

NOTE

ORS 1.735 (1) provides:

The Council on Court Procedures shall promulgate rules governing pleading, practice and procedure, including rules governing form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in all courts of the state which shall not abridge, enlarge or modify the substantive rights of any litigant. The rules authorized by this section do not include rules of evidence and rules of appellate procedure. The rules thus adopted and any amendments which may be adopted from time to time, together with a list of statutory sections superseded thereby, shall be submitted to the Legislative Assembly at the beginning of each regular session and shall go into effect on January 1 following the close of that session unless the Legislative Assembly shall provide an earlier effective date. The Legislative Assembly may, by statute, amend, repeal or supplement any of the rules.

The following materials reflect the changes to the Oregon Rules of Civil Procedure promulgated by the Council on Court Procedures on December 11, 2004. These changes take effect January 1, 2006.

Other amendments to the Oregon Rules of Civil Procedure passed by the Seventy-third Legislative Assembly at its 2005 regular session can be found by using the table entitled "Oregon Rules of Civil Procedure (ORCP) Amended, Repealed or 'Added to.'"

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

RULE 9

F Service by telephonic facsimile communication device. Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an attorney, the service may be made upon the attorney by means of a telephonic facsimile communication device if the attorney maintains such a device at the attorney's office and the device is operating at the time service is made. **Service in this manner shall be equivalent to service by mail for purposes of Rule 10 C.**

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.

A(1)(a) Parties. An application for an order to a party may be made to the court in which the action is pending, and, on matters relating to a deponent's failure to answer questions at a deposition, 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 court of competent jurisdiction in the political subdivision where the non-party deponent is located.

A(2) Motion. If a party fails to furnish a report under Rule 44 B or C, or if a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C(6) or Rule 40 A, or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. **Any motion made under this subsection shall set out at the beginning of the motion the items that the moving party seeks to discover.** When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 36 C.

A(3) Evasive or incomplete answer. For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

A(4) Award of expenses of motion. If the motion is granted, the court may, after opportunity for

hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

DISMISSAL OF ACTIONS; COMPROMISE

RULE 54

E Compromise; effect of acceptance or rejection.

E(1) Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time up to 10 days prior to trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified.

E(2) If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as a stipulated judgment. *[Unless agreed upon otherwise by the parties, costs, disbursements, and attorney fees shall be entered in addition as part of such judgment as provided in Rule 68.]* **If the offer does not state that it includes costs and disbursements or attorney fees, the party asserting the claim shall submit any claim for costs and disbursements or attorney fees to the court as provided in Rule 68.**

E(3) If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements, not including prevailing party fees, from the time of the service of the offer.

INSTRUCTIONS TO JURY AND DELIBERATION

RULE 59

[H Necessity of noting exception on error in statement of issues or instruction; all other exceptions automatic. No statement of issues submitted to the jury pursuant to subsection C(2) of this rule and no instruction given to a jury shall be subject to review upon appeal unless its error, if any, was pointed out to the judge who gave it and unless a notation of an exception is made immediately after the court instructs the jury. Any point of exception shall be particularly stated and taken down by the reporter or delivered in writing to the judge. It shall be unnecessary to note an exception in court to any other ruling made. All adverse rulings, including failure to give a requested instruction or a requested statement of issues, except those contained in instructions and statements of issues given, shall import an exception in favor of the party against whom the ruling was made.]

H Necessity of noting exception on error in statement of issues or instructions given or refused.

H(1) Statement of issues or instructions given or refused. A party may not obtain review on appeal of an asserted error by a trial court in submitting or refusing to submit a statement of issues to a jury pursuant to subsection C(2) of this rule or in giving or refusing to give an instruction to a jury unless the party who seeks to appeal identified the asserted error to the trial court and made a notation of exception immediately after the court instructed the jury.

H(2) Exceptions must be specific and on the record. A party shall state with particularity any point of exception to the trial judge. A party shall make a notation of exception either orally on the record or in a writing filed with the court.

JUDGMENTS

RULE 67

C Demand for judgment. Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled. A judgment for relief different in kind from or exceeding the amount prayed for in the pleadings may not be rendered unless reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.], even if such relief has not been demanded in the pleadings, except:]

[C(1) Default. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. However, a default judgment granting equitable remedies may differ in kind from or exceed in amount that prayed for in the demand for judgment, provided that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.]

[C(2) Demand for money damages. Where a demand for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount.]

PROVISIONAL PROCESS

RULE 83

A Requirements for issuance. To obtain an order for issuance of provisional process the plaintiff shall cause to be filed with the clerk of the court from which such process is sought a sworn petition and any necessary supplementary affidavits or declarations requesting specific provisional process and showing, to the best knowledge, information, and belief of the plaintiff, affiant or declarant that the action is one in which provisional process may issue, and:

A(1) The name and residence or place of business of the defendant;

A(2) Whether the underlying claim is based on a consumer transaction and whether provisional process in a consumer good is sought;

A(3)(a) If the provisional process sought is claim and delivery, a description of the claimed property in particularity sufficient to make possible its identification, and the plaintiff's estimate of the value and location of the property;

A(3)(b) If the provisional process sought is a restraining order, a statement of the particular acts sought to be restrained;

A(4) Whether the plaintiff's claim to provisional process is based upon ownership, entitlement to possession, a security interest or otherwise;

A(5) A copy or verbatim recital of any writing or portion of a writing, if plaintiff relies upon a writing, which evidences the origin or source of the plaintiff's claim to provisional process;

A(6) Whether the claimed property is wrongfully detained by the defendant or another person;

A(7) Whether the claimed property has been taken by public authority for a tax, assessment, or fine;

A(8) If the plaintiff claims that the defendant has waived the right to be heard, a copy of the writing evidencing such waiver and a statement of when and in what manner the waiver occurred;

[A(9) If provisional process is based on notice of a bulk transfer, a copy of the notice;]

[A(10)] A(9) Facts, if any, which tend to establish that there is a substantial danger that the defendant or another person is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser;

[A(11)] A(10) Facts, if any, which tend to establish that without restraint immediate and irreparable injury, damage, or loss will occur;

[A(12)] A(11) Facts, if any, which tend to establish that there is substantial danger that the defendant or another person probably would not comply with a temporary restraining order; and

[A(13)] **A(12)** That there is no reasonable probability that the defendant can establish a successful defense to the underlying claim.

C Evidence admissible; choice of remedies available to court.

C(1) The court shall consider the affidavit, declaration or petition filed under section A of this rule and may consider other evidence including, but not limited to, an affidavit, a declaration, a deposition, an exhibit or oral testimony.

C(2) If from the affidavit, declaration or petition or other evidence, if any, the court finds that a complaint on the underlying claim has been filed and that there is probable cause for sustaining the validity of the underlying claim, the court shall consider whether it shall order issuance of provisional process, as provided in section D [or E] of this rule, or a restraining order, as provided in section [F] **E** of this rule, in addition to a show cause order. The finding under this subsection is subject to dissolution upon hearing.

[D Effect of notice of bulk transfer. Subject to section B of this rule, if the court finds that with respect to property of the defendant notice of bulk transfer has been given and that the time for possession by the transferee has not passed, the court shall order issuance of provisional process.]

[E] **D** Issuance of provisional process where damage to property threatened. Subject to section B of this rule, if the court finds that before hearing on a show cause order the defendant or other person in possession or control of the claimed property is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser or that the defendant or other person in possession or control of the claimed property would not comply with a temporary restraining order, and if Rule 82 A has been complied with, the court shall order issuance of provisional process in property which probably would be the subject of such destruction, harm, concealment, removal, transfer, or violation. Where real property is subject to provisional process as provided by this section, the plaintiff shall have recorded in the County Clerk Lien Record a certified copy of that order.

[F] **E** Restraining order to protect property. Subject to section B of this rule, where hearing on a show cause order is pending or where the court finds that because of impending injury, destruction, transfer, removal, or concealment of the property in which provisional process is sought there is probable cause to believe that immediate and irreparable injury, damage, or loss to the plaintiff is imminent, and if Rule 82 A has been complied with, the court in its discretion may issue a temporary order directed to the defendant and each other person in possession or control of the claimed property restraining the defendant and each such other person from injuring, destroying, transferring, removing, or otherwise disposing of property and requiring the defendant and each such other person to appear at

a time and place fixed by the court and show cause why such restraint should not continue during pendency of the proceeding on the underlying claim. Such order shall conform to the requirements of Rule 79 D. A restraining order under this section does not create a lien.

[G] **F** Appearance; hearing; service of show cause order; content; effect of service on person in possession of property.

G(1) Subject to section B of this rule, the court shall issue an order directed to the defendant and each person having possession or control of the claimed property requiring the defendant and each such other person to appear for hearing at a place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue. Upon request of the plaintiff the hearing date may be set later than the seventh day.

G(2) The show cause order issued under subsection (1) of this section shall be served on the defendant and on each other person to whom the order is directed.

G(3) The order shall:

G(3)(a) State that the defendant may file affidavits or declarations with the court and may present testimony at the hearing; and

G(3)(b) State that if the defendant fails to appear at the hearing the court will order issuance of the specific provisional process sought.

G(4) If at the time fixed for hearing the show cause order under subsection (1) of this section has not been served on the defendant but has been served on a person in possession or control of the property, and if Rule 82 A has been complied with, the court may restrain the person so served from injuring, destroying, transferring, removing, or concealing the property pending further order of the court or continue a temporary restraining order issued under section F of this rule. Such order shall conform to the requirements of Rule 79 D. Any restraining order issued under this subsection does not create a lien.

NOTE: Section 4b, chapter 22, Oregon Laws 2005 (Enrolled House Bill 2261), completes the relettering begun in the amendments to ORCP 83 G promulgated by the Council on Court Procedures on December 11, 2004, and in G(4) corrects the citation to the section that was relettered by the council's amendments.

[H] **G** Waiver; order without hearing. If after service of the order issued under subsection [G(1)] **F(1)** of this rule, the defendant by a writing executed by or on behalf of the defendant after service of the order expressly declares that defendant is aware of the right to be heard and does not want to be heard, that defendant expressly waives the right to be heard, that defendant understands that upon signing the writing the court will order issuance of the provisional process sought so that the possession or control of the claimed property will be taken from

the defendant or another person, the court, subject to section B of this rule without hearing shall order issuance of provisional process.

[I] H Authority of court on sustaining validity of underlying claim; provisional process; restraining order.

[I(1)] **H(1)** Subject to section B of this rule, if the court on hearing on a show cause order issued under section [G] **F** of this rule finds that there is probable cause for sustaining the validity of the underlying claim and if Rule 82 A has been complied with, the court shall order issuance of provisional process. The order shall describe with particularity the provisional process which may be issued.

[I(2)] **H(2)** Subject to section B of this rule, if the court on hearing on a show cause order issued under section [G] **F** of this rule finds that there is probable cause for sustaining the validity of the underlying claim but that the provisional process sought cannot properly be ordered, and if Rule 82 A has been complied with, the court in its discretion may continue or issue a restraining order of the nature described in section [F] **E** of this rule. If a restraining order is issued, it shall conform to the requirements of Rule 79 D. A restraining order under this subsection does not create a lien.
