For distribution at meeting

Phil Goldsmith
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August 31, 1994

R. Alan Wight
Miller, Nash, Weiner, Hager & Carlsen
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111 S.W. Fifth Avenue
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James Murch
Sherman, Bryan, Sherman & Murch
687 Court Street, NE
P.O. Box 2247
Salem, OR 97308

Dear Alan and Jim:

Given the views expressed by the various members at the July meeting of the Council on Court Procedures, I have decided to withdraw my proposal for amending ORCP 32 F(2) and to concur in the language drafted by Judge Marcus.

I think Judge Marcus' language requires modification of ORCP 32 F(3) to make clear that, in hybrid cases, only claims for monetary damage will be dismissed. I suggest the following revision, with new language highlighted and deleted material lined through:

> F(3) Failure of a class member to file a statement required by the court pursuant to subsection F(2) of this rule will be grounds for ~~the~~ entry of judgment dismissing such class member's claim for monetary relief without prejudice to the right to maintain an individual, but not a class, action for such claim.

I would appreciate your discussing this proposal and one of you letting me know whether it meets with your approval.

Sincerely,

Phil Goldsmith

PG:lmk

P. S. to Jim: I'm sorry not to have talked with you in advance of the July Council meeting. I incorrectly understood that Alan was the only person who had expressed an interest in this matter.

cc: The Honorable Michael Marcus
Maury Holland

Phil Goldsmith
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July 14, 1994

Via Hand Delivery

The Honorable Michael H. Marcus
District Court Judge
1021 S.W. Fourth Avenue
Portland, OR 97204

RE: ORCP 32 F(2)

Dear Judge Marcus:

I have now completed my review of the legislative history of the class action bill enacted by the 1973 legislature, SB 163. Based on that review, I believe the latest proposed revision of ORCP 32 F(2), reflected in your memorandum of June 13, 1994, would require the use of claim forms in a broader range of circumstances than the 1973 legislature intended. To be consistent with its intent, that proposal should be amended by inserting at the beginning, "Except in a class action in which the court makes a finding of superiority based in part or in whole on subsections B(1) or B(2)."

I enclose the critical piece of legislative history, a ten page memorandum described by the State Archives in their summary of the legislative history of SB 163 as "No exh. no: unidentified source." I believe this is a valuable source of legislative history for the following reasons.

1. Much of the language of SB 163 represents a compromise between proponents and opponents of class actions. See Bernard v. First National Bank, 275 Or 145, 168, 550 P2d 1203 (1976). That compromise was reached before the June 13, 1973 hearing before the House Judiciary Committee. Id., 275 Or at 169 n8. Consequently at the time this memorandum was written all parties had an interest in the legislative history accurately reflecting the nature of the compromise reached. The tone of the initial paragraph of this memorandum -- "The answers to several of the questions at the hearing on SB163 on June 13 were in some cases either incorrect or (unintentionally) misleading" -- suggests that it demonstrates legislative intent as compared with

simply being the expression of an advocate for a particular outcome.

2. I have contacted all the people still living who represented interested parties in the 1973 legislative debate on class actions, along with George Cole, the chair of the House Judiciary Committee, and Keith Burns, the most active member of the Senate Judiciary Committee. Of course, after 20 years, memories have faded, and most of the people with whom I talked could provide no information about this memorandum. However, both Charlie Williamson, who then was lobbying for Multnomah County Legal Aid Service, and Tom Donaca, who then was lobbying for Associated Oregon Industries, told me that this document appears to have been prepared by the staff person for the House Judiciary Committee, the late Jena Schlegel.

Page 5 of this memorandum clearly identifies when claim forms must be used -- "in th[e] type of action [subject to] Section 4(1)." Section 4(1) eventually became former ORCP 32 F(1), which applied to ORCP 32 B(3) actions only. Therefore, the 1973 legislature only intended claim forms to be required in former ORCP 32 B(3) actions.

It is easy to imagine why the legislature drew the line in this fashion. A broader claim form requirement, even if limited to actions for individual monetary recovery, would have created great administrative problems, particularly in former ORCP 32 B(1) class actions. For example, former ORCP 32 B(1)(a) created a mandatory (i.e. not opt-out) class when there was the risk that separate lawsuits "would establish incompatible standards of conduct for the party opposing the class." Because ORCP 32 F(3) dictates that a class member who fails to file a claim form is dismissed from the class action without prejudice to the right to file a separate lawsuit, requiring claim forms in former ORCP 32 B(1)(a) class actions would be self-defeating. A person who desired to create difficulties for a defendant through court orders imposing incompatible standards of conduct could avoid the effect of the mandatory class by failing to submit a claim form, getting dismissed from the class action and then filing a separate case.

Requiring claim forms in former ORCP 32 B(1)(b) class actions would create similar problems. Such cases are usually certified as classes when there is a fund smaller than the claims

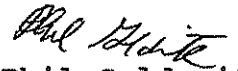
that could be brought against it. To avoid the inequalities and inefficiencies created by the first-come, first-served rule, courts under such circumstances sometimes create mandatory classes.

Without claim forms, distribution of the class recovery is simple. Claim forms would greatly complicate the matter. The first round of claims would be based on everyone sharing the recovery on a pro rata basis. But some class members would not file claim forms. Would another round of claim forms be required to distribute the remaining money? If so, what happens if not all of these claim forms are returned?

These examples show that the 1973 legislature sensibly could have limited claim forms to former ORCP 32 B(3) class actions. As I understand the Council's approach to amending ORCP 32 F(2), however, the critical factor is not policy but what the 1973 legislature actually intended. And it is clear from the face of the enclosed memorandum that the legislature only intended claim forms to apply in former ORCP 32 B(3) class actions.

With the elimination of the tripartite scheme of class actions, some drafting ingenuity is required to replicate the 1973 legislature's policy choice. The language proposed in the first paragraph of this letter is the best I can think of, but there may be better alternatives.

Sincerely,



Phil Goldsmith

PG:lr

cc: R. Alan Wight (via FAX)

Re: Oregon SB163 - Class Actions

The answers to several of the questions at the hearing on SB163 on June 13, were in some cases either incorrect or (unintentionally) misleading.

In discussing Federal Rule 23 (43? or 53?) the impression may have been created that under Rule 23 you only have one notice per class action; it is more common place to see multiple notices involved in virtually all federal class actions that proceed in any meaningful manner.

Representative Cole asked both Senator Keith Burns and Hugh Biggs why the class could not be identified at the outset of the action. Pursuant to Section 4(1) of SB163, individual notice shall be given to all class members who can be identified through reasonable effort. Pursuant to this provision the reasonable effort must be exerted prior to the first notice in order to identify the class. Section 21 authorizes the Supreme Court to set rules for the practice and procedure relating to a coordination of actions, including provisions for giving notice and presenting evidence. The scope of Section 21 should be broad enough to include the determination of the members of the class through reasonable effort at the

outset. Depending upon the case and the trial judge, the provision involving the so-called "second notice" is not required in the federal courts. Unless the Eisen rationale is adopted in all districts, the courts could utilize the so-called "fluid recovery" theory to avoid the burden of determining actual damages attributable to each class member. The provisions of SB163 couple to require the court to determine damages in relation to actual class members without the utilization of the floating calculation of damages based upon the projection of estimates. In short, the Bill foresees the use of traditional damage theories as applicable in a non-class action lawsuit or action raising the same theory of liability. Section 6 as it relates to Section 2 and 4 would allow a court to proceed in a flexible, yet efficient manner to resolve the damage issue.

In passing, note that Section 6 authorizes the severance of issues to an extent along with authorization to proceed with subclasses.

Another question related to the unascertainable class (such as all citizens of Portland) and how the defendant could approach the questions. Considering Section 4(1), check Section 2(2), in particular subsection (c)(D). It is the

parallel provision in the recent Eisen opinion that resulted in the determination that the action was unmanageable as a class action.

Unfortunately, the testimony on June 13 did little to clear the air. The general act of knowledge regarding class actions and the technicalities of them on most people's part is unfortunate but does not help in the resolution of the difficult questions.

To understand 163 and how a class action would proceed, one starts with Section 2 to classify the action and determine the maintainability of the action as a class action. Section 2 indicates that the common questions involved must predominate over questions effecting only individual members. The court is directed to not allow the action to proceed as a class action if it finds that the final determination would require separate adjudications of numerous claims unless those separate adjudications relate primarily to the calculation of damages. This criteria relates to the question of determination of damages provided in Section 4. The court is then given some standards to look at in determining the maintainability of a class action. Some of the fears expressed in relation to the

notice question are answered by the criteria for the maintainability of the action. See subsection 2(2)(c)(A)-(F). It is in the Eisen decision that we find some guidance on maintainability and management of a class action. Unmanageable class actions generally present questions that are more appropriately resolved by legislative action or public enforcement proceedings rather than private litigation on behalf of everyone conceivably involved. In short, a class action to be maintainable under Section 2 must be manageable.

Section 3 directs the court to make a manageability and maintainability decision as soon as practicable after the commencement of the action. These orders are conditional and may be altered or amended including a determination that the action shall not proceed as a class action at a future time depending upon the results of discovery.

As a footnote, the question as to whether Federal discovery would be advisable in the action would again only benefit the plaintiff and the court in determining maintainability and management of the action. No substantial objection, however, has been made by defendant representatives, and, in fact, they have recommended the inclusion of the power to engage in Federal court discovery in a state class action.

This is a procedural question beyond the scope of the present paper.

Section 4 is basically the notice Section. It provides in Section 4(1) that notice shall be given in any Section 2(2)(c) action to all members who can be identified through reasonable effort. The Section continues to provide that in that type of action the class members determined pursuant to the reasonable effort required by Section 4(1) must eventually return an affirmative statement. This affirmative statement must be sent out by the court prior to the entry of a final judgment against the defendant. This could be prior to the determination of liability, not necessarily after the determination of liability, depending upon the case. However, because of the expense involved in providing notice and the fact that in many Federal Court class actions you have multiple notices involved it is foreseeable that quite often the defendant would prefer to have the request for affirmative relief wait until after a determination of liability particularly if a question is raised under Section 4(4). The court under Section 4(2) is given a great deal of discretion along with considerable guidance to facilitate the affirmative relief. The fact that the court prescribes the form of the proof of claim or request for affirmative relief is not unique as the court must always

approve various court orders, notices and proofs of claim. The Section does prohibit the use of the so-called fluid recovery theory in determining damages to be awarded in a judgment. It does not prohibit the use of the fluid recovery theory by consent for settlement purposes. It should be noted that the major uses of the fluid recovery theory has been in settlement such as the drug cases and the Yellow Cab case discussed on June 13. One should be careful in discussing California cases as California does not have class action guidance in its statutory framework as found in Federal Rule 23. Section 4(4) indicates that the proceeding as a class action can be stayed while a determination of the validity or applicability of a statute, law, or interpretation of a regulation is determined where the party seeks to have the statute, etc, declared invalid or where the party has in good faith relied upon such statute or a legislative, judicial, or administrative interpretation of the statute or regulation. This provision is limited in its terms to certain circumstances to where the applicable statute would have to be voided or held inapplicable, but in many instances of class actions involving the target defendant, a solvent corporation, this is the type of issue raised. This provision provides for a more expiditious and economical determination of the issue.

Section 5 provides that a judgment must specify certain things including the names of the members of the class and the amount determined to be recovered by each member.

Section 6 provides that an action may be maintained as a class action with respect to particular issues or tried in subclasses. This Section would seem to provide part of the authorization that Mr. Biggs indicated was not present in Oregon law in relation to severance of issues.

Section 7 authorizes the court to make appropriate orders in a class action including provision for notice. It is in part upon this section that the provisions of Section 4(2) are based. It is also in this Section which an amendment could be made authorizing the court to order the parties to utilize appropriate discovery means as allowed by the Federal Court. One could argue that the provision authorizing a court to make orders dealing with similar procedural matters is sufficient power for a court to authorize the use of discovery means such as interrogatories and motions to produce documents.

Section 8 provides that a class action may not be dismissed or settled without approval of the court and notice

to the class unless the dismissal is to be without prejudice to the class or with prejudice against the class representative and no consideration, direct or indirect, has passed from the defendant to the class representative.

Sections 9 and 10 are self-explanatory and do not need to be discussed. However, this is not to decrease their importance as they are two key Sections providing protection against frivolous or harassment type lawsuits against target defendants.

Section 11 is also self-explanatory.

Sections 12 through 15 provide for the prelitigation notice. These provisions would primarily resolve problems in the area of misrepresentations and deceptive trade practices as opposed to cases involving the question of the applicability of statutes, including interpretation thereof.

Section 14 is a key section in that it provides for the bringing of an action for immediate equitable relief without requiring the prelitigation notice. These provisions are balanced and provide an important means of avoiding unnecessary litigations where mistakes have been made and the defendant is

willing to acknowledge that error.

Sections 16 through 22 relate to the coordination of civil actions. These provisions are designed to prevent the duplication of class litigation where a defendant or defendants in the same industry are subjected to a series of class actions involving the same question. The obvious waste of money involved in the multiple litigations situation as presently exists in California is self-evident. In most of the multiple litigation situations the question involved is one of statutory applicability, the validity of statute, or the validity of actions of a defendant under a given set of statutes. The coordination provisions would allow for these actions to be handled in a single forum for the just, economical and efficient adjudication of the issue. There is an analogy here to the Federal Multidistrict and Complex Litigation Panel procedures for handling similar types of problems in the Federal Courts. The specific sections are based upon a California Act for the Coordination of Class Actions to be effective on January 1, 1974. The California Act was enacted in the 1972 legislative session.

This paper attempts to set out how a class action would proceed under SB163 and does not attempt to comment upon

the pros and cons of class actions nor the arguments of the proponants or opponents of SB163 as to the desirability or undesirability of further amendments. Quite obviously, a single act of legislation cannot contemplate the resolution of all the problems that may be presented in a given type of proceeding; therefore, the Bill as it stands does have some areas where it is open to questions as to what would happen in a given situation as well as flexibility for trial courts to handle those types of actions that do create problems not expressly dealt with in the Bill.

COUNCIL ON COURT PROCEDURES

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April 25, 1994

Via FAX # (503) 224-0155

R. Alan Wight, Esq.
Miller, Nash, Wiener, Hager & Carlson
3500 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, OR 97204-3699

Re: Proposed Amendments to ORCP 32 F(2)

Dear Mr. Wight:

In response to your April 19 request, attached is a proposed amendment to subsection 32 F(2) drafted by Judge Marcus. Its purpose is not to reopen the controversial proposal of the last biennium to abolish the so-called claim form procedure, but is rather to make clear that such procedure is applicable only in money judgment class actions of the kind described by former ORCP 32 B(3). Judge Marcus's proposed language, or something closely resembling it, will almost certainly be on the agenda of the Council's May 14, 1994 meeting for its initial consideration.

The Council will certainly value your thoughts and comments, either in person or in writing. I shall operate on the assumption that you wish to be closely informed about the progress of this proposal, in particular if there is any change in it. You are of course welcome to phone me at any time. In addition, I shall take the initiative to phone you before the May 14 meeting, to let you know whether this matter will come on for discussion on that occasion and also whether the proposal that will be submitted for the Council's deliberation differs in any respect from Judge Marcus's draft.

Cordially,

Maurice J. Holland
Executive Director

Enc.
cc: Mr. Hart
Judge Marcus
Mr. Phillips

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April 19, 1994

The Honorable Michael H. Marcus
District Court Judge
Multnomah County Courthouse
1021 S.W. Fourth Avenue
Portland, Oregon 97204

Subject: Proposal for Amendments to ORCP 32

Dear Judge Marcus:

While attending a seminar today, I was informed by one of the members of the Council on Court Procedures that proposals for additional amendments to ORCP 32 are being formulated or have been presented to the Council for consideration. It was suggested that consideration of the amendments would be facilitated if I would obtain a copy of the proposals at an early stage and participate by giving my views to Council members while amendments were still being formulated.

If the suggestion seems like a good idea, I would appreciate it if you would send me a copy of the amendments now being proposed or under consideration.

Very truly yours,

R. Alan Wight

cc: Mr. Henry Kantor
Mr. Maury Holland

March 21, 1994

To: Hon. Michael J. Marcus, Mike Phillips

From: Maury Holland

Re: Draft Amendments to ORCP 32F(2)

To summarize, following our 3/16/94 conference call, we have agreed to present the language drafted by Judge Marcus to the Council at its April 16, 1994, subject to any further changes any of us might propose that are agreed to by each of us. (Since we have unanimity with respect to Judge Marcus' language, I don't think we should make any changes to that language except as agreed among the three of us.) Below I propose a few changes for your consideration (deletions in square brackets, additions in bold underlines):

F(2) When **in an action maintained under this rule the sole relief awarded to class members other than named parties, apart from interest, assessable costs or awardable attorney fees, consists exclusively of damages calculated either from the total of amounts of damages determined to be awardable to each such class member on the basis of loss, harm or injury found to have been individually sustained thereby or from the total amount for which a defendant is found liable to make restitution for wrongdoing to some or all members of the plaintiff class** [the court awards monetary relief to class members other than named parties and the amount of such relief depends upon individual calculation of the loss, harm or injury sustained by such class members], the court shall, prior to entry of final judgment against a defendant, request **each such** member[s] of the class who may be entitled to monetary relief to submit a statement in a **from** prescribed by the court requesting affirmative relief, which may also, where appropriate, require information

regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class, including the probable degree of sophistication of its members, and the availability of relevant information from sources other than individual class members. The total amount of damages assessed against a [the] defendant shall not exceed the total of amounts of damages determined to be awardable [allowable by the court] to [for] each [individual] class member who has filed a statement required by the court, together with any assessable costs or awardable attorney fees. [assessable court costs, and an award of attorney fees, if any, as determined by the court.]

COMMENTS:

1. First, I assume that both of you agree that, whatever we do with 32F(2), 32F(3) still needs amending as indicated in Mike's and my 12/31/93 memo.

2. My lengthy proposed change at the beginning of the subsection, in contrast to existing proposal of Judge Marcus, is designed to deal more comprehensively with the problem. By "problem," I mean limiting the claim form requirement to what might be called true or pure consumer class actions, corresponding to 32B(3) under the prior rule, but regardless of whether total damages are calculated by aggregating damages individually sustained by class members or by the amount of unjust enrichment on the part of the defendant at the expense of the class. (The latter sort is the kind that is most politically sensitive, and I agree with the thought expressed by both of you during our phone conference that, whatever we do, the "fix" we devise should raise no doubt but that both individual damages and

restitutionary class actions clearly remain subject to the claim form procedure.)

What the language I am proposing is intended to do is to make sure that the claim form procedure is limited to the former B(3)-type class actions, and to negate any inference that it might also apply to a "hybrid" class action (i.e., where an award of damages might be combined with declaratory or injunctive relief), or to class actions in which a monetary award is the sole form of relief (apart from costs, fees or interest), but which would have fallen under the former 32B(1) "necessary party" class action. The latter seems to me much harder to accomplish than it is to exclude hybrid class actions combining injunctive or declaratory with monetary relief. I am by no means certain my proposed language accomplishes the purpose of excluding necessary party class actions in the best possible way, or even at all. As you know, today most necessary party class actions become such, not because members of a class are legally restricted to recovery from discrete and limited funds, but because they are thus restricted because of practical limitations on actual recovery owing to insurance or insolvency. If prior to the recent Rule 32 amendments, Oregon courts would have classified such a class action as a B(1) necessary party class action, that would presumably have taken it out of application of the claim form provision. Should we not try to see if we can fortify that result, if we can devise apt language that is not unduly complicated? I <u>think</u> the wording I've suggested would do that, but we need to give it some careful thought. Phil Goldsmith has been concerned about this for some time, and has given the matter a good deal of thought. So I am copying him on this memo in the hope he will give us the benefit of his thoughts.

3. If we stay with Judge Marcus' suggested language, I shall be able to circulate it as an attachment to the agenda for the April 16 meeting. Given the length of time since the last meeting, and the incredible slowness of the mails locally inside the state, I want to get the 4/16/94 agenda out by April 1 or shortly thereafter. If, however, both of you agree that my substitute, or something like it, is worth pursuing, then I suppose that our proposal to the full Council will have to go over to the May meeting, so that we have time to polish the language and make sure we are accomplishing what we want to. There will be no problem if we decide to put this matter over, since there will be plenty of items to occupy the 4/16/94 meeting fully.

c: Phil Goldsmith

COUNCIL ON COURT PROCEDURES

Established by the Oregon Legislature in 1977

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March 2, 1994

Hon. Michael H. Marcus
District Court Judge
Multnomah County Courthouse
1021 S.W. Fourth Avenue
Portland, OR 97204-1197

Dear Judge Marcus:

Thanks for your February 26 letter with proposed amending language to subsection 32 F(2). Mike Phillips and I will need a bit of time to analyze and react to your proposal. We should be prepared to confer not later than about March 15, at which time I shall ask Gilma to set up a three-party conference call. Of course, two or three follow-on conference calls might then be needed in order for us to reach agreement on specific language to present at the April 15 meeting.

Cordially,

Maurice J. Holland
Executive Director

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March 2, 1994

Michael V. Phillips, Esq.
1158 High Street, Ste. 102
Eugene, OR 97401

Dear Mike:

The attached letter from Judge Marcus regarding Rule 32 does not show that you were either addressed or copied on it. After you and I have had a chance to digest his proposed amending language, we should chat by phone to see where each of us stands. Following that, Gilma could set up a three-party conference call to see how far the three of us can come to agreement.

Cordially,

Maurice J. Holland
Executive Director

Enc.

DISTRICT COURT OF THE STATE OF OREGON
for MULTNOMAH COUNTY
1021 SOUTHWEST FOURTH AVENUE
PORTLAND, OREGON 97204

DEPARTMENT NUMBER 12
(503) 248-3250

MICHAEL H. MARCUS
JUDGE

Prof. Maury Holland
Executive Director
Council on Court Procedures
University of Oregon
School of Law Room 331
1101 Kincaid Street
Eugene OR 97403

February 26, 1994

Dear Prof. Holland:

Although I expected to be added to the class action subcommittee, it wasn't until I received Phil Goldsmith's letter that I realized the next step was mine, but here's my suggestion for what it's worth:

> F(2) When the court awards monetary relief to class members other than named parties and the amount of such relief depends upon individual calculation of the loss, harm or injury sustained by such class members, the court shall, ~~P~~prior to ~~the final~~ entry of ~~a final~~ judgment against a defendant, ~~the court shall~~ request members of the class who may be entitled to monetary relief to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member who has filed a statement required by the court, assessable court costs, and an award of attorney fees, if any, as determined by the court.

Of course, I would have no objection to a provision allowing the court to dispense with a claim form if it has all the information it needs upon which to base any calculation, or if the parties waive the claim form requirement, but I suspect the former would exceed our delicate mission. Should we meet or conference call??

Sincerely,

Michael H. Marcus

DISTRICT COURT OF THE STATE OF OREGON
for MULTNOMAH COUNTY
1021 SOUTHWEST FOURTH AVENUE
PORTLAND, OREGON 97204

DEPARTMENT NUMBER 12
(503) 248-3250

MICHAEL H. MARCUS
JUDGE

Prof. Maury Holland
Executive Director
Council on Court Procedures
University of Oregon
School of Law Room 331
1101 Kincaid Street
Eugene OR 97403

February 26, 1994

Dear Prof. Holland:

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Of course, I would have no objection to a provision allowing the court to dispense with a claim form if it has all the information it needs upon which to base any calculation, or if the parties waive the claim form requirement, but I suspect the former would exceed our delicate mission. Should we meet or conference call??

Sincerely,

Michael H. Marcus

December 31, 1993

To: Chair and Members, Council on Court Procedures

From: Mike Phillips and Maury Holland

Re: Proposed "Clean-up" Amendments to ORCP 32F(2)and(3)

At its Dec. 12, 1992 meeting the Council promulgated several amendments to ORCP 32, the class action rule, as set forth in the attachment to this memo. The basic thrust of these amendments was to authorize broader judicial discretion to mold procedures regarding notice and the like according to the circumstances of particular cases without the strictures imposed by the abstract classification scheme of former section 32B. An important component of this effort was the amendment of section 32B eliminating the tripartite classification of class actions provided by its prior language in favor of an enumeration of factors to be considered by a court in deciding whether to certify a class action under what is now the unitary scheme of this section as amended. In thus amending section 32B, a majority of the Council was persuaded that the prior classification scheme, under which the universe of class actions was assumed to be neatly divisible into three sharply distinguishable categories corresponding to subsections B(1), B(2) and B(3) of the former section, was unduly abstract and rigid. This was deemed undesirable, largely because a number of important procedural consequences turned upon whether a given class action was determined to fall within the B(3) category in contrast to either of the categories defined by 32B(1) or (2).

Consistent with this amendment of section 32B the Council also amended subsection 32F(1). The former version of 32F(1) prescribed elaborate and detailed notice requirements, but only in class actions maintained under former subsection 32B(3). Since the latter was in the process of being jettisoned as a discrete category, subsection 32F(1) obviously could no longer refer to it. Unfortunately, the possible impact of these amendments to former section 32B and subsection 32F(1) upon subsections 32F(2) and (3) was not adequately considered by the subcommittee that worked on this project or by the full Council when it voted to promulgate them. The problem left over is that, neither in their present amended form nor in their prior form, subsections 32F(2) and (3) are not limited in their application to any distinct category of class action, but appear to apply indifferently to all. Prior to the '92 amendments, however, the applicability of both subsections 32F(2) and 32F(3) would probably have been understood as being limited by what was then paragraph 32F(1)(a), whose applicability was expressly confined to class actions maintained under prior subsection 32B(3). Since subsection 32F(1) as amended is not in terms restricted to

the no-longer-existing 32B(3) or to any other discrete category of class action, the difficulty is that the "statement" mandated to be requested by 32F(2), with its restrictive consequences for any judgment entered against a defendant, would seem to be pertinent to all class actions.

This is a result we believe should be avoided. Subsections 32F(2) and (3), in combination, constitute the controversial "claim form" provision of Oregon's class action rule, a feature that is unique to it among the class action rules of all American jurisdictions. The Council seriously considered abolishing it as part of the battery of '92 amendments of this rule, but finally determined not to do so. We are not proposing to reopen that debate. But we do think it would be highly regrettable if any Oregon court were to feel compelled by the language effective 1/1/94 to apply these claim form provisions in any class action other than one falling within the category formerly described by the prior version of subsection 32B(3).

The kind of class action described by former subsection 32B(3), which will of course continue to be adjudicated in the courts of this state despite the demise of its distinctive categorization, is generally known as a "common question" or "consumer" class action. Its salient characteristic is that it aggregates in a single action claims, predominantly for money damages, on the part of hundreds or thousands of class members, each of which could be litigated separately in a conventional civil action. While all class members will have sustained harm or injury arising out of more or less the same transaction or occurrence, which is required in order to meet the standard of one or more common questions of law or fact, amounts of damages recoverable by each class member will normally differ and be individually determined following adjudication of defendant's liability to the class generally.

While the desirability of a claim form or "opt-in" provision is debatable in the case of consumer or common question class actions, that debate was resolved last biennium in favor of its retention. But no one knowledgeable about class actions has ever, as far as we are aware, maintained that such a provision makes any sense for other kinds of class actions. The most obvious example of where a claim form provision would be wholly inapt is a civil rights class action, wherein the predominant form of relief is injunctive or declaratory in favor of a class nebulously defined in terms of some shared group characteristic. This is the kind of class action envisioned by former subsection 32(B)(2). Although perhaps less obvious, we also believe that the claim form procedure mandated by subsections 32F(2) and (3) are also unnecessary and inappropriate for the kind of class action envisioned by former subsection 32B(1). In the latter the predominant form of relief might well money damages. But, almost

by definition, class members in this sort of class action are "persons needed for just adjudication" within the meaning of Rule 29. In other words, they are not claimants who could litigate their individual claims separately, without joinder of other claimants having claims that are legally related and interconnected in such a manner as to make them what used to be called either "necessary" or "indispensable" parties.

To fix this problem all that is needed is language that would adequately describe in substance, rather than by bare reference to 32B(3), which is still present in the rule but no longer describes a discrete category of class action, the kind of class action for which the Council last biennium decided that the claim form procedure should be retained. To accomplish this we propose the following amendments to subsections 32F(2) and (3) [language to be added in italics; language to be deleted in square brackets]:

> F(2) Prior to [the] final entry of [a] judgment against a defendant *in an action maintained under this rule wherein the predominant form of relief consists of damages awarded to some or all class members calculated from the harm or injury they are found severally to have sustained,* the court shall request members of the class to submit a statement . . . .
>
> F(3) Failure of a class member to file a statement required by the court *pursuant to subsection F(2) of this rule* will be grounds for [the] entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.

As with any rules amendment, we should strive to attain the

greatest economy of words consistent with the clearest possible expression of intent. We trust that the full Council will find ways to improve upon the language proposed above. Incidentally, the bracketed articles have nothing to do with the specific problem at hand. Our thought was simply to clear out a bit of unnecessary verbiage.

CLASS ACTIONS
RULE 32

A. Requirement for class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

A.(1) The class is so numerous that joinder of all members is impracticable; ~~and~~

A.(2) There are questions of law or fact common to the class; ~~and~~

A.(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; ~~and~~

A.(4) The representative parties will fairly and adequately protect the interests of the class; and

A.(5) In an action for damages ~~under subsection (3) of section B of this rule~~, the representative parties have complied with the prelitigation notice provisions of section H of this rule.

B. Class action maintainable. An action may be maintained as a class action if the prerequisites of section A of this rule are satisfied, and in addition, the court finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to this finding include:

B.(1) The extent to which the prosecution of separate actions by or against individual members of the class ~~would~~ create a risk of:

B.(1)(a) Inconsistent or varying adjudications with respect to ~~individual~~ members of the class which would establish incompatible standards of conduct for the party opposing the class; or

B.(1)(b) Adjudications with respect to ~~individual~~ members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; ~~or~~

B.(2) ~~The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final~~ The extent to which the relief sought would take the form of injunctive relief or corresponding declaratory relief with respect to the class as a whole; ~~or~~

B.(3) The ~~court finds that the~~ extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members~~, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages. The matters pertinent to the findings include: (a)~~

B.(4) tThe interest of members of the class in individually controlling the prosecution or defense of separate actions;

~~b~~B.(5) t~~T~~he extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

~~c~~B.(6) t~~T~~he desirability or undesirability of concentrating the litigation of the claims in the particular forum;

~~d~~B.(7) t~~T~~he difficulties likely to be encountered in the management of a class action ~~that will be eliminated or significantly reduced if the controversy is adjudicated by other available means~~; ~~and~~

~~e~~B.(8) w~~W~~hether or not the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class~~; and (f) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal~~.

C. Determination by order whether class action to be maintained.

C.(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether ~~and with respect to what claims or issues~~ it is to be so maintained and~~, in action pursuant to subsection (3) of section B of this rule, the court~~ shall find the facts specially and state separately its conclusions thereon. An order under