Honorable Catherine Shaffer
Hearing: July 31, 2007
Without oral argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DOUGLAS L. MOORE, MARY CAMP, GAYLORD CASE, and a class of similarly situated individuals, Plaintiffs, v. HEALTH CARE AUTHORITY, and STATE OF WASHINGTON, Defendants.	NO. 06-2-21115-4 SEA

PLAINTIFFS' OPPOSITION TO PRE-LIABILITY OPT OUTS

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INTRODUCTION

The Court's order "bifurcate[s]" liability from damages and certifies the class under CR 23(b)(1) and (b)(2). Order, ¶9. The Court bifurcated liability and damages because there are "some questions" on how "issues relating to damages may affect class certification." *Id.* And it certified the class under CR 23(b)(1) and (b)(2) for the liability phase because "***this action sounds primarily at this time in equity or as a declaratory judgment action***." Transcript, pp. 12-13 (emphasis added). The Court's decision to defer deciding whether opt-outs are necessary until an issue actually arises in the relief phase is supported by numerous authorities; indeed, courts commonly certify a "hybrid" class action under (b)(2) with no opt-outs in the liability phase and under (b)(3) with opt-outs in the relief phase where substantial damages are based on individual subjective differences. *See infra,* pp. 2-4.

The State requests opt-outs in the *liability phase* due to unspecified issues relating to "*damages.*" *Id.*, p. 1-6 (emphasis added). But there is no authority that supports the State's request, and it is impractical. The purpose of opt-outs is to protect class members' interests to "litigate separately" substantial damage claims based on subjective individual circumstances. *Sitton v. State Farm,* 116 Wn.App. 245, 252 n. 11 and 252-53 (2003). Here, there is no evidence class members have substantial damage claims requiring subjective individual decisions.

Rather than protecting class members, an early pre-liability opt-out procedure could induce fearful or intimidated class members to forgo their legal rights with nothing in return. And even assuming damage issues arose in the relief phase that created a need for opt-outs, the Court retains discretion to order opt-outs at that time. The Court should deny the motion.

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ARGUMENT

I. THE COURT'S DECISION TO BIFURCATE LIABILITY AND DAMAGES, WHILE RETAINING DISCRETION TO ORDER OPT-OUTS IN THE DAMAGES PHASE, IS SUPPORTED BY OVERWHELMING AUTHORITY.

The Court's order "bifurcate[s]" liability and damages and, "[i]f the class prevails in the liability phase," the Court said it will then "address the issue of whether the class should remain certified under CR 23(b)(1) and (b)(2) or whether certification under CR 23(b)(3) is appropriate for the damages phase of this action." Order, ¶9. The Court ordered this procedure because it is uncertain how "damages may affect class certification" (Order, ¶9), but it recognized in the liability stage "this action sounds primarily . . . in equity or as a declaratory judgment action." Transcript, pp. 12-13. The Court's decision to decide whether opt-outs are necessary if the issue arises in the relief phase is supported by numerous authorities.

First, this procedure is consistent with CR 23(d)(1), which authorizes courts to enter orders that "determin[e] the course of proceedings," and CR 42(b), which authorizes the Court to bifurcate issues. *Sitton v. State Farm Mut. Auto Ins.*, 116 Wn.App. 245, 259-60 (2003).[1] In *Sitton*, the Court "emphasize[d] that ***management of the [class] action is for the trial court***" (*id.* at 260 n. 38), and "***bifurcation" is a viable option***. *Id.*, at 259-60 (emphasis added).

Accordingly, when the prerequisites for a (b)(2) class are present, but there remains uncertainty whether there are substantial damage claims based on subjective individual

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[1] The State erroneously cites *Sitton*, saying it addressed "hybrid certification" and "the superior court certified liability issues under Rules 23(b)(1) and (2) and damages under Rule 23(b)(3)." Mot., p. 3. Actually, the *Sitton* trial "court certified the class under CR 23(b)(1)(A) and (b)(2)" and it "then entered an additional order certifying the class under CR 23(b)(3)." *Sitton,* 116 Wn.App. at 249. The trial court then bifurcated the proceeding, but it did not, as the State contends (Mot., p. 3), bifurcate "liability issues under Rules 23(b)(1) and (2) and damages under Rule (b)(3)." Instead, the trial court certified *the entire action* "under all three sections of the rules," which the Court of Appeals said "is surely rare" and would "require a more definite and clear order than that entered here." *Id.* at 252; *see also id.* ("the parameters of the CR 23(b)(1) and (b)(2) certification are unclear"). The Court of Appeals ultimately held in *Sitton* that (b)(3) certification was proper in an action against State Farm alleging the insurance company acted in "bad faith" in denying insurance coverage even though each class member individually had "to establish causation and damages." *Id.* at 258.

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circumstances, *Newberg on Class Actions* suggests the exact procedure the Court ordered here (2 *Newberg on Class Actions*, pp. 94-95, 4th ed. 2002):

> ***the Court [can] certify the entire class initially under Rule 23(b)(2), bifurcate the trial*** *so that the defendant's liability potentially for both forms of relief is determined initially,* ***and reconsider the class certification category if the plaintiffs and the class are successful at the liability stage***. [Emphasis added.]

Eubanks v. Billington, 110 F.3d 87, 96 (D.C. Cir. 1997), relied on by the State (Mot., p. 6), recognizes this "hybrid" approach:

> ***[T]he court may adopt a 'hybrid' approach, certifying a (b)(2) class as to the claims for declaratory or injunctive relief, and a (b)(3) class*** as to the claims for monetary relief, effectively granting (b)(3) protections ***including the right to opt out to class members at the monetary relief phase***. [Emphasis added.]

Accord, 5 Moore's Federal Practice, §23.100[6], p. 23-376 (in a "class action certified under Rule 23(b)(1) or (b)(2) . . . it may be appropriate for the court to use its discretionary power to allow individual class members the opportunity to ***opt out of the damages portion of the action.***" [emphasis added]).[2]

Furthermore, in a bifurcated proceeding where the class is certified under (b)(2) for the liability phase, it is an abuse of discretion to have the opt-out procedure occur in the liability phase (*Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1554-55 (11th Cir.1986)):

> What is to be tried in stage one is simply the issue of liability....By releasing some class members from the suit at this stage, a trial judge would invite the repeated litigation of the [liability] issue, with lamentable consequences for judicial economy and the finality and consistency of judgments.

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[2] In addition to *Eubanks,* in the other employment discrimination cases cited by the State (Mot., pp. 4-6), the appellate courts recognized the trial court's ability to bifurcate issues and utilize an opt-out procedure in the relief phase. *See, e.g., Holmes v. Continental Can Co.*, 706 F.2d 144, 1157-58 (11th Cir. 1983) (court may employ a "bifurcated procedure" with no opt-outs in the "liability stage," and opt outs in the "recovery stage" if necessary); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) ("[i]t is possible to certify the injunctive aspects of the suit under Rule 23(b)(2) and the damages aspect under rule 23(b)(3), achieving both consistent treatment of class-wide equitable relief and an opportunity for each affected person to exercise control over the damages aspects."); *Lemon v. Int'l Union of Operating Engineers,* 216 F.3d 577, 581 (7th Cir. 2000) ("court could certify a Rule 23(b)(2) class for the portion of the case addressing equitable relief and a Rule 23(b)(3) class for the portion of the case addressing damages").

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> ***[An opt-out procedure is] inappropriate before the monetary relief stage of a hybrid rule 23(b)(2) class action...Such a procedure would only tend to promote what was actually accomplished here – the improper use of a court-approved opt-out procedure designed to force class members to take a stand against their employers***....To authorize such a procedure was abuse of discretion. [Emphasis added.]

Here, similar to *Cox*, the only reason the State wants an opt-out procedure is "to force class members to take a stand against" their employer, with the hope that some percentage of the class will be intimidated or fearful and opt out to please their employer.[3]

Class members' due process rights are protected in the liability phase because they assert a common cohesive claim for health insurance and there is adequate representation. Thus, to protect the purpose of (b)(1) and (b)(2) – to provide common class-wide injunctive relief – no opt-outs are allowed. *Cox, supra,* 784 F.2d at 1554; *Robinson v. Metro-North Commuter Railroad,* 267 F.3d 147, 166 n. 10 (2nd Cir. 2001) ("for those stages of this case where the interests of the class members are essentially identical...the due process rights of absent class members are ensured by class representation alone"); *Holmes, supra,* 706 F.2d at 1156-58. The class members' due process rights would only require an opt-out procedure in the relief phase if there are decisions relating to substantial damages that are necessarily based on individual subjective differences. *Sitton, supra,* 116 Wn.App. at 252-53; *Nelson v. Appleway Chevrolet, Inc.,* 160 Wn.2d 173, 189 (2007).

Here, there is no evidence any class member has relevant "subjective" individual factors that determine the *liability* phase of this action for health insurance. And there is no evidence any class member has a substantial damage claim that should be pursued *independently* based on his or her *individual* circumstances (such as a claim involving pain

[3] *Id.* The potential for fear or intimidation in the employment relationship is well-known. An "employer, by virtue of the employment relationship, may exercise intense leverage" over current employees because "[n]ot only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted." *N.L.R.B. v. Robbins Tire and Rubber Co.,* 437 U.S. 214, 240 (1978) (holding National Labor Relations Board not required to disclose pre-hearing employee witness statements in pending unfair labor practice proceeding).

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and suffering or emotional distress). The State's entire argument is based on the hypothetical possibility that such issues will arise in the *relief phase*. But the Court retains discretion to order opt-outs in the relief phase if any such subjective damage issues arise. Requiring opt-outs in the liability phase could impair, *not* protect, class members' due process rights by inducing fearful class members to forfeit their claim and right to relief.[4]

II. THE STATE'S REQUEST FOR PRE-LIABILITY OPT-OUTS DOES NOT "PROTECT" THE STATE -- CLASS MEMBERS WILL BE BOUND BY THE COURT'S DECISION ON LIABILITY WHETHER FAVORABLE OR UNFAVORABLE.

The State argues that opt-outs are necessary to protect "the rights of the defendant," citing (Mot., p. 2) *In re Ann M. Veneman,* 309 F.3d 789 (7th Cir. 2002). In *Veneman,* however, the Court of Appeals made no such ruling; indeed, it *refused* to accept interlocutory review of an order certifying a class under Rule 23(b)(2). *Id.* at 790-91. The State contends that "class members can wait and see what happens on liability" and the class would "not be bound" by a defense victory. Mot., p. 2. This is completely backwards; class members would certainly be bound by a judgment for the State under health insurance rules that apply to all state employees (*Robinson, supra,* 267 F.3d at 168):

> [If defendant] succeeds at the liability stage, [liability] would be completely and finally determined, thereby eliminating entirely the need for a remedial stage inquiry on behalf of each class member.

Accord, Holmes, supra, 706 F.2d at 1157 n. 9 ("a judgment should be res judicata as to all the class, even in the absence of notice, in the (b)(1) and (b)(2) situations when the requirements of Rule 23 have been satisfied"). Accordingly, if the State wins on liability, the case is over

[4] Because this action involves mandatory health insurance rules, the State's argument for opt-outs at the liability stage makes no sense -- if 100 fearful class members opted out in the liability phase and the class prevailed, would the State still not provide these 100 employees health insurance? In all likelihood, the State would have to provide health insurance to the class members who opted out. *See Holmes, supra,* 706 F.2d at 1157 ("Opting out of a (b)(2) suit for injunctive relief would have little or no practical effect. Even class members who opted out could not avoid the effects of the judgment. A (b)(2) injunction would enjoin all illegal action, and all class members would necessarily be affected by such broad relief.") The State's motion is thus not concerned about future relief; instead, the State's goal is to induce class members to give up their *right to relief for the past* while receiving nothing in return.

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and all class members are bound. Only if there were pre-liability opt-outs would some class members not be bound by a defense victory.

The State also oddly suggests that "damage issues can proceed to trial before injunction issues." Mot., p. 2. Since the "injunction issues" are essentially a question of liability – entitlement to health insurance – this seems to propose a trial on the amount of losses due to lack of health insurance and whether damages should be doubled *before* it is determined whether the State must provide the class health insurance at all. This argument makes no sense; liability necessarily needs to be decided *before* damages.

III. AN OPT-OUT PROCEDURE WILL BE UNECCESSARY IN THE RELIEF PHASE.

1. The Statute on Doubling Damages, RCW 49.52.070, Does Not Require Opt-Outs Because It is Applied on a Mechanical Basis and Focuses on the Health Care Authority's Conduct.

The State repeatedly argues here that "opt-outs" are necessary because plaintiffs assert "claims for punitive damages." Mot., p. 1. As the Court ruled, this issue may be considered later. Order, ¶9. In any event, the "punitive damages" are under RCW 49.52.050, which mechanistically "doubles" the monetary relief "for a willful withholding of wages due under a statute, ordinance, or contract." *Chelan Co. Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 300 (1987). And whether there is "willful" action depends on if there is a "bona fide dispute as to the obligation of payment." *Id.* at 300.

Here, the State's argument that plaintiffs' claim for double damages warrants opt-outs at the liability stage is wrong for numerous reasons. First, plaintiffs' claim for double damages arises only *if plaintiffs prevail on liability*. The claim for double damages therefore provides no need for opt-outs in the *liability* phase.

Furthermore, assuming plaintiffs prevail on liability, whether double damages are appropriate depends on if there is a "bona fide dispute." *Chelan,* 109 Wn.2d at 300. The doubling claim thus focuses entirely on the Health Care Authority's conduct, not on any

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subjective differences among individual class members. Indeed, class members all share the common claim that there is no "bona fide dispute" as to whether they are entitled to health insurance because state employees who "average half-time" have received health insurance ever since the rules were adopted more than 19 years ago and the State has never changed the rule.[5] *See* Festor 3/23/07 Dec., ¶¶4-6 and Exs. 4-13.

Accordingly, doubling damages is based on the Health Care Authority's conduct, not on any "individual differences" among class members.

2. The Value of the Class Members Lost Health Insurance is "Incidental" to Declaratory Relief Because It Does Not Depend on Class Members' "Intangible, Subjective Differences," and the Court Can Provide Relief to Class Members in a Manner That Protects Their Due Process Rights Without an Opt-Out Procedure.

The State's motion is purportedly made to protect class members' due process rights. Mot., pp. 1-6. But opt-outs are only necessary in the relief phase when the damages are based on the "intangible, subjective differences of each class member's circumstances." *Sitton, supra,* 116 Wn.App. at 252; *accord, Nelson, supra,* 160 Wn.2d at 189. Furthermore, in class actions monetary relief is routinely calculated on an aggregate basis – "[i]n fact, the ultimate goal in class actions is to determine the aggregate sum, which fairly represents the collective value of claims of individual class members." 3 *Newberg*, §10.2, p., 477. And "one acknowledged occasion for aggregate proof of monetary relief is the situation in which monetary liability can be demonstrated by a mathematical computation based on a formula common to an identified class." *Id.*, §10:3, pp. 479-80.

[5] Without "averaging" to calculate half-time, employees who work 180 hours per month in five months, but only 79 hours in one month, would be denied health insurance because they did not work at least half-time (80 hours) in each and every month, while employees who work 50% of the equivalent workload – a much lower 80 hours per month – in those same six months would receive health insurance.

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Here, many class members presumably self-paid for health insurance and their loss is the cost of the premiums. Class-wide monetary relief is therefore provable in the aggregate – for all class members – based on the premiums paid by the State. For any individual, then, damages are calculated by a mathematical formula applied to employment records that is based on total number of months the class members should have received health insurance multiplied by the monthly cost of health insurance. Strong 3/23/07 Dec., ¶4. The parties calculated a class's loss by this mathematical formula to resolve the similar class action for health insurance, *Mader v. HCA*. *Id.* And to the extent there is an unusual individual who has medical expenses greater than the value of the lost premiums, the Court could always allow that particular class member to prove their unique individual loss *in this case* through a claim process.[6] *Holmes, supra,* 706 F.2d at 1154 (any claim procedure should incur in the existing lawsuit because, among reasons, it "conserves judicial resources."). Accordingly, the damages here are "incidental" to the request for equitable relief because they are based on objective facts rather than "intangible, subjective differences." *Sitton*, 116 Wn.App. at 252.

CONCLUSION

The Court's class certification order is supported by Civil Rules 23 and 42, treatises, cases, and common sense. The class members' due process rights are protected in the liability phase because they are represented by experienced counsel pursing a common cohesive claim. There is no evidence an opt-out procedure will become necessary in the relief phase, but the Court retains discretion to implement such a procedure.

The State's motion is not intended to protect class members' due process rights. Instead, the State wants to use opt-outs to induce class members to give up their right to relief. The motion should be denied.

[6] Class members' medical expenses, to the extent the expenses ever became relevant, are also based on objective facts (medical bills) rather than on "intangible, subjective differences."

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Respectfully submitted this 24th day of July, 2007.

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Honorable Catherine Shaffer

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DOUGLAS L. MOORE, MARY CAMP, GAYLORD CASE, and a class of similarly situated individuals, Plaintiff, v. HEALTH CARE AUTHORITY and STATE OF WASHINGTON, Defendants.	NO. 06-2-21115-4 SEA [PROPOSED] ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATON

This matter came before the Court on defendants' motion for reconsideration. Having considered the materials submitted and the record in the case, defendants' motion is denied.

DATED this _____ day of _____, 2007.

_____
JUDGE CATHERINE SHAFFER

Presented by:

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