N O T I C E

TO: NEWS MEDIA
OREGON STATE BAR BULLETIN

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

The next meeting of the COUNCIL ON COURT PROCEDURES will be held Saturday, September 6, 1980, at 9:30 a.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon.

At that time, the Council will discuss and hear suggestions regarding proposed Oregon Rules of Civil Procedure.

# # # #

8-12-80

A G E N D A

COUNCIL ON COURT PROCEDURES

9:30 a.m., Saturday, September 6, 1980

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

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1. Proposed Rules 78 - 85 relating to provisional process - Butler subcommittee

2. Class actions

3. Tentative Rules 65 - 72 and amendments to Rules 1 - 64 and ORS - August 27, 1980 draft

4. Rule 7 amendments - Pozzi suggestions

5. Public meeting schedule; release and dissemination of tentative draft of rules and amendments

6. Approval of minutes of meeting of June 28 and July 26, 1980

7. NEW BUSINESS

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held September 6, 1980

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

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

Chairman Don McEwen called the meeting to order at 9:35 a.m.

Judge Buttler reviewed proposed Rules 78 through 85 submitted by the enforcement of judgments subcommittee in the draft dated August 29, 1980.

Charles K. Markley, Attorney, Portland, Oregon, spoke on behalf of the debtor-creditor section of the bar concerning the provisional remedies rules. He stated he was concerned about the following: the implication in the first paragraph of Rule 83 A. that all the information required be personally sworn to by plaintiff as opposed to affidavits of persons with knowledge; the seven-day limit for hearing in Rule 83 G.(1); the problem of application of Rule 84 A.(2)(a) to a partially secured creditor. He stated he felt there should be a description of the property for any type of provisional process in Rule 83 A.(3). He also questioned the necessity of the inclusion of all 13 items in Rule 83 A. for any kind of provisional process, and suggested the words "where applicable" could be appropriately inserted.

The Council considered and discussed Mr. Markley's suggestions and other aspects of the rules. The following actions were taken:

Rule 84 D.(3)(d). The reference to "subparagraph (ii) of this paragraph" was changed to read "paragraph B. of this subsection."

Rule 84 F. The Council unanimously decided to delete the provisions relating to release of liens, F.(2)(a) through F.(2)(e), in their entirety. The Council also unanimously agreed to delete the last sentence of F.(1)(a): "Delivery of property under this section does not affect the attaching plaintiff's lien."

Rule 81 B. Judge Sloper moved, seconded by Darst Atherly, that paragraphs B.(2)(b) through B.(2)(d) be deleted from the notice of exemption section. The motion carried unanimously. It was suggested by Frank Pozzi that some simple and clear language relating to possible exemptions be added to the notice. The Executive Director was asked to draft language and submit it for approval to the subcommittee.

Rule 83 G.(1). The Council decided that the following sentence should be added at the end of G.(1): "If the plaintiff so requests, the hearing date may be set at some date later than the seventh day."

Rule 83 A. Upon motion by Laird Kirkpatrick, seconded by Don McEwen, the Executive Director was asked to redraft the first paragraph of this rule to allow the required showing to be made by affidavits submitted in support of plaintiff's petition. Judge Dale opposed the motion.

Upon motion by Carl Burnham, seconded by Judge Sloper, the Council unanimously approved release of the tentative draft of Rules 78-85, dated August 29, 1980, as modified by the actions taken by the Council.

Class Actions. Austin Crowe moved, seconded by Charles Paulson, that Rule 32 be amended to incorporate the revisions submitted on July 21, 1980, by the class action subcommittee. The motion carried, with Carl Burnham, Darst Atherly Garr King, Judge Buttler, and Don McEwen opposing it.

The Council had no further objections to or suggestions regarding the draft of Rules 65-72 and amendments to ORCP 1-64 dated August 27, 1980, which had been approved for release at the last meeting.

The Council discussed the suggested changes in ORCP 7 set out in Frank Pozzi's letter dated August 4, 1980, and in the staff memorandum dated June 16, 1980.

A motion was made by Austin Crowe, seconded by Don McEwen, to adopt the change in 7 D.(4)(a) set out in the June 16, 1980, memorandum reinstating service on the Department of Motor Vehicles, with the substitution of "registered agent" for "attorney in fact" in paragraph (i). The motion passed unanimously.

A motion was made by Frank Pozzi, seconded by Charles Paulson, to adopt the change in D.(4)(c) on Page 2 of the August 4th letter.

The motion failed. Voting for the motion were: Berkeley Lent, David Vandenberg, Lyle Velure, Charles P.A. Paulson, Wendell Gronso, Frank Pozzi, Harriet Krauss, Val Sloper, and Don McEwen.

A motion was made by Frank Pozzi, seconded by Charles Paulson, that ORCP 7 D.(2)(d) be changed to provide that time should begin to run three days after mailing, if mailed within the State of Oregon, and seven days after mailing if mailed outside the state. The motion passed, with Darst Atherly and Don McEwen opposing it.

A motion was made by Frank Pozzi, seconded by Charles Paulson, that a new paragraph be added to subsection D.(3) of ORCP 7 providing service upon vessel owners and charterers. The motion passed unanimously.

The Executive Director stated that the approved tentative rules would be mailed to bar committees, the OADC, ATLA, law libraries, local bar associations, and to those persons who testified at the hearings or submitted comments. A summary of all of the changes would be sent to all members of the bar, all newspapers, and the Bar Bulletin, and copies of the rules would be available upon request.

The next meeting of the Council is scheduled for Saturday, September 27, 1980, at 9:30 a.m., at the RED LION INN/LLOYD CENTER, Parkman Room, 1000 N.E. Multnomah, Portland, Oregon.

The meeting adjourned at 11:55 a.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

REPORT OF CLASS ACTION SUBCOMMITTEE

July 21, 1980

REPORT OF CLASS ACTION SUBCOMMITTEE

At the request of the Council on Court Procedures and pursuant to a direction by the Senate Judiciary Committee of the 1979 Legislative Assembly, this subcommittee has conducted a detailed review of ORCP 32 relating to class actions. The subcommittee has compared the Oregon rule to Federal Rule 23, reviewed current legislative trends in other states and proposals for federal statutes relating to class action, and reviewed the extensive national literature on class actions. The subcommittee has also considered Oregon cases interpreting ORCP 32 and the legislative history of that rule, and on June 27, 1980, conducted a public hearing relating to class actions at which the testimony of 10 persons was received.

The subcommittee now recommends that Rule 32 be amended to incorporate the proposed revisions which are attached. These proposed revisions would do the following:

(1) Elimination of prelitigation notice requirements. The subcommittee recommends that section 32 I. be eliminated, with conforming elimination of subsection 32 A.(5) and modifications to 32 J. and K. This eliminates the requirement of notice 30 days prior to the commencement of class actions for damages. The subcommittee felt the requirement served no useful purpose and contained potential for abuse.

(2) Revision of factors to be considered in deciding predominance of common questions of law or fact. The subcommittee recommends that paragraphs (d) and (e) of subsection 32 B.(3) be changed to eliminate the reference to notice in paragraph (d) (because of the proposed change in 32 G.) and by substitution of paragraph 3(g)(13) of the Uniform Class Actions Act for paragraph B.(3)(e) of existing Oregon Rule 32. (The Uniform Act language more clearly expresses the idea incorporated in paragraph B.(3)(e).)

(3) Elimination of subsection 32 C. The subcommittee felt this provision was of very limited utility and confusing. Anything covered by this subsection could already be considered under B.(3).

(4) Clarification of provision relating to postponement of certification decision to determine legal question. Subsection G.(4) of the existing rule refers to a "stay" of the class action if the outcome turns upon a point of law and the court wishes to consider the legal question first. Technically, what is involved is not a "stay" but a postponement of the certification hearing or decision. The substance of section 32 G.(4) was moved up to subsection C.(2).

(5) Elimination of requirement of individual notice in all cases. The revision would replace the existing requirement of

subsection 32 G.(1) with the language of section 7 of the Uniform Class Actions Act (32 F.(1) of revision). The new language only requires individual notice for claims over $100 and has a number of provisions encouraging flexibility in the notice procedure. The subcommittee felt that an absolute requirement of individual notice was too rigid and imposed an unnecessary impediment to maintenance of class actions involving a large class and small individual claims. The subcommittee drafted revised paragraph (1)(f).

(6) Elimination of mandatory requirement of claim by class members prior to judgment. The committee changed the absolute requirement that class members submit claim forms in damage cases as a basis for judgment. The language of existing 32 G.(2) was changed from "the court shall" to "the court may" require such forms and by eliminating the last sentence (32 F.(2) in revision). Conforming changes were also made in 32 G.(3) and 32 N. (32 F.(3) and 32 L. in revision). The subcommittee felt that the requirement of a claim form in every damage case was too rigid and that a judgment listing all class members and individual damages in every case involves an extremely complex and expensive form of judgment for no good reason. The subcommittee took no position regarding award of aggregate damages not identifiable to individual class members (fluid class recovery). The subcommittee felt this was an area better determined by the courts or legislature in the context of remedies and proof of damages.

(7) Preliminary hearing and allocation of damage costs. The proposed revision adds a new subsection, F.(4), adapted from N.Y. C.P.L.R. section 904, which authorizes the court, after a preliminary hearing, to require the defendant to pay all or part of the costs of initial notice to class members. Although the normal rule is that plaintiffs pay the costs of notice, the subcommittee felt the New York approach provided desirable flexibility by allowing the trial judge to require payment by defendant, based upon a likelihood that the plaintiff class will win.

(8) Regulation of attorney fees. The proposed revision would substitute far more detailed provisions, taken from sections 16 and 17 of the Uniform Class Actions Act, for section 32 O. of the existing rule (section M. of revision). These provisions do not provide for or authorize award of attorney fees, not otherwise provided by statute or law, but have much more detailed provisions for court control of attorney fees and litigation expenses. The new language also covers liability of class members for fees, costs, and disbursements awards.

(9) New provision relating to tolling of statute of limitations. The proposed revision adds a new section, N., which is taken from section 18 of the Uniform Class Actions Act. The section clarifies the effect of pendency and termination of class actions upon the running of the statutes of limitations against the individual claims of class members. This is an area of considerable confusion and should be clarified. The subcommittee recognizes that this provision may have substantive elements, beyond the rulemaking powers of the Council, and suggest that it be submitted to the legislature with a note asking the legislature to review it in that light.

CLASS ACTION SUBCOMMITTEE

Austin W. Crowe, Jr., Chairman
William M. Dale, Jr.
Laird C. Kirkpatrick
Frank H. Pozzi

PROPOSED REVISIONS TO ORCP 32

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

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

class members, if judgment for the class is entered, are so minimal as not to warrant the intervention of the court;] whether or not the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class; (f) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal.

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

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

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

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

C.(2) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or

administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the court may postpone a determination under subsection (1) of this section until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.

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

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

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

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

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

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

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

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

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

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

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

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

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

F.(1)(b) The notice, based on the certification order and any amendment of the order, shall include:

F.(1)(b)(i) a general description of the action, including the relief sought, and the names and addresses of the representative parties;

F.(1)(b)(ii) a statement that the court will exclude such member of the class if such member so requests by a specified date.

F.(1)(b)(iii) a description of possible financial consequences on the class;

F.(1)(b)(iv) a general description of any counterclaim being asserted by or against the class, including the relief sought;

F.(1)(b)(v) a statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;

F.(1)(b)(vi) a statement that any member of the class may enter an appearance either personally or thorugh counsel;

F.(1)(b)(vii) an address to which inquiries may be directed; and

F.(1)(b)(viii) other information the court deems appropriate.

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

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

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

F.(1)(f) The court may order a defendant who has a mailing list of class members to cooperate with the representative parties in notifying the class members and may also direct that notice be included with a regular mailing by defendant to the class members.

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

[G.] F.(3) If the court requires class members to file a statement requesting affirmative relief, [F]failure of a class member to file a statement required by the court [will] may be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.

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

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

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

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

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

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

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

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

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

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

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

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

other people has been made;

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

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

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

[K. Application of sections I. and J. of this rule to actions for equitable relief; amendment of complaints for equitable relief to request damages permitted.]

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

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

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

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

[M.] K.(1)(b) Coordination of class actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and personnel; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.

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

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

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

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

[N.] L. Judgment; inclusion of class members; description; names. The judgment in an action maintained as a class action under subsections (1) or (2) of section B. of this rule, whether or not favorable to the class, shall include and

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

M.(1)(d) The court may order the adverse party to pay to the prevailing class its reasonable attorney fees and litigation expenses if permitted by law in similar cases not involving a class.

M.(1)(e) In determining the amount of attorney fees for a prevailing class the court shall consider the following factors:

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

K.(1)(e)(ii) results achieved and benefits conferred upon the class;

M.(1)(e)(iii) the magnitude, complexity, and uniqueness of the litigation;

M.(1)(e)(iv) the contingent nature of success;

M.(1)(e)(v) appropriate criteria in DR 2-106 of the Oregon Code of Professional Responsibility.

M.(2) Before a hearing under section C. of this rule or at any other time the court directs, the representative parties and the attorney for the representative parties shall file with the court, jointly or separately:

M.(2)(a) a statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts;

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

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

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

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

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

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

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

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July 30, 1980

12685-2
OUR FILE NO.

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

Dear Fred:

Proposed Rule 65E(3) seems to have an error in it. it reads:

> "Application to the court for action upon the report and upon objections to the report shall be by motion and upon notice."

The provision that the motion be made upon notice appears to have come from FRCP 53. The general pattern of the Oregon Rules of Civil Procedure is to require service of motions upon parties not in default, ORCP 9A, but not to require a separate document called a notice of motion. Local rules do require notice in some circuits.

I think that the words "and upon notice" should be deleted.

Very truly yours,

Bruce C. Hamlin

Bruce C. Hamlin

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August 1, 1980

12685-2
OUR FILE NO.

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

Dear Fred:

In several of the proposed rules the word "clerk" is defined to mean "clerk of the court or any person performing the duties of that office." See ORCP 81A.3 (Proposed). Does that concern you when compared with the definition in ORS 8.070(5):

> "All references in the Oregon Revised Statutes to clerk or clerk of the court shall be applicable to the court administrator described in subsection (4) of this section."

See also ORS 8.075 and ORS 205.110. My concern is that a reference to "clerk" in ORCP may not be a reference in the "Oregon Revised Statutes." Perhaps this is taken care of by ORS 1.750.

Very truly yours,

Bruce

Bruce C. Hamlin

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August 4, 1980

Fred Merrill, Esq.
University of Oregon
School of Law
Eugene, OR 97403

Re: ORCP 7, Suggested Changes

Dear Fred:

We have reviewed the suggested changes to ORCP 7 D.(4)(a) and agree that the changes are preferable to present ORCP 7 D.(4)(a). We would suggest only that the words "an attorney in fact" in D.(4)(a)(i) be changed to "a registered agent" since it would be virtually impossible to determine whether a foreign corporation has an attorney in fact located somewhere within the State.

There are some other difficulties with present ORCP 7 which we believe need correction. 7 D.(2)(d) provides:

> "Service by mail, when required or allowed by this rule, shall be made by mailing a true copy of the summons and a true copy of the complaint to the defendant by certified or registered mail, return receipt requested. For the purpose of computing any period of time prescribed or allowed by these rules, service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused."

The words "and the return receipt signed or when acceptance is refused" assume a standard of excellence on the part of the United States Post Office which no longer exists. It is very common for our office to receive return receipts which are unsigned; which have been signed by someone other than the recipient with no further identification, or which bear forged signatures. In many cases, the return receipts are

not returned at all. Moreover, a defendant can defeat service simply by allowing registered mail to sit at the post office without either signing for or refusing it.

Accordingly, since there are presumptions that official duty has been regularly performed and that mail sent has been received, we would suggest that service by mail should be deemed complete a fixed number of days after mailing (for example, seven days, or three days if mailed within the State of Oregon and seven days elsewhere).

The same difficulty applies to D.(4)(c) which provides with respect to Motor Vehicle service, that no default shall be entered against any defendant "who has not either received or rejected the registered or certified letter containing the copy of the summons and complaint." Moreover, since service no longer will be "by mail" but by service upon the Administrator of the Motor Vehicles Division plus mailing of the summons and complaint, the phrase "no default shall be entered against any defendant served by mail under this subsection" no longer appears to be correct. We would suggest that D.(4)(c) be changed to read:

> "No default shall be entered against any defendant served under this subsection unless the plaintiff first shows by affidavit that, within a reasonable time after service of summons and complaint upon the Administrator of the Motor Vehicles Division, he has caused to be mailed a true copy of the summons and complaint to the defendant at the address given by the defendant at the time of the accident or collision that is the subject of the action, and the most recent address furnished by the defendant to the Administrator of the Motor Vehicles Division, and any other address of the defendant known to the plaintiff, which might result in actual notice."

We would further suggest that a new D.(3)(e) be added as follows:

> "Vessel Owners & Charterers. Upon any foreign steamship company or steamship charterer, by personal service upon any agent authorized by such company or charterer to solicit cargo

> or passengers for transportation to or from ports in the State of Oregon or ports in the State of Washington on that portion of the Columbia River forming a common boundary with Oregon."

This provision would give statutory authority to a practice which has been prevalent among maritime lawyers for many years. Steamship agents are not general agents for purposes of service, but in fact, such agents are normally served with process in cases where the statute of limitations is not a problem. The new provision was suggested by a Washington statute, RCW 4.28.080(13), which provides for service of process:

> "If against a foreign or alien steamship company or steamship charterer, any agent authorized by such company or charterer to solicit cargo or passengers for transportation to or from ports in the State of Washington."

We have changed the Washington statute to include Columbia River ports on both sides of the river boundary, since under the terms of the Enabling Act establishing the States of Washington and Oregon, the courts of both states have concurrent jurisdiction over the surface waters of the Columbia River.

Very truly yours,

Frank Pozzi

FP:kt

cc: Donald W. McEwen, Esq.

MORTON A. WINKEL
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August 8, 1980

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

Dear Fred:

I would appreciate it if the sub-committee would consider the following comment regarding provisional remedies. I have found the provisions of ORS 29.010ff regarding provisional process to be very confusing and difficult to work with and I believe that many changes should be made in the interests of clarity so that lawyers and judges know what the rules are.

One fundamental question that should be addressed is whether those sections, when they were adopted in 1973, and as they have been amended to date, created any new remedies. For example, in a recent case in which I represented the defendant, my client was owed money by a third party. The plaintiff was not sure whether the money had yet been paid, and, therefore, sought provisional process including an order restraining my client from collecting or spending that money. If all plaintiff was entitled to was attachment, with or without garnishment, no such relief would have been available prior to 1973. Query: does the new statute, by referring to restraining orders, and the like, authorize the court to grant plaintiff the provisional relief requested? My personal belief is that no such relief is available, but the statute does not make that clear. I believe that some comment would be appropriate in the new Rules.

An interesting question raised in a recent case brought about by the Rules, is whether attachment is now available in what used to be "suits in equity."

I believe that the present provisional process statutes are terribly confusing in that they do not distinguish between provisions that relate to claim and delivery cases and actions for the recovery of money. The proposed Rules make some effort in that regard, but in my view, they fall far short of the goal. Perhaps those provisions of proposed Rule 83 which apply

only to claim and delivery could be put in proposed Rule 85.

I think it would be very helpful if Rule 83A would specify which subparagraphs had to be complied with reference to particular provisional process. For example, it is my opinion that subsections 4, 6, 10, 11 and 12 have no relevance to a claim for money in which attachment is sought.

Proposed Rule 83I(1) requires that Rule 82A be complied with. That suggests that every subsection of 82A must be complied with in order to obtain any provisional process. Clarification is in order.

Considerable confusion results from the comparision of the standard in proposed Rule 83A(13) with the language in proposed Rule 83C(2). Is there any difference between there being "no reasonable probability that the defendant can establish a successful defense to the underlying claim" and the existance of "probable cause for sustaining the validity of the underlying claim"? If the latter is the true standard, why does the application have to deal with another standard? If the standards are not different, why isn't the language in the Rule identical in each case?

One comment with regard to proposed Rule 84. I gather that a claimant may not file a "blanket" claim of lien on all of the alleged debtor's personal property but must believe that a certain identifiable piece or pieces of property exist and make claim to them. I think it would be appropriate for the comment to make that clear.

Generally I believe it is inappropriate in the Rules to identify the parties by the designations of plaintiff and defendant. I would suggest that some other designation such as "claimant" and "alleged obligee" would be appropriate, because there would be cases in which a defendant would be seeking provisional process.

Very truly yours,

Morton A. Winkel

MAW:dl
cc: William N. Stiles, Esq.

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August 18, 1980

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

RE: ORCP Rules 78-85; Rule 81A(11)
Rule 81B(1)

Dear Fred:

Thank you for inviting my comments on proposed Rules 78-85. My general impression is that the proposed Rules appear well-thought-out and practicable. Permit me, however, three or four "housekeeping" suggestions:

Rule 81A(11): The definition of "sheriff" is made to include "constable" in district court actions, but there is no reference to justice courts, of which there are still some 40-odd in the state. Nine Oregon counties, in fact, do not yet have district courts. ORCP 1A makes the Rules applicable to "all other courts. .., etc." ORS 52.010-52.030 provides that civil procedure in justice courts is the same as in circuit courts, while ORS 52.210-52.220 does the same as to provisional remedies. ORS 51.440 is the statute providing for constables in both justice and district courts. I would propose that the subcommittee consider the following alternative language for 81A(11):

> A. (11) Sheriff. The term, "sheriff," includes a constable of a district or justice court, for the purposes of Rules 81-85.

Rule 81B(1): Three problems which I perceive in Rule 81 and elsewhere in ORCP were created (inadvertently, I believe) in the original underlying legislation. One has to do with the mechanics of sending the Notice of Levy. I grant that the ultimate responsibility to see that the defendant is served, if possible, with the Notice of Levy, is and should be upon the plaintiff. However, the person in the best position to promptly mail (or serve personally at the actual moment of levy) the Notice of Levy is the sheriff executing the process. Therefore, I think the Rule should make it clearly possible for the plaintiff so to instruct the sheriff. This may be accomplished by changing the language.

> "...the plaintiff must promptly serve..." to,
> "...the plaintiff must cause promptly to be served..."

Rule 81B(2)(b): A second problem involves the list of exemptions to be served on a natural person defendant. The list currently in use around the state was created in December, 1977, ad hoc, in response to an emergency condition, and may or may not be 100% accurate (we didn't examine all the Indian Treaties, for instance). Other such "shopping lists" have since been adopted as statutory forms — I feel this one should also be given statutory blessing, for the protection of the creditor in good faith.

Rule 81B(2)(d): No one has ever told us just who at the courthouse is responsible for supplying the exemption claim forms. Given the buck-passing talents of a courthouse bureaucracy, this provision becomes sheer mumbo-jumbo. Closely connected is the lack of a statutory form, or any general rule respecting notice and hearing of exemption claims. Furthermore, many sheriffs have found that it reduces phone and mail traffic markedly, simply to enclose an exemption claim form right along with the notice of levy. Again, the Claim of Exemption form now in general use was extrapolated, more or less gastronomically, from that gawdawful galaxy of exemption statutes then and now on the state and Federal books. Probably the public, and possibly even some of the newer court officials, regard the form as statutory, which perhaps it should become, for the protection of the officials involved.

I sincerely hope that the foregoing will be of some assistance to the subcommittee, and I am sending copies of this directly to them, as well as to Bill Stiles and to Capt. Johnson of the Oregon Sheriffs' Association.

Very truly yours,

STAMM F. JOHNSON

SFJ/bas
cc: Hon. John Buttler
Hon. Robert W. Redding
Dean Laird Kirkpatrick
William N. Stiles, Esq.
Capt. Jerry Johnson

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DAVID S. BARROWS
PRESIDENT

August 25, 1980

Professor Fredric R. Merrill
Executive Director
Council on Court Procedure
University of Oregon School of Law
Eugene, Oregon 97403

Dear Professor Merrill:

I am writing to you on behalf of the Oregon Savings and Loan League, which is a trade association representing all of the savings and loan associations doing business in Oregon. We are deeply interested in the subject of class action procedures.

We were unable to testify at the public hearings of the Council on June 27th. I am enclosing a statement on behalf of the League relative to the issues currently before the Council. We would be most appreciative if a copy of this statement could be distributed to each member of the Council prior to the meeting on September 6th.

Thank you very much for your courtesy in this matter.

Sincerely yours,

David S. Barrows
President

Statement of the Oregon Savings and Loan League on the July 21, 1980, Report of the Class Action Subcommittee of the Council on Court Procedures.

1. Elimination of prelitigation notice requirements.

The deletion of section 32 I. and the conforming deletion of subsection 32 A.(5) and modifications to 32 J. and K. eliminate a procedure calling for notice to a potential defendant prior to the commencement of any action for damages. Under the current provisions, a potential defendant in an action for damages is extended a thirty-day period in which to identify potential class members and attempt to correct the alleged wrong. If the potential defendant resolves the conflict over the alleged wrong by way of compensation, correction or other remedy, a class action for damages may not be maintained. The determination of whether the potential defendant has satisfied the conditions of Rule 32J. is made by trial court. This thirty-day notice provision does not preclude immediate commencement of an action for injunctive relief.

These prelitigation notice provisions establish a procedure designed to avoid unnecessary and expensive litigation.

The key is to provide a means of resolving disputes without the necessity of a class action. In virtually all jurisdictions, class actions, once commenced, are difficult to adjudicate or compromise. Because of the fiduciary duties assumed by the class representatives and the requirements of procedural due process that parties receive notice that their

rights are to be affected, even compromise of the lawsuit is an expensive proposition. Therefore, any device that encourages compromise of disputes without court hearings and the other attendant costs of class actions should be encouraged rather than discouraged. The procedure does not modify or threaten rights of either plaintiffs or defendants. No need or cause for change has been advanced; therefore, careful consideration is warranted before a change is made.

Prelitigation notice and settlement can be a viable consumer remedy which can afford quick and inexpensive relief-potential class members would be prejudiced by it's deletion.

2. Revision of factors to be considered in deciding predominance of common questions of law or fact.

The language revision in paragraph (e) of subsection 32 B.(3) appears to be a desirable clarification of the amount of weight the court should give to the size of each individual's damages in assessing whether a class action is the best method for adjudication of the controversy. No substantive change is effected.

Paragraph (d), however, should not be amended to delete reference to notice as the question of whether notice is adequate to protect the due process rights of class members will remain a critical factor in the court's decision to allow or deny class action status.

3. Elimination of subsection 32 C.

Subsection 32 C. appears redundant of subsection 32 B.(2) and (3) and can be deleted with no substantive change in any party's rights.

4. Clarification of provision relating to postponement of certification decision to determine legal question.

The language of Section G.(4) has been amended to more accurately reflect the procedure followed by the court when the validity or applicability of a statute, which may be determinative of the outcome of a class action, must be resolved. The amended G.(4) language is then inserted as a new subsection (2) in section C. Placement of this language in section C. is a logical and positive change.

5. Elimination of requirement of individual notice in all cases.

The amendments to Rule 32 G. (new section F.) to provide personal notice only to class members whose claim exceeds $100.00 and only some form of media notice to other class members cannot be justified under a due process analysis.

It is entirely conceivable that under the subsection as drafted no class members would receive personal notice because the potential monetary recovery of each member did not exceed $100.00. This would occur even though the identities of all or a substantial portion of such members are known or could be ascertained through reasonable effort. This $100.00 exception creates a glaring problem, in light of the fact that most class actions are brought as class actions for the very reason that the small amount of damage to each member would not justify the bringing of an individual action.

Thus, pursuant to this subsection, large numbers of class actions would proceed without any personal notice, even

to readily identifiable potential class members. Such a result may well be unconstitutional and is certainly at odds with federal requirements, as most recently stated by the Supreme Court in Eisen v. Carlisle & Jacquelin, 417 U.S. 156:

> "Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.
>
> "The Advisory Committee's Note to Rule 23 reinforces this conclusion. The Advisory Committee described subdivision (c) (2) as 'not merely discretionary' and added that the 'mandatory notice pursuant to subdivision (c) (2) ... is designed to fulfill requirements of due process to which the class action procedure is of course subject'" (Citations omitted.) At 173.
>
> "[I]ndividual notice is not a discretionary consideration to be waived in a particular case." At 176.

The Court in Eisen further discusses Rule 23 and states starting at page 173:

> "Rule 23 (c) (2) provides that, in any class action maintained under subdivision (b) (3), each class member shall be advised that he has the right to exclude himself from the action on request or to enter an appearance through counsel, and further that the judgment, whether favorable or not, will bind all class members not requesting exclusion. To this end, the court is required to direct to class members 'the best practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.' We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort."

And in Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306, 94 L Ed 865, 70 S Ct 652 (1950), the Supreme Court held that publication notice does not satisfy due process

where the names and addresses of the beneficiaries (of the trust involved in the case) are known. In such cases "the reasons disappear for resort to means less likely than the mails to apprise them of (an action's) pendency." Id. at 318.

To a defendant who faces a lawsuit involving the aggregation of many small claims, all of which are potentially less than $100.00, unless parties are provided the best practicable notice under the circumstances as required by the United States Supreme Court in Mullane v. Central Hanover Bank and Trust Company, the final determination of the lawsuit will not finally dispose of the issues. Should the defendant win, as sometimes happens, the adjudication would not serve as res judicata upon members of the class who could have been identified and did not receive notice. The defendant will further be at risk if the defendant loses the case, as the doctrine of collateral estoppel will prevent re-litigation of the question of liability if a member or members of the class, who did not receive individual notice, brings another action. The possibility exists that all persons with claims under $100.00 could bring a separate class action after a defendant loses a class action involving all class members with claims over $100.00. If there were fluid damages awarded in the first case for all members of the class, defendant might still be required to pay additional damages to the under $100.00 class members if they are not bound by the judgment in the prior class action. Since mutuality is not required for collateral estoppel to operate, the only issue open to the defendant would be the question of damages.

Because Oregon uses the procedure whereby class members are bound by any decision unless they affirmatively "opt-out", it remains imperative that they be given personal notice; the right to "opt-out" is meaningless unless class members are told of that right.

The $100.00 damage figure for receiving personal notice is wholly arbitrary. There is nothing in the Constitution or the case law that even suggests that if a person's claim is below "X" number of dollars, due process guarantees are not applicable. Will the $100.00 figure require periodic upward adjustment to account for inflation?

Another question that remains unanswered by the subcommittee's proposal is who will make the determination of which class members have claims above $100.00, and who therefore get adequate notice, and which class members do not. The cost of making this determination could add large additional amounts to the cost of the action-costs which will be expended with no guarantee that the ultimate judgment will be binding on those who did not receive personal notice.

Although the new language in new section F. (1) is drawn almost verbatim from the Uniform Class Actions Act, there are some significant omissions in section F. (1) (e), which provides alternative means of notice to persons with claims under $100.00. The Uniform Act provides that:

> "For members of the class not given personal or mailed notice under subsection (4) of this section, the court shall provide, as a minimum, a means of notice reasonably calculated to apprise

the members of the class of the pendency of the action. Techniques calculated to asure effective communication of information concerning commencement of the action shall be used. The techniques may include personal or mailed notice, notification by means of newspaper, etc." (Emphasis supplied.)

Section F. (1) (e) as proposed by the subcommittee omits the language "as a minimum" and further deletes the language proposing "personal or mailed notice" to persons with claims under $100.00.

Nor does the proposal contain a section providing that if the identities and whereabouts of class members with claims under $100.00 are actually known they shall receive personal notice. It would appear from a reading of case law in this area that this would be the minimum required to withstand constitutional challenge.

6. Elimination of mandatory requirement of claim by class members prior to judgment.

The subcommittee proposes to amend section G. (2) (F. (2) in revision) to change the language from "the court shall" require that class members submit a statement of their individual damages to "the court may."

When the Legislature adopted the class action statutes in 1973 one of the major areas of dispute was whether Oregon would adopt an "opt-in" provision (whereby a person receiving notice becomes a member of the class only if he affirmatively requests inclusion) or an "opt-out" provision (whereby a person receiving notice is included as a member of the class unless he affirmatively requests exclusion). The Legisature

adopted the "opt-out" procedure because of the provision requiring claim statements after judgment. Mandatory claim statements to determine the amount of damages owed to individu class members were the quid pro quo for allowing the "opt-out" procedure to be used. The "opt-out" procedure is designed to achieve the largest possible class size - it can result in an almost open ended class. While the Legislature agreed to this, it was clear that at some point there would have to be some requirement that the individual members of the class be identified and their damages definitely ascertained. The claim statement was that requirement. Without a mandatory claim statement for individual damages, the class will be open-ended and the damages will be open-ended.

In 1975, SB 271 was introduced. Among other provisions, this bill would have amended what was then ORS 13.260 to make it discretionary with the court as to whether claim statements would be required. Senate Bill 271 failed twice on the Senate Floor.

In 1977, HB 3141 was introduced. It proposed to make many of the same changes as proposed in SB 271 and as proposed now by the subcommittee. The bill was tabled in the House Judiciary Committee.

Again in 1979, SB 904 would have amended the class actic statutues in the ways proposed by SB 271 and HB 3141 and now by the subcommittee. It too failed to obtain passage on the Senate floor.

By its actions in rejecting three bills in three successive sessions, the Legislature has made it clear that among other things, the class members must be identified and actual damages determined at some stage of the proceedings. As long as the "opt-out" provisions are retained, the delineation of members and damages must occur at the time of judgment. If the Council on Court Procedures, with the tacit concurrence of the Legislature, were to amend the rules to require potential class members to "opt-in" then the class and the damages would be determined at the outset of the action and no claim statement would be needed.

The subcommittee proposes to delete the last sentence in Section G. (2) (F. (2) in revision) which specifically limits damages to the amount of actual damages owed to identifiable individuals, court costs and allowable attorney fees. The commentary accompanying this recommendation states that the subcommittee is taking no position on the issue of whether or not fluid class recovery should be permitted.

By deleting the current language which specifically prohibits fluid class recovery, the subcommittee, and ultimately the Council, is changing the substantive rights of class action litigants. Removal of the prohibition opens up the possibility of discretionary court imposition of fluid damages with no legislative or other standards to control the exercise of this discretion. And although the subcommittee properly states that any decision to allow fluid class recovery should be made by the legislature or the courts, as a practical matter any

decision by the Council to delete the prohibition amounts to a decision to allow these damages. Moreover, the legislature made a decision to prohibit fluid class recovery in 1973, and although provided the opportunity to change that decision every session since then, it has declined to do so.

Fluid class damages are punitive damages. They are awarded not to compensate an individual or identifiable class of individuals but to "punish" the defendant. For the Council now to allow these damages to be imposed is to give a new substantive right to plaintiffs and impose a new potential liability upon the defendant. We submit that this substantive change is beyond the mandate given to the Council by the Legislature.

7. Preliminary hearing and allocation of damage costs.

The subcommittee recommends two significant changes with regard to initial notice to potential class members of the pendency of the action.

The first proposal adds a new paragraph (f) to section G. (1) (F. (1) (f) in revision) giving the court power to order a defendant who has a mailing list of class members to cooperate with the representative plaintiffs in notifying the class members and to direct defendant to include notice to class members with one of defendant's regular mailings to class members. *

This proposal does not define what is meant by the term "cooperate" with plaintiffs' representatives to notify class

*Defendant companies work hard on establishing a positive relationship with their customers. To require a defendant to provide this initial notice of a class action suit could create very serious, adverse public relations for the defendant.

members. Does it mean just providing a mailing list or does it mean assisting with the drafting, printing and distribution of the notice? The proposal does not address the issue of who shall pay the costs of this cooperation - do the plaintiffs bear the cost to defendant of providing a mailing list?

The provision allowing the court to order defendant to include notice with a regular mailing to class members also neglects the issue of who shall pay for the cost of drafting and printing the notice, the additional clerical time necessary, and possible additional postage needed. Nor is the issue addressed of whether the notice is to be mailed only to class members with claims over $100.00 or to all class members regardless of the size of the claim.

New section F. (4) allows the court to order the defendant to pay all or part of the costs of notice to potential class members if the court determines there is a "reasonable likelihood" that plaintiff will prevail. The court may hold a hearing to determine the allocation of costs.

It is our position that the decision to allow the courts to impose costs pendente lite upon the defendant affects the substantive, due process rights of the defendant in a class action suit - this is not a simple procedural change - and is thus not within the jurisdiction of the Council.

Beyond the question of whether the Council has the power to adopt such a substantive change in the rights of the parties, is the reality that one of the risks of litigation is that the

plaintiff, who commences and elects the format of the lawsuit must bear the costs until he prevails. Upon prevailing, he is awarded those amounts that are authorized to be taxed as costs. Should a defendant prevail, the defendant is awarded his costs as authorized by statute. Once rights are adjudicated, there is always the issue of collecting on a judgment. Those are the risks of normal litigation.

The defendant does not elect the class action forum, the plaintiff does. To force the defendant to pay costs, which may be tremendous because of the plaintiff's election of a class action, may be a deterrent to the defendant litigating legitimate issues and asserting bona fide defenses.

Under new section M. (1) (b), a prevailing defendant entitled by law to be paid attorney fees, costs, or disbursments from the plaintiff class, may only collect those costs and fees from the representative parties themselves and those members who have appeared individually. In a major class action suit the costs to defendant are ordinarily substantial-if the defendant is further required to pay the costs of notice, those costs will almost certainly be of a magnitude that collecting from a few named citizen plaintiffs is a practical impossibility. Thus a prevailing defendant may well be in the position of having to finance both the cost of defending a class action and the cost of prosecuting the action. For the Council to give the court the power to put a class action defendant in such a position offends not only the notion of procedural due process but may well give rise to a claim of violation of substantive due process.

The fact that the court may hold a hearing before ordering defendant to pay plaintiffs costs before any adjudication of liability provides at best illusory and expensive protection. Any hearing held would be to determine whether "there is a reasonable likelihood that the plaintiff may prevail." This hearing must then, from defendant's point of view, be a full-blown trial on the central issue of the class action itself - whether defendant is guilty of the wrong-doing alleged by the plaintiffs. The burden of proof at the preliminary hearing, "reasonable likelihood," is not discernibly different from the standard of proof at the trial - "preponderance of the evidence."

The question also remains of whether the defendant will have any right to appeal this interlocutory order imposing the cost of notice on the defendant. ORS 19.015 allows the trial court to certify a pre-trial order as appealable but this discretion can be exercised only if the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and .... an immediate appeal from the order may materially advance the ultimate termination of the litigation..." Id. It is doubtful that a pre-trial order imposing costs of notice on the defendant would or could be certified as involving a "controlling question of law" or that an appeal would materially advance the termination of the litigation. If the defendant has no immediate right to appeal the pre-trial order, the defendant would be placed in the untenable position of having to pay

the notice costs and then, if the defendant prevails in the acion, not having any practical means to collect the costs since new section M. (1) (b) imposes liability for costs only upon the few named representatives of the class.

Again when the 1973 Legislature adopted the "opt-out" procedure for determining the class members it was a compromise position, the quid pro quo for which was that the plaintiff would bear the cost of notice to this open-ended class. The Council would be going contrary to an affirmative legislative decision to require the defendant to pay the costs of notice while retaining the "opt-out" procedure.

Perhaps the real losers in a decision to require the defendant to pay costs of notice, when it is unlikely that defendant will ever recover these costs even if the defendant prevails, are the general consumers to whom a business defendant must ultimately pass on the costs of business-related litigation.

8. Regulation of Attorney Fees

The provisions of new section M. on attorney fees are a needed improvement on the very generel language of the current section O. There is still the problem presented by the proposal in section F., where the court may require the defendant to pay the costs of notice, and the fact that in section M. (1) (b) defendant can only collect costs and fees from the representative plaintiffs. As mentioned earlier, it is unlikely that as a practical matter a prevailing defendant

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CARLISLE B. ROBERTS
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MRS. LILLIAN M. DONKIN
CLERK

August 28, 1980

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

Dear Professor Merrill:

I can paraphrase the opening sentence of your letter of June 27, 1980:

> "I am sorry for the delay in responding to your gracious answer to my request that you examine the new rules for the Oregon Tax Court, largely based upon ORCP."

I am just concluding a particuarly rigorous two months of trying suits and writing opinions and have been frustrated in not finding opportunity to study the materials which you sent to me. The initial perusal has now been completed and I am indebted to you for your suggestions and support.

The usefulness of most of your suggestions is readily apparent and they will be put into effect as soon as feasible; a few, and particularly in the Proposed Rules 67-73, will be deferred, at least until the legislature approves them by an action or even until "manifest inconvenience doth appear" (a favorite phase of mine, garnered from an old English case in trusts).

I am genuinely touched that you, with all that you have to do, took time to give such careful scrutiny to the Tax Court rules. You are very kind. I hope I will have some opportunity in which to reciprocate.

Sincerely yours,

Carlisle B. Roberts

Carlisle B. Roberts
Judge

CBR/jmj

MEMORANDUM

TO: COUNCIL

FROM: Fred Merrill

DATE: August 27, 1980

Enclosed is a copy of Rules 65 - 72, together with modifications to ORCP 4, 7, 9, 21, 22, 23, 25, 26, 36, 46, 52, 54, 55, 60, 63, and 64 and ORS 20.100 and 20.220, which were approved by the Council.

Unless further objections are raised at the meeting on SEPTEMBER 6, these rules, together with rules or changes adopted in the areas of class actions and provisional remedies, will be released after that date for public comment as tentative rules promulgated by the Council.

Also enclosed are Frank Pozzi's suggestions relating to Rule 7 and some further written testimony relating to class actions received from the Oregon Savings and Loan. Enclosed is a public meeting schedule showing the exact location of the meetings.

FRM:gh

Enclosures

PROPOSED FORM OF RULES

FOR

PROVISIONAL REMEDIES

submitted by

ENFORCEMENT OF JUDGMENTS SUBCOMMITTEE

July 31, 1980

PROPOSED FORM OF RULES

FOR

PROVISIONAL REMEDIES

submitted by

ENFORCEMENT OF JUDGMENTS SUBCOMMITTEE

July 31, 1980

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RULE 78

ORDER OR JUDGMENT FOR SPECIFIC ACTS

A. Judgment requiring performance considered equivalent thereto. A judgment requiring a party to make a conveyance, transfer, release, acquittance, 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 as provided in ORS 33.010 through 33.050.

C. Application. Section B. of this rule does not apply to a 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, 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 through 33.150, 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:

D.(1) Notice of the show cause hearing shall be served personally upon the party required to show cause.

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

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

COMMENT

This rule was generally taken from existing ORS sections. Section A. is ORS 23.020(1). Section B. is ORS 23.020(2) with the specific reference to ORS chapter 33 added.

Section C. was taken from ORS 23.020. The ORS language forbidding punishment by contempt for failure to obey a court "order" was eliminated. If taken literally, it would prohibit enforcement of any interlocutory order for payment of money by contempt, e.g., discovery sanctions under Rule 46 or orders under Rule 36 C. See ORCP 67 A. and 68 C.(1).

Section D. is new and authorizes citation for contempt by motion, as an alternative to an independent proceeding under ORS chapter 33. The motion practice was the traditional chancery procedure.

RULE 79

TEMPORARY RESTRAINING ORDERS AND
PRELIMINARY INJUNCTIONS

A. Availability generally. Subject to the requirements of Rule 82, a temporary restraining order or preliminary injunction may be allowed under this rule:

A.(1)(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.(1)(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 the provisions of Rule 83 F., G.(4), and I.(2) are applicable, whether or not provisional relief is ordered under these provisions.

A.(2) Time. A temporary restraining order or preliminary injunction under this rule may be allowed by the court, or judge thereof, at any time after commencement of the action and before judgment.

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 attorney 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 notify defendant or defendant's attorney of the application, including attempts to provide notice by telephone, and the reasons supporting the claim that notice should not be required. The affidavit required in this paragraph shall not be required for orders granted by authority of paragraphs (c), (d), (e), (f), or (g) of subsection (1) of ORS 107.095.

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 paragraph B.(2)(a) does not apply to orders granted by authority of paragraphs (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 for dissolution or modification of such restraining order. 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, the parties may stipulate that the trial of the action on the merits shall be advanced and consolidated with the hearing of the application. The parties may also stipulate that 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.

D. 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 any of them who receive actual notice of the order by personal service or otherwise.

E. Scope of rule.

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

E.(2) This rule does not apply to temporary restraining orders or preliminary injunctions granted pursuant to ORCP 83 except for the application of section D. of this rule.

E.(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.

F. The writ of ne exeat is abolished.

COMMENT

This rule replaces ORS chapter 32. The existing ORS provisions are not complete, do not adequately distinguish between temporary restraining orders and preliminary injunctions, and have never been integrated with the provisional remedies procedure of ORS chapter 29 (now ORCP 83).

The grounds spelled out in subsection A.(1) are identical to ORS 32.040, except reference to a restraining order where a defendant threatens to remove or dispose of property has been eliminated. Restraining orders to prevent a defendant from frustrating enforcement of a future judgment by disposition of property are covered under the provisional remedies procedure of ORCP 83. See Huntington v. Coffee Associates, 43 Or. App. 595, 603 P.2d 1183 (1979). The procedure in this rule applies either to the situation where the ultimate remedy sought in the case is a permanent injunction and the plaintiff needs immediate relief, or where the injunction sought to effectuate the eventual judgment does not consist of restraining the defendant from disposing of property because such property could be applied to satisfy any judgment.

Subsection A.(2) was taken from ORS 32.020(1).

Sections B. and C. are adapted from Federal Rule 65(a) and (b). Subsection B.(1)(b) was redrafted to make clear that a party seeking a temporary restraining order must try to inform the opposing party or such party's attorney of the application by telephone or any other possible means. An ex parte restraining order is authorized but only for 10 days. Under Rule 17, a complaint need not be verified, but it could be verified to provide a basis for an order under 79 B.(1)(a). Paragraph B.(2)(b) makes clear that the 10-day limit does not apply in domestic relations cases.

Subsection B.(5) is not in the federal rule and was drafted to avoid the confusion discussed in Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 432 n.7 (1974).

Section C. was adapted from the federal rule. Subsection C.(2), however, differs from the federal rule in only allowing an accelerated hearing on the merits where the parties agree.

Section D. is taken from Federal Rule 65 (d). Note, the bond requirements for preliminary injunctions and temporary restraining orders are found in ORCP 82.

Under section E. certain preliminary injunctions are not covered. Subsection E.(1) covers the Family Abuse Prevention Act. Subsection E.(2) carries out the distinction in section A. between preliminary accelerated injunctive relief and restraining orders designed to preserve a defendant's property to satisfy judgment. Subsection E.(3) is taken from Federal Rule 65 (e) and is designed to avoid conflict with state and federal acts limiting injunctions in labor relations matters.

The writ of ne exeat was a common law form of restraining order that prevented a person from leaving the jurisdiction. It was explicitly abolished by ORS 34.820, which was repealed in 1979.

RULE 80

RECEIVERS

A. Receiver defined. A receiver is a person appointed by a 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.

B. When appointment of receiver authorized. Subject to the requirements of Rule 82, a receiver may be appointed by a court in the following cases:

B.(1) Provisionally to protect property. Provisionally, before judgment, on the application of any party, when such party's 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.

B.(2) To effectuate judgment. After judgment to carry the same into effect.

B.(3) To dispose of property, to preserve during appeal, or when execution unsatisfied. 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 the property in satisfaction of the judgment.

B.(4) Creditor's action. 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.

B.(5) Attaching creditor. 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.

B.(6) Protect, preserve, or restrain property subject to execution. 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.(7) Corporations and associations; when provided by statute. 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.(8) Corporations and associations; to protect property or interest of stockholders or creditors. 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. Appointment of receivers; notice. 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. Form of order appointing receivers. Except for an order appointing a temporary receiver, every order or judgment appointing a receiver:

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

D.(2) Time for report. 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;

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

D.(4) Periodic reports. May require periodic reports from the receiver.

E. 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 partnership or association, or of the individual, in such manner as the court may direct, requiring such creditors to file their claims, duly verified, with the receiver, the

receiver's attorney, or the clerk of the court, within such time as the court directs.

F. Special notices.

F.(1) Required notice. Creditors filing claims with the receiver, all persons making contracts with a receiver, all persons having claims against the receiver, all persons having 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.

F.(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 such person desires special notice of any and all of the following named steps in the administration of said receivership:

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

F.(2)(b) Filing of accounts;

F.(2)(c) Filing of motions for removal or discharge of the receiver; and

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

A request shall state the post office address of the person, or such person's attorney.

F.(3) Form of notices. Any notice required by 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 the person to be notified, or such person's attorney, at their 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 the person to be notified or such person's attorney not less than five days before such hearing. 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.

G. 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 provide for the filing of written objections to such account within a specified time. At the hearing on the motion to terminate the court shall hear all objections to the final account and shall take such evidence as is appropriate, and shall make such order as is just concerning termination of the receivership, including all necessary orders on the fees and costs of the receivership.

COMMENT

This rule clarifies the procedure for a receivership now covered by ORS chapter 31. It adds necessary provisions for notice and hearing. Although some receiverships are post judgment, the rule is included with provisional remedies because of the provisions covering pre-judgment receivership.

Section A. is identical to ORS 31.010. Under this rule a district court could direct a receivership under subsections (1) through (6). See amendment to ORS 46.060(1)(h).

Section B. is exactly the same as ORS 31.020. Note, temporary receiverships to preserve a defendant's property are governed here and not under provisional process in Rule 83. See ORCP 81 A.(9). It was felt that a receivership was such a specialized provisional remedy that it should be kept separate. The bond requirements for a receivership appear in ORCP 82.

The present ORS sections do not provide for notice to the defendant and hearing relating to setting up a receivership. Such procedure is required by case law. Anderson v. Robinson, 63 Or. 228, 233, 126 P. 988, 127 P. 546 (1912); Stacy v. McNichols, 76 Or. 167, 144 P. 96, 148 P. 67 (1915). There is no provision for an ex parte receivership order. In an emergency situation, a temporary restraining order would be available under Rule 79 to protect a party until a receivership could be established.

Section D. was adapted from Pennsylvania Rule of Civil Procedure 1533(g) and Rhode Island Rule of Civil Procedure 66 D. Section E. is taken from Washington Superior Court Rule 66(c).

Subsection F.(1) is required by Pacific Lumber Co. v. Prescott, 40 Or. 374, 384, 67 P.2d 207 (1902). Subsections F. (2) and (3) were taken from Washington Superior Court Rules 66 D. and E. Section G. is not covered by ORS and was taken from Arizona Rule of Civil Procedure 66 C.(3). Note, termination may be controlled by statute. See ORS 311.415 and 652.550.

ORS 31.040(2) was eliminated as unnecessary, and ORS 31.050 would remain as a statute.

RULE 81

DEFINITIONS; NOTICE OF LEVY; SERVICE

A. Definitions. As used in Rules 81-85, 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 prior to judgment.

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

A.(7) Levy. "Levy" means to create a lien upon property prior to judgment by any of the procedures provided by Rules 81-85 that create a lien.

A.(8) 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.(9) Provisional process. "Provisional process" means attachment under ORS chapter 29 or Rule 84, claim and delivery under Rule 85, temporary restraining orders under Rule 83, preliminary injunctions under Rule 83, 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, except an order appointing a provisional receiver under Rule 80 or granting a temporary restraining order or preliminary injunction under Rule 79.

A.(10) Security interest. "Security interest" means a lien created by agreement, as opposed to a judicial or statutory lien.

A.(11) Sheriff. "Sheriff" includes constable where Rules 81-85 apply to district court proceedings in counties having such an officer.

A.(12) 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) Form of notice. Whenever a plaintiff levies on

property of a defendant, other than wages held by an employer, the plaintiff must promptly serve on the defendant, in the manner provided in Rule 9 B., 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 Chevrolet, 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.

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

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 of plaintiff's attorney

B.(2) Notice of exemption. 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) Address of defendant unknown. Where a plaintiff cannot find defendant and knows of no address or office of defendant and with reasonable diligence cannot discover any address or office of defendant, plaintiff shall file an affidavit to that effect.

C. Service of notices; proof of service.

C.(1) Service. Save where some other method is expressly permitted, any notice or order to show cause required or permitted to be served by Rules 81-85 shall be served in the manner in which a summons may be served.

C.(2) Proof of service. Copies of all notices or orders to show cause shall be filed together with proof of service as provided in Rule 9 C.

D. Adverse claimants. A person other than the defendant claiming to be the actual owner of property subject to provisional process, or any interest in such property, may move the court for an order establishing the claimant's title or interest, extinguishing the plaintiff's lien, or other appropriate relief. After hearing:

D.(1) Summary release of attachment. In a case where there is no genuine issue as to any material fact and the claimant is entitled to relief as a matter of law, the court may make an order establishing claimant's title or interest, extinguishing or limiting the plaintiff's lien, or granting other appropriate relief.

D.(2) Continuation of attachment. In all other cases, the court shall order the provisional process continued pending judgment. Such order protects the sheriff but is not an adjudication between the claimant and the plaintiff.

COMMENT

This rule provides the general principles appliable to all provisional process covered in Rules 81 through 85.

Subsections A.(1), (2), (3), (8), (11), and (12) are new. Subsections A.(4), (5), and (6) were taken from ORS 29.020. Subsection A.(7) is based on ORS 24.010(3), and subsection A.(10) is based on 11 U.S.C. § 101 (37). The most important definition is A.(9), which was adapted from ORS 29.025(5) and clarifies the relationship between provisional process and other temporary restraining orders or provisional receiverships.

Section B. basically requires the same notices as did ORS 29.178, but the language of the statute was modified slightly and the form of notice was specified.

Sections C. and D. are new. Examples of notices which do not need service which complies with Rule 7 are 81 B.(1) and 84 E. Section D. is designed to provide summary procedure for release of attachment which does not infringe upon jury trial rights in the dispute between the attaching plaintiff and a claimant. Although the claimant of the property would have a right to a separate action to determine title and right to possession, that might not be sufficient when immediate action is needed. Section D. allows the court, which authorized the provisional process, to act after summary hearing if there are no facts in dispute and claimant is clearly entitled to relief. See ORCP 47. This is a more reasonable approach than the seldom used sheriff's jury provided in ORS 23.320 and 23.330.

RULE 82

SECURITY; BONDS AND UNDERTAKINGS; JUSTIFICATION OF SURETIES

A.(1) Restraining orders; preliminary injunctions. 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.

A.(2) When no security required. No security will be required under this section where:

A.(2)(a) A restraining order or preliminary injunction is sought to protect a person from violent or threatening behavior; or

A.(2)(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; or

A.(3) Receivers. No receiver shall be appointed except upon the giving of security by the receiver in such sum as the court deems proper for the payment of any costs, damages, and attorney fees as may be sustained or suffered by any party due to the wrongful act of the receiver.

A.(4) Attachment or claim and delivery bond.

A.(4)(a) Before any property is attached or taken by the sheriff under Rule 85, the plaintiff must file with the clerk

a surety bond, in an amount fixed by the court, 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 or taking, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the bond.

A.(4)(b) 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.

A.(4)(c) No bond shall be required before property is taken by the sheriff under Rule 85, if the court, in the order authorizing issuance of provisional process, finds that the claim for which probable cause exists is that defendant acquired the property contrary to law.

A.(5) Other provisional process. No other provisional process shall issue except upon the giving of security by the plaintiff in such sum as the court deems proper, for payment of such costs, damages, and attorney fees as may be incurred or suffered by any party who is wrongfully damaged by such provisional process.

A.(6) Form of security or bond. Unless otherwise ordered by the court under subsection (6) of this section, any security or bond provided for by these rules shall be in the form of a security bond issued by a corporate surety qualified by law to issue surety insurance as defined in ORS 731.186.

A.(7) Modification of security requirements by court. The court may waive, reduce, or limit any security or bond provided by these rules, or may authorize a non-corporate surety bond or deposit in lieu of bond, or require other security, upon a showing of good cause and on such terms as may be just and equitable.

B. 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.

C. 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 D.(2) of this rule.

D. Qualifications of sureties.

D.(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.

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

E. Affidavits of sureties.

E.(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 D. of this rule.

E.(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 stating that the corporation is qualified to issue surety insurance as defined in ORS 731.186.

E.(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.

F. Objections to sureties. If the party for those benefit a bond or undertaking is given 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 party giving the bond, or the attorney for the party giving the bond, a notice that the party for whose benefit the bond is given objects to the sufficiency of such sureties. If the party for whose benefit the bond is given fails to do so, that party is deemed to have waived all objection to the sureties.

G. Hearing on objections to sureties.

G.(1) Request for hearing. Notice of objections to a surety as provided in section F. 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 will warrant.

G.(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.

G.(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.

COMMENT

The bond requirement for release of party from attachment lien is found in Rule 84 E. This rule has most of the bond requirements for provisional remedies in ORCP 79-85. See ORS 22.010, which provides that bonds are not required for certain parties. This rule also contains some general rules on the form of security when required and general rules for justification of sureties.

Subsections A.(1) through A.(5) state when bonds will be required for various provisional remedies. Subsection A.(1) was taken from Federal Rule 65 (c). The exceptions in A.(2) are those contained in ORS 32.020(3). Note, this bond requirement would apply to injunctions and restraining orders both under ORCP 79 and 83. Subsection A.(3) is adapted from ORS 31.030. Paragraph A.(4)(a) is taken from ORS 29.130, but the court sets the amount of the bond. Paragraph A.(4)(b) is new. The bond requirement also applies to claim and delivery as well as attachment. The bond requirement would apply to any attachment whether by Rule 84 or ORS chapter 29. The existing provisions for claim and delivery do not require a bond. Paragraph A.(4)(c) is new and recognizes that a bond should not be required in claim and delivery when the underlying claim is a wrongful taking. No bond should be necessary to recover stolen property. See paragraph A.(2)(b). Since under ORCP 83 the court must determine that there is probable cause the underlying claim has validity before claim and delivery is possible, the basis of the claim can be easily determined. Subsection A.(5) is new and makes clear that a bond is required for all provisional process no matter how labelled. The definition of provisional process is found in ORCP 83 A.(9).

Subsections A.(6) and A.(7) apply to all bonds required by the ORCP, not simply to those required by subsections A.(1) through A.(5) of this rule. Subsection A.(6) is new. Subsection A.(7) was adapted from ORS 32.020(2). Note, ORS chapter 22 allows deposit in lieu of bond without court order in some circumstances.

Sections B. through G. apply to all bonds in trial level civil proceedings, whether required by ORCP or ORS. Section B.

was adapted from Federal Rule 65.1 and authorizes a supplementary procedure to enforce the bond. The procedure is analogous to that provided for undertakings on appeal. ORS 19.040(3) and ORS 19.190(2). This would not prohibit an independent action on the bond. Lonogan v. Jackson, 229 Or. 205, 366 P.2d 723 (1961). Sections C. through G. were adapted from Alaska Rules of Civil Procedure 80 and Michigan General Court Rule 763.4.

RULE 83

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 that the action is one in which provisional process may issue, and

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) If the provisional process sought is claim and delivery, a 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; if the provisional process sought is a restraining order, a statement of the particular acts sought to be restrained.

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, if plaintiff relies upon 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) 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.(9) 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.(10) 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.(11) Facts, if any, which tend to establish that without restraint immediate and irreparable injury, damage, or loss will occur;

A.(12) 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.(13) 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. 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. Provisional process authorized by Rule 85 may issue in consumer transactions.

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, as provided in section E. of this rule, or a restraining order, as provided in section F. of this rule, in addition to 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. 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, and if Rule 82 A. has been complied with, 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.

F. Restraining 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 Rule 82 A. has been complied with, 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. Such order shall conform to the requirements of Rule 79 D. A restraining order under this section does not create a lien.

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

G.(1) Subject to section B., the court shall issue an order directed to the defendant and each person having possession or control of the claimed property requiring the defendant and each such other person to appear for hearing at a placed 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.

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

G.(3) The order shall:

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

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

G.(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, and if Rule 82 has been complied with, the court may restrain the person so served from injuring, destroying, transferring, removing, or concealing the property pending further order of the court or continue a temporary restraining order issued under section F. Such order shall conform to the requirements of Rule 79 D. Any restraining order issued under this subsection does not create a lien.

H. Waiver; order without hearing. If after service of the order issued under subsection (1) of section G., 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.

I. Authority of court on sustaining validity of underlying claim; provisional process; restraining order.

I.(1) Subject to section B., if the court on hearing on a show cause order issued under section G. finds that there is probable cause for sustaining the validity of the underlying claim and if Rule 82 A. has been complied with, the court shall order issuance of provisional process. The order shall describe with particularity the provisional process which may be issued.

I.(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, and if Rule 82 A. has been complied with, the court in its discretion may continue or issue a restraining order of the nature described in section F. of this rule. If a restraining order issued, it shall conform to the requirements of Rule 79 D. A restraining order under this subsection does not create a lien.

COMMENT

This rule was taken almost verbatim from ORS 29.025 through 29.075. All provisional remedies intended to preserve a defendant's assets to satisfy an eventual judgment, except provisional receiverships covered by ORCP 80, would require an order by the court conforming to the procedure in this rule. This procedure was developed by a substantial legislative revision of ORS chapter 29 in 1973 to conform to current constitutional requirements.

For clarity, the first clause was added to A.(3). ORS 29.025(8) and 29.030(2) and (3) were eliminated because they were confusing and not very useful. The rule specifically requires an application by plaintiff, and the court could not issue a provisional process order on its own motion.

The last clause was added to B. for clarity. The existing language "to effect attachment" creates the exception for claim and delivery. The language of C.(2) was also changed slightly for clarity.

The Council eliminated ORS 29.050. The waiver authorized could still be no more than a printed sale contract or loan agreement. If there is an actual negotiated consensual waiver between freely contracting parties, nothing would prohibit the plaintiff from proving that waiver in an application for a provisional process order.

The cross reference to the security requirements of Rule 82 and form of order in Rule 79 D. were added to sections F., G., and I.

The most important change in the provisions relating to restraining orders was to specify that no lien attaches to property subject to a restraining order. A party who wishes to secure a lien, as opposed to merely restraining disposition of the property by defendant, should use other provisional process. The last sentence of I.(1) is also new.

RULE 84

ATTACHMENT BY CLAIM OF LIEN

A. Order for provisional process. Before a writ of attachment may be issued or any property attached by claim of lien, the plaintiff must obtain an order under Rule 83 that provisional process may issue.

B. Property subject to claim of lien. When attachment is authorized, by ORS 29.110 or by other rule or statute, the plaintiff may attach the following property by filing a claim of lien:

B.(1) Defendant's real property; or

B.(2) Personal property of the defendant in which a consensual security interest within ORS chapter 79.1020 would be required to be perfected by filing a financing statement under ORS 79.3020.

C. Form of claim; filing; attachment of lien.

C.(1) Form. The claim of lien must be signed by the plaintiff or plaintiff's attorney and must:

C.(1)(a) identify the action by names of parties and court, docket number, and judgment demanded;

C.(1)(b) describe the property sufficiently to identify it;

C.(1)(c) state that a provisional process order has been issued authorizing the claim of lien with the date of such order; and

C.(1)(d) state that an attachment lien is claimed on the property.

C.(2)(a) Filing. A claim of attachment lien in real property shall be filed with the clerk of the court that authorized the claim and with the county clerk of the county in which the property is located.

C.(2)(b) A claim of attachment lien in personal property shall be filed with the clerk of the court that authorized the claim of lien and in the same office or offices in which a financing statement would be required to be filed.

C.(3) Attachment of lien. A lien arises in the property described in the claim upon a filing of a claim of lien as provided in this section.

D. Disposition after judgment. The property subject to lien under this rule may be applied to the satisfaction of any judgment for the plaintiff, by execution upon the judgment. If judgment is entered for defendant, any lien provided by this rule shall be discharged.

E. Release of lien; bond. A defendant desiring to sell property that is subject to a lien under this rule may move for an order releasing the lien. Before ordering a release of lien, the court shall require the posting of bond or other security, as provided in Rule 82, in an amount set by the court. The bond shall guarantee payment of any judgment for plaintiff in the action up to the amount of the bond. A defendant moving to have a lien released under this subsection shall serve a statement of

the proposed amount for the bond 10 days prior to hearing upon the motion. The statement shall be served and returned in the manner provided in Rule 9.

F. Exception for bank. No claim of lien of attachment shall be authorized under this rule when the attachment is sought as security for the satisfaction of any judgment that may be recovered against a bank.

COMMENT

The ORCP do not include the procedure for attachment. This remains in ORS chapter 29 without change. This rule simply establishes one additional procedure for attachment of real property and personal property using the system for recording security interests.

The rule does not authorize attachment; this is covered by ORS 29.110. In a case when attachment is available, the plaintiff may file a claim of lien in addition to or instead of using a writ of attachment. Note, attachment of real property remains unavailable in district court. ORS 46.082.

The rule is designed to avoid the expense and extra work of a writ of attachment when all that plaintiff seeks is a pre-judgment lien. The procedure will not be abused because it cannot be used without court approval. The claim establishes the lien and nothing further need be done before judgment. For comparable provisions in other states, see Cal. Code of Procedure 48:340-360; Maine R.S. 14.4154; and Minn. Stats. Ann. 550.13.

Section F. provides a procedure for pendente lite release of lien if defendant wishes to sell the property subject to the lien. It is roughly equivalent to the redelivery procedure in ORS 29.220-.230 but requires court authorization, and the bond is set by the court. Section F. is the same as ORS 29.410 with the language revised for clarity.

RULE 85

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 83.

B. Delivery by sheriff under provisional process order. The order of provisional process issued by the court as provided in Rule 83 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. Custody and delivery of property. Upon receipt of the order of provisional process issued by the court as provided in Rule 83, 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 the sheriff's custody. The sheriff shall keep it in a secure place, and deliver it to the party entitled thereto upon receiving the lawful fees for taking, and the necessary expenses for keeping the same. The court may waive the payment of such fees and expenses upon a showing of indigency.

D. 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.

E. Dismissal prohibited. If property is taken by the sheriff pursuant to this rule, the plaintiff shall not dismiss the action under ORCP 54 A.(1) until 30 days after such taking.

COMMENT

Sections A. through D. are almost identical to existing ORS 29.080-.095.

The requirement of a bond before taking is covered in Rule 82. ORS 29.087 is substantive and would remain as a statute.

Section E. is new. After securing the property by claim and delivery, if the plaintiff immediately dismisses the action, the defendant must go to the expense of filing a separate action to recover possession even though defendant has a right to possession. Prohibiting dismissal gives the defendant sufficient time to secure an attorney and appear in the action.

of execution

29.178 Post-execution procedure; notice; contents; bank, trust company or savings and loan association as garnishee. (1) Following execution by the sheriff of any writ pursuant to ORS 29.170 or 29.175 other than a wage or salary garnishment, the sheriff shall promptly mail or deliver the following to the noncorporate judgment debtor at his last-known address:

(a) A copy of the writ;

(b) A copy of the certificate delivered to the county clerk pursuant to subsection (1) of ORS 29.170, if any;

(c) A copy of the notice delivered pursuant to subsection (3) of ORS 29.170 or subsection (1) of ORS 29.175, if any; and

(d) The notice described in subsection (2) of this section.

(2) The notice to the judgment debtor shall contain:

(a) A statement that certain property of the judgment debtor has been or may have been levied upon;

(b) If the sheriff has executed the writ by taking property into his custody, a list of the property so taken;

(c) A list of all property and funds declared exempt under state or federal law;

(d) An explanation of the procedure by which the judgment debtor may claim an exemption;

(e) A statement that the forms necessary to claim an exemption are available at the county courthouse at no cost to the judgment debtor; and

(f) A statement that if the judgment debtor has any questions, he should consult an attorney.

[(3) Notwithstanding subsection (1) of this section, if a writ is served on a bank, trust company or savings and loan association, as garnishee, the sheriff shall deliver the copies and notice required by subsection (1) of this section to such garnishee. If the garnishee has property belonging to the judgment debtor, the garnishee shall promptly mail or deliver the copies and notice to the judgment debtor.]

[(3)] [(4)] The sheriff may meet the requirements of subsection (1) of this section by mailing the documents to the last-known address of the judgment debtor as provided by the judgment creditor. The sheriff may withhold execution of the writ until such address or a statement that the judgment creditor has no knowledge of the judgment debtor's last-known address is furnished by the judgment creditor.

46.060 Jurisdiction, civil, generally. (1) Except as provided in subsection (2) of this section, the district courts shall have exclusive jurisdiction in the following cases:

(a) For the recovery of money or damages only when the amount claimed does not exceed $3,000. When, in such a case arising out of contract, the ends of justice demand that an account be taken or that the contract be reformed or canceled, the district court shall have jurisdiction to decree such accounting, reformation or cancellation.

(b) For the recovery of specific personal property when the value of the property claimed and the damages for the detention do not exceed $3,000.

(c) For the recovery of any penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $3,000.

(d) To give judgment without trial upon the confession of the defendant for any of the causes of action specified in this section, except for a penalty or forfeiture imposed by statute.

(e) To hear and determine actions of forcible entry and detainer.

(f) To enforce, marshal and foreclose liens upon personal property where the amount claimed for such liens does not exceed $3,000, and to render personal judgment therein in favor of any party.

(g) Actions and proceedings of interpleader and in the nature thereof, when the amount of money or the value of the property involved does not exceed $3,000.

(h) Actions and proceedings, whether legal or equitable, to preserve the property or rights of any party to an action of which the court has jurisdiction, and to enforce the collection of its own judgments, including all actions and proceedings in the nature of creditors' bills, and, in aid of execution, to subject the interest of a judgment debtor in personal property to the payment of such judgment. [District courts shall not have jurisdiction to appoint receivers.]

(2) The jurisdiction granted the district court in subsection (1) of this section does not affect the jurisdiction of any justice court, and in a county with no district court, the circuit court has jurisdiction to hear all matters otherwise assigned to the district court.

(4) Whenever it shall appear from the pleadings in any cause that the title to real property is in dispute, the court shall order the pleading raising that question stricken, unless within five days the party who has raised such issue shall file with the clerk of the district court a written motion for the transfer of the cause to the circuit court, accompanied by the tender of the costs of such transfer.

M E M O R A N D U M

TO: JOHN BUTTLER
ROBERT W. REDDING
LAIRD C. KIRKPATRICK
FRANK R. LACY

FROM: Fred Merrill

DATE: 8/26/80

RE: Rule 84

Enclosed is the latest draft of Rule 84. It attempts to integrate the proposed changes in attachment procedure with existing provisions in Chapter 29. Section A. is the existing procedure A.(2) was taken word for word from ORS 29.110. A.(3) is the changed version of ORS 29.410 which was agreed to by the subcommittee.

Section B. is ORS 29.140 with the clauses rearranged into logical order. Section C. is the new claim of lien procedure.

Section D. is basically the existing writ of attachment statutes. The first sentence of D.(1) is new; the rest was taken directly from ORS 29.160. D.(2) is taken from ORS 29.170. The only changes in D. are:

(1) ORS 29.190 was added to ORS 29.170(1) to create 84 D.(2)(a).

(2) ORS 29.200 was added to ORS 29.170(2) to create 84 D.(2)(b). The last sentence is new.

(3) The last sentence of 84 D.(2)(c) is new.

(4) 84 D.(2)(f) is new.

(5) 84 D.(2)(h) is Lacy's draft which was modelled after ORS 23.310.

(6) 84 D.(2)(j) is new and was in Lacy's rule. Note, this would apply only to notices under this section, not to notices under section C. Also note 84 D.(2)(e), which was ORS 29.170(5).

Section E. is Lacy's revision of ORS 29.380 and 29.390. Section F. is new; it was drafted by Lacy. Section G. is Lacy's draft with G.(1)(a) revised as suggested by the subcommittee.

All of the attachment provisions in Chapter 29 appear in this rule except:

ORS 29.120	Repeal - inconsistent with 1973 revision
ORS 29.150	Not necessary because of language added specifying when plaintiff's lien attaches
ORS 29.175	This would remain as statute. It specifically refers to execution as well as attachment.
ORS 29.178	Unnecessary - covered by 81 B.
ORS 29.210	Unnecessary - covered by 81 D.
ORS 29.220 - 29.260	Covered by 81 D. and 84 G.

Revised

RULE 84

ATTACHMENT

A. Actions in which attachment allowed.

A.(1) Order for provisional process. Before a writ of attachment may be issued or any property attached by any means provided by this rule, the plaintiff must obtain an order under Rule 83 that provisional process may issue.

A.(2) Actions in which attachment allowed. 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.(2)(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.

A.(2)(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.(2)(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.(3) Exception for bank. Notwithstanding subsection (2), no attachment shall be issued against any bank or its property before final judgment as security for the satisfaction of

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any judgment that may be recovered against such bank.

B. Property attachable. All property of a defendant in this state, not exempt from execution, including the rights or shares which a defendant may have in the stock of any association or corporation, together with the interest and profits thereon, shall be liable to be attached.

C. Attachment by claim of lien.

C.(1) Property subject to claim of lien. When attachment is authorized, the plaintiff may attach the following property by filing a claim of lien:

C.(1)(a) Defendant's real property; or

C.(1)(b) Personal property of the defendant in which a consensual security interest within ORS chapter 79.1020 would be required to be perfected by filing a financing statement under ORS 79.3020.

C.(2) Form of claim; filing.

C.(2)(a) Form. The claim of lien must be signed by the plaintiff or plaintiff's attorney and must:

C.(2)(a)(i) identify the action by names of parties and court, docket number, and judgment demanded;

C.(2)(a)(ii) describe the property sufficiently to identify it;

C.(2)(a)(iii) state that a provisional process order has been issued authorizing the claim of lien with the date of such order; and

C.(2)(a)(iv) state that an attachment lien is claimed on the property.

C.(2)(b) Filing.

C.(2)(b)(i) A claim of attachment lien in real property shall be filed with the clerk of the court that authorized the claim and with the county clerk of the county in which the property is located.

C.(2)(b)(ii) A claim of attachment lien in personal property shall be filed with the clerk of the court that authorized the claim of lien and in the same office or offices in which a financing statement would be required to be filed.

C.(3) Attachment of lien. A lien arises in the property described in the claim upon a filing of a claim of lien as provided in this section.

D. Writ of attachment.

D.(1) Issuance; contents; to whom directed; issuance of several writs. If directed by an order authorizing provisional process under Rule 83, the clerk shall 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 the sheriff to attach and safely keep all the property of the defendant within the county not exempt from execution, 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. Several writs may be issued at the same time to the sheriffs of different counties.

D.(2) Manner of executing writ. The sheriff to whom the writ is directed and delivered shall note upon the writ the date of such delivery, and shall execute the writ without delay, as follows:

D.(2)(a) To attach real property, the sheriff shall make a certificate containing the title of the cause, the names of the parties to the action, a description of such real property, and a statement that the same has been attached at the suit of the plaintiff, and deliver the certificate to the county clerk of the county in which the attached real estate is situated. The county clerk shall certify upon every certificate so delivered the time when it was received, and the certificate shall be effective from the time of its receipt by the county clerk. Upon receiving the sheriff's certificate as provided in ORS 29.170, the county clerk shall immediately file such certificate in the county clerk's office, and record it in a book to be kept for that purpose. When the certificate is so filed for record, the lien in favor of the plaintiff attaches to the real property described in the certificate. Whenever such lien is discharged, the county clerk shall enter upon the margin of the page on which the certificate is recorded a minute of the discharge.

D.(2)(b) Personal property capable of manual delivery to the sheriff, and not in the possession of a third person, shall be attached by taking it into his custody. If any property attached is perishable, or livestock, where the cost of

keeping is great, the sheriff shall sell the same in the manner in which property is sold on execution. The proceeds thereof and other property attached shall be retained by the sheriff to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment. Plaintiff's lien shall attach when the property is taken into the sheriff's custody.

D.(2)(c). Other personal property shall be attached by leaving a certified copy of the writ and a notice with the person having possession of the same, or if it be a debt, then with the individual debtor, and if such debt arises out of a wage or salary claim against a corporate debtor then with the registered agent of the corporation, the president or other head of the corporation, vice president, secretary, cashier, assistant cashier or managing agent or such other person designated by the corporation to accept the writ and notice, or if it be rights or shares in the stock of an association or corporation, or interests or profits thereon, then with such person or officer of the association or corporation as a summons is authorized to be served upon; provided that if it be a security, as defined in ORS 78.1020 or a share or any other interest for which a certificate is outstanding the requirements of ORS 78.3170 must be satisfied. However, debts owing to the defendant by a bank or trust company or savings and loan association maintaining branch offices, or credits or other personal property whether or not capable of manual delivery, belonging to the defendant and in the possession

of or under the control of such a bank or trust company or savings and loan association, shall be attached by leaving a certified copy of the writ ant the notice with the president, vice president, treasurer, secretary, cashier, or assistant cashier of the bank or trust company or savings and loan association at the office or branch thereof at which the account evidencing such indebtedness is carried or at which the bank or trust company or savings and loan association has credits or other personal property belonging to the defendant in its possession or under its control, or, if no such officers be found at such office or branch, by leaving a certified copy of the writ and the notice with the manager or assistant manager of such office or branch; and no attachment shall be effective as to any debt owing by such bank or trust company or savings and loan association if the account evidencing such indetedness is carried at an office or branch thereof not so served, or as to any credits or other personal property in its possession or under its control at any office or branch thereof not so served, except that such service on the head office of any such institution shall be effective service upon all offices or branches thereof located in the same city as the head office. Plaintiff's lien shall attach upon service of the copy of the writ and notice as provided in this subsection.

D.(2)(d) For purposes of this section, a savings and loan association, including such an association doing business in this state and organized under the laws of another state or of

the United States, shall be deemed the debtor of a defendant to whom a certificate, account, or obligation, or an interest therein, of the association has been issued, established, or transferred and in such case the provisions of ORS 78.3170 shall not apply; provided, however, ownership by a defendant of reserve fund capital stock, or comparable equity stock, or of an interest therein, of any such association shall not be deemed to create such a relationship.

D.(2)(e) The notice referred to in subsection (3) of this section shall contain the name of the court, the names of the parties to the action, clearly specify name of the party or parties whose property is being garnished, provide the last address, if known, of each party whose property is being garnished, be directed to the garnishee, specify the property attached, whenever possible, and comply with the requirements of ORS 23.185. The notice may contain additional information to assist the garnishee in identifying the party whose property is being garnished. be directed to the garnishee, specify the property attached, whenever possible, and comply with the requirements of ORS 23.185. The notice may contain additional information to assist the garnishee in identifying the party whose property is being garnished.

D.(2)(f) The interest of a distributee in an estate may be attached as provided in ORS 29.175. A plaintiff's lien shall attach upon service of the copy of the writ and notice as provided in that section.

D.(2)(g) Procedure after garnishment

D.(2)(g)(i) Liability of garnishee; delivery of attached property to sheriff by garnishee. Any person, association, or corporation mentioned in paragraph D.(2)(c) of this subsection, from the time of the service of a copy of the writ and notice as therein provided, shall, unless the attached property is delivered or attached debt is paid to the sheriff, be liable to the plaintiff for the amount thereof until the attachment is discharged or any judgment recovered by him is satisfied. Such property may be delivered or debt paid to the sheriff without suit, or at any time before a judgment against the garnishee, and the sheriff's receipt shall be a sufficient discharge.

D.(2)(g)(ii) Certificate of garnishee; order for examination of garnishee. Whenever the sheriff, with a writ of attachment against the defendant, shall apply to any person or officer mentioned in paragraph D.(2)(c) of this subjection, for the purpose of attaching any property mentioned therein, such person or officer shall furnish him with a certificate, designating the amount and description of any property in his possession belonging to the defendant, or any debt owing to the defendant, or the number of rights or shares of the defendant in the stock of the association or corporation, with any interest or profits or encumbrance thereon. The certificate shall be furnished to the sheriff within five days from the date of service of the writ, when service is made within the county in which the action is pending, and within 10 days when service is made in any other county. If such person or officer fails to do so within the time

stated, or if the certificate, when given, is unsatisfactory to the plaintiff, he may be required by the court, or judge thereof, where the action is pending, to appear and be examined on oath concerning the same, and disobedience to such order may be punished as a contempt.

D.(2)(g)(iii) Contents of order; designation of parties. The order shall require such person or officer to appear before the court or judge at a time and place therein stated. In the proceedings thereafter upon the order, such person or the association or corporation represented by such officer shall be known as the garnishee.

D.(2)(g)(iv) Restraining order against garnishee. The court or judge thereof may, at the time of the application of the plaintiff for the order provided for in subparagraph (ii) of this paragraph, and at any time thereafter before judgment against the garnishee, by order restrain the garnishee from in any manner disposing of or injuring any of the property of the defendant, alleged by the plaintiff to be in the garnishee's possession, control, or owing by him to the defendant, and disobedience to such order may be punished as a contempt.

D.(2)(g)(v) Allegations and interrogatories to the garnishee. After the allowance of the order provided for in subparagraph (ii) of this paragraph, and before the garnishee or officer thereof shall be required to appear, or within a time o be specified in the order, the plaintiff shall serve upon the

garnishee or officer thereof written allegations, and may serve written interrogatories, touching any of the property as to which the garnishee or officer thereof is required to give a certificate as provided in ORS 29.280.

D.(2)(g)(vi) Answer of garnishee. On the day when the garnishee or officer thereof is required to appear, he shall return the allegations and interrogatories of the plaintiff to the court or judge, with his written answer thereto, unless for good cause shown a further time is allowed. The answer shall be on oath, and shall contain a full and direct response to all the allegations and interrogatories.

D.(2)(g)(vii) Compelling garnishee to answer; judgment for want of answer. If the garnishee or officer thereof fails to answer, the court or judge thereof, on motion of the plaintiff, may compel him to do so, or the plaintiff may, at any time after the entry of judgment against the defendant, have judgment against the garnishee for want of answer. In no case shall judgment be given against the garnishee for a greater amount than the judgment against the defendant.

D.(2)(g)(viii) Exception or reply to answer. Plaintiff may except to the answer of the garnishee or officer thereof for insufficiency, within such time as may be prescribed or allowed, and if the answer is adjudged insufficient, the garnishee or officer may be allowed to amend his anwer, on such terms as may be proper, or judgment may be given for the plaintiff as for want of answer, or such garnishee or office may be compelled to make a sufficient answer. The plaintiff may reply to the whole or a

part of the answer within such time as may be prescribed or allowed. If the answer is not excepted or replied to within the time prescribed or allowed, it shall be taken to be true and sufficient.

D.(2)(g)(ix) Trial. Witnesses, including the defendant and garnisheee or officer thereof, may be required to appear and testify, and the issues shall be tried, upon proceedings against a garnishee, as upon the trial of an issue of fact between a plaintiff and defendant.

D.(2)(g)(x) Judgment against garnishee. If by the answer it shall appear, or if upon trial it shall be found, that the garnishee, at the time of the service of the copy of the writ of attachment and notice, had any property as to which such garnishee or officer thereof is required to give a certificate, as provided in ORS 29.280, beyond the amount admitted in the certificate, or in any amount if the certificate was refused, judgment may be given against the garnishee for the value thereof in money.

D.(2)(g)(xi) Execution against garnishee. Executions may issue upon judgments against a garnishee as upon ordinary judgments between plaintiff and defendant, and costs and disbursements shall be allowed and recovered in like manner; provided, however, when judgment is rendered against any garnishee, and the debt from the garnishee to the defendant is not yet due, execution shall not issue until the debt is due.

D.(2)(g)(xii) Release of garnishment. The clerk of any court in whom is vested authority to issue writs of attachment may issue releases of garnishments based upon writs of attachment issued by such clerk, whenever the plaintiff by his attorney of record, or the plaintiff in person if there is no attorney, shall file with the clerk a written request therefor. Such release shall be executed in duplicate, under the seal of the court or the stamp of the clerk, and may cover all or any portion of the funds or property held under garnishment. One duplicate original of the release shall be delivered to the garnishee and the other duplicate original, together with the written request therefor, indorsed on the fact thereof by the attorney of record, if there be an attorney, shall be attached to the original writ of attachment in the same manner as the return of the sheriff or constable; and any pending proceedings in such case for the sale upon execution of any property so garnished shall, as to all property covered by the release, thereupon be terminated and be considered of no effect; all costs to be paid by the plaintiff. Upon receipt by the garnishee of the duplicate original release, the garnishee, and all funds or property subject to such garnishment, shall, to the extent stated in the release, be released from all liability arising by reason of the issuance and service of the writ of attachment and notice of garnishment, or by reason of his return thereon, as though the writ of attachment and notice of garnishment had not been served. The garnishee may rely upon any such release so received by him

without any obligation on his part to inquire into the authority therefor. The authority vested by this section in the clerk of the court to issue releases is not exclusive but is in addition to the authority of the court having jurisdiction of the cause to release, discharge, or dissolve attachments and garnishments.

D.(2)(h) Return of writ; inventory. 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.

D.(2)(i) 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 the property, 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, indemnifying 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.

D.(2)(j) Form of notice or levy or attachment. Any notice of levy or attachment authorized by this section must:

D.(2)(j)(i) 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;

D.(2)(j)(ii) Require the debtor or third party 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 defendant, and the identity of any property of the defendant in the third party'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;

D.(2)(j)(iii) Order the debtor or third party not to pay or deliver to the defendant, or any other person, any money owed to or property owned by the defendant (save 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 debtor or third party.

D.(2)(j)(iv) Warn that payment, delivery, or settlement in violation of the order may make the debtor or third party 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.

D.(2)(j)(v) Have attached thereto a copy of the provisions of ORS 23.170 and 23.185.

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

F.(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.

F.(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.

F.(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.

F.(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.

F.(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.

F.(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.

G. Redelivery of attached property; release of liens.

G.(1)(a) If an attachment deprives the defendant or any other person claiming the property of the possession or use of the property, the defendant or such person may obtain redelivery or possession thereof, upon a court order authorizing such redelivery or possession, by filing with the court a surety bond undertaking to pay the value of the property, in an amount fixed by the court, if the same is not returned to the sheriff upon entry of judgment against the defendant. A motion seeking an order authorizing such redelivery or possession must state the moving party's claim or the value of the attached property and must be served upon plaintiff as provided in Rule 9 at least 5 days prior to any hearing on such motion, unless the court orders otherwise. The property shall be released to the defendant upon the filing of the bond. Delivery of property under this section does not affect the attaching plaintiff's lien.

G.(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.

G.(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.

G.(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:

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

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

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

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

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

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

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

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

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

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

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

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

TENTATIVE RULES

NEW RULES 35 - 72

PROPOSED AMENDMENTS TO ORCP

4, 7, 9, 21, 22, 25,
25, 26, 36, 46, 52, 54,
55, 60, 63, 64

and to

ORS 20.100 and 20.220

August 27, 1980

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RULE 65

REFEREES

A. In general.

A.(1) Appointment. A court in which an action is pending may appoint a referee who shall have such qualifications as the court deems appropriate.

A.(2) Compensation. The fees to be allowed to a referee shall be fixed by the court and shall be charged upon the parties or paid out of any fund or subject matter of the action which is in the custody and control of the court, as the court may direct.

A.(3) Delinquent fees. The referee shall not retain the referee's report as security for compensation. If a party ordered to pay the fee allowed by the court does not pay it after notice and within the time prescribed by the court, the referee is entitled to a writ of execution against the delinquent party.

B. Reference.

B.(1) Reference by agreement. The court may make a reference upon the written consent of the parties. In any case triable by right to a jury, consent to reference for decision upon issues of fact shall be a waiver of right to jury trial.

B.(2) Reference without agreement. Reference may be made in actions to be tried without a jury upon motion by any party or upon the court's own initiative. In absence of agreement of the parties, a reference shall be made only upon a showing that some exceptional condition requires it.

C. Powers.

C.(1) Order of reference. The order of reference to a referee may specify or limit the referee's powers and may direct the referee to report only upon particular issues, or to do or perform particular acts, or to receive and report evidence only. The order may fix the time and place for beginning and closing the hearings and for the filing of the referee's report.

C.(2) Power under order of reference. Subject to the specifications and limitations stated in the order, the referee has and shall exercise the power to regulate all proceedings in every hearing before the referee and to do all acts and take all measures necessary or proper for the efficient performance of duties under the order. The referee may require the production of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. Unless otherwise directed by the order of reference, the referee may rule upon the admissibility of evidence. The referee has the authority to put witnesses on oath and may personally examine such witnesses upon oath.

C.(3) Record. When a party so requests, the referee shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as a court sitting without a jury.

D. Proceedings.

D.(1) Meetings.

D.(1)(a) When a reference is made, the clerk or person performing the duties of that office shall forthwith furnish the referee with a copy of the order of reference. Upon receipt thereof, unless the order of reference otherwise provides, the referee shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys of the meeting date.

D.(1)(b) It is the duty of the referee to proceed with all reasonable diligence. Any party, on notice to the parties and the referee, may apply to the court for an order requiring the referee to speed the proceedings and to make the report.

D.(1)(c) If a party fails to appear at the time and place appointed, the referee may proceed ex parte or may adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

D.(2) Witnesses. The parties may procure the attendance of witnesses before the referee by the issuance and service of subpoenas as provided in Rule 55. If without adequate excuse a witness fails to appear or give evidence, that witness may be

punished as for a contempt by the court and be subjected to the consequences, penalties, and remedies provided in Rule 55 G.

D.(3) Accounts. When matters of accounting are in issue, the referee may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the referee may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or in such other manner as the referee directs.

E. Report.

E.(1) Contents. The referee shall without delay prepare a report upon the matters submitted by the order of reference and, if required to make findings of fact and conclusions of law, the referee shall set them forth in the report.

E.(2) Filing. Unless otherwise directed by the order of reference, the referee shall file the report with the clerk of the court or person performing the duties of that office and shall file a transcript of the proceedings and of the evidence and the original exhibits with the report. The referee shall forthwith mail a copy of the report to all parties.

E.(3) Effect.

E.(3)(a) Unless the parties stipulate to the contrary, the referee's findings of fact shall have the same effect as a jury

verdict. 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. The court after hearing may affirm or set aside the report, in whole or in part.

E.(3)(b) 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

This rule supersedes the existing sections in ORS chapter 17 relating to reference. The rule is intended to provide more flexibility in use of referees, but to avoid abuse of the procedure. It was adapted from Federal Rule 53 with substantial changes.

Section 65 A. was taken from Wisconsin statutes 805.06(1). It contemplates a single referee and leaves the qualifications to the court, rather than requiring that the referee have the same qualifications as the juror.

Section 65 B. contains the most important change in the procedure. Subsection 65 B.(1) does not appear in the federal rule and was taken from ORS 17.720. Any right to jury trial is waived by stipulating to a referee. ORS 17.725, covering the availability of a referee upon motion, was restricted to rather narrow categories. Subsection 65 B.(2) allows the court to appoint a referee upon motion in any type of case.

However, there are limitations:

(1) Reference upon motion is only available where there is no right to jury trial. This differs from the federal rule. The procedure is available in any non-jury case, whether formerly equitable or legal.

(2) The use of referees cannot be adopted by the court as a routine matter. See LaBuy v. Howes Leather Co., 352 U.S.

249 (1957). Note, long account cases would still be referable upon motion; there is no right to jury trial in such cases. Tribou and McPhee v. Strowbridge, 7 Or. 157 (1879).

The provisions relating to order of reference, power of the referee, proceedings, and the form and filing of the report (65 C. through 65 E.(2)) are taken from the federal rule and are more detailed than the ORS sections. They give the court a great deal of flexibility in utilization of the referee. The provisions of ORS 45.050 for deposition reference are unnecessary and would be superseded. The rule attempts to avoid delay, which is one of the principal difficulties with reference. The referee is required to begin meeting with the parties in 20 days, 65 D.(1)(a), and to act with all reasonable diligence. If the referee delays the proceeding, any party may ask the court for an order requiring the referee to act with more diligence. 65 D.(1)(b). Also, the referee cannot hold his or her report to force payment of fees. 65 A.(2).

Subsection 65 E.(3) is new but gives the same weight to the referee's findings of fact as did ORS 17.763.

RULE 66

SUBMITTED CONTROVERSY

A. Submission without action. Parties to a question in controversy, which might have been the subject of an action with such parties plaintiff and defendant, may submit the question to the determination of a court having subject matter jurisdiction.

A.(1) Contents of submission. The written submission shall consist of an agreed statement of facts upon which the controversy depends, a certificate that the controversy is real and that the submission is made in good faith for the purpose of determining the rights of the parties, and a request for relief.

A.(2) Who must sign the submission. The submission must be signed by all parties or their attorneys as provided in Rule 17.

A.(3) Effect of the submission. From the moment the submission is filed, the court shall treat the controversy as if it is an action pending after a special verdict found. The controversy shall be determined on the agreed case alone, but the court may find facts by inference from the agreed facts. If the statement of facts in the case is not sufficient to enable the court to enter judgment, the submission shall be dismissed or the court shall allow the filing of an additional statement.

B. Submission of pending case. An action may be submitted at any time before trial, subject to the same requirements and attended by the same results as in a submission without action, and in addition:

B.(1) Pleadings deemed abandoned. Submission shall be an abandonment by all parties of all prior pleadings, and the case shall stand on the agreed case alone; and

B.(2) Provisional remedies. The submission must provide for any provisional remedy which is to be continued or such remedy shall be deemed waived.

COMMENT

This rule covers the submitted controversies in ORS chapter 27. Although the procedure overlaps stipulation, admissions, declaratory judgment, and summary judgment in some respects, it provides for entry of judgment (a) without pleading or summons, and (b) with no trial or submission of evidence. The procedure did not exist at common law and a rule is required.

The procedure is the same as ORS chapter 27. The only changes are: (a) the submission is not verified (this conforms to ORCP 17), and (b) the second sentence of 66 A.(3) was added. This is a clarification taken from N.Y. C.P.L.R. § 3222 (b)(4).

Subsection 66 B. was taken from Iowa Code Ann. § 678. The submission after suit differs from a stipulated judgment or dismissal, because the parties agree to the facts but leave the decision to the court. For stipulated judgments and dismissals, see ORCP 54 and 67 F.

RULE 67

JUDGMENTS

A. Definitions. "Judgment" as used in these rules is the final determination of the rights of the parties in an action; judgment includes a decree and a final judgment entered pursuant to section B. of this rule. "Order" as used in these rules is any other determination by a court or judge which is intermediate in nature.

B. Judgment for less than all claims or parties in action; judgment on portion of claim exceeding counterclaim. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. The court may also direct entry of a final judgment as to that portion of any claim which exceeds a counterclaim asserted by the party or parties against whom the judgment is entered, only upon an express determination that the party or parties against whom such judgment is entered have admitted the claim and asserted a counterclaim amounting to less than the claim and there is no just reason for delay. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all

the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

C. Demand for judgment. Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if such relief has not been demanded in the pleadings, except:

C.(1) Default. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. However, a default judgment granting equitable remedies may differ in kind from or exceed in amount that prayed for in the demand for judgment, provided that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.

C.(2) Demand for money damages. Where a demand for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount.

D. Judgment in action for recovery of personal property. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value of the property, in case a delivery cannot be had, and damages for the detention of the property. If the property has been delivered to the plaintiff and the defendant claims a return of the property, judgment for the defendant may be for

a return of the property or the value of the property, in case a return cannot be had, and damages for taking and withholding the same.

E. Judgment in action against partnership or unincorporated association; judgments in action against parties jointly indebted. When a claim is asserted against parties jointly indebted upon a joint obligation, contract, or liability:

E.(1) Partnership and unincorporated association. Judgment in an action against a partnership or unincorporated association which is sued in any name which it has assumed or by which it is known may be entered against such partnership or association and shall bind the joint property of all of the partners or associates. If service of process is made upon any member of the partnership or other unincorporated association as an individual, whether or not such partner or associate is also served as a person upon whom service is made on behalf of the partnership or association, a judgment against such partner or associate based upon personal liability may be obtained in the action, whether such liability be joint, joint and several, or several.

E.(2) Joint obligations; effect of judgment. In any action against parties jointly indebted upon a joint obligation, contract, or liability, judgment may be taken against less than all such parties and a default, dismissal, or judgment in favor of or against less than all of such parties in an action does not preclude a judgment in the same action in favor of or against the remaining parties.

F. Judgment by stipulation.

F.(1) Availability of judgment by stipulation. At any time after commencement of an action, a judgment may be given upon stipulation that a judgment for a specified amount or for a specific relief may be entered. The stipulation shall be of the party or parties against whom judgment is to be entered and the party or parties in whose favor judgment is to be entered. If the stipulation provides for attorney fees, costs, and disbursements, they may be entered pursuant to Rule 68.

F.(2) Filing; assent in open court. The stipulation for judgment shall be in writing and filed according to Rule 9 or, if not, shall be assented to in open court. The stipulation shall be signed by the parties or by a person authorized to bind the parties.

COMMENT

The definition of judgment in 67 A. is taken from ORS 18.010. Under ORCP 1 and 2 the reference to decree is probably unnecessary but is included here for clarity. The separate reference to special proceedings of ORS 18.010 is eliminated, as statutory proceedings are "actions" under ORCP 1. The definition of "order" comes from ORS 18.010(2). See ORCP 14 A. for a definition of "motion."

Section 67 B. is a combination of ORS 18.125(1) and ORS 18.080(2). ORS 18.080(2), which covered the possibility of judgment for admitted amounts exceeding a counterclaim, was previously included with default judgment provisions. The judgment involved is a form of special final judgment, not a default judgment, and should fit the definition of judgment in Rule 67 A.

The procedural merger of law and equity creates the problem of whether the unified procedure follows the former equity

or legal rule relating to limitation of relief by the prayer of the complaint. Section 67 C. preserves the essential elements of the prior Oregon practice without reference to law or equity. The general rule is that of equity, where the relief accorded is not limited by the prayer. Recovery on default is limited to the prayer (ORS 18.080(a) and (b)), except for cases seeking equitable remedies (Kerschner v. Smith, 121 Or. 469, 236 P. 272, 256 P. 195 (1927)) if reasonable notice and opportunity to be heard are given (Leonard v. Bennett, 165 Or. 157, 103 P.2d 732, 106 P.2d 542 (1940)). Note, the limit of relief to the prayer applies for every default, not just defaults for failure to appear. In a case where money damages are claimed, the damages recoverable are limited to the prayer. Note that ORCP 18 B. requires a statement in the prayer of the amount of damages claimed.

Section 67 D. is ORS 18.110. See ORCP 61 D.

Section 67 E. addresses the problem of enforceability of judgments against assets held by a partnership or unincorporated association. Present Oregon rules address this problem through the device of a "joint debtor statute" (ORS 18.135). Partnerships and associations cannot be sued as entities, but suit must be brought against individual partners or members. At common law, for partnership or association assets to be subject to a judgment, the judgment had to be against all partners or association members. ORS 18.135 allows an action to recover for a joint debt even though not all joint debtors are served. A judgment enforceable against partnership assets can be secured by naming all partners but serving less than all.

This rule addresses the problem by the much simpler and more modern approach of making a partnership or unincorporated association suable in its own name and subject to entry of a judgment against the entity. To accomplish this, a new rule defining capacity of partnerships or associations to be sued is added to Rule 26 as section B. and a new service of summons category is added to Rule 7. The rule allows individual partners to be named in addition to the partnership and for the entry of a judgment enforceable against the personal assets of any partner actually served with summons.

The entity approach has a number of advantages. The approach:

(a) avoids the necessity of difficult distinctions between joint and several obligations. The joint debtor statute did not apply to some joint partnership obligations because it was limited to actions based on contract. See ORS 68.270.

(b) simplifies naming of defendants and service of process for partnerships and unincorporated associations with large membership. In some cases a defendant would find it difficult, if not impossible, to ascertain the names and locations of thousands of members of a multi-state partnership or association. Although in most cases the members would be subject to service of summons under ORCP 4, the difficulty and expense of serving such large numbers of people could be prohibitive.

(c) Litigation and judgment in the name of the partnership or association is more consistent with other treatment of such groups. If a partnership can own property and have bank accounts in its own name, it is simpler to have judgments entered against that partnership in its name.

The language used in 67 E.(1) and 26 B. was adapted from section 388 of the California Code of Civil Procedure.

ORS 18.135 referred to action against any joint obligors, not just partnerships or associations. This rule covers only the ability to create judgments enforceable against partnerships or associations. ORS 18.135 subjected a person, who was never actually served and perhaps not aware of a suit, to judgment because another joint obligor was served. From a due process standpoint, this is defensible for partnerships and associations because partners and association members can be viewed as agents for the partnership or association. That theory would usually not apply to other joint obligation situations.

Rule 67 E.(2) addresses a problem not specifically covered under ORS 18.135. Under the common law theories of joint obligations, including those of partnerships and associations, there was a requirement that any judgment be against all persons jointly obligated. Therefore, any suit or recovery against less than all joint obligors extinguished the claim against the other joint obligors. See Ryckman v. Manerud, 68 Or. 350, 136 P. 826 (1913); Wheatley v. Halvorson, 213 Or. 228, 323 P.2d 49 (1958). The same reasoning could be extended to say a default or dismissal against less than all partners or joint debtors extinguished the obligation. This is inconsistent with modern concepts of joinder and judgments and could be an unnecessary procedural trap. The rule does not affect the substantive nature of the joint obligation but merely says there is no procedural rule that prohibits separate judgment. Note, 67 E.(2) is not limited to partnerships or joint ventures, but covers any joint obligation.

ORS 18.135 also covered whether joint debtors could be or should be joined. ORCP 28 and 29 governing permissive and compulsory joinder of parties already cover this and should be the applicable rules. The joinder aspects of ORS 18.135 are unnecessary and are eliminated.

Section F. provides the procedure for specific submission to a judgment formerly referred to as confession of judgment after suit. ORS 26.010 through 26.040. The procedure is basically stipulation to an agreed judgment. Note, this is not a confession of judgment based upon prior contractual agreement, which is eliminated, but an actual stipulation to judgment after action. Dismissals by stipulation are covered by Rule 54.

RULE 68

ALLOWANCE AND TAXATION OF
ATTORNEY FEES, COSTS, AND DISBURSEMENTS

A. Definitions. As used in this rule:

A.(1) Costs and attorney fees. "Costs" are fixed sums provided by statute, intended to indemnify a party. "Attorney fees" are the reasonable and necessary value of legal services related to the prosecution or defense of an action.

A.(2) Disbursements. "Disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses, the necessary expenses of taking depositions, publication of summonses or notices, the postage where the same are served by mail, the compensation of referees, the copying of any public record, book, or document used as evidence on the trial, a sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation (not exceeding one percent per annum of the amount of the bond or other obligation), and any other expense specifically allowed by agreement, by these rules, or by other rule or statute.

B. Allowance of costs and disbursements. In any action, costs and disbursements shall be allowed to the prevailing party, except when express provision therefor is made either in these rules or other rule or statute, or unless the

court otherwise directs. If, under an express provision of these rules or any other rule or statute, a party has a right to recover costs, such party shall also have a right to recover disbursements. If a party is awarded attorney fees, such party shall not also recover the prevailing party fee authorized by ORS 20.070.

C. Award of and entry of judgment for attorney fees, costs, and disbursements.

C.(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 C. and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees, costs, and disbursements in all cases, regardless of the source of the right to recovery of such fees, except where:

C.(1)(a) Subsection (2) of ORS 105.405 or paragraph (h) of subsection (1) of ORS 107.105 provide the substantive right to such items; or

C.(1)(b) Such items are claimed as damages arising from events prior to the action; or

C.(1)(c) Such items are granted by order, rather than entered as part of a judgment.

C.(2) Asserting claim for 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 a pleading filed 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 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 or may affirmatively admit liability. Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fee is asserted as provided in this subsection.

C.(3) Proof. The items of attorney fees, costs, and disbursements shall be submitted in the manner provided by subsection C.(4) of this rule, without proof being offered during the trial.

C.(4) Award of attorney fees, costs, and disbursements; entry and enforcement of judgment. Attorney fees, costs, and disbursements shall be entered as part of the judgment as follows:

C.(4)(a) Entry by clerk. Costs shall be entered as part of a judgment by the clerk of court or person exercising the duties of that office. Attorney fees and disbursements (whether the disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:

C.(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and the disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and

C.(4)(a)(ii) Files the original statement and proof of service, in accordance with Rule 9 C., with the court.

C.(4)(b) Objections. A party may object to the allowance of attorney fees, costs, and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph C.(4)(a). 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.

C.(4)(c) Review by the court; hearing. Upon service and filing of timely objections, the court, without a jury, shall

hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.

C.(4)(d) Entry by court. After the hearing the court shall make a statement of the attorney fees, costs, and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.

C.(5) Enforcement. Attorney fees, costs, and disbursements entered as part of a judgment pursuant to this section may be enforced as part of that judgment. Upon service and filing of objections to the entry of attorney fees, costs, and disbursements as part of a judgment, pursuant to paragraph C.(4)(b) of this section, enforcement of that portion of the judgment shall be stayed until the entry of a statement of attorney fees, costs, and disbursements by the court pursuant to paragraph C.(4)(d) of this section.

C.(6) Separate judgments. Where separate judgments are entered under the provisions of Rule 67 B., attorney fees, costs, and disbursements common to more than one of such judgments shall be allowed only once, and the court may direct that the entry of attorney fees, costs, and disbursements as a part of a judgment be postponed until the entry of a subsequent judgment or judgments and may prescribe such condition or conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

COMMENT

This rule is designed to create a uniform procedure for determining the existence of a right to attorney fees. There has been substantial confusion in Oregon whether particular kinds of attorney fee claims must be pleaded and proved at trial, or could be submitted after trial. The Senate Judiciary Committee of the 1979 Legislative Assembly asked the Council to review the matter and to develop a uniform method of handling attorney fees.

This rule uses the bill of disbursements method for almost all attorney fee claims. The Council adopted the post trial procedure because it is the simplest and separates a collateral controversy from the main trial. It also makes sense to deal with attorney fees after the case is tried.

The rule also develops a uniform provision for entitlement to costs and disbursements. This is necessary because of the procedural merger of law and equity. The rule is the prior rule in equity and for special proceedings. The rule does not deal with right to receive attorney fees. This was felt to be a substantive rather than a procedural matter. For the same reason, the rule does not cover the amount of costs or fees.

Section 68 A. of the rule retains the existing Oregon distinction between costs and disbursements. It also defines attorney fees. The disbursement definition combines ORS 20.020 and ORS 20.055. The Council did not change the items recoverable as disbursements. Discovery deposition costs remain nonrecoverable because the rule refers to "necessary" deposition costs.

Section 68 B. would supersede ORS 20.040, 20.060, and the last sentence of 20.100. The rule is the flexible standard formerly applied to equity cases. The language used was adapted from Michigan District Court Rule 526.1. The second sentence was drafted to avoid any problem with other statutes or rules which refer only to a right to costs in reliance upon ORS 20.020. The last sentence settles a question not answered under the prior ORS sections.

Section 68 C.(1) makes almost all claims for attorney fees subject to this rule. There a large number of statutes governing right to attorney fees. Rather than attempt to change the language of all the statutes, the rule simply provides a procedure for assessing such fees no matter what source is relied upon as providing the right to such fees. There are a few specific exceptions where the rule procedure would not be appropriate, specifically, dissolution and partition cases. 68 C.(1)(a).

Since the rule is designed to provide a procedure for claiming and proving attorney fees which are an incident of the action, pre-existing attorney fees which are actually claimed as damages are excluded. 68 C.(1)(b). The rule also applies only to costs and fees which are included in the judgment. Other fees and costs, such as discovery sanctions which are part of a court order and enforceable by contempt, would not be covered by the rule. 68 C.(1)(c).

The Council felt that a party should receive some warning of a potential claim for attorney fees prior to trial, even though the decision on amount and entitlement to these fees is postponed until a bill of disbursements is filed. Requiring a pleading allegation of a right to attorney fees in 68 C.(2) also allows the opponent to test the right to such fees by a pretrial motion.

Subsections 68 C.(4) and (5) preserve the existing costs and disbursements procedure from ORS 20.210 through 20.230. The specific claim for attorney fees is included in the bill of disbursements. The Council increased the time for objection to the bill of disbursements from five days after expiration of the time to file the bill of disbursements to 15 days after service of a bill of disbursements. The last sentence of 68 C.(4)(c) requiring an opportunity to present evidence on affidavits was added. The provision for stay of enforcement upon objection in 68 C.(5) is new.

Subsection 68 C.(6) is new and provides for costs and disbursement assessment in cases where multiple judgments are entered under 67 B.

RULE 69

DEFAULT

A. Entry on default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, and these facts are made to appear by affidavit or otherwise, the clerk or court shall enter the default of that party.

B. Entry of default judgment.

B.(1) By the clerk. The clerk upon written application of the party seeking judgment shall enter judgment when:

B.(1)(a) The action arises upon contract; and

B.(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain; and

B.(1)(c) The party against whom judgment is sought has been defaulted for failure to appear; and

B.(1)(d) The party against whom judgment is sought is not an infant or incompetent person and such fact is shown by affidavit; and

B.(1)(e) The party seeking judgment submits an affidavit of the amount due; and

B.(1)(f) An affidavit pursuant to subsection B.(3) of this rule has been submitted; and

B.(1)(g) Summons was personally served within the State

of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7 D.(3)(a)(i) or 7 D.(3)(b)(i).

The judgment entered by the clerk shall be for the amount due as shown by the affidavit, and may include costs, disbursements, and attorney fees entered pursuant to Rule 68.

B.(2) By the court. In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against an infant or incompetent person unless they have a general guardian or they are represented in the action by another representative as provided in Rule 27. If the party against whom judgment by default is sought has appeared in the action, such party (or, if appearing by representative, such party's representative) shall be served with written notice of the application for judgment at least 10 days, unless shortened by the court, prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing or make an order of reference or order that issues be tried by a jury as it deems necessary and proper. The court may determine the truth of any matter upon affidavits.

B.(3) Non-military affidavit required. No judgment by default shall be entered until the filing of an affidavit made

by some competent person on the affiant's own knowledge, setting forth facts showing that the defendant is not a person in military service as defined in Article 1 of the "Soldiers' and Sailors' Civil Relief Act of 1940," as amended, except upon order of the court in accordance with that Act.

C. Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of Rule 67 B.

D. "Clerk" defined. Reference to "clerk" in this rule shall include the clerk of court or any person performing the duties of that office.

COMMENT

This rule is a combination of ORS 18.080 and Federal Rule 55. Under section 69 A. all defaults by a party against whom judgment is sought would be covered by this rule. ORS 18.080 referred only to failure to answer. A failure to file responsive pleading, or failure to appear and defend at trial, or an ordered default under Rule 46, would be regulated by this rule. Judgments of dismissal against a party seeking judgment are regulated by Rule 54.

Section 69 B. regulates entry of judgment after default. Subsection 69 B.(1) is more restrictive, in allowing entry by the clerk, than was ORS 18.080(a). The requirements of claim for a sum certain and jurisdiction based upon personal service within the state were added. The rule was drafted to avoid asking the clerk to make any decisions about the existence of jurisdiction or amount of the judgment.

In all other cases the court must order the entry of a default judgment. Subsection 69 B.(2) is a modified form of

Federal Rule 55 (b)(2). The limitation on judgments against infants and incompetents is new. The section requires 10 days' notice for any default other than failure to appear. The third sentence of subsection 69 B.(2) was intended to preserve the existing Oregon requirement for hearing before entry of a default judgment. See State ex rel Nilsen v. Cushing, 253 Or. 262, 453 P.2d 945 (1969). The fourth sentence specifically allows a court to use affidavits rather than require testimony. Finally, the rule allows the court to have a jury decide factual issues related to the default judgment, but does not require a jury in any case. ORS 18.080 did require a jury, upon demand, in some circumstances. There is no constitutional right to a jury trial after default, and the Council changed the rule. Deane v. Willamette Bridge Co., 22 Or. 167 (1892).

Under section 69 C., the rule applies to default by any party against whom a claim is asserted. A separate default judgment against less than all the opposing parties would require a court direction for entry of judgment as provided in Rule 67 C.

RULE 70

FORM AND ENTRY OF JUDGMENT

A. Form. Every judgment shall be in writing plainly labelled as a judgment and set forth in a separate document, except judgments need not be set forth in a separate document if the local rules of a court to provide. No particular form of words is required, but every judgment shall specify clearly the party or parties in whose favor it is given and against whom it is given and the relief granted or other determination of the action. The judgment shall be signed by the court or judge rendering such judgment, or in the case of judgment entered pursuant to ORCP 69 B.(1) by the clerk.

B. Entry of judgments.

B.(1) Filing; entry; notice. All judgments shall be filed and shall be entered by the clerk. The clerk shall, on the date judgment is entered, mail a copy of the judgment and notice of the date of entry of the judgment to each party who is not in default for failure to appear. The clerk also shall make a note in the judgment docket of the mailing. In the entry of all judgments, except a judgment by default under Rule 69 B.(1), the clerk shall be subject to the direction of the court. Entry of judgment shall not be delayed for taxing of costs, disbursements, and attorney fees under Rule 68.

B.(2) Judgment effective upon entry. Notwithstanding ORS 3.070 or any other rule or statute, for purposes of these

rules, a judgment is effective only when entered as provided in this rule.

B.(3) Time for entry. The clerk shall enter the judgment within 24 hours, excluding Saturdays and legal holidays, of the time the judgment is filed. When the clerk is unable to or omits to enter judgment within the time presented in this subsection, it may be entered any time thereafter.

C. Submission of forms of judgment. Attorneys shall submit proposed forms for judgment at the direction of the court rendering the judgment. Unless otherwise ordered by the court, any proposed form of judgment shall be served five days prior to the submission of judgment in accordance with Rule 9 B. The proposed form of judgment shall be filed and proof of service made in accordance with Rule 9 C.

D. "Clerk" defined. Reference to "clerk" in this rule shall include the clerk of court or any person performing the duties of that office.

COMMENT

This rule deals with several aspects of the crucial question of identification of a judgment and its effective date. Rule 70 A. defines "judgment" as a written document signed by the judge, or in the limited default area under 69 B.(1), by the clerk. The rule also directs, as a general rule, that the judgment document be separate and plainly labelled as such. This is the approach of Federal Rule 58 and is designed to avoid any question whether a written opinion or order of a court is or is not a judgment. The specificity of parties and relief language comes from ORS 18.030 and the statement that no particular form of words is required conforms to Oregon case law. Esselstyn v. Casteel, 205 Or. 344, 286 P.2d

665, 288 P.2d 214, 288 P.2d 215 (1955).

Under section 70 B. the important question addressed is exactly when the judgment becomes effective. Practically, the choice is between entry (which is a formal entry in the court records by the clerk, ORS 7.030) and filing (which is "delivery of the document to the clerk of the court with the intent that it be filed."). Charco, Inc. v. Cohn, 242 Or. 566, 571, 411 P.2d 264 (1966). See Washington Rules, 58 (b). There has been some confusion in the past over the effective date of a judgment. Most provisions in ORS refer to entry, e.g., ORS 23.030, 18.080, 18.510, and 20.210. On several occasions, however, the Oregon Supreme Court has interpreted "entry" to mean filing. Charco, Inc. v. Cohn, supra; Highway Commission v. Fisch-Or, Inc., 241 Or. 412, 399 P.2d 1011, 406 P.2d 539 (1965). Because of this, the Council used "filing" as the point when the time limit for filing or acting upon motion for new trial or judgment notwithstanding the verdict begins to run. ORCP 63 D.; 64 F. and G.

The Council felt that it was extremely important that the effective date of a judgment be the same for all purposes. The Council believed that entry was a better choice for several reasons:

(1) The time for appeal begins to run at entry. ORS 19.026. Change of the appeal statute would be beyond Council rulemaking authority.

(2) Entry is a far more certain point. The entry is part of an official record, whereas filing is not itself a record. If the date of filing is not stamped on the document, the filing date may be difficult to determine. There can be considerable confusion when filing takes place. See Vandermeer v. Pacific Northwest Development, 274 Or. 221, 223-224, 543 P.2d 868 (1976).

(3) There is a notice provision for entry. ORS 18.030 requires notice by the clerk to all parties not in default of the entry; that is retained in this rule as subsection B.(1). There is no requirement of notice of the exact date of filing a judgment.

Therefore, subsection 70 B.(2) states generally that a judgment is only effective when entered. Note, the entry approach will require the modification of ORCP 63 D. and 64 F. and G. from filing to entry. The reference to ORS 3.070 is necessary because the Charco, Inc. v. Cohn opinion refers to that statute as a basis for interpreting "entry" to mean "filing."

Subsection 70 B.(3) is based on ORS 18.040 and 18.050. ORS 18.040 referred to entry "within the day," which was interpreted to mean 24 hours. Casner v. Hoskins, 64 Or. 254, 281, 128 P. 841, 130 P. 55 (1913).

Section 70 C. is new but reflects existing practice. It was felt that submission of a form of judgment should be up to the court. However, if an attorney submits a form of judgment, it should be served on the other parties.

RULE 71

RELIEF FROM JUDGMENT OR ORDER

A. Clerical mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice to all parties who have appeared, if any, as the court orders. During the pendency of an appeal, a judgment may be corrected under this section only with leave of the apellate court.

B. Mistakes; inadvertence; excusable neglect; newly discovered evidence, etc.

B.(1) By motion. 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: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 64 F.; (d) fraud, misrepresentation, or other misconduct of an adverse party; (d) the judgment is void; or (e) 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 (a), (b), and, (c) 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 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 does not affect the finality of a judgment or suspend its operation.

B.(2) When appeal pending. With leave of the appellate court, a motion under this section 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.

C. Relief from judgment by other means. This rule does not limit the inherent power of a court to modify a judgment within a reasonable time, or the power of a court to entertain an independent action to relieve a party from a judgment, 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.

D. Writs and bills abolished. Writs of coram nobis, coram vobis, audita querela, 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

This rule is intended to provide a comprehensive procedure for vacating a judgment by motion to replace ORS 18.160. The rule also regulates nunc pro tunc entry of judgments, which are not covered by existing ORS sections. The rule is a modified form of Federal Rule 60, adapted to Oregon cases and practice.

Section 71 A. codifies existing Oregon practice and was taken from Federal Rule 60 (a). The last sentence is not in the federal rule. Under existing Oregon law, a trial court may change a judgment during the pendency of an appeal to correct the record. Caveny v. Asheim, 202 Or. 195, 274 P.2d 281 (1954). The appellate court should be aware of any change in the judgment order, particularly if there is a question whether the change is actually a correction of the record.

Section 71 B.(1) uses the same motion procedure as ORS 18.160. Paragraph B.(1)(a) eliminates the requirement in ORS 18.160 that the mistake be that of the moving party. This would allow vacation based upon error by the trial judge, at least of an unusual nature, after the time for a motion for new trial has elapsed. Paragraph 71 B.(1)(b) explicitly authorizes a motion based upon newly discovered evidence. Wells, Fargo & Co. v. Wall, 1 Or. 295 (1860). Paragraph 71 B.(1)(c) clarifies that fraud can be used as a basis for a motion to vacate. Compare Nichols v. Nichols, 174 Or. 390, 396, 143 P.2d 663, 149 P.2d 572 (1944); Miller v. Miller, 228 Or. 301, 307, 365 P.2d 86 (1961). Note, the provision differs from the federal rule and does not eliminate the distinction between extrinsic and intrinsic fraud. Paragraph 71 B.(1)(d) codifies cases allowing motion to vacate a void judgment. State ex rel Karr v. Shorey, 281 Or. 453, 466, 575 P.2d 981 (1978). Paragraph 71 B.(1)(e) is new but simply codifies the common law remedy of audita querela (available in Oregon by motion invoking the inherent power of the court). Herrick v. Wallace, 114 Or. 520, 236 P.2d 471 (1925). The reference to "no longer equitable" restates the rule that a judgment with prospective operation may be subject to change based upon changed conditions. Farmers' Loan Co. v. Oregon Pac. R. Co., 28 Or. 44, 40 P. 1089 (1895).

The one-year time limit of ORS 18.160 is retained for paragraphs 71 B.(1)(a), (b), and (c). The time limit is neither necessary nor desirable for paragraphs (d) and (e). The rule also requires that any motion be made in a reasonable time, which would be the same as the existing due diligence requirement in Oregon. This would not apply to ground 71 B.(1)(d). The most important change in the time limits is the reference to "filing," instead of granting the motion. Compliance with the

time limit should depend upon the diligence of the moving party and not the court.

The provisions relating to service of the motion are not in the federal rule and were drafted to conform to Herrick v. Wallace, supra, at 526.

Under Oregon case law, during the pendency of an appeal the trial judge could not vacate a judgment for the reasons covered in section 71 B. Caveny v. Asheim, supra. Since there is a one-year time limit upon filing the motion, it should be possible to file such a motion to await disposition of the appeal; this is provided by subsection 71 B.(2). Since the motion might affect the appellate court's consideration of the case, the rule requires notice and leave from the appellate court. After the termination of the appeal there is no reason to require permission of the appellate court. See Nessley v. Ladd, 30 Or. 564, 48 P. 420 (1897).

Subsection 71 B.(3) simply recognizes the other existing methods of seeking vacation of judgment, e.g., separate suit for equitable relief, Oregon-Washington R. & Navigation Co. v. Reid, 155 Or. 602, 65 P.2d 664 (1937), and a motion invoking the inherent power of a court to vacate a judgment within a reasonable time. ORS 1.055; Braat v. Andrews, 266 Or. 537, 514 P.2d 540 (1973).

Coram nobis, coram vobis, and audita auerela were common law procedures for vacating judgments. Bills of review and bills in the nature of review were used by the courts of equity. Any grounds for vacation which could be raised by such devices are covered by this rule and the earlier procedures are specifically eliminated to avoid confusion.

RULE 72

STAY OF PROCEEDINGS TO ENFORCE JUDGMENT

A. Immediate execution; discretionary stay. Execution or other proceeding to enforce a judgment may issue immediately upon the entry of the judgment, unless the court directing entry of the judgment in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs. No stay of proceedings to enforce judgment may be entered by the court under this section after the notice of appeal has been served and filed as provided in ORS 19.023 through 19.029 and during the pendency of such appeal.

B. Other stays. This rule does not limit the right of a party to a stay otherwise provided for by these rules or other statute or rule.

C. Stay or injunction in favor of state or municipality thereof. The state, or any county or incorporated city, shall not be required to furnish any bond or other security when a stay is granted by authority of section A. of this rule in any action to which it is a party or is responsible for payment or performance of the judgment.

D. Stay of judgment as to multiple claims or multiple parties. When a court has ordered a final judgment under the conditions stated in Rule 67 B., the court may stay enforcement of that judgment or judgments and may prescribe such conditions

as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

COMMENT

Existing ORS sections do not clearly cover stay of enforcement of judgment, other than providing for an automatic stay by the supersedeas bond. ORS 19.040, et seq. This rule does not change the supersedeas bond provisions or affect the power of the appellate court to grant a stay pending appeal, but deals with the power of the trial court to stay enforcement of judgment.

Section 72 A. is taken from Utah Rule of Civil Procedure 62(c) and restates existing Oregon law. Helms Groover & Dubber Co. v. Copenhagen, 93 Or. 410, 177 P. 935 (1919). The last sentence is not in the Utah rule but states the existing Oregon rule. State ex rel Peterkort v. Bohannon, 210 Or. 215, 309 P. 2d 800 (1957).

Section 72 C. is new. A bond is only necessary where the party against whom judgment is entered might not perform. Where a public body would be responsible, no bond is needed. See ORS 22.010 and 20.140.

Section 72 D. is taken from ORS 18.125(2).

M. Personal representative. In any action against a personal representative to enforce a claim against the deceased person represented where one or more of the grounds stated in sections [B.] A. through L. would have furnished a basis for jurisdiction over the deceased had the deceased been living. It is immaterial whether the action is commenced during the lifetime of the deceased.

COMMENT

The situation covered by section M. could arise where jurisdiction is based upon section A. of this rule.

D.(3)(b) Corporations[;] and limited partnerships. [unincorporated associations subject to suit under a common name.] Upon a domestic or foreign corporation[,] or limited partnership [, or other unincorporated association which is subject to suit under a common name]:

D.(3)(b)(i) Primary service method. By personal service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation[,] or limited partnership, [or association] or by personal service upon any clerk on duty in the office of a registered agent.

D.(3)(b)(ii) Alternatives. If a registered agent, officer, director, general partner, or managing agent cannot be found in the county where the action is filed, the summons may be served: by substituted service upon such registered agent, officer, director, general partner, or managing agent; or by personal service on any clerk or agent of the corporation[,] or limited partnership[, or association] who may be found in the county where the action is filed; or by mailing a copy of the summons and complaint to the last registered office of the corporation[,] or limited partnership[, or association], if any, as shown by the records on file in the office of the Corporation Commissioner or, if the corporation[,] or

limited partnership[, or association] is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the corporation[,] or limited partnership[, or association], and in any case to any address the use of which the plaintiff knows or, on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

* * *

D.(3)(e) General partnerships. Upon any general partnership by personal service upon a partner or any agent authorized by appointment or law to receive service of summons for the partnership.

D.(3)(f) Other unincorporated association subject to suit under a common name. Upon any other unincorporated association subject to suit under a common name by personal service upon an officer, managing agent, or agent authorized by appointment or law to receive service of summons for the unincorporated association.

[D.(6)(g) Completion of service. For the purpose of computing any period of time prescribed or allowed by these rules service by publication shall be complete at the date of the last publication.]

COMMENT

The changes in section 7 D.(3) are designed to specify a method of serving summons on a partnership consistent with ORCP 26 B. and 67 E.

Paragraph 7 D.(6)(g) was removed because of inconsistency with subsection C.(2) of this rule.

RULE 9

SERVICE AND FILING OF PLEADINGS
AND OTHER PAPERS

B. Service; how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless otherwise ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to such attorney or party or by mailing it to such attorney's or party's last known address. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at such person's office with such person's clerk or person apparently in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at such person's dwelling house or usual place of abode with some person over 14 years of age then residing therein. Service by mail is complete upon mailing. Service of any notice or other paper to bring a party into contempt may only be upon such party personally.

COMMENT

The added language of section B. formerly appeared in ORS 16.810 and was inadvertently omitted from this rule in 1979.

RULE 21

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

F. Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, except a motion to dismiss for lack of jurisdiction over the person or insufficiency of service of summons or process, but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G.[2] (3) of this rule on any of the grounds there stated. A party may make one motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses required by this section.

COMMENT

When Rule 21 G. was revised by the 1979 Legislature, the cross reference in Rule 21 F. was not changed.

RULE 22

COUNTERCLAIMS, CROSS-CLAIMS, AND THIRD PARTY CLAIMS

A. Counterclaims.

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

A.(2) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

COMMENT

The new rules supersede ORS 18.100 as unnecessary in view of ORCP 22 A. This language is implicit in the existing rule but is taken from Federal Rule 13(c) to avoid any problem with elimination of ORS 18.100.

RULE 23

AMENDED AND SUPPLEMENTAL PLEADINGS

B. Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended [and shall do so freely] when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining an action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

* * *

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

pleading is filed, the party filing the motion does not waive any defenses or objections asserted against the original pleading by filing a responsive pleading or failing to reassert the defenses or objections. If any motion is disallowed, the party filing the motion shall file a responsive pleading if any is required. By filing any amended pleading pursuant to this section, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling.]

[E. Amended pleading where part of pleading stricken. In all cases where part of a pleading is ordered stricken, the court, in its discretion, may require that an amended pleading be filed omitting the matter ordered stricken. If an amended pleading is filed, the party filing the motion to strike does not waive any defense or objection asserted against the original pleading by filing a responsive pleading or failing to reassert the defense or objection. By complying with the court's order, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling upon the motion to strike.]

COMMENT

The wording of section B. relating to amendments after the commencement of trial was changed slightly to give the trial judge more discretion in determining whether an amendment should be allowed under all of the circumstances. Some trial judges asserted that with the language that was removed, they would always have to allow amendment, no matter what circumstances were involved.

Subsections D. and E. are replaced by Rule 25.

RULE 25

EFFECT OF PROCEEDING AFTER MOTION OR AMENDMENT

A. Amendment or pleading over after motion; non-waiver of defenses or objections. When a motion to dismiss or a motion to strike an entire pleading or a motion for a judgment on the pleadings under Rule 21 is allowed, the court may, upon such terms as may be proper, allow the party to file an amended pleading. In all cases where part of a pleading is ordered stricken, an amended pleading shall be filed in accordance with Rule 23 F. By filing any amended pleading pursuant to this section, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling.

B. Filing of amended pleading; objections to amended pleading not waived. If any amended pleading is filed, whether pursuant to sections A. or B. of Rule 23 or section A. of this rule or pursuant to other rule or statute, a party who has filed and received a court's ruling on any motion directed to the preceding pleading does not waive any defenses or objections asserted in such motion by failing to reassert them against the amended pleading.

C. Denial of motion; non-waiver by filing responsive pleading. If an objection or defense is raised by motion, and the motion is denied, the party filing the motion does not waive the objection or defense by filing a responsive pleading or by

failing to re-assert the objection or defense in the responsive pleading or by otherwise proceeding with the prosecution or defense of the action.

COMMENT

Sections 25 A. and B. of this new rule include the provisions formerly found in ORCP 23 D. and E. The language used in sections D. and E. was not clear. Section 25 C. is new and was not clearly covered by the ORCP. Although sections 25 A. and B. do relate to some extent to amended pleading, section 25 C. does not. All three subsections basically deal with the effect of proceeding after motion or amendment, and it was therefore deemed advisable to put them together in a totally separate rule. See Moore v. West Lawn Memorial Park, Inc., 266 Or. 244 (1973).

RULE 26

REAL PARTY IN INTEREST;
CAPACITY OF PARTNERSHIPS AND
ASSOCIATIONS

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

B. Partnerships and associations. Any partnership or other unincorporated association, whether organized for profit or not, may sue in any name which it has assumed and be sued in any name which it has assumed or by which it is known. Any member of the partnership or other unincorporated association may be joined as a party in an action against the partnership or unincorporated association.

COMMENT

The reference to conservator was added to section 26 A. for clarity.

Section 26 B. provides the basis for suit of a partnership in its own name. This provision was taken from Cal. Code of Civil Procedure § 388. See ORCP 67 E.

B.(3) Trial preparation materials. Subject to the provisions of Rule 44 [and subsection B.(4) of this rule], a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B.(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a party who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person or party requesting the statement may move for a court order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

For purposes of this subsection, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

COMMENT

The cross reference to subsection 36 B.(4) in subsection 36 B.(3) was inadvertently not eliminated when the 1979 Legislature deleted subsection B.(4).

RULE 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

A.(2) Motion. If a party [fails to furnish a written statement under Rule 36 B.(4), or if a party] fails to furnish a report under Rule 44 B. or C., or if a dependent fails to answer a question propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C.(6) or Rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 36 C.

D. Failure of party to attend at own deposition or respond to request for inspection or to inform of question regarding the existence of coverage of liability insurance policy. If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails (1) to appear before the

officer who is to take the deposition of that party or person, after being served with a proper notice, or (2) to comply with or serve objections to a request for production and inspection submitted under Rule 43, after proper service of the request, [or (3) to inform a party seeking discovery of the existence and limits of any liability insurance policy under Rule 36 B. that there is a question regarding the existence of coverage,] the court in which the action is pending on motion may make such orders in regard to the failure as are just, including among others it may take any action authorized under paragraphs (a), (b), and (c) of subsection B.(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure, unless the court finds that the failure was substantially justified or that other circumstances made an award of expenses unjust.

COMMENT

The cross reference in subsection 46 A.(2) to 36 B.(4) should have been removed when the 1979 Legislature deleted 36 B.(4).

The language removed from section 46 D. became superfluous when the 1979 Legislature revised 36 B.(2).

RULE 52

POSTPONEMENT OF CASES

A. Postponement. When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a postponement. [The court may in a proper case, and upon terms, reset the same.] At its discretion, the court may grant a postponement, with or without terms, including requiring the party securing the postponement to pay expenses incurred by an opposing party.

COMMENT

The last sentence of section 52 A. as originally promulgated suggested there had to be terms. The last clause is suggested by Spalding v. McCaige, 47 Or. App. 129 (1980).

RULE 54

DISMISSAL OF ACTIONS; COMPROMISE

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time before trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as in case of a confession. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs or disbursements, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements from the time of the service of the offer.

COMMENT

The reference to disbursements was inadvertently omitted in 1979.

D.(1) Service. Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person [over 18 years of age] 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

* * *

F.(2) Place of examination. A resident of this state who is not a party to the action may be required by subpoena to attend an examination only in the county wherein such person resides, is employed, or transacts business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state who is not a party to the action may be required by subpoena to attend only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by an order of court.

COMMENT

The language change in D.(1) was made to conform to ORCP 7 E. and 7 F.(2).

The reference to place of examination in 55 F.(2) is only for non-party witnesses subpoenaed to attend. Under ORCP 46,

a party receiving a notice of deposition would have to attend wherever the deposition is set, unless a protective order was secured under ORCP 36.

RULE 60

MOTION FOR A DIRECTED VERDICT

Any party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. If a motion for directed verdict is made by the [defendant] party against whom the claim is asserted, the court may, at its discretion, give a judgment of dismissal without prejudice under Rule 54 rather than direct a verdict.

COMMENT

The language was changed in the last sentence because the motion could be made by a plaintiff against a counterclaim and the court might wish to dismiss the counterclaim without prejudice. See 54 C.

RULE 63

JUDGMENT NOTWITHSTANDING THE VERDICT

D. Time for motion and ruling. A motion for judgment notwithstanding the verdict shall be filed not later than 10 days after the [filing] entry of the judgment sought to be set aside, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days of the time of the filing of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

COMMENT

Section 63 D. was changed to make "entry" the effective date for all purposes related to judgments. See Comment to ORCP 70.

F. Time of motion; counteraffidvaits; hearing and determination. A motion to set aside a judgment and for a new trial, with the affidavits, if any, in support thereof, shall be filed not later than 10 days after the [filing] entry of the judgment sought to be set aside, or such further time as the court may allow. When the adverse party is entitled to oppose the motion by counteraffidavits, such party shall file the same within 10 days after the filing of the motion, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days from the time of the [filing] entry of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

G. New trial on court's own initiative. If a new trial is granted by the court on its own initiative, the order shall so state and shall be made within 30 days after the [filing] entry of the judgment. Such order shall contain a statement setting forth fully the grounds upon which the order was made, which statement shall be a part of the record in the case.

COMMENT

Sections 64 F. and G. were changed to make "entry" the effective date for all purposes related to judgments. See Comment to ORCP 70.

20.100 Costs on motion, and in cases not otherwise provided for. A sum not exceeding $5 as costs may be allowed to the prevailing party on a motion, in the discretion of the court, and may be absolute or directed to abide the event of the action or suit. [In any action, suit or proceeding as to which the allowance and recovery of costs may not be provided for by statute, costs may be allowed or not, according to the measure prescribed in this chapter, and apportioned among the parties, in the discretion of the court.]

20.220 [Hearing and determination of objections; appeal.] Appeal of judgment on the allowance of taxation of costs and disbursements.

[(1) As soon as convenient after objections are filed against a statement of disbursements, the court or judge thereof in which the action, suit or proceeding is pending shall, without a jury, proceed to hear and determine all the issues involved by the statement and objections. At such hearing the court or judge may examine any record or paper on file in the cause, and either party may produce relevant or competent testimony, orally or by deposition, or otherwise, to sustain the issues on his behalf. Either party may except to a ruling upon any question of law made at such hearing as in other cases.

(2) As soon as convenient after the hearing, the court or judge shall make and file with the clerk of the court an itemized statement of the costs and disbursements as allowed, and shall render judgment thereon accordingly for the party in whose favor allowed. No other finding or conclusion of law or fact shall be necessary, and the same shall be final and conclusive as to all questions of fact. The issues arising on the statement of disbursements and the objections thereto shall be heard and determined without either party recovering further costs or disbursements from the other, except that in the discretion of the court or judge a sum not exceeding $5 as costs, but without further disbursements, may be allowed to the party prevailing on the issues arising on the statement and objections thereto.]

[(3)] An appeal may be taken from the decision and judgment on the allowance and taxation of costs and disbursements on questions of law only, as in other cases. On such appeal the statement of disbursements, the objections thereto, the statement of costs and disbursements as filed by the court or judge, the judgment or decree rendered thereon, and the exceptions, if any, shall constitute the trial court file, as defined in ORS 19.005.

DISTRIBUTION CHART

ORS to Oregon Rules of Civil Procedure

ORS CHAPTER 17	ORCP
17.003	None
17.705	65 C.
17.710	None
17.720	65 B.
17.725	65 B.
17.730	65 A.
17.735	65 A.
17.740	None
17.745	65 D.
17.750	None
17.755	65 E.
17.760	65 E.
17.765	65 E.
CHAPTER 18	
18.010	67 A.
18.030	70 A. and B.
18.040	70 A. and B.
18.050	70 B.
18.060	None
18.070	69
18.080(1) and (2)	67 B.
18.080(3) and (4)	None
18.090	None
18.100	22 A.
18.110	67 C.
18.115	None
18.120	28 A., 67 C.
18.125	67 B., 72 E.
18.135	67 E., 26 B., 28 and 29

ORS	ORCP
18.160	71
18.320-.510	Remain as statutes

CHAPTER 20

20.010	68 A.
20.020	68 A.
20.020	68 B.
20.050	None
20.055	68 A.
20.060	None
20.070	Remains as statute
20.080	" " "
20.085	" " "
20.090	" " "
20.094	" " "
20.096	" " "
20.097	" " "
20.098	" " "
20.100	Modified
20.110	None
20.120-20.180	Remain as statutes
20.210	68 C.
20.220(1) and (2)	68 C.
20.220(3)	Remains as statute
20.230	68 C.
20.310-.330	Remain as statutes

CHAPTER 26

26.010	67 F.
26.020	67 F.
26.030	67 F.

ORS	ORCP
26.040	67 F.
26.110	None
26.120	None
26.130	None
CHAPTER 27	
27.010	66 A.
27.020	66 A.
27.030	66 A.
CHAPTER 45	
45.050	65 C.

M E M O R A N D U M

TO: JOHN BUTTLER
ROBERT W. REDDING
LAIRD KIRKPATRICK

FROM: Fred Merrill

DATE: 7/30/80

Enclosed is the latest redraft of Rules 78-85. I made the changes discussed at our last meeting.

I particularly call your attention to the following items:

Rule 79 B.(1)(b). This includes the limitation which the Council seemed to want. I could not find a separate restraining order procedure in ORS chapter 107, so I just excluded this requirement from application to domestic relations cases.

Rule 79 C.(2). This was Don McEwen's suggestion that consolidation be limited to agreement of the parties.

Rule 80 A. and B. I took out the words "circuit court."

Rule 81 B. This restores the statutory language.

Rule 83 B. The last sentence is added for clarity.

Rule 83 F., G.(4), and I.(2). Note specific statement on lien.

All of Rule 84. I could think of no way the existing language on attachments in Rule 84 could be adapted to a rule. I looked at Bob's rule and decided the most important embellishments were the possibility of attaching real property, personal property subject to UCC recording and debts, without a writ of the sheriff. This rule

simply leaves ORS 29 as it is and adds a new form of attachment for real property or UCC personal property. The attachment form is simply a filing and creates a lien. Anyone who wants to use a writ of attachment instead may do so. I left out the garnishment procedure as it was too complicated and politically controversial.

Section E. of the former rule seems like a sensible and useful provision. It does not fit in Rule 84, but we could add it to Chapter 29.

I sent copies of this draft to the following people for comment: Barry Caplan, Bill Stiles, Rich Josephson, Stamm Johnson, Derrick McGavic, Multnomah County Legal Aid, Multnomah County Sheriff's Office, the Oregon Bankers' Association, and Bob Harris.

FRM:gh

cc: Bob Lacy

NOTE TO JUDGE BUTTLER

Dear Judge Buttler:

Could you call a meeting during the week of August 25, 1980. We need to mail the final recommendations to the Council by September 1 at the latest. Call Gilma, 686-3990, if you need to have her contact the subcommittee members.

Fred Merrill

PROPOSED FORM OF RULES

FOR

PROVISIONAL REMEDIES

submitted by

ENFORCEMENT OF JUDGMENTS SUBCOMMITTEE

August 29, 1980

TABLE OF CONTENTS

RULE 78

ORDER OR JUDGMENT FOR SPECIFIC ACTS

A. Judgment requiring performance considered equivalent thereto. A judgment requiring a party to make a conveyance, transfer, release, acquittance, 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 as provided in ORS 33.010 through 33.050.

C. Application. Section B. of this rule does not apply to a 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, 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 through 33.150, 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:

D.(1) Notice of the show cause hearing shall be served personally upon the party required to show cause.

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

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

COMMENT

This rule was generally taken from existing ORS sections. Section A. is ORS 23.020(1). Section B. is ORS 23.020(2) with the specific reference to ORS chapter 33 added.

Section C. was taken from ORS 23.020. The ORS language forbidding punishment by contempt for failure to obey a court "order" was eliminated. If taken literally, it would prohibit enforcement of any interlocutory order for payment of money by contempt, e.g., discovery sanctions under Rule 46 or orders under Rule 36 C. See ORCP 67 A. and 68 C.(1).

Section D. is new and authorizes a motion procedure for contempt, as an alternative to an independent proceeding under ORS chapter 33. The motion practice was the traditional chancery procedure.

RULE 79

TEMPORARY RESTRAINING ORDERS AND
PRELIMINARY INJUNCTIONS

A. Availability generally.

A.(1) Circumstances. Subject to the requirements of Rule 82, a temporary restraining order or preliminary injunction may be allowed under this rule:

A.(1)(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.(1)(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 the provisions of Rule 83 F., G.(4), and I.(2) are applicable, whether or not provisional relief is ordered under those provisions.

A.(2) Time. A temporary restraining order or preliminary injunction under this rule may be allowed by the court, or judge thereof, at any time after commencement of the action and before judgment.

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 attorney 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 notify defendant or defendant's attorney of the application, including attempts to provide notice by telephone, and the reasons supporting the claim that notice should not be required. The affidavit required in this paragraph shall not be required for orders granted by authority of paragraphs (c), (d), (e), (f), or (g) of subsection (1) of ORS 107.095.

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 paragraph B.(2)(a) does not apply to orders granted by authority of paragraphs (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 for dissolution or modification of such restraining order. 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, the parties may stipulate that the trial of the action on the merits shall be advanced and consolidated with the hearing of the application. The parties may also stipulate that 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.

D. 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 any of them who receive actual notice of the order by personal service or otherwise.

E. Scope of rule.

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

E.(2) This rule does not apply to temporary restraining orders or preliminary injunctions granted pursuant to ORCP 83 except for the application of section D. of this rule.

E.(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.

F. Writ abolished. The writ of ne exeat is abolished.

COMMENT

This rule replaces ORS chapter 32. The existing ORS provisions are not complete, do not adequately distinguish between temporary restraining orders and preliminary injunctions, and have never been integrated with the provisional remedies procedure of ORS chapter 29 (now ORCP 83).

The grounds spelled out in subsection A.(1) are identical to ORS 32.040, except reference to a restraining order where a defendant threatens to remove or dispose of property has been eliminated. Restraining orders to prevent a defendant from frustrating enforcement of a future judgment by disposition of property are covered under the provisional remedies procedure of ORCP 83. See Huntington v. Coffee Associates, 43 Or. App. 595, 603 P.2d 1183 (1979). The procedure in this rule applies either to the situation where the ultimate remedy sought in the case is a permanent injunction and the plaintiff needs immediate relief, or where the injunction sought to effectuate the eventual judgment does not consist of restraining the defendant from disposing of property because such property could be applied to satisfy any judgment.

Subsection A.(2) was taken from ORS 32.020(1).

Sections B. and C. are adapted from Federal Rule 65(a) and (b). Subsection B.(1)(b) was redrafted to make clear that a party seeking a temporary restraining order must try to inform the opposing party or such party's attorney of the application by telephone or any other possible means. An ex parte restraining order is authorized but only for 10 days. Under Rule 17, a complaint need not be verified, but it could be verified to provide a basis for an order under 79 B.(1)(a). Paragraph B.(2)(b) makes clear that the 10-day limit does not apply in domestic relations cases.

Subsection B.(5) is not in the federal rule and was drafted to avoid the confusion discussed in Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 432 n.7 (1974).

Section C. was adapted from the federal rule. Subsection C.(2), however, differs from the federal rule in only allowing an accelerated hearing on the merits where the parties agree.

Section D. is taken from Federal Rule 65 (d). Note, the bond requirements for preliminary injunctions and temporary restraining orders are found in ORCP 82.

Under section E. certain preliminary injunctions are not covered. Subsection E.(1) covers the Family Abuse Prevention Act. Subsection E.(2) carries out the distinction in section A. between preliminary accelerated injunctive relief and restraining orders designed to preserve a defendant's property to satisfy judgment. Subsection E.(3) is taken from Federal Rule 65 (e) and is designed to avoid conflict with state and federal acts limiting injunctions in labor relations matters.

The writ of ne exeat was a common law form of restraining order that prevented a person from leaving the jurisdiction. It was explicitly abolished by ORS 34.820, which was repealed in 1979.

RULE 80

RECEIVERS

A. Receiver defined. A receiver is a person appointed by 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.

B. When appointment of receiver authorized. Subject to the requirements of Rule 82, a receiver may be appointed by a circuit court in the following cases:

B.(1) Provisionally to protect property. Provisionally, before judgment, on the application of any party, when such party's 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.

B.(2) To effectuate judgment. After judgment to carry the same into effect.

B.(3) To dispose of property, to preserve during appeal, or when execution unsatisfied. 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 the property in satisfaction of the judgment.

B.(4) Creditor's action. 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.

B.(5) Attaching creditor. 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.

B.(6) Protect, preserve, or restrain property subject to execution. 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.(7) Corporations and associations; when provided by statute. 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.(8) Corporations and associations; to protect property or interest of stockholders or creditors. 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. Appointment of receivers; notice. 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. Form of order appointing receivers. Every order or judgment appointing a receiver:

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

D.(2) Time for report. 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;

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

D.(4) Periodic reports. May require periodic reports from the receiver.

E. 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 partnership or association, or of the individual, in such manner as the court may direct, requiring such creditors to file their claims, duly verified, with the receiver, the

receiver's attorney, or the clerk of the court, within such time as the court directs.

F. Special notices.

F.(1) Required notice. Creditors filing claims with the receiver, all persons making contracts with a receiver, all persons having claims against the receiver, all persons having 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.

F.(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 such person desires special notice of any and all of the following named steps in the administration of said receivership:

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

F.(2)(b) Filing of accounts;

F.(2)(c) Filing of motions for removal or discharge of the receiver; and

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

A request shall state the post office address of the person, or such person's attorney.

F.(3) Form of notices. Any notice required by 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 the person to be notified, or such person's attorney, at their 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 the person to be notified or such person's attorney not less than five days before such hearing. 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.

G. 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 provide for the filing of written objections to such account within a specified time. At the hearing on the motion to terminate the court shall hear all objections to the final account and shall take such evidence as is appropriate, and shall make such order as is just concerning termination of the receivership, including all necessary orders on the fees and costs of the receivership.

COMMENT

This rule clarifies the procedure for a receivership now covered by ORS chapter 31. It adds necessary provisions for notice and hearing. Although some receiverships are post judgment, the rule is included with provisional remedies because of the provisions covering pre-judgment receivership.

Section A. is identical to ORS 31.010.

Section B. is exactly the same as ORS 31.020. Note, temporary receiverships to preserve a defendant's property are governed here and not under provisional process in Rule 83. See ORCP 81 A.(9). It was felt that a receivership was such a specialized provisional remedy that it should be kept separate. The bond requirements for a receivership appear in ORCP 82.

The present ORS sections do not provide for notice to the defendant and hearing relating to setting up a receivership. Such procedure is required by case law. Anderson v. Robinson, 63 Or. 228, 233, 126 P. 988, 127 P. 546 (1912); Stacy v. McNichols, 76 Or. 167, 144 P. 96, 148 P. 67 (1915). There is no provision for an ex parte receivership order. In an emergency situation, a temporary restraining order would be available under Rule 79 to protect a party until a receivership could be established.

Section D. was adapted from Pennsylvania Rule of Civil Procedure 1533(g) and Rhode Island Rule of Civil Procedure 66 D. Section E. is taken from Washington Superior Court Rule 66(c).

Subsection F.(1) is required by Pacific Lumber Co. v. Prescott, 40 Or. 374, 384, 67 P.2d 207 (1902). Subsections F. (2) and (3) were taken from Washington Superior Court Rules 66 D. and E. Section G. is not covered by ORS and was taken from Arizona Rule of Civil Procedure 66 C.(3). Note, termination may be controlled by statute. See ORS 311.415 and 652.550.

ORS 31.040(2) was eliminated as unnecessary, and ORS 31.050 would remain as a statute.

RULE 81

DEFINITIONS; NOTICE OF LEVY; SERVICE

A. Definitions. As used in Rules 81-85, 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 prior to judgment.

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

A.(7) Levy. "Levy" means to create a lien upon property prior to judgment by any of the procedures provided by Rules 81-85 that create a lien.

A.(8) 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.(9) Provisional process. "Provisional process" means attachment under ORS chapter 29 or Rule 84, claim and delivery under Rule 85, temporary restraining orders under Rule 83, preliminary injunctions under Rule 83, 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, except an order appointing a provisional receiver under Rule 80 or granting a temporary restraining order or preliminary injunction under Rule 79.

A.(10) Security interest. "Security interest" means a lien created by agreement, as opposed to a judicial or statutory lien.

A.(11) Sheriff. "Sheriff" includes a constable of a district or justice court.

A.(12) 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) Form of notice. Whenever a plaintiff levies on

property of a defendant, other than wages held by an employer, the plaintiff must cause to be promptly served on the defendant, in the manner provided in Rule 9 B., 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 Chevrolet, 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.

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

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 of plaintiff's attorney

B.(2) Notice of exemption. 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) Address of defendant unknown. Where a plaintiff cannot find defendant or defendant's attorney and knows of no address or office of defendant or defendant's attorney and with reasonable diligence cannot discover any address or office of defendant or defendant's attorney and cannot serve notice upon defendant in any manner, plaintiff shall file an affidavit to that effect, and service upon defendant shall not be required.

C. Service of notices; proof of service.

C.(1) Service. Save where some other method is expressly permitted, any notice or order to show cause required or permitted to be served by Rules 81-85 shall be served in the manner in which a summons may be served.

C.(2) Proof of service. Copies of all notices or orders to show cause shall be filed together with proof of service as provided in Rule 9 C.

D. Adverse claimants. A person other than the defendant claiming to be the actual owner of property subject to provisional process, or any interest in such property, may move the court for an order establishing the claimant's title or interest, extinguishing the plaintiff's lien, or other appropriate relief. After hearing:

D.(1) Summary release of attachment. In a case where there is no genuine issue as to any material fact and the claimant is entitled to relief as a matter of law, the court may make an order establishing claimant's title or interest, extinguishing or limiting the plaintiff's lien, or granting other appropriate relief.

D.(2) Continuation of attachment. In all other cases, the court shall order the provisional process continued pending judgment. Such order protects the sheriff but is not an adjudication between the claimant and the plaintiff.

COMMENT

This rule provides the general principles appliable to all provisional process covered in Rules 81 through 85.

Subsections A.(1), (2), (3), (8), (11), and (12) are new. Subsections A.(4), (5), and (6) were taken from ORS 29.020. Subsection A.(7) is based on ORS 24.010(3), and subsection A.(10) is based on 11 U.S.C. § 101 (37). The most important definition is A.(9), which was adapted from ORS 29.025(5) and clarifies the relationship between provisional process and other temporary restraining orders or provisional receiverships.

Section B. basically requires the same notices as did ORS 29.178, but the language of the statute was modified slightly and the form of notice was specified.

Sections C. and D. are new. Examples of notices which do not need service which complies with Rule 7 are 81 B.(1) and 84 E. Section D. is designed to provide summary procedure for release of attachment which does not infringe upon jury trial rights in the dispute between the attaching plaintiff and a claimant. Although the claimant of the property would have a right to a separate action to determine title and right to possession, that might not be sufficient when immediate action is needed. Section D. allows the court, which authorized the provisional process, to act after summary hearing if there are no facts in dispute and claimant is clearly entitled to relief. See ORCP 47. This is a more reasonable approach than the seldom used sheriff's jury provided in ORS 23.320 and 23.330.

RULE 82

SECURITY; BONDS AND UNDERTAKINGS;
JUSTIFICATION OF SURETIES

A.(1) Restraining orders; preliminary injunctions. 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.

A.(2) When no security required. No security will be required under this section where:

A.(2)(a) A restraining order or preliminary injunction is sought to protect a person from violent or threatening behavior; or

A.(2)(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.

A.(3) Receivers. No receiver shall be appointed except upon the giving of security by the receiver in such sum as the court deems proper for the payment of any costs, damages, and attorney fees as may be sustained or suffered by any party due to the wrongful act of the receiver.

A.(4) Attachment or claim and delivery bond.

A.(4)(a) Before any property is attached or taken by the sheriff under Rule 85, the plaintiff must file with the clerk

a surety bond, in an amount fixed by the court, 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 or taking, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the bond.

A.(4)(b) 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.

A.(4)(c) No bond shall be required before property is taken by the sheriff under Rule 85, if the court, in the order authorizing issuance of provisional process, finds that the claim for which probable cause exists is that defendant acquired the property contrary to law.

A.(5) Other provisional process. No other provisional process shall issue except upon the giving of security by the plaintiff in such sum as the court deems proper, for payment of such costs, damages, and attorney fees as may be incurred or suffered by any party who is wrongfully damaged by such provisional process.

A.(6) Form of security or bond. Unless otherwise ordered by the court under subsection (7) of this section, any security or bond provided for by these rules shall be in the form of a security bond issued by a corporate surety qualified by law to issue surety insurance as defined in ORS 731.186.

A.(7) Modification of security requirements by court. The court may waive, reduce, or limit any security or bond provided by these rules, or may authorize a non-corporate surety bond or deposit in lieu of bond, or require other security, upon a showing of good cause and on such terms as may be just and equitable.

B. 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.

C. 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 D.(2) of this rule.

D. Qualifications of sureties.

D.(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.

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

E. Affidavits of sureties.

E.(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 D. of this rule.

E.(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 stating that the corporation is qualified to issue surety insurance as defined in ORS 731.186.

E.(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.

F. Objections to sureties. If the party for those benefit a bond or undertaking is given 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 party giving the bond, or the attorney for the party giving the bond, a notice that the party for whose benefit the bond is given objects to the sufficiency of such sureties. If the party for whose benefit the bond is given fails to do so, that party is deemed to have waived all objection to the sureties.

G. Hearing on objections to sureties.

G.(1) Request for hearing. Notice of objections to a surety as provided in section F. 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 will warrant.

G.(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.

G.(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.

COMMENT

The bond requirement for release of party from attachment lien is found in Rule 84. This rule has most of the bond requirements for provisional remedies in ORCP 79-85. See ORS 22.010, which provides that bonds are not required for certain parties. This rule also contains some general rules on the form of security when required and general rules for justification of sureties.

Subsections A.(1) through A.(5) state when bonds will be required for various provisional remedies. Subsection A.(1) was taken from Federal Rule 65 (c). The exceptions in A.(2) are those contained in ORS 32.020(3). Note, this bond requirement would apply to injunctions and restraining orders both under ORCP 79 and 83. Subsection A.(3) is adapted from ORS 31.030. Paragraph A.(4)(a) is taken from ORS 29.130, but the court sets the amount of the bond. Paragraph A.(4)(b) is new. The bond requirement also applies to claim and delivery as well as attachment. The existing provisions for claim and delivery do not require a bond. Paragraph A.(4)(c) is new and recognizes that a bond should not be required in claim and delivery when the underlying claim is a wrongful taking. No bond should be necessary to recover stolen property. See paragraph A.(2)(b). Since under ORCP 83 the court must determine that there is probable cause the underlying claim has validity before claim and delivery is possible, the basis of the claim can be easily determined. Subsection A.(5) is new and makes clear that a bond is required for all provisional process no matter how labelled. The definition of provisional process is found in ORCP 83 A.(9).

Subsections A.(6) and A.(7) apply to all bonds required by the ORCP, not simply to those required by subsections A.(1) through A.(5) of this rule. Subsection A.(6) is new. Subsection A.(7) was adapted from ORS 32.020(2). Note, ORS chapter 22 allows deposit in lieu of bond without court order in some circumstances.

Sections B. through G. apply to all bonds in trial level civil proceedings, whether required by ORCP or ORS. Section B.

was adapted from Federal Rule 65.1 and authorizes a supplementary procedure to enforce the bond. The procedure is analogous to that provided for undertakings on appeal, ORS 19.040(3) and ORS 19.190(2). This would not prohibit an independent action on the bond. Lonogan v. Jackson, 229 Or. 205, 366 P.2d 723 (1961). Sections C. through G. were adapted from Alaska Rules of Civil Procedure 80 and Michigan General Court Rule 763.4.

RULE 83

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 that the action is one in which provisional process may issue, and

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) If the provisional process sought is claim and delivery, a 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; if the provisional process sought is a restraining order, a statement of the particular acts sought to be restrained.

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, if plaintiff relies upon 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) 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.(9) 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.(10) 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.(11) Facts, if any, which tend to establish that without restraint immediate and irreparable injury, damage, or loss will occur;

A.(12) 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.(13) 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. 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. Provisional process authorized by Rule 85 may issue in consumer transactions.

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, as provided in section D. or E. of this rule, or a restraining order, as provided in section F. of this rule, in addition to 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. 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, and if Rule 82 A. has been complied with, 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.

F. Restraining 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 Rule 82 A. has been complied with, 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. Such order shall conform to the requirements of Rule 79 D. A restraining order under this section does not create a lien.

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

G.(1) Subject to section B., the court shall issue an order directed to the defendant and each person having possession or control of the claimed property requiring the defendant and each such other person to appear for hearing at a placed 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.

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

G.(3) The order shall:

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

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

G.(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, and if Rule 82 has been complied with, the court may restrain the person so served from injuring, destroying, transferring, removing, or concealing the property pending further order of the court or continue a temporary restraining order issued under section F. Such order shall conform to the requirements of Rule 79 D. Any restraining order issued under this subsection does not create a lien.

H. Waiver; order without hearing. If after service of the order issued under subsection (1) of section G., 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.

I. Authority of court on sustaining validity of underlying claim; provisional process; restraining order.

I.(1) Subject to section B., if the court on hearing on a show cause order issued under section G. finds that there is probable cause for sustaining the validity of the underlying claim and if Rule 82 A. has been complied with, the court shall order issuance of provisional process. The order shall describe with particularity the provisional process which may be issued.

I.(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, and if Rule 82 A. has been complied with, the court in its discretion may continue or issue a restraining order of the nature described in section F. of this rule. If a restraining order is issued, it shall conform to the requirements of Rule 79 D. A restraining order under this subsection does not create a lien.

COMMENT

This rule was taken almost verbatim from ORS 29.025 through 29.075. All provisional remedies intended to preserve a defendant's assets to satisfy an eventual judgment, except provisional receiverships covered by ORCP 80, would require an order by the court conforming to the procedure in this rule. This procedure was developed by a substantial legislative revision of ORS chapter 29 in 1973 to conform to current constitutional requirements.

For clarity, the first clause was added to A.(3). ORS 29.025(8) and 29.030(2) and (3) were eliminated because they were confusing and not very useful. The rule specifically requires an application by plaintiff, and the court could not issue a provisional process order on its own motion.

The last sentence was added to B. for clarity. The existing language "to effect attachment" creates the exception for claim and delivery. The language of C.(2) was also changed slightly for clarity.

The Council eliminated ORS 29.050. The waiver authorized could still be no more than a printed sale contract or loan agreement. If there is an actual negotiated consensual waiver between freely contracting parties, nothing would prohibit the plaintiff from proving that waiver in an application for a provisional process order.

The cross reference to the security requirements of Rule 82 and form of order in Rule 79 D. were added to sections F., G., and I.

The most important change in the provisions relating to restraining orders was to specify that no lien attaches to property subject to a restraining order. A party who wishes to secure a lien, as opposed to merely restraining disposition of the property by defendant, should use other provisional process. The last sentence of I.(1) is also new.

Revised

RULE 84

ATTACHMENT

A. Actions in which attachment allowed.

A.(1) Order for provisional process. Before a writ of attachment may be issued or any property attached by any means provided by this rule, the plaintiff must obtain an order under Rule 83 that provisional process may issue.

A.(2) Actions in which attachment allowed. 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.(2)(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.

A.(2)(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.(2)(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.(3) Exception for bank. Notwithstanding subsection (2), no attachment shall be issued against any bank or its property before final judgment as security for the satisfaction of

any judgment that may be recovered against such bank.

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

B.(1) In actions in circuit court, real property;

B.(2) Tangible personal property, including negotiable instruments and securities as defined in ORS 78.1020 except a certificate of an account or obligation or interest therein of a savings and loan institution;

B.(3) Debts.

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

C. Attachment by claim of lien.

C.(1) Property subject to claim of lien. When attachment is authorized, the plaintiff may attach the following property by filing a claim of lien:

C.(1)(a) Defendant's real property; or

C.(1)(b) Personal property of the defendant in which a consensual security interest within ORS chapter 79.1020 would be required to be perfected by filing a financing statement under ORS 79.3020.

C.(2) Form of claim; filing.

C.(2)(a) Form. The claim of lien must be signed by the plaintiff or plaintiff's attorney and must:

C.(2)(a)(i) identify the action by names of parties and court, docket number, and judgment demanded;

C.(2)(a)(ii) describe the particular property attached in a manner sufficient to identify it;

C.(2)(a)(iii) have a certified copy of the order authorizing the claim of lien attached to the claim of lien.

C.(2)(a)(iv) state that an attachment lien is claimed on the property.

C.(2)(b) Filing.

C.(2)(b)(i) A claim of attachment lien in real property shall be filed with the clerk of the court that authorized the claim and with the county clerk of the county in which the property is located. The county clerk shall certify upon every claim of lien so filed the time when it was received. Upon receiving the claim of lien, the county clerk shall immediately file such claim of lien in the county clerk's office, and record it in a book to be kept for that purpose. When the claim of lien is so filed for record, the lien in favor of the plaintiff attaches to the real property described in the claim of lien. Whenever such lien is discharged, the county clerk shall enter upon the margin of the page on which the claim of lien is recorded a minute of the discharge.

C.(2)(b)(ii) A claim of attachment lien in personal property shall be filed with the clerk of the court that authorized the claim of lien and in the same office or offices in which a financing statement would be required to be filed. A lien arises in the property described in the claim upon a filing of the claim of lien.

D. Writ of attachment.

D.(1) Issuance; contents; to whom directed; issuance of several writs. If directed by an order authorizing provisional process under Rule 83, the clerk shall 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 the sheriff to attach and safely keep all the property of the defendant within the county not exempt from execution, 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. Several writs may be issued at the same time to the sheriffs of different counties.

D.(2) Manner of executing writ. The sheriff to whom the writ is directed and delivered shall note upon the writ the date of such delivery, and shall execute the writ without delay, as follows:

D.(2)(a) Personal property capable of manual delivery to the sheriff, and not in the possession of a third person, shall be attached by taking it into his custody. If any property attached is perishable, or livestock, where the cost of keeping is great, the sheriff shall sell the same in the manner in which property is sold on execution. The proceeds thereof and other property attached shall be retained by the sheriff to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment. Plain-

tiff's lien shall attach when the property is taken into the sheriff's custody.

D.(2)(b) Other personal property shall be attached by leaving a certified copy of the writ and a notice with the person having possession of the same, or if it be a debt, then with the individual debtor, and if such debt arises out of a wage or salary claim against a corporate debtor then with the registered agent of the corporation, the president or other head of the corporation, vice president, secretary, cashier, assistant cashier or managing agent or such other person designated by the corporation to accept the writ and notice, or if it be rights or shares in the stock of an association or corporation, or interests or profits thereon, then with such person or officer of the association or corporation as a summons is authorized to be served upon; provided that if it be a security, as defined in ORS 78.1020 or a share or any other interest for which a certificate is outstanding the requirements of ORS 78.3170 must be satisfied. However, debts owing to the defendant by a bank or trust company or savings and loan association maintaining branch offices, or credits or other personal property whether or not capable of manual delivery, belonging to the defendant and in the possession of or under the control of such a bank or trust company or savings and loan association, shall be attached by leaving a certified copy of the writ and the notice with the president, vice president, treasurer, secretary, cashier, or assistant cashier of the

bank or trust company or savings and loan association at the office or branch thereof at which the account evidencing such indebtedness is carried or at which the bank or trust company or savings and loan association has credits or other personal property belonging to the defendant in its possession or under its control, or, if no such officers be found at such office or branch, by leaving a certified copy of the writ and the notice with the manager or assistant manager of such office or branch; and no attachment shall be effective as to any debt owing by such bank or trust company or savings and loan association if the account evidencing such indetedness is carried at an office or branch thereof not so served, or as to any credits or other personal property in its possession or under its control at any office or branch thereof not so served, except that such service on the head office of any such institution shall be effective service upon all offices or branches thereof located in the same city as the head office. Plaintiff's lien shall attach upon service of the copy of the writ and notice as provided in this subsection.

D.(2)(c) For purposes of this section, a savings and loan association, including such an association doing business in this state and organized under the laws of another state or of the United States, shall be deemed the debtor of a defendant to whom a certificate, account, or obligation, or an interest therein, of the association has been issued, established, or transferred

and in such case the provisions of ORS 78.3170 shall not apply; provided, however, ownership by a defendant of reserve fund capital stock, or comparable equity stock, or of an interest therein, of any such association shall not be deemed to create such a relationship.

D.(2)(d) The notice referred to in paragraph D.(2)(b) of this subsection shall contain the name of the court, the names of the parties to the action, clearly specify name of the party or parties whose property is being garnished, provide the last address, if known, of each party whose property is being garnished, be directed to the garnishee, specify the property attached, whenever possible, and comply with the requirements of OR 23.185. A certified copy of the order authorizing provisional process shall be attached to the notice. If wages held by an employer are attached, a copy of the provisions of ORS 23.170 and 23.185 shall be included in the notice. The notice may contain additional information to assist the garnishee in identifying the party whose property is being garnished. The notice may contain additional information to assist the garnishee in identifying the party whose property is being garnished.

D.(2)(f) The interest of a distributee in an estate may be attached as provided in ORS 29.175. A plaintiff's lien shall attach upon service of the copy of the writ and notice as provided in that section.

D.(3) Procedure after garnishment

D.(3)(a) Liability of garnishee; delivery of attached property to sheriff by garnishee. Any person, association, or corporation mentioned in paragraph D.(2)(b) of this subsection, from the time of the service of a copy of the writ and notice as therein provided, shall, unless the attached property is delivered or attached debt is paid to the sheriff, be liable to the plaintiff for the amount thereof until the attachment is discharged or any judgment recovered by him is satisfied. Such property may be delivered or debt paid to the sheriff without suit, or at any time before a judgment against the garnishee, and the sheriff's receipt shall be a sufficient discharge.

D.(3)(b) Certificate of garnishee; order for examination of garnishee. Whenever the sheriff, with a writ of attachment against the defendant, shall apply to any person or officer mentioned in paragraph D.(2)(b) of this subjection, for the purpose of attaching any property mentioned therein, such person or officer shall furnish him with a certificate, designating the amount and description of any property in his possession belonging to the defendant, or any debt owing to the defendant, or the number of rights or shares of the defendant in the stock of the association or corporation, with any interest or profits or encumbrance thereon. The certificate shall be furnished to the sheriff within five days from the date of service of the writ, when service is made within the county in which the action is pending, and within 10 days when service is made in any other county. If such person or officer fails to do so within the time

stated, or if the certificate, when given, is unsatisfactory to the plaintiff, he may be required by the court, or judge thereof, where the action is pending, to appear and be examined on oath concerning the same, and disobedience to such order may be punished as a contempt.

D.(3)(c) Contents of order; designation of parties. The order shall require such person or officer to appear before the court or judge at a time and place therein stated. In the proceedings thereafter upon the order, such person or the association or corporation represented by such officer shall be known as the garnishee.

D.(3)(d) Restraining order against garnishee. The court or judge thereof may, at the time of the application of the plaintiff for the order provided for in subparagraph (ii) of this paragraph, and at any time thereafter before judgment against the garnishee, by order restrain the garnishee from in any manner disposing of or injuring any of the property of the defendant, alleged by the plaintiff to be in the garnishee's possession, control, or owing by him to the defendant, and disobedience to such order may be punished as a contempt.

D.(3)(e) Allegations and interrogatories to the garnishee. After the allowance of the order provided for in paragraph (b) of this subsection, and before the garnishee or officer thereof shall be required to appear, or within a time to be specified in the order, the plaintiff shall serve upon the

garnishee or officer thereof written allegations, and may serve written interrogatories, touching any of the property as to which the garnishee or officer thereof is required to give a certificate as provided in paragraph (b) of this subsection.

D.(3)(f) Answer of garnishee. On the day when the garnishee or officer thereof is required to appear, he shall return the allegations and interrogatories of the plaintiff to the court or judge, with his written answer thereto, unless for good cause shown a further time is allowed. The answer shall be on oath, and shall contain a full and direct response to all the allegations and interrogatories.

D.(3)(g) Compelling garnishee to answer; judgment for want of answer. If the garnishee or officer thereof fails to answer, the court or judge thereof, on motion of the plaintiff, may compel him to do so, or the plaintiff may, at any time after the entry of judgment against the defendant, have judgment against the garnishee for want of answer. In no case shall judgment be given against the garnishee for a greater amount than the judgment against the defendant.

D.(3)(h) Exception or reply to answer. Plaintiff may except to the answer of the garnishee or officer thereof for insufficiency, within such time as may be prescribed or allowed, and if the answer is adjudged insufficient, the garnishee or officer may be allowed to amend his answer, on such terms as may be proper, or judgment may be given for the plaintiff as for want of answer, or such garnishee or officer may be compelled to make a sufficient answer. The plaintiff may reply to the whole or a

part of the answer within such time as may be prescribed or allowed. If the answer is not excepted or replied to within the time prescribed or allowed, it shall be taken to be true and sufficient.

D.(3)(i) Trial. Witnesses, including the defendant and garnishee or officer thereof, may be required to appear and testify, and the issues shall be tried, upon proceedings against a garnishee, as upon the trial of an issue of fact between a plaintiff and defendant.

D.(3)(j) Judgment against garnishee. If by the answer it shall appear, or if upon trial it shall be found, that the garnishee, at the time of the service of the copy of the writ of attachment and notice, had any property as to which such garnishee or officer thereof is required to give a certificate, as provided in paragraph (b) of this subsection, beyond the amount admitted in the certificate, or in any amount if the certificate was refused, judgment may be given against the garnishee for the value thereof in money.

D.(3)(k) Execution against garnishee. Executions may issue upon judgments against a garnishee as upon ordinary judgments between plaintiff and defendant, and costs and disbursements shall be allowed and recovered in like manner; provided, however, when judgment is rendered against any garnishee, and the debt from the garnishee to the defendant is not yet due, execution shall not issue until the debt is due.

D.(3)(1) Release of garnishment. The clerk of any court in whom is vested authority to issue writs of attachment may issue releases of garnishments based upon writs of attachment issued by such clerk, whenever the plaintiff by his attorney of record, or the plaintiff in person if there is no attorney, shall file with the clerk a written request therefor. Such release shall be executed in duplicate, under the seal of the court or the stamp of the clerk, and may cover all or any portion of the funds or property held under garnishment. One duplicate original of the release shall be delivered to the garnishee and the other duplicate original, together with the written request therefor, indorsed on the fact thereof by the attorney of record, if there be an attorney, shall be attached to the original writ of attachment in the same manner as the return of the sheriff or constable; and any pending proceedings in such case for the sale upon execution of any property so garnished shall, as to all property covered by the release, thereupon be terminated and be considered of no effect; all costs to be paid by the plaintiff. Upon receipt by the garnishee of the duplicate original release, the garnishee, and all funds or prop= erty subject to such garnishment, shall, to the extent stated in the release, be released from all liability arising by reason of the issuance and service of the writ of attachment and notice of garnishment, or by reason of his return thereon, as though the writ of attachment and notice of garnishment had not been served. The garnishee may rely upon any such release so received by him

without any obligation on his part to inquire into the authority therefor. The authority vested by this section in the clerk of the court to issue releases is not exclusive but is in addition to the authority of the court having jurisdiction of the cause to release, discharge, or dissolve attachments and garnishments.

D.(4) Return of writ; inventory. 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.

D.(5) 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 the property, 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, indemnifying 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.

E. Disposition of attached property after judgment.

E.(1) If judgment is recovered by the plaintiff against the defendant, and it shall appear that property has been attached in the action, and has not been sold as perishable property or discharged from the attachment, the court shall order the property to be sold to satisfy the plaintiff's demands, and if execution issue thereon, the sheriff shall apply the property attached by him or the proceeds thereof, upon the execution, and if any such property or proceeds remain after satisfying such execution, he shall, upon demand, deliver the same to the defendant; or if the property attached has been released from attachment by reason of the giving of the undertaking by the defendant, as provided by subsection F.(1) of this rule, the court shall upon giving judgment against the defendant also give judgment in like manner and with like effect against the surety in such undertaking.

E.(2) If judgment is not recovered by the plaintiff, all the property attached, or the proceeds thereof, or the undertaking therefor, shall be returned to the defendant upon his serving upon the sheriff a certified copy of the order discharging the attachment.

F. Redelivery of attached property; release of liens.

F.(1)(a) If an attachment deprives the defendant or any other person claiming the property of the possession or use of the property, the defendant or such person may obtain redelivery or possession thereof upon a court order authorizing such

redelivery or possession. The moving party shall file a surety bond undertaking, in an amount fixed by the court, to pay the value of the property or the amount of plaintiff's claim, whichever is less, if the same is not returned to the sheriff upon entry of judgment against the defendant. A motion seeking an order authorizing such redelivery or possession must state the moving party's claim of the value of the attached property and must be served upon plaintiff as provided in Rule 9 at least 5 days prior to any hearing on such motion, unless the court orders otherwise. The property shall be released to the defendant upon the filing of the bond. Delivery of property 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 properts 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)(iii) 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.

F.(2)(e) After judgment the proceeds shall be disposed of as provided in section E. of this rule. However, the proceeds shall not be distributed to defendant until distribution to all other lienors according to priority.

COMMENT

This rule is primarily based upon the existing statutory provisions of ORS 29.110 - 29.410.

Subsection A.(1) indicates that attachment is provisional process subject to Rule 83. Subsection A.(2) is identical to ORS 29.110. Subsection A.(3) is taken from ORS 29.410.

Section B. is a clarification of ORS 29.140. It does not change the property that may be subject to attachment; the description of such property is clearer.

The claim of lien in section C. is a new procedure. It recognizes that no writ should be required to establish an attachment lien on real property. It also provides a simple way to establish a lien on personal property subject to recording of a security interest. In either case, plaintiff cannot abuse the procedure because it is only available after the order for provisional process authorizes a claim of lien for specific property.

Section D. is taken from ORS 29.160 - 29.200, 29.270 - 29.370, and 29.400. The only changes are: specific references to attachment of lien in D.(2)(a) and (b) which replace ORS 29.150; the requirement of attaching a copy of the provisional process order and ORS 29.170 and 29.185 were added to D.(2)(d); and, D.(5) is new and modelled upon ORS 23.310.

Section E. is ORS 29.380 and 29.390. Section F. is new and replaces ORS 29.220 - 29.260. It clarifies the procedure for redelivery bond and authorizes a new procedure allowing sale of attached property and deposit of proceeds pending judgment.

ORS 29.178 and 29.210 would be eliminated as unnecessary because of 81 B. and D. ORS 29.120 is eliminated as inconsistent with Rule 83. ORS 29.175 would remain as a statute.

RULE 85

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 83.

B. Delivery by sheriff under provisional process order. The order of provisional process issued by the court as provided in Rule 83 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. Custody and delivery of property. Upon receipt of the order of provisional process issued by the court as provided in Rule 83, 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 the sheriff's custody. The sheriff shall keep it in a secure place, and deliver it to the party entitled thereto upon receiving the lawful fees for taking, and the necessary expenses for keeping the same. The court may waive the payment of such fees and expenses upon a showing of indigency.

D. 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.

E. Dismissal prohibited. If property is taken by the sheriff pursuant to this rule, the plaintiff shall not dismiss the action under ORCP 54 A.(1) until 30 days after such taking.

COMMENT

Sections A. through D. are almost identical to existing ORS 29.080-.095.

The requirement of a bond before taking is covered in Rule 82. ORS 29.087 is substantive and would remain as a statute.

Section E. is new. After securing the property by claim and delivery, if the plaintiff immediately dismisses the action, the defendant must go to the expense of filing a separate action to recover possession even though defendant has a right to possession. Prohibiting dismissal gives the defendant sufficient time to secure an attorney and appear in the action.