

AMENDMENTS

TO ORCP 32

promulgated by

COUNCIL ON COURT PROCEDURES

1980 to 2024

RULE 32

CLASS ACTIONS

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

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

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

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

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

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

B. Class action maintainable. An action may be maintained as a class action if the prerequisites of section A. of this rule are satisfied, and in addition:

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

B.(1)(a) Inconsistent or varying adjudications with respect to individual members of the class which would establish

incompatible standards of conduct for the party opposing the class; or

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

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

B.(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability

of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action, including the feasibility of giving adequate notice; (e) the likelihood that the damages to be recovered by individual class members, if judgment for the class is entered, are so minimal as not to warrant the intervention of the court; (f) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal.

C. Court discretion. In an action commenced pursuant to subsection (3) of section B. of this rule, the court shall consider whether justice in the action would be more efficiently served by maintenance of the action in lieu thereof as a class action pursuant to subsection (2) of section B. of this rule.

D. Court order to determine maintenance of class actions. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained and, in action pursuant to subsection (3) of section B. of this rule, the court shall find the facts specially and state separately its conclusions thereon. An order under this section may be conditional, and may be altered or amended before the decision on the merits.

E. Dismissal or compromise of class actions; court approval required; when notice required. A class action shall not be dismissed or compromised without the approval of the court, and notice

of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs, except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to the class representative's attorney and that no promise to give any such compensation has been made. If the statute of limitations has run or may run against the claim of any class member, the court may require appropriate notice.

F. Court authority over conduct of class actions. In the conduct of actions to which this rule applies, the court may make appropriate orders which may be altered or amended as may be desirable:

F.(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

F.(2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or

otherwise to come into the action;

F.(3) Imposing conditions on the representative parties or on intervenors;

F.(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

F.(5) Dealing with similar procedural matters.

G. Notice required; content; statements of class members required; form; content; amount of damages; effect of failure to file required statement; stay of action in certain cases. In any class action maintained under subsection (3) of section B. of this rule:

G.(1) The court shall direct to the members of the class the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort. The notice shall advise each member that:

G.(1)(a) The court will exclude such member from the class if such member so requests by a specified date;

G.(1)(b) The judgment, whether favorable or not, will include all members who do not request exclusion; and

G.(1)(c) Any member who does not request exclusion may, if such member desires, enter an appearance through such member's counsel.

G.(2) Prior to the final entry of a judgment against a

defendant the court shall request members of the class to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member, assessable court costs, and an award of attorney fees, if any, as determined by the court.

G.(3) Failure of a class member to file a statement required by the court will be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.

G.(4) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is

to prevail in the class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.

H. Commencement or maintenance of class actions regarding particular issues; division of class; subclasses. When appropriate:

H.(1) An action may be brought or maintained as a class action with respect to particular issues; or

H.(2) A class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

I. Notice and demand required prior to commencement of action for damages.

I.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of subsection (3) of Section B. of this rule, the potential plaintiffs' class representative shall:

I.(1)(a) Notify the potential defendant of the particular alleged cause of action; and

I.(1)(b) Demand that such person correct or rectify the alleged wrong.

I.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, if neither will effect actual notice, the office of the Secretary of State.

J. Limitation on maintenance of class actions for damages.

No action for damages may be maintained under the provisions of sections A., B., and C. of this rule upon a showing by a defendant that all of the following exist:

J.(1) All potential class members similarly situated have been identified, or a reasonable effort to identify such other people has been made;

J.(2) All potential class members so identified have been notified that upon their request the defendant will make the appropriate compensation, correction, or remedy of the alleged wrong;

J.(3) Such compensation, correction, or remedy has been, or, in a reasonable time, will be, given; and

J.(4) Such person has ceased from engaging in, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage in such methods, acts, or practices alleged to be violative of the rights of potential class members.

K. Application of sections I. and J. of this rule to actions for equitable relief; amendment of complaints for equitable relief to request damages permitted. An action for equitable relief brought under sections A., B., and C. of this rule may be commenced without compliance with the provisions of section I. of this rule. Not less than 30 days after the commencement of an action for equitable relief, and after compliance with the provisions of section I. of this rule, the class representative's complaint may be amended without leave of court to

include a request for damages. The provisions of section J. of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.

L. Limitation on maintenance of class actions for recovery of certain statutory penalties. A class action may not be maintained for the recovery of statutory minimum penalties for any class member as provided in ORS 646.638 or 15 U.S.C. 1640(a) or any other similar statute.

M. Coordination of pending class actions sharing common question of law or fact.

M.(1)(a) When class actions sharing a common question of fact or law are pending in different courts, the presiding judge of any such court, upon motion of any party or on the court's own initiative, may request the Supreme Court to assign a Circuit Court, Court of Appeals, or Supreme Court judge to determine whether coordination of the actions is appropriate, and a judge shall be so assigned to make that determination.

M.(1)(b) Coordination of class actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and

personnel; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.

M.(2) If the assigned judge determines that coordination is appropriate, such judge shall order the actions coordinated, report that fact to the Chief Justice of the Supreme Court, and the Chief Justice shall assign a judge to hear and determine the actions in the site or sites the Chief Justice deems appropriate.

M.(3) The judge of any court in which there is pending an action sharing a common question of fact or law with coordinated actions, upon motion of any party or on the court's own initiative, may request the judge assigned to hear the coordinated action for an order coordinating such actions. Coordination of the action pending before the judge so requesting shall be determined under the standards specified in subsection (1) of this section.

M.(4) Pending any determination of whether coordination is appropriate, the judge assigned to make the determination may stay any action being considered for, or affecting any action being considered for, coordination.

M.(5) Notwithstanding any other provision of law, the Supreme Court shall provide by rule the practice and procedure

for coordination of class actions in convenient courts, including provision for giving notice and presenting evidence.

N. Judgment; inclusion of class members; description; names. The judgment in an action maintained as a class action under subsections (1) or (2) of section B. of this rule, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (3) of section B. of this rule, whether or not favorable to the class, shall include and specify by name those to whom the notice provided in section G. of this rule was directed, and whom the court finds to be members of the class, and the judgment shall state the amount to be recovered by each member.

O. Attorney fees. Any award of attorney fees against the party opposing the class and any fee charged class members shall be reasonable and shall be set by the court.

COMMENT

This rule is based on the existing ORS sections relating to class actions in ORS 13.220 through 13.390. ORS 13.400 and 13.410 are left as statutes because they are rules of appellate procedure. ORS 13.310 is left as a statute because it is a rule of evidence.

RULE 32

CLASS ACTIONS

[A.(5) In an action for damages under subsection (3) of section 8. of this rule, the representative parties have complied with the prelitigation notice provisions of section I. of this rule.]

8.(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action[, including the feasibility of giving adequate notice]; (e) [the likelihood that the damages to be recovered by individual

class members, if judgment for the class is entered, are so minimal as not to warrant the intervention of the court;] whether or not the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class; and (f) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal.

[C. Court discretion. In an action commenced pursuant to subsection (3) of section 8. of this rule, the court shall consider whether justice in the action would be more efficiently served by maintenance of the action in lieu thereof as a class action pursuant to subsection (2) of section 8. of this rule.]

[D. Court order to determine maintenance of class actions.]

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

C.(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained and, in action pursuant to subsection (3) of section 8. of this rule, the court shall find the facts specially and state separately its conclusions thereon. An order under this section may be conditional, and may be altered or amended before the decision on the merits.

C.(2) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or

administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the court may postpone a determination under subsection (1) of this section until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.

[E.] D. Dismissal or compromise of class actions; court approval required; when notice required. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs, except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to the class representative's attorney and that no promise to give any such compensation has been made. If the statute of limitations has run or may run against the claim of any class member, the court may require appropriate notice.

[F.] E. Court authority over conduct of class actions. In the conduct of actions to which this rule applies, the court may make appropriate orders which may be altered or amended as may be desirable:

[F.] E.(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

[F.] Ξ.(2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

[F.] Ξ.(3) Imposing conditions on the representative parties or on intervenors;

[F.] Ξ.(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

[F.] Ξ.(5) Dealing with similar procedural matters.

[G. Notice required; content; statements of class members required; form; content; amount of damages; effect of failure to file required statement; stay of action in certain cases. In any class action maintained under subsection (3) of section 3. of this rule:

G.(1) The court shall direct to the members of the class the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort. The notice shall advise each member that:

G.(1)(a) The court will exclude such member from the class if such member so requests by a specified date;

G.(1)(b) The judgment, whether favorable or not, will include all members who do not request exclusion; and

G.(1)(c) Any member who does not request exclusion may, if such member desires, enter an appearance through such member's counsel.]

F. Notice required; content; statements of class members may be required; form; content; effect of failure to file required statement.

F.(1)(a) Following certification, in any class action maintained under subsection (3) of section 8. of this rule, the court by order, after hearing, shall direct the giving of notice to the class.

F.(1)(b) The notice, based on the certification order and any amendment of the order, shall include:

F.(1)(b)(i) A general description of the action, including the relief sought, and the names and addresses of the representative parties;

F.(1)(b)(ii) A statement that the court will exclude any member of the class if such member so requests by a specified date;

F.(1)(b)(iii) A description of possible financial consequences on the class;

F.(1)(b)(iv) A general description of any counterclaim being asserted by or against the class, including the relief sought;

F.(1)(b)(v) A statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;

F.(1)(b)(vi) A statement that any member of the class may enter an appearance either personally or through counsel;

F.(1)(b)(vii) An address to which inquiries may be directed; and

F.(1)(b)(viii) Other information the court deems appropriate.

F.(1)(c) The order shall prescribe the manner of notification to be used and specify the members of the class to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.

F.(1)(d) Each member of the class, not a representative party, whose potential monetary recovery or liability is estimated to exceed \$100 shall be given personal or mailed notice if such class member's identity and whereabouts can be ascertained by the exercise of reasonable diligence.

F.(1)(e) For members of the class not given personal or mailed notice, the court shall provide a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. The means of notice may include notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups, or any other means reasonably calculated to provide notice to class members of the pendency of the action.

F.(1)(f) The court may order a defendant who has a mailing list of class members to cooperate with the representative parties in notifying the class members and may also direct that notice be included with a regular mailing by defendant to the class members.

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

[G.] F.(3) If the court requires class members to file a statement requesting affirmative relief, [F]failure of a class

member to file a statement required by the court [will] may be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.

[G.(4) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.]

F.(4) Unless the court orders otherwise, the plaintiffs shall bear the expense of notification. The court may, if justice requires, require that the defendant bear the expense of notification or may allocate the costs of notice among the parties if the court determines there is a reasonable likelihood that the plaintiffs may prevail. The court may hold a preliminary hearing to determine how the costs of notice should be apportioned.

[H.] G. Commencement or maintenance of class actions regarding particular issues; division of class; subclasses.

When appropriate:

[H.] G.(1) An action may be brought or maintained as a class action with respect to particular issues; or

[H.] G.(2) A class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

[I. Notice and demand required prior to commencement of action for damages.

I.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of subsection (3) of section 8. of this rule, the potential plaintiffs' class representative shall:

I.(1)(a) Notify the potential defendant of the particular alleged cause of action; and

I.(1)(b) Demand that such person correct or rectify the alleged wrong.

I.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, if neither will effect actual notice, the office of the Secretary of State.]

[J.] H. Limitation on maintenance of class actions for damages. No action for damages may be maintained under the provisions of sections A. [, B., and C.] and B. of this rule upon a showing by a defendant that all of the following exist:

[J.] H.(1) All potential class members similarly situated have been identified, or a reasonable effort to identify such

other people has been made;

[J.] H.(2) All potential class members so identified have been notified that upon their request the defendant will make the appropriate compensation, correction, or remedy of the alleged wrong;

[J.] H.(3) Such compensation, correction, or remedy has been, or, in a reasonable time, will be, given; and

[J.] H.(4) Such person has ceased from engaging in, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage in such methods, acts, or practices alleged to be violative of the rights of potential class members.

[K. Application of sections I. and J. of this rule to actions for equitable relief; amendment of complaints for equitable relief to request damages permitted.]

I. Amendment of complaints for equitable relief to request damages permitted. [An action for equitable relief brought under sections A., B., and C. of this rule may be commenced without compliance with the provisions of section I. of this rule.] Not less than 30 days after the commencement of an action for equitable relief[, and after compliance with the provisions of section I. of this rule,] the class representative's complaint may be amended without leave of court to include a request for damages. The provisions of section [J.] H. of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.

[L.] J. Limitation on maintenance of class actions for recovery of certain statutory penalties. A class action may not be maintained for the recovery of statutory minimum penalties for any class member as provided in ORS 646.638 or 15 U.S.C. 1640(a) or any other similar statute.

[M.] K. Coordination of pending class actions sharing common question of law or fact.

[M.] K.(1)(a) When class actions sharing a common question of fact or law are pending in different courts, the presiding judge of any such court, upon motion of any party or on the court's own initiative, may request the Supreme Court to assign a Circuit Court, Court of Appeals, or Supreme Court judge to determine whether coordination of the actions is appropriate, and a judge shall be so assigned to make that determination.

[M.] K.(1)(b) Coordination of class actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and personnel; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.

[M.] K.(2) If the assigned judge determines that coordination is appropriate, such judge shall order the actions coordinated, report that fact to the Chief Justice of the Supreme Court, and the Chief Justice shall assign a judge to hear and determine the actions in the site or sites the Chief Justice deems appropriate.

[M.] K.(3) The judge of any court in which there is pending an action sharing a common question of fact or law with coordinated actions, upon motion of any party or on the court's own initiative, may request the judge assigned to hear the coordinated action for an order coordinating such actions. Coordination of the action pending before the judge so requesting shall be determined under the standards specified in subsection (1) of this section.

[M.] K.(4) Pending any determination of whether coordination is appropriate, the judge assigned to make the determination may stay any action being considered for, or affecting any action being considered for, coordination.

[M.] K.(5) Notwithstanding any other provision of law, the Supreme Court shall provide by rule the practice and procedure for coordination of class actions in convenient courts, including provision for giving notice and presenting evidence.

[N.] L. Judgment; inclusion of class members; description[; names]. The judgment in an action maintained as a class action under subsections (1) or (2) of section 3. of this rule, whether or not favorable to the class, shall include and

describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (3) of section 8. of this rule, whether or not favorable to the class, shall include and specify [by name] those to whom the notice provided in section [G.] F. of this rule was directed, and who have not requested exclusion and whom the court finds to be members of the class [, and the judgment shall state the amount to be recovered by each member].

[O. Attorney fees. Any award of attorney fees against the party opposing the class and any fee charged class members shall be reasonable and shall be set by the court.]

M. Attorney fees, costs, disbursements, and litigation expenses.

M.(1)(a) Attorney fees for representing a class are subject to control of the court.

M.(1)(b) If under an applicable provision of law a defendant or defendant class is entitled to attorney fees, costs, or disbursements from a plaintiff class, only representative parties and those members of the class who have appeared individually are liable for those amounts. If a plaintiff is entitled to attorney fees, costs, or disbursements from a defendant class, the court may apportion the fees, costs, or disbursements among the members of the class.

M.(1)(c) If the prevailing class recovers a judgment that can be divided for the purpose, the court may order reasonable attorney fees and litigation expenses of the class to be paid from the recovery.

M.(1)(d) The court may order the adverse party to pay to the prevailing class its reasonable attorney fees and litigation expenses if permitted by law in similar cases not involving a class.

M.(1)(e) In determining the amount of attorney fees for a prevailing class the court shall consider the following factors:

M.(1)(e)(i) The time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered;

K.(1)(e)(ii) Results achieved and benefits conferred upon the class;

M.(1)(e)(iii) The magnitude, complexity, and uniqueness of the litigation;

M.(1)(e)(iv) The contingent nature of success; and

M.(1)(e)(v) Appropriate criteria in OR 2-106 of the Oregon Code of Professional Responsibility.

M.(2) Before a hearing under section C. of this rule or at any other time the court directs, the representative parties and the attorney for the representative parties shall file with the court, jointly or separately:

M.(2)(a) A statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts;

M.(2)(b) A copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangement or fees and

M.(2)(c) A copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or an attorney regularly of counsel with the law firm of the representative parties' attorney. This statement shall be supplemented promptly if additional arrangements are made.

N. Statute of Limitations. The statute of limitations is tolled for all class members upon the commencement of an action asserting a class action. The statute of limitations resumes running against a member of a class:

N.(1) Upon filing of an election of exclusion by such class member;

N.(2) Upon entry of an order of certification, or of an amendment thereof, eliminating the class member from the class;

N.(3) Except as to representative parties, upon entry of an order under section C. of this rule refusing to certify the class as a class action; and

N.(4) Upon dismissal of the action without an adjudication on the merits.

Report of Class Action Subcommittee

At the request of the Council on Court Procedures and pursuant to a direction by the Senate Judiciary Committee of the 1979 Legislative Assembly, this subcommittee has conducted a detailed review of ORCP 32 relating to class actions. The subcommittee has compared the Oregon rule to Federal Rule 23, reviewed current legislative trends in other states and proposals for federal statutes relating to class action, and reviewed the extensive national literature on class actions. The subcommittee has also considered Oregon cases interpreting ORCP 32 and the legislative history of that rule. The Council conducted a public hearing relating to class actions at which the testimony of 10 persons was received.

The subcommittee now recommends that Rule 32 be amended to incorporate the proposed revisions which are attached. The proposed revisions are:

(1) Elimination of prelitigation notice requirements. The subcommittee recommends that section 32 I. be eliminated, with conforming elimination of subsection 32 A.(5) and modifications to 32 J. and K. This eliminates the requirement of notice 30 days prior to the commencement of class actions for damages. The subcommittee felt the requirement served no useful purpose and contained potential for abuse.

(2) Revision of factors to be considered in deciding predominance of common questions of law or fact. The subcommittee recommends that paragraphs (d) and (e) of subsection 32 B.(3) be changed to eliminate the reference to notice in paragraph (d) (because of the proposed change in 32 G.) and by substitution of paragraph 3(a)(13) of the Uniform Class Actions Act for paragraph B.(3)(e) of existing Oregon Rule 32. (The Uniform Act language more clearly expresses the idea incorporated in paragraph B.(3)(e).)

(3) Elimination of subsection 32 C. The subcommittee felt this provision was of very limited utility and confusing. Anything covered by this subsection could already be considered under B.(3).

(4) Clarification of provision relating to postponement of certification decision to determine legal question. Subsection G.(4) of the existing rule refers to a "stay" of the class action if the outcome turns upon a point of law and the court wishes to consider the legal question first. Technically, what is involved is not a "stay" but a postponement of the certification hearing or decision. The substance of subsection 32 G.(4) was moved up to subsection C.(2).

(5) Elimination of requirement of individual notice in all cases. The revision would replace the existing requirement of

CLASS ACTIONS

RULE 32

H. Notice and demand required prior to commencement of action for damages.

H.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of subsection (3) of section B. of this rule, the potential plaintiffs' class representative shall:

H.(1)(a) Notify the potential defendant of the particular alleged cause of action; and

H.(1)(b) Demand that such person correct or rectify the alleged wrong.

H.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or [if neither will effect actual notice, the office of the Secretary of State], in the case of a corporation or limited partnership not authorized to transact business in this state, to the principal office or place of business of the corporation or limited partnership, and to any address the use of which the class representative knows, or on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

COMMENT

The amendment to subsection H.(2) provides for an attempt at actual notice to a foreign corporation when that corporation is a potential defendant in a class action.

**CLASS ACTIONS
RULE 32**

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

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

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

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

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

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

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

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

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

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

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

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

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

~~bB. (5) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;~~

~~eB. (6) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;~~

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

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

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

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

this section may be conditional, and may be altered or amended before the decision on the merits.

C.(2) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the court may postpone a determination under subsection (1) of this section until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.

D. Dismissal or compromises of class actions; court approval required; when notice required. A **Any action filed as a class action in which there has been no ruling under subsection C.(1) of this rule and any action ordered maintained as a class action shall not be voluntarily dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to some or all members of the class in such manner as the court directs, except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to the class representative's attorney and that no promise to give any of such compensation has been made.** If the statute of limitations has run or may run

against the claim of any class member, the court may require appropriate notice.

E. Court authority over conduct of class actions. In the conduct of actions to which this rule applies, the court may make appropriate orders which may be altered or amended as may be desirable:

E.(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument, including precertification determination of a motion made by any party pursuant to Rules 21 or 47 if the court concludes that such determination will promote the fair and efficient adjudication of the controversy and will not cause undue delay;

E.(2) Requiring, for the protection of ~~the members of the class~~ class members or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all ~~of the~~ class members of any step in the action, ~~or~~ of the proposed extent of the judgment, ~~or~~ of the opportunity of class members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, ~~or~~ otherwise to come into the action, ~~or to be excluded from the class;~~

E.(3) Imposing conditions on the representative parties, class members, or ~~an~~ intervenors;

E.(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and

that the action proceed accordingly; and

E.(5) Dealing with similar procedural matters.

~~F. Notice required; content; statements of class members required; form; content; effect of failure to file required statement and exclusion.~~

F.(1) When ordering that an action be maintained as a class action under this rule, the court shall direct that notice be given to some or all members of the class under subsection E.(2) of this rule, shall determine when and how this notice should be given and shall determine whether, when, how, and under what conditions putative members may elect to be excluded from the class. The matters pertinent to these determinations ordinarily include: (a) the nature of the controversy and the relief sought; (b) the extent and nature of any member's injury or liability; (c) the interest of the party opposing the class in securing a final resolution of the matters in controversy; (d) the inefficiency or impracticality of separately maintained actions to resolve the controversy; (e) the cost of notifying the members of the class; and (f) the possible prejudice to members to whom notice is not directed. When appropriate, exclusion may be conditioned on a prohibition against institution or maintenance of a separate action on some or all of the matters in controversy in the class action or a prohibition against use in a separately maintained action of any judgment rendered in favor of the class from which exclusion is sought.

~~F.(1)(a) Following certification, in any class action~~

~~maintained under subsection (3) of section B of this rule, the court by order, after hearing, shall direct the giving of notice to the class.~~

~~F.(1)(b) The notice, based on the certification order and any amendment of the order, shall include:~~

~~F.(1)(b)(i) A general description of the action, including the relief sought, and the names and addresses of the representative parties;~~

~~F.(1)(b)(ii) A statement that the court will exclude any member of the class if such member so requests by a specified date;~~

~~F.(1)(b)(iii) A description of possible financial consequences on the class;~~

~~F.(1)(b)(iv) A general description of any counterclaim being asserted by or against the class, including the relief sought;~~

~~F.(1)(b)(v) A statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;~~

~~F.(1)(b)(vi) A statement that any member of the class may enter an appearance either personally or through counsel;~~

~~F.(1)(b)(vii) An address to which inquiries may be directed; and~~

~~F.(1)(b)(viii) Other information the court deems appropriate.~~

~~F.(1)(c) The order shall prescribe the manner of~~

~~notification to be used and specify the members of the class to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.~~

~~F.(1)(d) Members of the class shall be given the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort.~~

~~F.(1)(e) For members of the class not given personal or mailed notice, the court shall provide a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. The means of notice may include notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups, or any other means reasonably calculated to provide notice to class members of the pendency of the action.~~

~~F.(1)(f) The court may order a defendant who has a mailing list of class members to cooperate with the representative parties in notifying the class members. The court may also direct that separate and distinctive notice be included with a regular mailing by the defendant to the class members who are current customers or employees of the defendant.~~

~~F.(1)(g) The court may order, as an alternative to the~~

~~order and direction under paragraph (f) of this subsection, that a defendant who has a mailing list of class members, including those who are or were current customers or employees of the defendant, provide a copy of that list to the representative parties. The representative parties shall be required to pay the reasonable costs of generating, printing or duplicating the mailing list.~~

~~F.(1)(h) The court may order a defendant who has a list of former customers or employees to provide that list to the representative parties. The court may further order that a separate and distinctive notice be included with a regular mailing by the defendant to current customers or employees of the defendant.~~

F.(2) Prior to the final entry of a judgment against a defendant the court shall request members of the class to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. The amount of

damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court, assessable court costs, and an award of attorney fees, if any, as determined by the court.

F.(3) Failure of a class member to file a statement required by the court will be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for each claim.

F.(4) ~~Except as otherwise provided in this subsection, the~~ Plaintiffs shall bear ~~the expense~~ costs of notification ~~any~~ notice ordered prior to a determination of liability. The court may, ~~if justice requires~~ however, order that the defendant bear ~~the expense of notification~~ all or a specified part of the costs of any notice ~~to the current customers or employees of the~~ defendant included with a regular mailing by the defendant ~~to its~~ current customers or employees. The court may hold a preliminary hearing to determine how the costs of such notice shall be apportioned.

* * * * *

G. Commencement or maintenance of class actions regarding particular issues; ~~division of class;~~ subclasses. When appropriate: G.(1) An action may be brought or ordered maintained as a class action with respect to particular claims or issues; or G.(2) ~~a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule~~

~~shall then be construed and applied accordingly by or against multiple classes or subclasses. Each subclass must separately satisfy all requirements of this rule except for subsection A. (1).~~

H. Notice and demand required prior to commencement of action for damages.

H.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of ~~subsection (3)~~ of sections **A and B** of this rule, the potential plaintiffs' class representative shall:

H.(1)(a) Notify the potential defendant of the particular alleged cause of action; and

H.(1)(b) Demand that such person correct or rectify the alleged wrong.

H.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, in the case of a corporation or limited partnership not authorized to transact business in this state, to the principal office or place of business of the corporation or limited partnership, and to any address the use of which the class representative knows, or on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

* * * * *

M. ~~Judgment; inclusion of class members; description; names~~

~~form of judgment. The judgment in an action ordered maintained as a class action under subsections (1) or (2) of section B of this rule, whether or not favorable to the class, include and shall specify or describe those whom the court finds found to be members of the class. The judgment in an action maintained as a class action under subsection (3) of section B of this rule, whether or not favorable to the class, shall include and specify by name those to whom the notice provided in section F of this rule was directed, and who have not requested exclusion and whom the court finds to be members of the class, and the judgment shall state the amount to be recovered by each class member or who, as a condition of exclusion, have agreed to be bound by the judgment. If a money judgment is entered in favor of a class it shall when possible identify by name each member of the class and the amount to be recovered thereby.~~

* * * * *

COMMENT

Rule 32 is substantially modified to substitute a unitary class action structure for the tripartite classification scheme of the prior rule, to remove some procedural obstacles to efficient and economical conduct of class action litigation, and to enlarge the discretion of judges to determine appropriate notice to class members. Some of these amendments were modeled in part upon a "Report and Recommendations of the Special Committee on Class Action Improvements," 110 FRD 195 (1986), which includes helpful commentary.

32 A.(5). Language referring specifically to subsection B.(3) of the former rule is deleted because, as amended, that subsection no longer defines a distinct category of class action.

32 B. This section is amended to substitute a unitary structure of class actions for the tripartite classification

scheme of the former section. As amended, this section changes the defining characteristics formerly used to distinguish among three types of class actions into a range of factors which are to be considered in any action for which class certification is sought. The former section's flat prohibition on the required finding of "predominance" of common questions of law or fact if any claims of individual class members are likely to require adjudication of any separate issues apart from ascertaining damages is abandoned as unduly rigid.

32 C.(1). Language is added making clear that the option exists of certifying for class treatment only some specified claims or issues, leaving others to be litigated outside the scope of the class action, and also that, when any class action is certified, the court is required to find the facts specially and to state separately its conclusions pertinent to such certification.

32 D. Language is added making clear that, when an action filed as a class action is settled or voluntarily dismissed, notice must be given to some or all class members unless class certification has already been denied or if no compensation has been paid or promised for the dismissal. The manner of giving this notice is within the court's discretion.

32 E.(1) Amended to clarify that, both prior to as well as following ruling upon certification, the court possesses the same authority to rule upon Rule 21 or summary judgment motions in class action litigation as in ordinary civil actions.

32 E.(2) Amended to provide that, in addition to the other matters specified, the court may direct that some or all class members be notified of their option to be excluded from the class. Such notice should include directions on how this option may be effectively exercised, including a reasonable time deadline within which to inform the court. The issues of whether this option should be afforded and, if so, whether it is to be extended to some or all class members, and if the former, to which class members, as well as whether such option is subject to any condition in addition to giving the court reasonable notice of its exercise, are all committed to the court's discretion. However, counsel should be alert to the possibility that the current controlling interpretation of the due process clause of the Fourteenth Amendment of the U.S. Constitution might, under certain circumstances, require that all class members identifiable with reasonable effort be given individual written notice of their option to be excluded from the class, subject to no condition except that of informing the court thereof in some reasonable manner as directed in the notice. See e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985), and subsequent lower court decisions.

32 E.(3) Amended to clarify that the court may impose conditions on class members as well as on representative parties

and intervenors.

32 F.(1) Amended to function consistently with the unitary class action structure provided by section B of this rule, as amended. The Council's intent is that the form, manner, and extent of notice of class certification to class members no longer be automatically determined on the basis of which of the three categories defined by former section B a given class action would be thought to fall within. Subject only to the requirement that in all class actions some form of notice of certification be afforded to at least some class members, all questions about the timing, method, and content of such notice are confided to the court's discretion, guided by the considerations specified. Likewise, when the court directs that notice of certification be directed only to some class members, it has discretion to decide which ones. However, counsel should be alert to the possibility that the current controlling interpretation of the due process clause of the Fourteenth Amendment of the U.S. Constitution might, under certain circumstances, require that all class members identifiable with reasonable effort be given individual written notice of class action certification. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 997, 811-12 (1985), and subsequent lower court decisions.

This subsection, as amended, applies to all class actions maintained under this rule, rather than only to a particular subset or category of class actions as defined by former section 32 B. However, the Council's understanding is that the statement required by subsection 32 F.(2) and the related dismissal provision of subsection 32 F.(3) have no application to class actions in which injunctive or declaratory relief is awarded. There is no intent to change existing law in this regard.

32 F.(4) is amended to remove any implication that it precludes imposing upon defendants the costs of any notice that might be ordered subsequent to determination of their liability, and to provide that even prior to such determination the court may order defendants to bear some or all the costs of any notice included with a regular mailing to their current customers or employees.

32 G. is amended to clarify that certain specified claims or issues subsumed within an action filed as a class action may be certified for class treatment, and that a single class as alleged in a complaint may be reorganized into subclasses, in which event each subclass must meet all requirements of this rule except the numerosity requirement of subsection A.(1).

32 H.(1) is amended to conform to the concurrent amendment to section 32 B.

32 M. is amended to conform to the concurrent amendment to section 32 B. and to make clear that class action judgments should specify or describe, in addition to those determined to be

members of the class, anyone who has agreed to be bound by the judgment as a condition of being excluded from the class.

CLASS ACTIONS
RULE 32

F. Notice and exclusion.

* * * * *

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

F(3) Failure of a class member to file a statement required by the court will be grounds for [~~the~~] entry of judgment dismissing such class member's claim ~~for individual monetary~~

recovery without prejudice to the right to maintain an individual, but not a class, action for such claim.

* * * * *

COMMENT

32 F(2) is amended to remove uncertainty left by the Council's 1992 amendments to Rule 32, specifically the amendment abolishing the classification of class actions in former section 32 B into three distinct categories. The purpose of the present amendment is to express the Council's intent that the understanding established prior to the 1992 amendments remains that the claim form procedure mandated by this subsection applies only to class actions wherein the relief sought consists of individual monetary recoveries by class members.

32 F(3) is amended for clarity and consistency with subsection 32 F(2) above, as amended.

CLASS ACTIONS
RULE 32

* * * * *

N Attorney fees, costs, disbursements, and litigation expenses.

N(1)(a) Attorney fees for representing a class are subject to control of the court.

* * * * *

N(1)(e)(v) Appropriate criteria in [OR] DR 2-106 of the Oregon Code of Professional Responsibility.

* * * * *

CLASS ACTIONS

RULE 32

F Notice and exclusion.

F(1) When ordering that an action be maintained as a class action under this rule, the court shall direct that notice be given to some or all members of the class under subsection E(2) of this rule, shall determine when and how this notice should be given and shall determine whether, when, how, and under what conditions putative members may elect to be excluded from the class. The matters pertinent to these determinations ordinarily include: (a) the nature of the controversy and the relief sought; (b) the extent and nature of any member's injury or liability; (c) the interest of the party opposing the class in securing a final resolution of the matters in controversy; (d) the inefficiency or impracticality of separately maintained actions to resolve the controversy; (e) the cost of notifying the members of the class; and (f) the possible prejudice to members to whom notice is not directed. When appropriate, exclusion may be conditioned on a prohibition against institution or maintenance of a separate action on some or all of the matters in controversy in the class action or a prohibition against use in a separately maintained action of any judgment rendered in favor of the class from which exclusion is sought.

F(2)

(i) Prior to the entry of a judgment against a defendant the court shall request members of the class who may be entitled to individual monetary recovery to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage.

(ii) The **form of the** statement shall be designed to meet the ends of justice. In determining the **language and** form of the [*statement*] **documents to be sent class members**

under subsection F(2)(i) or (iii), the court shall consider at least: (a) the nature of the acts of the defendant[,]; (b) the amount of knowledge a class member would have about the extent of such member's damages[,]; (c) the nature of the class including the probable degree of sophistication of its members and any special needs created by class members' disabilities; (d) whether it is appropriate for the statement to be prepared in alternative formats, such as large type, Braille, or in languages in addition to English[,]; and (e) the availability of relevant information from sources other than the individual class members.

(iii) When the names and addresses of the class members can reasonably be determined from the defendant's business records and individual monetary recoveries are capable of calculation without the need for individualized adjudications, the court, instead of requiring the statement referred to in subsection F(2)(i), may direct the defendant to send each class member notice of (a) the amount of the monetary recovery that has been calculated for that person and (b) that person's right to request exclusion from the class. All class members who do not request exclusion within the time specified by the court shall be deemed to have requested affirmative relief in the calculated amount.

(iv) The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for [*each*] all individual class members who [*has*] have filed [*a*] the statement required by the court under subsection F(2)(i) or who are deemed to have requested affirmative relief under subsection F(2)(iii), assessable court costs, and an award of attorney fees, if any, as determined by the court.

(v) If the parties agree and the court approves, any of the procedures set forth in subsection F(2)(i) to subsection F(2)(iv) may be waived in a particular case.

F(3) [*Failure of*] If a class member fails to file [*a*] the statement required by the court [*will be grounds for entry of judgment dismissing such class member's*] under subsection F(2)(i) or if a class member requests exclusion under subsection F(2)(iii) within the time specified by

the court, that person's claim for [*individual*] monetary recovery **shall be dismissed** without prejudice to the right to maintain an individual, but not a class, action for such claim.

F(4) **Nothing in subsections F(2) or F(3) is intended to allow the court to award any monetary recovery that is not claimed either because a class member failed to file the statement required by the court under subsection F(2)(i), or because a class member requested exclusion under subsection F(2)(iii) within the time specified by the court.**

F[(4)](5) Plaintiffs shall bear costs of any notice ordered prior to a determination of liability.

The court may, however, order that defendant bear all or a specified part of the costs of any notice included with a regular mailing by defendant to its current customers or employees. The court may hold a hearing to determine how the costs of such notice shall be apportioned.

F[(5)](6) No duty of compliance with due process notice requirements is imposed on a defendant by reason of the defendant including notice with a regular mailing by the defendant to current customers or employees of the defendant under this section.

F[(6)](7) As used in this section, "customer" includes a person, including but not limited to a student, who has purchased services or goods from a defendant.

* * * * *

N Attorney fees, costs, disbursements, and litigation expenses.

N(1)(a) Attorney fees for representing a class are subject to control of the court.

N(1)(b) If under an applicable provision of law a defendant or defendant class is entitled to attorney fees, costs, or disbursements from a plaintiff class, only representative parties and those members of the class who have appeared individually are liable for those amounts. If a plaintiff is entitled to attorney fees, costs, or disbursements from a defendant class, the court may apportion the fees, costs, or disbursements among the members of the class.

N(1)(c) If the prevailing class recovers a judgment that can be divided for the purpose, the court may order reasonable attorney fees and litigation expenses of the class to be paid from the recovery.

N(1)(d) The court may order the adverse party to pay to the prevailing class its reasonable attorney fees and litigation expenses if permitted by law in similar cases not involving a class.

N(1)(e) In determining the amount of attorney fees for a prevailing class the court shall consider the following factors:

N(1)(e)(i) The time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered;

N(1)(e)(ii) Results achieved and benefits conferred upon the class;

N(1)(e)(iii) The magnitude, complexity, and uniqueness of the litigation;

N(1)(e)(iv) The contingent nature of success; and

N(1)(e)(v) Appropriate criteria in [DR 2-106] **Rule 1.5** of the Oregon [Code] **Rules** of Professional [Responsibility] **Conduct**.

N(2) Before a hearing under section C of this rule or at any other time the court directs, the representative parties and the attorney for the representative parties shall file with the court, jointly or separately:

N(2)(a) A statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts;

N(2)(b) A copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangement or fees; and

N(2)(c) A copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or an attorney regularly of counsel with the law firm of the representative parties' attorney. This statement shall be supplemented promptly if additional arrangements are made.
