

- HOUSE COMMITTEE ON JUDICIARY CIVIL LAW AND JUDICIAL ADMINISTRATION

February 14, 1991 Hearing Room 357 1:00 p.m. Tapes 22 - 25  
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 MEMBER EXCUSED:Rep. Brain Rep. Clark STAFF  
PRESENT:Greg Chaimov, Committee Counsel Holly Robinson, Committee  
Counsel Jeff Steve, Committee Assistant MEASURES HEARD: HB 2530 -  
Honest Bidder Protection Act (PH/WS) HB 2375 - Professional Corporations  
(PH/WS) SB 374 - Non-Profit Corporation Director Liability (PH/WS) HB  
2386 - Director Liability and Derivative Actions (PH/WS) HB 2371 - Writs  
of Garnishment (PH/WS) SB 396 - Bulk Sales Act (PH/WS) SB 421 - Business  
Combination Act (PH/WS) HB 2377 - Liens on Unpaid Rents and Profits  
(PH/WS)

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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 22, SIDE A

004 CHAIR BAUM: Opens Subcommittee on Civil Law and Judicial  
Administration at 1:03.

HB 2530 - HONEST BIDDER PROTECTION ACT - PUBLIC HEARING

Witnesses:

Rep. Greg Walden Rep. Bob Shiprack Kim Mingo, Association of General  
Contractors House Committee on Judiciary February 14, 1991 - Page 2

Jim Stenbridge, Construction Contractors' Board Steve Little, Department  
of Revenue

010 GREG CHAIMOV: Summarizes HB 2530. Allows a losing bidder on a  
construction project to sue the winning bidder for lost profits and  
attorney fees if the winning bidder fails to register with state  
authorities or pay prevailing wages, workers' compensation, or  
unemployment or withholding taxes. 030 REP. GREG WALDEN: HB 2530  
comes about from concern where unlicensed contractors, or contractors  
who operate in ways contrary to law engage in competitive actions  
against those contractors who do follow the law and win over the  
legitimate contractor. Does not believe that is right. HB 2530 allows  
any person who loses a competitive bid for a contract involving  
construction to bring an action for damages against the prevailing party  
to the contract if the contractor making the losing bid can establish  
that the winning contractor knowingly violates the law. 052 REP. BOB  
SHIPRACK: HB 2530 creates a new private right of action.

089 REP. BRIAN: Does intent have to be present?

093 CHAIR BAUM: On line 8 it states, "knowingly." 096 REP. BRIAN:  
Line 21, page 1, states that 6 years is the period of time under which  
commencement of the action would be required. Where did that period of  
time come from? 100 WALDEN: The Legislative Counsel office  
recommended that. 104 REP. EDMUNSON: The statute of limitations for  
contracts is 6 years. So this makes sense. -On line 13 of HB 2530 it

states, "it shall be conclusively presumed that the person losing on the competitive bid would have been awarded the contract on which the bid was made . . . ." Conclusive presumptions are disfavored in Oregon and are not usually included. The violator is always allowed to go into court and prove that the plaintiff is also disqualified from the bidding. Is it your intent that the winning bidder not have an opportunity to rebut?

130 WALDEN: Legislative Counsel created a conclusive presumption that except for the failure of the winning bid or failure to comply with the law, the losing bidder would have gotten the contract. Legislative Counsel's rationale for this is "without such a presumption it is hard to see how a losing bidder could ever show that except for the lower costs attributable to noncompliance by the winning bidder the contract would have been awarded to the losing bidder."

140 REP. EDMUNSON: Is counsel aware of any conclusive presumptions in Oregon law?

145 CHAIMOV: Will check into this. . 146 REP. MANNIX: How about a liquidated damages provision where if you prove that the winning

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bidder violated the law and there was competitive bidding, plaintiff's damages would automatically be 10% of the value of the project, or \$100,000 which ever is less?

164 SHIPRACK: This applies to those contractors that "knowingly" engage in action contrary to law.

176 REP. EDMUNSON: What you are envisioning is that a second place bidder would bring the action. HB 2530 does not say that. If there are more than two bidders with two actions the court cannot conclusively presume that both parties would have one. How should HB 2530 read?

183 WALDEN: Does not think that you want to end up with a sweet heart deal. 190 REP. EDMUNSON: The second place bidder may also be a

violator. 194 CHAIR BAUM: What if we have a dozen bidders that lose out. Under HB 2530 there might be 5 potential law suits. Is that the

intent of HB 2530? 199 WALDEN: As drafted, yes. 200 CHAIR BAUM:

That would be a substantial penalty in and of itself. 204 WALDEN: The

problem is that when you get out into the competitive market place you face people who have to face chapter 11 all the time. 215 REP. BRIAN:

The solution might be found in lines 13-14, it says "it shall be conclusively presumed that the person would have won the debt." If there are three or four persons taking action one of them is going to have to demonstrate that they would have otherwise won. 231 REP. EDMUNSON:

Suggests amending the provision to say that there is a simple presumption that the person who is bringing the action would have won and allow that presumption to be overcome by evidence that they were not in compliance themselves or that they were not the next lowest bidder.

240 SHIPRACK: The intent is that the aggrieved bidder should not have to carry the burden of proof. 253 REP. EDMUNSON: If there are three

aggrieved bidders who all believe that their violation occurred, is it your intent that the contract should be awarded to the next lowest bidder or the person who goes to court first? 258 SHIPRACK: Often

times the contracts will already be awarded and work will be substantially in progress. Throwing out the bid would be a little late.

Rather, it is better to let the aggrieved bidder to sue for damages.  
269 REP. MANNIX: Do you have any problem with saying that if a person is successful in proving fault that they will get 10% of the bid?

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286 REP. JOHNSON: Paragraph 4 provides that if the person bringing the action is successful attorneys' fees will be granted. Suggests having the attorney fee provision work both ways.

290 SHIPRACK: Understands that to be so.

310 KIM MINGO, ASSOCIATED GENERAL CONTRACTORS (AGC): AGC cannot support this bill. Would like some time so the Associated General Contractors can provide some amendments. The thrust of the amendments would be to grant authority to the Construction Contractors Board to revoke the registration of the contractors found to be in violation of these statutes. The best way to put a contractor out of business who is not in compliance with the law is to revoke their registration.

340 JIM STEMBRIDGE, CONSTRUCTION CONTRACTORS BOARD: EXHIBIT A Speaking in support of HB 2530. The Board has two main purposes 1) to provide consumer protection 2) to ensure fair competition in the Oregon Construction Industry. HB 2530 would help the Board to achieve its goals by creating an additional incentive for contractors to register. There should be no significant fiscal impact on the agency. 350 CHAIR BAUM: Asks whether HB 2530 would encourage people to register with the Board?

358 STEMBRIDGE: Yes. This would provide additional incentive for people to investigate the contractors. 373 REP. MANNIX: ORS 279.350 is a prevailing wage section. ORS 656.017 requires that a contractor has workers compensation coverage. ORS 657.505 requires that the contractor pays unemployment insurance taxes and ORS 701.055 is the other withholding tax requirement. Asks whether Stemberidge's point as to construction contracts noncompliance with one of these provisions will trigger the action. 389 STEMBRIDGE: Yes.

396 STEVE LITTLE, OREGON DEPARTMENT OF REVENUE: Once a contractor is significantly not in compliance with the Oregon tax law the Department would under some circumstances have a warrant docketed in the counties. Until such time that would happen the contractor bringing the action would not have access to the information. This comes out of ORS 314.835.

TAPE 23, SIDE A

HB 2375 - PUBLIC HEARING

Witnesses

Genoa Ingram, Oregon Association of Realtors Craig Smith, Oregon State Bar Charles Williamson, Oregon Trial Lawyers' Association Andrew Morrow, Oregon Bar Association

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024 GENOA INGRAM, OREGON ASSOCIATION OF REALTORS: EXHIBIT B Proposes conceptual amendments to HB 2375. See Exhibit B Two changes in the proposed amendments: -On page 3, subsection (2) of Letter of Steve Hawes to Ray Shaw, Exhibit B: Insert after the words "licensing requirements for registration" the words "as a real estate professional corporation." -On page 3, section (3), after the words "as part of the application for registration, an agreement" the words "prescribed by rule." -On page 4, subsection (6): Questions the reason for this provision. 061 CHAIR BAUM: Asks whether she is amending the terms of HB 2375 or adding new provisions to it. 063 INGRAM: The Association would like to amend ORS 696 and use this as a vehicle because it relates to ORS 58. The two chapters need to interface. 073 INGRAM: The language in ORS 696 prohibits real estate licensees from filing as a professional corporation under ORS 58. These two chapters need to interface. 078 REP. MANNIX: The issue we are dealing with is revising the professional corporation law and its concepts across the board, not with real estate corporations specifically. 087 INGRAM: Considered the politics of the Bill prior to bringing the issue this far. 093 REP. MANNIX: Suggests getting someone to file a bill relating directly to this issue.

096 INGRAM: This was not an issue that the Association addressed in their legislative conference. It was pointed out shortly before the session started. 102 REP. BRIAN: Sees two issues here: 1) whether or not the professional corporation status should be available to real estate licensees 2) if yes then there needs to be a separate bill to address corresponding changes in the real estate law.

108 REP. BAUM: There are deadlines for introducing bills in the House, but the Senate has two more weeks.

117 REP. CLARK: There is not a concern about the issue. The question is how does this relate to the larger issues of HB 2375. Asks the chair to ask the Speaker for allowance to introduce this as a Committee bill.

134 REP. BRIAN: Suggests taking care of the Professional Corporation aspects of Ms. Ingram's request and not the corresponding real estate statute changes.

142 REP. MANNIX: Did you have some specific changes to ORS 58?

148 INGRAM: No. 157 REP. MANNIX: The changes that need to be made are in chapter 696 and not in chapter 58?

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159 INGRAM: Yes.

163 REP. BAUM: This is an issue that we have not dealt with. Suggests dealing with Ms. Ingram's request in some other way.

182 REP. BRIAN: If HB 2375 moves out, does not know if we are going to get a second bite of the apple. This may be the last chance to deal with professional corporations. 190 REP. JOHNSON: If there is a real problem with that, the Senate is going to have to address that issue again. If there is a continuing concern it can be discussed on the Senate side. 201 REP. BAUM: Recesses for 5 minutes. 207 INGRAM:

Withdraws request to amend HB 2375.

216 CRAIG SMITH, OREGON STATE BAR: There are three points to make:  
-Relating to two amendments that the Oregon Medical Association is proposing to make to HB 2375 See EXHIBIT C (a) The first amendment precludes medical professionals from engaging in a business through a professional corporation with multiple professions. The Bar has no problem with that. (b) .The second amendment allows a shareholder of a professional corporation to represent the corporation without a lawyer in an administrative hearing. The Bar has no objection to this.  
-Relating to vicarious liability: Questions why having a professional corporation statute at all. The reason is because some businesses are heavily regulated and there is a public policy rationale for having the administrative agency involved in the operation of the professional corporation. -Two alternatives to HB 2375: 1) Reinstate vicarious liability. The Bar opposes this because the statute is drafted with the assumption that there is no vicarious liability which would create major technical problems as the statute is now drafted. Also, it does not fit well having multiple specialties represented within a professional corporation. Issues of liability do not hold true when there are multiple specialties. 2) Whether insurance should be required in order to gain the freedom from vicarious liability. The Bar rejects this alternative.

314 CHARLES WILLIAMSON, OREGON TRIAL LAWYERS ASSOCIATION: EXHIBIT D  
-Reads from Exhibit D.

TAPE 22, SIDE B

034 REP. MILLER: There are still only five states such a Oregon?

037 WILLIAMSON: Yes. . 040 REP. CLARK: Refers to HB 2276-4  
Amendments attached to Exhibit D. In Exhibit D, page 8 it states, "At a minimum a shareholder should be responsible for those paralegals, secretaries, messengers, and associates under his or her direction as Washington and Idaho require."

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Looking at the printed HB 2375 that remains does it not?

051 WILLIAMSON: Yes.

055 REP. CLARK: Refers to Mr. Williamson's statement on page 8 concerning insurance. How does that work? Does that mean that if you do not carry enough insurance then the shareholders are joint and severally liable?

059 WILLIAMSON: Correct. 068 SMITH: That comes from a rule that the Supreme Judicial Court of Massachusetts held which applies to lawyers only. 073 REP. CLARK: You argue that you would not be able to support that kind of provision regarding insurance? 077 WILLIAMSON: His clients would not be happy with that. Lawyers can get the insurance relatively easily. There is a public policy rationale for assuring the public that there will be a reasonable amount of insurance to cover the claims. This should apply to at least doctors and lawyers. 097 ANDY MORROW, OREGON STATE BAR: What the Bar is proposing does not affect the

individual liability of the professional for supervisory responsibility for people under their direct supervision. 110 CHAIMOV: Does the phrase "in need of professional services" on page 3, line 35 of HB 2375 need to come out of the bill in light of the fact that under the bill professional corporations will not be limited to providing professional services? 120 SMITH: What the Bar had in mind is to focus on professional service and align that particular service of the array of services provided by the professional corporation with the shareholder providing those types of professional services. 135 MORROW: No, the language does not need to come out, but the responsibility with respect to non-professional services is really a liability that is consistent with normal corporate liabilities of business corporations for those activities.

SB 374 - NONPROFIT CORPORATION DIRECTOR LIABILITY - PUBLIC HEARING

Witnesses:

Senator Bob Shoemaker

150 SENATOR BOB SHOEMAKER: The present Oregon Nonprofit Corporation Act says that the civil liability of a qualified director for the negligent performance of the director's duties shall be limited to acts of gross negligence and intentional acts. Wants to know what that means. SB 374 clarifies this by altering the language in the original Act to say, "performance and non

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performance" and "gross negligence and intentional misconduct." See lines 5-7 of the printed SB 374.

SB 374 - NONPROFIT CORPORATION - WORK SESSION

194 MOTION, REP. MANNIX: Moves SB 374 to Full Committee with a "do pass" recommendation. 200 VOTE: 8-0 Motion passes. Rep. Clark to carry.

AYE: Brian, Clark, Edmunson, Johnson, Mannix, Miller, Bell, Baum NO: 0 EXCUSED:

HB 2375 - PROFESSIONAL CORPORATION - WORK SESSION

220 MOTION, REP. CLARK: Moves a conceptual amendment to keep joint and several liability provided that it would not apply to any shareholder with \$500,000 of insurance coverage. Limited to lawyers and physicians. DISCUSSION ON THE MOTION 234REP. EDMUNSON: For other than lawyers and physicians would there be joint and several liability at all? 241 REP. CLARK: I am troubled with the deletion of joint and several liability. The motion is an attempt to cut a middle ground. The \$500,000 figure is based upon the cost that most lawyers must carry plus an additional \$200,000. 273 REP. BELL: The insurance you are suggesting applies to the professional corporation and not to the individual? If it is for each shareholder then you have just made everyone liable again. 280 REP. CLARK: Lawyers are required to carry \$300,000 as a matter of law. Most physicians carry at least that amount. 286 REP. BELL: There is a great difference between an individual

professional carrying a lot of insurance to protect themselves and for this Committee to require that they also obtain this high priced insurance. 293 REP. BRIAN: In the selection of attorneys and physicians assumes that the nature of their professions that damages could be high and the insurance is commensurate. Is that correct? What about accounting and tax advising? 307 REP. CLARK: Takes that as a friendly amendment. 319 REP. MILLER: Non-professionals would not be able to obtain this insurance as easily as the professionals.

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329 REP. CLARK: Understands the concern.

339 REP. BELL: Your amendment included only attorneys and physicians. In the case of all the other people that are involved in professional corporations there would not be joint and several liability would there?

353 REP. CLARK: No response.

356 REP. MANNIX: Is on record as having a potential conflict of interest since he is a chair for a professional corporation. Also, he is troubled with the notion that the Committee will absolve people from liability to the extent that they have gone out and bought insurance.

375 REP. BELL: Looking at the list of professional corporations (Attachment to Exhibit B), there are a lot of other professions that could suffer great liability just as an attorney or a physician. Is opposed to singling out a select group of professionals.

397 VOTE: 3-5 Motion fails.

AYE: Brian, Clark, Edmunson, NO: Johnson, Mannix, Miller, Bell, Baum  
EXCUSED:

TAPE 23, SIDE B

002 MOTION, REP. EDMUNSON: Moves on page 3, line 34 after the second "or" between "acts" and "misconduct" insert the words "omission or." Traditionally, a consumer could come to a professional for services who could hand the responsibility off to another shareholder in the corporation who is not under their direct supervision and control and do nothing and the customer could then claim that the bargained for service was never provided. Misconduct as well as wrongful act implies that an act has taken place from which the damages flowed. Omission means a complete and utter failure to act. Does not want a loop hole. DISCUSSION ON THE MOTION 033 REP. JOHNSON: Must also make the change on line 38. 035 REP. EDMUNSON: Agrees. 040 MORROW: Has no reason to object. 048 REP. MANNIX: Friendly amendment to Edmunson Amendment. Also, on line 39. 055 REP. JOHNSON: Friendly amendment. Suggests the wording "acts, omissions or misconduct." 058 REP. EDMUNSON: Restates motion. It should read on line 34, "Personally liable for negligent or wrongful acts, omissions, or misconduct committed by the shareholder." On line 38, - 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 14, 1991 - Page 10

"Personally liable for shareholder's own negligence or wrongful acts, omissions, or misconduct in participation with such acts, omissions, or misconduct of another shareholder."

069 VOTE: No objection Motion passes. 074 REP. MANNIX: Concerned about HB 2375-1 Amendments (See Exhibit C) 075 REP. BAUM: The proponents of the HB 2375-1 amendments have changed line 12 to read "in this state, before state administrative agencies" and strike all language in lines 13-17. Lines 1-8 came from the Oregon Medical Association. 106MOTION, REP. MANNIX: Moves portion of HB 2375-1 amendments which covers lines 1-7. 109 VOTE: No objection. Motion passes. 110 MOTION, REP. MANNIX: Moves second portion of HB 2375-1 amendments, lines 8-12, deleting lines 13-21 and changing line 12 to read to state, "In this state before state administrative agencies." 123 VOTE: No objection. Motion passes. 124 REP. JOHNSON: Lines 13-17 would not be included in your amendment? 126 REP. MANNIX: Correct.

127 REP. JOHNSON: The result would be that any professional corporation with more than 1 shareholder could appear before any administrative agency, but not before any other court without the presence of an attorney.

132 MOTION, REP. MANNIX: Moves adoption of lines 18-21 of HB 2375-1 amendments. 140 VOTE: No objection. Motion passes. 147 MOTION, REP. MILLER: Moves HB 2375 as amended to Full Committee with "do pass" recommendation. DISCUSSION ON THE MOTION 158 REP. JOHNSON: Announces a potential conflict of interest. EXHIBIT E In society there is a need to encourage the use of economies of scale and HB 2375 would allow that to happen. The fact that some professionals have more insurance than others is no reason to get rid of joint and several liability since if liability is found then insurance rates will go up. 187 REP. BELL: Supports the bill. Need to protect innocent professionals from undue harassment. 203 VOTE: 6-2 Motion passes. Rep. Mannix to carry.

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AYE: Brian, Johnson, Mannix, Miller, Bell, Baum NO: Clark, Edmunson, EXCUSED:

HB 2386 - REVISES CORPORATION LAW - PUBLIC HEARING

Witnesses:

Henry Kantor, Pozzi Atchison O'Leary and Conboy Charles Williamson, Oregon Trial Lawyers Association John Ellis, Stoel Rives Boley Jones and Grey Andrew Morrow, Oregon State Bar

215 GREG CHAIMOV: Summarizes HB 2386. Revises Business Corporations Act. 249HENRY KANTOR, POZZI, WILSON, ATCHISON, O'LEARY & CONBOY: EXHIBITS F AND G Reads from Exhibit F. 387 CHARLES WILLIAMSON, OREGON TRIAL LAWYERS ASSOCIATION: EXHIBIT H This bill is a major piece of legislation. This kind of measure is not adopted in any other state and would make Oregon's law a joke. HB 2386 has not been thought through. -Nobody looks at the articles of incorporation when they buy stock.



023 REP. MANNIX: What is your reaction to bills provision that limits liability to the amount of financial benefit that you received as a director?

027 WILLIAMSON: It is ludicrous. Corporations can insure their directors and it is commonly done. 039 JOHN ELLIS, STOEL RIVES BOLEY JONES AND GREY: The basic point of HB 2386 is not a radical change in the law, but to give the trial judges a road map in an area that they are presently being confronted with where there are no decisional guidelines to follow. A traditional derivative law suit allows a single shareholder with a single share of stock to assume the power to direct a claim on behalf of the entire corporate body whether or not the rest of the shareholders want it. The decision whether or not to bring the suit is not a pure legal issue, but is one of business judgement. Judges have to sort it out and they are not always well equipped to do this. HB 2386 attempts to restructure the law to give a disinterested group of corporate fiduciaries the power to act for the whole company and apply business judgement and not just legal judgement. This benefits everyone. Other states employ different methods: -The New York courts give substantial deference to the corporate committees. -Iowa, North Carolina, and 7th Circuit's interpretation of Ohio law say that they do not trust that process at all and will not give any recognition to committees. -The Delaware courts apply a three step process: The court looks 1) at the independence of the committee 2) has a second hearing on the procedural process followed by the committee 3) attempts to substitute the courts "independent business judgement" for that of the committee.

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-Believes HB 2386 approaches the problem in a rational and intelligent manner. HB 2386 gives courts two criteria with which to look at: 1) Were the members of the committee independent 2) Look at the conduct of the committee in terms of good faith and reasonable inquiry.

167 REP. MILLER: Understands Mr. Ellis to say that creating this road map is good and Mr. Kantor as saying that a road map is good, but no one is travelling.

170 ELLIS: Has been in at least three of these cases in the last couple of years.

174 KANTOR: To say that there is no guidance for the trial judges is unfair. There has been a body of law that has been built up. The courts do not need a lengthy statute. Has litigated three cases and apply the common law. The judges were fully capable to deal with the issues involved.

228 REP. MILLER: If this committee reached a decision that there was a legitimate need do you think that this is a good road map?

234 KANTOR: No. HB 2386 still allows for people who are not truly disinterested or independent directors to participate in this process. HB 2386 is going to promote cronyism. 263 REP. MANNIX: Sections 2, 10, 12 and 17 are clarifications of existing law. Do you have any

objections to these sections? 273 WILLIAMSON: Referring to Gary Burns testimony (See Exhibit H) HB 2386 does not really provide any guidelines. HB 2386 puts the existing board of directors in the drivers seat. It tips the balance of power in favor of the existing power structure. What will happen is the directors will get caught, a shareholder will bring a suit, then a committee will be set up with the directors who will then decide whether or not what they did was right and the courts may be bound by that. 348REP. JOHNSON: Compares the language on lines 29-30, page 1 with lines 4-13, page 2. Is there any language that the Committee could add to the bold language on lines 4-13, page 2 that would include the kinds of liability that the opponents of HB 2386 feel that are being deleted by the bill so that the "road map" would be more complete. 364 KANTOR: Referring to section 1 of HB 2386 are specifications of wrongdoing. If the legislature were to delete the existing language of a breach of a director's duty of loyalty to the corporation or the shareholders then it could be replaced with more specific language, but it is not necessary since "duty of loyalty" is well known throughout the country. The changes to section 1 go too far and the deletion of duty of loyalty is radical.

TAPE 25, SIDE A

005 ANDREW MORROW, OREGON STATE BAR ASSOCIATION: This bill has been in the process for months now. -Does not think that the bill is as radical as the opponents say it is. HB 238 6 does not require a corporation to operate this way. The amended provisions of section 1 "may" be adopted by the corporation. Corporations are not required to adopt them.

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-Duty of loyalty is not a statutory concept, it is a concept that is the subject of changing case law. The ability to advise clients is difficult.

HB 2371 - WRIT OF GARNISHMENT - PUBLIC HEARING

Witnesses:

Wendell G. Kusnerus, Oregon State Bar Frank Brawner, Oregon Bankers Association

055 CHAIMOV: Sumarizes HB 2371. Allows judgment creditor to garnish a debtor's accounts in any bank branch in Oregon by serving a single writ on the bank's designated representative. 072 WENDELL G. KUSNERUS, OREGON STATE BAR: EXHIBIT I HB 2371 is a response to two aspects of existing garnishment statutes. First, in order to serve a writ of garnishment on a bank the general rule is one has to serve the branch where the account is. Second, one must now pay a fee for each writ of garnishment that is served. This could be upwards of \$1000 per service. The Bar's response to this was that there should be a way to serve a single writ of garnishment on a bank and catch all accounts statewide which HB 2371 attempts to do. The Oregon Bankers Association has an amendment that the Bar finds acceptable. The amendments (See Exhibit I) provide that a writ of garnishment served on any branch or office of the bank which accepts deposits would be effective to garnish all accounts statewide. -The amendments (See Exhibit I) contain additional language not addressing this service issue by providing that if a writ of

garnishment is served after 4:00 o'clock on a given day then the garnishment is effective the following day. The Oregon State Bar takes no position on this point. 132 REP. JOHNSON: Is it a requirement now that all banks in Oregon designate a person to receive these garnishments? 139 KUSNERUS: No.

150 FRANK BRAUNER, OREGON BANKERS ASSOCIATION: EXHIBIT J Reads from Exhibit J.

187 REP. MANNIX: Would that not promote the idea of going statewide since there are portions of the state that are on mountain time?

189 BRAUNER: Agrees. Suggests changes to the Exhibit I amendments: After the words "manager or assistant manager at" take out "the" and insert "any depository' ". After the words "designated person at any" insert "depository".

218 KUSNERUS: The Bar supports those changes.

HB 2371 - GARNISHMENT - WORK SESSION

234 MOTION, REP. MANNIX: Moves the proposed amendments to HB 2371 offered by the Oregon Bankers Association with the changes noted by Mr. Brauner. Refers to Exhibit I.

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Change "24" to "23". Delete the word "the" after "assistant manager at" and insert "any depository". After the words "designated person at any" insert "depository".

243 VOTE: No objection. Motion passes. 247 MOTION, REP. MANNIX: Moves HB 2371 as amended to Full Committee with a "do pass" recommendation. 250 VOTE: 6-0 Motion passes. Rep. Johnson to carry.

AYE: Edmunson, Johnson, Mannix, Miller, Bell, Baum NO: 0 EXCUSED: Brian, Clark,

SB 396 - BULK SALES ACT - PUBLIC HEARING

Witnesses:

Wendell G. Kusnerus, Oregon State Bar

280 GREG CHAIMOV: Summarizes SB 396.

297 WENDELL G. KUSNERUS, OREGON STATE BAR: EXHIBIT K Reads from Exhibit K.

SB 396 - BULK SALES - WORK SESSION

369 . MOTION, REP. MILLER: Moves SB 396 to Full Committee with a "do pass" recommendation. 388 VOTE: 5-0 Motion passes. Rep. Miller to carry.

AYE: Edmunson, Mannix, Miller, Bell, Baum NO: 0 EXCUSED: Brian, Clark, Johnson

TAPE 24, SIDE B

SB 421 - CORPORATIONS - PUBLIC HEARING

Witnesses:

Gary Conkling, Oregon Based Corporations Henry Hewitt, Oregon Based Corporations Doug Ragen, Willamette Industries, Inc.

012 HOLLY ROBINSON, COMMITTEE COUNSEL: Summarizes SB 421 A-Engrossed entitled "Business Combination Act."

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017 GARY CONKLING, OREGON BASED CORPORATIONS: Testifies in favor of SB 421. 041 REP. BAUM: Is concerned about Section 5, page 4, subparagraph (b), lines 39-41 of printed SB 421. It states, "The corporation, by action of its board of directors, adopts an amendment to its by-laws within 90 days after the effective date of this 1991 Act, expressly electing not to be governed by the 1991 Act." Why does this provision apply if the corporation does not formerly adopt an amendment if deemed adopted after 90 days if they do not do so? 052 HENRY HEWITT, OREGON BASED CORPORATIONS: EXHIBIT L SB 421 is patterned after a Delaware statute where many companies are incorporated. The premise is that it would be an unusual circumstance for a company to want to opt out of this statute and rather than forcing all the companies that would want to participate and have the benefit of this statute to go through a process of opting in the premise has been stated the other way. SB 421 is limited to publicly owned companies incorporated in Oregon.

082 REP. BAUM: Referring to Section 5 subparagraph (c), page 4 and 5 of printed SB 421, what is the 12 months scenario? Is that so the chair holders are not colluding with a hostile takeover? 087 HEWITT: Yes. It is designed to prevent a retroactive change of the rules. 088 REP. MANNIX: If you have a corporate raider they may have already acquired the shares and they are going to have the shareholders get together to retroactively amend the articles. 091 HEWITT: Twelve months is the common time frame.

093 REP. BAUM: Ninety days in the other paragraph under (b) is standard is it not?

096 HEWITT: Yes.

098 REP. BAUM: Are all of the public corporations in Oregon going to receive notice of this change in the law? How many of the corporations support SB 421?

101 CONKLING: Bohemia, Ninety-Scientific Industries, Mentor Graphics, Northwest Natural Gas, Precision Cast Parts, Tektronix, and Willamette Industries. 106 REP. BAUM: There are a number of ways of looking at leverage buy-outs. 1) For cheap easy cash and 2) to restructure the corporation. Could you address that issue? 112 HEWITT: SB 421 encourages negotiations before the acquisition occurs. This legislation is not "anti-takeover." It makes the take-overs that do occur better.

139 CONKLING: SB 421 is not one that protects corporate perks, rather it deals with the question of trying to prevent a third party from

"cherry-picking" a corporation. SB 421 says that a corporation can't be taken apart and sold for some of its parts by an interest that does not have as its objective running the corporation in its long term best interests including its employees and shareholders.

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164 REP. BAUM: Is this another share holder driven bill and will there be any adverse effect on the stock of these corporations once SB 421 becomes law?

171 HEWITT: There is generally no impact on the stock of a corporation due to this kind of law. This bill says if you don't tender you still have a franchise. It protects the shareholder.

193 DOUG RAGEN, WILLAMETTE INDUSTRIES: EXHIBIT M -SB 421 provides protection for the directors against pressures they might not otherwise be able to handle. In the negotiating setting there can occur tender offers that put the directors in compromising positions. SB 421 provides the board with more leverage in the negotiating process to get a better price for the shareholders. OTHER EXHIBITS SUBMITTED: EXHIBITS N and O.

SB 421- BUSINESS COMBINATION ACT - WORK SESSION

215 MOTION, REP. MILLER: Moves SB 421 A-Engrossed to Full Committee with a "do pass" recommendation. 220 REP. MANNIX: Notes a potential conflict in interest. Represents a client in workers compensation case against one of the corporations. Does not believe that there is a conflict, but goes on record. 225 VOTE: 6-0 Motion passes. Rep. Miller to carry.

AYE: Edmunson, Johnson, Mannix, Miller, Bell, Baum NO: 0 EXCUSED: Brian, Clark

HB 2377 - LIEN ON REAL PROPERTY - PUBLIC HEARING

Witnesses:

Wendell G. Kusnerus, Oregon State Bar

254 WENDELL KUSNERUS, OREGON STATE BAR: Mortgages and trust deeds typically include in addition to a lien on real property an assignment of rents. The difficulty is that while the mortgage is perfected by recording it in the real estate records the current law provides that the assignment of rents is not perfected by recording. There are no Oregon cases on the issue. The Bar views this as a trap for the unwary and a disincentive to negotiate workouts. If one has a loan with a mortgage on a piece of commercial property that comes into trouble, typically the lender and the Bar will try and work something out. However, the current state of the law gives the lender an incentive to not work it out, but instead the lender will more likely go down to court and file a foreclosure lawsuit and get a receiver appointed because if the lender does not do that then part of the lien will be unperfected namely, the assignment of rents. HB 2377 provides that an assignment of rents is perfected in the same manner as a mortgage or trust deed is perfected namely, by recording it in the realestate records.

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304 REP. BAUM: Every real estate contract that Baum has encountered has a receiver. This is why?

305 KUSNERUS: Yes.

310 REP. BAUM: That is a way to protect the property.

315 KUSNERUS: It enables one to obtain the rents on the property while foreclosure is in progress. -Suggested Amendments See EXHIBIT P

360 REP. BAUM: Understands that in a typical situation there is a primary mortgage holder on the property and then the debtor goes ahead and assigns some proceeds from the property.

364 KUSNERUS: Typically, whatever the lien instrument is there is a paragraph in the contract that provides in addition to the lien on the real property the rents are assigned as additional collateral.

367 REP. BAUM: Understands right now that a second party could come in with another sale or lien and have priority over the unperfected lien holder with respect to assignment of rents.

370 KUSNERUS: Whoever records with a receiver gets priority on the rents. In addition, if the debtor files bankruptcy the assignment of rents is unperfected and therefore can be avoided in the bankruptcy proceedings.

#### HB 2377 - LIENS ON REAL PROPERTY - WORK SESSION

389 MOTION, REP. MANNIX: Moves proposed amendments. (See Exhibit P)

397 VOTE: No objection. Motion passes. 398 MOTION, REP. MANNIX:

Moves HB 2377 as amended to Full Committee with a "do pass"

recommendation. 405 VOTE: 5-0 Motion passes. Rep. Mannix to carry.

AYE: Edmunson, Johnson, Mannix, Bell, Baum NO: 0 EXCUSED: Brian, Clark, Miller

CLOSE OF WORK SESSION ON HB 2377 418 REP. BAUM: Closes Subcommittee of Civil Law and Judicial Administration at 4:20 p.m.

Submitted by: David Harrell, Office Manager Reviewed by: J. Kennedy Steve,

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#### EXHIBIT LOG:

A Testimony on HB 2530 - Jim Stembridge - 1 page B Testimony on HB 2375 - Genoa E. Ingram - 6 pages C Written Material on HB 2375 - Staff - 1 page D Testimony on HB 2375 - Charles R. Williamson - 29 pages E Testimony on HB 2375 - Rep. Johnson - 1 page F Testimony on HB 2386 - Henry Kantor - 2 pages G Written Material on HB 2386 -

Henry Kantor - 59 pages H            Testimony on HB 2386 - Charles R.  
Williamson - 4 pages I    Written Material on HB 2371 - Wendell G.  
Kusnerus - 4 pages J        Testimony on HB 2371 - Frank Brawner - 3 pages  
K            Testimony on SB 396 - Wendell G. Kusnerus - 2 pages L    Testimony  
on SB 421 - Henry H. Hewitt - 5 pages M Testimony on SB 421 - Dog  
Ragen, WillameKe Industries, Inc. - 2 pages N    Testimony on SB 421 -  
Allan Leedy - 2 pages O Testimony on SB 421 - R. M. Marvin - 1 page  
P            Written Material on HB 2377 - Staff - 1 page

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