

AMENDMENTS

TO ORCP 83

promulgated by

COUNCIL ON COURT PROCEDURES

1980 to 2016

RULE 83

PROVISIONAL PROCESS

A. Requirements for issuance. To obtain an order for issuance of provisional process the plaintiff shall cause to be filed with the clerk of the court from which such process is sought a sworn petition and any necessary supplementary affidavits requesting specific provisional process and showing, to the best knowledge, information, and belief of the plaintiff or affiant, that the action is one in which provisional process may issue, and:

A.(1) The name and residence or place of business of the defendant;

A.(2) Whether the underlying claim is based on a consumer transaction and whether provisional process in a consumer good is sought;

A.(3)(a) If the provisional process sought is claim and delivery, a description of the claimed property in particularity sufficient to make possible its identification, and the plaintiff's estimate of the value and location of the property;

A.(3)(b) If the provisional process sought is a restraining order, a statement of the particular acts sought to be restrained;

A.(4) Whether the plaintiff's claim to provisional process is based upon ownership, entitlement to possession, a security interest or otherwise;

A.(5) A copy or verbatim recital of any writing or portion of a writing, if plaintiff relies upon a writing, which evidences

the origin or source of the plaintiff's claim to provisional process;

A.(6) Whether the claimed property is wrongfully detained by the defendant or another person;

A.(7) Whether the claimed property has been taken by public authority for a tax, assessment, or fine;

A.(8) If the plaintiff claims that the defendant has waived the right to be heard, a copy of the writing evidencing such waiver and a statement of when and in what manner the waiver occurred;

A.(9) If provisional process is based on notice of a bulk transfer under ORS chapter 76 or a similar statute or provision of law, a copy of the notice;

A.(10) Facts, if any, which tend to establish that there is a substantial danger that the defendant or another person is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser.

A.(11) Facts, if any, which tend to establish that without restraint immediate and irreparable injury, damage, or loss will occur;

A.(12) Facts, if any, which tend to establish that there is substantial danger that the defendant or another person

probably would not comply with a temporary restraining order;  
and

A.(13) That there is no reasonable probability that the defendant can establish a successful defense to the underlying claim.

B. Provisional process prohibited in certain consumer transactions. No court shall order issuance of provisional process to effect attachment of a consumer good or to effect attachment of any property if the underlying claim is based on a consumer transaction. Provisional process authorized by Rule 85 may issue in consumer transactions.

C. Evidence admissible; choice of remedies available to court.

C.(1) The court shall consider the affidavit or petition filed under section A. of this rule and may consider other evidence including, but not limited to, an affidavit, deposition, exhibit, or oral testimony.

C.(2) If from the affidavit or petition or other evidence, if any, the court finds that a complaint on the underlying claim has been filed and that there is probable cause for sustaining the validity of the underlying claim, the court shall consider whether it shall order issuance of provisional process, as provided in section D. or E. of this rule, or a restraining order, as provided in section F. of this rule, in addition to a show cause order. The finding under this subsection is

subject to dissolution upon hearing.

D. Effect of notice of bulk transfer. Subject to section B. of this rule, if the court finds that with respect to property of the defendant notice of bulk transfer under ORS chapter 76 or a similar statute or provision of law has been given and that the time for possession by the transferee has not passed, the court shall order issuance of provisional process.

E. Issuance of provisional process where damage to property threatened. Subject to section B. of this rule, if the court finds that before hearing on a show cause order the defendant or other person in possession or control of the claimed property is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser or that the defendant or other person in possession or control of the claimed property would not comply with a temporary restraining order, and if Rule 82 A. has been complied with, the court shall order issuance of provisional process in property which probably would be the subject of such destruction, harm, concealment, removal, transfer, or violation.

F. Restraining order to protect property. Subject to section B. of this rule, where hearing on a show cause order is pending or where the court finds that because of impending injury, destruction, transfer, removal, or concealment of the property in which provisional process is sought there is probable cause to believe that immediate and irreparable injury, damage, or loss to the

plaintiff is imminent, and if Rule 82 A. has been complied with, the court in its discretion may issue a temporary order directed to the defendant and each other person in possession or control of the claimed property restraining the defendant and each such other person from injuring, destroying, transferring, removing, or otherwise disposing of property and requiring the defendant and each such other person to appear at a time and place fixed by the court and show cause why such restraint should not continue during pendency of the proceeding on the underlying claim. Such order shall conform to the requirements of Rule 79 D. A restraining order under this section does not create a lien.

G. Appearance; hearing; service of show cause order; content; effect of service on person in possession of property.

G.(1) Subject to section B. of this rule, the court shall issue an order directed to the defendant and each person having possession or control of the claimed property requiring the defendant and each such other person to appear for hearing at a place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue. Upon request of the plaintiff the hearing date may be set later than the seventh day.

G.(2) The show cause order issued under subsection (1) of this section shall be served on the defendant and on each other person to whom the order is directed.

G.(3) The order shall:

G.(3)(a) State that the defendant may file affidavits with the court and may present testimony at the hearing; and

G.(3)(b) State that if the defendant fails to appear at the hearing the court will order issuance of the specific provisional process sought.

G.(4) If at the time fixed for hearing the show cause order under subsection (1) of this section has not been served on the defendant but has been served on a person in possession or control of the property, and if Rule 82 A. has been complied with, the court may restrain the person so served from injuring, destroying, transferring, removing, or concealing the property pending further order of the court or continue a temporary restraining order issued under section F. of this rule. Such order shall conform to the requirements of Rule 79 D. Any restraining order issued under this subsection does not create a lien.

H. Waiver; order without hearing. If after service of the order issued under subsection G.(1) of this rule, the defendant by a writing executed by or on behalf of the defendant after service of the order expressly declares that defendant is aware of the right to be heard and does not want to be heard, that defendant expressly waives the right to be heard, that defendant understands that upon signing the writing the court will order issuance of the provisional process sought so that the possession or control of the claimed property will be taken from the defendant or another person, the court, subject to section 8.

of this rule without hearing shall order issuance of provisional process.

I. Authority of court on sustaining validity of underlying claim; provisional process; restraining order.

I.(1) Subject to section B. of this rule, if the court on hearing on a show cause order issued under section G. of this rule finds that there is probable cause for sustaining the validity of the underlying claim and if Rule 82 A. has been complied with, the court shall order issuance of provisional process. The order shall describe with particularity the provisional process which may be issued.

I.(2) Subject to section B. of this rule, if the court on hearing on a show cause order issued under section G. of this rule finds that there is probable cause for sustaining the validity of the underlying claim but that the provisional process sought cannot properly be ordered, and if Rule 82 A. has been complied with, the court in its discretion may continue or issue a restraining order of the nature described in section F. of this rule. If a restraining order is issued, it shall conform to the requirements of Rule 79 D. A restraining order under this subsection does not create a lien.

COMMENT

This rule was taken almost verbatim from ORS 29.025 through 29.075. All provisional remedies intended to preserve a defendant's assets to satisfy an eventual judgment, except provisional receiverships covered by ORCP 80, would require an order by the court conforming to the procedure in this rule. This procedure was developed by a substantial legislative revision of ORS chapter 29 in 1973 to conform to current constitutional requirements.



The first paragraph of section A. was rewritten slightly to make clear that the showing of the necessary information for section A. can either be in plaintiff's sworn petition or in separate affidavits submitted to support the petition. For clarity, paragraph A.(3)(a) was added. ORS 29.025(8) and 29.030(2) and (3) were eliminated because they were confusing and not very useful. The rule specifically requires an application by plaintiff, and the court could not issue a provisional process order on its own motion.

The last sentence was added to B. for clarity. The existing language "to effect attachment" creates the exception for claim and delivery. The language of C.(2) was also changed slightly for clarity.

The Council eliminated ORS 29.050. The waiver authorized could still be no more than a printed sale contract or loan agreement. If there is an actual negotiated consensual waiver between freely contracting parties, nothing would prohibit the plaintiff from proving that waiver in an application for a provisional process order. See A.(8).

The cross reference to the security requirements of Rule 82 and form of order in Rule 79 D. were added to sections F., G., and I.

The most important change in the provisions relating to restraining orders was to specify that no lien attaches to property subject to a restraining order. A party who wishes to secure a lien, as opposed to merely restraining disposition of the property, should use other provisional process. The last sentence of I.(1) is also new.

Note, pursuant to Rule 81 C.(1), personal service of the show cause order is not absolutely required. The order may be served in any manner in which a summons may be served.

~~asserted error to the trial court and made a notation of exception immediately after the court instructed the jury.~~

~~H(2) Exceptions must be specific and on the record. A party shall state with particularity any point of exception to the trial judge. A party shall make a notation of exception either orally on the record or in a writing filed with the court.~~

## ~~JUDGMENTS RULE 67~~

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~~C Demand for judgment. Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if such relief has not been demanded in the pleadings, except: C(1) **Default.** A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. However, a default judgment granting equitable remedies may differ in kind from or exceed in amount that prayed for in the demand for judgment, provided that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered. C(2) **Demand for money damages.** Where a demand for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount.]. A judgment for relief different in kind from or exceeding the amount prayed for in the pleadings may not be rendered unless reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.~~

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## PROVISIONAL PROCESS

### RULE 83

**A Requirements for issuance.** To obtain an order for issuance of provisional process the plaintiff shall cause to be filed with the clerk of the court from which such process is sought a sworn petition and any necessary supplementary affidavits or declarations requesting specific

provisional process and showing, to the best knowledge, information, and belief of the plaintiff, affiant or declarant that the action is one in which provisional process may issue, and:

\* \* \*

[A(9) *If provisional process is based on notice of a bulk transfer, a copy of the notice;*]

[A(10)] **A(9)** Facts, if any, which tend to establish that there is a substantial danger that the defendant or another person is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser;

[A(11)] **A(10)** Facts, if any, which tend to establish that without restraint immediate and irreparable injury, damage, or loss will occur;

[A(12)] **A(11)** Facts, if any, which tend to establish that there is substantial danger that the defendant or another person probably would not comply with a temporary restraining order; and

[A(13)] **A(12)** That there is no reasonable probability that the defendant can establish a successful defense to the underlying claim.

**B Provisional process prohibited in certain consumer transactions.** No court shall order issuance of provisional process to effect attachment of a consumer good or to effect attachment of any property if the underlying claim is based on a consumer transaction. Provisional process authorized by Rule 85 may issue in consumer transactions.

**C Evidence admissible; choice of remedies available to court.**

C(1) The court shall consider the affidavit, declaration or petition filed under section **A** of this rule and may consider other evidence including, but not limited to, an affidavit, a declaration, a deposition, an exhibit, or oral testimony.

C(2) If from the affidavit, declaration or petition or other evidence, if any, the court finds that a complaint on the underlying claim has been filed and that there is probable cause for sustaining the validity of the underlying claim, the court shall consider whether it shall order issuance of

provisional process, as provided in section **D** [*or E*] of this rule, or a restraining order, as provided in section [**F**]**E** of this rule, in addition to a show cause order. The finding under this subsection is subject to dissolution upon hearing.

*[D Effect of notice of bulk transfer. Subject to section B of this rule, if the court finds that with respect to property of the defendant notice of bulk transfer has been given and that the time for possession by the transferee has not passed, the court shall order issuance of provisional process.]*

**[E] D Issuance of provisional process where damage to property threatened. \* \* \***

**[F] E Restraining order to protect property. \* \* \***

**[G] F Appearance; hearing; service of show cause order; content; effect of service on person in possession of property. \* \* \***

**[H] G Waiver; order without hearing.** If after service of the order issued under subsection [**G**(1)]**F**(1) of this rule, the defendant by a writing executed by or on behalf of the defendant after service of the order expressly declares that defendant is aware of the right to be heard and does not want to be heard, that defendant expressly waives the right to be heard, that defendant understands that upon signing the writing the court will order issuance of the provisional process sought so that the possession or control of the claimed property will be taken from the defendant or another person, the court, subject to section **B** of this rule without hearing shall order issuance of provisional process.

**[I] H Authority of court on sustaining validity of underlying claim; provisional process; restraining order.**

**[I**(1)]**H**(1) Subject to section **B** of this rule, if the court on hearing on a show cause order issued under section [**G**]**F** of this rule finds that there is probable cause for sustaining the validity of the underlying claim and if Rule 82 A has been complied with, the court shall order issuance of provisional process. The order shall describe with particularity the provisional process which may be issued.

**[I**(2)]**H**(2) Subject to section **B** of this rule, if the court on hearing on a show cause order

issued under section [G]F of this rule finds that there is probable cause for sustaining the validity of the underlying claim but that the provisional process sought cannot properly be ordered, and if Rule 82 A has been complied with, the court in its discretion may continue or issue a restraining order of the nature described in section [F]E of this rule. If a restraining order is issued, it shall conform to the requirements of Rule 79 D. A restraining order under this subsection does not create a lien.