

Senate Bill 216

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SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Allows Attorney General to intervene in class actions to assert claim on behalf of class members who fail to submit statements required for award of damages. Requires that judgment include money award to Attorney General for amount estimated to be attributable to claims of those members. Requires that judgment specify use of moneys awarded.

A BILL FOR AN ACT

1
2 Relating to cy pres claims in class actions; creating new provisions; amending ORCP 32; and ap-
3 propriating money.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORCP 32 is amended to read:

6 **A Requirement for class action.** One or more members of a class may sue or be sued as repre-
7 sentative parties on behalf of all only if:

8 A(1) The class is so numerous that joinder of all members is impracticable;

9 A(2) There are questions of law or fact common to the class;

10 A(3) The claims or defenses of the representative parties are typical of the claims or defenses
11 of the class;

12 A(4) The representative parties will fairly and adequately protect the interests of the class; and

13 A(5) In an action for damages, the representative parties have complied with the prelitigation
14 notice provisions of section H of this rule.

15 **B Class action maintainable.** An action may be maintained as a class action if the prerequisites
16 of section A of this rule are satisfied, and in addition, the court finds that a class action is superior
17 to other available methods for the fair and efficient adjudication of the controversy. The matters
18 pertinent to this finding include:

19 B(1) The extent to which the prosecution of separate actions by or against individual members
20 of the class creates a risk of:

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

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

26 B(2) The extent to which the relief sought would take the form of injunctive relief or corre-
27 sponding declaratory relief with respect to the class as a whole;

28 B(3) The extent to which questions of law or fact common to the members of the class predom-
29 inate over any questions affecting only individual members;

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 B(4) The interest of members of the class in individually controlling the prosecution or defense
2 of separate actions;

3 B(5) The extent and nature of any litigation concerning the controversy already commenced by
4 or against members of the class;

5 B(6) The desirability or undesirability of concentrating the litigation of the claims in the par-
6 ticular forum;

7 B(7) The difficulties likely to be encountered in the management of a class action that will be
8 eliminated or significantly reduced if the controversy is adjudicated by other available means; and

9 B(8) Whether or not the claims of individual class members are insufficient in the amounts or
10 interests involved, in view of the complexities of the issues and the expenses of the litigation, to
11 afford significant relief to the members of the class.

12 C Determination by order whether class action to be maintained.

13 C(1) As soon as practicable after the commencement of an action brought as a class action, the
14 court shall determine by order whether and with respect to what claims or issues it is to be so
15 maintained and shall find the facts specially and state separately its conclusions thereon. An order
16 under this section may be conditional, and may be altered or amended before the decision on the
17 merits. **Upon entry of an order under this section, the plaintiff in the action shall serve a copy
18 of the order on the Attorney General.**

19 C(2) Where a party has relied upon a statute or law which another party seeks to have declared
20 invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative
21 interpretation or regulation which would necessarily have to be voided or held inapplicable if an-
22 other party is to prevail in the class action, the court may postpone a determination under sub-
23 section (1) of this section until the court has made a determination as to the validity or applicability
24 of the statute, law, interpretation, or regulation.

25 D Dismissal or compromise of class actions; court approval required; when notice required. Any
26 action filed as a class action in which there has been no ruling under subsection C(1) of this rule
27 and any action ordered maintained as a class action shall not be voluntarily dismissed or compro-
28 mised without the approval of the court, and notice of the proposed dismissal or compromise shall
29 be given to some or all members of the class in such manner as the court directs, except that if the
30 dismissal is to be without prejudice or with prejudice against the class representative only, then
31 such dismissal may be ordered without notice if there is a showing that no compensation in any form
32 has passed directly or indirectly from the party opposing the class to the class representative or to
33 the class representative's attorney and that no promise of such compensation has been made. If the
34 statute of limitations has run or may run against the claim of any class member, the court may re-
35 quire appropriate notice.

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

39 E(1) Determining the course of proceedings or prescribing measures to prevent undue repetition
40 or complication in the presentation of evidence or argument, including precertification determi-
41 nation of a motion made by any party pursuant to Rules 21 or 47 if the court concludes that such
42 determination will promote the fair and efficient adjudication of the controversy and will not cause
43 undue delay;

44 E(2) Requiring, for the protection of class members or otherwise for the fair conduct of the
45 action, that notice be given in such manner as the court may direct to some or all class members

1 of any step in the action, of the proposed extent of the judgment; of the opportunity of members to
2 signify whether they consider the representation fair and adequate, to intervene and present claims
3 or defenses or otherwise to come into the action, or to be excluded from the class;

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

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

7 E(5) Dealing with similar procedural matters.

8 F Notice and exclusion.

9 F(1) When ordering that an action be maintained as a class action under this rule, the court
10 shall direct that notice be given to some or all members of the class under subsection E(2) of this
11 rule, shall determine when and how this notice should be given and shall determine whether, when,
12 how, and under what conditions putative members may elect to be excluded from the class. The
13 matters pertinent to these determinations ordinarily include: (a) the nature of the controversy and
14 the relief sought; (b) the extent and nature of any member's injury or liability; (c) the interest of the
15 party opposing the class in securing a final resolution of the matters in controversy; (d) the ineffi-
16 ciency or impracticality of separately maintained actions to resolve the controversy; (e) the cost of
17 notifying the members of the class; and (f) the possible prejudice to members to whom notice is not
18 directed. When appropriate, exclusion may be conditioned on a prohibition against institution or
19 maintenance of a separate action on some or all of the matters in controversy in the class action
20 or a prohibition against use in a separately maintained action of any judgment rendered in favor
21 of the class from which exclusion is sought.

22 F(2) Prior to the entry of a judgment against a defendant the court shall request members of the
23 class who may be entitled to individual monetary recovery to submit a statement in a form pre-
24 scribed by the court requesting affirmative relief which may also, where appropriate, require infor-
25 mation regarding the nature of the loss, injury, claim, transactional relationship, or damage. The
26 statement shall be designed to meet the ends of justice. In determining the form of the statement,
27 the court shall consider the nature of the acts of the defendant, the amount of knowledge a class
28 member would have about the extent of such member's damages, the nature of the class including
29 the probable degree of sophistication of its members, and the availability of relevant information
30 from sources other than the individual class members. *[The amount of damages assessed against the*
31 *defendant shall not exceed the total amount of damages determined to be allowable by the court for*
32 *each individual class member who has filed a statement required by the court, assessable court costs,*
33 *and an award of attorney fees, if any, as determined by the court.]*

34 F(3) Failure of a class member to file a statement required by the court will be grounds for entry
35 of judgment dismissing such class member's claim for individual monetary recovery without preju-
36 dice to the right to maintain an individual, but not a class, action for such claim.

37 F(4) Plaintiffs shall bear costs of any notice ordered prior to a determination of liability. The
38 court may, however, order that defendant bear all or a specified part of the costs of any notice in-
39 cluded with a regular mailing by defendant to its current customers or employees. The court may
40 hold a hearing to determine how the costs of such notice shall be apportioned.

41 F(5) No duty of compliance with due process notice requirements is imposed on a defendant by
42 reason of the defendant including notice with a regular mailing by the defendant to current cus-
43 tomers or employees of the defendant under this section.

44 F(6) As used in this section, "customer" includes a person, including but not limited to a stu-
45 dent, who has purchased services or goods from a defendant.

1 G Commencement or maintenance of class actions regarding particular issues; subclasses. When
 2 appropriate an action may be brought or ordered maintained as a class action with respect to par-
 3 ticular claims or issues or by or against multiple classes or subclasses. Each subclass must sepa-
 4 rately satisfy all requirements of this rule except for subsection A(1).

5 H Notice and demand required prior to commencement of action for damages.

6 H(1) Thirty days or more prior to the commencement of an action for damages pursuant to the
 7 provisions of sections A and B of this rule, the potential plaintiffs' class representative shall:

8 H(1)(a) Notify the potential defendant of the particular alleged cause of action; and

9 H(1)(b) Demand that such person correct or rectify the alleged wrong.

10 H(2) Such notice shall be in writing and shall be sent by certified or registered mail, return
 11 receipt requested, to the place where the transaction occurred, such person's principal place of
 12 business within this state, or, in the case of a corporation or limited partnership not authorized to
 13 transact business in this state, to the principal office or place of business of the corporation or
 14 limited partnership, and to any address the use of which the class representative knows, or on the
 15 basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

16 I Limitation on maintenance of class actions for damages. No action for damages may be main-
 17 tained under the provisions of sections A and B of this rule upon a showing by a defendant that all
 18 of the following exist:

19 I(1) All potential class members similarly situated have been identified, or a reasonable effort
 20 to identify such other people has been made;

21 I(2) All potential class members so identified have been notified that upon their request the de-
 22 fendant will make the appropriate compensation, correction, or remedy of the alleged wrong;

23 I(3) Such compensation, correction, or remedy has been, or, in a reasonable time, will be, given;
 24 and

25 I(4) Such person has ceased from engaging in, or if immediate cessation is impossible or unrea-
 26 sonably expensive under the circumstances, such person will, within a reasonable time, cease to
 27 engage in such methods, acts, or practices alleged to be violative of the rights of potential class
 28 members.

29 J Application of sections H and I of this rule to actions for equitable relief; amendment of
 30 complaints for equitable relief to request damages permitted. An action for equitable relief brought
 31 under sections A and B of this rule may be commenced without compliance with the provisions of
 32 section H of this rule. Not less than 30 days after the commencement of an action for equitable re-
 33 lief, and after compliance with the provisions of section H of this rule, the class representative's
 34 complaint may be amended without leave of court to include a request for damages. The provisions
 35 of section I of this rule shall be applicable if the complaint for injunctive relief is amended to re-
 36 quest damages.

37 K Limitation on maintenance of class actions for recovery of certain statutory penalties. A class
 38 action may not be maintained for the recovery of statutory minimum penalties for any class member
 39 as provided in ORS 646.638 or 15 U.S.C. 1640(a) or any other similar statute.

40 L Coordination of pending class actions sharing common question of law or fact.

41 L(1)(a) When class actions sharing a common question of fact or law are pending in different
 42 courts, the presiding judge of any such court, upon motion of any party or on the court's own ini-
 43 tiative, may request the Supreme Court to assign a Circuit Court, Court of Appeals, or Supreme
 44 Court judge to determine whether coordination of the actions is appropriate, and a judge shall be
 45 so assigned to make that determination.

1 L(1)(b) Coordination of class actions sharing a common question of fact or law is appropriate if
2 one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends
3 of justice taking into account whether the common question of fact or law is predominating and
4 significant to the litigation; the convenience of parties, witnesses, and counsel; the relative devel-
5 opment of the actions and the work product of counsel; the efficient utilization of judicial facilities
6 and personnel; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings,
7 orders, or judgments; and the likelihood of settlement of the actions without further litigation should
8 coordination be denied.

9 L(2) If the assigned judge determines that coordination is appropriate, such judge shall order the
10 actions coordinated, report that fact to the Chief Justice of the Supreme Court, and the Chief Jus-
11 tice shall assign a judge to hear and determine the actions in the site or sites the Chief Justice
12 deems appropriate.

13 L(3) The judge of any court in which there is pending an action sharing a common question of
14 fact or law with coordinated actions, upon motion of any party or on the court's own initiative, may
15 request the judge assigned to hear the coordinated action for an order coordinating such actions.
16 Coordination of the action pending before the judge so requesting shall be determined under the
17 standards specified in subsection (1) of this section.

18 L(4) Pending any determination of whether coordination is appropriate, the judge assigned to
19 make the determination may stay any action being considered for, or affecting any action being
20 considered for, coordination.

21 L(5) Notwithstanding any other provision of law, the Supreme Court shall provide by rule the
22 practice and procedure for coordination of class actions in convenient courts, including provision
23 for giving notice and presenting evidence.

24 M Form of judgment. The judgment in an action ordered maintained as a class action, whether
25 or not favorable to the class, shall specify or describe those found to be members of the class or
26 who, as a condition of exclusion, have agreed to be bound by the judgment. If a judgment that in-
27 cludes a money award is entered in favor of a class, the judgment must, when possible, identify by
28 name each member of the class and the amount to be recovered thereby.

29 N Attorney fees, costs, disbursements, and litigation expenses.

30 N(1)(a) Attorney fees for representing a class are subject to control of the court.

31 N(1)(b) If under an applicable provision of law a defendant or defendant class is entitled to at-
32 torney fees, costs, or disbursements from a plaintiff class, only representative parties and those
33 members of the class who have appeared individually are liable for those amounts. If a plaintiff is
34 entitled to attorney fees, costs, or disbursements from a defendant class, the court may apportion
35 the fees, costs, or disbursements among the members of the class.

36 N(1)(c) If the prevailing class recovers a judgment that can be divided for the purpose, the court
37 may order reasonable attorney fees and litigation expenses of the class to be paid from the recovery.

38 N(1)(d) The court may order the adverse party to pay to the prevailing class its reasonable at-
39 torney fees and litigation expenses if permitted by law in similar cases not involving a class.

40 N(1)(e) In determining the amount of attorney fees for a prevailing class the court shall consider
41 the following factors:

42 N(1)(e)(i) The time and effort expended by the attorney in the litigation, including the nature,
43 extent, and quality of the services rendered;

44 N(1)(e)(ii) Results achieved and benefits conferred upon the class;

45 N(1)(e)(iii) The magnitude, complexity, and uniqueness of the litigation;

1 N(1)(e)(iv) The contingent nature of success; and

2 N(1)(e)(v) Appropriate criteria in DR 2-106 of the Oregon Code of Professional Responsibility.

3 N(2) Before a hearing under section C of this rule or at any other time the court directs, the
4 representative parties and the attorney for the representative parties shall file with the court,
5 jointly or separately:

6 N(2)(a) A statement showing any amount paid or promised them by any person for the services
7 rendered or to be rendered in connection with the action or for the costs and expenses of the liti-
8 gation and the source of all of the amounts;

9 N(2)(b) A copy of any written agreement, or a summary of any oral agreement, between the
10 representative parties and their attorney concerning financial arrangement or fees; and

11 N(2)(c) A copy of any written agreement, or a summary of any oral agreement, by the repre-
12 sentative parties or the attorney to share these amounts with any person other than a member,
13 regular associate, or an attorney regularly of counsel with the law firm of the representative parties’
14 attorney. This statement shall be supplemented promptly if additional arrangements are made.

15 O Statute of limitations. The statute of limitations is tolled for all class members upon the
16 commencement of an action asserting a class action. The statute of limitations resumes running
17 against a member of a class:

18 O(1) Upon filing of an election of exclusion by such class member;

19 O(2) Upon entry of an order of certification, or of an amendment thereof, eliminating the class
20 member from the class;

21 O(3) Except as to representative parties, upon entry of an order under section C of this rule
22 refusing to certify the class as a class action; and

23 O(4) Upon dismissal of the action without an adjudication on the merits.

24 **P Cy pres claim by Attorney General. The court shall allow the Attorney General to in-**
25 **tervene in any class action for the purpose of asserting a claim on behalf of members of the**
26 **class who fail to submit a statement under subsection F(2) of this rule. In any class action**
27 **in which the Attorney General intervenes under the provisions of this section, the court**
28 **shall determine the number of class members who fail to submit statements under sub-**
29 **section F(2) of this rule. The judgment shall include a money award to the Attorney General**
30 **for the amount estimated to be attributable to the claims of class members who fail to sub-**
31 **mit statements. The judgment shall specify the manner in which the moneys awarded under**
32 **this section are to be expended.**

33 **SECTION 2. Section 3 of this 2005 Act is added to and made a part of ORS chapter 180.**

34 **SECTION 3. The Class Action Recovery Account is established within the General Fund.**
35 **Interest earned by the account shall be credited to the account. All moneys collected by the**
36 **Attorney General under money awards made under ORCP 32 P must be credited to the ac-**
37 **count. All moneys in the account are continuously appropriated to the Attorney General, and**
38 **may be used only for the purposes specified in the judgment that awarded the moneys to the**
39 **Attorney General.**

40