

TO: House Committee On Judiciary
FROM: Mae Lee Browning, Oregon Criminal Defense Lawyers Association
DATE: February 1, 2022
RE: Support for HB 4120

Chair Bynum, Vice Chairs Noble and Power, and Members of the Committee:

My name is Mae Lee Browning and I am testifying on behalf of OCDLA. The Oregon Criminal Defense Lawyers Association is a nonprofit professional association for experts, private investigators, and attorneys who represent Oregon’s children and parents in juvenile dependency proceedings, youth in juvenile delinquency proceedings, adults in criminal proceedings at the trial and appellate level, as well as civil commitment proceedings throughout the state of Oregon.

OCDLA has concerns about Section 1 of the bill on restitution procedure. **We respectfully request Section 1 be removed from HB 4075 for further discussion and for this Committee to pass Sections 6 and 7, which elevates restitution payments to crime victims from Level 2 to Level 1 in the priority of payments. By passing Sections 6 and 7 of HB 4075, this Committee is sending a bill to the floor that would increase crime victims’ access to restitution.** “Streamlining” the restitution process makes the District Attorney’s job easier; it does not get more money into the hands of victims or get them money faster.

OCDLA asks that Section 1 be removed because the Oregon Supreme Court will be ruling directly on the issue of reasonableness of bills currently section (1)(c) of HB 4075. A ruling is expected in *State v. Cruse* between now and April.¹ A ruling from the Supreme Court, whichever way it rules, will provide clarity and will be precisely worded, taking into account the body of caselaw that preceded *Cruse*. **Changing the wording of the statute before the Supreme Court issues its ruling may lead to further litigation on the reasonableness of bills.**

Our concerns about Section 1 of the bill are as follows:

- The “presumed reasonableness” of bills shifts the burden to the defendant, thus depriving the defendant of her due process rights.²

¹ The Oregon Supreme Court heard oral arguments on September 23, 2021.

² To the extent that this court must weigh costs to the state or civil plaintiffs against the permanent deprivation of a criminal defendant’s property or liberty, the choice seems easy—hold the state to its burden. *See Dangerfield v. State*, 376 SC 176, 181, 656 SE2d 352 (2008) (holding that the imposition of restitution “deprive[s] [the defendant] of the conditional liberty dependent on her compliance” with a restitution payment plan). As the Supreme Court of Kentucky has held, when the state seeks restitution, due process requires an adversarial hearing where “the burden shall be upon the Commonwealth to establish the validity of the claim for restitution and the amount of restitution by a preponderance of the evidence, and findings with regard to the imposition of restitution must be supported by substantial evidence[.]” *Jones v. Commonwealth*, 382 SW3d 22, 32 (Ky 2011); *see also Commonwealth v. Atanasio*, 997 A2d 1181, 1184 (Pa Super Ct 2010) (reversing a restitution award when the sentencing court “impermissibly shifted the Commonwealth’s burden of proving an entitlement to restitution” onto the defendant, depriving him of due process).

- Section 1(b)(A): **This language also appears to eliminate any outer limit on when the hearing can be held.** The language in HB 4075 replaces the timeframe for the hearing within a motion deadline for the state and fails to create a new timeframe for the hearing. **This means that a defendant could enter a plea, and then 90 days later, the state makes a restitution request that the defendant did not consider when deciding whether to take the plea.**
- Section (1)(b)(B) shifts the burden from the state to the defense. Currently, the state needs to present the request for restitution and demonstrate the reasonableness of that amount and the defendant can request a hearing. Now, this subsection requires the defense to file a motion which states "the nature of the objection." **There is no guidance for the court regarding what constitutes an appropriate "nature of objection." Requiring the defense to state the nature of their objection also creates a practical problem for defense attorneys.** When restitution requests come after cases close, many clients do not remain in good contact with their attorney. In these circumstances, a defense attorney would have reject to a restitution request because they are unable to reach their client to discuss whether or not to contest the amount requested from the state.
- Presuming bills are reasonable runs counter to 100 years of caselaw where the Oregon Supreme Court has held that a medical bill alone is not enough to prove reasonableness.³
- Presuming the reasonableness of estimates is extremely problematic because estimates are especially unreliable and are often inflated by the provider for a number of reasons.

We also have concerns with Section 3 of the bill. Wealthy insurance companies are allowed to use public resources to collect judgments from poor criminal defendants. By redirecting 50% of their awards to the Criminal Injuries Compensation Account creates a perverse incentive for the state to press for restitution awards to insurance companies in the name of funding the Compensation Account. This is an extremely poor way to fund the Account, since, as a practical matter, many defendants will never be able to afford to pay their restitution.⁴ It's an unstable revenue stream that seems unlikely to do much to actually compensate victims.

³ Medical bills are the *least* likely to be reasonable just on their face because they are often overcharged and then discounted by insurance. In *Cruse*, the state argued as much and cited to these cases in their brief: *Temple University Hosp., Inc. v. Healthcare Management Alternatives, Inc.*, 832 A 2d 501, 508 (Pa Super Ct 2003) (where a hospital "rarely recovers it published rates" those rates "cannot be considered the value of the benefit conferred because that is not what people in the community ordinarily pay for medical services"); George A. Nation III, *Determining the Fair and Reasonable Value of Medical Services: The Affordable Care Act, Government Insurers, Private Insurers and Uninsured Patients*, 65 *Baylor L Rev* 425, 429–30 (2013) (noting that list prices on medical bills "are grossly inflated because they are set to be discounted rather than paid," and that those prices "certainly do not represent the usual price actually paid for the listed goods and services").

⁴ From the February 2022 Legislative Fiscal Office report Liquidated and Delinquent Accounts Receivable, OJD's memo from page 56 of the report states: "Much of our delinquent debt is owed by people who do not have the ability to pay their court ordered obligations. This population might currently be incarcerated or may have been incarcerated multiple times. They often have multiple outstanding money judgments with large amounts owed (restitution). This population is also less likely to receive gainful employment once they are released."
<https://www.oregonlegislature.gov/lfo/Documents/2021%20Accts%20Rec%20Report.pdf>



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