COUNCIL ON COURT PROCEDURES

Minutes of Meeting of August 1, 1992

Multnomah County Sheriff's Office
The Hansen Building
12240 N.E. Glison, First Floor
Portland, Oregon

Present:	Susan G. Bischoff	Richard T. Kropp
	William D. Cramer, Sr.	Winfrid K.F. Liepe
	Susan P. Graber	Ronald L. Marceau
	Bruce C. Hamlin	Robert McConville
	John E. Hart	Michael V. Phillips
	Maury Holland	Charles A. Sams
	Lee Johnson	William C. Snouffer
	Bernard Jolles	Janice M. Stewart
	Henry Kantor	Elizabeth Welch
	John V. Kelly	
Excused:	Richard L. Barron	
	Richard C. Bemis	
	Paul J. DeMuniz	
	Lafayette G. Harter	

Also present were Maury Holland, Acting Executive Director, and Gilma Henthorne, Executive Assistant. The following attorneys were in attendance: Richard Caswell, Anton Pardini, Frank Dixon, Philip Emerson, Paul Fortino, Phil Goldsmith, G. Kevin Kiely, Robert Neuberger, John Ryan, Ken Sherman, Jr., Cecil Strange, Charles Tauman, Charlie Williamson, Michael L. Williams, and Alan Wight.

The meeting was called to order by Chair Henry Kantor at 9:30 a.m.

The Chair announced that the meeting was an advertised public meeting and invited those members of the public present to make any statements they wished to make during the meeting.

Agenda Item No. 1: Approval of minutes of meeting held May 9, 1992 and June 12, 1992. The minutes of both meetings were unanimously approved.

Agenda Item No. 2: Class actions. (Numerous comment letters from the bar and public concerning class actions were

distributed at the meeting and are attached to the original of these minutes.) The Chair stated that the subject of class actions originated as a result of a proposal made by a group of lawyers and interested people who are involved in class action practice. He stated that Mr. Phil Goldsmith had written a letter to the Council on December 14, 1991 (attached to these minutes), on behalf of the Committee to Reform Oregon's Class Action Rule, and had made a presentation to the Council at its February 8, 1992 meeting. The Chair stated that the Council's Subcommittee on Class Actions had worked diligently in studying the proposals and had prepared comprehensive reports. He then asked the Chair of the subcommittee to summarize the reports.

Janice Stewart, Chair of the Class Action Subcommittee, then summarized both the majority and minority reports of the subcommittee (both reports are attached to the original minutes of this meeting, and copies were previously furnished to Council members). By way of background she recalled that the proposed amendments now under consideration were modeled upon two sets of proposed revisions to FRCP 23, the federal class action rule, neither of which has been acted upon by the Civil Rules Advisory Committee. Stewart also recalled that the extensive revisions to ORCP 32 promulgated by the Council in 1980 were largely overridden by the 1981 Legislature. She summarized the most important features of the current proposals as being the substitution of a unitary for a tripartite classification scheme; making the giving of notice to class members discretionary even in damage class actions rather than mandatory as required under the present R. 32 F(1); and the abolition of the mandatory claim form procedure under R. 32 F(2). Stewart noted that she dissented from the subcommittee's recommendation regarding discretionary notice, primarily because she believes this might violate federal due process standards and because no other American jurisdiction appears to have gone so far.

Janice Stewart further stated that the subcommittee was unanimous in recommending deletion of the provision in current R. 32 F(2) for mandatory solicitation of claim forms in all damage actions maintained under R. 32 B(3), but also unanimously recommends against adoption of the proposed substitute provision. This is because the subcommittee believes that both the present R. 32 F(2) and the proposed revision would in effect instruct courts on how to ascertain the appropriate amounts of judgment entered in class actions to which they apply, and that such direction is not properly a matter of practice and procedure. She added that the subcommittee acknowledges the dilemma this might create for the Council, in that the present claim form procedure was enacted by the 1981 Legislature. If the Council were now to agree with the subcommittee that this sort of provision does not belong in a set of procedural rules, in whole or in part because it "affects substantive rights," it might be driven to the conclusion that the Council cannot, or at least

should not, touch the present R. 32 F(2), since that was enacted by the legislature, a body not subject to the Council's statutory limitation of authority over rules of practice or procedure not affecting substantive rights. This point was underlined by the fact that the subcommittee recommends that the Council not adopt the proposed revisions to R. 32 N regarding attorney fees on the ground that the rule clearly deals with a matter of substantive rights, the present version of which was enacted by the legislature.

Maury Holland stated that he had prepared a version of how Rule 32 would appear if the proposals favored by the majority of the subcommittee were adopted; he said that he also had made stylistic changes and corrected language glitches. He felt that it would be easier to read the total rule without brackets and underlining. He urged Council members to keep this version for possible use as a working document in the months to come.

The Chair then asked proponents of various of proposed revisions to R. 32 to speak first, followed by those who would speak in opposition.

Mr. Phil Goldsmith, Portland, spoke first and made the following points: He noted that the subcommittee report recommends that the Council reject the proposed changes to R. 32 N regarding shifting of attorney fees on the ground that this is a matter having to do with substantive rights and that the present version of the rule, having been enacted by the Legislature, should not be revised by the Council. He asked the Council to consider the counterarguments to this view set forth on pp. 6 and 7 of his June 9 letter to the Council. He also urged that if the full Council agrees with the subcommittee recommendation that present R. 32 N not be changed, it at least recommend to the 1993 Legislature that the substance of the proposed amendment be enacted statutorily. He pointed out that when class representatives face the possibility of having sometimes large defendant's attorney fees shifted against them, with no possibility of sharing such liability among non-appearing class members, that seriously discourages resort to this sort of class action. He emphasized the contention that class representatives, together with members who have appeared individually under appropriate circumstances, should be liable for a prevailing defendant's attorney fees only if shifting of such fees can be justified as a "sanction."

Mr. Goldsmith next addressed the proposed amendments that would abolish the claim form procedure and the methods of computing amounts of aggregate damages. He pointed out that limiting the total amount of the judgment to the aggregate of amounts claimed by individual class members in forms solicited by the court for that purpose, even when defendant's records or

other methods would allow a higher total class damage figure to be reliably established, appears to be unique to Oregon's rule. The purpose of the proposed amendments relating to this issue is to simplify and expedite class actions by avoiding unnecessary and expensive procedural steps when that is possible. They would also avoid the problem of cases where the total damages incurred by a class can be readily ascertained, but where, for whatever reasons, few class members complete and return claim forms to obtain their individual recoveries. The result is that defendants sometimes are allowed to retain a large portion of ill-gotten gains and many who have sustained injury recover nothing. This adversely affects the settlement value of this sort of class action, which in turn adversely affects the willingness of would-be class representatives to institute them, so that wrongdoing defendants get to keep the whole of their unjust enrichment and no injured party recovers anything. Mr. Goldsmith acknowledged that if the proposed amendment were adopted, there would sometimes be unclaimed funds when the aggregate class damages exceeded the total of individual recoveries that could be awarded to specific class members, and that the disposition of such unclaimed funds would have to be dealt with by statute, as a substantive matter beyond the competence of the Council.

Mr. Goldsmith next urged a drafting change relating to costs of notice and proposed 32 F(2). Specifically, he suggests that "at any point in the proceeding" following "except that" in line 2 be removed to avoid any ambiguity about at what point in the litigation the exception was applicable.

Finally Mr. Goldsmith made some comments about the issue of notice. He spoke in support of the subcommittee's majority view that notice of certification should be discretionary in damage class actions as it is with all other kinds of class actions under the present rule, even if current due process doctrine would make individual notice mandatory in some or all damage class actions. He pointed out that the cost of giving individual notice to class members can easily run as high as $1.00 per member, and this can make a given case economically inviable. The rule should be amended so as to give trial judges more latitude to weigh costs against benefits and to use common sense. Mr. Goldsmith's experience has been that the considerable costs of giving individual notice has often been proven to have been wasted, in the sense that no one as a result either opted out or intervened.

In response to a question from Maury Holland, Mr. Goldsmith said that if ORCP 32 were revised to authorize a unitary class action it would no longer be possible to provide for mandatory notice in some kinds of class actions and discretionary notice in other kinds. In response to a question from Susan Graber concerning the effect of moving to discretionary notice upon

putative class members who might want to opt out simply because they didn't want anything to do with the litigation, rather than in order to get their own lawyer and proceed separately, Mr. Goldsmith replied that this was clearly one of the concerns a judge should take into account and balance this interest against the costs to the class of protecting it in this or some other manner. He could imagine people who had never received post-certification notice might, if they disliked association with the litigation, simply refuse to cash their settlement or award checks.

Mr. John Ryan, Portland, then spoke of the proposal that would make notice discretionary. He stated that in his experience, the requirement of mandatory notice had proved to be a practical impediment to access to justice on the part of large numbers of relatively small claimants.

Mr. Phil Emerson, Portland, then spoke in favor of the proposals with special emphasis on the proposal to abolish the mandatory claim form procedure and limitations on amounts of class judgments to the total of amounts individually claimed, which he noted is unique to Oregon. While expressing a preference for the proposal submitted by the ad hoc group, Mr. Emerson believed that the intermediate position taken by the subcommittee, which would leave damage calculation and distribution of awards to judicial doctrine and legislative enactment to be a reasonable one he would be prepared to support.

Mr. Frank Dixon, Portland, next appeared in support of the proposed amendments generally. He stated that without reforms of this kind Oregon's class action procedure remains essentially unavailable to most wronged consumers because of costs and delays. He stated that he often recommends that injured consumers pursue their remedy in small claims court.

The Chair then asked for presentations by those who wished to speak in opposition to some or all of the class action reforms.

Mr. R. Alan Wight, Portland, then summarized his views contained in his letter to the Chair of the Council dated July 29, 1992 (attached to these minutes). He felt that the proposed changes are radical, unconstitutional, have been rejected at the federal level, and that Oregon should not create an unconstitutional civil procedure rule, nor should it use procedural rules to attempt to introduce substantive changes in the law. Mr. Wight objected that the proposals would abolish the typology contained in the federal rule and the rules of all other states, that the elimination of mandatory individual notice where required under the present rule would also run counter to the federal rule and those of all other states, that the proposals would legitimate the concept of fluid recovery, and that they

would make termination of actions easier for plaintiffs. Mr. Wight reviewed the history of class action procedure in Oregon, which in his opinion has produced the present reasonably balanced rule. He noted that the proposed changes are being promoted by a limited group of plaintiff's attorneys. He added that while liberalizing the requirements for certification of class actions is argued to produce some social benefits, it also has serious drawbacks, including that it "promulgates bad law suits" and use of "professional plaintiffs." Mr. Wight also expressed concern that the current proposals reflect an attempt to change substantive law. He expressed his belief that individual notice serves important benefits and is often required in the interest of fundamental fairness. He expressed strong reservations about "fluid recoveries" which he feared sometimes benefit plaintiffs' attorneys more than anyone else. He concluded by pointing out that most of the proposed changes had been rejected at the federal level, and had not been adopted by any other state.

Mr. Richard Caswell, Portland, stated that after many years experience on both sides of class actions, he cannot recall any such action that has failed because of the cost of individual notice. He expressed concern about the breadth of discretion regarding notice and other matters that the proposed amendments would confer upon trial judges, and shared the skepticism of the subcommittee's minority report that appellate review would provide adequate protection against inconsistent exercises of that discretion. He concluded by noting his agreement with the subcommittee's view that R. 32 N deals with a matter of substantive right, and hence should not be amended by the Council.

Mr. Kent Sherman, Jr., Attorney, Salem, stated he was in attendance at the Council meeting representing the Oregon Bankers Association and the Oregon League of Financial Institutions to register their concern and opposition regarding the proposed changes to R. 32. He felt that the existing rule establishes a carefully balanced procedural framework for the conduct of class action litigation which has endured eleven or twelve years and several exposures to the legislative process. Mr. Sherman further summarized their concerns expressed in correspondence to the Council (attached to these minutes). He stated they were particularly concerned about the proposed elimination of the notice and opt-out provisions for class actions and the proposed replacement of the claim form procedure under 32 F.(2) and F.(3). He said they were further concerned about the adoption of the proposal which would substantially broaden the discretion of trial judges to lay down procedural rules on a case-by-case basis. He felt that the replacement of the claim form procedure would effect a substantive rather than a procedural change in the class action rule. He added that elimination of the required notice and opt-out provision would eliminate protections to defendants against possibly financially devastating class

Chair said that the issue which the Council now needs to address is whether it is going to try to solve the problem which was first identified by Ms. Creason or take up a broader range of problems during a later biennium. Mike Phillips said that Ms. Creason's most recent letter indicated that hospitals have records which they believe they cannot provide in response to a subpoena and are making a choice not to provide them, but sign affidavits saying all the records are being provided.

John Hart made a motion, seconded by Susan Graber, that a task force be appointed to take a broader-scale, comprehensive look at the problem with Rule 55 and to submit a report to the Council for its consideration during the next biennium. The motion passed unanimously.

Agenda Item No. 4: Oaths for deposition by telephone (Acting Executive Director). Referring to the packet of materials entitled TENTATIVELY ADOPTED ORCP AMENDMENTS (attached to the original of these minutes, copies having been mailed to Council members previously), Maury Holland pointed out that the Council had not dealt with the last sentence of Rule 46 A.(1) (page 20 of the packet): "An application for an order to a deponent who is not a party shall be made to a judge of a circuit or district court in the county where the deposition is being taken."

Bruce Hamlin stated that the last sentence had been inadvertently omitted from his original proposal and that he had now prepared an amendment to that sentence which had been distributed prior to the commencement of the meeting. Discussion followed concerning the wording of that sentence. It was decided that Hamlin would rework the sentence and present it to the Council for its consideration later in the meeting.

Agenda Item No. 5: Exclusion of witnesses at depositions (Janice Stewart) (see page 4 of packet entitled TENTATIVELY ADOPTED ORCP AMENDMENTS). Janice Stewart stated that at the Council's February 8, 1992 meeting, the Council had voted to add the following as the second sentence of 39 D.: "At the request of a party or a witness, the court may order persons excluded from the deposition." She said that she had voted against the change because it did not accomplish what she had hoped to accomplish (it had been reported that the late Fred Merrill held the same opinion). She stated that she had wanted to make sure that the court has authority to exclude people from depositions for reasons other than just for protective orders. She said her preference is to list those people who can attend a deposition and if you want other people there, one would need a court order. Bruce Hamlin said the Council rejected that idea because of the difficulty in determining who fits within that list because of the variety of types of cases. Dick Kropp proposed the following change: "... the court may order persons <u>other than parties</u>

actions, and agreed that these proposals came from a relatively narrow group of plaintiffs' lawyers.

The Chair then asked if any speakers wished to make comments in the form of rebuttal.

Mr. Phil Goldsmith spoke in rebuttal to some of the arguments. He took exception to Mr. Wight's contention that Eisen established individual notice as a due process requirement, and reiterated the point that procedural rules ought not attempt to codify evolving due process requirements. In response to Mr. Caswell, he stated there is already very broad trial court discretion in all class actions except those aggregating individual damage claims. He stated that the reason few class actions fail because of notice costs is because of the pre-selection on the part of attorneys. He repeated that, in his experience, in cases where individualized notice had been provided, few if any class members either opted out or intervened. In response to Win Liepe's question whether the importance of notice increases as the size of individual claims increases, Mr. Goldsmith replied in the affirmative and expressed tentative agreement that it might theoretically be possible to trigger a mandatory notice requirement by reference to some minimum average recovery, although he was not at the moment prepared to suggest how some such feature might be practically implemented.

Various Council members were then given an opportunity to ask questions of the speakers and discussion followed.

Maury Holland stated that a practical problem involved the time element, i.e., the August 21 deadline for transmittal of any proposed ORCP amendments to the Publications Section of the Oregon Judicial Department for publication in the Advance Sheets. He said the class action matter would involve a lot of debate, discussion, and heavy-duty analysis. Janice Stewart suggested that a notice setting forth the recommendations of the Subcommittee on Class Actions, both majority and minority reports, be prepared for publication to allow for additional comments from the public. A discussion followed regarding publication requirements, but a final decision was deferred until later in the meeting.

Agenda Item No. 3: Subpoenas without trial or deposition and hospital records. (Attached to these minutes is a copy of a letter dated July 30, 1992 from Dennis J. Hubel regarding amendment to Rule 55 H.) The Chair stated that Karen Creason, Portland attorney, had made a proposal to amend Rule 55 H (to solve the relationship between hospital records and a subpoena duces tecum without a deposition, hearing, or trial), and the late Fred Merrill had prepared a memo dated March 12, 1992, which suggested a proposal to address Ms. Creason's concerns. The

excluded from the deposition." The Chair pointed out the problem in defining who the party is when a corporate defendant is involved.

After a lengthy discussion, the Council decided to include the proposed amendment to Rule 39 in the packet for publication in the Advance Sheets.

The Council recessed for lunch at 12:20 p.m. and resumed the meeting at 12:55 p.m.

Agenda Item No. 6: Secrecy in personal injury actions - Rule 36 C.(2) (Chair) (see attached proposed amendment). The Chair explained that the attached proposed amendment was part of Senate Bill 579 in the last legislative session with some of Susan Graber's comments. It had initially come about as a result of the concern of Mr. Larry Wobbrock and other members of the bar with reference to product liability cases. The Chair then asked for public comment.

Mr. Michael Williams, Portland, spoke on behalf of the Oregon Trial Lawyers Association as well as clients. He felt that the proposal codifies what Multnomah County judges are currently doing every time the issue is litigated and that the benefit of having it in the rule book would avoid having to file motions every time to get the same ruling. He stated that it would save litigation expenses for injured victims.

Lee Johnson questioned whether there would be any objection to changing "client" to "party". A discussion followed with different views.

Mr. Paul Fortino, Portland, a member of the Executive Board of the Oregon Association of Defense Counsel, stated that he had been asked to advise the Council that the OADC opposes provisions that would shift the burden of maintaining the secrecy of information in sealed filings to the party claiming confidentiality. Mr. Fortino then summarized his reasons that militate against shifting the burden (set forth in his June 12, 1992 letter to the Chair - attached).

Susan Graber wondered whether, from Mr. Fortino's reading of the proposal, parties could not stipulate as part of a stipulated protective order that they would not make a request for further disclosure, i.e. could not that be part of a stipulation -- that not only do we keep this secret but we will not ask to reopen the question. Mr. Fortino responded that if the proposal were adopted, he would try to do that.

Mr. Charles Tauman, Portland, speaking on behalf of himself and the Oregon Trial Lawyers Association, commented on the burden of allocation of the burden of proof; he felt that the burden of

proof should be on those who would deny further disclosure. Mr. Tauman stated that he thought the proposal would reduce the cost of litigation because it would disincline the parties from fighting over an original protective order.

Bill Cramer wondered why an attorney in his own case could not seek to have a protective order in another related case set aside for this purpose. He felt that the proposal involved a very narrow piece of litigation. He suggested saying that protective orders may be altered or terminated at any time by the court after hearing on good cause shown.

Bernie Jolles pointed out that he thought that the proposal would give one lawyer the right in a case to obtain the same information that had already been disclosed, either voluntarily or compelled by the court.

After a lengthy discussion, Win Liepe made a motion, seconded by Bernie Jolles, to adopt the proposal as written by Susan Graber. The motion failed with 7 in favor and 9 opposed.

The Chair made a motion, seconded by Bernie Jolles, to adopt the proposal as written by Susan Graber except that "client" would be changed to "party". The motion failed with 6 in favor and 10 opposed.

Win Liepe made a motion, seconded by Mike Phillips, to adopt the proposal as written by Susan Graber but with the following sentence added: "The above provision shall not apply to any settlement agreement incorporating a protected provision." The motion failed with 5 in favor and 11 opposed.

Agenda Item No. 8: NEW BUSINESS. The Chair stated that Judge Mattison had written a letter to him dated June 26, 1992 (attached to these minutes), wherein he discussed a problem he had experienced with Rule 69. In that letter, he asked the Council consider amending 69 A in a manner that would eliminate any requirement for any notices of any kind in the situation he had experienced and the situation Judge Deiz had experienced in Van Dyke v. Varsity Club, Inc. (opinion attached to Judge Mattison's letter). Judge Mattison felt that when a defendant has been served, has filed an appearance, has received notice of the trial date and then failed to appear for trial, a court should be able to allow the moving party, who has appeared ready for trial, to proceed to put on a case in support of the allegations of the complaint or petition, and the court should also be able to enter an appropriate judgment.

Bruce Hamlin had proposed the following changes to Rule 69 A:

1. Amend the first sentence to read: "... or is

otherwise subject to the jurisdiction of the court and has failed to [plead or otherwise defend] **appear** as provided in these rules ..." Also, amend the last sentence to read: "... against whom the order of default is sought has failed to [plead or otherwise defend] **appear** as provided in these rules ..."

or

2. "**No written notice of an application for entry of an order of default is required if a party, after notice, failed to appear and defend at trial.**"

Elizabeth Welch and John Kelly both felt that this issue is a very important one and should be addressed this biennium. Welch also said that she felt that alternative number 2 would be a very adequate statement to add.

The Chair pointed out that, according to ORS 1.730(3)(d), the Council must publish to all members of the Bar at least two weeks before its final meeting of the biennium a notice which shall include the time and place of the meeting and a description of the substance of the agenda of the meeting. The Chair felt that Maury Holland should add consideration of an amendment to Rule 69 in the notice to be published in the Advance Sheets.

A discussion followed after which the Chair asked Maury Holland to prepare an amended draft of Rule 69 for the consideration of the Council at its meeting in Seaside on September 26.

Lee Johnson asked that the Council consider at its next meeting an amendment to Rule 60 on directed verdicts. A letter from Johnson to the Chair dated August 20, 1992 is attached to these minutes. He pointed out that the rule as presently written says that a motion for directed verdict can be made at the close of the evidence; the federal rule says that it can be made at any time after the party against whom it has been made has had an opportunity to be heard. He mentioned the problem when there are multiple claims and a judge is attempting to sort out the claims that are legitimate from those that are not. He suggested the following amendment to Rule 60:

> "**Motion for a directed verdict.** Any party may move for a directed verdict [at the close of the evidence offered by an opponent or at the close of all the evidence] **at any time during the trial after the opponent has been fully heard**. ..."

After discussion, a motion was made and seconded to include a possible amendment to Rule 60 in the notice to be published in

the Advance Sheets. The motion passed with 9 in favor and 7 opposed.

The next item of new business concerned a proposal to amend Rule 18 prepared by Mr. Robert Neuberger, a Portland attorney (copies had been distributed to Council members at the meeting and a copy is attached to these minutes). Mr. Neuberger asked that the Council consider taking out the dollar amount for compensatory damages and for punitive damages and, upon request, the plaintiff would submit to the opposing party a statement of damages and that statement of damages would be the maximum amount that a plaintiff could recover.

A discussion followed after which it was suggested that the matter be put on the agenda for another meeting but that it should not be included in the notice as a matter to be considered during this biennium.

The Chair stated that the other item of new business was a proposal by Win Liepe to amend Rules 57 F, 58 D and 59 G(2) on alternate jurors (copies of which had been distributed to members prior to the meeting - copy attached to these minutes). Liepe pointed out that the proposal provides authority for less than twelve jurors. John Hart thought that the number of jurors could be worked out by the individual judges in the different counties, rather than have a procedural rule which might impact on the Constitution. Liepe said that the proposal also addressed the situation when a juror becomes ill or otherwise becomes unavailable.

The Chair felt that the consensus was that the proposal to amend Rule 57 should not be continued on the Council's agenda.

Agenda Item No. 4: Oaths for deposition by telephone (continued discussion). Bruce Hamlin had reworded the language in 46 A and after further suggestions, the Council voted unanimously to approve the following language:

> A.(1)(a) **Parties**. An application for an order to a party may be made to the court in which the action is pending, [or] **and**, on matters relating to a deponent's failure to answer questions at a deposition, [to a judge of a circuit or district court in the county where the deposition is located] **such an application may also be made to a court of competent jurisdiction in the political subdivision where the deponent is located**.
>
> A.(1)(b) **Non-parties**. An application for an order to a deponent who is not a party shall be made to a [judge of a circuit or district court in the county where the deposition is being taken] **court of competent**

jurisdiction in the political subdivision where the non-party deponent is located.

The Council then resumed the discussion regarding the substance of the material to be included for publication in the Advance Sheets. The Chair proposed that there be included in the notice an appropriate description of the substance of the proposed amendments, including a summary of the majority and minority reports pertaining to class actions. The Chair stated that time should be provided for Maury Holland to get into some of the issues involved with class actions at the next meeting of the Council to be held in Seaside on September 26.

Maury Holland stated that he would circulate to all members of the Council the draft of the materials that will be submitted for publication in the Advance Sheets so that Council members would have time to respond regarding any corrections.

Agenda Item No. 7: Executive Director search (Chair). The Chair reported his progress relative to the search for an Executive Director. He thanked all members for their suggestions and comments.

The meeting adjourned at 2:55 p.m.

Respectfully submitted,

Maurice J. Holland
Acting Executive Director

ATTACHMENTS TO MINUTES OF COUNCIL MEETING HELD 8-1-92

OTHER ATTACHMENTS ATTACHED TO ORIGINAL MINUTES ONLY:

Majority and minority reports re class actions

TENTATIVELY ADOPTED ORCP AMENDMENTS

Various comment letters

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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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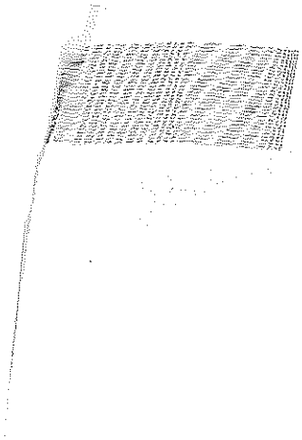
PROPOSED REVISIONS TO

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~~ creates a risk of:

> B(1)(a) Inconsistent or varying adjudications with respect to ~~individual~~ members of the class which would establish incompatible standards of conduct for the party opposing the class; or
>
> B(1)(b) Adjudications with respect to ~~individual~~ members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; ~~or~~

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

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

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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. 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.

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 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.

2. The consitutional 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.

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 Rule*s* 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); *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

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*, 599 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

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CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

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

(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*

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

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 PROPOSED CHANGES TO RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

SUB-COMMITTEE MEMBERS:

Garrard R. Beeney
Jeffrey 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.

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.

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.

DOCUMENTS

PERTAINING TO

SB 1008

4-3 Work Session held.
4-5 Recommendation: Do pass.
Second reading.
4-8 Carried over to 04-09 by unanimous consent.
4-9 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.
'0 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.
6-30 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.**

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--Grensky, 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.

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

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R. ALAN WIGHT
ADMITTED IN OREGON AND WASHINGTON

July 29, 1992

RECEIVED
JUL 29 1992
KANTOR AND SACKS

Mr. Henry Kantor
Chair, Council on Court
Procedures
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. <u>ORCP 32 in perspective</u>.

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. Alan Wight

Dennis J. Hubel

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July 30, 1992

VIA FACSIMILE AND REGULAR MAIL

Mr. Henry Kantor
Chair, Council on Court Procedures
Attorney at Law
14th Floor Standard Plaza
1100 S W Sixth Avenue
Portland OR 97204

Re: Council on Court Procedures 6-13 Meeting

Dear Mr. Kantor:

You asked for the input of the OSB Committee on Procedure & Practice to the Council on two topics at the Ashland meeting. Those topics were:

1. The issues with ORCP 55 regarding production of hospital records and other records which the Procedure & Practice Committee felt should be addressed in any review of ORCP 55 by the Council. In addition, I believe you inquired whether the Procedure & Practice Committee favored piecemeal revisions of portions of ORCP 55, or preferred that the entire rule be considered for changes with respect to any and all issues at one time.

2. Secrecy in personal injury actions - Rule 36 C(2) and and Justice Graber's proposal. Neither I nor our Committee have a copy of Justice Graber's proposal.

I'll start with ORCP 55. Our Committee is unanimous in its belief that the rule should not be reviewed and revised piecemeal. Rather, our concern is that the Rule, to the greatest extent practical, be viewed as a whole and that all records be treated and governed by the same procedures. As it stands now, there are some

20

differences, apparently slight on the surface, but probably significant in practice, in how one obtains hospital records versus any other records with this rule.

Issues that our Committee would like to see addressed upon the Council's consideration of Rule 55 include, at a minimum, the following:

1. Avoid making hospital records more difficult to obtain either for parties to litigation or, more difficult to produce, for the hospital's records custodians. While no formal position has been taken by the Committee, there has certainly been sentiment expressed that, as it stands now, that a deposition should not required to obtain hospital records, and actual appearance by the records custodian and/or attorneys should not be required and that the scope of the records available for discovery should not be changed.

2. The Council should address whether other records should also be made available without a required appearance by the records custodian, without a required deposition and via a mail in procedure as with hospital records, with the same notice and opportunity to object as currently provided in ORCP 55, both for non-hospital records and for hospital records.

3. The Committee is in general agreement with the concepts expressed by Art Johnson that it would be desirable to develop a procedure that would require hospital records to be produced only once in litigation (with an appropriate opportunity to require subsequently generated hospital records to be produced as well) with an obligation on the party obtaining them to make them available to other parties in the case for a reasonable charge (probably the normal copy cost charge plus a reasonable share of the expense of getting the records in the first instance).

4. An issue which may or may not be appropriate for consideration by the Council, but is certainly faced by practitioners is the cost charged by records custodians for hospital records and, in some instances, other records as well. Some facilities provide the records for the subpoena fee only. Others supply the records for a subpoena fee and reasonable [something less than $.50 per page] copy costs. Others charge a rather arbitrary fee for the production of the records in addition to whatever is supplied as a subpoena fee. Some clarification in

this as to what the charges can and/or should be made would be helpful to all.

5. Lastly, the most recent discussion by the Committee suggests that perhaps some of the issues raised to date by Art Johnson and others can be simplified if we consider the produce-ability of the records versus the admissibility of the records in evidence.

Our Committee is anxious to work with the Council on any and all of these Rule 55 issues in the future, but we agree with Karen Creason's most recent correspondence of June 8, 1992, in which she suggests that all of these issues be considered simultaneously and after the next Legislative session by the Council, with an opportunity for input by all concerned parties.

With respect to confidentiality, as indicated above, the Committee does not have a copy of and has not, therefore, had an opportunity to review Justice Graber's proposal. However, the topic of confidentiality and/or secrecy in personal injury actions has been discussed both with respect to protective orders for materials obtained in discovery in such actions and secrecy/confidentiality of settlement agreements. There is no agreement on our Committee with respect to either topic. There are strong feelings on both sides of each issue that seem to be split along "party lines" between plaintiff's trial lawyers and defense trial lawyers. It's the Committee's feeling that this needs to be studied in more detail and that no action should be taken until that occurs.

Very truly yours,

DENNIS JAMES HUBEL

DJH:sb

cc: Karen Creason
Stephen Thompson
Maurice J. Holland

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April 29, 1992

APR 30 1992

A.M. 7 8 9 10 11 12 1 2 3 4 5 6 P.M.

Janice M. Stewart, Esquire
McEwen, Gisvold, Rankin & Stewart
1600 Standard Plaza
1100 S.W. Sixth Avenue
Portland, OR 97204

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.

KSJ/jh

AMENDMENT TO ORCP 36 C.(2)

C.(2). A party may disclose materials or other information covered by a protective order issued under subsection (1) above to a lawyer representing a client in a similar or related matter if the party first obtains a court order, after notice and an opportunity to be heard is afforded to the parties or persons for whose benefit the protective order has been issued. Disclosure shall be allowed by the court except for good cause shown by the parties or persons for whose benefit the protective order has been issued. No order shall be issued allowing disclosure unless the attorney receiving the material or information agrees in writing to be bound by the terms of the protective order.

PERKINS COIE

A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
U.S. BANCORP TOWER, SUITE 2500 • 111 SOUTHWEST FIFTH AVENUE • PORTLAND, OREGON 97204
TELEPHONE: (503) 295-4400

June 12, 1992

BY FACSIMILE: (503) 274-9457

Henry Kantor, Esq.
Pozzi, Wilson, Atchison,
O'Leary & Conboy
1400 Standard Plaza
1100 S.W. Sixth Avenue
Portland, Oregon 97204-1087

Re: Changes to ORCP 36C - Proposed Senate Bill 579

Dear Henry:

The subject amendments are on the agenda of the Council on Court Procedures for its meeting in Ashland tomorrow. I am a member of the Executive Board of the Oregon Association of Defense Counsel and as I only became aware of the timing of your meeting yesterday, I apologize for the lateness of this letter. I have been asked to advise the Council that the OADC opposes provisions that would shift the burden of maintaining the secrecy of information in sealed filings to the party claiming confidentiality.

We believe that there are three important reasons that militate against shifting the burden. The first is fundamental fairness to litigants. A party to litigation must often disgorge a great deal of confidential and sensitive business information because it has been sued and because our system provides for wide-ranging discovery. In most cases, this information is disclosed only because of the suit and the discovery orders of court. In this context, we do not believe that the mere filing of a suit and compliance with discovery demands is sufficient reason to burden a person or corporation with the threat that its secrets will thereafter be made public unless it can be shown to the satisfaction of an unknown judge that the documents should be kept private. We believe that a party seeking to open sealed files should be the appropriate party to show why they should be opened and why private information should be made public. If there really is a good reason for doing this, a court, though possibly reluctant, can be expected to do the right thing.

[09901-0001/PA921640.009]

TELEX: 32-0319 PERKINS SEA • FACSIMILE: (503) 295-6793
ANCHORAGE • BELLEVUE • LOS ANGELES • SEATTLE • SPOKANE • WASHINGTON, D.C.

Our second reason for opposing these provisions impacts both the plaintiffs' and the defense bars. We believe such a provision may have the effect of adding to the expense of every litigation in which there is confidential and proprietary business information because parties with such secrets will be more aware that their documents may be made public and, thus, increase the intensity of "discovery wars" in the first instance. While this may seem unlikely, I can assure you that I have had a number of clients who are extremely militant in protection of their trade secrets and other confidential business information. Sometimes, such information is the very reason a business is doing well, and disclosure without protection is unthinkable to such clients. In that event, they will see the discovery process as a struggle for their continued existence and litigate accordingly.

A final reason for our opposition is that we believe there is a significant potential that settlements will be discouraged because litigants' arrangements with the approval of the court for maintaining confidentiality will be undermined. I have had numerous lawsuits in which the maintenance of confidentiality was a fundamental basis upon which settlement was reached. If there is a real risk of disclosure of confidential information, it may well be that settlements will not be concluded and litigation will be made to drag on because litigants will perceive that the trial judge in a pending case would be more reluctant to open current files than inactive files.

It is a hackneyed, but appropriate expression that "if it ain't broke, don't fix it!" We are simply unaware that the current system for obtaining relief from protective orders has enough problems that it should be changed.

Very truly yours,

Paul F. Fortino

PTF:jlp

CIRCUIT COURT OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
EUGENE, OREGON 97401

JACK L. MATTISON
JUDGE

687-4257

RECEIVED
JUL 16 1992
KANTOR AND SACKS

June 26, 1992

Mr. Henry Kantor
Attorney at Law
900 SW 5th Avenue, Suite 1437
Portland, OR 97204

Re: ORCP 69A

Dear Henry:

The case of Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990), which interprets ORCP 69A, was brought to my attention this morning during our trial call, and it may be that the Counsel should take a hard look at 69A in light of the holding in that case. I should have been aware of it prior to today, but was not, and I would guess that my ignorance has a lot of company among members of both our bench and bar.

My situation this morning was as follows. A domestic relations case involving a decree modification issue was on today's trial docket. The responding party was pro se, but had made an appearance and had received a written trial notice from our calendar clerk. I was told that he had informed the moving party yesterday that he would not be appearing for trial, but that is not of much legal significance except perhaps as an indication that he had, in fact, received the trial setting notice. When I advised the moving party's attorney I would assign the case out to a judge for a prima facie hearing, he allowed as how he would like to do that, but under the Van Dyke ruling, he believed he had to give the respondent ten days notice of his intent to take a default before he could proceed any further. I then read the opinion, and while 69A has been amended since the case was decided, it is pretty clear that he is right.

As a consequence, although the case was set for trial and proper notice was given to all parties, the only effect the trial date has had was to trigger the mailing of a ten day notice of intent to take a default - to a party who voluntarily chose not to appear for trial. So, the case is now in a state of limbo until the plaintiff's attorney jumps through the ORCP 69 hoops.

This section was amended while I was on the Counsel, and I do not recall any discussion about it having this effect in this not uncommon fact situation, but if anything, the changes that were made from the 1988 version strengthen the Van Dyke interpretation.

I would appreciate the Counsel considering amending 69A in a manner that would eliminate any requirement for any notices of any kind in the situation I had this morning, and the situation Judge Deiz had in Van Dyke. When a defendant has been served, has filed an appearance, has received notice of the trial date, and then fails to appear for trial, a court should be able to allow the moving party, who has appeared ready for trial, to proceed to put on a case in support of the allegations of the complaint or petition, and the court should also be able to enter an appropriate judgment. ORCP 71 is always available to the other side.

A copy of the Van Dyke opinion is attached, and thank you for your consideration of this request.

Very truly yours,

Jack Mattison
Presiding Judge

JM/rl

cc: Hon. Win Liepe

EDMONDS, J.

Petitioner moves for reconsideration of our opinion in *Mercer Industries v. Rose*, 100 Or App 252, 785 P2d 385 (1990). We held that the Board erred when it refused to award attorney fees to claimant after claimant actively litigated the issue of responsibility. Petitioner argues that claimant is not entitled to an employer-paid attorney fee, because his right to compensation was never in jeopardy.

Claimant's entitlement to receive compensation was resolved before the hearing when an order of responsibility under *former* ORS 656.307,[1] was issued. ORS 656.386(1) provides, in pertinent part:

> "In all cases involving accidental injuries where a claimant finally prevails in an appeal to the Court of Appeals or petition for review to the Supreme Court from an order or decision *denying the claim for compensation*, the court shall allow a reasonable attorney fee to the claimant's attorney. In such rejected cases where the claimant prevails finally in a hearing before the referee or in a review by the board itself, then the referee or board shall allow a reasonable attorney fee." (Emphasis supplied.)

Because claimant did not seek review from an order denying compensation, he is not entitled to attorney fees under ORS 656.386(1). *Shoulders v. SAIF*, 300 Or 606, 611, 716 P2d 751 (1986). To the extent that *SAIF v. Phipps*, 85 Or App 436, 737 P2d 131 (1987), is inconsistent with this opinion, it is overruled.

Motion for reconsideration allowed; former opinion modified to affirm on cross-petition and adhered to as modified.

[1] ORS 656.307 was amended in 1987, after the hearing in this case, to include a provision for [illegible] of attorney fees in responsibility hearings. *See* ORS 656.307(5).

Argued and submitted May 25, reversed and remanded for further proceedings August 8, reconsideration denied September 26, 1990, petition for review denied October 23, 1990 (310 Or 476)

Lyle H. VAN DYKE,
Myrtle R. Van Dyke, Frederick G. Witham
and Rest-A-Phone Corporation,
Respondents,

v.

VARSITY CLUB, INC.,
Appellant.

(A8606-03623; CA A60891)

796 P2d 382

Action was brought alleging conversion, trespass and interference with business. When defense counsel did not appear on trial date for which notice had been mailed to counsel for both sides, the Circuit Court, Multnomah County, Mercedes Deiz, J., entered judgment for plaintiffs and defendant appealed. The Court of Appeals, De Muniz, J., held that: (1) evidence including presumption of receipt from correctly mailed notice of trial date supported conclusion that defendant received sufficient notice of scheduled trial that defense counsel's failure to appear was not excusable neglect warranting setting aside of judgment, but (2) trial court did not have authority to proceed with trial in absence of defendant that had engaged in extensive motion practice, but rather, should have proceeded under rule governing default that requires ten days' written notice of intent to apply for judgment when party has appeared in action.

Reversed and remanded.

1. Evidence—Presumptions—Rebuttal of presumptions of fact

Evidence permitted conclusion that civil defendant did not defeat presumption of delivery of notice of trial date which arose from showing that court properly mailed notice to defense counsel at his correct address and notice was not returned undelivered to court, although defense counsel claimed that he never received notice, so failure of defense counsel to appear at scheduled trial would not be considered excusable neglect warranting setting aside of judgment for plaintiffs. ORCP 71B.(1)(a); OEC 311(1)(b, m, p, q).

2. Trial—Course and conduct of trial in general—Presence of parties and counsel—Judgment—By default—Requisites and validity

Trial court did not have authority to proceed with scheduled trial in absence of defendant, where defendant had engaged in extensive motion practice, but failed to appear and defend at trial; rather, court should have proceeded under rule providing for default, which requires giving ten days' written notice of intent to apply for judgment with respect to party who has appeared in action. ORCP 69.

3. Judgment—By default—Requisites and validity

Failure of litigant who has pled to appear and defend at trial is regulated by civil rule providing for default. ORCP 69.

CJS, Evidence § 115.

Appeal from Circuit Court, Multnomah County.

Mercedes Deiz, Judge.

Patrick N. Rothwell, Portland, argued the cause for appellant. With him on the briefs was Hallmark, Keating & Abbott, P.C., Portland.

Craig D. White, Portland, argued the cause and filed the brief for respondents.

Before Riggs, Presiding Judge, and Edmonds and De Muniz, Judges.

DE MUNIZ, J.

Reversed and remanded for further proceedings not inconsistent with this opinion.

DE MUNIZ, J.

Defendant did not appear for trial, and the court entered a judgment for plaintiffs. Defendant contends that the trial court should have granted its motion to set aside the judgment under ORCP 71B. We reverse.

On June 19, 1986, plaintiffs filed a complaint alleging conversion, trespass and interference with plaintiffs' business by defendant. After a series of ORCP 21 motions by defendant and repleadings by plaintiffs, plaintiffs filed a third amended complaint on July 20, 1987. Defendant filed its answer on July 28, 1987.

A trial date was set for March 13, 1989. The circuit court sent computerized trial notices to the correct addresses of the attorneys for both sides. Plaintiffs' counsel received the notice and appeared in court on March 13, 1989. Defendant's counsel did not appear. The trial court telephoned defense counsel's office but did not reach him. After waiting two hours, the trial court proceeded without defense counsel, took plaintiff's testimony and entered a judgment against defendant. Subsequently, defendant moved under ORCP 71[1] for relief from the judgment. The court denied the motion.

1. Defendant maintains that its motion to set aside the judgment should have been granted, because its counsel never received notice of the trial and, therefore, counsel's failure to appear was "excusable neglect." ORCP 71B(1)(a). The record shows that the circuit court properly mailed the notice to defendant's attorney at his correct address. The notice was not returned undelivered to the court, which was shown as the sender address on the notice. When a notice is duly directed and mailed, it is presumed to have been received in the regular course of the mail. OEC 311(1)(q); *see also* OEC 311(1)(b), (m) and (p). The trial court considered that presumption in regard to defendant's counsel's claim that he never received the notice. It concluded that the motion to set aside the judgment should be denied. There were sufficient grounds for the trial

[1] ORCP 71B provides, in pertinent part:

"(1) On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; * * * or (d) the judgment is void[.]"

court to conclude that defendant did not defeat the presumption of delivery of the notice. Therefore, the court acted within its discretion in concluding that defendant received sufficient notice. *Pacheco v. Blatchford,* 91 Or App 390, 392, 754 P2d 1219, *rev den* 306 Or 660 (1988).

Defendant next contends that "[t]he March 13 proceeding resulted in a judgment by default" and that the judgment was void, ORCP 71B(1)(d), because "[p]laintiff failed to comply with the notice requirements of ORCP 69 * * *."[2] Despite the fact that defendant mischaracterizes what happened in the trial court, he is correct. Although the word "default" was used several times at the March 13 proceeding, the trial judge clarified the type of judgment that she intended to enter:

> "An order of default may be entered against Varsity Club—well, actually, strike that. *There's no order of default.* They made an appearance. They've appeared, but they haven't appeared before the trial—for the trial itself." (Emphasis supplied.)

2, 3. The trial court did not intend to act under ORCP 69, but, rather, intended to proceed with the trial in the absence of defendant. However, the trial court had no authority to proceed in that manner. This is not the usual ORCP 69 case where a party fails to plead or to appear properly at any stage

[2] At the time of trial, ORCP 69 provided, in pertinent part:

"A. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, and these facts are made to appear by affidavit or otherwise, the clerk or court shall order the default of that party.

"* * * * *

"B.(2) In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against a minor or an incapacitated person unless they have a general guardian or they are represented in the action by another representative as provided in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits. In the event that it is necessary to receive evidence prior to entering judgment, and if the party against whom judgment by default is sought has appeared in the action, the party against whom judgment is sought shall be served with written notice of the application for judgment at least [illegible] days prior to the hearing on such application, unless shortened by the court, prior to the hearing on such application."

of the proceeding. Rather, defendant engaged in extensive motion practice but failed to appear and defend at trial. Although the phrase "otherwise defend" in ORCP 69 logically could be read not to include a situation when a litigant fails, after pleading, to appear and defend at trial, *see, e.g., 6 Moore's Federal Practice* 55-13, ¶ 55.03(1) (2d ed 1988) the commentary to the rule indicates that, in Oregon, the failure to appear and defend *is* regulated by ORCP 69.

ORCP 69 was meant to be broader than the statute that it replaced, *former* ORS 18.080, which merely addressed default for failure to answer.[3] The commentary to the proposed rule noted that "[t]his rule would apply to anyone required to file a responsive pleading to a claim and to any person who failed to appear and defend at trial." *Council on Court Procedures, Oregon Rules of Civil Procedure and Amendments, Preliminary Drafts and Final Draft,* Commentary to Draft of Proposed Rules 67-74 at page 40 (October 15, 1979). Moreover, the commentary to the final rule provides, in pertinent part:

> "This rule is a combination of ORS 18.080 and Federal Rule 55. Under section 69A. *all* defaults by a party against whom judgment is sought would be covered by this rule. ORS 18.080 referred only to failure to answer. A failure to file responsive pleading, *or failure to appear and defend at trial,* or an ordered default under Rule 46, *would be regulated by this rule.*" Commentary to Rule 69, reprinted in Merrill, *Oregon Rules of Civil Procedure: 1990 Handbook* 217. (Emphasis supplied.)

Thus, under the circumstances existing here, where the defendant and counsel, without explanation, failed to appear for trial, the court should have proceeded under ORCP 69. Although an order of default could have been entered, ORCP 69B(2) required that plaintiffs give defendant 10 days written notice of the intent to apply for a judgment. That was

[3] *Former* ORS 18.080(1) provided, in relevant part:

"Judgment may be had upon failure to answer, as prescribed in this section. When it appears that the defendant * * * has been duly served with the summons, and has failed to file an answer with the clerk of the court within the time specified in the summons, or such further time as may have been granted by the court or judge thereof, the plaintiff shall be entitled to have judgment against such defendant * * *."

not done. The trial court erred in not proceeding under ORCP 69.

Reversed and remanded for further proceedings not inconsistent with this opinion.

Argued and submitted May 30, reversed August 8, 1990

STATE OF OREGON,
Respondent,
v.
MATTIE ANN MARTZ,
Appellant.
(10-88-04062; CA A61146)
795 P2d 616

Appeal from Circuit Court, Lane County.

George J. Woodrich, Judge.

Henry M. Silberblatt, Salem, argued the cause for appellant. With him on the brief was Sally L. Avera, Public Defender, Salem.

Michael Livingston, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Before Joseph, Chief Judge, and Warren and Rossman, Judges.

PER CURIAM

Reversed.

return.

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

LEE JOHNSON
JUDGE
DEPARTMENT NO. 10

COURTROOM 528
(503) 248-3165

August 20, 1992

Henry Kantor, Chair
Council on Court Procedures
1100 Standard Plaza
1100 S.W. Sixth Avenue
Portland, OR 97204

Dear Henry:

This letter is to propose the following amendment to ORCP 60:

> "**Motion for a Directed Verdict.** Any party may move for a directed verdict [at the close of the evidence offered by an opponent or at the close of all the evidence] <u>at any time during the trial after the opponent has been fully heard</u>. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. If a motion for directed verdict is made by the party against whom the claim is asserted, the court may, at its discretion, give a judgment of dismissal without prejudice under Rule 54 rather than direct a verdict.

(The above material in brackets is to be deleted; the underlined material is new.)

This would conform ORCP 60 to Federal Rule 50(a)(1) and enable a trial judge to dispose of issues at any time during the

trial when it becomes apparent that there is no issue of fact and as a matter of law one side is entitled to prevail. This often occurs after opening statement. The trial judge should have means to dispose of these issues without having to continue the trial until close of the evidence.

To illustrate, I tried a case wherein Plaintiff advanced a multitude of legal theories, some legal and others equitable. I concluded in pretrial conference, that the gravamen of Plaintiff's claim was recision for mutual mistake and tried that claim. As to the other theories, I asked Plaintiff's counsel to make an offer of proof by summarizing the evidence he intended to offer and pointing up the inferences he wished me to draw. Based upon that presentation, and viewing the evidence most favorably to Plaintiff, I dismissed the other claims. The Court of Appeals affirmed the judgment on the recision claim; but, without reaching the merits, remanded the other claims for trial on the ground that they were "not in the posture for judgment." Harbert v. Riverplace Associates, Slip Opinion July 8, 1992.

Frankly, I have difficulty understanding the Court of Appeals decision. Plaintiff had opportunity to present her evidence in the most favorable light possible. The Court of Appeals may have been technically correct that summary judgment was inappropriate because ORCP 47 contemplates a written motion made 45 days prior to trial. However, ORCP 47 also gives the

trial court discretion to modify the time limits. Federal Courts have allowed summary judgment under identical conditions as in Harbert. FDIC v. Cover, 714 F. Supp. 455 (D. Kan. 1988) cited with favor in Moore, Federal Practice, Para. 50.03.

In any event, Plaintiff had presented his evidence by offer of proof and thus closed his case. A more liberal interpretation of ORCP 60 would permit a directed verdict under such circumstances. Finally, one must ask why did the Court of Appeals not treat the matter as harmless error and decide the issue on the merits.

The Court of Appeals, apparently, is preoccupied with the notion that the only time that it is appropriate to dispose of an issue is by judgment on the pleadings, summary judgment or after a full blown trial. See Harbert supra at p.3.
In Industrial Underwriters v. JKS Inc., 90 Or App 189 (1988), I allowed an oral motion for summary judgment at the conclusion of Plaintiff's opening statement. The case was again remanded without reaching the merits on the ground that summary judgment was improper at that stage of the proceedings. The Court of Appeals refused to treat the decision as a directed verdict. On remand, the case was assigned to another judge who, at the close of Plaintiff's case, allowed a directed verdict. I predict the same result will occur in Harbert.

Prior to 1991, Federal Rule 50(a)(2) was identical to ORCP 60 that a party could move for a "directed verdict at the

close of the evidence offered by an opponent. . .". Nonetheless, according to Moore, it was traditional to grant motions for directed verdict "(1) after the opening statement of adverse counsel, if by such statement it is clear that no question for the jury exists; (2) at the close of the evidence offered by an opponent; or (3) at the close of all the evidence. " According to Moore, the 1991 amendment was intended to make it clear that a directed verdict could be granted "at any time during the trial, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to the party's case. " Advisory Committee Note to the 1991 Amendments quoted in Moore, Federal Practice (1991).

The situation in which the proposed rule is most needed is the complex case where there are multitude of contentions by both sides. The proposed rule gives the trial judge a tool to sort out what are the valid contentions and present the case in some coherent form to the finder of fact.

Sincerely,

Lee Johnson

LJ/jim;ths
cc: Maury Holland
Acting Executive Director

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OF COUNSEL
WM. A. GALBREATH
HENRY KANTOR

RAYMOND J. CONBOY
(1930-1988)

PHILIP A. LEVIN
(1928-1967)

July 30, 1992

RECEIVED
JUL 30 1992
KANTOR AND SACKS

Henry Kantor
Attorney at Law
11th Floor
Standard Plaza
Portland, Oregon 97204

Re: Council on Court Procedures

Dear Henry:

I am enclosing a proposed amendment to ORCP 18 regarding the pleading of compensatory damages in personal injury and wrongful death claims and punitive damages in all cases. As you will recall, 1987 Oregon Laws Ch. 774 (SB 323) amended ORCP 18 to preclude pleading a dollar amount of noneconomic damages. I had the privilege of reporting on changes in the law regarding civil procedure and practice in 1987 Oregon legislation (Oregon CLE 1987). In reviewing Senate Bill 323, I noted that "in response to a concern that large prayers for damages in personal injury cases were being misused and were contributing to increased verdicts and settlements, the legislature abolished the prayer for 'noneconomic' damages." The Council on Court Procedures amended Rule 18 last term, and re-established the pleading of a specific dollar amount of damages.

The proposal to not plead a specific dollar amount of damages came from various groups advocating "tort reform." The plaintiff's bar neither advocated nor sought such a law. However, the concerns that pleading of damages in injury and death cases were being misused still seem valid. Insurers and defendants are concerned that verdicts and settlements are inflated. Plaintiffs feel that, in some cases, a defendant will use the prayer to make the plaintiff look greedy. Also, news reports about filed cases uniformly concentrate on the amount of claim. You may recall that a lawsuit for 40 million dollars was recently filed. The preoccupation with size of claims rather than the reason for the claims contributes to erosion in the confidence of our civil justice system.

The Council should amend Rule 18 to provide that the amount of compensatory damages in injury and death cases and punitive damages in any case not be pled. I have generally followed the procedure adopted by the legislature in 1987, with some changes. The amount of punitive damages in all cases and the amount of compensatory damages in injury and death cases shall not be pleaded. It is especially appropriate in cases in cities smaller than Portland, where it is not uncommon for a serious case to draw news attention when the case is filed. In all such cases, it does not seem fair that defendant be tarnished by the fact that a suit for a large sum of money has been filed. It seems if there is something of public interest, it should be the issues in the case.

My proposal also differs from the 1987 legislation in that the amount claimed in the statement of damages would clearly set a maximum of recoverable damages. Rule 23 would govern any attempt to amend the statement of damages. Unlike the 1987 version, the manner in which the amount sought could be brought to the court's attention is specifically provided.

I will be at the Council's August 1, 1992 meeting, and ask that the proposal be considered. A copy of the proposal and a copy of the rule as amended by Senate Bill 323 are enclosed. Thank you for your consideration.

Very truly yours,

Robert J. Neuberger

pk
Enclosures
xc: Maurice Holland

RULE 18. CLAIMS FOR RELIEF

A pleading which asserts a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain:

A. A plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition.

B. A demand of the relief which the party claims; if recovery of money or damages is demanded, the amount thereof shall be stated, **except as provided in Section C of this Rule;** relief in the alternative or of several different types may be demanded.

C(1) The amount of damages sought in a civil action for personal injuries or wrongful death shall not be pleaded in a complaint, counterclaim, cross-claim, or third-party claim.

C(2) The amount of punitive or exemplary damages sought in any civil action shall not be pleaded in a complaint, counterclaim, cross-claim, or third party claim.

C(3) The prayer for damages for personal injuries, wrongful death, and for punitive or exemplary damages, shall contain only a demand for the payment of damages without specifying the amount.

C(4) The party making the claim may supply to any adverse party a statement of the amount claimed for such damages, and shall do so within ten (10) days of a request for such statement. Amendment of the statement of damages is governed by ORCP 23. Unless otherwise ordered by the court, the request and the statement shall not be made part of the trial court file until damages are determined. The statement shall have the same effect as if it had been pleaded in a complaint, counterclaim, cross-claim, or third party claim.

Effective 9-26-87 to 12-31-91

RULE 18. CLAIMS FOR RELIEF

Claims for Relief. A pleading which asserts a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain:

A(1) A plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition.

A(2) A demand of the relief which the party claims; if recovery of money or damages is demanded, the amount thereof shall be stated, except as provided in section B of this rule; relief in the alternative or of several different types may be demanded.

B(1) The amount sought in a civil action for noneconomic damages, as defined in section 6 of this Act, shall not be pleaded in a complaint, counterclaim, cross-claim or third-party claim.

B(2) The prayer in such actions shall contain only a demand for the payment of damages without specifying the amount.

B(3) The party making the claim may supply to any adverse party a statement of the amount claimed for such damages, and shall do so within 10 days of a request for such statement. The request and the statement shall not be made a part of the trial court file.

[Amended effective September 26, 1987.]

M E M O R A N D U M

DATE: July 31, 1992

TO: COUNCIL ON COURT PROCEDURE

FROM: WINFRID K. LIEPE

RE: ALTERNATIVE TO RULE 57B ON ALTERNATE JURORS

A. Empaneling alternate jurors requires additional time, incurs some additional cost and raises questions under what circumstances alternate jurors should participate in deliberations.

B. Problems arise when a juror becomes sick or is absent, when no alternate jurors have been empaneled. Days of trial and trial preparation may be lost if one of the parties will not agree to continue without the absent juror.

The attached proposal offers solutions for both sets of problems:

(1) Abolish provisions for alternate jurors (by deleting ORCP 57F), and

(2) Provide for continuation of trial with less than twelve jurors (and with 5 out of a 6 member jury).

PROPOSED AMENDMENTS OF ORCP 58D AND 59G(2)

58D Proceedings when juror is sick, injured, impaired or absent.

D(1) The court may discharge a juror after formation of the jury and before verdict if the court determines that

D(1)(a) The juror is or has become sick, injured or impaired, so as to be unable to perform the duty of a juror without undue delay or disruption of trial; or

D(1)(b) The juror is absent without prior leave of court and that such absence is likely to result in undue delay or disruption of trial.

D(2) When a juror is so discharged the court may order any of the following:

D(2)(a) Continue the case without the discharged juror with the consent of the parties provided that the court and the parties agree regarding the number of the remaining jurors required to concur on a verdict;

D(2)(b) Continue the case without the discharged juror without the consent of the parties provided that after discharge of the juror the jury will be comprised of not less than eight (8) jurors when the original jury was comprised of ten (10) to twelve (12) members, and not less than five (5) jurors when the original jury was comprised of six (6) to nine (9) members;

D(2)(c) Swear in a new juror and begin the trial anew;

D(2)(d) Discharge the rest of the jurors and impanel a new jury;

D(2)(e) Terminate the trial and provide for setting a new trial date.

D(3) When the court orders trial to continue under section D(2)(b) of this rule, the verdict shall require the concurrence of three fourth of the remaining jurors, but in no event less than five (5).

59G(2) Number of Jurors Concurring. In civil cases three-fourths of the jury may render a verdict; but the number of jurors required to concur on a verdict shall in no event be less than five (5).

Note: The proposed amendment of ORCP 58D incorporates some of the provisions of the present rule; but the language is substantially new. In the proposed amendment of ORCP 59G(2) only the underlined language is new.

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.

Attachment C

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

TENTATIVELY ADOPTED ORCP AMENDMENTS

TENTATIVELY ADOPTED ORCP AMENDMENTS

EXCLUSION OF WITNESSES AT DEPOSITION

Excerpts from the late Fred Merrill's 9-26-91 memorandum:

> "EXCLUSION OF WITNESSES AT DEPOSITION. Ron Marceau passed along a question raised by a Bend judge by letter of February 6, 1991 ... The judge felt that the ORCP did not clearly cover the exclusion of witnesses during the deposition. ORCP 39 D provides for oral depositions ... 'Examination and cross-examination of witnesses may proceed as permitted at trial.' I would interpret this as providing that Rule 615 (ORS 40.385) of the Oregon Evidence Code and all other Oregon Evidence Code provisions regulating examination of witnesses at trial apply to the examination of a witness at deposition. Rule 615 provides that at the request of a party the court may order other witnesses excluded from the trial, except (a) a party, (b) an officer or employee of a party which is not a natural person designated as its representative, or (c) a person whose presence is shown by a party to be essential to the presentation of the party's cause (usually an expert).
>
> The federal rules are slightly clearer. FRCP 30(c) says 'Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence.' We could change our rule to specifically refer to the Oregon Rules of Evidence."

EXCERPTS FROM MINUTES OF COUNCIL'S 12-14-91 MEETING:

> Agenda Item No. 3: Exclusion of witnesses at depositions (Janice Stewart) (see attached memorandum from Janice Stewart dated November 4, 1991). Janice Stewart discussed whether ORCP 36 C(5), ORCP 39 D, or ORE 615 give the trial court authority to exclude witnesses from depositions for the same reason that witnesses may be excluded from trial. Her conclusion had been that the rules are unclear and that her recommendation would be to amend ORCP 39 D to clarify the question (see page 4 of her memorandum).
>
> The Executive Director asked whether this would be a rule of evidence and beyond the rulemaking power of the Council. Council members pointed out that the rule did not deal with the admission or exclusion of evidence at trial but with the procedure of conducting a deposition. Henry Kantor asked whether the rule would allow the court to control the number of representatives of a corporation that could attend a deposition. Janice Stewart said the intent was to have the same rule for persons attending depositions that applies to trials. Mike Phillips asked if the rule required a court order for exclusion or was mandatory in every case. After further discussion, the Executive Director was asked to confer with Janice Stewart and suggest some language that addressed the concerns expressed by Council members.

EXCERPT'S FROM THE LATE FRED MERRILL'S 1-27-92 MEMORANDUM:

3. Exclusion of witnesses at depositions

After discussion with Janice Stewart, we suggest the following as a redraft of ORCP 39 D. This draft attempts to control presence of witnesses at depositions in light of the concerns expressed by the Council at the last meeting:

> ORCP 39 D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Oregon Evidence Code. Unless the court orders otherwise, only the following persons may be present during the deposition: (1) attorneys representing the parties, (2) any party who is a natural person, and (3) an officer or employee of a party which is not a natural person designated as its representative by its attorney.

The existing rule says that examination and cross-examination may proceed as at trial. This draft refers to the Oregon Evidence Code. The Oregon Evidence Code is defined in ORS 40.010.

The draft defines who ordinarily may be present at deposition and requires a court order to change the usual rule. ORE 615 allows the court to direct that witnesses be excluded from trial, except for certain categories of witnesses. The deposition categories of normal attenders are generally the categories that cannot be excluded from trial under ORE 615. It is the opposite of ORE 615 because a court order is necessary to change the limitation not to create it.

The categories used differ slightly between this draft and ORE 615. ORE 615 does not specifically mention attorneys. This draft would allow any attorney representing a party to be present, not just an attorney of record for a party. There is no limit upon the number of attorneys that may attend for one party. The rule would, however, allow only one corporate representative without court order. This is consistent with ORE 615.

ORE 615 says that the court cannot exclude persons whose presence is essential to the presentation of a party's cause. This category is not used for depositions because it is too vague to be applied without court discretion. It would provide one basis for arguing that the court should allow an additional person to attend the deposition.

Other than a court order, if a party wants to have additional persons in attendance, the stipulation of all parties to the case would be necessary.

EXCERPTS FROM MINUTES OF COUNCIL'S 2-8-92 MEETING (DISCUSSION OF ABOVE PROPOSAL):

Agenda Item No. 3: Exclusion of witnesses at depositions (Janice Stewart). Janice Stewart said the draft set out on page 4 of the Executive Director's memorandum specified those who could be present at depositions and that unless the court orders otherwise, only those people may be present. She said subsection (1), which states that attorneys can always be present during deposition, was not taken out of ORE 615 but that subsections (2) and (3) were taken out of ORE 615. A discussion followed.

Judge Liepe wondered whether an expert whose deposition was next could listen in on a deposition; Janice Stewart said that a court order would have to be obtained or the parties would have to agree to it. Bernie Jolles wondered whether the witness would be able to have an attorney present. Janice Stewart suggested including language specifying "attorneys of any of the parties or the deponent".

Excerpts from 2-8-92 minutes:

The Chair suggested, to be consistent with the Council's approach in other rules, prefacing the second sentence of the draft with, "Unless the parties stipulate or the court orders otherwise," rather than "Unless the court orders otherwise,". Janice Stewart agreed to make that change also.

The Chair pointed out that ORE 615 has two categories which the proposed amendment to 39 D does not contain: a victim in a criminal case and a person whose presence is shown by the party to be essential to the presentation of the parties' cause, which would include expert witnesses and representatives of non-natural persons. He asked whether the intent was that one cannot bring an expert or a second corporate representative without either the parties' stipulation or a court order. Janice Stewart said the thought was that it was better not to have that specified in the rule and to leave it up to the parties to stipulate or the court to order otherwise. Judge Liepe wondered which would be the better approach: to say a court order is needed to exclude witnesses or that a court order is needed to let them be there. Janice Stewart stated the reason the rule was brought to the Council's attention was the problem currently with the court's authority under the rule that limits depositions. Mike Phillips felt that to have a rule which automatically excluded everyone from a deposition except a limited number of people went far beyond the initial concerns. Bernie Jolles stated that another issue had been raised and that was the intimidation question. Judge Kelly wondered whether or not legal assistants would be allowed to attend a deposition. Further discussion followed.

Attorney Dennis Hubel, speaking on behalf of the OSB Procedure & Practice Committee, stated he thought the amendment to ORCP 39 D as drafted provides a mechanism to limit it to a corporate representative and that would need interpretation if someone wanted to press the issue. He was in favor of leaving it up to the judge to decide how many corporate representatives could attend a deposition.

Judge Barron suggested that the word "exclusion" be added so that the first sentence would be prefaced by: "Examination, cross-examination and exclusion of witnesses may proceed ...".

The Chair asked whether the intent of the draft was to exclude the remainder of existing Rule 39 D. Janice Stewart stated that was not the intent and that perhaps it would be better to break the rule up into subsections.

Judge Barron raised another point: definition of parties. He wondered whether beneficiaries in a wrongful death action would be allowed to be present at a deposition.

The Council discussed whether adding the word "exclusion" would accomplish the intent of the amendment. Janice Stewart said the problem was that ORE 615 is taken directly from the federal rule and that there are federal cases that go both ways as to whether that rule applies to depositions. Bruce Hamlin said that if the concern was that by just adding the word "exclusion" to the first sentence of 39 D does not make it clear that the court has the power, a single sentence after the first sentence of existing 39 D could be added: "At the request of a party or a witness, the court may order persons excluded from the deposition."

The Chair asked for comments on the proposed language, "Examination, cross-examination, and exclusion of witnesses may proceed in the manner as permitted by trial," and adding the existing language in 39 D., with perhaps a reference back to Rule 36 C(5) to take care of the intimidation problem. Janice Stewart stated it would mean that you are only going to be excluding people who are witnesses and then the issue would be who are witnesses; she thought it would be a problem to simply refer to ORE 615 because it is not always clear at deposition who will be a witness at trial.

A motion was made and seconded to add the following language following the first sentence of existing 39 D: "At the request of a party or a witness, the court may order persons excluded from the deposition." A discussion followed regarding whether the sentence should be prefaced with "Upon motion". Maury Holland said he thought that people on all sides of a case want to have stated in the rule the category of people who will be present at deposition. Janice Stewart wanted to make sure that the amendment would not merely incorporate Rule 36 C, i.e. that it should be broader than Rule 36 C.

A vote was taken on Bruce Hamlin's motion to add the following sentence after the first sentence of existing 39 D: "At the request of a party or a witness, the court may order persons excluded from the deposition." The motion passed with 10 in favor and 3 opposed. Judge McConville said he was in favor of establishing categories and that was why he voted against the motion.

After a lengthy discussion of Agenda Item No. 3 (EXCLUSION OF WITNESSES AT DEPOSITION) at its February 8, 1992 meeting at the State Capitol in Salem, the Council voted to add the underlined boldface language to Rule 39 D shown below:

DEPOSITIONS UPON ORAL EXAMINATION
RULE 39

* * * *

D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. **At the request of a party or a witness, the court may order persons excluded from the deposition.** The person described in Rule 38 shall put the witness on oath. The testimony of the witness shall be recorded either stenographically or as provided in subsection C(4) of this rule. If testimony is recorded pursuant to subsection C(4) of this rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G(2) of this rule, until the final disposition of the action. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor[e]. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the record. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

* * * *

* * * *

Excerpts from the late Fred Merrill's 9-26-91 memorandum:

"7. **RECOVERY OF COST OF COPYING PUBLIC RECORDS.** Peter E. Baer wrote to the Chief Justice relating to the correct interpretation of 'the necessary expense of copying any public record, book or document used in evidence on the trial' which is listed as a recoverable cost and disbursement in ORCP 68 A(2). Mr. Baer apparently felt that he should be allowed to recover the cost of copies of pleadings and some other documents which he submitted, but his claim was disallowed by a trial judge. The Chief Justice passed the letter on to the Council (attached as Exhibit 9).

The reference to public records copies as recoverable disbursements was taken from the former statute governing costs in legal actions, ORS 20.020. The language did not appear in the Field Code and was not in the original 1853 Oregon Code. It was added by Judge Deady in the 1862 revision of the civil code. As far as I can determine in a brief search, the language has never been interpreted by the Oregon appellate courts.

On its face, the key part of the language is 'necessary expenses' and 'used in evidence on the trial.' The copies for which costs are recoverable are those public records where a certified copy must be used at trial; that is, where a party cannot submit an original document because the original must remain in public custody. This is presently covered in the Oregon Evidence Code under Rule 1005, ORS 40.570:

> 'The contents of an official record or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 802 of this act.'

Rule 803(8), ORS 40.460 of the Evidence Code, makes such documents admissible despite the hearsay rule, and Rule 802 allows for authentication by certificate. Under this interpretation, only the cost of procuring certified copies of documents admitted into evidence under these provision of the Evidence Code would be recoverable. This would not cover the pleadings referred to by Mr. Baer. To make this clearer we might change the language to say: '... the necessary expense of securing and copying any public records admitted into evidence pursuant to Rule 1005 of the Oregon Evidence Code.'"

Excerpt from the late Fred Merrill's 1-27-92 memorandum (page 7):

"The following language is intended to limit application of the public records provision in ORCP 68 A(2) to situations where use of certified copies of public records was mandatory. The word 'necessary' in the existing rule is redundant.

> **Costs and disbursements.** "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; the compensation of referees; the [necessary] expense of copying of any public record, book or document [used as evidence on trial] admitted into evidence at trial pursuant to ORS 40.570 (Oregon Evidence Code, Rule 1005); ..."

After discussion under Agenda Item No. 8 at its 2-8-92 meeting, the Council voted to adopt the Executive Director's amendment above, but deleted the language "pursuant to ORS 40.570 (Evidence Code, Rule 1005)". The rule as amended is set forth below:

ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS RULE 68

A. **Definitions.** As used in this rule:

* * * *

A.(2) **Costs and disbursements.** "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; the compensation of referees; the [necessary] expense of copying of any public record, book, or document [used as evidence on the trial] admitted into evidence at trial; recordation of any document where recordation is required to give notice of the creation, modification or termination of an interest in real property; a reasonable sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation therein; and any other expense specifically allowed by agreement, by these rules, or by other rule or statute. The expense of taking depositions shall not be allowed, even though the depositions are used at trial, except as otherwise provided by rule or statute.

* * * * *

Excerpts from the late Fred Merrill's 1-27-92 memorandum:

"**ORS sections limiting ORCP 7 E.**

As requested, I did a computer search to see how many ORS sections changed the limits on who may serve summons found in ORCP 7 E. The only ORS section that modifies ORCP 7 E is ORS 180.260 (attached) which allows employees of the Department of Justice to serve summons and process in cases in which the state is interested. The statute was enacted by the 1989 Legislature. We could amend ORCP 7 E as follows:

> **By whom served; compensation.** A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor, **except as provided in ORS 180.260,** an officer, director, or employee of, nor atttorney for, any party, corporate or otherwise. ..."

At the Council's 2-8-92 meeting, it voted unanimously to adopt the above language. The rule as amended is set forth below:

SUMMONS
RULE 7

* * * *

E. By whom served; compensation. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor, **except as provided in ORS 180.260,** an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. Compensation to a sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in Rule 68.

* * * *

Excerpt from the late Fred Merrill's 9-26-91 memorandum:

> "**SUMMONS WARNING.** The State Bar Lawyer Referral Committee is suggesting a change in the warning to defendants in the summons which is required by ORCP 7 C(3). This was transmitted to us by a letter from Ann Bartsch dated May 21, 1991 (attached as Exhibit 20). The idea apparently came from the New Jersey Summons form. Since the most useful thing in the summons language is the suggestion that an attorney be contacted, this may be a good idea. Are there other referral services that should be mentioned? Should there be a specific reference to legal aid? The New Jersey language has several numbers."

Following is an excerpt from the minutes of the Council's 3-14-92 meeting, after which the tentative amendments to ORCP 7 C(3) are set forth:

> **Agenda Item No. 3: Summons warning - progress report (Judge Welch). Judge Welch reported that almost a year ago the Bar had received a letter saying that New Jersey had a summons telling people what the telephone number was for the New Jersey State Bar and the New Jersey Law Referral Services, giving telephone numbers on a county-by-county basis, and Judge Welch had taken it upon herself to try to find out the answer to an issue raised by Council members whether that language in the summons wasn't just another opportunity to have something wrong on the form and be the basis for a dismissal or default. Anne Bartsch of the OSB had called and written letters to try to find out whether New Jersey had experienced any problems; Ms. Bartsch learned that there had never been any problem in New Jersey with using that language in the summons.**
>
> **Judge Welch suggested the following language: "If you need a lawyer and you don't have a lawyer, call the Oregon State Bar Lawyer Referral Service." She pointed out that the Lawyer Referral Service of the Oregon State Bar is a completely integrated referral service.**
>
> **Judge Graber said she supported the idea of having language in the summons and moved that the following slightly different wording be adopted [which would be an amendment to ORCP 7 C(3)]:**
>
> > **"If you have questions, you should see [an attorney] a lawyer immediately. If you need help in finding a lawyer, you may call the Oregon State Bar's Referral and Information Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636."**
>
> **Judge Welch seconded the motion. After discussion, the motion passed unanimously.**

SUMMONS
RULE 7

* * * *

C.(1) **Contents.** The summons shall contain:

* * * *

C.(3) **Notice to party served.**

C.(3)(a) **In general.** All summonses, other than a summons referred to in paragraph (b) or (c) of this subsection, shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see [an attorney] a lawyer immediately. If you need help in finding a lawyer, you may call the Oregon State Bar's Referral and Information Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.

C.(3)(b) **Service for counterclaim.** A summons to join a party to respond to a counterclaim pursuant to Rule 22 D.(1) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see [an attorney] **a lawyer immediately. If you need help in finding a lawyer, you may call the Oregon State Bar's Referral and Information Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.**

C.(3)(c) **Service on persons liable for attorney fees.** A summons to join a party pursuant to Rule 22 D(2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see [an attorney] **a lawyer immediately. If you need help in finding a lawyer, you may call the Oregon State Bar's Referral and Information Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.**

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* * * *

Excerpts from the late Fred Merrill's 9-20-91 memorandum:

"**OATHS FOR DEPOSITIONS BY TELEPHONE.** Keith Burns wrote the Council on October 24, 1990 for the Oregon Court Reporters Association (attached as Exhibit 7). Questions have apparently arisen about court reporters administering oaths for depositions by telephone. He suggests adding a cross-reference in ORS 39 C(7) to the oath procedure specified in ORCP 38 C.

I think the Council intended that the procedure for administering oaths would be one of the 'conditions of taking testimony' designated in the court order under ORCP 37 C(7) allowing a deposition by telephone. It was anticipation of problems of this type that led the Council to require a court order before a deposition could be taken by telephone. On the other hand, the change suggested by Mr. Burns is relatively simple and consistent with court control of the telephone deposition. ORCP 38 states that the oath can be administered by anyone the trial judge designates."

At the Council's 2-8-92 meeting, the Council discussed extensively the late Fred Merrill's proposal set out below:

2. Oaths for depositions by telephone. After consulting with Keith Burns, I suggest that the following be added at the end of subsection 39 C(7);

"The oath or affirmation may be administered to the deponent, either in person or over the telephone, by a person authorized to administer oaths by the laws of this state, by a person authorized to administer oaths by the laws of the place where the deposition is taken, or by a person specially appointed by the court in which the action is pending. If the witness is not physically in the presence of the officer or person administering the oath, the oath shall have the same force and effect as if the witness were physically present before the officer. For purposes of this rule, subsection 46 A(1), subsection 46 B(1), subsection 55 C(1) and subsection 55 F(2), a deposition taken by telephone is taken at the place where the deponent is to answer questions propounded to the deponent."

The first sentence provides flexibility in administering the oath. It may either be done by someone at the questioning end of the telephone call or someone who is in the presence of the deponent. The second sentence is taken from the proposed amendment to Arizona Rule of Civil Procedure 30(c). It makes clear that an oath outside the presence of the person administering the oath is as effective as an oath in the presence of such person. The last sentence is a modified version of FRCP 30 C(7). It actually goes beyond the problem raised by Mr. Burns. There are a number of places in the ORCP where it may be important to determine where a deposition by telephone is being taken. Under the existing rule you could argue that the deposition is taken where the questions are asked or where the deponent is located. The draft follows the federal rule in opting for the location of the deponent.

To define when a deposition has been regularly taken, administration of an oath at either end of the telephone line and by a person authorized to administer oaths by either state or by the court should be adequate. The Oregon court rules can control what formalities must accompany a deposition in order to be valid and usable in Oregon Courts. ORCP 38 A and B identify the same persons as proper oath givers for depositions taken within and without the state.

Whether the provision would subject an out-of-state deponent to prosecution for perjury is less clear. For purposes of defining the crime of perjury in Oregon, Oregon law would control. A definition of a proper form of oath for a deposition in the ORCP would apply in determining whether the deponent had lied under oath. The crime of perjury could be committed by a person outside the state who is testifying by telephone.

One difficulty is that an absent foreign deponent would usually not be subject to arrest and prosecution within the state of Oregon. This difficulty could be addressed in several ways:

1. Prosecute the deponent in the state where the deponent was located during the deposition. Most states have a crime of perjury or false swearing that would involve making a false statement under oath. The state where the deponent is located has an interest in controlling any improper conduct committed within its borders. A deponent who intentionally testifies falsely in an Oregon judicial proceeding, after having a standard oath or affirmation administered by a person authorized to do so by Oregon law, is engaging in improper conduct.

2. Use extradition. If the perjury was serious enough to warrant prosecution of a foreign defendant, it probably is a crime subject to extradition.

3. Ignore the problem. Perjury prosecutions are so rare for depositions that, if there is a problem when oaths are administered to a foreign deponent by a local court reporter, it is more theoretical than actual.

It should be noted that the rules already contain a procedure that presents the same problem. ORCP 38 B provides that, for a deposition taken outside the state in a case pending in Oregon, the oath may be administered by a person appointed by the court. That person probably would not be someone authorized to administer oaths by the laws of the foreign state.

2-8-92 MEETING

Excerpts from minutes of meeting:

Agenda Item No. 2: Oaths for depositions by telephone (subcommittee report - Mike Phillips and Bruce Hamlin; letters from Kathryn Augustson and Stephen Thompson; see pages 1 and 2 of Executive Director's January 27, 1992 memorandum). Mike Phillips explained that at the last meeting a proposal to amend subsection 39 C(7) had been discussed and concerns had been raised by Council members. The subcommittee, after discussion with Kathryn Augustson of the OSB Procedure and Practice Committee, is now suggesting the amendments to ORCP 39 C(7) and G(1) set out on pages 1 and 2 of the Executive Director's January 27, 1992 memorandum. A motion was made and seconded to adopt those proposed amendments. A lengthy discussion followed.

Bernie Jolles questioned the meaning of the language contained in the last sentence of proposed C(7)(b) which said:

> "If the place where the deponent is to answer questions is located outside this state, motions to terminate or limit examination under section E of this rule may only be made to the court in the state in which the action is pending and other applications for orders, subpoenas, and sanctions may be made to the court in the state in which the action is pending or a court of general jurisdiction in the county of the state where the deposition is being taken."

Excerpts from minutes of meeting (CONTINUED):

Bernie Jolles thought this dealt with a situation where an action is pending in Oregon and a deponent located in a foreign jurisdiction is being deposed. He suggested that, in the second from the last line above, the words "deposition is being taken" be deleted and the words "where the deponent is located" be substituted, Several other suggestions were made by Council members.

The Chair stated that he thought the intent of the last sentence of C(7)(b) should be clarified.

Janice Stewart stated she had a problem with reference to "county" in the last sentence of C(7)(b) since some states do not have counties. A suggestion was made that the wording should be "a court of general jurisdiction of the state where the deposition is being taken". Janice Stewart said it was still unclear where the deposition is being taken and that it could be where you are asking the questions or where the questions are being answered. It was pointed out that in the fourth sentence of C(7)(b) at the bottom of page 1, it states: "For the purposes of this rule ... depositions taken by telephone are taken at the place where the deponent is ...". Judge Liepe suggested that the language prefacing the last sentence of C(7)(b) could read, "If the deponent is located outside this state, ..." Janice Stewart suggested that "where the deponent is located" could be substituted for "where the deposition is being taken" at the end of the last sentence of C(7)(b). The Chair suggested that, to track the preceding sentence, the language "If the place of examination is outside the state" could be substituted for the proposed language in the last sentence of C(7)(b).

Judge Kelly wondered whether there really was an issue regarding out-of-state depositions by telephone. Bruce Hamlin explained that the rule as written requires a court order to conduct one. Bruce said the proposed rule makes it clear that parties can informally take an out-of-state deposition by telephone and tells the court reporters that it is all right to administer an oath over the telephone.

The Chair asked for comments regarding the first three sentences of C(7)(b). Judge Kelly felt that the third sentence of C(7)(b) repeated what is said in the first two sentences of C(7)(b). After further discussion, a motion was made and seconded to delete the third sentence from 39 C(7)(b). The motion passed unanimously.

The Chair asked for comments regarding whether the fourth sentence of C(7)(b) was needed since it is a definitional sentence. A motion was made and seconded to delete the fourth and fifth sentences from C(7)(b). Judge Liepe pointed out that it had been felt necessary to incorporate some language from the federal rule to address matters not addressed by the Oregon rule. Mike Phillips said the subcommittee wanted to try to give directions to the judges as to what they could rule upon, and Janice Stewart agreed that there needed to be some basis for rulings in Oregon. A vote was taken on the motion to delete the fourth and fifth sentences; the motion failed with 4 in favor and 9 opposed.

A motion was made and seconded to delete the words "in the county" from the second to the last line of the fifth sentence in C(7)(b). The motion passed unanimously.

Janice Stewart suggested amending the end of the fourth sentence so that it would say "where the deponent is located" instead of "where the deponent is to answer questions propounded to the deponent" and, at the beginning of the fifth sentence, she suggested saying "If the deponent is located" instead of "If the place where the deponent is to answer questions is located ...". A motion was made and seconded to adopt that language. Further discussion followed. Judge Liepe suggested amending the fourth sentence by saying "... place of the examination under Rule 55 F(2) is deemed to be the place where the deponent is located at the time of the deposition." Bill Cramer suggested deleting the language at the beginning of the fifth sentence, "If the place where the deponent is to answer questions is located outside this state" and begin the sentence with "Motions to terminate ..."

The Chair suggested that the subcommittee take another look at the draft, in particular, the fourth and fifth sentences of C(7)(b), and perhaps find a way of shortening them up. The Chair, referring to the language in C(7)(a), questioned whether a stipulation would be limited to the parties and whether there should be a concern about a witness needing to stipulate. Bruce Hamlin said he thought it was intended to apply to a stipulation of the parties. A discussion followed and it was suggested the last sentence of C(7)(a) was not needed. A motion was made and seconded to delete the last sentence of C(7)(a); the motion passed unanimously.

Excerpts from minutes of 2-8-92 meeting (continued):

The Chair asked if there were further comments regarding the motion as modified to adopt both C(7)(a), except the last sentence, and the first two sentences of C(7)(b). The last two sentences are to be redrafted and submitted for consideration at the next meeting. Attorney Jim Vick expressed concern that someone might forget to put a stipulation on the record, which would present problems at trial; he thought there should be language that would address that issue. The Chair asked the subcommittee to try to come up with some language.

A motion was made, seconded, and unanimously passed to table the motion to adopt 39 C(7)(a) and 39 C(7)(b) until the Council could consider the subcommittee's redraft of the proposed amendments.

At the Council's 5-9-92 meeting, Bruce Hamlin presented the following proposals:

PROPOSALS TO AMEND ORCP 38, 39, AND 46:

RULE 38. PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS

A. Within Oregon.

A(1) Within this state, depositions shall be preceded by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of this state or by a person specially appointed by the court in which the action is pending. A person so appointed has the power to administer oaths for the purpose of the deposition.

A(2) For purposes of this Rule, a deposition taken pursuant to Rule 39C(7) is taken within this state if either the deponent or the person administering the oath is located in this state.

B. Outside the State. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person appointed or commissioned by the court in which the action is pending, and such a person shall have the power by virtue of such person's appointment or commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable

PROPOSALS TO AMEND ORCP 38, 39, AND 46 (CONTINUED):

or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory, or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. Foreign Depositions.

C(1) Whenever any mandate, writ, or commission is issued out of any court of record in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.

C(2) This section shall be so interpreted and construed as to effectuate its general purposes to make uniform the laws of those states which have similar rules or statutes.

RULE 39. DEPOSITIONS UPON ORAL EXAMINATION

A. (unchanged)

B. (unchanged)

C. Notice of Examination.

C(1) (unchanged)

C(2) (unchanged)

C(3) (unchanged)

C(4) (unchanged)

C(5) (unchanged)

C(6) (unchanged)

C(7) *Deposition by Telephone.* Parties may agree by stipulation or [T]the court may (upon motion) order that testimony at a deposition be taken by telephone[.]. If testimony at a deposition is taken by telephone pursuant to court order, [in which event] the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be

PROPOSALS TO AMEND ORCP 38, 39, AND 46 (CONTINUED):

accurate and trustworthy. If testimony at a deposition is taken by telephone other than pursuant to court order or stipulation made a part of the record, then objections as to the taking of testimony by telephone, the manner of giving the oath or affirmation, and the manner of recording the deposition are waived unless reasonable objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the party taking the deposition.

D. (unchanged)

E. Motion to Terminate or Limit Examination. At any time during the taking of a deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court in which the action is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36C. Those described in Rule 46B(2) shall present the motion to the court in which the action is pending. Other non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46A(4) apply to the award of expenses incurred in relation to the motion.

F. (unchanged)

G. Certification; Filing; Exhibits; Copies.

G(1) *Certification.* When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was duly sworn [in the reporter's presence] and that the transcript is a true record of the testimony given by the witness. (Remainder unchanged.)

H. (unchanged)

I. (unchanged)

RULE 46. FAILURE TO MAKE DISCOVERY; SANCTIONS

A. Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, such applications may also be made to a court of general jurisdiction in the political subdivision where the deponent is located. [to a judge of a circuit or district court in the county where the deposition is being taken.]

A(2) (unchanged)

A(3) (unchanged)

A(4) (unchanged)

B. Failure to Comply With Order.

B(1) *Sanctions by Court in the County Where [Deposition Is Taken] the Deposition Is Located.* If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or district court judge in the county in which the [deposition is being taken] deponent is located, the failure may be considered a contempt of court.

B(2) (unchanged)

B(2)(a) (unchanged)

B(2)(b) (unchanged)

B(2)(c) (unchanged)

B(2)(d) (unchanged)

B(2)(e) (unchanged)

B(3) (unchanged)

C. (unchanged)

D. (unchanged)

5-9-92 MEETING

Excerpts from minutes of meeting (CONTINUED):

Agenda Item No. 7: Oaths for deposition by telephone (Bruce Hamlin and Mike Phillips). Bruce Hamlin had distributed proposed amendments to Rules 38, 39, and 46 prior to the meeting (they are also attached to these minutes). Bruce Hamlin stated that he and Mike Phillips had tried to incorporate suggestions made by the Council members at the February 8th meeting; they wanted to make it clear that an oath could be given during a telephone deposition over the telephone whether the deponent was located within this state or outside this state (that was designed to clear up any ambiguity with ORS 44.320). Bruce Hamlin explained the proposed amendments to Rules 38, 39, and 46 (see attached).

The Chair asked how the language proposed to be added to Rule 39 C(7) concerning "testimony ... taken by telephone other than pursuant to court order or stipulation made part of the record, ..." would bear upon either an oral stipulation at the deposition or a written stipulation, such as a letter between counsel, not customarily made part of the record. Mike Phillips replied that the language was included because he and Bruce Hamlin thought it was the sense of the Council at its last meeting that there should be two clearly stated ways of taking depositions by telephone -- court order or a written stipulation made part of the record of the deposition, by reading the stipulation into the record or attaching it as an exhibit to the transcript. Inadvertent failure by counsel to comply with this procedure, when there is no court order, should be readily avoided or cured by the proposed language providing that any objections to the taking of a deposition by telephone are waived unless seasonably made at the taking of the deposition.

The Chair questioned the language in 39 (E) on page 4 of the draft: "Those described in Rule 46 B(2) shall present the motion ... in which the action is pending." He wondered to whom the term "Those" made reference. After discussion, a suggestion was made to insert the word "persons" between "Those" and "described". Regarding 39 (C)(7), Judge Liepe suggested deleting the words "upon motion" in the second line of the draft so that the court's discretion would be clear.

The Council then considered the language in 46 A(1) and B(1). After discussion, a suggestion was made that the word "competent" be substituted for "general" in the first sentence of 46 A(1) so that it would read as follows: "... such application may also be made to a court of competent jurisdiction in the political subdivision where the deponent is located." A discussion followed about whether the language in 46 B(1) should be made consistent with the underlined language in 46 A(1).

Judge DeMuniz raised the question about whether the language in 46 B(1) would be utilized by, for example, a Texas judge to find someone in contempt and felt that we would not be able to do anything in Texas.

After further discussion, Mike Phillips made a motion, seconded by Judge Welch, that the Council adopt the amendments as originally written by Bruce Hamlin, with the exception that, in the second line of 39 C(7), the words "upon motion" be stricken. He amended his motion, seconded by Judge Welch, so that in Rule 46 A, in the underlined language, the word "general" would be stricken and the word "competent" would be substituted. Bruce Hamlin pointed out that in B(1), in the heading, the phrase "the Deponent Is located" should be substituted for "the Deposition Is Located." Janice asked whether the amendment to 46 A(1) would also apply to 46 B(1), and Mike Phillips said that it would not apply and that Judge DeMuniz was correct in pointing out that 46 B(1) is designed to address holding someone in contempt in Oregon.

Mike Phillips' motion was further amended by Judge McConville to insert "persons" between "Those" and "described" at the beginning of the underlined language in 39 E. It was also decided after discussion that the word "applications" in the underlined language in 46 A(1) should be changed to "application".

The motion as amended passed with 18 in favor and one opposed.

TENTATIVE AMENDMENTS TO RULES 38, 39, AND 46 AFTER COUNCIL ACTION TAKEN AT MAY 9, 1992 MEETING

PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS RULE 38

A. Within Oregon.

A.(1) Within this state, depositions shall be preceded by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of this state or by a person specially appointed by the court in which the action is pending. A person so appointed has the power to administer oaths for the purpose of the deposition.

A.(2) For purposes of this rule, a deposition taken pursuant to Rule 39 C(7) is taken within this state if either the deponent or the person administering the oath is located in this state.

* * * * *

DEPOSITIONS UPON ORAL EXAMINATION RULE 39

* * * * *

C. Notice of examination.

* * * * *

C.(7) **Deposition by telephone.** Parties may agree by stipulation or [T]the court may order that testimony at a deposition be taken by telephone[,]. If testimony at a deposition is taken by telephone pursuant to court order, [in which event] the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

* * * * *

E. Motion to terminate or limit examination. At any time during the taking of a deposition, on motion of any party or of

the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court in which the action is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36 C. **Those persons described in Rule 46 B(2) shall present the motion to the court in which the action is pending. Other non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination.** If the order terminates the examination, it shall be resumed hereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion.

* * * * *

G. Certification; filing; exhibits; copies.

G.(1) Certification. When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was **duly** sworn [in the reporter's presence] and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C4) of this rule, and thereafter transcribed, the person transcribing it shall certify, under oath, on the transcript that such person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify under oath that the recording, either filed or furnished to the person making the transcription, is a true, complete, and accurate recording of the deposition of the witness and that the recording has not been altered.

* * * * *

FAILURE TO MAKE DISCOVERY; SANCTIONS
RULE 46

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) **Appropriate court.** An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, [to a judge of a circuit or district court in the county where the deposition is being taken] **such applications may also be made to a court of competent jurisdiction in the political subdivision where the deponent is located**. An application for an order to a deponent who is not a party shall be made to a judge of a circuit or district court in the county where the deposition is being taken.

still to be addressed by Council

* * * * *

B. Failure to comply with order.

B.(1) **Sanctions by court in the county where [deposition is taken] the deponent is located.** If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or district court judge in the county in which [the deposition is being taken] **deponent is located**, the failure may be considered a contempt of court.

* * * * *

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December 4, 1991

Professor Fredric R. Merrill
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Eugene, OR 97403

Re: Council on Court Procedures

Dear Fred:

This letter is to confirm an issue we discussed by telephone a week or so ago. Among the amendments promulgated by the Council which become effective January 1, 1992 are changes to Rule 55 concerning subpoenas. In particular, it is my understanding that the intent of the addition to Rule 55A/B is to permit the use of subpoenas to obtain non-party documents without conducting a pro forma deposition of the holder of the documents, in much the same way that preexisting Rule 55H permitted with respect to hospital records. I believe that the proposed change, while generally desirable, has unintentionally introduced a significant problem, because of the failure to exempt hospital records from its reach (leaving them to be covered by the preexisting 55H rules).

In particular, I am concerned that attorneys will use Rule 55A/B to attempt to obtain hospital records rather than continuing to use Rule 55H. If they do so, 55B indicates that the receiving hospital must produce the requested materials unless within 14 days after service, it serves written objections to the inspection or copying of the designated material. As you know there are numerous authorities in both case law and health care provider regulations requiring medical providers to protect the confidentiality of medical information they hold and to release it only upon proper authorization. Often the patient is not even a party to the lawsuit. A hospital receiving such a subpoena would be required to routinely prepare an objection. That responsibility is even more urgent if the record happens to contain particular kinds

of information subject to special protections in the federal law (for example, drug and alcohol treatment information) or entitled to special protection under state statutes (HIV tests, certain mental health records, etc.). With respect to those kinds of information, there are explicit statutory provisions prohibiting response to such a demand short of a court order or specific written patient consent. The mere issuance of a subpoena by a litigant will not suffice in such cases even if the patient happens to be a party or otherwise gets notice of the demand.

When litigants used the 55H process to obtain hospital records, that problem was circumvented because the facility was authorized to prepare a certified copy of the record, seal it (together with the appropriate information necessary to authenticate it), and forward that sealed package to the presiding officer - judge, workers' compensation hearing officer, etc. The materials were not thereafter opened and distributed absent a direction of the presiding officer to do so. That minimal judicial involvement is lacking under the revised 55A and B processes; the hospitals will have to routinely object to assure that patient rights are protected and to avoid liability for unauthorized release of information. Such objections will, in turn, clog the court motion calendar unnecessarily.

I believe the appropriate resolution of the problem is to exempt production of hospital records from Rule 55A and B and require that they be obtained, as before, under Rule 55H. To do otherwise will impose significant burdens on the parties, the courts, and on the hospitals who will be called on to prepare the necessary objections.

I would very much appreciate the Council's attention to this problem. If something in its prior action addresses this concern, I would appreciate your official comments on how the problem is avoided under the rule changes you have proposed. As I mentioned on the phone, I serve as counsel to the Oregon Association of Hospitals and will need to get information out in their next newsletter about this new process. Unless some reasonable assurances are available to indicate that they are protected in responding to 55A and B requests for documents which are not accompanied by either patient consent or court order, I will have to advise them to make official objections in all cases. In addition, I expect

they will experience considerable confusion trying to figure out whether a subpoena is being issued under 55A and B or under 55H (i.e., whether or not they can respond by preparing the certified copy and mailing it to the presiding judge rather than delivering it directly to a party). I suspect that attorneys preparing subpoenas will have little appreciation for the distinction, either. Given the January 1 implementation date, I would appreciate your response about "legislative history" of the changes as soon as possible.

Sincerely,

Karen K. Creason

KKC:jb

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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.

Attachment A

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.

Attachment A

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.

Attachment A

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.

Attachment A

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

Attachment A

BANKS, NEWCOMB & ENGELS

By: _____
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December 17, 1991

Ms. Kathryn S. Augustson
JOHNSTON & AUGUSTSON, P.C.
630 Crown Plaza
1500 SW First Avenue
Portland, OR 97201

RE: Council on Court Procedures

Dear Ms. Augustson:

Reference is made to your letter of December 13. I appreciate receiving the proposal for amendment to ORCP 39C(7) and look forward to receiving other proposed improvements to the Oregon Rules of Civil Procedure from the Procedure and Practice Committee in the future.

You will be interested to learn that the Council on Court Procedures already has taken up a proposed amendment to ORCP 39C(7). The Oregon Court Reporters Association requested the Council to clarify the procedures for swearing in out-of-state witnesses who are appearing by telephone. Professor Fredric Merrill of the University of Oregon Law School, who is Executive Director to the Council, is in the process of drafting proposed language. I will ask him to consider your committee's proposal, a copy of which is enclosed with his copy only, and will see that it is placed on the agenda with the other proposed change to the same rule.

I also appreciate knowing that Dennis Hubel is your committee's liaison to the Council. By copy of this letter to Mr. Hubel, I request that he check in with his partner, Ron Marceau, who is a member and the immediate past chair of the

Council, in order to obtain the most current information on meetings and agendas.

Very truly yours,

Henry Kantor

Henry Kantor

HK:lb
cc: Prof. Fredric L. Merrill
Mr. Ronald L. Marceau
Mr. Dennis J. Hubel
Mr. William G. Wheatley
Ms. Susan E. Grabe

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February 7, 1992

Mr. Henry Kantor, Chair
Council on Court Procedures
Pozzi, Wilson, Atchison, O'Leary & Conboy
1100 S.W. Sixth, 14th Floor
Portland, Oregon 97204

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,

Phil Goldsmith

Oregon

DIVISION OF
STATE LANDS

STATE LAND BOARD
BARBARA ROBERTS
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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

cc: Henry Kantor
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May 6, 1992

Mr. Henry Kantor, Chair
Council on Court Procedures
POZZI, WILSON, ATCHISON, O'LEARY & CONBOY
1100 S.W. Sixth, 14th Floor
Portland, Oregon 97204

RE: Proposed Revisions to ORCP 32

Dear Henry:

I have reviewed Phil Goldsmith's letter to you of February 7, 1992, and agree that his proposals are reasonable and fair.

Sincerely,

WILLNER & ZABINSKY

Don

Don S. Willner

DSW/gjb

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May 7, 1992

RECEIVED
MAY 1992
POZZI, WILSON ATCHISON
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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

Lewis and Clark Legal Clinic
Northwestern School of Law
1018 Board of Trade Building
310 S.W. Fourth Avenue
Portland, Oregon 97204-2387
PH: (503) 222-6429 / FAX: 274-7915

Richard A. Slottee
Mark A. Peterson
Sandra A. Hansberger
Theresa L. (Terry) Wright
Supervising Attorneys

May 8, 1992

RECEIVED
MAY 8 1992
POZZI WILSON ATCHISON
O'LEARY AND CONBOY

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

JUSTINE FISCHER
ATTORNEY AT LAW
400 DIRECTOR BUILDING
808 S.W. THIRD AVENUE
PORTLAND, OREGON 97204
TELEPHONE (503) 222-4326
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MAY
POZZI WILSON ATCHISON
O'LEARY AND

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

McGAUGHEY & GEORGEFF

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Of Counsel

†Admitted in Oregon and Washington

RECEIVED
MAY 9 1992
POZZI WILSON ATCHISON
O'LEARY AND CONBOY

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

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RECEIVED
MAY 1992
POZZI WILSON ATCHISON
O'LEARY AND CONBOY

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

Phil Goldsmith
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FAX: (503) 222-7288

June 9, 1992

Ms. Janice Stewart, Chair (Hand Delivered)
Class Action Subcommittee
Council on Court Procedures
1100 SW Sixth, Suite 1600
Portland, OR 97204

Maury Holland (By FAX Communication
Class Action Subcommittee and Regular Mail)
Council on Court Procedures
University of Oregon, Room 275A
1101 Kincaid Street
Eugene, Oregon 97403-3720

Michael V. Phillips (By FAX Communication
Class Action Subcommittee and Regular Mail)
Council on Court Procedures
975 Oak Street, Suite 1050
Eugene, Oregon 97401-3176

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

Oregon Legal Services Corporation

Weatherly Building Suite 1000 516 S.E. Morrison Portland, OR 97214 (503) 234-1534 FAX: (503) 239-3837

July 21, 1992

RECEIVED
JUL 22 1992
KANTOR AND SACKS

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

CHRISTOPHER JAMES
DAVID R. DENECKE
ROGER K. HARRIS

J. RICHARD URRUTIA
SUSAN D. MARMADUKE*
CEEANN CALLAHAN†
CHRISTOPHER E. MARTIN**
JERRY L. LAWSON, JR.

*MEMBER OREGON, CALIFORNIA AND PENNSYLVANIA BARS
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OF COUNSEL:
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(503) 222-7261

IN REPLY, REFER TO
OUR FILE NUMBER:

July 27, 1992

RECEIVED
JUL 30 1992
KANTOR AND SACKS

Henry Kantor, Esq.
Chair
Counsel and Court Procedures
Pozzi, Wilson, Atchison, et al.
1100 S.W. 6th Avenue, Suite 1400
Portland, Oregon 97204-1087

Re: Proposed Revisions to ORCP 32

Dear Henry:

I have had experience with both defendants and plaintiffs in class action suits and I am interested in class action legislation. I have received a copy of Phil Goldsmith's letter to you dated February 7, 1992 regarding proposed revisions to ORCP 32. He has outlined two principal areas for proposed revisions. Since I understand the amendments generally as presently proposed unanimously passed the Senate last year, my comments are brief, and supportive of all of the proposed amendments.

As to damage calculations, there is one more situation besides these presently mentioned in which it is appropriate that the burden, in effect, be placed upon the court rather than the plaintiff to calculate damages. In an earlier letter addressed to Professor Frederick Merrill, Executive Director, counsel on court procedures at the University of Oregon school of law, its authors hypothesized:

> "What happens if the aggregate injury to the class can readily be calculated from the defendants records, but the defendant has no records from which each individual's share can be determined with precision?"

That exact situation was presented in Alsea Veneer, et al. v. State of Oregon, a case now pending before the Court of Appeals (and which addresses several other class action issues). The traditional "burden of proof" requirements were followed, even though the plaintiffs, because of defendants' wrongdoing or incompetency, were assigned a less stringent burden of proof. However, so long as the burden is upon the plaintiffs at all, under Alsea circumstances they cannot prevail. The reason is that defendant's own records offer no basis for reconstructing individual recoveries. On the other hand, if the court is given the responsibility, once liability is determined, of seeing that

damages are ascertained, an otherwise liable defendant will not escape the consequences of its conduct by virtue of the inadequacy of its own records.

The present statute does not permit redress in such situations, and the proposed revisions, under which a court of law would require the defendant to come up with a fair alternative, would do so.

Very truly yours,

Bruce M. Hall

BMH:sg
sg/c://0001Lbmh.724

Gray Panthers
AGE AND YOUTH IN ACTION

Portland Gray Panthers

1819 NW Everett • Portland, Oregon 97209 • (503) 224-5190

RECEIVED
JUL 29 1992
KANTOR AND SACKS

Henry Kantor, Chairperson, Council on Court Procedures,
1100 SW Sixth Avenue, Suite 1100
Portland, Oregon 97204

July 27, 1992

Dear Henry Kantor:

At our July Executive Committee meeting, the Portland Gray Panthers voted to support efforts at class action reform. We are writing to urge the Council on Court Proceedings to adopt the proposal to reform ORCP 32. We support this ORCP 32 as we feel it is necessary for victims to have "their day in court," and for the guilty parties to not keep money gained through illegal means.

Sincerely,

Gerri Peck

Gerri Peck, Executive Committee Member,
Portland Gray Panthers

Oregon Consumer League

3314 NE 65th Avenue • Portland, OR 97213 • (503) 227-3887

RECEIVED
JUL 31 1992
KANTOR AND SACKS

July 30, 1992

Mr. Henry Kantor, Chair
Council on Court Procedures
1100 S.W. Sixth, Suite 1100
Portland, Oregon 97204

Re: Proposed Amendments to ORCP 32

Dear Mr. Kantor:

The Oregon Consumer League is Oregon's oldest non-profit consumer organization. The League has a long history of advocating legislation to provide consumers remedies for unfair practices causing them injury. Representative examples include ORS 86.205 to 86.275, which regulate tax and insurance reserve requirements in home loans.

Class actions are an important consumer protection tool because they may be the only practical way for persons suffering small injuries in common with many others to obtain relief. Probably the most important example in Oregon are the cases against Benj. Franklin and other financial institutions concerning the earnings the lender made on home owners' tax and insurance reserves, which recovered a few hundred dollars for each litigant and several million dollars for Oregonians.

The Oregon Consumer League believes the current class action rule contains unnecessary barriers to consumers seeking redress and unnecessary incentives for true wrongdoers to delay and prolong litigation. We agree with the proposals made by the Committee to Reform Oregon's Class Action Rule and urge the Council on Court Procedure to adopt them. I would like to address briefly three specific issues.

1. The current rule requires post-certification notice to be given to all members of the class in most damage cases. The plaintiff must pay for this notice. This can be a huge expense when many thousand people have suffered the same injury; as a result, few such cases have been brought. Additionally, the notice serves no useful function when everyone's injury is small, because as a practical matter everyone's rights will be determined in the class action. The proposal before the Council would remove this unnecessary barrier to obtaining redress.

2. The current rule makes the class plaintiff liable for attorney fees if the case is lost and the defendant would be entitled to attorney fees in a non-class action. What this means is that, by putting an attorney fee provision in its contracts, a business can basically insure no class action will be brought against it. Nobody with a personal stake of a few hundred dollars

would risk liability for ten of thousands of dollars in attorney fees. The proposal before the Council would remove this unnecessary barrier to obtaining redress.

3. Under the current rule, it pays a defendant who expects to lose a class action to delay the case as long as possible. Its liability is limited to those people who sign claim forms; the longer the case takes, the harder it will be to find the victims and the more money the defendant will keep. This is very bad public policy. The proposal before the Council would correct this problem. It is not good enough to leave everything to the discretion of the trial judge, because the defendant can still follow a strategy of delay in the hopes that the judge will exercise his or her discretion by requiring claim forms.

For these reasons, the proposal before the Council would improve the ability of class actions in Oregon's state courts to serve their intended function of facilitating the litigation of small consumer claims. The Oregon Consumer League urges the Council to enact this proposal.

Thank you for the consideration of our views.

Sincerely,

Tom Novick

Tom Novick
President

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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

PETITION

The undersigned organizations understand that the Committee to Reform Oregon's Class Action Rule has made a proposal to the Council on Court Procedures which, among other things:

1. Eliminates the requirement that a plaintiff in a damage class action must always send notice to all class members before the case can be decided.
2. Eliminates most attorney fee liability for the named plaintiff in an unsuccessful class action.
3. Requires damages to be calculated for each class member, so they don't have to produce records showing how they have been injured.
4. Paves the way for legislation requiring losing defendants to pay to Oregon's common school fund all monies not claimed by class members.

We agree with these proposals and urge the Council on Court Procedures to adopt them.

ORGANIZATION	ADDRESS	BY
William Gordon Gray Panthers	5022 SE 41st	
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Gray Panthers	2405 NE 46th	Gerri Peck
Graypanthers	3125 NE Schuyler ST	Austin Collins
Gray Panthers	4424 N. Willis Blvd	Robert W. Mitchell
~~Peter H Panthers~~ Gray Panthers	6230 N.E. 22nd	Peter H Pearson
Forclaws On Board	19142 SE Bakers Ferry Rd. Barny, OR 97004	Floyd K Hyatt

POZZI WILSON ATCHISON O'LEARY & CONBOY

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LAWRENCE BARON
GREGORY A. BUNNELL
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DOLORES EMPEY
NELSON R. HALL
DAVID A. HYTOWITZ
TIMOTHY J. JONES
KEVIN N. KEANEY
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September 17, 1992

VIA FAX TRANSMISSION ONLY

Professor Maury Holland
School of Law
University of Oregon
1101 Kincaid Street, Room 275A
Eugene, Oregon 97403

Re: Council on Court Procedures

Dear Professor Holland:

I would like to comment upon Judge Lee Johnson's letter to you, dated August 20, 1992, concerning a proposed amendment to ORCP 60. The amendment would allow a directed verdict "at any time during the trial after the opponent [of the motion for a directed verdict] has been fully heard." Judge Johnson believes that the change is needed to give "the trial judge a tool to sort out what are the valid contentions and present the case in some coherent form to the finder of fact." What Judge Johnson is really contending for, however, is the unwarranted extension of the trial judge's power into questions properly considered only on summary judgment or after plaintiff has presented all the evidence (and not just counsel's summary of the evidence).

Spelled out, the objections are several:

First, there already is an orderly procedure, provided in ORCP 47, to decide summarily issues that ought not to be submitted to the jury. In addition, ORCP 60 (as is) provides an orderly procedure at trial to winnow unsupported claims.

Second, the amendment runs contrary to the reality that the evidence itself may be more evocative (and, hence, more convincing) than a terse summary uttered in chambers. For instance, although it may be tedious to have to listen to a witness, there may be something in the way the witness testifies

that draws a judge to reach a different conclusion than if he or she simply listened to counsel. Obviously, the only way to find that out is to let the witness testify. That testimony would be jeopardized, however, by the amendment.

The proposed amendments are an unneccessary expansion of judicial power. Judge Johnson's proposal would add an unneccessary layer to the Oregon Rules of Civil Procedure. Rule 47 provides the same relief as the proposed amendment. Rule 47 allows all the parties to avoid the expense of time and money of preparing for a trial because a motion for summary judgment must be filed 45 days before trial.

I have been unable to find any case where relief could have been entered under Judge Johnson's proposed amendments to Rule 60 that could not have been granted under a timely and competently filed motion for summary judgment.

The proposal also appears to be an attempt to allow a judge to decide disputed factual and credibility disputes. Resolution of these issues is the function of the finder of fact. Oregon Constitution, Article VII, Section 3 (Amended). The council on Court procedures should reject this unneccessary proposal.

Very truly yours,

Kevin Keaney

KK/sb
cc: Henry Kantor

Oregon Trial Lawyers Association

Suite 750 • 1020 SW Taylor Street • Portland, Oregon 97205 • (503)223-5587 • FAX (503)223-4101

September 24, 1992

Council on Court Procedures
Mr. Henry Kantor, Chair
1400 Standard Plaza
1100 S. W. Sixth
Portland, Oregon 97204-1087

Dear Council Members:

We very much oppose the suggestion of Lee Johnson set forth in his letter of August 20, 1992, to allow judges to grant summary judgments on their own motions at any time during the course of a trial. Our reasons are these:

1. If an opposing party in a case does not believe he or she is entitled to summary judgment and does not move for it appropriately in accordance with existing rules, we fail to see why a judge who has had only a few minutes of familiarity with the case should take it upon himself or herself to throw a litigant out of court summarily after they have waited for about a year to get there.

2. The procedure, especially in certain judges' hands, will simply pose an additional mine field for litigants trying to have a fair hearing and a day in court. Their attorneys will be placed upon notice by a judge at the beginning of a trial to orally state all the evidence they intend to produce and face the peril of leaving out some small item which might be crucial to the case. The present summary judgment procedure where one party pinpoints the reasons they are entitled to summary judgment and the other party is then given the opportunity with careful thought and consideration to counter that motion with appropriate affidavits, while still a mine field is at least marginally fair.

Some judges apparently like to make up their minds based on the opening statement and then do everything they can to effectuate and reinforce their own snap decisions. On one occasion one Multnomah County judge attempted to utilize the procedure suggested by Judge Johnson after opening statements and dismissed plaintiff's case "for lack of evidence." The plaintiff's attorney argued so vigorously against it that the judge reluctantly allowed the plaintiff to go ahead and present his case but stated that if

the jury returned a verdict of any amount for the plaintiff, the court would grant a motion for JNOV. By the time both parties had fully presented their cases, the judge allowed the case to go to the jury which returned a verdict for the plaintiff for $120,000; and the judge then decided that the motion for JNOV should be denied (to the surprise of defense counsel). This example simply shows the danger of the court's attempting to decide cases based only upon the pleadings and opening statements of the parties.

3. We do not believe that Judge Johnson's description with respect to the use of the procedures he urges in federal court is complete. We attach a copy of FDIC v. Cover, 714 F.Supp. 455 (D.Kan. 1988). In that case the FDIC made a motion in limine to prevent introduction of oral evidence of an accord and satisfaction. The court allowed that motion, thus finding against the defendant on its only defense. Defendants had only oral evidence of the accord and satisfaction. The court noted as follows:

> The effect of that ruling was essentially to preclude defendants from their anticipated defense of oral accord and satisfaction, leaving no issues for trial. The jury was released, the parties were directed to continue settlement negotiations, and the FDIC was allowed until December 10, 1987, to file a dispositive motion based upon [12 U.S.C.] § 1823(e). The court additionally invited defendants to brief the issues of sanctions against the FDIC for its having brought a dispositive motion on the eve of trial.

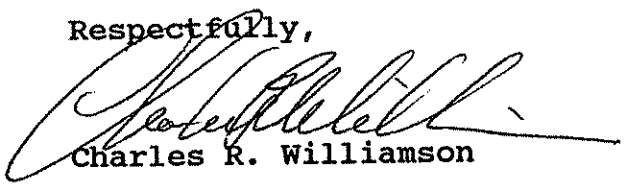
Thus, contrary to the procedures followed by Judge Johnson in Harbert, this court simply delayed the trial while appropriate dispositive motions could be filed. The court did not sua sponte issue summary judgment or allow an oral motion for summary judgment or a directed verdict by the defense. There would have been nothing to prevent Judge Johnson from following such a procedure in the Harbert case should he have wished to do so, i.e., continuing the trial and requesting defendant to file a proper motion for summary judgment. In such a situation the party moved against would at least have a reasonable opportunity to know the grounds of the opposing motion, have evidence presented in the form of affidavits supporting the motion, and have the opportunity to address it with affidavits and research over a reasonable period of time.

4. The procedure as urged by Judge Johnson is unfair tactically in that it requires one party to completely reveal their entire case or defense to the other before any evidence is offered,

thus giving the other party an advantage they would not have received if evidence were simply introduced in the normal course.

In sum, if a party to the litigation intimately familiar with it fails to move for summary judgment, it is inherently unfair for the court to have the authority to require the opposing party to immediately respond to such a motion without the benefit of a written statement, affidavits, and the ability to take the time allowed by ORCP 47 to respond. We urge the Council to reject Judge Johnson's proposal.

Respectfully,



Charles R. Williamson

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te as: 714 F.Supp. 455)

FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff,
v.
John W. COVER, et al., Defendants.
No. 86-1968.
United States District Court,
D. Kansas.
March 9, 1988.

'ederal Deposit Insurance Corporation brought action against debtors of :quired bank on promissory note. Corporation moved for "directed verdict," id debtors moved for equitable sanctions. The District Court, Crow, J., held :at: (1) motion for "directed verdict" would be construed as one for summary idgment, as jury had not yet been impaneled; (2) evidence showed that notes ere in bank's active files on date bank closed and on date bank's assets were irchased by Corporation in its corporate capacity; (3) defense of oral accord id satisfaction was statutorily barred as to claim brought by Corporation in :s corporate capacity; and (4) sanctions beyond costs of impaneling jury ould not be imposed on Corporation for having filed "motion in limine" on eve : trial.

Motion for summary judgment granted; motion for equitable sanctions denied.

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.Kan. 1988.
irected verdict is not possible where jury has not been impaneled. Fed.Rules iv.Proc.Rule 50(a, b), 28 U.S.C.A.
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14 F.Supp. 455
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. Motion.
.Kan. 1988.
otion for directed verdict would be construed as one for summary judgment, here motion had been made before jury had been impaneled. Fed.Rules iv.Proc.Rules 50(a, b), 56, 28 U.S.C.A.
'ederal Deposit Ins. Corp. v. Cover
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'or purpose of determining whether notes were "assets" acquired by Federal leposit Insurance Corporation from insolvent bank, and thus whether statute nvalidating certain unwritten agreements diminishing or defeating right, :' le, or interest of Corporation in any asset acquired by it from insolvent k was applicable, evidence showed that notes were in bank's active files on late that bank closed and on date that bank's assets were purchased by

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validating certain unwritten agreements which tend to diminish or defeat
ight, title, or interest of Federal Deposit Insurance Corporation in assets

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:cquired by it from insolvent banks, as to claim brought by Corporation in its :orporate capacity against debtors to collect deficiency on promissory notes; lebtors claimed that bank orally agreed that it would not seek deficiency gment against them if they would sell their farm machinery and equipment and ly proceeds to their indebtedness owed to bank. Federal Deposit Insurance ct, s 2[13](e), 12 U.S.C.A. s 1823(e).
'ederal Deposit Ins. Corp. v. Cover
'14 F.Supp. 455
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:. In general.
).Kan. 1988.
Equitable sanctions beyond costs of impaneling jury would not be imposed on 'ederal Deposit Insurance Corporation for making "motion in limine," a lispositive motion, on eve of trial.
'ederal Deposit Ins. Corp. v. Cover
'14 F.Supp. 455
*456 B.J. Hicker, Morrison, Hecker, Curtis, Kuder & Parrish, Wichita, Kan., and George W. Yarnevich, Kennedy, Berkley, Yarnevich & Williamson, Salina, Kan., for plaintiff.
Warren M. Wilbert, Stinson, Lasswell & Wilson, Wichita, Kan., and John F. Arens, Arens & Alexander, Fayetteville, Ark., for defendants.

MEMORANDUM AND ORDER

CROW, District Judge.

This case is before the court on a motion styled by the FDIC as a "rected verdict." (Dk. No. 29.) The case was previously set for trial to a y on November 9, 1987. At the chambers conference prior to jury selection on the morning of November 9, 1987, this court sustained the FDIC's "motion in limine" prohibiting defendants from mentioning or eliciting any testimony regarding any alleged oral agreements between defendants and the failed Talmage State Bank, pursuant to 12 U.S.C. s 1823(e). The effect of that ruling was essentially to preclude defendants from their anticipated defense of oral accord and satisfaction, leaving no issues for trial. The jury was released, the parties were directed to continue settlement negotiations, and the FDIC was allowed until December 10, 1987 to file a dispositive motion based upon s 1823(e). The court additionally invited defendants to brief the issue of sanctions against the FDIC for its having brought a dispositive motion on the eve of trial.

[1][2] On December 10, 1987, the FDIC filed the motion currently before the court. Although the FDIC has chosen to entitle its motion as one for a 'directed verdict," the court finds this characterization entirely inappropriate. A motion for directed verdict is to be made "at the close of the evidence offered by an opponent" or "at the close of all the evidence." Fed.R.Civ.P. 50(a) & (b). Additionally, no directed verdict is possible where no jury has been impaneled. In the present case, no jury selection was ever commenced and no evidence was presented by either side. The court will construe the FDIC's motion as one for summary judgment pursuant to Fed.R.Civ.P.

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n ruling on a motion for summary judgment, the trial court conducts a
r-shold inquiry of the need for a trial and grants summary judgment where no
ine issue of material fact exists and the moving party is entitled to
dgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
0-51, 106 S.Ct. 2505, 2511-12, 91 L.Ed.2d 202, 213 (1986). The court is to
concerned with the sufficiency of the evidence, not its weight. Casper v.
I.R., 805 F.2d 902, 904 (10th Cir.1986.) Essentially, the inquiry is
hether the evidence presents a sufficient disagreement to require submission
a jury or whether it is so one-sided that one party must prevail as a matter
law." Anderson, 477 U.S. at 251-52, 106 S.Ct. at 2512, 91 L.Ed.2d at
4. There is no genuine issue for trial unless there is sufficient evidence--
gnificantly probative or more than merely colorable--favoring the nonmoving
rty for a jury to return a verdict for that party. 477 U.S. at 248-50, 106
Ct. at 2510-11, 91 L.Ed.2d at 212. Where there is but one reasonable
nclusion as to the verdict and reasonable minds would not differ as to the
port of the evidence, summary judgment is appropriate. 477 U.S. at 250-51,
6 S.Ct. at 2511-12, 91 L.Ed.2d at 213.
he movant's burden under Fed.R.Civ.P. 56 is to make an initial showing of the
sence of evidence to support the nonmoving *457 party's case. Windon
ird Oil and Gas v. Federal Deposit Ins., 805 F.2d 342, 345. (10th Cir.1986),
rt. denied, 480 U.S. 947, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987). To show
absence of material fact, the movant must specify those portions of "the
eadings, deposition, answers to interrogatories and admissions on file,
gether with affidavits if any." Fed.R.Civ.P. 56(c). "[C]onclusory
sertions to aver the absence of evidence remain insufficient to meet this
rden." Windon, 805 F.2d at 345 n. 7. The opposing party may not rest upon
re allegations or denials in the pleadings but must set forth specific facts
orted by the kinds of evidentiary materials listed in 56(c), which
monstrate a genuine issue remaining for trial. Anderson, 477 U.S. at 248-
, 106 S.Ct. at 2510-11, 91 L.Ed.2d at 213. The evidence of the nonmoving
rty is deemed true and all reasonable inferences are drawn in his favor.
ndon, 805 F.2d at 346. "Summary judgment procedure is properly regarded
t as a disfavored procedural shortcut, but rather as an integral part of the
deral Rules as a whole, which are designed 'to secure the just, speedy and
expensive determination of every action.' Fed.R.Civ.P. 1." (citation
itted.) Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555,
L.Ed.2d 265, 276 (1986).
he sole issue presented in the FDIC's motion is whether the defense of
al accord and satisfaction between the debtors and the failed bank is barred
12 U.S.C. s 1823(e). The defendants contend that the Talmage State Bank
ally agreed that it would not seek any deficiency judgment against them if
fendants would sell their farm machinery and equipment and apply the proceeds
their indebtedness owed the bank. Defendants subsequently liquidated their
eration and applied the proceeds to their debt owed Talmage State Bank. The
nk later failed and FDIC was appointed as receiver. A purchase and
sumption transaction followed, and the FDIC in its corporate capacity
rchased assets that were unacceptable to the assuming bank, pursuant to 12
S.C. s 1823(d). The FDIC, in its corporation and receiver capacities, urges
e court to affirm its ruling that the defense of oral accord and satisfaction

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s barred.
Section 1823(e) provides:
No agreement which tends to diminish or defeat the right, title or interest
he Corporation in any asset acquired by it under this section, either as
ecurity for a loan or by purchase, shall be valid against the Corporation
nless such agreement (1) shall be in writing, (2) shall have been executed by
he bank and the person or persons claiming an adverse interest thereunder,
ncluding the obligor, contemporaneously with the acquisition of the asset by
he bank, (3) shall have been approved by the board of directors of the bank or
ts loan committee, which approval shall be reflected in the minutes of said
oard or committee, and (4) shall have been, continuously, from the time of its
xecution, an official record of the bank. (Emphasis added.)
It is uncontested that the agreement upon which defendants rely is not in
riting, and that defendants have failed to comply with the writing, approval,
nd filing requirements of s 1823(e). However, defendants assert that s
823(e) is not applicable because no "asset" was acquired by the corporation
hen it purchased the failed bank's interest in September of 1987.
[3] The term "asset" as used in s 1823(e) is not defined by statute. Although
he meaning of the term may perhaps be clarified, if not expressly defined, in
he Purchase and Assumption Agreement between the FDIC, as receiver, and the
bilene First National Bank, as assuming bank, or in the Contract of Sale
ntered into between the FDIC, as receiver, and the FDIC in its corporate
apacity, neither of those documents is included in the record before this
ourt.
The FDIC contends that the term "assets" as used in subsection (e) means
assets disclosed on the books and records of a bank which satisfy the
equirements of s 1823(e). Stated otherwise, an asset reflected in the records
f a bank does not cease being an asset for purposes of s 1823(e) until payment
eceived or an agreement complying with the requirements *458 of s
3(e) is concluded." (Dk. 30, p. 5.) Defendants do not challenge this
roposed definition, except to state that "no evidence has been presented by
he FDIC to prove that the notes in question were listed as assets on the books
nd records of the failed bank at the time the transfer to the FDIC in its
orporate capacity was made." (Dk. 35, p. 4.) That factual omission by the
DIC has been remedied in its reply brief, by the attached affidavit of Ricky
. Olson, a bank liquidation specialist of the FDIC. That affidavit
stablishes that each of the three notes that are the subjects of this action
as acquired by the FDIC in its corporate capacity from the receiver, and that
uch notes were reflected as assets in the loan files of the closed bank at the
ime of closure. (Dk. 42, Supplemental affidavit.)
The court finds that the notes in question were in the bank's active
iles on the date the bank closed and on the date the bank's assets were
urchased by the FDIC in its corporate capacity. See FDIC v. Venture
ontractors, Inc., 825 F.2d 143 (7th Cir.1987) (upholding trial court's finding
hat a guaranty was in an active file and thus a valid asset); FDIC v.
owers, 576 F.Supp. 1167, 1169 (N.D.Ill.1983) (rejecting as frivolous
efendants' argument that none of their facially sufficient written guarantees
as an "asset" under s 1823(e)).
Defendants additionally contend that even if their notes were reflected as
ssets on the bank's books, those notes ceased to be assets by virtue of the
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accord and satisfaction prior to the closure of the Talmage State Bank. Defendants' position finds support in FDIC v. Nemecek, 641 F.Supp. 740 D.Kan.1986). In Nemecek, J. Kelly held that:

> .. s 1823(e) has no application to this case. The Bank and the defendants reached an accord and satisfaction, a settlement of claims, prior to the Bank's closing. Therefore, when the F.D.I.C. purchased the Bank's assets, it could not have purchased defendants' note, as it had been previously extinguished. Section 1823(e) applies only to assets which the FDIC has acquired.

641 F.Supp. at 743 (emphasis in original).

The court declines to follow the Nemecek holding. That rationale requires the court to, in a preliminary step, look to evidence not permitted by s 823(e) to determine the FDIC's rights with respect to each item reflected in a ailed bank's books as an asset and purchased by the corporation. Such a heory would destroy the effect and protection of s 1823(e) and hamper the DIC's ability to follow the purchase and assumption alternative by injecting ncertainty into the valuation of assets.

[4][5] The court recognizes that s 1823(e) does not apply to every inquiry oncerning an asset. FDIC v. Merchants Nat. Bank of Mobile, 725 F.2d 634, 39 (11th Cir.1984), cert. denied, 469 U.S. 829, 105 S.Ct. 114, 83 L.Ed.2d 7. It does not apply when the court determines if an asset is invalid for reach of bilateral obligations contained in the asset, see Howell v. ontinental Credit Corp., 655 F.2d 743, 746-48 (7th Cir.1981) or for fraud, ee Langley v. FDIC, 484 U.S. 86, ----, 108 S.Ct. 396, 402, 98 L.Ed.2d 340, 48 (1987). Nor does the statute protect the FDIC against the consequences of ts own conduct with respect to the asset after acquiring it. See FDIC v. lue Rock Shopping Center, 766 F.2d 744, 753 (3d Cir.1985); FDIC v. arrison, 735 F.2d 408, 412 (11th Cir.1984). In such cases a defendant may resent evidence outside of the documents to establish a defense. In the ent case, however defendants have failed to offer any facts which would ntitle them to avoid the application of s 1823(e).

[6][7] The court chooses to follow those courts which hold that s 1823(e) bars he defense of oral accord and satisfaction. See Public Loan Co. v. FDIC, 03 F.2d 82, 84 (3d Cir.1986) (defense of oral accord and satisfaction barred y s 1823(e) despite assertion that the full amount of the letter of credit had een previously paid); FDIC v. General Investments, Inc., 522 F.Supp. 1061, 067 (E.D.Wis.1981) (holding that parties never finalized a settlement greement, ***459** but stating that if such an oral agreement has been made, he court would find it invalid for failure to comply with s 1823(e) equirements); FDIC v. Hoover-Morris Enterprises, 642 F.2d 785 (5th ir.1981) (defense of oral accord and satisfaction could not be asserted gainst FDIC which brought action to recover deficiency judgment because of s 823(e), the D'Oench doctrine, and failure to satisfy state law requirements accord and satisfaction); FDIC v. Fulcher, 635 F.Supp. 27 W.D.Tex.1985) (bank's oral agreement to let defendant off a guaranty upon eceipt of proceeds from sale of collateral was barred by s 1823(e) and Oench doctrine even though bank had allegedly received proceeds from sale collateral); FDIC v. WH Venture, No. 84-5673, slip op., 1986 WL 5919 E.D.Pa., May 22, 1986) (stating "[c]learly defendants' affirmative defense and ounterclaim based upon accord and satisfaction and novation, to the extent

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ite as: 714 F.Supp. 455, *459)
hey do not meet the requirements of s 1823(e) are barred.").
The United States Supreme Court, in Langley, reviewed two of the
urposes of s 1823(e):
] One purpose of s 1823(e) is to allow federal and state bank examiners to
e.y on a bank's records in evaluating the worth of the bank's assets. Such
valuations are necessary when a bank is examined for fiscal soundness by state
r federal authorities, see 12 USC ss 1817(a)(2), 1820(b) [12 USCS ss
817(a)(2), 1820(b)], and when the FDIC is deciding whether to liquidate a
ailed bank, see s 1821(d), or to provide financing for purchase of its assets
and assumption of its liabilities) by another bank, see s 1823(c)(2), (4)(A).
he last kind of evaluation, in particular, must be made "with great speed,
sually overnight, in order to preserve the going concern value of the failed
ank and avoid an interruption in baking services." Gunter v. Hutcheson, 674
2d at 865. Neither the FDIC nor state banking authorities would be able to
ake reliable evaluations if bank records contained seemingly unqualified notes
hat are in fact subject to undisclosed conditions.
A second purpose of s 1823(e) is implicit in its requirement that the
agreement" not merely be on file in the bank's records at the time of an
xamination, but also have been executed and become a bank record
contemporaneously" with the making of the note and have been approved by
fficially recorded action of the bank's board or loan committee. These latter
equirements ensure mature consideration of unusual loan transactions by senior
ank officials, and prevent fraudulent insertion of new terms, with the
ollusion of bank employees, when a bank appears headed for failure.
98 L.Ed.2d at 347. Neither of these purposes would be fulfilled if a debtor
ere allowed to show, by an oral agreement not meeting the statute's
equirements, that a facially unqualified note was subject to a condition such
s release upon partial payment.
's holding is consistent with others in the district. See, e.g., FDIC v.
:ring, 620 F.Supp. 1271, 1274 (D.Kan.1985) (holding that "... any
ffirmative defense that flows from an oral agreement is barred by
s 1823(e)]"); FDIC v. Soden, 603 F.Supp. 629, 634-35 (D.Kan.1984) (holding
ral side agreement between bank and law firm invalid under s 1823(e)). The
ourt finds that the defense of oral accord and satisfaction is barred by s
823(e) as to the claim brought by the FDIC in its corporate capacity.
Defendants have previously voluntarily withdrawn their counterclaims and all
ffirmative defenses except accord and satisfaction. (Dk. 36, p. 2.) Both
arties have stipulated that if the defendants were determined to be liable,
he correct amount of that liability would be $189,444.37, together with
nterest from and after November 9, 1987 at the contract rate, currently
alculated at $49.41 per diem. (Dk. 29, p. 1; Dk. 36, p. 3.)
[8] The parties have briefed the issue of equitable sanctions against the FDIC
n its corporate capacity. The court expressed to the parties at the in-
hambers conference on November 9, 1987 its concern *460 with the FDIC's
aving filed, in the form of a "motion in limine," a dispositive motion on the
ve of trial. The FDIC, in both its corporate and receivership capacities,
ubsequently tendered a check to the clerk of this court in the amount of
751.02 as payment for the costs of impaneling a jury on November 9, 1987.
Dk. 31.) That unconditional offer was found to be appropriate and the clerk
as ordered to accept the FDIC's check and to apply the proceeds as payment for
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e costs of impaneling a jury in this case. (Dk. 33). After reviewing the cts and arguments set forth in the parties' briefs on this issue, the court ... that no additional payment from the FDIC in the form of equitable ...ions is warranted.

T IS THEREFORE ORDERED that the FDIC's motion for summary judgment is anted, and the FDIC in its corporate capacity is awarded $189,444.37, plus terest from and after November 9, 1987 at the rate of $49.41 per day. It is rther ordered that defendants' motion for equitable sanctions against the IC is denied.

OF DOCUMENT

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STATE OF OREGON
COURT OF APPEALS
THIRD FLOOR
JUSTICE BUILDING
SALEM, OREGON
97310

R. WILLIAM RIGGS
JUDGE

RECEIVED
OCT - 9 1992

KANTOR AND SACKS
(503) 373-7124

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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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

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.

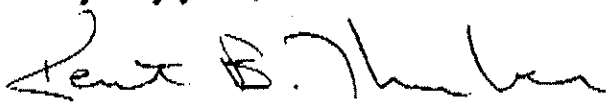
As you may know, Oregon Legal Services (OLS) is a private non-profit organization which represents low income people throughout rural Oregon. Over the years, we have successfully litigated quite a large number of class actions, for the most part involving governmental benefits such as Aid to Families 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

BODYFELT MOUNT STROUP & CHAMBERLAIN

Attorneys at Law

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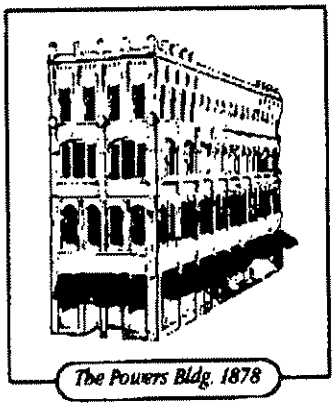

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October 16, 1992

VIA FAX NO. 346-1564

Maurice J. Holland
Acting Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403

Dear Mr. Holland:

Re: Proposed Change to ORCP 36C(2)

In the September 14, 1992 Advance Sheets, there were proposed amendments to the Oregon Rules of Civil Procedure which we understand the Council is considering. We have been informed that the Council will also consider at its October 17th meeting a proposed change to ORCP 36C(2). We would like to express our opposition to that proposed amendment. In our view, the proposed amendment is a bad idea for Oregon for several reasons.

The argument for this proposal proceeds from several faulty assumptions. One of these is that protective orders are being abused because they are obtained without any real need being demonstrated. That may or may not have once been the situation, but it definitely is not the case now. With the national campaign being waged by the American Trial Lawyers Association and the various state organizations, it has become increasingly more difficult to obtain a protective order in any case. In the past, plaintiffs' attorneys were primarily interested in the welfare of their own client. They made decisions based upon how they could best prosecute that client's case, including how they could most easily, efficiently and least expensively obtain the discovery necessary to prove that client's case. Plaintiffs' attorneys now seem inclined to view themselves as prosecutors for the public at large and therefore less willing to make decisions based upon a

single client's best interest. As a result, more and more protective orders are only obtained after a court is convinced of the need for and the proper breadth of the proposed order.

The Council should also consider that this proposal is certain to increase the litigation and trial court involvement surrounding the original protective order. Whatever may be the situation across the country, in Oregon plaintiff and defense lawyers typically know each other well and defense lawyers know that their counterparts can be trusted to be honest and exercise good faith. Oregon defense counsel can, with comfort, advise their corporate clients of the character of plaintiff's counsel and urge a client to take a less cautious approach to the discovery situation and protective order. This expedites discovery and cuts down trips to the trial court concerning discovery disputes. However, if this proposed amendment were enacted, while Oregon counsel for plaintiffs can be assumed to deal in good faith with the materials obtained under a protective order, defense counsel would not be able to give any such assurances with regard to whoever may obtain subsequent disclosure. Thus, protective order issues which once could have been worked out amicably between Oregon counsel with leeway given for the attitude of Oregon plaintiffs' counsel, will now be litigated to the trial court to the last degree if these protective orders are going to be transformed into a "national protective order." Plaintiff's counsel will think he or she needs to protect the unidentified national client and thus will also not be in a compromising mood. Thus, it can be safely assumed that both on the front end, obtaining the protective order, and, as will be discussed later, on the back end, when some party seeks to have the protective order opened, greater judicial involvement of Oregon judges will be required.

Another faulty premise for this proposed modification is that materials subject to the protective order cannot be obtained directly from the defendant. This premise has two separate aspects which need to be examined. As the Council is well aware, the scope of discovery in ORCP 36B is understandably broad. If a party is unable to obtain discovery of documents produced in another case and subject to a discovery order, because those documents in the current case are not within the scope of discovery, that party should not be able to go back to some other case, where the issues must have been different in order to make the documents there discoverable, and obtain indirectly what that party is not entitled to obtain directly. Shouldn't the decision as to whether something is discoverable or not discoverable be entrusted to the judge monitoring the current litigation, rather than the judge who dealt

with the prior litigation and approved the original protective order? It seems obvious which judge is in the better position to make sound decisions concerning the scope of discovery about the present litigation.

The second aspect of the faulty premise that discovery cannot be obtained directly is the implied or expressed view that the party to whom the discovery request is directed will not be faithful in complying with their obligations under the rules of discovery. In simple language, some plaintiffs' attorneys are paranoid that defendants will hide things that they've turned over in some other litigation. The simple language response is that there is absolutely and utterly no demonstration that such is occurring in Oregon or has occurred. If it has occurred in other jurisdictions, then it is the responsibility of the courts in those jurisdictions to deal with it, not a responsibility which should be imposed upon Oregon trial judges for some out-of-state plaintiff in some out-of-state case. Our judges have enough things to do to keep them busy with Oregon matters.

While there are no doubt several other valid reasons why the proposed amendment should not be adopted, the last one we would raise is the issue of enforcement. This is, of course, tied into the previously discussed issue of the behavior of Oregon counsel. Both defense counsel and the court can comfortably rely upon the good faith of Oregon counsel who receive documents under a protective order. Moreover, enforcement of violations against Oregon counsel can be dealt with easily. In contrast, how is an Oregon Circuit Court judge going to enforce a protective order over a New York, Chicago or Miami attorney? How is anyone going to monitor whether some enforcement action is necessary? Again, the Oregon bench has better things to do with its time than attempting to determine whether John Q. Esquire, New York, New York, has or hasn't abided by the terms of a protective order and how to deal with the issue if he has not.

Discovery can and should be dealt with by the parties and judiciary which are handling a currently pending action. It should not be ruled upon by a judge who is not involved in and probably has no real interest in the current case, nor should it be a burden upon a party who has long since put the issues in a prior case to bed. There is no demonstrated need for the proposed amendment in Oregon.

Thank you for your consideration of our input.

Very truly yours,

Roger K. Stroup

Peter R. Chamberlain

RKS:lme

cc: Henry Kantor

Georgia-Pacific Corporation

Law Department
William E. Craig
Western Regional Counsel

900 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone (503) 248-7284

VIA FACSIMILE

October 16, 1992

Maurice J. Holland
Acting Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403

Re: Comments on Proposed Amendment to Rule 36C(2)

Dear Mr. Holland:

Georgia-Pacific Corporation is concerned about the proposed amendment to Rule 36C(2) for 2 important reasons. First, the possibility of later disclosure of information provided pursuant to a protective order will adversely impact settlement negotiations. Georgia-Pacific is often willing to disclose commercially sensitive information under the terms of an appropriate protective order in order to settle cases which otherwise might result in protracted litigation. If the amendment to the rule as proposed is adopted, Georgia-Pacific would be considerably less willing to make such disclosures.

Secondly, the proposed rule amendment would further complicate discovery proceedings. The inability to rely on a negotiated protective order will result in many more trips to the presiding judge for rulings on specific objections which heretofore have been easily resolved with an appropriate protective order.

Thank you very much for the opportunity to provide these comments.

Very truly yours,

William E. Craig
Western Regional Counsel

WEC:gls

Phil Goldsmith
Attorney at Law
1100 S.W. 6th Avenue
Suite 1212
Portland, Oregon 97204

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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
Attorney at Law
1100 S.W. 6th Avenue
Suite 1212
Portland. Oregon 97204

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

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 F(2) of this rule, shall determine ~~whether~~ when, and how this notice should be given ~~under subsection F(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.

BIOJECT

BIOJECT INC.
7620 S.W. BRIDGEPORT ROAD
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BIOJECT MEDICAL SYSTEMS LTD.
WORLD TRADE CENTRE
650-999 CANADA PLACE
VANCOUVER, B.C. V6C 3E1
TELEPHONE: (604) 669-8234
FAX: (604) 681-2634

November 17, 1992

Maurice J. Holland
University of Oregon
School of Law, Room 331
1101 Kinkaid Street
Eugene, OR 97403

Re: Amendment to ORCP 36C(2)

Dear Mr. Holland:

Bioject, a public company traded on NASDAQ, located in Portland, Oregon is opposed to the proposed amendment to Rule 36C(2) of the Oregon Rules of Civil Procedure. This amendment proposes procedures overturning protective orders.

As Founder, General Counsel, President and CEO of Bioject, a company of 36 employees that was founded in 1985, this proposed rule change could have significant ramifications for our business. Protective orders are important to small, high-tech growth companies in Oregon, especially those that are publicly traded, in that they assist in preventing the unwarranted dissemination of confidential information. This rule change will have a detrimental effect on our operations by increasing the cost of an already expensive process. For example, this rule change could discourage clinical investigators from recruiting patients into clinical trials of health care products in Oregon medical institutions. It also introduces new economic uncertainty into the litigation process.

Our primary concerns about the proposed amendment to ORCP 36C(2) are as follows:

1. Protective orders are normally sought by a defendant business or company in the course of settling one of the inevitable plaintiff suits, many times for an amount less than the defense costs, as a means of achieving final settlement of a case.

2. Although meritorious cases do occur occasionally, unfortunately, a public company is also a perfect target for frivolous and meritless litigation. Such companies are highly motivated to conclude litigation quickly since their auditors must always treat

the amounts prayed for as a liability to be discussed in the footnotes of their audited financial statements. Also, quarterly and annual SEC filings must discuss all litigation and the associated liability exposure as well. Therefore, a public company is under great pressure to settle all litigation, even that which is frivolous and meritless.

3. Such settlements are usually accomplished as a result of extensive negotiations and may be accompanied by discovery.

4. An important component of such settlements is the ability to maintain secrecy of the settlement terms and discovery, both to confound competitors and to lessen the likelihood of inviting other, similar suits.

5. This amendment allows the protective order to be relitigated, forever, creating a great burden on the protected parties.

6. The proposed amendment will increase court congestion and drive up overall litigation costs.

7. This introduction of uncertainty into the litigation process will create a negative business environment which could discourage the formation of research alliances with major manufacturers of medical products. Bioject has already announced such agreements with Eli Lilly and Company and Kobayashi Pharmaceutical Co., Ltd.

8. This amendment could diminish the ability of Bioject and other businesses in Oregon to compete with other companies in states that do not have this rule change or legislation in effect.

In addition to the above concerns, this proposed amendment is not good policy or law for the following reasons:

1. The burden for overriding a previously-granted protective order is placed on the protected party rather than upon an applicant. This forces a protected party to essentially "re-apply" for protective orders on an ongoing basis . . . forever.

2. "A party" is allowed to make disclosure of protected discovery after making application and noticing a hearing to the protected party. Such a hearing would be onerous in that, for an unlimited period of time, any party to a settlement could be approached by other potential plaintiffs, and agree to force the protected party to

November 17, 1992

"reopen" that portion of the settled case, by producing witnesses and evidence, proving, once again, that the protective order should stand.

Bioject is committed to remaining in Oregon as a fast-growing, high-technology, medical device company. We hope that you will be similarly committed to protecting the rights of individuals and the opportunity for business to add to the prosperity of our state.

I strongly urge you to oppose this amendment to Rule 36C(2). Please feel free to contact me regarding this letter. Thank you for your consideration.

Sincerely,

Carl E. Wilcox
President/CEO

CEW/fkm

wp51\corporat\orcp.ltr

DUNN, CARNEY, ALLEN, HIGGINS & TONGUE

ROBERT L. ALLEN
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JONATHAN A. BENNETT*
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ROBERT R. CARNEY
GEORGE J. COOPER
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JOHN C. DEVOE
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DANIEL F. VIDAS
ROBERT K. WINGER

* ADMITTED IN OREGON AND WASHINGTON
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** RESIDENT, BEND OFFICE

November 19, 1992

Maurice J. Holland
Member of Council on Court Procedures
University of Oregon
School of Law, Rm. 331
1101 Kincaid Street
Eugene, OR 97403

RE: Proposed Amendment to ORCP 36(c)

Dear Mr. Holland:

At your December 12 meeting of the Council on Court Procedures, you will have before you a proposed amendment to Rule 36(c). After review of the proposed amendment, I have come to the conclusion that the amendment should be rejected.

Our firm represents plaintiffs and defendants. We represent out-of-state corporations that are sued in this state and Oregon corporations that are sued in various states. The present Rule 36(c) is for all practical purposes identical to the Federal Rule of Civil Procedure 26(c). That rule is well understood across the country and has been the subject of a number of court decisions that provide guidance to trial courts faced with interpreting the rule. The Federal Rules have recently been reviewed and proposed changes are being experimented with in various Districts. The rule change under consideration here is not a part of the proposed Federal Rule changes.

The proposed amendment to my knowledge has not been adopted in any state. There is no body of existing law as to the effect of the proposed amendment. If the proposed change were to be adopted, the result almost certainly would be an increase in Oregon's litigation to determine the confidentiality of key business information. If the amendment were to be passed, I would expect cases filed in Oregon in an attempt to obtain information to be used in litigation in other states without the same rule. I would further expect cases to be filed in the state court rather than in federal court. While the numbers of such additional cases may not be large, they are certainly going to be particularly time-consuming cases and burden our already overburdened judicial system. In my judgment, Oregon should defer considering this amendment until other states have had decisions interpreting the effect of changes and we know what we are getting ourselves into.

Oregon has longstanding practice of not adopting discovery rules which are considered experimental, burdensome or expensive. For example, Oregon delayed adopting many of the federal rules and still has not adopted rules permitting interrogatories. It would certainly be out of character for Oregon to be an experimenter with a new rule.

Trial lawyers presently exchange information without reservation based on protective orders. If this proposed amendment were to be adopted, I would expect defendants to be much more reluctant to release information to plaintiffs in Oregon resulting in delays and expense to Oregon plaintiffs in obtaining information that otherwise would have been available to them. I would expect state trial court judges would have to hear many more motions on the form of protective orders. The focus of these orders are presently worked out between counsel. The only potential benefit of the rule change would be to facilitate transfer of information obtained in one case to somebody who has a similar case. If Oregon was one of only a very few states having a rule permitting that sort of exchange, I would expect increased numbers of suits to be filed in Oregon for the purpose of obtaining information that would then be distributed about the country. I do not know that we want Oregon courts to be known as facilitating persons in dealing in confidential business information.

The proposed rule as drafted is highly indefinite as to what standards should be applied. It is further uncertain as to what the standard of review would be. This is the sort of uncertainty that will slow down progress of cases and add to litigation costs. The only potential benefits would be to litigants in other states who might receive information from Oregon cases. In my judgment, the proposed rule is not in the best interests of the state and should be rejected.

Very truly yours,

Thomas H. Tongue

THT:jjb

[THT\COV6-1.001]

Gilma, pls copy for distribution

PACCAR Inc

Business Center Building
P.O. Box 1518
Bellevue, Washington 98009
Telephone (206) 455-7400

December 7, 1992

Mr. Maury Holland
University of Oregon School of Law
1101 Kincaid
Eugene, Oregon 97403

Dear Mr. Holland:

We urge you, the Council for Court Procedures, to vote No on the proposed Protective Order regulation.

PACCAR Inc is a manufacturer of Kenworth and Peterbilt trucks with plants and facilities located throughout the United States. We believe the proposed regulation would restrict the authority of courts to issue Protective Orders to keep highly sensitive or commercially valuable information produced in a litigation confidential. This proposal would also create a decidedly hostile environment for business and the courts of Oregon by making it impossible for courts to adequately protect trade secrets and other proprietary business information. Further, this proposal would destroy court procedures that promote efficiency and economy, and deny protection of the fundamental rights of litigants.

The net effect of restricting the use of Protective Orders will be lawsuits which are more costly, more complex, and less likely to settle. As the proposed regulation will destroy a system that now works in the best interest of all parties involved with litigation, we strongly urge you to vote "NO" on this measure.

Sincerely,

Norman E. Proctor
Manager of State
Government Relations

NEP:lph

PERKINS COIE

A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
U.S. BANCORP TOWER, SUITE 2500 • 111 SOUTHWEST FIFTH AVENUE • PORTLAND, OREGON 97204
TELEPHONE: (503) 295-4400

December 9, 1992

Maurice J. Holland
University of Oregon
School of Law, Room 331
1101 Kincaid Street
Eugene, Oregon 97403

Re: Proposed Amendment to ORCP 36.C(2)

Dear Mr. Holland:

I am writing on behalf of the Oregon Association of Defense Counsel ("OADC") to reiterate our objections to the proposed changes regarding protective orders. As stated in our letter of June 12 on this subject, the OADC believes that the proposed changes do not advance the jurisprudence of the State of Oregon. The proposed changes will, in our view, increase the expense of civil litigation, impede settlements, and unfairly shift the burden of maintaining confidentiality to a party disgorging confidential information -- usually the defendant.

We also believe there is an additional major impact not addressed in our earlier letter. The proposed changes will likely have the effect of discouraging voluntary disclosure of confidential information pursuant to an agreed protective order. Substituted would be a procedure by which litigants can be expected to object in the first instance to production of sensitive materials because they will perceive that there is no benefit -- only detriment -- to voluntarily disclosing sensitive materials. Additionally, litigants will likely perceive their tactical interests better served by seeking the protection of the court and making a preliminary record regarding the sensitivity of various discovery materials before any documents have been turned over in discovery.

The spectre of increased court involvement in discovery disputes is real and potentially devastating to the civil justice system in light of ever greater pressures on the courts from such initiatives as Measure 5.

In summary, we believe the detriments from the proposed changes far outweigh the benefits, if any. We urge the

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Council to reject the proposed changes at the meeting on December 12.

Very truly yours,

Paul T. Fortino

PTF:jlp

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McEwen, Gisvold, Rankin
& Stewart
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December 10, 1992

By Messenger

Janice M. Stewart, Esq.
McEwen, Gisvold, Rankin & Stewart
1100 SW 6th Avenue, Suite 1600
Portland, OR 97204

Re: Proposed Amendments to ORCP 32

Dear Janice:

It has come to my attention that Phil Goldsmith and others have proposed certain amendments to ORCP 32 which may be considered by the Council on Court Procedures at its December 12, 1992 meeting in Eugene.

I understand that among the proposed amendments are those which in substance would do the following:

1. Delete notice provisions included in former ORS 13.260 as originally enacted; and

2. Eliminate or greatly reduce the use of claim forms as originally included in former ORS 13.260.

Having been directly involved in the negotiated legislative settlement of the differences between the plaintiffs' and defendants' bars in 1973, I want to set forth a bit of history and say why I think it would be unwise to change these two provisions.

The Oregon legislature considered and adopted class action legislation at the 1973 session. Henry Carey led the plaintiffs' bar, and among those who represented the defendants' bar were Hugh Biggs and I for our law firm. The

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Attorney General's office was also actively involved in the discussions leading to adoption of the class action rule.

The primary conflict was between ease of recovery on the one hand and due process protection of the rights of the litigants on the other. The plaintiffs' bar wanted an opt out rule, limited notice and fluid recovery. The defendants' bar wanted an opt in provision, expanded notice and a requirement that individual class plaintiffs had ultimately to express an interest in recovery.

As a result of the discussions before the legislature and with the participation by the Attorney General, the legislature balanced the equities. The legislature provided an opt out rule which automatically gives plaintiffs the collective force of a large group once a class is certified. However, the legislature adopted as a counter balance a requirement that before entry of a final judgment, individual members of the class would have to actually express an intention to make a claim against the defendant. As to notice, the legislature simply enacted the notice provisions of Federal Rule 23 and requested the best possible notice under the circumstances.

In both the 1975 and the 1977 legislatures, Mr. Carey and other proponents of a more liberalized use of class actions returned to Salem and, having obtained the advantages of opt out, tried to convince the legislature that it should modify the law to ease the notice provisions and to permit fluid recovery. In both 1975 and 1977 the attempts were unsuccessful, primarily, in my opinion, because there was no demonstration that the balance originally created had disadvantaged class plaintiffs.

It seems to me that nothing has happened in the 15 years since 1977 to demonstrate that class plaintiffs have been prejudiced by the notice requirements. Certainly there can be no showing that individual members of the public have suffered because they actually had to fill out and submit a claim form before they could be paid. Since the class action rule was enacted in 1973, class representatives have won litigation, class representatives have lost litigation, and many class actions have been settled. A body of law has been created which has served the public well, judging by the few decided cases evidencing problems with the procedures.

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It seems to me that what is presently being propounded is simply a revisitation of a controversy which was resolved by compromise in 1973 and not changed by the legislature in 1975 or 1977. There is no demonstrated public need for the change, and I believe that the suggested changes represent an attempt to have the Council enact not procedural but social changes, an impulse which I hope the Council will resist.

I would appreciate your distributing this letter to all members of the Council.

Very truly yours,

William M. McAllister

William M. McAllister

WMM:ml

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DEC 1 4 1992

December 10, 1992

By Messenger

Janice M. Stewart, Esq.
McEwen, Gisvold, Rankin & Stewart
1100 SW 6th Avenue, Suite 1600
Portland, OR 97204

Re: Proposed Amendments to ORCP 32

Dear Janice:

I am writing to voice my strong opposition to the proposed amendments to ORCP 32 that are to be considered by the Council on Court Procedures this Saturday.

I have handled numerous class actions during my 19 years of practice. Based on that experience, I can see no need for the proposed changes. Furthermore, I believe that the deletion of notice provisions and the elimination or reduction in the use of claim forms would pose significant due process questions that would unnecessarily complicate class action litigation. In addition, the elimination of the distinction between types of class actions would tend to confuse litigants and would inject uncertainty into a system that has been functioning smoothly for a number of years.

I would appreciate your distributing this letter to members of the Council for their consideration.

Sincerely yours,

Lois O. Rosenbaum

Lorp9350

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December 11, 1992

VIA FAX (364-1564) AND U.S. MAIL

Prof. Maury Holland, Executive Director
Council on Court Procedures
University of Oregon
School of Law, Room 275A
1101 Kincaid Street
Eugene, OR 97403-3720

Re: Proposed Amendment to ORCP 36C

Dear Prof. Holland:

During the last two sessions of the Procedure and Practice Committee, we discussed the proposed amendment to ORCP 36C. The committee was not able to reach a consensus regarding the amendment. As a result, we would like to share some of the concerns we discussed in this regard.

It is our understanding that the following is the proposed amendment:

> C.(2). A party may disclose materials or other information covered by a protective order issued under subsection (1) above to a lawyer representing a client in a similar or related matter if the party first obtains a court order, after notice and an opportunity to be heard is afforded to the parties or persons for whose benefit the protective order has been issued. Disclosure shall be allowed by the court except for good cause shown by the parties or persons for whose benefit the protective order has been issued. No order shall be issued allowing disclosure unless the attorney receiving the material or information agrees in writing to be bound by the terms of the protective order. (Renumber existing Rule 36C and 36C(1).)

1. The Procedure and Practice Committee discussed the general purpose behind the proposed amendment and concluded that there are really two distinct objectives for the amendment. The committee recognized the public policy against

secrecy although, at the same time, it recognized the necessity of protecting trade secret information which an entity has worked to develop and which forms the basis of its existence. In addition, there is a separate purpose to allow attorneys access to previously produced documents for convenience of counsel. Although the public policy disfavoring secrecy is somewhat intertwined in the result of the amendment, the amendment itself seems to be directed toward third party intervention into the production of documents. There was concern that the amendment merely allows for an additional procedure for disclosure of documents which a party would be entitled to and, in fact, obligated to request, pursuant to the normal discovery proccdures set forth in the ORCP.

2. The amendment is not clear regarding its application to closed cases. The amendment may require the court to entertain continuous jurisdiction over all civil actions in which a protective order has been issued. In contrast, if the civil file is still active, and if the information sought is available in an active civil case, the same information should be, and arguably would be, available to the second litigant under the normal discovery rules and thus there would be no need for invading the first protective order.

3. There is no specific provision for attorneys who do not practice in the State of Oregon to request and institute the ORCP 36C procedure. Furthermore, even if such attorney were able to litigate a prior protective order in an Oregon case, the committee had great concern over the Oregon court's ability to enforce the protective order even if the second attorney agreed to be bound by such. Routinely, failure to comply with protective orders is enforceable by a contempt citation. The Oregon courts do not have the practical ability to enforce such a contempt citation and in fact, would have no basis for any such sanctions against an out-of-state litigant. In addition, the Oregon court would have very limited, if any, ability to enforce a monetary sanction against an out-of-state attorney under the circumstances presented by the amendment.

4. With respect to the disclosure itself, the proposed amendment requires only that the two attorneys represent a client "in a similar or related matter." Such language may allow disclosure of trade secret information which has been produced pursuant to a protective order in a case involving two separate and distinct entities. As an example, General Motors may be involved in seatbelt litigation which is "similar" to a Honda Motors seatbelt case. However, the two entities have completely different trade secrets and interests in protecting

such data. Moreover, the language - "similar or related" - provides only a minimum relevancy requirement which would presumably have to be litigated on a case-by-case basis.

5. With respect to the burden of proof, the amendment to ORCP 36C as written presumes that disclosure is appropriate unless good cause is proven by the protected party. This places the burden of showing good cause upon the parties or person for whose benefit the protective order has been issued. There are pros and cons regarding placement of the burden of proof on either party, to wit:

A. Reasons for placing the burden of good cause on the party for whose benefit the protective order has been issued include the following:

(1) There is no potential harm because persons to whom disclosure is made must agree to be bound to the terms of the order. Responsibility for showing any harm from further disclosure, subject to the protective order, should rest upon the party who might suffer harm.

(2) The court should continue to presume that secrecy is against the public policy of Oregon. Therefore, the burden of obtaining secrecy should be on the party who wants secrecy.

(3) The attorney seeking the material in all likelihood does not know the true contents of the material at issue. Counsel is at a disadvantage in connecting the importance, or potential usefulness, of the disclosed material to the existing representation. Counsel who seeks to prevent disclosure is in a better position to urge lack of relevance.

B. Reasons in favor of placing the burden of showing good cause on the party who seeks disclosure are as follows:

(1) A status quo exists because a trial court has already decided that a protective order is necessary. It is more judicially efficient to place the burden on the party seeking to disturb the status quo, after a prior commitment of judicial resource, time, and examination of issues.

(2) A moving party bears the burden of proof on most motions, even discovery motions, and there are less compelling reasons to carve out an exception for third persons intervening in the private dispute of others.

(3) A person seeking disclosure is in a better position to demonstrate the necessity for the information.

(4) Requiring the benefitted party to bear the burden of proof may require that party to litigate their protective order hundreds of times after the initial litigation has been closed and dismissed.

(5) The moving party is able to obtain the same information, via the normal discovery procedure, in the moving party's case.

In conclusion, the Procedure and Practice Committee was unable to reach a consensus for or against adoption of the proposed amendment. It is our committee's hope that our input will be useful to the Council in its work on the proposal at tomorrow's meeting.

Respectfully Submitted,

Richard S. Yugler

Kathyrn S. Chase

Dennis J. Hubel

Stephen C. Thompson

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EXCLUSION OF WITNESSES AT DEPOSITION

Excerpts from the late Fred Merrill's 9-26-91 memorandum:

> "EXCLUSION OF WITNESSES AT DEPOSITION. Ron Marceau passed along a question raised by a Bend judge by letter of February 6, 1991 ... The judge felt that the ORCP did not clearly cover the exclusion of witnesses during the deposition. ORCP 39 D provides for oral depositions ... 'Examination and cross-examination of witnesses may proceed as permitted at trial.' I would interpret this as providing that Rule 615 (ORS 40.385) of the Oregon Evidence Code and all other Oregon Evidence Code provisions regulating examination of witnesses at trial apply to the examination of a witness at deposition. Rule 615 provides that at the request of a party the court may order other witnesses excluded from the trial, except (a) a party, (b) an officer or employee of a party which is not a natural person designated as its representative, or (c) a person whose presence is shown by a party to be essential to the presentation of the party's cause (usually an expert).
>
> The federal rules are slightly clearer. FRCP 30(c) says 'Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence.' We could change our rule to specifically refer to the Oregon Rules of Evidence."

EXCERPTS FROM MINUTES OF COUNCIL'S 12-14-91 MEETING:

> **Agenda Item No. 3: Exclusion of witnesses at depositions (Janice Stewart) (see attached memorandum from Janice Stewart dated November 4, 1991). Janice Stewart discussed whether ORCP 36 C(5), ORCP 39 D, or ORE 615 give the trial court authority to exclude witnesses from depositions for the same reason that witnesses may be excluded from trial. Her conclusion had been that the rules are unclear and that her recommendation would be to amend ORCP 39 D to clarify the question (see page 4 of her memorandum).**
>
> **The Executive Director asked whether this would be a rule of evidence and beyond the rulemaking power of the Council. Council members pointed out that the rule did not deal with the admission or exclusion of evidence at trial but with the procedure of conducting a deposition. Henry Kantor asked whether the rule would allow the court to control the number of representatives of a corporation that could attend a deposition. Janice Stewart said the intent was to have the same rule for persons attending depositions that applies to trials. Mike Phillips asked if the rule required a court order for exclusion or was mandatory in every case. After further discussion, the Executive Director was asked to confer with Janice Stewart and suggest some language that addressed the concerns expressed by Council members.**

EXCERPT'S FROM THE LATE FRED MERRILL'S 1-27-92 MEMORANDUM:

3. Exclusion of witnesses at depositions

After discussion with Janice Stewart, we suggest the following as a redraft of ORCP 39 D. This draft attempts to control presence of witnesses at depositions in light of the concerns expressed by the Council at the last meeting:

> ORCP 39 D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Oregon Evidence Code. Unless the court orders otherwise, only the following persons may be present during the deposition: (1) attorneys representing the parties, (2) any party who is a natural person, and (3) an officer or employee of a party which is not a natural person designated as its representative by its attorney.

The existing rule says that examination and cross-examination may proceed as at trial. This draft refers to the Oregon Evidence Code. The Oregon Evidence Code is defined in ORS 40.010.

The draft defines who ordinarily may be present at deposition and requires a court order to change the usual rule. ORE 615 allows the court to direct that witnesses be excluded from trial, except for certain categories of witnesses. The deposition categories of normal attenders are generally the categories that cannot be excluded from trial under ORE 615. It is the opposite of ORE 615 because a court order is necessary to change the limitation not to create it.

The categories used differ slightly between this draft and ORE 615. ORE 615 does not specifically mention attorneys. This draft would allow any attorney representing a party to be present, not just an attorney of record for a party. There is no limit upon the number of attorneys that may attend for one party. The rule would, however, allow only one corporate representative without court order. This is consistent with ORE 615.

ORE 615 says that the court cannot exclude persons whose presence is essential to the presentation of a party's cause. This category is not used for depositions because it is too vague to be applied without court discretion. It would provide one basis for arguing that the court should allow an additional person to attend the deposition.

Other than a court order, if a party wants to have additional persons in attendance, the stipulation of all parties to the case would be necessary.

EXCERPTS FROM MINUTES OF COUNCIL'S 2-8-92 MEETING (DISCUSSION OF ABOVE PROPOSAL):

Agenda Item No. 3: Exclusion of witnesses at depositions (Janice Stewart). Janice Stewart said the draft set out on page 4 of the Executive Director's memorandum specified those who could be present at depositions and that unless the court orders otherwise, only those people may be present. She said subsection (1), which states that attorneys can always be present during deposition, was not taken out of ORE 615 but that subsections (2) and (3) were taken out of ORE 615. A discussion followed.

Judge Liepe wondered whether an expert whose deposition was next could listen in on a deposition; Janice Stewart said that a court order would have to be obtained or the parties would have to agree to it. Bernie Jolles wondered whether the witness would be able to have an attorney present. Janice Stewart suggested including language specifying "attorneys of any of the parties or the deponent".

Excerpts from 2-8-92 minutes:

The Chair suggested, to be consistent with the Council's approach in other rules, prefacing the second sentence of the draft with, "Unless the parties stipulate or the court orders otherwise," rather than "Unless the court orders otherwise,". Janice Stewart agreed to make that change also.

The Chair pointed out that ORE 615 has two categories which the proposed amendment to 39 D does not contain: a victim in a criminal case and a person whose presence is shown by the party to be essential to the presentation of the parties' cause, which would include expert witnesses and representatives of non-natural persons. He asked whether the intent was that one cannot bring an expert or a second corporate representative without either the parties' stipulation or a court order. Janice Stewart said the thought was that it was better not to have that specified in the rule and to leave it up to the parties to stipulate or the court to order otherwise. Judge Liepe wondered which would be the better approach: to say a court order is needed to exclude witnesses or that a court order is needed to let them be there. Janice Stewart stated the reason the rule was brought to the Council's attention was the problem currently with the court's authority under the rule that limits depositions. Mike Phillips felt that to have a rule which automatically excluded everyone from a deposition except a limited number of people went far beyond the initial concerns. Bernie Jolles stated that another issue had been raised and that was the intimidation question. Judge Kelly wondered whether or not legal assistants would be allowed to attend a deposition. Further discussion followed.

Attorney Dennis Hubel, speaking on behalf of the OSB Procedure & Practice Committee, stated he thought the amendment to ORCP 39 D as drafted provides a mechanism to limit it to a corporate representative and that would need interpretation if someone wanted to press the issue. He was in favor of leaving it up to the judge to decide how many corporate representatives could attend a deposition.

Judge Barron suggested that the word "exclusion" be added so that the first sentence would be prefaced by: "Examination, cross-examination and exclusion of witnesses may proceed ...".

The Chair asked whether the intent of the draft was to exclude the remainder of existing Rule 39 D. Janice Stewart stated that was not the intent and that perhaps it would be better to break the rule up into subsections.

Judge Barron raised another point: definition of parties. He wondered whether beneficiaries in a wrongful death action would be allowed to be present at a deposition.

The Council discussed whether adding the word "exclusion" would accomplish the intent of the amendment. Janice Stewart said the problem was that ORE 615 is taken directly from the federal rule and that there are federal cases that go both ways as to whether that rule applies to depositions. Bruce Hamlin said that if the concern was that by just adding the word "exclusion" to the first sentence of 39 D does not make it clear that the court has the power, a single sentence after the first sentence of existing 39 D could be added: "At the request of a party or a witness, the court may order persons excluded from the deposition."

The Chair asked for comments on the proposed language, "Examination, cross-examination, and exclusion of witnesses may proceed in the manner as permitted by trial," and adding the existing language in 39 D., with perhaps a reference back to Rule 36 C(5) to take care of the intimidation problem. Janice Stewart stated it would mean that you are only going to be excluding people who are witnesses and then the issue would be who are witnesses; she thought it would be a problem to simply refer to ORE 615 because it is not always clear at deposition who will be a witness at trial.

A motion was made and seconded to add the following language following the first sentence of existing 39 D: "At the request of a party or a witness, the court may order persons excluded from the deposition." A discussion followed regarding whether the sentence should be prefaced with "Upon motion". Maury Holland said he thought that people on all sides of a case want to have stated in the rule the category of people who will be present at deposition. Janice Stewart wanted to make sure that the amendment would not merely incorporate Rule 36 C, i.e. that it should be broader than Rule 36 C.

A vote was taken on Bruce Hamlin's motion to add the following sentence after the first sentence of existing 39 D: "At the request of a party or a witness, the court may order persons excluded from the deposition." The motion passed with 10 in favor and 3 opposed. Judge McConville said he was in favor of establishing categories and that was why he voted against the motion.

After a lengthy discussion of Agenda Item No. 3 (EXCLUSION OF WITNESSES AT DEPOSITION) at its February 8, 1992 meeting at the State Capitol in Salem, the Council voted to add the underlined boldface language to Rule 39 D shown below:

DEPOSITIONS UPON ORAL EXAMINATION
RULE 39

* * * *

D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. **At the request of a party or a witness, the court may order persons excluded from the deposition.** The person described in Rule 38 shall put the witness on oath. The testimony of the witness shall be recorded either stenographically or as provided in subsection C(4) of this rule. If testimony is recorded pursuant to subsection C(4) of this rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G(2) of this rule, until the final disposition of the action. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor[e]. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the record. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

* * * *

* * * *

Excerpts from the late Fred Merrill's 9-26-91 memorandum:

> "7. **RECOVERY OF COST OF COPYING PUBLIC RECORDS.** Peter E. Baer wrote to the Chief Justice relating to the correct interpretation of 'the necessary expense of copying any public record, book or document used in evidence on the trial' which is listed as a recoverable cost and disbursement in ORCP 68 A(2). Mr. Baer apparently felt that he should be allowed to recover the cost of copies of pleadings and some other documents which he submitted, but his claim was disallowed by a trial judge. The Chief Justice passed the letter on to the Council (attached as Exhibit 9).
>
> The reference to public records copies as recoverable disbursements was taken from the former statute governing costs in legal actions, ORS 20.020. The language did not appear in the Field Code and was not in the original 1853 Oregon Code. It was added by Judge Deady in the 1862 revision of the civil code. As far as I can determine in a brief search, the language has never been interpreted by the Oregon appellate courts.
>
> On its face, the key part of the language is 'necessary expenses' and 'used in evidence on the trial.' The copies for which costs are recoverable are those public records where a certified copy must be used at trial; that is, where a party cannot submit an original document because the original must remain in public custody. This is presently covered in the Oregon Evidence Code under Rule 1005, ORS 40.570:
>
> > 'The contents of an official record or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 802 of this act.'
>
> Rule 803(8), ORS 40.460 of the Evidence Code, makes such documents admissible despite the hearsay rule, and Rule 802 allows for authentication by certificate. Under this interpretation, only the cost of procuring certified copies of documents admitted into evidence under these provision of the Evidence Code would be recoverable. This would not cover the pleadings referred to by Mr. Baer. To make this clearer we might change the language to say: '... the necessary expense of securing and copying any public records admitted into evidence pursuant to Rule 1005 of the Oregon Evidence Code.'"

Excerpt from the late Fred Merrill's 1-27-92 memorandum (page 7):

> "The following language is intended to limit application of the public records provision in ORCP 68 A(2) to situations where use of certified copies of public records was mandatory. The word 'necessary' in the existing rule is redundant.
>
> > **Costs and disbursements.** "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; the compensation of referees; the [necessary] expense of copying of any public record, book or document [used as evidence on trial] admitted into evidence at trial pursuant to ORS 40.570 (Oregon Evidence Code, Rule 1005); ..."

After discussion under Agenda Item No. 8 at its 2-8-92 meeting, the Council voted to adopt the Executive Director's amendment above, but deleted the language "pursuant to ORS 40.570 (Evidence Code, Rule 1005)". The rule as amended is set forth below:

ALLOWANCE AND TAXATION OF
ATTORNEY FEES AND COSTS AND DISBURSEMENTS
RULE 68

A. Definitions. As used in this rule:

* * * *

A.(2) **Costs and disbursements.** "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; the compensation of referees; the [necessary] expense of copying of any public record, book, or document [used as evidence on the trial] admitted into evidence at trial; recordation of any document where recordation is required to give notice of the creation, modification or termination of an interest in real property; a reasonable sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation therein; and any other expense specifically allowed by agreement, by these rules, or by other rule or statute. The expense of taking depositions shall not be allowed, even though the depositions are used at trial, except as otherwise provided by rule or statute.

* * * * *

Excerpts from the late Fred Merrill's 1-27-92 memorandum:

> **"ORS sections limiting ORCP 7 E.**
>
> As requested, I did a computer search to see how many ORS sections changed the limits on who may serve summons found in ORCP 7 E. The only ORS section that modifies ORCP 7 E is ORS 180.260 (attached) which allows employees of the Department of Justice to serve summons and process in cases in which the state is interested. The statute was enacted by the 1989 Legislature. We could amend ORCP 7 E as follows:
>
> > **By whom served; compensation.** A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor, except as provided in ORS 180.260, an officer, director, or employee of, nor atttorney for, any party, corporate or otherwise. ..."

At the Council's 2-8-92 meeting, it voted unanimously to adopt the above language. The rule as amended is set forth below:

SUMMONS
RULE 7

* * * *

E. By whom served; compensation. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor, except as provided in ORS 180.260, an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. Compensation to a sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in Rule 68.

* * * *

Excerpt from the late Fred Merrill's 9-26-91 memorandum:

> "**SUMMONS WARNING.** The State Bar Lawyer Referral Committee is suggesting a change in the warning to defendants in the summons which is required by ORCP 7 C(3). This was transmitted to us by a letter from Ann Bartsch dated May 21, 1991 (attached as Exhibit 20). The idea apparently came from the New Jersey Summons form. Since the most useful thing in the summons language is the suggestion that an attorney be contacted, this may be a good idea. Are there other referral services that should be mentioned? Should there be a specific reference to legal aid? The New Jersey language has several numbers."

Following is an excerpt from the minutes of the Council's 3-14-92 meeting, after which the tentative amendments to ORCP 7 C(3) are set forth:

Agenda Item No. 3: Summons warning - progress report (Judge Welch). Judge Welch reported that almost a year ago the Bar had received a letter saying that New Jersey had a summons telling people what the telephone number was for the New Jersey State Bar and the New Jersey Law Referral Services, giving telephone numbers on a county-by-county basis, and Judge Welch had taken it upon herself to try to find out the answer to an issue raised by Council members whether that language in the summons wasn't just another opportunity to have something wrong on the form and be the basis for a dismissal or default. Anne Bartsch of the OSB had called and written letters to try to find out whether New Jersey had experienced any problems; Ms. Bartsch learned that there had never been any problem in New Jersey with using that language in the summons.

Judge Welch suggested the following language: "If you need a lawyer and you don't have a lawyer, call the Oregon State Bar Lawyer Referral Service." She pointed out that the Lawyer Referral Service of the Oregon State Bar is a completely integrated referral service.

Judge Graber said she supported the idea of having language in the summons and moved that the following slightly different wording be adopted [which would be an amendment to ORCP 7 C(3)]:

> **"If you have questions, you should see [an attorney] a lawyer immediately. If you need help in finding a lawyer, you may call the Oregon State Bar's Referral and Information Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636."**

Judge Welch seconded the motion. After discussion, the motion passed unanimously.

SUMMONS
RULE 7

* * * *

C.(1) **Contents.** The summons shall contain:

* * * *

C.(3) **Notice to party served.**

C.(3)(a) **In general.** All summonses, other than a summons referred to in paragraph (b) or (c) of this subsection, shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see [an attorney] a lawyer immediately. If you need help in finding a lawyer, you may call the Oregon State Bar's Referral and Information Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.

C.(3)(b) **Service for counterclaim.** A summons to join a party to respond to a counterclaim pursuant to Rule 22 D.(1) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see [an attorney] **a lawyer immediately. If you need help in finding a lawyer, you may call the Oregon State Bar's Referral and Information Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.**

C.(3)(c) **Service on persons liable for attorney fees.** A summons to join a party pursuant to Rule 22 D(2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see [an attorney] **a lawyer immediately. If you need help in finding a lawyer, you may call the Oregon State Bar's Referral and Information Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.**

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* * * *

Excerpts from the late Fred Merrill's 9-20-91 memorandum:

> "**OATHS FOR DEPOSITIONS BY TELEPHONE.** Keith Burns wrote the Council on October 24, 1990 for the Oregon Court Reporters Association (attached as Exhibit 7). Questions have apparently arisen about court reporters administering oaths for depositions by telephone. He suggests adding a cross-reference in ORS 39 C(7) to the oath procedure specified in ORCP 38 C.
>
> I think the Council intended that the procedure for administering oaths would be one of the 'conditions of taking testimony' designated in the court order under ORCP 37 C(7) allowing a deposition by telephone. It was anticipation of problems of this type that led the Council to require a court order before a deposition could be taken by telephone. On the other hand, the change suggested by Mr. Burns is relatively simple and consistent with court control of the telephone deposition. ORCP 38 states that the oath can be administered by anyone the trial judge designates."

At the Council's 2-8-92 meeting, the Council discussed extensively the late Fred Merrill's proposal set out below:

> 2. Oaths for depositions by telephone. After consulting with Keith Burns, I suggest that the following be added at the end of subsection 39 C(7);
>
> > "The oath or affirmation may be administered to the deponent, either in person or over the telephone, by a person authorized to administer oaths by the laws of this state, by a person authorized to administer oaths by the laws of the place where the deposition is taken, or by a person specially appointed by the court in which the action is pending. If the witness is not physically in the presence of the officer or person administering the oath, the oath shall have the same force and effect as if the witness were physically present before the officer. For purposes of this rule, subsection 46 A(1), subsection 46 B(1), subsection 55 C(1) and subsection 55 F(2), a deposition taken by telephone is taken at the place where the deponent is to answer questions propounded to the deponent."
>
> The first sentence provides flexibility in administering the oath. It may either be done by someone at the questioning end of the telephone call or someone who is in the presence of the deponent. The second sentence is taken from the proposed amendment to Arizona Rule of Civil Procedure 30(c). It makes clear that an oath outside the presence of the person administering the oath is as effective as an oath in the presence of such person. The last sentence is a modified version of FRCP 30 C(7). It actually goes beyond the problem raised by Mr. Burns. There are a number of places in the ORCP where it may be important to determine where a deposition by telephone is being taken. Under the existing rule you could argue that the deposition is taken where the questions are asked or where the deponent is located. The draft follows the federal rule in opting for the location of the deponent.

To define when a deposition has been regularly taken, administration of an oath at either end of the telephone line and by a person authorized to administer oaths by either state or by the court should be adequate. The Oregon court rules can control what formalities must accompany a deposition in order to be valid and usable in Oregon Courts. ORCP 38 A and B identify the same persons as proper oath givers for depositions taken within and without the state.

Whether the provision would subject an out-of-state deponent to prosecution for perjury is less clear. For purposes of defining the crime of perjury in Oregon, Oregon law would control. A definition of a proper form of oath for a deposition in the ORCP would apply in determining whether the deponent had lied under oath. The crime of perjury could be committed by a person outside the state who is testifying by telephone.

One difficulty is that an absent foreign deponent would usually not be subject to arrest and prosecution within the state of Oregon. This difficulty could be addressed in several ways:

1. Prosecute the deponent in the state where the deponent was located during the deposition. Most states have a crime of perjury or false swearing that would involve making a false statement under oath. The state where the deponent is located has an interest in controlling any improper conduct committed within its borders. A deponent who intentionally testifies falsely in an Oregon judicial proceeding, after having a standard oath or affirmation administered by a person authorized to do so by Oregon law, is engaging in improper conduct.

2. Use extradition. If the perjury was serious enough to warrant prosecution of a foreign defendant, it probably is a crime subject to extradition.

3. Ignore the problem. Perjury prosecutions are so rare for depositions that, if there is a problem when oaths are administered to a foreign deponent by a local court reporter, it is more theoretical than actual.

It should be noted that the rules already contain a procedure that presents the same problem. ORCP 38 B provides that, for a deposition taken outside the state in a case pending in Oregon, the oath may be administered by a person appointed by the court. That person probably would not be someone authorized to administer oaths by the laws of the foreign state.

2-8-92 MEETING

Excerpts from minutes of meeting:

Agenda Item No. 2: Oaths for depositions by telephone (subcommittee report - Mike Phillips and Bruce Hamlin; letters from Kathryn Augustson and Stephen Thompson; see pages 1 and 2 of Executive Director's January 27, 1991 memorandum). Mike Phillips explained that at the last meeting a proposal to amend subsection 39 C(7) had been discussed and concerns had been raised by Council members. The subcommittee, after discussion with Kathryn Augustson of the OSB Procedure and Practice Committee, is now suggesting the amendments to ORCP 39 C(7) and G(1) set out on pages 1 and 2 of the Executive Director's January 27, 1992 memorandum. A motion was made and seconded to adopt those proposed amendments. A lengthy discussion followed.

Bernie Jolles questioned the meaning of the language contained in the last sentence of proposed C(7)(b) which said:

> "If the place where the deponent is to answer questions is located outside this state, motions to terminate or limit examination under section E of this rule may only be made to the court in the state in which the action is pending and other applications for orders, subpoenas, and sanctions may be made to the court in the state in which the action is pending or a court of general jurisdiction in the county of the state where the deposition is being taken."

Excerpts from minutes of meeting (CONTINUED):

Bernie Jolles thought this dealt with a situation where an action is pending in Oregon and a deponent located in a foreign jurisdiction is being deposed. He suggested that, in the second from the last line above, the words "deposition is being taken" be deleted and the words "where the deponent is located" be substituted, Several other suggestions were made by Council members.

The Chair stated that he thought the intent of the last sentence of C(7)(b) should be clarified.

Janice Stewart stated she had a problem with reference to "county" in the last sentence of C(7)(b) since some states do not have counties. A suggestion was made that the wording should be "a court of general jurisdiction of the state where the deposition is being taken". Janice Stewart said it was still unclear where the deposition is being taken and that it could be where you are asking the questions or where the questions are being answered. It was pointed out that in the fourth sentence of C(7)(b) at the bottom of page 1, it states: "For the purposes of this rule ... depositions taken by telephone are taken at the place where the deponent is ...". Judge Liepe suggested that the language prefacing the last sentence of C(7)(b) could read, "If the deponent is located outside this state, ..." Janice Stewart suggested that "where the deponent is located" could be substituted for "where the deposition is being taken" at the end of the last sentence of C(7)(b). The Chair suggested that, to track the preceding sentence, the language "If the place of examination is outside the state" could be substituted for the proposed language in the last sentence of C(7)(b).

Judge Kelly wondered whether there really was an issue regarding out-of-state depositions by telephone. Bruce Hamlin explained that the rule as written requires a court order to conduct one. Bruce said the proposed rule makes it clear that parties can informally take an out-of-state deposition by telephone and tells the court reporters that it is all right to administer an oath over the telephone.

The Chair asked for comments regarding the first three sentences of C(7)(b). Judge Kelly felt that the third sentence of C(7)(b) repeated what is said in the first two sentences of C(7)(b). After further discussion, a motion was made and seconded to delete the third sentence from 39 C(7)(b). The motion passed unanimously.

The Chair asked for comments regarding whether the fourth sentence of C(7)(b) was needed since it is a definitional sentence. A motion was made and seconded to delete the fourth and fifth sentences from C(7)(b). Judge Liepe pointed out that it had been felt necessary to incorporate some language from the federal rule to address matters not addressed by the Oregon rule. Mike Phillips said the subcommittee wanted to try to give directions to the judges as to what they could rule upon, and Janice Stewart agreed that there needed to be some basis for rulings in Oregon. A vote was taken on the motion to delete the fourth and fifth sentences; the motion failed with 4 in favor and 9 opposed.

A motion was made and seconded to delete the words "in the county" from the second to the last line of the fifth sentence in C(7)(b). The motion passed unanimously.

Janice Stewart suggested amending the end of the fourth sentence so that it would say "where the deponent is located" instead of "where the deponent is to answer questions propounded to the deponent" and, at the beginning of the fifth sentence, she suggested saying "If the deponent is located" instead of "If the place where the deponent is to answer questions is located ...". A motion was made and seconded to adopt that language. Further discussion followed. Judge Liepe suggested amending the fourth sentence by saying "... place of the examination under Rule 55 F(2) is deemed to be the place where the deponent is located at the time of the deposition." Bill Cramer suggested deleting the language at the beginning of the fifth sentence, "If the place where the deponent is to answer questions is located outside this state" and begin the sentence with "Motions to terminate ..."

The Chair suggested that the subcommittee take another look at the draft, in particular, the fourth and fifth sentences of C(7)(b), and perhaps find a way of shortening them up. The Chair, referring to the language in C(7)(a), questioned whether a stipulation would be limited to the parties and whether there should be a concern about a witness needing to stipulate. Bruce Hamlin said he thought it was intended to apply to a stipulation of the parties. A discussion followed and it was suggested the last sentence of C(7)(a) was not needed. A motion was made and seconded to delete the last sentence of C(7)(a); the motion passed unanimously.

Excerpts from minutes of 2-8-92 meeting (continued):

The Chair asked if there were further comments regarding the motion as modified to adopt both C(7)(a), except the last sentence, and the first two sentences of C(7)(b). The last two sentences are to be redrafted and submitted for consideration at the next meeting. Attorney Jim Vick expressed concern that someone might forget to put a stipulation on the record, which would present problems at trial; he thought there should be language that would address that issue. The Chair asked the subcommittee to try to come up with some language.

A motion was made, seconded, and unanimously passed to table the motion to adopt 39 C(7)(a) and 39 C(7)(b) until the Council could consider the subcommittee's redraft of the proposed amendments.

At the Council's 5-9-92 meeting, Bruce Hamlin presented the following proposals:

PROPOSALS TO AMEND ORCP 38, 39, AND 46:

RULE 38. PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS

A. Within Oregon.

A(1) Within this state, depositions shall be preceded by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of this state or by a person specially appointed by the court in which the action is pending. A person so appointed has the power to administer oaths for the purpose of the deposition.

A(2) For purposes of this Rule, a deposition taken pursuant to Rule 39C(7) is taken within this state if either the deponent or the person administering the oath is located in this state.

B. Outside the State. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person appointed or commissioned by the court in which the action is pending, and such a person shall have the power by virtue of such person's appointment or commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable

PROPOSALS TO AMEND ORCP 38, 39, AND 46 (CONTINUED):

or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory, or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. Foreign Depositions.

C(1) Whenever any mandate, writ, or commission is issued out of any court of record in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.

C(2) This section shall be so interpreted and construed as to effectuate its general purposes to make uniform the laws of those states which have similar rules or statutes.

RULE 39. DEPOSITIONS UPON ORAL EXAMINATION

A. (unchanged)

B. (unchanged)

C. Notice of Examination.

C(1) (unchanged)

C(2) (unchanged)

C(3) (unchanged)

C(4) (unchanged)

C(5) (unchanged)

C(6) (unchanged)

C(7) *Deposition by Telephone.* Parties may agree by stipulation or [T]the court may (upon motion) order that testimony at a deposition be taken by telephone[.]. If testimony at a deposition is taken by telephone pursuant to court order, [in which event] the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be

PROPOSALS TO AMEND ORCP 38, 39, AND 46 (CONTINUED):

accurate and trustworthy. If testimony at a deposition is taken by telephone other than pursuant to court order or stipulation made a part of the record, then objections as to the taking of testimony by telephone, the manner of giving the oath or affirmation, and the manner of recording the deposition are waived unless reasonable objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the party taking the deposition.

D. (unchanged)

E. Motion to Terminate or Limit Examination. At any time during the taking of a deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court in which the action is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36C. Those described in Rule 46B(2) shall present the motion to the court in which the action is pending. Other non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46A(4) apply to the award of expenses incurred in relation to the motion.

F. (unchanged)

G. Certification; Filing; Exhibits; Copies.

G(1) *Certification.* When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was duly sworn [in the reporter's presence] and that the transcript is a true record of the testimony given by the witness. (Remainder unchanged.)

H. (unchanged)

I. (unchanged)

RULE 46. FAILURE TO MAKE DISCOVERY; SANCTIONS

A. Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, such applications may also be made to a court of general jurisdiction in the political subdivision where the deponent is located. [to a judge of a circuit or district court in the county where the deposition is being taken.]

A(2) (unchanged)

A(3) (unchanged)

A(4) (unchanged)

B. Failure to Comply With Order.

B(1) *Sanctions by Court in the County Where [Deposition Is Taken] the Deposition Is Located.* If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or district court judge in the county in which the [deposition is being taken] deponent is located, the failure may be considered a contempt of court.

B(2) (unchanged)

B(2)(a) (unchanged)

B(2)(b) (unchanged)

B(2)(c) (unchanged)

B(2)(d) (unchanged)

B(2)(e) (unchanged)

B(3) (unchanged)

C. (unchanged)

D. (unchanged)

5-9-92 MEETING

Excerpts from minutes of meeting (CONTINUED):

Agenda Item No. 7: Oaths for deposition by telephone (Bruce Hamlin and Mike Phillips). Bruce Hamlin had distributed proposed amendments to Rules 38, 39, and 46 prior to the meeting (they are also attached to these minutes). Bruce Hamlin stated that he and Mike Phillips had tried to incorporate suggestions made by the Council members at the February 8th meeting; they wanted to make it clear that an oath could be given during a telephone deposition over the telephone whether the deponent was located within this state or outside this state (that was designed to clear up any ambiguity with ORS 44.320). Bruce Hamlin explained the proposed amendments to Rules 38, 39, and 46 (see attached).

The Chair asked how the language proposed to be added to Rule 39 C(7) concerning "testimony ... taken by telephone other than pursuant to court order or stipulation made part of the record, ..." would bear upon either an oral stipulation at the deposition or a written stipulation, such as a letter between counsel, not customarily made part of the record. Mike Phillips replied that the language was included because he and Bruce Hamlin thought it was the sense of the Council at its last meeting that there should be two clearly stated ways of taking depositions by telephone -- court order or a written stipulation made part of the record of the deposition, by reading the stipulation into the record or attaching it as an exhibit to the transcript. Inadvertent failure by counsel to comply with this procedure, when there is no court order, should be readily avoided or cured by the proposed language providing that any objections to the taking of a deposition by telephone are waived unless seasonably made at the taking of the deposition.

The Chair questioned the language in 39 (E) on page 4 of the draft: "Those described in Rule 46 B(2) shall present the motion ... in which the action is pending." He wondered to whom the term "Those" made reference. After discussion, a suggestion was made to insert the word "persons" between "Those" and "described". Regarding 39 (C)(7), Judge Liepe suggested deleting the words "upon motion" in the second line of the draft so that the court's discretion would be clear.

The Council then considered the language in 46 A(1) and B(1). After discussion, a suggestion was made that the word "competent" be substituted for "general" in the first sentence of 46 A(1) so that it would read as follows: "... such application may also be made to a court of competent jurisdiction in the political subdivision where the deponent is located." A discussion followed about whether the language in 46 B(1) should be made consistent with the underlined language in 46 A(1).

Judge DeMuniz raised the question about whether the language in 46 B(1) would be utilized by, for example, a Texas judge to find someone in contempt and felt that we would not be able to do anything in Texas.

After further discussion, Mike Phillips made a motion, seconded by Judge Welch, that the Council adopt the amendments as originally written by Bruce Hamlin, with the exception that, in the second line of 39 C(7), the words "upon motion" be stricken. He amended his motion, seconded by Judge Welch, so that in Rule 46 A, in the underlined language, the word "general" would be stricken and the word "competent" would be substituted. Bruce Hamlin pointed out that in B(1), in the heading, the phrase "the Deponent Is located" should be substituted for "the Deposition Is Located." Janice asked whether the amendment to 46 A(1) would also apply to 46 B(1), and Mike Phillips said that it would not apply and that Judge DeMuniz was correct in pointing out that 46 B(1) is designed to address holding someone in contempt in Oregon.

Mike Phillips' motion was further amended by Judge McConville to insert "persons" between "Those" and "described" at the beginning of the underlined language in 39 E. It was also decided after discussion that the word "applications" in the underlined language in 46 A(1) should be changed to "application".

The motion as amended passed with 18 in favor and one opposed.

TENTATIVE AMENDMENTS TO RULES 38, 39, AND 46 AFTER COUNCIL ACTION TAKEN AT MAY 9, 1992 MEETING

PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS RULE 38

A. Within Oregon.

A.(1) Within this state, depositions shall be preceded by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of this state or by a person specially appointed by the court in which the action is pending. A person so appointed has the power to administer oaths for the purpose of the deposition.

A.(2) For purposes of this rule, a deposition taken pursuant to Rule 39 C(7) is taken within this state if either the deponent or the person administering the oath is located in this state.

* * * * *

DEPOSITIONS UPON ORAL EXAMINATION RULE 39

* * * * *

C. Notice of examination.

* * * * *

C.(7) **Deposition by telephone.** Parties may agree by stipulation or [T]the court may order that testimony at a deposition be taken by telephone[,]. If testimony at a deposition is taken by telephone pursuant to court order, [in which event] the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

* * * * *

E. Motion to terminate or limit examination. At any time during the taking of a deposition, on motion of any party or of

the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court in which the action is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36 C. **Those persons described in Rule 46 B(2) shall present the motion to the court in which the action is pending. Other non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination.** If the order terminates the examination, it shall be resumed hereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion.

* * * * *

G. Certification; filing; exhibits; copies.

G.(1) Certification. When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was **duly** sworn [in the reporter's presence] and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C4) of this rule, and thereafter transcribed, the person transcribing it shall certify, under oath, on the transcript that such person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify under oath that the recording, either filed or furnished to the person making the transcription, is a true, complete, and accurate recording of the deposition of the witness and that the recording has not been altered.

* * * * *

FAILURE TO MAKE DISCOVERY; SANCTIONS
RULE 46

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, [to a judge of a circuit or district court in the county where the deposition is being taken] **such applications may also be made to a court of competent jurisdiction in the political subdivision where the deponent is located.** An application for an order to a deponent who is not a party shall be made to a judge of a circuit or district court in the county where the deposition is being taken.

still to be addressed by Council

* * * * *

B. Failure to comply with order.

B.(1) Sanctions by court in the county where [deposition is taken] the deponent is located. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or district court judge in the county in which [the deposition is being taken] **deponent is located**, the failure may be considered a contempt of court.

* * * * *

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December 4, 1991

Professor Fredric R. Merrill
School of Law
University of Oregon
Eugene, OR 97403

Re: Council on Court Procedures

Dear Fred:

This letter is to confirm an issue we discussed by telephone a week or so ago. Among the amendments promulgated by the Council which become effective January 1, 1992 are changes to Rule 55 concerning subpoenas. In particular, it is my understanding that the intent of the addition to Rule 55A/B is to permit the use of subpoenas to obtain non-party documents without conducting a pro forma deposition of the holder of the documents, in much the same way that preexisting Rule 55H permitted with respect to hospital records. I believe that the proposed change, while generally desirable, has unintentionally introduced a significant problem, because of the failure to exempt hospital records from its reach (leaving them to be covered by the preexisting 55H rules).

In particular, I am concerned that attorneys will use Rule 55A/B to attempt to obtain hospital records rather than continuing to use Rule 55H. If they do so, 55B indicates that the receiving hospital must produce the requested materials unless within 14 days after service, it serves written objections to the inspection or copying of the designated material. As you know there are numerous authorities in both case law and health care provider regulations requiring medical providers to protect the confidentiality of medical information they hold and to release it only upon proper authorization. Often the patient is not even a party to the lawsuit. A hospital receiving such a subpoena would be required to routinely prepare an objection. That responsibility is even more urgent if the record happens to contain particular kinds

of information subject to special protections in the federal law (for example, drug and alcohol treatment information) or entitled to special protection under state statutes (HIV tests, certain mental health records, etc.). With respect to those kinds of information, there are explicit statutory provisions prohibiting response to such a demand short of a court order or specific written patient consent. The mere issuance of a subpoena by a litigant will not suffice in such cases even if the patient happens to be a party or otherwise gets notice of the demand.

When litigants used the 55H process to obtain hospital records, that problem was circumvented because the facility was authorized to prepare a certified copy of the record, seal it (together with the appropriate information necessary to authenticate it), and forward that sealed package to the presiding officer - judge, workers' compensation hearing officer, etc. The materials were not thereafter opened and distributed absent a direction of the presiding officer to do so. That minimal judicial involvement is lacking under the revised 55A and B processes; the hospitals will have to routinely object to assure that patient rights are protected and to avoid liability for unauthorized release of information. Such objections will, in turn, clog the court motion calendar unnecessarily.

I believe the appropriate resolution of the problem is to exempt production of hospital records from Rule 55A and B and require that they be obtained, as before, under Rule 55H. To do otherwise will impose significant burdens on the parties, the courts, and on the hospitals who will be called on to prepare the necessary objections.

I would very much appreciate the Council's attention to this problem. If something in its prior action addresses this concern, I would appreciate your official comments on how the problem is avoided under the rule changes you have proposed. As I mentioned on the phone, I serve as counsel to the Oregon Association of Hospitals and will need to get information out in their next newsletter about this new process. Unless some reasonable assurances are available to indicate that they are protected in responding to 55A and B requests for documents which are not accompanied by either patient consent or court order, I will have to advise them to make official objections in all cases. In addition, I expect

they will experience considerable confusion trying to figure out whether a subpoena is being issued under 55A and B or under 55H (i.e., whether or not they can respond by preparing the certified copy and mailing it to the presiding judge rather than delivering it directly to a party). I suspect that attorneys preparing subpoenas will have little appreciation for the distinction, either. Given the January 1 implementation date, I would appreciate your response about "legislative history" of the changes as soon as possible.

Sincerely,

Karen K. Creason

KKC:jb

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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.

Attachment A

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.

Attachment A

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.

Attachment A

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.

Attachment A

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

Attachment A

BANKS, NEWCOMB & ENGELS

By: _____
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ALLEN, KILMER, YAZBECK, CHENOWETH & VOORHEES, PC

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PHILIP A. LEVIN
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December 17, 1991

Ms. Kathryn S. Augustson
JOHNSTON & AUGUSTSON, P.C.
630 Crown Plaza
1500 SW First Avenue
Portland, OR 97201

RE: Council on Court Procedures

Dear Ms. Augustson:

Reference is made to your letter of December 13. I appreciate receiving the proposal for amendment to ORCP 39C(7) and look forward to receiving other proposed improvements to the Oregon Rules of Civil Procedure from the Procedure and Practice Committee in the future.

You will be interested to learn that the Council on Court Procedures already has taken up a proposed amendment to ORCP 39C(7). The Oregon Court Reporters Association requested the Council to clarify the procedures for swearing in out-of-state witnesses who are appearing by telephone. Professor Fredric Merrill of the University of Oregon Law School, who is Executive Director to the Council, is in the process of drafting proposed language. I will ask him to consider your committee's proposal, a copy of which is enclosed with his copy only, and will see that it is placed on the agenda with the other proposed change to the same rule.

I also appreciate knowing that Dennis Hubel is your committee's liaison to the Council. By copy of this letter to Mr. Hubel, I request that he check in with his partner, Ron Marceau, who is a member and the immediate past chair of the

Council, in order to obtain the most current information on meetings and agendas.

Very truly yours,

Henry Kantor

Henry Kantor

HK:lb
cc: Prof. Fredric L. Merrill
Mr. Ronald L. Marceau
Mr. Dennis J. Hubel
Mr. William G. Wheatley
Ms. Susan E. Grabe

Phil Goldsmith
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February 7, 1992

Mr. Henry Kantor, Chair
Council on Court Procedures
Pozzi, Wilson, Atchison, O'Leary & Conboy
1100 S.W. Sixth, 14th Floor
Portland, Oregon 97204

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,

Phil Goldsmith

Oregon

DIVISION OF
STATE LANDS

STATE LAND BOARD
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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

cc: Henry Kantor
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MAY
POZZI WILSON
O'LEARY AND

May 6, 1992

Mr. Henry Kantor, Chair
Council on Court Procedures
POZZI, WILSON, ATCHISON, O'LEARY & CONBOY
1100 S.W. Sixth, 14th Floor
Portland, Oregon 97204

RE: Proposed Revisions to ORCP 32

Dear Henry:

I have reviewed Phil Goldsmith's letter to you of February 7, 1992, and agree that his proposals are reasonable and fair.

Sincerely,

WILLNER & ZABINSKY

Don

Don S. Willner

DSW/gjb

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May 7, 1992

RECEIVED
MAY 1992
POZZI WILSON ATCHISON
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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

Lewis and Clark Legal Clinic

Northwestern School of Law
1018 Board of Trade Building
310 S.W. Fourth Avenue
Portland, Oregon 97204-2387
PH: (503) 222-6429 / FAX: 274-7915

Richard A. Slottee
Mark A. Peterson
Sandra A. Hansberger
Theresa L. (Terry) Wright

Supervising Attorneys

RECEIVED
MAY 8 1992
POZZI WILSON ATCHISON
O'LEARY AND CONBOY

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

JUSTINE FISCHER
ATTORNEY AT LAW
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TELEPHONE (503) 222-4326
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RECEIVED
MAY
POZZI WILSON ATCHISON
O'LEARY

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

McGAUGHEY & GEORGEFF

Robert J. McGaughey†
Gary M. Georgeff †

Roger A. Lenneberg†
Of Counsel

†*Admitted in Oregon and Washington*

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RECEIVED
MAY 9 1992
POZZI WILSON ATCHISON
O'LEARY AND CONROY

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

LAW OFFICES OF
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*ALSO ADMITTED IN WASHINGTON

RECEIVED
MAY [illegible] 1992
POZZI WILSON ATCHISON
O'LEARY AND CONBOY

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

Phil Goldsmith
Attorney at Law
1100 S.W. 6th Avenue
Suite 1212
Portland, Oregon 97204

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

June 9, 1992

Ms. Janice Stewart, Chair (Hand Delivered)
Class Action Subcommittee
Council on Court Procedures
1100 SW Sixth, Suite 1600
Portland, OR 97204

Maury Holland (By FAX Communication
Class Action Subcommittee and Regular Mail)
Council on Court Procedures
University of Oregon, Room 275A
1101 Kincaid Street
Eugene, Oregon 97403-3720

Michael V. Phillips (By FAX Communication
Class Action Subcommittee and Regular Mail)
Council on Court Procedures
975 Oak Street, Suite 1050
Eugene, Oregon 97401-3176

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

---

[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

---

[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

Oregon Legal Services Corporation

Weatherly Building Suite 1000 516 S.E. Morrison Portland, OR 97214 (503) 234-1534 FAX: (503) 239-3837

July 21, 1992

RECEIVED
JUL 22 1992
KANTOR AND SACKS

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

CHRISTOPHER JAMES
DAVID R. DENECKE
ROGER K. HARRIS

J. RICHARD URRUTIA
SUSAN D. MARMADUKE*
CEEANN CALLAHANT
CHRISTOPHER E. MARTIN**
JERRY L. LAWSON, JR.

*MEMBER OREGON, CALIFORNIA AND PENNSYLVANIA BARS
†MEMBER OREGON AND KANSAS BARS
**MEMBER OREGON AND WASHINGTON BARS

JAMES, DENECKE & HARRIS
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OF COUNSEL:
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FACSIMILE
(503) 222-7261

IN REPLY, REFER TO
OUR FILE NUMBER:

July 27, 1992

RECEIVED
JUL 30 1992
KANTOR AND SACKS

Henry Kantor, Esq.
Chair
Counsel and Court Procedures
Pozzi, Wilson, Atchison, et al.
1100 S.W. 6th Avenue, Suite 1400
Portland, Oregon 97204-1087

Re: Proposed Revisions to ORCP 32

Dear Henry:

I have had experience with both defendants and plaintiffs in class action suits and I am interested in class action legislation. I have received a copy of Phil Goldsmith's letter to you dated February 7, 1992 regarding proposed revisions to ORCP 32. He has outlined two principal areas for proposed revisions. Since I understand the amendments generally as presently proposed unanimously passed the Senate last year, my comments are brief, and supportive of all of the proposed amendments.

As to damage calculations, there is one more situation besides these presently mentioned in which it is appropriate that the burden, in effect, be placed upon the court rather than the plaintiff to calculate damages. In an earlier letter addressed to Professor Frederick Merrill, Executive Director, counsel on court procedures at the University of Oregon school of law, its authors hypothesized:

> "What happens if the aggregate injury to the class can readily be calculated from the defendants records, but the defendant has no records from which each individual's share can be determined with precision?"

That exact situation was presented in Alsea Veneer, et al. v. State of Oregon, a case now pending before the Court of Appeals (and which addresses several other class action issues). The traditional "burden of proof" requirements were followed, even though the plaintiffs, because of defendants' wrongdoing or incompetency, were assigned a less stringent burden of proof. However, so long as the burden is upon the plaintiffs at all, under Alsea circumstances they cannot prevail. The reason is that defendant's own records offer no basis for reconstructing individual recoveries. On the other hand, if the court is given the responsibility, once liability is determined, of seeing that

damages are ascertained, an otherwise liable defendant will not escape the consequences of its conduct by virtue of the inadequacy of its own records.

The present statute does not permit redress in such situations, and the proposed revisions, under which a court of law would require the defendant to come up with a fair alternative, would do so.

Very truly yours,

Bruce M. Hall

BMH:sg
sg/c://0001t.bmh.724

Gray Panthers
AGE AND YOUTH IN ACTION

Portland Gray Panthers

1819 NW Everett • Portland, Oregon 97209 • (503) 224-5190

RECEIVED
JUL 29 1992
KANTOR AND SACKS

Henry Kantor, Chairperson, Council on Court Procedures,
1100 SW Sixth Avenue, Suite 1100
Portland, Oregon 97204

July 27, 1992

Dear Henry Kantor:

At our July Executive Committee meeting, the Portland Gray Panthers voted to support efforts at class action reform. We are writing to urge the Council on Court Proceedings to adopt the proposal to reform ORCP 32. We support this ORCP 32 as we feel it is necessary for victims to have "their day in court," and for the guilty parties to not keep money gained through illegal means.

Sincerely,

Gerri Peck

Gerri Peck, Executive Committee Member,
Portland Gray Panthers

Oregon Consumer League

3314 NE 65th Avenue • Portland, OR 97213 • (503) 227-3887

July 30, 1992

RECEIVED
JUL 3 1 1992

KANTOR AND SACKS

Mr. Henry Kantor, Chair
Council on Court Procedures
1100 S.W. Sixth, Suite 1100
Portland, Oregon 97204

Re: Proposed Amendments to ORCP 32

Dear Mr. Kantor:

The Oregon Consumer League is Oregon's oldest non-profit consumer organization. The League has a long history of advocating legislation to provide consumers remedies for unfair practices causing them injury. Representative examples include ORS 86.205 to 86.275, which regulate tax and insurance reserve requirements in home loans.

Class actions are an important consumer protection tool because they may be the only practical way for persons suffering small injuries in common with many others to obtain relief. Probably the most important example in Oregon are the cases against Benj. Franklin and other financial institutions concerning the earnings the lender made on home owners' tax and insurance reserves, which recovered a few hundred dollars for each litigant and several million dollars for Oregonians.

The Oregon Consumer League believes the current class action rule contains unnecessary barriers to consumers seeking redress and unnecessary incentives for true wrongdoers to delay and prolong litigation. We agree with the proposals made by the Committee to Reform Oregon's Class Action Rule and urge the Council on Court Procedure to adopt them. I would like to address briefly three specific issues.

1. The current rule requires post-certification notice to be given to all members of the class in most damage cases. The plaintiff must pay for this notice. This can be a huge expense when many thousand people have suffered the same injury; as a result, few such cases have been brought. Additionally, the notice serves no useful function when everyone's injury is small, because as a practical matter everyone's rights will be determined in the class action. The proposal before the Council would remove this unnecessary barrier to obtaining redress.

2. The current rule makes the class plaintiff liable for attorney fees if the case is lost and the defendant would be entitled to attorney fees in a non-class action. What this means is that, by putting an attorney fee provision in its contracts, a business can basically insure no class action will be brought against it. Nobody with a personal stake of a few hundred dollars

would risk liability for ten of thousands of dollars in attorney fees. The proposal before the Council would remove this unnecessary barrier to obtaining redress.

3. Under the current rule, it pays a defendant who expects to lose a class action to delay the case as long as possible. Its liability is limited to those people who sign claim forms; the longer the case takes, the harder it will be to find the victims and the more money the defendant will keep. This is very bad public policy. The proposal before the Council would correct this problem. It is not good enough to leave everything to the discretion of the trial judge, because the defendant can still follow a strategy of delay in the hopes that the judge will exercise his or her discretion by requiring claim forms.

For these reasons, the proposal before the Council would improve the ability of class actions in Oregon's state courts to serve their intended function of facilitating the litigation of small consumer claims. The Oregon Consumer League urges the Council to enact this proposal.

Thank you for the consideration of our views.

Sincerely,

Tom Novick

Tom Novick
President

LaBarre & Associates, P.C.
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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

PETITION

The undersigned organizations understand that the Committee to Reform Oregon's Class Action Rule has made a proposal to the Council on Court Procedures which, among other things:

1. Eliminates the requirement that a plaintiff in a damage class action must always send notice to all class members before the case can be decided.
2. Eliminates most attorney fee liability for the named plaintiff in an unsuccessful class action.
3. Requires damages to be calculated for each class member, so they don't have to produce records showing how they have been injured.
4. Paves the way for legislation requiring losing defendants to pay to Oregon's common school fund all monies not claimed by class members.

We agree with these proposals and urge the Council on Court Procedures to adopt them.

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September 17, 1992

VIA FAX TRANSMISSION ONLY

Professor Maury Holland
School of Law
University of Oregon
1101 Kincaid Street, Room 275A
Eugene, Oregon 97403

Re: Council on Court Procedures

Dear Professor Holland:

I would like to comment upon Judge Lee Johnson's letter to you, dated August 20, 1992, concerning a proposed amendment to ORCP 60. The amendment would allow a directed verdict "at any time during the trial after the opponent [of the motion for a directed verdict] has been fully heard." Judge Johnson believes that the change is needed to give "the trial judge a tool to sort out what are the valid contentions and present the case in some coherent form to the finder of fact." What Judge Johnson is really contending for, however, is the unwarranted extension of the trial judge's power into questions properly considered only on summary judgment or after plaintiff has presented all the evidence (and not just counsel's summary of the evidence).

Spelled out, the objections are several:

First, there already is an orderly procedure, provided in ORCP 47, to decide summarily issues that ought not to be submitted to the jury. In addition, ORCP 60 (as is) provides an orderly procedure at trial to winnow unsupported claims.

Second, the amendment runs contrary to the reality that the evidence itself may be more evocative (and, hence, more convincing) than a terse summary uttered in chambers. For instance, although it may be tedious to have to listen to a witness, there may be something in the way the witness testifies

that draws a judge to reach a different conclusion than if he or she simply listened to counsel. Obviously, the only way to find that out is to let the witness testify. That testimony would be jeopardized, however, by the amendment.

The proposed amendments are an unneccessary expansion of judicial power. Judge Johnson's proposal would add an unneccessary layer to the Oregon Rules of Civil Procedure. Rule 47 provides the same relief as the proposed amendment. Rule 47 allows all the parties to avoid the expense of time and money of preparing for a trial because a motion for summary judgment must be filed 45 days before trial.

I have been unable to find any case where relief could have been entered under Judge Johnson's proposed amendments to Rule 60 that could not have been granted under a timely and competently filed motion for summary judgment.

The proposal also appears to be an attempt to allow a judge to decide disputed factual and credibility disputes. Resolution of these issues is the function of the finder of fact. Oregon Constitution, Article VII, Section 3 (Amended). The council on Court procedures should reject this unneccessary proposal.

Very truly yours,

Kevin Keaney

KK/sb
cc: Henry Kantor

Oregon Trial Lawyers Association

Suite 750 • 1020 SW Taylor Street • Portland, Oregon 97205 • (503)223-5587 • FAX (503)223-4101

September 24, 1992

Council on Court Procedures
Mr. Henry Kantor, Chair
1400 Standard Plaza
1100 S. W. Sixth
Portland, Oregon 97204-1087

Dear Council Members:

We very much oppose the suggestion of Lee Johnson set forth in his letter of August 20, 1992, to allow judges to grant summary judgments on their own motions at any time during the course of a trial. Our reasons are these:

1. If an opposing party in a case does not believe he or she is entitled to summary judgment and does not move for it appropriately in accordance with existing rules, we fail to see why a judge who has had only a few minutes of familiarity with the case should take it upon himself or herself to throw a litigant out of court summarily after they have waited for about a year to get there.

2. The procedure, especially in certain judges' hands, will simply pose an additional mine field for litigants trying to have a fair hearing and a day in court. Their attorneys will be placed upon notice by a judge at the beginning of a trial to orally state all the evidence they intend to produce and face the peril of leaving out some small item which might be crucial to the case. The present summary judgment procedure where one party pinpoints the reasons they are entitled to summary judgment and the other party is then given the opportunity with careful thought and consideration to counter that motion with appropriate affidavits, while still a mine field is at least marginally fair.

Some judges apparently like to make up their minds based on the opening statement and then do everything they can to effectuate and reinforce their own snap decisions. On one occasion one Multnomah County judge attempted to utilize the procedure suggested by Judge Johnson after opening statements and dismissed plaintiff's case "for lack of evidence." The plaintiff's attorney argued so vigorously against it that the judge reluctantly allowed the plaintiff to go ahead and present his case but stated that if

the jury returned a verdict of any amount for the plaintiff, the court would grant a motion for JNOV. By the time both parties had fully presented their cases, the judge allowed the case to go to the jury which returned a verdict for the plaintiff for $120,000; and the judge then decided that the motion for JNOV should be denied (to the surprise of defense counsel). This example simply shows the danger of the court's attempting to decide cases based only upon the pleadings and opening statements of the parties.

3. We do not believe that Judge Johnson's description with respect to the use of the procedures he urges in federal court is complete. We attach a copy of FDIC v. Cover, 714 F.Supp. 455 (D.Kan. 1988). In that case the FDIC made a motion in limine to prevent introduction of oral evidence of an accord and satisfaction. The court allowed that motion, thus finding against the defendant on its only defense. Defendants had only oral evidence of the accord and satisfaction. The court noted as follows:

> The effect of that ruling was essentially to preclude defendants from their anticipated defense of oral accord and satisfaction, leaving no issues for trial. The jury was released, the parties were directed to continue settlement negotiations, and the FDIC was allowed until December 10, 1987, to file a dispositive motion based upon [12 U.S.C.] § 1823(e). The court additionally invited defendants to brief the issues of sanctions against the FDIC for its having brought a dispositive motion on the eve of trial.

Thus, contrary to the procedures followed by Judge Johnson in Harbert, this court simply delayed the trial while appropriate dispositive motions could be filed. The court did not sua sponte issue summary judgment or allow an oral motion for summary judgment or a directed verdict by the defense. There would have been nothing to prevent Judge Johnson from following such a procedure in the Harbert case should he have wished to do so, i.e., continuing the trial and requesting defendant to file a proper motion for summary judgment. In such a situation the party moved against would at least have a reasonable opportunity to know the grounds of the opposing motion, have evidence presented in the form of affidavits supporting the motion, and have the opportunity to address it with affidavits and research over a reasonable period of time.

4. The procedure as urged by Judge Johnson is unfair tactically in that it requires one party to completely reveal their entire case or defense to the other before any evidence is offered,

thus giving the other party an advantage they would not have received if evidence were simply introduced in the normal course.

In sum, if a party to the litigation intimately familiar with it fails to move for summary judgment, it is inherently unfair for the court to have the authority to require the opposing party to immediately respond to such a motion without the benefit of a written statement, affidavits, and the ability to take the time allowed by ORCP 47 to respond. We urge the Council to reject Judge Johnson's proposal.

Respectfully,

Charles R. Williamson

CRW/rw

FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff,
v.
John W. COVER, et al., Defendants.
No. 86-1968.
United States District Court,
D. Kansas.
March 9, 1988.

'ederal Deposit Insurance Corporation brought action against debtors of :quired bank on promissory note. Corporation moved for "directed verdict," id debtors moved for equitable sanctions. The District Court, Crow, J., held :at: (1) motion for "directed verdict" would be construed as one for summary idgment, as jury had not yet been impaneled; (2) evidence showed that notes :re in bank's active files on date bank closed and on date bank's assets were irchased by Corporation in its corporate capacity; (3) defense of oral accord id satisfaction was statutorily barred as to claim brought by Corporation in :s corporate capacity; and (4) sanctions beyond costs of impaneling jury ›uld not be imposed on Corporation for having filed "motion in limine" on eve : trial.

Motion for summary judgment granted; motion for equitable sanctions denied.

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.Kan. 1988.
irected verdict is not possible where jury has not been impaneled. Fed.Rules iv.Proc.Rule 50(a, b), 28 U.S.C.A.
ederal Deposit Ins. Corp. v. Cover
14 F.Supp. 455

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. Motion.
.Kan. 1988.
otion for directed verdict would be construed as one for summary judgment, here motion had been made before jury had been impaneled. Fed.Rules iv.Proc.Rules 50(a, b), 56, 28 U.S.C.A.
'ederal Deposit Ins. Corp. v. Cover
14 F.Supp. 455

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:. Powers, functions and dealings in general.
).Kan. 1988.
'or purpose of determining whether notes were "assets" acquired by Federal leposit Insurance Corporation from insolvent bank, and thus whether statute nvalidating certain unwritten agreements diminishing or defeating right, :' le, or interest of Corporation in any asset acquired by it from insolvent x was applicable, evidence showed that notes were in bank's active files on late that bank closed and on date that bank's assets were purchased by

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rporation in its corporate capacity. Federal Deposit Insurance Act, s 2[13]
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icquired by it from insolvent banks, as to claim brought by Corporation in its :orporate capacity against debtors to collect deficiency on promissory notes; iebtors claimed that bank orally agreed that it would not seek deficiency gment against them if they would sell their farm machinery and equipment and ly proceeds to their indebtedness owed to bank. Federal Deposit Insurance ict, s 2[13](e), 12 U.S.C.A. s 1823(e).
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'14 F.Supp. 455
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).Kan. 1988.
Equitable sanctions beyond costs of impaneling jury would not be imposed on 'ederal Deposit Insurance Corporation for making "motion in limine," a lispositive motion, on eve of trial.
'ederal Deposit Ins. Corp. v. Cover
'14 F.Supp. 455
*456 B.J. Hicker, Morrison, Hecker, Curtis, Kuder & Parrish, Wichita, Kan., and George W. Yarnevich, Kennedy, Berkley, Yarnevich & Williamson, Salina, Kan., for plaintiff.
Warren M. Wilbert, Stinson, Lasswell & Wilson, Wichita, Kan., and John F. Arens, Arens & Alexander, Fayetteville, Ark., for defendants.

MEMORANDUM AND ORDER

CROW, District Judge.

This case is before the court on a motion styled by the FDIC as a "rected verdict." (Dk. No. 29.) The case was previously set for trial to a y on November 9, 1987. At the chambers conference prior to jury selection on the morning of November 9, 1987, this court sustained the FDIC's "motion in limine" prohibiting defendants from mentioning or eliciting any testimony regarding any alleged oral agreements between defendants and the failed Talmage State Bank, pursuant to 12 U.S.C. s 1823(e). The effect of that ruling was essentially to preclude defendants from their anticipated defense of oral accord and satisfaction, leaving no issues for trial. The jury was released, the parties were directed to continue settlement negotiations, and the FDIC was allowed until December 10, 1987 to file a dispositive motion based upon s 1823(e). The court additionally invited defendants to brief the issue of sanctions against the FDIC for its having brought a dispositive motion on the eve of trial.

[1][2] On December 10, 1987, the FDIC filed the motion currently before the court. Although the FDIC has chosen to entitle its motion as one for a "directed verdict," the court finds this characterization entirely inappropriate. A motion for directed verdict is to be made "at the close of the evidence offered by an opponent" or "at the close of all the evidence." Fed.R.Civ.P. 50(a) & (b). Additionally, no directed verdict is possible where no jury has been impaneled. In the present case, no jury selection was ever commenced and no evidence was presented by either side. The court will construe the FDIC's motion as one for summary judgment pursuant to Fed.R.Civ.P.

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n ruling on a motion for summary judgment, the trial court conducts a r-shold inquiry of the need for a trial and grants summary judgment where no ine issue of material fact exists and the moving party is entitled to dgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 0-51, 106 S.Ct. 2505, 2511-12, 91 L.Ed.2d 202, 213 (1986). The court is to concerned with the sufficiency of the evidence, not its weight. Casper v. I.R., 805 F.2d 902, 904 (10th Cir.1986.) Essentially, the inquiry is hether the evidence presents a sufficient disagreement to require submission a jury or whether it is so one-sided that one party must prevail as a matter law." Anderson, 477 U.S. at 251-52, 106 S.Ct. at 2512, 91 L.Ed.2d at 4. There is no genuine issue for trial unless there is sufficient evidence-- gnificantly probative or more than merely colorable--favoring the nonmoving rty for a jury to return a verdict for that party. 477 U.S. at 248-50, 106 Ct. at 2510-11, 91 L.Ed.2d at 212. Where there is but one reasonable nclusion as to the verdict and reasonable minds would not differ as to the port of the evidence, summary judgment is appropriate. 477 U.S. at 250-51, 6 S.Ct. at 2511-12, 91 L.Ed.2d at 213.
he movant's burden under Fed.R.Civ.P. 56 is to make an initial showing of the sence of evidence to support the nonmoving *457 party's case. Windon ird Oil and Gas v. Federal Deposit Ins., 805 F.2d 342, 345. (10th Cir.1986), rt. denied, 480 U.S. 947, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987). To show absence of material fact, the movant must specify those portions of "the eadings, deposition, answers to interrogatories and admissions on file, gether with affidavits if any." Fed.R.Civ.P. 56(c). "[C]onclusory sertions to aver the absence of evidence remain insufficient to meet this rden." Windon, 805 F.2d at 345 n. 7. The opposing party may not rest upon re allegations or denials in the pleadings but must set forth specific facts orted by the kinds of evidentiary materials listed in 56(c), which monstrate a genuine issue remaining for trial. Anderson, 477 U.S. at 248- , 106 S.Ct. at 2510-11, 91 L.Ed.2d at 213. The evidence of the nonmoving rty is deemed true and all reasonable inferences are drawn in his favor. ndon, 805 F.2d at 346. "Summary judgment procedure is properly regarded t as a disfavored procedural shortcut, but rather as an integral part of the deral Rules as a whole, which are designed 'to secure the just, speedy and expensive determination of every action.' Fed.R.Civ.P. 1." (citation itted.) Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, L.Ed.2d 265, 276 (1986).
he sole issue presented in the FDIC's motion is whether the defense of al accord and satisfaction between the debtors and the failed bank is barred 12 U.S.C. s 1823(e). The defendants contend that the Talmage State Bank ally agreed that it would not seek any deficiency judgment against them if fendants would sell their farm machinery and equipment and apply the proceeds their indebtedness owed the bank. Defendants subsequently liquidated their eration and applied the proceeds to their debt owed Talmage State Bank. The nk later failed and FDIC was appointed as receiver. A purchase and sumption transaction followed, and the FDIC in its corporate capacity rchased assets that were unacceptable to the assuming bank, pursuant to 12 S.C. s 1823(d). The FDIC, in its corporation and receiver capacities, urges e court to affirm its ruling that the defense of oral accord and satisfaction

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s barred.
Section 1823(e) provides:
No agreement which tends to diminish or defeat the right, title or interest
he Corporation in any asset acquired by it under this section, either as
ecurity for a loan or by purchase, shall be valid against the Corporation
nless such agreement (1) shall be in writing, (2) shall have been executed by
he bank and the person or persons claiming an adverse interest thereunder,
ncluding the obligor, contemporaneously with the acquisition of the asset by
he bank, (3) shall have been approved by the board of directors or the bank or
ts loan committee, which approval shall be reflected in the minutes of said
oard or committee, and (4) shall have been, continuously, from the time of its
xecution, an official record of the bank. (Emphasis added.)
It is uncontested that the agreement upon which defendants rely is not in
riting, and that defendants have failed to comply with the writing, approval,
nd filing requirements of s 1823(e). However, defendants assert that s
823(e) is not applicable because no "asset" was acquired by the corporation
hen it purchased the failed bank's interest in September of 1987.
[3] The term "asset" as used in s 1823(e) is not defined by statute. Although
he meaning of the term may perhaps be clarified, if not expressly defined, in
he Purchase and Assumption Agreement between the FDIC, as receiver, and the
bilene First National Bank, as assuming bank, or in the Contract of Sale
ntered into between the FDIC, as receiver, and the FDIC in its corporate
apacity, neither of those documents is included in the record before this
ourt.
The FDIC contends that the term "assets" as used in subsection (e) means
assets disclosed on the books and records of a bank which satisfy the
equirements of s 1823(e). Stated otherwise, an asset reflected in the records
f a bank does not cease being an asset for purposes of s 1823(e) until payment
eceived or an agreement complying with the requirements *458 of s
3(e) is concluded." (Dk. 30, p. 5.) Defendants do not challenge this
roposed definition, except to state that "no evidence has been presented by
he FDIC to prove that the notes in question were listed as assets on the books
nd records of the failed bank at the time the transfer to the FDIC in its
orporate capacity was made." (Dk. 35, p. 4.) That factual omission by the
DIC has been remedied in its reply brief, by the attached affidavit of Ricky
. Olson, a bank liquidation specialist of the FDIC. That affidavit
stablishes that each of the three notes that are the subjects of this action
as acquired by the FDIC in its corporate capacity from the receiver, and that
uch notes were reflected as assets in the loan files of the closed bank at the
ime of closure. (Dk. 42, Supplemental affidavit.)
The court finds that the notes in question were in the bank's active
iles on the date the bank closed and on the date the bank's assets were
urchased by the FDIC in its corporate capacity. See FDIC v. Venture
ontractors, Inc., 825 F.2d 143 (7th Cir.1987) (upholding trial court's finding
hat a guaranty was in an active file and thus a valid asset); FDIC v.
owers, 576 F.Supp. 1167, 1169 (N.D.Ill.1983) (rejecting as frivolous
efendants' argument that none of their facially sufficient written guarantees
as an "asset" under s 1823(e)).
Defendants additionally contend that even if their notes were reflected as
ssets on the bank's books, those notes ceased to be assets by virtue of the
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accord and satisfaction prior to the closure of the Talmage State Bank. Defendants' position finds support in FDIC v. Nemecek, 641 F.Supp. 740 D.Kan.1986). In Nemecek, J. Kelly held that:

> .. s 1823(e) has no application to this case. The Bank and the defendants reached an accord and satisfaction, a settlement of claims, prior to the Bank's closing. Therefore, when the F.D.I.C. purchased the Bank's assets, it could not have purchased defendants' note, as it had been previously extinguished. Section 1823(e) applies only to assets which the FDIC has acquired.

641 F.Supp. at 743 (emphasis in original).
The court declines to follow the Nemecek holding. That rationale requires he court to, in a preliminary step, look to evidence not permitted by s 823(e) to determine the FDIC's rights with respect to each item reflected in e ailed bank's books as an asset and purchased by the corporation. Such a heory would destroy the effect and protection of s 1823(e) and hamper the DIC's ability to follow the purchase and assumption alternative by injecting ncertainty into the valuation of assets.
[4][5] The court recognizes that s 1823(e) does not apply to every inquiry oncerning an asset. FDIC v. Merchants Nat. Bank of Mobile, 725 F.2d 634, 39 (11th Cir.1984), cert. denied, 469 U.S. 829, 105 S.Ct. 114, 83 L.Ed.2d 7. It does not apply when the court determines if an asset is invalid for reach of bilateral obligations contained in the asset, see Howell v. ontinental Credit Corp., 655 F.2d 743, 746-48 (7th Cir.1981) or for fraud, ee Langley v. FDIC, 484 U.S. 86, ----, 108 S.Ct. 396, 402, 98 L.Ed.2d 340, 48 (1987). Nor does the statute protect the FDIC against the consequences of ts own conduct with respect to the asset after acquiring it. See FDIC v. lue Rock Shopping Center, 766 F.2d 744, 753 (3d Cir.1985); FDIC v. arrison, 735 F.2d 408, 412 (11th Cir.1984). In such cases a defendant may resent evidence outside of the documents to establish a defense. In the ent case, however defendants have failed to offer any facts which would ntitle them to avoid the application of s 1823(e).
[6][7] The court chooses to follow those courts which hold that s 1823(e) bars he defense of oral accord and satisfaction. See Public Loan Co. v. FDIC, 03 F.2d 82, 84 (3d Cir.1986) (defense of oral accord and satisfaction barred y s 1823(e) despite assertion that the full amount of the letter of credit had een previously paid); FDIC v. General Investments, Inc., 522 F.Supp. 1061, 067 (E.D.Wis.1981) (holding that parties never finalized a settlement greement, *459 but stating that if such an oral agreement has been made, he court would find it invalid for failure to comply with s 1823(e) equirements); FDIC v. Hoover-Morris Enterprises, 642 F.2d 785 (5th ir.1981) (defense of oral accord and satisfaction could not be asserted gainst FDIC which brought action to recover deficiency judgment because of s 823(e), the D'Oench doctrine, and failure to satisty state law requirements accord and satisfaction); FDIC v. Fulcher, 635 F.Supp. 27 W.D.Tex.1985) (bank's oral agreement to let defendant off a guaranty upon eceipt of proceeds from sale of collateral was barred by s 1823(e) and Oench doctrine even though bank had allegedly received proceeds from sale collateral); FDIC v. WH Venture, No. 84-5673, slip op., 1986 WL 5919 E.D.Pa., May 22, 1986) (stating "[c]learly defendants' affirmative defense and ounterclaim based upon accord and satisfaction and novation, to the extent

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hey do not meet the requirements of s 1823(e) are barred.").
The United States Supreme Court, in Langley, reviewed two of the
urposes of s 1823(e):
] One purpose of s 1823(e) is to allow federal and state bank examiners to
e.y on a bank's records in evaluating the worth of the bank's assets. Such
valuations are necessary when a bank is examined for fiscal soundness by state
r federal authorities, see 12 USC ss 1817(a)(2), 1820(b) [12 USCS ss
817(a)(2), 1820(b)], and when the FDIC is deciding whether to liquidate a
ailed bank, see s 1821(d), or to provide financing for purchase of its assets
and assumption of its liabilities) by another bank, see s 1823(c)(2), (4)(A).
he last kind of evaluation, in particular, must be made "with great speed,
sually overnight, in order to preserve the going concern value of the failed
ank and avoid an interruption in baking services." Gunter v. Hutcheson, 674
2d at 865. Neither the FDIC nor state banking authorities would be able to
ake reliable evaluations if bank records contained seemingly unqualified notes
hat are in fact subject to undisclosed conditions.
A second purpose of s 1823(e) is implicit in its requirement that the
agreement" not merely be on file in the bank's records at the time of an
xamination, but also have been executed and become a bank record
contemporaneously" with the making of the note and have been approved by
fficially recorded action of the bank's board or loan committee. These latter
equirements ensure mature consideration of unusual loan transactions by senior
ank officials, and prevent fraudulent insertion of new terms, with the
ollusion of bank employees, when a bank appears headed for failure.
98 L.Ed.2d at 347. Neither of these purposes would be fulfilled if a debtor
ere allowed to show, by an oral agreement not meeting the statute's
equirements, that a facially unqualified note was subject to a condition such
s release upon partial payment.
's holding is consistent with others in the district. See, e.g., FDIC v.
:ring, 620 F.Supp. 1271, 1274 (D.Kan.1985) (holding that "... any
ffirmative defense that flows from an oral agreement is barred by
s 1823(e)]"); FDIC v. Soden, 603 F.Supp. 629, 634-35 (D.Kan.1984) (holding
ral side agreement between bank and law firm invalid under s 1823(e)). The
ourt finds that the defense of oral accord and satisfaction is barred by s
823(e) as to the claim brought by the FDIC in its corporate capacity.
Defendants have previously voluntarily withdrawn their counterclaims and all
ffirmative defenses except accord and satisfaction. (Dk. 36, p. 2.) Both
arties have stipulated that if the defendants were determined to be liable,
he correct amount of that liability would be $189,444.37, together with
nterest from and after November 9, 1987 at the contract rate, currently
alculated at $49.41 per diem. (Dk. 29, p. 1; Dk. 36, p. 3.)
[8] The parties have briefed the issue of equitable sanctions against the FDIC
n its corporate capacity. The court expressed to the parties at the in-
hambers conference on November 9, 1987 its concern *460 with the FDIC's
aving filed, in the form of a "motion in limine," a dispositive motion on the
ve of trial. The FDIC, in both its corporate and receivership capacities,
ubsequently tendered a check to the clerk of this court in the amount of
751.02 as payment for the costs of impaneling a jury on November 9, 1987.
Dk. 31.) That unconditional offer was found to be appropriate and the clerk
as ordered to accept the FDIC's check and to apply the proceeds as payment for
COPR. (C) WEST 1992 NO CLAIM TO ORIG. U.S. GOVT. WORKS

e costs of impaneling a jury in this case. (Dk. 33). After reviewing the cts and arguments set forth in the parties' briefs on this issue, the court ... that no additional payment from the FDIC in the form of equitable ...ions is warranted.

T IS THEREFORE ORDERED that the FDIC's motion for summary judgment is anted, and the FDIC in its corporate capacity is awarded $189,444.37, plus terest from and after November 9, 1987 at the rate of $49.41 per day. It is rther ordered that defendants' motion for equitable sanctions against the IC is denied.

OF DOCUMENT

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STATE OF OREGON
COURT OF APPEALS
THIRD FLOOR
JUSTICE BUILDING
SALEM, OREGON
97310

R. WILLIAM RIGGS
JUDGE

RECEIVED
OCT - 9 1992
KANTOR AND SACKS
(503) 373-7124

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

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.

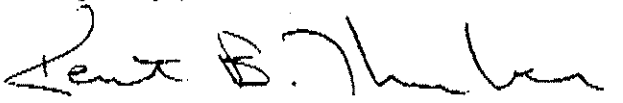
As you may know, Oregon Legal Services (OLS) is a private non-profit organization which represents low income people throughout rural Oregon. Over the years, we have successfully litigated quite a large number of class actions, for the most part involving governmental benefits such as Aid to Families 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

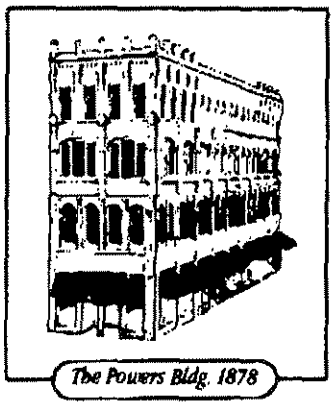
BODYFELT MOUNT STROUP & CHAMBERLAIN

Attorneys at Law

R. Richard Bodyfelt
Barry M. Mount
Roger K. Stroup*
Peter R. Chamberlain
Richard A. Lee*
Simeon D. Rapoport
Jane Paulson‡

*Also admitted in Washington

‡Also admitted in California



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65 S.W. Yamhill Street
Portland, Oregon 97204-3377
503-243-1022

Telecopier
503-243-2019

October 16, 1992

VIA FAX NO. 346-1564

Maurice J. Holland
Acting Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403

Dear Mr. Holland:

Re: Proposed Change to ORCP 36C(2)

In the September 14, 1992 Advance Sheets, there were proposed amendments to the Oregon Rules of Civil Procedure which we understand the Council is considering. We have been informed that the Council will also consider at its October 17th meeting a proposed change to ORCP 36C(2). We would like to express our opposition to that proposed amendment. In our view, the proposed amendment is a bad idea for Oregon for several reasons.

The argument for this proposal proceeds from several faulty assumptions. One of these is that protective orders are being abused because they are obtained without any real need being demonstrated. That may or may not have once been the situation, but it definitely is not the case now. With the national campaign being waged by the American Trial Lawyers Association and the various state organizations, it has become increasingly more difficult to obtain a protective order in any case. In the past, plaintiffs' attorneys were primarily interested in the welfare of their own client. They made decisions based upon how they could best prosecute that client's case, including how they could most easily, efficiently and least expensively obtain the discovery necessary to prove that client's case. Plaintiffs' attorneys now seem inclined to view themselves as prosecutors for the public at large and therefore less willing to make decisions based upon a

single client's best interest. As a result, more and more protective orders are only obtained after a court is convinced of the need for and the proper breadth of the proposed order.

The Council should also consider that this proposal is certain to increase the litigation and trial court involvement surrounding the original protective order. Whatever may be the situation across the country, in Oregon plaintiff and defense lawyers typically know each other well and defense lawyers know that their counterparts can be trusted to be honest and exercise good faith. Oregon defense counsel can, with comfort, advise their corporate clients of the character of plaintiff's counsel and urge a client to take a less cautious approach to the discovery situation and protective order. This expedites discovery and cuts down trips to the trial court concerning discovery disputes. However, if this proposed amendment were enacted, while Oregon counsel for plaintiffs can be assumed to deal in good faith with the materials obtained under a protective order, defense counsel would not be able to give any such assurances with regard to whoever may obtain subsequent disclosure. Thus, protective order issues which once could have been worked out amicably between Oregon counsel with leeway given for the attitude of Oregon plaintiffs' counsel, will now be litigated to the trial court to the last degree if these protective orders are going to be transformed into a "national protective order." Plaintiff's counsel will think he or she needs to protect the unidentified national client and thus will also not be in a compromising mood. Thus, it can be safely assumed that both on the front end, obtaining the protective order, and, as will be discussed later, on the back end, when some party seeks to have the protective order opened, greater judicial involvement of Oregon judges will be required.

Another faulty premise for this proposed modification is that materials subject to the protective order cannot be obtained directly from the defendant. This premise has two separate aspects which need to be examined. As the Council is well aware, the scope of discovery in ORCP 36B is understandably broad. If a party is unable to obtain discovery of documents produced in another case and subject to a discovery order, because those documents in the current case are not within the scope of discovery, that party should not be able to go back to some other case, where the issues must have been different in order to make the documents there discoverable, and obtain indirectly what that party is not entitled to obtain directly. Shouldn't the decision as to whether something is discoverable or not discoverable be entrusted to the judge monitoring the current litigation, rather than the judge who dealt

with the prior litigation and approved the original protective order? It seems obvious which judge is in the better position to make sound decisions concerning the scope of discovery about the present litigation.

The second aspect of the faulty premise that discovery cannot be obtained directly is the implied or expressed view that the party to whom the discovery request is directed will not be faithful in complying with their obligations under the rules of discovery. In simple language, some plaintiffs' attorneys are paranoid that defendants will hide things that they've turned over in some other litigation. The simple language response is that there is absolutely and utterly no demonstration that such is occurring in Oregon or has occurred. If it has occurred in other jurisdictions, then it is the responsibility of the courts in those jurisdictions to deal with it, not a responsibility which should be imposed upon Oregon trial judges for some out-of-state plaintiff in some out-of-state case. Our judges have enough things to do to keep them busy with Oregon matters.

While there are no doubt several other valid reasons why the proposed amendment should not be adopted, the last one we would raise is the issue of enforcement. This is, of course, tied into the previously discussed issue of the behavior of Oregon counsel. Both defense counsel and the court can comfortably rely upon the good faith of Oregon counsel who receive documents under a protective order. Moreover, enforcement of violations against Oregon counsel can be dealt with easily. In contrast, how is an Oregon Circuit Court judge going to enforce a protective order over a New York, Chicago or Miami attorney? How is anyone going to monitor whether some enforcement action is necessary? Again, the Oregon bench has better things to do with its time than attempting to determine whether John Q. Esquire, New York, New York, has or hasn't abided by the terms of a protective order and how to deal with the issue if he has not.

Discovery can and should be dealt with by the parties and judiciary which are handling a currently pending action. It should not be ruled upon by a judge who is not involved in and probably has no real interest in the current case, nor should it be a burden upon a party who has long since put the issues in a prior case to bed. There is no demonstrated need for the proposed amendment in Oregon.

Thank you for your consideration of our input.

Very truly yours,

Roger K. Stroup

Peter R. Chamberlain

RKS:lme

cc: Henry Kantor

Georgia-Pacific Corporation

Law Department
William E. Craig
Western Regional Counsel

900 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone (503) 248-7284

VIA FACSIMILE

October 16, 1992

Maurice J. Holland
Acting Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403

Re: Comments on Proposed Amendment to Rule 36C(2)

Dear Mr. Holland:

Georgia-Pacific Corporation is concerned about the proposed amendment to Rule 36C(2) for 2 important reasons. First, the possibility of later disclosure of information provided pursuant to a protective order will adversely impact settlement negotiations. Georgia-Pacific is often willing to disclose commercially sensitive information under the terms of an appropriate protective order in order to settle cases which otherwise might result in protracted litigation. If the amendment to the rule as proposed is adopted, Georgia-Pacific would be considerably less willing to make such disclosures.

Secondly, the proposed rule amendment would further complicate discovery proceedings. The inability to rely on a negotiated protective order will result in many more trips to the presiding judge for rulings on specific objections which heretofore have been easily resolved with an appropriate protective order.

Thank you very much for the opportunity to provide these comments.

Very truly yours,

William E. Craig
Western Regional Counsel

WEC:gls

Phil Goldsmith
Attorney at Law
1100 S.W. 6th Avenue
Suite 1212
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
Attorney at Law
1100 S.W. 6th Avenue
Suite 1212
Portland. Oregon 97204

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

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 F(2) of this rule, shall determine ~~whether~~ when, and how this notice should be given ~~under subsection F(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.

BIOJECT

BIOJECT INC.
7620 S.W. BRIDGEPORT ROAD
PORTLAND, OREGON 97224
TELEPHONE: (503) 639-7221
FAX: (503) 624-9002

CANADA OFFICE
BIOJECT MEDICAL SYSTEMS LTD.
WORLD TRADE CENTRE
650-999 CANADA PLACE
VANCOUVER, B.C. V6C 3E1
TELEPHONE: (604) 669-8234
FAX: (604) 681-2634

November 17, 1992

Maurice J. Holland
University of Oregon
School of Law, Room 331
1101 Kinkaid Street
Eugene, OR 97403

Re: Amendment to ORCP 36C(2)

Dear Mr. Holland:

Bioject, a public company traded on NASDAQ, located in Portland, Oregon is opposed to the proposed amendment to Rule 36C(2) of the Oregon Rules of Civil Procedure. This amendment proposes procedures overturning protective orders.

As Founder, General Counsel, President and CEO of Bioject, a company of 36 employees that was founded in 1985, this proposed rule change could have significant ramifications for our business. Protective orders are important to small, high-tech growth companies in Oregon, especially those that are publicly traded, in that they assist in preventing the unwarranted dissemination of confidential information. This rule change will have a detrimental effect on our operations by increasing the cost of an already expensive process. For example, this rule change could discourage clinical investigators from recruiting patients into clinical trials of health care products in Oregon medical institutions. It also introduces new economic uncertainty into the litigation process.

Our primary concerns about the proposed amendment to ORCP 36C(2) are as follows:

1. Protective orders are normally sought by a defendant business or company in the course of settling one of the inevitable plaintiff suits, many times for an amount less than the defense costs, as a means of achieving final settlement of a case.

2. Although meritorious cases do occur occasionally, unfortunately, a public company is also a perfect target for frivolous and meritless litigation. Such companies are highly motivated to conclude litigation quickly since their auditors must always treat

the amounts prayed for as a liability to be discussed in the footnotes of their audited financial statements. Also, quarterly and annual SEC filings must discuss all litigation and the associated liability exposure as well. Therefore, a public company is under great pressure to settle all litigation, even that which is frivolous and meritless.

3. Such settlements are usually accomplished as a result of extensive negotiations and may be accompanied by discovery.

4. An important component of such settlements is the ability to maintain secrecy of the settlement terms and discovery, both to confound competitors and to lessen the likelihood of inviting other, similar suits.

5. This amendment allows the protective order to be relitigated, forever, creating a great burden on the protected parties.

6. The proposed amendment will increase court congestion and drive up overall litigation costs.

7. This introduction of uncertainty into the litigation process will create a negative business environment which could discourage the formation of research alliances with major manufacturers of medical products. Bioject has already announced such agreements with Eli Lilly and Company and Kobayashi Pharmaceutical Co., Ltd.

8. This amendment could diminish the ability of Bioject and other businesses in Oregon to compete with other companies in states that do not have this rule change or legislation in effect.

In addition to the above concerns, this proposed amendment is not good policy or law for the following reasons:

1. The burden for overriding a previously-granted protective order is placed on the protected party rather than upon an applicant. This forces a protected party to essentially "re-apply" for protective orders on an ongoing basis . . . forever.

2. "A party" is allowed to make disclosure of protected discovery after making application and noticing a hearing to the protected party. Such a hearing would be onerous in that, for an unlimited period of time, any party to a settlement could be approached by other potential plaintiffs, and agree to force the protected party to

November 17, 1992

"reopen" that portion of the settled case, by producing witnesses and evidence, proving, once again, that the protective order should stand.

Bioject is committed to remaining in Oregon as a fast-growing, high-technology, medical device company. We hope that you will be similarly committed to protecting the rights of individuals and the opportunity for business to add to the prosperity of our state.

I strongly urge you to oppose this amendment to Rule 36C(2). Please feel free to contact me regarding this letter. Thank you for your consideration.

Sincerely,

Carl E. Wilcox
President/CEO

CEW/fkm

wp51\corporat\orcp.ltr

DUNN, CARNEY, ALLEN, HIGGINS & TONGUE

ROBERT L. ALLEN
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BRADLEY O. BAKER
JONATHAN A. BENNETT*
ROBERT F. BLACKMORE
ERNEST G. BOOTSMA
RICHARD T. BORST
WILLIAM H. CAFFEE
JOHN C. CAHALAN
ROBERT R. CARNEY
GEORGE J. COOPER
ANDREW S. CRAIG
I. KENNETH DAVIS
JOHN C. DEVOE
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MICHAEL J. FRANCIS*
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GILBERT E. PARKER
ROGER W. PERRY**
HELLE RODE
CHARLES D. RUTTAN
STACI L. SAWYER
G. KENNETH SHIROISHI††*
JAMES G. SMITH
DONALD E. TEMPLETON*
THOMAS H. TONGUE
DANIEL F. VIDAS
ROBERT K. WINGER

* ADMITTED IN OREGON AND WASHINGTON
†† ADMITTED IN OREGON AND CALIFORNIA
** RESIDENT, BEND OFFICE

November 19, 1992

Maurice J. Holland
Member of Council on Court Procedures
University of Oregon
School of Law, Rm. 331
1101 Kincaid Street
Eugene, OR 97403

RE: Proposed Amendment to ORCP 36(c)

Dear Mr. Holland:

At your December 12 meeting of the Council on Court Procedures, you will have before you a proposed amendment to Rule 36(c). After review of the proposed amendment, I have come to the conclusion that the amendment should be rejected.

Our firm represents plaintiffs and defendants. We represent out-of-state corporations that are sued in this state and Oregon corporations that are sued in various states. The present Rule 36(c) is for all practical purposes identical to the Federal Rule of Civil Procedure 26(c). That rule is well understood across the country and has been the subject of a number of court decisions that provide guidance to trial courts faced with interpreting the rule. The Federal Rules have recently been reviewed and proposed changes are being experimented with in various Districts. The rule change under consideration here is not a part of the proposed Federal Rule changes.

The proposed amendment to my knowledge has not been adopted in any state. There is no body of existing law as to the effect of the proposed amendment. If the proposed change were to be adopted, the result almost certainly would be an increase in Oregon's litigation to determine the confidentiality of key business information. If the amendment were to be passed, I would expect cases filed in Oregon in an attempt to obtain information to be used in litigation in other states without the same rule. I would further expect cases to be filed in the state court rather than in federal court. While the numbers of such additional cases may not be large, they are certainly going to be particularly time-consuming cases and burden our already overburdened judicial system. In my judgment, Oregon should defer considering this amendment until other states have had decisions interpreting the effect of changes and we know what we are getting ourselves into.

Oregon has longstanding practice of not adopting discovery rules which are considered experimental, burdensome or expensive. For example, Oregon delayed adopting many of the federal rules and still has not adopted rules permitting interrogatories. It would certainly be out of character for Oregon to be an experimenter with a new rule.

Trial lawyers presently exchange information without reservation based on protective orders. If this proposed amendment were to be adopted, I would expect defendants to be much more reluctant to release information to plaintiffs in Oregon resulting in delays and expense to Oregon plaintiffs in obtaining information that otherwise would have been available to them. I would expect state trial court judges would have to hear many more motions on the form of protective orders. The focus of these orders are presently worked out between counsel. The only potential benefit of the rule change would be to facilitate transfer of information obtained in one case to somebody who has a similar case. If Oregon was one of only a very few states having a rule permitting that sort of exchange, I would expect increased numbers of suits to be filed in Oregon for the purpose of obtaining information that would then be distributed about the country. I do not know that we want Oregon courts to be known as facilitating persons in dealing in confidential business information.

The proposed rule as drafted is highly indefinite as to what standards should be applied. It is further uncertain as to what the standard of review would be. This is the sort of uncertainty that will slow down progress of cases and add to litigation costs. The only potential benefits would be to litigants in other states who might receive information from Oregon cases. In my judgment, the proposed rule is not in the best interests of the state and should be rejected.

Very truly yours,

Thomas H. Tongue

THT:jjb

[THT\COV6-1.001]

Gilma, pls copy for distribution

PACCAR Inc

Business Center Building
P.O. Box 1518
Bellevue, Washington 98009
Telephone (206) 455-7400

December 7, 1992

Mr. Maury Holland
University of Oregon School of Law
1101 Kincaid
Eugene, Oregon 97403

Dear Mr. Holland:

We urge you, the Council for Court Procedures, to vote No on the proposed Protective Order regulation.

PACCAR Inc is a manufacturer of Kenworth and Peterbilt trucks with plants and facilities located throughout the United States. We believe the proposed regulation would restrict the authority of courts to issue Protective Orders to keep highly sensitive or commercially valuable information produced in a litigation confidential. This proposal would also create a decidedly hostile environment for business and the courts of Oregon by making it impossible for courts to adequately protect trade secrets and other proprietary business information. Further, this proposal would destroy court procedures that promote efficiency and economy, and deny protection of the fundamental rights of litigants.

The net effect of restricting the use of Protective Orders will be lawsuits which are more costly, more complex, and less likely to settle. As the proposed regulation will destroy a system that now works in the best interest of all parties involved with litigation, we strongly urge you to vote "NO" on this measure.

Sincerely,

Norman E. Proctor
Manager of State
Government Relations

NEP:lph

PERKINS COIE

A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
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TELEPHONE: (503) 295-4400

December 9, 1992

Maurice J. Holland
University of Oregon
School of Law, Room 331
1101 Kincaid Street
Eugene, Oregon 97403

Re: Proposed Amendment to ORCP 36.C(2)

Dear Mr. Holland:

I am writing on behalf of the Oregon Association of Defense Counsel ("OADC") to reiterate our objections to the proposed changes regarding protective orders. As stated in our letter of June 12 on this subject, the OADC believes that the proposed changes do not advance the jurisprudence of the State of Oregon. The proposed changes will, in our view, increase the expense of civil litigation, impede settlements, and unfairly shift the burden of maintaining confidentiality to a party disgorging confidential information -- usually the defendant.

We also believe there is an additional major impact not addressed in our earlier letter. The proposed changes will likely have the effect of discouraging voluntary disclosure of confidential information pursuant to an agreed protective order. Substituted would be a procedure by which litigants can be expected to object in the first instance to production of sensitive materials because they will perceive that there is no benefit -- only detriment -- to voluntarily disclosing sensitive materials. Additionally, litigants will likely perceive their tactical interests better served by seeking the protection of the court and making a preliminary record regarding the sensitivity of various discovery materials before any documents have been turned over in discovery.

The spectre of increased court involvement in discovery disputes is real and potentially devastating to the civil justice system in light of ever greater pressures on the courts from such initiatives as Measure 5.

In summary, we believe the detriments from the proposed changes far outweigh the benefits, if any. We urge the

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Council to reject the proposed changes at the meeting on December 12.

Very truly yours,

Paul T. Fortino

PTF:jlp

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& Stewart
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December 10, 1992

By Messenger

Janice M. Stewart, Esq.
McEwen, Gisvold, Rankin & Stewart
1100 SW 6th Avenue, Suite 1600
Portland, OR 97204

Re: Proposed Amendments to ORCP 32

Dear Janice:

It has come to my attention that Phil Goldsmith and others have proposed certain amendments to ORCP 32 which may be considered by the Council on Court Procedures at its December 12, 1992 meeting in Eugene.

I understand that among the proposed amendments are those which in substance would do the following:

1. Delete notice provisions included in former ORS 13.260 as originally enacted; and

2. Eliminate or greatly reduce the use of claim forms as originally included in former ORS 13.260.

Having been directly involved in the negotiated legislative settlement of the differences between the plaintiffs' and defendants' bars in 1973, I want to set forth a bit of history and say why I think it would be unwise to change these two provisions.

The Oregon legislature considered and adopted class action legislation at the 1973 session. Henry Carey led the plaintiffs' bar, and among those who represented the defendants' bar were Hugh Biggs and I for our law firm. The

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JONES & GREY

Attorney General's office was also actively involved in the discussions leading to adoption of the class action rule.

The primary conflict was between ease of recovery on the one hand and due process protection of the rights of the litigants on the other. The plaintiffs' bar wanted an opt out rule, limited notice and fluid recovery. The defendants' bar wanted an opt in provision, expanded notice and a requirement that individual class plaintiffs had ultimately to express an interest in recovery.

As a result of the discussions before the legislature and with the participation by the Attorney General, the legislature balanced the equities. The legislature provided an opt out rule which automatically gives plaintiffs the collective force of a large group once a class is certified. However, the legislature adopted as a counter balance a requirement that before entry of a final judgment, individual members of the class would have to actually express an intention to make a claim against the defendant. As to notice, the legislature simply enacted the notice provisions of Federal Rule 23 and requested the best possible notice under the circumstances.

In both the 1975 and the 1977 legislatures, Mr. Carey and other proponents of a more liberalized use of class actions returned to Salem and, having obtained the advantages of opt out, tried to convince the legislature that it should modify the law to ease the notice provisions and to permit fluid recovery. In both 1975 and 1977 the attempts were unsuccessful, primarily, in my opinion, because there was no demonstration that the balance originally created had disadvantaged class plaintiffs.

It seems to me that nothing has happened in the 15 years since 1977 to demonstrate that class plaintiffs have been prejudiced by the notice requirements. Certainly there can be no showing that individual members of the public have suffered because they actually had to fill out and submit a claim form before they could be paid. Since the class action rule was enacted in 1973, class representatives have won litigation, class representatives have lost litigation, and many class actions have been settled. A body of law has been created which has served the public well, judging by the few decided cases evidencing problems with the procedures.

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JONES & GREY

It seems to me that what is presently being propounded is simply a revisitation of a controversy which was resolved by compromise in 1973 and not changed by the legislature in 1975 or 1977. There is no demonstrated public need for the change, and I believe that the suggested changes represent an attempt to have the Council enact not procedural but social changes, an impulse which I hope the Council will resist.

I would appreciate your distributing this letter to all members of the Council.

Very truly yours,

William M. McAllister

William M. McAllister

WMM:ml

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JONES & GREY

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December 10, 1992

By Messenger

Janice M. Stewart, Esq.
McEwen, Gisvold, Rankin & Stewart
1100 SW 6th Avenue, Suite 1600
Portland, OR 97204

Re: Proposed Amendments to ORCP 32

Dear Janice:

I am writing to voice my strong opposition to the proposed amendments to ORCP 32 that are to be considered by the Council on Court Procedures this Saturday.

I have handled numerous class actions during my 19 years of practice. Based on that experience, I can see no need for the proposed changes. Furthermore, I believe that the deletion of notice provisions and the elimination or reduction in the use of claim forms would pose significant due process questions that would unnecessarily complicate class action litigation. In addition, the elimination of the distinction between types of class actions would tend to confuse litigants and would inject uncertainty into a system that has been functioning smoothly for a number of years.

I would appreciate your distributing this letter to members of the Council for their consideration.

Sincerely yours,

Lois O. Rosenbaum

Lorp9350

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December 11, 1992

VIA FAX (364-1564) AND U.S. MAIL

Prof. Maury Holland, Executive Director
Council on Court Procedures
University of Oregon
School of Law, Room 275A
1101 Kincaid Street
Eugene, OR 97403-3720

Re: Proposed Amendment to ORCP 36C

Dear Prof. Holland:

During the last two sessions of the Procedure and Practice Committee, we discussed the proposed amendment to ORCP 36C. The committee was not able to reach a consensus regarding the amendment. As a result, we would like to share some of the concerns we discussed in this regard.

It is our understanding that the following is the proposed amendment:

> C.(2). A party may disclose materials or other information covered by a protective order issued under subsection (1) above to a lawyer representing a client in a similar or related matter if the party first obtains a court order, after notice and an opportunity to be heard is afforded to the parties or persons for whose benefit the protective order has been issued. Disclosure shall be allowed by the court except for good cause shown by the parties or persons for whose benefit the protective order has been issued. No order shall be issued allowing disclosure unless the attorney receiving the material or information agrees in writing to be bound by the terms of the protective order. (Renumber existing Rule 36C and 36C(1).)

1. The Procedure and Practice Committee discussed the general purpose behind the proposed amendment and concluded that there are really two distinct objectives for the amendment. The committee recognized the public policy against

secrecy although, at the same time, it recognized the necessity of protecting trade secret information which an entity has worked to develop and which forms the basis of its existence. In addition, there is a separate purpose to allow attorneys access to previously produced documents for convenience of counsel. Although the public policy disfavoring secrecy is somewhat intertwined in the result of the amendment, the amendment itself seems to be directed toward third party intervention into the production of documents. There was concern that the amendment merely allows for an additional procedure for disclosure of documents which a party would be entitled to and, in fact, obligated to request, pursuant to the normal discovery procedures set forth in the ORCP.

2. The amendment is not clear regarding its application to closed cases. The amendment may require the court to entertain continuous jurisdiction over all civil actions in which a protective order has been issued. In contrast, if the civil file is still active, and if the information sought is available in an active civil case, the same information should be, and arguably would be, available to the second litigant under the normal discovery rules and thus there would be no need for invading the first protective order.

3. There is no specific provision for attorneys who do not practice in the State of Oregon to request and institute the ORCP 36C procedure. Furthermore, even if such attorney were able to litigate a prior protective order in an Oregon case, the committee had great concern over the Oregon court's ability to enforce the protective order even if the second attorney agreed to be bound by such. Routinely, failure to comply with protective orders is enforceable by a contempt citation. The Oregon courts do not have the practical ability to enforce such a contempt citation and in fact, would have no basis for any such sanctions against an out-of-state litigant. In addition, the Oregon court would have very limited, if any, ability to enforce a monetary sanction against an out-of-state attorney under the circumstances presented by the amendment.

4. With respect to the disclosure itself, the proposed amendment requires only that the two attorneys represent a client "in a similar or related matter." Such language may allow disclosure of trade secret information which has been produced pursuant to a protective order in a case involving two separate and distinct entities. As an example, General Motors may be involved in seatbelt litigation which is "similar" to a Honda Motors seatbelt case. However, the two entities have completely different trade secrets and interests in protecting

such data. Moreover, the language - "similar or related" - provides only a minimum relevancy requirement which would presumably have to be litigated on a case-by-case basis.

5. With respect to the burden of proof, the amendment to ORCP 36C as written presumes that disclosure is appropriate unless good cause is proven by the protected party. This places the burden of showing good cause upon the parties or person for whose benefit the protective order has been issued. There are pros and cons regarding placement of the burden of proof on either party, to wit:

A. Reasons for placing the burden of good cause on the party for whose benefit the protective order has been issued include the following:

(1) There is no potential harm because persons to whom disclosure is made must agree to be bound to the terms of the order. Responsibility for showing any harm from further disclosure, subject to the protective order, should rest upon the party who might suffer harm.

(2) The court should continue to presume that secrecy is against the public policy of Oregon. Therefore, the burden of obtaining secrecy should be on the party who wants secrecy.

(3) The attorney seeking the material in all likelihood does not know the true contents of the material at issue. Counsel is at a disadvantage in connecting the importance, or potential usefulness, of the disclosed material to the existing representation. Counsel who seeks to prevent disclosure is in a better position to urge lack of relevance.

B. Reasons in favor of placing the burden of showing good cause on the party who seeks disclosure are as follows:

(1) A status quo exists because a trial court has already decided that a protective order is necessary. It is more judicially efficient to place the burden on the party seeking to disturb the status quo, after a prior commitment of judicial resource, time, and examination of issues.

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(2) A moving party bears the burden of proof on most motions, even discovery motions, and there are less compelling reasons to carve out an exception for third persons intervening in the private dispute of others.

(3) A person seeking disclosure is in a better position to demonstrate the necessity for the information.

(4) Requiring the benefitted party to bear the burden of proof may require that party to litigate their protective order hundreds of times after the initial litigation has been closed and dismissed.

(5) The moving party is able to obtain the same information, via the normal discovery procedure, in the moving party's case.

In conclusion, the Procedure and Practice Committee was unable to reach a consensus for or against adoption of the proposed amendment. It is our committee's hope that our input will be useful to the Council in its work on the proposal at tomorrow's meeting.

Respectfully Submitted,

Richard S. Yugler

Kathyrn S. Chase

Dennis J. Hubel

Stephen C. Thompson

KSC:dh/SCT:ghp

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December 10, 1992

Maurice J. Holland
University of Oregon
School of Law, Rm 331
1101 Kincaid Street
Eugene OR 97403

RE: Oregon Rule of Civil Procedure 36, Relating to Protective Orders

I support Associated Oregon Industries position in opposing the amendment weakening Oregon's laws on protective orders. In these days of economic difficulty we should not pass anti-business laws. We need strong business in Oregon in order to provide jobs and fund initiatives that make Oregon a good place to live.

Sincerely,

Ray Tulaya
Vice President Finance

jk

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December 10, 1992

By Messenger

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McEwen, Gisvold, Rankin & Stewart
1100 SW 6th Avenue, Suite 1600
Portland, OR 97204

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I would appreciate your distributing this letter to all members of the Council.

Very truly yours,

William M. McAllister

WMM:ml

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Portland, OR 97204

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Lois O. Rosenbaum

Lorp9350

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December 11, 1992

VIA FAX (364-1564) AND U.S. MAIL

Prof. Maury Holland, Executive Director
Council on Court Procedures
University of Oregon
School of Law, Room 275A
1101 Kincaid Street
Eugene, OR 97403-3720

Re: Proposed Amendment to ORCP 36C

Dear Prof. Holland:

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It is our understanding that the following is the proposed amendment:

> C.(2). A party may disclose materials or other information covered by a protective order issued under subsection (1) above to a lawyer representing a client in a similar or related matter if the party first obtains a court order, after notice and an opportunity to be heard is afforded to the parties or persons for whose benefit the protective order has been issued. Disclosure shall be allowed by the court except for good cause shown by the parties or persons for whose benefit the protective order has been issued. No order shall be issued allowing disclosure unless the attorney receiving the material or information agrees in writing to be bound by the terms of the protective order. (Renumber existing Rule 36C and 36C(1).)

1. The Procedure and Practice Committee discussed the general purpose behind the proposed amendment and concluded that there are really two distinct objectives for the amendment. The committee recognized the public policy against

secrecy although, at the same time, it recognized the necessity of protecting trade secret information which an entity has worked to develop and which forms the basis of its existence. In addition, there is a separate purpose to allow attorneys access to previously produced documents for convenience of counsel. Although the public policy disfavoring secrecy is somewhat intertwined in the result of the amendment, the amendment itself seems to be directed toward third party intervention into the production of documents. There was concern that the amendment merely allows for an additional procedure for disclosure of documents which a party would be entitled to and, in fact, obligated to request, pursuant to the normal discovery procedures set forth in the ORCP.

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Respectfully Submitted,

Richard S. Yugler

Kathyrn S. Chase

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KSC:dh/SCT:ghp

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