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STATE OF OREGON  
LEGISLATIVE COUNSEL COMMITTEE

February 17, 2014

Representative Tobias Read  
900 Court Street NE H286  
Salem OR 97301

Re: A-engrossed HB 4143

Dear Representative Read:

You asked us to review an email submitted by Harrang Long Gary Rudnick P.C. and a floor letter signed by various lobbyists regarding House Bill 4143-A. The materials question the constitutionality of the measure. We disagree and conclude that the measure is constitutional.

HB 4143-A authorizes the judge in a class action to approve a process for payment of damages. If damages remain unclaimed after a time specified by the court, or if it is impracticable to pay all or part of the damages to class members, the court is directed to order the remaining damages to be deposited in an account for the purpose of funding legal aid services. Many class action suits conclude with unclaimed funds because class members cannot be identified or located, or sometimes because the individual recovery of class members is so small that the cost of distributing the damages exceeds the value of the claim. Many states have statutes allowing for these residual damages to be dedicated to charitable causes.

The email and floor letter claim that the bill "allows a judge to eliminate the fundamental requirement . . . that all plaintiffs prove they are actually owed money before the defendant is required to pay them." That statement is incorrect. The bill does delete some provisions requiring the judge in a class action to request claim forms from members of the class who wish to receive individual monetary recovery. Nevertheless, although the judge in a class action would no longer be required to use claim forms under the bill, any process for payment of damages approved by the judge would still have to meet all constitutional requirements and provide adequate due process to all parties. Class members would have to be properly notified and the plaintiff class, through its representatives, would have to prove its damages. There may be further procedures for individual class members to prove their damages before recovering individual damages. See, e.g. *State of California v. Levi Strauss & Co.*, 41 Cal. 3d 460 (1986). Thus, the bill is not unconstitutional in this respect.

Notably, under current law (ORCP 32 F(2)(v)), the parties and the court could decide to use an alternate method for assessing damages. An alternate method chosen under current law would also have to comply with constitutional requirements and provide for due process.

The email and floor letter also assert that HB 4143-A is unconstitutional because it allows the judge to use charitable distributions when it is impracticable to pay damages to class members. Use of charitable distributions could occur when class members cannot be identified, or when the individual recovery is so small that the cost of distribution exceeds the value of the damages.

FROM THE DESK OF:  
Senator Diane Rosenbaum

*Diane Rosenbaum*

Again, HB 4143-A does not permit the judge in a class action to fashion a process for paying damages that violates due process or any other constitutional requirement. The court would have to provide ample notice to class members on any process for payment of damages. ORCP 32 E and 32 F (1) give the court authority to provide notice to the class on various topics, including "the proposed extent of the judgment" and "the opportunity of members to signify whether they consider the representation fair and adequate." Thus, the court is able and encouraged to provide adequate notice and opportunity for class members and their representatives to comment before approving a process for payment of damages. See *In re Vitamin Cases*, 107 Cal. App. 4th 820 (2003) (charitable distribution of entire settlement fund appropriate where "each class member cannot be compensated exactly for the damage he or she suffered.").

Note also that federal courts use charitable distributions regularly "in the settlement of class actions where the proof of individual claims would be burdensome or distribution of damages costly." *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990). HB 4143-A's authorization of the use of charitable distributions in circumstances that make payment of damages to class members impracticable is not unconstitutional.

Finally, the email and floor letter assert that HB 4143-A violates a defendant's due process rights because the defendant might have to pay the same damages twice, or it violates the plaintiff's due process rights because the plaintiff is not allowed to bring an individual action after the class action is resolved. As is the case under current law, a judgment in a class action under HB 4143-A would have to identify the class that is bound by the judgment. The judgment would also identify persons who requested exclusion from the class and are not barred by the judgment. Members of the class who are covered by the judgment would be precluded from bringing individual claims, while persons who are not members of the class would be able to bring individual claims. The bill does not violate due process rights in this respect.

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Very truly yours,

DEXTER A. JOHNSON  
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By  
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