NOTICE
PUBLIC MEETING
COUNCIL ON COURT PROCEDURES

Saturday, September 14, 2002
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

AGENDA

1. Call to order (Mr. Spooner)

2. Approval of 6-8-02 meeting minutes (attached)

3. Reports and recommendations regarding current ORCP amendment projects (Mr. Spooner):

   3a. Amendments to **ORCP 44 and 55** recommended by the Medical Records Committee (see Attachment 3a to this agenda) (Ms. Clarke and Mr. Merrick)

   3b. Amendments to **ORCP 59** recommended by the Jury Innovation Committee (see Attachment 3b to this agenda) (Judge Harris)

   3c. Recommended amendment to **ORCP 34** (see Attachment 3c to this agenda) (Mr. Brothers)

   3d. Recommended amendment to **ORCP 43** (see Attachment 3d to this agenda) (Mr. Sugerman)

4. Old business (Mr. Spooner):

5. New business (Mr. Spooner)

   5a. Recommended amendment to **ORCP 21** to add as a new defense that can be raised by pre-answer motion that retaining jurisdiction over the action would contravene an enforceable forum-selection clause (see Attachment 5a to this agenda) (Mr. Bruce C. Hamlin* and Prof. Holland)

*Participating by speaker phone.

6. Adjournment (Mr. Spooner)

Note

The following ORCP amendments have been approved to date for tentative adoption for publication and comment:

1. To amend **ORCP 47 C** by substituting "at least 60 days before the date set for trial" for "at least 45 days before the date set for trial." (See minutes of 2-9-02 meeting at pp. 2-3.)

2. To amend **ORCP 68 C(4)(c)(i)** by adding at the end of that subparagraph:

", including any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees or costs and disbursements." (See minutes of 3-9-02 meeting at pp. 3-4.)

3. Technical amendment to **ORCP 62 F** changing statutory reference from "ORS 19.125" to "ORS 19.415(3)." (See minutes of 5-11-02 meeting at p. 3.)

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of June 8, 2002
Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present:

Richard L. Barron
Bruce J. Brothers
Ted Carp
Allan H. Coon
Rodger J. Isaacson
Nely L. Johnson
Nicolette D. Johnson
Alexander D. Libmann
Jeffrey S. Merrick
Ralph C. Spooner
David F. Sugerman
John L. Svoboda
David Schuman

The following attended by speaker telephone: Benjamin M. Bloom, Kathryn H. Clarke, Daniel L. Harris and Shelley D. Russell.

Excused:

Lisa A. Amato
Don A. Dickey
Robert D. Durham
Connie Elkins McKelvey
Karsten Hans Rasmussen

Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order. The Chair, Mr. Spooner, called the meeting to order at 9:38 a.m.

Agenda Item 2: Approval of minutes (attached). The minutes of the May 8, 2002 meeting were, without objection or correction, approved as distributed with the agenda of this meeting.

Agenda Item 3: Progress reports, discussion, and recommendations regarding current ORCP amendment projects (Mr. Spooner):

Sub-item 3a. From the Medical Records Committee (ORCP 44 and 55) (see Attachment 3a to agenda of this meeting) (Mr. Merrick). Mr. Merrick reported that this committee had reached consensus on amendments to Rules 44 and 55 that are needed in order to make them compliant with current HIPAA regulations, with only a very few scrivener's issues relating to details of language left to be finalized. He added that the committee had not ventured beyond the task of ensuring that ORCP 44 and 55 become compliant with HIPAA regulations, such as by attempting to reach one or more compromises on issues that have divided the plaintiffs and defendants bars in recent years apart from a matter as to which there is no disagreement, that is, ensuring that all parties receive identical copies of the same medical records.

Mr. Spooner suggested that Mr. Merrick summarize each of the committee's proposed amendments in turn. In response Mr. Merrick summarized the amendments as follows:

Section 44 E would be amended to delete references to "hospital records," to be replaced by the term "individually identifiable health information" as used in HIPAA regulations. This term is defined in amended paragraph 55 H(1)(a) in conformity with those regulations. In addition to "hospital records," this term would also replace the term "medical records" as the latter appears in the deleted section 55 I. No disagreement was expressed concerning this amendment.

Paragraph 55 H(1)(b) would define "qualified protective order" in conformity with HIPAA regulations.

Paragraph 55 H(1)(c) elicited prolonged discussion. In particular some questions were raised about how its definitional subparagraphs should best be arranged and numbered in the interest of clarity. Prof. Holland observed that designations such as "H(1)(c)(i)(a)" are not authorized by ORCP 1 E. Some members queried whether paragraph H(1)(c) makes sufficiently clear the relationship between a qualified protective order on the one hand and, on the other, the assurances required by subparagraphs (c)(i), c(i)(a), and c(i)(b) in the affidavit or declaration constituting a "satisfactory assurance." Judge Isaacson suggested that the word "representative" be used throughout, in lieu of "attorney," in the interest of consistency of usage.

There were several other drafting changes suggested by various members. Mr. Spooner suggested that, rather than trying to work through all these suggestions at this meeting, Ms. Clarke and Prof. Holland be tasked with finalizing the language of these amendments in the form they will be considered and voted upon at the 9-14-02 meeting. There was general agreement with this suggestion.

Sub-item 3b. From the Jury Innovation Committee (ORCP 59) (Judge Harris). Judge Harris stated that, during the next three months, prior to the 9-14-02 meeting, he would be working with members of the committee with a view to bringing to that meeting a proposed

amendment to Rule 59 that would deal only with the matter of written jury instructions. He added that any amendment proposed at that meeting would reflect a consensus on the part of the committee, and also his own on-going consultations with other interested individuals and organizations as well as comments and observations of Council members at recent meetings. He concluded by stating that all other topics relating to jury innovation, apart from jury instructions, seemed to him to be off the table for the current biennium.

Sub-item 3c. Possible amendment of ORCP 43 B to impose continuing duty to supplement responses to requests for production of documents, etc. (see Attachment 3c to agenda of this meeting) (Mr. Sugerman). At the request of Ms. Clarke Mr. Spooner read the text of Alternative A shown in the aforementioned Attachment 3c. One or more members asked whether, given that failure to comply with this new supplementation duty would be sanctionable, there is need for some amendment to Rule 46 to specify the appropriate sanction.

Mr. Sugerman stated that he and Prof. Holland would consider that question before the September meeting and, if it appeared necessary, prepare an amendment to Rule 46. Apart from whether an amendment to Rule 46 is needed, no objections were raised to Alternative A, which was therefore tentatively adopted by consensus subject to a subsequent vote at the 9-14-02 meeting.

Agenda Item 4: Old business (Mr. Spooner).

Sub-item 4a. Possible need to amend ORCP 70 A(2)(a)(ii) to avoid linking names of judgment debtors with their social security numbers (Judge Carp). Judge Carp said that he needed to consult with some people on the legislative staff and, depending upon what that consultation disclosed, would prepare something for the Council to consider at the September meeting.

Sub-item 4b. Technical amendment of ORCP 27 B (see Attachment 4b to agenda of this meeting) (Judge Rasmussen). Judge Carp stated that Judge Rasmussen prefers the language in Alternative A, and also noted that the amending language should be added to ORCP 69 B(1)(d), not to ORCP 27 B. In the absence of Judge Rasmussen further discussion of this sub-item was deferred to the 9-14-02 meeting. Prof. Holland said he would contact Judge Rasmussen to notify him of the Council's expectation.

Sub-item 4c. Proposal to amend ORCP 34 B(2) (see Attachment 4c to agenda of this meeting) (Mr. Brothers). Mr Brothers briefly recapitulated the basic purpose of this proposed amendment, which he stated was to shift the burden of finding out about the death of a defendant from the plaintiff to the lawyer representing that defendant, where it more fairly and sensibly belongs. He further explained that, if the notice required by ORS 115.003(3) is mailed

to the plaintiff or the plaintiff's attorney, the burden of substituting as defendant the decedent's personal representative or successor in interest would remain on the plaintiff.

There was prolonged discussion of whether the word "unless," as it appears in line 6 of the proposed amendment, correctly expressed this purpose. There was final agreement that it indeed did express this purpose. Mr. Brothers explained that this amendment can best be understood as being intended to give plaintiffs the same protection against being barred for failure timely to substitute a personal representative or successor in interest as ORS 115.003(3) gives to other kinds of claimants against decedents' estates. He further explained, in answer to a question by Judge Barron, why this amendment contained no reference to the four months that are mentioned in the statute. In other words, he stated that this amendment provided that if a personal representative or successor in interest failed to provide the plaintiff or plaintiff's attorney with notice of the defendant's death during the pendency of the action, the motion to substitute would still have to be made at some point, but would not be subject to any time limitation. Judge Carp commented that this amendment would not change the substantive law regarding claims against decedents' estate in any way, but would simply remove a possible trap which serves no useful purpose.

Ms. Clarke asked whether the amendment might better require delivery or mailing of the death notice to both the claimant *and* his or her attorney, rather than to one *or* the other. Judge Isaacson suggested rewording of line 8 as follows: "to the attorney of the claimant or the claimant if unrepresented, ..." with which suggestion there appeared to be general agreement.

Discussion of this sub-item continued by Mr. Brothers' pointing out that the present draft of this amendment did not require "service" of the notice on the claimant or the claimant's attorney, but simply "delivery" or "mailing." Some further questions relating to the clarity with which the amendment was worded were raised by, among others, Judge Johnson and Ms. Clarke.

At the conclusion of this discussion it was agreed that Mr. Brothers and Prof. Holland would work together on finalizing the language of this amendment in response to several members' comments and queries at this meeting, and that, at her request, a copy of their work product would be forwarded to Judge Johnson before its distribution with the 9-14-02 meeting agenda.

Sub-item 4d. Proposed ORS and ORCP statutory amendments re use of declarations (see Attachment 4d to agenda of this meeting) (Prof. Holland) (for information only). Prof. Holland invited the Council's attention to the ORS and ORCP amendments endorsed by the Procedure and Practice Committee and approved by the OSB Board of Governors for inclusion in the package of proposed legislation that will be sponsored by the OSB in the 2003 legislative session. No objection to these amendments, furnished solely for information, was made.

Agenda Item 5: New business (Mr. Spooner):

<u>Sub-item 5a.</u> Proposal to amend ORS 1.735 (see Attachment 5a to agenda of this meeting).

<u>Sub-item 5b.</u> Agreement regarding scheduled July 13 and August 10 meeting dates (Mr. Spooner). There was general agreement with Mr. Spooner's suggestion that, rather than holding the meetings scheduled for July 13 and August 10, the more productive use of the three months prior to the 9-14-02 meeting would be to allow the respective committees to continue their work among themselves in attending to any problems of drafting detail which remain unresolved. Prof. Holland reminded members that a convenient means by which committee members could communicate with one another during these three months was by using the Council's list serve address, COCP@law.uoregon.edu. At the conclusion of this discussion Mr. Spooner announced that the next meeting of the Council would be September 14, 2002, when the fullest possible attendance will be of utmost importance. No objection to this modification of the meeting schedule was expressed.

Agenda Item 6: Adjournment (Mr. Spooner). Without objection Mr. Spooner declared the meeting adjourned at 12:08 p.m.

Respectfully submitted,

Maury Holland,
Executive Director

PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATION RULE 44

* * * * *

E Access to [*hospital records*] individually identifiable health information. Any party against whom a civil action is filed for compensation or damages for injuries may obtain 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*] **individually identifiable health information as defined in Rule 55 H** within the scope of discovery under Rule 36 B. [*Hospital records*] **Individually identifiable health information** [*shall*] **may** be obtained **by written patient authorization, by an order of the court, or** by subpoena in accordance with Rule 55 H.

SUBPOENA RULE 55

* * * * *

[*H Hospital records.*

H(1) ***Hospital.*** *As used in this rule, unless the context requires otherwise, "hospital" means a hospital, as defined in ORS 442.015(19), or a long term facility or an ambulatory surgical*

center, as those terms are defined in ORS 442.025, that is licensed under ORS 441.015 through 441.097 and community health programs established under ORS 430.610 through 430.695.]

H Individually identifiable health information.

H(1) *Definitions*. As used in this rule, the terms "individually identifiable health information" and "qualified protective order" are defined as follows:

H(1)(a) "Individually identifiable health information" means information which identifies an individual or which could be used to identify an individual; which has been collected from an individual and created or received by a health care provider, health plan, employer, or health care clearinghouse; and which relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

H(1)(b) "Qualified protective order" means an order of the court, by stipulation of the parties to the litigation or otherwise, that prohibits the parties from using or disclosing individually identifiable health information for any purpose other than the litigation for which such information was requested and which requires the return to the original custodian of such information or destruction of the individually identifiable health information (including all copies made) at the end of the litigation.

*[H(2) **Mode of compliance**. Hospital records may be obtained by subpoena only as provided in this section. However, if disclosure of any requested records is restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless the requirements of the pertinent law have been complied with and such compliance is evidenced through an appropriate court order or through execution of an appropriate consent. Absent such consent or court order, production of the requested records not so protected shall be considered production of the records responsive to the subpoena. If an appropriate consent or court order does accompany the subpoena, then production of all records requested shall be considered production of the records responsive to the subpoena.]*

H(2) *Mode of Compliance*. Individually identifiable health information may be obtained by subpoena only as provided in this section. However, if disclosure of any requested records is restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless the requesting party has complied with the applicable law.

H(2)(a) The attorney for the party issuing a subpoena requesting production of individually identifiable health information must serve the custodian or other keeper of such information either with a qualified protective order or with an affidavit or declaration together with attached supporting

documentation demonstrating that: (i) the party has made a good faith attempt to provide written notice to the individual or the individual's attorney that the individual or the attorney had 14 days from the date of the notice to object; (ii) the notice included the proposed subpoena and sufficient information about the litigation in which the individually identifiable health information was being requested to permit the individual or the individual's attorney to raise an objection to the court; (iii) the individual did not object within the 14 days or, if objections were made, they were resolved and the information being sought is consistent with such resolution. The party issuing a subpoena must also certify that he or she will, promptly upon request, permit the patient or the patient's representative to inspect and copy the records received.

[H(2)(a)] **H(2)(b)** Except as provided in subsection (4) of this section, when a subpoena is served upon a custodian of [*hospital records*] **individually identifiable health information** in an action in which the [*hospital*] **entity or person** is not a party, and the subpoena requires the production of all or part of the records of the [*hospital*] **entity or person** relating to the care or treatment of an individual, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records responsive to the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

[*H(2)*(b] **H(2)(c)** The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance at court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with subparagraph [*H(2)(b)(iv)*] **H(2)(c)(iv),** then a copy of the **proposed** subpoena shall be served on the person whose records are sought and on all other parties to the litigation, not less than 14 days prior to service of the subpoena on the entity or person. **Any party to the proceeding may inspect the records provided and/or request a complete copy of the records. Upon request, the records must be promptly provided by the party who issued the subpoena at the requesting party's expense.**

[*H(2)(c)*] **H(2)(d)** After filing and after giving reasonable notice in writing to all parties who have appeared of the time and

place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

[H(2)(d)] **H(2)(e)** For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of [*section D(3) of this rule*] **subsection (3) of section D.**

H(3) **Affidavit or declaration of custodian of records.**

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit **or declaration** of a custodian of the [*hospital*] records, stating in substance each of the following: (i) that the affiant **or declarant** is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records responsive to the subpoena; (iii) that the records were prepared by the personnel of the [*hospital, staff physicians, or*] **entity** or person[*s*] acting under the control of either, in the ordinary course of [*hospital*] **entity's or person's** business, at or near the

time of the act, condition, or event described or referred to therein.

H(3)(b) If the [*hospital*] **entity or person** has none of the records described in the subpoena, or only **a** part thereof, the affiant **or declarant** shall so state in the affidavit **or declaration**[,] and shall send only those records of which the affiant **or declarant** has custody.

H(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit **or declaration**, more than one affidavit **or declaration** may be [*made*] **used.**

H(4) **Personal attendance of custodian of records may be required.**

H(4)(a) The personal attendance of a custodian of [*hospital*] records and the production of original [*hospital*] records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of [*hospital*] records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rules of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

H(4)(b) If more than one subpoena duces tecum is served on a custodian of [*hospital*] records and personal attendance is required under each pursuant to paragraph (a) of this subsection,

the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H(5) **Tender and payment of fees.** Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

H(6) ***Scope of discovery.*** **Nothing in this rule is intended to expand the scope of discovery beyond that provided in Rule 36 or Rule 44.**

[I Medical records.

1(1) ***Service on patient or health care recipient required.*** *Except as provided in subsection (3) of this section, a subpoena duces tecum for medical records served on a custodian or other keeper of medical records is not valid unless proof of service of a copy of the subpoena on the patient or health care recipient, made in the same manner as proof of service of a summons, is attached to the subpoena served on the custodian or other keeper of medical records.*

H(2) ***Manner of service.*** *If a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient not less than 14 days before the subpoena is served on a custodian or other keeper of medical records. Upon a showing of good cause, the court may shorten or lengthen the 14-day period. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by Rule 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on the patient or health care recipient not less than 14 days before the subpoena is served on the custodian or other keeper of medical records. Upon a showing of good cause, the court may shorten or lengthen the 14-day period. Service on a patient or health care recipient under this section must be made in the manner specified by Rule 7 D(3)(a) for service on individuals.*

I(3) ***Affidavit of attorney.*** *If a true copy of a subpoena duces tecum for medical records of a patient or health care recipient cannot be served on the patient or health care recipient*

in the manner required by subsection (2) of this section, and the patient or health care recipient is not represented by counsel, a subpoena duces tecum for medical records served on a custodian or other keeper of medical records is valid if the attorney for the person serving the subpoena attached to the subpoena the affidavit of the attorney attesting to the following: (a) That reasonable efforts were made to serve the copy of the subpoena on the patient or health care recipient, but that the patient or health care recipient could not be served; (b) That the party subpoenaing the records is unaware of any attorney who is representing the patient or health care recipient; and (c) That to the best knowledge of the party subpoenaing the records, the patient or health care recipient does not know that the records are being subpoenaed.

I(4) ***Application.*** *The requirements of this section apply only to subpoenas duces tecum for patient care and health care records kept by a licensed, registered or certified health practitioner as described in ORS 18.550, a health care service contractor as defined in ORS 750.005, a home health agency licensed under ORS chapter 443 or a hospice program licensed, certified or accredited under ORS chapter 443.]*

Attachment 3A-9 to
9-14-02 agenda

ALTERNATIVES FOR AMENDING ORCP 59 B

ORCP 59 B presently reads as follows:

B Charging the jury. In charging the jury, the court shall state to them all matters of law necessary for their information in giving their verdict. Whenever the knowledge of the court is by statute made evidence of a fact, the court shall declare such knowledge to the jury, who are bound to accept it as conclusive. If either party requires it, and at commencement of the trial gave notice of that party's intention so to do, or if in the opinion of the court it is desirable, the charge shall either be reduced to writing, and then read to the jury by the court or recorded electronically during the charging of the jury. The jury shall take such written instructions or recording with it while deliberating upon the verdict and then return the written instructions or recording to the clerk immediately upon conclusion of its deliberations. The clerk shall file the written instructions or recording in the court file of the case.

It is proposed that we amend ORCP 59 B by replacing the third sentence of that rule (underlined above) with one of the following alternatives (A, B, C or D):

Alternative A

At the request of any party before the court charges the jury, or if in the opinion of the court it is desirable, the court shall prepare, or require a requesting party to prepare, written jury instructions and shall read the instructions to the jury during the charging of the jury. If, in the opinion of the court, the preparation of written instructions is not feasible, the court may record the instructions electronically during the charging of the jury.

Alternative B

At the request of any party before the court charges the jury, or if in the opinion of the court it is desirable, the court shall prepare written jury instructions and shall read the instructions to the jury during the charging of the jury. If, in the opinion of the court, the preparation of written instructions is not feasible, the court may record the instructions electronically during the charging of the jury.

(This is the same as alternative A, without the language "or require a requesting party to prepare." The ability to require a party to prepare instructions appears to be covered by UTCR 6.070)

Alternative C

The charge shall be reduced to writing and then read to the jury by the court. If, in the opinion of the court, the preparation of written instructions is not feasible, the court may record the instructions electronically during the charging of the jury.

(This option makes it mandatory to put the instructions in writing or record them.)

Alternative D

The charge shall be reduced to writing and then read to the jury by the court. If, in the opinion of the court, the preparation of written instructions is not feasible, the court may verbally charge the jury or may record the instructions electronically during the charging of the jury.

ATTACHMENT 3C TO AGENDA OF 9-14-02 MEETING

Proposed Amendment to ORCP 34 B(2) (Mr. Brothers)
[Language to be added in bold underlined;
language to be deleted in italics enclosed in square brackets]

RULE 34. SUBSTITUTION OF PARTIES

* * * * *

B. Death of a Party; Continued Proceedings. In case of the death of a party, the court shall, on motion, allow the action to be continued:

B(1) By such party's personal representative or successors in interest at any time within one year after such party's death; or

B(2) Against such party's personal representative or successors in interest [*at any time within one year after such party's death*] **unless the personal representative or successors in interest mail or deliver notice including the information required by ORS 115.003(3) to the claimant or to the claimant's attorney, if the claimant is known to be represented, and the claimant or the claimant's attorney fails to move the court to substitute the personal representative or successor in interest within 30 days of mailing or delivery.**

* * * * *

Below is how amended 34 B(2) would read as thus amended:

B(2) Against such party's personal representative or successors in interest unless the personal representative or successors in interest mail or deliver notice including the information required by ORS 115.003(3) to the claimant or to the claimant's attorney, if the claimant is known to be represented, and the claimant or the claimant's attorney fails to move the court to substitute the personal representative or successor in interest within 30 days of mailing or delivery.

To: Library, file

UNIVERSITY OF OREGON

August 19, 2002

Mr. Bruce J. Brothers
Bruce J. Brothers & Associates
P.O. Box 871
Bend, OR 97709

Hon. Nely L. Johnson, Circuit Court Judge
Multnomah County Courthouse
1021 S.W. Fourth Avenue
Portland, OR 97204

Dear Bruce and Nely: *Re: Proposed Amendment to ORCP 34 B(2)*

Enclosed is the latest draft of Bruce's proposed amendment to ORCP 34 B(2) which he recently sent me. Unless I hear to the contrary from either or both of you before Sept. 1, which is the approximate date on which the 9-14-02 agenda with attachments should be mailed out, this draft is the form in which this proposed amendment will be distributed to Council members.

As Nely probably recalls, and Bruce certainly does, I made a big fuss at the June 8 meeting to the effect that the word "unless" in line 8 of Bruce's draft did make sense to me. It took Bruce quite a while to convince me, and I believe a few members who shared my confusion, that "unless" is indeed precisely the right word.

With that track record on my part, I hesitate to raise yet another point of doubt, but nonetheless shall risk trying your patience by doing do. Amended 34 B(2) still does not quite make complete sense to me for the following reason, but that reason has nothing to do with the word "unless."

In substance and effect, this amendment would direct courts to allow, on motion, an action against a defendant who dies while an action is pending against him or her to be "continued" against the pr or successor* in interest, presumably all the way to entry of judgment, unless the pr or successor mails or delivers a ORS 115.003(3) notice to the claimant or claimant's attorney and the latter fails to move for substitution of defendants within 30 days of the mailing or delivery. The point on which I'm somewhat confused is, assuming there is a failure to give

*I wonder whether "successors" should be changed to "successor" throughout, a very minor point that can easily be resolved at the 9-14-02 meeting. In fact, Bruce's draft used the singular "successor" in line 12 of his draft, and therefore that is the way I have it. Obviously, this word should be either consistently singular or consistently plural at every point in Rule 34, even though inconsistency would probably not confuse anyone.

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notice, how could it be said that the action would "continue" against the pr or successor when it is the deceased, not they, who is still the only named defendant? Perhaps I do not correctly understand what it means to "continue" an action. To me it means that a given action literally continues without what used to be called "abatement," but by or against one or more parties other than those originally named, with the former being substituted on motion.

In other words, suppose an action is commenced against John Doe, a living defendant who dies while the action is pending and for whom a pr is duly appointed. Further suppose that, for whatever reason, Doe's pr fails for an indefinite period of time to mail or deliver the ORS 115.003(3) notice.** How could it be said that, owing to this failure the action is allowed to "continue" against the pr when Doe is the only named defendant and, by hypothesis, neither the claimant nor the claimant's attorney becomes aware that poor old Doe has died?

If I correctly understand what Bruce is trying to achieve, my sense is that all Council members are in agreement with that purpose. Suppose the worst case, where the attorney for the pr or successor does nothing but grin like a Cheshire cat and lets the action go to judgment against the deceased as the only named defendant, hoping that a judgment against the deceased defendant would be worthless against the pr or successor. It seems to me the neatest solution would be for the law to provide that, in instances where the pr or successor has failed to provide the 115.003(3) notice, a judgment against a deceased defendant can be almost automatically converted into a judgment against the pr or successor which would reach assets of the estate.

I know very little about the law of decedents' estates, and have not yet had time to research ORS chapter 115 thoroughly, but I wouldn't be totally surprised if that chapter already provides a satisfactory solution to the problem Bruce has in mind. If it does not, I would then be amazed that the OSB, in particular the Procedure & Practice Committee, has never tackled what would seem to be an obvious problem, however seldom it happens that a claimant's attorney fails to learn of a defendant's demise by one means or other. Of course, that would not be the first time I've ever been amazed. But if that situation were actually to arise, wouldn't the judge, never mind the claimant's attorney, raise hell with the defendant's attorney? Wouldn't the latter face the real possibility of being referred to the Bar for some sort of ethical violation, a kind of misrepresentation to the court by silence when "speaking up" is required?

Having foolishly barked up the wrong tree once, there is a real possibility that I'm doing so once again. Therefore, so that Bruce doesn't have to turn away clients just to find the time to straighten me out about this, let me repeat that, absent word from one or the other or both of you, I'll go ahead and distribute the proposed amendment in the form shown in the enclosure.

Cordially,

/s/
Maury Holland

**I now feel as though I'm writing a law school exam question.

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES RULE 43

* * * * *

B Procedure. The request may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party. The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. A defendant shall not be required to produce or allow inspection or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time. The party upon whom a request has been served shall comply with the request, unless the request is objected to with a statement of reasons for each objection before the time specified in the request for inspection and performing the related acts. If objection is made to part of an item or category, the part shall be specified. **The party upon whom a request has been served has a continuing duty to respond to the request by supplementing production of responsive documents or things within a reasonable time.** The party submitting the request may move for an order under Rule 46 A with respect to any objection to or other failure to respond to the request or any part thereof**, any failure to**

supplement a response to a request, or any failure to permit inspection as requested.

* * * * *

Attachment 5a to Agenda of 9-14-02 Meeting

Proposed Amendment to ORCP 21

This proposal was suggested by Bruce Hamlin in his June 7, 2002 letter to me. *See* p. 5a-4. As stated in that letter Bruce was prompted to forward this proposal by the June 5, 2002 decision in *Black v. Arizala*, 182 Or App 16, 48 P3d 843 (2002). *See* pp. 5a-5 to 5a-18.

The usual practice of the Council has not been to consider, much less tentatively approve for publication and comment, amendment proposals coming before it for the first time at a September meeting, when referring them for study by a committee is no longer feasible. Proposals coming in so late are typically deferred for "full processing" in the next biennium. However, this particular amendment seems both to Bruce and me sufficiently urgent that the Council should give some serious consideration to tentatively adopting it for publication and comment. Such tentative adoption would not, of course, commit the Council to promulgating this amendment at its December meeting. (The amendment I have drafted appears at pp. 5a-19 to 5a-20.) Please bear in mind that, if something along the lines of this amendment is not tentatively adopted at this meeting, the earliest date one could become effective would be Jan. 1, 2006, apart from the chance one is enacted by the 2003 legislature.*

While it will not bring Oregon's courts to their knees, my opinion is that the alternate holding in *Black* has at least the potential for causing real problems. The case involved plaintiffs' claims that defendants had fraudulently sold them interests in a limited partnership. Defendants moved under ORCP 21 A(1) for dismissal for lack of subject-matter jurisdiction on the basis of a forum-selection clause in the partnership agreement specifying Puerto Rico as the exclusive forum in which any litigation relating to the agreement could be commenced. The trial court granted this motion. On appeal the Court of Appeals reversed on two alternate grounds. The first, not pertinent here, is that the claims in this action were not subject to the forum-selection clause since they arose out of defendants' conduct prior to the plaintiffs' becoming parties to the partnership agreement. The alternate holding, which is pertinent here, was that, even were the forum-selection clause applicable to the claims in this action, such clause cannot be raised by means of a 21 A(1) motion since the circuit court did have subject-matter over this action, which cannot be defeated by agreement to the contrary among contracting parties.

For what it is worth I think both of these holdings were correct. The problem created by the majority opinion in *Black* is its further holding that the only acceptable way under the ORCP

*There is perhaps some possibility that people urgently concerned about the alternative holding in *Black* will seek to have the 2003 legislature enact a statutory fix amending ORCP 21 A. Whenever that sort of thing happens, it tends to undermine the legislature's support for, and good will toward, the Council, much of the value of which, from legislators' perspective, is to keep ORCP matters off their backs.

of seeking enforcement of a forum-selection clause is by means of a motion for summary judgment pursuant to ORCP 47. Judge Armstrong's opinion, concurring in the result, well states what is wrong with using summary judgment as the only proper way to enforce a forum-selection clause:

> "Courts universally recognize the importance of a speedy resolution of this issue. Every other jurisdiction that has considered the question provides a method for resolving the issue by an early pre-trial motion; none relegates that resolution to summary judgment or trial. With a few exceptions, the jurisdictions permit the parties to present evidence outside of the pleadings to support their positions on the motion, and the court resolves any factual disputes. * * * *
>
> "The majority refuses to follow these other jurisdictions *because no Oregon procedural rule expressly provides for enforcing a forum selection clause by a motion to dismiss.* * * * *" 182 Or App at 35-36 (emphasis added).

What Judge Armstrong obviously had in mind is that the very purpose of forum-selection clauses, assuming they are applicable and enforceable as not contrary to Oregon's public policy, is largely defeated if defendants who invoke them have to litigate as far as summary judgment, or even trial, in other to get the benefit of them. In other words, actions commenced in contravention of enforceable forum-selection clauses should be subject to dismissal before any further pleading or discovery.

In addition to this problem identified by Judge Armstrong, in my view the majority holding to the effect that summary judgment is the only permissible way to enforce a forum-selection clause could well lead to another sort of difficulty. This relates to a procedural error that seems to be quite frequently made in Oregon procedure, which is to classify any trial-court ruling wherein the judge had to resolve controverted issues of fact as the grant or denial of summary judgment, despite the clear language of ORCP 21 A to the contrary, i.e. the language beginning: "If, on a motion to dismiss asserting defenses (1) through (7), * * * *"

For trial courts to decide whether or not a given forum-selection clause is applicable as against a particular claim will seldom require them to make findings of disputed facts, but there are other circumstances when it will. Obvious examples of such other circumstances are when the plaintiff contends that the clause is unenforceable on grounds such as unconscionability, gross disparity in bargaining power, fraudulent inducement, or the like. Suppose that ruling on such a contention requires the trial court to resolve disputed facts. According to the majority holding in *Black*, summary judgment could be granted enforcing a forum-selection clause only if there is no genuine issue as to any fact material to unconscionability, fraudulent inducement, and so forth. In fact, the majority opinion is very explicit about this:

> "If the enforceability of a forum selection clause cannot be resolved as a matter of law, a trial court may wish to bifurcate the issue for trial. If the parties wish an issue of fact to be submitted to a jury as part of the determination of the issue,

special interrogatories are available that enable a trial court to make rulings of law based on jury findings. * * * *" 182 Or App at 26, n. 4.

Consider what the unfortunate consequence of the above statement could be. Suppose a case where there is a genuine issue of fact material to the enforceability of a forum-selection clause. In order to get a favorable resolution of this issue, the defendant would have to prevail at trial to a jury, which would be a Pyrrhic victory since the clause would have been effectively nullified in order to establish its validity.

The federal and most state counterparts to ORCP 21 A include improper venue as one of the defenses that can be raised by pre-answer motion. *See, e.g.,* Fed. R. Civ. P. 12(b)(3). If ORCP 21 A included improper venue as a defense that could be raised by pre-answer motion Oregon courts would almost certainly hold that enforcement of a forum-selection clause could be sought by means of a motion to dismiss for improper venue. But amending ORCP 21 A to add improper venue as a basis for dismissal is not feasible, since it would upset too much long established law to the effect that the sole remedy for improper venue is a motion to transfer to a proper venue. *See* ORS 14.110, 14.120.

The draft of my suggested amendment to ORCP 21 is at pp. 5a-19 to 5a-20

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June 7, 2002

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Mr. Maury Holland
Executive Director
Counsel in Court Procedures
University of Oregon School of Law
1515 Agate Street, Room 307C
Eugene, OR 97403

Re: ***Counsel on Court Procedures.***

Dear Maury:

I noticed the enclosed Court of Appeals decision, decided on Wednesday. From a civil procedures standpoint, what the Court of Appeals concluded is that ORCP 21 does not permit a motion to dismiss on the basis of a forum selection clause. The concurring opinion points out that federal courts have not treated the absence of a rule that expressly provides for a motion to dismiss on the grounds of foreign non-convenience as having any significance. The concurrence analogized a forum selection clause to the common law doctrine of foreign non-convenience.

Considering the shear number of contracts which contain forum selection clauses, it would seem that there ought to be a rule that expressly provides a procedure for invoking such clause. In my mind, a motion for summary judgment is not the appropriate vehicle since it is invoked when the parties have conducted significant, and perhaps expensive, discovery. Furthermore, it would seem logical for the court to order dismissal without prejudice, or even to condition dismissal on the moving party agreeing that the statute of limitations was tolled as of the filing in Oregon.

Very truly yours,

LANE POWELL SPEARS LUBERSKY LLP

Bruce C. Hamlin

Anchorage, AK
Olympia, WA
Portland, OR
Seattle, WA

London, England

BCH:sc
Enclosure
cc w/encl.: Ralph Spooner
999999.2002/368921.1

Black v. Arizala, 182 Or App 16, 48 P3d 843 (2002)*

Before ARMSTRONG, Presiding Judge, and EDMONDS and KISTLER, Judges.

EDMONDS, J.

Plaintiffs John J. Lenahan, Marilyn S. Lenahan, and Willowrun, L.P. (plaintiffs), appeal from a judgment dismissing their claims for security law violations and related torts on the ground that a forum selection clause in a limited partnership agreement required them to bring the case in Puerto Rico. We reverse.

The consolidated cases involve investments in one or more of several related enterprises whose purpose is to seek the award of radio communication frequencies from the Federal Communications Commission for use in data transfer and other communications businesses. Plaintiffs, who are Oregon residents, are parties to only one of the cases, *Black v. Arizala*. That case involves their investment in PCS 2000, L.P. (PCS), a Delaware limited partnership whose headquarters are in San Juan, Puerto Rico. In their first amended complaint, plaintiffs allege that, in the process of selling limited partnership interests in PCS, defendants violated the federal securities laws and the securities laws of Oregon and several other jurisdictions; committed common-law fraud; and violated the Oregon Racketeer Influenced and Corrupt Organization Act (ORICO), ORS 166.715 to ORS 166.735.

Plaintiffs invested in PCS by purchasing limited partnership interests. As part of the purchase, they became parties to the PCS Agreement of Limited Partnership (the Agreement). All of their claims in this case are based on events that occurred before they purchased those interests and became parties to the Agreement. Among other things, plaintiffs allege that defendants represented that PCS could buy licenses from the FCC at a certain price when defendants in fact did not know what the price would be; did not disclose the cost of engineering, acquiring, and installing the necessary equipment; did not disclose the risk of losing the licenses if PCS failed to raise sufficient capital or to build the infrastructure within the required times; did not disclose that two principal promoters had been involved in previous unsuccessful transactions in the telecommunications industry and had defaulted on guarantees to equipment suppliers, creating a risk that it would be more difficult for PCS to raise capital; and did not disclose the increased costs and disadvantages of the technology that PCS would use in comparison to conventional cellular telephones.

The trial court dismissed the case based on the choice of law, forum selection, and arbitration clause of the Agreement. That clause provides:

> "This Agreement shall be construed and enforced in accordance with and governed by the law of the State of Delaware, excluding that body of law relating to conflicts of law. Any dispute under this Agreement shall be submitted to binding arbitration in San Juan, Puerto Rico under the rules of the American Arbitration Association concerning commercial disputes, and the parties agree to be bound by any decision reached under such rules. Any arbitrator shall be specifically bound by the provisions respecting limitation of liability set forth in this Agreement. Venue for any legal action arising from this Agreement, including enforcement of any arbitration award, shall be in San Juan, Puerto Rico."

*Some footnotes omitted, and remaining ones renumbered.

Although this clause appears to provide for arbitration as the primary method of resolving disputes under the Agreement, defendants did not ask the court to order plaintiffs to arbitrate their claims. Rather, they relied on the final sentence, which establishes venue "for any legal action arising from this Agreement" in Puerto Rico. They argued that that sentence required plaintiffs to bring this action in Puerto Rico, not in Oregon. The trial court agreed and dismissed the case.

The threshold issue concerns our standard of review. That standard depends on the nature of defendants' motion, about which the parties disagree. On appeal, plaintiffs argue,

> "Defendant[s] called [their] motion a Rule 21 motion, but it is not. ORCP 21 does not contain a motion to dismiss based on an arbitration/venue clause in a contract between the parties. Because defendants submitted, and the trial court relied on, facts that do not appear on the face of the [complaints], the motion to dismiss was really a motion for summary judgment."

Defendants counter,

> "ORCP 21A authorizes the trial court to determine facts relating to personal jurisdiction on a motion to dismiss. This court has applied that rule to review of a dismissal that turned on interpretation for a forum selection clause. Where the trial court has granted such a motion to dismiss, this Court assumes that the trial court made the necessary findings of fact to reach that conclusion. This Court reviews the trial court's assumed factual findings for 'any competent evidence' and its legal conclusions for errors of law."

Defendants rely on *Industrial Leasing Corp. v. Miami Ice Machine Co.*, 126 Or.App. 80, 867 P.2d 548 (1994), in support of their argument about our standard of review. In that case, the plaintiff appealed from a judgment dismissing its complaint for lack of personal jurisdiction under ORCP 21 A(2). The plaintiff was in the business of leasing equipment and purchasing lessors' interests in equipment leases. It entered into an agreement that contained a forum selection clause to obtain the assignment of the defendant's lessor's interest in an equipment lease. When the lessee failed to make the payments under the lease, the plaintiff made a demand that the defendant repurchase the lease in accordance with the terms of the assignment. The defendant moved to dismiss under ORCP 21 A(2), arguing that it had never done business in Oregon and lacked the requisite minimum contacts with the state necessary to confer personal jurisdiction. The trial court granted the defendant's motion without making any findings. On appeal, the plaintiff argued that the trial court had erred in granting the motion because the trial court should have treated the motion as a motion for summary judgment and there was at least *prima facie* evidence of personal jurisdiction in the record. The defendant countered that its motion should not be treated as a motion for summary judgment because ORCP 21 A(2) expressly authorizes courts to determine the facts relating to personal jurisdiction and, because the trial court granted the motion, it must be assumed that it made the necessary findings to reach that conclusion. We held that under ORCP 21 A(2) the court may determine the jurisdictional facts at the time of the motion to dismiss but that, for purposes of the motion, the trial court erred in concluding that the facts were insufficient to establish personal jurisdiction.

We fail to perceive how our holding in *Industrial Leasing Corp.* controls in this case where there is not an issue regarding jurisdiction. In our view, the issue concerning the enforceability of a forum selection clause in a contract is a matter of contract law and not a matter that would implicate subject matter jurisdiction under ORCP 21 A(1). That rule provides that "lack of jurisdiction over subject matter" may be challenged by a motion to dismiss. The concept of subject matter jurisdiction is well defined as pertaining to the authority of the court to deal with the general subject involved in the action. *Garner v. Alexander,* 167 Or. 670, 120 P.2d 238 (1941), *cert. den.* 316 U.S. 690, 62 S.Ct. 1281, 86 L.Ed. 1761 (1942). "It exists when the constitution, the legislature or the law has told a specific court to do something about the specific kind of dispute in issue." *Greeninger v. Cromwell*, 127 Or.App. 435, 438, 873 P.2d 377 (1994). Under the Oregon Constitution, subject matter jurisdiction exists in the circuit courts unless a statute or rule of law divests them of jurisdiction. *Novich v. McClean*, 172 Or.App. 241, 245, 18 P.3d 424, *rev. den.* 332 Or. 137, 27 P.3d 1043 (2001).

Merely because the parties have agreed upon a forum selection clause that limits where the parties may litigate their disputes under their agreement does not implicate subject matter jurisdiction. Parties by agreement have neither the power to confer or the power to divest an Oregon court of subject matter jurisdiction. *Fox et ux v. Lasley*, 212 Or. 80, 318 P.2d 933 (1957), overruled on other grounds by *Hawkins v. Hawkins,* 264 Or. 221, 237, 504 P.2d 709 (1972). The issue of the enforceability of a forum selection clause is qualitatively different from the issue of subject matter jurisdiction. The issue in this case is like other issues that arise from terms that parties may agree upon that operate as conditions precedent to the right to litigate in court or to procure a court-ordered remedy, such as a mandatory arbitration clause[1] or an agreement that damages for breach are limited to a certain remedy. In general, those kinds of issues, including the issue of the enforceability of a forum selection clause, are subject to challenges about the scope and subject matter of the term, whether it was the product of misrepresentation, deceit or coercion, and whether the term has been waived or one party is estopped from enforcing it. All of those issues are the kinds of issues that are subject to the Oregon Rules of Civil Procedure. In sum, ORCP 21 A(1) does not authorize a motion for dis-

[1]Unlike the Oregon Rules of Civil Procedure, which do not expressly provide for a procedure for determining the validity of forum selection clauses, ORS 36.310 provides for a statutory proceeding regarding the enforcement of arbitration clauses in agreements. It provides, in relevant part, "The court or judge shall hear the parties, and if satisfied that the making of the contract or submission or the failure to comply therewith is not an issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement or submission. If the making of the contract or submission or the default is an issue, the court or the judge shall proceed summarily to the trial thereof. If no jury trial is demanded by either party, the court or judge shall hear and determine such issue. Where such an issue is raised, any party may * * * demand a jury trial of the issue, and if such demand is made, the court or judge shall make an order referring the issue to a jury in the manner provided by ORCP 51 D."

missal on the basis of a forum selection clause.[2]

Defendants filed their motion to dismiss under ORCP 21. In their motions, they argued that, "[p]ursuant to the contractual agreement between the parties, this entire action should have been filed in San Juan, Puerto Rico and thus should be dismissed by this Court." In support of their motion, they referred to section 16.5 of the PCS Agreement. The Agreement was attached as an exhibit to an affidavit by one of defendants' attorneys and was filed contemporaneously with the motion. The "forum selection" clause had not been pled by plaintiffs at the time. Although a complaint can be dismissed under ORCP 21 A(8) for failure to state ultimate facts sufficient to constitute a claim, the rule does not authorize the use of facts that do not appear on the face of the pleading to grant a motion under subsection (8). Consequently, despite its label, defendants' motion cannot properly be considered under ORCP 21. We conclude that plaintiffs are correct. Defendants' motion was the functional equivalent of a summary judgment motion under ORCP 47 C.

The concurrence disagrees that we should treat defendants' motion as a summary judgment motion. According to it, the motion should be treated as a nonenumerated type of motion to dismiss, for which the court can generate appropriate procedures under the authority of ORS 1.160. That statute provides, in pertinent part, that when jurisdiction is conferred on a court and in the exercise of that jurisdiction,

> "if the course of proceeding is not specifically pointed out by the procedural statutes, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the procedural statutes."

The flaw in the concurrence's reliance on ORS 1.160 is that the statute authorizes a court to exercise its jurisdiction by implementing its own procedure only when there is no adequate existing procedure already available. In *K. v. Health Division*, 26 Or.App. 311, 319-20, 552 P.2d 840 (1976), *rev'd on other grounds* 277 Or. 371, 560 P.2d 1070 (1977), the court "consider [ed] * * * whether this is an appropriate case for it to provide procedures under ORS 1.160." It examined *Wulff v. Sprouse Reitz Co., Inc.*, 262 Or. 293, 313, 498 P.2d 766 (1972), and *Amer. Timber/Bernard v. First Nat'l,* 263 Or. 1, 500 P.2d 1204 (1972), and found that ORS 1.160 was intended to provide authority for creating new procedures only when there was no available procedure already established. It concluded, "Here, * * * there is no claim of another available procedure. We hold, then, that this is a proper case for use of new procedures as provided in ORS 1.160[.]" *K.*, 26 Or.App. at 320, 552 P.2d 840. Also, in *Amer. Timber/Bernard,* 263 Or. at 10, 500 P2d 1204, the Supreme

[2]In light of our ruling that a motion to enforce a forum selection clause is not cognizable under ORCP 21 A(1), the means by which to challenge the venue chosen by a plaintiff will depend on the facts of the particular case. It may be that the issue may be resolved in some cases under ORCP 21 B (providing for judgment on the pleadings). In others, the issue may be resolved as a matter of law under ORCP 47 where there is no genuine issue of material fact about what the parties intended. A motion under ORCP 47 can be filed "at any time after the expiration of 20 days from the commencement of the action." ORCP 47 A. If the enforceability of a forum selection clause cannot be resolved as a matter of law, a trial court may wish to bifurcate the issue for trial. If the parties wish an issue of fact to be submitted to a jury as part of the determination of the issue, special interrogatories are available that enable a trial court to make rulings of law based on jury findings. *See* ORCP 53 B and ORCP 61 B.

Court observed that,

> "[T]raditionally, the formation of procedural rules in this state has been considered to be a function of the legislature. Where a procedure at law has been provided for the vindication of a claim, we do not believe it to be our function under [ORS 1.160] to provide another procedure[.]"

See also Household Finance v. Bacon, 58 Or.App. 267, 271, 648 P.2d 421, *rev. den.* 293 Or. 653, 653 P.2d 998 (1982) ("The redemption statutes do not provide a procedure for curing a faulty notice under circumstances presented here. Accordingly, we think the court had authority under ORS 1.160 to provide 'any suitable process or mode of proceeding' to conform to the spirit of the redemption statutes."). Here, the ORCP provide a procedure to determine the enforceability of a forum selection clause. Depending on the specific facts of each case, such an issue can be decided on the pleadings, on summary judgment, or at trial. Moreover, ORCP 53 B permits the bifurcation of issues for trial. The availability of those procedures obviate the need for the court to create a different procedure, and where the legislature has provided adequate procedures, this court should not create a different procedure pursuant to ORS 1.160. We hold that defendants' motion is properly dealt with as a motion under ORCP 47 C.

When we review a judgment based on ORCP 47 C, we inquire whether there is a genuine issue of material fact in the summary judgment record and whether the moving party is entitled to judgment as a matter of law. We turn to the merits of the case and the parties' arguments. Plaintiffs argue that their claims do not "arise from" the parties' partnership agreement but rather from events that occurred before they entered into the partnership and therefore the forum selection clause does not govern their claims.[3] In support of their argument, they point to the language in the forum selection clause that refers to "any dispute under this Agreement" or "any legal action arising from this Agreement." Defendants respond, "the fact that the alleged conduct complained of occurred prior to their entry into [the partnership agreement] does not take their claims outside the forum selection clause." (Footnote omitted.)

The issue, thus, is one of determining the meaning and effect of the forum selection provision of the Agreement. In construing a contract, our goal is to determine and give effect to the intent of the parties, if possible. *See* ORS 42.240. We begin by examining the text of the disputed provision in the context of the document as a whole. If the provision is unambiguous, the analysis is over. Whether the terms of a contract are unambiguous is a question of law. In the absence of an ambiguity, we construe the contract as a matter of law. If the agreement is ambiguous, we examine extrinsic evidence of the parties' intent. Finally, if a contractual provision remains ambiguous after that examination, we rely on appropriate maxims of construction. *Yogman v. Parrott*, 325 Or. 358, 361-64, 937 P.2d 1019 (1997).

The Agreement provides that "[v]enue for any action arising from this Agreement" shall be in Puerto Rico. Only legal actions that fit within that description are subject to the forum selection provision. The relevant dictionary definitions of "arise" include "to originate from a specific source," "to come into being," and "to become operative." *Webster's Third New Int'l Dictionary, 117* (unabridged ed. 1993). According to

[3]Plaintiffs appear to accept that, if the forum selection provision applies, it provides for exclusive rather than concurrent venue in Puerto Rico.

the same dictionary, "from" is "used as a function word to indicate the source or original or moving force of something as * * * (4) the place of origin, source, or derviation of a material or immaterial thing." *Id.* at 913. Those definitions allow at least a reasonable inference that the forum selection provision in the Agreement was intended to apply only to legal actions that flow directl from the terms and requirements of the agreement itself.

In addition, the record shows that plaintiffs were not parties to the Agreement at the time that defendants allegedly made the representations about which plaintiffs complain. Also, the Agreement does not contain representations or other inducements that might lead a person to invest in the partnership. Rather, it describes the structure of the partnership, the relationships between the limited partners and the general partner, management of the business, capital contributions, responsibility for expenses, distribution of profits, and other similar matters that one would expect such an agreement to cover. It is inferable in light of those facts that the parties contemplated that the forum selection clause in the Agreement would govern disputes over matters that arose after the Agreement was signed but that section 16.5 is unrelated to pre-agreement representations.

Defendants refer us to federal case law that they say requires a contrary conclusion. We note that we are not bound by a federal court's interpretation of similar or even identical contract language. But even if we were persuaded by the reasoning in those opinions, defendants are faced with an unsurmountable hurdle because of the procedural posture of this case under ORCP 47 C. As parties moving for summary judgment, defendants have the burden of demonstrating that the forum selection clause unambiguously requires the dismissal of plaintiffs' claims. *Eagle Industries, Inc. v. Thompson,* 321 Or. 398, 404, 900 P.2d 475 (1995). As we have said, there is at least a reasonable inference from the text and context of the forum selection clause that it was not intended to cover disputes arising from conduct that occurred before plaintiffs were parties to the Agreement. We conclude that the trial court erred when it granted summary judgment to defendants on the basis of the forum selection clause.

We next consider plaintiffs' argument that the court also erred in holding that, as a result of the 1995 amendments to ORS 166.725, plaintiffs have failed to state a claim under ORICO.[4]

When a court determines that it is without jurisdiction, it cannot proceed to decide any other issue. *See Dippold v. Cathlamet Timber Co.*, 98 Or. 183, 188, 193 P. 909 (1920). Any decision that it made on another issue would not be essential to its judgment and thus would not give rise to issue preclusion. *See Drews v. EBI Companies,* 310 Or. 134, 139-40, 795 P.2d 531 (1990). In this case, we review the trial court's ORICO rulings because it did in fact have jurisdiction and those rulings provide an alternative ground for that portion of its judgment that dismisses the ORICO claims.

In order to recover under ORICO, a plaintiff must prove that the defendant engaged in a pattern of racketeering activity, ORS 166.720. Before 1995, the law did not require a prosecution or convinction for the elements of the crime in order for a plaintiff to obtain a civil recovery. ORS 166.725 (1993). Rather, a plaintiff could prove the crime in the civil ORICO case. *See Computer Concepts, Inc. v. Brandt,* 310 Or 706, 716-18, 801 P2d 800 (1990). As amended in 1995, ORS 166.725(6) and (7) now require, so far as the crimes

[4]On an appeal from a final judgment, we normally review any intermediate order that involves the merits or necessarily affects the judgment that is appealed. ORS 19.425. Because the trial court dismissed the case on grounds unrelated to the merits, it is not clear that its rulings on ORICO issues satisfy those criteria.

alleged in this case, that the plaintiff prove that the defendant has been convicted of the alleged crimes and that any rights of appeal have expired. Without proof of those facts, a plaintiff cannot obtain either injunctive relief or damages. In addition, ORS 166.725(11)(b) now provides that the cause of action accrues only when the criminal conviction is obtained. Or Laws 1995, ch 619, § 1,

The events that are the basis for plaintiffs' ORICO claims occurred before the effective date of the 1995 amendments, so plaintiffs' ORICO claims had accrued before that date. Defendants do not assert that plaintiffs have failed to state a claim under the pre-1995 version of ORS 166.725. Rather, they argue, and the trial court agreed, that the 1995 version applies to plaintiffs' claims. If the trial court is correct, plaintiffs have not stated, and apparently cannot state, an ORICO claim. On the other hand, if the pre-1995 version applies, the trial court erred in dismissing those claims on the grounds that defendants asserted.

The legislature did not expressly provide whether the 1995 amendments are retroactive--that is, whether they affect rights arising out of events that had occurred before the amendments became effective. Nothing in the wording of the amendments suggests that it intended to address that issue. In the absence of an express direction, we look to the purpose of the changes and to the general rules for construing statutes to determine whether the amendments are retroactive.

In general, a statutory change that affects legal rights and obligations arising out of past acts is not retroactive, but one that affects the remedies that a party may receive for a violation of its legal rights is retroactive. Courts label the first kind of change "substantive" and the second "remedial." However, as the Supreme Court has noted, the words "substantive" and "remedial" are more labels that we apply after reaching a conclusion than they are aids to the analysis. *See Joseph v. Lowery,* 261 Or. 545, 548-49, 495 P.2d 273 (1972); *see also Vloedman v. Cornell,* 161 Or.App. 396, 399-401, 984 P.2d 906 (1999).

In this case, plaintiffs had a fully accrued cause of action before the amendments became effective. That was a substantive right. The amendments significantly modified the substance of what plaintiffs had to prove to be able to assert that right. Before the amendment, they could recover merely by showing that defendants had violated a criminal statute; after the amendment, they had to show that defendants had been convicted of that crime. The difference is significant; not only does a conviction require a higher standard of proof than does a civil recovery, but plaintiffs would have to rely on a public authority to bring the criminal case rather than on their own proof. The statute did not change the remedy that plaintiffs would receive if they prevailed, but it profoundly affected what they needed to prove in order to prevail.

In *Thornton v. Hamlin,* 41 Or.App. 363, 597 P.2d 1307 (1979), the plaintiff sued an employee of the Department of Transportation to recover for injuries that he suffered in an accident involving a snowplow that the defendant was driving. The plaintiff received workers' compensation benefits from his employer as a result of the accident. After the accident, the legislature amended the Tort Claims Act to make public bodies and their employees immune from liability when the injured party received such benefits. The defendant argued that the amended statute applied to the case. We noted that the amendment was silent on its retroactive effect and held that we would not construe it to apply retroactively if doing so would " 'impair existing rights, create new obligations, or impose additional duties with respect to past transactions.' " *Id.* at 366, *quoting Derenco v. Benj. Franklin Fed. Sav. and Loan,* 281 Or 533, 539 n 7, 577 P2d 477, *cert den* 439 US 1051 (1978). We then held that, "in cutting off plaintiff's previous accrued cause of action, such retroactive application would impair an existing right belonging to plaintiff." *Id.* We therefore refused to apply the amended statute.

We do not see any difference between a statute that entirely cuts off a claim, as did the statute in *Thornton,* and one that changes the elements of that claim, as does the statute in this case. In either situation, the statute has changed the legal consequences that attach to past actions and has impaired the plaintiff's existing rights. We do not presume that the legislature intends that result. The trial court erred in holding that the 1995 amendments to ORS 166.725 apply to events that occurred before their effective date.

Finally, the parties raise two issues relating to arbitration of these claims. Plaintiffs assert that, once the court concluded that the forum selection provision of the Agreement was controlling, it should have applied the arbitration provision in the same clause and ordered the parties to arbitrate the dispute in San Juan, Puerto Rico. Because we reverse the trial court's holding that the forum selection provision applies to these claims, the foundation for plaintiffs' assertion that the court should have abated the case pending arbitration no longer exists.[5]

In a cross-assignment of error, defendants argue that the trial court erred in entering an order stating that plaintiffs have not waived their right to seek arbitration. Plaintiffs originally took the position that the forum selection provision did not apply. After the trial court ruled that the provision did apply and indicated that it would dismiss the case on that ground, they filed a request for arbitration with the American Arbitration Association and asked the trial court to stay the case for the duration of the arbitration. In response, defendants argued that plaintiffs had waived any right to arbitrate by litigating the case for well over a year before seeking arbitration. The court refused to stay the case, but it agreed to enter an order finding that plaintiffs had not waived their right to arbitration under the Agreement.

The effect of the court's order is at best unclear. It was not necessary to the judgment, to the decision not to stay the case, or to any other action that the court took. As defendants note, the order was essentially an advisory opinion. Its apparent purpose was to respond to defendants' argument that the court should deny the requested stay on the ground that plaintiffs had waived their right to arbitration. However, once the trial court concluded that the forum selection provision required it to dismiss the case, it had no authority to do anything other than dismiss it. *See* 182 Or.App. at 30 n. 6, 48 P.3d at 851 n. 6. Unlike the court's rulings on the ORICO issue, this order does not provide an alternative ground to support all or part of the court's judgment of dismissal. It is not, thus, something that we can review. For that reason, we affirm on the cross-assignment of error.

Reversed and remanded.

[5]We have no occasion to consider whether plaintiffs' assumption that the arbitration and forum selection provisions have the same scope is correct. *See* 182 Or.App. at 26 n. 3 48 P.3d at 848 n. 3 (discussing inapplicability of presumption in favor of arbitrability to forum selection clause).

ARMSTRONG, P.J., concurring. I agree with the majority's decision to reverse the judgment dismissing the case and with its reasoning on the other issues. I disagree with its reasoning for reversing the dismissal and therefore write separately.

The majority makes a ruling of procedure and a ruling of substance in explaining its decision to reverse the dismissal; both are wrong. It first holds, procedurally, that the only way that defendants can obtain a pre-trial decision on whether the forum selection clause applies to this case is by a motion for summary judgment. That holding ignores a statute that expressly permits the trial court to adopt a more sensible

procedure. It then holds, substantively, that the trial court erred in dismissing the case because there are issues of fact about the meaning of the clause in this case. However, there are no disputed facts in the record, and we should apply normal rules of contract construction and decide the issue as a matter of law. I would hold that the trial court properly treated defendants' motion as a motion to dismiss but erred in dismissing the case.

The trial court dismissed the case on defendants' motion, holding that the forum selection clause of the PCS Agreement of Limited Partnership (the Agreement) applied to plaintiffs' claims.[1] In making its decision by ruling on a pre-trial motion, the trial court correctly followed every other jurisdiction that has considered the matter. The purpose of a forum selection clause is to require the parties to resolve their disputes in a specific judicial forum. In order for a forum selection clause to have any practical meaning, there must be a way to determine at an early date whether it applies to the case at hand. The longer a case remains pending in a forum other than the chosen one, the longer the defendant is damaged. Even if there are no factual disputes, a motion for summary judgment is seldom as expeditious as a motion under ORCP 21 A. If there are factual issues, a motion for summary judgment will be useless, and the parties will have to wait for trial to determine whether they should be in an Oregon court at all. If the finder of fact ultimately determines that the forum selection provision is both enforceable and applicable, the Oregon trial will become a nullity and the parties must go to the chosen forum for an entirely new trial. That result would waste both Oregon's judicial resources and the resources of the parties. It would also violate the state's underlying policy to enforce the parties' valid choice of a specific judicial forum. The longer the parties remain in a forum that they did not choose, the longer they lose the benefit of their bargain.[2]

Courts universally recognize the importance of a speedy resolution of this issue. Every other jurisdiction that has considered the question provides a method for resolving the issue by an early pre-trial motion; none relegates that resolution to summary judgment or trial. With a few exceptions, the jurisdictions permit the parties to present evidence outside of the pleadings to support their positions on the motion, and the court resolves any factual disputes. This uniformity of practice occurs despite the lack of applicable procedural rules and without agreement on the appropriate rationale. Some state courts treat it as a question of proper venue, *see, e.g., Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 423 S.E.2d 780 (1992); *Voicelink Data Services v. Datapulse*, 86 Wash.App. 613, 937 P.2d 1158 (1997), while others simply rule on a motion to dismiss without identifying any particular rule. *See, e.g., Accelerated Christian Educ. v. Oracle Corp.*, 925 S.W.2d 66 (Tex.App.1996). Federal courts universally hold that a motion to dismiss is the only proper procedure. Most rely on Federal Rule of Civil Procedure 12(b)(3), which provides for dismissal on the ground of improper venue. A few require a motion under FRCP 12(b)(6), which provides for dismissal for

[1]That clause provides that "[v]enue for any legal action arising from this Agreement, including enforcement of any arbitration award, shall be in San Juan, Puerto Rico."

[2]A trial court could order a separate trial on the meaning of the forum selection clause, ORCP 53 B, but that approach would still be less expeditious and efficient than it would be to resolve the issue on a motion to dismiss.

failure to state a claim. *See* Daniel R. Coquillette et al, eds., *Moore's Federal Practice*, §§ 111.04[3][a] to 111.04[3][b] (3d ed 2002).[3] Federal courts also may treat a motion to dismiss based on a forum selection clause as a variation on a motion to dismiss for forum non conveniens. 17 *Moore's*, § 111.75. The federal courts do not treat the lack of a rule that expressly provides for a motion to dismiss on the ground of *forum non conveniens* as having any significance.

The majority refuses to follow these other jurisdictions because no Oregon procedural rule expressly provides for enforcing a forum selection clause by a motion to dismiss. It fails to recognize that the statutes and rules give trial courts the necessary flexibility to adopt an appropriate procedure when the rules do not provide one. In the trial court, defendants separated their motion to dismiss based on the forum selection clause from their motions to dismiss under ORCP 21 A. On appeal, however, they suggest that their motion fits under ORCP 21 A(2), which provides for motions to dismiss for lack of personal jurisdiction.[4] The difficulty with their suggestion on appeal is that the trial court had jurisdiction over the case. The motion did not question that jurisdiction but, rather, asked the trial court to decline to exercise its jurisdiction because the parties had chosen another forum.[5]

Defendants' original approach was correct: their motion was a motion to dismiss separate from the motions that the rules provide. The trial court's authority to entertain the motion comes from ORS 1.160, which is designed for precisely this situation:

> "When jurisdiction is, by the Constitution or by statute, conferred on a court or judicial officer, all the means to carry it into effect are also given; and *in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by the procedural statutes, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the procedural statutes."* (Emphasis added.)

Oregon courts have relied on ORS 1.160 and its predecessors, which go back without change to the Deady Code of 1862, a number of times to create appropriate procedures when none other was

[3]The minority position is flawed because it allows the motion to be made at any time up to trial and because the facts to support the motion are limited to those in the pleadings, which prevents the parties from presenting evidence on such issues as whether enforcing the clause would be unreasonable under the circumstances. *See* 17 *Moore's*, § 111.04[3][b][ii].

[4]Such a motion permits the parties to present evidence outside of the pleadings, with the court resolving any factual disputes. We would then accept the trial court's factual conclusions if the evidence was sufficient to support them and would review its legal conclusions as a matter of law. *See Industrial Leasing Corp. v. Miami Ice Machine Co.,* 126 Or.App. 80, 83-84, 867 P.2d 548 (1994).

[5]All of the cases that discuss the issue agree that a forum selection clause does not deprive the court of subject matter jurisdiction but, instead, provides an opportunity for the court to decline to exercise jurisdiction in light of the parties' agreement. *See, e.g.*, *Vanderbeek v. Vernon Corp.*, 25 P.3d 1242, 1248 (Colo.App.2000); *Perkins*, 423 S.E.2d at 782.

available.[6] In *Butterfield v. State Indus. Acc. Com.*, 111 Or. 149, 223 P. 941; 226 P. 216 (1924), the Supreme Court relied on the predecessor to ORS 1.160 to create a procedure for circuit courts to try appeals from administrative decisions under the Workmen's Compensation Law. Because of the statute, the absence of a specified mode of procedure did not prevent a fair and orderly trial of the issues. 111 Or. at 162, 226 P. 216. The court reemphasized its action soon afterward in *Meaney v. State Industrial Acc. Com.,* 113 Or. 371, 384, 227 P. 305; 232 P. 789 (1925). It had previously relied on the statute as the basis for its authority to issue execution on a judgment for costs in a case where it had original jurisdiction. *State v. Hodgin,* 76 Or. 480, 487-88, 146 P. 86; 149 P. 530 (1915).[7]

Other appellate uses of ORS 1.160 include *State Highway Com. v. Burk et al.*, 200 Or. 211, 259-60, 265 P.2d 783 (1954) (authorizing trial court in condemnation action to apportion the award among the owners and lessees of the condemned land); *State v. Ridder,* 185 Or. 134, 138-39, 202 P.2d 482 (1949) (prescribing method of appealing from a conviction based on a plea of guilty when the defendant alleges that the sentence is unconstitutionally cruel or unusual); *State v. Chase*, 106 Or. 263, 267-69, 211 P. 920 (1923) (trial court had authority to disqualify male prospective jurors in order to obtain a jury that consisted of equal numbers of men and women, as statute required); and *Household Finance v. Bacon,* 58 Or.App. 267, 271, 648 P.2d 421, rev. den. 293 Or. 653, 653 P.2d 998 (1982) (redemption statutes did not provide method for curing faulty notice in circumstances present in the case; court had authority under ORS 1.160 to adopt an appropriate procedure for doing so). The only apparent restriction on the use of the statute is that the court must have jurisdiction of the case. ORS 1.160 does not confer jurisdiction but simply authorizes a court that has jurisdiction to adopt a suitable process or mode of proceeding in order to carry its jurisdiction into effect. *State v. Endsley*, 214 Or. 537, 546-47, 331 P.2d 338 (1958); *Hensley v. State Court System Appeals Board,* 72 Or.App. 64, 70, 695 P.2d 65 (1984).

In a closely related area, we have decided issues raised by pre-trial motions that the Oregon Rules of Civil Procedure did not expressly authorize. In *Novich v. McClean,* 172 Or.App. 241, 244, 18 P.3d 424, *rev. den.* 332 Or. 137, 27 P.3d 1043 (2001), and *Fenn and Fenn*, 63 Or.App. 506, 512, 664 P.2d 1143 (1983), the trial courts decided issues of forum non conveniens based on pre-trial motions to dismiss. In *Fenn* there was a statute authorizing such a motion, but there was no procedural rule implementing the statute. In *Novich,* there was no basis for the motion in either a statute or a rule. We resolved the issues on appeal without discussing the authority for the motions, but the only possible source was ORS 1.160. The issue in this case, a motion to dismiss because the parties have chosen a different forum, is close in concept to *forum non*

[6]The procedural rules anticipate the use of ORS 1.160 in this fashion. ORCP 14 A sets forth the general requirements for a motion without limiting the motions to which it applies to those that the rules specifically describe.

[7]In *Evans v. OSP,* 87 Or.App. 514, 533, 743 P.2d 168 (1987), we relied on ORS 1.160 in holding that our authority to make an order carried with it the authority to enforce it, including the authority to invoke our contempt power.

conveniens.[8]

We should follow the uniform practice of other jurisdictions, and exercise the authority that the legislature gave us in ORS 1.160 for precisely this purpose, by holding that a trial court has the authority to rule on a motion to dismiss that is based on a forum selection clause. The procedures should be similar to those for motions under ORCP 21 A(1) and (2). Thus, the parties may submit relevant evidence and the court will then decide the motion, resolving whatever factual disputes may exist. That procedure provides a way to resolve the question at an early stage; if the motion is meritorious, it will send the parties to the forum where they agreed to go, at the least expense to them and to this state. That is the procedure that the trial court followed in this case.[9]

I turn to the merits of the trial court's decision, which I review in the same way that we would review a decision on a motion under ORCP 21 A(2)--that is, I accept the trial court's factual findings if there is evidence to support them and review the legal conclusions that it drew from the facts before it. The obvious point in that regard is that there are no disputed facts. Thus, even if we treat defendants' motion as one for summary judgment, there is nothing for the trial court to do on remand. The issues before us are purely legal, and we must resolve them. If the forum selection clause applies to this case, we should affirm the trial court's dismissal; if it does not apply, we should reverse.

Oregon has a well-established method for construing contractual provisions such as the forum selection clause in the Agreement. According to the Supreme Court, the purpose behind that method is to determine and enforce the intent of the contracting parties, as the statutes require. ORS 42.220; ORS 42.240; *see Yogman v. Parrott,* 325 Or. 358, 937 P.2d 1019 (1997). To find that intent, a court first looks at the words in question in the context of the contract of which they are a part. If the meaning of the words is clear in that context, the court goes no further. *Yogman*, 325 Or. at 361, 937 P.2d 1019. If, however, the contract is ambiguous, the court then considers extrinsic evidence of the parties' intent in order to resolve the ambiguity. Whether the terms are clear or ambiguous is a matter of law for the court to decide. Contractual terms are ambiguous when, in context, they can reasonably be given more than one meaning. *Id.* at 363-64, 937 P.2d 1019. Finally, if the evidence is insufficient to resolve the ambiguity, the court resolves it by applying appropriate maxims of construction. *Id.* at 364-65, 937 P.2d 1019. I do not find any ambiguity in this clause; it is clearly inapplicable to plaintiffs' claims. Even if it were ambiguous, applying the appropriate maxim of construction leads to the same result.

[8]As our forum non conveniens cases show, we have the authority to create an adequate procedure when the only available statutory procedure would be insufficient to give the parties the benefit of their agreement. (The availability of summary judgment did not prevent us from deciding the issue on a non-ORCP motion to dismiss.) Thus the majority's suggestion that ORS 1.160 does not apply to this case is incorrect.

[9]In *Reeves v. Chem Industrial Co.*, 262 Or. 95, 495 P.2d 729 (1972), the first Oregon case to approve the validity of a forum selection clause, the defendant raised the issue by a motion to dismiss, although there was no pre-ORCP express statutory provision for a motion to dismiss. Only ORS 1.160 could justify the procedure that the trial court and the Supreme Court followed.

The Agreement establishes venue "for any legal action arising from this Agreement " in San Juan, Puerto Rico. (Emphasis added.) The question is whether that provision applies to the claims that plaintiffs make in their complaint. None of those claims relates to the terms of the Agreement or to any actions taken under it. Rather, as defendants recognize, every claim that plaintiffs make involves things that defendants allegedly did before plaintiffs were parties to the Agreement. The damages that plaintiffs seek are for actions that allegedly induced them to enter into the Agreement, not for anything related to the terms or conditions that it contains or the things that happened after plaintiffs became bound by it. The forum selection clause applies to plaintiffs' claims, and the trial court correctly dismissed them, only if claims based on actions that induced plaintiffs to enter into the agreement are claims "arising from this Agreement."

In construing contracts, the Supreme Court relies heavily on the dictionary meanings of the words that the parties used. *See Yogman,* 325 Or. at 362-63, 937 P.2d 1019. The relevant dictionary definitions of "arise" include "to originate from a specific source," "to come into being," and "to become operative." Webster's Third New Int'l Dictionary, 117 (unabridged ed. 1993). According to the same dictionary, "from" is "used as a function word to indicate the source or original or moving force of something as * * * (4) the place of origin, source, or derivation of a material or immaterial thing." Id. at 913. Unlike forum selection clauses discussed in other cases, this clause does not extend to disputes that "relate to" or are "connected with" the Agreement. Under the words that the parties used, the Agreement itself, not the relationship of which the Agreement is a part, and not the things that led the parties to enter into the Agreement, must be the source of the dispute. It must be "the place of origin, source, or derivation" of the legal action.

Plaintiffs were not parties to the Agreement at the time that defendants allegedly made the representations about which plaintiffs complain, so it is difficult to see how the Agreement could be the point of origin of this legal action. In addition, the Agreement does not contain representations or other inducements that might lead a person to invest in the partnership. Rather, the Agreement describes the structure of the partnership, relationships between the limited partners and the general partner, management of the business, capital contributions, responsibility for expenses, distribution of profits, and other similar matters that one would expect such an agreement to cover. Defendants do not assert that any aspect of the Agreement, other than the forum selection clause, is relevant to any party's claim or defense. Thus, the context of the Agreement as a whole does not provide any broader scope to the forum selection clause than do the words themselves.

I do not see how the Agreement can be the source or origin of plaintiffs' claims. The purpose of the representations about which they complain was to induce them to invest in the overall enterprise; the Agreement is simply part of the package that came with the decision to invest. It was the end point of the representations, not their source. The Agreement was the goal to which defendants sought to guide plaintiffs by their representations, not their origin. Plaintiffs do not allege that any of the representations related to the terms or conditions of the Agreement. It may well be that the Agreement is "related to" or "connected with" plaintiffs' claims, but those claims do not arise from it. I would hold that the forum selection clause is unambiguous and does not apply to plaintiffs' claims.

The parties discuss a number of federal cases in support of their positions. For two reasons, with the exception of several Ninth Circuit cases, I do not find them very helpful. First, many of the provisions at issue are broader than the one in the Agreement and clearly cover the parties' entire relationship, not simply a specific document. Secondly, most of the cases involve arbitration rather than forum selection clauses. There

is a special presumption in favor of arbitrability under both federal and state law. Most of the federal cases on which defendants rely involve broad constructions of arbitration clauses that often pay little attention to the words that the parties used. In *Snow Mountain Pine, Ltd. v. Tecton Laminates Corp.*, 126 Or.App. 523, 869 P.2d 369, rev. den. 319 Or. 36, 876 P.2d 782 (1994), we stated that the presumption requires us to order arbitration "unless we can say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute[.]" *Id.* at 529, 869 P.2d 369. If there is any ambiguity, we leave the question of arbitrability for the arbitrator to decide. *Id.* The reason for that approach to an arbitration clause is that, when parties agree to arbitrate, they choose a nonjudicial forum for their disputes. In doing so, they agree that that nonjudicial forum will decide whether the dispute in issue is subject to the arbitration provision.

The extremely broad construction that we give an arbitration clause does not apply to a forum selection clause. When parties agree to a forum selection clause, they simply choose one judicial forum instead of another. There is no policy reason to construe such clauses differently from how we construe the rest of the contract, nor is there any reason to require that the chosen judicial forum be the one to decide whether the clause applies. Thus, there is no policy reason that would require us to strain to find a forum selection clause applicable to this case in the way that we might with an arbitration clause. I would hold that the forum selection clause is unambiguous and does not apply to plaintiffs' claims. Even if I were to conclude that the clause is ambiguous, it would still be our job to resolve the ambiguity before deciding that the clause requires us to send the case to a different forum.

The majority holds that the clause is ambiguous and remands the case for a factual determination. However, as Yogman makes clear, the only relevant facts would be extrinsic evidence of the intent of the parties in agreeing to the forum selection clause. Although the parties had both the opportunity and every incentive to place such evidence in the record, there is none. There is no reason to believe that they could produce any on remand. The clause was one of many provisions in an agreement that was part of a larger investment package. There is no evidence that plaintiffs paid the slightest attention to the terms of the clause in deciding to invest or that defendants told them anything about their understanding of the clause. Thus, if the majority is correct that the clause is ambiguous, we must resolve the ambiguity as a matter of law by using the appropriate maxim of construction. In this context the appropriate maxim is to construe the ambiguous phrase against the drafter. *See Quality Contractors, Inc. v. Jacobsen,* 139 Or.App. 366, 371, 911 P.2d 1268, *rev. den.* 323 Or. 691, 920 P.2d 550 (1996). Because defendants drafted the Agreement, the majority's own analysis requires us to construe the clause against them, which would lead us to hold that the forum selection clause does not apply to plaintiffs' claims.

Proposed Amendment to ORCP 21 {language to be added in bold underlined; to be deleted in italics enclosed in square brackets}:

RULE 21. DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

A. How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, [*and*] (9) that the pleading shows that the action has not been commenced within the time limited by statute[.], **and (10) that retaining jurisdiction would contravene an enforceable forum-selection clause.** A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting defenses (1) through (7) **or (10)**, the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. If the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. If the court grants the motion to dismiss on the basis of defense (3), the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry of judgment pursuant to subsection B(3) of Rule 54.

* * * * *

C. Preliminary Hearings. The defenses specifically denominated (1) through [*(9)*] **(10)** in section A of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings mentioned in section B of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

* * * * *

G. Waiver or Preservation of Certain Defenses.

G(1) A defense of lack of jurisdiction over the person, that there is another action pending between the same parties for the same cause, insufficiency of summons or process, [*or*] insufficiency of service of summons or process, **or that retaining jurisdiction would contravene an enforceable forum-selection clause** is waived under either of the following circumstances: (a) if the defense is omitted from a motion in the circumstances described in section F of this rule, or (b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this subsection shall not be raised by amendment.

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C. Preliminary Hearings. The defenses specifically denominated (1) through [*(9)*] **(10)** in section A of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings mentioned in section B of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

* * * * *

G. Waiver or Preservation of Certain Defenses.

G(1) A defense of lack of jurisdiction over the person, that there is another action pending between the same parties for the same cause, insufficiency of summons or process, [*or*] insufficiency of service of summons or process, **or that retaining jurisdiction would contravene an enforceable forum-selection clause** is waived under either of the following circumstances: (a) if the defense is omitted from a motion in the circumstances described in section F of this rule, or (b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this subsection shall not be raised by amendment.

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C. Preliminary Hearings. The defenses specifically denominated (1) through [*(9)*] **(10)** in section A of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings mentioned in section B of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

* * * * *

G. Waiver or Preservation of Certain Defenses.

G(1) A defense of lack of jurisdiction over the person, that there is another action pending between the same parties for the same cause, insufficiency of summons or process, [*or*] insufficiency of service of summons or process, **or that retaining jurisdiction would contravene an enforceable forum-selection clause** is waived under either of the following circumstances: (a) if the defense is omitted from a motion in the circumstances described in section F of this rule, or (b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this subsection shall not be raised by amendment.

* * * * *