

See: Minutes of Subcommittee No. 1
6/13/69, p. 28, Vol. X, Tapes #76 & 77

7/7/69, p. 1, Vol. X, Tape #78

8/15/69, p. 1, Vol. X, Tape #80

CRIMINAL LAW REVISION COMMISSION
208 Agriculture Building
Salem, Oregon

ARTICLE 19 . BUSINESS AND COMMERCIAL FRAUDS

Preliminary Draft No. 1; May 1969

Reporter: Roger D. Wallingford

Subcommittee No. 1

ARTICLE 19. BUSINESS AND COMMERCIAL FRAUDS

Section 1. Business and Commercial Frauds; definitions. As used in this Article, unless the context may require otherwise:

(1) "Business records" means any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activities.

(2) "Enterprise" means any private entity of one or more persons, corporate or otherwise, engaged in business, commercial, professional, charitable, industrial or social activity.

(3) "Financial institution" means a bank, insurance company, credit union, savings and loan association, investment trust or other organization held out to the public as a place of deposit of funds or medium of savings or collective investment.

(4) "Property" means any money, personal property, real property, things in action, evidence of debt or contract, or article of value of any kind.

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(41.690
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COMMENTARY - BUSINESS AND COMMERCIAL FRAUDS; DEFINITIONS

A. Summary

These definitions are intended to delineate the scope of the substantive offenses covered in the following Article.

"Business records" include all private records kept or maintained within the scope of business activity. It includes false writings that are prepared for use outside the normal recordation system, e.g., stock offer prospectus that is publicly distributed, although this type of fraudulent misconduct is usually governed by statutes such as Theft by Deception.

"Enterprise" includes virtually every kind of private endeavor or project, for which permanent records are maintained. The falsification of public records is covered by Section _____, Tampering with Public Records.

B. Derivation

Reference was made to New York Revised Penal Law Section 175.00 and Michigan Revised Criminal Code Section 4125 (2) and (3).

C. Relationship to Existing Law

As used in this context the definitions are new to Oregon law.

ORS 41.680 defines the term "business" as including "every kind of business, professional, occupation, calling or operating of institutions, whether carried on for profit or not."

ORS 41.690 Admissibility of business records. A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information; method and time of preparation were such as to justify its admission.

TEXT OF REVISIONS OF OTHER STATES

Text of New York Revised Penal Law

Section 175.00 Falsifying business records; definitions of terms

The following definitions are applicable to sections 175.05 and 175.10:

1. "Enterprise" means any entity of one or more persons, corporate or otherwise, public or private, engaged in business, commercial, professional, industrial, eleemosynary, social, political or governmental activity.

2. "Business record" means any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity.

Text of Michigan Revised Criminal Code

[Falsifying Business Records]

Sec. 4125. (1) A person commits the crime of falsifying business records if, with intent to defraud, he:

(a) Makes or causes a false entry in the business records of an enterprise; or

(b) Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or

(c) Omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law other than for the convenience of the government or by the nature of his position; or

(d) Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

(2) "Enterprise" means any entity of one or more persons, corporate or otherwise, engaged in business, commercial, professional, industrial, eleemosynary or social activity.

(3) "Business record" means any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity.

(4) Falsifying business records is a Class A misdemeanor.

Section 2. Falsifying business records. A person commits the crime of falsifying business records if, with intent to defraud, he:

- (1) Makes or causes a false entry in the business records of an enterprise; or
- (2) Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or
- (3) Fails to make a true entry in the business records of an enterprise in violation of a known duty imposed upon him by law or by the nature of his position; or
- (4) Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

Existing Law
ORS
165.235
165.250
165.255
165.655
165.660
165.665
708.705
708.710

COMMENTARY - FALSIFYING BUSINESS RECORDS

A. Summary

This section makes punishable the falsifying, destroying, or otherwise impairing business records.

Current legislation is moving in the direction of extending criminal sanctions in this field. New York Revised Penal Law Sections 175.05 and 175.10, and Michigan Revised Criminal Code Section 4125 deal with this type of falsification. The New York provisions include public records, which under our proposed code will be treated under Section _____, Tampering with Public Records.

The proposed Minnesota Criminal Code (1962), Section 609.63, treats the falsification of business records as second degree forgery. California Penal Code Section 471 reads: "Altering entries in books and records. Every person who, with intent to defraud another, makes, forges, or alters any entry in any book of records, or any instrument purporting to be any record or return...is guilty of forgery."

The problem presented by applying the law of forgery to falsification of private and public records is well stated by the annotator in 41 ALR 231:

"While...there is irreconcilable conflict in the authorities..
..the better view, and that supported by the majority opinion, is
that under the common law and under statutes defining forgery in
the substantial language of the common law definitions, the genuine
making of an instrument for the purpose of defrauding does not
constitute the crime of forgery...under the rule stated...defen-
dants in prosecutions for forgery have been held not guilty of
the crime charged:

"...where defendant foreman falsely entered upon a genuine time
roll of employees' time when the employees had not worked,
for the purpose of defrauding the employer, DeRose v. People,
(1918) 64 Colo. 332, 171 Pac 359.

"...where a county clerk, having authority to attest county
warrants signed by another county officer and issue them, was
charged with attesting and issuing such a warrant in favor of
a firm for money not due, with the intent of defrauding the
county. Goucher v. State of Neb., 204 N.W. 967 (1925).

"...where defendant, a merchant, entered upon his books of
account a charge against a customer for an article never purchased.
State v. Young, (1865) 46 N.H. 266, 88 Am. Dec. 212."

The modern trend has been therefore to make the falsification of
private and public records a distinct substantive offense. It is
recognized, of course, that the basic elements of forgery law are
inextricably involved in such statutes.

In reviewing the legislative response to falsification of
business records Burdick comments:

"Statutes have been passed in some states making it forgery
to make, with intent to defraud, false entries in account-books.
Some of these statutes relate to entries in account-books of
corporations doing business for pecuniary profit...whereby, by
such entries, 'any pecuniary obligation, claim or credit is, or
purports to be, created, increased, diminished, discharged
or in any matter affected' (Calif Penal Code, Sec. 471) See also
Kan Gen Stats (1935 c 21 Sec. 617, 618, and Mo. Stats Ann. (1929)
Sec. 4192.)

"The statute of another state may apply to any corporation,
and a statute may declare one guilty of forgery who, with intent
to defraud, or to conceal any larceny or misappropriation, makes
a false entry of any material particular in any account book per-
taining to the business of a corporation, association, public
office or officer, partnership, or individual." (Law of Crime,
Burdick (1946) Vol. 2, Sec. 661 (i))

Wisconsin Criminal Code Section 943.39 (2), is an example of legislation that does not define the crime in terms of forgery law:

"Fraudulent Writings. Whoever, with intent to defraud... being a director, officer, agent or employee of any corporation falsifies any record, account or other document belonging to that corporation by alteration, false entry or omission, or makes, circulates, or publishes any written statement regarding the corporation which he knows is false ... may be fined not more than \$2,500 or imprisoned not more than 3 years, or both."

The Model Penal Code commentary (Tent. Draft No. 11 (1960) p. 98) makes this observation in support of the rationale behind such legislation:

"In a highly organized society like ours where accuracy of corporate and other records is nearly as important as accuracy of public records, the need for deterring tampering with such records seems reasonably clear, and there is no occasion to distinguish in this regard between corporate records and those of a church, union or club."

It should be noted that it is not the intention of the proposed section to preserve the integrity of business records. Instead, the prohibition is directed at conduct preliminary to the commission of a fraud, in that it requires "intent to defraud".

B. Derivation

The basis of the statutory form and language of the proposed section is Michigan Revised Criminal Code Section 4125 and New York Revised Penal Law Sections 175.00 and 175.05.

C. Relationship to Existing Law

There are a number of Oregon statutes dealing with falsification of business and commercial records:

ORS:

- 165.235 Issuing a false invoice, bill of lading, or estimate of property.
- 165.250 Destruction or falsification of corporate records.
- 165.255 Officer or agent of savings and loan association distributing false material.
- 165.655 Issuing receipt where no goods are received.

165.660: Issuing receipt containing false statements.

165.665: Fraudulently issuing duplicate or additional receipts.

708.705: False statements in report or book entry by bank.

708.710: False or omitted book entry by bank.

There are no Oregon cases dealing directly with falsification of private business records. The reported cases in this area concern themselves primarily with forgery offenses.

In that connection it is essential to distinguish between a false instrument and false statements in an instrument. No amount of misstatement of fact and no amount of fraud will make a false instrument out of what purports to be the very instrument which it is in fact and in law.

As stated by Perkins (Perkins on Criminal Law, Foundation Press, 1957, p. 296), "If a man fraudulently executes a deed to real estate with a covenant that it is free and clear of encumbrances, this is a genuine deed even if the grantor knows that the land is subject to a heavy mortgage. It is a genuine deed with a false covenant. This is a case of the false making of a writing with intent to defraud, but it will not support a conviction of forgery because for this purpose it would be necessary to show that the deed itself was false. Typical instances of writings which are falsely made with intent to defraud but are not forgery because they are genuine writings with false statements rather than false writings, are (1) a "padded" time roll issued by the one authorized to issue it, (2) a warehouse receipt fraudulently issued by a warehouse which did not have the grain purportedly represented thereby, (3) a check wrongfully drawn on a bank in which the drawer has no funds, or insufficient funds, or (4) a false entry made in one's own account book."

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 224.4. Tampering with Records.

A person commits a misdemeanor if, knowing that he has no privilege to do so, he falsifies, destroys, removes or conceals any writing or record, with purpose to deceive or injure anyone or to conceal any wrongdoing.

Text of Michigan Revised Criminal Code

[Falsifying Business Records]

Sec. 4125. (1) A person commits the crime of falsifying business records if, with intent to defraud, he:

(a) Makes or causes a false entry in the business records of an enterprise; or

(b) Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or

(c) Omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law other than for the convenience of the government or by the nature of his position; or

(d) Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

(2) "Enterprise" means any entity of one or more persons, corporate or otherwise, engaged in business, commercial, professional, industrial, eleemosynary or social activity.

(3) "Business record" means any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity.

(4) Falsifying business records is a Class A misdemeanor.

Text of New York Revised Penal Law

Sec. 175.00 Falsifying business records; definitions of terms

The following definitions are applicable to sections 175.05 and 175.10:

1. "Enterprise" means any entity of one or more persons, corporate or otherwise, public or private, engaged in business, commercial, professional, industrial, eleemosynary, social, political or governmental activity.

2. "Business record" means any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity.

Sec. 175.05 Falsifying business records in the second degree

A person is guilty of falsifying business records in the second degree when, with intent to defraud, he:

1. Makes or causes a false entry in the business records of an enterprise;
or

2. Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or

3. Omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law or by the nature of his position; or

4. Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

Falsifying business records in the second degree is a class A misdemeanor.

Section 3. Commercial bribery. A person commits the crime of commercial bribery if he offers, confers or agrees to confer any pecuniary benefit upon an employee, agent or fiduciary upon an agreement or understanding that the latter violate a duty of fidelity owed to his employer, principal or beneficiary.

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Section 4. Receiving a commercial bribe. A person commits the crime of receiving a commercial bribe if while an employee, agent or fiduciary he solicits, accepts or agrees to accept any pecuniary benefit upon an agreement or understanding that he violate a duty of fidelity owed to his employer, principal or beneficiary.

COMMENTARY - COMMERCIAL BRIBERY; RECEIVING A COMMERCIAL BRIBE

A. Summary

Previous sections in the proposed revised code deal with bribery of public officials and sports bribery. The object of such criminal sanctions is to serve the public interest by discouraging corrupt influences. Quite apart from official or quasi-official action, bribery may be used as an instrument in undermining the integrity of business and commercial affairs.

Perkins comments on this type of commercial bribery:

"One type of such fraud has been for a wholesaler, or his representative, by gift or promise to the agent or employee of a retailer, to induce such agent or employee to keep in mind the interest of the wholesaler rather than that of his employer. Bribery of purchasing agents . . . is incompatible with commercial honor. A bonus or commission secretly given is nothing short of a bribe to betray one's employer. It is also frowned upon as a corrupt and unfair trade practice. Hence there is a tendency in the direction of including such misconduct in the crime of bribery, and punishing it accordingly -- although perhaps only as a misdemeanor." (Perkins on Criminal Law, Foundation Press, 1957, p. 400)

The rationale for legislation governing commercial bribery was stated in American Distilling Co. v. Wisconsin Liquor Co., 104 F 2d 582 (7th Cir 1939):

"The vice of conduct labeled 'commercial bribery', as related to unfair trade practices, is the advantage which one competitor secures over his fellow competitors by his secret and corrupt dealings with employees or agents of prospective purchasers."

The proposed sections are founded on the principle that all recognized relations in our society involving special trust should be secure from the corrupting influence of bribery. Admittedly, criminal sanctions cannot solve all the problems inherent in commercial bribery. There are means of securing favor without explicit agreement that are beyond the scope of such legislation. A "disk jockey" with an undisclosed personal interest in a particular recording is as subject to conflict of interest as one who accepts a gratuity from an independent source. Until standards applicable to this type of conduct have become fully crystallized, such commercial practices may best be enforced through private employer discipline and other civil remedies.

The crime of commercial bribery is separated into two distinct offenses; the crime of giving a bribe and the crime of receiving. This is consistent with the other bribery sections and avoids the problem of corroboration of an accomplice's testimony.

Both sections require the same culpability elements:

- (1) A person acting in a particular capacity, whereby,
- (2) a pecuniary benefit is solicited or accepted, upon
- (3) an agreement or understanding,
- (4) that a known duty of fidelity be violated.

The term "fidelity" is used in its ordinary dictionary meaning: "Careful observance of duty, or discharge of obligations, esp. loyalty. Faithfulness to that to which one is bound by pledge or duty". (Webster's New Collegiate Dictionary, 1961)

New York Revised Penal Law Sections 180.00 and 180.05, and Michigan Revised Criminal Code Sections 4201 and 4205, differ from the proposed section in a number of respects.

Both the New York and Michigan statutes include the term "without the consent of his employer or principal" in referring to the prohibited conduct of the employee or agent. By incorporating the term, "violate a duty of fidelity", contained in Model Penal Code Section 224.8 (1), into the proposed section your reporter felt that the language made it clear that the conduct was nonconsensual in respect to the person to

whom the duty is owed. This rationale is supported by Barger v. Taylor, 30 Or 228, 42 Pac 615, 47 Pac 618 (1895), which held: "The presumption is that an agency comprehends the doing of only lawful things, and the law will always assume that an illegal act . . . was done without the principal's authority or consent".

The duty imposed by the relationships covered in the proposed section is widely recognized in the law of agency. Hughes v. Helzer, 182 Or 205, 182 P.2d 537 (1947), reiterated the rule: "An agent has the duty to act solely for the benefit of his principal in all matters connected with the agency and this duty applies to gratuitous as well as paid agents".

It seems more logical to treat consent of the employer, principal or beneficiary as a matter of defense rather than a constituent element of the crime.

The Michigan commercial bribery receiving statute includes a provision directed at hiring agents or officials and employees in charge of employment. This particular class of persons would appear to be covered under Section ____, as no special distinctions are apparent.

Legislation covering commercial bribery was extensively reviewed in 108 U. Pa. Law Rev. 848 (1960) in an article titled "Control of Non-governmental Corruption by Criminal Legislation". A digest of that article follows:

"Thirteen states have statutes which make it a crime to corrupt any agent or employee of another. (See Conn. Gen. Rev. Stat. 53-266, 20-231 1958) In addition to statutes of this general type, there are seventeen states which have statutes making it a crime to bribe a particular type of employee, notably agents or employees in charge of purchasing or hiring. (See N.J. Rev. Stat. 2A: 91-1, 93-8, 93-9, 32:23-21 1951) Other common categories are telegraph and telephone personnel and common carrier personnel . . . probably the most important federal legislation in the field is the section of the Federal Trade Commission Act which authorizes the FTC "to prevent . . . unfair methods of competition in commerce".

"It has long been established that commercial bribery is such an unfair method of competition. However, the statute is not a criminal one, and the FTC is limited in enforcing its policies to the use of cease and desist orders . . . The most salient feature of the cases in this area is that they are very few in number and most of those which are to be found are civil rather than criminal. The New York statutes have been broadest in scope and more widely enforced than any others. Almost without exception the cases have arisen under the New York statute."

"In 1915, a purchasing agent of R.H. Macy was indicted for accepting \$10 in connection with a purchase of sponges. (See People v. Davis, 33 N.Y. Crim 460, 160 N.Y. Supp. 769, Ct. Spec. Sess. 1915) Defendant attacked the statute as unconstitutional on the grounds that the [statute] (1) singles out purchasing agents for special treatment, (2) curtails their freedom to contract, and (3) is not necessary to protect the welfare of the community.

"The court rejected all three assertions of unconstitutionality: (1) no violation of equal protection was found because the statute 'affects alike all persons similarly situated', (2) constitutional freedom of contract may be limited by police power, and (3) as to the propriety of the exercise of the police power in this situation, the court said: 'Without such a statute, under the fierce competition of modern life, purchasing agents . . . can be lured all too readily into service of hopelessly conflicting interests . . . sound public policy, commercial honor, and the good faith of trusted . . . employees imperatively demand some such measure in the written law'".

The validity and constituent elements of commercial bribery statutes is discussed in ALR 3rd 1350 (1965) p. 1357:

"All the statutes that have been attacked as unconstitutional have been found not to be so. The courts have decided that the statutes are not too vague, uncertain, or indefinite, that they do not amount to class legislation, and that they are not an unreasonable exercise of the police power of the state, and the immunity provisions of the statutes have been found not to violate the defendant's constitutional rights. The presumption of constitutionality has weighed heavily in favor of the statutes . . .

"The cases hold that where there is proof of offering and/or paying a bribe to, and acceptance thereof by, an employee, agent, or servant, with the intent that his relation to his employer, principal, or master be influenced thereby, a violation of the statute has taken place. The gravamen of the offense is the intent to influence, and where the prosecution is for an attempted bribe, the attempt need not be successful, nor is actual tender, or tender or offer in person necessary . . . where the lack of knowledge or consent is not an element of the crime it need not be alleged or proved, and failure to do so does not constitute a good defense."

In State v. Landecker, 100 NJL 195, 126 A 408, affd. 103 NJL 716, 137 A 919, (1924) defendant was charged with having corruptly offered and paid to a chemical company employee \$100 with the intent to have him procure secret manufacturing formulas from his employer. Affirming his conviction, the court held that it was immaterial whether the briber succeeded in his purpose, since it was the intent to use the bribe for

the purpose of influencing the employee in his relation to the employer that was improper, and that it made no difference if the employer was not injured.

18 USC 201 punishes the offering and giving of a bribe as well as the soliciting and receiving thereof. The intent to influence is once more the crucial factor, and must be charged. The offense is complete upon the tender of the bribe, and the offer need not be accepted, nor need any cash be exhibited in order to establish an offense under the statute. However, there must be sufficient proof that the employee who was bribed was an employee of the United States. "Business practices that are merely shabby and distasteful do not violate the statute".

B. Derivation

The proposed section is a composite of the statutory form and language found in Model Penal Code Section 224.8, Michigan Revised Criminal Code Sections 4201 and 4205, and New York Revised Penal Law Sections 180.00 and 180.05.

C. Relationship to Existing Law

ORS 708,715 Receiving illegal compensation; Bank and Trust Co. officers and employees.

ORS 165,515 prohibits bribery of telegraphic agents, employees or operators to induce them to disclose content of messages.

Except for these statutes Oregon has no criminal provisions dealing with commercial bribery. Existing bribery statutes are directed at corruption of public officials.

In adopting a comprehensive commercial bribery section Oregon will reflect its legislative concern with continued high standards of conduct in business and commercial affairs.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 224.8. Commercial Bribery and Breach of Duty to Act Disinterestedly.

(1) A person commits a misdemeanor if he solicits, accepts or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as:

(a) agent or employee of another;

(b) trustee, guardian, or other fiduciary;

(c) lawyer, physician, accountant, appraiser, or other professional adviser or informant;

(d) officer, director, partner, manager or other participant in the direction of the affairs of an incorporated or unincorporated association; or

(e) arbitrator or other purportedly disinterested adjudicator or referee.

(2) A person who holds himself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities or services commits a misdemeanor if he solicits, accepts or agrees to accept any benefit to influence his selection, appraisal or criticism.

(3) A person commits a misdemeanor if he confers, or offers or agrees to confer, any benefit the acceptance of which would be criminal under this Section.

Text of Michigan Revised Criminal Code

[Commercial Bribery]

Sec. 4201. (1) A person commits the crime of commercial bribery if he:

(a) Confers, or agrees or offers to confer any benefit upon any employee or agent without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs; or

(b) Confers, or agrees or offers to confer any benefit upon any fiduciary without the consent of the latter's beneficiary, with intent to influence him to act or conduct himself contrary to his fiduciary obligation.

(2) Commercial bribery is a Class A misdemeanor.

Text of Michigan Revised Criminal Code

[Receiving a Commercial Bribe]

Sec. 4205. (1) A person commits the crime of receiving a commercial bribe if:

(a) As an agent or employee, and without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that that benefit will influence his conduct in relation to his employer's or principal's affairs; or

(b) As a hiring agent or an official or employee in charge of employment, he solicits, accepts or agrees to accept any benefit from another person upon agreement or understanding that someone shall be hired, retained in employment or discharged or suspended from employment; or

(c) As a fiduciary, and without the consent of his beneficiary, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that that benefit will influence his conduct in his fiduciary capacity.

(2) Subparagraph (1) (b) does not apply to any person conducting a private employment agency licensed and operating under the laws of Michigan.

(3) Receiving a commercial bribe is a Class A misdemeanor.

Text of New York Revised Penal Law

Sec. 180.00 Commercial bribing

A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.

Commercial bribing is a class B misdemeanor.

Sec. 180.05 Commercial bribe receiving

An employee, agent or fiduciary is guilty of commercial bribe receiving when, without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs.

Commercial bribe receiving is a class B misdemeanor.

Section 5. Sports Bribery; definitions. As used in Sections

_____ unless the context requires otherwise:

(1) "Sports Contest" means any professional or amateur sport or athletic game or contest viewed by the public.

(2) "Sports participant" means any person who directly or indirectly participates in sports contests as a player, contestant, team member, coach, manager, trainer, or any other person directly associated with a player, contestant or team member.

(3) "Sports official" means any person who acts in sports contests as an umpire, referee, judge or sports contest official.

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(Law
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COMMENTARY - SPORTS BRIBERY; DEFINITIONS

A. Summary

The definitions of these three terms are intended to bring brevity and precision to the statutes dealing with sports bribery.

B. Derivation

The model for the definitions is New York Revised Penal Law Section 180.35.

C. Relationship to Existing Law

The definitions are new to Oregon law. Due to a complete lack of reported cases in Oregon involving the sports bribery statutes the language used in the existing law has never been judicially construed.

TEXT OF REVISIONS OF OTHER STATES

Text of Michigan Revised Criminal Code

[Sports Bribery: Definition of Terms]

Sec. 4210. The following definitions apply to sections 4211 through 4220:

(1) "Sports contest" means any professional or amateur sport, athletic game or contest, or race or contest involving machines, persons or animals, viewed by the public.

(2) "Sports participant" means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

(3) "Sports official" means any person who acts or expects to act in a sports contest as an umpire, referee or judge, or otherwise to officiate at a sports contest.

Text of New York Revised Penal Law

Sec. 180.35 Sports bribery; definitions of terms

As used in this article:

1. "Sports contest" means any professional or amateur sport or athletic game or contest viewed by the public.

2. "Sports participant" means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

3. "Sports official" means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest.

Section 6. Sports bribery. A person commits the crime of sports bribery if he;

(1) Offers, confers or agrees to confer any pecuniary benefit upon a sports participant with intent to influence him not to give his best effort in a sports contest; or

(2) Offers, confers or agrees to confer any pecuniary benefit upon a sports official with intent to influence him to improperly perform his duties.

Existing Law
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167.720
167.725
167.730
167.735
462.420
462.430
462.440
462.450
462.990

Section 7. Sports bribe receiving. A person commits the crime of sports bribe receiving if:

(1) As a sports participant he solicits, accepts, or agrees to accept any pecuniary benefit from another person upon an agreement or understanding that he will thereby be influenced not to give his best effort in a sports contest; or

(2) As a sports official he solicits, accepts, or agrees to accept any pecuniary benefit from another person upon an agreement or understanding that he will improperly perform his duties.

Section 8. Tampering with a sports contest. A person commits the crime of tampering with a sports contest if, with intent to influence its outcome, he tampers with any sports participant, sports official, or with any animal, equipment, or other thing involved in the operation of a sports contest contrary to the rules and usages governing such contest.

COMMENTARY - SPORTS BRIBERY; SPORTS BRIBE RECEIVING; TAMPERING WITH A SPORTS
CONTEST.

A. Summary

Oregon now has four statutes governing bribery of participants in athletic contests and bribery of athletic coaches and officials (ORS 167.720-167.735).

In addition, five statutes in Chapter 462, Racing, punish the unlawful administration of stimulating or depressive drugs to racehorses.

The social factors giving impetus to renewed legislation in this area is stated by the court in Commonwealth v. Friedman, 193 Pa. Super 640, 165 A 2d 678:

"Recent rash of bribery sweeping professional sports of baseball, football, basketball and boxing, as well as amateur sports, has resulted in intensified effort on part of legislatures and law enforcement agencies to prevent and eradicate this crime. Because of very nature of the crime itself, its secrecy and its attempt to corrupt integrity of national sports, sincerity and motive of accuser become an integral part of the crime itself and relevant toward the establishment of criminal intent of the accused."

A 1960 U. of Pennsylvania Law Review article offers a comprehensive review of current activity in the sports bribery field.

"Thirty two states have some sort of athletic corruption statute: thirty are of an enhaustive type which attempts to include all athletics and all participants¹, one applies only to horse and dog racing and boxing², and one to athletic contests for which an admission fee is charged³. The New York statute is the prototype of those in several other states. The statute covers in addition to certain specifically named sports any professional or amateur game or sport and forbids the bribery of any player or referee or other official who participates or expects to participate⁴. Arguably even broader is the Oregon legislation which includes 'any athletic contest or game of any kind' and 'any contest of ability or skill'⁵, provisions which would cover such activities as races 'against the clock' which might not, under strict construction, be 'games' or 'sports'. . .

"Despite the number of statutes in this area, only a few appellate decisions involving athletic bribery have been discovered. The leading case is Glickfield v. State, 203 Md. 400, 101 A 2d (1953). The defendant was convicted of offering the center on the

U. of Maryland football team \$1,000 to keep Maryland's margin of victory within 20½ points in a given game. On appeal, defendant attacked the Maryland statute as unconstitutional for vagueness. The statute read: 'Any person or persons who shall bribe or attempt to bribe any persons participating in or connected in any way with any athletic contest held in this state shall be deemed guilty of bribery'⁶.

"The court accepted a broad dictionary definition of bribery (to influence corruptly), held that money offered 'to control the score' came within that definition and found the language as applied sufficiently clear to withstand constitutional challenge. The court admitted that the common law concept of bribery was limited to public officials but saw no bar to legislative enlargement to analogous situations.

"In a similar Iowa holding, State v. DiPaglia, 247 Iowa 79, 71 N.W. 2d 601 (1955) cert. denied 325 U.S. 1017 (1956), although here defendant was convicted of attempting to bribe a basketball player to ensure that his team lost by more than eight points, a sentence of ten years in county prison and a \$10,000 fine was upheld."

1. California Penal Code Section 337b
2. Arizona Rev. Stat. Ann. 5-115-205 (1956)
3. Illinois Rev. Stat. Ch. 38, 83(a) (Smith-Hurd 1959)
4. Prior New York Penal Law Section 382
5. ORS 167.720 (1953)
6. Md. Ann. Cd. Art. 27, 24 (1957)

49 ALR 2d 1234 discusses the problem of accomplice testimony as it relates to the corroboration rule:

"It is the rule that, as in other crimes, the testimony of an accomplice in a prosecution for bribery is admissible, and should be weighed by the same rules as those by which the testimony of other witnesses is weighed -- that is, by considering the connection of the accomplice with the crime and with the defendant, his interest in the case, his appearance on the witness stand, the reasonableness of his testimony, and its consistency with the other facts proved in the case."

The proposed sections on sports bribery do not depart from the substantive coverage presently in effect. The term "with the intent, understanding or agreement that [the participant, contestant or player] shall not use his best effort", is replaced with "intent to influence him not to give his best effort".

The specific penalty provisions in ORS Chapter 462, Racing, can be amended to reflect by reference the coverage provided in the proposed sections.

B. Derivation

The proposed sections follow substantially the statutory form and language of Michigan Revised Criminal Code Sections 4211, 4212, 4215, and New York Revised Penal Law Sections 180.40, 180.45 and 180.50.

C. Relationship to Existing Law

There are nine Oregon statutes governing sports bribery and tampering with racing animals:

ORS:

- 167.720 Bribing participant in athletic contest
- 167.725 Acceptance of bribe by athlete
- 167.730 Bribery of athletic coaches and officials
- 167.735 Acceptance of bribe by coach or official
- 462.420 Stimulating or depressing racing animal with drugs or unauthorized device
- 462.430 Attempt to affect race result by unlawfully stimulating or depressing participating animal
- 462.440 Entering unlawfully stimulated or depressed animal in race within 48 hours of administration of drug
- 462.450 Regulation of possession, transportation or use of local anesthetics or barbituric acid preparation or derivations within racing enclosure
- 462.990 Penalty provisions for violation of ORS Ch. 462. Designated a felony with imprisonment in the Oregon State Penitentiary for not more than two years, or by fine of \$5,000, or both.

These statutes would be repealed by the proposed sections insofar as they govern sports bribery and tampering with racing animals. It might be advisable to retain some of the coverage existing in ORS Ch. 462, Racing, as specialized problems may be inherent in this activity.

There are no reported appellate cases in Oregon involving sports bribery. The test of accomplice corroboration as it applies to bribery has been enunciated by the court:

ORS 136.550 Test of accomplice corroboration. A conviction cannot be had upon the testimony of an accomplice unless it is corroborated by other evidence that tends to connect the defendant with the commission of the crime. The corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission."

The application of this statute to accomplice testimony in bribery cases was stated by the court in State v. Coffey, 157 Or 457, 72 P.2d 35 (1937):

"A person is not an 'accomplice' within the statute requiring an accomplice's testimony be corroborated to sustain a conviction unless such person can be indicted and punished under the same statute which is being invoked against defendant . . . a person who bribed a police officer was not an 'accomplice' whose testimony was required to be corroborated in prosecution of sergeant under statute making it a crime for executive officers to receive anything intended to influence them in discharge of their duties, since bribe giver could not be indicted and punished under same statute employed against sergeant." (Accord: State v. McCowan, 203 Or 551, 280 P.2d, 976, 1955)

In this connection, it might be noted that Article _____, Parties to Crime, Tentative Draft No. 1, Section 4 (2), exempts from criminal liability the conduct of a person if "the crime is so defined that his conduct is necessarily incidental thereto". Examples of the incidental conduct contemplated by the section include the bribery situation. Thus, the act of bribe receiving would be considered incidental to the act of bribe giving, exempting the bribe receiver from an accomplice status under the bribe giving statute.

The crime of bribe giving and bribe receiving are designated separate indictable offenses under the proposed draft. This will make it possible to support a conviction on the uncorroborated testimony of the other person involved in the act of bribery.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 224.9. Rigging Publicly Exhibited Contest.

(1) A person commits a misdemeanor if, with purpose to prevent a publicly exhibited contest from being conducted in accordance with the rules and usages purporting to govern it, he:

(a) confers or offers or agrees to confer any benefit upon, or threatens any injury to a participant, official or other person associated with the contest or exhibition; or

(b) tampers with any person, animal or thing.

(2) Soliciting or Accepting Benefit for Rigging. A person commits a misdemeanor if he knowingly solicits, accepts or agrees to accept any benefit the giving of which would be criminal under Subsection (1).

(3) Participation in Rigged Contest. A person commits a misdemeanor if he knowingly engages in, sponsors, produces, judges, or otherwise participates in a publicly exhibited contest knowing that the contest is not being conducted in compliance with the rules and usages purporting to govern it, by reason of conduct which would be criminal under this Section.

Text of Michigan Revised Criminal Code

[Sports Bribery]

Sec. 4211. (1) A person commits the crime of sports bribery if he:

(a) Confers, or offers or agrees to confer any benefit upon a sports participant with intent to influence him not to give his best efforts in a sports contest; or

(b) Confers, or offers or agrees to confer any benefit upon a sports official with intent to influence him to perform his duties improperly.

(2) Sports bribery is a Class C felony.

Text of Michigan Revised Criminal Code Cont'd.

[Receiving a Sports Bribe]

Sec. 4212. (1) A person commits the crime of receiving a sports bribe if:

(a) Being a sports participant, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that he will thereby be influenced not to give his best efforts in a sports contest; or

(b) Being a sports official, he solicits, accepts, or agrees to accept any benefit from another person upon an agreement or understanding that he will perform his duties improperly.

(2) Receiving a sports bribe is a Class C felony.

Tampering With a Sports Contest

Sec. 4215. (1) A person commits the crime of tampering with a sports contest if, with intent to influence the outcome of a sports contest, he:

(a) Tamper with any sports participant or sports official, or with any animal, equipment, or other thing involved in the conduct or operation of a sports contest, in a manner contrary to the rules and usages purporting to govern the sports contest in question; or

(b) Substitutes a sports participant, animal, equipment, or other thing involved in the conduct or operation of a sports contest, for the genuine person, animal, or thing.

(2) Tampering with a sports contest is a class A misdemeanor.

Text of New York Revised Penal Law

Section 180.40 Sports bribing

A person is guilty of sports bribing when he:

1. Confers, or offers or agrees to confer, any benefit upon a sports participant with intent to influence him not to give his best efforts in a sports contest; or

2. Confers, or offers or agrees to confer, any benefit upon a sports official with intent to influence him to perform his duties improperly.

Sports bribing is a class D felony.

Text of New York Revised Penal Law, Cont'd.

Sec. 180.45 Sports bribe receiving

A person is guilty of sports bribe receiving when:

1. Being a sports participant, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that he will thereby be influenced not to give his best efforts in a sports contest; or

2. Being a sports official, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that he will perform his duties improperly.

Sports bribe receiving is a class E felony.

Sec. 180.50 Tampering with a sports contest

A person is guilty of tampering with a sports contest when, with intent to influence the outcome of a sports contest, he tampers with any sports participant, sports official or with any animal or equipment or other thing involved in the conduct or operation of a sports contest in a manner contrary to the rules and usages purporting to govern such a contest.

Tampering with a sports contest is a class A misdemeanor.

Section 9. Defrauding secured creditors. A person commits the crime of defrauding secured creditors if:

(1) He destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest with intent to hinder enforcement of that interest.

(2) "security interest" means an interest in personal property or fixtures as defined in ORS 71.2010.

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COMMENTARY - DEFRAUDING SECURED CREDITORS

A. Summary

The proposed section is applicable to both the typical secured consumer sale situation and those transactions involving business enterprises. The growing problem in the latter field is discussed by the Commercial Law Journal 70:5 (1965) in an article titled "Business Fraud -- Challenge to the Commercial Community":

"There are many kinds and types of business frauds . . . the more publicized failures in which there are elements of fraud have involved secured creditors -- those who receive either inventory or accounts receivable as security for advances of money . . . in [this] situation the opportunity for fraud exists on a broad scale.. ..there are as many 'gimmicks' to deceive creditors as there are fertile minds which either by design or circumstances turn to fraud as a way of business life . . . exposure by full investigation and insistence upon full recourse against all defrauders is . . . the answer".

Under the definition of "owner" in the proposed draft on Theft, Section No. 1, a debtor cannot commit theft against his creditor by disposing of property subject to a security interest, since the creditor's right to possession is not superior to that of the debtor. This section is designed to reach that type of misconduct.

Statutes imposing a criminal penalty for debtors who wrongfully dispose of property subject to an outstanding security interest are common among the states. The legislative trend in the field is towards imposition of misdemeanor penalties for interference in the enforcement of valid security interests.

Some states have gone beyond such coverage to penalize a debtor who removes, sells, conceals or otherwise disposes of his own unencumbered property, with intent to defraud, hinder or delay his creditors. (See Cal. Penal Code Section 154, 531) Other states provide felony penalties for the act of removing encumbered property from the county or selling the property without consent of the secured creditor. (See Wisc. Stat. Ann. 943.25, 1918)

It would seem the better view to limit application of the criminal law to those intentional acts whereby the debtor resists enforcement of a security interest. In accord with this reasoning the proposed section therefore makes the intentional interference with enforcement of the lien the gravamen of the offense. The rationale supporting this limitation is well stated by the Model Penal Code Commentary to Tent. Draft 11, pp 98,99, (1960):

"Although there is need for some penal legislation in this area, we believe that many current laws go too far when they provide felony penalties for acts such as removing encumbered property from the county or selling the property without consent of the secured creditor . . . The offense is classified as a misdemeanor regardless of the amount involved . . . [this is] justified because offenders against this section are less dangerously deviated from social norms than are outright thieves who take property to which they have no claim. Moreover, sellers can guard against this kind of fraud by caution in extending credit . . . If the legislature wishes to single out unusual transactions [involving disposition of a debtor's unencumbered property to defraud creditors], e.g., bulk sales, sales below cost, this should probably be done in appropriate regulatory codes where the diversity of business practices can be reflected, rather than in the penal code."

The reference to "security interest" in subsection (2) incorporates the Uniform Commercial Code concept of that term.

B. Derivation

The proposed section is derived from Model Penal Code Section 224.10. Michigan Revised Criminal Code Section 4130 is an exact duplicate.

C. Relationship to Existing Law

There are a number of interrelated Oregon statutes that deal with the law of secured transactions and fraudulent conveyances.

ORS: Chapter 79, Secured transactions, contains the Uniform Commercial Code provisions on perfecting vland security interests in personal property.

Chapter 76, Bulk transfers, applies to the transfer of goods in bulk outside the ordinary course of business.

Chapter 95, Fraudulent conveyances, deals with property conveyed with an intent to defraud purchasers and creditors.

95.060: Voids all assignments of goods, chattels, or things in action in trust as against creditors of the transferrer.

95.070: Makes void every conveyance, transfer or device made with intent to defraud, hinder or delay creditors.

165.220: Provides a felony penalty for the false representation of ownership of land and the execution of a conveyance thereof with intent to defraud anyone.

165.675: Prohibits warehousemen from delivering goods in his possession where a negotiable receipt covering the same goods is outstanding. A misdemeanor.

165.680: Prohibits the deposit of goods subject to a lien or mortgage in return for a negotiable receipt which is afterwards negotiated for value, with intent to deceive. A misdemeanor.

29.520: Provides for civil arrest:

(c) in an action to recover the possession of personal property unjustly detained, when the property or any part thereof has been concealed, removed or disposed of . . . with intent to deprive the [creditor] of the benefit thereof.

(d) when the defendant has been guilty of fraud in contracting the debt or incurring the obligation...

(e) when the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

41.360 (39): Provides that a disputable presumption of fraud against creditors is raised by the sale or assignment of secured property unaccompanied by immediate delivery or actual change of possession.

The penal sanctions in this section would apply to property subject to a security interest as defined by ORS Chapter 79. It would not cover transactions giving rise to statutory liens, judgment creditors or unsecured claims. ORS Chapters 26-40, Remedies, and 86-90, Mortgages and Liens, provide adequate remedies in these areas. A proposed section on defrauding judgment creditors follows this section.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 224.10. Defrauding Secured Creditors.

A person commits a misdemeanor if he destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest with purpose to hinder enforcement of that interest.

Text of Michigan Revised Criminal Code

[Defrauding Secured Creditors]

Sec. 4130. (1) A person commits the crime of defrauding secured creditors if he destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest with intent to hinder enforcement of that interest.

(2) "Security interest" means an interest in personal property or fixtures as defined in Section 1201 (37) of the Uniform Commercial Code [C.L.1948 Sec. 440.1201(37)].

(3) Defrauding secured creditors is a Class B misdemeanor.

Text of New York Revised Penal Law

Sec. 185.05 Fraud involving a security interest

A person is guilty of fraud involving a security interest when, having executed a security agreement creating a security interest in personal property securing a monetary obligation owed to a secured party, and:

1. Having under the security agreement both the right of sale or other disposition of the property and the duty to account to the secured party for the proceeds of disposition, he sells or otherwise disposes of the property and wrongfully fails to account to the secured party for the proceeds of disposition; or

2. Having under the security agreement no right of sale or other disposition of the property, he knowingly secretes, withholds or disposes of such property in violation of the security agreement.

Fraud involving a security interest is a class A misdemeanor.

Text of New York Revised Penal Law, Cont'd.

Sec. 185.10 Fraudulent disposition of mortgaged property

A person is guilty of fraudulent disposition of mortgaged property when, having theretofore executed a mortgage of real or personal property or any instrument intended to operate as such, he sells, assigns, exchanges, secretes, injures, destroys or otherwise disposes of any part of the property, upon which the mortgage or other instrument is at the time a lien, with intent thereby to defraud the mortgagee or a purchaser thereof.

Fraudulent disposition of mortgaged property is a class A misdemeanor.

Sec. 185.15 Fraudulent disposition of property subject to a conditional sale contract

A person is guilty of fraudulent disposition of property subject to a conditional sale contract when, prior to the performance of the condition of a conditional sale contract and being the buyer or any legal successor in interest of the buyer, he sells, assigns, mortgages, exchanges, secretes, injures, destroys or otherwise disposes of the goods subject to the conditional sale contract under claim of full ownership, with intent thereby to defraud another.

Fraudulent disposition of property subject to a conditional sale contract is a class A misdemeanor.

Section 10. Defrauding judgment creditors. A person commits the crime of defrauding judgment creditors if he:

Existing
Law
ORS
Chapter 2
95.070

- (1) Removes his property from a county with intent to prevent it being levied upon by execution; or
- (2) Secretes, assigns, conveys or otherwise disposes of his property with intent to defraud a judgment creditor.

COMMENTARY - DEFRAUDING JUDGMENT CREDITORS

A. Summary

Under ORS 79.1040 (8), rights represented by a judgment are excluded from the provisions of the Uniform Commercial Code. This exempts a judgment debtor who secretes or disposes of property to avoid levy by execution from coverage under Section Defrauding secured creditors. The crime of Fraud in insolvency, Section _____, would also not apply unless the debtor acted with knowledge of an impending bankruptcy or receivership proceedings.

The proposed section is intended to reach those situations where levy of execution is intentionally evaded by the removal or disposition of their property lawfully subject to attachment.

B. Derivation

The proposed section is taken from Michigan Revised Criminal Code Section 4135.

C. Relationship to Existing Law

ORS 95.070 declares void every conveyance, transfer or device made with the intent to hinder, delay or defraud creditors of their lawful suits...damages...decree of judgment.

ORS Chapter 23 provides for the enforcement of judgments and decrees.

ORS 23.710 and 23.720 establish the procedure for bringing a judgment debtor before the court to be examined about his property.

ORS 23.730 grants the court authority to issue an order restraining disposal of a debtors property.

ORS 23.740 provides for civil arrest of a judgment creditor who refuses to apply his property to such judgment.

Wright v. Wimberly, 94 Or 1, 184 P. 740 (1919), defined "judgment":

"The final determination of an action at law by a court in Oregon is called a judgment while that of a suit in equity is denominated a decree."

Seed v. Jennings, 47 Or 464, 83 P. 872 (1905) discusses the circumstances giving rise to a fraudulent conveyance:

"In order to set aside a fraudulent conveyance a person must have an unsatisfied judgment as against the transferor or a lien on his property created by an attachment."

Bays v. Brown, 160 Or 594, 86 P. 2d 951 (1939), commented on the species of evidence required to show fraudulent intent:

"Circumstantial evidence is normally used to establish the presence of a fraudulent intent, since direct proof is not available."

Evans v. Trude, 193 Or 648, 240 P. 2d 940 (1952), discusses the badges of fraud applied in inferring fraudulent conveyances:

"The badges of fraud are clearly apparent where... (8) the transfer so completely depleted the assets of the debtor that his creditor was hindered or delayed in recovering any part of his judgment."

Judgments are normally enforced by execution, attachment and garnishment proceedings. The proposed section is designed to encourage stricter compliance with debtor obligations arising from valid judgments.

TEXT OF REVISIONS OF OTHER STATES

Text of Michigan Revised Criminal Code

[Defrauding Judgment Creditors]

Sec. 4135. (1) A person commits the crime of defrauding judgment creditors if he:

(a) Removes his property from a county with intent to prevent it being levied upon by an execution; or

(b) Secretes, assigns, conveys or otherwise disposes of his property with intent to defraud a judgment creditor or to prevent that property from being made liable for the payment of his debts.

(2) Defrauding judgment creditors is a Class B misdemeanor.

Section 11. Receiving deposits in a failing financial institution. A person commits the crime of receiving deposits in a failing financial institution if:

(1) As an officer, manager or other person participating in the direction of a financial institution, he knowingly receives or permits the receipt of a deposit or other investment, knowing the institution to be insolvent.

(2) A financial institution is insolvent within the meaning of this section when the sound value of its assets is insufficient to pay its liabilities.

Existing Law
ORS
711.405
711.415
711.990 (1), (
707.720
708.110
708.650
711.420

COMMENTARY - RECEIVING DEPOSITS IN A FAILING FINANCIAL INSTITUTION

A. Summary

Section 8 is designed to protect the innocent depositor whose money or property is received for deposit by officials who have knowledge of their institution's precarious financial stability.

The culpability element of deception is not required. The section does require that the officer, manager or other person participating in the direction of the financial institution "knowingly" receive or permit the deposit, and that at the time of such knowing receipt he "know" (ing) that the institution is insolvent.

The terms "financial institution", as defined in Section 1 of this Article, includes all the various types of institutions which now accept savings and investment deposits.

This history and underlying rationale of this type legislation is discussed in Wharton on Crim. Law, Sections 1163, 1166 (1957):

"At common law it is not an offense for a private banker, or the officers or agents of a bank, to receive deposits, even though they know that the bank is insolvent.

statutes have now been enacted in most states making it a crime to receive deposits into a bank after it is known that the bank is insolvent. These statutes vary in form and effect, but three elements are necessary to the offense: (1) the receipt of a deposit; (2) insolvency of the bank at the time the deposit was received, and (3) knowledge of the insolvency.² Under these statutes, although the official receiving the deposit may have no interest whatever in the bank and although he may receive no personal benefit from the deposit, still he is made criminally liable if at the time he had knowledge of the bank's insolvency...Statutes penalizing the acceptance of deposits when the bank is insolvent are constitutional³... [but] a state does not have lawful power to enact penal laws rendering officers of banks organized and operating under the laws of the United States criminally liable for receiving deposits in such bank while the bank is insolvent

"The purpose of statutes making it an offense to receive deposits when a bank is insolvent is to save the public from being induced to deposit money with a bank upon implied assurances of responsibility and wealth essential to the banking business which do not in fact exist, and it seems unnecessary to criminal liability under such statute that an actual or express representation of solvency be made.⁴ The mere fact that the bank continues to function and to receive deposits is in itself a representation of the ability to engage in banking and the existence of a state of solvency."⁵

1. State v. Craemer, 20 Idaho 639, 119 P 30
Coblentz v. State, 164 Md. 558, 166 A 45, 88 A.L.R. 886
2. Brown v. State, Tex. Cr. R. 353, 162 S.W. 337
3. Eastman v. State, 131 Ohio 1, 1 N.E. 2d 140
4. Ex parte Pittman, 31 Nev. 43, 99 P. 700, 22 L.R.A. N.S. 266
5. Peterson v. Baird, 63 N.D. 604, 249 N.W. 690

Subsection (2) defines the term "insolvent" as used in subsection (1). The definition is derived from ORS 711.405 of the Oregon Banking Code, which establishes the conditions whereby a bank or trust company shall be deemed insolvent.

The varying positions taken by statutes in defining circumstances determinative of insolvency is discussed in Banks & Banking, Mitchie, Vol. 1, Sec. 224 (1956):

"Statutes defining the conditions when a bank shall be deemed insolvent...there are two doctrines upon this subject. According to one line of decisions, a bank is insolvent within the purview of a statute forbidding the receipt of deposits after knowledge of insolvency when

there is a present inability to pay depositors as banks usually do, and meet all liabilities as they become due in the ordinary course of business. Under this view the words 'insolvency' and 'failing circumstances' are synonymous.

"According to the other line of decisions, the terms 'unsafe', 'insolvent', 'in failing circumstances', etc., do not mean insolvent in the limited sense of inability to pay depositors and creditors in the ordinary course of business, but insolvent in the broad sense of a deficiency of cash and assets convertible into cash within a reasonable time to pay liabilities."

The proposed section adopts the bankruptcy concept of "liabilities exceed assets". It is submitted that no unreasonable burden is imposed by this definition of insolvency. Receipt of deposits by a financial institution under these circumstances would now violate the regulatory prohibitions of the Oregon Banking Code. This view affords the unwary depositor increased protection in that it discourages receipt of deposits before the financial institution becomes hopelessly insolvent.

B. Derivation

Subsection (1) is derived from Michigan Revised Criminal Code Section 4150 and Illinois Revised Criminal Code Section 17-1 (b), both of which were taken from Model Penal Code Section 224.12.

Subsection (2) was taken from ORS 711.405 of the Oregon Banking Code.

C. Relationship to Existing Law

There are a number of regulatory statutes applicable to the conduct of officers, directors and owners of financial institutions.

ORS 711.415, Receiving deposits while insolvent. No owner, director or officer of any bank or trust company shall receive or permit to be received any deposit, knowing such bank or trust company to be insolvent.

ORS 711.405 states when a bank or trust company shall be deemed insolvent.

ORS 711.990 (1) provides that violation of ORS 711.415 is a felony and is punishable by a maximum \$5,000 fine or five years in prison, or both.

ORS 707.720 prohibits a violation of law or omission of duty by an officer or director of a bank or trust company. ORS 707.990 (2) provides a misdemeanor penalty for such violation.

ORS 708.110 provides the procedure for determining a deficiency in bank and trust company reserves and the insolvency proceedings that may be instituted if the institution fails to make good such reserve.

ORS 708.650 states that suspension or restriction of a bank or trust company's liability payments by order of the Banking Division shall not be deemed an act of insolvency by a bank or trust company, nor raise such a presumption thereof.

Brown v. Siemens, 117 Or 583, 245 P. 510 (1926) was an action for damages allegedly sustained by false representations of a bank's solvency. The plaintiff was induced by a bank president to leave a sizable amount of cash on deposit at a bank that failed ten days later. The bank president had assured the plaintiff of the bank's solvency with knowledge of its failing circumstances. In discussing the liability of the bank president for civil damages the court quoted with approval 14 A.C.J. 181, Section 1959:

"The directors or officers of a corporation are liable for the fraudulent acts and representations to persons who are injured thereby. They are no more immune for their false representations made with intent to deceive, and which result in a loss to one who relied thereon, than any other individual. The fact that they are acting for the benefit of the corporation and that they did not personally receive the fruits of the transaction, or that the company is nominally the contracting party, does not relieve them from liability." (Accord: Hill v. Tualatin Academy, 61 Or 190, 200, 121 P. 901, (1912))

The Oregon Supreme Court has commented on the varying definitions of the term "insolvency".

In Sabin v. Columbia Fuel Company, 25 Or 15, 34 P. 692 (1893) the court stated:

"The term 'insolvency' as used in bankrupt and insolvency proceedings denotes the inability of a party to pay his debts as they become due in the ordinary course of business, but for general purposes the popular meaning of the word is preferable, viz., the insufficiency of the entire property of an individual or corporation to pay his or its debts."

Wiggins Company v. McMinnville Motor Car Company, 111 Or 1225 P. 314. (1924), held that: "The mere fact that a corporation

is unable to pay its debts upon a particular day does not constitute insolvency. If this were true there is probably not a bank nor any large business interest solvent, in the sense that it would be able to pay its debts if they were all demanded on the same day, or in the same week, or the same month."

The Oregon Court has thus recognized the personal liability of officers of financial institutions for the knowing misrepresentation of solvency, and has recognized the validity of the "liabilities in excess of assets" test for insolvency.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 224.12. Receiving Deposits in a Failing Financial Institution

An officer, manager or other person directing or participating in the direction of a financial institution commits a misdemeanor if he receives or permits the receipt of a deposit, premium payment or other investment in the institution knowing that:

(1) due to financial difficulties the institution is about to suspend operations or go into receivership or reorganization; and

(2) the person making the deposit or other payment is unaware of the precarious situation of the institution.

Text of Michigan Revised Criminal Code

[Receiving Deposits in a Failing Financial Institution]

Sec. 4150. (1) A person commits the crime of receiving deposits in a failing financial institution if, as an officer, manager or other person participating in the direction of a financial institution he knowingly receives or permits the receipt of a deposit or other investment, knowing that the institution is insolvent.

(2) A financial institution is insolvent within the meaning of this section when from any cause it is unable to pay its obligations in the ordinary or usual course of business.

(3) Receiving deposits in a failing financial institution is a Class A misdemeanor.

Text of Illinois Criminal Code

§ 17-1. Deceptive Practices

(b) Being an officer, manager or other person participating in the direction of a financial institution, he knowingly receives or permits the receipt of a deposit or other investment, knowing that the institution is insolvent, or

Section 12. Fraud in insolvency. A person commits the crime of fraud in insolvency if, with intent to defraud any creditor and knowing that a proceeding for the appointment of an administrator or a composition agreement or other arrangement for the benefit of creditors has been or is about to be instituted, he:

Existing Law
ORS
711.410
711.420
711.990 (2)

(1) Destroys, removes, conceals, encumbers, transfers, conveys or otherwise disposes of any part of or any interest in the debtor's estate; or

(2) Obtains any substantial part of or interest in the debtor's estate; or

(3) Presents to any creditor or administrator a writing or record relating to the debtor's estate, not otherwise within the coverage of Article ___ (Perjury & Related Offenses), knowing it contains a false material statement; or

(4) Misrepresents or fails or refuses to disclose to the administrator the existence, amount or location of any part of or any interest in the debtor's estate, or any other information which he is legally required to furnish to such administrator.

(5) "Administrator", as used within the meaning of this section, means an assignee or trustee for the benefit of creditors, a conservator, a liquidator, a receiver or any other person entitled to administer property for the benefit of creditors.

COMMENTARY - FRAUD IN INSOLVENCY

A. Summary

Sections 10 and 11 of this Article deal with intentional interference with the enforcement rights of secured and judgment creditors. This section is designed to discourage similar conduct prejudicial to the rights of unsecured creditors.

There is current legislation making it criminal to fraudulently dispose of unsecured assets in anticipation of insolvency proceedings. (See Mich. Rev. Crim. Code 4140; N. Y. Rev. Penal Law 185.00; 18 U.S.C. 152)

Some states provide punishment for a debtor who conceals, sells or otherwise disposes of assets with intent to defraud his creditors regardless of present or prospective insolvency. (See Okla. Stat. Ann. c. 63, 1590 (1958); Wis. Stat. Ann. 943.39 (2) (1958))

A Massachusetts statute makes criminal the disposition of any money other than for minimal family necessities, after knowledge of impending insolvency proceedings. (See Mass. Ann. Laws, c. 216, 136 (1955))

The proposed section is more conservative than some of these statutes since other proposed criminal sections makes securing credit or goods upon a false representation of intent to pay punishable. (See T.D. No. 1, Theft by Deception)

Subsections (1) through (4) all require:

(1) The intent to defraud a creditor, and

(2) Knowledge either that,

(a) Proceedings for the appointment of an administrator have begun or are about to begin, or that

(b) A composition or other arrangement for the benefit of creditors has been made or is about to be made.

Subsection (1) parallels the language of section 10 relating to secured creditors.

Subsection (3) protects an administrator from intentionally false information not reached by the Article on Perjury and Related Offenses.

The section covers both the individual debtor and the business entity faced with insolvency proceedings. There is a current demand for broad penal legislation in the field of business and commercial bankruptcy frauds. The growing problem in the area is discussed in the Commercial Law Journal, 71:383 (1966):

"The newest and fastest growing business is the 'planned bankruptcy'. In essence, the planned bankruptcy is a merchandising swindle based on the abuse of credit, either legitimately or fraudulently established. We in the Department of Justice have been aware of this developing area of commercial fraud for some time...this scheme consists of (1) over-purchase of inventory on credit, (2) sales or other disposition of the merchandise thus obtained, (3) concealment of the proceeds, (4) non-payment of creditor and finally, (5) the filing of involuntary petition in bankruptcy. We refer to this as a 'planned bankruptcy' since at the very inception of the scheme, the operators make elaborate plans for the hiring of attorneys and formulate various explanations to be used to describe why assets are not on hand when creditors file the involuntary bankruptcy petition." (Article based upon an address delivered by Shelton Davidson, Asst. U. S. Atty., Dept. of Justice, at the 36th annual meeting of the 17th Reg. Dist. of the Comm. Law League of America, Mar. 14, 1966, Chicago, Ill.)

The applicability of the federal bankruptcy code to this problem is discussed in Remington on Bankruptcy, Vol. 4, Sec. 1646 (1957):

"Clause (d) of paragraph (2) of Section 67 (d) of the Bankruptcy Act nullified transfers and obligations within a year of bankruptcy made or incurred with actual intent to hinder, delay, or defraud creditors. The pertinent language of the statute is that every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating proceedings under the Act by or against him is 'fraudulent'..(d) as to then existing and future creditors, if made or incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors...it is not sufficient to establish intent to hinder or delay creditors. Intent to 'defraud' them must also appear." (See Doehler v. Real Estate Bd. of N. Y. Bldg. Co., 150 Misc. 733, 270 N.Y.S. 386

B. Derivation

The language and structure of the section was derived from New York Revised Penal Law Section 185.00 and Michigan Revised

Criminal Code Sec. 4140. The basic model for these two statutes is Model Penal Code Section 224.11.

C. Relationship to Existing Law

This section is new to Oregon law.

Fraud prior to or during insolvency proceedings has essentially been a concern of federal bankruptcy law, e.g., provisions voiding preferential and fraudulent transfers of the debtors assets. Three statutes in Chapter 711 of the Oregon Banking Code have some relevancy to the problem:

ORS 711.410 nullifies all transfers of assets by a bank or trust company after commission of an act of insolvency or in contemplation of insolvency.

ORS 711.420 prohibits officers or directors of a bank or trust company from participation in fraudulent insolvency.

ORS 711.990 (2) provides a misdemeanor penalty for violation of ORS 711.420.

Two Oregon cases have discussed the test of insolvency and the admissibility of testimony given during insolvency proceedings in criminal trials.

Patterson v. Baker Grocery Co., 73 Or 433, 144 P. 673 (1914) discussing the test of insolvency, quoted with approval, 1 Loveland, Bankruptcy, (4th ed) p. 303:

"In estimating the probable worth of a debtor, in order to ascertain whether or not he is insolvent, all his property that is salable or may be converted into money should be taken into consideration, including property that is excepted from execution under state law."

In State v. Frasier, 94 Or 90, 94 Or 108, 184 P. 848 (1919), the court, in a petition for rehearing proceeding, commented on the bankruptcy rule making inadmissible in criminal actions testimony received from a debtor in the course of bankruptcy proceedings:

"Section 7 of ch. 3 of Bankruptcy Act of 1898, 30 U.S. Stats. 548, [directs that a bankrupt shall] submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and in addition, all matters which may affect the administration

and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding."

The court held that this section providing that no testimony given by a bankrupt shall be offered against him in any criminal proceeding, does not apply to the language and acts of a bankrupt who in the course of his examination upon the witness stand commits a fresh crime, such as perjury or the uttering of a forged instrument.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 224.11. Fraud in Insolvency.

A person commits a misdemeanor if, knowing the proceedings have been or are about to be instituted for the appointment of a receiver or other person entitled to administer property for the benefit of creditors, or that any other composition or liquidation for the benefit of creditors has been or is about to [be] made, he:

(a) destroys, removes, conceals, encumbers, transfers, or otherwise deals with any property with purpose to defeat or obstruct the claim of any creditor, or otherwise to obstruct the operation of any law relating to administration of property for the benefit of creditors; or

(b) knowingly falsifies any writing or record relating to the property; or

(c) knowingly misrepresents or refuses to disclose to a receiver or other person entitled to administer property for the benefit of creditors, the existence, amount or location of the property, or any other information which the actor could be legally required to furnish in relation to such administration.

Text of Michigan Revised Criminal Code

[Fraud in Insolvency]

Sec. 4140. (1) A person commits the crime of fraud in insolvency if, with intent to defraud a creditor and with knowledge either that proceedings have been or are about to be instituted for the appointment of an administrator or that a composition agreement or other arrangement for the benefit of creditors has been or is about to be made, he:

(a) Conveys, transfers, removes, conceals, destroys, encumbers or otherwise disposes of any part of or any interest in the debtor's estate; or

(b) Presents to any creditor or to the administrator any writing or record relating to the debtor's estate, not otherwise within the coverage of sections 4905, 4906 or 4935, knowing that it contains a false material statement; or

(c) Misrepresents or fails or refuses to disclose to the administrator, under circumstances not amounting to a violation

Text of Michigan Revised Criminal Code (Cont'd.)

of section 4720, the existence, amount or location of any part of or any interest in the debtor's estate, or any other information that he is legally required to furnish to the administrator.

(2) "Administrator" means an assignee or trustee for the benefit of creditors, a conservator, a liquidator, a receiver or any other person entitled to administer property for the benefit of creditors.

(3) Fraud in insolvency is a Class B misdemeanor.

Text of New York Revised Penal Law

Section 185.00 Fraud in insolvency

1. As used in this section, "administrator" means an assignee or trustee for the benefit of creditors, a liquidator, a receiver or any other person entitled to administer property for the benefit of creditors.

2. A person is guilty of fraud in insolvency when, with intent to defraud any creditor and knowing that proceedings have been or are about to be instituted for the appointment of an administrator, or knowing that a composition agreement or other arrangement for the benefit of creditors has been or is about to be made, he

(a) conveys, transfers, removes, conceals, destroys, encumbers or otherwise disposes of any part of or any interest in the debtor's estate; or

(b) obtains any substantial part of or interest in the debtor's estate; or

(c) presents to any creditor or to the administrator any writing or record relating to the debtor's estate knowing the same to contain a false material statement; or

(d) misrepresents or fails or refuses to disclose to the administrator the existence, amount or location of any part of or any interest in the debtor's estate, or any other information which he is legally required to furnish to such administrator.

Fraud in insolvency is a class A misdemeanor.

Section 13. Misapplication of entrusted property. A person commits the crime of misapplication of entrusted property if, with knowledge that the misapplication is unlawful or that it involves a substantial risk of loss or detriment to the owner or beneficiary of such property, he:

(1) Intentionally misapplies or disposes of property that has been entrusted to him as a fiduciary or that is property of the government or a financial institution.

(2) "Fiduciary" includes a trustee, guardian, executor, administrator, receiver or any other person acting in a fiduciary capacity as agent or employe of an organization which is a fiduciary.

(3) "Misapplies" means dealing with property contrary to law or governmental regulation governing the custody or disposition of that property; governmental regulation includes administrative and judicial rules and orders as well as statutes and ordinances.

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COMMENTARY - MISAPPLICATION OF ENTRUSTED PROPERTY

A. Summary

The fraudulent appropriation and disposition of property is defined and appropriately punished in the Theft and Bribery Articles.

The proposed theft provisions require either an intent to deprive another of his property or to appropriate the property of another for one's own use.

Section 6, Official Misconduct, of the Bribery Article reaches improper appropriation and disposition of money by public servants. That section requires an intent to obtain a benefit or to harm another.

The mens rea requirement of this section is (1) knowledge that the conduct is contrary to legally established rules governing the care of entrusted property, or (2) knowledge that such conduct involves a substantial risk of loss or detriment to the actual owner or beneficiary of the property.

The section is intended to reach intentional recklessness in the handling of certain kinds of property by those acting in a fiduciary capacity, e.g., fiduciaries of governmental and financial institutions, trustees, administrators, executors, attorneys at law, etc. This type of non-fraudulent misdealing with property is distinguished from theft by the moral quality of the conduct. Misdemeanor sanctions in this area would be sufficient to deter persons acting in a fiduciary capacity from wrongful dealing with property involving no gain or advantage to the actor or to third persons in whom he is interested.

To the extent that state regulatory statutes govern banking, insurance, trust companies and investment funds, a knowing violation of such law may reasonably be subject to criminal sanction.

The meaning of the terms "property" and "financial institutions" as defined in section 1 of this Article are applicable to this section. The term "government" is used in the same sense as defined in section 1 of the article on Bribery and Other Corrupt Influences.

The definitions of "fiduciary" and "misapplies" in subsection (2) and (3) are self-explanatory.

B. Derivation

The section is derived from Michigan Revised Criminal Code Section 4155, which was modeled after Model Penal Code Section 224.13,

C. Relationship to Existing Law

There are a number of Oregon statutes covering the conversion and misapplication of property by certain specified persons. These crimes are presently designated embezzlement:

ORS: 165.025: trustee converting subject matter of trust to his own use or use of third party.

165.030: agent, attorney, broker, banker, employe or merchant converting entrusted property.

165.035: bank and trust company official or employe who embezzles, abstracts or wilfully misapplies entrusted property.

165.040: embezzling funds of savings and loan association by officer, director, employe or agent who embezzles, abstracts or misapplies property.

All of these provisions require an intent to deceive, injure or defraud.

Numerous other provisions impose a standard of legal duty in connection with the care and disposition of entrusted property:

ORS: 707.720: Violations of law or omission of duty by bank, trust company officer or director.

707.990(2): provides misdemeanor penalty for violation.

Chap: 708: Regulation of Bank and Trust Companies generally

709: Regulation of Trust Business

716: Mutual Savings Banks

722: Loan Associations

723: Credit Unions

724: Industrial Loan Companies

725: Small Loan Companies

733: Accounting and Investments of Insurance Companies

- ORS: 726.270: prohibits the conversion or disposition of unredeemed pledge by pawnbroker for specified period of time.
- 293.265: Receiving, handling and disbursing state funds.
- 180.370: Turning over to State Public Welfare Commission monies received by Welfare Recovery Division.
- 8.130: Paying over to State Treasurer charges collected by Clerk of Supreme Court.
- 462.260: Monies paid to Racing Commission to be deposited in a bank.
- 423.070: Funds received under Western Interstate Corrections Compact.
- 156.650: Disposition of fines and forfeited bail in criminal actions in District Court.
- 251.610: Election recount deposits.
- 292.316: Certain state officers required to pay fees and commissions into treasury.
- 279.722: Disposition of bid deposits.
- 297.120: Investigating loss of public funds or property involving a public officer.
- 126.225: General functions of guardians of estate.
- 126.250: Investments by guardian.
- 127.060: Duties and powers of trustee conserving property of missing persons.
- 128.410 & 128.415: Payments made under prearranged funeral plans as trust funds and their required deposit.
- 128.990: Misdemeanor penalty for violation of 128.410 and 128.415.
- 128.020: Investments by fiduciaries, "prudent man rule".

Some of the persons covered by these provisions would not be acting in a fiduciary capacity as defined in this section. Public servants who misapply property entrusted to them in their official capacity would be covered by the section on official misconduct if an intent to benefit themselves or to harm another was present. There are a number of other Oregon statutes pertinent to this class of persons:

- ORS: 162.630: Disposal by Treasurer of money in his custody.
- 162.640: Making profit out of public funds.
- 162.650: Unlawful use of funds by state treasurer.
- 162.660: Multnomah County Treasurer making profit from county funds.
- 162.680: Making profit out of money in hands of port commissioner.
- 162.690: Making profit from funds in hands of school clerk.

The conduct reached by this section must be clearly distinguished from the fraudulent misapplication of entrusted property. The deviations from fiducial duty contemplated by this section involve the reckless or grossly negligent management of entrusted property. It does not include the culpability element of intent to deceive, injure or defraud.

Black's Law Dic. (4th Ed., 1951) defines the term "misapplication": "Improper, illegal, wrongful, or corrupt use or application of funds, property, etc."

Ferguson v. State, 80 Tex. Cr. R. 383, 189 S.W. 271, construed a statute similar in import to the present Oregon embezzlement statutes:

"Under statute declaring guilty of a felony an officer or clerk of a state bank who 'embezzles, abstracts, or wilfully misapplies' its funds, 'embezzle' refers to acts done for the benefit of the actor as against the bank, 'misapply' covers acts having no relation to pecuniary profit or advantage to the doers, while 'abstracts' means only to take and withdraw from the possession and control of the bank; and while 'embezzlement' may include the offenses of abstraction and wilful misapplication, either of these offenses may be committed without embezzlement."

A recent Oregon case construed the mens rea requirements of the Oregon embezzlement statutes:

State v. Hanna, 224 Or 588, 356 P.2d 1046 (1960), held that criminal intent is necessary to make out the crime of embezzlement by bailee, mortgagor or purchaser under a conditional sales contract. (ORS 165.010) The court quoted Perkins on Crim. Law, (1957) p. 817: "This intent, while perhaps not strictly an intent to steal, is an intent to deprive the owner of his property and is for practical purposes the counterpart of the animus ferandi required for larceny. Hence the unauthorized retention of the property of another under a bona-fide claim of right is not embezzlement even if the error is one of law."

The court went on to say, "The crime of conversion of public funds (ORS 165.015) has been generally regarded as not requiring proof of a specific intent to defraud. As explained by Perkins, Criminal Law, pp. 247-249 (1957), this offense is considered to be a special type of crime designed to hold public officers strictly accountable for the conversion of public funds, even though they may not embezzle or fraudulently convert the property.

Marshall v. Frazier, 159 Or 491, 80 P.2d 42, 81 P.2d 132 (1938), discusses the fiduciary duty of a trustee:

"If a trustee acts within his power, good faith is a defense to a charge of mistake in judgment, and, if the trust provision gives the trustee wide powers of investment, he may exercise his sound discretion within those limits, and his actions are not to be tested by considerations of 'hindsight' judgment. Discretion to a trustee does not mean arbitrary or unlimited or absolute discretion, but a reasonable one, and trustee must use judgment and prudence, and, if no limits are placed on his discretion, must nevertheless invest funds according to approved rules for trust investments.

"Good faith alone will not protect a trustee, but he must also exercise diligence, prudence and absolute fidelity, as respects investments."

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 224.13. Misapplication of Entrusted Property and Property of
Government or Financial Institution.

A person commits an offense if he applies or disposes of property that has been entrusted to him as a fiduciary, or property of the government or of a financial institution, in a manner which he knows is unlawful and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted. The offense is a misdemeanor if the amount involved exceeds \$50; otherwise it is a petty misdemeanor. "Fiduciary" includes trustee, guardian, executor, administrator, receiver and any person carrying on fiduciary functions on behalf of a corporation or other organization which is a fiduciary.

TEXT OF REVISIONS OF OTHER STATES

Text of Michigan Revised Criminal Code

[Misapplication of Property]

Sec. 4155. (1) A person commits the crime of misapplication of property if, with knowledge that he is misapplying and that the misapplication involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted, he misapplies or disposes of property that has been entrusted to him as a fiduciary or that is property of the government or a financial institution.

(2) "Fiduciary" includes a trustee, guardian, executor, administrator, receiver or any other person acting in a fiduciary capacity, or any person carrying on fiduciary functions on behalf of a corporation or other organization which is a fiduciary.

(3) To "misapply" means to deal with the property contrary to law or governmental regulation of the custody or disposition of that property; governmental regulation includes administrative and judicial rules and orders as well as statutes and ordinances.

(4) Misapplication of property is a Class A misdemeanor.

Text of New York Revised Penal Law

Sec. 165.00 Misapplication of property

1. A person is guilty of misapplication of property when, knowingly possessing personal property of another pursuant to an agreement that the same will be returned to the owner at a future time, he loans, leases, pledges, pawns or otherwise encumbers such property without the consent of the owner thereof in such manner as to create a risk that the owner will not be able to recover it or will suffer pecuniary loss.

2. In any prosecution under this section, it is a defense that, at the time the prosecution was commenced, (a) the defendant had recovered possession of the property, unencumbered as a result of the unlawful disposition, and (b) the owner had suffered no material economic loss as a result of the unlawful disposition.

Misapplication of property is a class A misdemeanor.

Section 14. Issuing a false financial statement. A person commits the crime of issuing a false financial statement if, with intent to defraud, he:

(1) Knowingly makes or utters a written statement which purports to describe the financial condition or ability to pay of himself or some other person and which is inaccurate in some material respect; or

(2) Represents in writing that a written statement purporting to describe a person's financial condition or ability to pay as of a prior date is accurate with respect to that person's current financial condition or ability to pay, knowing the statement to be materially inaccurate in that respect.

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COMMENTARY - ISSUING A FALSE FINANCIAL STATEMENT

A. Summary

This section covers the preparation or issuance of a false financial report, or the certification of such a report. The mens rea requirement is knowledge that the written statements are false coupled with an intent to defraud. Culpability attaches to issuance of the false statement with the specified intent, regardless of the success or failure of the fraudulent purpose. If property, as defined by the article on Theft, is actually obtained the crime of theft by deception will have resulted.

Subsection (1) applies to the primary source of the fraudulent statement. Subsection (2) extends beyond the original source of the misstatement to reach the person who either (1) affirms it because of his position, e.g., accountant or auditor, or (2) employs the misstatement for his own fraudulent purposes.

While both subsections require an intent to defraud, the benefit need not flow to the defendant. The term "defraud" is used in its ordinary dictionary sense: "to deprive a person of property or any

interest, estate, or right by fraud, deceit, or artiface." (Black's Law Dic. (4th ed 1951) p. 511)

The requirement that the misstatement be "material" is intended to exempt minor inaccuracies upon which reliance would not reasonably be grounded.

B. Derivation

With some minor changes the section is a composite of Michigan Revised Criminal Code Section 4145 and New York Revised Penal Law Section 175.45.

C. Relationship to Existing Law

The Oregon criminal code includes three statutes directed at false financial statements:

ORS: 165.615: False statements as to financial condition or ability to pay.

165.620: Procuring benefit upon false statement concerning financial condition.

165.625: Publication of false statement concerning liabilities or assets of company.

59.135: Prohibits fraud and deceit with respect to securities or the security business. Subsection (2) refers to untrue statements of a material fact.

708.705: states, "No officer, director, owner or employe of any bank or trust company in this state shall . . . (5) make any entry upon the books or records of such bank or trust company with intent to deceive or conceal the true condition thereof."

708.710 is also directed to banks and trust companies, and prohibits false and omitted entries as to the business affairs or condition of such institutions in books, reports and statements.

708.990(6) provides a felony penalty for violation of ORS 708.705 and 708.710.

A federal case held that, "Fraudulent representations as to the financial responsibility of another for the purpose of procuring him credit are actionable, though containing no statement as to the amount of credit it is safe to extend." Nevada Bank of S.F. v. Portland National Bank, 59 F 338 (C.C. of Or 1893).

ORS 165.615 was discussed in State v. Bosch, 139 Or 150, 7 P.2d 554, (1932). The court reviewed the legislative history of the statute: "OC 14-335 (now ORS 165.615) was enacted by the legislature at its 1921 session, being 'An act relating to false statements in writing to obtain credit . . . any person who shall knowingly make . . . any false statement in writing, with intent that it shall be relied upon, respecting the financial condition, or means or ability to pay of himself . . . for the purpose of procuring . . . the making of a loan or credit, the extension of a credit . . . shall be guilty of a misdemeanor! Section (3) of the act makes it a misdemeanor for any person to make, in writing, a false statement to the effect that any former statement so made was and still is a correct statement, for the purpose of procuring credit or other benefits."

The lower court decision was reversed on grounds not pertinent to this discussion.

The proposed section is not a departure from existing Oregon law. The present statutes relating to securities and bank and trust companies should probably be retained as they are designed to provide increased protection in areas that demand a high degree of public confidence.

TEXT OF REVISIONS OF OTHER STATES

Text of Michigan Revised Criminal Code

[Issuing a False Financial Statement]

Sec. 4145. (1) A person commits the crime of issuing a false financial statement if, with intent to defraud, he:

(a) Knowingly makes or utters a written instrument which purports to describe the financial condition or ability to pay of himself or some other person and which is inaccurate in some material respect; or

(b) Represents in writing that a written instrument purporting to describe a person's financial condition or ability to pay as of a prior date is accurate with respect to that person's current financial condition or ability to pay, knowing the instrument to be materially inaccurate in that respect.

(2) Issuing a false financial statement is a Class A misdemeanor.

Text of New York Revised Penal Law

Sec. 175.45 Issuing a false financial statement

A person is guilty of issuing a false financial statement when, with intent to defraud:

1. He knowingly makes or utters a written instrument which purports to describe the financial condition or ability to pay of some person and which is inaccurate in some material respect; or

2. He represents in writing that a written instrument purporting to describe a person's financial condition or ability to pay as of a prior date is accurate with respect to such person's current financial condition or ability to pay, whereas he knows it is materially inaccurate in that respect.

Issuing a false financial statement is a class A misdemeanor.

Text of Minnesota Proposed Criminal Code

Sec. 609.82 Fraud in Obtaining Credit

Whoever, with intent to defraud, obtains credit for himself or another from a bank, trust company, savings or building and loan association, or credit union, by means of a present or past false representation as to his or another's financial ability may be sentenced as follows:

(1) If no money or property is obtained by the defendant by means of such credit, to imprisonment for not more than 90 days or to payment of a fine of not more than \$100; or

(2) If money or property is so obtained, the value thereof shall be determined as provided in section 609.52, subdivision 1, clause (3) and he may be sentenced as provided in section 609.52, subdivision 3.

Section 15. Obtaining execution of documents by deception.

(1) A person commits the crime of obtaining execution of documents by deception if, with intent to defraud or injure another or to acquire a substantial benefit for himself or another, he knowingly obtains by deception the execution of a written instrument affecting or purporting to affect the pecuniary interest of any person.

(2) "Deception" as defined in Article 13, Section 5, is applicable to this section.

COMMENTARY - OBTAINING EXECUTION OF DOCUMENTS BY DECEPTION

A. Summary

This section is designed to complement the coverage provided in the provisions relating to theft by deception and fraudulently obtaining a signature. It avoids the problems involved in the "property" concept inherent in the theft provisions. The same approach was used in drafting Section 5, Fraudulently obtaining a signature, in the Forgery Article. (P.D. No. 2, amended) Some written instruments whose execution is obtained by deception may not properly be classified as "property" within the theft definition, even though they indirectly represent a pecuniary interest, e.g., fishing and hunting license, motor vehicle registration. The basic forgery provisions would not be applicable since the written instrument would legitimately be what it purported to be.

The section does not cover obtaining execution of documents by threats and intimidation. This type of misconduct is expected to be reached by a general criminal coercion section.

The scope of the language is broad enough to include the execution of releases, wills, leases, trust agreements, licenses, election certificates, extension of time for obligation payments, and other similar written instruments that involve a pecuniary interest.

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Section 5, Article 20, covers unsworn written falsifications made to public servants to obtain a pecuniary benefit. This section would fill a gap in that area by prohibiting all oral misstatements made to obtain pecuniary benefits from government agencies when evidenced by a document. Problems of any overlapping will be solved by proposed general provisions against cumulative convictions and sentences based upon the same conduct.

B. Derivation

The proposed section, with substantial changes, is derived from Model Penal Code Section 224.14.

C. Relationship to Existing Law

There are numerous existing Oregon statutes dealing with fraud, deception and misrepresentation in applying for and obtaining various types of documents.

The majority of these provisions are regulatory in nature with misdemeanor penalties attached. A brief summary follows:

- ORS: 165.680: Fraud of depositor in obtaining and negotiating receipt for goods to which he has no title. Misdemeanor.
- 288.991: Wilful false written representation in support of application for payment or reissuance of lost, mutilated or destroyed evidence of indebtedness. Felony - 5 years, \$10,000 fine maximum.
- 462.195: False statement as to age to obtain mutual wagering ticket or receipt. Misdemeanor.
- 471.143: False information or statement in application for OLCC identity card. Misdemeanor.
- 165.605: Falsely representing age to secure right, benefit or privilege.
- 481.150: False statement or representation in application for registration or certificate of title to motor vehicle. Felony - 10 years, \$1,000 fine.
- 482.610 (5): Fraud in securing motor vehicle operator or chauffeur's license. Misdemeanor.
- 671.440: Obtaining registration or permit as landscape architect by fraud or material misrepresentation. Misdemeanor.

- ORS: 677.080: Knowing false statement or representation of fact, or concealment of material fact, in obtaining physician's license. Misdemeanor.
- 321.730: False statement or report in application for classification and certification of forest lands. \$500 fine, 3 months jail term.
- 497.230: False statement of residence in applying for game commission licenses. Misdemeanor.
- 571.125(2): Suspension, revocation or refusal of nurserymen license for fraud, deception or misrepresentation in procurement of license. \$500 fine.
- 746.100: False or fraudulent statements or representations in insurance applications or transactions.

The following statutes relate to fraudulent and deceptive practices in obtaining professional licenses and certificates. Some provide criminal penalties, while others refer to the suspension, revocation or refusal to issue or renew such instruments.

- ORS: 671.090: Architect's certificate
- 672.200: Professional engineers
- 673.170: Accountants
- 675.070: Psychologists
- 677.200: Physicians
- 678.085: Nurses. Misdemeanor penalty (ORS 678.990)
- 679.170: Dentists
- 682.110: Podiatrists
- 683.140: Optometrists
- 684.100: Chiropractors
- 685.110: Naturopaths
- 687.081: Masseurs
- 688.120: Physical therapists. Misdemeanor (ORS 688.990)

ORS: 689.410: Pharmacists

690.220: Barbers. Misdemeanor (ORS 690.990)

691.130: Cosmetic therapists

692.180(n): Funeral directors and embalmers

693.090(a): Plumbers

694.135(2): Hearing aid dealers

695.070(b): Watch and clock makers

696.300: Real estate brokers

698.560: Auctioneers

State v. Tauscher, 227 Or 1, 360 P.2d 764 (1961) discusses the property concept as it relates to the crimes of larceny, embezzlement and false pretenses:

"Since . . . the crime of false pretenses is analogous to the crime of larceny, these cases support our conclusion that only property which is tangible and capable of being possessed may be the subject of larceny under ORS 164.310 . . . embezzlement under ORS 165.005 [and false pretenses under ORS 165.205]".

Fraud, deceit, deception, or misrepresentation of a material fact employed in obtaining execution of a document embodying a pecuniary interest would not be perjury unless given under oath; it would not constitute an unsworn falsification unless given in writing to a public servant; it would not be forgery since the document would be authentic; and, it would not be theft by deception unless the document or pecuniary interest contained therein fell clearly within the theft concept of "property".

This section attempts to focus on certain culpable misconduct while avoiding collision with those legal distinctions.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 224.14. Securing Execution of Documents by Deception.

A person commits a misdemeanor if by deception he causes another to execute any instrument affecting or likely to affect the pecuniary interest of any person.

Text of Illinois Criminal Code of 1961

Sec. 17-1. Deceptive Practices

A person commits a deceptive practice when:

(a) He causes another, by deception or threat to execute a document disposing of property or a document by which a pecuniary obligation is incurred,

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ARTICLE 19. BUSINESS AND COMMERCIAL FRAUDS

Amendments to:

Preliminary Draft No. 1; May 1969

(As proposed by Subcommittee No. 1 at meetings on June 13 and July 7, 1969)

Reporter: Roger D. Wallingford

Subcommittee No. 1

On page 1, Section 1 is amended to read as follows:

Section 1. Business and Commercial Frauds; definitions. As used in this Article, unless the context may require otherwise:

(1) "Business records" means any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activities.

(2) "Enterprise" means any private entity of one or more persons, corporate or otherwise, engaged in business, commercial, professional, charitable, political, industrial or organized fraternal activity.

(3) "Financial institution" means a bank, insurance company, credit union, savings and loan association, investment trust or other organization held out to the public as a place of deposit of funds or medium of savings or collective investment.

(4) "Property" means any article, substance or thing of value, including, but not limited to, money, tangible and intangible personal property, real property, choses-in-action, evidence of debt or of contract.

On page 10, Section 3 is amended to read as follows:

Section 3. Commercial bribery. A person commits the crime of commercial bribery if he offers, confers or agrees to confer any pecuniary benefit upon an employee, agent or fiduciary with the intent that the latter violate a duty of fidelity owed to his employer, principal or beneficiary.

On page 10, Section 4 is amended to read as follows:

Section 4. Receiving a commercial bribe. A person commits the crime of receiving a commercial bribe if while an employee, agent or fiduciary he solicits, accepts or agrees to accept any pecuniary benefit with the intent that he violate a duty of fidelity owed to his employer, principal or beneficiary.

On page 19, Section 7 is amended to read as follows:

Section 7. Sports bribe receiving. A person commits the crime of sports bribe receiving if:

(1) As a sports participant he solicits, accepts, or agrees to accept any pecuniary benefit from another person with the intent that he will thereby be influenced not to give his best effort in a sports contest; or

(2) As a sports official he solicits, accepts, or agrees to accept any pecuniary benefit from another person with the intent that he will improperly perform his duties.

On page 19, Section 8 is not approved, but has been retained for further discussion.

On page 49, Section 13 is amended to read as follows:

Section 13. Misapplication of entrusted property. A person commits the crime of misapplication of entrusted property if, with knowledge that the misapplication is unlawful and that it involves a substantial risk of loss or detriment to the owner or beneficiary of such property he:

(1) Intentionally misapplies or disposes of property that has been entrusted to him as a fiduciary or that is property of the government or a financial institution.

Subsections (2) and (3) of section 13 remain the same.

On page 62, Section 15 is amended to read as follows:

Section 15. Obtaining execution of documents by deception.

(1) A person commits the crime of obtaining execution of documents by deception if, with intent to defraud or injure another or to acquire a substantial benefit for himself or another he knowingly obtains by deception the execution of a written instrument affecting or purporting to affect the pecuniary interest of any person.

(2) "Deception" as defined in Article 13, section 5, is applicable to this section also.

(3) "Benefit" as defined in Article 19, section 1, is applicable to this section also.