

SENATE COMMITTEE ON JUDICIARY

April 13, 1999 Hearing Room 343

3:00 p.m. Tapes 118 - 119

MEMBERS PRESENT: Sen. Bryant, Chair

Sen. Courtney, Vice-Chair

Sen. Brown

Sen. Nelson

Sen. Qutub

Sen. Tarno

MEMBER EXCUSED: Sen. Burdick

STAFF PRESENT: Anne Tweedt, Counsel

Judith Minnich, Administrative Support

MEASURE/ISSUES HEARD: SB 176 Work Session

SB 961 Public Hearing

SB 504 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 118, A		
002	Chair Bryant	Calls the meeting to order at 3:10 p.m.
<u>SB 504 PUBLIC HEARING</u>		

005	Chair Bryant	Opens the Public Hearing on SB 504.
008	Chair Bryant	Closes the Public Hearing on SB 504.
<u>SB 961 PUBLIC HEARING</u>		
024	Rep. Max Williams	State Representative, District 9 Testifies in support of SB 961 that requires the awarding of attorney's fees to the prevailing party in certain civil judicial cases where a state agency is the adverse party.
056	John DiLorenzo	Attorney, Oregon Litigation Reform Commission Submits testimony and testifies in support of SB 961 (EXHIBIT A). Indicates that Sections 1, 2 and 3 of SB 961 contain the main operative provisions of the bill.
140	Chair Bryant	Under current law when can costs be recovered from the state?
142	DiLorenzo	Costs can be recovered if a statute specifically authorizes it, if the state's claim has no objectively reasonable basis, or if it is a claim for non-economic relief under the Federal Civil Rights Act.
160	Chair Bryant	Are you aware of any case that has used the standard "without reasonable basis in fact, or law"?
164	DiLorenzo	I have asked for attorney's fees in the tax court under that standard, however, judges are reluctant to do this. I know of no case in which fees have been awarded.
181	Sen. Courtney	This committee just passed a bill (SB 268) that says that you can't sue a public entity for errors resulting from Y2K problems. How does SB 961 fit in with that?
196	DiLorenzo	The difference is that SB 961 is procedural and SB 268 is substantive.
224	Sen. Nelson	They would still be able to sue under SB 268 if SB 961 were adopted.
231	Sen. Brown	Why shouldn't this be reciprocal? Let the state recover fees if the taxpayer can recover fees.
235	Rep. Williams	The government often does have the ability to recoup legal costs. The government has a little power advantage over the citizen.

264	Sen. Brown	Discusses costs for private legal expertise versus government attorneys.
273	Rep. Williams	Indicates that the costs to the state for legal assistance are far less than the costs to a private citizen. Indicates lower costs may be an incentive to the state to pursue a case that may not be the strongest.
304	Sen. Courtney	The vast majority of these cases are settled and part of the settlement cost is legal fees.
317	Rep. Williams	Discusses the imbalance of power between the state and the citizen when pursuing legal matters.
356	David Schuman	Deputy Attorney General, Department of Justice Submits written testimony and testifies in opposition to SB 961 (EXHIBIT B). Indicates SB 961 imposes unilateral liability on the state in all civil litigation. Discusses the many enforcement roles played by the state, and indicates that these areas would be open to legal fee claims for any suits in which they don't prevail. Indicates that the state usually wins their cases. SB 961 is a powerful disincentive for enforcement action.
Tape 119, A		
027	Schuman	Indicates that the state would never have entered into litigation against tobacco manufacturers if SB 961 had been in effect.
062	Sen. Qutub	You indicated that the state would not enter litigation if there were a remote chance that they would not prevail. Could you please quantify "remote chance".
066	Schuman	It would depend on the potential size of the liability, balanced with our assessment of the case.
079	Sen. Qutub	What percentage chance of winning would you require?
087	Schuman	We wouldn't go forward unless we had a significant chance of winning, probably over 75%.
092	Sen. Qutub	You have told us that the state prevails overwhelmingly, in 98% of your cases, yet you feel this bill is a threat?
113	Schuman	Many cases we currently win we would not prosecute. The risk is too great.
119	Sen. Qutub	Frankly with your win rate, I don't see this bill as a big threat to the state

		pursuing appropriate remedies in court.
141	Sen. Nelson	Wouldn't you say the power of the state is awesome in a legal battle?
143	Schuman	In some cases. However, the state's technical resources do not compare to the resources of the law firms that represent the defendant in large cases.
161	Sen. Brown	I'm extremely concerned about the power of the state in civil forfeiture cases. What is the money used for?
165	Schuman	Proceeds from drug cases usually go to law enforcement.
182	Paul Snider	Association of Oregon Counties Testifies in opposition to SB 961. SB 961 grants private parties the right to recover legal fees but removes the right of government to do so.
208	Greg Mowe	Oregon State Bar, Procedures and Practices Committee Submits written testimony and testifies in opposition to SB 961 (EXHIBIT C). SB 961 advantages the private party at the expense of the government entity. Suggests that attorney's fees should be reciprocal which would make it consistent with the rest of the law.
262	Carl Stecher	Oregon District Attorney's Association Testifies in opposition to SB 961. Discusses state prosecution to enforce regulations governing the public interest or prosecution to govern relations between two parties. Gives example of child support enforcement actions in which the state is a third party.
326	Charlie Swindells	1000 Friends of Oregon Testifies in opposition to SB 961. Discusses Section 17 of SB 961 which would govern how SB 961 would impact on Land Use cases. Discusses the actual effect of Section 17. The Land Use Board of Appeals (LUBA) can already award fees to any party that participates frivolously. The proponents of the bill would like to control the agencies through this legislation. The courts are available to establish case law to do this.
Tape 118, B		
003	Joe Gilliam	National Federation of Independent Business Testifies in support of SB 961. Represents small business clients in regulation matters. Indicates that the small business owners, even if they win, must be content to just win, and then pay their own attorney fees. Gives an example.

053	Sen. Brown	In the interests of being fair, wouldn't you apply the awarding of attorney fees both ways?
054	Gilliam	In the area of regulation, the business owner is not initiating a claim against the state. Allowing the business owner to recover attorney fees is appropriate when a regulatory action is without merit. It is not appropriate for the state to recover fees in the course of performing their job. Discusses reciprocity.
061	Sen. Brown	If the business owner is wrong, don't you think they should pay?
062	Gilliam	The business owner did not initiate the action.
067	Sen. Brown	What if the business is not operating according to law?
073	Gilliam	In most cases the business owner will have to pay a fine.
074	Sen. Brown	But you don't think they should pay attorney fees?
075	Gilliam	No. If they're wrong, they will pay a fine and a penalty.
078	Sen. Qutub	Discusses the costs of small business owner. Indicates that regulatory enforcement can include fines.
099	Vice-Chair Courtney	Closes the public hearing on SB 961.
<u>SB 176 WORK SESSION</u>		
106	Counsel Tweedt	SB 176 requires a notice and specifies a hearing procedure for abandoned boats. There was concern that the notice provisions were perhaps unfair. The appeal was directed to the entity that took the boat in the first place. Discusses the changes made by the 11 amendments in order to solve the concerns expressed (EXHIBIT D).
166	Sen. Qutub	MOTION: Moves to ADOPT SB 176-1 amendments dated 4/7/99.
170	Vice-Chair Courtney	Asks about enforcement under the 11 amendments.
172	Counsel Tweedt	Indicates enforcement remains the same as it was in the original bill.
184		VOTE: 5-0

		EXCUSED: 2 - Bryant, Tarno
	Vice-Chair Courtney	Hearing no objection, declares the motion CARRIED.
185	Sen. Qutub	MOTION: Moves SB 176 to the floor with a DO PASS AS AMENDED recommendation.
		VOTE: 5-0 EXCUSED: 2 - Bryant, Tarno
	Vice-Chair Courtney	Hearing no objection, declares the motion CARRIED. SEN. QUTUB will lead discussion on the floor.
198	Vice-Chair Courtney	Closes the hearing at 4:25 p.m.

Submitted By, Reviewed By,

Judith Minnich, Anne Tweedt,
Administrative Support Counsel

EXHIBIT SUMMARY

A ñ SB 961, written testimony dated April 13, 1999, John DiLorenzo, 4 pp

B ñ SB 961, written testimony dated April 13, 1999, David Schuman, 3 pp

C ñ SB 961, letter dated April 9, 1999, Gregory Mowe, 2 pp

D ñ SB 176, -1 amendments dated 4/7/99, 1 pp