N O T I C E

TO: COUNCIL ON COURT PROCEDURES

FROM: Fredric R. Merrill

RE: CHANGE IN PUBLIC MEETING DATE ON CLASS ACTIONS
FROM 6-14-80 to 6-28-80

Because the public meeting date on class actions scheduled for June 14th fell on the day of the Rose Festival parade, it appeared impossible to have the meeting as scheduled.

The meeting date has been changed to Saturday, June 28, 1980, commencing at 9:30 a.m., County Commissioners' Meeting Room, Rm. 602, Multnomah County Courthouse, Portland, Oregon.

It was possible to correct the public notices before they were published. A copy of the NOTICE OF PUBLIC HEARING ON CLASS ACTIONS is attached.

NOTE: Copies of this notice of change in meeting date and the NOTICE OF PUBLIC HEARING ON CLASS ACTIONS has been furnished to all members of the Bar who appear on the Council's monthly mailing list.

5-12-80

A G E N D A

COUNCIL ON COURT PROCEDURES

9:30 a.m., Saturday, June 28, 1980

COUNTY COMMISSIONERS' MEETING ROOM (Room 602)

Multnomah County Courthouse

Portland, Oregon

---

1. Public hearing on class actions

2. Scheduling public meetings; dates for distribution of tentative drafts of rules

3. Proposed rules relating to referees, submitted controversies, form, entry, vacation of judgments, and default judgments - report of Jackson subcommittee

4. Further consideration of possible revisions to ORCP 1 - 64

5. Approval of minutes of meeting held May 10, 1980

6. NEW BUSINESS

# # #

NOTICE OF PUBLIC HEARING ON CLASS ACTIONS

The Council on Court Procedures has received and is considering changes in Oregon Rule of Civil Procedure 32 relating to class actions. The Council wishes to secure public comment relating to class actions and possible problems with ORCP 32. The Council will hold a public hearing relating to class actions at 9:30 a.m. on Saturday, June 14, 1980, in the County Commissioners' Meeting Room in the Multnomah County Courthouse, Portland, Oregon.

The specific proposals which have been made to the Council include the following:

1. Eliminate the required 30-day prelitigation notice in 32 I. and J.

2. Eliminate personal notice when plaintiffs claims are less than $100 and allow the court to order the defendant to pay for the initial notice.

3. Eliminate the requirement that affirmative claims for damages be submitted by class members and allow the court to distribute unclaimed amounts of damages in the manner most equitable under the circumstances.

4. Allow class actions to recover statutory penalties.

5. Eliminate ORCP 32 B.(3)(d)(e),(f), 32 C., and 32 G.(4).

Written comments and suggestions may be submitted to the Council prior to the hearing. Copies of the suggested changes may be obtained by writing the COUNCIL ON COURT PROCEDURES, University of Oregon School of Law, Eugene, Oregon 97403, or by calling (503)-686-3880 or 686-3990.

OREGON STATE BAR

1776 S.W. MADISON STREET
PORTLAND, OREGON 97205
503-224-4280
FREE WATS LINE: 1-800-452-8260

June 11, 1980

Contact:
Michelle J. McKenna
Director of Information
224-4280, X225 or X226

FOR IMMEDIATE RELEASE

PUBLIC HEARING DATE WRONG

The date of a Council on Court Procedures public hearing as reported on page 23 ("Council Proposes Class-action Change") of the Oregon State Bar Bulletin is incorrect.

The correct date for the public hearing, which concerns the Council's contemplated changes of Oregon Rule of Civil Procedure No. 32, is June 28, 1980. The hearing will be held in the County Commissioners' Meeting Room (Room 602) of Multnomah County Courthouse, 1021 SW Fourth Avenue, in Portland.

Rule No. 32 concerns class actions. The proposed changes to the rule include the following:

1. Eliminate the required 30-day prelitigation notice in 32 I and J.

2. Eliminate personal notice when plaintiff's claims are less than $100 and allow the court to order the defendant to pay for the initial notice.

3. Eliminate the requirement that affirmative claims for damages be submitted by class members and allow the court to distribute unclaimed amounts of damages in the manner most equitable under the circumstances.

-more-

add - 1

4. Allow class actions to recover statutory penalties.

5. Eliminate ORCP 32 B(3)(d)(e)(f), 32 C, and 32 G(4).

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* NOTICE *
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# # #

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held June 28, 1980

COUNTY COMMISSIONERS' MEETING ROOM (Room 602)

Multnomah County Courthouse

Portland, Oregon

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

The meeting was called to order at 9:30 a.m. by Chairman Don McEwen. The Council conducted a public hearing relating to class actions and heard the following testimony:

Mr. Michael H. Marcus, Director of Litigation, Multnomah County Legal Aid, Portland, Oregon, stated that what was really at stake is whether the class action device can work or whether the financial burden of the class action device will prevent enforcement of rights. Mr. Marcus stated it seemed appropriate for the Council to recommend to the legislature that the court have discretion to award attorney fees above and beyond the class recovery. He felt that it was important to have a preliminary determination on the merits to arrive at a decision as to how the cost of notice should be borne. He also felt that the requirement that a member of a class submit a claim form should be eliminated.

Mr. Henry A. Carey, Jr., Portland, Oregon, stated he felt the class action statute in its present form is completely unworkable. He expressed concern about the cost of notice in consumer-type class actions, and mentioned two Multnomah County cases involving 200,000 to 300,000 claimants pending certification where the cost of notice would be prohibitive for the plaintiff it the court requires

individual notice to all class members. He suggested that individual notice be eliminated in claims estimated to be $100 or less and that a published notice would suffice. He stated that after a preliminary hearing, how those costs would be borne should be left to the court's discretion. Finally, he urged that the fluid recovery theory be given serious consideration by the Council.

Mr. William M. McAllister, Attorney, Portland, Oregon, stated that the present class action rule as adopted by the 1973 Legislature presented a workable balance between various interests involved in class action litigation and should not be changed. He said the requirement that class members submit claims as a basis for judgment was a balance between requiring persons to opt in to be members of the class and the complete opt-out system and should be retained. Mr. McAllister opposed less than individual notice to class members with claims below $100 and forcing defendants to pay notice costs. He also opposed any general award of attorney fees to successful plaintiffs in class actions and said such a provision would be unfair because there would be no workable way to grant attorney fees to successful defendants.

Mr. Charles S. Tauman, Attorney, Portland, Oregon, stated that he supported the proposed amendments to ORCP 32. He added there should be an effective method for standardizing when the trial judge may or may not certify an appeal in a class action. He said that he was not proposing an interlocutory appeal as a matter of right but that he was advocating that the Council formulate some standards. He also suggested development of some objective criteria for the trial judge to follow in the certification decision.

Mr. Norman J. Wiener, Attorney, Portland, Oregon, stressed the importance of recognizing the rights of both plaintiff and defendant and felt that the current statute has worked, even though it is not perfect. He expressed the opinion that class action litigation becomes so complex, so time-consuming, so burdensome on the judicial and legal resources that the merits of the case become lost in the tangle of procedural rules. Mr. Wiener stated he was not in favor of pre-judgment interest to try to correct lengthy delay in cases and that notice by publication rather than actual notice, in a case with multiple claims, would be unconstitutional.

Mr. R. Alan Wight, Attorney, Portland, Oregon, addressed the proposed changes to ORCP 32 and expressed opposition to elimination of the 30-day prelitigation notice, for the reason that its inclusion provided an opportunity for possible settlements of claims. He said he opposed elimination of personal notice to class members, when the claims are less than $100, and he also opposed allowing the court to order the defendant to pay for the initial notice.

Mr. Elden M. Rosenthal, Attorney, Portland, Oregon, expressed the opinion that the primary thrust of the proposed amendments to ORCP 32 is to simplify certain aspects of the notice procedures. He said that he had some reservations about the attorney fee aspects of the proposals being within the rulemaking power of the Council but felt it could take a position with the legislature. Mr. Rosenthal suggested that in small class actions, with individual claims of $100 or less, the notice should be in the most practicable manner. He opposed the requirement of a claim form at the end of a case due to possible incapacity of claimants.

Mr. John D. Ryan, Attorney, Portland, Oregon, stated that he favored a change in the notice requirements for claims under $100. He stated that the cost of individual notice prevented plaintiffs classes from ever prosecuting their case. Mr. Ryan also favored a preliminary hearing on probability of recovery and transfer of notice costs to the defendant where there was a high likelihood the plaintiff would prevail.

Mr. N. Robert Stoll, Attorney, Portland, Oregon, stated that the requirement of ORCP 32 N. that the judgment order include the names of all class members who received notice and the exact amount to be recovered by each class member is unduly burdensome. He thought it should be possible in a class action judgment order to record the amount of the total judgment, and then have a reference back to the clerk of the circuit court in which the judgment was obtained. Mr. Stoll felt that the criteria set forth in ORCP 32 B.(3)(d), (e), and (f) are unnecessary. He stated that: he saw no justification for not having prejudgment interest; he did not approve of a claimant having to file a claim form; and, he favored use of fluid recovery. Mr. Stoll thought there would be no constitutional impediment to saying that no individual notice is required in cases with claims under $100.

Mr. J. Kirk Johns, Chief Counsel, Anti-Trust Division, Department of Justice, Salem, Oregon, emphasized the importance of maintaining flexibility and balance in the class action device. He stated he did not approve of the prelitigation notice provision because he felt that it only accomplished additional delay and it could be used as a coercive device for settlement. He said there was no reason to stay certification of a class under ORCP 32 G.(4) pending a determination on the merits which could result in prolonged litigation and appeals. Mr. Johns stated that ORCP 32 J. relating to identification of class members and notice should be eliminated. Regarding the claim form provision, he said that the claim form should not be an absolute requirement to request affirmative relief, but that he was not making an across-the-board objection because some sort of claim form is needed in certain cases. He stated that in the context of a settlement the automatic requirement of a claim form can be very disruptive because in many instances the form is not needed in order to determine the amount to which a class member is entitled.

The Council discussed a proposed schedule of meetings for the balance of the year and tentatively decided to schedule the meetings as shown on Exhibit A attached to these minutes.

The minutes of the meeting held May 10, 1980, were unanimously approved.

The remaining items on the agenda were set over until the next meeting. It was pointed out that in addition to those items, the subcommittee on enforcement of judgments probably would have some recommendations for rules relating to provisional remedies and the class actions subcommittee would probably make its report.

The next meeting of the Council is scheduled for Saturday, July 26, 1980, at 9:30 a.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon. Council members should anticipate that this meeting will be an all-day meeting.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

MEETING SCHEDULE

July 26, 1980	Council meeting, Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon - 9:30 a.m. (1) Jackson Subcommittee - JUDGMENTS (2) Butler Subcommittee - PROVISIONAL REMEDIES (3) Class actions (4) Other changes - ORCP 1-64
Sept. 6, 1980	Council meeting, Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon - 9:30 a.m. Approve provisional remedies, judgments, and changes in ORCP 1-64 as tentative rules to be released for comment
Sept. 27, 1980	Public meeting, Third Congressional District, East Portland
Oct. 18, 1980	Public meeting, Second Congressional District, Bend
Nov. 1, 1980	Public meeting, Fourth Congressional District, Eugene
Nov. 22, 1980	Public meeting, First Congressional District, County Commissioners' Meeting Room, Multnomah County Courthouse, Portland
Dec. 6, 1980	FINAL ACTION ON RULES

EXHIBIT A to Minutes

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES DATE: 6/20/80

FROM: Fred Merrill

RE: THIRD PARTY PRACTICE - ORCP 22 C.

I. BACKGROUND

Impleader or third party practice is a relatively recent procedural development in the United States. The practice was developed in the English procedural rules in 1873 and was followed in admiralty practice in the United States after 1883. Between 1920 and 1938 the practice was statutorily enacted in a few American states.[1/]

The primary source of development of the practice in the United States was the promulgation of Federal Rule 14 in 1938. As first adopted, the federal rule required leave of court for every impleader. In 1955 an amendment was proposed to Rule 14, but not adopted, which would have allowed impleader at any time without leave. In 1963 the present form of Rule 14 was adopted. This allows impleader without leave up to 10 days after the answer is filed, and interpleader only with leave of court after that point. This rule was adopted verbatim by the 1975 Oregon State Legislature and has become ORCP 22 C.

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1. Primarily New York, Pennsylvania, and Wisconsin. See Moore, Federal Practice, § 1402.

II. PRESENT THIRD PARTY PRACTICE IN THE UNITED STATES

The procedural rules or statutes in 47 states and the District of Columbia were examined to determine what impleader procedure they have, what limitations exist on impleader, and what special procedures and trial rules for third party cases are used.[2/]

A. Impleader allowed

Of the 48 jurisdictions examined, Mississippi was the only one which did not have a statute or rule generally authorizing impleader of a third party.

B. Limits on impleader

The impleader provisions in the 48 jurisdictions fall into five categories:

(1) Rule identical to FRCP 14 - 27 states.

(2) States which follow the basic Rule 14 pattern (no leave required to a certain point) but which allow a longer period for impleader without leave - 7 states.[3/]

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2. The statutes or rules for Louisiana, New Jersey, and South Carolina could not be located. The Council is indebted to Burk Voight, University of Oregon law student, for research on these rules.

3. Ohio (14 days after answer), Florida and Massachusetts (20 days after answer); Virginia (21 days after answer); Maryland (30 days after answer); Pennsylvania (60 days after answer); and, Wisconsin (6 months after answer).

(3) States which follow the basic pattern of Rule 14, but which allow a shorter period for impleader without leave - 4 states.[4/]

(4) States where leave is always required to implead - 6 states.[5/]

(5) States where leave is never required to implead - 3 states.[6/]

C. Special provisions for third party cases

No state seemed to have any special provision for third party cases governing discovery, trial procedure, or order of trial.

III. CURRENT LITERATURE

I examined the provision in Wright and Miller and Moore relating to Rule 14. I also checked the law review articles back to 1970 relating to third party practice. I found almost no voiced dissatisfaction with current impleader practice and no proposals for change. Whatever dissatisfaction exists in other

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4. California, Illinois, and Indiana (no leave required before answer); Minnesota (no leave required until 45 days after service on impleading defendant).

5. Alaska, Connecticut, Kentucky, Michigan, Oklahoma, and Texas. This is basically the pre-1963 federal rule.

6. Montana, New York, and Vermont. This is basically the proposed but rejected 1955 federal rule. Note, this procedure, as with any impleader without leave, does not mean the impleader cannot be contested. The objection comes in the form of a motion to strike or for separate trial rather than resistance to a motion for leave to interplead.

jurisdictions with the practice has not risen to a level of law review or scholarly analysis. Most of the literature is concerned with application of federal ancillary and pendent jurisdiction to third party practice.

IV. POSSIBLE LIMITATIONS OR CHANGES

A. Limiting or eliminating impleader without leave of court

One possible approach might be to change 22 C. to always require leave to implead or reduce the time period when impleader may be accomplished without leave. The problem with third party practice, however, seems to be that late impleaders delay trial and prosecution of a plaintiff's claim. Late impleader already requires leave of court. Restricting timely interpleader does not cure the the problem. It would only create another motion that has to be heard by the court.

B. Prohibiting impleader after a certain time

The only other attempt at limiting impleader which I could find is in the local rules of 6 federal district courts.[7] These courts all have a rule prohibiting the granting of leave to interplead when some period has elapsed after the answer is filed.[8] In all cases the prohibition is not absolute but is subject to

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7. S.D. of Alabama, N.D. of Florida, S.D. of New York, E.D. and N.D. of Pennsylvania, and S.D. of Texas.

8. 6 months in Florida, New York, and Pennsylvania; 120 days in Alabama; and 90 days in Texas.

exception in some unusual circumstances. An absolute prohibition on impleader more than six months after answer probably would be invalid as inconsistent with Federal Rule 14. In any case, even after 6 months there would be an occasional unusual case where an impleader would work no harm and be very reasonable.[9/] The effect of the provision is to put a much heavier burden upon a party seeking leave to implead more than 6 months after answer. It would eliminate most impleaders after that date. These rules could be adapted to Oregon by adding something like the following provision as 22 C.(3):

> "A motion for leave to bring in a third party defendant under this section shall be made not later than six months from the date of service of the moving party's answer to the complaint or reply to the counterclaim or at least 60 days prior to a scheduled trial date, whichever first occurs, except leave may be granted after the expiration of such period in exceptional cases upon a showing of special circumstances and of the necessity for such leave in the interest of justice and upon such terms and conditions as the court deems fair and appropriate."[10/]

C. Regulating procedure and order of trial

We have no model of any such rule, and I cannot think of a way to do it. The variety of fact situations that may arise is so complex that no general rule seems appropriate. The handling of special order of trial and procedural problems presented in third party cases almost has to be left to the trial judge.

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9. Wright and Miller, Federal Practice and Procedure, § 1454.

10. This language combines Rule 16 of the S.D. of New York rules and Rule 403 of the N.D. of Florida rules.

M E M O R A N D U M

TO: HON. WILLIAM L. JACKSON
CARL BURNHAM, JR.
WENDELL E. GRONSO

FROM: Fred Merrill

DATE: June 16, 1980

Enclosed is the memorandum to the Council detailing the changes agreed to in our meeting in Ontario. As you can see, I am hoping we can meet Friday night or Saturday morning before the meeting on June 28th and you will then be in a position to recommend tentative approval of this section of the rules. According to my notes, there were four item that you wished to have checked further:

(1) RULE 66 - HAVING THE STATE OR COUNTY FINANCE THE COST OF REFEREES UNDER RULE 65. As we discussed at the meeting, this would be beyond Council rulemaking power. I spoke with Chuck Gleason and discovered that the group chaired by Barnes Ellis (the Oregon Commission in the Judicial Branch) will be submitting a variety of bills on state court financing to the legislature in 1981. I talked to Dennis Bromka, their staff counsel. He said the Commission would consider the idea if they received a recommendation from the Council. The subcommittee could propose that the Council recommend that the Commission prepare and submit a bill to the legislature providing public funding for referees under Rule 65. The argument would be that use of the referees saves valuable judge-time, but the parties rarely do it because of the expense. It would be less expensive to have the state fund some referee time than pay for more permanent or pro tem judges.

2) RULE 83 A. - JUDGMENT ON SEPARATE DOCUMENTS IN DISTRICT COURT. I am enclosing a copy of a letter received from Judge Win Liepe of the Lane County District Court. I talked with Judge Casciato. He did not initially agree with Judge Liepe. I have sent Judge Casciato a copy of Judge Liepe's letter and he intends to speak with Judge Redding and other Multnomah County district judges.

If you wish to modify the rule for district court, I suggest we change the first sentence of 83 A. (70 A. in the Feb. 4, 1980, draft) to read as follows:

> "Every judgment shall be in writing plainly labelled as a judgment and set forth in a separate document, except judgments in a district court need not be set forth in a separate document if the local rules of such court so provide."

(3) RULE 85 D. - STATE "INTERESTED IN AN ACTION"; RULE RELATING TO THE NECESSITY OF A BOND FOR A STAY OF EXECUTION. You asked me to do some further checking on the question of whether no bond should be required when a state is not a party but is interested in an action. I spoke with attorneys in the Attorney General's office. Apparently, the problem does not come up under ORS 20.140 for costs because routinely in cases handled by the State Attorney General's office (whether or not the State is a party):

(a) The AG's office does not advance costs and filing fees.

(b) If the State wins, they do not collect fees from the defendant in the cost bill unless the counties insist. The AG's office says it costs more to collect than it is worth. If the county insists, they will collect via cost bill and remit to the county.

(c) If the State loses, it will pay the opponent's fees claimed in the opponent's cost bill, but the State apparently never pays its own fees to the county.

No one had a suggestion on our problem as there is no existing statute for bonds.

After thinking about it, I believe the problem is really different. It may be reasonable to have the State pay and not advance costs where it will not directly perform or benefit by the judgment. It, however, seems reasonable that no bond be required for a stay of judgment when only the State has to carry out the judgment. The question is whether the party who would have to pay is good for the money. The public entities are good for the money and the bond exception should only apply where they will pay the judgment. Rather than talk about "interested", I think the last sentence of 85 D. should say: ". . . in any action to which it is a party or is responsible for payment or performance of the judgment."

(4) RELATIONSHIP BETWEEN PRELIMINARY INJUNCTIONS AND RECEIVERSHIPS AND OTHER PROVISIONAL REMEDIES. You suggested that the rules submitted (65 - 66) on provisional remedies and receiverships needed to be coordinated generally with provisional remedies in Rule 29. You also raised the question whether there was any reasonable provision allowing provisional receivership to preserve a defendant's property to pay the judgment.

This suggested that the entire provisional remedies area should be put together in one portion of the rules. Since the Lacy total package of

rules did not seem to be going anywhere, I took a try at separating the provisional remedies sections from the rest and integrating them with preliminary injunctions and receiverships. I am enclosing the results and a letter to the Butler subcommittee. I would hope we could submit something to the Council on this for the July meeting of the Council. The provisional receivership is covered by Rule 71 K.

FRM:gh

Enclosures: Memorandum to Council dated June 16, 1980
Letter from Judge Winfrid K. Liepe (with enclosures) dated May 30, 1980
DRAFT OF RULES COMBINING PROF. LACY'S MATERIAL ON PROVISIONAL REMEDIES WITH PROPOSED RULES 90 AND 91 (AS REVISED BY JUDGE JACKSON'S SUBCOMMITTEE)

DISTRICT COURT OF THE STATE OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
EUGENE, OREGON 97401

May 30, 1980

WINFRID K. LIEPE
DISTRICT JUDGE
687-4218

Professor Fred Merrill
University of Oregon
School of Law
Eugene, Oregon 97403

RE: Oregon Rules of Civil Procedure

Dear Fred:

Some time ago you mentioned that the Council on Civil Procedure was contemplating a rule requiring judgments to be prepared on separate papers.

Enclosed please find copies of judgments and some other orders combined with motions, stipulations, cost bills and the like.

The practice of combining judgments and orders with motions, stipulations and affidavits in a single document, saves paper, typing and a good deal of reading. There is no need to have a motion on a separate document repeating everything that will be contained in the accompanying judgment document, where a brief "it is so moved" at the bottom of the judgment form would do the same service.

Over 3,500 civil cases were filed in the Lane County District Court in 1979. The vast majority conclude with disposition on default or stipulation. Most of them are collection cases. The total number of civil cases filed in all Oregon State District Courts in 1979 was 34,440.

A rule requiring judgments to be on separate documents would result in substantial and unnecessary inconvenience and expense.

Some time ago you mailed to me a copy of proposed rule revisions. I must confess that I either lent that copy to

someone who didn't return it or maybe I just misplaced it. Could you send me another copy.

Thanks for your consideration.

Best regards,

Winfrid K. Liepe
District Judge

WKL/bsh

Enclosure

mml 022980

'80 MAY 19 PM 4 48

IN THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF LANE

CREDITORS PROTECTIVE ASSOCIATION, INC., Plaintiff, vs. CAROLYN A. KETCH, Defendant(s)	)	No. A 86-074 **JUDGMENT ON STIPULATION**

J-306

THIS MATTER coming before the Court on stipulation of the parties, by and through their respective attorneys of record, it is

ORDERED AND ADJUDGED that the plaintiff have judgment for and recover of and from the defendant(s),

CAROLYN A. KETCH, ___, and each of them, for the following sums, to-wit: 1.80

$668.48, plus $25.00 out-of-pocket court costs, plus $50.00 attoney's fees, for a GRAND TOTAL of $743.48;

/////
/////
/////
/////

wbg

PROVIDED, HOWEVER, that no execution or other process shall issue so long as payments are made on account of said sums, as follows:

$XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, and

$ 25.00 per month, beginning March 15, 1980, and continuing on the same day of each month thereafter so long as said judgment remains unsatisfied; PROVIDED FURTHER, that if any of such payments is not paid promptly when due, then and in that event, and without demand, notice, motion, affidavit or other showing, execution or other process may issue for the entire balance of said sums then remaining unpaid.

DATED this 23 day of ~~March~~ May, 19 80.

[signature]
JUDGE

IT IS SO STIPULATED:

[signature]
Attorney for Plaintiff

[signature]
Attorney for Defendant(s)

FILED
[illegible] 1980
[illegible], Court Administrator
District Court for Lane County, Oregon

LAW OFFICES OF STAMM F. JOHNSON
POSTOFFICE BOX 738
LAKE OSWEGO, OREGON 97034
TELEPHONE (503) 635-4387

TC

'80 MAY 20 PM 4 58

In the DISTRICT Court of the State of Oregon

for Lane County

WEST COAST TRUCK LINES, an Oregon corporation,
Plaintiff

vs.

ROLLIE SHANDY dba Shandy Hardwoods,
Defendant

No. A92-213

ORDER OF DEFAULT AND JUDGMENT AND MOTION

This matter coming on at this time to be heard on the motion of Keith Y. Boyd, *attorney for plaintiff herein, for a default judgment against the above named defendant* Rollie Shandy dba Shandy Hardwoods; *and it appearing to the court from the records and files herein that said defendant, and if more than one, each of them, was duly and regularly and in the manner provided by law served with summons and complaint herein on the* 9th *day of* April, 1980, *notwithstanding which the said defendant has, and if more than one, all defendants have, failed to answer the complaint or otherwise appear herein and that the time for so doing has now expired; and it further appearing to the satisfaction of the court from the executed affidavit appearing on the reverse hereof that said defendant was not, and if more than one, none of them was, at the time of said service and none of them is now in the military service of the United States; and the court being fully advised in the premises,*

NOW, THEREFORE, IT HEREBY IS ADJUDGED that the above named defendant Rollie Shandy dba Shandy Hardwoods *is or are in default for want of an answer or other appearance herein and ordered that said default be and it hereby is entered of record; and*

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff do have and recover of and from the defendant Rollie Shandy dba Shandy Hardwoods, *and each of them, the sum of* $736.40, plus interest at 6% per annum from 6/21/79 to 7/24/79 plus interest at 9% per annum from 7/25/79 to 5/21/80 in the sum of $58.96, plus interest at 9% per annum until both principal and interest are paid in full *together with costs and disbursements herein incurred taxed at $* 59.50, *and that execution issue therefor; and*

IT IS FURTHER ORDERED AND ADJUDGED that all properties heretofore attached in the above entitled action, as appears from the records and files herein, be sold in the manner provided by law and the proceeds thereof, together with all moneys, if any, in the possession of the sheriff or constable, be applied toward the satisfaction of the within judgment.

Dated at Eugene, *Oregon, this* 23 *day of* May, *19* 80.

IT IS SO MOVED this 20th day of May, 1980.
BEVANS & McCULLEN, P.C.

Keith Y. Boyd

Judge.

By: Keith Y. Boyd, Plaintiff's Attorney
777 High St.
Suite 260
Eugene, OR 97401
City State Telephone Number 686-9165

FILED
AT ... O'CLOCK ... M
Office Address
MAY 20 1980

Court Administrator
District Court for Lane County, Oregon
BY

(OVER)

AFFIDAVIT OF NON-MILITARY SERVICE AND BILL OF DISBURSEMENTS

STATE OF OREGON, County of Lane) ss.

I, Keith Y. Boyd , *being first duly sworn, depose and say: That I am* one of the attorneys for *the plaintiff in the above entitled court and cause; that as appears from the records and files therein, reference to which hereby is made, the above named defendant, and if more than one, each of them, was duly and regularly served with a copy of the summons and complaint in said cause; that on the date of each such service as shown by said records and files, the said defendant was not and, if more than one, none of them was, nor is defendant, or if more than one, is any of them now in the military service of the United States.*

I further depose and say that the items claimed by plaintiff in the following Bill of Disbursements are correct and true and have been necessarily incurred by plaintiff in the within entitled action as I verily believe:

Clerk's Fees	$ 25.00
Constable's Fees	
Sheriff's Fees	
Process Server's Fees	12.50
Advertising	
Notary Fees	
Prevailing Costs	25.00
Total	$ 59.50

Keith Y. Boyd

Subscribed and sworn to before me this 20th *day of* May, *19* 80.

Marie E. Sackson

Notary Public for Oregon.

(SEAL) My Commission expires: 3-29-83

'80 MAY 19 PM 1 19

IN THE DISTRICT COURT OF THE STATE OF OREGON FOR LANE COUNTY

THE MIT PRESS, a foreign corporation,

Plaintiff(s),

vs

B & B ENT., INC., an Oregon corporation dba Merlin's Majestic Books & Gifts, Ltd.,

Defendant(s)

Case No. A90-256

MOTION AND ORDER TO APPEAR FOR EXAMINATION

THIS MATTER having come before the Court upon Plaintiff(s) Motion for an Order requiring the Defendant(s) to appear and answer under oath concerning any property or interest that Defendant(s) may have or claim, restraining Defendant(s) from selling or transferring any of Defendant(s) property and directing that Citation be issued on the Order to Appear for Examination, based upon Plaintiff's attorney's affidavit marked Exhibit "A" which is attached hereto and incorporated herein, and it appearing to the Court that the Motion should be granted and that the Defendant(s) is/are a resident of Lane County, Oregon.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. That the Defendant(s) be, and Defendant(s) is/are hereby ordered to appear before the above entitled Court in Lane County, Oregon Courthouse on the 23 day of June, 19 80, at the hour of 1:30 p.m., then and there to answer under oath concerning any property or interest in any property that Defendant(s) may have or claim.

2. That the Defendant(s) be, and Defendant(s) is/are hereby restrained from selling, transferring or in any manner disposing of any of Defendant(s) property liable to execution pending this proceeding, and

3. That the Defendant(s) be, and Defendant(s) is/are hereby ordered to bring with Defendant(s), on the day and hour above-stated, a list of all real and personal property owned and a complete statement of all debts and obligations, and

4. That the Clerk issue a Citation to Defendant(s) and that the Citation be served upon the Defendant(s) by delivering to Defendant(s) personally and in person a copy thereof together with a copy of the Plaintiff(s) motion, affidavit and this order.

DATED this 16 day of May, 19 80.

Court Judge

IT IS SO MOVED:

BEVANS & McCULLEN

By Keith Y. Boyd
Keith Y. Boyd
Of Attorneys for Plaintiff

ATTORNEYS AT LAW
102 FORUM BLDG., 777 HIGH STREET
EUGENE, OREGON 97401
485 9165

DEFAULT ORDER AND JUDGMENT

DC [illegible]

In the District Court of the State of Oregon
for [illegible] County
Lane

COAST CREDIT RECOVERY, INC.
an Oregon Corporation
Plaintiff

vs.

Jack Adkins & Jody Adkins
dba DEVONSHIRE HILLS APTS.
Defendant

DEFAULT ORDER AND JUDGMENT

NO. L 90138

FILED

FEB 21 1980

, Court Administrator
District Court for Lane County, Oregon
BY _____ DEPUTY

It appearing to the Court from an examination of the records and files in the above entitled action that Defendant herein Jack Adkins & Jody Adkins *served with the Summons and Complaint in the above entitled action on the* 18th *day of* December, *19* 79, *in Multnomah County and State of Oregon in the manner prescribed by law, and that said Defendant.s. ha.ve failed to answer said Complaint or to otherwise appear herein, and that the time for answering or appearing has expired:*

On motion of James T. Marquoit *Attorney for Plaintiff, said Defendant.s are hereby declared to be in default, and such default is hereby entered of record.*

And it is further ordered and adjudged that Plaintiff have judgment for and recover of and from Defendant Jack Adkins and Jody Adkins *and each of them, the sum of* $2156.00 plus interest thereon at the rate of 6% per annum from July 22, 1978 until paid in full.

together with the costs and disbursements herein incurred taxed at $ 59.50, *and that execution issue therefor.*

And it is further ordered that any monies or property under attachment herein, or in the hands of the Court, be applied toward the satisfaction of the within judgment.

[signature]
Judge.

Dated and entered this 21 *day of* Feb, *19* 80

Attorney for Plaintiff

Telephone No

Address

James T. Marquoit
242 Pacific Building
520 S. W. Yamhill
Portland, OR 97204

FILED
AT ..... O'CLOCK ..... M

MAY 7 1980

, Court Administrator
District Court for Lane County, Oregon
By _____ DEPUTY

IN THE DISTRICT COURT OF THE STATE OF OREGON FOR LANE COUNTY

MICHAEL D. LUBBERS,

Plaintiff,

vs.

KEITH S. LANDERS and ALAN L. LANDERS, dba Dexter Wood Products,

Defendants.

Case No. A93-034

ORDER AND MOTION

Based upon the Motion and Affidavit of Plaintiff

IT IS HEREBY ORDERED that the payment of filing fees, service fees and court costs by Plaintiff in this matter be and hereby are waived.

Dated this 7 day of May, 19 80.

_____
District Judge

IT IS SO MOVED based upon the Affidavit of Plaintiff dated this 2nd day of May, 19 80.

JOHNSON, HARRANG, SWANSON & LONG

By _____
Michael L. Williams
Of Attorneys for Plaintiff

FILED
AT ..... O'CLOCK ..... M

MAY 6 1980

Court Administrator
District Court for Lane County, Oregon
BY _____
DEPUTY

ATTORNEYS AND COUNSELORS AT LAW
400 SOUTH PARK BUILDING
101 EAST BROADWAY
EUGENE OREGON 97401
TELEPHONE (503) 485-0220

'80 APR 30 AM 11 01

FILED
AT ... O'CLOCK ... M
MAY 2 1980
..., Court Administrator
District Court for Lane County, Oregon
By ... DEPUTY

IN THE DISTRICT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF LANE

ERNEST F. MART and RON L. WAGNON, dba AUTORAMA OF AMERICA,

Plaintiff,

vs.

MARK E. HAGUE and GLADYS V. HAGUE,

Defendants.

Case No. A85-293

ORDER AND MOTION FOR DISMISSAL WITH PREJUDICE

The court having found that this matter has been settled between the parties and the Plaintiff requests that this matter be dismissed with prejudice,

NOW, THEREFORE, IT IS HEREBY ORDERED that the above entitled case shall be dismissed with prejudice, without costs to either side.

DATED this 2 day of May, 1980.

District Court Judge

* *

IT IS SO MOVED this 28th day of April, 1980.

LIVELY, WISWALL, SVOBODA, THORP & DENNETT

By
Dwight G. Purdy
of Attorneys for Plaintiff

ORCP 54

FILED

APR 30 1980

..., Court Administrator
District Court for Lane County, Oregon
BY ... DEPUTY

LIVELY, SVOBODA, THORP & DENNETT ATTORNEYS AT LAW EUGENE

'80 APR 24 AM 10 42

FILED
AT ..... O'CLOCK ..... M
APR 24 1980
Court Administrator
District Court for Lane County, Oregon
BY E. Williams DEPUTY

IN THE DISTRICT COURT OF THE STATE OF OREGON

FOR LANE COUNTY

WILLAMETTE COLLECTION SERVICE, INC., an Oregon corporation,

Plaintiff,

vs.

Steven Lee Holley,

Defendant.

Case No. A89-483

MOTION AND ORDER OF DEFAULT AND JUDGMENT

THIS MATTER coming on to be heard on motion of Dwight L. Faulhaber, attorney for plaintiff, for a default judgment against the above named defendant, Steven Lee Holley; and it appearing from the records and files herein that defendant, Steven Lee Holley, was duly and regularly, and in the manner provided by law, served with summons and complaint herein on March 19, 1980, and defendant, Steven Lee Holley, has failed to answer the complaint or otherwise appear herein and the time for doing so has now expired; and it further appearing to the satisfaction of the court from the executed affidavit filed herewith that defendant, Steven Lee Holley, was not, at the time of service, and is not now, in the military service of the United States; and the court being fully advised;

NOW, THEREFORE, IT IS HEREBY ORDERED that the above named defendant, Steven Lee Holley, is in default for want of an answer or other appearance herein; and

IT IS FURTHER ORDERED that plaintiff does have and recover of and from defendant, Steven Lee Holley, the sum of $982.52 principal, plus plaintiff's costs and disbursements in the sum of $59.50, for a total judgment herein being $1,042.02; and that execution issue therefore.

DATED this 24th day of April, 1980.

Dwight L. Hodges
JUDGE

IT IS SO MOVED:

Dwight L. Faulhaber
Attorney for Plaintiff

ATTORNEY AT LAW
910 LINCOLN STREET
EUGENE, OREGON 97401
503-686-2014

CASE NO. L 90138

IN THE

DISTRICT COURT

OF THE

STATE OF OREGON

FOR

Lane ~~MULTNOMAH~~ COUNTY

COAST CREDIT RECOVERY

Plaintiff,

vs.

JACK ADKINS & JODY ADKINS

Defendant.

NON-MILITARY AFFIDAVIT
DEFAULT ORDER AND
JUDGMENT
BILL OF DISBURSEMENTS

STATE OF OREGON,
Multnomah County } ss.

NON-MILITARY AFFIDAVIT AND BILL OF DISBURSEMENTS

I, James T. Marquoit, being first duly sworn, depose and say that I am attorney for plaintiff in the within entitled action; that on the 18th day of December 19 79, the within named defendant against whom default judgment is requested duly and regularly served with a copy of the Complaint and Summons in the within entitled action; that the defendant S were ~~was~~ not at that time nor are now in the military service of the United States.

I further depose and say that the items claimed by plaintiff in the following Bill of Disbursements are correct and true and have been necessarily incurred by plaintiff in the within entitled action as I verily believe:

Filing Fees	$ 22.00
Civil Process Fees	
Sheriff's Fees	12.50
Process Server's Fees	
Advertising	
Notary Fees	
Prevailing Costs	25.00
Total	$ 59.50

Subscribed and sworn to before me this 15th day of February 19 80

Linda A Hales
Notary Public for Oregon

My Commission expires 10-3-83

80 MAR 11 AM 11 12

FILED

IN THE DISTRICT COURT OF THE STATE OF OREGON MAR 12 1980

FOR THE COUNTY OF LANE

District Court for Lane County, Oregon, Court Administrator
BY DEPUTY

HOUSEHOLD FINANCE CORPORATION, a corporation,	)	
Plaintiff,	)	CASE NO. A90-028
vs.	)	ORDER OF DEFAULT AND JUDGMENT AND MOTION THEREON
FRANK C. ENDSLEY,	)	
Defendant.	)	

THIS MATTER coming on regularly for hearing upon motion of the plaintiff and the Court being fully advised in the premises

NOW, THEREFORE, IT IS HEREBY ORDERED that the defendant FRANK C. ENDSLEY be, and hereby is declared to be in default for want of answer or other appearance; and

IT IS FURTHER ORDERED that a judgment is entered in favor of plaintiff and against the defendant as follows:

Principal	$1,457.07
Interest (to 03/10/80)	382.17
Court costs	~~72.00~~ 47.00
Attorney's fees	425.00
TOTAL	~~$2,336.24~~ 2311.24

for a total judgment of ~~$2,336.24~~ 2311.24, plus interest at plaintiff's contract rate of 24.120% per annum from date hereof, until paid and that execution issue hereon.

Dated this 12th day of March, 1980.

DISTRICT JUDGE

It is so moved:

DERRICK E. MC GAVIC
Attorney for Plaintiff

DERRICK E. MC GAVIC
DREW L. JOHNSON
Attorneys At Law
229 Mill Street
Eugene, Oregon 97401
Telephone (503) 485-4555

LAW OFFICES
STOLL & STOLL, P. C.
HISTORIC STROWBRIDGE BLDG.
735 S.W. FIRST AVENUE
PORTLAND, OREGON 97204
TEL. (503) 227-1601

June 9, 1980

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

RE: Proposals for Change in ORCP 32, Relating to Class Actions

Gentlemen:

I understand that on Saturday, June 28, at 9:30 A.M. in the Multnomah County Courthouse, Room 602, there will be a hearing relating to changes in ORCP 32, relating to class actions. Preparatory to that hearing, I wish to make the following comments with respect to proposals that I understand are under consideration:

(1) Elimination of personal notice when plaintiffs' claims are less than $100. Requiring individual notice, in any class action, not only involves costs of printing and postage for the individual notice, but, more significantly, time in compiling names and addressing (or keypunching) addresses and processing of the individual notices. When one considers that, in fact, it is unlikely that there will be a high percentage of claimants with claims of under $100, the cost of giving individual notice in relation to the claims that are actually filed may be ridiculous. For instance, if one fully considers the costs involved in obtaining and preparing the mailing lists, addressing the individual notices, printing the individual notices, and postage, it may be that each individual notice may cost as much as $20 or more, particularly in cases where names and addresses are not simply on a computer tape. If the average claim is $50, but only 30% of the class members file claims, the costs of getting notice to those 30% of claimants exceeds the gross amount of moneys that they will receive: Ten notices would cost $200, and 30% (or three claims at $50 each) would mean net claims of $150. This, frankly, is not an unlikely situation. In those instances where there is a computer tape of addresses, the cost of giving individual notice for each claimant may be less than $20. However, in such instances it is very likely that the computer tape

is over-inclusive of the class members. In other words, there may be many (if not most) of the names on the computer tape who are in fact not class members. In such circumstances the number of proper claims may be substantially less than 30% of the total number of notices mailed.

I do not believe that there is any constitutional impediment to elimination of personal notice for claims under $100. I think all the Constitution requires is that the best practical notice be given under the circumstances. Other notice--such as newspapers--may be more practical, and individual mailed notice may not be practical.

It should be noted that the costs of notice are not simply the costs charged by a computer firm in preparing mailing lists, a printing company in printing the notice to be mailed, or in postage. Time expended by counsel or counsel's paralegals in preparing the mailing list and in supervising the mailing is certainly a cost and expense that must be considered.

(2) In circumstances in which the trial court can find, in a preliminary hearing, that it is "more probable than not" that plaintiffs will succeed as to liability, defendants should be required to pay the costs of initial notice to class members. At the very least, the trial court should have the discretionary power to order the defendants to pay the initial notice when there is found to be a "probability of success" in plaintiffs' claims. It should not be necessary at such a "mini-hearing" for plaintiffs to prove an amount of damages, but only that liability, and the "fact of damage" is probable. In most class action litigation, the defendant is substantially more affluent than the plaintiff. If it were otherwise, it likely would be more "practical" not to have the case proceed as a class action. The named plaintiff class representative is likely to bear a substantial cost in the litigation, even without considering the costs of notice. Where probability of success can be demonstrated, it is thus not unreasonable to require the defendant to pay this cost of notice. Of course in many cases the defendant may regularly be in contact with class members; for instance, financial institutions mailing regular mortgage or other financing statements to class members: In such circumstances it would be relatively effortless and of little expense, for the defendant to include in such mailing a notice of class certification. On the other hand, the cost of preparing an individual mailed notice to all class members, if not included in such a regular mailing, might be quite expensive.

A couple of years ago in the so-called Arizona Milk Case, defendants were required to print notice on the exterior of milk cartons that were likely to be sold to putative class members.

(3) It should not be required that affirmative claims for damages be submitted by class members. The court should have the power to distribute unclaimed amounts of damages in a manner the court determines to be most equitable under the circumstances. Simply put, where a wrongdoer has been found to have caused injury, he should not be entitled to keep the benefits of his wrongdoing, even if the damages are unclaimed. For instance, if a nursing home operator had been found--several years after the complained of conduct--to have defrauded persons in his care of moneys, and those persons were now deceased, and the individual claims were of such a size it was not practical to set up or re-open probates for class members, it would be unlikely that there would many claims filed. Under these circumstances, it would seem entirely appropriate that the court could recover from the defendant the money taken and then, for instance, distribute that money to a state or private agency or organization involved in the care or protection of rights of nursing home patients.

(4) Class actions should be permitted to recover statutory penalties. A primary purpose of the class action statute is to provide judicial efficiency. Since the law now provides, for instance, that 100 individuals with the same claim could individually bring actions for statutory penalties, or could by joinder make their claims for statutory penalties, there appears to be no reason why these claims for penalties rationally could not be joined together in a class action.

(5) ORCP 32 B.(3)(d)(e)(f) should all be eliminated. All of these provisions are not found in FRCP 23 and no reason has been found in FRCP 23 why these additional criteria should be considered. "Difficulties likely to be encountered in the management of a class action" may be considered by the court, in any event, as to whether or not the class action is a superior device for the resolution of the controversy. However, by having these criteria contained on provisions (d), (e), (f) given apparent equal weight with considerations (a), (b) and (c), provides undue emphasis to the court with these former considerations. Furthermore, if read literally, you could have a grievance or cause of action that was not practical to handle on an individual basis, and because of considerations contained in (d), (e) and (f) could not proceed either as a class action: The result

would be that litigants would not have their day in court. I think that as a society we should encourage people to resolve their issues in court. If a litigant is interested enough in the matter to bring the matter to the court's attention, it should proceed for the peaceful judicial resolution of the matter.

Provision (f) is particularly a bad one, and in conflict with other provisions of the class action rule requiring that the class determination be done at an early stage. It may be very difficult at an early stage to have a preliminary hearing, prior to there being any significant discovery being completed, to determine that there is a probability of sustaining the claim. Similarly, damage calculation, at a preliminary stage [provision (e)] is also an unreasonable requirement.

(6) The requirement of ORCP 32 N. that the judgment order must include the names of all class members who received notice and the exact amount to be recovered by each class member is unduly burdensome. It may be that there should be an order of the court, in the county in which a judgment is obtained, indicating the name of each class member and the amount of each class member's recovery. However, if the judgment order contains what may be the names of hundreds, if not thousands, of class members, and the judgment order needs to be recorded in various counties, the simple cost of recording that judgment order can be horrendous. Frankly, our office had such an experience in a class action involving a class of only 52 individuals. It should be possible in a class action judgment order to record the amount of the total judgment, and then have a reference back to the clerk of the circuit court in which the judgment was obtained in the event that it is necessary to locate the names of all class members and the amount due to each class member.

I hope the foregoing will be of some assistance.

Very truly yours,

N. Robert Stoll

N. ROBERT STOLL

NRS:al

LAW OFFICES OF
WHEELOCK, NIEHAUS, HANNA, MURPHY, GREEN & OSAKA
SUITE 700 BENJ. FRANKLIN PLAZA
ONE SOUTHWEST COLUMBIA
PORTLAND, OREGON 97258

AREA CODE 503
TELEPHONE 224-5930

C.E. WHEELOCK
RUSSELL R. NIEHAUS
HARRY M. HANNA
EDWARD MURPHY, JR.
DONALD W. GREEN, III
GORDON L. OSAKA
ROBERT T. SCHERZER

June 26, 1980

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

Gentlemen:

The Council is considering changes in Oregon Rule of Civil Procedure 32 relating to class actions. The Council requests public comment relating to class action and possible problems with ORCP 32. This letter constitutes comments relative to specific proposals that have been made to the Council to change and modify the present rules.

The first suggested change is to eliminate the required 30-day pre-litigation notice in 32 I and J. The notice should not be eliminated, especially in those situations where the prospective representative plaintiff plans to seek injunctive and/or declaratory relief. Additionally, with the notice, there is a probability that after a full disclosure by the prospective defendant of the pertinent facts, the prospective representative plaintiff and such party's attorneys will conclude that such an action be without merit.

The second proposed change is in two parts. The first is to eliminate the necessity of notice to prospective claimants where the amount of an individual claim would be less than $100. The present rule contemplates that the court will determine the best notice practicable under the circumstances and to give prospective claimants the ability to opt out of the case. The mere fact that a specific claimant's claim may be less than $100 should not deprive such claimant of the same rights enjoyed by a claimant whose claim may be greater than $100.

The second part of the proposed change in the rule would impose the cost of the giving of the initial notice to the defendant. This would be the same as requiring the defendant to pay the representative party's filing fees, service charges, costs of taking depositions and other expenses on discovery, and trial fees and expenses, all before there would be any determination of liability. Again, this proposal is without merit.

The next proposed change in the rule is one which the legislature considered at the time of the adoption of our present class action rules. At that time, the legislature considered the proposal now being made by the proponents for the change; i.e., the opt in and out procedure, and adopted the rule in its present form. Subsequent sessions of the legislature have considered amending the rule as now being proposed, and in each instance the proposal for the change was rejected by the legislature. It is suggested that the minutes of the legislature relative to this section of the rule are pertinent and should be carefully considered by the Council.

The next comments are directed to the elimination of ORCP 32 B (3)(d), (e), (f), 32 C and 32 G (4). Such eliminations will substantially change the Oregon class action rules and, although the elimination of these sections will bring the Oregon procedural statutes more closely aligned to Federal Procedural Rule 23, the elimination thereof will not be beneficial.

Class action litigation, at best, is extremely time-consuming for the courts, the parties, and the attorneys. It also is extremely expensive. With this in mind, the portions of 32 B (3) (d), (e), and (f) require the court early on and prior to certification to make certain affirmative findings; i.e., is the court able to manage such a class action and give appropriate notice; will the damages sought to be recovered by individual class members, if judgment is entered, be so minimal as not to warrant the intervention of the court, and, after a preliminary hearing or otherwise, is there a probability of sustaining the claim.

These protective provisions were considered and adopted by the legislature at the time of the enactment of the class action rules and at subsequent sessions when like proposed amendments were being considered by the legislature.

The same comments are applicable to Section C of the rule which are contained in the preceding paragraphs as to section B of the rule.

Section G (4) of the rule basically calls for a stay in the certification of a class action under certain specific circumstances; i.e., where the claim is based on the application of a law, rule,

or regulation and the defendant challenges the validity or applicability of such law, rule, or regulation, then the court under this section would grant the stay until there has been an adjudication on this question. Certainly this is reasonable and, thus, this section of the rule should not be deleted.

By way of general comment, the Oregon class action statute has sufficient maturity so that it is understood by the courts and by attorneys handling this type of litigation. Patchwork amendments, as proposed, is not, in my opinion, the appropriate approach. If the legislature determines that Rule 32 is cumbersome and inefficient and that the State would be better served by the adoption of Federal Rule 23 or by the uniform class action statute, then let the legislature repeal in whole Rule 32 and replace it in whole by either of the alternatives suggested.

Respectfully submitted,

C. E. Wheelock

CEW:js

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill

RE: JUDGMENT SUBCOMMITTEE'S RECOMMENDATIONS ON RULES

DATE: June 16, 1980

Enclosed is a report of further changes proposed by the Jackson subcommittee in the rules relating to judgments which appear as Rules 67 - 73 dated February 4, 1980. These changes should be read with the February 4th draft. Rules 67 - 73 will ultimately have to be renumbered to follow the provisional remedies rules. The renumbering from the February 4th draft will be as follows:

Rule 67	=	Rule 80
Rule 68	=	Rule 81
Rule 69	=	Rule 82
Rule 70	=	Rule 83
Rule 71	=	Rule 84
Rule 73	=	Rule 85

The changes are given according to the new numbers, but the numbers shown in the February 4, 1980 draft are included in parenthesis.

The report also included recommendations on Rules 65 - 66 relating to referees and submitted controversies which were submitted to the Council on January 16, 1980. Since these are logically part of the trial rules, they were not renumbered.

The Jackson subcommittee will be meeting one more time before the July 28th meeting and will recommend tentative approval of these rules as modified by the subcommittee at that time.

FRM:gh

Enclosure (RECOMMENDATIONS BY SUBCOMMITTEE)

RECOMMENDATIONS BY SUBCOMMITTEE REGARDING PROPOSED RULES 65, 66, AND 80 - 85

Set out below are further changes in proposed Rules 65, 66, and 80 - 85 recommended by the subcommittee considering those rules (Judge Jackson, Carl Burnham, and Wendell Gronso).

RULE 65 - REFEREES

B.(2) Reference without agreement. In absence of agreement of the parties, reference shall be the exception and not the rule. [In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it] Reference may be made, upon motion by any party or the court's own initiative, in actions to be tried without a jury. Except in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

COMMENT

The subcommittee eliminated any proposed use of references in jury cases. Subsection B.(2) was rewritten to make this clear, and E.(4) was eliminated.

65 E.(3)

E.(3) [Without jury. In an action to be tried without a jury the court shall accept the referee's findings of fact unless clearly erroneous] Effect. Unless the parties stipulate to the contrary, the referee's findings of fact shall have the same effect as a decision

of an advisory jury under Rule 51 D. Within 10 days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections to the report shall be by motion and upon notice. The court after hearing may affirm or set aside the report, in whole or in part.

65 E.(4) With jury. (ELIMINATE)

65 E.[(5)](4) Stipulation by parties. [In any case, the parties may stipulate that a referee's findings of fact shall be final; in such case, only questions of law arising upon the report shall thereafter be considered.] In any case, the parties may stipulate that a referee's findings of fact shall be binding or shall be binding unless clearly erroneous.

COMMENT

Subsection E.(3) was rewritten to change the effect of factual findings from "binding unless clearly erroneous" to advisory only.

Rule 65 E.(4) With jury was eliminated to allow parties to stipulate the findings of fact to be absolutely binding or subject to review by the court under a clearly erroneous standard. This allows the parties to select a different weight for the referee's ruling if they wish.

* * * * * * * * *

RULE 66 - SUBMITTED CONTROVERSY

Unchanged

RULE 80 (formerly RULE 67)

Unchanged

* * * * * * * *

RULE 7 - SUMMONS (modifications to)

Unchanged

* * * * * * * *

RULE 81 - ALLOWANCE AND TAXATION OF ATTORNEY FEES, ETC.

(formerly Rule 68 A.)

81 A.

A. Definitions. As used in this rule:

[A.(1) Attorney fees. "Attorney fees" are the reasonable and necessary value of legal services related to the prosecution or defense of an action.]

[A.(2) Costs. "Costs" are fixed sums provided by statute, intended to indenify a party.]

A.[2)(1) Costs and attorney fees. "Costs" are fixed sums provided by statute, intended to indennify a party, and include attorney fees, where payment of such fees is provided by agreement, rule, or statute. "Attorney fees" are the reasonable and necessary value of legal services related to the prosecution or defense of an action.

COMMENT

The subcommittee changed the definitions section of Rule 81 A. to clarify that attorney fees are a form of "cost" which is specially provided by statute or contract. Such change was recommended by the Oregon State Bar Procedure and Practice Committee.

81 C.(2) (formerly 68 C.(2))

C.(2) [Asserting claim for attorney fees, costs, and disbursements.] Asserting claim for attorney fees.

[C.(2)(a) Attorney fees.] A party seeking attorney fees shall assert the right to recover such fees by alleging the facts, statute, or rule which provides a basis for the award of such fees in the initial pleading filed by that party. If a party did not know and reasonably could not have known of the existence of a basis for the award of attorney fees, such allegations may be made in a subsequent or supplemental pleading by that party. A party shall not be required to allege a right to a specific amount of attorney fees; an allegation that a party is entitled to "reasonable attorney fees" is sufficient. If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be asserted by a demand for attorney fees in such motion, in substantially similar form to the allegations required by this subsection. [Such allegations or demand shall be taken as substantially denied unless the party against whom the award of attorney fees is sought fails to object to the entry of an award of attorney fees under paragraph C.(4)(b) of this rule, admits liability for attorney fees under Rule 45, or affirmatively admits such liability.] 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. Attorney fees may be sought before the substantive right to recover such fees accrues. Notwithstanding the provisions of Rule 80 C., no attorney

fees shall be awarded unless a right to recover such fee is asserted as provided in this subsection.

COMMENT

The last portion of this paragraph was revised. The language change was recommended by the OSB Procedure and Practice Committee.

* * * * * *

81 C.(2)(b) (formerly 68 C.(2)(b)

ELIMINATED

COMMENT

The subcommittee eliminated this provision and felt that a requirement for attorney fees, costs, and disbursements should appear in the prayer to warn a defendant who may not have an attorney in a default situation. The factual allegations for attorney fees would be pleaded pursuant to 68 C.(2)(a). No allegations in the body of the pleading would be required for costs and disbursements. This is consistent with the recommendations of the OSB Procedure andPractice Committee.

* * * * * *

81 C.(4)(b) (formerly 68 C.(4)(b))

C.(4)(b)) Objections. A party may object to the entry of attorney fees, costs, and disbursements as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than [30] 15 days after the [entry of the judgment] filing of the cost bill. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.

COMMENT

The subcommittee set the time for filing of bill objections as 15 days from filing of the cost bill. The existing statute allows 5 days from tne date of expiration of the time to file the cost bill (15 days from rendition of judgment). ORS 20.210.

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RULE 82 - DEFAULT (formerly Rule 69)

Unchanged

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RULE 83 - FORM AND ENTRY OF JUDGMENT (formerly Rule 70)

Unchanged

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MODIFICATION OF ORCP 63 AND 64

Unchanged

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RULE 84 - RELIEF FROM JUDGMENT OR ORDER (formerly Rule 71)

84 B. Mistakes; inadvertence; excusable neglect; newly discovered evidence, etc. On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 64 F.; (3) fraud, misrepresentation or other misconduct of an adverse party; [3] (4) the judgment is void; or [4] (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. The motion shall be made within a reasonable time, and for reasons (1), [and] (2), and (3) not more than one year after receipt of notice by the

moving party of the judgment. A copy of a motion filed within one year after the entry of the judgment, order, or proceeding shall be served on all parties as provided in Rule 9, and all other motions filed under this rule shall be served as provided in Rule 7. A motion under this section B. does not affect the finality of a judgment or suspend its operation. With leave of the appellate court, a motion under this section B. may be filed during the time an appeal from a judgment is pending before an appellate court, but no relief may be granted during the pendency of an appeal. Leave to make the motion need not be obtained from any appellate court except during such time as an appeal from the judgment is actually pending before such court. This rule does not limit the inherent power of a court to modify a judgment within a reasonable time, or thepower of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or the power of a court to grant relief to a defendant under Rule 7 D.(6)(f), or the power of a court to set aside a judgment for fraud upon the court, or the power of a court to vacate a judgment under Rule 74. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion or by an independent action.

COMMENT

The subcommittee reinstated the possibility of a motion to vacate based upon fraud because of the confusion over availability of a motion to vacate discussed in the Comment to Rule 71 in the February 4, 1980, memo. The subcommittee did not, however, eliminate the distinction between extrinsic and intrinsic fraud. Therefore, in accordance with Oregon cases, the fraud, misconduct, etc., would have to be extrinsic.

DRAFT OF RULES COMBINING PROF. LACY'S MATERIAL ON PROVISIONAL REMEDIES WITH PROPOSED RULES 90 AND 91 (AS REVISED BY JUDGE JACKSON'S SUBCOMMITTEE)

June 16, 1980

RULE 70

DEFINITIONS; NOTICE OF LEVY; SERVICE

A. Definitions. As used in Rules 70-75, unless the context otherwise requires:

A.(1) Attachment. "Attachment" is the procedure by which an unsecured plaintiff obtains a judicial lien on defendant's property.

A.(2) Bank. "Bank" includes commercial and savings banks, trust companies, savings and loan associations, and credit unions.

A.(3) Clerk. "Clerk" means clerk of the court or any person performing the duties of that office.

A.(4) Consumer goods. "Consumer goods" means consumer goods as defined in ORS 79.1090.

A.(5) Consumer transaction. "Consumer transaction" means a transaction in which the defendant obligates himself to pay for goods sold or leased, services rendered or monies loaned, primarily for purposes of the defendant's personal, family, or household use.

A.(6) Garnishment. "Garnishment" is a method of attachment as specified in Rule 73.

A.(7) Issuing officer. "Issuing officer" means any person who on behalf of the court is authorized to issue provisional process.

A.(8) Levy. "Levy" means to create a lien upon property under any judicial writ or process or by any of the procedures provided by Rules 70 - 75.

A.(9) Plaintiff and defendant. "Plaintiff" includes any party asserting a claim for relief whether by way of claim, third party claim, cross claim or counterclaim, and "defendant" includes any person against whom such claim is asserted.

A.(10) Provisional process. "Provisional process" means attachment under Rule 72, garnishment under Rule 73, claim and delivery under Rule 74, temporary restraining orders, preliminary injunctions, receiverships, or any other legal or equitable judicial process or remedy which before final judgment enables a plaintiff, or the court on behalf of the plaintiff, to take possession or control of, or to restrain use or disposition of, or fix a lien on property in which the defendant claims an interest. Provisional process does not include any temporary restraining orders or preliminary injunctions issued under Rule 75.

A.(11) Restricted mail. "Restricted mail" means mail which carries on its face the endorsements "return receipt requested showing address where delivered" and "deliver to addressee only"; provided that on mail on which the addressee is not a natural person the endorsement "deliver to addressee only" may be omitted.

A.(12) Sheriff. "Sheriff" includes constable where Rules 75-87 apply to district court proceedings in counties having such an officer.

A.(13) Writ. A "writ" is an order by a court to a sheriff or other official to aid a creditor in attachment.

B. Notice to defendant following levy.

B.(1) Whenever a plaintiff levies on property of a defendant, other than garnishment of an employer, the plaintiff must promptly serve on the defendant a notice in substantially the following form:

IN THE _____ COURT OF THE STATE OF OREGON FOR _____ COUNTY

_____ Plaintiff	No. _____
v.	Notice of Levy
_____ Defendant	

TO: (Defendant) IMPORTANT NOTICE. READ CAREFULLY. IT CONCERNS YOUR PROPERTY.

1. Action was commenced against you on _____ for $_____.

2. To secure payment the following has been levied on:

(E.g.: 1979 Wombat, License #ABC 123

Savings account in Fiduciary Trust & Savings Co.

Etc.)

3. This property will (be held by the court) (remain subject to a lien) while the action is pending and may be taken from you permanently if judgment is entered against you (for attachment only).

4. You may release the property from the levy by delivering a bond to the clerk of the court.

5. If you have any questions about this matter, you should consult an attorney.

IF YOU DO NOTHING ABOUT THIS, YOU MAY LOSE THIS PROPERTY PERMANENTLY.

Name and address of plaintiff or plaintiff's attorney

B.(2) If the defendant is a natural person, the notice served shall also contain the following:

B.(2)(a) A statement that a defendant may be entitled to claim that the property levied on is exempt from the claims of the plaintiff;

B.(2)(b) A list of all property and funds declared exempt under state or federal law;

B.(2)(c) An explanation of the procedure by which the defendant may claim an exemption; and

B.(2)(d) A statement that the forms necessary to claim an exemption are available at the county courthouse at no cost to the defendant.

B.(3) When a levy is made by garnishing a bank, the notices required by subsections (1) and (2) shall be delivered to the bank with the Notice of Garnishment. If the bank has property of, or is obligated to, the defendant, the bank shall promptly forward the notices to the defendant.

C. Service of notices; proof of service.

C.(1) Save where some other method is expressly required or permitted, any notice required to be served by Rules 70-75 may be sent by restricted mail or served in the manner of a summons.

C.(2) Before making any order that will materially affect a person's interests, the court must be satisfied that the person actually received any notice required to be given, or that the creditor has made a good faith effort and employed the best available means under the circumstances to give actual notice.

D. Adverse claimants. A person other than the defendant claiming to be the actual owner of property levied on may move the court for an order establishing the claimant's title, enjoining transfer, dissolving the creditor's lien, or other appropriate relief. After hearing, the court may:

D.(1) In a case where summary judgment would be allowed by Rule 47, make an order conclusive on the parties as to the ownership of the property.

D.(2) Summarily order that the property may be transferred. Such order protects the sheriff and a third person transferee but is not an adjudication between the claimant and the plaintiff.

D.(3) Enjoin transfer until the dispute is formally adjudicated.

RULE 71

PROVISIONAL PROCESS

A. Requirements for issuance. To obtain an order for issuance of provisional process the plaintiff shall file with the clerk of the court from which such process is sought an affidavit or sworn petition requesting specific provisional process and showing, to the best knowledge, information and belief of the plaintiff:

A.(1) The name and residence or place of business of the defendant;

A.(2) Whether the underlying claim is based on a consumer transaction and whether provisional process in a consumer good is sought;

A.(3) Description of the claimed property in particularity sufficient to make possible its identification, and the plaintiff's estimate of the value and location of the property;

A.(4) Whether the plaintiff's claim to provisional process is based upon ownership, entitlement to possession, a security interest or otherwise;

A.(5) A copy or verbatim recital of any writing or portion of a writing which evidences the origin or source of the plaintiff's claim to provisional process;

A.(6) Whether the claimed property is wrongfully detained by the defendant or another person;

A.(7) Whether the claimed property has been taken by public authority for a tax, assessment, or fine;

A.(8) Whether the claimed property is held under execution, garnishment, or other legal or equitable process or, if it is so held, either that the plaintiff has a superior right to provisional process in the property or that the property is exempt from such execution, garnishment, or process.

A.(9) If the plaintiff claims that the defendant has waived his right to be heard, a copy of the writing evidencing such waiver and a statement of when and in what manner the waiver occurred;

A.(10) If provisional process is based on notice of a bulk transfer under ORS chapter 76 or a similar statute or provision of law, a copy of the notice;

A.(11) Facts, if any, which tend to establish that there is a substantial danger that the defendant or another person is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser.

A.(12) Facts, if any, which tend to establish that without restraint immediate and irreparable injury, damage, or loss will occur;

A.(13) Facts, if any, which tend to establish that there is substantial danger that the defendant or another person probably would not comply with a temporary restraining order; and

A.(14) That there is no reasonable probability that the defendant can establish a successful defense to the underlying claim.

B. Provisional process prohibited in certain consumer transactions.

B.(1) No court shall order issuance of provisional process to effect attachment of a consumer good or to effect attachment of any property if the underlying claim is based on a consumer transaction.

B.(2) In absence of the finding described in subsection (2) of section D., the court shall not order issuance of provisional process.

B.(3) In absence of specific application by the plaintiff, the court shall not order issuance of provisional process.

C. Evidence admissible; choice of remedies available to court.

C.(1) The court shall consider the affidavit or petition filed under section A. and may consider other evidence, including, but not limited to, an affidavit, deposition, exhibit, or oral testimony.

C.(2) If from the affidavit or petition or other evidence, if any, the court finds that a complaint on the underlying claim has been filed and that there is probable cause for sustaining the validity of the underlying claim, the court shall consider whether it shall order issuance of provisional process, a restraining order, or a show cause order. The finding under this subsection is subject to dissolution upon hearing.

D. Effect of notice of bulk transfer. Subject to section B., if the court finds that with respect to property of the defendant notice of bulk transfer under ORS chapter 76 or a similar statute or provision of law has been given and that the time for possession by the transferee has not passed, the court shall order issuance of provisional process.

E. Effect of waiver of right to notice and hearing. Subject to section B., the court finds:

E.(1) That the defendant, by conspicuous words in a writing executed by or on behalf of the defendant before filing of the affidavit or petition under section B. or by handwriting of the defendant or the defendant's agent executed before filing of the affidavit or petition under section A. has declared substantially that he is aware of his right to notice and hearing on the question of the probable validity of the underlying claim before he can be deprived of his property in his possession or control or in the possession or con-

trol or in the possession or control of another and that he waives that right and agrees that the creditor, or one acting on behalf of the creditor, may employ provisional process to take possession or control of the property without first obtaining a final judgment or giving notice and opportunity for hearing on the probable validity of the underlying claim.

E.(2) That there is no reason to believe that the waiver or agreement is invalid, and

E.(3) That the defendant has voluntarily, intelligently and knowingly waived that right, the court shall order issuance of provisional process in property to which the waiver and agreement apply.

F. Issuance of provisional process where damage to property threatened. Subject to section B., if the court finds that before hearing on a show cause order the defendant or other person in possession or control of the claimed property is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser or that the defendant or other person in possession or control of the claimed property would not comply with a temporary restraining order, the court shall order issuance of provisional process in property which probably would be the subject of such destruction, harm, concealment, removal, transfer, or violation.

G. Retraining order to protect property. Subject to section B., where hearing on a show cause order is pending or where the court finds that because of impending injury, destruction, transfer, removal, or concealment of the property in which provisional process is sought there is probable cause to believe that immediate and irreparable injury, damage, or loss to the plaintiff is imminent, if an undertaking has been filed by the plaintiff in accordance with ORS chapter 32, the court, in its discretion, may issue a temporary order directed to the defendant and each other person in possession or control of the claimed property restraining the defendant and each such other person from injuring, destroying, transferring, removing, or otherwise disposing of property and requiring the defendant and each such other person to appear at a time and place fixed by the court and show cause why such restraint should not continue during pendency of the proceeding on the underlying claim.

H. Appearance; hearing; service of show cause order; content; effect of service on person in possession of property.

H.(1) Subject to section B., the court shall issue an order directed to the defendant and each person having posession or control of the claimed property requiring the defendant and each such other person to appear for hearing at a place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue.

H.(2) The show cause order issued under subsection (1) of this section shall be served personally on the defendant and on each other person to whom the order is directed.

H.(3) The order shall:

H.(3)(a) State that the defendant may file affidavits with the court and may present testimony at the hearing; and

H.(3)(b) State that if the defendant fails to appear at the hearing the court will order issuance of the specific provisional process sought.

H.(4) If at the time fixed for hearing the show cause order under subsection (1) of this section has not been served on the defendant but has been served on a person in possession or control of the property, the court may restrain the person so served from injuring, destroying, transferring, removing, or concealing the property pending further order of the court.

I. Waiver; order without hearing. If after service of the order issued under subsection (1) of section H. the defendant by a writing executed by or on behalf of the defendant after service of the order expressly declares that he is aware that he has the right to be heard, that he does not want to be heard, that he expressly waives his right to be heard, that he understands that upon his signing the writing the court will order issuance of the provisional process sought so that the possession or control of the claimed property will be taken from the defendant or another person, the court, subject to section B., without hearing shall order issuance of provisional process.

J. Authority of court on sustaining validity of underlying claim.

J.(1) Subject to section B., if the court on hearing on a show cause order issued under section H. finds that there is probable cause for sustaining the validity of the underlying claim, the court shall order issuance of provisional process.

J.(2) Subject to section B., if the court on hearing on a show cause order issued under section H. finds that there is probable cause for sustaining the validity of the underlying claim but that the provisional process sought cannot properly be ordered, the court in its discretion may continue or issue a restraining order.

K. Provisional receivership.

K.(1) Actions in which provisional receivership allowed. Subject to section B., a circuit court may appoint a receiver provisionally, before judgment, in the following cases:

K.(1)(a) On the application of either party, when his right to the property, which is the subject of the action, and which is in the possession of an adverse party, is probable, and the property or its rents or profits are in danger of being lost or materially injured or impaired.

K.(1)(b) In an action brought by a creditor to set aside a transfer, mortgage, or conveyance of property on the ground of fraud or to subject property or a fund to the payment of a debt.

K.(1)(c) At the instance of an attaching creditor when the property attached is of a perishable nature or is otherwise in danger of waste, impairment, or destruction or where the debtor has absconded or abandoned the property and it is necessary to conserve or protect it, or to dispose of it immediately.

K.(2) Form of order; oath and security; notice and termination. The provisions of Rule 71 E. through I. apply to appointment of provisional receivers.

RULE 72

ATTACHMENT

A. Actions in which attachment allowed; procedural prerequisite.

A.(1) The plaintiff, at the time of issuing the summons or any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, in the following cases:

A.(1)(a) An action upon a contract, expressed or implied, for the direct payment of money, when the contract is not secured by mortgage, lien or pledge, or when it is so secured but such security has been rendered nugatory by act of the defendants, or when the defendant is a nonresident of this state.

A.(1)(b) An action against a defendant not residing in this state to recover a sum of money as damages for breach of any contract, expressed or implied, other than a contract of marriage.

A.(1)(c) An action against a defendant not residing in this state to recover a sum of money as damages for injury to property in this state.

~~A.(1)(d) The defendant may have the property of the plaintiff attached upon filing a counterclaim within paragraphs (a), (b), or (c). References to plaintiff in Rule 78 include a counterclaiming defendant.~~

A.(2) Notwithstanding subsection (1), no attachment, injunction, or execution shall be issued against any bank or its property before final judgment.

A.(3) Before a writ of attachment may be issued or any property attached, the plaintiff must obtain an order under Rule 71 that provisional process may issue.

B. Attachment bond.

B.(1) Before any property is attached, the plaintiff must file with the clerk a ~~corporate~~ surety bond in a sum not less than $100, and equal to the amount for which the plaintiff demands judgment, and to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which the defendant may sustain by reason of the attachment, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the bond.

B.(2) Upon motion by the defendant and a showing that defendant's potential costs or damages exceed the amount of the bond, the court may require the plaintiff to give additional security.

C. Property that may be attached. Only the following kinds of property are subject to lien or levy before final judgment:

C.(1) In actions in circuit court, real property ~~within Rule 80 A.~~;

C.(2) Tangible personal property;

C.(3) Liquidated, non-contingent, uncontested debts.

C.(4) The interest of a distributee of a decedent's estate.

D. How property is attached.

D.(1) Real property. Any time after an order that provisional process may issue has been made under Rule 71 in a circuit

court action, the plaintiff may obtain a lien on the defendant's real property by filing with the county clerk a Claim of Lien. Such Claim must identify the action by names of parties, docket number, and judgment demand, describe the real property, state that an attachment lien is claimed thereon, and be signed by the plaintiff or the plaintiff's attorney. The clerk shall verify that a provisional process order has been made by countersigning the Claim and note thereon and the date and time it was received. The lien arises at the time the claim is delivered to the clerk.

D.(2) Debts. Debts may be attached in accordance with the provisions of Rule 73.

D.(3)(a) Chattels in which security interests may be recorded. If a consensual security interest within ORS Chapter 79.1020 on a chattel would be required by ORS Chapter 79.3020 to be perfected by filing a financing statement, the plaintiff may obtain an attachment lien on such chattel at any time after an order that provisional process may issue has been made by filing a Claim of Lien with the clerk of the court that issued the writ and in the same office or offices that a financing statement would be required to be filed. Such claim shall identify the action by names of parties, court and docket number, and judgment demand, describe the property sufficiently to identify it, state that a provisional process order has been made with the date thereof, and state that an attachment lien is claimed on the property.

D.(3)(b) On motion by the plaintiff and showing that a lien obtained under paragraph D.(3)(a) will not provide adequate security, the court may authorize levy by seizure under subsection D.(4).

D.(4) Other chattels.

D.(4)(a)(i) A plaintiff desiring to attach an item of tangible personal property not covered by paragraph D.(3)(a), or having obtained authorization under paragraph D.(3)(b), may require the clerk to issue a writ of attachment. The writ shall be directed to the sheriff of any county in which property of the defendant may be, and shall require him to attach and safely keep certain described property of the defendant, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, together with costs and expenses. The writ may issue to the sheriff of any county in the state and several writs may be issued at the same time to the sheriffs of different counties.

D.(4)(a)(ii) A plaintiff may also attach according to the procecure provided in Rule 73.

D.(4)(a)(iii) Personal property capable of manual delivery to the sheriff, and not in the possession of a third person, shall be levied on by taking it into his custody.

D.(4)(a)(iv) When, in the judgment of the sheriff, the cost of removal, transport, or storage of an item of property relative to the amount of the judgment makes physical seizure impractical, an effective levy may be made by inventorying the property and delivering to the debtor a copy of the inventory, a copy of the writ, and a notice signed by the sheriff stating that the property is levied on and directing the debtor to hold the same subject to further order. The sheriff may appoint some person as keeper in connection with such a levy.

D.(5) When the writ of attachment has been fully executed or discharged, the sheriff shall return the same, with his proceedings indorsed thereon, to the clerk of the court where the action was commenced, and the sheriff shall make a full inventory of the property attached, and return the same with the writ.

E. Disposition of attached property after judgment. If property other than real property has been attached, it shall be applied to satisfaction of any judgment recovered by the plaintiff. If judgment is entered for the defendant, the lien of any attachment shall be discharged and any property that has been seized returned to the defendant.

F. Redelivery of attached property; release of liens.

F.(1)(a) If an attachment deprives the defendant of the possession or use of property, the defendant may obtain redelivery thereof by filing with the court a surety bond undertaking to pay the value of the property, as stated in the bond, if the same is not returned to the sheriff upon entry of judgment against the defendant. The property shall be released to the defendant upon the filing of the bond and notice thereof sent by ordinary mail by the court to the attaching plaintiff. If the plaintiff contends that the bond undervalues the property or for some other reason does not provide adequate security the court, after hearing, may order that the defendant return the property or provide additional security. Delivery of property to the defendant under this section does not affect the attaching plaintiff's lien.

F.(1)(b) In an action brought upon such undertaking against the principal or the sureties, it shall be a defense that the property for which the undertaking was given did not, at the execution of the writ of attachment, belong to the defendant against whom the writ was issued.

F.(2)(a) A defendant desiring to sell property that is subject to a lien of attachment may apply at any time for an order discharging the lien and all liens junior thereto.

F.(2)(b) At least 15 days in advance of applying for such order, the defendant shall serve notice on each person whose lien will be affected. The notice shall:

F.(2)(b)(i) Describe the property;

F.(2)(b)(ii) State the price for which it will be sold;

F.(2)(b)(iii) State whether the defendant claims an exemption for the proceeds of sale or any part thereof;

F.(2)(b)(iv) List the liens against the property showing order of priority and amount.

F.(2)(b)(v) State that, unless a creditor objects before a specified date, the court may make an order discharging liens.

F.(2)(c) The court shall grant the application if:

F.(2)(c)(i) The proceeds of sale will satisfy the claim of the attaching plaintiff and all liens junior thereto; or

F.(2)(c)(ii) No creditors have objected; or

F.(2)(c)(i) It finds, after hearing, that the proposed sale price is not less than the fair value of the property.

F.(2)(d) If sale is permitted, the proceeds shall be distributed.

F.(2)(d)(i) To the defendant in the amount of any exemption to which he is entitled.

F.(2)(d)(ii) To the court to be held pending judgment.

G. Indemnity to sheriff. Whenever a writ of attachment is delivered to the sheriff, if the sheriff has actual notice of any third party claim to the personal property to be levied on or is in doubt as to ownership of theproperty, or of encumbrances thereon, or damage to the property held that may result by reason of its perishable character, such sheriff may require the plaintiff to file with the sheriff a surety bond, indenifying the sheriff and the sheriff's bondsmen against any loss or damage by reason of the illegality of any holding or sale on execution, or by reason of damage to any personal property held under attachment. Unless a lesser amount is acceptable to the sheriff, the bond shall be in double the amount of the estimated value of the property to be seized.

RULE 73

GARNISHMENT

A. Debts; choses in action; claims and causes of action against third parties.

A.(1)(a) At any time after an order that provisional process may issue has been made the plaintiff may attach defendant's property by service of notice of garnishment on any person believed to be obligated or liable to the defendant or to have possession of property belonging to the defendant. Plaintiff's lien shall attach to any obligation or liability to or property of defendant at the time the notice of garnishment is served.

A.(1)(b) If the garnishee is a bank maintaining branch offices, the notice must be served on the manager or assistant manager of the branch at which the defendant has an account, and is effective only with respect to such account, except that service on the president, vice-president, treasurer, secretary, cashier, or assistant cashier at the head office of the bank is effective with respect to accounts in any branch located in the same city as the head office.

A.(2) The notice of garnishment shall be prepared and signed by the plaintiff or plaintiff's attorney and must:

A.(2)(a) Identify the action in connection with which it is served by names of parties, court, and docket number;

A.(2)(b) State that an order for provisional process has been made in an action in which a stated amount is claimed. The date on which the order was made allowing provisional process shall

be included. This statement must be verified by the signature of the clerk;

A.(2)(c) Require the garnishee to return a written answer to the plaintiff within a stated time (not less than five days) stating the amount and nature of any obligation or liability to the debtor, and the identify of any property of the defendant in the garnishee's possession, or that no such obligation or liability or property exists. The notice may describe the specific obligation or property that the plaintiff believes to exist;

A.(2)(d) Order the garnishee not to pay or deliver to the defendant, or any other person, any money owed to or property owned by the defendant (saive payments of any excess above the sum claimed by the plaintiff in the notice) or to settle any claim or cause of action asserted by the defendant against the garnishee;

A.(2)(e) Warn that payment, delivery, or settlement in violation of the order may make the garnishee personally liable to the plaintiff and that failure to answer, or answer accurately, may result in personal liability for any amount that the plaintiff can prove was owed when the notice was served.

A.(2)(f) Have attached thereto a copy of the provisions of ORS 23.170 and 23.185.

A.(3) Notice of garnishment shall be served in the manner of a summons and may be served by anyone eligible to make service of summons. Proof of service shall be returned to the plaintiff and a copy of the notice and proof of service shall be filed with the clerk when the garnishee's answer is filed.

of such payment the clerk shall hold it pending judgment in the action in which provisional process was authorized. If the garnishee under a provisional process is a bank, the clerk, instead of ordering immediate payment, may direct that the money be held by the bank in a restricted, interest bearing, account pending judgment in the action.

A.(5)(a) If the garnishee's answer states that money is presently owed to the defendant but is not payable until some future time, the plaintiff may apply to the court for an order directing the garnishee to pay the money to the clerk when it becomes payable. If money owed by the garnishee is payable in instalments, the order may be to pay all, or a part of, future instalments to the clerk for a specified time.

A.(5)(b) The plaintiff and the garnishee shall be served notice of an application under paragraph A.(5)(a) and given an opportunity to make alternative proposals and to be heard thereon.

A.(6) Any amounts paid by or collected from garnishee, exclusive of amounts applied to costs assessed against the garnishee in connection with the garnishment, correspondingly extinguish the debtor's claim against the garnishee. The clerk shall give the garnishee a receipt identifying a payment as money paid under a designated garnishment.

B. Levy on bank account or contents of safe deposit box not wholly in name of defendant.

B.(1) If the debt, credit, or other personal property sought to be levied upon is any bank account, or interest therein, not standing in the name of the defendant or standing in the name of the defendant and one or more other persons, or property in a safe deposit box maintained by a bank and rented by it to a person other than the defendant or to the defendant and one or more other persons, the provisions of this section must be complied with; otherwise the levy shall not be effective for any purpose. The plaintiff shall deliver to such bank a surety bond in an amount not less than twice the amount of the judgment (or prayer of the complaint in case of attachment) indemnifying the persons, other than the defendant whose interest is sought to be levied upon, rightfully entitled to such debt, credit, or other personal property (which persons need not be named specifically in said bond but may be referred to generally in the same manner as in this sentence), against actual damage by reason of the taking of such debt, credit, or other personal property and assuring to such persons the return thereof upon proof of their right thereto.

B.(2) Upon delivery to it of the aforesaid bond the bank shall immediately notify the person in whose name such account stands, other than the defendant, or the person to whom such safe deposit box is rented, other than the defendant, by restricted mail, or the service of said writ and of the delivery to it of said bond.

B.(3) From the time of said levy and the delivery to it of said bond the bank shall not honor a check or other order for the payment of money drawn against the account or other credit levied upon or permit the removal of any of the contents of the safe deposit box for a period of fifteen (15) days from the mailing of said notice or until the levy is sooner released.

B.(4) Any person claiming an interest in the account or safe deposit box contents so levied on may institute proceedings under Rule 70 D. An order under Rule 70 D.(2) or (3) shall be without prejudice to a subsequent action on the surety bond.

B.(5) After fifteen (15) days from the making of the levy and the delivery of said bond, if no proceedings under Rule 70 B. have been commenced, the bank shall comply with the levy, unless it has been sooner released, and shall not be liable to any person by reason of such compliance or by reason of the non-payment of any check or other order for the payment of money drawn against the account or other credit so levied upon and presented while the levy is in force or by reason of the removal, pursuant to the levy, of any of the contents of such safe deposit box or by reason of the refusal of such bank to permit access to such safe deposit box by the renter thereof.

B.(6) Before giving access to any safe deposit vault or box, the bank may demand payment to it of all costs and expenses of opening the safe deposit box and all costs and expenses of repairing any damage to the safe deposit box caused by the opening thereof.

RULE 74

CLAIM AND DELIVERY

A. Claim and delivery. In an action to recover the possession of personal property, the plaintiff, at any time after the action is commenced and before judgment, may claim the immediate delivery of such property, as provided in Rule 71.

B. Delivery by sheriff under provisional process order. The order of provisional process issued by the court as provided in Rule 71 may require the sheriff of the county where the property claimed may be to take the property from the defendant or another person and deliver it to the plaintiff.

C. Bond required. Before any property may be taken from defendant, the plaintiff must file with the clerk a surety bond in a sum not less than $100, and equal to the value of the property, and to the effect the plaintiff will pay all amounts to be adjudged to the defendant and all damages which the defendant may sustain by reason of the attachment if the same be wrongful or without sufficient cause, not exceeding the amount specified in the bond.

D. Custody and delivery of property. Upon receipt of the order of provisional process issued by the court as provided in Rule 71, the sheriff shall forthwith take the property described in the order, if it be in the possession of the defendant or another person, and retain it in his custody. He shall keep it in a secure place, and deliver it to to the party entitled thereto upon receiving his lawful fees for taking, and his neces-

sary expenses for keeping the same. The court may waive the payment of such fees and expenses upon a showing of indigency.

E.(5) Filing of order by sheriff. The sheriff shall file the order, with the sheriff's proceedings thereon, including an inventory of the property taken, with the clerk of the court in which the action is pending, within 10 days after taking the property; or, if the clerk resides in another county, shall mail or forward the same within that time.

F. Indemnity bond. The sheriff may require an indemnity bond as provided in Rule 72 G.

RULE 75

TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS

A. Availability generally.

A.(1) Time. A temporary restraining order or preliminary injunction may be allowed by the court, or judge thereof, at any time after commencement of the action and before judgment.

A.(2) Grounds and notice of relief. A temporary restraining order or preliminary injunction may be allowed:

A.(2)(a) When it appears that a party is entitled to relief demanded in a pleading, and such relief, or any part thereof, consists of restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the party seeking the relief, or

A.(2)(b) When it appears that the party against whom a judgment is sought is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of a party seeking judgment concerning the subject matter of the action, and tending to render the judgment ineffectual. This paragraph shall not apply when relief is available by a restraining order under Rule 7 .

B. Temporary restraining order.

B.(1) Notice. A temporary restraining order may be granted without written or oral notice to the adverse party or to such party's attorney only if:

B.(1)(a) It clearly appears from specific facts shown by

affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the adverse party's atttorney can be heard in opposition, and

B.(1)(b) The applicant or applicant's attorney submits an affidavit setting forth the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

B.(2) Contents of order. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith; shall define the injury and state why it is irreparable and why the order was granted without notice.

B.(2)(a) Duration. Every temporary restraining order shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

B.(2)(b) When 10-day limit does not apply. The 10-day limit of Section B.(2)(a) does not apply to orders granted by authority of paragraph (c), (d), (e), (f) or (g) of subsection (1) of ORS 107.095.

B.(3) Hearing on preliminary injunction. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for

hearing at the earliest possible time and takes precedence over all matters except older matters of the same character. When the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if such party does not do so, the court shall dissolve the temporary restraining order.

B.(4) Adverse party's motion to dissolve or modify. On two days' notice (or on shorter notice if the court so orders) to the party who obtained the temporary restraining order without notice, the adverse party may appear and move its dissolution or modification. In that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

B.(5) Temporary restraining orders not extended by implication. If the adverse party actually appears at the time of the granting of the restraining order, but notice to the adverse party is not in accord with section C.(1), the restraining order is not thereby converted into a preliminary injunction. If a party moves to dissolve or modify the temporary restraining order as permitted by section B.(4), and such motion is denied, the temporary restraining order is not thereby converted into a preliminary injunction.

C. Preliminary injunction.

C.(1) Notice. No preliminary injunction shall be issued without notice to the adverse party at least five days before the time specified for the hearing, unless a different period is

fixed by order of the court.

C.(2) Consolidation of hearing with trial on merits. Before or after the commencement of the hearing of an application for preliminary injunction and upon motion of a party, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on trial and need not be repeated upon the trial. This subsection shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

D. Security.

D.(1) General rule. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs, damages, and attorney fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

D.(2) Waiver or reduction. The court may waive, reduce, or limit the security provided for in subsection (1) of this section upon a showing of good cause, including indigency, and on such terms as shall be just and equitable.

D.(3) When no security required. No security will be required under this section where:

D.(3)(a) A restraining order or preliminary injunction is sought to protect a person from violent or threatening behavior; or

D.(3)(b) A restraining order or preliminary injunction is sought to prevent unlawful conduct when the effect of the injunction is to restrict the enjoined party to available judicial remedies.

D.(3)(c) ORS 32.010 does not require it.

D.(4) Liability of sureties. The provisions of Rule 92 apply to a surety upon a bond or undertaking under this rule. The liability of the surety shall be limited to the amount specified in the undertaking.

E. Form and scope of injunction or restraining order. Every order granting a preliminary injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

F. Scope of rule.

F.(1) This rule does not apply to a temporary restraining order issued by authority of ORS 107.700 to 107.720.

F.(2) This rule does not apply to temporary restraining orders or preliminary injunctions granted pursuant to ORCP 79 except for the application of section E. of this rule as required by Rule 79 H.

F.(3) These rules do not modify any statute or rule of this state relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee.

G. The writ of ne exeat is abolished.

RULE 79

BONDS AND UNDERTAKINGS

A. Security; proceedings against sureties. Whenever these rules or other rule or statute require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as such surety's agent upon whom any papers affecting his liability on the bond or undertaking may be served. Any surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

B. Approval by clerk. Except where approval by a judge is otherwise required, the clerk is authorized to approve all undertakings, bonds, and stipulations of security given in the form and amount prescribed by statute, rule, or order of the court, where the same are executed by a corporate surety under C.(2) of this rule.

C. Qualifications of sureties.

C.(1) Individuals. Each individual surety must be a resident of the state. Each must be worth the sum specified in the undertaking, exclusive of property exempt from execution, and over and above all just debts and liabilities, except that where

there are more than two sureties, each may be worth a lesser amount if the total net worth of all of them is equal to twice the sum specified in the undertaking. No attorney at law, peace officer, clerk of any court, or other officer of any court is qualified to be surety on the undertaking.

C.(2) Corporations. A corporate surety must be qualified by law to issue surety insurance as defined in ORS 731.186.

D. Affidavits of sureties.

D.(1) Individuals. The bond or undertaking must contain an affidavit of each surety which shall state that such surety possesses the qualifications prescribed by section C. of this rule.

D.(2) Corporations. The bond or undertaking of a corporate surety must contain affidavits showing the authority of the agent to act for the corporation and swearing that the corporation is qualified to issue surety insurance as defined in ORS 731.186.

D.(3) Service. When a bond or undertaking is given for the benefit of a party, a copy of such bond or undertaking shall be served on that party promptly in the manner prescribed in Rule 9. Proof of service thereof shall thereupon be filed promptly in the court in which the bond or undertaking has been filed.

E. Objections to sureties. If the party for whose benefit a bond or undertaking is taken is not satisfied with the sufficiency of the sureties, that party may, within 10 days after

the receipt of a copy of the bond, serve upon the officer taking the bond and the party giving the bond, or the attorney for the party giving the bond, a notice that the party for whose benefit the bond is taken objects to the sufficiency of such sureties. If the party for whose benefit the bond is taken fails to do so, that party is deemed to have waived all objection to the sureties.

F. Hearing on objections to sureties.

F.(1) Request for hearing. Notice of objections to a surety as provided in section E. shall be filed in the form of a motion for hearing on objections to the bond. Upon demand of the objecting party, each surety shall appear at the hearing of such motion and be subject to examination as to such surety's pecuniary responsibility or the validity of the execution of the bond. Upon hearing of such motion, the court may approve or reject the bond as filed or require such amendment, substitute or additional bond as the circumstances shall warrant.

F.(2) Information to be furnished. Sureties on any bond or undertaking shall furnish such information as may be required by the judge approving the same.

F.(3) Surety insurers. It shall be sufficient justification for a surety insurer when examined as to its qualifications to exhibit the certificate of authority issued to it by the Insurance Commissioner or a certified copy thereof.

G. Deposits in lieu of undertakings and bonds. ORS Chapter 22 governs the circumstances and procedure whereby deposits may be made in lieu of a bond or undertaking.

RULE 90

JUDGMENTS FOR SPECIFIC ACTS

A. Judgment requiring act. A judgment requiring a party to make a conveyance, transfer, release, acquittance, delivery of a document, or other like act within a period therein specified shall, if such party does not comply therewith, be deemed to be equivalent thereto.

B. Enforcement; contempt. The court or judge thereof may enforce an order or judgment directing a party to perform a specific act by punishing the party refusing or neglecting to comply therewith, as for a contempt.

C. Application. Subsection (2) of this section does not apply to an order or judgment for the payment of money, except orders and judgments for the payment of suit money, alimony, and money for support, maintenance, nurture, education, or attorney fees pendente lite, or by final decree, in:

C.(1) Actions for dissolutions of marriages.

C.(2) Actions for separation from bed and board.

C.(3) Proceedings under ORS 108.110 and 108.120.

D. Contempt proceeding. As an alternative to the independent proceeding contemplated by ORS 33.010-.150, when a contempt consists of disobedience of an injunction or other judgment or order of court in a civil action, citation for contempt may be by motion in the action in which such order was made and the determination respecting punishment made after a show cause hearing. Provided however:

C.(1) Notice of the show cause hearing shall be served in the manner of a summons;

C.(2) Punishment for contempt shall be limited as provided in ORS 33.020.

C.(3) The party cited for contempt shall have right to counsel as provided in ORS 33.095.

RULE 91

RECEIVERS

A. Receiver defined. A receiver is a person appointed by a circuit court, or judge thereof, to take charge of property during the pendency of a civil action or upon a judgment or order therein, and to manage and dispose of it as the court may direct. Receivers during the pendency of an action are regulated by Rule 71.

B. When appointment of receiver authorized. A receiver may be appointed by a circuit court in the following cases:

B.(1) After judgment to carry the same into effect.

B.(2) To dispose of the property according to the judgment, or to preserve it during the pendency of an appeal or when an execution has been returned unsatisfied, and the debtor refuses to apply his property in satisfaction of the judgment.

B.(3) At the instance of a judgment creditor either before or after the issuance of an execution to preserve, protect, or prevent the transfer of property liable to execution and sale thereunder.

B.(4) In cases provided by statute, when a corporation or cooperative association has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

B.(5) When a corporation or cooperative association has been dissolved or is insolvent or in imminent danger of insolvency and it is necessary to protect the property of the corporation or cooperative association, or to conserve or protect the interests

of the stockholders or creditors.

C. Temporary ex parte receivership.

C.(1) Notice. A temporary receiver may be appointed without written or oral notice to the adverse party or his attorney only if the applicant shows in detail by verified complaint or affidavit the matters required by paragraphs (a) to (d) of this subsection. If any of those matters are unknown to the applicant and cannot be ascertained by the exercise of due diligence, the applicant may be excused from setting them forth. In such case the affidavit or complaint shall fully state the matters unknown and the efforts made to acquire such information.

C.(1)(a) The nature of the emergency existing and the reasons why irreparable injury would be suffered by the applicant during the time necessary for a hearing on notice;

C.(1)(b) The names, addresses, and telephone numbers of the persons then in actual possession of the property for which a receiver is requested, or of the president, manager or principal agent of any corporation in possession of said property;

C.(1)(c) The use then being made of the property by the persons in possession thereof;

C.(1)(d) If the property is a part of the plant, equipment, or stock in trade of any business, the nature and approximate size or extent of the business, and facts sufficient to show whether or not the taking of the property by a receiver would stop or seriously interfere with the operation of the business.

C.(2) Attorney's certificate. The applicant's attorney shall certify to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.

C.(3) Contents of order. Every order appointing a temporary receiver without notice shall (a) be endorsed with the date and hour of issuance; (b) be filed forthwith in the clerk's office and entered of record; (c) define the injury and state why it is irreparable and why the order was granted without notice; and (d) describe the property as required by section F.(1).

C.(4) Duration. Every order appointing a temporary receiver without notice shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

C.(5) Hearing on receivership. In the case of an order appointing a temporary receiver without notice, the motion for appointment of a receiver shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character. When the motion comes on for hearing, the party who obtained the temporary receiver shall proceed with the application for a receiver and, if he does not do so, the court shall dissolve the temporary receivership.

C.(6) Adverse party's motion to dissolve or modify. On two days' notice (or on shorter notice if the court so orders) to the party who obtained the temporary receiver without notice, the adverse party may appear and move its dissolution or modification. In that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

C.(7) Temporary receiverships not extended by implication. If the adverse party actually appears at the time of the appointment of the temporary receiver, but notice to the adverse party is not in accord with section D.(1), the temporary receiver is not thereby converted into a receiver. If a party moves to dissolve or modify the temporary receivership as permitted by subsection C.(6) of this section, and such motion is denied, the temporary receiver is not thereby converted into a receiver.

D. Appointment of receivers on notice.

D.(1) Notice. Except as permitted by section C., no receiver shall be appointed without notice to the adverse party at least 10 days before the time specified for the hearing, unless a different period is fixed by order of the court.

D.(2) Consolidation of hearing with trial on merits. The provisions of Rule 75 D.(2) are also applicable to hearings for appointment of receivers prior to trial.

E. Form of order appointing receivers. Except for an order appointing a temporary receiver, every order or judgment appointing a receiver:

E.(1) Shall contain a reasonable description of the property included in the receivership;

E.(2) Shall fix the time within which the receiver shall file a report setting forth (a) the property of the debtor in greater detail, (b) the interests in and claims against it, (c) its income-producing capacity and recommendations as to the best method of realizing its value for the benefit of those entitled;

E.(3) Shall set a time within which creditors and claimants shall file their claims or be barred; and

E.(4) May require periodic reports from the receiver.

F. Oath and security. A receiver, before entering upon his duties, shall be sworn faithfully to perform his trust to the best of his ability. The provisions of Rule 75 F.(1), (2), and (4), relating to security, are also applicable to receivers appointed under this rule.

G. Notice to persons interested in receivership. A receiver appointed after notice and hearing shall, under the direction of the court, give notice to the creditors of the corporation, of the copartnership, or of the individual, by publication or otherwise, requiring such creditors to file their claims, duly verified, with the receiver, his attorney, or the clerk of the court, within such time as the court directs.

H. Special notices.

H.(1) Required notice. Creditors filing claims with the receiver, all persons making contracts with a receiver, all persons having claims against the receiver or any interests in

receivership property, and all persons against whom the receiver asserts claims shall receive notice of any proposed action by the court affecting their rights.

H.(2) Request for special notice. At any time after a receiver is appointed, any person interested in said receivership as a party, creditor, or otherwise, may serve upon the receiver (or upon the attorney for such receiver) and file with the clerk a written request stating that he desires special notice of any and all of the following named steps in the administration of said receivership. A request shall state the post office address of the person, or his attorney.

H.(2)(a) Filing of motions for sales, leases, or mortgages of any property in the receivership.

H.(2)(b) Filing of accounts.

H.(2)(c) Filing of motions for removal or discharge of the receiver.

H.(2)(d) Such other matters as are officially requested and approved by the court.

H.(3) Form of notices. Notice of any of the proceedings set out in subsections H.(1) and (2) of this rule (except petitions for the sale of perishable property, or other personal property, the keeping of which will involve expense or loss) shall be addressed to such person, or his attorney, at his stated post office address, and deposited in the United States Post Office, with the postage thereon prepaid, at least five days before the hearing on any of the matters above described; or personal service of such notice may be made on such person or his

attorney not less than five days before such hearing; and proof of mailing or personal service must be filed with the clerk before the hearing. If upon the hearing it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order and such shall be final and conclusive order.

I. Termination of receiverships. A receivership may be terminated only upon motion served with at least ten days' notice upon all parties who have appeared in the proceedings. The court may require that a final account and report be filed and served, and may require the filing of written objections thereto. In the termination proceedings, the court shall take such evidence as is appropriate and shall make such order as is just concerning its termination, including all necessary orders on the fees and costs of the receivership.

COMMENTS

RULES 70 - 75
RULES 90 - 91

I. GENERALLY

These draft rules are an attempt to: (a) separate the portion of the Lacy rules relating to provisional remedies from the portion relating to enforcement of judgments; and (b) reconcile the provisions of ORS relating to provisional process (ORS Chapter 29) with the preliminary injunctions and receivership provisions in ORS Chapters 31 and 32.

The reason for treating the provisional remedies aspects of the Lacy draft separately is that the provisional process elements of Chapter 29 were substantially revised by the 1977 legislature, and those ORS sections were adopted by Lacy with relatively little change. The 1977 legislative revision left substantial confusion as to the relationship between Chapters 31 and 32 covering receivers and preliminary injunctions and provisional process under ORS Chapter 29. ORS Chapters 31 and 32 were not modified in 1977 and are very outdated. We are considering needed revisions for Chapters 30 and 31 in new rules covering preliminary injunctions and receivers (proposed Rules 90 - 91, drafted by Merrill). It makes sense to integrate the entire provisional remedies area into one comprehensive set of rules. The enforcement of judgments area is relatively more controversial and difficult and could be left for consideration during the next biennium.

This draft of the rules renumbers all or part of prior rules, (a) drafted by Lacy under numbers 75, 76, 77, 78, 79, 83, and 87 and (b) by Merrill under numbers 90 and 91), into proposed Rules 70 - 75 and 90 - 91. The reason for the renumbering was to put provisional remedies in logical order following provisions relating to trial and before judgment and then to have any rules relating to enforcement of judgments follow the rules relating to entry and form of judgment. The renumbering scheme would then be:

ORCP	70 - 79	Provisional remedies
	80 - 89	Form of entry and vacation of judgments
	90 and above	Enforcement of judgments

The integration of Chapters 29 and 31-32 was accomplished by treating all provisional procedures for establishing a lien on property and taking possession of personal property pending judgment under the Rule 71 procedure which is the provisional process procedure established by ORS Chapter 29. This would include temporary or permanent restraining orders directed to the preservation of a defendant's property, which formerly could have also been governed by ORS Chapter 32, and temporary receiverships, which were under ORS Chapter 31. Other preliminary injunctions (primarily where injunction is the ultimate remedy sought) are covered by an entirely separate rule and procedure (Rule 75). Receiverships, either ancillary to enforcement of judgments or as an ultimate remedy when an insolvent or dissolved corporation is involved,

appear under a separate rule (Rule 91). Rule 90 is the portion of Lacy Rule 87 which related to enforcement of equitable judgments. The rule is equivalent to Federal Rule 70.

II. RULE 70 - DEFINITIONS

Rule 70 A. combines the definitions of Lacy's Rule 79 A. and those of Lacy's Rule 79 C. which seemed appropriate to provisional remedies. The most important definition is "provisional process" in 70 A.(10), which has been changed to specifically include provisional restraining orders, injunctions, and receiverships and to exclude temporary restraining orders and preliminary injunctions under Rule 75.

Definitions A.(3), A.(6), and A.(9) are also new. Since these rules refer to provisional remedies against a party who is not yet a "judgment debtor," the words "plaintiffs" and "defendants" are used.

Rule 70 B. was taken from Lacy's Rule 77 A.(1), (2) and (3). Wage garnishment is the only exception to the notice. Levy on real property would require notice. This is consistent with ORS 29.178, but not with the Lacy rule.

Rule 70 C. was taken from Lacy's Rule 77 C.

Rule 70 D. was taken from Lacy's Rule 77 B.(5).

RULE 71 - PROVISIONAL PROCESS

Sections A. thorugh J. are taken directly from Lacy's Rule 79 B. through K. Lacy had taken this directly out of ORS Chapter 29. This is the 1977 provision to conform to constitutional requirements. The language is not as clear as it might be, but it is apparently constitutional and accepted. See Huntington v. Coffee Associates, 43 Or. App. 395 (1979). Section K. of this rule is new. Since by the definition of Rule 70 A.(10) a receivership prior to judgment is provisional process, all of the provisions and limitations of this rule would apply to such receiverships. Note, in compliance with Chapter 31, receiverships are limited to circuit court.

Procedural matters in the provisional receivership are provided in subsection K.(2) by cross reference to the general receivership rule. Note, by virtue of the incorporation of 91 F., the provisional receivership would require a bond; this was not clearly provided by ORS.

RULE 72 - ATTACHMENT

Sections A. through E. are taken from Lacy's Rule 78 A. through E. The only changes were to eliminate Lacy's Rule 78 A.(1)(d), which is unnecessary because of the definition in 70 A.(8), and to remove the limit to corporate security bonds. Although non-corporate security bonds present problems of justification of sureties, some people cannot secure or afford a corporate bond. D.(4)(a)(iii) and (iv) were taken from 82 D. D.(5) is ORS 29.180.

Section F. is taken from Lacy's Rule 77 F. and section G. from 77 G. Again, the limit to the corporate surety bond is removed. Lacy's Rule 77 F.(2)(e) was not included as it refers to the special procedures of Lacy's Rule 80 which have not yet been adopted.

RULE 73 - GARNISHMENT

This rule has been primarily adapted from Lacy's Rule 83 A. It uses the notice of garnishment procedure rather than a writ of attachment. This rule allows the plaintiff to issue the notice rather than a clerk issuing a writ, and any person can serve instead of only a sheriff.

Rule 73 A. makes clear that garnishment is simply a method of attachment. Rule 72 D.(2) and D.(4)(a)(ii) indicate the same. The garnishment creates a lien on the debt or property in the hands of the third person, and the lien attaches upon service. The references in Lacy's Rule 83 to judgment creditors and executions have been removed. In paragraph A.(4)(a), the substance of Lacy's Rule 82 G. was incorporated, rather than have a cross reference. Note, the rule does not provide any procedure for contesting a response by the garnishee that no money is owed nor any property held. Under A.(1)(a) the lien attaches upon notice, and after judgment the matter would be decided upon a proceeding to foreclose the lien against the garnishee if the

plaintiff believes money was held or property owned. Note, notice to the defendant and a bond is required by Rule 72 since this is a form of attachment.

Lacy's sections 83 B., C., and D. were excluded because they applied only to garnishment as an execution method.

Section B. is taken from Lacy's Rule 83 E. Again, the corporate bond requirement is eliminated.

RULE 74 - CLAIM AND DELIVERY

This was adapted from Lacy's Rule 87 A. Lacy's Rule 87 A.(3) was not included. This appears substantive and should be left in the statutes. Section C. of this rule was not in Lacy's rule and requires a bond prior to claim and delivery. Section F. is also new and requires indemnity to the sheriff. These two requirements exist for the similar procedure of attachment. The rule does not make the redelivery by bond procedure available. Since plaintiff sued to replevin this specific property, he should be enabled to insist the sheriff hold it until judgment.

RULE 75 - TEMPORARY RESTRAINING ORDER

This was formerly denominated Rule 90. The only changes are those suggested by the Jackson subcommittee. Note, the provisional process rule (Rule 71) excludes restraining orders under this rule. Paragraph A.(2)(b) would only apply when the restraining order did not restrict or prevent alienation of defendant's property

for the purpose of protecting plaintiff's ability to satisfy the judgment. There might be situations where some other type of preliminary order is needed to prevent a judgment from being useless. Both the provisional process rules and the preliminary injunction rules have the same basic due process elements: (a) court order, (b) bond, and (c) hearing before or soon after the provisional remedy. The exact procedure specified, however, is different.

The only change suggested by the Jackson subcommittee was in paragraph B.(1) where an affidavit, rather than a certificate, is required.

RULE 79 - BONDS AND UNDERTAKINGS

This rule is not limited to provisional remedies and would govern for all bonds. The most important and common bond provisions are in the area of provisional remedies, and this would cover bonds referred to in Rules 72, 73, 74, and 75.

The Jackson subcommittee did not suggest any changes in the draft of this rule.

RULE 90 - JUDGMENTS FOR SPECIFIC ACTS

This rule relates to enforcement of judgments. It covers the same area as Rule 70 of the federal rules. This was taken from Lacy's Rule 87 E.

RULE 91 - RECEIVERS

This rule again includes only receiverships ancillary to judgment and relating to corporations. Provisional receiverships to preserve property for enforcement of judgment, if one is

secured, fall under Rule 71. Section B. includes only B.(2), (3), (6), (7), and (8) of the prior version of the rules.