

HOUSE COMMITTEE ON JUDICIARY

SUBCOMMITTEE ON CIVIL LAW

April 16, 1997 Hearing Room 357

1: 00 P.M. Tapes 62 - 63

MEMBERS PRESENT:

Rep. Lane Shetterly, Chair

Rep. Judy Uherbelau, Vice-Chair

Rep. Roger Beyer

Rep. Jo Ann Bowman

Rep. George Eighmey

Rep. Floyd Prozanski

Rep. Charles Starr

Rep. Larry Wells

STAFF PRESENT:

William E. Taylor, Counsel

Lauri A. Smith, Administrative Support

MEASURE/ISSUES HEARD:

HB 3539 - Work Session

HB 2308 - Work Session

HB 3188 - Work Session

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 62, A		
002	Chair Shetterly	Calls the meeting to order at 1:05 p.m.

HB 3539 - WORK SESSION		
005	Chair Shetterly	Opens a work session on HB 3539.
006	William E. Taylor	Counsel Reads a Preliminary Staff Measure Summary on HB 3539. Presents -1 amendments and an opinion letter from Legislative Counsel (EXHIBIT A) .
025	Rep. Eighmey	Public official is defined as "an elected or appointed official." It is not a candidate.
026	Chair Shetterly	What is the definition of a "public official" in ORS?
034	Rep. Eighmey	A "public official" is defined in the -1 amendments on lines 9 and 10.
036	Chair Shetterly	This measure applies to an elected or appointed official of a public body. Public body is defined in ORS 30.260.
049	David Schuman	Deputy Attorney General Testifies in support of HB 3539. The Attorney General's office is concerned as to the measure's clarity, whether it applies to state officials. HB 3539 is placed in ORS 294.100 which deals with municipalities and expenditure of public funds. Secondly, as the measure is written, it's tone is harsh. It imposes liability even for good faith mistakes. Finally, there is confusion between the interaction of the measure and the Tort Claims Act. Refers to the -1 amendments in regards to the indemnification language (EXHIBIT A) .
078	Chair Shetterly	Is the indemnification language you are referring to on lines 7 and 8 of the -1 amendments?
086	Schuman	Yes.
092	Rep. Uherbelau	Has this statute been applied harshly over the years?
096	Schuman	This statute hasn't been applied very frequently. There has been inquires to the Attorney General's office as to whether it should be applied harshly. Our suggestion has been to apply the statute harshly. I believe, Rep. Sunseri's intent was to anticipate a case happening.
103	Rep. Eighmey	It isn't a change in the present statute. The measure refers to an action that can be brought forward by a taxpayer in the district on lines 4 and 5 of the -1 amendments. How is the term "taxpayer" defined? Gives example.

		Could we not state "any resident of the district" or "any person of the district"?
118	Schuman	That would certainly eliminate an unexplainable part of the language in the statute. The -1 amendments were not intended to impact the policy and coverage within the statutes but to eliminate unintended ambiguities.
124	Chair Shetterly	Therefore, to raise a complaint you must be a taxpayer as outlined in the ORS 294.100. Isn't this a standing threshold issue in the statute that a complaint can only be brought by a taxpayer over excess spending of public funds?
128	Rep. Wells	Offers a definition of taxpayer as "a person who owns property."
133	Rep. Eighmey	I don't disagree with the statute, but as a lawyer, the definition of taxpayer could be attacked. Gives examples.
148	Rep. Wells	In defining taxpayer, could it be handled by how the municipalities receive funding and who contributes? This maybe a way of limiting the definition of taxpayer.
153	Rep. Eighmey	Continues to share his concerns about the definition of taxpayer.
162	Rep. Uherbelau	Perhaps the definition of taxpayer needs to be taken into consideration by the subcommittee at this time.
166	Rep. Bowman	Could you present the rational behind the proposed change on line 7 of the printed measure in light of the comments in the letter dated 04/11/97 from David W. Heynderickx, Deputy Legislative Counsel (EXHIBIT A)?
172	Schuman	There are very subtle differences in the use of the words "knowingly" and "intentionally" in the law. I believe the -1 amendments still expresses the original idea.
177	Chair Shetterly	Reads annotations associated with ORS 294.100.
185	Schuman	Is the annotation from an Attorney General's opinion or an actual case?
186	Chair Shetterly	Identifies case cite of annotation: Porter vs. Tiffany, 11 Or App 542, 502 P2d 1385 (1972), Sup Ct reviewed denied. What is the definition of a "public body" as referenced in lines 9 and 10 of the -1 amendments?
196	Taylor	Reads definition of "public official" from ORS 30.260.
209	Chair Shetterly	So, the insertion of the language on lines 9 and 10 of the -1 amendments, is to clarify that a public official includes state officials for purpose of this statute, ORS 294.100?
211	Schuman	Yes.
216	Chair Shetterly	If the subcommittee uses the definition of "public official" from the -1 amendments, I have concerns about the definition in conjunction with subsection (3) of the statute, as the latter would seem not to apply to state officials. The subcommittee needs to be intentional, if we are to include state officials.

226	Rep. Uherbelau	If we are going to be intentional in including state officials, I believe, we need to expand subsection (3). Was Rep. Sunseri's intent from the stand point of state officials?
234	Schuman	I believe, Rep. Sunseri's situation stemmed from a school board member in Bend.
239	Chair Shetterly	If any of the subcommittee members is concerned with the dissidents between the definition of "public official" and the scope of subsection (3), we could add language "unless the context required otherwise, a public official means." This could add the clarity needed in subsection (3). Is subsection (3) limited to the actions of the city, and would it apply to state public officials?
247	Rep. Eighmey	There are state laws that apply to state officials. Do we really need a definition of a "public official?" What if we deleted lines 9 and 10 of the -1 amendments and retained the language, as is in the statute, to mean only a municipal public official?
260	Chair Shetterly	The statute is being interpreted to refer only to a municipal public official.
263	Schuman	The subcommittee may want to make the implication explicit that the legislature intends it to refer to only municipal public officials.
266	Taylor	Mr. Schuman, are you saying that the confusion seems to come from the location of this measures within ORS 294 and not from the text of the act itself?
271	Schuman	Yes.
272	Rep. Eighmey	I think that is exactly opposite. The confusion arises because public official is not defined. The clarity, if any, occurs from the position in the statute as this defines public official.
278	Rep. Uherbelau	Shares concerns about the confusion raised in defining "public official" and who is considered as a taxpayer.
292	Chair Shetterly	What is meant by a tax supervising and conservation commission on line 15 of the original measure?
298	Taylor	Refers to the budget committee of the particular body.
303	Chair Shetterly	Closes the work session on HB 3539.
<u>HB 2308 - WORK SESSION</u>		
318	Chair Shetterly	Opens a work session on HB 2308.
324	Randall Jordan	Assistant Attorney General Civil Enforcement Division Testifies in support, if amendments are adopted, and presents written testimony (EXHIBIT B). Refers to the -2 amendments (EXHIBIT C).

374	Jordan	Continues testimony.
389	Rep. Eighmey	The -2 amendments address my earlier concerns regarding construction liens and the standing of interveners. Two practitioners whose practice is in liens, have a concern whether an encumbrance was a lien or whether a lien was an encumbrance. I believe an encumbrance subsumes liens.
411	Chair Shetterly	Gives example. The -2 amendments are designed to specifically address construction liens and attorney liens to be protected. Also, subsection (e) of the -2 amendments is designed as a "catch all" that protects other statutory liens against property, as long as the liens are valid in their own rights.
441	Jordan	Correct. Continues testimony in regards to the -2 amendments.
457	Chair Shetterly	Have you spoken with any title attorneys in this area?
458	Jordan	Yes.
Tape 63, A		
030	Rep. Uherbelau	MOTION: Moves to ADOPT HB 2308-2 amendments dated 04/16/97.
032	Rep. Wells	What prompted this measure to be drafted?
038	Jordan	Identifies a foreclosure case that prompted the measure.
049		VOTE: 8-0-0
	Chair Shetterly	Hearing no objection, declares the motion CARRIED.
051	Rep. Wells	Could you explain how this measure will solve your concerns.
053	Jordan	This measure is designed to protect the interest in real property, where a deed is unrecorded or where an unrecorded mortgage exists.
060	Rep. Wells	Is the action taken to first foreclose, then pay off the liens from out of pocket?
062	Jordan	Yes. However, the construction lien would probably have to be paid first because some construction liens can have a lower priority than mortgage liens.
064	Chair Shetterly	However, this measure will not effect that part of the law.
065	Jordan	Correct.
066	Chair Shetterly	The reason for adding the language on page 2, lines 16 - 23, is so that statutory liens were not inadvertently cut out of their rights after the subcommittee reviewed the original measure's language.
070	Rep. Beyer	Why are we specifically including attorney liens? Why not accountant liens,

		etc.?
079	Rep. Uherbelau	Attorney liens arise from statutes not from a suit. The inclusion in this statute does not give an attorneys lien priority. Generally, a practitioner knows when a notice of pendency has not been filed, when applying for an attorney lien. This statute will not change priority of claims, it is to merely leave the statutory right of attorney liens present.
090	Rep. Beyer	How many other classes or groups have statutory lien rights, besides attorneys?
092	Chair Shetterly	Other statutory lien rights do exist. I state, for the record, that by listing construction and attorney liens in subsection (c) and (d) in the -2 amendments, this was not meant to give any special notation. Subsection (e) covers all other statutory liens and is intended to give other statutory liens the same protection and priority. The ability to list all possible liens is there. However, some could be missed.
104	Jordan	Within statutory liens there exists different priorities. The intent was to preserve the existing statutory lien priority without providing more priority.
112	Rep. Beyer	If, in subsection (e) this catches all statutory liens, why retain subsection (c) and (d)?
114	Chair Shetterly	I could be amenable to removing subsection (c) and (d) of the -2 amendments, as subsection (e) is designed as a catch all section.
117	Rep. Eighmey	I brought up construction liens in an earlier hearing .
118	Chair Shetterly	I believe Rep. Uherbelau brought up attorney liens.
119	Rep. Eighmey	However, construction liens are a very unique body of law. There is significant attention regarding the operation of construction liens. I wanted to make sure this measure does not effect construction liens. I still think construction liens need to be clearly identified.
130	Rep. Uherbelau	I believe subsection (e) refers to only bona purchasers. This is not a "catch all" section, regarding statutory liens.
140	Jordan	The intent of the measure is to protect statutory liens that can be recorded later, but will relate back and have some protection. If a statutory lien would be valid against a purchaser in good faith, it will continue to be valid against a notice of pendency. A statutory lien generally provides that a purchaser, in good faith, would also be effected. A purchaser will be bound by the statutory lien.
154	Rep. Uherbelau	What about agricultural liens; don't they relate back?
155	Chair Shetterly	Yes, agricultural liens relate back. An agricultural lien would not be an encumbrance that would not be void as against a person who purchased a property in good faith.
156	Rep. Uherbelau	I don't believe subsection (e) is a catch all for other statutory liens.
	Chair	Why not? For instance, an agricultural lien would not be void under ORS

160	Shetterly	93.640 as against a person who purchases the property in good faith.
168	Rep. Eighmey	I agree, it should not be void against a person who purchased property in good faith, but by reversing this definition you are saying: "The conveyance or encumbrance would be void as against a person who purchases the property in bad faith and for less than consideration." Isn't the reverse true. Why couldn't we state: "The encumbrance is not void under ORS 93.640 as against a person who purchases the property and records it."
183	Rep. Uherbelau	For instance, the person who files a notice of pendency is the person who is foreclosing. A bona fide purchaser has nothing to do with the person who is foreclosing. Is it the person who is foreclosing who can wipe out the lien holder's interest?
205	Rep. Beyer	I don't agree with specifically naming attorney liens, if the subcommittee is not going to make a laundry list to catch all other statutory liens.
212	Chair Shetterly	I believe we need to make subsection (e) as clear as possible. If the subcommittee decides, it wants to create a "catch all" section, okay, as long as the intent is clear. Closes the work session on HB 2308.
<u>HB 3188 - WORK SESSION</u>		
226	Chair Shetterly	Opens the work session on HB 3188.
227	William E. Taylor	Counsel Reads a Preliminary Staff Measure Summary on HB 3188. Refers to the -1 amendments (EXHIBIT D). Explains intent behind the proposed -1 amendments.
261	Rep. Prozanski	Why, on page 2, line 6, are we deleting "A political committee may not be sued as defendant in such an action."?
264	Taylor	Gives example. I assume, by removing this sentence, we are allowing suits to be brought forward .
275	Rep. Prozanski	MOTION: Moves to AMEND HB 3188 with the conceptual amendments, discussed by Counsel Taylor, that are reflected in the amendment request dated 04/11/97.
283	Chair Shetterly	I question the deletion of the word "actual" in line 26, page 1 of the original measure. I believe the \$2,500 (inserted for \$200 by -1 amendments) is actual damages. Regarding the Unlawful Trade Practices, there is language "that an individual who's suffers a loss may bring an action in an appropriate court to recover actual damages or \$200." However, if a person can't measure actual damages, the default is the \$2,500, or that may be greater than the actual dollars needed. I would be more comfortable retaining the

		word "actual" within the statute.
307	Rep. Uherbelau	Statutes have always identified the type of damages, for instance, punitive or actual. I can't recall any statutes that use only the word damages.
310	Rep. Prozanski	I rescind my motion.
311	Chair Shetterly	Would you be willing to accept a friendly amendment?
313	Rep. Wells	I wonder why "actual damages or \$2,500," is better than the current language that is being removed.
318	Taylor	Identifies the results of a word search to confirm usage of actual and compensatory damage language.
329	Rep. Prozanski	The threshold for the amount of damages is \$2,500. So, if the amount is beyond the \$2,500 and proof of actual damages can be shown, the person can gain the additional amount?
334	Rep. Wells	Why remove the language regarding false statements of facts? I would like "false statement of facts" defined as it relates to this measure.
344	Chair Shetterly	I believe, the language on page 1, line 25 of the original measure is being remove due to redundancy. Subsection (4), which in turn refers to subsection (1), already covers false statements.
354	Chair Shetterly	False statements are a predicate of the violation of subsection (4).
358	Rep. Beyer	On page 1, lines 25 and 28 of the original measure, do we need to insert "actual" for "compensatory?"
368	Rep. Bowman	How would you prove "actual" damages in the particular case described in this measure?
370	Chair Shetterly	There is difficulty in proving actual damages in falsifying election statements. That is why the alternative "or \$2,500" is being proposed.
375	Rep. Bowman	For the record, I will not be supporting this measure. Shares concerns.
383	Rep. Uherbelau	The idea of this measure is already in statute. I believe, by inserting the alternative of a dollar figure, this will help in recovery of damages.
387	Chair Shetterly	The \$200 penalty, associated in the original measure, does not present enough of a fine to discourage false election statements.
400	Rep. Eighmey	There is no change to the statute. The threshold, for proving that a candidate or political committee has been violated, is still present in the statute. The safeguards are still present. If, however, a person has hurdled all of these thresholds, the \$200 is not enough to discourage usage of false election statements.
422	Taylor	Provides an example of a false election statement from an annotation within ORS 260.532.
434	Rep. Bowman	Gives example about a recent candidate was penalized for a false statement. Why is this measure needed, is it not already in ORS, to penalize for a false statement?

443	Taylor	The candidate you refer to was penalized under this statute. The proposed measure would make it easier to pursue a claim over a false statement.
460	Chair Shetterly	This measure would be to discourage any false election statements.
463	Rep. Uherbelau	I think this is broader than the original statute. Shares concerns.
Tape 62, B		
035	Rep. Uherbelau	Continues to share concerns.
040	Chair Shetterly	There is no need to include a request for plaintiff attorney fees, as already covered on page 1, line 29 of the original measure.
065	Rep. Uherbelau	MOTION: Moves to AMEND HB 3188 with the conceptual amendments described by Chair Shetterly.
067		VOTE: 8-0-0
	Chair Shetterly	Hearing no objection, declares the motion CARRIED.
068	Rep. Beyer	On page 2, lines 6 through 8, has the subcommittee created an unworkable position?
069	Chair Shetterly	The language on page 2, lines 6 through 8, is part of existing statute.
071	Rep. Beyer	Are the conceptual amendments creating an opening for recovery of damages, where before damages were not recoverable?
072	Chair Shetterly	Now punitive damages are being awarded.
073	Rep. Beyer	Where within the statute was it punitive damages previously?
074	Rep. Wells	Punitive damages previously were not included. However, I believe the conceptual language is punitive damages.
075	Rep. Beyer	Now, there is a collection of money into the political committee that needs to be distributed, via a pro rata basis, among persons who have made contributions to the committee.
077	Taylor	A political committee is an unincorporated association. There isn't a legal person defined as "an individual or a corporation." It must be determined how the association, who now has assets, should distribute these assets, especially when the committee is disbanded. Pro rata is one method of distribution.
084	Rep. Uherbelau	Shares concern about distribution of monetary award. Gives example.
093	Chair Shetterly	How else would you distribute the monetary award?
095	Rep. Wells	There are laws that relate to excess funds at the end of political campaigns. None of those laws address going back to the contributors, when distributing excess funds.

100	Rep. Wells	I believe the award could remain in the political committee funds.
102	Chair Shetterly	Instead of distributing the award as referenced on page 2, line 6 of the printed measure, what if the award is retained with the political committee?
104	Rep. Bowman	On page 2, line 13 of the original measure, this section does not appear to address what does happen to state officials.
114	Taylor	The Oregon Constitution determines the qualifications of the legislative body. Any action taken against a member is determined by the Senate or House of Representatives body. Any challenge would be by credentials, which would require a two-thirds vote of the governing body. All such actions have been upheld by the US Constitution.
121	Rep. Uherbelau	I withdraw my last motion and forward a new motion.
124	Rep. Uherbelau	MOTION: Moves to AMEND HB 3188 to insert the conceptual amendments, as discussed by Chair Shetterly, and to add the recommendation by Rep. Beyer to remove the entire sentence beginning on line 6, page 2, which ends on line 8 of page 2.
127	Chair Shetterly	What if there is no political committee to receive the award? I believe, if a suit is brought, there is still a political committee.
132	Rep. Beyer	Due to the number of changes involved, I would like to await amendments drafted by Legislative Counsel.
140	Chair Shetterly	Closes the work session on HB 3188. Adjourns the meeting at 2:11 p.m.

Submitted by, Reviewed by,

Lauri A. Smith, Sarah Watson,

Administrative Support Office Manager

EXHIBIT SUMMARY

A - HB 3539, -1 amendments dated 04/11/97, Staff, 1 page.

B - HB 2308, written testimony, Randall C. Jordan, 2 pages.

C - HB 2308, -2 amendments dated 04/16/97, Staff, 4 pages.

D - HB 3188, -1 amendments dated 04/16/97, Staff, 1 page.