

RULE 25

EFFECT OF PROCEEDING AFTER MOTION OR AMENDMENT

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

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

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

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

COMMENT

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

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

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