expense of notice under this section if there is no counterclaim asserted. If a counterclaim is asserted the expense of notice shall be allocated as the court orders in the interest of justice.	No equivalent provision.	The Uniform Rule provision should comprehend not only notice but any communication with the class ordered by the court. Moreover, the expense of notice should be allocated only if a counterclaim is asserted against the class. Federal courts have also required that the plaintiff advance costs of notice. Apparently the plaintiff will also be liable for expenses incurred in notifying a defendant class, even if the defendant class is promoted by the defendant.
(g) The court may order that steps be taken to minimize the expense of notice.	No equivalent provision.	This provision is ambiguous and would seem to be unnecessary given the preceding provisions. The court will order whatever notice it deems to be necessary and plaintiff is liable for the expenses which result.
ection 8		
(a) A member of a plaintiff class may elect to be excluded from the action unless (1) he is a representative party, (2) the certification order contains an affirmative finding on factor (1), (2) or (3) of Section 3(a), or (3) a counterclaim under Section 11 is pending against the	No equivalent provision.	By its terms the Federal Rule permits class members to request exclusion in (b)(3) cases. There is an implication that class members may not request exclusion in (b)(1) and (b)(2) cases and most courts have so held. Since subsections (3)(a)(2) and (3)(a)(3) of the Uniform Act are the equivalent of a (b)(1) class, this Uniform Act provision is similar to the Federal Rule to the extent that the Federal Rule has been interpreted to prohibit exclusion of class members in (b)(1) class. However,

UNIFORM ACT	RULE 23	COMMENTS
Section 8 (cont'd)		
member, his class or subclass.		the Uniform Act provision would permit exclusion of class members in b(2) cases, which is the equivalent of subsection 3(a)(4) of the Uniform Act. This more liberal exclusion provision is preferable to the Federal Rule. Other aspects of this provision are objectionable. A class member may not opt out if there is a counterclaim against him or his class. Actually, the class member is likely to be most anxious for exclusion when a counterclaim has been asserted. The Uniform Act itself recognized this by requiring at subsection 7(b)(4) that the class notice contain a general description of any counterclaim being asserted against the class. If the class member thinks he might be liable for more than his claim is worth, he should have a right to opt out of the action. This provision is also objectionable since joint or common interests will always exist among the members of any class, and therefore this provision could have the effect of prohibiting any opt out from the class.
(b) Any member of a plaintiff class entitled to be excluded under subsection (a) who files an election to be excluded, in the manner and in the time specified in the notice, is excluded from the action and not bound by the judgment in the class action.	(c)(2) The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date.	Because the Uniform Act applies this provision only to members of a plaintiff class, it is objectionable. It should apply equally to a defendant class. Moreover, the Uniform Act should provide that the court may require that class members opt into the class rather than out of the class if in its discretion the court determines that such a procedure is appropriate and just.
(c) The elections shall be [docketed] [made a part of the record] in the action.	No equivalent provision.	
(d) A member of a defendant class may not elect to be excluded.	No equivalent provision.	This provision is completely objectionable.

UNIFORM ACT	RULE 23	COMMENTS
ction 9		
(a) The court on motion of a party or its own motion may make any appropriate order dealing with the conduct of the action including, but not limited to, the following: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given as the court directs, of (i) any step in the action, (ii) the proposed extent of the judgment, or (iii) the opportunity of members to signify whether they consider the representation fair and adequate, to enter an appearance and present claims or defenses, or otherwise come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) inviting the attorney general to participate with respect to the question of adequacy of class representation; (5) making any other order to assure that the class action proceeds only with adequate class representation; and (6) making any order to assure that the class action proceeds only with competent representation by the attorney for the class. The order may be amended.	(d) In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.	Subsection 9(a)(4) of the Uniform Act is objectionable. Pursuant to the Uniform Act, a class could easily consist almost entirely of out of state members. The attorney general of the state in which the action is brought would have neither the competence nor the interest required to assist the court in determining whether class representation is adequate. It is difficult to conceive of a situation in which a court would be unable to intelligently apply the factors set out in subsection 3(b) and come to a reasoned conclusion as to the adequacy of class representation without the assistance of a third party. Moreover, subsection (d)(4) of the Federal Rule would be a good addition to the Uniform Act as it is now drafted. That Federal Rule subsection might replace subsection 9(a)(6) of the Uniform Act which is redundant.

UNIFORM ACT	RULE 23	COMMENTS
Section 9 (cont'd)		
(b) A class member not a representative party may appear and have separate counsel represent him in the action.	(c)(2)(C) Any member who does not request exclusion may, if he desires, enter an appearance through his counsel.	
Section 10		
(a) Discovery under [applicable discovery rules] may be used against class members who are not representative parties or who have not appeared only on order of the court. In deciding whether discovery should be allowed the court shall consider, among other relevant factors, the timing of the request, the subject matter to be covered, whether representatives of the class are seeking discovery on the subject to be covered, and whether the discovery will result in annoyance, oppression, undue burden or expense for the class members.	No equivalent provision.	The federal courts have generally not permitted any discovery from non-representative class members. This provision in the Uniform Act should make discovery from non-representative class members more attainable.
(b) Discovery by or against representative parties or those appearing is governed by the rules dealing with discovery by or against a party to a civil action.	No equivalent provision.	

UNIFORM ACT	RULE 23	COMMENTS
Section 11		
(a) A defendant in an action brought by a class may plead as a counterclaim any claim that the court certifies as a class action against the plaintiff class. On leave of court, the defendant may plead as a counterclaim a claim against a member of the class, or a claim that the court certifies as a class action against a subclass.	No equivalent provision.	Besides being poorly drafted, this Uniform Act provision is objectionable to the extent that it requires leave of court to plead a counterclaim against a member of a class. Certainly counterclaims should be permitted against representative plaintiffs who sue both individually and on behalf of a class, and preferably they should also be permitted against absent class members. A nonrepresentative member of a defendant class should also be permitted to bring a counterclaim.
(b) Any counterclaim in an action brought by a plaintiff class must be asserted before notice is given under Section 7.	No equivalent provision.	This provision of the Uniform Act is objectionable. If defendant desires to bring a counterclaim subsequent to the notification of the class, he should be free to do so as long as he pays for notice of the counterclaim to be given to the class.
(c) If a money judgment is recovered against a party on behalf of a class, the court rendering judgment may stay distribution of any award or execution of any portion of a judgment allocated to a member of the class against whom the losing party has pending an action in or out of state for a money judgment, and continue the stay so long as the losing party in the class action pursues the pending action with reasonable diligence.	No equivalent provision.	

UNIFORM ACT	RULE 23	COMMENTS
Section 11 (cont'd)		
(d) A defendant class may plead as a counterclaim any claim on behalf of the class that the court certifies as a class action against the plaintiff. The court may certify as a class action a counterclaim against the plaintiff on behalf of a subclass or permit a counterclaim by a member of the class. The court shall order notice of the counterclaim by the class, subclass, or member of the class be given to the members of the class as the court directs, in the interest of justice.	No equivalent provision.	
(e) A member of a class or subclass asserting a counterclaim shall be treated as though a member of a plaintiff class for the purpose of exclusion under Section 8(a).	No equivalent provision.	See Section 8(a), supra.
(f) The court's refusal to allow, or the defendant's failure to plead, a claim as a counterclaim in a class action does not bar the defendant from asserting the claim in a subsequent action.	No equivalent provision.	It is assumed that this provision applies to both individual and class defendants.

UNIFORM ACT	RULE 23	COMMENTS
Section 12		
(a) Unless certification has been refused under Section 2, a class action shall not, without approval of the court after hearing, be (1) dismissed voluntarily, (2) dismissed involuntarily unless based on a contested adjudication on the merits, or (3) compromised.	(e) A class action shall not be dismissed or compromised without the approval of the court.	To whatever extent subsection (2) of the Uniform Act provision may prevent a court from dismissing a class action for failure to state a claim, lack of jurisdiction, a statute or limitations defense or other procedural reason, it is objectionable.
(b) If the court has certified the action under Section 2, notice of hearing of the proposed dismissal or compromise shall be given to all members of the class in a manner directed by the court. If the court has not ruled on certification, notice of hearing on the proposed dismissal or compromise may be ordered by the court which shall specify the persons to be notified and the manner in which notice is to be given.	(e) Notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.	
(c) Notice given under subsection (b) shall include a full disclosure of the reasons for the dismissal or compromise including, but not limited to, (1) any payments made or to be made in connection with the dismissal or compromise, (2) the anticipated effect of the dismissal or compromise on the class members, (3) any agreements made in connection with the dismissal or compromise, (4) a description and evaluation of alternatives considered by the representative parties and (5) an explanation of any other circumstances giving rise to the proposal. The notice shall also include a description of the procedure available for modification of the dismissal or compromise.	No equivalent provision.	The result of this Uniform Act provision will be that attorneys for both parties will be the prime witnesses whenever a disgruntled class member attempts to attack a dismissal or compromise of a class action which has become effective on the ground that the notice did not meet the requirements of this subsection.

UNIFORM ACT	RULE 23	COMMENTS
Section 12 (cont'd)		
(d) On the hearing on dismissal or compromise, the court may (1) as to the representative parties or a class certified under Section 2, permit dismissal with or without prejudice or approve the compromise, (2) as to a class not certified, permit dismissal without prejudice, (3) deny dismissal, (4) or disapprove compromise or take any other appropriate action for the protection of the class and in the interest of justice.	No equivalent provision.	
(e) The cost of notice given under subsection (b) shall be paid by the party seeking dismissal, or as agreed in the case of a compromise, unless the court, after hearing orders otherwise.	No equivalent provision.	In the case of a dismissal as opposed to a compromise the class representatives should pay notification expenses or such expenses should be taxed as costs.

UNIFORM ACT	RULE 23	COMMENTS
ection 13		
(a) In a class action certified under Section 2 in which notice has been given under Section 7 or 12, a judgment as to the claim or particular claim or issue certified is binding, according to its terms, on any member of the class not filing an election of exclusion under Section 8. The judgment shall name or describe the members of the class who are bound by its terms.	(c)(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class; shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.	
ection 14		
a) Only the representative parties and those members of the class who have appeared are liable for costs assessed against a plaintiff class.	No equivalent provision.	
(b) The court shall apportion the liability for costs assessed against a defendant class.	No equivalent provision.	This Uniform Act provision is ambiguous. It is assumed that it intends costs assessed against a defendant class to be apportioned per capita against each defendant class member whether or not he has appeared.

UNIFORM ACT	RULE 23	COMMENTS
Section 14 (cont'd)		
(c) Expenses of notice advanced under Section 7 are taxable costs in favor of the prevailing party.	No equivalent provision.	Either all expenses advanced for notice whether or not made pursuant to Section 7 of the Uniform Act should be taxable as costs or no notification expense should be taxable. E.g. § 5 of the Uniform Act.
Section 15		
(a) The court may award any form of relief consistent with the order of certification, including, but not limited to, equitable, declaratory, or monetary relief to individual class members or the class in a lump sum or installments, to which the party in whose favor it is rendered is entitled	No equivalent provision.	
(b) Damages fixed by a minimum measure of recovery provided by any statute cannot be recovered in a class action.	No equivalent provision.	This is a highly satisfactory provision. If it were part of the Federal Rule, truth-in-lending class actions would not exist as the truth-in-lending statute provides for a $100 minimum recovery. However, this provision could be profitably amended to also exclude the recovery of penalties. See NYCPLR Section 901(b).
(c) If a class is awarded a monetary judgment, the distribution shall be determined as follows:	No equivalent provision.	The Uniform Act should be amended to provide that upon request of the defendant, it may pay the amount of judgment into the court and be excluded from any further participation in the case.
(1) the parties shall list as expeditiously as possible all members of the class whose identity can be determined without expending a disproportionate share of the recovery.	No equivalent provision.	

UNIFORM ACT		RULE 23	COMMENTS
ection 15 (cont'd)			
(c)	(2) The reasonable expense of identification and distribution shall be paid, with the court's approval, from the funds to be distributed;	No equivalent provision.	Otherwise the expense should be borne by the class representatives.
	(3) The court may order steps taken to minimize the expense of identification;	No equivalent provision.	This Uniform Act provision is very ambiguous and probably redundant.
	(4) The court shall supervise, and may grant or stay the whole or any portion of the execution of the judgment and the collection and distribution of funds to the members of the class as their interests warrant;	No equivalent provision.	
	(5)(A) The court shall determine what amount of the funds available for the payment of the judgment cannot be distributed to members of the class individually because they have not been identified or located or because they do not claim or prove the right to money apportioned to them. That amount shall be distributed in whole or in part by the court after hearing to one or more states as unclaimed property or to the defendant.	No equivalent provision.	This provision of the Uniform Act is objectionable to the extent it provides for fluid class recovery. In a fluid class recovery the class is treated as an individual and damages are calculated on the basis of injury to the class rather than injury to the individual. The general practice in the federal courts has been to deny class certification if recovery by the class must be fluid in nature. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973). In re Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974). However, fluid recovery has been urged on the courts by some commentators. Note, Managing the Large Class Action, 87 Harv. L. Rev. 426 (1973).

UNIFORM ACT		RULE 23	COMMENTS
Section 15 (cont'd)			
(c)(5)(A)	The court shall consider the following criteria in determining the amount, if any, to be distributed to a state, and, if any, to the defendant: (i) any unjust enrichment of the defendant, (ii) the willfulness or lack of willfulness on the part of the defendant, (iii) the impact of the relief granted on the defendant, (iv) the pendency of other claims against the defendant; (v) any criminal sanction imposed on the defendant, and (vi) the loss suffered by the plaintiff class.	No equivalent provision.	Same as above.
(5)(B)	The court may impose conditions on the defendant with regard to the use of the money distributed to the defendant to remedy or alleviate the harm done.	No equivalent provision.	Same as above.
(5)(C)	The amount to be distributed to a state shall be distributed as unclaimed property to any state in which is located the last known addresses of the members of the class to whom distribution cannot be made. If the last known addresses cannot be ascertained with reasonable diligence the court may determine by other means	No equivalent provision.	Without a class member to prove his damages, it is unclear how the court can determine how much he should receive. Moreover, the last sentence of this subsection is ambiguous. It is assumed its purpose is to permit each state to be heard on the issue of what portion of the damages its residents would have received.

UNIFORM ACT	RULE 23	COMMENTS
Section 15 (cont'd)		
(5)(C) what portion of the unidentified or unlocated members of the class were residents of a state. A state shall receive that portion of the distribution that its residents would have received had they been identified and located. Before entering an order distributing any part of the amount to a state the court shall give written notice of its intention to make distribution to the attorney general of each state if any of its residents were given notice under Section 7 or 12 and shall afford the attorney general an opportunity to move for an order requiring payment to the state.		
Section 16		
(a) Attorney's fees for representing the class are subject to the control of the court.	No equivalent provision.	

UNIFORM ACT	RULE 23	COMMENTS
Section 16 (cont'd)		
(b) If under an applicable provision of law a defendant is entitled to attorney's fees from a plaintiff class, only representative parties and those members of the class who have appeared are liable for those fees. If a plaintiff is entitled to attorney's fees from a defendant class, the court may apportion the fees among the members of the class.	No equivalent provision.	
(c) If a prevailing class recovers a money judgment or other award that can be divided for the purpose, the court may order paid from the recovery reasonable attorney's fees and litigation expenses of the class.	No equivalent provision.	
(d) If the prevailing class is entitled to declaratory or equitable relief, the court may order the adverse party to pay to the class its reasonable attorney's fees and litigation expenses if permitted by law in similar cases not involving a class or if the court finds that the judgment has vindicated an important public interest, but if any monetary award is also recovered, then only to the extent that a reasonable proportion of that award is	No equivalent provision.	The court should not be permitted to award fees and and expenses simply because in the court's opinion the judgment vindicated an important public interest.

UNIFORM ACT	RULE 23	COMMENTS
Section 16 (cont'd)		
(d) insufficient to defray the fees and expenses.		
(e) In determining the amount of attorney's fees for a prevailing class the court shall consider the following factors:	No equivalent provision.	Subsection (5) of the Uniform Act provision should be modified to take into account any modifications made in subsection (d) of the Uniform Act.
(1) The time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered by the attorney;		
(2) Results achieved and benefits conferred upon the class;		
(3) The magnitude, complexity and uniqueness of the litigation;		
(4) The contingent nature of success;		
(5) The cases awarding attorney's fees and litigation expenses under Subsection (d) because of the vindication of an important public interest, the economic impact on the party against whom the award is made, and		

UNIFORM ACT	RULE 23	COMMENTS
Section 16 (cont'd)		
(6) The appropriate factors included in the [state's Code of Professional Responsibility].		
Section 17		
(a) Before a hearing under Section 2(a) or at any other time as the court directs, the representative parties and the attorney for the representative parties shall file with the court, jointly or separately: (1) a statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts; (2) a copy of any written agreement, or a summary of any oral agreement, between representative parties and their attorney concerning financial arrangements or fees and (3) a copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or an attorney regularly of counsel with his law firm. This statement shall be supplemented promptly if additional arrangements are made.	No equivalent provision.	

UNIFORM ACT	RULE 23	COMMENTS
Section 17 (cont'd)		
(b) Upon a determination that the costs and litigation expenses of the action cannot reasonably and fairly be defrayed by the representative parties or by other available sources, the court by order may authorize and control the solicitation and expenditure of voluntary contributions for this purpose from members of the class, or advances by the attorneys or others, or both, subject to reimbursement from any recovery that may be obtained for the class. The court may order any available funds so contributed or advanced to be applied to the payment of costs which may be taxed in favor of a party opposing the class.	No equivalent provision.	This provision of the Uniform Act is objectionable. A class representative which cannot support the expenses of the action is not an adequate representative. See subsection 3(b)(3)
Section 18		
The statute of limitations is tolled for all class members upon the commencement of an action asserting a class action. The statute of limitations resumes running against: (1) A class member upon filing an election of exclusion; (2) A class member included in the class at the time the action was commenced, upon entry of an order of certification, or of an amendment thereof eliminating him from the class;	No equivalent provision.	The Supreme Court has held that commencement of a class action pursuant to the Federal Rule tolls the statute of limitations for the entire class. American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974). The result of this decision may be that the statute of limitation is extended almost indefinately in certain situations. A better procedure would be to toll the statute of limitations only for those class members who can prove that their reliance on the class action prevented them from bringing an individual action. In any case, the Uniform Act provision should make it clear that bringing an action against a defendant class does not toll the statute of limitations for any other plaintiff who may have a claim against the defendant class arising out of the same or similar facts. It should also make clear that the statute is never tolled for a class representative.

UNIFORM ACT	RULE 23	COMMENTS
Section 18 (cont'd)		
(3) The class members, except the representative parties, upon entry of an order under Section 2 refusing to certify the action as a class action; and	No equivalent provision.	
(4) The class members upon dismissal of the action other than on the merits.		

School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

March 10, 1980

Mr. Austin W. Crowe, Jr.
622 Pittock Block
921 S.W. Washington Street
Portland, OR 97205

Dear Austin:

I am enclosing a background memo related to the proposed revisions in Rule 32. It is devoted to current national developments in the class action area, classification of changes, and the Council rulemaking power. I tried to avoid expressing opinions on the relative merits of expanding or restricting class actions. I did run across a 1977 American Enterprise Institute publication, Consumer Class Actions, which contains a good summary of the various arguments. I am enclosing a copy of that summary.

Very truly yours,

Fredric R. Merrill
Executive Director, Council
on Court Procedures

FRM:gh

Enclosures

cc: Hon. William H. Dale, Jr. (Encl.)
Laird Kirkpatrick (Encl.)
Frank H. Pozzi (Encl.)

P.S. We are sending this material both by SPECIAL DELIVERY and regular mail to make certain it arrives by Friday.

M E M O R A N D U M

TO: CLASS ACTION SUBCOMMITTEE

FROM: Fred Merrill

RE: PROPOSED CHANGES TO RULE 32

DATE: March 10, 1980

INTRODUCTION

The extent of the current literature relating to class actions and Federal Rule 23 is awesome. Since Federal Rule 23 was amended in 1966 to allow a binding class action for damages, it has been persistently and repeatedly criticized by potential defendants and judges. Beginning in 1969 a series of restrictive interpretations of the rule by the United States Supreme Court has resulted in mounting criticism by plaintiffs attorneys and consumer and environmental interests. A 1977 survey by an informal subcommittee of the Advisory Committee on Civil Rights of Judges and Attorneys revealed substantial dissatisfaction with class action procedures in federal courts.[1]

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1. See 5 Class Action Reports 3-36 (1978). Fifty percent of the district judges, twenty-seven percent of the circuit judges, two-thirds of the defense attorneys, and ten percent of the plaintiffs attorneys responded that Court Rule 23 should be amended to eliminate "cumbersome, expensive, time-consuming procedures." Id., p. 17. As can be seen from the above figures, responses of attorneys to questions relating to specific changes that would either liberalize or restrict class actions under Rule 23 differed markedly depending upon whether the attorneys identified themselves as representing plaintiffs or defendants. See also summary of complaints presented to drafters and at hearings in 1978 relating to § 3495, 93rd Congress, 2d Session, in Kennedy, Federal Class Actions, A Need for Legislative Reform, 32 S.W. Law Journal 1209, 1212-1215 at n.25 (1979).

The key Supreme Court decisions relating to Rule 23 include: (1) Snyder v. Harris, 394 U.S. 332 (1969), which held that damage claims of class members could not be aggregated to meet the $10,000 minimum amount required by diversity jurisdiction in federal court; (2) Zahn v. International Paper Co., 414 U.S. 291 (1974), which held that ancillary jurisdiction could not be used to allow litigation by a class even though some class members had claims over $10,000; (3) and, Eisen v. Carlisle and Jacquelin, 479 F.2d 1005 (2nd Cir. 1973), aff'd 417 U.S. 156 (1974) (commonly referred to as Eisen III and IV). The Eisen case involved a claim brought on behalf of six million purchasers of odd lots on the New York Stock Exchange for overcharges on commissions in violation of anti-trust laws. After over 7 years of litigation the Supreme Court finally decided: (1) Rule 23 C.(2) strictly required individual notice to all class members that could be identified, and (2) there was no available procedure that would allow the trial court to hold a preliminary hearing and make the defendant pay the costs of notice. The district court in the case had also directed use of a fluid class recovery plan. This was emphatically rejected by the circuit court but the Supreme Court opinion does not address the question.

The result of dissatisfaction with the present state of Rule 23 has been a series of proposals for change through legislation or rule-making. There also has been continuing pressure to modify state class

action procedures to provide a state forum for class actions. The debate over class actions is bitter, highly policy oriented, and extensive. Specific changes suggested are complex and are the subject of extensive analysis in cases and literature. A complete analysis of the proposed changes is impossible without extensive research. Rather than enter the debate over the wisdom of liberalizing class action procedure or the desirability of specific changes being proposed, the purpose of this memorandum is the following: (1) to detail the nature and status of proposed changes in class action procedure on the state and federal level; (2) to present a technical summary of the nature of the changes proposed, and (3) to analyze the proposed changes in terms of the rule-making power of the Council.

I. FEDERAL AND STATE CHANGES IN CLASS ACTION PROCEDURE

A. Since Snyder v. Harris, supra, there has been a steady stream of bills introduced in Congress to change Rule 23 and class actions.[2] No comprehensive change has been made, although availability of class actions in specific substantive areas has been affected by amendments to certain substantive acts.[3]

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2. For a summary of various proposals, see American Enterprise Institute, Consumer Class Actions (1977), pp. 3-6; 2 Newberg, Class Actions § 2475. Most of the early proposals were attempts to remove jurisdictional barriers in federal courts. Later proposals also attempt to eliminate restrictions presented by Eisen IV.

3. Such as: limiting liability in claims under Truth-in-Lending Act to one percent of net worth or $500,000; requiring that class members assert affirmative claims for recovery under the Age Discrimination in Employment Act, requiring a minimum number of class members under the Magnuson-Moss Warranty Act. On the other hand, the Hunt-Scott-Rodino Antitrust Improvement Act authorizes fluid class recovery in parens patriae actions brought by State Attorney Generals. See acts cited in Kennedy, supra, at 1212, n.24.

Due to the controversial nature of the subject, the Supreme Court has decided not to amend Rule 23 through the rulemaking power. In March 1978 the Judicial Conference of the United States adopted a resolution which "approve[d] in principle the revision of Rule 23 (b)(3) . . . by direct legislative enactment, rather than by the rulemaking authority.[4]

The most extensive current proposals for revision are in the form of a proposal submitted by the Office for Improvements in the Administration of Justice of the U.S. Justice Department. The proposal was first submitted to the 95th Congress on August 25, 1978, as SB 3475. After extensive hearings before the Senate Judiciary Subcommittee for improvements in judicial machinery, the bill was not passed out by the Committee. In 1979 the Justice Department made substantial revisions in response to objections voiced at the hearings and the proposal was resubmitted as Title 1 of HR 5103, The Small Business Judicial Access Act of 1979.[5] Despite the politically attractive new label, the Bill has not been the subject of Committee hearings.

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4. Proceedings of the Judicial Conference of the United States, 33 Comm. 1978. In fact, the Conference had never specifically considered any amendments other than some minor and non-controversial revisions. See 4 Class Action Reports 288 (1975).

5. The text of SB 3475 is set out as an Appendix to Kennedy, supra, at p. 1241. The Bill Commentary prepared by the Justice Department appears at 124 Cong. Rec. S 14,502 (daily ed, May 25, 1978). The Kennedy article is an extensive analysis of the Bill, and comments also appear in 5 Class Action Reports 1 (1978). HR 5103 and Commentary is set out in full in 6 Class Action Reports 2 (1979), followed by an extensive critique at p. 27. The description of the Justice Department proposal is based on HR 5103.

The Justice Department proposal is based on the premise that there are two different types of class damage actions being litigated under Rule 23 (b)(3):

(1) Where individual economic injury is small and the primary purpose is to prevent unjust enrichment and deter illegal conduct rather than compensate individuals for minor harm.

(2) Where individual economic injury is more substantial and the primary purpose of the suit is to compensate the injured persons.

The proposed Bill would eliminate 23 (b)(3) from the federal rule and establish two separate procedures: one, called a public action procedure, would include cases where claimed illegal conduct involves widespread harm to individuals in small amounts; the other, called a compensatory class action, is designed for cases of more substantial damage.

The Bill also assumes that many major problems in Rule 23 result from the fact that Rule 23 does not provide adequate procedures for judicial management.

The public action procedure could only be brought where at least 200 persons have sustained an injury not exceeding $300 as a consequence of an injury which would otherwise give rise to a civil private

right of action under statutes relating to commercial conduct. The aggregate of all harm must be $60,000 or more. The case is brought in the name of the United States. There must be at least one substantial question of law or fact common to all injured persons, but that question need not predominate. There is no requirement of typicality of the person bringing the action or impracticability of joinder of all class members. A preliminary hearing is required within 120 days of filing. Before such hearing, discovery is limited. The preliminary hearing involves an inquiry into the merits to see if there is a "serious question" of liability. This is not the equivalent of a summary judgment procedure; if the court declines to proceed, there is no binding effect upon the class.

In the public action, the Attorney General or a federal agency may take over the action if injured persons are found in more than ten states or refer the action to a state Attorney General if a substantial number of injured persons reside in one state. Upon assumption, the United States or a state is required to pay, to the extent escheat funds from prior actions are available, the plaintiffs' reasonable attorney fees. The government may also retain the plaintiffs' attorney as private counsel and pay fees out of escheated funds. The Bill also provides an incentive fee to the person initiating a successful action up to $10,000.

This procedure would eliminate the major Rule 23 obstacle of individual notice. In fact, no notice is given at all, and no opt-out

procedure is available to class members.

The public action provides for aggregate recovery. A judgment may be equal to the value of benefit or profit to the defendant or the combined value of all damage to injured persons. Claims administration could be transferred to the administrative office of the U.S. Courts. Unclaimed balances escheat and are used for fees and expenses in future public claims.

The compensatory action is much closer to the present class action procedure. At least 40 persons with claims exceeding $300 would be required. A substantial, but not predominant, common question of law or fact is required. The claims must arise out of the same transaction or series of transactions. Notice would be required, but in more flexible form than in Rule 23 (c). The court must direct notice "reasonably necessary to assure adequacy of representation and fairness" to all persons concerned. Individual notice would not be required absent large claims. There appears to be no specific provision for payment of notice costs by defendants, but a conditional partial expense award (discussed below) might require defendant to pay such costs before the case is completed. The court can either require opt-in or opt-out by class members, but apparently only cases where individuals have claims of $10,000 or so will be appropriate for an opt-in requirement. There would be no fluid class recovery and no payment of fees from a public fund; the government could not take over the case. The option of the court to dismiss a compensatory action on manageability grounds would be retained.

The compensatory action, as well as the public action, would be subject to the preliminary merits hearing. For both actions the Bill also regulates discovery and interlocutory appeals and has detailed provisions for separate trial of issues. It also provides for proof of essential elements of the claim and damages by sampling. For public actions, this could provide the basis of liability and, for compensatory actions, would allow a finding of conditional liability and damage leading to an immediate partial award of expenses, including attorney fees. The Bill also provides more detailed provisions for regulation of settlement and requires approval of attorney fees by the court.

Both persons favoring or disfavoring class actions can easily find some gain and loss in the proposed bill.[6] One difficult problem arises from replacing Rule 23 (b) because the proposed substitute, particularly for claims under $300, does not cover all claims that could be brought in federal courts.[7] Also limiting compensatory damages actions to the same transaction or occurrence may be more limited than Rule 23. Political prospects for passage appear very dim.[8]

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6. The editors of class action reports, who favor expanded class actions, conclude that on balance the gains outweigh losses. 6 Class Action Reports at 41.

7. The public action is limited to consumer claims. See Kennedy, supra, at 1217-18.

8. See 6 Class Action Reports at 28.

B. State Class Actions and the Uniform Class Action Act

1. Uniform Class Action Act

For state courts, the 1966 Revisions of Rule 23 and restriction of access to federal courts have resulted in substantial activity related to state class action procedures.

The most notable event has been the promulgation, by the National Conference of Commissioners on Uniform State Laws, of the Uniform Class Actions Act in 1975. Generally, the Act is designed for state courts with little class action experience and has far more detailed provisions than Rule 23. The Act covers discovery, counterclaims, tolling of the statute of limitations, class liability for costs, and jurisdiction over multi-state classes. The most important differences between the Act and Rule 23 are:

(a) The Act eliminates the mandatory individual notice to class members who can be identified. See Section 7.

(b) The Act provides for fluid class recovery in the form of an aggregate judgment, with unclaimed amounts escheating to the state as unclaimed property. The escheat, however, is not automatic, and the court has the option after considering specified criteria to conditionally or unconditionally return unclaimed amounts to the defendant. See Section 15.

(c) The Act contains extremely detailed provisions and criteria for regulating attorney fees and fee and expense arrangements. See Sections 16 and 17.

2. Distribution of States

In addition to the Uniform Act, the Class action provisions in the states fall into five categories.[9]

(A) States with no formal class action statutes in rules.

(B) States which use the Field Code model (the Oregon statute prior to 1973).

(C) States which have the pre-1966 version of Federal Rule 23.

(D) States which have adopted Federal Rule 23 verbatim.

(E) States which have a modified form of Federal Rule 23.

After 1973 Oregon fits into the last category. In 1973 the distribution of states was as follows:

(A) No statute or rule - 4 states.

(B) Field Code - 9 states.

(C) Pre-1966 Rule 23 - 13 states.

(D) Post-1966 Rule 23 - 19 states.

(E) Modified form of Rule 23 - 5 states.[10]

Other states with a modified Federal Rule 23 included:

(1) Kansas had a version of Rule 23 that allowed the court on its own motion to convert an action into a class action. The Kansas rule also allowed the court to prohibit opting-out of class members in a 23 (b)(3) action.

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9. Note the analysis of state provisions which follows was drawn from 2 Newberg, Class Actions, Chapter 4, pp. 293-454, supplemented by some material in the Class Action Reports.

10. The California Field Code provision and the Pennsylvania pre-1966 Rule 23 had been judicially interpreted as substantially equivalent to present Rule 23. New Mexico, listed in the third category, also had an unrepealed Field Code provision.

(2) Maryland - which had a brief rule that was a precurser of the 1966 Amendment to Federal Rule 23. Notice was discretionary with the court.

(3) Massachusetts - which eliminated 23 (b)(1) and (2), thus requiring predominance of common questions for all actions. The Massachusetts rule also did not have any mandatory notice requirement.

(4) Ohio - which included special provisions relating to aggregation of damages for jurisdictional purposes.

As of 1978, the distribution was as follows:

(A) No statute or rule - 3 states.
(B) Field Code - 8 states.
(C) Pre-1966 Rule 23 - 10 states.
(D) Post-1966 Rule 23 - 18 states.
(E) Modified Rule 23 - 10 states.
(F) Uniform Class Action Act - 1 state.

In 1977, Illinois, which previously had no statute, adopted a modified form of Rule 23 which requires only numerosity, adequate representation, and a predominant common question of law or fact. The Illinois statute does not require individual notice.

In 1975, New York, which had a Field Code statute, enacted a modified form of Rule 23 as a statute. The New York statute eliminates 23 (b)(1) and (2) and requires only the standard prerequisites and a predominant question. Class actions to recover statutory penalties are forbidden. The New York statute makes notice discretionary and has a provision allowing the court to order that the defendant pay notice costs. A new provision allowing the court to award attorney fees was also added.

In 1977 Pennsylvania, which had the pre-1966 federal rule, enacted a new rule, modeled on the federal rule, but with provisions taken from the Uniform Class Actions Act and some new provisions. The three categories of Rule 23 (b) are recited with slightly different language. For 23 (b)(3) class actions, the court is directed to consider whether the amount to be recovered by individual class members, in relation to the expense and effort of administering the action, is so low that a class action would not be justified. In certifying any class the court is directed to consider whether the representative parties have a conflict of interest and whether the representative parties have adequate financial resources to maintain the action. The court is required to make findings of fact and conclusions of law in the certification decision. In certain cases (substantial claims for class members or other special circumstances) the court is given the discretion to require that class members opt-in. The rule eliminates mandatory individual notice but requires payment of notice costs by the plaintiff. The rule allows the court to regulate attorney fees.

In 1977 Texas, which had the pre-1966 federal rule, adopted a modified form of Rule 23. The Texas rule requires mandatory Eisen type individual notice for all 23 (b) categories. It also has a provision making discovery unavailable against unnamed class members.

In 1975 New Jersey, which had a post-1966 federal rule, amended its rule. It eliminates mandatory individual notice and also

allows the court to require that defendant pay notice costs. It also specifically authorizes fluid class recovery.

Idaho, which had a pre-1966 Federal Rule 23, adopted the post-1966 Federal Rule 23.

North Dakota, which had Federal Rule 23, adopted the Uniform Class Action Act.

In California one substantive consumer statute, the California Consumers Legal Remedies Act, contains a provision for publication rather than personal notice in class actions.

III. SUMMARY OF PROPOSED CHANGES

The proposed change would eliminate all of the modifications of Rule 23 enacted by the 1973 legislature and add four new provisions that do not appear in Rule 23. Some of the changes would have clear impact in increasing availability of class actions in Oregon courts; others would seem to have no effect at all. What follows is a brief technical description of the changes.

A. Substantial changes

1. Prelitigation notice

ORCP 32 I., requiring prelitigation notice 30 days prior to filing, and ORCP 32 J., allowing a defendant to avoid a damage action by taking corrective steps, would be eliminated. Prelitigation notice as a prerequisite (32 A.(5)) and the procedure for converting an injunctive claim to a damages claim (32 K.) are also deleted.

Prelitigation notice is unique in the Oregon rule. It does

not appear to be a substantial barrier to certification. On the other hand, its utility may be questionable. The likelihood of a defendant avoiding a substantial case by complying with 32 J. appears low.

2. Pendency notice

The most important limitation in Federal Rule 23 upon maintenance of large class action damage cases is the requirement that individual notice be given to all absent class members whose identity and location can be determined and that plaintiff initially pay the cost. This is the interpretation of Rule 23 by the Supreme Court in the Eisen case. The substantial initial investment would deter bringing most cases with a large class of people and small individual damages. The plaintiff in the Eisen case had a 70 dollar claim and individual notice costs were in excess of $200,000. The Eisen notice decision terminated the case.

The proposed changes would: (a) eliminate any notice when plaintiffs' claims are under $100 by changing 32 G.(1), and (b) add a new provision which does not appear in the federal rule allowing the court to order defendant to pay the initial notice costs (32 F.(3) of proposed rule). The principal question presented by the amendments is whether there are any constitutional problems.

The present Oregon notice requirement, 32 G.(2), is identical to Federal Rule 26 C.(2), and under Eisen requires individual notice. Although the parties in Eisen argued the question of whether individual notice is constitutionally required, the Supreme Court decision is

based solely on the wording of the rule. The suggested change is taken from Section 9 (d) of the Uniform Act. The comment to the Uniform Rule cites two post Eisen state cases (Nebraska and Calfiornia) which hold that notice is not constitutionally required. The lower federal courts have also been consistently holding that notice for 23 (b)(1) and (2) class actions (not required by Rule 23) is not constitutionally required.

The suggested amendment actually requires no notice at all for claims under $100. This would also appear to limit the right to opt-out for such claims. While this is consistent with the public action in the justice department statute, most states have modified Eisen only to require some form of notice less than individual notice. In fact, the Uniform Act also does this. The proposed change leaves out Section 7(e) of the Act:

> (e) For members of the class not given personal or mailed notice under subsection (d), the court shall provide, as a minimum, a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. Techniques calculated to assure effective communication of information concerning commencement of the action shall be used. The techniques may include personal or mailed notice, notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups.

The ability to force payment of initial costs by defendant would also reverse the Eisen interpretation of Rule 23. The U.S. Supreme Court opinion was based upon the fact that the rule authorizes no initial payment of costs by defendant. The opinion, however, discusses

unfairness and prejudice to a defendant, suggesting due process considerations.[11] On the other hand, the Court does say that in unusual situations, such as the existence of a fiduciary relationship, reallocating notice costs would be justified.

Most states changing their statute or rule in reaction to Eisen have not included the procedure. New York and New Jersey have. Despite the comment next to the proposed change submitted, the cost allocation provision does not come from the Uniform Act. In fact, the Act says in Section F.:

> (f) The plaintiff shall advance the expense of notice under this section if there is no counterclaim asserted. If a counterclaim is asserted the expense of notice shall be allocated as the court orders in the interest of justice.

3. Fluid Class Recovery

Another important issue in class actions is whether judgment for damages is limited to claims actually established by individual class members or damages may be assessed based upon improper gain by the defendant. A related question is distribution of unclaimed portions of aggregate damages.

The present Oregon statute clearly forbids any fluid class recovery. ORCP 32 G.(2) and (3) require that class members file affirmative claims after notice and 32 N. provides that judgment only be for claims actually filed. The proposed change would eliminate this

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11. See 2 Newberg, Class Actions § 2350, pp. 48-56.

and specify that, if after determining liability the court cannot identify class members, the amount of damages for such class members shall be "distributed in a manner most equitable under the circumstances." (32 F.(4) of proposed rule)

The Supreme Court did not pass upon the validity of fluid recovery in Eisen IV. The court of appeals strongly rejected the concept. Rule 23 does not deal with the problem. Apparently, no federal court has entered a judgment granting fluid recovery.[12] The proposed justice department statute would authorize fluid recovery in public actions. The Hunt-Scott-Rodino Antitrust Improvement Act of 1976 does authorize fluid recovery.

Among the states, only New Jersey has a specific provision authorizing fluid recovery.[13] The Uniform Act does authorize such recovery. The suggested provision, however, is different from the suggested change in the Oregon statute. Section 15 of the Act includes the following provisions:

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12. It has been used in settlement in some federal cases.

13. The California court has approved the procedure under its Field Code statute. Daar v. Yellow Cab, 63 Cal. Rptr. 724 (1967).

> (5) The court shall determine what amount of the funds available for the payment of the judgment cannot be distributed to members of the class individually because they could not be identified or located or because they did not claim or prove the right to money apportioned to them. The court after hearing shall distribute that amount, in whole or in part, to one or more states as unclaimed property or to the defendant.
>
> (6) In determining the amount, if any, to be distributed to a state or to the defendant, the court shall consider the following criteria: (i) any unjust enrichment of the defendant; (ii) the willfulness or lack of willfulness on the part of the defendant; (iii) the impact on the defendant of the relief granted; (iv) the pendency of other claims against the defendant; (v) any criminal sanction imposed on the defendant; and (vi) the loss suffered by the plaintiff class.
>
> (7) The court, in order to remedy or alleviate any harm done, may impose conditions on the defendant respecting the use of the money distributed to him.

The fluid class recovery is at court discretion and factors to be considered are spelled out. The Uniform Act also uses the concept of escheat. Presumably, the state is free to use escheated funds as provided by state law.

4. Attorney Fees

Present Oregon law does not provide a separate authorization for attorney fees in every class action. ORCP 32 O. authorizes the court to regulate fees to be charged. The proposed change would eliminate 32 O. and authorize a separate attorney fee award. (32 F.(5) of proposed rule).

The federal rule does not provide for either regulation or award of attorney fees. Fee awards may be available in federal courts

under a specific statute. Fee awards may be available under federal courts' equitable power to award fees from a common fund.[14] In some cases the federal courts have also controlled fee arrangements between the representative and attorney under the general power to control conduct of a class action, but this does not appear to be a regular practice.[15] The justice department statute would authorize attorney fee awards in public actions from prior unclaimed class action aggregate awards held by the jurisdiction.

In the states, a few rules specifically provide for court regulation of fees. New York specifically authorizes an award of fees. The Uniform Act also authorizes regulation and award of fees, but the Act is again quite different from the proposal presented. Sections 16 and 17 of the Uniform Act provide:

> (a) Attorney's fees for representing a class are subject to control of the court.
>
> (b) If under an applicable provision of law a defendant or defendant class is entitled to attorney's fees from a plaintiff class, only representative parties and those members of the class who have appeared individually are liable for those fees. If a plaintiff is entitled to attorney's fees from a defendant class, the court may apportion the fees among the members of the class.

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14. 3 Newberry, supra, § 6905, pp. 1119-1123.

15. 3 Newberry, supra, § 6914, p. 1126.

(c) If a prevailing class recovers a judgment for money or other award that can be divided for the purpose, the court may order reasonable attorney's fees and litigation expenses of the class to be paid from the recovery.

(d) If the prevailing class is entitled to declaratory or equitable relief, the court may order the adverse party to pay to the class its reasonable attorney's fees and litigation expenses if permitted by law in similar cases not involving a class or the court finds that the judgment has vindicated an important public interest. However, if any monetary award is also recovered, the court may allow reasonable attorney's fees and litigation expenses only to the extent that a reasonable proportion of that award is insufficient to defray the fees and expenses.

(e) In determining the amount of attorney's fees for a prevailing class the court shall consider the following factors:

(1) the time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered;

(2) results achieved and benefits conferred upon the class;

(3) the magnitude, complexity, and uniqueness of the litigation;

(4) the contingent nature of success;

(5) in cases awarding attorney's fees and litigation expenses under subsection (d) because of the vindication of an important public interest, the economic impact on the party against whom the award is made; and

(6) appropriate criteria in the [state's Code of Professional Responsibility].

Comment: Most of the factors listed in subsection (e) are taken from Lindy Bros. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973).

Section 17. [Arrangements for Attorney's Fees and Expenses.] (a) Before a hearing under Section 2(a) or at any other time the court directs, the representative parties and the attorney for the representative parties shall file with the court, jointly or separately; (1) a statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts; (2) a copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangements or fees and (3) a copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or an attorney regularly of counsel with his law firm. This statement shall be supplemented promptly if additional arrangements are made.

5. Statutory Penalties

The proposal would eliminate ORCP 32 L., which prohibits class actions for statutory penalties. Rule 23 does not have such a provision. Except where limited by a substantive statute, such as the Truth-in-Lending Act, actions may be maintained for statutory penalties. Under the justice department statute, the basis for calculating judgments do not include penalties.

The rationale for limitation in statutory penalty cases is that a result totally out of proporation to defendant's behaviour may result. Another consideration is that statutory penalty statutes are

usually enacted as an incentive for individual small claims; the availability of class recovery makes such incentive unnecessary.[16] On the other hand, if the substantive statute provides for such penalties without limiting the total exposure, as the Truth-in-Lending Act, why should the class action rule limit liability.

The New York statute prohibits statutory penalty cases. The Uniform Act also specifically so provides in Section 15 (b).

6. Criteria for Certification

Class action cases appear to be won or lost on the certification hearing. Almost all Oregon cases relating to the Oregon rule are appeals on the certification hearing and relate to 32 B.(3). For certification under 32 B.(3), the plaintiff must establish predominance of the common questions of law or fact, superiority of the class action over alternative methods of adjudication, and manageability of the action.

The Oregon rule has a number of provisions not appearing in Rule 32 which would be eliminated by the proposed change:

(1) 32 B.(3) requires the court to not find predominance unless separate questions relate "primarily" to damages.

(2) 32 B.(3)(d) requires the court to consider feasibility of notice.

(3) 32 B.(3)(e) requires the court to consider if damages to be received by individual class members are so minimal as not to warrant intervention by the court.

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16. The leading case recognizing the problem is Ratner v. Chemical Bank, 34 F.2d 412 (S.D.N.Y. 1971). See Kennedy, supra, pp. 1932-1235.

(4) 32 B.(3)(f) requires the court to consider likelihood of success at a preliminary hearing.

(5) 32 (c) requires the court to consider the alternative of injunctive relief rather than damages.

(6) 32 G.(4) requires a stay to determine questions of law prior to notice and other class action procedures.

These provisions apparently were taken from the American College of Trial Lawyers, Report and Recommendations of Special Committee on Rule 23 (1972).[17] The first is the most limiting, and the Oregon Supreme Court has concluded that the legislature intended that the scope of 32 B.(3) class actions be more restrictive than the federal rule.[18] They have denied certification in cases when many federal courts would find predominance. The limitation seems to be unique to Oregon, as is the reference to feasibility of notice in 32 B.(3)(d).

The minimal damages limitation of 32 B.(3)(e) and the consideration of alternative remedies of 32 C. are less unusual. Both are particularized aspects of the question of superiority of the class action over other methods of disposing of the controversy. Federal courts can and do consider these factors in particular cases. 32 B.(3)(e) is not very well drafted. Section 3 (g)(13) of the Uniform Act is clearer:

> (13) whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class.

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17. See Bernhard v. First National Bank, 275 Or. 145, 150-51 (1976).

18. Bernhard v. First National Bank, supra, p. 732. Actually, the American College proposal was that predominance should exist when separate questions relate solely to damages. See Kirkpatrick, Class Actions, 1973 Legislation, OSB; 39, 43.

The preliminary hearing on the merits directed by 32 B.(3)F. was originally intended to provide some control of spurious claims because Oregon did not have a summary judgment procedure in 1973.[19] However, one key element of the new management controls proposed in the Justice Department Act is a preliminary hearing where the court must decide if "there are sufficiently serious questions going to the merits to make them fair ground for litigation." The Comment explains the proposal as follows: (Footnotes omitted)

> a. Merits Inquiry After Limited Discovery. The early merits evaluation promises defendants protection from the costs of extensive and unnecessary discovery (and motion practice) in cases not presenting serious issues. It provides the relator and the United States with an early, tentative judicial determination on the merits so they are better able to assess the wisdom of pursuing the action. Also, given the present potential for excessive discovery and motion practice by both sides, a mandatory preliminary hearing requires the court to take firm, early control of the action. The implementation of a preliminary look at the worthiness of these suits has wide support.
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> * * *
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> The operation of this merits screening procedure differs in many particulars from that of a summary judgment determination under Rule 56. Under §3022(b)(2) the plaintiff does not have as burdensome a showing as a Rule 56 movant. That is, the former must show uncertainty on the merits, not the existence of a clear rule favoring his case. The defendant under §3022(b)(2) has a more difficult showing than the party opposing a Rule 56 motion. He must demonstrate that the law is clearly in his favor, whereas the party adverse to a Rule 56 motion must show only that the merits are uncertain. These balances are struck differently because of the divergent screening and case-disposition purposes motivating the two determinations. Divergent purpose is reflected not only in each determination's standard, but in its effect, timing, and required discovery.

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19. Kirkpatrick, supra, at 45.

> The purpose of a Rule 56 motion is to dispose of the merits of a case and avoid unnecessary trial.[186] An award of summary judgment is binding on the parties.[187] Thus, a complex case may not be "ripe" for summary judgment for many years.[188] Moreover, this device is not a favored means of deciding antitrust violations where, for example, state of mind or intent is at issue, or the facts are peculiarly in the knowledge of the moving party.[189]
>
> In contrast, the preliminary hearing test screens out those cases where the merits showing does not justify the expensive panopoly of class treatment. This merits determination does not have binding effect on the injured persons. While a finding adverse to the plaintiff results in a dismissal of the action as formulated in the complaint, the defendant's conduct may be the basis for a subsequent collective action. which is better pleaded or supported

B. Technical Questions

The changes listed below are included in this section because they do not appear to affect the availability of class actions.

1. Findings of fact and conclusions of law. Section 32 (d) requires the court to make findings of fact and conclusions of law in the certification decision. The certification decision is frequently the crucial decision and is appealable. (ORS 13.400) This is a desirable requirement and should be retained.

2. Notice on settlement. Section 32 E. has special language not appearing in Federal Rule 23 which allows dismissal without notice to class members under some circumstances. This provision avoids the expense of mandatory notice for every dismissal.

3. Amending orders. Section 32 F. has a phrase not appearing in Rule 23, reciting that orders of the court in the conduct of actions "may be altered and amended as desirable." The possibility of amendment

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20. Class Action Reports at 21-22.

of the certification order as the action develops seems reasonable and in any case it would be within the inherent power of the court to change any order before final judgment. The Uniform Act has a much more elaborate provision relating to the amendment or certification orders. See Section 5.

4. Consolidation of actions. The proposal would eliminate the procedure for consolidation of actions by the Supreme Court. Although the occasion for use of this provision would be rare, it seems reasonably designed to avoid duplication of effort by circuit courts in unusual cases.

5. Inaccurate notice. The proposals do point out that there is an inconsistency in the existing rule. 32 F.(1) requires a notice which states that class members who do not opt-out are bound but under 32 G.(3) and N., only members who file claims are bound in favorable judgments.

6. Drafting details. Cross references in 32 B., G., and F.(6) eliminate the words "of this rule" and 32 G.(1) has had masculine pronouns reinserted. This style is inconsistent with the ORCP.

C. Areas Not Covered

If Rule 32 is to be revised, there are troublesome areas not addressed. They include (1) jurisdiction over multi-state classes - Section 6 of the Uniform Act, (2) exclusion for members of defendant classes - Section 8 (d) of the Uniform Act, (3) discovery by or against

class members - Section 10 of the Uniform Act, (4) counterclaims by or against the class - Section 11 of the Uniform Act, (5) liability of class members for costs - Section 14 of the Uniform Act, and (6) tolling of the statute of limitations for class members - Section 18 of the Uniform Act.

IV. COUNCIL RULEMAKING POWER

One obvious question presented by any proposed changes is whether they can be promulgated by the Council as rules or could only be submitted to the legislature as a suggested statutory revision. The rulemaking power of the Council is set out in ORS 1.735 as follows:

> The Council on Court Procedures shall promulgate rules governing pleading, practice and procedure, including rules governing form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant.

The question is, as with similar language in many rulemaking statutes,[21] what is meant by "pleading, practice and procedure." In many cases the question is not capable of a categorical answer. There are, of course, no Oregon cases. Cases in other jurisdictions are spotty and none deal with the particular questions presented. There is also no agreement among commentators on a reasonable definition of substance or procedure in the rulemaking context.

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21. E.g., 28 U.S.C.A. 2072, the Federal Rules Enabling Act.

The most reasonable approach is to recognize that what is at issue is a balance between legislative and judicial power. This balance is controlled by the legislature. The ultimate question is one of legislative intent in ORS 1.735. In using the words "pleading, practice and procedure" the legislature identifies many areas which by common understanding would be procedural, i.e., directly related to the administration of courts with minimal policy implications. The language, however, leaves many other areas in a twilight zone. These areas are clearly related to administration of justice but also have substantive policy implications beyond the court system. Whether or not the legislature intended to trust these policy questions to a judicial body can only be answered by the legislature. The rulemaking structure in this state has a built-in mechanism for resolving doubtful areas. Under ORS 1.735 the rules are submitted to the legislature for review.[22] This is exactly what was done the last biennium with Rule 4 relating to personal jurisdiction.

The federal courts have decided to leave any changes in Rule 23 to the legislature. Whether the Judicial Conference action was motivated by a recognition that they were stalemated on changes or by a fear the changes exceeded rulemaking power is not clear.[23]

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22. This approach is based upon that used by Levin and Amsterdam, Legislature Control Over Judicial Rule Making, 107 U.Pa. L. Rev. 1, 23-24 (1958). See also Comment, Staff Memo to the Enforcement of Judgments and Provisional Remedies Subcommittee, dated February 7, 1980.

23. Kennedy, supra, at 1215.

On this basis all changes suggested that would conform Rule 32 to Federal Rule 23 would clearly be procedural. Although some doubt was expressed when Rule 23 was first enacted,[24] after 14 years of acceptance as a judicial rule there is little doubt that Rule 23 as it exists is a valid exercise of rulemaking power.[25]

The real difficult area is in the changes which do not appear in the federal rule:

1. No notice for claims of less than $100.

2. Payment of notice costs by defendant.

3. Fluid class recovery.

4. Authorizing attorney fees.

The first seems the most clearly procedural. Rule 23 originally specified the form of notice. The rules deal extensively with notice relating to conduct of actions.[26]

The last seems clearly substantive. Most commentators agree that remedies are substantive. Right to attorney fees, as opposed to procedure for determining fees, is a form of remedy.[27] The Council is considering rules for assessment of attorney fees but not rules governing the right to such fees. Existing section 32 O. related to controlling fees. The suggested revision would create a right to fees.

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24. Kennedy, supra, at 1215-1216. Ross, Rule 23(b), Class Actions - A Matter of "Practice and Procedure" or "Substantive Right," 27 Emory Law Journal 247 (1978).

25. Kennedy, supra, at 1216. Fyr, on Classifying Class Suits, 27 Emory Law Journal (1978).

26. Joiner and Miller, Rules of Practice and Procedure, A Study of Judicial Rulemaking, 55 Mich. L. Rev. 623, 646 (1957).

27. Joiner and Miller, supra, at 653.

Taxing costs to defendant and fluid recovery could easily be argued as both substantive and procedural. Cost assessments and distributing damages are standard procedural activities. Forcing a defendant to pay initial costs of a suit against him and creating an ability to collect damages that do not go to compensate the person injured have enormous policy implications.

My best analysis is that the notice change is procedural and the attorney fee award is substantive. Only the legislature could settle the question for fluid recovery and payment of costs by defendant.

CONCLUSION

If the subcommittee wishes to have more detailed research in any particular area, this can be done. There certainly is no shortage of material.

One useful approach may be to consider the available empirical data on how class actions actually are operating. There are a few studies available which shed some light on the reality of class action practice:

> "[W]e seem to be in the midst of a holy war over this Rule, one being fought between the defense bar and the plaintiff's bar. In some respects it has become a political figure, for example, in the consumer and environmental areas, and some aspects of the Rule have received public notoriety in many parts of the United States because of media attention. Unfortunately, much of the discussion has been highly emotional and considerable snake-oil has been sold along the way.
>
> . . .

> In point of fact, we have precious little empiric evidence as to how the Rule actually has been functioning. The evidence that we have, largely in the form of an excellent report by the Senate Committee on Commerce, the so-called Magnuson Committee Study, and a study done by the American Bar Foundation on antitrust class actions, indicates that much of the debate has been based on erroneous assumptions. The studies indicate that Rule 23 is achieving its intended purposes and may well be providing system-wide economies, even though some cases are incredibly difficult to process. Moreoever, it appears that to the extent there are difficulties with the functioning of Rule 23, they center around the (b)(3) category of cases and do not involve (b)(1) or (b)(2) cases.
>
> These studies also suggest that although there are some indications of undesirable or unprofessional conduct in certain cases, abuse is not widespread. What appears to have happened is that anecdotes about a few situations have been repeated so often at professional meetings that an impression has been created that these abuses occur in every case. The empiric evidence also suggests, contrary to a widely held opinion, that in settled damage class actions, particularly in the treble damage antitrust and securities contexts, the vast majority of the money received actually is distributed to the class members. It does not get devoured by avaricious attorneys questing for fees nor is it eaten-up by administrative expenses.[28]

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28. Miller, An Overview of Federal Class Actions, Past, Present and Future, Federal Judicial Center, 1977.

BACKGROUND - STATUTORY PROVISIONS IN OTHER JURISDICTIONS

I. NOTICE - PENDENCY

A. NO NOTICE UNDER $100

Sec. 7 - Uniform Act

B. OTHER THAN INDIVIDUAL NOTICE

1. Sec. 7e - Uniform Act

2. Small Business Judicial Access Act (see II below)

3. Pennsylvania

4. New York

5. New Jersey

6. Illinois

7. California

8. Hunt-Scott-Rodino Act

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decision on the matters specified in Rules 1702, 1708 and 1709, including findings of fact, conclusions of law and appropriate discussion.

(b) In certifying a class action, the court shall set forth in its order a description of the class.

(c) When appropriate, in certifying, refusing to certify or revoking a certification of a class action the court may order that

(1) the action be maintained as a class action limited to particular issues or forms of relief, or

(2) a class be divided into subclasses and each subclass treated as a class for purposes of certifying, refusing to certify or revoking a certification and that the provisions of these rules be applied accordingly.

(d) An order under this rule may be conditional and, before a decision on the merits, may be revoked, altered or amended by the court on its own motion or on the motion of any party. Any such supplemental order shall be accompanied by a memorandum of the reasons therefor.

(e) If certification is refused or revoked, the action shall continue by or against the named parties alone.

Rule 1711. The Plaintiff Class. Exclusion. Inclusion

(a) Except as provided in subdivision (b) or as otherwise provided by the court, in certifying a plaintiff class or subclass the court shall state in its order that every member of the class is included unless by a specified date a member files of record a written election to be excluded from the class.

(b) If the court finds that

(1) the individual claims are substantial, and the potential members of the class have sufficient resources, experience and sophistication in business affairs to conduct their own litigation; or

(2) other special circumstances exist which are described in the order,

the court may state in its order that no person shall be a member of the plaintiff class or subclass unless by a specified date of record a written election to be included in the class or subclass.

Rule 1712. Order. Notice of Action

(a) After the entry of the order of certification and after hearing the parties with respect to the notice to be given, the court shall enter a supplementary order which shall prescribe the type and content of notice to be used and shall specify the members to be notified. In determining the type and content of notice to be used and the members to be notified, the court shall consider the extent and nature of the class, the relief requested, the cost of notifying the members and the possible prejudice to be suffered by members of the class or by other parties if notice is not received. The court may designate in the notice a person to answer inquiries from, furnish information to or receive comments from members or potential members of the class with respect to the notice.

(b) The court may require individual notice to be given by personal service or by mail to all members who can be identified with reasonable effort. For members of the class who cannot be identified with reasonable effort or where the court has not required individual notice, the court shall require notice to be given through methods reasonably calculated to inform the members of the class of the pendency of the action. Such methods may include using a newspaper, television or radio or posting or distributing through a trade, union or public interest group.

(c) The notice shall be prepared by and given at the expense of the plaintiff in the manner required by the order. A proposed form of notice shall be submitted for approval to the court and to all named defendants, who may file objections thereto within ten days. The court may require a defendant to cooperate in giving notice by

taking steps which will minimize the plaintiff's expense including the use of the defendant's established methods of communication with members of the class, provided, however, that any additional costs thereby incurred by the defendant shall be paid by the plaintiff.

Note: Illustrative of the means of reducing the expense of individual notice is the inclusion of the notice in a mailing normally made by the defendant to members of the class.

(d) If a defendant asserts a counterclaim against a plaintiff class or subclass, the expense of a combined notice of the plaintiff's claim and of the defendant's counterclaim shall be allocated between the parties as the court may order.

Rule 1713. Conduct of Actions

(a) In the conduct of actions to which this rule applies, the court may make appropriate orders

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice, other than notice under Rule 1712, be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate;

(3) permitting an interested person to intervene in accordance with Rules 2326 et seq. governing Intervention;

(4) imposing conditions on the representative party or an intervener;

(5) taking any action to assure that the representative party adequately represents the class;

(6) dealing with other administrative or procedural matters.

(b) Any such order may be revoked, altered or amended as may be appropriate from time to time.

Rule 1714. Compromise. Settlement. Discontinuance

(a) No class action shall be compromised, settled or discontinued without the approval of the court after hearing.

(b) Prior to certification, the representative party may discontinue the action without notice to the members of the class if the court finds that the discontinuance will not prejudice the other members of the class.

(c) If an action has been certified as a class action, notice of the proposed compromise settlement or discontinuance shall be given to all members of the class in such manner as the court may direct.

Rule 1715. Judgment

(a) Except by special order of the court, no judgment by default or on the pleadings or by summary judgment may be entered in favor of or against the class until the court has certified or refused to certify the action as a class action.

(b) A judgment entered on preliminary objections in a class action before certification shall bind only the named parties to the action.

(c) A judgment entered in an action certified as a class action shall be binding on all members of the class except as otherwise directed by the court.

(d) In all cases the judgment shall be framed by the court and shall specify or describe the parties who are bound by its terms.

Rule 1716. Counsel Fees

In all cases where the court is authorized under applicable law to fix the amount of counsel fees it shall consider, among other things, the following factors:

(1) the time and effort reasonably expended by the attorney in the litigation;

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b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

§902. Order allowing class action

Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

2. The impracticability or inefficiency of prosecuting or defending separate actions;

3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;

5. The difficulties likely to be encountered in the management of a class action.

§903. Description of class

The order permitting a class action shall describe the class. When appropriate the court may limit the class to those members who do not request exclusion from the class within a specified time after notice.

§904. Notice of class action

(a) In class actions brought primarily for injunctive or declaratory relief, notice of the pendency of the action need not be given to the class unless the court finds that notice is necessary to protect the interests of the represented parties and that the cost of notice will not prevent the action from going forward.

(b) In all other class actions, reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs.

(c) The content of the notice shall be subject to court approval. In determining the method by which notice is to be given, the court shall consider

I. the cost of giving notice by each method considered

II. the resources of the parties and

III. the stake of each represented member of the class, and the likelihood that significant numbers of represented members would desire to exclude themselves from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to a random sample of the class.

(d) I. Preliminary determination of expenses of notification. Unless the court orders otherwise, the plaintiff shall bear the expense of notification. The court may, if justice requires, require that the defendant bear the expense of notification, or may require each of them to bear a part of the expense in proportion to the likelihood that each will prevail upon the merits. The court may hold a preliminary hearing to determine how the costs of notice should be apportioned.

II. Final determination. Upon termination of the action by order or judgment, the court may, but shall not be required to, allow to the prevailing party the expenses of notification as taxable disbursements under article eighty-three of the civil practice law and rules.

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NEW JERSEY

[NJ R Civ P 4:32 (effective April 1, 1975)]

RULE 4:32. CLASS ACTIONS

4:32-1. Requirements for Maintaining Class Action

(a) General Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common the the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of paragraph (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk either of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The factors pertinent to the findings include: first, the interest of members of the class in individually controlling the prosecution or defense of separate actions; second, the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; third, the difficulties likely to be encountered in the management of a class action.

4:32-2. Determination of Maintainability of Class Action; Notice; Judgment; Partially as Class Actions

(a) Order Determining Maintainability. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditioned, and may be altered or amended before the decision on the merits.

(b) Notice. In any class action maintained under R. 4:32-1(b) (3) the court shall direct to the members of the class the best notice practicable under the circumstances, consistent with due process of law. The notice shall advise that (1) each member, not present as a representative, will be excluded from the class by the court if he so requests by a specified date; (2) the judgment, whether favorable or not, will bind all members who do not request exclusion; and (3) any member who does not request exclusion may enter an appearance. The cost of notice may be assessed against any party present before the court, or may be allocated among parties present before the court, pending final disposition of the cause.

(c) Judgment. The judgment in an action maintained as a class action under R. 4:32-1(b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under R.4:32-1(b) (3), whether or not favorable to the class, shall, to the extent practicable under the circumstances, consistent with due process of law, describe the class and specify those who have been excluded

from the class. In any class action, the judgment may, consistent with due process of law, confer benefits upon a fluid class, whose members may be, but need not have been members of the class in suit.

(d) Partial Class Actions. If appropriate an action may be brought or maintained as a class action with respect to particular issues, or a class may be subdivided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

Note: Paragraphs (b) and (c) amended November 27, 1974 to be effective April 1, 1975.

4:32-3. Orders in Conduct of Actions

In the conduct of actions to which this rule applies, the court may make appropriate orders: (a) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (b) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (c) imposing conditions on the representative parties or on intervenors; (d) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (e) dealing with similar procedural matters. These orders may be combined with an order under R. 4:32-2(a) and may be altered or amended as may be desirable from time to time.

4:32-4. Dismissal or Compromise

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

4:32-5. Derivative Action by Shareholders

In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified and allege that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share thereafter devolved on him by operation of law. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort. Immediately on filing the complaint and issuing the summons, the plaintiff shall give such notice of the pendency and object of the action to the other shareholders as the court by order directs. The derivative action may not be maintained if it appears that the plaintiff does not fairly represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. R. 4:32-4 (dismissal and compromise) is applicable to actions brought under this rule.

New Jersey Rules 4:32-1 to 4:32-4 were adopted as part of the 1969 amendments and followed the 1966 revisions of FR Civ P 23. Major further amendments to Rule 4:32-2(b) and (c) were made November 27, 1974, effective April 1, 1975.

Class Notice under New Jersey Rules:

The amendment to Rule 4:32-2(b) significantly relaxes the federal rule requirement in FR Civ P 23(b) (3) actions that individual notice must be given

representative was an adequate representative in that his interests coincided with those of class members and he prosecuted the action vigorously and competently. The court awarded reasonable attorney's fees from the portion of each class member's recovery. *Bush v Upper Valley Telecable Co* 96 Id 83, 524 P2d 1055* (1974)

G65-1. Class upheld in action by corporation and individuals on behalf of 600 landowners, lessees or purchasers of property along a lake to stabilize water level of lakes. *Twin Lakes Improvement Assn v East Greenacres Irrigation District* 90 Id 281, 409 P2d 390* (1965)

G63-1. City had the right to bring an action under Rule 23(a) to enforce a trust to be used primarily for the recreation of youth of the area. *In re Eggan's Estate* 86 Id 328, 386 P2d 563 (1963); also see *Dolan v Johnson* 95 Id 385, 509 P2d 1306 (1973) (challenge to will giving residue of estate for charitable purposes)

ILLINOIS

NEW ILLINOIS CLASS ACTION STATUTE

Until 1977 Illinois followed state common law in the area of class actions. Ill RCivP §§57.2–57.7 (1977) (analyzed at 110a Smith-Gurd Annot. Ill Stat at 1432) now expressly provides for the maintenance of class actions in Illinois

§57.2 Prerequisites for the Maintenance of a Class Action

(a) An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:

(1) The class is so numerous that joinder of all members is impracticable.

(2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.

(3) The representative parties will fairly and adequately protect the interest of the class.

(4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

§57.3 Order and Findings Relative to the Class

(a) *Determination of Class.* As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it may be so maintained and describe those whom the court finds to be members of the class. This order may be conditional and may be amended before a decision on the merits.

(b) *Class Action on Limited Issues and Sub-classes.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or divided into sub-classes and each sub-class treated as a class. The provisions of this rule shall then be construed and applied accordingly.

§57.4 Notice in Class Action

Upon a determination that an action may be maintained as a class action, or at any time during the conduct of the action, the court in its discretion may order such notice that it deems necessary to protect the interest of the class and the parties.

An order entered under paragraph (a) of Section 57.3, determining that an action may be maintained as a class action, may be conditioned upon the giving of such notice as the court deems appropriate.

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(b) The court shall permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist:

(1) It is impracticable to bring all members of the class before the court.

(2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.

(3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.

(4) The representative plaintiffs will fairly and adequately protect the interests of the class.

(c) If notice of the time and place of the hearing is served upon the other parties at least 10 days prior thereto, the court shall hold a hearing, upon motion of any party to the action which is supported by affidavit of any person or persons having knowledge of the facts, to determine if any of the following apply to the action:

(1) A class action pursuant to subdivision (b) is proper.

(2) Published notice pursuant to subdivision (d) is necessary to adjudicate the claims of the class.

(3) The action is without merit or there is no defense to the action.

A motion based upon Section 437c of the Code of Civil Procedure shall not be granted in any action commenced as a class action pursuant to subdivision (a).

(d) If the action is permitted as a class action, the court may direct either party to notify each member of the class of the action. The party required to serve notice may, with the consent of the court, if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally, give notice as prescribed herein by publication in accordance with Section 6064 of the Government Code in a newspaper of general circulation in the county in which the transaction occurred.

(e) The notice required by subdivision (d) shall include the following:

(1) The court will exclude the member notified from the class if he so requests by a specified date.

(2) The judgment, whether favorable or not, will include all members who do not request exclusion.

(3) Any member who does not request exclusion, may, if he desires, enter an appearance through counsel.

(f) A class action shall not be dismissed, settled, or compromised without the approval of the court, and notice of the proposed dismis-

Hunt Scott Reading

District court need not apply laches to claims of private plaintiff in injunction action if it finds that sufficient reasons, traditionally cognizable in equity, exist which prevented plaintiff from making timely challenge or that delay caused defendant no prejudice. Id.

Laches, being an equitable consideration, was not a bar to antitrust action brought prior to expiration of four-year statute of limitations period set by Congress. Hecht Co. v. Southern Union Co., D.C.N.M.1979, 474 F.Supp. 1022.

49. Review

Where, in antitrust treble damage action by motion picture accessories jobber against motion picture producer and others for alleged monopolization of motion picture accessories market, trial court had not determined whether there was, during limitations period, mere absence of dealing by defendants with jobber or whether, instead, there was some specific act or word precluding jobber from gaining access to producers posters for distribution during period governed by this section, district court having been of erroneous opinion that cause of action arose in neither case, action would be remanded for proceedings to clarify such issue. Poster Exchange, Inc. v. National Screen Service Corp., C.A.Ga.1975, 517 F. 2d 117, rehearing denied 520 F.2d 943, certiorari denied 96 S.Ct. 2166, 425 U.S. 971, 48 L.Ed.2d 793.

Although, under sections 12–27 of this title, judgment of conviction rendered against same defendants in prior criminal antitrust action brought by United States was only "prima facie" evidence against such defendants in subsequent action brought by State of Illinois, doctrine of collateral estoppel could be invoked to preclude defendants from pleading any defense in subsequent action. State of Ill. v. Huckaba & Sons Const. Co., D.C.Ill.1977, 442 F.Supp. 56.

50. Burden of proof

A party asserting fraudulent concealment as a basis for tolling period of limitations in an antitrust suit bears burden of proof on issue. Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., C.A.N.C.1976, 546 F.2d 570.

Once it appears that statute of limitations on private antitrust action has run, plaintiff must sustain burden of showing not merely that he failed to discover cause of action prior to running of statute, but also that he exercised due diligence and that some affirmative act of fraudulent concealment frustrated discovery notwithstanding such diligence. City of Detroit v. Grinnell Corp., C.A.N.Y.1974, 495 F.2d 448.

Plaintiffs in private antitrust class action who attacked proposed settlement, inter alia, on ground that starting date of "settlement period" was incorrectly determined failed to prove that period of fraudulent concealment of monopolistic practices continued to point where it could be "tacked on" to earliest point from which limitations would otherwise run. Id.

That prior judgment in antitrust action against defendant is prima facie evidence in subsequent action simply means that plaintiff can shift burden of proof to defendant, but does not preclude defendant from putting up defense. State of Ill. v. Huckaba & Sons Const. Co., D.C.Ill.1977, 442 F.Supp. 56.

It was the duty of the plaintiffs to come forward and show that the alleged unlawful discriminatory transactions with defendant occurred within four years prior to filing of suit. Beam v. Monsanto Co., Inc., D.C.Ark.1976, 414 F. Supp. 570.

To establish claim of fraudulent concealment in order to avoid defense of limitations in private treble damage antitrust action, plaintiff must prove fraudulent concealment by defendant raising statute together with plaintiff's failure to discover facts which are basis of his cause of action despite exercise of due diligence on his part. In re Independent Gasoline Antitrust Litigation, D.C.Md. 1978, 79 F.R.D. 552.

§ 15c. Actions by state attorneys general—Parens patriae; monetary relief; damages

(a)(1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of Sections 1 to 7 of this title. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.

(2) The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee.

Notice; exclusion election; final judgment

(b)(1) In any action brought under subsection (a)(1) of this section, the State attorney general shall, at such times, in such manner, and with such content as the court may direct, cause notice thereof to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case.

III. OPTIONAL CLAIM FORMS

OPT-in POSSIBLE AT COURT DISCRETION

A. Small Business Access Act

B. Pennsylvania

States described in subsection (a) shall employ procedures provided by that statute or by the State.

§3012. Proof of damages; separate determination of liability and damages; judgment

(a) The amount of injury to each person who remains in or enters a class compensatory action shall be proven by any method permitted by section 3022(f) or other law.

(b) If the court orders separate trial, or trials, of liability issues pursuant to section 3026(b), and a defendant is found liable, he shall be ordered by the court, at his own expense, to—

(1) make reasonable effort to identify from his records or other reasonably available sources the persons likely to have been injured in excess of $300 each by his conduct and the amount of individual injury;

(2) give individual notice of the finding of liability to such persons; and

(3) with respect to all other persons injured or likely to have been injured, give such notice as is reasonably calculated to assure that a substantial percentage of such persons is informed of the finding of liability.

(c) The court may, in addition to an award of damages, order appropriate equitable or declaratory relief.

SUBCHAPTER C—JUDICIAL MANAGEMENT OF PUBLIC AND CLASS COMPENSATORY ACTIONS

§3021. Initial discovery

(a)(1) Prior to the preliminary hearing provided in section 3022, discovery for each side shall be limited to—

(A) thirty interrogatories;

(B) the lesser of not more than ten deposition days, or depositions of not more than ten persons; and

(C) requests for production of documents.

(2) For good cause shown, the court may expand or further limit discovery prior to the preliminary hearing.

(b) Before or after the preliminary hearing, no discovery of injured persons shall be undertaken without leave of court, upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Failure of an injured person to respond to such discovery shall not be grounds for excluding him from recovery, except where the court determines that no other sanction is adequate to protect the interest of the person seeking discovery.

(c) Notice of discovery to be taken by a relator in a public action shall be served on the Attorney General of the United States, who may examine material discovered by the relator. The filing or prosecution of a public action by a relator or by a State shall not preclude issuance of civil investigative demands by the United States pursuant to the Antitrust Civil Process Act (15 U.S.C. §1312(a)).

§3022. Preliminary hearing; scope of action; notice in class compensatory action; sampling

(a)(1) Within thirty days after a public or class compensatory action is commenced, the court shall give notice to the parties and to the relator, if any, of a preliminary hearing to be held to determine whether, and in what manner, the action shall proceed. The hearing shall be held no later than one hundred and twenty days from the date of the commencement of the action.

(2) In a public action the court may, on the petition of the United States within sixty days of service upon it of the complaint and summons in an action brought on relation pursuant to section 3002(a), grant a reasonable postponement of the hearing to permit the completion of a related Federal or State investigation in progress on the date of the commencement of the action or promptly commenced after the service upon the United States.

(3) No motion, other than a discovery motion or motion seeking immediate injunctive relief, shall be heard or disposed of prior to the preliminary hearing.

(b) At or immediately after the preliminary hearing, the court shall make a preliminary determination on the basis of the pleadings, affidavits, material produced during discovery, any statement filed in a public action by an attorney general or agency pursuant to section 3002(b)(3)(C) or 3002(b)(4), and any other matter presented at the hearing—

(1) whether there is a reasonable likelihood that the action meets the prerequisites of section 3001(a) or 3011(a);

(2) whether there are sufficiently serious questions going to the merits to make them fair grounds for litigation;

(3) whether in a public action the relator has demonstrated that the action should proceed as a public action, if an attorney general or agency has filed a statement pursuant to section 3002(b)(3)(C) or 3002(b)(4); and

(4) whether the relator and his counsel in a public action not assumed by an attorney general or agency, or the class representative and his counsel in a class compensatory action, will adequately protect the interests of the United States or the class.

(c) If the court makes a negative determination at the preliminary hearing, or at any time prior to the entry of judgment, with respect to a matter listed in subsection (b), the court shall dismiss the action as a public or class compensatory action: Provided, That where a public action meets the prerequisites of section 3011(a)(1), or a class compensatory action meets the prerequisites of section 3001(a), the court shall permit amendment of the complaint to allow the action to proceed as a class compensatory action, or a public action. If the action proceeds as a public action, the court shall make orders necessary to permit the parties to comply with section 3002.

(d) If the action is not dismissed as a public or class compensatory action, the court shall enter an order describing the scope of the action, including a description of the transaction giving rise to the action and a statement of the substantial question of law or fact common to all injured persons. Such order shall be conditional and may be altered or amended before judgment is entered.

(e)(1) At or immediately after the preliminary hearing in a class compensatory action, the court in its discretion shall determine whether some or all injured persons shall be excluded from or included in the class only if they so request by a specified date. In determining whether persons shall be excluded from the class unless a specific request to be included is made, the court shall consider whether there is a substantial likelihood that—

(A) the amount of their injury or liability makes it feasible for them to pursue their interests separately; and

(B) they have sufficient resources, experience, and sophistication in business affairs to conduct their own litigation.

(2) The court shall promptly thereafter give notice reasonably necessary to assure adequacy of representation of all persons included in the class and fairness to all such persons. Such notice shall describe the persons, if any, by name or category who are to be excluded from the action unless a request to be included is made. The judgment, whether or not favorable to the class, will include all persons who remain in or enter the action pursuant to this subsection.

(f) Except as provided in section 3004(c)(2), where the defend-

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decision on the matters specified in Rules 1702, 1708 and 1709, including findings of fact, conclusions of law and appropriate discussion.

(b) In certifying a class action, the court shall set forth in its order a description of the class.

(c) When appropriate, in certifying, refusing to certify or revoking a certification of a class action the court may order that

(1) the action be maintained as a class action limited to particular issues or forms of relief, or

(2) a class be divided into subclasses and each subclass treated as a class for purposes of certifying, refusing to certify or revoking a certification and that the provisions of these rules be applied accordingly.

(d) An order under this rule may be conditional and, before a decision on the merits, may be revoked, altered or amended by the court on its own motion or on the motion of any party. Any such supplemental order shall be accompanied by a memorandum of the reasons therefor.

(e) If certification is refused or revoked, the action shall continue by or against the named parties alone.

Rule 1711. The Plaintiff Class. Exclusion. Inclusion

(a) Except as provided in subdivision (b) or as otherwise provided by the court, in certifying a plaintiff class or subclass the court shall state in its order that every member of the class is included unless by a specified date a member files of record a written election to be excluded from the class.

(b) If the court finds that

(1) the individual claims are substantial, and the potential members of the class have sufficient resources, experience and sophistication in business affairs to conduct their own litigation; or

(2) other special circumstances exist which are described in the order,

the court may state in its order that no person shall be a member of the plaintiff class or subclass unless by a specified date of record a written election to be included in the class or subclass.

Rule 1712. Order. Notice of Action

(a) After the entry of the order of certification and after hearing the parties with respect to the notice to be given, the court shall enter a supplementary order which shall prescribe the type and content of notice to be used and shall specify the members to be notified. In determining the type and content of notice to be used and the members to be notified, the court shall consider the extent and nature of the class, the relief requested, the cost of notifying the members and the possible prejudice to be suffered by members of the class or by other parties if notice is not received. The court may designate in the notice a person to answer inquiries from, furnish information to or receive comments from members or potential members of the class with respect to the notice.

(b) The court may require individual notice to be given by personal service or by mail to all members who can be identified with reasonable effort. For members of the class who cannot be identified with reasonable effort or where the court has not required individual notice, the court shall require notice to be given through methods reasonably calculated to inform the members of the class of the pendency of the action. Such methods may include using a newspaper, television or radio or posting or distributing through a trade, union or public interest group.

(c) The notice shall be prepared by and given at the expense of the plaintiff in the manner required by the order. A proposed form of notice shall be submitted for approval to the court and to all named defendants, who may file objections thereto within ten days. The court may require a defendant to cooperate in giving notice by

IV. REGULATING ATTORNEY FEES

A. See 16-17 -- Uniform Act.

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taking steps which will minimize the plaintiff's expense including the use of the defendant's established methods of communication with members of the class, provided, however, that any additional costs thereby incurred by the defendant shall be paid by the plaintiff.

Note: Illustrative of the means of reducing the expense of individual notice is the inclusion of the notice in a mailing normally made by the defendant to members of the class.

(d) If a defendant asserts a counterclaim against a plaintiff class or subclass, the expense of a combined notice of the plaintiff's claim and of the defendant's counterclaim shall be allocated between the parties as the court may order.

Rule 1713. Conduct of Actions

(a) In the conduct of actions to which this rule applies, the court may make appropriate orders

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice, other than notice under Rule 1712, be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate;

(3) permitting an interested person to intervene in accordance with Rules 2326 et seq. governing Intervention;

(4) imposing conditions on the representative party or an intervener;

(5) taking any action to assure that the representative party adequately represents the class;

(6) dealing with other administrative or procedural matters.

(b) Any such order may be revoked, altered or amended as may be appropriate from time to time.

Rule 1714. Compromise. Settlement. Discontinuance

(a) No class action shall be compromised, settled or discontinued without the approval of the court after hearing.

(b) Prior to certification, the representative party may discontinue the action without notice to the members of the class if the court finds that the discontinuance will not prejudice the other members of the class.

(c) If an action has been certified as a class action, notice of the proposed compromise settlement or discontinuance shall be given to all members of the class in such manner as the court may direct.

Rule 1715. Judgment

(a) Except by special order of the court, no judgment by default or on the pleadings or by summary judgment may be entered in favor of or against the class until the court has certified or refused to certify the action as a class action.

(b) A judgment entered on preliminary objections in a class action before certification shall bind only the named parties to the action.

(c) A judgment entered in an action certified as a class action shall be binding on all members of the class except as otherwise directed by the court.

(d) In all cases the judgment shall be framed by the court and shall specify or describe the parties who are bound by its terms.

Rule 1716. Counsel Fees

In all cases where the court is authorized under applicable law to fix the amount of counsel fees it shall consider, among other things, the following factors:

(1) the time and effort reasonably expended by the attorney in the litigation;

(2) the quality of the services rendered;

(3) the results achieved and benefits conferred upon the class or upon the public;

(4) the magnitude, complexity and uniqueness of the litigation; and

(5) whether the receipt of the fee was contingent on success.

Note: The rule does not determine when fees may be awarded. That is a matter of substantive law.

The order in which the factors are listed is not intended to indicate the priority or weight to be accorded them respectively.

This Order is effective, September 1, 1977.

By the Court:
MICHAEL J. EAGEN, C.J.

EXPLANATORY NOTE CLASS ACTION RULES

The Pennsylvania Rules of Civil Procedure governing class actions, promulgated June 30, 1977, and effective September 1, 1977, are the culmination of more than a two year study of a vast array of resource material embodying practically every point of view. The role and purpose of class actions in modern society, particularly those involving consumer actions or other types of actions involving many thousands of members with their potential for vast amount of damage claims, has caused more debate and roused more passion than practically any other subject in the preceding decade.

Some look upon it as the most effective tool for the protection of individual rights in every field, rights which could not be effectively asserted by individual actions. They consider action by public officials to protect these rights to be inadequate; the attorneys for the class are deemed in effect private attorneys general spurred on by the prospect of substantial fees contingent upon the successful outcome of the action. Others characterize class actions as affording the opportunity for legalized blackmail, forcing defendants into tactical positions where surrender by settlement, even in nonmeritorious cases, often becomes the most expeditious course of terminating the litigation.

The Committee has tried to ignore these polemics and to consider the matter objectively recognizing that sharp differences of opinion will necessarily exist. Many desirable approaches to class action problems involve substantive rather than procedural solutions. The new Uniform Class Action Act approved by the Commissioners on Uniform State Laws in August 1976 which was carefully studied by the Committee presents a number of substantive solutions. These are beyond the power of the Procedural Rules.

In broad outline the Committee has attempted to retain all the best features of Federal Rule 23 excluding those which seem inappropriate or unsuccessful and all the best features of the Uniform Class Action Act. The Committee also has included novel provisions not found in the Federal Rule or in the Uniform Class Action Act. These combinations should simplify and improve class actions in Pennsylvania.

ANALYSIS OF THE RULES

Rule 1701. Definition. Conformity.

Subdivision (a) defines "Class Action" to include any action brought by or against parties as representatives of a class until the court refuses to certify it as such or revokes a prior certification.

This definition follows language in *Bell v. Beneficial Consumer Discount Company* 465 Pa. 225, 348 A. 2d 734 (1975), that "when an action is instituted by a

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§905. Judgment

The judgment in an action maintained as a class action, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class.

§906. Actions conducted partially as class actions

When appropriate,

1. an action may be brought or maintained as a class action with respect to particular issues, or

2. a class may be divided into subclasses and each subclass treated as a class.

The provisions of this article shall then be construed and applied accordingly.

Rule 907. Orders in conduct of class actions

In the conduct of class actions the court may make appropriate orders:

1. determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

2. requiring, for the protection of the members of the class, or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, or to appear and present claims or defenses, or otherwise to come into the action;

3. imposing conditions on the representative parties or on intervenors;

4. requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

5. directing that a money judgment favorable to the class be paid either in one sum, whether forthwith or within such period as the court may fix, or in such installments as the court may specify;

6. dealing with similar procedural matters.

The orders may be altered or amended as may be desirable from time to time.

Rule 908. Dismissal, discontinuance or compromise

A class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs.

Rule 909. Attorneys' fees

If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees to the representatives of the class based on the reasonable value of legal services rendered and if justice requires, allow recovery of the amount awarded from the opponent of the class. Added L. 1975, c. 207, §1.

On signing the new class action statute in 1975 New York Governor Carey stated:

> "The present law and its precursors have caused extraordinary judicial confusion extending over the past 125 years and have resulted in needlessly restricting meaningful access to state courts for countless people. Such an anachronism has no place in a legal system which has to cope with contemporary problems." McKinney's N.Y.Sess.Laws 1975, p. 1748.

The 1975 New York class rules substituted a functional approach and pragmatic considerations for the earlier strict requirement that class members had to be in privity. Major criteria for New York class actions are modeled

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(2) Any person on whose behalf an action is brought under subsection (a)(1) of this section may elect to exclude from adjudication the portion of the State claim for monetary relief attributable to him by filing notice of such election with the court within such time as specified in the notice given pursuant to paragraph (1) of this subsection.

(3) The final judgment in an action under subsection (a)(1) of this section shall be res judicata as to any claim under section 5 of this title by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given pursuant to paragraph (1) of this subsection.

Dismissal or compromise of action

(c) An action under subsection (a)(1) of this section shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

Attorneys' fees

(d) In any action under subsection (a) of this section—

(1) the amount of the plaintiffs' attorney's fee, if any, shall be determined by the court; and

(2) the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

Oct. 15, 1914, c. 323, § 4C, as added Sept. 30, 1976, Pub.L. 94–435, Title III, § 301, 90 Stat. 1394.

Effective Date. Section 304 of Pub.L. 94–435 provided that: "The amendments to the Clayton Act [sections 12 to 27 of this title] made by section 301 of this Act [enacting sections 15c to 15h of this title] shall not apply to any injury sustained prior to the date of enactment of this Act [Sept. 30, 1976]."

Legislative History. For legislative history and purpose of Pub.L. 94–435, see 1976 U.S.Code Cong. and Adm.News, p. 2572.

1. Persons entitled to sue

Under this section, State's Attorney General could sue on behalf of State's injured consumer regardless of existence of injury to general economy. In re Montgomery County Real Estate Antitrust Litigation, D.C.Md.1978, 452 F.Supp. 54.

2. Injunctive relief

Under this section, State could maintain suit for injunctive relief where it alleged injury to its general economy. In re Montgomery County Real Estate Antitrust Litigation, D.C.Md.1978, 452 F.Supp. 54.

Index to Notes

§ 15d. Measurement of damages

In any action under section 15c(a)(1) of this title, in which there has been a determination that a defendant agreed to fix prices in violation of the sections 1 to 7 of this title, damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

Oct. 15, 1914, c. 323, § 4D, as added Sept. 30, 1976, Pub.L. 94–435, Title III, § 301, 90 Stat. 1395.

Effective Date. Injuries sustained prior to Sept. 30, 1976, not covered by this section, see section 304 of Pub.L. 94–435, set out as a note under section 15c of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–435, see 1976 U.S.Code Cong. and Adm.News, p. 2572.

§ 15e. Distribution of damages

Monetary relief recovered in an action under section 15c(a)(1) of this title shall—

(1) be distributed in such manner as the district court in its discretion may authorize; or

V. FLUID CLASS RECOVERY

A. Small Business Judicial Access Act

B. Sec. 15 - Uniform Act

C. New Jersey

D. Hunt-Scott-Rodino Act

A. Justice Dept Proposal - 1979 - Public Actions

on behalf of the United States relator or other private counsel—

(i) on an hourly basis to the extent funds are authorized by section 3005(c)(2); or

(ii) on a contingent fee basis.

(2) To the extent taxable costs and reasonable expenses are paid by the United States or a State under this subsection, the defendant shall pay costs and expenses provided in subsection (a)(1) to the Department of Justice, a State, or an agency.

§3004. Public recovery; judgment

(a) In a public action in which the defendant is found liable, the judgment shall include a public recovery in an amount to be determined under this section.

(b)(1) Except as provided in subsection (d), the public recovery shall be in an amount equal to—

(A) the monetary benefit or profit realized by the defendant from conduct injuring persons not in excess of $300 each; or

(B) the aggregate damage to persons injured not in excess of $300 each.

(2) If a judgment includes a public recovery, the court may also include in the judgment appropriate equitable or declaratory relief. Any person prosecuting a public action in the name of the United States shall have standing to enforce such relief.

(c)(1) In electing the measure of public recovery to be applied under subsection (b), the court shall consider among other relevant factors—

(A) the intent of Congress embodied in the statute giving rise to the public action under section 3001(a)(1);

(B) the relative expeditiousness of proof; and

(C) The degree of uncertainty in the law upon which liability is based prior to the filing of the complaint.

(2) This determination shall be based upon any reasonable means of ascertaining benefit, profit, or damage provided by law and by section 3022(f). Separate proof of damage to persons injured not in excess of $300 each shall not be required except as necessary to conduct any sampling that the court may direct.

(d) If the statute under which the action was brought provides for—

(1) an award of a multiple of the damage or the recovery, the multiple shall be applied to the public recovery;

(2) a limitation on aggregate liability, that limitation shall apply to the public recovery; and

(3) punitive damages, such damages shall, if awarded, be added to the public recovery.

(e) Within sixty days after entry of judgment against the defendant, or within such time as the court may otherwise order, the defendant shall pay to the clerk of the court the amount of the judgment, which shall be used to establish a public recovery fund under the supervision of the court.

§3005. Public recovery fund; payments to injured persons

(a) The public recovery fund established under section 3004(e) shall be used for—

(1) payments to persons injured in an amount not exceeding $300 by conduct giving rise to the public action;

(2) administrative expenses incurred in carrying out the provisions of this section; and

(3) reasonable expenses provided in subsection (c).

(b) The court shall determine whether the court or the Director of the Administrative Office of the United States Courts shall administer the payment of claims. If the court determines that the Director shall administer the payment of claims, the amount of the public recovery shall be transmitted to the Administrative Office, where it shall be deposited in a public recovery fund. The Director shall administer such claims according to any condition and direction the court may provide. Claims shall be paid within one year from the date of notice. If the public recovery is adjusted as described in section 3004(d), claim payments shall be proportionately adjusted. Notice may be by publication and such other means as the court or Director determines are reasonably likely to inform persons eligible to file claims. The court or Administrative Office may utilize a payment procedure which will distribute payments in a reasonably accurate manner without requiring submission of claims. If the court or Administrative Office finds that it is impracticable to determine with reasonable accuracy the identities of all or some of the injured persons, or the amount of all or some of the individual damages, the court may order that payments not be made to such persons for such damages.

(c)(1) If the public recovery is greater than the administrative expenses and payments referred to in subsection (a), the clerk of the court shall pay the excess amount to the Treasury of the United States. The Treasury shall pay such amount to—

(A) a fund established under the direction and control of—

(i) the Department of Justice or the agency conducting the action, if it has been initiated or assumed by the United States; or

(ii) The Department of Justice, or other executive or independent agency authorized pursuant to section 3001(c) to bring the action in which the public recovery was obtained, if there has been no assumption by the United States or a State; or

(B) a State, if the State has initiated the action and it is not assumed, or prosecuted the action by reference.

(2) Payments under paragraph (A), as appropriated, and paragraph (B), and any funds that Congress or a State may authorize, shall be used to pay the reasonable expenses provided in section 3003(b). Payments not applied to these reasonable expenses after three years from the date of deposit may be employed by the Department of Justice or agency, as appropriated, or by the State for the enforcement of any statute within its responsibility.

(d) The Director shall issue such regulations as are necessary and appropriate to assure the prompt, fair, and inexpensive claim administration by the Administrative Office pursuant to subsection (b). The court or Director may compensate a relator or other private counsel for assistance in claim administration.

SUBCHAPTER B—CLASS COMPENSATORY ACTION

§3011. Class compensatory action; prerequisites; district court jurisdiction

(a) A person whose conduct gives rise to a civil right of action for damages under a statute of the United States shall be liable individually or as a member of a class to the injured persons in a civil class compensatory action if—

(1) such conduct injures forty or more named or unnamed persons each in an amount exceeding $300, or creates liabilities for forty or more persons, each in an amount exceeding $300;

(2) the injuries or liabilities arise out of the same transaction or occurrence or series of transactions or occurrences; and

(3) the action presents a substantial question of law or fact common to the injured or sued persons.

(b) The district courts of the United States shall have jurisdiction, exclusive of the courts of the States, of actions brought under this section. A State court in the exercise of its concurrent jurisdiction expressly conferred by any statute of the United

B- Uniform Act.

(4) disapprove the compromise; or

(5) take other appropriate action for the protection of the class and in the interest of justice.

(e) The cost of notice given under subsection (b) shall be paid by the party seeking dismissal, or as agreed in case of a compromise, unless the court after hearing orders otherwise.

Comment

This section covers class actions brought under Section 1 until certification has been refused under Section 2, as well as class actions certified under Section 2.

Library References

Pretrial Procedure ⇐505.
C.J.S. Compromise and Settlement §§ 6, 24.

Section 13. [Effect of Judgment on Class]

In a class action certified under Section 2 in which notice has been given under Section 7 or 12, a judgment as to the claim or particular claim or issue certified is binding, according to its terms, on any member of the class who has not filed an election of exclusion under Section 8. The judgment shall name or describe the members of the class who are bound by its terms.

Comment

Section 13 deals with the application of a class action judgment to the members of the class. This Act does not deal with the preclusive effect of a class action upon a member of the class who has requested exclusion. This is a matter which is governed by the normal rules of res judicata/preclusion.

Library References

Judgment ⇐677.
C.J.S. Judgments §§ 772, 777.

Section 14. [Costs]

(a) Only the representative parties and those members of the class who have appeared individually are liable for costs assessed against a plaintiff class.

(b) The court shall apportion the liability for costs assessed against a defendant class.

(c) Expenses of notice advanced under Section 7 are taxable as costs in favor of the prevailing party.

Comment

Section 14 specifies the liability of class members when costs are assessed against the class and provides for assessment of the expense of notification under Section 7. The nature of other costs and assessments against parties in a class action is left to the law generally applicable in the state.

Historical Note

Costs ⇐93.
C.J.S. Costs §§ 110, 112.

Section 15. [Relief Afforded]

(a) The court may award any form of relief consistent with the certification order to which the party in whose favor it is rendered is entitled including equitable, declaratory, monetary, or other relief to individual members of the class or the class in a lump sum or installments.

(b) Damages fixed by a minimum measure of recovery provided by any statute may be recovered in a class action.

(c) If a class is awarded a judgment for money, the distribution shall be determined as follows:

(1) The parties shall list as expeditiously as possible all members of the class whose identity can be determined without expending a disproportionate share of the recovery.

(2) The reasonable expense of identification and distribution shall be paid, with the court's approval, from the funds to be distributed.

(3) The court may order steps taken to minimize the expense of identification.

(4) The court shall supervise, and may grant or stay the whole or any portion of, the execution of the judgment and the collection and distribution of funds to the members of the class as their interests warrant.

(5) The court shall determine what amount of the funds available for the payment of the judgment cannot be distributed to members of the class individually because they could not be identified or located or because they did not claim or prove the right to money apportioned to them. The court after hearing shall distribute that amount, in whole or in part, to one or more states as unclaimed property or to the defendant.

(6) In determining the amount, if any, to be distributed to a state or to the defendant, the court shall consider the following criteria: (i) any unjust enrichment of the defendant; (ii) the willfulness or lack of willfulness on the part of the defendant; (iii) the impact on the defendant of the relief granted; (iv) the pendency of other claims against the defendant; (v) any criminal sanction imposed on the defendant; and (vi) the loss suffered by the plaintiff class.

(7) The court, in order to remedy or alleviate any harm done, may impose conditions on the defendant respecting the use of the money distributed to him.

(8) Any amount to be distributed to a state shall be distributed as unclaimed property to any state in which are located the last known addresses of the members of the class to whom distribution could not be made. If the last known addresses cannot be ascertained with reasonable diligence, the court may determine by other means what portion of the unidentified or unlocated members of the class were residents of a state. A state shall receive that portion of the distribution that its residents would have received had they been identified and located. Before entering an order distributing any part of the amount to a state, the court shall given written notice of its intention to make distribution to the attorney general of the state of the residence of any person given notice under Section 7 or 12 and shall afford the attorney general an opportunity to move for an order requiring payment to the state.

Comment

Subsection (c)(3) is similar to subsection 7(g) in its purpose and scope and should be construed similarly.

Subsection 15(c)(5) provides for the possibility of escheat of funds available for the payment of the judgment if the court, applying the relevant criteria, so orders. The escheat provision is similar to that found in the Model Escheat of Postal Savings System Accounts Act.

If the court decides that undistributed funds available for the payment of the judgment should be distributed to the defendant, the court under subsection 15(c)(7), "in order to remedy or alleviate any harm done, may impose conditions on the defendant respecting the use of the money distributed to him." For example, if the plaintiff class sued for damage done because of the discharge of pollutants by the defendant and the class won a money judgment, the court might distribute to the defendant funds undistributed to the plaintiff class on condition that the defendant use the funds to install pollution-control devices.

C. New Jersey

adjudication of the controversy. The factors pertinent to the findings include: first, the interest of members of the class in individually controlling the prosecution or defense of separate actions; second, the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; third, the difficulties likely to be encountered in the management of a class action.

4:32-2. Determination of Maintainability of Class Action; Notice; Judgment; Partially as Class Actions

(a) Order Determining Maintainability. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditioned, and may be altered or amended before the decision on the merits.

(b) Notice. In any class action maintained under R. 4:32-1(b) (3) the court shall direct to the members of the class the best notice practicable under the circumstances, consistent with due process of law. The notice shall advise that (1) each member, not present as a representative, will be excluded from the class by the court if he so requests by a specified date; (2) the judgment, whether favorable or not, will bind all members who do not request exclusion; and (3) any member who does not request exclusion may enter an appearance. The cost of notice may be assessed against any party present before the court, or may be allocated among parties present before the court, pending final disposition of the cause.

(c) Judgment. The judgment in an action maintained as a class action under R. 4:32-1(b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under R.4:32-1(b) (3), whether or not favorable to the class, shall, to the extent practicable under the circumstances, consistent with due process of law, describe the class and specify those who have been excluded from the class. In any class action, the judgment may, consistent with due process of law, confer benefits upon a fluid class, whose members may be, but need not have been members of the class in suit.

(d) Partial Class Actions. If appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be subdivided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

Note: Paragraphs (b) and (c) amended November 27, 1974 to be effective April 1, 1975.

4:32-3. Orders in Conduct of Actions

In the conduct of actions to which this rule applies, the court may make appropriate orders: (a) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (b) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (c) imposing conditions on the representative parties or on intervenors; (d) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (e) dealing with similar procedural matters. These orders may be combined with an order under R. 4:32-2(a) and may be altered or amended as may be desirable from time to time.

D - Hart-Scott-Rodino

(2) Any person on whose behalf an action is brought under subsection (a)(1) of this section may elect to exclude from adjudication the portion of the State claim for monetary relief attributable to him by filing notice of such election with the court within such time as specified in the notice given pursuant to paragraph (1) of this subsection.

(3) The final judgment in an action under subsection (a)(1) of this section shall be res judicata as to any claim under section 5 of this title by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given pursuant to paragraph (1) of this subsection.

Dismissal or compromise of action

(c) An action under subsection (a)(1) of this section shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

Attorneys' fees

(d) In any action under subsection (a) of this section—

(1) the amount of the plaintiffs' attorney's fee, if any, shall be determined by the court; and

(2) the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

Oct. 15, 1914, c. 323, § 4C, as added Sept. 30, 1976, Pub.L. 94–435, Title III, § 301, 90 Stat. 1394.

Effective Date. Section 304 of Pub.L. 94–435 provided that: "The amendments to the Clayton Act [sections 12 to 27 of this title] made by section 301 of this Act [enacting sections 15c to 15h of this title] shall not apply to any injury sustained prior to the date of enactment of this Act [Sept. 30, 1976]."

Legislative History. For legislative history and purpose of Pub.L. 94–435, see 1976 U.S.Code Cong. and Adm.News, p. 2572.

1. Persons entitled to sue

Under this section, State's Attorney General could sue on behalf of State's injured consumer regardless of existence of injury to general economy. In re Montgomery County Real Estate Antitrust Litigation, D.C.Md.1978, 452 F.Supp. 54.

2. Injunctive relief

Under this section, State could maintain suit for injunctive relief where it alleged injury to its general economy. In re Montgomery County Real Estate Antitrust Litigation, D.C.Md.1978, 452 F.Supp. 54.

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§ 15d. Measurement of damages

In any action under section 15c(a)(1) of this title, in which there has been a determination that a defendant agreed to fix prices in violation of the sections 1 to 7 of this title, damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

Oct. 15, 1914, c. 323, § 4D, as added Sept. 30, 1976, Pub.L. 94–435, Title III, § 301, 90 Stat. 1395.

Effective Date. Injuries sustained prior to Sept. 30, 1976, not covered by this section, see section 304 of Pub.L. 94–435, set out as a note under section 15c of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–435, see 1976 U.S.Code Cong. and Adm.News, p. 2572.

§ 15e. Distribution of damages

Monetary relief recovered in an action under section 15c(a)(1) of this title shall—

(1) be distributed in such manner as the district court in its discretion may authorize; or

(2) be deemed a civil penalty by the court and deposited with the State as general revenues;

subject in either case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the net monetary relief.

Oct. 15, 1914, c. 323, § 4E, as added Sept. 30, 1976, Pub.L. 94–435, Title III, § 301, 90 Stat. 1395.

Effective Date. Injuries sustained prior to Sept. 30, 1976, not covered by this section, see section 304 of Pub.L. 94–435, set out as a note under section 15c of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–435, see 1976 U.S.Code Cong. and Adm.News, p. 2572.

§ 15f. Actions by Attorney General

(a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under sections 12 to 27 of this title based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.

(b) To assist a State attorney general in evaluating the notice or in bringing any action under sections 12 to 27 of this title, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under sections 12 to 27 of this title.

Oct. 15, 1914, c. 323, § 4F, as added Sept. 30, 1976, Pub.L. 94–435, Title III, § 301, 90 Stat. 1395.

Effective Date. Injuries sustained prior to Sept. 30, 1976, not covered by this section, see section 304 of Pub.L. 94–435, set out as a note under section 15c of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–435, see 1976 U.S.Code Cong. and Adm.News, p. 2572.

1. Disclosure of grand jury material

The investigative files or other materials which the Attorney General of the United States is required to make available to state Attorneys General under this section do not include grand jury materials. Matter of Grand Jury Criminal Indictments 76–149 and 77–72 In Middle Dist. of Pennsylvania, D.C.Pa.1978, 469 F.Supp. 666.

Under this section, State Attorney General suing on behalf of State's consumers was entitled to disclosure of all federal grand jury materials, including transcripts, in possession of government, absent provision specifically prohibiting disclosure of such materials. In re Montgomery County Real Estate Antitrust Litigation, D.C.Md.1978, 452 F.Supp. 54.

§ 15g. Definitions

For the purposes of sections 15c, 15d, 15e and 15f of this title:

(1) The term "State attorney general" means the chief legal officer of a State, or any other person authorized by State law to bring actions under section 15c of this title, and includes the Corporation Counsel of the District of Columbia, except that such term does not include any person employed or retained on—

(A) a contingency fee based on a percentage of the monetary relief awarded under this section; or

(B) any other contingency fee basis, unless the amount of the award of a reasonable attorney's fee to a prevailing plaintiff is determined by the court under section 15c(d)(1) of this title.

(2) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

(3) The term "natural persons" does not include proprietorships or partnerships.

Oct. 15, 1914, c. 323, § 4G, as added Sept. 30, 1976, Pub.L. 94–435, Title III, § 301, 90 Stat. 1396.

RULE 32

CHANGES - SUMMARY

1.	A.(5)	Eliminate prelitigation notice.
2.	B.(3)	Eliminate special predominance rule.
3.		Eliminate feasibility of notice factor.
4.		Substitute Uniform Act provision - 3(g)(13) for paragraph B.(3)(e).
5.	C.	Eliminate discretion to use injunction instead of damages.
6.	D.	Renumber as C. Add old G.(4) with language changed to eliminate reference to "stay."
7.	E. and F.	Renumber as D. and E.
8.	G.	Renumber as F. Replace notice provisions of subsection (1) with provisions from Uniform Act, section 7; includes no individual notice where claims are less than $100. F.(1)(f) is not in Uniform Act and was added. Subsection (2) has "shall" changed to "may" making opt-in provision for judgment discretionary, and F.(3) was changed to conform. Last sentence of F.(2) eliminated. Language of F.(4) allowing court to order defendant to pay notice costs adapted from section 904 of N.Y. C.P.L.R.
9.	H., L., and M.	Renumbered as G., H., and I. Retains statutory damages limit and supreme court coordination.
10.	I., J., and K.	Eliminated - gets rid of prelitigation notice.
11.	N.	Renumber as J. and change language to conform to Pozzi's suggestions.
12.	O.	Renumber as K. and replace with attorney fee provisions from sections 16 and 17 of Uniform Act.
13.		Add new section L. relating to tolling of statute of limitations - taken from section 18 of Uniform Act.

PROPOSED REVISIONS TO RULE 32

[A.(5) In an action for damages under subsection (3) of section B. of this rule, the representative parties have complied with the prelitigation notice provisions of section I. of this rule.]

B.(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. [Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages.] The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action, [including the feasibility of giving adequate notice;] (e) [the likelihood that the damages to be recovered by individual class members, if judgment for the class is entered, are so minimal as not to warrant the intervention of the court;] whether or not the claims of individual class

members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class; (f) after a preliminary hearing or otherwise, the determination by he court that the probability of sustaining the claim or defense is minimal.

[C. Court discretion. In an action commenced pursuant to subsection (3) of section B. of this rule, the court shall consider whether justice in the action would be more efficiently served by maintenance of the action in lieu thereof as a class action pursuant to subsection (2) of section B. of this rule.]

[D. Court order to determine maintenance of class actions.]

C. Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.

C.(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained and, in action pursuant to subsection (3) of section B. of this rule, the court shall find the facts specially and state separately its conclusions thereon. An order under this section may be conditional, and may be altered or amended before the decision on the merits.

C.(2) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the court may postpone a determination under subsection (1) of this section until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.

[E.] D. Dismissal or compromise of class actions; court approval required; when notice required. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs, except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to the class representative's attorney and that no promise to give any such compensation has been made. If the statute of limitations has run or may run against the claim of any class member, the court may require appropriate notice.

[F.] E. Court authority over conduct of class actions. In the conduct of actions to which this rule applies, the court may make appropriate orders which may be altered or amended as may be desirable:

[F.] E.(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

[F.] E.(2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

[F.] E.(3) Imposing conditions on the representative parties or on intervenors;

[F.] E.(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

[F.] E.(5) Dealing with similar procedural matters.

[G.] F. Notice required; content; statements of class members required; form; content; amount of damages; effect of failure to file required statement; stay of action in certain cases. [In any class action maintained under subsection (3) of section B. of this rule:]

[G.(1) The court shall direct to the members of the class the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort. The notice shall advise each member that:

G.(1)(a) The court will exclude such member from the class if such member so requests by a specified date;

G.(1)(b) The judgment, whether favorable or not, will include all members who do not request exclusion; and

G.(1)(c) Any member who does not request exclusion may, if such member desires, enter an appearance through such member's counsel.]

(included as F.(1)(b)(i) thru F.(1)(b)(iii) below)

F.(1)(a) Following certification, in any class action maintained under subsection (3) of section B. of this rule, the court by order, after hearing, shall direct the giving of notice to the class.

F.(1)(b) The notice based on the certification order and any amendment to the order shall advise each member that:

F.(1)(b)(i) The court will exclude each member from the class if such member so requests by a specified date;

F.(1)(b)(ii) The judgment, whether favorable or not, will include all members who do not request exclusion; and

F.(1)(b)(iii) any member who does not request exclusion may, if such member desires, enter an appearance th ugh such member's counsel.

F.(1)(c) The order shall prescribe the manner of notification to be used and specify the members of the class to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.

F.(1)(d) Each member of the class, not a representative party, whose potential monetary recovery or liability is estimated to exceed $100 shall be given personal or mailed notice if his identify and whereabouts can be ascertained by the exercise of reasonable diligence.

F.(1)(e) For members of the class not given personal or mailed notice, the court shall provide a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. The means of notice may include notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups, or any other means reasonably calculated to provide notice to class members of the pendency of the action.

F.(1)(f) The court may order a defendant who has a mailing list of class members to cooperate with the representative parties in notifying the class members

and may also direct that notice be included with a regular mailing by defendant to the class members.

[G.] F.(2) Prior to the final entry of a judgment against a defendant the court [shall] may request members of the class to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. [The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member, assessable court costs, and an award of attorney fees, if any, as determined by the court.]

[G.] F.(3) If the court requires class members to file a statment requesting affirmative relief, [Failure] failure of a class member to file a statement required by the court [will] may be grounds for the entry of judgment

dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.

(Under C. above with addtl Language)

[G.(4) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.]

F.(4) Unless the court orders otherwise, the plaintiff shall bear the expense of notification. The court may, if justice requires, require that the defendant bear the expense of notification, or may allocate the costs of notice among the parties if the court determines there is a reasonable likelihood that the plaintiff may prevail. The court may hold a preliminary hearing to determine how the costs of notice should be apportioned.

[H.] G. Commencement or maintenance of class actions regarding particular issues; division of class; subclasses. When appropriate:

[H.] G.(1) An action may be brought or maintained as a class action with respect to particular issues; or

[H.] G.(2) A class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

[I. Notice and demand required prior to commencement of action for damages.

I.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of subsection (3) of Section B. of this rule, the potential plaintiffs' class representative shall:

I.(1)(a) Notify the potential defendant of the particular alleged cause of action; and

I.(1)(b) Demand that such person correct or rectify the alleged wrong.

I.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, if neither will effect actual notice, the office of the Secretary of State.]

[J. Limitation on maintenance of class actions for damages. No action for damages may be maintained under the provisions of sections A., B., and C. of this rule upon a showing by a defendant that all of the following exist:

J.(1) All potential class members similarly situated have been identified, or a reasonable effort to identify such other people has been made;

J.(2) All potential class members so identified have been notified that upon their request the defendant will make the appropriate compensation, correction, or remedy of the alleged wrong;

J.(3) Such compensation, correction, or remedy has been, or, in a reasonable time, will be, given; and

J.(4) Such person has ceased from engaging in, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage in such methods, acts, or practices alleged to be violative of the rights of potential class members.]

[K. Application of sections I. and J. of this rule to actions for equitable relief; amendment of complaints for equitable relief to request damages permitted. An action for equitable relief brought under sections A., B., and C. of this rule may be commenced without compliance with the provisions of section I. of this rule. Not less than 30 days after the commencement of an action for equitable relief, and after compliance with the provisions of section I. of this rule, the class representative's complaint may be amended without leave of court to

include a request for damages. The provisions of section J. of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.]

[L.] H. Limitation on maintenance of class actions for recovery of certain statutory penalties. A class action may not be maintained for the recovery of statutory minimum penalties for any class member as provided in ORS 646.638 or 15 U.S.C. 1640(a) or any other similar statute.

[M.] I. Coordination of pending class actions sharing common question of law or fact.

[M.] I.(1)(a) When class actions sharing a common question of fact or law are pending in different courts, the presiding judge of any such court, upon motion of any party or on the court's own initiative, may request the Supreme Court to assign a Circuit Court, Court of Appeals, or Supreme Court judge to determine whether coordination of the actions is appropriate, and a judge shall be so assigned to make that determination.

[M.] I.(1)(b) Coordination of class actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and

personnel; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.

[M.] I.(2) If the assigned judge determines that coordination is appropriate, such judge shall order the actions coordinated, report that fact to the Chief Justice of the Supreme Court, and the Chief Justice shall assign a judge to hear and determine the actions in the site or sites the Chief Justice deems appropriate.

[M.] I.(3) The judge of any court in which there is pending an action sharing a common question of fact or law with coordinated actions, upon motion of any party or on the court's own initiative, may request the judge assigned to hear the coordinated action for an order coordinating such actions. Coordination of the action pending before the judge so requesting shall be determined under the standards specified in subsection (1) of this section.

[M.] I.(4) Pending any determination of whether coordination is appropriate, the judge assigned to make the determination may stay any action being considered for, or affecting any action being considered for, coordination.

[M.] I.(5) Notwithstanding any other provision of law, the Supreme Court shall provide by rule the practice and procedure

for coordination of class actions in convenient courts, including provision for giving notice and presenting evidence.

[N.] J. Judgment; inclusion of class members; description; names. The judgment in an action maintained as a class action under subsections (1) or (2) of section B. of this rule, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (3) of section B. of this rule, whether or not favorable to the class, shall include and specify [by name] those to whom the notice provided in section [G.] F. of this rule was directed, and who have not requested exclusion and whom the court finds to be members of the class[, and the judgment shall state the amount to be recovered by each member.]

[O. Attorney fees. Any award of attorney fees against the party opposing the class and any fee charged class members shall be reasonable and shall be set by the court.]

Proposed Revisions to Rule 32

K. Attorney fees, costs, disbursements, and litigation expenses.

K.(1)(a) Attorney fees for representing a class are subject to control of the court.

K.(1)(b) If under an applicable provision of law a defendant or defendant class is entitled to attorney fees, costs, or disbursements from a plaintiff class, only representative parties and those members of the class who have appeared individually are liable for those fees. If a plaintiff is entitled to attorney fees, costs, or disbursements from a defendant class, the court may apportion the fees, costs, or disbursements among the members of the class.

K.(1)(c) If the prevailing class recovers a judgment that can be divided for the purpose, the court may order reasonable attorney fees and litigation expenses of the class to be paid from the recovery.

K.(1)(d) If the prevailing class is entitled to declaratory or equitable relief, the court may order the adverse party to pay to the class its reasonable attorney fees and litigation expenses if permitted by law.

K.(2)(b) a copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangements or fees and

K.(2)(c) a copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or an attorney regularly of counsel with his law firm. This statement shall be supplemented promptly if additional arrangements are made.

L. Statute of limitations. The statute of limitations is tolled for all class members upon the commencement of an action asserting a class action. The statute of limitations resumes running against a member of a class:

L.(1) upon filing of an election of exclusion by such class member;

L.(2) upon entry of an order of certification, or of an amendment thereof, eliminating the class member from the class;

L.(3) except as to representative parties, upon entry of an order under subsection (2) of this section refusing to certify the class as a class action; and

L.(4) upon dismissal of the action without an adjudication on the merits.

Senate Bill 271

Sponsored by Senator McCOY, Representative KATZ

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Changes class action provisions. Removes prelitigation notice requirement. Eases formation of a class based on common questions of law or fact. Removes requirement that court find facts specially and state separately its conclusions in an action pursued by a class based on common questions of law or facts.

Requires notice to class with any proposed dismissal or compromise, rather than only with dismissals or compromises with prejudice. Permits, rather than requires, court to request claim forms from class members, and then only if opposing party cannot ascertain the information.

Repeals limitation on maintenance of class action for damages when defendant does certain acts. Allows court to assign cost of notice. Prevents retention by defendant of damages awarded to unidentified plaintiff class members.

Requires award of attorney fees to prevailing plaintiff class. Provides that award of costs include cost of notices. Gives Act retroactive effect.

NOTE: Matter in **bold face** in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted; complete new sections begin with **SECTION**.

A BILL FOR AN ACT

Relating to class actions; creating new provisions; amending ORS 13.220, 13.230, 13.240, 13.260, 13.390 and 20.020; and repealing ORS 13.280, 13.290, 13.300 and 13.310.

Be It Enacted by the People of the State of Oregon:

Section 1. ORS 13.220 is amended to read:

13.220. (1) One or more members of a class may sue or be sued as representative parties on behalf of all only if:

(a) The class is so numerous that joinder of all members is impracticable; and

(b) There are questions of law or fact common to the class; and

(c) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(d) The representative parties will fairly and adequately protect the interests of the class [*; and*].

[*(e) In an action for damages under paragraph (c) of subsection (2) of this section, the representative parties have complied with the pre-litigation notice provisions of ORS 13.280.*]

(2) An action may be maintained as a class action if the prerequisites of subsection (1) of this section are satisfied, and in addition:

(a) The prosecution of separate actions by or against individual members of the class would create a risk of:

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(b) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(c) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. [*Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages. The matters pertinent to the findings include:*]

[*(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;*]

[*(B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;*]

[*(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;*]

[*(D) The difficulties likely to be encountered in the management of a class action, including the feasibility of giving adequate notice;*]

[*(E) The likelihood the damages to be recovered by individual class members if judgment for the class is entered are so minimal as not to warrant the intervention of the court;*]

[*(F) After a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal.*]

(3) In an action commenced pursuant to paragraph (c) of subsection (2) of this section, the court shall consider whether justice in the action would be more efficiently served by maintenance of the action in lieu thereof as a class action pursuant to paragraph (b) of subsection (2) of this section.

Section 2. ORS 13.230 is amended to read:

13.230. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained [*and, in an action pursuant to paragraph (c) of subsection (2) of ORS 13.220, the court shall find the facts specially and state separately its conclusions thereon. An order under this section may be*

conditional, and may be altered or amended before the decision on the merits] .

Section 3. ORS 13.240 is amended to read:

13.240. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs [, *except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to his attorney and that no promise to give any such compensation has been made. If the statute of limitations has run or may run against the claim of any class member, the court may require appropriate notice*] .

NO

Section 4. ORS 13.260 is amended to read:

13.260. In any class action maintained under paragraph (c) of subsection (2) of ORS 13.220:

(1) The court shall direct to the members of the class the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort.] The notice shall advise each member that:

↳ and whose potential monet. recovery or liability is estimated to exceed $100.

(a) The court will exclude him from the class if he so requests by a specified date;

(b) The judgment, whether favorable or not, will include all members who do not request exclusion; and

(c) Any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(2) Prior to the final entry of a judgment against a defendant the court [*shall*] **may** request members of the class to submit a [*statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage*] **claim form. The court shall not require a claim form if the party opposing the class can reasonably identify the majority of the class members and the amount owing to or**

claimed by them. [*The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of his damages, the nature of the class, including the probable degree of sophistication of its members and the availability of relevant information from sources other than the individual class members. The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member, assessable court costs, and an award of attorney fees, if any, as determined by the court.*]

(3) [*Failure of a class member to file a statement required by the court will be grounds for the entry of judgment dismissing his claim without prejudice to his right to maintain an individual, but not a class, action for such claim.*] **The court may order that the cost of any notice under this statute be paid by the defendant or the plaintiff or by the parties jointly,** as it deems fair and equitable. The court may conduct a hearing to determine who shall pay the cost of notice

(4) [*Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation or regulation.*] **If the court, after determination of liability, is unable to identify all or some members of the class, it shall order that any damages with respect to such unidentified class members shall be distributed in a manner most equitable under the circumstances. Such equitable distribution shall not include retention of such damages by any defendant held liable.**

Section 5. ORS 13.390 is amended to read:

13.390. [*Any award of attorney fees against the party opposing the class and any fee charged class members shall be reasonable and shall be set by the court.*] **A prevailing plaintiff class, in addition to other relief, shall be awarded reasonable attorney fees.**

Section 6. ORS 20.020 is amended to read:

20.020. A party entitled to costs shall also be allowed for all necessary disbursements, including the fees of officers and witnesses, the necessary expenses of taking depositions, the expense of publication of the summons or notices, **including any or all notices as described in the Oregon Class Action Statutes,** and the postage where the same are served by mail, the compensation of referees, and the necessary expense of copying any public record, book or document used as evidence on the trial.

SECTION 7. This Act shall be applied retroactively to all causes of action arising before the effective date of this Act.

SECTION 8. ORS 13.280, 13.290, 13.300 and 13.310 are repealed.

COSGRAVE, KESTER, CROWE, GIDLEY & LAGESEN
ATTORNEYS AT LAW
622 PITTOCK BLOCK
921 S.W. WASHINGTON ST.
PORTLAND, OREGON 97205
TELEPHONE (503) 227-3711

R ALL S. KESTER
WALTER J. COSGRAVE
AUSTIN W. CROWE, JR.
JAMES H. GIDLEY
FRANK H. LAGESEN
EUGENE H. BUCKLE
DAVID P. MORRISON
SAMUEL C. JUSTICE

ROBERT F. MAGUIRE
(1886-1976)
ROY F. SHIELDS
(1888-1966)

February 19, 1980

William M. McAllister
STOEL, RIVES, BOLEY,
FRASER & WYSE
Attorneys at Law
900 S. W. Fifth Avenue
Portland, Oregon 97204

Re: Council on Court
Procedure

Dear Bill:

I am enclosing a copy of the 1980 Proposed Changes in Class Actions and comments prepared by Frank Pozzi.

I appreciate your offer to review the material and provide some background information concerning the advisability of the proposed changes.

You should know that the Subcommittee is planning to meet on March 15th at 8:30 a.m. to review any information provided. At that time we will schedule a meeting to have any interested persons testify before our Subcommittee prior to making recommendations to the Council.

Very truly yours,

Austin W. Crowe, Jr.

AWC:jmc

cc: Judge Wm. M. Dale, Jr.
Frank H. Pozzi
Laird Kirkpatrick
Fredric R. Merrill

1980 PROPOSED CHANGES IN CLASS ACTIONS

RULE 32

This proposal is essentially the well-tested Federal Rule 23 (now the law in 24 states and the District of Columbia).

Recommended Changes (Six)

Changes made in the existing law are included in the attached proposed amendments. These changes are largely based on Federal Rule 23, and the case law under Rule 23. Certain identified changes, not contained in Rule 23, are designed to make the rule less restrictive. Oregon has lagged behind the other states in development of its class action law, and now possesses restrictive provisions found in no other state law!

Attached is a list of the 24 states, plus the District of Columbia, which have adopted Federal Rule 23, together with a copy of Rule 23 for purposes of comparison. In summary, the proposed changes provide for:

A. ELIMINATION OF PRELITIGATION DEMAND NOTICE. The notice serves no useful purpose and is an additional burden to plaintiff. It was argued that this provision would encourage settlements. In fact, its only use has been in the case of a few unscrupulous defendants to attempt to pay off the plaintiffs and the attorney before suit is filed. Rule 23(e) protects class members (after filing) by prohibiting compromise or dismissal without court approval. The requirement that a defendant be given notice

before filing is contrary to the spirit of Rule 23(e) and is in conflict with the interest which 23(e) seeks to protect; namely, the buyout of the class representative or his attorney.

B. NOTICE--TO WHOM GIVEN. This provision is an improvement over Rule 23 and is adopted from the Uniform Act. It does not require individual notice to class members whose recovery or liability is estimated to be $100 or less. Rule 23 provides for "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

C. NOTICE--COST OF NOTICE. The United States Supreme Court has held that plaintiffs must bear the cost of the initial notice (in every case), thus, effectively eliminating all large consumer-type class actions. The proposed amendment will permit the court to decide who must pay the cost of notice. It may be the plaintiff or defendant exclusively, or may be by the parties jointly.

D. CLAIM FORM. The requirement of Oregon law that a claim form be submitted by each class member is eliminated. This requirement is not contained in Rule 23, and is believed not to exist in any other state. The effect of the requirement of a claim form is to change the opt-out provision to an opt-in provision. The proposed amendment, however, does allow for the filing of claim forms in cases where the court deems this to be necessary.

E. REASONABLE ATTORNEYS' FEES TO PREVAILING PLAINTIFF CLASS, including fees assessed against the defendant, as well as against any fund which may have been created.

F. FLUID RECOVERY. Unclaimed funds may be disposed of as directed by the court.

RULE 32

CLASS ACTIONS

A. Requirement for class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

A.(1) The class is so numerous that joinder of all members is impracticable; and

A.(2) There are questions of law or fact common to the class; and

A.(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

A.(4) The representative parties will fairly and adequately protect the interests of the class; and

[A.(5) In an action for damages under subsection (3) of section B. of this rule, the representative parties have complied with the prelitigation notice provisions of section I. of this rule.] (Eliminate to conform to Rule 23)

B. Class action maintainable. An action may be maintained as a class action if the prerequisities of section A. [of this rule] are satisfied, and in addition:

B.(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

B.(1)(a) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

B.(1)(b) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

B.(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

B.(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. [Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages.] The matters pertinent to the findings include: (a) the interest of mem-

(Eliminate to conform to Rule 2

bers of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action, [including the feasibility of giving adequate notice; (e) the likelihood that the damages to be recovered by individual class members, if judgment for the class is entered, are so minimal as not to warrant the intervention of the court; (f) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal].

(Eliminate t conform to Rule 23. (and (f) add tional clau unique to Oregon class action stat

[C. Court discretion. In an action commenced pursuant to subsection (3) of section B. of this rule, the court shall consider whether justice in the action would be more efficiently served by maintenance of the action in lieu thereof as a class action pursuant to subsection (2) of section B. of this rule.]

(Not in Rule but unique t Oregon class action statute)

[D. Court order to determine maintenance of class actions.]

C. Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions. As soon as practicable after the commence- (Rule 23(c))

ment of an action brought as a class action, the court shall determine by order whether it is to be so maintained [and, in action pursuant to subsection (3) of section B. of this rule, the court shall find the facts specially and state separately its conclusions thereon.] An order under this section may be conditional, and may be altered or amended before the decision on the merits.

(Not in Rule but unique Oregon clas action statute)

D. Dismissal or compromise of class actions; court approval required; when notice required. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs, [except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to the class representative's attorney and that no promise to give any such compensation has been made. If the statute of limitations has run or may run against the claim of any class member, the court may require appropriate notice.]

(Inconsisten with provis for require ment for pr litigation notice)

(Para. E is : serted out c order; ident cal to Rule 23(e), excep for language after the wo "directs"; unnecessary and unique t Oregon class action statu

[F. Court authority over conduct of class actions.]

E. Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders [which may be altered or amended as may be desirable]:

(Adapted from Rule 23)

[F.]E.(1) [D]determining the course of proceedings or (No paragrap
prescribing measures to prevent undue repetition or compli-
cation in the presentation of evidence or argument;

[F.]E.(2) [R]requiring, for the protection of the mem-(No paragrap
bers of the class or otherwise for the fair conduct of the
action, that notice be given in such manner as the court may
direct to some or all of the members of any step in the ac-
tion, or of the proposed extent of the judgment, or of the
opportunity of members to signify whether they consider the
representation fair and adequate, to intervene and present
claims or defenses, or otherwise to come into the action;

[F.]E.(3) [I]imposing conditions on the representative (No paragra
parties or on intervenors;

[F.]E.(4) [R]requring that the pleadings be amended to (No paragra
eliminate therefrom allegations as to representation of
absent persons, and that the action proceed accordingly;

[F.]E.(5) [D]dealing with similar procedural matters. (No paragrap

[G. Notice required; content; statement of class members required; form; content; amount of damages; effect of failure to file required statement; stay of action in certain cases.]

F. Determination by Order Whether Class Action to be (Rule 23(c))
Maintained; Notice; Judgment; Actions Conducted Partially as
Class Actions. In any class action maintained under subsec- (Rule 23(c)
(1) and (2)
tion (3) of section B. [of this rule]:

[G.]F.(1) The court shall direct to the members of the
class the best notice practicable under the circumstances,

including [I]individual notice [shall be given] to all members who can be identified through reasonable effort and whose potential monetary recovery or liability is estimated to exceed $100. The notice shall advise each member that:

(Verbatim f Uniform Cl Actions Ac

[G.]F.(1)(a) The court will exclude [such member] him from the class if [such member] he so requests by a specified date;

[G.]F.(1)(b) The judgment, whether favorable or not, will include all members who do not request exclusion; and

(This para. taken from Rule 23; in may, correct as matter of See ORCP G(

[G.]F.(1)(c) Any member who does not request exclusion if [such member] he desires, enter an appearance through [such member's] his counsel.

[G.]F.(2) Prior to the final entry of a judgment against a defendant the court shall request members of the class to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from

sources other than the individual class members. The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member, assessable court costs, and an award of attorney fees, if any, as determined by the court.]

[G.(3) Failure of a class member to file a statement required by the court will be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.]

F.(3) The court may order that the cost of any notice under this section be paid by the defendant or the plaintiff or by the parties jointly, as it deems fair and equitable. The court may conduct a hearing to determine who shall pay the cost of notice. (Verbatim Uniform C Actions A

[G.(4) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.]

F.(4) If the court, after determination of liability, is unable to identify all or some members of the class, it shall order that any damages with respect to such unidentified class members shall be distributed in a manner most equitable under the circumstances. Such equitable distribution shall not include retention of such damages by any defendant held liable.

(Verbatim f Uniform Cl Actions Ac

[O. Attorney fees. Any award of attorney fees against the party opposing the class and any fee charged class members shall be reasonable and shall be set by the court.]

(Eliminate conform to Rule 23)

F.(5) Attorneys' fees. A prevailing plaintiff class, in addition to other relief, shall be awarded reasonable attorneys' fees.

(Verbatim f Uniform Cl Actions Ac

[N.] F.(6) [Judgment; inclusion of class members; description; names.] The judgment in an action maintained as a class action under subsections (1) or (2) of section B. [of this rule], whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (3) or section B. [of this rule], whether or not favorable to the class, shall include and specify [by name] those to whom the notice provided in section F. [of this rule] was directed, and who have not requested exclusion and whom the court finds to be members of the class [and the judgment shall state the amount to be recovered by each member].

(Rule 23(c)(

[H. Commencement or maintenance of class actions regarding particular issues; division of class; subclasses.]

F.(7) When appropriate:

(Rule 23

F.(7)(a) An action may be brought or maintained as a class action with respect to particular issues; or

F.(7)(b) A class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

[I. Notice and demand required prior to commencement of action for damages.]

(Eliminat conform Rule 23)

[I.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of subsection (3) of Section B. of this rule, the potential plaintiffs' class representative shall:]

[I.(1)(a) Notify the potential defendant of the particular alleged cause of action; and]

[I.(1)(b) Demand that such person correct or rectify the alleged wrong.]

[I.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, if neither will effect actual notice, the office of the Secretary of State.]

[J. Limitation on maintenance of class actions for damages. No action for damages may be maintained under the provisions of sections A., B., and C. of this rule upon a showing by a defendant that all of the following exist:] (Eliminate t conform to Rule 23)

[J.(1) All potential class members similarly situated have been identified, or a reasonable effort to identify such other people has been made;]

[J.(2) All potential class members so identified have been notified that upon their request the defendant will make the appropriate compensation, correction, or remedy of the alleged wrong;]

[J.(3) Such compensation, correction, or remedy has been, or, in a reasonable time, will be, given; and]

[J.(4) Such person has ceased from engaging in, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage in such methods, acts, or practices alleged to be violative of the rights of potential class members.]

[K. Application of sections I. and J. of this rule to actions for equitable relief; amendment of complaints for equitable relief to request damages permitted. An action for equitable relief brought under sections A., B., and C. of this rule may be commenced without compliance with the provisions (Eliminate to conform to Rule 23)

of section I. of this rule. Not less than 30 days after the commencement of an action for equitable relief, and after compliance with the provisions of section I. of this rule, the class representative's complaint may be amended without leave of court to include a request for damages. The provisions of section J. of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.]

[L. Limitation on maintenance of class actions for recovery of certain statutory penalties. A class action may not be maintained for the recovery of statutory minimum penalties for any class member as provided in ORS 646.638 or 15 U.S.C. 1640(a) or any other similar statute.] (Eliminate t conform to Rule 23)

[M.(1)(a) When class actions sharing a common question of fact or law are pending in different courts, the presiding judge of any such court, upon motion of any party or on the court's own initiative, may request the Supreme Court to assign a Circuit Court, Court of Appeals, or Supreme Court judge to determine whether coordination of the actions is appropriate, and a judge shall be so assigned to make that determination.] (Eliminate t conform to Rule 23)

[M.(1)(b) Coordination of class actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is pre-

dominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and personnel; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.]

[M.(2) If the assigned judge determines that coordination is appropriate, such judge shall order the actions coordinated, report that fact to the Chief Justice of the Supreme Court, and the Chief Justice shall assign a judge to hear and determine the actions in the site or sites the Chief Justice deems appropriate.]

[M.(3) The judge of any court in which there is pending an action sharing a common question of fact or law with coordinated actions, upon motion of any party or on the court's own initiative, may request the judge assigned to hear the coordinated action for an order coordinating such actions. Coordination of the action pending before the judge so requesting shall be determined under the standards specified in subsection (1) of this section.]

[M.(4) Pending any determination of whether coordination is appropriate, the judge assigned to make the determination may stay any action being considered for, or affecting any action being considered for, coordination.]

[M.(5) Notwithstanding any other provision of law, the Supreme Court shall provide by rule the practice and procedure for coordination of class actions in convenient courts, including provision for giving notice and presenting evidence.]

YOUNG, HORN, CASS & SCOTT
ATTORNEYS AT LAW
SOUTH PARK BUILDING, SUITE 200
101 EAST BROADWAY
EUGENE, OREGON 97401

LEO F. YOUNG
JOHN H. HORN
PHIL CASS, JR.
MALCOLM H. SCOTT
ROBERT D. WOODS
BRUCE E. SMITH
EDWARD P. THOMPSON
NICK E. RAUCH
RICHARD K. QUINN
DOUGLAS R. SCHULTZ
STUART M. BROWN
JUDITH TEGGER
THOMAS J. MURPHY
FRANK C. GIBSON
C. AKIN BLITZ

OF COUNSEL
ORLANDO JOHN HOLLIS
THOMAS E. BROWNHILL

TELEPHONE 687-1515
AREA CODE 503

March 4, 1980

Fredric R. Merrill
Executive Director
Counsel on Court Procedures
School of Law
University of Oregon
Eugene, OR 97403

Dear Fred:

At the March 1 meeting, the State Bar Committee on Procedure and Practice reviewed your draft of a proposed rule relating to discovery of expert witnesses. In your letter of February 20, you asked for comments within 30 days.

The proposed rule appears to be identical to that submitted to the legislature, with the addition of language limiting the right to take depositions. Concern was expressed about this limitation by all members of our Committee. An example was given of a products liability situation in which only the expert for one side had the opportunity to analyze the alleged defective product, and in the course of analyzation the product was destroyed or substantially altered. In this situation, the other party probably should have the right to take the deposition of that expert and determine what observations were made before the product was destroyed or altered. It was the view of our Committee that the limitation on depositions or other discovery should not be embodied in a rule, but should be left to case law.

Concern was also expressed by our Committee members about the effect of such a rule upon medical malpractice cases. It is evident from the minutes of the Counsel on Court Procedures that others share this concern, and it is not necessary to state it in detail here.

The Committee had no further comments about the rule.

Very truly yours,

Bruce Smith

BES/flr

ROBERT ANDREW BROWNING -
ATTORNEYS PC
Post Office Box 928
Forest Grove, Oregon 97116
(503) 359-4456

Council on Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403

March 5, 1980

Attn: Frederic R. Merrill
Executive Director

RE: Summons Service by Mail under ORCP 7

Mr. Merrill:

Thank you for taking the time to chat with me this past Tuesday morning. As we discussed, a question has arisen in our office as to when service of summons by mail is allowed under the procedure set forth in ORCP 7 D.(2)(d). The question involves apparent discrepancies between the literal wording of ORCP 7 D.(1); the comments appended to ORCP 7 as reported in 1980 Oregon Civil Procedure Rules, 33-36. (Oregon Law Institute, 1979, hereafter O.L.I.); and your own comments offered in analysis of the rules under the heading of "Jurisdiction Over Parties; Service of Summons" (Rules 4-7), (O.L.I. 230-39). The discrepancy is between the wording of the rule and the "official" comments which imply that the listed forms of specific service are permissive and that the only mandatory requirement is that:

> Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action ... Summons may be served in a manner specified in this rule ... Service may be made, subject to the restrictions and requirements of this rule, by the following methods ... Service by mail; or, service by publication, (ORCP 7D.(1), emphasis added.)

> This rule brings all general provisions for service of summons together in one place. The basic standards of adequacy of service of summons is set forth in the first sentence of ORCP 7 D.(1). Succeeding portions of the rule provide ways in which service may be made and how these ways may be used for particular defendants,

> including conditional preferences. The particular methods, however, are methods which may be used. The rule does not require them to be used. Compliance with the specific methods of service is presumed to be service reasonably calculated, under all the circumstances, to apprise the defendant of the pendency of the action and to afford a reasonable opportunity to appear and defend. Other methods of service might accomplish the same thing. Subsection 4 F.(4) and section 4 G. also make clear that any technical defects in the return, form of summons, issuance of summons, and persons serving do not invalidate service if the defendant received actual notice of the existence and pendency of the action. Note, however, that summons must be served and returned; mere knowledge of the pendency and nature of the action will not require the defendant to appear and defend. (O.L.I., 33, emphasis added except "may" in line 7!)

It appears quite obvious from a reading of Rule 7 and the appended comments that the only mandatory feature is that the method used for service shall, as the title to Section 7 D.(1) indicates, require notice in a "manner reasonably calculated" to let the defendant know he or she is the subject of a civil action.

On the other side of the discrepancy, however, is your analysis. You state that

> ORCP 7 D(2), describing methods of service, does not authorize use of all described methods against all defendants and in all cases. Use of the different methods in a particular case is governed by section 7 D.(3) and (4). Thus, although mail service is described, it is only available as an alternative method of service upon a corporation or for service in motor vehicle cases.
> (O.L.I., 237, emphasis added.)

You continually use the word "authorize" to describe the methods of service other than personal service and explicitly state that these other methods are only available as provided. ORCP Rule 7 makes no such distinction when it continually uses the permissive wording "may" in reference to the specific methods of service.

Perhaps the issue is made less clear when the "official" comments imply that ORCP 7 D. sets forth "preferred"

and "alternative" methods. (O.L.I., 34.) However, no such hierarchy is found in Rule 7 itself. The rule only states that "Service may be made upon specified defendants as follows ... (ORCP 7 D.(3), emphasis added.) Again, the persuasive "may" is worlds apart from the mandatory "shall".

I submit that service by mail, under the procedure set forth in ORCP 7 D.(2)(d), is allowed in all cases where it gives the requisite notice to the defendant. I further submit that service by mail would in most instances be the preferable form of service. The method is economical, speedy, provides a rapid confirmation as to the correctness of the defendants' address, and removes an excessive burden from the understaffed and under-funded sheriff offices.

The method is certainly more economical than personal service. Our staff cost in preparing the necessary documents is identical for either personal or mailed service. However, the additional postal charges for "certified - return receipt requested" postage is only $1.25 versus the minimum $12.50 charge imposed by most sheriffs. In small actions with two or three defendants, the differences in cost to the plantiff, or defendant if the plantiff prevails, are significant.

Service by mail is also often much speedier then using either an official or independent process server. In one recent case in which this firm was involved, more than four weeks passed before we were notified that the summons could not be personally served since the defendant had moved from that county. Another three weeks passed before the defendant was ultimately served in the correct county. Had we used mailed service, we would have known in less than one week if the defendant had moved, leaving no forwarding address. If he had moved and left a forwarding address, for another 10 cents we can determine that address at the time the signed receipt is returned. In any case, a receipt signed by the defendant is good assurance that the defendant has been "apprised of the pendency of the action".

In closing, could you or the council please advise us as to the intent of Rule 7. Is it a wide-open rule applying the essential features of Mullane, as the Rule appears on its face to be, with the specific methods of service given as guidance to the extent and meaning of "reasonably calculated"; or is it a rule of hierarchies and specifics, setting forth methods for service as stringent as the old statutes?

For the reasons enumerated above, I hope it is the former rather than the latter. Otherwise, the saving provisions of ORCP 7 G. lose all their meaning, since specific rules without a specific sanction for their abuse lose all meaning.

I look forward to hearing from you on this matter. Hopefully, we can arrive at the intent of the council and the understanding of the legislature.

Thank you for your assistance.

Sincerely,

Robert Andrew Browning
Attorney at Law

RAB:alm

cc: Oregon Law Institute
Richard Slottee - Northwestern Legal Clinic

OADC
OREGON ASSOCIATION OF DEFENSE COUNSEL

March 12, 1980

Fredric R. Merrill
Executive Director,
Council on Court Procedures
School of Law
University of Oregon
Eugene, Oregon 97403

Dear Fred:

The Oregon Association of Defense Counsel, as an organization, has not previously taken positions on particular rules being promulgated or considered by the Council on Court Procedures. The Association is in the process of re-evaluating that position and, hopefully, will formulate a long-term policy for distribution to the membership of proposed rules for their comments which would be forwarded to the Council on Court Procedures.

Very truly yours,

James F. Spiekerman
Secretary-Treasurer

JFS:jmc

GREEN & GRISWOLD
LAWYERS

BURL L. GREEN
JAMES B. GRISWOLD
MICHAEL R. SHINN
PAMELA McCARROLL THIES

9TH FLOOR JACKSON TOWER
806 S. W. BROADWAY AT YAMHILL
PORTLAND, OREGON 97205
TELEPHONE 228-1221

March 14, 1980

Fredric R. Merrill
Executive Director
Counsel on Court Procedures
School of Law
University of Oregon
Eugene, Oregon 97403

Dear Fred:

I understand that the Council is re-proposing a rule relating to discovery of expert witnesses. I do not have a copy of the proposal, but am told that it is very similar to the one turned down by the legislature in 1979.

As you are aware, I am very much opposed to this rule and would like to be sent a copy of the proposal and be notified, well in advance, of the meeting at which the proposal will be considered by the Council.

In my judgment, such a rule would virtually eliminate meritorious professional negligence cases. It would also give the defense a great advantage, in that they can get "the book" on the numerically few experts who are willing to testify for the plaintiffs, where the plaintiffs cannot have the same advantage because of the numerically far greater experts available to industry and to the professional.

Very truly yours,

Burl L. Green

e
cc: Donald W. McEwen

COSGRAVE, KESTER, CROWE, GIDLEY & LAGESEN
ATTORNEYS AT LAW
622 PITTOCK BLOCK
921 S.W. WASHINGTON ST.
PORTLAND, OREGON 97205
TELEPHONE (503) 227-3711

RANDALL B. KESTER
WALTER J. COSGRAVE
AUSTIN W. CROWE, JR.
JAMES H. GIDLEY
FRANK H. LAGESEN
EUGENE H. BUCKLE
DAVID P. MORRISON
SAMUEL C. JUSTICE

ROBERT F. MAGUIRE
(1886-1976)
ROY F. SHIELDS
(1888-1966)

March 19, 1980

C

Judge William M. Dale, Jr.
Multnomah County Courthouse
Portland, Oregon 97204

Frank H. Pozzi
Attorney at Law
Standard Plaza
1100 S. W. Sixth Avenue
Portland, Oregon 97204

O

Laird C. Kirkpatrick
Attorney at Law
204 Federal Building
211 E. Seventh Avenue
Eugene, Oregon 97401

Re: Council on Court Procedures

Gentlemen:

P

At the Subcommittee meeting on March 17, 1980, it was suggested that we have a hearing before the Subcommittee at which time those interested in discussing the proposed changes suggested by Mr. Pozzi could appear and provide background information to the members of the Subcommittee for their consideration in making a recommendation to the Council as a whole.

Y

In a discussion with Laird Kirkpatrick, he suggested that perhaps there would be additional members of the Council who would feel a need to hear the testimony in order to be in a position to make a judgment as to whether they concurred in the proposed recommendations by the Subcommittee. The schedule is such that the members of the Subcommittee could not appear at any dates set in April or May with the possible exception of Saturday, May 10th.

In a discussion with Mr. McEwan, we considered that it might be more appropriate to have one hearing dedicated to class actions sponsored by the whole Council which would satisfy the requirement of a public meeting and also give sufficient background to the Council as a whole as well as the Subcommittee members regarding any proposals. The Subcommittee could then take that information and formulate their proposal to be con-

sidered by the Council as a whole.

There was also a suggestion that any proposal which would consider a provision providing for attorneys' fees would be beyond the scope of the jurisdiction of the Council on Court Procedures. Perhaps the Subcommittee or Council at the April meeting should initially consider whether that matter should be discussed at the hearing. Mr. McEwen suggested that the Council as a whole consider setting the date for the hearing sometime in May or June so that they would have the opportunity to be available. At that time we could also consider the attorneys' fees provision suggested by Mr. Pozzi.

Prior to the Council meeting on April 12, 1980, I will contact the Bar Bulletin and the Multnomah Lawyer to determine their printing deadlines for notices and will also contact the O. T. L. A. and the O. A. D. C. concerning the possibility of their providing notice to their members of the public hearing.

Very truly yours,

Austin W. Crowe, Jr.

AWC:jmc

cc: Fredrick R. Merrill
Donald W. McEwen

MEMORANDUM

TO: COUNCIL

FROM: Fred Merrill

RE: Proposed Discovery Rule

DATE: April 4, 1980

The enclosed letter was sent to me by Jere Webb relating to the proposed expert witness rule. He also surveyed members of his firm as to preference between the federal rule, proposed Rule 36 B.(4), and no rule. The results were:

Federal rule	13
Proposed rule	0
No rule	0
Other	2

The written comments of some responding attorneys will be available at the meeting.

FRM:gh

Encl.

STOEL, RIVES, BOLEY, FRASER AND WYSE

(DAVIES, BIGGS, STRAYER, STOEL AND BOLEY)
(RIVES, BONYHADI & SMITH)

LAW OFFICES
900 S W FIFTH AVENUE
PORTLAND, OREGON 97204

(503) 224-3380

ALLAN R. ABRAVANEL
JEFFREY MICHAEL ALDEN
RICHARD E. ALEXANDER
RICHARD D. BACH
PAUL L. BOLEY
ERNEST BONYHADI
PHILLIP D. CHADSEY
HARRY S. CHANDLER
CLEVELAND C. CORY
KAREN K. CREASON
THOMAS P. DEERING
JOHN DETJENS, III
BARNES H. ELLIS
EDWARD L. EPSTEIN
HOWARD M. FEUERSTEIN
RICHARD A. FRANZKE
GEORGE H. FRASER
GEORGE M. GALLOWAY
LEONARD A. GIRARD
WILLIAM J. GLASGOW
GERSHAM GOLDSTEIN
RONALD S. GROSSMANN
CHARLES H. HABERNIGG
ROBERT F. HARRINGTON
JOHN R. HAY
RICHARD A. HAYDEN, JR.
DAVID G. HAYHURST
HENRY H. HEWITT
CHARLES F. HINKLE
ROBERT H. HUNTINGTON
STEPHEN T. JANIK
VELMA JEREMIAH
RICHARD C. JOSEPHSON
JOEL D. KUNTZ
DEXTER E. MARTIN
WILLIAM M. McALLISTER
CHARLES J. McMURCHIE
GEORGE K. MEIER, III
DAVID P. MILLER
GREGORY R. MOWE
HARDY MYERS
THOMAS R. NICOLAI
MILO E. ORMSETH
TERRENCE R. PANCOAST
MARK H. PETERMAN
CAMPBELL RICHARDSON
ROBERT L. RIDGLEY
GEORGE D. RIVES
RICHARD E. ROY
JOHN M. SCHWEITZER
PATRICK J. SIMPSON
HUGH SMITH
THOMAS B. STOEL
MANLEY B. STRAYER
JERE M. WEBB
CLARENCE R. WICKS
MARCUS WOOD
WILLIAM W. WYSE

Counsel
DAVID L. DAVIES
HUGH L. BIGGS

GAIL L. ACHTERMAN
CHARLES F. ADAMS
STEPHEN E. BABSON
MARGARET M. BAUMGARDNER
HENRY C. BREITHAUPT
MATTHEW W. CHAPMAN
BERTRAND J. CLOSE
NANCY L. COWGILL
C. PAUL DAGLE
E. JOSEPH DEAN
CHRISTINE L. DICKEY
MARK R. FEICHTINGER
RANDOLPH C. FOSTER
SUSAN P. GRABER
DAVID W. GREEN
STEPHEN L. GRIFFITH
THOMAS G. P. GUILBERT
SUSAN M. HAMMER
NORMAN D. HOLLY
PAMELA L. JACKLIN
PETER R. JARVIS
JENNIFER J. JOHNSON
CHARLES S. LEWIS, III
GREGORY H. MACPHERSON
SUSAN F. MANDIBERG
THOMAS H. NELSON
MARGARET HILL NOTO
BRUCE K. POSEY
GUY A. RANDLES
LOIS O. ROSENBAUM

March 26, 1980

Mr. Fredric R. Merrill
Executive Director
Council on Court Procedures
School of Law
University of Oregon
Eugene, OR 97403

Dear Fred:

Re: Discovery of Expert Witnesses

Out of curiosity I circularized the trial lawyers in our firm for their views on the proposed rule pertaining to discovery of expert witnesses. For whatever interest they may be, the responses are attached.

I am also enclosing a copy of a letter received today from the firm of Esler & Schneider. I am not sure why this was directed to me, but guess that it has to do with the fact that I am currently serving on a committee of the trial practice section of the Oregon State Bar which has been asked to review the new rules proposed by the Council.

I do not know whether you are interested in having this sort of input but thought there would be no harm in sending it along.

Very truly yours,

Jere M. Webb

jek

Enclosures

ESLER & SCHNEIDER
ATTORNEYS AT LAW
610 S.W. BROADWAY, SUITE 510
PORTLAND, OREGON 97205
(503) 223-1510

March 25, 1980

Jere M. Webb
Stoel, Reeves, Boley,
Fraser & Weiss
900 S.W. 5th Avenue
Portland, Oregon 97204

Re: Draft of Proposed Rule Relating to Discovery of Expert Witness

Dear Jere:

Thank you for sending to me a copy of the proposed new Rule regarding discovery of expert witnesses.

This firm favors the idea of specific provisions in the Oregon Rules of Civil Procedure governing discovery of expert witnesses. This firm favors the broader discovery provisions set forth in FRCP 26(b)(4)(A)(i) over those set forth in the proposed Rule. In our opinion, just knowing the expert's name and the subject matter on which he is expected to testify is not enough information for a proper preparation of a case for trial.

This firm is also concerned about subsection B.(4)(e) which appears to broaden the scope of the term "expert witness," especially when read in conjunction with subsection B.(4)(d). A person should not be insulated from the taking of his deposition simply because he is expected to answer one or two questions at trial in an expert capacity.

This firm also believes there should be some provision for allowing other discovery procedures to be used to secure information from expert witnesses in extraordinary circumstances. For example, suppose the expert witness is the only one who has had an opportunity to examine tangible evidence which is no longer in existence. It would not do the parties seeking discovery much good to know the expert was going to testify at trial on the findings of his examination. In that situation, this firm believes the party seeking discovery should be allowed to take

the expert's deposition.

Thank you for giving this firm an opportunity to comment on the proposed Rule. If we can be of any further assistance, please advise.

Very truly yours,

Kim T. Buckley
For Esler & Schneider

KTB:meg

COSGRAVE, KESTER, CROWE, GIDLEY & LAGESEN
ATTORNEYS AT LAW
622 PITTOCK BLOCK
921 S.W. WASHINGTON ST.
PORTLAND, OREGON 97205
TELEPHONE (503) 227-3711

R ALL B. KESTER
WALTER J. COSGRAVE
AUSTIN W. CROWE, JR.
JAMES H. GIDLEY
FRANK H. LAGESEN
EUGENE H. BUCKLE
DAVID P. MORRISON
SAMUEL C. JUSTICE

ROBERT F. MAGUIRE
(1886-1976)
ROY F. SHIELDS
(1888-1966)

February 19, 1980

William M. McAllister
STOEL, RIVES, BOLEY,
FRASER & WYSE
Attorneys at Law
900 S. W. Fifth Avenue
Portland, Oregon 97204

Re: Council on Court Procedures

Dear Bill:

I am enclosing a copy of the 1980 Proposed Changes in Class Actions and comments prepared by Frank Pozzi.

I appreciate your offer to review the material and provide some background information concerning the advisability of the proposed changes.

You should know that the Subcommittee is planning to meat on March 15th at 8:30 a.m. to review any information provided. At that time we will schedule a meeting to have any interested persons testify before our Subcommittee prior to making recommendations to the Council.

Very truly yours,

Austin W. Crowe, Jr.

AWC:jmc

cc: Judge Wm. M. Dale, Jr.
Frank H. Pozzi
Laird Kirkpatrick
Fredric R. Merrill

1980 PROPOSED CHANGES IN CLASS ACTIONS

RULE 32

This proposal is essentially the well-tested Federal Rule 23 (now the law in 24 states and the District of Columbia).

Recommended Changes (Six)

Changes made in the existing law are included in the attached proposed amendments. These changes are largely based on Federal Rule 23, and the case law under Rule 23. Certain identified changes, not contained in Rule 23, are designed to make the rule less restrictive. Oregon has lagged behind the other states in development of its class action law, and now possesses restrictive provisions found in no other state law!

Attached is a list of the 24 states, plus the District of Columbia, which have adopted Federal Rule 23, together with a copy of Rule 23 for purposes of comparison. In summary, the proposed changes provide for:

A. ELIMINATION OF PRELITIGATION DEMAND NOTICE. The notice serves no useful purpose and is an additional burden to plaintiff. It was argued that this provision would encourage settlements. In fact, its only use has been in the case of a few unscrupulous defendants to attempt to pay off the plaintiffs and the attorney before suit is filed. Rule 23(e) protects class members (after filing) by prohibiting compromise or dismissal without court approval. The requirement that a defendant be given notice

before filing is contrary to the spirit of Rule 23(e) and is in conflict with the interest which 23(e) seeks to protect; namely, the buyout of the class representative or his attorney.

B. NOTICE--TO WHOM GIVEN. This provision is an improvement over Rule 23 and is adopted from the Uniform Act. It does not require individual notice to class members whose recovery or liability is estimated to be $100 or less. Rule 23 provides for "the best notice practicable under the circumstances, <u>including individual notice to all members</u> who can be identified through reasonable effort."

C. NOTICE--COST OF NOTICE. The United States Supreme Court has held that plaintiffs must bear the cost of the initial notice (in every case), thus, effectively eliminating all large consumer-type class actions. The proposed amendment will permit the court to decide who must pay the cost of notice. It may be the plaintiff or defendant exclusively, or may be by the parties jointly.

D. CLAIM FORM. The requirement of Oregon law that a claim form be submitted by each class member is eliminated. This requirement is not contained in Rule 23, and is believed not to exist in any other state. The effect of the requirement of a claim form is to change the opt-out provision to an opt-in provision. The proposed amendment, however, does allow for the filing of claim forms in cases where the court deems this to be necessary.

E. REASONABLE ATTORNEYS' FEES TO PREVAILING PLAINTIFF CLASS, including fees assessed against the defendant, as well as against any fund which may have been created.

F. FLUID RECOVERY. Unclaimed funds may be disposed of as directed by the court.

RULE 32

CLASS ACTIONS

A. Requirement for class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

A.(1) The class is so numerous that joinder of all members is impracticable; and

A.(2) There are questions of law or fact common to the class; and

A.(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

A.(4) The representative parties will fairly and adequately protect the interests of the class; and

[A.(5) In an action for damages under subsection (3) of section B. of this rule, the representative parties have complied with the prelitigation notice provisions of section I. of this rule.] (Eliminate to conform to Rule 23)

B. Class action maintainable. An action may be maintained as a class action if the prerequisities of section A. [of this rule] are satisfied, and in addition:

B.(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

B.(1)(a) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

B.(1)(b) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

B.(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

B.(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. [Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages.] The matters pertinent to the findings include: (a) the interest of mem-

(Eliminate to conform to Rule 2

bers of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action, [including the feasibility of giving adequate notice; (e) the likelihood that the damages to be recovered by individual class members, if judgment for the class is entered, are so minimal as not to warrant the intervention of the court; (f) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal].

(Eliminate t conform to Rule 23. (and (f) add tional clau unique to Oregon class action stat

[C. Court discretion. In an action commenced pursuant to subsection (3) of section B. of this rule, the court shall consider whether justice in the action would be more efficiently served by maintenance of the action in lieu thereof as a class action pursuant to subsection (2) of section B. of this rule.]

(Not in Rule but unique t Oregon class action statute)

[D. Court order to determine maintenance of class actions.]

C. Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions. As soon as practicable after the commence- (Rule 23(c))

ment of an action brought as a class action, the court shall determine by order whether it is to be so maintained [and, in action pursuant to subsection (3) of section B. of this rule, the court shall find the facts specially and state separately its conclusions thereon.] An order under this section may be conditional, and may be altered or amended before the decision on the merits.

(Not in Rule but unique Oregon clas action statute)

D. Dismissal or compromise of class actions; court approval required; when notice required. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs, [except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to the class representative's attorney and that no promise to give any such compensation has been made. If the statute of limitations has run or may run against the claim of any class member, the court may require appropriate notice.]

(Inconsisten with provis for require ment for pr litigation notice)

(Para. E is serted out order; iden cal to Rule 23(e), exce for language after the w "directs"; unnecessary and unique Oregon class action stat

[F. Court authority over conduct of class actions.]

E. Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders [which may be altered or amended as may be desirable]:

(Adapted fro Rule 23)

[F.]E.(1) [D]determining the course of proceedings or (No paragrap
prescribing measures to prevent undue repetition or compli-
cation in the presentation of evidence or argument;

[F.]E.(2) [R]requiring, for the protection of the mem-(No paragrap
bers of the class or otherwise for the fair conduct of the
action, that notice be given in such manner as the court may
direct to some or all of the members of any step in the ac-
tion, or of the proposed extent of the judgment, or of the
opportunity of members to signify whether they consider the
representation fair and adequate, to intervene and present
claims or defenses, or otherwise to come into the action;

[F.]E.(3) [I]imposing conditions on the representative (No paragrap
parties or on intervenors;

[F.]E.(4) [R]requring that the pleadings be amended to (No paragrap
eliminate therefrom allegations as to representation of
absent persons, and that the action proceed accordingly;

[F.]E.(5) [D]dealing with similar procedural matters. (No paragrap

[G. Notice required; content; statement of class members required; form; content; amount of damages; effect of failure to file required statement; stay of action in certain cases.]

F. Determination by Order Whether Class Action to be (Rule 23(c))
Maintained; Notice; Judgment; Actions Conducted Partially as
Class Actions. In any class action maintained under subsec- (Rule 23(c)
(1) and (2)
tion (3) of section B. [of this rule]:

[G.]F.(1) The court shall direct to the members of the
class the best notice practicable under the circumstances,

including [I]individual notice [shall be given] to all members who can be identified through reasonable effort and whose potential monetary recovery or liability is estimated to exceed $100. The notice shall advise each member that:

(Verbatim f
Uniform Cl
Actions Act

[G.]F.(1)(a) The court will exclude [such member] him from the class if [such member] he so requests by a specified date;

[G.]F.(1)(b) The judgment, whether favorable or not, will include all members who do not request exclusion; and

(This para.
taken from
Rule 23; in
may,
correct as
matter of
See ORCP G(

[G.]F.(1)(c) Any member who does not request exclusion if [such member] he desires, enter an appearance through [such member's] his counsel.

[G.]F.(2) Prior to the final entry of a judgment against a defendant the court shall request members of the class to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from

sources other than the individual class members. The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member, assessable court costs, and an award of attorney fees, if any, as determined by the court.]

[G.(3) Failure of a class member to file a statement required by the court will be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.]

F.(3) The court may order that the cost of any notice under this section be paid by the defendant or the plaintiff or by the parties jointly, as it deems fair and equitable. The court may conduct a hearing to determine who shall pay the cost of notice.

(Verbatim Uniform C Actions A

[G.(4) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.]

F.(4) If the court, after determination of liability, is unable to identify all or some members of the class, it shall order that any damages with respect to such unidentified class members shall be distributed in a manner most equitable under the circumstances. Such equitable distribution shall not include retention of such damages by any defendant held liable.

(Verbatim f Uniform Cl Actions Ac

[O. Attorney fees. Any award of attorney fees against the party opposing the class and any fee charged class members shall be reasonable and shall be set by the court.]

(Eliminate t conform to Rule 23)

F.(5) Attorneys' fees. A prevailing plaintiff class, in addition to other relief, shall be awarded reasonable attorneys' fees.

(Verbatim fr Uniform Cla Actions Act

[N.] F.(6) [Judgment; inclusion of class members; description; names.] The judgment in an action maintained as a class action under subsections (1) or (2) of section B. [of this rule], whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (3) or section B. [of this rule], whether or not favorable to the class, shall include and specify [by name] those to whom the notice provided in section F. [of this rule] was directed, and who have not requested exclusion and whom the court finds to be members of the class [and the judgment shall state the amount to be recovered by each member].

(Rule 23(c)(

[II. Commencement or maintenance of class actions regarding particular issues; division of class; subclasses.]

F.(7) When appropriate:

F.(7)(a) An action may be brought or maintained as a class action with respect to particular issues; or (Rule 23

F.(7)(b) A class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

[I. Notice and demand required prior to commencement of action for damages.] (Eliminat conform Rule 23)

[I.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of subsection (3) of Section B. of this rule, the potential plaintiffs' class representative shall:]

[I.(1)(a) Notify the potential defendant of the particular alleged cause of action; and]

[I.(1)(b) Demand that such person correct or rectify the alleged wrong.]

[I.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, if neither will effect actual notice, the office of the Secretary of State.]

[J. Limitation on maintenance of class actions for damages. No action for damages may be maintained under the provisions of sections A., B., and C. of this rule upon a showing by a defendant that all of the following exist:] (Eliminate t conform to Rule 23)

[J.(1) All potential class members similarly situated have been identified, or a reasonable effort to identify such other people has been made;]

[J.(2) All potential class members so identified have been notified that upon their request the defendant will make the appropriate compensation, correction, or remedy of the alleged wrong;]

[J.(3) Such compensation, correction, or remedy has been, or, in a reasonable time, will be, given; and]

[J.(4) Such person has ceased from engaging in, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage in such methods, acts, or practices alleged to be violative of the rights of potential class members.]

[K. Application of sections I. and J. of this rule to actions for equitable relief; amendment of complaints for equitable relief to request damages permitted. An action for equitable relief brought under sections A., B., and C. of this rule may be commenced without compliance with the provisions (Eliminate to conform to Rule 23)

of section I. of this rule. Not less than 30 days after the commencement of an action for equitable relief, and after compliance with the provisions of section I. of this rule, the class representative's complaint may be amended without leave of court to include a request for damages. The provisions of section J. of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.]

[L. Limitation on maintenance of class actions for recovery of certain statutory penalties. A class action may not be maintained for the recovery of statutory minimum penalties for any class member as provided in ORS 646.638 or 15 U.S.C. 1640(a) or any other similar statute.] (Eliminate t conform to Rule 23)

[M.(1)(a) When class actions sharing a common question of fact or law are pending in different courts, the presiding judge of any such court, upon motion of any party or on the court's own initiative, may request the Supreme Court to assign a Circuit Court, Court of Appeals, or Supreme Court judge to determine whether coordination of the actions is appropriate, and a judge shall be so assigned to make that determination.] (Eliminate t conform to Rule 23)

[M.(1)(b) Coordination of class actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is pre-

dominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and personnel; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.]

[M.(2) If the assigned judge determines that coordination is appropriate, such judge shall order the actions coordinated, report that fact to the Chief Justice of the Supreme Court, and the Chief Justice shall assign a judge to hear and determine the actions in the site or sites the Chief Justice deems appropriate.]

[M.(3) The judge of any court in which there is pending an action sharing a common question of fact or law with coordinated actions, upon motion of any party or on the court's own initiative, may request the judge assigned to hear the coordinated action for an order coordinating such actions. Coordination of the action pending before the judge so requesting shall be determined under the standards specified in subsection (1) of this section.]

[M.(4) Pending any determination of whether coordination is appropriate, the judge assigned to make the determination may stay any action being considered for, or affecting any action being considered for, coordination.]

[M.(5) Notwithstanding any other provision of law, the Supreme Court shall provide by rule the practice and procedure for coordination of class actions in convenient courts, including provision for giving notice and presenting evidence.]

YOUNG, HORN, CASS & SCOTT
ATTORNEYS AT LAW
SOUTH PARK BUILDING, SUITE 200
101 EAST BROADWAY
EUGENE, OREGON 97401

LEO F. YOUNG
JOHN H. HORN
PHIL CASS, JR.
MALCOLM H. SCOTT
ROBERT D. WOODS
BRUCE E. SMITH
EDWARD P. THOMPSON
NICK E. RAUCH
RICHARD K. QUINN
DOUGLAS R. SCHULTZ
STUART M. BROWN
JUDITH TEGGER
THOMAS J. MURPHY
FRANK C. GIBSON
C. AKIN BLITZ

OF COUNSEL
ORLANDO JOHN HOLLIS
THOMAS E. BROWNHILL

TELEPHONE 687-1515
AREA CODE 503

March 4, 1980

Fredric R. Merrill
Executive Director
Counsel on Court Procedures
School of Law
University of Oregon
Eugene, OR 97403

Dear Fred:

At the March 1 meeting, the State Bar Committee on Procedure and Practice reviewed your draft of a proposed rule relating to discovery of expert witnesses. In your letter of February 20, you asked for comments within 30 days.

The proposed rule appears to be identical to that submitted to the legislature, with the addition of language limiting the right to take depositions. Concern was expressed about this limitation by all members of our Committee. An example was given of a products liability situation in which only the expert for one side had the opportunity to analyze the alleged defective product, and in the course of analyzation the product was destroyed or substantially altered. In this situation, the other party probably should have the right to take the deposition of that expert and determine what observations were made before the product was destroyed or altered. It was the view of our Committee that the limitation on depositions or other discovery should not be embodied in a rule, but should be left to case law.

Concern was also expressed by our Committee members about the effect of such a rule upon medical malpractice cases. It is evident from the minutes of the Counsel on Court Procedures that others share this concern, and it is not necessary to state it in detail here.

The Committee had no further comments about the rule.

Very truly yours,

Bruce Smith

BES/flr

ROBERT ANDREW BROWNING -
ATTORNEYS PC
Post Office Box 928
Forest Grove, Oregon 97116
(503) 359-4456

Council on Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403

March 5, 1980

Attn: Frederic R. Merrill
Executive Director

RE: Summons Service by Mail under ORCP 7

Mr. Merrill:

Thank you for taking the time to chat with me this past Tuesday morning. As we discussed, a question has arisen in our office as to when service of summons by mail is allowed under the procedure set forth in ORCP 7 D.(2)(d). The question involves apparent discrepancies between the literal wording of ORCP 7 D.(1); the comments appended to ORCP 7 as reported in 1980 Oregon Civil Procedure Rules, 33-36. (Oregon Law Institute, 1979, hereafter O.L.I.); and your own comments offered in analysis of the rules under the heading of "Jurisdiction Over Parties; Service of Summons" (Rules 4-7), (O.L.I. 230-39). The discrepancy is between the wording of the rule and the "official" comments which imply that the listed forms of specific service are permissive and that the only mandatory requirement is that:

> Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action ... Summons may be served in a manner specified in this rule ... Service may be made, subject to the restrictions and requirements of this rule, by the following methods ... Service by mail; or, service by publication, (ORCP 7D.(1), emphasis added.)
>
> This rule brings all general provisions for service of summons together in one place. The basic standards of adequacy of service of summons is set forth in the first sentence of ORCP 7 D.(1). Succeeding portions of the rule provide ways in which service may be made and how these ways may be used for particular defendants,

> including conditional preferences. The particular methods, however, are methods which may be used. The rule does not require them to be used. Compliance with the specific methods of service is presumed to be service reasonably calculated, under all the circumstances, to apprise the defendant of the pendency of the action and to afford a reasonable opportunity to appear and defend. Other methods of service might accomplish the same thing. Subsection 4 F.(4) and section 4 G. also make clear that any technical defects in the return, form of summons, issuance of summons, and persons serving do not invalidate service if the defendant received actual notice of the existence and pendency of the action. Note, however, that summons must be served and returned; mere knowledge of the pendency and nature of the action will not require the defendant to appear and defend. (O.L.I., 33, emphasis added except "may" in line 7!)

It appears quite obvious from a reading of Rule 7 and the appended comments that the only mandatory feature is that the method used for service shall, as the title to Section 7 D.(1) indicates, require notice in a "manner reasonably calculated" to let the defendant know he or she is the subject of a civil action.

On the other side of the discrepancy, however, is your analysis. You state that

> ORCP 7 D(2), describing methods of service, does not authorize use of all described methods against all defendants and in all cases. Use of the different methods in a particular case is governed by section 7 D.(3) and (4). Thus, although mail service is described, it is only available as an alternative method of service upon a corporation or for service in motor vehicle cases.
> (O.L.I., 237, emphasis added.)

You continually use the word "authorize" to describe the methods of service other than personal service and explicitly state that these other methods are only available as provided. ORCP Rule 7 makes no such distinction when it continually uses the permissive wording "may" in reference to the specific methods of service.

Perhaps the issue is made less clear when the "official" comments imply that ORCP 7 D. sets forth "preferred"

and "alternative" methods. (O.L.I., 34.) However, no such hierarchy is found in Rule 7 itself. The rule only states that "Service may be made upon specified defendants as follows ... (ORCP 7 D.(3), emphasis added.) Again, the persuasive "may" is worlds apart from the mandatory "shall".

I submit that service by mail, under the procedure set forth in ORCP 7 D.(2)(d), is allowed in all cases where it gives the requisite notice to the defendant. I further submit that service by mail would in most instances be the preferable form of service. The method is economical, speedy, provides a rapid confirmation as to the correctness of the defendants' address, and removes an excessive burden from the understaffed and under-funded sheriff offices.

The method is certainly more economical than personal service. Our staff cost in preparing the necessary documents is identical for either personal or mailed service. However, the additional postal charges for "certified - return receipt requested" postage is only $1.25 versus the minimum $12.50 charge imposed by most sheriffs. In small actions with two or three defendants, the differences in cost to the plantiff, or defendant if the plantiff prevails, are significant.

Service by mail is also often much speedier then using either an official or independent process server. In one recent case in which this firm was involved, more than four weeks passed before we were notified that the summons could not be personally served since the defendant had moved from that county. Another three weeks passed before the defendant was ultimately served in the correct county. Had we used mailed service, we would have known in less than one week if the defendant had moved, leaving no forwarding address. If he had moved and left a forwarding address, for another 10 cents we can determine that address at the time the signed receipt is returned. In any case, a receipt signed by the defendant is good assurance that the defendant has been "apprised of the pendency of the action".

In closing, could you or the council please advise us as to the intent of Rule 7. Is it a wide-open rule applying the essential features of Mullane, as the Rule appears on its face to be, with the specific methods of service given as guidance to the extent and meaning of "reasonably calculated"; or is it a rule of hierarchies and specifics, setting forth methods for service as stringent as the old statutes?

For the reasons enumerated above, I hope it is the former rather than the latter. Otherwise, the saving provisions of ORCP 7 G. lose all their meaning, since specific rules without a specific sanction for their abuse lose all meaning.

I look forward to hearing from you on this matter. Hopefully, we can arrive at the intent of the council and the understanding of the legislature.

Thank you for your assistance.

Sincerely,

Robert Andrew Browning
Attorney at Law

RAB:alm

cc: Oregon Law Institute
Richard Slottee - Northwestern Legal Clinic

OADC
OREGON ASSOCIATION OF DEFENSE COUNSEL

March 12, 1980

Fredric R. Merrill
Executive Director,
Council on Court Procedures
School of Law
University of Oregon
Eugene, Oregon 97403

Dear Fred:

The Oregon Association of Defense Counsel, as an organization, has not previously taken positions on particular rules being promulgated or considered by the Council on Court Procedures. The Association is in the process of re-evaluating that position and, hopefully, will formulate a long-term policy for distribution to the membership of proposed rules for their comments which would be forwarded to the Council on Court Procedures.

Very truly yours,

James F. Spiekerman
Secretary-Treasurer

JFS:jmc

GREEN & GRISWOLD
LAWYERS

BURL L. GREEN
JAMES B. GRISWOLD
MICHAEL R. SHINN
PAMELA McCARROLL THIES

9TH FLOOR JACKSON TOWER
806 S. W. BROADWAY AT YAMHILL
PORTLAND, OREGON 97205
TELEPHONE 228-1221

March 14, 1980

Fredric R. Merrill
Executive Director
Counsel on Court Procedures
School of Law
University of Oregon
Eugene, Oregon 97403

Dear Fred:

I understand that the Council is re-proposing a rule relating to discovery of expert witnesses. I do not have a copy of the proposal, but am told that it is very similar to the one turned down by the legislature in 1979.

As you are aware, I am very much opposed to this rule and would like to be sent a copy of the proposal and be notified, well in advance, of the meeting at which the proposal will be considered by the Council.

In my judgment, such a rule would virtually eliminate meritorious professional negligence cases. It would also give the defense a great advantage, in that they can get "the book" on the numerically few experts who are willing to testify for the plaintiffs, where the plaintiffs cannot have the same advantage because of the numerically far greater experts available to industry and to the professional.

Very truly yours,

Burl L. Green

e
cc: Donald W. McEwen

COSGRAVE, KESTER, CROWE, GIDLEY & LAGESEN
ATTORNEYS AT LAW
622 PITTOCK BLOCK
921 S.W. WASHINGTON ST.
PORTLAND, OREGON 97205
TELEPHONE (503) 227-3711

RANDALL B. KESTER
WALTER J. COSGRAVE
AUSTIN W. CROWE, JR.
JAMES H. GIDLEY
FRANK H. LAGESEN
EUGENE H. BUCKLE
DAVID P. MORRISON
SAMUEL C. JUSTICE

ROBERT F. MAGUIRE
(1886-1976)
ROY F. SHIELDS
(1888-1966)

March 19, 1980

C

Judge William M. Dale, Jr.
Multnomah County Courthouse
Portland, Oregon 97204

Frank H. Pozzi
Attorney at Law
Standard Plaza
1100 S. W. Sixth Avenue
Portland, Oregon 97204

O

Laird C. Kirkpatrick
Attorney at Law
204 Federal Building
211 E. Seventh Avenue
Eugene, Oregon 97401

Re: Council on Court Procedures

Gentlemen:

P

At the Subcommittee meeting on March 17, 1980, it was suggested that we have a hearing before the Subcommittee at which time those interested in discussing the proposed changes suggested by Mr. Pozzi could appear and provide background information to the members of the Subcommittee for their consideration in making a recommendation to the Council as a whole.

Y

In a discussion with Laird Kirkpatrick, he suggested that perhaps there would be additional members of the Council who would feel a need to hear the testimony in order to be in a position to make a judgment as to whether they concurred in the proposed recommendations by the Subcommittee. The schedule is such that the members of the Subcommittee could not appear at any dates set in April or May with the possible exception of Saturday, May 10th.

In a discussion with Mr. McEwen, we considered that it might be more appropriate to have one hearing dedicated to class actions sponsored by the whole Council which would satisfy the requirement of a public meeting and also give sufficient background to the Council as a whole as well as the Subcommittee members regarding any proposals. The Subcomittee could then take that information and formulate their proposal to be con-

sidered by the Council as a whole.

There was also a suggestion that any proposal which would consider a provision providing for attorneys' fees would be beyond the scope of the jurisdiction of the Council on Court Procedures. Perhaps the Subcommittee or Council at the April meeting should initially consider whether that matter should be discussed at the hearing. Mr. McEwen suggested that the Council as a whole consider setting the date for the hearing sometime in May or June so that they would have the opportunity to be available. At that time we could also consider the attorneys' fees provision suggested by Mr. Ponzi.

Prior to the Council meeting on April 12, 1980, I will contact the Bar Bulletin and the Multnomah Lawyer to determine their printing deadlines for notices and will also contact the O. T. L. A. and the O. A. D. C. concerning the possibility of their providing notice to their members of the public hearing.

Very truly yours,

Austin W. Crowe, Jr.

AWC:jmc

cc: Fredrick R. Merrill
Donald W. McEwen

MEMORANDUM

TO: COUNCIL

FROM: Fred Merrill

RE: Proposed Discovery Rule

DATE: April 4, 1980

The enclosed letter was sent to me by Jere Webb relating to the proposed expert witness rule. He also surveyed members of his firm as to preference between the federal rule, proposed Rule 36 B.(4), and no rule. The results were:

Federal rule	13
Proposed rule	0
No rule	0
Other	2

The written comments of some responding attorneys will be available at the meeting.

FRM:gh

Encl.

STOEL, RIVES, BOLEY, FRASER AND WYSE

(DAVIES, BIGGS, STRAYER, STOEL AND BOLEY)
(RIVES, BONYHADI & SMITH)

LAW OFFICES
900 S W FIFTH AVENUE
PORTLAND, OREGON 97204

(503) 224-3380

ALLAN R. ABRAVANEL
JEFFREY MICHAEL ALDEN
RICHARD E. ALEXANDER
RICHARD D. BACH
PAUL L. BOLEY
ERNEST BONYHADI
PHILLIP D. CHADSEY
HARRY S. CHANDLER
CLEVELAND C. CORY
KAREN K. CREASON
THOMAS F. DEERING
JOHN DETJENS, III
BARNES H. ELLIS
EDWARD L. EPSTEIN
HOWARD M. FEUERSTEIN
RICHARD A. FRANZKE
GEORGE H. FRASER
GEORGE M. GALLOWAY
LEONARD A. GIRARD
WILLIAM J. GLASGOW
GERSHAM GOLDSTEIN
RONALD S. GROSSMANN
CHARLES H. HABERNIGG
ROBERT F. HARRINGTON
JOHN R. HAY
RICHARD A. HAYDEN, JR.
DAVID G. HAYHURST
HENRY H. HEWITT
CHARLES F. HINKLE
ROBERT H. HUNTINGTON
STEPHEN T. JANIK
VELMA JEREMIAH
RICHARD C. JOSEPHSON
JOEL D. KUNTZ
DEXTER E. MARTIN
WILLIAM M. McALLISTER
CHARLES J. McMURCHIE
GEORGE K. MEIER, III
DAVID P. MILLER
GREGORY R. MOWE
HARDY MYERS
THOMAS R. NICOLAI
MILO E. ORMSETH
TERRENCE R. PANCOAST
MARK H. PETERMAN
CAMPBELL RICHARDSON
ROBERT L. RIDGLEY
GEORGE D. RIVES
RICHARD E. ROY
JOHN M. SCHWEITZER
PATRICK J. SIMPSON
HUGH SMITH
THOMAS B. STOEL
MANLEY B. STRAYER
JERE M. WEBB
CLARENCE R. WICKS
MARCUS WOOD
WILLIAM W. WYSE

Counsel
DAVID L. DAVIES
HUGH L. BIGGS

GAIL L. ACHTERMAN
CHARLES F. ADAMS
STEPHEN E. BABSON
MARGARET M. BAUMGARDNER
HENRY C. BREITHAUPT
MATTHEW W. CHAPMAN
BERTRAND J. CLOSE
NANCY L. COWGILL
C. PAUL DAGLE
E. JOSEPH DEAN
CHRISTINE L. DICKEY
MARK R. FEICHTINGER
RANDOLPH C. FOSTER
SUSAN P. GRABER
DAVID W. GREEN
STEPHEN L. GRIFFITH
THOMAS G. P. GUILBERT
SUSAN M. HAMMER
NORMAN D. HOLLY
PAMELA L. JACKLIN
PETER R. JARVIS
JENNIFER J. JOHNSON
CHARLES S. LEWIS, III
GREGORY H. MACPHERSON
SUSAN F. MANDIBERG
THOMAS H. NELSON
MARGARET HILL NOTO
BRUCE K. POSEY
GUY A. RANDLES
LOIS O. ROSENBAUM

March 26, 1980

Mr. Fredric R. Merrill
Executive Director
Council on Court Procedures
School of Law
University of Oregon
Eugene, OR 97403

Dear Fred:

Re: Discovery of Expert Witnesses

Out of curiosity I circularized the trial lawyers in our firm for their views on the proposed rule pertaining to discovery of expert witnesses. For whatever interest they may be, the responses are attached.

I am also enclosing a copy of a letter received today from the firm of Esler & Schneider. I am not sure why this was directed to me, but guess that it has to do with the fact that I am currently serving on a committee of the trial practice section of the Oregon State Bar which has been asked to review the new rules proposed by the Council.

I do not know whether you are interested in having this sort of input but thought there would be no harm in sending it along.

Very truly yours,

Jere M. Webb

jek

Enclosures

ESLER & SCHNEIDER
ATTORNEYS AT LAW
610 S.W. BROADWAY, SUITE 510
PORTLAND, OREGON 97205
(503) 223-1510

March 25, 1980

Jere M. Webb
Stoel, Reeves, Boley,
Fraser & Weiss
900 S.W. 5th Avenue
Portland, Oregon 97204

Re: Draft of Proposed Rule Relating to Discovery of Expert Witness

Dear Jere:

Thank you for sending to me a copy of the proposed new Rule regarding discovery of expert witnesses.

This firm favors the idea of specific provisions in the Oregon Rules of Civil Procedure governing discovery of expert witnesses. This firm favors the broader discovery provisions set forth in FRCP 26(b)(4)(A)(i) over those set forth in the proposed Rule. In our opinion, just knowing the expert's name and the subject matter on which he is expected to testify is not enough information for a proper preparation of a case for trial.

This firm is also concerned about subsection B.(4)(e) which appears to broaden the scope of the term "expert witness," especially when read in conjunction with subsection B.(4)(d). A person should not be insulated from the taking of his deposition simply because he is expected to answer one or two questions at trial in an expert capacity.

This firm also believes there should be some provision for allowing other discovery procedures to be used to secure information from expert witnesses in extraordinary circumstances. For example, suppose the expert witness is the only one who has had an opportunity to examine tangible evidence which is no longer in existence. It would not do the parties seeking discovery much good to know the expert was going to testify at trial on the findings of his examination. In that situation, this firm believes the party seeking discovery should be allowed to take

MARY DAHLGREN
ATTORNEY AT LAW
468 STATE STREET
SALEM, OREGON 97301

SUITE 202
UNION TITLE BUILDING

370-8700
AREA CODE 503

April 8, 1980

Carl Burnham, Jr.
Attorney at Law
89 S.W. Third Avenue
P.O. Box S
Ontario, Oregon 97914

Dear Mr. Burnham:

Bruce Smith, Chairman of the Procedure and Practice Committee, asked that I write to you summarizing the recommendations of the Committee on proposed Rule 68. The following are the suggested changes:

A(2) Definition of "Costs." "Costs are the fixed sums provided by ORS 20.070 intended to indemnify a party where attorney fees are not available." The Committee feels this would more clearly separate the three terms but realizes that there will be some problems with existing statutes. For example, ORS 20.010 defines "costs" as "certain sums by way of indemnity for... attorney fees." While this section will be superseded by Rule 68, other statutes will remain in effect with such language as - "the prevailing party is entitled to reasonable attorney fees as part of his costs."

A(3) Disbursements. The words "or costs" should be inserted in the phrase "other than for attorney fees or costs...." The Committee also suggests adding filing fees, trial and reporter fees, and sheriff's service fees to the examples given.

B(1) Allowance of Costs & Disbursements. The Committee suggests rewording as follows: "In any action, costs and disbursements shall be allowed to the prevailing party except where these rules or other rule or statute expressly provide otherwise." The suggested change is for clarity and also, the Committee members were unanimously opposed to any discretion being given to the court, feeling that the award should be mandatory except in those instances listed in C(1)(a)(b) and (c).

C(2)(a) Asserting Demand For Attorney Fees. The sentence "Such allegations or demand shall be taken as substantially denied...or affirmatively admits such liability.", should be reworded, again for clarity, as follows: "Such allegation shall be taken as substantially denied and no responsive pleading shall be necessary. The party against whom the award of attorney fees is sought may admit liability for attorney fees under Rule 45, may affirmatively admit liability, or may object to the entry of attorney fees under paragraph C(4)(b) of this rule."

C(2)(b) Costs & Disbursements. The Committee believes that costs and disbursements should be required in the prayer, for notice (disbursements can amount to a considerable sum in many cases) and because costs and disbursements would not be awarded in a default situation unless they were included in the pleading.

C(4) Award of Attorney Fees. The Committee would like to see some guidelines for the court to follow in assessing the amount of attorney fees to be allowed because of the wide variance among the courts on this issue.

If you have any questions concerning any of the recommendations please don't hesitate to call me.

Very truly yours,

Mary Dahlgren

MD/hs

cc: Bruce E. Smith
Fred W. Merrill
Don McEwen
Judge Wm. Dale

YTURRI, ROSE, BURNHAM & EBERT
ATTORNEYS AT LAW

ANTHONY YTURRI
GENE C. ROSE
CARL BURNHAM, JR.
GARY J. EBERT
CLIFF S. BENTZ

89 S. W. THIRD AVENUE
P. O. BOX 5
ONTARIO, OREGON 97914
(503) 889-5368

April 9, 1980

COUNCIL ON COURT PROCEDURES
Attention: Don McEwen, Chairman
HARDY, McEWEN, NEWMAN, FAUST & HANNA
Attorneys at Law
1408 Standard Plaza
1100 SW 6th Avenue
Portland, OR 97204

Gentlemen:

On April 5, 1980, the Bar Committee on Procedures and Practice discussed and reviewed the proposed ORCP Rules 78, 79, 80, and 81. The Committee is now prepared to set forth its comments and recommendation regarding these four rules.

1. Rule 78 - Attachment.

The Committee on Procedure and Practice recommends that this rule be adopted, but suggests that several clarifications be made.

A. Section C(1) refers to "real property within Rule 80A". The description of real property contained in Rule 80A is not clear and should be clarified.

B. Section D(1) states that "the lien arises at the time the claim is delivered to the Clerk". This procedure could cause difficulty since actual time of delivery may not be known. The Committee suggests that this be changed to "the lien arises at the time the claim is entered of record by the Clerk".

2. Rule 79 - Provisional Process.

The Committee recommends that this rule be adopted.

3. Rule 80 - Enforcing Judgment Against Interest in Real Property.

The Committee, by a four to three vote, recommends that this rule be adopted with the following changes:

A. Section C(2) discusses notice to junior lienors. This section currently provides that the creditor, following serving notice of foreclosure, shall "serve on each holder of an interest in the property junior to his own whose interest was of record at least one week before the date of notice: . . .". The method of service should be more clearly delineated. The Committee suggests that service on junior lienors be by mail.

B. Section C(4)(b)(iv) provides that, upon transfer of the debtor's property to the applicant, the applicant's judgment against the debtor "is satisfied wholly or in the amount of the tax assessor's appraised value of the property, whichever is less, . . .". The Committee believes that selection of the assessed value of the property as the measure of the satisfaction of judgement may result in an unwarranted benefit to the creditor since the tax assessed value may well not reflect the actual value of the property. It is suggested that provision be made for a hearing on the value of the property if the debtor so elects.

4. Rule 81 - Enforcing Judgments Against Interests in Land Sale Contracts.

The Committee recommends that Rule 81 be referred back to the Committee for further work. The Committee believes that the following sections of the proposed rule require clarification:

A. Section B should more clearly delineate the fact that the purchaser's interest being discussed is an interest held by a judgment debtor. This is not clear from the language now used.

B. Section C, discussing the vendor's interest, does not appear to discuss procedures applicable to recorded land sale contracts.

The comments to the above discussed rules prepared by the Committee on Procedure and Practice subcommittee on Rules 78, 79, 80, and 81 are attached hereto for the Council's review.

Very truly yours,

YTURRI, ROSE, BURNHAM & EBERT

By
Cliff S. Bentz

CSB:nb
encls.

cc: Bruce Smith, Committee Chairman
James L. Knoll, Committee Secretary
Professor Ronald B. Lansing, Lewis and Clark Law School
Douglas McCool
Richard Hayden
Levi Smith
Robert McConville
Mary Dahlgren
David Vandenberg
Dean DeChaine

PROCEDURE AND PRACTICE COMMITTEE

COMMENTS

RULE 78 - ATTACHMENT

A. (1) This section is almost identical to ORS 29.110. Its language has been slightly clarified but attachment will be available under the new rule in the same situations it is allowed under the present statute.

A. (2) This section is the same as ORS 29.410. It continues present policy in that no attachment, injunction or execution may be issued against any bank or its property before inssuance of a final judgment.

A. (3) This is a new section. It provides that a prerequisite to issuance of a writ of attachment is the issuance of an order under Rule 79 that provisional process may issue.

B. (1) This section is derived from ORS 29.130 and, in fact, utilizes the exact language of the first portion of the present statute. However, the author has clarified the language of the new rule, substituting the word "bond" for the word "undertaking" and has also rephrased a portion of the present statute's language.

The author has deleted entirely all requirements of an affidavit concerning the type and nature of the surety involved. Instead, the new rule simply requires that the plaintiff file a "corporate surety bond." This is actually not a change from the old statute, since under ORS 743.732 no affidavit is

necessary so long as the surety company providing the bond was authorized to do business in Oregon.

The one major change made is contained in Section B.(2). This section provides that, upon a motion by the defendnat, the court may require the plaintiff to provide additional security if the defendant's potential costs for damages exceed the amount of the attachment bond.

C. Subsection C replaces ORS 29.140. ORS 29.140 defines attachable property as "any property not exempt from execution." Subsection (1) of the new rule lacks clarity. C (1) refers to "real property within Rule 80 (A)." Rule 80 (A) provides a definition of the term "real property." Unfortunately, land sale contract interests, contingent and equitable interests and short-term leaseholds are discussed in Rule 81 and Rule 83 (C). It is not clear whether the type of real property interests discussed in Rules 81 and 83 (C) are included in the definition found in Rule 78(C)(1).

The "largely illusory constriction" is probably justified given the policy reason set forth in the author's comment to Rule 78 wherein he states that " a plaintiff should not be allowed to invoke the more complex procedures for levying on non-garden variety assets when it is not certain that he will win the case."

METHOD OF ATTACHMENT:

D.(1) Real property - This section replaces ORS 29.170(1) Under the current statute, real property is attached by having the clerk issue a writ to the sheriff directing the sheriff to

the location of the property. The sheriff prepares a certificate containing the title of the cause, the names of the parties to the action, the description of such real property as is to be attached, and a statement that the real property has been attached at the instance of the plaintiff. This certificate is then delivered to the County Clerk. The Clerk then files it and records it in a book kept for that purpose. ORS 29.190. The filing of a certificate with the Clerk causes the attachment to be perfected.

D. (1) Dispenses with the need to utilize the sheriff. After the plaintiff has obtained an order that provisional process may issue under Rule 79, the plaintiff may obtain a lien on the defendant's real property by simply filing with the County Clerk a "claim of lien." The new rule provides that the lien arises at the time that the claim is delivered to the Clerk. I should point out that this is going to cause some problems since the actual time of delivery may be earlier than the time of filing. I would suggest that the lien arise at the time that the claim is filed by the Clerk rather than delivered to the Clerk.

D.(2) Has also been streamlined to avoid the necessity of having the sheriff issue a writ. Note that the rule requires the notice of garnishment to reflect the fact that it is issued by way of attachment and not by way of execution.

D.(3)(a) Is a new addition and follows the guiding principal set forth in Rule 75(B)(3). This principal is that the defendant be left with possession of the property whenever possible. Section D (3)(a) therefore provides that the plain-

tiff may obtain an attachment lien by filing a claim of lien with the Clerk of the court that issued the writ and also by filing the claim of lien in the same office or offices that a financing statement would be required to be filed. It is not clear whether the attachment lien would be perfected at the time of filing with the Clerk or at the time of filing with both and Clerk and the office that a financing statement would be required to be filed. Consideration might be given to a clear statement of the actual time of perfection of such a lien.

D.(3)(b) Provides some additional security to the plaintiff by allowing him to obtain actual possession of the chattels if filing of the lien is not sufficient security.

D.(4) Is derived from ORS 29.160 and ORS 29.170(2). It simply allows a plaintiff to cause the sheriff to attach and safely keep certain described real property of the defendant The procedure for such attachment is almost identical to the current procedure.

E. Disposition of attached property after judgment, is taken from ORS 29.380 and 29.390. The author has dispensed completely with any language referring to sale of the property The author has also deleted any reference to the sheriff applying the property toward satisfaction of the judgment. This section might be clarified somewhat if a reference to Rule 80 and its treatment of real property was included.

PROCEDURE AND PRACTICE COMMITTEE

COMMENTS

RULE 79

Rule 79 sets forth the basis for provisional process. It is lifted directly from ORS 29.020 through 29.075.

No changes have been made by Professor Lacy.

The provisional process statute was enacted in 1973 in its current state. Of course, as is noted by Professor Lacy, ORS 29.040 was repealed by the 1979 legislature.

PROCEDURE AND PRACTICE COMMITTEE

COMMENTS

RULE 80

A. Scope: The author has selected, for purposes of defining an interest in real property, a vested legal interest greater than a leasehold of two years unexpired term. Unfortunately, as indicated earlier, the author is not clear in whether land sale contract interests in Rule 81 and contingent and equitable interests and short-term leaseholds are also included. Of course, the implication is that they are. However, it would seem clarity could be achieved by simply saying that these real property interests are also within the scope of the term "real property."

B. Judgment Liens:

B.(1). This section sets forth the fact that the order of priority of a judgment lien is determined by the time of docketing the judgment in the county in which the land lies.

B.(1)(a). This section provides that where real property has been attached and judgment is subsequently recovered, the judgment retains the priority of the attachment lien.

B.(1)(b). As the author has indicated in his comment, this paragraph sets forth the rule found in Creighton vs. Leeds, Palmer and Co., 9 OR 215 (1881).

B.(2). How lien obtained.

B.(2)(a)(i). This is ORS 18.320 and 18.350(1).

B.(2)(b). This is ORS 46.276.

B.(2)(c). As is indicated by the author, is derived

from ORS 18.380 and 18.390.

B.(3). This is ORS 18.360.

B.(4)(b) and B.(4)(c) are ORS 18.350(2) and 18.350(3).

C. This section effects a major change in the procedure for selling a debtor's real property. Essentially, rather than a public sale, the new rule provides for reduction of the judgment by the amount of the tax assessed value of the real property, less several other allowances. Since this section has such a far reaching affect, it is suggested that it be read closely by each member of the committee and set for further review at a future hearing.

C.(1). This sets forth the form of notice to the debtor. The section specifically provides that the notice must be served upon the debtor in the same way that a summons would be served. The notice must have a copy of the entire rule, 80(C),attached to it, a copy of all of subsection C.(4), and a copy of the homestead exemptions available to the debtor.

C.(2). This section provides that the creditor serving the notice of foreclosure serve upon each junior interest holder a specified notice. Unfortunately, the method of service is not clearly delineated.

C.(3). Claims of junior lienors. Section C.(3) discusses the procedures and remedies available to junior lien holders. Essentially, the junior lien holders are allowed to request a hearing on the validity or amount of any filed claim. In addition, the junior lien holders are given the right to "purchase" the positions of prior lien holders.

This is done through the payment by the junior lien holder of the amount presently due the foreclosing creditor and all filed claims senior to the junior lien holder's position. All amounts so paid are added to the judgment of the redeeming creditor.

C.(4). Order for sale by debtor or transfer to creditor. Section C.(4)(a) provides that following the expiration of forty (40) days from the date of notice of foreclosure, the debtor may apply to the court under Rule 77(F)(2) for sale of the property. If this is not done, at any time after six months from the date of notice of foreclosure, the foreclosing creditor is given the right to request that the court order transfer of ownership of the property to him and also discharging all junior interests therein.

C.(4)(b)(iv). This section sets forth the contents of the order of transfer. Specifically, the order does the following:

(1) Directs satisfaction of a homestead exemption claimed;

(2) Vests title in the transferee free and clear of all liens of those holders of junior interests who were served with notice;

(3) Declare that the transferee is personally and primarily liable to pay any obligation secured by a lien on the property, senior to that of the foreclosing creditor;

(4) Order that the applicant's judgment be fully satisfied or reduced by the amount of the tax assessor's appraised

value of the property, whichever is less.

The amount of the reduction of the judgment shall be reduced by any amounts paid to the debtor for his homestead exemption and also by the amount of any debtor's obligations assumed by the transferee.

The theory underlying this procedure is that all junior lien holders or the debtor will step in and acquire the rights of the foreclosing creditor so long as the value of the property exceeds the amount of the debt. As the author points out, this system theoretically should result in a more equitable treatment of debtors against whom the foreclosure remedy has been utilized.

PROCEDURE AND PRACTICE COMMITTEE

COMMENT

RULE 81:

Rule 81 applies to all interests created by contracts for the sale of interest in real property. It is specifically made applicable to earnest money receipts.

The rule is divided into two parts, the first concerning the purchaser's or vendee's interest (§B), the second applying to the seller's or vendor's interest. (Subsection C)

Section B.(1) proceeds upon the premise of "equitable conversion", providing the creditor with a method to obtain a lien against the vendee's contractual interest. Subsection B.(4) provides that a copy of the application and notice must be served upon the purchaser and the vendor. Again, the author has failed to indicate the nature of the required service.

Section B provides for a hearing on the creditor's application at which other creditors and the judgment debtor may appear. The court is given the power to dismiss the application or grant relief according to the circumstances shown at the hearing. A number of proposed methods of relief are set forth in the rule.

Subsection (c) clearly states that a judgment against a contract vendor is not a lien upon the real property if the

property was sold before the judgment was docketed. The rule states that should the property be repossessed or otherwise re-acquired by the vendor, the judgment shall become a lien as in the case of after-acquired property.

Section C provides that the creditor has a lien against the vendor's right to receive payments under the contract and on the vendor's title reserved as security for such payments. This lien may be perfected by serving a copy of the judgment and a notice that future contract payments must be made to the judgment creditor upon the purchaser of the property. Again, no mention is made of the method of service.

The purchaser is protected by language in the rule providing that the creditor's lien is extinguished to the extent that payment had been made to the vendor prior to service of the judgment and notice.

C.(1)(c) This section provides, again, that even if the contract has been recorded, the judgment against the vendor is not a lien on the real property. The creditor is given the power to compel sale of the vendor's contractual interest under section C(2). Section C.(3) further clarifies the fact that statutory liens securing obligations of the vendor do not attach to real property that is the subject of a land sale contract.

The author, for some reason, has limited the scope of section C.(1)(b) to situations where the contract has not been recorded. Although section C.(2) would provide a remedy

to creditors holding judgments against vendors who own long-term contractual rights, no specific arrangements are made for those dreditors who might wish to proceed under C.(1)(b) if the contract has been recorded.

STOEL, RIVES, BOLEY, FRASER AND WYSE

(DAVIES, BIGGS, STRAYER, STOEL AND BOLEY)
(RIVES, BONYHADI & SMITH)

LAW OFFICES
900 S W FIFTH AVENUE
PORTLAND, OREGON 97204

(503) 224-3380

April 10, 1980

Mr. Austin W. Crowe, Jr.
Attorney at Law
622 Pittock Block
921 SW Washington Street
Portland, OR 97210

Dear Austin:

Enclosed herewith is some material which we submitted to the Senate Judiciary Committee in 1979. I also enclose a copy of my analysis of proposed amendments which was given to the legislators shortly before the vote in the Senate.

In addition, I have enclosed a memorandum regarding the proposed Uniform Class Actions Act which may be of help.

Very truly yours,

William M. McAllister

William M. McAllister

WMM:map
Enclosures

Analysis of Proposed Amendments to ORS 13.260

A. General Observations

The existing law was passed in 1973 as a result of compromises between representatives of plaintiffs and defendants. It has been in effect for nearly six years and has permitted class recovery of damages in a number of instances, i.e., recovery of escrow charges and recovery of interest on insurance and tax deposits. The proponents of the amendments made no showing that there was a need for a change - that meritorious class actions were abandoned because of problems with the existing law. The amendments are aimed at shifting the burden or financing class actions to defendants and eliminating the need for any meaningful communication with class members.

Since 1973 attorneys have brought class actions which have a reasonable probability for success. Given the uncertainty of judicial construction of new amendments, any change in the balance which was achieved in 1973 increases the risk of a proliferation of marginal claims and strike suits.

The judges are familiar with the existing law and have applied it in a number of cases. In addition, the Supreme court has interpreted the existing law. Evidentiary of the the Court's concern about any change in the existing

law is the memorandum provided to the Senate Judiciary Committee by Judge Beatty, concurred in by Judge Dale, requesting that the Council on Court Procedures consider the proposed amendments before they become law.

B. Specific Changes

1. Removal of Requirement that Notice by Mail Be Given to Class Members Whose Potential Monetary Recovery Is Estimated to Be Less than $100

It is easy to lose sight of the fact that the aggregate damages in a class action may be in the millions, but no class member may be entitled to more than $100. The proposed amendment makes it possible for a court to order notice by advertisement in such cases. If a court later holds that advertised notice was not reasonable and the named plaintiff loses, the persons who did not get actual notice may be able to sue the defendant again.

2. Discretionary Assessment of the Cost of Notice to Defendant

Neither Federal Rule 23 nor the Uniform Class Action Act allows assessment of all the cost of initial notice against defendant.

It is basically unfair to require defendant to pay for notice to a plaintiff. In effect defendant is paying to tell someone that a claim has been made by another person on his behalf and unless he expends time and effort to remove himself from the class he also is making a claim.

get relief, the person has to make a claim. This law has been in effect for nearly six years. Now the plaintiffs want to change the balance without demonstrating any need for such a change.

As a matter of fairness, litigants ought to have to say at some point in the proceedings that they want to make a claim. In cases where amounts due are known, defendants have sent notices which say a judgment has been rendered against the defendant and you are due X dollars. If you want to make a claim, put a check mark in the box and return the claim form. If plaintiffs do not return the form, it is hard to say that defendants have been allowed to keep ill gotten gains. Some people do not want to make a claim against someone everytime something goes wrong in their life.

C. Conclusion

The proponents of the amendments say they are representing the little guy. If you take the three amendments as a whole it is possible that plaintiff's attorneys representing one person whose injury has been minimal can recover millions of dollars without ever having communicated with members of the class other than to send them a check. It seems fair that if people are representing the little guy, they ought to at least be required to communicate with him and determine if the little guy wants to make a claim.

Oregon Trial Lawyers Association

1178 Chemeketa St., N.E., Suite 206 • P.O. Box 2064
Salem, Oregon 97308
Phone (503) 399-8207

April 11, 1980

Council on Court Procedures
Fredric R. Merrill
Executive Director
School of Law
University of Oregon
Eugene, Oregon 97403

Re: Proposed Rule on Disclosure of Expert Witnesses

Dear People:

It is my understanding that the Council is again considering adopting a rule that would require the advance disclosure of expert witnesses in personal injury cases.

The Oregon Trial Lawyers Association is on record as opposing such a rule, as we opposed it when it was proposed during the last Legislative Session.

At first glance, such a rule appears to be fair, in that it appears to avoid surprise at trial, and is part of the federal trend toward more extensive discovery.

However, such a rule in its operation would operate unfairly against injured persons, and most especially those injured by defective products and medical negligence. It is common knowledge among plaintiff attorneys that qualified expert witnesses willing to testify in court are difficult to obtain.

This is a particularly acute problem in the area of medical negligence. Doctors are often very reluctant to testify against other doctors. They are often subject to pressure not to testify from other doctors and defense lawyers. Our member attorneys have often had doctors, originally willing to testify, later refuse to testify after their names had been revealed

to defense counsel. We cannot document the exact nature of the pressure which seems to be brought on these doctors, but it certainly does exist.

It is also common knowledge that defense lawyers have far greater resources with which to defend most personal injury cases, and if the proposed rule were adopted, the defense side would have an even greater advantage over persons by defective products and medical negligence.

Under the current rules, defense counsel already have access to any reports of doctors which are in existence. Often plaintiff expert witnesses have prepared reports which are discoverable by defense counsel now. Thus defense counsel are not completely without access to information on plaintiffs' experts.

On behalf of the Board of Governors of the Oregon Trial Lawyers Association, I urge the Council on Court Procedures not to adopt the proposed rule.

If I can be of any further assistance, or can provide any further information, please contact me.

Sincerely,

Clayton C. Patrick
Attorney at Law
Executive Director

CCP:cpt