

RULE 77

RULES OF GENERAL APPLICATION

A. Notice to debtor following levy.

A.(1) Whenever a creditor levies on property of a debtor, other than a levy on real property or garnishment of an employer, the creditor must promptly serve on the debtor a notice in substantially the following form:

IN THE _____ COURT OF THE STATE OF OREGON FOR _____ COUNTY

_____)	No. _____
Plaintiff)	
v.)	Notice of Levy of Execution
_____)	(Attachment)
Defendant)	

TO: (Debtor) IMPORTANT NOTICE. READ CAREFULLY. IT CONCERNS YOUR PROPERTY.

1. A judgment was recovered (action was commenced) against you on _____ for \$_____.
2. To enforce (secure) payment the following has been levied on:
 - _____
(E.g.: 1979 Wombat, License # ABC 123
 - _____
Savings account in Fiduciary Trust & Sav-
 - _____
ings Co.
 - _____
Etc.)
3. (Execution) On or about ___ (date) ___ this property will be
 - _____
(E.g.: sold by the sheriff at public sale,
 - _____
paid over to the creditor etc.)

You will be notified of the exact date.

3. (Attachment) This property will (be held by the court) (remain subject to a lien) while the action is pending and may be taken from you permanently if judgment is entered against you.
4. You may release the property from the levy by paying the judgment (delivering a bond) to the clerk of the court.
5. If you have any questions about this matter, you should consult an attorney.

IF YOU DO NOTHING ABOUT THIS, YOU MAY LOSE THIS PROPERTY PERMANENTLY.

Name and address of creditor or
creditor's attorney

A.(2) If the debtor is a natural person, the notice required by Rule 76 E. shall be attached to the notice described in subsection (1).

A.(3) When a levy is made by garnishing a bank the notices required by subsections (1) and (2) shall be delivered to the bank with the Notice of Garnishment. If the bank has property of, or is obligated to, the debtor it shall promptly forward the notices to the debtor.

B. Effect of enforcement proceedings on interests of third persons in debtor's property; protective measures.

B.(1) Definitions. In this section B., "creditor" means the execution or judgment creditor who is enforcing a lien against an item of a debtor's property. "Property" means the item of property affected by the enforcement proceedings. "Transfer" includes transfers by the sheriff or the creditor at public or private sale and transfers to the creditor, and sales by the debtor under Rule 77 F.(2). Where notice is required to be given to a lienor, this means lienors whose liens are matters of public record or perfected under ORS 79.3030.

B.(2) Senior liens. Liens senior to a lien enforced by a transfer of property under Rules 75-87 are not affected by the transfer. Such senior lien is enforceable against the transferred property and the transferee is personally and primarily liable to pay the obligation secured thereby. In order to protect these rights:

B.(2)(a) Not less than five days before the date of any public sale of a debtor's property the creditor shall serve on each senior lienor notice of the time and place of the sale.

B.(2)(b) Each senior lienor shall be given an opportunity at a public sale to make an announcement respecting his interest.

B.(2)(c) A sheriff, creditor, or debtor making a transfer shall notify each senior lienor of the name and address of a transferee of the property.

B.(3) Junior liens. Liens junior to a lien enforced by a transfer of property under Rules 75-87 are extinguished by the transfer. A junior lienor may acquire the rights of the creditor by paying the amount of the judgment and, subject to the requirements of Rule 80 respecting transfers of real property, is entitled to payment, in order of priority, out of any proceeds of a sale of property remaining after satisfying the creditor's claim. In order to protect these rights, the notice required by Rule 80 C.(2) must be given when real property is transferred and in all other cases:

B.(3)(a) Not less than 15 days before the date of any public sale or any proposed transfer of the property by the creditor or debtor, the creditor (or, in case of a proposed transfer by the debtor, the debtor) shall serve on each junior lienor notice of the time and place of public sale or the terms of the proposed private transfer.

B.(3)(b) Not less than 10 days before a public sale or proposed transfer of property, a junior lienor may move for an order

forbidding or imposing conditions on the sale or transfer.

B.(4) Co-tenants. The transferee of a debtor's interest as a tenant in common becomes a tenant in common with the debtor's co-tenant. The transferee of a debtor's interest as a joint tenant or tenant by the entireties succeeds to the debtor's right of survivorship and to share in the rents and profits of the property, but acquires no right to possession or to restrict the possession of the debtor's co-tenant.

B.(5) Adverse claimants. A person other than the debtor claiming to be the actual owner of property levied on may move the court for an order establishing the claimant's title, enjoining a sale or transfer, dissolving the creditor's lien, or other appropriate relief. After hearing, the court may:

B.(5)(a) In a case where summary judgment would be allowed by Rule 47, make an order conclusive on the parties as to the ownership of the property.

B.(5)(b) Summarily order that the property may be sold or transferred. Such order protects the sheriff and a third person transferee but is not an adjudication between the claimant and the creditor.

B.(5)(c) Enjoin sale or transfer until the dispute is formally adjudicated.

C. Service of notices; proof of service.

C.(1) Save where some other method is expressly required or permitted, any notice required to be served by Rules 75-87 may be sent by restricted mail or served in the manner of a summons.

C.(2) Before making any order that will materially affect a person's interests, the court must be satisfied that the person actually received any notice required to be given, or that the creditor has made a good faith effort and employed the best available means under the circumstances to give actual notice.

D. Discovery.

D.(1) A judgment creditor may use the discovery devices of Rules 36, 38-43, 45, and 46 in aid of enforcing a judgment. An action is pending for purposes of Rule 55 as long as a judgment therein remains unsatisfied.

D.(2)(a) A judgment creditor may serve on the debtor written interrogatories concerning the debtor's property and financial affairs. Said interrogatories shall notify the debtor that his failure to answer truthfully shall subject him to the penalties for false swearing contained in ORS 162.075.

D.(2)(b) Within 20 days after receipt of said interrogatories, the judgment debtor shall answer all questions under oath and return the original interrogatories to the judgment creditor or the judgment creditor's attorney, and shall retain a copy for himself.

E. Supervision of enforcement proceedings; show cause hearings; venue; unified records.

E.(1) The court shall make any orders necessary to the administration of Rules 75-87 and, where promotive of the general principles stated in Rule 75 B., may authorize variance from the procedure prescribed by the Rules.

E.(2) Save as otherwise expressly provided, applications for orders and hearings under Rules 75-87 shall conform to local practice respecting show cause orders.

E.(3) Applications for orders under Rules 75-87 will ordinarily be addressed to the court in which the judgment sought to be enforced was recovered or has been registered under ORS Chapter 24. However:

E.(3)(a) Orders respecting real property located in another county must be obtained in the circuit court for that county;

E.(3)(b) When personal property has been levied on in another county, the court on its own initiative or on motion by a party may transfer proceedings respecting such property to a court in the other county;

E.(3)(c) When a proceeding to enforce a circuit court judgment involves personal property estimated by the court to be worth less than \$3000, the proceeding may be transferred to the district court.

E.(4) All notices, motions, orders, and other papers in proceedings under Rules 75-87 shall be styled as proceedings in the case in which the judgment was recovered and filed with the records of that case. When proceedings are conducted in another court, copies of all papers filed therein shall be sent to the court in which the judgment was recovered.

F. Redelivery of attached property; release of liens.

F.(1)(a) If an attachment deprives the debtor of the possession or use of property, he may obtain redelivery thereof by filing with the court a corporate surety bond undertaking to pay the value of the property, as stated in the bond, if the same is not returned to the sheriff upon entry of judgment against the debtor. The property shall be released to the debtor upon the filing of the bond and notice thereof sent by ordinary mail by the court to the attaching creditor. If the creditor contends that the bond undervalues the property or for some other reason does not provide adequate security the court, after hearing, may order that the debtor return the property or provide additional security. Delivery of property to the debtor under subsection F.(1) does not affect the attaching creditor's lien.

F.(1)(b) In an action brought upon such undertaking against the principal or his sureties, it shall be a defense that the property for which the undertaking was given did not, at the execution of the writ of attachment, belong to the defendant against whom the writ was issued.

F.(2)(a) A debtor desiring to sell property that is subject to a judgment lien or lien of attachment may apply at any time for an order discharging the lien and all liens junior thereto.

F.(2)(b) At least 15 days in advance of applying for such order, the debtor shall serve notice on each person whose lien will be affected. The notice shall:

F.(2)(b)(i) Describe the property;

F.(2)(b)(ii) State the price for which it will be sold;

F.(2)(b)(iii) State whether the debtor claims an exemption for the proceeds of sale or any part thereof;

F.(2)(b)(iv) List the liens against the property showing order of priority and amount.

F.(2)(b)(v) State that, unless a creditor objects before a specified date, the court may make an order discharging liens.

F.(2)(c) The court shall grant the application if:

F.(2)(c)(i) The proceeds of sale will satisfy the claim of the attachment or judgment creditor and all liens junior thereto; or

F.(2)(c)(ii) No creditors have objected; or

F.(2)(c)(i) It finds, after hearing, that the proposed sale price is not less than the fair value of the property.

F.(2)(d) If sale is permitted, the proceeds shall be distributed:

F.(2)(d)(i) To the debtor in the amount of any exemption to which he is entitled.

F.(2)(d)(ii) To the lienors according to priority (or, in the case of an attachment lien, to the court to be held pending judgment).

F.(2)(d)(iii) To the debtor.

F.(2)(e) Notwithstanding the provisions of paragraphs (a) to

(d), an application to sell real property after Notice of Foreclosure has been given under Rule 80 C. may be made only at the time provided in Rule 80 C.(4) and notices need be served on and proceeds distributed only to junior lienors who have filed claims under Rule 80 C.(3).

G. Indemnity to sheriff. Whenever a writ of attachment or execution is delivered to the sheriff, if the sheriff has actual notice of any third party claim to the personal property to be levied on or is in doubt as to ownership of the property, or of encumbrances thereon, or damage to the property held that may result by reason of its perishable character, such sheriff may require the plaintiff or judgment creditor to file with the sheriff or constable a corporate surety bond, indemnifying the sheriff and his bondsmen against any loss or damage by reason of the illegality of any holding or sale on execution, or by reason of damage to any personal property held under attachment or execution. Unless a lesser amount is acceptable to the sheriff, the bond shall be in double the amount of the estimated value of the property to be seized.

H. Satisfaction, assignment, and discharge of judgments and liens.

H.(1) Payment of judgment to court. Any person, against whom exists a judgment for the payment of money or who is interested in any property upon which any such judgment is a lien, may pay the amount due on such judgment to the clerk of the court in which the

judgment was rendered, and the clerk shall thereupon satisfy the judgment upon the records of the court. If such judgment has been entered in the records or docketed in the judgment lien docket of any other county than the county in which it was rendered, then a certified copy of the satisfaction may be recorded in the journal of the circuit court of such other county and the clerk of that court shall thereupon satisfy the judgment upon the records of that court. Unless the clerk of the court in which the judgment was rendered sooner turns over the money paid to him on the judgment to the person determined by such court to be entitled thereto, he shall turn the money over to the county treasurer of his county, who shall give the clerk duplicate receipts therefor. One of the receipts shall be filed with the papers in the case in which such judgment was rendered, and the other shall be retained by the clerk. The county treasurer shall at any time pay the money over to the person who shall be determined to be entitled thereto by the order of the court in which the judgment was rendered.

H.(2) Satisfaction by docket entry. When any judgment is paid or satisfied, that fact may noted upon the judgment docket of original entry over the signature of the officer having the official custody of such docket, or of the party entitled to receive and receiving payment or satisfaction, or of the attorney or attorneys representing the judgment creditor in the action in which the judgment was rendered; provided, such satisfaction shall not be

made by an attorney whose authority over the judgment has expired. Upon annulment or payment or satisfaction and entry thereof being so made, the officer having the official custody of the judgment docket of original entry shall, upon request of any person and payment of a fee of 50 cents for the benefit of the county, issue a certificate showing the fact of satisfaction of such judgment, or annulment of the lien thereof, describing the same sufficiently for identification; and such certificate shall, upon presentation to the officer having official custody of the judgment docket in any county in which a transcript of such judgment may have been docketed, be entered upon such docket for the purpose of making the satisfaction of judgment a matter of record in such county.

H.(3) Satisfaction, release or assignment by creditor's certificate.

H.(3)(a) Evidence of the satisfaction of any judgment may also be perpetuated by the execution and acknowledgment by the judgment creditor, his assignee, or personal representative, of a certificate describing the judgment with convenient certainty, and specifying that the judgment has been paid or otherwise satisfied or discharged. Such certificate shall be acknowledged or proved and certified in the manner provided by law for conveyances of real property, and may be recorded in the record of deeds of any county or counties, upon payment of the same fees as for recording a deed. In case such judgment has been entered in the judgment lien docket of any such county, the official custodian of such lien

docket shall, upon presentation and recording of such certificate of annulment or satisfaction, make notation of the recording thereof, with reference to the book and page of the record.

H.(3)(b) An assignment of any judgment executed in like manner shall be entitled to record in the deed records of any county, and, upon recording, the fact thereof, with reference to book and page, shall be noted opposite the judgment on the judgment lien docket of such county.

I. Proceedings after discharge in bankruptcy.

I.(1) A discharge in bankruptcy bars all further proceedings to establish or enforce a discharged claim or judgment, except that where a lien has been obtained on the debtor's property and has not been discharged in the bankruptcy proceedings such lien remains enforceable notwithstanding the discharge of the debtor's personal liability. If such lien was obtained by attachment, the action may be continued after the discharge and a judgment enforceable only against the attached property rendered.

I.(2) If the dischargeability of a claim has been expressly adjudicated in the bankruptcy court, a transcript of the bankruptcy court order may be filed in the appropriate state court whereupon, save as provided in subsection (1), any action or enforcement proceedings pending thereon shall be dismissed and any judgment thereon discharged.

I.(3) If the dischargeability of a claim has not been expressly adjudicated in the bankruptcy court, a discharged debtor

may file in any court or tribunal in which a judgment has at any time been rendered or a transcript thereof filed against that person, either before or after such discharge, a motion in the action for the discharge of the judgment from the record. Notice of such motion shall be served on all parties having recorded interests in the judgment. If it appears to the court that the person has been discharged from the payment of the judgment or the claim upon which the judgment was based, the court shall order that the judgment be discharged and satisfied of record, and thereupon the clerk of the court shall enter a satisfaction thereof; however, no such order shall be granted except upon such notice to the parties interested as the court or judge thereof may by order prescribe.

J. Certificate of release of levy. Whenever a judgment has been satisfied or discharged, or the holder of a judgment asserts thereto in writing, the clerk, at the request of the debtor, shall issue certificates to the effect that any property levied on under the judgment is released from lien. Such a certificate shall be full authority to any person holding property of the debtor to deliver the same to the debtor or his order.

K. Effect of advance payment; payment as satisfaction of judgment.

K.(1) If judgment is entered against a party on whose behalf an advance payment referred to in ORS 41.960 or 41.970 has been made and in favor of a party for whose benefit any such advance payment has been received, the amount of the judgment shall be reduced by the amount of any such payments in the manner provided in subsection

(3) of this section. However, nothing in ORS 12.155, 41.950 to 41.980 and this section authorizes the person making such payments to recover such advance payment if no damages are awarded or to recover any amount by which the advance payment exceeds the award of damages.

K.(2) If judgment is entered against a party who is insured under a policy of liability insurance against such judgment and in favor of a party who has received benefits that have been the basis for a reimbursement payment by such insurer under ORS 743.825, the amount of the judgment shall be reduced by reason of such benefits in the manner provided in subsection (3) of this section.

K.(3)(a) The amount of any advance payment referred to in subsection (1) of this section may be submitted by the party making the payment, in the manner provided in ORS 20.210 and 20.220 for the submission of disbursements.

K.(3)(b) The amount of any benefits referred to in subsection (2) of this section, diminished in proportion to the amount of negligence attributable to the party in favor of whom the judgment was entered and diminished to an amount no greater than the reimbursement payment made by the insurer under ORS 743.825, may be submitted by the insurer which has made the reimbursement payment, in the manner provided in ORS 20.210 and 20.220 for the submission of disbursements.

K.(3)(c) Unless timely objections are filed as provided in ORS 20.210, the court clerk shall apply the amounts claimed pursuant to this subsection in partial satisfaction of the judgment.

Such partial satisfaction shall be allowed without regard to whether the party claiming the reduction is otherwise entitled to costs and disbursements in the action.

COMMENT

Rule 77

Section A. is derived from ORS 29.178. ORS 29.178(4) is made unnecessary by Rule 77 C.

Subsection B.(2) provides for sale of a debtor's equity notwithstanding the existence of liens senior to the levying creditor's. Cf. ORS 79.3110, Kans. C.C.P. § 60-2409, Mich. Comp. Laws § 600.6034. As the creditor acquires title to the entire property for the amount of the debtor's equity (see Rule 80 C.(4)(b)(iv)), it would be unfair to make the debtor exonerate it from senior encumbrances. Cf. Me. R.S. § 14-4251.

Subsection B.(3) requires notice to junior lienors whose interests will necessarily be cut off. See Call v. Jeremiah, 246 Or. 568, 452 P.2d 502 (1967). The failure of ORS to provide for any notice to junior lienors in connection with execution sales (in contrast to the requirement that they be joined in a foreclosure suit) is a serious omission.

Subsection B.(4) states existing law, Ganoe v. Ohmart, 121 Or. 116, 254 P. 203 (1927).

Subsection B.(5) eliminates the sheriff's jury option of ORS 23.320-.350. Subparagraph B.(5)(a) permits final adjudication of clear cases. The choice between subparagraphs B.(5)(b) and B.(5)(c) turns on the judge's estimate as to the probable ultimate winner. Cf. New York C.P.L.R. 5239.

Subsection C.(1) is similar to Rule 9 B. Service in the manner of a summons is required for notices of foreclosure (Rule 80 C.(1) and

garnishment (Rule 83 A.(1)(a)). Restricted mail is defined in Rule 75 C. Subsection C.(2) may require brief interrogation of a party or his attorney by the judge, in addition to examining affidavits and written returns. The "good faith . . . best available means" language is suggested by Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950), and Thoenes v. Tatro, 270 Or. 775, 529 P.2d 912 (1975).

Section D. recognizes that discovery may be as useful in collecting a judgment as in obtaining one. Subsection D.(1) is similar to New York C.P.L.R. 5223. It substitutes a deposition for the debtor's examination of ORS 23.710 and .720(1) and also permits deposing non-parties. Subsection D.(2) is taken from ORS 23.720. It should be remembered that garnishment also serves an important discovery function.

Subsections E.(1) and (2) implement the concept, explained in the Introductory Note to Rules 75-87, of substituting ongoing discretionary, and relatively informal, control by the judge for the traditional system of detailed regulations for the conduct of subordinate officials whose strict compliance therewith could be tested only long after the event in a plenary action. The "authorize variance" language is taken from New York C.P.L.R. 5240.

Subsection F.(1) is derived from ORS 29.220 and .230. The requirement of a corporate surety bond here and throughout Rules 75-87 reflects belief that undertakings by the parties' friends frequently do not provide adequate security and avoids the necessity of justification hearings. A similar requirement appears in ORS 18.350(2). ORS 23.440 provided for redelivery of property taken on execution. This is omitted. The interval between levy and sale is brief (Rule 82 F.); the cost of a redelivery bond would be high; the debtor might better ransom his property by paying the judgment.

Subsection F.(2) is a version of ORS 23.280-.300 considerably shortened, because many of the provisions of those sections now appear elsewhere in the Rules, and made applicable to non-exempt property as well as homesteads. An argument for this extension is made in 8 Will. L.J. 327, 334 (1972). The distinctive treatment of real property lienors in subsection F.(2)(e) is by analogy to the rule in mortgage foreclosures. See Call v. Jeremiah, 246 Or. 568, 572, 425 P. 2d 502 (1967). Subsection F.(2) also replaces ORS 29.240 and .250.

Section G. is derived from ORS 23.310 with the difference that the amount of the bond is to be determined by the value of the property rather than the amount of the plaintiff's claim which seems irrelevant to the third parties' potential injury.

Subsection H.(1) is ORS 18.410; subsection H.(2) is ORS 18.400(1); and subsection H.(3) is ORS 18.400(2) and (3).

Subsection I.(3) is essentially ORS 18.420. Subsection I.(1) is a statement of substantive law clarifying the exact effect of bankruptcy on liens. Subsection I.(2) and the first clause of subsection I.(3) take account of the 1970 amendment to § 17 of the Bankruptcy Act and 11 U.S.C. § 523(c) of the new Bankruptcy Code.

ORS sections superseded: 18.400, 18.410, 18.420, 23.310-.350, 23.440, 23.580, 23.720, 29.178, 29.220-.250.

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)