

**HOUSE COMMITTEE ON JUDICIARY**

**SUBCOMMITTEE ON CIVIL LAW**

**April 7, 1997 Hearing Room 357**

**3:15 P.M. Tapes 56 - 57**

**MEMBERS PRESENT:**

**Rep. Lane Shetterly, Chair**

**Rep. Judith Uherbelau, Vice-Chair**

**Rep. Roger Beyer**

**Rep. Jo Ann Bowman**

**Rep. George Eighmey**

**Rep. Floyd Prozanski**

**Rep. Charles Starr**

**MEMBER EXCUSED:**

**Rep. Larry Wells**

**STAFF PRESENT:**

**Bill Taylor, Counsel**

**Sandy Thiele-Cirka, Administrative Support**

**MEASURES/ISSUES HEARD:**

**HB 3435 - Public Hearing**

**HB 3539 - Public Hearing**

**HB 2308 - Public Hearing**

**HB 2998 - 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

<b>TAPE 56, A</b>		
005	Chair Shetterly	Calls meeting to order at 3:15 p.m.
<b><u>OPENS PUBLIC HEARING ON HB 3435</u></b>		
013	Rep. Bryan Johnston	District 31 Discusses background, intent, and purposes of HB 3435. I'm trying to demonstrate to those, who believe dispute resolution is only useful in certain cases, that they underestimate it's potential. There are two areas we should focus on: the state being the prosecutor and the state being the defender.
063	Rep. Johnston	Continues testimony.
090	Rep. Beyer	What is defined ORS 260?
091	Rep. Johnston	That involves everything that isn't criminal, and that makes it too broad. That's one of the problems.
100	Chair Shetterly	Have you had conversations about narrowing or redrafting this? Have you spoke with any of the people here to testify, and are you making any movement with them?
103	Rep. Johnston	I've spoken with them only today. I was going to ask that maybe the Chair appoint a few people for me to work with, and then we would come back, or I will pull the group together after today's meeting. That's really what this needs now.
110	Rep. Eighmey	Comments that mandatory mediation in child cases can be used as a representative of how the process works. Suggests that Rep. Johnston get together with different parties to work on the bill.
126	Chair Shetterly	Recesses Public Hearing on HB 3435.
<b><u>OPENS PUBLIC HEARING ON HB 3539</u></b>		
133	Rep. Sunseri	District 22 Discusses background, intent, and purposes of HB 3539.
150	Rep. Bowman	Wouldn't they be eligible to receive counsel from the school district?

152	Rep. Sunseri	Indeed they did, as the school board was sued jointly. However, they were sued individually as well. They had one attorney that represented them as a school board, but because they were sued individually, they had to obtain individual attorneys. Under this bill, if they are not found to be liable, they will be reimbursed for the cost of attorney.
179	Rep. Eighmey	When you speak about "found liable," found by whom? Gives examples.
196	Chair Shetterly	Closes Public Hearing HB 3539.
<p><b><u>REOPENS PUBLIC HEARING ON HB 3435</u></b></p>		
204	Russell Lipetzky	Family and Juvenile Section, Oregon State Bar Submits and discusses proposed amendments to SB 3435 ( <b>EXHIBIT A</b> ). It would not be appropriate to have this bill apply to domestic relations situations.
265	Chair Shetterly	ORS 30.268 to 30.300 do include the Oregon Tort Claims Act. Goes on to explain, in more detail, what the chapters include.
284	Rep. Uherbelau	What types of domestic situations would the state be involved in, other than support?
303	Lipetzky	The only examples I can think of are: (1) if support is or has been assigned to the state, (2) if the state is prosecuting and is involved in a contempt proceeding, or (3) if the state is initiating a support modification proceeding.
328	David Nebel	Representing the low-income clients of the Oregon Law Center I would echo many of Mr. Lipetzky's concerns about this bill, especially with respect to support issues. The state is involved in setting the amount of support and putting proceedings in motion, to establish support in the first place, when someone goes on welfare. I think that the ability of a party to request mediation, in a case like that, might work against a policy that is inherent in the child support guidelines: to try to bring some rationality and uniformity to the establishment of support between cases and among counties.
356	Carl R. Stecker	Marion County Deputy District Attorney Submits written testimony and proposed amendments to HB 3435 ( <b>EXHIBIT B</b> ).
<p><b>TAPE 57, A</b></p>		
008	Chair Shetterly	What is IVD?
010	Stecker	"Four D," the Federal Social Security Act. It mandates child enforcement

		programs throughout various states.
016	Timothy Wood	Chief Counsel, Department of Justice (DOJ) Testifies in opposition to HB 3435 (as currently formatted). Notes the Department's objections to mandating mediation. Discusses current processes and fiscal impact.
054	Rep. Uherbelau	Even if 50 percent is resolved by motion, I would imagine many are appealed. We have a cost here that you seem to be discounting, and I'm wondering if the mediation wouldn't be less in the long run.
066	Wood	Discusses how the DOJ deals with these types of cases.
077	Chair Shetterly	You are referring to the number of appeals from the cases that are dismissed motion for judgment or motion for dismissal.
079	Rep. Uherbelau	Yes.
080	Wood	When we look at these cases, we have three criteria we look at: efficiency, cost, satisfactory resolution (both for the state agency and the individual who filed the lawsuit). We try to find the most cost efficient way to solve a case, early on in the dispute. This impacts all public bodies, not just the state.
130	Wood	Continues testimony.
180	Wood	Continues testimony. Discusses other states which have mandated mediation.
192	Rep. Eighmey	Is Rep. Johnston's request to narrowing the bill feasible?
198	Wood	The DOJ is open to alternatives.
213	Rep. Eighmey	Comments on cost effectiveness and other factors. Is mandatory mediation, in child support cases, cost effective?
224	Wood	The pilot program utilized a criteria to determine if the case moves forward into mediation. Not all cases are mediated.
244	Chair Shetterly	How does this relate to other mediation programs we have, in the trial courts, around the state? You're already mediating, I assume.
250	Wood	We are mediating cases. That's part of the point. I see this as another layer to court mediation processes.
263	Chair Shetterly	Would it be useful to put a "trigger point" in this to have it relate to cases, either after the parties have filed their motions for summary judgment, and the motions have been denied, so that part of the case is basically over, or after the time of filing the summary judgment has expired, so you basically know you are on the trial track at that point? These are cases that are not going to be disposed of by motion.
273	Wood	Perhaps, but the point is that each case is different. These suggestions may be acceptable.
291	Bill Taylor	Committee Counsel I take it that your analysis, concerning cost benefit, is based on the benefit to your client, which would be a state agency, and it did not include the fact that maybe mediation would take cases out of the courts.

300	Greg Malkasian	Workers' Compensation Division of the Department of Consumer and Business Services Submits written testimony in opposition and proposed amendments to HB 3435 ( <b>EXHIBIT C</b> ).
344	Jim Harlan	Chief of Registration and Licensing, Division of Finance and Corporate Securities Testifies in support of the mediation process, but opposes HB 3435 because of his involvement with highly liquid and fungible assets.
409	Chair Shetterly	Closes Public Hearing on HB 3435.
<b><u>REOPENS PUBLIC HEARING ON HB 3539</u></b>		
421	David Schuman	Deputy Attorney General Submits written testimony, concerning HB 3539 ( <b>EXHIBIT D</b> ).
<b>TAPE 56, B</b>		
014	Rep. Uherbelau	Is there nothing in case law that qualifies that? Has anyone been held liable when they've made a "good faith" decision?
020	Schuman	The case law on ORS 294.100 goes back a long way. There isn't anything recent, but in the older cases, "harsh result" is used. To answer your question, yes there is law. There are more recent attorney general decisions, which cite those cases and point out that this does, in many incidences, mandate a very harsh result. The reasoning, at the time, was that an office of public trust was something that is very delicate and sensitive, and people should be held responsible if they misspend funds.
027	Rep. Uherbelau	Most officials must not know about this because I think it would shut government down, if they knew that making a "good faith" effort could result in such a way.
029	Schuman	That brings up another point: many government officials believe they are indemnified by the Oregon Tort Claims Act. There is a concurring opinion, in a fairly recent case, in which misspending of funds is a tort, for purposes of the Oregon Tort Claims Act. That is a concurring opinion, and it has never been solidly held by the court. In the opinion of many, it is a stretch to regard the misspending of funds as a tort, so there is a kind of mismatch, between the Oregon Tort Claims Act and ORS 294.100, which we think could be remedied by a few simple amendments, and I have suggested a couple of them. We bring these to you more as law improvement than as supporting or opposing a piece of legislation, but we feel that these are "statutory time bombs" that are ticking and should probably be taken care of while you have the bill in front of you.
		I assume that these statutes have been in this form for quite some time.

040	Rep. Uherbelau	Why haven't these issues been raised before, or have they been raised, and we have ignored them?
044	Schuman	The issues have been raised, but not litigated.
055	Chair Shetterly	Suggests that the witnesses work with Rep. Sunseri and get the amendments in Legislative Counsel form.
059	Rep. Prozanski	Have you come across any type of indemnification for legal services?
068	Schuman	I don't know that we have, but it is worth looking into.
076	Chair Shetterly	Closes Public Hearing on HB 3539.
<b><u>OPENS PUBLIC HEARING ON HB 2308</u></b>		
083	David N. Hicks	Assistant Attorney General, Civil Enforcement Division of the DOJ Submits written testimony in support of HB 2308 -- as amended <b>(EXHIBIT E)</b> .
135	Hicks	Continues testimony.
178	Chair Shetterly	Reads aloud from the new subsection two. What about the actual situation of an unrecorded interest? Would those be disposed of by this amendment also?
190	Hicks	The case laws are already very clear that the plaintiff has a duty to add parties of which it has actual knowledge, irrespective of whether or not they are recorded. Cites subsection three.
198	Rep. Uherbelau	There is a duty to name, but is there a duty to discover something that is not recorded in the usual scheme of things?
214	Hicks	Yes. We agonized over how to word this, so that we reserved the duty, as it is currently explicated in the case law, without expanding or contracting it. When we took the bill back and redrafted it, we did so to address concerns of the Oregon State Bar and some other organizations, and they were all comfortable with this language. Explains why the bill was originally drafted.
266	Chair Shetterly	As I see it, on lines 12-15, page two, those late arising interests can still derail the foreclosure, right up to the moment before the entry of final judgment, but it is incumbent on the person, claiming the interest, to actually intervene. Is that what happens here?
278	Hicks	That's correct. We contemplated that the judge exercise the type of discretion that trial judges normally do when permitting the intervention.
291	Rep. Eighmey	It is my understanding that, under case law, your "gap" situation is already covered.
		There has not been a ruling against the DOJ. However, there is nothing on

301	Hicks	the books.
316	Randall Jordan	DOJ We did find case law from other states, and it was inconsistent. However, there were cases that ruled in favor of the unrecorded interest. That's why we decided to take the chance. There were inconsistent decisions out of state and no decisions in the state.
328	Rep. Eighmey	Were those states prior recording states?
330	Jordan	Yes.
353	Chair Shetterly	Comments on the time and length of intervention, citing statutes. This appears to create the right of intervention after trial, prior to judgment.
360	Jordan	We did not draft the bill with the intention to create a right of intervention. We contemplated that trial judges would exercise their right of discretion, under the rule, to the extent that they are not authorized to do so. Cites subsections two and three. I didn't envision that it created an unconditional right to intervene, merely because they claimed the interest.
364	Chair Shetterly	Line 15 concerns me more. The line suggests that there is an intervention after trial, prior to entry of judgment, under this bill. We need to say that explicitly or reconsider whether we want to do that.
370	Rep. Uherbelau	Maybe one way of dealing with that is just to refer to ORCP 33.
380	Chair Shetterly	We could just delete line 15 and reference ORCP 33, as long as everyone understands that the time could be limited.
391	Bill Taylor	Committee Counsel How would this measure affect construction liens?
398	Jordan	There should be no effect on construction liens.
433	Rep. Eighmey	I understand what you are saying, with regard to construction liens, but I'm still a little concerned about that. Have you passed this by a construction lien hold expert? I think this would raise some rights, with construction liens, that otherwise would not have been available.
<b>TAPE 57, B</b>		
008	Chair Shetterly	My concern would be preserving that right.
010	Hicks	It is not our purpose to interfere with that right. We did not discuss this with anyone involved with construction liens. Suggests inviting a construction lien expert to the work session.
039	Chair Shetterly	Closes Public Hearing on SB 2308.
<b><u>OPENS PUBLIC</u></b>		

**HEARING  
ON HB 2998**

041	Rep. Floyd Prozanski	District 40 Discusses the background, purposes, and intent of HB 2998. This is modeled after an Alaskan law. Discusses -1 amendments to the bill <b>(EXHIBIT F)</b> .
080	Rep. Uherbelau	On line 11, I assume you want to include both real and personal property, tangible and intangible, anything you can file a lien against?
083	Rep. Prozanski	Yes.
084	Rep. Uherbelau	That probably needs to be clarified.
085	Brenda Rocklin	DOJ Testifies in support of HB 2998. This bill compliments one that the subcommittee has already heard, HB 2918, which hopefully will preclude individuals from filing these false claims against real and personal property. This bill would authorize criminal penalties; HB 2918 offers civil penalties.
095	Chair Shetterly	What other records, besides Uniform Commercial Code records (UCC) and real property liens, would be covered by this bill?
103	Rep. Prozanski	The intent is that any interest, not covered by a lien, would be protected.
114	Chair Shetterly	If someone files a water rights case, would that be covered?
121	Rep. Eighmey	This bill relates to recording. It is for any document that is notarized.
123	Chair Shetterly	But, that is expanded on line eight.
128	Rep. Eighmey	You're right.
136	Rep. Bowman	How would intent to defraud be identified?
150	Rep. Prozanski	It's a fact-based driven requirement, where you have to bring the evidence that's necessary to, in this case, prove beyond a reasonable doubt, that they did, in fact, have that intent.
169	Sergeant Michael Ramsby	Oregon State Police Submits written testimony in support of HB 2998 <b>(EXHIBIT G)</b> .
181	Rocklin	Gives example of how a prosecutor may try a case like this (to respond to Rep. Bowman's question).
193	Chair Shetterly	Would it be clearer if we would say to "harass and defraud?"
199	Bill Taylor	Committee Counsel I always thought defraud meant to take money from someone. The cases described are more harassment rather than defraud.



209	Ramsby	Gives examples in which individuals have placed a fictitious lien on a person in common law court filings. The false claims may lead to financial gains through fraud.
224	Chair Shetterly	Closes public hearing on HB 2998. Adjourns the meeting at 5:07 p.m.

Submitted by, Reviewed by,

Lisa Fritz Sarah Watson

Administrative Support Office Manager

**EXHIBIT SUMMARY**

**A - HB 3435, proposed amendments, Russell Lipetzky of the Oregon State Bar, 2 pages.**

**B - HB 3435, written testimony and proposed amendments, Carl R. Stecker, Deputy District Attorney of Marion County, 1 page.**

**C - HB 3435, written testimony and proposed amendments, The Workers' Compensation Division, 3 pages.**

**D - HB 3539, written testimony, David Schuman, Deputy Attorney General, 2 pages.**

**E - HB 2308, written testimony, David N. Hicks, Assistant Attorney General of the Civil Enforcement Division, Oregon Department of Justice, 2 pages.**

**F - HB 2998, proposed amendments (-1), Legislative Counsel and Rep. Floyd Prozanski of District 40, 1 page.**

**G - HB 2998, written testimony, Sgt. Mike Ramsby of the Oregon State Police, 2 pages.**