

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

April 4, 1991 Hearing Room 357 1:00 p.m. Tapes 68 - 70

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. Randy Miller

STAFF PRESENT: Greg Chaimov, Committee Counsel Karen Edwards,
Committee Assistant

MEASURES HB 2828 PH (Witness Fees)
CONSIDERED: HB 3349 PH (Liability for Hazardous Substance
Release) SB 572 PH/WS (Secured Transactions) SB 426 PH/WS (Nonprofit
Corporations)

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 68, SIDE A

004 REPRESENTATIVE BAUM, CHAIR calls the meeting to order at 1:08 p.m.

HB 2828 - PUBLIC HEARING Witnesses: Representative John Minnis, District 20 Paul Snider, Association of Oregon Counties Charles Williamson, Oregon Trial Attorneys Association

GREG CHAIMOV: HB 2828 is sponsored by Rep. Minnis. Summarizes HB 2828 (EXHIBIT A). Amendments have been drafted that will circumvent the court and allow the check and subpoena to go directly to the police officer (EXHIBIT B).

032 REPRESENTATIVE JOHN MINNIS, DISTRICT 20: HB 2828 is intended to help cities and counties recover more of the costs that are incurred when officers appear as witnesses in various civil trials. Has no objection to the proposed amendments (EXHIBIT B). They are consistent with proposed amendments that were suggested by Chief Court Administrator Bill Linden (EXHIBIT C).

REP. JIM EDMUNSON: What would your reaction be if we put a one and a half percent limitation on fees that police officers could charge as expert witnesses?

061 REP. MINNIS: That is an issue you may want to consider as you discuss HB 2828. There are some collective bargaining agreements that already exist between law enforcement agencies and those cities and

counties that they serve.

REP. EDMUNSON: Would this have any fiscal impact on the state if police officers were asked to be expert witnesses?

REP. MINNIS: Would have to ask Mr. Linden, to what degree does the state call a police officer in as an expert witness on behalf of the state?

REP. EDMUNSON: Are you making the distinction in HB 2828 between police officers being witnesses and expert witnesses?

REP. MINNIS: Does not know. The intent was more inclusive to have police officers subpoenaed into civil trials as witnesses.

104 REP. EDMUNSON: Your intent was to cover all police officers at any time they are subpoenaed to appear in court, whatever the capacity may be?

REP. MINNIS: That is correct, in a civil setting.

140 PAUL SNIDER, ASSOCIATION OF OREGON COUNTIES: Testifies in support of HB

282 8. Section nine leads me to believe that if the state, as a party, subpoenaed a city police officer to testify as a witness, there would be no fiscal impact. The exception applies to any public body.

REP. BAUM: Where is that in HB 2828?

SNIDER: It is in section nine.

CHARLES WILLIAMSON, OREGON TRIAL LAWYERS ASSOCIATION: Testifies in opposition to HB 2828: >It will impose additional costs on litigants. >Does not see why police officers or public employees should be given special treatment when subpoenaed to court. >It will be impossible to determine, prior to a civil trial, whether or not a police officer is subpoenaed to testify as a witness or expert witness. It would be hard to know what fee to pay the officer ahead of time.

184 REP. ROD JOHNSON: For civil cases, anyone who wants a police officer to appear as a witness for any purposes, expert or otherwise, should pay the set fee that has been established.

REP. EDMUNSON: There is nothing new about paying expert witnesses expert witness fees. You cannot subpoena someone in and demand their expertise without paying for it. Is that true or not?

WILLIAMSON: Expert witnesses generally get expert witness fees.

REP. EDMUNSON: If a police officer is testifying in an expert witness capacity, he is entitled to be paid. How will HB 2828 define when a witness is testifying as an expert as opposed to testifying as an eye witness? Does HB 2828 do anything other than limit the fee that a police officer can charge as an expert?

210 WILLIAMSON: If HB 2828 does not do anything, it should not be passed. It has been my impression that if you subpoena a police officer, the police officer is generally able to testify about things within his particular expertise. Police officers are called for both purposes in almost all cases.

REP. KEVIN MANNIX: It is important to note that we have limited HB 2828 to a police officer who is called as an expert witness. The expert witness is called upon to use his training and expertise, apply them to the facts and present an expert opinion about those facts. Neither side gets to take advantage of the officer without paying the fee.

WILLIAMSON: My understanding is the police officer that is subpoenaed and called upon as a witness, who is then used as an expert witness has to be paid for giving that expert opinion.

REP. MANNIX: Does HB 2828 not indicate the moment you want to change the police officer from a witness to an expert witness, an additional fee is to be paid?

WILLIAMSON: That is the intent of HB 2828.

285 REP. MANNIX: The social problem we are presently trying to address is the lack of resources for law enforcement. Do you have a response to that?

WILLIAMSON: No. Not at this time.

REP. EDMUNSON: Do you know what fees a police officer is paid as an expert?

WILLIAMSON: Police officers are called into court to testify on what the witnesses have said, what they observed and to give their opinion about what happened. HB 2828 will cover every police officer that ever goes to court and has an opinion about the accident he is testifying on. This will make all police officers experts and they will all be paid. HB 282 8 will raise money to provide more police officers from this source.

332 REP. KELLY CLARK: In a medical malpractice case, a Professor of Neurology from New York is asked to be an expert witness. Explain the process by which the witness is paid fees? Is that negotiated over the phone?

WILLIAMSON: Yes.

REP. CLARK: Can you give a more common example where someone is called in to testify as an expert?

WILLIAMSON: Generally speaking, that is the process. HB 2828 addresses the issue of when the police officer has already been subpoenaed to court and is asked opinions during the trial.

383 REP. CLARK: If an individual was called to testify as an expert witness, would it be assumed that a fee was involved?

WILLIAMSON: You can subpoena an expert witness. You cannot force that expert to give an opinion for free.

REP. CLARK: Will a public official charge for giving testimony as an expert if it is outside his or her normal duties?

WILLIAMSON: It would be up to that individual to ask for a fee.

TAPE 69, SIDE A

011 SNIDER: A distinction should be made as to whether or not an individual is testifying to something that has already been witnessed or done. If you are asking that individual to do something out of the realm of their normal employment, a witness fee may be requested to do that.

WILLIAMSON: If a person is subpoenaed to court solely to act as an expert witness, that person should be paid. If the person is subpoenaed as a witness and an expert witness, the expert testimony is incidental. Written testimony submitted on HB 2828 (EXHIBIT D).

Tape 69, Side A HB 3349 - PUBLIC HEARING Witnesses: Frank Browner, Oregon Bankers Association Dave Ellis, Oregon Bankers Association Ken Shermon, Jr., Oregon Bankers Association Quincy Sugarman, Oregon State Public Interest Research Group Brian Boe, Oregon Petroleum Marketers Association

037 FRANK BROWNER, OREGON BANKERS ASSOCIATION: >The 1980 Congress assessed the Federal Comprehensive Environmental Response, Compensation and Liability Act which is commonly called the Superfund Law.

>This piece of legislation has held companies accountable for damages that have been caused to the environment by requiring the owners and operators of these properties to pay to clean them up. >In the original law there was an exemption of liability for lenders who hold as collateral, property that is contaminated by environmental wastes that they did not cause. >Court decisions, in interpreting this exemption, have narrowed the protection for lenders. Financial institutions and others who act as trustees to hold property are put at great risks. The Oregon League of Financial Institutions endorses and supports HB 3349.

101 DAVE ELLIS, OREGON BANKERS ASSOCIATION: Reads written testimony in support of HB 3349 (EXHIBIT E).

196 REP. CLARK: What is the argument?

ELLIS: By allowing the public to pay for the cleaning up of a piece of property upon which a lender has a security interest, then allowing the secured lender to foreclose, they could gain a windfall profit from the public's actions.

REP. CLARK: The argument that you have just given us could only be sustained if the lender did not know at the time, when the institution made the loan, that there was a problem with the property. Assumes property with hazardous wastes is not as profitable other properties.

ELLIS: We are proposing to allow the Department of Environmental Quality to have a lien against the property which is in the lender's hands for their clean up costs. Continues reading written testimony (EXHIBIT E).

262 KEN SHERMON, JR., OREGON BANKERS ASSOCIATION: Discusses general concerns of HB 3349: >HB 3349 will impede clean up. Feels that it will more fairly and reasonably balance the equities between the parties who are involved in a hazardous waste site. Will encourage owners and lenders to clean up sites at private expense rather than leaving the responsibility to the public.

>Feels that the intended protection in the state and federal laws are not working for lenders. >Disagrees with the ideas that HB 3349 will

discourage careful loan policies. >HB 3349 will create more orphan sites. An orphan site is a site that people walk away from and nobody wants to clean up. It will encourage private businesses to get involved with the funding or participation in the clean up of those sites. >Has tried to construct a carefully balanced bill that recognizes that these hazardous waste problems are with us and they are going to be significant problems for all concerned, including lenders.

357 REP. JOHNSON: What does the Superfund Law speak to in terms of liability to lenders?

BROWNER: When the Superfund Law was adopted in 1980, a provision was made to exempt lenders from liability. It has been the case law and the interpretation of that exemption that has caused problems to lenders.

REP. JOHNSON: Will HB 3349 relieve the civil liability under federal law?

SHERMON: No. It would not. We expect Congress to move on a parallel track with this issue at the federal level.

387 REP. EDMUNSON: Is there any conceivable opportunity, as a condition of trust, the trustee might have the obligation to clean up a company and use HB 3349 as a defense to relieve that liability?

ELLIS: The liability of a trustee in a fiduciary capacity to the trust has to be distinguished. That is guided by state law and the trust instrument. There may be contaminated real property that is held in trust. HB 3349 will accept to the extent, that which was caused by an act or omission to the trustee. The trust's assets will remain fully liable for hazardous waste clean ups, not the trustees.

TAPE 68, SIDE B

023 REP. EDMUNSON: XYZ Bank of Oregon is the trustee for the ABC Corporation. It acquires all of the assets of the ABC Corporation through foreclosure of a note or something of that nature. ABC Corporation has property that has been contaminated. Are you saying that all of the assets of the ABC Corporation are available for clean up and not those of XYZ Bank?

ELLIS: Are you referring to the bank in this circumstance as a trustee under a deed of trust?

REP. EDMUNSON: Possibly. The term fiduciary seems broad enough where they could become a fiduciary in several capacities.

ELLIS: As a trustee under a deed of trust, you serve a very limited purpose. All you do is send out some notices and generally name a title company as a trustee. If there is going to be a foreclosure, you appoint a new trustee. It is the attorney that is going to do the foreclosure. That would exempt them. In response to your hypothetical question, XYZ bank holds the assets of ABC Corporation in trust. That means to me the assets of ABC Corporation were put in trust by the shareholders. All the trustee does is manage the trust under fiduciary principles which may include a duty between the trustee and the beneficiaries of the trust to act certain ways regarding contaminated property.

049 REP. EDMUNSON: ABC Corporation goes to the bank, says it wants the

bank to be the trustee of their property and has the bank agree to clean up the property if it is contaminated. If that is included in the trust, will it affect the trustees?

ELLIS: It would allow the trustee to fulfill those trust purposes with knowledge that they would not be held liable personally beyond trust assets except to the trustor on some common lot theory. They would not be held liable to the state.

REP. EDMUNSON: Or the neighbors?

ELLIS: Or the neighbors.

REP. EDMUNSON: Unless there was gross negligence, intention of misconduct, recklessness or wanton?

BROWNER: Your example is very hypothetical. The chances are, without the passage of HB 3349, no trust company is going to be involved with a corporation like ABC.

CHAIMOV: Refers to page 3, lines 29-30. How does a lender control or manage a facility pursuant to the terms of an extension of credit?

078 ELLIS: In a situation where there is a pending loan or foreclosure proceeding where either the lender or receiver, selected by the lender or appointed by the court, may have to keep a business up and running to maintain the going concern value of that business.

QUINCY SUGARMAN, OREGON STATE PUBLIC INTEREST RESEARCH GROUP: Reads written testimony in opposition to HB 3349 (EXHIBIT F). Amends testimony on page two to reflect, "The state Superfund law follows that in interpretation, the actual statute states only strict liability."

REP. JOHNSON: Does that mean it would not have much of an affect if banks were removed and you would then support HB 3349?

SUGARMAN: No. It means the concern that lenders have being tied in as potentially responsible parties for liability is not a very large problem at this time. Continues to read written testimony (EXHIBIT F).

158 REP. TOM BRIAN: What if a lender responsibly requires an examination of soils before making a loan, then makes the loan. The bank takes back the property and during that operation period discovers the property had become contaminated with toxic wastes. What would happen in that type of situation?

SUGARMAN: As the loan is being made and the lender undergoes an investigation with due diligence, they are included in the current exemptions.

REP. BRIAN: It does not seem right to force the lender into the position of having to supervise the detailed activities of a business.

SUGARMAN: Lenders should be concerned about the environmentally responsible activities of the people for whom they are lending money.

REP. BRIAN: Would that not cause the need for lenders to inspect their mortgagors?

SUGARMAN: Perhaps that would.

REP. CLARK: Wants to purchase a piece property that is contaminated. The bank will not give a loan. Who would benefit from that type of a situation? Could you explain what is meant by, "current provisions adequately protect lenders" from your testimony?

SUGARMAN: The federal and state laws have two provisions for lenders. The party who did cause the contamination is held responsible for the clean up of that site.

219 REP. CLARK: "Narrowing liability will shift more of the burden for toxic clean ups to the state's taxpayers. More sites become orphaned and clean ups must be funded through state monies." Do you disagree with this statement made by the representatives of the Bankers Association?

SUGARMAN: Has not seen enough examples where that has happened in Oregon to support the Bankers Association.

REP. JOHNSON: It was mentioned that federal law has two provisions that exempt lenders from liability. Earlier testimony given stated that those laws have been interpreted by courts to allow liability to take place. Do you agree with that testimony?

SUGARMAN: Has not read any of the cases.

BRIAN BOE, OREGON PETROLEUM MARKETERS ASSOCIATION: Testifies in support of HB 3349. It is an important component in dealing with the underground storage tank issue in complying with the federal regulations.

280 REP. JOHNSON: The marketer is liable if there is a spill or leak. Do your clients have to cover that cost?

BOE: Right. Unless it bankrupts them.

REP. JOHNSON: Does that give the marketer some incentive to be careful and not create spills?

BOE: Very careful.

REP. JOHNSON: Does this additional threat to the lenders, making it difficult for your clients to get loans, cause your clients to be any more cautious about spills than they would be otherwise because of their own liability?

BOE: The consciousness of this issue has caused marketers, over the decade of the 80's, to be much more conscientious of their practices. They realize the consequences if they are not good stewards of the product they are storing.

REP. JOHNSON: Their own liability causes them to be careful about spills to a certain degree. Does this additional problem, the threat to lenders, make them any more careful than they already would be because of their own liability for spills?

310 BOE: Not sure of the question that is being asked.

REP. JOHNSON: Your clients are subject to bankruptcy if payment of a

spill costs that much. The threat to their lender does not make them any more careful, correct?

BOE: No.

Tape 68, Side B SB 572 - PUBLIC HEARING Witnesses: Frank Browner, Oregon Bankers Association

CHAIMOV: Summarizes SB 572 (EXHIBIT G).

FRANK BROWNER, OREGON BANKERS ASSOCIATION: Testifies in support of SB 572.

367 REP. BAUM: Do you have any amendments you would like to add to SB 572?

BROWNER: We think SB 572 is a perfect bill.

Tape 68, Side B SB 572 - WORK SESSION

MOTION: REP. CLARK moves SB 572 to the full committee with a "due pass" recommendation.

DISCUSSION TO THE MOTION:

REP. CLARK: SB 572 allows the secured party to amend a financing statement without the debtors address when the secured party changes its address.

REP. EDMUNSON: Does that include post office boxes?

REP. BAUM: Right. SB 572 passed the Senate with 29 votes. There was one excused absence.

VOTE: In a roll call vote, the motion carries with all members present voting AYE.

TAPE 69, SIDE B SB 426 - PUBLIC HEARING Witnesses: Jeff Wolfstone, Oregon State Bar Ross Laybourne, Department of Justice

018 CHAIMOV: Summarizes SB 426 (EXHIBIT H).

042 JEFF WOLFSTONE, OREGON STATE BAR, BUSINESS LAW SECTION: Gives background information on SB 426: >In 1989 the Legislature passed the Nonprofit Corporation Act. It excluded public benefit and religious corporations from allowing loans or guarantees, as part of a recruitment package, to bring in qualified individuals to run their organizations. >Came up with a recruitment package. In the context of a recruitment package the allowance of a loan or a guarantee could be provided not to exceed a period of three years. The approval would be through the full disclosure of the potential conflict between the director or officers interest and interests of the corporation combined with a vote by a disinterested majority supporting it. It will allow nonprofit corporations to compete with the private sector. >Also provides that notice of a loan, guarantee or other provision be given to the members of the corporation. >At least 20 days notice should be given to the Attorney General before the loan or guarantee is made and/or becomes binding. SB 426 has attempted to build in some safeguards to balance those interests.

151 REP. CLARK: Does not agree with the inability for individuals to serve on nonprofit corporations is due to competition with the public sector.

WOLFSTONE: Often times some of these organizations are competing nationally and other states allow these recruitment packages. It can be a deciding factor.

REP. CLARK: Is there a policy distinction between a director and an officer? The officer is going to be compensated for work performed. The director may or may not be compensated.

WOLFSTONE: Directors may receive reimbursements for out-of-pocket expenses.

REP. CLARK: What can the Attorney General do in reference to the 20 day notice of the loan?

199 ROSS LAYBOURNE, DEPARTMENT OF JUSTICE: The Attorney General has authority over charitable organizations. In some cases there is authority for the Attorney General to go to court with respect to particular identified abuses. In other cases, there are provisions where a certain type of transaction requires notice, in advance, to the Attorney General.

REP. CLARK: What happens when the Attorney General receives a notice that violates the statute?

LAYBOURNE: When looking at the notice or transaction, we look for a specific violation of the act or something that would constitute in more general terms a breach of fiduciary duty. If SB 426 were to pass, in its present form, we would look at the totality of circumstances that were involved in entering into that loan with the officer or director and its terms.

260 REP. BRIAN: Will their not be liability with the Attorney General's office in deciding whether or not these loans are sound and appropriate?

LAYBOURNE: Historically, if we have found out that such a loan exists, it is illegal. We have gone to the organization who unwinds the transaction. If SB 426 is adopted, it makes the Attorney General's task more difficult in that we are required to evaluate transactions.

REP. BRIAN: When would a private nonprofit organization need to offer loans for directors?

291 WOLFSTONE: Cannot come up with a good response or example to that question as a director that is solely a director.

REP. MANNIX: Where is the great need for this loan provision as opposed to the rest of SB 426 ? Who has lost a recruitment opportunity for a major officer for a major nonprofit corporation because they could not put together a recruitment package that included a loan?

WOLFSTONE: Aware of some private colleges in the Portland area where they were unable to compete by offering a loan to someone who was offered a position as president.

REP. MANNIX: Are we speaking of low-interest home loans?

350 WOLFSTONE: It may be a loan to cover certain expenses involved in

relocating to another community, a guarantee of a home loan or a part of a home loan or a second loan to help cover the move.

REP. MANNIX: Concerned with the loan provision in SB 426.

WOLFSTONE: Our committee would consider a change that would reduce the reference to director if that were a way of getting SB 426 to move forward.

409 REP. CLARK: Have an easier time, in theory, with the idea of this authority going for a public benefit corporation than a religious corporation. Might there be a policy distinction between public benefit and religious corporations?

TAPE 70, SIDE A

006 WOLFSTONE: When looking at religious corporations and comparing them to public benefit corporations, we have to be careful. Many religious corporations are not what you necessarily think of as strictly being a church. They often are doing a number of other things such as running a hospital or running a school. They are often doing the same activities and it gets hard to draw those lines.

REP. CLARK: Under the last session's legislation, the Attorney General's ability to regulate a religious corporation was substantially less than the Attorney General's ability to regulate a public benefit corporation. The concern was whether or not there would be an incentive for individuals to file a religious corporation for that reason and decided that there would not be. How does that figure into this issue?

033 WOLFSTONE: Would like know if the Attorney General's office has seen a change in that regard since 1989 when this legislation became effective?

LAYBOURNE: Cannot say that there are organizations that are using religion as a basis to avoid scrutiny.

REP. BRIAN: The greater public interest is to not encourage loans between directors and officers.

Tape 70, Side B SB 426 - WORK SESSION

061 MOTION: REP. MANNIX moves to amend SB 426 on page six, section six to restore the original language that was found in ORS 65.364, subparagraph one. It would put back into bracketed language may not "lend money to or guarantee the obligation of a director or officer of the corporation", and would strike the rest of the bold type language all the way through line 35.

VOTE: Hearing no objection, Chair Baum so moves.

MOTION: REP. MANNIX moves to adopt an amendment presented by Lane Powell Spears to SB 426 (EXHIBIT I). Changing ORS 65.624 to add in the phrase "or for dissolution".

VOTE: Hearing no objection, Chair Baum so moves.

MOTION: REP. MANNIX moves SB 426 to the full committee with a "due pass" recommendation.

VOTE: In a roll call vote, the motion carries with all members present
AYE.

112 CHAIR BAUM closes the work session and adjourns the meeting.

Submitted by: Reviewed by:

Karen Edwards Greg Chaimov Committee Assistant Committee Counsel

EXHIBIT LOG:

A	-	Staff Measure Summary on HB 2828 - Staff - 5 pages.	
B	-	Amendments to HB 2828 - Staff - 2 pages	C - Amendments
		to HB 2828 - Rep. John Minnis - 1 page	D- Testimony on HB 2828 -
		Staff - 1 page	E-Testimony on HB 3349 - Frank Browner - 25 pages
F	-	Testimony on HB 3349 - Quincy Sugarman - 2 pages	
G	-	Staff Measure Summary on SB 572 - Staff - 5 pages	
H	-	Staff Measure Summary on SB 426 - Staff - 6 pages	
I	-	Amendment to SB 426 - Staff - 1 page	