

SENATE COMMITTEE ON HEALTH CARE AND BIO-ETHICS

March 30, 1993 Hearing Room C 3:00 p.m. Tapes 35 - 37

MEMBERS PRESENT: Senator Bob Shoemaker, Chair Senator Jeannette Hamby,
Vice Chair Senator Gordon Smith

EXCUSED: Senator Joyce Cohen Senator Bill McCoy

STAFF PRESENT: Barbara Coombs, Administrator Dick Shoemaker,
Administrator/Assistant Joan Green, Assistant

MEASURES HEARD: SB 683 relating to cooperative programs for
transplant services SB 756 relating to hospital cooperative programs

WITNESSES: Dan Harris, Executive Director, Oregon
Health Resources Commission Bruce Bishop, Kaiser Permanente Gary
Conkling, Sisters of Providence Hospital Jim Sanger, Legacy Health
Systems Tim Goldfarb, Oregon Health Sciences University Andy Aubertine,
Assistant Attorney General, Natural

Fraud Unit, Oregon Department of Justice Ed Patterson, Oregon
Association of Hospitals Joyce Bernheim, Oregon Association of Hospitals
Scott Gallant, Oregon Medical Association Mike Crew, Oregon Medical
Association Ellen Pinney, Oregon Health Action Campaign

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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. [--- Unable To Translate
Graphic ---]

TAPE 35, SIDE A

006 Chair Shoemaker: Meeting called to order at 3:11 p.m.
Discusses two reasons the bills are needed: 1) an agreement
regarding heart and

kidney programs and 2) an anticipation there will be other such programs
in the future.

023 Sen. Smith: Does this just relate to Oregon hospitals, as an
Oregon cooperation?

024 Chair Shoemaker: Yes.

025 Sen. Smith: I assume there are federal problems that have not
been addressed, if they went over the State line. 026 Chair Shoemaker:
Yes. There are federal anti-trust problems even if they don't go
over the State line.

PUBLIC HEARING

SB 683 RELATING TO COOPERATIVE PROGRAMS FOR TRANSPLANT SERVICES

SB 756 RELATING TO HOSPITAL COOPERATIVE PROGRAMS

030 Andy Aubertine, Assistant Attorney General, Natural Fraud Unit, Oregon Department of Justice: Gives a brief overview of the anti-trust laws

and the State Action Defense. Discusses legal ramifications of the bills. _ The bills are designed to provide anti-trust immunity to activity on

medical service providers which otherwise might be violation of

anti-trust laws, both federal and state. _ The policy behind the anti-trust laws is to promote competition in

the market place. The underlying policy is that competition in any

industry is generally a good thing and should be promoted and

protected, wherever and whenever possible. _ The federal anti-trust laws are primarily found in the federal

Sherman and Clayton Acts. Reviews Sherman Act section by section and cites examples. _ Discusses ORS 646.725 and ORS 646.730 which essentially mirror

Sherman Act 's 1 and 2. _ We essentially have one body of law despite the fact that we have a

federal statutory scheme and a state statutory scheme, the same body of law will prevail in each court.

156 Sen. Smith: When the US Attorney is prosecuting anti-trust in Oregon do you back off, or do you join with them, or do you pursue it and they

fall away?

160 Aubertine: It is a matter of jurisdiction.

171 Sen. Smith: Would the federal authorities abide an Oregon law that did not mirror a federal law?

172 Aubertine: If the Legislature passes a bill that provides immunity for the federal laws then the United States Department of Justice must honor those laws. The federal anti-trust laws recognize the State-action

exemption, as a defense to application of the federal anti-trust laws.

185 Sen. Hamby: What is happening nationally; have other states taken such an approach and has it been respected?

186 Aubertine: Maine and Wisconsin have passed this type of legislation. Continues with testimony. _ Discusses penalties of the anti-trust laws. _ The proposed legislation does have the effects of some of the

activities previously discussed (i.e. price fixing, potential competitors staying out of a market and group boycott).

258 Sen. Smith: What is the case load volume of anti-trust cases in Oregon now? Of that volume how many are handled by the US Attorney and how

many by the Attorney General?

262 Aubertine: Responds.

289 Sen. Smith: Of the 10 decisions there may have been 100 cases filed. Of that would the federal government pursue 7 and the State 3 or what?

290 Aubertine: Responds.

309 Sen. Smith: Is there no true competition in the field of medicine any more?

312 Aubertine: Responds.

328 Sen. Smith: We can still be rational and promote competition in medicine?

329 Aubertine: Responds. Continues with testimony. _ Discusses the State Action Immunity Doctrine or the Parker Doctrine. _ Two criteria to be met for the State Action Doctrine to apply: 1)

The conduct within the statute that is going to be protected must either be mandated, permitted or at least contemplated by the Legislature. The best way to do that is to draft the legislation to make it clear that this is what the Legislature contemplated it is going to permit. 2) The State itself must actively supervise this conduct which would otherwise be a violation of the law. The ultimate authority must be with the State Agency. _ These activities must be permitted in a very clear fashion by the statutes because they would likely otherwise be violation of the anti-trust laws and subject to anti-trust penalties, damages and injunctively.

TAPE 36, SIDE A

018 Ed Patterson, Oregon Association of Hospitals: Speaks in support of the bill. Presents amended bill (red-lined version), Exhibit B. Refers to

position paper and article, Exhibit C. Refers to fax of SB 756, Exhibit D.

135 Tim Goldfarb, Oregon Health Sciences University: Speaks in support of the bills.

172 Jim Sanger, Legacy Health Systems: Speaks in support of the bills.

216 Gary Conkling, Sisters of Providence Hospital: Speaks in support of the bills.

249 Sen. Smith: What is the public benefits test? I'm concerned that if there is no market test in this how does the customer know they are

getting the best for the least price?

259 Chair Shoemaker: The bill provides for a public member of the decision making body with the cooperative programs; and that public member will

essentially have a veto power over prices and perhaps over capital expenditures and hiring of professional personnel.

293 Sen. Smith: How will that individual in ten years know what the market is in order to veto suggested prices?

295 Chair Shoemaker: Responds.

297 Goldfarb: Responds. 305 Conkling: Responds.

BILL INTRODUCTION

326 MOTION: CHAIR SHOEMAKER MOVED THE PACKET OF LEGISLATIVE DRAFTS, EXHIBIT A, AS COMMITTEE BILLS.

328 VOTE: HEARING NO OBJECTION, SO ORDERED. (EXCUSED: SEN. COHEN, SEN. McCOY).

PUBLIC HEARING

SB 683 RELATING TO COOPERATIVE PROGRAMS FOR TRANSPLANT SERVICES

SB 756 RELATING TO HOSPITAL COOPERATIVE PROGRAMS

332 Joyce Bernheim, Oregon Association of Hospitals: Reviews amendments, Exhibit B.

442 Sen. Smith: That does presume that there can be other hospitals who may want to join and can, they are not precluded from joining?

443 Bernheim: Responds.

445 Sen. Smith: Can they join this one?

447 Bernheim: Responds.

TAPE 35, SIDE B

024 Bernheim: Continues response. Continues with review of the amendments, Exhibit B.

036 Sen. Hamby: Can you tell me what ORS 646.805 is, why it was deleted?

040 Bernheim: Responds. Continues with review of the amendments, Exhibit B.

117 Chair Shoemaker: The commission is defined as the Human Resources Commission, do you mean the Health Resources Commission?

118 Bernheim: Responds.

125 Chair Shoemaker: How is "other persons" defined, pg. 4, (4), Exhibit B.

131 Bernheim: Responds.

150 Chair Shoemaker: In a case where there was not a hearing how would you propose that standing be established?

154 Bernheim: Responds. 164 Chair Shoemaker: Could you define de nova review of the record, pg. 4, (4), Exhibit B.

165 Bernheim: Responds.

189 Chair Shoemaker: Would the Hospital Association be comfortable in permitting any other interested person to essentially require an

informational hearing?

190 Bernheim: Responds.

192 Chair Shoemaker: If not I can see the possibility for abuse. Explains his concern.

202 Bernheim: Responds. Continues with review of amendments, pg. 4, Exhibit B.

246 Sen. Hamby: I do support the substance of benefit language inclusion, however further on pg. 4, (6), Exhibit B why does the commission only

"consider" rather than "find"?

260 Bernheim: Responds. Continues with review of amendments, pg. 5, (h), Exhibit B.

283 Sen. Hamby: Are you comfortable speaking to the deletion of (h), (i) and (j)?

287 Bernheim: Responds.

307 Chair Shoemaker: Refers to pg. 5, (h), Exhibit B, "In case of cooperative programs to provide heart . . . set forth in (c), (d), and

(f) . . .". With (f) being a reduction in duplication of resources, but it certainly doesn't lead to a reduction.

309 Bernheim: Responds.

316 Chair Shoemaker: Perhaps we should just say "prevention or reduction".

318 Bernheim: Responds.

331 Chair Shoemaker: The same is true of (c), as applied to that program.

334 Bernheim: Responds. Continues with review of amendments, pg. 5, (7), Exhibit B.

418 Chair Shoemaker: I believe it is important that be extended to capital expenditures and retention of highly priced professional personnel, not for anti-trust reasons, but for cost containment reasons.

TAPE 36, SIDE B

004 Bernheim: Responds. Continues with review of amendments, pg. 6, 4, Exhibit B.

040 Sen. Hamby: I'm not real comfortable with the new proposed 5.

047 Chair Shoemaker: Requests clarification to pg. 7, (2), Exhibit B.

050 Bernheim: Responds. Continues with review of amendments, pg. 7, 6, Exhibit B.

099 Chair Shoemaker: Assuming that we include not only prices, but capital expenditures and hiring of professional personnel within the public

supervision end of this; would any of that information be a trade secret?

106 Bernheim: Responds.

117 Chair Shoemaker: It may be an important policy question that needs to be faced. Perhaps every piece of information that bears on public

supervision of the cooperative program should be in the public arena.

123 Bernheim: Responds. Continues with review of amendments, pg. 9, 8, Exhibit B.

154 Scott Gallant, Oregon Medical Association: Requests additional time to review the amendments.

176 Mike Crew, Oregon Medical Association: With the amendments the concept of the bill has changed. Requests additional time to review the

amendments.

229 Chair Shoemaker: Requests that Mr. Aubertine be provided with any information that could be useful in his research

regarding any

anti-trust information you received at your meeting.

232 Gallant: Responds. Requests clarification of public domain for pricing from the Chair.

259 Chair Shoemaker: Those aspects of the cooperative arrangement, which the public has an interest in (i.e. the prices charged and the

significant expenditures of) ought to be in the public arena.

266 Dan Harris, Executive Director, Oregon Health Resources Commission: Speaks in support of the bill, Exhibit F.

377 Chair Shoemaker: Is the Commission comfortable with assuming an advisory and regulatory role, which goes beyond the original mission of the Commission?

389 Harris: Responds.

395 Chair Shoemaker: It is comfortable with being a regulatory body?

397 Harris: Responds.

404 Ellen Pinney, Oregon Health Action Campaign: Speaks to the bills.

TAPE 37, SIDE A

025 Pinney: Continues with testimony.

050 Sen. Smith: Could you explain to me why there is not open and free competition-managed prices in health care?

062 Pinney: Responds.

064 Sen. Smith: Stacked deck by the nature of the business we are dealing with?

067 Pinney: Responds.

080 Sen. Smith: I'm not totally convinced that there is not a choice.

083 Pinney: Responds. Continues with testimony.

153 Chair Shoemaker: I believe the proposal is that any person who is interested enough to involve themselves in the first hearing would have standing to move it on up.

158 Pinney: Responds. Continues with testimony.

163 Chair Shoemaker: You were talking about the confidentiality?

164 Pinney: Clarifies what she is referring to. Continues with testimony.

180 Chair Shoemaker: Requests her proposal be put in written form.

182 Pinney: Responds.

187 Bruce Bishop, Kaiser Permanente: Speaks to the bills.

Distributes fiscal impact statement, Exhibit E.

Meeting adjourned at 5:22 p.m.

Submitted by:

Reviewed by:

Joan Green
Administrator

Dick Shoemaker Assistant

EXHIBIT LOG:

A - Legislative draft packet - Staff - 3 pages B - Amendments to SB
756 - Patterson - 10 pages C - Paper relating to SB 756 - Patterson - 4
pages D - Amendments to SB 756 - OAH - 8 pages E - Fiscal impact
statement SB 756 - Staff - 1 page F - Testimony to SB 756 - Harris - 4
pages