COUNCIL ON COURT PROCEDURES

Legislative History Materials

1991-93 Biennium

CLASS ACTIONS

GOLDSMITH LETTER AND
PROPOSAL 12/4/91

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December 14, 1991

Professor Fredric Merrill
Executive Director, Council on
Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403

Re: Proposed revisions to ORCP 32

Dear Professor Merrill:

This letter is written on behalf of the Committee to Reform Oregon's Class Action Rule, an ad hoc coalition of law firms and lawyers. The names of committee members appear at the end of this letter. The original of this letter bears their signatures as well.

The Council on Court Procedures last considered amending the class action rule, ORCP 32, more than a decade ago. At that time the Council adopted a number of reforms that it believed would further the legislative policy of permitting class actions (1) to efficiently resolve in a single case what otherwise would require multiple actions and (2) to permit small injuries to be litigated in the aggregate. A few of these reforms were approved by the 1981 legislature; most were not.

The time has come, we believe, for the Council to re-examine Rule 32. Enclosure A to this letter contains the specific proposals which we urge the Council to consider. These reforms are primarily designed to achieve two ends.

The first is to replace the present three-part standard for class certification contained in ORCP 32 B with a single standard which has been recommended by the ABA Section on Litigation (Enclosure B) and is presently being considered by the Advisory Committee on Federal Rules (Enclosure C).[1] The second is to replace present method of damage computation and distribution in ORCP 32 F in light of (1) the problems which have been identified in the past decade and (2) the legislative

[1] The Section on Litigation's comments on the proposal before the Advisory Committee can be found at Enclosure D.

interest in making class action judgments subject to the abandoned property statute, ORS 98.302 et seq.

This letter will explain why Rule 32 should be revised, will identify the principles we believe should guide that process and then will discuss in general terms the nature of the principal reforms that should be made. The specific language changes we seek can be found on enclosure A; an explanation of their purpose is provided in the comments to the proposed amendments, which can be found beginning at page 12 of Enclosure A. Virtually all the reforms we propose differ from those the 1981 legislature found unacceptable.

The Need for Reform

When the Council last considered reforming Rule 32, there was limited experience with how the rule actually worked, particularly in the context of allegedly wrongful practices which caused relatively small harm to each of a large number of people. By that time, several such cases had been filed. However, the developments in those cases which revealed problems with ORCP 32 mostly occurred later.[2] Thus, one reason why the changes in ORCP 32 adopted by the Council in 1980 may have been rejected by the legislature is that a need to alter the status quo had not been demonstrated.

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[2] In particular, several cases had been filed challenging the non-payment of earnings on tax and insurance reserves, including Derenco, Inc. v. Benj. Franklin Federal Savings & Loan Association, 281 Or 533, 577 P2d 477, cert den, 439 US 851 (1978); Guinasso v. Pacific First Federal Savings & Loan Association, 89 Or App 270, 749 P2d 577, rev denied, 305 Or 678 (1988); and Powell v. Equitable Savings & Loan Association, 57 Or App 1110, 643 P2d 1331, rev denied, 293 Or 394 (1982). By 1979, the merits of this controversy had largely been resolved by an interlocutory appeal in Derenco, but most of the class action issues had not yet been addressed.

Additionally, in 1979 and 1980, several cases were filed challenging bank NSF charges, including Best v. United States National Bank, 303 Or 557, 739 P2d 554 (1987) and Tolbert v. First National Bank, 96 Or App 398, 772 P2d 1373 (1989), rev pending. The class action issues in these cases were first considered in 1982.

Most of these cases have now been concluded.[3] A recent commentator, writing in the Willamette Law Review, draws the following lessons from them:

> "[A]t least one meritorious class action was abandoned because the claim form requirement precluded the possibility of meaningful monetary recovery. Additionally, in the tax and insurance reserve cases, * * * the wrongdoing defendants retained over two million dollars in illegally-obtained profits * * *." Emerson, "Oregon Class Actions: The Need for Reform," 27 Will L Rev 757, 760-761 (1991).

Our proposals for reform draw not only on Mr. Emerson's study of the Oregon class action experience. They also incorporate the best portions of the ABA Section on Litigation's recent proposal for the reform of the federal class action rule and the proposal presently in a preliminary stage of consideration by the Advisory Committee on Federal Rules.

The Principles That Should Guide the Reform Effort

Rules governing class actions have tended to be controversial because of the impact the class certification decision has upon the stakes involved in litigation. However, even some of the most conservative jurists have recognized the social benefits provided by class actions. For example, in Deposit Guaranty National Bank v. Roper, 445 US 326, 339 (1980), former Chief Justice Burger wrote:

> "The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."

Similarly, in Hoffmann-La Roche, Inc. v. Sperling, ____ US ____, 110 S Ct 482, 486 (1989), Justice Kennedy acknowledged that class actions benefit not only plaintiffs but also "[t]he

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[3] The only exception is Tolbert, which is pending in the Oregon Supreme Court.

judicial system * * * by efficient resolution in one proceeding of common issues of law and fact * * *." See also Phillips Petroleum Co. v. Shutts, 472 US 797, 809 (1985) (Rehnquist, J).

In its previous examination of ORCP 32, the Council started from the premise that class action procedures should enable such cases to be litigated expeditiously, fairly and inexpensively, without creating undue burdens for either plaintiffs or defendants. We believe those continue to be appropriate standards for evaluating the class action rule. We also believe procedures must be designed so that, if a plaintiff class ultimately prevails, the defendant cannot escape a significant portion of the consequences either by the difficulty of calculating individual recoveries with precision or the inability to locate everyone entitled to a recovery.

Finally, it is critical to remember that class actions are about mass justice. The legal system traditionally has focused on individualizing justice to make sure that every injured party gets exactly what he or she deserves, not one cent more or less. This approach does not take into account what economists call transaction costs, the time spent by lawyers and judges and juries in determining the injured party's entitlement.

Historically, the consequences of the emphasis on individualized justice has been that small injuries which could not be aggregated into a class action have gone unresolved because, in the words of former Chief Justice Burger, injured parties have "not consider[ed] it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost." Roper, supra, 445 US at 338. But mass torts, in particular the asbestos cases, demonstrate that, when individual stakes are high enough, case-by-case adjudication results in the repetitious litigation of common issues, wastes judicial time and the parties' resources, and ultimately produces chaos. See, e.g., Cimino v. Raymark Industries, Inc., 751 F Supp 649, 650-652, 666 (ED Tex 1990).

The Principal Reforms Needed

1. Creation of a Unitary Class Certification Standard

Like the existing federal rule, ORCP 32 B contemplates three different types of class actions with three different standards for certification, differing obligations to give class members notice of the pendency of the action and differing criteria for participation in or exclusion from the class. The

predominant models are ORCP 32 B(2), which generally involves class actions for injunctive or corresponding declaratory relief, and ORCP 32 B(3),[4] which generally involves class actions for monetary damages.

The dividing line between B(2) and B(3) class actions is far from clear. For example, the federal courts have characterized class actions under Title VII seeking back pay for victims of discrimination to be B(2) cases on the grounds that this remedy is really a form of equitable restitution. E.g., Williams v. Owens-Illinois, Inc., 665 F2d 918, 929 (9th Cir 1982).

There are great procedural differences depending on which subsection of ORCP 32 B a case is certified under. In a B(3) class action, notice must be given to the class at the time of certification, usually at the plaintiff's expense, ORCP 32 F(1) and (4), and class members must be given an opportunity to opt out of the class. See ORCP 32 F(1)(b)(ii). Neither is required in a B(2) class action. In addition, a lesser showing is needed to certify a B(2) class.

The ABA Section on Litigation committee, "comprised of attorneys with broad experience representing plaintiffs and defendants in major class action litigation, attorneys with particular public interest perspectives, and two experienced federal judges," 110 FRD 195, 196 (1986), concluded that "the distinctions and procedural effects reflected in the presently trifurcated rule tend to blur the core values of the class action and to promote unnecessary, expensive and inefficient litigation over peripheral issues." 110 FRD at 198. Why, for instance, is notice and an opportunity to opt out required in a lawsuit seeking money damages like Best, where an individual could have as little at stake as $6, but is discretionary with the court in a lawsuit for injunctive relief to desegregate a school district, which will affect the education of all school children for years?

The proposed revisions to ORCP 32 B would make these procedural choices turn not on the form of the action, but on the concrete circumstances of the individual case before the court.

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[4] ORCP 32 B(1) involves special circumstances, probably the most important of which is the limited fund class action invoked when the defendant's resources are insufficient to pay all the claims of class members, should they succeed in litigation, as in some of the asbestos cases.

This necessarily requires modification of several other portions of the rule, including ORCP E, F(1) and M.

One of the effects of this proposal would be to reverse a policy judgment by the 1973 legislature (which enacted the statutory predecessor to ORCP 32) to make certification of "damage" class actions under ORCP 32 B(3) more difficult than in federal court. The legislature attempted to achieve this by enacting the second sentence of ORCP 32 B(3), which provides that the predominance requirement of section B(3) cannot be satisfied "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."

There are three reasons why this language is not maintained. First, because the legislature made this requirement applicable only to B(3) class actions, it is impossible to preserve the legislative policy choices for each category of class actions while eliminating the tripartite certification structure. Second, in cases certified under ORCP 32 B(3), this sentence has prompted substantial litigation over the meaning of words like "numerous" and "likely," which in the end have resulted in decisions based primarily on judicial intuition. Compare Bernard v. First National Bank, 275 Or 145, 158-162, 550 P2d 1203 (1976) (defense of customer knowledge raises legitimate issues as to many members of the class) with Derenco, supra, 281 Or at 555, 571-572 (defense of customer knowledge not a legitimate issue except in isolated and infrequent instances) and Guinasso, supra, 89 Or App at 277-278 (defense of customer knowledge not a legitimate issue except in isolated and infrequent instances despite survey evidence and testimony to the contrary, given the unreliability of memory).

Finally, experience shows that the value choice in existing B(3) is wrong. There is no good reason why, for instance, the common issues in a mass tort like the asbestos cases should be litigated in Oregon state court over and over again because those cases also involve individual liability issues. As the Litigation Section committee puts it, the existence of individual questions "should not be viewed as insuperable stumbling blocks to maintenance of a class action if, after due consideration, the court concludes that class treatment is 'superior to other available methods for the fair and efficient adjudication of the controversy'". 110 FRD at 204.

Our proposal adopts most of the changes which appear in both the Section on Litigation and the Advisory Committee on Federal Rules proposals, and a number of the changes which are found exclusively in the Advisory Committee proposal. A few of these modify the rule in ways unrelated to the elimination of the tripartite class certification structure. The comments to Enclosure A identify the sources of the revisions we propose and, when we have chosen not to follow revisions recommended by either the Section on Litigation or the Advisory Committee, explain the reasons for our decision.

2. Reform of Damage Calculations

At present, if the plaintiff class prevails on liability, ORCP 32 F(2) and (3) require class members to submit claim forms or be excluded from the judgment. This requirement is unique to Oregon law. It creates two sets of problems that require reform.

First, ORCP 32 F(2) implies that, in some circumstances, class members will be required to provide "information regarding the nature of the[ir] loss, injury * * * or damage." This rule fails to give the parties and the court clear guidance in determining when class members will be required to provide evidence of the damages they suffered and when they will be sent claim forms with their proposed recovery precalculated from the defendant's records.[5] What happens if the defendant has records from which individual damages could be calculated, but the calculation will be expensive? What happens if the aggregate injury to the class can readily be calculated from the defendant's records, but the defendant has no records from which each individual's share can be determined with precision?

In many instances, the answer to these questions (which can only be known at the conclusion of litigation) determines whether a finding of liability results in a real or a Pyrrhic victory for the class. When most class members do not keep the relevant records for many years and the litigation is protracted,

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[5] The only certainty is that claim forms must be sent out before checks are issued to prevailing class members. Benj Franklin Federal Savings & Loan Association v. Dooley, 287 Or 693, 601 P2d 1248 (1979). If the defendant has accurate records, requiring this additional step adds expense without any countervailing benefit.

only a tiny percentage of the class would be able to document their individual damages. Thus, as Mr. Emerson's article shows, when plaintiff's counsel receive a modest settlement offer, the uncertainty of how the claim form process will operate often will cause them to believe the class will be better served by settlement.

Trying to make the existing rule more clear does not alleviate the problem. The basic vice with it is that the viability of a class action turns on the quality of the defendant's record keeping. In fact, defining when a defendant will have to calculate individual damages for claim forms is likely to encourage deficient record keeping by defendants who operate on the edge of legality.

The second problem with the claim form procedure is most evident when the defendant can and does calculate individual damages before mailing claim forms, as occurred in the tax and insurance reserve cases. As Mr. Emerson's article shows, a substantial number of claim forms were not returned in these cases, mostly because class members could no longer be located.[6]

It appears likely that legislation will be passed making the unclaimed portion of any class action judgment payable to the state under the abandoned property statutes. This past session, the Oregon Senate passed such a bill unanimously (SB 1008). Due to pressures at the end of the session, the House Judiciary Committee was unable to hold a hearing on it. This bill was endorsed by both the Division of State Lands, which administers the unclaimed property statute, and the Superintendent of Public Instruction, whose agency would be the principal beneficiary of such legislation. Documents pertaining to this legislation can be found at Enclosure E.

We understand that a similar proposal will be introduced in the 1993 legislature by the Division of State Lands. The intent of this legislation is to require all monies unclaimed by class members to be paid over to the state. However, the last sentence of ORCP 32 F(2) and ORCP 32 F(3) stand as an obstance to this end.

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[6] The percentage of class members located depends, among other things, on whether the court requires a locator service to be used to find people who have moved from their last known address, on the length of time the case is litigated, and on the transiency or stability of the class.

To remedy the problems with the claim form procedure, we propose eliminating existing ORCP 32 F(2) and (3), redefining the judgment in a class action to be the aggregate amount which the defendant owes the plaintiff class and employing language from the Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 USC 15d, regarding damage computation techniques.

Conclusion

We appreciate the Council's consideration of these proposals. Although we have attempted to provide the Council with substantial information at the outset, we recognize that the Council undoubtedly will wish to receive testimony concerning this proposal and may request additional written materials.

We will endeavor to assist the Council in its deliberations in any way we can. All requests should be directed to Phil Goldsmith at the address and telephone number on the letterhead.

Respectfully submitted,

Phil Goldsmith

Philip Emerson

Jan Wyers

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PROPOSED REVISIONS TO
ORCP 32

The text of proposed additions to the existing rule are shaded; text which is proposed to be deleted has a line through it.

Rule 32. CLASS ACTIONS

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~~ create~~s~~ 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)~~ (4) the interest of members of the class in individually controlling the prosecution or defense of separate actions; ~~(b)~~ (5) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; ~~(c)~~ (6) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; ~~(d)~~ (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 ~~(e)~~ (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 Compromise of Class Actions; Court Approval Required; When Notice Required. Any action filed as a class action in which there has been no ruling under subsection (1) of section C of this rule and any action ordered maintained as a 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 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 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 pre-certification determination of a motion made by any party pursuant to Rules 21 or 47 if the court concludes that such a 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 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~~:~~, or to be excluded from the class;

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

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; Calculation of Class Monetary Recovery.

F(1) When ordering that an action be maintained as a class action under this rule, the court shall determine whether, when, and how notice should be given under subsection 2 of Section E of this rule and whether, when, how, and under what conditions putative members may elect to be excluded from the class. The matters pertinent to this determination will 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 who do not receive notice. 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. ~~(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) If a defendant is found liable to a plaintiff class in an action for monetary relief, the defendant's obligation to class members may be proved and assessed in the aggregate by statistical or sampling methods, by computations based upon the defendant's records, or by such other reasonable system of computing aggregate damages as the court in its discretion may permit, without the necessity of separately proving the individual claim of, or amount of damage to, each member of the class. Before entry of judgment against the defendant, the court may afford members of the class notice, to be paid by the defendant, and an opportunity to contest the amount of the class member's proposed individual recovery. The judgment against the defendant shall consist of the total obligation to the class as calculated in accordance with this subsection, ~~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 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 without prejudice to the right to maintain an individual, but not a class, action for such claim.~~

F(43) Except as otherwise provided in this subsection, the plaintiffs shall bear the expense of notification prior to a determination of liability. The court may, if justice requires, require that the defendant bear the expense of notification to the current customers or employees of the defendant included with

the current customers or employees of the defendant included with a regular mailing by the defendant. ~~The court~~ or may hold a preliminary hearing to determine how the costs of such notice ~~notice~~ shall be apportioned.

~~F(5) 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~~4) 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.

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 (1) with respect to particular claims or issues~~;~~, or (2) by or against multiple classes or subclasses. Each subclass must separately satisfy the requirements of this rule except for subsection (1) of Section A.

~~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.~~

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.

I. Limitation on Maintenance of Class Actions for Damages. No action for damages may be maintained under the provisions of sections A and B of this rule upon a showing by a defendant that all of the following exist:

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

I(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;

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

I(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.

J. Application of Sections H and I 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 and B of this rule may be commenced without compliance with the provisions of section H 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 H 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 I of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.

K. 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.

L. Coordination of Pending Class Actions Sharing Common Question of Law or Fact.

L(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.

L(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.

L(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 Judge deems appropriate.

L(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.

L(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.

L(5) Notwithstanding any other provisions 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.

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, shall ~~include and~~ specify or describe those ~~whom the court finds~~ who are found to be members of the class~~. The judgment in an~~

~~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 member.~~ or who, as a condition to exclusion, have agreed to be bound by the judgment. If a money judgment is entered in favor of a class, where possible, the judgment should specify by name each member of the class and the amount to be recovered by each member.

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~~ Notwithstanding any other applicable provision of law, a defendant or defendant class is entitled to attorney fees, costs, or disbursements ~~from a plaintiff class,~~ only against the representative parties and those members of the class who have appeared individually ~~are liable for those amounts~~ and only if the award is assessed as a sanction. 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)(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 of the Oregon Code of Professional Responsibility.

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.

O. 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:

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

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

O(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

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

Commentary on proposed revisions

The source of most of these revisions is the draft revisions to Federal Rule 23 presently before the Advisory Committee on Federal Rules ("Advisory Committee"), which in turn are largely based on a proposal made by the ABA Section on Litigation, published at 110 FRD 195. Where the Advisory Committee proposal's language is used, its committee notes and, if applicable, the Section on Litigation's committee commentary explain the basis and purpose of the revision. These comments will explain the reasons for deviations from the Advisory Committee proposal, and those revisions not addressed by that proposal.

Section A(4).

The Advisory Committee proposal would add the requirement that the class representative serve "willingly." This proposal is not followed because of its apparent impact on actions involving a defendant class.

The federal courts have allowed one defendant to be certified as representative of a defendant class when an appropriate "juridical link" exists between members of that class. E.g., LaMar v. H & B Novelty & Loan Co., 489 F2d 461, 466, 469-470 (9th Cir 1973) (governmental bodies in a single state); Alaniz v. California Processors Inc., 73 FRD 269, 276 (ND Cal 1976) (employers operating under a single industry-wide collective bargaining agreement). Because few, if any, defendants are willingly part of any litigation, the Advisory Committee proposal would tend to preclude defendant class actions, contrary to ORCP 32 N(1) which expressly contemplates an action against a defendant class.

Section B.

To the extent present ORCP 32 B is identical to FRCP 23(b), the changes are identical in language to the Advisory Committee proposal and identical in substance to the Section on Litigation recommendation. The unique portions of present ORCP 32 B(3) are treated as follows.

B(3)(e) is maintained. B(3)(f) is deleted as unnecessary in light of the revision to ORCP 32 E(1) to permit precertification merits determinations. Because the second sentence of existing B(3) is similar (but not identical) to the second sentence of existing Federal Rule 23(b)(3), it is similarly deleted.

Section C(1).

The new text is based on the Advisory Committee proposal for revising Federal Rule 23(c)(1). The second half of the first

sentence of the existing rule, which is presently limited to B(3) class actions, is not contained in the federal rule. Because the policy it expresses both conveys to trial courts the importance of the class certification decision and facilitates appellate review of such decisions, it has been broadened to apply to all class actions.

Section D.

The revision is a blend of the best elements of the present rule and the Advisory Committee proposal for revising Federal Rule 23(e). It preserves the Oregon policy of requiring notice if a class action is settled, even before the certification decision, unless the class representative and that person's attorney receive no compensation from the case. This protects against a sellout of the class interests for personal gain, without impeding the class representative from withdrawing from an unmeritorious case. However, the revision adopts language from the Advisory Committee proposal which makes clear that this rule does not apply to the settlement of a proposed class representative's individual claim once class certification has been denied.

The revision also adopts the Advisory Committee proposal to give the trial court discretion on the extent of notice required in situations where the rights of absent class members may be adequately protected by notice directed to less than all. An example where this provision might have been invoked is the settlement of the claim for appellate attorney fees against the defendant in Guinasso v. Pacific First Federal, Multnomah County Circuit Court Case No. 416-583 (Amended Order Re Settlement, dated January 26, 1990). Even though the settlement had only a modest impact on the recoveries of individual class members and paved the way for an immediate payment of a nearly two million dollar class recovery, the court read existing ORCP 32 D as requiring notice to all class members and therefore ordered published notice.

Section E.

Based on the Advisory Committee proposal to revise Federal Rule 23(d).

Section F(1).

The revision replaces existing ORCP F(1) and (5) and generally is based on the Advisory Committee proposal to revise Federal Rule 23(c)(2). There are, however, three differences:

1. The Advisory Committee proposal would require some form of post-certification notice to be given in all cases, and defines the criteria to be used in determining the type and

extent of that notice. Like the Section on Litigation recommendation, this revision leaves to the trial court's discretion, in accordance with defined criteria, the determination of "who will receive notice, when that notice will be given, and the form of notice that will be required." 110 FRD at 208.

The obligation to give notice in part is a question of constitutional due process. However, in the words of the Section on Litigation, it is "both unnecessary and unwise to attempt codification of constitutional principles in a procedural rule applicable to all civil actions." Id. at 198 n 2. This is so because courts in deciding individual cases can factor in evolving constitutional standards, but have no freedom to disregard the value choices reflected in rules even if the assumptions of constitutional law on which those rules rest prove to be incorrect. See Eisen v. Carlisle & Jacquelin, 417 US 156, 176-177 (1974) (irrespective of the requirements of due process, Federal Rule 23(c)(2) mandates individual notice in a case certified under Federal Rule 23(b)(3)).

A recent Oregon case illustrates why trial courts should retain the discretion to not require post-certification notice. Benzinger v. Oregon Department of Insurance & Finance, Multnomah County Circuit Court No. 9102-01201, involved the construction of ORS 656.268(6)(a) regarding time limits for workers' compensation reconsideration decisions. After the trial court's decision on the merits adopting plaintiff's construction of the statute was affirmed on appeal, 107 Or App 449, 812 P2d 36 (1991), the plaintiff moved to certify an injunctive relief class to insure that all similarly situated claimants would be treated equally. The trial court did so.

In such a case, requiring post-certification notice of any type would increase the expense of litigation without providing corresponding benefit to class members. The same would be true in a class action involving a government benefits program where all the class members qualify for representation by a legal services office. These are just examples, not an exclusive list of the circumstances in which post-certification notice should be dispensed with.

2. This revision identifies six criteria to guide the trial court's discretionary decisions regarding notice and the opportunity to request exclusion. The first four of these are drawn from the Advisory Committee proposal. The last two are drawn from the criteria to guide the trial court's discretion in determining the manner and form of notice in present ORCP 32 F(1)(c).

3. The Advisory Committee proposal contemplates under some circumstances "opt-in" classes, i.e., classes in which

absent class members must make an affirmative request to be included in the case. The Advisory Committee proposal's comments stresses that "[r]arely should a court impose an 'opt-in' requirement for membership in a class," but state that the option should be preserved if needed to avoid due process problems.

However, in Phillips Petroleum Co. v. Shutts, 472 US 797, 812-814 (1985), a unanimous Supreme Court rejected the notion that due process requires an absent plaintiff to opt in and suggested that such a requirement "would probably impede the prosecution of those class actions involving an aggregation of small individual claims" and would "sacrifice the obvious advantages in judicial efficiency resulting from the 'opt out' approach." The Advisory Committee proposal has identified no case in which an opt-out class has been found to violate due process. In short, an opt-in requirement is both bad policy and unnecessary to satisfy due process.

Section F(2).

In light of the experience summarized in Emerson, "Oregon Class Actions: The Need for Reform," 26 Will L Rev 757 (1991), the mandatory claim form requirement of existing ORCP 32 F(2) and (3) is eliminated. It is replaced by a methodology for computing the class monetary recovery which is drawn from the Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 USC §15(d).

The trial court is given a choice of tools to use in making this calculation in accordance with the measure of damages defined by governing substantive law. In determining which tool to use, the trial court should consider how accurately a particular method will determine each individual class member's recovery, how expensive using the particular method is and any other factors relevant to the particular case. When each individual's recovery can be calculated from the defendant's records relatively inexpensively, this methodology has been used in the past in cases like Guinasso and Powell v. Equitable Savings & Loan Association, Multnomah County Circuit Court Case No. 414-798, and should continue to be used.

Where the defendant does not have records to permit an exact calculation of each individual's recovery or where using these records would be disproportionately expensive, the trial court is authorized to consider other options. One option expressly identified is the use of statistical or sampling methods. Such methods have been employed by federal courts in a variety of class action contexts. The state of the federal law is summarized in Long v. Trans World Airlines, Inc., 761 F Supp 1320, 1323-28 (ND Ill 1991) and Cimino v. Raymark Industries, Inc., 751 F Supp 649, 659-666 (ED Tex 1990). See also Oregon Management and Advocacy Center, Inc. v. Mental Health Division,

96 Or App 528, 774 P2d 1113, rev denied, 308 Or 405 (1989) (approving use of statistical sampling techniques for damage calculations in a non-class action).

In some instances, the aggregate recovery can be determined from the defendant's records using traditional methods, with statistical methods being used to allocate shares to individuals. In other circumstances, statistical or sampling techniques will be needed to ascertain both the aggregate recovery and each individual share.

The trial court is free to consider any other computational technique that makes sense under the facts of the particular case. But it cannot require class members to complete claim forms as a condition of participation in the recovery.

It should be emphasized that this rule only applies to the computation of damages after a class has been certified. Even when all other class certification criteria are satisfied, where each individual has suffered substantial damages that cannot readily be calculated based on a formula, section B of this rule gives the trial court discretion to deny class certification.

Once a recovery calculation has been made for each class member, the trial court is given the discretion whether to afford class members notice and the opportunity to contest their personal share of the recovery. In deciding whether to exercise this authority, the trial court is to balance the cost of this process against the likelihood that class members would have the means by which to materially improve the calculation of their individual recoveries.

The judgment ultimately entered will include the entire monetary recovery awarded to the class. This revision does not address the disposition of that portion of the judgment awarded in favor of individuals who cannot be identified or located, but leaves this issue for legislative determination.

Section F(3).

The revisions are intended to remove a possible ambiguity in the text of this section which was added by the 1981 legislature. The defendant in Guinasso contended that the present wording of this section, currently located at ORCP 32 F(4), obligated the plaintiff to pay the cost of notice to class members after they had prevailed at trial, and eliminated the basis of the ruling in Powell (Order dated April 5, 1979) that, after the plaintiff has prevailed on liability, the defendant has to pay such costs. The trial court in Guinasso rejected this contention, Order Re Costs dated December 24, 1984, and the Court of Appeals rejected without discussion an assignment of error

based on this ruling. 89 Or App 270, 278, 749 P2d 577, rev denied, 305 Or 672 (1988). Modification of the existing language is desirable to preclude a similar contention from being raised in the future.

Section G.

The revisions are based on the Advisory Committee proposal's revisions of Federal Rule 23(c)(4). However, the Advisory Committee proposal refers at the beginning of the second sentence to "each class or subclass." The words "class or" have been deleted because they could be read as permitting certification of a class without satisfying the numerosity requirement in ORCP 32 A(1).

Section M.

The first sentence adopts the Advisory Committee proposal's revisions of Federal Rule 23(c)(3) with minor wording changes to enhance clarity. The second sentence is based on experience under the existing rule that, when a class prevails in an action for monetary recovery, it is preferable that the judgment specify the name and recovery amount of each class member.

Section N (1)(a).

The present rule, which makes the class representative liable for attorney fees in an unsuccessful class action, is inconsistent with the general policy of ORCP 32. One function of ORCP 32 is to permit the aggregation of small claims which are individually uneconomical to litigate, so that they can be undertaken by an attorney on a contingent basis. See Bernard v. First National Bank, 275 Or 145, 152, 550 P2d 1203 (1976). Making the class representative liable for all attorney fees, costs and disbursements if the case is unsuccessful effectively deters a class action whenever the defendant has a basis for recovering attorney fees.

The revision limits the class representative's liability to sums assessed as sanctions in the litigation process. This will permit fees and costs to be awarded, for example, if the plaintiff violates ORCP 17 or if the defendant is entitled to fees under a statute which requires a showing that the plaintiff's case was frivolous. However, a defendant could not employ a contractual attorney fee provision against the class representative.

Revision omitted.

There is an additional element of the Advisory Committee proposal, to create a right to seek an interlocutory

appeal from any class certification decision. This proposal is not followed because it seems redundant of ORS 19.015 as interpreted by the Oregon Supreme Court in Joachim v. Crater Lake Lodge, Inc., 276 Or 875, 556 P2d 1334 (1976).

ABA SECTION
ON LITIGATION
RECOMMENDATION

prevents disclosure of the memorandum which defendants seek.[2]

ORDER

Having considered the memoranda and arguments in support and in opposition to Defendants' Motion to Compel Production of Documents and good cause appearing therefore,

IT IS HEREBY ORDERED:

Defendants' Motion to Compel Production of Documents is DENIED.

IT IS SO ORDERED.

2. Since contempt is generally the only effective way to ensure a non-party witness' compliance with an order for production the California constitutional provision is in effect an absolute bar to compelled production. *Playboy, supra*, 154 Cal.App.3d at p. 26, 201 Cal.Rptr. 207; *Mitchell v. Superior Court*, 37 Cal.3d 268, 274, 208 Cal. Rptr. 152, 690 P.2d 625 (1984).

AMERICAN BAR ASSOCIATION SECTION OF LITIGATION

REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON CLASS ACTION IMPROVEMENTS

THE AMERICAN BAR ASSOCIATION HAS AUTHORIZED THE SECTION ON LITIGATION TO TRANSMIT THIS REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES. THIS REPORT HAS BEEN APPROVED BY THE COUNCIL OF THE SECTION OF LITIGATION BUT HAS NOT BEEN APPROVED BY THE AMERICAN BAR ASSOCIATION.

Introduction

In December 1977, the Office for Improvements in the Administration of Justice of the United States Department of Justice released for public comment a proposal to reform certain aspects of the class action for federal civil litigation. That proposal, which resulted in legislation introduced but not enacted during the 95th Congress, S. 3475, 95th Cong., 2d Sess. (1978), sparked considerable debate.[1] The American Bar Association, and its Section of Litigation, joined those opposing the Department of Justice proposal. Recognizing the seriousness of the problems addressed by the Department of Justice, and mindful of its public responsibilities, the Section of Litigation, in cooperation with the American Bar Association and the American Bar Foundation, appointed the Special Committee on Class Action Improvements.

The Committee, comprised of attorneys with broad experience representing plaintiffs and defendants in major class action litigation, attorneys with particular public interest perspectives, and two experienced federal judges, began its deliberations in October 1981. A preliminary report was circulated for public comment and published in the Fall 1984 edition of *Litigation News*. After consideration of suggestions and comments, the Committee made appropriate revisions and submitted its report to the Council of the Section of Litigation. The Council approved the report and in July 1985 the House of Delegates of the American Bar Association authorized the Section of Litigation to transmit the report to the Advisory Committee on Civil Rules of the Judicial Conference of the United States. In authorizing transmittal to the Advisory Committee, the House of Delegates neither approved nor disapproved the recommendations set forth in this report.

I

BACKGROUND OF THE STUDY AND RECOMMENDATIONS

This is not the first undertaking looking to change class action procedures. Previous efforts at meaningful reform of the class action

1. See, Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 Colum.L.Rev. 299 (1980); OIAJ, *The Case for Comprehensive Revision of Federal Class Damage Procedure*, reprinted, 6 Class Action Rep. 9 (1979); Wells, *Reforming Federal Class Action Procedure: An Analysis of the Justice Department Proposal*, 16 Harv.J.Legis. 543 (1979); *Proceedings of the Thirty-Ninth Annual Conference of the District of Columbia Circuit*, 81 F.R.D. 243, 285-291 (remarks of Mr. Meador), 291-295 (remarks of Mr. Mickum), 295-303 (remarks of Professor Miller); OIAJ, *Effective Procedural Remedies for Unlawful Conduct Causing Mass Economic Injury* (1977).

have encountered stiff opposition and none has commanded the consensus necessary to achieve adoption. There are those who argue that evidence is lacking to demonstrate a need for any change in the present rule. Others believe that the need for change is established, particularly with regard to the class actions maintained under Rule 23(b)(3), but disagree over what changes are required.

Since 1966, determination of whether a class action is "proper" has required consideration of one (or more) of the three subdivisions of Rule 23(b). These three categories are far from airtight and the complexities of modern litigation doom to failure efforts to insist that a given case must fit one, and only one, of the rule's subdivisions. For example, cases involving claims for both money damages and injunctive or declaratory relief present significant difficulties of classification. Under the present rule, the mere fact that money damages are sought will not defeat a (b)(2) action if the court determines that the monetary relief is "incidental" to the equitable claim. On the other hand, if the action is determined to be one "predominantly" for money damages, the action may not be maintained under subdivision (b)(2). Since an artful pleader can endeavor to make the declaratory or injunctive relief appear to "predominate," and since the plaintiff obviously will prefer to escape the onerous notice requirements and associated expense involved in a (b)(3) action, this problem arises frequently. As a result, much wheel spinning, expense and delay is often involved in the classification determination.

If the court determines that the requirements of subdivision (a) and either (b)(1) or (b)(2) are satisfied, the present rule mandates that the case proceed as a class action without regard to the predominance of the common question of law or fact, or to the superiority of the class action to other available methods for the fair and efficient adjudication of the controversy. Such a determination has profoundly important procedural consequences, for an action ordered maintained under either subdivision (b)(1) or (b)(2) is free of the mandatory notice requirements of Rule 23(c)(2) and is instead governed by the more flexible provisions of Rule 23(d) subject, of course, to whatever constitutional requirements may pertain in the particular circumstances. Moreover, class members in an action maintained under subdivisions (b)(1) or (b)(2) are not afforded a right of exclusion for the "opt out" feature of Rule 23(c)(2) is applicable only to actions "maintained under subdivision (b)(3)...."

If, on the other hand, the court concludes that the case is one that can only be maintained pursuant to subdivision (b)(3), dramatically different consequences attach. Initially, the often difficult determination of "predominance" and "superiority" command the attention of the parties and the court. A principal focus is often on the subsidiary issues enumerated in the rule as "pertinent to the [predominance and superiority] findings" including importantly "the difficulties likely to be encountered in the management of a class action." Delay in the certification ruling is not uncommon.

Even if the action is ordered maintained as a class action under subdivision (b)(3), the present rule contains formidable procedural barriers that must be surmounted if the action is to proceed to judgment. In a (b)(3) case, unlike cases maintained under subdivisions (b)(1) or (b)(2), the plaintiff must furnish notice to each member of the class "including individual notice to all members who can be identified through reasonable effort" without regard to whether notice to fewer than all class members or notice by some method would satisfy constitutional requirements. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Class members in an action ordered maintained under subdivision (b)(3), unlike their counterparts in a (b)(1) or (b)(2) action, are afforded an unqualified right to be excluded from the case.

We have concluded that the distinctions and procedural effects reflected in the presently trifurcated rule tend to blur the core values of the class action and to promote unnecessary, expensive and inefficient litigation over peripheral issues. Our recommendations are designed to refocus the certification inquiry upon the superiority of class action treatment for the particular dispute, eliminate unnecessary expense and delay in the maintenance and resolution of the action and facilitate attainment of important purposes of the modern class action. See *Phillips Petroleum Co. v. Shutts*, — U.S. —, —, 105 S.Ct. 2965, 2973, 86 L.Ed.2d 628 (1985).[2] These recommendations are summarized at pp. 198–203 and detailed at pp. 203–211.

II

CONCLUSIONS AND RECOMMENDATIONS

(A). *Summary of Conclusions and Recommendations.*

Central to the Committee's recommendations is its conclusion that the class action is a valuable procedural tool affording significant opportunities to implement important public policies. Although recognizing the role assigned to public enforcement actions, the constraints and limitations necessarily placed upon such actions persuades the Committee that private injunctive and damage actions, properly contained and efficiently administered, are often essential if widespread violations of those policies are to be deterred. Such actions should not be thwarted by unwieldy or unnecessarily expensive procedural requirements.

The Committee is aware of claims that the class action procedure is or may be misused. Cries of "legalized blackmail" and "Frankenstein

2. The constitutional issues addressed in *Phillips Petroleum* arose in the context of a state court proceeding involving a national class of plaintiff members almost none of whom had jurisdictionally sufficient contact with the forum state. Nevertheless, we recognize that constitutional issues may arise under an amended rule just as they do under the present rule. It is, we believe, both unnecessary and unwise to attempt codification of constitutional principles in a procedural rule applicable to all civil actions. See *infra* at 207–208.

monster," while not infrequently overstated, reflect important concerns. These concerns are best addressed, the Committee has concluded, by judicial oversight and discerning application of procedural mechanisms already in place and designed to eliminate meritless actions or to deter other abuses of the litigation process.

The Committee has considered and rejected proposals for radical revision of the class action procedure. In doing so, it is mindful of the fact that the present rule, adopted in 1966, was the product of thoughtful work by the Advisory Committee and its advisers and reflected cautious accommodation of a number of competing considerations. In the Committee's judgment, those who would fundamentally alter federal class action procedure, whether to expand or constrict the reach of the rule, have yet to make their case.

At the same time, this is not 1966. Today's understanding of constitutional constraints involving notice, the force and effect of judgments, and the right to institute and control an individual action has evolved beyond the thinking that shaped some of the major features of the 1966 rule. The experience gained in administration of class actions maintained under subdivisions (b)(1) and (b)(2), for example, has demonstrated that notice requirements may sometimes be satisfied at different times and in less expensive ways than the framers of present Rule 23(c)(2) thought possible. Post 1966 developments involving the the collateral estoppel effects of a prior judgment and modification of the common law mutuality doctrine raise difficulties not contemplated by those who drafted the present rule. Adoption in 1968 of multi-district consolidation procedures, 28 U.S.C. § 1407, and associated procedural innovations aimed at increased judicial efficiency in the face of mounting case loads warrants reexamination of earlier views concerning the right of individual litigants to institute and control separate law suits involving questions of law and fact common to a number of litigants.

Moreover, technological progress and resulting change in the nature and complexity of federal civil actions has mandated recent adoption of techniques designed to facilitate litigation, control mounting costs, and reduce delay. Part of the solution has been to impose upon the federal trial judge increasingly important management responsibilities.

These considerations persuade the committee that reexamination of certain features of the class action rule is warranted, and that there are now available ways by which unnecessarily time consuming and expensive features of the present rule may be modified to increase the utility of the procedure without sacrificing needed safeguards against abuse. As detailed below, the Committee accordingly recommends:

1. Elimination of the three subdivisions of present Rule 23(b) in favor of a unified standard governing all class actions.

2. Modification of the notice requirements of present Rule 23(c)(2), now applicable only to actions maintained under subdivision (b)(3). The amended rule will permit the timing, extent and method of notice to be tailored to the needs and circumstances of the particular case.

3. Modification of the exclusion feature of present Rule 23(c)(2), now applicable only to actions maintained under subdivision (b)(3). The amended rule will authorize the court to permit, refuse or condition exclusion as the needs and circumstances of the case may warrant.

4. Clarification to eliminate confusion concerning proper treatment of pre-certification motions under Rules 12 or 56 and to authorize consideration of such motions prior to certification of the class when such action is appropriate.

5. Addition of specific provisions designed to facilitate early judicial management of class action, and to coordinate proceedings under Rule 23 with the recently added provisions of Rules 16 and 26(f).

6. Establishment of jurisdictional provisions permitting appellate review of the certification ruling by permission of the court of appeals with accompanying safeguards designed to deter vexatious or delaying resort to interlocutory review.

These recommendations are detailed in the proposed revisions to F.R.Civ.P. 23 and to Title 28 of the United States Code set forth below with accompanying commentary.

(B). *Recommendations for Amendments to F.R.Civ.P. 23.*

The Special Committee for Class Action Improvements of the American Bar Association, Section of Litigation, proposes that the following amendments be made to the Federal Rules of Civil Procedure. New material is italicized; material to be deleted is lined through.

RULE 23
CLASS ACTIONS

(a). Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b). Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

~~(1) the prosecution of separate actions by or against individual members of the class would create a risk of~~

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

~~(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~~

(3) the court finds ~~that 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. The matters pertinent to the *this* findings include: *(A) the extent to which questions of law and fact common to members of the class predominate over any questions affecting only individual members;* (B) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (C) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (D) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (E) the difficulties likely to be encountered in the management of a class action *that would be eliminated or significantly reduced if the controversy was adjudicated by other available means; (F) the extent to which the prosecution of separate actions by or against individual members of the class would create a risk of (1) 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 (2) 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 adjudication or substantially impair or impede their ability to protect their interests; (G) 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.*

(c). Determination by Order Whether Class Action to be Maintained; *Exclusion;* ~~Notice;~~ Judgment; Actions Conducted Partially as Class Actions.

(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. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2). In any class action *ordered* maintained *as a class action* under ~~subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the~~

~~judgment, whether favorable or not, will include all members who do not request exclusion, and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.~~ *this rule, the court shall determine by order whether members of the class will be excluded from the class if a request for exclusion is made by a date specified in the order, whether members of the class will be excluded from the class only upon a showing of good cause, or whether exclusion will not be permitted. The matters pertinent to this determination will ordinarily include: (A) the nature of the controversy and the relief sought; (B) the amount or nature of any individual member's injury or liability; (C) the interest of the party opposing the class in securing a final resolution of the matters in controversy; and (D) the inefficiency or impracticability of separately maintained actions to resolve the controversy. When appropriate, an order permitting exclusion may contain such conditions as are just, including 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 which may be rendered in favor of the class from which exclusion is sought.*

(3). The judgment in an action *ordered* maintained as a class action ~~under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those which the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3),~~ whether or not favorable to the class, shall include and specify or describe those ~~to whom the notice provided in subdivision (c)(2) was directed, and~~ who have not ~~requested exclusion~~ *been permitted to exclude themselves from the class*, and ~~whom the court finds~~ *who are found to be members of the class.*

(4). When appropriate (A) an action may be brought or *ordered* maintained as a class action with respect to particular issues, or (B) 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.

(d). Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument *including pre-certification determination of a motion made by any party pursuant to Rules 12 or 56 if the court concludes that such a determination will promote the fair and efficient adjudication of the controversy and will not cause undue delay;* (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, *or of the opportunity, if any, to seek exclusion from the action together with the conditions or limitations imposed pursuant to subdivision (c)(2) upon such opportunity;* (3) imposing conditions on the representative parties or intervenors, (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rules 16 *and 26(f)*, and may be altered or amended as may be desirable from time to time.

(e). Dismissal or Compromise. *An action filed as 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.~~ *An action ordered maintained as 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 some or all members of the class in such manner as the court directs.*

COMMITTEE COMMENTARY

Subdivision (b).

Merger of Subdivisions (b)(1), (b)(2), and (b)(3). The present rule places a premium on characterization of the action. An action determined to meet the definitions set forth in subdivision (b)(1) or (b)(2) is, if the rule is applied as written, an action that must be permitted to proceed as a class action without regard to whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Moreover, such actions are exempt from the mandatory "best notice practicable under the circumstances" and the exclusion requirements of subdivision (c)(2). Conversely, an action determined to meet solely the requirements of subdivision (b)(3) may only be maintained as a class action if the court makes the required predominance and superiority determinations, and if the class champion is willing and able to finance the costs of the required notice. In such a case, class members have an unqualified right under the existing rule to insist upon exclusion from the class action.

With such important procedural consequences at stake, it is no surprise that enormous amounts of energy and money are often devoted to the characterization battle, and difficult questions command the attention of the courts as the parties struggle at the outset of a case to decide whether the presence of an "individual issue" defeats a claim to (b)(1) status, *Tober v. Charnita, Inc.*, 58 F.R.D. 74 (E.D.Pa.1973); *Contract Buyers League v. F' & F' Investment*, 48 F.R.D. 7 (N.D.Ill.1969), or whether the equitable relief said to warrant a (b)(2) determination is

"incidental" or "predominant." Compare *Marshall v. Kirkland*, 602 F.2d 1282 (8th Cir.1979); *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir.1977); and *Bolton v. Murray Envelope Corp.*, 553 F.2d 881 (5th Cir.1977) with *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304 (9th Cir.1977); *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594 (4th Cir.1976); *Serafin v. Sears, Roebuck & Co., Inc.*, 446 F.Supp. 611 (N.D.Ill.1978).

The trifurcation created by present subdivision (b) places a premium on pleading distinctions with important procedural consequences flowing to the victor. This comes uncomfortably close to resurrection of the forms of action abolished by Rule 2. The Committee believes that not all civil actions can be made to fit one of three predefined procedural compartments, and it considers efforts to do so as unnecessary and wasteful.

The Committee recommends elimination of the three subsections of present subdivision (b) in favor of a unified rule permitting any action meeting the prerequisites of Rule 23(a) to be maintained as a class action if the court finds "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." In so recommending, we agree with the similar recommendation made by the Special Committee on Uniform Class Actions and adopted by the National Conference of Commissioners on Uniform State Laws.

Additional considerations, including importantly the extent to which the common questions of law and fact predominate over individual questions and those factors now identified in subdivisions (b)(1) and (b)(2), are unquestionably important. The court should weigh such considerations along with other relevant factors, in deciding whether to permit the action to be maintained as a class action. These matters, however, should not be viewed as insuperable stumbling blocks to maintenance of a class action if, after due consideration, the court concludes that class treatment is "superior to other available methods for the fair and efficient adjudication of the controversy." The Committee accordingly recommends that these factors be identified as among the considerations "pertinent to the [superiority] finding" required by the rule.

Difficulties of Management. The Committee is concerned that much preliminary and potentially wasteful skirmishing takes place over the "management" factor identified in present subdivision (b)(3)(D). The concerns there identified are important ones and may be pivotal in a particular case. Nevertheless, some courts appear to view management difficulties alone as a sufficient ground to defeat a proposed class action. Such an approach runs counter to the spirit of the 1966 amendments and overlooks the important implementation and deterence functions of privately maintained class action. We accordingly agree with the observation set forth in the Manual for Complex Litigation, § 1.42 n. 72 (1977):

> Some cases have apparently held that it is proper to dismiss class actions on the basis of management problems alone. ... Dismissal for management reasons, in view of the public interest involved in class actions, should be the exception rather than the rule. ... In order that some standard apply, it would appear that the judge should not dismiss a suit purely for management reasons without some assessment of possible merit in the action and a determination of the issue of whether management problems would frustrate any ultimate relief. That determination should be supported by fact. See *Yaffe v. Powers*, 454 F.2d 1362, 1365 (1st Cir.1972), to the following effect: "[F]or a court to refuse to certify a class action on the basis of speculation as to the merits of the cause of action because of vaguely perceived management problems is counter to the policy which originally led to the rule, and more specially, to its thoughtful revision and also to discount too much the power of the court to deal with a class suit flexibly, in response to difficulties as they arise."

Before management difficulties are relied upon to defeat a class action, the Committee believes the court should determine that those "difficulties would be eliminated or significantly reduced if the controversy was adjudicated by other available means...." The addition of such qualifying language will serve to underscore what we believe was the purpose and intention of the original rule.

In a number of cases, the difficulties and expense involved in ascertaining, collecting and/or distributing damages has surfaced as the dispositive issue at the certification phase of the litigation. In an important decision, two senior members of the Second Circuit appeared to hold that a "fluid recovery" proposal advanced by the plaintiffs in an effort to overcome alleged management difficulties was impermissible and perhaps unconstitutional. *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir.1973). The case involved other issues and despite the view of a majority of the active circuit judges who voted to deny rehearing en banc because the case "is of such extraordinary consequence that [we are] confident the Supreme Court will take this matter under its certiorari jurisdiction" and resolve "the far-reaching implications the panel's opinion might have on the initiation and administration of certain class action litigation in the future," 479 F.2d at 1020–1021, the Supreme Court reserved decision on the "fluid recovery" aspect of the case. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 n. 10, 94 S.Ct. 2140, 2150 n. 10, 40 L.Ed.2d 732 (1974). Nevertheless, a number of courts have relied upon the "difficulties of management" provision to deny class action certification to cases where individual proof, collection and/or distribution or damages would be difficult, impossible or disproportionately costly. *E.g., In re Federal Skywalk Cases*, 680 F.2d 1175, 1189–1190 (8th Cir.1982); *Windham v. American Brands, Inc.*, 565 F.2d 59, 66–72 (4th Cir.1977) (en banc); *In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir.1974).

The Committee considered and rejected proposals to recommend legislation establishing some form of "fluid recovery" as a way to overcome perceived management difficulties for some kinds of class actions. Rather, the Committee believes it best to leave the question of damages to develop, as it now is developing, in cases that present the problem

unencumbered by the certification issue. Thus, for example, in cases now maintained under subdivisions (b)(1) or (b)(2), or in other kinds of litigation, questions involving "classwide" proof of damages by use of statistical and other evidence are being isolated and addressed, *L.C.L. Theatre v. Columbia Pictures Industries*, 421 F.Supp. 1090 (N.D.Tex. 1976), as are questions concerning appropriate disposition of unclaimed damages. *Van Gemert v. Boeing Co.*, 739 F.2d 730 (2d Cir.1984). See *Van Gemert v. Boeing Co.*, 553 F.2d 812 (2d Cir.1977), 590 F.2d 433, 440 n. 17 (2d Cir.1978), aff'd, 444 U.S. 472, 482 n. 8, 100 S.Ct. 745, 751 n. 8, 62 L.Ed.2d 676 (1980). When these questions are addressed on their individual merit, differences in statutory language and other policy considerations can be focused on the particular issue presented. When, however, the damage issue is presented in *limine* at the certification stage of the case, such discerning development of the law is not possible. The improvements in class action procedure which the Committee has recommended, and the elimination of unnecessarily costly procedures which have heretofore hindered presentation of some of these questions, will now serve to facilitate presentation of particularized questions involving the calculation, collection and/or distribution of damages on records permitting informed development of the governing principles.

Subdivision (c).

Present subdivision (c)(2), applicable only to actions maintained under subdivision (b)(3), requires the court to "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort" and confers upon each class member an unqualified right to be excluded from the class. In actions now maintained under subdivisions (b)(1) or (b)(2), notice is governed by the more flexible provisions of subdivision (d) and no right of exclusion is conferred by the rule.

Exclusion. The right to be excluded from class litigation and the right to institute and control one's own law suit are important rights reflecting fundamental concerns. Since Rule 23 was adopted in its present version in 1966, the overriding needs of the federal judicial system have mandated imposition of limitations upon those rights. See, *e.g.*, 28 U.S.C. § 1407. The obligatory exclusion provision of subdivision (c)(2) can create unnecessary difficulties in the administration of a class action. It is, for example, one thing for a class member to decide to have nothing to do with pending litigation. It is quite another for that member to insist upon exclusion under subdivision (c)(2) of the rule in order to institute a separate action where reliance will be placed upon the class action judgment to establish important aspects of the claim. See, *In re Transocean Tender Offer Securities Litigation*, 455 F.Supp. 999 (N.D.Ill.1978); George, *Sweet Use of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 Stan.L.Rev. 655 (1980); Note, *Class Action Judgments and Mutuality of Estoppel*, 43 Geo.Wash.L.Rev. 814 (1975).

While different in form, this use of the exclusion feature of the present rule does not differ in substance from the "one way intervention" tactic available under pre 1966 practice. It is, moreover, wasteful of scarce judicial resources and affords unnecessary opportunities for abuse. The exclusion provision has also thwarted innovative efforts to deal with the difficult problems encountered in classwide claims for punitive damages. *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.1982).

The Committee has concluded that the obligatory exclusion feature of present subdivision (c)(2) should be eliminated in favor of provisions permitting the trial judge to assess the individual circumstances of the case and, where appropriate, to attach conditions to a request for exclusion or to prohibit exclusion altogether.

In determining whether it is appropriate that members of a class may be excluded, the Committee's proposed revision of Rule 23(c)(2) identifies a member of pertinent factors. One of these, "the nature of the controversy and the relief sought," is intended to refer principally to those actions now maintained under Rule 23(b)(2) where "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." In such cases, the courts have held that there is no absolute right of exclusion. *E.g., LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 n. 7 (5th Cir.1975); *United States v. United States Steel Co.*, 520 F.2d 1043, 1057 (5th Cir.1975), *clarified*, 525 F.2d 1214, *cert. denied*, 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77 (1976).

The 1966 addition of Rule 23 (b)(2) was based "on experience mainly, but not exclusively, in the civil rights field." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure I*, 81 Harv.L.Rev. 356, 389 (1967); see also, *Notes of the Advisory Committee on the Federal Rules*, 39 F.R.D. 69, 102 (1966). Civil rights cases alleging racial or other group discrimination are often by their very nature class suits, involving classwide wrongs. In civil rights and other actions presently maintained under Rule 23(b)(2), the group nature of the harm alleged and the broad character of the relief sought minimizes the need for or appropriateness of exclusion.

Some of these cases, however, have become "mixed" class actions seeking classwide injunctive or declaratory relief and individual monetary damages or injunctive relief. See, *e.g., Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir.1974). It may be appropriate in such cases to permit class members to exclude themselves from the action, especially at the stage in the proceeding when individual relief is determined. See *Penson v. Terminal Transport Co.*, 634 F.2d 989, 993–94 (5th Cir.1981). The proposed amendment permits consideration of these and other relevant factors, and is designed to afford the trial judge an opportunity to tailor exclusion provisions appropriate to the needs of the particular case and to impose suitable conditions when necessary to prevent abuse.

Notice. Present subdivision (c)(2) mandates the scope and form of notice required in a (b)(3) action. As construed, this provision frequently obliges a court to require the class representative to advance huge sums of money as a precondition to further prosecution of the action. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). As a practical matter, such orders may effectively preclude maintenance of the action. This possibility, in turn, may prompt the party opposing the class to insist upon expensive and time consuming discovery grounded on the requirement of "individual notice to all members who can be identified through reasonable effort." By contrast, those actions maintained under subdivisions (b)(1) and (b)(2) are governed by the flexible notice requirements of subdivision (d) and due process considerations. See Restatement (Second) of Judgments § 86, Comment b, p. 72 (Second Tentative Draft, 1975); cf. 15 U.S.C. 15c(b)(1).

Consistent with our recommendation for elimination of the trifurcated approach to class action management and our belief that procedural rules should not mandate unnecessarily cumbersome or expensive requirements, we have proposed deletion of the special notice provisions now set forth in subdivision (c)(2) and applicable only to (b)(3) cases. Adoption of this recommendation will permit trial judges to consider the nature of the particular case in making the determination of who will receive notice, when that notice will be given, and the form of notice that will be required. As is the case with the determination to permit an action to be maintained as a class action, or with the exclusion provisions of such an order, the Committee concludes that the need for, the timing of, and the method of notice is best determined by the trial judge subject, of course, to the requirements of due process of law. Obtainable economies in the notice phase of the case should be realized when such economies do not impair the rights of absent class members.

Subdivisions (d) and (e).

Pre-Certification Decision of "Merits Motions." The present rule has generated uncertainty concerning the appropriate order of proceeding when the court is faced with a precertification motion addressed to the merits of the claims or defenses. Compare, *e.g., National Contractors v. National Electrical Contractors*, 498 F.Supp. 510, 519 (D.Md. 1980); *Pabon v. McIntosh*, 546 F.Supp. 1328 (E.D.Pa.1982); *Koslowski v. Doughlin*, 539 F.Supp. 852 (S.D.N.Y.1982). Many courts construe the rule to permit precertification decision of the defendant's motion, *e.g., Hotel Employers Association v. Gorsuch*, 669 F.2d 1305, 1306 n. 1 (9th Cir.1982); *Zambardino v. Schweiker*, 668 F.2d 194, 201 (3d Cir.1981); *Pharo v. Smith*, 621 F.2d 656, 663–64, *reh. granted in part and remanded on other grounds*, 625 F.2d 1226 (5th Cir.1980); *Roberts v. American Airlines, Inc.*, 526 F.2d 757, 763 (7th Cir.1975); *Case & Co., Inc. v. Board of Trade*, 523 F.2d 355, 360 (7th Cir.1975); *Jackson v. Lynn*, 506 F.2d 233, 236 (D.C.Cir.1974), although some courts draw a distinction between actions maintained under subdivisions (b)(1) or (b)(2) and those maintained under subdivision (b)(3), and permit such precertification decision only for the former. *E.g., Roberts v. American Airlines, Inc., supra*, 526 F.2d at 763; *Jiminez v. Weinberger*, 523 F.2d 689, 699–702 (7th Cir.1975). See generally, Wright and Miller, *Federal Practice & Procedure*, § 1798 and nn. 18.1–18.2 (1982); Newberg, *Class Actions*, § 2160 (Supp., 1980); Note, *Developments in the Law—Class Actions*, 89 Harv.L.Rev. 1318, 1416–1427 (1976). The Senate Commerce Committee reports that about 55% of the class action cases it studied were disposed of in favor of the defendant on preliminary motion. Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 Geo.L.J. 1123, 1136, 1144 (1974). Where, however, the plaintiff seeks precertification determination of the merits of the claims or defenses, the present rule has caused considerable confusion. See generally, *Gurule v. Wilson*, 635 F.2d 782, 790 (10th Cir.1980); *Postow v. OBA Federal Savings and Loan Association*, 627 F.2d 1370, 1380 (D.C.Cir.1980); *Kohne v. Imco Container Co.*, 480 F.Supp. 1015, 1017 n. 1 (W.D.Va.1979); *Issen v. GSC Enterprises, Inc.*, 522 F.Supp. 390, 395 (N.D.Ill.1981); *Izaguirre v. Tankersley*, 516 F.Supp. 755, 757 (D.Ore.1981).

We recognize the difficulties but on balance conclude that in an appropriate case precertification decision of a merits motion, whether made by a plaintiff or a defendant, may advance a "speedy and inexpensive" resolution of the controversy or significantly inform the certification ruling. When such a ruling will not require substantial delay, as would be the case if extensive discovery was needed for fair consideration of the motion, we do not think the "as soon as practicable" requirement of subdivision (b) ought to preclude precertification determination of a motion made pursuant to Rules 12 or 56. In such cases, the sound discretion of the trial judge is to be preferred over a rule according automatic priority to the certification motion. Too much delay can be just as prejudicial and counterproductive as too much haste. When informed discretion is guided by modern management techniques reflected in amended Rules 16 and 26 and the safeguards against abuse found in the recent additions to Rules 7 and 11, the proper balance is more likely to be struck. The amendment we propose makes it clear that the court has such discretion.

Dismissal or Compromise. There are sound reasons for requiring judicial approval of a proposal to dismiss or compromise an action filed or ordered maintained as a class action. The reasons for requiring notice of such a proposal to members of a putative class are significantly less compelling. Despite the language of the present rule, courts have recognized the propriety of a judicially supervised precertification dismissal or compromise without requiring notice to putative class members. *E.g., Shelton v. Pargo*, 582 F.2d 1298 (4th Cir.1978). We find such cases persuasive and see no reason to mandate notice for every precertification dismissal or compromise. If circumstances warrant, the court has ample authority to direct notice to some or all putative class members pursuant to the discretionary provisions of subdivision (d).

Once an action has been ordered maintained as a class action, the reasons for requiring notice of a proposed dismissal or compromise are significantly more compelling. There are situations, however, where the rights of absent class members may be adequately protected by notice directed to less than "all" members. This subsection makes it clear that the court has discretion to tailor not only the form of notice but the size and composition of those to be notified as the circumstances of the particular case and proposal may require.

Conforming Amendments. Minor conforming amendments are proposed to these subdivisions. The addition of a reference to Rules 16 and 26(f), adopted since promulgation in 1966 of the present version of Rule 23, is designed to draw attention to the availability of these procedures in class action litigation. Use of the discovery conference, for example, may eliminate wasteful resort to discovery procedures aimed at mechanical aspects of the class action determination and permit the trial court to properly sequence discovery in a class action while avoiding unnecessarily costly and time consuming inquires.

(C). *Recommendations for Legislation.*

The Special Committee for Class Action Improvements of the American Bar Association, Section of Litigation, proposes that Section 1292 of title 28, United States Code, be amended by adding new subdivision (c) after present subsection (b) as follows:

> (c). A Court of Appeals may permit an appeal to be taken from an order of a district court granting or denying a motion for class action certification pursuant to F.R.Civ.P. 23 if application is made to it within ten days after entry of such order: *Provided,* however, That prosecution of an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

COMMITTEE COMMENTARY

The certification ruling is often the critical ruling in an action filed as a class action. If denied, the individual plaintiff must abandon his efforts to represent the alleged class or incur expenses wholly disproportionate to his individual recovery in order to secure appellate review of the certification ruling. If, as often happens, the individual plaintiff is unwilling to incur such an expense, the case is dismissed and the certification ruling is never reviewed. Moreover, if the plaintiff perseveres and is ultimately successful on appeal of the certification decision postponement of appellate review of the certification ruling raises the

spectre of "one way intervention." Conversely, if class certification is erroneously granted, a defendant faces potentially ruinous liability and may be forced to settle a case rather than run the economic risk of trial in order to secure review of the certification ruling. The unique public importance of properly instituted class actions justifies a special provision for interlocutory review of this critical ruling.

The Committee is cognizant of the arguments against interlocutory review and the risk of delay or abuse. Its recommendation includes significant protection against such tactics. Under its proposal, appellate review is available only by leave of the Court of Appeals promptly sought. Proceedings in the district court are not stayed by the application for, or prosecution of, such an interlocutory appeal unless the district judge, the Court of Appeals, or a judge thereof so orders. These safeguards, coupled with the provisions of 28 U.S.C. § 1927 F.R.Civ.P. 7 and F.R.A.P. 38, augmented by the inherent power of both the trial and appellate courts, are ample deterrents against abusive resort to interlocutory review.

The Committee anticipates that orders permitting such interlocutory review will be rare. Nevertheless, the potential for immediate appellate review will encourage compliance with the certification procedure and will afford an opportunity for the prompt correction of error with resulting litigation economies.

PROPOSAL BEFORE
ADVISORY COMMITTEE ON
FEDERAL RULES

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

June 13, 1991

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

Enclosed are two sets of proposed amendments to the Federal Rules of Civil Procedure and to the Federal Rules of Evidence. With the accompanying Committee Notes, these have been considered and approved by the Advisory Committee on Civil Rules for submission to the Standing Committee under rule 3c of the governing procedures. Although most of these proposals have been circulated informally to various groups and individuals for suggestions, none have been formally published in their present format. A summary of the proposals, briefly explaining the need for amendment and highlighting the more significant changes, is attached.

The first set, which contains proposals of a technical nature largely mandated by statutory changes, could be approved by the Standing Committee under the special procedures for expedited consideration. The second set, which contains proposals of a substantive and potentially controversial nature, should be considered under the normal procedures, which will involve formal publication, a period for comments, and public hearings.

There is no urgency for adoption of the technical amendments. Indeed--in order to reduce the frequency with which changes are submitted to the Judicial Conference, the Supreme Court, and Congress--we suggest that they not be transmitted this year to the Judicial Conference. For this reason, the Standing Committee may prefer that the normal procedures, including publication, be followed with respect to these proposals, in which event the two sets could be combined for publication as a single set of proposed amendments. The only disadvantage to publication of these technical changes is that their inclusion in the published materials might divert attention away from the substantive proposals.

The only other matter under active consideration by the Advisory Committee, but not ripe for presentation to the Standing Committee, is a proposed revision of Rule 23.

Sincerely,

Sam C. Pointer, Jr., Chairman
Advisory Committee on Civil Rules

cc: Members, Reporter, and Secretary
of Advisory Committee
Chairmen, other Advisory Committees

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly, ~~and~~ adequately, *and willingly* protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) 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*:

(1) *the extent to which* the prosecution of separate actions by or against individual members of the class ~~would~~ create~~s~~ a risk of (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) 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~~

(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~~

(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. The matters pertinent to the findings include:~~;

(~~A~~*1*) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(~~B~~*2*) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(~~C~~*3*) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; *and*

(~~D~~*4*) 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*.

(c) **Determination by Order Whether Class Action to be Maintained; Notice** *and Membership in Class*; **Judgment; Actions Conducted Partially as Class Actions;** *Multiple Classes and Subclasses*.

(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. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) ~~In any class~~ *When ordering that an* action *be* maintained *as a class*

action under ~~subdivision (b)(3)~~ *this rule*, the court shall direct *that notice be given* to the ~~members of the~~ class *under subdivision (d)(2),* ~~the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.~~ *including the court's determination whether, when, how, and under what conditions putative members may elect to be excluded from, or included in, the class. The matters pertinent to this determination will 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; and (D) the inefficiency or impracticality of separately maintained actions to resolve the controversy. When appropriate, exclusion may be conditioned upon 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, and inclusion may be conditioned upon bearing a fair share of the expense of litigation incurred by the representative parties.*

(3) The judgment in an action *ordered* maintained as a class action ~~under subdivision (b)(1) or (b)(2), 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 subdivision (b)(3),~~ whether or not favorable to the class, shall ~~include and~~ specify or describe those ~~to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds~~ *who are found* to be members of the class *or have as a condition to exclusion agreed to be bound by the judgment*.

(4) When appropriate ~~(A)~~ an action may be brought or *ordered* maintained as a class action *(A)* with respect to particular *claims or* issues, or (B) *by or against multiple classes or subclasses. Each class or subclass must separately satisfy the requirements of this rule except for subdivision (a)(1).* ~~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.~~

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument *including pre-certification determination of a motion made by any party pursuant to Rules 12 or 56 if the court concludes that such a determination will promote the fair and efficient adjudication of the controversy and will not cause undue delay*; (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 *or to be excluded from the class*; (3) imposing conditions on the representative parties *class members* or ~~on~~ intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. ~~A~~*An* ~~class~~ action *filed as a class action* shall not *before the court's ruling under subdivision (c)(1),* 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~~. *An action ordered maintained as 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 some or all members of the class in such manner as the court directs.*

(f) Interlocutory Appeals. A Court of Appeals may permit an appeal to be taken from an order of a district court granting or denying a request for class action certification under this rule if application is made to it within ten days after entry of such order. Prosecution of an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals, or a judge thereof, shall so order.

COMMITTEE NOTES

PURPOSE OF REVISION. As initially adopted, Rule 23 defined class actions as "true," "hybrid," or "spurious" according to the abstract nature of the rights involved. The 1966 revision created a new tripartite classification in subdivision (b), and then established different provisions relating to notice and exclusionary rights based on that classification. For (b)(3) class actions, the rule mandated "individual notice to all members who can be identified through reasonable effort" and a right by class members to "opt-out" of the class. For (b)(1) and (b)(2) class actions, however, the rule did not by its terms mandate any notice to class

members, and was generally viewed as not permitting any exclusion of class members. This structure has frequently resulted in time-consuming and lengthy procedural battles either because the operative facts did not fit neatly into any one of the three categories, or because more than one category could apply and the selection of the proper classification would have a major impact on the practicality of the case proceeding as a class action.

In the revision the separate provisions of former subdivisions (b)(1), (b)(2), and (b)(3) are combined and treated as pertinent factors in deciding "whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy." This becomes the critical question, without regard to whether, under the former language, the case would have been viewed as being brought under (b)(1), (b)(2), or (b)(3). Use of a unitary standard, once the prerequisites of subdivision (a) are satisfied, is the approach taken by the National Conference of Commissioners on Uniform State Laws and adopted in several states.

Questions regarding notice and exclusionary rights remain important in class actions--and, indeed, may be critical to due process. Under the revision, however, these questions are ones that should be addressed on their own merits, given the needs and circumstances of the case and without being tied artificially to the particular classification of the class action.

As revised, the rule will afford some greater opportunity for use of class actions in appropriate cases notwithstanding the existence of claims for individual damages and injuries--at least for some issues under subdivision (c)(4)(A), if not for the resolution of the individual damage claims themselves. The revision is not however a unqualified license for certification of a class whenever there are numerous injuries arising from a common or similar nucleus of facts, nor does the rule attempt to establish a system for "fluid recovery" or "class recovery" of damages. Such questions are ones for further case law development

SUBDIVISION (a). Subdivision (a)(4) is revised to explicitly require that a proposed class representative be willing to undertake the responsibilities inherent in such representation on behalf of the class members. Before ordering a class action when not requested by those who would become the class representatives, the court must determine that the parties to be appointed as representatives are willing to accept such responsibilities.

SUBDIVISION (b). As noted, subdivision (b) has been substantially reorganized. One element, drawn from former subdivision (b)(3), is made the controlling issue; namely, whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The other provisions of former subdivision (b) become factors to be considered in making this ultimate determination. Of course, there is no requirement that all of these factors be present before a class action may be ordered, nor is this list intended to be exclusive of other factors that in a particular case may bear on the superiority of a class action when compared to other available methods for resolving the controversy.

Factor (7)--the consideration of the difficulties likely to be encountered in the management of a class action--is revised by adding a clause to emphasize that such difficulties should be assessed not in the abstract, but rather in comparison to those that would be encountered with individually prosecuted actions.

SUBDIVISION (c). Former paragraph (2) of this subdivision contained the provisions for notice and exclusion in (b)(3) class actions. Under the revision the provisions relating to notice apply to all types of class actions; but the type and extent of notice is to be determined in accordance with subdivision (d)(2). The provisions relating to exclusion are likewise made applicable to all class actions, but with flexibility for the court to determine whether, when, and how putative class members should be allowed to exclude themselves from the class. The

court may also impose appropriate conditions on such "opt-out ... r, in some cases, require that a putative class member "opt-in" in order to be treated as a ... ember of the class.

The potential for class members to exclude themselves from many class action remains a primary consideration for the court in determining whether to allow a case to proceed as a class action, both to assure due process and in recognition of individual preferences. Even in the most compelling situation for not allowing exclusion--the fact pattern described in subdivision (b)(1)(A)--a person might nevertheless be allowed to be excluded from the class if, as a condition, the person agreed to be bound by the outcome of the class action. The opportunity for imposition of appropriate conditions on the privilege of exclusion enables the court to avoid the unfairness that resulted when a putative class member elected to exclude itself from the class action in order to take advantage of collateral estoppel if the class action was resolved favorably to the class while not being bound by an unfavorable result.

Rarely should a court impose an "opt-in" requirement for membership in a class. There are, however, situations in which such a requirement may be desirable to avoid potential due process problems, such as with some defendant classes or in cases when it may be impossible or impractical to give meaningful notice of the class action to all putative members of the class.

The revision to subdivision (c)(4) is intended to eliminate the problem when a class action with several subclasses should be certified, but one or more of the subclasses may not independently satisfy the "numerosity" requirement.

Under paragraph (4), some claims or issues may be certified for resolution as a class action, while other claims or issues are not so certified. For example, in some mass tort situations it may be appropriate to certify as a class action issues relating to the defendants' culpability and general causation, while leaving issues relating to specific causation, damages, and contributory negligence for resolution through individual lawsuits brought by members of the class. Since the entirety of the class representative's claim will be before the court, there is a "case or controversy" justifying exercise of the court's jurisdiction; and the rule is intended to eliminate the problems that might otherwise arise based on the splitting of a cause of action.

SUBDIVISION (d). The former rule generated uncertainty concerning the appropriate order of proceeding when a motion addressed to the merits of claims or defenses is submitted prior to a decision on whether a class should be certified. The revision provides the court with discretion to address a Rule 12 or Rule 56 motion in advance of a certification decision when this will promote the fair and efficient adjudication of the controversy.

Inclusion in former subdivision (c)(2) of detailed requirements for notice in (b)(3) actions sometimes placed unnecessary barriers to formation of a class, as well as masked the desirability, if not need, for notice in (b)(1) and (b)(2) actions. Even if not required for due process, some form of notice to class members should be regarded as desirable in virtually all class actions. Revised subdivision (d)(2) takes on added importance in light of the revision of subdivision (c)(2). Subdivision (d)(2) contemplates that some form of notice to class members should be given in virtually all class actions. The particular form of notice, however, in a given case is committed to the sound discretion of the court, keeping in mind the requirements of due process.

SUBDIVISION (e). There are sound reasons for requiring judicial approval of proposals to dismiss or compromise an action filed or ordered maintained as a class action. The reasons for requiring notice of such a proposal to members of a putative class are significantly less compelling. Despite the language of the former rule, courts have recognized the propriety of

a judicially supervised precertification dismissal or compromise without requiring notice to putative class members. *E.g., Shelton v. Pargo*, 582 F.2d 1293 (4th Cir. 1978). The revision adopts that approach. If circumstances warrant, the court has ample authority to direct notice to some or all putative class members pursuant to the provisions of subdivision (d).

SUBDIVISION (f). The certification ruling is often the crucial ruling in a case filed as a class action. If denied, the plaintiff, in order to secure appellate review, may have to incur expenses wholly disproportionate to any individual recovery. If the plaintiff ultimately prevails on an appeal of the certification decision, postponement of the appellate decision raises the specter of "one way intervention." Conversely, if class certification is erroneously granted, a defendant may be forced to settle rather than run the risk of potential ruinous liability of a class-wide judgment in order to secure review of the certification decision. These consequences, as well as the unique public interest in properly certified class actions, justify a special procedure allowing early review of this critical ruling.

Recognizing the disruption that can be caused by piecemeal reviews, the revision contains provisions to minimize the risk of delay and abuse. Review will be available only by leave of the court of appeals promptly sought, and proceedings in the district court with respect to other aspects of the case are not stayed by the prosecution of such an appeal unless the district court or court of appeals so orders. As authorized by 28 U.S.C. § 2072(c), the rule has the effect of permitting the appellate court to treat as final for purposes of 28 U.S.C. § 1291 an otherwise conditional and interlocutory order.

It is anticipated that orders permitting immediate appellate review will be rare. Nevertheless, the potential for this review should encourage compliance with the certification procedures and afford an opportunity for prompt correction of error.

THE RULE 23 SUB-COMMITTEE PRELIMINARY REPORT TO THE COMMITTEE ON CLASS ACTIONS AND DERIVATIVE SUITS CONCERNING THE PROPOSED CHANGES TO RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

SUB -COMMITTEE MEMBERS

Garrard R. Beeney
Jeffery J. Greenbaum
Alice S. Johnston
Lewis H. Lazarus (Co-chair)
Joel M. Leifer
Elizabeth M. McGeever (Co-chair)

October 16, 1991

THE RULE 23 SUB-COMMITTEE PRELIMINARY REPORT TO THE COMMITTEE ON CLASS ACTIONS AND DERIVATIVE SUITS CONCERNING PROPOSED CHANGES TO RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

October 16, 1991

I. INTRODUCTION

In July, 1991, Roberta D. Liebenberg, co-chair of the Section on Litigation's Committee on Class Actions and Derivative Suits, appointed a Sub-Committee to examine a proposal to amend Rule 23 of the Federal Rules of Civil Procedure ("Rule 23" or "the Rule"). The proposal is attached hereto as Exhibit A. The Sub-Committee has six members: Jeffrey J. Greenbaum, Newark, NJ; Alice S. Johnston, Pittsburgh, PA; Garrard R. Beeney, New York, NY; Joel M. Leifer, New York, NY; Lewis H. Lazarus, Wilmington, DE and Elizabeth M. McGeever, Wilmington, DE. This is the Sub-Committee's preliminary report on the proposed Rule changes.

Two points should be stressed at the outset. First, the proposed Rule change is still very much in infancy form. It has not yet been considered by the Advisory Committee on Civil Rules. The Advisory Committee's next meeting is in November, 1991. It may consider the proposal at that time. We are informed that no definitive action will be taken at that time on the proposal. Second, we have had only a short time to study the proposed changes to Rule 23. Accordingly, this report is preliminary in nature. Further study and evaluation is necessary before any definitive conclusions can be reached as to the desirability of the changes proposed or of any other changes to Rule 23.

II. BACKGROUND OF THE PROPOSED RULE CHANGE

Apart from some technical amendments in 1987, no substantive changes have been made to Rule 23 since 1966. We understand that the proposed draft resulted from two concerns. First, in March, 1991, an Ad Hoc Committee on Asbestos Litigation recommended that Rule 23 be examined in light of the experience of the Federal Judiciary with problems in the management of asbestos litigation.* In particular, the courts are being asked to certify class actions in asbestos cases, notwithstanding commentary to the 1966 amendments which states:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages, but of liability and defenses of liability, would be present affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

See 1966 Amendments, Commentary to Sub-Division(b)(3) of Rule 23. Second, after 25 years of experience with the Rule, it appears the time is right to review whether improvements might be made in light of that experience. Over the years concerns have been raised regarding the tri-partite classification system and the notice and exclusion aspects of Rule 23. In July, 1985 the House of Delegates of the American Bar Association authorized the Section of Litigation to transmit a "Report and Recommendations of The Special

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* The Ad Hoc Committee on Asbestos Litigation is a committee of federal judges appointed in September, 1990. Its Report to the Judicial Conference is attached hereto as Exhibit B.

Committee on Class Action Improvements" to the Advisory Committee on Civil Rules of the Judicial Conference of the United States, without either approving or disapproving the recommendations in the report. A copy of the Litigation Section's 1985 report, known as the Flegal Report for the Reporter, Frank F. Flegal, Esquire, is attached as Exhibit C hereto. The Advisory Committee did not take any formal action on the recommendations in the Flegal Report. We understand that the Advisory Committee believed it wiser to accumulate additional experience before recommending changes to Rule 23.

It is against this background that we have undertaken to review the proposed draft.

III. DISCUSSION

The Sub-Committee recognizes that the draft is very preliminary and that the commentary is not as extensive as it would be if the proposal were at a more advanced stage. Because of this the Sub-Committee experienced some difficulty in evaluating the proposed draft and understanding the reasons behind the proposed changes. In particular, we noted the absence of a section in the draft commentary explaining the "difficulties with the current rule" by reference to particular cases. See by contrast the Commentary to the 1966 Amendment to Rule 23. The Sub-Committee believes that any proposal which fundamentally changes Federal class action procedure should be accompanied by a specific discussion of the problems under the current Rule, including

concrete examples supported by case law. In addition, some members of the Sub-Committee who were inclined to support some modification in the Rule nonetheless expressed concern that in an effort to address problems which have been encountered in the "massive tort" cases, changes would be made which would affect all other types of class actions.

Despite these concerns, the Sub-Committee has attempted to evaluate the draft by examining its overall effects on the prosecution and defense of class actions. In so doing, we simply have not had the time to review and to analyze the proposed changes with the deliberation that such substantive changes would warrant. In reviewing the proposed changes, we have attempted to balance the varying competing interests underlying certification issues.

The Sub-Committee tentatively agreed on the desirability of certain changes while deferring judgment on certain others as summarized below. For organizational purposes we have broken down the proposed changes into the following ten categories:

A. The elimination of the (b)(1), (b)(2), (b)(3) categories in favor of a unitary standard.

B. Empowering the court to certify "claims" or "issues" for class treatment.

C. Enlarging the power of the court to impose conditions upon class membership.

D. Excluding sub-classes from having to meet independently the numerosity requirement.

E. Permitting pre-certification determination of motions made by any party pursuant to Rules 12 or 56.

F. Permitting the court to dismiss an action prior to class determination upon court approval and without notice to the class.

G. The mandatory notice provision.

H. Interlocutory appeal.

I. Requiring the named representative to serve "willingly".

J. Permitting the court to require class members to bear a share of the financial burden.

A specific discussion of these topics follows.

A. The Unitary Standard Seems Preferable to the Current b(1), b(2) and b(3) Classifications

The Sub-Committee believes that the current tri-partite classification is unduly rigid. In the Sub-Committee's view, some actions do not neatly fit any of the categories, yet once pigeonholed a host of notice and exclusion rules apply. Although the Sub-Committee has some concern that the draft proposal provides very broad discretion to the trial judge, the Sub-Committee believes that the policies underlying the class action rule are better served by a unitary standard. The Sub-Committee believes it is sensible to treat the issues of notice and exclusionary rights on their merits rather than tying them artificially to the particular classification.

B. The Certification of "Claims" and "Issues"

Although the Sub-Committee is uncertain as to the intended distinction between "claims" and "issues", we agree that the concept of permitting a court flexibility to certify a portion of an action for class treatment is appropriate. At the same time,

at least one member expressed concern that permitting a court to certify "claims" not be converted into an enlargement of a court's jurisdiction where the parties on whose behalf the claim is asserted would otherwise not be subject to the court's jurisdiction.

C. Enlarging The Power of the Court to Impose Conditions Upon Class Membership

The Sub-Committee believes that Rule 23 should expressly permit trial judges to impose conditions on class membership as may be appropriate on a case by case basis. In the Sub-Committee's view, both judicial economy and considerations of fairness dictate this conclusion. Thus, in certain circumstances, courts should be able to prevent a person who wishes to be excluded from the class from taking advantage of the res judicata or collateral estoppel effect of a favorable judgment or ruling. This prevents a putative class member from requesting exclusion without penalty if the action is unfavorable to the class while waiting to take advantage of a favorable result. The Sub-Committee believes, however, that further study is required as to the desirability of permitting courts to require class members to "opt in" to the class.

D. Excluding Sub-Classes From Having to Meet Independently the Numerosity Requirement

The Sub-Committee believes that considerations of judicial economy require a court to be able to certify a sub-class even when that sub-class does not independently satisfy the numerosity requirement. Were this not the case, one court would not be able to dispose of all matters arising out of a common

course of conduct if a small number of persons were somewhat differently affected by the same course of unlawful conduct. The Sub-Committee believes that this change should be limited to "sub-classes" and should not include "classes" as is presently suggested by the language of (c)(4)(B) on the proposed draft.

E. Permitting Pre-Certification Determination of Motions Made by any Party Pursuant to Rules 12 and 56

The Sub-Committee agrees with the Flegal Report that "in an appropriate case pre-certification decision of a merits motion, whether made by a plaintiff or a defendant, may advance a "speedy and inexpensive" resolution of the controversy or significantly inform a certification ruling." See Exhibit C at 209. Also, this is often the practice of the courts under the current Rule.

F. Permitting the Court to Dismiss an Action Prior to Class Determination Upon Court Approval and Without Notice to the Class

The Sub-Committee concurs in the reasoning of the Flegal Report that while sound reasons exist for requiring court approval of dismissal or compromise of a class action, the arguments in favor of mandatory notice to a putative class are less convincing. The policy of favoring the compromise and settlement of disputed actions may be frustrated where a settlement is delayed or its cost increased by the requirement of notice and possibly a hearing. Further, the Sub-Committee recognizes that in some cases notice may be appropriate. In such cases the court should have the discretion pursuant to sub-division (d) to direct notice to some or all class members.

G. Mandatory Notice of Class Certification

The proposed draft requires that "when ordering that an action be maintained as a class action under this rule, the court shall direct that notice be given." A majority of the Sub-Committee believes that mandatory notice may go hand in hand with the unitary standard.** Further study of the interrelationships between mandatory notice and the other proposed changes is necessary. Among other things, the Sub-Committee is concerned about the broad discretion that the proposed change gives courts in light of the important due process issues at stake. In addition, a consequence of mandatory notice may be an increase in litigation as to the adequacy of the notice.

H. Interlocutory Appeal

The Sub-Committee recognizes that a class action certification decision is often determinative of the future course of litigation. Thus, as noted in the Flegal Report, individual plaintiffs often abandon their efforts if certification is denied rather than incur expenses disproportionate to their individual recovery to secure appellate review. Id. at 210. From the defendant's perspective an erroneously granted certification motion may lead to settlement unrelated to the merits simply to avoid an adverse liability determination with a greatly increased damage exposure. See Exhibit C at 211. While the Sub-Committee generally concurs in the conclusion of the Flegal Report that a change is

** Two members questioned the desirability of required mandatory notices in all class actions regardless of the nature of the case and the relief sought.

desirable, we remain uncertain as to (1) whether the change should be accomplished by rule or by statute and (2) whether standards for appellate review should be articulated or discretion left entirely to the Court of Appeals.

I. Requiring the Named Representative to Serve "Willingly"

The Sub-Committee believes that while it is desirable for a plaintiff who would seek certification as a class representative to do so "willingly," it nonetheless appears that this concept is included within the adequacy requirement already contained in the Rule. The Sub-Committee is unclear over the intended effect of such a provision on the ability to sue a defendant class.

J. Permitting the Court to Require Class Members to Bear a Share of the Financial Burden

The proposal would give courts discretion to condition class membership upon sharing the financial burden of the prosecution of the action. A comparable provision was not included in the Flegal Report. Section 17 of the Uniform Model Class Actions Rule provides that if the costs of the action cannot reasonably and fairly be defrayed by the representative parties, the court may by order authorize and control the solicitation and expenditure of voluntary contributions from class members. The Sub-Committee believes that additional study is required on the cost sharing issue, including a clearer statement of how the current practice has been adversely affected by its absence.

IV. CONCLUSION

As noted at the outset and throughout this report, the Sub-Committee believes that further study is necessary before any definitive conclusions can be reached with respect to the proposed changes to Rule 23. All of the members of the Sub-Committee are interested in further reviewing the proposed changes as well as any changes that may be recommended by the Advisory Committee. Accordingly, subject to the approval of the Committee, the Sub-Committee proposes that it remain extant and continue to review and to comment on any proposals made by the Advisory Committee with respect to Rule 23.

LL193004.mem

DOCUMENTS
PERTAINING TO
BS 1008

A-Engrossed
Senate Bill 1008

Ordered by the Senate April 11
Including Senate Amendments dated April 11

Sponsored by COMMITTEE ON JUDICIARY (at the request of Phil Goldsmith, Attorney at Law)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Creates presumption that class member's share of recovery in class action is abandoned and subject to custody of state if certain conditions are met and if class member cannot be located or identified within time set by court, or if class member does not negotiate check or other instrument for amount of recovery within time set by court. Allows Administrator of State Lands to waive record keeping procedures for holders of certain unclaimed property.

A BILL FOR AN ACT

Relating to recoveries in class actions.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this Act is added to and made a part of ORS 98.308 to 98.314.

SECTION 2. (1) In any class action that results in a money judgment in favor of the class, an individual class member's share of the recovery is presumed to be abandoned and subject to the custody of the state under ORS 98.302 to 98.436 if one or more of the conditions of ORS 98.304 (1) to (5) are satisfied and:

(a) The class member cannot be located or identified within the time permitted by court order; or

(b) The check or other instrument for the class member's share of the recovery is not negotiated within the time permitted by the court order.

(2) Notwithstanding ORS 98.352 (4), a person holding unclaimed property of the type described in subsection (1) of this section shall make the report required by ORS 98.352 within 60 days after the expiration of the time allowed in the court order for locating or identifying class members, or within 60 days after the expiration of the time allowed in the court order for negotiating checks or other instruments reflecting a class member's share of the recovery, whichever is later. The administrator need not publish notice for reports under this section until the next regularly scheduled date under ORS 98.356.

(3) Any person holding unclaimed property of the type described in subsection (1) of this section is not required to comply with ORS 98.352 (5) if the person has complied with all court orders in the class action regarding notice and payment of claims to class members.

(4) The administrator may waive the record keeping requirements of ORS 98.354 (1) for holders of unclaimed property of the type described in subsection (1) of this section, except that the director shall require those holders to keep records sufficient to enable the administrator to identify the owners of the property.

(5) Notwithstanding ORS 98.356, the administrator may elect not to follow part or all of the

NOTE: Matter in bold face in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.

4-3 Work Session held.
4-5 Recommendation: Do pass.
Second reading.
4-8 Carried over to 04-09 by unanimous consent.
9 Third reading. Carried by Brockman. Passed.
Ayes, 29 --Excused, 1--Duff.
4-10(H) First reading. Referred to Speaker's desk.
4-12 Referred to Judiciary with subsequent referral to Ways and Means.
5-6 Public Hearing and Work Session held.
5-10 Work Session held.
5-15 Recommendation: Do pass.
Referred to Ways and Means by prior reference.
6-24 Public Hearing and Work Session held.
6-26 Recommendation: Do pass.
Rules suspended. Second reading.
6-27 Third reading. Carried by Jones, D.E.. Passed.
Ayes, 46 --Excused for business of the House, 14---Baum, Bauman, Brian, Clarno, Johnson, R., Jones, D., Mason, Miller, Minnis, Parks, Shiprack, Sunseri, Van Vliet, Whitty.
7-1(S) President signed.
7-3(H) Speaker signed.
8-5(S) Governor signed.
Chapter 782, 1991 Laws.
Effective date, September 29, 1991.

Specifies that Attorney General, deputy attorneys general and assistants may provide pro bono legal services.

SB 1007 By COMMITTEE ON JUDICIARY (at the request of Senator Joyce Cohen) -- Relating to the lottery.

3-15(S) Introduction and first reading. Referred to President's desk.
3-19 Referred to Trade and Economic Development, then Judiciary.
6-30 In committee upon adjournment.

Requires Oregon State Lottery Commission to limit to two maximum number of video game devices allowed on premises operating devices under commission authority. Prohibits keeping such devices if not authorized by commission. Provides maximum penalty of five years' imprisonment or $100,000 fine, or both for violation.

SB 1008 By COMMITTEE ON JUDICIARY (at the request of Phil Goldsmith, Attorney at Law) -- Relating to recoveries in class actions.

3-19(S) Introduction and first reading. Referred to President's desk.
3-20 Referred to Judiciary.
4-1 Public Hearing held.
4-5 Work Session held.
4-11 Recommendation: Do pass with amendments. (Printed A-Eng.)
4-12 Second reading.
4-15 Third reading. Carried by Cohen. Passed.
Ayes, 26 --Excused, 4--Bradbury, Gold, Jolin, Smith.
4-16(H) First reading. Referred to Speaker's desk.
4-17 Referred to Judiciary.
5-30 In committee upon adjournment.

Creates presumption that class member's share of recovery in class action is abandoned and subject to custody of state if certain conditions are met and if class member cannot be located or identified within time set by court, or if class member does not negotiate check or other instrument for amount of recovery within time set by court. **Allows Administrator of State Lands to waive record keeping procedures for holders of certain unclaimed property.**

SB 1009 By COMMITTEE ON JUDICIARY -- Relating to inmates; appropriating money.

3-18(S) Introduction and first reading. Referred to President's desk.
3-20 Referred to Judiciary, then Ways and Means.
6-30 In committee upon adjournment.

Establishes personal visits at penal and correctional institutions. Defines "personal visit" and related terms.

Exempts state officials and employees from liability for injuries caused by participants of visit.

Establishes Personal Visit Account in State Treasury.

Appropriates moneys from account to Department of Corrections for purposes of Act.

SB 1010 By Senator SPRINGER (at the request of Oregon State Public Interest Research Group (OSPIRG)) -- Relating to household hazardous products.

3-19(S) Introduction and first reading. Referred to President's desk.
3-20 Referred to Agriculture and Natural Resources.
4-8 Public Hearing held.
4-22 Work Session held.
4-30 Recommendation: Do pass with amendments and be referred to Ways and Means. (Printed A-Eng.)
Referred to Ways and Means by order of the President.
6-30 In committee upon adjournment.

[Requires Department of Environmental Quality and State Department of Agriculture to develop programs to require labeling and distribution of consumer information about hazardous household products, pesticides and commercial fertilizers. Imposes civil penalties for failure to label or provide information.]

Requires Department of Environmental Quality and State Department of Agriculture to make information about household hazardous products available to retailers. Specifies that retailers shall be responsible for distributing information to consumers.

Exempts certain nonprescription drugs from definition of household hazardous products.

Requires retail establishments to display designated shelf signs in immediate vicinity of household hazardous products.

Imposes civil penalty for violations.

SB 1011 By COMMITTEE ON AGRICULTURE AND NATURAL RESOURCES -- Relating to urban planning.

3-15(S) Introduction and first reading. Referred to President's desk.
3-19 Referred to Agriculture and Natural Resources.
4-24 Public Hearing held.
5-13 Work Session held.
5-23 Recommendation: Do pass with amendments. (Printed A-Eng.)
5-24 Second reading.
5-27 Made a Special Order of Business by unanimous consent.
Third reading. Carried by Cohen. Passed.
Ayes, 27 --Excused, 1--Gronsky, Attending Legislative Business, 2---Fawbush, Yih.
5-27(H) First reading. Referred to Speaker's desk.
5-28 Referred to Environment and Energy.
6-30 In committee upon adjournment.

[Directs Land Conservation and Development Commission to require local governments to insure commercial and residential zoning at density appropriate to maximum use of mass transit in vicinity of mass transit stations. Specifies further requirements of local governments.]

[Directs commission to report to Joint Legislative Committee on Land Use on progress in carrying out provisions of Act.]

Directs Land Conservation and Development Commission to adopt rules that require local governments to implement specified integrated urban planning policies. Directs metropolitan areas with population in excess of one million to adopt planning requirements to increase effectiveness of existing and future light rail transit facilities.

procedures provided in ORS 98.356 if:

(a) The unclaimed property is of the type described in subsection (1) of this section; and

(b) In the judgment of the administrator, the procedures provided in ORS 98.356 would substantially duplicate location efforts made in the class action and would not materially increase the chances of locating owners of the abandoned property.

Norma Paulus
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

June 5, 1991

JUN 06 1991

The Honorable Randy Miller
Chairman
House Judiciary Committee
H-388 State Capitol
Salem, Oregon 97310

Dear Randy:

I am writing to ask that you schedule Senate Bill 1008 for a hearing and work session. Senate Bill 1008 would create a presumption that unclaimed judgments in class action litigation would be treated as abandoned property. As such, the monies would accrue to the Common School Fund. There was no opposition to the bill in the Senate Judiciary Committee, and the measure passed the Senate unanimously.

I realize that time is getting late in the session and that scheduling is very difficult. However, I believe that any bill we can enact that will enhance the Common School Fund is well worth the effort as we struggle to find resources for our schools.

If you are able to schedule the bill, could you please have your staff contact Greg or me?

Thank you.

Sincerely,

Norma Paulus

700 Pringle Parkway SE, Salem, Oregon 97310-0290 • (503)378-3573 • Fax (503)373-7968

Oregon

DIVISION OF
STATE LANDS

STATE LAND BOARD
BARBARA ROBERTS
Governor
PHIL KEISLING
Secretary of State
ANTHONY MEEKER
State Treasurer

March 29, 1991

Senator Joyce Cohen
Room S-218
State Capitol
Salem, OR 97310

RE: SB 1008

Dear Senator Cohen:

SB 1008 was proposed by Phil Goldsmith, an attorney in private practice, but it will have a positive impact on unclaimed property received by The Division of State Lands. However, the impact is not possible to estimate.

We are pleased that Mr. Goldsmith proposed this legislation. If enacted, it will amend the unclaimed property statute to include assets recovered on behalf of members of class action suits. Presently, the statute does not specifically address this situation.

The Division of State Lands is supportive of this legislation.

Sincerely,

Marcella Easly

Marcella Easly, Manager
Trust Property Section

ME/ame

CC Sen. Jim Hill
Sen. Peter Brockman
Sen. Jim Brown
Sen. Jeannette Hamby
Sen. Bob Shoemaker
Sen. Dick Springer

775 Summer Street NE
Salem, OR 97310
(503) 378-3805
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Phil Goldsmith
Attorney at Law
1100 S.W. 6th Avenue
Suite 1212
Portland, Oregon 97204

(503) 224-2301
FAX: (503) 222-7288

October 30, 1991

Professor Fredric Merrill
Executive Director of Council on
Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403

Re: ORCP 32

Dear Professor Merrill:

You may be aware that the Fall 1991 issue of the Willamette Law Review contains an article by Portland lawyer Philip Emerson entitled "Oregon Class Actions: The Need for Reform." Mr. Emerson concludes, based on developments since the Council on Court Procedures last considered the class action rule in 1981, that "ORCP 32 inadequately serves its stated purposes." 27 Will L Rev at 761. He goes on to offer certain proposals for reforming ORCP 32.

Since I have been involved in much of the litigation discussed in Mr. Emerson's article, I have been heading up a group of lawyers who are preparing a set of revisions to ORCP 32. We had hoped to be able to provide our proposals to you for circulation to the Council in advance of its November meeting.

However, we recently learned that the Advisory Committee on Federal Rules has been considering revisions to the federal class action rule, FRCP 23. While the Advisory Committee deferred action on this proposal this year, we felt it important to review what the Advisory Committee has had before it before making our proposal to the Council. I believe that we will receive materials from the Advisory Committee in sufficient time so that I can get our proposal to you for circulation to the Council in advance of its December meeting.

In the meantime, the Council might be interested in Mr. Emerson's article. I am sending under separate cover sufficient copies for you to distribute one to each Council member and to retain three copies for your use. If you need additional copies, please call Phil Emerson at 224-2823.

Sincerely,

Phil Goldsmith

PG:rr
Enclosures

ARTICLES

WILLAMETTE LAW REVIEW

27:4 Fall 1991

OREGON CLASS ACTIONS: THE NEED FOR REFORM

PHILIP EMERSON*

I. INTRODUCTION

Any debate over class action procedure is not strictly a debate over procedure. It is also a debate over substantive law and which substantive laws will be enforced.[1] Oregon's class action practice is governed by Oregon Rules of Civil Procedure (ORCP) 32. ORCP 32 contains barriers to class litigation not found in any other state's class action rule.[2] Similarly, ORCP 32 places greater constraints on class action practice than its federal counterpart, Federal Rule of Civil Procedure (FRCP) 23. This was apparently the intent of the Oregon legislature when it enacted ORCP 32 in 1973.[3]

At the same time, the legislature may not have intended some of the results of ORCP 32. Class actions are the procedural vehi-

* Attorney, Portland. B.A. 1987, University of Oregon, J.D. 1990, Northwestern School of Law at Lewis and Clark College. This Article is dedicated to Professor John E. Kennedy, 1934-1989, for his lifelong contributions as a lawyer, teacher, and scholar. The author gratefully acknowledges the assistance of Phil Goldsmith and Rosemary Rettig.

1. Miller, *Proceedings of the Thirty-Ninth Annual Conference of the District of Columbia Circuit*, 81 F.R.D. 263, 298 (1978).

2. 2 H. NEWBERG, CLASS ACTIONS § 8.35, at 169-70 n.380 (2d ed. 1985). The claim form procedure of ORCP 32 (F)(2) appears to be unique. The so-called "prelitigation notice" provision, ORCP 32(H), is also unique.

3. Bernard v. First Nat'l Bank of Oregon, 275 Or. 145, 152, 550 P.2d 1203, 1208 (1976).

cles used to aggregate essentially common claims too small or numerous to be efficiently tried separately.[4] A wide variety of substantive claims have been litigated under ORCP 32.[5] Some ORCP 32 class actions demonstrate that the mandatory claim form provision of ORCP 32(F)(2) contains a procedural barrier that often compromises substantive law objectives.[6]

The mandatory claim form procedure in ORCP 32 limits damages. The losing class action defendant is liable only for damages claimed by class members who submit individual affirmative requests for relief known as claim forms.[7] Thus, the total damage award may not exceed the sum of individual claims.[8] Actual class damages, however, often demonstrably exceed this amount.[9] Defendants' own records often provide the clearest evidence of the true extent of class damages.

For a variety of reasons, a damage award computed under ORCP 32 may be inadequate to compensate the class as a whole.[10] Potential class members may not be aware an action has commenced. Class action cases usually proceed slowly. Class members change address, die, or lose interest, possibly due to their small individual stakes in the action. By the time liability is determined, many class members do not claim their portions of the class award.[11]

More importantly, ORCP 32 damage awards often fail to force wrongdoing defendants to fully disgorge their ill-gotten gains. In two related actions brought under ORCP 32, *Derenco v. Benj. Franklin Federal Savings & Loan Association*[12] and *Guinasso v. Pacific First Federal Savings & Loan Association*,[13] the trial courts found that the defendants were unjustly enriched by retaining earnings from mortgagors' tax and insurance reserve accounts. Large portions of the proven damages went unclaimed. The two defendants were allowed to keep a combined two million dollars that the trial courts held they had unjustly obtained.[14] This result mocks the controlling equitable principle that wrongdoers should not retain the fruits of their wrongdoing.[15]

No other state burdens its class action procedure with a mandatory claim form requirement.[16] Congress has enacted legislation specifically waiving the claim form as the sole means to compute damages in certain consumer class actions.[17] Federal courts have devised other, more accurate methods to compute aggregate damages in class suits.[18]

4. *Id. See also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); *see generally* Dam, *Class Actions: Efficiency, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975).

5. *See, e.g.*, Best v. United States Nat'l Bank of Oregon, 303 Or. 557, 739 P.2d 554 (1986) (consumer/contract); Derenco v. Benjamin Franklin Fed. Sav. & Loan Ass'n, 281 Or. 533, 577 P.2d 477, *cert. denied*, 439 U.S. 1051 (1978); Hurt v. Midrex Div. of Midland Ross Corp., 276 Or. 925, 556 P.2d 1337 (1976) (mass tort); Guinasso v. Pacific First Fed. Sav. & Loan Ass'n, 89 Or. App. 270, 749 P.2d 577 (1988); Powell v. Equitable Sav. & Loan Ass'n, 57 Or. App. 110, 643 P.2d 1331 (1982) (mortgagees' wrongful retention of earnings from tax and insurance reserve accounts); Eischen v. Avia Group Int'l, Inc., No. 88703-01691 (Cir. Ct. Mult. Co. 1988) (securities).

6. ORCP 32(F)(2) states in pertinent part:

> 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 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 . . . .

7. *Id.*

8. *Id.*

9. For instance, 13,647 class members entitled to $822,116.20 failed to file claim forms and thus were precluded from recovery under ORCP 32(F)(2) in Guinasso v. Pacific First Fed. Sav. & Loan Ass'n, No. 416-583 (Mult. Co. Sept. 6, 1985).

10. In a study of antitrust settlements, Professor Duval found, "[s]ettlements that limited defendants' liability to the amount of claims filed had been unsuccessful in forcing defendants to pay out a major part of the damages sustained by the class." DuVal, *Class Actions as an Antitrust Enforcement Device: The Chicago Experience II*, 1976 AM. B. FOUND. RES. J. 1273, 1355.

11. *See infra* text accompanying notes 111-18.

12. 281 Or. 553, 557 P.2d 477, *cert. denied*, 439 U.S. 1051 (1978).

13. 89 Or. App. 270, 643 P.2d 1331 (1982).

14. In *Derenco*, defendant retained $1,359,779.75 in profits from its illegal activities. Derenco v. Benjamin Franklin Fed. Sav. & Loan Ass'n, No. 404-741, Decree (Mult. Co. Oct. 17, 1980). In *Guinasso*, the comparable figure was $822,116.20. Guinasso v. Pacific First Fed. Sav. & Loan Ass'n, No. 416-583 (Mult. Co. Sept. 6, 1985).

15. Derenco v. Benjamin Franklin Fed. Sav. & Loan Ass'n, 281 Or. 533, 557, 577 P.2d 477, 491 (1978) (citing DOBBS, REMEDIES § 4.2, at 235 (1973)).

16. *See* H. NEWBERG, *supra* note 2. The author researched each state's class action rule and found no other mandatory claim form provision.

17. Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, 90 Stat. 1394-95 (codified at 15 U.S.C. § 15d-e (1988)). Congress was concerned that individual proof of damages undercut the deterrent value of consumer class actions. H.R. REP. NO. 459, 94th Cong., 1st Sess., *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2571, 2583-84.

18. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 339-43 (1962) (statistical modeling to compute aggregate damages); Van Gemert v. Boeing Co., 553 F.2d 812, 814 (2d Cir. 1977) (when defendant liable for not informing stockholders of redemption offer, measure of damage based on differences between redemption price and market price of plaintiffs' shares on date redemption offer closed); *see also* MANUAL FOR COMPLEX LITIGATION § 2.712 (1973). Oregon recently has allowed for the use of statistical proof in

When ORCP 32 was enacted, many judges and scholars viewed class actions as, at best, a mixed blessing. Despite the common-law tradition of the representative suit, and its long acceptance in American law,[19] conservative jurists and commentators decried the class action as "Frankenstein's monster."[20] However, judicial resistance to the class action has faded. The class action as a procedural device has been embraced by such eminent conservative jurists as Judge Posner[21] and the Chief Justice of the United States Supreme Court.[22] Experience has shown that the class action is "a valuable procedural tool affording significant opportunities to implement important public policies" and that "private injunctive and damage actions . . . are often essential if widespread violations of those policies are to be deterred."[23]

In 1981, Oregon's Council on Court Procedures recommended several changes in ORCP 32, including deletion of 32(F)(2). These changes were rejected by the 1981 Legislature.[24] The principal argument advanced against the changes was that "[t]he proponents of the amendments made no showing that there was a need for change — that meritorious class actions were abandoned because of problems with the existing law."[25]

That assertion cannot be made fairly today. Since 1981, at least one meritorious class action was abandoned because the claim form requirement precluded the possibility of meaningful monetary

estimating damages for fraudulent billings of a health care provider. Oregon Management & Advocacy Center, Inc. v. Mental Health Div., 96 Or. App. 528, 534, 774 P.2d 1113, 1117 (1989), *rev. denied*, 308 Or. 405 (1989).

19. As early as 1853, the Supreme Court endorsed the equitable representative action as manifestly necessary to promote justice. Smith v. Swormstet, 57 U.S. 288, 303 (1853).

20. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, C.J., dissenting). The phrase was picked up by the popular media. *See Why Those Big Cases Drag On*, TIME, Jan. 8, 1979, at 62-63.

21. The law and economics school vigorously approves of the private class action as a true procedural device that allows efficient judicial enforcement of substantive policy, compensation of victims and deterrence of defendants' wrongdoing. *See* R. POSNER, ECONOMIC ANALYSIS OF THE LAW § 21.9, at 536-37 (3d ed. 1986).

22. Rehnquist wrote in *Phillips Petroleum Co. v. Shutts* that the class suit vindicates the rights of the plaintiff whose "claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually. . . ." 472 U.S. 797, 813 (1984).

23. *Report and Recommendations of the American Bar Association Special Committee on Class Action Improvements*, 110 F.R.D. 195, 198 (1986).

24. 4 COUNCIL ON COURT PROCEDURES, 1979-81 BIENNIUM, AMENDMENTS TO RULE 32: BACKGROUND MATERIAL.

25. *Id.* at Item 7, p.1 (memorandum by William McAllister).

recovery.[26] Additionally, in the tax and insurance reserve cases, *Derenco* and *Guinasso*, the wrongdoing defendants retained over two million dollars in illegally-obtained profits with the aid of ORCP 32(F)(2).[27]

During the last two decades, state courts have assumed increasing importance as class action forums.[28] This trend was prompted by Supreme Court decisions that drastically curtailed the availability of federal diversity jurisdiction to class action plaintiffs.[29] It gained importance with the proliferation of state consumer protection statutes and some concurrent federal and state jurisdictional provisions in federal remedial statutes.[30] Recently, the Supreme Court held that federal law does not preempt the recovery of damages for classes of consumers under pertinent state antitrust statutes, even though such damages are unavailable under federal law.[31] The increasing importance of state court class actions underscores the need for a more workable rule in Oregon.

This Article explains how ORCP 32 inadequately serves its stated purpose, and offers a suggestion for its reform. The first section traces the evolution of ORCP 32 and its early application by Oregon courts. The second section outlines the reform attempt aborted by the 1981 Legislature. The history of this reform attempt is important because the guiding premise of the reform's opponents has proven false. The third section examines *Best v. United States National Bank*[32] and the tax and insurance reserve cases. These cases illustrate the critical role of the mandatory claim form procedure in Oregon class action practice. Finally, this Article proposes reform that will make ORCP 32 more fair and workable: the repeal of ORCP 32(F)(2) as a damage limitation and a provision for escheat for unclaimed damage awards to the state common school fund.

26. *See infra* text accompanying notes 111-18.

27. *See supra* note 14.

28. 3 H. NEWBERG, *supra* note 2, § 13.45, at 87.

29. *See, e.g.*, Zahn v. International Paper, 414 U.S. 291, 301 (1973) (each plaintiff in FED. R. CIV. P. 23(b)(3) class action must satisfy $10,000 jurisdictional amount, and those who do not must be dismissed from action); Snyder v. Harris, 394 U.S. 332, 341 (1969) (class members may not aggregate individual claims to satisfy $10,000 jurisdictional amount).

30. *See, e.g.*, Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. § 2301-12 (1988)).

31. California v. ARC Am. Corp., 490 U.S. 93, 101 (1989).

32. 303 Or. 557, 739 P.2d 554 (1987).

II. Background and Development of ORCP 32

A. Case Development

In 1973, the Oregon legislature enacted the antecedent to ORCP 32.[33] Prior to 1973, a class action for money damages could not be brought in Oregon courts.[34] As originally introduced in committee, ORCP 32 was an exact duplicate of Fed. R. Civ. P. 23. However, it was modified extensively in committee. In *Bernard v. First National Bank of Oregon,* Justice Holman, applying ORCP 32 for the first time, summarized its legislative history:

> There can be no doubt that the purpose of the amendments was to prevent abuses perceived under Rule 23 . . . and that the scope of the class action in Oregon was intended to be circumscribed to a greater extent than is the case under some federal courts' interpretation of Rule 23.[35]

Bernard involved an action by a class of commercial borrowers challenging a banking practice known as the "365/360" method of interest computation.[36] Under this method, the borrower pays an interest rate 1.388 percent above the nominal rate.[37] Other states have allowed similar actions to proceed.[38] However, under Oregon's class action rule, the action was not maintainable.[39] The Oregon Supreme Court noted that with the large class of commercial borrowers it was likely that a substantial number would have knowledge of the challenged practice.[40] Prior knowledge of the practice was a substantive defense to liability.[41] Therefore, the court held that resolution of the prior knowledge issue would be a matter of individualized proof, requiring separate adjudications.[42] For this reason, claims or defenses common to class members did

33. 1973 Or. Laws ch. 970.

34. American Timber & Trading Co. v. First Nat'l Bank of Oregon, 263 Or. 1, 7-9, 500 P.2d 1204, 1206-07 (1972).

35. 275 Or. 145, 152, 550 P.2d 1203, 1208 (1976).

36. *Id.* at 147, 550 P.2d at 1206.

37. *Id.* at 148, 550 P.2d at 1206.

38. *See, e.g.,* Perlman v. First Nat'l Bank of Chicago, 15 Ill. App. 3d 784, 305 N.E.2d 236 (1973); Holisak v. Northwestern Nat'l Bank of St. Paul, 297 Minn. 248, 210 N.W.2d 413 (1973); Silverstein v. Shadow Lawn Sav. & Loan Ass'n, 51 N.J. 30, 237 A.2d 474 (1968).

39. 275 Or. at 169, 550 P.2d at 1218.

40. *Id.* at 156, 550 P.2d at 1211.

41. *Id.*

42. *Id.* at 157, 550 P.2d at 1211.

not predominate over purely individual issues.[43]

Many class actions following *Bernard* were unremarkable in their size, complexity, or contributions to the growth of Oregon class action law.[44] Distinct from these cases were the tax and insurance reserve cases. They were perhaps the most important, and certainly the most successful, class actions in Oregon history: *Derenco v. Berj. Franklin Savings & Loan Association,*[45] *Guinasso v. Pacific First Federal Savings & Loan Association,*[46] and *Powell v. Equitable Savings & Loan Association.*[47]

Derenco, the lead case, was filed in 1974.[48] The class members, who were mortgage borrowers, challenged the savings and loan's (S&L's) retention of the proceeds from the borrowers' tax and insurance reserve accounts.[49] At the beginning of each year, homeowners whose mortgages were secured by their properties paid lump sums into accounts earmarked for taxes and insurance.[50] Throughout the year, these deposits generated earnings which the S&Ls retained without reporting them to the mortgagors.[51] The trial court held that the defendants were unjustly enriched and ordered all illegally-obtained profits to be disgorged.[52] The defend-

43. *Id.* at 162-63, 550 P.2d at 1214.

ORCP 32(B)(3) specifies that a class action for money damages may proceed if:

> 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 separate members* of the class, unless the separate adjudications relate primarily to damages. . . .

Id. (emphasis added). The California Supreme Court, in a case brought under that state's Business and Professions Code Sec. 17335, has held that, in a comparable action, a class restitutionary recovery need not be predicated on class members' lack of knowledge. Fletcher v. Security Pacific Bank, 23 Cal. 3d 442, 453, 591 P.2d 51, 58, 153 Cal. Rptr. 28, 35 (1979).

44. *See, e.g.,* Newman v. Tualatin Dev., 287 Or. 47, 597 P.2d 800 (1979) (consumer contract/warranty); Hurt v. Midrex Div. of Midland Ross Corp., 276 Or. 925, 556 P.2d 1337 (1976); Joachim v. Crater Lake Lodge, Inc., 48 Or. App. 379, 617 P.2d 632 (1980).

45. 281 Or. 533, 577 P.2d 477 (1978).

46. 89 Or. App. 270, 749 P.2d 577 (1988).

47. 57 Or. App. 110, 643 P.2d 1331 (1982).

48. 281 Or. at 535, 577 P.2d at 480.

49. *Id.* at 535-36, 577 P.2d at 480.

50. *Id.* at 535-37, 577 P.2d at 480-81.

51. *Id.*

52. *Id.*

ants raised several issues on appeal, including the propriety of the class certification order.[53]

As in *Bernard,* the defendant raised individual knowledge of the S&L's practice as a substantive defense.[54] The defendant proposed that individual adjudications would be necessary to resolve this issue, thus destroying the predominance of common questions of law or fact.[55] The Oregon Supreme Court disagreed, factually distinguishing *Bernard*.[56] The *Bernard* court was unwilling to accept the premise that the class of commercial borrowers was uniformly unaware of the lenders' practices.[57] *Derenco*, however, did not involve commercial borrowers.[58] A loan officer employed by the defendant testified that the income from tax and insurance reserve accounts was not mentioned in the various loan agreements. Additionally, loan officers, as a matter of routine, never raised the subject with the borrowers, and borrower inquiries into the practice were isolated and infrequent.[59] The court affirmed the judgment, concluding that few borrowers were even aware of their beneficial interest in the reserve funds.[60]

Derenco was followed by two similar cases. One proceeded to a plaintiffs' verdict, sustained on appeal,[61] and the other settled.[62] According to the defendants' records in these cases, the plaintiff class members sustained an aggregate of nearly $6 million in damages due to the profits gained from the S&L's illegal conduct.[63] Because of the mandatory claim form requirement of ORCP 32, however, only a fraction of the award was claimed by class members and paid out in damages. The defendants retained the use and enjoyment of the unclaimed damages, which totalled nearly one-third of the ascertainable class damages.[64]

53. *Id.* at 568, 577 P.2d at 497.
54. *Id.* at 568-70, 577 P.2d at 497-98.
55. *Id.*
56. *Id.* at 570-72, 577 P.2d at 498-99.
57. *Id.* at 572, 577 P.2d at 499.
58. 281 Or. at 572, 577 P.2d at 499.
59. *Id.*
60. *Id.* at 573, 577 P.2d at 499.
61. Guinasso v. Pacific First Fed. Sav. & Loan Ass'n, 89 Or. App. 270, 749 P.2d 577 (1988).
62. Powell v. Equitable Sav. & Loan Ass'n, 57 Or. App. 110, 643 P.2d 1331 (1982).
63. *Derenco*, No. 404-741 at 2 (Mult. Co. Oct. 17, 1980).
64. In *Guinasso,* out of $2.3 million in ascertainable damages, only about $1.5 million was claimed. Pacific First Federal retained $812,116.20. The trial court awarded some $525,000 in plaintiff's attorneys' fees to be paid out of the unclaimed portion. Guinasso v. Pacific First Fed. Sav. & Loan Ass'n, No. 416-583 (Mult. Co. Sept. 16, 1985). The Court of Appeals later held these fees directly taxable to Pacific. 89 Or. App. at 278-79, 749 P.2d at 583. In effect, then, Pacific has retained use and benefit of the $800,000 which it procured illegally from its customers. In *Derenco,* the defendant retained over $1.2 million in unclaimed damages. *Derenco*, No. 404-741 at 2 (Mult. Co. Oct. 17, 1980).

In 1979, a class action was filed that would lead eventually to an expansion of Oregon's substantive law.[65] In *Best v. United States National Bank of Oregon,* holders of non-business checking accounts challenged the bank's fees for servicing non-sufficient-funds (NSF) checks.[66] The plaintiffs originally pleaded several theories of liability.[67] Eventually, the Multnomah County Circuit Court granted summary judgment in favor of the defendant, and plaintiffs appealed.[68]

The Oregon Court of Appeals reversed the summary judgment against one claim which alleged that the bank had violated its implied contractual duty to set NSF fees in good faith.[69] The Oregon Supreme Court affirmed this holding.[70] The bank had not informed its customers of its NSF fees.[71] It possessed the unilateral authority to set those fees, constrained only by the implied contractual duty of good faith and fair dealing.[72] Whether on the facts of the case the bank had violated this duty, the Oregon Supreme Court held, was a matter for the jury.[73] The case was remanded to the trial court[74] but was never tried.

B. Efforts at Legislative Reform

Between 1973 and 1979, legislative reformers made two attempts to change ORCP 32. One attempt, offered in the 1979 legislative session, attracted considerable support. It sought to replace the existing ORCP 32 with the Uniform Class Actions Act, promulgated by the National Law Institute's Commission on Uniform State Laws.[75] The Uniform Act included several provisions

65. Best v. United States Nat'l Bank of Oregon, 303 Or. 557, 739 P.2d 554 (1987).
66. *Id.* at 558, 739 P.2d at 555.
67. The originally pleaded theories included breach of good faith, unlawful penalty, and unconscionability. Best v. United States Nat'l Bank of Oregon, 78 Or. App. 1, 3, 714 P.2d 1049, 1050 (1986).
68. *Id.*
69. Best v. United States Nat'l Bank of Oregon, 78 Or. App. 1, 714 P.2d 1049 (1986).
70. 303 Or. at 572-73, 739 P.2d at 563.
71. *Id.* at 561, 739 P.2d at 557.
72. *Id.*
73. *Id.* at 565, 739 P.2d at 559.
74. *Id.* at 573, 739 P.2d at 563.
75. UNIFORM LAW COMMISSIONER MODEL CLASS ACTIONS ACT (1976).

that departed radically from Oregon procedure. One such provision authorized fluid recovery.[76] Other provisions either waived individual notice to class members or shifted the costs of notifying class members to the defendants.[77] The bill was withdrawn due to objections from several legislators; the objectors asserted that any changes to the ORCP first ought to be considered and approved by the Council on Court Procedure (CCP).[78] The CCP has the power to set purely procedural rules for Oregon courts.[79]

The CCP appointed a class action subcommittee which heard testimony from the defense bar and from attorneys representing class action plaintiffs. Plaintiffs' attorneys testified to a strong need for reform. They claimed ORCP 32 made class actions to vindicate consumer rights "completely unworkable."[80] Defense attorneys were generally content with ORCP 32.[81]

In December 1981, the CCP amended ORCP 32. The changes included: (1) eliminating the mandatory thirty-day prelitigation notice to defendant required in class actions for money damages;[82] (2) eliminating the mandatory notice to class members whose individual recoveries were estimated at less than $100;[83] (3) granting the trial court discretion to shift notice costs to the defendant upon a preliminary finding plaintiffs were likely to prevail; (4) modifying the certification criteria in class actions for money damages to conform with FRCP 23;[84] (5) adding a provision that regulates attorneys' fee awards to prevailing plaintiffs;[85] and (6) eliminating the mandatory claim form procedure.[86]

76. *Id.* § 15(a). Fluid recovery is explained in text accompanying *infra* notes 140-63.

77. *Id.* § 7(d)-(f).

78. 4 COUNCIL ON COURT PROCEDURES, *supra* note 24, at Item 1, correspondence from Vern Cook, Chairperson of Senate Judiciary Committee to Donald McEwen, Chairperson of Council on Court Procedures, June 8, 1979.

79. ORS 1.735 (1989).

80. 3 COUNCIL ON COURT PROCEDURES, 1979-81 BIENNIUM, AMENDMENTS TO RULE 32: BACKGROUND MATERIAL, Item 5, minutes of meeting of June 28, 1980 (remarks of Henry E. Carey).

81. *Id.* at Item 5, minutes of meeting of June 18, 1980 (remarks of William McAllister, Norman Wiener, and R. Alan Wight).

82. ORCP 32(H).

83. Patterned after the UNIFORM CLASS ACTIONS ACT § 7(d) (1976).

84. A number of criteria are listed in both the federal and state rules to guide the court in determining whether a class action is a superior method of resolving the controversy in a (B)(3) class action. Among these are:

> The interest of members of the class in individually controlling the prosecution or defense of separate actions, the extent and nature of any litigation concerning controversy already commenced by or against members of the class, the desirability or undesirability of concentrating the litigation of the claims in the particular forum [and] the difficulties likely to be encountered in the management of the action.

It was to be the role of the CCP to propose the amendments, and of the legislature to dispose of them. The proposed changes worked against the state's financial institutions, and their representatives in Salem lobbied vigorously against the CCP amendments.[87] Under state law, the amendments were to take effect automatically, unless the legislature modified or overruled them.[88] With *Best* and the other NSF cases[89] looming on the horizon, and two tax and insurance reserve cases still unresolved, a great deal was at stake for the state's financial institutions. House Bill 3122, introduced in the 1981 legislative session, effectively reinstated ORCP 32 as it had been enacted in 1973.[90] The day the Senate Justice Committee voted to repeal the CCP amendments, one senator wryly commented on the mastery those lobbying against the rule changes had asserted over the legislature.[91]

While plaintiffs' attorneys will disagree, it seems that most of the CCP's proposed changes to ORCP 32 were not absolutely nec-

FED. R. CIV. P. 23(b)(3)(A-D); ORCP 32(B)(3)(a-d). In addition, the Oregon rule directs the court to consider

> (e) whether or not the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities 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 the success of sustaining the claim or defense is minimal.

ORCP 32(B)(3)(e) & (f). The CCP amendments eliminated these final two criteria.

85. Adapted from UNIFORM CLASS ACTIONS ACT §§ 16-17 (1976). This was eventually incorporated as ORCP 32(N).

86. For the reasons cited herein. *See supra* notes 38-39.

87. Testimony of Bill McAllister representing United States National Bank, 61st Leg. Sess. (1981), Min. at Tape 348, Senate Comm. on Justice, July 20, 1981; Testimony of Diana Godwin representing Oregon Savings & Loan League, 61st Leg. Sess., Exhibit G, Senate Comm. on Justice, July 9, 1981.

88. ORS 1.735 (1989).

89. *See, e.g.*, Tolbert v. First Interstate Bank, 96 Or. App. 398, 722 P.2d 1393 (1989), *rev. granted*, 309 Or. 333, 787 P.2d 887 (1990).

90. H.B. 3122, 61st Leg. Sess. Summary (1981); *see* 1981 Or. Laws Ch. 912.

91. Senate Committee on Justice, minutes of meeting of July 28, 1981, at 6:

> SENATOR WYERS stated that what he had asked Mr. Barrows [Dave Barrows, President of the Oregon Savings and Loan League] to do was to release the other vehicle which is sitting out there ready to have the whole bill or any part of it he wants stuck in to it. Mr. Wyers asked Mr. Barrows if he would support concurrence in the House.
> MR. DAVE BARROWS . . . stated that they would support HB 3122 as amended by the Committee. . . . Mr. Barrows stated that he thought Senator Wyers was giving him more credit than he deserved . . . .

essary to class action practice. The requirement for mandatory prelitigation notice, for example, never has presented a barrier to class action litigation. The mandatory notice provisions of ORCP 32 have been interpreted flexibly — allowing published notice in conjunction with individual notice.[92]

The 1981 effort was the last well-organized attempt to reform Oregon's class action rule. When the legislature enacted ORCP 32 in 1973, it intended the rule to facilitate the aggregation of small claims.[93] The service of ORCP 32 to that purpose has been hindered by one fatal flaw.

III. *BEST* AND *GUINASSO*: TWO CASES THAT ILLUSTRATE THE RULE'S CRITICAL FLAW

Best v. United States National Bank of Oregon[94] and *Guinasso v. Pacific First Federal Savings & Loan Association*[95] illustrate the functional inadequacy of ORCP 32. *Best* was abandoned because the mandatory claim form procedure precluded a significant damage recovery.[96] In *Guinasso*, the guilty defendant retained a large part of its ill-gotten gains because of ORCP 32's inability to effect their disgorgement.[97]

In *Best*, the bank had not informed its customers of its NSF fees.[98] The bank's only means of notification was by extracting the fees. The trial court in *Best* granted summary judgment against plaintiffs' claims.[99] The Oregon Supreme Court noted that the bank's own records proved it had gained millions of dollars in profits from setting NSF fees greatly in excess of its costs and normal profit margins, "in an effort to reap the large profits to be made from the apparently inelastic 'demand' for the processing of NSF checks. . . ."[100] The plaintiffs' theory was that the bank's practice of unilaterally setting and raising NSF fees should be subject to the

92. The court, for example, allowed for published class notice in *Guinasso*, No. 416-583 (Mult. Co. Sept. 6, 1985).

93. Bernard v. First Nat'l Bank of Oregon, 275 Or. 145, 152, 550 P.2d 1203, 1208-09 (1976).

94. 303 Or. 557, 739 P.2d 554 (1987).

95. 89 Or. App. 270, 749 P.2d 577 (1988).

96. Telephone interview with Phil Goldsmith, plaintiffs' co-counsel (Nov. 17, 1988) [hereinafter Goldsmith interview].

97. *See supra* note 64.

98. 303 Or. at 561, 739 P.2d at 555.

99. *Id.*

100. *Id.*

implied duty to perform all contracts in good faith.[101]

The Oregon Court of Appeals reversed the summary judgment.[102] The Oregon Supreme Court affirmed, and remanded for trial on the good-faith claim.[103] The case, however, was never tried.

Predicting the trial outcome in any case is a difficult task. The plaintiffs' task in *Best* was doubly difficult. Proving and recovering damages were separate concerns. Under ORCP 32, assessed damages can equal only the sum of those claimed individually by class members. This created two problems. First, many class members could not be located.[104] Second, class members who could be located were unlikely to have kept any records of NSF fees paid ten years earlier. This made it unlikely that they would remember any damages they had suffered, much less be able to document them.[105]

As the trial date neared, each side advanced settlement proposals.[106] The bank's proposals reflected the strength of its position. The plaintiffs' attorneys, aware that even a victory at trial likely would be a hollow one, were not positioned to bargain aggressively.[107]

The terms of the settlement required that the bank notify all current customers and publish notice in the state's newspapers.[108] Class members were entitled to submit coupons redeemable for $10 off any number of bank services. Plaintiffs' attorneys were paid $225,000.[109] By the time the settlement offer closed, over 4,000

101. *Id.*; *see also* U.C.C. § 1-203.

102. *Id.*

103. *Id.* at 573, 739 P.2d at 563.

104. The bank had written records of each of its customers during the period in question. Goldsmith interview, *supra* note 96.

105. Describing a similar situation, the federal House Committee on the Judiciary opined:

> This committee emphatically rejects the notion that our constitutional requirements are so rigid that they somehow require each of millions of potential claimants for individually trivial sums be paraded through the court to prove his personal damages, when the best evidence and often the only appropriate measure of the scope of the violation is found in the records of the defendants themselves.

HOUSE COMM. ON THE JUDICIARY, H.R. REP. NO. 459, 94th Cong., 1st Sess., *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, 2571, 2585.

106. Goldsmith interview, *supra* note 96.

107. Goldsmith interview, *supra* note 96. For an analysis of economic factors bearing on settlement negotiations, see R. POSNER, *supra* note 21, at 522-28.

108. Settlement Agreement, Nov. 16, 1988, at 3; Best v. United States Nat'l Bank, No. 87905-0253 (Mult. Co. Nov. 16, 1988).

109. *Id.*

class members had claimed their coupons.[110] Even if the bank's costs of delivering the services represented by the coupons was equal to their face value, the settlement's benefit to the class was less than $50,000. By comparison, it is useful to note that the bank cleared a $1.6 million profit from NSF fees in 1976 alone.[111] Under these circumstances, the settlement agreement signifies the abandonment of a legitimate class action suit in the face of an intractable procedural obstacle — ORCP 32F(2).

We will never know how *Best* would have been resolved by a jury. *Guinasso,* however, proceeded to a verdict that was upheld on appeal.[112] Evidence obtained from the defendant's records indicated who the class members were and to what extent each had been damaged.[113] Claim forms were sent to all the class members, but not all were returned. In the end, some $822,000 of the total available judgment funds remained unclaimed.[114] The defendant, Pacific First Federal, retained the unclaimed money, although every penny, as the trial court judgment reveals, was obtained wrongfully.[115] The facts in *Derenco* are parallel to those in *Guinasso.* There, the defendant retained over $1.3 million in illegal profits.[116]

Not only have meritorious class actions been abandoned because of the language in ORCP 32, but wrongdoing defendants have been allowed to retain the fruits of their wrongdoing because of its provisions. This was certainly not the intention of the legislature when it enacted ORCP 32 in 1973. In addition, protection of unjustly enriched defendants was clearly not within the contemplation of the 1981 legislature.[117] Results in *Derenco* and *Guinasso,* however, should alert the legislature of the need for change.

110. Correspondence from Rece Bly, counsel for U.S. National Bank, to Phil Goldsmith, plaintiffs' co-counsel (Sept. 8, 1989).

111. Brief for Appellant at 10, Best v. United States Nat'l Bank, 78 Or. App. 1, 739 P.2d 554 (1986).

112. 89 Or. App. 270, 749 P.2d 577 (1988).

113. *Guinasso,* No. 416-583, at 2 (Mult. Co. Sept.6, 1985).

114. *Id.*

115. *Id.*

116. *See supra* note 14.

117. 61st Leg. Sess., Min. at Tape 404, House Comm. on Judiciary, May 21, 1981. Representitive Smith stated that "one of the compelling factors on this issue is the notion of unjust enrichment for defendants." He didn't feel there should be a possibility of that happening. *Id.*

IV. Aggregation of Damages and Rationales for the Class Action

There are three commonly-recognized rationales for the class action to vindicate consumer rights. The three rationales are: (1) compensating victims; (2) disgorging profits illegally or wrongfully obtained; and (3) deterring future illegal conduct.[118] Where the plaintiff class is large and the individual recovery small, the compensation value loses importance. However, the two other elements remain to animate the public interest in class litigation.[119]

At times, ORCP 32 has failed to serve either objective. The *Guinasso* and *Derenco* defendants retained substantial proceeds of their tax and insurance reserve gambits. To the extent the defendants, at the end of the day, profited, there was incomplete disgorgement. The non-claiming class members received no compensation. Allowing a defendant to retain wrongfully-obtained funds, as a means of deterring wrongful behavior, is counterproductive. These results flow predictably, however, from the claim form regime.[120]

The concepts of disgorgement and deterrence are as related as the two sides of a coin. A system that limits defendants' exposure by imposing the burden of proof on individual class members undermines both objectives. Congress recognized this when it considered and passed the Hart-Scott-Rodino Antitrust Improvement Act of 1976 (Act).[121]

The Act authorizes state attorneys general to sue as representatives of their citizens to recover damages for antitrust violations. Illegal overcharges addressed by the bill are suffered by thousands, possibly millions, of consumers, typically in small amounts. Section IX of the Act provides for proof of damages independent of any individualized showing.[122] This allows the court to hear evi-

118. Dam, *supra* note 4; *see also* Kennedy, *Federal Class Actions: The Need for Legislative Reform,* 32 Sw. L. J. 1209 (1979).

119. Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action,* 80 Colum. L. Rev. 299, 326 (1980).

120. *See, e.g.,* DuVal, *supra* note 10, at 1355. After an extensive survey of antitrust litigation in the Fifth Circuit, Professor Duval commented: "We found that settlements that limited defendants' liability to the amount of claims filed had been unsuccessful in forcing defendants to pay out a major part of the damages sustained by the class." DuVal, *supra* note 10, at 1355.

121. 15 U.S.C. § 15a-e (1988).

122. 15 U.S.C. § 15d (1988) states:

> [D]amages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable

dence of aggregated damages, proved with the aid of a number of sufficiently reliable methods. It frees the court of the strictures imposed by an individualized proof regime. The sense of Congress was that "[a]ggregation of damages, as provided by [the Act], is necessary because the proof of individual claims and amounts would be impracticable and virtually impossible. . . . Few consumers keep receipts for all the goods and services they purchase or use . . . ."[123]

In addressing the argument that aggregation of damages is unfair to defendants, the legislative history states emphatically:

> [Aggregation] is fair to both plaintiffs and to defendants.
>
> There is no injustice in permitting aggregation and estimation after defendant's liability to the class has been established.
>
> The committee believes that a defendant who has committed an antitrust violation has no right, constitutional or otherwise, to the retention of one penny of measurable illegal overcharges or other fruits of the violation.[124]

There is precious little case law interpreting Hart-Scott-Rodino. In the first major action brought under the statute, the United States Supreme Court severely limited its scope, holding that only direct purchasers of goods whose prices were artificially raised because of proven illegal anticompetitive conduct could recover under federal antitrust laws.[125] This holding, unrelated to the aggregation issue, restricted development of case law under the statute.[126]

A procedure to aggregate and assess damages in large class actions where individual recoveries are small is necessary to force guilty defendants to fully disgorge illegally-obtained profits. Some

system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the action was brought.

123. HOUSE COMM. ON THE JUDICIARY, H.R. REP. NO. 459, 94th Cong., 1st Sess., *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2571, 2584.

124. *Id.* at 2585 (citing Hohmann v. Packard Instrument Co., 399 F.2d 711, 715 (7th Cir. 1968)); *see also In re* Sugar Indus. Antitrust Litigation, 73 F.R.D. 323 (E.D. Pa. 1976) (statistical sampling methods proper as means of ascertaining class-wide damages in nationwide antitrust action).

125. Illinois Brick Co. v. Illinois, 423 U.S. 720 (1984).

126. *Id. But see* California v. ARC Am., 490 U.S. 93 (1989) (Supreme Court limited reach of *Illinois Brick*). It is unlikely that *ARC* will have an impact on Hart-Scott-Rodino, however, because that statute enhances federal antitrust law, whereas *ARC* will allow for expansion of state law antitrust actions.

federal courts have resorted to aggregated damage formulas.[127] Alternative means of damage computation are available. For example, defendant's own records[128] or statistical and sampling methods can be used.[129]

There are two necessary steps in any aggregated damages regime. The first step, computing the size of the damage fund, generally is not as controversial.[130] The second step, however, distribution of the damage fund, has been perhaps the most controversial element of class litigation jurisprudence and commentary.

V. DISTRIBUTION ALTERNATIVES: FLUID RECOVERY AND ESCHEAT

Aggregation of damages carries with it the potential for a damage fund, parts of which are not claimed by class members. Disposition alternatives for unclaimed portions of the fund may be categorized under two general headings: fluid recovery and escheat.

A. Fluid Recovery

The fluid recovery method of distribution was the principal concern voiced by the claim form procedure's apologists during the 1981 legislative session. Under the fluid recovery method, part of the damage fund is distributed to claimants. The remainder, pursuant to either a settlement agreement or the court's order, is distributed in a manner calculated to best serve the interests of the class. In this way, all the proceeds of the losing defendant's wrongful conduct are disgorged and returned, at least indirectly, to damaged parties.[131]

The fluid recovery method is derived from the *cy pres* doctrine in the law of charitable trusts. When compliance with the literal

127. *See, e.g.*, Boeing Inc. v. Van Gemert, 444 U.S. 472 (1979).

128. This was the computation method used in *Guinasso* and *Derenco*.

129. *See* Rosado v. Wyman, 322 F. Supp. 1173 (S.D.N.Y. 1970); MANUAL FOR COMPLEX LITIGATION § 2.712 (1973). There is some acceptance of statistical and sampling computation in Oregon. *See* Oregon Management & Advocacy Center, Inc. v. Mental Health Div., 96 Or. App. 528, 774 P.2d 1113 (1989).

130. *But see In re* Fibreboard Corp., 893 F.2d 706, 707 (5th Cir. 1990) (improper for consolidated trial of 3031 asbestos to proceed as FED. R. CIV. P. 23(b)(3) class action; statistically based classwide presumptions about causation and damages altered substantive Texas tort law in violation of Rules Enabling Act).

131. *See generally* Comment, *Fluid Recovery and Due Process*, 53 OR. L. REV. 225 (1973).

terms of a charitable trust becomes impossible, the funds can be put to the next best use in accord with the dominant charitable purposes of the donor.[132]

Fluid recovery has sometimes taken the form of court-ordered rate reductions to redress past illegal overcharges. It may involve the distribution of unclaimed funds to a government agency for use on projects that benefit nonclaiming class members and promote the purposes of the original cause of action.[133] Other approaches to distribution of the fund also exist.[134]

A 1981 Oregon Attorney General's opinion concluded that the CCP's amendments to ORCP 32, which eliminated the claim form requirement, removed the procedural obstacles to fluid recovery.[135] While the amendments did not reflect a substantive change in legal relationships, they did, the opinion stated, raise due process questions.[136] This reflected the view, articulated in *Eisen v. Carlisle & Jacquelin*,[137] the lead class action case of the era, that denying class action defendants the ability to confront each claimant in open court was to deny them due process of law.[138]

Eisen was an antitrust action brought on behalf of a class of six million odd-lot stock purchasers to recover alleged commission overcharges.[139] Writing for the United States Court of Appeals for the Second Circuit, Judge Medina emphatically rejected the notion that relief afforded to the "class as a whole" was an equitable solution to the management problems presented by large classes composed of small individual stakeholders.[140] On review, the Supreme

132. Quick v. Hayter, 188 Or. 218, 226, 215 P.2d 374, 378 (1950); Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1972).

133. Market St. Ry. v. Railroad Comm'n, 28 Cal. 2d 363, 171 P.2d 875 (1946).

134. *See, e.g.*, State v. Levi-Strauss & Co., 41 Cal. 3d 460, 715 P.2d 564, 224 Cal. Rptr. 605 (1986). *Levi-Strauss* was a class action brought under the Cartwright Act, a California statute which, among other things, prohibits price fixing, the gravamen of this action. Drawing heavily on Simer v. Rios, 661 F.2d 655 (7th Cir. 1981), the California Supreme Court approved, in concept, a settlement agreement calling for either a *cy pres* distribution or an escheat of unclaimed damage funds to the state, with proceeds earmarked to indirectly benefit class members, in order to further the substantive goal of deterrence advanced by the underlying statute. *See also* Feldman v. Quick Quality Restaurants, Inc., N.Y.L.J. July 22, 1983 at 12, col. 5 (N.Y. Sup. Ct. July 15, 1983) (damages distributed to class by way of future price reductions; no proof of individual damage required).

135. 41 Op. Att'y Gen. 527, 537 (1981).

136. *Id.*

137. 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974).

138. *Id.*

139. *Id.* at 1005-06.

140. *Id.* at 1018.

Court declined to rule on the constitutionality of fluid recovery, and to this day has not done so. In *Eisen's* wake, however, other circuits adopted its strident tone.[141]

The 1980s saw an evolution and refinement of the federal judiciary's attitude toward the fluid recovery or *cy pres* concept. An early manifestation of the change was evident in *Simer v. Rios*,[142] a Seventh Circuit opinion which endorsed use of *cy pres* distribution vehicles, while failing to impose one based on the facts of that particular case:

> [A] careful case-by-case analysis of use of the fluid recovery mechanism is the better approach. In this approach we focus on the various substantive policies that use of a fluid recovery would serve in the particular case. The general inquiry is whether the use of such a mechanism is consistent with the policy or policies reflected by the statute violated.[143]

In *Nelson v. Greater Gadsden Housing Authority*,[144] the United States Court of Appeals for the Eleventh Circuit approved a *cy pres* distribution in a class action brought by tenants of a public housing complex to recover damages resulting from the defendant's inadequate utility allowances. The district court entered an injunction mandating the defendant's readjustment of the allowances and awarding compensatory damages based on the inadequacy of past allowances. Any compensatory damages that remained unclaimed after a specified time period were to be applied by the defendant to increase the energy efficiency of the plaintiff class' apartment units.[145] The defendant appealed the unclaimed damage award, raising the fluid recovery issue and relying on *Eisen*.[146]

The Eleventh Circuit discounted *Eisen* as authority on the fluid recovery issue, stating that the issue "may not have been properly before the court" and that "[o]ther courts [h]ad addressed fluid recovery systems with different results."[147]

In a more recent case, *Six (6) Mexican Farmworkers v. Arizona*

141. *See, e.g.*, Windham v. American Brands, Inc., 565 F.2d 59, 72 (4th Cir. 1977) (fluid recovery concept "illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper").

142. 661 F.2d 655 (7th Cir. 1981).

143. *Id.* at 676.

144. 802 F.2d 405 (11th Cir. 1986).

145. *Id.* at 409.

146. *Id.*

147. *Id.*

Citrus Growers,[148] the United States Court of Appeals for the Ninth Circuit approved use of a *cy pres* distribution of unclaimed damage funds, although it rejected the specific plan ordered by the district court.

The evolving view of fluid recovery, as exemplified by *Simer, Nelson, Six Mexicans*, and state court class actions such as *State v. Levi Strauss & Co.*,[149] emphasize pragmatic analysis of fluid recovery in light of its service to the underlying goals of the class action: deterrence, compensation, and disgorgement. The view of fluid recovery epitomized by *Eisen*, which sees fluid recovery as a means of circumventing the management problems presented by large classes,[150] appears to be declining.

Congress, through the Hart-Scott-Rodino Antitrust Improvement Act, prescribed two specific approaches for distribution of unclaimed damage funds awarded. One commits the funds to the court's discretion. The other allows the funds to escheat to the respective states upon whose behalf the action is brought.[151]

In addition to the due process/manageability argument represented in *Eisen*,[152] two other arguments commonly are raised against fluid recovery. The first is that such recoveries principally benefit plaintiffs' attorneys.[153] The second is that the fluid recovery option that distributes unclaimed funds to those class members who actually file claims, on a *pro rata* basis (sometimes advanced as a distribution alternative), results in a windfall for those claimants.[154]

148. 904 F.2d 1301 (9th Cir. 1990). This case was a class action on behalf of thousands of Mexican farmworkers for violations of the Farm Labor Contractor Registration Act (FLCRA), 7 U.S.C. § 2041 *et seq.* On appeal, the Ninth Circuit gave a qualified endorsement to the notion of a *cy pres* distribution but rejected the distribution plan advanced by the trial court. The district court's plan called for payment of unclaimed, aggregated statutory damages to the Inter American Fund for indirect distribution in Mexico. The Ninth Circuit held that the "plan does not adequately target the plaintiff class and fails to provide adequate supervision over distribution." *Id.* at 1309. The Ninth Circuit remanded for further consideration, with instructions for the district court to consider escheat for the unclaimed funds to the United States Treasury under 28 U.S.C. § 2042 "if the district court is unable to develop an appropriate cy pres distribution, or finds cy pres no longer appropriate." *Id.*

149. *See supra* note 134.

150. *See, e.g., Nelson*, 802 F.2d at 409. "The objections to fluid recovery appear to relate to the use of this system to relieve plaintiff classes of the burden of proving individual damages or to avoid the dismissal of unmanageable class actions. Neither problem exists here."

151. 15 U.S.C. § 15(d) (1988).

152. This argument retains vitality even yet: *see In re* Fibreboard Corp., 893 F.2d 706, 708 (5th Cir. 1990).

153. *See, e.g.*, Kline v. Coldwell Banker & Co., 508 F.2d 226, 237 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

The evolution of federal and state case law may be leading toward broad acceptance of fluid recovery in appropriate cases. Nevertheless, the majority of fluid recovery outcomes are the result of negotiation and settlement.[155] The fact that fluid recovery settlements are negotiated at all, however, is likely due to the availability of aggregated damages and pragmatic distribution regimes and their influence on settlement negotiations.

It is no coincidence that notable fluid recovery settlements have been achieved under circumstances where limits on damages similar to those imposed by ORCP 32(F)(2) were not present. Defendants' incentives to settle are at least partly a function of their potential exposure to liability.[156] An Oregon class action defendant, whose damage exposure is sharply limited by ORCP 32(F)(2), is not influenced by the downside risk present in other jurisdictions.

Fluid recovery, as a procedural vehicle, will remain controversial. There is, however, another often-used means of forcing defendants to disgorge all their ill-gotten gains. This vehicle involves the escheat of unclaimed damage funds to the treasury of the appropriate jurisdiction.

B. Escheat

Escheat is a widely-practiced and hence more politically acceptable model for administering unclaimed judgment funds.[157] Under this solution, the court's discretion to dispose of the funds is guided by the jurisdiction's law of unclaimed judgments.

Both federal and state courts have used this device to avoid

154. *See* Van Gemert v. Boeing Co., 739 F.2d 730, 736 (2d Cir. 1984) (rejecting *pro rata* as a form of fluid recovery). *But see Six (6) Mexicans*, 904 F.2d at 1307 n.4 ("We express no view as to the propriety of this distribution method.").

155. *See, e.g.*, West Virginia v. Chas. Peizer Co., 314 F. Supp. 710 (S.D.N.Y.), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971); *see also In re* Agent Orange Product Liability Litigation, 818 F.2d 179 (2d Cir. 1987).

156. *See* R. POSNER, supra note 21, at 522-24.

157. Under 28 U.S.C. § 2042 (1988), the federal district court may hold judgment funds for up to five years. After that time,

> such court shall cause such money to be deposited in the treasury of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States Attorney, and full proof of the right thereto, obtain an order directing payment to him. *Id.*

See In re Folding Carton Antitrust Litigation, 744 F.2d 1252 (7th Cir.), *cert. dismissed*, 471 U.S. 1113 (1984).

either a fluid distribution or a return of unclaimed damages to the losing defendant.[158] One court, discussing the latter alternative, noted that "permitting reversion of the unclaimed funds to this defendant would be equivalent to awarding it the benefit of its own wrongdoing, a result which should not be sanctioned."[159] The Ninth Circuit recently rejected a district court's *cy pres* fluid recovery distribution plan, with instructions for the district court to consider, on remand, an escheat to the federal treasury if it couldn't devise an appropriate plan.[160]

In a Sixth Circuit case, *S.E.C. v. Blavin*,[161] the defendant, found to have violated federal securities laws, challenged the district court's disgorgement order.[162] The district court ordered defendant to surrender all wrongful profits.[163] After the individual claims had been satisfied, the unclaimed funds were to escheat to the United States Treasury.[164] The defendant appealed, claiming that the escheat order violated his due process rights.[165] The Sixth Circuit disagreed. The court noted, "[T]he purpose of disgorgement is to force a defendant to give up the amount by which he was unjustly enriched rather than to compensate the victims of fraud."[166] The district court had the equitable power to impose complete disgorgement "without inquiring whether, and to what extent, identifiable private parties have been damaged by Blavin's fraud."[167]

Federal and state class actions have demonstrated that aggregation of damages independent of individual claims is necessary to effect complete disgorgement of illegally-obtained profits. Complete disgorgement is essential to the substantive goal of deterrence.

158. S.E.C. v. Golconda Mining Co., 327 F. Supp. 257 (S.D.N.Y. 1971); Friar v. Vanguard Holding Corp., 125 A.D.2d 444, 509 N.Y.S.2d 374 (1986).

159. *Friar*, 125 A.D.2d at 446, 509 N.Y.S.2d at 376. *See also Six (6) Mexican Workers*, 904 F.2d at 1309 ("In light of the deterrence objectives of FLCRA and the nature of the violations, . . . reversion of the [unclaimed damage] funds to the defendants is not an available option.").

160. Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990).

161. 760 F.2d 706 (6th Cir. 1985).

162. *Id.* at 708.

163. *Id.* at 710.

164. *Id.*

165. *Id.* at 712-13.

166. *Id.* at 713 (citing S.E.C. v. Commonwealth Chemical Securities, Inc., 574 F.2d 90, 102 (2d Cir. 1978)).

167. 760 F.2d at 713.

With a view toward disgorgement and deterrence, the assessment and collection of an appropriate damage remedy is more important than precisely how the damage fund is distributed. All that is really necessary to realize the disgorgement and deterrence functions is the certainty that damages will be assessed based on the defendant's wrongful gain, and that the wrongful gain will be as completely disgorged as due process of law will allow. Fluid recovery, closely tailored to the characteristics of the class, is probably the most efficient vehicle to compensate the class. Fluid recovery most often results from settlement. Without the looming possibility of a judicially-enforced disgorgement, however, the unjustly enriched defendant has little reason to settle.

VI. CONCLUSION

Oregon's class action rule is an automobile without an engine. Despite its elaborately constructed machinery, it is capable only of travelling downhill — it lacks the power to deal with large, difficult cases. As a result, it is inadequate to fulfill its purpose.

The engine has two necessary components. The capacity to aggregate and award damages independent of individual claims is one necessary component. The other is a distribution regime — either fluid recovery or escheat — which is adequate to effect complete disgorgement of all illegally-obtained profits. The controversy over fluid recovery probably never will be resolved. Such a controversial procedural vehicle has little chance of being adopted. Escheat, however, is the more widely accepted and thus, most politically feasible alternative for procedural reform.

Under Oregon law, funds escheated to the state eventually end up in the state's Common School Fund.[168] Oregon's current political and fiscal climate make this fund a very attractive destination for unclaimed portions of class action judgments. The Oregon Legislature should address the fundamental inadequacy of Rule 32 by repealing ORCP 32(F)(2) and enacting legislation to direct the escheat of unclaimed class action damages to the Common School Fund.

168. ORS 98.386 (1989).

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February 7, 1992

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Re: Proposed Revisions to ORCP 32

Dear Henry:

The Committee to Reform Oregon's Class Action Rule transmitted proposed changes in ORCP 32 to the Council on Court Procedures in December. We have concluded that a summary of our proposals may be of benefit to the Council. I have provided copies for each member.

Class actions are designed to avoid the repeated adjudication of common questions of fact and law, thus saving court time. They also permit claims too small to be pursued individually, to be litigated on behalf of all injured. In Oregon, as elsewhere, class actions have enabled consumers and others to vindicate rights that otherwise would have gone unremedied. See, e.g., Derenco, Inc. v. Benj. Franklin Federal Savings and Loan Association, 281 Or 533, 577 P2d 477, cert denied, 439 US 851 (1978) (requiring lender to pay borrowers the earnings generated by their tax and insurance reserves).

Existing requirements in ORCP 32, however, sometimes impede cases from being decided on their merits and reaching fair outcomes. Our proposal is designed primarily to seek reform in two areas.

1. **Class Certification Standards.** At present, ORCP 32 B creates three types of class actions with widely varying standards. Whether a case can proceed as a class action, at what cost and on what terms, depends on what class action type is found applicable, not on the interests at stake in the case.

The greatest practical consideration is that of giving notice. If mailed notice to each class member is required, postage and processing costs may exceed $1.00 per person.

Under the existing rule, notice (and the opportunity to opt out) must be given in any lawsuit seeking damages. This is so even if a few dollars are at stake for each class member.

However, in an injunctive relief case, notice and the opportunity to opt out presently are discretionary with the court. Thus, even when there are significant and potentially divergent interests at stake, such as in a school desegregation case which will affect the education of all children for years to come, it is not mandatory that class members be given notice.

This is not a problem unique to Oregon. At the national level, there have been several proposals to revise the federal class action rule so that such procedural choices will turn on the interests involved in a particular case, rather than on the form of the action. The revisions we propose are drawn from recommendations made by the ABA Section on Litigation, which presently are before the Advisory Committee on Federal Rules.

2. **Damage calculations.** In Oregon, unlike all other jurisdictions, when a class action is successful, only those individuals who return claim forms share in the judgment. The wrongdoer keeps the rest. For example, in Derenco, the defendant kept more than $1.3 million of illegally obtained profits.

There was strong support in the last legislature for requiring the unclaimed portion of any class action judgment to be paid to the common school fund. To fully implement this policy of transferring unclaimed funds from wrongdoers to the state, the claim form requirement has to be eliminated.

One factor which presently influences the extent of the recovery received by class members is whether damages are precalculated by the defendant or have to be determined by class members from their own records. As is shown in Emerson, "Oregon Class Actions: The Need for Reform," 27 Will L Rev 757 (1991), uncertainty on this point caused plaintiff's counsel in at least one major class action to conclude the class would be better off settling the case on very modest terms.

Our proposal eliminates both problems. It ensures that damages will be computed by the court without having to use class members' records, and that the entire unclaimed recovery will be available for transfer to the common school fund.

Sincerely,

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June 9, 1992

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Re: Proposed Revisions to ORCP 32

Dear Subcommittee Members:

I understand that your subcommittee will be making a recommendation to the full Council on Court Procedures at its meeting this coming Saturday whether any proposals of the Committee to Reform Oregon's Class Action Rule ("the Committee") are substantive and therefore outside the power of the Council to promulgate. You have asked the Committee for comments on this issue.

From my prior discussions with you as well as from Professor Holland's memo of May 26, it appears there are four items which subcommittee members are concerned may be substantive rather than procedural:

(1) The portion of the proposed revisions to ORCP 32 F(2) which would eliminate the mandatory claim form requirement,

(2) The portion of the proposed revisions to ORCP 32 F(2) regarding damage computation methodology,

(3) The proposed revision to existing ORCP 32 F(4) regarding the extent to which plaintiffs bear the expense of notification, and

(4) The proposed revisions to the attorney fee provisions in ORCP 32 N(1)(b).

In this letter I will address only (1) whether these proposals are substantive or procedural and (2) what course of action the Committee recommends the Council take should it conclude any is substantive. Ms. Stewart has previously forwarded to me the letters of R. Alan Wight, Kenneth Sherman, Jr., David S. Barrows and Jeffrey S. Love opposing certain of the Committee's proposals and has asked for the Committee's comments on them. Because an unexpectedly complex appellate brief has disrupted my work schedule, the Committee will need about two more weeks to complete those comments.

Elimination of Mandatory Claim Forms

This proposed revision to ORCP 32 F(2) and (3) is procedural essentially for the reasons set forth in 41 Op Atty Gen 527, 537-538 (1981). As the Attorney General explained, existing ORCP 32 F(2) and (3) contain "procedural obstacles to [fluid] recovery."[1] The Attorney General concluded that elimination of these barriers is procedural and therefore within the authority of the Council. 41 Op Atty Gen at 538.

The comments to our proposal make clear that this proposed revision "does not address the disposition of that portion of the judgment awarded in favor of individuals who cannot be identified or located, but leaves this issue for legislative determination." December 14, 1991 letter to Professor Fredric Merrill, Tab A at 16. Rather, the intent of

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[1] The Attorney General's definition of fluid recovery includes the escheat to the state of unclaimed portions of a class recovery. 41 Op Atty Gen at 533. The Committee's response to the substantive criticisms of its proposals will show that escheat and fluid recovery are two different things. However, this point has no bearing on the substance versus procedure issue.

this amendment is to remove procedural obstacles to proposed legislation making unclaimed class action judgments subject to the abandoned property statutes. December 14, 1991 letter at 8. Therefore, like the amendments to ORCP 32 F(2) and (3) which the Council adopted in 1980, this proposal does not "affirmatively authorize fluid class recovery" and does not involve "a substantive change in rights of litigants." 41 Op Atty Gen at 543.

Damage calculation methods

Presently, members of a successful class are required by ORCP 32 F(2) and (3) to submit claim forms to recover the damages caused them by the defendant. The trial court presently has the discretion to require the defendant to calculate damages for each class member from its own records before mailing claim forms or to require class members to determine from their records how they have been damaged.

As the Committee's December 14, 1991 letter at 7-8 shows, these two approaches may result in vastly different outcomes, which makes it difficult to determine the economic viability of a case or the quality of a settlement offer. This proposed revision to ORCP 32 F(2) would eliminate this problem by requiring class damages to be "proved and assessed in the aggregate."

It may be helpful to give an example of how the rule change would work before addressing whether it is substantive or procedural. In Best v. United States National Bank, 303 Or 557, 739 P2d 554 (1987), which challenged the amount of the bank's NSF check charges, the plaintiffs obtained in discovery a document stating the bank's aggregate past net income from the charge was approximately $1,100,000. Suppose a jury found all this income to be excessive. Suppose further this sum could readily be converted into a per item overcharge, but the court determined that the cost of reconstructing bank records to establish who paid each charge was prohibitive.

Under the Committee's proposal, the $1,100,000 would represent the aggregate damages. The court would then determine the best model for establishing each individual's share of the recovery. The court might conclude from the evidence that the average customer received an NSF charge every x months or once in

every y checks written. Whatever approach the court found most justified by the evidence would determine how the $1,100,000 would be divided among members of the class.[2]

As a practical matter, using the aggregate damages approach will increase what the defendant has to pay class members over what it would pay if class members were required to individually prove their damages. In legal theory, however, the defendant in my hypothetical could be liable for the full $1,100,000 even if claim forms were used.

The 1981 Attorney General's opinion establishes this amendment is procedural. The Attorney General concluded the Council's 1980 amendments could result in the "defendant ow[ing] a total of $X to the class of defendants [sic], all identifiable but not yet all identified." 41 Op Atty Gen at 538. Obviously, such a judgment would have to be calculated on an aggregate rather than individual basis, for under the latter approach all class members would have to be identified before the amount of the judgment could be determined. The Attorney General recognized that such a rule would change "the method by which some claimants may be able to recover" but nevertheless concluded the rule did not affect the substantive rights of the defendant and was procedural. Id., emphasis in original. See also 2 Newberg on Class Actions, §1005 at 352-353 (2d ed 1985) ("[c]hallenges that * * * aggregate proof [of class monetary

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[2] At that point, the court could simply order that checks be sent to class members or could require notice be sent to give class members the opportunity to challenge from their own records the recoveries calculated for them. The court would decide whether to give notice after "balanc[ing] the cost of this process against the likelihood that class members would have the means by which to materially improve the calculation of their individual recoveries." December 14, 1991 letter, Tab A at 16.

Our proposal would require the defendant to bear the cost of any such notice, in accordance with existing Oregon precedent on allocating the cost of claim form distribution under existing ORCP 32 F(2). If the Council is concerned that this oversteps the procedural/substantive line, it should delete the words "to be paid by the defendant" from the second sentence of proposed ORCP 32 F(2).

recovery] affects substantive law * * * will not withstand analysis").

Proposed amendment to ORCP 32 F(4)

From my discussions with Mr. Phillips, it appears members of the subcommittee may be concerned that this amendment revisits the 1980 Council's effort to shift by rule who bears the burden of post-certification notice costs, an effort that the Attorney General said was beyond the power of the Council to adopt.[3] As I will show, this is not the intent or effect of this proposal.

The premise of the Attorney General's opinion on this point is that:

> "costs necessary for plaintiff to prosecute its case are plaintiff's costs, and costs necessary for defendant to defend are defendant's costs; and that allocation procedures which would shift those costs would violate substantive rights of the parties." 41 Op Atty Gen at 541.

The Attorney General recognized an exception to this principle: "The judgment ordinarily allows the prevailing party to recover some * * * costs." Id. at 540.

Before the enactment of present ORCP 32 F(4), courts in Oregon and elsewhere had extended this exception to require a defendant to pay the costs of notice as long as there was a final determination of that defendant's liability, whether or not

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[3] In 1981, I disagreed with the Attorney General's conclusion and provided the Senate Judiciary Committee with authority that this proposal was procedural and within the Council's powers. Because the Committee's current proposal does not try to shift notice costs, it is unnecessary to reopen this debate.

judgment had been entered.[4] The intention of the proposed amendment is not to incorporate this exception into the Oregon Rules of Civil Procedure. Rather, as is stated in the December 14, 1991 letter, it is to remove any implication that might be drawn from existing ORCP 32 F(4) that its language precludes the court from considering the availability of this exception. Under our proposed amendment, the language of the rule would be completely silent on who bears the expense of notification after a determination of liability, leaving courts free to decide this issue based on case law authority.[5]

Restricting attorney fee awards against the class plaintiff

We propose restricting the attorney fees which can be awarded against unsuccessful plaintiffs in a class action to those amounts which are awarded as a sanction. The Council has previously promulgated rules not only regulating the procedure for the award of attorney fees, e.g., ORCP 68, but also creating the right to recover attorney fees under certain circumstances. E.g., ORCP 17 C; ORCP 46 B(3). These have never been challenged in a reported case as beyond the Council's powers.

On the other hand, the Oregon Court of Appeals has held, in the conflicts of laws context, that when attorney fees "are not merely costs incidental to judicial administration, awarding them is a matter of substantive, rather than procedural, right." Seattle-First National Bank v. Schriber, 51 Or App 441,

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[4] The existence of this exception is of great practical significance when the parties have agreed to defer the sending of post-certification notice until the case has been decided on summary judgment, a choice which sometimes is as much in the defendant's tactical interest as it is in the plaintiff's.

[5] To assist the subcommittee, I enclose the briefs of the parties and the opinion of the court in Guinasso v. Pacific First Federal Savings & Loan Association, Multnomah County Circuit Court No. 416-583, where this issue was raised. (For the Eugene subcommittee members, the enclosures are being sent with the mailed copy only). The legislative history discussed at pages 4-7 of plaintiff's reply memorandum in Guinasso demonstrates that the proposed amendment accords fully with the intent of the 1981 legislature.

448, 625 P2d 1370 (1981). Under this analysis, the legislative choice of making fees part of or in addition to costs determines whether a procedural or substantive right is created.

The Attorney General's opinion casts considerable doubt on the utility of applying the conflict of laws distinction between substance and procedure to determine the scope of the Council's powers, since a procedural rule "hav[ing] policy implications or some collateral effect on substantive law" is likely to be characterized as substantive under conflicts of law doctrine. 41 Op Atty Gen at 531.

For the following reasons, the Committee's proposal satisfies Professor Ely's definition of a procedural rule (see 41 Op Atty Gen at 532) as one "designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes." If a plaintiff chooses to exercise his or her procedural right to bring a class action rather than an individual claim, the attorney fees at stake in the case are vastly increased. This is due in part to litigation over the procedural issue of class certification and in part to the increased monetary importance of the litigation as a class action.

One purpose of the class action rule is to create a procedure by which claims too small to be economical to litigate on an individual basis can be aggregated. However, if the class representative is responsible for all the defendant's attorney fees in the event the case is lost, as ORCP 32 N(1)(b) presently contemplates, this procedure cannot work. No rational person with a few dollars or even a few thousand dollars at stake would volunteer to serve as class representative in a case knowing that, if the action fails, he or she will be liable for hundreds of thousands of dollars of attorney fees. Eliminating such potential liability, as the proposed amendment to ORCP 32 N(1)(b) would do, would further the purposes of the class action rule and thus, in Professor Ely's words, is "designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes."

If the subcommittee has remaining doubts on this issue, I should point out that the 1980 Council had similar concerns in proposing what became ORCP 32 O. As Professor Holland states in his May 26 report, "[i]n promulgating this amendment, the Council conceded that it might exceed its rule-making authority as

impinging upon substantive rights, and therefore invited the 1981 Legislature to enact the amendment as a statute." If doubts remain, a similar course could be taken with regard to the proposed amendment to ORCP 32 N(1)(b).

Sincerely,

Phil Goldsmith

PG:rr
Enclosures

cc: Henry Kantor
Committee Members

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. 4TH AVENUE
PORTLAND, OREGON 97204

JOHN C. BEATTY, JR., JUDGE
Department No. 5
Circuit Court of Oregon
Fourth Judicial District

512 Multnomah County Courthouse
1021 S.W. Fourth Avenue
Portland, Oregon 97204
248-3187

December 14, 1984

Phil Goldsmith, Esquire
Attorney at Law
851 SW 6th, #1402
Portland, OR 97204

Henry Kantor, Esquire
Attorney at Law
900 SW 5th, #1437
Portland, OR 97204

Donald Morgan, Esquire
Attorney at Law
1001 SW 5th, #1300
Portland, OR 97204

RE: GUINASSO v. PACIFIC FIRST FEDERAL
416-583 - OPINION ON COSTS

Dear Counsel:

I have considered the argument and reviewed the memoranda and have the following Opinion:

1. Under ORCP 32 there are two occasions upon which communication with class members is required: First, notice to the members of the class following certification (Rule 32F(1)(a)); second, a "request" to members of the class to submit a "statement" as a claim for relief after a determination that defendant is liable but before final entry of judgment (Rule 32F(2)). Plaintiff is required to bear the expense of notification following certification and before determination of liability. Defendant here contends that plaintiff is also required to bear the expense of sending the post-liability request, relying upon Rule 32F(4):

> "Except as otherwise provided in this subsection, the plaintiffs shall bear the expense of notification. The court may, if justice requires, require that the defendant bear the expense of notification to the current customers or employees of the defendant included with a regular mailing by the defendant. The court may hold a preliminary hearing to determine how the costs of notice shall be apportioned."

2. Prior to the 1981 Legislative Session which added Rule 32F(4) Oregon courts routinely held that defendants could be required to pay the expense of sending the request following determination of liability. Any analysis of Rule 32 shows that the various subsections do not necessarily follow in an orderly sequence, and Subsection F(4) is no exception. That subsection was enacted in 1981 to override a section adopted by the Council on Court Procedures which would have permitted the trial court in its discretion to require defendants to pay costs of notification before a determination of liability. The legislative history persuades me that F(4) was not intended to apply to the court's request to class members following determination of liability. Nothing in the legislative history suggests that any legislator or witness before it contemplated the result for which defendant contends. I particularly note that F(4) refers to "notification" -- not to "requests" to submit a statement. The primary ambiguity in the Rule lies in the sequence of its provisions and in the absence of a provision expressly controlling payment for the cost of the request. The ambiguity is disposed of by the prior case law and the legislative history.

3. Defendant stipulated with plaintiff that no notification of the class was required prior to determination of liability. That stipulation avoided a preliability expense to plaintiff and a post-judgment cost to defendant if plaintiff prevailed. It does not appear that inclusion of explanatory words concerning the lawsuit with the post-liability request to submit a claim will significantly increase the cost of the request or require any additional postage. Moreover, as noted above, the single mailing has significantly reduced the costs assessable against plaintiff upon entry of final judgment.

Defendant will, therefore, bear the reasonable expense of the combined notice and request to class members.

Very truly yours,

John C. Beatty, Jr.

DATED at Portland, Oregon this 14th day of December, 1984.

JCB:ach

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

CHARLES B. GUINASSO and ROSARIA V. GUINASSO, husband and wife, Plaintiffs, v. PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal savings and loan association, Defendant.	No. 416-583 MOTION FOR AN ORDER REQUIRING PACIFIC FIRST FEDERAL TO BEAR CERTAIN COSTS

Plaintiffs move for an order requiring defendant Pacific First Federal Savings & Loan Association (hereafter, "Pacific") to bear the costs of those procedures required to distribute claim forms to class members pursuant to ORCP 32 F.(2) and to administer the responses. Plaintiffs request an expedited hearing on this motion for the reasons set forth below.

Since this Court rendered its October 2, 1984, opinion letter, the parties have held at least five meetings to discuss the procedures required to distribute claim forms to class members pursuant to ORCP 32 F.(2) and to administer the responses. During those meetings, the parties reached agreement on a number of these procedures. In the last week in October, 1984, Pacific commenced work at its own expense

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on the steps necessary to develop a list of the names, addresses and reserve balances of class members. In early November, 1984, Pacific presented to plaintiffs' counsel a proposed schedule pursuant to which claim forms would be distributed in early January, 1985.

Until the last of these meetings referred to in the preceding paragraph, the parties jointly assumed that the cost of distributing the claim forms and the cost of administering the responses would be borne by Pacific. At the meeting on November 15, 1984, counsel for Pacific asserted that plaintiffs should bear these costs. On November 26, 1984, Don Morgan, of attorneys for Pacific, told Phil Goldsmith, of attorneys for plaintiffs, that Pacific had not yet decided whether it intended to pursue the contention that plaintiffs had to bear these costs, and that he would notify Mr. Goldsmith on the following day what Pacific's decision was. On November 30, 1984, Mr. Goldsmith received a letter from Mr. Morgan dated November 29, 1984, which read in pertinent part:

> "After December 10, 1984, we will perform no further work unless plaintiffs accept responsibility for the costs and give us assurance they will be paid."

Thus, unless this motion is decided prior to December 10, 1984, the distribution of claim forms to class members will be delayed which in turn will delay the entry of a final judgment in this case.

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This motion is supported by the Points and Authorities set forth below and by the Affidavit of Phil Goldsmith attached hereto as Exhibit A.

DATED this 3rd day of December, 1984.

Respectfully submitted,

HENRY A. CAREY, P.C.

DELO, KANTOR & STAMM

By: Phil Goldsmith
Phil Goldsmith (No. 78223)
Henry Kantor (No. 79284)

Attorneys for Plaintiffs

POINTS AND AUTHORITIES

The distribution of claim forms here comes after a complete determination of the merits of this case. Under these circumstances, it is settled that the costs are to be borne by the defendant. Derenco, Inc. v. Benj. Franklin Federal Savings & Loan Association, Multnomah County Case No. 404-741 (Amended Order dated November 9, 1979) attached as Exhibit B; Babcock v. Citizens Bank, Lane County Case No. 74-1346 (Order dated March 18, 1981) attached as Exhibit C. See also Powell v. Equitable Savings & Loan Association, Multnomah County Case No. 414-798 (order dated April 5, 1979) (F.(1) notice costs imposed on defendant after its liability had been determined on summary judgment but prior to a trial on damages) attached as Exhibit D; 1 Newberg on Class Actions,

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§ 1760a at 546 ("If plaintiff obtains a summary judgment, a class may be certified under (b)(3) and the cost of notice shifted to the losing defendant, as part of the taxed costs of suit"). As Pacific's position is completely unwarranted, the requested order should be entered forthwith to insure that claim forms will be distributed as planned in January, 1985.

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

CHARLES B. GUINASSO and ROSARIA V. GUINASSO, husband and wife, Plaintiffs, v. PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal savings and loan association, Defendant.	No. 416-583 AFFIDAVIT OF PHIL GOLDSMITH

County of Multnomah)
) ss.
STATE OF OREGON)

I, Phil Goldsmith, being first duly sworn on oath, hereby depose and state as follows:

I am one of the attorneys for the plaintiff class in this case. I make this affidavit in support of plaintiffs' Motion for an Order Requiring Pacific First Federal to Bear Certain Costs. Each of the statements of fact contained in the second and third paragraphs of this motion is based on my personal knowledge except for the statement regarding the work which has been undertaken by Pacific, which is based on what

/ / /

/ / /

/ / /

/ / /

Exhibit A

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Telephone 224-5355

a representative of Pacific told me.

Phil Goldsmith

SUBSCRIBED AND SWORN TO before me this 3rd day of December, 1984.

NOTARY PUBLIC FOR OREGON
My Commission Expires: 8/29/86

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

DERENCO, INLC, a Nevada corporation,

Plaintiff,

v.

BENJ. FRANKLIN FEDERAL SAVINGS AND LOAN ASSOCIATION, a corporation,

Defendant.

RECEIVED
NOV 24 1979
HENRY A. CAREY

No. 404-741

A M E N D E D
O R D E R

Be it remembered that heretofore, the defendant has represented to the court that, pursuant to prior order, the defendant has prepared a list of all borrowers who are member of the class together with the last known address of each class member as shown by defendant's records; defendant did further represent that it is able to compute an amount of damage for each individual class member from defendant's records, but that defendant was unable to indentify the loans of certain persons who had requested exclusion from the class by reason of illegibility or incompleteness of such persons' signatures; and

It appearing to the court that, pursuant to ORS 13.260 (2), prior to entry of final judgment the court shall request members of the class to submit a statement requesting affirmative relief in a form prescribed by the court; and

Exhibit B

It further appearing to the court that in determining the form of statement to be requested from class members the court shall, and does consider the following.

A. The defendant's actions which resulted in the unjust enrichment of defendant.

B. Class members most probably do not know the amount of their damages, neither individually nor collectively, nor is it probable that class members have data from which those damages can be calculated.

C. The majority of class members are home owners whose transactions with defendant were personal, as distinguished from commercial, transactions. As such, class members are not likely to have had accounting or legal assistance in keeping records of transactions with defendant, but most likely relied upon statements prepared by defendant concerning amounts of taxes, insurance premiums, accrued interest, principal balances, and defendant's applications of payments thereto.

D. Defendant does have information available to it from which calculations of damages of individual class members can be made.

And it further appearing to the court that the ends of justice will best be met by that procedure which will result in payment of damages to be made to class members most expeditiously;

Now, therefor, on the court's own motion, it is hereby ordered:

1. That the request of any person for exclusion from the class, whose request cannot be precisely identified by reason of illegibility of ther person's handwriting or incompleteness of form in signature or other wise, be and it is void and held for naught. Such person or persons, is or are members of the class and subject to the proceedings herein.

2. The defendant is ordered to compute the amount of damages to which each class member is entitled as shown by defendant's own records.

3. Defendant is ordered to prepare a form of statement for each member of the class and to mail the statement, in duplicate, with postage prepaid by defendant, to each member of the class or to the principal borrower if there is more than one borrower named in a security instrument. The principal borrower shall be defined as that person whose name appears first in a security instrument.

4. The form of statement shall include the following text:

(Title of Case)

"To all members of the class who were or are borrowers of money from Benj. Franklin Federal Savings and Loan Association under mortgage loans or deeds of trust secured by real property who were required to make monthly

payments as a reserve for payment of real property taxes and/or insurance on property which was security for the loan.

The Circuit Court of the State of Oregon for Multnomah County has entered an order in favor of the class and against Benj. Franklin Federal Savings and Loan Association which requires the Association to pay to borrowers the income derived from investment of such reserves. That order has been affirmed by the Supreme Court of the State Of Oregon.

Eash member of the class is entitled to an amount of money equal to interest computed at the same rate paid by the Association for ordinary demand savings accounts for the same periods of time the Association actually held funds in a reserve account for each individual borrower member of the class.

According to the records of Benj. Franklin Federal Savings and Loan Association, the amount of damages to be paid to you is the sum of $_____. If you believe that you are entitled to more or less than that amount, you should state that amount to which you believe you are entitled with your reasons for that belief.

The amount of damages stated in this notice is subject to final approval by the court and may be subject to a deduction of not more than twenty per centum (20%) to apply upon payment of plaintiff's attorney fees.

A final judgment will be made by the court after

which money damages will be sent to you if you return the duplicate copy of this statement of claim to the court on or before the 15th day of March, 1980. If you do not return the statement of claim to the court by the 15th day of March, 1980, a judgment dismissing your claim against Benj. Franklin Federal Savings and Loan Association without prejudice to your right to maintain an individual action against Benj. Franklin Federal Savings and Loan Association will be made by the court.

If the addressee of this notice is deceased or is unable, because of physical or mental disability, to present a statement of claim, then the statement of claim may be presented by an heir at law, personal representative, or attorney in fact of the addressee together with proof of death or incompetency. Proof shall be by a certified copy of the certificate of death of the addressee together with a letter of administration issued by a court of competent jurisdiction [of] probate of the addressee's estate is pending, [or by a certified copy of the certificate of death of the addressee together with an affidavit that no probate is pending if the affiant is the surviving spouse or direct lineal ancestor or descendant of the addressee.] Proof of the addressee's incompetence shall be made by a letter of guardianship issued by a court of competent jurisdiction, or by a written appointment of attorney in fact acknowledged by the addressee before a person authorized to attest such acknowledgement, or by affidavit of the person presenting the statement of of claim if such person is the spouse or an

heir of the payee under the law of intestate distribution of the State of Oregon.

/s/ Pat Dooley
Judge of the Circuit Court
Fourth Jucidial District
Multnomah County Court House
Portland, Oregon 97204

I, _____, make claim
(print name)

against Benj. Franklin Federal Savings and Loan Association for the amount of damages as shown in this notice of claim, or in the sum of $_____. (If you claim damages in an amount greater or lesser than that shown in this notice of claim, attach a statement of your reason or reasons therefor.)

_____
Signature

_____
Address

_____
City State Zip Code

_____
Social Security Number

5. The defendant shall enclose with the foregoing statement an envelope addressed to the undersigned judge with postage prepaid for the use of a class member in

submitting his statement of claim.

6. The defendant shall insert in each form of statement that amount of money damage to which the addressee is entitled as shown by the records of defendant.

7. Defendant shall prepare and mail said statement to each class member on or before the 15th day of January, 1980.

DATED this 9th day of November, 1979.

Pat Dooley

JUDGE

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF LANE

WILLIAM BABCOCK and FRANCES M. BABCOCK, husband and wife,	)	
Plaintiffs,	)	No. 74-1346
v.	)	ORDER
CITIZENS BANK OF OREGON, a corporation,	)	
Defendant.	)	

This suit, certified by the court as a class action, came before the court for trial on stipulated facts. The court subsequently entered its Findings of Fact and Conclusions of Law and Supplemental Conclusions of Law, ultimately ruling that the defendant is liable to the plaintiff class for income derived from defendant's use of plaintiffs' funds paid into tax and insurance reserve accounts under the terms of real estate loan agreements. The court further ruled that defendant must account to plaintiffs for profits and earnings derived from the use of plaintiffs' funds to prevent the unjust enrichment of defendant.

Pursuant to ORCP 32(G)(2), prior to the entry of final judgment, the court shall require members of the class to submit a statement requesting affirmative relief in a form prescribed by the court. In determining the form of statement to be required from class members, the court has considered the following:

Exhibit C

A. The defendant's actions which resulted in the unjust enrichment of defendant;

B. The improbability that class members know the amount of their damages or possess data and records from which to calculate their damages;

C. The defendant's possession of data and records from which the class members' damages can be calculated;

D. The disparity in expertise between defendant and the class members in regard to record keeping, and the likely reliance upon defendant's record keeping by the class members, the majority of whom entered into personal, as opposed to commercial, transactions with the defendant for residential loans;

E. The previous preparation by defendant of account records concerning amounts of taxes, insurance premiums, accrued interest, principal balances, and defendant's applications of payments thereto relative to the class members' reserve accounts;

F. The defendant's capacity and ability to calculate the damages of the class members.

Now, therefore, to achieve an expeditious payment of damages to class members and best meet the ends of justice, and the court being fully advised by the pleadings and proceedings heretofore in this case and the arguments of counsel,

IT IS HEREBY ORDERED:

1. The class as originally defined in this Court's Order of January 7, 1975, is hereby modified by the elimination of the following claims:

(a) claims for the payment of interest based upon insurance deposits which were not required by defendant and which were therefore voluntary;

(b) all claims by persons who specifically requested this Court in writing within the allowed time period to be excluded from the class of plaintiffs in this action. The request of any person for exclusion from the class, whose request cannot be precisely identified by reason of illegibility of the person's handwriting or incompleteness of form in signature or otherwise, be and it is void and held for naught. Such person or persons, is or are members of the class and subject to the proceedings herein.

2. Defendant shall account to each class member for profits and earnings derived from defendant's use of the class member's funds paid into tax and insurance reserve accounts pursuant to the terms of real estate loan agreements between the parties.

3. The period of limitation to be applied to this case is six years prior to March 15, 1974.

4. The exact amount of such earnings being impossible to compute and the defendant having incurred some

expense in the administration and investing of the funds of each class member, it is fair and equitable for defendant to pay each class member interest on the class member's funds paid into the accounts at the same rate as paid by defendant on "pass-book" savings accounts during corresponding periods of time. Defendant shall compute interest as prescribed over the period March 15, 1968 up to and including the date of actual payment of damages to the individual class member.

5. The date of payment by defendant of damages claimed by individual class members shall be September 1, 1981.

6. On or before 5:00 p.m., April 6, 1981, defendant shall produce a master list of all class members remaining in this action. The following information for each class member shall be keypunched on a magnetic tape, and a printout of this information shall be delivered to this court and to plaintiffs' attorneys:

(a) The account number;

(b) The full name and address of the class member (and when applicable, the updated or current address if known by the Bank);

(c) Receipts and disbursements relative to the member's reserve accounts for each year;

(d) In the event of an assumption of a mortgage, the full name and address of any person(s) who assumed such loan; and

(e) The damages to which the class member is entitled, (i.e. earnings and profits computed by applying defendant's passbook rates during corresponding periods of time to plaintiff's funds held in reserve accounts commencing March 15, 1968 and to such earnings and profits unjustly retained by defendant commencing March 15, 1968 up to and including September 1, 1981.)

7. For those class members for whom defendant is unable to compute damages by April 6, 1981, defendant shall file on that date with the court affidavits of the appropriate officers of defendant averring 1) whether records exist from which the individual's damages may be computed and, if not, the reasons why such records cannot be located or 2) the length of additional time required to compute the individual's damages and the reason why additional time is required.

8. Defendant, Citizens Bank of Oregon, shall provide this Court and plaintiffs' attorneys with the precise number of borrowers in the class as modified herein, and the aggregate damages of the class no later than May 1, 1981.

9. Forty percent of the damages claimed by each individual class member shall be assessed toward an award of attorneys' fees to plaintiffs' counsel.

10. On or before the 1st day of June, 1981, defendant shall prepare a form of claim statement for each member of the class and mail the statement, in duplicate, with post-

age prepaid by defendant, to each member of the class or to the principal borrower if there is more than one borrower named in a security instrument. The principal borrower shall be defined as that person whose name appears first in a security instrument.

11. The form of statement shall include the following text:

(Title of Case)

"To all members of the class who were or are borrowers of money from the Citizens Bank of Oregon under mortgage loans or deeds of trust secured by real property and who were required to make monthly payments as a reserve for payment of real property taxes and/or insurance on property which was security for the loan.

The Circuit Court of the State of Oregon for Lane County has entered an Order in favor of the class and against Citizens Bank of Oregon which requires the Bank to pay to borrowers the income derived from investment of such reserves.

Each member of the class is entitled to an amount of money equal to interest computed at the same rate paid by the Bank for ordinary demand savings accounts for the same periods of time the Bank actually held funds in a reserve account for each individual borrower member of the class.

According to the records of Citizens Bank of Oregon, the amount of damages to be paid to you is the sum of [(defend-

ant shall insert the amount of damages which it has computed for the class member)]. If you believe that you are entitled to more or less than that amount, you should state that amount to which you believe you are entitled with your reasons for that belief.

The amount of damages stated in this notice is subject to final approval by the court and will be subject to a deduction of not more than forty per centum (40%) to apply upon payment of plaintiff's attorney fees.

A final judgment will be made by the court after which money damages will be sent to you if you return the duplicate copy of this statement of claim to the court on or before the 31st day of July, 1981. If you do not return the statement of claim to the court by the 31st day of July, 1981, a judgment dismissing your claim against Citizens Bank of Oregon without prejudice to your right to maintain an individual action against Citizens Bank of Oregon will be made by the court.

On August 10, 1981 at 9:20 a.m. in Courtroom No. 5, Lane County Courthouse, a hearing will be held by this Court at which time you may dispute the amount of damages to which you are entitled or object to any other matter, including the amount assessed for plaintiffs' counsel fees.

If the addressee of this notice is deceased or is unable, because of physical or mental disability, to present

a statement of claim, then the statement of claim may be presented by an heir at law, personal representative, or attorney in fact of the addressee together with proof of death or incompetency. Proof shall be by a certified copy of the certificate of death of the addressee together with a letter of administration issued by a court of competent jurisdiction if probate of the addressee's estate is pending, or by a certified copy of the certificate of death of the addressee together with an affidavit that no probate is pending if the affiant is the surviving spouse or direct lineal ancestor or descendant of the addressee. Proof of the addressee's incompetence shall be made by a letter of guardianship issued by a court of competent jurisdiction, or by a written appointment of attorney in fact acknowledged by the addressee before a person presenting the statement of claim if such person is the spouse or an heir of the payee under the law of intestate distribution of the state of Oregon.

/s/ Honorable Douglas R. Spencer
Circuit Court Judge
Circuit Court for the State
of Oregon for Lane County
Lane County Courthouse
Eugene, Oregon

I, _____, make claim against
(print name)

Citizens Bank of Oregon for the amount of damages as shown in this notice of claim or in the sum of $ _____. (If you claim damages in an amount greater or lesser than that

shown in this notice of claim, attach a statement of your reason or reasons therefor.)

Signature

Address

City State Zip

Social Security Number

12. The defendant, Citizens Bank of Oregon, shall enclose with the foregoing statement an envelope addressed to the undersigned judge with postage prepaid for the use of a class member in submitting his statement of claim.

13. The defendant shall insert in each form of statement that amount of money damage to which the addressee is entitled as shown by the records of defendant.

14. Defendant shall pay the damages claimed by individual class members on or before September 1, 1981.

15. Defendant shall have until 5:00 p.m. March 27, 1981 to file objections to plaintiffs' Petition for An Award of Attorneys' Fees and Costs. Defendant shall promptly inform the court and plaintiffs' counsel whether it wishes to present witnesses or evidence at a hearing relative to its objections.

by Spencer 3/18/81
Douglas R. Spencer
Circuit Court Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

WILLIAM N. POWELL, et al, Plaintiffs,	)	Case No. 414 798
v.	)	ORDER
EQUITABLE SAVINGS AND LOAN ASSOCIATION, an Oregon savings and loan association, Defendant.	)	

The Court having approved a notice to class members in the form attached hereto and summary judgment having been granted in favor of Plaintiffs on the issue of liability on November 7, 1978, it is hereby

ORDERED that Defendant Equitable Savings and Loan Association shall send a copy of the attached notice by first class mail to all members of the class at their last known address, and shall file with this Court a copy of the computer printout containing the names and last known addresses of the members of the class. It is further

ORDERED that Defendant shall publish this notice once each week for three consecutive weeks in the following newspapers of general circulation in the states of Oregon, Washington and Idaho, and publication shall take place on the following dates:

STATE OF OREGON

Oregonian

Sunday, April 22, 1979, Sunday, April 29, 1979 and Sunday, May 6, 1979.

Exhibit D

Oregon Journal

Friday, April 20, 1979, Friday, April 27, 1979 and Friday, May 4, 1979.

STATE OF WASHINGTON

Seattle Times

Sunday, April 22, 1979, Sunday, April 29, 1979, and Sunday, May 6, 1979.

STATE OF IDAHO

Idaho Statesman

Sunday, April 22, 1979, Sunday, April 29, 1979 and Sunday, May 6, 1979.

Dated this 5th day of April, 1979.

/s/ John C. Beatty
CIRCUIT COURT JUDGE

1408 Standard Plaza
Portland, Oregon 97204
Telephone 226-7321

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Motion for an Order Requiring Pacific First Federal to Bear Certain Costs upon the following attorneys by hand delivering to them a true and correct copy thereof, on December 3, 1984:

Mr. Donald J. Morgan
Mr. Peter G. Voorhies
1300 Orbanco Building
1001 S. W. Fifth Avenue
Portland, Oregon 97204

Phil Goldsmith

HENRY A. CAREY, P.C.
Attorneys at Law
Suite 1402, 851 S. W. Sixth Avenue
Portland, Oregon 97204
Telephone 224-5355

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

CHARLES B. GUINASSO and ROSARIA V. GUINASSO, husband and wife, Plaintiffs vs. PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal savings and loan association, Defendant	No. 416-583 DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION RE: NOTIFICATION COSTS

In seeking to impose the costs of notice on the defendant, plaintiffs ignore the changes made to Rule 32F, ORCP, by the 1981 Legislature.

Section F of Rule 32 provides for two notices. The first after the case has been certified as a class action, (F(1)) the second after a finding of liability (F(2)). Prior to 1981, Section F did not expressly provide which party was to bear these notification costs.

In 1981, the Oregon Legislature amended Section F. The amendments to paragraph (1), which covers the notice after certification, clearly requires a plaintiff to pay the costs. The obligation of the defendant is limited to furnishing a list of the class members, if one exists, and to include the notice in any regular mailing by the defendant to members of the class. Rule 32F(1)(f), (g) and (h), ORCP.

Paragraph 2 continued the prior requirement that the court,

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after finding liability, notify the class a claim form must be filed if a member desires to participate in the recovery. Paragraph 3 requires the dismissal without prejudice of the claim of a class member who fails to file a claim. The 1981 Legislature added a new paragraph, which appears as F(4) and which reads:

> Except as otherwise provided in this subsection, the plaintiffs shall bear the expense of notification. The court may, if justice requires, require that the defendant bear the expense of notification to the current customers or employes of the defendant included with a regular mailing by the defendant. The court may hold a preliminary hearing to determine how the costs of notice shall be apportioned."

Paragraph (4) is clear and unambiguous. A plaintiff, not the defendant, must bear the costs of notification. The only expense which paragraph (4) allows the court to impose on the defendant is the cost of including notification in a regular mailing by the defendant to the class.

Generally each party must advance its own costs and expenses of litigation. Paragraph (4) modifies this rule slightly by allowing the court to require the defendant to bear the cost of inserting notification in a regular mailing. Otherwise, the plaintiff must pay its costs and expenses for prosecuting the case.

Any doubt as to the meaning of Paragraph (4) is dispelled by its history. In December, 1980 the Council on Court Procedures amended Rule 32 by adding a provision as F(4) which would have given the court authority to require the defendant to pay notification costs. Merrill, Oregon Rules of Civil Procedure: 1984

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Handbook, p. 74. The 1981 Legislature rejected the change and enacted the present provision requiring the plaintiff to pay these costs. Chap. 912, §1, Or. Laws 1981.

There are sound policy reasons supporting either approach. Here the notification costs are estimated at $266,251. Affidavit of Sattler, attached. To require a plaintiff, who in a class action usually has only a claim for nominal damages, to advance costs of this magnitude may preclude meritorious class actions. On the other hand, to require a defendant to advance not only the costs of defense but also the expenses of the prosecution, prior to a final judgment, would be a revolutionary change in American procedure, and could encourage spurious litigation. As a matter of financial reality, a defendant who ultimately prevailed could rarely recover these expenses from the representative plaintiff.

Plaintiffs here rely on orders entered by the trial court in Derenco on November 9, 1979, in Babcock on March 18, 1981 and Powell on April 5, 1979. Paragraph (4) became effective on August 22, 1981. All of these orders were issued prior to the adoption of Paragraph (4) by the Legislature.

With rare exceptions, each party to litigation must pay its own costs. Only after final judgment is one party compelled to pay the costs of the other. Paragraph (4), perhaps unnecessarily, codifies this rule in class actions. Plaintiffs' motion should be denied.

Respectfully submitted
WOOD TATUM MOSSER BROOKE & HOLDEN

Donald J. Morgan OSB # 60059
Attorneys for Defendant

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

CHARLES B. GUINASSO and ROSARIA V. GUINASSO, husband and wife, Plaintiffs	No. 416-583
vs.	AFFIDAVIT OF J. TIMOTHY SATTLER
PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal savings and loan association, Defendant	

I, J. TIMOTHY SATTLER, being first duly sworn, depose and say:

1. I am employed by Pacific First Federal and have been assigned responsibility for the project to mail notice to the class and to process claim forms submitted by class members.

2. I have attended several meetings attended by attorneys for PFF and attorneys for the plaintiffs. I prepared an outline of the separate tasks required to complete the project through receipt and processing of the claim forms. To the best of my understanding, there is general agreement between plaintiffs and defendants concerning the necessary tasks.

3. A "budget" of the estimated costs for the project is attached as Exhibit A. The projected expenses are necessarily estimates. Among other factors that could change the estimates, no final decision has been made on the work to be performed in Tacoma and that to be accomplished in Portland, nor on the length

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of the notice.

4. In estimating the costs I relied when possible on actual costs incurred by PFF for similar services or products as well as quotations from outside supplies. For example the estimates for compensation are based on rates paid by PFF to Kelly Services for temporary help to perform comparable tasks, and discussions with Kelley Services in Tacoma.

5. As additional examples, the estimated cost for the locator service is based on the price most recently paid by PFF to Morrow & Co., a locator service, used to locate shareholders of PFF, postage expenses are from the U.S. Postal Service, and the capital expenditures for computer terminals, printers, maintenance and insurance from Digital Equipment Corporation.

6. Not included in the estimates are the costs which will be incurred for employees or resources of PFF utilized in the project.

7. In my opinion, the estimated cost of $266,251 to complete the project is reasonable.

Dated this ___ day of December, 1984.

_____
J. Timothy Sattler

Subscribed and sworn to before me this ___ day of December 1984.

_____
Notary Public for Washington
My Commission expires:

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GUINASSO BUDGET

			OPTION 1 To complete Obj. 1, 2 & 4	OPTION 2 To complete Obj. 1. tasks 1-6
Compensation:				
Outside Service Fees:				
Team Leader			$12,000.00	$0.00
Name/Address reviewers (6)	(1,044 hrs)	(#1, task 15/16)	$9,240.00	$0.00
Data Entry Ops to key surname (6)	(192 hrs)	(#1, task 20)	$1,700.00	$0.00
Data Entry Operators (4)	(700 hrs)	(#2, task 21)	$6,200.00	$0.00
Clerical (2)	(1,400 hrs)	(#2, task 21)	$12,300.00	$0.00
Loan/Microfiche researchers (3)	(2,100 hrs)	(#2, task 21)	$18,600.00	$0.00
Telephone staff (4)	(700 hrs)	(#2, task 21)	$6,200.00	$0.00
Closed loan file research (3)	(100 hrs)	(#2, task 21)	$900.00	$0.00
		Total:	$67,140.00	$0.00
Professional & Supervisory fees:				
Contract Programmer			$12,500.00	$9,500.00
Locator Service			$50,000.00	$0.00
Auditor (P/W)			$16,500.00	$0.00
		Total:	$79,000.00	$9,500.00
Disbursements:				
Misc. (Travel, etc.)			$5,000.00	$2,000.00
Furniture & Equipment:				
Minor purchases under $500:				
Phone books			$120.00	$0.00
Zip-code directories			$120.00	$0.00
Copies of microfiche			$180.00	$0.00
Microfilm Reader			$250.00	$0.00
		Subtotal:	$670.00	$0.00
Machine Rental Expense:				
Desk			$120.00	$0.00
Chairs (14)			$730.00	$0.00
Typewriter			$240.00	$0.00
Copier (4 mos)			$500.00	$0.00
		Subtotal:	$1,590.00	$0.00
		Total:	$2,260.00	$0.00
Stationary & Supplies:				
Stationary Printing (@ 20,000 items)			$3,000.00	$0.00
Office Supplies			$1,250.00	$0.00
Other Expense:				
Floor Space (4 mos)			$5,500.00	$0.00
Advertising:			$52,000.00	$0.00
Misc. office materials			$1,000.00	$0.00

EXHIBIT A - 1

GUINASSO BUDGET

Phone, Postage & Delviery expense:		
Phone:		
Installation	$515.00	$0.00
Monthly Charge (6 mos)	$2,790.00	$0.00
Data Lines:		
Installation	$1,000.00	$0.00
Monthly Charge (6 mos)	$2,400.00	$0.00
Postage:		
C/S pick up (3 @ $90./6 mos each)	$270.00	$0.00
Postage (40,000 @ $.22)	$8,800.00	$0.00
Delivery Express, etc.:		
Total:	$15,765.00	$0.00
TOTAL - Operating Expense:	$231,915.00	$11,500.00
CAPITAL EXPENDITURES		
Hardware:		
Terminals (12 @ $910 ea.)	$10,920.00	$0.00
Printers (3 @ $1,150 ea.)	$4,600.00	$0.00
Maintenance	$1,980.00	$0.00
Insurance	$116.00	$0.00
Multiplexers (4 @ $1,700 ea.)	$6,800.00	$0.00
Modems (2 @ $3,000 ea., 2 @ $400 ea.)	$6,800.00	$0.00
Software:		
Furniture & Equipment:	$3,120.00	$0.00
Total:	$34,336.00	$0.00
TOTAL.....	$266,251.00	$11,500.00
DIFFERENCE BETWEEN OPTION 1 & OPTION 2.....	$254,751.00	

AALL QUOTES ARE ESTIMATES, BASED ON AGREEMENTS REACHED BY 11/15/84.

EXHIBIT A - 2

CERTIFICATE — TRUE COPY

I hereby certify that the foregoing copy of ..... *is a complete and exact copy of the original.*

Dated ....., *19*.....

.....

Attorney(s) for .....

ACCEPTANCE OF SERVICE

Due service of the within ..... *is hereby accepted on* ....., *19*....., *by receiving a true copy thereof.*

.....

Attorney(s) for .....

CERTIFICATES OF SERVICE

Personal

I certify that on ....., *19*....., *I served the within* ..... *on* ..... *attorney of record for* ..... *by personally handing to said attorney a true copy thereof.*

.....

Attorney(s) for .....

At Office

I certify that on ....., *19*....., *I served the within* ..... *on* ..... *attorney of record for* ....., *by leaving a true copy thereof at said attorney's office with his/her clerk therein, or with a person apparently in charge thereof, at* ....., *Oregon.*

.....

Attorney(s) for .....

Mailing

I hereby certify that I served the foregoing Defendant's Memorandum in Opposition to Plaintiffs' Motion re: Notification Costs on: Phil Goldsmith and Henry Kantor,

.....

.....

attorney(s) of record for Plaintiffs

on December 7, *19*84, *by mailing to said attorney(s) a true copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney(s) at said attorney(s) last known address, to-wit:* Phil Goldsmith, 1402 Pacific 1st Federal Center, 851 S.W. 6th Avenue, Portland, Oregon 97204; Henry Kantor, 1437 Georgia-Pacific Bldg., 900 S.W. Fifth Avenue, Portland, Oregon97204

and deposited in the post office at Portland, *Oregon, on said day.*

Dated December 7, *19*84

Donald K. Mosser

of *Attorney(s) for* Defendant

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ATTORNEYS AT LAW
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1001 S. W. Fifth Avenue
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BACKING SHEET

1/1/80-B
FORM No. 100½—STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

F 1210

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

CHARLES B. GUINASSO and ROSARIA V. GUINASSO, husband and wife, Plaintiffs, v. PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal savings and loan association, Defendant.	No. 416-583 REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER REQUIRING PACIFIC FIRST FEDERAL TO BEAR CERTAIN COSTS

Pacific First Federal Savings and Loan Association (hereafter, Pacific) does not seriously dispute that, prior to August 22, 1981, it would have been obligated to bear the costs of distributing claim forms and administering responses thereto. Its contention is that the enactment of ORCP 32 F.(4) by the 1981 legislature substantially diminished its obligations in this respect.

This memorandum will demonstrate that Pacific's argument misreads the language of the legislative scheme and has grossly distorted the legislative history and the intent of the 1981 legislature. The materials set forth below leave no question that Pacific's argument is without foundation and that the 1981 legislature specifically contemplated that class action defendants would continue to be obligated to

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pay these kinds of costs once their liability had been adjudicated.

Pacific assumes that ORCP 32 "provides for two notices," a notice after certification as provided in ORCP 32 F.(1) and a notice after a finding of liability as provided in ORCP 32 F.(2). Defendant's Memorandum in Opposition to Plaintiffs' Motion Re: Notification Costs (hereafter, Defendant's Memorandum) at 1. Based on this assumption, Pacific argues that the language of ORCP 32 F.(4) providing that plaintiffs generally "shall bear the expense of notification" applies to both notices. Id. at 2.

This argument misreads the legislative scheme. The words notice, notification, notified and notifies appear 17 times in ORCP 32 F.(1). None of these words are used in ORCP 32 F.(2). Instead, that procedure is described in terms of the submission of claim statements by members of the class. This strongly suggests that the references in ORCP 32 F.(4) to the expenses of notification and the cost of notice relate to the procedures required under ORCP 32 F.(1), not to those under ORCP 32 F.(2).

A review of the legislative history leaves no doubt that the legislature intended ORCP 32 F.(4) to apply only to notice sent prior to a determination of liability. What became ORCP 32 F.(4) was developed in the Senate Committee on Justice on July 28, 1981 as a compromise between A-

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Engrossed House Bill 3122 and the proposal of the Council on Court Procedures. A review of these alternatives helps explain the intended reach of this compromise.

In 1980, the Council on Court Procedures promulgated various revisions of ORCP 32. One of these would have added an ORCP 32 F.(4) providing:

> "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 cost of notice should be apportioned." Council on Court Procedures, Oregon Rules of Civil Procedure and Amendments, 117 (December 13, 1980)

The Council on Court Procedures justified this proposal on the following grounds:

> "(7) Preliminary hearing and allocation of damage [sic] costs. The proposed revision adds a new subsection, F.(4), adapted from N.Y. C.P.R.L. section 904, which authorizes the court, after a preliminary hearing, to require the defendant to pay all or part of the costs of initial notice to class members. Although the normal rule is that plaintiffs pay the costs of notice, the subcommittee felt the New York approach provided desirable flexibility by allowing the trial judge to require payment by defendant, based upon a likelihood that the plaintiff class will win." Id at 126, emphasis added.

The reference to the chances that plaintiffs "may prevail" and the reference to "initial notice" demonstrates this version of ORCP 32 F.(4) was intended to apply only to notice given before the case had been decided on the merits.

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As might be expected, it did not win the favor of potential or actual class action defendants.

The amendments to ORCP 32 promulgated by the Council on Court Procedures would have taken effect on January 1, 1982 in the absence of a statute amending or repealing the Council's action. ORS 1.735. Reflecting the dissatisfaction with the Council proposal, the House of Representatives passed A-Engrossed HB 3122, a copy of which is attached as Exhibit A. This bill contained no provision comparable to the proposed ORCP 32 F.(4) and thus reflected a decision to retain in its entirety the pre-1981 policy regarding the costs of the ORCP 32 F. procedures. In this respect, the bill as enacted by the House was identical to the proposal that had been recommended by the Oregon Savings League and the Oregon Bankers' Association. House Committee on Judiciary, Subcommittee 2, May 21, 1981, 8:45 a.m. hearing, Exhibit D at 4 (proposed HB 3122 hand-engrossed), attached hereto as Exhibit B.

The Senate Committee on Justice held its first hearing on this subject on July 20, 1981. During that hearing, lobbyists for potential or actual class action defendants made two revealing comments demonstrating that they were not seeking to avoid responsibility for costs after an adjudication of liability.

One took place during a colloquy between attorney

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William M. McAllister, who represented Associated Oregon Industries and United States National Bank (an actual class action defendant), and Senator Ed Fadeley on the function of notice in a class action.

> "MR. McALLISTER: And in the situation where you get the notice of a class action and you didn't know that you had been injured until you get the notice, all the notice tells you is that you may have been injured. I mean, it doesn't say that you have been injured and another thing that this bill or that the Council on Court Prodedures did was take out the after-notification which would require that when you finally are determined that you are injured, then you get another notice and then you are entitled to make a claim. And that . . .
>
> "SENATOR FADELEY: I guess that puts it in the right focus. <u>You are objecting to paying for the notice until its been determined</u> . . .
>
> "MR. McALLISTER: That's right.
>
> "SENATOR FADELEY: . . . <u>there has been an injury</u>.
>
> "MR. McALLISTER: <u>That's absolutely right</u>." (Emphasis added)1/

The other occurred during an exchange between Diana Godwin, a lobbyist for the Oregon Savings League and Oregon Bankers' Association, and Senator Jan Wyers. Senator Wyers asked Ms. Godwin to articulate the policy justifications for the elimination of the fee shifting proposal promul-

---

1/ The passages quoted in the text are transcribed from the tapes of the committee hearing. See Goldsmith affidavit at 1, attached as Exhibit D. These tapes will be played at the December 11, 1984 hearing in this case if either the Court or opposing counsel questions the accuracy of the transcription.

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gated by the Council in ORCP 32 F.(4). Ms. Godwin stated:

> "In our 3122 deletes [sic] the provision that allows the court to shift the cost of notice and the reason we did that and the policy behind it is one of fundamental fairness and that is where a defendant has not in fact been found to be liable for anything to the plaintiffs, has not been found in fact to be in the wrong that that defendant ought not to bear the costs of financing the lawsuit against himself or itself." See footnote 1, emphasis added.

At its July 28, 1981 work session, the Senate Committee on Justice initially rejected a motion to recommend passage of A-Engrossed HB 3122. Minutes at 2, attached as Exhibit C. Senator Fadeley then offered certain amendments to the bill, including the language which became ORCP 32 F.(1)(f), (g) and (h) and ORCP 32 F.(4). He explained their function and the interrelationship between the amendments in some detail. With regard to what became ORCP 32 F.(4), Senator Fadeley said:

> "In addition, in the subject of who would pay the cost of the pre-determination of liability notice, the notice at the beginning, the court would still have a hearing, the court will still be able to allocate the costs provided it was within one of the notice levels that I have mentioned and it would reinstate Mr. Pozzi's rule but limit the reinstatement so that plaintiffs would bear the expense of notification except as otherwise provided in paragraph F.(4), which becomes reinstated in the bill. That means that the defendant could bear the expense of notification of its current customers or employees when included within a regular mailing and the court could so order. But the expense for former customers or employees, although a mailing list of them had been provided, the expense of mailing that would not be shifted to the defendants prior to a determination of liability." See footnote 1, emphasis added.

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Later, the following exchange occurred between Senator Fadeley and Senator Gardner:

> "SENATOR FADELEY: Yes, I have left in the sentence that 'the court may hold a preliminary hearing to determine how the costs of notice should be apportioned.' It is my intention to leave that in. But I have deleted on line 24 and line 25 the words 'or may allocate the cost of notice among the parties if the court determines there is a reasonable likelihood that the plaintiffs may prevail' and the way the rule would read is 'the plaintiffs shall bear the expense of notification. The court may, if justice requires require the defendant bear the expense of notification of its current customers or employees when included in a regular mailing.'
>
> "SENATOR GARDNER: So the fee-shifting feature would be restricted to that situation?
>
> "SENATOR FADELEY: The cost of preliability notice would be borne by the defendant only in the instance where it was a separate and distinct notice included within a regular mailing to the customers or employees * * *." See footnote 1, emphasis added.

The legislative history could not be clearer. The author of ORCP 32 F.(4) intended this section to apply only to pre-liability notice. The legislative history further establishes that none of the participants in the legislative process desired to modify the 1973 law as interpreted in Derenco and Babcock that the losing defendant would pay the costs of distributing and administering claim forms pursuant to ORCP 32 F.(2). The lobbyists for potential class action defendants only contended that defendants should not have to bear the costs when they had not been "found to be liable for anything to the plaintiffs," to use Ms. Godwin's formulation.

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Neither the language of ORCP F.(4) nor its legislative history supports Pacific's contention that the legislature intended for class action plaintiffs who had already prevailed on the merits to "advance costs of [a] magnitude that may preclude meritorious class actions."2/ Defendant's Memorandum at 3. Accordingly, plaintiffs' motion should be granted and Pacific should be required to bear the costs of distributing claim forms and administering the responses.

DATED this 10th day of December, 1984.

Respectfully submitted,

HENRY A. CAREY, P.C.

DELO, KANTOR & STAMM

By: Phil Goldsmith
Phil Goldsmith (No. 78223)
Henry Kantor (No. 79284)

Attorneys for Plaintiffs

2/ The estimated budget attached to the affidavit of J. Timothy Sattler should be disregarded because the figures contained therein are grossly exaggerated for the reasons given in the Goldsmith affidavit at 2-3.

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A-Engrossed

House Bill 3122

Ordered by the Speaker June 15
(Including Amendments by House June 15)

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Modifies civil procedure rule on class actions to restore rule to way it was before amendment by Council on Court Procedures in December 1980.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to class actions; amending ORS 41.815 and ORCP 32 and 54 A.; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

Section 1. ORCP 32, as amended by promulgation on December 13, 1980, by the Council on Court Procedures, is amended to read:

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:

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

NOTE: Matter in **bold face** in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted; complete new sections begin with SECTION.

Exhibit A

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) 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; (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 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 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.

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;

E.(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;

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

E.(5) Dealing with similar procedural matters.

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 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) 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)(d) Each member of the class, not a representative party, whose identity and whereabouts are known shall be given personal or mailed notice.

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.]

F.(1)(f) The court may order that a defendant who has a mailing list of class members 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.(2) Prior to the final entry of a judgment against a defendant the court *[may]* **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.**

F.(3) *[If the court requires class members to file a statement requesting affirmative relief,]* Failure of a class member to file a statement required by the court *[may]* 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.

[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.]

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

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

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.

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

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

[*H.*] I.(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;

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

[*H.*] I.(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.

[*I. Amendment of complaints for equitable relief to request damages permitted.*] J. Application of sections H. and I. 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. and B. of this rule may be commenced without compliance with the provisions of section H. 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 H. 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 [*H.*] I. of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.

[*J.*] K. 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.

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

[*K.*] L.(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.

[*K.*] L.(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.

[*K.*] L.(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.

[*K.*] L.(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.

[*K.*] L.(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.

[*K.*] L.(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.

[*L.*] M. 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 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.

[*M.*] N. Attorney fees, costs, disbursements, and litigation expenses:

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

[*M.*] 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.

[*M.*] 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.

[*M.*] 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.

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

[*M.*] 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;

[*M.*] N.(1)(e)(ii) Results achieved and benefits conferred upon the class;

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

[*M.*] N.(1)(e)(iv) The contingent nature of success; and

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

[*M.*] 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:

[*M.*] 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;

[*M.*] 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

[*M.*] 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.

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

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

[*N.*] O.(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.*] O.(4) Upon dismissal of the action without an adjudication on the merits.

Section 2. ORCP 54 A. is amended to read:

A. Voluntary dismissal; effect thereof.

A.(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 [*E.*] **D.** and of any statute of this state, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal with the court and serving such notice on the defendant not less than five days prior to the day of trial if no counterclaim has been pleaded, or (b) by filing a stipulation of dismissal signed by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action against the same parties on or including the same claim unless the court directs that the dismissal shall be without prejudice. Upon notice of dismissal or stipulation under this subsection, the court shall enter a judgment of dismissal.

A.(2) By order of court. Except as provided in subsection (1) of this section, an action shall not be dismissed at the plaintiff's instance save upon judgment of dismissal ordered by the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the defendant may proceed with the counterclaim. Unless otherwise specified in the judgment of dismissal, a dismissal under this subsection is without prejudice.

Section 3. ORS 41.815 is amended to read:

41.815. Attempts to comply with the provisions of ORCP 32 [*J.*] **I.** by a person receiving a demand shall be construed to be an offer to compromise and shall be inadmissible as evidence. Such attempts to comply with a demand shall not be considered an admission of engaging in the act or practice alleged to be unlawful nor of the unlawfulness of that act. Evidence of compliance or attempts to comply with the provisions of ORCP 32 [*J.*] **I.** may be introduced by a defendant for the purpose of establishing good faith or to show compliance with the provisions of ORCP 32 [*J.*] **I.**

SECTION 4. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

Exhibit D, HB 3122
May 21, 1981 - 8:45 am
7 Page Exhibit
Presented By: Rep. Rutherfor

House Bill 3122

HAND ENGROSSED (with amendments submitted by the Oregon Savin League and Oregon Bankers' Assoc.

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Modifies civil procedure rule on class actions to restore rule to way it was before amendment by Council on Court Procedures in December 1980.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to class actions; amending ORCP 32; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

Section 1. ORCP 32, as amended by promulgation on December 13, 1980, by the Council on Court Procedures, is amended to read:

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 [1.] 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:

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

NOTE: Matter in bold face in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted; complete new sections begin with SECTION.

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) *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;* 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.

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 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 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.

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;

E. (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;

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

E. F.(5) Dealing with similar procedural matters.

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 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) 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) (d) Each member of the class, not a representative party, whose identity and whereabouts are known, shall be given personal or mailed notice.

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.]

F. (1) (f) The court may order that a defendant who has a mailing list of class members 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.

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.

F. (2) Prior to the final entry of a judgment against a defendant the court [*may*] 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.

F. (3) [*If the court requires class members to file a statement requesting affirmative relief,*] Failure of a class member to file a statement required by the court [*may*] 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.

[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.]

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

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

G. .(2) A class may be divided into subclasses and each subclass treated as a class, and the provisions

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.

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

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

I.(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;

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

I.(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.

J. Amendment of complaints for equitable relief to request damages permitted. J. Application of sections H and I 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., and B. of this rule may be commenced without compliance with the provisions of section H. 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 H. 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 I. of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.

K. 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.

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

L.(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.

L.(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.

L. (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.

L. (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.

L. (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.

L. (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.

M. 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 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.

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.

restore *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.* restore

restore *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 OR 2-106 of the Oregon Code of Professional Responsibility.

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.

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O. 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:

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

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

O (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

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

SECTION 2. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

SENATE COMMITTEE ON JUSTICE

Room 347, State Capitol
SALEM, OREGON 97310
(503) 378-8833

TUESDAY, JULY 28, 1981 — M I N U T E S — 2:00 p.m. — ROOM 350

008 Meeting was called to order by SENATOR JAN WYERS at 3:09 p.m. in Room 350.

029 SENATE BILL 887 - Relating to Weapons

030 MOTION: SENATOR BROWN moved the bill to the floor with a Do Pass as Amended recommendation.

VOTE: In a roll call vote the motion carried with Senator Brown, Fadeley, Jernstedt and Smith voting AYE. Senator Gardner and Wyers voting NO. Senator Kulongoski excused.

9 HOUSE BILL 3111 - Relating to Vehicles

070 SENATOR WYERS stated that the bill changes the length of time that a person cannot get a drivers license if the license is suspended because of an unsatisfied judgement.

MOTION: CHAIRMAN WYERS moved to change the length of time from ten years to seven years.

VOTE: CHAIRMAN WYERS called for objection and there being none the motion was so ordered.

087 MOTION: CHAIRMAN WYERS moved HB 3111 to the floor with a Do Pass as Amended recommendation.

VOTE: In a roll call vote the motion carried with Senators Brown, Fadeley Gardner, Jernstedt and Wyers voting AYE. Senator Smith voting NO. Senator Kulongoski excused.

1[illegible] SENATOR KULONGOSKI arrived at 3:15 p.m.

Exhibit C

003 HOUSE BILL 2506 - Relating to Exemptions from Execution

104 COUNSEL LA MAR stated that HB 2506 had been sent to committee because of conflict amendments. SB 660 is in conference committee and the problem is that HB 2506 may be signed after August 1st which is less than thirty days. The suggested change is to December 1 so the bankruptcy people have a beginning of the month date.

112 MOTION: CHAIRMAN WYERS moved HB 2506 be amended to make the effective date December 1, 1981.

VOTE: CHAIRMAN WYERS called for objection and there being none the motion was so ordered.

MOTION: CHAIRMAN WYERS moved HB 2506 to the floor with a Do Pass as Amended recommendation.

VOTE: In a roll call vote the motion carried 7-0.

132 HOUSE BILL 3122 - Relating to Class Actions

155 MOTION: SENATOR GARDNER moved HB 3122 to the floor with a Do Pass recommendation.

VOTE: In a roll call vote the motion failed 3-4 with Senators Gardner, Jernstedt and Smith voting AYE. Senator Brown, Fadeley, Kulongoski and Wyers voting NO.

203 SENATOR FADELEY stated that he had worked with the people that want the bill and had prepared amendments which were hand-engrossed on his copy of the bill. The amendments were being copied and Senator Fadeley was speaking without them in front of the committee. The effort was to have the notice the way Mr. Posey would wrote the bill and additional alternatives. The notice could be ordered to be given by the defendant in a regular mailing but by a separate and distinct piece of paper in the regular mailing. If a mailing list was desired by the plaintiffs of the current employees or defendants could be provided and old customers who are no longer active customers or employees the court could order a list of former customers or employees to be provided to the representative parties as well as ordering the separate and distinct notice to be included in the regular mailing to the current customers and employees. This should provide the same level of notice as in the rule but would reduce the cost demand to the defendant because the plaintiff will be providing the notice generally.

285 SENATOR FADELEY stated that the amendments remove fluid recovery out of the bill. The damages would be limited to the persons that return the claim form and there would not be recovery for members of the class that did not join in a claim form after determination of liability.

307 SENATOR KULONGOSKI asked if SENATOR FADELEY'S amendments only pertained to Page 4 of the A-Engrossed HB 3122 and SENATOR FADELEY stated that they did only pertain to page 4 but he also wanted a definition of "customer" so it included a student or a person purchasing goods or services. SENATOR FADELEY stated that he had also made it clear that there is no duty of complying with due process notice requirements which is shifted to the defendant by virtue of the defendant including a notice in a regular mailing to current customers and employees. A potential class member who said he did not get the notice or did not like the form of notice would not have a complaint about that against the defendant.

331 The amendments were handed out to the Committee.

334 SENATOR GARDNER stated that as he read the amendments the fee shifted provision is restricted to the situation where you are either sending out a regular mailing either to current customers or employees. Senator Gardner stated that by modifying a version of F(1)(f) which requires cooperation it was stated.

345 SENATOR FADELEY stated that he had left in the sentence which states "The court may hold a preliminary hearing to determine how the costs of notice should be apportioned." On line 24 and 25 the words "or may allocate the cost of notice among the parties if the court determines there is a reasonable likelihood that the plaintiffs may prevail." is deleted. The rule would read "The plaintiffs shall bear the expense of notifications, the court may if justice requires require the defandant bear the expense of notification of its current customers or employees when included in a regular mailing." The cost of preliability notice would be borne by the defendant only in the instance where it was a separate and distinct notice included in a regular mailing to the customers or employees.

378 SENATOR FADELEY stated that he had amended in F(2) left the word "shall" as it is in the printed bill as new language proposing "may" in line 9 of page 4. The language would read "F.(2) Prior to the final entry of a judgement against a defendant the court shall request members . . ." In line 16, 17 and 18 the new language would be included but on line 17 after the word "member" and before the comma insert "who has returned a claim form". This makes it clear that the damges are only collected after liability by someone that has returned the claim form. That does not allow a fluid recovery. SENATOR FADELEY stated that as he understood the definition of fluid recovery to be where no individual defendant will receive the money but the court could order it paid to the charity or paid to the state. This form makes it clear that the damage is only for one who has returned a claim form after liability determination.

464 MOTION: SENATOR FADELEY moved the amendment which removes fluid recovery from the promilgated rule and keeps the law as to fluid recovery as the current law. (Section F(2))

VOTE: In a roll call vote the motion carried 5-2 with Senators Brown, Fadeley, Gardner, Jernstedt and Smith voting AYE. Senators Kulongoski and Wyers voting NO.

039 SENATOR WYERS stated that he had contacted a Mr. Goldstein who had worked on preparation of the memo. Mr. Goldstein suggested that if language was going to be inserted with regard to the notice being sent along with a regular mailing that may language should also be inserted which says "As to the people who are no longer employees or customers some less requirement of notice would be set up at the pre-liability phase. After the court has determined the liability question there could be further determination who would pay for the cost of the claim form."

087 SENATOR GARDNER asked Senator Fadeley to read the language in F(1)(h). The language is "F(1)(h) The court may order a list of former customers or employees to be provided the representative parties and that a separate and distinctive notice be included in a regular mailing to current customers and employees."

105 SENATOR GARDNER read the proposed language in F.(1)(g): "F.(1)(g) The court may order as an alternative to F(1)(f) that a defendant who has a mailing list of class members who are or were current customers or employees of defendant provide a copy of that list . . ."

151 SENATOR WYERS stated that this says that the court could order the defendant to supply the list at their cost. SENATOR WYERS stated that if the intent was clear the language could be drafted by Mr. Lundy of Legislative Counsel. SENATOR GARDNER stated that there might be a computer list of depositors or advertisers or something that would not technically fall within the definition of employees or customers but would be members of the plaintiff class. If there is a mailing list of those under current law there is an obligation to disclose that and provide the list provided the representative parties pay the cost of duplicating. That obligation should be kept in tack and not restrict it to only employees or customers. SENATOR GARDNER stated that he was thinking of government benefit cases such as Legal Aid and its cases with welfare laws. There could be class members that are not employees or customers.

252 SENATOR BROWN asked if on Line 6 by adding the words "a mailing list of class customers including those who are . . ." The current customers and employees would not be the only list of class customers that would be required.

285 MOTION: SENATOR FADELEY moved the amendments that have been stated in the above copy. The amendments were moved in concept. Also moved was the definiton "Customer includes a person, such as a student, who has purchased services or goods. Also moved was "No duty of compliance with due process notice requirements is shifted to the defendant by virtue of defendant including notice in a regular mailing to current customers or employees.

VOTE: In a roll call vote the motion carried 4-3 with Senators Brown, Fadeley, Gardner and Kulongoski voting AYE. Senators Jernstedt Smith and Wyers voting NO.

318 MOTION: SENATOR BROWN moved the words "including those" to be inserted on page 4, line 6.

VOTE: CHAIRMAN WYERS called for objection and there being none the motion was so ordered.

377 SENATOR KULONGOSKI stated that he wanted to move to go back with promulgated rule on line 32-34 and delete line 35 and 36 on page 3. It is obvious that if you go to the notice provisal that has been adopted in the bill already that each member of the class not a representative of the party because their whereabouts if known shall be given personal notice or mail notice. The way it is written is an absolute.

388 SENATOR GARDNER stated that another way of doing that with more flexibility to the court is the language that is in the statute which states "the court shall direct to the members of the class the best notice practicable under the circumstances. Individual notices shall be given to all members who can be identified through reasonable effort." This gives the court discretion to determine what is reasonable effort. Senator Kulogoski stated that he would agree with the existing language as a lesser accomodation to go back to line 32-34.

418 MOTION: SENATOR GARDNER moved the language in the statute in G(1) ORCP Law Rule 32G(1) be substituted for the bold language on lines 35 and 36.

VOTE: In a roll call vote the motion carried 4-3 with Senators Fadeley, Gardner, Kulongoski and Wyers voting AYE. Senators Brown, Jernstedt and SMITH voting NO.

MOTION: SENATOR KULONGOSKI moved to delete the first seven words on line 14 of page 2 of the printed bill and insert a comma on line 13.

VOTE: CHAIRMAN WYERS called for objection and there being none the motion was so ordered.

473 SENATOR KULONGOSKI stated that the bold language that appears by name that the judgement state the amount to be recovered by each member is already covered in the previous amendment that Senator Fadeley had by requiring that a written form be submitted.

Tape 321B
055

MOTION: SENATOR GARDNER moved HB 3122 to the floor with a Do Pass as Amended recommendation.

VOTE: In a roll call vote the motion carried 4-3 with Senators Fadeley, Gardner, Jernstedt and Smith voting AYE. Senators Brown, Kulongoski and Wyers voted NO.

059 SENATOR WYERS asked Mr. Dave Barrows what he thought would happen about concurrence. SENATOR WYERS stated that what he had asked Mr. Barrows to do was to release the other vehicle which is sitting out there ready to have the whole bill or any part of it they want stuck in to it. Mr. Wyers asked Mr. Barrows if he would support concurrence in the House.

062 MR. DAVE BARROWS, Oregon Savings League, stated that they would support HB 3122 as Amended by the Committee through the process to the Governor. Mr. Barrows stated that he thought Senator Wyers was giving him more credit than he deserved and that on HB 3162 he would ask all the members of the conference to let the bill go as is. This has been discussed with the other interested groups in the room and the support is unanimous.

071 The meeting was adjourned at 4:10 p.m.

Respectfully submitted,

Sandra Brantley

Sandra Brantley
Committee Assistant

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

CHARLES B. GUINASSO and ROSARIA V. GUINASSO, husband and wife, Plaintiffs, v. PACIFIC FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal savings and loan association, Defendant.	No. 416-583 AFFIDAVIT OF PHIL GOLDSMITH

County of Multnomah)
) ss.
STATE OF OREGON)

I, Phil Goldsmith, being first duly sworn on oath, hereby depose and state as follows:

I am one of the attorneys for the plaintiff class in this case. In 1982, an employee of Henry A. Carey, P.C., at my direction, ordered from the State Archives a copy of the tapes in its possession of the Senate Committee on Justice sessions of July 20, 1981 and July 28, 1981 dealing with class action issues. I have reviewed these tapes within the last ten days and on December 8, 1984, listened once again to the passages quoted in the Reply Memorandum in Support of Plaintiffs' Motion for an Order Requiring Pacific First Federal to Bear Certain Costs. The language quoted in the Reply Memorandum is an accurate reproduction of the language on the tapes.

Exhibit D

HENRY A. CAREY, P.C.
Attorneys at Law
Suite 1402, 851 S. W. Sixth Avenue
Portland, Oregon 97204 —
Telephone 224-5255

In case the Court wishes to consider the assertions contained in the affidavit of J. Timothy Sattler regarding the costs of distributing claim forms and administering responses thereto, I state the following:

I saw the "budget" attached to this affidavit for the first time in the afternoon of December 7, 1984 when I received the memorandum to which it is attached. I note that the document itself is dated November 20, 1984. Accordingly, I can only address in the affidavit a few of our concerns regarding this budget.

Based on my class action experience, I can state unequivocally that certain of these "cost estimates" are greatly exaggerated. For example, a cost of $52,000 is shown for publishing a one-quarter page advertisement three times in the Portland Oregonian and in eight other newspapers. Two years ago, the plaintiffs in Best v. United States National Bank, Multnomah County Case No. A7905-02523 and Tolbert v. First National Bank of Oregon, Multnomah County Case No. A8004-02328 were required to publish a one-quarter page notice pursuant to ORCP 32 F.(1) six times in the Oregonian and three times in eleven other newspapers. The accounting records of my firm show that these advertising costs amounted to $18,104.59.

Additionally, certain of the cost estimates are for items which have never been discussed between the parties and

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which do not appear to be necessary. For example, there is a listing of $16,500 for auditor's fees. There has been no discussion regarding the use of an auditor in this case. Plaintiffs would not consider such an expense necessary unless there was strong evidence that responses to the claim forms had been mishandled.

Phil Goldsmith

SUBSCRIBED AND SWORN TO before me this 10th day of December, 1984.

NOTARY PUBLIC FOR OREGON
My Commission Expires: 8/29/810

HENRY A. CAREY, P.C.
Attorneys at Law
Suite 1402, 851 S. W. Sixth Avenue
Portland, Oregon 97204
Telephone 224-5255

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Reply Memorandum in Support of Plaintiffs' Motion for an Order Requiring Pacific First Federal to Bear Certain Costs upon the following attorneys by delivering to them personally a true and correct copy thereof, on December 10, 1984:

Mr. Donald J. Morgan
Mr. Peter G. Voorhies
1300 Orbanco Building
1001 S. W. Fifth Avenue
Portland, Oregon 97204

Phil Goldsmith

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June 12, 1992

Janice Stewart, Chair
Class Action Subcommittee
Council on Court Procedures
1100 SW Sixth, Suite 1600
Portland, OR 97204 (Via Hand Delivery)

Professor Maury Holland
Class Action Subcommittee
Council on Court Procedures
University of Oregon School of Law, Room 275A
1101 Kincaid Street
Eugene, Oregon 97403-3720 (Via Overnight Delivery)

Michael V. Phillips
Class Action Subcommittee
Council on Court Procedures
975 Oak Street, Suite 1050
Eugene, Oregon 97401-3176 (Via Overnight Delivery)

Re: Proposed Revisions to ORCP 32

Dear Subcommittee Members:

Earlier this year, your subcommittee received comments from R. Alan Wight, Kenneth Sherman, Jr., David S. Barrows and Jeffrey S. Love which are critical of portions of the proposal of the Committee to Reform Oregon's Class Action Rule. Ms. Stewart has requested the Committee's response. This letter will show that these criticisms rest on erroneous factual and legal premises.

Ms. Stewart also asked me to determine the status of the proposal to revise Federal Rule 23, a version of which can be found at Enclosure C to the Committee's letter of December 14, 1991 to Professor Fredric Merrill (hereafter "the December 14, 1991 letter"). I am still trading telephone calls with people back East and will provide you that information as soon as I have it.

Before addressing the claims of our critics, the Committee has a few comments about and responses to Professor Holland's memorandum dated May 26, 1992 regarding the relationship between the Committee's proposals and the changes to

ORCP 32 which were adopted by the 1980 Council but rejected subsequently by the legislature.

Professor Holland's Memorandum

The Committee agrees with Professor Holland that most of our proposals have no 1980 counterpart and that one of the two which does is formulated much differently.[1] This refutes Mr. Barrows' claim that "the 1981 Session of the Oregon Legislature thoroughly debated the issues * * * and determined that fairness would be best served by not making these proposed changes."

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[1] The only direct overlap is that the Committee, like the 1980 Council, would eliminate the claim form requirement in ORCP 32 F(2). The Committee believes that, since the 1981 legislature, a political consensus has developed that any unclaimed class recovery should escheat to the common school fund rather than be retained by the defendant. This is evidenced by the progress of SB 1008 in the 1991 Legislature, see enclosure E to the December 14, 1991 letter, as well as the endorsements of this proposal by Superintendent of Public Instruction Norma Paulus (letter dated May 8, 1992 to Henry Kantor) and Marcella Easly of the Unclaimed Property Section of the Division of State Lands (letter dated March 20, 1992 to Fredric Merrill). The elimination of the claim form is necessary to fully realize that policy.

Like the 1980 Council, the Committee would alter the requirements for notice in B(3) class actions. However, the proposals are very different. The 1980 Council would have required personal or mailed notice to every class member with a damage claim over $100. Where some but not all class members had such claims, each individual's potential recovery would need to be calculated to determine what kind of notice would be given, thereby significantly complicating the proceedings.

Our proposal is much simpler. The trial court would determine "whether, when and how notice should be given" in a particular case based on factors set forth in proposed ORCP 32 F(1). These factors would apply in all class actions, eliminating the great discrepancy in procedural consequences which presently follows from the court's determination whether a case should be certified under existing ORCP 32 B(1) or B(2) on the one hand or B(3) on the other. The legislature has never considered a proposal of this character.

Professor Holland had difficulty understanding the amendment to the first sentence of ORCP 32 M which would include in the judgment those "who, as a condition to exclusion, have agreed to be bound by the judgment." When I first read the proposed federal amendments, I too found this concept mystifying. The late Herb Newberg, author of the leading class action treatise, provided me with the following helpful example.

In an employment discrimination class action, an employee may agree with the goals of the case but feel that remaining in the class could jeopardize his or her future employment. An employee in such circumstances could seek exclusion from the class subject to the condition that he or she would be bound by the judgment. Having this option would protect the employee from the perceived risk of retaliation without having to forego the benefits if the class claims are valid.

The second sentence of the Committee's proposed amendments to ORCP 32 F(2) also confused Professor Holland. He reads it as permitting "the defendant [to] cause notice to be given to class members, at defendant's expense, in order to contest proposed individual recoveries." What the Committee intended (and what the second to the last paragraph of the comments on proposed F(2) was meant to convey) is that the court could order claim forms if (a) the defendant didn't have an accurate basis for calculating each individual's share of the class recovery, (b) class members had records which would materially improve the calculation of their own recoveries, and (c) the cost of the claim form process was reasonable. The claim forms would be used only to change individual shares of the class recovery, not the defendant's total obligation to the class.

The Committee disagrees with Professor Holland's analysis in two minor respects:

1. Professor Holland is correct that the legislature rejected the specific proposal made by the 1980 Council to reduce notice requirements in B(3) class actions. But the legislature did not as a consequence reject the Council's proposed amendments to ORCP 32 B(3)(d) and (e). Rather, the legislature ratified these amendments. See Merrill, Oregon Rules of Civil Procedure: 1992 Handbook, 89.

2. Professor Holland interprets the notice requirements enacted by the 1981 legislature as "if anything * * * more exacting * * * than those pre-existing." The legislative history shows that the Senate Judiciary Committee

(which drafted these amendments) intended to liberalize notice requirements, though only to a limited extent. See Supplemental Memorandum re "Individual Notice" (March 15, 1983) at 3-4 and Exhibit A, filed in Tolbert v. First National Bank, Multnomah County Circuit Court Case No. A8004-02328, a copy of which is enclosed. As a consequence, in Tolbert Judge Riggs allowed notice by publication to class members who no longer were customers of the bank, despite the bank's contention that addresses for those customers were readily available. See Order re Motion to Amend Pursuant to ORS 19.015 (dated March 23, 1983) (denying defendant's motion to certify for interlocutory appeal the question whether due process and ORCP 32 F(1)(d) require individual notice to class members who can be identified with reasonable effort).

Comments of Kenneth Sherman, Jr.

These largely rest on two incorrect premises. Mr. Sherman asserts that the proposal to amend the class certification standards seeks to "shift [the] costs associated with any notice requirements to the defendant prior to any judicial determination of liability." In fact, to quote from Professor Holland's memo, "[t]he current proposals do not include any * * * shifting [of] costs of notice to defendant(s) prior to a determination of liability * * * beyond what present [ORCP] 32 F(4) authorizes."

Mr. Sherman also is incorrect in claiming that the driving force behind the amendment of the definition of a judgment in ORCP 32 F(2) is "increased attorney's fees." His argument assumes that "[t]he successful plaintiffs' lawyers' attorney's fee is based upon the total dollars paid to the plaintiff's class."

Attorney fees in class actions are set by the court after applying the standards in ORCP 32 N(1)(e). The Committee's proposal does not change this. The "[r]esults achieved and benefits conferred upon the class" are considered in setting fees, but so are the time expended and the nature and quality of services rendered. Given these standards, Mr. Sherman's hypothetical class lawyer who breached a fiduciary duty to class members by failing to give them the opportunity to share in the class recovery should be penalized, rather than rewarded, by the trial judge in awarding attorney fees.

The true driving force behind the proposed revision in the definition of a judgment is the legislative interest in

making unclaimed class action judgments subject to the abandoned property statute. Should such a law be enacted, the revised definition of a judgment would permit a more complete realization of the policy choice that monies unclaimed by class members (usually because, by the time the case is over, they have moved or died and cannot be found) should not revert to an adjudicated wrongdoer.

In addition, Mr. Sherman is too sanguine in his assertion that these changes are unnecessary because small consumer claims are effectively redressed by the state Attorney General's office and federal oversight agencies. Sometimes the agencies don't do the job. An egregious example is the dispute over the earnings on mandatory tax and insurance reserves on home loans. Nearly a decade after the Oregon Supreme Court decided these monies belonged to the borrower rather than the lender,[2] the Federal Home Loan Bank Board sought to file an amicus brief in the Oregon Court of Appeals in Guinasso v. Pacific First Federal Savings & Loan Association in support of the lender.

Comments of R. Alan Wight

These comments also suffer from factual and legal inaccuracies. For example, Mr. Wight challenges Philip Emerson's assessment that Best v. United States National Bank was a "meritorious class action * * * abandoned because the claim form requirement [in current ORCP 32 F(2)] precluded the possibility of meaningful monetary recovery." Emerson, "Oregon Class Actions: The Need for Reform," 27 Will L Rev 757, 760-761 (1991). Mr. Wight contends at page 7 of his letter that "[i]t was the failure to prevail before a jury in [a companion] case that led [plaintiffs' counsel] to settle the Best litigation."

In fact, plaintiffs' counsel told the trial court in Best that a significantly discounted settlement in that case was reasonable because "even if plaintiffs overcame the risks of * * * loss at trial, the economic value of this case to the class was subject to being gutted by an unfavorable ruling on the

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[2] Derenco, Inc. v. Benj. Franklin Federal Savings & Loan Association, 281 Or 533, 577 P2d 477, cert den, 439 US 1051 (1978).

nature of the claim forms to be used."[3] In his supporting affidavit, plaintiffs' lead counsel Jerome E. LaBarre referred to "the significant possibility that a favorable verdict would result in a Pyrrhic victory" and explained that "[a]lthough class counsel could have accepted the other litigation risks * * *, the claim procedure risks * * * made * * * settlement the superior alternative."[4] Mr. Wight, who defended Best, did not challenge the accuracy of any of these statements.

Mr. Wight also contends at page 12 that the Committee's proposal to create a unified class certification structure is bad policy because individual post-certification notice enables "putative class members * * * to participate in and control the proceedings, instead of relinquishing all responsibility to plaintiffs' class lawyers." In fact, our proposed amendments to ORCP 32 F(1) give the trial judge discretion, in accordance with the defined criteria, to determine "whether, when and how notice should be given." Thus, when class members are likely to participate in and control the litigation, individual notice should be given.

But the current rule imposes expensive post-certification notice requirements in every B(3) action, regardless of the benefits that will result. For example, in Best, none of the approximately 400,000 persons who received mailed post-certification notice filed an appearance in the case or otherwise sought to control the proceedings. In this kind of circumstance, there is no good policy rationale for requiring such notice.

Mr. Wight argues at length that permitting a fluid class recovery would be unconstitutional. In fact, in Best, Mr.

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[3] Plaintiffs' Memorandum in Support of Motion for Court Approval of Settlement (filed November 16, 1988) at 9, filed in Best v. United States National Bank, Multnomah County Circuit Court Case No. A7905-02523, a copy of the relevant portions of which are enclosed.

[4] Affidavit of Jerome E. LaBarre in Support of Motion for Court Approval of Settlement (November 16, 1988) at 6, filed in Best, a copy of the relevant portions of which are enclosed.

Wight and his firm entered into a settlement containing a fluid recovery.[5]

While Mr. Wight's analysis is wrong,[6] more importantly his argument is a red herring. None of these rules changes seeks to implement a fluid class recovery, under which damages belonging to class members are paid to others who are not injured. See Darr v. Yellow Cab, 67 Cal 2d 695, 63 Cal Rptr 724, 433 P2d 732 (1967) (after remand, damages resulting from overcharges to past taxicab passengers used to reduce fares to riders in the future).[7] Treating unclaimed damages as abandoned property (escheat) is different -- among other reasons, because each injured individual always has the right to reclaim the abandoned property from the state.[8] ORS 98.392; ORS 98.396(2).

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[5] The plaintiffs in Best sought damages for people who paid charges for checks written on insufficient funds between 1973 and 1979. The settlement primarily provided benefits to people who had checking accounts with U.S. Bank in 1989.

[6] It is true that the Second Circuit in Eisen v. Carlisle & Jacquelin, 479 F2d 1005, 1018 (2d Cir 1973) called fluid recovery a "fantastic procedure" that was "illegal * * * and wholly improper." The Supreme Court, in affirming Eisen on other grounds, reserved decision on the propriety of fluid recovery. 417 US 156, 172 n10 (1974). The federal courts of appeals which have considered this issue in the last decade have found fluid recovery to be permissible. See Emerson, supra, 27 Will L Rev at 775-776 (summarizing recent cases).

Contrary to Mr. Wight's implication, the Oregon Supreme Court has never addressed this issue. American Timber & Trading Co. v. First National Bank, 263 Or 1, 500 P2d 1204 (1972) simply held that Oregon's Field Code did not permit the bringing of a class action for damages. It said nothing about the propriety of fluid recovery.

[7] The outcome in Darr is reported in Blue Chip Stamps v. Superior Court, 18 Cal 3rd 381, 134 Cal Rptr 393, 556 P2d 755, 760 n 1 (Tobriner, J, concurring).

[8] Some analysts have characterized escheat as a form of fluid recovery. E.g., 41 Op Atty Gen at 533. It is not. See, e.g., In re Folding Carton Anti-Trust Litigation, 744 F2d 1252, 1254-1255 (7th Cir 1984) (rejecting fluid recovery as "not needed;" unclaimed monies would instead escheat to the federal

Further, the proposal for a unified class certification structure has nothing to do with fluid recovery. In fact, the ABA committee which originally made this proposal simultaneously "rejected proposals to recommend legislation establishing some form of 'fluid recovery.'" 110 FRD 195, 205, reprinted as Enclosure B to the Committee's December 14, 1991 letter.

Finally, Mr. Wight claims at page 12 of his letter, without any supporting citation, that "[t]he aggregation of claims * * * already make [sic] the prospect of attempting to defend a class action case so terrifying that almost no defendant will undertake a defense, no matter how meritorious." It is interesting to contrast that assertion with the statement on page 3 of Mr. Wight's letter about the "long years" he and his firm have spent defending class actions brought by several members of the Committee. It would be less of an exaggeration, given Guinasso v. Pacific First Federal, to say that the existing rule creates so many obstacles to the plaintiff class that almost no defendant will forego a defense, no matter how unmeritorious.

Comments of Jeffrey S. Love

Mr. Love recognizes that the elimination of the claim form requirement and the redefinition of a judgment in ORCP 32 F(2) are procedural and leave to the legislature the disposition of the unclaimed portion of the judgment.[9] Mr. Love suggests such a revision is unnecessary because, "if the legislature does decide to pass such legislation, it can also make the necessary changes to ORCP 32F(2)."

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government). Thus, while the existing rule is designed to preclude a fluid recovery, 41 Op Atty Gen at 533-534, an escheat can occur under certain circumstances. Affidavit of Assistant Attorney General William R. Cook, dated August 16, 1989, filed as Exhibit A to Plaintiffs' Motion Regarding Locator Service (filed August 23, 1989) in Guinasso v. Pacific First Federal Savings & Loan Association, Multnomah Circuit Court Case No. 416-583, a copy of which is enclosed.

[9] Mr. Love suggests that the first sentence of proposed ORCP 32 F(2) regarding damage computation methodology is part and parcel of this mechanism. However, as explained at pages 3-4 of my June 9 letter to the subcommittee, once damages are calculated in the aggregate, they will then be allocated to individual class members.

The Committee understands to the contrary. Historically, the legislature has refused to consider proposed procedural changes which have not been passed upon by the Council. Thus, unless this Council amends ORCP 32 F(2), any bill passed by the 1993 legislature would not become fully effective until the conclusion of the next biennium of the Council, i.e., 1995.

Mr. Love also argues that the proposed revisions to ORCP 32 B "would force the courts" to certify "overly burdensome, unmanageable and unfair class actions." This seems implausible, given that this proposal is based on draft revisions to Federal Rule 23 suggested by the ABA Section on Litigation and presently being considered by the Advisory Committee on Federal Rules. A review of the text confirms that Mr. Love has misread this proposal.

Proposed ORCP 32 B would condition class certification on a finding "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The predominance of common questions is to be taken into account in making this finding. Proposed ORCP 32 B(3). The circumstances Mr. Love hypothesizes would fail this test.

In fact, the draft Committee Notes to the proposal before the Advisory Committee on Federal Rules, while acknowledging "some greater opportunity for use of class actions in appropriate cases notwithstanding the existence of [individual] claims," cautions that "[t]he revision is not * * * an unqualified license for certification of a class whenever there are numerous injuries arising from a common or similar nucleus of facts." See enclosure C (page 7) to the December 14, 1991 letter.

Mr. Love's argument against proposed ORCP 32 B relies in part on the belief expressed by the Oregon Supreme Court in Bernard v. First National Bank, 275 Or 145, 159, 550 P2d 1203 (1976), that allowing any case appearing to present individual inquiries of a considerable number of persons to proceed as a class action would inevitably either overload the courts or deprive defendants of valuable rights. Fifteen additional years of experience in the federal courts have proven that to be a significant overstatement. See generally, 1 Newberg on Class Actions, §§425, 426 (2d ed 1985).

One of the reasons why is that courts have developed sophisticated alternatives to complete approval or complete denial of class certification. These include the certification of a class only on certain common claims or issues, and the use of subclasses when a particular claim in the case presents common issues to some but not all members of the main class. See proposed ORCP 32 G.

Conclusion

I hope the foregoing comments will be of assistance to you in considering the Committee's proposal. If there is anything further which you would like from me or other members of the Committee to assist you in assessing our proposal, please let me know.

Sincerely,

Phil Goldsmith

PG:le

cc: Henry Kantor
Committee Members

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July 28, 1992

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Professor Maury Holland
Class Action Subcommittee
Council on Court Procedures
University of Oregon School of Law, Room 275A
1101 Kincaid Street
Eugene, Oregon 97403-3720

Michael V. Phillips
Class Action Subcommittee
Council on Court Procedures
975 Oak Street, Suite 1050
Eugene, Oregon 97401-3176

Re: Proposed Revisions to ORCP 32

Dear Subcommittee Members:

I have now had an opportunity to review and distribute to various members of our Committee your recommendations regarding our proposed amendments to ORCP 32. Obviously, at this point, any substantive comments; pro or con, about your recommendations should be addressed to the whole Council on Court Procedures at this Saturday's meeting. The purpose of this letter is simply to discuss two issues of drafting.

First, your recommendations fail to address the relatively minor changes we propose to ORCP 32 E(2), E(3) and H.

Second, as I understand it, your proposed amendment to existing ORCP 32 F(4) is an attempt to improve upon the wording of the Committee's proposal while accomplishing the same end (i.e. clarifying that this section applies only to the giving of notice prior to a determination of liability). Your proposal is much better written, but the words "at any point in the proceeding" may reintroduce ambiguity. The Committee therefore suggests that the section be reworded as follows:

F(3) The plaintiff shall bear the costs of any notice ordered prior to liability being determined, except that the court may order the defendant bear the costs of any notice to current customers or employees included with a regular mailing thereto, or the court may hold a preliminary hearing to determine how the costs of such notice shall be apportioned.

Thank you for your thoughtful consideration of our proposals.

Sincerely,

Phil Goldsmith

PG:rr

cc: Henry Kantor
Committee members

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September 16, 1992

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Re: Proposed Revisions to ORCP 32

Dear Subcommittee Members:

Earlier this year, you recommended that existing ORCP 32 F(2) be deleted. The Committee to Reform Oregon's Class Action Rule agrees that the elimination of mandatory claim forms would be a positive development.

However, if your recommendation is adopted in its present form, the rules of civil procedure would give the trial courts no guidance in exercising their discretion over the selection of damage computation methods in class actions. This concerns us. As explained in our initial submission to the Council, uncertainties over damage computation methods will distort the evaluation of the merits of a case, and thus distort the decision whether to proceed with litigation and settlement discussions if litigation is commenced. See the Committee's letter to Professor Fredrick Merrill dated December 14, 1991 at pages 7-8.

Professor Holland suggested that you might be willing to consider a proposal to guide trial court discretion in this regard. With vacation schedules, it has taken some time to formulate our proposal. I hope we get it to you in sufficient time for you to consider it in advance of the next Council meeting.

Our proposal is designed to provide a comprehensive set of factors for trial courts to consider in selecting damage computation methodologies, while being consistent with the value choices expressed in your report. Please feel free to call me if you have any questions concerning this proposal.

Sincerely,

Phil Goldsmith

PG:rr

F(2) If a defendant is found liable to a plaintiff class in an action for monetary relief, the defendant's obligation to class members shall be determined from its records provided that such records are reasonably accurate and will permit the obligation owed to individual class members to be computed with reasonable effort. Otherwise, the court shall determine the fairest and most efficient method or methods to establish the defendant's obligation to class members after considering the following factors: (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, (d) the availability of relevant information from sources other than individual class members, including the feasibility of using statistical or sampling methods, (e) the anticipated average recovery of class members, (f) the likelihood that class members will have records from which their recoveries can be determined with reasonable effort, (g) the relative accuracy of alternative methods in determining individual class members' recoveries and (h) the relative expense of alternative methods.

Commentary

In determining how to calculate the monetary recovery of individual class members in a successful class action, the court must balance such factors as expense, accuracy of computation, and fairness to the litigants. This proposal attempts to employ the methodology expressed at page 4 of the subcommittee report: "[w]here equitable discretion is the appropriate mode of decisionmaking, rules of procedure should clearly confer that discretion and then seek to control its exercise by enumeration of relevant factors that must be taken into account." It attempts also to follow the views expressed by the subcommittee in its discussion of ORCP 32 F(2) at pages 8-11 of its report. The first four factors in the second sentence are drawn from the third sentence of existing ORCP 32 F(2). This proposal should be understood as allowing a court, when the facts justify it, to use different methods to calculate the monetary recovery of different portions of a class.

State Rules Affording Trial Courts
Discretion in Giving Notice in Damage Cases

The following list is based on 3 Newberg on Class Actions, Appendix 13-2 at 109-183 (2d ed 1985) and March 1992 Cumulative Supplement at 444-457.

Alaska (rule does not discuss notice).

Arkansas (court given discretion over whether and how to give notice).

California (in consumer class actions, court given discretion over whether and how to give notice). Discussed in 3 Newberg on Class Actions, §13.20 at 41 n299.

Connecticut (court given discretion over whether and how to give notice, except in Unfair Trade Practices Act class actions).

Georgia (rule does not discuss notice).

Illinois (court given discretion over whether and how to give notice).

Iowa (court given discretion over how to give notice for individuals with claims under $100).

Kansas (court given discretion over how to give notice except "specific notice" required if class member already involved in litigation with the party opposing the class).

Louisiana (rule does not discuss notice).

Maryland (court given discretion over how to give notice).

Massachusetts (court given discretion over whether and how to give notice).

Michigan (court given discretion over how to give notice).

Nebraska (rule does not discuss notice).

New Jersey (court to give "best notice practicable under the circumstances, consistent with due process of law").

New Mexico (court given discretion over whether and how to give notice).

New York (court given discretion over how to give notice).

North Carolina (rule does not discuss notice).

North Dakota (same rule as Iowa).

Oklahoma (court must give individual notice to 500 class members and given discretion over how to give notice to the remainder of the class).

Pennsylvania (court given discretion over how to give notice).

Rhode Island (court given discretion over whether and how to give notice).

South Carolina (court given discretion over whether and how to give notice).

West Virginia (rule does not discuss notice).

Wisconsin (rule does not discuss notice).

Does Due Process Require Individual Post-Certification Notice to be Given in Class Actions?

It is a fundamental principle of due process that one is not bound by a judgment in litigation unless he or she has received notice of the pendency of the action and has been given an opportunity to be heard. A half century ago in Hansberry v. Lee, 311 US 32, 42-43 (1940), the United States Supreme Court made clear that this rule does not apply to a class or representative suit as long as the members of the class "not present as parties to the litigation * * * are in fact adequately represented."

Historically, whether class members have to be given notice has been determined by court rule. The most common formulation is that contained in the federal rules. These mandate individual notice, following certification of a (b)(3) class action, to all class members who can be identified through reasonable effort, Federal Rule of Civil Procedure 23(c)(2), and give the trial courts discretion over whether, when, how and to whom notice is given in other class actions. Fed R Civ Pro 23(d)(1). There is no question that the drafters of the federal rules believed the notice requirement in Federal Rule of Civil Procedure 23(c)(2) to be dictated by due process. See Eisen v.

Carlisle & Jacquelin, 417 US 156, 173 (1974), quoting from the Advisory Committee on Federal Rules' Note to Rule 23.[1]

However, United States Supreme Court decisions from the 1970's suggested that due process, independent of any court rule, did not require individual post-certification notice. First, in Eisen, the Supreme Court held that individual notice in (b)(3) class actions was mandated by Rule 23 "quite apart from what due process may require." 417 US at 177. In a footnote, the Eisen court carefully pointed out that the rule's individual notice requirements did not extend to actions for injunctive or declaratory relief maintained under rule 23(b)(2). The next year, in Sosna v. Iowa, 419 US 393, 397 n 4 (1975), the Supreme Court reiterated this point by stating that "the problems associated with a Rule 23(b)(3) class action, which were considered * * * in Eisen * * *, are not present in this case" because it was a (b)(2) class action.

By the early 1980s, the proposition that due process did not require individual post-certification notice seemed so clear that, in Tolbert v. First National Bank, Multnomah County Circuit Court Case No. A8004-02328, Judge Riggs refused to allow the bank to take an interlocutory appeal from his ruling that individual notice need not be given to class members who no longer maintained accounts with the defendant. Order Re Motion to Amend Pursuant to ORS 19.015 (dated March 23, 1983). See also

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[1] It is this language which R. Alan Wight quotes at page 3 of his letter to the Council dated July 29, 1992.

1 Restatement (Second) of Judgments, §41 (as a general rule, class members are bound by a class judgment even if they had no notice of the action).

The Supreme Court's subsequent decision in Phillips Petroleum Co. v. Shutts, 472 US 797 (1985), has clouded the waters. Shutts was a class action for money damages filed in Kansas state court. Many class members had no prelitigation contact with Kansas. Phillips argued that Kansas could exercise jurisdiction over those absent class members only if they consented (i.e., opted in the case).

The relevant holdings of Shutts appear in the context of addressing the circumstances under which a state can constitutionally exercise jurisdiction over the claims of out-of-state class members. Specifically, the Supreme Court held that "the forum State * * * to bind an absent plaintiff concerning a claim for money damages or similar relief at law" had to "provide minimal procedural due process protection." 472 US at 811-812. Among other things, the class member had to "receive notice plus an opportunity to be heard" and had to be given the right to opt out of the case. Id. at 812. The court limited its holdings to "claims wholly or predominately for money judgments" and "intimate[d] no view concerning other types of class actions, such as those seeking equitable relief." Id. at 811-812 n 3.

The lower courts have been divided in their interpretation of Shutts. Some have held or suggested that it only addressed the acquistion of jurisdiction over class members

who do not have minimum contacts with the forum, and therefore does not apply to class members who are residents of the forum state.[2] E.g., Battle v. Liberty National Life Ins. Co., 770 F Supp 1499, 1517-1518 n 51 (ND Ala 1991); Bell v. American Title Insurance Co., 226 Cal App3d 1589, 277 Cal Rptr 583, 596-597 (1991). See also, 7B Wright, Miller & Kane, Federal Practice and Procedure: Civil, §1789 at 255 (2d ed 1986) ("[t]he [Shutts] criteria properly viewed seem to provide a means of meeting due process standards when traditional personal jurisdiction standards do not apply").

Conversely, one court has read Shutts as holding that due process requires individual post-certification notice to be given in damage actions, and vacated a judgment in favor of a class of forum residents who had not been given notice. Workman v. Nagle Construction, Inc., 802 P2d 749 (Utah App 1990). The courts have unanimously held that Shutts' due process requirements do not apply to class actions seeking injunctive or other equitable relief, even for class members lacking minimum contacts with the forum state. E.g., Woodrow v. Colt Industries,

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[2] Although Mr. Wight's letter to the Council dated July 29, 1992, at pages 4-5 suggests that state court class actions usually involve plaintiffs who are residents of multiple states, the Oregon Court of Appeals has narrowly interpreted the circumstances in which an Oregon court can adjudicate claims of non-residents. Powell v. Equitable Savings & Loan Assn., 57 Or App 110, 643 P2d 1331, rev denied, 293 Or 394 (1982). See also, Tolbert v. First National Bank, Multnomah County Circuit Court Case No. A8004-02328, Class Certification Order at 4 (limiting class to Oregon residents).

77 NY2d 185, 565 NYS 2d 755, 566 NE2d 1160 (1991); Nottingham Partners v. Dana, 564 A2d 1089, 1097-1101 (Del 1989).

In summary, at present, there is a substantial argument that due process does not generally require individual post-certification notice.

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September 18, 1992

Maury Holland
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Re: Proposed Changes to ORCP 32

Dear Professor Holland:

You have already received a substantial amount of written material and heard much testimony on these matters. Consequently, this letter -- written on behalf of the Committee to Reform Oregon's Class Action Rule -- will limit itself to two issues.

First, it will address the post-certification notice question, focusing on the practical problems created by mandatory notice and showing that your subcommittee's proposal is consistent with rules in a number of jurisdictions. Then it will briefly discuss the elimination of claim forms.

Notice issues

When a class action involves a large number of people, each of whom has suffered a small injury, the cost of the post-certification notice required by ORCP 32 F(1) in a B(3) class action can be staggering. For example, in Best v. United States National Bank and Tolbert v. First National Bank, plaintiffs' counsel paid nearly $25,000 for the publication of notice to class members. Had the court instead ordered notice sent by first class mail, the cost would have been in the hundreds of thousands of dollars.

My discussions with other Oregon lawyers who handle class actions indicate there is only one firm which would consider a case with notice costs of even $25,000. This is because notice costs are on top of all the other expenses in ordinary contingent litigation, all of which themselves are likely to be increased because of the additional procedural requirements in a class action.

At your last meeting, I was asked how many potential cases I had turned down in the last five years because of notice costs. I identified and described one such case. You should also know that notice costs were one of the factors in my decision to reject several other cases during that time. Also, you should know that, in the last five years, I have filed only two class actions, both of which were brought under ORCP 32 B(2) so that the giving of notice was discretionary with the court.

The experience of other plaintiffs' lawyers is similar. For example, in the last eight years, LaBarre & Associates has filed one class action and that for a class with under 500 members.

The subcommittee's proposal would address this problem by giving trial courts discretion over the manner and timing of notice in all class actions, rather than (as now) just B(1) and B(2) actions. Some of you, however, may be concerned that taking this step will either violate due process or make Oregon unique.

For those of you concerned about due process, I enclose an analytical memorandum showing there is a substantial argument that due process does not require an Oregon court to give individual post-certification notice to Oregon residents. According to Newberg on Class Actions, there are 16 states whose rules afford trial courts discretion over whether or how to give notice in damage class actions and seven states which have no notice rule. A listing of these states is enclosed.

The minority report points out a minor difference between the subcommittee proposal and the draft before the Advisory Committee on Federal Rules. The latter would amend Fed R Civ Pro 23(c)(2) to require post-certification notice pursuant to Fed R Civ Pro 23(d)(2), under which "notice [is to] be given in such manner as the court may direct to some or all of the members" of the class. In other words, the difference is that your subcommittee correctly contemplates some circumstances where a court should have discretion to give no notice at all, such as Judge Haas' certification of a class for declaratory and injunctive relief in State ex rel Benzinger v. Oregon Department of Insurance and Finance, Multnomah County Case No. A9102-01201, after his decision on the merits had already been affirmed on appeal.

It is the notice proposal in the minority report which is a great departure from existing law. Only Texas today requires post-certification notice in cases which fall under

present ORCP 32 B(1) and B(2). The minority report would create the same financial impediment for injunctive relief cases on behalf of a large group of people -- usually to block wrongful government action -- as presently exists for damage actions.

By making ORCP 32 F(1) applicable to all class actions, the minority report would also create the right for class members to opt out of any case to bring their own action. See existing ORCP 32 F(1)(b)(ii). However, one universally-recognized criterion for class certification is when multiple actions would create the risk of "[i]nconsistent or varying adjudications * * * which would establish incompatible standards of conduct for the party opposing the class." Existing ORCP 32 B(1)(a). At least in that circumstance, granting the right to opt out would defeat the whole purpose of the class action.

Claim forms

At your last meeting, some concern was expressed that the subcommittee's proposal to eliminate existing ORCP 32 F(2) and (3) and thereby delete the mandatory claim form requirement involves a substantive decision beyond the powers of the Council. It may be of benefit to know that the Attorney General has issued an opinion holding that such a decision is a matter of procedure and therefore within your jurisdiction. 41 Op Atty Gen 527 (1981).

If you accept the subcommittee's recommendation to eliminate the mandatory claim form requirement, it would seem appropriate to establish criteria to guide the trial court's discretion in selecting the method of calculating the recovery of class members. Earlier this week, I sent such a proposal to subcommittee members and enclose a copy of it, together with my letter of transmittal. Since then, I have received a helpful suggestion from one Council member to delete all text in the second sentence beginning with the words "after considering the following factors" through the end of the sentence.

Additional information

Please feel free to call me if there is anything in any of our materials which you have questions about or would like to discuss. I will also be in attendance at the September 26 Council meeting.

You should also be aware that Professor Laird Kirkpatrick of the University of Oregon Law School, who has written on class actions and was a member of the 1980 Council which last addressed ORCP 32, is willing to discuss with individual members of the Council how the current proposals relate to what the 1980 Council did or other issues related to these proposals. Because Professor Kirkpatrick has a deadline later this year for a multi-volume treatise on federal evidence, he will be unable to provide written comments for the Council.

Sincerely,

Phil Goldsmith/rr

Phil Goldsmith

PG:rr
Enclosure

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November 5, 1992

Janice Stewart, Chair
Class Action Subcommittee
Council on Court Procedures
1100 SW Sixth, Suite 1600
Portland, OR 97204 (Via Hand Delivery)

Re: Proposed Revisions to ORCP 32

Dear Janice:

I appreciate having had the opportunity to talk with you after the October Council on Court Procedures meeting about the class action notice issue. As I think I told you, this discussion gave me insight into a way of redrafting our committee's proposal to accomodate your concerns.

Since that time, I have circulated the redrafted language to the members of our committee as well as to Bernie Thurber, Darcy Norville and Dick Baldwin. I received no negative feedback.

Accordingly, I enclose an alternative to the version of ORCP 32 F(1) which our committee proposed and the majority of your subcommittee recommended. The highlighted and lined-through language represents the ways in which this alternative differs from our earlier proposal.

If you can accept this language (or you and I can agree to further revisions), the next step would be to circulate it to the other members of the subcommittee to see if they also are willing to modify their position in the interest of simplifying the issues which the full Council will need to decide at the November 14 meeting.

After you have had an opportunity to consider this proposed compromise, let me know what you think.

Sincerely,

Phil Goldsmith

PG:rr

P.S. I will be able to attend our Stanford reunion this weekend.

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 ~~whether when,~~ and how this notice should be given ~~under subsection E(2) of this rule~~ 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.

May 26, 1992

M E M O R A N D U M

TO: Janice Stewart, Chair, and Mike Phillips, member, CCP Subcommittee on Class Actions

FROM: Maury Holland, member of the subcommittee

RE: The 1980 Proposed Amendments to ORCP 32

My assignment in preparation for the June 13 meeting was to summarize the amendments to ORCP 32 promulgated by the Council in 1980, to check back on the fate of those amendments in the 1981 Legislature, to ascertain the official position taken by the Oregon Attorney General where pertinent, and to compare the 1980 amendments with those currently under consideration. This memo is divided into two parts. Part I summarizes the amendments promulgated in 1980, indicates the responses thereto respectively of the Legislative Assembly and the Oregon Attorney General, and describes their counterparts among the current proposals. In contrast to the prospective focus of Part I, Part II identifies for each of the current proposals the corresponding 1980 amendment and reiterates the respective responses of the Legislative Assembly and the Attorney General, if any. In general I have limited this memo to matters having some procedural substance, if that is not a contradiction in terms, and exclude matters merely of drafting detail.

I. Part I - the 1980 Amendments to ORCP 32 et al

1. Elimination of Thirty-Day Prelitigation Notice to Putative Defendant(s) - Deletion of then R. 32 I (now R. 32 H) with conforming elimination of R. 32 A(5) and amendments of then-R. 32 J (now R. 32 I) and R. 432K (now R. 32 J). This amendment was rejected by the 1981 Legislature by re-enactment of the pre-amendment language, 1981 Oregon Laws, ch. 912, Sec. 1. These amendments were not addressed in the AG opinion, 41 Op. Att. Gen. 527 (1981). There is nothing corresponding to this among the current proposals - the minor amendment that is proposed to R. 32 H(1) is merely to conform to other proposed changes not directly related to the prelitigation notice requirement.

2. Revision of factors to be considered in deciding predominance of common questions of law or fact, by deletion of R. 32 B(3) (d) and (e). The principal purpose of this amendment was to obviate the requirement of mandatory notice to class

members applicable to B(3) damage class actions. This was not addressed by the AG opinion, but was totally rejected by the 1981 Legislature. This effort is revived among the current proposals (see pp. 4-7 of the Goldsmith 12/4/91 letter) that call for amendments to R. 32 B and 32 F that would transform the issue of notice to class members in 32 B(3) "damage" class actions from being a matter mandated by rule to a matter discretionary with the court on a case-by-case basis, as is true with class actions involving only injunctive or declaratory relief.

3. Former R. 32 C was eliminated as superfluous. The rule thus deleted provided: "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." This amendment was not addressed in the AG opinion and was not disturbed by the 1981 Legislature. Naturally, it has no counterpart among the current proposals.

4. Clarification of former R. 32 G(4) by substituting "postponement" for "stay" and transfer to present R. 32 C(2). This was not addressed in the AG opinion and was not disturbed by the 1981 Legislature. Naturally, it has no counterpart among the current proposals.

5. Elimination of required notice to individual class members except those whose recoveries were estimated to be more than $100 or more, by amending then-R. 32 G, now R. 32 F. Not addressed in AG opinion, but rejected by the 1981 Legislature which, if anything, enacted more exacting notice requirements than those pre-existing the Council's promulgated amendment. The counterpart among the current proposals is the proposal to amend R. 32 F(1), E, and M to give courts discretionary authority to determine the form and method of notice to class members regardless of which of the R. 32 B categories a given class action comes within.

6. Elimination of mandatory requirement of claim forms being filed by class members in damage class actions by amending "the court shall" to "the court may" in then R. 32 G(2), now R. 32 F(2). This amendment was addressed in the AG opinion, which concluded that it was validly within the rule-making power of the Council, in large part because it merely removed some procedural barriers to "fluid recovery," while not "authorizing" such recovery, 41 Op. Att. Gen. 527, at 527-28 and 532-539 (1981). It was, however, wholly rejected by the 1981 Legislature, which re-enacted the present claim form requirement of present R. 32 F(2). Its counterpart among the current proposals is to amend present R. 32 F(2) and (3) so as to make the claim form procedure discretionary with the court rather than mandated by rule. This proposed discretionary procedure would be after a finding of

liability and costs of notice for this purpose would be assessed against defendant(s).

7. Authorization to courts to shift to defendant(s) some or all of costs of initial notice to class members following a "preliminary hearing" at which it is determined that plaintiffs are "likely to prevail," but prior to ultimate determination that defendant is liable. This amendment was wholly rejected by the 1981 Legislature. The AG opinion somewhat tentatively opined that this provision was "probably" beyond the rule-making authority of the Council, since it was determined to affect a substantive right, 41 Op. Att. Gen. 527, at 528, 539 (1981). The current proposals do not include any that would authorize shifting costs of notice to defendant(s) prior to a determination of liability, see proposed R. 32 F(3), beyond what present R. 32 F(4) authorizes, i.e., notice to current customers or employees of defendant included with a regular mailing by the latter.

8. Regulation of attorney fees by amendment of then-R. 32 O, now R. 32 N. This was not addressed in the AG opinion and was not disturbed by the 1981 Legislature which, in fact and for some reason, probably because of some concern that it touched upon substantive rights, enacted the amendment in the form promulgated by the Council and now set forth in R. 32 N. The amendment currently proposed to R. 32 N(1)(b) goes beyond the corresponding 1980 proposal in that the former would bar shifting defendant attorney fees even against class representatives, irrespective of any other provision of law, "except as a sanction." {N.B: My personal opinion is that, among all of the current proposals, this is the one most likely to elicit a challenge, in the Legislature or elsewhere, as exceeding the authority of the Council to make or change rules without affecting substantive rights.}

9. Amendment of what is now R. 32 O to clarify effect of pendency of class action on running of limitations against individual claims of class members. In promulgating this amendment, the Council conceded that it might exceed its rule-making authority as impinging upon substantive rights, and therefore invited the 1981 Legislature to enact the amendment as a statute, which the Legislature in fact did. Not addressed in AG opinion. There is no counterpart among the current proposals.

II. Part II - The Current Proposals

1. The current proposals include no counterpart to the 1980 amendment deleting present R. 32 H(1) imposing a thirty-day prelitigation notice to putative defendant(s) requirement. As noted above, this amendment was overridden by the 1981 Legislature.

2. The current proposal to create a "unitary" class action by amendments to R. 32 B, E, F(1) and M. The principal purpose of these amendments is to move away from the present tripartite classification scheme under present R. 32 B, so that a variety of procedural consequences do not automatically and mandatorily follow upon a determination as to which category a given class action falls within. The most important of these is the present requirement, applicable only to damage class actions falling within R. 32 B(3) that individual notice be given to all class members who can be identified with reasonable effort. These proposals would convert R. 32 B from being a somewhat rigid tripartite classification system, with important, expensive and burdensome notice requirements turning upon a supposedly clear distinction between R. 32 B(3) class actions and all other categories, into an enumeration of factors arranged along a more or less continuous spectrum ranging from the most compact to the least compact kinds of class actions. The main thrust of the current proposal in this regard is essentially the same as that sought to be embodied in the 1980 amendment promulgated by the Council but rejected by the Legislature, although the former strikes me as more elegantly drafted.

3. Another important amendment to R. 32 B(3) currently proposed would eliminate the apparently flat prohibition on class certification of damage actions unless the court determines that the only issues likely to require separate adjudication with respect to claims of class members relate solely to damages, and not, for instance, to affirmative defenses that might be applicable to some but not all individual claims. There was no counterpart to this among the 1980 amendments.

4. A modest but useful proposal among those currently under consideration would amend R. 32 C(1) to make clear that courts could certify for class treatment some, but not all claims or issues in a given case. There was no counterpart to this among the 1980 amendments.

5. R. 32 D would be amended to make clear that no action filed as a class action, as opposed to one that has been so certified, may be dismissed without approval of the court and compliance with such notice requirements as the court might direct. There was no counterpart to this among the 1980 amendments.

6. R. 32 E(1) is proposed to be amended to make clear that in an action filed as a class action, but prior to certification as such, a court has authority to grant judgments on the pleadings or summary judgments in the ordinary fashion. There was no counterpart among the 1980 amendments.

7. R. 32 E(2) is proposed to be amended to the effect that such notice to putative class members as a court might direct can

include an opt-out provision. There was no counterpart among the 1980 amendments.

8. A clarifying amendment to R. 32 E(3) is proposed that would make clear that "conditions" may be imposed upon class members as well as representative parties and intervenors. There was no counterpart among the 1980 amendments.

9. Important reworking of R. 32 F(1) to provide that all questions respecting notice to class members are within the discretionary authority of the court, with factors to be considered being enumerated. The 1980 counterpart, which was rejected by the 1981 Legislature, would have merely dispensed with mandatory notice to those class members whose recoveries were estimated not to exceed $100.

10. It is proposed to facilitate fluid recovery by making the requirement of present R. 32 F(2) that claim forms be requested optional with the court rather than mandatory. This proposal goes beyond the 1980 counterpart, which was rejected by the 1981 Legislature, in that the former would expressly provide that "the . . . judgment shall consist of the total obligation to the class," rather than, as currently provided, that the judgment may not exceed the aggregate amount claimed in filed claim forms. {N.B. My personal view is that rules of procedure ought not deal with the measure of recovery. This is an objection that can just as well be raised against the present language of the rule as to the proposed language, unless the fact that the Legislature enacted the present rule obviates any objection based upon the appropriate scope of procedural rules in contrast to one based upon the special limitations on the Council's rule-making authority.} The 1980 counterpart to this current proposal was determined to be within the Council's rule-making authority, but the 1980 formulation simply removed the claim form procedure without specifying anything about any limit on recovery or calculation of the amount of the judgment.

11. R. 32 F(2) is further proposed to be amended to provide that prior to entry of judgment, but after a finding of liability, the defendant can cause notice to be given to class members, at defendant's expense, in order to contest proposed individual recoveries. The 1980 counterpart to this proposal, rejected by the 1981 Legislature and determined in the AG opinion to be "probably" beyond the rule-making authority of the Council, was more radical in that it would have allowed partial or total shifting of costs of initial notice to class members to defendants prior to a determination of liability, based only on a preliminary hearing at which it is determined that plaintiffs are likely to prevail. {N.B. The rationale of this particular proposal is not clear to me, although it is obviously meant to fill the vacuum left in the event the claim form procedure is jettisoned. What in particular is not clear to me is whether a

defendant who was willing to pay for this kind of notice in order to contest individual recoveries might thereby limit the total judgment against it to the aggregate of all individual recoveries. The language proposed does not seem to contemplate this result.}

12. The proposed amendment to R. 32 G is simply in the interest of better draftsmanship. There was no counterpart among the 1980 amendments.

13. Proposed amendments to R. 32 M are mostly technical and conforming to the proposed abolition of mandatory individual notice in B(3) class actions. There was no counterpart among the 1980 amendments. {N.B. I am right now having some difficulty understanding the concept of "those who, as a condition of exclusion, have agreed to be bound by the judgment."}

14. Proposed amendment to R. 32 N(1)(b) to effect that attorney fees of a prevailing defendant can be awarded against certain parties "only if assessed as a sanction." No counterpart among the 1980 amendments. [N.B. This seems like a trivial matter, but could it not be a bombshell? If some law outside of ORCP gave prevailing defendants the right to have some or all of their reasonable attorney fees awarded against plaintiffs, would not it affect a substantive right were R. 32 N(1)(b) to preclude such award except under special circumstances?]

cc: Henry Kantor

July 3, 1992

TO: MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Subcommittee on Proposed Changes to Class Action Rule (ORCP 32), Janice Stewart, Chair, Mike Phillips and Maury Holland, Members

RE: Recommended Amendments for Consideration at 8/1/92 Meeting of Council

For the past six months this subcommittee has been considering proposed amendments to the class action rule, ORCP 32, focusing specifically on a set of proposals forwarded to Fred Merrill by letter dated December 14, 1991 by "an ad hoc coalition of law firms and lawyers" styling itself the "Committee to Reform Oregon's Class Action Rule" [hereinafter the "Committee"]. A copy of the Committee's proposals, together with its Comments thereon, is appended as Attachment A to this memo. The Committee's proposals were largely modeled upon a "Report and Recommendations of the Special Committee on Class Action Improvements" from the ABA Section of Litigation, 110 F.R.D. 195 (1986), which were submitted with Comments to the Advisory Committee on the Federal Rules of Civil Procedure, but which have not yet been transmitted to the Standing Committee on Rules of Practice and Procedure. A copy of this report and recommendations is appended as Attachment B to this memo. The Committee's proposals were also, albeit to a considerably lesser degree, modeled upon proposals of the Advisory Committee on the Federal Rules of Civil Procedure to amend the federal class action rule, F.R.Civ. P. 23, which have not yet been formally transmitted for approval to the Standing Committee. A copy of these proposals, with Notes, is appended as Attachment C to this memo.

At the Council's August 1 meeting this subcommittee will recommend that the Council tentatively approve and adopt the amendments proposed by the Committee with, however, some substantial modifications devised and favored by the subcommittee. Part One of this memo sets forth this subcommittee's comments on the amendments to ORCP 32 as proposed by the Committee. Part Two of this memo sets forth the modifications of the Committee's proposed amendments that are favored by this subcommittee, together with commentary setting forth our reasons for the suggested modifications.

PART ONE

1. We concur with the deletion of language in ORCP 32 A(5) as indicated in the proposal because this deletion is needed to conform this rule to ORCP 32 B as proposed to be amended.

2. ORCP 32 B is proposed to be extensively amended for the reasons stated on p. 12 of Attachment A and pp. 203-08 of Attachment B, with which we are in substantial agreement. The thrust of these proposed amendments is to abolish the sharply differentiated notice requirements mandated by present ORCP 32 F(1)(a) for class actions maintained under ORCP 32 B(3), that is, actions aggregating large numbers of individual claims for money damages. Historically, this type of class action was once known as a "spurious" class action because it did not conform to the patterns known to classical equity jurisprudence, wherein either the predominant form of relief sought was injunctive or declaratory (e.g., ORCP 32 B(2)) or where there were pre-existing legal or factual interrelationships among class members (e.g., ORCP 32 B(1)(a) and (b)), such that joinder of some or all class members would be required as parties needed for just adjudication (see ORCP 29).

The reasons for the historically cautious, even hostile attitude toward class actions that "merely" effect limited joinder of large numbers of money damages actions claims might otherwise be brought by individual claimants were both philosophical and procedural. The philosophical objections were that allowing this type of class action, in the absence of the special equities inhering in the types historically known to equity, would encourage class representatives, or more particularly their "aggressive" lawyers to initiate or "stir up" litigation that would otherwise not be brought, usually because the modest amounts of individual claims would not make it economically worthwhile to do so, or because many potential claimants would never be aware of the existence of possible claims unless "recruited" as class members into a "Frankenstein monster" of a class action. The procedurally oriented skepticism about aggregated money damages class actions derived from due process concerns about the possibility of res judicata foreclosure of individual claims held by people who might prefer to prosecute individual actions on their own, with a lawyer of their own choice and in a forum of their own choosing. There were also expressed serious concerns about possible conflicts of interest between class representatives and their attorneys on the one hand, and normally quite passive class members whose interests were feared might be sacrificed in one or another fashion on the other. These concerns have led to special procedural requirements, both in present ORCP and in its federal counterpart, F.R.Civ. P. 23, for the protection of putative class members, primarily in the form of mandatory Mullane-type

individual notice to all class members who can be identified with reasonable effort, combined with the unconditional option on the part of any class member to "opt out," and thus to be unaffected by the outcome of the class action. This requirement of individual notice to class members has proven to be a major practical impediment to maintenance of many damages class actions, since its costs, which can amount to several hundreds of thousands of dollars, must be "fronted" by the class representatives or their attorneys.

In addition to special notice requirements, present ORCP 32 B(3) imposes a special prerequisite to certification of money damages class actions to the effect that the court must find that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, . . ." and precludes such a finding if the court determines that separate adjudications of any matters apart from amounts of damage recoveries are likely to be required. The Committee's proposal would convert this "predominance" question from a required finding to merely one among the other factors enumerated in ORCP 32 B(3) as bearing upon the decision whether to certify the action. Its proposal would transfer the "superiority" requirement presently contained in ORCP 32 B(3) ("[A]nd that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.") to ORCP 32 B, thus making what we regard as the ultimate question bearing upon certification pertinent to all class actions rather than merely to money damage actions.

This subcommittee agrees with each of these proposed amendments and the essential reasoning in support of them in the Comments of the Committee and those of the Special Committee of the Section of Litigation (see pp. 12-16 of Attachment A and pp. 203-08 of Attachment B). Mandating Mullane-type notice (referring to Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)) where the Supreme Court held that due process requires, in any proceeding where property rights might be affected, individual notice to each person whose rights might be affected, where and to the extent that is reasonably possible), together with the concomitant right of unconditional opting out on the part of class members, only in class actions determined to come within ORCP 32 B(3), but in no others, seems to us to be unwise and unnecessary in a set of procedural rules. Doing so conduces to distracting and needless litigation at the trial level, often to be renewed on appeal, about a matter of categorization. The difficulty with making important consequences turn upon crudely defined categories contained in procedural rules is that the actual distinctions among class actions are too nuanced and multifarious to be captured adequately in this abstract and generalized fashion. It is better, we think, to allow relevant distinctions across the spectrum of class actions to be ascertained by trial judges on a

case-by-case basis and, subject to the minimum requirements of constitutional due process, to confer upon them broadly discretionary authority to order whatever procedural safeguards seem called for in light of the particular circumstances presented.

We believe that rules of procedure should provide clear-cut rule-oriented commands and prohibitions about the more mechanical aspects of procedure with respect to which lawyers and judges are best served by being clearly informed in advance of litigation, and during its progress, what is required, what is prohibited, and how certain things must be done. Examples of these include most things about pleadings, the form of motions, discovery, methods of preserving error and taking appeals, etc. Rule-oriented commands and prohibitions are also most suitable for matters amenable to uniformity of treatment across the entire spectrum of civil litigation.

This is certainly not a characteristic of modern class action litigation. Where, as we believe is the case with the issue of the elaborateness, timing and content of notice to class members in class actions, equitable discretion is called for, rules of procedure should expressly confer that discretion, usually in accompaniment with an enumeration of factors to be taken into account. That is essentially what these proposed amendments do. Apart from considerations of fourteenth-amendment due process, discussed below, in devising rules for something as complex, multifaceted and multifarious as class actions, the rule-maker should maximize the element of judicial discretion and minimize hard-and-fast requirements that cannot take account of the myriad facts and circumstances likely to arise in this context. The present ORCP 32 assumes that each of the types of class action it authorizes exists in something akin to watertight compartments, that in particular the aggregated damages action provided for in 32 B(3) is clearly distinguishable from the other categories, and that invariably in the former much more elaborate and expensive procedural protection of class members is required than in the latter. Freed from the straightjacket of present ORCP 32 B, a trial judge might well conclude that, in a case where full compliance with Mullane-type notice requirements would doom a given class action because of high costs, adequate protection could be afforded, given all the facts and circumstances, such as the average dollar amount of claims, by something less, such as individual notice to selected claimants perhaps combined with notice by publication. The larger question presented by these amendments is whether the issues regarding form of notice and opting out are better decided by trial judges in light of all the facts and circumstances of a given case, trial judges who will typically have the benefit of counsel possessing both motivation and skill probably above the general level of trial counsel, or by rule-makers on the basis of a necessarily general and imprecisely delineated classification

scheme. It is important to bear in mind that nothing about the proposed amendments prevents judges from exercising their equitable discretion to order the full panoply of procedural protections for class members that are presently prescribed for class members in aggregated damage actions either when, as discussed below, that is determined to be constitutionally required by fourteenth-amendment due process, or when, after weighing benefits against costs, they determine that all of those protections are indispensable to ensure fundamental fairness to class members.

In light of the decision of the U.S. Supreme Court in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), it is clear that fourteenth-amendment due process presently mandates Mullane-type notice, including individual notice to each class member who can be identified and whose address can be ascertained by reasonable effort, presumably supplemented by notice by means of publication, in aggregated damage actions corresponding to those provided for by ORCP 32 B(3). That being so, some might question the wisdom of a rules amendment that would make discretionary certain procedural safeguards that the fourteenth amendment makes obligatory, and ask whether such an amendment would not constitute an invitation, or at least a trap, for Oregon trial judges to commit constitutional error.

This subcommittee, however, agrees with the Committee and the Special Committee of the Section of Litigation that evolving constitutional doctrine ought not be codified in rules of procedure. We are confident that judges and lawyers in this state fully understand that multiple sources of law often bear upon the resolution of various issues presented in the course of litigation, and will not automatically assume that giving notice, with or without an opt out election, is merely discretionary as determined by all of the controlling law simply because it would be discretionary under ORCP 32 as proposed to be amended. To further safeguard against any unwary lawyers or judges falling into such a trap, however, it would be clearly called for, if these amendments are adopted, that the Staff Comment alert them to the possible bearing that fourteenth-amendment due process might have on notice and related matters.

Some might still object that, if fourteenth amendment due process as currently interpreted requires notice, and possibly an opt-out election, in aggregated money damage class actions, what sense does it make to jettison the present form of ORCP 32, which imposes the same requirements in favor of an amended rule that, within its four corners, would countenance possibly unconstitutional procedure. A sufficient response, we believe, is that the requirements of fourteenth amendment due process emanate from evolving case law handed down by the U.S. Supreme Court. Even if it could be assumed that the notice requirements currently imposed by due process as announced in Shutts

correspond precisely with the notice and opt-out provisions of present ORCP 32, to "codify" (i.e., by retaining the latter in place) them as they exist at one particular point in time does not make good sense to us. If, as we believe, the proposed amendments make good sense as rules of procedure, the Council should promulgate them and allow due process doctrine to evolve as it will.

In addition to whatever possibility exists of future evolution of due process constraints, including the possibility of their being relaxed, an important added consideration is that Shutts characteristically leaves many issues regarding notice and opting out unanswered. Apart from choice-of-law, the issue decided by the Court in Shutts was whether, consistent with fourteenth-amendment due process, a Kansas state court could exercise in personam jurisdiction over the bulk of plaintiff class members lacking "minimum contacts" with Kansas. The Court answered that it could because Kansas procedure provided, not merely for Mullane-type notice, but also for the unconditional opportunity of class members to opt out of the action, which made the exercise of jurisdiction consensual, thus dispensing with any need for minimum contacts. The Court expressly reserved the question of whether notice alone, or notice combined with an opt out election, might be constitutionally required in other kinds of class actions. The opinion also did not address the issue of what might be required by way of notice or opportunity to opt out as applied to class members who are residents of the forum jurisdiction or who otherwise have minimum contacts with it. Our best guess is that Mullane-type notice, but not necessarily an unconditional opportunity to opt out, would be required respecting class members who are forum residents. However, rather than codifying our, or anyone's best guess, as to how these issues might be resolved over time, it is surely better to await developments from the Supreme Court. Shutts also left unresolved all issues regarding what fourteenth amendment due process might require by way of notice in the context of defendant class actions.

3. We agree with the proposed deletion of ORCP 32 B(3)(f), since this matter is better addressed in the language proposed to be added to ORCP 32 E(1).

4. We support the proposed deletion and addition to ORCP 32 C(1) on the ground that there seems no good reason to limit the requirement of specific findings and conclusions relating to certification to B(3) class actions, and in the interest of making clear that certification might be limited to fewer than all claims or issues presented by the action as filed.

5. We have not, at this writing, reached a final judgment about the advisability of the revisions proposed by the Committee to ORCP 32 D, but expect to do so by the August 1 meeting. Our

doubts concern whether it is wise to trigger the rather cumbersome procedures relating to dismissal or settlement on the basis of an action having been merely filed as a class action as opposed to have been certified as such.

6. We support the language proposed to be added to ORCP 32 E(1) in the interest of making clear that motions for dismissal on the pleadings or summary judgment can, under appropriate circumstances, be disposed of prior to the judge reaching the issue of certification.

7. With one minor exception, we support the additions and deletions proposed to ORCP 32 F(1), which are the correlatives of the amendments proposed to ORCP 32 B relating primarily to mandatory as opposed to discretionary notice, discussed in 2 above. The minor exception is that we think the word "determination" should be changed to "determinations," since the determination regarding notice is distinct from, though often related to, the determination regarding the exclusion option. The list of specifics regarding the content of notices detailed in the present ORCP 32 F(1)(a)-(h) relate only to B(3) class actions, with questions relating to the timing, content and method of affording notice in all other kinds of class actions being remitted, pursuant to ORCP 32 E(2), to the sound discretion of the trial judge. Extending that discretion to all matters regarding notice, regardless of typology, seems to us most consistent with the general thrust of the amendments proposed to ORCP 32 B that envision a unitary class action. This does not mean that different sorts of class actions will not call for different procedures and handling. Rather, the underlying thought behind the concept of a unitary class action is that the myriad differences among class actions are too subtle and too multifarious for them to be captured or provided for in a procedural rule of general application. A class action rule, therefore, should confer a wide ambit of discretionary authority by which trial judges can take account of and respond to the kaleidoscopic distinctions among class actions that inevitably arise. These proposed revisions give as much guidance as is consonant with necessarily broad discretion controlled by enumerated pertinent factors. Naturally, in this as with other exercises of trial judge discretion generally, appellate review according to the abuse standard will be available to litigants believing themselves aggrieved. We think the Council should also have in mind that it is in the nature of class actions that counsel for both sides are likely to be unusually motivated to lend constructive, and most often expert, assistance to trial judges as the latter confront discretionary decisions relating to notice, exclusion and other like matters.

8. The additions and deletions proposed to ORCP 32 F(2) will be discussed in Part Two of this memo, since we have serious disagreements with those proposals.

9. We agree with the proposed deletion of ORCP 32 F(3) on the ground that this is a matter best left to the trial judge's discretion.

10. We concur with the thrust of the amended language proposed to ORCP 32 F(4), but suggest the following revised wording simply in the interest of clarity:

> "F(3) The plaintiff shall bear the costs of any notice ordered prior to liability being determined, except that the court may require at any point in the proceeding that the defendant bear the cost of notice to current customers or employees if included with a regular mailing to them by a defendant, or the court may hold a preliminary hearing to determine how the costs of such notice shall be apportioned."

11. We support the revision proposed to ORCP 32 C(1) and deletion of C(2) as surplusage in light of that revision.

12. We support the revisions proposed to ORCP 32 M, except we suggest that the final sentence read: "If a money judgment is entered in favor of a class, the judgment shall where possible specify . . . ." etc.

PART TWO

1. We recommend that, rather than being extensively amended as proposed on p. 6 of the Committee's submission, ORCP 32 F(2) be repealed in its entirety. F(2) is the notorious "claim form" provision, which is not part of the federal class action rule or, according to our best information, of the class action rule of any other state. We are familiar enough with the ways of Oregon to understand that this, by itself, is not a sufficient argument as to why it should not remain a part of our rule. Nevertheless, we are persuaded that sufficient reasons do exist for dropping this claim form procedure, which the present rule makes mandatory in any money judgment class action maintained under ORCP 32 B(3), which will no longer exist as a distinct category if the amendments proposed to that rule and to ORCP 32 F(1) are promulgated by the Council. As with notice, the proposed amendments would not deprive trial judges of their authority to require submissions of claim forms, or their functional equivalent, at any point in the proceeding should they determine that step required in the interest of fairness or efficiency.

Jettisoning of the claim form procedure was perhaps the most controversial of the amendments promulgated by the Council in 1980 and overridden by the 1981 Legislature. The members of the ad hoc group that submitted the current proposed revisions opine

that, with the ensuing decade of greater experience with class actions across the nation, the 1993 Legislature might well decline to override an amendment promulgated by the Council dropping the mandatory claim form procedure. They might or might not be correct about this, but, at the least, substantial controversy and opposition should probably be anticipated. That should not, however, deflect the Council from exercising its best judgment on what, in its considered opinion, constitutes soundly devised civil procedure.

Insistence upon retention of the claim form procedure is, of course, the opposite side of the coin from resistance to what is loosely called "fluid recovery." This reflects the perfectly respectable view that the legitimate purpose of private civil litigation is to provide an appropriate remedy, most often in the form of money damages, to specific people who as plaintiffs claim and prove legal injury. According to this view, when a class action results in a judgment in excess, sometimes far in excess of any damages that can be identified and awarded to injured parties, at that point, unless the excess is returned to the defendant, private civil litigation assumes the illegitimate function of punishing defendants for their wrongdoing, which is properly a function of criminal law or, alternatively, the function of public law civil litigation brought by government agencies. Critics of class actions not subject to a claim form restriction or some functional equivalent assert that it is something akin to "unAmerican" for a court unable to identify or locate substantial numbers of class members, in order to adjudicate amounts of their individual damages and to distribute their recoveries to them, to nonetheless mulct defendants for such damages and order them paid over to some charitable institution or other stranger to the proceedings whose activities are somehow thought to benefit the plaintiff class, broadly defined or, as is currently proposed, order the funds escheated to the state. Such critics usually elaborate their jurisprudential attack by asserting that money judgment class actions not subject to something like a claim form restriction primarily benefit "rapacious" class action attorneys, whose fees are usually increased to take account of the portion of the judgment paid over to the state or "cy pres'd" to do-good organizations, and hence lead to "strike suits" or otherwise frivolous litigation, with extortionate settlement demands, irresistible pressure on deep-pocket institutional defendants to buy peace at an inordinate price, and so forth. In short, many will see the kind of class action that would be authorized by the amendment now under consideration as part and parcel of the "Litigation Explosion" they view as damaging to American business and the nation's competitiveness.

The opposing view, of course, is that, as with the burgeoning of public interest litigation by private parties against government agencies and typically seeking injunctive or

declaratory relief, money judgment class actions unconstrained by anything akin to claim form procedure is, on balance, a good thing, and that whatever abuses might be associated with it can and should be dealt with by other, more discriminating means, such as the firm exercise of considered discretion by trial judges. These proponents argue that a good deal of unlawful conduct is not, and perhaps cannot, be dealt with by government agencies, that no one is proposing that any defendant be adjudged to pay for more than the aggregate damages they have unlawfully caused, even if some portion of those damages cannot be identified to all of the individual class members, that a considerable portion of the aggregate damages will be paid to individual claimants to redress the harms they have suffered, and that as to the remainder, it is better that the state or some pro bono organization get the funds than that wrongdoing defendants retain any of the fruits of their wrongdoing.

Having sketched out the opposing positions, with at least some of their ideological or political overtones, the important point we wish to make is that we do not believe that either choice as between these conflicting views should properly be embodied, or sought to be advanced, in rules of procedure. The current ORCP 32 F(2) of course reflects and advances the restrictive attitude toward class actions, whereas the proposed amendment would incorporate the opposite, hospitable view. Our opinion is that it is not appropriate for the Council to make the choice as between these views in its capacity as rule-maker. In the most general terms, our position is that rules of procedure should be confined in their operation to matters that are, to the maximum extent possible, strictly procedural in the sense of promoting the fair, efficient and economical conduct of litigation. Rules of procedure should, in other words, avoid either promoting or handicapping certain favored or disfavored claims, defenses or interest under the guise of regulating judicial procedure. We believe that both the present rule, and the rule as proposed to be amended, share the same vice, if in directly opposite directions. Neither, we think, properly belongs in the ORCP.

The overriding defect of present ORCP 32 F(2) is that it seeks to limit damages in class actions to which it pertains by mandating a procedure that has no other manifest purpose or function than to do precisely that. In a money judgment class action it might well make good sense for the trial judge at some point to order that claim forms or their equivalents be solicited from some or all class members. Depending upon all the circumstances, failure to do so might even amount to reversible abuse of discretion. For example, in the kind of money damage class action involving a class alleged to have suffered personal injuries, but with no element of unjust enrichment on the part of the defendant, it is difficult to imagine how the action could be successfully conducted without submission of something like claim

forms, probably buttressed by affidavits or other supporting documentation, and perhaps even hearings before the judge or someone authorized to conduct them. On the other hand, in class actions involving funds or other property unlawfully obtained or retained by a defendant, where the amount of funds or identity of the property can be ascertained from defendant's records, requiring claim forms to be forwarded to and returned by every class member might, depending upon all the facts and circumstances, be a needless expense, the effect of which could be to deprive some claimants of the recovery they might have obtained and leaving in the defendant's hands some portion of its ill-gotten gains. There might, in other words, be some circumstances where failure to order essentially a claim form procedure would be so foolish that no competent trial judge would fail to do it or, having failed, would be subject to likely reversal for abuse of discretion. But under other circumstances, precisely the opposite would obtain. The variant circumstances that are likely to present themselves as bearing upon this issue are too multifarious to be formulated in a mandatory rule of procedure having general application to a broad spectrum of cases.

We disfavor the proposed amended version of ORCP 32 F(2) as gratuitously instructing trial judges on how certain kinds of damages might be proven. Since the methods mentioned turn out to be illustrative, and other unspecified ones may be employed, this proposed language accomplishes little, and that little has more to do with evidence than with procedure. We also recommend rejection of the sentence that imperiously commands: "The judgment against the defendant shall consist of the total obligation to the class as calculated in this subsection, ..." We do not regard it as any proper business of rules of procedure to instruct judges on how to calculate the amounts of judgments, least of all to resolve, one way or the other, the large policy issue sought to be resolved in diametrically opposite ways by the proposed amendment and the existing rule. A plague on both their house, we say!

We do not believe there is any substance to a possible objection that, if the existing rule is repealed and the proposed amendment or some variant thereof is not adopted in its place, judges will be left at large, with no guiding authority and no germane legal principles to inform their decisions in this area. If the proposed escheat statute is enacted, that should provide judges with some guidance, although the Council might well seek to have some input on whatever measure is adopted, as much outside the scope of rule-making as an escheat statute would doubtless be. The relevant committees of the Legislature should be informed, by someone if not by the Council, that any escheat statute that might be adopted should be clearly limited in its operation to funds representing unjust enrichment, and not to funds that could not be paid over to class members as

compensatory damages. At least the committees should be made aware of that distinction, something that cannot be assumed on the part of legislators who appear to be confused on the distinction between recess and adjournment

In addition to any escheat statute that might be enacted, there is a developing body of case law generated by federal and state courts across the country. These decisions draw upon fairly traditional principles of equity jurisprudence and the law of restitution. There have been many litigations in which federal judges have had to deal with issues such as under what circumstances one or another variant of fluid recovery is appropriate, and how the process is to be managed. These federal judges have resolved these questions without restrictions imposed either by rules of procedure or statutes.

2. We recommend that the Council reject the amending language proposed to ORCP 32 N(1)(b). This recommendation is not intended to import any view on the merits of the proposed revision, but rather is based upon our conclusion that both the existing rule and the revision, in dealing with attorney fees, is not properly within the Council's jurisdiction over rules of practice and procedure that do not impinge upon substantive rights. Since the existing rule is equally subject to the same objection as the proposed revision, some might expect us to recommend repeal of the former along with rejection of the latter. We do not do so, since the existing rule was enacted by the Legislature.

Some might be led to wonder why, since existing ORCP 32 F(2) regarding claim forms was also enacted by the Legislature, we are recommending its repeal, along with rejection of the proposed amendment. At this writing, we do not have a fully satisfactory answer to that question, which has just occurred to us, but our preliminary response is as follows.

ORCP 32 N(1)(b) on its face deals with shifting of attorney fees and costs, something we conclude is clearly a matter of substantive rights and therefore beyond the scope of rules of practice and procedure. This is a matter entirely for the legislature. The Council would probably prefer that the legislature refrain from secreting what ought to be statutory provisions into "our" rules of procedure, but when it chooses to do so, there is not much the Council can do about it. It would be unwise and probably improper for the Council to comb through the ORCP and repeal any provision of them for no other reason than we find them outside of our definition of practice and procedure. In enacting ORCP 32 N(1)(b), the legislature has dealt with a matter purely and solely a matter of substantive rights, and the mere fact that it might have inappropriately placed its enactment is not something we should or can do anything about. If this is a correct analysis, and if

promulgation of a mere repealer of this rule would be improper, then **a fortiori** promulgating an amendment to the rule seems wholly out of the question.

The present ORCP 32 F(2), which do we recommend be repealed, not amended as proposed by the Committee, is different in our view. In enacting that rule, the 1981 Legislature seems to have legislated a substantive policy judgment certainly affecting substantive rights, but did so in a manner that has all the appearance of being purely procedural. The language of ORCP 32 F(2) certainly has the surface appearance of being purely procedural, that is, of providing direction to courts on how to conduct one particular aspect of litigation. But if our analysis above is sound, it is a bogus kind of procedure, bogus in the sense that the procedures it mandates seem to have no other purpose than to substantively affect outcomes of litigation by codifying the restrictive view toward money damage class actions as discussed above.

We do not believe it has been, or should be, the Council's view that it is precluded from promulgating amendments to any particular provisions of the ORCP merely because they derive from legislative, as opposed to Council action. If a given ORCP provision either is procedural, or has the appearance of being procedural, so that it will be generally understood to fall within that category, then we think the Council has both the authority and obligation to review and revise such provision according to our evolving best judgment, even though the Legislature might well override us. That is what we think is involved with ORCP 32 F(2). That is why we recommend its repeal, and also recommend rejection of the proposed amendment, which we find to be subject to precisely the same objection. ORCP 32 N(1)(b) is different, because its procedural disguise is so thin that no one would be misled into supposing it is anything other than a regulation of substantive rights, and therefore something properly attributable to the Legislature, for which it, not the Council, should take responsibility.

July 19, 1992

TO: **CHAIR AND MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: Janice Stewart, Chair, Mike Phillips and Maury Holland, Members of the Subcommittee Formed to Consider Proposed Amendments to ORCP 32 - Class Actions

RE: Report of Recommended ORCP 32 Amendments for Consideration by Council at its August 1, 1992 Meeting at the Multnomah County Sheriff's Office in East Portland

For the past six months this subcommittee has been considering proposed amendments to Oregon's class action rule, ORCP 32, focusing in particular on a set of proposals forwarded to Fred Merrill by letter dated Dec. 14, 1991 from "an ad hoc coalition of law firms and lawyers" styling itself the "Committee to Reform Oregon's Class Action Rule" [hereinafter the "Committee"]. A copy of the Committee's proposals, together with its comments thereon, is appended as Attachment A to this memo. These proposals were in turn largely modeled upon two other proposals to amend the federal class action rule (FRCP 23). These are a "Report and Recommendations of the Special Committee on Class Action Proposals, 110 FRD 195 (1986), prepared with commentary by a committee of the ABA Section of Litigation, appended to this memo as Attachment B. This set of proposals, commonly known as the Flegel Report, was authorized by the Council of the Section of Litigation to be prepared for forwarding in 1985 to the Advisory Committee on the (Federal) Civil Rules. It was not, however, approved or disapproved by the ABA House of Delegates, and so does not bear the official imprimatur of the ABA. These proposals have not emerged from the Advisory Committee by way of transmittal to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, which would be the next step toward promulgation by the Supreme Court of the United States as amendments to FRCP 23.

The Committee's proposals regarding ORCP 32 that this subcommittee has been considering also draw in part upon a different and more recent (1991) set of proposed amendments to FRCP 23 now under consideration by the same Advisory Committee on the Civil Rules and informally communicated to the Committee on Rules of Practice and Procedure, but not yet formally approved by the former. These proposals were not the work of the Advisory

Committee itself, but were provided to it by another group. Thus, as appended as Attachment C to this memo, they include a "Preliminary Report" dated October 16, 1991 prepared by the Advisory Committee's Rule 23 Subcommittee. This report notes that: "Further study and evaluation is necessary before any definitive conclusions can be reached as to the advisability of the changes proposed or of any changes to Rule 23."

This memo represents the shared views and recommendations of Mike Phillips and Maury Holland, and in part those of Janice Stewart. Immediately following this memo you will find a "Minority Report" by Janice, which sets forth her areas of agreement and disagreement with the views expressed in this memo. Part One of this memo sets forth this subcommittee's comments, or where noted the comments of its majority, on those among the Committee's proposed amendments with which the subcommittee or its majority is in substantial agreement and therefore supports. Part Two of this memo sets forth the modifications of others among the Committee's proposed amendments which the subcommittee or its majority urges the Council to consider, together with the reasons for doing so.

PART ONE

1. ORCP 32 A(5). We support the proposed deletions as needed to conform to ORCP 32 B as proposed to be amended.

2. ORCP 32 B is proposed to be extensively amended for the reasons stated on p. 12 of Attachment A and pp. 203-08 of Attachment B, with which we are in substantial agreement. The thrust of these proposed amendments is to abolish the sharply differentiated notice requirements mandated by present ORCP 32 F(1)(a) for class actions maintained under ORCP 32 B(3), that is, actions aggregating large numbers of individual claims for money damages. Historically, this type of class action was known as a "spurious" class action because it did not conform to the patterns known to classical equity jurisprudence, either where the predominant form of relief sought was equitable or declaratory or where a class was formed to join parties whose joinder was regarded as necessary for just adjudication.

The reasons for the historically skeptical attitude toward class actions merely effecting joinder of large numbers of money damage claims that might otherwise be brought by individual claimants were both philosophical and procedural. The philosophical objection was that allowing this type of class action, in the absence of the special equities inhering in those types historically known to equity, might encourage class representatives, or more particularly their "aggressive" lawyers to "stir up" litigation that would otherwise likely not be brought, either because the modest amounts of individual claims would not make it economically worthwhile to do so or because

many potential claimants would never be aware they possessed claims until recruited as class members. The more procedurally oriented skepticism centered around due process concerns about the possibility of res judicata foreclosure of individual claims held by people who might prefer to prosecute them on their own, with a lawyer of their own selection and in a forum of their own choosing. Worries were also expressed about conflicts of interest, solicitation, barratry and other forms of unprofessional conduct on the part of lawyers who would tend, in this type of litigation, to take an unusually aggressive and controlling role.

Concerns of this sort provided much of the basis for the special procedural requirements, both in present ORCP 32 and its federal counterpart, FRCP 23, meant for the protection of putative class members. Principal among these special requirements has been mandatory individual notice to all class members who can be identified and located with reasonable effort, typically combined with an unconditional option on their part to "opt out" of the action and so avoid being legally bound by its outcome. The mandatory individual notice requirement has posed a significant economic impediment to maintenance of some damages class actions, because the costs of giving notice, which can often amount to hundreds of thousands of dollars, must be "fronted" by class representatives or their attorneys

In addition to special notice requirements, present ORCP 32 B(3) imposes a specific prerequisite to certification of damage class actions in the form of a mandatory finding that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, . . ." and precludes such a finding if the court determines that separate adjudications of any matters apart from amounts of individual recoveries are likely to be necessary. The Committee's proposal would convert this "predominance" issue from a required finding to merely being one of several factors enumerated in ORCP 32 B(3) as bearing upon the question of whether to grant or deny certification. Its proposal would also transfer the "superiority" presently set forth in ORCP 32 B(3) and therefore pertinent only to damage class actions, to ORCP 32 B, thereby making what we regard as the ultimate question regarding certification pertinent to all class actions.

This subcommittee agrees with each of these proposed amendments essentially for the reasons given in the Committee's Comments (pp. 12-16 of Attachment A) and those of the Special Committee of the Section of Litigation (pp. 203-08 of Attachment B), which need not be repeated here. Mandating individual notice, together with the opt-out election, in damage class actions determined to come within ORCP 32 B(3), but in no others, seems to us unwise and unnecessary in a set of procedural rules. It would also be inconsistent with the movement toward a "unitary

class action" unless mandatory individual notice and opting out were to be made applicable to all kinds of class actions, a step backward that no one appears to favor.

Retention of these special procedures only for class actions determined to fall under ORCP 32 B(3), but for no others, conduces to needless and distracting litigation in the trial court, often renewed on appeal, about a matter of categorization. The difficulty with making important consequences turn upon crudely defined categories contained in procedural rules is that the actual distinctions among class actions are too nuanced and multifarious to be prescribed adequately in this abstract and generalized fashion. It is better, we think, to allow relevant distinctions across the spectrum of class actions to be ascertained by judges on a case-by-case basis, who could then exercise their broad equitable discretion to order whatever procedural safeguards seem appropriate in light of all the particular circumstances as they arise.

We believe that rules of procedure should provide clear-cut, rule-oriented commands and prohibitions about the more mechanical aspects of procedure. They should address matters concerning which judges and counsel are best served by straightforward knowledge about how such matters as pleadings, forms of motions, available modes of discovery, preserving error and taking appeals should be handled, matters most amenable to uniform treatment across the full spectrum of civil litigation. This is certainly not a characteristic of contemporary class action litigation. Where equitable discretion is the appropriate mode of decisionmaking, rules of procedure should clearly confer that discretion and then seek to control its exercise by enumeration of relevant factors that must be taken into account. Apart from requirements imposed by fourteenth-amendment due process, discussed below, the rule-maker is best advised to minimize hard-and-fast requirements that cannot take into account the myriad facts and circumstances characteristically presented in the class action context. The present ORCP 32 B assumes that each of the types of class action it authorizes exists in something akin to a watertight compartment, that in particular the aggregated damage class action contemplated by ORCP 32 B(3) is clearly and sharply distinguishable from the other categories, and that invariably much more elaborate and costly procedural protections of class members is imperative in the former than in the latter.

It is important to bear in mind that nothing in the proposed amendments prevents judges from ordering the full panoply of procedural protections of class members as presently required in ORCP 32 F(1) for damage class actions, either when that is determined to be required by fourteenth amendment due process or where, after weighing benefits against costs, they determine as a matter of equitable discretion that such protections are needed

to ensure fairness to all concerned.

In light of the decision of the U.S. Supreme Court in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), it is reasonably clear that fourteenth amendment due process presently requires individual notice of some sort to all class members in damage class actions who can be identified with reasonable effort, and might in some circumstances also require that all class members be accorded an unconditional election to opt out. That being so, some might question the wisdom of a rules amendment that would purport to make discretionary procedures that the fourteenth amendment currently makes obligatory. The majority of the subcommittee, however, agrees with the Committee and the Special Committee of the Section of Litigation that evolving constitutional doctrine ought not be codified in rules of procedure. We are confident that judges and lawyers in this state fully understand that multiple sources of law often bear upon resolution of various issues that arise in the course of litigation. We do, however, believe that if these amendments are promulgated by the Council, it would be appropriate for the Staff Comment to draw to the attention of the bench and bar the pertinence of fourteenth amendment requirements, of course without assuming to specify just what they might be.

It might still be objected that, if the fourteenth amendment as currently construed requires individual notice and possibly an opt-out election in damage class actions, what sense does it make to jettison the present forms of ORCP 32 B(3) and F(1), which impose the same requirements, in favor of an amended rule that, within its four corners, would seem to countenance unconstitutional procedures. The subcommittee majority, however, would respond that the requirements of fourteenth amendment due process emanate from evolving case law handed down by the U.S. Supreme Court, which means that it can, and characteristically does, change over time. Even if it could be assumed that the notice requirements announced in Shutts correspond precisely to the notice and opt-out provisions of present ORCP 32, to "codify" (i.e., by retaining the latter in place) them as they exist at any particular time does not make good sense to us. If, as the majority believes, the proposed amendments are sensible as rules of procedure, the Council would be well advised to promulgate them as such and allow due process doctrine to evolve as it will.

In addition to whatever possibility exists of future evolution of due process requirements, including their being relaxed, an important added consideration is that Shutts characteristically left many issues regarding notice and opting out unanswered. Apart from choice-of-law, not relevant here, the issue decided in Shutts was whether it was consistent with fourteenth amendment due process for a Kansas state court to exercise in personam jurisdiction over the vast bulk of class members involved in that litigation who lacked "minimum contacts"

with Kansas. The Court answered that question in the affirmative because Kansas procedure provided both for individual notice to all class members and for their unconditional right to opt out of the proceeding if they so chose. This made the exercise of jurisdiction consensual in the Court's view, thereby dispensing with any need for minimum contacts. The Court expressly reserved the question of whether notice alone, or notice combined with an opt-out election, might be constitutionally required in other kinds of class actions. Its opinion also did not address the question of what might be required by way of notice or opting out as applied to class members who are residents of the forum state or who otherwise have minimum contacts with it. Our best guess is that notice, but not necessarily an opt-out feature, would probably be required as to any class members who are forum residents. Rather than codifying our, or anyone's, best guess as to how these issues might be resolved over time, it seems to us clearly preferable to await developments from the Court. Shutts also left unresolved all issues concerning what the fourteenth amendment might require in the context of defendant class actions.

3. ORCP 32 B(3)(f): We agree with the proposed deletion of this provision, since this matter is better addressed in the language proposed to be added to ORCP 32 E(1).

4. ORCP 32 C(1): We support the proposed addition and deletion on the ground that there seems to be no good reason to require specific findings and conclusions only for damage class actions, and also in order to clarify that certification can be limited to fewer than all issues and claims presented by the action as filed.

5. ORCP 32 D: We support the clarifying language as proposed by the Committee. In the counterpart federal rule, FRCP 23(e), the term "class action" for purposes of dismissal or compromise is not defined as to whether it means an action filed as a class action as opposed to one that has been certified by the court as such. All of the federal court decisions that have addressed this issue, however, are in agreement that an action filed as a class action, not merely those certified as such, should be subject to the requirement of judicial approval of any settlement or voluntary dismissal. We recommend to the Council, additionally, that it consider whether, further by way of clarification, it might be worthwhile adding the word "voluntarily" to the first sentence of ORCP 32 D immediately before "dismissed." Voluntary dismissals are clearly what the rule has in mind. But the Council might conclude that this addition would be an excess of clarification, since obviously the court does "approve" all involuntary dismissals simply by ordering them.

6. ORCP 32 E(1): We support the language proposed to be added

to this provision in the interest of making it clear that motions for dismissal on the pleadings or for summary judgment can, under appropriate circumstances, be disposed of prior to the court ruling on certification.

7. ORCP 32 F(1): With one minor exception, the majority of the subcommittee supports the proposed additions and deletions to this provision, which are the correlatives of the amendments proposed to ORCP 32 B discussed in paragraph 2 above. The minor exception is that we think the word "determination" should be changed to read "determinations," since the determination regarding notice is distinct from, though often related to, the determination regarding opting out.

The list of specifics regarding the content of notices detailed in the present ORCP 32 F(1)(a)-(h) relate only to B(3) class actions, with questions relating to the timing, content and method of affording notice in all other kinds of class actions being remitted, pursuant to ORCP 32 E(2), to the discretion of the judge. Extending that discretion to all questions regarding notice, regardless of the typology now proposed to be muted, seems to us most consistent with the general thrust of the ORCP 32 B amendments in the direction of a unitary class action. This does not mean that different sorts of class actions will not call for different procedures and handling. But the underlying thought behind the concept of a unitary class action is that the myriad differences among class actions are too subtle and multifarious to be satisfactorily encapsulated in procedural rules of general application. By widening the ambit of judicial discretion, and disconnecting the exercise of that discretion from an unduly crude classification scheme, judges will be enabled better to respond to the kaleidoscopic distinctions among class actions as they actually arise. The proposed revisions give as much guidance to judges as is consonant with necessarily broad discretion cabined only by enumeration of factors to be considered.

Naturally, as with other kinds of trial judge discretion, litigants who think themselves aggrieved will have recourse to appellate review under the abuse standard. The Council should also take into account one additional factor that, although admittedly a generalization, we think has considerable validity and pertinence. This factor is that trial counsel who litigate class actions will tend to have a higher degree of motivation, and probably a higher degree of professional ability, than is true of the average of the trial bar generally. Counsel on all sides will, we think, have every incentive to assist the trial judge in reaching sound procedural rulings so that the outcome of class action litigation, whether it be a contested judgment or a settlement, can withstand collateral attack.

8. ORCP 32 F(2): Since we have serious disagreements with these

proposals, they will be discussed in Part Two of this memo.

9. ORCP 32 F(3): We support deletion of this provision on the ground that this matter is best left to the trial judge's discretion.

10. ORCP 32 F(4): We concur with the thrust of the proposed amendment to this rule, but recommend the following revised wording in the interest of greater clarity:

> F(3) The plaintiff shall bear the costs of any notice ordered prior to liability being determined, except that the court may order at any point in the proceeding that the defendant bear the costs of any notice to current customers or employees included with a regular mailing thereto, or the court may hold a preliminary hearing to determine how the costs of such notice shall be apportioned.

11. ORCP 32 G(1) and (2): We support the revision proposed to ORCP 32 G(1) and deletion of ORCP 32 G(2) as surplusage in light of that revision.

12. ORCP 32 M: We support the proposed revisions to ORCP 32 M, except we suggest that the final sentence should read: "If a money judgment is entered in favor of a class, the judgment shall where possible specify . . . . "

PART TWO

1. ORCP 32 F(2): We recommend that, rather than being extensively amended as the Committee proposes, ORCP 32 F(2) be repealed in its entirety. F(2) is the notorious "claim form" procedure, which is not part of the federal class action rule or, according to our best information, the rule of any state. We are persuaded that there are sufficient reasons for dropping this feature of the Oregon rule, a feature pertinent only to damage class actions maintained under ORCP 32 B(3), a distinct category that will no longer exist for purposes of the rules if the revisions that would substitute a unitary for a tripartite class action are promulgated. As with notice requirements, the proposed repeal of ORCP 32 F(2) would not deprive judges of discretionary authority to require submission of claim forms or their functional equivalent at any point in the proceeding if it is determined to be in the interest of fairness or efficiency to do so.

Jettisoning of the claim form procedure was perhaps the most controversial of the amendments promulgated by the Council in 1980 and overridden by the 1981 Legislature. Members of the ad hoc group that submitted the revisions now under consideration opine that, with the ensuing decade of increased experience with

class action litigation across the country, the 1993 Legislature might well leave abrogation of the claim form procedure undisturbed. That might or might not be a correct assessment, but substantial opposition should nonetheless be anticipated, although that does not seem to us a sufficient reason for the Council not to exercise it best present judgment on what constitutes sound procedure.

Insistence upon retention of the claim form procedure is, of course, the opposite side of the coin from resistance to what is vaguely called "fluid recovery." This reflects the perfectly respectable view that the legitimate purpose of civil litigation is to provide an appropriate remedy, usually money damages, to specific people who as plaintiffs prove legal injury at the hands of defendants. According to this view, when a class action results in a judgment in excess, sometimes far in excess, of any amounts that can be identified and awarded to injured parties, at that point, unless the excess is returned to the defendant, private civil litigation assumes the illegitimate function of punishing defendants for their wrongdoing, properly a function of the criminal law or, alternatively, public civil litigation brought by government agencies. Critics of class actions not subject to a claim form limitation assert that it is nearly "unAmerican" for courts unable to identify or locate substantial numbers of class members in order to adjudicate their individual recoveries, nonetheless to mulct defendants for aggregated damages and order undistributed amounts either "cy-pres'd" to some public interest organization or escheated to the state. Such critics often amplify their attack by conjuring up visions of "rapacious" lawyers recruiting clients to institute frivolous litigation intended to harass institutional defendants and bludgeon them into inordinately expensive settlements. To some discarding the claim form procedure will appear as part and parcel of the "Litigation Explosion" they blame for the uncompetitiveness of American business and a wide assortment of other ills.

The opposing view is that, as with the burgeoning of public interest litigation wherein private citizens seek primarily injunctive relief against government agencies, damage class actions unconstrained by a claim form requirement are, on balance, good things that serve public as well as private interests. Any abuses that might be associated with them are better dealt with by other, more discriminating means, such as greater willingness of trial judges to impose tough sanctions for frivolous claims, harassing tactics and the like. Advocates of the kind of class actions the proposed amendments would make more viable and hence in all likelihood more numerous in the courts of this state argue that a good deal of wrongful conduct, particularly on the part of powerful institutions, is not, and probably cannot be, addressed by government agencies, especially when the harms, while great in the aggregate, are diffused among

thousands of victims. They add that no one is proposing that wrongdoing defendants should be made to pay for more than the total monetary value of the harms they have inflicted. Such defendants would be deprived by repeal of the claim form procedure only of a procedural weapon they should not possess, one that either allows them to retain substantial portions of the fruits of their wrongdoing or, by rendering some class actions non-viable, allows them to get off scot-free.

Having sketched out the opposing positions, the important point we wish to make is that we do not believe that either choice as between them ought to be embodied in, or advanced by rules of procedure. The current ORCP 32 F(2), of course, advances the skeptical view of damage class actions, whereas the proposed amendment would embody the opposite. Our position is that rules of procedure should, to the maximum extent possible, confine their operation to genuinely regulating procedure in a manner that is not prospectively outcome determinative. They should, in other words, avoid as much as possibly can be managed either promoting or handicapping certain favored or disfavored claims, defenses or interests under the guise of regulating court procedure. We conclude that both the present rule, and the proposed amendment, share the same vice, albeit in opposite directions.

The overriding defect of present ORCP 32 F(2) is that it seeks to limit damages in class actions to which it pertains by mandating a special procedure that has no other apparent purpose than to do precisely that. In a money damages class action it might well make good sense for the trial judge at some point to order that claim forms or their equivalents be solicited from some or all class members, something that would still be authorized by provisions elsewhere in ORCP that would remain in place. Depending upon the circumstances, failure to do so might even amount to an abuse of discretion. For example, in the kind of damage class action involving a class alleged to have sustained unliquidated damages on account of personal injuries, but with no element of unjust enrichment on the part of the defendant, it is difficult to see how the action could be managed to a successful conclusion without submission of something like claim forms, probably buttressed by affidavits and perhaps even contested evidentiary hearings. On the other hand, in class actions involving funds or other property unlawfully obtained or retained by a defendant, where the aggregate class damages equals the total amount of such funds or property and this can be ascertained from defendant's records, for the judge to require submission of claim forms from all class members might well doom an otherwise meritorious action, or at the least, needlessly increase the costs of prosecuting it. There might, in other words, be some circumstances where failure to order solicitation of claim forms would be so foolish that no competent trial judge would do so, or if he or she did, would fail to be reversed. But

under other circumstances, precisely the opposite might be the case. An apt illustration of a situation in which the Oregon Court of Appeals felt constrained by the wording of the statutory predecessor of ORCP 32 F(2) to mandamus the Circuit Judge to order what appears to have been needless and costly solicitation of claim forms before entering judgment is provided by Benj. Franklin Federal Savings & Loan Assoc., 287 Or. 693, 601 P.2d 1248 (1977), noted by the Committee in its submission (p. 7, n. 5 in Attachment A). A likely consequence of this mandated procedure was that many people with valid claims never received any recovery, and to that extent the defendant was allowed to retain some of its unjust enrichment.

At the same time, we disfavor the proposed amendment to ORCP 32 F(2) as gratuitously instructing trial judges on how certain kinds of damages are to be proved. Since the methods mentioned turn out to be merely illustrative, and other unspecified ones are stated to be permissible, this proposed language accomplishes little, and that little as more to do with evidence than with procedure. We object to the proposed sentence that reads: "The total judgment against the defendant shall consist of the total obligation to the class as calculated in this subsection . . . ." etc. This is because we do not believe it is any proper business of rules of procedure to instruct judges on how to calculate the amounts of judgments, much less to resolve, under the guise of procedure, the larger policy question that lurks ~~with~~in behind this.

We do not believe there is any substance to a possible objection that, if the existing rule is repealed and the proposed amendment or some variant of it is not adopted in its place, judges would then be left at large, with no guiding authority and no germane legal principles to inform their decisions in this area. If the escheat statute that has been discussed were to be enacted, that would of course provide some control. More importantly, there exists a developed and developing body of case law generated by federal and state courts across the country that deals with when fluid recovery is appropriate and how it is to be managed, case law that would provide persuasive authority for judges in this state. Decisions in this area draw upon traditional principles of equity jurisprudence and the law of restitution. There have been many reported trial and appellate court decisions in which federal judges have dealt with the full range of issues presented by fluid recovery and have done so without any restrictions being imposed either by statutes or rule of procedure.

2. ORCP 32 F(5): We favor retention of this provision in its present form, rather than deletion as the Committee proposes.

3. ORCP 32 N(1)(b): We recommend that the Council reject the proposed amendment to this rule, and that it be left as it is.

This is not intended to import any view on the merits of the proposed amendment, but is based upon our conclusion that both the existing rule and the proposed revision deal with substantive rights and are therefore beyond the Council's statutory jurisdiction. The present rule was enacted by the Legislature.

This "leave it alone" recommendation, when juxtaposed with our recommendation in para. 1 of Part Two above regarding ORCP 32 F(2), poses a vexed question that we believe the full Council must debate and resolve. This question is a function of Oregon's bifurcated jurisdiction over rules of procedure, with the Legislature being empowered to legislate matters purely of substantive right implicating substantive policy considerations and to insert such enactments, however thinly disguised as rules of procedure, in the ORCP whenever it wants to do so. The Legislature can also obviously enact provisions that clearly or arguably qualify as rules of procedure, even if they also impinge upon substantive rights. The Council, however, is limited to promulgating provisions that are genuinely rules of procedure, but which do not impinge upon substantive rights, and even in that capacity we are subject to being legislatively overridden.

The conundrum is as follows. ORCP 32 F(2), which we have recommended be repealed and not amended, was just as much enacted by the Legislature and at least arguably just as much impinges upon substantive rights, as does the present ORCP 32 N(1)(b), which we are recommending be left as it is. In an earlier version of this memo an effort was made to explain why we take a different stance vis-a-vis these two provisions. This effort was characterized by one member of the subcommittee as "tortuous," and that might have been too charitable. So rather than subject you to the torture of reading it, we have omitted this discussion, and look forward to joining with the members of the full Council as we discuss and try to resolve it at our August 1 meeting.

M E M O R A N D U M

TO: Members, Council on Court Procedures

FROM: Chair, Subcommittee on Proposed Changes To Class Action Rule (ORCP 32)

DATE: July 16, 1992

RE: Minority Report

I do not concur with some of my Subcommittee's recommendations for changes to ORCP 32, and therefore submit this minority report to the Council.

I preface this report by reminding the Council that class actions are not a substantive right in Oregon governed by procedural rules, but were created by and exist because of procedural rules. Therefore, it is within the prerogative of the procedural rules to limit or expand the availability of class actions to the extent desired by the politicians, subject only to the due process restrictions imposed by the courts.

Based on the years of experience since the Federal and Oregon class action rules were adopted, the courts have had the opportunity to interpret those rules. In the process, the need for clarification or revisions of certain portions of the rules has arisen. To the extent that such revisions resolve ambiguities or serve to reduce litigation over technicalities, they are useful and should be adopted. Many of the revisions proposed by Mr. Goldsmith's committee fall in that category, including the

change from the rigid tri-partite classification of class actions to a more flexible unitary class action standard. Although a unitary class action may seem a drastic and controversial change, it has been recommended by the Flegel Report, the Advisory Committee draft, and the ABA Subcommittee in recognition of the need for greater flexibility.

Similarly, I recognize the merit of eliminating the current claim form procedure as the sole method of determining damages. The current procedure may well be an obstacle to more creative and perhaps less expensive methods of accomplishing the same result. For example, in a particular case, it may be more economical for a check to be sent to a class member advising that the class member will be deemed to be bound by a settlement or judgment if the check is negotiated, as opposed to a more cumbersome claim form procedure. By eliminating Oregon's claim form procedure, Oregon's rule is made more similar to the federal class action rule.

However, as an experienced trial lawyer, I become very concerned about proposed changes which confer extremely broad discretion on the courts in light of important due process considerations. In that regard, several points are important to keep in mind.

First, if a judge abuses his/her discretion, the aggrieved party may have a theoretical error reversible on appeal. But, in reality, it is nearly impossible to obtain a reversal for an abuse of discretion. After spending time and money to appeal

such an error, the appellate courts generally treat it with disdain by merely mentioning that the ruling was discretionary and affirming the trial court. Therefore, to the extent possible, procedural rules should limit, rather than expand, judicial discretion in order to inject certainty, rather than uncertainty, into the process. This is the very reason we have rules concerning what notice must be given when in order to take a default order and judgment, rather than permitting judges to apply differing standards of their notions of proper notice. Given that class actions often involve millions of dollars, I prefer certainty at the trial level to avoid appeals.

Second, if we have clear case law authority on what is required to satisfy procedural due process, then we can insure uniformity in practice by codifying those requirements. A majority of the Subcommittee is satisfied with a mere reference to due process considerations in the Staff Comment. However, the Staff Comment is not included in the West's edition of ORCP used by most practitioners, is rarely read or consulted, and does not have the force of law. I question why due process considerations, if sufficiently important for the Staff Comment, are not sufficiently important for the rule itself.

We also must not forget the impact of eliminating both a notice and opt-out procedure, as well as a claim form procedure, as recommended by the majority of the Subcommittee. These twin deletions effectively eliminate all protections to a defendant from a potentially financially devastating class action. After

all, class actions were not intended to become a social tool by which to shift wealth by requiring a defendant to forfeit its "unjust enrichment" to an unidentifiable class and its lawyers. Instead, it is a procedural device to permit claims to be aggregated to save judicial time and resources, protect the rights of class members whose interests are represented by another, and clearly identify those persons who are bound by a determination of liability through *res judicata* for the benefit of the defendants. The mere filing of a class action against a small corporation can have an *in terrorem* effect and force an early settlement. And where only small amounts of money are involved for each class member, one must question the social utility of bringing such class actions in the first place.

Mandatory notice may be more costly than no notice at all, but it protects both the absent class members and the defendants. In fact, neither the Flegel Report, the Advisory Committee Recommendations, nor the ABA Subcommittee Report recommend the elimination of all notice, as does Mr. Goldsmith's committee. The Flegel Report contemplates notice in Fed R Civ P 23(c)(2) by requiring the court to determine whether members of a class will be excluded. A majority of the ABA Subcommittee believes that "mandatory notice may go hand in hand with the unitary standard." The Advisory Committee proposes in Fed R Civ P 23(c)(2):

> "In ordering that an action be maintained as a class action under this rule, the court shall direct that notice be given to the class under subdivision (d)(2) ... ."

All defense counsel consulted about eliminating the notice requirement rejected the concept out of hand. Only Mr. Goldsmith's committee of Oregon's plaintiffs' lawyers recommend the possibility of no notice whatsoever.

Detailed requirements for notice in the current ORCP 32 B may place unnecessary barriers to formation of a class. But even if not required for due process, which seems unlikely, some form of notice to class members at some point in some form is desirable in virtually all class actions. Under the current ORCP 32 F, the notice must be given and must include certain information, but the court currently has discretion as to when and how to give that notice.

Therefore, I recommend that the Council reject the proposed changes to ORCP 32 F(1), and instead delete only the phrase "under subsection (3) of Section B of this rule" to correspond to the recommended change in ORCP 32 B to a unitary class action standard.

JMS:lam

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December 14, 1991

Professor Fredric Merrill
Executive Director, Council on
Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403

Re: Proposed revisions to ORCP 32

Dear Professor Merrill:

This letter is written on behalf of the Committee to Reform Oregon's Class Action Rule, an ad hoc coalition of law firms and lawyers. The names of committee members appear at the end of this letter. The original of this letter bears their signatures as well.

The Council on Court Procedures last considered amending the class action rule, ORCP 32, more than a decade ago. At that time the Council adopted a number of reforms that it believed would further the legislative policy of permitting class actions (1) to efficiently resolve in a single case what otherwise would require multiple actions and (2) to permit small injuries to be litigated in the aggregate. A few of these reforms were approved by the 1981 legislature; most were not.

The time has come, we believe, for the Council to re-examine Rule 32. Enclosure A to this letter contains the specific proposals which we urge the Council to consider. These reforms are primarily designed to achieve two ends.

The first is to replace the present three-part standard for class certification contained in ORCP 32 B with a single standard which has been recommended by the ABA Section on Litigation (Enclosure B) and is presently being considered by the Advisory Committee on Federal Rules (Enclosure C).[1] The second is to replace present method of damage computation and distribution in ORCP 32 F in light of (1) the problems which have been identified in the past decade and (2) the legislative

[1] The Section on Litigation's comments on the proposal before the Advisory Committee can be found at Enclosure D.

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interest in making class action judgments subject to the abandoned property statute, ORS 98.302 et seq.

This letter will explain why Rule 32 should be revised, will identify the principles we believe should guide that process and then will discuss in general terms the nature of the principal reforms that should be made. The specific language changes we seek can be found on enclosure A; an explanation of their purpose is provided in the comments to the proposed amendments, which can be found beginning at page 12 of Enclosure A. Virtually all the reforms we propose differ from those the 1981 legislature found unacceptable.

The Need for Reform

When the Council last considered reforming Rule 32, there was limited experience with how the rule actually worked, particularly in the context of allegedly wrongful practices which caused relatively small harm to each of a large number of people. By that time, several such cases had been filed. However, the developments in those cases which revealed problems with ORCP 32 mostly occurred later.[2] Thus, one reason why the changes in ORCP 32 adopted by the Council in 1980 may have been rejected by the legislature is that a need to alter the status quo had not been demonstrated.

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[2] In particular, several cases had been filed challenging the non-payment of earnings on tax and insurance reserves, including Derenco, Inc. v. Benj. Franklin Federal Savings & Loan Association, 281 Or 533, 577 P2d 477, cert den, 439 US 851 (1978); Guinasso v. Pacific First Federal Savings & Loan Association, 89 Or App 270, 749 P2d 577, rev denied, 305 Or 678 (1988); and Powell v. Equitable Savings & Loan Association, 57 Or App 1110, 643 P2d 1331, rev denied, 293 Or 394 (1982). By 1979, the merits of this controversy had largely been resolved by an interlocutory appeal in Derenco, but most of the class action issues had not yet been addressed.

Additionally, in 1979 and 1980, several cases were filed challenging bank NSF charges, including Best v. United States National Bank, 303 Or 557, 739 P2d 554 (1987) and Tolbert v. First National Bank, 96 Or App 398, 772 P2d 1373 (1989), rev pending. The class action issues in these cases were first considered in 1982.

Most of these cases have now been concluded.[3] A recent commentator, writing in the Willamette Law Review, draws the following lessons from them:

> "[A]t least one meritorious class action was abandoned because the claim form requirement precluded the possibility of meaningful monetary recovery. Additionally, in the tax and insurance reserve cases, * * * the wrongdoing defendants retained over two million dollars in illegally-obtained profits * * *." Emerson, "Oregon Class Actions: The Need for Reform," 27 Will L Rev 757, 760-761 (1991).

Our proposals for reform draw not only on Mr. Emerson's study of the Oregon class action experience. They also incorporate the best portions of the ABA Section on Litigation's recent proposal for the reform of the federal class action rule and the proposal presently in a preliminary stage of consideration by the Advisory Committee on Federal Rules.

The Principles That Should Guide the Reform Effort

Rules governing class actions have tended to be controversial because of the impact the class certification decision has upon the stakes involved in litigation. However, even some of the most conservative jurists have recognized the social benefits provided by class actions. For example, in Deposit Guaranty National Bank v. Roper, 445 US 326, 339 (1980), former Chief Justice Burger wrote:

> "The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."

Similarly, in Hoffmann-La Roche, Inc. v. Sperling, ____ US ____, 110 S Ct 482, 486 (1989), Justice Kennedy acknowledged that class actions benefit not only plaintiffs but also "[t]he

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[3] The only exception is Tolbert, which is pending in the Oregon Supreme Court.

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judicial system * * * by efficient resolution in one proceeding of common issues of law and fact * * *." See also Phillips Petroleum Co. v. Shutts, 472 US 797, 809 (1985) (Rehnquist, J).

In its previous examination of ORCP 32, the Council started from the premise that class action procedures should enable such cases to be litigated expeditiously, fairly and inexpensively, without creating undue burdens for either plaintiffs or defendants. We believe those continue to be appropriate standards for evaluating the class action rule. We also believe procedures must be designed so that, if a plaintiff class ultimately prevails, the defendant cannot escape a significant portion of the consequences either by the difficulty of calculating individual recoveries with precision or the inability to locate everyone entitled to a recovery.

Finally, it is critical to remember that class actions are about mass justice. The legal system traditionally has focused on individualizing justice to make sure that every injured party gets exactly what he or she deserves, not one cent more or less. This approach does not take into account what economists call transaction costs, the time spent by lawyers and judges and juries in determining the injured party's entitlement.

Historically, the consequences of the emphasis on individualized justice has been that small injuries which could not be aggregated into a class action have gone unresolved because, in the words of former Chief Justice Burger, injured parties have "not consider[ed] it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost." Roper, supra, 445 US at 338. But mass torts, in particular the asbestos cases, demonstrate that, when individual stakes are high enough, case-by-case adjudication results in the repetitious litigation of common issues, wastes judicial time and the parties' resources, and ultimately produces chaos. See, e.g., Cimino v. Raymark Industries, Inc., 751 F Supp 649, 650-652, 666 (ED Tex 1990).

The Principal Reforms Needed

1. Creation of a Unitary Class Certification Standard

Like the existing federal rule, ORCP 32 B contemplates three different types of class actions with three different standards for certification, differing obligations to give class members notice of the pendency of the action and differing criteria for participation in or exclusion from the class. The

predominant models are ORCP 32 B(2), which generally involves class actions for injunctive or corresponding declaratory relief, and ORCP 32 B(3),[4] which generally involves class actions for monetary damages.

The dividing line between B(2) and B(3) class actions is far from clear. For example, the federal courts have characterized class actions under Title VII seeking back pay for victims of discrimination to be B(2) cases on the grounds that this remedy is really a form of equitable restitution. E.g., Williams v. Owens-Illinois, Inc., 665 F2d 918, 929 (9th Cir 1982).

There are great procedural differences depending on which subsection of ORCP 32 B a case is certified under. In a B(3) class action, notice must be given to the class at the time of certification, usually at the plaintiff's expense, ORCP 32 F(1) and (4), and class members must be given an opportunity to opt out of the class. See ORCP 32 F(1)(b)(ii). Neither is required in a B(2) class action. In addition, a lesser showing is needed to certify a B(2) class.

The ABA Section on Litigation committee, "comprised of attorneys with broad experience representing plaintiffs and defendants in major class action litigation, attorneys with particular public interest perspectives, and two experienced federal judges," 110 FRD 195, 196 (1986), concluded that "the distinctions and procedural effects reflected in the presently trifurcated rule tend to blur the core values of the class action and to promote unnecessary, expensive and inefficient litigation over peripheral issues." 110 FRD at 198. Why, for instance, is notice and an opportunity to opt out required in a lawsuit seeking money damages like Best, where an individual could have as little at stake as $6, but is discretionary with the court in a lawsuit for injunctive relief to desegregate a school district, which will affect the education of all school children for years?

The proposed revisions to ORCP 32 B would make these procedural choices turn not on the form of the action, but on the concrete circumstances of the individual case before the court.

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[4] ORCP 32 B(1) involves special circumstances, probably the most important of which is the limited fund class action invoked when the defendant's resources are insufficient to pay all the claims of class members, should they succeed in litigation, as in some of the asbestos cases.

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This necessarily requires modification of several other portions of the rule, including ORCP E, F(1) and M.

One of the effects of this proposal would be to reverse a policy judgment by the 1973 legislature (which enacted the statutory predecessor to ORCP 32) to make certification of "damage" class actions under ORCP 32 B(3) more difficult than in federal court. The legislature attempted to achieve this by enacting the second sentence of ORCP 32 B(3), which provides that the predominance requirement of section B(3) cannot be satisfied "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."

There are three reasons why this language is not maintained. First, because the legislature made this requirement applicable only to B(3) class actions, it is impossible to preserve the legislative policy choices for each category of class actions while eliminating the tripartite certification structure. Second, in cases certified under ORCP 32 B(3), this sentence has prompted substantial litigation over the meaning of words like "numerous" and "likely," which in the end have resulted in decisions based primarily on judicial intuition. Compare Bernard v. First National Bank, 275 Or 145, 158-162, 550 P2d 1203 (1976) (defense of customer knowledge raises legitimate issues as to many members of the class) with Derenco, supra, 281 Or at 555, 571-572 (defense of customer knowledge not a legitimate issue except in isolated and infrequent instances) and Guinasso, supra, 89 Or App at 277-278 (defense of customer knowledge not a legitimate issue except in isolated and infrequent instances despite survey evidence and testimony to the contrary, given the unreliability of memory).

Finally, experience shows that the value choice in existing B(3) is wrong. There is no good reason why, for instance, the common issues in a mass tort like the asbestos cases should be litigated in Oregon state court over and over again because those cases also involve individual liability issues. As the Litigation Section committee puts it, the existence of individual questions "should not be viewed as insuperable stumbling blocks to maintenance of a class action if, after due consideration, the court concludes that class treatment is 'superior to other available methods for the fair and efficient adjudication of the controversy'". 110 FRD at 204.

Our proposal adopts most of the changes which appear in both the Section on Litigation and the Advisory Committee on Federal Rules proposals, and a number of the changes which are found exclusively in the Advisory Committee proposal. A few of these modify the rule in ways unrelated to the elimination of the tripartite class certification structure. The comments to Enclosure A identify the sources of the revisions we propose and, when we have chosen not to follow revisions recommended by either the Section on Litigation or the Advisory Committee, explain the reasons for our decision.

2. Reform of Damage Calculations

At present, if the plaintiff class prevails on liability, ORCP 32 F(2) and (3) require class members to submit claim forms or be excluded from the judgment. This requirement is unique to Oregon law. It creates two sets of problems that require reform.

First, ORCP 32 F(2) implies that, in some circumstances, class members will be required to provide "information regarding the nature of the[ir] loss, injury * * * or damage." This rule fails to give the parties and the court clear guidance in determining when class members will be required to provide evidence of the damages they suffered and when they will be sent claim forms with their proposed recovery precalculated from the defendant's records.[5] What happens if the defendant has records from which individual damages could be calculated, but the calculation will be expensive? What happens if the aggregate injury to the class can readily be calculated from the defendant's records, but the defendant has no records from which each individual's share can be determined with precision?

In many instances, the answer to these questions (which can only be known at the conclusion of litigation) determines whether a finding of liability results in a real or a Pyrrhic victory for the class. When most class members do not keep the relevant records for many years and the litigation is protracted,

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[5] The only certainty is that claim forms must be sent out before checks are issued to prevailing class members. Benj Franklin Federal Savings & Loan Association v. Dooley, 287 Or 693, 601 P2d 1248 (1979). If the defendant has accurate records, requiring this additional step adds expense without any countervailing benefit.

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only a tiny percentage of the class would be able to document their individual damages. Thus, as Mr. Emerson's article shows, when plaintiff's counsel receive a modest settlement offer, the uncertainty of how the claim form process will operate often will cause them to believe the class will be better served by settlement.

Trying to make the existing rule more clear does not alleviate the problem. The basic vice with it is that the viability of a class action turns on the quality of the defendant's record keeping. In fact, defining when a defendant will have to calculate individual damages for claim forms is likely to encourage deficient record keeping by defendants who operate on the edge of legality.

The second problem with the claim form procedure is most evident when the defendant can and does calculate individual damages before mailing claim forms, as occurred in the tax and insurance reserve cases. As Mr. Emerson's article shows, a substantial number of claim forms were not returned in these cases, mostly because class members could no longer be located.[6]

It appears likely that legislation will be passed making the unclaimed portion of any class action judgment payable to the state under the abandoned property statutes. This past session, the Oregon Senate passed such a bill unanimously (SB 1008). Due to pressures at the end of the session, the House Judiciary Committee was unable to hold a hearing on it. This bill was endorsed by both the Division of State Lands, which administers the unclaimed property statute, and the Superintendent of Public Instruction, whose agency would be the principal beneficiary of such legislation. Documents pertaining to this legislation can be found at Enclosure E.

We understand that a similar proposal will be introduced in the 1993 legislature by the Division of State Lands. The intent of this legislation is to require all monies unclaimed by class members to be paid over to the state. However, the last sentence of ORCP 32 F(2) and ORCP 32 F(3) stand as an obstance to this end.

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[6] The percentage of class members located depends, among other things, on whether the court requires a locator service to be used to find people who have moved from their last known address, on the length of time the case is litigated, and on the transiency or stability of the class.

To remedy the problems with the claim form procedure, we propose eliminating existing ORCP 32 F(2) and (3), redefining the judgment in a class action to be the aggregate amount which the defendant owes the plaintiff class and employing language from the Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 USC 15d, regarding damage computation techniques.

Conclusion

We appreciate the Council's consideration of these proposals. Although we have attempted to provide the Council with substantial information at the outset, we recognize that the Council undoubtedly will wish to receive testimony concerning this proposal and may request additional written materials.

We will endeavor to assist the Council in its deliberations in any way we can. All requests should be directed to Phil Goldsmith at the address and telephone number on the letterhead.

Respectfully submitted,

Phil Goldsmith

Philip Emerson

Jan Wyers

WILLIAMS & TROUTWINE, P.C.

By: _____
Gayle L. Troutwine

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BANKS, NEWCOMB & ENGELS

By: _____
Robert S. Banks, Jr.

ALLEN, KILMER, YAZBECK, CHENOWETH & VOORHEES, PC

By: _____
F. Gorden Allen

STOLL, STOLL, BERNE & LOKTING, PC

By: _____
Gary M. Berne

Danny Gerlt

GRENLEY, ROTENBERG, LASKOWSKI, EVANS & BRAGG

By: _____
Gary Grenley

GRIFFIN & McCANDLISH

By: _____
Mark E. Griffin

The text of proposed additions to the existing rule are shaded; text which is proposed to be deleted has a line through it.

Rule 32. CLASS ACTIONS

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~~

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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)~~ (4) the interest of members of the class in individually controlling the prosecution or defense of separate actions; ~~(b)~~ (5) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; ~~(c)~~ (6) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; ~~(d)~~ (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 ~~(e)~~ (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 Compromise of Class Actions; Court Approval Required; When Notice Required. Any action filed as a class action in which there has been no ruling under subsection (1) of section C of this rule and any action ordered maintained as a 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 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 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 pre-certification determination of a motion made by any party pursuant to Rules 21 or 47 if the court concludes that such a 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 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~~:~~, or to be excluded from the class;

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

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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; Calculation of Class Monetary Recovery.

F(1) When ordering that an action be maintained as a class action under this rule, the court shall determine whether, when, and how notice should be given under subsection 2 of Section E of this rule and whether, when, how, and under what conditions putative members may elect to be excluded from the class. The matters pertinent to this determination will 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 who do not receive notice. 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. ~~(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~~

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~~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) If a defendant is found liable to a plaintiff class in an action for monetary relief, the defendant's obligation to class members may be proved and assessed in the aggregate by statistical or sampling methods, by computations based upon the defendant's records, or by such other reasonable system of computing aggregate damages as the court in its discretion may permit, without the necessity of separately proving the individual claim of, or amount of damage to, each member of the class. Before entry of judgment against the defendant, the court may afford members of the class notice, to be paid by the defendant, and an opportunity to contest the amount of the class member's proposed individual recovery. The judgment against the defendant shall consist of the total obligation to the class as calculated in accordance with this subsection, ~~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 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 without prejudice to the right to maintain an individual, but not a class, action for such claim.~~

F(43) Except as otherwise provided in this subsection, the plaintiffs shall bear the expense of notification prior to a determination of liability. The court may, if justice requires, require that the defendant bear the expense of notification to the current customers or employees of the defendant included with

the current customers or employees of the defendant included with a regular mailing by the defendant. ~~The court~~ or may hold a preliminary hearing to determine how the costs of such notice ~~notice~~ shall be apportioned.

~~F(5) 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~~4) 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.

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 (1) with respect to particular claims or issues~~;~~, or (2) by or against multiple classes or subclasses. Each subclass must separately satisfy the requirements of this rule except for subsection (1) of Section A.

~~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.~~

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

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the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

I. Limitation on Maintenance of Class Actions for Damages. No action for damages may be maintained under the provisions of sections A and B of this rule upon a showing by a defendant that all of the following exist:

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

I(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;

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

I(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.

J. Application of Sections H and I 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 and B of this rule may be commenced without compliance with the provisions of section H 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 H 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 I of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.

K. 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.

L. Coordination of Pending Class Actions Sharing Common Question of Law or Fact.

L(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.

L(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.

L(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 Judge deems appropriate.

L(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.

L(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.

L(5) Notwithstanding any other provisions 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.

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, shall ~~include and~~ specify or describe those ~~whom the court finds~~ who are found to be members of the class~~. The judgment in an~~

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~~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 member.~~ or who, as a condition to exclusion, have agreed to be bound by the judgment. If a money judgment is entered in favor of a class, where possible, the judgment should specify by name each member of the class and the amount to be recovered by each member.

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~~ Notwithstanding any other applicable provision of law, a defendant or defendant class is entitled to attorney fees, costs, or disbursements ~~from a plaintiff class,~~ only against the representative parties and those members of the class who have appeared individually ~~are liable for those amounts~~ and only if the award is assessed as a sanction. 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)(iii) The magnitude, complexity, and uniqueness of the litigation;

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

N(I)(e)(v) Appropriate criteria in DR 2-106 of the Oregon Code of Professional Responsibility.

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.

O. **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:

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

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

O(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

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

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Commentary on proposed revisions

The source of most of these revisions is the draft revisions to Federal Rule 23 presently before the Advisory Committee on Federal Rules ("Advisory Committee"), which in turn are largely based on a proposal made by the ABA Section on Litigation, published at 110 FRD 195. Where the Advisory Committee proposal's language is used, its committee notes and, if applicable, the Section on Litigation's committee commentary explain the basis and purpose of the revision. These comments will explain the reasons for deviations from the Advisory Committee proposal, and those revisions not addressed by that proposal.

Section A(4).

The Advisory Committee proposal would add the requirement that the class representative serve "willingly." This proposal is not followed because of its apparent impact on actions involving a defendant class.

The federal courts have allowed one defendant to be certified as representative of a defendant class when an appropriate "juridical link" exists between members of that class. E.g., LaMar v. H & B Novelty & Loan Co., 489 F2d 461, 466, 469-470 (9th Cir 1973) (governmental bodies in a single state); Alaniz v. California Processors Inc., 73 FRD 269, 276 (ND Cal 1976) (employers operating under a single industry-wide collective bargaining agreement). Because few, if any, defendants are willingly part of any litigation, the Advisory Committee proposal would tend to preclude defendant class actions, contrary to ORCP 32 N(1) which expressly contemplates an action against a defendant class.

Section B.

To the extent present ORCP 32 B is identical to FRCP 23(b), the changes are identical in language to the Advisory Committee proposal and identical in substance to the Section on Litigation recommendation. The unique portions of present ORCP 32 B(3) are treated as follows.

B(3)(e) is maintained. B(3)(f) is deleted as unnecessary in light of the revision to ORCP 32 E(1) to permit precertification merits determinations. Because the second sentence of existing B(3) is similar (but not identical) to the second sentence of existing Federal Rule 23(b)(3), it is similarly deleted.

Section C(1).

The new text is based on the Advisory Committee proposal for revising Federal Rule 23(c)(1). The second half of the first

sentence of the existing rule, which is presently limited to B(3) class actions, is not contained in the federal rule. Because the policy it expresses both conveys to trial courts the importance of the class certification decision and facilitates appellate review of such decisions, it has been broadened to apply to all class actions.

Section D.

The revision is a blend of the best elements of the present rule and the Advisory Committee proposal for revising Federal Rule 23(e). It preserves the Oregon policy of requiring notice if a class action is settled, even before the certification decision, unless the class representative and that person's attorney receive no compensation from the case. This protects against a sellout of the class interests for personal gain, without impeding the class representative from withdrawing from an unmeritorious case. However, the revision adopts language from the Advisory Committee proposal which makes clear that this rule does not apply to the settlement of a proposed class representative's individual claim once class certification has been denied.

The revision also adopts the Advisory Committee proposal to give the trial court discretion on the extent of notice required in situations where the rights of absent class members may be adequately protected by notice directed to less than all. An example where this provision might have been invoked is the settlement of the claim for appellate attorney fees against the defendant in Guinasso v. Pacific First Federal, Multnomah County Circuit Court Case No. 416-583 (Amended Order Re Settlement, dated January 26, 1990). Even though the settlement had only a modest impact on the recoveries of individual class members and paved the way for an immediate payment of a nearly two million dollar class recovery, the court read existing ORCP 32 D as requiring notice to all class members and therefore ordered published notice.

Section E.

Based on the Advisory Committee proposal to revise Federal Rule 23(d).

Section F(1).

The revision replaces existing ORCP F(1) and (5) and generally is based on the Advisory Committee proposal to revise Federal Rule 23(c)(2). There are, however, three differences:

1. The Advisory Committee proposal would require some form of post-certification notice to be given in all cases, and defines the criteria to be used in determining the type and

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extent of that notice. Like the Section on Litigation recommendation, this revision leaves to the trial court's discretion, in accordance with defined criteria, the determination of "who will receive notice, when that notice will be given, and the form of notice that will be required." 110 FRD at 208.

The obligation to give notice in part is a question of constitutional due process. However, in the words of the Section on Litigation, it is "both unnecessary and unwise to attempt codification of constitutional principles in a procedural rule applicable to all civil actions." Id. at 198 n 2. This is so because courts in deciding individual cases can factor in evolving constitutional standards, but have no freedom to disregard the value choices reflected in rules even if the assumptions of constitutional law on which those rules rest prove to be incorrect. See Eisen v. Carlisle & Jacquelin, 417 US 156, 176-177 (1974) (irrespective of the requirements of due process, Federal Rule 23(c)(2) mandates individual notice in a case certified under Federal Rule 23(b)(3)).

A recent Oregon case illustrates why trial courts should retain the discretion to not require post-certification notice. Benzinger v. Oregon Department of Insurance & Finance, Multnomah County Circuit Court No. 9102-01201, involved the construction of ORS 656.268(6)(a) regarding time limits for workers' compensation reconsideration decisions. After the trial court's decision on the merits adopting plaintiff's construction of the statute was affirmed on appeal, 107 Or App 449, 812 P2d 36 (1991), the plaintiff moved to certify an injunctive relief class to insure that all similarly situated claimants would be treated equally. The trial court did so.

In such a case, requiring post-certification notice of any type would increase the expense of litigation without providing corresponding benefit to class members. The same would be true in a class action involving a government benefits program where all the class members qualify for representation by a legal services office. These are just examples, not an exclusive list of the circumstances in which post-certification notice should be dispensed with.

2. This revision identifies six criteria to guide the trial court's discretionary decisions regarding notice and the opportunity to request exclusion. The first four of these are drawn from the Advisory Committee proposal. The last two are drawn from the criteria to guide the trial court's discretion in determining the manner and form of notice in present ORCP 32 F(1)(c).

3. The Advisory Committee proposal contemplates under some circumstances "opt-in" classes, i.e., classes in which

absent class members must make an affirmative request to be included in the case. The Advisory Committee proposal's comments stresses that "[r]arely should a court impose an 'opt-in' requirement for membership in a class," but state that the option should be preserved if needed to avoid due process problems.

However, in Phillips Petroleum Co. v. Shutts, 472 US 797, 812-814 (1985), a unanimous Supreme Court rejected the notion that due process requires an absent plaintiff to opt in and suggested that such a requirement "would probably impede the prosecution of those class actions involving an aggregation of small individual claims" and would "sacrifice the obvious advantages in judicial efficiency resulting from the 'opt out' approach." The Advisory Committee proposal has identified no case in which an opt-out class has been found to violate due process. In short, an opt-in requirement is both bad policy and unnecessary to satisfy due process.

Section F(2).

In light of the experience summarized in Emerson, "Oregon Class Actions: The Need for Reform," 26 Will L Rev 757 (1991), the mandatory claim form requirement of existing ORCP 32 F(2) and (3) is eliminated. It is replaced by a methodology for computing the class monetary recovery which is drawn from the Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 USC §15(d).

The trial court is given a choice of tools to use in making this calculation in accordance with the measure of damages defined by governing substantive law. In determining which tool to use, the trial court should consider how accurately a particular method will determine each individual class member's recovery, how expensive using the particular method is and any other factors relevant to the particular case. When each individual's recovery can be calculated from the defendant's records relatively inexpensively, this methodology has been used in the past in cases like Guinasso and Powell v. Equitable Savings & Loan Association, Multnomah County Circuit Court Case No. 414-798, and should continue to be used.

Where the defendant does not have records to permit an exact calculation of each individual's recovery or where using these records would be disproportionately expensive, the trial court is authorized to consider other options. One option expressly identified is the use of statistical or sampling methods. Such methods have been employed by federal courts in a variety of class action contexts. The state of the federal law is summarized in Long v. Trans World Airlines, Inc., 761 F Supp 1320, 1323-28 (ND Ill 1991) and Cimino v. Raymark Industries, Inc., 751 F Supp 649, 659-666 (ED Tex 1990). See also Oregon Management and Advocacy Center, Inc. v. Mental Health Division,

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96 Or App 528, 774 P2d 1113, rev denied, 308 Or 405 (1989) (approving use of statistical sampling techniques for damage calculations in a non-class action).

In some instances, the aggregate recovery can be determined from the defendant's records using traditional methods, with statistical methods being used to allocate shares to individuals. In other circumstances, statistical or sampling techniques will be needed to ascertain both the aggregate recovery and each individual share.

The trial court is free to consider any other computational technique that makes sense under the facts of the particular case. But it cannot require class members to complete claim forms as a condition of participation in the recovery.

It should be emphasized that this rule only applies to the computation of damages after a class has been certified. Even when all other class certification criteria are satisfied, where each individual has suffered substantial damages that cannot readily be calculated based on a formula, section B of this rule gives the trial court discretion to deny class certification.

Once a recovery calculation has been made for each class member, the trial court is given the discretion whether to afford class members notice and the opportunity to contest their personal share of the recovery. In deciding whether to exercise this authority, the trial court is to balance the cost of this process against the likelihood that class members would have the means by which to materially improve the calculation of their individual recoveries.

The judgment ultimately entered will include the entire monetary recovery awarded to the class. This revision does not address the disposition of that portion of the judgment awarded in favor of individuals who cannot be identified or located, but leaves this issue for legislative determination.

Section F(3).

The revisions are intended to remove a possible ambiguity in the text of this section which was added by the 1981 legislature. The defendant in Guinasso contended that the present wording of this section, currently located at ORCP 32 F(4), obligated the plaintiff to pay the cost of notice to class members after they had prevailed at trial, and eliminated the basis of the ruling in Powell (Order dated April 5, 1979) that, after the plaintiff has prevailed on liability, the defendant has to pay such costs. The trial court in Guinasso rejected this contention, Order Re Costs dated December 24, 1984, and the Court of Appeals rejected without discussion an assignment of error

based on this ruling. 89 Or App 270, 278, 749 P2d 577, rev denied, 305 Or 672 (1988). Modification of the existing language is desirable to preclude a similar contention from being raised in the future.

Section G.

The revisions are based on the Advisory Committee proposal's revisions of Federal Rule 23(c)(4). However, the Advisory Committee proposal refers at the beginning of the second sentence to "each class or subclass." The words "class or" have been deleted because they could be read as permitting certification of a class without satisfying the numerosity requirement in ORCP 32 A(1).

Section M.

The first sentence adopts the Advisory Committee proposal's revisions of Federal Rule 23(c)(3) with minor wording changes to enhance clarity. The second sentence is based on experience under the existing rule that, when a class prevails in an action for monetary recovery, it is preferable that the judgment specify the name and recovery amount of each class member.

Section N (1)(a).

The present rule, which makes the class representative liable for attorney fees in an unsuccessful class action, is inconsistent with the general policy of ORCP 32. One function of ORCP 32 is to permit the aggregation of small claims which are individually uneconomical to litigate, so that they can be undertaken by an attorney on a contingent basis. See Bernard v. First National Bank, 275 Or 145, 152, 550 P2d 1203 (1976). Making the class representative liable for all attorney fees, costs and disbursements if the case is unsuccessful effectively deters a class action whenever the defendant has a basis for recovering attorney fees.

The revision limits the class representative's liability to sums assessed as sanctions in the litigation process. This will permit fees and costs to be awarded, for example, if the plaintiff violates ORCP 17 or if the defendant is entitled to fees under a statute which requires a showing that the plaintiff's case was frivolous. However, a defendant could not employ a contractual attorney fee provision against the class representative.

Revision omitted.

There is an additional element of the Advisory Committee proposal, to create a right to seek an interlocutory

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appeal from any class certification decision. This proposal is not followed because it seems redundant of ORS 19.015 as interpreted by the Oregon Supreme Court in Joachim v. Crater Lake Lodge, Inc., 276 Or 875, 556 P2d 1334 (1976).

prevents disclosure of the memorandum which defendants seek.[2]

ORDER

Having considered the memoranda and arguments in support and in opposition to Defendants' Motion to Compel Production of Documents and good cause appearing therefore,

IT IS HEREBY ORDERED:

Defendants' Motion to Compel Production of Documents is DENIED.

IT IS SO ORDERED.

2. Since contempt is generally the only effective way to ensure a non-party witness' compliance with an order for production the California constitutional provision is in effect an absolute bar to compelled production. *Playboy, supra*, 154 Cal.App.3d at p. 24, 201 Cal.Rptr. 207; *Mitchell v. Superior Court*, 37 Cal.3d 268, 274, 208 Cal. Rptr. 152, 690 P.2d 625 (1984).

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AMERICAN BAR ASSOCIATION SECTION OF LITIGATION

REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON CLASS ACTION IMPROVEMENTS

THE AMERICAN BAR ASSOCIATION HAS AUTHORIZED THE SECTION ON LITIGATION TO TRANSMIT THIS REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES. THIS REPORT HAS BEEN APPROVED BY THE COUNCIL OF THE SECTION OF LITIGATION BUT HAS NOT BEEN APPROVED BY THE AMERICAN BAR ASSOCIATION

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Introduction

In December 1977, the Office for Improvements in the Administration of Justice of the United States Department of Justice released for public comment a proposal to reform certain aspects of the class action for federal civil litigation. That proposal, which resulted in legislation introduced but not enacted during the 95th Congress, S. 3475, 95th Cong., 2d Sess. (1978), sparked considerable debate.[1] The American Bar Association, and its Section of Litigation, joined those opposing the Department of Justice proposal. Recognizing the seriousness of the problems addressed by the Department of Justice, and mindful of its public responsibilities, the Section of Litigation, in cooperation with the American Bar Association and the American Bar Foundation, appointed the Special Committee on Class Action Improvements.

The Committee, comprised of attorneys with broad experience representing plaintiffs and defendants in major class action litigation, attorneys with particular public interest perspectives, and two experienced federal judges, began its deliberations in October 1981. A preliminary report was circulated for public comment and published in the Fall 1984 edition of *Litigation News*. After consideration of suggestions and comments, the Committee made appropriate revisions and submitted its report to the Council of the Section of Litigation. The Council approved the report and in July 1985 the House of Delegates of the American Bar Association authorized the Section of Litigation to transmit the report to the Advisory Committee on Civil Rules of the Judicial Conference of the United States. In authorizing transmittal to the Advisory Committee, the House of Delegates neither approved nor disapproved the recommendations set forth in this report.

I

BACKGROUND OF THE STUDY AND RECOMMENDATIONS

This is not the first undertaking looking to change class action procedures. Previous efforts at meaningful reform of the class action

1. See, Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 Colum.L.Rev. 299 (1980); OIAJ, *The Case for Comprehensive Revision of Federal Class Damage Procedure*, reprinted, 6 Class Action Rep. 9 (1979); Wells, *Reforming Federal Class Action Procedure: An Analysis of the Justice Department Proposal*, 16 Harv.J.Legis. 543 (1979); *Proceedings of the Thirty-Ninth Annual Conference of the District of Columbia Circuit*, 81 F.R.D. 263, 285-291 (remarks of Mr. Meador), 291-295 (remarks of Mr. Mickum), 295-303 (remarks of Professor Miller); OIAJ, *Effective Procedural Remedies for Unlawful Conduct Causing Mass Economic Injury* (1977).

have encountered stiff opposition and none has commanded the consensus necessary to achieve adoption. There are those who argue that evidence is lacking to demonstrate a need for any change in the present rule. Others believe that the need for change is established, particularly with regard to the class actions maintained under Rule 23(b)(3), but disagree over what changes are required.

Since 1966, determination of whether a class action is "proper" has required consideration of one (or more) of the three subdivisions of Rule 23(b). These three categories are far from airtight and the complexities of modern litigation doom to failure efforts to insist that a given case must fit one, and only one, of the rule's subdivisions. For example, cases involving claims for both money damages and injunctive or declaratory relief present significant difficulties of classification. Under the present rule, the mere fact that money damages are sought will not defeat a (b)(2) action if the court determines that the monetary relief is "incidental" to the equitable claim. On the other hand, if the action is determined to be one "predominantly" for money damages, the action may not be maintained under subdivision (b)(2). Since an artful pleader can endeavor to make the declaratory or injunctive relief appear to "predominate," and since the plaintiff obviously will prefer to escape the onerous notice requirements and associated expense involved in a (b)(3) action, this problem arises frequently. As a result, much wheel spinning, expense and delay is often involved in the classification determination.

If the court determines that the requirements of subdivision (a) and either (b)(1) or (b)(2) are satisfied, the present rule mandates that the case proceed as a class action without regard to the predominance of the common question of law or fact, or to the superiority of the class action to other available methods for the fair and efficient adjudication of the controversy. Such a determination has profoundly important procedural consequences, for an action ordered maintained under either subdivision (b)(1) or (b)(2) is free of the mandatory notice requirements of Rule 23(c)(2) and is instead governed by the more flexible provisions of Rule 23(d) subject, of course, to whatever constitutional requirements may pertain in the particular circumstances. Moreover, class members in an action maintained under subdivisions (b)(1) or (b)(2) are not afforded a right of exclusion for the "opt out" feature of Rule 23(c)(2) is applicable only to actions "maintained under subdivision (b)(3)...."

If, on the other hand, the court concludes that the case is one that can only be maintained pursuant to subdivision (b)(3), dramatically different consequences attach. Initially, the often difficult determination of "predominance" and "superiority" command the attention of the parties and the court. A principal focus is often on the subsidiary issues enumerated in the rule as "pertinent to the [predominance and superiority] findings" including importantly "the difficulties likely to be encountered in the management of a class action." Delay in the certification ruling is not uncommon.

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Even if the action is ordered maintained as a class action under subdivision (b)(3), the present rule contains formidable procedural barriers that must be surmounted if the action is to proceed to judgment. In a (b)(3) case, unlike cases maintained under subdivisions (b)(1) or (b)(2), the plaintiff must furnish notice to each member of the class "including individual notice to all members who can be identified through reasonable effort" without regard to whether notice to fewer than all class members or notice by some method would satisfy constitutional requirements. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Class members in an action ordered maintained under subdivision (b)(3), unlike their counterparts in a (b)(1) or (b)(2) action, are afforded an unqualified right to be excluded from the case.

We have concluded that the distinctions and procedural effects reflected in the presently trifurcated rule tend to blur the core values of the class action and to promote unnecessary, expensive and inefficient litigation over peripheral issues. Our recommendations are designed to refocus the certification inquiry upon the superiority of class action treatment for the particular dispute, eliminate unnecessary expense and delay in the maintenance and resolution of the action and facilitate attainment of important purposes of the modern class action. See *Phillips Petroleum Co. v. Shutts*, — U.S. —, —, 105 S.Ct. 2965, 2973, 86 L.Ed.2d 628 (1985).[1] These recommendations are summarized at pp. 198–203 and detailed at pp. 203–211.

II

CONCLUSIONS AND RECOMMENDATIONS

(A). *Summary of Conclusions and Recommendations.*

Central to the Committee's recommendations is its conclusion that the class action is a valuable procedural tool affording significant opportunities to implement important public policies. Although recognizing the role assigned to public enforcement actions, the constraints and limitations necessarily placed upon such actions persuades the Committee that private injunctive and damage actions, properly contained and efficiently administered, are often essential if widespread violations of those policies are to be deterred. Such actions should not be thwarted by unwieldy or unnecessarily expensive procedural requirements.

The Committee is aware of claims that the class action procedure is or may be misused. Cries of "legalized blackmail" and "Frankenstein monster," while not infrequently overstated, reflect important concerns. These concerns are best addressed, the Committee has concluded, by judicial oversight and discerning application of procedural mechanisms already in place and designed to eliminate meritless actions or to deter other abuses of the litigation process.

1. The constitutional issues addressed in *Phillips Petroleum* arose in the context of a state court proceeding involving a national class of plaintiff members almost none of whom had jurisdictionally sufficient contact with the forum state. Nevertheless, we recognize that constitutional issues may arise under an amended rule just as they do under the present rule. It is, we believe, both unnecessary and unwise to attempt codification of constitutional principles in a procedural rule applicable to all civil actions. See *infra* at 207–208.

The Committee has considered and rejected proposals for radical revision of the class action procedure. In doing so, it is mindful of the fact that the present rule, adopted in 1966, was the product of thoughtful work by the Advisory Committee and its advisers and reflected cautious accommodation of a number of competing considerations. In the Committee's judgment, those who would fundamentally alter federal class action procedure, whether to expand or constrict the reach of the rule, have yet to make their case.

At the same time, this is not 1966. Today's understanding of constitutional constraints involving notice, the force and effect of judgments, and the right to institute and control an individual action has evolved beyond the thinking that shaped some of the major features of the 1966 rule. The experience gained in administration of class actions maintained under subdivisions (b)(1) and (b)(2), for example, has demonstrated that notice requirements may sometimes be satisfied at different times and in less expensive ways than the framers of present Rule 23(c)(2) thought possible. Post 1966 developments involving the the collateral estoppel effects of a prior judgment and modification of the common law mutuality doctrine raise difficulties not contemplated by those who drafted the present rule. Adoption in 1968 of multi-district consolidation procedures, 28 U.S.C. § 1407, and associated procedural innovations aimed at increased judicial efficiency in the face of mounting case loads warrants reexamination of earlier views concerning the right of individual litigants to institute and control separate law suits involving questions of law and fact common to a number of litigants.

Moreover, technological progress and resulting change in the nature and complexity of federal civil actions has mandated recent adoption of techniques designed to facilitate litigation, control mounting costs, and reduce delay. Part of the solution has been to impose upon the federal trial judge increasingly important management responsibilities.

These considerations persuade the committee that reexamination of certain features of the class action rule is warranted, and that there are now available ways by which unnecessarily time consuming and expensive features of the present rule may be modified to increase the utility of the procedure without sacrificing needed safeguards against abuse. As detailed below, the Committee accordingly recommends:

1. Elimination of the three subdivisions of present Rule 23(b) in favor of a unified standard governing all class actions.

2. Modification of the notice requirements of present Rule 23(c)(2), now applicable only to actions maintained under subdivision (b)(3). The amended rule will permit the timing, extent and method of notice to be tailored to the needs and circumstances of the particular case.

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3. Modification of the exclusion feature of present Rule 23(c)(2), now applicable only to actions maintained under subdivision (b)(3). The amended rule will authorize the court to permit, refuse or condition exclusion as the needs and circumstances of the case may warrant.

4. Clarification to eliminate confusion concerning proper treatment of pre-certification motions under Rules 12 or 56 and to authorize consideration of such motions prior to certification of the class when such action is appropriate.

5. Addition of specific provisions designed to facilitate early judicial management of class action, and to coordinate proceedings under Rule 23 with the recently added provisions of Rules 16 and 26(f).

6. Establishment of jurisdictional provisions permitting appellate review of the certification ruling by permission of the court of appeals with accompanying safeguards designed to deter vexatious or delaying resort to interlocutory review.

These recommendations are detailed in the proposed revisions to F.R.Civ.P. 23 and to Title 28 of the United States Code set forth below with accompanying commentary.

(B). *Recommendations for Amendments to F.R.Civ.P. 23.*

The Special Committee for Class Action Improvements of the American Bar Association, Section of Litigation, proposes that the following amendments be made to the Federal Rules of Civil Procedure. New material is italicized; material to be deleted is lined through.

RULE 23
CLASS ACTIONS

(a). Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b). Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

~~(1) the prosecution of separate actions by or against individual members of the class would create a risk of~~

~~(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~~

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

~~(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~~

(3) the court finds ~~that 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. The matters pertinent to the *this* findings include: *(A) the extent to which questions of law and fact common to members of the class predominate over any questions affecting only individual members;* (B) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (C) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (D) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (E) the difficulties likely to be encountered in the management of a class action *that would be eliminated or significantly reduced if the controversy was adjudicated by other available means; (F) the extent to which the prosecution of separate actions by or against individual members of the class would create a risk of (1) 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 (2) 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 adjudication or substantially impair or impede their ability to protect their interests; (G) 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.*

(c). Determination by Order Whether Class Action to be Maintained; *Exclusion;* Notice; Judgment; Actions Conducted Partially as Class Actions.

(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. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2). In any class action *ordered* maintained *as a class action* under ~~subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the~~

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judgment, whether favorable or not, will include all members who do not request exclusion, and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel. *this rule, the court shall determine by order whether members of the class will be excluded from the class if a request for exclusion is made by a date specified in the order, whether members of the class will be excluded from the class only upon a showing of good cause, or whether exclusion will not be permitted. The matters pertinent to this determination will ordinarily include: (A) the nature of the controversy and the relief sought; (B) the amount or nature of any individual member's injury or liability; (C) the interest of the party opposing the class in securing a final resolution of the matters in controversy; and (D) the inefficiency or impracticability of separately maintained actions to resolve the controversy. When appropriate, an order permitting exclusion may contain such conditions as are just, including 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 which may be rendered in favor of the class from which exclusion is sought.*

(3). The judgment in an action *ordered* maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those which the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion *been permitted to exclude themselves from the class*, and whom the court finds *who are found to be members of the class.*

(4). When appropriate (A) an action may be brought or *ordered* maintained as a class action with respect to particular issues, or (B) 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.

(d). Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument *including pre-certification determination of a motion made by any party pursuant to Rules 12 or 56 if the court concludes that such a determination will promote the fair and efficient adjudication of the controversy and will not cause undue delay;* (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

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action, or *of the opportunity, if any, to seek exclusion from the action together with the conditions or limitations imposed pursuant to subdivision (c)(2) upon such opportunity;* (3) imposing conditions on the representative parties or intervenors, (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rules 16 *and 26(f)*, and may be altered or amended as may be desirable from time to time.

(e). Dismissal or Compromise. *An action filed as 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. *An action ordered maintained as 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 some or all members of the class in such manner as the court directs.*

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Subdivision (b).

Merger of Subdivisions (b)(1), (b)(2), and (b)(3). The present rule places a premium on characterization of the action. An action determined to meet the definitions set forth in subdivision (b)(1) or (b)(2) is, if the rule is applied as written, an action that must be permitted to proceed as a class action without regard to whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Moreover, such actions are exempt from the mandatory "best notice practicable under the circumstances" and the exclusion requirements of subdivision (c)(2). Conversely, an action determined to meet solely the requirements of subdivision (b)(3) may only be maintained as a class action if the court makes the required predominance and superiority determinations, and if the class champion is willing and able to finance the costs of the required notice. In such a case, class members have an unqualified right under the existing rule to insist upon exclusion from the class action.

With such important procedural consequences at stake, it is no surprise that enormous amounts of energy and money are often devoted to the characterization battle, and difficult questions command the attention of the courts as the parties struggle at the outset of a case to decide whether the presence of an "individual issue" defeats a claim to (b)(1) status, *Tober v. Charnita, Inc.*, 58 F.R.D. 74 (E.D.Pa.1973); *Contract Buyers League v. F & F Investment*, 48 F.R.D. 7 (N.D.Ill.1969), or whether the equitable relief said to warrant a (b)(2) determination is

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"incidental" or "predominant." Compare *Marshall v. Kirkland*, 602 F.2d 1282 (8th Cir.1979); *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir.1977); and *Bolton v. Murray Envelope Corp.*, 553 F.2d 881 (5th Cir.1977) with *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304 (9th Cir.1977); *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594 (4th Cir.1976); *Sarafin v. Sears, Roebuck & Co., Inc.*, 446 F.Supp. 611 (N.D.Ill.1978).

The trifurcation created by present subdivision (b) places a premium on pleading distinctions with important procedural consequences flowing to the victor. This comes uncomfortably close to resurrection of the forms of action abolished by Rule 2. The Committee believes that not all civil actions can be made to fit one of three predefined procedural compartments, and it considers efforts to do so as unnecessary and wasteful.

The Committee recommends elimination of the three subsections of present subdivision (b) in favor of a unified rule permitting any action meeting the prerequisites of Rule 23(a) to be maintained as a class action if the court finds "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." In so recommending, we agree with the similar recommendation made by the Special Committee on Uniform Class Actions and adopted by the National Conference of Commissioners on Uniform State Laws.

Additional considerations, including importantly the extent to which the common questions of law and fact predominate over individual questions and those factors now identified in subdivisions (b)(1) and (b)(2), are unquestionably important. The court should weigh such considerations along with other relevant factors, in deciding whether to permit the action to be maintained as a class action. These matters, however, should not be viewed as insuperable stumbling blocks to maintenance of a class action if, after due consideration, the court concludes that class treatment is "superior to other available methods for the fair and efficient adjudication of the controversy." The Committee accordingly recommends that these factors be identified as among the considerations "pertinent to the [superiority] finding" required by the rule.

Difficulties of Management. The Committee is concerned that much preliminary and potentially wasteful skirmishing takes place over the "management" factor identified in present subdivision (b)(3)(D). The concerns there identified are important ones and may be pivotal in a particular case. Nevertheless, some courts appear to view management difficulties alone as a sufficient ground to defeat a proposed class action. Such an approach runs counter to the spirit of the 1966 amendments and overlooks the important implementation and deterence functions of privately maintained class action. We accordingly agree with the observation set forth in the Manual for Complex Litigation, § 1.42 n. 72 (1977):

> Some cases have apparently held that it is proper to dismiss class actions on the basis of management problems alone. ... Dismissal for management reasons, in view of the public interest involved in class actions, should be the exception rather than the rule. ... In order that some standard apply, it would appear that the judge should not dismiss a suit purely for management reasons without some assessment of possible merit in the action and a determination of the issue of whether management problems would frustrate any ultimate relief. That determination should be supported by fact. See *Yaffe v. Powers*, 454 F.2d 1362, 1365 (1st Cir.1972), to the following effect: "[F]or a court to refuse to certify a class action on the basis of speculation as to the merits of the cause of action because of vaguely perceived management problems is counter to the policy which originally led to the rule, and more specially, to its thoughtful revision and also to discount too much the power of the court to deal with a class suit flexibly, in response to difficulties as they arise."

Before management difficulties are relied upon to defeat a class action, the Committee believes the court should determine that those "difficulties would be eliminated or significantly reduced if the controversy was adjudicated by other available means...." The addition of such qualifying language will serve to underscore what we believe was the purpose and intention of the original rule.

In a number of cases, the difficulties and expense involved in ascertaining, collecting and/or distributing damages has surfaced as the dispositive issue at the certification phase of the litigation. In an important decision, two senior members of the Second Circuit appeared to hold that a "fluid recovery" proposal advanced by the plaintiffs in an effort to overcome alleged management difficulties was impermissible and perhaps unconstitutional. *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir.1973). The case involved other issues and despite the view of a majority of the active circuit judges who voted to deny rehearing en banc because the case "is of such extraordinary consequence that [we are] confident the Supreme Court will take this matter under its certiorari jurisdiction" and resolve "the far-reaching implications the panel's opinion might have on the initiation and administration of certain class action litigation in the future," 479 F.2d at 1020–1021, the Supreme Court reserved decision on the "fluid recovery" aspect of the case. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 n. 10, 94 S.Ct. 2140, 2150 n. 10, 40 L.Ed.2d 732 (1974). Nevertheless, a number of courts have relied upon the "difficulties of management" provision to deny class action certification to cases where individual proof, collection and/or distribution or damages would be difficult, impossible or disproportionately costly. *E.g., In re Federal Skywalk Cases*, 680 F.2d 1175, 1189–1190 (8th Cir.1982); *Windham v. American Brands, Inc.*, 565 F.2d 59, 66–72 (4th Cir.1977) (en banc); *In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir.1974).

The Committee considered and rejected proposals to recommend legislation establishing some form of "fluid recovery" as a way to overcome perceived management difficulties for some kinds of class actions. Rather, the Committee believes it best to leave the question of damages to develop, as it now is developing, in cases that present the problem

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unencumbered by the certification issue. Thus, for example, in cases now maintained under subdivisions (b)(1) or (b)(2), or in other kinds of litigation, questions involving "classwide" proof of damages by use of statistical and other evidence are being isolated and addressed, *L.C.L. Theatre v. Columbia Pictures Industries*, 421 F.Supp. 1090 (N.D.Tex. 1976), as are questions concerning appropriate disposition of unclaimed damages. *Van Gemert v. Boeing Co.*, 739 F.2d 730 (2d Cir.1984). See *Van Gemert v. Boeing Co.*, 553 F.2d 812 (2d Cir.1977), 590 F.2d 433, 440 n. 17 (2d Cir.1978), aff'd, 444 U.S. 472, 482 n. 8, 100 S.Ct. 745, 751 n. 8, 62 L.Ed.2d 676 (1980). When these questions are addressed on their individual merit, differences in statutory language and other policy considerations can be focused on the particular issue presented. When, however, the damage issue is presented *in limine* at the certification stage of the case, such discerning development of the law is not possible. The improvements in class action procedure which the Committee has recommended, and the elimination of unnecessarily costly procedures which have heretofore hindered presentation of some of these questions, will now serve to facilitate presentation of particularized questions involving the calculation, collection and/or distribution of damages on records permitting informed development of the governing principles.

Subdivision (c).

Present subdivision (c)(2), applicable only to actions maintained under subdivision (b)(3), requires the court to "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort" and confers upon each class member an unqualified right to be excluded from the class. In actions now maintained under subdivisions (b)(1) or (b)(2), notice is governed by the more flexible provisions of subdivision (d) and no right of exclusion is conferred by the rule.

Exclusion. The right to be excluded from class litigation and the right to institute and control one's own law suit are important rights reflecting fundamental concerns. Since Rule 23 was adopted in its present version in 1966, the overriding needs of the federal judicial system have mandated imposition of limitations upon those rights. See, *e.g.*, 28 U.S.C. § 1407. The obligatory exclusion provision of subdivision (c)(2) can create unnecessary difficulties in the administration of a class action. It is, for example, one thing for a class member to decide to have nothing to do with pending litigation. It is quite another for that member to insist upon exclusion under subdivision (c)(2) of the rule in order to institute a separate action where reliance will be placed upon the class action judgment to establish important aspects of the claim. See, *In re Transocean Tender Offer Securities Litigation*, 455 F.Supp. 999 (N.D.Ill.1978); George, *Sweet Use of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 Stan.L.Rev. 655 (1980); Note, *Class Action Judgments and Mutuality of Estoppel*, 43 Geo.Wash.L.Rev. 814 (1975).

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While different in form, this use of the exclusion feature of the present rule does not differ in substance from the "one way intervention" tactic available under pre 1966 practice. It is, moreover, wasteful of scarce judicial resources and affords unnecessary opportunities for abuse. The exclusion provision has also thwarted innovative efforts to deal with the difficult problems encountered in classwide claims for punitive damages. *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.1982).

The Committee has concluded that the obligatory exclusion feature of present subdivision (c)(2) should be eliminated in favor of provisions permitting the trial judge to assess the individual circumstances of the case and, where appropriate, to attach conditions to a request for exclusion or to prohibit exclusion altogether.

In determining whether it is appropriate that members of a class may be excluded, the Committee's proposed revision of Rule 23(c)(2) identifies a member of pertinent factors. One of these, "the nature of the controversy and the relief sought," is intended to refer principally to those actions now maintained under Rule 23(b)(2) where "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." In such cases, the courts have held that there is no absolute right of exclusion. *E.g., LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 n. 7 (5th Cir.1975); *United States v. United States Steel Co.*, 520 F.2d 1043, 1057 (5th Cir.1975), *clarified*, 525 F.2d 1214, *cert. denied*, 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77 (1976).

The 1966 addition of Rule 23 (b)(2) was based "on experience mainly, but not exclusively, in the civil rights field." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure I*, 81 Harv.L.Rev. 356, 389 (1967); see also, *Notes of the Advisory Committee on the Federal Rules*, 39 F.R.D. 69, 102 (1966). Civil rights cases alleging racial or other group discrimination are often by their very nature class suits, involving classwide wrongs. In civil rights and other actions presently maintained under Rule 23(b)(2), the group nature of the harm alleged and the broad character of the relief sought minimizes the need for or appropriateness of exclusion.

Some of these cases, however, have become "mixed" class actions seeking classwide injunctive or declaratory relief and individual monetary damages or injunctive relief. See, *e.g., Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir.1974). It may be appropriate in such cases to permit class members to exclude themselves from the action, especially at the stage in the proceeding when individual relief is determined. See *Penson v. Terminal Transport Co.*, 634 F.2d 989, 993-94 (5th Cir.1981). The proposed amendment permits consideration of these and other relevant factors, and is designed to afford the trial judge an opportunity to tailor exclusion provisions appropriate to the needs of the particular case and to impose suitable conditions when necessary to prevent abuse.

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Notice. Present subdivision (c)(2) mandates the scope and form of notice required in a (b)(3) action. As construed, this provision frequently obliges a court to require the class representative to advance huge sums of money as a precondition to further prosecution of the action. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). As a practical matter, such orders may effectively preclude maintenance of the action. This possibility, in turn, may prompt the party opposing the class to insist upon expensive and time consuming discovery grounded on the requirement of "individual notice to all members who can be identified through reasonable effort." By contrast, those actions maintained under subdivisions (b)(1) and (b)(2) are governed by the flexible notice requirements of subdivision (d) and due process considerations. See Restatement (Second) of Judgments § 86, Comment b, p. 72 (Second Tentative Draft, 1975); cf. 15 U.S.C. 15c(b)(1).

Consistent with our recommendation for elimination of the trifurcated approach to class action management and our belief that procedural rules should not mandate unnecessarily cumbersome or expensive requirements, we have proposed deletion of the special notice provisions now set forth in subdivision (c)(2) and applicable only to (b)(3) cases. Adoption of this recommendation will permit trial judges to consider the nature of the particular case in making the determination of who will receive notice, when that notice will be given, and the form of notice that will be required. As is the case with the determination to permit an action to be maintained as a class action, or with the exclusion provisions of such an order, the Committee concludes that the need for, the timing of, and the method of notice is best determined by the trial judge subject, of course, to the requirements of due process of law. Obtainable economies in the notice phase of the case should be realized when such economies do not impair the rights of absent class members.

Subdivisions (d) and (e).

Pre-Certification Decision of "Merits Motions." The present rule has generated uncertainty concerning the appropriate order of proceeding when the court is faced with a precertification motion addressed to the merits of the claims or defenses. Compare, *e.g., National Contractors v. National Electrical Contractors*, 498 F.Supp. 510, 519 (D.Md. 1980); *Pabon v. McIntosh*, 546 F.Supp. 1328 (E.D.Pa.1982); *Koslowski v. Doughlin*, 539 F.Supp. 852 (S.D.N.Y.1982). Many courts construe the rule to permit precertification decision of the defendant's motion, *e.g., Hotel Employers Association v. Gorsuch*, 669 F.2d 1305, 1306 n. 1 (9th Cir.1982); *Zambardino v. Schweiker*, 668 F.2d 194, 201 (3d Cir.1981); *Pharo v. Smith*, 621 F.2d 656, 663–64, *reh. granted in part and remanded on other grounds*, 625 F.2d 1226 (5th Cir.1980); *Roberts v. American Airlines, Inc.*, 526 F.2d 757, 763 (7th Cir.1975); *Case & Co., Inc. v. Board of Trade*, 523 F.2d 355, 360 (7th Cir.1975); *Jackson v. Lynn*, 506 F.2d 233, 236 (D.C.Cir.1974), although some courts draw a distinction between actions maintained under subdivisions (b)(1) or (b)(2)

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and those maintained under subdivision (b)(3), and permit such precertification decision only for the former. *E.g., Roberts v. American Airlines, Inc., supra*, 526 F.2d at 763; *Jiminez v. Weinberger*, 523 F.2d 689, 699–702 (7th Cir.1975). See generally, Wright and Miller, *Federal Practice & Procedure*, § 1798 and nn. 18.1–18.2 (1982); Newberg, *Class Actions*, § 2160 (Supp., 1980); Note, *Developments in the Law—Class Actions*, 89 Harv.L.Rev. 1318, 1416–1427 (1976). The Senate Commerce Committee reports that about 55% of the class action cases it studied were disposed of in favor of the defendant on preliminary motion. Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 Geo.L.J. 1123, 1136, 1144 (1974). Where, however, the plaintiff seeks precertification determination of the merits of the claims or defenses, the present rule has caused considerable confusion. See generally, *Gurule v. Wilson*, 635 F.2d 782, 790 (10th Cir.1980); *Postow v. OBA Federal Savings and Loan Association*, 627 F.2d 1370, 1380 (D.C.Cir.1980); *Kohne v. Imco Container Co.*, 480 F.Supp. 1015, 1017 n. 1 (W.D.Va.1979); *Issen v. GSC Enterprises, Inc.*, 522 F.Supp. 390, 395 (N.D.Ill.1981); *Izaguirre v. Tankersley*, 516 F.Supp. 755, 757 (D.Ore.1981).

We recognize the difficulties but on balance conclude that in an appropriate case precertification decision of a merits motion, whether made by a plaintiff or a defendant, may advance a "speedy and inexpensive" resolution of the controversy or significantly inform the certification ruling. When such a ruling will not require substantial delay, as would be the case if extensive discovery was needed for fair consideration of the motion, we do not think the "as soon as practicable" requirement of subdivision (b) ought to preclude precertification determination of a motion made pursuant to Rules 12 or 56. In such cases, the sound discretion of the trial judge is to be preferred over a rule according automatic priority to the certification motion. Too much delay can be just as prejudicial and counterproductive as too much haste. When informed discretion is guided by modern management techniques reflected in amended Rules 16 and 26 and the safeguards against abuse found in the recent additions to Rules 7 and 11, the proper balance is more likely to be struck. The amendment we propose makes it clear that the court has such discretion.

Dismissal or Compromise. There are sound reasons for requiring judicial approval of a proposal to dismiss or compromise an action filed or ordered maintained as a class action. The reasons for requiring notice of such a proposal to members of a putative class are significantly less compelling. Despite the language of the present rule, courts have recognized the propriety of a judicially supervised precertification dismissal or compromise without requiring notice to putative class members. *E.g., Shelton v. Pargo*, 582 F.2d 1298 (4th Cir.1978). We find such cases persuasive and see no reason to mandate notice for every precertification dismissal or compromise. If circumstances warrant, the court has ample authority to direct notice to some or all putative class members pursuant to the discretionary provisions of subdivision (d).

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Once an action has been ordered maintained as a class action, the reasons for requiring notice of a proposed dismissal or compromise are significantly more compelling. There are situations, however, where the rights of absent class members may be adequately protected by notice directed to less than "all" members. This subsection makes it clear that the court has discretion to tailor not only the form of notice but the size and composition of those to be notified as the circumstances of the particular case and proposal may require.

Conforming Amendments. Minor conforming amendments are proposed to these subdivisions. The addition of a reference to Rules 16 and 26(f), adopted since promulgation in 1966 of the present version of Rule 23, is designed to draw attention to the availability of these procedures in class action litigation. Use of the discovery conference, for example, may eliminate wasteful resort to discovery procedures aimed at mechanical aspects of the class action determination and permit the trial court to properly sequence discovery in a class action while avoiding unnecessarily costly and time consuming inquires.

(C). *Recommendations for Legislation.*

The Special Committee for Class Action Improvements of the American Bar Association, Section of Litigation, proposes that Section 1292 of title 28, United States Code, be amended by adding new subdivision (c) after present subsection (b) as follows:

> (c). A Court of Appeals may permit an appeal to be taken from an order of a district court granting or denying a motion for class action certification pursuant to F.R.Civ.P. 23 if application is made to it within ten days after entry of such order: *Provided*, however, That prosecution of an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

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The certification ruling is often the critical ruling in an action filed as a class action. If denied, the individual plaintiff must abandon his efforts to represent the alleged class or incur expenses wholly disproportionate to his individual recovery in order to secure appellate review of the certification ruling. If, as often happens, the individual plaintiff is unwilling to incur such an expense, the case is dismissed and the certification ruling is never reviewed. Moreover, if the plaintiff perseveres and is ultimately successful on appeal of the certification decision postponement of appellate review of the certification ruling raises the

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spectre of "one way intervention." Conversely, if class certification is erroneously granted, a defendant faces potentially ruinous liability and may be forced to settle a case rather than run the economic risk of trial in order to secure review of the certification ruling. The unique public importance of properly instituted class actions justifies a special provision for interlocutory review of this critical ruling.

The Committee is cognizant of the arguments against interlocutory review and the risk of delay or abuse. Its recommendation includes significant protection against such tactics. Under its proposal, appellate review is available only by leave of the Court of Appeals promptly sought. Proceedings in the district court are not stayed by the application for, or prosecution of, such an interlocutory appeal unless the district judge, the Court of Appeals, or a judge thereof so orders. These safeguards, coupled with the provisions of 28 U.S.C. § 1927 F.R.Civ.P. 7 and F.R.A.P. 38, augmented by the inherent power of both the trial and appellate courts, are ample deterrents against abusive resort to interlocutory review.

The Committee anticipates that orders permitting such interlocutory review will be rare. Nevertheless, the potential for immediate appellate review will encourage compliance with the certification procedure and will afford an opportunity for the prompt correction of error with resulting litigation economies.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

June 13, 1991

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

Enclosed are two sets of proposed amendments to the Federal Rules of Civil Procedure and to the Federal Rules of Evidence. With the accompanying Committee Notes, these have been considered and approved by the Advisory Committee on Civil Rules for submission to the Standing Committee under rule 3c of the governing procedures. Although most of these proposals have been circulated informally to various groups and individuals for suggestions, none have been formally published in their present format. A summary of the proposals, briefly explaining the need for amendment and highlighting the more significant changes, is attached.

The first set, which contains proposals of a technical nature largely mandated by statutory changes, could be approved by the Standing Committee under the special procedures for expedited consideration. The second set, which contains proposals of a substantive and potentially controversial nature, should be considered under the normal procedures, which will involve formal publication, a period for comments, and public hearings.

There is no urgency for adoption of the technical amendments. Indeed--in order to reduce the frequency with which changes are submitted to the Judicial Conference, the Supreme Court, and Congress--we suggest that they not be transmitted this year to the Judicial Conference. For this reason, the Standing Committee may prefer that the normal procedures, including publication, be followed with respect to these proposals, in which event the two sets could be combined for publication as a single set of proposed amendments. The only disadvantage to publication of these technical changes is that their inclusion in the published materials might divert attention away from the substantive proposals.

The only other matter under active consideration by the Advisory Committee, but not ripe for presentation to the Standing Committee, is a proposed revision of Rule 23.

Sincerely,

Sam C. Pointer, Jr., Chairman
Advisory Committee on Civil Rules

cc: Members, Reporter, and Secretary
of Advisory Committee
Chairmen, other Advisory Committees

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Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly, ~~and~~ adequately, *and willingly* protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) 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*:

(1) *the extent to which* the prosecution of separate actions by or against individual members of the class ~~would~~ create*s* a risk of (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) 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~~

(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~~

(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. The matters pertinent to the findings include:~~

(~~A~~*f*) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

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

(~~C~~*6*) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; *and*

(~~D~~*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*.

(c) **Determination by Order Whether Class Action to be Maintained; Notice** *and Membership in Class*; **Judgment; Actions Conducted Partially as Class Actions;** *Multiple Classes and Subclasses*.

(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. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) ~~In any class~~ *When ordering that an* action *be* maintained *as a class*

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action under ~~subdivision (b)(3)~~ *this rule*, the court shall direct *that notice be given* to the ~~members of the~~ class *under subdivision (d)(2),* ~~the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.~~ *including the court's determination whether, when, how, and under what conditions putative members may elect to be excluded from, or included in, the class. The matters pertinent to this determination will 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; and (D) the inefficiency or impracticality of separately maintained actions to resolve the controversy. When appropriate, exclusion may be conditioned upon 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, and inclusion may be conditioned upon bearing a fair share of the expense of litigation incurred by the representative parties.*

(3) The judgment in an action *ordered* maintained as a class action ~~under subdivision (b)(1) or (b)(2), 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 subdivision (b)(3),~~ whether or not favorable to the class, shall ~~include and~~ specify or describe those ~~to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds~~ *who are found* to be members of the class *or have as a condition to exclusion agreed to be bound by the judgment*.

(4) When appropriate ~~(A)~~ an action may be brought or *ordered* maintained as a class action *(A)* with respect to particular *claims or* issues, or (B) *by or against multiple classes or subclasses. Each class or subclass must separately satisfy the requirements of this rule except for subdivision (a)(1).* ~~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.~~

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument *including pre-certification determination of a motion made by any party pursuant to Rules 12 or 56 if the court concludes that such a determination will promote the fair and efficient adjudication of the controversy and will not cause undue delay*; (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

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defenses, or otherwise to come into the action *or to be excluded from the class*; (3) imposing conditions on the representative parties *class members* or ~~on~~ intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. *An* ~~class~~ action *filed as a class action* shall not *before the court's ruling under subdivision (c)(1),* 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~~. *An action ordered maintained as 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 some or all members of the class in such manner as the court directs.*

(f) Interlocutory Appeals. A Court of Appeals may permit an appeal to be taken from an order of a district court granting or denying a request for class action certification under this rule if application is made to it within ten days after entry of such order. Prosecution of an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals, or a judge thereof, shall so order.

COMMITTEE NOTES

PURPOSE OF REVISION. As initially adopted, Rule 23 defined class actions as "true," "hybrid," or "spurious" according to the abstract nature of the rights involved. The 1966 revision created a new tripartite classification in subdivision (b), and then established different provisions relating to notice and exclusionary rights based on that classification. For (b)(3) class actions, the rule mandated "individual notice to all members who can be identified through reasonable effort" and a right by class members to "opt-out" of the class. For (b)(1) and (b)(2) class actions, however, the rule did not by its terms mandate any notice to class

members, and was generally viewed as not permitting any exclusion of class members. This structure has frequently resulted in time-consuming and lengthy procedural battles either because the operative facts did not fit neatly into any one of the three categories, or because more than one category could apply and the selection of the proper classification would have a major impact on the practicality of the case proceeding as a class action.

In the revision the separate provisions of former subdivisions (b)(1), (b)(2), and (b)(3) are combined and treated as pertinent factors in deciding "whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy." This becomes the critical question, without regard to whether, under the former language, the case would have been viewed as being brought under (b)(1), (b)(2), or (b)(3). Use of a unitary standard, once the prerequisites of subdivision (a) are satisfied, is the approach taken by the National Conference of Commissioners on Uniform State Laws and adopted in several states.

Questions regarding notice and exclusionary rights remain important in class actions--and, indeed, may be critical to due process. Under the revision, however, these questions are ones that should be addressed on their own merits, given the needs and circumstances of the case and without being tied artificially to the particular classification of the class action.

As revised, the rule will afford some greater opportunity for use of class actions in appropriate cases notwithstanding the existence of claims for individual damages and injuries--at least for some issues under subdivision (c)(4)(A), if not for the resolution of the individual damage claims themselves. The revision is not however a unqualified license for certification of a class whenever there are numerous injuries arising from a common or similar nucleus of facts, nor does the rule attempt to establish a system for "fluid recovery" or "class recovery" of damages. Such questions are ones for further case law development

SUBDIVISION (a). Subdivision (a)(4) is revised to explicitly require that a proposed class representative be willing to undertake the responsibilities inherent in such representation on behalf of the class members. Before ordering a class action when not requested by those who would become the class representatives, the court must determine that the parties to be appointed as representatives are willing to accept such responsibilities.

SUBDIVISION (b). As noted, subdivision (b) has been substantially reorganized. One element, drawn from former subdivision (b)(3), is made the controlling issue; namely, whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The other provisions of former subdivision (b) become factors to be considered in making this ultimate determination. Of course, there is no requirement that all of these factors be present before a class action may be ordered, nor is this list intended to be exclusive of other factors that in a particular case may bear on the superiority of a class action when compared to other available methods for resolving the controversy.

Factor (7)--the consideration of the difficulties likely to be encountered in the management of a class action--is revised by adding a clause to emphasize that such difficulties should be assessed not in the abstract, but rather in comparison to those that would be encountered with individually prosecuted actions.

SUBDIVISION (c). Former paragraph (2) of this subdivision contained the provisions for notice and exclusion in (b)(3) class actions. Under the revision the provisions relating to notice apply to all types of class actions, but the type and extent of notice is to be determined in accordance with subdivision (d)(2). The provisions relating to exclusion are likewise made applicable to all class actions, but with flexibility for the court to determine whether, when, and how putative class members should be allowed to exclude themselves from the class. The

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court may also impose appropriate conditions on such "opt-out" [illegible], in some cases, require that a putative class member "opt-in" in order to be treated as a member of the class.

The potential for class members to exclude themselves from many class action remains a primary consideration for the court in determining whether to allow a case to proceed as a class action, both to assure due process and in recognition of individual preferences. Even in the most compelling situation for not allowing exclusion--the fact pattern described in subdivision (b)(1)(A)--a person might nevertheless be allowed to be excluded from the class if, as a condition, the person agreed to be bound by the outcome of the class action. The opportunity for imposition of appropriate conditions on the privilege of exclusion enables the court to avoid the unfairness that resulted when a putative class member elected to exclude itself from the class action in order to take advantage of collateral estoppel if the class action was resolved favorably to the class while not being bound by an unfavorable result.

Rarely should a court impose an "opt-in" requirement for membership in a class. There are, however, situations in which such a requirement may be desirable to avoid potential due process problems, such as with some defendant classes or in cases when it may be impossible or impractical to give meaningful notice of the class action to all putative members of the class.

The revision to subdivision (c)(4) is intended to eliminate the problem when a class action with several subclasses should be certified, but one or more of the subclasses may not independently satisfy the "numerosity" requirement.

Under paragraph (4), some claims or issues may be certified for resolution as a class action, while other claims or issues are not so certified. For example, in some mass tort situations it may be appropriate to certify as a class action issues relating to the defendants' culpability and general causation, while leaving issues relating to specific causation, damages, and contributory negligence for resolution through individual lawsuits brought by members of the class. Since the entirety of the class representative's claim will be before the court, there is a "case or controversy" justifying exercise of the court's jurisdiction; and the rule is intended to eliminate the problems that might otherwise arise based on the splitting of a cause of action.

SUBDIVISION (d). The former rule generated uncertainty concerning the appropriate order of proceeding when a motion addressed to the merits of claims or defenses is submitted prior to a decision on whether a class should be certified. The revision provides the court with discretion to address a Rule 12 or Rule 56 motion in advance of a certification decision when this will promote the fair and efficient adjudication of the controversy.

Inclusion in former subdivision (c)(2) of detailed requirements for notice in (b)(3) actions sometimes placed unnecessary barriers to formation of a class, as well as masked the desirability, if not need, for notice in (b)(1) and (b)(2) actions. Even if not required for due process, some form of notice to class members should be regarded as desirable in virtually all class actions. Revised subdivision (d)(2) takes on added importance in light of the revision of subdivision (c)(2). Subdivision (d)(2) contemplates that some form of notice to class members should be given in virtually all class actions. The particular form of notice, however, in a given case is committed to the sound discretion of the court, keeping in mind the requirements of due process.

SUBDIVISION (e). There are sound reasons for requiring judicial approval of proposals to dismiss or compromise an action filed or ordered maintained as a class action. The reasons for requiring notice of such a proposal to members of a putative class are significantly less compelling. Despite the language of the former rule, courts have recognized the propriety of

a judicially supervised precertification dismissal or compromise without requiring notice to putative class members. *E.g., Shelton v. Pargo*, 582 F.2d 1298 (4th Cir. 1978). The revision adopts that approach. If circumstances warrant, the court has ample authority to direct notice to some or all putative class members pursuant to the provisions of subdivision (d).

SUBDIVISION (f). The certification ruling is often the crucial ruling in a case filed as a class action. If denied, the plaintiff, in order to secure appellate review, may have to incur expenses wholly disproportionate to any individual recovery. If the plaintiff ultimately prevails on an appeal of the certification decision, postponement of the appellate decision raises the specter of "one way intervention." Conversely, if class certification is erroneously granted, a defendant may be forced to settle rather than run the risk of potential ruinous liability of a class-wide judgment in order to secure review of the certification decision. These consequences, as well as the unique public interest in properly certified class actions, justify a special procedure allowing early review of this critical ruling.

Recognizing the disruption that can be caused by piecemeal reviews, the revision contains provisions to minimize the risk of delay and abuse. Review will be available only by leave of the court of appeals promptly sought, and proceedings in the district court with respect to other aspects of the case are not stayed by the prosecution of such an appeal unless the district court or court of appeals so orders. As authorized by 28 U.S.C. § 2072(c), the rule has the effect of permitting the appellate court to treat as final for purposes of 28 U.S.C. § 1291 an otherwise conditional and interlocutory order.

It is anticipated that orders permitting immediate appellate review will be rare. Nevertheless, the potential for this review should encourage compliance with the certification procedures and afford an opportunity for prompt correction of error.

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THE RULE 23 SUB-COMMITTEE PRELIMINARY REPORT TO THE COMMITTEE ON CLASS ACTIONS AND DERIVATIVE SUITS CONCERNING PROPOSED CHANGES TO RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

October 16, 1991

I. INTRODUCTION

In July, 1991, Roberta D. Liebenberg, co-chair of the Section on Litigation's Committee on Class Actions and Derivative Suits, appointed a Sub-Committee to examine a proposal to amend Rule 23 of the Federal Rules of Civil Procedure ("Rule 23" or "the Rule"). The proposal is attached hereto as Exhibit A. The Sub-Committee has six members: Jeffrey J. Greenbaum, Newark, NJ; Alice S. Johnston, Pittsburgh, PA; Garrard R. Beeney, New York, NY; Joel M. Leifer, New York, NY; Lewis H. Lazarus, Wilmington, DE and Elizabeth M. McGeever, Wilmington, DE. This is the Sub-Committee's preliminary report on the proposed Rule changes.

Two points should be stressed at the outset. First, the proposed Rule change is still very much in infancy form. It has not yet been considered by the Advisory Committee on Civil Rules. The Advisory Committee's next meeting is in November, 1991. It may consider the proposal at that time. We are informed that no definitive action will be taken at that time on the proposal. Second, we have had only a short time to study the proposed changes to Rule 23. Accordingly, this report is preliminary in nature. Further study and evaluation is necessary before any definitive conclusions can be reached as to the desirability of the changes proposed or of any other changes to Rule 23.

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II. BACKGROUND OF THE PROPOSED RULE CHANGE

Apart from some technical amendments in 1987, no substantive changes have been made to Rule 23 since 1966. We understand that the proposed draft resulted from two concerns. First, in March, 1991, an Ad Hoc Committee on Asbestos Litigation recommended that Rule 23 be examined in light of the experience of the Federal Judiciary with problems in the management of asbestos litigation.* In particular, the courts are being asked to certify class actions in asbestos cases, notwithstanding commentary to the 1966 amendments which states:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages, but of liability and defenses of liability, would be present affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

See 1966 Amendments, Commentary to Sub-Division(b)(3) of Rule 23. Second, after 25 years of experience with the Rule, it appears the time is right to review whether improvements might be made in light of that experience. Over the years concerns have been raised regarding the tri-partite classification system and the notice and exclusion aspects of Rule 23. In July, 1985 the House of Delegates of the American Bar Association authorized the Section of Litigation to transmit a "Report and Recommendations of The Special

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* The Ad Hoc Committee on Asbestos Litigation is a committee of federal judges appointed in September, 1990. Its Report to the Judicial Conference is attached hereto as Exhibit B.

Committee on Class Action Improvements" to the Advisory Committee on Civil Rules of the Judicial Conference of the United States, without either approving or disapproving the recommendations in the report. A copy of the Litigation Section's 1985 report, known as the Flegal Report for the Reporter, Frank F. Flegal, Esquire, is attached as Exhibit C hereto. The Advisory Committee did not take any formal action on the recommendations in the Flegal Report. We understand that the Advisory Committee believed it wiser to accumulate additional experience before recommending changes to Rule 23.

It is against this background that we have undertaken to review the proposed draft.

III. DISCUSSION

The Sub-Committee recognizes that the draft is very preliminary and that the commentary is not as extensive as it would be if the proposal were at a more advanced stage. Because of this the Sub-Committee experienced some difficulty in evaluating the proposed draft and understanding the reasons behind the proposed changes. In particular, we noted the absence of a section in the draft commentary explaining the "difficulties with the current rule" by reference to particular cases. See by contrast the Commentary to the 1966 Amendment to Rule 23. The Sub-Committee believes that any proposal which fundamentally changes Federal class action procedure should be accompanied by a specific discussion of the problems under the current Rule, including

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concrete examples supported by case law. In addition, some members of the Sub-Committee who were inclined to support some modification in the Rule nonetheless expressed concern that in an effort to address problems which have been encountered in the "massive tort" cases, changes would be made which would affect all other types of class actions.

Despite these concerns, the Sub-Committee has attempted to evaluate the draft by examining its overall effects on the prosecution and defense of class actions. In so doing, we simply have not had the time to review and to analyze the proposed changes with the deliberation that such substantive changes would warrant. In reviewing the proposed changes, we have attempted to balance the varying competing interests underlying certification issues.

The Sub-Committee tentatively agreed on the desirability of certain changes while deferring judgment on certain others as summarized below. For organizational purposes we have broken down the proposed changes into the following ten categories:

A. The elimination of the (b)(1), (b)(2), (b)(3) categories in favor of a unitary standard.

B. Empowering the court to certify "claims" or "issues" for class treatment.

C. Enlarging the power of the court to impose conditions upon class membership.

D. Excluding sub-classes from having to meet independently the numerosity requirement.

E. Permitting pre-certification determination of motions made by any party pursuant to Rules 12 or 56.

F. Permitting the court to dismiss an action prior to class determination upon court approval and without notice to the class.

G. The mandatory notice provision.

H. Interlocutory appeal.

I. Requiring the named representative to serve "willingly".

J. Permitting the court to require class members to bear a share of the financial burden.

A specific discussion of these topics follows.

A. The Unitary Standard Seems Preferable to the Current b(1), b(2) and b(3) Classifications

The Sub-Committee believes that the current tri-partite classification is unduly rigid. In the Sub-Committee's view, some actions do not neatly fit any of the categories, yet once pigeonholed a host of notice and exclusion rules apply. Although the Sub-Committee has some concern that the draft proposal provides very broad discretion to the trial judge, the Sub-Committee believes that the policies underlying the class action rule are better served by a unitary standard. The Sub-Committee believes it is sensible to treat the issues of notice and exclusionary rights on their merits rather than tying them artificially to the particular classification.

B. The Certification of "Claims" and "Issues"

Although the Sub-Committee is uncertain as to the intended distinction between "claims" and "issues", we agree that the concept of permitting a court flexibility to certify a portion of an action for class treatment is appropriate. At the same time,

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at least one member expressed concern that permitting a court to certify "claims" not be converted into an enlargement of a court's jurisdiction where the parties on whose behalf the claim is asserted would otherwise not be subject to the court's jurisdiction.

C. Enlarging The Power of the Court to Impose Conditions Upon Class Membership

The Sub-Committee believes that Rule 23 should expressly permit trial judges to impose conditions on class membership as may be appropriate on a case by case basis. In the Sub-Committee's view, both judicial economy and considerations of fairness dictate this conclusion. Thus, in certain circumstances, courts should be able to prevent a person who wishes to be excluded from the class from taking advantage of the res judicata or collateral estoppel effect of a favorable judgment or ruling. This prevents a putative class member from requesting exclusion without penalty if the action is unfavorable to the class while waiting to take advantage of a favorable result. The Sub-Committee believes, however, that further study is required as to the desirability of permitting courts to require class members to "opt in" to the class.

D. Excluding Sub-Classes From Having to Meet Independently the Numerosity Requirement

The Sub-Committee believes that considerations of judicial economy require a court to be able to certify a sub-class even when that sub-class does not independently satisfy the numerosity requirement. Were this not the case, one court would not be able to dispose of all matters arising out of a common

CORRECTED 11-14-92

October 12, 1992

TO: Chair and Members, COUNCIL ON COURT PROCEDURES

FROM: Maury Holland, Executive Director

RE: Recommended amendments to ORCP (Class Actions)

To keep the record straight, and to facilitate further discussion of the class action proposals, I was asked to provide you with the proposed amendments to ORCP that the subcommittee found "non-controversial" and unanimously recommends that the Council promulgate. They are as follows, with proposed deletions indicated by square brackets and proposed additions indicated by boldface underlining:

RULE 32
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 **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.

D. Dismissal or compromise of class actions; court approval required; when notice required. **Any action filed as a class acation in which there has been no ruling under subsection C.(1) of this rule and any action ordered maintained as a** [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 [on] intervenors;

* * * * *

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

* * * * *

[F.(4)] F.(3) [Except as otherwise provided in this subsection, the] **P**laintiff[s] 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 employes of the defendant included with a regular mailing by the defendant] included with a regular mailing by [the] defendant **to its current customers or employes**. The court may hold a [preliminary] hearing to determine how the costs of such notice shall be apportioned.

[F.(5)] **F.4** 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 employes of the defendant under this section.

[F.(6)] **F.(5)** 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.

G. Commencement or maintenance of class actions regarding particular issues; [division of class;] subclasses. When appropriate[: G.(1)] **[A]**an action may be brought or **ordered** maintained as a class action (1) with respect to particular **claims or** issues[;], or **(2) by or against multiple class or subclasses. Each subclass must separately satisfy all requirements of this rule except for subsection A.(1)**.

* * * * *

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**.

November 6, 1992

TO: Chair and Members, COUNCIL ON COURT PROCEDURES

FROM: Maury Holland

RE: Proposed ORCP 32 Amendments (Class Actions)

The first substantive agenda item for our November 14 meeting is the class action subcommittee's recommendations regarding proposed amendments to R. 32. Since you have received an enormous amount of materials on this subject over several meetings, I thought it might assist in your preparation for this meeting if I provided you with a brief "road map" referring to those materials in the order I anticipate they will become germane in the course of discussion:

1. At the September 26 meeting Jan Stewart summarized for the Council each of the ad hoc group's proposed amendments to R. 32 (see Attachment A to July 19, 1992 memo of Jan Stewart et al.) which the class action subcommittee unanimously recommends that the Council adopt and regards as "non-controversial." For ease of reference, these proposed amendments (to Rules 32 C.(1), D., E.(1), (3), F.(4) (F.(3) as amended), F.(5) (F.(4) as amended), F.(6) (F.(5) as amended), G. and M.) are set forth in my October 12, 1992 memo to the Council. Each of them remain pending final action at our December 12, 1992 meeting, but should occasion little or no discussion at the November 14 meeting.

2. The only tentative action taken to date by the Council respecting any of the ad hoc group's proposals and the subcommittee's recommendations regarding them was the unanimous vote at the September 26 meeting to accept the recommendation that R. 32 N. be left unchanged in its present form.

3. Referencing Attachment A to the July 19, 1992 memo of Jan Stewart et al, discussion at our November 14, 1992 meeting is likely to focus primarily upon the following amendments:

A. The class action subcommittee unanimously recommends that Rules 32 F.(2) and (3) be deleted in their entirety, rather than amended as indicated in Attachment A (see pp. 8-11 of the said memo). This would effectively abolish the mandatory claim form procedure and related limitation on amounts of judgments entered in class actions that effect joinder of separate money damage claims.

B. By a divided 2-1 vote the subcommittee recommends that Rule 32 F.(1) be amended as shown in Attachment A (see pp. 2-6 of the said memo together with Jan Stewart's "Minority Report" dated July 16, 1992). This would make individual post-certification notice to all class members in class actions effecting joinder of separate money damage claims discretionary, rather than mandatory as the present 32 F.(1) requires. If this amendment is approved, the following additional amendments should also be approved as logically entailed: Rules 32 A.(5), B., B.(1), B.(1)(a), B.(1)(6), B.(2) and B.(3).

CORRECTED 11-14-92 (to add E.(2) In paragaraph 1 and H.(1) to subparagraph B)

November 6, 1992

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RE: Proposed ORCP 32 Amendments (Class Actions)

The first substantive agenda item for our November 14 meeting is the class action subcommittee's recommendations regarding proposed amendments to R. 32. Since you have received an enormous amount of materials on this subject over several meetings, I thought it might assist in your preparation for this meeting if I provided you with a brief "road map" referring to those materials in the order I anticipate they will become germane in the course of discussion:

1. At the September 26 meeting Jan Stewart summarized for the Council each of the ad hoc group's proposed amendments to R. 32 (see Attachment A to July 19, 1992 memo of Jan Stewart et al.) which the class action subcommittee unanimously recommends that the Council adopt and regards as "non-controversial." For ease of reference, these proposed amendments (to Rules 32 C.(1), D., E.(1), (2), (3), F.(4) (F.(3) as amended), F.(5) (F.(4) as amended), F.(6) (F.(5) as amended), G. and M.) are set forth in my October 12, 1992 memo to the Council. Each of them remain pending final action at our December 12, 1992 meeting, but should occasion little or no discussion at the November 14 meeting.

2. The only tentative action taken to date by the Council respecting any of the ad hoc group's proposals and the subcommittee's recommendations regarding them was the unanimous vote at the September 26 meeting to accept the recommendation that R. 32 N. be left unchanged in its present form.

3. Referencing Attachment A to the July 19, 1992 memo of Jan Stewart et al, discussion at our November 14, 1992 meeting is likely to focus primarily upon the following amendments:

A. The class action subcommittee unanimously recommends that Rules 32 F.(2) and (3) be deleted in their entirety, rather than amended as indicated in Attachment A (see pp. 8-11 of the said memo). This would effectively abolish the mandatory claim form procedure and related limitation on amounts of judgments entered in class actions that effect joinder of separate money damage claims.

B. By a divided 2-1 vote the subcommittee recommends that Rule 32 F.(1) be amended as shown in Attachment A (see pp. 2-6 of the said memo together with Jan Stewart's "Minority Report" dated July 16, 1992). This would make individual post-certification notice to all class members in class actions effecting joinder of separate money damage claims discretionary, rather than mandatory as the present 32 F.(1) requires. If this amendment is approved, the following additional amendments should also be approved as logically entailed: Rules 32 A.(5), B., B.(1), B.(1)(a), B.(1)(6), B.(2) and B.(3), and H.(1).

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Re: Council on Court Procedures -
Subcommittee on Proposed Revisions to ORCP 32

Gentlemen:

Enclosed is a copy of a letter just received from R. Alan Wight of the Miller, Nash firm responding to the proposals for changes in Rule 32.

I have called other defense counsel to ask for some response as soon as possible. Since Saturday's meeting has been cancelled, I will try to arrange a telephone conference of our Subcommittee in the near future.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

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Enclosure

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Subject: Subcommittee on Proposed Revisions to ORCP 32 of Council on Court Procedures

Dear Janice:

We appreciate the opportunity to respond to your letter of February 19, 1992, and various letters by Phil Goldsmith which were enclosed with your letter.

We do have experience with class action procedural rules within the state of Oregon that may bear on the issues raised. Our experience includes the first modern class action cases for damages under the previous Oregon code-pleading statute (American Timber & Trad. Co. v. First Nat. Bank of Ore., 263 Or 1, 500 P2d 1204 (1972), in which the Oregon Supreme Court held that a class action for money damages could not be maintained under the then existing equity rule; and a Legal Aid case against Debt Reducers). After those decisions, the Oregon State Bar and the Oregon legislature solicited views from both plaintiffs and defense attorneys about drafting a modern class action rule for Oregon. We participated in the initial structuring of ORCP 32 and in every discussion of proposed changes to the rule since its adoption. We have also been continually involved in class action litigation in the federal court system, including another American Timber & Trad. Co. v. First Nat. Bank of Ore. case, Best v. U. S. National Bank, an antitrust case against Denney's Restaurants, the Corrugated Container antitrust cases, the Plywood antitrust cases, the Cement & Concrete antitrust cases, the Pipe Fabrication antitrust case, and various securities cases.

cc: Henry Kantor
John Hart

Basically, our view is that ORCP 32 in its present form correctly balances interests of plaintiffs and defendants, and should not be changed. The language presently used in ORCP 32 represented a distillation of knowledge, including experience with class action abuses by plaintiffs' attorneys. These experiences came about after the "modern" class action rule was introduced into the Federal Rules of Civil Procedure in 1967. The language used reflects some of the constitutional criteria that have been announced by the federal courts in various class action cases after 1967. In addition, the Oregon rule was consciously drafted to reject the California usage of a "fluid damages" theory, as announced in Daar v. Yellow Cab, 67 Cal 2d 695, 63 Cal Rptr 724, 433 P2d 732 (1967).

1. Narrow interest of proponents of proposed changes.

The persons making the proposals for changes to ORCP 32 represent a very narrow, special-interest group with a personal stake. These are people who at various times were associates of Henry Carey, then a well-known Portland lawyer. Mr. Carey attempted over nearly two decades to develop class action procedures in Oregon that would be extremely favorable to plaintiffs and almost impossible for courts to control or defendants to manage or defend. These former associates of Mr. Carey regularly present requests to change Oregon law to favor the interests of plaintiffs' attorneys.

In one of the more recent cases involving this group, Tolbert v. First National Bank, 312 Or 485, 823 P2d 965 (1991), Phil Goldsmith was the attorney for the plaintiffs. The other members of this group obtained permission to file briefs as amici, and their appearances are described by the court as follows:

> "Henry Kantor, of Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland, filed a brief on behalf of amici curiae Oregon Trial Lawyers Ass'n, Multnomah County Legal Aid Service, Ecumenical Ministries of Oregon, Forelaws on Board, Pineros Y Campesinos Unidos Del Noroeste, Portland Gray Panthers, Portland Chapter of Oregon Fair Share, Local 2949 of the Lumber and Sawmill Workers Union, Banks & Newcomb, Griffin & McCandlish, Pozzi, Wilson, Atchison, O'Leary & Conboy, Stoll, Stoll, Berne & Lokting, Williams, Troutwine & Bowersox, Willner & Associates, Roger Anunsen, Frank J. Dixon, Gregory Kafoury, Mark Anthony LaMantia, James T. Massey, Roger Tilbury, Linda K. Williams, and Jan Wyers." 823 P2d at 966.

(In the Tolbert case, incidentally, the Oregon Supreme Court held against plaintiffs and their amicus colleagues on the grounds (1) depositors' "reasonable expectations" about NSF check charges were irrelevant as to charges that were in effect when depositors opened accounts, where depositors were informed of the charges and nonetheless agreed to open the accounts, and (2) changes in the charges were consistent with the bank's obligation of good faith, where the parties had agreed to unilateral exercise of discretion by the bank and that discretion was exercised after prior notice to depositors.)

In pointing out the narrow interest of the proponents of the 1992 proposal for changes to ORCP 32, we mean no disrespect to these attorneys. They are dedicated to their interests as they see them. We have worked long years in defending cases brought by them (the American Timber & Trading series of litigation took about 10 years to complete; the Best v. U. S. National Bank/Tolbert v. First National Bank series took a little more than 10 years; some of Mr. Tilbury's cases against Denney's Restaurants took three years; some of the cases by Mr. Massey against the Farm Credit Banks took many years; and the Cement & Concrete antitrust litigation, which the Stoll law firm was involved in as attorneys for plaintiffs, took eight years to complete).

2. Historical antecedents to ORCP 32.

Prior to 1972, Oregon had only an equity rule governing class action. In the late 1960s and early 1970s, in a case brought by Legal Aid against Debt Reducers, Inc., and in the case brought by Henry Carey's office on behalf of American Timber & Trading against First National Bank of Oregon, plaintiffs sought to convince the Oregon courts that the old equity rule could be used for class actions for money damages in Oregon. As part of that argument, plaintiffs' attorneys sought to persuade courts that the "fluid damages" theory which the California court had recently announced in Daar v. Yellow Cab, 67 Cal 2d 695, 63 Cal Rptr 724, 433 P2d 732 (1967), should be followed (the "fluid damages" theory is to the effect that members of the plaintiff class need not actually receive notice of the pendency of the litigation nor come forward to prove and claim damages if the litigation is successful in establishing liability--damages will be proved under some model and any damages not claimed will either escheat to the state or be directed by the court to be donated to some charitable purpose).

The Oregon Supreme Court in American Timber & Trad. Co. v. First Nat. Bank of Ore., 263 Or 1, 500 P2d 1204 (1972), rejected the class action proposal and the fluid damages

theory. Thereafter, committees of lawyers worked on drafting a class action rule, but one that would eliminate the abuses then perceived under the 1967 amendments to FRCP 23. Some of the language included in the Oregon rule required certain notices to class members and required that claim forms be submitted by class members, so that the perceived abuses could not be carried into Oregon practice.

3. Consolidating all three types of class actions into one would be constitutionally improper and would place too much power and discretion in the hands of plaintiffs' class action attorneys.

One of the proposals in the letters written by Mr. Goldsmith is to "replace the present three-part standard for class certification contained in ORCP 32 B with a single standard." This change purportedly would be helpful because it would eliminate certain strictures in identifying class members and having them come forward to prove their damages and claim their share of any favorable judgment.

a. Mr. Goldsmith has a personal interest.

In discussing this issue, Mr. Goldsmith refers to various cases he personally worked on as plaintiffs' attorney, including Derenco, Guinasso, Powell, Best, and Tolbert. Each of these was a case brought by Mr. Carey's office.

b. Mr. Emerson is not an experienced scholar, but merely a recent professional colleague of Mr. Goldsmith.

Mr. Goldsmith also refers in his letter to a "commentator" writing recently in the Willamette Law Review, purportedly giving the following carefully studied advice:

> "[A]t least one meritorious class action was abandoned because the claim form requirement precluded the possibility of meaningful monetary recovery. Additionally, in the tax and insurance reserve cases, * * * the wrongdoing defendants retained over two million dollars in illegally-obtained profits." Emerson, Oregon Class Actions: The Need for Reform 27 Willamette L Rev 757, 760-61 (1991).

Unfortunately, Mr. Emerson is not a long-time distinguished litigator or college professor with expertise on such matters. Instead, he is a 1990 graduate of Willamette Law, and associated in some fashion with Mr. Goldsmith. The Law Review article, far from being an unbiased scholarly study, was the argument of an interested advocate.

Mr. Emerson was referring in his article to the case of Best v. U. S. National Bank, 303 Or 557, 739 P2d 554 (1987), a case which we handled. Mr. Emerson's article sets forth matters that are factually incorrect insofar as Best is concerned. Mr. Emerson purported in the article to have interviewed Mr. Goldsmith to obtain the information. However, Mr. Emerson did not interview me or other defense attorneys involved in similar cases.

(i) Emerson's facts were incorrect.

What Mr. Emerson proposed in the article and what Mr. Goldsmith is now proposing is to return to the "fluid damages recovery theory." This is the very theory that was rejected by the Oregon legislature and has been rejected by the federal courts.

At page 768 of his Law Review article, Mr. Emerson stated:

> "The Oregon Supreme Court [in Best] noted that the bank's own records proved it had gained millions of dollars in profits from setting NSF fees greatly in excess of its costs and normal profit margins 'in an effort to reap the large profits to be made from the apparently inelastic "demand" for the processing of NSF checks.'" 27 Willamette L Rev at 768 (footnote omitted).

Mr. Emerson also stated:

> "Best was abandoned because the mandatory claim form procedure precluded a significant damage recovery." 27 Willamette L Rev at 768 (footnote omitted).

[The basis for this statement is claimed to be a telephone interview with Phil Goldsmith, plaintiffs' co-counsel in Best, on November 17, 1988.]

Mr. Emerson is incorrect, because the Oregon Supreme Court never stated that the bank's records "proved" it had gained millions of dollars in profits from setting NSF fees greatly in excess of its costs. The case came up on appeal from a grant of summary judgment in favor of the bank, and there had been no trial at which evidence was offered, accepted, or subjected to cross-examination. No court or jury had made a finding. Instead, plaintiffs were merely making arguments as to what they thought they might be able to prove.

In this context, the Oregon Supreme Court made the following statements:

> "Nevertheless, we believe that there is a genuine issue of material fact whether the Bank set its NSF fees in accordance with the reasonable expectations of the parties. The record shows that when the depositors opened their accounts, the only account fees that would ordinarily be discussed would be the Bank's monthly and per check charges, if any. The sole reference to NSF fees was contained in the account agreement signed by the depositors, which obligated them to pay the Bank's 'service charges in effect at any time.' Because NSF fees were incidental to the Bank's principal checking account fees and were denominated 'service charges,' a trier of fact could infer that the depositors reasonably expected that NSF fees would be special fees to cover the costs of extraordinary services. This inference could reasonably lead to the further inference that the depositors reasonably expected that the Bank's NSF fees would be priced similarly to those checking account fees of which the depositors were aware--the Bank's monthly checking account service fees and per check fees, if any. By 'priced similarly,' we mean priced to cover the Bank's NSF check processing costs plus an allowance for overhead costs plus the Bank's ordinary profit margin on checking account services.
>
> "Finally, assuming that the Bank's obligation of good faith required the Bank to set its NSF fees in accordance with its costs and ordinary profit margin, there was evidence that the Bank breached the obligation. The Bank's own cost studies show that its NSF fees were set at amounts greatly in excess of its costs and ordinary profit margin. Internal memoranda and depositions of Bank employees permit the inference that the Bank's NSF fees were set at these high levels in order to reap the large profits to be made from the apparently inelastic 'demand' for the processing of NSF checks and in order to discourage its depositors from carelessly writing NSF checks. A trier of fact could find that both of these purposes were contrary to the reasonable expectations of the depositors when they agreed to pay whatever NSF fee was set by the Bank." Best v. U. S. National Bank, 303 Or 557, 565-66, 739 P2d 554 (1987) (emphasis added).

Mr. Emerson also cites Mr. Goldsmith to the effect that the Best litigation was abandoned because the mandatory claim form procedure precluded a significant damage recovery. I believe this statement to be inaccurate. The fact is that Mr. Goldsmith and his colleagues had actually gone to trial in the companion case of Tolbert v. First National Bank and had suffered an adverse jury verdict. The adverse jury verdict was based in part on expert testimony offered by the bank that its NSF check processing costs plus allowance for overhead costs plus an ordinary or reasonable profit margin equaled or exceeded the NSF fee that was charged. In the most recent decision, the Oregon Supreme Court rejected the view advocated by Mr. Goldsmith that the "good faith" doctrine controlled the amount that could be set by the bank for NSF charges, so long as the amount was made known to the depositor before the account was opened or the changed amount was made known to the depositor before the changed fee went into effect. See Tolbert v. First National Bank, 312 Or 485, 823 P2d 965 (1991).

At the time of the settlement of Best, a similar study had been undertaken, and United States National Bank of Oregon was fully prepared to show that direct costs plus overhead costs plus an ordinary and reasonable profit margin equaled or exceeded the NSF fees it had charged to customers. It was the failure to prevail before a jury in the Tolbert case that led Mr. Goldsmith and Mr. Ryan to settle the Best litigation, primarily on a basis where a sum of money was paid to partially cover attorney fees, plus certificates issued to class members.

(ii) The fluid damages theory is unconstitutional.

The current proposal for change is based on the theory that the Oregon statute is unusual and improper because it requires members of the class to come forward and identify themselves. They must show that they are proper members of the class in order to have their claimed damages computed and made part of the judgment award. Mr. Emerson argues that this type of requirement does not allow plaintiffs' class attorneys to prove all the damages that a defendant causes.

The argument made by Mr. Emerson and Mr. Goldsmith is a return to the theory of damages that was popular in certain state courts in the 1960s, but was ultimately rejected by federal courts as being unconstitutional. Thus, in Eisen v. Carlisle & Jacquelin, 479 F2d 1005 (2d Cir 1973) (en banc), the second circuit held that an odd-lot investor's treble damage claim, which he sought to maintain as a class action on behalf of approximately 6 million persons, of whom about 2 million

were easily identifiable, was not maintainable as a class action regardless of the fluid class recovery theory.

> "We must reject Eisen's claim that the fluid class recovery theory is not ripe for review. Indeed, there is no way to side-step this issue. We specifically remanded the case for consideration of the problem of manageability. The further proceedings on the remand were necessarily concerned with ascertaining whether there was a judicially sound way effectively to administer this action. Administration, of course, includes proof of damages and the distribution of the same. As we point out later in this opinion, Eisen concedes that the action is not manageable if fluid class recovery is not permissible. We must face this issue if we are to pass on the question of manageability, which is the most important point in the case. We are no longer at the early stages of this case where it might be possible to put off to a later time the troublesome question of what to do with the damage fund if only a small number of claims are filed against the fund. * * *
>
> * * *
>
> "Thus statements about 'disgorging' sums of money for which a defendant may be liable, or the 'prophylactic' effect of making the wrongdoer suffer the pains of retribution and generally about providing a remedy for the ills of mankind, do little to solve specific legal problems. <u>The result of this approach is almost always confusion of thought and irrational, emotional and unsound decisions</u>. In cases involving claims of money damages all litigation presumes a desire on the part of the judicial establishment to make the wrongdoer pay for the wrongs he has committed, <u>but to do this by applying settled or clearly stated principles of law, rather than by some process of divination</u>. Punishment of wrongdoers is provided by law for criminal acts in statutes making it a crime punishable by fine or imprisonment to violate the antitrust laws. In certain civil suits punitive damages may be awarded; and in private antitrust cases the possible recovery of triple the loss actually suffered by a plaintiff is very properly praised as a supplementary deterrent. <u>But none of these considerations justifies disregarding,</u>

> nullifying or watering down any of the procedural safeguards established by the Constitution, or by congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23. It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protections against oppressions, including oppressions by those whose intentions may be above reproach.
>
> "We adhere to what we have written in support of the remand of this case now in Eisen II. On the basis of the new evidence adduced on the remand, what we are now doing is interpreting and applying various provisions of an amended and improved procedural device intended to facilitate the judicial disposition of the individual claims of the separate members of a class of persons so numerous that joinder of all members is impracticable. Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that 'such rules shall not abridge, enlarge or modify any substantive right.'" Eisen, 479 F2d at 1011-12, 1013-14 (footnotes omitted) (emphasis added).

The United States Supreme Court upheld this ruling in Eisen, going on to hold that class plaintiffs must bear the cost of personal notice. See also Windham v. American Brands, Inc., 565 F2d 59, 70-71 (4th Cir 1977), cert denied, 435 US 968, 98 S Ct 1605, 56 L Ed 2d 58 (1978).

In essence, fluid damages theories have been rejected by responsible appellate courts because such a proceeding would allow lawyers to appoint themselves to represent persons who never have received court notice that they are being represented, cannot be identified, and cannot control the proceedings. The bad effect, from the standpoint of administration of justice, is that lawyers bringing such an action are not responsible to anyone; they act principally for themselves. Because of the threatened damages, such class actions are used as a "club" to extort unreasonable settlements by lawyers--unless a "claim form" procedure is used, it is the lawyers who drive the case, not the class members. Finally, if personal notice and opportunity to opt-out is not furnished, the binding effect of the judgment is questionable. This is true both at the initial notice stage and the damages notice stage.

4. Fluid damage recoveries, to the extent not the result of claims made and proved individually by class members, are abusive.

Although fluid recovery theories have been uniformly rejected since the 1973 decision in Eisen, there are parallels that demonstrate the difficulties and improprieties that arise when sums of money are extracted from defendants in class action proceedings over and above amounts which result from assertion of claims by individual class members who actually come forth, identify themselves, and show the basis for their claim.

One example is the situation which arises where settlement proceeds exceed the amount of claims submitted to the court by identifiable class members. See Houck on Behalf of U.S. v. Folding Carton Admin., 881 F2d 494 (7th Cir 1989). In Folding Carton, the antitrust settlements of about $200 million produced approximately $6 million in excess of known claims and costs. This extra money was designated as the Reserve Fund, and the trial court appointed a committee to make fee recommendations and to assist in handling claims. Several years later, in 1982, after a few additional late claims and expenses had been paid, the committee recommended to the district court that the balance of the Reserve Fund, still approximately $6 million because of favorable interest, be used to establish an "antitrust development and research foundation" to promote the study of complex litigation. Various class members and defendants objected, but the court adopted the idea. In the first appeal, the court of appeals rejected the trial court's disposition of the fund and instead "directed" that the remainder of the Reserve Fund escheat to the United States under 28 USC §§ 2041 and 2042.

Thereafter, some parties filed certiorari petitions in the Supreme Court. While those petitions were pending, the parties began working out a settlement to dispose of excess funds. That settlement was not in keeping with the mandate of the Seventh Circuit Court of Appeals. After providing for late claims, that settlement proposal provided that the funds remaining after the expiration of the deadline for late claims would be divided equally between (1) a pro rata distribution to all previously paid class members and (2) two or more Chicago area law schools for the purpose of funding research projects involving enforcement of the antitrust laws. Folding Carton, 881 F2d at 497. The trial court allowed that "settlement."

In the second appeal, the Seventh Circuit chastised the trial judge.

> "In the district court the 'escheat' ruling of this court, Folding Carton I, appears not to have been acceptable to anyone. Judge Will wrote that it was not a disposition that any of the parties had requested or desired, that it was done without a hearing or opportunity to object, and that it was causing some 'confusion.' In Re Folding Carton Antitrust Litigation, 687 F Supp 1223, 1225-26 (ND Ill 1988). Judge Will went further and described the opinion in Folding Carton I as 'silly.' More constructive, since the opinion of this court was not on appeal in the district court, was Judge Will's consideration of the nature of the interest given by this court to the government. It was, he held, not a true escheat.' 687 F Supp at 1226." Folding Carton, 881 F2d at 500-501 (emphasis added).

After deciding that certain circumstances had caused any interest the United States may have had under the escheat statute to be extinguished, the Seventh Circuit again remanded to the trial court to dispose of the unclaimed funds under the cy pres doctrine, stating:

> "When the district court comes to a conclusion on the remaining issues in this case, a copy of that decision shall forthwith be filed with the Clerk of this court. It will then be reviewed by this present panel for conformity with the mandate of this court, and on any other basis which may be raised by appropriate parties. To expedite that review, this court retains jurisdiction. Any related problems that arise on remand may be brought by petition to the attention of this court." Folding Carton, 881 F2d at 503.

In short, there is no accepted method for disposition of surplus funds from "fluid damage recoveries." Instead, the creation, existence, and disposition of such funds results in interminable arguments and costs for the plaintiffs, the defendants, the court system, and numerous governmental and charitable entities that seek to establish either a claim or a favorable charitable gift by those having authority to make the disposition. Even the theory that funds should simply escheat to the state disregards the procedural safeguards established by the Constitution, as the court so plainly pointed out in the Eisen case.

SUMMARY

In reality, the current proposal presents a theory for application of procedural rules to change substantive law that has been rejected for 20 years. The Oregon procedural rule takes into account the Eisen decision and should not be changed. Furthermore, although the Oregon rule may be somewhat unusual in codifying the procedure for handling claims by individual class members, all federal courts in our experience actually promulgate and enforce such a procedure. None has allowed a fluid damages method to usurp an individual claims method.

In conclusion:

(1) There are good reasons for treating the three types of class actions differently. Individual notice to class members when money damages are sought in a class action is constitutionally required; it is also highly desirable from a policy standpoint, so that putative class members have incentive to participate in and control the proceedings, instead of relinquishing all responsibility to plaintiffs' class lawyers.

(2) The fluid damages theory not only unjustly deprives defendants of the protection of substantive law, but puts an additional club in the hands of plaintiffs' class attorney to coerce settlement. The aggregation of claims in the form of a class action already make the prospect of attempting to defend a class action case so terrifying that almost no defendant will undertake a defense, no matter how meritorious; when that is coupled with treble damages such as are available under antitrust or racketeering laws, the result always is threat of total ruin and closure of business.

Based on our 25 years of experience with the "modern" class action rule, we submit that the 1992 proposals are bad law and bad social policy.

Very truly yours,

R. Alan Wight

McEWEN, GISVOLD, RANKIN & STEWART

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April 29, 1992

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Re: Council on Court Procedures -
Subcommittee on Proposed Revisions to ORCP 32

Gentlemen:

Henry Kantor is anxious to get moving on this matter and has put it on the agenda for May 9. Because I have only received one response from defense counsel to date, I have again placed telephone calls and sent out a few letters soliciting comments, copies of which are enclosed. If and when I receive additional comments, I will forward them to you.

Mr. Wight's objection, which I previously forwarded to you, is premised on problems with the "fluid recovery theory." That objection represents a philosophical disagreement between plaintiff and defense counsel which goes to the very heart of ORCP 32 and may be irreconcilable.

I suggest that we hold a telephone conference call on Thursday, May 7, at 4:00 p.m. to discuss what report we should make to the Council on Saturday, May 9. If this time is not convenient for you, please let me know. And I promise that I will remember to call on time.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam
Enclosures

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Eugene, Oregon 97401-3176

Re: Council on Court Procedures -
Subcommittee on Proposed Revisions to ORCP 32

Gentlemen:

Enclosed is a copy of a letter received from David S. Barrows, President of the Oregon League of Financial Institutions, endorsing the contents of the letter from Kenneth Sherman, Jr., which I previously forwarded to you.

Also enclosed is a copy of a memorandum I prepared following a telephone call from Joe Willis of the Schwabe, Williamson firm regarding this subject.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam
Enclosures

JMS\CCP-0123.H&P

Oregon League of Financial Institutions
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Portland, Oregon 97205
(503) 227-5591
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May 1, 1992

MAY 1992
A.M. 7 8 9 10 11 12 1 2 3 4 5 6 P.M.

Ms. Janice Stewart
Attorney at Law
McEwen, Gisvold, Rankin and Stewart
1600 Standard Plaza
1100 S.W. Sixth Avenue
Portland, Oregon 97204

Dear Janice:

We appreciate very much the opportunity to comment to you and the members of your Subcommittee on the proposed revisions to ORCP 32, dealing with class action suits.

We will keep our comments brief by indicating to you that we strongly endorse the memorandum forwarded to you by Kenneth Sherman, Jr., Legal Counsel to the Oregon Bankers Association. He has thoroughly and clearly discussed the issues in a manner which reflects our perspective on these matters.

As you are aware, the 1981 Session of the Oregon Legislature thoroughly debated the issues which have been raised by the petitioners and determined that fairness would be best served by not making these proposed changes.

We would strongly urge the Subcommittee to reject the petition and leave all of the parties in the balanced position in which they currently operate under Rule 32.

If you, or any member of your Subcommittee, desire further information, I hope you will not hesitate to call on us.

Thank you very much for considering our views.

Sincerely yours,

David S. Barrows
President

M E M O R A N D U M

TO: Class Action Subcommittee

FROM: Janice M. Stewart

DATE: May 4, 1992

RE: Joe Willis

Joe Willis at Schwabe, Williamson called me on May 4 to comment on the proposed class action rule changes. His experience with class actions is primarily from the defense side, but on occasion he has also represented plaintiffs to designate a class. He had read Alan Wight's letter and stated that he agreed with its criticism of the proposed changes. He noted that this is not the first time that plaintiffs' attorneys have tried to amend the rule to conform to the "fluid recovery theory."

He feels that there is a need to clearly identify class members for purposes of res judicata. On 6-8 occasions in his experience, some class members have opted out at the last minute for tactical reasons. A defendant needs to know whose peace it is buying with a settlement.

He added that because class actions are so costly, once a class is designated, a defendant has a strong incentive to settle. The only advantage/protection to a defendant in a class action is the notice requirement.

Even if the action only requests equitable relief (which somewhat minimizes the res judicata problem), the issue remains

of "virtual representation." The defendant and the court need to know that the plaintiffs are properly aligned with no conflicting interests.

Because he wrote a CLE chapter once on class actions, he recalled that the American College of Trial Lawyers did its own study some years back concerning class action abuses. The Oregon legislature almost adopted its proposed changes verbatim, but then made amendments before passage. He will try to dig out further information on this for me.

He also commented that class actions rarely benefit the individual plaintiff and in reality are owned and managed by the plaintiffs' lawyers. A recent example is the Melridge case in which the class has obtained a partial settlement of $5-6 million, none of which will go to class members due to their diverse interests. About half of the settlement will pay attorney's fees and half will remain in escrow until the case is completed. Another example is the Bosky case where the class members will be fighting for some time.

MCEWEN, GISVOLD, RANKIN & STEWART

(FOUNDED AS CAKE & CAKE - 1886)

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July 16, 1992

Professor Maury Holland
School of Law
University of Oregon, Room 275A
1101 Kincaid Street
Eugene, Oregon 97403-3720

VIA FACSIMILE

Re: Council on Court Procedures -
Subcommittee on Proposed Revisions to ORCP 32

Dear Maury:

I regret that I have been extremely busy and not had as much time as I would have liked to review your draft report. By and large, I thought it was quite good.

Enclosed are copies of the pages of your draft with my proposed handwritten changes, most of which are probably illegible to you.

In the introduction, I suggest referring specifically by name to the 1985 Flegel Report. I also suggest noting, as is true, that the Flegel Report was not approved by the ABA and that the Advisory Committee did not take any formal action, but wished to accumulate additional experience. I also suggest we note the date of the Advisory Committee's proposal, namely June 1991, noting that the Advisory Committee is part of the Judicial Conference of the United States.

I also suggest attaching as Exhibit D the October 1991 review of the Flegel Report by the Subcommittee of the ABA Section on Litigation. We should also add that the Advisory Committee met in November 1991, but did not consider or take action on the proposed changes and is scheduled to consider them at its next meeting in the fall of 1993. I think it is important for the Council to know that in fact nothing has been adopted anywhere yet with respect to these proposed changes to the Federal rule.

JMG:CCP-0167.LTH

MCEWEN, GISVOLD, RANKIN & STEWART

On page 7 I made some editorial changes simply to reduce the verbiage.

On page 9, I changed the language to reflect the opinion of the majority of the Subcommittee because of my minority report. The same is true on page 10.

On page 12, I again made small editorial changes. On page 13, I again made the change to a majority of the Subcommittee with respect to the discretionary notice.

On page 15 in paragraph 11, you should change the references from "C" to "G."

In your discussion of jettisoning the claim form procedure, please mention whatever case you were referring to in our discussion which held that the current claim form procedure prevented any alternative way of determining damages. That, to my mind, was the critical reason for accepting Mr. Goldsmith's proposed change.

On page 22, I suggest deleting the negative reference to the legislators, since they may read this report at some point.

You need to add that we oppose the deletion of F(5).

I am not certain what to do with the long, tortured discussion of why we recommend deleting the claim form, but not changing the attorney fee provision.

Also enclosed is my "minority" report.

I will be out of town until Monday, but will be available all day Monday for consultation, if needed.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam
Enclosures
cc: Mr. Michael V. Phillips - **VIA FACSIMILE**
(w/enclosures)

JM3\CCP-0167.LTH

Jan Stewart

July 3, 1992

TO: MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Subcommittee on Proposed Changes to Class Action Rule (ORCP 32), Janice Stewart, Chair, Mike Phillips and Maury Holland, Members

RE: Recommended Amendments for Consideration at 8/1/92 Meeting of Council

For the past six months this subcommittee has been considering proposed amendments to the class action rule, ORCP 32, focusing specifically on a set of proposals forwarded to Fred Merrill by letter dated December 14, 1991 by "an ad hoc coalition of law firms and lawyers" styling itself the "Committee to Reform Oregon's Class Action Rule" [hereinafter the "Committee"]. A copy of the Committee's proposals, together with its Comments thereon, is appended as Attachment A to this memo. The Committee's proposals were largely modeled upon a 1985 Report and Recommendations of the Special Committee on Class Action Improvements" from the ABA Section of Litigation, 110 F.R.D. 195 (1986), which were submitted with Comments to the Advisory Committee on Civil Rules of the Judicial Conference of the U.S. on the Federal Rules of Civil Procedure, but which were not yet been approved by the ABA. The Advisory Committee did not take any formal action, but instead accumulated additional expression of Practice and Procedure. A copy of this report and recommendations is appended as Attachment B to this memo. The Committee's proposals were also, albeit to a considerably lesser degree, modeled upon the June 1991 proposals of the Advisory Committee on the Judicial Conference of the U.S. on Civil Rules

~~Federal Rules of Civil Procedure to amend the federal class action rule, F.R.Civ.P. 23, which have not yet been formally transmitted for approval to the Standing Committee.~~ leaves in A copy of these proposals, with Notes, is appended as Attachment C to this memo. Also attached as Ex. D is the report by the Subcommittee of the ABA Section of Litigation. The Advisory Committee met in Nov. 1991 but did not consider or take action on the proposed changes. It is scheduled to consider these proposed changes at its next meeting in the fall of 19.

At the Council's August 1 meeting this subcommittee will recommend that the Council tentatively approve and adopt the amendments proposed by the Committee with, however, some substantial modifications devised and favored by the subcommittee. Part One of this memo sets forth this subcommittee's comments on the amendments to ORCP 32 as proposed by the Committee. Part Two of this memo sets forth the modifications of the Committee's proposed amendments that are favored by this subcommittee, together with commentary setting forth our reasons for the suggested modifications.

PART ONE

1. We concur with the deletion of language in ORCP 32 A(5) as indicated in the proposal because this deletion is needed to conform this rule to ORCP 32 B as proposed to be amended.

2. ORCP 32 B is proposed to be extensively amended for the

the modest amounts of individual claims would not make it economically worthwhile to do so, or because many potential claimants would never be aware of the existence of possible claims unless "recruited" as class members into a "Frankenstein monster" of a class action. The procedurally oriented skepticism about aggregated money damages class actions derived from due process concerns about the possibility of res judicata foreclosure of individual claims held by people who might prefer to prosecute individual actions on their own, with a lawyer of their own choice and in a forum of their own choosing. There were also expressed serious concerns about possible conflicts of interest between class representatives and their attorneys on the one hand, and normally quite passive class members whose interests were feared might be sacrificed in one or another fashion on the other. These concerns have led to special procedural requirements, both in present ORCP and in its federal counterpart, F.R.Civ. P. 23, for the protection of putative class members, primarily in the form of mandatory ~~Mullane type~~ individual notice to all class members who can be identified with reasonable effort, combined with the unconditional option on the part of any class member to "opt out," and thus to be unaffected by the outcome of the class action. This requirement of individual notice to class members has proven to be a major practical impediment to maintenance of ~~many~~ damages class actions, since its costs, which can amount to several hundreds of thousands of dollars, must be "fronted" by the class

aspects of procedure ~~with respect to which lawyers and judges~~ are best served by being clearly informed in advance of litigation, and during its progress, what is required, what is prohibited, and how certain things must be done. Examples of these include most things about pleadings, the form of motions, discovery, methods of preserving error and taking appeals, etc. ~~Rule-oriented commands and prohibitions are also most suitable~~ for matters amenable to uniformity of treatment across the entire spectrum of civil litigation.

This is certainly not a characteristic of modern class action litigation. Where, ~~as we believe is the case with the issue of the elaborateness, timing and content of notice to class members in class actions,~~ equitable discretion is ~~called for~~ aggregate, rules of procedure should expressly confer that discretion, usually in accompaniment with an enumeration of factors to be taken into account. That is essentially what these proposed amendments do. Apart from considerations of fourteenth-amendment due process, discussed below, ~~in devising rules for something as complex, multifaceted and multifarious as class actions~~, the rule-maker should ~~maximize the element of judicial discretion and~~ minimize hard-and-fast requirements that cannot take account of the myriad facts and circumstances likely to arise in ~~this~~ class actions ~~context~~. The present ORCP 32 assumes that each of the types of class action it authorizes exists in something akin to watertight compartments, that in particular the aggregated damages action

protections are indispensable to ensure fundamental fairness to class members.

In light of the decision of the U.S. Supreme Court in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), it is clear that fourteenth-amendment due process presently mandates Mullane-type notice, including individual notice to each class member who can be identified and whose address can be ascertained by reasonable effort, presumably supplemented by notice by means of publication, in aggregated damage actions corresponding to those provided for by ORCP 32 B(3). That being so, some might question the wisdom of a rules amendment that would make discretionary certain procedural safeguards that the fourteenth amendment makes obligatory, and ask whether such an amendment would not constitute an invitation, or at least a trap, for Oregon trial judges to commit constitutional error.

The majority of this subcommittee, however, agrees with the Committee and the Special Committee of the Section of Litigation that evolving ~~constitutional doctrine~~ case law ought not be codified in rules of procedure. ~~We are confident that judges and lawyers in this~~ state fully understand that multiple ~~sources~~ of law often bear upon the resolution of various issues presented in the course of litigation, and ~~will~~ not automatically assume that giving notice, with or ~~without~~ an opt out election, is merely discretionary as ~~determined by all of the controlling law simply because it would~~

Scope

~~be discretionary under ORCP 32 as proposed to be amended.~~ To ~~further~~ safeguard against any unwary lawyers or judges falling into such a trap, however, ~~it would be clearly called for, if these amendments are adopted,~~ that the Staff Comment alert ~~judges~~ to the possible bearing that fourteenth-amendment due process might have on notice and related matters.

Some might still object that, if fourteenth amendment due process as currently interpreted requires notice, and possibly an opt-out election, in aggregated money damage class actions, what sense does it make to jettison the present form of ORCP 32, which imposes the same requirements in favor of an amended rule that, within its four corners, would countenance possibly unconstitutional procedure. ~~A sufficient response, we believe,~~ A majority of the Subcommittee responds that is that the requirements of fourteenth amendment due process emanate from evolving case law handed down by the U.S. Supreme Court. Even if it could be assumed that the notice requirements currently imposed by due process as announced in Shutts correspond precisely with the notice and opt-out provisions of present ORCP 32, to "codify" (i.e., by retaining the latter in place) them as they exist at one particular point in time does not make good sense to us. If, as we believe, the proposed amendments make good sense as rules of procedure, the Council should promulgate them and allow due process doctrine to evolve as it will.

unresolved all issues regarding what fourteenth amendment due process might require by way of notice in the context of defendant class actions.

3. We agree with the proposed deletion of ORCP 32 B(3)(f), since this matter is better addressed in the language proposed to be added to ORCP 32 E(1).

4. We support the proposed deletion and addition to ORCP 32 C(1) on the ground that there seems no good reason to ~~limit the~~ require~~ments of~~ specific findings and conclusions ~~relating to~~ only for certification to B(3) class actions, and ~~in the interest of making clear~~ to clarify that certification might be limited to fewer than all claims or issues presented by the action as filed.

5. We have not, at this writing, reached a final judgment about the advisability of the revisions proposed by the Committee to ORCP 32 D, which are different than the present version of the federal rule ~~but expect to do so by the August 1 meeting~~. Our doubts concern whether it is wise to trigger the rather cumbersome procedures relating to dismissal or settlement on the basis of an action having been merely filed as a class action as opposed to have been certified as such.

6. We support the language proposed to be added to ORCP 32 E(1) in the interest of making clear that motions for dismissal on the pleadings or summary judgment can, under appropriate

circumstances, be disposed of prior to the judge reaching the issue of certification.

7. With one minor exception, the majority of the subcommittee ~~we support~~ the additions and deletions proposed to ORCP 32 F(1), which are the correlatives of the amendments proposed to ORCP 32 B relating primarily to mandatory as opposed to discretionary notice, discussed in 2 above. The minor exception is that we think the word "determination" should be changed to "determinations," since the determination regarding notice is distinct from, though often related to, the determination regarding the exclusion option. The list of specifics regarding the content of notices detailed in the present ORCP 32 F(1)(a)-(h) relate only to B(3) class actions, with questions relating to the timing, content and method of affording notice in all other kinds of class actions being remitted, pursuant to ORCP 32 B(2), to the sound discretion of the trial judge. Extending that discretion to all matters regarding notice, regardless of typology, seems to us most consistent with the general thrust of the amendments proposed to ORCP 32 B that envision a unitary class action. This does not mean that different sorts of class actions will not call for different procedures and handling. Rather, the underlying thought behind the concept of a unitary class action is that the myriad differences among class actions are too subtle and too multifarious for them to be captured or provided for in a procedural rule of general application. A class action rule,

"F(3) The plaintiff shall bear the costs of any notice ordered prior to liability being determined, except that the court may require at any point in the proceeding that the defendant bear the cost of notice to current customers or employees if included with a regular mailing to them by a defendant, or the court may hold a preliminary hearing to determine how the costs of such notice shall be apportioned."

11. We support the revision proposed to ORCP 32 E(1) and deletion of C(2) as surplusage in light of that revision.

12. We support the revisions proposed to ORCP 32 M, except we suggest that the final sentence read: "If a money judgment is entered in favor of a class, the judgment shall where possible specify . . . ." etc.

PART TWO

1. We recommend that, rather than being extensively amended as proposed on p. 6 of the Committee's submission, ORCP 32 F(2) be repealed in its entirety. F(2) is the notorious "claim form" provision, which is not part of the federal class action rule or, according to our best information, of the class action rule of any other state. We are familiar enough with the

ways of Oregon to understand that this, by itself, is not a sufficient argument as to why it should not remain a part of our rule. Nevertheless, we are persuaded that sufficient reasons do exist for dropping this claim form procedure, which the present rule makes mandatory in any money judgment class action maintained under ORCP 32 B(3), which will no longer exist as a distinct category if the amendments proposed to that rule and to ORCP 32 F(1) are promulgated by the Council. As with notice, the proposed amendments would not deprive trial judges of their authority to require submissions of claim forms, or their functional equivalent, at any point in the proceeding should they determine that step required in the interest of fairness or efficiency.

Jettisoning of the claim form procedure was perhaps the most controversial of the amendments promulgated by the Council in 1980 and overridden by the 1981 Legislature. The members of the ad hoc group that submitted the current proposed revisions opine that, with the ensuing decade of greater experience with class actions across the nation, the 1993 Legislature might well ~~decline to override~~ reverse an amendment promulgated by the Council dropping the mandatory claim form procedure. They might or might not be correct about this, but, at the least, substantial controversy and opposition should probably be anticipated. That should not, however, deflect the Council from exercising its best judgment on what, in its considered opinion, constitutes soundly

devised civil procedure.

~~Insistence upon retention of~~ The claim form procedure is, of course, the opposite side of the coin from ~~resistance to~~ what is loosely called "fluid recovery." This reflects the perfectly respectable view that the legitimate purpose of private civil litigation is to provide an appropriate remedy, most often in the form of money damages, to specific people who as plaintiffs claim and prove legal injury. According to this view, when a class action results in a judgment in excess, sometimes far in excess of any damages that can be identified and awarded to injured parties, at that point, unless the excess is returned to the defendant, private civil litigation assumes the illegitimate function of punishing defendants for their wrongdoing, which is properly a function of criminal law or, alternatively, the function of public law civil litigation brought by government agencies. Critics of class actions not subject to a claim form restriction or some functional equivalent assert that it is something akin to "unAmerican" for a court unable to identify or locate substantial numbers of class members, in order to adjudicate amounts of their individual damages and to distribute their recoveries to them, to nonetheless mulct defendants for such damages and order them paid over to some charitable institution or other stranger to the proceedings whose activities are somehow thought to benefit the plaintiff class, broadly defined or, as is currently proposed, order the funds escheated

to the state. Such critics usually elaborate their jurisprudential attack by asserting that money judgment class actions not subject to ~~something like~~ a claim form restriction primarily benefit "rapacious" class action attorneys, whose fees are usually increased to take account of the portion of the judgment paid over to the state or "cy pres'd" to do-good organizations, and hence lead to "strike suits" or otherwise frivolous litigation, with extortionate settlement demands, irresistible pressure on deep-pocket institutional defendants to buy peace at an inordinate price, and so forth. In short, many will see the kind of class action that would be authorized by the amendment now under consideration as part and parcel of the "Litigation Explosion" they view as damaging to American business and the nation's competitiveness.

The opposing view, of course, is that, as with the burgeoning of public interest litigation by private parties against government agencies ~~and~~ typically seeking injunctive or declaratory relief, money judgment class actions unconstrained by ~~anything akin to~~ a claim form procedure is, on balance, a good thing, and that whatever abuses might be associated with it can and should be dealt with by other, more discriminating means, such as the firm exercise of considered discretion by trial judges. These proponents argue that a good deal of unlawful conduct is not, and perhaps cannot, be dealt with by government agencies, that no one is proposing that any defendant be adjudged

to pay for more than the aggregate damages they have unlawfully caused, even if some portion of those damages cannot be identified to all of the individual class members, that a considerable portion of the aggregate damages will be paid to individual claimants to redress the harms they have suffered, and that as to the remainder, it is better that the state or some pro bono organization get the funds than that wrongdoing defendants retain any of the fruits of their wrongdoing.

Having sketched out the opposing positions, with at least some of their ideological or political overtones, the important point we wish to make is that we do not believe that either choice as between these conflicting views should properly be embodied, or sought to be advanced, in rules of procedure. The current ORCP 32 F(2) of course reflects and advances the restrictive attitude toward class actions, whereas the proposed amendment would incorporate the opposite, ~~hospitable~~ view. Our opinion is that it is not appropriate for the Council to make the choice as between these views in its capacity as rule-maker. In the most general terms, our position is that rules of procedure should be confined in their operation to matters that are, to the maximum extent possible, strictly procedural in the sense of promoting the fair, efficient and economical conduct of litigation. Rules of procedure should, in other words, avoid either promoting or handicapping certain favored or disfavored claims, defenses or interest under the guise of regulating

judicial procedure. We believe that both the present rule, and the rule as proposed to be amended, share the same vice, if in directly opposite directions. Neither, we think, properly belongs in the ORCP.

The overriding defect of present ORCP 32 F(2) is that it seeks to limit damages in class actions to which it pertains by mandating a procedure that has no other manifest purpose or function than to do precisely that. In a money judgment class action it might well make good sense for the trial judge at some point to order that claim forms or their equivalents be solicited from some or all class members. Depending upon all the circumstances, failure to do so might even amount to reversible abuse of discretion. For example, in the kind of money damage class action involving a class alleged to have suffered personal injuries, but with no element of unjust enrichment on the part of the defendant, it is difficult to imagine how the action could be successfully conducted without submission of something like claim forms, probably buttressed by affidavits or other supporting documentation, and perhaps even hearings before the judge or someone authorized to conduct them. On the other hand, in class actions involving funds or other property unlawfully obtained or retained by a defendant, where the amount of funds or identity of the property can be ascertained from defendant's records, requiring claim forms to be forwarded to and returned by every class member might, depending upon all the facts and

large policy issue sought to be resolved in diametrically opposite ways by the proposed amendment and the existing rule. ~~A plague on both~~ their house, we say!

We do not believe there is any substance to a possible objection that, if the existing rule is repealed and the proposed amendment or some variant thereof is not adopted in its place, judges will be left at large, with no guiding authority and no germane legal principles to inform their decisions in this area. If the proposed escheat statute is enacted, that should provide judges with some guidance, although the Council might well seek to have some input on whatever measure is adopted, as much outside the scope of rule-making as an escheat statute would doubtless be. The relevant committees of the Legislature should be informed, ~~by someone if not by the Council,~~ that any escheat statute that might be adopted should be clearly limited in its operation to funds representing unjust enrichment, and not to funds that could not be paid over to class members as compensatory damages. ~~At least the committees should be made~~ aware of that distinction, something that cannot be assumed on the part of ~~legislators~~ who appear to be confused on the ~~distinction between recess and adjournment~~.

In addition to any escheat statute that might be enacted, there is a developing body of case law generated by federal and state courts across the country. These decisions draw upon

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(1891-1973)

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November 10, 1992

VIA FACSIMILE

Professor Maury Holland
School of Law
University of Oregon, Room 275A
1101 Kincaid Street
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Mr. Michael V. Phillips
Attorney at Law
#1050 Citizens Building
975 Oak Street
Eugene, Oregon 97401-3176

Re: Council on Court Procedures -
Subcommittee on Proposed Revisions to ORCP 32

Dear Maury and Mike:

My apologies for being unable to attend the meeting this coming Saturday. However, I am confidant that my absence will hardly be noticed with both of you there.

Despite my best efforts at prior meetings to finish up the proposed changes to Rule 32, there are still three areas for the Council to cover. These are:

(1) Elimination of F(2) claim form procedure;
(2) Adoption of unitary versus tripartite class action;
(3) Revision of F(1) notice.

With respect to the first two areas, I give you my proxy to vote in favor of the subcommittee's recommendations.

With respect to the last area, some clarification as to my position is in order. Please advise the Council that I am in favor of retaining a mandatory notice for class actions which

seek monetary damages, although not necessarily in the form currently mandated by Rule 32.

Some Council members may have been under the erroneous impression that I wish to expand mandatory notice to other types of class actions which do not now require notice. To the contrary, I do not support expanding the notice requirement, but I do oppose its elimination for damage class actions. Therefore, I opposed the original proposal by Mr. Goldsmith's committee to allow the trial court discretion to determine whether or not to give notice in damage class actions.

Furthermore, I favor a more flexible notice requirement than currently exists to accommodate the variety of circumstances that arise in these types of cases.

Mr. Goldsmith's committee has now proposed an amended F(1) (attached to Mr. Goldsmith's November 5 letter to me) which meets with my approval. It deletes the discretion of the trial court to determine "whether" to give notice, which was the basis of my prior opposition. Again, I give you my proxy to vote in favor of the revised F(1) proposal.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam

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*ADMITTED IN OREGON AND WASHINGTON
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February 18, 1992

Mr. Barnes H. Ellis
Attorney at Law
900 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268

Re: Proposed Revisions to ORCP 32

Dear Barnes:

A proposal has been made to the Council on Court Procedures by Phil Goldsmith and a number of lawyers who primarily represent plaintiffs to revise ORCP 32 concerning class actions. A Subcommittee consisting of Professor Maury Holland, Michael Phillips and me has been appointed by the Council to review these revisions.

Since you may have had some experience with ORCP 32 or the equivalent federal rule as a defense lawyer, the Subcommittee would be interested in your reaction to these proposed revisions. For that purpose, I am enclosing copies of Mr. Goldsmith's letters dated December 14, 1991, to Professor Merrill and February 7, 1992, to Mr. Kantor, as well as the proposed revisions with comments.

If you have comments, either pro or con, please convey them to one of the members of the Subcommittee, either orally or in writing. We suspect that some of the proposed revisions are not controversial, whereas others may be controversial.

The next meeting of the Council will be held on March 14. If possible, we would appreciate receiving your comments by that date. You will also have an opportunity to appear before the

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Council at one or more of its future meetings before any revisions are adopted.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam

Enclosures

cc: Prof. Maury Holland
Mr. Michael Phillips
Mr. Henry Kantor
(all without enclosures)

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(FOUNDED AS CAKE & CAKE - 1886)

ATTORNEYS AT LAW

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DONALD W. McEWEN
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DON G. CARTER
JAMES RAY STREINZ*
ALLEN B. BUSH
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RALPH H. CAKE
(1891-1973)

NICHOLAS JAUREGUY
(1896-1974)

HERBERT C. HARDY
(1912-1989)

*ADMITTED IN OREGON AND WASHINGTON
†ADMITTED IN OREGON, ALASKA AND MASSACHUSETTS

February 19, 1992

The Honorable Charles S. Crookham
Attorney General
Department of Justice
100 Justice Building
Salem, Oregon 97310

Re: Proposed Revisions to ORCP 32

Dear Judge Crookham:

A proposal has been made to the Council on Court Procedures by Phil Goldsmith and a number of lawyers who primarily represent plaintiffs to revise ORCP 32 concerning class actions. A Subcommittee consisting of Professor Maury Holland, Michael Phillips and me has been appointed by the Council to review these revisions.

Since you may have had some experience with ORCP 32 or the equivalent federal rule as a defense lawyer, the Subcommittee would be interested in your reaction to these proposed revisions. For that purpose, I am enclosing copies of Mr. Goldsmith's letters dated December 14, 1991, to Professor Merrill and February 7, 1992, to Mr. Kantor, as well as the proposed revisions with comments.

If you have comments, either pro or con, please convey them to one of the members of the Subcommittee, either orally or in writing. We suspect that some of the proposed revisions are not controversial, whereas others may be controversial.

The next meeting of the Council will be held on March 14. If possible, we would appreciate receiving your comments by that date. You will also have an opportunity to appear before the

Council at one or more of its future meetings before any revisions are adopted.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam

Enclosures

cc: Prof. Maury Holland
Mr. Michael Phillips
Mr. Henry Kantor
(all without enclosures)

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†ADMITTED IN OREGON, ALASKA AND MASSACHUSETTS

February 19, 1992

Ms. Diana E. Godwin
Attorney at Law
3400 First Interstate Tower
1300 S.W. Fifth Avenue
Portland, Oregon 97201-5696

Re: Proposed Revisions to ORCP 32

Dear Diana:

A proposal has been made to the Council on Court Procedures by Phil Goldsmith and a number of lawyers who primarily represent plaintiffs to revise ORCP 32 concerning class actions. A Subcommittee consisting of Professor Maury Holland, Michael Phillips and me has been appointed by the Council to review these revisions.

Since you may have had some experience with ORCP 32 or the equivalent federal rule as a defense lawyer, the Subcommittee would be interested in your reaction to these proposed revisions. For that purpose, I am enclosing copies of Mr. Goldsmith's letters dated December 14, 1991, to Professor Merrill and February 7, 1992, to Mr. Kantor, as well as the proposed revisions with comments.

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Council at one or more of its future meetings before any revisions are adopted.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam

Enclosures

cc: Prof. Maury Holland
Mr. Michael Phillips
Mr. Henry Kantor
(all without enclosures)

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*ADMITTED IN OREGON AND WASHINGTON
†ADMITTED IN OREGON, ALASKA AND MASSACHUSETTS

February 18, 1992

Ms. Carol A. Hewitt
Attorney at Law
222 S.W. Columbia, Suite 1800
Portland, Oregon 97201-6618

Re: Proposed Revisions to ORCP 32

Dear Carol:

A proposal has been made to the Council on Court Procedures by Phil Goldsmith and a number of lawyers who primarily represent plaintiffs to revise ORCP 32 concerning class actions. A Subcommittee consisting of Professor Maury Holland, Michael Phillips and me has been appointed by the Council to review these revisions.

Since you may have had some experience with ORCP 32 or the equivalent federal rule as a defense lawyer, the Subcommittee would be interested in your reaction to these proposed revisions. For that purpose, I am enclosing copies of Mr. Goldsmith's letters dated December 14, 1991, to Professor Merrill and February 7, 1992, to Mr. Kantor, as well as the proposed revisions with comments.

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Council at one or more of its future meetings before any revisions are adopted.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam

Enclosures

cc: Prof. Maury Holland
Mr. Michael Phillips
Mr. Henry Kantor
(all without enclosures)

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February 18, 1992

Mr. Wayne Hilliard
Attorney at Law
Lane Powell Spears Lubersky
520 S.W. Yamhill Street, Suite 800
Portland, Oregon 97204-1383

Re: Proposed Revisions to ORCP 32

Dear Wayne:

A proposal has been made to the Council on Court Procedures by Phil Goldsmith and a number of lawyers who primarily represent plaintiffs to revise ORCP 32 concerning class actions. A Sub-committee consisting of Professor Maury Holland, Michael Phillips and me has been appointed by the Council to review these revisions.

Since you may have had some experience with ORCP 32 or the equivalent federal rule as a defense lawyer, the Subcommittee would be interested in your reaction to these proposed revisions. For that purpose, I am enclosing copies of Mr. Goldsmith's letters dated December 14, 1991, to Professor Merrill and February 7, 1992, to Mr. Kantor, as well as the proposed revisions with comments.

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Council at one or more of its future meetings before any revisions are adopted.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam

Enclosures

cc: Prof. Maury Holland
Mr. Michael Phillips
Mr. Henry Kantor
(all without enclosures)

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†ADMITTED IN OREGON, ALASKA AND MASSACHUSETTS

February 18, 1992

Mr. Jack L. Kennedy
Mr. Garr M. King
Attorneys at Law
2600 Pacwest Center
1211 S.W. Fifth Avenue
Portland, Oregon 97204-3726

Re: Proposed Revisions to ORCP 32

Dear Jack and Mike:

A proposal has been made to the Council on Court Procedures by Phil Goldsmith and a number of lawyers who primarily represent plaintiffs to revise ORCP 32 concerning class actions. A Subcommittee consisting of Professor Maury Holland, Michael Phillips and me has been appointed by the Council to review these revisions.

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Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam

Enclosures

cc: Prof. Maury Holland
Mr. Michael Phillips
Mr. Henry Kantor
(all without enclosures)

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*ADMITTED IN OREGON, ALASKA AND MASSACHUSETTS

February 19, 1992

Mr. David B. Markowitz
Attorney at Law
300 Benj. Franklin Plaza
One S.W. Columbia
Portland, Oregon 97258

Re: Proposed Revisions to ORCP 32

Dear Dave:

A proposal has been made to the Council on Court Procedures by Phil Goldsmith and a number of lawyers who primarily represent plaintiffs to revise ORCP 32 concerning class actions. A Sub-committee consisting of Professor Maury Holland, Michael Phillips and me has been appointed by the Council to review these revisions.

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Council at one or more of its future meetings before any revisions are adopted.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam

Enclosures

cc: Prof. Maury Holland
Mr. Michael Phillips
Mr. Henry Kantor
(all without enclosures)

MCEWEN, GISVOLD, RANKIN & STEWART
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February 19, 1992

Mr. Milo Petranovich
Attorney at Law
Lane Powell Spears Lubersky
520 S.W. Yamhill Street, Suite 800
Portland, Oregon 97204-1383

Re: Proposed Revisions to ORCP 32

Dear Milo:

A proposal has been made to the Council on Court Procedures by Phil Goldsmith and a number of lawyers who primarily represent plaintiffs to revise ORCP 32 concerning class actions. A Sub-committee consisting of Professor Maury Holland, Michael Phillips and me has been appointed by the Council to review these revisions.

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Council at one or more of its future meetings before any revisions are adopted.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam

Enclosures

cc: Prof. Maury Holland
Mr. Michael Phillips
Mr. Henry Kantor
(all without enclosures)

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*ADMITTED IN OREGON AND WASHINGTON
†ADMITTED IN OREGON, ALASKA AND MASSACHUSETTS

February 19, 1992

Mr. Kenneth Sherman
Attorney at Law
P. O. Box 2247
Salem, Oregon 97308

Re: Proposed Revisions to ORCP 32

Dear Ken:

A proposal has been made to the Council on Court Procedures by Phil Goldsmith and a number of lawyers who primarily represent plaintiffs to revise ORCP 32 concerning class actions. A Sub-committee consisting of Professor Maury Holland, Michael Phillips and me has been appointed by the Council to review these revisions.

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JMS\CCP-0021

Council at one or more of its future meetings before any revisions are adopted.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam

Enclosures

cc: Prof. Maury Holland
Mr. Michael Phillips
Mr. Henry Kantor
(all without enclosures)

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February 19, 1992

Mr. James N. Westwood
Mr. R. Alan Wight
Attorneys at Law
Suite 3500
111 S.W. Fifth Avenue
Portland, Oregon 97204-3699

Re: Proposed Revisions to ORCP 32

Dear Jim and Alan:

A proposal has been made to the Council on Court Procedures by Phil Goldsmith and a number of lawyers who primarily represent plaintiffs to revise ORCP 32 concerning class actions. A Subcommittee consisting of Professor Maury Holland, Michael Phillips and me has been appointed by the Council to review these revisions.

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JMS\CCP-0021

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Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam

Enclosures

cc: Prof. Maury Holland
Mr. Michael Phillips
Mr. Henry Kantor
(all without enclosures)

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February 27, 1992

Mr. Roland F. Banks
Attorney at Law
Suites 1600-1950 Pacwest Center
1211 S.W. Fifth Avenue
Portland, OR 97204-3795

Re: Proposed Revisions to ORCP 32

Dear Jerry:

A proposal has been made to the Council on Court Procedures by Phil Goldsmith and a number of lawyers who primarily represent plaintiffs to revise ORCP 32 concerning class actions. A Sub-committee consisting of Professor Maury Holland, Michael Phillips and me has been appointed by the Council to review these revisions.

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Council at one or more of its future meetings before any revisions are adopted.

Very truly yours,

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Janice M. Stewart

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Enclosures

cc: Prof. Maury Holland
Mr. Michael Phillips
Mr. Henry Kantor
(all without enclosures)

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April 29, 1992

Mr. Milo Petranovich
Attorney at Law
Lane Powell Spears Lubersky
520 S.W. Yamhill Street, Suite 800
Portland, Oregon 97204-1383

Re: Council on Court Procedures
Proposed Revisions to ORCP 32

Dear Milo:

Enclosed for your review is a letter from Alan Wight responding to Phil Goldsmith's proposal. Please let me know your thoughts on this subject before the next meeting of the Council on Court Procedures on May 9. This item will be on the agenda at that meeting.

Instead of (or in addition to) written comments, you or someone else from your firm is welcome to attend the meeting on May 9 to make oral comments.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam
Enclosure
cc: Maury Holland
Michael Phillips
(both w/o enclosure)

JMSVCCP-0117.LTP

McEWEN, GISVOLD, RANKIN & STEWART

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April 29, 1992

Ms. Lois Rosenbaum
Attorney at Law
Stoel Rives Boley Jones & Grey
Suite 2300
900 S.W. Fifth Avenue
Portland, Oregon 97204-1268

Re: Council on Court Procedures
Proposed Revisions to ORCP 32

Dear Lois:

As the spokesperson for your firm on this issue, I am enclosing a copy of Alan Wight's comments on Phil Goldsmith's proposal for your review.

Sorry our lunch was cancelled. If we cannot reschedule next week, would you either write or call me with your comments before the next meeting of the Council on Court Procedures on May 9? Or, if you prefer, you can attend the meeting and make oral comments. Thanks.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam
Enclosure
cc: Maury Holland
Michael Phillips
(both w/o enclosure)

JMS\CCP-0118.LTR

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R. ALAN WIGHT
ADMITTED IN OREGON AND WASHINGTON

April 3, 1992

Ms. Janice M. Stewart
McEwen, Gisvold, Rankin & Stewart
1600 Standard Plaza
1100 S.W. Sixth Avenue
Portland, Oregon 97204

Subject: Subcommittee on Proposed Revisions to ORCP 32 of Council on Court Procedures

Dear Janice:

We appreciate the opportunity to respond to your letter of February 19, 1992, and various letters by Phil Goldsmith which were enclosed with your letter.

We do have experience with class action procedural rules within the state of Oregon that may bear on the issues raised. Our experience includes the first modern class action cases for damages under the previous Oregon code-pleading statute (American Timber & Trad. Co. v. First Nat. Bank of Ore., 263 Or 1, 500 P2d 1204 (1972), in which the Oregon Supreme Court held that a class action for money damages could not be maintained under the then existing equity rule; and a Legal Aid case against Debt Reducers). After those decisions, the Oregon State Bar and the Oregon legislature solicited views from both plaintiffs and defense attorneys about drafting a modern class action rule for Oregon. We participated in the initial structuring of ORCP 32 and in every discussion of proposed changes to the rule since its adoption. We have also been continually involved in class action litigation in the federal court system, including another American Timber & Trad. Co. v. First Nat. Bank of Ore. case, Best v. U. S. National Bank, an antitrust case against Denney's Restaurants, the Corrugated Container antitrust cases, the Plywood antitrust cases, the Cement & Concrete antitrust cases, the Pipe Fabrication antitrust case, and various securities cases.

cc: Henry Kantor
John Hart

Basically, our view is that ORCP 32 in its present form correctly balances interests of plaintiffs and defendants, and should not be changed. The language presently used in ORCP 32 represented a distillation of knowledge, including experience with class action abuses by plaintiffs' attorneys. These experiences came about after the "modern" class action rule was introduced into the Federal Rules of Civil Procedure in 1967. The language used reflects some of the constitutional criteria that have been announced by the federal courts in various class action cases after 1967. In addition, the Oregon rule was consciously drafted to reject the California usage of a "fluid damages" theory, as announced in Daar v. Yellow Cab, 67 Cal 2d 695, 63 Cal Rptr 724, 433 P2d 732 (1967).

1. Narrow interest of proponents of proposed changes.

The persons making the proposals for changes to ORCP 32 represent a very narrow, special-interest group with a personal stake. These are people who at various times were associates of Henry Carey, then a well-known Portland lawyer. Mr. Carey attempted over nearly two decades to develop class action procedures in Oregon that would be extremely favorable to plaintiffs and almost impossible for courts to control or defendants to manage or defend. These former associates of Mr. Carey regularly present requests to change Oregon law to favor the interests of plaintiffs' attorneys.

In one of the more recent cases involving this group, Tolbert v. First National Bank, 312 Or 485, 823 P2d 965 (1991), Phil Goldsmith was the attorney for the plaintiffs. The other members of this group obtained permission to file briefs as amici, and their appearances are described by the court as follows:

> "Henry Kantor, of Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland, filed a brief on behalf of amici curiae Oregon Trial Lawyers Ass'n, Multnomah County Legal Aid Service, Ecumenical Ministries of Oregon, Forelaws on Board, Pineros Y Campesinos Unidos Del Noroeste, Portland Gray Panthers, Portland Chapter of Oregon Fair Share, Local 2949 of the Lumber and Sawmill Workers Union, Banks & Newcomb, Griffin & McCandlish, Pozzi, Wilson, Atchison, O'Leary & Conboy, Stoll, Stoll, Berne & Lokting, Williams, Troutwine & Bowersox, Willner & Associates, Roger Anunsen, Frank J. Dixon, Gregory Kafoury, Mark Anthony LaMantia, James T. Massey, Roger Tilbury, Linda K. Williams, and Jan Wyers." 823 P2d at 966.

(In the Tolbert case, incidentally, the Oregon Supreme Court held against plaintiffs and their amicus colleagues on the grounds (1) depositors' "reasonable expectations" about NSF check charges were irrelevant as to charges that were in effect when depositors opened accounts, where depositors were informed of the charges and nonetheless agreed to open the accounts, and (2) changes in the charges were consistent with the bank's obligation of good faith, where the parties had agreed to unilateral exercise of discretion by the bank and that discretion was exercised after prior notice to depositors.)

In pointing out the narrow interest of the proponents of the 1992 proposal for changes to ORCP 32, we mean no disrespect to these attorneys. They are dedicated to their interests as they see them. We have worked long years in defending cases brought by them (the American Timber & Trading series of litigation took about 10 years to complete; the Best v. U. S. National Bank/Tolbert v. First National Bank series took a little more than 10 years; some of Mr. Tilbury's cases against Denney's Restaurants took three years; some of the cases by Mr. Massey against the Farm Credit Banks took many years; and the Cement & Concrete antitrust litigation, which the Stoll law firm was involved in as attorneys for plaintiffs, took eight years to complete).

2. Historical antecedents to ORCP 32.

Prior to 1972, Oregon had only an equity rule governing class action. In the late 1960s and early 1970s, in a case brought by Legal Aid against Debt Reducers, Inc., and in the case brought by Henry Carey's office on behalf of American Timber & Trading against First National Bank of Oregon, plaintiffs sought to convince the Oregon courts that the old equity rule could be used for class actions for money damages in Oregon. As part of that argument, plaintiffs' attorneys sought to persuade courts that the "fluid damages" theory which the California court had recently announced in Daar v. Yellow Cab, 67 Cal 2d 695, 63 Cal Rptr 724, 433 P2d 732 (1967), should be followed (the "fluid damages" theory is to the effect that members of the plaintiff class need not actually receive notice of the pendency of the litigation nor come forward to prove and claim damages if the litigation is successful in establishing liability--damages will be proved under some model and any damages not claimed will either escheat to the state or be directed by the court to be donated to some charitable purpose).

The Oregon Supreme Court in American Timber & Trad. Co. v. First Nat. Bank of Ore., 263 Or 1, 500 P2d 1204 (1972), rejected the class action proposal and the fluid damages

theory. Thereafter, committees of lawyers worked on drafting a class action rule, but one that would eliminate the abuses then perceived under the 1967 amendments to FRCP 23. Some of the language included in the Oregon rule required certain notices to class members and required that claim forms be submitted by class members, so that the perceived abuses could not be carried into Oregon practice.

3. Consolidating all three types of class actions into one would be constitutionally improper and would place too much power and discretion in the hands of plaintiffs' class action attorneys.

One of the proposals in the letters written by Mr. Goldsmith is to "replace the present three-part standard for class certification contained in ORCP 32 B with a single standard." This change purportedly would be helpful because it would eliminate certain strictures in identifying class members and having them come forward to prove their damages and claim their share of any favorable judgment.

a. Mr. Goldsmith has a personal interest.

In discussing this issue, Mr. Goldsmith refers to various cases he personally worked on as plaintiffs' attorney, including Derenco, Guinasso, Powell, Best, and Tolbert. Each of these was a case brought by Mr. Carey's office.

b. Mr. Emerson is not an experienced scholar, but merely a recent professional colleague of Mr. Goldsmith.

Mr. Goldsmith also refers in his letter to a "commentator" writing recently in the Willamette Law Review, purportedly giving the following carefully studied advice:

> "[A]t least one meritorious class action was abandoned because the claim form requirement precluded the possibility of meaningful monetary recovery. Additionally, in the tax and insurance reserve cases, * * * the wrongdoing defendants retained over two million dollars in illegally-obtained profits." Emerson, Oregon Class Actions: The Need for Reform 27 Willamette L Rev 757, 760-61 (1991).

Unfortunately, Mr. Emerson is not a long-time distinguished litigator or college professor with expertise on such matters. Instead, he is a 1990 graduate of Willamette Law, and associated in some fashion with Mr. Goldsmith. The Law Review article, far from being an unbiased scholarly study, was the argument of an interested advocate.

Mr. Emerson was referring in his article to the case of Best v. U. S. National Bank, 303 Or 557, 739 P2d 554 (1987), a case which we handled. Mr. Emerson's article sets forth matters that are factually incorrect insofar as Best is concerned. Mr. Emerson purported in the article to have interviewed Mr. Goldsmith to obtain the information. However, Mr. Emerson did not interview me or other defense attorneys involved in similar cases.

(i) Emerson's facts were incorrect.

What Mr. Emerson proposed in the article and what Mr. Goldsmith is now proposing is to return to the "fluid damages recovery theory." This is the very theory that was rejected by the Oregon legislature and has been rejected by the federal courts.

At page 768 of his Law Review article, Mr. Emerson stated:

> "The Oregon Supreme Court [in Best] noted that the bank's own records proved it had gained millions of dollars in profits from setting NSF fees greatly in excess of its costs and normal profit margins 'in an effort to reap the large profits to be made from the apparently inelastic "demand" for the processing of NSF checks.'" 27 Willamette L Rev at 768 (footnote omitted).

Mr. Emerson also stated:

> "Best was abandoned because the mandatory claim form procedure precluded a significant damage recovery." 27 Willamette L Rev at 768 (footnote omitted).

[The basis for this statement is claimed to be a telephone interview with Phil Goldsmith, plaintiffs' co-counsel in Best, on November 17, 1988.]

Mr. Emerson is incorrect, because the Oregon Supreme Court never stated that the bank's records "proved" it had gained millions of dollars in profits from setting NSF fees greatly in excess of its costs. The case came up on appeal from a grant of summary judgment in favor of the bank, and there had been no trial at which evidence was offered, accepted, or subjected to cross-examination. No court or jury had made a finding. Instead, plaintiffs were merely making arguments as to what they thought they might be able to prove.

In this context, the Oregon Supreme Court made the following statements:

> "Nevertheless, we believe that there is a genuine issue of material fact whether the Bank set its NSF fees in accordance with the reasonable expectations of the parties. The record shows that when the depositors opened their accounts, the only account fees that would ordinarily be discussed would be the Bank's monthly and per check charges, if any. The sole reference to NSF fees was contained in the account agreement signed by the depositors, which obligated them to pay the Bank's 'service charges in effect at any time.' Because NSF fees were incidental to the Bank's principal checking account fees and were denominated 'service charges,' a trier of fact could infer that the depositors reasonably expected that NSF fees would be special fees to cover the costs of extraordinary services. This inference could reasonably lead to the further inference that the depositors reasonably expected that the Bank's NSF fees would be priced similarly to those checking account fees of which the depositors were aware--the Bank's monthly checking account service fees and per check fees, if any. By 'priced similarly,' we mean priced to cover the Bank's NSF check processing costs plus an allowance for overhead costs plus the Bank's ordinary profit margin on checking account services.
>
> "Finally, assuming that the Bank's obligation of good faith required the Bank to set its NSF fees in accordance with its costs and ordinary profit margin, there was evidence that the Bank breached the obligation. The Bank's own cost studies show that its NSF fees were set at amounts greatly in excess of its costs and ordinary profit margin. Internal memoranda and depositions of Bank employees permit the inference that the Bank's NSF fees were set at these high levels in order to reap the large profits to be made from the apparently inelastic 'demand' for the processing of NSF checks and in order to discourage its depositors from carelessly writing NSF checks. A trier of fact could find that both of these purposes were contrary to the reasonable expectations of the depositors when they agreed to pay whatever NSF fee was set by the Bank." Best v. U. S. National Bank, 303 Or 557, 565-66, 739 P2d 554 (1987) (emphasis added).

Mr. Emerson also cites Mr. Goldsmith to the effect that the Best litigation was abandoned because the mandatory claim form procedure precluded a significant damage recovery. I believe this statement to be inaccurate. The fact is that Mr. Goldsmith and his colleagues had actually gone to trial in the companion case of Tolbert v. First National Bank and had suffered an adverse jury verdict. The adverse jury verdict was based in part on expert testimony offered by the bank that its NSF check processing costs plus allowance for overhead costs plus an ordinary or reasonable profit margin equaled or exceeded the NSF fee that was charged. In the most recent decision, the Oregon Supreme Court rejected the view advocated by Mr. Goldsmith that the "good faith" doctrine controlled the amount that could be set by the bank for NSF charges, so long as the amount was made known to the depositor before the account was opened or the changed amount was made known to the depositor before the changed fee went into effect. See Tolbert v. First National Bank, 312 Or 485, 823 P2d 965 (1991).

At the time of the settlement of Best, a similar study had been undertaken, and United States National Bank of Oregon was fully prepared to show that direct costs plus overhead costs plus an ordinary and reasonable profit margin equaled or exceeded the NSF fees it had charged to customers. It was the failure to prevail before a jury in the Tolbert case that led Mr. Goldsmith and Mr. Ryan to settle the Best litigation, primarily on a basis where a sum of money was paid to partially cover attorney fees, plus certificates issued to class members.

(ii) The fluid damages theory is unconstitutional.

The current proposal for change is based on the theory that the Oregon statute is unusual and improper because it requires members of the class to come forward and identify themselves. They must show that they are proper members of the class in order to have their claimed damages computed and made part of the judgment award. Mr. Emerson argues that this type of requirement does not allow plaintiffs' class attorneys to prove all the damages that a defendant causes.

The argument made by Mr. Emerson and Mr. Goldsmith is a return to the theory of damages that was popular in certain state courts in the 1960s, but was ultimately rejected by federal courts as being unconstitutional. Thus, in Eisen v. Carlisle & Jacquelin, 479 F2d 1005 (2d Cir 1973) (en banc), the second circuit held that an odd-lot investor's treble damage claim, which he sought to maintain as a class action on behalf of approximately 6 million persons, of whom about 2 million

were easily identifiable, was not maintainable as a class action regardless of the fluid class recovery theory.

> "We must reject Eisen's claim that the fluid class recovery theory is not ripe for review. Indeed, there is no way to side-step this issue. We specifically remanded the case for consideration of the problem of manageability. The further proceedings on the remand were necessarily concerned with ascertaining whether there was a judicially sound way effectively to administer this action. Administration, of course, includes proof of damages and the distribution of the same. As we point out later in this opinion, Eisen concedes that the action is not manageable if fluid class recovery is not permissible. We must face this issue if we are to pass on the question of manageability, which is the most important point in the case. We are no longer at the early stages of this case where it might be possible to put off to a later time the troublesome question of what to do with the damage fund if only a small number of claims are filed against the fund. * * *
>
> * * *
>
> "Thus statements about 'disgorging' sums of money for which a defendant may be liable, or the 'prophylactic' effect of making the wrongdoer suffer the pains of retribution and generally about providing a remedy for the ills of mankind, do little to solve specific legal problems. <u>The result of this approach is almost always confusion of thought and irrational, emotional and unsound decisions</u>. In cases involving claims of money damages all litigation presumes a desire on the part of the judicial establishment to make the wrongdoer pay for the wrongs he has committed, <u>but to do this by applying settled or clearly stated principles of law, rather than by some process of divination</u>. Punishment of wrongdoers is provided by law for criminal acts in statutes making it a crime punishable by fine or imprisonment to violate the antitrust laws. In certain civil suits punitive damages may be awarded; and in private antitrust cases the possible recovery of triple the loss actually suffered by a plaintiff is very properly praised as a supplementary deterrent. <u>But none of these considerations justifies disregarding,</u>

> nullifying or watering down any of the procedural safeguards established by the Constitution, or by congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23. It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protections against oppressions, including oppressions by those whose intentions may be above reproach.
>
> "We adhere to what we have written in support of the remand of this case now in Eisen II. On the basis of the new evidence adduced on the remand, what we are now doing is interpreting and applying various provisions of an amended and improved procedural device intended to facilitate the judicial disposition of the individual claims of the separate members of a class of persons so numerous that joinder of all members is impracticable. Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that 'such rules shall not abridge, enlarge or modify any substantive right.'" Eisen, 479 F2d at 1011-12, 1013-14 (footnotes omitted) (emphasis added).

The United States Supreme Court upheld this ruling in Eisen, going on to hold that class plaintiffs must bear the cost of personal notice. See also Windham v. American Brands, Inc., 565 F2d 59, 70-71 (4th Cir 1977), cert denied, 435 US 968, 98 S Ct 1605, 56 L Ed 2d 58 (1978).

In essence, fluid damages theories have been rejected by responsible appellate courts because such a proceeding would allow lawyers to appoint themselves to represent persons who never have received court notice that they are being represented, cannot be identified, and cannot control the proceedings. The bad effect, from the standpoint of administration of justice, is that lawyers bringing such an action are not responsible to anyone; they act principally for themselves. Because of the threatened damages, such class actions are used as a "club" to extort unreasonable settlements by lawyers--unless a "claim form" procedure is used, it is the lawyers who drive the case, not the class members. Finally, if personal notice and opportunity to opt-out is not furnished, the binding effect of the judgment is questionable. This is true both at the initial notice stage and the damages notice stage.

4. Fluid damage recoveries, to the extent not the result of claims made and proved individually by class members, are abusive.

Although fluid recovery theories have been uniformly rejected since the 1973 decision in Eisen, there are parallels that demonstrate the difficulties and improprieties that arise when sums of money are extracted from defendants in class action proceedings over and above amounts which result from assertion of claims by individual class members who actually come forth, identify themselves, and show the basis for their claim.

One example is the situation which arises where settlement proceeds exceed the amount of claims submitted to the court by identifiable class members. See Houck on Behalf of U.S. v. Folding Carton Admin., 881 F2d 494 (7th Cir 1989). In Folding Carton, the antitrust settlements of about $200 million produced approximately $6 million in excess of known claims and costs. This extra money was designated as the Reserve Fund, and the trial court appointed a committee to make fee recommendations and to assist in handling claims. Several years later, in 1982, after a few additional late claims and expenses had been paid, the committee recommended to the district court that the balance of the Reserve Fund, still approximately $6 million because of favorable interest, be used to establish an "antitrust development and research foundation" to promote the study of complex litigation. Various class members and defendants objected, but the court adopted the idea. In the first appeal, the court of appeals rejected the trial court's disposition of the fund and instead "directed" that the remainder of the Reserve Fund escheat to the United States under 28 USC §§ 2041 and 2042.

Thereafter, some parties filed certiorari petitions in the Supreme Court. While those petitions were pending, the parties began working out a settlement to dispose of excess funds. That settlement was not in keeping with the mandate of the Seventh Circuit Court of Appeals. After providing for late claims, that settlement proposal provided that the funds remaining after the expiration of the deadline for late claims would be divided equally between (1) a pro rata distribution to all previously paid class members and (2) two or more Chicago area law schools for the purpose of funding research projects involving enforcement of the antitrust laws. Folding Carton, 881 F2d at 497. The trial court allowed that "settlement."

In the second appeal, the Seventh Circuit chastised the trial judge.

> "In the district court the 'escheat' ruling of this court, Folding Carton I, appears not to have been acceptable to anyone. Judge Will wrote that it was not a disposition that any of the parties had requested or desired, that it was done without a hearing or opportunity to object, and that it was causing some 'confusion.' In Re Folding Carton Antitrust Litigation, 687 F Supp 1223, 1225-26 (ND Ill 1988). Judge Will went further and described the opinion in Folding Carton I as 'silly.' More constructive, since the opinion of this court was not on appeal in the district court, was Judge Will's consideration of the nature of the interest given by this court to the government. It was, he held, not a true escheat.' 687 F Supp at 1226." Folding Carton, 881 F2d at 500-501 (emphasis added).

After deciding that certain circumstances had caused any interest the United States may have had under the escheat statute to be extinguished, the Seventh Circuit again remanded to the trial court to dispose of the unclaimed funds under the cy pres doctrine, stating:

> "When the district court comes to a conclusion on the remaining issues in this case, a copy of that decision shall forthwith be filed with the Clerk of this court. It will then be reviewed by this present panel for conformity with the mandate of this court, and on any other basis which may be raised by appropriate parties. To expedite that review, this court retains jurisdiction. Any related problems that arise on remand may be brought by petition to the attention of this court." Folding Carton, 881 F2d at 503.

In short, there is no accepted method for disposition of surplus funds from "fluid damage recoveries." Instead, the creation, existence, and disposition of such funds results in interminable arguments and costs for the plaintiffs, the defendants, the court system, and numerous governmental and charitable entities that seek to establish either a claim or a favorable charitable gift by those having authority to make the disposition. Even the theory that funds should simply escheat to the state disregards the procedural safeguards established by the Constitution, as the court so plainly pointed out in the Eisen case.

SUMMARY

In reality, the current proposal presents a theory for application of procedural rules to change substantive law that has been rejected for 20 years. The Oregon procedural rule takes into account the Eisen decision and should not be changed. Furthermore, although the Oregon rule may be somewhat unusual in codifying the procedure for handling claims by individual class members, all federal courts in our experience actually promulgate and enforce such a procedure. None has allowed a fluid damages method to usurp an individual claims method.

In conclusion:

(1) There are good reasons for treating the three types of class actions differently. Individual notice to class members when money damages are sought in a class action is constitutionally required; it is also highly desirable from a policy standpoint, so that putative class members have incentive to participate in and control the proceedings, instead of relinquishing all responsibility to plaintiffs' class lawyers.

(2) The fluid damages theory not only unjustly deprives defendants of the protection of substantive law, but puts an additional club in the hands of plaintiffs' class attorney to coerce settlement. The aggregation of claims in the form of a class action already make the prospect of attempting to defend a class action case so terrifying that almost no defendant will undertake a defense, no matter how meritorious; when that is coupled with treble damages such as are available under antitrust or racketeering laws, the result always is threat of total ruin and closure of business.

Based on our 25 years of experience with the "modern" class action rule, we submit that the 1992 proposals are bad law and bad social policy.

Very truly yours,

R. Dean Wight

McEWEN, GISVOLD, RANKIN & STEWART

(FOUNDED AS CAKE & CAKE - 1886)

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April 29, 1992

Mr. Donald Joe Willis
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Portland, Oregon 97204-3795

Re: Council on Court Procedures
Proposed Revisions to ORCP 32

Dear Joe:

Jerry Banks advised me that he turned over to you my request for comments on the proposed changes to ORCP 32. I have telephoned you, but have not yet made contact with you.

The next meeting of the Council on Court Procedures will be Saturday, May 9, and this item will be on the agenda. May I have your comments, either orally or in writing, before then? Alternatively, you are welcome to attend the meeting and make oral comment on the proposal.

For your assistance, I am enclosing a copy of a letter from Alan Wight commenting on the proposed revisions.

Thank you.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam
Enclosure
cc: Maury Holland
Michael Phillips
(both w/o enclosure)

JMS\CCP-0119.LTW

Section Monitors Proposals to Change Rule 23's Class Action Requirements

Committee provides comment to civil rules advisory panel

by Wiley E. Mayne, Jr., *Associate Editor*

Proposed changes to the federal class action rule are afoot, and the Section is providing comment on the changes to the Advisory Committee on Civil Rules. Spurred by recommendations of the Judicial Conference of the United States Ad Hoc Committee on Asbestos Litigation, the Advisory Committee on Civil Rules of the Conference considered proposed changes in Rule 23 at its November 1991 meeting.

In July 1991, the Section's Committee on Class Actions and Derivative Suits appointed a subcommittee to examine the proposed changes and provide comment to the Advisory Committee. The subcommittee, co-chaired by Lewis H. Lazarus and Elizabeth M. McGeever, both of Wilmington, DE, provided a preliminary report last October.

The subcommittee provided preliminary comment on 10 specific proposals for changes in the rule. It agreed that permitting a trial court flexibility to certify portions of an action for class treatment would be appropriate. It also agreed that Rule 23 should expressly permit trial judges to impose conditions on class membership and that considerations of judicial economy require that a trial court be able to certify a subclass even when that subclass does not independently satisfy the rule's numerosity requirement. The subcommittee also agreed that in appropriate cases, precertification decision of Rule 12 and 56 motions is appropriate. Under the current rule, whether those motions may be decided before certification is an open issue.

The subcommittee concurred with the proposal to eliminate Rule 23's three different categories of permissible class actions and substitute for it a unitary standard. At the same time, the subcommittee expressed some concern that the draft proposal provides very broad discretion to the trial judge.

Finally, the subcommittee expressed reservations about proposed revisions to the rule that would make notice in the event of a settlement or dismissal of a certified class action mandatory and would likewise make mandatory notice of class certification. The subcommittee expressed concern that a mandatory notice requirement may be fodder for increased litigation as to the adequacy of notice.

"The proposed amendments are very preliminary," according to Roberta D. Liebenberg, Philadelphia, Co-Chair of the Class Actions and Derivative Suits Committee. "The proposed changes would make Rule 23 adaptable to mass tort cases," according to Liebenberg, "by allowing the trial court to certify a class as to particular claims or as to a particular damage issue." As the proposals become less preliminary, Liebenberg forecasts a split between plaintiffs and defense counsel on the proposed changes.

Much of what is in the preliminary proposed changes is consistent with long-standing Section recommendations. In 1985, after extensive review, the Section's Special Committee on Class Action Improvements recommended to the Advisory Committee on Civil Rules a number of improvements to the class action process. Federal Judge Sam C. Pointer, Jr., Birmingham, AL, who was a member of that Special Committee, is also a member of the Ad Hoc Committee on Asbestos Litigation and a proponent of the rule changes.

4

Janice:

The 1st paragraph suggests the Advisory Committee has started to consider the draft amendments to Rule 23. Also, one additional defense lawyer whose views you might solicit is Jerry Bank.

RECEIVED
McEwen, Gisvold, Rankin & Stewart

FEB 27 1992

A.M. 7 8 9 10 11 12 1 2 3 4 5 6 P.M.

4

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March 20, 1992

Professor Fredric Merrill
Executive Director
Council on Court Procedures
University of Oregon
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Eugene, OR 97403

Re: Proposed revision of ORCP 32

To Whom it May Concern:

I understand the Oregon Council on Court Procedures is proposing an amendment to Oregon's state court class action rule which could impact unclaimed class action judgments.

On behalf of the Unclaimed Property Section of the Division of State Lands, I would like to go on record as supporting this amendment.

Thank you for the opportunity to comment on the proposed changes.

Sincerely,

Marcella Easly

Marcella Easly, Manager
Trust Proeprty Section

ME/skr

WPTRU 38

cc: Henry Kantor
Mary Holland
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Dear Janice:

We appreciate the opportunity to respond to your letter of February 19, 1992, and various letters by Phil Goldsmith which were enclosed with your letter.

We do have experience with class action procedural rules within the state of Oregon that may bear on the issues raised. Our experience includes the first modern class action cases for damages under the previous Oregon code-pleading statute (American Timber & Trad. Co. v. First Nat. Bank of Ore., 263 Or 1, 500 P2d 1204 (1972), in which the Oregon Supreme Court held that a class action for money damages could not be maintained under the then existing equity rule; and a Legal Aid case against Debt Reducers). After those decisions, the Oregon State Bar and the Oregon legislature solicited views from both plaintiffs and defense attorneys about drafting a modern class action rule for Oregon. We participated in the initial structuring of ORCP 32 and in every discussion of proposed changes to the rule since its adoption. We have also been continually involved in class action litigation in the federal court system, including another American Timber & Trad. Co. v. First Nat. Bank of Ore. case, Best v. U. S. National Bank, an antitrust case against Denney's Restaurants, the Corrugated Container antitrust cases, the Plywood antitrust cases, the Cement & Concrete antitrust cases, the Pipe Fabrication antitrust case, and various securities cases.

Basically, our view is that ORCP 32 in its present form correctly balances interests of plaintiffs and defendants, and should not be changed. The language presently used in ORCP 32 represented a distillation of knowledge, including experience with class action abuses by plaintiffs' attorneys. These experiences came about after the "modern" class action rule was introduced into the Federal Rules of Civil Procedure in 1967. The language used reflects some of the constitutional criteria that have been announced by the federal courts in various class action cases after 1967. In addition, the Oregon rule was consciously drafted to reject the California usage of a "fluid damages" theory, as announced in Daar v. Yellow Cab, 67 Cal 2d 695, 63 Cal Rptr 724, 433 P2d 732 (1967).

1. Narrow interest of proponents of proposed changes.

The persons making the proposals for changes to ORCP 32 represent a very narrow, special-interest group with a personal stake. These are people who at various times were associates of Henry Carey, then a well-known Portland lawyer. Mr. Carey attempted over nearly two decades to develop class action procedures in Oregon that would be extremely favorable to plaintiffs and almost impossible for courts to control or defendants to manage or defend. These former associates of Mr. Carey regularly present requests to change Oregon law to favor the interests of plaintiffs' attorneys.

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> "Henry Kantor, of Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland, filed a brief on behalf of amici curiae Oregon Trial Lawyers Ass'n, Multnomah County Legal Aid Service, Ecumenical Ministries of Oregon, Forelaws on Board, Pineros Y Campesinos Unidos Del Noroeste, Portland Gray Panthers, Portland Chapter of Oregon Fair Share, Local 2949 of the Lumber and Sawmill Workers Union, Banks & Newcomb, Griffin & McCandlish, Pozzi, Wilson, Atchison, O'Leary & Conboy, Stoll, Stoll, Berne & Lokting, Williams, Troutwine & Bowersox, Willner & Associates, Roger Anunsen, Frank J. Dixon, Gregory Kafoury, Mark Anthony LaMantia, James T. Massey, Roger Tilbury, Linda K. Williams, and Jan Wyers." 823 P2d at 966.

(In the Tolbert case, incidentally, the Oregon Supreme Court held against plaintiffs and their amicus colleagues on the grounds (1) depositors' "reasonable expectations" about NSF check charges were irrelevant as to charges that were in effect when depositors opened accounts, where depositors were informed of the charges and nonetheless agreed to open the accounts, and (2) changes in the charges were consistent with the bank's obligation of good faith, where the parties had agreed to unilateral exercise of discretion by the bank and that discretion was exercised after prior notice to depositors.)

In pointing out the narrow interest of the proponents of the 1992 proposal for changes to ORCP 32, we mean no disrespect to these attorneys. They are dedicated to their interests as they see them. We have worked long years in defending cases brought by them (the American Timber & Trading series of litigation took about 10 years to complete; the Best v. U. S. National Bank/Tolbert v. First National Bank series took a little more than 10 years; some of Mr. Tilbury's cases against Denney's Restaurants took three years; some of the cases by Mr. Massey against the Farm Credit Banks took many years; and the Cement & Concrete antitrust litigation, which the Stoll law firm was involved in as attorneys for plaintiffs, took eight years to complete).

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The Oregon Supreme Court in American Timber & Trad. Co. v. First Nat. Bank of Ore., 263 Or 1, 500 P2d 1204 (1972), rejected the class action proposal and the fluid damages

theory. Thereafter, committees of lawyers worked on drafting a class action rule, but one that would eliminate the abuses then perceived under the 1967 amendments to FRCP 23. Some of the language included in the Oregon rule required certain notices to class members and required that claim forms be submitted by class members, so that the perceived abuses could not be carried into Oregon practice.

3. Consolidating all three types of class actions into one would be constitutionally improper and would place too much power and discretion in the hands of plaintiffs' class action attorneys.

One of the proposals in the letters written by Mr. Goldsmith is to "replace the present three-part standard for class certification contained in ORCP 32 B with a single standard." This change purportedly would be helpful because it would eliminate certain strictures in identifying class members and having them come forward to prove their damages and claim their share of any favorable judgment.

a. Mr. Goldsmith has a personal interest.

In discussing this issue, Mr. Goldsmith refers to various cases he personally worked on as plaintiffs' attorney, including Derenco, Guinasso, Powell, Best, and Tolbert. Each of these was a case brought by Mr. Carey's office.

b. Mr. Emerson is not an experienced scholar, but merely a recent professional colleague of Mr. Goldsmith.

Mr. Goldsmith also refers in his letter to a "commentator" writing recently in the Willamette Law Review, purportedly giving the following carefully studied advice:

> "[A]t least one meritorious class action was abandoned because the claim form requirement precluded the possibility of meaningful monetary recovery. Additionally, in the tax and insurance reserve cases, * * * the wrongdoing defendants retained over two million dollars in illegally-obtained profits." Emerson, Oregon Class Actions: The Need for Reform 27 Willamette L Rev 757, 760-61 (1991).

Unfortunately, Mr. Emerson is not a long-time distinguished litigator or college professor with expertise on such matters. Instead, he is a 1990 graduate of Willamette Law, and associated in some fashion with Mr. Goldsmith. The Law Review article, far from being an unbiased scholarly study, was the argument of an interested advocate.

Mr. Emerson was referring in his article to the case of Best v. U. S. National Bank, 303 Or 557, 739 P2d 554 (1987), a case which we handled. Mr. Emerson's article sets forth matters that are factually incorrect insofar as Best is concerned. Mr. Emerson purported in the article to have interviewed Mr. Goldsmith to obtain the information. However, Mr. Emerson did not interview me or other defense attorneys involved in similar cases.

(i) Emerson's facts were incorrect.

What Mr. Emerson proposed in the article and what Mr. Goldsmith is now proposing is to return to the "fluid damages recovery theory." This is the very theory that was rejected by the Oregon legislature and has been rejected by the federal courts.

At page 768 of his Law Review article, Mr. Emerson stated:

> "The Oregon Supreme Court [in Best] noted that the bank's own records proved it had gained millions of dollars in profits from setting NSF fees greatly in excess of its costs and normal profit margins 'in an effort to reap the large profits to be made from the apparently inelastic "demand" for the processing of NSF checks.'" 27 Willamette L Rev at 768 (footnote omitted).

Mr. Emerson also stated:

> "Best was abandoned because the mandatory claim form procedure precluded a significant damage recovery." 27 Willamette L Rev at 768 (footnote omitted).

[The basis for this statement is claimed to be a telephone interview with Phil Goldsmith, plaintiffs' co-counsel in Best, on November 17, 1988.]

Mr. Emerson is incorrect, because the Oregon Supreme Court never stated that the bank's records "proved" it had gained millions of dollars in profits from setting NSF fees greatly in excess of its costs. The case came up on appeal from a grant of summary judgment in favor of the bank, and there had been no trial at which evidence was offered, accepted, or subjected to cross-examination. No court or jury had made a finding. Instead, plaintiffs were merely making arguments as to what they thought they might be able to prove.

In this context, the Oregon Supreme Court made the following statements:

> "Nevertheless, we believe that there is a genuine issue of material fact whether the Bank set its NSF fees in accordance with the reasonable expectations of the parties. The record shows that when the depositors opened their accounts, the only account fees that would ordinarily be discussed would be the Bank's monthly and per check charges, if any. The sole reference to NSF fees was contained in the account agreement signed by the depositors, which obligated them to pay the Bank's 'service charges in effect at any time.' Because NSF fees were incidental to the Bank's principal checking account fees and were denominated 'service charges,' a trier of fact could infer that the depositors reasonably expected that NSF fees would be special fees to cover the costs of extraordinary services. This inference could reasonably lead to the further inference that the depositors reasonably expected that the Bank's NSF fees would be priced similarly to those checking account fees of which the depositors were aware--the Bank's monthly checking account service fees and per check fees, if any. By 'priced similarly,' we mean priced to cover the Bank's NSF check processing costs plus an allowance for overhead costs plus the Bank's ordinary profit margin on checking account services.
>
> "Finally, assuming that the Bank's obligation of good faith required the Bank to set its NSF fees in accordance with its costs and ordinary profit margin, there was evidence that the Bank breached the obligation. The Bank's own cost studies show that its NSF fees were set at amounts greatly in excess of its costs and ordinary profit margin. Internal memoranda and depositions of Bank employees permit the inference that the Bank's NSF fees were set at these high levels in order to reap the large profits to be made from the apparently inelastic 'demand' for the processing of NSF checks and in order to discourage its depositors from carelessly writing NSF checks. A trier of fact could find that both of these purposes were contrary to the reasonable expectations of the depositors when they agreed to pay whatever NSF fee was set by the Bank." Best v. U. S. National Bank, 303 Or 557, 565-66, 739 P2d 554 (1987) (emphasis added).

Mr. Emerson also cites Mr. Goldsmith to the effect that the Best litigation was abandoned because the mandatory claim form procedure precluded a significant damage recovery. I believe this statement to be inaccurate. The fact is that Mr. Goldsmith and his colleagues had actually gone to trial in the companion case of Tolbert v. First National Bank and had suffered an adverse jury verdict. The adverse jury verdict was based in part on expert testimony offered by the bank that its NSF check processing costs plus allowance for overhead costs plus an ordinary or reasonable profit margin equaled or exceeded the NSF fee that was charged. In the most recent decision, the Oregon Supreme Court rejected the view advocated by Mr. Goldsmith that the "good faith" doctrine controlled the amount that could be set by the bank for NSF charges, so long as the amount was made known to the depositor before the account was opened or the changed amount was made known to the depositor before the changed fee went into effect. See Tolbert v. First National Bank, 312 Or 485, 823 P2d 965 (1991).

At the time of the settlement of Best, a similar study had been undertaken, and United States National Bank of Oregon was fully prepared to show that direct costs plus overhead costs plus an ordinary and reasonable profit margin equaled or exceeded the NSF fees it had charged to customers. It was the failure to prevail before a jury in the Tolbert case that led Mr. Goldsmith and Mr. Ryan to settle the Best litigation, primarily on a basis where a sum of money was paid to partially cover attorney fees, plus certificates issued to class members.

(ii) The fluid damages theory is unconstitutional.

The current proposal for change is based on the theory that the Oregon statute is unusual and improper because it requires members of the class to come forward and identify themselves. They must show that they are proper members of the class in order to have their claimed damages computed and made part of the judgment award. Mr. Emerson argues that this type of requirement does not allow plaintiffs' class attorneys to prove all the damages that a defendant causes.

The argument made by Mr. Emerson and Mr. Goldsmith is a return to the theory of damages that was popular in certain state courts in the 1960s, but was ultimately rejected by federal courts as being unconstitutional. Thus, in Eisen v. Carlisle & Jacquelin, 479 F2d 1005 (2d Cir 1973) (en banc), the second circuit held that an odd-lot investor's treble damage claim, which he sought to maintain as a class action on behalf of approximately 6 million persons, of whom about 2 million

were easily identifiable, was not maintainable as a class action regardless of the fluid class recovery theory.

> "We must reject Eisen's claim that the fluid class recovery theory is not ripe for review. Indeed, there is no way to side-step this issue. We specifically remanded the case for consideration of the problem of manageability. The further proceedings on the remand were necessarily concerned with ascertaining whether there was a judicially sound way effectively to administer this action. Administration, of course, includes proof of damages and the distribution of the same. As we point out later in this opinion, Eisen concedes that the action is not manageable if fluid class recovery is not permissible. We must face this issue if we are to pass on the question of manageability, which is the most important point in the case. We are no longer at the early stages of this case where it might be possible to put off to a later time the troublesome question of what to do with the damage fund if only a small number of claims are filed against the fund. * * *
>
> * * *
>
> "Thus statements about 'disgorging' sums of money for which a defendant may be liable, or the 'prophylactic' effect of making the wrongdoer suffer the pains of retribution and generally about providing a remedy for the ills of mankind, do little to solve specific legal problems. <u>The result of this approach is almost always confusion of thought and irrational, emotional and unsound decisions</u>. In cases involving claims of money damages all litigation presumes a desire on the part of the judicial establishment to make the wrongdoer pay for the wrongs he has committed, <u>but to do this by applying settled or clearly stated principles of law, rather than by some process of divination</u>. Punishment of wrongdoers is provided by law for criminal acts in statutes making it a crime punishable by fine or imprisonment to violate the antitrust laws. In certain civil suits punitive damages may be awarded; and in private antitrust cases the possible recovery of triple the loss actually suffered by a plaintiff is very properly praised as a supplementary deterrent. <u>But none of these considerations justifies disregarding,</u>

> nullifying or watering down any of the procedural safeguards established by the Constitution, or by congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23. It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protections against oppressions, including oppressions by those whose intentions may be above reproach.
>
> "We adhere to what we have written in support of the remand of this case now in Eisen II. On the basis of the new evidence adduced on the remand, what we are now doing is interpreting and applying various provisions of an amended and improved procedural device intended to facilitate the judicial disposition of the individual claims of the separate members of a class of persons so numerous that joinder of all members is impracticable. Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that 'such rules shall not abridge, enlarge or modify any substantive right.'" Eisen, 479 F2d at 1011-12, 1013-14 (footnotes omitted) (emphasis added).

The United States Supreme Court upheld this ruling in Eisen, going on to hold that class plaintiffs must bear the cost of personal notice. See also Windham v. American Brands, Inc., 565 F2d 59, 70-71 (4th Cir 1977), cert denied, 435 US 968, 98 S Ct 1605, 56 L Ed 2d 58 (1978).

In essence, fluid damages theories have been rejected by responsible appellate courts because such a proceeding would allow lawyers to appoint themselves to represent persons who never have received court notice that they are being represented, cannot be identified, and cannot control the proceedings. The bad effect, from the standpoint of administration of justice, is that lawyers bringing such an action are not responsible to anyone; they act principally for themselves. Because of the threatened damages, such class actions are used as a "club" to extort unreasonable settlements by lawyers--unless a "claim form" procedure is used, it is the lawyers who drive the case, not the class members. Finally, if personal notice and opportunity to opt-out is not furnished, the binding effect of the judgment is questionable. This is true both at the initial notice stage and the damages notice stage.

4. Fluid damage recoveries, to the extent not the result of claims made and proved individually by class members, are abusive.

Although fluid recovery theories have been uniformly rejected since the 1973 decision in Eisen, there are parallels that demonstrate the difficulties and improprieties that arise when sums of money are extracted from defendants in class action proceedings over and above amounts which result from assertion of claims by individual class members who actually come forth, identify themselves, and show the basis for their claim.

One example is the situation which arises where settlement proceeds exceed the amount of claims submitted to the court by identifiable class members. See Houck on Behalf of U.S. v. Folding Carton Admin., 881 F2d 494 (7th Cir 1989). In Folding Carton, the antitrust settlements of about $200 million produced approximately $6 million in excess of known claims and costs. This extra money was designated as the Reserve Fund, and the trial court appointed a committee to make fee recommendations and to assist in handling claims. Several years later, in 1982, after a few additional late claims and expenses had been paid, the committee recommended to the district court that the balance of the Reserve Fund, still approximately $6 million because of favorable interest, be used to establish an "antitrust development and research foundation" to promote the study of complex litigation. Various class members and defendants objected, but the court adopted the idea. In the first appeal, the court of appeals rejected the trial court's disposition of the fund and instead "directed" that the remainder of the Reserve Fund escheat to the United States under 28 USC §§ 2041 and 2042.

Thereafter, some parties filed certiorari petitions in the Supreme Court. While those petitions were pending, the parties began working out a settlement to dispose of excess funds. That settlement was not in keeping with the mandate of the Seventh Circuit Court of Appeals. After providing for late claims, that settlement proposal provided that the funds remaining after the expiration of the deadline for late claims would be divided equally between (1) a pro rata distribution to all previously paid class members and (2) two or more Chicago area law schools for the purpose of funding research projects involving enforcement of the antitrust laws. Folding Carton, 881 F2d at 497. The trial court allowed that "settlement."

In the second appeal, the Seventh Circuit chastised the trial judge.

> "In the district court the 'escheat' ruling of this court, Folding Carton I, appears not to have been acceptable to anyone. Judge Will wrote that it was not a disposition that any of the parties had requested or desired, that it was done without a hearing or opportunity to object, and that it was causing some 'confusion.' In Re Folding Carton Antitrust Litigation, 687 F Supp 1223, 1225-26 (ND Ill 1988). Judge Will went further and described the opinion in Folding Carton I as 'silly.' More constructive, since the opinion of this court was not on appeal in the district court, was Judge Will's consideration of the nature of the interest given by this court to the government. It was, he held, not a true escheat.' 687 F Supp at 1226." Folding Carton, 881 F2d at 500-501 (emphasis added).

After deciding that certain circumstances had caused any interest the United States may have had under the escheat statute to be extinguished, the Seventh Circuit again remanded to the trial court to dispose of the unclaimed funds under the cy pres doctrine, stating:

> "When the district court comes to a conclusion on the remaining issues in this case, a copy of that decision shall forthwith be filed with the Clerk of this court. It will then be reviewed by this present panel for conformity with the mandate of this court, and on any other basis which may be raised by appropriate parties. To expedite that review, this court retains jurisdiction. Any related problems that arise on remand may be brought by petition to the attention of this court." Folding Carton, 881 F2d at 503.

In short, there is no accepted method for disposition of surplus funds from "fluid damage recoveries." Instead, the creation, existence, and disposition of such funds results in interminable arguments and costs for the plaintiffs, the defendants, the court system, and numerous governmental and charitable entities that seek to establish either a claim or a favorable charitable gift by those having authority to make the disposition. Even the theory that funds should simply escheat to the state disregards the procedural safeguards established by the Constitution, as the court so plainly pointed out in the Eisen case.

SUMMARY

In reality, the current proposal presents a theory for application of procedural rules to change substantive law that has been rejected for 20 years. The Oregon procedural rule takes into account the Eisen decision and should not be changed. Furthermore, although the Oregon rule may be somewhat unusual in codifying the procedure for handling claims by individual class members, all federal courts in our experience actually promulgate and enforce such a procedure. None has allowed a fluid damages method to usurp an individual claims method.

In conclusion:

(1) There are good reasons for treating the three types of class actions differently. Individual notice to class members when money damages are sought in a class action is constitutionally required; it is also highly desirable from a policy standpoint, so that putative class members have incentive to participate in and control the proceedings, instead of relinquishing all responsibility to plaintiffs' class lawyers.

(2) The fluid damages theory not only unjustly deprives defendants of the protection of substantive law, but puts an additional club in the hands of plaintiffs' class attorney to coerce settlement. The aggregation of claims in the form of a class action already make the prospect of attempting to defend a class action case so terrifying that almost no defendant will undertake a defense, no matter how meritorious; when that is coupled with treble damages such as are available under antitrust or racketeering laws, the result always is threat of total ruin and closure of business.

Based on our 25 years of experience with the "modern" class action rule, we submit that the 1992 proposals are bad law and bad social policy.

Very truly yours,

R. Alan Wight

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RALPH H. CAKE
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NICHOLAS JAUREGUY
(1896-1974)

HERBERT C. HARDY
(1912-1989)

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April 8, 1992

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Mr. Michael V. Phillips
Attorney at Law
#1050 Citizens Building
975 Oak Street
Eugene, Oregon 97401-3176

Re: Council on Court Procedures -
Subcommittee on Proposed Revisions to ORCP 32

Gentlemen:

Enclosed is a copy of a letter just received from R. Alan Wight of the Miller, Nash firm responding to the proposals for changes in Rule 32.

I have called other defense counsel to ask for some response as soon as possible. Since Saturday's meeting has been cancelled, I will try to arrange a telephone conference of our Subcommittee in the near future.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam
Enclosure

JMS\CCP-0100.H&P

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R. ALAN WIGHT
ADMITTED IN OREGON AND WASHINGTON

April 3, 1992

Ms. Janice M. Stewart
McEwen, Gisvold, Rankin & Stewart
1600 Standard Plaza
1100 S.W. Sixth Avenue
Portland, Oregon 97204

Subject: Subcommittee on Proposed Revisions to ORCP 32 of Council on Court Procedures

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cc: Henry Kantor
John Hart

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a. Mr. Goldsmith has a personal interest.

In discussing this issue, Mr. Goldsmith refers to various cases he personally worked on as plaintiffs' attorney, including Derenco, Guinasso, Powell, Best, and Tolbert. Each of these was a case brought by Mr. Carey's office.

b. Mr. Emerson is not an experienced scholar, but merely a recent professional colleague of Mr. Goldsmith.

Mr. Goldsmith also refers in his letter to a "commentator" writing recently in the Willamette Law Review, purportedly giving the following carefully studied advice:

> "[A]t least one meritorious class action was abandoned because the claim form requirement precluded the possibility of meaningful monetary recovery. Additionally, in the tax and insurance reserve cases, * * * the wrongdoing defendants retained over two million dollars in illegally-obtained profits." Emerson, Oregon Class Actions: The Need for Reform 27 Willamette L Rev 757, 760-61 (1991).

Unfortunately, Mr. Emerson is not a long-time distinguished litigator or college professor with expertise on such matters. Instead, he is a 1990 graduate of Willamette Law, and associated in some fashion with Mr. Goldsmith. The Law Review article, far from being an unbiased scholarly study, was the argument of an interested advocate.

Mr. Emerson was referring in his article to the case of Best v. U. S. National Bank, 303 Or 557, 739 P2d 554 (1987), a case which we handled. Mr. Emerson's article sets forth matters that are factually incorrect insofar as Best is concerned. Mr. Emerson purported in the article to have interviewed Mr. Goldsmith to obtain the information. However, Mr. Emerson did not interview me or other defense attorneys involved in similar cases.

(i) Emerson's facts were incorrect.

What Mr. Emerson proposed in the article and what Mr. Goldsmith is now proposing is to return to the "fluid damages recovery theory." This is the very theory that was rejected by the Oregon legislature and has been rejected by the federal courts.

At page 768 of his Law Review article, Mr. Emerson stated:

> "The Oregon Supreme Court [in Best] noted that the bank's own records proved it had gained millions of dollars in profits from setting NSF fees greatly in excess of its costs and normal profit margins 'in an effort to reap the large profits to be made from the apparently inelastic "demand" for the processing of NSF checks.'" 27 Willamette L Rev at 768 (footnote omitted).

Mr. Emerson also stated:

> "Best was abandoned because the mandatory claim form procedure precluded a significant damage recovery." 27 Willamette L Rev at 768 (footnote omitted).

[The basis for this statement is claimed to be a telephone interview with Phil Goldsmith, plaintiffs' co-counsel in Best, on November 17, 1988.]

Mr. Emerson is incorrect, because the Oregon Supreme Court never stated that the bank's records "proved" it had gained millions of dollars in profits from setting NSF fees greatly in excess of its costs. The case came up on appeal from a grant of summary judgment in favor of the bank, and there had been no trial at which evidence was offered, accepted, or subjected to cross-examination. No court or jury had made a finding. Instead, plaintiffs were merely making arguments as to what they thought they might be able to prove.

In this context, the Oregon Supreme Court made the following statements:

> "Nevertheless, we believe that there is a genuine issue of material fact whether the Bank set its NSF fees in accordance with the reasonable expectations of the parties. The record shows that when the depositors opened their accounts, the only account fees that would ordinarily be discussed would be the Bank's monthly and per check charges, if any. The sole reference to NSF fees was contained in the account agreement signed by the depositors, which obligated them to pay the Bank's 'service charges in effect at any time.' Because NSF fees were incidental to the Bank's principal checking account fees and were denominated 'service charges,' a trier of fact could infer that the depositors reasonably expected that NSF fees would be special fees to cover the costs of extraordinary services. This inference could reasonably lead to the further inference that the depositors reasonably expected that the Bank's NSF fees would be priced similarly to those checking account fees of which the depositors were aware--the Bank's monthly checking account service fees and per check fees, if any. By 'priced similarly,' we mean priced to cover the Bank's NSF check processing costs plus an allowance for overhead costs plus the Bank's ordinary profit margin on checking account services.
>
> "Finally, assuming that the Bank's obligation of good faith required the Bank to set its NSF fees in accordance with its costs and ordinary profit margin, there was evidence that the Bank breached the obligation. The Bank's own cost studies show that its NSF fees were set at amounts greatly in excess of its costs and ordinary profit margin. Internal memoranda and depositions of Bank employees permit the inference that the Bank's NSF fees were set at these high levels in order to reap the large profits to be made from the apparently inelastic 'demand' for the processing of NSF checks and in order to discourage its depositors from carelessly writing NSF checks. A trier of fact could find that both of these purposes were contrary to the reasonable expectations of the depositors when they agreed to pay whatever NSF fee was set by the Bank." Best v. U. S. National Bank, 303 Or 557, 565-66, 739 P2d 554 (1987) (emphasis added).

Mr. Emerson also cites Mr. Goldsmith to the effect that the Best litigation was abandoned because the mandatory claim form procedure precluded a significant damage recovery. I believe this statement to be inaccurate. The fact is that Mr. Goldsmith and his colleagues had actually gone to trial in the companion case of Tolbert v. First National Bank and had suffered an adverse jury verdict. The adverse jury verdict was based in part on expert testimony offered by the bank that its NSF check processing costs plus allowance for overhead costs plus an ordinary or reasonable profit margin equaled or exceeded the NSF fee that was charged. In the most recent decision, the Oregon Supreme Court rejected the view advocated by Mr. Goldsmith that the "good faith" doctrine controlled the amount that could be set by the bank for NSF charges, so long as the amount was made known to the depositor before the account was opened or the changed amount was made known to the depositor before the changed fee went into effect. See Tolbert v. First National Bank, 312 Or 485, 823 P2d 965 (1991).

At the time of the settlement of Best, a similar study had been undertaken, and United States National Bank of Oregon was fully prepared to show that direct costs plus overhead costs plus an ordinary and reasonable profit margin equaled or exceeded the NSF fees it had charged to customers. It was the failure to prevail before a jury in the Tolbert case that led Mr. Goldsmith and Mr. Ryan to settle the Best litigation, primarily on a basis where a sum of money was paid to partially cover attorney fees, plus certificates issued to class members.

(ii) The fluid damages theory is unconstitutional.

The current proposal for change is based on the theory that the Oregon statute is unusual and improper because it requires members of the class to come forward and identify themselves. They must show that they are proper members of the class in order to have their claimed damages computed and made part of the judgment award. Mr. Emerson argues that this type of requirement does not allow plaintiffs' class attorneys to prove all the damages that a defendant causes.

The argument made by Mr. Emerson and Mr. Goldsmith is a return to the theory of damages that was popular in certain state courts in the 1960s, but was ultimately rejected by federal courts as being unconstitutional. Thus, in Eisen v. Carlisle & Jacquelin, 479 F2d 1005 (2d Cir 1973) (en banc), the second circuit held that an odd-lot investor's treble damage claim, which he sought to maintain as a class action on behalf of approximately 6 million persons, of whom about 2 million

were easily identifiable, was not maintainable as a class action regardless of the fluid class recovery theory.

> "We must reject Eisen's claim that the fluid class recovery theory is not ripe for review. Indeed, there is no way to side-step this issue. We specifically remanded the case for consideration of the problem of manageability. The further proceedings on the remand were necessarily concerned with ascertaining whether there was a judicially sound way effectively to administer this action. Administration, of course, includes proof of damages and the distribution of the same. As we point out later in this opinion, Eisen concedes that the action is not manageable if fluid class recovery is not permissible. We must face this issue if we are to pass on the question of manageability, which is the most important point in the case. We are no longer at the early stages of this case where it might be possible to put off to a later time the troublesome question of what to do with the damage fund if only a small number of claims are filed against the fund. * * *
>
> * * *
>
> "Thus statements about 'disgorging' sums of money for which a defendant may be liable, or the 'prophylactic' effect of making the wrongdoer suffer the pains of retribution and generally about providing a remedy for the ills of mankind, do little to solve specific legal problems. <u>The result of this approach is almost always confusion of thought and irrational, emotional and unsound decisions</u>. In cases involving claims of money damages all litigation presumes a desire on the part of the judicial establishment to make the wrongdoer pay for the wrongs he has committed, <u>but to do this by applying settled or clearly stated principles of law, rather than by some process of divination</u>. Punishment of wrongdoers is provided by law for criminal acts in statutes making it a crime punishable by fine or imprisonment to violate the antitrust laws. In certain civil suits punitive damages may be awarded; and in private antitrust cases the possible recovery of triple the loss actually suffered by a plaintiff is very properly praised as a supplementary deterrent. <u>But none of these considerations justifies disregarding,</u>

> nullifying or watering down any of the procedural safeguards established by the Constitution, or by congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23. It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protections against oppressions, including oppressions by those whose intentions may be above reproach.
>
> "We adhere to what we have written in support of the remand of this case now in Eisen II. On the basis of the new evidence adduced on the remand, what we are now doing is interpreting and applying various provisions of an amended and improved procedural device intended to facilitate the judicial disposition of the individual claims of the separate members of a class of persons so numerous that joinder of all members is impracticable. Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that 'such rules shall not abridge, enlarge or modify any substantive right.'" Eisen, 479 F2d at 1011-12, 1013-14 (footnotes omitted) (emphasis added).

The United States Supreme Court upheld this ruling in Eisen, going on to hold that class plaintiffs must bear the cost of personal notice. See also Windham v. American Brands, Inc., 565 F2d 59, 70-71 (4th Cir 1977), cert denied, 435 US 968, 98 S Ct 1605, 56 L Ed 2d 58 (1978).

In essence, fluid damages theories have been rejected by responsible appellate courts because such a proceeding would allow lawyers to appoint themselves to represent persons who never have received court notice that they are being represented, cannot be identified, and cannot control the proceedings. The bad effect, from the standpoint of administration of justice, is that lawyers bringing such an action are not responsible to anyone; they act principally for themselves. Because of the threatened damages, such class actions are used as a "club" to extort unreasonable settlements by lawyers--unless a "claim form" procedure is used, it is the lawyers who drive the case, not the class members. Finally, if personal notice and opportunity to opt-out is not furnished, the binding effect of the judgment is questionable. This is true both at the initial notice stage and the damages notice stage.

4. Fluid damage recoveries, to the extent not the result of claims made and proved individually by class members, are abusive.

Although fluid recovery theories have been uniformly rejected since the 1973 decision in Eisen, there are parallels that demonstrate the difficulties and improprieties that arise when sums of money are extracted from defendants in class action proceedings over and above amounts which result from assertion of claims by individual class members who actually come forth, identify themselves, and show the basis for their claim.

One example is the situation which arises where settlement proceeds exceed the amount of claims submitted to the court by identifiable class members. See Houck on Behalf of U.S. v. Folding Carton Admin., 881 F2d 494 (7th Cir 1989). In Folding Carton, the antitrust settlements of about $200 million produced approximately $6 million in excess of known claims and costs. This extra money was designated as the Reserve Fund, and the trial court appointed a committee to make fee recommendations and to assist in handling claims. Several years later, in 1982, after a few additional late claims and expenses had been paid, the committee recommended to the district court that the balance of the Reserve Fund, still approximately $6 million because of favorable interest, be used to establish an "antitrust development and research foundation" to promote the study of complex litigation. Various class members and defendants objected, but the court adopted the idea. In the first appeal, the court of appeals rejected the trial court's disposition of the fund and instead "directed" that the remainder of the Reserve Fund escheat to the United States under 28 USC §§ 2041 and 2042.

Thereafter, some parties filed certiorari petitions in the Supreme Court. While those petitions were pending, the parties began working out a settlement to dispose of excess funds. That settlement was not in keeping with the mandate of the Seventh Circuit Court of Appeals. After providing for late claims, that settlement proposal provided that the funds remaining after the expiration of the deadline for late claims would be divided equally between (1) a pro rata distribution to all previously paid class members and (2) two or more Chicago area law schools for the purpose of funding research projects involving enforcement of the antitrust laws. Folding Carton, 881 F2d at 497. The trial court allowed that "settlement."

In the second appeal, the Seventh Circuit chastised the trial judge.

> "In the district court the 'escheat' ruling of this court, Folding Carton I, appears not to have been acceptable to anyone. Judge Will wrote that it was not a disposition that any of the parties had requested or desired, that it was done without a hearing or opportunity to object, and that it was causing some 'confusion.' In Re Folding Carton Antitrust Litigation, 687 F Supp 1223, 1225-26 (ND Ill 1988). Judge Will went further and described the opinion in Folding Carton I as 'silly.' More constructive, since the opinion of this court was not on appeal in the district court, was Judge Will's consideration of the nature of the interest given by this court to the government. It was, he held, not a true escheat.' 687 F Supp at 1226." Folding Carton, 881 F2d at 500-501 (emphasis added).

After deciding that certain circumstances had caused any interest the United States may have had under the escheat statute to be extinguished, the Seventh Circuit again remanded to the trial court to dispose of the unclaimed funds under the cy pres doctrine, stating:

> "When the district court comes to a conclusion on the remaining issues in this case, a copy of that decision shall forthwith be filed with the Clerk of this court. It will then be reviewed by this present panel for conformity with the mandate of this court, and on any other basis which may be raised by appropriate parties. To expedite that review, this court retains jurisdiction. Any related problems that arise on remand may be brought by petition to the attention of this court." Folding Carton, 881 F2d at 503.

In short, there is no accepted method for disposition of surplus funds from "fluid damage recoveries." Instead, the creation, existence, and disposition of such funds results in interminable arguments and costs for the plaintiffs, the defendants, the court system, and numerous governmental and charitable entities that seek to establish either a claim or a favorable charitable gift by those having authority to make the disposition. Even the theory that funds should simply escheat to the state disregards the procedural safeguards established by the Constitution, as the court so plainly pointed out in the Eisen case.

SUMMARY

In reality, the current proposal presents a theory for application of procedural rules to change substantive law that has been rejected for 20 years. The Oregon procedural rule takes into account the Eisen decision and should not be changed. Furthermore, although the Oregon rule may be somewhat unusual in codifying the procedure for handling claims by individual class members, all federal courts in our experience actually promulgate and enforce such a procedure. None has allowed a fluid damages method to usurp an individual claims method.

In conclusion:

(1) There are good reasons for treating the three types of class actions differently. Individual notice to class members when money damages are sought in a class action is constitutionally required; it is also highly desirable from a policy standpoint, so that putative class members have incentive to participate in and control the proceedings, instead of relinquishing all responsibility to plaintiffs' class lawyers.

(2) The fluid damages theory not only unjustly deprives defendants of the protection of substantive law, but puts an additional club in the hands of plaintiffs' class attorney to coerce settlement. The aggregation of claims in the form of a class action already make the prospect of attempting to defend a class action case so terrifying that almost no defendant will undertake a defense, no matter how meritorious; when that is coupled with treble damages such as are available under antitrust or racketeering laws, the result always is threat of total ruin and closure of business.

Based on our 25 years of experience with the "modern" class action rule, we submit that the 1992 proposals are bad law and bad social policy.

Very truly yours,

R. Alan Wright

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April 29, 1992

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Re: Proposed Revisions to ORCP 32
Subcommittee for the Council on Court Procedures

Dear Janice:

Thank you for your letter of February 19, 1992 regarding the above.

The class action rule as presently constituted is a study in balance between the need to allow the aggregation of individual claims while not depriving a defendant of due process of law. As pointed out in your materials, the class action rule was originally developed to allow for the combining of individual claims, where it was not economically feasible to obtain relief within a traditional framework or where the bringing of a multiplicity of small suits would deprive individual claimants from an effective redress of their injuries or damages, due to the administrative costs of bringing that action, including attorney's fees, which would be excessive on a per claim basis. The balancing ideal, then, behind ORCP 32 is that class action procedures should enable class action cases to be litigated expeditiously, fairly, and inexpensively without creating undue burdens for either plaintiffs or defendants.

The two primary areas which Mr. Goldsmith seeks to change or reform are as follows:

(1) Class Certification Standards. Mr. Goldsmith feels that the different procedural requirements for certification under ORCP 32B should be eliminated in favor of adopting the present discretionary procedures for injunctive relief class action cases. In addition, Mr. Goldsmith would like to shift these costs associated with any notice requirements to the defendant prior to any judicial determination of liability. Mr. Goldsmith's proposal would thus equate damage actions with injunctive relief for "socially important cases" such as school desegregation, etc.. It appears that there is an obvious

distinction between an action for money damages and an action to prevent discrimination, and that the procedural distinctions in the existing rule attempt to balance the needs and rights of potential plaintiffs against the needs and rights of potential defendants. With respect to Mr. Goldsmith's second proposal, which is to shift initially the administrative burden of any notice to the defendant, our response is that this would rewrite the basic tenets of American jurisprudence, at least as far as class actions are concerned. It has always been the basis of our civil system that parties be encouraged to bring legal actions as a way of redressing wrongs or supposed wrongs existing between them, with the costs of those actions to be borne by the parties during the litigation until the final judgment/verdict when all or most of those costs are then awarded in favor of the prevailing party against the non-prevailing party. Not all defendants who are subject to class action rules have large, deep pockets and are bent on spreading evil in the world, and the spectre of a small to medium-sized company facing economic ruin as a result of having to not only defend itself in a spurious legal action, but actually having to pay the costs up front of plaintiff's lawyers to get the action certified against it, certainly makes no attempt to balance the competing interests of the potential plaintiffs and defendants. Mr. Goldsmith's proposal would create a different result for the case of an evil corporation running over a plaintiff with an oil tanker driven by an inebriated skipper, where plaintiff has to pay all of the costs until final judgment, to an instance when small to medium-sized companies are alleged to have short-changed customers by $1.25 each over the past few years. There simply is no basis for skewing the process so much in favor of class action plaintiffs.

(2) Reform of the Damage Calculation. Under Oregon's rule, where a class action is successful, each individual member of the plaintiff class must now submit a claim form in order to share in the judgment. If a plaintiff does not submit a claim form, the defendant does not have to pay the award. Mr. Goldsmith's proposal would require that any unclaimed portion of a class action judgment be paid to the common school fund as a part of the abandoned property statute. Given the effects of Measure 5, we would assume that Oregon schools will gladly support this change. However, a change in the class action rules regarding damage calculations should not be made as a hidden tax measure but, rather, should be made on its own merits. Generally, as we understand it, plaintiffs' lawyers send out a claim form to the members of a successful class, noting that the claimant must file the claim in order to share in the award. For

whatever reason, from lack of understanding, lack of clarity of the notice, or a disagreement with being a member of the class, the claimant does not return the claim form. The successful plaintiffs' lawyers' attorney's fee is based upon the total dollars paid to the plaintiff's class. A change in this rule would promote lackadaisical attempts by plaintiffs lawyers to notify the individual members of a class, since plaintiffs lawyers would be paid in full in any class action.

While the banking community, with its Attorney General's Consumer Division and the federally mandated error resolution procedures, may wish that ORCP 32 was substantially tightened or eliminated, the bankers recognize that it is only the trust and confidence which the general public has in their respective banks which allows our banking system to exist. They also recognize the need to allow for a redress of individual customers' claims against the bank. Part of this social contract, however, requires that the interests of the alleged affected customers be balanced against the rights and responsibilities of the defendant bank. It would be much easier for banks to consider Mr. Goldsmith's suggestions if it were not so obvious that in each of his major reform proposals, the driving force appears to be increased attorney's fees rather than increased protection for plaintiffs. The offices of the State Attorney General and the federal oversight function of the regulators are effective agents of redress for small but unprofitable claims (at least as to plaintiff's attorney's fees) and, it is our recommendation that ORCP 32 not be amended or changed so as to allow, at least for banks, a third level of review for class actions where that level is skewed entirely against the rights and needs of the banks and in favor of the plaintiff's bar.

I understand there will be a meeting on these proposals on May 9 at 9:30 a.m. at the OSB office. We will try to have someone in attendance at that meeting, but I would request that this letter be made a part of the record.

Very truly yours,

SHERMAN, BRYAN, SHERMAN & MURCH

By Kenneth Sherman Jr.
Kenneth Sherman, Jr.

KSJ/jh

LANE
POWELL
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May 6, 1992

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Re: Proposed Revisions to ORCP 32

Dear Janice:

Wayne Hilliard asked me to respond to your invitation for comments on the proposed revisions to ORCP 32. He was particularly concerned with the proposed changes to ORCP 32F(2) and 32B. In general, we believe that these proposals should not be adopted by the Council because they are incomplete, and would overload the courts, and would deprive defendants of valuable rights, and involve substantive legal and policy issues that should be fully addressed by the legislature.

A. ORCP 32F(2):

The proposed revision to ORCP 32F(2) would authorize awards of aggregate damages not identifiable to individual class members (a kind of award sometimes referred to as "fluid class recovery"). This change was considered by the Council on Court Procedures in 1981, but was rejected after a subcommittee of the Council concluded that "'this was an area better determined by the courts or legislature in the context of remedies and proof of damages.'" 41 Op Atty Gen 527, 537 (1981) (quoting the Council's commentary to the proposed 1981 amendments to ORCP 32). Nothing has happened in the interim to warrant a change in the Council's position. Fluid class recovery is a drastic remedy which raises issues of public policy, fairness and due process that deserve the full attention of the legislature. It would mark a major substantive change in Oregon law, the kind of change that may be beyond the

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London, England

Council's limited mission to promulgate rules "governing pleading, practice and procedures * * * which shall not abridge, enlarge or modify the substantive rights of any litigant." ORS 1.735.*/ (The proposed 1981 revision was determined by the Attorney General to be a "procedural" rather than a "substantive" change precisely because it only sought to "remove procedural obstacles to 'fluid class recovery'" and "did not affirmatively authorize fluid class recovery." 41 Op Atty Gen at 537, 543.)

The proposed revision is also incomplete in that it fails to identify who is to receive the damages recovered on behalf of unidentified class members. Only the legislature can designate a beneficiary of these unclaimed damages, since the Council would be impermissibly "enlarging" the "substantive rights" of anyone whom it designated. The proponents of this revision admit that it is incomplete, but suggest that this is not a problem because a bill will be introduced in the 1993 legislature that would designate the State as the beneficiary of all monies unclaimed by class members. But they can give no assurance that such legislation will be enacted, and if the legislature does decide to pass such legislation, it can also make the necessary changes to ORCP 32F(2). It would be premature for the Council to make an incomplete change before then.

B. ORCP 32B:

The proposed revisions to ORCP 32B would allow an action for damages to be maintained as a class action, even though final determination of the action will require separate adjudications of the claims of numerous members of the class on issues other than the calculation of damages. The present rule clearly contemplates that some suits should not be tried because of the disproportionate cost to the judicial system and unfairness to defendants of separate adjudications of numerous claims. See Bernard v. First Nat'l Bank, 275 Or 145, 151-152, 550 P2d 1203 (1976) ("there can be no doubt that the purpose of the

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*/ Other proposed revisions clearly modify parties' substantive rights. For example, the proposed revision to ORCP 32N(1)(b) would severely limit defendants' rights to attorney fees.

[predominance requirement] was to prevent abuses perceived under [FRCP] Rule 23 which would put an unmanageable burden upon the court system").

> "** * * To hold that a case may proceed as a class action when there appears to be a legitimate issue or defense which will require an individual inquiry of a considerable number of the claimants would attribute to the legislature an intention either to overload the courts with an unmanageable proceeding or to deprive the defendants of valuable procedural and substantive rights by preventing them from asserting what appears to be a bona-fide defense. One or the other would be the inevitable result. * * *" Id., 225 Or at 159.

By requiring that common issues predominate, the court can weed out overly burdensome, unmanageable and unfair class actions. The proposed revision would force the courts to certify such undesirable actions so long as there was no "superior * * * method for the * * * adjudication of the controversy," leaving no room for the court to respond to the legitimate interests of the courts and defendants. These interests are reflected in part in statutes which generally require a plaintiff who wants a separate adjudication of a damage claim to pay an appearance fee and to meet the minimum amount in controversy necessary to come within the jurisdiction of the Circuit or District Court. This revision would allow numerous plaintiffs who could not or would not meet these threshold requirements to obtain separate adjudication of liability issues. (Note that in diversity cases, Federal courts require each plaintiff in a class action for damages to meet the statutory minimum amount in controversy necessary to obtain federal jurisdiction.) This proposed revision should not be adopted.

Very truly yours,

Jeffrey S. Love

cc: Wayne Hilliard, Esq.

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(2) Reform of the Damage Calculation. Under Oregon's rule, where a class action is successful, each individual member of the plaintiff class must now submit a claim form in order to share in the judgment. If a plaintiff does not submit a claim form, the defendant does not have to pay the award. Mr. Goldsmith's proposal would require that any unclaimed portion of a class action judgment be paid to the common school fund as a part of the abandoned property statute. Given the effects of Measure 5, we would assume that Oregon schools will gladly support this change. However, a change in the class action rules regarding damage calculations should not be made as a hidden tax measure but, rather, should be made on its own merits. Generally, as we understand it, plaintiffs' lawyers send out a claim form to the members of a successful class, noting that the claimant must file the claim in order to share in the award. For

whatever reason, from lack of understanding, lack of clarity of the notice, or a disagreement with being a member of the class, the claimant does not return the claim form. The successful plaintiffs' lawyers' attorney's fee is based upon the total dollars paid to the plaintiff's class. A change in this rule would promote lackadaisical attempts by plaintiffs lawyers to notify the individual members of a class, since plaintiffs lawyers would be paid in full in any class action.

While the banking community, with its Attorney General's Consumer Division and the federally mandated error resolution procedures, may wish that ORCP 32 was substantially tightened or eliminated, the bankers recognize that it is only the trust and confidence which the general public has in their respective banks which allows our banking system to exist. They also recognize the need to allow for a redress of individual customers' claims against the bank. Part of this social contract, however, requires that the interests of the alleged affected customers be balanced against the rights and responsibilities of the defendant bank. It would be much easier for banks to consider Mr. Goldsmith's suggestions if it were not so obvious that in each of his major reform proposals, the driving force appears to be increased attorney's fees rather than increased protection for plaintiffs. The offices of the State Attorney General and the federal oversight function of the regulators are effective agents of redress for small but unprofitable claims (at least as to plaintiff's attorney's fees) and, it is our recommendation that ORCP 32 not be amended or changed so as to allow, at least for banks, a third level of review for class actions where that level is skewed entirely against the rights and needs of the banks and in favor of the plaintiff's bar.

I understand there will be a meeting on these proposals on May 9 at 9:30 a.m. at the OSB office. We will try to have someone in attendance at that meeting, but I would request that this letter be made a part of the record.

Very truly yours,

SHERMAN, BRYAN, SHERMAN & MURCH

By Kenneth Sherman Jr.
Kenneth Sherman, Jr.

KSJ/jh

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May 7, 1992

Henry Kantor, Chair
Counsel on Court Procedures
Pozzi, Wilson, Atchison, O'Leary & Conboy
1100 S.W. Sixth Avenue, 14th Floor
Portland, OR 97204

Re: Proposal to Reform ORCP 32

Dear Mr. Kantor:

This letter is to urge the Counsel on Court Proceedings to adopt the proposal to reform ORCP 32. My perspective on this issue is based upon personal and telephone consultations with hundreds of consumers since I began private practice in 1980. Many of these consultations result from referrals by other lawyers who do not find consumer law economically feasible. I do not disagree with their assessment; and in the last few years of my practice, I have had to severely restrict my intake of consumer cases. Because the dollar value of such claims are relatively small and the expense of litigation high, Oregon's consumer protection laws are not generally enforceable by private civil action.

ORCP 32 purports to offer small claimants, such as consumers, a method to bring their claims. However, as ORCP 32 is presently written, it presents too many barriers. In my practice, I have never had the occasion to recommend its use. Instead, I routinely must advise Oregon consumers that except in Small Claims Court (without assistance of counsel) there is no cost effective way within our judicial system to pursue their valid claims.

An economically viable way to address consumers' claims would, in my opinion, reduce consumer bankruptcies and promote better business practices in the state of Oregon. The ever increasing skepticism and frustration with our judicial system will not diminish as long as we have procedures such as ORCP 32 that superficially offer the ordinary citizen access to the courts but, in fact, bar them from meaningful participation.

Very truly yours,

DIXON & FRIEDMAN, P.C.

Frank J. Dixon

FJD:wt

NORMA PAULUS
State Superintendent
of Public Instruction

OREGON DEPARTMENT OF EDUCATION
700 Pringle Parkway SE, Salem, Oregon 97310-0290 • (503) 378-3569 • Fax (503) 373-7968

May 8, 1992

Mr. Henry Kantor, Chair
Council on Court Procedures
Pozzi, Wilson, Atchison, O'Leary & Conboy
1400 Standard Plaza
1100 SW Sixth Avenue
Portland, Oregon 97204

Via Facsimile Transmission

Dear Mr. Kantor:

I am writing in support of proposed amendments to ORCP 32 that would eliminate the claim form requirement and redefine a class action judgment to include the defendant's total obligation to class members. This would allow the full unclaimed amount to be included in the judgment.

The Division of State Lands, the operating arm of the State Land Board, is introducing legislation during the 1993 session of the Legislative Assembly that would create a presumption that unclaimed judgments in class action litigation is abandoned property. As such, the monies would accrue to the Common School Fund for the benefit of Oregon's school children. The amendment to ORCP 32 would expand the definition of class action judgment and thus enhance the amount of money accruing to the fund.

I ask the council to take a favorable position on the amendment at the May 9, 1992 hearing.

Sincerely,

Norma Paulus

GMklhSUPT1254
cc: Janet Neuman, Director
Division of State Lands

McGAUGHEY & GEORGEFF

Robert J. McGaughey†
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May 8, 1992

Mr. Henry Kantor, Chair
Council on Court Procedures
1100 SW Sixth, 14th Floor
Portland, Oregon 97204

SENT BY FAX AND BY MAIL

Re: Proposed Reform of ORCP 32

Dear Mr. Kantor:

I would like to join in urging the Council on Court Procedures to adopt the reform of ORCP 32 proposed by Phil Goldsmith. I believe that the proposed changes are necessary to assure access to the courts by small claimants and serve to make access to the courts fairer.

Very truly yours,

Robert J. McGaughey

RJM;amw

cc: Phil Goldsmith

Lewis and Clark Legal Clinic

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Richard A. Slottee
Mark A. Peterson
Sandra A. Hansberger
Theresa L. (Terry) Wright

Supervising Attorneys

May 8, 1992

Henry Kantor
Pozzi, Wilson, Atchison,
O'leary & Conboy
1400 Standard Plaza
1100 SW 6th Ave.
Portland, OR 97204

Re: Proposed Amendments to Class Action Provisions

Dear Mr. Kantor:

I understand that the Council on Court Procedures will be meeting to consider, among other things, proposals by Phil Goldsmith to modify the Oregon class action provisions.

I know that Mr. Goldsmith has been involved with class action issues for some time, and has a sincere interest in pursuing the adoption of procedures which are both effective and equitable. I understand that one of the modifications to the notice provisions would make it easier for low income individuals with valid claims to overcome the otherwise often insurmountable costs of notice.

While I have been only tangentially involved with class action issues, I hope the Council will give Mr. Goldsmith's proposals serious consideration.

Sincerely,

RICHARD A. SLOTTEE
Supervising Attorney

RAS:st

c: Phil Goldsmith

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*ALSO ADMITTED IN WASHINGTON

May 8, 1992

Henry Kantor, Chair
Counsel on Court Procedures
Pozzi, Wilson, Atchison, O'Leary & Conboy
1100 S.W. Sixth Avenue, 14th Floor
Portland, OR 97204

Re: Proposed revisions to ORCP 32

Dear Mr. Kantor:

I believe that the proposed revisions to ORCP 32 are very important. The revisions have been well thought out and are fair to both sides. At a time when regulatory agencies are incurring strict budget limitations and cannot pursue issues in which there is clearly a need for redress, but are not high-priority, there must be a practical solution for the wronged individual/party.

ORCP 32 as currently written often makes it impracticable for the consumer to pursue the issue, even though the extent of the breach for the class of the affected parties may be substantial.

Sincerely,

SHANNON, JOHNSON & BAILEY, P.C.

David S. Shannon

DSS:dlt

c:\work\wp51\dss\letters\050892.ltr

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May 8, 1992

Henry Kantor
Chair, Council on Court Procedures
Pozzi, Wilson, et al.
1400 Standard Plaza
1100 SW Sixth Avenue
Portland, OR 97204

Re: Proposed Revisions

Dear Henry:

I am writing to voice my general support for the proposed revision to ORCP 32 that are now before the council.

I have participated in numerous state and federal class actions, primarily connected with the securities laws. Based upon my experience, I believe that the proposed revisions which streamline the criteria for certifying classes, and which give the Court greater flexibility in shaping the nature and timing of class notice, and in determining how damages are to be proved, are particularly desirable. The existing requirements on notice and on the mandatory claim form serve only to make class action litigation more expensive and time consuming than necessary and do not protect either absent class members or defendants.

I also strongly support the elimination of attorney fee liability for named class representatives in unsuccessful class actions, except as sanctions. It has been my experience that legitimate potential class representatives are justifiably deterred from serving as named plaintiffs because of potential exposure to huge attorney fees awards in meritorious, but risky, litigation.

Very truly yours,

JUSTINE FISCHER

JF/pet

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(1891-1973)

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(1896-1974)

HERBERT C. HARDY
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*ADMITTED IN OREGON AND WASHINGTON
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June 26, 1992

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Mr. Jeffrey S. Love
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Lane Powell Spears Lubersky
520 S.W. Yamhill Street, Suite 800
Portland, Oregon 97204-1383

Re: Proposed Revisions to ORCP 32

Gentlemen:

Enclosed is Mr. Phil Goldsmith's response to your criticisms of his proposed revisions to ORCP 32.

The Subcommittee of the Council on Court Procedures will be meeting on July 1 to review all comments and formulate recommendations to the Council. The Council will then meet on August 1 in Portland to consider the Subcommittee's recommendations. The August 1 meeting will be a public meeting at which the Council will receive public comments before taking action. Whatever changes the Council adopts to ORCP 32 will then be published in the advance sheets and submitted to the Legislature. As you know, changes adopted by the Council take effect unless the Legislature rejects those changes.

JMS\CCP-0156.LTR

If you have any further comments on Mr. Goldsmith's proposed revisions, please communicate them to the members of the Subcommittee by July 1 or to the Council before or at its meeting on August 1.

Very truly yours,

McEWEN, GISVOLD, RANKIN & STEWART

Janice M. Stewart

JMS:lam

Enclosures

cc: Mr. David S. Barrows
Mr. Donald Joe Willis
Ms. Lois Rosenbaum
(w/ enclosures)
Professor Maury Holland
Mr. Michael V. Phillips
Mr. Henry Kantor
(w/o enclosures)

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July 21, 1992

Henry Kantor
Council on Court Procedures
1100 S. W. Sixth, Suite 1100
Portland, OR 97204

Dear Mr. Kantor:

I write on behalf of Oregon Legal Services Corporation to state our general support for the proposed revision of ORCP 32 now before the council. Oregon Legal Services provides civil representation to low-income individuals and groups.

We have represented plaintiffs in numerous state and federal class actions on behalf of farmworkers, tenants, Social Security recipients and others seeking relief against large institutions. The proposed revisions streamline the criteria for certifying a class and grant the court flexibility related to the notice and when determining damages.

We especially support the proposed provision eliminating attorney fee liability for named class representatives in unsuccessful class actions, except as damages. We talk to many low-income clients who are not willing to take that risk even with meritorious claims important to the group.

Very truly yours,

OREGON LEGAL SERVICES

David Thornburgh

David Thornburgh
Attorney at Law

DT:sew

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July 29, 1992

Mr. Henry Kantor
Chair, Council on Court
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Kantor and Sacks
1100 Standard Plaza
1100 S.W. Sixth Avenue
Portland, Oregon 97204

HAND-DELIVERED

Subject: Report of Recommended ORCP 32 Amendments for Consideration by Council at its August 1, 1992, Meeting

Dear Chair and Members, Council on Court Procedures:

The undersigned lawyers of this firm have actively worked with class action cases in the federal courts and state courts for at least 25 years. We submit the following comments in opposition to the July 19, 1992, report of recommended ORCP 32 amendments, as furnished to you by a subcommittee consisting of Janice Stewart, Mike Phillips, and Maury Holland.

1. ORCP 32 in perspective.

The Oregon rule on class action procedures was adopted several years after the 1966 version of Fed R Civ P 23 was promulgated. The Oregon rule reflects the experience of knowledgeable trial lawyers and judges who had dealt with the federal rule and had observed some of its shortcomings and some of the opportunities for abuse. The Oregon rule was carefully crafted to meet constitutional requirements to avoid favoring either plaintiffs or defendants and to give trial judges specific direction as to steps that should be taken in handling class actions.

The Oregon rule was wisely drafted. Experience has shown that it has no inadequacies. There is no reason to adopt sweeping changes at this time.

2. **The changes proposed in the Subcommittee's July 19, 1992, report were rejected at the federal level after careful consideration.**

The Subcommittee has proposed changes to ORCP 32 that are based largely upon recommendations for amendments to Fed R Civ P 23 made by a special committee for class action improvements and published in 1986. The proposed amendments to Fed R Civ P 23 were not adopted. We believe the reason the changes suggested in 1986 were not adopted is that the changes would have resulted in procedures that were unconstitutional and that they did not improve the administration of class actions. The amendments are contained in the Report and Recommendations of the Special Committee on Class Action Proposals, 110 FRD 195 (1986).

Different proposed changes were recommended at the federal level in 1991. However, the 1991 changes do not eliminate the distinctions between types of class actions and do not eliminate notice requirements, as did the 1986 proposal. Instead, the notice requirements are actually strengthened, and trial courts are given some guidance as to how they shall handle opt-out requests in light of more recent developments in the case law on collateral estoppel.

3. **The proposed changes to ORCP 32 would impermissibly effect changes in substantive law in the guise of making mere adjustments in procedural law.**

At the time ORCP 32 (or its statutory predecessor) was put into effect, the requirements of notice and that any class member claiming benefits under a favorable judgment come forward and file a claim were adopted after a great deal of discussion and careful consideration. This adoption by the Oregon Legislature effectively rejected the theory of "fluid damages" that had been suggested by one California case law decision, Darr v. Yellow Cab, 67 Cal 2d 695, 63 Cal Rptr 724, 433 P2d 732 (1967).

The July 16, 1992, proposals are intended by their proponents to allow Oregon trial courts to adopt a "fluid damages" theory. This is a change in substantive law. Because the Oregon Legislature has prohibited fluid damage theories of recovery, a council on procedural rules should not be able to change the result desired by the Legislature by promulgating a rule of procedure.

4. The July 16, 1992, proposals are unconstitutional.

The two most sweeping changes proposed by your Subcommittee in its July 16, 1992, report are (1) to abolish all distinctions between the three types of class actions and (2) to eliminate any express suggestion in ORCP 32 that the court need send notice to members of a class for any reason.

The theory that distinctions between the three types of class actions presents difficulties and should be abolished was contained in the 1986 federal report that was rejected. The 1991 report makes no similar attempt to abolish the distinctions, but merely makes some housekeeping changes. The rule was not changed at the federal level, and no change should be made at the state level.

As to the notice requirement, the Subcommittee has attempted to sidestep the issue by saying in its report that the elimination of any requirement of notice would not mean that a trial judge could not order notice to be sent to the class. This attitude is in stark contrast with other statements by the Subcommittee, in which it has indicated that ORCP 32 should "provide clear-cut, rule-oriented commands and prohibitions." Report at 4. Instead, the Subcommittee sidesteps the constitutional issues by suggesting that the United States Supreme Court at some time in the future may reverse its concepts of notice and procedural due process under the fourteenth amendment and that eliminating notice requirements now would provide the flexibility to implement that change in interpretation of the fourteenth amendment, should it ever come from the United States Supreme Court.

At best, this reasoning is circuitous and speculative. At worst, it is an attempted invitation to trial court judges to ignore case law decisions of the United States Supreme Court.

There are at least two United States Supreme Court decisions on notice and due process requirements of the Constitution that should be taken into account. In Eisen v. Carlisle & Jacquelin, 417 US 156, 94 S Ct 2140, 40 L Ed 2d 732 (1974), the court concluded that the mandatory notice requirement of Fed R Civ P 23 was "'not merely discretionary,'" but mandatory in order "'to fulfill requirements of due process to which the class action procedure is of course subject.'" The court went on to note that the "Committee explicated its incorporation of due process standards by citation to Mullane v Central Hanover Bank & Trust Co., 339 US 306, 94 L Ed 865, 70 S Ct 652 (1050), and like cases." Eisen, 40 L Ed 2d at 746 (quoting 39 FRD 69, 106-107).

In fact, the notice requirement is absolutely critical. Without notice, putative class members will not know that litigation is being carried on in their name and that they may be bound by an eventual judgment. They will not be able to control the lawyers who brought the action, nor will they be able to "opt out" to prevent the application of a decision they might not like. Indeed, our experience has shown that many putative class members do not want to be involved in litigation at all, for a variety of reasons--they may not wish to sue the particular defendant named, or they may not wish to promulgate the legal theories on which the case is based.

The other important case, Phillips Petroleum Co. v. Shutts, 472 US 797, 105 S Ct 2965, 86 L Ed 2d 628 (1985), is alluded to briefly by the Subcommittee. In Phillips Petroleum, the United States Supreme Court held that if a state court wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. To do this, the plaintiff must receive notice, plus an opportunity to be heard and participate in the litigation, whether in person or through counsel.

> "The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' Mullane, 339 US, at 314-315, 94 L Ed 865, 70 S Ct 652; cf. Eisen v Carlisle & Jacquelin, 417 US 156, 174-175, 40 L Ed 2d 732, 94 S Ct 2140 (1974). The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." Phillips Petroleum, 86 L Ed 2d at 642.

In Phillips Petroleum, the Supreme Court went on to find that the Kansas Supreme Court erred in holding that Kansas law would apply to the entire claim for money damages, even though the greater percentage of the putative class members resided outside Kansas.

In light of these two key decisions, we believe the proposed changes to ORCP 32 would be unconstitutional and would be disastrous to the rights of putative class members. As illustrated by Phillips Petroleum, class actions brought in the state court system do not usually rely on a law of equal application to all members of the class, such as a federal

statute. Therefore, it is even more important that a class member in a state court proceeding be allowed notice and the opportunity to control the litigation or opt out so as to preserve the legal rights which that putative plaintiff might have by reason of his state of residence or domicile.

CONCLUSION

The proposed changes are radical, unconstitutional, and have been rejected on the federal level. Oregon should not create an unconstitutional civil procedure rule, nor should it use procedural rules to attempt to introduce substantive changes in the law.

If any changes should be made to ORCP 32, they should be only such changes as would conform the language with that of the federal rule (in the interests of uniformity of interpretation and application).

Very truly yours,

R. Adam Wight

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July 31, 1992

Henry Kantor, Esq.
Chair, Council on Court Procedures
Kantor & Sacks
1100 Standard Plaza
1100 S.W. 6th Avenue
Portland, Oregon 97204

Re: Report of Recommended ORCP 32 Amendments for Consideration by Council at its August 1, 1992 Meeting

Dear Chair and Members, Council on Court Procedures:

This letter is to strongly support your adoption of ORCP 32 amendments as recommended to you in the July 19, 1992 report by your sub-committee. I had hoped to be able to appear before you to make my presentation, however, an unexpected family obligation has required me to put my remarks in writing.

1. Background. I have had experience in class action litigation in both state and federal court on an on-going basis since 1970. The class actions which I have handled have been in the fields of securities, consumer cases, banking practices and civil rights. While I have done class action defense work, most of my experience has been on the plaintiff's side. I have also been active in professional groups and am familiar with the views of other lawyers representing plaintiffs in class actions.

Generally, the Oregon rules on class actions are quite restrictive and make it needlessly difficult and expensive to pursue such cases. Very few class actions are litigated in the state courts of Oregon because of unnecessary burdens placed upon them. The recommendations of your sub-committee in my opinion will reduce some of the problems which are keeping class actions from being properly utilized.

2. Proposal will Simplify Current Complex Rules. One major problem with class actions is that they are far too complex and the Oregon rules contain too many mandatory requirements. The concept of making the notice requirement and claim forms discretionary with the court will help ease the undue complexity.

3. Saving of Money and Time. Another current problem with class actions in Oregon is that they can be extremely expensive. In one case which I have worked on, the lawyers needed to advance approximately $35,000 just for notice costs alone when it was highly questionable whether the notice was needed. Very few law firms in Oregon are willing to make such cost advances just for notice in even the most worthy case. Obviously, in many cases, notice is appropriate. However, by giving the court discretion, a decision as to the necessity of notice can be made to avoid unnecessary expense and the lengthy time process which notice always requires.

4. Easing the Burden on Judges. In my experience, judges have not been happy with the mandatory nature of the requirements presently set forth in ORCP 32. Mandatory notice and claim form procedures create more opportunities for disputes between the parties over the form, content and other decisions relating to claim forms and notice. The sub-committee proposals simplify the task for trial judges where claim forms and notice requirements are not appropriate.

The sub-committee's proposal will improve class action practice in Oregon while not creating any undue problems. I urge you to adopt the proposal before you.

Very truly yours,

LaBARRE & ASSOCIATES, P.C.

Jerome E. LaBarre

JLB/mm

STATE OF OREGON
COURT OF APPEALS
THIRD FLOOR
JUSTICE BUILDING
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97310

R. WILLIAM RIGGS
JUDGE

October 7, 1992

Mr. Henry Kantor
Chair, Council on Court Procedures
Kantor and Sacks
1100 S.W. Sixth, Suite 1100
Portland, OR 97204

RE: Proposed Revisions to ORCP 32

Dear Mr. Kantor:

I write to urge the Council to adopt the amendment to ORCP 32 F(1) recommended by the majority to your class action subcommittee and to reject the formulation proposed by the minority report. Based on my experience as the trial judge in Best v. United States National Bank and Tolbert v. First National Bank, I believe that expanding the flexibility afforded trial courts concerning the giving of notice will both create efficiencies for trial courts and reduce costs for litigants. Conversely, retaining existing ORCP 32 F(1) and extending it to B(1) and B(2) class actions would be a step backward.

As the Council may know, Best and Tolbert were lawsuits which alleged that Oregon's two largest banks had assessed allegedly unlawful high charges on customers who wrote checks on insufficient funds. The plaintiff sought restitution of the alleged excessive charges. The class in each case numbered in the hundreds of thousands. The potential recovery of the average class member was probably under $100.

I concluded that existing ORCP 32 F(1) required extensive notice be given to members of any class certified under ORCP 32 B(3). Accordingly, in Best and Tolbert, I ordered that notice to current checking customers be included with a monthly statement and that notice to former checking account customers be published at least three times in 12 different newspapers throughout the state. I understand that giving this notice cost plaintiffs approximately $25,000. In addition, the defendant in Tolbert estimated that it had to pay $6,000 in increased postage because of the inclusion of a notice in its statements.

The court received hundreds of responses to the notice. This was due not only to the size of the classes but also to the fact that I believed, as long as we were communicating with the class, we should ask for certain information that might be of assistance in the future management of these cases. As a consequence, even those who desired to remain in the class were encouraged to respond to the notice by providing such information as the date they opened their checking account, whether they retained records from the class period and the approximate number of NSF charges they had paid during the class period. The processing of these responses took two people several full days. A substantial amount of court storage space was required to retain these records.

Not one member of either class exercised the option afforded by ORCP 32 F(1)(b)(vi) to appear in the litigation. To my knowledge, no one opted out of the cases in order to maintain an individual action.

I only ordered this kind of notice because I believed it to be required by existing ORCP 32 F(1). Nothing in my experience in Best and Tolbert has caused me to change my opinion that, in a case where every class member has a small individual stake, the kind of notice required by ORCP 32 F(1) is unnecessary, wasteful to the litigants' resources and a burden on the court. Had the amendment to ORCP 32 F(1) recommended by the majority of your class action subcommittee been in effect at the time I ordered the giving of notice in Best and Tolbert, it would have allowed me to exercise my discretion more sensibly to structure notice in a more meaningful and less costly fashion. I therefore urge the Council to adopt the amendment to ORCP 32 F(1) recommended by the majority of your class action subcommittee and to reject the proposal in the minority report.

Thank you for the consideration of my views.

Sincerely,

R. William Riggs

RWR:lac

OREGON ADVOCACY CENTER

October 9, 1992

Phil Goldsmith
Suite 1212
1100 S.W. Sixth Avenue
Portland, OR 97204

Re: Proposed Changes to Oregon's Class Action Rule, ORCP 32

Dear Phil:

As you know, Oregon Advocacy Center (OAC) is a private non-profit organization that provides legal representation to persons with mental disabilities. A great many of OAC's clients are low-income; Social Security disability or SSI benefits is the sole source of income for many.

OAC recently became aware of the Coalition's proposed reforms of ORCP 32. I understand that the Council on Court Procedure's class action subcommittee is currently considering the proposed changes, and considering an alternative proposal. As I understand it, the alternative proposal would require that notice be given to class members in all class actions, including those actions seeking only injunctive or other equitable relief. This latter proposal is of great concern to Oregon Advocacy Center, because such a rule could effectively preclude the maintenance of class action suits for injunctive relief on behalf of groups of low-income clients such as we represent.

Being a small, publicly funded organization with a broad mandate - to provide protection and advocacy and legal representation to persons with developmental disabilities and mental illness - OAC attempts to get the most "bang for our buck" in the cases we pursue in court. This means that we frequently represent groups of clients challenging policies or practices that affect many individuals similarly, and often bring our cases as class actions seeking injunctive relief. (Typically we refer out damages cases to the private bar.) Our clients do not have the financial resources that would enable them to comply with a mandatory notice requirement in all injunctive relief cases.

On behalf of Oregon Advocacy Center and our clients I would like to urge the Council's class action subcommittee to reject any proposed reforms of ORCP 32 that would dictate the giving of notice in injunction actions, and urge that the current discretionary notice provisions for these types of cases be retained. I would

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625 BOARD OF TRADE BLDG.
310 SW FOURTH AVENUE
PORTLAND, OREGON 97204-2309

very much appreciate it if you would communicate these concerns to the appropriate members of the Council. Thank you.

Sincerely,

Darcy Norville
Director of Litigation
Oregon Advocacy Center

MULTNOMAH COUNTY LEGAL AID SERVICE
900 BOARD OF TRADE BUILDING
310 S.W. FOURTH AVENUE
PORTLAND, OREGON 97204

Terry Ann Rogers, Executive Director
Richard C. Baldwin, Director of Litigation

(503) 224-4086 (Main Office; TDD)
(503) 295-9496 (FAX)

October 15, 1992

Henry Kantor, Chair
Council on Court Procedure
Kantor & Saks
1100 Standard Plaza
1100 SW Sixth Avenue
Portland, OR 97204-1087

Re: Council on Court Procedure -- Proposed Changes to ORCP 32

Dear Mr. Kantor:

As you know, Multnomah County Legal Aid Service (MCLAS) is a private nonprofit corporation which provides legal services to low-income people in non-criminal cases. There are currently in excess of 100,000 citizens in Multnomah County who are financially eligible for our services. We turn away approximately two out of three eligible clients due to inadequate resources. Historically, our program has filed a number of class action suits primarily to enforce our clients' rights to receive public benefits under federal law. We anticipate that a greater number of our class actions will be filed in state court in the years ahead. The availability of class action procedures allow our program (and other Legal Aid programs) to effectively enforce important rights of numerous clients who would otherwise have no representation. We are therefore most interested in your committee's deliberations on the proposed revisions to ORCP 32 governing class actions.

My understanding is that the majority of the Council on Court Procedures class action subcommittee have recommended the proposal submitted by the Coalition to Reform Oregon's Class Action Rule in favor of liberalizing notice requirements in ORCP 32B(3) class actions. We support this proposed liberalization of notice requirements.

We are, however, concerned about the minority report which apparently recommends extending costly notice requirements under ORCP 32F(1) to all state court class actions including injunction actions and similar equitable relief cases. This would pose grave problems for our clients. Our clients have no resources to finance the giving of

extensive notice nor does our program have the financial resources to do so. Because of a 44% decrease in our funding from the Oregon Law Foundation based on a corresponding decrease in interest on IOLTA accounts, we will have even less resources next year to support our litigation. Even without this shortfall, there is no room in our meager litigation budget for additional costs of litigation relating to notice requirements.

Oftentimes, a class action is the only way that large numbers of our clients are able to achieve a fair and efficient adjudication of their rights under complex state and federal entitlement programs. Our resources are such that we must carefully limit the number of class actions we prosecute on behalf of individuals who otherwise have virtually no access to our system of justice. (I have enclosed a copy of our program's policies pertaining to class actions for your information.) The significant costs incident to more stringent notice requirements would seriously undermine our ability to assert our clients' rights in important areas relating to public assistance, Medicaid, Social Security, food stamps, public housing, and many other important areas. We recently entered into a consent decree with Multnomah County in a class action which will result in the construction of a new juvenile detention facility in place of the substandard and deteriorated Donald E. Long Home. In retrospect, notification of the thousands of juveniles who were class members as proposed by the minority report would have been an undue if not impossible burden. Such a requirement would have significantly increased attorney fees and costs without any net benefit to the parties or the court.

We strongly urge the Council to not impose more stringent notice requirements where only equitable relief such as an injunction is requested by the plaintiff. Thank you for your consideration of these comments.

Sincerely,

Richard C. Baldwin

RICHARD C. BALDWIN
Director of Litigation

RCB:elh

CLASS ACTIONS

Each specialty unit may decide, with prior approval of the program director and without interfering with the professional responsibility of the client's attorney, whether or not to initiate or defend any class action or suit without prior consultation with the Board wherein the specific client or clients of Legal Aid Service qualify, and

1. The case is within program priority guidelines;

2. The class relief which is the subject of the class action lawsuit is sought for the primary benefit of individuals who are eligible for Legal Aid services;

3. The director has approved the filing of the class action complaint;

4. All class action complaints shall be co-signed by the program director or the person designated by the director for such a purpose, in addition to the attorney(s) responsible for the case;

5. All requests for approval must be accompanied by a signed retainer.

In addition, Legal Aid Service attorneys may file a class action suit against the federal government or any state or local governmental entity provided that prior to the filing of the class action the Director has determined that:

a. The governmental entity is not likely to change voluntarily and promptly its policy or practice in question and that eligible clients will continue to be adversely affected by the policy;

b. The program has given notice to the prospective defendant of its intent to seek class relief; and

c. Responsible efforts to resolve without litigation the adverse effects of the policy or practice have not been successful or would be adverse to the interests of the clients.

Because of the importance of the above policies, failure to observe them shall be a basis for dismissal from Legal Aid Service employment.

Oregon
Legal
Services
Corporation

Weatherly Building Suite 1000 516 S.E. Morrison Portland, OR 97214 (503) 234-1534 FAX: (503) 239-3837

October 16, 1992

Henry Kantor
Attorney at Law
1100 Standard Plaza Building
1100 S. W. Sixth Avenue
Portland, OR 97204

Re: Proposed Changes to ORCP 32

Dear Mr. Kantor:

I am writing to you about the proposal regarding classwide notice which has been submitted in a Minority Report from the Class Action Subcommittee to the Council on Court Procedures. I believe that this proposal could be devastating to our ability to adequately represent low income people.

As you may know, Oregon Legal Services (OLS) is a private non-profit organization which represents low income people throughout rural Oregon. Over the years, we have successfully litigated quite a large number of class actions, for the most part involving governmental benefits such as Aid to Families with Dependent Children, Medicaid, food stamps, and subsidized housing. It is not unusual for the classes in such cases to consist of thousands of people, and, in a few notable situations, tens of thousands.

As I understand the proposal, individual notice would have to be given to class members in all class actions, even if only injunctive or other equitable relief was sought. Given the size of classes which are typical in public benefit litigation, such a requirement could easily prohibit OLS and other legal services organizations in Oregon from litigating these cases. All legal services organizations are under tremendous financial pressure, notwithstanding the success of such recent efforts as the Campaign for Equal Justice. We simply do not have the financial

resources to provide individual notices in large cases. I fear that important and significant issues for low income Oregonians may not be litigated if such a requirement is imposed.

We therefore urge the Council to reject these proposed amendments.

Very truly yours,

Kent B. Thurber
Attorney at Law

KBT:sew

Phil Goldsmith
Attorney at Law
1100 S.W. 6th Avenue
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Portland, Oregon 97204

(503) 224-2301
FAX: (503) 222-7288

November 10, 1992

Janice Stewart, Chair
Class Action Subcommittee
Council on Court Procedures
1100 SW Sixth, Suite 1600
Portland, OR 97204 VIA HAND DELIVERY

Professor Maury Holland
Class Action Subcommittee
Council on Court Procedures
University of Oregon School of Law, Room 275A
1101 Kincaid Street
Eugene, Oregon 97403-3720 VIA FAX COMMUNICATION

Michael V. Phillips
Class Action Subcommittee
Council on Court Procedures
975 Oak Street, Suite 1050
Eugene, Oregon 97401-3176 VIA FAX COMMUNICATION

Re: Proposed Revisions to ORCP 32

Dear Subcommittee Members:

In an effort to simplify the issues before the full Council on Court Procedures this coming Saturday, the Committee to Reform Oregon's Class Action ("the Committee") has authorized me to do two things.

First, to cease pursuing the proposals concerning damage computations which your subcommittee has previously rejected, namely the versions of ORCP 32 F(2) proposed in the Committee's letter of December 14, 1991 to Professor Merrill and in my letter of September 16, 1992 to you. Thus, the only damages issue before the Council will be your subcommittee's recommendation to eliminate existing ORCP 32 F(2) and F(3).

Secondly, the Committee has authorized me to seek a compromise version of ORCP 32 F(1) which all members of the subcommittee could accept. Enclosed with this letter is a copy of my letter to Janice Stewart of November 5, 1992 which makes such a proposal. This proposal retains all the discretion in the version which the majority of your subcommittee previously approved, except that it would eliminate the option of giving no notice.

As I indicate in my letter to Jan, I have circulated this proposal to people who handle injunctive relief class actions to make sure they felt comfortable with the change. Jan told me this morning that it is acceptable to her. If Mike and Maury are also prepared to recommend this language, then the Committee will withdraw the version of ORCP 32 F(1) which it originally proposed in favor of this new version.

Assuming this occurs, there are three principal questions which the full Council will need to decide:

1. Should ORCP 32 B be revised to replace the current tripartite class action with a unitary class, as you have recommended?

2. Should ORCP 32 F(1) be revised to expand the discretion of trial courts concerning when and how post-certification notice will be given, but requiring such notice to be given to some or all members of the class?

3. Should claim forms be eliminated by deleting existing ORCP 32 F(2) and F(3), as you have recommended?

There may also be some minor language issues which the Council will need to address. According to my notes of the September meeting, the language of ORCP 32 F(3) in the version which Maury circulated at the August meeting was to be modified in a couple of respects. Additionally, the Council may want to address Maury's style proposals in the text he circulated in August.

I would appreciate being informed when the subcommittee has decided whether or not to recommend the new version of ORCP 32 F(1).

Sincerely,

Phil Goldsmith

PG:le
Encl.

cc: Henry Kantor (via hand delivery)
Committee Members

Phil Goldsmith
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1100 S.W. 6th Avenue
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November 5, 1992

Janice Stewart, Chair
Class Action Subcommittee
Council on Court Procedures
1100 SW Sixth, Suite 1600
Portland, OR 97204 (Via Hand Delivery)

Re: Proposed Revisions to ORCP 32

Dear Janice:

I appreciate having had the opportunity to talk with you after the October Council on Court Procedures meeting about the class action notice issue. As I think I told you, this discussion gave me insight into a way of redrafting our committee's proposal to accomodate your concerns.

Since that time, I have circulated the redrafted language to the members of our committee as well as to Bernie Thurber, Darcy Norville and Dick Baldwin. I received no negative feedback.

Accordingly, I enclose an alternative to the version of ORCP 32 F(1) which our committee proposed and the majority of your subcommittee recommended. The highlighted and lined-through language represents the ways in which this alternative differs from our earlier proposal.

If you can accept this language (or you and I can agree to further revisions), the next step would be to circulate it to the other members of the subcommittee to see if they also are willing to modify their position in the interest of simplifying the issues which the full Council will need to decide at the November 14 meeting.

After you have had an opportunity to consider this proposed compromise, let me know what you think.

Sincerely,

Phil Goldsmith

PG:rr

P.S. I will be able to attend our Stanford reunion this weekend.