CHANGES SUGGESTED TO OREGON RULES OF CIVIL PROCEDURE
SENATE AND HOUSE JUDICIARY COMMITTEE MEETING
MARCH 1, 1979

RULE 22

COUNTERCLAIMS, CROSS-CLAIMS, AND
THIRD PARTY CLAIMS

A. through B.(3) unchanged.

C. Third party practice.

C.(1) At any time after commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff. The third party plaintiff need not obtain leave to make the service if the third party complaint is filed not later than 10 days after service of the third party plaintiff's original answer. Otherwise the third party plaintiff must obtain leave on motion upon notice to all parties to the action. Such leave shall not be given if it would substantially prejudice the rights of existing parties [.] including, but not limited to, causing unwarranted delay in trial of the plaintiff's claim. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in sections A. and B. of this rule. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's

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

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

[D. Joinder of persons in contract actions.]

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

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

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

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

D. Joinder of additional parties.

D.(1) Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 28 and 29.

D.[(3)](2) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097. As used in this subsection:

D.(2)(a) "Maker" means the original party to the contract which is the subject of the action who is the predecessor in interest of the plaintiff under the contract; and

D.(2)(b) "Contract" includes any instrument or document evidencing a debt.

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

E. unchanged.

* * * *

3/1/79

Rule 22

[D. Joinder of Persons in contract actions.]

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

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

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

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

D. Joinder of additional parties.

D.(1) Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 28 and 29.

D.[(3)](2) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097. As used in this subsection "contract" includes any instrument or document evidencing a debt.

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

M E M O R A N D U M

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

FROM: Fred Merrill

RE: THIRD PARTY PRACTICE - ORCP 22 C.

I. BACKGROUND

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

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

---

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

II. PRESENT THIRD PARTY PRACTICE IN THE UNITED STATES

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

A. Impleader allowed

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

B. Limits on impleader

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

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

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

---

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

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

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

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

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

C. Special provisions for third party cases

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

III. CURRENT LITERATURE

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

---

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

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

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

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

IV. POSSIBLE LIMITATIONS OR CHANGES

A. Limiting or eliminating impleader without leave of court

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

B. Prohibiting impleader after a certain time

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

---

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

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

exception in some unusual circumstances. An absolute prohibition on impleader more than six months after answer probably would be invalid as inconsistent with Federal Rule 14. In any case, even after 6 months there would be an occasional unusual case where an impleader would work no harm and be very reasonable.[9/]

The effect of the provision is to put a much heavier burden upon a party seeking leave to implead more than 6 months after answer. It would eliminate most impleaders after that date. These rules could be adapted to Oregon by adding something like the following provision as 22 C.(3):

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

C. Regulating procedure and order of trial

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

---

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

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

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 22

[D. Joinder of Persons in contract actions.]

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

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

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

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

D. Joinder of additional parties.

D.(1) Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 28 and 29.

D.[(3)](2) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097. As used in this subsection "contract" includes any instrument or document evidencing a debt.

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

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 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.