TESTIMONY OF CAROL BERNICK
BEFORE THE SENATE COMMITTEE ON JUDICIARY
IN OPPOSITION TO HOUSE BILL 4143A

February 20, 2014

Good Morning, Mr. Chair and Members of the Committee. For the record my name is Carol Bernick. I am the Partner-in-Charge of the Portland office of Davis Wright Tremaine. However, this morning, I am testifying in opposition to House Bill 4143A, on my own behalf, not on behalf of my firm or any client of my firm. I realize that many of the witnesses who you have and will hear from will discuss in detail, specific problems with the language in this bill, its overall fairness, and its constitutionality. I am not here to talk about those issues. Nor am I here to oppose funding for legal aid. I have been a long-time "champion" level contributor to The Campaign for Equal Justice and my law firm, Davis Wright Tremaine, is frequently among its top contributors. Rather, I am testifying in opposition to House Bill 4143A because of the severe practical impacts it will have on the very persons who class action lawsuits are intended to benefit.

I have litigated class action cases, primarily those involving those involving alleged wage and hour violations, for 15 years. During the course of my practice, I have represented large and medium sized employers and settled over a dozen class action lawsuits. These settlements always require significant efforts to be made to

locate the class members, typically using a third-party class administrator and various search tools.

Wage class actions – like many other lawsuits – are frequently settled based on a cost of litigation approach. But unlike consumer class actions, employment claims involve ongoing personal relationships. Employers always consider the impact of protracted litigation on their employee-employer relationships.

Therefore, employers usually have an incentive to structure a settlement with class action litigants if doing so makes financial sense.

A major consideration that defendants in class actions regularly take into account when discussing settlement is the recognition that no matter what efforts are employed, not all class members are going to be found and even those who are found may not participate in the class action. Many class members do not submit claim forms because they do not agree with the underlying allegations. Under the current bill, there is no mechanism for a class member to reject a payment on principled reasons. Current ORCP 32 allows the class member to simply not respond.

Regardless of the reason for not submitting claim forms, employers are able to put more money into the pockets of those who genuinely believe they have been aggrieved because the total settlement pot typically takes into consideration that not all class members will file claims. Here is an example. A defendant employer

may be willing to devote $1.5 million dollars to the settlement of a class action. But the employer might agree to a $2 million settlement fund, knowing there will be some percentage of people who do not submit a claim or cannot be found and that the remainder in the fund which is unclaimed will revert back to the employer. The $2 million settlement fund is divided among class members and therefore results in larger settlements for those class members who do submit claims. A defendant in this type of case does nothing to prevent or discourage class members to submit claims. (If it ever did, there are strong mechanisms that the courts always employ including striking an answer, striking opt-outs, and the like.)

House Bill 4143A eliminates the feature that permits unclaimed portions of a settlement fund to revert back to the defendant who posted the fund. It therefore deprives defendants of the option to create a settlement fund in excess of what they are actually willing to expend to settle the case and, as a consequence, provides less money to the claimants who feel they have been wronged and who submit claim forms.

Based on my years of experience, I respectfully submit that this will be a practical consequence of the passage of this bill. Rather than encourage settlements, this bill will discourage them or will result in settlement amounts lower than would otherwise have been possible. It will also result in litigation of

these cases to final judgment, more often resulting in defense verdicts and zero recovery to the class, whereas today the cases would have been settled.

I do not believe this bill is well thought through and feel it hurts the very people that it is intended to help.

Mr. Chair and Members, thank you for your time. I am available to answer any questions you may have.