

BROTHERS & ASH

AND ASSOCIATES

August 22, 2000

Via Facsimile (541) 346-3834

Maurice Holland
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Dear Maury:

You have asked for my proposed amendment to ORCP 34.

I am proposing an amendment to ORCP 34B(2) as shown below (language to be added in **bold underlined**; to be deleted [*in italics enclosed in square brackets*):

*"B(2) Against such party's personal representative or successors in interest [at any time within four months after the date of the first publication of notice to interested persons, but not more than one year after such party's death.] **unless the personal representative or successor in interest serves notice of the death of the party on the claimant and the claimant fails to substitute the personal representative or successor in interest within four months of service of such notice.***

This amendment puts the burden where it belongs. There is simply no just rationale for allowing the death of a party to a lawsuit which has already been commenced to cause the action to be dismissed because the plaintiff did not discover the defendant's death. This is simply a trap for the unwary and allows a defendant's attorney to "lay low" in the hopes that opposing counsel won't find out that his client is dead. For an example of the trap in action, see Mendez v. Walker, 272 Or. 602, 538 P.2d 939 (1975).

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There is no longer a statutory basis for such a result. For example, ORS 30.080 through 30.100 provide that claims for relief arising out of injury to a person caused by the wrongful act of another shall not abate upon the death of the wrongdoer. ORS 30.090 provides that if no probate of the estate of the wrongdoer has been instituted within 60 days from the death of the wrongdoer, the court, upon motion of the injured person, shall appoint an administrator of the estate.

ORS 30.100 provides that in the event of the death of a wrongdoer while an action is pending, the court, upon motion of the plaintiff, shall cause to be substituted as defendant the personal representative of the wrongdoer and the action shall continue against such personal representative.

While it makes sense for a person who has a claim against a deceased person to have to comply with rules relating to creditors of estates generally, there is simply no reason why an action which has been filed against an individual should be dismissed because that individual dies if the plaintiff is not made aware of his death. Once a claim has been filed and both sides are represented it is, in my opinion, inappropriate to place the burden on the plaintiff not only to continue the litigation, but also to keep track of the health of the opposing party.

Furthermore, ORCP 34B(2) is probably unconstitutional as written. The provision conflicts with ORS 115.003 which requires a personal representative to ascertain each person who has or asserts a claim against the estate and requires the personal representative to notify each such claimant. That requirement follows a United States Supreme Court decision, Tulsa Professional Collection Services v. Pope, 45 U.S. 478, 108 S.Ct. 1340, holding that a creditor's claim is a property interest and that due process requires a personal representative who could reasonably ascertain the identity of creditors against the estate to give those creditors actual notice, before a claim may be abated.

Pursuant to ORS 115.003, responsibility for failure to give notice to a claimant falls on the personal representative. The net effect is that an attorney representing an insurance company might be successful in having an action dismissed for failure to substitute the personal representative within four months and the injured party would have a claim only against the personal representative or an estate with limited assets.

ORS 115.005(5)(b) provides that this section does not affect or prevent "...[t]o the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which the decedent or personal representative is protected by liability insurance at the time the proceeding is commenced." This section suggests that even if you don't file a claim against a decedent within the time allowed, one may still recover insurance proceeds. However, ORCP 34B would, arguably, cause an action to abate even after an insured decedent has appeared and answered.

One must also consider that there are many claims that may be asserted against a decedent for which there is no insurance coverage. Such claims would be barred by ORS 115.005 and ORCP 34B(2). Ironically, it appears that if a suit has not been filed, a claimant is entitled to actual notice pursuant to ORS 115.003, but if a suit has been filed, pursuant to ORCP 34, it abates if substitution of the personal representative is not completed within four months.

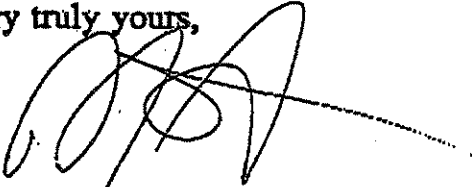
All of the above is complicated by ORS 115.315 which provides, "An action against a decedent commenced before and pending on the date of death of the decedent may be continued as provided in ORCP 34B(2) without presentation of a claim against the estate of the decedent." ORS 115.315 existed prior to the adoption of the Oregon Rules of Civil Procedure. Previously the statute referred to ORS 13.080 which included language identical to ORCP 34B(2). However, ORS 115.003, which places the burden upon the personal representative to notify claimants, was adopted in 1989, following the United States Supreme Court decision requiring notice and subsequent to the adoption of ORCP 34B. Accordingly, the language of ORCP 34B(2) is an anomaly in that it continues to allow the loss of a claim even in the absence of any notice of death. It therefore seems appropriate that the obligation to act be placed on the personal representative and not on the unknowing plaintiff.

At best ORCP 34B(2) is confusing and at worst it provides a defense to a defendant when none would otherwise exist. The potential for injustice is well illustrated in the matter of Castro v. Ogburn, 140 Or. App. 122, 914 P.2d 1, where the court went to great lengths to avoid the harsh results dictated by ORCP 34B. Such gymnastics should not be required. The practice of law is difficult enough without adding the burden of making sure that a negligent party is alive throughout the course of litigation.

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Thank you for your consideration.

Very truly yours,



BRUCE J. BROTHERS

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