

COUNCIL ON COURT PROCEDURES

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February 3, 1994

Mr. Douglas R. Wilkinson
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Springfield, OR 97477-4694

Dear Doug:

Re: ORCP 15 A

Thanks for your January 26 letter regarding the P&P Committee's recommended amendment to ORCP 15 A. With John Hart's approval I shall circulate your letter and accompanying material with the agenda of the Council's next meeting and include this item on that agenda. Naturally I can't make any commitments on behalf of the Council, but would guess that this recommended amendment can be "fast tracked" at least to the extent of not taking the time to refer it to a subcommittee. The Committee will be kept informed through you and Kathy.

With appreciation for your and the Committee's helpful contribution to the common cause,

Cordially,



Maurice J. Holland
Executive Director

c: John Hart (w/enc.)

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January 26, 1994

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MAURICE J HOLLAND
EXECUTIVE DIRECTOR
COUNCIL ON COURT PROCEDURES
UNIVERSITY OF OREGON SCHOOL OF LAW
EUGENE OR 97403-1221

Re: OSB Practice and Procedure Committee
Recommendations for Revision to ORCP 15A

Dear Maurie:

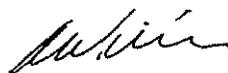
There appears to be some confusion over the amount of time a party has to file their reply to a counterclaim. Some lawyers appear to read ORCP 15A as indicating 30 days and others say that the reply to a counterclaim of a party summoned under the provisions of Rule 22D is the only reply that is entitled to a 30-day time frame. Accordingly, the Oregon State Bar Practice and Procedure Committee voted to recommend to the Council on Court Procedures that ORCP 15A be amended by deleting language so that it reads as follows:

"A. **Time for Filing Motions and Pleadings.** A motion or answer to the complaint or third party complaint and the reply to a counterclaim or answer to a cross-claim [~~of a party summoned under the provisions of Rule 22D~~] shall be filed with the clerk by the time required by Rule 7C(2) to appear and defend. Any other motion or responsive pleading shall be filed not later than 10 days after service of the pleading moved against or to which the responsive pleading is directed."

Enclosed are OSB publications indicating that the time for reply to a counterclaim is ten (10) days.

Sincerely,

THORP, PURDY, JEWETT,
URNESS & WILKINSON, P.C.



Douglas R. Wilkinson

DRW:sak
encl.

cc: OSB Practice and Procedure Committee

F:\ATTORNEY\DRW\COMMITTEE\P&M\HOLLAND.LTR

OREGON

FEDERAL

Petition for
Removal

Within 30 days after receipt of initial pleading, or within 30 days after service of summons (without a complaint), whichever is shorter. 28 USC §1446(b).

If case not removable on initial pleading, within 30 days of receipt of a copy of amended pleading which first shows it to be removable. 28 USC §1446(b).

(§3.43) **REPLY TO ANSWER**

Only to assert any affirmative allegations in avoidance of any defenses asserted in an answer unless court orders otherwise. ORCP 13 B. Within 10 days of service of answer. ORCP 15 A.

Only if ordered by the court. FRCP 7(a). 20 days after service of order unless otherwise ordered. FRCP 12(a).

(§3.44) **REPLY TO COUNTER-CLAIM**

10 days after service. For new party joined to respond to counterclaim 30 days after service. ORCP 15 A, 7 C(2).

20 days after service of answer. 60 days for U.S. after service on U.S. attorney. FRCP 12(a).

(§3.45) **RESPONSIVE PLEADING**

To Amended Pleading within 10 days after service of amended pleading or within time remaining for response to original pleading, whichever is longer. ORCP 15 C.

To Amended Pleading within 10 days after service of amended pleading or within time remaining for response to original pleading, whichever is longer. FRCP 15(a).

§21.34/Responsive Pleadings

ALERY V. ALERY, JR., 193 Or 332, 238 P2d 769 (1951). Replevin action seeking recovery of personal property and damages for wrongful withholding. Defendants' answer contained a general denial and a purported separate defense, set forth affirmatively, in which defendants alleged that the property in question was owned by them and their daughter. Plaintiff failed to reply, and judgment on the pleadings was entered for defendants. *Held*: Reversed. As defendants' purported affirmative defense could have been proved under their general denial, it was not "new matter" and no reply was required.

STERNES V. TUCKER, 239 Or 105, 395 P2d 881 (1964). Plaintiff's complaint for return of earnest money alleged that the written earnest money agreement was subject to an oral condition. Plaintiff's reply alleged that the agreement was not binding because of defendant's breach of fiduciary duties to plaintiff. The trial court struck this allegation, and defendant appealed. *Held*: Affirmed. The reply could not assert a basis for relief different from that pleaded in the complaint.

TRACY AND BAKER V. CITY OF ASTORIA, 193 Or 118, 237 P2d 954 (1951). Action for damages for injuries to plaintiffs' realty by landslides allegedly caused by defendant's negligence in dumping material on adjoining land. Defendant alleged affirmatively that the damage was caused by plaintiffs' unauthorized removal of lateral support to a hill, which caused the soil adjacent to a ravine to move downward and a drainage system to break, creating the landslides. In their reply, plaintiffs alleged that the damage was caused by the city's negligence in failing to maintain its drainage system in conjunction with the dumping of material into the ravine. Judgment for defendant was entered. On appeal, plaintiffs urged, *inter alia*, that their complaint and reply should be construed together, giving plaintiffs the benefit of the charges of negligence contained in both. *Held*: Affirmed. The reply cannot aid the complaint by broadening its scope or adding new grounds of relief, and plaintiffs must prevail, if at all, upon the matters alleged in their complaint.

B. (§21.34) Time for Filing Reply

A reply to a counterclaim must be filed within 10 days after service. ORCP 15 A. However, if the person served with a counterclaim is a new party summoned under the provisions of ORCP 22 D, that person has 30 days within which to respond. ORCP 15 A, 7 C(2).

The court may, in its discretion, allow a reply to be filed after the prescribed time. ORCP 15 ~~B~~ D.

C. (§21.35) Failure to Reply

Failure to reply to allegations in a counterclaim results in admission of those allegations unless they concern the amount of damages. ORCP 19 C. But allegations in affirmative defenses are taken as denied and need not be denied in a reply. ORCP 13 B, 19 C. For example, failure to deny a counterclaim for trespassing results in admission of the counterclaim; but the plaintiff's failure to deny an affirmative defense alleging assumption of risk does not constitute admission of that allegation. However, failure to file a reply asserting new matters in avoidance of affirmative defenses raised in an answer results in inability to raise those new matters at trial. ORCP 13 B. Thus, in the foregoing example, if plaintiff wishes to present evidence