

RULE 90

TEMPORARY RESTRAINING ORDERS AND  
PRELIMINARY INJUNCTIONS

A. Availability generally.

A.(1) Time. A temporary restraining order or preliminary injunction may be allowed by the court, or judge thereof, at any time after commencement of the action and before judgment.

A.(2) Grounds and notice of relief. A temporary restraining order or preliminary injunction may be allowed:

A.(2)(a) When it appears that a party is entitled to relief demanded in a pleading, and such relief, or any part thereof, consists of restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the party seeking the relief, or

A.(2)(b) When it appears that the party against whom a judgment is sought is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of a party seeking judgment concerning the subject matter of the action, and tending to render the judgment ineffectual. This paragraph shall not apply when relief is available by a restraining order under Rule 79.

B. Temporary restraining order.

B.(1) Notice. A temporary restraining order may be granted without written or oral notice to the adverse party or to such party's attorney only if:

B.(1)(a) It clearly appears from specific facts shown by

affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the adverse party's attorney can be heard in opposition, and

B.(1)(b) The applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

B.(2) Contents of order. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith; shall define the injury and state why it is irreparable and why the order was granted without notice.

B.(2)(a) Duration. Every temporary restraining order shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

B.(2)(b) When 10-day limit does not apply. The 10-day limit of Section B.(2)(a) does not apply to orders granted by authority of paragraph (c), (d), (e), (f) or (g) of subsection (1) of ORS 107.095.

B.(3) Hearing on preliminary injunction. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for

hearing at the earliest possible time and takes precedence over all matters except older matters of the same character. When the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if such party does not do so, the court shall dissolve the temporary restraining order.

B.(4) Adverse party's motion to dissolve or modify. On two days' notice (or on shorter notice if the court so orders) to the party who obtained the temporary restraining order without notice, the adverse party may appear and move its dissolution or modification. In that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

B.(5) Temporary restraining orders not extended by implication. If the adverse party actually appears at the time of the granting of the restraining order, but notice to the adverse party is not in accord with section C.(1), the restraining order is not thereby converted into a preliminary injunction. If a party moves to dissolve or modify the temporary restraining order as permitted by section B.(4), and such motion is denied, the temporary restraining order is not thereby converted into a preliminary injunction.

C. Preliminary injunction.

C.(1) Notice. No preliminary injunction shall be issued without notice to the adverse party at least five days before the time specified for the hearing, unless a different period is

fixed by order of the court.

C.(2) Consolidation of hearing with trial on merits.

Before or after the commencement of the hearing of an application for preliminary injunction and upon motion of a party, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on trial and need not be repeated upon the trial. This subsection shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

D. Security.

D.(1) General rule. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs, damages, and attorney fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

D.(2) Waiver or reduction. The court may waive, reduce, or limit the security provided for in subsection (1) of this section upon a showing of good cause, including indigency, and on such terms as shall be just and equitable.

D.(3) When no security required. No security will be required under this section where:

D.(3)(a) A restraining order or preliminary injunction is sought to protect a person from violent or threatening behavior;  
or

D.(3)(b) A restraining order or preliminary injunction is sought to prevent unlawful conduct when the effect of the injunction is to restrict the enjoined party to available judicial remedies.

D.(3)(c) ORS 32.010 does not require it.

D.(4) Liability of sureties. The provisions of Rule 92 apply to a surety upon a bond or undertaking under this rule. The liability of the surety shall be limited to the amount specified in the undertaking.

E. Form and scope of injunction or restraining order.

Every order granting a preliminary injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

F. Scope of rule.

F.(1) This rule does not apply to a temporary restraining order issued by authority of ORS 107.700 to 107.720.

F.(2) This rule does not apply to temporary restraining orders or preliminary injunctions granted pursuant to ORCP 79 except for the application of section E. of this rule as required by Rule 79 H.

F.(3) These rules do not modify any statute or rule of this state relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee.

G. The writ of ne exeat is abolished.

RULE 90

COMMENT

This rule is a combination of ORS Chapter 32 and FRCP 65. The rule attempts to: (a) clarify procedure in this area; (b) separate the concepts of temporary restraining orders and preliminary injunctions and limit the temporary restraining order; (c) clarify who is bound by a temporary restraining order and preliminary injunction; (d) accommodate the procedure to the merger of law and equity; and (e) harmonize the relief available to other provisional process and restraining orders appearing elsewhere.

Section A.

This rule covers only provisional orders, not permanent injunctions. The time availability is that described by ORS 32.020.

The availability of an order under this rule is a reduced version of ORS 32.040. ORS 32.040 was the Field Code restatement of the traditional equitable power to issue provisional injunctions. When the legislature modified ORS Chapter 29 in 1973, it modified the definition of provisional process in that chapter so that it literally included pendente lite injunctions. ORS 29.020(5) includes

"\* \* \* 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, property in which the defendant claims an interest."

ORS 29.060 (79 H.) provides:

Restraining order to protect property. Subject to ORS 29.030, 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.

This created some confusion because there apparently was no consideration of the relationship between Chapters 29 and 32. The court of appeals has recently held that:

In summary, we hold that ORS 29.060 authorizes a restraining order as provisional process under the circumstances described in that statute whether the underlying action is one at law or in equity, and that issuance of such an order is not dependent upon the requirement of an undertaking complying with chapter 32. Huntington v. Coffee Associates, 43 Or. App. 595, 609 (1979).

The grounds for injunction are set out as follows in ORS 32.040:

Grounds for preliminary injunction. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists of restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff; or when it appears by affidavit that the defendant is doing, or threatens or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights concerning the subject of the suit, and tending to render the decree ineffectual; or when it appears by affidavit that the defendant threatens or is about to remove or dispose of his property, or any part thereof, with intent to delay or defraud his creditors, an injunction may be allowed to restrain such act, removal, or disposition.

Of the three grounds covered by ORS 32.040:

(1) The first, allowing a temporary injunction when a permanent injunction is sought, is retained. This would be the primary area

for injunctions not covered by Chapter 29. The particular requirements of Chapter 29 would not seem appropriate to this type of injunction. Note, the rule, in conformance with Rule 2, would apply to any actions which include equity and law. However, Chapter 32 has always applied in any case where the ultimate relief sought was a restraining order. Temporary injunctions seem to have been granted without question in mandamus cases. State ex rel. v. Duncan, 191 Or. 475 (1951).

(2) The second ground, to avoid frustration of judgment, is retained because ORS 29.060 (79 H.) only covers situations relating to loss of property. There are other possible actions by a party that could frustrate an ultimate judgment which would not fall within Chapter 29 but might require some immediate action. Again, the particular provisions of Chapter 29 do not seem applicable. This section, however, is subject to Rule 79 to avoid overlap. Note, it is conceivable that the need for temporary injunctions may arise in a case not involving equitable relief. The rule then would extend the availability of the provisional injunction. If this is not thought desirable, it could be avoided by adding the quotation, "judgment granting an equitable remedy." Since presumably a separate equitable suit could be maintained to secure an injunction to avoid frustration of a judgment in a legal action, it makes more sense to allow the court flexibility to give a preliminary injunction in any action.

(3) The third ground, protecting property, seemed completely swallowed by Chapter 29 and was eliminated. The particular provisions in Chapter 29 are better designed to deal with the situation.

Finally, the constitutionality of the procedures must be considered. ORS Chapter 29 was changed in 1973 to meet the requirements of the due process cases relating to provisional remedies. The Huntington

case, at least in dicta, says the procedures now would be constitutional. The key elements appear to be: (1) findings must be based upon specific facts; (2) the provisional remedy is granted after examination of the facts by the judge; (3) a bond or undertaking is required; and (4) there is prompt opportunity for adversary hearing. The rule as drafted meets all these conditions.

The last sentence of the rule is designed to meet the difficulty faced in attempting to distinguish affirmative injunctions from negative injunctions. ORS Chapter 32 was phrased in such a way in which it seemed to authorize only negative provisional injunctions. American Life Ins. Co. v. Ferguson, 66 Or. 417, 420, 134 P. 1029 (1913). Actually, the limitation is that the remedy may only be used to preserve the status quo. State ex rel. v. Duncan, supra at 497. State ex rel. v. Mart, 135 Or. 603, 613 (1931). The negative-positive distinction is a verbal trap. J. F. Dobbyn, Injunctions in a Nutshell, 162-170 (1974); D. B. Dobbs, Remedies § 210, at pp. 105-06 (1973). For example, in the Duncan case, supra, the plaintiff sought a temporary injunction restraining the public utility commissioner from suspending operation of a new rate tariff. The requested injunction was in negative form but would result in a change in rates pending outcome of the suit. The court in that case suggests, at 497, that injunctions which did more than maintain the status quo might be possible upon an especially strong showing of need. The court, however, held that the requested provisional injunction was correctly denied.

#### Section B.

ORS Chapter 32 does not adequately distinguish between ex parte temporary restraining orders and preliminary injunctions. No special

protections granting prompt hearing are provided, and no time limit is imposed upon the temporary restraining order. This section is taken from section B. of the Alabama Rules of Civil Procedure, which is modelled upon FRCP 65. Note, under B.(1)(b) the factual showing may be by affidavit or verified complaint. ORS 32.040 required a complaint in some cases and affidavits in others.

Paragraph B.(2)(b) makes clear that the 10-day limit does not apply to temporary restraining orders in domestic relations cases. Specific provisions in ORS would override the general procedure here by virtue of ORCP 1 A., but ORS 107.095 prescribes no specific time limit.

Subsection B.(5) is totally new and is designed to prevent the confusion discussed in Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 432, n.7 (1974). An adequate adversary hearing for a preliminary injunction requires adequate notice. See C.(1) below.

#### Section C.

C.(1) is taken from F.R.C.P. 65. The existing statutes just refer to notice. C.(2) is also from the federal rule. This was a result of a 1966 amendment to the federal rules. The reasoning behind the rule is stated in Wright and Miller, Federal Practice and Procedure, § 2950, p. 484 (1973), as follows:

It long has been recognized that an accelerated trial on the merits often is appropriate when a preliminary injunction has been requested. If a Rule 65(a) injunction is granted, a speedy trial minimizes the potential adverse effect of what may prove to be an unjustified restraint on defendant; if relief under Rule 65(a) is denied, a quick disposition of the merits shortens the period in which plaintiff may be threatened by irreparable harm. In either situation the urgency that is characteristic of cases involving preliminary injunction applications makes a rapid determination of the merits especially important.

The federal rules allow consolidation on the court's own motion. Note, however, consolidation is possible after commencement of the hearing. This would present some danger of unfairness if done without motion. Therefore, the words "upon motion of a party" were added.

The second sentence of C.(2) is not a rule of evidence but a rule allowing a type of qualified consolidation that avoids having exactly the same evidence repeated a second time. For purposes of the record, the trial includes the preliminary hearing. The parties may present any additional evidence they wish at the trial and no final order is entered until trial. The rule simply avoids having identical testimony given in two proceedings.

The last sentence of C.(2) recognizes that in some instances at least part of the ultimate relief sought is legal and would involve a right to jury trial. In such case consolidation could not be used and the evidence at the preliminary hearing would have to be repeated to the jury.

#### Section D.

Section D. is taken from FRCP 65(c) as adopted in Alabama Rules of Civil Procedure 65 C. The mention of attorney fees is in accord with Olds v. Carey, 13 Or. 362 (1886). Sections E.(2) and E.(3)(a) and (b) are taken from ORS 32.020(2) and (3). They were part of a comprehensive package adopted by the 1977 Legislature dealing with waiver of security. E.(4) is a combination of FRCP 65(c) (last sentence) and ORS 32.020(4).

#### Section E.

Section E. is taken from Federal Rule 65(d). The rule requires a desirable specificity in the restraining order or preliminary injunction which is not required by ORS Chapter 32. The last clause indicates who is bound by the restraining order. It is probably an accurate recitation of

limits that exist anyway, but have never been spelled out adequately in Oregon. Injunctions that bind the whole world are prohibited. The language is a restatement of the standard equitable doctrine limiting injunctions to parties and persons in "privity" with parties. See Old Mill Ditch & Irr. Co. v. Breeding, 65 Or. 581, 586 (1913) (injunction could properly bind employees and successors in interest of a corporation but not stockholders). For a detailed discussion, see 11 Wright and Miller, Federal Practice and Procedure § 2956 (1973).

The rule ties binding effect to notice. ORS 32.010 says that when an order is given, it is effective on a defendant without other proceeding or process. ORS 32.030 refers to personal service on a defendant. The question is not one of jurisdiction but one of notice. A party participating in a hearing on a temporary injunction has notice; for a temporary restraining order or to bind a non-party, however, some notice is required. Personal service is desirable but not absolutely essential in an emergency situation or when in fact there is notice.

#### Section F.

The first limitation makes this rule inapplicable to the Family Abuse Prevention Act.

The second limitation is consistent with the harmonization or provisional remedies and preliminary injunctions discussed above under the comment to section A. The cross reference in ORCP 79 H. should be changed from "ORS Chapter 32" to Rule 90 E. Also, the words in 79 H.(4), "any other legal or equitable judicial process or remedy," should be modified by "except temporary restraining orders and temporary injunctions under Rule 90."

The last limitation is taken from FRCP 65(e) and prevents conflict

with legislation limiting injunctions in labor relations cases.

Section G.

A writ of ne exeat was a form of restraining order that prevented a person from leaving the jurisdiction. It was abolished by ORS 34.820, which was superseded by the ORCP. The abolition should perhaps remain in explicit language and logically fits here.

RULE 90

JUDGMENTS FOR SPECIFIC ACTS

A. Judgment requiring act. A judgment requiring a party to make a conveyance, transfer, release, acquittance, delivery of a document, or other like act within a period therein specified shall, if such party does not comply therewith, be deemed to be equivalent thereto.

B. Enforcement; contempt. The court or judge thereof may enforce an order or judgment directing a party to perform a specific act by punishing the party refusing or neglecting to comply therewith, as for a contempt.

C. Application. Subsection (2) of this section does not apply to an order or judgment for the payment of money, except orders and judgments for the payment of suit money, alimony, and money for support, maintenance, nurture, education, or attorney fees pendente lite, or by final decree, in:

C.(1) Actions for dissolutions of marriages.

C.(2) Actions for separation from bed and board.

C.(3) Proceedings under ORS 108.110 and 108.120.

D. Contempt proceeding. As an alternative to the independent proceeding contemplated by ORS 33.010-.150, when a contempt consists of disobedience of an injunction or other judgment or order of court in a civil action, citation for contempt may be by motion in the action in which such order was made and the determination respecting punishment made after a show cause hearing. Provided however:

C.(1) Notice of the show cause hearing shall be served in the manner of a summons;

C.(2) Punishment for contempt shall be limited as provided in ORS 33.020.

C.(3) The party cited for contempt shall have right to counsel as provided in ORS 33.095.

for the purpose of protecting plaintiff's ability to satisfy the judgment. There might be situations where some other type of preliminary order is needed to prevent a judgment from being useless. Both the provisional process rules and the preliminary injunction rules have the same basic due process elements: (a) court order, (b) bond, and (c) hearing before or soon after the provisional remedy. The exact procedure specified, however, is different.

The only change suggested by the Jackson subcommittee was in paragraph B.(1) where an affidavit, rather than a certificate, is required.

#### RULE 79 - BONDS AND UNDERTAKINGS

This rule is not limited to provisional remedies and would govern for all bonds. The most important and common bond provisions are in the area of provisional remedies, and this would cover bonds referred to in Rules 72, 73, 74, and 75.

The Jackson subcommittee did not suggest any changes in the draft of this rule.

#### RULE 90 - JUDGMENTS FOR SPECIFIC ACTS

This rule relates to enforcement of judgments. It covers the same area as Rule 70 of the federal rules. This was taken from Lacy's Rule 87 E.

#### RULE 91 - RECEIVERS

This rule again includes only receiverships ancillary to judgment and relating to corporations. Provisional receiverships to preserve property for enforcement of judgment, if one is

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