

## HOUSE COMMITTEE ON JUDICIARY

July 01, 2003 Hearing Room 357  
1:00 p.m. Tapes 229 - 231

**MEMBERS PRESENT:**       Rep. Max Williams, Chair  
                                  Rep. Gordon Anderson, Vice-Chair  
                                  Rep. Robert Ackerman, Vice-Chair  
                                  Rep. Jeff Barker  
                                  Rep. Bob Jenson  
                                  Rep. Jerry Krummel  
                                  Rep. Greg Macpherson  
                                  Rep. Floyd Prozanski  
                                  Rep. Lane Shetterly

**STAFF PRESENT:**        Bill Taylor, Counsel  
                                  Craig Prins, Counsel  
                                  Ann Martin, Committee Assistant

**MEASURE/ISSUES HEARD:**        SB 59A Work Session  
  SB 297A Public Hearing

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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.

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| <b>TAPE/#</b>                     | <b>Speaker</b>        | <b>Comments</b>  |
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| <b>TAPE 229, A</b>                |                       |  |
| 004                               | Chair Williams        | Calls the meeting to order at 1:07 p.m. Opens a work session on SB 59A.  |
| <b><u>SB 59A WORK SESSION</u></b> |                       |  |
| <b>006</b>                        | <b>Rep. Ackerman</b>  | <b>MOTION: Moves to SUSPEND the rules for the purpose of RECONSIDERING the vote on SB 59A.</b>   |
|                                   |                       | <b>VOTE: 9-0</b>   |
| <b>010</b>                        | <b>Chair Williams</b> | <b>Hearing no objection, declares the motion CARRIED.</b>  |
| 017                               | Craig Prins           | Committee Counsel. Introduces SB 59A which extends period during which forfeiture counsel must file criminal information or indictment for criminal forfeiture. Discusses the A6 amendments <b>(EXHIBITS A &amp; B).</b> |
| 047                               | Rep. Prozanski        | Explains the A6 amendments.  |
| 067                               | Rep. Jenson           | Says that he supports the A6 amendments.   |
| <b>069</b>                        | <b>Rep. Jenson</b>    | <b>MOTION: Moves to ADOPT SB 59A-6 amendments dated 07/01/03.</b>  |
|                                   |                       | <b>VOTE: 9-0</b>   |
| <b>071</b>                        | <b>Chair Williams</b> | <b>Hearing no objection, declares the motion CARRIED.</b>  |
| 075                               | Rep. Krummel          | Asks about the selling of the forfeited weapons.   |
| 086                               | Rep. Prozanski        | Refers to the formula on page 2 and 3, Section 4 of the A6 amendments.   |
| <b>115</b>                        | <b>Rep. Prozanski</b> | <b>MOTION: Moves SB 59A to the floor with a DO PASS AS AMENDED recommendation.</b>   |
|                                   |                       | <b>VOTE: 9-0</b>   |

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| 120                                  | Chair Williams         | <b>Hearing no objection, declares the motion CARRIED. REP. JENSON will lead discussion on the floor.</b>  |
| 130                                  | Chair Williams         | Closes the work session on SB 59A and opens a public hearing on SB 297A.  |
| <b><u>SB 297A PUBLIC HEARING</u></b> |                        |   |
| 140                                  | Bill Taylor            | Committee Counsel. Introduces SB 297A which requires insurer to pay all sums covered by general liability insurance policy unaffected by other insurance that may provide coverage for same environmental claim.  |
| 150                                  | Bill Wyatt             | Executive Director, Port of Portland. Testifies in support of SB 297A.  |
| 289                                  | Tom Gallagher          | Schnitzer Investment Corporation. Submits testimony and testifies in support of SB 297A ( <b>EXHIBIT C</b> ).   |
| <b>TAPE 230, A</b>                   |                        |   |
| 003                                  | Gallagher              | Continues his testimony in support of SB 297A.  |
| 035                                  | Chris Herman           | Attorney. Testifies in support of SB 297A.  |
| 038                                  | Vice Chair<br>Ackerman | Says he is trying to conceptualize how this bill works and that if liability has been established then is it a question of allocation of that liability among insurance companies.  |
| 043                                  | Herman                 | Explains that there are two categories of liability.  |
| 050                                  | Vice Chair<br>Ackerman | Asks if adjudication of liability takes place in a judicial or administrative proceeding.   |
| 060                                  | Herman                 | Answers that it can take place in either, but the hopes of the proponents are that litigation is not required.  |
| 069                                  | Vice Chair<br>Ackerman | Asks since liability has been established in a judicial forum then would it be likely that those insurance companies would have participated in those proceedings representing their insurers.  |
| 070                                  | Herman                 | Answers, yes.   |
| 075                                  | Vice Chair<br>Ackerman | Asks if the allocation process can take place through the contribution method in court.   |
| 077                                  | Herman                 | Answers, that it probably would take place in the same proceeding.  |
| 081                                  | Vice Chair<br>Ackerman | Says that on page 2, line 36 of the bill, there is a situation in which the insured has more than one insurance policy. Asks if multiple landowners or predecessors of interest are liable.   |
| 090                                  | Herman                 | Responds that the bill does not attempt to allocate between the parties that are liable on the environmental liability.   |
| 097                                  | Rep. Shetterly         | Asks for clarification of the allocation process. Asks if it raises the risk that an insurer has to pay out on a claim in which coverage expired.   |
| 112                                  | Herman                 | Explains that an insurer only would have to pay out for a claim that happened when the property damage occurred.  |
| 122                                  | Gallagher              | Discusses an environmental case in Portland.  |
| 136                                  | Rep. Macpherson        | Asks if all insurers would be responsible for a clean-up and do the insurers have the opportunity to go after other insurers.   |
| 151                                  | Herman                 | Answers yes, explains.  |
| 166                                  | Rep. Macpherson        | Says that each of these potentially responsible parties (PRP's) may have one or more insurers that are responsible for different periods. Asks if this bill extends to other co-insurers with respect to that PRP or does it extend to all the potential insurers or all the potential PRP's. |
| 178                                  | Herman                 | Answers that it extends to other insurers of that insured.  |
| 181                                  | Rep. Prozanski         | Asks if there are nine states that have adopted this legislation. Asks if they now have less litigation.  |

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| 185                | Herman          | Responds those states have not adopted this rule legislatively, but through the Supreme Court on its allocation rule. Explains that there is still litigation but the litigation is on other coverage issues and not so much on the allocation rule. |
| 211                | Rep. Prozanski  | Asks if any of these states offer any other forms of mediation.  |
| 218                | Herman          | Says that he is not aware of any states that have special statutes of regulation that require mediation in this area.  |
| 234                | Chair Williams  | Asks Mr. Herman to discuss the shift of burden of responsibility to the carriers and how that will affect public policy.   |
| 260                | Herman          | Explains that insurance carriers accepted responsibility when they wrote the policies.   |
| 284                | Chair Williams  | Asks Mr. Herman for the legal costs of a case he would deal with on a regular basis.   |
| 294                | Herman          | Says that a typical clean-up site costs \$2,000,000 to \$5,000,000. Discusses the phases of litigation.  |
| 338                | Wyatt           | Points out that as an insured, the greatest fear that you have is that all the assets are consumed in transaction costs and you have nothing to work with when it comes to the clean-up.   |
| 361                | Jack Munro      | American Insurance Association. Testifies in opposition to SB 297A.  |
| 373                | Shawn Miller    | National Association of Independent Insurers. Submits testimony and testifies in opposition to SB 297A <b>(EXHIBIT D)</b> .  |
| 387                | Diane Pulcer    | Attorney. Testifies in opposition to SB 297A. Discusses the “all sums” issue. Believes that they are going into uncharted territory.   |
| <b>TAPE 229, B</b> |                 |  |
| 010                | Pulcer          | Continues her testimony in opposition to SB 297A.  |
| 065                | Laura Foggan    | Complex Insurance Claims Litigation Association. Testifies in opposition to SB 297A and discusses the “lost policy period.” Wants Section 3 to be deleted. Urges two amendments to the bill.   |
| 175                | Rep. Prozanski  | Asks what other states require sanctions where there isn’t fairness followed by either party.  |
| 180                | Foggan          | Answers that there are provisions in the Washington regulations relating to sanctions.   |
| 194                | Rep. Prozanski  | Discusses Schnitzer case <b>(Exhibit C)</b> and the “lost policy” problem that is addressed in this bill.  |
| 215                | Foggan          | Says that she cannot sanction conduct in which a known document is withheld.   |
| 229                | Rep. Prozanski  | Asks what the current state of law is in regards to a “lost policy”.   |
| 233                | Foggan          | Answers that it is parallel with any lost instrument law and explains.   |
| 253                | Pulcer          | Adds that Oregon Law generally is a “clear and convincing” standard.   |
| 265                | Chair Williams  | Asks Ms. Foggan why she thinks we should keep the “clear and convincing” standard.   |
| 282                | Foggan          | Explains that there are a host of reasons supporting the clear and convincing standard for any lost instrument.  |
| 305                | Chair Williams  | Says that clear and convincing is a very high standard. Asks Ms. Pulcer how it’s decided which insurance company pays for the environmental clean up.  |
| 346                | Pulcer          | Explains how they decide who pays for the clean up.  |
| 357                | Chair Williams  | Points out that as the bill is currently written, Oregon Mutual’s exposure would be no greater than its maximum policy limits.   |
| 360                | Pulcer          | Answers, yes, plus defense costs.  |
| 369                | Rep. Macpherson | Says that he works with health insurance companies and they  |

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|                    |                        | have “coordination of benefits.” Asks if these insurance companies have anything developing like this to determine who pays and how much.   |
| 396                | Munro                  | Says that most policies have that kind of language, but says we are mixing up a couple of different factual situations. Explains that a health situation occurs and can be sorted out unlike an environmental situation.  |
| 424                | Rep. Macpherson        | Asks about the Portland Super Fund site and how many insurers are obligated with respect to the clean up costs.   |
| 434                | Munro                  | Says he cannot comment on that.   |
| <b>TAPE 230, B</b> |                        |   |
| 019                | Rep. Prozanski         | Asks what the changes will be if they change the law to the “clear and convincing” standard.  |
| 027                | Foggan                 | Answers that she finds the language a little confusing and explains.  |
| 040                | Vice Chair<br>Ackerman | Comments on the 1 <sup>st</sup> page of the letter from Oregon Mutual Insurance Company ( <b>Exhibit D</b> ) and points out a misquote. Asks about 10-year period of pollution exposure with policy in effect for 1 year and if insurer has to pay for 10 years of pollution. |
| 061                | Foggan                 | Answers that she doesn’t think the statute says that. Explains.   |
| 070                | Purcell                | Talks about the obligation for the insurers to pay being established.   |
| 097                | Munro                  | Comments on enforcement of insurance policies and multiple insurers.  |
| 151                | John DiLorenzo         | Attorney. Testifies in support of the A6 amendments to SB 297A ( <b>EXHIBITS E &amp; F</b> ).   |
| 297                | Mark Nelson            | Oregon Metal Industries Counsel. Testifies on SB 297A.  |
| 360                | Rep. Krummel           | Asks if Mr. Nelson thinks that the bill puts the responsibility on the insurer.   |
| 374                | Nelson                 | Says that discussion is in the question of lost policy and that it is in the interest of the insured to provide every piece of policy they have.  |
| 396                | Rep. Shetterly         | Talks about the lost policy issue.  |
| <b>TAPE 231, A</b> |                        |   |
| 003                | Rep. Shetterly         | Asks what would show the policy limits in the absence of a policy.  |
| 005                | Nelson                 | Answers that he is not sure, but thinks that some other reference to the policy limit would be acceptable.  |
| 015                | Rep. Macpherson        | Asks how many insurers are involved in the Portland Super Fund Site.  |
| 019                | Herman                 | Says he thinks that there are about 10 carriers.  |
| 032                | Rep. Macpherson        | Asks how many are actively writing policies in Oregon today.  |
| 034                | Herman                 | Responds that he doesn’t know, but pre-1986 general liability coverage is not being written by anyone in Oregon.  |
| 038                | Chair Williams         | Asks him to talk about what the bill would accomplish with the insurance carriers.  |
| 046                | Herman                 | Says that there are two situations that they deal with factually. Explains one is a site in which the harm is visible and then talks about a situation when the harm is not visible.  |
| 079                | Chair Williams         | Asks about the lost policy issue.   |
| 081                | Herman                 | Says that currently the Oregon law is being debated in front of the Oregon Court of Appeals. Adds that current state of law is that the standard is preponderance of the evidence.  |

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| 094 | Rep. Prozanski | Says that the trial court is applying “clear and convincing” and asks why they are using that higher standard.   |
| 102 | Joan Snider    | Attorney, representing Schnitzer. Says that the trial court did not give a rationale. Says that it is not clear that that issue will be resolved by the court. |
| 108 | Gallagher      | Comments on the A5 amendments ( <b>EXHIBIT G</b> ).  |
| 120 | Rep. Krummel   | Asks for clarification on what Ms. Snider said.  |
| 129 | Snider         | Explains that what the judge said is that he thought the standard should be clear and convincing.  |
| 139 | Rep. Krummel   | Asks if the standard is explicit in the statute.   |
| 142 | Snider         | Says that the general rule in Oregon is to prove a contract through preponderance of evidence.   |
| 165 | Foggan         | Talks about the A5 amendments.   |
| 186 | Taylor         | Asks if Ms. Foggan has any suggested language.   |
| 187 | Foggan         | Says that she would work on some and be prepared to propose them.  |
| 201 | Gallagher      | Says that they have no disagreement with Ms. Foggan and are willing to look at their suggestions.  |
| 221 | Chair Williams | Closes the work session on SB 297A and adjourns the meeting at 3:10 p.m.   |

## **EXHIBIT SUMMARY**

**A – SB 59A, A6 amendments, submitted by staff, dated 7/1/03, 3 pgs.**

**B – SB 59A, hand-engrossed bill, 8 pgs.**

**C – SB 297A, written testimony of Tom Zelenka, submitted by Tom Gallagher, 4 pgs.**

**D – SB 297A, written testimony of Micheal Keyes, submitted by Shawn Miller, 4 pgs.**

**E – SB 297A, written testimony submitted by John DiLorenzo, Jr., 4 pgs.**

**F – SB 297A, A6 amendments, submitted by staff, dated 6/27/03, 1 pg.**

**G – SB 297A, A5 amendments, submitted by staff, dated 6/27/03, 1 pg.**