

House Committee on Judiciary February 4, 1991 - Page

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 Judiciary February 4, 1991 - Page

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 JUDICIARY CIVIL LAW AND JUDICIAL ADMINISTRATION

February 4, 1991Hearing Room 357 1:00 p.m.Tapes 13 - 15

MEMBERS PRESENT:Rep. Ray Baum, Chair Rep. Marie Bell Rep. Tom Brian
Rep. Kelly Clark Rep. Jim Edmunson Rep. Rod Johnson Rep. Kevin Mannix
Rep. Randy Miller

STAFF PRESENT: Greg Chaimov, Committee Counsel Jeff Steve,
Committee Assistant

MEASURES CONSIDERED: HB 2386 - Revises corporation law.

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 13, SIDE A

004 REP. BAUM: Calls meeting to order. >Professor Squier will discuss the judicial review of government action and administrative law.

INFORMATIONAL MEETING ON HB 2386 Witness: Professor Ann W. Squire, Northwestern School of Law

023 GREG CHAIMOV: Introduces hearing, explaining Professor Squire's

overview.

036 PROFESSOR ANN W. SQUIER, NORTHWESTERN SCHOOL OF LAW: Provided an overview of administrative hearings and judicial review of state agencies and local government actions. (Exhibit A) >Administrative Procedures Act (APA) divides state agency actions into two basic modes: rules and orders.

156 REP. CLARK: Why do we care?

157 SQUIER: The reason is twofold: 1) Knowing what kind of procedures must be followed in order to get a valid agency decision, and 2) judicial review by the Court of Appeals or the Circuit Court is determined by the type of order.

192 SQUIER: Continues with overview. The APA has incorporated procedural matters into the discussion on the different types of actions. >There is concern about hearings officials being a part of an agency when the agency is also performing investigative functions, deciding whether or not to bring charges to revoke a license. There is some case law regarding the combination of function concerns.

223 REP. CLARK: Questioned whether this would be constitutional?

226 SQUIER: Did not take a position on the public policy issue. She stated she was describing a legal conclusion that had been drawn in the federal system and in the state system with respect to members of the agency itself. >No Oregon cases have directly addressed the function of the subordinate official.

249 REP. CLARK: Felt concern that the person making the decision works for the other party. It gives the appearance of impropriety.

257 REP. BELL: Are there any qualifications for hearings officer?

260 SQUIER: There are no statutory requirements in the APA. Individual agencies may have specific requirements for their hearings officers.

268 REP. MANNIX: An example of a specific requirement would be workers' compensation referees are required by law to be attorneys.

327 SQUIER: There are restrictions of ex parte communications on the facts and issues hearing officials. Communications from within the agency are deemed to be permissible. >There are multiple types of actions that a local government may take: Legislative, quasi-judicial, and ministerial actions. >The actions by local government are not subject to state APA. There is no statutory scheme that governs local procedures. >Judicial Review of tort actions and contract actions for both state agencies and local governments are governed by ORS 30.260-30.300.

TAPE 14, SIDE A

028 SQUIER: Review of a contested case is more broad because the Court of Appeals will look for errors of law and constitutionality. >Under ORS 183.490 the circuit courts can compel an agency to act when they have refused to act.

037 REP. CLARK: Asked if ORS 183.490 is a catchall?

045 SQUIER: It can be used to compel any type of agency action where an agency has a responsibility to act and has failed to do so.

050 SQUIER: Explained time lines for the actions being filed. >Reviewed the Oregon Environmental Counsel vs. State Board of Education, which was determined in 1988 by the Oregon Supreme Court, as not being a contested case. >Some agencies and types of agency action are exempt from the APA and would not fall under the judicial review provisions. >She felt there still remains a good deal of ambiguity about the extent of certain circumstances.

146 SQUIER: Continued, explaining the judicial review of local government actions. >Writ of review is a method of reviewing governmental action for error. Writ of review is not available for land use decisions. This is also not available for state agency actions because they are reviewable under the APA. The writ of review is available only to review quasi-judicial actions. >Declaratory judgment is not available for quasi-judicial acts, but is available for reviewing legislative or ministerial acts. >Writ of mandamus is an action to compel a clear duty that is imposed on the governmental body by law. This may compel the governmental body to exercise its discretionary duty, but may not compel the agency to exercise it in a certain fashion.

223 REP. CLARK: Is this used as a substantive move?

228 SQUIER: When there is no discretion left it can have the same effect as a substantive order. When discretion weighs public interest factors, this does not provide the court the ability to do that weighing for the agency. >Case law and statutes use different descriptions of what merits bringing this before the court.

288 REP. CLARK: The declaratory judgment, writ of review and writ of mandamus are all brought in Circuit Court. If in Circuit Court on a particular dispute, who cares what writ is on top of the complaint?

299 SQUIER: From the point of view of someone seeking review, the courts care very much because of the exclusivity of certain remedies. There could be a lot of time and money spent on the procedural circumstance if this were to go to the Supreme Court.

308 REP. CLARK: If going in under a declaratory judgment, writ of review or writ of mandamus, would it be the same result.

313 SQUIER: Agreed. In the end you would be asking for an invalidation or the overturning of an action the local government has taken. You would be seeking some different types of relief and invoking different standards of review.

321 REP. MANNIX: Would it help to have a generic provision stating you had misfiled in the wrong court, or followed the wrong procedure, but had filed within the time limit if you had gone to the right court? Would this approach help reduce the problem of someone being unaware and possibly reduce some duplication in effort?

344 SQUIER: The problem still remains with the filing deadlines being different with each type of review. You could lose your opportunity if, in good faith, you file the wrong review. >The writ of review may be the exclusive remedy where available.

(Tape 13, Side B) HB 2386 - REVISES CORPORATION LAW, PUBLIC HEARING
Witnesses: Andrew J. Morrow, Oregon State Bar Association Gary Burne,
OTLA Barnes Ellis, Oregon State Bar Association

006 CHAIMOV: Summary of HB 2386. (EXHIBIT B) He explained the attached exhibits and stated there is no fiscal impact to the bill. (EXHIBIT C, section by section analysis prepared by the Oregon State Bar Business Law Section; EXHIBIT D, testimony by Gary Berne; EXHIBIT E, current derivative proceedings statute; EXHIBIT F, statute relating to the ability of a corporation to indemnify a director)

045 ANDREW J. MORROW, Oregon State Bar Association: Submitted and gave an overview of the bill summary of HB 2386 (EXHIBIT C and written testimony, EXHIBIT G). >Most important parts of bill are the issues relating to director liabilities and derivative suits. >Language in present statute is based upon the adoption of a provision in the Delaware Corporation Law in 1986. >Deals with monetary damages, and liability of director to the corporation or its shareholders. >The purpose of the statute is to encourage participation by directors.

157 REP. BELL: Explained why the new Section 1(2)(c)(A) is less ambiguous than Section 1(2)(c)(D), which would be removed. The section talks about improper personal benefit vs. financial benefit received by ...

161 MORROW: The intention of the change is to focus upon a financial benefit which is received, rather than some other possible benefit. The financial benefits focus on whether the director has preferred himself over the corporation financially.

197 REP. BELL: What if the money was used for speculative land investments and making a large amount of money, then the investor/investors put back only the money they took.

200 MORROW: The corporation's position would be that an investment was made of corporate money, therefore the amount of personal benefit the investors made includes the additional gain which was involved.

245 REP. CLARK: Questioned the Delaware statute.

252 MORROW: The statute in Delaware is identical to the existing Oregon statute. We are proposing this revision based upon a revision to the model Business Corporation Act. The type of statute allowing a corporation to make the decision of limiting liability has been adopted in nearly 30 states. Approximately 16 states are using the Delaware language.

301 REP. CLARK: Asked for an example of breach of duty of loyalty to a corporation.

305 MORROW: The most common breach of duty of loyalty are things that involve financial benefit to the director. The most common of those is a conflict of interest transaction. Another type is referred to as a user/patient of corporate opportunity, which is taking something that is an opportunity to the corporation.

326 REP. CLARK: Compare the standards used for a derivative suit with what might be used if trying to pierce a corporation veil. What provisions would be used?

348 MORROW: The response in terms of the circumstance would probably depend on whether there was any financial benefit involved, did the actions involved constitute an intentional infliction of harm, or intentional violation of some criminal law.

364 REP. CLARK: Gross negligence might be actionable currently under a breach of duty of loyalty.

368 MORROW: Duty of loyalty is not a statutory concept, it is a common law concept. The confusion of that concept, with the other element which is the duty of care, is more in the realm of what is being described. >This is an optional choice done by the corporation for the purpose of encouraging people to serve as director.

TAPE 14, SIDE B

019 REP. BELL: Questioned the granting of personal favors for status sake. Isn't this what undermines banks, insurance companies and other corporations, and the directors then grant personal favors or direct business in a certain direction because of a friendship? Why are we becoming more loose in our definition at a time when people are becoming more worried about this sort of thing?

026 MORROW: The issue raised is how far can one go in terms of giving friends and colleagues an opportunity for some non- financial benefit that does not generate personal reward beyond reputation.

068 REP. BRIAN: Is HB 2386 endorsed by the Oregon State Bar?

072 MORROW: These are introduced as section bills. They are sent to the OSB A's Public Affairs Committee for review. This is not an issue that has been before the Board of Governor's and the OSB A has not taken a position. This is a section position. >The purpose of the section in general terms is to define the process by which the directors may control derivative litigation. Derivative suit is an action brought by the shareholders in the name of the corporation.

137 REP. MILLER: Do prospective shareholders have the right to read the articles of incorporation prior to purchasing any shares in a corporation?

138 MORROW: The articles are a public record with the Corporation Division in the Secretary of State's Office.

140 REP. MILLER: Are the director's of the corporations elected?

141 MORROW: They are elected by the shareholders.

168 CHAIR BAUM: What is the business purpose for this bill? Will this encourage business?

174 MORROW: In dealing with the issues of director liability, the response of a corporation, if it thinks these issues are important and they can get a better statutory result elsewhere, is to reincorporate in another state. >The statute allows the board of director's to delegate, to a committee, most of the powers of the board, should it choose to do so.

293 GARY BURNE, Oregon Trial Attorney's Association: Testified in

opposition to HB 2386 (EXHIBIT D). >Because this is a model act of an ABA Committee it does not mean this is something that has been developed among american corporate lawyers, and studied beyond the one committee. >The director liability portion of HB 2368 would undue hundreds of years of english and american law. Director's have always had duties of loyalty, fiduciary duties, duties of trust to the corporation. >There is no situation where derivative suits are being brought improperly. >There are very few people refusing to be directors due to liability.

TAPE 15, SIDE A

036 BURNE: The attorney's fee provisions in HB 2386 show prejudice of the committee that drafted HB 2386 as a model bill. >The idea that this can be done at the option of the shareholders is unrealistic.

053 BARNES ELLIS, representing the Oregon State Bar: Testified in support of HB 2386. >Special committees are being used today. There are no guidelines from the Legislature the on how to use these committees. >A derivative lawsuit is a system which could not have been devised from scratch. The system grew from several judicial anomalies. We now have a circumstance in which any one shareholder can act for the entire corporation. >Derivative litigation converts business issues to legal issues automatically. >The use of a committee system puts people in a position of responsibility in acting for the whole corporation.

211 CHAIR BAUM adjourned the meeting.

Prepared by: Reviewed by:

Debbie Schieno Greg Chaimov Assistant Committee Administrator

EXHIBIT LOG:

A - Testimony on HB 2386 - Professor Ann W. Squier - 2 pages
B - Staff Measure Summary - HB 2386 - 1 page C - Bill
Summary on HB 2386 - 4 pages D - Testimony on HB 2386 - Gary Berne - 3
pages E - Oregon Statute 60.261 - Derivative Proceedings - 2 pages F -
Oregon Statute 60.391 - Indemnification - 2 pages G - Testimony on HB
2386 - Andrew J. Morrow, Jr. - 5 pages