

RULE 91
RECEIVERS

A. Receiver defined. A receiver is a person appointed by a circuit court, or judge thereof, to take charge of property during the pendency of a civil action or upon a judgment or order therein, and to manage and dispose of it as the court may direct.

B. When appointment of receiver authorized. A receiver may be appointed by the court in the following cases:

B.(1) Provisionally, before judgment, on the application of either party, when his right to the property, which is the subject of the action, and which is in the possession of an adverse party, is probable, and the property or its rents or profits are in danger of being lost or materially injured or impaired.

B.(2) After judgment to carry the same into effect.

B.(3) To dispose of the property according to the judgment, or to preserve it during the pendency of an appeal or when an execution has been returned unsatisfied, and the debtor refuses to apply his property in satisfaction of the judgment.

B.(4) In an action brought by a creditor to set aside a transfer, mortgage or conveyance of property on the

2.16.80

ground of fraud or to subject property or a fund to the payment of a debt.

B.(5) At the instance of an attaching creditor when the property attached is of a perishable nature or is otherwise in danger of waste, impairment or destruction or where the debtor has absconded or abandoned the property and it is necessary to conserve or protect it, or to dispose of it immediately.

B.(6) At the instance of a judgment creditor either before or after the issuance of an execution to preserve, protect or prevent the transfer of property liable to execution and sale thereunder.

B.(7) In cases provided by statute, when a corporation or cooperative association has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

B.(8) When a corporation or cooperative association has been dissolved or is insolvent or in imminent danger of insolvency and it is necessary to protect the property of the corporation or cooperative association, or to conserve or protect the interests of the stockholders or creditors.

B.(9) When a statute or rule provides for the appointment of a receiver.

C. Temporary ex parte receivership.

C.(1) Notice. A temporary receiver may be appointed without written or oral notice to the adverse party or his attorney only if the applicant shows in detail by verified complaint or affidavit the matters required by paragraphs (a) to (d) of this subsection. If any of those matters are unknown to the applicant and cannot be ascertained by the exercise of due diligence, the applicant may be excused from setting them forth. In such case the affidavit or complaint shall fully state the matters unknown and the efforts made to acquire such information.

C.(1)(a) The nature of the emergency existing and the reasons why irreparable injury would be suffered by the applicant during the time necessary for a hearing on notice;

C.(1)(b) The names, addresses and telephone numbers of the persons then in actual possession of the property for which a receiver is requested, or of the president, manager or principal agent of any corporation in possession of said property;

C.(1)(c) The use then being made of the property by the persons in possession thereof;

C.(1)(d) If the property is a part of the plant, equipment, or stock in trade of any business, the nature and approximate size or extent of the business, and facts sufficient to show whether or not the taking of the property by a receiver would stop or seriously interfere with the operation of the business.

C.(2) Attorney's certificate. The applicant's attorney shall certify to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.

C.(3) Contents of order. Every order appointing a temporary receiver without notice shall (a) be endorsed with the date and hour of issuance; (b) be filed forthwith in the clerk's office and entered of record; (c) define the injury and state why it is irreparable and why the order was granted without notice; and (d) describe the property as required by Section F.(1).

C.(4) Duration. Every order appointing a temporary receiver without notice 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.

C.(5) Hearing on receivership. In the case of an order appointing a temporary receiver without notice, the motion for appointment of a receiver 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 receiver shall proceed with the application for a receiver and, if he does not do so, the court shall dissolve the temporary receivership.

C.(6) Adverse party's motion to dissolve or modify. On 2 days' notice (or on shorter notice if the court so orders) to the party who obtained the temporary receiver 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.

C.(7) Temporary receiverships not extended by implication. If the adverse party actually appears at the time of the appointment of the temporary receiver, but notice to the adverse party is not in accord with Section E.(1), the temporary receiver is not thereby converted into a receiver. If a party moves to dissolve or modify the temporary receivership as permitted by Section .(6), and such motion is denied, the temporary receiver is not thereby converted into a receiver.

D. Appointment of receivers on notice.

D.(1) Notice. Except as permitted by section D., no receiver shall be appointed without notice to the adverse party at least 10 days before the time specified for the hearing, unless a different period is fixed by order of the court.

D.(2) Consolidation of hearing with trial on merits. The provisions of Rule 90 D.(2) are also applicable to hearings for appointment of receivers prior to trial.

E. Form of order appointing receivers. Except for an order entered pursuant to section D., every order or judgment appointing a receiver:

E.(1) Shall contain a reasonable description of the property included in the receivership;

E.(2) Shall fix the time within which the receiver shall file a report setting forth (a) the property of the debtor in greater detail, (b) the interests in and claims against it, (c) its income-producing capacity and recommendations as to the best method of realizing its value for the benefit of those entitled;

E.(3) Shall set a time within which creditors and claimants shall file their claims or be barred; and

E.(4) May require periodic reports from the receiver.

F. Oath and security. A receiver, before entering upon his duties, shall be sworn faithfully to perform his trust to the best of his ability. The provisions of Rule 90 E.(1), (2) and (4), relating to security, are also applicable to receivers appointed under this rule.

G. Notice to persons interested in receivership. A receiver appointed under section D. shall, under the direction of the court, give notice to the creditors of the corporation, of the copartnership, or of the individual, by publication or otherwise, requiring such creditors to file their claims, duly verified, with the receiver, his attorney, or the clerk of the court, within such time as the court directs.

H. Special notices.

H.(1) Required notice. Creditors filing claims with the receiver, all persons making contracts with a receiver, all persons having claims against the receiver or any interests in receivership property, and all persons against whom the receiver asserts claims shall receive notice of any proposed action by the court affecting their rights.

H.(2) Request for special notice. At any time after a receiver is appointed, any person interested in said receivership as a party, creditor, or otherwise, may serve upon the receiver (or upon the attorney for such receiver) and file with the clerk a written request stating that he desires special notice of any and all of the following named steps in the administration of said receivership. A request

shall state the post office address of the person, or his attorney.

H. (2)(a) Filing of motions for sales, leases, or mortgages of any property in the receivership.

H. (2)(b) Filing of accounts.

H. (2)(c) Filing of motions for removal or discharge of the receiver.

H. (2)(d) Such other matters as are officially requested and approved by the court.

H. (3) Form of notices. Notice of any of the proceedings set out in subsections H. (1) and (2) of this rule (except petitions for the sale of perishable property, or other personal property, the keeping of which will involve expense or loss) shall be addressed to such person, or his attorney, at his stated post office address, and deposited in the United States Post Office, with the postage thereon prepaid, at least 5 days before the hearing on any of the matters above described; or personal service of such notice may be made on such person or his attorney not less than 5 days before such hearing; and proof of mailing or personal service must be filed with the clerk before the hearing. If upon the hearing it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order and such shall be final and conclusive order.

I. Termination of receiverships. A receivership may be terminated only upon motion served with at least ten days' notice upon all parties who have appeared in the proceedings. The court may require that a final account and report be filed and served, and may require the filing of written objections thereto. In the termination proceedings, the court shall take such evidence as is appropriate and shall make such order as is just concernings its termination, including all necessary orders on the fees and costs of the receivership.

RULE 91

COMMENT

The purpose of this revision of ORS Chapter 31 is to: (a) clarify the relationship to provisional remedies in ORS Chapter 29; (b) provide constitutionally necessary notice and opportunity to be heard requirements, and (c) make some specific provisions for content of orders appointing receivers and termination of receiverships.

As was the case with preliminary injunctions, the 1973 revisions to Chapter 29 fail to adequately take account of Chapter 31 and receiverships as a provisional remedy. ORS 29.020(5) would literally include pendente lite injunctions in the definition of provisional process. The requirements for issuance of provisional process do not appear particularly suited to the receivership situations.

The rule would apply to all actions at law or in equity. This works no change as Chapter 31 applied to "suits, actions, and proceedings."

Section A.

This is ORS 31.010. The only change is the insertion of the word "circuit" before court. Under ORS 46.060(1)(h), district courts cannot appoint receivers.

Section B.

This is ORS 31.020. The only change is the addition of B.(9), which recognizes that there may be situations which authorize appointment of receivers in specific situations. Note, the listing is not exclusive as courts have some inherent authority to appoint receivers in other circumstances. Cf. Grayson v. Grayson, 222 Or. 507 (1960).

Sections C. and D.

The most serious defect in the existing statutes is that they do

not provide any due process elements before appointment of a receiver. There is, however, a judicially created requirement of notice and an opportunity for hearing. Anderson v. Robinson, 63 Or. 228, 233 (1912). Stacy v. McNicholas, 76 Or. 167, 182 (1915). In an emergency situation the temporary appointment of a receiver is possible until a hearing can be had. Facts constituting such emergency must be shown to the court. Stacy v. McNicholas, supra, pp. 236-239. Notice and hearing would also be constitutionally required.

The notice and hearing problems presented are almost identical to injunctions, and sections C. and D. follow exactly the same pattern presented in Rule 90. Again, this should meet due process requirements for ex parte orders. Huntington v. Coffee Associates, 43 Or. App. 595, 607 (1979). The factual matters which must be demonstrated in C.(1)(a)-(d) are more detailed, reflecting the different nature of the receivership. The last sentence of C.(1) provides for the contingency that all detailed facts cannot be shown because of lack of knowledge. It is taken from California Rules for Superior Courts 238.

Note, in some cases the receivership may not be a provisional remedy or ancillary to judgment but may be the ultimate remedy sought in the case. In such situations, section C. would not apply as there is notice in the complaint and section D. would be satisfied. Ten days' notice, rather than five days' notice, is required as receiverships would be a relatively more drastic remedy than injunction.

Section E.

Section E.(1) is meant to incorporate the specificity test of ORS 79.110. This is the modern rule applied to real property descriptions in deeds as well. The remainder of section E. is taken from Pennsylvania Rules of Civil Procedure 1533(g) and Rhode Island Rules of Civil Procedure 66(d).

Section F.

Section F. is based on ORS 31.030 and is a new provision which simply cross-refers to Rule 91, rather than repeating the requirements for security.

Section G.

Section G. is based on Washington Rules for Superior Court 66(c). See also Pennsylvania Rules of Civil Procedure 1533(g).

Section H.

Section H.(1) is required by Pacific Lumber Co. v. Prescott, 40 Or. 374, 384 (1902). Sections C. and D. deal only with notices of appointment of receiver to parties. The Prescott case says that persons contracting with or buying property from a receiver become parties to the proceeding and must have notice.

Section H.(2) is based on Washington Rules for Superior Court 66(d).

Section H.(3) is based on id., 66(e).

Section K.

Section K. is based on Arizona Rules of Civil Procedure 66(c)(3).

A similar provision is contained in FRCP 66 (first sentence). The federal provision on voluntary dismissals, FRCP 41(a)(1), is expressly made subject to the receivership rule. It is expected that section K. and ORCP 54 A.(1) would be so construed. Note that other provisions may prevent or delay termination. See, e.g., ORS 311.415 (payment of taxes) and ORS 652.550 (satisfaction of wage claims).

One remaining problem is what to do with ORS 31.040(2) and (3):

(2) When a receiver is appointed in attachment or execution proceedings, the receiver shall take possession of all evidences of indebtedness which have been attached or levied upon as the property of the defendant, and after judgment shall have the power to settle and collect them and for that purpose may commence and maintain actions in his own name as receiver.

(3) The receiver shall immediately after taking the same into his possession give written or printed notices of his appointment to the persons indebted to the defendant in the attachment or execution, which notices must be served upon the debtor by copy personally, by a copy left at his residence, or by mail. From the date of such service the debtor shall be liable to the plaintiff in the action for the amount of money or credits due defendant in the attachment or execution in his hands and shall account therefor to the receiver.

To some extent this would be covered by section H. above. But there is specific reference to powers of and duties to the receiver which would not be covered. I cannot understand the language and have not decided what would be lost by simply eliminating the language.

SECTIONS SUPERSEDED

ORS 31.010 - 30.040 would be superseded. ORS 31.050 would remain as a statute.

RULE 91
RECEIVERS

A. Receiver defined. A receiver is a person appointed by a circuit court, or judge thereof, to take charge of property during the pendency of a civil action or upon a judgment or order therein, and to manage and dispose of it as the court may direct. Receivers during the pendency of an action are regulated by Rule 71.

B. When appointment of receiver authorized. A receiver may be appointed by a circuit court in the following cases:

B.(1) After judgment to carry the same into effect.

B.(2) To dispose of the property according to the judgment, or to preserve it during the pendency of an appeal or when an execution has been returned unsatisfied, and the debtor refuses to apply his property in satisfaction of the judgment.

B.(3) At the instance of a judgment creditor either before or after the issuance of an execution to preserve, protect, or prevent the transfer of property liable to execution and sale thereunder.

B.(4) In cases provided by statute, when a corporation or cooperative association has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

B.(5) When a corporation or cooperative association has been dissolved or is insolvent or in imminent danger of insolvency and it is necessary to protect the property of the corporation or cooperative association, or to conserve or protect the interests

of the stockholders or creditors.

C. Temporary ex parte receivership.

C.(1) Notice. A temporary receiver may be appointed without written or oral notice to the adverse party or his attorney only if the applicant shows in detail by verified complaint or affidavit the matters required by paragraphs (a) to (d) of this subsection. If any of those matters are unknown to the applicant and cannot be ascertained by the exercise of due diligence, the applicant may be excused from setting them forth. In such case the affidavit or complaint shall fully state the matters unknown and the efforts made to acquire such information.

C.(1)(a) The nature of the emergency existing and the reasons why irreparable injury would be suffered by the applicant during the time necessary for a hearing on notice;

C.(1)(b) The names, addresses, and telephone numbers of the persons then in actual possession of the property for which a receiver is requested, or of the president, manager or principal agent of any corporation in possession of said property;

C.(1)(c) The use then being made of the property by the persons in possession thereof;

C.(1)(d) If the property is a part of the plant, equipment, or stock in trade of any business, the nature and approximate size or extent of the business, and facts sufficient to show whether or not the taking of the property by a receiver would stop or seriously interfere with the operation of the business.

C.(2) Attorney's certificate. The applicant's attorney shall certify to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.

C.(3) Contents of order. Every order appointing a temporary receiver without notice shall (a) be endorsed with the date and hour of issuance; (b) be filed forthwith in the clerk's office and entered of record; (c) define the injury and state why it is irreparable and why the order was granted without notice; and (d) describe the property as required by section F.(1).

C.(4) Duration. Every order appointing a temporary receiver without notice 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.

C.(5) Hearing on receivership. In the case of an order appointing a temporary receiver without notice, the motion for appointment of a receiver 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 receiver shall proceed with the application for a receiver and, if he does not do so, the court shall dissolve the temporary receivership.

C.(6) 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 receiver 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.

C.(7) Temporary receiverships not extended by implication. If the adverse party actually appears at the time of the appointment of the temporary receiver, but notice to the adverse party is not in accord with section D.(1), the temporary receiver is not thereby converted into a receiver. If a party moves to dissolve or modify the temporary receivership as permitted by subsection C.(6) of this section, and such motion is denied, the temporary receiver is not thereby converted into a receiver.

D. Appointment of receivers on notice.

D.(1) Notice. Except as permitted by section C., no receiver shall be appointed without notice to the adverse party at least 10 days before the time specified for the hearing, unless a different period is fixed by order of the court.

D.(2) Consolidation of hearing with trial on merits. The provisions of Rule 75 D.(2) are also applicable to hearings for appointment of receivers prior to trial.

E. Form of order appointing receivers. Except for an order appointing a temporary receiver, every order or judgment appointing a receiver:

E.(1) Shall contain a reasonable description of the property included in the receivership;

E.(2) Shall fix the time within which the receiver shall file a report setting forth (a) the property of the debtor in greater detail, (b) the interests in and claims against it, (c) its income-producing capacity and recommendations as to the best method of realizing its value for the benefit of those entitled;

E.(3) Shall set a time within which creditors and claimants shall file their claims or be barred; and

E.(4) May require periodic reports from the receiver.

F. Oath and security. A receiver, before entering upon his duties, shall be sworn faithfully to perform his trust to the best of his ability. The provisions of Rule 75 F.(1), (2), and (4), relating to security, are also applicable to receivers appointed under this rule.

G. Notice to persons interested in receivership. A receiver appointed after notice and hearing shall, under the direction of the court, give notice to the creditors of the corporation, of the copartnership, or of the individual, by publication or otherwise, requiring such creditors to file their claims, duly verified, with the receiver, his attorney, or the clerk of the court, within such time as the court directs.

H. Special notices.

H.(1) Required notice. Creditors filing claims with the receiver, all persons making contracts with a receiver, all persons having claims against the receiver or any interests in

receivership property, and all persons against whom the receiver asserts claims shall receive notice of any proposed action by the court affecting their rights.

H.(2) Request for special notice. At any time after a receiver is appointed, any person interested in said receivership as a party, creditor, or otherwise, may serve upon the receiver (or upon the attorney for such receiver) and file with the clerk a written request stating that he desires special notice of any and all of the following named steps in the administration of said receivership. A request shall state the post office address of the person, or his attorney.

H.(2)(a) Filing of motions for sales, leases, or mortgages of any property in the receivership.

H.(2)(b) Filing of accounts.

H.(2)(c) Filing of motions for removal or discharge of the receiver.

H.(2)(d) Such other matters as are officially requested and approved by the court.

H.(3) Form of notices. Notice of any of the proceedings set out in subsections H.(1) and (2) of this rule (except petitions for the sale of perishable property, or other personal property, the keeping of which will involve expense or loss) shall be addressed to such person, or his attorney, at his stated post office address, and deposited in the United States Post Office, with the postage thereon prepaid, at least five days before the hearing on any of the matters above described; or personal service of such notice may be made on such person or his

attorney not less than five days before such hearing; and proof of mailing or personal service must be filed with the clerk before the hearing. If upon the hearing it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order and such shall be final and conclusive order.

I. Termination of receiverships. A receivership may be terminated only upon motion served with at least ten days' notice upon all parties who have appeared in the proceedings. The court may require that a final account and report be filed and served, and may require the filing of written objections thereto. In the termination proceedings, the court shall take such evidence as is appropriate and shall make such order as is just concerning its termination, including all necessary orders on the fees and costs of the receivership.

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

secured, fall under Rule 71. Section B. includes only B.(2), (3), (6), (7), and (8) of the prior version of the rules.

RULE 91
RECEIVERS

A. Receiver defined. A receiver is a person appointed by a circuit court, or judge thereof, to take charge of property during the pendency of a civil action or upon a judgment or order therein, and to manage and dispose of it as the court may direct. Receivers during the pendency of an action are regulated by Rule 71.

B. When appointment of receiver authorized. A receiver may be appointed by a circuit court in the following cases:

B.(1) After judgment to carry the same into effect.

B.(2) To dispose of the property according to the judgment, or to preserve it during the pendency of an appeal or when an execution has been returned unsatisfied, and the debtor refuses to apply his property in satisfaction of the judgment.

B.(3) At the instance of a judgment creditor either before or after the issuance of an execution to preserve, protect, or prevent the transfer of property liable to execution and sale thereunder.

B.(4) In cases provided by statute, when a corporation or cooperative association has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

B.(5) When a corporation or cooperative association has been dissolved or is insolvent or in imminent danger of insolvency and it is necessary to protect the property of the corporation or cooperative association, or to conserve or protect the interests

C.(2) Attorney's certificate. The applicant's attorney shall certify to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.

C.(3) Contents of order. Every order appointing a temporary receiver without notice shall (a) be endorsed with the date and hour of issuance; (b) be filed forthwith in the clerk's office and entered of record; (c) define the injury and state why it is irreparable and why the order was granted without notice; and (d) describe the property as required by section F.(1).

C.(4) Duration. Every order appointing a temporary receiver without notice 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.

C.(5) Hearing on receivership. In the case of an order appointing a temporary receiver without notice, the motion for appointment of a receiver 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 receiver shall proceed with the application for a receiver and, if he does not do so, the court shall dissolve the temporary receivership.

E.(2) Shall fix the time within which the receiver shall file a report setting forth (a) the property of the debtor in greater detail, (b) the interests in and claims against it, (c) its income-producing capacity and recommendations as to the best method of realizing its value for the benefit of those entitled;

E.(3) Shall set a time within which creditors and claimants shall file their claims or be barred; and

E.(4) May require periodic reports from the receiver.

F. Oath and security. A receiver, before entering upon his duties, shall be sworn faithfully to perform his trust to the best of his ability. The provisions of Rule 75 F.(1), (2), and (4), relating to security, are also applicable to receivers appointed under this rule.

G. Notice to persons interested in receivership. A receiver appointed after notice and hearing shall, under the direction of the court, give notice to the creditors of the corporation, of the copartnership, or of the individual, by publication or otherwise, requiring such creditors to file their claims, duly verified, with the receiver, his attorney, or the clerk of the court, within such time as the court directs.

H. Special notices.

H.(1) Required notice. Creditors filing claims with the receiver, all persons making contracts with a receiver, all persons having claims against the receiver or any interests in

attorney not less than five days before such hearing; and proof of mailing or personal service must be filed with the clerk before the hearing. If upon the hearing it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order and such shall be final and conclusive order.

I. Termination of receiverships. A receivership may be terminated only upon motion served with at least ten days' notice upon all parties who have appeared in the proceedings. The court may require that a final account and report be filed and served, and may require the filing of written objections thereto. In the termination proceedings, the court shall take such evidence as is appropriate and shall make such order as is just concerning its termination, including all necessary orders on the fees and costs of the receivership.