

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.

Measures Heard SB 426, WS SB 402, WS SB 455, PH SB 429, PH SB 406, PH SB 401, PH

SENATE COMMITTEE ON JUDICIARY

February 4, 1991Hearing Room C 1:00 p.m.Tapes 19 - 20

MEMBERS PRESENT:Sen. Joyce Cohen, Chair Sen. Jim Hill, Vice-Chair
Sen. Peter Brockman Sen. Jim Bunn Sen. Jeannette Hamby Sen. Bob
Shoemaker Sen. Dick Springer

STAFF PRESENT: Bill Taylor, Committee Counsel Kate Wrightson,
Committee Assistant

WITNESSES: Kathleen Beufet, Office of Legislative
Counsel Barbara Potter, Office of Legislative Counsel Roy Tucker,
Securities Regulation Section, Oregon State Bar Laurie Skillman,
Department of Insurance and Finance James Harlan, Department of
Insurance and Finance Mary Ann Frantz, Securities Regulation Section,
Oregon State Bar Jerome La Barre, Securities Task Force, Oregon State
Bar Sumner Youngblood, Citizen Roger Martin, Securities Dealers
Association Jerome R. Barton, International Law Section, Oregon State
Bar

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TAPE 19, SIDE A

002 CHAIR COHEN: Calls meeting to order at 1:10 p.m.

SB 426 - REVISES NONPROFIT CORPORATION LAW, WORK SESSION

009 TAYLOR: Reviews intended purpose of bill.

022 CHAIR COHEN: Do we need a plural for "person" on page 7? We were to look at the definition of a person.

031 SEN. SHOEMAKER: The question was whether "person" includes corporations or just people, and whether it could be plural or singular.

035 CHAIR COHEN: It's on page 7, lines 13 and 14.

037 KATHLEEN BEAUFET, LEGISLATIVE COUNSEL: In ORS Chapter 174.80, the definition of "person" says that "unless otherwise indicated is the definition that applies throughout the Oregon Revised Statutes".

041 SEN. SHOEMAKER: What is that definition?

043 BEAUFET: It says that the singular encompasses the plural unless otherwise indicated.

047 CHAIR COHEN: [QUOTE] "Kathleen Beaufet has clarified 'person,' with respect to Chapter 174 ."

052 TAYLOR: [QUOTE] "ORS 174-100, subsection 4: 'Person' includes individuals, corporations, associations, firms, partnerships, and joint stock companies." -The singular also refers to the plural.

058 SEN. HILL: Did we come to a consensus about the loan provisions of this statute?

063 SEN. SPRINGER: Mr. Layburn, from the Attorney General's office, explained to us their intent; I was satisfied that the review provision is reasonable and that the Consumer Protection Division will exercise discretion.

070 CHAIR COHEN: This doesn't prohibit just giving them money, and we assume that the Attorney General will keep a close eye on them. I don't think we can do any better than what's provided in this bill.

077 MOTION: SEN. HILL moves SB 426 to the floor with a "do pass" recommendation.

083 VOTE: MOTION PASSES UNANIMOUSLY, SENATOR BROCKMAN EXCUSED

SB 402 - CORPORATE TAKEOVER CLEAN-UP, WORK SESSION

085 TAYLOR: Reviews intended purpose of SB 402.

092 MOTION: SEN. SHOEMAKER moves SB 402 to the floor with a "do pass" recommendation.

097 VOTE: MOTION PASSES UNANIMOUSLY, SENATOR BROCKMAN EXCUSED.

SB 455 - CORRECTS INTERNAL AND GENDER REFERENCES IN OREGON REVISED STATUTES, PUBLIC HEARING

111 BEAUFET: SB 455 is a biennial bill which straightens out publication mistakes in ORS which cannot be corrected editorially. -Corrects references to repealed federal acts, to subsections, internal references, gender references, punctuation, grammar, syntax, or spelling. -Two criteria for correction: (1) changes cannot be done editorially; (2) changed material contains no substantive or controversial matter.

147 SEN. BROCKMAN: I like the effort toward gender-neutral language; what about "fisherman," which is unchanged?

152 BEAUFET: We did not change combined words, such as "police man." "Fisherman" is one word, not two. Also, I'm not sure what we could have substituted.

157 SEN. BROCKMAN: In some places, it's "angler."

164 SEN. SPRINGER: In our Staff Measure Summary (Exhibit A), I see that subsection 6 changes names of state officials. What names were changed? Are we changing the actual title?

171 BEAUFET: We changed the title of the former Juvenile Services Commission.

173 TAYLOR: I took this information from Legislative Counsel's memo to me, which stated "changes in the names of state officials and agencies." (Exhibit B)

184 BEAUFET: Our memo might read more gracefully if that were changed to say "changes in references to the names of state officials and agencies." It refers to agencies and positions with new titles.

196 CHAIR COHEN: In Section 14, has the change of "registered builder" to "contractor" been cleared with the Builders' Board and the Building & Contractors' Board?

200 BEAUFET: Yes.

SB 429 - RELATING TO LIABILITY OF SECURITIES BROKER/SERVICE PROVIDER, PUBLIC HEARING

SB 406 - ALLOWS RECOVERY OF ACTUAL DAMAGES FOR CERTAIN SECURITIES LAW VIOLATIONS, PUBLIC HEARING

222 TAYLOR: Reviews intended purpose of SB 429 and SB 406.

244 ROY TUCKER, SECURITIES REGULATION SECTION, OREGON STATE BAR: Submits and summarizes written testimony. (Exhibit C)

419 CHAIR COHEN: Please go through burden of proof issues again, especially in regard to proposed amendments. The professional is still liable, but only if plaintiff sustains the burden of proving that the professional had knowledge. Who is required to keep this information? If the professional destroyed that information, there would be no way to gain access to it and thus prove their liability. It appears that the amendment changes it back for certain people.

TAPE 20, SIDE A

010 TUCKER: This amendment only addresses that indirectly. There are statements which a professional could reasonably be expected to make on his or her authority.

023 CHAIR COHEN: And that burden of proof remains with the professional?

024 TUCKER: Yes. Our proposal parallels federal law. There are also issues, which the professional may give an opinion on, which are not within that professional's realm of expertise. The burden of proof is on the plaintiff there.

037 CHAIR COHEN: I think that we need a clear record of what these differentials mean.

045 SEN. SHOEMAKER: If an attorney represents the offeror, and the attorney's name is included in the offering statement, what is attorney's liability if offer turns out bad, and has false facts in statement? The attorney is not liable, unless the false statement is in

some portion that reflects attorney's expertise as attorney?

057 TUCKER: Yes.

058 SEN. SHOEMAKER: So the burden of proof remains with the plaintiff, unless the attorney's expertise as attorney is called into question?

067 TUCKER: That's essentially correct. That inquiry is not even relevant unless you're within the registered offerings or the enumerated exemptions that lead you to inquire whether it's an expertised statement or some other kind of statement.

084 SEN. SHOEMAKER: And the attorney is exposed to the same extent as the promoters?

085 TUCKER: Yes.

095 SEN. HILL: How would you determine damages for churning or unsuitable recommendations?

101 TUCKER: Our conclusion is that you'll look to federal law on that issue. Case law under the Federal Securities Act provides some guidance, and recognizes that churning is an independent violation, apart from total value of portfolio.

125 LAURIE SKILLMAN, DEPUTY ADMINISTRATOR, DIVISION OF FINANCE AND SECURITIES, DEPT. OF INSURANCE AND FINANCE: Testifies in support of SB 429 and -1 amendments. -The implication of Mr. Tucker's answer to Senator Shoemaker's question about liability was that there was some question about when an attorney is liable or not liable. That is not necessarily true. -Attorneys are always liable: only the degree of liability varies.

155 SEN. SHOEMAKER: If the burden of proof is established, is the degree of liability different?

159 SKILLMAN: No. The standard of duty, whether it's a recklessness standard or not, differs.

169 MARY ANN FRANTZ, SECURITIES REGULATIONS SECTION, OREGON STATE BAR: Testifies in support of SB 429. Submits and summarizes written testimony. (Exhibit D)

239 SUMNER YOUNGBLOOD, CITIZEN: Testifies in favor of SB 429. -Began investment program in 1950s, and by 1986 had a portfolio adequate for retirement. -In 1986, national brokerage firm who held portfolio invested its monies in options trading, though options did not fit our investment objectives: too risky. We were assured that it was adequate for us. -Because of risky investments, we were wiped out in the 1987 market crash. -Under Oregon law, suing a brokerage firm or its representative is difficult. -Such law should be fixed so those in this situation could be protected.

278 CHAIR COHEN: You are concerned with the anti-churning aspects of this bill?

281 YOUNGBLOOD: I'm more concerned with unsuitable investment advice.

286 JEROME LE BARRE, SECURITIES REGULATIONS SECTION, OREGON STATE BAR: Testifies in favor of SB 429. -Committee's questions about legislative history, especially on the issue of the liability of aiders and abettors, will be answered by a summary of bills which is forthcoming.

When it is finalized, it will be given to you.

321 CHAIR COHEN: Yes: we will need that before we go into work session on the bill.

330 LE BARRE: Addresses subject of provisions on churning and unsuitable advice, and the provision which will now cover improper activity by investment advisors. -Churning and unsuitability have hit close to home in Oregon. Unsuspecting Oregonians have relied on financial specialists and have lost their investments. Oregon law should address these problems, but it doesn't always do so. -NeSB it vs. McNeil: in this case, Mrs. NeSB it's account was worth more at the end, even though it had been churned. We took it to federal court, and won a jury trial under federal law. Under Oregon law we would not have had a case. This led to a loss by Mrs. NeSB it, because federal law doesn't provide everything that Oregon law provides. We appealed, and got a win under federal law, but not under Oregon law. The appellate judge said that we didn't have a case under Oregon law, and wondered whether Oregon law even addressed these issues. -SB 429 would address a number of problems which now exist. Oregon law is purely recisionary; SB 429 would give damages in the case of excessive commissions and diminution of portfolio value. -A statute of remedies is very much needed. If you are far from a federal court or cannot afford to take a case to federal court, your remedy in state law is not very good. -Investment advisors section: some financial planners are not careful and give bad advice, but they are not sellers of securities and are therefore not covered under securities law. We have drafted a section to deal with such people.

TAPE 19, SIDE B

015 CHAIR COHEN: Is your testimony on SB 406 the same?

021 LE BARRE: Yes. My remarks were addressed to both of the bills. It is my understanding that the bills will be combined.

023 CHAIR COHEN: There has been a request to do so.

028 SEN. SHOEMAKER: What is the standard of conduct involved in the investment adviser section of the bill, and what is an unsuitable investment recommendation?

034 LE BARRE: The rules of the SEC and the National Association of Securities Dealers have established that a dealer needs to determine the investor's objectives. What may actually happen is that clients' monies are put in speculations, limited partnerships, options, and other risky investments in order to get higher commissions. The investor is then entitled to lost portfolio value and commissions unlawfully received. -Submits article in support of testimony (Exhibit E).

073 SEN. SPRINGER: I would note that Mrs. NeSB it is a constituent and neighbor of mine, and that her circumstances have been described accurately.

080 JAMES HARLAN, DEPARTMENT OF INSURANCE AND FINANCE: Testifies in favor of

SB 429 and SB 406.

085 SEN. SHOEMAKER: Section 4.1.a states that an investment advisor who "issues or promulgates analysis or reports concerning securities in violation of the securities law or of any condition, limitation, or

restriction imposed upon a registration or license under the securities law." This is not just bad advice, then, but advice contrary to securities law?

096 HARLAN: Yes. We're not holding them liable for bad advice.

102 SEN. SHOEMAKER: Could you give me an example?

103 HARLAN: A clear example would be a case where investment advice was rendered by an individual who has not been licensed as required by Oregon securities law.

106 SEN. SHOEMAKER: What if that person were licensed?

108 HARLAN: If one has complied and been licensed as an advisor, and conditions have not been imposed on that advisory license, then I can't think of an example. It might be possible that advice could be rendered in connection with a security that was not otherwise in compliance with law.

120 LE BARRE: If an investment advisor advises someone to buy an unregistered security, that is a violation of Oregon securities law. The advisor is liable.

130 HARLAN: SB 429 and SB 406 focus on failure to comply with licensing regulations.

135 SEN. SHOEMAKER: Let's contrast an investment advisor with a broker, dealer, or salesperson. Does the investment advisor have liability for "unsuitable recommendations"?

136 HARLAN: That would possibly be covered by fraud or deceit.

140 SEN. SHOEMAKER: What about double dipping?

141 HARLAN: That would also be fraud or deceit.

146 SEN. HILL: I'd like to ask about the distinction between federal & Oregon laws. Why is federal law not adequate to cover such suits?

151 LE BARRE: Federal suits need to be brought in federal court.

155 SEN. HILL: Why is that a problem?

157 LE BARRE: Because of federal rules of civil procedure, it's very expensive to bring such a case, and it's hard to get to a federal court from many remote areas of the state.

164 SEN. HILL: It is more expensive in federal court; is there any distinction about attorney's fees?

167 LE BARRE: Yes. Federal courts provide neither court-awarded attorneys' fees nor interest.

171 SEN. HILL: Federal law does not provide attorneys' fees? Why?

172 LE BARRE: That is correct. In the Securities Exchange Act of 1934, such provisions were not made.

198 SEN. HILL: In the NeSB it case, did you get paid?

201 LE BARRE: Yes. My fees came out of Mrs. NeSB it's award.

207 TAYLOR: Does the investment advisors section apply if the advisor advises the investor to put their money in a bank account?

210 HARLAN: Non-securities advice is not in our jurisdiction.

220 SEN. HILL: Our Staff Measure Summary says that "who advises others for compensation to purchase or sell securities and who are in violation of Oregon securities laws are liable to the purchasers of this advice," and this distinguishes an investment advisor from a broker. Could counsel explain this?

230 TAYLOR: The summary was written before I received these amendments. An investment advisor is someone who gets a fee for giving advice; a broker is someone who gets a commission from the sale or purchase of stock.

236 SEN. HILL: There are people who are both, and they would be covered under both sections of this bill?

240 HARLAN: Yes.

247 SEN. SHOEMAKER: If a person's business was advising people not to play the market, would they be covered?

262 HARLAN: If we had a situation where people were being advised to sell their securities, then they would be covered under the proposed amendments. Advice rendered, that subjects one to the jurisdiction of this bill, can be given on either side of the transaction.

275 SEN. SHOEMAKER: What about intrastate offerings? Would they be covered only under state law?

280 LE BARRE: No, intrastate offerings could be brought in federal court if you meet the requirements of Rule 10.b.5. You could allege both kinds of law and file a common securities fraud lawsuit, instead of a churning or unsuitable advice lawsuit.

294 SEN. HILL: Are the verdicts bigger in federal court?

297 LE BARRE: They can be.

301 SEN. HILL: For a case like this, would you allege both a federal and a state violation? I'm concerned that the provision for attorneys' fees in state cases would keep people from bringing federal cases.

317 LE BARRE: You can't bring the same suit in two different courts. Because of Oregon law, a case may be brought in federal court that also pleads an Oregon statute in federal court.

335 SEN. HILL: One could allege state violations in federal court?

338 LE BARRE: Yes.

342 SEN. HILL: Can you allege a federal violation in state court?

345 LE BARRE: I don't think so. You could bring racketeering claims, but not securities claims.

351 SEN. HILL: Because of the distinction about attorneys' fees, do more people just bring state action?

355 LE BARRE: That's very likely.

357 SEN. HILL: Is this to the detriment of the client? Don't you want to file in federal court?

363 LE BARRE: It depends on circumstances, and arbitration proceedings may also be involved. When you are involved in arbitration, according to the National Association of Securities Dealers' guidelines, you plead all available statutes.

393 ROGER MARTIN, SECURITIES INDUSTRY ASSOCIATION AND PORTLAND SECURITIES DEALERS: Would like to bring bill to our counsel, in order to present informed testimony at the next hearing.

428 CHAIR COHEN: Should we have the bill reprinted? As a prerogative of the Chair, I'd like to have the bill reprinted with the amendments incorporated so that it would be clearer when people look at it and review it.

TAPE 20, SIDE B

011 TAYLOR: Do you want a new bill introduced?

012 CHAIR COHEN: No, let's just reprint SB 429. Are there any objections from the committee? We're not in work session on this bill, so we'll wait until Wednesday to vote on the amendments, and then have the bill redone.

020 SEN. HILL: Are we including SB 406 in that?

022 CHAIR COHEN: That's what the amendments would do.

028 SEN. HILL: Mr. Martin, were you asked to be on the task force which drafted this bill?

034 MARTIN: We were asked to attend, and we did attend one or two meetings. We did not attend every meeting. We are not inferring that we did not have access to the task force's deliberations.

SB 401 - ENACTS UNIFORM FOREIGN-MONEY CLAIMS ACT, PUBLIC HEARING

056 JEROME BARTON, INTERNATIONAL SECTION, OREGON STATE BAR: Testifies in favor of SB 401. Submits and summarizes written testimony. (Exhibit F) Submits and summarizes written testimony on behalf of Uniform State Laws Committee, Oregon State Bar (Exhibit G). Submits proposed amendment to SB 401 (Exhibit H). -Colorado, Connecticut, Hawaii, Utah, and Illinois have adopted this Uniform Foreign Money Claim Act. -We want to make it comfortable for Oregon companies to do business with other countries, not to make it easy for foreign companies to do business here. -There is a problem with the court administrator's office; they want to know the administrative impact, since the bill refers to an "index". They don't index any more, and wonder whether we want them to create a new index? We are not. We're contemplating deleting "index" because Oregon doesn't have such a thing.

260 CHAIR COHEN: I have asked Mr. Barton and our staff to check with the State Treasurer's office, since they are in the process of handling most of these dealings.

265 BARTON: This bill is really quite simple. It permits a person to sue in circuit court and ask to be given a judgment in foreign currency. It also determines how to convert claims against assets in Oregon into

foreign currency.

292 SEN. SHOEMAKER: What freedom does a claimant have to pick a currency in which to be paid?

294 BARTON: The claimant can only claim in the currency which the contract specified.

300 SEN. SHOEMAKER: Are these always contract claims?

301 BARTON: Yes.

318 SEN. SHOEMAKER: Could you sue, if you chose, in dollars or in foreign currency?

320 BARTON: If you want to make your claim in a foreign currency, this permits you to do so.

327 CHAIR COHEN: This is permissive, rather than prescriptive.

328 BARTON: Yes.

330 SEN. HILL: Has this been widely circulated among the International Section of the Bar?

333 BARTON: Yes.

358 CHAIR COHEN: Adjourns at 2:57 p.m.

Submitted by: Reviewed by:

Kate Wrightson Bill Taylor Assistant Counsel

EXHIBIT LOG:

A	-	Staff Measure Summary of SB 455 - Staff - 2 pages
B	-	Testimony on SB 455 - Legislative Counsel - 2 pages
C	-	Testimony on SB 429 and SB 406 - Roy Tucker - 6 pages
D	-	Testimony on SB 429 and SB 406 - Mary Ann Frantz - 3 pages
E	-	Article in support of SB 429 and SB 406 - Jerome Le Barre - 2
pages F	-	Testimony on SB 401 - Jerome R. Barton - 8 pages
G	-	Testimony on SB 401 - Jerome R. Barton - 19 pages
H	-	Amendment to SB 401 - Jerome R. Barton - 1 page