

CHANGES SUGGESTED TO OREGON RULES OF CIVIL PROCEDURE
SENATE AND HOUSE JUDICIARY COMMITTEE MEETING
MARCH 15, 1979

RULE 54

DISMISSAL OF ACTIONS; COMPROMISE

A. Voluntary dismissal; effect thereof.

A.(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 E. and of any statute of this state, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal with the court and serving such notice on the defendant not less than five days prior to the day of trial if no counterclaim has been pleaded, or (b) by filing a stipulation of dismissal signed by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action against the same parties on or including the same claim unless the court directs that the dismissal shall be without prejudice. Upon notice of dismissal or stipulation under this subsection, the court shall enter a judgment of dismissal.

A.(2) through C. unchanged.

D. Costs of previously dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court

may make such order for the payment of [costs of] any unpaid judgment for costs and disbursements against plaintiff in the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

E. unchanged.

* * *

RULE 55

SUBPOENA

A. and B. unchanged.

C. Issuance.

C.(1) By whom issued. A subpoena is issued as follows:

(a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein: (i) it may be issued in blank by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C., or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths

RULE 54

DISMISSAL OF ACTIONS; COMPROMISE

E. Compromise; effect of acceptance or rejection.

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

COMMENT

The reference to disbursements was inadvertently omitted in 1979.

RULE 54

DISMISSAL OF ACTIONS[:]; COMPROMISE

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time [before] up to three days prior to trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as [in case of a confession] a stipulated judgment. Unless agreed upon by the parties, costs, disbursements, and attorney fees shall be entered as part of such judgment as provided in Rule 68. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, disbursements, and attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements from the time of the service of the offer.

DISMISSAL OF ACTIONS[:]; COMPROMISE

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COMMENT

The amendment to 54 E. requires that the offer of compromise be made at least three days prior to trial. It also makes clear that a more favorable judgment bars not only all costs and disbursements, but attorney fees "incurred after the date of the offer." The addition of the second sentence allows a settlement of the principal claim even though there is no agreement as to attorney fees, disbursements, or costs. Note, ORS 20.180 is not superseded.

Rule 54

Dismissal of Actions; Compromise

Rule 54(A)(1) preserves that right to take a non-prejudicial dismissal without prejudice up to five days before the trial unless as specified in ORS 18.210 and ORS 18.230. The next to the last sentence of Rule 54(A)(1) was intended to prevent harrassment of a defendant by repeated filings and dismissals of complaints by the plaintiff. Under the terms of that sentence, the plaintiff is allowed one dismissal without prejudice. The second dismissal "operates as an adjudication upon the merits." The reference to Rule 32(E) in this subsection indicates that class actions have more detailed requirements for dismissal due to the representative character of the class plaintiffs.

Rule 54(A)(2) is based upon Federal Rule 41(a)(2). A dismissal by order of the court would be required any time after five days prior to trial. Counterclaims filed prior to the motion to dismiss could proceed. The order of dismissal could be with or without prejudice.

Rule 54(B) covers involuntary dismissal. Rule 54(B)(1) makes only one change in existing law, providing for dismissal for failure to comply with rules or court orders. This language comes from the first sentence of Federal Rule 41(b). Rule 54(B)(3) is taken from ORS 18.260 (dismissal for want of prosecution) and defines the procedure by which the court can clear its docket. Only minor changes were made in incorporating ORS 18.260 into Rule 54.

Rule 54(B)(2) is based upon Federal Rule 41(b) and covers the judgment of dismissal at the close of a claimant's case for insufficiency of the evidence in cases tried without a jury. The Oregon State Bar has a bill on this same subject, H.B. 2196, which will probably be consolidated for hearing with Rule 54 during this session of the legislature. This rule also changes the former rule that a judgment of dismissal at the close of a claimant's case did not bar another suit; under Rule 54(B)(4) the judgment of dismissal is with prejudice unless the court specifies otherwise. The last sentence of Rule 54(B)(2) requires findings only when they would be required for a judgment under Rule 62.

Rule 54(B)(4) is somewhat like the last sentence of Federal Rule 41(b). The Federal Rule states the effect of all dismissals and lists many exceptions. Rule 54(B)(5) only defines the effect of dismissals under Section B and so is stated in broader terms.

Section C provides that the rule applies to counterclaims, cross-claims and third-party claims. They would be either voluntary, under Rule 54(A), or involuntary, under Rule 54(B).

Section D is derived from Federal Rule 41(d). It provides for costs of previously dismissed actions to be paid to the defendant, if they have not already been. The court can order the payment of costs and stay the proceedings until the plaintiff has done so.

Rule 54(E) is derived from ORS 17.055 with only minor changes in language.

RULE 54

DISMISSAL OF ACTIONS; COMPROMISE

B.(4) Effect of judgment of dismissal. Unless the court in its judgment of dismissal otherwise specifies, a dismissal under this section operates as an adjudication with prejudice.

COMMENT: The language of this rule should be reversed, requiring affirmative action on the part of the court to dismiss a case with prejudice. A dismissal under this rule includes a dismissal for want of prosecution and would include situations where an attorney's inattention to his client's case may result in its being dismissed with prejudice. It is unfair to the litigants of this state that their cases be dismissed without any wrongdoing on their parts as they may wish to seek the assistance of other counsel and they should not be precluded by a dismissal with prejudice, as the dismissal would not be upon the merits of their claims.

D. Costs of previously dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order

COMMENT: This rule provides the court with the power to tax costs of the action previously dismissed as the court may deem proper without any definition of what the term "proper" means. There are many reasons why a case may have to be dismissed prior to trial, one of which would include the legitimate inability to try the case at the time it is set. In the event of a dismissal, the defendant is entitled to file his cost bill and this rule should restrict the taxing of costs solely to the cost bill. As the rule is presently written, a court could go beyond this proposal and include inconvenience of parties' attorneys, etc., and tax the refiling plaintiff with amounts that could preclude his day in court.

The Council also endorsed the changes suggested by Frank Pozzi to section 54 B.(4) (page 14 of March 29 Committee memo) and section 64 B. (page 26 of Committee memo). The changes would appear as follows:

Rule 54

B.(4) Effect of judgment of dismissal. Unless the court in its judgment of dismissal otherwise specifies, a dismissal under this section operates as an adjudication [with] without prejudice.

Rule 64

B. Jury trial; grounds for new trial. A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having fair trial.

B.(2) Misconduct of the jury or prevailing party.

B.(3) Accident or surprise which ordinary prudence could not have guarded against.

B.(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

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A.(2) By order of court. Except as provided in subsection (1) of this section, an action shall not be dismissed at the plaintiff's instance save upon judgment of dismissal ordered by the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the defendant may proceed with the counterclaim. Unless otherwise specified in the judgment of dismissal, a dismissal under this subsection is without prejudice.

Rule 54

B. Involuntary dismissal.

B.(1) Failure to comply with rule or order. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for a judgment of dismissal of an action or of any claim against such defendant.

B.(2) Insufficiency of evidence. After the plaintiff in an action tried by the court without a jury has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a judgment of dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment of dismissal against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment of dismissal with prejudice against the plaintiff, the court shall make findings as provided in Rule 62.

B.(3) Dismissal for want of prosecution; notice. Not less than 60 days prior to the first regular motion day in each calendar year, unless the court has sent an earlier notice on its own initiative, the clerk of the court shall mail notice to the attorneys of record in each pending case in which no action has been taken for one year immediately prior to the mailing of

such notice, that a judgment of dismissal will be entered in each such case by the court for want of prosecution, unless on or before such first regular motion day, application, either oral or written, is made to the court and good cause shown why it should be continued as a pending case. If such application is not made or good cause shown, the court shall enter a judgment of dismissal in each such case. Nothing contained in this subsection shall prevent the dismissal by the court at any time, for want of prosecution of any action upon motion of any party thereto.

B.(4) Effect of judgment of dismissal. Unless the court in its judgment of dismissal, otherwise specifies, a dismissal under this section operates as an adjudication [with] without prejudice.

Rule 54

D. Costs of previously dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of [costs of] any unpaid judgment for costs and disbursements against plaintiff in the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

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