



February 2, 2015

TO: CHAIR BARKER  
MEMBERS OF THE HOUSE JUDICIARY COMMITTEE

FROM: BRAD DANIELS, STOEL RIVES LLP

RE: WRITTEN TESTIMONY REGARDING HB 2700

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## I. INTRODUCTION

I am a partner at Stoel Rives who handles class action litigation. I am one of the trial attorneys representing BP West Coast Products in a major class action in Portland that has been discussed in connection with this legislation, and I also have been involved in many class actions in Oregon state courts.

Legal Aid plays a critical role in providing access to justice for citizens across the state, and it is important to provide reliable financial support for the programs that it oversees. HB 2700, however, presents a fundamentally flawed means to pursue that goal. The proponents of the bill cannot predict how many cases it would affect, what the effect would be, or when (if ever) the bill will result in a tangible impact to Legal Aid. In fact, your Legislative Revenue Office reviewed nearly identical legislation last February and found it was unable to determine how much revenue would be generated for Legal Aid.

Even if the bill impacts one or more pending cases, and that itself is uncertain, in the best-case scenario it would take several years for Legal Aid to receive the windfall proponents promise from this bill. It may never materialize, depending upon the outcome of the appeal from the case this bill specifically targets.

In addition to raising false hope for Legal Aid, I want to highlight three other major flaws contained within HB 2700: (1) the procedural vacuum for identifying victims or damages that no state currently has; (2) the creation of an “unclaimed funds” category that will make it more likely defendants will pay damages never owed and less likely that actual victims will receive what is legitimately theirs; and (3) how this bill threatens all Oregonians’ constitutional rights.

## II. ANALYSIS

### A. HB 2700 Would Make Oregon an Outlier

Contrary to what proponents say, HB 2700 would not bring Oregon into line with dozens of other states. By eliminating the procedural framework for determining class action

membership and damages, and by expressly authorizing the court to dispense with the claims process entirely, Oregon would do what no other state has ever done.

Indeed, the reason Oregon has for decades provided a set of clear and consistent rules governing class membership and class damages is because that is what due process requires. Parties must be able to depend on a consistent set of rules that will be available to them from case to case and from court to court. That is the reason rules of civil procedure exist.

Accordingly, even if the Legislature were to deem it appropriate to change Oregon class action law by removing the procedural protections that are currently in place, it must replace those provisions with some other framework by which to guide the courts. The most sensible means to do so (which is a proposed amendment to HB 2700) is to amend the remaining provisions of Oregon's class action procedures to conform to the existing federal rules and the rules of many other states, thereby bringing Oregon in line with most other states in the country.

## **B. HB 2700 Dismantles Decades of Well-Established Procedural Rules Governing Class Actions in Oregon**

Support for HB 2700 is based on the notion that the bill merely distributes “unclaimed damages” to Legal Aid, because it is better to use “unclaimed damages” to benefit the public than to return them to the defendant. The argument is often made by drawing an analogy to criminal law: If a thief were apprehended with twenty stolen televisions, but the authorities could find the owners of only ten of them, would the remaining ten be given back to the thief?

The problem with proponents' reasoning can be stated simply: that is not the way Oregon's class action rule works now. Oregon's class action rule has been uniquely crafted to avoid the problem of “unclaimed damages,” by ensuring that a court knows exactly who is a member of the class, where they reside, and how much the defendant must pay to each class member. Because there are generally no “unclaimed damages” in Oregon class actions, the only way for a *cy pres* bill to create any substantial funding is to dismantle that procedural framework, thereby creating a pool of money to divert. That is what this bill does.

To understand how this proposed change in the law works, it is necessary to review briefly how class actions currently proceed in the Oregon courts. First, it is important to understand that, unlike in virtually every other state and under the federal rule, an Oregon court can allow a case to proceed as a class action even if there are numerous issues that must be proven individually by each class member. After a plaintiff has shown that a lawsuit should proceed as a class action, the court will adjudicate those issues of fact and law that are common to the class as a whole. From that point, the case follows three steps: determining precisely who will participate as a member of the class and the amount in damages they claim; adjudicating individual issues, in order to determine defendant's liability for the damages each member claims; and entering judgment. Those three steps proceed as follows:

- **First**, if defendant's records already make clear who has a rightful claim, where they live, and what each is owed, the court notifies those individuals of their claims and their right to “opt out” of the class recovery and instead pursue the claim on their own. Those who do not opt out are paid. In all other cases, the court notifies all those who *may* be entitled

to monetary recovery that, to participate in the class, they must “opt in” to the class by filing a form stating their claim for damages, or else pursue a claim on their own. Regardless of whether it’s an “opt out” or “opt in” case, this step is the way the court learns who will participate as a member of the class and how much in damages each member claims.

- **Second**, the court adjudicates issues pertaining to *individual* members, such as whether certain members’ claims are time-barred under the statute of limitations. Having done so, the court reaches an overall damages assessment by totaling the amount due to each class member. By rule, the court cannot assess *more* than that total amount (on the theory, for example, that defendant harmed more people than actually participated in the class), because those who aren’t class participants still retain the right to pursue their claims individually. The court cannot take away that right by awarding those individual’s damages to Legal Aid or another charity. But that is what this legislation would do.
- **Third**, the court enters judgment. In all cases awarding money, the judgment must state the class members’ names and their amounts recovered. This is essential in order to ensure that, in any later case pursued by a plaintiff suing individually, the court can determine whether the plaintiff already recovered for that claim as a member of the class action.

By following this procedure, the court in an Oregon class action will know exactly who is a member of the class, where they reside, and how much in damages each member claims; it will know exactly how much in damages to assess against defendant, and to whom those damages are owed; and it can tell defendant exactly whom to pay, and how much to pay each class member. And those who do not receive money as a member of the class keep their right to sue the defendant.

That is why merely adding a *cy pres* provision to Oregon’s class action rules cannot alone accomplish the goal that this bill’s proponents seek -- because there are typically no “unclaimed damages” to divert. For such a bill to create any substantial funding, it must also change the underlying procedural framework to *create* unclaimed damages. HB 2700 does exactly that, by deleting the key rules that establish and govern the three-step process outlined above.

- **As to the first step**, HB 2700 deletes the provisions at ORCP 32 F(2) that establish the “opt-out” and “opt in” process, leaving nothing in their place. As a result, there will be no established process by which the courts learn who is a member of the class and how much in damages each member claims.
- **As to the second step**, given the absence of the above procedures, the court and the parties are left with no process for litigating individual issues. HB 2700 then deletes the language at ORCP 32 F(2)(iv) limiting damages to the total claimed by class members, and deletes the provisions at ORCP 32 F(3) and (4) requiring that courts protect the rights of excluded members to retain their individual claims and prohibiting courts from awarding their claims to the class instead. Without facts to adjudicate individual issues, and without procedural rules to govern the calculation of damages, courts can do little else but “pick a number” representing estimated damages to the class as a whole.

- **And as to the third step,** HB 2700 deletes the language at ORCP 32 L requiring that money judgments state class members’ names and their amounts recovered. Rather, courts would enter a money judgment that does no more than state an estimated amount in damages the court believes is owed to the class – leaving unresolved the issues of whom defendant must pay and in what amounts. HB 2700 also authorizes the court not to attempt to get that money into the hands of class members if it is “not practicable” to do so.

The practical outcome of those changes is clear. By taking away most of the procedural framework that guides Oregon courts in assessing class action damages – and by not enacting any other equivalent framework in its place – the bill makes it simultaneously *more* likely that an Oregon court will impose damages in excess of what defendant actually owes to class members, and *less* likely that rightful claimants will actually receive the amounts to which they are entitled.

In short, this legislation does not simply make use of otherwise unclaimed funds, as proponents claim. Indeed, it does not solve any existing problem in Oregon class action law. Instead, it *creates* a problem of “unclaimed funds” that Oregon law had already solved through four decades of iterative work by the Council on Court Procedures. There is no sound reason to make these changes to the class action procedure, and the proponents of this legislation have never stated one. From the perspective of all potential parties to a class action—class members and defendants alike—the legislation is both harmful and unwarranted.

**C. The Procedural Changes Proposed in HB 2700 Threaten Significant Constitutional Harms to Both Plaintiffs and Defendants Alike.**

Many of the bill’s specific procedural changes risk significant violations of the constitutional rights to litigants on both sides of the table. For instance:

- By allowing the court to divert damages from those who *are* members of the class to nonparties like Legal Aid (on the basis that payment to the injured class member is not “practicable”), and by precluding members who have *not* been made whole from bringing an individual action on their own, the bill risks depriving those members of their claim and a remedy for their harm, in violation of the takings and remedies clauses of the state and federal constitutions.
- By deleting those rules that ensure that individual members and their claims are identified, HB 2700 allows a court to impose a “bulk” award of damages that no member has actually claimed or proved, and against which defendant had no opportunity to defend, in violation of the right to due process.
- By providing no clear indication of whose claims are included in the judgment, and by deleting the rules governing which members’ claims will be dismissed from the action, HB 2700 creates the risk that a plaintiff who was deemed part of the class will also be able to assert an individual cause of action on his or her own. Such “double recovery” violates the defendant’s constitutional right not to be subjected to multiple liabilities for the same harm.

In sum, this bill will not provide a reliable source of funding for Legal Aid as some hope, and it will leave Oregon with class action rules that are not only unreliable, but detrimental for victims and defendants alike.