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.

HOUSE COMMITTEE ON BUSINESS AND CONSUMER AFFAIRS

June 20, 1991 Hearing Room F 1:30 P.M. Tapes 105 - 106

MEMBERS PRESENT:Rep. John Schoon, Chair Rep. Hedy L. Rijken, Vice-Chair Rep. Jerry Barnes Rep. Lisa Naito Rep. Carolyn Oakley Rep. Beverly Stein Rep. Greg Walden

STAFF PRESENT: Terry Connolly, Committee Administrator Annetta Mullins, Committee Assistant

MEASURES CONSIDERED: SB 551 WS SB 429 PH

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 105, SIDE A

004 CHAIR SCHOON calls the meeting to order at 1:36 p.m. and opens the public hearing on SB 429 A-Eng.

(See also Tape 106, Side A at 060) SB 429 A-ENG. - SPECIFIES LIABILITY OF PERSONS PROVIDING ADVICE OR SERVICES

IN CONNECTION WITH OFFER, SALE OR PURCHASE OF SECURITIES.

006 CHAIR SCHOON asks if anyone has new information or information they would like to present on SB 429 A-Eng. Hearing no response, he closes the public hearing and opens the work session on SB 551 A-Eng.

(Tape 105, Side A) SB 551 - A-ENG. REQUIRES DIRECTOR OF DEPARTMENT OF INSURANCE AND FINANCE TO EXCLUDE FROM APPLICATION OF MEDICAL FEE SCHEDULES AND HOSPITAL SERVICES THOSE SERVICES PERFORMED BY HOSPITAL PARTICIPATING IN CERTIFIED MANAGED CARE ORGANIZATIONS. Witnesses:Rep. Gene Derfler Gary Weeks, Department of Insurance and Finance

016 TERRY CONNOLLY reviews the provisions of the bill.

022 CHAIR SCHOON: The committee held a rather extensive public hearing previously and did not take action on the bill.

023 REP. GENE DERFLER: We have presented the HB 551-A4 amendments (EXHIBIT A). I think we have come up with a program that will work very well. It will encourage the formation of MCOs. Since the passage of SB 1197 we haven't had as many MCOs form as we thought we should have had.

The amendments say that any hospital that has a contract with an MCO between now and December 1, 1991 will have a reduction in hospital fees which will be set by the director. He has indicated he is looking at perhaps a 25 percent reduction in the difference between the fee schedule and the accepted rate. For 50 percent of the people treated by an MCO, the hospital fee would disappear in the next year. I think that will encourage everyone to get into the MCO programs.

046 GARY WEEKS, Director, Department of Insurance and Finance: I will clarify a couple points of the bill from our viewpoint as the agency that has to administer it. I was concerned about the loss of a fee schedule. I think it is an important element to the administration of the program and is major cost saver of the workers' comp system. I don't want to lose the fee schedule. I think this bill is a compromised effort which assures for the department and the workers' comp system that we retain a fee schedule in the form it is in now. It provides an incentive for employers to sign up for a fee schedule, which they may not have now. There are incentives for hospitals to contract with certified MCOs.

Section 2 of the bill is the real meat. Section 2 (a) provides in the first year of the program (the program is a staggered three-year program), 1992, we build in an incentive for hospitals that as of this December 1, 1991 have a contractual relationship with an MCO. They will get a benefit in the cost-to-charge ratio for the next calendar year, 1992. That benefit is an "enhancement" to the formula. We would, by administrative rule (lines 8 and 9), work it by using a formula of 1.0, which is the full fee, and subtract the hospital's cost-to-charge ratio. There are about 65 different cost-to-charge ratios representing the different hospitals. As an example for Sacred Heart, their cost-to-charge ratio is .723. The difference is .27. The formula would then say as an enhancement, multiply that .277 by 25 percent and you come up with a factor of .06, which you add to the original cost-to-charge ratio. That enhances the cost-to-charge ratio for Sacred Heart or any other hospital that contracts by December 1. It means they get a little bit more in terms of their fees under the cost-to-charge ratio that the department has adopted.

097 That enhancement, achieved through the formula, would apply for one year, the calendar year of 1992. At the end of the calendar year 1992, any hospital that has a contractual relationship or participates with an MCO and has served since that 1992 year at least 60 percent of the injured workers under an MCO arrangement, for the next year, 1993, we would exempt them from our cost-to-charge fee schedule for any non-MCO patients.

We would permit the hospitals to certify that they met that threshold at the end of 1992. We would audit the verifiable data that the hospitals give to us to determine whether they served that percentage in the prior year. At the end of 1993 if the hospital has served during the prior calendar year, 75 percent of their injured worker through an MCO arrangement, for the next calendar year, 1994, they are exempted from the cost-to-charge fee schedule for any non-MCO patients that walk through the door.

There is an increasing incentive for hospitals to be part of the MCO process. Seventy-five percent under this bill becomes the threshold for 1994 and years thereafter. We did include a sunset in the bill so we can take a look at how the program is working in the 1995 Legislative session.

131 When we talk about 60 percent of the workers' comp patients and 75 percent, we are talking about unduplicated head count. We would have to rely on certified data from the hospitals. In Section 2 (2) there is a requirement that the hospitals provide the director with verifiable

information and documentation so we can determine if they met the 60 and 75 percent threshold. If a hospital meets the 75 percent threshold and qualifies for the exemption in a given year and the next year they didn't meet that threshold, they would fall out of the program and go back to having every injured worker that wasn't part of an MCO be paid under the department's cost-to- charge ratio. There is a sunset provision.

There are a couple of impacts that I am uncertain about in the bill. One is the impact on small insurers who have a particular niche in the market. The question I asked, and which I don't have an answer for, is whether they will join an MCO because of this or will they just say it is not worth it and leave the state. I want as many carriers in the state as possible for competition and reducing rates. We would have to sell the small insurers on the benefit of being part of an MCO, not only in the terms of reduced hospital bills, but in terms of utilization, claims management, etc.

170 There may be some impact on self-insured employers and I would hope they would want to be part of an MCO process anyway.

178 Issues discussed: >Benefits for hospitals that are not providing MCOs now.

223 REP. STEIN: When did the MCO program into effect.

224 MR. WEEKS: It was just after the first of the year. We now have three certified MCOs, three are in the application process to be certified, and three have issued a notice of intent to apply. We expect to have all nine in operation in a short time.

238 REP. STEIN: Is the process of getting MCOs started about what you had expected?

242 MR. WEEKS: I am more satisfied it is going to increase its momentum. When I came March 1 there were some problems with the MCO rules. We reviewed the administrative rules which were adopted December 26 and published new rules which were effective last week. They expand the universe of who may own, form and operate an MCO program. Other than the nine, I have three other organizations who intend to file application to form following adoption of these new rules.

251 REP. STEIN: Essentially what is being requested here is a continuation of a cost shift that has been going on to allow the workers' comp system to absorb some of the uncompensated care. Is that not correct?

270 MR. WEEKS: There probably will continue to be cost shifts. Our cost-to-charge ratio is intended to be the absolute floor. It is true there were things in the cost-to-charge that aren't considered, like uncompensated care. The cost-to-charge ratio we have now does limit what could be passed on to the workers' comp system.

271 REP. STEIN: Should not employers be demanding of hospital providers that they institute MCOs? What is the real incentive to get MCOs set up?

294 REP. DERFLER: I think the problem won't be in Portland. For example, Salem has one hospital and they have no incentive to form an MCO because they are going to get paid a larger fee if they don't. This will make it more level so they will have an incentive to form an MCO.

301 MR. WEEKS: We have to sell employers that more is to gained than the reduction in the cost of the medical services.

323 REP. STEIN: What is the financial impact on the workers' compensation system?

325 MR. WEEKS: It is difficult to calculate because there are offsetting costs. Giving the enhancement to the hospitals will cost us a little bit. In the first year it will be marginal; we haven't been able to cost it out. It will not, I don't think, be millions. I would guess it will be thousands. You have a little bit of increase in the medical costs but the other side is the claims management, utilization review, the early return to work, etc. that come from the MCOs that offset these.

345 REP. STEIN: After the first year, what is the financial effect?

348 MR. WEEKS: We are developing ways to determine what MCOs are actually saving the system. I haven't been able to do that for the SB 551-A4 amendments. I think there is some expense to the system and I think it is probably minimal and it may be offset in part or even in whole by some of the other benefits.

342 REP. WALDEN: Another issue was raised earlier with the medical fee schedule. Do you have any comments on that?

367 MR. WEEKS: If the concern is the physicians' fees that are contracted as part of an MCO agreement, we haven't promulgated any rules. My intent is to have our administrative rules say if there are contracts for physicians' fees under an MCO we will honor those. We won't bind the physicians to our 75th percentile which we have out there now. That would argue against physicians wanting to be part of an MCO process. I don't think the department wants to get into that contractual relationship between the MCO and the physicians. We have to depend on the insurance company and the MCO bargaining.

386 REP. BARNES: On the percentage of injured workers treated and the unduplicated workers, are you going to have a hard and fast rule. If you have a worker going in for different injuries, you may have to have different types of case management.

396 MR. WEEKS: We may be able to do something different with different injuries. I am taking the hospital association's good word that they can give us the kind of data we will need to confirm the percentages. I haven't seen their data and accept their word they will be able to give it to us. We have a public hearing process on the administrative rules and I am more than willing to think about two different injuries of the same worker. I just want to make it clear that if a worker comes in three times in a week for treatment for the same injury, the hospital can't count that as three different workers.

418 MOTION: CHAIR SCHOON moves that the SB 551-A4 amendments BE ADOPTED.

430 REP. STEIN: I think the amendments are far better than the bill. I am not convinced that there has been enough time with the current program to see if it does make a difference and we are allowing a cost shift. When we adopted the workers' comp rules and the new law, we were very strict that we weren't going to change that this session. We haven't changed it for workers and I am not sure I want to change it for hospitals. I will support the amendments, but I am not sure I will support the bill even as amended.

446 VOTE: CHAIR SCHOON hearing no objection to the motion, declares the motion PASSED.

447 MOTION: CHAIR SCHOON moves that SB 551 A-Eng., as amended, be sent

to the Floor with a DO PASS recommendation.

451 CHAIR SCHOON: I would agree that the original bill is without merit. It was simply a shift of costs into workers' compensation for the hospitals. These amendments, however, I believe will cause the hospitals to work hard to establish MCOs and provide the type of service we hope to acquire and achieve through their organizations. We are looking for the long-term benefit. I would agree with Rep. Stein that we probably should have just let it set for a couple more years. In the meantime, since some of the hospitals were concerned and thought they had no incentive to establish an MCO, I think these amendments almost leave them no choice but to do it now.

TAPE 106, SIDE A

021 REP. RIJKEN: I would like to echo Rep. Stein's comments.

024 REP. STEIN: I don't think I want to support this. I think there hasn't been enough time to really evaluate this. I have been very concerned about constricting the rights of workers in the workers' comp system. I have seen no particular leeway during this session to accommodate workers who think the new workers' comp law restricted their rights even further. I think we should try this out for a while. It sounds like MCOs are being formed and will be formed. I would also like to see businesses see their own interest and demand these MCOs be formed. It is in their interest. I don't know that workers should pay for that interest. The way I understand the system is if we save the workers' comp system money, it is supposed to flow through to reduce the premiums that employers pay. I will vote no even though I supported the amendment.

035 REP. BARNES: I don't see this hurting the workers. I see this as a comprehensive way of treating the workers and helping both sides. If it is not working in two years, we can change it. I support it.

048 VOTE: In a roll call vote, REPS. BARNES, WALDEN and CHAIR SCHOON vote AYE. REPS. OAKLEY, STEIN and RIJKEN vote NO. REP. NAITO is EXCUSED.

052 CHAIR SCHOON declares the motion FAILED.

052 REP. WALDEN changes his vote to NO and SERVES NOTICE OF POSSIBLE RECONSIDERATION.

059 CHAIR SCHOON reopens the public hearing on SB 429 A-Eng.

(Tape 106, Side A) SB 429 A-ENG. - SPECIFIES LIABILITY OF PERSONS PROVIDING ADVICE OR SERVICES

IN CONNECTION WITH OFFER, SALE OR PURCHASE OF SECURITIES. Witnesses:Sen. Bob Shoemaker Jim Harlan, Department of Insurance and Finance Laurie Skillman, Department of Insurance and Finance Roger Martin, Security Industry Association and a financial adviser firm in

Portland

061 SEN. BOB SHOEMAKER: SB 429 A-Eng. has been very carefully worked on by a committee of the Oregon State Bar composed of securities lawyers for both the plaintiff and defense sides. It tries to get at, in a fair way, a number of abuses that are going on regarding sales of securities to provide appropriate remedies to those who are injured. Last session SB 104 4, we felt, was an over correction. The present law puts the lawyers for the party offering the security at quite a degree of risk.

They can share the liability with the principals of the venture even though they are totally uninvolved in the transgression that lead to the damage. The lawyer, or it could be an engineer or some other professional, has to sustain the burden of proof that they did not know and in the exercise of reasonable care could not have known of the existence of the facts on which the liability is based.

115 The provisions of the bill: >A professional or other person involved in an offering who is offering his expertise in some fashion, can be liable jointly and severly with the principals in the venture. The question was where the due diligence burden ought to be imposed. We ended up with the attorney having the burden of proving his or her due diligence. >The second part of the bill is to get at "churning" by primarily securities brokers. This gives cause of action by those damaged by churning activities by broker dealers.

>The third part is to get at the investment advisors who are offering their services to purchasers. When the investment advisor engages in fraudulent activities or violates the Oregon Securities Law, this bill would give the customer or client a cause of action for damages caused by that behavior. The damages are ordinary, not treble or punitive, plus interest and less any income earned by the investor on the account of that advice. It is not an effort to hammer those who act inappropriately, but to balance the scale.

169 JIM HARLAN, Department of Insurance and Finance: I was a member of the task force.

171 REP. WALDEN: How will this help reduce the costs for professional services for new public stock offerings, or will it?

174 SEN. SHOEMAKER: I think it will. The cost of malpractice insurance in this specialty is a big expense. It should serve to bring down the cost of malpractice insurance and thereby reduce their fees. You will have more attorneys competing to represent those going out with public offerings.

192 LAURA SKILLMAN, Department of Insurance and Finance: The investment advisor provision is the department's contribution to this bill. Currently there is no cause of action for consumers against investment advisors. If an investment advisor commits fraud, the consumer cannot sue under the securities law. This bill would bring the law into conformance with the law for broker-dealers.

209 REP. WALDEN: What would be the difference in the outcome under the fraud statute than under this.

212 MR. HARLAN: I think the case law that has been established under this statute does not carry the detailed indicia of fraud that you would find in a general fraud statute, otherwise known as common law fraud. The steps an injured party has to go through to show the fraud and depth of intent on the part of the wrong-doer is more extensive under a common law statute of fraud than it would be under this.

241 REP. WALDEN: Who are the people this would apply to?

244 MR. HARLAN: The primary focus is on a group of individuals who are rendering investment advice in instances where they are not complying with very specific provisions of the securities law, a licensing requirement or requirement to maintain a surety bond. Those persons are subject to a criminal penalty, but an injured consumer has no remedy against those individuals. If they are rendering investment advice and are not maintaining a license as required, you would not be able to show common law fraud. If they were not maintaining a surety bond, it would not be an act of fraud in and of itself.

282 Under the investment advisor provisions of this bill, bad advice is not compensable, but covers the individual who has not complied with the licensing requirement or maintained a surety bond or employs unlicensed sales people or commits fraud. Fraud would be where the investment advisor suggests to the client that they invest in stock and does not disclose to the investor they are receiving kick back fees from the stock.

319 ROGER MARTIN, representing Security Industry Association and a financial advising firm in Portland: This is a very technical bill and without the attorney here I can only parrot some things the attorney told me over the phone or request that you postpone the hearing on the bill.

Sen. Shoemaker has pointed out the various parts of this bill. It was represented to you that this was a complete representative committee of the bar that put this together. When I brought up the name of Mr. Palmer, it was pointed out that one of his partners served on the Bar's committee and they were therefore represented. I have found out there are several kinds of investment attorneys. There are those who do corporate security work or some of the general work and there are some specialists. It took a specialist, Mr. Palmer, to figure out for me after this had passed the Senate that there are some major problems.

The securities industry is in a nationwide debate over this. The Investment Company Institute held a convention or gathering in Washington, D. C. and debated this last week. The Maryland's security chief and the Missouri security person debated the vice president of Merril Lynch, Asset Management, Robert Harris and Conrad Goodkind of Quayles and Brady in a very heated debate over how broad this is going to be. It seems the industry is concerned that there is a driving factor behind this and that is to reach out and embrace as many people as we can because we are going to charge them fees because the undertaking is going to cost a lot of money.

It was suggested that Section 4 would be dropped from bill. We have a problem with limiting the liability of attorneys who are involved in the issuance of securities. Our concern is for the expanded liability for the broker-dealers and advisors by providing expressed civil liabilities for churning and unsuitability of stocks. The remedies in the bill offer "recession." Usually this is a federal type of penalty reserved for fraud cases but it is being extended to civil kinds of cases. There is a real concern by the people I represent that we are getting ourselves into some wide open liability situations beyond what is suitable for the action taken.

411 We have extended liability to investment advisors. It is the contention of the attorney that I am dealing with that we have adopted an extreme broad definition to cover anyone who gives advice. There are already acceptable definitions in the statutes. He feels this is reaching out as far as insurance salesmen and others and he will tell you there is a statute already covering this.

437 CHAIR SCHOON: How will this bill help the consumer?

440 MR. MARTIN: I am sure there are cases that Ms. Skillman would point out where people are giving advice who are unsuited to do it. There probably are people that definitely should be covered by some state control who are not now covered. It is our contention in trying to do this they not only have they extended it to a great number of people, some who are not appropriately to be covered by, but the penalties are more severe than are necessary. It is the distinct feeling of our folks that we are dealing with another situation where trial lawyers are going to bring a great number of suits.

475 CHAIR SCHOON closes the public hearing on SB 429 A-Eng. and declares the meeting adjourned at 2:34 p.m.

Respectfully submitted,Reviewed by,

Annetta MullinsTerry Connolly AssistantAdministrator

EXHIBIT SUMMARY

A - SB 551, SB 551-A4 amendment, Rep. Derfler