COUNCIL ON COURT PROCEDURES

Saturday, May 9, 1992, Meeting
9:30 a.m.

Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

A G E N D A

1. Approval of minutes of meeting held March 14, 1992

2. Passing of Fred Merrill; appointment of Acting Executive Director; search for new Executive Director (Chair)

3. Posthumous honors to Fred Merrill (John Hart and Ron Marceau)

4. Six-person juries (Ron Marceau and attached letter from Judge Barron)

5. Class actions (Janice Stewart and attached letters from Oregon Division of State Lands and Attorney R. Alan Wight)

6. Subpoenas without trial or deposition and hospital records (Executive Director's 3-12-92 memorandum, Karen Creason, and attached letters from Art Johnson, James Lemieux, Kent Ballantyne, and Larry Thorp)

7. Oaths for deposition by telephone (Bruce Hamlin and Mike Phillips)

8. Revised meeting schedule (Chair)

9. Oregon Dispute Resolution Commission (Chair -- time permitting)

10. **NEW BUSINESS**

# # # #

HH

CIRCUIT COURT OF OREGON
Fifteenth Judicial District

RICHARD L. BARRON
Judge

Coos County Courthouse
Coquille, Oregon 97423
396-3121

March 18, 1992

Ronald L. Marceau
Attorney at Law
Suite 300
1201 NW Wall Street
Bend, OR 97701-1936

Re: Six person juries

Dear Mr. Marceau:

Enclosed please find some proposed changes to Rules 56 and 57 and discussion of the proposed changes.

For your information the following table indicates the total number of civil (includes a very small number of domestic relations cases) and criminal jury trials in circuit court and the percentage of the total number of cases terminated in circuit court by jury trial from 1982 through 1991:

Year	Civil	Criminal	Percentage
1982	1549	995	3.4
1983	1121	1113	2.9
1984	1038	1049	2.8
1985	1027	1146	2.9
1986	904	1075	2.2
1987	900	1040	2.2
1988	960	1120	2.3
1989	716	1137	1.9
1990	617	1030	1.4
1991	655	1055	1.4

In 1982 the total number of cases terminated by the circuit courts was 75,127. The total number of cases terminated by the circuit courts in 1991 was 125,921.

The cost savings in reducing civil juries from 12 to six persons over a biennium would be small in relation to the judicial department's total budget. If 25 jurors are called in for a 12 person civil jury trial, the number could be reduced to 16 for a six person civil jury trial. Each juror receives $10.00 a day for jury service and eight cents a mile for mileage. The system would save the cost of nine jurors the first day of trial and the cost of six persons for each day thereafter. If the average civil jury case lasts two days, the system would save $150.00 plus for each jury trial. Using the 1991 civil jury trial figure, the savings

for two years would be a little over $200,000.00.

There would be a time savings in selecting a jury, but it would probably not be more than 30 minutes to an hour. Some courts may be able to reduce the length of jury service for citizens because of the reduced number of jurors needed for each jury in a civil case.

As I stated at the Council's meeting on March 14, 1992, I have no strong opinion on the subject of six person juries for civil cases, but feel the Council might want a proposal to look at and might want some information on the number of civil jury trials and the cost savings to the system by reducing civil juries from 12 to six persons.

I do plan to raise this issue at the presiding judges' meeting following the Judicial Conference in April. I might also raise it at the Judicial Conference.

Sincerely,

Richard L. Barron
Presiding Judge

cc. Henry Kantor
Attorney at Law
1400 Standard Plaza
1100 SW 6th Avenue
Portland, OR 97204-1087

In Rules 56 and 57 matter in parentheses is omitted and matter underlined is added

Rule 56 Trial by Jury
Trial by Jury Defined

A trial jury in the circuit court is a body of (12) six persons drawn as provided in Rule 57. (The parties may stipulate that a jury shall consist of any number less than 12 or that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.)

Discussion

Oregon Constitution, Amended Article VII, section 7 states, "In civil cases three-fourths of the jury may render a verdict(,)" and section 9 states, "Provision may be made by law for juries consisting of less than 12 but not less than six jurors."

In light of the above provisions Rule 56 should be amended by eliminating the second sentence. Section 9 of Amended Article VII is clear. There cannot be a jury of less than six persons in Oregon. Although section 7 is not quite as clear as section 9, it appears to require that at least three-fourths of all jurors agree upon a verdict. Without amending the Constitution it is not advisable to allow a statute, rule or stipulation to lessen the number of jurors or the number of jurors required to reach a verdict.

If the Council wishes to recommend that civil cases in circuit be tried by six person juries, it can amend Rule 56 as indicated above in the first sentence of the rule.

F. Alternate Jurors

F(1) Alternate Jurors; how drawn. The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retired to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges , shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. (An alternate juror who does not replace a regular juror shall be discharged as the jury retires to consider its verdict.) Each side is entitled to one peremptory challenge in addition to those otherwise allowed by these rules or other rule or statute if one or two alternate jurors are to be impanelled, two peremptory challenges if three or four alternate jurors are to be impanelled, and three peremptory challenges if five or six alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory

challenges allowed by these rules or other rule or statute shall not be used against an alternate juror.

F(2) Alternate jurors; deliberations. The court may allow not more than two alternate jurors in the order in which they were called to retire with the jury to consider its verdict. An alternate juror may participate in the jury's deliberations, but not in reaching a verdict unless it is necessary for an alternate juror to replace a juror who becomes or is found to be unable or disqualified to perform the duties of a juror. The manner of replacing a juror with an alternate juror during deliberations is the same as is set forth in Rule 57 F(1) for replacing a juror with an alternate juror prior to the time the jury retires to consider its verdict.

Discussion

At the Council meeting on March 14, 1992 Judge Panner stated that he allowed alternate jurors to retire with the jury, participate in deliberations and participate in reaching a verdict. It appeared that several Council members felt that provision should be made for a similar procedure in Oregon circuit courts because of the possibility that a juror could be unable to continue to serve or disqualified from serving on jury during deliberations.

Rule 57F allows alternate jurors to be chosen, but requires their discharge before the jury begins deliberations. The above proposal divides Rule 57F into two sections. Proposed Rule 57F(1) remains the same as the present rule except the sentence requiring that alternate jurors be discharged before the jury begins deliberations is omitted. All of proposed Rule 57F(2) is new. It allows not more than two alternate jurors to retire with the jury and participate in deliberations. It does not allow the alternate jurors to participate in reaching a verdict. The remainder of proposed Rule 57F(2) tracks the language of proposed Rule 57F(1) as it relates to the procedure of replacing jurors with alternate jurors during deliberations.

It is practicable and cost-effective to allow alternate jurors to retire with the jury to avoid mistrials in situations where a juror is unable to continue to serve or is disqualified from serving during deliberations. The procedure could allow the alternate jurors to retire, but not participate in deliberations or in reaching a verdict or vice versa. Neither of these alternatives is attractive. It would be awkward and could be distracting to allow up to two people to retire with the jury, but not allow them to participate. It would be unrealistic to expect the alternate jurors to remain silent during the jury's deliberations. Allowing the alternate jurors to fully participate would change the number of jurors on the jury and change the number of jurors needed to reach a verdict.

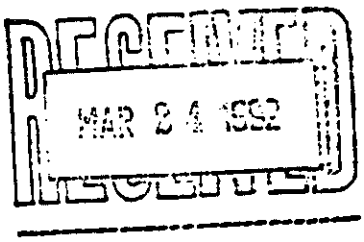
The procedure set forth in proposed Rule 57F(2) allows alternate jurors to participate in the jury's discussions and to possibly have some impact upon the verdict that is reached. The proposed rule does not allow the alternate jurors to participate in reaching the verdict. In this way the number of jurors on the jury

is not changed and the number of jurors needed to reach a verdict is not changed. Further, the six persons the parties selected as their jury reaches a verdict, but with the presence of the alternates, the parties are protected from a mistrial if a juror is unable to continue to serve or is disqualified from serving during deliberations.

Oregon

DIVISION OF
STATE LANDS

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



March 20, 1992

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

775 Summer Street NE
Salem, OR 97310-1337
(503) 378-3805
FAX (503) 378-4844

MILLER, NASH, WIENER,
HAGER & CARLSEN
ATTORNEYS AND COUNSELORS AT LAW
3500 U.S. BANCORP TOWER
111 S.W. FIFTH AVENUE
PORTLAND, OREGON 97204-3699
TELEPHONE (503) 224-5858
TELEX 364462 KINGMAR PTL
FACSIMILE (503) 224-0155

R. ALAN WIGHT
ADMITTED IN OREGON AND WASHINGTON

SEATTLE OFFICE:
4400 TWO UNION SQUARE
601 UNION STREET
SEATTLE, WASHINGTON 98101-2352
TELEPHONE (206) 622-8484
FACSIMILE (206) 622-7485

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.

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

March 12, 1992

TO: **MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: **Fred Merrill, Executive Director**

RE: **Agenda Item No. 5 - March 14, 1992 meeting**

I have consulted with Karen Creason and Larry Thorp regarding amendments to ORCP 55 H to solve the problem of the relationship between hospital records and a subpoena duces tecum without a deposition, hearing, or trial. We suggested the following changes to ORCP 55 H would solve the problem and would be consistent with the Council's intent in making the amendments last biennium.

DELETED LANGUAGE IS BRACKETED; NEW LANGUAGE IS UNDERLINED AND IN BOLDFACE.

SUBPOENA
RULE 55

* * * *

H. Hospital records.

* * * *

H.(2) **Mode of compliance.** Hospital records may be obtained by subpoena duces tecum as provided in this section; if disclosure of such records is restricted by law, the requirements of such law must be met.

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

H.(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i)

if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business[; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena]. If the subpoena directs delivery of the records in accordance with this subparagraph, then a copy of the subpoena shall be served on the injured party not less than 14 days prior to service of the subpoena on the hospital.

← NOTE BRACKETS

* * * *

H.(4) **Limitation of use of subpoena to produce hospital records without command for appearance; [P]personal attendance of custodian of records may be required.**

H.(4)(a) Hospital records may not be subject to a subpoena commanding production of such records other than in connection with a deposition, hearing, or trial.

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

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

H.(4)[(b)]**(c)** If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

* * * *

FRM:gh

JOHNSON, CLIFTON, LARSON & BOLIN, P.C.

ATTORNEYS AND COUNSELORS AT LAW

975 OAK STREET, SUITE 1050

EUGENE, OREGON 97401-3176

(503) 484-2434

FAX (503) 484-0882

ARTHUR C. JOHNSON
JACOB K. CLIFTON, JR.
RICHARD L. LARSON
JANE NELSON BOLIN
DON CORSON
DOUGLAS G. SCHALLER
DEREK C. JOHNSON *

*ALSO MEMBER CALIFORNIA AND WASHINGTON BARS

MICHAEL PHILLIPS
OF COUNSEL

ALDEN B. WOLFE, CLI
LEGAL INVESTIGATOR

DONNA WILSON
MARDEL SKILLMAN
LUCIE KRUEGER, RN, MN, FNP
TRIAL ASSISTANTS

March 16, 1992

Oregon Association of Hospitals
Bldg. 2, Suite 100
4000 Kruse Way Place
Lake Oswego, OR 97035

COPY

Gentlemen:

Hospitals, clinics, and individual physicians in the state of Oregon are regularly required to incur expense and inconvenience because of the present practices of obtaining medical records for purposes of litigation. A simple change in the Oregon Rules of Civil Procedure could significantly reduce that workload.

Whether the claim has resulted from a motor vehicle collision, a defective product, or professional negligence, the parties require accurate and complete copies of the medical records.

At the present time it is common for plaintiff's counsel to obtain some or all of the medical records before an action is filed. Once the suit is filed, each defendant normally seeks, through a subpoena duces tecum, to obtain another complete record. Then at or prior to trial another subpoena will usually be issued requiring the medical provider to deliver a third set of records for the trial. In some cases I've seen, the medical provider has been required to produce the same set of records as many as 7 times.

To reduce the inconvenience and expense imposed upon the medical providers, I have for many years urged opposing counsel to cooperate and to obtain the records only one time. The procedure is to subpoena one set of the records early on and have that copy delivered in a sealed envelope, in response to the subpoena, to a certified court reporter. The court reporter then makes true copies for each of the litigants and retains the original copy furnished by the medical provider, in a sealed envelope for trial. Not only does this practice obviate repeated inconvenience and expense to the medical provider, it is also more convenient and less expensive for the litigants.

I have been frustrated however, in that I find that only

occasionally will opposing counsel agree to such a procedure. Rather, each attorney tends to want to seek his or her own set of records.

I am proposing to the Council on Court Procedure that the Oregon Rules of Civil Procedure be amended specifically providing for such a procedure. Once an action is filed, any of the litigants has a right to subpoena a copy of the records. But the subpoena would require that the set of records provided by the medical provider, in response to the subpoena, not simply be sent to the office of the attorney issuing the subpoena, but rather, go to a court reporter. The reporter would make a record of having received the medical records in a sealed envelope and duly provide a true copy thereof to each litigant entitled to a copy. The reporter would then preserve the original set of records in a sealed envelope to be used as the trial exhibit.

While I have on some occasions persuaded opposing counsel to follow this procedure, and it has worked without a hitch, and with savings to all involved, I continue to be frustrated that many counsel are unwilling to so cooperate. I am troubled about the additional expense, the waste of paper, and waste of time that results.

Our office will be presenting a proposal to the Council on Court Procedure that promulgates amendments to the Oregon Rules of Civil Procedure and we suggest that your respective organizations consider the proposal and lend support.

If you or representatives of your respective organizations have any interest in discussing the matter or helping to refine the proposal, I would be pleased to hear from you.

Sincerely,

Arthur C. Johnson

ACJ/ng
cc: Jan Baisch
Jeff Foote
Larry Wobbrock
Charlie Williamson

SACRED HEART GENERAL HOSPITAL
1255 HILYARD STREET • P.O. BOX 10905 • EUGENE, OREGON 97440 • PHONE 503/686-7300

COPY

March 20, 1992

Arthur C. Johnson
975 Oak St Ste 1050
Eugene OR 97401-3176

Dear Mr. Johnson:

I have reviewed your 3/16/92 letter in which you purpose to modify the Oregon Rules of Civil Procedure to delineate a new process by which medical records will be distributed to litigants once an action is filed.

In a review with our Medical Records department we feel that your proposal has merit and would like to suggest that you also include patient billing information as this also seems to be a high demand item at the time litigation is initiated.

If we can be of any assistance please contact me at 686-7243.

Sincerely,

James M. Lemieux
Director, Risk Management

rb

HC

JOHNSON, CLIFTON, LARSON & BOLIN, P. C.
ATTORNEYS AND COUNSELORS AT LAW
975 OAK STREET, SUITE 1050
EUGENE, OREGON 97401-3176
(503) 484-2434
FAX (503) 484-0882

ARTHUR C. JOHNSON
JACOB K. CLIFTON, JR.
RICHARD L. LARSON
JANE NELSON BOLIN
DON CORSON
DOUGLAS G. SCHALLER
DEREK C. JOHNSON *

*ALSO MEMBER CALIFORNIA AND WASHINGTON BARS

MICHAEL PHILLIPS
OF COUNSEL

ALDEN B. WOLFE, CLI
LEGAL INVESTIGATOR

DONNA WILSON
MARDEL SKILLMAN
LUCIE KRUEGER, RN, MN, FNP
TRIAL ASSISTANTS

March 25, 1992

Kent Ballentine
Oregon Association of Hospitals
4000 Kruse Way Place
Lake Oswego, OR 97035

COPY

Dear Kent:

Thank you for your phone call in response to my letter of March 16. I also received a response from James M. Lemieux of Sacred Heart General Hospital. Mr. Lemieux agreed with the general idea contained in my proposal and suggested that it be broadened to include patient billing information.

Michael Phillips of our office is a member of the Council on Court Procedure. He advises that a proposal accomplishing at least part of this proposal will be before the Council on Court Procedure at its meeting to be held in Eugene, Saturday, April 11, at 9:30 a.m. The meeting will be held at the University of Oregon Law School.

Meetings of the Council are open to the public and I would suggest that you or representatives of the Oregon Association of Hospitals, as well as others interested in such a reform, be present to express their views.

If you want any specific information concerning the pending proposal or the procedures that will be followed by the Council at its meeting on April 11, you may wish to contact the chair of the Council, Henry Kantor, 226-3232. We have asked that this matter also be put on the May agenda for the Council as that meeting will be held in Portland, and may be more convenient. You can also contact Mr. Phillips of our office. I'm sure either would be willing to confer with you and share such information.

Sincerely,

Arthur C. Johnson

ACJ/ng
cc: Mel Pyne, McKenzie-Willamette Hospital
James M. Lemieux, Sacred Heart General Hospital
Henry Kantor
Jan Baisch
Jeff Foote

4000 Kruse Way Place
Bldg. 2, Suite 100
Lake Oswego, Oregon 97035
503-636-2204

Oregon
Association of
Hospitals

April 13, 1992

Mr. Arthur C. Johnson
Johnson Clifton Larson & Bolin, P.C.
975 Oak St., Suite 1050
Eugene, OR 97401-3176

Dear Mr. Johnson:

Since your letter of March 16, 1992 and our subsequent phone conversation, I have gathered information and opinion on the procedures for obtaining medical records. The issue is complex, and your proposed solution leaves a number of questions unresolved. These include:

- The manner in which the records of litigants receiving ongoing treatment would be forwarded to the court; and,

- A procedure for protecting records which contain information that is not pertinent to the case at issue, and is protected from release by state or federal law. If the hospital does not control access to the record, it cannot fulfill its legal responsibility to limit release of the record to authorized parties.

In addition to these specific questions raised by your proposal, a number of related issues have been raised by others who work with these record requests on a regular basis. I believe it would be appropriate to consider all of these issues concurrently with any effort to modify ORCP 44 and/or 55. Rather than asking the Council on Court Procedures to consider individual proposals in a vacuum, I recommend that the Council sponsor a multidisciplinary task force to undertake a comprehensive review of the rules governing the subpoenaing of medical records. Such a group might include attorney's from the plaintiff's and defense bar, along with representatives from the Oregon Medical Records Association, the Oregon Medical Association, and the Oregon Association of Hospitals. I hope you will join me in urging the Council on Court Procedures to consider sponsoring such an effort.

Thank you again for the opportunity to respond to your proposal. I look forward to working with you on this issue.

Sincerely,

G. Kent Ballantyne
Senior Vice President

c: Mel Pyne, McKenzie-Willamette Hospital
James M. Lemieux, Sacred Heart General Hospital
Henry Kantor

THORP
DENNETT
PURDY
GOLDEN
& JEWETT P.C.
ATTORNEYS AT LAW

644 NORTH A STREET
SPRINGFIELD, OREGON 97477-4694
FAX: (503) 747-3367
PHONE: (503) 747-3354

LAURENCE E. THORP
DOUGLAS J. DENNETT
DWIGHT G. PURDY
JILL E. GOLDEN
G. DAVID JEWETT
JOHN C. URNESS
DOUGLAS R. WILKINSON
RICHARD L. FREDERICKS

JAN DRURY
OFFICE MANAGER

MARVIN O. SANDERS
(1912-1977)
JACK B. LIVELY
(1923-1979)

April 23, 1992

Mr. Henry Kantor
Pozzi, Wilson, et al
1400 Standard Plaza
1100 SW 6th Avenue
Portland, OR 97204

Dear Henry:

I have received several letters concerning proposals to modify the procedure for subpoenaing hospital records. The issue was originally brought up when Karen Creason raised the issue of whether the modified subpoena procedure under ORCP 55H was the exclusive procedure under which hospital records could be subpoenaed. That was followed up by a letter from Art Johnson suggesting an alternative to the 55H procedure. It is also my understanding that the Council on Court Procedures as well as the Procedure and Practice Committee of the State Bar are looking into this matter.

I received a copy of G. Kent Ballantynes letter addressed to Art Johnson dated April 13, 1992 suggesting that before any changes are made a multidisciplinary task force be put together to study the issues surrounding the subpoenaing of the hospital records. Quite candidly my experience has been that trial lawyers engaged in personal injury litigation either on behalf of the plaintiff or defendant are generally unappreciative and do not understand the problems that hospitals have in disclosing their records. There are constraints under both state and federal law as well as the risk of litigation by patients for inappropriate disclosure of hospital records. Given those facts I would hate to see any changes made without an opportunity for the Oregon Association of Hospitals, the Oregon Medical Records Association, the Oregon Medical Association and the Oregon Society of Hospital Attorneys participating in that process. As a result I believe Mr. Ballantynes suggestion is a good one and should be considered.

Please call if you have any questions.

Very truly yours,

THORP, DENNETT, PURDY
GOLDEN & JEWETT, P.C.

Laurence E. Thorp

LET/cam
cc: Dan Fields
Karen Creason
Mel Pyne
Kurt Hansen