ORCP Rule 22 — Third-Party Practice – Summary of COCP History

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Oregon Rule of Civil Procedure 22 governs counterclaims, cross-claims, and third-party practice. Subsection C specifically addresses when and how a defending party may bring an additional party into an action—the process known as impleader or "third-party practice." The history of ORCP 22C reflects a persistent tension between two competing ideas: protecting plaintiffs and existing parties from prejudicial delay, on one hand, and ensuring that defendants have a fair opportunity to implead parties who may share liability, on the other. That tension has never been fully resolved, and the consent-of-parties requirement at the heart of the rule has ultimately survived several efforts to eliminate it.

Pre-1982: ORCP 22 Origins

ORCP 22 C and its predecessor statute, ORS 16.315, were modeled after Federal Rule of Civil Procedure 14(a). Third-party practice has been available in Oregon since 1975. Under the original rule, a defending party had ten (10) days after service of its original answer to file a third-party complaint as a matter of right, without obtaining leave of court. If that window closed, the defendant had to seek leave of court, with notice to all parties.

By the early 1980s, significant controversy had developed over whether third-party practice should be retained at all. Judges responding to a bar committee questionnaire were overwhelmingly in favor of abolishing it, citing delays, increased motion practice, discovery complications, and jury confusion. The practicing bar, by contrast, generally viewed it as an effective procedural device that facilitated settlement and avoided multiple trials. In 1981, the Council voted to abolish third-party practice entirely (a decision it later rescinded).

1982 Amendment

In May 1982, a deadlocked ORCP 22 C subcommittee referred the matter to the full Council, attaching a proposal from the OSB's Procedure and Practice Committee. That proposal recommended amending ORCP 22 C to address judicial concerns while preserving the mechanism. The key proposed changes included: requiring the third-party plaintiff to demonstrate "due diligence" in seeking late impleader; authorizing the court to refuse leave if the filing would substantially prejudice existing parties or unreasonably delay the trial; and allowing the court to impose terms and conditions on any leave granted.

At the Council's December 4, 1982 meeting, the Council adopted an amended version of Rule 22 C. Most significantly, the 10-day right-of-service window was replaced with a 90-day period running from service of the plaintiff's summons and complaint on the defending party. After 90 days, the rule required both (1) agreement of the parties who have appeared, and (2) leave of court. The version passed unanimously. A contemporaneous comment to the rule provided that within the 90-day window, third parties may be brought in as a matter of right; after 90 days, they may only be added by agreement of parties who have appeared and leave of court. This consent-plus-leave structure became the defining feature of ORCP 22 C(1) going forward.

1992 Challenge to Consent Requirement
The Council considered changes to ORCP 22 C in the 1991–1993 biennium, including whether to strike the consent-of-parties language added in 1982. The proposal was rejected. This was the first of a series of unsuccessful efforts to remove the consent requirement from the rule.

1993–1995 Challenge to Consent Requirement
At the May 14, 1994 meeting, the Council took up a proposal by member Rudy Lachenmeier to amend ORCP 22 C(1). His motion would have retained the leave-of-court requirement for post-90-day impleader but deleted the additional requirement of obtaining "agreement of parties who have appeared." A competing proposal discussed by the subcommittee would have eliminated both requirements and instead required only leave of court. After extensive debate, the Council voted on the motion to delete the agreement-of-parties requirement. The motion failed to carry.

The issue did not rest there within that biennium. Member John Hart later re-presented the same proposed amendment at the Council's December 10, 1994 meeting, with Executive Director Maury Holland also pressing for the change. No vote appears to have been taken at that meeting, and the amendment did not advance.

2000 Subcommittee Review of Consent Requirement
In the 1999–2000 biennium, the Council assigned a subcommittee (Judge Richard Barron, (now Judge) Benjamin Bloom, and Bill Gaylord) to revisit ORCP 22 C(1). Three issues were before the subcommittee: (1) whether the 90-day period should be shortened; (2) whether the conjunctive agreement-of-parties-plus-leave-of-court requirement should be changed; and (3) whether the rule should be clarified to allow impleading a party liable to the plaintiff but not to the defendant.

The subcommittee did not recommend changing the 90-day period. On the consent issue, its consensus was that the requirement that a defendant obtain both agreement of the parties who have appeared and leave of court should not be changed—specifically, that the court should not be able to allow the filing of a third-party complaint if the plaintiff opposed it after the 90-day window had run. Bill Gaylord, in a written submission, argued for retaining the consent structure on the grounds that when all existing parties agree to a late joinder, there is no need to burden the court with a leave motion at all. The Council took no final action to change the rule at this time.

2018 Review – Published Amendment; Fails Supermajority
The 2017–2019 biennium saw the most sustained challenge to the consent requirement. At that time, the Council published a proposed amendment to ORCP 22 C(1) that would have eliminated the requirement that all parties who have appeared consent to a post-90-day third-party filing. Under the published amendment, a defendant would need only leave of court, not the agreement of existing parties, to bring in a third-party defendant after 90 days.

Proponents argued that the existing consent requirement gives the plaintiff a unilateral veto over a legitimate procedural motion—something that does not exist anywhere else in the ORCPs—and that it improperly restricts the trial court's discretion. Defense-side members noted that, as a practical matter, it is often impossible to identify all relevant parties within 90 days, particularly in medical malpractice and complex multi-party cases. They further argued that changes to Oregon's tort law (including the elimination of joint and several liability under ORS 31.600) had fundamentally altered the strategic context since 1982.

Opponents countered that the rule reflects a deliberate historical compromise between the plaintiffs' bar and the defense bar—the defense secured an extended 90-day window in exchange for the consent requirement thereafter. They emphasized that late joinder prejudices plaintiffs by diluting verdict forms, complicating discovery, and threatening case timelines. They also noted that two prior attempts to remove the consent requirement (in 1992 and 1999) had failed.

At the December 8, 2018 meeting, the Council voted on whether to promulgate the published amendment. The motion received 11 votes in favor and 9 votes opposed. Because the Council requires a supermajority of affirmative votes to promulgate, the motion failed. The consent-of-parties requirement was retained.

Oregon Rule of Civil Procedure 22C(1). Third-party practice.

1. **No Change**

   Change: None. The rule is retained as currently written.

   Impact: The 90-day as-of-right window is preserved, and after that period a third-party plaintiff must obtain both the agreement of all appearing parties and leave of court. Plaintiffs retain an absolute veto over late third-party complaints.

C(1) After commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third-party plaintiff must obtain agreement of parties who have appeared and leave of court.

2. **Consent with Judicial Override**

   Change: Retains the current conjunctive requirement of party agreement and court leave after the 90-day window, but adds an explicit judicial override. The court may grant leave over a party's objection only upon express findings on all three prongs: late discovery of the claim despite reasonable diligence, prompt filing after discovery, and no substantial prejudice to any appearing party or unreasonable delay to trial.

   Impact: Preserves the plaintiff's practical ability to block late impleader in the ordinary case while eliminating the absolute veto that has been the central objection to the current rule. The narrow override addresses the concern — raised in the 2018 debate — that the 90-day window is insufficient in complex cases where the basis for third-party liability does not emerge until later in discovery. Because all three findings are required and must be express, circuit courts have a clear and reviewable standard, resolving the trial court split identified in current practice.

C(1) After commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third-party plaintiff must obtain agreement of parties who have appeared and leave of court. **If a party objects to such service, the court may nonetheless grant leave upon an express finding that: (a) the basis for the third-party claim could not have been discovered through reasonable diligence within the 90-day period; (b) the motion was filed promptly after the basis for the claim was or should have been discovered; and (c) granting leave will not prejudice any appearing party or unreasonably delay the trial.**

3. Eliminate "Agreement of the Parties"

Change: Removes the requirement to obtain party agreement after the 90-day window; court leave alone is sufficient for a late third-party complaint.

Impact: Eliminates the plaintiff's unilateral veto over late impleader and gives courts sole discretion to permit or deny it. Aligns Oregon with the federal rule and most other states, which require only court leave after the initial as-of-right window.

C(1) After commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third-party plaintiff must obtain [*agreement of parties who have appeared and*] leave of court.