

HOUSE MINORITY REPORT AMENDMENTS TO HOUSE BILL 2700

By Nonconcurring Members of COMMITTEE ON JUDICIARY

February 6

1 On page 1 of the printed bill, line 2, after “provisions;” delete the rest of the line and delete line
2 3 and insert “and amending ORCP 32 B, 32 C, 32 E and 32 F.”.

3 Delete lines 5 through 29 and delete pages 2 and 3 and insert:

4 “**SECTION 1.** ORCP 32 B is amended to read:

5 “B Class action maintainable. An action may be maintained as a class action if the prerequisites
6 of section A of this rule are satisfied[,] and [*in addition, the court finds that a class action is superior*
7 *to other available methods for the fair and efficient adjudication of the controversy. The matters perti-*
8 *nent to this finding include*]:

9 “B(1) The [*extent to which the*] prosecution of separate actions by or against individual members
10 of the class [*creates*] **would create** a risk of:

11 “B(1)(a) Inconsistent or varying adjudications with respect to members of the class which would
12 establish incompatible standards of conduct for the party opposing the class; or

13 “B(1)(b) Adjudications with respect to members of the class which would as a practical matter
14 be dispositive of the interests of the other members not parties to the adjudications or substantially
15 impair or impede their ability to protect their interests;

16 “B(2) The [*extent to which the relief sought would take the form of*] **party opposing the class**
17 **has acted or refused to act on grounds that apply generally to the class, so that** injunctive
18 relief or corresponding declaratory relief **is appropriate** with respect to the class as a whole; **or**

19 “B(3) The [*extent to which*] **court finds that the** questions of law or fact common to the mem-
20 bers of the class predominate over any questions affecting only individual members[;] **and that a**
21 **class action is superior to other available methods for fairly and efficiently adjudicating the**
22 **controversy. The matters pertinent to these findings include:**

23 “[B(4)] **B(3)(a)** The interest of members of the class in individually controlling the prosecution
24 or defense of separate actions;

25 “[B(5)] **B(3)(b)** The extent and nature of any litigation concerning the controversy already
26 commenced by or against members of the class;

27 “[B(6)] **B(3)(c)** The desirability or undesirability of concentrating the litigation of the claims in
28 the particular forum;

29 “[B(7)] **B(3)(d)** The difficulties likely to be encountered in the management of a class action that
30 will be eliminated or significantly reduced if the controversy is adjudicated by other available
31 means; and

32 “[B(8)] **B(3)(e)** Whether or not the claims of individual class members are insufficient in the
33 amounts or interests involved, in view of the complexities of the issues and the expenses of the lit-
34 igation, to afford significant relief to the members of the class.

1 “**SECTION 2.** ORCP 32 C is amended to read:

2 “C Determination by order whether class action to be maintained.

3 “C(1) As soon as practicable after the commencement of an action brought as a class action, the
4 court shall determine by order whether and with respect to what claims or issues *[it]* **the action** is
5 to be so maintained and shall find the facts specially and state separately its conclusions thereon.
6 **If the court orders the action to be maintained as a class action, the order must define the**
7 **class.** An order under this section may be conditional, and may be altered or amended before the
8 decision on the merits.

9 “C(2) Where a party has relied upon a statute or law which another party seeks to have de-
10 clared invalid, or where a party has in good faith relied upon any legislative, judicial, or adminis-
11 trative interpretation or regulation which would necessarily have to be voided or held inapplicable
12 if another party is to prevail in the class action, the court may postpone a determination under
13 subsection (1) of this section until the court has made a determination as to the validity or appli-
14 cability of the statute, law, interpretation, or regulation.

15 “**SECTION 3.** ORCP 32 E is amended to read:

16 “E Court authority over conduct of class actions. In the conduct of actions to which this rule
17 applies, the court may make appropriate orders which may be altered or amended as may be desir-
18 able:

19 “E(1) Determining the course of proceedings or prescribing measures to prevent undue repe-
20 tition or complication in the presentation of evidence or argument, including precertification deter-
21 mination of a motion made by any party pursuant to Rules 21 or 47 if the court concludes that such
22 determination will promote the fair and efficient adjudication of the controversy and will not cause
23 undue delay;

24 “E(2) Requiring, for the protection of class members or otherwise for the fair conduct of the
25 action, that notice be given in such manner as the court may direct to *[some or all]* class members
26 of any step in the action, of the proposed extent of the judgment; of the opportunity of members to
27 signify whether they consider the representation fair and adequate, to intervene and present claims
28 or defenses or otherwise to come into the action, or to be excluded from the class;

29 “E(3) Imposing conditions on the representative parties, class members, or intervenors;

30 “E(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to repre-
31 sentation of absent persons, and that the action proceed accordingly; and

32 “E(5) Dealing with similar procedural matters.

33 “**SECTION 4.** ORCP 32 F is amended to read:

34 “F Notice and exclusion.

35 “F(1) When ordering that an action be maintained as a class action under this rule, the court
36 shall direct that notice be given *[to some or all members of the class]* under subsection E(2) of this
37 rule **to all members of the class who can be identified through reasonable effort**, shall deter-
38 mine when and how this notice should be given and shall determine whether, when, how, and under
39 what conditions putative members may elect to be excluded from the class. The matters pertinent
40 to these determinations ordinarily include: (a) the nature of the controversy and the relief sought;
41 (b) the extent and nature of any member’s injury or liability; (c) the interest of the party opposing
42 the class in securing a final resolution of the matters in controversy; (d) the inefficiency or
43 impracticality of separately maintained actions to resolve the controversy; (e) the cost of notifying
44 the members of the class; and (f) the possible prejudice to members to whom notice is not directed.
45 **If a class member requests exclusion from the class within the time specified by the court,**

1 **that person’s claim for monetary recovery shall be dismissed without prejudice to the right**
2 **to maintain an individual, but not a class, action for such claim.** When appropriate, exclusion
3 may be conditioned on a prohibition against institution or maintenance of a separate action on some
4 or all of the matters in controversy in the class action or a prohibition against use in a separately
5 maintained action of any judgment rendered in favor of the class from which exclusion is sought.

6 “[F(2)(i) *Prior to the entry of a judgment against a defendant the court shall request members of*
7 *the class who may be entitled to individual monetary recovery to submit a statement in a form pre-*
8 *scribed by the court requesting affirmative relief which may also, where appropriate, require informa-*
9 *tion regarding the nature of the loss, injury, claim, transactional relationship, or damage.*.]

10 “[F(2)(ii) *The form of the statement shall be designed to meet the ends of justice. In determining*
11 *the language and form of the documents to be sent class members under subsection F(2)(i) or (iii), the*
12 *court shall consider at least: (a) the nature of the acts of the defendant; (b) the amount of knowledge*
13 *a class member would have about the extent of such member’s damages; (c) the nature of the class in-*
14 *cluding the probable degree of sophistication of its members and any special needs created by class*
15 *members’ disabilities; (d) whether it is appropriate for the statement to be prepared in alternative for-*
16 *mats, such as large type, Braille, or in languages in addition to English; and (e) the availability of*
17 *relevant information from sources other than the individual class members.*.]

18 “[F(2)(iii) *When the names and addresses of the class members can reasonably be determined from*
19 *the defendant’s business records and individual monetary recoveries are capable of calculation without*
20 *the need for individualized adjudications, the court, instead of requiring the statement referred to in*
21 *subsection F(2)(i), may direct the defendant to send each class member notice of (a) the amount of the*
22 *monetary recovery that has been calculated for that person and (b) that person’s right to request ex-*
23 *clusion from the class. All class members who do not request exclusion within the time specified by the*
24 *court shall be deemed to have requested affirmative relief in the calculated amount.*.]

25 “[F(2)(iv) *The amount of damages assessed against the defendant shall not exceed the total amount*
26 *of damages determined to be allowable by the court for all individual class members who have filed the*
27 *statement required by the court under subsection F(2)(i) or who are deemed to have requested affirma-*
28 *tive relief under subsection F(2)(iii), assessable court costs, and an award of attorney fees, if any, as*
29 *determined by the court.*.]

30 “[F(2)(v) *If the parties agree and the court approves, any of the procedures set forth in subsection*
31 *F(2)(i) to subsection F(2)(iv) may be waived in a particular case.*.]

32 “[F(3) *If a class member fails to file the statement required by the court under subsection F(2)(i)*
33 *or if a class member requests exclusion under subsection F(2)(iii) within the time specified by the court,*
34 *that person’s claim for monetary recovery shall be dismissed without prejudice to the right to maintain*
35 *an individual, but not a class, action for such claim.*.]

36 “[F(4) *Nothing in subsections F(2) or F(3) is intended to allow the court to award any monetary*
37 *recovery that is not claimed either because a class member failed to file the statement required by the*
38 *court under subsection F(2)(i), or because a class member requested exclusion under subsection F(2)(iii)*
39 *within the time specified by the court.*.]

40 “[F(5)] **F(2)** Plaintiffs shall bear costs of any notice ordered prior to a determination of liability.
41 The court may, however, order that defendant bear all or a specified part of the costs of any notice
42 included with a regular mailing by defendant to its current customers or employees. The court may
43 hold a hearing to determine how the costs of such notice shall be apportioned.

44 “[F(6)] **F(3)** No duty of compliance with due process notice requirements is imposed on a de-
45 fendant by reason of the defendant including notice with a regular mailing by the defendant to

1 current customers or employees of the defendant under this section.

2 “[F(7)] F(4) As used in this section, ‘customer’ includes a person, including but not limited to
3 a student, who has purchased services or goods from a defendant.

4 **“SECTION 5. ORCP 32 is amended by adding a new section O to read:**

5 **“O Payment of damages. O(1) As used in this section, ‘residual funds’ means funds that
6 remain after the payment of all approved class member claims, attorney fees and costs.**

7 **“O(2) Any order entering a judgment or approving a settlement of a class action certified
8 under this rule must provide for distribution of residual funds to the Oregon State Bar for
9 the funding of legal services provided through the Legal Services Program established under
10 ORS 9.572.**

11 **“O(3) This rule does not prohibit the parties to a class action from suggesting, or the
12 trial court from approving, a settlement that does not create residual funds.**

13 **“SECTION 6. All amounts distributed to the Oregon State Bar under section 5 of this
14 2015 Act are continuously appropriated to the Oregon State Bar, and may be used only for
15 the funding of legal services provided through the Legal Services Program established under
16 ORS 9.572.**

17 **“SECTION 7. Section 5 of this 2015 Act and the amendments to ORCP 32 B, 32 C, 32 E
18 and 32 F by sections 1 to 4 of this 2015 Act apply only to class actions commenced on or after
19 the effective date of this 2015 Act.”.**

20 /s/ Andy Olson
21 Representative

22 /s/ Bill Post
23 Representative
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