

HOUSE COMMITTEE ON JUDICIARY

SUBCOMMITTEE ON CIVIL LAW

April 12, 2005 Hearing Room 357

8:30 A.M. Tapes 52 - 55

MEMBERS PRESENT: Rep. Bob Ackerman, Chair

Rep. Linda Flores

Rep. Bill Garrard

Rep. Kelley Wirth

GUEST MEMBERS: Rep. Wayne Krieger

Rep. Kim Thatcher

Rep. Greg Macpherson

STAFF PRESENT: Sam Sears, Counsel

Louann Rahmig, Committee Assistant

MEASURES/ISSUES HEARD:

HB 2744 – Public Hearing

HB 3208 – Public Hearing

HB 3212 – Public Hearing

HB 3209 – Public Hearing

HB 2748 – Public Hearing

HB 3076 – Public Hearing

HB 3210 – Public Hearing

HJR 40 – Public Hearing

These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.

TAPE/#	Speaker	Comments
TAPE 52, A		
003	Chair Ackerman	Calls the meeting to order at 8:40 a.m. Announces the order in which the bills will be heard.
012	Chair Ackerman	Opens a public hearing on HB 2744, HB 3208 and HB 3212.

HB 2744, HB 3208 AND HB 3212 – PUBLIC HEARING

014	Sam Sears	<p>Counsel. Explains HB 2744 which provides that a plaintiff in a civil action must pay prevailing party fees to a defendant who makes an offer of compromise if the plaintiff fails to obtain a more favorable judgment than what defendant proffered in the offer of compromise; and requires that the court order a settlement conference upon the request of either party. Advises that the pleading requirements in HB 3208 were discussed in the hearing on HB 2745. Explains that HB 3208 mandates a settlement conference in an action in which a professional liability claim is made; allows for a defendant in a professional liability claim to request the impaneling of a common sense jury if a claim is for more than \$50,000; and requires an award of reasonable attorney fees to the defendant if the common sense jury</p> <p>determines that the claim is meritless and the plaintiff does not receive any money award at trial. Describes HB 3212, which authorizes the use of binding arbitration in lieu of civil actions for injuries and damages suffered as a result of receiving services from a licensed professional; provides that a claim is subject to binding arbitration if a client and a licensed professional enter into an agreement to arbitrate; provides that an arbitration is the exclusive remedy if a claim is subject to binding arbitration; prescribes procedures for and contents of agreements to arbitrate; and establishes time limitations and processes for claims subject to binding arbitration.</p>
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046	Kevin Mannix	Project Manager, Oregon Litigation Fairness Project. Refers to packet of information (EXHIBIT A) and requests it be made a part of the record on each bill being considered. Testifies in support of HB 2744, HB 3208 and HB 3212. States that HB 2744 is designed to encourage early settlement of claims, helps level the playing field and includes attorney fees. Refers to HB 3208 which mandates a settlement conference in cases relating to the performance of services by a licensed professional.
084	Mannix	Continues that HB 3208 involves cases against a licensed professional amounting to more than \$50,000 and use of a common-sense jury panel to determine the merits of the case.
106	Mannix	Advises that HB 3212 is an attempt to expedite the litigation process by turning more toward support for binding arbitration where agreed upon.
118	Richard Lane	Oregon Trial Lawyers Association. Testifies in opposition to HB 2744, HB 3208 and HB 3212. Points out that HB 2744 makes changes to Rule 54 of the Oregon Rules of Civil Procedure (ORCP). Explains the process for making changes to the ORCP, which includes public input. Believes HB 2744 should go through that process. Advises that HB 2744 deals with meritorious claims.
167	Lane	Continues that parties are free to negotiate on suits of many causes so settlement conferences do not need to be mandated.
183	Lane	Discusses Section 2 in HB 3208 that covers any registered or certified trade profession. Refers to ORS 31.250 which requires mandatory alternative dispute resolution in any action against a health care practitioner or health care facility within 270 days of the action being filed. Believes the peer jury under the current system is a common sense jury, and the new requirement poses a burden to present a case twice. Advises that there is a two-hour limit to present the case and two hours for jury deliberation.
225	Lane	Explains that any party now can request a dispute be resolved by binding arbitration. States that HB 3212 allows professionals to make a contract of adhesion. Expresses concern with time limits in HB 3212. Advises that under current law, an individual has two years from discovery to file action against a wrong-doer. Continues that HB 3212 requires that a claim be presented within six months of discovery and no later than one year after date of service, and that is a vast change in existing law.

- 263 Rep. Garrard Reads from a letter from Cameron Wogon, the presiding judge in the 13th Judicial District, opposing HB 3208 as it would remove the court's authority to order a settlement conference on its own motion. Continues that Judge Wogon also opposes HB 2744 as it removes the court's discretion to manage each case.
- 276 Mannix Agrees that a judge ought to be able to order a settlement conference and proposal should be changed.
- 304 Lane Advises that ORCP 54 currently states a settlement conference may be ordered by the court.
- 309 Rep. Thatcher Asks why it would not be preferable to try to settle before getting to the point of a jury trial to minimize costs.
- 320 Lane Objects to the common-sense jury because of the time restrictions on the presentation of evidence. Informs that the cost of pursuing any case is dependent on the nature of the facts in dispute and complexity of the issues.
- 344 Mannix Responds that language needs to be changed to present an "outline" of the case to a common-sense jury, much like an opening statement. Agrees that the time limitation for jury consideration should be removed.
- 363 Lane Wants to be sure members understand that opening statements are not evidence. Reiterates that juries presently decide cases based on evidence.
- 383 Chair Ackerman Asks about a possible flaw in the process on a meritless case supported by "junk" science.
- 395 Mannix Answers that there are ethical standards for attorneys, and the representations they make to a jury need to be reasonably tied to some basis. Admits that the system needs to be tested. Doesn't have an answer to the "junk" science issue raised.

TAPE 53, A

- 019 Sears Asks if the defendant would have to pay the cost of the plaintiff if case had merit and eventually received a jury settlement.

026	Mannix	Responds that he doesn't mind a decision that it "cuts both ways."
048	Theresa Booth	Testifies in opposition to HB 3212. Describes circumstances surrounding premature birth of her son 12 years ago. Continues that if there were caps on medical malpractice she wouldn't have been able to care for his medical needs.
068	Michael Bridwell	Testifies that he was born two months premature and doesn't understand why he has to pay for the doctor's mistakes. Believes HB 3212 is plain wrong as it limits rights to a jury.
084	Booth	Describes son's needs in school and his medical history which includes several medical procedures. Explains her attempt to obtain satisfaction from the doctor, who has not been disciplined. Continues that her son's physical limitations prevent him from doing what he wants to do in life.
102	Jason Reynolds	Executive Director, Oregon Consumer League. Testifies in opposition to HB 2744, HB 3208 and HB 3212. States that arbitration is secret and unable to be appealed.
138	Reynolds	Concludes that HB 3208 creates two hurdles before getting to court. Cites his personal automobile accident experience.
170	Darrell Fuller	Oregon Automobile Dealers Association. Testifies in support of HB 2744. Discusses the processes used to resolve consumer complaints.
193	Fuller	Comments that there have been numerous meritless cases where a settlement is reached. Cites an example.
268	Bruce Miller	State Court Administrators Office. Testifies as neutral on HB 2744. Points out the impacts that would result from HB 2744. Refers to Page 1, Lines 26 and 27 where changes were made on how conferences are run. Points out that a court can no longer order a settlement conference on its own motion.
297	Bradd Swank	Oregon Judicial Department. Testifies as neutral on HB 3208. Raises questions about whether a judge is present during the proceeding before a common-sense jury and if a record is created. Asks if there will be rulings on evidence and the standard of proof for meritless claims. Inquires who instructs the jury if there is no judge. Asks who rules on questions of applicable law and if the proceeding is open to

the public. Questions if the same case that is presented to a common-sense jury is presented at trial.

- 377 Swank Continues with issues of mistakes made in the presentation to the common-sense jury. Inquires how much supervision the court needs to provide. Expresses the need to resolve these issues so litigation is not required.
- 404 Bryan Johnston Former State Representative, Salem, Oregon. Testifies in opposition to HB 3208. Refers to a pilot project of summary jury trials in the late 1970s in another state. Advises that HB 3208 ignores the lessons of history of summary jury trials.

TAPE 52, B

- 015 Johnston Continues that summary jury trials are not foolproof and should not replace the other system but be used as negotiation aids.
- 025 Chair Ackerman Comments that there is no guideline on whether the common sense jury must reach a unanimous decision or a majority.
- 030 Swank Responds that it appears that six people are picked from the jury pool but HB 3208 is silent on numerous other procedures.
- 034 Chair Ackerman Asks if individuals summoned to serve on a common-sense jury have to report.
- 037 Johnston Believes that would be handled differently in the districts. Raises the question whether the jury is advised that their verdict is merely advisory, which could cause a different type of deliberation.
- 046 Chair Ackerman Assumes there would be opening presentations by attorneys and instructions by the court to the jury. Asks how this relates to the two-hour time limit.
- 052 Swank Answers it is not possible to stay within the time limit. Advises that some large cities already offer summary jury trials.
- 058 Rep. Flores Asks how other states call in panelists for a summary jury trial and if their state rules of civil procedure apply.

- 064 Johnston Replies that is a matter of local court procedure. Is not aware of any other state court jurisdictions that have adopted summary jury trials as part of their system. Knows only of the federal system.
- 074 Mannix Comments that one constant that could be applied to the settlement offer proposal is to put a cap on the exposure one may have as to prevailing parties and attorney fees.
- 087 Lane Has no further comments on HB 2744, HB 3208 and HB 3212.

The following prepared testimony is submitted for the record without public testimony:

- Tom Burns GlaxoSmithKline. Submits written testimony in support of HB 2744 **(EXHIBIT I)**.
- 089 Chair Ackerman Closes the public hearing on HB 2744, HB 3208 and HB 3212 and opens a public hearing on HB 3209 and HB 2748.

HB 3209 AND HB 2748 – PUBLIC HEARING

- 092 Sam Sears Counsel. Describes HB 3209 which provides that a class action may be maintained only for members of a class who are residents of Oregon; provides that an order certifying a class, or an order denying certification of a class, is appealable; and requires a stay of proceedings in an action until a final appellate judgment has been entered on appeal. Explains that HB 2748 is encompassed within HB 3209.
- 102 Kevin Mannix Project Manager, Oregon Litigation Fairness Project. Explains that not all the bills were filed at their request even though they are testifying in support. Refers to written packet of information to be made a part of the record on HB 3209 and HB 2748 **(EXHIBIT A)**. Explains that HB 3209 and HB 2748 relate to class actions and provide the legislature with an opportunity to improve the efficiency and fairness of the judicial process as it relates to class actions.
- 147 Richard Lane Oregon Trial Lawyers Association. Testifies in opposition to HB 3209 and HB 2748. Believes that HB 3209 and HB 2748 will cause more inefficiency, longer delays to resolution, and greater costs to both sides because of a possible series of interlocutory appeals over what a judge considering class action status does. Continues that the

residency requirement in HB 3209 raises a constitutionality issue and presents procedural problems.

- 170 David Sugerman Attorney, Portland, Oregon. Testifies and submits written testimony in opposition to HB 3209 and HB 2748 (**EXHIBITS B AND C**). Explains the responsibilities of the Council on Court Procedures, which includes looking at the Oregon Rules of Civil Procedure and what changes will do.
- 193 Sugerman Explains that under existing Oregon law any decision in a class action case can be subject to an appeal if the trial court certifies it for appeal and the court of appeals agrees to hear it. Continues that class actions are treated as special types of cases as they can be complicated and expensive.
- 236 Sugerman Concludes that businesses can file class actions. Cites an example of an insurance company overcharging premiums.
- 261 Rep. Garrard Asks when a judge rules against certification of a class if a reason is issued.
- 266 Sugerman Responds, yes.
- 270 Rep. Garrard Inquires if HB 3209 could be amended to reflect that such a case was nonappealable.
- 273 Sugerman Replies that any bill can be amended. Points out a court does not consider the merits of a case when deciding whether to certify a class action or not.
- 302 Rep. Garrard Continues that if a judge considered a case frivolous, the appeal could be denied.
- 311 Sugerman Explains that one appeal would be eliminated and two appeals would be collapsed into one.
- 350 Russ Walker FREEDOMWORKS/Citizens for a Sound Economy. Testifies in support of HB 3209 and HB 2748. States that the goal is to limit the number of frivolous suits that don't provide any remedy to the class but provide huge awards to the attorneys. Cites personal examples. Believes HB 3209 and HB 2748 provide an opportunity to appeal prior to investing a large amount of resources.

Tape 53, b

017	Chair Ackerman	Asks how many claimants were involved in the class actions cited in examples presented.
021	Walker	Does not know.
022	Chair Ackerman	Comments there could be thousands.
023	Walker	Replies, could be.
024	Chair Ackerman	Inquires about the procedure for award of attorneys fees in a class action.
026	Walker	Responds, he does not know.
027	Chair Ackerman	Asks if he is aware that plaintiffs' lawyers would have to file appropriate documentation that could be contested by the defendants with the ultimate decision by the court.
029	Walker	Replies, yes.
031	Chair Ackerman	Closes the public hearing on HB 2748 and HB 3209 and opens a public hearing on HB 3076, HB 3210 and HJR 40.

HB 3076, HB 3210 AND HJR 40 – PUBLIC HEARING

040	Sam Sears	Counsel. Explains that HB 3076 provides that punitive damages may be awarded by a court only if such award is authorized by statute; imposes limits on awards of punitive damages; requires that a court impanel a new jury to consider the proper amount of punitive damages; prohibits amendment of a pleading to make a claim for punitive damages unless the party produces affidavits and supporting documentation that set out specific facts supported by evidence that is both admissible and substantial, and that establishes there is a probability the plaintiff will prevail on the claim; and prohibits an award of punitive damages against a health practitioner unless the act or omission constitutes an intentional tort.
048	Sears	Describes HB 3210 which has some of the same provisions as HB 3076 and also provides that an employer or principal is not liable for

punitive damages by reason of a tort of an employee or agent unless the employer or principal knew that the employee or agent intended to commit the tort and failed to take reasonable action to prevent the commission of the tort or the employer or principal ratified the actions of the employee or agent that constituted the tort.

- 055 Sears Explains HJR 40 proposes an amendment to the Oregon Constitution to impose limitations on awards of noneconomic damages in civil actions.
- 060 Kevin Mannix Project Manager, Oregon Litigation Fairness Project. Refers to written information packet of materials previously submitted to be made a part of the record on HB 3076, HB 3210 and HJR 40 **(EXHIBIT A)**. Informs that HJR 40 proposes a referral to amend to the Constitution. Continues that HB 3076 and HB 3210 provide the legislature with an opportunity to set some guidelines on punitive damages, which used to be called exemplary damages. Advises that these damages are separate from the recovery a person receives for economic loss.
- 093 Mannix Explains that the courts have been reserved for cases on egregious conduct. States that the U. S. Supreme Court has advised that punitive damages should bear some proportion to actual damages and not be more than nine times that amount.
- 120 Mannix States that the significant concept in HB 3076 and HB 3210 is establishing legislative standards of proportionality.
- 130 Mannix Continues that specific language in HB 3076 states that punitive damages may not be awarded if the amount exceeds 10 percent of the net worth of the business, if the net worth is less than \$2 million.
- 148 Mannix Expresses concern with the language in HB 3210 that sets up formulas for different kinds of cases that needs to be clarified.
- 161 Richard Lane Oregon Trial Lawyers Association. Testifies in opposition to HB 3076, HB 3210 and HJR 40. Comments that the issue in HJR 40 has been presented to the people twice and believes they have spoken. Advises that HB 3076 and HB 3210 are wholesale revisions to punitive damage law. Reads ORS 31.730 which is the current standard. Continues that to bring a claim presently, there are pre-pleading requirements to be met.
- 199 Lane

Discusses post-verdict reviews required. Refers to *State Farm v. Campbell*. Explains that punitive damages are designed to make individuals stop reprehensible conduct, but HB 3210 ties punitive damages to economic recovery. Continues that under that proposal, the elderly and children would not be entitled to punitive damages. Cites ORS 31.750 which requires that 60 percent of any punitive damage recovery is awarded to the state and goes into the crime victims' fund, and 40 percent is recovered by the plaintiff in any case.

- 237 Lane Explains that HB 3076 limits total recovery based upon the damages the jury finds on a particular plaintiff and their economic worth. States that a two-step process to determine punitive damages would be necessary.
- 279 Lane Discusses HB 3210 which eliminates the concept of vicarious liability and allows a corporate entity to say they didn't know certain activities were taking place.
- 290 Rep. Garrard Asks if a parent and child could be interpreted as a principal and an agent.
- 298 Mannix Reads from HB 3210, Section 2. Doesn't believe it contemplated parent-child relationships. Advises that family law usually deals with the responsibilities of parents for inappropriate civil action of minors.
- 310 Lane Agrees.
- 312 Rep. Thatcher Asks if under the Oregon Civil Procedures Act there are any guidelines on amounts of punitive damages that would be requested.
- 321 Mannix Responds that there is a standard on whether punitive damages are appropriate but is not aware of any current proportionality requirement.
- 329 Lane Answers that the jury is advised of the amount the parties are seeking. States that the numerous factors the jury is to consider are set out in statute.
- 353 Rep. Wirth Asks about the punishment aspect of punitive damages.
- 371 Mannix

Replies that limiting punitive damages in proportion to economic damages would not impact a large company as much as a small company. Believes there should be a limitation of 10 percent of net worth on a small company.

- 390 Mannix Points out the HB 3076 provision to change Section 4 of ORS 31.740 to delete “without malice.” Refers to a recent court decision interpreting “malice” which reopened the door to punitive damages being applicable to health care practitioners. Comments that if “malice” is retained, it needs to be defined.
- 420 Sears Asks if his interpretation of HB 3076 to establish a limit regardless of type of case at \$1 million is correct.
- 433 Mannix Answers, yes. Clarifies that he should have referred to HB 3210 instead of HB 3076.

TAPE 54, A

- 011 Lane Raises a concern about the witness list being incomplete as some people were planning to attend at 3:00 p.m.
- 016 Chair Ackerman Replies that the committee will reconvene at 3:00 p.m. to allow additional witnesses to testify.
- 025 Bruce Miller Office of the State Court Administrator. Testifies as neutral on HB 3076. Refers to Section 2 of HB 3076 that establishes a second jury. Raises questions on what they will hear, how they will hear the evidence (by attorneys or some other manner such as a recording), and the limits, if any, on how the evidence will be presented.
- 045 Russ Walker FREEDOM WORKS/Citizens for a Sound Economy. Describes the organization. Testifies in support of HB 3076, HB 3210 and HJR 40. Indicates their concern with punitive damages is the impact on the economy, especially small businesses. Defines a small business as having less than \$10 million per year in revenue and a very small business as less than \$1 million per year.
- 069 Walker Continues that punitive damages are intended to punish the offender and describes the effect on small businesses and their employees. Suggests an exemption for small businesses. Agrees that language in

HB 3210 is difficult to understand. Advises of other states that have limited punitive damage awards.

- 092 Rep. Thatcher Seeks clarification that the cost figures cited were for liability and not litigation.
- 093 Walker Responds, yes.
- 104 Chair Ackerman Recesses the meeting at 10:37 a.m.
- 105 Chair Ackerman Reconvenes the meeting and opens a public hearing on HB 3076, HB 3210 and HJR 40 at 3:05 p.m.
- 118 Darrell Fuller Oregon Automobile Dealers Association. Testifies in support of HB 3076 and HB 3210. Discusses situations when small businesses must decide whether to defend or settle, regardless of the validity of the claim. Concludes that plaintiffs' rights are out of balance with defendants' rights.
- 150 Chair Ackerman Announces that written testimony from the Oregon Trial Lawyers Association on HB 3076 and HB 3210 has been distributed **(EXHIBITS D AND E)**.
- 154 Connie Gallagher Crime Victims' Assistance Section, Department of Justice (DOJ). Testifies and submits written testimony in opposition to HB 3076 and HB 3210 **(EXHIBITS F AND G)**. Offers that Crime Victims United also oppose HB 3076 and HB 3210. States there will be a significant fiscal impact resulting from HB 3076 and HB 3210. Reports that the Criminal Injuries Compensation Account established by statute receives 60 percent of each punitive damage award. Describes the use of the fund.
- 186 Rep. Macpherson Asks for an explanation of allocation of punitive damages under current law.
- 194 Gallagher Responds that 60 percent goes to the Criminal Injuries Compensation Account and 40 percent to the prevailing party, from which their attorney is paid.
- 204 Pete Shepherd Deputy, Attorney General. Testifies in opposition to HJR 40. Reads Article I, Section 17 of the Oregon Constitution. Advises that the Supreme Court has stricken down previous statutory attempts to limit the right to a trial by jury by imposing a statutory cap on

noneconomic damages. Continues that HJR 40 proposes to reimpose that cap in the form of a constitutional amendment rather than a statute.

- 224 Shepherd Provides historical information on the constitutional language.
- 245 Shepherd Continues that HJR 40 expresses a judgment that jurors cannot be trusted to limit noneconomic damages to amounts reasonably calibrated to the circumstances of a particular dispute.
- 270 Mark Unger Resident, Eagle Point, Oregon. Testifies and submits written testimony in opposition to HJR 40 (**EXHIBIT H**). Explains his mother's illness and treatment.
- 341 Unger Continues with explanation of the circumstances surrounding his mother's death. Reiterates that the medical system needs to be held accountable for negligence, especially in preventable medical errors.

TAPE 55, A

- 002 Kevin Mannix Asks that any proposed cap be analyzed by the DOJ before presenting a fiscal impact statement. Requests details of a fiscal impact on the Crime Victims' Assistance Fund.
- 023 Chair Ackerman Closes the public hearing on HB 3076, HB 3210 and HJR 40 and opens a public hearing on HB 3209.

HB 3209 – PUBLIC HEARING

- 030 Merle Campbell Resident, Clackamas, Oregon. Testifies in opposition to HB 3209. Comments that HB 2748 and HB 3209 are nearly identical, except HB 3209 has a provision that all members of a class must be residents of Oregon. States that class actions take a lot of effort. Cites personal experience with case against General Motors and his daughter's case of toxic mold in her house in another state.
- 066 Campbell Continues that people with similar circumstances should be in the same class, regardless of where they live. Explains that classes are certified by judges after a thoughtful process.

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Chair Ackerman

Closes the public hearing on HB 3209 and adjourns the meeting at 3:31 p.m.

EXHIBIT SUMMARY

- A. **HB 2744, written information packet, Kevin Mannix, 32 pp**
- B. **HB 3209, written testimony, David Sugerman, 1 p**
- C. **HB 2748, written testimony, David Sugerman, 1 p**
- D. **HB 3076, written testimony, Richard Lane, 2 pp**
- E. **HB 3210, written testimony, Richard Lane, 2 pp**
- F. **HB 3076, written testimony, Connie Gallagher, 1 p**
- G. **HB 3210, written testimony, Connie Gallagher, 1 p**
- H. **HJR 40, written testimony, Mark Unger, 3 pp**

- I. **HB 2744, written testimony, Tom Burns, 2 pp**