COUNCIL ON COURT PROCEDURES

Minutes of Meeting of September 26, 1992

Seaside Civic & Convention Center
415 First Avenue
Seaside, Oregon

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

The following guests were in attendance: Larry Cullen, David Culpepper, Paul Cosgrove, Don Douglas, Kathleen P. Eymann, Phil Goldsmith, Dennis Hubel, Ann Kartsch, A. Carl Myers, Bob Oleson, Phoebe Joan O'Neill, Chuck Ruttan, Ramey Stroud, Cecil Strange III, Chuck Tauman, Keith E. Tichenor, Twyla Williams, Charlie Williamson, and Larry Wobbrock. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

The meeting was called to order by Chair Henry Kantor at 9:00 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 August 1, 1992. The minutes of the meeting held August 1, 1992 were unanimously approved.

Agenda Item No. 2: Old business (Chair). The Chair indicated that, under this agenda item, there was an opportunity

for anyone to comment on the proposed ORCP amendments as published in the Advance Sheets. John Hart recalled that at the last meeting it was decided that a task force would be created regarding subpoena of hospital records and said that he and the Chair had sent a letter to several people who had expressed interest in this subject. He asked whether anyone present would like to serve on that task force committee; Mr. Larry Wobbrock indicated that he would.

Agenda Item No. 3: Amendment to Rule 60 (see attached letter from Lee Johnson) (Lee Johnson). Lee Johnson presented a draft amendment to Rule 60 concerning which two letters (attached to these minutes) had been distributed at the beginning of the meeting. Johnson said that he disagreed with some criticism to the effect that his amendment would increase the power of trial judges to rule on credibility of evidence. He recalled that, in the two contexts where the problem his amendment seeks to deal with arose, the plaintiff had made his opening statement on the basis of which it seemed to him that the defendant was entitled to a summary judgment.

The Chair then asked whether any members of the public wished to comment on his proposed amendment.

Mr. Charles Williamson, Portland, referring to his September 24th letter on behalf of OTLA (attached to these minutes), stated that OTLA is very concerned about the proposal. Specifically, OTLA's concern is that if the amendment were adopted, judges would then be able to require plaintiff's counsel to lay out every detail of their case and give the opposing party a "birdseye view." Mr. Williamson said that in cases like Harbert, the better procedure would be, when it becomes clear that the plaintiff's case lacks an essential element, for the court to grant a continuance with an opportunity for defendant to file a motion for summary judgment.

William Snouffer asked what the judge is supposed to do with a jury during the 30 or 40 days a summary judgment might take. Mr. Williamson responded that probably the jury would have to be dismissed and a new jury empaneled later.

Bernie Jolles stated that he did not see the need for this change. He added that a procedure similar to what Johnson proposes existed for many years with one of the late federal district court judges, and there was at least some frustration and dissatisfaction, particularly on the part of litigants who thought they had to come to court for trial and then after the lawyers met with the judge in chambers had to be told it was all over and that they had lost.

Susan Graber stated that she opposed this proposal for two reasons. First, she was not convinced of a need for it--that

there is a significant gap in the current rules. Her second reason was that the proposal would confuse two different things, namely, Rule 60 as used in the context of a jury trial after the evidence is in and the other category being summary judgment.

Mr. Larry Wobbrock, Portland, spoke in opposition on behalf of OTLA, arguing that juries are expected to reach results on the basis of justice and might react differently to testimony and other evidence in the full presentation of a case than would a judge to a lawyer's summarizing of the case in chambers. He also pointed out that plaintiffs come to court prepared for trial, often with very expensive expert witnesses, and a lot of money would be lost if a trial judge granted this kind of motion and was then reversed by the appellate court.

Maury Holland said that the proposal and the opposition to it raises what might be a problem in our system, that is, how to dispose of cases lacking merit after the normal pretrial motion period is over but prior to midway through the actual trial itself. Of course, the current rule might deal with this reasonably well by giving judges discretion to shorten the period prior to trial before which summary judgment motions must be filed. Holland wondered whether the proposal might give judges some discretion to impose a penalty against a defendant who waited until the very eve of trial, when the plaintiff was fully prepared for trial, only then to make what in substance would be a summary judgment motion that could have been made much earlier.

Jan Stewart said that part of the problem is the reluctance to file summary judgment motions because so many judges appear to have a strong dislike for those motions. However, she expressed understanding of the point made by others who represent primarily plaintiffs about truncating the trial practice.

The Chair stated that he was concerned about the potential for serious interference with the advocacy process.

Bill Cramer stated that in many years of experience he has found that many of the litigants he has represented were better able to accept and understand an adverse verdict, provided they had been given their full opportunity to present their case, in other words, to have their day in court. His view was that our procedures are already very technical and that to make them even more technical might increase the frustration many people already feel about our legal system.

In response to a question from the Chair as to whether anyone wished to make a motion, Johnson then withdrew his proposal.

Agenda Item No. 4: Amendment to Rule 69 (see attached proposed amendment) (Maury Holland). The Chair asked Holland to

remind the Council about the background of the proposed amendment to Rule 69. Holland responded that at the August 1 meeting, the Council indicated they wished to consider the issue relating to Rule 69 that was raised by Judge Mattison in his June 26th letter to the Chair. Specifically, Judge Mattison referred to a recent Court of Appeals decision, Van Dyke v. Varsity Club, Inc., which seemed to hold that Rule 69 requires 10 days prior written notice before default can be entered against a defendant who has failed to show up for trial, despite notice of that trial. Holland made clear that despite what might appear from the draft amendment, there was no intention to delete the final sentence of Rule 69 A. He also explained that his proposed amendment would carve out an explicit exception to Rule 69 A, which generally does require 10 days prior written notice for cases where the default takes the form of a failing to appear at trial personally or by counsel when there had been adequate notice of that trial. He also said that his draft amendment would change "fail to appear" in 69 B(1) to "failure to plead or otherwise defend" so that the wording would be consistent with the first sentence of Rule 69 A.

The Chair commented essentially that he believed that if there is going to be an entry of an order of default for failure to defend at trial, he thought it would have to be by the court as opposed to the court or the clerk.

Stewart asked Holland what his proposed phrase "having proper notice thereof" was intended to mean. Holland responded that his thought was that the defendant should be shown to have actual knowledge of the trial date.

The Chair then asked whether there was general agreement that the question raised by Judge Mattison should be considered in a way that would essentially overrule Van Dyke.

Snouffer expressed regret that Betsy Welch was not present because he understood that this problem, of one party to a domestic relations case showing up for trial and the opposing party failing to do so without any apparent excuse, was a serious one in that area. He added that he believed that under these circumstances, the court should be able to proceed immediately to a default and after a prima facie case, enter a judgment.

Jolles stated that he thought the problem of notice to the non-appearing litigant is best solved by the procedure for setting aside default.

Bruce Hamlin then moved that the Council adopt Holland's amendment to Rule 69 A only, and the motion was seconded. The Chair called for a discussion.

John Kelly then moved to amend the proposed amendment by striking the words "having proper notice thereof." Hamlin

disagreed with the Kelly motion because he believed that the question of sufficient notice should be dealt with by the court at the outset. There followed some discussion concerning the meaning of the word "proper" and whether that might be deleted. Jolles agreed with Hamlin that the question of notice should be resolved if possible at the outset, especially since many of these cases involve pro se litigants. Holland interjected that he chose the word "proper" because he assumed that there might well be a wide variety of local court rules and other about notice of a time of trial. The intent of the word "proper" was simply to incorporate whatever local rules or other requirements might arise in a particular procedure. Jolles asked whether the word "having" was meant to imply that the defendant actually received notice. Hart said that he did not believe additional notice of an application for default should necessarily be required in the case of a litigant who had already received notice of trial and ignored it.

The Chair then called for a vote on the motion to delete the proposed language "having proper notice thereof." The motion failed with 6 in favor and 8 opposed.

Hamlin stated that having made the original motion to adopt the proposed changes in Rule 69 A, he was now willing to change the motion by simply deleting the word "proper." This was treated as a motion to amend and was seconded.

Graber then asked Holland why he used the term "defend" rather than "appear." Holland responded that, on the basis of a brief conversation with Ron Marceau at an earlier meeting, he was persuaded that whatever language is used should convey the idea that merely physically appearing in the courtroom was not enough, but that the litigant should be ready to participate in the trial.

Mr. Dennis Hubel, Bend, was then recognized for making comment on behalf of the Procedure & Practice Committee. He commented that any consideration of non-appearing defendants under Rule 69 should also include what is done about plaintiffs who fail to prosecute under Rule 54. There was general agreement, however, that Rule 54 was not presently on the Council's agenda.

Graber stated she was concerned about how the amendment might apply in the case of a defendant who actually shows up at trial but for one reason or another chooses not to put on a case. She said it did not make good sense to her that the judge could simply order entry of a default against such a defendant.

The Chair expressed some concern that whatever default might be entered, the court should make the determination--not the clerk.

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] at any time during the trial after the opponent has been fully heard. 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

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.

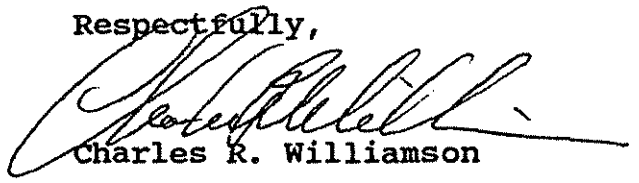
Thus, contrary to the procedures followed by Judge Johnson in Harbert, this court simply delayed the trial while appropriate dispositive motions could be filed. The court did not sua sponte issue summary judgment or allow an oral motion for summary judgment or a directed verdict by the defense. There 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

ite 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.

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

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

[1]
170Ak2117
FEDERAL CIVIL PROCEDURE
k. Direction of verdict.
D. Kan. 1988.
Directed verdict is not possible where jury has not been impaneled. Fed.Rules Civ.Proc.Rule 50(a, b), 28 U.S.C.A.
Federal Deposit Ins. Corp. v. Cover
714 F.Supp. 455

[2]
170Ak2533
FEDERAL CIVIL PROCEDURE
k. Motion.
D.Kan. 1988.
Motion for directed verdict would be construed as one for summary judgment, where motion had been made before jury had been impaneled. Fed.Rules Civ.Proc.Rules 50(a, b), 56, 28 U.S.C.A.
Federal Deposit Ins. Corp. v. Cover
714 F.Supp. 455

[3]
52k505
BANKS AND BANKING
k. Powers, functions and dealings in general.
D.Kan. 1988.
For purpose of determining whether notes were "assets" acquired by Federal Deposit Insurance Corporation from insolvent bank, and thus whether statute invalidating certain unwritten agreements diminishing or defeating right, title, or interest of Corporation in any asset acquired by it from insolvent bank was applicable, evidence showed that notes were in bank's active files on date that bank closed and on date that bank's assets were purchased by

acquired by it from insolvent banks, as to claim brought by Corporation in its corporate capacity against debtors to collect deficiency on promissory notes; debtors claimed that bank orally agreed that it would not seek deficiency judgment against them if they would sell their farm machinery and equipment and apply proceeds to their indebtedness owed to bank. Federal Deposit Insurance Act, s 2[13](e), 12 U.S.C.A. s 1823(e).
Federal Deposit Ins. Corp. v. Cover
714 F.Supp. 455
[8]
170Ak2721
FEDERAL CIVIL PROCEDURE
k. In general.
D.Kan. 1988.
Equitable sanctions beyond costs of impaneling jury would not be imposed on Federal Deposit Insurance Corporation for making "motion in limine," a dispositive motion, on eve of trial.
Federal Deposit Ins. Corp. v. Cover
714 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 "directed verdict." (Dk. No. 29.) The case was previously set for trial to a jury on November 9, 1987. At the chambers conference prior to jury selection 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.

is barred.
Section 1823(e) provides:
No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank. (Emphasis added.)
It is uncontested that the agreement upon which defendants rely is not in writing, and that defendants have failed to comply with the writing, approval, and filing requirements of s 1823(e). However, defendants assert that s 1823(e) is not applicable because no "asset" was acquired by the corporation when 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 the meaning of the term may perhaps be clarified, if not expressly defined, in the Purchase and Assumption Agreement between the FDIC, as receiver, and the Abilene First National Bank, as assuming bank, or in the Contract of Sale entered into between the FDIC, as receiver, and the FDIC in its corporate capacity, neither of those documents is included in the record before this court.
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 requirements of s 1823(e). Stated otherwise, an asset reflected in the records of a bank does not cease being an asset for purposes of s 1823(e) until payment is received or an agreement complying with the requirements *458 of s 1823(e) is concluded." (Dk. 30, p. 5.) Defendants do not challenge this proposed definition, except to state that "no evidence has been presented by the FDIC to prove that the notes in question were listed as assets on the books and records of the failed bank at the time the transfer to the FDIC in its corporate capacity was made." (Dk. 35, p. 4.) That factual omission by the FDIC has been remedied in its reply brief, by the attached affidavit of Ricky C. Olson, a bank liquidation specialist of the FDIC. That affidavit establishes that each of the three notes that are the subjects of this action was acquired by the FDIC in its corporate capacity from the receiver, and that such notes were reflected as assets in the loan files of the closed bank at the time of closure. (Dk. 42, Supplemental affidavit.)
The court finds that the notes in question were in the bank's active files on the date the bank closed and on the date the bank's assets were purchased by the FDIC in its corporate capacity. See FDIC v. Venture Contractors, Inc., 825 F.2d 143 (7th Cir.1987) (upholding trial court's finding that a guaranty was in an active file and thus a valid asset); FDIC v. Powers, 576 F.Supp. 1167, 1169 (N.D.Ill.1983) (rejecting as frivolous defendants' argument that none of their facially sufficient written guarantees was an "asset" under s 1823(e)).
Defendants additionally contend that even if their notes were reflected as assets on the bank's books, those notes ceased to be assets by virtue of the

they do not meet the requirements of s 1823(e) are barred.").
The United States Supreme Court, in Langley, reviewed two of the purposes of s 1823(e):
[ ] One purpose of s 1823(e) is to allow federal and state bank examiners to [illegible] on a bank's records in evaluating the worth of the bank's assets. Such [illegible]sations are necessary when a bank is examined for fiscal soundness by state or federal authorities, see 12 USC ss 1817(a)(2), 1820(b) [12 USCS ss 1817(a)(2), 1820(b)], and when the FDIC is deciding whether to liquidate a failed 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). The last kind of evaluation, in particular, must be made "with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in baking services." Gunter v. Hutcheson, 674 F2d at 865. Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that 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 examination, but also have been executed and become a bank record "contemporaneously" with the making of the note and have been approved by officially recorded action of the bank's board or loan committee. These latter requirements ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion 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 were allowed to show, by an oral agreement not meeting the statute's requirements, that a facially unqualified note was subject to a condition such as release upon partial payment.
This holding is consistent with others in the district. See, e.g., FDIC v. [illegible]ring, 620 F.Supp. 1271, 1274 (D.Kan.1985) (holding that "... any [illegible]rmative defense that flows from an oral agreement is barred by [illegible]s 1823(e)]"); FDIC v. Soden, 603 F.Supp. 629, 634-35 (D.Kan.1984) (holding oral side agreement between bank and law firm invalid under s 1823(e)). The court finds that the defense of oral accord and satisfaction is barred by s 1823(e) as to the claim brought by the FDIC in its corporate capacity.
Defendants have previously voluntarily withdrawn their counterclaims and all affirmative defenses except accord and satisfaction. (Dk. 36, p. 2.) Both parties have stipulated that if the defendants were determined to be liable, the correct amount of that liability would be $189,444.37, together with interest from and after November 9, 1987 at the contract rate, currently calculated 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 in its corporate capacity. The court expressed to the parties at the in-chambers conference on November 9, 1987 its concern *460 with the FDIC's having filed, in the form of a "motion in limine," a dispositive motion on the eve of trial. The FDIC, in both its corporate and receivership capacities, subsequently 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 was ordered to accept the FDIC's check and to apply the proceeds as payment for

POZZI WILSON ATCHISON O'LEARY & CONBOY

DONALD ATCHISON
LAWRENCE BARON
GREGORY A. BUNNELL
DANIEL C. DZIUBA
DOLORES EMPEY
NELSON R. HALL
DAVID A. HYTOWITZ
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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

RULE 69
DEFAULT ORDERS AND JUDGMENTS

A. Entry of order of default. 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, the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for [an] <u>such</u> order [of default] at least 10 days, unless shortened by the court, prior to entry [of the order of default] <u>thereof</u>[.]<u>, except that no prior notice is required for entry of an order of default against a party who, having proper notice thereof, fails to defend at trial.</u>

B. Entry of default judgment.

B.(1) By the court or the clerk. The court or the clerk upon written application of the party seeking judgment shall enter judgment when:

* * * * *

B.(1)(c) The party against whom judgment is sought has been defaulted for failure to [appear] <u>plead or otherwise defend</u>;

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