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February 6, 2015

Fawn Barrie, Executive Director  
Oregon Liability Reform Coalition  
1249 Commercial St SE  
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Re: Effect of HB 2700 on Claims against Governments

Dear Ms. Barrie:

This letter responds to your request for our opinion whether the adoption of 2015 HB 2700 would likely increase the amount the State of Oregon and other Oregon governments would pay in class actions. The answer is yes.

We are not in this letter addressing constitutional or other concerns with the changes the bill makes; our discussion is limited to how the changes, if valid, would change class action procedure.

Today, ORCP 32 F provides a process that allows a judge to decide how much compensation is due to an individual member of a class. That process includes a provision for class members to submit information to show that the class members were injured and by how much.

HB 2700 eliminates the process without requiring a replacement process. Instead, HB 2700 adds a new paragraph—O—that is unique in class action law. As written, new paragraph O would permit a court to forego a claims process and instead direct damages to Legal Aid Services (and another entity of the judge's choice) if it is "not practicable" to award damages to individual class members. To our knowledge, no other state expressly provides for this procedure. If a court follows this procedure, the class could recover damages without proof of who the members of the class are or of harm to any individual member--which would necessarily mean greater exposure to liability than under current law.

This expanded liability is most likely to adversely affect governments. Governments typically provide goods and services to the public at large. Unlike with a business transaction, there is frequently no record of the use of a government good or service.

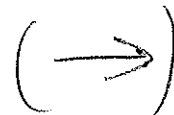
The elimination of the process for deciding the amount of compensation for individual members of a class means that claimants without documented proof of harm are more likely to be able to recover damages against the State of Oregon and other Oregon governments than they are against private businesses.

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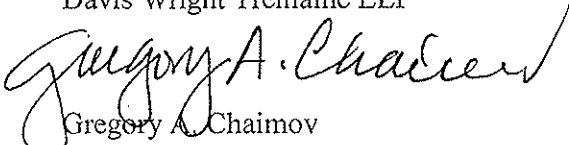
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The recently filed case of *Curzi v. Oregon State Lottery* is an example of the problem HB 2700 could present for governments. In that case, an individual seeks to represent a class of all individuals who played video poker. The individual claims that the Oregon State Lottery “rigged” video poker games so that players were less likely to win and seeks at least \$134 million from the state for the individuals who played video poker. There is, however, no way to determine who played video poker, who played a certain amount, or who won and who lost. Under these circumstances, current law would likely result in a court’s deciding not to award any damages to class members.

HB 2700 eliminates the requirement for class members to submit proof of their damages. Instead, using the *Curzi* case as an example, a would appear to be able to base an award of damages on surveys or statistical estimates of players’ poker habits generally, and on the opinions of experts on which individuals are more likely to play video poker and for how long. Courts’ reliance on this kind of opinion or statistical information—rather than on proof of actual injury to a class member—is likely to increase the amounts governments will pay in class actions.

Very truly yours,

Davis Wright Tremaine LLP



Gregory A. Chaimov

GAC/jan