

RULE 75

SCOPE; GENERAL PRINCIPLES; DEFINITIONS

A. Scope of Rules 75-87. Rules 75-87 govern the procedure for obtaining provisional security while an action is pending and for the enforcement of final judgments. They apply to proceedings in both circuit and district courts unless otherwise expressly stated. Rules 75-86 relate to the enforcement of money judgments; Rule 87 relates to judgments for the possession of specific property or requiring specific acts.

B. General principles. Rules 75-87 shall be construed and applied in accordance with Rule 1 B. and so as to give effect to the following general principles:

B.(1) Anything of value owned by a judgment debtor should be available to satisfy the judgment unless expressly made exempt by state or federal law.

B.(2) Proceedings to force liquidation of a debtor's assets should be administered, in so far as consistent with reasonably prompt satisfaction of the creditor's claim, so as to avoid sacrifice of values and to minimize hardship to the debtor.

B.(3) Interference with a defendant's possession and enjoyment of property prior to judgment should be regarded as a last resort.

B.(4) Only the debtor's actual, beneficial interest in property may be taken to secure or satisfy a judgment. Equities of third persons, interests of co-owners, and liens senior to the lien of the judgment creditor must be protected.

C. Definitions for Rules 75-87. As used in Rules 75-87, unless the context requires otherwise:

C.(1) "After hearing" means after such notice as is required by statute or rule or order of court has been given and an opportunity for a hearing provided but does not require an actual hearing if none is requested by an interested party or if the party whose interests are to be affected does not appear at a scheduled hearing;

C.(2) "Assets", or "property", include interests, whether legal or equitable, fixed or contingent, liquidated or unliquidated, joint or several, in realty and personalty, tangibles and intangibles, claims, rights of action, franchises, and anything else of material value;

C.(3) "Bank" includes commercial and savings banks, trust companies, savings and loan associations, and credit unions;

C.(4) "Clerk" means clerk of the court;

C.(5) "Court" means the circuit or district court in which a judgment was recovered or in which proceedings to enforce a claim or judgment are pending;

C.(6) A debtor's "equity" in an item of property means the value of the property less the amount of any security interests of other persons therein.

C.(7) "Execution"; "attachment"; "writ". "Execution" is the procedure for enforcing a judgment; "attachment" is the procedure by which an unsecured creditor obtains a judicial lien on a

debtor's property while an action is pending; a "writ" is an order by a court to a sheriff or other official to aid a creditor in execution or attachment.

C.(8) "Levy" means to create a lien upon property under any judicial writ or process or by any of the procedures provided by Rules 75-87.

C.(9) "Lien" means a charge on an item of property entitling the lienholder to compel the item to be applied to satisfaction of a claim and, ordinarily, determining the priority of the lienholder's interest among other interests in the property. A judicial lien is a lien created by judgment, levy, garnishment, sequestration, or other legal or equitable process or proceeding.

C.(10) "Restricted mail" means mail which carries on its face the endorsements "return receipt requested showing address where delivered" and "deliver to addressee only"; provided that on mail on which the addressee is not a natural person the endorsement "deliver to addressee only" may be omitted.

C.(11) "Security interest" means a lien created by agreement, as opposed to a judicial or statutory lien.

C.(12) "Sheriff" includes constable where Rules 75-87 apply to district court proceedings in counties having such an officer.

COMMENT

Rule 75

The general principles stated in subsections B.(1), (2), and (4) have long been recognized. Subsection B.(1) is derived from ORS 23.160 and 29.140. Subsection B.(2) is the presumable motivation for the system of public sale and redemption from execution. Subsection B.(4) is seemingly contrary to ORS 18.370 and 29.150 but is believed to accurately reflect the supreme court's construction and application of those sections; see Thompson v. Hendricks, 118 Or. 39, 345 P. 724 (1926); Chaffin v. Solomon, 255 Or. 141, 465 P.2d 217 (1970); Wilson v. Willamette Industries, 280 Or. 45, 569 P.2d 609 (1977); Jennings v. Lentz, 50 Or. 483, 93 P. 327 (1908). Subsection B.(4) is, of course, a generalization and yields to a specific statute like ORS 79.3010. Nor would it affect application of the law of fraudulent conveyances where a creditor has been prejudicially misled by a debtor's apparent ownership. Cf. ORS 41.360 (39).

Subsection B.(3) is a newer concept reflecting the expansion of due process in the area of debt collection. Cf. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and Fuentes v. Shevin, 407 U.S. 67 (1972).

It is worthwhile to provide a succinct statement of these general principles to serve as guidelines for the discretionary rulings required of the judge by a number of the rules. (E.g., Rule 83 C.(5))

Of the definitions in section C.: subsection C.(1) is based on sec. 102(1) of the new Bankruptcy Code, 11 U.S.C. § 102(1); subsection C.(8) is based on ORS 24.010(3); subsection C.(9) is based on 11 U.S.C. § 101(27); subsection C.(10) is a slightly revised version of Kans. C.C.P. sec. 60-103; and subsection C.(11) is based on 11 U.S.C. § 101 (37).

ORS sections superseded: 18.370, 29.150.

many consumer transactions. See ORS 83.670(1), 91.745(1)(b), and 697.733(3). The language used was adapted from Cal. Code of Civ. Proc. § 1132.

Section 73 B. is new and is intended to allow confessions of judgments based upon agreement by the debtor after the amounts claimed were due and not allow confessions of judgment based upon a cognovit agreement in the original agreement or instrument creating the debt. The cognovit situation is the one most open to abuse and where due process may require some hearing or notice before entry of the judgment. Testimony received by the Council indicated that confessions of judgments based upon cognovit agreements were not used in Oregon practice, but the confession of judgment was needed to encourage some settlements when a debtor acknowledges that a debt is due but cannot pay immediately.

Sections 73 C. and D. were adapted from N.Y. C.P.L.R. § 3218.

RULE 74 (RESERVED)

RULE 75 (RESERVED)

RULE 76 (RESERVED)

RULE 77 (RESERVED)