

SENATE JUDICIARY SUBCOMMITTEE
ON CIVIL PROCESS

Hearing Room
Tapes - 8

MEMBERS PRESENT:

Rep. Del Parks, Chair
Sen. Tom Bryant, Vice-Chair
Rep. Kate Brown
Rep. Bryan Johnston
Rep. Bob Tiernan
Sen. Ken Baker
Sen. Randy Miller
Sen. Peter Sorenson

MEMBER EXCUSED:

Rep. Lewis

STAFF PRESENT:

Holly Robinson, Committee Counsel
Max Williams, Committee Counsel
Sarah May, Committee Assistant

MEASURES HEARD:

SB 386 - Public Hearing

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks

report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

TAPE , SIDE A

003 CHAIR BRYANT: Calls the hearing to order at 3:40 pm.

PUBLIC HEARING ON SB 386

(SB 386 eliminates right of individual to bring civil action under Oregon Racketeer Influenced and Corrupt Organization Act.)

Witnesses:

John Dilorenzo, Oregon Litigation Reform Coalition
Jack Faust, Naegeli & Associates, Inc.
Larry Campbell, Litigation Reform Coalition
Lee Nuisch, Oregon Bankers Association
Lisa Horowitz, Executive Director of Oregon National Abortion and
Action League

Reproduction

Jude Hanzo, Feminists Women's Health Center
Maura Roche, Planned Parenthood Affiliates of Oregon
Laurie Wimmer, Oregon Commission for Women
Tevina Benedict, Women's Rights Coalition
Richard Yugler, Attorney
Jerome LeBarre, Attorney for Mark Krieger

Mark Kreiger, Self
Michael Esler, Attorney
John Stephens, Attorney
Coln Ainslie, Self

043 JOHN DILORENZO, OREGON LITIGATION REFORM COALITION: Testifies and submits booklet in support of SB 386. (EXHIBITS A, B-1, B-2)

334 JACK FAUST, NAEGELI & ASSOCIATES, INC.: Testifying by video tape in support of SB 386. (EXHIBITS A, B-1)

432 DILORENZO: Continues testimony on SB 386. Discusses proposed amendments proposed by Faust EXHIBIT B-2.

TAPE 6, SIDE A

009 REP. TIERNAN: How many civil RICO cases have been filed, and how many have been decided in the state of Oregon?

013 DILORENZO: We are in process of assembling that material. We found 14 ORICO cases that have come up on appeal and have reached the appellate court. Discusses Oregon and Federal racketeering provisions that include mail and phone fraud.

030 REP. TIERNAN: Will you have numbers for us before we vote on this?

031 DILORENZO: I will try. It is difficult to assemble because they are counted by counties.

033 REP. TIERNAN: How would this effect Planned Parenthood and their fear that they will not be able to stop clinic violence if this is repealed?

042 DILORENZO: I spoke with some of the people from Planned Parenthood and assured them that it is not our intent to do anything other than eliminate the application of this law to innocent business people. Discusses other possible remedies to help solve any problems that may occur.

071 REP. JOHNSTON: Your intent is to take the "ordinary" business transaction out of SB 386?

077 DILORENZO: Yes, that is exactly our intent.

079 REP. JOHNSTON: Are there other ways to do that? Gives example of how to remove all of the business transactions from this bill that are the problems and still keep in place the tool that is valuable for many purposes.

085 DILORENZO: One of the problems with concentrating on all of the racketeering offenses is that we do not want to limit the authority of the Attorney General to prosecute. The Oregon racketeering list is much broader than the federal list. The only way we can determine to keep and enhance the ability of the Attorney General to utilize RICO, is to eliminate the private right of action.

096 REP. JOHNSTON: Your suggestion is to take away the private right of action?

099 DILORENZO: Yes, that might work. We want to make sure that RICO is not used in an effort to enhance the recovery that is already provided for under Oregon law.

107 CHAIR BRYANT: If nine percent of the claims, as stated in the law review article, are RICO claims, one way to limit the civil action might be

to only allow it after a criminal conviction.

111 DILORENZO: That proposal has been proposed in Congress, explains. There are a number of bills in Congress that are pending to address the RICO problem. That is one way to get at the situation because then you are assured that what was involved was criminal activity.

122 CHAIR PARKS: The objections about the mob violence and abortion clinics need to be addressed better. Cites the instructions to the jury, would like to see the rest of jury instructions. What is the difference between the state and the federal RICO?

140 DILORENZO: Explains the significant difference concerning racketeering offenses between federal and state RICO. Cites tab 7 in (EXHIBIT A).

158 CHAIR PARKS: What is the chilling effect on investment capital in a practical way?

162 DILORENZO: The security laws already have a significant impact on the way businesses run, explains. Discusses remedies for securities offerings.

185 CHAIR PARKS: Isn't there a measure of damages someplace in that statute?

196 DILORENZO: Most of the litigation securities area has to do with rescission, explains.

205 CHAIR PARKS: Where does SB 385 fit into this area?

210 DILORENZO: Explains how SB 385 would make the one-way fee shifting rule in securities litigation, now a two-way rule.

218 CHAIR PARKS: Discusses SB 385, asks if all of the defendants have to be named and given notice within twenty days before the filing of the suite.

223 DILORENZO: That was not in the bill, but was a suggestion of something to be added into the bill.

227 SEN. SORENSON: Have any states repealed their civil RICO?

230 DILORENZO: I do not know.

231 SEN. SORENSON: Can you give me an example of a successful ORICO lawsuit, where the law was abused?

236 DILORENZO: There are 5-9 states that do not have state RICO laws, they rely on the federal RICO laws.

239 SEN. SORENSON: Would Oregon be the first state to repeal their state RICO?

245 DILORENZO: I'm unaware of any state that has adopted a state RICO that has subsequently repealed it.

247 SEN. SORENSON: Do you think that adoption of SB 386 would result in fewer actions under ORICO?

249 DILORENZO: Yes, because SB 386 repeals the right of a private party to file a civil suit under RICO.

253 SEN. SORENSON: If we passed this bill, wouldn't we be eliminating the

right for people who have been damaged and civilly harmed, to in fact file lawsuits against people that are "real" criminals?

262 DILORENZO: I don't believe so, because in order to file the civil action currently, there has to be statutes that are listed in RICO triggered. The victim would already have recourse under that statute, explains.

275 SEN. SORENSON: So the victim of that criminal would lose rights under this bill?

277 DILORENZO: The victim would lose the right to a windfall, but not the right to be fully compensated.

279 SEN. SORENSON: Has this bill been referred to, or the subject of, any Oregon State Bar Law reform committee?

289 DILORENZO: The process that I have utilized has been orderly.

293 SEN. SORENSON: Has it gone through any bar committee?

294 DILORENZO: I am unaware of any bar committee having considered this particular issue.

300 SEN. SORENSON: This law was passed a long time ago. If we had started reform earlier, we could have been further along.

302 DILORENZO: The environment, in previous legislative sessions, was not conducive to this type of legislation.

306 SEN. SORENSON: Would cities, states, or counties be precluded from bringing civil RICO actions under this bill?

309 DILORENZO: The civil right of action would be eliminated for any private plaintiffs.

320 CHAIR PARKS: Why didn't you propose that securities be taken out of RICO and leave the rest of it in?

328 DILORENZO: Sometimes there may be a securities violation which could plead another way, gives examples of possibilities.

338 CHAIR PARKS: If it was listed as mail or wire fraud, would that be under the federal RICO statutes?

340 DILORENZO: That is an approach that can be taken. What we want done is to eliminate the practice of private litigants using RICO to enhance damages that are already available to them, and to target those lawsuits against parties who are not organized criminals.

351 CHAIR PARKS: In the organized mob violence, I approve of enhancing damages and I approve of intimidating people to get them to stop their actions. Is the big problem in the securities area?

362 DILORENZO: I do not have any intention to limit what the Planned Parenthood people have available to them. What we need to address is the use of civil RICO against legitimate businesses.

377 REP. BROWN: What happens if the Attorney General does not wish to intervene?

385 DILORENZO: They have the opportunity to not intervene using their prosecutorial discretion, but there could be enough political pressure put on that public official to intervene.

398 REP. BROWN: Cites page 16 of article under Tab 7. Asks for a response to the language that states "the civil remedies under RICO are perhaps more important than it's criminal provisions".

405 DILORENZO: This article was written in 1982 when ORICO was first passed, prior to many of the examples that have been given. I agree that the civil remedies are important, but he is speaking primarily of the civil remedies in the hands of the Attorney General and the DA. These civil remedies provide those law enforcement officers with a lot of flexibility to handle a problem. Discusses article on forfeiture.

429 REP. BROWN: The article suggests the advantage of filing a civil RICO as opposed to the criminal RICO because of the lessor burden of proof, do you agree?

433 DILORENZO: I do agree that there is a significant relaxed standard of proof, with respect to civil RICO, in the hands of a prosecutor. The commission of a criminal act, in a business context, need not be proven beyond a reasonable doubt. In that, the defendant who faces that type of a charge basically has a much more relaxed standard to deal with instead of the protections that would normally be afforded him in a criminal proceeding.

TAPE 5, SIDE B

014 REP. BROWN: Cites other testimony in (EXHIBIT A). Why was a private right of action granted under RICO?

018 DILORENZO: There was very little discussion, if any, relating to civil right of action in the hands of private individuals under RICO. Most of the discussion was shutting down organized crime and the host of remedies that would be afforded to prosecutors.

032 REP. BROWN: Would you agree that by having a private right of action that we may lessen the burden on government to do law enforcement?

034 DILORENZO: There is a special provision in the law now that allows the Attorney General to selectively intervene on civil cases, cites example. This eliminates the use of RICO in areas where RICO does not belong.

050 LARRY CAMPBELL, LITIGATION REFORM COALITION: Testifies and submits written testimony in support of SB 386. (EXHIBIT C)

171 SEN. SORENSON: You mentioned that you were critical of the defense attorneys who you felt misused the intent of RICO, until you recognized the nature of a plaintiff's attorney is not to zealously defend the public's interest, but to pursue their clients interest. Do you think that applies to the defense attorneys and whether we should change the duties of lawyers, instead of representing their clients, to be representing a more broader notion of public interest? If we have an adversary system where the parties are represented by attorneys that are supposed to represent their interests, that tends to bring about the feeling that no one is representing the public interest.

206 CAMPBELL: My comments were in reference to a change of my view and how some RICO cases have been used wrongly.

221 SEN. MILLER: Cites testimony by Campbell about an attorney not defending the public's interest. Discusses how some of them have been around long enough to see how some of the bills they have passed have

effected laws years later. RICO is not working out how we thought it would and it is not necessary to continue the wrong.

263 CHAIR PARKS: My understanding of ORICO is that it has to be enumerated in the law by a statute. How could a person use ORICO in a sexual harassment claim?

271 CAMPBELL: I will give you the article about a sexual harassment case using ORICO. When we passed this bill we were concerned about racketeering and our concern should be no less today. We should look at the concerns of the Planned Parenthood. When we passed the state and federal ORICO laws, we had a different picture as to what was supposed to happen with those than how they apply today.

314 LEE NUSICH, OREGON BANKERS ASSOCIATION: Testifies and submits written testimony in support of SB 385. (EXHIBIT D)

TAPE 6, SIDE B

008 CHAIR BRYANT: Was the lawsuit against First Interstate joined under the securities portion, or was it relating to banking? What subsection of ORICO was your nemesis?

013 NUSICH: There were two sections. Cites predicate crimes in securities fraud and criminal misapplication of entrusted funds. Explains case against them.

028 CHAIR BRYANT: Those provisions are intended to catch laundering in racketeering funds?

032 NUSICH: This is meant to protect banks from being defrauded. Discusses safety and soundness of banks regarding racketeering lawsuits.

054 SEN. SORENSON: Asks for names of plaintiff's attorneys in lawsuit he was citing.

056 NUSICH: Mr. Esler and Mr. Stevens. The case against us wasn't a proper use of the racketeering statute.

070 SEN. SORENSON: The bill, as written, is broad. It deals with all aspects of RICO. Do you agree that citizens should not be able to restrain activity under civil RICO law, i.e. abortion clinics and violence, that can occur?

088 NUSICH: Generally it is not a viable remedy for a private citizen to civilly go after criminals. We have had people come into the bank that have caused violent problems, and the civil law system doesn't apply to them.

115 SEN. SORENSON: Do you think that the bank would be better served by changing the cause of action instead of racketeering, to a violation of an important civil action law? Discusses the verbal reference to this type of lawsuit.

133 NUSICH: Why should there be a cause of action that has the horrible penalties. There is no reason to have this type of burden imposed on legitimate businesses.

145 CHAIR PARKS: Has the bank been sued more than this one time on this cause of action?

146 NUSICH: We were sued back in the early 80's, but other than that, I don't think so.

166 LISA HOROWITZ, EXECUTIVE DIRECTOR OF OREGON NATIONAL ABORTION AND REPRODUCTION ACTION LEAGUE (NARAL): Testifies in opposition to SB 386. (EXHIBIT E)

199 JUDE HANZO, FEMINISTS WOMEN'S HEALTH CENTER: Testifies in opposition to SB 386.

269 MAURA ROCHE, PLANNED PARENTHOOD AFFILIATES OF OREGON: Testifies and submits written testimony in opposition to SB 386. (EXHIBIT F)

357 CHAIR BRYANT: The purpose of SB 386 was not directed in any way to abortion clinics. If your cause of action in some way was allowed to continue under ORICO, then your opposition to SB 386 would diminish?

366 ROCHE: That is correct.

367 SEN. BAKER: Discusses clinic violence. Are you aware of any district attorney in Oregon who would not prosecute in a clinic violence?

376 HANZO: We have this problem all of the time. By the time we call the police and they get there, the behavior stops.

382 SEN. BAKER: Would the district attorney prosecute on that?

383 HANZO: No, because the police do not file a report. This is a problem that a lot of clinics are having today.

390 SEN. BAKER: This legislative assembly in the '93 session, enhanced the penalties for clinic violence from a misdemeanor to a felony. The enhancement to the felony level has curbed a great deal of the organized violence and protest, do you agree?

406 HANZO: A lot of what we have seen in Oregon are lawsuits that have been filed by clinics and the passage of the Strong Clinic Access Law.

413 SEN. BAKER: Have you ever collected any money from the judgment on these individuals? If so, how much and has it seemed to be a deterrent?

427 HANZO: Yes, we have. It has been critical in getting these people to stop barricading the door.

430 SEN. BAKER: How many people have you collected from?

431 HANZO: Between 30-50 people.

434 SEN. BAKER: What has your total dollar recovery been?

435 HANZO: We have received about \$32,000 total. These people hide their assets, but this law has curtailed them and their actions.

TAPE 7, SIDE A

013 SEN. BAKER: They must be fairly sophisticated to do hid their assets. Is the average protester judgment proof?

017 HANZO: No, not the average protester. The leader possibly.

020 CHAIR PARKS: Could you have your lawyer right me a letter as to which part of this bill you need to maintain your position? We are not going to change the law and take this away if I can do anything about it.

029 CHAIR BRYANT: Could you also, in that letter, include the other remedies for recovering attorney fees?

043 REP. BROWN: Is your lawyer that is currently representing you, the same lawyer that represented you in the '84-'85 action?

045 HANZO: Yes.

046 REP. BROWN: You said your case was handled on a pro bono basis. Do you know what your attorney fees were?

047 HANZO: This was an eight year long case, there were about 700 pleadings filed, our attorney fees after the court date was \$300,000.

052 SORENSON: If there was a conviction for a crime that was then followed by a civil RICO, would that work?

060 ROCHE: I would not feel comfortable addressing that.

065 HANZO: We were having so much trouble getting order restored outside of our clinic that we could not get a criminal conviction during five years of heavy protest activity. There was only one arrest for trespass and they were not convicted. We need Oregon RICO, to protect us. The system was not working for us, gives examples of why.

079 SORENSON: Asks if the women have any comment on the companion bill, SB 385. Is there any relationship between the "loser pays" concept, and the "judgment fee shifting"?

089 CHAIR BRYANT: We have approximately 20 minutes left, and 5 more witnesses. If you care to make comments on SB 385, we will have two more days of public hearing on that, and you are welcome back.

092 SORENSON: Are you saying that you do not need a private right of action under RICO, as long as other rights to seek injunctions or trespasses to keep these people off of your premises are maintained? As long as your needs are taken care of, you don't care what we do with civil RICO?

104 ROCHE: With regards to Planned Parenthood, our primary concern is that we need to preserve our ability to pursue private civil action under RICO.

111 SORENSON: Does that include being awarded attorneys fees in RICO cases?

112 ROCHE: Yes, explains that the attorneys that represent them are on a pro bono basis.

142 LAURIE WIMMER, OREGON COMMISSION FOR WOMEN: Testifies and submits written testimony in opposition to SB 386. (EXHIBITS G, H)

184 TEVINA BENEDICT, WOMEN RIGHTS COALITION: Testifies and submits written testimony in opposition to SB 386. (EXHIBIT I)

210 SEN. SORENSON: In some of the racial harassment incidents, were they RICO cases? Have you had any contact with people from the Hispanic or Black affairs?

221 WIMMER: The director of the Hispanic affairs is planning on testifying tomorrow, I will defer to her.

234 RICHARD YUGLER, SOLO PRACTITIONER: Testifies and submits written testimony in opposition to SB 386. (EXHIBIT J)

264 CHAIR PARKS: What were some of those facts?

265 YUGLER: My client was the administrator of an operation and profit sharing plan who was induced to invest in a movie investment. He was taken for \$200,000. This movie company had done this with numerous people around Oregon, and outside of Oregon, for many years. Mr. Faust's client set this company up for tax benefits, tax dodges, and controlled the company. He had 72 meetings with the seller of securities, controlled the seller of securities, and he knew his son was out there selling phony movie investments to people. He didn't care because he made money and it would be a tax dodge for him. I had the current president of NBC network come and testify, who said that this was 'the most crooked movie deal he had seen'. This was white collar crime. Reads letters (EXHIBIT J). Oregon suffers from so-called legitimate business enterprises, violating numerous criminal acts. Discusses allegations of bank being involved with bad deals.

395 CHAIR PARKS: What county is this in?

398 YUGLER: This is for the entire state of Oregon. The number of fraud cases that are characterized by the State Court Administrator were only 224 cases in 1994. For tort cases, another area racketeering gets put into, only 19 cases.

409 CHAIR PARKS: All of these cases are arising out of RICO claims?

411 YUGLER: No, these are the total number of cases that are filed as fraud cases. Less than 1 in 30 cases alleging fraud will also include a RICO claim. The number of cases actually brought as civil racketeering are less than 30 a year. There is no flood of RICO litigations, they are rarely used. Cites Dilorenzo's testimony about number of cases tried. RICO is an important tool for citizens. There is nothing wrong with prosecuting white collar crime. The white collar crimes are as or more dangerous to the economy and citizens as violent criminals. Continues testimony and examples of RICO cases. Discusses most recent RICO case filed. RICO is not abused, it is used by victims of crime. The only people who should be in favor of abolishing a private right of action are crooks and criminals. There is no evidence that RICO is used for extortion. RICO cases rarely make it to trial, and the ones that do are good ones.

TAPE 8, SIDE A

067 JEROME LEBARRE, PRACTICING ATTORNEY FOR MARK KRIEGER: Testifies in opposition to SB 385. RICO cases are extremely rare, maybe 1 out of 100. They are not being misused. Cites Krieger case of whom he is representing.

Addresses securities issue. Cites that there is a statute of limitations, which is important because frauders are very good at hiding their fraud.

151 MARK KRIEGER, SELF: Testifies in opposition to SB 386.

175 SEN. SORENSON: Can you describe the process in which you have come before this committee with this legislation to repeal civil RICO? Has the Oregon State Bar looked into modifications, amendments, or concerns regarding the Oregon RICO statute?

186 YUGLER: The bar has not had the opportunity to make a decision on this bill. This bill is being pushed through at a very fast speed, explains. Describes the ordinary process of following a bill through the legislative process.

218 CHAIR BRYANT: We met with the procedures committee on the Oregon State Bar and I'm sure they will give us input on any bill that goes through this committee.

228 REP. BROWN: Has there been any task forces within the bar to address RICO issues in the last 14 years?

231 YUGLER: None that I'm aware of.

238 REP. BROWN: There has been some testimony that this bill is not intended to address clinic violence, can you respond?

241 YUGLER: SB 386 is absolutely intended to address that. That sort of violence and organized crime is precisely what RICO is for. Discusses Mafia type crime and West Coast "crime organizations". Quotes SB 386 language on "organized crime", that says it is an enterprise with an ongoing existence, a formal company or partnership, or a group of people that behave like an organized company. Cites abortion clinic examples. The ORICO law as written and is intended to reach "white collar" crime.

272 REP. BROWN: Can we have a chapter of your written statement? It would be helpful to understand civil RICO better.

292 MICHAEL ESLER, PRACTICING ATTORNEY: Testifies and submits written testimony in opposition to SB 386. (EXHIBIT K)

TAPE 7, SIDE B

037 JOHN STEPHENS, PRACTICING ATTORNEY: Testifies and submits written testimony in opposition to SB 386. (EXHIBIT L)

082 CHAIR BRYANT: On the survey of these cases, how did you get this information?

084 STEPHENS: Out of the Oregonian, I will submit it. Explains his survey is not scientific or statistical.

095 COLN AINSLIE, SELF: Testifies in opposition to SB 386. This bill doesn't seem to do the citizens of Oregon any good.

113 CHAIR BRYANT: Explains the process that the bill goes through to get to committee and be heard. It is all part of the democratic process.

122 SEN. SORENSON: Asks Mr. Stephens if his summary of RICO cases was taken out of the newspaper.

131 STEPHENS: Yes, explains.

142 SEN. SORENSON: Asks Mr. Esler if there is an attorney fee provision in civil RICO that is a one-way attorney fee provision, or is it a loser pay provision?

145 ESLER: It is a one-way provision, explains.

150 SEN. SORENSON: Is your testimony that local governments, city attorneys, or publicly employed attorneys would be barred from representing their clients in civil RICO cases if this bill was passed?

154 ESLER: No, explains that it would bar the Federal Deposit Insurance Corporation (FDIC) from bringing civil claims for bank fraud. Those types of actions don't seem to be allowed.

159 STEPHENS: They would have a hard time doing it, explains. It has happened in the past though. We haven't brought very many RICO actions, explains.

173 CHAIR BRYANT: Could you provide me with a copy of your final amended complaint against First Interstate?

175 ESLER: We will provide you with a summary of that.

181 CHAIR BRYANT: I am looking for the cause of action that you went to trial with.

182 ESLER: The other cause of action was criminal misapplication of entrusted funds, explains.

187 CHAIR BRYANT: Also include the relief that was reclaimed under each cause of action.

191 CHAIR BRYANT: Adjourns the hearing at 6:40 pm.

Submitted by, Reviewed by,

Sarah May Debra Johnson
Committee Assistant Committee Coordinator

EXHIBIT SUMMARY:

- A. Testimony on SB 386 - John Dilorenzo - Booklet
- B-1 Video tape testimony of John Faust - John Dilorenzo - Video
- B-2 Proposed Amendments to SB 386 - John Dilorenzo - 1 page
- C. Testimony on SB 386 - Larry Campbell - 7 pages
- D. Testimony on SB 386 - Lee Nuisch - 3 pages
- E. Testimony on SB 386 - Lisa Horowitz - 6 pages
- F. Testimony on SB 386 - Maura Roche - 1 page
- G. Testimony on SB 386 - Laurie Wimmer - 1 page
- H. Testimony on SB 386 - Roberta Webber - 1 page
- I. Testimony on SB 386 - Tevina Benedict - 1 page
- J. Testimony on SB 386 - Richard Yugler - 18 pages
- K. Testimony on SB 386 - Michael Esler - 2 pages
- L. Testimony on SB 386 - John Stephens - 3 pages
- M. Testimony on SB 386 - Sam Nelson - 2 pages