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Oregon Pleadings and Parties: Tips to Consider and Traps to Avoid

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Chapter 2

Oregon Pleadings and Parties: Tips to Consider and Traps to Avoid

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I. INTRODUCTION

These materials are intended to provide you with basic resources regarding Oregon's state court procedures for pleadings and parties. However, be forewarned: each county may also have local practices—some written and some not—that can trip you up. In addition to consulting the Oregon Rules of Civil Procedure ("ORCP") and Uniform Trial Court Rules ("UTCR"), the wise lawyer will also check the Supplemental Local Rules ("SLR") for the county in which they plan to appear. Most rules can be accessed online through the Oregon Judicial Department at http://www.courts.oregon.gov/OJD/rules/pages/index.aspx. Many counties, such as Clackamas, Multnomah, and Washington, provide guidelines for civil motions on their website. Multnomah County Circuit Court also posts its Attorney Reference Manual as an aid.[1]

Check with the local bar organizations for local practice aides. For example, Clackamas County Bar Association has a "Lawyer Survival Guide" which provides detailed information about filing and practices in that county or the Multnomah Bar Association which has judicial profiles and county practice materials.

II. DIFFERENCES—THE OREGON PLAINTIFF

While many states have adopted civil procedures that mirror those used by federal courts, Oregon has a long history of carefully preserving its own method of doing things. One of the areas where Oregon has withstood federalization is in its pleadings. The careful plaintiff will consider those differences before preparing and filing their complaint in Oregon.

A. One Form of Action

ORCP 2 provides that there is only one form of action in Oregon, known as a civil action. Except as specifically identified in the rules, statutes, or Constitution, procedural distinctions between actions at law and suits in equity have been abolished in Oregon.

B. Code Pleading Versus Notice Pleading

Oregon state courts require "code" or fact pleading that must contain a plain and concise statement of "ultimate facts" constituting a claim for relief without unnecessary repetition. ORCP 18A. As a result, claims or defenses must state ultimate facts to support the elements of each particular claim or defense. *Davis v. Tyee Industries, Inc.,* 295 Or 467, 476, 668 P2d 1186 (1983). With Oregon's system, mechanisms are in place to frame, narrow, or broaden the ultimate facts alleged and to narrow the issues for discovery and trial. *See* ORCP 21D and E. It is the allegations contained in the pleadings that are used to measure relevance of particular evidence at trial. Thus, in the absence of amendment, evidence outside the scope of the issues pleaded may be excluded through the *doctrine of variance. Compare Smith v. Fred Meyer, Inc.,* 70 Or App 30, 687 P2d 1128 (1984). It has become common practice for judges in Oregon to summarize the pleadings rather than read them to the jury.

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[1] https://www.courts.oregon.gov/courts/multnomah/go/Documents/ARM.pdf is the link to the 2020 version.

By contrast, federal and other courts require "notice" pleading, which merely includes a short and plain statement showing that a pleader is entitled to relief. FRCP 8(a)(a). Since federal pleadings are designed to place a party on "notice" of a particular claim or defense, they can consist of a general summary of the position stated. Any further narrowing is more typically achieved through discovery and other procedural mechanisms.

The careful pleading of ultimate facts is best done through a simple detailed recitation of facts, which will withstand a motion attacking the complaint as redundant or frivolous. Conversely, it also requires more than mere notice of the claims being alleged to withstand a motion to make more definite and certain. Thus, there is a certain element of art to a properly alleged complaint that walks the fine line between both ends of the spectrum.

C. Standards for Pleadings and Documents

1. Pleadings Allowed. ORCP 13 provides that the pleadings are the written statements by the parties of the facts constituting their respective claims and defenses. The only permissible pleadings include the complaint, answer, third-party complaint, and reply. An answer may also include a counterclaim against a plaintiff or a cross-claim against a defendant. Answers are necessary in response to cross-claims and third-party complaints. Replies are necessary to respond to counterclaims and to assert an affirmative defense to defenses asserted in an answer. ORCP 13B. Demurrers and pleas are not used. ORCP 13C.

2. Substantive Requirements. ORCP 16 contains several substantive requirements for pleadings filed in Oregon state court. The complaint must have a caption containing the title of the action, the name of the court, the case number, and a pleading designation in accordance with ORCP 13B. In the complaint, the title must include the names of all the parties. However, subsequent pleadings may abbreviate the title by stating the name of the first party on each side, "with an appropriate indication of other parties." ORCP 16A. The case number, which is assigned when the complaint is filed, should be placed on all pleadings.

The pleading must consist of plain and concise statements in paragraphs that are consecutively numbered in Arabic numerals (i.e., 1, 2, 3, etc.). The contents of each paragraph, where possible, should be limited to stating a single set of circumstances. A paragraph number may then be referred to by number in all subsequent pleadings and may be adopted by reference in a different part of the same pleading. ORCP 16B and D.

Each separate claim or defense must be separately stated. Alternative theories of recovery are allowed as separate counts under the same claim. Even when a party is in doubt as to which of two factual statements is true, they may be pleaded in the alternative, so long as they can be verified in good faith as being consistent with ORCP 17, discussed below. ORCP 16C.

Any pleading that contains a claim for relief shall state the ultimate facts constituting that claim, without unnecessary repetition, and must include a demand for the relief called the *prayer.* The *prayer* for relief is the request for the relief to which plaintiff thinks it is entitled. The purpose of the prayer is to advise defendant of the precise nature of the demand, in order that the party may be prepared to meet it. *Kerschner v. Smith,* 121 Or 469, 473, 236 P 272 (1925), 121 Or 469, 256 P 195 (1927). The prayer is not part of the claim, although it may explain or qualify other parts of

the pleading. *Finch v. Miller,* 271 Or 271, 275, 531 P2d 892 (1975); *Green v. Cox,* 44 Or App 183, 186, 605 P2d 1198 (1980). If recovery of money or damages is sought, the amount thereof must be stated in the pleading. ORCP 18. However, the amount of a claim for noneconomic damages does not need to be specifically stated, inconsistent with the rule. *McKenzie v. Pacific Health & Life Ins. Co.,* 118 Or App 377, 382, 847 P2d 879 (1993), *rev dismissed*, 318 Or 476 (1994).

If attorney fees are being sought, the party must allege the basis for the award of fees, whether statutory or contractual in the pleading. ORCP 68 C(2)(a). If the statutory provision is not alleged, the allegation of a right to fees may still be considered sufficient if facts are alleged that would provide "a basis for an award of fees, the parties have been fairly alerted that attorney fees would be sought and no prejudice would result." *Marc Nelson Oil Prods., Inc. v. Grim Logging Co., Inc*., 199 Or App 73, 85, 110 P3d 120, *adh'd to as modified on recons*, 200 Or App 239 (2005) (internal citations omitted).

Prejudgment interest must be specifically pleaded, along with a factual basis for an award of prejudgment interest. *Emmert v. No Problem Harry, Inc*., 222 Or App 151, 158, 192 P3d 844 (2008).

Keep in mind that pleadings are to be liberally construed, so as to disregard any error or defect that does not affect the substantive rights of the adverse party. ORCP 12. *Stringer v. Car Data Systems, Inc.,* 314 Or 576, 841 P2d 1183 (1992).

3. Technical Requirements. UTCR 2.010 contains detailed instructions for compliance with the technical requirements for pleadings in Oregon. Below is only a brief summary of some of the requirements. Lawyers and legal assistants should familiarize themselves with all provisions. Failure to comply with the requirements could result in a court clerk rejecting a pleading and returning it to the lawyer as unfiled or it being stricken. UTCR 1.090 (Sanctions). Such a result would be disastrous if the pleading was filed on the last day of a statute of limitations ("SOL") or other deadline.[2]

a. ***Title or Caption*.** The title, or caption, is treated as a formal matter. Its purpose is to identify the parties with the claim and the court. *State ex rel. Brookfield Co. v. Mart,* 135 Or 603, 609, 283 P 23, 295 P 459 (1931). The caption should indicate the type of claim, such as "personal injury," "breach of contract," "injunctive relief," etc. UTCR 2.010(11)(b).

The caption of the pleading must contain a statement of whether it is subject to mandatory arbitration. UTCR 13.060(3).

b. ***Size and Appearance*.** Except where designated by the court, all pleadings must be printed or typed on 8.5×11-inch paper that contains numbered lines on the left side. No font is specified, though Times New Roman, Arial, or Courier are common. Blanks in preprinted forms may be completed in handwriting, as may notations by the trial court administrator or a judge.

Printing should be double-spaced and with two to four inches left blank at the top of the first page. Subsequent pages must have a one-inch margin. The name of the document and page

[2] It is also advisable to check if a statute of ultimate repose applies.

number, expressed in Arabic numerals, must appear at the bottom left side of each page, and the attorney or firm name and information, including facsimile and email (if any), must also appear within the document, frequently in the bottom right margin along with the attorney's bar number. Exhibits must be marked as such at the bottom right side with an Arabic numeral identifying the exhibit, as well as its page number. UTCR 2.010(2)–(10). The courts are required to accept documents printed on both sides of each sheet and encourage printing on recycled paper. ORS 7.250.

c. ***Subscription and Verification.*** Pleadings must be signed by at least one attorney of record who is an active member of the Oregon State Bar or, if a party is not represented by an attorney, by the party. ORCP 17A. The name of the party or attorney signing any pleading or motion must be typed or printed immediately below the signature, and the signatures must be dated. UTCR 2.010(6). While verifications of pleadings have generally been eliminated, there are some unique exceptions for specific statutory claims. The wise practitioner will consult the Oregon Revised Statutes for the type of claim being asserted.

d. ***Paragraphs.*** Claims and defenses must be made in paragraphs that are numbered consecutively in the center of the page with Arabic numerals and lowercase letters for any subparagraphs.

4. Special Pleading Rules. Oregon law provides numerous special pleading rules, some of which may be intuitive and some not. Likewise, some are matters of substance, and some procedural. The following is a brief summary of the highlights.

a. ***Conditions Precedent.*** In pleading the performance or occurrence of all conditions precedent, it is sufficient to generally allege that all conditions precedent have been performed or occurred. A denial of such occurrence, however, must be made specifically and with particularity, forcing the adverse party to establish the proof of such performance at trial. ORCP 20A.

b. ***Designation of Type of Claim.*** Although UTCR 2.010(11) requires the pleader to designate the type of claim, failure to correctly designate it may not be fatal. *Windle v. Flinn,* 196 Or 654, 664, 251 P2d 136 (1952); *Laird v. Frick,* 142 Or 639, 644, 18 P2d 1029 (1933).

c. ***Presumptions.*** Facts presumed by law need not be alleged. For example, it is unnecessary to allege that a contract within the statute of frauds is in writing when the making of the contract is alleged. *See, e.g., Ingerslev v. Goodman,* 116 Or 210, 216, 240 P 877 (1925); *Smith v. Jackson,* 97 Or 479, 482, 192 P 412 (1920). Similarly, where a corporation is a plaintiff, it is not necessary to allege the corporate existence or that the corporation has the capacity to sue; both are presumed. Rossman, *Plain and Concise Language,* 6 Or L Rev 293, 297 (1927). Presumptions can be a powerful ally in trial and are frequently overlooked. An extensive list of evidentiary presumptions is contained in ORS 40.135, Oregon Evidence Code ("OEC") 311.

d. ***Judicial Notice.*** Facts judicially noticed need not be alleged. *Peters v. McKay,* 195 Or 412, 421, 238 P2d 225 (1951), *reh'g denied* 195 Or 412, 246 P2d 585 (1952); *Cameron v. Goree,* 182 Or 581, 599, 189 P2d 596 (1948) (courts take judicial notice of facts that form part of the common knowledge of people who possess average intelligence). However, the careful lawyer will allege facts over which there may be any doubt. Some examples of facts that may be judicially

noticed include corporate existence of cities and counties, the existence of ordinances, comprehensive plans, or enactment, incorporation of a city or county, or a private right derived by statute where the title and date of passage are alleged. ORCP 20D; ORCP 20C.

e. ***Matters of Record/Written Instruments.*** Oregon allows a party to allege something involving a document in one of three ways. They may: (i) summarize the material parts of the document in the body of the pleading; (ii) copy the material parts of the document into the pleading; or (iii) attach a copy of the document to the pleading as an exhibit and incorporate it by reference in the allegations. *Vaughn v. Spence,* 170 Or 440, 448–49, 133 P2d 242 (1943).

Oregon has "consistently adhered" to the above method of pleading. *Vaughn, supra,* 170 Or at 449. However, an exhibit cannot supply ultimate facts to establish a claim; those allegations must still be made in the complaint. Where a written instrument is relied upon as the foundation of a claim and it is set forth in full in the complaint or incorporated by reference, the written instrument prevails over the pleading for its purported legal effect. *Kelley v. Mallory,* 202 Or 690, 697, 277 P2d 767 (1954).

f. ***Compliance with the Statute of Limitations.*** It is not usually necessary for the plaintiff to allege facts showing compliance with any applicable SOL. Nevertheless, specific facts showing why the SOL is tolled or avoided must be pleaded if it would otherwise appear that the SOL had run. *Hewitt v. Thomas,* 210 Or 273, 276, 310 P2d 313 (1957); *Huycke v. Latourette,* 215 Or 173, 176, 332 P2d 606 (1958). In cases where the statute begins to run upon discovery, discovery must be pleaded. *Frohs v. Greene,* 253 Or 1, 7, 452 P2d 564 (1969).

g. ***Judgment or Other Determination of Court or Officer.*** In pleading a judgment or other determination of a court or officer with special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading is bound to establish at trial the facts conferring jurisdiction. ORCP 20B.

h. ***Agency.*** Oregon does not require specific pleading of agency where a known agent executes a contract on behalf of the agent's principal. It is sufficient to plead execution of the contract by the principal, allowing proof to be introduced at trial that the agent executed the contract. *Masters v. Walker,* 89 Or 526, 530, 174 P 1164 (1918). Similarly, ratification of a contract does not have to be alleged. *Scandinavian-American Bank v. Wentworth Lumber Co.,* 101 Or 151, 157, 199 P 624 (1921). Alleging that a principal executed the contract permits proof of execution of an agreement by an unauthorized agent and subsequent ratification by the principal. *Phillips v. Colfax Co.,* 195 Or 285, 292, 243 P2d 276, *reh'g denied* 195 Or 285, 245 P2d 898 (1952); *Levy v. Nevada-California-Oregon Ry.,* 81 Or 673, 675, 160 P 808 (1916). *See also Downs v. National Share Corp.,* 152 Or 546, 552, 55 P2d 27 (1936), regarding alternative methods for alleging agency. Likewise, agency need not be pleaded in a tort action against a corporation, as an allegation that the corporation committed the tort is proper. *Scibor v. Oregon-Washington R. & Nav. Co.,* 70 Or 116, 120, 140 P 629 (1914).

i. ***Libel, Slander, and Fraud.*** In an action for libel or slander, it is not necessary to allege extrinsic facts to show application to the plaintiff. It is sufficient to say that the same was

spoken or published about the plaintiff. If controverted, the plaintiff must establish at trial that it was published or spoken. ORCP 20E.

Certain causes of action, such as fraud must be alleged with greater particularity. The elements of actionable fraud consist of: (i) a representation; (ii) its falsity; (iii) its materiality; (iv) the speaker's knowledge of its falsity of ignorance of its truth; (v) their intent that it should be acted on by the person and in the manner reasonably contemplated; (vi) the hearer's ignorance of its falsity; (vii) their reliance on its truth; (viii) their right to rely thereon; and (ix) their consequent and proximate injury. To state a good cause of action, it is necessary that each and every one of the essential elements of fraud be alleged. *Musgrave v. Lucas,* 193 Or 401, 410, 238 P2d 780 (1951).

j. ***Time and Place.*** Only material aspects of time and place are necessary. When matters of quality and quantity are unimportant to a case, they do not need to be alleged as material facts. Within the bounds of ORCP 17, it is sufficient to allege that a certain event occurred "on or about" a certain date when the exact date is unknown.

k. ***Statutory Duty of Damages.*** Where a case rests on a statutory duty imposed on a class of persons, the complaint must contain facts bringing the defendant within the statutory class. *State Forester v. Obrist,* 237 Or 63, 390 P2d 333 (1964). Violation of a statutory duty may be alleged in general terms without pleading the exact language of the statute. *Moe v. Alsop,* 189 Or 59, 66, 216 P2d 686 (1950), *overruled in part in other grounds, Bay Creek Lumber & Mfg. Co. v. Cesla,* 213 Or 316, 320, 322 P2d 925, *reh'g denied* 213 Or 316, 324 P2d 244 (1958). Where aggravated damages are claimed under a statute, the statute should be recited in the complaint or the claim should be stated as being made under the terms of the statute. *Springer v. Jenkins,* 47 Or 502, 507, 84 P 479 (1906).

l. ***Punitive Damages.*** Oregon has special requirements for the pleading and recovery of punitive damages contained in ORS 31.725 et seq. Plaintiffs may not include a claim for punitive damages in their initial complaint. ORS 31.725(1) and (2). Instead, at any time after the pleading is filed, a party may move the court to allow amendment of the pleading in order to assert a claim for punitive damages. Both the moving and nonmoving parties may submit affidavits and documentation supporting or opposing a punitive damages claim. ORS 31.725(2).

Upon receipt of a motion to amend to add punitive damages, the court will conduct a hearing to determine if there are specific facts, supported by admissible evidence, to allow the punitive damages claim. The court decides the motion based upon a directed-verdict standard. ORS 31.725(3).

The party seeking punitive damages must prove "by clear and convincing evidence" that the party against whom punitive damages are sought "has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others." ORS 31.730(1). The court must issue its decision on the motion to amend a pleading to assert a claim for punitive damages within ten days after the hearing. If the court does not issue a decision within ten days, the motion is deemed denied. ORS 31.725(5). Discovery of evidence of a defendant's ability to pay is not allowed unless and until a motion to amend is allowed. ORS 31.725(6).

The distribution of a punitive damages award may affect whether it is worth alleging. The Department of Justice Criminal Injuries Compensation Account receives 60% of the award, while the prevailing party receives only 30%, no more than 20% of which may be paid to the prevailing party's attorney. 10% is payable is payable to the Attorney General for deposit in the State Court Facilities and Security Account. ORS 31.735. Specific notification and payment procedures apply, not the least of which is a requirement that the prevailing party provide notice in writing of the judgment to the Department of Justice Crime Victims' Assistance Section in Salem, Oregon, within five days after the entry of the verdict or judgment. ORS 31.735(3).

m. ***Information and Belief.*** If a party is without knowledge or information sufficient to form a belief as to the truth of an allegation, the party may allege so, which will have the same effect as a denial. ORCP 19A.

n. ***Recitals and Negative Pregnants.*** No allegation in a pleading is held insufficient merely because it is pled by way of a recital rather than alleged directly. Likewise, no denial is treated as an admission because it contains a negative pregnant. ORCP 20G. Nevertheless, allegations by way of recital rather than direct allegations are not encouraged. The most common example of a recital is an allegation introduced by a "whereas" or an allegation introduced with "by reasons of." *See Graham v. Corvallis & Eastern R. Co.,* 71 Or 477, 142 P 774 (1914).

o. ***Fictitious Parties and Unknown Persons.*** When you do not know the name of an opposing party, it may be designated by any name, with the pleadings amended to substitute the true name once it is known. ORCP 20H. However, a pleading should explain why an unknown "Jane Doe" party cannot be specifically identified. When heirs of a deceased are unknown, they may be designated as "unknown heirs." ORCP 20I. *See also* ORCP 20J regarding unknown persons when trying to determine an adverse claim, estate, lien, or interest in property. Be wary when the SOL is close, as notice must be received by the proper party.

D. Prerequisites for Certain Claims

A thorough discussion of statutes of limitations and service requirements is beyond the scope of this presentation. Nevertheless, close attention should be paid to the SOL applicable to the type of claims and relief requested. Although based on the same transaction or occurrence, different claims or theories may be subject to different statutes of limitation. A lawyer's characterization of the claim does not necessarily determine which SOL will apply. *Securities-Intermountain, Inc. v. Sunset Fuel Co.,* 289 Or 243, 611 P2d 1158 (1980).

More importantly, certain types of claims may contain additional demand or notice requirements. A few examples are included below.

1. Oregon Tort Claims. No action may be maintained arising out of any act or omission of a public body or its agents unless notice of the claim is given as required by ORS 30.275. When a person injured is a minor, incompetent, or otherwise unable to give the notice, the deadline for the notice is tolled up to a *maximum of only 90 days* (basically a 270–days' notice period). Otherwise, notice must be given within 180 days after the alleged loss or injury, or within one year if the claim is for wrongful death.

2. Insurance Policies—Proof of Claim. Most insurance policies require notice from the insured of any loss or claim in order to activate the insurer's responsibilities under the policy. *See* ORS 742.061 (proof of claim required to start claim for attorney fees); *American Star Ins. Co. v. Allstate Ins. Co.,* 12 Or App 553, 558, 508 P2d 244 (1973) (notice over 2.5 years after the accident did not satisfy notice requirement).

3. Conversion. In order to state a claim for conversion in certain circumstances, the party claiming rightful ownership must demand the return of the property and have been refused. *See Daniels v. Foster & Kleiser,* 95 Or 502, 507, 187 P 627 (1920).

4. Shareholder's Derivative Action. In most cases, a shareholder may not pursue an action on behalf of the corporation unless the corporate officers and directors have refused to take the action in response to the shareholder's demand. *See Browning v. C & C Plywood Corp.,* 248 Or 574, 434 P2d 339 (1967).

5. Attorney Fees. Certain claims for personal injury under ORS 20.080, and breach of contract under ORS 20.082, where the prayer is for less than $10,000 may substantively qualify for recovery of attorney fees, but only where a demand is sent to the defendant at least 30 days before commencement of the tort action and 20 days before commencement of the contract action, along with other statutory requirements.

6. Complaint against Certain Professionals. For any claim asserted against a design professional that arises out of the provision of services within the course and scope of the registered/licensed activities (usually in the construction defect context), the filing attorney must certify that the attorney has consulted a design professional with similar credentials who is qualified, available, and willing to testify to admissible facts and opinions sufficient to create a question of fact as to the liability of the design professional. ORS 31.300. Similarly, for any claim of professional negligence against a real estate licensee within the course and scope of the registered/licensed activities, the claimant's attorney must certify that the attorney has consulted a real estate licensee who is qualified, available, and willing to testify to admissible facts and opinions sufficient to create a question of fact as to the liability of the real estate licensee when filing. ORS 31.350.

E. Choosing the Correct Parties

1. Capacity.

a. ***Governmental Units.*** The United States, the State of Oregon, municipal corporations, counties, and certain specified public agencies, commissions, boards, departments, and corporations may commence proceedings in Oregon courts.

b. ***Corporations.*** Foreign corporations may sue in Oregon, but where a foreign corporation is "transacting business" in Oregon and has not obtained a certificate of authority, it cannot maintain an action. ORS 60.704(1). However, even where a foreign corporation has not obtained the necessary certification, it can still be sued. ORS 60.704(5).

Where a corporation is dissolved, it still may have an action prosecuted in its corporate name; a dissolved domestic corporation may be sued on a cause of action arising prior to

dissolution if the action is commenced within five years. ORS 60.644(2)(c). Whether a dissolved foreign corporation is subject to suit depends upon the laws of its domicile.

c. ***Partnerships and Unincorporated Associations.*** A limited partnership may sue or be sued as an entity. Any partnership or unincorporated association may sue in any name that it has assumed and be sued by any name that it has assumed or by which it is known. ORCP 26B.

d. ***Minors and Incapacitated Persons.*** ORCP 27 places restrictions on when a party who is a minor or incapacitated may appear. Minors who are a party to an action must appear by a conservator or guardian. If they do not have one, the court will, under some conditions, appoint one. ORCP 27A. Incapacitated persons must also appear by or through a conservator or guardian. If they do not have one, the court will, under some conditions, appoint one. ORCP 27B.

Note. it is required that the state or a party that is not a natural person (such as a corporation) appear by an attorney unless otherwise specifically provided by law. ORS 9.320.

2. Permissive Joinder. ORCP 28 provides the conditions under which parties may be joined in an action. All persons may join as plaintiffs in an action if they assert any right to relief jointly, severally or in the alternative in respect to or arising out of the same transaction or occurrence and if a common question of fact or law will arise in the action. A party need not be interested in obtaining or defending against all the relief demanded. ORCP 28A. Separate trials may also be sought where justice so requires. ORCP 28B. Judgment may be entered for one or more of the parties according to their respective rights to relief or to their liabilities. ORCP 28A.

3. Compulsory Joinder. ORCP 29 applies to compulsory joinder. When a party is needed for just adjudication and is subject to service of process, it is to be joined if feasible under the standards identified in ORCP 29A. When a necessary party cannot be made a party, the court must determine whether the action can equitably continue or should be dismissed under the standards identified in ORCP 29B.

A person who is subject to service must be joined as a party if: (a) in that person's absence, complete relief cannot be accorded among those already parties; or (b) that person claims an interest relating to the subject of the action and is so situated that the disposition in the person's absence may: (i) as a practical matter, impair or impede the person's ability to protect that interest; or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest. ORCP 29A. Where a necessary party has not been joined and can be joined, the court shall order that the person be made a party. Where the person should join the action as a plaintiff but refuses to do so, that person must be made a defendant, the reason being stated in the complaint.

4. Misjoinder or Nonjoinder of Parties. ORCP 30 provides that parties may be dropped or added by order of the court on motion of any party or on the court's own initiative at any stage of the proceeding and on such terms as are just. The rule further provides that any claim may be severed and proceeded with separately. Misjoinder of parties is not grounds for dismissal of an action.

5. Substitution of Parties. ORCP 34 provides the procedure for substitution of parties, whether resulting from death, disability, or some other issue relating to a party.

Substitution will allow the action to proceed with the substitute party. The rules provide that an action may be continued upon death of a plaintiff, if the claim survives, by substituting the personal representative or successor in interest upon motion to the court within one year. ORCP 34D. On motion, the court may also substitute a guardian, conservator, or successor in interest within one year after disability of a party. ORCP 34C. Additional time and procedural limitations apply to other substitutions.

6. Real Party in Interest. ORCP 26A requires that every action be prosecuted in the name of the real party in interest. The real party in interest is the person or entity that has the right to enforce the claim. The rule is designed to protect the defendant from being harassed later for the same claim for relief. *Verret v. Leagjeld,* 263 Or 112, 501 P2d 780 (1972). Certain persons and entities, such as executors, administrators, bailees, or trustees, may sue in another party's name without that other party being joined. ORCP 26A. Insurers frequently are allowed to sue in the name of their insured through use of a loan receipt that maintains the insured's interest in the matter. Failure to join a real party in interest will not result in immediate dismissal of the action. Instead, the real party in interest is given a reasonable time to ratify, join, or substitute into the action. ORCP 26A.

Use of pseudonym. If a party wishes to commence and litigate a case under a name other than their true name, a motion seeking leave to proceed under a pseudonym is appropriate. ORCP 16B. It will be the litigant's responsibility to establish a basis to be granted leave to proceed using a pseudonym.

F. Choosing Where to File

1. State Versus Federal Court. While this presentation is focused on state court procedures, the wise lawyer will not overlook whether to file his or her action in federal court if all other things are equal. Obviously, some actions involving federal questions may only be maintained in federal court. Conversely, some actions, due to the amount in controversy or the absence of diversity, must be pursued in state court. When either court would have jurisdiction, considerations should be given to a number of factors that could have a dramatic effect on the ultimate result.

a. ***Federal Court Pros.*** Federal judges have law clerks and cases are immediately assigned to a judge. The rules and court practices are more specified. Many attorneys believe summary judgment is more likely to be granted by federal judges who have more resources to review briefs and write opinions. Judges are used to seeing attorneys from all over the state. There is no "trial by ambush."

b. ***Federal Court Cons.*** Some practitioners complain that federal court interferes with lawyers "trying their cases." Rules and procedures control most aspects of a case, including disclosures, pretrial conferences, scheduling orders, time limitations for depositions, and evidence. While those procedures can force parties to look at their case more quickly, they also tend to significantly increase litigation costs. And there is no "trial by ambush."

c. ***State Court Pros.*** State court is less expensive, and there tends to be more flexibility in how cases are prepared and tried. Depending on the county, some courts virtually leave the

parties alone until just before trial. Some cases are subject to nonbinding arbitration. Some courts implement and enforce a fast-track system in which trials go within 12 months from filing; other counties do not. No disclosure or deposition of expert witnesses; no interrogatories, i.e., "trial by ambush."

Note, to obtain some of the above benefits of federal court, a case may be able to be designated as a complex case under UTCR 7.030. By doing so, the case will be assigned to a judge to oversee, and the parties generally have more flexibility on the trial date.

d. ***State Court Cons.*** Judges tend to have less time to spend on a particular matter. Budgetary restrictions can impede availability of judges for trial of civil matters. Some cases are subject to nonbinding arbitration. Some counties will not set over trial dates due to fast-track rule. There is no disclosure of or deposition of experts so you are faced with "trial by ambush."

On that related note, depending on the legal issue, a party opposing summary judgment may avoid summary judgment by providing "an affidavit or a declaration of the party's attorney stating that an unnamed, qualified expert has been retained who is available and willing to testify to admissible facts or opinions" and, by doing so, create "a question of fact…sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion." ORCP 47 E.

2. Venue. Once the decision is made to file in state court, a plaintiff must then determine the appropriate venue. If a contract is involved, the choice may already have been specified in the document. Depending on the type of case, venue may exist in several different counties. *See* ORS 14.030 et seq. With many exceptions, venue generally exists in the county where the cause of action arose or at least one of the defendants resides. Corporations are typically deemed to be a resident of any county where they conduct regular, sustained business.

If a choice is available, consideration should then be given to strategic factors such as distance for the client and lawyers, local customs and procedures, and the relative nature of typical jurors in each county.

G. Commencing the Action

ORCP 3 provides that, "other than for purposes of statutes of limitations," an action is commenced by filing a complaint with the clerk of the court.

1. Commencement Within the SOL. ORS 12.010 and 12.020 generally regulate commencement for the purposes of determining whether an action was commenced before expiration of a particular SOL. For those purposes, commencement does not occur until the complaint is filed *and* the summons and complaint are served on a particular defendant.

2. Relation Back. Oregon subscribes to a unique "relation back" system for determining commencement that allows for additional time to serve a defendant. Pursuant to ORS 12.020(2), if the complaint is filed within the time allowed by the applicable SOL, service of the summons and complaint within 60 days of the filing date allows the service to "relate back" to the date of filing. Thus, the action is deemed to have been commenced on the date of filing. *Beware:* The relation back only applies within 60 days of the filing date, not the SOL. Many attorneys have

filed well before the SOL expired but failed to serve within 60 days thereafter and before the SOL expired. As a result, the action was not deemed commenced.

3. Time. Except as governed by ORS 174.120, ORCP 10 provides important information on how time periods are calculated in Oregon. Specifically, the date of the act, event, or default from which the period of time begins to run is not included, but the last day is included unless it falls on a Saturday, Sunday, or legal holiday. In that event, the time period runs until the next day that is not a Saturday, Sunday, or legal holiday. *See also* ORS 187.010 and 187.020 for a list of legal holidays.

When the period of time prescribed or allowed is less than seven days, then intermediate Saturdays, Sundays, and legal holidays are not included in the computation of time. When the time is more than seven days, all days within the period are counted. ORCP 10A.

Except with regard to service of summons, additional time may be allowed when a party is served with documents by mail, e-mail, fax, or electronic service. If the party served is required to do some act within a prescribed period after service of a notice or other paper on that party, then three days are added to the response period when service is made by mail, e-mail, fax, or electronic service. ORCP 10C.

4. **Filing fee.** Be sure to pay the filing fee under ORS 21.160(1), which is based on a graduated scale of claimed damages. ORS 21.100.

III. DIFFERENCES—THE OREGON DEFENDANT

Many of the rules and procedures discussed with regard to the Oregon plaintiff also apply to the Oregon defendant. To avoid undue repetition, only the differences are highlighted. An answer or responsive pleading is due with 30 days after service of the summons. If service is by publication, then the answer or responsive pleading is due within 30 days from the date of first publication. ORCP 7C.

A. General Considerations

1. Tender of Defense. The process of tendering the defense of a matter is a procedure through which a party gives notice of a pending action to another party from whom indemnity may be sought. The party tendering the defense typically demands defense of, or participation in, the action. Tenders of defense are based upon principles of collateral estoppel and the law of indemnity.

Where a claim is covered under an indemnity agreement, or the allegations of the complaint, without amendment, state a claim within the terms of the indemnity agreement, the indemnitor has a duty to defend the indemnitee. *St. Paul Fire & Marine Ins. Co. v. Crosetti Bros., Inc.,* 256 Or 576, 475 P2d 69 (1970). The tender of defense may be based upon express indemnity agreements, such as insurance policies, contracts, and warranties, or through implied indemnity, such as that arising out of a relationship between the parties.

Before tendering the defense of the matter, thought should be given to several strategic considerations, specifically:

a. Is indemnitor able to respond to a judgment?

b. What is the caliber of the defense that the indemnitor would provide?

c. Is the indemnitor obliged to defend all claims or just some of the claims asserted?

d. Would acceptance of the defense with reservation of rights as to ultimate responsibility for a judgment be acceptable?

The tender of defense must be given within a "reasonable time." Notice immediately before trial is generally not sufficient.

2. Extensions of Time. Local custom and practice is to grant defendants an extension of time upon request. Where defense counsel has insufficient time to prepare an appropriate response to a claim, it is common practice to ask opposing counsel for an extension of time in which to appear or respond. Professional courtesy dictates that a reasonable extension be given whenever possible. However, any agreement concerning the extension of time to respond to a claim should be memorialized in writing. Where the SOL is expired, or rapidly approaching, it is also common practice for a plaintiff to request confirmation that there are no service or SOL defenses that will be raised. In that manner, it is less likely that a plaintiff will be prejudiced by the extension.

Most lawyers will automatically write to plaintiff's counsel informing them of their representation of a particular defendant, stating that they intend to appear and requesting that they be given at least 10 days' notice of any intent to apply for default. Doing so requires that defense counsel receive notice before a motion for default is filed. ORS 69 B(2).

3. Removal to Federal Court. Immediately upon receipt of the complaint, counsel should determine whether the case is removable to federal court pursuant to 28 USC §1441(a) (diversity of citizenship) or 28 USC §1441(b) (federal question). Petition for removal of a civil action must be filed within 30 days after the defendant receives a copy of the initial pleading or a service of summons. 28 USC §1446(b).

There are a number of procedural "snafus" associated with removal, and considerable care should be taken in analyzing these issues, particularly in multiple-party cases. For example, a removal petition filed 29 days after the moving defendant was served but 42 days after the first defendant was served was held not to be timely filed. *See Balestrieri v. Bell Asbestos Mines, Ltd.,* 544 F Supp 528 (ED Pa 1982).

Moreover, where a jury trial is requested before removal, or if the procedure of the court in which the case was originally filed does not require express demand for jury trial (like Oregon), demand is not required after removal unless specifically directed by the court. Otherwise, the petitioner has 14 days after filing the petition for removal in which to demand a jury trial; a nonpetitioner has 14 days after being served with notice of removal. FRCP 81(c).

B. Motions to Consider

Generally, motions against a complaint must be filed within the time allowed for a party to appear and defend under ORCP 7C. If a motion is filed, it may not file its answer until the issues raised in the motion are resolved. ORCP 21A.

Several motions are available under ORCP 21, including motions to dismiss a particular claim or the entire complaint for various reasons, motions to strike sham, frivolous, or irrelevant pleadings, motions to strike a complaint containing more than one claim not separately stated, or motions to make the allegations more definite and certain.

In the past, a great deal of money was spent by lawyers filing and responding to Rule 21 motions. A wise defendant will carefully consider whether it is strategically better to file motions to clean up a complaint or to simply allow the allegations to stand as pleaded. In addition to the economic considerations, filing such motions frequently serve to educate the plaintiff and improve the claims. Many experienced litigators feel that the use of pretrial motions only educates the opponent as to the opponent's weaknesses. Others take the "first door out" approach and are of the view that the use of pretrial motions encourages settlements and the early disposition of cases. The expense associated with pretrial motion practice should be discussed with the client, and the ultimate decision should be that of the client.

Keep in mind the deadlines imposed under UTCR 5.030, which generally allows an opposing party to file a written memorandum in response to any motion (besides motions for summary judgment) not later than 14 days from the date of service or the date of filing of the motion, whichever is later. A reply memorandum, if any, must be filed within 7 days of the service or filing of the responding memorandum, whichever is later.

C. Defenses That Must Be Raised or Waived

Certain defenses may be raised either by motion or by answer. ORCP 21G(1) provides that defenses of lack of jurisdiction over a person, another action pending, insufficiency of summons or process, or insufficiency of service are waived if not included in an ORCP motion or a responsive pleading. No amendment is allowed to raise those defenses.

ORCP 21G(2) provides that other defenses may be raised by amendment if leave of court is obtained and the party did not know, and could not have reasonably known, that the defense existed. Those defenses include legal capacity to sue, real party in interest, and that the action was not commenced within the time allowed by statute.

Under ORCP 21G(3), defenses for failure to state ultimate facts constituting a claim, failure to join an indispensable party, or an objection of failure to state a legal defense to a claim may be made in a pleading permitted under ORCP 13B, in a motion for judgment on the pleadings, or at trial on the merits. However, the wise practitioner will not wait until that time to pursue such a motion. Finally, a defense that the court lacks jurisdiction over the subject matter may be made at any time.

D. Filing the Answer

1. Admissions. ORCP 19A requires a defendant to admit or deny the allegations upon which the adverse party relies. Where a defendant admits a fact in the answer, that admission relieves the plaintiff from proving that allegation at trial. *Owen v. Bradley,* 231 Or 94, 100, 371 P2d 966 (1962). However, an admission may be waived where the case is tried as if the admitted fact were still at issue. ORCP 23B. An admission in the pleadings of one defendant is not admissible against a codefendant, especially when the interests of the defendants are adverse to one another. *Hyatt v. Johnson,* 204 Or 469, 477, 284 P2d 358 (1955).

2. Denials. ORCP 19A also requires a party to state in short and plain terms the party's defenses to each claim asserted. If a party lacks sufficient knowledge or information sufficient to form a belief as to the truth of the matter alleged, then it must so state, and doing so will have the effect of a denial. Denials must fairly meet the substance of the allegations denied. The pleader must admit as much of an allegation as is true and deny the remainder. Thus, an entire allegation may not be denied simply because part of it is not true. That portion that is true must be admitted. ORCP 19A.

A general denial is permissible only when the pleader intends in good faith to controvert every allegation of the pleading. Allegations to which a response is required, other than the amount of damages, are deemed admitted if not denied. If no responsive pleading is required, the allegations will be treated as denied or avoided. ORCP 19C. Other issues sometimes arise as to certain types of denials, as follows.

a. ***The Negative Pregnant.*** A denial that does not completely respond to an allegation and therefore implies that the allegation may be partly true is known as a "negative pregnant." ORCP 20G provides that no denial shall be treated as an admission on the ground that it contains a negative pregnant.

b. ***Evasive Denial*****.** A denial must "fairly" meet the substance of the allegations denied. ORCP 19A. A refusal to admit or deny allegations may result in the allegations being admitted. ORCP 19C.

c. ***Argumentative Denial.*** An argumentative denial is an allegation by the responding party that could not be true if the plaintiff's allegations were true. Under the traditional rule, an argumentative denial was regarded as not denying anything and therefore admitting the allegation in the plaintiff's complaint. *See Loveland v. Warner,* 103 Or 638, 204 P 622, *reh'g denied* 103 Or 638, 206 P 298 (1922) (the insertion of a clause pretending to admit a fact not pleaded in the complaint is not proper, raises no issue, is not capable of being denied, and should not be tolerated).

3. Defenses. All defenses must be stated separately. ORCP 16B. Alternative and inconsistent defenses are permissible and often tactically wise, though it may also be more effective to decide on a single defense before the time of trial. One should plead partial as well as complete defenses. Mitigation of damages is an example of a partial defense that, to be relied upon, generally must be pleaded. *Kirby v. Snow,* 252 Or 592, 595, 451 P2d 866 (1969). Partial defenses should be pleaded as such, or one risks having them treated as a complete defense.

4. Affirmative Defenses. In responding to a preceding pleading, a party shall set forth any matter constituting an avoidance or affirmative defense. ORCP 19B. Any fact that does not directly controvert a fact necessary to be established by the claimant is a new matter and must be pleaded as an affirmative defense. *Hubbard v. Olsen-Roe Transfer Co.,* 110 Or 618, 626, 224 P 636 (1924). If doubt exists as to the admissibility of evidence of any defensive matter under a denial, it is appropriate to set it forth as an affirmative defense. However, the party asserting an affirmative defense will generally bear the burden of proof on that issue.

Certain matters must be set forth affirmatively, including accord and satisfaction, arbitration and award, assumption of risk, comparative or contributory negligence, duress, estoppel, failure of consideration, fraud, illegality, laches, payment, release, res judicata, statute of frauds, statute of limitation, unconstitutionality, and waiver. A nonexhaustive list of other affirmative defenses not listed in the rules include mistake, adhesion, impossibility, incompetency, failure to mitigate, and setoff or recoupment.

Ordinarily, the party alleging the defense must prove it. While the burden of proof shifts to the plaintiff when a defendant raises a matter as an affirmative defense that could equally be proven under a denial, a defendant cannot take advantage of that rule where it assumes the burden of proof on an issue. Thus, when affirmatively controverting an issue that may be part of the plaintiff's burden of proof, the defendant should specifically deny that, by so pleading, it is admitting that it is assuming the burden of proof. That position should be clearly stated in the pleading so that a trial or an appellate court cannot cite reliance on the pleadings as a rationale for imposing the burden of proof on the defendant.

a. ***Effect of Failure to Plead Affirmative Defense.*** Failure to plead an affirmative defense in the first responsive pleading may result in a waiver, and the party failing to plead the defense may not be permitted to introduce evidence in support of the defense. ORCP 23B.

b. ***Joinder of Affirmative Defense.*** A party is permitted to assert as many affirmative defenses as it may have. ORCP 19B, 21A. If more than one affirmative defense is pleaded, each must be set forth separately. ORCP 16B. Defenses may also be inconsistent. ORCP 16C. When one is in doubt as to which of several statements of fact is true, statements may be alleged in the alternative. However, inconsistent statements of fact within the pleader's knowledge are improper. *See* ORCP 17C.

E. Counterclaims, Cross-Claims, and Third-Party Claims

1. Counterclaims. A counterclaim is a claim by the defendant against the plaintiff that is asserted in the answer. ORCP 13B. A defendant may assert as many counterclaims, both legal and equitable, that the defendant may have against the plaintiff. ORCP 22A(1). Oregon generally does not require compulsory counterclaims. *Burlington Northern Inc. v. Lester,* 48 Or App 579, 583, 617 P2d 906 (1980). However, when a counterclaim is based upon facts common with any affirmative defenses asserted by the defendant, or where only part of the counterclaim is asserted, the doctrine of res judicata or collateral estoppel might preclude subsequent litigation in a separate proceeding. Thus, some counterclaims may be compulsory even though Oregon's counterclaim rule only mentions permissive counterclaims.

Note that if there is a basis to recover attorney fees, it has been the practice to assert a right to attorney fees as a counterclaim instead of an affirmative defense.

2. Cross-Claims. When an action is against two or more defendants, any defendant may allege in its answer a cross-claim against any other defendant. A cross-claim must: (a) arise out of the transaction or occurrence that is the subject matter of the complaint; or (b) relate to any property that is the subject matter of the original action. ORCP 22B(1). A cross-claim may include a claim for indemnity or contribution. ORCP 22B(2).

Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the joinder rules. ORCP 22D(1). The joinder rules should not be confused with the rules allowing third-party complaints. *Compare* ORCP 22C. Oregon rules contain a special joinder provision relating to counterclaims that is not found in the federal rules. ORCP 22D(2) provides that a defendant in an action on a contract brought by an assignee may join all or any as persons liable for attorney fees under ORS 20.097 (maker and plaintiff/assignee both liable to defendant for attorney fees if the defendant prevails in contract action and contract provides for recovery of such fees). The Oregon rules provide that a party joined under ORCP 22D is to be treated as a defendant for purposes of service of summons and time to answer under ORCP 7. ORCP 22D(3). If a cross-claim seeks relief against another defendant, it must be served on that defendant, even though that party is in default for the party's failure to appear and defend. ORCP 22 B(3).

The deadline to answer a cross-claim or any motion directed against a cross-claim is 30 days from the date of service. ORCP 15A.

3. Third-Party Complaint. After the commencement of an action, a defending party, as a third-party plaintiff, may file and serve a complaint against a person not then a party to the action as a third-party defendant, alleging that the person is or may be liable to the defending party for all or part of the plaintiff's claim against it. The third-party defendant, in turn, can then raise defenses, counterclaims, or cross-claims just like any other party. ORCP 22C. Where a counterclaim is asserted against a plaintiff, the plaintiff also may cause a third party to be brought into the action. ORCP 22C(2).

ORCP 22C(1) requires that a defending party, as a third-party plaintiff, must commence a third-party action not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise, it must obtain agreement of parties who have appeared and leave of court. Although some circuit court judges have ruled that the court has the power to grant leave to file third-party actions without regard to whether the other parties to the action agree, this appears to be contrary to the express language of ORCP 22C(1). The careful lawyer will decide whether to file a third-party claim as soon as possible after the complaint is served.

IV. GENERAL CONSIDERATIONS

A. Amended and Supplemental Pleadings

1. Amendment as a Matter of Course. ORCP 23A allows a party to amend its pleading once as a matter of course at any time before a responsive pleading is served, or, if no

response is permitted, the amendment must be filed within 20 days after the pleading to be amended is served.

2. Amendment by Leave of Court Before Trial. Where a party cannot amend as a matter of course, it must obtain leave of court or written consent of the adverse party before it can amend its pleading. "[L]eave shall be freely given when justice so requires." ORCP 23A. Review of a trial court's decision to deny leave to amend is for abuse of discretion. *Quillen v. Roseburg Forest Products, Inc.,* 159 Or App 6, 10, 976 P2d 91 (1999). Thus, beware of last-minute motions to amend filed by the opposing party. Note that some defenses ordinarily waived if not raised can be raised by amended pleading under certain limited circumstances. ORCP 21G(2).

An order granting leave to amend should be obtained prior to filing and serving the amended pleading. Once the order is entered, the pleading can be filed. The pleading should be filed and served after the order is entered. A proposed pleading should be filed with a motion to amend. However, the proposed pleading does not become an "official" pleading unless so ordered by the court.

3. Amendments After Motion. After a motion to dismiss, a motion to strike an entire pleading, or a motion for judgment on the pleadings has been granted, the court may, upon such terms as may be proper, allow a party to amend its pleading. ORCP 25A. Where a court orders that part of the pleading be stricken or where the pleading, or a part of it, is to be made more definite and certain, the pleading must be amended pursuant to ORCP 23D. *See* ORCP 25A.

4. Amendments After Commencement of Trial. Where issues not raised by the pleadings are not objected to at trial, they will be treated in all respects as if they had been raised in the pleadings. On motion of any party at any time, even after judgment, the pleadings may be amended to conform to the evidence and to raise such issues. However, failure to amend does not affect the outcome of the trial on those issues. If evidence is objected to as not being within the scope of the pleadings, the court may allow the pleadings to be amended if the merits of the action will be advanced and the objecting party cannot demonstrate prejudice. ORCP 23B. In some circumstances, a court may grant a continuance to enable the objecting party to meet the new evidence. ORCP 23B.

5. Relation Back of Amendments. Whenever a claim or defense asserted in an amended pleading arises out of the conduct, transactions, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. ORCP 23C.

An amendment changing the party against whom a claim is asserted relates back if the conditions described above are satisfied and, within the statute of limitations, the new party: (1) had notice of the action so it will not be prejudiced in its defense; and (2) knew, or should have known, that, but for a mistake concerning the identity of the proper party, the action would have been brought against the new party. ORCP 23C.

6. Procedure for Amendments. Under ORCP 23D, where a pleading is amended before trial, a new "amended" pleading is filed, labeled as such. Occasionally, an amendment may be made by deletions or interlineation in the original pleading. ORCP 23D. An amended pleading

must be complete in itself, without reference to the preceding pleading or amendments by the party. ORCP 23D. Once an original pleading has been amended, the original pleading no longer is operative for the action. Nevertheless, it may still serve as evidence or an admission. Whenever an amended pleading is filed, it must be served on all parties who are not in default. A default judgment may be entered in accordance with the original pleading served upon any party who is in default or against whom a default has already been entered. However, the amended pleading need not be served on such parties in default unless that pleading asks for additional relief against them. ORCP 23A.

7. Response to Amendments. Unless the court orders otherwise, a party must respond to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amendment, whichever is longer. ORCP 15C.

B. Interpleader

ORCP 31A provides that persons having claims against the plaintiff may be joined as defendants and be required to interplead when their claims are such that the plaintiff is or may be exposed to multiple liability. A defendant exposed to similar liability may obtain such interpleader by way of a cross-claim or counterclaim. It is not grounds for objection that the claims do not have a common origin or that they are adverse to and independent of one another. It is also not grounds for objection that the plaintiff alleges that it is not liable in whole or in part to any or all of the claimants.

ORCP 31B provides that any property or amount involved as to which the plaintiff admits liability may, upon order of the court, be deposited with the court "or otherwise preserved, or secured by bond in an amount sufficient to assure payment of the liability admitted." Once that is done, the court may enjoin all the parties before it from pursuing any other action regarding the subject matter of the interpleader action. Following a hearing, the court may order the plaintiff discharged from liability "as to the property deposited or secured" before determining the rights of the claimants.

Interpleader is often considered as a possibility when an insurer is faced with multiple claims against an insured that exceed the amount of a liability policy. In theory, interpleading the policy limits would allow the insurer to avoid incurring defense costs on the claims. However, in practice, doing so without first obtaining a release for an insured could expose the insurer to allegations of bad faith in leaving its insured unprotected.

C. Ethical Considerations—ORCP 17

In form, ORCP 17 is similar to its federal counterpart, FRCP 11. In practice, however, it is infrequently necessary or imposed by Oregon judges. Fortunately, Oregon's collegiality has avoided a flood of Rule 17 sanction motions except when they are well-deserved.

1. Sanctions for Improper Pleading/Certification to the Court. ORCP 17 is somewhat similar to FRCP 11 in requiring certain certifications to the court by signing pleadings, motions, and other papers. Sanctions are available for violations of these rules. An attorney or party signing a pleading certifies that:

a. The statements are based upon reasonable knowledge, information, or belief, formed after making reasonable inquiry under the circumstances;

b. The pleading is not made for an improper purpose, such as delay or a needless increase in the cost of litigation;

c. The legal positions taken are "warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law or the establishment of new law;" and

d. The allegations or denials are supported by the evidence.

Any allegations or denials that the party or attorney does not wish to certify as supported by the evidence must be "specifically identified." The party or attorney's signature constitutes a reasonable belief that an allegation so identified will be supported by the evidence after further investigation and a denial so identified is reasonably based upon a lack of information or belief. ORCP 17C.

ORCP 17(D) also provides that, in the event a pleading or motion is signed in violation of the rule, the court may, upon motion or its own initiative, impose sanctions on the party or the attorney. Sanctions under ORCP 17 are limited to amounts sufficient to reimburse the moving party for attorney fees, including fees for bringing the motion. ORCP 17(D)(4). ORCP 17 sanctions may also include amounts sufficient to deter future false certifications. ORCP 17(D)(4). However, sanctions sufficient to deter future false certification must be based "upon clear and convincing evidence of wanton misconduct." ORCP 17(D)(4).

2. Asserting a Claim in Bad Faith. ORS 20.105 provides for an award of attorney fees for disobeying a court order or other misconduct. It requires a court to award reasonable attorney fees to a party against whom a claim, defense, or ground for appeal or review is asserted, if that party is a prevailing party in the proceeding and to be paid by the party asserting the claim, defense, or ground, upon a finding by the court that the party willfully disobeyed a court order or that there was no objectively reasonable basis for asserting the claim, defense, or ground for appeal.

These rules and statutes impose a definite moral and professional obligation upon the attorney. An attorney should not rely solely on information provided by the client if the attorney can obtain or verify the facts through other sources with reasonable diligence. Thus, whenever possible, an attorney should investigate the merits of a client's case before filing. If the attorney decides that an action lacks merit, the attorney should advise the client promptly before filing. If the case has already been filed, the attorney should get the client's consent to dismiss or seek leave to withdraw. Counsel should always be mindful of potential personal liability for improperly bringing or continuing an action.

Practicing Law in Oregon:
Tips to Consider and Traps to Avoid

OREGON STATE BAR
CLE SEMINARS

DECEMBER 21, 2020

PRESENTED BY

JOVITA WANG
RICHARDSON WRIGHT LLP

Richardson Wright
ATTORNEYS AT LAW

How to Avoid Hearing…
"You're Not Around These Parts, Are You?"

What makes Oregon special…

- From the **Plaintiff's** perspective
- From the **Defendant's** perspective

Local Practices to Consult

- Oregon Rules of Civil Procedure (ORCP)
- Uniform Trial Court Rules (UTCR)
- Supplemental Local Rules (SLR)

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Code Pleading

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Requirements of Code Pleading

Plain and concise statement of "ultimate facts" constituting a claim for relief without unnecessary repetition. ORCP 18 A.

What are ultimate facts?

- Must support the elements of each particular claim or defense. But cannot be mere recitation of elements.
- An ultimate fact is somewhere between a general allegation and a specific evidentiary allegation that describes an event or thing having a legal consequence.
- Facts must be pled fairly specifically.
- Avoid conclusory statements.

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Which is Code Compliant?

Defendant was negligently operating his vehicle when he struck plaintiff and caused plaintiff injuries.

Vs.

Defendant was operating a vehicle on a public road at an excessive rate of speed under the circumstances when he struck plaintiff.

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Which Pleadings?

- Complaint
- Answer
- Third-Party Complaint
- Reply

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Examples of what needs to be included...

- If attorney fees are being sought, the party must allege the basis for the award of fees, whether statutory or contractual in the pleading. ORCP 68 C(2)(a).
- Prejudgment interest must be specifically pleaded, along with a factual basis for an award of prejudgment interest.
- If seeking monetary damages, amount sought must be stated.



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The Prayer…

IS NOT PART OF THE CLAIM.

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But keep in mind….

Pleadings are to be liberally construed, so as to disregard any error or defect that does not affect the substantive rights of the adverse party. ORCP 12.

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Seeking Punitive Damages…

Oregon has special requirements for the pleading and recovery of punitive damages contained in ORS 31.725 et seq. Plaintiffs may not include a claim for punitive damages in their initial complaint. ORS 31.725(1) and (2). Instead, at any time after the pleading is filed, a party may move the court to allow amendment of the pleading in order to assert a claim for punitive damages. Both the moving and nonmoving parties may submit affidavits and documentation supporting or opposing a punitive damages claim. ORS 31.725(2).

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Some interesting pre-requisites

Oregon Tort Claims. No action may be maintained arising out of any act or omission of a public body or its agents unless notice of the claim is given as required by ORS 30.275. When a person injured is a minor, incompetent, or otherwise unable to give the notice, the deadline for the notice is tolled up to a maximum of only 90 days (basically a 270–days' notice period). Otherwise, notice must be given within 180 days after the alleged loss or injury, or within one year if the claim is for wrongful death.

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Some interesting pre-requisites – cont'd

Attorney Fees. Certain claims for personal injury under ORS 20.080, and breach of contract under ORS 20.082, where the prayer is for less than $10,000 may substantively qualify for recovery of attorney fees, but only where a demand is sent to the defendant at least 30 days before commencement of the tort action and 20 days before commencement of the contract action, along with other statutory requirements.

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Some interesting pre-requisites – cont'd

Complaint against Certain Professionals.

- Design professionals
- Real estate professionals

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Some interesting pre-requisites – cont'd

Corporations:

- If transacting business in Oregon, must obtain a certificate of authority before maintaining an action…but
- Can still be sued



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When does an action commence?

- Commencement does not occur until the complaint is filed and the summons and complaint are served on a particular defendant.
- ORS 12.010 and 12.020.

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Relation Back

If complaint is filed within the time allowed by the applicable SOL, service of the summons and complaint within 60 days of the filing date allows the service to "relate back" to the date of filing. Thus, the action is deemed to have been commenced on the date of filing.

Beware: The relation back only applies within 60 days of the filing date, not the SOL. ORS 12.020(2).



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Pay the Fees…

- ORS 21.160(1) – Filing fees based on the amount claimed
- ORS 21.200, where motion fees and responses apply to
  - Motion for summary judgment (MSJ)
  - Motion notwithstanding the verdict
  - Motion for new trial
  - Motion for relief from judgment
  - Motion for preliminary injunction
  - Motion seeking contempt of court

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Timing Considerations for the Defendant

Lawyers will typically write to plaintiff's counsel informing them of their representation of a particular defendant, stating that they intend to appear and requesting that they be given at least 10 days' notice of any intent to apply for default. Doing so requires that defense counsel receive notice before a motion for default is filed. **ORCP 69** B(2).

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DATE

VIA FIRST CLASS MAIL AND EMAIL

OPPOSING COUNSEL

Re: Plaintiff v. Defendant
Circuit Court Case No.

Dear Opposing Counsel:

Our firm has been retained to represent Defendant in the above-referenced matter. Please accept this letter as our client's ORCP 69 notice. As such, we ask that you kindly not take a default judgment or otherwise petition the court without providing us with ten days' written notice.

I look forward to working with you about this matter.

Sincerely,
RICHARDSON WRIGHT LLP

Jovita Wang
jovita@richardsonwright.com

Motions Practice

ORCP 21:

Examples include

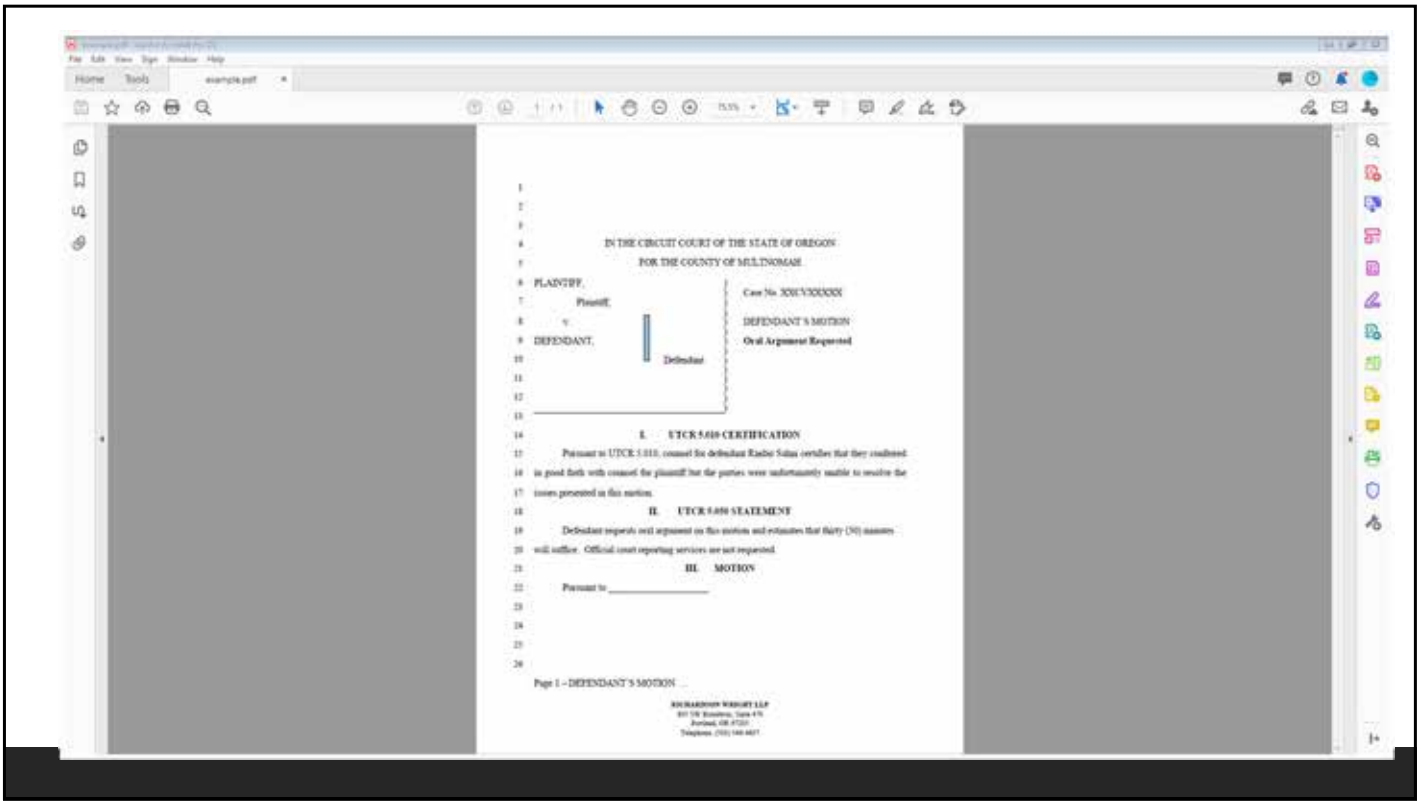
- Motions to dismiss a particular claim or the entire complaint for various reasons;
- Motions to strike sham, frivolous, or irrelevant pleadings
- Motions to strike a complaint containing more than one claim not separately stated; or
- Motions to make the allegations more definite and certain.

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Conferral

Don't forget to make a good faith effort to confer. UTCR 5.010 (must confer under ORCP 21, 23, 36-46 except a motion to dismiss for failure to state a claim/lack of jurisdiction).

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH
PLAINTIFF,
Plaintiff,
v.
DEFENDANT,
Defendant
Case No. 20XCVXXXXX
DEFENDANT'S MOTION
Oral Argument Requested
I. UTCR 5.010 CERTIFICATION
II. UTCR 5.050 STATEMENT
III. MOTION
Pursuant to _____
Page 1 – DEFENDANT'S MOTION

Responding to a Complaint

- A denial.
- A statement that the party lacks knowledge or information sufficient to form a belief about the allegation's truth, which has the effect of a denial.
- An admission.

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Denials…

- ORCP 19A requires a party to state in short and plain terms the party's defenses to each claim asserted.
- The pleader must admit as much of an allegation as is true and deny the remainder.
- A general denial is permissible only when the pleader intends in good faith to controvert every allegation of the pleading.
- Allegations to which a response is required, other than the amount of damages, are deemed admitted if not denied.



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Defenses

Check ORCP 19B for a list of defenses, including affirmative defenses.

E.g.

- Estoppel
- Laches
- Statute of Frauds
- Statute of Limitations
- Waiver
- Issue preclusion



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Other pleadings

- Counterclaims.
  - Response is Reply
- Cross-Claims.
  - Response is an Answer
- Third-Party Complaint.
  - Response is an Answer

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Amendments

- As a matter of course
- By leave of Court
- Written consent of adverse party





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Ethical Considerations



- ORCP 17
- ORS 20.105





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Strategy on where to file…



Federal Courts

v.

State Courts



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Federal Court

- Specific Timelines & Requirements
- Assigned Judges with Law Clerks
- No "trial by ambush."
- Cost



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State/Circuit Court

- Flexibility
- Cost
- Trial by Ambush.
- Budgetary restrictions
- Favors procrastinators more



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Resources

1. https://www.courts.oregon.gov/Pages/default.aspx
2. https://www.courts.oregon.gov/courts/multnomah/go/Documents/ARM.pdf
3. https://www.courts.oregon.gov/courts/clackamas/resources/Pages/default.aspx
4. https://www.courts.oregon.gov/courts/clackamas/programs-services/Documents/Motion_Practice_Guidelines_Final_Draft_June_2019.pdf
5. https://www.courts.oregon.gov/courts/washington/programs-services/Pages/MotPnlStmt.aspx
6. https://www.courts.oregon.gov/courts/multnomah/go/CivilMotionPanel/CV_CivilMotionPanelStatementOfConsensus.pdf
7. https://www.osbar.org/members/localbars.asp
8. Oregon Bar Books

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TL;DR

- CHECK THE LOCAL RULES
- CHECK THE LOCAL GUIDELINES
- CODE PLEADING – ultimate facts

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THANK YOU!

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