



# IN BRIEF

MALPRACTICE AVOIDANCE NEWSLETTER FOR OREGON LAWYERS

Issue No. 86

DECEMBER 2001

## LEGISLATION ALERTS

This issue of *In Brief* focuses on some of the significant changes made by the 2001 Legislature. **The new legislation takes effect on January 1, 2002 unless otherwise stated.**

The hardbound, 3 volume set of 2001 *Oregon Laws* can be ordered for \$150 from the Legislative Counsel distribution center in Salem at 503-986-1243. 2001 *Oregon Laws* contains all of the legislative changes. The softbound 2001 *Oregon Revised Statutes* will most likely be available in January. If you did not receive an order form, call the Legislative Counsel distribution center at 503-986-1243.

For additional information about legislation, see [www.lc.state.or.us](http://www.lc.state.or.us).

### WHERE TO FIND CIVIL PROCEDURE CHANGES

The changes to civil procedure rules promulgated by the Council on Court Procedures and submitted to the 2001 Legislative Assembly (ORCP 7, 21, 58) take effect January 1, 2002 and can be found in the 2001 *OREGON APPELLATE COURTS ADVANCE SHEETS* No. 3 (Feb 5, 2001). Changes to the Uniform Trial Court Rules (UTCR 3.170, Chapter 9) took effect August 1, 2001 and can be found in 2001 *OREGON APPELLATE COURTS ADVANCE SHEETS* No. 11a (May 28, 2001). Other changes to civil procedure rules made by the 2001 Legislature can be found in the 2001 *OREGON LAWS ADVANCE SHEETS* published by the Oregon Legislative Assembly.

### CIVIL PROCEDURE ORCP 7 D(2) – Service by Mail

ORCP 7 D(2)(ii) has been amended to allow the defendant “*or other person authorized by appointment or law*” to sign the receipt for service by mail.

### CIVIL PROCEDURE

#### ORCP 7 (D)(3) – Substituted and Office Service

ORCP 7 (D)(3)(a)(i) now authorizes the use of office or substituted service without the need to show that the defendant could not be found at his or her residence.

### CIVIL PROCEDURE

#### ORCP 7 (D)(4) – Service – Actions Involving Motor Vehicles

ORCP 7 (D)(4) now allows the use of service by mail for accidents occurring on premises open to the public as defined by law. This broadens the use of service by mail, which previously was limited to actions arising out of motor vehicles on the roads, highways, or streets of this state.

### CIVIL PROCEDURE

#### ORCP 21 (A) – Motion to Dismiss

This rule now provides that if the court grants a Motion to Dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. The rule outlines the options available to the court.

### CIVIL PROCEDURE

#### ORCP 58 B – Statements of Fact to Jury

ORCP 58 B now allows the parties, with the court’s consent, to present a short statement of facts of the case to the entire jury panel before voir dire. The rule outlines the requirements of the court’s instructions and the procedure for jurors submitting written questions.

### DISCLAIMER

This newsletter includes claim prevention techniques that are designed to minimize the likelihood of being sued for legal malpractice. The material presented does not establish, report, or create the standard of care for attorneys. The articles do not represent a complete analysis of the topics presented and readers should conduct their own appropriate legal research.

## **CIVIL PROCEDURE**

### **Attorney Fees on Multiple Claims – ORS 20.075, 20.096, ORCP 70A, ORS 20.015 2001 Or Laws Ch 417 (HB 2374)**

In any action or suit in which one or more claims are asserted for which an award of attorney fees is either authorized or required, the prevailing party on each claim shall be determined as provided in HB 2374. The Act states that the prevailing party for the purposes of making an award of attorney fees on a claim, is the party who receives a favorable final judgment, decree, or arbitration award on the claim. The Act also describes the procedure for awards if more than one claim is made in an action or suit for which an award of attorney fees is either authorized or required.

ORCP 70 A(2)(a)(viii) is amended to require clear identification of the specific claims for which any attorney fees are awarded and the amount of attorney fees for each claim.

This Act addresses the issues raised in *Newell v. Weston*, 156 Or App 371, 965 P2d 1039 (1998) and *Wilkes v. Zurlinden*, 328 Or 626, 984 P2d 261 (1999).

## **CIVIL PROCEDURE**

### **Attorney Fees in Contract Claims 2001 Oregon Laws Ch 542 (HB 2381)**

HB 2381 provides for an award of attorney fees to the prevailing party on any claim based on a contract, including an implied contract, when the amount of the principal and interest due at the time the claim is filed is \$5,500 or less, and the contract does not provide for an award of attorney fees. (These provisions mirror ORS 20.080 which provides for attorney fees when the claim is for injuries to person or property of \$5,500 or less.) The statute outlines the procedure for recovering attorney fees, including requiring the plaintiff to make a written demand for payment of the claim at least ten days before the action is commenced or a complaint is filed. The statute also clarifies the types of contracts to which it does not apply.

*Applies to actions commenced on or after January 1, 2002.*

## **CIVIL PROCEDURE**

### **Admissibility of Complaint of Abuse of Elderly OEC 803 2001 Oregon Laws Ch 533 (SB 780)**

OEC 803 has been amended to allow testimony of a complaint of abuse, criminal mistreatment, or theft from an elderly person 65 years of age or older. When the declarant is unavailable, admissibility is governed by the same provisions as determining the admissibility of a complaint of child abuse.

*Applies to trials and other hearings commenced on or after January 1, 2002.*

## **CIVIL PROCEDURE**

### **Judicial Transfer of Lawsuits Against Public Bodies 2001 Oregon Laws Ch 561 (HB 3119)**

Section 1 of HB 3119 directs a circuit court or the Court of Appeals to transfer to the proper court or tribunal a petition or action against a public body that was improperly filed, and directs the Court of Appeals to resolve any disputes relating to which court or tribunal has authority over the lawsuit.

Section 2 of HB 3119 allows a person to amend a petition or action as provided for in the section if (1) the person seeks relief against a public body and (2) the person incorrectly filed a petition for a writ of review, a petition for a writ of mandamus, or an action for declaratory judgment and the correct remedy is one of these three.

The statute also provides for rules governing dismissals for failure to timely file.

*Applies to actions or other proceedings filed on or after January 1, 2002.*

## **CIVIL PROCEDURE**

### **Telephone Testimony – ORS 45.400 2001 Oregon Laws Ch 398 (HB 2372)**

ORS 45.400 is amended to allow telephone testimony in civil jury trials providing that the proponent of the testimony demonstrates good cause and a compelling need for the telephone testimony.

## **CIVIL PROCEDURE**

### **Use of Deposition at Trial – ORS 45.250 2001 Oregon Laws Ch 234 (HB 2375)**

ORS 45.250 is amended to clarify that failure of a party to serve a witness with a trial subpoena at the

time of the deposition does not constitute sufficient grounds to deny the use of that witness' deposition at trial without a further showing of lack of diligence on the part of the party offering the deposition.

**CIVIL PROCEDURE**  
**Special Motions to Strike**  
**2001 Oregon Laws Ch 616 (HB 2460)**

HB 2460 allows a defendant in a civil action to make a special motion to strike if the plaintiff's claim arises out of certain conduct by the defendant in furtherance of the exercise of the constitutional rights of petition or free speech in connection with an issue of public interest. The Bill provides that a special motion to strike must be treated as a motion to dismiss under ORCP 21 A. The defendant has the initial burden of showing that the plaintiff's claim arose from protected speech or conduct; then the burden shifts to the plaintiff to establish a probability that he or she will prevail on the claim. The defendant who prevails on a special motion to strike is entitled to an award of reasonable attorneys fees and costs.

Section 2 of the Act requires that the motion be filed within 60 days after service of the complaint or, in the court's discretion, at any later time. Subsection (2) stays discovery upon the filing of the motion.

**CIVIL PROCEDURE**  
**Motion to Correct Transcript – ORS 19.370**  
**2001 Oregon Laws Ch 341 (HB 2338)**

ORS 19.370 has been amended and clarified. Subsection (3) of Section 1 of the Act provides that the transcript for appeals referred to an appellate mediation program must be filed within 30 days after expiration of the period of time specified in the rules during which the appeal is held in abeyance, or within 30 days after the court directs that the appeal no longer be held in abeyance, whichever occurs first. Subsection (5) of the Act clarifies that when portions of a transcript are filed by two different persons working on the transcript, the time for filing a motion to correct the transcript does not begin to run until the last portion of the transcript is filed. Subsection (6) of Section 1 provides that in a case held in abeyance pending the outcome of an appellate mediation program, the motion to correct the transcript is not due until 15 days after the abatement period ends or 15 days after the appeal is reactivated, whichever is sooner.

*Applies to notices of appeal filed on or after January 1, 2002.*

**CIVIL PROCEDURE**  
**Stipulated Judgments**  
**2001 Oregon Laws Ch 541 (HB 2361)**

HB 2361 allows an appeal of a stipulated judgment in certain circumstances if the party has reserved the right to appeal and the appeal presents a justiciable controversy.

*Applies to judgments entered in the register of a court on or after January 1, 2002.*

**CIVIL PROCEDURE**  
**Future-Crimes Exception - OEC 503**  
**2001 Oregon Laws Ch 640 (SB 437)**

SB 437 eliminates the lawyer-client, psycho-therapist-patient, physician-patient, and other specified privileges in certain circumstances when, in the professional's judgment, the declarant indicates a clear and serious intent to commit a crime specifically named in the Act, the declarant poses a danger of committing the crime, and the person receiving the communication makes a report to another person based on the communication. The Act establishes civil immunity for damage or injury arising from the disclosure or failure to disclose the unprivileged communication specified in the Act, and states that the provisions do not create a duty to report.

*The limitations on liability apply to all communications made before, on, or after January 1, 2002.*

*The limitations on privilege created by section 2 of the Act apply only to trials or proceedings commenced on or after January 1, 2002.*

**CIVIL PROCEDURE**  
**Use of Legislative History**  
**2001 Oregon Laws Ch 438 (HB 3677)**

HB 3677 allows a party to offer legislative history to the court to aid in its pursuit of the legislative intent, regardless of whether the meaning of the statute is clear from the text and context. The court can then weigh the proffered legislative history as "the court considers to be appropriate." The statute was promulgated after *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993).

*HB 3677 applies to actions commenced after June 18, 2001.*

**CIVIL PROCEDURE**  
**ORCP 69 B – Default Orders and Judgments**  
**2001 Oregon Laws Ch 418 (HB 2382)**

The affidavit requirements of ORCP 69 B(1)(d) and 69 B(2) have been changed to allow an affidavit in support of the entry of a default judgment to be based on “the best knowledge and belief of the parties seeking judgment” that the party against whom judgment is sought is not incapacitated, a minor, a protected person, or a respondent as defined in ORS 125.005. (The previous standard required an affidavit stating that the respondent was not incapacitated or financially incapable, as defined in ORS 125.005.)

**CIVIL PROCEDURE**  
**ORCP 84 – Writ of Attachment Notice**  
**2001 Oregon Laws Ch 249 (HB 2386)**

ORCP 84 D now requires a sheriff to promptly mail or deliver a copy of the writ and other enumerated documents to a defendant after taking his or her property into custody under a writ of attachment. These changes coordinate the writ of attachment process with the writ of garnishment process.

**CIVIL PROCEDURE**  
**UTCRC 3.170 (1) - Pro Hac Vice**

UTCRC 3.170 (1)(g) requires out-of-state attorneys to submit proof that appearance fees have been paid.

**CIVIL PROCEDURE**  
**UTCRC Chapter 9**

UTCRC Chapter 9 has been renumbered and reorganized. For a chart that shows the old and new UTCRC numbers, see 2001 OREGON APPELLATE COURTS ADVANCE SHEETS No. 11a (May 28, 2001).

Changes include clarification and form changes to UTCRC 9.180 (former UTCRC 9.060), UTCRC 9.170, and UTCRC 9.160. These rules govern vouchers, depository statements, and accountings in probate proceedings, including conservatorships. The form required for an accounting is available on the Judicial Department web site [www.ojd.state.or.us](http://www.ojd.state.or.us), at the end of the section on the 2001 UTCRC changes.

**DOMESTIC RELATIONS**  
**Visitation/Parenting**  
**2001 Oregon Laws Ch 873 (HB 2427)**

Section 1 of HB 2427 created a rebuttable presumption in ORS 109.119 that the legal parent acts in the best interest of the child. To award visitation or custody to a third party over the objection of the legal parent, the third party must rebut the presumption. The standards of proof vary, depending on the type of case. The bill also lists the criteria that the court can consider in determining whether the presumption has been rebutted.

The provisions of ORS 109.119, ORS 109.121, and ORS 109.123, all of which related to third party visitations, are consolidated.

This Act is often referred to as “the Troxel fix” because it was enacted to address the issues raised in *Troxel v. Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed2d 49 (2000).

*Effective July 31, 2001.*

**DOMESTIC RELATIONS**  
**Contract Remedies/Stipulated Judgment –**  
**ORS 107.135, 109.155, 109.165**  
**2001 Oregon Laws Ch 203 (HB 2494)**

HB 2494 addresses the issues raised in *Webber v. Olsen*, 330 Or 189, 998 P2d 666 (2000) and allows the court in a suit for marital annulment, dissolution, or separation to enforce the terms set forth in a stipulated decree signed by the parties, a decree resulting from a settlement on the record, or a decree incorporating a marital settlement agreement (1) as contract terms using contract remedies, (2) by imposing any remedy available to enforce a decree, or (3) by any combination of the above provisions.

The parties retain their ability, in a separate proceeding, to file a motion to set aside, alter, or modify a decree under ORS 107.135 or seek enforcement of an ancillary agreement to the decree.

The Act provides for similar remedies for modifications and paternity cases.

*Applies to decrees, orders, and judgments entered before, on, or after May 25, 2001.*

## DOMESTIC RELATIONS

### Stipulated Judgments – ORS 107.095 2001 Oregon Laws Ch 286 (SB 124)

ORS 107.095 is amended to allow parties to an annulment, dissolution of marriage, or a separation to stipulate to the entry of decree. This Bill allows the court to enter a stipulated judgment by affidavit without a prima facie hearing.

## TORTS

### Work-Related But Not Compensable Injury 2001 Oregon Laws Ch 865 (SB 485)

Section 15 of SB 485 provides that a worker must first pursue the potential remedies under ORS Chapter 656 and may not pursue a civil action until an order determining that the claim is not compensable becomes final. The worker must file the lawsuit within two years from the date of injury or 180 days from the date that the order affirming that the claim is not compensable becomes final, whichever is later. The time period for filing the action is not extended if the workers' compensation claim is filed after the statute of limitations has expired for filing the civil action.

*Effective July 30, 2001.*

## TORTS

### Serving Alcoholic Beverages – ORS 30.950 2001 Oregon Laws Ch 534 (SB 925)

ORS 30.950 has been amended and new provisions have been added relating to the liability of persons serving alcoholic beverages. Patrons or guests, including those who are visibly intoxicated, who voluntarily consume alcoholic beverages are denied any cause of action against the server of the alcohol if the server is (1) a person licensed by the Oregon Liquor Control Commission, (2) a person holding a permit issued by the OLCC, or (3) a social host. The immunity afforded to the servers of alcoholic beverages is limited to claims for relief based on injury, death, or damages caused by the intoxication of the patron or guest. The limitation does not apply to "claims for relief based on injury, death, or damages caused by negligent or intentional acts other than the service of alcoholic beverages to a visibly intoxicated patron or guest."

ORS 30.950 is also amended to require a plaintiff to establish by clear and convincing evidence that alcoholic beverages were provided when the patron

or guest was visibly intoxicated and that the plaintiff did not "substantially contribute" to the intoxication of the patron or a guest. The statute defines "substantially contribute."

*Applies to causes of action arising on or after January 1, 2002.*

## TORTS

### Actions Against Public Bodies – ORS 30.275 2001 Oregon Laws Ch 601 (SB 773)

SB 773 exempts certain specified claimants from the notice provisions generally required for claims against public bodies under ORS 30.260-30.300. Under SB 773, if (1) the claimant was under 18 years of age when the act or omission giving rise to the claim occurred, (2) the claim is against the State Office for Services to Children and Families or the Oregon Youth Authority, *and* (3) the claimant was in the custody of the State Office for Services to Children and Families or the Oregon Youth Authority pursuant to specified statutes when the act or omission occurred.

*SB 773 applies to ORS 30.260-30.300 claims that arise before, on, or after January 1, 2002. The new provisions do not apply to claims for which judgment has been entered in the register of a court before January 1, 2002.*

## SECURED TRANSACTIONS

### Revisions to UCC Article 9 2001 Oregon Laws Ch 445 (SB 171)

SB 171 implements a complete revision of Article 9 of the Uniform Commercial Code (ORS Ch 79), as proposed by the American Law Institute and the National Conference of Commissioners on the Uniform State Laws.

The revisions made to UCC Article 9 are beyond the scope of this *In Brief*. For resources, we recommend:

- The side-by-side comparison of UCC Article 9 and new UCC Article 9 (Product Code #320.01) available through the Oregon State Bar Order Desk (503-684-7413). The handbook is annotated for Oregon. The cost for the handbook and disk is \$35.00 plus \$5.00 shipping and handling.
- New Article 9 – an OSB CLE program presented on October 5, 2001, available through the OSB Order Desk (503-684-7413). Program audiotapes,

materials, and forms (Product Code #UCC 201.91) cost \$165. Program materials and forms on disk (Product Code #UCC 201.90) cost \$45.

- NCCUSL comments on the recommended NCCUSL transition rules are available on the PLF web site, [www.osbplf.org](http://www.osbplf.org). Click on Loss Prevention Materials, then on Alerts and Special Information.

*Changes to UCC Article 9 were effective July 1, 2001.*

## **ESTATE AND PROBATE**

### **Notices/Claims – ORS 113.145, 115.005, 414.105 2001 Oregon Laws Ch 620 (HB 2243)**

ORS 113.145 is amended to require the personal representative, within 30 days of appointment, to mail or deliver the notice to heirs and devisees required by ORS 113.145(1) *and* a copy of the death certificate to the Estate Administration Unit of the Department of Human Services. The address is: Estate Administration Office, Department of Human Services, PO Box 14021, Salem, Oregon 97309-5024.

ORS 114.525 has also been amended to clarify that copies of small estate affidavits are to be mailed to the Estate Administration Office of the Department of Human Services.

ORS 115.005 is amended to provide that the two-year limitation on claims against an estate does not apply to claims by the state for recovery of public assistance if assistance was provided to the decedent or the decedent's spouse and assets were not disclosed to the state when public assistance was provided.

ORS 414.105 is amended to allow the state to recover for medical assistance paid on behalf of a person of *any age* who was permanently institutionalized in a nursing facility, immediate care facility for the mentally retarded, or other medical institution. (Prior law limited recovery to a person who was 55 years old or older.)

## **ESTATE AND PROBATE**

### **Power of Attorney**

### **2001 Oregon Laws Ch 395 (HB 2365)**

HB 2365 creates a new law to provide that a person may not refuse to recognize the authority of an attorney-in-fact or agent acting under a power of attorney based solely on the passage of time since the power of attorney was executed.

Section 2 of the Act limits the liability of any person who reasonably relies in good faith on the authority of an attorney-in-fact or agent under a power of attorney.

ORS 127.005 is also amended to explicitly provide that a power of attorney remains in effect until revoked by the principal.

Section 3 of the Act requires that unless otherwise provided in the document, an attorney-in-fact must use the property for the benefit of the principal.

*Applies to all powers of attorney whether executed before, on, or after January 1, 2002.*

## **ESTATE AND PROBATE**

### **Power of Attorney – ORS 696.030**

### **2001 Oregon Laws Ch 300 (SB 446)**

SB 446 amends ORS 696.030 to clarify that persons acting as an attorney-in-fact under a duly executed power of attorney are excluded from real estate licensing requirements if (1) the power of attorney is recorded, (2) the power of attorney specifically describes the real estate to be sold, leased, or exchanged, *and* (3) the person using the power of attorney is not compensated in any manner for the real estate-related activities. **PRACTICE TIP:** Lawyers drafting estate planning documents may wish to consider modifying power of attorney documents (1) to include the specific addresses of real property that the agent is authorized to manage and control, and (2) to state that the agent, in dealing with real property, may not receive any compensation that would require the agent to be licensed under ORS Chapter 696 or other applicable law.

## **ESTATE AND PROBATE**

### **Transfers to Minor – ORS 126.805-126.886**

### **2001 Oregon Laws Ch 244 (SB 122)**

The Oregon Uniform Transfers to Minor Act (ORS 126.805-126.886) is amended in two ways.

The amount that can be transferred for the benefit of a minor under ORS 126.822, without court approval, by a personal representative or trustee in the absence of a will or under a will or trust that does not contain an authorization to do so, has been increased from \$10,000 to \$30,000.

SB 122 also allows a person making a transfer under ORS 126.816 (irrevocable gifts or exercise of a

power of appointment) to provide for a delayed transfer of the property until the minor reaches an age between 21 and 25. The legislation also allows a person making a transfer under ORS 126.189 (transfer by personal representative or trustee as authorized in the governing will or trust) to provide for a delayed transfer of the property until the minor reaches an age between 21 and 25, provided that the governing will or trust so directs.

Language establishing custodial property is specified in Section 4 of the Act.

**ESTATE AND PROBATE**  
**Uniform Disclaimer of Property Interests Act**  
**2001 Oregon Laws Ch 245 (SB 123)**

SB 123 enacts the Uniform Disclaimer of Property Interests Act (UDPIA) and replaces Oregon's version of the Uniform Disclaimer of Transfers Under Non Testamentary Instruments Act, ORS 105.625-105.640 and the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, ORS 112.650-112.667. The UDPIA has many features of the previous disclaimer statutes; however, the UDPIA does not impose a specific time limit for making a disclaimer and also creates rules for several types of disclaimers that were not expressly covered in the previous statutes. The nine-month deadline for disclaimers of future interests was eliminated and rules have been established for disclaimers of joint property, disclaiming of assets that would otherwise become trust property, and disclaiming of powers held in a fiduciary capacity. **PRACTICE TIP:** Lawyers also need to be familiar with the requirements for tax-qualified disclaimers under Section 2518 of the Internal Revenue Code. Although the UDPIA removed the specific time limit for disclaimers, the IRS requirement may not be satisfied by complying with state law.

Oregon's version of the UDPIA largely follows the text as approved by the National Conference of Commissioners on Uniform State Laws, although there are some differences including Section 14 and Section 17 of the Act. The full text of the model Act is available at [www.law.upenn.edu/bll/ulc/fnact99/1990s/udpia99.htm](http://www.law.upenn.edu/bll/ulc/fnact99/1990s/udpia99.htm). The Commissioners' comments accompany the text. Although those comments give useful background to various sections, it is unclear how far an Oregon court will rely on the comments.

*SB 123 applies to disclaimers made on or after January 1, 2002.*

**ESTATE AND PROBATE**  
**Priority of Child Support Arrearages –**  
**ORS 115.125**  
**2001 Oregon Laws Ch 316 (SB 165)**

ORS 115.125 is amended to provide that child support arrearages have priority over general creditors and certain state reimbursement claims.

*This priority applies to estates for which petitions are filed under ORS 113.035 on or after January 1, 2002.*

**ESTATE AND PROBATE**  
**Advanced Directives – ORS 125.010 and**  
**ORS 127.550**  
**2001 Oregon Laws Ch 396 (HB 2368)**

ORS 125.010 is amended to allow the court to make a determination described in ORS 127.550 with regard to an advanced directive in a protective proceeding in which a guardian or temporary guardian has been appointed for the principal, or in which the petition seeks the appointment of a guardian or a temporary guardian for the principal.

HB 2368 also amends ORS 127.550 to allow a court to make any of the determinations described in Section 2 of the Act as a part of a protective proceeding under ORS chapter 125 if a guardian or temporary guardian has been appointed for the principal, or if the petition seeks the appointment of a guardian or a temporary guardian for the principal.

**ELDER LAW**  
**Elder Abuse Civil Action – ORS 124.100**  
**2001 Oregon Laws Ch 843 (SB 956)**

ORS 124.100 has been amended to allow a civil action for elder abuse, or for abuse of an incapacitated person, to be brought by the personal representative of the estate of the person who was abused.

**GUARDIANSHIPS**  
**Notice Requirements – ORS 125.070**  
**2001 Oregon Laws Ch 416 (HB 2363)**

HB 2363 specifies that the notice requirements in ORS 125.070(2) apply to a notice of petition for the appointment of a conservator for a financially incapable respondent or for the appointment of a guardian or conservator for a minor respondent. The statutory notice form in ORS 125.070(3) was amended to include the relevant notice requirements listed in

ORS 125.070(2), resulting in one standardized, comprehensive statutory notice form for all adult respondents in a guardianship proceeding.

*The amendments to ORS 125.070 of Section 1 of the Act apply to petitions and motions in protective proceedings filed on or after January 1, 2002.*

## **GUARDIANSHIPS**

### **Notice Requirements – ORS 125.320(3)(c) 2001 Oregon Laws Ch 473 (HB 2367)**

ORS 125.320(3)(c) has been amended to expand the list of persons requiring notification before a guardian may place an adult protected person in a mental health treatment facility, nursing home, or other residential facility. The list now includes any lawyer who represented the protected person at any time during the protected proceedings; the office of the Long-Term Care Ombudsman (under certain circumstances); and, in certain specified situations, to the system designed to protect and advocate for the rights of individuals with developmental disabilities and mental illness. The amendments clarify that notice served on a lawyer does not impose any responsibility on the lawyer receiving the notice to represent the protected person in the protective proceeding.

*The amendments to ORS 125.320 by Section 1 of this Act apply only to notices of statement of intent filed in a protective proceeding on or after January 1, 2002.*

## **DEBTOR-CREDITOR**

### **Garnishments – Chapter 29/Chapter 22 2001 Oregon Laws Ch 249 (HB 2386)**

ORS 29.125-29.415 have been completely revised. The changes do not significantly change the existing substantive law but clarify the garnishment process and forms. All statutory garnishment forms have been extensively changed. New statutory forms are available in WordPerfect and Word formats on the Oregon State Bar web site at [www.osbar.org/clepubs/forms/garnish.html](http://www.osbar.org/clepubs/forms/garnish.html).

The new forms are codified in ORS Chapter 22. The following topics are among the revisions: (1) definitions, (2) debt subject to garnishment, (3) form of writ, (4) validity and duration of writ, (5) courts with authority over writs, (6) property subject to garnishment, (7) multiple-writ priority, (8) authorized issuers, (9) delivery of the writ, (10) documents to be delivered to the debtor, (11) duties of the garnishee, (12) contents of garnishee response, (13) challenge to garnishment, (14) garnishor's duties created by

challenge to garnishment, (15) hearing on challenge to garnishment, (16) allowance or denial of the challenge, (17) sanctions, (18) claim by person other than the debtor, (19) payment of money under the writ, (20) payment of wages subject to garnishment, (21) crediting of payments, (22) response to sheriff, (23) sale by sheriff, (24) release of garnishment, (25) sanctions for garnishee's failure to comply, (26) financial institution as garnishee, and (27) writs used to enforce agency orders or warrants.

For a comprehensive discussion of the garnishment law changes, see *2001 Oregon Legislation Highlights* (Oregon CLE 2001). This handbook can be obtained from the Oregon State Bar Order Desk (503-684-7413) for \$65 (Product Code #270.24).

## **LIENS**

### **Disclosures by Seller – ORS 93 Notice of Lien - ORS 87.021 2001 Oregon Laws Ch 311 (HB 3842)**

ORS Chapter 93 is amended to require a seller of real property to provide the purchaser (1) a list of any party hired by the owner to perform construction work within two years of the date of sale if the owner has not paid the party in full or the party disputes that it has been paid in full, (2) a copy of all notices of right to a lien, lien claims, lien satisfactions, lien waivers, and lien releases received by the seller within the past two years, and (3) a copy of the cautionary notice described in ORS 701.250(B) that is provided by the Construction Contractors Board. A violation of this obligation is a Class B Misdemeanor.

ORS 87.021 has been amended to specify that the exception applies when the material, equipment, services, or labor described in ORS 87.010 is furnished *at the request of an owner who is not the original contractor*. (Former ORS 87.021 read *at the request of the owner*.)

## **LIENS**

### **Agricultural Liens – ORS 87 2001 Oregon Laws Ch 301 (HB 2051)**

ORS 87.700-87.740 has been changed, including repealing ORS 87.720 (which required the recording officer of the county to record notices of agricultural liens) and directing the Secretary of State to maintain an index of notices and certificates under ORS 87.735.

The legislation outlines the procedure to be

followed by the Secretary of State when it receives notices of lien under ORS 87.226 (agricultural services lien), 87.705 (agricultural produce lien), or 87.755 (grain producer's lien). The Secretary of State, on request, must furnish the person who filed the lien with a list of persons who have filed a financing statement under ORS 79.4010 that perfects the security interest in the inventory, proceeds, or accounts receivable of the lien debtor or purchaser.

The following topics are among the revisions: (1) requirements for agricultural cooperatives under Chapter 62, (2) agricultural services lien date of attachment and breadth, (3) agricultural produce liens, and (4) grain producer's liens.

For a more complete discussion, see 2001 *Oregon Legislation Highlights* (Oregon CLE 2001) available from the Oregon State Bar Order Desk (503-684-7413) for \$65 (Product Code #270.24).

*The effective date of these changes varies depending on the section of the Act.*

## TRUSTS

### Creditors Claims Against Revocable Trusts

#### 2001 Oregon Laws Ch 593 (SB 120)

SB 120 creates an optional, probate-like, but streamlined, procedure by which a trustee may notify creditors that the grantor has died and that trust assets are about to be distributed. This optional procedure parallels the existing probate notice procedure and incorporates many of the provisions of ORS Chapter 115.

Section 1 of the Bill establishes that claims against a nontestamentary trust described in Section 2 of the Act that are not presented within the time limitations established under Section 2 of the Act or within the statute of limitations applicable to the claim, whichever is earlier, are barred from payment from the trust estate. Section 2 of the Act contains the basic four-month deadline for presenting claims after notice, which is similar to ORS 115.005. Other provisions in the Act include (1) commencement of proceedings, (2) limitation on presentation of claims when notice to claimants is given, (3) publication of notice, (4) notice to individual claimants, (5) form of claims; evidence in support, (6) claim based on debt due or judgment, (7) claim on debts not yet due, (8) claim on secured debt that is due, (9) claim on contingent or unliquidated debt, (10) allowance and disallowance of claims, (11) creditor may obtain order

for payment, (12) evidence required to allow court approval of claim disallowed by trustee, (13) waiver of statute of limitations, (14) tolling of statute of limitations, (15) priority of claims, (16) applicability of time limitations to public bodies, (17) applicability of time limitations to certain claims based on liens against property and liability of grantor or trustee, (18) petition to close case, (19) dismissal for want of prosecution, and (20) consolidation of proceedings.

*Sections 1 and 17 of the Act apply to claims against trust estates that arise on or after January 1, 2002.*

For more information about trusts, see ADMINISTERING TRUSTS IN OREGON §8.43 (Oregon 1995 and Supp 2000). For a more thorough discussion of SB 120, see, 2001 *Oregon Legislation Highlights* (Oregon CLE 2001). This handbook can be obtained from the Oregon State Bar Order Desk (503-684-7413) for \$65 (Product Code #270.24).

## WORKERS' COMPENSATION

### 2001 Oregon Laws Ch 865 (SB 485)

Extensive changes in the workers' compensation laws were made in SB 485. The Act clarified the procedure under which an injured worker, in certain circumstances, can file a civil negligence action for a work-related injury. It also makes substantive and procedural changes involving compensability of preexisting, new, and omitted conditions, payment of temporary and permanent disability benefits, claims processing, the Workers' Compensation Board own-motion jurisdiction, payment of medical expenses, and employer liability law. Topics that are covered in the Act include (1) time to accept or deny claims, (2) payment of medical bills before acceptance or denial of a claim, (3) definition of *worker* for temporary disability and permanent total disability, (4) increase in temporary disability benefits, (5) supplemental temporary disability benefits for injured workers with multiple jobs, (6) refusal of modified employment without effect on temporary total disability benefits, (7) increase in permanent partial disability benefits, (8) definition and compensability of preexisting conditions, (9) burden of proof on compensability of combined conditions, (10) compensability of occupational disease claims, (11) worker-arranged deposition at reconsideration, (12) postdenial worker-compelled independent medical evaluation, (13) revised requirements for own-motion cases including new/omitted conditions, (14) procedural requirements for pursuit of civil

negligence action for noncompensable work-related injury, and (15) amendments to the Employer Liability Act.

Discussion of this Senate Bill is beyond the scope of this *In Brief*. We recommend the following resources:

- 2001 *Oregon Legislation Highlights* (OSB CLE 2001) available from the Oregon State Bar Order Desk (503-684-7413) for \$65 (Product Code #270.24).
- Oregon Law Institute Northwestern School of Law of Lewis & Clark College, *Oregon Workers' Compensation Law 2001*, CLE presented October 11, 2001. CLE Materials (\$49), with audiotape (\$149), or with videotape (\$295) available through OLI (503-243-3326).

*SB 485 took effect July 30, 2001.*

## THANK YOU!

This Legislative Alert issue of *In Brief* was prepared with the assistance of:

Dady K. Blake  
C. Lane Borg  
Richard A. Canaday  
Mark B. Comstock  
Tammy M. Dentinger  
Jonathan A. Levy  
Richard H. Mills  
Christopher D. Moore  
Marilyn K. Odell  
Andrea B. Shartel  
Ruth Simonis  
Thomas W. Stilley  
Brent G. Summers  
Anne M. Talcott  
Bernard F. Vail

The Professional Liability Fund thanks these authors, as well as Susan Evans Grabe, Stacey A. Malagamba, Solange Ledee, and Mary Oberst of the Oregon State Bar, for their assistance in preparing this issue.

## IN BRIEF

Published by the  
Professional Liability Fund  
Ira R. Zarov, CEO

Editor: Barbara S. Fishleder  
Director of Loss Prevention  
503-639-6911 or 1-800-452-1639

### **Professional Liability Fund Board of Directors and Officers**

Gary R. Ackley – *Cottage Grove*  
(*Chairperson*)  
Karen C. Allan – *Medford*  
(*Vice Chairperson*)  
Mary Alice Bjork – *Salem*  
(*Public Member – Secretary-Treas.*)  
William H. Martin – *Eugene*  
Albert J. Bannon – *Portland*  
Robert W. Nunn – *Portland*  
Bob Thuemmel – *Portland*  
Stephen M. Bloom – *Pendleton*  
Ron J. Palmer – *Cottage Grove*  
(*Public Member*)

*Printed on recycled paper with soy ink*  
*Desktop Publishing by Karen Neese and SKG*  
*Marketing Associates*