N O T I C E

TO: NEWS MEDIA

FROM: COUNCIL ON COURT PROCEDURES
University of Oregon Law Center
Eugene, Oregon

The next meeting of the COUNCIL ON COURT PROCEDURES will be held on Saturday, June 12, 1982, at 9:30 a.m., in Judge Dale's Courtroom, Multnoman County Courthouse, Portland, Oregon. At that time, the Council will discuss and consider various suggested revisions to the Oregon pleading, practice and procedure rules.

# # # # #

May 28, 1982

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES:

John H. Buttler	Donald W. McEwen
J.R. Campbell	Edward L. Perkins
John M. Copenhaver	Frank H. Pozzi
Austin W. Crowe, Jr.	Robert W. Redding
William M. Dale, Jr.	E.B. Sahlstrom
Robert H. Grant	James C. Tait
Wendell E. Gronso	Wendell H. Tompkins
John H. Higgins	Lyle C. Velure
William L. Jackson	James W. Walton
Roy Kilpatrick	William W. Wells
Harriet R. Krauss	Bill L. Williamson
Jon B. Lund	

FROM: Douglas A. Haldane, Executive Director

DATE: June 4, 1982

PLEASE NOTICE

The Council meeting originally scheduled for Saturday, June 12, 1982 is being rescheduled for Saturday, *June 19, 1982*, due to problems with traffic congestion in downtown Portland on the day of the ROSE PARADE.

Next Meeting: *Saturday, June 19*
9:30 a.m.
Judge Dale's Courtroom
Multnomah County Courthouse
Portland

PLEASE MAKE A NOTE OF THIS CHANGE ON YOUR CALENDARS.

DAH:gh

N O T I C E

TO: NEWS MEDIA

FROM: COUNCIL ON COURT PROCEDURES
University of Oregon Law Center
Eugene, Oregon 97403

The next meeting of the COUNCIL ON COURT PROCEDURES will be held on Saturday, June 19, 1982, at 9:30 a.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon. It should be noted that this meeting originally had been scheduled for June 12 but was postponed due to anticipated traffic congestion in downtown Portland on the day of the Rose Parade.

At that time, the Council will discuss and consider various suggested revisions to the Oregon pleading, practice and procedure rules.

# # # #

June 4, 1982

M E M O R A N D U M

TO: Subcommittee on ORCP 44 E.

E.B. Sahlstrom
Austin Crowe
Jim Tait
Lyle Velure
Jim Walton

FROM: Douglas A. Haldane, Executive Director

DATE: June 9, 1982

NOTICE

We will have a meeting in Judge Dale's Courtroom at 9:00 a.m. on Saturday, June 19, 1982, immediately preceding the meeting of the full Council.

DAH:gh

A G E N D A

COUNCIL ON COURT PROCEDURES

Meeting

9:30 a.m., Saturday, June 19, 1982

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

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1. Approval of minutes of meeting held January 23, 1982

2. Report of Subcommittee on ORCP 47 (summary judgment)

3. Report of Subcommittee on ORCP 44 E. (access to hospital records)

4. Report of Subcommittee on ORCP 22 (third party practice)

5. Meeting locations

6. NEW BUSINESS

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held June 19, 1982

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

Present:	John H. Buttler	James C. Tait
	Austin W. Crowe, Jr.	Wendell H. Tompkins
	William M. Dale, Jr.	Lyle C. Velure
	Robert H. Grant	James W. Walton
	William L. Jackson	William W. Wells
	Edward L. Perkins	Bill L. Williamson
	E. B. Sahlstrom	

(Also attending were Douglas Haldane of the Council staff and Walter H. Sweek, of the Oregon Association of Defense Counsel.)

Absent:	J. R. Campbell	Harriet R. Krauss
	John M. Copenhaver	Jon B. Lund
	Wendell E. Gronso	Donald W. McEwen
	John J. Higgins	Frank H. Pozzi
	Roy Kilpatrick	Robert W. Redding

In the absence of Chairman McEwen, Judge Dale agreed to act as Chairman and called the meeting to order at 9:36 a.m.

The minutes of the meeting held January 23, 1982 were read and approved without correction.

Austin Crowe reported for the SUBCOMMITTEE ON ORCP 47 (summary judgment). He described the subcommittee's approach to dealing with what some have seen as an abuse of the summary judgment rule in using it as a discovery device. He moved, with Mr. Sahlstrom's second, to adopt the subcommittee's proposed amendment to ORCP 47, a copy of which is attached to these minutes as Exhibit A. Mr. Velure raised the question of whether the proposal would require disclosure of facts and opinions of an expert witness in an affidavit submitted in response to a motion for summary judgment. Mr. Crowe said the proposal would not require the disclosure of facts and opinion. The proposal was adopted, with 9 voting in favor and 4 being opposed. Following the vote, Mr. Velure changed his vote from nay to aye.

Mr. Sahlstrom reported for the SUBCOMMITTEE ON ORCP 44 E. (access to hospital records). Mr. Sahlstrom moved the adoption of the subcommittee proposal, a copy of which is attached as Exhibit B. The motion was seconded by Mr. Velure. Mr. Tait expressed his concern that the proposal, in restricting access to records which are now available, would be substantive in nature and was beyond the jurisdiction of the Council.

Mr. Sweek, a representative of the Oregon Association of Defense Counsel, spoke against the proposal, stating that the clear trend had been toward promoting and expanding discovery rather than restricting it. He objected to the provision requiring a showing of substantial need before access to records could be gained, stating that without access to the records it would be impossible for one to know if access were, in fact, needed.

Before proceeding to a vote on the proposal, Judge Dale suggested that the proposal be divided into three parts:

1) That portion of the amendment requiring that a civil action be filed before access would be allowed passed with a vote of 9 in favor and 4 opposed;

2) That portion limiting access to records relating directly to the subject incident and requiring a showing of substantial need before other records would be accessible failed, with 6 in favor and 7 opposed, following which Mr. Velure changed his vote from aye to nay; and

3) That portion of the amendment requiring that copies of records discovered be provided to opposing counsel failed, with a vote of 5 in favor and 8 opposed, with Mr. Velure changing his vote from aye to nay.

Mr. Crowe reported for the THIRD PARTY PRACTICE SUBCOMMITTEE, stating that the subcommittee was deadlocked on the question of retention or abolishment of third party practice and that the subcommittee was turning the matter back to the Council. A general discussion of the pros and cons of third party practice followed, with Mr. Sahlstrom suggesting that a mail vote of the entire Council be taken on the question. Mr. Haldane was directed to undertake a mail vote of the Council if Chairman McEwen concurred.

The Council then discussed whether a meeting on July 10 was necessary, and Judge Dale announced that the July 10 meeting would be dependent on the call of the Chairman.

Mr. Haldane reported to the Council a communication from Mr. Robert Ringo of Corvallis regarding the giving of testimony by physicians through deposition. It was the consensus of the Council that Mr. Ringo's suggestion was evidentiary and outside the Council's jurisdiction.

Mr. Grant reported a communication from Mr. Richard Lang expressing concern over the Court of Appeals opinion in Harp v. Loux, 54 Or App 840 (1981). A copy of Mr. Lang's letter is attached as Exhibit C to these minutes. Mr. Velure moved to refer the matter to a subcommittee to explore the question of providing for service on an insurance company as being effective service as to a covered defendant. Without objection, Mr. Velure's suggestion was adopted, and it was suggested that Mr. Higgins and Mr. Grant be appointed to the subcommittee.

Being advised of the illness of David Vandenberg, a former member of the Council, the Council adopted by acclamation a resolution sending Mr. Vandenberg its appreciation and its best wishes. A copy of that resolution is attached as Exhibit D to these minutes.

The meeting was adjourned at 11:40 a.m., with the next meeting scheduled at the call of the Chairman.

Respectfully submitted,

Douglas A. Haldane
Executive Director

DAH:gh

May 7, 1982

PROPOSED AMENDMENT TO RULE 47 SUMMARY JUDGMENT

(1) Motions under this rule are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions.

(2) If a party, in opposing a motion for summary judgment, is required to provide the opinion of an expert to establish a genuine issue of material fact, an affidavit of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion.

(3) The affidavit shall be made in good faith based on admissible facts or opinions obtained from a qualified expert who has actually been retained by the attorney who is available and willing to testify and who has actually rendered an opinion or provided facts which, if revealed by affidavit, would be a sufficient basis for denying the motion for summary judgment.

AWC:jmc

EXHIBIT A

TO MINUTES OF COUNCIL MEETING HELD 6/19/82

Proposed Amendment 6-19-82

PHYSICAL AND MENTAL
EXAMINATION OF PERSONS;
REPORTS OF EXAMINATIONS

RULE 44

E. Access to hospital records.

E.(1) Records relating to civil action. Any party legally liable or against whom a [claim] civil action is [asserted] filed for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under Rule 36 B., and arising out of the accident, incident, or occurrence for which the civil action has been filed. Any party seeking access to hospital records under this section shall give written notice of any proposed action to seek access to hospital records, at a reasonable time prior to such action, to the injured person's attorney or, if the injured person does not have an attorney, to the injured person. Any person gaining access to hospital records under this section shall forward copies of those records, within a reasonable time after gaining access, to the injured person's attorney, or, if the injured person does not have an

EXHIBIT B
TO MINUTES OF COUNCIL MEETING HELD 6/19/82

attorney, to the injured person.

E.(2) Other records. Any party legally liable or against whom a civil action is filed for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under Rule 36 B., not arising out of the accident, incident, or occurrence for which the civil action has been filed, only upon a showing that the party seeking discovery has substantial need of the records in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the records by other means.

(503) 224-5858

M. CHRISTIE HELMER
ATTORNEY AT LAW
900 S.W. FIFTH AVENUE
PORTLAND, OREGON 97204

June 3, 1982

Mr. Douglas A. Haldane
Executive Director
Council on Court Procedures
School of Law
University of Oregon
Eugene, Oregon 97403

Dear Mr. Haldane:

This letter is written in response to the request printed in the April, 1982, edition of "The Multnomah Lawyer" that lawyers with thoughts on third party practice send them to you.

Although it is probably far more information than you wanted, I am enclosing a copy of an article on "Third Party Practice" which I and Randee Fenner recently wrote for the Oregon State Bar CLE Department. As should be evident from the article, my primary concerns in the area of third party practice are the effect of collateral estoppel and the practical aspects of how to procedurally handle a third party trial when the Oregon Rules of Civil Procedure relating to trial practice do not really seem to contemplate the simultaneous trial of a primary claim and a third party claim.

Very truly yours,

M. Christie Helmer

I. THIRD PARTY PRACTICE--THE CONCEPT

A. Background and Reputation of Third Party Practice

Third party practice (also known as "impleader") is a procedural device which allows a party to an existing lawsuit (usually a defendant) to join as a party someone who may be liable to that original party for all or part of the claim asserted against it (usually by the plaintiff). Originally instituted in Oregon with the enactment in 1975 of ORS 16.315(4) and (5), third party practice has remained essentially the same since its enactment. It is currently provided for in Rule 22 C. of the Oregon Rules of Civil Procedure. The provisions of ORCP 22 C. are nearly identical to those of Rule 14(a) and (b) and Rule 42(b) of the Federal Rules of Civil Procedure. Thus, although the concept of third party practice has not been in existence in Oregon long enough for substantial law to have developed in the area, federal authorities may be useful and persuasive in interpreting the Oregon rule.

Not everyone, particularly judges, favors third party practice. ORCP 22 C. has been the subject of a number of hearings held by the Council on Court Procedures, and third party practice has been near extinction several times in its short existence. Why? Because it is hard to manage, frequently expensive for litigants, and many judges and practitioners feel it contributes to congestion and delay in the court system. Why should the practical lawyer care about

these considerations? If for no other reason, because judges interpreting the rule will frequently limit its uses or react negatively to lawyers invoking it.

By definition, third party practice involves at least one more party, one more lawyer and one more claim. Although multiple cross-claim or class action litigation would seem to have the same drawbacks, if any, of third party practice, those types of cases may still be channeled, to a certain extent, into the familiar two-party adversary system and thus avoid the bad name given third party practice. In multiple-defendant or class action litigation, one side is still "plaintiffs" and the other "defendants." In third party practice, on the other hand, the concept is tripartite, or worse. Further, third party claims can arise from the simplest of factual situations, and, therefore, they arise more often than class actions or multiple cross-claim litigation. In the latter two situations, the cases are frequently labeled "complex litigation" and given special assignment to a trial judge and special attention. A third party claim, in contrast, bumbles along in the normal stream of litigation disguising by its minimal prayer or simple theory its procedural complexities.

> PRACTICE TIP: Be prepared to have your proposed assertion of a third party claim draw some resistance. Argue to the plaintiff that it makes more (or some) funds available for settlement and to the court that, in the long run, it saves judicial time and money.

B. Do I Have a Third Party Claim?

ORCP 22 C. allows a defendant to implead ~~into an action~~ a new party who is or may be liable to the defendant for all or part of the plaintiff's claim against that defendant. Similarly, it allows a plaintiff against whom a counterclaim has been asserted to implead ~~into an action~~ a new party who is or may be liable to the plaintiff for all or part of the counterclaim asserted against it.

The new party who is brought into the action by one of the original parties is known as the third party defendant. The original party who brings that new party into the action is known as the third party plaintiff. As noted above, the third party plaintiff may either be an original plaintiff or an original defendant. To make this article's discussion easier to understand, the third party plaintiff in most examples discussed will be the original defendant.

The test for determining whether a claim is properly asserted as a third party action is whether, under substantive law, the defendant has the right to transfer to the third party defendant all or part of the liability asserted against the defendant by the plaintiff. It is immaterial whether the defendant bases its claim against the third party defendant on indemnity, contribution, subrogation, express or implied warranty, or on some other theory. 6 Wright and Miller, Federal Practice and Procedure § 1446 (1971). See, e.g., United States Fidelity & Guar. Co. v. American State Bank, 372 F2d 449 (10th Cir 1967).

PRACTICE TIP: It is a common error to want to join as a third party defendant the "real culprit," that is, the person who a defendant feels "really" damaged the plaintiff but whom the plaintiff, for whatever reason, neglected to name as a defendant. Third party practice cannot be used for that purpose. A proper third party defendant is one who is liable to reimburse the defendant for any recovery the plaintiff obtains against that defendant, not one who should be ~~primarily~~ liable to plaintiff in the first place, without any liability to defendant.

C. Asserting Claims Which Have Not Yet Accrued

ORCP 22 C. allows a third party plaintiff to bring in as a third party defendant one who "may be liable" to the third party plaintiff for any recovery plaintiff obtains against it. This language is commonly interpreted to allow impleader of one whose liability to the third party plaintiff has not yet been established (for example, the liability of an indemnitor against loss, whose liability to the indemnitee does not accrue until the indemnitee pays a judgment). Some courts, however, refuse to allow "may be liable" third party claims to proceed as part of the primary case. They sever the third party claim and postpone its trial (and sometimes discovery) until the primary claim is determined.

PRACTICE TIP: Know the approach of the judge before whom you will appear on a motion to allow the filing of a third party complaint or on a motion for severance of a third party claim. Judge Charles S. Crookham, Multnomah County Circuit Court Presiding Judge from June, 1979, to June, 1982, does not sever "unripe" third party claims, while Multnomah County Circuit Court Judge Pat Dooley, when he presided, did. Judge John M. Copenhaver, Deschutes County Circuit Court Presiding Judge (who opposes the concept of third party practice rather strongly) also severs third party claims in the face of a ripeness argument.

D. Is a Third Party Action Desirable?

Just because the procedural rules allow you to bring in a third party does not mean it is the best thing to do for your case. You may choose, instead, to pursue a third party claim in a separate action; just as Oregon has no compulsory counterclaim rule, neither does it have any requirement that a claim which could be brought as a third party action be so asserted. Some of the "pros" of using a third party action are:

1. Your client may feel more secure having its claim proceed against a third party while it is being required to defend a plaintiff's claim.

2. Your client may be willing to bring as a third party claim a claim it would not be willing to spend the time and money to bring were it not already involved in litigation with the plaintiff.

3. The third party defendant may help to settle the case by, among other things, providing additional settlement funds or putting additional pressure on the plaintiff.

4. The third party defendant may assist in developing the defense by expertise of counsel or by sharing expenses and attorneys' work.

5. Time and money may be saved by eliminating duplication in trial preparation and in the presentation of evidence at trial.

6. Bringing a third party action avoids a potentially damaging delay between entry of a judgment against a defendant in the main action and entry of a judgment in defendant's favor against the party ultimately liable.

7. Broader means of discovery will be available to you if a potential witness is joined as a third party.

8. The result obtained by the plaintiff in its suit against the defendant will be consistent with the result obtained by the third party plaintiff against the third party defendant; provided that the claims proceed together to trial, all parties will be bound by findings of fact and conclusions of law in each claim. See 3 Moore's Federal Practice ¶ 14.13 (2d ed 1980); § II.E., infra.

Some of the "cons" of a third party action are:

1. The defendant and the third party defendant may argue, thereby detracting from the weaknesses of the plaintiff's case or inappropriately emphasizing the "need" for a defense.

2. Joining a third party makes the case more complicated, more expensive and more time-consuming, especially in the discovery and pretrial stages, where all parties may feel obligated to be involved in all motions and depositions, even though those procedures may seem to relate only to one claim and not to the other.

3. The defendant may lose control over the defense; that is, tactics that the defendant may use against the plaintiff may be offset by actions of the third party defendant, whose ideas of what evidence is beneficial or what arguments are persuasive differ from those of the defendant.

4. The third party defendant may side with the plaintiff in pointing an accusing finger at the defendant.

5. The plaintiff's verdict may be increased because there is more than one defendant, especially if the defendant impleads as a third party defendant a "deep pocket."

6. Defense facts that may be appealing to a jury may be overshadowed or lost in the procedural complications which may attend trial of a case involving a third party claim.

See: Jere M. Webb, "Handling Multi-Party Cases: Contribution and Indemnity," (MBA-CLE Program, May 8, 1980); 6 Wright and Miller, Federal Practice and Procedure, § 1442 (1971).

II. THIRD PARTY PRACTICE--IN PRACTICE

A. Invoking the Right to Assert a Third Party Claim

Good judgment dictates that a third party claim be asserted as soon as its existence is discovered and you have had an opportunity to evaluate the "pros" and "cons." Permission of the court is not required to bring a third party action

if the third party complaint is filed within ten days after the defendant's answer is filed.

> PRACTICE TIP: Because ORCP 22 C. does not specify whether the third party claim must be filed within ten days after the defendant's answer is due or is actually filed, you might gain some time to investigate or prepare a third party claim by obtaining an extension of time within which to appear on behalf of the defendant in the main action.

If more than 10 days have passed since its answer was filed, the defendant must file a motion for leave to file a third party complaint, with notice to all parties to the action. There is no provision for notice to the prospective third party defendant. Plaintiff's counsel may be willing to stipulate to an order allowing you to file a third party complaint. Unless a substantial amount of time has expired since you appeared on behalf of defendant, and joining a third party would thus delay trial of the plaintiff's case, stipulations are frequently given as a matter of course.

Because motions seeking permission to file third party complaints are so frequently granted, a court may expedite the hearing on the motion. In Multnomah County Circuit Court, for example, motions for such orders are heard immediately after ex parte motions on one week's notice to opposing counsel; they do not require a motion setting in the ordinary course, which would be approximately two months from their filing.

> PRACTICE TIP: If you file a motion to allow the filing of a third party complaint, whether opposing counsel stipulates to the granting of the motion or not, attach a copy of the proposed third party complaint to your motion as an exhibit. Opposing counsel will want to know what they are

stipulating to, and the court will want to know what it is allowing you to file. The easiest way to do this is simply to prepare in final form the third party complaint you intend to file, and use a copy of it as an exhibit to the motion.

At the time a motion seeking permission to file a third party complaint is made, there is as yet no third party defendant and, thus, the lawsuit's caption remains the same (except for the proposed third party complaint attached to the motion as an exhibit, which bears what will become the new caption).

Any party may object to a motion seeking leave to file a third party complaint, and the court is directed by ORCP 22 C. not to grant leave if it would substantially prejudice the rights of existing parties. Some common arguments of prejudice made by those opposing the filing of a third party complaint are that the filing would introduce unrelated issues or unduly complicate or delay the original action. The court may also deny leave if the third party claim clearly lacks merit or is not within the scope of ORCP 22 C. 6 Wright and Miller, Federal Practice and Procedure § 1443 (1971).

PRACTICE TIP: If, as plaintiff's counsel, you feel a third party complaint would be detrimental to your case or if your client does not want to see the prospective third party defendant sued (they may be related companies or they may have an indemnity agreement), you should (if you have a basis for doing it) oppose the filing of the third party complaint on the ground that it would not withstand a motion to dismiss. If the court is faced with allowing the filing of a third party complaint which it will later have to dismiss, it may in the interests of judicial economy simply refuse permission to file.

PRACTICE TIP: As an alternative to denying a motion for leave to file, the court may allow the third party action to be filed but order severance or separate trials. For example, some courts will employ this device when a motion for leave to file a third party complaint is otherwise proper but is brought after the original action has been set for trial.

B. Drafting the Third Party Complaint

The third party complaint is, of course, a complaint, and as such it is subject to general rules of pleading. Specifically, it must comply with ORCP 18, which provides in part that a "third party claim * * * shall contain: * * * [a] plain and concise statement of the ultimate facts constituting a claim for relief * * * [and] [a] demand of the relief which the party claims; * * *."

The basis for third party relief is, as previously discussed, that the third party defendant is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant. Thus, in addition to setting forth a theory of recovery as against the third party defendant, the third party complaint must allege facts showing that the third party defendant would be liable to the defendant for any recovery obtained by plaintiff.

PRACTICE TIP: The original complaint should be attached as an exhibit to the third party complaint. This will make your third party allegations easier to phrase, as they will, of necessity, refer to the plaintiff's complaint. It will also give the third party defendant a copy of plaintiff's complaint which it would otherwise have to secure independently as, not yet being a party, it does not have a copy.

The caption of the third party complaint should name the parties as follows:

_____, Plaintiff, v. _____, Defendant and Third Party Plaintiff, v. _____, Third Party Defendant.	No. THIRD PARTY COMPLAINT

If there is more than one defendant, and only one of the defendants is asserting a third party claim, the caption should read:

_____, Plaintiff, v. _____, and _____, Defendants, _____, Defendant and Third Party Plaintiff, v. _____, Third Party Defendant.	No. THIRD PARTY COMPLAINT

PRACTICE TIP: If a plaintiff joins a third party in response to a defendant's counterclaim, it becomes more complicated to draft a caption which clearly shows the positions of the parties. You might want to designate the plaintiff as the "Plaintiff, Counterclaim Defendant and Third Party Plaintiff." In any event, there is no prescribed manner for drafting a caption of that nature. It would seem that the best caption is one which clearly shows who has a claim against whom, despite the fact that that caption may be a long one.

The third party complaint is the first document in the tripartite lawsuit to bear a changed caption. Once the third party complaint is filed, all papers filed should bear the new caption. Even if the third party claim is later separated for trial, the caption does not change unless the court severs the two claims and requests that the clerk assign the third party claim a separate case number.

C. Service of the Third Party Complaint

Service of summons and complaint by the defendant and third party plaintiff on the third party defendant is made in the same manner as service is made by a plaintiff on a defendant. The procedure is outlined in ORCP 7.

ORCP 22 C. provides that service of the third party complaint shall also be made on parties existing at the time that complaint is filed. Service on those parties is made pursuant to ORCP 9.

Technically, even if a copy of your proposed third party complaint was attached as an exhibit to a motion for leave to file, this does not constitute service on existing parties. Service of the third party complaint must still be

made on existing parties by mailing or by other means specified in ORCP 9.

D. Moving Against the Third Party Complaint

Despite the defendant's ability to initiate a third party action without the court's permission (provided the complaint is filed within the requisite ten-day period), the court still has ultimate discretion over whether to allow the third party action to proceed.

ORCP 22 C. provides that any party, including the third party defendant, may move to strike the third party complaint after it has been served. Although that rule does not state the grounds for such a motion, it would seem that the court should entertain the motion if it is based on any of the grounds on which the court could deny permission to file a third party complaint after expiration of the 10-day period. ORCP 22 C. sets no time limit for filing a motion to strike.

> PRACTICE TIP: Even though ORCP 22 C. does not address the question of when a motion to strike should be made, as a matter of good practice, such a motion should be made as early in the proceedings as possible. A court is more likely to look on the motion favorably (and the claim of prejudice by the party moving to strike is more convincing) in the early stages of the third party action.

An alternative, or additional, interpretation of ORCP 22 C.'s motion to strike provision is that that rule serves not to create a new basis for filing a motion to strike but to expand to additional parties the existing bases provided by ORCP 21 E. ORCP 21 E. allows a party to move to strike all or part of a pleading which contains:

> "(1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated; (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading."

Thus, reading ORCP 21 E. together with ORCP 22 C., it appears that any party may file a motion to strike against the third party complaint (or fourth or further party complaint) on the grounds set forth in ORCP 21 E. See 6 Wright and Miller, Federal Practice and Procedure § 1460 (1971).

If a party invokes under ORCP 22 C. the right to move to strike provided by ORCP 21 E., it would appear that the time limitations of ORCP 21 E. for asserting such a motion would apply. Thus, a party who must appear to the third party complaint must file any ORCP 21 E. motion to strike within 30 days from service of the third party complaint upon it. A party from whom no such responsive pleading is required has 10 days from service within which to file its motion.

Although ORCP 22 C. makes no reference to any party's right to move to make the third party complaint more definite and certain, the language of ORCP 21 D. (which deals with such motions) can clearly be read to contemplate motions filed by the third party defendant. Because ORCP 21 D. also contemplates motions to make more definite and certain filed by a party who would not be filing a responsive pleading, ORCP 21 D. arguably permits parties in addition to the third party defendant to file a motion to make the third party complaint more definite and certain. The same 30-day or 10-day time periods applicable to ORCP 21 E. motions to strike apply to ORCP 21 D. motions to make more definite and certain.

E. Defense of the Third Party Complaint

There is certainly some merit to the theory "a good offense is a good defense." Just as the defendant has benefitted itself by becoming a third party plaintiff, so can the third party defendant benefit itself by asserting claims it may have against the defendant and third party plaintiff, another third party defendant, the plaintiff, or a fourth party defendant. (Perhaps this approach to third party practice is what brings on the ire of judges.)

1. The third party defendant's claims and defenses against the third party plaintiff

As respects the third party plaintiff, the third party defendant has the same pleading rights and obligations as it would have as a defendant in an ordinary two party action. Thus, the third party defendant must answer or move against the third party complaint pursuant to ORCP 19 and 21 and may counterclaim against the third party plaintiff pursuant to ORCP 22 A. The counterclaim may be any claim which the third party defendant has against the third party plaintiff. This is significant because claims between the plaintiff and the third party defendant and cross-claims between parties are limited to claims arising out of the same transaction.

2. The third party defendant's claims and defenses against the plaintiff

The third party defendant need not answer the original plaintiff's complaint unless the plaintiff amends its complaint

to include a claim against the third party defendant; in that event, the third party defendant is treated both as a third party defendant and as a defendant and must move against or answer the plaintiff's complaint pursuant to ORCP 19 and 21. ORCP 22 C.(1); 6 Wright and Miller, Federal Practice and Procedure §§ 1456, 1457 (1971); 3 Moore's Federal Practice § 14.17 (2d ed 1980).

Even if the plaintiff does not assert a claim against the third party defendant directly, the third party defendant, under ORCP 22 C.(1), "may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim." Thus, the third party defendant need not sit by anxiously, allowing its potential liability to be increased by mistakes of the defendant and third party plaintiff. It can assert against the plaintiff's claim any defenses that the defendant and third party plaintiff could assert, with the exception of defenses <u>personal</u> to that defendant, such as lack of personal jurisdiction, improper venue or improper service of process. 6 Wright and Miller, Federal Practice and Procedure § 1457 (1971).

The third party defendant may assert as a counterclaim against the plaintiff any claim arising from the same transaction or occurrence that is the subject matter of the action between the plaintiff and the defendant. As in two party actions, there is no compulsory counterclaim requirement, and

the third party defendant may therefore assert the counterclaim in a separate action.

Although ORCP 22 C.(1) does not specifically allow a third party defendant to assert against a plaintiff any claim "related to any property that is the subject matter of the action brought by plaintiff" (which, under ORCP 22 B.(1), is a type of claim that may be asserted as a cross-claim), the language of ORCP 22 C.(1) can arguably be interpreted to allow the assertion of such a claim. That interpretation would make the category of third party defendant versus plaintiff claims consistent with the category of cross-claims.

3. The third party defendant's claims and defenses as against other third party defendants and defendants who are not the third party plaintiff

The third party defendant is entitled to cross-claim against other third party defendants in the same manner that any defendant is entitled to cross-claim. Thus, although the third party defendant may allege any claim it has against the defendant and third party plaintiff, pursuant to ORCP 22 B.(1), it may only allege against other third party defendants a claim which (1) arises out of the same transaction or occurrence as that set forth in plaintiff's complaint or (2) is related to property which is the subject of plaintiff's complaint.

There is no provision in Oregon practice for a third party defendant's assertion of a claim against a defendant who has not brought a third party claim against the third party defendant.

Because, however, a third party defendant may implead as a fourth party defendant one who "is or may be liable" to the third party defendant for all or part of the claim made against the third party defendant (ORCP 22 C.(1)), it seems only logical that the third party defendant could assert this type of indemnity or contribution claim against a defendant who has not asserted a claim against the third party defendant. A question arises, however, as to what to call such a claim, as it does not fit the traditional definition of counterclaim, cross-claim or third party claim, but then, neither does a third party defendant's claim against a plaintiff.

4. The third party defendant's claims against nonparties

As stated in the previous paragraph, pursuant to ORCP 22 C.(1), the third party defendant may assert a claim against any nonparty who may be liable to the third party defendant for all or part of any claim asserted in the lawsuit against the third party defendant. Although the rules do not specifically state that a fourth party defendant may become a fifth party plaintiff, ad infinitum, that is the way ORCP 22 C. is interpreted, at least in Multnomah County. When fourth or further parties are involved in a case, the caption of the pleadings is revised in the same manner as it is to include a third party:

_____,	)
	)
Plaintiff,	)
	)
v.	)
	)
_____,	)
	)
Defendant and Third Party Plaintiff,	)
	)
v.	)
	)
_____,	)
	)
Third Party Defendant and Fourth Party Plaintiff	)
	)
v.	)
	)
_____,	)
	)
Fourth Party Defendant.	)

5. The fourth or further party claim

Although the Oregon Rules of Civil Procedure do not specify what claims or defenses can be asserted by a party joined as a fourth party or further defendant, it makes sense that the fourth party defendant would be basically in the same position as the third party defendant vis-a-vis the other parties. Using this assumption, the fourth party defendant: (1) would be in the same position vis-a-vis the plaintiff and the defendant and third party plaintiff as the third party defendant would be in vis-a-vis the plaintiff; (2) would be in the same position vis-a-vis the third party defendant and fourth party plaintiff as the third party defendant would be in vis-a-vis the defendant and third party plaintiff; (3) would be in the same position vis-a-vis other fourth party defendants as

the third party defendant and fourth party plaintiff would be vis-a-vis other third party defendants; (4) would be in the same position vis-a-vis defendants who were not third party plaintiffs as the third party defendant would be in vis-a-vis those parties; and (5) would be in the same position vis-a-vis third party defendants who were not fourth party plaintiffs as the third party defendant would be in vis-a-vis a defendant who did not assert a third party claim. The same parallels can be drawn for relationships between the parties when a fifth or further party is joined.

PRACTICE TIP: When fourth or further parties are added to a case, some lawyer has likely not done their job. It is, of course, possible that a series of separate indemnity claims might exist, but it is more likely that the majority of fourth or further party cases are cases where those fourth or further parties might also have been appropriate defendants or third party defendants. If that is the situation, and the plaintiff or defendant and third party plaintiff wishes to assert claims against the new parties, it might be worthwhile, by stipulation or court order, to file an amended complaint or amended third party complaint naming the additional parties as defendants or third party defendants, thereby avoiding the confusion that the unfamiliar and additional designations would likely cause.

Remember, there is no requirement that a claim be brought as a third, fourth or further party claim just because it qualifies as one. The "cons" of third party practice would appear to be magnified for fourth and further party practice.

D. Rights of the Plaintiff in Third Party Practice

1. Against nonparties

As noted earlier, the plaintiff may implead a third party defendant in response to a counterclaim asserted by the defendant. The same rules that apply to impleader of a third

party by the defendant apply to impleader of a third party by the plaintiff. ORCP 22 C.(2).

2. Against the third party defendant

When the defendant impleads a third party defendant, the plaintiff may assert against the third party defendant any claim arising out of the same transaction or occurrence which is the subject of plaintiff's claim against the defendant. As with counterclaims or cross-claims in Oregon practice, the plaintiff's assertion of such a claim as part of its existing claim is not compulsory.

At least one authority states that not only must the plaintiff amend its pleadings in order to directly assert a claim against the third party defendant, but it must also obtain leave of court to do so. 6 Wright and Miller, Federal Practice and Procedure § 1459 (1971). ORCP 22 C.(1) simply states that the plaintiff "may assert" claims against the third party defendant; it does not say how. It seems that an opposing party would have little ground to complain were a plaintiff simply to amend its complaint, without leave of court, to assert a claim against the third party defendant, provided that the amended complaint was filed promptly after the third party complaint was served on the plaintiff. Ten days, which is the period of time an answering defendant has to assert a third party complaint without leave of court, seems to be an appropriately prompt period of time within which to amend the plaintiff's complaint in those circumstances.

PRACTICE TIP: If the plaintiff has a direct claim against the third party defendant, the better practice is to amend the complaint to state a claim against the third party defendant. This assures that the plaintiff has a judgment against both the defendant and the third party defendant. Nevertheless, some courts will find direct liability from the third party defendant to the plaintiff, even if the plaintiff has not appropriately amended its complaint, assuming the plaintiff and the third party defendant have treated each other as adversaries. Wasik v. Borg, 423 F2d 44 (2d Cir 1970).

E. Out of the Pleadings and Toward the Courtroom: Severing or Separating the Claims and the Effect of Collateral Estoppel

ORCP 22 C.(1) provides that any party may move to sever or separate for trial the third party claim, but that rule does not state on what basis the court shall grant or deny such a motion. ORCP 22 E. provides that the court can separate for trial, on its own motion or that of any party, any counterclaim, cross-claim or third party claim if to do so would: "(1) be more convenient; (2) avoid prejudice; or (3) be more economical and expedite the matter." As noted previously, this option gives the court an alternative to striking the third party complaint or to denying a motion for leave to file the third party complaint. See Practice Tip, § II.A., supra.

There is a substantial practical difference between severing a third party claim, which apparently can be done at any stage of the litigation, and separating the claim for trial. Although the Oregon Rules of Civil Procedure do not state how a third party claim should be treated once it is severed, it seems that the claim should be treated as if it had been initially filed as a separate claim. The purpose of severing, as opposed

to merely separating the claims for trial, must be to alleviate the necessity of all parties and their attorneys being notified of, and having the right to participate in, every move made in both the primary and the third party claim. Thus, it seems that, if a third party claim were severed, that claim should be given a new case number and the two cases should then be treated as if they had no relationship to each other.

Separating the third party claim for trial, however, is not the simple, clean procedure that severance appears to be. The primary claim and the third party claim are joined for purposes of pretrial motions and pretrial discovery. That means that the extent to which the plaintiff participates in the pretrial stages of the third party claim and the extent to which the third party defendant participates in the pretrial stages of the primary claim are left to the discretion of the lawyer.

> PRACTICE TIP: This is an area where third party practice has earned the disapproval of lawyers. To be sure that they are fully protecting their client, lawyers representing the plaintiff or third party defendant may feel that they need to attend every hearing and every deposition in the case, even when it seems that the motion may only involve the other claim. But who knows? Something may be said or decided that affects all parties. The extent to which a lawyer participates in the handling of both claims is a tough decision.

There is no procedural rule for determining the collateral estoppel effect when a third party claim has been severed or separated for trial from the primary claim. Oregon law provides that findings of fact or conclusions of law made

in one action will be conclusive in a second action where the party against whom the findings or conclusions are to be used was a party to or in privity with a party to the first action and had a full and fair opportunity to litigate the issue in the first action. Bahler v. Fletcher, 257 Or 1, 474 P2d 329 (1970). In other words, the party against whom the estoppel is sought to be used must have had a real opportunity in the previous case to litigate the issues for which the estoppel is sought to be invoked.

If a third party claim is severed from the primary claim, it would appear that the parties to one claim have no right to participate in any part of the litigation of the other claim, and, thus, collateral estoppel could not be invoked from one claim to the other. With respect to a case where claims have been separated for trial, however, the answer is not as clear. It seems that the only way to be certain whether one claim will have a collateral estoppel effect on the other is to ask the court for a ruling. The request for a ruling should be made prior to the trial of the first claim to enable the parties to the subsequent claim to plan their participation in the first trial.

> PRACTICE TIP: A good time to get a ruling from the court on collateral estoppel would be at the time that the court hears the motion to sever or separate. Ask the court to include in its order a statement on the collateral estoppel effect of the trial of the first claim on the trial of the second. Additionally, pointing up the problem of collateral estoppel at the time of this hearing may have an effect on how the court rules on severance or separation.

III. THIRD PARTY PRACTICE--THE TRIAL

~~A. Is This the Bar Convention or a Trial?~~

If a case which includes a third party claim really does involve an overly complicated number of issues, parties, and lawyers, it probably is to everyone's advantage to separate the claims for trial. Particularly with a jury, it is difficult, if not impossible, to predict in whose favor the confusion resulting from a single trial will work.

Where both claims do proceed together to trial, the lawyers should spend more trial preparation time simply planning their presentation than they might otherwise spend. Some areas to be considered are:

~~a~~ Do I need to participate in the whole trial? Although, where claims are not served, a party will be bound by the result whether the party participates or not, it may be a long trial, only parts of which cannot be adequately handled by other counsel. Again, it is a tough decision.

~~b~~ Do I want to divide up responsibility for examination of witnesses, argument and briefing with other counsel, or do I want to keep my client's participation separate and to a minimum?

~~c~~ Do I want to devote any of my own argument or trial time to aspects of the case which do not concern my client directly, or do I jeopardize my case by becoming more involved?

~~d~~ If there are a number of parties and lawyers, is it important for me to be at the counsel table at all times?

If I make a decision to minimize or maximize my participation, to what extent should I advise the judge or comment in my opening statement to the jury about my approach?

> PRACTICE TIP: Rules of thumb in cases which do not include third party claims are frequently said to be "[D]on't object unless it really hurts you" or "[D]on't raise an issue unless you are sure it can help you." These maxims are even more important in a case involving a third party claim, because there is more risk in those types of cases that you will lose sight of what you are trying to accomplish for your client. You should map out your strategy earlier and in more detail when you have a more complicated case.

When asked how they handle the trial of a third party action, judges uniformly reply "[T]he same as any two party case." The Oregon Rules of Civil Procedure which deal with jury selection (ORCP 57) and trial procedure (ORCP 58) take a similar approach: they, too, make no distinction between the handling of a tripartite trial and the handling of a conventional two party case. In fact, portions of those rules make it clear that the draftsmen could not have contemplated third party trial practice when the rules were formulated. For example, ORCP 57 D.(2) provides that:

> "[W]here there are multiple parties plaintiff or defendant in the case or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the [jury] challenge and are limited to a total of three peremptory challenges * * *."

With whom should the third party defendant side, the plaintiff or the defendant? To be fair, ORCP 57 D.(2) continues from the previously quoted portion to allow the court, in its discretion, to grant additional peremptory challenges for joint or separate

exercise. This additional provision, however, does not treat the issue of third party practice with enough specificity (it does not mention third party practice at all) to ~~sufficiently~~ meet the special trial practice problems which third party practice creates.

The failure of ORCP 57 D.(2), or any portion of ORCP 57 or ORCP 58, to provide specifically for third party practice trial procedure gives the courts wide latitude in deciding how those types of trials will be conducted. It also makes the task of advising practitioners on how to conduct those trials impossible. The only thing a trial lawyer can do is identify the areas where a tripartite trial will not fit neatly into the two party system and ask the trial judge in advance how the judge will handle those aspects of the trial. Some problem areas will be:

- ~~1.~~ The seating at counsel table of all lawyers and their clients;
- ~~2.~~ The number of peremptory challenges each party will be allowed to exercise;
- ~~3.~~ The manner in which peremptory challenges will be exercised;
- ~~4.~~ The order of opening statements;
- ~~5.~~ The order of the presentation of evidence (i.e., will the defendant/~~and~~ third party plaintiff put on its defense of the plaintiff's complaint and its case against the third party defendant at the same time?);

— 6. Handling objections to the introduction of evidence;

— 7. Who rebuts what evidence when;

— 8. The order of closing arguments;

— 9. The amount of time that can be devoted to each closing argument;

— 10. Allowing for replies to closing argument to equalize any advantage the "last arguer" may obtain;

— 11. The time to make a motion for directed verdict.

PRACTICE TIP: Third party cases are good cases for the use of special verdicts or general verdicts with interrogatories (ORCP 61 B., C.). Giving the jury a concise structure for making their findings and returning their verdict will help to alleviate any confusion caused by the multiple party nature of the case.

IV. APPEAL OF THE THIRD PARTY CASE

A. What is appealable?

An order granting or denying a defendant's motion for leave to file a third party complaint is interlocutory and not appealable except as part of the final judgment in the case. ORS 19.010; 6 Wright and Miller, Federal Practice and Procedure § 1463 (1971). Likewise, an order denying a motion to strike or to dismiss a third party complaint is interlocutory and not immediately appealable. Id.

The court's power under ORS 18.125 to enter multiple judgments in cases involving multiple claims or multiple parties

applies to third party cases. ORS 18.125 provides that, on a finding by the court that there is no just reason for delay in the entry of judgment on a portion of a case and an express direction by the court for such entry, a judgment terminating only that portion (such as a primary claim or a third party claim) is final and appealable. ~~It should be noted~~ that Hill v. Oland, _____ Or App _____, _____ P2d _____ (1981), requires that a judgment entered pursuant to ORS 18.125 affirmatively set forth the facts supporting the court's finding of "no just reason for delay," or the judgment will not be considered final and appealable.

B. Who may appeal?

In the case of a judgment on the primary claim, the third party defendant should have the right to appeal if the plaintiff asserted a claim against the third party defendant or if the third party defendant asserted a defense to the plaintiff's claim against the defendant. See 3 Moore's Federal Practice ¶ 14.19 (2d ed 1980). However, even if the third party defendant has not presented defenses, it arguably should be able to appeal from the judgment on the primary claim, notwithstanding the absence of an appeal by the defendant, on the ground that, if the defendant were not liable to the plaintiff, then the third party defendant would not be liable to the defendant. See Kicklighter v. Nails by Jannee, Inc., 616 F2d 734, n. 1 (5th Cir 1980).

FORM 1: THIRD PARTY COMPLAINT

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

WASHINGTON METAL WORKS COMPANY, a Washington corporation, Plaintiff, v. RAPID TRUCK LINES, LTD., an Oregon corporation, Defendant and Third Party Plaintiff, v. CARGO HANDLERS, INC., an Oregon corporation, Third Party Defendant.	No. THIRD PARTY COMPLAINT

Defendant and third party plaintiff Rapid Truck Lines, Ltd., (hereinafter referred to as "Truck Lines"), for its third party complaint against third party defendant Cargo Handlers, Inc. (hereinafter referred to as "Handlers"), alleges as follows:

I

Washington Metal Works Company (hereinafter referred to as "Metal Works") has filed a complaint against Truck Lines, a copy of which is attached to this third party complaint as "Exhibit A" and referred to hereinafter as "plaintiff's complaint."

II

As shown by plaintiff's complaint, Metal Works alleges that it contracted with Truck Lines for the transportation in Oregon of certain galvanized coils of steel sheet owned by Metal Works (hereinafter referred to as "the coils"). That transportation involved loading the coils onto trucks owned and operated by Truck Lines, transporting the coils to a location designated by Metal Works, and unloading the coils from the trucks of Truck Lines.

III

Plaintiff's complaint alleges that the coils were damaged in the course of their transportation by Truck Lines and seeks recovery of $25,000 in damages.

IV

Truck Lines contracted with Handlers for the loading and unloading of the coils in a workmanlike manner.

V

Any damage occurring to the coils during the course of their transportation by Truck Lines, and Truck Lines denies that any damage occurred, occurred during the loading and unloading of the coils by Handlers and occurred as a result of Handlers' breach of its obligation to Truck Lines to perform its work in a workmanlike manner.

VI

If Truck Lines is found liable to Metal Works, and Truck Lines denies that there is any basis for such liability,

then Handlers is liable to Truck Lines in the amount of any recovery obtained by Metal Works against Truck Lines, together with Truck Lines' expenses incurred in investigating and defending this action, including its attorneys' fees and court costs.

WHEREFORE, defendant and third party plaintiff Rapid Truck Lines, Ltd. demands judgment against third party defendant Cargo Handlers, Inc., for all sums that may be adjudged against Rapid Truck Lines, Ltd. in favor of plaintiff Washington Metal Works Company, together with Rapid Truck Lines, Ltd.'s expenses incurred in investigating and defending this action, including its attorneys' fees and court costs expended.

HOROWITZ AND BROWN

Margaret Brown

Attorneys for Defendant and
Third Party Plaintiff Rapid
Truck Lines, Ltd.

FORM 2: MOTION FOR LEAVE TO FILE THIRD PARTY COMPLAINT; POINTS AND AUTHORITIES

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

WASHINGTON METAL WORKS COMPANY, a Washington corporation, Plaintiff,	)	No.
v.	)	MOTION FOR LEAVE TO FILE THIRD PARTY COMPLAINT
RAPID TRUCK LINES, LTD., an Oregon corporation, Defendant.	)	

Pursuant to ORCP 22 C., defendant hereby moves the court for leave to file a third party complaint in the form attached to this motion as "Exhibit A." This motion is based on the record and file herein and on the attached points and authorities.

HOROWITZ AND BROWN

_____
Margaret Brown

Attorneys for Defendant
Rapid Truck Lines, Ltd.

POINTS AND AUTHORITIES

ORCP 22 C.(1) provides in relevant part that "[a]t any time after commencement of an action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff."

As shown by the third party complaint, a copy of which is attached to this motion as "Exhibit A," Cargo Handlers, Inc., an entity which is not a party to this action, will, if defendant's allegations are proven, be liable to indemnify defendant for any amounts which defendant is required to pay to plaintiff. See General Ins. Co. v. P. S. Lord, 258 Or 332, 336, 482 P2d 709 (1971). For this reason, Cargo Handlers, Inc., is a proper third party defendant in this action, and defendant should be granted leave to serve and file its third party complaint.

FORM 3: ORDER (GRANTING/DENYING) MOTION FOR LEAVE TO FILE THIRD PARTY COMPLAINT

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

WASHINGTON METAL WORKS COMPANY, a Washington corporation,	)	
Plaintiff,	)	No.
v.	)	ORDER (Granting/Denying) MOTION FOR LEAVE TO FILE THIRD PARTY COMPLAINT
RAPID TRUCK LINES, LTD., an Oregon corporation,	)	
Defendant.	)	

This matter having come before the court at 10 a.m., June 15, 1981, on defendant's motion for leave to file a third party complaint, plaintiff being represented by its attorney, John Gorin, and defendant being represented by Margaret Brown of Horowitz and Brown, its attorneys, and the court having reviewed the record and file herein and having heard argument of counsel, now, therefore,

IT IS HEREBY ORDERED that defendant's motion for leave to file a third party complaint, in the form attached to its motion as Exhibit A, is hereby (granted/denied).

DATED this ___ day of June, 1981.

_____
Judge

Presented by:

_____
Margaret Brown
Horowitz and Brown

Attorneys for Defendant
Rapid Truck Lines, Ltd.

FORM 4: PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

WASHINGTON METAL WORKS COMPANY, a Washington corporation, Plaintiff, v. RAPID TRUCK LINES, LTD., an Oregon corporation, Defendant and Third Party Plaintiff, v. CARGO HANDLERS, INC., an Oregon corporation, Third Party Defendant.	No. PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

Pursuant to ORCP 22 C.(1), plaintiff hereby moves the court for leave to amend its complaint to assert a claim against third party defendant Cargo Handlers, Inc. A copy of the proposed amended complaint is attached to this motion as Exhibit A.

John Gorin

Attorney for Plaintiff
Washington Metal Works Company

FORM 5: THIRD PARTY DEFENDANT'S ANSWER TO THIRD PARTY COMPLAINT AND PLAINTIFF'S COMPLAINT

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

WASHINGTON METAL WORKS COMPANY, a Washington corporation,	)	
Plaintiff,	)	No.
v.	)	THIRD PARTY DEFENDANT'S ANSWER TO THIRD PARTY COMPLAINT AND PLAINTIFF'S COMPLAINT
RAPID TRUCK LINES, LTD., an Oregon corporation,	)	
Defendant and Third Party Plaintiff,	)	
v.	)	
CARGO HANDLERS, INC., an Oregon corporation,	)	
Third Party Defendant.	)	

For its answer to defendant and third party plaintiff Rapid Truck Lines, Ltd.'s (hereinafter referred to as "Truck Lines") third party complaint and to plaintiff's complaint, third party defendant Cargo Handlers, Inc. (hereinafter referred to as "Handlers"), admits, denies and alleges as follows:

I

Admits the allegations of paragraph I.

II

Admits that plaintiff's complaint in this lawsuit makes the allegations alleged in paragraph II.

III

Admits that plaintiff's complaint in this lawsuit makes the allegations and seeks the recovery alleged in paragraph III.

IV

Answering the allegations of paragraph IV, admits that Truck Lines contracted with Handlers for the loading and unloading of the coils, but Handlers does not have sufficient information on which to base a belief as to the truth or falsity of whether the word "workmanlike" as used by Truck Lines describes the manner in which the work was to be done, and, therefore, denies the same.

V

Answering the allegations of paragraph V, admits that no damage occurred to the coils during their transportation by Truck Lines, including that portion of that transportation which was performed by Handlers, but denies the remaining allegations of paragraph V.

VI

Answering the allegations of paragraph VI, admits that there is no basis for any liability as between plaintiff and Truck Lines, and therefore no basis for any liability between Truck Lines and Handlers, but denies the remaining allegations of paragraph VI.

AFFIRMATIVE DEFENSE TO THIRD PARTY COMPLAINT

VII

Handlers realleges those matters admitted in paragraphs I through IV of this pleading.

VIII

The loading and unloading of the coils which Handlers performed under its contract with Truck Lines was done pursuant to the express direction and specific instructions of Truck Lines, and Handlers' work was at all times under the control of Truck Lines as to its method and manner of execution.

IX

If the coils were damaged during their loading and unloading by Handlers, and Handlers denies that any such damage occurred, then that damage was not due to any fault or breach of duty on the part of Handlers, but, rather, was due to the fault and breach of duty of Truck Lines in designating the method to be used by Handlers in the loading and unloading and the manner of that method's exercise.

AFFIRMATIVE DEFENSE TO PLAINTIFF'S COMPLAINT

X

Handlers realleges those matters admitted in paragraphs I through IV of this pleading.

XI

Plaintiff strapped the coils onto pallets and constructed packaging around the coils to facilitate their loading and unloading.

XII

If the coils were damaged during their loading and unloading by Handlers, and Handlers denies that any such damage occurred, then that damage was not due to any fault or breach of duty on the part of Handlers, but, rather, was due to the fault of plaintiff in failing to properly strap and and package the coils for loading and unloading.

WHEREFORE, having fully answered the third party complaint and plaintiff's complaint, third party defendant Cargo Handlers, Inc., demands that those complaints be dismissed and that it be awarded its costs and disbursements incurred herein.

DAVID, OWENS & FEED

Andrew Walters

Attorneys for Third Party
Defendant Cargo Handlers, Inc.

****

RESOLUTION

WHEREAS, DAVID R. VANDENBERG, JR., has served the People of the State of Oregon as a member of the Oregon State Bar since 1956; and

WHEREAS, during those 26 years he has established himself among his peers as a fearsome adversary in the courtroom and as a respected colleague and prized friend outside;

WHEREAS, he has also served with distinction as a member of the OREGON COUNCIL ON COURT PROCEDURES during a period of some of its most difficult work; and

WHEREAS, the OREGON COUNCIL ON COURT PROCEDURES has been advised that he is now suffering from a serious illness;

BE IT HEREBY RESOLVED, that the COUNCIL ON COURT PROCEDURES takes this opportunity to express its appreciation to DAVID R. VANDENBERG, JR., for his years as an adversary, colleague, friend, and COUNCIL member, and extends to Mr. Vandenberg the best wishes of the COUNCIL.

BE IT FURTHER RESOLVED, that the original Resolution be forwarded to Mr. Vandenberg with the COUNCIL's good wishes and that a copy of the Resolution be made a part of the minutes of the meeting of the COUNCIL ON COURT PROCEDURES held on June 19, 1982.

****

Exhibit "D" to Minutes of Meeting Held 6/19/82

School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

March 7, 1982

MEMORANDUM

TO: Jere Webb
Jay Folberg
Liz Stephens
Randy Foster

Dear Folk:

The following are some points remaining after our last meeting:

1. Chapter 7 - Legal Research

At our meeting on Saturday, I suggested Peter Nycum's revision on Chapter 7 was an improvement. I forgot to add the suggested changes. His section on computerized legal research (p. 22 of typed version) makes reference to specific locations for terminals. This seems too limited and easily outdated. In any case, it seems to assume the book is only published for Multnomah County. For example, the Lane County Bar has Westlaw and our law library has Lexis. More and more firms and local Bars are adding one or the other services. I assume Willamette is planning one or the other service. I suggest we combine the first two sentences of Paragraph 1 with the second paragraph as follows:

> "Computerized legal research is not coming to Oregon. It is here. Moreover, it is growing rapidly. The two computer systems, Mead Data's Lexis and West's Westlaw, . . . "

On Page 23 we should change the second sentence to read: "Visit a law school or law library for a demonstration or else contact Mead and West directly."

Also, he left out one particularly useful service that I believe is accessible, and that is OLIS, the legislative system. This is a word search system that has ORS and I believe State Administrative Regulations with Attorney General

Opinions. Nycum should check with the Legislative Counsel's Office about this.

2. Revised Chapter 14

A. I have revised Chapter 14, and it is good. I have a couple of minor points:

(a) Page 14.22, § 14.52

The following cross references should be removed: "§ 10. 1-10.7 (partnerships); §§ 10.32 and 33 (unincorporated associations). The new ORCP change this. We could just say, "See ORCP 26 B. and 67 E. relating to partnerships and unincorporated associations."

Also, the last sentence is not correct. ORCP 21 A.(4) only refers to lack of plaintiff's capacity, not defendant's capacity.

(b) Page 14.28, § 14.68

I question whether this section is correct under the ORCP. The ORCP provide no such procedure as a motion to elect, and ORCP 16 C. says that inconsistent pleadings are not objectionable. The only consistency limit is imposed by the truthful pleading requirement of ORCP 17, and the only attack provided under 17 B. is a motion to strike.

(c) Page 14.29, § 14.75

Why is writ of mandamus listed under motions treated elsewhere? Also, why list summary judgments again? They are covered in 14.73 above.

(d) Pages 14.33-14.35, §§ 14.88-14.90

I agree we should use the new rule numbers, but don't we need to change prior cites? What about § 2.2 in Chapter 2? That seems outdated.

(e) Page 14.36, third line at end of paragraph. We ought to cite ORCP 9 here.

(f) Page 14.43. Does Form 14.5 belong in here?

3. Chapter 33

The following modifications result from points raised:

A. Page 33.36, § 33.10. Strike the last sentence and insert:

"D. In interpleader, the interpleading stakeholder is generally entitled to costs and disbursements. This amount is deducted from the fund and then can be entered as a cost judgment in favor of prevailing claimants against losing claimants. Gresham State Bank v. O & K Construction, 231 Or 106, 128-129, 370 P2d 726, 372 P2d 187 (1962). If the nature of the item interpleaded makes it unavailable to pay costs and disbursements, then a cost judgment can be granted in favor of the plaintiff and gainst some or all of the claimants. The court might also allow a lien upon the intended item for these costs. Milton Warehouse Co. v. Basch-Sage Hardware Co., 147 Or 563, 587, 34 P2d 978 (1934). As between the claimants, the prevailing claimant(s) would generally also be entitled to recover their costs and disbursements from the losing claimant(s). See Wright and Miller, Federal Practice and Procedure, § 17.19."

4. Costs

(a) Expert Witnesses, page 33.10, § 33.27. Strike last sentence of paragraph and add to paragraph: "However, in some circumstances a court may find that expert witness fees are a 'necessary' expense and allow recovery." American Timber and Trading v. Neidemeyer, 276 Or 1135, 538 P2d 1211 (1976). In some cases recovery of such fees is provided by statute. ORS 20.098(1) provides for a reasonable amount to be fixed by the court as compensation for expert witnesses in warranty actions. ORS 35.335 and 35.346(2) also provide for recovery of appraisal and expert witness fees by the condemnee in condemnation actions. Such fees are not recoverable by the condemnor. ORS 35.346(2).

(b) Depositions, page 33.10, § 33.23. Strike last sentence and add the following:

"The Oregon court has held that the reasoning of Kendall v. Curl, supra, applies to use of depositions to support a summary

> judgment motion. In Straube v. Larson, supra, at 374, it upheld a trial court decision that such depositions were only recoverable costs if taken for use at trial, despite the fact that they were the basis of a summary judgment. On the other hand, in Gleason v. International Multifoods Corp., 282 Or 253, 261, 577 P2d 931 (1978), the same court upheld a trial court allowance of the cost of a deposition used to suppport a summary judgment motion. The court again stated that when a deposition was 'necessary' is ordinarily a matter left to trial court discretion. It may be worth noting that the Gleason case involved recovery for one deposition, and Straube involved recovery for 66 depositions."

I was also tempted to add as a practice tip: "And there is no greater disaster than greed. The Way of Lao Tzu, p. 46."

(c) Transcripts, page 33.12, § 33.30. Add new material to paragraph:

> "There are no Oregon cases on the subject, but in federal practice such fees may be found 'necessary' under some circumstances. See § 33.54 below."

(d) Add new section at end of page 33.22 as § (33.66) and add to table of contents, page 33.3:

> "F. (§ 33.66) Applicable Law. In diversity cases in federal courts, it has been generally held that availability of ordinary cost items, which are covered by federal statute, are governed by federal law and not state law. See Wright and Miller, Federal Practice and Procedure, § 2669. Also, the federal procedure for assertion of costs provided in 54 (a), and not state cost bill procedure, should be followed in a diversity case in federal court. See Hanna v. Plumer, 380 S Ct 1136, 14 L Ed 2d 8 (1965).

FRM:gh

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May 21, 1982

Mr. Robert H. Grant
Attorney at Law
201 West Main Street
No. 5B
Medford, Oregon 97501

Re: ORCP 7D(4)(a) and ORCP 7D(4)(c)

Dear Bob:

You and I discussed service of process by mail under the new rules of civil procedure and the decision in Harp v. Loux, 54 Or App 840 (1981). In the case Judge Richardson concludes the previous "due diligence" requirement to locate a defendant for service of process set forth in TerHar v. Backus, 259 Or 478, 487 P2d 660 (1971) no longer exists. Service by mail is now proper and a default can be taken without a "due diligence" search to locate the defendant.

In Harp v. Loux the plaintiff's attorney knew the existence of defendant's insurance company and the court ruled there is no duty to inform the insurance company when serving process by mail and taking a default.

I understand you have been contacted by State Farm Mutual Insurance Company and asked to discus this unfair rule with the Council on Court Procedures members.

I have discussed the matter with John Hageman, Regional Claims Manager, Oregon Division, Farmers Insurance Group. On behalf of Farmers I would like to appear and testify before the council to have the rule changed.

It is unfair to allow a default without informing the known insurer that one will be taken and then refuse to

set the default aside after plaintiff's lawyer then advises the insurer that a default has been taken.

Very truly yours,

Richard L. Lang

RLL:ks

Law Offices

Ringo, Walton and Eves, P.C.

Robert G. Ringo
nes W. Walton
S. David Eves
Larry W. Stuber

May 26, 1982

Mr. Donald W. McEwen
Attorney at Law
1408 Standard Plaza
1100 SW 6th Avenue
Portland OR 97204

Dear Mr. McEwen:

In numerous conversations with defense counsel, and others, it is apparent that the expenses of physicians coming to court are substantial. The suggestion has been made that ORCP allow the testimony of any treating, or examining physician whose office is outside the county of the place of trial, to be presented by deposition as a matter of right by the party offering it. If their office is within the county, upon a sufficient showing to the court, testimony should be able to be presented by deposition.

I would appreciate you bringing this up at your next meeting.

Very truly yours,

Robert G. Ringo

jr

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HERBERT C. HARDY
OF COUNSEL

June 2, 1982

Professor Douglas A. Haldane
School of Law
University of Oregon
Eugene, Oregon 97403

Re: Council on Court Procedures

Dear Doug:

I enclose herewith a copy of a letter from Mr. Robert Ringo to me dated May 26, 1982. Mr. Ringo makes a suggestion to me concerning testimony of physicians. A rule permitting publication of a physician's testimony by deposition or otherwise is certainly procedural, but it strikes me as a suggestion that would have been better addressed to the framers of the evidence code than to the Council.

Best personal wishes.

Yours very truly,

McEWEN, NEWMAN, HANNA & GISVOLD

Donald W. McEwen

DWM:lam

Enclosure

cc: The Honorable William M. Dale, Jr.

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June 4, 1982

Mr. Doug Haldane
Executive Director of
Council on Court Procedures
University of Oregon
School of Law
Eugene, Oregon 97403

Dear Professor Haldane:

This law firm is primarily engaged in defense work for insurance companies. Since the decision in Harp v. Loux, 54 Or App 840 (1981) we have had inquiries from clients about this, in my opinion, unfair result. I have talked with Bob Grant at length and have asked for the opportunity to appear before the Council on Court Procedures to present the view of the insurance industry and attempt to have the service of process rules changed.

I would appreciate hearing from you.

Very truly yours,

Richard L. Lang

RLL:ks

EXHIBIT C

TO MINUTES OF COUNCIL MEETING HELD 6/19/82

LAW OFFICES OF
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June 4, 1982

Mr. Douglas A. Haldane
Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene Oregon 97403

Dear Doug:

I have a matter which I would appreciate your referring to the sub committee on Rule 7 if there is such a committee.

I enclose herewith a copy of a letter received from Richard L. Lang respecting this problem.

As you know, pursuant to Rule 7 D (4) (a) (i), service in a motor vehicle accident case may now be made upon the Motor Vehicles Division. In many cases, such as Harp v. Loux, 54 Or App 840 (1981), the carrier runs into the problem of never receiving notice of the service because service is made upon the Motor Vehicles Division and then mailed to the defendant at the defendant's last known address and never reaches the defendant. Sometimes this takes place after an extended period of negotiation between an insurance adjuster and plaintiff's attorney.

On the other side of the coin, many times the service on the Motor Vehicles Division is fraught with hazard because default may not be obtained against someone who has not either received or rejected the registered or certified letter unless plaintiff is able to show that the defendant cannot be found. In such a case, the plaintiff is at a disadvantage.

The proposal which has been suggested is that in the case of a motor vehicle accident where the defendant is known to be insured by a particular carrier, that service can be effected by service upon the carrier, without the necessity of service upon the Director of the Motor Vehicles Division and the consequent affidavit if default is sought. On the other hand, if the carrier is known and service is obtained by another method, then there could be a requirement of notice of the time of service upon the Motor Vehicles Division to the involved carrier so that in either case the carrier is given notice of the effecting of service, whether it be upon the

carrier directly or upon the Motor Vehicles Division, or simply by mail.

It would seem that the adoption of such a rule would have aspects of fairness to both sides, both to the carrier and to the plaintiff.

Perhaps this could be referred to the appropriate sub comittee before any discussion by the committee as a whole.

Very truly yours,

GRANT, FERGUSON & CARTER

By ROBERT H. GRANT

RHG:dg

Enc.

Cc: Dick Lang
Cc: Joe Schuetz

Law Offices

Ringo, Walton and Eves, P.C.

Robert G. Ringo
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Larry W. Stuber

June 14, 1982

Mr. Douglas Haldane
University of Oregon
Eugene, OR 97403

Dear Mr. Haldane:

In considering my proposal that examining and treating physicians be allowed to testify by deposition if their office is located outside the county of the trial, you indicated that you thought this might involve an exception to the hearsay rule. I have reviewed the matter, and it appears to me that it would be procedural. A deposition is sworn testimony, the same as any other testimony, so it would certainly not be hearsay. I cannot see how it is evidentiary. I would seem to me that it is procedural as to when you have to bring a witness and the rules for when you can use their deposition.

I would appreciate it if you would reconsider it from that viewpoint. If there is any further that I can answer for you, I will be glad to do so.

Very truly yours,

Robert G. Ringo

jrb

cc: Donald McEwen

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