

RULE 83

ENFORCING JUDGMENTS AGAINST INTANGIBLE PROPERTY
AND MISCELLANEOUS INTERESTS

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

A.(1)(a) At any time after entry of judgment or after an order that provisional process may issue has been made the creditor may serve a notice of garnishment on any person believed to be obligated or liable to the debtor or to have possession of property belonging to the debtor.

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

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

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

A.(2)(b) State that a judgment has been recovered against the debtor on which a stated amount is presently due, or that an order for provisional process has been made in an action in which a stated amount

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

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

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

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

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

A.(3) Notice of garnishment shall be served in the manner of a summons and may be served by anyone eligible to make service of

summons. Proof of service shall be returned to the creditor and a copy of the notice and proof of service shall be filed with the clerk when the garnishee's answer is filed.

A.(4)(a) If the garnishee's answer states that the garnishee has possession of property of the debtor the creditor may proceed under Rule 82 G. The creditor's lien in such case attaches at the time the notice of garnishment is served.

A.(4)(b) If the creditor files a garnishee's answer which states that a sum of money is owed and presently payable to the debtor, or if the garnishee's obligation to the debtor has been established by judgment, the clerk, at the creditor's request, shall order the garnishee to pay such sum to the clerk up to the amount necessary to satisfy or secure the creditor's judgment or claim and notify the garnishee that as to any excess the garnishment is released. Upon receipt of such payment the clerk shall remit the same to the judgment creditor or hold it pending judgment in the action in which provisional process was authorized. If the garnishee under a provisional process is a bank, the clerk, instead of ordering immediate payment, may direct that the money be held by the bank in a restricted, interest bearing, account pending judgment in the action.

A.(5)(a) If the garnishee's answer states that money is presently owed to the debtor but is not payable until some future time, the creditor may apply to the court for an order directing the garnishee to pay the money to the clerk when it becomes payable, or requiring the debtor to transfer ownership of his claim against the

garnishee to the creditor, either immediately or if the debtor fails to sell the claim within some stated time. If such claim is secured the debtor may be ordered to transfer the collateral to the creditor. If money owed by the garnishee is payable in instalments, the order may be to pay all, or a part of, future instalments to the clerk for a specified time.

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

A.(6) If the garnishee admits obligation to the debtor, or if such obligation has been established by judgment, but the garnishee fails to pay the clerk when ordered to do so under section A.(4) or (5) a judgment creditor may apply to the court for judgment against the garnishee in the amount admitted or established or the amount of the creditor's judgment against the debtor, whichever is less. Such a judgment against a garnishee may be enforced in the same manner as any other judgment. If the garnishment was under provisional process judgment shall not be entered against the garnishee before judgment is entered against the debtor.

A.(7) If the garnishee fails to answer, or denies any obligation or liability to the debtor, or admits owing an amount less than that believed by the creditor to be owing, a judgment creditor may apply to the court for an order authorizing the creditor to institute an action, in his own name or in the debtor's

name, on the debtor's alleged cause of action. Authorization may be given either unconditionally or on condition that the debtor does not himself institute an action within a specified time. If the creditor is authorized and commences an action, the debtor may intervene under Rule 33 B. Whether or not the debtor intervenes, a judgment on the merits in the action between the creditor and the garnishee bars a subsequent action by the debtor.

A.(8) Any amounts paid by or collected from garnishee, exclusive of amounts applied to costs assessed against the garnishee in connection with the garnishment, correspondingly extinguish the debtor's claim against the garnishee. The clerk shall give the garnishee a receipt identifying a payment as money paid under a designated garnishment and, if judgment has been entered in favor of the debtor against the garnishee, record total or partial satisfaction thereof.

B. Pending actions.

B.(1) If a debtor is a plaintiff, or counterclaiming defendant, in an action pending in a court of this state, a creditor holding a judgment against such debtor may file with the clerk of the court in which the action is pending a claim of lien against such cause of action. From the time of such filing the creditor shall have a lien for the amount of his judgment on the cause of action and on any judgment recovered by the debtor therein and, provided notice of said lien has been served on the parties

to the action, no compromise or settlement of the action or satisfaction of the judgment shall be made without the consent of the creditor unless his lien has been satisfied or discharged.

B.(2) The claim of lien shall be styled as a paper in the action in which the debtor is asserting a right to recover and shall identify the creditor's judgment by names of parties, court, and docket number, state the amount presently due on the creditor's judgment, and state that a lien is claimed for such amount on the debtor's cause of action and any judgment recovered thereon. If the claim of lien is filed in a court other than the court in which the creditor's judgment was recovered, it must be verified by the signature of the clerk of such court.

B.(3) A creditor who has filed a claim of lien on a debtor's cause of action may intervene in such action by leave of court under Rule 33 C.

B.(4) After a judgment has been entered in favor of the debtor in an action in which the creditor has filed a claim of lien, the creditor may enforce the lien by garnishing the judgment debtor of the debtor under section A. The priority of such garnishment is determined by the time the claim of lien was filed rather than by the time that notice of garnishment was served.

C. Other intangibles; miscellaneous interests.

C.(1) This section applies to corporate shares not evidenced by securities as defined in ORS 78.1020, equities, franchises, patents, licenses, and similar incorporeal rights other than claims

against specific persons; also to contingent interests in real or personal property and leaseholds in personal property and of less than two years unexpired term in real property.

C.(2) Upon ex parte application by a judgment creditor, the court may, in its discretion, authorize the creditor to institute proceedings to enforce the judgment against interests of the debtor of the kind described in subsection (1). In deciding whether or not to authorize proceedings the court should consider the availability of other methods of satisfying the judgment and the likelihood that the proceeding will produce a substantial return to the creditor without disproportionate loss to the debtor.

C.(3) If the court decides to authorize proceedings, it shall direct notice to be served on the debtor enjoining transfer of the interest in question and setting a date for a hearing at which the debtor may show cause why the interest should not be sold or its transfer to the debtor compelled. The court may also direct notice to be served on, or otherwise communicated to, the franchiser, licensor, or other person from whom the debtor's interest is derived or any other person whose interests may be affected. If the debtor's interest is a matter of public record, a copy of the notice shall be filed with the appropriate registrar.

C.(4) The creditor has a lien on the interest described in the notice from the time of its service on the debtor and filing with the registrar if such filing is required by subsection (3).

C.(5) After hearing, the court shall make a final order directing a public sale of the interest, or authorizing public or

private sale by the creditor, or directing that the interest be transferred to the creditor, or assigning all or part of the income from the property to the creditor for a stated period, or setting a time within which the debtor must sell the interest, or dismissing the creditor's application and discharging the lien on the interest, or making any other order that will effectuate the principles of Rule 75 B. If a sale or transfer of the interest is ordered, the debtor shall be required to cooperate therein.

C.(6) If the final order is that the interest be transferred to the creditor, the court shall take evidence respecting the value of the interest and set the amount to be credited on the judgment.

D. Partnership interests. The right of a creditor to reach his debtor's interest in a partnership is defined in, and the procedure provided by, ORS 68.420 and .450.

E. Levy on bank account or contents of safe deposit box not wholly in name of judgment debtor.

E.(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 debtor or standing in the name of the debtor 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 debtor or to the debtor 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 corporate 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 debtor 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.

E.(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 debtor, or the person to whom such safe deposit box is rented, other than the debtor, by restricted mail, of the service of said writ and of the delivery to it of said bond.

E.(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.

E.(4) Any person claiming an interest in the account or safe deposit box contents so levied on may institute proceedings under Rule 77 B.(5). An order under Rule 77 B.(5)(b) or (c) shall be without prejudice to a subsequent action on the surety bond.

E.(5) After fifteen (15) days from the making of the levy and the delivery of said bond, if no proceedings under Rule 77 B.(5) 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.

E.(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.

COMMENT

Rule 83

Subsections A.(1)-(3) use the "writ of garnishment" procedure of ORS 23.650-.670, rather than the ORS 29.170(3) procedure, with the difference that there is no writ and the creditor issues the notice. Paragraph A.(1)(b) comes from ORS 29.170(3). Subsection A.(4) is derived from ORS 29.270 and 23.430. Subsection A.(5) is derived from the last sentence of ORS 23.420(1) but adds some flexibility respecting payments due in the future. Subsection A.(6) is derived from ORS 29.360 and .370 and eliminates the procedure of ORS 23.420(1) which has proven a trap for the unwary. See Murphy v. Bjelik, 87 Or. 329, 169 P. 520, 170 P. 723 (1918). Postponement of judgment against the garnishee in attachment situations is mandated by Union Oil Co. v. Pacific Whaling Co., 240 Or. 151, 400 P.2d 509 (1965). Subsection A.(7) replaces the suit-within-a-suit procedure of 29.310-.370. This avoids possible harassment of the garnishee by splitting a cause of action against him and also meets the objection implicit in Pringle v. Robertson, 258 Or. 369, 465 P.2d 223 (1970); if the court senses unfairness in letting a creditor (e.g., an uncompensated accident victim) sue a garnishee (e.g., tortfeasor's liability insurer) in his own name, it can deny authorization or require suit in the debtor's name. Ky. R.S. 425.526 is a similar provision authorizing direct action by a garnishee against a creditor who gives an unsatisfactory answer. Subsection A.(8) provides machinery to assure the garnishee proper credit for any payment. Cf. ORS 23.430.

Section B. is based on Cal. C.C.P. 688.1 with the difference that the California statute requires the creditor to apply to the court for a discretionary ruling. Rule 83 B. makes the lien a matter of right, assuming the cause of action is not exempt (cf. Rule 76 D.). Whether or not the creditor should be allowed to participate in the action should be a discretionary matter but this is best handled under Rule 33.

Section C. combines the common law creditor's suit and supplementary proceedings (ORS 23.710-.730). The principal change is the elimination of an independent, formal suit and the hard and fast requirement of return of execution nulla bona. The latter is seen as a time consuming gesture. The creditor's self-interest will normally counsel against using more elaborate remedies when simpler ones will avail. If a creditor should seek to invoke section C. out of caprice or malice when conventional property was available, the court can refuse authorization under C.(2) or the debtor can use the conventional property to pay off the judgment. The point of the initial ex parte application is to allow the court to screen out an occasional wholly inappropriate application and, more importantly, to set a date for the hearing and determine who must be given what kind of notice.

Section E. is based on Cal. C.C.P. 682a.

ORS sections superseded: 23.420(1)(2), 23.430, 23.650-.670, 23.710-.730, 29.170(3), 29.270, 29.310-.370.

RULE 79

PROVISIONAL PROCESS

A. Definitions for Rule 79. As used in Rule 79, unless the context requires otherwise:

A.(1) "Consumer goods" means consumer goods as defined in ORS 79.1090.

A.(2) "Consumer transaction" means a transaction in which the defendant obligates himself to pay for goods sold or leased, services rendered or monies loaned, primarily for purposes of the defendant's personal, family, or household use.

A.(3) "Issuing officer" means any person who on behalf of the court is authorized to issue provisional process.

A.(4) "Provisional process" means attachment under Rule 78, replevin, or claim and delivery under Rule 87, 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.

B. 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:

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

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

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

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

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

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

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

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

B.(9) If the plaintiff claims that the defendant has waived his right to be heard, a copy of the writing evidencing such

waiver and a statement of when and in what manner the waiver occurred;

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

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

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

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

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

C. Provisional process prohibited in certain consumer transactions.

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

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

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

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

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

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

E. Effect of notice of bulk transfer. Subject to section C., 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.

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

F.(1) That the defendant, by conspicuous words in a writing executed by or on behalf of the defendant before filing of the affidavit or petition under section B. or by handwriting of the defendant or the defendant's agent executed before filing of the affidavit or petition under section B. has declared substantially that he is aware of his right to notice and hearing on the question of the probable validity of the underlying claim before he can be deprived of his property in his possession or control or in the possession or control or in the possession or control of another and that he waives that right and agrees that the creditor, or one acting on behalf of the creditor, may employ provisional process to take possession or control of the property without first obtaining a final judgment or giving notice and opportunity for hearing on the probable validity of the underlying claim.

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

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

G. Issuance of provisional process where damage to property threatened. Subject to section C., if the court finds that before hearing on a show cause order the defendant or other person in

possession or control of the claimed property is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser or that the defendant or other person in possession or control of the claimed property would not comply with a temporary restraining order, the court shall order issuance of provisional process in property which probably would be the subject of such destruction, harm, concealment, removal, transfer, or violation.

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

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

I.(1) Subject to section C., 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 place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue.

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

I.(3) The order shall:

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

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

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

J. Waiver; order without hearing. If after service of the order issued under subsection (1) of section I. 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 C., without hearing shall order issuance of provisional process.

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

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

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

COMMENT

Rule 79

Rule 79 is ORS 29.020-.075. ORS 29.040 providing for attachment to obtain quasi in rem jurisdiction was repealed by Or. L. 1979 c. 284, § 199. See Comment to Rule 5.

ORS sections superseded: 29.020-.075.

PROCEDURE AND PRACTICE COMMITTEE

COMMENTS

RULE 79

Rule 79 sets forth the basis for provisional process.

It is lifted directly from ORS 29.020 through 29.075.

No changes have been made by Professor Lacy.

The provisional process statute was enacted in 1973 in its current state. Of course, as is noted by Professor Lacy, ORS 29.040 was repealed by the 1979 legislature.

RULE 71
PROVISIONAL PROCESS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Provisional process prohibited in certain consumer transactions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

H.(3) The order shall:

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

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

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

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

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

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

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

K. Provisional receivership.

K.(1) Actions in which provisional receivership allowed.

Subject to section B., a circuit court may appoint a receiver provisionally, before judgment, in the following cases:

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

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

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

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

RULE 71 - PROVISIONAL PROCESS

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

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

RULE 72 - ATTACHMENT

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

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.

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 place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue.

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 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 place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue.

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.

RULE 83
PROVISIONAL PROCESS

A. Requirements for issuance. To obtain an order for issuance of provisional process the plaintiff shall cause to be filed with the clerk of the court from which such process is sought a sworn petition and any necessary supplementary affidavits requesting specific provisional process and showing, to the best knowledge, information, and belief of the plaintiff or affiants 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)(a) 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;

A.(3)(b) 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 the 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, and 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 place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue. Upon request of the plaintiff the hearing date may be set later than the seventh day.

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 A. 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 defendant is aware of the right to be heard and does not want to be heard, that defendant expressly waives the right to be heard, that defendant understands that upon 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 G. 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.

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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, should use other provisional process. The last sentence of I.(1) is also new.

RULE 83

PROVISIONAL PROCESS

A. Requirements for issuance. To obtain an order for issuance of provisional process the plaintiff shall cause to be filed with the clerk of the court from which such process is sought a sworn petition and any necessary supplementary affidavits requesting specific provisional process and showing, to the best knowledge, information, and belief of the plaintiff or affiant, 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)(a) 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;

A.(3)(b) 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 the 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. of this rule 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. of this rule, 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. of this rule, 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. of this rule, 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, and 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. of this rule, 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 place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue. Upon request of the plaintiff the hearing date may be set later than the seventh day.

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 A. 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. of this rule. 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 G.(1) of this rule, the defendant by a writing executed by or on behalf of the defendant after service of the order expressly declares that defendant is aware of the right to be heard and does not want to be heard, that defendant expressly waives the right to be heard, that defendant understands that upon 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 8.

of this rule 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. of this rule, if the court on hearing on a show cause order issued under section G. of this rule 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. of this rule, if the court on hearing on a show cause order issued under section G. of this rule 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.

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Note, pursuant to Rule 81 C.(1), personal service of the show cause order is not absolutely required. The order may be served in any manner in which a summons may be served.